CAUSE NO. DC-18-06835

FEE, SMITH, SHARP & VITULLO, LLP, ANTHONY VITULLO,	§	IN THE DISTRICT COURT
Plaintiffs,	§	
v.	§	OF DALLAS COUNTY, TEXAS
BLOCK GARDEN & McNeill, LLP, f/k/a BLOCK & GARDEN, LLP, CHRISTOPHER McNEILL and STEVEN BLOCK,	§	
Defendants.	§	95TH JUDICIAL DISTRICT

PLAINTIFFS' MOTION FOR NEW TRIAL

Plaintiffs Fee Smith Sharp & Vitullo LLP ("FSSV") and Anthony Vitullo ("Vitullo") (FSSV and Vitullo collectively, "Plaintiffs") respectfully submit this Motion for New Trial, which asks the Court to reconsider its grant of summary judgment in favor of Defendants' Block, Garden & McNeill, LLP f/k/a Block & Garden, LLP, Christopher McNeill, and Steven Block (collectively, "Defendants"). Plaintiffs show as follows in support of this Motion:

1. This Motion for New Trial is being filed within thirty (30) days from the date that this Court entered its January 7, 2020 Order Granting Defendants' Motion for Traditional Summary Judgment.

2. A trial court has broad discretion in ruling on such a motion. *See, e.g., In re Columbia Med. Ctr. of Las Colinas*, 290 S.W.3d 204, 210 (Tex. 2009). A new trial may be granted and judgment set aside for any good cause, on motion or a trial court's own motion. TEX. R. CIV. P. 320. Further, a trial court has the inherent authority to change or modify any order or judgment until expiration of its plenary power. *See, e.g.,*

Fruehauf Corp. v. Carrillo, 848 S.W.2d 83, 84 (Tex. 1993); TEX. R. CIV. P. 329b(d).

3. Here, a new trial and/or reconsideration of the Court's Order Granting Defendants' Motion for Traditional Summary Judgment is warranted because Defendants did not meet their heavy burden of establishing asserted defenses as a matter of law, and also because there are disputed issues of material fact which preclude this Court's grant of summary judgment.

4. Plaintiffs will not repeat all of the facts, evidence and argument contained in or attached to their Response to Defendants' Traditional Motion for Summary Judgment and/or the Affidavit of Anthony L. Vitullo filed in support thereof. Instead, Plaintiffs incorporate those pleadings, documents and arguments by reference as if fully set forth herein, as well as their Third Amended Petition.

5. Briefly, however, Defendants made three primary arguments as to why FSSV and Vitullo should not be allowed to proceed with their causes of action against the Defendant attorneys for tortious interference, fraud, fraudulent inducement, and negligent misrepresentation. Defendants claim to have been "privileged" to assert their claim for fees which interfered with Plaintiffs' client relationship, that Plaintiffs have not suffered compensable injury, and that Plaintiffs are "judicially estopped" from making their claims against Defendants. None of these are valid arguments.

6. In particular, Defendants' claim to "enjoy a privilege, tantamount to immunity, to have pursued their claim for attorney's fees against Clients" (Motion, at 2), even though such claim was unsupportable and interfered with the relationship between Plaintiffs and the Clients in question following settlement of underlying litigation with Chase Bank, is fundamentally flawed.

7. The privilege known variously in Texas as the "judicial proceedings privilege," the "litigation privilege" or the "attorney immunity privilege," applies *only* to statements made in the course of judicial proceedings in connection with the representation of clients. *Bird v. W.C.W.*, 868 S.W.2d 767, 771 (Tex. 1994); *James v. Brown*, 637 S.W.2d 914, 916-17 (Tex. 1982). Here, Defendants are not being sued for bringing lawsuits on behalf of clients or for representing clients, but for *impermissibly interfering* in the fee agreement and business relationship of another firm and *its* clients.

8. In essence, the law relied upon by Defendants amounts to the fact that, in Texas, acts by an attorney *on behalf of, or in connection with, representing a client* are "not actionable" by a non-client. *Cantey Hanger, LLP v. Byrd*, 467 S.W.3d 477, 481 (Tex. 2015). But that privilege is not implicated here. Defendants' interference was not undertaken on behalf of or for the benefit of a client, but rather for Defendants own perceived benefit.

9. The Texas Supreme Court, in *Youngkin v. Hines*, 546 S.W.3d 675 (Tex. 2018), specifically noted this significant distinction. *See id,* at 683 n.3 ("[w]hether an attorney may be liable to nonclients for conduct engaged in to benefit the lawyer personally, as opposed to the client, is outside the scope of our opinion today"). And engaging in fraudulent activity is not in the category of activity protected by the privilege either. *See, e.g., Alpert v. Crain, Caton & James, P.C.*, 178 S.W.3d 398, 406 (Tex. App. -- Houston [1st Dist.] 2005, pet. denied) ("[i]f a lawyer participates in independent fraudulent activities, his action is 'foreign to the duties of an attorney").

10. So, it is beyond question that the privilege asserted by Defendants does not apply and that, in any event, no privilege is accorded to conduct constituting

independent fraudulent activities that are, as here, "foreign to the duties of an attorney." Summary judgment cannot be granted on this basis.

11. Likewise, Defendants' claim that Plaintiffs have not incurred any compensable injury is equally without merit. Attorneys' fees are ordinarily not recoverable as actual damages in and of themselves. *See, e.g., Tana Oil & Gas Corp. v. McCall*, 104 S.W.3d 80, 81-82 (Tex. 2003). But, again, this body of law relied upon by Defendants has no application to the facts of this case. Plaintiffs are not asking for fees they incurred in defending against the Defendants' unwarranted intervention in the Chase lawsuit to pursue a nonexistent contingent fee interest.

12. Instead, Plaintiffs are asking for, as one measure of damages, the *lost profits* they incurred based on the time required in these endeavors, as such time would have been spent on other billable matters for paying clients or in the prosecution of other cases involving contingent fees, for which Plaintiffs have a long-standing and successful track record. Unquestionably, lost profit damages are fully recoverable in Texas. *See, e.g., Trenholm v. Ratcliff,* 646 S.W.2d 927, 933 (Tex. 1983).

13. The fact that the lost profit damages at issue here take the form of fees that would have been earned by attorneys is of no consequence. Plaintiffs are seeking those fees as *actual damages*, not as compensation for services in a particular case, and such damages are freely recovered in Texas. *See, e.g., Haubold v. Med. Carbon Research Inst., LLC*, 2014 Tex. App. LEXIS 2863 (Tex. App. -- Austin Mar. 14, 2014, no pet.), "when the actual damages *are* attorney's fees, then they are recoverable." *Id*., at *25 (emphasis in original). *See also In re Nalle Plastics Family Ltd. P'ship*, 406 S.W.3d 168, 174-175 (Tex. 2013) ("[w]hile attorney's fees incurred in prosecuting this claim are

not compensatory damages, the fees comprising the breach-of-contract damages are"); *Qwest Communications Int'l, Inc. v. AT&T Corp*., 114 S.W.3d 15, 32-33 (Tex. App. -- Austin 2003), rev'd in part on other grounds, 167 S.W.3d 324 (Tex. 2005) ("where the defendant's tort requires the plaintiff to act in the protection of his interests by bringing or defending an action against a third party" the plaintiff "is entitled to recover compensation for the reasonably necessary loss of time, attorney fees and other expenditures thereby suffered or incurred").

14. Plaintiffs seek the recovery of their lost time as lost profits, which constitute actual compensable damages for which recovery is permitted. Plaintiffs recovered fees expended in connection with the arbitration at issue paid to other firms, but did not also recover for the "lost time" resulting to their own firms as a direct result of Defendants' tortious conduct. Moreover, Plaintiffs' Third Amended Petition requests *additional* damages in the form of a recovery for mental anguish. Summary judgment cannot be granted on the basis of Defendants' argument that Plaintiffs are only seeking unrecoverable attorneys' fees.

15. Finally, Defendants also made the argument that Plaintiffs are "judicially estopped" from asserting their claims, because Plaintiffs' counsel made statements in connection with arbitration of the fee dispute at issue to the effect that the Clients at issue (Hopper and Wassmer) "never intended to pay" the required fee to Plaintiffs, and thus cannot now claim that it was the Defendants' unwarranted interference in that process which caused injury to Plaintiffs. Motion, at 13-17. Again, judicial estoppel cannot be applied to such statements.

16. Judicial estoppel precludes a party who successfully maintains a position in one proceeding from afterwards adopting a clearly inconsistent position in another proceeding to obtain an unfair advantage. *Pleasant Glade Assembly of God v. Schubert*, 264 S.W.3d 1, 6 (Tex. 2008). The elements of judicial estoppel are: (1) a sworn, prior inconsistent statement made in a judicial proceeding; (2) which was successfully maintained in the prior proceeding; (3) not made inadvertently or by mistake, or pursuant to fraud or duress; and (4) which is deliberate, clear, and unequivocal. *Parsa v. Walker*, 2016 Tex. App. LEXIS 8337, at *7 (Tex. App. -- Dallas Aug. 3, 2016, no pet.).

17. Judicial estoppel cannot apply here because Plaintiffs are not taking inconsistent positions. Plaintiffs at various times have believed and understood both of these things to be true: that clients Hopper and Wassmer never intended to pay Plaintiffs the full amount of the fee agreed to, and that Defendants interference by asserting a bogus claim for an even greater recovery caused the clients to dig in their heels and fully contest everything, to the detriment of Plaintiffs. These are not "inconsistent positions," and cannot form the basis for judicial estoppel. *See, e.g., Krobar Drilling, L.L.C. v. Ormiston*, 426 S.W.3d 107, 116 (Tex. App. -- Houston [1st Dist.] 2012, pet. denied) (the doctrine of judicial estoppel applies only to sworn statements of fact, not to equivocal statements made upon information and belief in the course of pursuing a claim). At the very least, Plaintiffs' respective positions and their beliefs with respect to same constitute significant issues of material fact.

18. In any event, a statement in arbitration that the Clients "never intended to pay the fee" due to Plaintiffs is not a statement of fact within the personal knowledge of

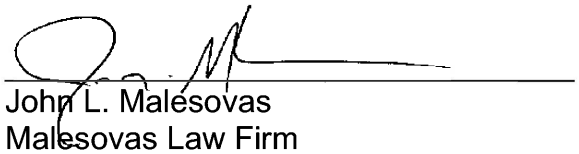
the Plaintiffs, but an opinion only. Judicial estoppel does not apply to opinions that amount to argument only. *See, e.g., DeWoody v. Rippley,* 951 S.W.2d 935, 946-947 (Tex. App. -- Fort Worth 1997, no writ) (statements of opinion not based on personal knowledge or on a mistaken belief of fact fail to meet the requirements for judicial estoppel).

19. Likewise, the statements of Plaintiffs' counsel in the arbitration proceeding that Hopper and Wassmer never intended to pay the full fee was not a position that was necessary to the claim for fees, or a fact or argument that had to be or was accepted by the arbitrator in order for the Final Award to be issue in favor of Plaintiffs. The Final Award makes no mention of any such fact or opinion. Unless a litigant's position is "successfully maintained," *i.e*., accepted by the court in the judicial proceeding, then it cannot form the basis of judicial estoppel.

20. For all of these reasons, judicial estoppel cannot form a legitimate basis for the Court's grant of summary judgment nor, as discussed above, do Defendants' additional claims of privilege and/or unrecoverable damages. The Court's grant of summary judgment for one or more of these reasons was and is manifestly unjust.

WHEREFORE, PREMISES CONSIDERED, Plaintiffs FSSV and Vitullo respectfully pray that this pleading be received and filed, that this Motion be granted, that the Court's January 7, 2020 Order Granting Defendants' Motion for Traditional Summary Judgment previously entered in this cause be vacated in all respects, and that this matter be reset for trial in accordance with the Court's availability.

Respectfully Submitted,



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CERTIFICATE OF SERVICE

In accordance with Rule 21a of the Texas Rules of Civil Procedure, the undersigned hereby certifies that a true and correct copy of the foregoing instrument has been served on all counsel of record on February 4, 2020, through the ECF case manager system.

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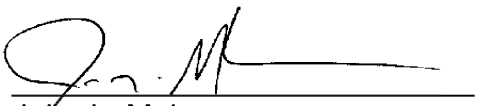

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