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Supreme Court of Texas.
Anglo-Dutch Petroleum International, Inc. and Anglo-Dutch (Tenge) L.L.C.
v.
Greenberg Peden, P.C. and Gerard J. Swonke.
No. 08-0833.

September 14, 2010.

Appearances:

Gregory S. Coleman, Yetter Coleman, LLP, Austin, TX, for petitioner.
Christopher S. Johns, Dawson, Sodd, Ellis & Hodge, LLP, Austin, TX, for Amicus Curiae, for petitioner.
Robert M. Roach, Jr., Roach & Newton, LLP, Austin, TX, for respondent.

Before:

Chief Justice Wallace B. Jefferson; Nathan L. Hecht, Dale Wainwright, David Medina, Paul W. Green, Phil Johnson, Don R. Willett, and Debra Lehrmann, Justices.

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CHIEF JUSTICE WALLACE B. JEFFERSON: The Court is now ready to hear argument in the first cause 08-0833, Anglo-Dutch Petroleum vs. Greenberg Peden.

MARSHALL: May it please the Court, Mr. Coleman will present argument for the Petitioner. Mr. Johns will present argument for the Amicus. Petitioner has reserved four minutes for rebuttal. Mr. Coleman will open with the first 12 minutes and he will present the rebuttal.

ORAL ARGUMENT OF GREGORY S. COLEMAN ON BEHALF OF THE PETITIONER

ATTORNEY GREGORY S. COLEMAN: Good morning and may it please the Court, a fee contract on firm letterhead and signed under a firm signature block is a contract with the firm and not with the signing lawyer individually. That is true, whether it is considered under traditional contract interpretation principles, Texas' rules of ethics for lawyers, or the fiduciary duty of special trust between attorney and client, but this court has

long held and forms the interpretation of attorney-client fee contracts. The four corners review of this agreement, which I've attached as Exhibit One in my handouts this morning, as well as the surrounding circumstances, does not remotely suggest that this contract is a contract with Swonke individually. And the lower Court's ---

CHIEF JUSTICE DALE WAINWRIGHT: Um, so are you arguing that we should disregard the jury finding and conclusively hold as a matter of fact that the contract is with the firm and not with Swonke individually?

ATTORNEY GREGORY S. COLEMAN: Absolutely.

CHIEF JUSTICE DALE WAINWRIGHT: The jury found the opposite of your argument.

ATTORNEY GREGORY S. COLEMAN: That's correct, Justice Wainwright, but this is an issue that should never have gone to the jury. This Court has held many times that the fundamental question of whether an ambiguity exists is a question of law for the Court. And so the first threshold question that we ask the Court to address is the question of ambiguity. We say that both traditional contract interpretation principles as well as the nature of - the fiduciary nature of the relationship between Swonke and Greenberg Peden and Anglo-Dutch clearly indicate that the Court should interpret this contract in a way that says it is a contract with the firm, and that there's simply no question about that.

JUSTICE PAUL W. GREEN: Well, Mr. Van Dyke, well first of all, you would agree that an attorney-client relationship, I mean that's a personal services arrangement. Would you agree with that?

ATTORNEY GREGORY S. COLEMAN: Yes, a fiduciary relationship.

JUSTICE PAUL W. GREEN: I mean typically a client wants to hire a lawyer. I want to hire Greg Coleman in this case. And so when you're doing that, to say then well it's not the individual who I'm contracting with or hiring; it's the law person, ignoring the individual. This is sort of ignored reality of the situation.

ATTORNEY GREGORY S. COLEMAN: No, I don't think that that's true at all, Justice Green. It is long-established tradition and practice within the practice of law that typically most lawyers, or many lawyers at least, practice within firms and that the standard when people come and hire those lawyers is that they hire the firm. And that's why we have firm letterhead, firm signature blocks. That's also why we have a disciplinary rule that requires that there not be a misleading use of letterhead. And so this is a contract. It's on firm letterhead. It's making a representation, and the signature block itself is a formal signature block on behalf of the firm.

CHIEF JUSTICE WALLACE B. JEFFERSON: It's not clear that Greenberg had refused to represent Anglo-Dutch in the case and wasn't Van Dyke aware of that when he started the relationship with Swonke?
ATTORNEY GREGORY S. COLEMAN: We don't dis-- Two points, Mr. Chief Justice. First, we don't dispute that six months prior to the formation of this contract, Anglo-Dutch had come to Greenberg Peden because of it's longstanding existing relationship and it offered the entire case to Greenberg Peden on a contingency basis. The firm said we don't want to take the case. When Anglo-Dutch came back, they weren't asking the firm to take the case as a contingency-fee representation for the entire case, but they had been calling Mr. Swonke to say we need to use you as a historical resource because of factual discovery and other issues. He knew a lot about the case because of his work as a lawyer. And so he said, you're going to have to pay for that, and they came in and formed this relationship. So the fact that six months before the firm had declined the relationship for the entire case doesn't say really anything about whether you could come in and say for a more limited purpose, we are now actually going to take on this representation. And one thing, I think, is additionally relevant to that, Chief Justice, is that this is not a relationship that began at that time. This is a relationship that had gone back many, many years. There had been many engagements with, and all of them had been with Greenberg Peden as a firm and not with Mr. Swonke individually. And so you had a long history of prior dealings in which every single prior engagement had been with the firm Greenberg Peden and not with Swonke.

CHIEF JUSTICE WALLACE B. JEFFERSON: Let me ask you just one more question then and ---

JUSTICE DAVID M. MEDINA: I'll yield to you this time.

CHIEF JUSTICE WALLACE B. JEFFERSON: Thank you. Just Greenberg Peden assigned its, any interest that it might have under the fee agreement to the lawyer Swonke in an assignment and a release agreement. What impact if any does that have on the legal argument here?

ATTORNEY GREGORY S. COLEMAN: Well, I don't think, I think it supports us entirely. I mean it may have something to do with where the money ultimately goes when we write a check to Greenberg Peden, but I think the Court should keep foremost in its mind and that assignment that you referred to is actually in Exhibit 7. At the very moment Swonke was coming into Anglo-Dutch's offices in April of 2004 and saying, you, know that contract that says my firm name at the top of it and a firm signature block? Well, you didn't get this, but that's actually an agreement with me individually and you're going to, you owe me know $1.5 million instead of the $300,000 you thought you were going to owe. At the very moment he was telling his client that's with me individually, he's negotiating with his firm for an assignment of their interest in the case. And the document that he drafts and writes says - and this is the highlighted language - whereas Swonke executed the letter agreement, that's the agreement, on behalf of and while affiliated with Greenberg Peden as of counsel. So it is an assignment of a firm interest, which he is recognizing through a solemn contract with the firm. You have an interest in a fee contract and I want you to assign it to me at the same time he's telling his client that was never with the firm in the first place and you owe me $1.5 million.

JUSTICE DON R. WILLETT: But at the end of the day, the legal effect may be he still may wind up individually with the money in his pocket.

ATTORNEY GREGORY S. COLEMAN: Absolutely. Absolutely. We don't dispute that. The question ---

JUSTICE NATHAN L. HECHT: Some of the money.

ATTORNEY GREGORY S. COLEMAN: Most of the money. Most of the money.

JUSTICE DAVID M. MEDINA: What does that matter to you, if he's negotiating a separate deal with the law firm? You certainly didn't expect him to work for free, or maybe you did.

ATTORNEY GREGORY S. COLEMAN: No, no, that's correct, Justice Medina, but the key point is what Swonke is trying to assert by coming in and saying that contract was with me individually the whole time, is that now you owe me not only for the 200 hours I spent at Greenberg Peden, but I found a way to record over 1,000 hours on the case while I was at McConn Williams. And so while the contingency fee contract with McConn Williams says you're going to pay us 20% for the work of all McConn Williams attorneys, which would include Swonke. In addition, you're also going to pay me a second time for the hours that I bill to McConn Williams because that was a contract with me additionally. So Swonke wants Anglo-Dutch to pay twice, once to McConn Williams and once to him, for all the hours that he spent while he was employed at McConn Williams. That's ultimately the main difference is if that was a contract with Greenberg Peden, then he moves over and he becomes an attorney with McConn Williams under an existing contingency fee contract and if he does some work, he does some work and that firm gets paid under a preexisting fee agreement, and Greenberg Peden gets paid and then he works it out with Greenberg Peden and McConn & Williams under his of counsel agreements, which we knew nothing about, of how much he would personally get paid.

JUSTICE DAVID M. MEDINA: Let me ask you this. He said that the client always hires the firm or certainly maybe your client always hires the firm. In my experience in private practice, you never hired the firm. If there's a lawyer that did a great job for Cooper Industries, wherever that lawyer went, I wanted to retain his or her ser-

vices irrespective of what's on the letterhead. So perhaps I erred in that regard, but you said the client always hires the law firm. So when there's a problem with the case, who do you deal with? The managing partner or do you deal with the lawyer that is assigned to the case?

ATTORNEY GREGORY S. COLEMAN: As a practical matter, it's not uncommon to say I'd like you to represent me in this. The tradition standard is that you actually formally hire the firm. Now it's not impossible for somebody like an of counsel to enter into a relationship and Swonke, the evidence at trial showed that he had done this many times. He had many contingency fee agreements on letterhead that said Law Offices of Gerard Swonke and signed individually, but he didn't do that. And so, traditionally, if you were in private practice and you came and said you know, Greg, I want to hire you for a matter, that fee agreement would be on Yetter Coleman letterhead and it would be signed on behalf of the firm. And so if you had a problem, certainly I would want you to come and talk to me about it, but you would also be entitled to talk to the leadership of the firm. And one thing that I think is very relevant here, Swonke has used this claimed ambiguity very opportunistically because this case turned out really well, alright. And so he says, now I didn't tell the client about this, what this letterhead, what I think now it really meant, and these other communications, I didn't say anything about those. But on the day that I can figure out a way to get an extra million dollars, now I'm going to come in and say it's with me individually. But I guarantee you that if this case had turned out poorly and instead of a big paycheck there were malpractice claims running around, Swonke was not going to come in and say, Anglo-Dutch, I just want you to know that that contract was with me individually and so I don't have the protection of the firm's malpractice insurance anymore, right? He wasn't going to do that.

CHIEF JUSTICE WALLACE B. JEFFERSON: So the firm is owed the fee? Greenberg Peden is owed the fee?

ATTORNEY GREGORY S. COLEMAN: The firm is owed the fee.

JUSTICE DEBRA H. LEHRMANN: Mr. Coleman?

CHIEF JUSTICE WALLACE B. JEFFERSON: Does the firm - didn't I read somewhere that the firm disclaimed any interest in it?

ATTORNEY GREGORY S. COLEMAN: The firm, by contract again, this is Exhibit 7 in my handout. The firm had assigned the vast majority of that fee to Swonke individually.

JUSTICE NATHAN L. HECHT: What fee? How much?

ATTORNEY GREGORY S. COLEMAN: I think we had sent a check and made an offer of about $329,000.

JUSTICE NATHAN L. HECHT: Not the $1.5 million?

ATTORNEY GREGORY S. COLEMAN: Not the $1.5 million.

JUSTICE NATHAN L. HECHT: We're not - we're confused about that. I'm not clear about that.

ATTORNEY GREGORY S. COLEMAN: Okay.

SPEAKER: When I said earlier some of the money, you said most of the money, but you don't mean the $1.5 million?

ATTORNEY GREGORY S. COLEMAN: Well, I thought Greenberg Peden had assigned 90% of in its interest. It does look that maybe it's all of the interest that has gone to Swonke.

JUSTICE NATHAN L. HECHT: But it's in the hours that were spent there?

ATTORNEY GREGORY S. COLEMAN: At Greenberg Peden.

JUSTICE NATHAN L. HECHT: Not the 1,022 hours that were spent at McConn?

ATTORNEY GREGORY S. COLEMAN: That's correct. We've paid for that already. We paid McConn & Williams under its contingency fee agreement, which included all of the hours spent by all the lawyers at McConn & Williams, including, you know, a bunch of other of counsel and associates and other people.

CHIEF JUSTICE WALLACE B. JEFFERSON: Justice Lehrmann had a question.
JUSTICE DEBRA H. LEHRMANN: Yeah. Mr. Coleman, I'm still not clear how to get around the fact that Greenberg had refused to take the case and I think because there were, bills had not been paid, correct?

ATTORNEY GREGORY S. COLEMAN: That is correct. Prior bills had not been paid and they said we're not going to take the entire case. But when they came back and said we're not asking you to take the entire case; we're asking you to allow us to use Swonke as a historical reference to assist with the preparation of the case. And they worked out a special kind of sum ---

JUSTICE DEBRA H. LEHRMANN: Because they hired someone else.

ATTORNEY GREGORY S. COLEMAN: That's right. They hired somebody else. McConn & Williams had a 20% contingency fee ---

JUSTICE DEBRA H. LEHRMANN: Right.

ATTORNEY GREGORY S. COLEMAN: -- agreement. Then Swonke said, well, we're going to take it on a contingency, but it's a percentage of a percentage based on my hours that I spent at Greenberg Peden. There is nothing inconsistent with saying, okay, you refuse the whole case. We come back six months later and say at least take this little part and help us a little bit with them saying, okay, that's fine. And that's exactly what happened. We don't believe there's any ambiguity here. The Court should render on that deck action or at very least remand based on our argument about the jury instruction.

CHIEF JUSTICE WALLACE B. JEFFERSON: Thank you, Mr. Coleman.

JUSTICE DEBRA H. LEHRMANN: Can I just ask that ---

CHIEF JUSTICE WALLACE B. JEFFERSON: And if you can come back in rebuttal. You're sharing time with Amicus, Counsel?

ATTORNEY GREGORY S. COLEMAN: Yes.

CHIEF JUSTICE WALLACE B. JEFFERSON: We'll hear from the Amicus counsel at this point.

ATTORNEY GREGORY S. COLEMAN: Thank you, Your Honor.

ORAL ARGUMENT OF CHRISTOPHER S. JOHNS ON BEHALF OF THE PETITIONER, FOR AMICUS CURIAE

ATTORNEY CHRISTOPHER S. JOHNS: Good morning and may it please the Court, all clients deserve to have a clear picture of who represents them. Is it the law firm whose name appears in the signature block and on the letterhead of the engagement letters they sign or is it merely the lawyer who actually signs the engagement

letter? Likewise ---

JUSTICE DAVID M. MEDINA: That to me seems like a red herring. I can understand if you have a small business out there, an individual. Here you have a major corporation, which I presume has a sophisticated law department. So I don't understand about this ambiguity and not knowing who represents whom. So maybe you can just flush that out for me.

ATTORNEY CHRISTOPHER S. JOHNS: Well, consider some of the real-world implications for how this would work in applying a very loose ambiguity standard. In every working day, Texas law firms around the state enter into hundreds, if not thousands, of these agreements and the practice has been for people in the profession to assume that something that's printed on firm letterhead is an engagement letter with the firm, rather than with the ind-- rather than between the client and the individual attorney. And now no one can confidently answer any of the following questions, such as for sure who can I turn to in cases of malpractice, who owes fiduciary duties to the client. Is it only the attorney that signed the engagement letter or is it the whole firm? And this is important for firms who I represent, which is a diverse group of firms from around Texas. Can we count on the engagement letters that are entered into and memorialized on our letterhead? Those questions affect how we staff cases, how we make budgeting decisions, how we deal with conflicts of interest, and, apparently, how closely we need to go back through our files and figure out whether one of our attorneys has been a little too liberal with the use of the first-person singular pronoun.

JUSTICE PAUL W. GREEN: Should it matter whether the lawyer is of counsel with the firm or actually an associate or a partner in the firm?

ATTORNEY CHRISTOPHER S. JOHNS: Justice Green, I do not think it makes a difference. If it's on firm letterhead and it's signed with the signature block of the firm, I think that's the relevant inquiry.

JUSTICE PHIL JOHNSON: But couldn't the firm just simply specify? When lawyers are making attorney client agreements for our firm, you specify it's with this firm and not you as an individual. I mean a firm can control that, can't they?

ATTORNEY CHRISTOPHER S. JOHNS: The firm I guess can control that and I think the ---

JUSTICE PHIL JOHNSON: Not only can, they probably should control it shouldn't they?

ATTORNEY CHRISTOPHER S. JOHNS: I think it's best practice to define things clearly and in this case it's, we're all about clarity. I think clarity's incredibly important. And in this case, the law firm involved had one of their agents use firm letterhead, use the signature block, and then use some personal pronouns to personalize the body of the message. And I think it's important that we seek clarity and that in cases where things are not clear, then we generally construe the ambiguity against the, against the attorney rather than against the client.

JUSTICE DALE WAINWRIGHT: THis fee agreement-- under that theory, if this fee agreement entered into between the client and the attorney, they negotiated it and it said, I'll work for you at $200 an hour. The secretary made a mistake and put $2 an hour in the fee agreement; lawyer didn't catch it, signed it and sent it out. Under your theory, does the lawyer get $2 an hour? Could you construe it against the draft paper? I mean at the bottom, at the base of all of this, the question is what did the parties agree to? And what you're arguing for is interpretive aides when there's mistakes or ambiguity. But the bottom line is what did the parties agree to? Isn't that the bottom line issue?

ATTORNEY CHRISTOPHER S. JOHNS: Well, I agree with you, Justice Wainwright, that it is your case, the hypothetical is a difficult one, $2 an hour. I think ---

JUSTICE DALE WAINWRIGHT: Let's say that was your fee agreement, what are you entitled to, $2 an hour

or $200?

ATTORNEY CHRISTOPHER S. JOHNS: A little more than $2 an hour. Well, in those cases, and I do want to make clear that it is important to figure out what the parties intended, but in this case you look at it from the perspective of a reasonable client. First, you look at the fee agreement itself; is it clear and unambiguous? I think in this case, I think under general commercial contract terms, it would be unambiguous. But if that fails you, then you look at what the perspective of a reasonable client is. And in this case, the facts are that the reasonable client, the client in this case, the same day he signs the fee agreement sends a letter back to the firm and says here's a letter back to the firm; this contract is between Greenberg Peden and Anglo-Dutch. And so unless you're willing to assume that our client is unreasonable and is not doing it as a client would, the agreement was with the firm.

CHIEF JUSTICE WALLACE B. JEFFERSON: Thank you, Mr. Johns. Any further questions?

JUSTICE DEBRA H. LEHRMANN: I have one.

JUSTICE PHIL JOHNSON: Is your position it should be reversed and rendered or reversed and remanded?

ATTORNEY CHRISTOPHER S. JOHNS: Reversed and rendered, Your Honor.

CHIEF JUSTICE WALLACE B. JEFFERSON: Justice Lehrmann.

JUSTICE DEBRA H. LEHRMANN: Can I just ask, as a generality, how do you envision that we would construe this rule that you would have us adopt that these fee agreements should be construed against the lawyer? Do you mean by that, generally, that from a procedural point of view that the lawyer would have the burden or that the law, it's not going to go to the trier of fact? I mean, what do you envision, procedurally how we would set forth a test from this point forward?

ATTORNEY CHRISTOPHER S. JOHNS: Thank you. I think it's a question of law. First to look at it, whether it's ambiguous or not.

JUSTICE DEBRA H. LEHRMANN: All right

ATTORNEY CHRISTOPHER S. JOHNS: Second, the Judge would look and decide whether from the perspective of a reasonable client, there's an ambiguity or not and to look at it from the client's perspective.

JUSTICE DEBRA H. LEHRMANN: Right. And then what if there's fact issues with regard to those circumstances? Would that also be an issue for the Judge?

ATTORNEY CHRISTOPHER S. JOHNS: Section 18 lists a number of factors that the Judge would consider, but I do think it's important for law firms to, given the nature of the fiduciary relationship, for the client to be taken care of. A contract is not just a contract when you're dealing with a contract between a lawyer and a client.

JUSTICE DEBRA H. LEHRMANN: And let's get when we get to the next stage and that is if an ambiguity is found, then what do you envision procedurally?
ATTORNEY CHRISTOPHER S. JOHNS: If there's a true ambiguity found, I think those are construed against the lawyer.

JUSTICE DEBRA H. LEHRMANN: And what does that mean? Does that mean that the lawyer always loses? Does that mean that it's a fact issue? Does that mean that the lawyer has the burden of proving that a reasonable person would view it the way that they're construing it? What does that mean to you?

ATTORNEY CHRISTOPHER S. JOHNS: I think unless there are cases of dishonesty or a large misrepresentation on the client's behalf, it generally - it would mean construing it against the lawyer and the lawyer loses those cases.

CHIEF JUSTICE WALLACE B. JEFFERSON: Thank you, thank you.

JUSTICE DEBRA H. LEHRMANN: So not just at the burden.

CHIEF JUSTICE WALLACE B. JEFFERSON: Thank you, Mr. Johns. I think it's time to hear from the Respondent.

ORAL ARGUMENT OF ROBERT M. ROACH, JR. ON BEHALF OF THE RESPONDENT

ATTORNEY ROBERT M. ROACH, JR.: May it please the Court, I'm Randy Roach for the defendant Swonke and Greenberg Peden. Until the last minute, it was unclear to me whether we were going to be talking about contra proferentem. And, Justice Lehrmann, your question is what I thought this argument was going to be about. And so I was prepared to talk about three things. One, why this contract is unambiguous in favor of Swonke. Two; why Justice Boyce got it right and if it is ambiguous, then it's clearly got to be interpreted as the jury did as a contract between Swonke and the client not between Greenberg Peden. And then I was going to give you seven, eight, nine different reasons why adopting a strict liability of contra proferentem rule would be a huge mistake.

JUSTICE DAVID M. MEDINA: If you could work in there the jury charge as well, I'd like to explore some of that.

ATTORNEY ROBERT M. ROACH, JR.: Sure. Well if - and if you mean Justice Medina the - what I understood to be the original request of the Amici of a fiduciary as super thumbs on the scale, fiduciary duty instruction both on the contract interpretation question and on the fiduciary duty issue, that's - it's a lot to cover, but I'd be [inaudible] to do it.

JUSTICE DALE WAINWRIGHT: You call that a super thumbs on the scale instruction ---

ATTORNEY ROBERT M. ROACH, JR.: I do.

JUSTICE DALE WAINWRIGHT: But there is law in Texas that if you change the basis of the representation during the representation, there's a presumption of unfairness and you've got to overcome that. So let's, if you would, start with the jury instruction issue. Rendition, frankly, is hard for me to get to in this case. Should it be retried, however, under instructions that provide some fiduciary context for laypersons in the jury in looking at this agreement, that is, fiduciary issues that the lawyer has or obligations the lawyer has, that's the question I'm frankly wrestling with more than a rendition question. So if you could reproach that I'd, address that I'd appreciate it.

ATTORNEY ROBERT M. ROACH, JR.: Sure. It seems to me all the fiduciary-duty-related issues all get answered in question number 5, which is the fiduciary duty question. Their entire theory about this is an ambiguous contract; the lawyer had an obligation to clarify. If it was confusing, he had to dispel that confusion; he had to explain what the deal was after he goes to McConn Williams. All of their theories about what problems we have in this agreement because of the letterhead and the signature block. All got tried under the fiduciary duty question and all got answered in favor not only of no breech, but of compliance with the fiduciary duties, the highest possible standard. And that issue is not challenged by the client in this Court. So the fiduciary duty instructions were thus appropriate. The fiduciary duty questions were all there and isn't that - I want to make the argument

that that's the right place for all these questions of lawyer-client relationships to be handled. It shouldn't be handled by a strict rule of liability, all ambiguities construed against the lawyer in favor of the client, like we do in insurance, because that would be disastrous. Instead, having these issues all tried under very tough fiduciary duty standards, why doesn't that solve everything? What's broken about that system, especially where the burden is shifted as the Court did here from the plaintiff has to prove a breech of fiduciary duty to the burden shifted to the defendant proof compliant with fiduciary duty? And you get all of those answers affirmatively for the lawyer.

JUSTICE DALE WAINWRIGHT: On question five you rightly indicated that the jury said that Swonke firmatively complied with all his fiduciary duties that are listed here. What's not listed here is what the Amici bring up, which is some instruction about the fee agreement and it's clarity. These fiduciary findings do address fairness -- fair and equitable in dealing with Anglo-Dutch, utmost good faith in representing Anglo-Dutch, etc., but nothing about the contract, the fee agreement that the parties entered. And the fee agreement the parties entered, as you know, has the firm letterhead at the top, the firm's name at the bottom, and then throughout, it says I personally, I, I, I referring to an individual.

ATTORNEY ROBERT M. ROACH, JR.: Right.

JUSTICE DALE WAINWRIGHT: Should there be something in the instruction about fiduciary duty in the entering agreement, which is not in question 5?

ATTORNEY ROBERT M. ROACH, JR.: Right, right. I don't know what further instruction you would have that would not put the thumb on the scales. What they have asked for I think is the kind - it is the standard that Courts use, not that juries would use because that instruction would tell the jury you are not to consider the perspective of the attorney. The other party's intentions are irrelevant under the fiduciary, under the instruction they're requesting. They're, the jury is instructed to consider only the client's reasonable expectations. And that completely denudes lawyers of the protection of saying, wait a minute, I complied with my fiduciary duties and I had the explanations, the conversations. I had a meeting of the minds, an understanding with this person as to what our contract was going to be. That's all gone if the jury is instructed to consider, in essence, only the perspective of the client.

JUSTICE NATHAN L. HECHT: Let me ask you about the record just briefly.

ATTORNEY ROBERT M. ROACH, JR.: Please.

JUSTICE NATHAN L. HECHT: You quote the Court of Appeals' opinion as saying according to Swonke, Van Dyke absolutely and without a doubt knew that Swonke would be paid individually when he moved from Greenberg Peden to McConn & Williams. But there's no record site there. And in Professor Eads brief, she says although Swonke indicated he would continue to work on the Halliburton Remco matter at McConn & Williams, he did not disclose to Anglo-Dutch that he expected to be paid individually under the agreement signed while at Greenberg Peden, and cites the record. And so my question is, is there record support for the Court of Appeals' statement that Van Dyke of Anglo-Dutch knew that they were going to be paying Peden indiv, I mean Swonke individually after he moved?

ATTORNEY ROBERT M. ROACH, JR.: I think that is Swonke's testimony. I don't have page and cite with you, but I'd be delighted to do a supplemental brief on that.

JUSTICE NATHAN L. HECHT: If you would.

ATTORNEY ROBERT M. ROACH, JR.: Certainly. And on the larger you know - the larger issue, there was a letter no one disputes that said I'm going to take all of your files, Anglo-Dutch, with me and if you've got any problem with that, then tell me. Now, of course, that didn't happen.

JUSTICE NATHAN L. HECHT: But that's--usually, if a lawyer moves firms, you expect him to be paid by the new firm.

ATTORNEY ROBERT M. ROACH, JR.: You would unless you had an agreement and a contract contrary to that. And I think you know this goes to - I want to try to lump in the of counsel question and the do you hire a lawyer or lawyer or a firm all into the freedom of contract point that I want to make, which is that lawyers and firms both and clients all need to be able to enter into an agreement that makes sense for them, particularly right now where costs are giant issues and people are looking for alternative ways of doing compensation agreements and hiring lawyers.

CHIEF JUSTICE WALLACE B. JEFFERSON: But most lawyers are sophisticated enough to know that if I'm expected to be paid myself for this, I'm not going to give my client a letter under the law firm's letterhead that says very truly yours, law firm with my signature under it. I mean that just looks on its face like you are contracting on behalf of the firm, and the client doesn't care whether you know once it pays the firm, all that money goes to Swonke because he had some kind of arrangement with Greenberg Peden, but this looks like the check is going to be written to Greenberg Peden.

ATTORNEY ROBERT M. ROACH, JR.: And it probably would have been written to Greenberg Peden under normal circumstances. Greenberg Peden normally would get the money and then it would be distributed. That wasn't the deal they had in this case and that's why the jury appropriately was asked, is this contract with Greenberg Peden, and got to hear all of the surrounding circumstances, looked at that language and said no.

CHIEF JUSTICE WALLACE B. JEFFERSON: But it seems to me that most lawyers would not do it this way if they expected to be paid individually. So the universe of cases that we're talking about when we decide to write a rule, do we guard against confusion in this sort of instance or do we go for the bright line rule that says in all future case, lawyers, if you want to be individually compensated when you are associated or affiliated with a law firm, you better make it crystal clear and not use firm letterhead; make it crystal clear that any payment for my services is going to be to me individually. That would be it seems a cleaner rule.

ATTORNEY ROBERT M. ROACH, JR.: No question it would be cleaner. The question is if it would be good for Texas or would it be bad.

CHIEF JUSTICE WALLACE B. JEFFERSON: And why would it be bad?

ATTORNEY ROBERT M. ROACH, JR.: It would be bad because it would corrode and erode the relationship between lawyers and clients. Because now, doing what a lawyer's supposed to do, having a clear understanding with their client first and foremost, having a meeting of the minds about what the contract is would become irrelevant under this bright line test because the mere fact that we have letterhead and signature block firm under the bright line test says we don't look at the intentions of the parties because it's a whole lot cleaner just to be able to say lawyer loses, we're going to have that rule. Now what does that say to society about lawyers and their relationship to clients? It says we can't trust lawyers. It says we've got so many problems with lawyers, we need this rule that imposes strict liability on them.

JUSTICE DEBRA H. LEHRMANN: What do you say about the ethical rule states that lawyers should not use firm letterhead in a misleading way? What is your response to that?

ATTORNEY ROBERT M. ROACH, JR.: If it's in a misleading way, it would be bad. If it's not in a misleading way, it's not bad. And here, the parties understood that this was a personal services contract only between this lawyer and could not be about the law firm because the law firm had said, no, generally you're a deadbeat; we're not going to represent you anymore.

JUSTICE DALE WAINWRIGHT: So was Van Dyke's October 17, 2000 letter a mistake? It says the agree-

ments between Greenberg Peden, the firm, and Anglo-Dutch the day after the agreement was signed.

ATTORNEY ROBERT M. ROACH, JR.: Mr. Swonke testified that he was suspicious in his mind once he saw that. And Mr. Harden asked the jury to find fraud against Mr. Swonke because of that and so many other--Mr. Swonke--against Mr. Van Dyke for that and so many other things that he did that made him look like a predator. The jury said no to the fraud question, but it does go to bat. Now, Mr. Van Dyke knew that Greenberg Peden had said no way José. We are not going to represent you anymore, any case, and not in this case. So he sees, he notes. He's a smart guy and he sees ooh, he said Greenberg Peden in the letterhead and the signature block. I'm going to say that very indescriptly, make - I'm not going to say anything about it. I'm not going to ask the lawyer, hey, your law firm said we would never ever represent me until I got my bills, hundreds of thousands of bills paid, but it looks like you guys are hiring me. I'm - our party is to this contract, is that right? I mean is that was a reasonable client would do? Of course.

CHIEF JUSTICE WALLACE B. JEFFERSON: Let me ask you your understanding of what will happen if we were to rule against your argument and say that the fee is Greenberg Peden's fee.

ATTORNEY ROBERT M. ROACH, JR.: Sure.

CHIEF JUSTICE WALLACE B. JEFFERSON: What happens at that point? What's - and/or do we know from the record what happens? Does it flow from Greenberg Peden to your client then or?

ATTORNEY ROBERT M. ROACH, JR.: I think they've released their interest, but obviously we would go back to trial and the jury would have to decide what amount of money was appropriate, assuming it was a Greenberg Peden case, trial. Now the position they have taken is that it would be limited to the time spent at Greenberg Peden, which is 277 hours. I think that there is a separate question about whether this contract, which otherwise says you're going to be paid for all of your hours, whether that contract terminated or not, okay. There is no, there has never been an issue about whether this contract terminated. They have just assumed that a judge would, what? Find as a matter of law that if it was a Greenberg Peden contract that it would terminate even though that every word and substance in the agreement says you're the person who has the responsibility to do the work and you're the person who's going to be paid. The incorporation of McConn Williams' agreement into this agreement is something that the Anglo-Dutch people have always pushed on. Well, if you were going to incorporate the termination clause of McConn Williams' agreement into this agreement then it says parties won't withdraw or be terminated without good cause. There was no - I mean this work all happened. There was no hitches, no problems. So why would you say there was a termination under this contract just because he goes to McConn Williams. Now, sure, that's why they say well, but the client would assume that he would. It makes no difference. If there is a contract and if this contract - this contract would still be just as true whether it's a Greenberg Peden contract or a Swonke contract because the terms have never been challenged. The subset terms have never claimed to be ambiguous or unenforceable. And so why does this agreement terminate when it goes to McConn Williams? It's a complete mystery to me; I do not understand it.

JUSTICE NATHAN L. HECHT: At the end of the day, there's a lot of confusion here. Greenberg Peden had not taken the client on for a while, didn't want to. So that looks like maybe it was an individual lawyer did it and he uses individual pronouns, but then he signs it on letterhead. And then you go to another firm and he tries to get under that contract and they won't do it.

ATTORNEY ROBERT M. ROACH, JR.: That happened prior. That did not happen - there's no testimony that he tried to get under their contract once he got there. He didn't want to be under their contract.

JUSTICE NATHAN L. HECHT: Alright. And then there's an assignment and why are you assigning an interest if you don't have one and all these questions.

ATTORNEY ROBERT M. ROACH, JR.: Right.

JUSTICE NATHAN L. HECHT: It seems that at the very least there's confusion. Why isn't that the lawyer's fault, just bottom line?

ATTORNEY ROBERT M. ROACH, JR.: If that confusion is really created by the client, it is not really created by the attorney.

JUSTICE NATHAN L. HECHT: Just a smoke screen to get out of that.

ATTORNEY ROBERT M. ROACH, JR.: That's right, that's right. I mean I think the question here is are we going to protect only clients form predatory lawyers or are we also going to have a rule that fairly protects lawyers from predatory clients? That happens. And these days, clients want to reduce the amount of fees they have to pay, I mean in almost all circumstances. But I can tell you that is a reality. And certainly there are times when clients, unscrupulous clients, will try to get a windfall and get out of paying the fees entirely. And with fiduciary duty law, we allow them to go after punitive damages, even when they weren't hurt. In a contingency fee deal that was successful, the lawyer performed all the work, the client got all the benefit, wasn't hurt, but if there is a fiduciary duty breech because of misunderstandings, confusions, whatever, we allow fee forfeiture and we allow punitive damage exposure to the attorneys.

JUSTICE DEBRA H. LEHRMANN: Can I ask whose malpractice insurance would have covered any negligence on Swonke's part?

ATTORNEY ROBERT M. ROACH, JR.: Well, Greenberg Peden had insurance for him while he was there.

JUSTICE DEBRA H. LEHRMANN: Even for independent services?

ATTORNEY ROBERT M. ROACH, JR.: Yes, absolutely. That was their nature of their of counsel relationship. Now, this is not in the record what I'm about to say, but, presumably, McConn Williams - he was under McConn Williams' insurance as an of counsel when he was at McConn Williams. I don't think that's in record, but I - you know that's the nature of his relationship and of all of counsels.

JUSTICE DALE WAINWRIGHT: Counsel, both you and your opposing Counsel have indicated that if there's fee owed, it from your standpoint worse case would go to Greenberg Peden than to you, and from their standpoint it only goes to Greenberg Peden. Was Greenberg Peden at the trial?

ATTORNEY ROBERT M. ROACH, JR.: Yes.

JUSTICE DALE WAINWRIGHT: Well didn't the jury find in question 1 that the fee agreement was entered not into with Greenberg Peden, but into on behalf of Swonke individually?

ATTORNEY ROBERT M. ROACH, JR.: Yes.

JUSTICE DALE WAINWRIGHT: Wouldn't that be a problem with trying to compel payment to Greenberg Peden?

ATTORNEY ROBERT M. ROACH, JR.: Well, of course, there was a release by Greenberg Peden. I mean Greenberg Peden has always said it's Jerry's money.

JUSTICE DALE WAINWRIGHT: Put the release to the side. When Anglo-Dutch says we'd owe the money to Greenberg Peden, can that happen given this jury finding?

ATTORNEY ROBERT M. ROACH, JR.: That's an interesting question. That's a very interesting question. I honestly can't answer that clearly because I - but I think what that does is implicate why did Van Dyke want this in the first place. I mean the scenario is Swonke says, hey, the deal's over, congratulations, here's - I'm going to submit to you my hours so you can pay me for all this time. He says Van Dyke never said wait a minute, I don't owe you individually. He said wait a minute, your agreement's on Greenberg Peden letterhead; I need you to get a release from Greenberg Peden, okay. And so in order to get paid, he does what the client insists. He does that. Now, was that part of a scheme by the client to avoid paying all fees because your scenario implicates that? I mean, otherwise, you know, why does he do that? So I think - I think there's more than reasonable evidence to believe that in this case and you know in other cases, there are situations where clients will try to take advantage of lawyers. I mean remember, in this case Jerry Swonke's name was taken off of the settlement payment list at Van Dyke's request, okay. He was supposed to get money and then they took it off. Van Dyke admits that he owed Greenberg Peden $300,000 for Swonke's time while at Greenberg Peden, but he does not put Greenberg Peden on the list. Greenberg Peden doesn't get paid either. So he keeps the money. I think you know from the record because it was in trial evidence and it's in the briefs how Mr. Van Dyke also tried to get all of his investors. He misled his investors into trying - into agreeing to give up some of their money too.

JUSTICE DON R. WILLETT: So your bottom line is all the murkiness, all the confusion here is traceable and is at the feet of a sneaky client and not the lawyer?

ATTORNEY ROBERT M. ROACH, JR.: Yes. Now, with not a caveat, but with one admission is, Justice Jefferson, this goes to your earlier question. Not a model of clarity to have Greenberg Peden on the letterhead and the signature block; I wouldn't say it. That's why we're here. But there is testimony from Greenberg Peden that they allowed him to do that on his own cases. They didn't have a problem with that. There are probably lots of firms that aren't going to have the kinds of rules that say you can't do that; it's a violation of our rules to do it. So does that alone create the kind of this is an unambiguous contract between us and the law firm. Now, Agency Law would be a complete mess if all you had to do was have Greenberg Peden - you know letterhead and signature block and that creates agency as a matter of law? What happened to consent and control, those elements under Agency Law? Especially where the client knows that there has been a rejection and refusal of consent by the punitive principle saying he's not going to be our agent for this transaction. So whether you look at just the document and I urge you in my last one second or so, to take a look at the substance of this agreement because it's not just personal pronouns. It is that every single trim of this agreement is personal to Jerry Swonke--the payment, the hours, or the fee are only Jerry Swonke. The work to be performed, the assistance, is only Jerry Swonke. And one last thought. And that is that the agreement separates out. This agreement, the text of it separates out individual Van Dyke from his clients. And Anglo-Dutch is a defined term in the very first paragraph, first sentence of this agreement. There is no reference to Greenberg Peden in the substance of this document. Greenberg Peden is never broken out or referenced. So clearly this agreement contemplated there would be a difference between an individual and his company with respect to one side, Anglo-Dutch, that does not have any comparable reference to Greenberg Peden and it's all personal. It's not just personal pronouns, it is - it's and the only lawyer who would be paid under this fee agreement is Jerry Swonke. If Jerry Swonke quit Greenberg Peden, it's not like Greenberg Peden could substitute somebody in under this contract and get paid because the payment formula is specific to one person, Jerry Swonke. Thank you, Your Honor.

CHIEF JUSTICE WALLACE B. JEFFERSON: Further questions? Thank you, Mr. Roach.

REBUTTAL ARGUMENT OF GREGORY S. COLEMAN ON BEHALF OF PETITIONER

JUSTICE DON R. WILLETT: Pull my signature block aside, letterhead aside, Mr. Roach says the confusion is traceable to your client and not to his.

ATTORNEY GREGORY S. COLEMAN: That's ridiculous. I'm sorry; that is utterly ridiculous. Mr. Van Dyke and Anglo-Dutch did not create this contract, did not put the signature block on or did not put it on firm letter-

head. Mr. Van Dyke and Anglo-Dutch are not the one who entered all of Mr. Swonke's times in Greenberg Peden's time system the entire time he was working on this not keeping it separately. Anglo-Dutch is not the one who submitted the expenses in the case while Mr. Swonke was at Greenberg Peden through the Greenberg Peden accounting system and sent Anglo-Dutch an invoice for those expenses on Greenberg Peden or through Greenberg Peden's thing and you know requested payment to Greenberg Peden. Mr. Van Dyke did send the very same day he signed this agreement, a confirmation letter saying that this is an agreement between Anglo-Dutch and Greenberg Peden, and Mr. Swonke said I never read it; it wasn't important to me to read my client's correspondence. Coming back to a point that has been made a couple of times during the argument, to the extent that there is any confusion, that confusion could have been very, very easily dispelled with one phone call if, in fact, Mr. Swonke ever believed that this was an agreement with him individually before the moment he realized he could get a million dollars more.

JUSTICE DEBRA H. LEHRMANN: But can I ask you, how are you going to get around the fact that it's not just the use of pronouns, but you know that the contingency fee was totally between Swonke's services in the form of a fraction of a recovery that was going to be received, and there was nothing in the contract that dealt with payment of staff like paralegal time and that kind of stuff? How can you get around that, that it's not just the pronouns?

ATTORNEY GREGORY S. COLEMAN: Justice Lehrmann, there is no need to get around it. You know, Exhibit 8 in my little handout is the contract that you looked at last year in the David J. Sacks case. I am honored to represent you; you have requested that I assist with the writing of the brief. There isn't anything there that says that anybody other than David J. Sacks personally is going to provide services. It's on firm letterhead, although it's signed personally David J. Sacks. There certainly is no argument there. And I'm not saying, right, that the Court made a mistake or the parties made a mistake there. What I am saying is that this type of language that says I'm going to provide services for you is completely inconsistent with an engagement letter with a firm. It can be that somebody says I want you to do this for me and the person says I'm going to do this for you and I work at this firm and so it's on - it's a firm contract because going back to the question earlier, partners, associates, and of counsel all owe fiduciary duties to the firm. This Court has decided that and so I do it through the firm. I may do it individually but there are certain requirements that firms would like to see. I believe that Mr. Roach is completely wrong in suggesting that if you sign an agreement, you know, Law Offices of Jerry Swonke, I'm doing this individually, it's not with the firm, that somehow the firm's malpractice coverage, in fact, covers you. I think that is clear that it doesn't because that's what these insurers ask for and look about - look for.

JUSTICE DALE WAINWRIGHT: Counsel, why did you not challenge the jury's finding that Swonke complied with his fiduciary duties to Anglo-Dutch? The jury said yes to that.

ATTORNEY GREGORY S. COLEMAN: We did in the Court of Appeals, but for purposes of coming to this Court and trying to limit the number of questions presented for this Court's consideration, we believe that at the end of the day we don't want to go back and try a new fraud case or a new fiduciary duty case. We want the central issue here to be resolved, which is who is this contract with and who do we owe money? We already paid McConn Williams millions of dollars. We paid every other lawyer on this case. Mr. Roach is trying to bring in accusations about bad advice that he received with respect to these plaintiff finance cases. The Courts have ruled on that issue; that's done. What's at issue here is this contract and this Court has said that the fiduciary duty between lawyer and client allows and requires the Courts to put the burden on the clients to clarify. This Court said that in Levine, in Hoover Slovacek, in Lopez, going all the way back to Archer. It is the burden of the Court and these relationships between attorney and client will work much better if we say, lawyer, you have the obligation to clarify this confusion or uncertainty that arises because you are the one that's in the know. This Court has said it many times. All we ask is that you apply that rule of law here and reverse the findings below.

CHIEF JUSTICE WALLACE B. JEFFERSON: Any further questions? Thank you, Counsel. The cause is sub-

mitted and the Court will take a brief recess.
MARSHALL: All rise.

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