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SUPREME COURT OF TEXAS
BLAKE A. HAWTHORNE, CLERK

No. 20-0254

In the

Supreme Court of Texas

K&L Gates, LLP, Petitioner,

v.

Quantum Materials Corp., Respondent

On Petition for Review from the Third Court of Appeals
No. 03-19-00138-CV

Response to Petition for Review

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ATTORNEYS FOR RESPONDENT

IDENTITIES OF PARTIES AND COUNSEL

Pursuant to TEX. R. APP. P. 38.1(a), a complete list of the names of all interested parties is provided below:

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STATEMENT OF THE CASE

Nature of the Case:	Malpractice, breach of fiduciary duty, and violations of the Deceptive Trade Practices Act, see generally Tex. Bus. & Com. Code §§ 17.01–.955 ("DTPA"). K&L Gates did hundreds of thousands of dollars of corporate legal work for Quantum Materials. K&L Gates wanted more billable work, so they represented two lenders of Quantum's [SBI Investments, LLC, 2014-1 and L2 Capital LLC] who declared Quantum to be in default on the basis of some of the very same financial documents K&L Gates had prepared during their contractual engagement for Quantum.
Trial Court:	274th Judicial District Court Hays County, Texas (Honorable Gary Steele)
Course of Proceedings:	KL Gates moved to dismiss under the Texas Citizens Participation Act.
Disposition:	The trial court denied this motion.
Court of Appeals:	Austin [Third] Court of Appeals Justice Smith, joined by Chief Justice Rose and Justices Triana
Disposition on Appeal:	Affirmed. "K&L Gates contends Quantum Materials' claims are barred by the doctrine of attorney immunity. We disagree."

ISSUE(S) PRESENTED

1. Whether "attorney immunity" doctrine applies when a plaintiff alleges breaches of obligations owed to a current or former client of a defendant law firm. No case has ever found this doctrine to a client suing his former attorney, as contra-distinguished from suits by third-parties/non-clients. As stated in the Panel Opinion: "K&L Gates has identified no authority holding otherwise, and we are aware of none." App. A., at 6.

2. The legal predicates for KL Gates's other laundry list of arguments necessarily assume that the TCPA applies. Even if the TCPA applies (which every jurist to look at this case has concluded it does not) whether Quantum satisfied its burden to withstand dismissal.

STATEMENT OF FACTS

Methodologically, Quantum will first state the 'undisputed facts' which are straightforward data points in the record. Next, Quantum will state facts about which KL Gates takes umbrage in its Petition for Review.

Undisputed Facts

In March 2016, technology manufacturer Quantum Materials retained the law firm K&L Gates to perform all the transactional work for Quantum and participate, as corporate counsel, in the board meetings of Quantum. The parties memorialized this agreement with a letter entitled "Confirmation

of Engagement" and an appendix titled "Terms of Engagement for Legal Services." This transactional work included negotiations with the principals of SBI Investments, LLC.

In March 2017, Quantum borrowed money from and issued promissory notes to SBI Investments, LLC and L2 Capital, LLC and agreed that these two financial firms could convert this debt into equity in the event that Quantum defaulted under the terms of the notes. At the same time, Quantum delivered "irrevocable transfer agent instructions" to Empire Stock Transfer, Inc., the holder/transfer agent for the parties' agreements. After disputes arose between Quantum and SBI Investments, LLC and L2 Capital, LLC over payments on the notes and other obligations of Quantum under the terms of the parties' agreements, Quantum filed suit against Empire Stock Transfer at the end of September 2017 asserting the cause of action of conversion.

It is vital to note that Empire never answered this suit and was perfectly content to abide by injunctions entered against it. More specifically, the trial court entered a temporary restraining order on October 2, 2017, restraining Empire from conveying any shares that it held on behalf of Quantum to the two financial firms. On October 16, 2017, the trial court entered a subsequent order extending the temporary restraining order and

resetting the hearing for October 26, 2017. But, quite alarmingly, SBI Investments, LLC and L2 Capital, LLC had intervened in the proceeding, asserted affirmative claims for monetary damages against Quantum, and opposed Quantum's request for temporary injunctive relief. Which global law firm just happened to represent these two Kansas City based financial firms in their intervention in a case against a [non-answering and compliant] stock transfer agent pending in Hays County? K&L Gates- the same firm that had represented Quantum for over a year and half by that point in time.

In October, Quantum moved to disqualify K&L Gates from representing the financial firms alleging a conflict of interest arising from the firm's ongoing representation of Quantum Materials and arguing that K&L Gates had obtained confidential financial information during the representation. In response, K&L Gates attested that the dispute between Quantum Materials and its lenders bore no relationship to the work it had undertaken for Quantum Materials, and therefore that no conflict existed. Notwithstanding its denial of any conflict, K&L Gates withdrew its representation of the financial firms. Thus, the district court did not rule on the motion to disqualify.[1]

[1] Please note that KL Gates did not return the client file to Quantum until November 13, 2017; this vitiates KL Gates's contention that it had long since ended the attorney-client relationship. While not in the record on appeal, the undersigned fully warrant to this Court that a copy of the letter from KL Gates on this date is in in their files and is available for the inspection.

Things did not go well for the financial firms after K&L Gates substituted in new counsel. After prosecuting an appeal based on third-party standing to challenge injunctions against Empire Stock Transfer, the Third Court of Appeals affirmed the injunctive relief. *SBI Invs., LLC v. Quantum Materials Corp*., No. 03-17-00863-CV, 2018 Tex. App. LEXIS 1740,*17 ("[W]e conclude that the trial court did not abuse its discretion by finding that Quantum had carried its burden of showing that it had a probable right of recovery on its claim of conversion against Empire."). (Tex. App.—Austin Mar. 8, 2018).

Facts About Which KL Gates Takes Umbrage

The linchpin of KL Gates's attorney-immunity argument is that Quantum was at most a non-client/former client of that law firm. K&L Gates's umbrage is an outgrowth of frustration that this law firm cannot state the date at which the representation ended. In other words, the engagement letter was signed in March 2016; it was never terminated by any letter or document K&L Gates is apparently able to find.

To be sure, over a year after the fact, K&L Gates became adamant that its representation had ended on January 31, 2017. But if anyone at K&L Gates ever said 'final', it must have been whispered *sotto voce*.

Query, when did K&L Gates tell Quantum that the representation had ended? Quoting its Engagement Letter, the motion to dismiss argued that K&L Gates's representation of Quantum automatically terminated by the condition precedent of its having sent a "final invoice." The problem is that K&L Gates did not send a "Final Invoice", a "Final Statement", or anything else marked "Final". The 'last' invoice dated January 31, 2017 is reproduced below:

K&L GATES

K&L GATES LLP
1000 MAIN STREET
SUITE 2550
HOUSTON, TX 77002
T 713.815.7300 F 713.815.7301 klgates.com
Tax ID No. 25 0921018

Quantum Materials Corp.
Stephen Squires
3055 Hunter Road
San Marcos, TX 78666

Invoice Date : January 31, 2017
Invoice Number : 3342778
Services Through : December 31, 2016

2700201.00001 Corporate Law Advice

INVOICE SUMMARY

Fees	$ 39,226.50
CURRENT INVOICE DUE	**$ 39,226.50**

Please send payment to: K&L Gates, RCAC, 925 Fourth Avenue, Suite 2900, Seattle, Washington 98104-1158
Payment can also be made by wire to: US Bank, Private Financial Services, 1420 5th Ave. Suite 2100, Seattle, WA 98101, ABA Routing Number: 125000105, Account # 153557906580, SWIFT Code USBKUS44IMT

EXHIBIT 1.B

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Nor does the January 2017 invoice aggregate, refer, or reference the other 'open invoices' that sum to the $318,935.32 of which K&L Gates is so adamant that Quantum still owes. In other words, even if the January 2017 invoice turned out to be the last invoice K&L Gates sent to Quantum, this document was merely one single invoice (in the total amount of $39,226.50) that K&L Gates sent in its ongoing representation of Quantum (with fees summing to ten times this amount.). At most, the Snively Affidavit establishes that K&L Gates sent no other invoices subsequent to the one in 2017; but no one can testify as to any circumstances of "withdrawal" because [at best] the law firm kept this to themselves.

The problem with K&L Gates' *ex post* urged justification that its representation ended on January 31, 2017 is that nothing in the Engagement Letter supports that contention. The relevant section of the Engagement Letter's addendum is reproduced below; there is no indication that K&L Gates did any of the things necessary to invoke its "right to terminate":

B. Our Right to Terminate

Subject to any applicable ethical rule or legal requirement, the Firm reserves the right to terminate its representation of you, subject to such permission from any court or tribunal as may be required under the circumstances. In such event, we will provide you with reasonable notice of our decision to terminate and afford you a reasonable opportunity to arrange for successor lawyers, and we will assist you and your successor lawyers in effecting a transition of the engagement. Reasons for the Firm's termination may include your breach of our Engagement Contract including, without limitation, failure to pay outstanding statements in a timely manner as set forth above, the risk that continued representation may result in our violation of applicable rules of professional conduct or legal standards or of our obligations to any tribunal or third parties, your failure to give us clear or proper direction as to how we are to proceed or to cooperate in our representation of your interests, or other good cause.

But by far, the worst fact for K&L Gates is that the section of the Engagement Letter's section entitled "Scope of Our Engagement" does not contain any of the limitations that K&L has started to exclaim once it wanted to file a SLAPP motion to dismiss. To the contrary, the "scope" was defined broadly as "corporate law advice" plus the potential for "additional matters."

The Scope of Our Engagement

The Firm is being engaged to act as counsel solely for Quantum and not for any affiliated entity (including parents and subsidiaries), shareholder, partner, member, manager, director, officer or employee not specifically identified herein.

We understand that we are to provide you with non adverse corporate law advice and to address those additional matters for which the Firm expressly agrees to provide representation.

K&L Gates will only provide legal services. We have not been retained, and expressly disclaim any obligation, to provide business or investment advice.

The Trial Judge, and All Three Justice On the Intermediate Court of Appeals, Have Rejected KL Gates's Motion to Dismiss

At the January 2019 hearing on KL Gates's TCPA motion, the trial judge explained as follows:

> THE COURT: But I will tell you-all this. I cannot imagine the Legislature's intent in the TCPA is to immunize, or whatever the word is, attorneys representing people for malpractice. I just don't believe that's the case.

The Third Court of Appeals affirmed, noting that neither K&L Gates, nor its own research, could reveal a single case establishing that attorney immunity doctrine extirpates claims made by a client-or former client-against its current- or former- law firm:

> Quantum Materials alleges breaches of obligations K&L Gates owed to Quantum Materials as a current or former client of the firm. And as the Dallas court has explained, the defense does not shield an attorney

> from liability arising from misconduct toward his or her own client. *See Stover v. ADM Milling Co*., No. 05-17-00778-CV, 2018 WL 6818561, at *13 (Tex. App.—Dallas Dec. 28, 2018, pet. filed) (citing *Youngkin*, 546 S.W.3d at 682 ("This is not to say that an attorney could not be held liable to his own client for misconduct similar to that alleged by Hines or be reprimanded for ethics violations."). K&L Gates has identified no authority holding otherwise, and we are aware of none. We therefore conclude K&L Gates has not met its burden to show the defense applicable to Quantum Materials' claims.

SUMMARY OF ARGUMENT

K&L Gates cannot prevail on the grounds of attorney immunity because "the attorney-immunity defense does not bar the liability of an attorney to his own client for misconduct… Rather, liability to non-clients is a wholly different matter." *Stover v. ADM Milling Co*., 2018 WL 6818561 (Tex. App. Dallas 2018). The Panel Opinion rested its holding on *Stover*; this logic is correct and, as the Panel noted, there is no case anyone has found to the contrary:

> "K&L Gates has identified no authority holding otherwise, and we are aware of none."

As much as K&L Gates really needs to characterize Quantum Materials as a 'non-client', the reality is that K&L Gates never terminated its representation either explicitly- or even implicitly under the terms of its own engagement letter.

More specifically, on the day K&L Gates first met Quantum in Hays County court as an adversary in the intervention/injunction suit, K&L Gates simultaneously was the actual custodian of all of Quantum's legal records. The sophistry of K&L Gates' position is this: K&L Gates ***represented*** Quantum while they were negotiating with the parties K&L Gates would eventually ***represent against*** Quantum.

As a direct result, with regards the underlying loan/financing documents, Quantum is presently in the anomalous position of having to defend the work done by K&L Gates viz SBI Investments, LLC, 2014-1 and L2 Capital LLC in suits by SBI Investments, LLC, 2014-1 and L2 Capital LLC in multiple forums across the country.

This Court should deny review because the "far-reaching implications" exclaimed on page 6 of the Petition for Review simply do not exist; to the contrary, every court of appeals in this state to address the issue has come to the same conclusion.

ARGUMENT

I. ATTORNEY IMMUNITY CAN ONLY BAR SUIT BY A "NON-CLIENT"

The core of K&L Gates' argument is this "Quantum was a 'non-client'". Appellant's Br. at 40. Query, how K&L Gates can argue this with

a straight face while simultaneously arguing that Quantum owes that law firm hundreds of thousands of dollars for open invoices for legal work?

Attorney immunity has always turned on the *type or kind* of conduct in which an attorney is engaged. *Cantey Hanger, LLP v. Byrd,* 467 S.W.3d 477, 483 (Tex. 2015). The Third Court of Appeals stated the law as follows:

> The litigation privilege focuses on the type of conduct engaged in by the attorney, rather than on whether the conduct was meritorious in the context of the underlying lawsuit.

Michels v. Zeifman, No. 03-08-00287-CV, 2009 WL 349167, at *2 (Tex. App. - Austin Feb. 12, 2009, pet. denied) (mem. op).

This Court has repeatedly and recently reaffirmed that attorney immunity shields lawyers from suits by ***third-parties*** claiming to be aggrieved by work an attorney did for its underlying client(s):

> Our recent opinion in *Cantey Hanger, LLP v. Byrd*, controls our analysis of attorney immunity. 467 S.W.3d 477 (Tex. 2015). In *Cantey Hanger*, we explained that an attorney is immune from liability to ***nonclients*** for conduct within the scope of his representation of his clients. *Id*. at 481. Put differently, an attorney may be liable to ***nonclients*** only for conduct outside the scope of his representation of his client or for conduct foreign to the duties of a lawyer.

Youngkin v. Hines, 546 S.W.3d 675, 681 (Tex. 2018) (emphasis added).

> [A]t bottom, Bethel takes issue with the manner in which Quilling examined and tested evidence during discovery in civil litigation *while representing Bethel's* ***opposing party.***

Bethel v. Quilling, 595 S.W.3d 651, 658 (Tex. 2020) (emphasis added).

The bottom line is that as much as K&L Gates may wish that it were not so, Quantum was a client of that law firm and no act by K&L Gates ever implicitly or explicitly terminated that representation. In other words, there is no condition recognized in the law buy which Quantum can be deemed a "non-client" *vis-a-vis* K&L Gates.

II. KL GATES'S SUBSIDIARY ARGUMENTS, AND LAUNDRY LIST OF GRIEVANCES ABOUT THE TRIAL COURT'S RULINGS, ARE NOT GRIST FOR A PDR

A. Introduction

Having failed to identify any "far-reaching [doctrinal] implications" as exclaimed on page 6 of its Petition for Review, KL Gates spends the balance of its brief bemoaning its general dislike of each of the trial court's rulings in Quantum's case. More specifically, at pages "x-xi" of its PDR, KL Gates presents a putative 'second of two issues' which actually granulates into at least ten (10) idiosyncratic sub-grievances.

B. There Is No *Sine Qua Non* Expert Report Requirement at the Outset of a Fiduciary Duty Case

KL Gates is adamant that an expert report is a *sine qua non* of breach-of-fiduciary duty claims. In other words, KL Gates believes that a plaintiff must retain an expert at or near the time it files suit-even without discovery yet from the defendant. KL Gates's problem is that the cases cited in its

Footnote 63 do not establish that expert testimony is required- certainly not at the motion to dismiss stage. The first case cited in this footnote is *Alexander v. Turtur & Assocs.*, 146 S.W.3d 113 (Tex. 2004) (this Court disagreed with intermediate appeals court that the causal connection was either obvious or a matter within the common understanding of lay persons and concluded that there was no competent evidence to connect a brokerage's damages to its attorneys' negligence.). As an initial matter, please note that this case was tried to a jury and the opinion says nothing about evidential standards governing pretrial motions. More impactfully, nor does the opinion state that expert witness testimony is required in every case:

> [W]e conclude on this record that the errors allegedly made by Mingledorff in the preparation and trial of the admittedly complex, yet truncated, underlying proceeding were not so obviously tied to the adverse result as to obviate the need for expert testimony. We therefore conclude that the court of appeals erred in holding that the jury was competent to determine causation in either negligence or violation of the DTPA without expert guidance in this case.

Id. at 120.

KL Gates may ultimately be correct that the *Alexander* opinion favorably commends plaintiffs [such as Quantum] to present expert witness testimony at trials for fiduciary duty claims. But for present purposes, the provident course for this Court is to affirm the denial of pretrial dismissal

and let KL Gates prepare for it forthcoming cross-examination of such a witness.

C. Trial Courts' Inherent Authority to Receive Evidence; When the Trial Court Told Quantum to File Its Affidavit, Mr. Kryder Responded: "Got It"

KL Gates seems to take great offense that the trial court received into evidence the Lindberg Affidavit a few days after the hearing on the motion to dismiss. Quantum would argue that K&L Gates does not cite any caselaw establishing that receiving such an affidavit is verboten because there is none. To the contrary, Chapter 27 contains its own provision for "Evidence":

> (a) In determining whether a legal action should be dismissed under this chapter, the court shall consider the pleadings and supporting and opposing affidavits stating the facts on which the liability or defense is based.

There is simply no temporal limitation on when such affidavits may be presented. Nor does anything in this provision affect a court's inherent authority to continue a hearing. *Dow Chem. Co. v. Franci*s, 46 S.W.3d 237, 240 (Tex.2001) (per curium) (quoting *Landis v. N. Am. Co*., 299 U.S. 248, 254, 57 S.Ct. 163, 81 L.Ed. 153 (1936) (trial court also has the inherent power to control the disposition of cases "with economy of time and effort for itself, for counsel, and for litigants.').

With all due respect, KL Gates's argument in this regard is especially specious because, at the January 2019 hearing, the district court specifically stated that he would take evidence up to a week subsequent, and Counsel Kryder not only voiced no objection, but actually responded: "Got it" and "Thank you, Your Honor."

> THE COURT: I'll give you-all a week to respond to their submittals.
> MR. MURPHY: Yes, Your Honor. And –
>
> MR. KRYDER: Your Honor, they filed a response. It's in the -- in the --
>
> THE COURT: I'm not talking about the response in the –
>
> MR. KRYDER: Oh.
>
> THE COURT: -- here. I'm talking about any case law or whatever else –
> ***MR. KRYDER: Got it.***
>
> THE COURT: -- they may want to present.
>
> ***MR. KRYDER: Thank you, Your Honor.***

Transcript, p. 47-48 (emphasis added).

D. Quantum Presented Puissant Evidence of Damages

The Panel Opinion's reasoning as to Quantum's showing of damages was thorough:

> Applying those standards here, Quantum Materials has satisfied its burden. It is undisputed that K&L Gates represented Quantum Materials, at minimum, for the better part of a year. K&L Gates does not deny that it was present at board meetings and concedes that it prepared the corporation's S-1 filing. It is reasonable to infer that over

the course of preparing that document, K&L Gates would have become familiar with Quantum Materials' financial outlook. It is undisputed that the Lenders, after initially accepting cash payments toward the loan obligation, later began insisting on equity as reimbursement. And it is equally uncontroverted that at some point K&L Gates began assisting the Lenders to that end, ultimately suing Quantum Materials in an effort to obtain that equity. A rational mind could review these undisputed facts and infer that K&L Gates: (1) failed to identify a conflict of interest, (2) used its representation of Quantum Materials to its own advantage, or (3) divulged confidential information to the Lenders that led them to seek equity in Quantum Materials. These are well-settled examples of breached fiduciary duty. *See Gibson*, 126 S.W.3d at 330. And while K&L Gates argues that there is no evidence of injury, Quantum Materials suffered injury—at the very least—when it incurred the cost of filing the motion to disqualify. Evidence of further injury may be revealed during discovery. *See Deuell v. Texas Right to Life Comm., Inc*., 508 S.W.3d 679, 689 (Tex. App.—Houston [1st Dist.] 2016, pet. denied) (explaining nonmoving party's burden "to adduce evidence supporting a rational inference as to the existence of damages, not their amount or constituent parts"). Because Quantum Materials satisfied its burden to state a prima facie case for its claim of breached fiduciary duty, the district court did not err in declining to dismiss that claim.

2020 Tex. App. LEXIS 2335, at 13-15.

CONCLUSION

The petition for review should be denied.

Dated: September 22, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of this brief were served on all parties by electronic filing on the 22cnd day of September, 2020.

Seth Kretzer

CERTIFICATE OF COMPLIANCE

I certify that this brief contains 3,262 words.

Seth Kretzer

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