FILED
20-0066
1/15/2021 5:24 PM
tex-49772527
SUPREME COURT OF TEXAS
BLAKE A. HAWTHORNE, CLERK

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

PETITIONERS' REPLY BRIEF ON THE MERITS

BECK REDDEN LLP
Russell S. Post
State Bar No. 00797258
rpost@beckredden.com
David J. Beck
State Bar No. 00000070
dbeck@beckredden.com
Alex B. Roberts
State Bar No. 24056216
aroberts@beckredden.com
Nicholas M. Bruno
State Bar No. 24097432
nbruno@beckredden.com
1221 McKinney, Suite 4500
Houston, TX 77010-2010
(713) 951-3700
(713) 951-3720 – Fax

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

TABLE OF CONTENTS

PAGE

Table of Contents i

Index of Authorities iii

Argument in Reply 1

I. Whether attorney immunity applies to transactional law practice warrants Supreme Court review. 2

II. Respondents' arguments for a litigation/transaction distinction cannot be reconciled with the principles of *Cantey Hanger*. 5

A. The concern for protecting zealous representation applies equally to transactional law practice. 5

B. Being a "competent and ethical lawyer" is no greater protection for transactional lawyers than for litigators. 9

C. Transactional attorneys, like litigators, are subject to adequate public and private remedies despite attorney immunity. 12

D. Reliance on the *Cantey Hanger* dissent is unconvincing. 16

III. Respondents' reliance on out-of-state authorities, the Restatement, *Poole*, and *McCamish* cannot save the court of appeals' decision. 17

A. *Cantey Hanger* already rejected the approach of other states. 17

B. *Cantey Hanger* already rejected the Restatement approach. 19

C. *Poole* is consistent with the "scope of representation" test. 20

D. *McCamish* does not warrant an exception to attorney immunity in the transactional context. 22

IV. Petitioners satisfy the test for attorney immunity as a matter of law. 26

Conclusion 28

Certificate of Service 29

Certificate of Compliance 30

INDEX OF AUTHORITIES

CASE **PAGE(S)**

Cantey Hanger, LLP v. Byrd,
467 S.W.3d 477 (Tex. 2015) .....*passim*

Chu v. Hong,
249 S.W.3d 441 (Tex. 2008) 25

Dallas County v. Halsey,
87 S.W.3d 552 (Tex. 2002).....10

Energy Transfer Partners, L.P. v. Enter. Prods. Partners, L.P.,
593 S.W.3d 732 (Tex. 2020) 10

Erikson v. Renda,
590 S.W.3d 557 (Tex. 2019) 8

Hughes v. Mahaney & Higgins,
821 S.W.2d 154 (Tex. 1991) 8

Hunter v. Marshall,
No. 01-16-00636-CV, 2018 WL 6684840 (Tex. App.—Houston
[1st Dist.] Dec. 20, 2018, no pet.).....3

JJJJ Walker, LLC v. Yollick,
447 S.W.3d 453 (Tex. App—Houston [14th Dist.] 2014,
pet. denied).....3

Kurker v. Hill,
689 N.E.2d 833 (Mass. App. Ct. 1998) 18

Likover v. Sunflower Terrace,
696 S.W.2d 468 (Tex. App.—Houston [1st Dist.] 1985, no writ) 3, 20

LJH, Ltd. v. Jaffe,
4:15-CV-00639, 2017 WL 447572 (E.D. Tex. Feb. 2, 2017) 20

McCamish, Martin, Brown & Loeffler v. F.E. Appling Interests,
991 S.W.2d 787 (Tex. 1999) 15, 22, 23, 25

Poole v. Houston & T.C. Ry. Co.,
58 Tex. 134 (1882).....4, 20

Sheller v. Corral Tran Singh, LLP,
551 S.W.3d 357 (Tex. App.—Houston [14th Dist.] 2018,
pet. denied).....3, 25

Simms v. Seaman,
69 A.3d 880 (Conn. 2013).....11

Stover v. ADM Milling Co.,
No. 05-17-00778-CV, 2018 WL 6818561 (Tex. App.—Dallas
Dec. 28, 2018, pet. denied).....3, 20

Troice v. Greenberg Traurig, L.L.P.,
921 F.3d 501 (5th Cir. 2019).....4

U.S. Bank Nat'l Ass'n v. Sheena,
479 S.W.3d 475 (Tex. App.—Houston [14th Dist.] 2015, no pet.).....3

Walls v. VRE Chicago Eleven, LLC,
344 F. Supp.3d 932 (N.D. Ill. 2018).....18

Youngkin v. Hines,
546 S.W.3d 675 (Tex. 2018).....7, 14, 21, 25, 26

RULES

Tex. R. Evid.
503(c)(1).....14
503(d)(3).....14

OTHER AUTHORITIES

Kevin Penton,
Jones Day Accused of Duping Berkshire Hathaway Unit
(Sept. 29, 2020).....12

ARGUMENT IN REPLY

Although it poses a question of first impression in this Court, this is not a case about first principles—it is a case about line drawing. The key legal principles were settled in *Cantey Hanger, LLP v. Byrd*, 467 S.W.3d 477 (Tex. 2015). The question in this case is simply whether those principles apply to transactional law practice.

Respondents have failed to clash on several significant points. Importantly, Respondents have proven unable to grapple with our historical research into *Poole*. This case affords the Court a rare opportunity to resolve the confusion about *Poole* that has existed in the lower courts for several decades.

When Respondents do address our arguments, they proceed as if the Court were writing on a blank slate, ignoring the key principles settled by *Cantey Hanger*. *Cantey Hanger* adopted a broad interpretation of the attorney immunity doctrine, rejecting the more narrow approaches of other states and the Restatement. Similarly, *Cantey Hanger* synthesized earlier decisions and clarified the boundaries of the attorney immunity doctrine, so pre-*Cantey Hanger* decisions are no longer helpful. Respondents are relitigating issues this Court settled just a few years ago.

Respondents are fighting the last war. They have no valid way to draw a line between litigation and all other forms of law practice, so in an attempt to defend the decision below, they are forced to challenge the very foundations of *Cantey Hanger*. This Court should grant review and finish the work of *Cantey Hanger*.

I. Whether attorney immunity applies to transactional law practice warrants Supreme Court review.

Respondents agree that whether the attorney immunity doctrine applies to transactional law practice is "important to the jurisprudence of the state." Br. at xi. This is the rare case in which both sides agree that review is warranted.

First, review is warranted because of the conflicts among the appellate courts. Tellingly, Respondents do not respond to the mischief caused by these conflicts. They call the statements from the other intermediate courts "stray dicta." Br. at xi; *accord id.* at 43-44. But those courts have not characterized their rulings as "dicta," and the trial courts in Austin, Dallas, and Beaumont are not at liberty to ignore them. Similarly, Respondents are quick to classify these decisions as occurring in the "litigation-like context" (whatever that means), Pet. Br. App. C at 16, but this Court will not find that gloss in the opinions of the Third, Fifth, or Ninth Court of Appeals. The Fourteenth Court holds the attorney immunity doctrine does not apply outside the litigation context; the Third, Fifth, and Ninth Courts disagree with that position. Resolving such splits among the lower courts is uniquely the province of this Court.

Respondents attempt to deny the existence of a split by painting a picture of a widespread refusal to apply attorney immunity to transactional conduct. Br. at 36. But that picture does not withstand scrutiny. Respondents seek to impose a rationale on the cited opinions that does not appear in the opinions themselves.

For example, Respondents make much of this Court's use of the word "litigation" in discussing attorney immunity. *See* Br. at 27-28 (*Youngkin* and *Bethel*). And they note that the Fourteenth Court previously has done the same. *Id*. at 40-42 (*Sheller v. Corral Tran Singh, LLP*, 551 S.W.3d 357, 363 (Tex. App.—Houston [14th Dist.] 2018, pet. denied); *U.S. Bank Nat'l Ass'n v. Sheena*, 479 S.W.3d 475 (Tex. App.—Houston [14th Dist.] 2015, no pet.)). But those cases involved conduct that occurred in litigation, so their references to "litigation immunity" cannot be read as a comment on the scope of attorney immunity outside the litigation context.

Similarly, the two cited post-*Cantey Hanger* decisions do not distinguish between litigation and transactional law practice; those cases involved other issues. *See Stover v. ADM Milling Co.*, No. 05-17-00778-CV, 2018 WL 6818561, at *15 (Tex. App.—Dallas Dec. 28, 2018, pet. denied) (attorney was not acting as a lawyer for a client but "acting in his personal capacity by providing confidential information to his son"); *Hunter v. Marshall*, No. 01-16-00636-CV, 2018 WL 6684840 at *21 (Tex. App.—Houston [1st Dist.] Dec. 20, 2018, no pet.) (special appearance).

The other two cited cases do not discuss a litigation/transaction distinction—and in any event, they were both decided before *Cantey Hanger*. *See* Br. at 36 (citing *JJJJ Walker, LLC v. Yollick*, 447 S.W.3d 453 (Tex. App—Houston [14th Dist.] 2014, pet. denied); *Likover v. Sunflower Terrace*, 696 S.W.2d 468, 473 (Tex. App.—Houston [1st Dist.] 1985, no writ)). Those cases are obsolete now.

Second, Respondents do not dispute that *Troice v. Greenberg Traurig, L.L.P.*, 921 F.3d 501 (5th Cir. 2019), held that immunity applies to transactional conduct—creating a square conflict between the federal courts and the state courts in Houston. Unable to deny that conflict, Respondents argue that *Troice* might have been decided differently if their reading of *Poole v. Houston & T.C. Ry. Co.*, 58 Tex. 134 (1882), had been preserved for appellate review. Br. at 45. But that does not change the fact that *Troice* did, in fact, predict that immunity applies to transactional law practice. Nor does it change the fact that the Fourteenth Court rejected *Troice* on the merits—not on the theory that it could be distinguished based on *Poole*. For these reasons, Respondents' attempt to distinguish *Troice* is futile. Federal district courts in the Fifth Circuit are bound by *Troice*, while the decision below refused to follow *Troice*. The square conflict between the two can be reconciled only by this Court.

Third, far from diminishing the importance of this conflict among the courts, Respondents' resort to *Poole* as the controlling precedent confirms that guidance from this Court is sorely needed. Br. at 45. As the opening brief explained in detail, *Poole* has been misunderstood ever since the First Court's 1985 decision in *Likover*, and this Court has never addressed the *Likover* gloss. If *Poole* is the Rosetta Stone—an ancient artifact that somehow answers the lingering question about the scope of attorney immunity in transactional law practice—then this Court should decipher it. That jurisprudentially important task should not be left to the lower courts.

II. Respondents' arguments for a litigation/transaction distinction cannot be reconciled with the principles of *Cantey Hanger*.

Most of Respondents' arguments that attorney immunity should be limited to litigation conduct cannot be reconciled with this Court's decision in *Cantey Hanger*. In particular:

(1) *Cantey Hanger* settled that a broad immunity doctrine is necessary to promote zealous representation. That bedrock principle applies equally to transactional law practice.

(2) *Cantey Hanger* settled that this broad immunity is necessary to avoid the chilling effect created by the prospect of liability to non-clients. Behaving "ethically and competently" was no answer to that rationale in the litigation context, and the transactional context is no different.

(3) *Cantey Hanger* settled that the proper remedy against a lawyer who is a bad actor is a public remedy, not a claim belonging to the adversary. Respondents' desire for a private remedy against transactional lawyers belonging to the adversary is irreconcilable with that principle.

Petitioners recognize that the outcome in *Cantey Hanger* was not preordained; the Court might have reached a different conclusion. But it announced a rule of law based on these core principles, so they should be applied consistently.

A. The concern for protecting zealous representation applies equally to transactional law practice.

The Court already has concluded that a broad attorney immunity doctrine is justified to safeguard zealous representation. *Cantey Hanger*, 467 S.W.3d at 483. The question this case poses is whether that same bedrock principle applies to transactional law practice—which, no less than litigation, is characterized by parties acting in their own self-interest who need and deserve zealous representation.

Respondents implausibly argue that transactional work is free from conflict, charmingly suggesting "[t]he goal in a business deal is to enter into an arrangement that both parties find mutually desirable." Br. at 18; *see also id*. at 55; Reid at 4. This naïve view is based on a fundamental misconception of a capitalist economy (as this Court well knows from its numerous decisions involving business disputes). In an arms-length business transaction, a "mutually desirable" bargain is rarely one in which the interests of the parties are aligned; ordinarily, it is an arrangement in which the interests of the parties are independent but the bargained-for exchange advances the interests of each party. At its core, capitalism is based on competition, based on the premise that the greatest social good arises from business transactions in which each party pursues its own economic self-interest. The fundamental flaw of Respondents' argument was exposed long ago by the Father of Economics:

> It is not from the benevolence of the butcher, the brewer, or the baker that we expect our dinner, but from their regard to their own interest.

ADAM SMITH, AN INQUIRY INTO THE NATURE & CAUSES OF THE WEALTH OF NATIONS (1776).

Because contracting parties in a capitalist system seek their own self-interest, any party to an arms-length transaction can come out on the "losing" side of a deal (or a failed deal). Given the inherently adversarial nature of arms-length bargains, *Cantey Hanger*'s rationale that broad attorney immunity is necessary to safeguard zealous representation applies equally to transactional practice.

Cantey Hanger itself anticipated the difficulty of drawing a meaningful line, pointing out that immunity is "not universally" limited to representation in litigation. 467 S.W.3d at 482 n.6. Respondents try to explain away these cases as involving "litigation-like" activities, Br. at 17, confidently asserting that "[f]or over a century, Texas courts have ably distinguished between litigation and non-litigation contexts for purposes of applying the attorney immunity doctrine." *Id.* at xi, 17. However, Respondents cannot find a single authority that discusses "litigation-like" conduct; they are simply adding their own gloss to the decisions. *See* Br. at 39-40.

Furthermore, Respondents' "test" for a "litigation-like context" is bankrupt. Transactional practice is often "highly adversarial and often emotional" (Factor #1). Transactions often create a "winner and a loser" (Factor #2). Transactional lawyers "often ha[ve] to make split-second decisions for the client" (Factor #4). *Id.* at 18. None of these "tests" justifies a distinction between litigation and transactional work. Little wonder that no Texas court has ever applied such a "test."

Likewise, one amicus suggests that broad immunity is necessary to protect Texas lawyers from "dissatisfied participants" in the court system. Schuwerk at 32. Why would a "dissatisfied participant" in a commercial transaction be any different? This Court already has extended its immunity rule beyond adjudicative proceedings to settlement negotiations. *See Youngkin v. Hines*, 546 S.W.3d 675, 682 (Tex. 2018). It is hard to see how one form of legal negotiation is different from another.

At the end of the day, Respondents offer neither a meaningful distinction between litigation and non-litigation conduct nor a test for "litigation-like" conduct that will guide practicing attorneys and courts to understand when attorney immunity is appropriate. This is not a principled line; it is a Rorschach test.

Respondents claim to find support for their "litigation-like" test and their distinction between litigation and transactional representation in *Erikson v. Renda*, 590 S.W.3d 557 (Tex. 2019). Br. at 53; Schuwerk at 36. But *Erikson* involved a line that was drawn for very different reasons and in very different terms.

Erikson considered whether the tolling rule of *Hughes v. Mahaney & Higgins*, 821 S.W.2d 154 (Tex. 1991), is limited to allegations of malpractice in litigation. Because tolling is limited to claims of malpractice "in the prosecution or defense of a claim that results in litigation," *id*. at 157, this Court reasoned that the tolling rule does not apply to purely transactional conduct. The tolling rule applies only when "the legal services providing the basis for the malpractice claim occurred directly in, and were integrally connected to, the prosecution or defense of a claim," *Erikson*, 590 S.W.3d at 567, whereas "the mere rendition of legal advice does not constitute 'the prosecution or defense of a claim.'" *Id*. Lower-court opinions referring to a "'transactional work' exclusion" were "merely a shorthand way of saying *Hughes* tolling is limited to malpractice 'in the prosecution or defense of a claim' whether occurring during litigation or not." *Id*. at 568.

Unlike the narrow language of *Hughes*, this Court announced a broad rule in *Cantey Hanger* that extends immunity to *all* conduct in the scope of representation; nothing in that decision restricts immunity to conduct in the prosecution or defense of a claim. *See Cantey Hanger*, 467 S.W.3d at 483-84. And as we have explained, the rationale for immunity applies equally to litigation and transactional practice: just as a litigator should be free from the chilling threat of litigation by an adversary, a transactional attorney should not be forced to "balance his own potential exposure against his client's best interest." *Id.* at 483. Accordingly, the logic of *Erikson* supports the conclusion that the "scope of representation" test for attorney immunity applies equally to transactional representation.

B. Being a "competent and ethical lawyer" is no greater protection for transactional lawyers than for litigators.

Respondents deny that the threat of litigation has a chilling effect on lawyers. They promise that "[c]ompetent and ethical transactional lawyers" can expect to fare "just fine" without immunity from adversaries. Br. at 18-19; *see also* Reid at 5. "All a transactional lawyer need[s] to 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.'" *Id*. at 19.

The Court has heard variations on this theme many times, in many contexts. It has never been persuasive before; indeed, the very same argument could be made about litigators, but it did not succeed in *Cantey Hanger*. It is no better now.

The fatal flaw in this argument is that it ignores the threat of false positives, which is the whole reason for matter-of-law defenses such as attorney immunity: lawyers who risk liability to an adversary will be chilled from legitimate behavior (*i.e.*, zealous representation) out of fear that a jury will find them liable incorrectly. Behaving as a "competent and ethical lawyer" will not protect a lawyer against a suit by a disgruntled adversary any more than competent and ethical judges are protected against retaliatory lawsuits by disgruntled litigants. The judicial immunity doctrine addresses this hazard. "While protecting the individual judge, this policy likewise serves to protect the public 'whose interest it is that the judges should be at liberty to exercise their functions with independence, and without fear of consequences.'" *Dallas County v. Halsey*, 87 S.W.3d 552, 554 (Tex. 2002) (citation omitted). Attorney immunity serves the same important public policy.

Therefore, the reassurance that "competent and ethical" transactional lawyers have nothing to fear is cold comfort when deciding what is "competent and ethical" is left to a jury. The jury system has many virtues, but certainty and predictability are not among them. Matter-of-law rules (like immunity) exist to provide certainty and eliminate unpredictability, as this Court held just last year. *See Energy Transfer Partners, L.P. v. Enter. Prods. Partners, L.P.*, 593 S.W.3d 732, 740 (Tex. 2020) (citation omitted) (rejecting the argument "that the key to avoiding an accidental partnership is to avoid the conduct that establishes a partnership under the statute").

The Connecticut Supreme Court—in a case relied upon by the Reid amicus, Reid at 13-14—expounded on these principles:

> [A]s both the English and American courts have stated numerous times, the privilege is not intended to protect counsel who may be motivated by a desire to gain an unfair advantage over their client's adversary from subsequent prosecution for bad behavior but, rather, *to encourage robust representation of clients and to protect the vast majority of attorneys who are innocent of wrongdoing from harassment in the form of retaliatory litigation by litigants dissatisfied with the outcome of a prior proceeding* . . . . it is better to make the rule of law so large that an innocent counsel shall never be troubled, although by making it so large counsel are included who have been guilty of malice and misconduct . . . . The privilege thus *encourages* candor on the part of honest attorneys, who greatly outnumber those few attorneys who choose not to abide by the rules.

Simms v. Seaman, 69 A.3d 880, 902–04 (Conn. 2013) (citation omitted) (emphasis added). Immunity exists to protect the zealous behavior of "competent and ethical" lawyers who might otherwise be chilled by the threat of a retaliatory lawsuit.

This Court applied this prophylactic rationale to attorneys in *Cantey Hanger*, explaining that a broad immunity rule is necessary to "avoid the inevitable conflict that would arise if [the lawyer] were forced constantly to balance his own potential exposure against his client's best interest." *Cantey Hanger*, 467 S.W.3d at 483 (citation omitted). Confidence in the fact-finding process was not deemed sufficient protection for "competent and ethical" litigators, and there is no reason to reach a different conclusion for transactional lawyers.

C. Transactional attorneys, like litigators, are subject to adequate public and private remedies despite attorney immunity.

Respondents next argue that immunity cannot extend to transactional conduct because there are no "restraints to keep attorneys in line in the transactional context." Br. at 25; *id.* at 54. Their self-interested amicus warns there is "practically nothing to hold attorneys accountable." Reid at 4; *id.* at 12.[1] But the principal remedy for attorney misconduct "'is public, not private.'" *Cantey Hanger*, 467 S.W.3d at 482 (citation omitted). That rationale applies equally to transactional lawyers. Moreover, there are better ways to hold misbehaving transactional lawyers accountable.

First, just as in *Cantey Hanger*, disciplinary proceedings are available if a transactional lawyer engages in misconduct. Respondents' brief proves the point. They suggest that a transactional lawyer will be subject to liability only if he or she fails to comply with the Rules of Professional Conduct. Br. at 19; Reid at 8, 9. Yet, by definition, disciplinary proceedings offer a public remedy in those circumstances. If it is true that "all a transactional attorney need do to avoid exposure to nonclients" is to follow the disciplinary rules, Br. at 19, then there is no need for civil liability. Violation by transactional lawyers can be punished through disciplinary proceedings just as readily as violations by litigators. *See Cantey Hanger*, 467 S.W.3d at 482. Thus, Respondents' argument flies in the face of *Cantey Hanger.*

[1] *See* Reid Br. at v (forthrightly explaining that the amicus "has a national practice of pursuing both negligence and intentional tort claims against law firm defendants").

To be sure, transactional lawyers are not subject to court-ordered sanctions. Br. at 54. But if the inability to levy monetary penalties against transactional lawyers is seen as a deficiency, that is a complaint about the Texas lawyer discipline process that should be addressed to this Court in its role as a regulator of the profession—not a reason for civil liability. Civil liability exists to compensate an injured party, where the law deems compensation appropriate. Sanctions exist to punish and deter, not primarily to compensate. Thus, the lack of a monetary remedy for a non-client is not meaningfully different between litigators and transactional lawyers.

Second, to the extent that a monetary remedy is an important consideration, Respondents fail to grapple with our answer: the adverse party can sue the client, and if the client so chooses, the client can assert a cross-action against the lawyer (which is precisely what has occurred in this case). *See* Pet. Br. at 43. In this manner, the transactional lawyer can be held financially accountable if the client concludes that conduct within the scope of representation was wrongful. If the client decides not to assert such a cross-claim and wishes to protect the attorney-client relationship, the client's adversary should not be able to drive a wedge between lawyer and client by making predictable accusations of self-interest that could be lodged in any case. *See*, *e.g.*, Br. at 6 (desire to be paid fees); *id*. at 8-9 (desire to solicit new business). Litigators want to be paid and to generate business too, but such financial incentives do not deprive them of immunity. Why should transactional lawyers be different?

The practical importance of leaving this decision in the hands of the client cannot be overstated. Not only does it allow the client to maintain control of the attorney-client relationship, but it also allows the lawyer to defend himself or herself. If an adversary sues the lawyer directly, the lawyer cannot use privileged documents to defend against the claim—even if they would exculpate the attorney and inculpate the client in the alleged wrongdoing. *See* Tex. R. Evid. 503(c)(1) (privilege may be asserted by the client). If the client brings a cross-claim against the lawyer, however, the privilege "does not apply." Tex. R. Evid. 503(d)(3).

The real reason for Respondents' desire to sue opposing counsel is exposed by the Reid amicus brief. It stresses the policy of compensating "victims of fraud," Reid at 1, warning that fraudfeasors "often lack funds to satisfy" a judgment. *Id*. Respondents and their amicus want to transform transactional lawyers into insurers for their clients—but the search for a deep pocket is not a good reason to cast aside the substantial public policies served by the attorney immunity doctrine. After all, the same point about judgment-proof clients could be made in the litigation context, yet this Court has not hesitated to hold that attorneys are immune from liability—even from claims of fraud in settlement negotiations, which are no different from allegations of fraud in any other transaction. *See, e.g.*, *Youngkin*, 546 S.W.3d at 682. At bottom, Respondents and their amici are really relitigating *Cantey Hanger*.

Finally, there is one difference between litigation and transactional practice that offers counterparties in arms-length transactions a much greater opportunity to hold opposing transactional lawyers accountable than litigators: contracting parties are free to bargain for the right to rely on representations made by opposing counsel, and for any assurances from counsel that they consider material to the transaction. That occurred in *McCamish, Martin, Brown & Loeffler v. F.E. Appling Interests*, 991 S.W.2d 787 (Tex. 1999), where one party negotiating a settlement agreement became concerned about its enforceability and "agreed to sign the agreement only if [the opposing] lawyers would affirm that the agreement did, in fact, comply with the [relevant] statute." *Id*. at 789. When the agreement later proved to be unenforceable, the injured party sued the lawyers based on that misrepresentation and prevailed—precisely because that party had bargained for the right to rely on opposing counsel. *See id*. at 793-95 (discussing justifiable reliance).

The opportunity to bargain for such justifiable reliance on opposing counsel is much more prevalent in the transactional context than in routine litigation matters (or even in settlement negotiations). Thus, far from justifying a distinction between litigation and transactional conduct, the case for immunity may be even stronger in the transactional context. As in *McCamish*, parties to arms-length transactions are free to bargain for the right to rely on opposing counsel if they desire such protection. If they do not, the rule of *Cantey Hanger* should be controlling.

D. Reliance on the *Cantey Hanger* dissent is unconvincing.

Throughout the brief, Respondents rely heavily on the *Cantey Hanger* dissent. Healthy respect for *stare decisis* should discourage the Court from treating the *Cantey Hanger* dissent as persuasive authority just five years later.

For example, in discussing the appropriate interpretation of *Cantey Hanger*, Respondents rely on the dissent (just as the court of appeals did). Br. at 23-25. Obviously, this Court discerns its holdings from majority opinions—not dissents.

Likewise, Respondents rely on the dissent for their assertion that public policy does not support attorney immunity in the transactional context. *Id.* at 54. The Court could have adopted that position in *Cantey Hanger*, but did not do so.

Next, Respondents ask the Court to reject the "scope-of-representation test" adopted in *Cantey Hanger*, which they say "cannot be the law." *Id.* On the contrary, *Cantey Hanger* held immunity is "conclusively established" if an attorney proves "that its alleged conduct was within the scope of its legal representation" of a client. *Cantey Hanger*, 467 S.W.3d at 484.

Finally, Respondents argue that attorneys should not be treated differently than other professionals. But *Cantey Hanger* already determined that attorneys are subject to a different liability regime than "[p]rofessionals in many other fields [who] remain liable to such conduct." Br. at 54; *see also* Reid at 7.

Cantey Hanger controls all these issues. We will not belabor them.

III. Respondents' reliance on out-of-state authorities, the Restatement, *Poole*, and *McCamish* cannot save the court of appeals' decision.

The authorities cited by Respondents and their amici cannot be reconciled with the principles adopted in *Cantey Hanger*.

A. *Cantey Hanger* already rejected the approach of other states.

Respondents and their amici rely on out-of-state authorities, but this Court has already rejected the version of attorney immunity represented by those authorities. As the *Cantey Hanger* dissent noted, Texas has recognized a broader approach to attorney immunity than other states. *See Cantey Hanger*, 467 S.W.3d at 492 n.7 (Green, J. dissenting) (citing out-of-state authorities). Respondents' quarrel is with the rule of *Cantey Hanger*—not with applying that rule to transactional practice.

Many of the out-of-state cases adopt a fraud exception to attorney immunity. *See*, *e.g.*, Reid at 15-16. But *Cantey Hanger* rejected a categorical fraud exception. *Cantey Hanger*, 467 S.W.3d at 483. Reliance on this case law is an argument against *Cantey Hanger* itself—not against its application to transactional practice.

Several other out-of-state cases illustrate applications of attorney immunity in the litigation context but do not address the transactional context. *See* Reid at 13-15. For the same reasons *Youngkin* and *Bethel* do not answer the question presented by this case, those cases do not support the proposition that attorney immunity is limited to the litigation context. *See* p. 3, *supra*.

Several other out-of-state cases apply the defamation privilege for attorneys, which is an entirely different doctrine. *See Cantey Hanger*, 467 S.W.3d at 485 n.12. That line of authority is inapposite.

In the end, Respondents and their amici can cite only two out-of-state cases that actually limit the scope of the attorney immunity doctrine without relying on the so-called fraud exception this Court rejected in *Cantey Hanger*. In *Kurker v. Hill*, 689 N.E.2d 833 (Mass. App. Ct. 1998), the court stated that immunity does not cover "counselling and assisting . . . clients in business matters generally." *Id*. at 839. However, that case involved "allegations that the attorneys represented individuals on both sides of the transaction and engaged in a conspiracy to undervalue the assets and freeze out the plaintiff," *id*., which is a very different situation from this case. *See* pp. 22-25, *infra* (discussing *McCamish*). In *Walls v. VRE Chicago Eleven, LLC*, 344 F. Supp.3d 932 (N.D. Ill. 2018), meanwhile, the court openly recognized that Illinois' attorney immunity rule is inconsistent with *Cantey Hanger*. *Id*. at 949.

In short, Respondents and their amici cannot justify a distinction between litigation and transactional conduct by relying on out-of-state cases that (a) do not even consider such a distinction and/or (b) depend on a so-called fraud exception. *Cantey Hanger* already rejected this approach. Respondents' reliance on these cases illustrates that their position—and the court of appeals' decision—is irreconcilable with the rationale of *Cantey Hanger* itself.

B. *Cantey Hanger* already rejected the Restatement approach.

Similarly, Respondents and their amici ask this Court to turn back the clock and adopt the Restatement approach of "equat[ing] a lawyer's conduct to that of a nonlawyer for liability purposes." Br. at 20; *see also id.* at 56. But *Cantey Hanger* refused to adopt the Restatement approach—to the dismay of the dissenting justices, who argued that the majority's approach was "inconsistent with the approach the Restatement adopted." *Cantey Hanger*, 467 S.W.3d at 490 (Green, J. dissenting). Again, Respondents' real grievance is with *Cantey Hanger*, not with the application of its rule to the transactional context.

The Schuwerk amicus brief lays bare the full consequences of this position, criticizing the Court's refusal to make categorical exceptions for allegations of fraud (*Cantey Hanger* and *Youngkin*) and criminal conduct (*Bethel*). It does not advocate a distinction between litigation and transactional conduct, but a consistent rule that allows liability "[e]ven in a litigation setting." Schuwerk at 11; *see also id.* at 14-15 (advocating exceptions for fraudulent and criminal acts "both in transactional setting and in litigation ones"); *id.* at 19, 25 (same). In place of the *Cantey Hanger* rule, Professor Schuwerk would prefer a "more complicated path of reasoning." *Id.* at 21. Again, the Court crossed this bridge in *Cantey Hanger*. The only real contribution, therefore, is Professor Schuwerk's confirmation that the attorney immunity doctrine should apply equally to litigators and transactional lawyers.

C. *Poole* is consistent with the "scope of representation" test.

As our principal brief explained in detail, *Poole v. Houston & T.C. Ry. Co.*, 58 Tex. 134 (1882), stands only for the proposition that an attorney who participates as a principal in a fraudulent transaction is not immune from liability simply because he or she holds a law license; such conduct is "foreign to the duties of a lawyer" because it is not within the scope of representation. *Poole* has been misunderstood ever since *Likover v. Sunflower Terrace*, 696 S.W.2d 468, 473 (Tex. App.—Houston [1st Dist.] 1985, no writ), and that error should be corrected. *See* Pet. Br. at 22-30.

Respondents' brief distorts our argument and ignores the historical record. Their view of *Poole* is historically incorrect and incompatible with *Cantey Hanger*.

First, Respondents dismiss our argument as a matter of form, not substance. Br. at 26-28. They are quite wrong. The distinction between an attorney acting as a *principal* in a transaction and an attorney acting *on behalf of a client* is substantive; indeed, it is the very essence of the "scope of representation" test. Every individual who carries a law license engages in some conduct in his or her capacity as a lawyer and other conduct in his or her personal capacity. A lawyer is generally immune from liability to non-clients for conduct in the former capacity, but not the latter. Our careful reading of *Poole* respects that substantive distinction.[2]

[2] For examples consistent with this reading, *see Stover v. ADM Milling Co.*, No. 05-17-00778-CV, 2018 WL 6818561, at *15 (Tex. App.—Dallas Dec. 28, 2018, pet. denied) and *LJH, Ltd. v. Jaffe*, 4:15-CV-00639, 2017 WL 447572, at *3-4 (E.D. Tex. Feb. 2, 2017).

Second, the fallacy of Respondents' interpretation is exposed by the record. Petitioners went beyond the face of the *Poole* opinion to investigate its substance precisely because we agree that the meaning of *Poole* should not turn on semantics. Our historical analysis revealed that (a) the attorney immunity doctrine did not exist at the time of *Poole*; (b) the parties did not litigate the question of attorney immunity; and (c) the facts did *not* prove—and the Court did *not* hold—that J.L. Scott had acted in his capacity as a lawyer. In short, the *Likover* gloss on *Poole* is mistaken.

Unable to respond, Respondents completely ignore the historical record and blithely quote the *Poole* opinion out of context. *See* Br. at 38-39. It is curious that Respondents accuse Petitioners of engaging in semantics, yet they are willfully blind to the substance of the *Poole* decision and double down on a superficial reading that is divorced from historical reality. The Court should seize this opportunity to correct the mistaken *Likover* gloss on *Poole*, which Respondents cannot defend.[3]

Third, Respondents' reading of *Poole* is incompatible with *Cantey Hanger*. They read *Poole* as support for a categorical exception for "fraudulent conduct in a business transaction," Br. at 34, but this Court has rejected a general fraud exception. *Cantey Hanger*, 467 S.W.3d at 483. Our reading harmonizes the two decisions.

[3] Respondents quote *Youngkin*'s statement in dictum that "some fraudulent conduct, even if done on behalf of a client, *may* be actionable." Br. at 26-27 (citing *Youngkin*, 546 S.W.3d at 683) (emphasis added). That equivocal statement signaled that exploring the contours of *Poole* was a question for another day. This case is the opportunity to address that issue.

D. *McCamish* does not warrant an exception to attorney immunity in the transactional context.

Finally, relying on an argument that the court of appeals did not embrace, Respondents argue that applying attorney immunity to transactional lawyers would be inconsistent with *McCamish, Martin, Brown & Loeffler v. F.E. Appling Interests*, 991 S.W.2d 787 (Tex. 1999). Br. at 52, 20-21. In this case, there is no inconsistency. And if there is a threat of inconsistency in other cases, there are better solutions than drawing an artificial line between litigation and transactional practice.

McCamish and *Cantey Hanger* are not in conflict. *McCamish* recognized the existence of a cause of action (under unusual facts). *McCamish*, 991 S.W.2d at 793. Recognizing an affirmative defense does not "abrogate" the cause of action itself. Br. at 52. It simply establishes conditions under which the claim cannot succeed. Those conditions will be satisfied in some—but not all—cases in which attorneys are sued by non-clients for negligent misrepresentation. And when they are satisfied (*i.e.*, when the attorney proves the conduct was within the scope of representation), there would rarely be a valid *McCamish* claim in any event. *McCamish* emphasized that only a "narrow" class of non-clients could successfully sue an opposing attorney for negligent misrepresentation—namely, those who have a justifiable right to rely on opposing counsel. *McCamish*, 991 S.W.2d at 791. And reliance is "not justified" when it occurs in an adversarial context like an arms-length transaction. *Id*. at 794. Thus, recognizing immunity in this context would not materially limit *McCamish*.

Furthermore, recognizing the applicability of the attorney immunity doctrine to transactional practice would not necessarily have changed the result in *McCamish*. *McCamish* was an unusual case in which lawyers expressly undertook obligations to a counterparty in transaction documents. The *McCamish* attorneys expressly gave a legal opinion to the counterparty (and signed a contract certifying that they did so). *Id.* at 789. This unique situation was the key to *McCamish*'s holding. *Id*. at 793-95 (explaining that non-clients may justifiably rely on opinion letters). By bargaining for the right to rely on the lawyers' representations, the *McCamish* plaintiffs created a direct relationship with the opposing lawyers; in substance, a limited engagement was created between the counterparty and the lawyers. Courts could reasonably hold that attorney immunity is not a defense in such a rare situation.

Compare this scenario to *Cantey Hanger*, where the lawyers also participated in transactions related to (and outside of) litigation but did not undertake obligations to the adverse party. *Cantey Hanger*, 467 S.W.3d at 485. *McCamish* did not support a claim in that case, *see id*. at 483 n.7, and this Court found immunity appropriate.

This comparison illustrates two conceivable types of misrepresentation claims by non-clients against opposing counsel: cases that fit the *McCamish* fact pattern (*i.e.*, the non-client expressly bargained for the right to rely on opposing counsel), and cases that do not. The latter category is much more common—and in those cases, there is no tension because there is no valid *McCamish* claim in the first place.

This case falls into the latter category. Petitioners made no representations in the Asset Purchase Agreement, nor did they sign any agreement with Respondents or furnish any opinion letter to Respondents. On the contrary, the APA recited that "Buyer has independently relied on its own judgment," 2CR628 at ¶ 10(f), that the transaction was entirely "a product of an arm's length transaction," 2CR633 at ¶ 28, that Buyer "had the benefit of legal representation by counsel of its own choosing," *id*., and that it was not "relying upon any verbal promise or representation. . . ." *Id*. Thus, the Court need not consider whether attorney immunity would apply to a case satisfying the *McCamish* fact pattern; it could leave that question for another day. But if it wishes to address the issue now and hold that attorney immunity will not lie when a non-client bargains for the right to rely on opposing counsel, it may do so. Declaring that immunity is not a defense if (but only if) a non-client bargains for the right to rely on opposing counsel would be a simple and principled way to reconcile the holdings of *McCamish* and *Cantey Hanger*.

A faithful synthesis of *McCamish* and *Cantey Hanger* would recognize that attorney immunity is the background rule, but parties are free to contract around it. Contracting parties who want the right to rely on opposing counsel could then insist on making the opposing attorney's representations an essential term of the bargain, putting them in the same position as the *McCamish* plaintiffs. This simple solution would resolve any tension between *McCamish* and *Cantey Hanger*.

In this case, for example, Respondents could have asked the seller's lawyers to make specific representations about patent enforceability. But they did not do so, so there is no viable *McCamish* claim and no tension with *Cantey Hanger*.

In any event, any tension between *McCamish* and *Cantey Hanger* could not be resolved by limiting attorney immunity to litigation and "litigation-like" contexts. *McCamish* itself involved a "litigation-like" context: the misrepresentation occurred during the negotiation of a settlement agreement. *McCamish*, 991 S.W.2d at 789. *McCamish* is thus indistinguishable from *Youngkin*, which involved representations made by attorneys in "negotiat[ing] a settlement agreement." 546 S.W.3d at 678. Thus, Respondents are wrong to suggest that the tort of negligent misrepresentation "is limited to business transactions." Br. 53; *see also id.* at 51. This Court adopted the tort in the context of a settlement agreement, a classic "litigation-like" context, so drawing an artificial line in this case between litigation and transactional conduct would not resolve any tension between *Cantey Hanger* and *McCamish*. *See*, *e.g.*, *Sheller*, 551 S.W.3d at 365-66 (discussing *McCamish* in the litigation context).[4]

In the end, Respondents are fighting the last war, criticizing the principles of *Cantey Hanger* rather than offering any persuasive justification for the artificial line drawn by the court of appeals between litigation and transactional practice.

[4] Similarly, *Chu v. Hong*, 249 S.W.3d 441 (Tex. 2008), arose in a "litigation-like" context. There, an attorney demanded performance of a bill of sale and "threatened civil litigation." *Id*. at 443. Thus, *Chu* does not support a litigation/transaction distinction (or even discuss attorney immunity).

IV. Petitioners satisfy the test for attorney immunity as a matter of law.

Finally, Respondents argue that the conduct at issue in this case does not satisfy the test announced by *Cantey Hanger*. That test looks beyond mere labels and artful pleading to "focus on the conduct at issue," *Youngkin*, 546 S.W.3d at 682 (citing *Cantey Hanger*, 467 S.W.3d at 484), then asks whether the conduct at issue was within the scope of representation. *Id*. at 682-83. "The only facts required . . . are the type of conduct at issue and the existence of an attorney-client relationship at the time." *Id*. at 683. Those facts are conclusively established here.

There is no dispute that the conduct in question occurred during the existence of Petitioners' attorney-client relationship, and "the type of conduct at issue"—negotiating and drafting the APA—was all within the scope of their representation. Hoping to avoid that conclusion, Respondents rely entirely on pejorative labels. They label the contract negotiations "misrepresentations," Br. at 48-50, a slur that could be lodged by any disgruntled counterparty in a failed commercial transaction. And they falsely claim Petitioners acted as a "broker," Br. at 47, 48, even though the parties to the APA expressly agreed that there were no brokers in this transaction. 2CR623, 628; *see also* Pet. Br. at 5. Finally, they paint Petitioners in a negative light by accusing them of "socializing at a pub" and "soliciting future representation." Br. at 48-49. Importantly, however, this collateral conduct does not form the basis of their complaints about the invalidity of the Bernardo patents.

Furthermore, Respondents' arguments demonstrate why labels cannot matter. Consider the logical implications of Respondents' labels, which seek to avoid the attorney immunity doctrine based on insinuations of improper motives:

- Why should the location of a negotiation matter? *See* Br. at 48-49 ("at a pub"). Does immunity apply in the office but not in a restaurant?

- Why should a lawyer with a financial incentive to close a deal for his client forfeit immunity? *See* Br. at 48-49 (financial interest). Is immunity denied to litigators who work on contingency simply because their financial interests are aligned with their clients?

- Why should a transactional attorney be required to disclose to an adverse party his or her bills, Br. at 4, "attorney-client privileged memorandum," *id*. at 5, and internal communications to a law partner simply because a counterparty wants to discover the "motive" underlying the attorney's conduct? *Id.* at 6, 8. Is the attorney-client privilege less sacred in the transactional context than the litigation context?

Fortunately, these pejorative labels are immaterial. Respondents do not deny that negotiating and drafting a contract is part of a lawyer's representation of a client in a transactional engagement. Because the type of conduct at issue is indisputably the kind of activity performed by a transactional lawyer and it was all authorized by the lawyers' broad engagement agreement, it was within the scope of representation.

Respondents argue that certain tasks in these negotiations could have been performed by non-lawyers, but that fact is legally immaterial. Immunity applied to statements made during negotiations in *Cantey Hanger* and *Youngkin* even though those statements could have been made just as easily by non-lawyers. Pet. Br. at 48. To the bitter end, Respondents remain at war with the rationale of *Cantey Hanger*.

CONCLUSION

The Court should grant review, then reverse the court of appeals' judgment and reinstate the judgment of the trial court.

Respectfully submitted,

BECK REDDEN LLP

By: */s/ Russell S. Post*

Russell S. Post
State Bar No. 00797258
rpost@beckredden.com
David J. Beck
State Bar No. 00000070
dbeck@beckredden.com
Alex B. Roberts
State Bar No. 24056216
aroberts@beckredden.com
Nicholas M. Bruno
State Bar No. 24097432
nbruno@beckredden.com
1221 McKinney, Suite 4500
Houston, TX 77010-2010
(713) 951-3700
(713) 951-3720 – Fax

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

CERTIFICATE OF SERVICE

I hereby certify that on January 15, 2021, a true and correct copy of the above and foregoing brief was forwarded to all counsel of record via the Electronic Service Provider pursuant to the Texas Rules of Appellant Procedure as follows:

Kenneth R. Breitbeil
kbreitbeil@fbtlaw.com
Courtney B. Gahm-Oldham
coldham@ fbtlaw.com
Stephen P. Crowder
Scrowder@ fbtlaw
FROST BROWN TODD LLC
4400 Post Oak Parkway, Suite 2850
Houston, TX 77027

Attorneys for Respondents, NFTD, LLC f/k/a Bernardo Group, LLC, Bernardo Holdings, LLC and Peter J. Cooper

Michael Trevino
mtrevino@flemingattorneys.com
MICHAEL P. FLEMING
& ASSOCIATES, P.C.
1345 Campbell, Suite 100
Houston, TX 77055

Attorneys for Respondent, Jacqueline Miller

Robert Paul Schuwerk
Robert P. Schuwerk, P.C.
207 Bonnieview
Austin, TX 78704

Amicus Curiae

Thomas E. O'Brien
tom.obrien@bakterbotts.com
Susan Cannon Kennedy
susan.kennedy@bakerbotts.com
Christopher W. Hunt
chris.hunt@bakerbotts.com
BAKER BOTTS L.L.P.
2001 Ross Ave., Suite 900
Dallas, TX 75201

Attorneys for Amicus Curiae, Consortium of Law Firms

R. Michael Northrup
mnorthrup@cowlesthompson.com
COWLES & THOMPSON, P.C.
901 Main Street, Suite 3900
Dallas, TX 75202

Amicus Curiae

William T. Reid, IV
Joshua J. Bruckerhoff
Keith Y. Cohan
Zachary C. Edwing
Morgan M. Menchaca
Reid Collins & Tsai LLP
1301 S. Capital of Texas Hwy.
Building C, Suite 300
Austin, TX 78746

Amicus Curiae

/s/ *Russell S. Post*
Russell S. Post

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Tex. R. App. P. 9.4 because it contains 6,974 words, including text in images and excluding the parts of the brief exempted by Tex. R. App. P. 9.4.

2. This brief complies with the typeface requirements of Tex. R. App. P. 9.4(e) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14 point Times New Roman font.

Dated: January 15, 2021.

/s/ *Russell S. Post*
Russell S. Post

Automated Certificate of eService

This automated certificate of service was created by the efiling system. The filer served this document via email generated by the efiling system on the date and to the persons listed below:

Laura Crain on behalf of Russell Post
Bar No. 797258
lcrain@beckredden.com
Envelope ID: 49772527
Status as of 1/18/2021 7:33 AM CST

Associated Case Party: Haynes and Boone, LLP

Name	BarNumber	Email	TimestampSubmitted	Status
David J.Beck		dbeck@beckredden.com	1/15/2021 5:24:49 PM	SENT
Russell S.Post		rpost@beckredden.com	1/15/2021 5:24:49 PM	SENT
Alex B.Roberts		aroberts@beckredden.com	1/15/2021 5:24:49 PM	SENT
Nicholas Bruno		nbruno@beckredden.com	1/15/2021 5:24:49 PM	SENT

Associated Case Party: NFTD, LLC f/k/a Bernardo Group, LLC

Name	BarNumber	Email	TimestampSubmitted	Status
Courtney Gahm-Oldham	24074240	coldham@fbtlaw.com	1/15/2021 5:24:49 PM	SENT
Kenneth R. Breitbeil	2947690	kbreitbeil@fbtlaw.com	1/15/2021 5:24:49 PM	SENT

Case Contacts

Name	BarNumber	Email	TimestampSubmitted	Status
Thomas O'Brien		tom.obrien@bakerbotts.com	1/15/2021 5:24:49 PM	SENT
Susan Kennedy		susan.kennedy@bakerbotts.com	1/15/2021 5:24:49 PM	SENT
Christopher Hunt		chris.hunt@bakerbotts.com	1/15/2021 5:24:49 PM	SENT
Jessica Aquino		jessica.aquino@bakerbotts.com	1/15/2021 5:24:49 PM	SENT
David Gerkin		David.Gerkin@bakerbotts.com	1/15/2021 5:24:49 PM	SENT
Michael Northrup		mnorthrup@cowlesthompson.com	1/15/2021 5:24:49 PM	SENT

Associated Case Party: Jacqueline Miller

Name	BarNumber	Email	TimestampSubmitted	Status
Michael Trevino	24070762	mtrevino@mtrevinolaw.com	1/15/2021 5:24:49 PM	SENT
Terry AnnGomez		tgomez@Flemingattorneys.com	1/15/2021 5:24:49 PM	SENT