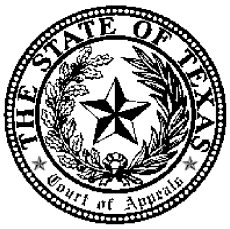
Reversed and Rendered and Concurring Opinion filed October 25, 2001.



In The

Fourteenth Court of Appeals

NO. 14-99-00327-CV

GLADYS R. GOFFNEY, Appellant

V.

SYLVIA RABSON, Appellee

On Appeal from the 55th District Court
Harris County, Texas
Trial Court Cause No. 95-40177

CONCURRING OPINION ON MOTION FOR REHEARING

I concur in the court's refusal to grant a rehearing.

However, we should not be read to say that we deny Texas citizens the right to enforce a contingent fee contract with an attorney. Enforcement of a contingent fee contract may be obtained by both the attorney and her client.

Our original opinion, in which I concurred in the result only, implicitly dealt with enforceability of this special type of contract. The majority opinion lumps the contingent fee aspect of the underlying contract in with standing case law applying the two year statute of

limitations to legal malpractice. Legal malpractice actions, whether based on negligence or failure to perform some legal representation aspect of a contract, often sound in tort. We failed to distinguish one of Rabson's claims, which specifically sounded in contract.

Mrs. Rabson specifically pled in her amended petition paragraph 35 that she contracted with Goffney to provide legal services. Because Goffney did not perform "the terms of their contract" and "abandoned" her on the day of trial, she was forced to hire another firm, she claimed. The terms of their contract specifically provided for a contingent fee, not an hourly rate.

In paragraph 36, Rabson alleged Goffney's failure to perform was a breach of contract "and because Mrs. Rabson was forced to hire additional attorneys, she has been damaged . . . . " The damages found by the jury were the amount Rabson had to pay the additional attorneys. The majority opinion observes Rabson claimed no damages she would have recovered but for the negligence. The opposite is more likely. The particular claim Rabson asserted that would give rise to the specific damages awarded, was the contract claim. The only damage amount sought, proven and found by the jury was the amount Rabson was forced to pay, not because of negligence, but because Goffney failed to perform the terms of the contract, to represent Rabson on a contingent fee basis. When Goffney undoubtedly attempted to abandon Rabson on the eve of trial and attempted an *ex parte* withdrawal from the case, Rabson elected to hire new lawyers, not on a contingent fee basis, but on an hourly rate that arguably caused the damages of $125,000. Indeed, the jury agreed. They found a failure to perform the contingent fee contract and the precise damages caused by the failure–the cost of new counsel paid on an hourly basis.

We cited by way of example *Van Polen v. Wisch*, 23 S.W.3d 510 (Tex. App.–Houston [1st Dist.] 2000, pet. denied). There, our sister court dealt not with a contingent fee contract but a contract for criminal representation. Hinojosa's conviction was upheld on appeal and thus his own conduct was the sole proximate cause of his damages. *See Peeler v. Hughes & Luce*, 909 S.W.2d 497, 498 (Tex. 1995). His suit on the contract "action[s] sounds in tort,

even if the suit is framed as a breach of contract. . . ." *Van Polen*, 23 S.W.3d at 515-16. Hinojosa was not allowed to escape the negligence law principle that does not allow a convicted criminal to blame his attorney for his just punishment. That is not the case of Sylvia Rabson.

We cited *Black* and *Shapiro*. In *Black v. Wills*, 758 S.W.2d 809 (Tex. App.—Dallas 1988, no writ), the Dallas court of appeals (following *Shapiro*) applied the two year statute of limitations to legal malpractice claims because: "[a]lthough couched in terms of a contract cause of action, these allegations basically do no more that reiterate the previously mentioned causes of action for ...breach of fiduciary duty." *Id*. at 814. They concluded the cause of action sounded in tort and therefore the limitation period was two years. In *Citizens State Bank of Dickinson v. Shapiro*, 575 S.W.2d 375 (Tex. App.—Tyler 1979, writ ref'd n.r.e.), the Tyler court had already stated the same logic: "[a]lthough couched in terms of a contract cause of action, these allegations basically do no more than reiterate the previously mentioned causes of action for negligence. . . ." *Id.* at 387. And so we too decided "Rabson's claim that Goffney 'abandoned' her on the day of trial is essentially a legal malpractice claim." This is problematic.

I agree narrowly that the so called "abandonment," that is the several hours in which Goffney sought to withdraw and was denied by the trial court, was—in this instance—lack of proper representation and therefore no more than a reiteration of Rabson's own abandoned claim of malpractice. From the contract perspective, however, the trial court promptly and properly refused this attempted repudiation of the contract. Goffney was forced by the trial court to honor her contract and indeed attended throughout the trial. There is no evidence this was not done on a contingent fee basis, as required under the contract. I would have preferred that we conduct a more traditional legal sufficiency analysis and then conclude Goffney substantially performed her contract. Goffney did after all lose, through no fault of her own, co-counsel who was principally charged with assimilating and presenting thousands of documents. When her aborted abandonment failed, she took her proper place with new

trial counsel, however reluctantly, and assisted throughout the trial that ensued. The attempted abandonment fell short of a repudiation of the contract.

There should be no question the law recognizes that Rabson had a constitutionally protected right to contract. "There are certain fundamental rights of every citizen which are recognized in the organic law of all out free American States . . . the right to acquire, possess, and protect property, includes the right to make reasonable contracts. . . ." *Jordan v State*, 103 S.W. 633, 634 (Tex. Crim. App. 1907); *see also St. Louis Southwestern Ry. Co. v Griffin*, 171 S.W. 703, 703–04 (Tex. 1914) (destruction of liberty of contract violates Fourteenth Amendment). We cannot abridge the right of contract and deprive litigants of one of their greatest protections in dealing with an attorney, their contract. In this case, the trial court properly refused Goffney's's attempt to abscond from both her professional and contractual duties.

Finally, the courts recognize, contrary to the exceptions we cited, *Van Polen*, *Black* and *Shapiro*, that generally failure to perform terms of a contract are a breach of contract, not a tort. *See Crim. Truck & Tractor v. Navistar*, 823 S.W.2d 591, 592 (Tex. 1992). Here, in sum, the legal negligence claims were abandoned, leaving the breach of contract claims, which were not supported by legally competent evidence. Thus, my concurrence in the court's refusal to grant rehearing.

/s/ Don Wittig
Senior Justice

Judgment rendered and Opinion filed October 25, 2001.
Panel consists of Justices Yates, Frost, and Wittig.[1]
Publish — TEX. R. APP. P. 47.3(b).

[1] Senior Justice Don Wittig sitting by assignment.