

NO. 08-0833

**IN THE
SUPREME COURT OF TEXAS**

**ANGLO-DUTCH PETROLEUM INTERNATIONAL, INC.
and ANGLO-DUTCH (TENGE) L.L.C., Petitioners**

V.

GREENBERG PEDEN, P.C. and GERARD J. SWONKE, Respondents

**RESPONSE OF
GERARD J. SWONKE and GREENBERG PEDEN, P.C.**

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STATEMENT OF THE CASE

Nature of the case: Declaratory judgment and breach of fiduciary duty action brought by Anglo-Dutch Petroleum International, Inc. and Anglo-Dutch (Tenge) L.L.C. (collectively “Anglo-Dutch”) against their attorney, Gerard Swonke, and Greenberg Peden, P.C., the law firm to which he was formerly “of counsel.” Swonke counterclaimed for a declaratory judgment, breach of contract, and fraud. Swonke also sued Scott Van Dyke, the president of Anglo-Dutch, for fraud.

Trial court: 61st District Court, Harris County, Judge John Donovan

Jury verdict: The jury found that Swonke was, and Greenberg Peden was not, a party to a contingent fee agreement (“Fee Agreement”) with Anglo-Dutch, 5 CR 829, and that Anglo-Dutch breached the Fee Agreement.¹ 5 CR 830. The jury awarded damages of \$1,000,000. 5 CR 831. The jury also found that Swonke complied with his fiduciary duties to Anglo-Dutch.² 5 CR 833.

Trial court disposition: Judgment rendered for Swonke on the jury’s verdict for actual damages, attorneys’ fees, pre- and post-judgment interest, and costs of court.³ 4 CR 800-803.

Court of Appeals: Fourteenth Court of Appeals, panel consisting of Justice Boyce (author), Justice Fowler, and Senior Justice Hudson

COA disposition: Affirmed.

COA opinion: *Anglo-Dutch Petroleum Int’l, Inc. v. Greenberg Peden, P.C.*, 267 S.W.3d 454 (Tex. App.—Houston [14th Dist.] Aug. 26, 2008, pet. filed) (“*Anglo-Dutch*”).⁴

¹ A copy of the Fee Agreement is attached as Appendix A.

² A copy of the jury’s verdict is attached to the Final Judgment which is attached as Appendix B.

³ A copy of the Final Judgment is attached as Appendix B.

⁴ A copy of *Anglo-Dutch Petroleum Int’l, Inc. v. Greenberg Peden, P.C.*, 267 S.W.3d 454 (Tex. App.—Houston [14th Dist.] Aug. 26, 2008, pet. filed) is attached as Appendix C.

ISSUES PRESENTED

- I. Did Anglo-Dutch waive its complaint that the trial court erred by asking the jury to interpret an unambiguous Fee Agreement because it did not object to the submission of Question 1 on that basis?
- II. Does the application of the proper standard and scope of review to the evidence supporting the jury's findings that Swonke signed the Fee Agreement on behalf of himself and not Greenberg Peden defeat Anglo-Dutch's first issue?
- III. Did Anglo-Dutch waive its complaint that the alleged ambiguity in the Fee Agreement should have been construed against Swonke under the rule of *contra proferentem* by not objecting to—and indeed requesting—the submission of a jury question to resolve the alleged ambiguity?
- IV. Do the jury's findings that Swonke signed the Fee Agreement on behalf of himself and not Greenberg Peden prevent this Court from reaching Anglo-Dutch's argument that the Fee Agreement should have been construed against Swonke under the rule of *contra proferentem*?
- V. Did Anglo-Dutch waive the complaint in its third issue that the trial court erred by refusing to properly instruct the jury because it tendered its proposed instruction in a cluster of other instructions at least one of which could not properly have been submitted because it assumed the truth of a controverted fact? (Unbriefed).

STATEMENT OF FACTS

Gerard Swonke is a 34-year lawyer who was “of counsel” to Greenberg Peden, P.C. or its predecessor from 1987 until November 2001. 9 RR 201, 203-04; 6 RR 258.

Scott Van Dyke worked for Van Dyke Energy Company (later Vanco Energy Company), his father’s oil company, where he spent 50% of his time negotiating and preparing contracts. In that role, he learned that one must affix a title or position to a signature block in a contract in order to sign on behalf of an entity and not individually. 3 RR 63, 70-72, 87.

Swonke first met Van Dyke in 1987 through Van Dyke’s father. 9 RR 205-06, 208. Soon thereafter, Swonke began to represent Van Dyke’s father’s company. 9 RR 208. During the course of this representation, on several occasions Swonke told Van Dyke, Van Dyke’s father, and even Van Dyke’s mother that he was “of counsel” to—not employed by—Greenberg Peden, and he explained what that meant. *See* 9 RR 209-211.

In 1989, Van Dyke and his mother formed Anglo-Dutch Petroleum International, Inc., an exploration company. 3 RR 72-74. Van Dyke served as its president. 4 RR 51-52. Beginning in 1993, Van Dyke became the chief architect and negotiator of an elaborate limited liability agreement that brought together disparate investor interests from several countries to pursue a license in Kazakhstan for the development of the Tenge oil and gas field. 8 RR 174; 9 RR 214. Swonke drafted the formal documents and obtained the assistance of Skip Naylor, a Greenberg Peden shareholder, to help document the transaction. 8 RR 176; 9 RR 214. Anglo-Dutch (Tenge) L.L.C. was the entity formed to complete the transaction. *See* 8 RR 176.

In 1997, Swonke negotiated and drafted confidentiality agreements that Halliburton and Ramco executed in order to view Anglo-Dutch's confidential data regarding the Tenge field to assess a proposed buy out of Anglo-Dutch's existing partners. 3 RR 92-95. In February 2000, Anglo-Dutch requested that Swonke examine the viability of a potential lawsuit against Halliburton and Ramco for breaching the confidentiality agreements. 4 RR 227; 9 RR 228, 230. Swonke concluded a lawsuit was viable and so advised Anglo-Dutch. 4 RR 229; 9 RR 232.

Although Anglo-Dutch wished to pursue the lawsuit, it did not have the financial resources to do so on an hourly basis. 3 RR 98. Anglo-Dutch owed Greenberg Peden a large sum of money. 7 RR 197. For that reason, Greenberg Peden previously had decided and told Van Dyke that it would no longer represent Anglo-Dutch in any matters. 6 RR 231-32; 7 RR 208-09; 9 RR 222-23; 8 RR 179-81. Nevertheless, as required under Swonke's "of counsel" agreement with Greenberg Peden, Swonke first approached Greenberg Peden and asked if it would represent Anglo-Dutch against Halliburton and Ramco. 8 RR 179-80; 7 RR 108; DX 3 at 7 ¶ 8. Greenberg Peden flatly refused. 7 RR 124, 132-33, 205-09; 8 RR 179-80, 185, 207-08; 247, 252. Swonke and David Peden, a named shareholder of Greenberg Peden, both informed Van Dyke that Greenberg Peden would not represent it against Halliburton and Ramco, a fact even Van Dyke concedes. 4 RR 229; 6 RR 231-32; 7 RR 208-09; 8 RR 180, 207-08, 247, 252-53.

Swonke then referred the case to McConn & Williams without seeking a referral fee. 9 RR 234. McConn & Williams signed a fee agreement with Anglo-Dutch on March 25, 2000 and filed *Anglo-Dutch (Tenge) L.L.C., et al. v. Ramco Oil & Gas, Ltd., et*

al.; in the 61st Judicial District Court of Harris County, Texas, Cause No. 2000-22588 (“Halliburton Lawsuit”) on May 2, 2000. PX 3; 3 RR 103; 3 RR 105. McConn & Williams later associated with John O’Quinn to try the case. 8 RR 21.

After Anglo-Dutch hired McConn & Williams, Van Dyke and McConn & Williams’ lawyers frequently asked Swonke for advice and to perform tasks on the Halliburton Lawsuit even though at that time Swonke had no agreement with Anglo-Dutch or McConn & Williams by which he would be paid for his efforts. 9 RR 235-37. After several months of such requests, Swonke finally concluded that he had to be compensated if he was going to continue to work on the Halliburton Lawsuit. 9 RR 237. Swonke told McConn and Williams that he was willing to continue helping, but needed to be paid. 9 RR 237. McConn and Williams told Swonke that they could not compensate him because they did not have a large enough fee interest. 9 RR 237-38.

Van Dyke then called Swonke and specifically asked to retain him, not Greenberg Peden, to work on the Halliburton Lawsuit on a contingent fee because he could not afford to pay Swonke by the hour. 9 RR 239-40. Van Dyke suggested a contingency fee based on a formula. 9 RR 240. Swonke resisted Van Dyke’s proposal because he thought it was too complicated and instead sought a flat 8-10% contingent fee contract. 9 RR 240-41. After further negotiations, Swonke and Anglo-Dutch agreed to Van Dyke’s terms, which Swonke dictated into a Dictaphone. 9 RR 241-43. Swonke then asked his secretary to transcribe his dictation and finalize the document. 9 RR 253.

The body of the Fee Agreement never mentions Greenberg Peden. PX 1. Instead, the body of the Fee Agreement exclusively uses the personal pronouns “I”, “me”, and

“my” twelve times in a nine-sentence contract to refer to Swonke, individually, and his rights and obligations under the Fee Agreement. PX 1.

Swonke’s secretary inadvertently put the Fee Agreement on Greenberg Peden letterhead and inserted “GREENBERG PEDEN, P.C.” into the signature block. 9 RR 253. Swonke then signed the Fee Agreement on October 16, 2000, never noticing the references to Greenberg Peden in the letterhead and in the signature block. 9 RR 254; PX 1 at 1. Van Dyke signed the Fee Agreement the next day for Anglo-Dutch. PX 1 at 2.

Swonke had no intention to, did not, and could not—because of Greenberg Peden’s prohibition on doing work for Anglo-Dutch—act for Greenberg Peden by signing the Fee Agreement. 6 RR 169. Instead, Swonke signed the contract for himself individually. 10 RR 63. Swonke has never signed a contingency fee contract on behalf of Greenberg Peden. 7 RR 68. Indeed, when Greenberg Peden signs a contingency fee contract with a client, a Greenberg Peden attorney executes the fee agreement. 6 RR 264. Greenberg Peden had flatly refused to represent Anglo-Dutch in the Halliburton Lawsuit and told Van Dyke so—thus, Swonke had no authority to sign the Fee Agreement on behalf of Greenberg Peden, a fact known by Van Dyke. 4 RR 229; 6 RR 231-32; 7 RR 124, 132-33, 205-09; 8 RR 179-80, 185, 207-08; 247, 252-53. Naylor, Greenberg Peden’s managing shareholder, agreed that Swonke did not execute the Fee Agreement on behalf of Greenberg Peden. 8 RR 232, 234.

After signing the Fee Agreement, Swonke worked on the Halliburton Lawsuit for 277 hours while physically present at Greenberg Peden’s offices. 7 RR 70. On October 26, 2001, Swonke became “of counsel” to McConn & Williams. DX 25. Swonke

informed Anglo-Dutch that he was taking its files, including the Halliburton Lawsuit, with him to his “of counsel” position at McConn & Williams unless Anglo-Dutch objected. DX 27. Anglo-Dutch did not object. 5 RR 187-188. Because Swonke was to be compensated for his work on the Halliburton Lawsuit under the Fee Agreement, Swonke’s “of counsel” agreement with McConn & Williams provided that McConn & Williams would not share any fees with Swonke that it derived from the Halliburton Lawsuit. *See* DX 25 at 3. With Anglo-Dutch’s knowledge, Swonke then worked 1,022 hours on the Halliburton Lawsuit while “of counsel” at McConn & Williams. 6 RR 148.

On May 7, 2002, six months after Van Dyke learned that Swonke had physically left Greenberg Peden to become “of counsel” to McConn & Williams, Van Dyke was deposed in the Halliburton Lawsuit. **Van Dyke expressly testified that Anglo-Dutch had a fee agreement with Swonke.** 5 RR 194; 9 RR 88. Van Dyke did not remotely suggest during his deposition that Anglo-Dutch had a fee agreement with Greenberg Peden. 5 RR 194.

The jury in the Halliburton Lawsuit rendered a \$70,500,000 verdict for Anglo-Dutch against Halliburton and Ramco. 3 RR 160. Halliburton and Ramco then stipulated that Anglo-Dutch incurred reasonable and necessary attorneys’ fees of \$9,800,000. 5 RR 10. The attorneys’ time for which Anglo-Dutch recovered attorneys’ fees included the 1,022 hours that Swonke worked on the Halliburton Lawsuit while “of counsel” to McConn & Williams. 6 RR 17; 7 RR 70.

Anglo-Dutch eventually settled with Halliburton for \$51,000,000 on April 1, 2004, and Halliburton funded the settlement on April 15, 2004. 3 RR 161; DX 48A. During

this period, Swonke repeatedly emailed Van Dyke about the calculation of his fee, directed Van Dyke's attention to the fact that Swonke's wiring instructions were not included with those of other attorneys who received their fees directly from Halliburton, and asked Van Dyke to promptly address "my contract." DX 44, 45, 48, 50. Van Dyke never suggested in response to these communications that he believed Swonke was not a party to the Fee Agreement. See 6 RR 55; 10 RR 7.

On April 20, 2004, Van Dyke met with a lawyer and discussed issues related to Swonke. 4 RR 5. On April 22, 2004, Swonke met with Van Dyke and, for the first time, Van Dyke asserted that the Fee Agreement is between Anglo-Dutch and Greenberg Peden, shocking Swonke. 9 RR 286-287; 10 RR 38. Swonke left the meeting, telling Van Dyke "I can't believe you're going to do this to me and my family." 10 RR 42. Several hours later, Anglo-Dutch sued Swonke, asserting that Anglo-Dutch's Fee Agreement was with Greenberg Peden, not Swonke. 6 RR 105.

Like it did with Swonke's Fee Agreement, Anglo-Dutch also attempted to avoid numerous other contracts that required it to share the settlement from the Halliburton Lawsuit. For example, Anglo-Dutch executed 33 contracts that would have required it to pay approximately \$11,000,000 of the settlement to investors in the Halliburton Lawsuit. 5 RR 211-12, 229-30. However, Van Dyke did not pay any of the investors the amount they contracted for, thereby saving \$4-5 million. 5 RR 229, 263. Like Swonke, at least eight of the investors successfully sued Anglo-Dutch for breach of contract. See, e.g., *Anglo-Dutch Petroleum Int'l, Inc. v. Smith*, 243 S.W.3d 776 (Tex. App.—Houston [14th Dist.] 2007, pet. denied); *Anglo-Dutch Petroleum Int'l, Inc. v. Littlemill Ltd.*, No. 14-06-

00921-CV, 2007 WL 2826900 (Tex. App.—Houston [14th Dist.] Oct. 2, 2007, pet. denied); *Anglo-Dutch Petroleum Int’l, Inc. v. Haskell*, 193 S.W.3d 87 (Tex. App.—Houston [1st Dist.] 2007, pet. denied).

SUMMARY OF THE ARGUMENT

“[A]ttorneys are entitled to protection from clients who would abuse the contingent fee arrangement and avoid duties owed under contract.” *Hoover Slovacek, L.L.P. v. Walton*, 206 S.W.3d 557, 563 (Tex. 2006). In a nutshell, that is what this case is about.

Van Dyke’s company, Anglo-Dutch, settled the Halliburton Lawsuit for \$51,000,000 and then stiffed Swonke on his fee. Anglo-Dutch then sued Swonke for a judicial declaration that it owed him nothing for the 1,299 hours he had worked on the lawsuit and for breach of fiduciary duty, claiming that Greenberg Peden was the party to the Fee Agreement and Swonke was not. Anglo-Dutch took these unconscionable steps even though:

- Greenberg Peden had expressly refused to represent Anglo-Dutch in the Halliburton Lawsuit and told Van Dyke so;
- Van Dyke knew that Swonke was “of counsel” to—and not an employee of—Greenberg Peden;
- Greenberg Peden is not mentioned in the body of the Fee Agreement;
- The Fee Agreement uses personal pronouns twelve times in nine sentences to refer to Swonke;
- Swonke did not affix a title or position to the signature block in the Fee Agreement, an act that Van Dyke, a sophisticated businessman, thought was necessary for an individual to sign a contract on behalf of an entity and not individually;

- Van Dyke himself testified in the Halliburton Lawsuit that Anglo-Dutch had a fee agreement with Swonke;
- Swonke worked 1,022 hours on the Halliburton Lawsuit without compensation while “of counsel” at McConn & Williams because he knew he would be compensated under his Fee Agreement with Anglo-Dutch;
- Anglo-Dutch recovered attorneys’ fees in the Halliburton Lawsuit for the 1,022 hours Swonke worked on the case while “of counsel” at McConn & Williams; and
- Greenberg Peden has repeatedly insisted against its economic interests that it is not the party to the Fee Agreement and Swonke is.

These facts and numerous others detailed in the court of appeals’ excellent opinion demonstrate that the result in this case is fair, just, and correct.

Nevertheless, this Court need not examine whether the court of appeals correctly decided the issues before it because Anglo-Dutch has waived the complaints it asserts in this Court.

In its first issue, Anglo-Dutch complains that the trial court erred by asking the jury to interpret the Fee Agreement because it is unambiguously between Anglo-Dutch and Greenberg Peden. Anglo-Dutch has waived this complaint by:

- Pleading that the Fee Agreement was ambiguous;
- Proposing a jury question regarding the interpretation of the Fee Agreement;
- Failing to object to Question 1 on the ground it submitted the interpretation of an unambiguous contract to the jury;
- Asserting at the charge conference that the Fee Agreement was ambiguous; and
- Questioning witnesses about their interpretation of the Fee Agreement and the intent of the parties at its formation.

In any event, the application of the proper standard and scope of review to the evidence supporting the jury’s finding that Swonke signed the Fee Agreement on behalf of himself and not Greenberg Peden defeats Anglo-Dutch’s first issue.

In its second issue, Anglo-Dutch complains that the alleged ambiguity in the Fee Agreement should not have been submitted to the jury, but should have been construed against Swonke under the doctrine of *contra proferentem*. Anglo-Dutch has waived this complaint by not objecting to—and indeed requesting—the submission of a jury question to resolve the alleged ambiguity in the Fee Agreement. In any event, the jury’s findings prevent this Court from reaching Anglo-Dutch’s argument that the Fee Agreement should have been construed against Swonke under the rule of *contra proferentem*.

ARGUMENT

I. Anglo-Dutch has waived its complaint that the trial court erroneously asked the jury to interpret an unambiguous Fee Agreement because it did not object to the submission of Question 1 on that basis.

Although the court of appeals decided Anglo-Dutch’s first issue on the merits, Anglo-Dutch has clearly waived its complaint that the trial court erred by asking the jury in Question 1 to interpret an unambiguous Fee Agreement.⁵ *See Recognition*

⁵ Although unclear, it appears that Anglo-Dutch’s first issue complains that the trial court erred by having the jury interpret an unambiguous Fee Agreement because that is the issue it asserted in the court of appeals. *See Anglo-Dutch*, 267 S.W.3d at 466 (“Anglo-Dutch first argues that the trial court erred by allowing the jury to interpret the fee agreement because it unambiguously is between Anglo-Dutch and Greenberg Peden—not between Anglo Dutch and Swonke individually.”). However, to the extent that Anglo-Dutch’s first issue complains that the trial court erred by ruling that the Fee Agreement is ambiguous, that complaint has been waived because Anglo-Dutch did **not** make that complaint in the trial court or the court of appeals. *See id.* Anglo-Dutch presumably avoided that complaint and its attendant preservation problem because the trial court never made that ruling. To the contrary, the trial court’s only ruling regarding the ambiguous or unambiguous nature of the Fee Agreement occurred post-verdict

Communications, Inc. v. American Auto. Ass'n, Inc., 154 S.W.3d 878, 888 (Tex. App.—Dallas 2005, pet. denied) (appellant waived complaint that the trial court erred by having jury determine the meaning of unambiguous paragraphs in a contract because the appellant pled the paragraphs were ambiguous and proposed a jury question regarding their interpretation); *Haley v. GPM Gas Corp.*, 80 S.W.3d 114, 119-20 (Tex. App.—Amarillo 2002, no pet.) (appellant waived complaint that the trial court erred by submitting the interpretation of an unambiguous contract to the jury because the appellant did not object to the question on that basis and invited any error by requesting the submission of substantially the same question); *Furnace v. Furnace*, 783 S.W.2d 682 (Tex. App.—Houston [14th Dist.] 1989, writ dism'd) (appellants waived complaint that the unambiguous terms of an agreement entitled them to judgment as a matter of law because they asserted that the agreement was ambiguous, questioned witnesses about their interpretation of the agreement, and did not object to, but instead urged, the submission of an issue regarding the meaning of the agreement).

Like the appellant in *Recognition Communications*, Anglo-Dutch pled that the Fee Agreement was ambiguous and proposed a jury question regarding the interpretation of the Fee Agreement. 2 CR 344; Second Supp. CR 20. Moreover, like the appellant in *Haley*, Anglo-Dutch did not object to Question 1 on the ground it submitted a question of law involving the interpretation of an unambiguous contract to the jury, but instead requested that the trial court include substantially the same question in the jury charge.

when it found that the Fee Agreement is unambiguously between Anglo-Dutch and Swonke. Second Supp. RR 155.

10 RR 137-151; *compare* 5 CR 829 with Second Supp. CR 20. Finally, like the appellants in *Furnace*, Anglo-Dutch asserted at the charge conference that the Fee Agreement was ambiguous, questioned witnesses about their interpretation of the Fee Agreement and the intent of the parties at its formation, did not object to the submission of Question 1, urged the trial court to submit the interpretation of the Fee Agreement to the jury, and obtained an unfavorable jury finding. 3 RR 64-65, 112; 7 RR 155; 10 RR 142-43; 5 CR 829; Second Supp. CR 20. Consequently, like the appellants in *Recognition Communications*, *Haley*, and *Furnace*, Anglo-Dutch has waived its complaint that the trial court erroneously asked the jury to interpret an unambiguous Fee Agreement. *See Recognition Communications*, 154 S.W.3d at 888; *Haley*, 80 S.W.3d at 120; *Furnace*, 783 S.W.2d at 684-85. Anglo-Dutch's first issue does not merit review.

II. Anglo-Dutch's first issue is defeated by the application of the proper standard and scope of review to the evidence supporting the jury's findings that Swonke signed the fee agreement on behalf of himself and not Greenberg Peden.

Throughout its petition, Anglo-Dutch repeatedly asserts that Swonke signed the Fee Agreement "on behalf of" Greenberg Peden. Since Greenberg Peden did not sign the Fee Agreement, Anglo-Dutch needs Swonke to have signed it "on behalf of" Greenberg Peden to make Greenberg Peden a party to the Fee Agreement. *See Suarez v. Jordan*, 35 S.W.3d 268, 272-74 (Tex. App.—Houston [14th Dist.] 2000, no pet.) (holding the appellant was not a party to a contract because he did not sign it and there was no evidence that the person who signed the contract had either actual or apparent authority to bind the appellant). Indeed, this factual predicate is the primary basis on which Anglo-

Dutch relies to argue that Greenberg Peden was a party to the Fee Agreement and Swonke was not.

However, the jury expressly found that Swonke: (1) signed the Fee Agreement “on behalf of” himself; and (2) did not sign the Fee Agreement “on behalf of” Greenberg Peden. 5 CR 829. It was Anglo-Dutch’s burden to prove that Swonke signed the Fee Agreement “on behalf of” Greenberg Peden. *See IRA Resources, Inc. v. Griego*, 221 S.W.3d 592, 597 (Tex. 2007) (“Texas law does not presume agency, and the party who alleges it has the burden of proving it.”). Consequently, this Court cannot conclude that Greenberg Peden was a party to the Fee Agreement and Swonke was not unless the evidence conclusively proves that Swonke signed the Fee Agreement on behalf of Greenberg Peden and no evidence proves that Swonke signed the Fee Agreement on behalf of himself.

The court of appeals thoroughly examined the record and exhaustively detailed the evidence supporting the jury’s findings that Swonke signed the Fee Agreement on behalf of himself and not on behalf of Greenberg Peden. *See Anglo-Dutch*, 267 S.W.3d at 476-81. Even a cursory review of this evidence demonstrates that the jury reached a fair, just, and correct result, and that Anglo-Dutch cannot prevail on its first issue when the proper standard and scope of review are applied.⁶ Consequently, Anglo-Dutch’s first issue does not merit review.⁷

⁶ Anglo-Dutch relies on *Suttles v. Thomas Bearden Co.*, 152 S.W.3d 607, 611-14 (Tex. App.—Houston [1st Dist.] 2004, no pet.), in which the court held that as a matter of law a signatory to a promissory note was not individually liable on the note under Texas Business and Commerce Code section 3.402(b)(1) because: as president of the company, the signatory was a

III. Anglo-Dutch has waived its complaint that the alleged ambiguity in the fee agreement should have been construed against Swonke under the rule of *contra proferentem* by not objecting to—and indeed requesting—the submission of a jury question to resolve the alleged ambiguity.

In its second issue, Anglo-Dutch complains that the alleged ambiguity in the Fee Agreement should not have been submitted to the jury, but should have been construed against Swonke under the doctrine of *contra proferentem*. Anglo-Dutch has waived this issue by not objecting to—and indeed requesting—the submission of a jury question to resolve the alleged ambiguity in the Fee Agreement.

Question 1 asked whether Anglo-Dutch contracted with Swonke or Greenberg Peden. *See* 5 CR 829. At the charge conference, Anglo-Dutch conceded that an ambiguity existed regarding the parties to the Fee Agreement and requested the submission of a question substantially similar to Question 1 to resolve that ambiguity. 10 RR 142-43; *compare* 5 CR 829 *with* Second Supp. CR at 20. Anglo-Dutch did not object to Question 1 on either the ground that no evidence supported its submission or on the ground that any ambiguity must be construed against Swonke. 10 RR 138-143. In

representative of the company; the parties did not dispute the signatory's authority to bind the company to the note; and the signature block identified the signatory as the president of the company. However, unlike *Suttles*, in this case, the evidence shows and/or the jury found that Swonke was not a representative of Greenberg Peden with respect to the Fee Agreement, Swonke did not have authority to bind Greenberg Peden to the Fee Agreement, and the signature block did not identify Swonke as an agent of Greenberg Peden. *Suttles* is inapposite.

⁷ Anglo-Dutch also makes a vague complaint in its first issue that the court of appeals erroneously referred to extrinsic circumstances when deciding whether the trial court had erred by asking the jury to interpret the Fee Agreement. *See* Pet. at 7-8. This complaint is not worthy of review since Anglo-Dutch did not bother to identify or specify a single piece of evidence that the court of appeals improperly considered. This is not surprising since Anglo-Dutch itself asked the court of appeals to consider the circumstances surrounding the formation of the Fee Agreement. *See* Anglo-Dutch COA Br. at 23-26.

response to Question 1, the jury found that Swonke was a party to the Fee Agreement and Greenberg Peden was not. *See* 5 CR 829.

Anglo-Dutch has waived its complaint that the doctrine of *contra proferentem* required any ambiguity to be construed against Swonke—not submitted to the jury—because Anglo-Dutch asked that the jury resolve the ambiguity and it did so adversely to Anglo-Dutch. *See Furnace v. Furnace*, 783 S.W.2d 682 (Tex. App.—Houston [14th Dist.] 1989, writ *dism'd w.o.j.*) (“Having urged the trial court to find the . . . agreement ambiguous and to submit the issue to the jury, appellants cannot now, following an unfavorable finding from the jury, argue that . . . they are entitled to judgment as a matter of law.”). Anglo-Dutch’s second issue does not merit review.

IV. The jury’s findings that Swonke signed the fee agreement on behalf of himself and not Greenberg Peden prevent this court from reaching Anglo-Dutch’s argument that the fee agreement should have been construed against Swonke under the rule of *contra proferentem*.

Although this Court has never adopted the rule that an ambiguous attorney-client fee agreement must automatically be construed against the attorney-drafter, *Lopez v. Munoz, Hockema & Reed, L.L.P.*, 22 S.W.3d 857, 866 (Tex. 2000) (Gonzalez, J. dissenting), Anglo-Dutch asks it to do so in this case. However, the Court cannot reach that issue because the jury’s verdict is an insurmountable obstacle to the application of *contra proferentem*.

The jury determined the meaning of the Fee Agreement at Anglo-Dutch’s request. *See* 5 CR 829. And those findings are supported by legally and factually sufficient evidence. Consequently, the jury’s findings control over the rule of *contra proferentem*.

See TEX. CONST. art. I, § 15 (“The right of trial by jury shall remain inviolate.”); *Roberts v. Short*, 1 Tex. 373, 1846 WL 3625, at **5-6 (1846) (recognizing long before Texas adopted its current constitution that an ambiguity in a contract creates a question of fact for the jury).

The Michigan Supreme Court recently recognized this principle:

[I]f a contract is ambiguous regarding whether a term means “a” or “b,” but relevant extrinsic evidence leads the jury to conclude that the parties intended the term to mean “b,” then the term should be interpreted to mean “b,” even though construing the document in the nondrafter’s favor pursuant to an application of the rule of *contra proferentem* would produce an interpretation of the term as “a.”

Klapp v. United Ins. Group Agency, Inc., 663 N.W.2d 447, 455 (Mich. 2003). The foreign authorities that Anglo-Dutch cites in support of automatically applying the rule of *contra proferentem* to attorney-client fee agreements are easily distinguished because **none** of those cases applied the rule of *contra proferentem* to override a jury’s interpretation of an ambiguity in a fee agreement. Anglo-Dutch’s second issue does not merit review.

PRAYER

Swonke and Greenberg Peden request that the Court deny Anglo-Dutch’s petition for review.

Respectfully submitted,

RUSTY HARDIN & ASSOCIATES, P.C.

/s/

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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of Response of Gerard J. Swonke and Greenberg Peden, P.C. has been served via certified mail, return receipt requested on Mr. Kenneth Breitbeil, McFall, Sherwood & Breitbeil, P.C., 1331 Lamar Street, 1250 Four Houston Center, Houston, Texas 77010-3027 and Mr. Greg S. Coleman, Yetter & Warden, L.L.P., 221 W. 6th St., Suite 750, Austin, Texas 78701 on March 17, 2009.

/S/

Joe Roden