IN THE SUPREME COURT OF TEXAS

NO. 95-0934

COLETTE BOHATCH, PETITIONER

v.

BUTLER & BINION, ET AL., RESPONDENTS

ON APPLICATION FOR WRIT OF ERROR TO THE
COURT OF APPEALS FOR THE FOURTEENTH DISTRICT OF TEXAS

Argued November 20, 1996

JUSTICE ENOCH delivered the opinion of the Court, in which JUSTICE GONZALEZ, JUSTICE OWEN, JUSTICE BAKER, and JUSTICE HANKINSON join.

JUSTICE HECHT filed a concurring opinion.

JUSTICE SPECTOR filed a dissenting opinion, in which CHIEF JUSTICE PHILLIPS joined.

Partnerships exist by the agreement of the partners; partners have no duty to remain partners. The issue in this case is whether we should create an exception to this rule by holding that a partnership has a duty not to expel a partner for reporting suspected overbilling by another partner. The trial court rendered judgment for Colette Bohatch on her breach of fiduciary duty claim against Butler & Binion and several of its partners (collectively, "the firm"). The court of appeals held that there was no evidence that the firm breached a fiduciary duty and reversed the trial court's tort judgment; however, the court of appeals found evidence of a breach of the partnership agreement and rendered judgment for Bohatch on this ground. 905 S.W.2d 597. We affirm the court of appeals' judgment.

I. FACTS

Bohatch became an associate in the Washington, D.C., office of Butler & Binion in 1986 after working for several years as Deputy Assistant General Counsel at the Federal Energy Regulatory Commission. John McDonald, the managing partner of the office, and Richard Powers, a partner, were the only other attorneys in the Washington office. The office did work for Pennzoil almost exclusively.

Bohatch was made partner in February 1990. She then began receiving internal firm reports showing the number of hours each attorney worked, billed, and collected. From her review of these reports, Bohatch became concerned that McDonald was overbilling Pennzoil and discussed the matter with Powers. Together they reviewed and copied portions of McDonald's time diary. Bohatch's review of McDonald's time entries increased her concern.

On July 15, 1990, Bohatch met with Louis Paine, the firm's managing partner, to report her concern that McDonald was overbilling Pennzoil. Paine said he would investigate. Later that day, Bohatch told Powers about her conversation with Paine.

The following day, McDonald met with Bohatch and informed her that Pennzoil was not satisfied with her work and wanted her work to be supervised. Bohatch testified that this was the first time she had ever heard criticism of her work for Pennzoil.

The next day, Bohatch repeated her concerns to Paine and to R. Hayden Burns and Marion E. McDaniel, two other members of the firm's management committee, in a telephone conversation. Over the next month, Paine and Burns investigated Bohatch's complaint. They reviewed the Pennzoil bills and supporting computer print-outs for those bills. They then discussed the allegations with Pennzoil in-house counsel John Chapman, the firm's primary contact with Pennzoil. Chapman, who had a long-standing relationship with McDonald, responded that Pennzoil was satisfied that the bills were reasonable.

In August, Paine met with Bohatch and told her that the firm's investigation revealed no basis for her contentions. He added that she should begin looking for other employment, but that the firm would continue to provide her a monthly draw, insurance coverage, office space, and a secretary. After this meeting, Bohatch received no further work assignments from the firm.

In January 1991, the firm denied Bohatch a year-end partnership distribution for 1990 and reduced her tentative distribution share for 1991 to zero. In June, the firm paid Bohatch her monthly draw and told her that this draw would be her last. Finally, in August, the firm gave Bohatch until November to vacate her office.

By September, Bohatch had found new employment. She filed this suit on October 18, 1991, and the firm voted formally to expel her from the partnership three days later, October 21, 1991.

The trial court granted partial summary judgment for the firm on Bohatch's wrongful discharge claim, and also on her breach of fiduciary duty and breach of the duty of good faith and fair dealing claims for any conduct occurring after October 21, 1991 (the date Bohatch was formally expelled from the firm). The trial court denied the firm's summary judgment motion on Bohatch's breach of fiduciary duty and breach of the duty of good faith and fair dealing claims for conduct occurring before October 21, 1991. The breach of fiduciary duty claim and a breach of contract claim were tried to a jury. The jury found that the firm breached the partnership agreement and its fiduciary duty. It awarded Bohatch \$57,000 for past lost wages, \$250,000 for past mental anguish, \$4,000,000 total in punitive damages (this amount was apportioned against several defendants), and attorney's fees. The trial court rendered judgment for Bohatch in the amounts found by the jury, except it disallowed attorney's fees because the judgment was based in tort. After suggesting remittitur, which Bohatch accepted, the trial court reduced the punitive damages to around $237,000.

All parties appealed. The court of appeals held that the firm's only duty to Bohatch was not to expel her in bad faith. 905 S.W.2d at 602. The court of appeals stated that "'[b]ad faith' in this context means only that partners cannot expel another partner for self-gain." *Id.* Finding no evidence that the firm expelled Bohatch for self-gain, the court concluded that Bohatch could not recover for breach of fiduciary duty. *Id.* at 604. However, the court concluded that the firm breached the partnership agreement when it reduced Bohatch's tentative partnership distribution for 1991 to zero without notice, and when it terminated her draw three months before she left. *Id.* at 606. The court concluded that Bohatch was entitled to recover $35,000 in lost earnings for 1991 but none for 1990, and no mental anguish damages. *Id.* at 606-07. Accordingly, the court rendered judgment for Bohatch for $35,000 plus $225,000 in attorney's fees. *Id.* at 608.

II. BREACH OF FIDUCIARY DUTY

We have long recognized as a matter of common law that "[t]he relationship between . . . partners . . . is fiduciary in character, and imposes upon all the participants the obligation of loyalty to the joint concern and of the utmost good faith, fairness, and honesty in their dealings with each other with respect to matters pertaining to the enterprise." *Fitz-Gerald v. Hull*, 237 S.W.2d 256, 264 (Tex. 1951) (quotation omitted). Yet, partners have no obligation to remain partners; "at the heart of the partnership concept is the principle that partners may choose with whom they wish to be associated." *Gelder Med. Group v. Webber*, 363 N.E.2d 573, 577 (N.Y. 1977). The issue presented, one of first impression, is whether the fiduciary relationship between and among partners creates an exception to the at-will nature of partnerships; that is, in this case, whether it gives rise to a duty not to expel a partner who reports suspected overbilling by another partner.

At the outset, we note that no party questions that the obligations of lawyers licensed to practice in the District of Columbia — including McDonald and Bohatch — were prescribed by the District of Columbia Code of Professional Responsibility in effect in 1990, and that in all other respects Texas law applies. Further, neither statutory nor contract law principles answer the question of whether the firm owed Bohatch a duty not to expel her. The Texas Uniform Partnership Act, TEX. REV. CIV. STAT. ANN. art. 6701b, addresses expulsion of a partner only in the context of dissolution of the partnership. *See id.* §§ 31, 38. In this case, as provided by the partnership agreement, Bohatch's expulsion did not dissolve the partnership. Additionally, the new Texas Revised Partnership Act, TEX. REV. CIV. STAT. ANN. art. 6701b-1.01 to -11.04, does not have retroactive effect and thus does not apply. *See id.* art. 6701b-11.03. Finally, the partnership agreement contemplates expulsion of a partner and prescribes procedures to be followed, but it does not specify or limit the grounds for expulsion. Thus, while Bohatch's claim that she was expelled in an *improper way* is governed by the partnership agreement, her claim that she was expelled for an *improper reason* is not. Therefore, we look to the common law to find the principles governing Bohatch's claim that the firm breached a duty when it expelled her.

Courts in other states have held that a partnership may expel a partner for purely business reasons. *See St. Joseph's Reg'l Health Ctr. v. Munos*, 934 S.W.2d 192, 197 (Ark. 1996) (holding that partner's termination of another partner's contract to manage services performed by medical partnership was not breach of fiduciary duty because termination was for business purpose); *Waite v. Sylvester*, 560 A.2d 619, 622-23 (N.H. 1989) (holding that removal of partner as managing partner of limited partnership was not breach of fiduciary duty because it was based on legitimate business purpose); *Leigh v. Crescent Square, Ltd.*, 608 N.E.2d 1166, 1170 (Ohio App. 1992) ("Taking into account the general partners' past problems and the previous litigation wherein Leigh was found to have acted in contravention of the partnership's best interests, the ouster was instituted in good faith and for legitimate business purposes."). Further, courts recognize that a law firm can expel a partner to protect relationships both within the firm and with clients. *See Lawlis v. Kightlinger & Gray*, 562 N.E.2d 435, 442 (Ind. App. 1990) (holding that law firm did not breach fiduciary duty by expelling partner after partner's successful struggle against alcoholism because "if a partner's propensity toward alcohol has the potential to damage his firm's good will or reputation for astuteness in the practice of law, simple prudence dictates the exercise of corrective action . . . since the survival of the partnership itself potentially is at stake"); *Holman v. Coie*, 522 P.2d 515, 523 (Wash. App. 1974) (finding no breach of fiduciary duty where law firm expelled two partners because of their contentious behavior during executive committee meetings and because one, as state senator, made speech offensive to major client). Finally, many courts have held that a partnership can expel a partner without breaching any duty in order to resolve a "fundamental schism." *See Waite*, 560 A.2d at 623 (concluding that in removing partner as managing partner "the partners acted in good faith to resolve the 'fundamental schism' between them"); *Heller v. Pillsbury Madison & Sutro*, 58 Cal. Rptr. 2d 336, 348 (Cal. App. 1996) (holding that law firm did not breach fiduciary duty when it expelled partner who was not as productive as firm expected and who was offensive to some of firm's major clients); *Levy v. Nassau Queens Med. Group*, 476 N.Y.S.2d 613, 614 (N.Y. App. 1984) (concluding that expelling partner because of "[p]olicy disagreements" is not "bad faith").

The fiduciary duty that partners owe one another does not encompass a duty to remain partners or else answer in tort damages. Nonetheless, Bohatch and several distinguished legal scholars urge this Court to recognize that public policy requires a limited duty to remain partners — *i.e.*, a partnership must retain a whistleblower partner. They argue that such an extension of a partner's fiduciary duty is necessary because permitting a law firm to retaliate against a partner who in good faith reports suspected overbilling would discourage compliance with rules of professional conduct and thereby hurt clients.

While this argument is not without some force, we must reject it. A partnership exists solely because the partners choose to place personal confidence and trust in one another. *See Holman*, 522 P.2d at 524 ("The foundation of a professional relationship is personal confidence and trust."). Just as a partner can be expelled, without a breach of any common law duty, over disagreements about firm policy or to resolve some other "fundamental schism," a partner can be expelled for accusing another partn or not, may have a profound effect on the personal confidence and trust essential to the partner relationship. Once such charges are made, partners may find it impossible to continue to work together to their mutual benefit and the benefit of their clients.

We are sensitive to the concern expressed by the dissenting Justices that "retaliation against a partner who tries in good faith to correct or report perceived misconduct virtually assures that others will not take these appropriate steps in the future." ___ S.W.2d at ___ (Spector, J., dissenting). However, the dissenting Justices do not explain how the trust relationship necessary both for the firm's existence and for representing clients can survive such serious accusations by one partner against another. The threat of tort liability for expulsion would tend to force partners to remain in untenable circumstance — suspicious of and angry with each other — to their own detriment and that of their clients whose matters are neglected by lawyers distracted with intra-firm frictions.

Although concurring in the Court's judgment, Justice Hecht criticizes the Court for failing to "address amici's concerns that failing to impose liability will discourage attorneys from reporting unethical conduct." ___ S.W.2d at ___ (Hecht, J., concurring). To address the scholars' concerns, he proposes that a whistleblower be protected from expulsion, but only if the report, irrespective of being made in good faith, is proved to be correct. We fail to see how such an approach encourages compliance with ethical rules more than the approach we adopt today. Furthermore, the amici's position is that a reporting attorney must be in good faith, not that the attorney must be right. In short, Justice Hecht's approach ignores the question Bohatch presents, the amici write about, and the firm challenges — whether a partnership violates a fiduciary duty when it expels a partner who in good faith reports suspected ethical violations. The concerns of the amici are best addressed by a rule that clearly demarcates an attorney's ethical duties and the parameters of tort liability, rather than redefining "whistleblower."

We emphasize that our refusal to create an exception to the at-will nature of partnerships in no way obviates the ethical duties of lawyers. Such duties sometimes necessitate difficult decisions, as when a lawyer suspects overbilling by a colleague. The fact that the ethical duty to report may create an irreparable schism between partners neither excuses failure to report nor transforms expulsion as a means of resolving that schism into a tort.

We hold that the firm did not owe Bohatch a duty not to expel her for reporting suspected overbilling by another partner.

III. BREACH OF THE PARTNERSHIP AGREEMENT

The court of appeals concluded that the firm breached the partnership agreement by reducing Bohatch's tentative distribution for 1991 to zero without the requisite notice. 905

S.W.2d at 606. The firm contests this finding on the ground that the management committee had the right to set tentative and year-end bonuses. However, the partnership agreement guarantees a monthly draw of $7,500 per month regardless of the tentative distribution. Moreover, the firm's right to reduce the bonus was contingent upon providing proper notice to Bohatch. The firm does not dispute that it did not give Bohatch notice that the firm was reducing her tentative distribution. Accordingly, the court of appeals did not err in finding the firm liable for breach of the partnership agreement. Moreover, because Bohatch's damages sound in contract, and because she sought attorney's fees at trial under section 38.001(8) of the Texas Civil Practice and Remedies Code, we affirm the court of appeals' award of Bohatch's attorney's fees.

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We affirm the court of appeals' judgment.

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Craig T. Enoch
Justice

Opinion delivered: January 22, 1998