Affirmed in Part, Reversed and Rendered in Part, and Reversed and Remanded, and Majority and Dissenting Opinions filed April 7, 2020.

In The

Fourteenth Court of Appeals

NO. 14-18-00001-CV

CARL TOLBERT, NIZZERA KIMBALL, AND VIVIAN ROBBINS, Appellants

V.

TERISA TAYLOR AND PATHWAY FORENSICS, LLC, Appellees

On Appeal from the 309th District Court
Harris County, Texas
Trial Court Cause No. 2015-23649

D I S S E N T I N G O P I N I O N

The events that spurred this attorney-immunity case arose out of a child-custody modification suit between ex-spouses embroiled in litigation. The ex-wife and other plaintiffs brought claims against the ex-husband's attorney in the modification suit and a company the ex-husband hired to provide expert testimony in that suit, asserting illegal interception of the plaintiffs' electronic communications. On appeal, three appellants/plaintiffs challenge the trial court's

orders granting two appellees/defendants' summary-judgment motions, and one of the trial court's discovery orders. Because the appellants have not shown that the trial court erred, this court should affirm the trial court's judgment. Instead, the court reverses. The majority uses an attorney-immunity analysis that conflicts with binding precedent from the Supreme Court of Texas. The majority also addresses unpreserved error — the appellants' complaint about the trial court's costs assessment in the discovery order — and then reverses the trial court's decision without saying why or how the trial court abused its discretion. Because these departures from settled precedent cause the court to render the wrong judgment, I respectfully dissent.

I. SUMMARY JUDGMENT FOR TAYLOR

The appellants have not shown that the trial court erred in granting the attorney's summary-judgment motion.

Under their first issue, appellants/plaintiffs Carl Tolbert, Nizzera Kimball, and Vivian Robbins (collectively the "Robbins Parties") assert that the trial court erred in granting appellee/defendant Terisa Taylor's summary-judgment motion and rendering a take-nothing judgment in Taylor's favor based on attorney immunity. Taylor sought a traditional summary judgment and did not rely on any summary-judgment evidence.[1] The Robbins Parties did not object to Taylor's request for summary judgment on the pleadings, and they did not request an opportunity to amend their pleadings. So, we are to review the propriety of summary judgment based on the "Plaintiffs' First Amended Original Petition," the Robbins Parties' live pleading at the time the trial court granted Taylor's summary-

[1] Taylor said she was relying upon the Robbins Parties' live pleading as summary-judgment evidence, but a party's pleading is not summary-judgment evidence. *See LaGoye v. Victoria Wood Condominium Ass'n*, 112 S.W.3d 777, 787 (Tex. App.—Houston [14th Dist.] 2003, no pet.).

judgment motion.[2] In determining whether the trial court erred in granting Taylor's motion, we are to presume the truth of all facts the Robbins Parties alleged and indulge all reasonable inferences in the light most favorable to the Robbins Parties.[3] We are not to presume the truth of any legal conclusions stated in the pleadings.[4]

1. Attorney Immunity

In the 1882 case of *Poole v. Houston & Texas Central Railway Company*, the Supreme Court of Texas addressed the alleged fraud of a defendant, noting evidence that when this defendant committed the alleged fraud, he was acting as attorney for other participants in the alleged fraud, though not in the context of litigation.[5] The high court rejected the notion that the defendant's status as an attorney representing a client would give the attorney immunity from liability to the party allegedly damaged by the fraud:

> Having assumed the apparent ownership of the goods, for the purpose and with the intention of consummating the fraud upon [the plaintiff], [the attorney] will not be heard to deny his liability to [the plaintiff] for the loss sustained by reason of his wrongful acts, under the privileges of an attorney at law, for **such acts are entirely foreign to the duties of an attorney**; neither will he be permitted, under such circumstances, to shield himself from liability on the ground that he was the agent of [his clients], for no one is justified on that ground in knowingly committing wil[l]ful and premeditated frauds for another.[6]

Texas's intermediate courts of appeals later developed various approaches to

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[2] *See Warwick Towers Council of Co-owners ex rel. St. Paul Fire & Marine Ins. Co. v. Park Warwick, L.P.*, 298 S.W.3d 436, 444 (Tex. App.—Houston [14th Dist.] 2009, no pet.).

[3] *Id.*

[4] *Id.*

[5] *See Poole v. Houston & T.C. Ry. Co.*, 58 Tex. 134, 137 (Tex. 1882).

[6] *Poole*, 58 Tex. at 137–38 (emphasis added).

delineating the scope of an attorney's immunity from liability to a claimant for allegedly actionable conduct while representing a client in a matter in which the claimant was an opposing party. The Fourteenth Court of Appeals concluded that though attorneys owe no negligence duty to opposing parties, an attorney still faces potential liability to nonclients, including opposing parties, based on the attorney's fraudulent or malicious conduct, even if the attorney was acting in the course of representing the client.[7] This court decided that, if an attorney engages in fraudulent or malicious conduct in the course of representing the attorney's client, an opposing party may assert intentional tort claims against the attorney based upon this conduct.[8] This court concluded that, once a defendant showed that the attorney undertook the allegedly actionable conduct in the legal representation of a third-party client, the claimant then had to do one of two things: (1) raise a fact issue as to whether the attorney engaged in the conduct in the representation of a third-party client or (2) plead sufficient facts to show that the plaintiff asserts one or more claims that fall within an exception to attorney immunity.[9]

Other courts of appeals recognized categorical exceptions to the attorney-immunity doctrine, but they characterized the exceptions as "fraudulent or criminal" conduct rather than "fraudulent or malicious conduct."[10] Still other

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[7] *Lackshin v. Spofford*, No. 14-03-00977-CV, 2004 WL 1965636, at *3 (Tex. App.—Houston [14th Dist.] Sept. 7, 2004, pet. denied) (mem. op.). *See also JJJJ Walker, LLC v. Yollick*, 447 S.W.3d 453, 468 (Tex. App.—Houston [14th Dist.] 2014, pet. denied) (stating that "it is well established that an attorney can be held liable for his own fraudulent conduct even though it was performed on a client's behalf"); *James v. Easton*, 368 S.W.3d 799, 803 (Tex. App.—Houston [14th Dist.] 2012, pet. denied) (stating that, if an attorney engages in fraudulent or malicious conduct in the course of representing his client, an opposing party may assert intentional tort claims against the attorney based upon this conduct).

[8] *Lackshin*, 2004 WL 1965636, at *3.

[9] *Id.*

[10] *See Rawhide Mesa-Partners, Ltd. v. Brown McCarroll, L.L.P.*, 344 S.W.3d 56, 60 (Tex. App.—Eastland 2011, no pet.).

courts of appeals took a broader view of attorney immunity and did not recognize either of these categorical exceptions.[11]

In the wake of these decisions, the Supreme Court of Texas, in *Cantey Hanger, LLP v. Byrd*, addressed the legal standard applicable to attorney immunity from the claims of an opposing party in the litigation context.[12] The *Cantey Hanger* court stated that the law does not protect attorneys from liability to non-clients for their actions when the actions do not qualify as "'the kind of conduct in which an attorney engages when discharging his duties to his client.'"[13] The high court gave as an example of such conduct an attorney's participation in a fraudulent business scheme with the attorney's client and stated that the *Poole* court had found such acts to be "'entirely foreign to the duties of an attorney.'"[14] The *Cantey Hanger* court also suggested that other examples of such conduct include an attorney knowingly assisting the client in committing a fraudulent transfer and a situation in which an attorney commits physical assault during trial.[15]

The *Cantey Hanger* court, after taking note of both the line of cases adopting categorical exceptions to the attorney-immunity doctrine and the line of cases rejecting categorical exceptions, disapproved of the cases recognizing categorical

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[11] *See Alpert v. Crain, Caton & James, P.C.*, 178 S.W.3d 398, 405–08 (Tex. App.—Houston [1st Dist.] 2005, pet. denied).

[12] *See* 467 S.W.3d 477, 481–85 (Tex. 2015); *U.S. Bank Nat'l Ass'n v. Sheena*, 479 S.W.3d 475, 478–79 (Tex. App.—Houston [14th Dist.] 2015, no pet.).

[13] *Cantey Hanger, LLP*, 467 S.W.3d at 482 (quoting *Dixon Financial Servs. v. Greenberg, Peden, Siegmyer & Oshman, P.C.*, No. 01-06-00696-CV, 2008 WL 746548, at *9 (Tex. App.—Houston [1st Dist.] Mar. 20, 2008, pet. denied) (mem. op.)).

[14] *Id*. (quoting *Poole*, 58 Tex. at 138).

[15] *See id*. (citing *Essex Crane Rental Corp. v. Carter*, 371 S.W.3d 366, 382 (Tex. App.—Houston [1st Dist.] 2012, pet. denied), and referring to a hypothetical stated in *Bradt v. West*, 892 S.W.2d 56, 72 (Tex. App.—Houston [1st Dist.] 1994, writ denied)).

exceptions and generally approved of the other line of cases, stating that the latter are "consistent with the nature and purpose of the attorney-immunity defense."[16] The high court suggested that (1) an attorney's knowing commission of a fraudulent act "outside the scope of his legal representation of the client" is actionable; and (2) an attorney's participation in "independently fraudulent activities" is considered "foreign to the duties of an attorney" and is not shielded from liability.[17] In analyzing the issues, the supreme court stated that an attorney's conduct may be wrongful yet still fall within the scope of client representation and still be protected by attorney immunity.[18] The *Cantey Hanger* court stated that fraud is not an exception to attorney immunity but that the immunity defense does not extend to fraudulent conduct falling outside the scope of an attorney's legal representation of the attorney's client, just as it does not extend to other wrongful conduct falling outside the scope of representation.[19] The high court concluded that an attorney who pleads the affirmative defense of attorney immunity bears the burden to show that the attorney's alleged wrongful conduct, even if it is alleged to be fraudulent, forms part of the discharge of the attorney's duties to the client.[20]

The *Cantey Hanger* court disagreed with the court of appeals's conclusion that an attorney's intentional misrepresentations made for the purpose of conferring a benefit on the attorney's client fall outside the scope of the attorney's duties to the client.[21] The high court indicated that an attorney's conduct may be fraudulent and still fall within the scope of the attorney's representation of the

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[16] *Cantey Hanger, LLP*, 467 S.W.3d at 483.

[17] *See id*. at 483–85.

[18] *See id*. at 485.

[19] *See id*. at 484.

[20] *See id*.

[21] *See id*. at 485.

client.[22] The *Cantey Hanger* court found the law firm entitled to summary judgment on its defense of attorney immunity because the law firm conclusively established that its allegedly fraudulent conduct fell within the scope of its representation of a client in divorce proceedings and was not foreign to the duties of an attorney.[23]

In part of the *Cantey Hanger* opinion, the supreme court appears to say that a defendant asserting attorney immunity in a litigation context need only show that the allegedly actionable conduct, even if it is alleged to be fraudulent, was part of the discharge of the attorney's duties to the client in the litigation context.[24] Given the high court's conclusion that an attorney's fraudulent misrepresentations still may fall within the scope of the attorney's representation of the client, if this were the only requirement for attorney immunity, then an attorney would enjoy complete immunity from civil liability for all conduct committed during the representation of a client in litigation, even if the conduct was fraudulent (hereinafter "Complete Immunity Rule").[25]

In another part of the *Cantey Hanger* opinion the high court appears to say that one asserting attorney immunity in a litigation context must show that (1) the attorney's allegedly actionable conduct, even if alleged to be fraudulent, formed part of the discharge of the attorney's duties to the client in the litigation context; and (2) the allegedly actionable conduct was not "foreign to the duties of an attorney" (hereinafter "Partial Immunity Rule").[26] Under this rule, an attorney would be immune from civil liability for the attorney's fraudulent or wrongful

[22] *See id*.

[23] *See id*.

[24] *See id*. at 483–84.

[25] *See id*. at 483–85.

[26] *See id*. at 485.

conduct committed while representing a client in litigation if the conduct was not "foreign to the duties of an attorney," but the attorney would not be immune from civil liability for fraudulent or wrongful conduct that was "foreign to the duties of an attorney."[27] To apply the Partial Immunity Rule, courts would need to distinguish between conduct "foreign to the duties of an attorney" and conduct not foreign to these duties. Though the *Cantey Hanger* court concluded that the law firm's allegedly fraudulent conduct was not "foreign to the duties of an attorney," the court did not articulate the legal standard it used to make this determination.[28]

In *Youngkin v. Hines*, the supreme court again addressed attorney immunity in the litigation context.[29] The *Youngkin* court applied an analysis similar to that of the *Cantey Hanger* court and held that attorney immunity barred a plaintiff's claim against an attorney who had represented an opponent of the plaintiff in litigation, alleging the attorney knowingly participated in a fraudulent scheme to deprive the plaintiff of his property.[30] In *Youngkin*, the essence of the attorney's alleged fraudulent conduct consisted of (1) entering into an agreement under Texas Rule of Civil Procedure 11 on his clients' behalf knowing that his clients had no intention to comply; (2) helping his clients avoid compliance with the agreement by preparing the deed used to transfer their property interest to one of the attorney's other clients; and (3) aiding the other client in efforts to wrongfully assert ownership over a portion of the property by filing a lawsuit.[31]

The *Youngkin* court stated that the *Cantey Hanger* opinion controlled the

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[27] *See id.*

[28] *See id.* at 482–85.

[29] *See* 546 S.W.3d 675, 681–83 (Tex. 2018).

[30] *See id.*

[31] *See id.* at 679.

analysis in *Youngkin*.[32] Looking to *Cantey Hanger*, the supreme court emphasized that an attorney enjoys immunity from liability to nonclients for conduct falling within the scope of client representation.[33] According to the *Youngkin* court, an attorney may be liable to nonclients only for outside-the-scope-of-client-representation conduct or for foreign-to-the-duties-of-a-lawyer conduct.[34] The attorney-immunity inquiry focuses on the kind of conduct at issue rather than the plaintiff's allegation that the conduct is wrongful.[35] The high court declared that "a lawyer is no more susceptible to liability for a given action merely because it is alleged to be fraudulent or otherwise wrongful." [36]

Looking beyond the plaintiff's assertion that the attorney engaged in fraudulent conduct, the *Youngkin* court determined that the attorney's allegedly actionable conduct fell directly within the scope of the attorney's representation of his client.[37] The *Youngkin* court stressed the policy behind attorney immunity — removing lawyers' fear of personal liability so as to promote faithful and aggressive representation by lawyers of their clients.[38] The *Youngkin* court recognized the breadth of the attorney-immunity doctrine, yet made clear that the doctrine is not without limits.[39] The high court stated that the *Cantey Hanger* opinion identified the following "nonexhaustive examples that may fall outside the reach of the attorney-immunity defense":

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[32] *See id*. at 681.

[33] *See id*.

[34] *See id*.

[35] *See id*.

[36] *Id*.

[37] *See id*. at 682.

[38] *See id*.

[39] *See id*.

- participation in a fraudulent business scheme with a client,
- knowingly helping a client with a fraudulent transfer to avoid paying a judgment,
- theft of goods or services on a client's behalf, and
- assaulting opposing counsel during trial.[40]

The *Youngkin* court said these examples are "nonexhaustive," yet, as in *Cantey Hanger*, the supreme court did not articulate a legal standard for determining if conduct is not covered by the attorney-immunity doctrine.[41] After listing the nonexhaustive examples, the *Youngkin* court ends by saying, "[t]hus, while we recognize that some fraudulent conduct, even if done on behalf of a client, may be actionable, [the plaintiff] does not allege any such behavior."[42] Simply put, the *Youngkin* court appears to have concluded that attorney immunity applied because the alleged conduct fell within the scope of the attorney's representation of the client and did not fall within any of the examples listed in the *Cantey Hanger* opinion.[43]

Recently, in the *Bethel* case, the supreme court addressed the applicability of the attorney-immunity doctrine to allegedly criminal conduct committed by an attorney while representing a client in the litigation context.[44] The *Bethel* court rejected the plaintiff's request that the high court create a categorical exception to the *Cantey Hanger* analysis for allegedly criminal conduct by an attorney and applied the *Cantey Hanger* analysis to allegedly criminal conduct during the course

[40] *Id*.; *Cantey Hanger, LLP*, 467 S.W.3d at 482–83.

[41] *See Youngkin*, 546 S.W.3d at 682–83; *Cantey Hanger, LLP*, 467 S.W.3d at 482–85.

[42] *Youngkin*, 546 S.W.3d at 683.

[43] *See id*. at 681–83.

[44] *See Bethel v. Quilling, Selander, Lownds, Winslett & Moser, P.C.*, No. 18-0595, —S.W.3d —, —, 2020 WL 938618, at *4–5 (Tex. Feb. 21, 2020).

of litigation.[45] This holding is consistent with the holdings of other courts on this issue.[46]

The *Bethel* court concluded that exempting allegedly criminal conduct from the *Cantey Hanger* analysis would "significantly undercut" the protections of attorney immunity by allowing non-client plaintiffs to sue opposing counsel so long as the plaintiffs alleged that the attorney's actions were criminal.[47] The high court reiterated that attorney immunity under the *Cantey Hanger* analysis is not boundless and that an attorney does not enjoy immunity from civil suit for participating in criminal conduct outside the scope of the attorney's representation of a client.[48] The *Bethel* court stated that a wide range of criminal conduct does not fall within the "scope of client representation" and therefore is "foreign to the duties of an attorney."[49] Though the high court declined to recognize a categorical exception for criminal conduct, the court stated that "an attorney's allegedly criminal conduct may fall outside the scope of attorney immunity."[50] The *Bethel* court observed that an attorney's immunity from civil suit based on allegedly criminal conduct does not shield the attorney from criminal liability if the conduct constitutes a criminal offense.[51] The high court also noted that sanctions,

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[45] *See id*.

[46] *See Troice v. Greenberg Traurig, L.L.P.*, 921 F.3d 501, 506–07 (5th Cir. 2019) (applying Texas law); *Dorrell v. Prosakauer Rose, LLP*, No. 3:16-CV-1152-N, 2017 WL 6764690, at *5–6 (N.D. Tex Nov. 2, 2017) (applying Texas law); *Highland Capital Management, LP v. Looper Reed & McGraw, P.C.*, No. 05-15-00055-CV, 2016 WL 164528, at 1–4, 6 (Tex. App.—Dallas Jan. 14, 2016, pet. denied) (mem. op.).

[47] *See Bethel*, 2020 WL 938618, at *4.

[48] *See id*.

[49] *Id*.

[50] *Id*.

[51] *See id*.

spoliation instructions, contempt, and attorney-disciplinary proceedings may be available, even if immunity shields an attorney's wrongful conduct.[52]

According to the *Bethel* court, even taking the plaintiffs' factual allegations as true, the actions in question — the examination and testing of evidence during discovery — were the kinds of conduct in which an attorney engages while representing a client in litigation, and the attorneys were immune from civil liability even if the conduct constituted criminal destruction of property, as the plaintiff alleged.[53] The high court concluded that attorney immunity likely would not apply if an attorney "destroyed a non-client's property that was unrelated to litigation."[54] The *Bethel* court also stated that attorney immunity likely would not apply if an attorney used a sledgehammer to destroy a non-client's property that was related to litigation, because wielding a sledgehammer to destroy property does not involve the provision of legal services.[55] The high court concluded that because the attorney's conduct — acting in conjunction with experts to examine and test key evidence in the underlying suit — involved the rendition of legal services, the attorney-immunity doctrine protected that conduct and prevented a non-client from seeking to hold the attorney civilly liable, even if the conduct was allegedly criminal.[56]

2. The Allegedly Criminal Conduct

The Robbins Parties asserted against Taylor and appellee/defendant Pathway Forensics, LLC: (1) civil claims under former article 18.20, section 16 of the Code

[52] *See id*.

[53] *See id*. at *5.

[54] *See id*.

[55] *See id*.

[56] *See id*.

of Criminal Procedure[57] ("Article 18.20") based on the alleged interception, disclosure, or use of the Robbins Parties' electronic communications in violation of Chapter 16 of the Penal Code[58] (the "Texas Wiretap Claims") and (2) civil claims under title 18, section 2520 of the United States Code[59] based on the alleged interception, disclosure, or use of the Robbins Parties' electronic communications in violation of title 18, chapter 119 of the United States Code[60] (the "Federal Wiretap Claims"). Under their first issue, the Robbins Parties assert that attorney immunity does not apply to the Texas Wiretap Claims and the Federal Wiretap Claims against Taylor because the Robbins Parties base these claims on Taylor's alleged criminal conduct. The Robbins Parties assert that attorney immunity does not apply to these claims because Taylor's alleged acts on which these claims are based constitute criminal conduct that is "foreign to the duties of an attorney."

The potential violation of chapter 16 of the Penal Code that the Robbins Parties raise on appeal as the basis for the Texas Wiretap Claims rests in section 16.02(b), which prohibits (1) intentionally intercepting an electronic communication, (2) intentionally disclosing to another person the contents of an electronic communication, knowing or having reason to know that the information was obtained through the interception of an electronic communication in violation of section 16.02(b) of the Penal Code, or (3) intentionally using the contents of an electronic communication, knowing or being reckless about whether the information was obtained through the interception of an electronic communication

[57] *See* Tex. Code Crim. Proc. Ann. art. 18.20, §16 (West 2015). The Legislature repealed this statute effective January 1, 2019.

[58] *See* Tex. Pen. Code Ann. §16.01, *et seq*. (West 2015).

[59] *See* 18 U.S.C. §2520.

[60] *See* 18 U.S.C. §2510, *et seq*.

in violation of section 16.02(b) of the Penal Code.[61]

The violation of title 18, chapter 119 of the United States Code that the Robbins Parties raise on appeal as the basis for the Federal Wiretap Claims is a violation of title 18, section 2511 of the United States Code (the "Federal Wiretap Act") by (1) intentionally intercepting an electronic communication, (2) intentionally disclosing to any other person the contents of an electronic communication, knowing or having reason to know that the information was obtained through the interception of an electronic communication in violation of title 18, section 2511(1) of the United States Code, or (3) intentionally using the contents of an electronic communication, knowing or having reason to know that the information was obtained through the interception of an electronic communication in violation of title 18, section 2511(1) of the United States Code.[62]

The Robbins Parties base all of the Federal Wiretap Claims and Texas Wiretap Claims on the alleged interception of an electronic communication.[63] For there to have been an "interception" of an electronic communication under the Federal Wiretap Act or Texas wiretap statute, there would have to have been a contemporaneous acquisition of the communication when it was sent.[64] Accessing

[61] *See* Tex. Pen. Code Ann. §16.02.

[62] *See* 18 U.S.C. §2511(a),(c),(d).

[63] *See* 18 U.S.C. §2511(a),(c),(d); Tex. Pen. Code Ann. §16.02.

[64] *See Fraser v. Nationwide Mut. Ins. Co.*, 352 F.3d 107, 113–14 (11th Cir. 2003) (holding under the Federal Wiretap Act that an interception does not occur absent a contemporaneous acquisition of the communication when it was sent); *Talon Transaction Technologies, Inc. v. StoneEagle Servs., Inc.*, No. 3:13-cv-00902-P, 2013 WL 12172926, at *4–5 (N.D. Tex. Aug. 15, 2013) (holding that Article 18.20 and section 16.02 of the Texas Penal Code should be interpreted the same way as the Federal Wiretap Act and that under the Texas and Federal statutes an interception does not occur absent a contemporaneous acquisition of the communication when it was sent); *Bailey v. Bailey*, No. 07–11672, 2008 WL 324156, at *4 (E.D. Mich. Feb. 6, 2008) (holding under the Federal Wiretap Act that an interception does not occur absent a contemporaneous acquisition of the communication when it was sent).

a person's stored emails or text messages without the person's authorization does not constitute "interception" because it is not done contemporaneously with the original transmission of the email or text message.[65] No one alleges contemporaneous acquisition in this case.

The next step is to examine the Robbins Parties' live pleading at the time of the summary judgment to determine if, under the applicable standard of review, the Robbins Parties alleged facts showing criminal conduct by Taylor in violation of chapter 16 of the Penal Code and title 18, chapter 119 of the United States Code.[66] In this live pleading, the Robbins Parties allege the following facts:

- In April 2013, Robbins's ex-husband, Mark Broome filed a child-custody modification proceeding against his ex-wife, Robbins, regarding custody of their daughter (the "Modification Proceeding").
- Starting on July 18, 2013, a tablet computer owned by the sister-in-law of Broome (the "Tablet") began to receive text messages and emails between Robbins and others (collectively, the "Messages").
- The Robbins Parties' confidential and personal communications were appearing on the Tablet without the Robbins Parties' knowledge or consent.
- Broome's sister-in-law or his brother mailed the Tablet to Broome, who "then had to intentionally connect [the Tablet] up to his home WiFi network at least twice so it could start receiving [Robbins's] communications again."
- Broome's attorney, Taylor, apparently inadvertently produced a CD containing data from the Tablet to Robbins's attorney in the Modification Proceeding ("Robbins's Attorney"), on April 2, 2014, and that data shows the Tablet's email settings had been changed to use Robbins's personal email address and password as the "setting for incoming e-mails." This action amounts to something much more than use of Robbins's "Apple ID" and password to download games or even use a text message application.

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[65] *See Fraser*, 352 F.3d at 113–14; *Talon Transaction Technologies, Inc.*, 2013 WL 12172926, at *4–5; *Bailey*, 2008 WL 324156, at *4–5.

[66] *See Warwick Towers Council of Co-owners ex rel. St. Paul Fire & Marine Ins. Co.*, 298 S.W.3d at 444.

- Someone intentionally set the Tablet to capture Robbins's incoming emails.
- Broome's "Emergency Motion for Turnover of Respondent's Computer/Electronic Devices," filed on March 3, 2014, revealed that Broome knew the contents of Robbins's emails as well as her text messages.
- Broome filed a pleading entitled "Mark Broome's Brief on Interception of Communications" which states, "We know that Mark Broome ("Mark") obtained a number of communications sent to, or sent by, [Robbins]." Broome has to this day never produced the emails he intercepted from Robbins.
- Broome shared the Messages with his lawyer, Taylor.
- Robbins did not know that her text messages and emails were being intercepted until Taylor produced 617 pages of her text messages to Robbins's Attorney and told the attorney that Taylor and Broome were in possession of everything Robbins had communicated to others, including a nude photograph of Robbins that Robbins had sent to her boyfriend by text message.
- Taylor told Robbins's Attorney that Taylor intended to use the photograph of Robbins's breasts as demonstrative evidence in the jury trial and that Taylor would show the jury a poster-size photo of Robbins's breasts.
- Taylor told Robbins's Attorney to advise Robbins to sign an agreed order resolving the Modification Proceeding and agreeing that the only visitation Robbins would have with her daughter would be supervised visitation, otherwise this evidence would be used against Robbins.
- After Robbins refused to sign Taylor's proposed order, Taylor filed a document in the Modification Proceeding entitled "Notice of Intent to Use Demonstrative Evidence," in which Taylor, on behalf of Broome, stated that Broome intended to use at trial a "Power Point presentation and large photo board."
- During the six months before February 5, 2014, Taylor had used information gleaned from illegally intercepted communications in the Modification Proceeding in several hearings and to conduct discovery.
- Broome disclosed the contents of Robbins's intercepted electronic communications to Taylor, who used and disclosed these contents to the trial court in the Modification Proceeding and in the pleadings in the Modification Proceeding.

- Taylor or Broome provided the Tablet to Pathway for examination.
- Broome obtained a court order "through his attorneys' use of illegally intercepted communications on [the Tablet]."

The Robbins Parties' pleading also contains legal conclusions,[67] but, as noted at the outset, this court must not presume the truth of legal conclusions.[68]

Focusing on the kind of conduct alleged rather than the alleged criminality of this conduct, the Robbins Parties base their claims against Taylor on Taylor's alleged receipt of data from her client regarding the Modification Proceeding, Taylor's alleged production of data to opposing counsel in the Modification Proceeding, Taylor's alleged statements to opposing counsel regarding evidence that Taylor intended to use at trial in the Modification Proceeding, Taylor's alleged statement to opposing counsel that Robbins should agree to an order resolving the Modification Proceeding otherwise this evidence would be used against Robbins, Taylor's alleged filing of a notice of intent to use evidence with the trial court in the Modification Proceeding, Taylor's alleged receipt of electronic communications from her client, Taylor's alleged use of this information in the Modification Proceeding, Taylor's disclosure of this information to the trial court in the Modification Proceeding, Taylor's alleged providing of the Tablet to Pathway (a company providing expert witnesses) for examination, and Taylor's alleged use of the communications on the Tablet to obtain a court order in the Modification Proceeding. Under the *Cantey Hanger* analysis, this alleged conduct falls squarely within the scope of Taylor's representation of Broome in the

[67] These legal conclusions include the following: (1) "Defendants intercepted, disclosed or used the electronic communications of [the Robbins Parties] in violation of Chapter 16, Penal Code." and (2) "Defendants intercepted, disclosed or intentionally used the electronic communications of [the Robbins Parties]."

[68] *See Warwick Towers Council of Co-owners ex rel. St. Paul Fire & Marine Ins. Co.*, 298 S.W.3d at 444.

Modification Proceeding.[69] So, if the Complete Immunity Rule applies, then attorney immunity would bar the Texas Wiretap Claims and the Federal Wiretap Claims against Taylor, even if the claims are based on Taylor's alleged criminal conduct.[70]

If the Partial Immunity Rule applies, then attorney immunity would not bar these claims if Taylor's alleged criminal conduct was "foreign to the duties of an attorney."[71] As a basis for the Texas Wiretap Claims and the Federal Wiretap Claims, the Robbins Parties assert that the defendants, including Taylor violated chapter 16 of the Penal Code and title 18, chapter 119 of the United States Code. As to the potential criminality of Taylor's conduct, even viewing the Robbins Parties' live pleading under our deferential standard of review, it is clear they do not assert that Taylor "intercepted" any electronic communication, and the facts pled and the reasonable inferences therefrom do not show that Taylor "intercepted" any electronic communication by acquiring the communication at the same time as it was being sent.[72]

Though the Robbins Parties allege that Taylor disclosed the contents of Robbins's intercepted electronic communications to the trial court in the Modification Proceeding and in the pleadings in the Modification Proceeding, the Robbins Parties do not allege that Taylor made any such disclosure knowing or having reason to know that the information was obtained through the interception of an electronic communication in violation of section 16.02(b) of the Penal Code

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[69] *See Youngkin*, 546 S.W.3d at 681–83; *Cantey Hanger, LLP*, 467 S.W.3d at 484–85; *Highland Capital Management, LP*, 2016 WL 16428, at *1–4, 6.

[70] *See Cantey Hanger, LLP*, 467 S.W.3d at 483–85.

[71] *See id*. at 485.

[72] *See* 18 U.S.C. §2511(a); Tex. Pen. Code Ann. §16.02; *Fraser*, 352 F.3d at 113–14; *Talon Transaction Technologies, Inc.*, 2013 WL 12172926, at *4–5; *Bailey*, 2008 WL 324156, at *4–5.

or in violation of title 18, section 2511(1) of the United States Code.[73] Neither do the Robbins Parties allege facts from which the foregoing proposition reasonably may be inferred.

In addition, the facts pled in the Robbins Parties' live pleading and the reasonable inferences therefrom do not show that Broome, his sister-in-law, or anyone else "intercepted" any of the Robbins Parties' electronic communications by acquiring any communication at the same time as it was being sent.[74] The Robbins Parties do not allege that their emails or text messages were acquired contemporaneously when the emails or text messages were sent. Instead, they allege unauthorized access to their emails or text messages after those communications were sent, which does not fall within the purview of either the Federal Wiretap Act or the state statutes on which the Robbins Parties base the Texas Wiretap Claims.[75]

Though the Robbins Parties allege that Taylor used the contents of Robbins's intercepted electronic communications in the Modification Proceeding, they do not allege that Taylor used these contents either (1) knowing or being reckless about whether the information was obtained through the interception of an electronic communication in violation of section 16.02(b) of the Penal Code or (2) knowing or having reason to know that the information was obtained through the interception of an electronic communication in violation of title 18, section 2511(1) of the United States Code.[76] Neither do the Robbins Parties allege facts

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[73] *See* 18 U.S.C. §2511(c); Tex. Pen. Code Ann. §16.02.

[74] *See* 18 U.S.C. §2511(a); Tex. Pen. Code Ann. §16.02; *Fraser*, 352 F.3d at 113–14; *Talon Transaction Technologies, Inc.*, 2013 WL 12172926, at *4–5; *Bailey*, 2008 WL 324156, at *4–5.

[75] *See* 18 U.S.C. §2511(a); Tex. Pen. Code Ann. §16.02; *Fraser*, 352 F.3d at 113–14; *Talon Transaction Technologies, Inc.*, 2013 WL 12172926, at *4–5; *Bailey*, 2008 WL 324156, at *4–5.

[76] *See* 18 U.S.C. §2511(d); Tex. Pen. Code Ann. §16.02.

from which these things reasonably may be inferred.

Even presuming the truth of all facts the Robbins Parties alleged and indulging all reasonable inferences in the light most favorable to the Robbins Parties, one could only conclude the pleadings fall short. The Robbins Parties did not allege facts showing criminal conduct by Taylor in violation of chapter 16 of the Penal Code and title 18, chapter 119 of the United States Code.[77] So, even if a criminal violation of either chapter 16 of the Penal Code or of title 18, chapter 119 of the United States Code would be "foreign to the duties of an attorney" and thus preclude application of attorney immunity, the Robbins Parties did not allege facts showing any such violation.[78]

3. Alternative Application of the Cantey Hanger Analysis to Criminal Conduct

In the alternative, one may consider whether attorney immunity would apply even if the conduct the Robbins Parties allege showed a criminal violation by Taylor of either chapter 16 of the Penal Code or of title 18, chapter 119 of the United States Code. Though neither *Cantey Hanger* nor *Youngkin* involved alleged criminal conduct by the attorney, the *Bethel* court held that the *Cantey Hanger* analysis applies to allegedly criminal conduct by an attorney during the course of litigation.[79] As discussed above, Taylor's alleged conduct falls directly within the scope of Taylor's representation of Broome in the Modification

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[77] *See Fraser*, 352 F.3d at 113–14; *Talon Transaction Technologies, Inc.*, 2013 WL 12172926, at *4–5; *Bailey*, 2008 WL 324156, at *4–5; *Youngkin*, 546 S.W.3d at 683; *Gaia Environmental, Inc. v. Galbraith*, 451 S.W.3d 398, 408–10 (Tex. App.—Houston [14th Dist.] 2014, pet. denied); *Warwick Towers Council of Co-owners ex rel. St. Paul Fire & Marine Ins. Co.*, 298 S.W.3d at 444.

[78] *See* 18 U.S.C. §2511(d); Tex. Pen. Code Ann. §16.02; *Fraser*, 352 F.3d at 113–14; *Talon Transaction Technologies, Inc.*, 2013 WL 12172926, at *4–5; *Bailey*, 2008 WL 324156, at *4–5; *Youngkin*, 546 S.W.3d at 683; *Gaia Environmental, Inc.*, 451 S.W.3d at 408–10.

[79] *See Bethel*, 2020 WL 938618, at *4–5; *Youngkin*, 546 S.W.3d at 681–83; *Cantey Hanger, LLP*, 467 S.W.3d at 481–85.

Proceeding.[80] So, if the Complete Immunity Rule applies, then attorney immunity would bar the Texas Wiretap Claims and the Federal Wiretap Claims against Taylor, even if the claims are based on Taylor's alleged criminal conduct.[81] If the Partial Immunity Rule applies, then attorney immunity would not bar these claims if Taylor's alleged criminal conduct was "foreign to the duties of an attorney."[82] But, Taylor's alleged conduct does not fall within any of the examples enumerated in *Cantey Hanger* and *Youngkin*.[83] Thus, under *Youngkin*, this alleged conduct is not "foreign to the duties of an attorney."[84] Under *Bethel*, because Taylor's allegedly criminal conduct involved the provision of legal services to her client in litigation, the attorney-immunity doctrine protects Taylor's conduct and prevents the Robbins Parties from seeking to hold Taylor civilly liable, even though the Robbins Parties allege that the conduct was criminal.[85] Instead of discussing and applying *Bethel*, the majority steps over this supreme court precedent to craft a categorical exception to attorney immunity for criminal conduct.[86] Today's decision conflicts with the supreme court's holding in *Bethel* as well as the binding judicial dicta in *Cantey Hanger* and *Youngkin*.[87] Under these mandatory

[80] *See Youngkin*, 546 S.W.3d at 681–83; *Cantey Hanger, LLP*, 467 S.W.3d at 484–85; *Highland Capital Management, LP*, 2016 WL 16428, at *1–4, 6.

[81] *See Bethel*, 2020 WL 938618, at *4–5; *Cantey Hanger, LLP*, 467 S.W.3d at 483–85; *Troice*, 921 F.3d at 506–07; *Dorrell*, 2017 WL 6764690, at *5–6; *Highland Capital Management, LP*, 2016 WL 164528, at 1–4, 6.

[82] *See Cantey Hanger, LLP*, 467 S.W.3d at 485.

[83] *See Youngkin*, 546 S.W.3d at 682–83; *Cantey Hanger, LLP*, 467 S.W.3d at 482–83.

[84] *See Youngkin*, 546 S.W.3d at 682–83; *Troice*, 921 F.3d at 506–07; *Dorrell*, 2017 WL 6764690, at *5–6; *Bethel*, 581 S.W.3d at 311–12; *Highland Capital Management, LP*, 2016 WL 16428, at *1–4, 6.

[85] *See Bethel*, 2020 WL 938618, at *4–5; *Troice*, 921 F.3d at 506–07; *Dorrell*, 2017 WL 6764690, at *5–6; *Highland Capital Management, LP*, 2016 WL 164528, at 1–4, 6.

[86] *See ante* at 10–11.

[87] *See Bethel*, 2020 WL 938618, at *4–5; *Youngkin*, 546 S.W.3d at 682–83; *Cantey Hanger, LLP*, 467 S.W.3d at 481–85.

precedents, attorney immunity bars the Robbins Parties' claims against Taylor.[88]

4. Alleged Preemption of Attorney Immunity by the Federal Act

The Robbins Parties also assert that the Federal Wiretap Act preempts the Texas common-law doctrine of attorney immunity. The Robbins Parties do not cite the record, nor do they cite any part of title 18, chapter 119 of the United States Code. Though the Robbins Parties cite three cases, none of them deal with attorney immunity. The Robbins Parties do not articulate the applicable preemption legal standard, nor do they provide an analysis applying a legal standard to the text of the federal statute and the Texas attorney-immunity doctrine.[89] Even under a liberal interpretation of the Robbins Parties' appellate briefing, they have not adequately briefed this point.[90]

5. The Robbins Parties' Request for Injunctive Relief

On appeal, the Robbins Parties assert that attorney immunity does not apply to their requests for injunctive relief, and they contend the trial court erred in granting summary judgment as to these requests. The Robbins Parties first raised this point in the trial court in their motion to reconsider the granting of Taylor's summary-judgment motion. Because they did not raise this issue until after the trial court granted Taylor's motion, the Robbins Parties did not timely raise this issue in the trial court, and they may not obtain a reversal of the trial court's summary judgment on this ground.[91]

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[88] *See Bethel*, 2020 WL 938618, at *4–5; *Youngkin*, 546 S.W.3d at 682–83; *Cantey Hanger, LLP*, 467 S.W.3d at 481–85.

[89] *See GTE Mobilnet of S. Tex. v. Pascouet*, 61 S.W.3d 599, 608–09 (Tex. App.—Houston [14th Dist.] 2001, pet. denied) (addressing various legal standards for determining whether a federal statute preempts state law).

[90] *See Tooker v. Alief Indep. Sch. Dist.*, 522 S.W.3d 545, 556 (Tex. App.—Houston [14th Dist.] 2017, no pet.).

[91] *See Wakefield v. Ayers*, No. 01-14-00648-CV, 2016 WL 4536454, at *9-10 (Tex. App.—

Because all of the Robbins Parties' points under their first issue lack merit, this court should overrule the first issue.

II. SUMMARY JUDGMENT FOR PATHWAY

The Robbins Parties have not shown that the trial court erred in granting Pathway's summary-judgment motion.

Under their third issue, the Robbins Parties assert that the immunity afforded by the judicial-proceedings privilege does not apply to claims under the Texas wiretap statute or the Federal Wiretap Act. The Robbins Parties correctly note that Pathway does not cite any case in which a court applies this immunity to a claim under a wiretap statute. But, the Robbins Parties do not cite any case in which a court stated that this immunity does not apply to a claim under a wiretap statute. The First Court of Appeals has applied this immunity to claims for (l) libel, (2) slander, (3) intentional infliction of emotional distress, (4) denial of due process under the United States and Texas Constitutions, and (5) tortious interference with a contractual relationship.[92] In doing so, the court noted that "[a]lthough most cases addressing the judicial communication privilege involve claims of libel or slander, Texas courts have consistently applied the privilege to claims arising out of communications made in the course of judicial proceedings, regardless of the label placed on the claim."[93] The Fourth Court of Appeals has stated that this immunity applies to "a defamation action, or any other action."[94] This court should conclude that this immunity applies to the Texas Wiretap Claims and the Federal Wiretap

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Houston [1st Dist.] Aug. 30, 2016, no pet.) (mem. op.).

[92] *See Laub v. Pesikoff*, 979 S.W.2d 686, 689 (Tex. App.—Houston [1st Dist.] 1998, pet. denied).

[93] *Id*. at 690.

[94] *Hernandez v. Hayes*, 931 S.W.2d 648, 650 (Tex. App.—San Antonio 1996, writ denied).

Claims against Pathway.[95]

The Robbins Parties also assert that the Federal Wiretap Act preempts the Texas common-law doctrine of immunity based on the judicial-proceedings privilege. The Robbins Parties provide three sentences, a citation to one case, and a reference to their statements regarding preemption under their first issue. The Robbins Parties do not cite to the record, nor do they cite any part of title 18, chapter 119 of the United States Code, to support their position. The four cases the Robbins Parties cite do not deal with attorney immunity. The Robbins Parties do not articulate the applicable preemption legal standard, nor do they provide an analysis applying a legal standard to the text of the federal statute and the Texas attorney-immunity doctrine.[96] Even under a liberal interpretation of the Robbins Parties' appellate briefing, they have not adequately briefed this point.[97]

The Robbins Parties assert that public policy favors making forensic experts liable under these circumstances. They provide no citations to the record or any legal authorities for this position. Nor do they articulate a legal standard or provide an analysis. Even under a liberal interpretation of the their appellate briefing, the Robbins Parties have not adequately briefed this point.[98]

The Robbins Parties cite a 2011 case from the Supreme Court of the United Kingdom. They claim the Supreme Court of the United Kingdom abolished the immunity of expert witnesses from liability based on the judicial-proceedings privilege, and they assert that this common-law rule should be abolished in today's case. On matters of Texas civil law, this court must follow the Supreme Court of

[95] *See Laub*, 979 S.W.2d at 689; *Hernandez*, 931 S.W.2d at 650.

[96] *See GTE Mobilnet of S. Tex.*, 61 S.W.3d at 608–09 (addressing various legal standards for determining whether a federal statute preempts state law).

[97] *See Tooker*, 522 S.W.3d at 556.

[98] *See id.*

Texas rather than the Supreme Court of the United Kingdom.[99] This court is not in a position to abolish this common-law immunity.

Because all of the Robbins Parties' points under their third issue lack merit, this court should overrule the third issue.

III. COSTS AND ATTORNEY'S FEES FOR DISCOVERY

The appellants have not shown that the trial court erred in requiring the Robbins Parties to pay Pathway the expense of producing items in response to their requests for production.

The Robbins Parties served requests for production on Pathway, to which Pathway objected. The Robbins Parties filed a motion to compel discovery, and Pathway moved for protection from this discovery. Pathway also asked the trial court to order the Robbins Parties to pay its reasonable costs and attorney's fees in responding to the requests for production. After a hearing, the trial court signed an order in which it granted the Robbins Parties' motion to compel discovery, denied Pathway's motion for protection, and granted Pathway's request that the Robbins Parties pay reasonable costs and attorney's fees associated with producing the requested items. The trial court ordered that, upon the Robbins Parties' payment of Pathway's reasonable costs and attorney's fees associated with producing the requested items, Pathway should produce the items sought in the Robbins Parties' requests for production.

The parties disputed the amount the Robbins Parties had to pay, so the Robbins Parties filed a motion to determine the reasonable cost of production. After a hearing, the trial court signed an order finding that "that the reasonable cost of production for the work done as a result of [the Robbins Parties'] first request for production is $9,374.50 and that [the Robbins Parties] are required to pay the

[99] *See Bird v. W.C.W.*, 868 S.W.2d 767, 771 (Tex. 1994).

above sum to Pathway before the production of documents." The Robbins Parties paid Pathway this amount and received the documents and data requested.

In their second issue the Robbins Parties assert that the trial court abused its discretion by requiring them to pay Pathway $9,374.50 before Pathway produced any items in response to the Robbins Parties requests for production. Texas Rule of Civil Procedure 196.6 provides that "unless otherwise ordered by the court for good cause, the expense of producing items will be borne by the responding party and the expense of inspecting, sampling, testing, photographing, and copying items produced will be borne by the requesting party."[100]

The Robbins Parties point out that part of the $9,374.50 is for payment of attorney's fees for Pathway's counsel. The Robbins Parties assert that the trial court may not award attorney's fees absent a contract or statute authorizing the recovery of fees, and they claim that neither Rule 196.6 nor any contract or statute provides for Pathway's recovery of attorney's fees in this context. Crucially, the Robbins Parties did not raise this complaint in the trial court. Having failed to preserve the complaint in the trial court, they do not get appellate review in this court.

The supreme court has recognized the strong policy supporting Texas's longstanding preservation-of-error requirement.[101] A timely and specific complaint alerts the trial court and the adversary to the purported error, giving both a chance to remedy the problem and thus avert the need to raise the issue on appeal.[102] For these and other reasons, subject to a narrow exception, the law commands Texas

[100] Tex. R. Civ. P. 196.6.

[101] *See Mansions in the Forest, L.P. v. Montgomery County*, 365 S.W.3d 314, 317 (Tex. 2012) (per curiam).

[102] *See id.*

appellate courts in civil appeals to step away from reviewing non-jurisdictional complaints raised for the first time on appeal.[103]

The Robbins Parties' appellate complaint as to Pathway's alleged inability to recover attorney's fees as a matter of law does not fall within the tight constraints of the fundamental-error doctrine.[104] So, the Robbins Parties had to preserve this complaint or forfeit appellate review.[105] They did not raise this complaint in the trial court.[106] Nor have they offered this court any reason why they should be excused from the preservation-of-error requirement and allowed to present these issues for the first time on appeal. The majority offers no explanation either.

Inasmuch as the Robbins Parties failed to preserve error, this court cannot reverse the trial court's order based on their complaint that the trial court erred in ordering them to pay Pathway for its attorney's fees because neither Rule 196.6 nor any contract or statute provides for the recovery of Pathway's attorney's fees in this context.[107] In doing just that, this court treads on mountains of precedent.

The Robbins Parties also assert in the alternative that the trial court abused its discretion in implicitly finding good cause under Rule 196.6 to order them (the requesting parties) to pay the expense of producing items responsive to the production requests rather than Pathway, the responding party.[108] A trial court abuses its discretion if it acts in an unreasonable or arbitrary manner, or without

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[103] *See id.*

[104] *See In re B.L.D.*, 113 S.W.3d 340, 350–52 (Tex. 2003).

[105] *See In re L.M.I.*, 119 S.W.3d 707, 711 (Tex. 2003).

[106] *See Laguan v. U.S. Bank Trust, N.A.*, No. 14-14-00577-CV, 2016 WL 750172, at *3–4 (Tex. App.—Houston [14th Dist.] Feb. 25, 2016, no pet.) (mem. op.).

[107] *See Tex. R. App. P.* 33.1(a); *In re L.M.I.*, 119 S.W.3d at 711; *In re B.L.D.*, 113 S.W.3d at 350–52; *Laguan*, 2016 WL 750172, at *3–4.

[108] *See* Tex. R. Civ. P. 196.6.

reference to guiding rules and principles.[109] The Robbins Parties have not shown that the trial court abused its discretion by implicitly finding good cause to order the Robbins Parties — rather than Pathway — to pay the expense of producing items responsive to the production requests.[110] The Robbins Parties have not shown that the trial court erred in issuing the discovery orders requiring the Robbins Parties to pay Pathway the reasonable costs of responding to their requests for production.

The majority, speaking in conclusory terms, says that the record does not demonstrate that Pathway showed good cause for the trial court to order the Robbins Parties — rather than Pathway — to pay the expense of producing items responsive to the production requests. The majority does not address the evidence Pathway submitted. Nor does the majority address the trial court's statements at the two hearings. Before reversing a discretionary discovery ruling on appeal, this court should explain why the record shows that the trial court acted in an unreasonable or arbitrary manner, or without reference to guiding rules and principles.[111]

IV. CONCLUSION

The Robbins Parties have not shown that the trial court erred in granting Taylor's summary-judgment motion or in granting Pathway's summary-judgment motion. Nor have the Robbins Parties shown that the trial court abused its discretion by implicitly finding good cause to order them, rather than Pathway, to pay the expense of producing items responsive to the production requests. This

[109] *Downer v. Aquamarine Operators*, 701 S.W.2d 238, 241–42 (Tex. 1985).

[110] *See* Tex. R. Civ. P. 196.6.

[111] *See Downer*, 701 S.W.2d at 241–42.

court should affirm the trial court's judgment.

/s/ Kem Thompson Frost
Chief Justice

Panel consists of Chief Justice Frost and Justices Bourliot and Poissant (Poissant, J., majority).