

No. 08-0833

In the
Supreme Court of Texas

ANGLO-DUTCH PETROLEUM INTERNATIONAL, INC. AND
ANGLO-DUTCH (TENGE) L.L.C.,

Petitioners,

v.

GREENBERG PEDEN, P.C. AND GERARD J. SWONKE,

Respondents.

On Petition for Review from the
Fourteenth Court of Appeals at Houston, Texas

REPLY IN SUPPORT OF PETITION FOR REVIEW

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TO THE HONORABLE SUPREME COURT OF TEXAS:

More significant than what Swonke's response argues is what it doesn't. Swonke refuses to defend the court of appeals's decision on the merits, relying instead on misleading arguments based on waiver. His response underscores why full briefing is needed.

This case presents important questions:

- whether a fee agreement on firm letterhead executed with a firm signature block is unambiguously an agreement with the firm, not the signing attorney;
- whether the court of appeals properly applied the correct legal standard for interpreting attorney fee agreements, and;
- whether a jury, asked to decide whether an attorney's fee agreement has been breached, must be instructed on the nature of the attorney-client relationship and the controlling interpretive standard.

Texas rules governing attorney behavior and the unique nature of the attorney-client relationship reinforce that an attorney cannot use his own drafting "mistakes" to his advantage and against his client, and in particular to excuse a derogation of his duty not to capitalize on mistakes and to correct any errors or misimpressions. Swonke's response avoids any discussion of the important legal issues in this case. Instead, he asserts waiver and predicates his arguments on a blizzard of extrinsic facts—all outside the disputed agreement's four corners. Ironically, Swonke's fact blizzard is nearly a perfect example of what attorneys should be prohibited from doing—using their control over the words used in their fee agreements to take advantage of their clients. Because the court of appeals's decision empowers unscrupulous attorneys and firms to take advantage of their clients, it should be reversed.

Swonke responds, specifically, that Anglo-Dutch waived any argument about the written fee contract's interpretation. But that question is a pure question of law for the court, not the jury. From the outset, Anglo-Dutch has argued that the fee contract was amenable to only one reasonable interpretation. Under no circumstances has Anglo-Dutch waived the courts' obligation to decide whether the contract is ambiguous. Even if Swonke is correct and this fee agreement is ambiguous and, therefore, the trial court correctly submitted the meaning of that agreement to the jury to decide, the trial court erroneously failed to properly instruct the jury. The jury should have been instructed to interpret the fee agreement, not like an arm's length business contract, but, rather, in light of the ethical considerations underlying the performance of attorney fee agreements—particularly the duty to clarify “mistakes” about the identity of the contracting parties.

Anglo-Dutch did not waive any arguments about the fee agreement's interpretation. And because Swonke makes no answer to the merits of Anglo-Dutch's points, this Court should grant this petition for review, reverse the court of appeals judgment, and render judgment for Anglo-Dutch.

ARGUMENT

I. ATTORNEYS' DUTY TO CLARIFY ATTORNEY-CLIENT FEE AGREEMENTS IS SQUARELY BEFORE THE COURT.

A. Litigants Cannot Waive the Courts' Duty to Construe Unambiguous Contracts as a Matter of Law.

Swonke pins his entire response on a series of baseless appellate-waiver arguments, including primarily that Anglo-Dutch waived its argument that the contract is unambiguously an agreement between Anglo-Dutch and Greenberg Peden. Under

Swonke’s reasoning, courts have no duty to determine if attorney fee contracts are unambiguous or ethical.

Whether a contract is ambiguous is a question of law. *Am. Mfrs. Mut. Ins. Co. v. Schaefer*, 124 S.W.3d 154, 157 (Tex. 2003). Because courts, not juries, decide questions of law, a jury determination of a question of law is “immaterial” and must be discarded because it calls for a finding “beyond the province of the jury.” *Se. Pipeline Co., Inc. v. Tichacek*, 997 S.W.2d 166, 172 (Tex. 1999). If a contract is unambiguous, courts are “obligated to interpret the contract as a matter of law.” *DeWitt County Elec. Coop. v. Parks*, 1 S.W.3d 96, 100 (Tex. 1999) (emphasis added, citing *Coker v. Coker*, 650 S.W.2d 391, 393 (Tex. 1983)).

“[P]arties cannot validly stipulate to legal conclusions to be drawn from the facts of the case.” *Martinez v. Hardy*, 864 S.W.2d 767, 770 (Tex. App.—Houston [14th Dist.] 1993, no writ). In particular, stipulations as to the legal effect of an unambiguous contract are not binding on the courts. *See e.g., Atl. Richfield Co. v. Hilton*, 437 S.W.2d 347, 351 (Tex. Civ. App.—Tyler 1969, writ ref’d n.r.e.). Indeed, this Court held in *El Paso Natural Gas Co. v. Minco Oil & Gas, Inc.* that a party cannot have “waived” the right to have a court decide questions of contract ambiguity, if that party argued for its interpretation of the agreement in the trial court:

Whether or not a contract is ambiguous is a question of law for the court. . . . And the court of appeals erred in concluding on rehearing that El Paso had to affirmatively challenge on appeal the trial court’s finding of ambiguity. . . . [T]he legal issue of ambiguity was subsumed under El

Paso's principal complaint that the release was not unconscionable, but rather should be enforced as written.

8 S.W.3d 309, 315 (Tex. 2000).

B. Anglo-Dutch Consistently Asserted the Unambiguous Interpretation of the Agreement.

Anglo-Dutch raised its argument about the agreement's unambiguous meaning in its live pleadings,¹ motion for summary judgment,² and motion for jnov.³ Swonke's view of the world makes litigation a treacherous undertaking rather than a search for truth. A party has a right to defend itself against a trial court's mid-trial rulings. Thus, it is not a waiver to argue to the jury about the meaning of a contract once the court has ruled on the ambiguity issue and placed the meaning of the contract in the jury's hands. *See Minco Oil & Gas*, 8 S.W.3d at 315.

Anglo-Dutch's actions in the trial court could not have relieved the trial court or the court of appeals of their duty to construe the unambiguous contract and enforce it as written. *E.g., Bates v. MTH Homes-Texas, L.P.*, 177 S.W.3d 419, 423 n.3 (Tex. App.—Houston [1st Dist.], no pet.). Once the trial court denied summary judgment and placed the contract in front of the jury, Anglo-Dutch undeniably preserved its argument for appeal by asserting in its motion for jnov that no evidence supports the trial court's finding of ambiguity or the jury's interpretation of the agreement, and that the evidence

¹ 2 CR 344 (“Anglo-Dutch believes that the [attorney-client agreement] should be construed . . . without any finding of ambiguity.”).

² 1 CR 120-21 (“The four corners of the [agreement] make it clear that it is between Anglo-Dutch and Greenberg Peden, and not Swonke individually.” (emphasis in original)); *see also* 3 CR 495 (motion for reconsideration of summary judgment).

³ 2 CR 344 (“Anglo-Dutch believes that the [CFA] should be construed . . . without any finding of ambiguity.”).

instead supports only one reasonable interpretation of the contract. *Cecil v. Smith*, 804 S.W.2d 509, 510 (Tex. 1991).

C. Issues of Capacity and Authority Are Irrelevant.

Anglo-Dutch's petition raises the legal question of whom the parties intended to bind under the fee agreement. Accordingly, Swonke's argument about the jury finding that he executed the agreement on behalf of himself begs question. Swonke cites no authority, because there is none, to support his misguided implication that a jury finding on agency or capacity is necessary before a court can construe an unambiguous contract to determine whom the parties intended to bind; indeed, the issue was never contested by Swonke or Greenberg Peden.⁴ Swonke overlooks the fact that the court of appeals's analysis of the evidence to support the verdict occurred *after* that court rejected Anglo-Dutch's matter-of-law arguments about the meaning of the unambiguous contract and the controlling legal standard, which is something Swonke fails to mention in his response. *See Anglo-Dutch Petroleum Int'l, Inc. v. Greenberg Peden, P.C.*, 267 S.W.3d 454, 476-81 (Tex. App.—Houston [14th Dist.] 2008, pet. filed).

II. AT A MINIMUM, THE FAILURE TO PROPERLY INSTRUCT THE JURY ON THE NATURE OF THE ATTORNEY-CLIENT RELATIONSHIP WARRANTS A NEW TRIAL.

Attorneys' fiduciary obligations to clarify uncertain or misleading fee agreements will be meaningless unless juries receive proper instructions on those obligations. A

⁴ Greenberg Peden never filed a verified denial under TEX. R. CIV. P. 93(7) that Swonke lacked authority or capacity to sign the fee agreement on Greenberg Peden's behalf (which is a necessary predicate for the issue to be raised), and Skip Naylor, Greenberg Peden's managing partner, acknowledged that Swonke had authority to sign fee agreements on behalf of the firm. *See* 7 RR 104-07. Swonke's argument is a red herring.

generic instruction to consider “all of the facts and circumstances surrounding the making of the agreement” is appropriate for interpreting a contract governing an everyday commercial transaction. Pet. App. C at 41. But that instruction cannot and does not properly inform a jury of the ethical obligations that infuse the attorney-client relationship, including that lawyers have “the obligation of clarifying attorney-client contracts,” *Levine v. Bayne, Snell & Krause, Ltd.*, 40 S.W.3d 92, 95 (Tex. 2001), and are charged to avoid doing anything “misleading as to the identity of the lawyer or lawyers,” *see* TEX. DISCIPLINARY R. PROF’L CONDUCT 7.01. The instruction also effectively wipes out the disciplinary rules, §18 of the RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS, and this Court’s pronouncements on the special relationship between attorney and client.

Anglo-Dutch properly preserved its objection to the charge by objecting to Question 1’s omission of the necessary instructions and submitting a proper question that contained the omitted instructions. *See* 10 RR 138-43; Supp. CR. Anglo-Dutch also timely and plainly informed the trial court that if it refused some of the proposed instructions for Question 1, it should at least include an instruction explaining that a fee agreement should be construed as a reasonable client would construe it, which is in accordance with the RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS. 10 RR 139-43. The trial court refused, preserving the issue for appeal. *State Dep’t of Highways & Pub. Transp. v. Payne*, 838 S.W.2d 235, 241 (Tex. 1992) (charge error preserved by making trial court aware of the complaint, timely and plainly, and obtaining a ruling).

PRAYER

Anglo-Dutch respectfully requests that the Court request full briefing, grant the petition for review, reverse the court of appeals, and render judgment that the attorney-client fee agreement was between Anglo-Dutch and Greenberg Peden, or, in the alternative, remand the case for a new trial.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the attached Reply in Support of Petition for Review has been forwarded to counsel of record by certified mail, return receipt requested, in accordance with the Texas Rules of Appellate Procedure on this the 23rd day of March, 2009 as follows:

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