Affirmed and Opinion Filed May 30, 2018

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-17-00850-CV

CHERYLN BETHEL, INDIVIDUALLY AND AS THE REPRESENTATIVE OF THE ESTATE OF RONALD J. BETHEL, DECEASED, Appellant
V.
QUILLING, SELANDER, LOWNDS, WINSLETT & MOSER, P.C., AND JAMES H. MOODY, III, Appellees

On Appeal from the 116th Judicial District Court
Dallas County, Texas
Trial Court Cause No. DC-17-03487

MEMORANDUM OPINION

Before Justices Francis, Fillmore, and Whitehill
Opinion by Justice Francis

Cheryln Bethel, individually and as the representative of the Estate of Ronald J. Bethel, sued opposing counsel for conduct involving an expert inspection of a trailer brake assembly that is the focus of a separate wrongful death action. Appellees Quilling, Selander, Lownds, Winslett & Moser, P.C., and James H. Moody, III, filed a motion to dismiss under Texas Rule of Civil Procedure 91a, asserting the affirmative defense of attorney immunity. The trial court granted the motion, dismissed Bethel's suit, and awarded attorney's fees to appellees. In two issues, Bethel challenges the ruling on appeal. We affirm.

Bethel's petition in this suit alleged the following: Bethel's husband, Ron, died following an accident that Bethel contends was caused by defective brakes in the trailer he was towing.

Bethel sued the manufacturer of the trailer, and appellees represent the manufacturer in the wrongful death suit. According to Bethel, during the course of that litigation, appellees or their experts, with appellees' "knowledge and at their direction and supervision," disassembled the brakes and destroyed their condition. Bethel filed this lawsuit against appellees and their experts, alleging fraud, tortious interference with a contract, spoliation of evidence, "conspiracy to deny [Bethel] the pursuit of justice," trespass to chattel, conversion, negligence, and gross negligence. She sought damages for the destruction of the evidence.

Appellees filed a motion to dismiss the lawsuit, arguing there was no basis in law or fact because the claims were barred by attorney immunity. Bethel responded to the motion, arguing appellees' conduct constituted criminal destruction of property, and Texas law is unresolved as to whether the attorney immunity doctrine applies to criminal conduct. In addition, Bethel amended her petition to add nine paragraphs addressing whether the attorney immunity doctrine applied.

The trial court granted the motion, dismissed Bethel's claims with prejudice, and awarded appellees $7,480 in attorney's fees as well as contingent appellate attorney's fees. After Bethel nonsuited her claims against the engineers and their firms, she appealed the trial court's order dismissing her claims against appellees.

Under rule 91a, a party may move to dismiss a cause of action on the grounds it has no basis in law or fact. TEX. R. CIV. P. 91a.1. "A cause of action has no basis in law if the allegations, taken as true, together with the inferences reasonably drawn from them, do not entitle the claimant to the relief sought." *Id*. In ruling on a 91a motion, the trial court may not consider evidence and must decide the motion "solely on the pleading of the cause of action, together with any pleading exhibits permitted by Rule 59." TEX. R. CIV. P. 91a.6; *Highland Capital Mgmt., LP v. Looper Reed & McGraw, P.C.*, No. 05-15-00055-CV, 2016 WL 164528, at *4 (Tex. App.—Dallas Jan. 14, 2016, pet. denied) (mem. op.). Whether a cause of action has any basis in law is a legal question

we review de novo. *See City of Dallas v. Sanchez*, 494 S.W.3d 722, 724 (Tex. 2016) (per curiam). We base our review on the allegations in the live petition and any attachments, and we accept as true the factual allegations. *Wooley v. Schaffer*, 447 S.W.3d 71, 76 (Tex. App.—Houston [14th] 2014, pet. denied).

In her first issue, Bethel asserts the plain language of rule 91a limits the scope of a court's review to the plaintiff's pleading. Because an affirmative defense is not part of a plaintiff's pleading, she argues, it cannot serve as a basis for dismissal. Consequently, she concludes, the trial court erred by granting appellees' motion on the basis of the affirmative defense of attorney immunity.

Initially, we note that Bethel did not present this particular issue to the trial court in her response to the motion to dismiss; rather, her response argued only that appellees' conduct constituted a crime for which attorney immunity should not apply. Preservation of error reflects important prudential considerations recognizing that the judicial process benefits greatly when trial courts have the opportunity to first consider and rule on error. *Burbage v. Burbage*, 447 S.W.3d 249, 258 (Tex. 2014). Affording courts this opportunity conserves judicial resources and promotes fairness by ensuring that a party does not neglect a complaint at trial and raise it for the first time on appeal. *Id*. Because Bethel did not present this issue to the trial court below, we conclude it is waived.

But even assuming this issue is properly before us,[1] Bethel acknowledges this Court, as well as others, have upheld rule 91a dismissals on the basis of affirmative defenses. *See Highland Capital,* 2016 WL 164528, at *4–6 (attorney immunity); *Galan Family Tr. v. State*, No. 03-15-00816-CV, 2017 WL 744250, at *3 (Tex. App.—Austin Feb. 24, 2017, pet. denied) (mem. op.)

[1] Courts may not consider *issues* that were not raised in the courts below, but parties are free to construct new *arguments* in support of issues properly before the court. *Miller v. JSC Lake Highlands Ops., LP*, 536 S.W.3d 510, 513 n.5 (Tex. 2017). Thus, to the extent Bethel's assertion is an *argument* as opposed to an *issue*, we address it.

(statute of limitations); *Guzder v. Haynes & Boone, LLP,* No. 01-13-00985-CV, 2015 WL 3423731, at *7 (Tex. App.—Houston [1st Dist.] May 28, 2015, no pet.) (mem. op.) (attorney immunity); *GoDaddy.com, LLC v. Toups*, 429 S.W.3d 752, 754–55 (Tex. App.—Beaumont 2014, pet. denied) (immunity from suit under the Communications Decency Act). Nevertheless, she argues these cases apply a "mistaken interpretation" of the rule and urges us to follow *Bedford Internet Office Space, LLC v. Texas Insurance Group, Inc.*, 537 S.W.3d 717 (Tex. App.—Fort Worth 2017, pet. filed). There, the Fort Worth court concluded the plain language of the rule required trial courts to "wear blinders to any pleadings except 'the pleading of the cause of action'" and determined the court erred by dismissing claims on the basis of the statute of limitations, which would require the court to look beyond the plaintiff's pleadings and review the defendant's pleadings. 537 S.W.3d at 720. We decline Bethel's invitation for two reasons.

First, as stated above, this Court previously applied rule 91a to the affirmative defense of attorney immunity. *See Highland Capital*, 2016 WL 164528, at *4–6. In *Highland Capital,* we considered the plaintiff's pleadings and concluded that, meritorious or not, the *type* of conduct alleged fell squarely within the scope of the law firm's representation of its client. 2016 WL 164528, at *4. We therefore concluded the trial court did not err in granting the law firm's rule 91a motion to dismiss the non-client's claims for theft, breach of the duty of confidentiality, conversion, tortious interference with contract, and civil conspiracy to commit theft, extortion, slander, and disparagement based on attorney immunity. *Id.*

Second, the rationale underpinning Bethel's argument and the *Bedford Internet* case is that rule 91a limits a court's consideration to the plaintiff's pleading of the cause of action. Even if we were to assume the correctness of this argument, Bethel's live pleading included nine paragraphs on why attorney immunity does not shield appellees from her suit. In particular, she alleged she owned the trailer and its component parts; appellees knew she owned them and that they were

critical to her claim against the manufacturer; appellees did not obtain her consent to conduct destructive testing; she did not consent to such testing; and appellees "intentionally and knowingly directed the destructive disassembly, testing, and examination of the trailer brakes." She alleged appellees were "seasoned veterans" who were familiar with the standards governing forensic engineering and product liability litigation and were aware "with reasonable certainty" that the disassembly, testing, and examination of the trailer brakes would damage or destroy the brakes. Finally, Bethel alleged appellees' acts and omissions constituted criminal tampering with evidence, given they were aware she had filed a civil lawsuit against the trailer's manufacturer and they altered or destroyed the brakes with the intent to impair the "verity, legibility, or availability of the trailer brakes as evidence" in the suit. Because these allegations are contained in Bethel's live pleading, the trial court would not have needed to look beyond Bethel's petition to consider the issue of attorney immunity. We overrule the first issue.

In her second issue, Bethel argues appellees cannot establish attorney immunity solely from the facts alleged on the face of her petition. She contends Texas law does not shield an attorney from the consequence of "illegal conduct." More specifically, she acknowledges that appellees' investigation of the trailer brakes would ordinarily fall within an attorney's role in representing his client, but appellees' actions "went far beyond obtaining, retaining, reviewing, or analyzing evidence." She argues appellees conducted destructive testing they knew was reasonably certain to cause this result and proceeded even though they knew they had no consent from her and destroyed property owned by her. She equates appellees' actions with conduct that is clearly "foreign to the duties of an attorney," such as assaulting opposing counsel in trial. We cannot agree.

We begin with the Supreme Court's decision in *Cantey Hanger, LLP v. Byrd*, 467 S.W.3d 477 (Tex. 2015), which controls our analysis of attorney immunity. *See Youngkin v. Hines*, No.

16–0935, 2018 WL 1973661, at *4 (Tex. Apr. 27, 2018). In *Cantey Hanger,* the Texas Supreme Court explained the attorney immunity defense is intended to ensure "loyal, faithful, and aggressive representation by attorney's employed as advocates." *Cantey Hanger*, 467 S.W.3d at 481 (quoting *Mitchell v. Chapman*, 10 S.W.3d 810, 812 (Tex. App.—Dallas 2000, pet. denied). An attorney is immune from liability to non-clients for conduct within the scope of his representation of his clients. *Youngkin*, 2018 WL 1973661, at *4; *Cantey Hanger*, 467 S.W.3d at 481. In other words, an attorney may be liable to non-clients only for conduct outside the scope of his representation of his client or for conduct foreign to the duties of a lawyer. *Youngkin*, 2018 WL 1973661, at *4; *Cantey Hanger*, 467 S.W.3d at 482.

In determining the immunity issue, the inquiry focuses on the *kind* of conduct at issue rather than the *alleged wrongfulness* of said conduct. *Youngkin*, 2018 WL 1973661, at *4; *Cantey Hanger*, 467 S.W.3d at 482. Even conduct that is "wrongful in the context of the underlying suit" is not actionable if it is "part of the discharge of the lawyer's duties in representing his or her client." *Cantey Hanger*, 467 S.W.3d at 481. Thus, a plaintiff's characterization of a firm's conduct as fraudulent or otherwise wrong is immaterial to our evaluation of the immunity defense. *Youngkin*, 2018 WL 1973661, at *4. If an attorney proves his conduct is "part of the discharge of the duties to his client," immunity applies. *Cantey Hanger*, 467 S.W.3d at 484; *Highland Capital*, 2016 WL 164528, at *3.

At the same time, attorneys "are not protected from liability to non-clients for their actions when they do not qualify as 'the kind of conduct in which an attorney engages when discharging his duties to his client.'" *Cantey Hanger*, 467 S.W.3d at 482 (quoting *Dixon Fin. Servs. v. Greenberg, Peden, Siegmyer & Oshman, P.C.*, No. 01-06-00696-CV, 2008 WL 746548, at *9 (Tex. App.—Houston 1st] Mar. 20, 2008, pet. denied) (mem. op. on reh'g). Examples of attorney conduct that would not be protected include participating in a fraudulent business scheme with a

client, knowingly assisting 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. *Youngkin*, 2018 WL 1973661, at 5; *Cantey Hanger*, 467 S.W.3d at 482–83.

Here, Bethel's third amended petition alleged appellees permitted or conducted the destruction of key components of the trailer's brakes by permitting, directing, or taking the following action or inaction:

> a. Disassembly of the brakes, which was destructive in nature and by itself. Essentially everything about the brakes has changed because of the inspection.
>
> b. Failed to establish any testing/inspection protocol at the time of the disassembly.
>
> c. Failed to video document the brake disassembly being done, despite the fact that video cameras were present (videos of the brake operation were done by [engineer] Kelly Adamson).
>
> d. Manipulation of the adjuster screw for each brake to facilitate drum removal. The original condition and position of the adjuster screws now cannot be known.

Bethel alleged appellees (1) failed to notify her or her counsel of their intent to do a destructive examination and did not have an agreed-upon protocol; (2) intended to cause the disassembly and destruction of the brakes; and (3) altered or destroyed the trailer brakes with the intent to "impair the verity, legibility, or availability" of the trailer brakes as evidence in the pending action against the manufacturer. Bethel asserted that because she was not given notice of the inspection, she did not have an agent present.

Bethel's allegations focus on *how* the inspection was conducted and contend appellees' actions were criminal. She asserts that "intentionally destroying property belonging to another and willfully concealing from Texas courts evidence crucial to resolving claims" fall outside the immunity doctrine. But merely labeling an attorney's conduct wrongful does not and should not remove it from the scope of representation or render it 'foreign to the duties of a lawyer. *Id*. As the court said in *Cantey Hanger*, other mechanisms are in place to discourage and remedy such conduct, such as sanctions, contempt, and attorney disciplinary proceedings. *Id*. at 482.

Focusing on the type of conduct alleged here—and not the nature of the conduct—we conclude these alleged acts do not constitute conduct "foreign to the duties of an attorney" in representing a client. The complained-of actions involve the investigation of the trailer brakes, and more specifically the scheduling of the inspection, the planning of and participation in the expert inspection, and the testing and examination of those brakes, in a wrongful death action. These are the types of action taken to facilitate the rendition of legal services to a client in such a case. This case simply does not rise to the level of those examples of misconduct cited in *Cantey Hanger* that fall outside the immunity doctrine. *See Cantey Hanger*, 467 S.W.3d at 482.

We find support for our conclusion in this Court's previous opinion in *Highland Capital*. There, the plaintiff also argued the law firm's actions were criminal. Highland sued opposing counsel alleging the client-employee stole documents containing confidential and privileged information and the law firm then tried to "extort Highland" through a "series of criminal acts" with respect to the documents. *Highland Capital*, 2016 WL 164528, at *1. Highland alleged the law firm reviewed, copied, and analyzed information it knew to be stolen and proprietary in furtherance of its scheme to extort, slander, and disparage Highland; threatened to disclose the information and disparage Highland if a monetary sum was not paid; refused to return or stop using the information after receiving written notice of the nature of the stolen materials; lied to Highland's counsel about the scope of the theft and stolen material in the firm's possession; and knowingly and actively facilitated the employee's wrongful disclosure of the information and then lied to Highland and the court regarding the extent to counsel's involvement. *Id*. Highland characterized the law firm's actions as "criminal, tortious, and malicious." *Id*. at *6.

This Court, however, looked at the actions taken by the law firm—acquiring documents from a client that were the subject of litigation against the client; reviewing, copying, retaining and analyzing the documents; making demands on the client's behalf; advising a client on a course of

action; and threatening to disclose the documents if demands were not met—and concluded they were the "kinds of actions" that were part of an attorney's duties in representing a client in "hard-fought litigation." *Id*.

As in *Highland* Capital, we conclude the type of conduct alleged by Bethel falls within the scope of appellees' representation of the manufacturer of the trailer. Accepting Bethel's factual allegations as true, appellees' conduct "involves acts or omissions undertaken as part of the discharge of the attorney's duties as counsel to an opposing party." *See id*. We therefore conclude the trial court did not err by granting appellees' rule 91a motion to dismiss Bethel's claims. We overrule the second issue.

We affirm the trial court's order.

/Molly Francis/
MOLLY FRANCIS
JUSTICE

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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

CHERYLN BETHEL, INDIVIDUALLY AND AS THE REPRESENTATIVE OF THE ESTATE OF RONALD J. BETHEL, DECEASED, Appellant

No. 05-17-00850-CV V.

QUILLING, SELANDER, LOWNDS, WINSLETT & MOSER, P.C., AND JAMES H. MOODY, III, Appellees

On Appeal from the 116th Judicial District Court, Dallas County, Texas
Trial Court Cause No. DC-17-03487.
Opinion delivered by Justice Francis; Justices Fillmore and Whitehill participating.

In accordance with this Court's opinion of this date, the trial court's dismissal order is **AFFIRMED**.

It is **ORDERED** that appellees QUILLING, SELANDER, LOWNDS, WINSLETT & MOSER, P.C., AND JAMES H. MOODY, III recover their costs of this appeal from appellant CHERYLN BETHEL, INDIVIDUALLY AND AS THE REPRESENTATIVE OF THE ESTATE OF RONALD J. BETHEL, DECEASED.

Judgment entered May 30, 2018.