AFFIRM in Part, REVERSE in Part, and REMAND; Opinion Filed December 2, 2014.

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-12-01714-CV

RICKEY L. AND KAREN HOLLAND, Appellant
V.
FRIEDMAN & FEIGER, LAWRENCE J. FRIEDMAN, AND MARLA S. PITTMAN, Appellees

On Appeal from the 44th Judicial District Court
Dallas County, Texas
Trial Court Cause No. DC-09-15867

MEMORANDUM OPINION

Before Justices Bridges, O'Neill, and Brown
Opinion by Justice O'Neill

Appellants Ricky and Karen Holland appeal a take-nothing judgment granted in favor of appellees Freidman & Feiger (F & F), Lawrence J. Friedman, and Marla S. Pittman. In three issues, the Hollands contend: (1) the trial court erred in granting a no-evidence motion for summary judgment on their breach of fiduciary duty claim against Freidman, (2) the trial court abused its discretion in "dismissing" their claims against F & F and Pittman following a pretrial hearing, and (3) the judge assigned to hear their motions to recuse the trial judge abused his discretion in denying those motions. For the following reasons, we affirm the trial court's judgment that the Hollands take nothing on their claims against Friedman and F & F. We also affirm the trial court's judgment that the Hollands take nothing on their breach of fiduciary duty and DTPA claims against Pittman. We reverse the trial court's judgment on the Hollands'

intentional infliction of emotional distress claim against Pittman and remand that claim to the trial court for further proceedings consistent with this opinion.

In 2005, the Hollands sued a pharmaceutical company in state district court for injuries Ricky Holland suffered after taking medication manufactured by the company. They also sued a hospital for negligently treating those injuries. Appellees represented the Hollands in that suit. The Hollands were unable to obtain an expert report and nonsuited their claims against the hospital. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 74.351 (West Supp. 2014). The Hollands' remaining claims against the pharmaceutical company were removed to federal court, after which summary judgment was granted in favor of the pharmaceutical company.

The Hollands retained an appellate attorney to review their case and discovered they had no basis to appeal because appellees had not filed a response to the pharmaceutical company's motion for summary judgment. The Hollands then retained attorney Mark Lenahan to pursue any claims they might have against appellees. After Lenahan made a demand on appellees, Friedman preemptively filed suit against the Hollands.

In his suit, Friedman acknowledged the Hollands were represented by F & F and Pittman in the underlying suit, but claimed that he did not personally represent them. He further asserted the Hollands had fraudulently induced F & F to take their case. Specifically, he asserted the Hollands told Pittman they had already had a medical expert "on board" who would file an "expert report," and that other lawyers had told them they had a "slam dunk" case. Friedman said Pittman filed the lawsuit based on the Hollands' representations because the statute of limitations was soon going to run. Shortly after she filed the suit, Pittman called the expert that the Hollands had given her and he told her that he had not agreed to provide an expert report and that another lawyer had told him not to get involved with the case because the Hollands had "no

possibility" of success. Pittman was unable to find another expert, and the Hollands nonsuited their medical malpractice suit.

Friedman alleged that after the remaining claims were removed to federal court, the Hollands "implored" Pittman to find "any way" to recover some money. He said Pittman would not agree to find "any way" to recover for the Hollands, but told them she would try to find a "legal way." Pittman was unable to do so.

Friedman asserted the Hollands then concocted false allegations against Friedman in the hope of extorting money from him. In particular, he alleged the Hollands, through Lenahan, made a demand on him alleging he had committed negligence, fraud, and DTPA violations, even though he did not represent the Hollands.[1] Friedman alleged claims against both the Hollands and their attorney for conspiracy, extortion, and duress. After Lenahan terminated his attorney-client relationship with the Hollands, Friedman failed to prosecute the suit, and it was dismissed.

In 2009, the Hollands filed this suit against appellees. They first asserted claims connected to appellees' representation of them in the underlying litigation. Specifically, the Hollands complained that appellees told them they were going to file a response to the motion for summary judgment, and Pittman specifically procured an affidavit from Karen for the response, but appellees did not then file any response. Further, when appellees told the Hollands summary judgment had been granted, they did not tell them they had failed to file a response.

The Hollands also alleged claims arising from Friedman's lawsuit against them and Lenahan. They asserted Friedman filed the lawsuit, and had processed issued, for illegal purposes, and that Friedman had no intent to prosecute the suit. Only after Lenahan withdrew (and they retained new counsel) did Friedman "allow" his suit to be dismissed.

[1] However, the filings in the underlying proceedings listed both Friedman and Pittman as the Hollands' attorneys.

The Hollands asserted claims against all appellees for breach of fiduciary duty and DTPA violations. They also asserted a claim against Friedman for abuse of process. Finally, they asserted, "[a]lternatively, the actions of Friedman along with Pittman, singularly or collectively, constituted intentional infliction of emotional distress."

Appellees filed a no-evidence motion for summary judgment on all of the Hollands' claims against Friedman. The trial court granted the motion in its entirety. The Hollands' remaining claims against F & F and Pittman were set for a jury trial. On the day before trial, appellees' filed a motion requesting that the trial court exclude all evidence of the Hollands' remaining claims or prevent them from proceeding to trial because (1) they failed to disclose the damages they were seeking in response to proper discovery requests, and (2) their claims were improperly fractured malpractice claims. Appellees presented the motion to the trial court at the previously scheduled pretrial conference hearing. Following the hearing, the trial court granted the motion and, based on that ruling, entered a take-nothing judgment against the Hollands on their claims. This appeal followed.

In their first issue, the Hollands contend the trial court erred in granting appellees' no-evidence motion for summary judgment on their breach of fiduciary duty claim against Friedman.[2] A no-evidence summary judgment motion is essentially a motion for a pretrial directed verdict; it requires the nonmoving party to present evidence raising a genuine issue of material fact supporting each element contested in the motion. Tex. R. Civ. P. 166a(i); *Timpte Indust., Inc. v. Gish*, 286 S.W.3d 306, 310 (Tex. 2009). When reviewing a no-evidence summary judgment, we "review the evidence presented by the motion and response in the light most favorable to the party against whom the summary judgment was rendered, crediting evidence favorable to that party if reasonable jurors could, and disregarding contrary evidence

[2] The Hollands do not complain of the summary judgment on their other claims against Friedman.

unless reasonable jurors could not." *Mack Trucks*, 206 S.W.3d 572, 582 (Tex. 2006) (citing *City of Keller v. Wilson*, 168 S.W.3d 802, 827 (Tex. 2005)).

Appellees' motion for summary judgment challenged each element of the Hollands' breach of fiduciary duty claim against Friedman. Specifically, they asserted the Hollands had no evidence that (1) a fiduciary relationship existed between the Hollands and Friedman, (2) Friedman breached any fiduciary duties that existed, or (3) that any breach resulted in injury to the Hollands or a benefit to Friedman. *See Jones v. Blume*, 196 S.W.3d 440, 447 (Tex. App.—Dallas 2006, pet. denied). In their response to appellees' motion, to show they were injured as a result of Friedman's breach, the Hollands relied on evidence of mental anguish damages.

To recover for mental anguish, the plaintiff must show a relatively high degree of mental pain and distress that is more than mere worry, anxiety, vexation, embarrassment, or anger. *EMC Mort. Corp. v. Jones*, 252 S.W.3d 857, 871 (Tex. App.—Dallas 2008, no pet.). Because of the subjective nature of mental anguish claims, the Texas Supreme Court has admonished appellate courts to closely scrutinize such awards. *Universal Life Ins. Co. v. Giles*, 951 S.W.2d 48, 54 (Tex. 1997). An award of mental anguish damages will survive a legal sufficiency challenge when the plaintiffs have introduced direct evidence of the nature, duration, and severity of their mental anguish, thus establishing a substantial disruption in their daily routine. *Parkway Co. v. Woodruff*, 901 S.W.2d 434, 444 (Tex. 1995). When claimants fail to present direct evidence of the nature, duration, or severity of their anguish, we apply traditional "no evidence" standards to determine whether the record reveals any evidence of "a high degree of mental pain and distress" that is "more than mere worry, anxiety, vexation, embarrassment, or anger." *Id.* Generalized conclusory descriptions of how an event affected a person are insufficient evidence on which to base mental anguish damages. *See Serv. Corp. Intern. v. Guerra*, 348 S.W.3d 221, 232 (Tex. 2011).

In their summary judgment response, to show mental anguish, the Hollands relied on a single sentence in Karen Holland's affidavit:

> When I was served with Friedman's lawsuit, I became visibly upset and suffered severe physical manifestations requiring hospitalization.

We conclude Karen's affidavit does not constitute legally sufficient evidence that she suffered compensable mental anguish damages. We begin by noting that Karen's statement that she was "visibly upset" does nothing more than show the existence of mere emotions and is insufficient to raise a fact issue on mental anguish. *See Parkway Co.*, 901 S.W.2d at 445. The Hollands, however, assert the additional facts Karen provided − that she suffered "severe physical manifestations" that required "hospitalization" − were sufficient to show the negative emotions she suffered rose to the level of compensable mental anguish. We disagree.

The phrase "physical manifestation" is a legal term used by courts to refer to various physical responses a plaintiff might experience that could corroborate a claim of mental anguish. Some jurisdictions require a plaintiff to show such physical manifestations to support a claim of mental anguish. *See Boyles v. Kerr*, 855 S.W.2d 593, 598 (Tex. 1993) The Texas Supreme Court has rejected the physical manifestation rule because such manifestations are not an accurate indicator of whether or not the plaintiff suffered compensable mental anguish. *See Boyles*, 855 S.W.2d at 598 (citing Julie A. Davies, Direct Actions for Emotional Harm; Is Compromise Possible?, 67 Wash. L. Rev. 1, 24-25 (1992) (the physical manifestation rule "has been criticized on the ground it has no obvious relationship to emotional harm); *Moore v. Lillebo*, 722 S.W.2d 683, 686 (Tex. 1986) (noting the term "physical manifestation" has lost much of its significance because it has been expanded to include all manner of symptoms including nervousness, fatigue, weakened muscles, severe headaches, memory lapses, and "brain deterioration.").

Here, Karen wholly failed to state what physical manifestations she suffered or provide any facts showing how any physical manifestations were linked to or corroborated her claim for mental anguish. Karen also failed to provide any facts about the circumstances surrounding her hospitalization. We cannot agree Karen's statement she was hospitalized on a single occasion for an unstated length of time, for unspecified reasons, constitutes direct evidence of her mental suffering establishing a "substantial disruption" in her "daily" routine.[3] We conclude Karen's affidavit failed to raise a fact issue showing she suffered compensable mental anguish.

To raise a fact issue, the Hollands also direct this Court to supplemental affidavits they filed six days before the summary judgment hearing. According to appellees, we cannot consider these affidavits because they were not properly before the trial court when it granted the motion for summary judgment. We agree.

A trial court need only consider the record as it properly appears before it when the motion for summary judgment is heard. *WTFO, Inc. v. Braithwaite*, 899 S.W.2d 709, 721 (Tex. App.—Dallas 1995, no writ). The nonmovant must file its summary judgment response and evidence at least seven days before the summary judgment hearing, unless the nonmovant gets permission to file it later. TEX. R. CIV. P. 166a(c). If the court allows the late filing of evidence, the court must affirmatively indicate in the record acceptance of the late filing. *See Benchmark Bank v. Crowder*, 919 S.W.2d 657, 663 (Tex. 1996); *Goswami v. Metropolitan Sav. & Loan Ass'n*, 751 S.W.2d 487, 490 n. 1 (Tex. 1988); *WTFO, Inc.*, 899 S.W.2d at 721. Absent any indication leave was granted, we must presume the trial court did not consider the late-filed evidence.[4] *See Benchmark Bank*, 919 S.W.2d 663; *WTFO, Inc.*, 899 S.W.2d at 721. The

[3] In their brief, the Hollands assert evidence of Karen's hospitalization alone satisfied their burden because it showed an "interruption" in her daily routine. While this sounds very much like the standard, it is significantly different in that it focuses on a single event, but the actual standard is directed to showing a substantial disruption in the plaintiff's daily life. *See Parkway Co.*, 901 S.W.2d at 444.

[4] The Supreme Court has cautioned courts not to confuse the presumptions applicable to amended pleadings filed less than seven days before a summary judgment hearing with the presumptions applicable to summary judgment responses or evidence filed less than seven days

Hollands do not dispute they did not timely file the affidavits. Nor do they claim they either sought or obtained leave to file the affidavits. Instead, the Hollands assert the record shows the trial court nevertheless considered the affidavits and appellees waived any objection that the affidavits were not timely filed. To show the trial court considered the untimely affidavits, the Hollands rely on the trial court's statement in its order granting summary judgment that it considered the Hollands' "Response." The Hollands' Response, however, was timely filed. The affidavits they now rely on to raise a fact issue, however, were filed separately, after the deadline for filing summary judgment evidence. The trial court's consideration of the Hollands' response does not indicate it also considered affidavits that were not attached to the response, or even that the trial court was aware the affidavits were filed.

Nor can we agree appellees waived their "objection" that the affidavits should not be considered as summary judgment evidence. To support their contention, the Hollands rely on the well-settled principal that a party must object in writing and obtain an express or implied ruling from the trial court to preserve a complaint about the form of "summary judgment evidence." *Grand Prairie I.S.D. v. Vaughan*, 792 S.W.2d 944, 945 (Tex. 1990). The Hollands misunderstand the nature of appellees' contention. Appellees are not asserting the trial court erred in considering the untimely affidavits, but that we are required to presume the trial court did not consider them absent some affirmative indication to the contrary.

When a party does not timely file evidence in response to a motion for summary judgment and the record does not show the late-filed evidence was with leave of court, the evidence is "not part of the summary judgment record." *See Benchmark Bank*, 919 S.W.2d at 663. Appellees thus had no reason to object to the late filed affidavits because they were not

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before the hearing. In the case of pleadings, we generally presume the trial court granted leave for the late filing absent some showing to the contrary, *See Goswami*, 751 S.W.2d 491 & 491 n.1. In contrast, "when nothing appears of record to indicate that the late filing of the written response was with leave of court, it must be presumed that the trial court did not consider the response." *See Goswami*, 751 S.W.2d 491 & 491 n.1.

summary judgment evidence. *See Owens v. Wal-Mart Stores, Inc.*, No. 05-01-00357-CV, 2002 WL 181755, * 1 (Tex. App.—Dallas Feb. 6, 2002, no pet.) (not designated for publication). Because the trial court was not required to consider the untimely affidavits and we are required to presume the trial court did not in fact consider the untimely affidavits, we cannot consider those affidavits in reviewing the trial court's ruling.[5] *See Benchmark Bank*, 919 S.W.2d at 663.

Finally, in their reply to appellees' brief, the Hollands for the first time assert that, even if they failed to present any evidence of damages, they raised a fact issue on the challenged element by showing Friedman benefitted by breaching his fiduciary duties. *See Jones*, 196 S.W.3d at 447 (breach of fiduciary duty claim can be supported by evidence of an injury to the plaintiff or benefit to the defendant). However, because the Hollands did not raise this as a basis for denying summary judgment in the trial court or as a ground for reversing the trial court's judgment in their original brief, we conclude the issue is not properly before us. *See* TEX. R. APP. P. 166a(c) ("Issues not expressly presented to the trial court by written motion, answer, or other response shall not be considered on appeal as grounds for reversal."); *see also Anderton v. Cawley*, 378 S.W.3d 38, 58 (Tex. App.—Dallas 2012, no pet.) (same); *Dallas County v. Gonzalez*, 183 S.W.3d 94, 104 (Tex. App.—Dallas 2006, pet. denied) (appellant cannot raise a new issue in a reply brief that was not raised in their original brief). We resolve the first issue against the Hollands.

In their second issue, the Hollands contend the trial court erred in "dismissing" their remaining claims against F & F and Pittman following a "pretrial conference." On the day before trial, appellees filed a "motion to exclude evidence" requesting the trial court to exclude

[5] The Hollands reliance on *Lection v. Dyll*, 65 S.W.3d 696 (Tex. App.—Dallas 2001, pet. denied) is misplaced. In that case, the defendant argued the plaintiff's summary judgment evidence, which was attached to her response to the defendant's motion to reconsider the denial of his summary judgment, could not be considered because it was not properly "authenticated" and because it was not timely filed. *Id*. at 702. We concluded the evidence was timely filed because it was on file more than seven days before the hearing at which the summary judgment was granted. *Id.* We also concluded the defendant waived any alleged "defects" in the plaintiff's "offer" by failing to object and obtain a ruling. *Id*. at 703. Contrary to the Hollands' contention, we did not hold a party must object to untimely summary evidence that was filed without leave of court to argue that evidence was not part of the summary judgment record.

all evidence of the Hollands' breach of fiduciary duty and DTPA claims − or to preclude them from proceeding on those claims − because the claims were "fractured" legal malpractice claims. Appellees also requested the trial court to exclude any evidence of mental anguish damages because they failed to disclose those damages in response to their requests for disclosures. *See* Tex. R. Civ. P. 194.2. The trial court granted appellees' motion and, based on that order, rendered a take-nothing judgment against the Hollands.

On appeal, the Hollands do not complain of the procedure the trial court utilized to dispose of their claims. Instead, they contend the trial court abused its discretion because: (1) they were given inadequate notice of the hearing on appellees' motion to exclude, (2) they properly answered appellees' requests for disclosure, and (3) their claims were not improperly fractured malpractice claims.

The Hollands first complain they were not given proper notice of appellees' motion under Texas Rule of Civil Procedure 21a. Rule 21a provides that "an application to the court for an order and notice of any hearing thereon, not presented during a hearing or trial, must be served upon all other parties not less than three days before the time specified for the hearing." TEX. R. CIV. P. 21a. Appellees' motion was presented at a pretrial hearing, and the Hollands do not contend they were not given notice of that hearing. Assuming rule 21a nevertheless required notice of the motion to exclude, we conclude the Hollands waived any error.

To preserve a complaint of untimely notice under rule 21a, the complaining party must object under that rule, request additional time to prepare for the hearing, and obtain a ruling by the court on each objection or request. TEX. R. APP. P. 33.1(a)(1); *Prade v. Helm*, 725 S.W.2d 525, 526-27 (Tex. App.—Dallas 1987, no pet.); *In re R.A.*, 417 S.W.3d 569, 581 (Tex. App.—El Paso 2013, no pet.); *see also Low v. Henry*, 221 S.W.3d 609, 618 (Tex. 2007). Because the

Hollands did not raise any complaint regarding notice under rule 21a, or otherwise, any error is waived. *Prade*, 725 S.W.3d at 526-27.

The Hollands next contend the trial court abused its discretion in concluding they were required to disclose their claim for mental anguish damages in response to appellees' rule 194.2 requests for disclosure. A party may request during discovery disclosure of "the legal theories and, in general, the factual bases of the responding party's claims or defenses." TEX. R. CIV. P. 194.2(c). A party may also request disclosure of "the amount and any method of calculating economic damages." TEX. R. CIV. P. 194.2(d). A party who fails to "make, amend, or supplement" a discovery response "may not introduce evidence of the information that was not disclosed unless the court finds (1) there was good cause for the failure to timely disclose, or (2) the failure to timely disclose will not unfairly surprise or unfairly prejudice the other party. TEX. R. CIV. P. 193.6(a); *Williams v. County of Dallas*, 194 S.W.3d 29, 32 (Tex. App.—Dallas 2006, pet. denied). When answering a request for disclosure, "the responding party need not marshal all evidence that may be offered at trial." TEX. R. CIV. P. 194.2(c). This rule is intended to require disclosure of a party's "basic assertions," not necessarily all aspects of the party's claims or defenses. TEX. R. CIV. P. 194 cmt. 2.

In response to appellees' request that they disclose their legal theories and the factual bases of their claims, the Hollands did not disclose they were claiming mental anguish damages. According to the Hollands, comment 2 to rule 194 makes "clear" that they were not required to disclose mental anguish damages. That comment states:

> Rule 194.2(c) and (d) permit a party further inquiry into another's legal theories and factual claims than is often provided in notice pleading. . . . Paragraphs (c) and (d) are intended to require disclosure of a party's basic assertions, whether in prosecution of claims or in defense. Thus, for example, a plaintiff would be required to disclose that he or she claimed damages suffered in a car wreck caused by defendant's negligence in speeding, and would be required to state how loss of past earnings and future earning capacity was calculated, but would not be required to state the speed at which defendant was allegedly driving. Paragraph

> (d) does not require a party, either a plaintiff or a defendant, to state a *method of calculating* non-economic damages, such as for mental anguish.

(emphasis added).

According to the Hollands, because there is no requirement to disclose the "method of calculating" mental anguish damages, they were not required to disclose they were seeking such damages. They further assert their disclosures were sufficient because they pleaded claims for which mental anguish damages are recoverable and they disclosed they were seeking all damages "allowed by statute or common law." We disagree.

In this case, it was not clear from the Holland's petition the legal injury on which they were predicating their claims or their damages. For example, although they asserted claims related to F & F's representation of them, they neither claimed they would have prevailed in the underlying claims but for F & F's actions nor did they claim they paid F & F any attorneys' fees. The Hollands did state in their disclosures they were seeking attorneys' fees as "economic damages," but they now contend they were seeking such fees because they were recoverable under the DTPA. Regardless, at his deposition, Ricky Holland was unable to identify the damages they were claiming. On the day of the pretrial hearing, however, the Hollands asserted they were seeking mental anguish damages, and only mental anguish damages.

Mental anguish damages are a class of damages that are generally limited to certain legal theories and must often be supported by heightened culpability. *See* TEX. BUS. & COM. CODE ANN. § 17.50(b)(1) (West 2011) (consumer may recover mental anguish if defendant's conduct was committed knowingly); *Vickery v. Vickery*, 999 S.W.2d 342, 345 (Tex. 1999) (a client cannot recover mental anguish damages against an attorney for breach of fiduciary duty unless the breach is accompanied by more than an economic loss or when a heightened culpability is alleged). Although such damages may be recoverable in such cases, mental anguish is not an injury that is generally evident from the tortious conduct. *Cf. City of Tyler v. Likes*, 962 S.W.2d

489, 494-96 (1997) (explaining limitations on the recoverability of mental anguish damages is linked to problems of foreseeability of such damages). Indeed, a claim for mental anguish damages must be supported by pleadings to give a defendant adequate notice to prepare a defense. *See Dalon v. City of DeSoto*, 852 S.W.2d 530, 538 (Tex. App.—Dallas 1992, writ denied).

The purpose of the discovery rules is to encourage full discovery of the issues and facts before trial so that parties can make realistic assessments of their respective positions in order to facilitate settlements and prevent trial by ambush. *Oscar Luis Lopez v. La Madeleine of Tex., Inc.*, 200 S.W.3d 854, 860 (Tex. App.—Dallas 2006, no pet.). Under rule 194.2(c), appellees were entitled to disclosure of the Hollands' legal theories and the factual basis of their claims. We conclude the Hollands' failure to disclose they either suffered or were seeking mental anguish damages did not comply with the rule 194.2(c). *Cf. Dalon*, 852 S.W.2d at 538 (plaintiffs' petition failed to provide fair notice that they were seeking mental anguish damages when petition did not make any mention of mental anguish).

We now turn to the Hollands' argument that the trial court nevertheless erred in granting appellees' motion to exclude because they showed appellees would suffer no unfair surprise or prejudice by allowing them to put on evidence of mental anguish. The burden to show good cause or lack of unfair surprise or unfair prejudice is on the party seeking to admit the evidence. TEX. R. CIV. P. 193.6(b); *Williams*, 194 S.W.3d at 32. A finding of good cause or lack of unfair surprise or unfair prejudice must be supported by the record. TEX. R. CIV. P. 193.6(b).

According to the Hollands, the record shows appellees could not have been surprised or unfairly prejudiced because appellees knew they were seeking mental anguish damages prior to trial. They first rely on appellees' motion to exclude which shows appellees' were anticipating the Hollands were going to present evidence of mental anguish. At the hearing on the motion,

appellees acknowledged that were aware of the claim when they filed the motion. But they explained they only obtained this information days earlier when the Hollands submitted their proposed jury instructions. We cannot agree this prior knowledge suffices to establish a lack of surprise or unfair prejudice. *See Alvarado v. Farah Mfg. Co., Inc.*, 830 S.W.2d 911, 915 (Tex. 1992); *see Gibbs v. Bureaus Inv. Grp. Portfoloi No. 14, LLC*, 441 S.W.3d 764, 768-69 (Tex. App.—El Paso 2014, no pet.) (party entitled to disclosures to enable it to conduct an effective investigation for the purpose of discovering possibly impeaching facts).

The Hollands also assert they showed appellees knew they were claiming mental anguish damages based on their response to appellees' summary judgment motion concerning their claims against Friedman. The Hollands' response, however, shows only appellees were aware the Hollands were claiming they suffered mental anguish as a result of Friedman's lawsuit against them. But the Hollands alleged claims against F & F and Pittman for breach of fiduciary duty and DTPA violations for their conduct arising from their legal representation in the underlying litigation. Neither the Hollands' response to the summary judgment, the summary judgment evidence, nor any untimely filed evidence indicates the Hollands were alleging they had suffered or were claiming mental anguish as a result of that conduct. We conclude the Hollands failed to show appellees' would suffer no unfair surprise or prejudice by allowing them to present evidence of mental anguish in support of their claims for breach of fiduciary duty and DTPA violations.[6]

However, we reach a different conclusion with respect to the Hollands' intentional infliction of emotional distress claim against Pittman. This claim was based on Pittman's alleged complicity in Friedman's lawsuit. The Hollands' response to appellees' motion for summary

[6] Hollands also assert even if they failed to make the necessary showing of unfair prejudice or surprise, the trial court should have granted them a continuance under Texas Rule of Civil Procedure 193.6(c). But the only authority they cite concerns a continuance that was necessitated to prevent a due process violation. *See Union Carbide Corp. v. Moye*, 798 S.W.2d 792, 793 (Tex. 1990) (orig. proceeding). The Hollands did not raise any due process complaints in the trial proceedings. Consequently, this argument was not preserved. *In re L.M.I.*, 119 S.W.3d 707, 711 (Tex. 2003).

judgment, their summary judgment evidence, as well as their untimely filed affidavits clearly reveal they were claiming they suffered mental anguish damages from that conduct. Indeed, appellees admitted the Hollands' summary judgment response provided them adequate notice of the Hollands' claim with respect to that conduct. We conclude the record shows Pittman would suffer no unfair surprise or prejudice from allowing the Hollands to present evidence of mental anguish on that claim.

The trial court also stated it was rendering judgment against the Hollands on the intentional infliction of emotional distress claim because that claim was "inapplicable in light of [their] other plead causes of action." According to the Hollands, the trial court erred in disposing of that claim on his basis as well.

The tort of intentional infliction of emotional distress is a "gap-filler" tort which was created for the "limited purpose of allowing recovery in those rare instances in which a defendant intentionally inflicts severe emotional distress in a manner so unusual that the victim has no other recognized theory of redress." *Hoffmann–La Roche, Inc. v. Zeltwanger*, 144 S.W.3d 438, 447 (Tex. 2004); *see also Young v. Kranz*, 434 S.W.3d 335, 344 (Tex. App.—Dallas 2014, no pet.). The tort's clear purpose is to supplement existing forms of recovery by providing a cause of action for egregious conduct that might otherwise go unremedied. *Young*, 434 S.W.3d at 344. The tort has no application when the actor intends to invade some other legally protected interest, even if emotional distress results. *See id*. Thus, where the gravamen of a complaint is another tort, an intentional infliction of emotional distress claim is not available. *Id.*

Here, the trial court concluded the Hollands could not proceed on their intentional infliction claim because it was "inapplicable" in light of the other claims they had pleaded.[7] However, a plaintiff is permitted to plead claims in the alternative, regardless of consistency.

[7] We reiterate the Hollands do not complain of the procedural mechanisms the trial court utilized to dispose of their claims.

See TEX. R. CIV. P. 48. Nor does the fact the Hollands pleaded other theories of recovery show that the gravamen of their complaint was really another tort. We conclude the trial court erred in entering a take-nothing judgment on this basis.

In their reply brief, appellees assert this Court should affirm the trial court's judgment on the Hollands' intentional infliction of emotional distress claim because the claim was based on statements made in Friedman's suit, which are protected by an absolute privilege. *See Senior Care Resources, Inc. v. OAC Senior Living, LLC*, No. 05-12-00495-CV, 2014 WL 1007783, at *6 (Tex. App.—Dallas March 5, 2014, no pet.). This privilege was not raised in the trial proceedings and was not a basis for the trial court's ruling. According to appellees, we can nevertheless affirm on this basis "under the rule that a judgment will be affirmed on any legal theory supporting affirmance." However, we are only permitted to affirm a judgment on a legal theory that was properly before the trial court. *Victoria Gardens of Frisco v. Walrath*, 257 S.W.3d 284, 290 (Tex. App.—Dallas 2008, pet. denied); *see also Guar. County Mut. Ins. Co. v. Reyna*, 709 S.W.2d 647, 648 (Tex. 1986) (court of appeals must uphold a lower court judgment on any legal theory before it, even if the court gives an incorrect reason for its judgment); *Brocail v. Detroit Tigers, Inc.*, 268 S.W.3d 90, 99 (Tex. App.—Houston [14th Dist.] 2008, pet. denied) (appellate court will affirm on any legal theory "expressly placed at issue" and supported by the evidence); *Cf. Stiles v. Resolution Trust Corp.*, 867 S.W.2d 24, 26 (Tex. 1993) (appellate court cannot affirm a summary judgment on grounds not presented). Consequently, we cannot affirm the trial court's judgment on the basis of a privilege that was never raised in the trial proceedings nor considered by the trial court. We conclude the trial court erred in entering a judgment against the Hollands on their intentional emotional distress claim against Pittman.

In their third issue, the Hollands complain of the denial of two motions to recuse the trial judge, Carlos Cortez. The Hollands's first motion to recuse was filed on November 30, 2011 on

the grounds that (1) Judge Cortez's impartiality might reasonably questioned, and (2) Judge Cortez had a personal bias or prejudice concerning Friedman and/or F & F. To support the motion, the Hollands alleged appellees had made campaign contributions to Judge Cortez and assisted in raising funds for his campaign. The administrative judge assigned the motion to Judge Michael Snipes. Following an evidentiary hearing, Judge Snipes denied the motion.

The Hollands assert Judge Snipes abused his discretion in denying the motion because they presented evidence Judge Cortez's campaign reimbursed F & F $400 for a "fund raising event" and F & F had made a $5,000 campaign contribution to Judge Cortez. The Hollands however did not request the court reporter to include the hearing on the motion to recuse be included in the record on appeal and, as a consequence, we do not have a record of that hearing before us. *See* TEX. R. APP. P. 34.6(b) (the appellant must request in writing the portions of the proceedings to be included in the record). Without a record, we cannot review Judge Snipes denial of the Hollands' first motion to recuse.[8] *Birnbaum v. Law Offices of G. David Westfall, P.C.*, 120 S.W.3d 470, 477 (Tex. App.—Dallas 2003, pet. denied).

The Hollands filed their second motion to recuse after Judge Cortez heard and ruled on appellees' motion for summary judgment. Texas Rule of Civil Procedure 18a(b)(1) provides:

> A motion to recuse:
>
> (A) must be filed as soon as practicable after the movant knows of the grounds stated in the motion; *and*
>
> (B) must not be filed after the tenth day before the date set for trial or other hearing unless, before that day, the movant neither knew nor reasonably should have known:

[8] We also note that Texas courts have repeatedly rejected the argument that campaign contributions by attorneys is grounds for recusal. *See J-IV Invest. v. David Lynn Mach., Inc.*, 784 S.W.2d 106, 107 (Tex. App.—Dallas 1990, no pet.). The Hollands assert this authority is inapplicable because F & F was also a party in the litigation. But they fail to provide any applicable legal authority, or any argument or analysis, showing the distinction requires a different result under the facts of this case. See TEX. R. APP. P. 38.1(f), (h), and (i); *Bolling v. Farmers Branch Indep. Sch. Dist.*, 315 S.W.3d 893, 895 (Tex. App.—Dallas 2010, no pet.) (appellant must provide argument and cite authority showing why their complaint has merit).

> (i) that the judge whose recusal is sought would preside at the trial or hearing; or
>
> (ii) that the ground stated in the motion existed.

Tex. R. Civ. P. 18a(b)(1) (emphasis added).

Appellees responded to the motion asserting it was untimely because it was not filed as soon as practicable after the Hollands knew of the grounds stated in the motion and it was not filed more than ten days before Judge Cortez's hearing on the motion for summary judgment. Judge Snipes denied the motion as untimely.

The Hollands first assert appellees failed to show they did not file the motion as soon as practicable as required by subsection (A). They further assert subsection (B) "clearly" does not apply. To support their assertion that subsection (B) is inapplicable they state only that there were "no motions pending" in the trial court "within" ten days of the date they filed the motion. The Hollands assertion is not based on the language in subsection (B). *See Parker v. Textron Fin. Corp.*, No. 04-12-00564-CV, 2013 WL 979208, * 2 (Tex. App.—San Antonio Mar. 13, 2013, no pet.) (motion to recuse filed after summary judgment hearing untimely because it was filed after the tenth day before the date set for the summary judgment hearing). Nor do the Hollands provide any argument or authority to support their construction of the rule.[9] The rules of appellate procedure require an appellant to provide argument showing why their complaint has merit in both fact and in law, and to cite and apply law that is applicable to their complaint with appropriate citations to the record. TEX. R. APP. P. 38.1(f), (h), and (i); *Bolling v. Farmers Branch Indep. Sch. Dist.*, 315 S.W.3d 893, 895 (Tex. App.—Dallas 2010, no pet.). We conclude the Hollands' brief fails to meet these requisites.

[9] We recognize the Hollands' second motion to recuse relied, in part, on facts the Hollands discovered after the summary judgment hearing. But the Hollands have not alleged or attempted to show that they neither knew, nor could have known, that the grounds stated in the motion (Judge Cortez's alleged bias or prejudice against them) existed in time to file the motion within the rule's deadline. *See* TEX. R. CIV. P. 18a(b)(1).

Finally, the Hollands contend we must "reverse" Judge Snipes "finding" that the motion was filed in bad faith and for purposes of unnecessary delay. Although Judge Snipes made a bad faith finding, he did not impose any sanctions on the Hollands based on that finding. The Hollands nevertheless assert their due process rights were violated because Judge Snipes made the finding without conducting an evidentiary hearing. They rely entirely on authority that concerns a party's right to notice and a hearing before sanctions can be ordered. *See* TEX. R. CIV. P. 18a(h); *Low v. Henry*, 221 S.W.3d 609, 614-15 (Tex. 2007). Because Judge Snipes did not award any sanctions, this authority is inapplicable. We conclude the Hollands have failed to show Judge Snipes abused his discretion in denying their motions to recuse.

For the foregoing reasons, we reverse the trial court's judgment on the Hollands' intentional infliction of emotional distress claim against Pittmnan, but affirm the trial court's judgment in all other respects.

/Michael J. O'Neill/
MICHAEL J. O'NEILL
JUSTICE

121714F.P05

Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

RICKEY L. HOLLAND AND KAREN HOLLAND, Appellants

No. 05-12-01714-CV V.

FRIEDMAN & FIEIGER, LAWRENCE J. FRIEDMAN, AND MARLA S. PITTMAN, Appellees

On Appeal from the 44th Judicial District Court, Dallas County, Texas
Trial Court Cause No. DC-09-15867.
Opinion delivered by Justice O'Neill.
Justices Bridges and Brown participating.

In accordance with this Court's opinion of this date, we **AFFIRM** in part and **REVERSE** in part the trial court's judgment. We **REVERSE** the portion of the trial court's judgment that appellants Ricky L. Holland and Karen Holland take-nothing judgment on their intentional infliction of emotional distress claim against appellee Marla S. Pittman. We **AFFIRM** the trial court's judgment in all other respects. We **REMAND** this cause to the trial court for further proceedings consistent with this opinion.

We **ORDER** that appellees FRIEDMAN & FIEIGER, LAWRENCE J. FRIEDMAN, and MARLA S. PITTMAN recover their costs of this appeal from appellants RICKEY L. HOLLAND and KAREN HOLLAND.

Judgment entered this 2nd day of December, 2014.