

IN THE SUPREME COURT OF TEXAS

No. 98-0994

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

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE FOURTH DISTRICT OF TEXAS

Argued on October 20, 1999

JUSTICE O'NEILL delivered the opinion of the Court, joined by JUSTICE HECHT, JUSTICE ENOCH, JUSTICE OWEN, JUSTICE BAKER, JUSTICE ABBOTT, and JUSTICE HANKINSON, and by CHIEF JUSTICE PHILLIPS and JUSTICE GONZALES as to Parts I and IV.

JUSTICE GONZALES filed an opinion concurring in part and dissenting in part, in which CHIEF JUSTICE PHILLIPS joined.

The contingent fee contract that underlies this dispute allowed the plaintiffs' law firm to charge an additional five percent fee in the event the case was "appealed to a higher court." We must decide whether the law firm breached the contract by charging its client the additional fee when the defendant, to preserve its right to appeal, filed a cash deposit in lieu of a cost bond with the trial court shortly before settlement documents were signed. We hold that the case was "appealed to a higher court" when the defendant initiated the appellate process by filing a cash deposit in lieu of a cost bond; therefore, the law firm did not breach the contract by charging the additional fee. This

holding also disposes of the clients' breach of fiduciary duty claim because that claim is based entirely upon the alleged contract breach. However, because the trial court's judgment improperly disposed of the clients' fraud, negligence, and DTPA claims, we remand them to the trial court for further proceedings.

I

Background

The Muñoz, Hockema & Reed (MHR) law firm represented the Lopez family in a wrongful-death suit against Westinghouse Electric Corporation. Their contingent fee contract assigned forty percent of any recovery to MHR, and forty-five percent if the case "is appealed to a higher court."¹ After the jury returned a verdict against Westinghouse in excess of twenty-five million dollars, the parties began settlement negotiations. While the negotiations were ongoing, the trial court rendered judgment on the verdict, and the deadline for perfecting an appeal was October 29, 1991.

By mid-October, Westinghouse had tentatively agreed to a settlement.² To preserve its right to appeal should the settlement fall through, Westinghouse, on October 18, 1991, filed a cash deposit in lieu of a cost bond with the trial court. MHR and the Lopezes met on October 21 to discuss the settlement and MHR's fees. The Lopezes' estate and tax attorneys, their family attorney and an accountant attended this meeting. MHR explained to the Lopezes that its fee would be forty-five

¹The relevant portion of the Lopezes' contract with MHR reads as follows:

For services rendered, and to be rendered, I/we assign 40% of any monies or other property recovered. If the case is appealed to a higher court then 45% of any monies or other property recovered is herein assigned. If nothing is recovered, I/we owe said attorneys nothing.

²Although the court of appeals wrote that Westinghouse's attorney "agreed to [settle]," 980 S.W.2d 738, 740, there was conflicting testimony as to whether the attorney accepted the settlement or merely reported that he would take it to his client for approval.

percent of the recovery, or \$6,750,000, and no one voiced an objection. The settlement was ultimately signed on October 30, 1991. Among other documents, the Lopez family members signed a settlement statement reflecting MHR's forty-five percent fee percentage. The funds were distributed according to the settlement statement, and Westinghouse took no further action on its appeal.

About three years later, MHR received a letter requesting that the firm refund the additional five percent fee to the Lopez family. When MHR refused, the Lopezes sued, alleging breach of contract, breach of fiduciary duty, fraud, negligence, and DTPA violations. The Lopezes sought forfeiture of the entire fee. The Lopezes moved for summary judgment on the breach of fiduciary duty and contract claims and moved to sever the other claims. MHR filed a cross-motion for summary judgment alleging that the doctrines of accord and satisfaction and "acceptance of benefits" defeated the Lopezes' claims and that limitations barred their breach of fiduciary duty claim. MHR also claimed that the summary judgment evidence showed no contract breach as a matter of law.

The trial court denied the Lopezes' summary judgment and severance motions, and granted MHR's motion for summary judgment except as to limitations. The court of appeals reversed. *See* 980 S.W.2d 738, 744. The appeals court held that MHR breached the fee agreement by charging the forty-five percent appeal rate, and that the contract breach was also a breach of fiduciary duty. *See id.* at 742-43. The court reasoned that "appealed to a higher court" means something more than initiating the appellate process by filing a cash deposit in lieu of a cost bond. *See id.* at 742. The appeals court further held that MHR's affirmative defenses did not defeat the Lopezes' recovery, and reversed and rendered a \$750,000 judgment for the Lopezes, representing five percent of the settlement. *See id.* at 742. The court of appeals remanded the case to the trial court for consideration

of the Lopezes' claim for attorneys' fees. One justice, concurring and dissenting, agreed with the majority that MHR had breached its fiduciary duty but concluded that the appropriate remedy was forfeiture of MHR's entire fee. *See id.* at 744-45 (Duncan, J., concurring and dissenting).

The Lopezes petitioned this Court for review, arguing that the court of appeals should have ordered MHR to remit the entire fee and not just the five percent overcharge. MHR cross-petitioned arguing that, as a matter of law, it did not breach its contract with, or fiduciary duty to, the Lopezes.

II

Breach of Contract

We first consider the breach of contract claim. The Lopezes argue that the phrase "appealed to a higher court" is ambiguous and should be construed against its drafter, MHR. *See Gonzalez v. Mission American Ins. Co.*, 795 S.W.2d 734, 737 (Tex. 1990). They also argue that, because of the fiduciary nature of the relationship, any contract between an attorney and a client must be construed in a reasonable and equitable manner. *Cf. Keck, Mahin & Cate v. Insurance Co. of N. Am.*, __ S.W.3d __; *Archer v. Griffith*, 390 S.W.2d 735, 739 (Tex. 1964). The Lopezes contend that the contract provision at issue is subject to only one reasonable and ethical meaning, although their expression of that meaning is less than clear. While these general rules of construction apply when we construe ambiguous contracts or contracts that are reasonably susceptible to more than one interpretation, we hold that the contract language at issue is unambiguous and that MHR did not breach the contract. *See Heritage Resources, Inc. v. NationsBank*, 939 S.W.2d 118, 121 (Tex. 1996) (stating that an unambiguous contract will be enforced as written).

Whether a contract is ambiguous is a question of law for the court to decide. *See R & P Enters. v. LaGuarta, Gavrel & Kirk, Inc.*, 596 S.W.2d 517, 518 (Tex. 1980). In construing contracts,

we must ascertain and give effect to the parties' intentions as expressed in the document. *See id.* A contract is not ambiguous if it can be given a certain or definite legal meaning or interpretation. *See Columbia Gas Transmission Corp. v. New Ulm Gas, Ltd.*, 940 S.W.2d 587, 589 (Tex. 1996); *Friendswood Dev. Co. v. McDade + Co.*, 926 S.W.2d 280, 282 (Tex. 1996). Ambiguity does not arise simply because the parties advance conflicting interpretations of the contract; rather, for an ambiguity to exist, both interpretations must be reasonable. *See Columbia Gas*, 940 S.W.2d at 589; *National Union Fire Ins. Co. v. CBI Indus., Inc.*, 907 S.W.2d 517, 520 (Tex. 1995). Because here the contract language can be given a definite legal meaning, and it is not reasonably susceptible to more than one meaning, it is unambiguous.

By filing a cash deposit in lieu of a cost bond, Westinghouse “perfected” an appeal under the appellate procedure rules in effect when the underlying case settled. TEX. R. APP. P. 40(a)(1), 707 S.W.2d (Tex. Cases) LI (Tex. 1986, amended 1997).³ The appellate rule further provided that, absent a supersedeas bond, a cash deposit does not suspend the judgment and execution may issue “as if no appeal . . . had been taken.” TEX. R. APP. P. 40(a)(5), 707 S.W.2d (Tex. Cases) LII (Tex. 1986, amended 1997). Thus, the rule’s plain language indicates an appeal was “taken” and the appellate court’s jurisdiction was invoked when Westinghouse made its cash deposit. *See Burns v. Miller, Hiersche, Martens & Hayward, P.C.*, 909 S.W.2d 505, 506 (Tex. 1995)(per curiam); *Ammex Warehouse Co. v. Archer*, 381 S.W.2d 478, 482 (Tex. 1964).

The Lopezes contend, and the court of appeals agreed, that “appealed to a higher court” means something more than initiating the appellate process. *See* 980 S.W.2d at 742. Although not

³Rule 25.1(a) of the Texas Rules of Appellate Procedure now provides that “[a]n appeal is perfected when a written notice of appeal is filed with the trial court clerk.” TEX. R. APP. P. 25.1(a).

stating what that “something more” might be, the court of appeals held that “appealed to a higher court” anticipates “a meaningful review of the appellate record and a careful consideration of the arguments presented in the appeal.” 980 S.W.2d at 742. The problem with this approach, however, is that it expands the actual contract language and makes it difficult, if not impossible, to determine with any certainty when a case has been “appealed.”

The appellate process involves many steps, such as transmitting the trial court record, preparing and responding to the briefs, and presenting oral argument. *See* TEX. R. APP. P. 54(a), 74, 75, 707 S.W.2d (Tex. Cases) XVIII, LXXIV-LXXVIII (Tex. 1986, amended 1997). The rules require the court of appeals to write an opinion addressing all issues raised and necessary to the appeal’s disposition. *See* TEX. R. APP. P. 90(a), 707 S.W.2d (Tex. Cases) LXXXV (Tex. 1986, amended 1997). After the opinion issues, the parties may file motions for rehearing, which the court must then consider and decide. *See* TEX. R. APP. P. 100, 707 S.W.2d (Tex. Cases) LXXXVI-LXXXVII (Tex. 1986, amended 1997). At what point “meaningful review” occurs during this ongoing process is not readily discernible. We believe the Lopezes’ interpretation of the contract language is too broad and therefore unworkable. That an appeal may encompass multiple and various stages does not mean that the contract language is ambiguous. Under our former appellate rules, an appeal was “taken” and the court of appeals’ jurisdiction invoked when a cash deposit in lieu of a cost bond was filed. Thus, when Westinghouse made its cash deposit, the case was “appealed to a higher court” under the contract’s terms.

When a contract is unambiguous we will enforce it as written. *See Heritage Resources*, 939 S.W.2d at 121. We hold that the case was “appealed to a higher court” when Westinghouse perfected its appeal. Accordingly, as a matter of law MHR did not breach the contract by charging

the additional appeals fee. Therefore, the trial court did not err in granting MHR summary judgment on the Lopezes' breach of contract claim.

III

Breach of Fiduciary Duty

The Lopezes' breach of fiduciary duty claim, as presented in their pleadings and summary judgment motion, was grounded solely on the theory that MHR breached its contract. As the court of appeals noted, "the Lopez family tied its breach of fiduciary duty claim to its breach of contract claim." 980 S.W.2d at 740. In their summary judgment motion, the Lopezes summarized the facts and argued that MHR's behavior breached the contract. Their argument that MHR breached its fiduciary duty followed immediately: "Further, such conduct constitutes, as a matter of law, a breach of the Defendant's fiduciary obligation to the Plaintiffs." Nowhere in their pleadings, their motion for summary judgment, or their response to MHR's motion for summary judgment did the Lopezes argue that MHR breached its fiduciary duty other than by breaching its contract. Although counsel later posited that MHR had a duty to inform the Lopezes that there was an alternate colorable construction of the triggering clause, the Lopezes neither pleaded nor briefed this theory.

Texans for Reasonable Legal Fees (TRLF) has filed an amicus brief arguing that MHR's fee is unreasonable despite the fee agreement and that MHR breached its fiduciary duty by charging an excessive fee. Alternatively, TRLF contends MHR breached its fiduciary duty by failing to inform the Lopezes that the phrase "if the case is appealed to a higher court" might colorably be interpreted to mean something other than "if appeal is perfected." Whether or not these theories have merit, they are not before us.

The Lopezes submitted no theory other than breach of contract to support their breach of fiduciary duty claim. They did not allege that the forty-five percent appeal rate was excessive when the contract was made, or that charging the additional five percent was a breach of fiduciary duty irrespective of the contract's terms.⁴ Nor did they allege that MHR concealed the additional fee charge, improperly delayed execution of the settlement so that Westinghouse would perfect an appeal, or otherwise manipulated the settlement and appeal process in order to charge the higher fee.

On an appeal from summary judgment, we cannot consider issues that the movant did not present to the trial court. *See Cincinnati Life Ins. Co. v. Cates*, 927 S.W.2d 623, 625 (Tex. 1996); *Travis v. City of Mesquite*, 830 S.W.2d 94, 100 (Tex. 1992). We have already decided that the trial court did not err in granting MHR's motion for summary judgment on the breach of contract claim. Because the Lopezes premised their breach of fiduciary duty claim on MHR's alleged contract breach, our conclusion on the contract issue necessarily disposes of the breach of fiduciary duty claim.⁵

IV

Other Claims/Affirmative Defenses

The Lopezes also pleaded negligence, DTPA violations, and fraud. The Lopezes did not move for summary judgment on these claims but rather moved to sever them. The motion to sever was combined with their motion for summary judgment on the breach of contract and breach of

⁴According to the court of appeals, the evidence showed that the parties understood the case would not be appealed if it settled, and MHR breached its fiduciary duty because it knew the case would not be appealed when it charged the additional five percent. *See* 980 S.W.2d at 743. But this conclusion is based upon the court of appeals' expanded definition of an appeal, which we have rejected in the context of this case.

⁵We note that the court of appeals also concluded that the Lopezes' breach of fiduciary duty claim was predicated on their contract claim. *See* 980 S.W.2d at 740.

fiduciary duty claims. In response, MHR filed a cross-motion for summary judgment arguing that (1) the parties had reached an accord and satisfaction, (2) the Lopezes accepted the benefits of the settlement and were therefore estopped from contesting it, (3) the breach of fiduciary duty claim was barred by limitations, and (4) there was no breach of contract as a matter of law. The trial court denied the Lopezes' severance and summary judgment motions, and rendered summary judgment for MHR on all of the Lopezes' claims without specifying the grounds for its ruling. We have upheld the trial court's summary judgment in MHR's favor on the Lopezes' breach of contract and breach of fiduciary duty claims. We must next decide whether the trial court properly granted summary judgment in MHR's favor on the Lopezes' remaining fraud, negligence, and DTPA claims.

The affirmative defenses asserted by MHR that could arguably defeat the Lopezes' remaining claims are accord and satisfaction and acceptance of the benefits. MHR contends that the trial court properly granted summary judgment on these defenses, and therefore all of the Lopezes' remaining claims are barred. The Lopezes, on the other hand, contend that MHR was not entitled to summary judgment on these affirmative defenses. We agree with the Lopezes, and consequently remand their fraud, negligence, and DTPA claims to the trial court.⁶

The accord and satisfaction defense rests upon a contract, express or implied, in which the parties agree to the discharge of an existing obligation by means of a lesser payment tendered and accepted. *See Jenkins v. Henry C. Beck Co.*, 449 S.W.2d 454, 455 (Tex. 1969). MHR claims that the Lopez family's agreement to accept the settlement after full disclosure of the forty-five percent additional fee constituted an accord, which was satisfied when the Lopezes accepted payment of their

⁶MHR claims that the Lopezes did not properly plead fraud or negligence, but concedes that the Lopezes pleaded DTPA violations. Nonetheless, both parties agree that whatever claims remain were disposed of improperly and should be remanded unless MHR established that it was entitled to summary judgment on its affirmative defenses.

part of the settlement funds. However, for this defense to prevail, there must be a dispute and an unmistakable communication to the creditor that tender of the reduced sum is upon the condition that acceptance will satisfy the underlying obligation. *See id.* The parties must specifically and intentionally agree to the discharge of one of the parties' existing obligations. *See Industrial Life Ins. Co. v. Finley*, 382 S.W.2d 100, 104 (Tex. 1964). In other words, to prevail on its defense, MHR was required to present summary judgment evidence that the Lopezes disputed the fee and specifically and intentionally agreed to relinquish any claims they might have had against MHR for its alleged overcharge. To knowingly relinquish claims arising out of MHR's alleged overcharge the Lopezes would have to know that an overcharge existed. There is no evidence in the record, however, that there was a fee dispute between the Lopezes and MHR when the Lopezes accepted the settlement. "A valid accord and satisfaction requires that there initially be a legitimate dispute between the parties about what was expected." *Bueckner v. Hamel*, 886 S.W.2d 368, 372 (Tex. App.—Houston [1st Dist.] 1994, writ denied). Accordingly, MHR was not entitled to summary judgment on its accord and satisfaction defense.

MHR's remaining defense, acceptance of the benefits, is a species of quasi-estoppel. *See Atkinson Gas Co. v. Albrecht*, 878 S.W.2d 236, 240 (Tex. App.—Corpus Christi 1994, writ denied). Quasi-estoppel precludes a party from asserting, to another's disadvantage, a right inconsistent with a position previously taken. *See id.* The doctrine applies when it would be unconscionable to allow a person to maintain a position inconsistent with one to which he acquiesced, or from which he accepted a benefit. *See id.; Vessels v. Anschutz Corp.*, 823 S.W.2d 762, 765-66 (Tex. App.—Texarkana 1992, writ denied). For the reasons considered in connection with the accord and satisfaction defense, the Lopezes' initial acceptance of a lesser portion of the settlement is not

inconsistent with their later assertion that they were entitled to more. Consequently, MHR was not entitled to summary judgment based upon its acceptance of the benefits defense.

V

We reverse the court of appeals' judgment on the Lopeses' breach of contract and breach of fiduciary duty claims, render judgment that the Lopeses take nothing on those claims, and remand the Lopeses' fraud, negligence, and DTPA claims to the trial court.

Harriet O'Neill
Justice

OPINION DELIVERED: June 8, 2000.