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SUPREME COURT OF TEXAS
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No. 20-0066

In the Supreme Court of Texas

HAYNES AND BOONE, LLP AND ARTHUR L. HOWARD,
PETITIONERS,

V.

NFTD, LLC F/K/A BERNARDO GROUP, LLC, BERNARDO HOLDINGS, LLC, PETER J. COOPER, AND JACQUELINE MILLER,
RESPONDENTS.

On Petition for Review from the Fourteenth Court of Appeals
Court of Appeals No. 14-17-00999-CV

RESPONDENTS' BRIEF ON THE MERITS

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DEFINITIONS OF PARTIES TO SIMPLIFY THE BRIEF

The litigation below involves the sale of the Bernardo women's footwear business assets, including its design patents, from "Bernardo 1" to "Bernardo 2." The parties will be referenced in this Brief as follows:

- **"Lawyers" –** Petitioners Arthur Howard and Haynes and Boone LLP, third-party defendants below. Their client was Bernardo 1.
- **"Bernardo 1" –** Formally named TEFKAB Footwear, LLC f/k/a Bernardo Footwear, LLC. Bernardo 1 was the original owner/seller of the Bernardo footwear assets, including the design patents, which were purchased by Respondents (*i.e.*, Bernardo 2). The Lawyers represented Bernardo 1 in the transaction.
- **"Bernardo 2"** – The Respondents, formally named NFTD, LLC f/k/a Bernardo Group, LLC, Bernardo Holdings, LLC, and Peter J. Cooper. Bernardo 2 was the purchaser of the Bernardo assets from Bernardo 1.

STATEMENT OF THE CASE

Nature of the case	Multi-party litigation over the sale of patent assets that were represented by Petitioners and their client to be enforceable, when they were not. After critical information was obtained by discovery, Respondent Bernardo 2 as buyer of the assets filed a third-party petition against Petitioner Lawyers, who had represented the seller Bernardo 1, alleging claims for fraud and negligent misrepresentation in a business transaction under RESTATEMENT (SECOND) OF TORTS §552. Lawyers pleaded attorney immunity as an affirmative defense.
Trial Court	269th Judicial District Court of Harris County, Texas, Hon. Dan Hinde presiding.
TC Disposition	Summary judgment granted in favor of Lawyers on Bernardo 2's fraud claims. Lawyers then filed a plea to the jurisdiction on Bernardo 2's claim for negligent misrepresentation under RESTATEMENT (SECOND) OF TORTS §552, which the trial court granted, dismissing the §552 claims with prejudice.
Court of Appeals	Houston Fourteenth Court of Appeals (Justice Meagan Hassan, joined by Justices Christopher and Poissant).
COA Disposition	The Court of Appeals reversed and remanded the trial court's orders granting the Lawyers' summary judgment motion and plea to the jurisdiction. The court analyzed the policy issues and canvassed Texas law, determined that no Texas case *on its facts* extended attorney immunity beyond the litigation context, and thus held that attorney immunity does not apply to fraudulent conduct by a lawyer toward a nonclient in a business transaction. *NFTD, LLC v. Haynes & Boone, LLP*, 591 S.W.3d 766 (Tex. App. – Houston [14th Dist.] 2019, pet. filed).

STATEMENT OF JURISDICTION

Respondent Bernardo 2 does not dispute this Court's jurisdiction and discretion to review the case. The attorney immunity defense is important to the jurisprudence of the State for the general public, businesses, and the legal profession.

As discussed below, however, the purported "conflicts" cited by Petitioners while invoking this Court's jurisdiction are illusory. Neither the stray dicta in the Dallas and Austin opinions nor the (erroneous) "*Erie* guess" by the Fifth Circuit creates the conflict—and resulting parade of horribles—depicted by Petitioners. For over a century, Texas courts have ably distinguished between litigation and non-litigation contexts for purposes of applying the attorney immunity doctrine. *See, e.g.*, *Bethel v. Quilling, Selander, Lownds, Winslett & Moser, P.C.*, 595 S.W.3d 651 (Tex. 2020) (repeatedly framing limits of attorney immunity based on whether the alleged wrongful actions were taken in connection with representing a client "in litigation"). Petitioners' request for blanket immunity for lawyers in all contexts represents a stark departure from that settled rule.

ISSUES PRESENTED

1. Should attorney immunity be expanded beyond litigation or the litigation-related context to shield lawyers from liability for their fraudulent conduct toward a nonclient in a purely business transaction?

2. Should attorney immunity be expanded to shield lawyers from claims by nonclients for negligent misrepresention in a business transaction under the elements set out in RESTATEMENT (SECOND) OF TORTS §552 (thereby effectively overturning this Court's 1999 holding in *McCamish*[1])?

3. Is attorney immunity a procedural bar to suit making it subject to a plea to the jurisdiction (as argued by the Lawyers below)? [*Unbriefed and not addressed by the Fourteenth Court of Appeals given the disposition of the appeal*].

[1] *McCamish, Martin, Brown & Loeffler v. F.E. Appling Interests*, 991 S.W.2d 787 (Tex. 1999).

STATEMENT OF FACTS

This lawsuit arises out of a business transaction in which the lawyer-defendants—who were transactional lawyers—represented the seller. It is undisputed the Lawyers' representation was not connected with actual or potential litigation; this was purely a business deal.

Having been pressed by his Haynes and Boone partner to collect serial unpaid invoices, attorney Arthur Howard was the architect of a fraudulent business scheme for the sale of his client's "Bernardo" women's footwear business that included a number of key design patents Howard knew were unenforceable. Howard's scheme produced the desired result – a sale of the company's tainted assets from Howard's client Bernardo 1 to Respondent Bernardo 2. That sale generated enough cash from the unsuspecting buyer, Bernardo 2, to pay off the nearly one-half million dollars of past-due legal fees that Bernardo1 had owed to Haynes and Boone ("H&B"). (*see generally* 2CR306).

A. OVERVIEW OF THE "BERNARDO" BUSINESS AND THE TWO ASSET SALES.

The Bernardo name covers an iconic brand of women's footwear that was established in 1946 and featured in Vogue and Harper's Bazaar. (2CR577). Bernardo's trendy sandals were worn by Jacqueline Kennedy Onassis and Twiggy. Bernardo 1 acquired the Bernardo name and business in 2001. (2CR445, 578).

The underlying claims revolve around two separate asset sales of the Bernardo

business, first from Bernardo 1 to Bernardo 2, then from Bernardo 2 to Bernardo 3:

- Asset sale no. 1: The first sale occurred in September 2011, wherein **Bernardo 1** sold the Bernardo assets, including multiple design patents for Bernardo footwear, to Respondent **Bernardo 2**. The Petitioner **Lawyers** represented Bernardo 1 in this transaction.

- Asset sale no. 2: The second sale occurred in February 2014, wherein **Bernardo 2** participated in the sale of the Bernardo assets, including the same design patents, to **Bernardo** 3 (involved in the litigation but not this appeal).

(1CR284-305).[2] Key to both asset sales were five design patents that should have protected several popular sandal designs from being knocked-off in the cutthroat fashion industry. Nine months *after* asset sale no. 2, however, both Bernardo 3 and Bernardo 2 discovered that these five important and valuable sandal design patents were, in fact, totally unenforceable and worthless. (1CR5-11 at ¶¶9, and 24-25; 2SuppCR6-7). Litigation ensued as explained below.

B. THE LAWYERS WITH MR. HOWARD IN THE LEAD BECOME BERNARDO 1'S COUNSEL IN 2009 (TWO YEARS BEFORE ASSET SALE NO. 1).

In 2002, when the founder of Bernardo 1 passed away, the founder's son, Roy Smith, III ("Trae Smith"), began running the company, and did so until 2009. (2CR366-67 at pp. 7, 8 and 11). Effective August 6, 2009, however, Trae Smith was terminated from his chief executive position. (2CR416). The person who terminated Trae was Bernardo 1's brand new lawyer, Petitioner Arthur Howard, and partner at

[2] The "Definitions of Parties to Simplify the Brief," set out above at p. ix, identifies the litigants by their full names.

the time with co-Petitioner H&B. (2CR367-6 at pp. 11-14). Howard was a transactional lawyer, not a litigator. (2CR342 at pp. 14-15). On the same day he terminated Trae Smith, Howard prepared a corporate notice stating that Bernardo 1 under its new management (*i.e.*, Trae's mother) had engaged the Lawyers to "represent the Company and communicate concerning any and all business, financial and legal matters related to the Company." (emphasis added). (2CR417; 2CR368 at pp. 14-16). With this management change, Howard and H&B replaced Bernardo 1's long-standing corporate counsel, James Hansen. (2CR373-74 at pp. 65-66).

Trae Smith's sudden termination and the replacement of long-time counsel Hansen created an information gap within Bernardo 1. (2CR354 at p. 89). Wilma Jean Smith, one of the new member managers (and Trae's mother), had never been involved in the business before. (2CR372 at p. 59). The other member manager, Dennis Comeau, was the creative shoe designer who lived in New Mexico, but "he didn't really run it." (2CR375 at p. 71). Lacking experience and faced with unfamiliar challenges, both Mrs. Smith and Comeau were in a crisis mode. (2CR373 at p. 64; 2CR375 at p. 71). Howard seized the moment. He and other lawyers at H&B billed nearly 200 hours to Bernardo 1 at rates as high as $600/hour in the first two months. (2CR418-26; 2CR427-37). In the midst of these events, for no apparent reason given the modest size of the company, Howard designated H&B as "Special Investigative Counsel" to the new board of Bernardo 1, following from which he

conducted an "internal investigation" and prepared a 132-page Investigative Report on H&B letterhead. (2CR438-569; 2CR368-69 at pp. 17-19).

C. LAWYERS LEARN THAT BERNARDO 1'S KEY PATENTS ARE UNENFORCEABLE (WHICH THEY LATER CONCEAL FROM BERNARDO 2).

When the Lawyers began representing Bernardo 1 in August 2009, they learned of a no-longer-pending malpractice lawsuit that Bernardo 1 had filed against its former Maryland I.P. lawyers. (2CR386-413; 2CR342-43 at pp. 17-18). Bernardo 1 alleged in its malpractice suit that it had to dismiss a patent infringement lawsuit against Olem Shoe Company when it learned realized that the application for the patent-in-suit was filed too late for the patents-in-suit and was thus unenforceable. (2CR393). In the lawsuit, Bernardo 1 stated that "all patents for all [Bernardo 1's] products were worthless by not being timely filed."[3] (*Id*.) (emphasis added). The worthless/unenforceable design patents are referred to herein as the "Patents." Howard became aware of the Maryland malpractice lawsuit from his paralegal on August 31, 2009. (2CR422 at 8/31/09 time entry). Mr. Howard billed a total of 4.30 hours that day. (*Id*.). On September 3, 2009, Howard billed time to "matters handled by prior counsel affecting IP, . . .". (2CR428).

On September 4, 2009, Bernardo 1's outgoing lawyer, James Hansen, whom

[3] Bernardo 1's malpractice lawsuit against the Maryland lawyers involved the following unenforceable design patents: D495,855 S1; D496,147 S1; D508,305 S1; D487,183 S1; and D489,517 S1.

Howard and H&B had just replaced, sent an attorney-client privileged memorandum to Howard to bring him up to speed on all of Bernardo 1's legal affairs. (2CR378-85; 2CR347 at p. 38). In the section regarding cases handled by other attorneys, the memorandum included the following disclosures to Howard about the Patents:

> 4) OTHER ATTY
> Olem Shoes---This was handled by Elton Dry, a patent atty as design infringement claim relating to Olem's knock off of Client's Miami sandal; a BIG seller. In discovery, Dry learned **Client's patent applic filing was tardy, and a bar to ehorcing [*sic.*] the Olem claim**. Suit was quickly dismissed, in fed court, and Client pursued the patent attys.
>
> 5) OTHER ATTY
> Rose, et al. --- **This Maryland based legal malpractice/negligence suit is handled by attys there suing the patent attys on the Miami Sandal late filing of Clients**. I gave a depo in support of Client, but I am not sure if the suit is pending/closed/settled … or of the result. Please check with Trae, on such

(emphasis added). (2CR384). Howard's time records show that on September 10, 11 and 14, 2009, he reviewed and analyzed the memorandum from Mr. Hanson, and matters related thereto, and billed a total of 9.40 hours. (2CR428).

Bernardo 1's shoe designer and co-owner of the Patents, Dennis Comeau, discussed the Maryland malpractice suit with Howard on multiple occasions. (2CR414-15). Comeau told Howard that the lawsuit was based on the claim that Bernardo 1's former patent attorneys messed up several of its design patents by filing the patent applications too late. (*Id.* at ¶4).

D. As Haynes and Boone's unpaid legal fees mount, Howard looks to find a buyer of Bernardo 1's tainted assets.

Over the first year of the Lawyers' representation of Bernardo 1, H&B had run up significant amounts in unpaid legal fees dating back to the firm's very first invoice. (2CR572-73; 2CR361 at pp. 164-65). Howard was concerned about getting his firm paid. (2CR350 at pp. 70-71). He knew that a clear path to payment was through the sale of Bernardo 1's assets in an asset purchase agreement ("APA)" he could prepare. (2CR351 at pp. 75-76). Howard wrote in an e-mail to his law partner on the subject of "Outstanding Fees," "hopefully we will get a deal done to sell the business in October which will put us in the position of being able to collect the outstanding deferral ($) – see attached." (2CR574).

Consistent with the Lawyers' all-encompassing scope of engagement ("any and all business, financial and legal matters"), the work that Howard did for Bernardo 1 involved not just legal matters, but also financial matters and business decisions that were made on behalf of the company. (2CR368 at pp. 14-15). Naturally, Howard was involved in the decision to sell the assets of Bernardo 1 (2CR368 at p. 16) – a non-legal decision. Within 6 days of the e-mail he had sent to his law partner about "Outstanding Fees," Howard prepared a corporate resolution, which he had Mrs. Smith sign, commissioning himself (along with non-lawyer sandal designer Dennis Comeau) to "immediately pursue the potential sale of the

Company or its assets . . ." (2CR571; 2CR349 at pp. 68-69; 2CR370 at p. 35).[4]

E. TO MARKET THE COMPANY, LAWYERS PREPARE A CONFIDENTIAL "BUSINESS PROFILE" THAT CONTAINS FALSE STATEMENTS ABOUT THE PATENTS, WHICH WAS FORWARDED TO POTENTIAL BUYER BERNARDO 2.

In his mission to sell the Bernardo 1 assets, Howard prepared a Confidential Business Profile for the company which prominently references Howard and H&B on the cover page. (2CR576-86; 2CR 351 at pp. 76-77). It is essentially a sales brochure, and it states that any interested recipients should contact Howard directly. 2CR576. By this time, Howard was not merely engaged in legal matters, but was also involved in brokering the sale of Bernardo 1 and in the making of other business and financial decisions for the company. (*see, e.g.*, 2CR368 at pp. 15-16). Even Mrs. Smith, a member/manager of Bernardo 1, described Howard as the one who "brokered the deal." (2CR376 at p. 107).

In the intellectual and intangible property section of the Profile, Howard wrote that it is a routine part of Bernardo 1's business practice to develop, protect and defend its intellectual property rights. Howard also wrote that the I.P. of Bernardo 1 comprised a "significant portion" of the overall value of the business. (2CR579; 2CR352-53 at pp. 79-80, and 87). Immediately below this statement was a listing of Bernardo 1's design patents <u>including the Patents that were known by the Lawyers</u>

[4] The fact that a non-lawyer was co-assigned the same task makes clear that there was *nothing* about this assignment that required the professional skill, training and experience of a lawyer.

to be worthless (*e.g.*, D495,855 S1; D496,147 S1; D508,305 S1; D487,183 S1; and D489,517 S1). (2CR579; 2CR592-93 at ¶¶15-17; 1CR289 at footnote 5). Howard failed to disclose in the Profile that these Patents were unenforceable.

In February 2011, Howard personally authorized forwarding the Profile, with its false and misleading statements, to be the Bernardo 2 owners, as potential buyers. (2CR586; 2CR602 at ¶6). By this time, the fees that Bernardo 1 owed to Haynes and Boone were growing at a faster pace. (2CR572). The Profile touted the value of Bernardo 1's Patents and Trademarks, stating that "the value of Bernardo 1 is in its intellectual property," which was among the statements Bernardo 2 trusted and relied on in making their decision to buy. (2CR602-03 at ¶¶6, 7 and 10; 2CR608 at ¶¶3 and 5).

F. AS APA DISCUSSIONS WERE ONGOING, HOWARD MADE FALSE REPRESENTATIONS DIRECTLY TO BERNARDO 2'S OWNERS, WHILE ALSO SOLICITING HIS FUTURE REPRESENTATION OF THEM.

The Lawyers had a further motive for making the deal go through with Bernardo 2. Howard had a prior relationship with one of Bernardo 2's co-owners, Todd Miller (the other co-owner was Peter Cooper). In mid-2011 (several months before the APA closed), unprompted, Howard contacted his friend Miller and stated that he was representing Bernardo 1 in the potential sale. Thereafter, Howard initiated multiple communications with Miller. During some of these, Howard would tell Miller that, given his institutional knowledge of the Bernardo 1 business,

he would be well-suited to represent Bernardo 2 if they acquired the business. Howard made these solicitations *while still representing Bernardo 1*. (2CR601-07 at ¶¶2-5).

On another occasion before the APA was signed, Miller invited Howard, Cooper and others to his house for some wine. Thereafter, the group went to Kenneally's Pub in Houston. While at Kenneally's, Howard made false statements to Cooper to the effect that Bernardo 1 had an unnamed buyer who was ready, willing and able to purchase the Bernardo 1 assets *in cash* if Bernardo 2 did not do so. (2CR608-10 at ¶5). He made similar false statements to Miller, including that the supposed buyer was willing to pay $6.5 million just for the intellectual property. (2CR603 at ¶9). Howard also falsely represented to Cooper that, other than a trademark issue (which was disclosed), there were no other issues of concern with any of Bernardo 1's patents or trademarks. (2CR609 at ¶5). In truth, there was no $6.5 million bona fide cash offer from a third party to Bernardo 1, and there were mortal problems with the Patents. (2CR371 at p. 54; 2CR361 at p. 162; 2CR384; 2CR389-98; 2CR414-15; 2CR587-600). Howard made these false statements knowing that Bernardo 2 was a prospective buyer of the assets. (2CR601-02 at ¶¶2-5; 2CR608-09 at ¶¶2, 3 and 5).

Howard's solicitations to represent Bernardo 2 in the future is significant. Because of their prior relationship, Miller placed a great deal of trust in Howard

throughout the pre-sale process. (2CR601-02 at ¶¶5 and 7). Howard's lies to the Bernardo 2 owners about a "stalking horse" buyer waiting in the wings to pay cash if Bernardo 2 hesitated on the deal were among the representations that his then-client Bernardo 1 *never* authorized him to make; Howard was acting on his own. (2CR371 at p. 54).

At no time during any of their many discussions did Howard tell the Bernardo 2 owners that there were serious problems with Bernardo 1's Patents, or that Bernardo 1 had filed a legal malpractice lawsuit against its former Maryland lawyers for causing its key design Patents to be unenforceable. If Mr. Howard had ever advised Miller or Cooper about the unenforceable Patents, Bernardo 2 would have walked away from the potential deal.[5] (2CR601-03 at ¶¶6-9; 2CR608-10 at ¶¶3-5).

Petitioners attempt to marginalize Respondents' fraud claims by claiming in their Brief, at p. 4, that records of the Maryland malpractice case were made available for Bernardo 2 to review in a box labeled "Malpractice Suit." The suggestion that this is a "fact of the case" for purposes of this appeal is a red herring that has previously been refuted when the issues between Bernardo 2 and Barnardo 1 were arbitrated as required by the APA. (4SuppCR1699 at ¶¶7-11, 1703 at ¶4, and

[5] Petitioners state in their Brief, at p. 2, that the Maryland legal malpractice case was a failure, intentionally inviting speculation that *perhaps* the patent applications were timely filed by the Maryland lawyers and thus valid. That is incorrect, and the implication is false, as there were other reasons for the outcome in that case including Maryland's contributory negligence bar to recovery (rather than a comparative negligence scheme).

1706 at ¶4). In fact, the issue has already been litigated and the assertion was rejected as contrary to the credible evidence. (5SuppCR2060 at ¶14). The truth is that the Bernardo 2 owners and/or counsel were very diligent in "kicking the tires" of Bernardo 1's assets and I.P. They reviewed all documents made available to them, and none of those made any reference to Bernardo 1 having to dismiss its patent infringement claims against an alleged infringer because of patent invalidity; nor did any of those documents include any reference to the Maryland malpractice litigation. *Id*. Additionally, Bernardo 2's counsel checked the records of the USPTO to confirm that Bernardo 1 was the owner of the patents and trademarks made the basis of the asset sale, and nothing unusual turned up. (4SuppCR1701 at ¶10). Further, notwithstanding the APA's requirement that Bernardo 1 identify all pending and past lawsuits (notably, Howard and Bernardo 1 did not identify any), Bernardo 2's counsel nonetheless conducted his own search of lawsuit records in Harris County and found none. (4SuppCR1701 at ¶11).

G. HOWARD WROTE FALSE REPRESENTATIONS AND WARRANTIES INTO THE APA.

The Lawyers suggest in their Brief, at p. 6, that the APA did not contain any representations that addressed the "enforceability" or "validity" of the Patents. This misses the point. Besides Howard's face-to-face false statements to the Bernardo 2 owners and the written misrepresentations about the value of the Patents in the Business Profile, there were multiple representations and warranties in the APA

itself that covered the same ground.

1. The Lawyers knew that Bernardo 1 had historically "used" its patent rights to sue for infringing conduct.

Prior to the APA being consummated, Howard knew that in the past Bernardo 1 had "used its patent rights" to sue for infringement. (2CR348 and 352, at pp. 52 and 79-80; 2CR579). He also knew that the design Patents were material to the APA. (2CR363 at p. 177). Howard is an experienced transactional lawyer and understands the significance of representations and warranties in an agreement. (2CR341-42 at pp. 10-11, and 14-15). He also knows that representations and warranties are relied upon by the party to whom they are directed. If there turns out to be a false representation or warranty, it can be actionable. (2CR358 at pp. 108-09). In fact, in the APA, Bernardo 1 agreed to indemnify Bernardo 2 for any damages if a representation or warranty proved to be false. (*Id.*; 2CR629-30 at §13).

2. The APA included false representations and warranties regarding Bernardo 1's Patents.

Section 8 represents and warrants that the Acquired Assets, which includes the Patents, are "free and clear of all . . . restrictions of any kind".[6] (2CR621 at § 8).

Subsection 9.n. of the APA represents and warrants that all of Bernardo 1's assets, including the Patents, are <u>suitable</u> for the purpose for which they are <u>presently</u>

[6] Patents that are unenforceable are not "free and clear of all … restrictions of any kind."

used or have historically been used.[7] (2CR624-25 at §9.n).

Subsection 9.s. states that the Seller owns and/or has the right to use each item of Intellectual Property,[8] and that, *except as set out in Schedule 9.s.*, no other party has the right to use any of the Intellectual Property or, to Seller's or Owner's knowledge, is infringing upon any Intellectual Property. (2CR626 at §9.s.).

Importantly, Schedule 9.s. (corresponding with subsection 9.s.), entitled "Intellectual Property Exceptions," required Bernardo 1 to identify any patents or trademarks that were impaired or unusable in some way. Any I.P. disclosed in Schedule 9.s. would be exempt from the seller's representations and warranties under subsection 9.s. (2CR694, and 626; 2CR609 at ¶4). Significantly, nowhere in the APA including Schedule 9.s. is there any reference to the five unenforceable design Patents.[9] (2CR346 at p. 36).

Subsection 9.u. is particularly important in a catch-all sense. It states that "[n]o representation or warranty made by Seller or Owners, nor any . . . schedule attached to this Agreement . . . contains any untrue statement of material fact or omits to state any material fact necessary to make the statement contained herein not misleading." (2CR626 at § 9.u). This subsection protects against tricky or deceitful

[7] An unenforceable patent is not "suitable."
[8] An unenforceable patent cannot be "use."
[9] Based on the express purpose of Schedule 9.s., Howard's failure to disclose the tainted Patents in that Schedule was a representation that those Patents had no issues in terms of any impairment or their capability of being used.

conduct.

Nowhere in the APA including Schedule 9.s. is there any reference to Bernardo 1's design Patents being impaired, unenforceable, invalid, useless, or unusable in the past or present. (2CR346 at p. 36). In their many discussions and his solicitations, Howard never disclosed the truth about the Patents to Miller or Cooper. (2CR357 at pp. 103-04; 2CR602-03 at ¶¶ 6-9; 2CR608-10 at ¶¶ 3-5).

3. Howard admits that the patent enforceability problems should have been disclosed in the 2011 APA.

Howard agrees that if there is a known issue with the enforceability of patents, it should be disclosed to the buyer. (2CR 362 at p. 166). To that end, Howard does not deny that the *Olem Shoe* suit (dismissed when Bernardo 1 learned the patent-in-suit was unenforceable) and the Maryland malpractice suit over the bad Patents should have been disclosed in the APA. He states early in his deposition that *if* he had known that Bernardo 1 had filed a lawsuit asserting that the Patents were unenforceable and worthless, this would have been disclosed in the APA ("<u>It would have been disclosed</u>.") ("<u>I am telling you that if I had known these facts, those issues would have been disclosed</u>…").[10] (emphasis added). (2CR344-45 at pp. 29 and 33).

But Howard did know. Later in his deposition Howard admitted that, prior to

[10] Howard implies that Bernardo 2 should have essentially disbelieved the seller's representations and warranties and done its own investigation to discover the Patent problems. (*Id.*). Any such "buyer beware" excuse does not work as it would defeat the purpose of a seller's representations and warranties in an asset purchase agreement, which is to allow the buyer to rely on those statements without incurring the significant expense of going behind them. 4SuppCR1700 at ¶7.

the 2011 APA, he **knew** of the *Olem Shoe* suit filed by Bernardo 1 and the fact that it had to be dismissed. (2CR355 at p. 96). He also **knew** about the Maryland legal malpractice suit. (*Id*.) In fact, Howard even mentioned the malpractice suit in the "Investigative Report" that he finished on November 1, 2010 (*i.e.*, prior to the APA). (2CR565). Despite this knowledge, the Lawyers never made any reference to this litigation in response to Bernardo 2's due diligence index furnished several months prior to the 2011 APA, which required a "[l]ist and brief description of litigation claims and proceedings settled or concluded." (2CR355 at pp. 95, and 97-98; 2CR717-32 at 730). The due diligence index also asked for communications, studies or reports relating to the "validity or infringement" of the Company's patents, or the "validity or value" of the Company's patents. (2CR729). But, again, no responsive information about the bad Patents was provided. *Id.*

Howard also admitted that the responsibility for accurately drafting exceptions to the intellectual property representations and warranties in the APA lay with the Seller. (2CR360 at pp. 140-41; 2CR733). Instead of disclosure, however, Howard told Bernardo 2's counsel just days before the APA was executed – "[y]ou have everything there is in the realm of IP," and then later, "you have a list of everything we have." (2CR735-48, at 736-37).

H. BERNARDO 2 JUSTIFIABLY RELIED ON THE LAWYERS' MISREPRESENTATIONS.

The facts set out above show (i) a pre-existing cordial relationship between

Howard and Todd Miller of Bernardo 2; (ii) multiple unsolicited telephone and one-on-one contacts initiated by Howard; (iii) broker-like sales pitches made orally and in writing by Howard; (iv) Howard enticing Bernardo 2 to do the deal by falsely stating that there was a ready, willing and able buyer waiting in the wings; (v) Howard giving false assurances to Bernardo 2 about the quality of the I.P. they were buying; (vi) Howard promising his future legal representation of them; and (vii) statements by Howard that Bernardo 2 already has been provided "everything there is in the realm of IP". (2CR601-04; 608-10; 576-86; 737). Indeed, Todd Miller of Bernardo 2 testified that the intellectual property, and the Patents in particular, were critical to Bernardo 2's decision to buy. (2CR602 at ¶7).

All of this leading up to the APA created a sense of trust and reliance on the part of Bernardo 2 in what Howard was telling them, and a belief that Howard had always been open to them about all issues regarding Bernardo 1's business, including its intellectual property (2CR602 at ¶¶ 7 and 10). In fact, after the APA closed in September 2011, the trust that Howard had cultivated with Bernardo 2 led them to retain him and H&B as their attorneys. (2CR603 at ¶ 9).

I. THE LAWYERS' PLAN – *i.e.,* TO USE THE CASH GENERATED FROM THE SALE OF BERNARDO 1 ASSETS TO PAY THEIR OUTSTANDING INVOICES – PAID OFF.

The Lawyers had a pecuniary interest in the APA being consummated. Howard set it up so that the payment of his firm's past-due legal fees from the cash at closing became "a part of the final deal," which closed on September 16, 2011.

(2CR361 at pp. 164-65). The moment Bernardo 2's $2.65 million payment was put into escrow, $436,177.22 of that amount was wired out of the escrow to H&B. (*Id.*). The plan worked. The Lawyers finally got paid in full for two years of past due receivables. (2CR572-73).

SUMMARY OF ARGUMENT

1. Petitioners ask this Court to expand attorney immunity beyond its historical boundaries. The essential premise of Petitioners' and amici's position is that attorneys have always been immune from liability for fraudulent conduct in a business transaction – so long as the lawyer was representing the co-fraudster in the deal. This is false. The Fourteenth Court did not "carve out an exception" to attorney immunity, nor is the *NFTD* opinion a "minority view." Rather, Petitioners are attempting to *expand* the defense –tellingly also called litigation immunity[11] – into an arena that no appellate court in Texas or any other state has countenanced. The Court should reject this invitation to adopt this outlier view.

2. Texas courts have clearly and sensibly limited the attorney immunity defense to the "litigation context." Despite Petitioners' suggestions otherwise, the parameters of "litigation context" are clear. It is limited to litigation-like proceedings, pre-suit demands where litigation is imminent, and foreclosure

[11] *Youngkin v. Hines*, 546 S.W.3d 675, 679 n. 2 (Tex. 2018).

proceedings. There is no muystery to these boundaries. And they are entirely sensible. First, litigation and litigation-like situations are highly adversarial and often emotional. There is a winner and a loser, and a lawyer who often has to make split-second decisions for the client should not have his/her judgment clouded by concern for exposure to the opposite party if they step too far in their advocacy. Transactional work is different. By contrast, the ultimate goal is a business transaction in the parties' mutual interest. Second, disputes in the litigation context have or will have a judge or other independent referee with the authority to take measures to keep the playing field level when one side cheats. No such referee exists in the transactional context. And, in the case of foreclosure proceedings, there are due process protections. If immunty were expanded to business transactions, there will be no repurcussions to the lawyer who facilitates the fraud for a significant fee and, correspondingly, no remedy to the innocent buyer—especially when the seller becomes an empty vessel shortly after the sale is consummated.

3. Petitioners' and amici's "sky is falling" arguments are overblown.

Because Texas courts have long confined the attorney immunity doctrine to the litigation context, the predictions of doom by Petitioners and their amici ring hollow. Indeed, if this unremarkable rule were so destabalizing—and transactional immunity so essential to the functioning of law and business in America—why have other states not already recognized transactional immunity? Competent and ethical

transactional lawyers have fared just fine without any state appellate court in the United States protecting them with immunity for two centuries. All a transactional attorney need do to avoid exposure to nonclients is to meet the "minimum standards of conduct below which no lawyer can fall without being subject to disciplinary action." *See* TEX. DISCIPLINARY RULES OF PROF'L CONDUCT, Preamble ¶7. In Texas, this merely calls for the lawyer to (i) not assist a client in conduct that the lawyer knows is fraudulent; and (ii) not knowingly make a false statement of material fact to a third person or assist a client in defrauding a third party. *Id.* at DR 1.02 and 4.01.

4. This Court has previously recognized a distinction between the litigation context and transactional work when assessing attorney liability. Petitioners urge this Court to eliminate any distinction between the litigation context and transactional conduct for purposes of attorney immunity. But this distinction is persuasive. In addition to the attorney immunity context, this Court applied the distinction for purposes of statutes of limitations. In 2019, this Court rejected a further extension of the *Hughes v. Mehaney & Higgins*, 821 S.W.2d 154 (Tex. 1981), statute of limitations tolling rule, concluding that the tolling principle it had enunciated in connection with litigation and quasi-litigation matters should be limited to such cases, and that malpractice cases growing out of transactional work are not entitled to any greater protection than the traditional ones (*e.g.*, discovery

rule, *etc*.). *See Erickson v. Renda*, 590 S.W.3d 557 (Tex. 2019).

5. The Fourteenth Court's ruling is consistent with the RESTATEMENT. Petitioners' and amici's argument for universal attorney immunity under Texas law would be in conflict with the RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS. Section 51 of the RESTATEMENT imposes a duty of care on lawyers toward a nonclient to the extent the lawyer invites the nonclient to rely on the lawyer's opinion and the nonclient is not too remote from the lawyer to be entitled to protection. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §51. This "not too remote" exclusion from liability expressly recognizes that §51 does not apply to claims against opposing counsel in litigation. *Id.* at cmt c. In short, §51 is consistent with the limiting the application of the attorney immunity defense to litigation-related conduct. Additionally, RESTATEMENT §56 states that a lawyer is subject to liability to a nonclient when a nonlawyer would be under similar circumstances. Recognizing no special protections for lawyers outside the litigation context, the RESTATEMENT is consistent with the law in Texas and around the country. Also, because §56 equates a lawyer's conduct to that of a nonlawyer for liability purposes, this standard for attorney liability would certainly apply to business transactions, but it could not apply to litigation as such activity requires a law license which a nonlawyer would not have.

6. *McCamish* is still good law. If this Court were to expand the immunity

defense to protect attorneys for their transactional fraud, it would abrogate *McCamish, Martin, Brown & Loeffler v. F.E. Appling Interests*, 991 S.W.2d 787 (Tex. 1999). There is no basis for creating such turbulence in the law. Lawyers have understood the rules that guide their behavior toward nonclients for over 100 years and have managed quite well without what would be a blanket immunity to nonclients.

7. Factual grounds also exist to support affirmance because the Lawyers failed to meet their summary judgment burden on the "scope of representation" test. There are two inquiries that must be made for attorney immunity to apply: The conduct must be (1) within the scope of representation and not foreign to the duties of an attorney, and (2) in litigation or the litigation context. The underlying outcome at the trial court was summary judgment in favor of the Lawyers on the immunity issue (or, confusingly, the granting of the Lawyers' Plea to the Jurisdiction as to Bernardo 2's Restatement §552 claim). Fact issues exist as to the first inquiry, and it is undisputed under the second inquiry that the Lawyers' conduct was not in the litigation context. Accordingly, the Fourteenth Court's decision can also be affirmed because the Lawyers failed to meet their summary judgment burden on the first inquiry.

ARGUMENT

With its origins in English common law, the attorney immunity defense is limited to conduct occurring in litigation and the litigation context. *See* T. Leigh Atkinson, ABSOLUTE IMMUNITY FROM CIVIL LIABILITY: LESSONS FOR LITIGATION LAWYERS, 31 Pepp. L. Rev. 915 (2004). Attorney immunity's purpose is to protect the integrity of the adversary system by allowing a lawyer to zealously advocate for the client in litigation without any fear of reprisal by the opposing litigant for the lawyer's hostile or aggressive conduct. *Id.* at 922. Unlike in litigation where there is a judge to provide oversight with the power to sanction or foreclosure proceedings that employ procedural due process protections, the immunity defense, if extended to conduct in business transactions, would give transactional lawyers an oversight-free license to defraud counterparties in business deals with impunity. That would be a bad policy, harmful to the public, and damaging to the integrity of the legal profession.

I. NEITHER THIS COURT NOR ANY LOWER COURT HAS EVER EXTENDED ATTORNEY IMMUNITY TO PURELY BUSINESS TRANSACTIONS.

Because this Court is obviously well-familiar with its recent decisions on attorney immunity, the background facts of the *Cantey Hanger*, *Youngkin* and *Bethel* cases will not be discussed in any detail.

A. *Cantey Hanger* holds that attorney immunity applies in the litigation context (but not beyond).

An attorney's shelter from liability on immunity grounds has boundaries. The immunity defense "does not apply to all causes of action against an attorney", and does not cover all acts by an attorney. *Cantey Hanger, LLP v. Byrd*, 467 S.W.3d at 477 (Tex. 2015), 481; *Alpert v. Crain, Caton & James, P.C.*, 178 S.W.3d 398, 405 (Tex. App.—Houston [1st Dist.] 2005, pet. denied). To begin, the immunity is limited to "conduct . . . involving 'the office, professional training, skill, and authority of an attorney.'" *Reagan Nat'l Advert. of Austin, Inc. v. Hazen*, No. 03-05-00699-CV, 2008 WL 2938823, at *3 (Tex. App.—Austin July 29, 2008, no pet.) (mem. op.) The burden falls on the attorney to prove that his conduct is protected by immunity. *Cantey Hanger*, 467 S.W.3d at 481.

The attorney immunity defense is extends only to litigation or the quasi-litigation context. Texas appellate courts have never applied attorney immunity to a transactional setting. This Court recognized: "[T]here is a consensus among the court of appeals that, as a general rule, attorneys are immune from civil liability to non-clients 'for actions taken in connection with representing a client in litigation.'" *Cantey Hanger*, 467 S.W.3d at 481 (quoting *Alpert*, 178 S.W.3d at 405).

Cantey Hanger applied attorney immunity to conduct that fell *within* the scope of the lawyers' duties representing their clients <u>in litigation</u>. *Id*. at 481. The dissent worried that "the Court overlook[ed] an important element of the form of attorney immunity at issue in this case—that the attorney's conduct must have occurred in

litigation." *Id.* In response, the majority expressly disclaimed broadening attorney immunity to conduct unrelated to litigation, stating the dissent "mischaracterizes the scope of our opinion in asserting that we 'suggest[ ] that this form of attorney immunity applies outside of the litigation context.'". *Id.* at 482, n. 6. Indeed, the *only issue* between the majority and dissent was whether the alleged fraud on the part of the Cantey Hanger firm following from a contested divorce proceeding was part of the litigation. *Id.* at 482, n. 6, 486, 489. The majority said it was and held that immunity applied, while the dissent disagreed. *Id.* at 484, 486. Here, there is no debate on this point; it is *undisputed* that the Lawyers' conduct had nothing to do with litigation or the litigation context.

The basic purpose of the immunity defense is to protect an attorney's right to be aggressive in litigation. *Id.* at 480-81. The defense was conceived and exists "to promote zealous representation," and to ensure "loyal, faithful, and aggressive representation by attorneys employed as advocates." *Id.* at 481 (*quoting Mitchell v. Chapman,* 10 S.W.3d 810, 812 (Tex. App.—Dallas 2000, pet. denied); *Alpert,* 178 S.W.3d at 405. "The courts of appeals have universally reasoned that ***litigation*** immunity furthers this goal." *Id.* at 488-99 (*quoting Alpert,* 178 S.W.3d at 405) (emphasis added); Applying attorney immunity as a defense to conduct in business transactions has nothing to do with that goal.

In the *Cantey Hanger* dissent, Justice Green juxtaposed the litigation context

against the transactional context, explaining that attorney immunity should not extend to the latter because it would be overly broad and would immunize "attorneys for conduct arising from fraudulent business schemes." *Id.* at 489. Justice Green further stated that the limited application of attorney immunity has the benefit of maintaining the procedural safeguards that only apply to litigation and serve as recourse for litigants wronged by an attorney's misconduct (*e.g.*, TEX. R. CIV. P. 13, requiring all papers attorneys file in a lawsuit be signed, certifying that the attorney believes that they are not groundless and brought in bad faith or to harass, and authorizing sanctions for violation of the rule; TEX. CIV. PRAC. & REM. CODE §§ 9.001–.014, 10.001–.006, allowing for sanctions and the offended party's recovery of expenses). *Id*. In contrast, there are no such restraints to keep attorneys in line in the transactional context.

Within litigation and quasi-litigation matters, there are checks and balances to police a lawyer's actions. *See e.g.*, *Alpert,* 178 S.W.3d at 406. For example, the court has the power to impose sanctions or contempt as necessary. *Id.* Non-judicial foreclosures are still subject to due process rules and protections. TEX. PROP. CODE §51.002 (mandating that any foreclosure must involve notice to the borrower, occur at a specific time and place, and provide notice of the sale to the public). In a business transaction where a lawyer can mislead the counter-party by misrepresenting material facts, there is no judge to ensure fairness or levy sanctions,

nor are there due process requirements to provide a level playing field. That is why, after over a century of jurisprudence, no published opinion in any state appellate court in Texas, or nationwide, has ever declared on the facts of that case that an attorney rendering legal services *in a transactional/business context* has an absolute immunity from claims by a nonclient for fraudulent conduct or negligent misrepresentations.

This Court should maintain the limits of attorney immunity to the policy it serves. Lawyers should not be given a free pass when they do something intentional or negligently to deceive others in a business transaction, especially when they profit from that deceit.

B. *Youngkin v. Hines* set a bright line that regardless whether a lawyer's wrongdoing is in the name of, with or on behalf of a client in a fraudulent business scheme, immunity will not apply.

As with every other case that has found attorney immunity to apply, *Youngkin v. Hines*, 546 S.W.3d 675 (Tex. 2018), was based on alleged wrongful conduct by the lawyer in litigation or the litigation context, in that case arising from a Rule 11 settlement agreement made in open court. *Id.* at 678-79. Petitioners cite the case but gloss over the most important portion of the opinion for purposes of this appeal:

> This is also not to say that attorneys are insulated from all liability for all wrongdoing in the name of the client. Though attorney immunity is broad, it is not limitless. In *Cantey Hanger*, we identified several nonexhaustive examples of conduct that may fall outside the reach of the attorney-immunity defense—participation in a fraudulent business scheme with a client, knowingly helping a client with a fraudulent

> transfer to avoid paying a judgment, theft of goods or services on a client's behalf, and assaulting opposing counsel during trial. Thus, while we recognize that some fraudulent conduct, even if done on behalf of a client, may be actionable, Hines does not allege any such behavior.

Id. at 682-83 (emphasis added). A clearer line of demarcation could not have been drawn to show that a lawyer's fraudulent conduct toward a nonclient in a business transaction is not immune from liability.

1. The Lawyers' artificial distinction between fraudulent conduct "with" vs. "for" a client does not bear out.

The Lawyers parse language about an attorney participating in a fraudulent business scheme "with" a client, as being meaningfully different for immunity purposes than doing so "for" a client. Petitioners' Br., pp. 22-24. They imply that there is no immunity in the former scenario, but that immunity attaches to the latter. The Lawyers' attempt to marginalize the key pronouncement in *Youngkin* with an artificial distinction is silly. In fact, the above quote from *Youngkin* contradicts the Lawyers' false distinction. 546 S.W.3d at 682-83. The Court uses three phrases to frame the type of conduct that is not subject to immunity – describing such conduct alternatively as being done "in the name of a client," "with a client," and, most tellingly, "on behalf of a client." *Id.* at 683.

Regardless whether the lawyer is participating in a fraudulent business scheme *with* or *for* a client, assuming *arguendo* there was any difference intended, the immunity defense would not apply. *Id.* The Court has made it clear for over a

century that such conduct, even if done "on behalf of a client" (as stated in *Youngkin*), is not immune from liability because "such acts are entirely foreign to the duties of an attorney." *Cantey Hanger, LLP v. Byrd*, 467 S.W.3d 477, 482 (Tex. 2015) (citing *Poole v. H.&T.C.R'y Co.*, 58 Tex. 134, 137 (Tex. 1882); *Youngkin*, 546 S.W.3d at 683.

2. "Litigation privilege" and "attorney immunity" are labels that describe the same doctrine.

Attempting to distance themselves from the reality that attorney immunity has always been limited to litigation and the litigation context, the Respondents have suggested in the past that the Supreme Court in *Youngkin* implicitly rejected the "litigation immunity" label to describe the defense. The Court actually embraced the label, stating: "Youngkin referred in his briefs to litigation privilege rather than attorney immunity, but both labels describe the same doctrine." (emphasis added). *Youngkin v. Hines*, 546 S.W.3d 675, 679 n. 2 (Tex. 2018).

C. *Bethel v. Quilling* reinforced that attorney immunity shields a lawyer from suit by a third party for conduct "connected with representation of a client in litigation."

Petitioners likewise miss the mark regarding this Court's opinion in *Bethel v. Quilling, Selander, Lownds Winslett & Moser, P.C.*, 595 S.W.3d 651 (Tex. 2020). In *Bethel*, the Court famed the issue in terms of "whether the alleged destruction of evidence is an action 'taken in connection with representing a client in litigation,'

thus entitling the respondent attorneys to attorney immunity."[12] (emphasis added). *Id.* at 653. Immunity applied because the lawyer's "complained-of actions are the kind of actions that are 'taken in connection with representing a client in litigation.'" (emphasis added). *Id*. at 658. No less than ten times in the opinion when discussing the standard for immunity to apply, the Court specifically referenced the "in litigation" requirement as part of the test. *Id*.

D. In both *Poole* and *Chu v. Hong*, the Court refused to extend immunity to fraudulent conduct in a business transaction.

From the beginning, this Court has made clear that attorney immunity does not apply to conduct occurring in purely business transactions.

First, in *Poole*, the Supreme Court ruled that an attorney cannot be heard to deny liability to a nonclient for his own fraudulent conduct on a merchant in a purely transactional context, even though it was performed for the benefit of the client. Such conduct is considered foreign to the duties of an attorney. *Poole v. H. & T. C. R. Co.*, 58 Tex. 134, 137 (1882). Contrary to Petitioners suggestion, the Court in *Poole* clearly understood that the immunity doctrine was the issue, stating that an attorney acting as the "agent of the [client]" cannot perpetrate a fraud on a third party and then deny liability "under the privilieges of an attorney at law". Such acts are

[12] The Court points to its earlier opinion for the framing of the issue: "In *Cantey Hanger, LLP v. Byrd*, we held that, 'as a general rule, attorneys are immune from civil liability to non-clients for actions taken in connection with representing a client in litigation. 467 S.W.3d 477, 481 (Tex. 2015) (quotations omitted).'" *Id*. at 657 (emphasis added).

entirely foreign to the duties of an attorney.[13]

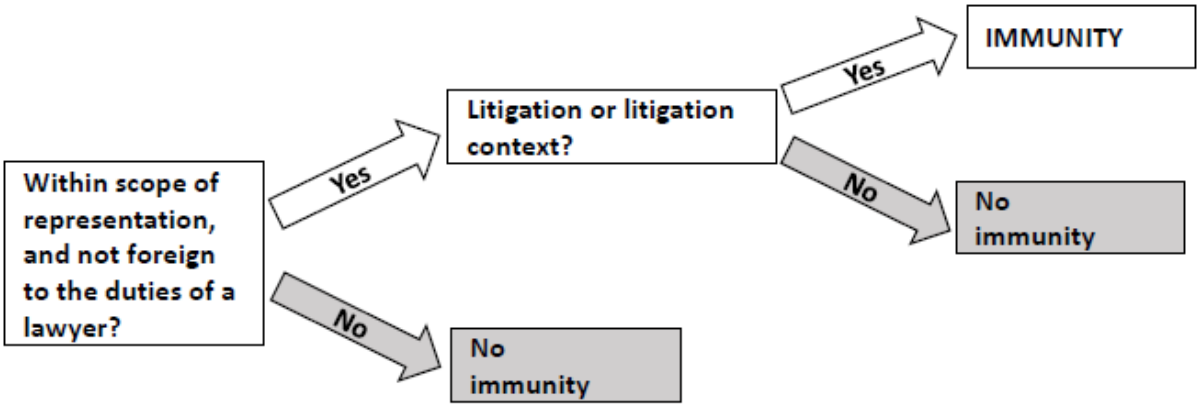
Second, in *Chu v. Hong*, discussing whether an attorney could be held liable to a nonclient in a buy-sell business transaction, this Court stated "[a]n attorney who . . . tells lies on a client's behalf may be liable for conversion or fraud in some cases. *Chu v. Chong Hi Hong*, 249 S.W.3d 441, 446 (Tex. 2008). In *Chu*, however, the Court could not address or rule on the immunity defense because no allegations were made by the nonclient that could have given rise to assertion of the defense. *Id*.

II. THE "SCOPE OF REPRESENTATION" TEST HAS ALWAYS BEEN EVALUATED IN CONJUNCTION WITH LITIGATION OR THE LITIGATION CONTEXT

The underlying premise to the Petitioners' argument for reversal is that the *only* issue a court need ever address to determine if the immunity defense exists is whether, at the time of the conduct in question, the lawyer was acting in the scope of representation of the client. The premise is wrong. The inquiry is two-tiered—namely, whether the lawyer's alleged conduct (i) was within the scope of the lawyer's representation of the client and not foreign to the duties of a lawyer (itself two factors); and (ii) was done in litigation or in the litigation context. *Cantey Hanger*, 467 S.W.3d at 482-86; *U.S. Bank Nat'l Ass'n v. Sheena*, 479 S.W.3d 475, 478-81 (Tex.App.—Houston [14th Dist.] 2015, no pet.).

[13] Petitioners' attempt to explain away *Poole* based on the tortured reading that the lawyer (Scott) was never found to have been acting in a representative capacity for the client is dealt with in subsection II.A.4.

The proper inquiry, first identified in 1882 with *Poole*, and articulated throughout the 14th court's *Sheena* opinion, is demonstrated as follows:



Poole, 58 Tex. at 137; *Sheena*, 479 S.W.3d at 478-81.

The second element is rarely discussed on any detail because, until the past few years, there has been little suggestion that immunity applies outside the litigation context. To eliminate the litigation context element would deviate from the reason for the rule, which is to assure that an attorney can engage in aggressive *advocacy* for the client without fear of reprisal by offending or slandering the opponent in the heat of litigation. *See, e.g.*, *Cantey Hanger*, 467 S.W.3d at 480-81; *Sheller v. Corral Tran Singh, LLP*, 551 S.W.3d 357, 363 (Tex. App.—Houston [14th Dist.] 2018, pet. denied). These considerations do not apply to negotiating a business deal, especially when the seller's lawyer is concurrently soliciting his future representation of the buyer. 2CR601-07 at ¶¶2-9.

A. The "scope of representation" inquiry is itself two-fold—the conduct must be within the scope and not foreign to the duties of an attorney.

The "scope of representation" test for immunity to attach is only the first of a two-tiered inquiry, requiring the lawyer to establish that the alleged conduct was within the scope of the attorney's legal representation of the client and not foreign to the duties of an attorney. *Cantey Hanger*, 467 S.W.3d at 484.

1. The lawyer must be discharging his/her duties to the client.

Simply because a lawyer is billing the client does not mean the lawyer is acting in the scope of his representation. *See Kelly v. Nichamoff*, 868 F.3d 371, 375-76 (5th Cir. 2017). The lawyer must be discharging the duties to his/her client by advancing the client's rights, even if such conduct is characterized as fraudulent. *Cantey Hanger*, at 483-84; *Sheena*, 479 S.W.3d at 479-80. The conduct must also require the "office, professional training, skill, and authority of an attorney." *Cantey Hanger*, at 482 (quoting *Dixon Fin. Servs. Ltd. v. Greenberg, Peden, Siegmyer & Oshman, P.C.*, No. 01-06-00696-CV, 2008 WL 746548, at *7 (Tex. App.–Houston [1st Dist.] March 20, 2008) (remanded on other grounds)). Immunity cannot apply when the attorney's actions do not involve the "provision of legal services." *Cantey Hanger* at 482; *Bethel* at 658.

Additionally, for immunity to apply under this inquiry, the attorney's conduct cannot involve fraudulent conduct that is considered "foreign to the duties of an

attorney", such as, for example, participation in a fraudulent business scheme in the name of, with, or on behalf of the client. *Cantey Hanger* at 482-83 (quoting *Poole*, 58 Tex. at 137)); *Youngkin* at 682-83; *Sheena*, 479 S.W.3d at 479-80. In the *Poole* case, the high court rejected the notion that one's status as an attorney representing the client would give the him immunity from liability to the party allegedly damaged by the business fraud, "for no one is justified on that ground in knowingly committing willful and premeditated frauds on another." 58 Tex. at 137-38. Even before *Cantey Hanger*, the Texas Supreme Court, in *Chu v. Chong Hi Hong*, stated that "[a]n attorney who personally steals goods or tells lies on a client's behalf may be liable for conversion or fraud in some cases." *Cantey Hanger*, 467 S.W.3d at 483 (*quoting Chu*, 249 S.W.3d 441, 446 (Tex. 2008)).

2. The mere fact that an attorney was representing the client at the time of alleged fraudulent activity is not enough to warrant immunity.

A lawyer "cannot shield his own willful and premeditated fraudulent actions from liability simply on the ground that he is an agent of his client." *Alpert v. Crain, Caton & James, P.C.*, 178 S.W.3d 398, 406 (Tex.App.—Houston [1st Dist.] 2005, pet. denied). The *Kelly v. Nichamoff* case is a good example of the proper application of this principle. Applying Texas law to the pleadings, the Fifth Circuit affirmed Judge Werlein's order denying lawyer Nichamoff's immunity-based on his Rule 12(b)(6) motion to dismiss on alternative grounds. *Kelly v. Nichamoff*, 868 F.3d 371

(5th Cir. 2017). The Fifth Circuit held that the pleadings did not establish that *all* of lawyer Nichamoff's alleged conduct fell within the scope of his legal representation of his client:

> Kelly acknowledges in her complaint that "Nichamoff was Rembach's attorney" at the time Kelly acquired the Legacy shares. But this information establishes only that Rembach was Nichamoff's client. It does not establish the *scope* of Nichamoff's representation. The mere fact that an attorney was representing a client at the time of alleged fraudulent activity is not enough to warrant immunity.

Id. at 375 (emphasis added) (citing to *Alpert v. Crain, Caton & James, P.C.*, 178 S.W.3d at 406).

The Lawyers' position in this case—that immunity applies merely because they were representing a client when the alleged fraudulent activity took place—should be rejected based on the reasoning in *Kelly v. Nichamoff*.

3. Petitioners' "scope of representation" argument overlooks settled law that fraudulent conduct in a business transaction is outside the scope and "foreign to the duties of an attorney."

The *Poole* and *Chu* cases involved allegedly fraudulent conduct by an attorney in a bill of lading transaction and a buy-sell agreement, respectively, *unrelated* to any pending or threatened litigation. These cases make clear that immunity will not apply to such transactional conduct. Indeed, in its February 2020 opinion in *Bethel v. Quilling*, the Supreme Court parenthetically summarized *Poole* as "holding that attorney immunity did not protect actions taken 'for the purpose and with the intention of consummating [] fraud upon [the] appellant'". *Bethel* at 654. This is

because this an attorney's participation in a fraudulent business scheme with the client falls outside of the scope of the attorney's representation of the client:

> An attorney is not immune from suit for participating in criminal or "independently fraudulent activities" that fall outside the scope of the attorney's representation of a client. *Cantey Hanger*, 467 S.W.3d at 483. For example, immunity does not apply when an attorney participates in a fraudulent business scheme with her client or knowingly facilitates a fraudulent transfer to help her clients avoid paying a judgment. *Id.* at 482. …

Bethel at 657 (emphasis added).

The final phrase from this passage (*i.e.*, knowingly facilitating a fraudulent transfer to help the client) has not received much attention in this case, because Bernardo 2's claims against the Lawyers did not involve a "fraudulent transfer" cause of action. But the essence of that statement directly parallels why Howard's conduct here cannot pass muster for purposes of permitting immunity. Distilled to the essence, Howard's misrepresentations and deceit that he directed to the Bernardo 2 owners about supposedly valuable Patents that he knew to be unenforceable, effected a fraudulent transfer of bogus assets to the innocent purchaser. Such conduct is always actionable, with or without the bad actor having a law license.

This Court's consistent holdings that fraudulent conduct with or on behalf of a client in a business transaction falls *outside* the scope of representation is a critical distinction that Petitioners ignore as they make their distorted "scope of representation" argument. Moreover, even if the lawyer acted solely as the client's agent, that does not shield their fraudulent actions from liability. *Edwin K. Hunter*

& Hunter, Hunter & Sonnier, LLC v. Marshall, No. 01-16-00636-CV, 2018 WL 6684840 at *21 (Tex. App.—Houston [1st Dist.] Dec. 20, 2018, no pet.).

In addition to the Supreme Court's history of statements declining to extend immunity to an attorney's participation in a fraudulent business scheme with or for a client, Texas courts of appeals, prior to the *NFTD* case, have also uniformly ruled that the immunity defense does not apply in those situations:

- *Stover v. ADM Milling Co*., No. 05-17-00778-CV, 2018 WL 6818561 (Tex. App.—Dallas, Dec. 28. 2018, pet. filed) (immunity denied where attorney was sued for fraud respecting his involvement in a failed business agreement for purchase of real property);

- *Edwin K. Hunter & Hunter, Hunter & Sonnier, LLC v. Marshall*, 2018 2018 WL 6684840 (Tex. App.—Houston [1st Dist.] Dec. 20, 2018, no pet.) (immunity defense was raised in jurisdictional context, and not permitted where lawyer's alleged wrongful conduct pertained to tortious interference with business relations and existing contracts);

- *JJJJ Walker, LLC v. Yollick*, 447 S.W.3d 453 Tex. App—Houston [14th Dist.] 2014, pet. denied) (attorney involved for bank client and entity under bank's control in defrauding investors in business transaction was not entitled to immunity); and

- *Likover v. Sunflower Terrace*, 696 S.W.2d 468, 473 (Tex. App.—Houston [1st Dist.] 1985, no writ) (attorney assisting client in real estate conveyance that divested title from true owner not entitled to immunity).

Tellingly, none of these cases are discussed or distinguished by Petitioners or amici.

Texas appellate courts have addressed the issue on both sides of the coin, and have drawn a bright line that attorney immunity will not attach to conduct beyond litigation and the litigation context. These holdings were on the facts applied to the

law, not mere dicta. The Supreme Court of Texas has not changed its analysis after 138 years of jurisprudence. The limits of attorney immunity remain at litigation and the litigation context, for good reasons noted by all the courts.

4. The DISCIPLINARY RULES might also have bearing on what constitutes conduct foreign to the duties of an attorney.

All a transactional attorney need do to avoid exposure to a nonclient in a business transaction is meet the "minimum standards of conduct below which no lawyer can fall without being subject to disciplinary action." *See* TEX. DISCIPLINARY RULES OF PROF'L CONDUCT, Preamble ¶7. In Texas, this merely calls for the lawyer to (i) not assist a client in conduct that the lawyer knows is fraudulent; (ii) not knowingly make a false statement of material fact to a third party, and (iii) not knowingly fail to disclose a material fact to a third person when disclosure is necessary to avoid knowingly assisting a client in defrauding a third party. *Id.* at DR 1.02 and 4.01. While the violation of a DISCIPLINARY RULE does not create an independent cause of action, it would seem that conduct which knowingly violates the DISCIPLINARY RULES would be considered "foreign to the duties of a attorney."

5. Respondents' attempt to marginalize *Poole* disregards specific findings by the Supreme Court in the body of its 1882 opinion.

Petitioners spend eight pages of their brief attempting to recast *Poole v. Houston & T.C. Ry. Co*., 58 Tex. 134 (1882), as basically not even evoking the need for an attorney immunity analysis. Petitioners' Br., pp. 22-29. The problem is that

Petitioners' primary argument relies on the parties' handwritten briefs from 1882 and not the actual Supreme Court opinion, plus Petitioners engage in some convenient partial quoting of the key holding in *Poole*.

First, rather than parsing the handwritten briefs, which are not evidence or the law, one need only look to the facts set out *in* the three-page opinion. On the first page of the opinion, second paragraph, the fact finding is made that the La Presses "assigned their bill of lading to Scott, their attorney, without consideration…" (emphasis added) *Id*. at 135. Does such a finding in support of the Court's opinion need to be stated more than once? Petitioners attempt to negate this finding by suggesting that this reference to Scott was merely to note the fact that he had appeared in the lawsuit as counsel for the purchasers. Petitioners' Br., p. 27. This obfuscation does not even deserve a response. The *Poole* opinion continues with the statement that some of the witnesses testified that Scott was the attorney for and representing the La Prelles. *Id*. at 137. Given the brevity of the opinion, this statement would not have been included if it were not material to the Court's ruling.

Second, at p. 24 of their Brief, Petitioners quoted from a passage in *Poole*, but omitted the most important language of that paragraph. The excluded language immediately follows from the opinion's reference to acts that are "entirely foreign to the duties of an attorney":

> neither will [Scott] be permitted, under such circumstances, to shield himself from liability on the ground that he was the agent of the La

> Presses, for no one is justified on that ground in knowingly committing wilful and premeditated frauds for another. In this particular the charge of the court was clearly erroneous.

(emphasis added). *Id*. at 137-38.

The *Poole* case has not been misread or misunderstood through the years. And the *Poole* court's refusal to extend the attorney immunity privilege beyond its historical limits dating back to English common law is hardly unsurprising.

B. The second inquiry asks whether the conduct occurred in litigation or the litigation context.

The "litigation or litigation context" requirement is the other essential requirement for attorney immunity to apply. *Sheena*, 479 S.W.3d at 478-81. "Litigation context" refers to highly adversarial litigation-like proceedings where Texas courts have routinely held immunity also applies—specifically, (i) conduct in foreclosure proceedings, (ii) proceedings before administrative bodies, (iii) bankruptcy proceedings, and (iv) pre-suit demands where litigation is contemplated in good faith. *See, e.g.*, *Landry's, Inc. v. Animal Legal Def. Fund*, 566 S.W.3d 41 (Tex. App.—Houston [14th Dist.] 2018, pet. denied) (immunity applied to pre-suit notice letter related to contemplated lawsuit); *Alanis v. Wells Fargo Bank Nat'l Ass'n,* No. 04-17-00069-CV, 2018 WL 1610939 (Tex. App.—San Antonio April 4, 2018, pet. denied) (immunity applied where attorney sued for debt acceleration/foreclosure notices); *Highland Capital Mgmt., LP v. Looper Reed & McGraw, P.C.*, No. 05-15-00055-CV, 2016 WL 164528 (Tex. App.—Dallas Jan.

14, 2016, pet. denied) (immunity applied to attorney's "extortion" efforts directed to client's former employer with litigation actually contemplated); *Dixon Fin. Servs. Ltd. v. Greenberg, Peden, Siegmyer & Oshman, P.C.,* No. 01-06-00696-CV, 2008 WL 746548 (Tex. App.—Houston [1st Dist.] March 20, 2008) (remanded on other grounds) (immunity applied to claim that attorneys knowingly facilitated client's fraud in post-arbitration proceedings).

Petitioners and amici feign confusion as to how attorney immunity applies outside the walls of a courtroom. But there is no mystery. As these Texas authorities (and others) make clear, if the conduct falls within one of the recognized "litigation context" categories, immunity applies.

Moreover, Petitioners' attempts to muddy the waters are simply a distraction. Here, there is no question that the Lawyers' conduct fell outside "the litigation context"—the conduct occurred in the paradigmatic non-litigation/transactional context, to which Texas law has never extended the blanket attorney immunity Petitioners seek.

C. Both inquiries must be satisfied for the immunity defense to succeed.

Just weeks after *Cantey Hanger* issued, the Fourteenth Court of Appeals undertook a detailed analysis of the state of the law on attorney immunity. *See U.S. Bank Nat'l Ass'n v. Sheena*, 479 S.W.3d 475 (Tex.App.—Houston [14th Dist.] 2015, no pet.). The Court of Appeals construed *Cantey Hanger* to provide for what it

described as either the "Complete Immunity Rule" or, alternatively, the "Partial Immunity Rule." *Id.* at 479-80.

Under the Complete Immunity Rule, which assumes that the scope of the attorney's representation is the only requirement for attorney immunity, "an attorney would enjoy complete immunity from civil liability for all conduct committed during the representation of the client in litigation, even if the conduct is fraudulent". *Id.* at 479 (emphasis added). Under the Partial Immunity Rule, the 14th Court held that the lawyer must "conclusively prove[ ] that (1) all of the allegedly actionable conduct was part of the discharge of [the lawyer's] duties to his client in the litigation context; and (2) none of the allegedly actionable conduct was 'foreign to the duties of an attorney.'" *Id.* at 480-81 (emphasis added).

What is most important to note from the *Sheena* opinion is that, under *both* the Complete Immunity Rule and the Partial Immunity Rule, the actionable conduct must have taken place as part of the discharge of the attorney's duties to the client in litigation or the litigation context. *Id.* at 479-81.

Similarly, just weeks after the Supreme Court issued the *Youngkin v. Hines* opinion, the 14th Court issued another opinion on attorney immunity. *See Sheller v. Corral Tran Singh, LLP*, 551 S.W.3d 357, 363 (Tex. App.—Houston [14th Dist.] 2018, pet. denied). The nonclient's claims against the Corral Tran Singh law firm ("CTS") all arose out of the CTS lawyers' conduct in a bankruptcy proceeding,

including alleged failure to prepare witnesses to testify, failure to list expert witnesses and exhibits, and improper witness exams. *Id.* at *3-4. Citing its earlier *Sheena* opinion, the 14th Court affirmed the summary judgment in favor of the CTS lawyers based on their affirmative defense of attorney immunity, stating:

> Each of these challenged actions falls within the kind of activity that would be expected as part of the discharge of an attorney's duties in representing his client in a bankruptcy matter and, in particular, in the underlying proceeding. We conclude that CTS Defendants' conduct was directly within the scope of their representation of their client New Millennium as the debtor-in-possession in the context of the chapter 11 bankruptcy proceeding, regardless of whether such conduct was 'meritorious'.

Id. at 11 (emphasis added) (citing *Sheena*, 479 S.W. 3d at 480)

As this Court has made clear most recently in *Cantey Hanger*, *Youngkin* and *Bethel*, and supported by the reasoning in *Sheena* and *Sheller* among other court of appeals cases, cases finding attorney immunity to exist share a common factual thread that does not exist in Bernardo 2's claims against the Lawyers. All the cases finding immunity involved conduct by the attorney either in litigation or in what the courts have narrowly defined to be in the "litigation context."

D. There is no 'conflict' or 'split' among courts: Texas law does not apply attorney immunity outside the litigation context.

Petitioners and amici attack the Fourteenth court's *NFTD* opinion for its statement that it has not found a single Texas state case that extends attorney immunity beyond litigation or the litigation context. *See NFTD, LLC v. Haynes &*

Boone, LLP, 591 S.W.3d at 775-76. They claim that if *NFTD* is not reversed, it will create "an intolerable split of authority with other Texas appellate courts and the Fifth Circuit." Petitioners' Brief, p. 13. Petitioners are wrong. The 14th Court's statement is accurate. None of the four cases that Petitioners and amici reference as being in conflict with *NFTD* involved wrongful attorney conduct in a business transaction, which is the issue here. Those cases involved claims in what Texas courts have defined to be the "litigation context," and hence immunity was afforded in those cases.

1. The four court of appeals decisions that Petitioners claim create a split of authority with *NFTD* are distinguishable and recite mere dicta.

Unlike *NFTD*, each of those cases involved claims in the litigation context where the Texas courts agree attorney immunity applies:

- *Santiago v. Mackie Wolf Zientz & Mann, P.C.*, No. 05-16-00394-CV, 2017 WL 944027 (Tex. App.—Dallas March 10, 2017, no pet.) (immunity applied to alleged misconduct by lawyer sending notice of default and acceleration as part of foreclosure *proceeding*);

- *Farkas v. Wells Fargo Bank*, 03-14-00716-CV, 2016 WL 7187476 (Tex. App.—Austin Dec. 8, 2016, no pet.) (immunity applied to alleged misconduct by lawyer sending out notices of default and intent to accelerate planned foreclosure *proceeding*);

- *Campbell v. Mortgage Elec. Registrations Sys., Inc.*, No. 03-11-00429-CV, 2012 WL 1839357 (Tex. App.—Austin May 18, 2012, pet. denied) (mem. op.) (immunity applied to lawyer sending notice of foreclosure and

intent to accelerate as prelude to non-judicial foreclosure *proceeding*); [14] and

- *Reagan Nat'l Adver. of Austin, Inc. v. Hazen*, No. 03-05-00699-CV, 2008 WL 2938823 (Tex. App.—Austin July 29, 2008, no pet.) (immunity applied where lawyer's "alleged actions were in the context of an adversarial dispute in which litigation was contemplated, impending or actually ongoing.").

None of these cases involved conduct in a business transaction. Any suggestion in those cases that attorney immunity would apply beyond litigation or the litigation context is, at best, the mere expression of an opinion on a matter not at issue, and, as such, dicta. Dicta does not create binding precedent. *Travelers Indem. Co. v. Fuller*, 892 S.W.2d 848, 852 (Tex. 1995). Nor are such comments the basis for the intolerable "conflict" claimed by Petitioners.

2. Petitioners' reliance on the Fifth Circuit's opinion in *Troice*, to claim a split in authority, is misplaced.

There is likewise no merit to Petitioners' invocation of *Troice v. Greenberg Traurig*, L.L.P., 921 F.3d 501 (5th Cir. 2019). *Troice* is of no binding effect on this Court, but a careful reading will also show it to have limited if any application to the issue in this case.

[14] In *Campbell*, the court implicitly recognized litigation immunity's contextual requirement when it concluded that "[n]either the Campbells' petition nor their response to the motion to dismiss alleged that the Attorney Defendants committed any wrongful acts outside of the foreclosure proceedings." *See id.* at *6 (emphasis added). The wording of the court's holding, coupled with the fact that foreclosure proceedings employ specific notice and process protections and may become highly adversarial, demonstrate that the *Campbell* court recognized litigation immunity's contextual requirement. *See* TEX. PROP. CODE § 51.002.

First, in *Troice*, the Fifth Circuit noted that the plaintiffs never argued that attorney immunity did not apply because Greenberg Traurig's conduct was outside the scope of representation (nor, apparently, was there any related argument that Greenberg's acts were foreign to the duties of a lawyer). Because of the plaintiffs' waiver, the Fifth Circuit noted it could not address that issue, and was left with addressing only whether alleged criminal conduct automatically negates immunity. *Id*. at 507. The issue the Fifth Circuit could not address or answer is the issue in the *NFTD* case, which makes the holding in *Troice* inapplicable. The answer as this Court has made clear is that an attorney's participation in a fraudulent business scheme with or on behalf of a client falls outside of the scope of the attorney's representation of the client and/or is foreign to the duties of a lawyer. *Bethel,* 595 S.W.3d at 657; *Youngkin,* 546 S.W.3d at 682.

Second, to the extent Petitioners rely on *Troice* as holding that the immunity defense applies outside the litigation context, the opinion curiously cites as authority three unpublished Texas court of appeals opinions that, in fact, involved conduct *in* the litigation context. *Troice,* 921 F.3d at 505. *See e.g., Alanis*, 2018 Tex.App. LEXIS 2376 (sending notice of acceleration and intent to foreclose); *Rogers v. Walker*, No. 09-15-00489-CV, 2017 Tex.App. LEXIS 7303 (Tex.App.—Beaumont Aug. 3, 2017, pet. denied) (litigation of a contested probate proceeding); *Santiago v. Mackie Wolf Zientz & Mann, P.C.*, No. 05-16-00394-CV, 2017 Tex.App. LEXIS

2092 (Tex.App.—Dallas March 10, 2017, no pet.) (sending notice of default and acceleration as part of foreclosure proceeding). Each of those cases involved alleged wrongful attorney conduct in proceedings which Texas case law has long held to be eligible for immunity. *See supra*, section B.

Third, while the Fifth Circuit cited to three unpublished cases in its discussion of whether immunity applies beyond the litigation context that are not on point, it inexplicably did not cite to the Supreme Court's *Poole* and *Chu* opinions which are on point. Nor did it cite to relevant published court of appeals opinions. *See, e.g.*, *Landry's, Inc.*, 566 S.W.3d 41; *JJJJ Walker, LLC,* 447 S.W.3d 453; *Likover,* 696 S.W.2d 468.

III. EVEN WITHOUT APPLYING THE LITIGATION CONTEXT INQUIRY, THE LAWYERS' CONDUCT DOES NOT SATISFY THE "SCOPE OF REPRESENTATION" TEST—HENCE IMMUNITY DOES NOT APPLY FOR THIS ADDITIONAL REASON.

Because of its ruling that attorney immunity does not extend beyond the litigation context, the Fourteenth Court of Appeals in *NFTD* did not have to consider if the Lawyers But the Lawyers cannot satisfy that requirement, either. In their summary judgment motion, the lawyers failed satisfy their burden to conclusively establish that all their alleged wrongful conduct was within the scope of their representation of Bernardo 1 and not foreign to the duties of an attorney. The only testimony included with the Lawyers' Motion was from Cynthia Smith, one of the co-owners of Bernardo 1, for the proposition that the Lawyers represented Bernardo

1, and not Bernardo 2, in the 2011 APA. (1CR 184; 1CR 241-42, and 243 at pp. 60-61 and 124). As noted in *Youngkin v. Hines*, this is of little if any consequence to the scope of representation inquiry. 524 S.W.3d at 291. There must be a deeper inquiry which the Lawyers did not support with evidence in their motion for summary judgment on attorney immunity. Petitioners' failure to present evidence that satisfies the "conduct within the scope of representation and not foreign to the duties of an attorney" test is an additional ground for affirmance.

On the other hand, as set out in Respondents' Statement of Facts, *supra*, Bernardo 2 presented evidence that raises fact issues on Bernardo 2's claim that the Lawyers' conduct went beyond the scope of their legal representation of Bernardo 1, and strayed into misconduct acting in the non-immune capacity as an investment banker/broker and perpetrator of a knowing fraud in a business transaction. Indeed, the Bernardo 1 corporate resolution, which Howard prepared, authorized the Lawyers to represent Bernardo 1 and communicate with third parties on "any and all" <u>business, financial</u> and legal matters. (2CR 417). To this end, the Lawyers were involved in the non-legal business/financial decision to sell the Company. (2CR 368 at pp. 14-16). Howard also drafted the corporate resolution that commissioned the Lawyers to find someone to buy the Company assets. (2CR 370 at p. 35; 2CR 570-71). As Bernardo 1 owner Jean Smith stated, "[Howard's] the one that brokered the deal.". (2CR 368 and 376, at pp. 15-16, 107). During the entire time, the Lawyers

knew that the key Patents were worthless and could not be enforced against infringers. *See supra*, Statement of Facts, Section C. And, after acting like an investment banker/broker in preparing the "Confidential Business Profile" that misrepresented the quality of Bernardo 1's intangible assets, Howard traded on his pre-existing friendship with Todd Miller of Bernardo 2 to privately solicit his future representation of them once the APA was completed. (2CR 579, 601-03 at ¶¶ 3-7 and 9).

This conduct is highly inappropriate and unethical. Howard's overtures to his friend on the buyer's side were done not as a lawyer, but rather more like a broker with a mission to complete the sale and get his firm paid out of the sales proceeds – all without the permission of his client Bernardo 1. (2CR 371 and 376 at pp. 54-55, and 107). This duplicity was outside the scope of Howard's legal representation of Bernardo 1, and foreign to his duties as a lawyer.

As a result of Howard's private communications and false assurances about the value of the intellectual property to Miller, combined with their pre-existing friendship and Howard's solicitation to represent Bernardo 2 if the deal went through, Miller placed a great deal of trust in him and his on-going advice throughout the pre-APA process. (2CR 601-02 at ¶¶ 3-7). Further, while socializing at a pub with the Bernardo 2 owners, Howard also misrepresented to Peter Cooper that there were no issues with any of the Patents. (2CR 609-10 at ¶ 5). Then, to further induce

Bernardo 2 to go through with the transaction, Howard lied to both Cooper and Miller that Bernardo 1 had an anonymous buyer in reserve who would pay cash if Bernardo 2 chose to back out of the deal. (2CR 603 at ¶ 9; 2CR 609-10 at ¶ 5). This statement was false—and made without the consent of Bernardo 1, not to mention it being false. (2CR 371 at pp. 54-55). Howard obviously was not billing his client when socializing with and soliciting his future representation of the Bernardo 2 owners. These actions did not require the "office, professional training, skill, and authority of an attorney." Howard was on his own mission to make sure the deal would go through so his firm could get paid hundreds of thousands of dollars in past-due fees. (2CR 572-73; 2CR 350 at pp. 70-71; 2CR 361 at pp. 164-65; 2 CR 574). To top it off, with full knowledge about the Patents being unenforceable, Howard wrote false and misleading representations and warranties into the APA. (2CR 602-03 at ¶ 8; 2CR 608-09 at ¶ 4; 2CR 611-714 at §§ 8, 9.h., 9.s. and 9.u., and Schedule 9.s).

The scheme worked. Not knowing that the Patents were "worthless" (Bernardo 1's own words in its malpractice suit against the Maryland I.P. lawyers), Bernardo 2 bought the tainted assets, and the Lawyers got paid $436,000 out of the closing proceeds to cover two years of their unpaid invoices. (2CR 361 at pp. 164-65). Howard agreed that structuring the APA closing for his firm to get paid out of Bernardo 2's purchase proceeds was done "as a part of the final deal". (*Id.*) This

voluminous evidence showed, or at least created multiple fact questions, that the Lawyers' fraudulent conduct fell are outside the scope of their representation.

IV. EXPANDING ATTORNEY IMMUNITY TO TRANSACTIONAL WRONGDOINGS WOULD ABROGATE THIS COURT'S HOLDING IN *MCCAMISH.*

Accepting Petitioners' invitation to recognize for the first time blanket immunity for transactional lawyers would not only upend decades of Texas law, but would also abrogate this Court's opinion in *McCamish, Martin, Brown & Loeffler v. F.E. Appling Interests,* 991 S.W.2d 787 (Tex. 1999). In *McCamish*, this Court considered whether the elements of Section 552 of the Restatement (Second) of Torts can be applied to lawyers in business transactions. Section 552, titled Information Negligently Supplied for the Guidance of Others, states in pertinent part:

> (1) One who, in the course of his ***business, profession or employment***, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others ***in their business transactions***, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.
>
> . . .

RESTATEMENT (SECOND) OF TORTS §552 (emphasis added).

Applying §552, this Court held that, like other professionals, attorneys can be liable to a nonclient for misrepresentations made in a business transaction context when the attorney is aware of the nonclient's reliance on the misrepresentations. *See McCamish,* 991 S.W.2d at 791-94.

The Court explained that §552 extends to numerous professionals including lenders, auditors, physicians, real estate brokers, securities agents, accountants, surveyors, and title insurers, and there was no discernable reason why it should not extend to attorneys. *Id.* at 791 (citations omitted). Further, §552 was/is the most widely adopted standard of negligent misrepresentation in attorney liability and economic cases. *Id*. at 792 (noting that Tennessee, Massachusetts, Louisiana, Illinois, Pennsylvania, Colorado, and New Mexico all permit attorney-liability for misrepresentations to a nonclient). Section 552 imposes a duty to avoid misrepresentation regardless of privity. *Id*.

The lawyer defendants in *McCamish* argued that the application of §552 causes a client to "lose control over the attorney-client relationship", "damages an attorney's ability to represent a client", and "creates a conflict of duties and threatens the attorney-client privilege." *Id*. at 793. Those arguments—echoing the sky-is-falling arguments by Petitioners here—sound in attorney immunity. The Court rejected those contentions, explaining that liability only extends where an attorney who provides the information is aware of and intends that the nonclient rely on the information. *Id*. at 794. (internal citations omitted). As discussed above, the same is true here. *See* 1CR284-305. at ¶¶17, 18, and 34.

The *McCamish* holding centered on the attorney's intent for the nonclient to rely on his/her misrepresentation of a material fact in a business transaction, and the

nonclient's justified reliance on same. *Id.* at 794. To determine whether the nonclient justifiably relied on the representation, the reviewing court must consider the nature of the relationship between that attorney, client and nonclient. *Id.* The nonclient cannot rely on the attorney's representations unless the attorney invites that reliance. *Id.* at 795. Based on the facts and pleadings in this case, the *McCamish* precedent clearly applies to the Lawyers' conduct alleged in this suit. 1CR284-305. at ¶¶17, 18, and 34.

If the Fourteenth Court's opinion is reversed, and the Court holds that that attorney immunity applies in the context of business transactions, *McCamish* will be abrogated. The Court should not follow Petitioners in creating such an upheaval in Texas law. Indeed, in *Cantey Hanger* itself, the Court embraced *McCamish*'s analysis 467 S.W.3d at 483 n. 7 ("In *McCamish*, we held that an attorney can be liable to a non-client for negligent misrepresentation where 'an independent duty to the nonclient [arises] based on the [attorney's] manifest awareness of the nonclient's reliance on the misrepresentation and the [attorney's] intention that the nonclient so rely.' 991 S.W.2d at 792. The plaintiffs do not assert such a claim here."). Petitioners offer no reason for the Court to reverse course now.

There is clear line of separation between the furthest reaches of the attorney immunity defense, on the one hand, and a *McCamish*/§552 cause of action against lawyers who provide false information to others "in their business transactions," on

the other hand. The reason is because §552 is limited to business transactions, an area that has always been beyond the reach of attorney immunity. Attorney immunity cannot be applied to Bernardo 2's claims against the Lawyers for negligent misrepresentations in a business transaction, because that is territory occupied by RESTATEMENT §552.

V. THIS COURT HAS PREVIOUSLY RECOGNIZED THAT THERE IS A DISTINCTION BETWEEN THE LITIGATION CONTEXT AND TRANSACTIONAL WORK WHEN ASSESSING ATTORNEY LIABILITY IN A LEGAL MALPRACTICE CONTEXT.

Ruling favor of Petitioners would reverberate throughout Texas law. While Petitioners reject any distinction between the litigation context and business transactions, this Court has recently applied that distinction in the context of limitations. In *Erickson v. Renda*, 590 S.W.3d 557 (Tex. 2019), this Court declined to extend the "*Hughes* tolling rule," which governs malpractice claims regarding litigation and quasi-litigation matters, to malpractice claims arising from transactions. *Id.* Petitioners' broad-based immunity rule would call *Erickson* into question as well.

VI. PUBLIC POLICY FAVORS NOT EXPANDING IMMUNITY TO ATTORNEY WRONGDOING IN PURELY BUSINESS TRANSACTIONS.

The consequences of the rule advocated by Petitioners are grave. Granting blanket immunity for *anything* done in the scope of an attorney's representation of his client in a business deal, even where the conduct is fraudulent, would violate the norms of American law. Attorneys would be immunized from setting up fraudulent

business schemes merely because they have a law license, while other professionals would not enjoy such an indulgence. As the *Cantey Hanger* dissent put it, "[t]his scope-of-representation test cannot be the law, or almost anything an attorney does would be protected from civil liability. This is not the law in Texas, and it is inconsistent with the approach the RESTATEMENT adopted." 467 S.W.3d at 489-490.

Professionals in many other fields remain liable for such conduct. *See McCamish,* 991 S.W.2d at 791 (noting that auditors, physicians, real-estate brokers, accountants and others are liable for misrepresentations). The outcome that would result from applying attorney immunity to business transactions is nonsensical, and prompts these questions: Why can a tax **CPA** be liable under RESTATEMENT §552 for making negligent misrepresentations in a business transaction that he or she is aware the other party will rely on, but not a tax **lawyer** who engages in the identical conduct? What policy is served by shielding the tax lawyer from suit but not the tax CPA when everything else is the same?

The essential differences between litigation and transactions cannot be ignored. Unlike in litigation where there is a referee with the power to sanction inappropriate conduct, or foreclosure proceedings where notice and due process protections exist, there are no similar protections against mischievous conduct by a lawyer left to his own devices in a business transaction. If attorney immunity were extended to business transactions, a lawyer could intentionally defraud a counter-

party buyer in an asset sale to assure payment of his fees out of the sale proceeds, and then openly admit to his deceit once the deal is done with no repercussions from the defrauded buyer. Shielding a lawyer from liability for such conduct would be harmful to the public and the integrity of the legal profession and violate the norms of American law.

The counterargument against limiting the attorney immunity defense to the litigation context is that transactional lawyers also face adversity in their business deals, and they need the same protection. But no court has ever equated the degree of adversity in litigation with a business deal—and for good reason. The goal in a business deal is to enter into an arrangement that both parties find mutually desirable. In litigation, where there is a winner and a loser, and regular conflict, there is no common goal.

The Fourteenth Court's opinion is consistent with the RESTATEMENT'S standards for attorney liability to nonclients. On the other hand, Petitioners' and amici's argument for universal attorney immunity under Texas law cannot be reconciled with the RESTATEMENT. Their attempt to suggest that the RESTATEMENT draws completely different boundaries than the attorney immunity doctrine under *Cantey Hanger* and progeny is wholly dependent on acceptance of their false narrative that attorney immunity has no limits. Petitioners' Br., pp. 35-36. Section 51 of the RESTATEMENT imposes a duty of care on lawyers toward a nonclient to the

extent the lawyer invites the nonclient to rely on the lawyer's opinion and the nonclient is not too remote from the lawyer to be entitled to protection. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §51. This "not too remote" exclusion from liability expressly recognizes that the §51 does not apply to claims against opposing counsel in litigation. *Id.* at cmt c. In short, §51 is consistent with the application of the attorney immunity defense to litigation-related conduct, and is equally consistent with not extending immunity to fraudulent conduct in business transactions.

Additionally, RESTATEMENT §56 states that a lawyer is subject to liability to a nonclient when a nonlawyer would be in similar circumstances. This standard for attorney liability would certainly apply to business transactions where attorneys are not immune from liability. But it could not apply to litigation as such activity requires a law license which a nonlawyer would not have, and so the remedy permitted in RESTATEMENT §56 would not apply in litigation. In sum, the RESTATEMENT parallels the law in Texas, and elsewhere, that attorney immunity does not apply outside the litigation context.

No Texas appellate court—or any American court—has ever granted a lawyer carte-blanche immunity from suit or liability for false representations made to a counter-party in a business transaction. For all the reasons stated above, this Court should not be the first.

CONCLUSION

Respondents request that the Petition for Review be refused, and, alternatively, if the Petition is granted, Petitioners request that the opinion of the court of appeals be affirmed, and for such other and further relief to which they are entitled.

Respectfully submitted,

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Dated: December 1, 2020.

/s/ Kenneth R. Breitbeil
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