Affirmed and Opinion and Concurring Opinion filed November 15, 2022.

In The

Fourteenth Court of Appeals

NO. 14-21-00042-CV
NO. 14-21-00053-CV

JOHN J. KLEVENHAGEN III, Appellant

V.

BARBARA A. HILBURN; HARRIS HILBURN, L.L.P.; MICHAEL C. FEEHAN; LAW FEEHAN ADAMS, L.L.P.; R. BRENT COOPER; DIANA FAUST; AND COOPER & SCULLY, P.C., Appellees

On Appeal from Probate Court No. 2
Harris County, Texas
Trial Court Cause Nos. 352,953-401 & 352,923-406

O P I N I O N

At the root of these consolidated appeals from a medical-malpractice suit and and a legal-malpractice suit is the question whether a trial court abuses its discretion in refusing to order the turnover of a judgment debtor's litigation-related legal-malpractice claims, if any, for prosecution by a special receiver. Because we

conclude that long-recognized public-policy concerns support the trial court's rulings, we affirm the challenged final orders.[1]

I. BACKGROUND

In 2004, when Shannon McCoy was thirty-seven weeks pregnant, she went to the hospital with severe abdominal pain. *See Gunn v. McCoy*, 489 S.W.3d 75, 81 (Tex. App.—Houston [14th Dist.] 2016) (sub. op.), *aff'd*, 554 S.W.3d 645 (Tex. 2018). The fetus had died from placental abruption, and Shannon was suffering from the blood-clotting disorder "disseminated intravascular coagulation." *Id.* Shannon continued losing blood after the stillbirth; she ultimately went into cardiac arrest, suffered profound brain damage, and was rendered quadriplegic. *Id.* at 81, 83.

Shannon's husband Andre McCoy filed suit in Probate Court No. 2 of Harris County, asserting medical-malpractice claims against physician Debra Gunn, along with two organizations with which Gunn was affiliated, Obstetrical and Gynecological Associates, P.A., and Gynecological Associates, PLLC (collectively OGA), among others. *Id.* at 83. The *McCoy* case was tried in November 2011. The jury found that Gunn and OGA's breach of the standard of care proximately caused Shannon's injuries and assessed damages of $10,626,368.98, *id.* at 83, which ultimately was reduced by settlement credits of $1,206,773.50 and by Andre's acceptance of this court's suggestion of remittitur in the amount of $159,854.00. *Id.* at 83, 117.

A. OGA's Assertion and Dismissal of Legal-Malpractice Claims

After the jury returned its verdict in *McCoy*, but before the trial court rendered judgment, OGA asserted legal-malpractice claims against the attorneys and law firms that had represented it in the *McCoy* litigation. OGA filed a third-party petition

[1] *See* TEX. EST. CODE § 32.001(c).

against its attorneys Barbara Hilburn and Alan Scott Alford and law firms Cooper & Scully, P.C., and Harris, Hilburn & Sherer (now known as Harris Hilburn, L.L.P.) and moved for leave to designate them as responsible third parties. OGA asserted the same claims against the same parties in a separate legal-malpractice case filed in the 151st District Court. But, after the probate court finally signed the judgment in the *McCoy* case in November 2013, OGA voluntarily dismissed all of its legal-malpractice claims in both the probate court and district court.

B. The Receivership Orders and the Receivers' Assertion of Legal-Malpractice Claims

Gunn's and OGA's appeal from the *McCoy* judgment was unsuccessful, and the Supreme Court of Texas issued its mandate in September 2018. Eight months later, Andre filed in the *McCoy* suit an application for the appointment of a receiver and issuance of a turnover order to collect the outstanding balance of the final judgment against OGA.

1. First Order Appointing General and Separate Receivers and Ordering Turnover of OGA's Legal-Malpractice Claims

The trial court granted Andre's application, appointing John J. Klevenhagen III as the general receiver and appointing Spencer Markle as a "separate receiver" to "resume prosecution" of the judgment-debtors' legal-malpractice claims. Markle, however, immediately moved to vacate the order as it pertained to his appointment and to the turnover of the legal-malpractice claims. He cited a conflict of interest inasmuch as he had represented OGA when it had asserted, then voluntarily dismissed, its own legal-malpractice claims. The trial court granted the motion.

2. Second Order Appointing a Separate Receiver and Ordering Turnover of OGA's and Gunn's Legal-Malpractice Claims

After the first order appointing a separate receiver and ordering turnover of the legal-malpractice claim was vacated, Klevenhagen applied to the probate court

a second time for appointment of a separate receiver and issuance of a turnover order. On September 14, 2020, the trial court granted the order and appointed Randy Johnston[2] as separate receiver "[t]o prosecute the legal malpractice claims against counsel for the Judgment-Debtors." The reference to "Judgment-Debtors" encompassed Dr. Gunn, though Andre had not moved for a receiver for Gunn's non-exempt assets, and she had never asserted any legal-malpractice claims. Nevertheless, Johnston filed a legal-malpractice suit under a new cause number in the same probate court in which *McCoy* was tried. He asserted claims on behalf of both Gunn and OGA against R. Brent Cooper, Diana Faust, Cooper & Scully, P.C., Michael C. Feehan, Law Feehan Adams, L.L.P., Barbara A. Hilburn, and Harris Hilburn, L.L.P. (collectively, "the Legal-Malpractice Defendants").

The petition filed in the legal-malpractice suit alerted the Legal-Malpractice Defendants to the claims against them. Because the trial court's order appointing the separate receiver and ordering turnover of legal malpractice claims had been filed in the *McCoy* case, the Legal-Malpractice Defendants filed interventions in that case to set aside the order.

Before these matters were heard, Johnston moved to withdraw as separate receiver and stated that the Legal-Malpractice Defendants "are hesitant to turn over their file for fear of violating their obligations of confidentiality to the Judgment Debtors." The trial court granted the motion to withdraw, leaving no one to prosecute the legal-malpractice claims.

3. Order Appointing an Interim Separate Receiver

Arguing that limitations were about to run on claims against additional defendants, Klevenhagen filed an emergency motion to be appointed as "interim

[2] The attorney is identified in the record as both Randy Johnston and Coyt Randy Johnston.

special receiver for the purpose of amending [the petition in the legal-malpractice case] to name other potential defendants into the case before the expiration of the tolling agreements and the statute of limitations." The trial court granted the motion, and Klevenhagen filed an amended petition in the legal-malpractice case.[3]

Once the only purpose for which an interim special receiver was appointed had been satisfied, there was again no one to prosecute the legal-malpractice case.

4. Orders Setting Aside the Order for Turnover of the Legal-Malpractice Claims and Denying Klevenhagen's Application for a New Separate Receiver

Klevenhagen then filed a third application in the *McCoy* case for appointment of a separate receiver to prosecute legal-malpractice claims. As intervenors in the *McCoy* case, the Legal-Malpractice Defendants objected.

After a hearing on the various competing motions and applications in the *McCoy* case, the trial court signed separate orders (1) granting the Legal-Malpractice Defendants' intervention to set aside the turnover order and motion for new trial, and (2) denying Klevenhagen's amended application for appointment of a separate receiver and for issuance of a turnover order regarding the legal-malpractice claims.

5. Dismissal of the Legal-Malpractice Case

In light of the rulings in the *McCoy* case, Klevenhagen moved to abate the legal-malpractice case pending an appeal of those orders, while the Legal-Malpractice Defendants moved to dismiss the legal-malpractice case altogether. The trial court agreed with the latter, and signed an order denying Klevenhagen's motion to abate and granting the Legal-Malpractice Defendants' motion to dismiss.

[3] The newly-added attorneys and law firms are not part of this appeal and the record does not indicate that they were served.

Klevenhagen appealed the final orders from both cases, and we consolidated the two appeals. In two issues, Klevenhagen argues that the trial court abused its discretion in (a) denying his amended application for appointment of a separate receiver and for issuance of a turnover order regarding the legal-malpractice claims, and (b) dismissing the legal-malpractice action.

II. STANDARD OF REVIEW

The Texas turnover statute is a procedural device by which judgment creditors may receive aid from a court if the judgment debtor owns nonexempt property that could not be readily attached or levied on by ordinary legal process. *See* TEX. CIV. PRAC. & REM. CODE § 31.002(a); *Beaumont Bank, N.A. v. Buller*, 806 S.W.2d 223, 224 (Tex. 1991). A court may order the debtor to turn over nonexempt property in the debtor's possession or subject to his or her control to a sheriff or constable for execution, otherwise apply the property to satisfy the judgment, or appoint a receiver to take possession of the property to sell it and pay the proceeds to the judgment creditor. TEX. CIV. PRAC. & REM. CODE § 31.002(b).

We review the issuance or denial of a turnover order for abuse of discretion. *Marrs v. Marrs*, 401 S.W.3d 122, 124 (Tex. App.—Houston [14th Dist.] 2011, no pet.). The same abuse-of-discretion standard applies to the trial court's ruling on an application for appointment of a receiver. *See Hamilton Metals, Inc. v. Global Metal Servs., Ltd.*, 597 S.W.3d 870, 878 (Tex. App.—Houston [14th Dist.] 2019, pet. denied) (op. on reh'g). A trial court abuses its discretion when it acts arbitrarily or unreasonably, without reference to any guiding rules and principles. *Downer v. Aquamarine Operators, Inc.*, 701 S.W.2d 238, 241–42 (Tex. 1985). Whether there is evidence to support a turnover order is a relevant consideration in determining whether the trial court abused its discretion. *Beaumont Bank*, 806 S.W.2d at 226. But if the decision was within the trial court's authority and is sustainable for any

reason, then the reviewing court may not reverse merely because it disagrees with the ruling. *Id.*

III. TURNOVER OF A LEGAL-MALPRACTICE CLAIM

The Fourth Court of Appeals held in *Zuniga v. Groce, Locke & Hebdon*, 878 S.W.2d 313, 318 (Tex. App.—San Antonio 1994, writ ref'd), that "an assignment of a legal malpractice claim arising from litigation is invalid." The *Zuniga* court further stated that "[t]he reasons for our holding, which concerns voluntary assignments, would prevent the judgment creditor from obtaining the malpractice action by execution or turnover from a defendant who was willing to assert it as a valid claim." *Zuniga*, 878 S.W.2d at 317 n.5. *See also Charles v. Tamez*, 878 S.W.2d 201, 208–09 (Tex. App.—Corpus Christi–Edinburg 1994, writ denied) (unasserted claims of legal malpractice by client satisfied with attorney's performance are not subject to turnover).

By refusing the application for writ of error in *Zuniga*, the Supreme Court of Texas adopted the opinion as its own. *See Myers v. Gulf Coast Minerals Mgmt. Corp.*, 361 S.W.2d 193, 196 (Tex. 1962); *Zaidi v. Shah*, 502 S.W.3d 434, 443 n.7 (Tex. App.—Houston [14th Dist.] 2016, pet. denied). The *Zuniga* court's statement that a judgment debtor's legal-malpractice claim is therefore treated as if made by the Supreme Court of Texas. *See State Farm Fire & Cas. Co. v. Gandy*, 925 S.W.2d 696, 707 (Tex. 1996) ("In *Zuniga* . . . , *we* considered 'whether a client may assign his cause of action for legal malpractice arising out of litigation'" (quoting *Zuniga*, 878 S.W.2d at 314)) (emphasis added). Although *Zuniga* concerned a voluntary assignment, the statement that the turnover of legal-malpractice claims is similarly barred has the status of judicial dictum, that is, "a statement made deliberately after careful consideration and for future guidance in the conduct of litigation." *Seger v. Yorkshire Ins. Co., Ltd.*, 503 S.W.3d 388, 399 (Tex. 2016) (quoting *Lund v. Giauque*,

416 S.W.3d 122, 129 (Tex. App.—Fort Worth 2013, no pet.)). Judicial dictum "is at least persuasive and should be followed unless found to be erroneous." *Id.* (quoting *Palestine Contractors, Inc. v. Perkins*, 386 S.W.2d 764, 773 (Tex. 1964)).

In *Zuniga* and its progeny, Texas courts have identified many reasons why the harm caused by the assignment or turnover of a legal-malpractice claim outweighs its benefits. Among other things, such actions could lead to commercial marketing of claims,[4] substitution of a malpractice claim for a claim against an insolvent defendant,[5] discouragement of voluntary settlement agreements,[6] compromise of client confidentiality,[7] and weakening of the attorney's duty of loyalty.[8]

Klevenhagen argues that these concerns are not present when the legal-malpractice claims are not voluntarily assigned but are turned over for prosecution by a disinterested special receiver. In effect, he contends that *Zuniga*'s judicial dictum regarding the turnover of legal-malpractice claims is erroneous. We disagree. Some of the concerns about the assignment of legal-malpractice claims apply equally to their turnover.

A. Substituting a Legal-Malpractice Claim for a Claim Against an Underinsured or Undercapitalized Judgment Debtor

First, and most importantly, turnover of a legal-malpractice claim would allow the substitution of a claim against the judgment debtor's litigation or appellate counsel in the place of a claim against a defendant with insufficient insurance and

[4] *Zuniga*, 878 S.W.2d at 316.

[5] *Id.* at 317.

[6] *Wright v. Sydow*, 173 S.W.3d 534, 553 (Tex. App.—Houston [14th Dist.] 2004, pet. denied).

[7] *Vinson & Elkins v. Moran*, 946 S.W.2d 381, 394 (Tex. App.—Houston [14th Dist.] 1997, writ dism'd by agr.).

[8] *Id.*

non-exempt assets to cover a large judgment. By agreeing to represent a defendant with such exposure, the lawyer's own assets and insurance could be placed "within reach of a plaintiff who otherwise would have an uncollectible judgment." *Zuniga*, 878 S.W.2d at 318. This, in turn, "would make lawyers reluctant—and perhaps unwilling—to represent defendants with inadequate insurance and assets." *Id.* at 317. This risk that the defendant's lawyer might become "the most attractive target in the lawsuit" is the same regardless of whether the attorney is targeted by the judgment debtor, the judgment creditor, an assignee, or a receiver. *See id.* at 317–18.

Regarding this factor, Klevenhagen states that the Legal-Malpractice Defendants presented no evidence to establish that they "were in any way deterred from zealously representing the judgment debtors because of some threat that the legal malpractice claims would be transferred from the Receiver to a special receiver for prosecution." But, of course, there would be no such evidence. First, the representation concluded months before McCoy applied for appointment of a receiver and issuance of a turnover order. And second, the concern is about the effect that precedent upholding such a turnover would have on future representation. To date, there is no such precedent. The attorneys and law firms who agreed to represent OGA or Gunn therefore had no reason to think that a court would allow an unpaid judgment against their clients to result in a turnover of any legal-malpractice claims that their clients might have against them.[9]

[9] Although Klevenhagen also asserts that the Legal-Malpractice Defendants did not argue this point in the trial court, counsel on behalf of all of the Legal-Malpractice Defendants specifically stated at the hearing on the motion to set aside the turnover order,

> Your Honor, allowing a turnover where the client has not advanced a malpractice claim would make lawyers reluctant and perhaps unwilling to represent clients like Dr. Gunn and OGA with inadequate insurance and assets. Both the *Zuniga* case and the *Goin* [*v. Crump*, No. 05-18-00307-CV, 2020 WL 90919 (Tex. App.—Dallas

B. Increased Threat to Client Confidentiality

The prosecution of a legal-malpractice claim by a non-client also presents an increased threat to client confidentiality. In a legal-malpractice suit, the defendant attorney can reveal confidential information relevant to the attorney's defense. *See* TEX. R. EVID. 503(d)(3) (attorney-client privilege does not apply to communications "relevant to an issue of breach of duty by a lawyer to the client or by a client to the lawyer"). But a client who prosecutes a legal-malpractice claim "retains control and thus, the scope of any disclosure can be limited by the client's power to drop the suit." *Vinson & Elkins v. Moran*, 946 S.W.2d 381, 394 (Tex. App.—Houston [14th Dist.] 1997, writ dism'd by agr.). On the other hand, if the claim is turned over for prosecution by someone else, the client's control is lost. *See id.*

In connection with this concern, we note that OGA originally asserted legal-malpractice claims against attorneys Barbara Hilburn and Alan Scott Alford and law firms Cooper & Scully, P.C., and Harris Hilburn, L.L.P., but nonsuited those claims. Although the statute of limitations on a litigation-related legal-malpractice claim is tolled until all appeals are exhausted,[10] OGA did not reassert those claims after the mandate in *McCoy v. Gunn* was issued in September 2018. As for the remaining defendants named in the legal-malpractice petitions filed by receivers—that is, attorneys Diana Faust, R. Brent Cooper, Michael C. Feehan, and the law firm Law Feehan Adams, L.L.P.—OGA never independently asserted legal-malpractice

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Jan. 8, 2020, no pet.) (mem. op.)] case talk about that concern in making a lawyer, essentially, a target in the lawsuit and we certainly have that concern here.

Counsel for Barbara Hilburn and her law firm similarly stated that "any reservations an attorney might have in representing a client that could be subject to an [ex]cess judgment is certainly in play here" and that this factor "cannot be mitigated by the appointment of a receiver."

[10] *See Zive v. Sandberg*, 644 S.W.3d 169, 174 (Tex. 2022) (citing *Hughes v. Mahaney & Higgins*, 821 S.W.2d 154, 156–57 (Tex. 1991)).

claims against these defendants. Dr. Gunn never asserted legal-malpractice claims against any of the attorneys or law firms who represented her.

IV. CONCLUSION

The concerns discussed above affect more than the claims at issue in this case. Like attorney immunity, the bar on the assignment or turnover of litigation-related legal-malpractice claims is intended, among other things, "to ensure 'loyal, faithful, and aggressive representation by attorneys employed as advocates.'" *Cantey Hanger, LLP v. Byrd*, 467 S.W.3d 477, 481 (Tex. 2015) (quoting *Mitchell v. Chapman*, 10 S.W.3d 810, 812 (Tex. App.—Dallas 2000, pet. denied)). And the willingness of counsel to represent undercapitalized or underinsured clients, like the ability of clients to control the extent to which otherwise-privileged communications are disclosed, affect the societal interest in the effective administration of justice. *Cf. Ford Motor Co. v. Leggat*, 904 S.W.2d 643, 647 (Tex. 1995) (discussing the purpose of attorney-client privilege).

We accordingly conclude that the trial court did not abuse its discretion in the medical-malpractice action by (1) denying Klevenhagen's amended application for appointment of a separate receiver and for issuance of a turnover order regarding the legal-malpractice claims, and (2) granting the Legal-Malpractice Defendants' intervention to set aside the turnover order and motion for new trial. We likewise conclude that the trial court did not err in denying Klevenhagen's motion to abate and granting the Legal-Malpractice Defendants' motion to dismiss.

We overrule the issues presented and affirm the trial court's final orders.

/s/ Tracy Christopher
Chief Justice

Panel consists of Chief Justice Christopher and Justices Bourliot and Spain (Spain, J., concurring).