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Professional Liability

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PROFESSIONAL LIABILITY

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I. INTRODUCTION

During the Survey period, there were important decisions issued in professional liability actions of all types. In the medical negligence context, the Texas Supreme Court continued to weigh in on what constitutes a "health care liability claim," and addressed issues related to asserting the medical peer review privilege. In the legal malpractice realm, Texas courts addressed what is required to prove causation and analyzed circumstances under which a corporate shareholder may have standing to sue the corporation's outside attorney. During the Survey period, Texas courts also addressed several important issues related to director and officer liability, including Texas courts' personal jurisdiction over foreign business entities, fiduciary relationships in closely held companies and partnerships, personal liability of corporate officers and directors, and a plaintiff's standing to pursue derivative claims for a representative of a limited partner.

II. MEDICAL MALPRACTICE

A. WHAT EXACTLY IS A "HEALTH CARE LIABILITY CLAIM"?—TEXAS COURTS CONTINUE TO WEIGH IN

The Texas Medical Liability Act, Texas Civil Practice and Remedies Code Chapter 74 (Chapter 74), requires plaintiffs asserting a "health care liability claim" (HCLC) to file an expert report within 120 days after each defendant's original answer or risk dismissal of the case with prejudice.[1] It is therefore crucial for plaintiffs to recognize when their case qualifies as an HCLC under Chapter 74 and requires a preliminary expert report. The Texas courts continued to define the applicability of Chapter 74

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

throughout the last Survey period, with the Texas Supreme Court weighing in to say an autopsy may be a HCLC that requires an expert report.

1. Is an Autopsy Considered "Health Care"? The Texas Supreme Court Says Yes

The Texas Supreme Court reversed a judgment against Christus Health Gulf Coast (Christus), holding that the plaintiff's claim for fraud in connection with the deceased patient's autopsy was a "health care liability claim" under Chapter 74 and was, therefore, subject to a two-year statute of limitations.[2] The plaintiff, Linda Carswell, brought suit against Christus, claiming the hospital committed malpractice in the treatment of her husband, Jerry, who died while being treated at a Christus facility in Houston.[3] Nearly three years after her husband's death and a year and a half after originally filing the lawsuit, Carswell amended her petition to include claims against Christus and its employees for conduct that took place post-mortem.[4] Carswell alleged, among other things, that Christus fraudulently obtained her consent to a private autopsy at a related facility in order to cover up the alleged malpractice.[5] Carswell did not submit any further expert reports related to the post-mortem conduct or her newly-added claims.[6]

Christus moved for summary judgment on the grounds that the post-mortem claims were HCLCs under Chapter 74 and were barred by the two-year statute of limitations.[7] After the trial court denied the motion, the case proceeded to trial.[8] The jury cleared Christus on the malpractice charges, but awarded damages to Carswell on the claim that Christus improperly obtained her consent to a private autopsy.[9] The First Houston Court of Appeals affirmed.[10]

On appeal, the supreme court reversed and rendered judgment in favor of Christus.[11] The supreme court first looked to Chapter 74's definition of "professional or administrative services," which are defined as "those duties or services that a physician or health care provider is required to provide as a condition of maintaining the physician's or health care provider's license, accreditation status, or certification to participate in state or federal health care programs."[12] Because Christus's license could be revoked for failure to comply with its duties related to post-mortem care, the supreme court held Carswell's post-mortem claims were for "profes-

2. Christus Health Gulf Coast v. Carswell, 505 S.W.3d 528, 541–42 (Tex. 2016).
3. *Id.* at 531–32.
4. *Id.* at 532.
5. *Id.* at 534–35.
6. *Id.* at 532.
7. *Id.* at 533.
8. *Id.*
9. *Id.* at 530.
10. *Id.*
11. *Id.* at 542.
12. *Id.* at 534 (quoting TEX. CIV. PRAC. & REM. CODE ANN. § 74.001(a)(24) (West 2015)).

sional or administrative services."[13]

That did not end the analysis, however, because to be considered an HCLC, the services must have had a direct relationship to health care.[14] The supreme court examined the language of the Act and determined that the claims were directly related to health care because Carswell's fraud claim alleged Christus's post-mortem conduct was for the purpose of covering up the insufficient health care provided to Jerry prior to his death.[15] The supreme court distinguished the opinions from lower courts holding that post-mortem claims were not health care liability claims because, in those cases, the plaintiffs were not alleging that the defendants' post-mortem activities were carried out for the purpose of concealing deficient health care prior to the patients' deaths.[16] The supreme court also held that, to be "directly related to health care," the alleged injury does not have to be to a "patient" and need not occur "during or contemporaneously with health care."[17]

Because the claims were health care liability claims, they were subject to Chapter 74's two-year statute of limitations.[18] The supreme court rejected the argument that Carswell's Third Amended Petition related back to her Original Petition.[19] New claims will relate back unless they are "wholly based on a new, distinct, or different transaction or occurrence."[20] The supreme court analyzed Carswell's claims and determined that the facts underlying the post-mortem claims were based on separate and distinct transactions or occurrences than the facts underlying the malpractice claims.[21] As such, Carswell did not timely file her post-mortem fraud claim and the supreme court reversed and rendered judgment for Christus.[22]

2. Slip and Fall Slip Up—The Saga Continues

In the last Survey publication, we reported on three slip and fall cases in which the Texas Supreme Court and an appellate court concluded a slip and fall was not an HCLC subject to the expert report and other requirements of Civil Practice & Remedies Code Chapter 74 just because the accident occurred in a medical facility. However, in *Phillips v. Jones*, the Dallas Court of Appeals held that slipping off the step of an examining room table is considered an HCLC that requires the plaintiff to serve a preliminary expert report.[23]

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13. *Id.* at 535.
14. *Id.*
15. *Id.* at 536.
16. *Id.* at 536–37.
17. *Id.* at 535.
18. *Id.* at 537.
19. *Id.* at 539.
20. *Id.* at 537 (quoting TEX. CIV. PRAC. & REM. CODE ANN. § 16.068 (West 2015)).
21. *Id.* at 538.
22. *Id.* at 539, 541–42.
23. Phillips v. Jones, No. 05-15-00005-CV, 2016 Tex. App. LEXIS 162, at *8 (Tex. App.— Dallas Jan. 7, 2016, no pet.) (mem. op.).

Plaintiff Velda Phillips sued Dr. Ryan Jones for injuries she sustained after she slipped off the step of the examination table once her medical exam was finished and Dr. Jones had left the room.[24] The plaintiff framed her case as a premises liability claim and did not serve the Chapter 74 expert report required for HCLCs.[25] She argued her claim was not subject to Chapter 74 because it was not based on medical care provided by Dr. Jones and was not "based upon any departure from accepted standards of medical care directly related to healthcare," as required under the definitions in Chapter 74.[26] The court of appeals disagreed, stating that the critical issue is whether the claim invokes the duties the defendant owes as a health care provider, which include its obligation to ensure patient safety.[27] The court of appeals looked to the seven factors articulated by the Texas Supreme Court in *Ross v. St. Luke's Episcopal Hospital*, and explained that the examination room where the fall occurred is not an area accessible to the public.[28] The court of appeals noted that "[t]he physician uses the examination room to examine patients who have sought the physician's medical services," and the examination table is "an instrumentality" important to the medical services the physician provides in the examination room.[29]

The court of appeals distinguished recent cases, including the ones reported on in our last Survey publication, in which the accidents took place in hospital elevators, parking lots, and lobbies, and were held not to have a "substantive nexus" with the delivery of health care.[30] Because plaintiff's claims were HCLCs, the court of appeals affirmed the trial court's dismissal of plaintiff's claims since she failed to timely tender an expert report as required under Chapter 74.[31]

B. Medical Peer Review Privilege

Texas law has several privileges that apply in the healthcare context. One of these privileges, codified in Section 160.007 of the Texas Occupations Code, makes medical peer review proceedings and records confidential in order to promote candid and open communications regarding a physician's competency and improve the standard of medical care provided to patients.[32] During the last Survey period, Texas courts addressed the applicability of the medical peer review privilege and the procedure for asserting and proving the privilege.

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24. *Id.* at *1.
25. *Id.* at *1–2.
26. *Id.* at *2–3.
27. *Id.* at *4.
28. *d.* at *4–6 (citing Ross v. St. Luke's Episcopal Hosp., 462 S.W.3d 496, 505 (Tex. 2015)).
29. *Id.* at *6.
30. *Id.* at *7–8.
31. *Id.* at *8.
32. *See* Tex. Occ. Code Ann. § 160.007(a) (West 2012).

1. Proving the Applicability of Privilege—Courts Must Examine Documents In Camera

The Texas Supreme Court granted mandamus relief to Christus Santa Rosa Health System (Christus) in *In re Christus Santa Rosa Health System* on the applicability of the medical peer review committee privilege and ordered the trial court to perform an in camera inspection to determine whether an exception to the privilege applied.[33] The supreme court held the trial court abused its discretion when it ordered Christus to produce records without first adequately reviewing the documents in camera.[34]

Plaintiff Leslie Baird filed a lawsuit against Dr. Franklin and Christus after a thyroid surgery performed by Dr. Franklin was unsuccessful and a second surgery was necessary.[35] After the first surgery was unsuccessful, Christus's medical peer review committee reviewed Dr. Franklin's conduct and concluded that no disciplinary or other action was required.[36] In the course of discovery in Baird's lawsuit, Dr. Franklin sought documents from the hospital's medical peer review file, but Christus served its objections and asserted the medical peer review privilege.[37] Dr. Franklin then moved to compel Christus to produce the documents, so Christus submitted its privilege log and the documents for an in camera inspection by the trial court.[38]

The supreme court laid out the procedure for establishing and challenging privilege.[39] The party claiming the privilege must first establish a prima facie case for privilege through testimony or an affidavit.[40] Once the prima facie case for privilege is established, the party asserting the privilege submits the documents to the trial court for inspection of the documents.[41] Then, the party requesting production has the burden to prove the application of an exception to the privilege.[42]

In this case, Christus and Dr. Franklin did not dispute that the medical peer review committee privilege applied to the records sought, but disagreed about whether disclosure was required under the exception to that privilege under Section 160.007(d).[43] Section 160.007(d) requires that a written copy of the committee's recommendation, final decision, and reason for the decision be disclosed to the physician if the committee "takes action that could result in censure, suspension, restriction, limitation, rev-

33. *In re* Christus Santa Rosa Health Sys., 492 S.W.3d 276, 278 (Tex. 2016) (orig. proceeding).
34. *Id.*
35. *Id.*
36. *Id.*
37. *Id.*
38. *Id.*
39. *Id.* at 279–80.
40. *Id.* at 279.
41. *Id.*
42. *Id.* at 279–80.
43. *Id.* at 281.

ocation, or denial" of the physician's privileges at the hospital.[44] The supreme court clarified the exception and held that, for the exception to apply, the peer review committee has to do more than merely convene to review the physician's actions—they must take some action that could have resulted in discipline.[45] Otherwise, the "take action" language in Section 160.007(d) would be rendered meaningless because disclosure would be required each time the committee conducted a peer review, regardless of the result, which would undermine the very purpose of the medical peer review committee privilege—confidentiality to encourage open discussion of a physician's competency.[46]

Based on the record before it, the supreme court could not determine whether any action by Christus's medical peer review committee might have resulted in some sort of discipline against Dr. Franklin.[47] The trial court abused its discretion when it failed to review the documents submitted for in camera inspection, which was integral to determining whether the documents were protected by the medical peer review privilege.[48] As a result, the supreme court vacated the order for Christus to produce the documents and directed the trial court to conduct an in camera review of the documents and the evidence to determine if the exception in Section 160.007(d) applied.[49]

2. Medical Peer Review Privilege is Not Easily Waived

The Dallas Court of Appeals also weighed in on the medical peer review privilege during the last Survey period to emphasize the strength of the privilege.[50] Rockwall Regional Hospital is a physician-owned hospital.[51] When Dr. Ciarochi, a shareholder who was also an anesthesiologist at the hospital, terminated his practice at Rockwall Regional, the hospital sought to redeem his ownership shares.[52] Dr. Ciarochi sued, claiming another recently-departed physician had been offered better compensation for his shares.[53]

In discovery, Dr. Ciarochi requested documents that encompassed the peer review and credentialing files for both himself and the other recently-departed physician.[54] Rockwall Regional resisted, asserting the medical peer review committee privilege under Texas Occupations Code Section 160.007(a).[55] The medical peer review privilege covers a peer re-

44. *Id.* (citing TEX. OCC. CODE ANN. § 160.007(d) (West 2012)).
45. *Id.* at 282–83.
46. *Id.* at 283–84.
47. *Id.* at 285.
48. *Id.* at 286.
49. *Id.* at 287.
50. *See In re* Rockwall Reg'l Hosp., LLC, No. 05-15-01554-CV, 2016 Tex. App. LEXIS 2177 (Tex. App.—Dallas Mar. 2, 2016, orig. proceeding) (mem. op.).
51. *Id.* at *2.
52. *Id.*
53. *Id.* at *2–3.
54. *Id.* at *3.
55. *Id.*

view committee's credentialing and review of physicians, including confidential documents created by the committee or prepared at its direction, its recommendations and minutes, and committee inquiries about a physician and responses to those inquiries.[56] The trial court reviewed in camera the documents in question and ordered the hospital to produce almost all of the documents it claimed were privileged.[57] The hospital turned over four pages of the contested documents, but sought mandamus relief with respect to production of the remaining documents, submitting a sealed record with the disputed documents for review by the court of appeals.[58]

The court of appeals reviewed the "sealed record" of contested documents and declared them all to be covered by the medical peer review committee privilege.[59] Dr. Ciarochi, however, argued that the hospital had waived the privilege by allowing him to view, but not copy, his own credentialing file (part of the disputed documents), pursuant to a letter from Rockwall Regional's attorney, and by producing four pages of the other doctor's file.[60] The court of appeals rejected these arguments.[61] Just as the trial court had concluded, the hospital agreed the four pages from the other physician's peer review and credentialing file were not covered by the medical peer review privilege.[62] Therefore, the production of those four pages could not constitute waiver as to other documents that were privileged.[63] More significantly, the court of appeals held that allowing the plaintiff-doctor to view his own file, even though authorized in writing by the hospital's attorney, did not waive the privilege.[64] Section 160.007(e) only allows for a waiver of the privilege if the waiver is "executed in writing . . . by the chair, vice chair, or secretary of the affected medical peer review committee[,]" which was not shown here.[65] Although the hospital's voluntary disclosure of the doctor's records likely would have waived other privileges such as the attorney-client or work product privileges, it did not meet the strict requirements set forth in the statute for waiver of the medical peer review committee privilege.[66]

III. LEGAL MALPRACTICE

A. Causation in Legal Malpractice Claims

Texas courts have constantly wrangled with the necessary proof of causation required in legal malpractice claims. During this Survey period, a

56. Tex. Occ. Code Ann. § 160.007(a) (West 2015).
57. *In re Rockwall Reg'l Hosp.*, 2016 Tex. App. LEXIS 2177, at *4.
58. *Id.* at *4–5.
59. *Id.* at *9–10.
60. *Id.* at *3, *10–12.
61. *Id.* at *10–13.
62. *Id.* at *13.
63. *Id.*
64. *Id.* at *10–11.
65. *Id.* at *10 (quoting Tex. Occ. Code Ann. § 160.007(e) (West 2015)).
66. *Id.* at *11–12.

number of cases were decided where courts weighed in on this issue. While these cases reiterate that basic causation standards applicable in all cases still guide the analysis in legal malpractice claims, courts have highlighted that causation analysis is important in ensuring that lawyers are held responsible only for the harm they actually cause, not harm caused by judicial error or speculative harm. The cases discussed below reinforce that parties bringing claims against their lawyers should carefully analyze their causation theory and ensure that they have non-speculative evidence to fully support that theory if they hope to prevail.

1. Chain of Causation in a Legal Malpractice Claim May Be Broken by Judicial Error

During this Survey period, the Texas Supreme Court was confronted with the question of whether the causal chain is broken when a lawyer makes a strategic error, but a subsequent error by the trial judge requires a costly appeal.[67] The supreme court analyzed this issue by looking at well-settled principles of causation and held that judicial error, to which the lawyer did not contribute, breaks the causal chain.[68] In such a situation, the lawyer cannot be held liable under a legal malpractice theory for the costs of an appeal to correct that error.[69]

This case stems from a usury case filed by Buck Glove Company (Buck) against Jon and Barbara Neubaum (the Neubaums).[70] The Neubaums' answer asserted the affirmative defenses of "usury cure and *bona fide* error," but those were not pursued at trial as the Neubaums' counsel focused on Buck's case in chief, arguing that the Neubaums' alleged agent who actually made the loans in question was not, in fact, acting as the Neubaums' agent.[71] Before trial, the Neubaums' counsel argued there was no evidence to support an agency claim and objected to a jury instruction on actual or apparent authority.[72] This objection was overruled and the jury found against the Neubaums on the usury claim.[73] After the Neubaums' trial counsel moved for a new trial or reformation of the judgment, which was denied, the "Neubaums hired new counsel to appeal the adverse usury judgment."[74] The court of appeals reversed, holding that there was not sufficient evidence to prove the essential element of agency to support the jury's verdict in the trial court.[75]

After winning their appeal, the Neubaums filed a malpractice suit against their trial counsel, claiming negligent representation led to the necessity of their appeal and the costs incurred therewith.[76] Specifically,

67. Stanfield v. Neubaum, 494 S.W.3d 90, 93 (Tex. 2016).
68. *Id.* at 104.
69. *Id.*
70. *Id.* at 94.
71. *Id.*
72. *Id.*
73. *Id.*
74. *Id.* at 94–95.
75. *Id.* at 95.
76. *Id.*

the Neubaums claimed their trial counsel was negligent by not presenting evidence to support the affirmative defenses of usury cure and bona fide error and failing to request a jury instruction regarding these defenses, and that if their trial counsel had taken these actions, the trial court's erroneous ruling on agency would have been mooted and the Neubaums would have avoided the cost of the subsequent appeal.[77] In response, the Neubaums' trial counsel moved for summary judgment, arguing that their trial strategy focusing on Buck's case in chief was conclusively proven to be correct by the court of appeals' ruling regarding agency and that, absent the trial court's error, no appeal would have been required.[78] The trial court granted counsel's motion for summary judgment in the malpractice case.[79] The Neubaums appealed, and the court of appeals reversed and remanded as to the claim of negligent representation.[80]

The court of appeals' ruling on the claim of negligent representation was then appealed to the supreme court, where the key issue was "whether judicial error constitutes a superseding cause of the Neubaums' injuries in the absence of evidence the Attorneys contributed to the error."[81] Focusing on traditional proximate cause principles, the supreme court honed in on the fact that, in certain circumstances, a "new and independent cause" can disrupt the causal link between the plaintiff's injury and the defendant's negligence.[82]

First and foremost among the factors that must be considered in determining whether a new and independent cause has broken the causal connection is the reasonable foreseeability of the new and independent cause.[83] After noting that the fact that a judge might err is always foreseeable as a theoretical matter, the supreme court explained that "it is not typically foreseeable on what issues a judge will err [or not]."[84] When looking at judicial error, the inquiry should focus on "whether the trial court's error is a reasonably foreseeable result of the attorney's negligence in light of all existing circumstances."[85]

In this instance, the appeal and the costs thereof were undeniably the result of the trial court's erroneous rulings on agency.[86] When the Neubaums' trial counsel made their strategic decisions, they were "neither negligent nor incorrect" in arguing the agency issues.[87] Had the trial court ruled correctly on that legal issue, regardless of any other strategic decisions by the Neubaums' trial counsel, there would have been no

77. *Id.*
78. *Id.*
79. *Id.*
80. *Id.* at 95–96.
81. *Id.* at 96.
82. *See id.* at 97–98.
83. *Id.* at 98.
84. *Id.* at 99–100.
85. *Id.* at 100 (emphasis omitted).
86. *See id.* at 102–04.
87. *Id.* at 103.

need for an appeal.[88]

While it was previously unclear, with this ruling, the supreme court has definitively stated that an attorney's error or negligence may be causally superseded by judicial error. Attorneys are not required to guarantee an "error-free trial" and should only be liable for injury that they cause.[89] When judicial error occurs and an attorney did not contribute to or cause the error, the attorney is not to be held responsible to the client as a result thereof. This should cause legal malpractice plaintiffs to pause before filing and ensure that their attorney, and not an adverse judicial error, caused the damages of which they complain.

2. Causation Theory in Support of Legal Malpractice Claim Cannot Depend on Speculation Regarding How Third Parties Would Have Reacted Under Hypothetical Circumstances

Also during the Survey period, the Dallas Court of Appeals heard an appeal from a take-nothing judgment in favor of Baker Botts, L.L.P. (Baker Botts), who was sued by its former patent client, Axcess International, Inc. (Axcess).[90] The appeal presented the question of whether Axcess's expert testimony on causation was legally sufficient.[91]

Axcess sued its former patent counsel, Baker Botts, alleging Baker Botts was representing Axcess's primary competitor in patenting technology arguably similar to Axcess's active-radio-frequency identification (RFID) technology for which Baker Botts was prosecuting Axcess's patent applications.[92] Axcess alleged causes of action for breach of fiduciary duty, negligence, and failure to disclose material information.[93] In support of its claims, Axcess hired an expert to provide causation testimony who testified: (1) Axcess would have hired other counsel had they known Baker Botts was working for Axcess's competitor; and (2) absent being represented by conflicted counsel, Axcess could have taken action to file an interference proceeding with the United States Patent and Trademark Office (USPTO) and amended its existing patent applications.[94] In addition, the expert testified that if such actions had been taken, Axcess would have been better positioned to negotiate with its competitor, and the parties would have reached a business solution.[95]

On appeal, Baker Botts challenged Axcess's claims on a number of grounds, but the court of appeals' opinion focused on Baker Botts's attack on Axcess's proof of causation—specifically the sufficiency of the

88. *Id.* at 103–04.
89. *Id.* at 104.
90. Axcess Int'l, Inc. v. Baker Botts, L.L.P., No. 05-14-01151-CV, 2016 Tex. App. LEXIS 3081, at *1 (Tex. App.—Dallas Mar. 24, 2016, pet. denied) (mem. op.).
91. *Id.* at *2.
92. *Id.* at *1–8.
93. *Id.* at *8.
94. *Id.* at *12–13.
95. *Id.* at *13.

expert testimony.[96] The court of appeals confronted the expert's testimony and found it to be rank speculation based primarily on how third parties (the USPTO and Axcess's competitor) would have behaved in hypothetical situations.[97] The court of appeals further highlighted that, beyond the expert's speculative testimony, Axcess had not presented any evidence of the success of similar interference claims in the USPTO or evidence to support how a competitor would have responded under different circumstances.[98] In light of this, the causation testimony was held legally insufficient and the court of appeals affirmed the take-nothing judgment.[99]

The court of appeals emphasized that proof of causation cannot be merely theoretical or speculative—actual proof is required.[100] While malpractice claims often involve claims that, absent the negligence or breach of fiduciary duty by an attorney, a plaintiff would have taken different actions leading to different results, plaintiffs must give actual evidence of that. Suggestions or theories, even by an expert, do not prove how third parties would behave in hypothetical situations.[101] If plaintiffs want to argue about what could have been, the court of appeals made sure that plaintiffs know that they must be prepared to provide non-speculative evidence that what could have been actually would have been the case absent the alleged negligence or breach of fiduciary duty by the attorney.[102]

B. Shareholder May Have Individual Standing to Bring Malpractice Claim Against Company's Lawyers

Lawyers often do their best to define who their client is. Lawyers regularly make a point to delineate when they represent a company as opposed to its employees or shareholders. The Texas Supreme Court was recently presented with the question of whether "an individual beneficiary of a self-directed retirement account managed by a corporate trustee[ ] had standing to sue [attorneys] for legal malpractice based on advice [given to him] regarding a loan from the retirement account to a third party" of which he was a shareholder the attorneys represented.[103] In holding that the individual shareholder had standing to sue, the supreme court reminds every lawyer to be cautious who they are actually advising and the potential ramifications of such advice.

Chris Linegar (Linegar) was an Australian businessman. He owned a limited liability company that, through a number of divisions and mergers, became a part of IdentiPHI, Inc. (IdentiPHI), in which he was a ma-

96. *Id.* at *2, *11–18.
97. *See id.* at *13–14, *16–21.
98. *Id.*
99. *Id.* at *21.
100. *Id.* at *12.
101. *See id.* at *13–14.
102. *See id.*
103. Linegar v. DLA Piper LLP, 495 S.W.3d 276, 277 (Tex. 2016).

jor stockholder.[104] DLA Piper was IdentiPHI's corporate counsel. Linegar caused Zaychan PTY, Ltd. (Zaychan), the corporate trustee of his and his wife's Australian self-managed retirement trust, to lend $1.67 million to IdentiPHI.[105] As IdentiPHI's corporate counsel, DLA Piper advised IdentiPHI in the loan transaction and also worked with Linegar directly.[106] To complete the loan transaction, IdentiPHI signed a promissory note that granted Zaychan a security interest in all assets of IdentiPHI.[107] The note was due on June 29, 2008—which was important to ensure compliance with Australian law governing self-managed retirement accounts.[108]

At some point it became clear that IdentiPHI would default on the loan.[109] Linegar then found out that Zaychan's security interest was not perfected.[110] Linegar, in an attempt to remain in compliance with Australian law governing self-managed retirement accounts, mortgaged his home and used the proceeds to return the balance of the loan to his retirement account.[111] A few months later, IdentiPHI filed for bankruptcy.[112] In bankruptcy, the note yielded only $150,000 of the loan.[113]

Linegar sued DLA Piper.[114] Linegar alleged that he was advised individually with regard to the loan and that that advice included an assurance that the security interest would be perfected.[115] The jury found in favor of Linegar and awarded damages of $1,293,606.00.[116] DLA Piper appealed, raising a number of issues, but after finding that Linegar lacked standing, the Eastland Court of Appeals declined to address any of the other issues.[117] The court of appeals premised its no-standing holding on the fact that Zachyan, not Linegar, held the note, that Linegar's use of personal funds to restore the balance of the trust did not give him standing, and that Linegar did not have standing as a beneficiary of the trust.[118] This ruling was then appealed to the supreme court.

The supreme court reviewed existing case law on standing and noted while the general rule is that "a corporate stockholder cannot recover damages personally for a wrong done solely to the corporation, even though he may be injured by that wrong," a stockholder may nonetheless recover under a personal cause of action regarding a duty owed directly

104. *Id.*
105. *Id.*
106. *Id.*
107. *Id.*
108. *Id.*
109. *Id.*
110. *Id.*
111. *Id.*
112. *Id.* at 278.
113. *Id.*
114. *Id.* While other entities sued as well, only Linegar's individual claims were ultimately tried to a jury and are at issue in this appeal.
115. *Id.*
116. *Id.*
117. *Id.*
118. *Id.*

to the stockholder.[119] Linegar claimed that DLA Piper improperly advised him in his individual capacity, not in his capacity as a shareholder or a trustee, and a jury found in his favor.[120] Despite DLA Piper's arguments that corporation-shareholder standing and trustee-beneficiary standing rules must apply in this case, the supreme court noted that Linegar pleaded this as an individual claim and it was tried and submitted to the jury as an individual claim.[121] In light of this and the fact that, given the circumstances, any loss would have fallen on Linegar, the supreme court had no problem reversing the court of appeals decision on standing and remanding for consideration of other issues not reached.[122]

While the facts of *Linegar* are unique and the relationships between Linegar, his trust, and IdentiPHI may seem convoluted and to have complicated the case, the supreme court's ruling highlights the potential for liability of lawyers to shareholders of a company the lawyers represent. It is always of utmost importance for lawyers to define who the client is, not only in an engagement letter, but also throughout communications with shareholders and other individuals. *Linegar* also provides a warning to lawyers to avoid making statements that would lead a shareholder to believe, and ultimately a jury to conclude, that the lawyer has advised that shareholder individually when that is beyond the scope of the lawyer's engagement. It is important to remember that the mere fact that the company engaged the lawyer will not shield the lawyer from suits by individual shareholders with whom the lawyer interacts in all circumstances and all transactions.

IV. DIRECTOR AND OFFICER LIABILITY

During the Survey period, Texas courts addressed several issues, including Texas courts' personal jurisdiction over foreign business entities, fiduciary relationships in closely held companies and partnerships, individual director and officer liability pursuant to two different statutes, and a plaintiff's standing to pursue derivative claims for a representative of a limited partner. Of particular import were two decisions from the Texas Supreme Court articulating in what situations a Texas court may or may not have personal jurisdiction over a foreign business entity, and two courts of appeals decisions narrowly interpreting statutes that permit personal liability on corporate officers and directors.

A. The Texas Supreme Court Issues Two Opinions on Personal Jurisdiction of Foreign Business Entities

On June 17, 2016, the Texas Supreme Court issued two opinions addressing the issue of Texas courts' personal jurisdiction over foreign business entities and their directors and officers. In *Searcy v. Parex Resources,*

119. *Id.* at 279 (quoting Wingate v. Hajdik, 795 S.W.2d 717, 719 (Tex. 1990)).
120. *Id.* at 281–82.
121. *Id.* at 279–82.
122. *See id.* at 281–82.

Inc., the supreme court held that a Texas court did not have personal jurisdiction, general or specific, over a Canadian corporation (Parex Resources) that purchased the shares of a Bermudian company (Ramshorn), which owned assets in Colombia, from another Bermudian company (Nabors).[123] Nabors had operations in Texas and previously entered into a share purchase agreement with a Texas limited liability company (ERG) for the Ramshorn shares.[124] When the deal between Nabors and ERG failed, Nabors contracted with Parex Resources, the Canadian corporation, for the sale of Ramshorn.[125] ERG later sued Parex Resources, amongst other parties, in Texas state court for tortious interference.[126] Parex Resources filed a special appearance, and the trial court concluded that it had personal jurisdiction over Parex Resources.[127] The court of appeals, however, reversed, concluding that the trial court did not have personal jurisdiction over Parex Resources, and ERG appealed to the supreme court.[128]

The supreme court began by reviewing Texas law on personal jurisdiction. Texas courts can exercise personal jurisdiction over a defendant if: "(1) the Texas long arm statute [grants] jurisdiction; and (2) the exercise of jurisdiction [comports] with federal and state constitutional guarantees of due process."[129] The exercise of jurisdiction by a Texas court comports with due process guarantees if the defendant has minimum contacts with Texas and if the assertion of personal jurisdiction does not "offend traditional notions of fair play and substantial justice."[130] "[S]ufficient minimum contacts exist when the nonresident defendant 'purposefully avails itself of the privilege of conducting activities within the forum [s]tate, thus invoking the benefits and protections of its laws.'"[131] General personal jurisdiction exists where the defendant's contacts within Texas "are so continuous and systematic as to render it *essentially at home*" in Texas.[132] In contrast, specific personal jurisdiction "exists when the plaintiff's claims 'arise out of' or are 'related to' the defendant's contact with the forum" state.[133]

In *Searcy*, the supreme court easily concluded that the trial court did not have general personal jurisdiction over the Canadian corporation because Parex Resources did not have any "bank accounts, offices, property, employees, or agents in Texas."[134] The more difficult question was

123. Searcy v. Parex Res., Inc. 496 S.W.3d 58, 62–63, 79 (Tex. 2016).
124. *Id.* at 63.
125. *Id.* at 64–65.
126. *Id.* at 65.
127. *Id.* at 65–66.
128. *Id.* at 66.
129. *Id.*
130. *Id.* (citing Int'l Shoe Co. v. State of Wash., Office of Unemployment Comp. & Placement, 326 U.S. 310, 316 (1945)).
131. *Id.* at 67 (quoting Hanson v. Denckla, 357 U.S. 235, 253 (1958)).
132. *Id.* at 72 (quoting Daimler AG v. Bauman, 134 S. Ct. 746, 761 (2014)).
133. *Id.* at 67 (quoting Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 414 (1984)).
134. *Id.* at 73.

whether specific personal jurisdiction existed. The supreme court explained that Parex Resources was not intending to operate in Texas or benefit from the Texas economy, but was seeking Colombian assets.[135] The fact that Nabors and ERG operated in Texas was not sufficient for asserting specific personal jurisdiction.[136] Even though Parex Resources directed "voluminous" electronic communications to Nabors' employees located in Texas, those contacts were not purposeful availment of the Texas forum, but were merely a coincidence of Nabors' employees' location.[137]

In contrast, in *Cornerstone Healthcare Group Holding, Inc. v. Nautic Management VI, L.P.*, the Texas Supreme Court held that a Texas court had specific personal jurisdiction over three private-equity funds and their general partner, all of which were Delaware limited partnerships.[138] Several executives from Cornerstone Healthcare Group Holding, Inc. (Cornerstone), a company that operates hospitals in Texas and various other states, contacted the three private-equity funds about purchasing a chain of Texas hospitals from Reliant Hospital Partners, LLC (Reliant).[139] After the deal was completed, the executives resigned their positions with Cornerstone and joined the new entity the private-equity funds purchased, which had purchased the hospitals from Reliant.[140] Cornerstone then sued the executives, the private-equity funds, and their general partner, alleging that the private-equity funds and their general partner committed tortious interference and that they "conspired with and assisted the executives in their tortious conduct."[141] The private-equity funds and their general partner filed a special appearance.[142] The trial court concluded it had personal jurisdiction over the private-equity funds but not the general partner, and the Dallas Court of Appeals affirmed in part and reversed in part, holding that the Texas court did not have personal jurisdiction over any of the four entities.[143]

The supreme court reversed, concluding that the trial court had specific personal jurisdiction over the private-equity funds and their general partner.[144] The supreme court concluded that the funds and the general partner established minimum contacts with Texas because they "targeted Texas assets in which to invest and sought to profit from that investment."[145] Similarly, specific personal jurisdiction over the private-equity funds and their general partner comported with traditional notions of fair

135. *Id.* at 74.
136. *Id.* at 73–74.
137. *Id.* at 74–76.
138. Cornerstone Healthcare Grp. Holding, Inc. v. Nautic Mgmt. VI, L.P., 493 S.W.3d 65, 67 (Tex. 2016).
139. *Id.* at 67–68.
140. *Id.* at 69.
141. *Id.*
142. *Id.*
143. *Id.* at 70.
144. *Id.* at 74.
145. *Id.* at 73.

play and substantial justice because any burden to them was outweighed by Texas's interest in a dispute alleging a "usurpation of a corporate opportunity in Texas involving Texas assets."[146]

As *Searcy* and *Cornerstone Healthcare Group Holding, Inc.* demonstrate, a Texas court is likely to have personal jurisdiction over a foreign entity and its executives when the foreign entity is seeking to purchase Texas assets and benefit from the Texas economy, but may not have personal jurisdiction when the foreign entity is seeking foreign assets and the contacts with Texas are merely fortuitous.

B. Fiduciary Relationships in Closely Held Companies and Partnerships

In 2014, in *Ritchie v. Rupe*, the Texas Supreme Court notably declined to recognize a cause of action for "minority shareholder oppression" in a closely held corporation, and in doing so, reversed the Dallas Court of Appeals' judgment that affirmed the jury's finding of oppressive conduct on the minority shareholder's oppression claim.[147] The supreme court, however, remanded the case to the court of appeals to determine whether the plaintiff minority shareholder could recover on her breach of fiduciary claims against the directors of the closely held corporation.[148] On remand, the court of appeals determined that she could not because no informal fiduciary relationship between the directors and minority shareholder existed.[149]

The court of appeals explained that informal fiduciary relationships only arise in a business transaction if a "special relationship of trust and confidence existed prior to, and apart from, the transaction(s) at issue . . . ."[150] In other words, there must be proof that because of the special relationship of trust and confidence the plaintiff "is in fact accustomed to be guided by the judgment or advice" of the party owing the fiduciary duty.[151] In *Ritchie*, there was insufficient evidence to demonstrate the existence of an informal fiduciary relationship.[152] The family relationship between the parties and the minority shareholder's mere hope that one of the directors would explain the operations of the business entity to her were insufficient to create the informal fiduciary relationship.[153]

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146. *Id.* at 74.
147. Ritchie v. Rupe, 443 S.W.3d 856, 860, 891 (Tex. 2014).
148. *Id.* at 892.
149. Ritchie v. Rupe, No. 05-08-00615-CV, 2016 Tex. App. LEXIS 276, at *2 (Tex. App.—Dallas Jan. 12, 2016, pet. denied) (mem. op.). The minority shareholder's breach of "fiduciary duty claim [was] not based on the formal fiduciary duties that officers and directors owe to the corporation," but on an informal fiduciary duty they allegedly owed directly to the minority shareholder. *Ritchie*, 443 S.W.3d at 891–92.
150. *Ritchie*, 2016 Tex. App. LEXIS 276, at *9 (quoting Associated Indem. Corp. v. CAT Contracting, Inc., 964 S.W.2d 276, 288 (Tex. 1998)).
151. *Id.* at *11 (quoting Gregan v. Kelly, 355 S.W.3d 223, 228 (Tex. App.—Houston [1st Dist.] 2011, no pet.)).
152. *Id.* at *2.
153. *Id.* at *13–14.

Along the same lines, in *Rainier Income Fund I, Ltd. v. Gans*, the Dallas Court of Appeals determined that a president/owner of a general or limited partner in a partnership does not owe a fiduciary duty to the other limited partners in the partnership.[154] In that case, the parties formed two partnerships, R–75 L.P. and R–75 II L.P., for the purpose of developing and leasing two commercial properties in Allen, Texas.[155] Star Creek Construction GP, Inc. was the general partner of both partnerships, and FNS Holdings, L.P., Rainier Income Fund I, Ltd., and Rainier Income & Growth Fund II, Ltd. were the limited partners.[156] Gans was the president of Star Creek Construction GP, Inc. and the co-owner of FNS Holdings, L.P., and he signed personal guaranties in relation to both projects.[157] When "the project [was] not commercially successful" and "Gans refused to pay" on the guaranties, the two Rainier Income Funds (the limited partners) sued Gans for breach of the guaranty agreements and breach of fiduciary duty.[158] A special judge, appointed pursuant to Chapter 151 of the Texas Civil Practice and Remedies Code, determined that Gans owed no fiduciary duty to either of the Rainier Income Funds.[159] The trial court adopted the special judge's conclusion, and the Rainier Income Funds appealed.[160] The court of appeals determined that Gans, as an officer of the general partner and as co-owner of one of the limited partners, did not owe a fiduciary duty to the partnership; that fiduciary duty was owed by the partners themselves (i.e., the general partner, Star Creek Construction GP, Inc.).[161]

Importantly, the court of appeals explained that the plaintiffs did not allege that the corporate identity of Star Creek Construction GP, Inc. should have been disregarded or that there was an informal fiduciary relationship between the Rainier Income Funds and Gans.[162] Therefore, because there was no fiduciary relationship, the Rainier Income Funds could not prevail on their breach of fiduciary duty claim.[163] The *Ritchie* and *Gans* cases reinforce the principle that courts will closely analyze the existence of formal and informal fiduciary duties owed directly to the shareholders of corporations or partners of partnerships, as opposed to the traditional fiduciary duties the directors and officers owe to the entities themselves.

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154. Rainier Income Fund I, Ltd. v. Gans, 501 S.W.3d 617, 624 (Tex. App.—Dallas 2016, pet. denied).

155. *Id.* at 619.

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.* at 620.

160. *Id.*

161. *See id.* at 624.

162. *Id.* The court of appeals also concluded that Gans's obligation to pay under the guaranties was contingent on certain events that did not occur, and thus held that the Rainier Income Funds similarly take nothing on their breach of guaranty claim as well. *Id.* at 624–26.

163. *Id.* at 624.

C. Individual Liability of Corporate Officers and Directors Pursuant to Statutes

It is a well-known principle of corporate law that corporate officers and directors are shielded from personal liability for the entity's contractual obligations pursuant to the corporate shield.[164] Section 171.255 of the Texas Tax Code, however, makes corporate directors and officers personally liable for business debts "created or incurred" *after* the entity fails to pay its franchise tax if the corporate privileges of the entity are forfeited.[165] In *Hovel v. Batzri*, the First Houston Court of Appeals concluded that a debt is created or incurred when the wrongful conduct occurs, not when a judgment is ultimately entered.[166]

In *Hovel*, two homeowners contracted with a Texas limited liability company to build a custom home.[167] The limited liability company had a single member and manager.[168] When the homeowners became unhappy with the final product, they sued the limited liability company for breach of contract, violations of the Deceptive Trade Practices Act, and statutory fraud, amongst other claims.[169] After plaintiffs filed suit, the limited liability company forfeited its corporate privileges when it did not pay the franchise tax.[170] While the corporate charter was forfeited, the homeowners were awarded a default judgment against the limited liability company for over $2 million, after which the charter and corporate privileges were reinstated.[171] The homeowners then sued the member-manager directly, seeking to hold him personally liable for the judgment against the limited liability company under Section 171.255 of the Texas Tax Code.[172] The trial court granted summary judgment to the member-manager, concluding that the default judgment did not create or incur the debt, which was previously created when the underlying conduct occurred.[173] The homeowners appealed, arguing that the debt was not created or incurred until it was liquidated by the default judgment, which occurred while the limited liability company's corporate charter was forfeited, and thus the member-manager was individually liable.[174]

The court of appeals disagreed and affirmed the trial court's summary judgment. The court of appeals noted, "Although the statute imposes civil liability, [it] operates as a penal statute," and thus would be strictly

164. Willis v. Donnelly, 199 S.W.3d 262, 271 (Tex. 2006).

165. Tex. Tax Code Ann. § 171.255(a) (West 2015). The statute applies to limited liability companies. *See id.* § 171.2515(b).

166. Hovel v. Batzri, 490 S.W.3d 132, 149 (Tex. App.—Houston [1st Dist.] 2016, pet. filed).

167. *Id.* at 134.

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.*

173. *Id.* at 135.

174. *Id.* at 136.

construed.[175] The court of appeals also relied on broad definitions of the terms "created" and "incurred" previously articulated by the Texas Supreme Court.[176] In *Schwab v. Schlumberger Well Surveying Corp.*, the supreme court defined created as "[t]o bring into existence something which did not exist," and incurred as "[b]rought on, occasioned, or caused,"[177] and the supreme court concluded that debts are considered created or incurred "at the time the relevant contractual obligations were incurred."[178] With those principles in mind, the court of appeals held that the debt was not created or incurred when the default judgment was entered but was created or incurred pre-forfeiture.[179] The court of appeals explained that all of the wrongful conduct underlying the claims occurred prior to the corporate charter being forfeited when "the parties established their contractual and other obligations," and that the only post-forfeiture occurrence was the entry of the default judgment.[180] Accordingly, the member-manager was not individually liable for the $2 million debt because the debt was created or incurred before the limited liability company's charter was forfeited.[181]

Similarly, in *Morello v. State*, the Austin Court of Appeals held that a statute in the Texas Water Code that authorizes the assessment of a civil penalty on "[a] person who causes, suffers, allows, or permits a violation of"[182] certain sections of the Texas Water Code and other statutes does not impose individual liability on a director or officer of a business entity, absent the director or officer's individual tortious or fraudulent conduct.[183] In *Morello*, the Texas Commission on Environmental Quality (the Commission) issued a compliance plan on five surface-water impoundments situated on real property that had been used in the past as a pipe-manufacturing facility.[184] The original property owner declared bankruptcy, and the property was purchased by a Texas limited liability company at auction.[185] Morello was the manager and operator of the limited liability company that purchased the real property.[186] A couple of years after the property was purchased, the State sued the limited liability company on behalf of the Commission, alleging that the company did not follow the compliance plan's provisions, including, but not limited to, the

175. *Id.*
176. *Id.* at 138.
177. Schwab v. Schlumberger Well Surveying Corp., 198 S.W.2d 79, 81 (Tex. 1946).
178. *Id.*; *Hovel*, 490 S.W.3d at 138 (quoting *Schwab*, 198 S.W.2d at 81). The court of appeals explained that in 2008, the Texas Legislature repealed a narrow definition of "debt" found within the Tax Code, and in doing so reaffirmed the relation-back doctrine found in *Schwab* and other cases. *Hovel*, 490 S.W.3d at 142–44.
179. *Hovel*, 490 S.W.3d at 145.
180. *Id.*
181. *Id.*
182. TEX. WATER CODE ANN. § 7.102 (West 2008).
183. Morello v. State, No. 03-15-00428-CV, 2016 Tex. App. LEXIS 4800, at *24–26 (Tex. App.—Austin May 6, 2016, pet. filed) (mem. op.).
184. *Id.* at *2–3.
185. *Id.* at *4.
186. *Id.*at *5.

company's failure to provide financial assurance, prepare necessary reports, and conduct groundwater testing.[187] The State also sought to impose civil penalties on Morello personally as a result of the statutory violations.[188] The trial court granted the State summary judgment against Morello and ordered that he pay $367,250 pursuant to Section 7.102 of the Texas Water Code.[189]

The court of appeals reversed, holding that Morello could not be individually liable for the civil penalties unless the failure to comply with the compliance plan was "tortious or fraudulent conduct of Morello individually."[190] The court of appeals began by explaining that it is a "bedrock principle of corporate law"[191] that individuals associated with the corporate entity are shielded from personal liability, except when "maintaining the corporate shield would result in '"injustice" and "inequity[ ]"' . . . ."[192] In this case, however, the State did not allege that it was seeking to pierce the limited liability company's corporate veil to hold Morello personally liable or that Morello used the limited liability company to perpetuate a fraud or tort on the State for his own personal benefit.[193] Instead, the State argued that Morello should be individually liable because when a statutory provision creates individual liability, as in this case, a corporate officer may be held personally liable for the violations when those violations are a result of "wrongful acts," even if the wrongful acts are performed as an agent of the corporation.[194] The court of appeals disagreed, and instead held that the case law does not support "the proposition that the legislature intended to allow for individual liability to be imposed on an agent of a limited liability company even in the absence of fraudulent or tortious conduct through the passage of the [civil penalties sections] of the Water Code . . . ."[195]

Both the *Hovel* and *Morello* decisions illustrate examples of the courts of appeals narrowly interpreting penal-like statutes that could be read to impose direct liability on corporate directors and officers. In doing so, the courts of appeals have re-affirmed the corporate shield and its protection of directors and officers from individual liability, absent a showing necessitating the piercing of the corporate veil.

D. Standing of a Representative of a Limited Partner

Finally, in *Shurberg v. La Salle Industries Limited*, a limited partner in a limited partnership passed away and her husband, as sole heir and repre-

187. *Id.* at *5–6.
188. *Id.*
189. *Id.* at *2.
190. *Id.* at *26, *32.
191. *Id.* at *10–11 (quoting Willis v. Donnelly, 199 S.W.3d 262, 271 (Tex. 2006)).
192. *Id.* at *11 (quoting SSP Partners v. Gladstrong Invs. (USA) Corp., 275 S.W.3d 444, 455 (Tex. 2008)).
193. *Id.* at *16.
194. *Id.* at *17–21.
195. *Id.* at *25.

sentative of the estate, sought to hold the limited partnership and remaining partners liable under several causes of action.[196] The husband sued the limited partnership and other limited partners alleging breach of fiduciary duty, breach of contract, negligent misrepresentation, and fraud. Further, he demanded an accounting, sought to have the general partner removed, and requested that a receiver be appointed.[197] The defendants filed, and the trial court granted, pleas to the jurisdiction stating that the representative lacked standing to assert derivative claims on behalf of the limited partnership because the personal representative and estate were not limited partners.[198] Upon the trial court's dismissal, the representative appealed.[199]

The San Antonio Court of Appeals first inquired into whether the personal representative was a limited partner. The court of appeals interpreted a section of the Texas Business and Organizations Code and concluded that the statute's plain meaning provides that "a legal representative [of a limited partner] is not automatically transformed into a limited partner, but may become one if the partnership agreement permits it."[200] In this case, the partnership agreement provided that it was binding on a successor or assignee, but it explicitly provided that an assignment does not make the assignee a limited partner.[201] Therefore, the representative was not a limited partner of the partnership.[202] The court of appeals then analyzed whether the representative's claims were derivative or direct because Section 153.402 of the Texas Business Organizations Code requires a person bringing a derivative claim on behalf of a limited partnership to be a limited partner when the action is commenced.[203] The court of appeals had little problem determining that the breach of fiduciary duty, negligent misrepresentation, fraud, and breach of contract claims were derivative claims because they alleged wrongs to the limited partnership.[204] Moreover, the claims for removal of the general partner, appointment of a receiver, and an accounting were also de-

196. Shurberg v. La Salle Indus., No. 04-15-00320-CV, 2016 Tex. App. LEXIS 2939, at *4 (Tex. App.—San Antonio Mar. 23, 2016, no pet.) (mem. op.).

197. *Id.* at *5.

198. *Id.*

199. *Id.* at *6.

200. *Id.* at *11 (citing TEX. BUS. ORGS. CODE ANN. § 153.113 (West 2012)). The full section of the statute provides:

> If a limited partner who is an individual dies or a court adjudges the limited partner to be incapacitated in managing the limited partner's person or property, the limited partner's executor, administrator, guardian, conservator, or other legal representative may exercise all of the limited partner's rights and powers to settle the limited partner's estate or administer the limited partner's property, including the power of an assignee to become a limited partner under the partnership agreement.

TEX. BUS. ORGS. CODE ANN. § 153.113.

201. *Shurberg*, 2016 Tex. App. LEXIS 2939, at *11–13.

202. *Id.* at *16–17. The court of appeals also rejected the representative's argument that there was consent that he was a limited partner, finding no evidence of consent. *Id.* at *15–16.

203. *Id.* at *17.

204. *Id.* at *19.

rivative because they were based on and derived out of the representative's claim for breach of fiduciary duty.[205] Accordingly, the representative did not have standing to pursue the derivative claims because he was not a limited partner, and the court of appeals affirmed the grant of the pleas to the jurisdiction.[206] Corporate officers and directors should be sure to determine early on in a lawsuit whether a legal representative of a former owner of the corporate entity has standing to pursue claims alleging injury to the corporate entity (even if the claims are wrongly characterized as direct claims).

205. *Id.* at *22–26. The representative also sought access to books and records, but the court of appeals held that there was no justiciable controversy because the representative was given the right to access the books and records through a stipulation. *Id.* at *20–22.

206. *Id.* at *26–27.