IN THE SUPREME COURT OF TEXAS

NO. 07-0815

INTERCONTINENTAL GROUP PARTNERSHIP, PETITIONER,

v.

KB HOME LONE STAR L.P., RESPONDENT

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

Argued March 12, 2009

JUSTICE BRISTER, joined by JUSTICE O'NEILL, JUSTICE WAINWRIGHT and JUSTICE MEDINA, dissenting.

You would hardly know it from the Court's opinion, but the only question in this case is what the parties intended in a contract providing attorney's fees for "the prevailing party." In the rush to find a simple answer, the Court grabs the nearest tool at hand: federal and state laws using the same words. But legislative intent (which forms the basis of the companion case decided today[1]) is not the same as the parties' intent, unless the parties intended to adopt the same meaning—and there is

[1] *See MBM Fin. Corp. v. Woodlands Operating Co.*, ___ S.W.3d ___ (Tex. 2009).

no evidence here that they did. To the contrary, we must presume they did not, as the defendant filed only a partial reporter's record with no statement of points.[2]

The judgment here granted the plaintiff KB Home no damages, but, as the Court admits, "nothing in the contract expressly requires that a party receive any amount of damages" before recovering its fees.[3] The contract provided fees to the prevailing party in an action "to declare rights hereunder," and the judgment here declared that the defendant Intercontinental breached the contract. This alone was enough to justify the fee award.

KB Home's victory in the trial court was not Pyrrhic—that is, a victory "won at excessive cost."[4] Until now, this suit cost KB Home nothing because the jury assessed fees against its opponent. It hardly seems fair to declare that KB Home gained nothing by this suit *after* setting aside the part of the jury verdict and judgment in which it gained something.

I agree with the court of appeals that under this contract, "liability, not damages, is the appropriate indicator of which party has prevailed in litigation."[5] Accordingly, I would affirm the judgment for the plaintiff; because the Court does otherwise, I respectfully dissent.

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[2] *See Feldman v. Marks*, 960 S.W.2d 613, 614 (Tex. 1996) (per curiam) ("If an appellant fails to present a complete statement of facts on appeal, the appellate court must presume that the omitted portions are relevant and support the trial court's judgment."); TEX. R. APP. P. 34.6(c)(1).

[3] ___ S.W.3d at ___ (quotation marks omitted).

[4] WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1855 (2002).

[5] ___ S.W.3d at ___.

I. "To Declare Rights Hereunder"

Texas follows "the American Rule" prohibiting recovery of attorney's fees unless provided by contract or statute.[6] As this fee award depends entirely on a contract, we must start with the contract's terms:

> Attorney's Fees. If either party named herein brings an action to enforce the terms of this Contract or to declare rights hereunder, the prevailing party in any such action, on trial or appeal, shall be entitled to his reasonable attorney's fees to be paid by [the] losing party as fixed by the court.

Even if "prevailing party" status usually requires an award of money damages (which, as shown below, it does not), this contract precludes such an interpretation for three reasons. First, the contract provides fees for a prevailing *defendant* as well as a prevailing *plaintiff*. A defendant with no counterclaim could never recover money damages, yet under this contract would be entitled to recover its attorney's fees anyway.

Second, the contract provides for fees in actions "to declare rights hereunder." An action to "declare rights" is not an action for money damages; a declaratory judgment may be rendered on liability alone without any reference to damages.[7] The Court says KB Home did not obtain a judgment declaring its rights, but that is not what the judgment itself says. After detailing the jury's verdict, the judgment explicitly states on page 4 that Intercontinental "failed to comply with the Santa Clara Lot Contract" and its "failure to comply was not excused." What more could a judgment say to declare the parties' contractual rights?

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[6] *Tony Gullo Motors I, L.P. v. Chapa*, 212 S.W.3d 299, 310-11 (Tex. 2006).

[7] *CU Lloyd's of Tex. v. Feldman*, 977 S.W.2d 568, 569 (Tex. 1998) (per curiam) ("When the relief sought is a declaratory judgment, an appellate court may properly render judgment on liability alone.").

Third, a party with no damages can still bring an action "to enforce the terms" of a contract. Since its earliest days, Texas law has provided that a party who has suffered no damages may still obtain nominal damages for breach of contract.[8] A party with no damages may also seek rescission or specific performance.[9] Money damages may be indispensable in contract claims *seeking money damages*, but not for contract claims seeking something else.

The Court says "[a] stand-alone finding on breach confers no benefit whatsoever."[10] But this judgment did not rescind the contract or render it void, and there was no evidence all the lots in Santa Clara had been sold. While KB Home did not request specific performance, that does not mean either party no longer has to perform. Before suit was filed, Intercontinental acted as if it were excused from the contract; this judgment says it is not. That seems to me precisely the kind of "judicially sanctioned change in the legal relationship of the parties"[11] that makes KB Home at least partly the winner.

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[8] *See, e.g.*, *Lubbock Mfg. Co. v. Sames*, 598 S.W.2d 234, 237 (Tex. 1980); *Malakoff Gin Co. v. Riddlesperger*, 192 S.W. 530, 532 (Tex. 1917); *Porter v. Kruegel*, 155 S.W. 174, 175 (Tex. 1913); *Raymond v. Yarrington*, 73 S.W. 800, 804 (Tex. 1903); *Davis v. Tex. & P. Ry.*, 44 S.W. 822, 823 (Tex. 1898); *Seibert v. Bergman*, 44 S.W. 63, 64 (Tex. 1898); *East Line & Red River R.R. v. Scott*, 10 S.W. 99, 102 (Tex. 1888); *Stuart v. W. Union Tel. Co.*, 18 S.W. 351, 352 (Tex. 1885); *Moore v. Anderson*, 30 Tex. 224, 231 (1867); *Hope v. Alley*, 9 Tex. 394, 395 (1853); *McGuire v. Osage Oil Corp.*, 55 S.W.2d 535, 537 (Tex. Comm'n App. 1932, holdings approved); *see also* Note, *Pleading—Necessity of Damage to Cause of Action*, 9 TEX. L. REV. 111, 112 (1930) (citing cases).

[9] *See, e.g.*, *DiGiuseppe v. Lawler*, 269 S.W.3d 588, 594 (Tex. 2008) (specific performance); *Country Cupboard, Inc. v. Texstar Corp.*, 570 S.W.2d 70, 73-74 (Tex. Civ. App.—Dallas 1978, writ ref'd n.r.e.) (rescission).

[10] ___ S.W.3d at ___.

[11] *See Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 605 (2001); *id.* at 615 (Scalia, J., concurring) (stating that "prevailing party" has "traditionally" and "invariably" meant "the party that wins the suit or obtains a finding (or an admission) of liability").

The Court avoids the parties' contract by looking entirely to federal and state statutory law, but those laws are drafted differently. In Texas, statutory attorney's fees for breach of contract require a monetary recovery because the statute provides for fees only when recovered "in addition to the *amount* of a valid claim."[12] The federal Declaratory Judgment Act does not authorize attorney's fees,[13] so the Supreme Court cases said to be "helpful in this area" all concern federal statutes attaching attorney's fees to a damages claim.[14] Of course, the Supreme Court's views are not just "helpful" but *binding* when we construe those federal statutes. But that is not the case when we apply Texas law to construe a Texas contract whose terms differ from any existing federal or state law. As there is no evidence the parties contracted with reference to these statutes or cases, relying on them simply replaces the parties' intent with someone else's.

I agree that if a statute of limitations or some other affirmative defense barred KB Home's contract claim, it could not be the prevailing party. But the judgment in such a case would declare that KB Home had no contractual rights due to that affirmative defense. By contrast, the absence of damages does not preclude a declaration that KB Home has a right to contract performance.

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[12] TEX. CIV. PRAC. & REM. CODE § 38.001 (emphasis added); *see MBM Fin. Corp. v. Woodlands Operating Co.*, ___ S.W.3d ___, ___ (Tex. 2009); *Mustang Pipeline Co. v. Driver Pipeline Co.*, 134 S.W.3d 195, 201 (Tex. 2004) (per curiam); *Green Int'l, Inc. v. Solis*, 951 S.W.2d 384, 390 (Tex. 1997); *State Farm Life Ins. Co. v. Beaston*, 907 S.W.2d 430, 437 (Tex. 1995).

[13] *See AG Acceptance Corp. v. Veigel*, 564 F.3d 695, 701 (5th Cir. 2009) (noting the federal Declaratory Judgment Act, 28 U.S.C. §§ 2201-2202, authorizes attorney's fees only if state substantive law provides for them); *see also Camacho v. Tex. Workforce Comm'n*, 445 F.3d 407, 409-12 (5th Cir. 2006) (holding Texas Declaratory Judgment Act does not represent "state substantive law").

[14] *See County of Dallas v. Wiland*, 216 S.W.3d 344, 358 n.61 (Tex. 2007) (addressing attorney's fees provided by 42 U.S.C. § 1988); *Sw. Bell Mobile Sys., Inc. v. Franco*, 971 S.W.2d 52, 55-56 (Tex. 1998) (per curiam) (addressing attorney's fees provided by Texas Labor Code § 21.259, a statute intended to effectuate Title VII of the federal Civil Rights Act, *see id.* § 21.001); *Grounds v. Tolar Indep. Sch. Dist.*, 856 S.W.2d 417, 423 (Tex. 1993) (Gonzalez, J., concurring) (addressing attorney's fees provided by 42 U.S.C. § 1988).

Reading this contract as a whole, the parties never intended zero damages to mean zero attorney's fees.

II. "Prevailing Party"

There is a another reason KB Home is entitled to attorney's fees under this contract and this judgment: it was the "prevailing party" as that term is understood in Texas law. The contractual context here shows the parties did not intend "prevailing party" to require damages, but the term itself would require the same conclusion regardless of context.

When looking for common and ordinary meanings of legal terms, we routinely refer to Black's Law Dictionary,[15] which defines "prevailing party" as "[a] party in whose favor a judgment is rendered, *regardless of the amount of damages awarded*."[16] By ignoring the second phrase and making the $0 damage award dispositive, the Court departs from the ordinary meaning of "prevailing party."

Earlier editions of Black's from the 1960s until the 1990s included an additional qualifier—that "prevailing party" should focus on the "main issue" in the litigation:

> **Prevailing party**. The party to a suit who successfully prosecutes the action or successfully defends against it, *prevailing on the main issue*, even though not necessarily to the extent of his original contention.[17]

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[15] *See, e.g.*, *Ingram v. Deere*, ___ S.W.3d ___, ___ (Tex. 2009); *Entergy Gulf States, Inc. v. Summers*, 282 S.W.3d 433, 437-38, 441 (Tex. 2009); *Guitar Holding Co. v. Hudspeth County Underground Water Conservation Dist. No. 1*, 263 S.W.3d 910, 916 n.6 (Tex. 2008); *Hyundai Motor Co. v. Vasquez*, 189 S.W.3d 743, 751 n.33 (Tex. 2006); *Am. Mfrs. Mut. Ins. Co. v. Schaefer*, 124 S.W.3d 154, 158-59 (Tex. 2003).

[16] BLACK'S LAW DICTIONARY 1154 (8th ed. 2004) (emphasis added).

[17] BLACK'S LAW DICTIONARY 1188 (6th ed. 1990) (emphasis added); *see also* BLACK'S LAW DICTIONARY 1069 (5th ed. 1979); BLACK'S LAW DICTIONARY 1352 (4th ed. 1968).

This "main issue" qualification has been adopted by 11 of the 14 courts of appeals in Texas.[18]

In this litigation, there is no doubt the main issue was the defendant Intercontinental's counterclaim. The parties' contract reserved every lot in the Santa Clara subdivision for KB Home, and Intercontinental conceded it sold some of those lots to third parties. Thus, the main issue was not whether Intercontinental had breached the contract; it clearly had. Instead, the main issue was whether that breach was excused by KB Home's refusal to buy lots at high prices elsewhere in return

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[18] 1st: *Indian Beach Prop. Owners' Ass'n v. Linden*, 222 S.W.3d 682, 696-97 (Tex. App.—Houston [1st Dist.] 2007, no pet.); *Weng Enters., Inc. v. Embassy World Travel, Inc*., 837 S.W.2d 217, 222-23 (Tex. App.—Houston [1st Dist.] 1992, no writ).

2nd: *Taylor Elec. Servs., Inc. v. Armstrong Elec. Supply Co.*, 167 S.W.3d 522, 532-33 (Tex. App.—Fort Worth 2005, no pet.); *Head v. U.S. Inspect DFW, Inc*., 159 S.W.3d 731, 749 (Tex. App.—Fort Worth 2005, no pet.).

3rd: *Lay v. Whelan*, No. 03-03-00115-CV, 2004 WL 1469246, at *6 (Tex. App.—Austin July 1, 2004, pet. denied); *Cysco Enters., Inc. v. Hardeman Family Joint Venture, Ltd.*, No. 03-02-00230-CV, 2002 WL 31833724, at *6 (Tex. App.—Austin Dec. 19, 2002, no pet.).

4th: *City of Laredo v. Almazan*, 115 S.W.3d 74, 78 (Tex. App.—San Antonio 2003, no pet.).

5th: *Blockbuster, Inc. v. C-Span Enter., Inc*., 276 S.W.3d 482, 491 (Tex. App.—Dallas 2008, pet. granted); *In re M.A.N.M.*, 231 S.W.3d 562, 566 (Tex. App.—Dallas 2007, no pet.); *Probus Props. v. Kirby*, 200 S.W.3d 258, 265 (Tex. App.—Dallas 2006, pet. denied).

6th: *Moore v. Jet Stream Invs., Ltd.*, 261 S.W.3d 412, 431 n.15 (Tex. App.—Texarkana 2008, pet. denied); *In re Estate of Bean*, 206 S.W.3d 749, 764 (Tex. App.—Texarkana 2006, pet. denied).

7th: *Brent v. Field*, 275 S.W.3d 611, 622 (Tex. App.—Amarillo 2008, no pet.); *Dean Foods Co. v. Anderson*, 178 S.W.3d 449, 454 (Tex. App.—Amarillo 2005, pet. denied).

8th: *Guitar Holding Co. v. Hudspeth County Underground Water Conservation Dist. No. 1*, 209 S.W.3d 146, 168 (Tex. App.—El Paso 2006), *rev'd on other grounds*, 263 S.W.3d 910 (Tex. 2008).

12th: *Robbins v. Capozzi*, 100 S.W.3d 18, 27 (Tex. App.—Tyler 2002, no pet.).

13th: *Pegasus Energy Group, Inc. v. Cheyenne Petroleum Co.*, 3 S.W.3d 112, 128 (Tex. App.—Corpus Christi 1999, pet. denied); *Norrell v. Aransas County Navig. Dist. No. 1*, 1 S.W.3d 296, 303 (Tex. App.—Corpus Christi 1999, pet. dism'd).

14th: *4901 Main, Inc. v. TAS Auto., Inc*., 187 S.W.3d 627, 634 (Tex. App.—Houston [14th Dist.] 2006, no pet.); *Emery Air Freight Corp. v. Gen. Transp. Sys., Inc*., 933 S.W.2d 312, 316 (Tex. App.—Houston [14th Dist.] 1996, no pet.).

for buying at low prices in Santa Clara. The jury rejected that counterclaim, so KB Home was the prevailing party on the main issue in this litigation.[19]

The Court rejects main-issue analysis (although adopted by virtually every other Texas court) because Intercontinental's counterclaim was not "an action to enforce the terms of *this* Contract."[20] But to recover on this contract, KB Home had to prove it had not been orally amended by another. As we held in *Varner v. Cardenas*, attorney's fees for enforcing a contract include those incurred overcoming counterclaims raised in defense.[21]

Oddly, the Court's opinion today means Intercontinental was the prevailing party, even though it was the only party that breached. The Court avoids awarding Intercontinental attorney's fees on the ground that it failed to preserve error. But future contract breakers may not make the same mistake. It is hard to see the justice in reading this common contract provision to provide attorney's fees for the party that committed the breach.

The Court's rule also ignores the reality that everybody incurs costs when a contract fails. Breach of contract damages include lost profits (expectancy), out-of-pocket expenses (reliance), and restitution;[22] most litigants pursue only lost profits as that is normally the largest measure. But

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[19] *See Cysco Enters.*, 2002 WL 31833724, at *6 (holding defendant was prevailing party on main issue even though jury awarded it no damages on its counterclaim).

[20] ___ S.W.3d at ___.

[21] *See* 218 S.W.3d 68, 69 (Tex. 2007) (per curiam).

[22] RESTATEMENT (SECOND) OF CONTRACTS § 344 (1981); *see Quigley v. Bennett*, 227 S.W.3d 51, 56 (Tex. 2007) (Brister, J., concurring in part and dissenting in part); Lon L. Fuller & William R. Perdue, *The Reliance Interest in Contract Damages*, 46 YALE L.J. 52, 56 (1936).

today's ruling requires parties to sue for all of them, no matter how small, to make sure they will "prevail" by receiving some kind of money judgment.

The Court's no-damages/no-fees rule is certainly easy to apply, but making life easy for judges is not a rule of contract construction.[23] Whether a party prevailed in litigation is a mixed question of law and fact. Perhaps in some cases a $1 recovery represents a substantial victory for the plaintiff, but in most cases it represents a total loss; treating every plaintiff who wins $1 as a prevailing party is not what most people intend when they sign a contract like this.

The contract here called for attorney's fees to be "fixed by the court," and the trial judge awarded them to KB Home. With only a partial trial record, we must presume that was right.

IV. Conclusion

I agree there is little reason to encourage suits by those who have suffered no damages solely so an attorney can recover a large fee. But that is not the way litigation usually works, or what occurred here. Lost profits from a venture that failed are always hard to assess, so litigants often believe they have been damaged until a jury tells them they have not. I would not punish such litigants for failing to prove damages unless that is what their contract requires.

Markets, especially in real estate, can rise or fall substantially in a very short time. Under the Court's interpretation, the "prevailing party" entitled to attorney's fees may depend precisely upon those swings, not upon who was in the wrong. That may be a reasonable way to draft a statute,

[23] I do not know what the Court means when it says the Supreme Court's opinion in *Buckhannon* "basically held 'no money judgment, no fees.'" ___ S.W.3d at ___ n.26. The question in *Buckhannon* was not money judgments but collateral consequences—whether legislative action apart from any judgment could make a litigant the prevailing party.

but that is not what the parties contracted for here. Accordingly, I would affirm the judgment of the trial court and court of appeals.

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Scott Brister
Justice

OPINION DELIVERED: August 28, 2009