Reversed and Remanded and Opinion filed August 16, 2022.

In The

Fourteenth Court of Appeals

NO. 14-17-00999-CV

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

V.

HAYNES & BOONE LLP AND ARTHUR L. HOWARD, Appellees

On Appeal from the 269th District Court
Harris County, Texas
Trial Court Cause No. 2015-10626

OPINION

This case comes to us on remand from the Supreme Court of Texas and involves Appellants' (NFTD, LLC f/k/a Bernardo Group, LLC, Bernardo Holdings, LLC, Peter J. Cooper, and Jacqueline Miller) challenge of a summary judgment and a plea to the jurisdiction granted on the basis of attorney immunity in favor of Appellees, Haynes & Boone, LLP and Arthur L. Howard. In the first appeal, we sustained Appellants' first and second issues, concluding that attorney

immunity does not apply in a business transaction. On petition for review, the supreme court held for the first time that "attorney immunity applies to claims based on conduct outside the litigation context, so long as the conduct is the 'kind' of conduct" the court set forth in a two-pronged test. *Haynes & Boone, LLP v. NFTD, LLC*, 631 S.W.3d 65, 78-79, 81 (Tex. 2021). The supreme court remanded the case to our court to address Appellants' remaining issues in light of its pronouncements and the arguments and evidence the parties presented. Because we conclude the trial court erroneously granted summary judgment and the plea to the jurisdiction in favor of Appellees, we again reverse and remand.

BACKGROUND

I. The Parties

As we stated in our original opinion, this appeal stems from a lawsuit relating to business asset sales and involving, among other parties, three consecutive owners of the Bernardo women's footwear company, investor Jacqueline Miller, attorney Arthur Howard, and the law firm Haynes and Boone, LLP (who represented the first owners in the sale of the company's business assets to the second owners).[1] Appellants and Appellees refer to the relevant parties as follows:

- Bernardo 1 (Owner No. 1): TEFKAB Footwear, LLC f/k/a Bernardo Footwear, LLC, Wilma Jean Smith, and Cynthia Smith (third-party defendants in the trial court);
- Bernardo 2 (Owner No. 2): NFTD, LLC f/k/a Bernardo Group, LLC, Bernardo Holdings, LLC, and Peter J. Cooper (defendants and third-

[1] This opinion will not address all the parties and claims involved in the underlying lawsuit; instead, we limit our discussion to parties and claims in the instant appeal.

party plaintiffs in the trial court and Appellants herein);

- Bernardo 3 (Owner No. 3): JPT Group, LLC (plaintiff);
- The Lawyers: Haynes and Boone, LLP and Arthur Howard (third-party defendants in the trial court and Appellees herein); and
- The Investor: Jacqueline Miller (intervenor in the trial court and an Appellant herein).

II. Factual Background

In 2001, Roy Smith, Jr., his wife Wilma "Jean" Smith, and designer Dennis Comeau purchased the Bernardo brand assets through a company they created called TEFKAB Footwear, LLC. Roy R. Smith, Jr. died in 2002, leaving one half of his estate to his daughter Cynthia Smith and the other half of his estate to his son Roy R. Smith, III (known as "Trae") and Trae's three children. After Roy Smith, Jr.'s death, Trae started managing TEFKAB.

By 2008, Jean, Cynthia, and Dennis were concerned about Trae's management of the company. In August 2009, they hired Haynes and Boone and Howard to "represent the Company and communicate concerning any and all business, financial and legal matters related to the Company." On the same day, Howard terminated Trae's employment with the company. Dennis and Jean removed Trae as the managing member of TEFKAB, and they started serving as managers.

Over the next several months, Howard and others at Haynes and Boone billed many hours to the company, and TEFKAB fell behind on paying the invoices. Around that time, Howard conducted an internal investigation of the company and prepared an "investigative report." The company's outgoing attorney, James Hanson, sent a memorandum to Howard to provide an

"update/status of legal matters and issues of client [TEFKAB]" in September 2009. In the memorandum, Hanson disclosed, among other things, that another attorney (who is not a party to this case) had brought a "design infringement claim relating to [the] knock off of [TEFKAB]'s Miami sandal" on behalf of TEFKAB, but had to dismiss the suit after learning in discovery that TEFKAB's "patent applic[ation] filing was tardy." Hanson also disclosed that another attorney had filed a legal malpractice suit on TEFKAB's behalf against its former patent attorneys "on the Miami Sandal late filing," and Hanson advised Howard to check with Trae whether the suit was still pending.

Dennis submitted an affidavit in which he stated that he discussed TEFKAB's legal malpractice suit against its former patent and intellectual property attorneys on several occasions with Arthur Howard in August and September 2009. Specifically, he alleged TEFKAB's "former patent/IP lawyers had messed up several design patents, of which [Dennis] was the inventor, by filing the patent applications too late." Howard denied that he had knowledge of the allegations TEFKAB made in the malpractice suit or that there were potential issues with several of TEFKAB's design patents.

In August 2010, managers Dennis and Jean signed a resolution to sell TEFKAB's assets and authorized Dennis and Haynes and Boone to "immediately pursue the potential sale of the Company or its assets." Howard prepared a confidential business profile describing the company and its assets in November 2010 to assist with the sale. The profile contained statements about TEFKAB's intellectual and intangible property, such as, "Bernardo Footwear owns intellectual property in many forms, including patented, trademarked, and copyrighted properties." The profile asserted that it is TEFKAB's routine "business practice to develop, protect and defend intellectual property rights affecting the business and

goodwill developed." The profile listed numerous trademarks and patents, including five patents at issue now that were allegedly unenforceable and "worthless" because the applications were filed late, but the profile did not mention the Maryland lawsuit or any concerns that the five patents were invalid.

Cynthia mentioned TEFKAB's interest in selling the Bernardo brand assets to Peter J. Cooper, who was an old college friend. Peter and his business partner, Todd Miller, were interested in buying the assets, so they formed NFTD, LLC (among several other companies) to make the purchase. The business profile was sent to Peter and Todd in February 2011. NFTD was interested in buying TEFKAB's assets and negotiations continued for several months; TEFKAB was represented by Howard while NFTD was represented by its own counsel. According to Bernardo 1, with regard to due diligence surrounding the 2011 asset sale, Bernardo 2 had access to records during the negotiation process, including a box of materials related to the Maryland malpractice suit.

Todd, who was acquainted with Howard prior to and independent of the impending asset transaction, stated in his affidavit that he had many conversations with Bernardo 1 and Howard, and he was never told TEFKAB "had filed a malpractice lawsuit against its Maryland patent lawyers, alleging that a number of its valuable patents were filed too late and [were] thus unenforceable and/or invalid." Todd averred that Howard never told him "there were issues with several of [TEFKAB]'s design patents that would have prevented a future owner of those assets from being able to enforce the patent rights for various sandals that it sold." He also averred Howard told him several times "that he wanted to represent Bernardo 2 if Bernardo 2 ended up acquiring the Bernardo assets."

TEFKAB and NFTD signed an asset purchase agreement in September 2011 (the "2011 APA"), under which NFTD acquired all of TEFKAB's assets for a $3

million payment at closing; NFTD also agreed to pay specified "earn-out payments" to be calculated based on the brand's performance under NFTD's ownership. The parties dispute whether or to what extent the 2011 APA represents and warrants that the Bernardo patents were valid and enforceable, but the agreement does not disclose that the previous patent-enforcement litigation or the Maryland malpractice suit raised questions about the patents. NFTD engaged lawyers to conduct due diligence into TEFKAB's intellectual property; nonetheless, Peter and Todd claim that they never learned that the five patents were invalid. They also claim that if Howard had told them that there were problems with the patents, they would have ceased all negotiations, "would not have gone through with" the purchase, and "[t]here would have been no deal." After NFTD purchased the Bernardo brand assets from TEFKAB, it hired Howard to handle the process of registering the Bernardo patents.

NFTD ran the business for a few years but Peter and Todd decided to sell the Bernardo brand assets in 2014. Because NFTD still owed TEFKAB some earn-out payments under the 2011 APA, Peter and Todd approached TEFKAB about settling those liabilities to make it easier to sell the assets. Howard, who by that time had moved to a new law firm, represented TEFKAB in those negotiations. In 2015, the parties reached a settlement and NFTD released all claims it might have had against TEFKAB or against Howard and his firm.

In the meantime, in early 2014, NFTD sold the Bernardo brand assets (including "all of the copyrights, trademarks, patents, and other intellectual property") to Bernardo 3. As part of the sale, NFTD signed an agreement expressly representing that all of the Bernardo patents were "valid and enforceable." Later that year, Bernardo 3 allegedly attempted to enforce its rights for seven women's shoes design patents that it purchased as part of the asset sale,

but "it discovered that five of those seven patents were worthless, having previously been declared invalid years before" its asset purchase from TEFKAB in 2014.

III. Procedural Background

Bernardo 3 sued Bernardo 2 in February 2015 for breach of contract and breach of warranty. It alleged that despite Bernardo 2's warranty that all of TEFKAB's Bernardo brand patents were enforceable and valid, the five most valuable design patents were all invalid based on untimely patent applications.

Bernardo 2 then asserted third-party claims against Bernardo 1 for, among other things, breach of the 2011 APA, misrepresentation, and fraud. Bernardo 2 also filed a third-party petition against the Lawyers, alleging negligence, negligent misrepresentation, fraud, and fraud in the inducement (arising from the Lawyers' alleged concealment and false representations regarding the validity of design patents).[2]

Jacqueline Miller (an investor in Bernardo 2) filed a petition in intervention asserting fraud and negligent misrepresentation claims against Bernardo 1 and the Lawyers. Miller alleged she relied on representations made in the business profile Howard drafted for Bernardo 1 and other representations regarding the validity of design patents made during the negotiations of the 2011 APA.

The Lawyers moved for summary judgment based on their asserted attorney

[2] Although not consequential to the disposition of the case before us, we note that TEFKAB filed cross-claims for legal malpractice against Howard and Haynes and Boone. Bernardo 1, 2, and 3 arbitrated or otherwise settled and dismissed all of the claims between them. But because Howard and Haynes and Boone still faced both legal malpractice claims asserted by their former client, TEFKAB, and a variety of negligence, fraud, and misrepresentation claims asserted by NFTD (which they did not represent during the 2011 transaction), the trial court severed the legal malpractice claims (all claims "arising out of the attorney-client relationship"), leaving only Bernardo 2's claims against Howard and Haynes and Boone "not arising out of the attorney-client relationship."

immunity defense, arguing that attorney immunity barred Bernardo 2's fraud claim and Miller's claims in intervention for fraud and negligent misrepresentation. The Lawyers argued attorney immunity applies not only in the litigation context but also in a transactional setting, and their actions in this case were within the scope of representation and a part of the discharge of the Lawyers' duties to their client.

Before the summary judgment hearing, Bernardo 2 amended its claims. It filed a second amended third-party petition against the Lawyers, asserting claims for fraud, fraud in the inducement, fraud by nondisclosure, aiding and abetting a fraud, negligence, negligent misrepresentations and omissions (under Restatement (Second) of Torts section 552), and gross negligence based on the Lawyers' conduct leading up to the 2011 APA.

Bernardo 2 responded to the Lawyers' summary judgment motion, arguing that attorney immunity only applies in "litigation or quasi-litigation (*i.e.*, adversarial proceedings that employ notice and due process protections)," but it does not extend to transactional matters. Bernardo 2 argued (1) attorney immunity does not apply "to fraudulent acts beyond the scope of the legal representation of the client or to independently fraudulent acts"; (2) the Lawyers are liable for their negligent misrepresentations or omissions under the Restatement (Second) of Torts section 552; and (3) the Lawyers failed to address liability under section 552 in their summary judgment motion. Miller also filed a response to the Lawyers' motion for summary judgment on January 27, 2017, in which she adopted Bernardo 2's response.

The Lawyers filed their reply and argued attorney immunity is a bar to all civil liability (including negligent misrepresentation under section 552 of the Restatement (Second) of Torts). The Lawyers also argued that attorney immunity applies in a transactional setting outside the litigation context and that they "acted

within the scope of legal representation of their client."

The trial court granted summary judgment in favor of the Lawyers with respect to (1) Bernardo 2's fraud and fraud in the inducement claims; and (2) "all claims asserted by Intervenor Jacqueline Miller" on February 20, 2017.

On March 1, 2017, the Lawyers filed a motion for clarification or, alternatively, a plea to the jurisdiction, "request[ing] that the Court either clarify its order on summary judgment such that it encompasses all remaining claims against the Lawyers by Bernardo 2 or sustain the Lawyers' plea to the jurisdiction on Bernardo 2's remaining claims based on the Court's holding that attorney immunity applies."

The Lawyers also filed a traditional summary judgment motion "'on negligent misrepresentation claims' filed against them by" Bernardo 2 on March 13, 2017, contending "[s]ummary judgment is proper on the negligent misrepresentation claims" because (1) Bernardo 2 expressly disclaimed reliance on any written or verbal representation made before the 2011 APA was executed; (2) the negligent misrepresentation claims are time-barred; and (3) "Bernardo 2 does not have a viable theory of recoverable damages under its negligent misrepresentation claim." The trial court did not rule on this summary judgment motion.

On March 31, 2017, the trial court signed an order denying the Lawyers' motion to clarify, granting the Lawyers' plea to the jurisdiction, and dismissing "all remaining claims in this action asserted by" Bernardo 2. The trial court did not grant summary judgment on the negligent misrepresentation claim.

Bernardo 2 and Miller timely appealed the trial court's orders granting summary judgment and the plea to the jurisdiction in favor of the Lawyers. On

initial review, we sustained Bernardo 2's and Miller's first and second issues because we concluded that attorney immunity does not apply in a business transaction. The Lawyers then sought review in the Supreme Court of Texas.

The supreme court disagreed with our determination and held for the first time that "attorney immunity applies to claims based on conduct outside the litigation context, so long as the conduct is the 'kind' of conduct" the court set out in its opinion. *See Haynes & Boone, LLP*, 631 S.W.3d at 78-79, 81. As instructed by the supreme court, we now address the remaining issues Bernardo 2 and Miller raised in their original briefing in this court in light of the supreme court's pronouncements and the arguments and evidence presented by the parties.

ANALYSIS

Bernardo 2 and Miller[3] raised the following issues we did not reach in our original opinion:

> Issue 3: Regardless [of] whether attorney immunity is a fact-based defense to liability or a pleadings-based bar to suit, did the trial court err in ruling that the Appellee Lawyers conclusively established their affirmative defense of attorney immunity on Appellant Bernardo 2's claims?
>
> Issue 4: Did the trial court err in ruling that the Lawyers also conclusively established that all of their alleged wrongful conduct was within the scope of the discharge of their duties to their client (*i.e.*, not foreign to the duties of a lawyer)?

[3] In her appellate brief, Miller states that she "incorporates and fully adopts the Issues Presented filed by [Bernardo 2] . . . and supplements as follows: 1. Regardless of whether attorney immunity is a fact-based defense to liability or a pleadings-based bar to suit, did the trial court err in ruling that the Appellee Lawyers conclusively established their affirmative defense of attorney immunity on Jacqueline's claims?" Miller also states that she "incorporates and fully adopts the Argument and Authorities filed by" Bernardo 2. Therefore, our analysis and disposition of Bernardo 2's issues equally applies to Miller.

I. Standard of Review

A. Summary Judgment

We review a grant of summary judgment *de novo*. *B.C. v. Steak N Shake Operations, Inc.*, 512 S.W.3d 276, 279 (Tex. 2017). A party moving for traditional summary judgment has the burden to prove that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. *Id*.; *see also* Tex. R. Civ. P. 166a(c). In reviewing a summary judgment, we take as true all evidence favorable to the nonmovant, and we indulge every reasonable inference and resolve any doubts in favor of the nonmovant. *Cantey Hanger, LLP v. Byrd*, 467 S.W.3d 477, 481 (Tex. 2015). Attorney immunity is an affirmative defense that protects attorneys from liability. *Sheller v. Corral Tran Singh, LLP*, 551 S.W.3d 357, 363 (Tex. App.—Houston [14th Dist.] 2018, pet. denied); *see also Taylor v. Tolbert*, No. 20-0727, 2022 WL 1434659, at *4 (Tex. May 6, 2022); *Cantey Hanger*, 467 S.W.3d at 481. A party seeking summary judgment on an affirmative defense "bears the burden of conclusively establishing that attorney immunity bars the plaintiffs' recovery on the claims asserted." *Taylor*, 2022 WL 1434659, at *4; *see also Cantey Hanger*, 467 S.W.3d at 481.

B. Plea to the Jurisdiction

A plea to the jurisdiction is a dilatory plea that seeks dismissal of a case for lack of subject matter jurisdiction. *Harris Cnty. v. Sykes*, 136 S.W.3d 635, 638 (Tex. 2004). Immunity from suit defeats a trial court's subject matter jurisdiction and is properly asserted in a plea to the jurisdiction. *City of Houston v. Kelley St. Assocs., LLC*, No. 14-14-00818-CV, 2015 WL 7739754, at *3 (Tex. App.—Houston [14th Dist.] Nov. 30, 2015, no pet.) (mem. op.). Whether a trial court has subject matter jurisdiction is a question of law. *Harris Cnty. v. Annab*, 547 S.W.3d 609, 612 (Tex. 2018). We therefore review the trial court's ruling on a plea to the

jurisdiction *de novo*. *See id*.

II. Attorney Immunity

Because there are common threads and overlap in the arguments Bernardo 2 presents in its third and fourth issues, we analyze these issues together.

A. Governing Law

The common law attorney immunity defense "applies to lawyerly work in 'all adversarial contexts in which an attorney has a duty to zealously and loyally represent a client' but only when the claim against the attorney is based on 'the kind of conduct' attorneys undertake while discharging their professional duties to a client." *Taylor*, 2022 WL 1434659, at *4 (quoting *Haynes & Boone, LLP*, 631 S.W.3d at 67, and citing *Landry's, Inc. v. Animal Legal Defense Fund*, 631 S.W.3d 40, 47 (Tex. 2021); *Cantey Hanger*, 467 S.W.3d at 481). Conversely, if a lawyer engages in conduct that is not "lawyerly work", is "entirely foreign to the duties of a lawyer", or falls outside the scope of client representation, the attorney immunity defense is not applicable. *Id*. (quoting *Landry's, Inc.*, 631 S.W.3d at 47, 51-53; *Youngkin v. Hines*, 546 S.W.3d 675, 681 (Tex. 2018)).

In determining whether conduct is "the kind" that attorney immunity protects, the focus is on the type of conduct at issue instead of the alleged wrongfulness of that conduct. *Id*.; *Landry's, Inc.*, 631 S.W.3d at 47. "But when the defense applies, counsel is shielded only from liability in a civil suit, not from 'other mechanisms' that exist 'to discourage and remedy' bad-faith or wrongful conduct, including sanctions, professional discipline, or criminal penalties, as appropriate." *Taylor*, 2022 WL 1434659, at *4 (citing *Bethel v. Quilling, Selander, Lownds, Winslett & Moser, P.C.*, 595 S.W.3d 651, 657-58 (Tex. 2020); *Youngkin*, 546 S.W.3d at 679, 682-83; *Cantey Hanger*, 467 S.W.3d at 482, 484-

86).

Conduct is not "the kind of conduct" attorney immunity protects "simply because attorneys often engage in that activity" or because an attorney performed the activity on a client's behalf. *Landry's, Inc.*, 631 S.W.3d at 52. Instead, the conduct must involve "the uniquely lawyerly capacity" as well as the "attorney's skills as an attorney." *Taylor*, 2022 WL 1434659, at *4 (citing *Landry's, Inc.*, 631 S.W.3d at 52). By way of example, an attorney who makes statements to the press and on social media on behalf of a client does "not partake of 'the office, professional training, skill, and authority of an attorney'" because "[a]nyone—including press agents, spokespersons, or someone with no particular training or authority at all—can publicize a client's allegations to the media." *See Landry's, Inc.*, 631 S.W.3d at 52. Attorney immunity attaches only if the lawyer is discharging "lawyerly" duties to the client. *Taylor*, 2022 WL 1434659, at *4.

Similarly, attorneys will not be entitled to civil immunity for conduct that is "entirely foreign to the duties of an attorney", which does not mean something a good attorney should not do; rather, it means that the attorney is acting outside his capacity and function as an attorney. *Id.* Therefore, whether counsel may assert the privilege turns on the task that was being performed and not whether the challenged conduct was meritorious. *Id.*

Clients' interests require that attorneys "competently, diligently, and zealously represent their clients' interests while avoiding any conflicting obligations or duties to themselves or others." *Haynes & Boone, LLP*, 631 S.W.3d at 79. To prevent chilling a lawyer's faithful discharge of this duty, lawyers must be able to pursue legal rights they deem necessary and proper for their clients without worrying about civil liability looming and influencing their actions at the expense of their clients' best interest. *See Taylor*, 2022 WL 1434659, at *5;

Cantey Hanger, 467 S.W.3d at 483.

"Attorney immunity exists to promote such 'loyal, faithful, and aggressive representation' by alleviating in the mind of the attorney any fear that he or she may be sued by or held liable to a non-client for providing such zealous representation." *Haynes & Boone, LLP*, 631 S.W.3d at 79 (quoting *Youngkin*, 546 S.W.3d at 683). The defense thereby protects lawyers as well as their clients, "who can be assured that counsel is representing the client's best interests, not the lawyer's." *See Taylor*, 2022 WL 1434659, at *5.

Because the wrongfulness of an attorney's conduct is not the focus in determining applicability of the attorney immunity defense, conduct alleged to be fraudulent does not necessarily fall outside the scope of the defense. *Haynes & Boone, LLP*, 631 S.W.3d at 78; *Bethel v. Quilling, Selander, Lownds, Winslett & Moser, P.C.*, 595 S.W.3d 651, 657 (Tex. 2020); *Youngkin*, 546 S.W.3d at 681; *Cantey Hanger*, 467 S.W.3d at 482, 484-86. A "general fraud exception" would "significantly undercut" the purposes of the attorney immunity defense by allowing lawyers to be sued for discharging their lawyerly duties if a plaintiff could simply characterize the lawyers' conduct as fraudulent. *Taylor*, 2022 WL 1434659, at *5; *Bethel*, 595 S.W.3d at 657; *Cantey Hanger*, 467 S.W.3d at 483-84. Thus, "[m]erely labeling an attorney's conduct 'fraudulent' does not and should not remove it from the scope of client representation or render it 'foreign to the duties of an attorney.'" *Bethel*, 595 S.W.3d at 657 (quoting *Cantey Hanger*, 467 S.W.3d at 483).

In keeping with these principles and considerations, the supreme court confirmed that attorney immunity will protect an attorney against a non-client's claim as long as the "claim is based on conduct that (1) constitutes the provision of 'legal' services involving the unique office, professional skill, training, and

authority of an attorney"; and (2) "the attorney engages in to fulfill the attorney's duties in representing the client within an adversarial context in which the client and the non-client do not share the same interests and therefore the non-client's reliance on the attorney's conduct is not justifiable." *Haynes & Boone, LLP*, 631 S.W.3d at 78.

B. Affirmative Defense to Liability

Before addressing Bernardo 2's arguments challenging the trial court's conclusion that the Lawyers are protected by attorney immunity in this case, we first consider Bernardo 2's contention that attorney immunity is an affirmative defense to liability rather than a jurisdictional bar to suit.

The Supreme Court of Texas recently issued several detailed opinions concerning the attorney immunity defense in *Taylor*, *Haynes & Boone, LLP*, and *Landry's, Inc*.; in neither case did the court analyze the defense as a jurisdictional bar to suit. *See Taylor*, 2022 WL 1434659, at *4-13; *Haynes & Boone, LLP*, 631 S.W.3d at 67-81; *Landry's, Inc.*, 631 S.W.3d at 52. For example, in *Taylor*, the court stated that (1) "attorneys are generally immune from civil liability to nonclients for actions taken within the scope of legal representation if those actions involve 'the kind of conduct' attorneys engage in when discharging their professional duties to a client"; and (2) "[a]s the summary-judgment movant on an affirmative defense, Taylor bears the burden of conclusively establishing that attorney immunity bars the plaintiffs' recovery on the claim asserted." *Taylor*, 2022 WL 1434659, at *1, 4.

In *Landry's*, the court stated: "Attorney immunity is a comprehensive affirmative defense protecting attorneys from liability to non-clients." *Landry's, Inc.*, 631 S.W.3d at 47 (internal quotation marks and citation omitted). Earlier, in *Youngkin*, the supreme court stated that the attorney immunity "defense exists to

promote loyal, faithful, and aggressive representation by attorneys, which it achieves, essentially, by removing the fear of personal liability." *Youngkin*, 546 S.W.3d at 682 (internal quotation marks and citation omitted).

Additionally, we have stated that "[a]ttorney immunity is an affirmative defense that protects attorneys from liability to nonclients." *Sheller*, 551 S.W.3d at 362-63. Moreover, we have explicitly found that attorney immunity is not a jurisdictional issue and, thus, not a jurisdictional bar to suit. *See Hunter v. Marshall*, No. 14-17-00839-CV, 2020 WL 103706, at *10 (Tex. App.—Houston [14th Dist.] Jan. 9, 2020, no pet.) (mem. op.). Our sister court also agrees, stating that "[a]n attorney has qualified immunity from civil liability, with respect to non-clients," and "the attorney immunity defense is an affirmative defense; it is not a jurisdictional issue." *Diogu v. Aporn*, No. 01-17-00392-CV, 2018 WL 3233596, at *5 (Tex. App.—Houston [1st Dist.] July 3, 2018, no pet.) (mem. op.).

We agree with Bernardo 2 that attorney immunity is an affirmative defense to liability and not a jurisdictional bar to suit.

C. Application

We now turn to Bernardo 2's arguments challenging the trial court's conclusion that the Lawyers established as a matter of law they are protected by attorney immunity. Bernardo 2 argues that "[i]f this Court finds that attorney immunity is a fact-based affirmative defense to liability, it must reverse both [of] the trial court's orders" because the Lawyers failed to conclusively establish that attorney immunity applies to the facts of this case when all of the Lawyers' alleged wrongful conduct was not within the scope of their representation of Bernardo 1 and was foreign to the duties of an attorney. Bernardo 2 also contends that (1) the Lawyers presented no evidence "to meet their burden that all of their wrongful conduct was within the scope of their representation and in the discharge of their

duties to their client," and (2) "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." To support its contention that not all of the Lawyers' conduct is protected by attorney immunity, Bernardo 2 states in its brief as follows:

- "[T]he Bernardo 1 corporate resolution, which Howard prepared, authorized the Lawyers to represent Bernardo 1 and communicate with third parties on 'any and all' business, financial and legal matters," so that "the Lawyers were involved in the non-legal business/financial decision to sell the Company."
- "Howard also drafted the corporate resolution that commissioned the Lawyers to find someone to buy the Company assets"; and Howard was "the one who brokered the deal" to sell the company to Bernardo 2.
- "[A]fter 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."
- Howard engaged in "private communications and false assurances about the value of the intellectual property to Miller."
- "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."

- "[W]hile 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."
- Without Bernardo 1's consent, "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."
- 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."
- "During the entire time, the Lawyers knew that the key Patents were worthless and could not be enforced against infringers" and "with full knowledge about the Patents being unenforceable, Howard wrote false and misleading representations and warranties into the APA."

The Lawyers counter that their conduct was within the scope of representation of Bernardo 1 and therefore protected by attorney immunity. In that regard, the Lawyers argue that (1) their scope of representation included negotiating and drafting the APA and (2) negotiating and drafting are duties and the type of conduct transactional attorneys perform. The Lawyers argue that, because of their "unusually broad scope of representation in this case" which included "all business, financial and legal matters related to the Company," preparing the confidential business profile was within the scope of representation of Bernardo 1 and transactional attorneys "frequently assist in the preparation of marketing documents, which require legal expertise and judgment." The Lawyers

further argue that "part of negotiating is making representations" and acting as a "banker or broker while negotiating the transaction" was still within the scope of representation and the type of work performed by attorneys, even though "certain work could have been performed by a non-lawyer."

We note that the Lawyers fail to address how the following allegations of conduct are protected by attorney immunity: Howard's engagement in "private communications and false assurances about the value of the intellectual property to Miller"; "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"; and "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." However, more importantly, the Lawyers' evidence does not support their propounded arguments.

Considering the Lawyers have the burden of proving their asserted attorney immunity defense, we cannot conclude they met that burden after reviewing the evidence they presented in the trial court. To carry their burden, the Lawyers were required to establish as a matter of law that Bernardo 2's claims were based on conduct that (1) constituted the provision of "legal" services involving the unique office, professional skill, training, and authority of an attorney; and (2) the Lawyers engaged in to fulfill their duties in representing TEFKAB within an adversarial context in which TEFKAB and Bernardo 2 do not share the same interests and therefore Bernardo 2's reliance on the Lawyers' conduct is not justifiable. *See Haynes & Boone, LLP*, 631 S.W.3d at 78.

The Lawyers did not attach any evidence to their plea to the jurisdiction; and to their motion for summary judgment, the Lawyers only attached the following five exhibits: (1) the confidential business profile Howard drafted; (2) the 2011

APA; (3) excerpts from Cynthia Smith's deposition; (4) a short email between Todd Miller and his attorney about bringing in another attorney to help work on a draft of the 2011 APA; and (5) an email exchange between Howard, Todd, and Todd's attorney concerning a "Follow-up to call re: open issues" relating to the 2011 APA. However, none of this evidence supports a finding that all of the Lawyers' conduct in this case was the kind of legal services to which the attorney immunity defense applies. The Lawyers do not explain and we fail to see how the evidence they presented in the trial court conclusively establishes that their allegedly wrongful conduct is the "kind of conduct" protected by attorney immunity. The exhibits the Lawyers provided to the trial court do not show as a matter of law that Bernardo 2's claims are "based on conduct that (1) constitutes the provision of 'legal' services involving the unique office, professional skill, training, and authority of an attorney"; and (2) "the attorney engages in to fulfill the attorney's duties in representing the client within an adversarial context in which the client and the non-client do not share the same interests and therefore the non-client's reliance on the attorney's conduct is not justifiable." *Id*.

Therefore, based on the supreme court's latest pronouncements, we conclude that because the Lawyers failed to conclusively prove their attorney immunity defense based on the record before us, we cannot grant them attorney immunity as a matter of law on Bernardo 2's claims. Accordingly, we sustain Bernardo 2's and Miller's[4] third and fourth issues.[5]

[4] As we explained in footnote 3, our analysis and disposition equally apply to Miller.

[5] In light of our disposition, we need not address any alternative arguments Bernardo 2 and Miller made. *See* Tex. R. App. P. 47.1.

CONCLUSION

Having sustained Bernardo 2's and Miller's third and fourth issues, we hold that the trial court erroneously granted the Lawyers' summary judgment motion and plea to the jurisdiction on their asserted attorney immunity defense. We reverse the trial court's orders granting the Lawyers' summary judgment motion and plea to the jurisdiction, and we remand this cause to the trial court for further proceedings consistent with this opinion.

/s/ Meagan Hassan
Justice

Panel consists of Chief Justice Christopher and Justices Hassan and Poissant.