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Professional Liability

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PROFESSIONAL LIABILITY

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I. INTRODUCTION

During the Survey period, Texas courts issued important decisions in professional liability actions of all types. The Texas Supreme Court clarified a 2012 health care liability opinion that was causing inconsistencies among the courts of appeals. The supreme court also addressed the enforceability of arbitration agreements in both the health care and legal malpractice contexts. Finally, the Survey period included several decisions related to director and officer liability that addressed outstanding questions about the application of the business judgment rule to closely held corporations; the viability of double derivative standing; the definition of the term "investment contract" under the Texas Securities Act; the limitations period for suits brought against a partner to collect on judgments against the partnership; whether Texas specific personal jurisdiction extended to non-resident corporate officers in securities fraud cases; and whether joint venture status applied to certain types of real estate partnerships.

II. MEDICAL MALPRACTICE

A. THE TEXAS SUPREME COURT CONTINUES TO DEFINE THE SCOPE OF THE TEXAS MEDICAL LIABILITY ACT—CLAIMS AGAINST PHARMACISTS MAY QUALIFY AS HEALTH CARE LIABILITY CLAIMS

The Texas Medical Liability Act (codified as Texas Civil Practice and Remedies Code Chapter 74) requires plaintiffs asserting a "health care liability claim" (HCLC) to serve each defendant with an expert report within 120 days after the defendant's original answer or risk dismissal of

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the case with prejudice.[1] Continuing the trajectory of its past decisions, the Texas Supreme Court held in *Randol Mill Pharmacy v. Miller* that claims against a compounding pharmacy and its licensed-pharmacist employees are HCLCs that require an expert report compliant with Chapter 74.[2] This case addressed an issue of first impression: the application of Chapter 74 to claims against pharmacists in general and compounding pharmacists in particular.[3]

Plaintiff Stacey Miller was being treated by her physician, Dr. Ricardo Tan, for symptoms related to Hepatitis C.[4] As part of her treatment, Dr. Tan administered weekly injections of lipoic acid to Miller during her visits to his office. Dr. Tan had previously ordered twenty-three vials of lipoic acid from Randol Mill Pharmacy, a licensed compounding pharmacy, for use in his office.[5] Dr. Tan's order did not refer to any particular patient, but administered some of the lipoic acid to Miller. Miller suffered a severe adverse reaction to her tenth injection, which resulted in a long hospitalization, multiple blood transfusions, and permanent blindness in both eyes. Miller sued Randol Mill Pharmacy, the pharmacy that compounded the vial of lipoic acid, and several of Randol Mill's licensed pharmacists. Miller alleged that the defendants' negligence in compounding the lipoic acid, along with inadequate and inappropriate warnings and instructions for use, made the lipoic acid defective, ineffective, and unreasonably dangerous.[6] Miller did not timely serve an expert report as required under Chapter 74 for an HCLC, prompting Randol Mill and the pharmacists to move to dismiss all claims against them. The trial court denied the motion to dismiss and the court of appeals affirmed, finding that the defendants were not "health care providers" and the claims did not qualify as HCLCs under Chapter 74.[7]

The supreme court reversed.[8] Noting that HCLCs can only be brought against physicians and health care providers, the supreme court first looked to the statute's definition of "health care provider."[9] A health care provider is defined in Chapter 74 as "any person, partnership, professional association, corporation, facility, or institution duly licensed, certified, registered, or chartered by the State of Texas to provide health

1. TEX. CIV. PRAC. & REM. CODE ANN. § 74.351 (West 2015).

2. Randol Mill Pharmacy v. Miller, 465 S.W.3d 612, 621–23 (Tex. 2015).

3. *Id.* at 617.

4. *Id.* at 614.

5. *Id.* Compounding pharmacies mix or alter drugs to create a medication that is tailored to the needs of an individual patient and that is not otherwise commercially available. Michael Snow, *Seeing Through the Murky Vial: Does the FDA Have the Authority to Stop Compounding Pharmacies from Pirate Manufacturing?*, 66 VAND. L. REV. 1609, 1611 (2013).

6. *Randol Mill Pharmacy*, 465 S.W.3d at 615. Miller also sued Dr. Tan, but the claims against Dr. Tan were dismissed and severed. *Id.*

7. *Id.*

8. *Id.* at 614.

9. *Id.* at 615.

care, including . . . a pharmacist."[10] However, the supreme court read this general definition of "health care provider" in conjunction with Chapter 74's specific definition of "pharmacist."[11] For purposes of Chapter 74, a pharmacist is one who

> performs those activities limited to the dispensing of prescription medicines which result in health care liability claims and does not include any other cause of action that may exist at common law against them, including but not limited to causes of action for the sale of mishandled or defective products.[12]

Because Miller's claims focused on the compounding of a drug, rather than an incorrectly filled prescription (to which courts agree Chapter 74 applies), the crux of the supreme court's analysis focused on whether Randol Mill was "dispensing prescription medicines" as contemplated by Chapter 74.[13]

Under the Pharmacy Act, to "dispense" medicine means to compound it for "delivery to the ultimate user or the user's agent."[14] Although the court of appeals found that Dr. Tan qualified as the user's agent, it concluded Randol Mill was not dispensing the medicine as defined by the Pharmacy Act because Dr. Tan did not specify the patients for which the drugs were intended when he ordered them.[15] The supreme court disagreed with this reasoning, pointing out that the Pharmacy Act allows pharmacists to dispense reasonable quantities of drugs to a practitioner for office use without knowing the end user's identity.[16] As such, the supreme court concluded Randol Mill was dispensing medication within the meaning of Chapter 74.[17]

Once the supreme court concluded that Randol Mill and the pharmacists were health care providers under Chapter 74, it then looked to whether the causes of action asserted by Miller met the definition of an HCLC. The supreme court held that Miller's claims that the pharmacists negligently compounded the drug and failed to provide adequate warnings and instructions clearly alleged "a departure from accepted standards of health care."[18] Hence, Miller's claims were HCLCs. The supreme court rejected Miller's argument that her claims were product-liability claims: because Miller questioned Randol Mill's compliance with compounding regulations, adjudication of her claims will require expert testimony to determine compliance with those standards.[19] Because

10. TEX. CIV. PRAC. & REM. CODE ANN. § 74.001(a)(12)(A)(iv) (West 2015). Employees and independent contractors acting in the course and scope of employment are also health care providers. *Id.* § 74.001(12)(B)(ii).
11. *Randol Mill Pharmacy*, 465 S.W.3d at 616–17.
12. TEX. CIV. PRAC. & REM. CODE ANN. § 74.001(a)(22).
13. *Randol Mill Pharmacy*, 465 S.W.3d at 617–20.
14. *Id.* at 619–20.
15. *Id.*
16. *Id.*
17. *Id.* at 621.
18. *Id.* at 621–22.
19. *Id.* at 622.

Miller's allegations against Randol Mill and the pharmacists were HCLCs under Chapter 74, the trial court erred in refusing to grant the defendants' motion to dismiss for Miller's failure to serve an expert report.[20]

Pharmacists are the only type of healthcare providers that do not benefit from the expert report requirements and damages caps of Chapter 74 in all circumstances.[21] Before this case was decided, the supreme court had not addressed or analyzed the scope of Chapter 74's limited application to pharmacists.[22] Chapter 74's expert report requirement was enacted to weed out and deter frivolous claims.[23] Compounding pharmacists feared that, without the protections of Chapter 74, the customized nature of their pharmacy practice would be lumped in with claims for mishandled or defective pharmaceutical products, which are explicitly excluded from Chapter 74's expert report requirements.[24] The supreme court's holding in *Randol Mill Pharmacy* relieved those fears and offered guidance on Chapter 74's application to pharmacists.

B. Slip and Fall—HCLC or Not? Texas Supreme Court Clarifies the Standard For Safety-Based Claims

1. Ross v. St. Luke's Episcopal Hospital

During the last Survey period, the Texas Supreme Court clarified its 2012 holding in *Texas West Oaks Hospital, L.P. v. Williams*, which stated that a safety-standards-based claim against a health care provider does not have to be "directly related to the provision of health care" in order to fall within the protections of Chapter 74.[25] Since the *Williams* decision, lower courts have reached varying conclusions about how much of a connection, if any, a safety-standards claim must have to the provision of health care for it to be considered a HCLC.[26] The supreme court granted review on this issue in *Ross v. St. Luke's Episcopal Hospital* and held that not all falls in a hospital are considered an HCLC under Chapter 74.[27]

Lezlea Ross was visiting a patient at St. Luke's Episcopal Hospital when she slipped and fell near the exit doors of the hospital where workers were buffing and cleaning the floor.[28] Ross sued St. Luke's on a premises liability theory. Citing *Williams*, St. Luke's asserted that Ross's claim was an HCLC and that her failure to serve an expert report required

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20. *Id.*
21. *See id.* (citing Tex. Civ. Prac. & Rem. Code Ann. § 74.001(22) (West 2015)).
22. *Id.* at 617.
23. Jonathan D. Nowlin, *Scalpel, Please: Why the Definition of "Health Care Liability Claim" in Chapter 74 of the Civil Practice and Remedies Code Is Not As Clean-Cut As It Could Be*, 43 Tex. Tech L. Rev. 1247, 1255–56 (2011).
24. *Id.*; *see* Brief of Amicus Curiae Alliance of Independent Pharmacists at 2, 9, Randol Mill Pharmacy v. Miller, 465 S.W.3d 612 (Tex. 2015), 2014 WL 589096, at *2, *9; Tex. Civ. Prac. & Rem. § 74.001(a)(22).
25. Tex. West Oaks Hosp., L.P. v. Williams, 371 S.W.3d 171, 186 (Tex. 2012).
26. *See* Ross v. St. Luke's Episcopal Hosp., 462 S.W.3d 496, 500 (Tex. 2015).
27. *Id.* at 498.
28. *Id.* at 499.

dismissal of her lawsuit with prejudice.[29] The trial court granted the motion to dismiss and the court of appeals affirmed, holding that under *Williams*, an HCLC does not require a connection between the provision of health care and the safety standard allegedly breached.[30] The supreme court, however, reversed, explaining that "for a safety standards-based claim to be an HCLC there must be a substantive nexus between the safety standards allegedly violated and the provision of health care."[31]

The supreme court first looked to the statutory definition of HCLC and past decisions interpreting Chapter 74. The supreme court stressed that the expert report requirement exists to deter frivolous claims; the requirement was not meant to apply to every claim that arises from a health care context.[32] Further, hospitals are just one of the many types of businesses that have a duty to maintain a safe environment.[33] Based on this, the supreme court concluded that the legislature intended the safety standards referred to in the definition of HCLC to have a deeper relationship with the provision of health care than the mere location of the occurrence or the status of the defendant.[34] Thus, to qualify as a HCLC, a safety-standards claim must have "a substantive nexus between the safety standards allegedly violated and the provision of health care. And the nexus must be more than a 'but for' relationship."[35]

The supreme court explained that the pivotal issue is whether "the standards on which the claim is based implicate the defendant's duties as a health care provider, including its duties to provide for patient safety."[36] The supreme court articulated seven factors that should be considered in making this determination:

1. Did the alleged negligence of the defendant occur in the course of the defendant's performing tasks with the purpose of protecting patients from harm?
2. Did the injuries occur in a place where patients might be during the time they were receiving care, so that the obligation of the provider to protect persons who require special, medical care was implicated?
3. At the time of the injury was the claimant in the process of seeking or receiving health care?
4. At the time of the injury was the claimant providing or assisting in providing health care?
5. Is the alleged negligence based on safety standards arising from professional duties owed by the health care provider?
6. If an instrumentality was involved in the defendant's alleged negligence, was it a type used in providing health care?

29. *Id.*
30. *Id.*
31. *Id.* at 504.
32. *Id.* at 502. *See, e.g.*, Loaisiga v. Cerda, 379 S.W.3d 248, 258 (Tex. 2012).
33. *Ross*, 462 S.W.3d at 503.
34. *Id.* at 504.
35. *Id.*
36. *Id.* at 505.

> 7. Did the alleged negligence occur in the course of the defendant's taking action or failing to take action necessary to comply with safety-related requirements set for health care providers by governmental or accrediting agencies?[37]

Applying these factors, the supreme court concluded that Ross's claim against St. Luke's was not a HCLC, and that the trial court erred in holding that Ross was required to serve an expert report to avoid dismissal of her suit.[38] Justices Lehrmann and Devine wrote a concurring opinion to emphasize the significance of the third and fifth factors, opining that focusing on the specialized duty of care health care providers owe their patients ensures that safety-based claims will implicate the "provision of health care."[39]

2. Reddic v. East Texas Medical Center Regional Health Care System

Several months after deciding *Ross*, the Texas Supreme Court issued a per curium opinion in a factually similar case.[40] Louisa Reddic was visiting East Texas Medical Center-Crockett Hospital when she slipped on a floor mat in the hospital exit area. Like the plaintiff in *Ross*, Reddic sued the Hospital on a premises liability theory.[41] The Hospital moved to dismiss the case for failure to serve an expert report.[42] The trial court denied the motion, but the court of appeals reversed, concluding that floor maintenance in an area frequented by patients had a sufficient relationship to the provision of health care to qualify as a safety-based claim under Chapter 74.[43]

The supreme court granted review and analyzed whether Reddic's claims were HCLCs based on the *Ross* factors.[44] The Hospital argued that, the holding in *Ross* was not determinative because the hospital in *Ross* did not assert that the area where Ross fell was a patient care area, and the record in *Ross* failed to demonstrate that the site of the fall was subject to maintenance standards related to the provision of health care.[45] In support of its argument, the Hospital pointed to general safety requirements under federal regulations for facilities participating in Medicare, to standards for accreditation by the Joint Commission, and to Texas Department of State Health Service licensure requirements, all of which addressed the Hospital's duty to provide a safe facility.[46]

The supreme court rejected the Hospital's argument, holding that there was no showing that the Hospital's compliance or non-compliance with

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37. *Id.*
38. *Id.*
39. *Id.* at 506–07 (Lehrmann, J., concurring).
40. Reddic v. East Tex. Med. Ctr. Reg'l Health Care Sys., 474 S.W.3d 672 (Tex. 2015) (per curiam).
41. *Id.* at 673.
42. *Id.*
43. *Id.*
44. *Id.*
45. *Id.* at 674.
46. *Id.* at 675.

any of these standards had a substantive relationship to the safety standards underlying Reddic's claims.[47] The supreme court reiterated that, although floor maintenance in an area used by patients is related to the provision of health care, to qualify as a HCLC there must be "more of a relationship to the provision of health care than that [a claim] arises from an occurrence within a hospital."[48] As such, the supreme court concluded there was not "a substantive nexus between the safety standards Reddic claim[ed] the Hospital violated and the hospital's provision of health care."[49] Because her claims were not HCLC's, Reddic did not have to serve an expert report to proceed with her case.[50]

3. Christus Spohn Health System Corporation v. Goodhew

Shortly before the Texas Supreme Court issued its opinions in *Ross* and *Reddic*, the Corpus Christi Court of Appeals held that an expert report was required for a claim based on a patient's fall in a restroom at a wound care treatment center.[51] During her recovery from hip surgery, Jeanne Goodhew went to Christus Spohn Shoreline Wound Care Center for treatment. Prior to meeting with the doctor, "Goodhew informed the nurse that she needed to use the restroom."[52] With the walker provided by the nurse, Goodhew entered the restroom, fell, and injured herself. Goodhew argued that her claims were similar to those in cases in which a hospital visitor fell and suffered an injury.[53] The court of appeals, however, disagreed based on the fact that Goodhew was at the facility to receive medical treatment and was in the middle of an evaluation when her need to use the restroom arose.[54] The court of appeals relied on the Texas Supreme Court's reasoning in *Harris Methodist Fort Worth v. Ollie* to conclude that Goodhew's safety claims were directly related to the provision of health care.[55]

The facts of *Goodhew* fall somewhere between the facts of *Ollie* and the facts of *Ross* and *Reddic*.[56] Although *Goodhew* was decided prior to the supreme court's announcement of the *Ross* factors, the *Goodhew* slip and fall could qualify as a safety-based HCLC, especially if special weight

47. *Id.* at 675.
48. *Id.*
49. *Id.* at 676.
50. *Id.*
51. Christus Spohn Health Sys. Corp. v. Goodhew, No. 13-14-00322-CV, 2015 WL 1284672, at *5 (Tex. App.—Corpus Christi Mar. 19, 2015, pet. denied) (mem. op.).
52. *Id.* at *1.
53. *Id.* at *3.
54. *Id.*
55. *Id.* at *7. The plaintiff in *Harris Methodist Fort Worth v. Ollie* was a patient when she slipped on a wet bathroom floor during her post-operative confinement. Harris Methodist Fort Worth v. Ollie, 342 S.W.3d 525, 525–26 (Tex. 2011). The Texas Supreme Court held that the services a hospital provides its patients necessarily include those services required to meet patients' fundamental needs, including safety. *Id.*
56. *See Ollie*, 342 S.W.3d at 525–26; Reddic v. E. Tex. Med. Ctr. Reg'l Health Care Sys., 474 S.W.3d 672, 672–73 (Tex. 2015); Ross v. St. Luke's Episcopal Hosp., 462 S.W.3d 496, 499 (Tex. 2015).

was given to the third and fifth factors as encouraged by Justices Lehrmann and Devine's concurrence in *Ross*.[57] Notably, the supreme court denied Goodhew's petition for review.[58]

C. Failing to Follow Chapter 74's Arbitration Requirements May Not Be the End of the Road for Compelling Arbitration

The Texas Medical Liability Act requires any arbitration agreement between physicians or other health care providers and their patients to be in writing, with a "notice in 10-point boldface type [that] clearly and conspicuously" states:

> UNDER TEXAS LAW, THIS AGREEMENT IS INVALID AND OF NO LEGAL EFFECT UNLESS IT IS ALSO SIGNED BY AN ATTORNEY OF YOUR OWN CHOOSING. THIS AGREEMENT CONTAINS A WAIVER OF IMPORTANT LEGAL RIGHTS, INCLUDING YOUR RIGHT TO A JURY. YOU SHOULD NOT SIGN THIS AGREEMENT WITHOUT FIRST CONSULTING WITH AN ATTORNEY.[59]

In the last Survey period, the Texas Supreme Court held that failure to include this statement in an arbitration agreement does not necessarily bar a health care provider from compelling a case to arbitration.[60]

In *Fredericksburg Care Co., L.P. v. Perez*, the supreme court addressed whether § 74.451 of the Texas Civil Practice and Remedies Code was preempted by federal law or whether an exception under the McCarran-Ferguson Act (MFA) barred preemption.[61] The beneficiaries of Elisa Zapata (Beneficiaries) brought a lawsuit for negligence and wrongful death against Fredericksburg Care Company (Fredericksburg), the nursing home where Zapata was a resident patient when she died. Relying upon an arbitration clause in the agreement Zapata signed before she entered the nursing home, Fredericksburg filed a motion to compel arbitration. The arbitration agreement, however, did not meet § 74.451 requirements. But Fredericksburg argued that compliance was not required because federal law preempted § 74.451.[62] Fredericksburg contended that the use of Medicare funds implicated interstate commerce, and therefore, the Federal Arbitration Act (FAA), not § 74.451, determined the enforceability of the arbitration clause.[63]

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57. *Ollie*, 342 S.W.3d at 526.

58. Goodhew v. Christus Spohn Health Sys. Corp., No. 15-0418, 2015 Tex. LEXIS 848 (Tex. Sept. 11, 2015).

59. Tex. Civ. Prac. & Rem. Code Ann. § 74.451(a) (West 2015).

60. Fredericksburg Care Co., L.P. v. Perez, 461 S.W.3d 513, 528 (Tex. 2015).

61. *Id.* at 516.

62. *Id.* at 516–17.

63. *Id.* The Texas Supreme Court had previously ruled in *In re Nexion Health at Humble, Inc.* that evidence of Medicare payments to a health care provider on a patient's behalf was sufficient to establish interstate commerce and the FAA's application to the case. *In re* Nexion Health at Humble, Inc., 173 S.W.3d 67, 69 (Tex. 2005).

The Beneficiaries agreed that the FAA normally preempts § 74.451, but argued that the MFA contained "an exemption from preemption[, meaning state law governed the enforceability of the arbitration clause,] for any federal law that could be 'construed to invalidate, impair or supersede any state law enacted . . . for the purpose of regulating the business of insurance.'"[64] The Beneficiaries posited that the legislative purpose behind § 74.451 and its predecessor statutes was to protect and manage medical malpractice and health care liability insurance policies.[65] The trial court and court of appeals both agreed with the Beneficiaries.[66]

The supreme court, however, reversed after a close analysis of whether § 74.451 was enacted for the "purpose of regulating the business of insurance."[67] To reach its conclusion, the supreme court looked at § 74.451 through the lens of the MFA, which focused on "the relationship between the insurance company and its policyholders."[68] For purposes of the MFA, state laws that regulate the "business of insurance" are those aimed at protecting, adjusting, managing or controlling the insurance company-policyholder relationship.[69] And, as the U.S. Supreme Court has held, a state law's weak "connection to the ultimate aim of insurance" is not enough to avoid preemption under the MFA.[70] The supreme court reviewed the legislative intent of the Texas Medical Liability Act and its predecessor statute, the Medical Liability and Insurance Improvement Act of Texas, and concluded the purpose of both was to "make health care . . . more available and less expensive by reducing the cost of health care liability claims" and "lowering malpractice insurance premiums."[71] However, this goal of inspiring lower insurance rates does not implicate the relationship between the insurance company and their policy holders.[72] Further, § 74.451 has no bearing on the performance of insurance contracts because it does not address whether a claim is paid or denied, the terms of insurance contracts, the rates insurance companies can charge, or the type of policy insurance companies can issue.[73] Given this,

64. *Fredericksburg Care Co.*, 461 S.W.3d at 517 (citing 15 U.S.C. § 1012(b) (2012)).

65. *Id.*

66. *Id.*

67. *Id.* at 518. The supreme court used the three-part test established under federal law for determining the application of the MFA. *Id.* The MFA must satisfy the following three elements for the exemption to apply: "(1) the federal statute does not specifically relate to the 'business of insurance,' (2) the state law was enacted of the 'purpose of regulating the business of insurance,' and (3) the federal statute operates to 'invalidate, impair or supersede' the state law." *Id.* (quoting Munich Am. Reinsurance Co. v. Crawford, 141 F.3d 585, 590 (5th Cir. 1998)). The supreme court noted that elements one and three were clearly met, and therefore, focused its analysis on element two. *Id.* at 519.

68. *Id.* at 521–25 (quoting U.S. Dep't of Treasury v. Fabe, 508 U.S. 491, 501 (1993)).

69. *Id.* at 521.

70. *Id.* (citing *Fabe*, 508 U.S. at 509). Examples of practices within the scope of the MFA include the fixing of rates, the selling and advertising of policies, the licensing of insurance companies and their agents, and the writing and performance of insurance contracts. *Id.* at 522.

71. *Id.* at 523.

72. *Id.* at 524.

73. *Id.*

the supreme court concluded that § 74.451's tenuous impact on the "business of insurance" was not enough to bring it under MFA protection.[74] Hence, the trial court erred by denying Fredericksburg's motion to compel arbitration.

The supreme court's holding in *Frederickburg Care Co.* makes arbitration a more viable option for healthcare providers and physicians who prefer to resolve healthcare liability claims through arbitration rather than litigation. Prior to this decision, healthcare providers likely saw the strong arbitration language required by § 74.451 as off-putting to potential patients.[75] That concern, along with the potential penalties for failing to meet § 74.451's specific requirements, was enough for most healthcare providers to decide that the risk of an arbitration clause in any pre-treatment agreement outweighed the benefit.[76] Now, in certain circumstances, healthcare providers who prefer to resolve disputes through arbitration can include arbitration clauses without alarming patients with the language in § 74.451. Healthcare providers, however, should still be mindful that the FAA only preempts state law in certain circumstances—when interstate commerce is involved, the arbitration clause is in writing, the clause has been agreed to by all parties, and the clause covers the claim at issue. Otherwise, compliance with § 74.451 is still required.

III. LEGAL MALPRACTICE

A. Expert Testimony on Causation Required in Malpractice Claims

During the last Survey period, the Fourteenth Houston Court of Appeals rejected attempts to fracture negligence claims into breach-of-fiduciary-duty claims and shed light on the type of evidence that is sufficient to establish causation in malpractice cases.[77] In *Neubaum v. Stanfield*, the Neubaums sued three lawyers for negligence and breach of fiduciary duty that allegedly occurred when the lawyers represented the Neubaums in a usury suit brought by Buck Glove Company. In the underlying usury suit, the jury rendered a judgment in favor of Buck Glove Company for $3.9 million in actual damages plus attorneys' fees, but also rendered judgment for the Neubaums on their counterclaim for money had and received in the amount of $151,000. The Neubaums retained new counsel to

74. *Id.* at 525. The supreme court, applying U.S. Supreme Court precedent, analyzed the purpose of Chapter 74 in its entirety and § 74.451 specifically. *Id.* Because the arbitration provision in § 74.451 applies to health care liability claims rather than insurance contracts, it does not relate to the "business of insurance" any more than Chapter 74 as a whole. *Id.* at 524–25.

75. *See* Matt Goodman, *Texas High Court Ruling Frees Healthcare Providers To Elect Arbitration In Malpractice Suits*, D Magazine (Mar. 10, 2015), http://healthcare.dmagazine.com/2015/03/10/texas-high-court-ruling-frees-healthcare-providers-to-elect-arbitration-in-malpractice-suits/ [https://perma.cc/K9BN-2K85].

76. *See* Michael L. Hood & David M. Merryman, *Med Mal Game Changer the Texas Supreme Court Strikes Down Bar to Arbitration Agreements*, 78 Tex. B.J. 638, 638 (2015).

77. *See generally* Neubaum v. Stanfield, 465 S.W.3d 266 (Tex. App.—Houston [14th Dist.] 2015), *rev'd*, No. 15-0387, 2016 WL 3536865 (Tex. June 24, 2016).

appeal the judgment. The court of appeals held that the trial evidence was legally insufficient, reversed the trial court, and rendered judgment that Buck Glove Company take nothing.[78]

The Neubaums then filed a legal malpractice lawsuit against their trial counsel in the usury suit, alleging that their lawyers neglected to advise them of the damages sought against them and failed to remove or more adequately supervise the junior lawyer who did the majority of the work in the usury suit.[79] The lawyers sought summary judgment on various grounds including that "the Neubaums had impermissibly fractured negligence claims into breach-of-fiduciary-duty claims," that the alleged conduct of the lawyers "did not the proximate cause any damage to the Neubaums," and that the lawyers "[could] not be held liable for an error committed by the trial court in the usury suit."[80] The trial court granted the lawyers' motion and the Neubaums appealed.[81]

"The rule against fracturing a negligence claim" prevents a legal malpractice claim from being converted from a claim that sounds only in negligence into some other claim, such as breach of fiduciary duty.[82] In essence, the rule is that when the allegations in the complaint are that the attorney did not exercise an ordinary degree of care, skill, or diligence, negligence is the proper and sole cause of action.[83] The court of appeals in *Neubaum v. Stanfield* reinforced this rule and held that the trial court did not err in granting summary judgment as to the Neubaums' breach of fiduciary duty claims.[84]

The court of appeals then addressed the Neubaums' negligence claim.[85] In legal malpractice claims involving alleged negligence, an attorney's negligence causes damages when a client with competent counsel would have obtained a more favorable result than the result the client received.[86] As the party moving for summary judgment, the lawyers had the burden to prove that a more favorable result would not have been achieved by competent counsel.[87] The court of appeals determined that the summary judgment evidence presented by the lawyers did not satisfy this burden as a matter of law.[88] Most glaringly, the lawyers did not present expert testimony regarding causation.[89] Texas courts previously held that expert testimony is necessary to prove proximate cause regarding a negligence claim against a litigation attorney because "determinations regarding the legal and procedural intricacies" and the impact of certain

78. *Id.*
79. *Id.* at 268–70.
80. *Id.* at 268–69.
81. *Id.* at 269.
82. *Id.*
83. *Id.* at 269–70.
84. *Id.* at 270.
85. *See id.* at 270–76.
86. *Id.* at 273.
87. *Id.*
88. *Id.*
89. *Id.* at 274.

attorney behavior on the ultimate result is beyond the common understanding of the trier-of-fact.[90] In part, this was because the lawyers argued that any damages to the Neubaums were caused by the trial court's erroneous rulings in the usury case and not the lawyers' actions—a highly technical consideration.[91]

The court of appeals's causation analysis in this case is especially important. The court of appeals's decision that expert testimony is required for summary judgment on the issue of causation has wide repercussions for legal malpractice claims. While the dissent argued that expert testimony was not actually necessary,[92] the majority made it clear that in order for litigation attorneys to avoid liability on causation grounds for malpractice stemming from alleged negligence in underlying litigation, there is no replacement for expert testimony.[93] Attorneys should be cautious of filing summary judgment motions on these grounds without expert testimony.

B. Interplay Between Arbitration Clauses in Attorney-Client Contracts and the Disciplinary Rules

In *Royston, Rayzor, Vickery & Williams, LLP v. Francisco "Frank" Lopez*, the Texas Supreme Court addressed whether an arbitration provision in an attorney-client employment contract was enforceable."[94] The provision at issue specified that the parties would arbitrate disputes arising between them. But the same provision excluded any claims concerning the recovery of the law firm's fees and expenses.[95]

The client, Francisco Lopez, engaged the law firm, Royston, Rayzor, Vickery & Williams, LLP, to represent in him in a divorce from his alleged wife who had won the $11 million playing the lottery.[96] After the divorce action settled at mediation, Lopez sued the law firm claiming his attorneys "induced him to accept an inadequate settlement."[97] The law firm moved to compel the dispute to arbitration under the arbitration provision in the attorney-client contract. The trial court denied the law firm's motion, and the court of appeals affirmed on the basis that the arbitration provision was substantively unconscionable and not enforceable.[98]

The supreme court granted review and addressed three basic arguments asserted by Lopez: (1) the arbitration provision was unconscionable; (2) enforcing the arbitration provision violated public policy; and (3)

90. *Id.*
91. *Id.* at 275.
92. *Id.* at 277–81.
93. *Id.* at 277.
94. Royston, Rayzor, Vickery & Williams, LLP v. Lopez, 467 S.W.3d 494, 497 (Tex. 2015).
95. *Id.*
96. *Id.* at 498.
97. *Id.*
98. *Id.*

the arbitration provision was illusory.[99] After considering each of Lopez's arguments, the supreme court reversed the judgment of the court of appeals and remanded the case to the trial court for further proceedings.[100]

Regarding unconscionability, the supreme court characterized Lopez's unconscionability claim as "essentially that the provision is oppressive and grossly one-sided because it requires [Lopez] to arbitrate all his claims against Royston, Rayzor, while allowing the firm to choose whether to litigate or arbitrate the only claim it realistically would have against him."[101] However, excepting a few specified disputes from the scope of an arbitration provision does not necessarily render that provision one-sided and therefore unconscionable.[102] While the court of appeals recognized that "[t]he prospective attorney-client relationship adds an overlay to attorney-client employment contracts," the supreme court clarified that that "overlay does not alter the basic principle that arbitration clauses in agreements are enforceable absent proof of a defense."[103]

Regarding public policy, the supreme court acknowledged that ongoing debate surrounds attorney-client arbitration agreements.[104] This debate centers on two opposing policies: (1) "the policy of holding attorneys to the highest level of ethical conduct"; and (2) "the policy of encouraging and enforcing arbitration agreements."[105] Lopez argued that the Disciplinary Rule 1.03(b) standard for attorney conduct applies to interactions with prospective clients.[106] Disciplinary Rule 1.03(b) provides, "a lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."[107] Royston, Rayzor, on the other hand, argued that Disciplinary Rule and Professional Ethics Committee opinions are "advisory and do not impose legal duties."[108] While noting that it did not intend to minimize attorneys' ethical obligations, the supreme court held that parties to an agreement determine the terms of the agreement and that courts must respect and enforce those terms.[109] Further, the supreme court noted that the legislature has unequivocally indicated that arbitration agreements should be treated like other contracts.[110] In light of this, the supreme court declined to impose "a legal requirement that attorneys explain to prospective clients . . . arbitration provisions in attorney-client employment agreements."[111] The supreme court noted that prospective clients are protected

99. *Id.* at 499.
100. *Id.*
101. *Id.* at 501.
102. *Id.* at 501–02.
103. *Id.* at 500.
104. *Id.* at 502.
105. *Id.* at 502–03.
106. *Id.* at 503.
107. *Id.* (quoting TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.03(b)).
108. *Id.*
109. *Id.* at 503–04.
110. *Id.* at 504 (citing TEX. CIV. PRAC. & REM. CODE ANN. § 171.001 (West 2015)).
111. *Id.* at 504.

just as any other contracting party.[112]

The supreme court also addressed Lopez's claim that the arbitration provision was illusory because Lopez was required to arbitrate all his claims and Royston, Rayzor's only possible claim against Lopez was excluded from the scope of the arbitration provision.[113] "Promises are illusory and unenforceable if they lack bargained-for consideration because they fail to bind the promisor."[114] When one party is bound to arbitrate and the other can simply choose whether to arbitrate or not, the arbitration provision is illusory.[115] But limiting the scope of an arbitration provision to certain claims does not meet this standard and does not render the provision illusory.[116]

In sum, this case is an important example of Texas courts upholding the enforceability of arbitration provisions in attorney-client contracts. Going forward, attorneys can exclude certain claims from an arbitration provision without concern that this omission will affect the contract's enforceability. Most significantly, however, the supreme court's analysis of the public policy related to arbitration provisions in attorney-client contracts and its interplay with Disciplinary Rule 1.03(b) clarifies an area of the law that has been the subject of ongoing debate.[117] While attorneys are held to high standards, there is no legal requirement, as a matter of public policy, that attorneys explain the arbitration provisions contained in attorney-client employment agreements to prospective clients.

IV. DIRECTOR AND OFFICER LIABILITY

A. The Business Judgment Rule in Closely Held Corporations and Double Derivative Standing

Under Texas law, the business judgment rule protects corporate directors and officers against alleged breaches of their corporate duties if the actions of the fiduciaries are "within the exercise of their discretion and judgment in the development or prosecution of the enterprise in which their interests are involved."[118] In a shareholder derivative action, which is a lawsuit brought by a shareholder on behalf of the corporation, the business judgment rule is applied at two separate junctures.[119] Initially, the business judgment rule is applied to the directors' decision whether to pursue a cause of action belonging to the corporation.[120] The business judgment rule is then applied again as a defense on the merits against the shareholder's derivative claim for the breaches of duties that injured the

112. *Id.* at 504–05.
113. *Id.* at 505–06.
114. *Id.* at 505 (citing *In re* 24R, Inc., 324 S.W.3d 564, 566–67 (Tex. 2010)).
115. *Id.*
116. *Id.*
117. *Id.* at 502.
118. Cates v. Sparkman, 11 S.W. 846, 849 (Tex. 1889).
119. Sneed v. Webre, 465 S.W.3d 169, 178 (Tex. 2015).
120. *Id.* (citing *Cates*, 11 S.W. at 849).

corporation.[121] In *Sneed v. Webre*, the Texas Supreme Court addressed the role of the business judgment rule as it applies to a shareholder bringing a derivative suit on behalf of a closely held corporation.[122]

In *Sneed*, a shareholder of Texas United Corporation, a closely held corporation, sued the officers of United Salt Corporation, Texas United's wholly owned subsidiary and also a closely held corporation, both as an individual and derivatively on behalf of Texas United and United Salt.[123] The shareholder, who was also a director of both Texas United and United Salt, alleged that United Salt's officers did not adequately inform the directors of United Salt about the full details of a salt mining and storage facility in Saltville, Virginia, which United Salt agreed to purchase. The petition alleged that these material non-disclosures about potential liabilities and additional costs associated with the purchase "caused United Salt to enter into an unprofitable transaction" that resulted in losses of over $7,000,000 due to United Salt's officers' errors, negligence, and mismanagement.[124] The trial court granted the defendants' pleas to the jurisdiction and motions to dismiss, concluding that the Texas United shareholder lacked standing to sue.[125] The court of appeals reversed, holding that the written shareholder demand requirements do not apply to closely held corporations and that the shareholder had double-derivative standing to sue.[126] The supreme court affirmed the court of appeals' decision.[127]

The supreme court initially took the opportunity to eliminate any confusion about the application of the business judgment rule as a defense on the merits to a claim brought on behalf of a closely held corporation.[128] The supreme court explained that the "business judgment rule continues to apply to the *merits* of a derivative proceeding, whether brought on behalf of a closely held corporation or any other corporation, when a corporation's officers' or directors' actions are being challenged."[129] This, however, is not the case as it applies to the initial requirement that a derivative plaintiff show that the board's refusal to pursue a cause of action belonging to the corporation was outside of their business judgment.[130]

The statutory framework for shareholder derivative actions is found in

121. *Id.* at 178–79 (citing *Cates*, 11 S.W. at 848–49).

122. *Id.* at 173. Under the Texas Business Organizations Code, a closely held corporation is defined as a corporation that has "fewer than 35 shareholders" and "no shares listed on a national securities exchange or regularly quoted in an over-the-counter market by one or more members of a national securities association." TEX. BUS. ORGS. CODE ANN. § 21.563(a) (West 2015).

123. *Sneed*, 465 S.W.3d at 174–75.

124. *Id.* at 175–76.

125. *Id.* at 176.

126. *Id.* at 176–77.

127. *Id.* at 193.

128. *Id.* at 179.

129. *Id* (emphasis added).

130. *Id.* at 187.

§§ 21.551–21.563 of the Texas Business Organizations Code (TBOC).[131] The statutory framework contains a number of requirements that must be met before a shareholder can bring a suit derivatively on behalf of a corporation, including that a demand must initially be made on the board to take appropriate action, that the demand must be subjected to independent and disinterested evaluation, and that the demand may be dismissed if the evaluation determines that the claim is not in the corporation's best interests.[132] The Texas Legislature, however, expressly exempted closely held corporations from these initial demand requirements and procedures.[133] Based on this express exemption, the supreme court concluded that by removing these requirements, "the Legislature gave shareholders of closely held corporations the right to pursue corporate causes of action derivatively without interference from the board of directors."[134] Therefore, to achieve standing to bring a derivative suit, "a shareholder of a closely held corporation is not required to make a demand" on the board or plead and prove that the board's actions were outside of the scope of the business judgment rule prior to asserting the derivative suit.[135]

Finally, the supreme court acknowledged the concept of "double-derivative" standing, which allows a shareholder of a parent entity to maintain a derivative action on behalf of the parent's subsidiary.[136] By doing so, it permitted the Texas United shareholder to assert a derivative claim on behalf of United Salt because he had an "equitable or beneficial ownership interest in Texas United's assets," which included United Salt's shares.[137]

The supreme court's interpretation of the business judgment rule as it applies to closely held corporations appears to be partially crafted as a follow-up to its decision last term in *Ritchie v. Rupe*.[138] In *Ritchie*, the Texas Supreme Court declined to recognize a cause of action for "minority shareholder oppression" in a closely held corporation but recognized

131. TEX. BUS. ORGS. CODE ANN. §§ 402.001, 402.005 (West 2015). These sections were previously codified in Article 5.14 of the Texas Business Corporation Act (TBCA), which expired on January 1, 2010. TEX. BUS. CORP. ACT ANN. art. 5.14 (West Supp. 2002). The supreme court analyzed Article 5.14 in *Sneed* because that was the statute the court of appeals applied and because the parties did not dispute that application. *Sneed*, 465 S.W.3d at 177 n.4. The supreme court, however, noted that the two statutes "are substantially similar and the outcome here would be the same under either statute." *Id.*

132. TEX. BUS. ORGS. CODE ANN. §§ 21.553, 21.554, 21.558.

133. *Id.* § 21.563(b).

134. *Sneed*, 465 S.W.3d at 185.

135. *Id.* at 185–86, 193. In this portion of the opinion, the supreme court also noted in passing that—if justice so requires—TBCA Article 5.14(L) (now TBOC § 21.563(c)) permits a court to treat a derivative proceeding brought by a shareholder of a closely held corporation as a direct proceeding and permit recovery to be paid directly to the plaintiff. *Id.* at 188 (citing TEX. BUS. CORP. ACT ANN. art. 5.14(L) (West Supp. 2002)). The supreme court, however, emphasized without any explanation that "the proceeding still must be derivative" and that "shareholders have no individual or direct claims for injuries to the corporation." *Id.* (citing Wingate v. Hajdik, 795 S.W.2d 717, 719 (Tex. 1990); Massachusetts v. Davis, 168 S.W.2d 216, 221 (Tex. 1942)).

136. *Id.* at 189 (quoting Blasband v. Rales, 971 F.2d 1034, 1043 (3d Cir. 1992)).

137. *Id.* at 193.

138. *See id.* at 187; Ritchie v. Rupe, 443 S.W.3d 856 (Tex. 2014).

that much of the complained-of conduct in such cases could be addressed via claims for breach of fiduciary duty through shareholder derivative action.[139] The *Sneed* decision appears to be crafted in a way that allows shareholders of closely held corporations to obtain redress without completing all the formalities that are normally required when a shareholder sues a corporation.[140]

B. The Texas Supreme Court Clarifies the Definition of an "Investment Contract" Under the Texas Securities Act

Directors and officers should be aware that the Texas Supreme Court recently embraced a broad definition of "investment contract" for liability under the Texas Securities Act (TSA) in *Life Partners, Inc. v. Arnold*.[141] Life Partners bought existing life insurance policies from insured individuals and then sold interests in the policies to others. The transactions are "referred to as life settlements when the insured is elderly [and] viatical settlements when the insured is terminally ill."[142] At issue before the supreme court was whether Life Partners's sale of the life insurance interests to its purchasers is a "security" under the TSA and thus gives rise to possible claims for the sale of unregistered securities and fraud.[143] The supreme court ultimately concluded that the life settlements and viatical settlements constituted "investment contracts" under the TSA, and thus were securities.[144]

Under the TSA, the term security is defined broadly to include "any limited partner interest in a limited partnership, share, stock, treasury, stock, . . . *investment contract*, or any other instrument known as a security, whether similar to those herein referred to or not."[145] In construing the definition of "investment contract," the supreme court consulted decisions by the U.S. Supreme Court and numerous federal and state courts that had previously interpreted and applied the investment contract term.[146] After canvassing prior cases addressing the issue—especially the U.S. Supreme Court's decisions in *S.E.C. v. W.J. Howey Co.*[147] and *United Housing Foundation Inc. v. Forman*[148]—the supreme court distilled three guiding principles.[149]

First, the TSA's definition of security "must be construed broadly to maximize the protection it provides to investors, while focusing on the economic realities of the transaction regardless of any labels or terminol-

139. *Ritchie*, 443 S.W.3d at 878, 887.
140. *See Sneed*, 465 S.W.3d at 193.
141. 464 S.W.3d 660, 662 (Tex. 2015).
142. *Id.* at 663 (internal citations omitted).
143. *Id.* at 662–63.
144. *Id.* at 686.
145. *Id.* at 666 (quoting Tex. Rev. Civ. Stat. Ann. art. 581-4.A (West 2015)).
146. *Id.* at 667.
147. 328 U.S. 293, 298 (1946).
148. 421 U.S. 837, 852 (1975).
149. Life Partners, Inc. v. Arnold, 464 S.W.3d 660, 668–80 (Tex. 2015).

ogy the parties may have used."[150] Second, an investment contract under the TSA is defined as a

> contract, transaction, or scheme through which a person pays money to participate in a common venture or enterprise with the expectation of receiving profits, under circumstances in which the failure or success of the enterprise, and thus the person's realization of the expected profits, is at least predominately due to the *entrepreneurial or managerial*, rather than merely ministerial or clerical, efforts of others.[151]

Finally, the "entrepreneurial or managerial efforts" of others that are relevant to the investment contract analysis "include those that are made prior to the transaction as well as those that are made after."[152] On this last point, the supreme court departed from the D.C. Circuit's analysis in *S.E.C. v. Life Partners, Inc.*, in which the court of appeals concluded that pre-purchase efforts could not, by themselves, suffice to cause the expected profits to "arise predominately from the efforts of others," and therefore, Life Partners' life settlements and viatical settlements were not investment contracts.[153]

In this case, the supreme court determined, after analyzing Life Partners' pre- and post-purchase efforts, that the life settlements and viatical settlements were investment contracts, and thus securities under the TSA.[154] The supreme court's decision to consider both pre- and post-purchase investment efforts certainly expands the definition of investment contract under the TSA and raises questions about the applicability of the TSA and its liability provisions to other types of investment vehicles.

C. The Statute of Limitations Against an Individual Partner Does Not Commence Until Final Judgment Against the Partnership is Entered

Texas recognizes an entity theory of partnership, meaning that "[a] judgment against a partnership is not by itself a judgment against a partner."[155] Nonetheless, a partner is still "jointly and severally liable for all obligations of the partnership."[156] The Texas Business Organizations Code also specifies that a creditor cannot seek to satisfy a judgment against a partner until a judgment is entered against the partnership, and then can do so only if the judgment against the partnership is unsatisfied for ninety days.[157] The statute, however, does not specify an applicable limitations period for suits brought against an individual partner to col-

150. *Id.* at 681.
151. *Id.* (emphasis added).
152. *Id.*
153. S.E.C. v. Life Partners, Inc., 87 F.3d 536, 548 (D.C. Cir. 1996).
154. *Life Partners, Inc.*, 464 S.W.3d at 682–84.
155. Tex. Bus. Orgs. Code Ann. § 152.306(a) (West 2015).
156. *Id.* § 152.304(a).
157. *Id.* § 152.306(b)(2).

lect on a judgment against the partnership.[158]

The Texas Supreme Court took up the limitations issue in *American Star Energy & Minerals Corp. v. Stowers*.[159] In this case, four partners formed a general partnership, S & J Investments, "to invest in and manage . . . oil and gas properties."[160] S & J and American Star Energy entered into an agreement, and American Star Energy later brought suit against S & J for breach of that contract in the early 1990s. After several years of litigation, a verdict, an appeal, reversal, and a second trial, American Star Energy eventually obtained a $227,884.46 judgment against S & J in 2007. After American Star Energy determined that S & J could not satisfy the judgment, it sued S & J's four partners individually in 2010.[161] The trial court and the court of appeals determined that the suit against the individual partners was time-barred because it was brought more than four years after the underlying breach of contract claim against S & J accrued.[162]

The supreme court reversed and held that the limitations period against an individual partner does not commence until the creditor can proceed against the partner: generally, ninety days after judgment is rendered against the partnership.[163] The supreme court relied on the "derivative and contingent nature" of the individual partner's liability and the structure of the statutory scheme such that a "collection action [is] separate from the underlying litigation."[164] The supreme court also analogized the collection action to a claim for indemnity and noted that the U.S. Court of Appeals for the Fifth Circuit[165] had already reached the same conclusion about partner liability.[166] Finally, the supreme court explained that its holding did not disrupt the policy purposes underlying the limitations period—including the opportunity to defend an action while witnesses are still available—because those concerns are addressed by the limitations period applicable to the underlying claims against the partnership.[167] As such, the supreme court's opinion in this case expands the scope and duration of potential liability a partner in a partnership may face for the partnership's judgments.[168]

158. *See* Am. Star Energy & Minerals Corp. v. Stowers, 457 S.W.3d 427, 430 (Tex. 2015).
159. *Id.* at 428.
160. *Id.*
161. *Id.* at 429.
162. *Id.*
163. *Id.* at 431, 435.
164. *Id.* at 431–32.
165. *See* Evanston Ins. Co. v. Dillard Dep't Stores, Inc., 602 F.3d 610, 617 (5th Cir. 2010).
166. *Am. Star Energy & Minerals Corp.*, 457 S.W.3d at 433.
167. *Id.* at 434.
168. *See id.* at 435.

D. Specific Jurisdiction for a Nonresident Corporate Officer for Allegations of Securities Fraud

In *Norstrud v. Cicur*, the Fort Worth Court of Appeals addressed the contours of Texas courts' specific personal jurisdiction for purposes of officer liability in a securities fraud case.[169] Andrew Norstrud, a Florida resident, was the Chief Financial Officer of Amstem Corporation, a Nevada corporation that sold stem cell-based cosmetics that purportedly promoted youthful skin.[170] Norstrud needed to raise $1,000,000 in bridge note financing to continue the company's operations as it sought additional equity financing. Norstrud used Jakobus Jordaan and Stonegate Securities, Inc. to identify Anna and John Cicur as potential bridge investors. Norstrud helped prepare a presentation about Amstem that was presented to the Cicurs in Texas, but Norstrud never personally traveled to the state. The Cicurs invested $1,000,000 in Amstem in exchange for securities and a note, and their investment was secured through stock of Histostem Company, Ltd., which Amstem purported to own through its wholly-owned subsidiary. The agreements documenting the Cicurs' investment were intended to be performed in Texas.[171]

The Cicurs sued Norstrud and other defendants for violations of the Texas Securities Act, breach of fiduciary duty, and fraud, amongst other claims.[172] The Cicurs alleged that Norstrud took their investment and directed the funds to himself, to other companies he controlled, and to other individuals that assisted him in making Amstem appear to be a legitimate company.[173] They also alleged that—contrary to Norstrud's representations—Amstem did not own the Hisostem shares that secured their investment.[174] Norstrud entered a special appearance in the lawsuit, claiming that the trial court lacked personal jurisdiction over him; however, after a hearing, Norstrud's special appearance was denied.[175] The court of appeals affirmed the trial court's denial of the special appearance.[176]

The court of appeals began by reviewing Texas law on specific personal jurisdiction. Texas courts can exercise specific personal jurisdiction over a nonresident defendant if: (1) "the Texas long-arm statute authorizes the exercise of personal jurisdiction"; (2) "the nonresident defendant's contacts with the forum state [are] purposeful"; (3) "the claims in question arise from or relate to the defendant's purposeful contacts with Texas"; and (4) "the exercise of personal jurisdiction over a nonresident defendant [comports] with traditional notions of fair play and substantial jus-

169. Norstrud v. Cicur, No. 02-14-00364-CV, 2015 Tex. App. LEXIS 8563, at *1 (Tex. App.—Fort Worth Aug. 13, 2015, no pet.) (mem. op.).
170. *Id.* at *7.
171. *Id.* at *8.
172. *Id.* at *2.
173. *Id.* at *8–9.
174. *Id.* at *9.
175. *Id.* at *3.
176. *Id.* at *2.

tice."[177] The court of appeals had little trouble finding authorization for personal jurisdiction under the long-arm statute because the Cicurs alleged that Norstrud committed a tort at least partially in Texas.[178]

The court of appeals then addressed more difficult questions about whether Norstrud's contacts were purposeful and whether the Cicurs' claims arose from those purposeful contacts.[179] In analyzing Norstrud's contacts, the court focused on whether Norstrud had minimum contacts with Texas, whether Norstrud "purposefully availed himself of the privilege of conducting [business]" in Texas, and whether Norstrud sought a "financial benefit or profit" through his purposeful availment.[180] Based on the trial court's findings, the court of appeals concluded that Norstrud "purposefully targeted the Cicurs in Texas, directed misinformation to them to secure their investment, and used the money that they had invested in a manner inconsistent with the alleged purpose for soliciting it."[181] The court of appeals was not persuaded by Norstrud's arguments that he did not personally make the alleged misrepresentations to the Cicurs and that he never entered the state.[182] The fact that Jordaan and Stonegate Securities were acting as agents for Amstem and "were utilized by Norstrud to funnel [the misinformation]" was sufficient, and Norstrud's lack of physical presence in Texas was irrelevant considering the purposeful direction of his actions.[183] Based on these facts, there was little doubt that the asserted claims "[arose] from and [were] directly related to Norstrud's purposeful contacts."[184]

The court of appeals also rejected Norstrud's argument that the corporate shield doctrine protected him from personal jurisdiction because his contacts occurred through his position at Amstem and in his corporate officer capacity.[185] The corporate (or fiduciary) shield doctrine does not apply "if the officer engaged in tortious or fraudulent conduct directed at the forum state for which he may be held personally liable" because a corporate officer remains "primarily liable for his own torts."[186] In this case, Norstrud's status as a corporate officer did not shield him from specific jurisdiction because the Cicurs' claims were based on alleged misrep-

177. *Id.* at *18–19.
178. *Id.* at *20–21 (citing TEX. CIV. PRAC. & REM. CODE ANN. § 17.042(2) (West 2015)).
179. *Id.* at *21–22.
180. *Id.* at *22.
181. *Id.* at *23. The court of appeals also specifically noted that several of the agreements the Cicurs entered into stated that the agreement was to be performed in Texas, which demonstrated that the parties planned a long-term relationship with the state. *Id.* at *24.
182. *Id.* at *24–26.
183. *Id.* at *25–26.
184. *Id.* at *26.
185. *Id.* at *28. Under the corporate or fiduciary shield doctrine, an "individual's transaction of business within the state solely as a corporate officer does not create personal jurisdiction over that individual though the state has in personam jurisdiction over the corporation." Stull v. Laplant, 411 S.W.3d 129, 135 (Tex. App.—Dallas 2013, no pet.) (quoting Stuart v. Spademan, 772 F.2d 1185, 1197 (5th Cir. 1985)).
186. *Norstrud*, 2015 Tex. App. LEXIS 8563, at *28.

resentations for which Norstrud could be held personally liable.[187] The court of appeals also noted that the corporate shield doctrine would not apply if Amstem was Norstrud's alter ego, but it did not conduct any alter ego analysis because the personal liability exception already established specific jurisdiction over Norstrud.[188]

Finally, the court of appeals found that the application of specific jurisdiction "comport[ed] with traditional notions of fair play and substantial justice" in this case.[189] The court of appeals concluded that defending a lawsuit in Texas was not an excessive burden for Norstrud because Texas had an interest in adjudicating this matter within its court system and because the Cicurs had an interest in receiving convenient and just relief in the state where they reside.[190] Accordingly, Norstrud's special appearance was properly denied.[191] This opinion demonstrates the willingness of Texas courts to exercise specific personal jurisdiction against a director or officer who makes alleged misrepresentations concerning a security to Texas residents.[192]

E. Court Fails to Find a Joint Venture in Real Estate Partnership

During the Survey period, the Dallas Court of Appeals addressed the application of joint venture status to a real estate "partnership" founded to develop real estate lots.[193] In *Stutz Road, Ltd. Partnership v. Weekley Homes, L.P.*, a residential real estate developer and his company entered into a development agreement with Weekley Homes' sister company, Priority Development.[194] Under the agreement, Priority Development would purchase lots and the developer would perform the work necessary to convert the land into lots ready for building residential homes. Priority would then reimburse the developer for all costs, pay the developer a fixed fee, and pay him a contingent fee based on the revenues from the project. When the housing market crashed in 2007 and 2008, the development stalled and Priority Development never paid any of the contingent fee.[195]

One of the claims asserted by the developer and his entity against Priority Development was for breach of fiduciary duty. Although the developer was not a shareholder of Priority Development, "[p]arties in a joint venture owe a fiduciary duty to one another."[196] The court of appeals listed the requirements for a joint venture: "(1) a community of interest

187. *Id.* at *28–29.
188. *Id.* at *29–31 n.8.
189. *Id.* at *32.
190. *Id.*
191. *Id.*
192. *See id.* at *33.
193. Stutz Road, Ltd. P'ship v. Weekley Homes, L.P., No. 05-13-01-01752-CV, 2015 Tex. App. LEXIS 11440, at *5–6 (Tex. App.—Dallas Nov. 4, 2015, no pet.) (mem. op.).
194. *Id.* at *2–3.
195. *Id.* at *6–8.
196. *Id.* at *26 (citing Bohatch v. Butler & Binion, 977 S.W.2d 543, 550 (Tex. 1998)).

in the venture, (2) an agreement to share profits, (3) an agreement to share losses, and (4) a mutual right of control or management of the enterprise."[197] In this case, while the contingent fee may have given the developer and his company an interest in the venture and a right to share in the profits, there was no agreement that parties share in losses or have a mutual right of control or management.[198] Although this particular joint venture did not give rise to a fiduciary duty, directors and officers, especially of real estate entities, should be mindful of the elements that will give rise to a joint venture and create a corresponding fiduciary duty.[199]

V. CONCLUSION

The cases decided by the courts during the last Survey period address important issues that arise in professional liability claims across all industries—whether against lawyers, healthcare professionals, corporate owners, officers or directors. As Texas courts continue to define the procedural, evidentiary, and legal requirements for professional liability claims, it is important that professionals and those that represent professionals stay attuned to new legal developments. As is clear from the cases discussed in this article, failure to comply with these legal requirements can be detrimental to plaintiffs and defendants alike.

197. *Id.* at *26–27 (citing Ayco Dev. Corp. v. G.E.T. Serv. Co., 616 S.W.2d 184, 186 (Tex. 1981); Smith v. Deneve, 285 S.W.3d 904, 913 (Tex. App.—Dallas 2009, no pet.)).
198. *Id.* at *27.
199. *See id.*