

IN THE SUPREME COURT OF TEXAS

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No. 98-0994
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LEONEL LOPEZ, SR., ZULEMA M. LOPEZ, AND LEONEL LOPEZ, JR., INDIVIDUALLY
AND ON BEHALF OF THE ESTATE OF ELOY LOPEZ, DECEASED, PETITIONERS

v.

MUÑOZ, HOCKEMA & REED, L.L.P. AND ALBERT A. MUÑOZ, II, DAVID A.
HOCKEMA AND ROGER H. REED, INDIVIDUALLY AND D/B/A MUÑOZ, HOCKEMA &
REED, RESPONDENTS

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ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE FOURTH DISTRICT OF TEXAS
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Argued on October 20, 1999

JUSTICE GONZALES, joined by CHIEF JUSTICE PHILLIPS, concurring and dissenting.

I join Part IV of the Court's opinion, that the Lopez family's fraud, negligence, and DTPA claims should be remanded. I agree with the Court's conclusion but not its reasoning in Part III that the Muñoz firm did not breach the fiduciary duty alleged by the Lopez family. However, I dissent from Part II of the Court's opinion because, unlike the Court, I conclude that the contract is ambiguous and would remand for that reason. Accordingly, I only join the Court's judgment in part. I write further to advance the proposition that attorneys owe a fiduciary duty to fully explain the ramifications of their employment contracts to their clients.

Here we must decide whether a contingent fee contract between a law firm, Muñoz, Hockema & Reed, and its client, the Lopez family, entitles the firm to forty percent or forty-five percent of the Lopezes' settlement recovery of fifteen million dollars from Westinghouse Electric Corporation.

The settlement was finalized a few days after Westinghouse filed a cash deposit in lieu of cost bond to preserve its right to appeal. *See* TEX. R. APP. P. 40(a)(1), 707 S.W.2d (Tex. Cases) LI (Tex. 1986, amended 1997). The lawyers' portion of the fifteen million dollars depends on the contract language that provides a forty percent contingent fee for services rendered, but forty-five percent if the case is "appealed to a higher court." The Court decides that the term "appealed to a higher court" plainly and unambiguously means the moment that one party files a cash deposit in lieu of a cost bond with the court, thereby preserving its right to an appeal. I respectfully disagree.

As the Court acknowledges, our standard rules of contract construction direct us to ascertain the true intentions of the parties as expressed in the terms of the instrument. *See Coker v. Coker*, 650 S.W.2d 391, 393 (Tex. 1983). We give contract terms their plain, ordinary, and generally accepted meaning unless the instrument shows that the parties used them in a technical or different sense. *See Heritage Resources, Inc. v. NationsBank*, 939 S.W.2d 118, 121 (Tex. 1996). Neither the parties nor the Court contends that "appealed to a higher court" is a technical term or a term of art. The Court, however, ignores the tenets of contract construction by adopting a technical and specialized meaning of the term "appealed to a higher court." While the public would generally understand that some act must be taken to initiate the appellate process, it defies common sense to conclude that the general public would understand the term to mean the point in time a party files a cash deposit in lieu of a cost bond. The Court's own words confirm the ambiguity about this term. The Court concludes that the filing of a cash deposit in lieu of a cost bond *results* in an appeal, and yet states that filing a cash deposit in lieu of a cost bond *preserves* a right to appeal — suggesting that an appeal has yet to occur. ___ S.W.3d ___, ___. Generally, only members of the legal profession have any reason to know and appreciate that filing a cash deposit in lieu of a cost bond preserved a right to appeal under

the old rules. Such a limited and specialized meaning cannot be the plain and common meaning of the term for purposes of this contract.

The Court says that it chooses the filing of a cash deposit in lieu of cost bond as the point in time a case is “appealed” because that event provides certainty. ___ S.W.3d at ___. The Court dismisses the court of appeals’ decision that “appealed to a higher court” means something more than initiating the appellate process, because, the Court explains, such a construction expands the actual contract language and “makes it difficult, if not impossible, to determine with any certainty when a case has been appealed.” ___ S.W.3d at ___. But the Court has no obligation to reach an interpretation that achieves certainty if a construction is inconsistent with the intent of the parties as reflected in the words of the contract. Instead, the Court must construe the contract as written, not as it would have drafted the contract had it been a party. *See Coker v. Coker*, 650 S.W.2d 391, 393 (Tex. 1983).

Even if providing certainty were the goal in construing this contract, the Court does not explain why perfection of an appeal is any more certain than other stages of the appellate process. The Court concedes that the appellate process involves many steps, and I find nothing in the contract that specifies that the law firm is entitled to the additional fee for services rendered if the right to appeal is *preserved* — which is all that really happened here. The contract merely provides for the additional fee if the case is “appealed.” Thus, it is the Court that expands the contract language by choosing the preparatory stage of the appellate process. And as for the certainty in contract desired by the Court, that can surely be achieved by choosing other equally determinable events in the appellate process.

When considering the plain meaning of the term “appealed to a higher court,” I believe there are multiple reasonable interpretations. First, this term reasonably could mean the first procedural or technical step taken to preserve the right to appeal — the interpretation adopted by the Court. Second, the term “appealed to a higher court” could mean when a party expresses his or her complaint to an appellate court and seeks redress. Under this view, the term “appealed” would correspond with the filing of the appellant’s brief in the court of appeals or the filing of a petition for review in this Court. Third, one could conclude that the term “appealed” contemplates a completed act. In that case, “appealed” could mean when the parties have fully expressed their arguments and have submitted the case to an appellate court for a decision. Each of these constructions is consistent with the plain language of the contract, and each would provide the certainty important to the Court. Because I conclude there are multiple reasonable meanings of the term “appealed to a higher court,” I would hold that this contract is ambiguous. *See Coker v. Coker*, 650 S.W.2d 391, 393 (Tex. 1983) (explaining a contract is ambiguous when its meaning is reasonably susceptible to more than one meaning).

Generally, when the objective meaning of a contract term is ambiguous, the parties’ subjective meaning of the term becomes a fact question. *See Columbia Gas Transmission Corp. v. New Ulm Gas, Ltd.*, 940 S.W.2d 587, 589 (Tex. 1996). In some circumstances, however, courts will construe the contract to favor one party in light of the relationship of the parties or public policy. *See Temple-Eastex, Inc. v. Addison Bank*, 672 S.W.2d 793, 798 (Tex. 1984) (“a writing is generally construed most strictly against its author and in such a manner as to reach a reasonable result consistent with the apparent intent of the parties.”) For example, when an insurance contract is ambiguous, the contract is construed against the insurer. *See State Farm Fire & Cas. Co. v.*

Vaughan, 968 S.W.2d 931, 933 (Tex. 1998). One court construed an equipment lease against the drafter because that party was responsible for choosing the ambiguous language and could have used clearer terms. *See General Corrosion Services Corp. v. K Way Equip. Co., Inc.*, 631 S.W.2d 578, 580 (Tex. App. — Tyler 1982, no writ). However, this Court has not applied the rule of construction to an employment contract between an attorney and client.¹

The special relationship between a lawyer and client leads me to conclude that an ambiguous contract between them should generally be construed against the lawyer-drafter. The Restatement of Contracts suggests that construing contracts against the drafter is justified when the drafter is in a better position to know of uncertainties of meaning or when the drafting party has the stronger bargaining position. *See* Restatement (Second) of Contracts § 206 com. a (1981). The Restatement of the Law Governing Lawyers, which adopts a similar construction rule for lawyer-client contracts, adds the rationale that lawyers are more able than most clients to detect and repair omissions in lawyer-client agreements. *See* Restatement (Third) of Law Governing Lawyers § 29A com. h (Proposed Final Draft No. 1, 1996). These reasons suggest that ambiguities in fee contracts should be construed against the lawyer-drafter. Usually a lawyer is in a better position to understand the terms of a contract drafted by the lawyer than a client. Clients, after all, are clients because they need legal advice and seek to hire lawyers with greater legal skill and experience. Additionally, a lawyer is usually in a stronger bargaining position and generally has more experience negotiating contracts,

¹ Many other courts, however, have adopted as a rule of construction that lawyer-client contracts will be strictly construed against the lawyer. *See, e.g., Vans Agnew v. Fort Myers Drainage Dist.*, 69 F.2d 244, 246 (5th Cir. 1934); *Waugh v. Q. & C. Co.*, 16 F.2d 363, 365 (7th Cir. 1926); *Estate of Sparkman v. Smith*, 639 So.2d 1258, 1261 (Miss. 1994); *Cardenas v. Ramsey County*, 322 N.W.2d 191, 193-94 (Minn. 1982); *Hitchcock v. Skelly Oil Co.*, 440 P.2d 552, 554 (Kan. 1968); *In re Irwin*, 91 P.2d 518, 523 (Or. 1939); *Bennett v. Potter*, 183 P. 156, 157-58 (Cal. 1919); *Falloon v. Miles*, 170 N.W. 191, 192 (Neb. 1918).

settlements, and fee arrangements. Finally, lawyers, because of their training and experience, are in a better position than most of their clients to discover and correct ambiguities in the contract.

For these reasons, I would generally construe ambiguous lawyer-client contracts against the lawyer-drafter. But even if the Court is unwilling to adopt such a rule of construction, it should at least remand because the objective meaning of the contract term “appealed to a higher court” is ambiguous.

The Lopez family also alleges that the Muñoz law firm breached its fiduciary duty by breaching their contract. In Texas, we hold attorneys to the highest standards of ethical conduct in their dealings with their clients. *See Archer v. Griffith*, 390 S.W.2d 735, 739 (Tex. 1964). The duty is highest when the attorney contracts with his or her client or otherwise takes a position adverse to his or her client’s interests. As Justice Cardozo observed, “[a fiduciary] is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior.” *Meinhard v. Salmon*, 164 N.E. 545, 546 (N.Y. 1928). Accordingly, a lawyer must conduct his or her business with inveterate honesty and loyalty, always keeping the client’s best interest in mind.

Clearly, a breach of fiduciary duty may arise if a lawyer accepts fees that the lawyer is not entitled to by contract. But not every breach of contract is necessarily a breach of fiduciary duty. If a lawyer acts in good faith under a colorable interpretation of a contract, the lawyer does not necessarily act against a client’s interest. *See* Restatement (Third) of Law Governing Lawyers § 28 (Proposed Final Draft No. 1, 1996) (limiting professional discipline to *intentional* failures to fulfill a valid contract). Here, the Muñoz law firm accepted the additional fee under one of several reasonable interpretations of the contract, and the Lopez family does not allege that the firm was

acting in bad faith. Accordingly, even if the fact finder were to conclude that the term “appealed to a higher court” refers to a point in time after the right to appeal is preserved, I would hold that the Muñoz firm did not breach its fiduciary duty to the Lopez family by breaching its contract.

But there are two other ethical issues in this case, about which the Lopez family does not complain, that nonetheless deserve discussion. The first relates to a lawyer’s duty to fully and honestly inform his or her client of a fee arrangement. See TEX. DISCIPLINARY R. PROF. CONDUCT 1.03(b), 1.04(d) (1989), *reprinted in* TEX. GOV’T CODE ANN., tit. 2, subtit. G app. A (1998). The fiduciary relationship between attorney and client requires “absolute and perfect candor, openness and honesty, and the absence of any concealment or deception.” *Vickery v. Vickery*, 999 S.W.2d 342, 376 (Tex. 1999). Fundamentally, a lawyer should always act in the client’s best interests. A lawyer and client’s negotiations are often imbalanced in favor of the lawyer because of information inequalities and the client’s customary reliance on the lawyer’s legal advice. Consequently, a lawyer should fully explain to the client the meaning and impact of any contract between them. Here, for example, to best serve their client, and to protect their own interests, the Muñoz firm could have explained to the Lopez family at the time the contract was signed that the firm believed it would be entitled to an additional fee the moment Westinghouse preserved their right to appeal, even though an agreement in principle had been reached to settle the case.

Another ethical consideration that deserves mention is the lawyer’s fiduciary duty not to collect an unconscionable fee from his client. See TEX. DISCIPLINARY R. PROF. CONDUCT 1.04(a); *Nolan v. Foreman*, 665 F.2d 738, 741 (5th Cir. 1982) (holding under Texas law an attorney breaches a fiduciary duty to the client by charging an excessive fee). A fee is unconscionable if a competent lawyer could not form a reasonable belief that the fee is reasonable. See TEX. DISCIPLINARY R.

PROF. CONDUCT 1.04(a). The reasonableness of any fee depends on the circumstances of the services. See TEX. DISCIPLINARY R. PROF. CONDUCT 1.04(b) (detailing factors to weigh in determining reasonableness of fees); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS, §§ 46, 47 (Proposed Final Draft No. 1, 1996). Generally, however, a lawyer's fee is unreasonable if it is grossly disproportionate to the work and the risks. See TEX. DISCIPLINARY R. PROF. CONDUCT 1.04(b); *Committee on Legal Ethics v. Tatterson*, 352 S.E.2d 107, 113 (W.Va. 1986); *The Florida Bar v. Moriber*, 314 So.2d 145, 149 (Fla. 1975); see also *General Motors Corp. v. Bloyed*, 916 S.W.2d 949, 960 (Tex. 1996) (discussing lodestar method to calculate lawyer's fees in class actions as calculated by multiplying the number of hours expended by an appropriate hourly rate determined by a variety of factors, such as the benefits obtained for the class, the complexity of the issues involved, the expertise of counsel, the preclusion of other legal work due to acceptance of the class action suit, and the hourly rate customarily charged in the region for similar legal work).

The fee contract here compensated the lawyers for "services rendered." There is evidence in the record that the firm did *some* work in connection with an appeal both before and after the cash deposit in lieu of cost bond was filed. But the record also suggests that the Lopez family and Westinghouse had agreed in principle to a settlement, substantially lowering the risk to the law firm — a risk existing in all contingent fee contracts — that it might not collect its fees. While a contract may entitle a lawyer to a substantial fee for little or no work, a lawyer may nonetheless be required by his or her fiduciary duty to decline the fee. Additionally, a law firm may breach its fiduciary duty if it provides little or no services, but still collects a substantial part of its clients recovery in the face of a pending settlement.

By all appearances, the law firm did a good job representing its client against Westinghouse.

The firm obtained a twenty-five million dollar jury award and participated in negotiating a fifteen million dollar settlement. The lawyers should be fully compensated for their work and the risks they assumed. I do not begrudge them for demanding compensation for services rendered according to their contract.² But the demand must be clearly supported by the contract. And when construing contracts between lawyers and clients, it is not enough to simply say that a contract is a contract. There are ethical considerations overlaying the contractual relationship. Lawyers should be just as mindful of these ethical obligations as their contractual obligations.

For these reasons, I concur in part and dissent in part.

Alberto R. Gonzales
Justice

OPINION ISSUED: June 8, 2000

² I note that the law firm has indicated its willingness to repay the additional five percent by not appealing the court of appeals' judgment.