



## Alerts

### Attorney Has Immunity for Destroying Evidence When Acting Within Scope of Representation

March 2, 2020

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*Bethel v. Quilling, Selander, Lownds, Winslett & Moser, P.C.*, (Feb. 21, 2020, No. 18-0595) 2020 Tex. LEXIS 139

#### Brief Summary

The Texas Supreme Court held that a claim over an attorney's alleged destruction of evidence is subject to the affirmative defense of "attorney immunity," as long as the alleged conduct falls within the scope of representation during litigation.

#### Complete Summary

Petitioner Cherlyn Bethel—a woman whose husband died in a trailer-towing car accident—originally sued the trailer's manufacturer on the grounds of product liability. The manufacturer was represented in the underlying lawsuit by Quilling, Selander, Lownds, Winslett & Moser, as well as attorney James "Hamp" Moody (collectively, "Quilling"). During the course of discovery, Quilling disassembled and examined the trailer's breaks before Bethel's counsel had an opportunity to inspect them. Upon discovering this, Bethel sued Quilling based on a number of claims, including fraud, trespass to chattel, and conversion.

Quilling moved to dismiss the case under Texas Rule of Civil Procedure 91a, arguing that it was entitled to attorney immunity as to all of Bethel's claims. The trial court granted Quilling's motion and dismissed the case. Bethel appealed, arguing that (1) affirmative defenses such as attorney immunity, cannot be the basis of a Rule 91a dismissal, and (2) attorney immunity did not protect Quilling's conduct. The appellate court affirmed the dismissal on the grounds that attorney immunity is indeed a proper basis for dismissal, and further, that attorney immunity barred Bethel's complaint in its entirety.

The Texas Supreme Court agreed with the lower court's ruling on both grounds. First, as to whether or not affirmative defenses are a proper basis for a Rule 91a dismissal, the court rejected Bethel's "overly narrow interpretation of one piece of the rule." Namely, Bethel focused only on the rule's requirement that the court "must decide the motion based solely on the pleading of the cause of action." TEX. R. CIV. P. 91a.6. However, the court said such an interpretation would prevent a judge from considering even the substance of a Rule 91a

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motion or a response in deciding whether to dismiss the case. See *Silguero v. CSL Plasma, Inc.*, 579 S.W.3d 53, 59 (Tex. 2019). In finding that the rule "does not limit the universe of legal theories" by which the attorney defendant may show that the claimant is not entitled to relief, the court held that Rule 91a limits a court's factual inquiry to the plaintiff's pleadings "but does not so limit the court's legal inquiry." The court concluded that in this case, the trial court did not need to look outside Bethel's pleadings to determine whether attorney immunity applied to the alleged facts.

As to the second issue of attorney immunity, the court reasoned that the immunity inquiry "focuses on the kind of conduct at issue rather than the alleged wrongfulness of said conduct." *Youngkin v. Hines*, 546 S.W.3d 675, 681 (Tex. 2018). Bethel argued that because a third party was alleging the alleged criminal wrongdoing during the course of litigation, the blanket protections of attorney immunity did not apply. The court disagreed.

In explaining its decision, the court reasoned that merely labeling an attorney's conduct "fraudulent" or "illegal" does not, and should not, remove it from the scope of client representation. Such a ruling would "significantly undercut" the protections of attorney immunity. Instead, the court stated the inquiry must remain on whether the attorney's complained of conduct falls "within the scope of the attorney's legal representation of the client."

The court did, however, recognize that the immunity is "not boundless," and cannot be invoked for attorneys participating in independently fraudulent or criminal activities that fall outside the scope of representation. It also doesn't shield attorneys from other remedies for alleged wrongful conduct such as sanctions and disciplinary proceedings. Here, however, Bethel's alleged criminal activity—the purported destruction of evidence—fell squarely within the parameters of attorney immunity protection. At its core, the court reasoned that Bethel took issue with "the manner in which Quilling examined and tested evidence during discovery in civil litigation while representing Bethel's opposing party." This examination and testing of relevant evidence during the scope of litigation is routine conduct in such an action, and is protected by attorney immunity.

## Significance of Decision

This is yet another case where a court has held that attorneys are absolutely immune from liability to non-client third-parties for conduct which occurred within the scope of their representation.