

IN THE SUPREME COURT OF TEXAS

No. 99-0981

RON LEVINE AND SERENA LEVINE, PETITIONERS

v.

BAYNE, SNELL & KRAUSE, LTD., RESPONDENT

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

Argued on April 12, 2000

JUSTICE HECHT, joined by JUSTICE ABBOTT, dissenting.

Conspicuously, the Court does not say that the contract in this case is ambiguous or contrary to any public policy. Yet the Court refuses to give effect to its plain language for this one reason: the contract is a contingent fee agreement between a lawyer and client. I disagree, and therefore dissent.

The Smiths sold the Levines their home, taking a promissory note that called for monthly payments and was secured by a deed of trust. When the Levines discovered problems with the home's foundation, they retained the law firm of Bayne, Snell & Krause to sue the Smiths for failing to disclose the problems before the sale. The Levines contracted in writing to pay the firm any attorney fees awarded by the court and, in addition, a contingent fee equal to "33-1/3% (1/3) of any amount received by settlement or recovery". On their lawyers' advice, the Levines discontinued

their mortgage payments, and the Smiths accelerated the note and counterclaimed for the balance due. The trial court rendered judgment for the Levines, awarding them damages and attorney fees, and for the Smiths on their counterclaim, awarding them the amount due on the note and attorney fees. The Smiths' award was offset against the larger award to the Levines, leaving the Levines with a net judgment. After the judgment was affirmed on appeal,¹ the Smiths paid the judgment plus interest, and the Levines endorsed the check over to the Snell firm in payment of their legal fee. The Snell firm accepted the check as partial payment, insisting that its fee should be calculated on the damages awarded the Levines before the offset; the Levines took the position that the fee should be calculated on the judgment net of the offset. (The firm also asserted that it was contractually entitled to the attorney fees awarded in the judgment, and the Levines have not challenged that assertion.) After the Levines sold their home and still refused to pay what the Snell firm claimed was owed, the firm sued the Levines. The trial court granted summary judgment for the firm, and the court of appeals affirmed.²

The value of the Levines' recovery was the same as it would have been had they continued to make their mortgage payments to the Smiths:

$$\begin{array}{ccc} \text{they received —} & & \text{they would have received —} \\ & = & \\ (\text{Damages} - \text{Mortgage}) + \text{Home} & & \text{Damages} + (\text{Home} - \text{Mortgage}) \end{array}$$

Unquestionably, the Levines received a financial benefit from the cancellation of their mortgage debt to the Smiths, and the Court acknowledges this fact. That benefit was converted to cash when

¹ *Smith v. Levine*, 911 S.W.2d 427 (Tex. App.—San Antonio 1995, writ denied).

² ___ S.W.2d ___ (Tex. App.—San Antonio 1999).

the Levines sold their home. In my view, the cancellation of the debt was an “amount received” by the Levines within the meaning of their contingent fee agreement with the Snell firm. The Levines owned their home free and clear, and each month they had cash money in their pockets from not having to make a mortgage payment. But even if the canceled debt was not an “amount received”, surely the money from the sale of the home was.

The Court does not disagree with this but holds, nevertheless, that the amount of the Snell firm’s contingent fee must be calculated on the net judgment. Had the Levines not discontinued their mortgage payments, their legal bill would have been one-third of the total damages their lawyers recovered for them against the Smiths. The Levines would have been required to continue making mortgage payments to the Smiths as they had been doing, and when the home was sold, the Levines would have been required to pay the balance due on the note. But because the Levines discontinued their mortgage payments and recovered instead a smaller damages award plus a home free and clear of any debt, the Court holds that they owe their lawyers less. Indeed, had the Levines’ damages only equaled the balance due on their note, the Court would hold that the Snell firm was not entitled to any contingent fee at all, even though the Levines would have their home debt-free. The Court gives three reasons for the result it reaches.

First, the Court points to section 35(2) of the *Restatement of the Law Governing Lawyers*, which provides that “[u]nless the contract construed in the circumstances indicates otherwise, when a lawyer has contracted for a contingent fee, the lawyer is entitled to receive the specified fee only when and to the extent the client receives payment.”³ But even if the Levines did not “receive

³ RESTATEMENT OF THE LAW GOVERNING LAWYERS § 35(2) (2000).

payment” of the total value recovered by their judgment when the Smiths paid it off, they certainly received payment when they sold their home free and clear of any mortgage lien. At most, section 35(2) indicates that payment of a legal fee based on the cancellation of the Levines’ mortgage was not due until they sold their home. Consistent with section 35(2), the Snell firm did not insist on payment until the home was sold. Nothing in section 35(2) so much as hints that no fee was owed based on the cancellation of the debt..

Second, the Court points to a sentence in comment d to section 35(2) that states: “In the absence of prior agreement to the contrary, the amount of the client’s recovery is computed net of any offset, such as recovery by an opposing party on a counterclaim.”⁴ This may be a good rule in some circumstances, although I doubt that it should apply in every case. The nature of the offset or counterclaim, the liquidity of the client’s recovery, and the ordinary expectation of clients in the circumstances must be taken into account. But even if the rule were applied here, it would not resolve the dispute but merely beg the question whether the Levines’ contract to pay the Snell firm one-third of “any amount received” was a “prior agreement” that called for the fee to be calculated on everything the Levines received, including the cancellation of their mortgage debt. If it was, then comment d would favor the Snell firm’s position.

Third, since neither section 35(2) nor its comment d, according to their express terms, justifies calculating the Snell firm’s contingent fee based on the net judgment, the Court attempts to justify denying the Snell firm the fee it contracted for by reciting several truisms: that a lawyer is better able than most clients to anticipate the various possibilities for calculating a contingent fee

⁴ *Id.* § 35(2), cmt d.

and contract for them, that clients trust their lawyers, that as between a lawyer and a client the lawyer may justifiably be required to bear risks of uncertainty, especially with respect to fees owed, and that lawyers should clearly communicate with clients concerning fees and other matters. It is hard to disagree with any of these statements as general propositions, but it is impossible to see how they can justify avoiding the plain language of a contingent fee agreement and concluding that “any amount received” does not mean *any* amount received but only *some* amounts received. Lawyers should always strive for clear communications with clients, but that obvious pronouncement is irrelevant in a case like this in which *the Court does not find the agreement unclear in any respect*.

The Court’s reasons for refusing to give effect to the plain meaning of the agreement in this case could also have been applied to deny recovery of legal fees in *Lopez v. Munoz, Hockema & Reed, L.L.P.*,⁵ a case decided just last Term, but the Court did not mention even one of them. There we held that the clients’ agreement to pay a higher contingent fee if their case was “appealed to a higher court” meant — unambiguously and as a matter of law — that the fee was owed when the notice of appeal was filed.⁶ We rejected the clients’ argument that the phrase could have meant the filing of a brief, the presentation of argument, or the submission of a case for decision.⁷ We did not consider whether the agreement should have been construed against the lawyers who drafted it, or whether they were better able to draft agreements and anticipate contingencies, or whether their clients trusted them, or whether the agreement should have been clearer — all of the reasons the

⁵ 22 S.W.3d 857 (Tex. 2000).

⁶ 980 S.W.2d 738, 741 (Tex. 1998).

⁷ *Id.*

Court gives today for agreeing with the clients. The Court completely ignores *Lopez*, leaving readers to wonder why “appealed to a higher court” should be given effect and “any amount received” should not.

JUSTICE OWEN argues that cancellation of the Levines’ mortgage debt was not cash and therefore was not an “amount received”. Cancellation of the debt put real money in the Levines’ pockets. As the first of each month rolled around, the Levines had more cash because they no longer had to make mortgage payments. But even if this were not persuasive, at one point the Levines obtained actual cash from the sale of their home, and the Snell firm waited until then to insist on payment of its full fee. JUSTICE OWEN argues that

[a] reasonable person in the Levines’ shoes would not expect that they would have to find a means of paying their counsel over \$53,000 in cash. Paying such an amount may have been difficult if not impossible for some homeowners without selling their home.⁸

Perhaps so, but this simply ignores the fact that the Levines *did* sell their home, and that *only then* did the Snell firm request payment of its fee. Surely no reasonable client would expect to owe his lawyer nothing for removing an encumbrance from his home. Even if the Levines did not owe the Snell firm any additional fee until they sold their home, surely they did once they had the cash in hand.

JUSTICE OWEN also faults the Snell firm for not obtaining “an express agreement from the Levines that attorney’s fees would be based on the amount awarded for the Levines’ affirmative claims without any reduction for a counterclaim, even though Snell should have anticipated a

⁸ *Ante* at ____.

counterclaim.”⁹ The Snell firm should certainly have anticipated a counterclaim, but it is hard to fault the firm for failing to clarify its fee agreement when no court so far — including this one — has held that its agreement was unclear in any respect. Until today, the courts that have considered the firm’s legal position have agreed with it. Had the firm ever dreamed that someday, years later, this Court would refuse to enforce the fee agreement that no one will say is ambiguous, I suspect it would have counseled the Levines to keep making their mortgage payments.

I cannot help thinking that the Court’s result must be influenced by its view, nowhere expressed, that it is unreasonable for clients to pay almost their entire recovery in legal fees, a view with which I am quick to sympathize. This may explain why the Court is driven to employ a contract construction analysis that is so deeply flawed. The Levines could have complained here that their fee contract was unreasonable, but they have not done so. They have not even challenged their agreement to pay the Snell firm the attorney fees awarded by the court in addition to the contingent fee, as they might have.¹⁰ As this case comes to us, the only issue is the proper construction to be given plain language in a fee contract. The Court could hold that the contract language is ambiguous, but then it would be inconsistent with its decision in *Lopez*, which is not even a year old. The Court could hold that a contingent fee must always be calculated on a net judgment, regardless of what the contract says, perhaps as a matter of public policy, but it is unwilling to go that far. The Court could join JUSTICE OWEN’s view that lawyers should be

⁹ *Ante* at ____.

¹⁰ *See* RESTATEMENT OF THE LAW GOVERNING LAWYERS § 38, cmt f (2000) (“A contract providing that a lawyer is to receive both a standard contractual fee and a fee award, without crediting the award against the contractual fee, is presumptively unreasonable under § 34.”).

prescient as Nostradamus or risk the consequences, but this view does not appeal to the Majority, either. Left with no acceptable alternative — except, of course, enforcement of the contract according to its terms — the Court bases its decision on one fact and one fact alone: that the parties to the contract are lawyer and client. Contract law in Texas should not be contorted to try to reach what a few judges regard as a fair result in a single case.

One can easily imagine many situations in which it would be unreasonable to conclude that a client had received something when it was offset by other awards. This is not such a case. The Snell firm obtained a real, cash benefit for the Levines, and when it did, it was entitled to be compensated for its efforts according to the clear terms of their agreement. The firm certainly should not be denied recovery merely because it is comprised of lawyers.

Nathan L. Hecht
Justice

Opinion delivered: February 1, 2001