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.

On Petition for Review from the
Fourteenth Court of Appeals at Houston, Texas

PETITIONERS' REPLY BRIEF ON THE MERITS

Gregory S. Coleman
State Bar No. 00783855
Richard B. Farrer
State Bar No. 24055470
YETTER, WARDEN & COLEMAN, L.L.P.
221 West Sixth Street, Suite 750
Austin, Texas 78701
[Tel.] (512) 533-0150
[Fax] (512) 533-0120

Craig T. Enoch
State Bar No. 00000026
WINSTEAD PC
401 Congress Avenue, Suite 2100
Austin, Texas 78701
[Tel.] (512) 370-2800
[Fax] (512) 370-2850

Mike A. Hatchell
State Bar No. 09219000
Charles "Skip" Watson
State Bar No. 20967500
LOCKE LORD BISSELL & LIDDELL, LLP
100 Congress Avenue, Suite 300
Austin, Texas 78701
[Tel.] (512) 305-4700
[Fax] (512) 305-4800

Kenneth R. Breitbeil
State Bar No. 02947690
Donald B. McFall
State Bar No. 13595000
Brian Tully
State Bar No. 24039217
MCFALL, BREITBEIL & SHULTS, P.C.
1250 Four Houston Center
Houston, Texas 77010
[Tel.] (713) 590-9300
[Fax] (713) 590-9399

ATTORNEYS FOR ANGLO-DUTCH PETROLEUM INTERNATIONAL, INC. AND ANGLO-DUTCH (TENGE) L.L.C.

TABLE OF CONTENTS

Index of Authorities iii

Introduction 1

Argument 3

I. Settled Principles of Contract Interpretation Should Be Enforced When Unambiguous Attorney-Fee Contracts Are Construed 3

A. The Court of Appeals's Decision Violates the Rules of Contract Interpretation by Relying on Matters Outside the Contract to Create Ambiguity in an Unambiguous Contract 3

B. Personal Pronouns in an Unambiguous Fee Contract on Firm Letterhead and Signed on Behalf of the Firm Do Not Render It Ambiguous 4

C. The Court of Appeals's Decision Undercuts Settled Rules of Contract Interpretation and Undermines Rules Intended to Protect Clients Contracting with Attorneys. 8

D. Arguments About Swonke's Authority to Act for Greenberg Peden Should Not Distract the Court from the Purely Legal Issues Squarely Presented in the Petition 9

II. The Special Attorney-Client Relationship Overlays and Affects the Interpretation of Fee Contracts 12

A. The Most Important Circumstance Surrounding the Contract Is the Fiduciary Nature of the Attorney-Client Relationship 12

B. The Special Nature of the Attorney-Client Relationship Informs How Courts Interpret Fee Contracts 13

C. The Jury's Findings That Swonke Did Not Breach His Fiduciary Duty Do Not Affect the Construction of the Fee Contract 17

III. A Jury Charged with Interpreting an Ambiguous Attorney-Fee Contract Should Be Properly Instructed 18

Conclusion 23

Certificate of Service 25

INDEX OF AUTHORITIES

CASES

Anglo-Dutch v. Greenberg Peden, P.C.,
267 S.W.3d 454 (Tex. App.—Houston [14th Dist.] 2008, pet. filed) 16

Archer v. Griffith,
390 S.W.2d 735 (Tex. 1964). 1, 13

Cardenas v. Ramsey County,
322 N.W.2d 191 (Minn. 1982) 16

Cecil v. Smith,
804 S.W.2d 509 (Tex. 1991) 20, 21

City of Groves v. Ponder,
303 S.W.2d 485 (Tex. Civ. App.—Beaumont 1957, writ ref'd n.r.e.) 10

Coker v. Coker,
650 S.W.2d 391 (Tex. 1983) 5

Columbia Rio Grande Healthcare, L.P. v. Hawley,
248 S.W.3d 851 (Tex. 2009) 19, 20, 22

David J. Sacks, P.C. v. Haden,
266 S.W.3d 447 (Tex. 2008) 3, 4, 7

Fiess v. State Farm Lloyds,
202 S.W.3d 744 (Tex. 2006) 7

GTE Mobilnet of S. Tex. Ltd. P'ship v. Telecell Cellular, Inc.,
955 S.W.2d 286 (Tex. App.—Houston [1st Dist.] 1997, writ denied) 21

Hoover Slovacek LLP v. Walton,
206 S.W.3d 557 (Tex. 2006) 1, 13, 14

In re Cypresswood Land Partners, I,
No. 07-32437-H4-11, 2009 WL 2447617 (Bankr. S.D. Tex. Aug. 7, 2009) 13

In re Myers,
663 N.E.2d 771 (Ind. 1996) 16

Int'l & G.N.R. Co. v. Tisdale,
74 Tex. 8, 11 S.W. 900 (1889) 11

IRA Res., Inc. v. Griego,
221 S.W.3d 592 (Tex. 2007) 10

Levine v. Bayne, Snell & Krause, Ltd.,
40 S.W.3d 92 (Tex. 2001) 1, 2, 14, 17

Lopez v. Muñoz, Hockema & Reed, L.L.P.,
22 S.W.3d 857 (Tex. 2000) 2, 13, 14

Meinhard v. Salmon,
249 N.Y. 458, 164 N.E. 545 (1928) 13

Nat'l Union Fire Ins. Co. v. CBI Indus., Inc.,
907 S.W.2d 517 (Tex. 1995) 4

Palmer v. Goudchaux/Maison Blanche, Inc.,
613 So.2d 704 (La. App. 1993) 17

Pasadena Assoc. v. Connor,
460 S.W.2d 473 (Tex. App.—Houston [14th Dist.] 1970, writ ref'd n.r.e.).... 10, 11

Pub. Serv. Life Ins. Co. v. Copus,
494 S.W.2d 200 (Tex. Civ. App.—Tyler 1973, no writ) 11

Rodriguez v. Higginbotham-Bailey-Logan Co.,
172 S.W.2d 991 (Tex. Civ. App.—San Antonio 1943, writ ref'd) 11

Scott v. Atchison, Topeka & Santa Fe Ry. Co.,
572 S.W.2d 273 (Tex. 1978) 20

Sec. & Commc'ns Sys., Inc. v. Hooper,
575 S.W.2d 606 (Tex. Civ. App.—Dallas 1978, no writ) 11

Ship Ahoy, Inc. v. Whalen,
347 S.W.2d 662 (Tex. Civ. App.—Houston 1961, no writ) 10

Sun Oil Co. (Delaware) v. Madeley,
626 S.W.2d 726 (Tex. 1981) 3, 4, 7

Tex. Workers' Comp. Ins. Fund v. Mandlbauer,
34 S.W.3d 909 (Tex. 2000) 19

Wetzel v. Sullivan, King & Sabom, P.C.,
745 S.W.2d 78 (Tex. App.—Houston [1st Dist.] 1988, no writ) 10

STATUTES AND RULES

TEX. DISCIPLINARY R. PROF'L CONDUCT 1.04(d) 9

TEX. DISCIPLINARY R. PROF'L CONDUCT 7.01 .... 9, 14

TEX. R. CIV. P. 93(7) 11

OTHER

RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §18 .... 4, 14

RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §18(2)................................ 14

RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §18 cmt. h 14

RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §38 14

INTRODUCTION

Because Swonke cannot respond to this Court's jurisprudence on the attorney-client relationship, his response instead creates and attacks a straw-man *contra proferentum* argument, and, at every turn, insinuates nonexistent fact questions, unfounded waiver arguments, and irrelevant issues into the case to avoid the straight-forward, squarely presented questions of law that this Court should resolve:

- Is a fee contract drafted on firm letterhead and signed for the firm using a firm signature block an agreement with the firm, unless clearly indicated otherwise in the contract?
- If a fee contract is ambiguous, should it be construed as a reasonable client would construe it, with any doubts being resolved in favor of the client's reasonable expectations?
- If a jury is charged with interpreting a fee contract, should the jury be instructed on the special nature of the attorney-client relationship and the proper legal standard for interpreting the contract?

Rather than engage those questions, Swonke's response begins with an erroneous assertion that attorney-fee contracts are no different than any commercial agreement between arms' length contractual counterparties. From that flawed premise, Swonke concludes that nothing beyond ordinary contract-interpretation principles and jury instructions has any bearing on the interpretation of attorney-fee contracts, and that clients have no protection when contracting with an attorney during an ongoing representation. Thus, Swonke's response avoids entirely this Court's opinions and reasoning in cases on the attorney-client relationship and its implications for attorney-fee agreements, including cases like *Archer v. Griffith*, 390 S.W.2d 735 (Tex. 1964), *Hoover Slovacek LLP v. Walton,* 206 S.W.3d 557, 565 (Tex. 2006), *Levine v. Bayne, Snell &*

Krause, Ltd., 40 S.W.3d 92 (Tex. 2001), and *Lopez v. Muñoz, Hockema & Reed, L.L.P.*, 22 S.W.3d 857, 866 & n.1 (Tex. 2000).

The irony of Swonke's efforts to treat the fee contract like any other contract is that under settled principles of contract interpretation, the fee contract in this case is unambiguously between Anglo-Dutch and Greenberg Peden, not Swonke as an individual. The court of appeals's resort to matters beyond the four corners of the agreement to *create* ambiguity in the contract where none otherwise exists should concern this Court, as it severely undermines this Court's decisions on the interpretation of unambiguous contracts and creates unacceptable uncertainty in a large number of attorney-fee contracts.

Of equal, if not greater, concern are Swonke's successful attempts to convince the court of appeals that an attorney-fee contract may be rendered ambiguous and presented to a jury for interpretation against the interests of a client based on the attorney's uncorrected, unexplained drafting errors and failures to clarify. The same is true of Swonke's success in convincing the court of appeals that the special nature of the attorney-client relationship has no bearing on how the contract is interpreted.

These issues involve an area of the law over which this Court has exercised special stewardship, and the Court should grant the petition to resolve them.

ARGUMENT

I. SETTLED PRINCIPLES OF CONTRACT INTERPRETATION SHOULD BE ENFORCED WHEN UNAMBIGUOUS ATTORNEY-FEE CONTRACTS ARE CONSTRUED.

Had the lower courts correctly applied the law governing the interpretation of unambiguous contracts, they would have properly concluded that the fee contract in this case is unambiguously between the client, Anglo-Dutch, and Greenberg Peden, the firm whose letterhead and signature block adorn the contract, and whose attorney, Swonke, drafted the contract and signed it for the firm.

A. The Court of Appeals's Decision Violates the Rules of Contract Interpretation by Relying on Matters Outside the Contract to Create Ambiguity in an Unambiguous Contract.

Swonke's brief incorrectly attempts to justify the court of appeals's violation of contract-interpretation principles by conflating the court of appeals's improper use of extrinsic evidence to *create* an ambiguity in an unambiguous contract with courts' use of extrinsic evidence to interpret ambiguous contracts. *See* Swonke Br. 13-16. Since at least this Court's decision in *Sun Oil Co. (Delaware) v. Madeley*, 626 S.W.2d 726, 731-32 (Tex. 1981), it has been clear that "parol evidence is not admissible to render a contract ambiguous, which on its face, is capable of being given a definite certain legal meaning." *See also, e.g.*, *David J. Sacks, P.C. v. Haden*, 266 S.W.3d 447, 450-51 (Tex. 2008) (same).

The prohibition against using extrinsic evidence to create contractual ambiguities is not limited to evidence of the parties' subjective beliefs about the contract's meaning, as Swonke argues. *See* Swonke Br. 13-15. As this Court has made clear, that prohibition

"obtains even to the extent of prohibiting proof of circumstances surrounding the transaction when the instrument involved, by its terms, plainly and clearly discloses the intention of the parties." *Sun Oil Co.*, 626 S.W.2d at 731-32; *David J. Sacks, P.C.*, 266 S.W.3d at 450-51; *Nat'l Union Fire Ins. Co. v. CBI Indus., Inc.*, 907 S.W.2d 517, 520 (Tex. 1995) (stating that the prohibition applies to all "extraneous evidence" introduced for the purpose of "determin[ing] the true meaning of the instrument").

B. Personal Pronouns in an Unambiguous Fee Contract on Firm Letterhead and Signed on Behalf of the Firm Do Not Render It Ambiguous.

Swonke fails in his attempt to defend the court of appeals's ambiguity finding by invoking the fee contract's use of personal pronouns. *See* Swonke Br. 10, 12, 18-20. A fee contract, like the one at issue, that is drafted on firm letterhead and signed using a firm signature block is an agreement with the firm, barring a clear indication to the contrary in the body of the agreement. *See* Anglo-Dutch Br. 19-20.

In this case, the fee contract's use of the personal pronouns "me" and "I" cannot reasonably support interpreting the contract as being between Anglo-Dutch and Swonke, instead of the firm on whose behalf he executed it. Swonke does not dispute that pronouns like "I" and "me" are commonly used in fee contracts, like the one in this case, to identify the particular lawyer(s) at a firm the parties expect will perform the work. Anglo-Dutch Br. 15; RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §18 [hereinafter RESTATEMENT §18]. And he does not dispute that he was best qualified to assist Anglo-Dutch's trial lawyers with background information in the Halliburton

representation and that the fee contract, on its face, is entirely consistent with that unremarkable fact.

Instead, Swonke argues that the fee contract "exclusive[ly]" uses personal pronouns. Swonke Br. 18-20. The fee agreement, however, designates Greenberg Peden specifically by name in large bold letters at the top of the page and in all capital letters in the signature block, details that both the court of appeals and Swonke neglect in their respective presentations of the fee contract. That unmistakable designation of Greenberg Peden, not Swonke, does not create ambiguity, it conclusively resolves any conceivable ambiguity concerning the intended contractual parties. And Swonke's assertion that the "use of personal pronouns has long been considered evidence that a contract was with the individual" only highlights that the court of appeals's decision will seed every fee contract containing personal pronouns with a potential ambiguity. Swonke Br. 19.

Nor does either the court of appeals or Swonke offer any meaningful response to the fact that their proposed alternative interpretation of the fee contract rests on an internal inconsistency, which violates the rule requiring that a contract's provisions be harmonized to avoid rendering the contract internally inconsistent or self-contradictory. *E.g.*, *Coker v. Coker*, 650 S.W.2d 391, 393 (Tex. 1983). There is simply no satisfactory explanation for how the fee contract could, with any internal consistency, use the personal pronouns "I" and "me" necessarily to refer to Swonke (not Greenberg Peden) while at the same time use the personal pronoun "you" necessarily to refer only to Anglo-Dutch (not Scott Van Dyke). *See* 6 RR 173-176 (Swonke conceding that "you" refers to

Anglo-Dutch, not Scott Van Dyke). Swonke relegates to a footnote his half-hearted response, which is that the inconsistency somehow does not matter because the contract refers to Anglo-Dutch by name. That response, however, completely ignores the fact that the fee contract refers to Greenberg Peden by name in extra-large letters at the top of the page and again in the signature block. *See* Swonke Br. 19, n.10.

It is nonsense for Swonke to claim that extrinsic evidence is relevant in this case because it shows that the parties never in fact reached an agreement. *See* Swonke Br. 16-18. No one, including Swonke, has ever argued that there is no valid agreement. Indeed, it is uncontested that Anglo-Dutch owes fees to Greenberg Peden under the agreement and has offered to pay $323,650 to Greenberg Peden for the hours Swonke worked while at that firm. *See* PX 37A. And if there was no valid agreement, why would Greenberg Peden have invoiced Anglo-Dutch for expenses related to the representation, *see* PX 55,[1] and why would Swonke have executed an assignment of rights with Greenberg Peden, which acknowledged that Swonke signed the fee agreement on behalf of Greenberg Peden, and which transferred to Swonke virtually all of Greenberg Peden's rights in the fees earned for Swonke's work at the firm on the Halliburton matter? *See* PX 5. In any event, the extrinsic evidence that the court of appeals relied so heavily upon goes to the *interpretation* of the contract, and in particular the issue of who Anglo-Dutch was contractually obligated to pay, Swonke or Greenberg Peden. That evidence does not concern whether there was a valid, enforceable agreement. Swonke's argument, in short,

[1] The fee contract provides that "I will not be responsible for any expenses other than those I may personally incur," PX 1, yet Greenberg Peden, not Swonke, invoiced Anglo-Dutch for expenses, PX 55.

cannot alter the fact that the court of appeals improperly invoked extrinsic matters to alter the meaning of a contract that on its face could only have been intended to be between Anglo-Dutch and Swonke.

Swonke's arguments boil down to an acknowledgment that the court considered matters beyond the face of the contract to justify its ambiguity finding. But extrinsic matters like the parties' prior agreements and dealings, or Greenberg Peden's six-month-old refusal to act as lead counsel for Anglo-Dutch, are not a legitimate means to *create* an ambiguity in, or to alter the meaning of, a contract that on its face is unambiguous. *David J. Sacks, P.C.*, 266 S.W.3d at 450-51 ("If a contract is unambiguous, the parol evidence rule precludes consideration of evidence of prior or contemporaneous agreements . . . ."); *Fiess v. State Farm Lloyds*, 202 S.W.3d 744, 747 (Tex. 2006); *Sun Oil Co.*, 626 S.W.2d at 731-32.[2] Nor is it any response for Swonke to assert his subjective view of the agreement and the underlying facts, which he repeatedly does in his response, when all the while it is undisputed that Swonke *never communicated* those facts and subjective beliefs to the client, despite his legal obligation to do so and a contemporaneous letter from the client confirming the agreement was with Greenberg Peden. Indeed, that Swonke discussed with his new firm, McConn & Williams, whether it would pay him under its preexisting fee agreement shows that when Swonke joined McConn & Williams

[2] It is for this reason that out-of-context statements from a Scott Van Dyke deposition from the Halliburton litigation, not this case, on an entirely different topic are irrelevant. *See* Swonke Br. 3, 10, 11. In any event, Scott Van Dyke's layman's testimony from a different proceeding in which he loosely referred to various fee contracts by naming the attorneys associated with the firms is no evidence in support of the jury's finding and is no more capable of creating an ambiguity in, or altering the meaning of, the fee contract than is Swonke's self-serving testimony.

he knew there was some uncertainty regarding the agreement he executed while at Greenberg Peden. Yet Swonke never addressed that uncertainty with his client.[3]

C. The Court of Appeals's Decision Undercuts Settled Rules of Contract Interpretation and Undermines Rules Intended to Protect Clients Contracting with Attorneys.

Under Swonke's and the court of appeals's view of the law, virtually no fee contract would be susceptible to a certain, ascertainable meaning. To create ambiguity out of certainty, a party need only present some prior inconsistent statement or previous course of dealing between the contracting parties that could conceivably create an alternative interpretation of the contract. And that ambiguity could send the interpretation of the contract to the jury even if that contract, on its face, could not possibly support more than one reasonable interpretation. The serious negative consequences of that view of contract interpretation, a view endorsed and adopted by the court of appeals, reach far beyond fee agreements and should be addressed and remedied by the Court.

Moreover, even considering only the attorney-fee-contract context, the court of appeals's holding has serious negative consequences that neither Swonke nor the court of appeals addressed. By relying on Greenberg Peden's prior oral representations to Anglo-Dutch as a source of ambiguity and excusing Swonke's claimed "mistaken" use of firm letterhead and signing the firm's signature block, for instance, the court of appeals has

[3] Faced with a choice between going back to Anglo-Dutch to request that he be paid separately for his work while at McConn & Williams or simply waiting to see how the Halliburton litigation turned out and then asserting an individual right to compensation under the Greenberg Peden fee agreement, Swonke chose the latter course, to his client's substantial detriment and his personal benefit.

knocked the legs out from under the Texas disciplinary rules requiring that contingent-fee agreements be in writing and refrain from using firm letterhead in any way that could mislead a client about the identity of the lawyer or firm. *See* TEX. DISCIPLINARY R. PROF'L CONDUCT 1.04(d), 7.01. Swonke's brief never addresses the disciplinary rules or the obvious violence his proposed interpretive approach, and the court of appeals's opinion, does to them.

D. Arguments About Swonke's Authority to Act for Greenberg Peden Should Not Distract the Court from the Purely Legal Issues Squarely Presented in the Petition.

Swonke's regurgitation of an argument, previously presented to and rejected by the court of appeals, questioning his status as Greenberg Peden's authorized agent has no bearing on the issues in this appeal. Essentially, Swonke's argument advocates a rule requiring clients to obtain affirmative jury findings that attorneys executing fee contracts were in fact authorized agents of the firm. That means until a jury speaks, clients can never know with any certainty whether their contracts bind the firm or merely some individual attorney who executed the agreement. That is not the law in Texas, nor is there any conceivable legal or policy justification for adopting that radical position.

Even within the confines of this case, Swonke's agency argument fails before it gets started. *First*, Swonke's authority to enter into agreements on behalf of Greenberg Peden is simply not open to dispute. Greenberg Peden's managing partner, Harlan "Skip" Naylor, repeatedly and conclusively testified that Swonke, as an of-counsel attorney at Greenberg Peden, had full authority to engage clients for the firm, and he

expressly conceded that "he [Swonke] had the authority from Greenberg Peden to bind Greenberg Peden on fee agreements." 8 RR 206; *see also* 7 RR 104-08, 111-12; 8 RR 186-87. That is why Greenberg Peden executed an assignment of its rights to Swonke, in April 2004, acknowledging that Swonke had executed the fee contract "on behalf of" Greenberg Peden. PX 5. Swonke never mentions the assignment in his agency argument, nor does he mention that by executing a binding assignment of rights, *see* PX 5, and invoicing Anglo-Dutch for expenses, *see* PX 55, Greenberg Peden necessarily acknowledged that it had acquired rights under the agreement, thereby ratifying Swonke's execution of the fee contract. *See, e.g.*, *Wetzel v. Sullivan, King & Sabom, P.C.*, 745 S.W.2d 78, 81 (Tex. App.—Houston [1st Dist.] 1988, no writ) ("Ratification occurs when a party recognizes the validity of a contract by acting under it, performing under it, or affirmatively acknowledging it.").

Second, Anglo-Dutch was not required to obtain a jury finding on Swonke's authority to bind the firm because that issue was never disputed in the district court and may not properly be raised for the first time on appeal, as Swonke seeks to do. *See Ship Ahoy, Inc. v. Whalen*, 347 S.W.2d 662, 664 (Tex. Civ. App.—Houston 1961, no writ); *City of Groves v. Ponder*, 303 S.W.2d 485, 489 (Tex. Civ. App.—Beaumont 1957, writ ref'd n.r.e.). Undisputed facts do not require jury findings, even with respect to a contracting party's authority to execute a contract, and none of the cases Swonke cites establishes otherwise. *Cf. IRA Res., Inc. v. Griego*, 221 S.W.3d 592, 597 (Tex. 2007) (involving personal jurisdiction); *Pasadena Assoc. v. Connor*, 460 S.W.2d 473, 479 (Tex.

App.—Houston [14th Dist.] 1970, writ ref'd n.r.e.); *Rodriguez v. Higginbotham-Bailey-Logan Co*., 172 S.W.2d 991, 993 (Tex. Civ. App.—San Antonio 1943, writ ref'd).

Moreover, Anglo-Dutch pleaded that Swonke bound the firm with his signature on the fee contract. *See* 1 CR 3. If Swonke or Greenberg Peden wished to contest Swonke's authority to sign for the firm, they were required to file a verified denial of that fact or else accept the fact as conclusively established. TEX. R. CIV. P. 93(7); *Sec. & Commc'ns Sys., Inc. v. Hooper*, 575 S.W.2d 606, 608 (Tex. Civ. App.—Dallas 1978, no writ) ("The lack of an agent's authority is a defensive matter that must be specifically pleaded and sworn to before it can be raised."). Neither did. The failure to do so means Swonke's authority was conclusively established.[4] *Int'l & G.N.R. Co. v. Tisdale*, 74 Tex. 8, 14, 11 S.W. 900, 901 (1889); *Pub. Serv. Life Ins. Co. v. Copus*, 494 S.W.2d 200, 203 (Tex. Civ. App.—Tyler 1973, no writ) ("[S]ince appellant failed to deny under oath the execution of the written instrument . . . , the authority of Millard Collins to act for the company will be deemed to have been admitted."); TEX. R. CIV. P. 93(7); *see also* 1 CR 8-14 (Swonke's answer with no verified denial of authority to bind the firm).

Third, Swonke's claim that he lacked authority to bind the firm conflates issues about the *enforceability* of the fee contract with arguments about the contracting parties' *intent*. Whether Swonke was authorized to bind Greenberg Peden is for the most part irrelevant to whether the parties' contract reflects a mutual intent that Anglo-Dutch pay

[4] Swonke invokes case law stating that agency is not presumed in Texas. But authority to sign on behalf of another that is affirmatively pled is conclusively established as a matter of fact if not denied, it is not presumed. Swonke's case law, in short, is inapplicable. *See* Swonke Br. 42.

Greenberg Peden, rather than Swonke, the individual. In other words, proving what a contract *means* does not require obtaining jury findings that the contract was *enforceable*.

II. THE SPECIAL ATTORNEY-CLIENT RELATIONSHIP OVERLAYS AND AFFECTS THE INTERPRETATION OF FEE CONTRACTS.

The Court should grant the petition to prevent further harm to well-settled jurisprudence defining the attorney-client relationship and to clarify that the special nature of that relationship affects how fee contracts are interpreted.

A. The Most Important Circumstance Surrounding the Contract Is the Fiduciary Nature of the Attorney-Client Relationship.

Although quick to resort to extrinsic circumstances surrounding the execution of the fee contract, Swonke's brief ignores the single most important surrounding circumstance: The fee contract was entered into during an existing attorney-client relationship. Thus, when Anglo-Dutch sent Swonke a contemporaneous confirmation letter clearly communicating its understanding that the fee contract was with Greenberg Peden, Swonke was obligated to respond and clarify any misunderstanding he perceived with Anglo-Dutch's expressed view of the contract. That Swonke did nothing to communicate his supposed conflicting view of the contract, even though obligated to do so, should have ended the lower courts' inquiry and conclusively established that the contract was between Anglo-Dutch and Greenberg Peden. By passing over Swonke's admitted failure to read or respond to his client's correspondence, and then passing over Swonke's subsequent failure to clarify the representation after his move to a new firm with a preexisting fee agreement with Anglo-Dutch covering the same lawsuit, the lower

courts permitted Swonke to base his alternative interpretation of the fee contract on his admitted drafting mistakes and subsequent failures to clarify them. No proposed alternative interpretation of a fee contract necessarily premised on such egregious lapses is reasonable, as a matter of law.

B. The Special Nature of the Attorney-Client Relationship Informs How Courts Interpret Fee Contracts.

No matter how strident Swonke's attempts are to miscast this case as involving a request to apply the rule of *contra proferentum*, it is inescapable that this case involves an agreement between an attorney and a client undertaken when the attorney owed the client one of the strictest fiduciary duties in the law. In such circumstances, the attorney is not merely an arm's length contractual counterparty to his existing client. Accordingly, the general *contra proferentum* rule that requires, when all other things are equal, that a contractual ambiguity be resolved against the contract drafter, is not the rule that governs the attorney-client relationship and the interpretation of fee contracts.

Unlike in a typical arms' length commercial exchange, an attorney-client fee contract involves a contracting party, the lawyer, who is required to "conduct his or her business with inveterate honesty and loyalty, always keeping the [ ] best interest" of the other contracting party, the client, "in mind." *Lopez*, 22 S.W.3d at 866-67 (citing *Meinhard v. Salmon*, 249 N.Y. 458, 164 N.E. 545, 546 (1928)); *see Walton,* 206 S.W.3d at 565; *Archer*, 390 S.W.2d at 739; *see In re Cypresswood Land Partners, I*, No. 07-32437-H4-11, 2009 WL 2447617, at *9 (Bankr. S.D. Tex. Aug. 7, 2009) (applying these principles under Texas law). The lawyer must act with perfect fairness toward the client,

and must clarify the relationship both at the outset and throughout the representation so that there can be no doubt in the client's mind as to the nature of the parties' agreement or its terms and implications. *See Walton,* 206 S.W.3d at 565; *Levine*, 40 S.W.3d at 95-96; RESTATEMENT §§18, 38. Similarly, as this Court has recognized, an attorney must clearly express and explain any contract term that might diverge from a reasonable client's expectations, particularly any term the lawyer might invoke to the client's detriment. *See, e.g.*, *Levine*, 40 S.W.3d at 95-96 & n.10; *see also Lopez*, 22 S.W.3d at 866 & n.1 (Gonzales, J., concurring and dissenting); *see also* RESTATEMENT §18 cmt. h. Finally, the lawyer must refrain from using letterhead in a way that could mislead a client about the lawyer's or firm's identity. *See* TEX. DISCIPLINARY R. PROF'L CONDUCT 7.01.

Those unique characteristics and the fiduciary duties owed by lawyers to their clients overlay and complement traditional contract interpretation principles, coloring how fee agreements are properly interpreted. Traditional rules of contract interpretation apply to attorney-fee contracts and require, for instance, that an unambiguous fee contract be enforced by its plain terms. But those traditional interpretive rules do not provide the whole story because a fee contract, considering the special relationship between lawyer and client, should be construed "as a reasonable person in the circumstances of the client would [ ] construe[] it." RESTATEMENT §18(2).

Anglo-Dutch was more than reasonable in its expectation that it had contracted with Greenberg Peden to obtain Swonke's services, or in its understanding that once

Swonke left Greenberg Peden his compensation would be covered by a share of his new firm's generous contingent-fee contract with Anglo-Dutch:

- Swonke presented the fee contract to Anglo-Dutch on Greenberg Peden letterhead and signed using a Greenberg Peden signature block.
- Anglo-Dutch sent a confirmation letter to Swonke clearly communicating its understanding that the fee contract was with Greenberg Peden, and Swonke never disputed that understanding until well after the fact when it became clear he could personally benefit by doing so.
- Greenberg Peden invoiced Anglo-Dutch for expenses related to the representation.
- When Swonke left Greenberg Peden he sent a letter to Anglo-Dutch confirming that his prior provision of services had been through his association with Greenberg Peden.
- Swonke never told Anglo-Dutch that he had agreed with McConn & Williams not to get paid from McConn & Williams's contingent-fee recovery in the Halliburton litigation, even though other attorneys at the firm would get paid from that recovery.

Swonke's response and the court of appeals's decision ignore a reasonable person's expectations in Anglo-Dutch's circumstances.[5]

Nor does Swonke's brief make any meaningful effort to examine this Court's cases addressing the interpretation of attorney-client fee contracts, and indeed the response hardly mentions those cases at all or the immense body of Texas law addressing the special nature of the attorney-client relationship. *See* Anglo-Dutch Br. 27-30. The response scarcely mentions RESTATEMENT §18, yet even the court of appeals

[5] Swonke's repeated insinuations that Anglo-Dutch is trying to skip out on paying its fee, rather than merely enforce a contract, are belied by the more than $17 million Anglo-Dutch paid to attorneys for the Halliburton representation and the fact that no other attorney or firm associated with that representation has ever complained or had reason to complain about fees. *See* PX 23.

acknowledged that §18 provides the controlling standard for interpreting fee agreements. *Anglo-Dutch v. Greenberg Peden, P.C.*, 267 S.W.3d 454, 471 (Tex. App.—Houston [14th Dist.] 2008, pet. filed). And it was only by misapplying §18's standard, *see* Anglo-Dutch Br. 32-35, and ultimately accepting that an attorney-fee contract entered into during an ongoing attorney-client relationship should be treated no differently than an everyday commercial contract, that the court of appeals could look past Swonke's admitted drafting errors, failure to respond to (or even read) his client's correspondence, and failures to clarify the representation either at the outset or any time later.

That a client can sue for breach of fiduciary duty is no reason to pull back from recognizing that the special attorney-client relationship affects how fee contracts are interpreted. *See* Swonke Br. 26. Obtaining a favorable tort verdict is not, and should not be, a prerequisite to a client enforcing its reasonable expectations concerning an attorney-client fee agreement. Nor does the availability of breach-of-fiduciary-duty claims explain why a host of jurisdictions and the Restatement already recognize that the attorney-client relationship affects how fee contacts are interpreted, even in the absence of such claims. *See* Anglo-Dutch Br. 35-36 & n.3 (collecting cases).[6] Swonke's assertion that clients

[6] In response to the overwhelming acceptance across the country of a rule acknowledging that the special attorney-client relationship requires that ambiguities in fee contracts be construed against the attorney, *see* Anglo-Dutch Br. 35-36, Swonke engages in misdirection by collecting cases discussing the inapposite doctrine of *contra proferentum*. Swonke does not explain that the vast majority of the decisions he cites that actually involve attorney-fee contracts demonstrate that courts have indeed already adopted the rule that ambiguities in attorney-fee contracts should be construed against the attorney. *See, e.g.*, *Cardenas v. Ramsey County*, 322 N.W.2d 191, 193 (Minn. 1982) ("Appellant urges that the ambiguity in the contingent fee contract must be resolved against respondent as the drafter of the agreement. That principle is well established. We prefer, however, to base our decision on the obligations imposed on respondent by the unique fiduciary relationship existing between attorney and client."); *In re Myers*, 663 N.E.2d 771, 774-75 (Ind. 1996) ("Lawyers almost always possess the more sophisticated understanding

should just sue for breach of fiduciary duty is also at odds with this Court's decisions, which have recognized that special interests are at play in the attorney-client fee context and that, for instance, an attorney must clearly express and explain any contract term that might diverge from a reasonable client's expectations. *See, e.g.*, *Levine*, 40 S.W.3d at 95.

C. The Jury's Findings That Swonke Did Not Breach His Fiduciary Duty Do Not Affect the Construction of the Fee Contract.

There is no merit to Swonke's argument that a jury finding that Swonke did not breach his fiduciary duty somehow insulates the fee contract from the rules governing its correct interpretation. A client is not required to prevail on breach-of-fiduciary-duty claims in order to demonstrate that an attorney's consistent and undisputed failures to live up to his fiduciary obligations color the interpretation of a fee contract and cannot serve as a basis for creating an ambiguity in a contract or otherwise interpreting it in the attorney's favor. In short, the Court need not render judgment on Anglo-Dutch's fiduciary-duty claims to reverse the court of appeals's erroneous interpretation of the fee contract.

In any event, the jury's findings on fiduciary duty were improper because neither Swonke's actions nor the nature of the fiduciary duties Swonke owed are in dispute. To be clear, Swonke does not meaningfully contest that:

- his admitted drafting errors caused the alleged ambiguities that he later invoked to his client's detriment;

---

of fee arrangements. It is therefore appropriate to place the balance of the burden of fair dealing and the allotment of risk in the hands of the lawyer in regard to fee arrangements with clients."); *Palmer v. Goudchaux/Maison Blanche, Inc.*, 613 So.2d 704, 708 (La. App. 1993). Nor does Swonke's collection of cases include a single case, in any jurisdiction, declining to adopt the rule that ambiguous attorney-fee agreements are interpreted according to the client's reasonable expectations.

- he never clarified the nature of the representation, either at its outset or after he left Greenberg Peden to join McConn & Williams;

- he owed a duty to Anglo-Dutch to read its correspondence, yet failed to do so, and had he lived up to that duty and acted on the correspondence there would have been no grounds to allege an ambiguity in the fee agreement; and

- he never communicated to Anglo-Dutch that his agreement with McConn & Williams would not allow him to recover a fee from that firm for the Halliburton representation, even though all of the other attorneys at the firm were paid according to the fee agreement with the firm and not under a separate agreement with Anglo-Dutch.

That Swonke breached his fiduciary duties is established as a matter of law, regardless of what the jury may have concluded.

III. A JURY CHARGED WITH INTERPRETING AN AMBIGUOUS ATTORNEY-FEE CONTRACT SHOULD BE PROPERLY INSTRUCTED.

Even if the fee contract were ambiguous, the jury should have been properly instructed on the appropriate legal rules for interpreting it. Although the court of appeals acknowledged that RESTATEMENT §18 correctly states the proper interpretive rule, the court then unaccountably declined to require trial courts to instruct juries on that rule, leaving juries free to ignore the special attorney-client relationship and interpret fee contracts as they would any commercial contract. The Court should grant the petition to ensure that juries tasked with interpreting ambiguous fee contracts are properly instructed on the controlling law, and that the special nature of the attorney-client relationship, the rules governing attorney behavior, and the fiduciary duties lawyers owe to clients are given effect in Texas.

Anglo-Dutch requested a proper instruction for Questions 1, 2, and 3. The requested instruction explained the fiduciary duties owed by lawyers to existing clients, including the duties of fidelity, candor, and honesty, and well as the obligations lawyers have to inform their clients of any matter material to the representation and to explain at the outset of the representation all relevant details concerning the fee. *See* 10 RR 137-38; 4 CR 672-73, 5 CR 851-52; 2 Supp. CR. 18-26. The proposed instruction correctly explained that "a presumption of unfairness automatically arises and it is the attorney's and law firm's burden to prove (a) that the questioned transaction was made in good faith, (b) for a fair consideration, and (c) after full and complete disclosure of all material information to the client." 10 RR 137-38; 5 CR 851-52; 2 Supp. CR. 18-26. Anglo-Dutch additionally requested an instruction for Question 1 that mirrored the language in RESTATEMENT §18 and would have properly informed the jury of the controlling legal standard governing the interpretation of attorney-fee agreements. 10 RR 138-39; 2 Supp. CR 18-26; *see* 4 CR 672-73; 5 CR 851-56.

The instructions were essential to the jury's deliberation of the issues, were "an accurate statement of applicable law," and were supported by the pleadings and evidence, and the failure to include them resulted in the rendition of an improper verdict that warrants reversal. *Columbia Rio Grande Healthcare, L.P. v. Hawley*, 284 S.W.3d 851, 862 (Tex. 2009); *Tex. Workers' Comp. Ins. Fund v. Mandlbauer*, 34 S.W.3d 909, 912 (Tex. 2000). Indeed, a broad-form charge like the one used in this case is particularly well served by an instruction explaining to the jury how to properly apply the law.

"[T]he explanatory instruction should focus the effect of the [legal] concept on the relevant issues that are to be considered," and it should "instruct the jurors how to apply the law to the issues." *Scott v. Atchison, Topeka & Santa Fe Ry. Co.*, 572 S.W.2d 273, 279-80 (Tex. 1978); *Hawley*, 284 S.W.3d at 862, 865. No such instruction was given in this case, and, instead, the jury was instructed to decide the issue using the wrong legal standard.

Swonke claims Anglo-Dutch waived the legal issue of the matter-of-law interpretation of the contract by submitting a jury question on ambiguity. Nonsense. It is not waiver to submit a question on ambiguity after pleading and arguing that the contract is susceptible to only a single interpretation, when the district court rules that the contract is ambiguous and should go to the jury for interpretation. *See* 2 CR 344 ("Anglo-Dutch believes that the [CFA] should be construed . . . without any finding of ambiguity."). If that were the law, then no party could ever request that the jury interpret a contract in its favor once the court refused to interpret it as a matter of law, at least not without waiving the right to argue on appeal that the contract is unambiguous. That nonsensical proposition is not the law in Texas. Indeed, once a trial court has denied summary judgment and has taken the case to the jury, like in this case, a party may preserve its pleaded argument about the meaning of an unambiguous contract by asserting after trial in a motion for j.n.o.v. that no evidence supports a finding of ambiguity or the jury's interpretation of the contract, and that the evidence instead supports only one reasonable interpretation of the contract, which is precisely what occurred in this case. *Cecil v.*

Smith, 804 S.W.2d 509, 510 (Tex. 1991) (motion for j.n.o.v. preserves legal sufficiency challenges on appeal); *see also* 1 CR 25, 120-21; 2 CR 344; 3 CR 495.

Swonke claims Anglo-Dutch's instruction was properly refused by the district court because it was somehow calculated to tilt the jury's decision by advocating an incorrect evidentiary burden. *See* Swonke Br. 47-48. But the proffered instruction did not affect the burden of proof; it provided an accurate statement of the law, which the jury is properly charged to follow. Swonke's invocation of *GTE Mobilnet of South Texas Limited Partnership v. Telecell Cellular, Inc*., 955 S.W.2d 286, 291 (Tex. App.—Houston [1st Dist.] 1997, writ denied), and other cases addressing the preponderance-of-the-evidence standard in civil cases also does nothing to support his argument. *GTE Mobilnet* involved an instruction informing the jury to apply a beyond-a-reasonable-doubt standard in a civil case. *Id*. at 291 ("Mobilnet had to prove *beyond a reasonable doubt* that its interpretation was correct. Issues of fact in a civil case, however, are only to be resolved by a preponderance of the evidence."). In contrast, the proffered instruction in this case did not improperly alter the standard of proof; it informed the jury that it should interpret the agreement as a reasonable client would interpret it. Nor is it correct to circularly reason, as Swonke does, that a refused jury instruction is either unnecessary because it would not have affected the jury's outcome or was necessarily calculated to tilt the jury's deliberations because it would have affected the jury's outcome. Swonke Br. 48 n.48.

Similarly unavailing is Swonke's claim that no harm resulted from the refusal to properly instruct the jury because Anglo-Dutch's counsel was allowed to argue to the jury about the fiduciary duties Swonke owed his client. *See* Swonke Br. 49-50. That argument, if adopted, would justify refusing in every case to properly instruct the jury on the law so long as the attorneys are entitled to make closing arguments. The argument also ignores this Court's recent decision in *Hawley*, 248 S.W.3d at 862, which explained that "[s]tatements from lawyers as to the law do not take the place of instructions from the judge as to the law. It is the trial court's prerogative and duty to instruct the jury on the applicable law." Moreover, harm is inherent when juries are not properly instructed on the law relating to a "contested, critical issue" because such a failure probably causes "the rendition of an improper judgment." *Id.*; *see also* Anglo-Dutch Br. 37-41 (discussing in detail the harm resulting from the trial court's refusal of Anglo-Dutch's instructions).

In sum, if the attorney disciplinary rules, the body of law governing the attorney-client relationship and the interpretation of attorney-fee contracts, and this Court's recent decisions related to these issues are to have any impact on how lawyers interact and contract with their clients, juries must be properly instructed on the law governing those topics.

CONCLUSION

For these reasons, the Court should grant the petition for review, reverse the court of appeals, and render judgment that the attorney-client fee agreement was between Anglo-Dutch and Greenberg Peden, or, in the alternative, remand the case for a new trial.

Respectfully submitted,

Gregory S. Coleman
State Bar No. 00783855
Richard B. Farrer
State Bar No. 24055470
YETTER, WARDEN & COLEMAN, L.L.P
221 West 6th Street, Suite 750
Austin, Texas 78701
[Tel] (512) 533-0150
[Fax] (512) 533-0120

Mike A. Hatchell
State Bar No. 09219000
Charles "Skip" Watson
State Bar No. 20967500
LOCKE LORD BISSELL & LIDDELL, LLP
100 Congress Avenue, Suite 300
Austin, Texas 78701
[Tel.] (512) 305-4700
[Fax] (512) 305-4800

Craig T. Enoch
State Bar No. 00000026
WINSTEAD PC
401 Congress Avenue, Suite 2100
Austin, Texas 78701
[Tel.] (512) 370-2800
[Fax] (512) 370-2850

Kenneth R. Breitbeil
State Bar No. 02947690
Donald B. McFall
State Bar No. 13595000
Brian Tully
State Bar No. 24039217
MCFALL, BREITBEIL & SHULTS, P.C.
1250 Four Houston Center
Houston, Texas 77010
[Tel.] (713) 590-9300
[Fax] (713) 590-9399

ATTORNEYS FOR ANGLO-DUTCH PETROLEUM
INTERNATIONAL, INC. AND ANGLO-DUTCH
(TENGE) L.L.C.

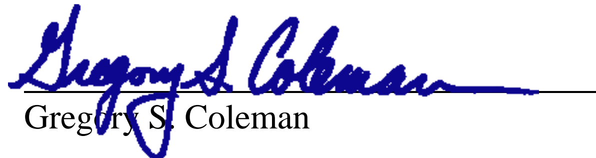
CERTIFICATE OF SERVICE

I certify that Petitioners' Reply Brief on the Merits has been served on all counsel of record, by certified mail, return receipt requested, on August 28, 2009.

Rusty Hardin
Joe Roden
RUSTY HARDIN & ASSOCIATES, P.C.
Five Houston Center
1401 McKinney Avenue, Suite 2250
Houston, Texas 77010

Robert M. (Randy) Roach, Jr.
Daniel W. Davis
ROACH & NEWTON, L.L.P.
Heritage Plaza
1111 Bagby, Suite 2650
Houston, Texas 77002

ATTORNEYS FOR APPELLEES
GERARD J. SWONKE AND GREENBERG PEDEN, P.C.



Gregory S. Coleman