

FORMER CLIENT, FIRM CLASH OVER CONTINGENT FEE

by JOHN COUNCIL

Attempts by a prominent Dallas plaintiffs firm to recover a contingent fee from a former client who ended up taking his medical malpractice case to a lawyer outside of that firm were “unconscionable as a matter of law,” Fort Worth’s 2nd Court of Appeals recently ruled.

The Feb. 6 decision in *Law Offices of Windle Turley v. Robert L. French, et al.* stems from an unusual long-running dispute in which clients took a case away from the Law Offices of Windle Turley (LOWT) and then tried unsuccessfully to take it back to the firm.

In a 2-1 opinion, the 2nd Court found that LOWT was entitled to recover from the former client the out-of-pocket expenditures incurred for preparing the case but not the contingent fee the firm ultimately could have been entitled to based on the damages awarded to the client at trial.

According to the opinion, LOWT attorney Michael Sawicki filed the med-mal suit on the French family’s behalf in 1997 and served as lead counsel in the suit until he left the firm in 2000. In their suit, the Frenches alleged that a family practitioner had failed to diagnose their mother’s cerebellar hemorrhage and she died.

After Sawicki left the firm, LOWT lawyer John Kirtley took over the case on the firm’s behalf, according to the 2nd Court’s opinion. Robert L. French subsequently took the case to Sawicki and his new firm because he was concerned over Kirtley’s alleged lack of experience in medical-mal-

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practice litigation, according to the opinion.

French offered to reimburse LOWT for its out-of-pocket expenses and urged the firm to work out a "joint venture fee agreement" with Sawicki, according to the opinion. But LOWT filed a notice of assignment of attorneys' fees, asserting that the Frenches had terminated the contingent-fee contract without good cause and therefore the firm was entitled to recover the full contingent fee — 40 percent of

when the trial judge in Tarrant County's 141st District Court signed a judgment awarding them \$550,212, according to the 2nd Court's opinion.

A month after the verdict, LOWT filed a motion for summary judgment on its petition in intervention with the trial court to collect the contingent fee, and the Frenches also filed a motion for summary judgment. The trial court granted the Frenches motion, but denied LOWT's.

The firm subsequently appealed to the 2nd Court, which reversed the trial court's order granting summary judgment for the Frenches and awarded LOWT \$32,585 in "out-of-pocket" expenses from the Frenches. However, the court decided the firm was not entitled to recover a contingent fee for the Frenches case.

"While a client's breach of a fee agreement may excuse the attorney from performing thereunder, it does not entitle the attorney to the full contractual fee," Chief Justice John Cayce wrote for the majority. "Here, LOWT was not damaged by being prevented from performing because it had clearly had the opportunity to perform, but chose not to."

LOWT's refusal to take the case back put the Frenches "in a no-win situation of having to give up their lawsuit, represent themselves pro se, find an attorney who would represent them for nothing, or pay the bulk of their recovery in attorney's fees," wrote Cayce, who was joined by Justice Sam Day.

"Under these circumstances, we do not believe that a competent lawyer could form a reasonable belief that LOWT's attempt to recover its contingency fee is reasonable. Therefore, we hold that LOWT's attempt to recover its contingent fee is unconscionable as a matter of law," wrote Cayce, citing Texas Rule of Professional Conduct 1.04 (a).

In a dissenting opinion, Justice Lee Ann Dauphinot wrote that the trial court improperly granted summary judgment on the attorney fee issue.

"I believe a genuine issue of material fact was raised as to whether LOWT had the opportunity to perform and as to whether LOWT had the opportunity to mitigate its damages," Dauphinot wrote. "I also believe that LOWT raised a genuine issue of material fact as to whether the Frenches had good cause to terminate the contract."

Lesson Learned

Windle Turley, principal of LOWT, is not pleased with the 2nd Court's decision.

"It's a troubling path that the courts are going down as to the attorneys' validity of their contracts with their clients," Turley says, declining to comment further on the case or on his firm's possible plans for appeal.

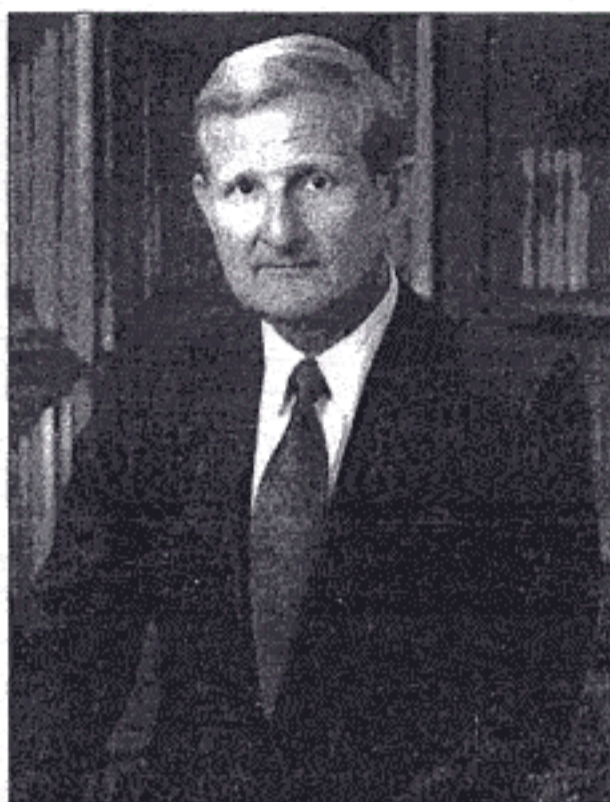
Former LOWT associate Kirtley, who is now an associate with Dallas' Ferrer, Poirot & Wansbrough, says he's also disturbed by the majority opinion's conclusion. Kirtley maintains he had enough experience to try the case, despite the Frenches' allegations.

"This is absolutely an appalling decision as it relates to the law of assignments and contingency contracts," Kirtley says. "I think that this opinion is so results-oriented that it has emasculated 32 years of Texas Supreme Court precedent. And I think this opinion is bad for clients, and it's certainly bad for attorneys."

Kirtley alleges French's attempts to take the case back to Turley were "nothing more than a veiled attempt to set Mr. Turley up on an abandonment theory. Because where's the logic in someone saying that they don't think an attorney is qualified to handle their case" filing a grievance against the firm and then saying "I want you to represent me again."

Sawicki, now a partner in Dallas' Brown Sawicki & Mitchell, says the majority opinion correctly reflected the situation his clients were in after LOWT refused to take their case back.

"I want to make one thing clear: The Frenches never tried to cut him [Turley] out of his fee. But he took the position that he was entitled to everything," Sawicki says. "That



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puts the Frenches in an impossible situation. They can either stay with an attorney that they no longer trust, try their cases themselves, or find someone who would be willing to try it for free. Ultimately it's not fair to the client."

"It's like going to a restaurant and telling the waiter that you don't like the food and being told you have to eat it all," Sawicki says.

Chuck Herring, a legal ethics expert and partner in Austin's Herring & Irwin, says the decision may cause the Texas Supreme Court to re-examine its 1969 opinion in *Mandell & Wright v. Thomas*. In that case, the court found that when a client discharges an attorney without good cause before work has been completed, the attorney may recover on the contract for the amount of his compensation.

"The Supreme Court has shown some interest in the area," Herring says. "And this case may give the court an opportunity to clarify how the rules might apply to a fairly common situation in Texas and to revisit *Mandell & Wright*."

Rogge Dunn, a partner in Dallas' Clouse Dunn & Hirsch who handles lawyer partnership and attorney fee disputes, says French puts an interesting twist on a common conflict — disputes between clients and attorneys on contingent-fee contracts.

"The law in Texas is [that] if the client doesn't have a good cause for leaving the attorney, that the attorney can collect the fee," Dunn says. "What makes this case different is that the client fires the lawyer apparently with good cause. And the client wants the firm to take it back and the firm won't take it back."

Dunn notes: "I think the lesson to be learned is that if you want to continue to collect your contingency attorney fees and your client wants you to take the case back, you better take the case back."

John Council's e-mail address is:
jcouncil@texaslawyer.com.

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the recovery if the case settled 10 days before trial and 45 percent thereafter — according to the opinion.

As a result, months before trial, French repeatedly asked LOWT to take the case back but it refused, in part because French filed a grievance against the firm with the State Bar of Texas over the "maintenance of its lien in the Frenches' case" — a complaint the Texas Supreme Court Board of Disciplinary Appeals ultimately dismissed — according to the opinion.

After LOWT refused to take the case back, the Frenches returned to Sawicki for representation. In January 2001, the Frenches prevailed in the med-mal case

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