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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 various professional liability actions. In the medical field, the Texas Supreme Court weighed in on the applicability of governmental immunity to medical residents and continued to clarify the boundaries of what testimony is sufficient to demonstrate causation. In the legal malpractice context, courts also addressed an issue related to causation. Specifically, the Texas Supreme Court offered guidance as to what does and what does not satisfy the requirements to demonstrate an issue of material fact regarding causation at the summary judgment stage. Finally, during the Survey period, courts addressed a wide-ranging set of issues related to director and officer liability, including the availability of constructive trusts for breaches of fiduciary duty, the relationship between indemnity and settlement agreements, and the standard for piercing the corporate veil in reverse.

II. MEDICAL MALPRACTICE

A. GOVERNMENTAL IMMUNITY AND THE LIABILITY OF MEDICAL RESIDENTS

Across the state of Texas, a number of medical residents work in clinics or hospitals associated with governmental units. However, the nature of a resident's employment is not necessarily a cut and dry issue. During the Survey period, the Texas Supreme Court addressed in *Lenoir v. Marino* who constitutes an "employee" in this context and, particularly, how this determination bears upon the invocation of governmental immunity. While it is unclear at this date whether the ruling will have far-reaching effects, the issues discussed, particularly in the margins of the case in *dicta*, are worthy of note.

Shana Lenoir was between thirty-two and thirty-five weeks pregnant with two unborn twins when she was scheduled to see her physician at the

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University of Texas Physicians Clinic in Houston.[1] However, her physician was unavailable to provide prenatal care.[2] In the physician's absence, a second-year medical resident, Dr. Leah Anne Gonski, attended to Shana Lenoir.[3] Dr. Gonski was a resident at the University of Texas Physicians Clinic in Houston, but in a program in obstetrics and gynecology offered by the University of Texas Health Science Center at Houston (UTHSCH).[4] During the visit, Shana Lenoir communicated to Dr. Gonski that she had an earlier twin pregnancy with a preterm delivery that resulted in serious complications, namely the extended hospitalization of one twin and the death of the second child.[5]

At the conclusion of the appointment, Dr. Gonski ordered a progesterone injection to be administered that day at the office and prescribed weekly progesterone injections going forward.[6] The assisting nurse administered the injection, and Shana Lenoir left the office.[7] Tragically, after several hours Shana started struggling to breathe, and emergency assistance was called to take her to a hospital for care.[8] Before arriving at a hospital, Shana Lenoir and both of her unborn twins died.[9]

The father of Shana's living child, Christopher McKnight, and Shana's mother, Shirley Lenoir (collectively, the Lenoirs), filed a medical malpractice lawsuit against the clinic, Dr. Gonski, the nurse who administered the injection, and the attending physician who was overseeing Dr. Gonski—Dr. Jaou-Chen Huang.[10] In the 164th Judicial District Court, Harris County, Dr. Gonski and Dr. Huang moved to be dismissed pursuant to Tort Claims Act section 101.106(f), which states:

> If a suit is filed against an employee of a governmental unit based on conduct within the general scope of that employee's employment and if it could have been brought under this chapter against the governmental unit, the suit is considered to be against the employee in the employee's official capacity only. On the employee's motion, the suit against the employee shall be dismissed unless the plaintiff files amended pleadings dismissing the employee and naming the governmental unit as defendant on or before the 30th day after the date the motion is filed.[11]

The doctors presented argument and documents attempting to show they were employees of governmental units. Dr. Gonski claimed she was an employee of the University of Texas System Medical Foundation (the

1. *See* Lenoir v. Marino, 469 S.W.3d 669, 672 (Tex. App.—Houston [1st Dist.] 2015), *aff'd*, 526 S.W.3d 403 (Tex. 2017).
2. *Id.*
3. *Id.*
4. *See* Marino v. Lenoir, 526 S.W.3d 403, 404 (Tex. 2017).
5. *See Lenoir*, 469 S.W.3d at 672.
6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.*
11. TEX. CIV. PRAC. & REM. CODE ANN. § 101.106(f) (West 2011).

Foundation)—a nonprofit corporation that appointed her to the University of Texas Health Science Center's residency program.[12] Dr. Huang, however, contended that he was an employee of UTHSCH and not the Foundation.[13] A hearing was held on the doctors' motions; both were granted, dismissing each doctor from the suit.[14]

The Lenoirs challenged these findings via an interlocutory appeal which was taken up by the First Houston Court of Appeals.[15] The court of appeals overruled the challenge to Dr. Huang's dismissal but sustained the challenge to the dismissal of Dr. Gonski.[16] Dr. Gonski appealed to the Texas Supreme Court, which took up the question of whether dismissal was appropriate.[17]

The key issue before the supreme court was whether Dr. Gonski qualified as an employee of a governmental unit entitled to dismissal under Section 101.106(f). The supreme court considered the definition of an "employee" under the Tort Claims Act:

> [A] person, including an officer or agent, who is in the paid service of a governmental unit by competent authority, but does not include an independent contractor, an agent or employee of an independent contractor, or a person who performs tasks the details of which the governmental unit does not have the legal right to control.[18]

Dr. Gonski presented evidence that she was in the paid service of the Foundation, and the Lenoirs did not challenge this fact.[19] However, the definition of employee excludes individuals who perform tasks "the details of which *the* governmental unit does not have the legal right to control."[20]

The supreme court interpreted the definition of employee as referring to a single governmental unit ("*the*" governmental unit). The relevance of this is made clear when one considers the nature of Dr. Gonski's residency: the Foundation paid Dr. Gonski, the Foundation appointed Dr. Gonski through the residency program which is administered by the Foundation, the Foundation provided malpractice insurance to residents, and the Foundation required residents to abide by Foundation policies.[21] However, the Foundation's policies indicate that teaching staff supervise the resident, and a Program Director and/or teaching staff determine the level of responsibility assigned to each resident.[22] The Foundation's poli-

12. *See Lenoir*, 469 S.W.3d at 673.
13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.* at 687.
17. *See Marino*, 526 S.W.3d at 404.
18. TEX. CIV. PRAC. & REM. CODE ANN. § 101.001(2) (West 2011).
19. *See Marino*, 526 S.W.3d at 406 n.8 (noting, additionally, that the supreme court did not reach the issue of whether the Foundation was actually a governmental unit under the Act).
20. TEX. CIV. PRAC. & REM. CODE ANN. § 101.001(2) (West 2011) (emphasis added).
21. *See Marino*, 526 S.W.3d at 406.
22. *Id.*

cies and bylaws, as well as other evidence, demonstrated that the Foundation does not control the details of physicians' tasks, such as Dr. Gonski's, as a medical resident when they work at hospitals not owned by the Foundation.[23]

Dr. Pamela Promecene was the Program Director of the residency program at UTHSCH.[24] Dr. Promecene testified that she was a full-time employee of UTHSCH and not an employee of the Foundation.[25] There was no evidence the Foundation owned or staffed the clinic in which Shana was treated, but rather evidence indicated that the clinic was an internal site of UTHSCH.[26]

Dr. Gonski did note that one provision contained within the Graduate Medical Education Resident Handbook (to which the Foundation requires residents' compliance) reserved the right of the Foundation to change requirements affecting terms and conditions of the residents' employment.[27] The supreme court found, however, that "for purposes of section 101.106, a general right to change the terms and conditions of employment should not trump control of the details of Gonski's employment . . . as provided in the version of the Handbook and other legal documents under which Gonski in reality worked."[28]

This case, therefore, reveals a somewhat counterintuitive issue in asserting governmental immunity. An individual paid by a government unit, who performs tasks under the control of a governmental unit, may not be entitled to dismissal under Section 101.106 pursuant to governmental immunity when payment and oversight are not contained within the same governmental unit and the defendant identifies only one unit as the single employer entitling them to the status of "employee."

However, the supreme court noted, and perhaps signaled suggestions for, other possible approaches. The supreme court wrote that Dr. Gonski did not argue that the Foundation and UTHSCH should be treated as a single, umbrella entity for the purposes of Section 101.106.[29] Additionally, the supreme court called attention to the fact that Dr. Gonski did not argue she was an employee because she was paid by one governmental unit and subject to the legal control of another.[30] The supreme court expressly stated that they would not explore these issues and would issue no opinion on their possible validity.[31]

Due to the great number of doctors practicing in connection with governmental units, this case law is likely to develop further, toward greater

23. *Id.* at 407–08.
24. *Id.* at 404.
25. *Id.* at 406.
26. *Id.* at 407.
27. *Id.* at 410.
28. *Id.*
29. *Id.*
30. *Id.*
31. *Id.*

clarity.[32] However, until that time residents and insurance providers should be well aware of the state of the law, and attorneys on both plaintiffs' and defendants' sides should be particularly diligent when considering the status of any individual as an "employee" of a governmental unit.

B. Texas Courts Continue to Address Expert Testimony on Causation

During the Survey period, Texas courts continued to wrestle with the sufficiency of expert testimony to demonstrate causation. Our Survey highlights two such cases, demonstrating the push and pull and continuing development in this area of liability law.

1. Texas Home Health Skilled Servs., LP v. Anderson

Prior to April 25, 2014, Elizabeth Timmons was under the care of a Dr. Rosenquist and Texas Home Health for the monitoring and testing of blood coagulation levels as well as general care.[33] However, according to pleadings in the eventual lawsuit, Ms. Timmons's levels were not tested or monitored since at least February 26, 2014.[34] On April 25, 2014, Ms. Timmons suffered a stroke at a family member's home.[35] Subsequent testing revealed an INR (a measure of blood coagulation) level of 15.[36] A normal range for INR is 2–3, and higher levels are correlated with increased risk of stroke.[37]

Ms. Timmons was placed in West Houston Medical Center and, according to pleadings, encountered inadequate medical attention, suffering bedsores, significant skin breakdown, dehydration, and acute renal failure.[38] Ms. Timmons' daughter, Judy Anderson, transferred her mother to the Huntsville Healthcare Center due to the inadequate care, but her condition worsened and she was transferred to Huntsville Memorial Hospital.[39] According to the pleadings, Ms. Timmons continued to receive inadequate care, suffering kidney failure and an inability to swallow or talk.[40] Ms. Timmons progressively declined and was ultimately unable to recover, dying on June 7, 2014.[41]

Ms. Timmons' daughter, Judy Anderson, filed a wrongful death and survival suit in the 278th District Court of Walker County, Texas against multiple parties including Texas Home Health Skilled Services, L.P.

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32. *See, e.g.*, Skapek v. Perkins, No. 05-16-00796-CV, 2017 WL 655950, at *3 (Tex. App.—Dallas Feb. 17, 2017, pet. denied) (mem. op.).
33. *See* Texas Home Health Skilled Servs., LP v. Anderson, No. 10-15-00440-CV, 2016 WL 6134468, at *1 (Tex. App.—Waco Oct. 19, 2016) (mem. op.).
34. *Id.*
35. *Id.*
36. *Id.*
37. *Id.*
38. *Id.*
39. *Id.* at *2.
40. *Id.*
41. *Id.*

(THH).[42] Specifically, Ms. Anderson asserted claims of negligence, vicarious liability, and gross negligence related to the death of her mother.[43] Though Ms. Anderson served expert reports, THH challenged their sufficiency.[44] The trial court found the expert reports sufficient, but the Waco Court of Appeals reversed on appeal, finding the reports insufficient as to causation.[45]

The court of appeals sent the matter back to the trial court to make a determination as to whether the deficiencies could be cured.[46] After supplements were made to the report, THH filed a motion to dismiss, which was denied.[47] An interlocutory appeal followed.

As discussed thoroughly in previous Surveys, 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 for the case with prejudice.[48] The report must include "a fair summary of the expert's opinions" as of the date of the report regarding, among other items, the causal relationship between the asserted failure to meet applicable standards and the claimed injury.[49]

The only issue before the appellate court was whether the expert reports met the causation requirement by explaining how THH's alleged breach leading to a subdural hematoma was a substantial factor in Ms. Timmons's death from dehydration and acute renal failure.[50] Though the original report listed a number of risk factors, in the supplemented report the expert opined that Ms. Timmons became dehydrated due to her subdural hematoma, which in and of itself was caused by THH's failure to properly monitor her Coumadin intake.[51]

The appellate court noted that the expert report did not explain the conclusion that the subdural hematoma was the superior or medically-preferable cause of Timmons's death, especially when compared to other risk factors that were detailed in the first expert report.[52] The court determined, therefore, that the reports were conclusory and raised no more than a possibility of causation.[53] Collecting a number of recent cases demonstrating insufficient causal links, the court concluded that, without a causal link between THH's care and Ms. Timmons's death, the trial court

42. *Id.* at *1.
43. *Id.*
44. *Id.* at *11.
45. *Id.*
46. *Id.*
47. *Id.* at *1.
48. TEX. CIV. PRAC. & REM. CODE ANN. § 74.351(a), (b)(2) (West 2017).
49. *Id.* § 74.351(a), (r)(6).
50. *Anderson*, 2017 WL 4079595, at *3.
51. *Id.* at *4.
52. *Id.*
53. *Id.*

abused its discretion in denying THH's motion to dismiss.[54]

2. Bustamante v. Ponte

D.B., a premature infant, suffered loss of vision.[55] A jury reached the conclusion that the infant's neonatologist proximately caused the loss of vision due to negligence.[56] The case was brought before the Dallas Court of Appeals to consider whether the experts established causation to a reasonable degree of medical certainty.[57]

The evidence showed that D.B., due to severe prematurity, had a 90%–100% chance of developing retinopathy of prematurity (ROP), which affects blood vessel growth in the eyes.[58] These abnormalities can cause diminished vision or blindness, but blindness of this fashion is typically preventable.[59] Yet, D.B. suffered ROP and lost all vision in her right eye and severe impairment in her left eye.[60] D.B.'s parents sued several defendants, asserting negligence by D.B.'s doctors. In particular, they asserted that they failed to timely schedule follow-up appointments and corrective eye surgery, presenting expert testimony to support these positions.[61]

Like in *Anderson*, the appellate court in *Bustamante* found that the experts' opinions on causation were conclusory and insufficient because they failed to rule out other possible causes of the injury.[62] On appeal, the Texas Supreme Court, however, disagreed with the Dallas Court of Appeals in almost every facet of the appellate court's decision.

First, the supreme court corrected the Dallas Court of Appeals' use of a but-for causation test when there was proof of more than one proximate cause of injury.[63] Specifically, the case involved the alleged combined negligence of two doctors, and the supreme court noted that it has long been the law in Texas that "a defendant's act or omission need not be the sole cause of an injury, as long as it is a substantial factor in bringing about the injury."[64] Thus, the appellate court should have applied the substantial-factor test, rather than a stringent but-for test. Considering the substantial-factor test, the supreme court found that there was abundant evidence in the record that the doctors' failure to timely diagnose and treat D.B.'s ROP resulted in retinal detachment and vision impairment.[65]

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54. *Id.*
55. Bustamante v. Ponte, 529 S.W.3d 447, 450 (Tex. 2017).
56. *Id.*
57. *Id.*
58. *Id.*
59. *Id.*
60. *Id.*
61. *Id.* at 451.
62. *Id.* at 454.
63. *Id.* at 457–59.
64. *Id.* at 457 (citing Havner v. E-Z Mark Stores, Inc., 825 S.W.2d 456, 459 (Tex. 1992)).
65. *Id.* at 459.

Second, the supreme court corrected the court of appeals' rejection of statistical evidence presented by the plaintiffs. The supreme court noted that this case was distinguishable from a case in which a statistical survey was used in isolation to establish general causation without supporting evidence of direct proof.[66] The supreme court found that, in this case, the statistical evidence was but one factor relied on by the experts and was supplemented with clinical experience and direct examination of D.B. and her medical records.[67]

Finally, and perhaps most importantly in this context, the supreme court discussed how the experts adequately offered the bases for their opinions. The supreme court noted that the expert testimony must establish a "how" and a "why" supporting its conclusions.[68] The supreme court then exhaustively analyzed the experts' testimony in detail, noting that the experts' opinions were not perfect, but they "did not simply state a conclusion without any explanation or ask the jurors to take their word for it."[69] Further, they noted that expert opinions do not have to disprove every conceivable cause, but merely the plausible causes.[70]

While providing some guidance about adequate causation evidence, the actual method employed by the court—a detailed, fact-specific analysis—does not demonstrate an expansion or simplification of the standards for expert testimony in medical malpractice cases. If there is some wisdom that can be gleaned from the joint consideration of *Anderson* and *Bustamante*, it is perhaps that disagreements and confusion continues in the courts, and detailed, fact-specific analysis at the supreme court level suggests the possibility of somewhat less than mechanical results.

III. LEGAL MALPRACTICE

A. Expert Testimony on Causation at the Summary Judgment Stage

1. The Difficulty of Causation at Summary Judgment

As discussed in last year's Annual Texas Survey, legal malpractice claimants and the courts that hear them must inevitably grapple with the question of causation and the type of evidence required to establish it. 2017 was no different, but this year the Texas Supreme Court offered significant guidance on what does and does not satisfy the requirements to demonstrate an issue of material fact regarding causation at the summary judgment stage. In one case, the supreme court offered a lesson in just how difficult avoiding summary judgment on this essential element of a malpractice claim can be. But, as if to assure court watchers that it could be done, another case found the supreme court convinced that an issue of

66. *Id.* at 460.
67. *Id.* at 461.
68. *Id.* at 462.
69. *Id.* at 465.
70. *Id.* at 468.

fact had been raised with respect to causation and that summary judgment was inappropriate. A look at these two cases offers attorneys perspective on the supreme court's recent views on causation evidence. Though the cases reach different outcomes, they both reiterate and underscore the type of evidence required to defeat summary judgment on causation.

The first case from the Texas Supreme Court, *Rogers v. Zanetti*, considered three possible instances of malpractice but found all three of them wanting.[71] The underlying action that gave rise to the malpractice claim involved a business dispute over a home health care company. The plaintiffs in the case, Daniel and Leslie Alexander and Judith Pucci, founded a home health care business called Accent Home Health.[72] The defendant, James Rogers, owned other healthcare businesses, and upon learning of Accent's existence, Rogers viewed it as a potential investment opportunity.[73] Rogers approached the founders of Accent and represented himself as well-connected in the medical community due to his outpatient clinic businesses.[74] Rogers expressed interest in the success of the business and emphasized the value his experience, professional network, and administrative support could provide to their new enterprise.[75] He also indicated that he had substantial investment resources at his disposal.[76] In exchange for his professional services and a $250,000 dollar investment in Accent, Accent's founders agreed to grant Rogers a majority stake in the business.[77] Victor Zanetti, Rogers's attorney and subsequently one of the defendants in Rogers's malpractice case, drafted an agreement to memorialize the deal.[78]

Once the agreement had been executed, Rogers and his associate William Burmeister assumed financial control of the business.[79] Mr. Bumeister, a certified public accountant who served as the chief financial officer in Rogers's other ventures, tended to the financial affairs of Accent while the original founders were to focus on expanding the business.[80] Unfortunately, the founders discovered that Rogers had begun transferring funds from the company accounts to an account only he had access to and ultimately realized that he had not even made the promised $250,000 investment.[81] Accent's founders sued for fraud, conversion and civil theft, civil conspiracy, and breach of fiduciary duty.[82] At Zanetti's recommendation, Rogers hired Charles Perry as trial counsel, who served

71. Rogers v. Zanetti, 518 S.W.3d 394, 398 (Tex. 2017).
72. *Id.*
73. *Id.* at 398–99.
74. *Id.* at 398.
75. *Id.* at 399.
76. *Id.* at 398–99.
77. *Id.* at 399.
78. *Id.*
79. *Id.*
80. *Id.*
81. *Id.*
82. *Id.*

in that role until shortly before trial.[83] Ultimately, the jury found for Accent's founders and awarded damages.[84] The court's final judgment also voided the original investment agreement for lack of consideration, unconscionability, and fraudulent inducement.[85] The Dallas Court of Appeals affirmed.[86] This underlying litigation is referred to here and in the supreme court's opinion as the *Alexander* case."[87]

Rogers sued Zanetti, Perry, and the Andrews Kurth law firm years later alleging malpractice.[88] Rogers claimed that Perry had a conflict of interest when he accepted the role as trial counsel because Zanetti and Perry both worked at Andrews Kurth.[89] This conflict, Rogers contended, also led Perry not to name Zanetti and Andrews Kurth as responsible third parties in the *Alexander* case, a move Rogers felt would have been warranted and taken but for Perry's favoritism for his colleague and employer.[90] Rogers further claimed that Perry engaged in multiple instances of negligent conduct when he failed to present a settlement offer to Rogers, failed to designate an expert to counter the plaintiffs' expert's valuation of Accent, and conducted discovery in a manner that prejudiced the defense.[91] Finally, Rogers claimed that his attorneys in the *Alexander* case breached their fiduciary duties and should reimburse him for the attorneys' fees he paid.[92]

Faced with a motion for summary judgment from the attorneys, the trial court granted the motion.[93] While the trial court did not specify its reasons, the malpractice defendants argued that there was no evidence of causation, that the breach of fiduciary duty claims were simply negligence claims, and that collateral estoppel, the *Alexander* court's finding on fraud, and the statute of limitations barred Rogers's malpractice claims.[94] The court of appeals considered whether Rogers raised an issue of fact as to whether the attorneys' negligence caused Rogers's injury.[95] Concluding that it had not, the court of appeals affirmed.[96]

Before the supreme court, Rogers argued that the traditional suit-within-a-suit method of examining legal malpractice claims should not apply to four of his claims.[97] Specifically, Rogers argued that the approach should not apply to his claims that (1) Zanetti erred in drafting the invest-

83. *Id.*
84. *Id.*
85. *Id.*
86. *Id.* (citing *Rogers v. Alexander*, 244 S.W.3d 370 (Tex. App.—Dallas 2007, pet. denied).
87. *Id.*
88. *Id.* at 399–400.
89. *Id.* at 400.
90. *Id.*
91. *Id.*
92. *Id.*
93. *Id.*
94. *Id.*
95. *Id.*
96. *Id.*
97. *Id.* at 401.

ment agreement; (2) Perry should have joined Zanetti and Andrews Kurth as responsible third parties; (3) Perry should have designated an expert to rebut the valuation of Accent; and (4) Perry should have communicated a settlement offer in the *Alexander* litigation.[98]

The supreme court first considered Rogers's claims that Zanetti negligently drafted the agreement and that, as such, Perry should have joined Zanetti and his law firm.[99] The defendants noted the finding in the *Alexander* case that Rogers had defrauded Accent's founders, thereby voiding the investment agreement, and argued that, regardless of how it was drafted, any claim of malpractice stemming from the agreement would necessarily fail to establish causation because the agreement itself was void.[100] Rogers contended that the agreement was transactional malpractice that at least partially caused his damages.[101] He advocated that the court apply a "substantial factor" test of causation to his claim rather than requiring him to establish that the agreement was the proximate cause of his damages.[102]

Setting aside the fact that Rogers raised his "substantial factor" argument for the first time on appeal, the supreme court walked through the proximate cause requirements typically applied to legal malpractice claims and negligence claims more generally.[103] In explaining that proximate cause requires a showing of cause-in-fact and foreseeability, the supreme court reiterated that proving cause-in-fact requires showing both that the act or omission was a substantial factor in causing the harm and that without that act or omission the harm would not have occurred.[104] Put differently, the supreme court emphasized that "our cause-in-fact standard requires not only that the act or omission be a substantial factor but also that it be a but-for cause of the injury or occurrence."[105] Accordingly, the supreme court presumed that Rogers was advocating the application of only half of the cause-in-fact standard, the substantial factor requirement, while seeking to have the court cast aside but-for causation.[106]

The supreme court declined this invitation, noting earlier decisions describing "a cause-in-fact definition that omits the but-for component as 'incomplete'" and citing scholarly work describing use of the substantial factor requirement decoupled from but-for causation as appropriate in only rare concurrent-cause situations.[107] Rogers's case did not present a case of concurrent cause, so the standard cause-in-fact requirement of

98. *Id.*
99. *Id.*
100. *Id.* at 401–02.
101. *Id.*
102. *Id.* at 402.
103. *Id.*
104. *Id.* at 402–03.
105. *Id.* at 403.
106. *Id.*
107. *Id.* (quoting Transcon. Ins. Co. v. Crump, 330 S.W.3d 211, 223 (Tex. 2010)).

but-for causation applied.[108] Accordingly, the supreme court concluded that the court of appeals did not err in demanding cause-in-fact and failing to apply Rogers's preferred substantial-factor-only test.[109]

The supreme court next considered Perry's failure to designate an expert to rebut the *Alexander* plaintiff's expert valuation of Accent.[110] The plaintiffs' expert valued Accent at $2,493,611.68, and the jury returned an award that split that amount evenly between the company's original founders.[111] As a result of Perry's choice not to designate any expert to rebut that valuation, the jury heard no competing testimony on valuation from the defense, which Rogers claimed was malpractice and resulted in an unnecessarily inflated award.[112]

The supreme court began its analysis by correcting the defendants' misimpression that suit-within-a-suit causation requires a showing that the party would have won the case but for the attorney malpractice.[113] Rather, malpractice claims frequently involve accusations that an attorney's missteps hurt the value of a claim or defense and those claims do not hinge on the ultimate success or failure of the suit as a whole.[114] As such, "different cases involve different injuries and different causal links."[115] In Rogers's case, he claimed that the failure to present a rebuttal expert led to an award of higher damages.[116] So, the supreme court concluded, Rogers needed to present evidence that the high award was more likely than not caused by the failure to put on expert testimony.[117] To make such a showing would require expert testimony on causation, and the parties disputed the adequacy of the evidence Rogers's experts had offered.[118]

The supreme court evaluated the testimony of each of Rogers's experts.[119] First, the court found the testimony of a valuation expert lacking because, while it demonstrated the availability of valuation testimony, it did nothing to show that such testimony would have altered the verdict in the case.[120] Next, the supreme court considered testimony by a litigation expert who testified that Perry's choice was risky and that one of the attorneys who had handled the case felt that by failing to offer expert testimony on valuation, the defense offered the jury no alternative on damages, which that attorney viewed as a significant contributing factor in the resulting damages award.[121] Dispensing first with the testimony

108. *Id.*
109. *Id.* at 403–04.
110. *Id.* at 404.
111. *Id.*
112. *Id.*
113. *Id.*
114. *Id.*
115. *Id.*
116. *Id.* at 405.
117. *Id.*
118. *Id.*
119. *Id.* at 406.
120. *Id.*
121. *Id.*

that failure to designate an expert was risky, the supreme court noted that this testimony did nothing to show causation and instead related to the breach-of-duty element of a malpractice claim.[122] As for the claim that an attorney on the case viewed the absence of an expert as a contributing factor in the award, the court rejected this recitation of another person's opinion without providing a basis for that opinion as "no evidence" and an "*ipse dixit*."[123] The supreme court also reminded again that the appropriate standard for causation is but-for, not substantial contributing factor, thus rendering the testimony inadequate to meet the required causal standard.[124]

The supreme court next turned to the testimony of one of the attorneys who tried the *Alexander* case before the jury.[125] The attorney, Peter Marketos, offered somewhat remarkable testimony regarding a juror on the case who contacted him after the trial and explained that the jurors had debated a lower award but decided that because they had no competing evidence, they would credit the testimony of the plaintiffs' expert.[126] Consequently, Marketos concluded that the absence of defense expert testimony caused the high verdict.[127]

Assuming the admissibility of the evidence, the supreme court found it inadequate.[128] The supreme court stressed the need to compare the case as it actually occurred with a hypothetical case in which the alleged mistake never happened.[129] In the *Alexander* case, the question involves a comparison between what happened and what would have happened if the jury had heard the omitted expert testimony.[130] Rogers would need to show that the hypothetical result would more likely than not produce a lower verdict than the actual result.[131] But the supreme court found that Marketos's affidavit failed to accomplish these tasks because it offered no such comparison.[132] The supreme court determined that a "juror's (eventually abandoned) reservations about testimony in the actual case is no support for an opinion that a reasonable jury would have credited the testimony of a competing expert (like Hahn [the valuation expert discussed above]) had it been given the chance."[133] The supreme court also suggested that Marketos would have needed to provide seemingly impossible opinions regarding the juror's credibility comparison of the plaintiffs' expert and a defense expert that never was.[134] In the absence of an in-depth comparison between the real and the hypothetical, the supreme

122. *Id.* (citing Cosgrove v. Grimes, 774 S.W.2d 662, 665 (Tex. 1989)).
123. *Id.* at 406–07.
124. *Id.* at 407.
125. *Id.*
126. *Id.*
127. *Id.*
128. *Id.* at 408.
129. *Id.* at 407–08.
130. *Id.*
131. *Id.* at 408.
132. *Id.*
133. *Id.*
134. *Id.*

court characterized Marketos's affidavit as speculative, conclusory, and incompetent summary judgment evidence.[135]

Finally, the supreme court evaluated the causation opinion of a defense attorney for Burmeister, Rogers's associate in the case.[136] Here too, the affidavit was found to be conclusory.[137] While the court conceded that the attorney's experience litigating the *Alexander* case at issue would certainly bolster his credibility and familiarity with the facts, credibility and familiarity were not enough to provide the required "demonstrable and reasoned basis" for his opinion on causation.[138] The supreme court also pointed out that the attorney's opinion that the evidence on valuation was insufficient to support the valuation the jury adopted was necessarily false because a court of appeals had determined that the evidence on valuation was sufficient as a matter of law.[139] And like Marketos's affadavit, the court determined that the other attorney's affidavit was inadequate because it did not provide evidence demonstrating that testimony from a defense expert on valuation would likely have changed the result.[140] In sum, none of the four experts' affidavits presented by Rogers provided adequate evidence to create a fact issue regarding whether the failure to designate a rebuttal expert caused an oversized verdict.[141]

The final issue before the court was whether a fact issue existed as to whether Perry's failure to communicate a settlement offer caused Rogers's harm.[142] The supreme court found it did not.[143] Rogers took the position that he did not know of the settlement offer, and that if he had, he would have instructed his lawyer to negotiate a settlement.[144] Perry and Andrews Kurth took the position that, even assuming Rogers's statement was true, it did not raise a fact issue on causation because the record lacked evidence that he could have settled the case or that a settlement would have actually occurred.[145] In other words, Rogers's intent to *try* to settle did not demonstrate the case actually *would or could* have settled. The court of appeals and the supreme court agreed.[146]

The *Rogers* case is perhaps most instructive in revealing just how difficult showing causation at the summary judgment stage of a legal malpractice case can be. Though not surprising given established law, the supreme court's repeated efforts to stress the cause-in-fact standard and its requirement to show that an act or omission was the but-for cause of the plaintiff's damages should leave little doubt that efforts urging the

135. *Id.*
136. *Id.*
137. *Id.* at 409.
138. *Id.* at 409–10.
139. *Id.* at 410.
140. *Id.*
141. *Id.*
142. *Id.*
143. *Id.* at 411.
144. *Id.*
145. *Id.*
146. *Id.*

court to adopt a more forgiving causation standard will prove fruitless. The supreme court's treatment of Rogers's expert witness affidavits adds to the difficulty in meeting this standard because, despite the witnesses' deep familiarity with the case and, in one instance, the thinking of at least one of the jurors, their testimony proved inadequate to show causation. Experts offering opinions on causation will be judged by high standards and be deemed to have met them only where they can explain a demonstrable and reasoned basis for a conclusion that a different outcome was likely in the absence of the relevant act or omission. *Rogers* demonstrates the need for attorneys pursuing malpractice claims to make early evaluations about how and on what basis they will present evidence regarding causation. In doing so, those attorneys can ensure that adequate and appropriate evidence is offered or make an early assessment in the litigation as to whether such a showing is even possible under the law. Finally, the supreme court's ruling on the settlement offer Rogers never received reminds practitioners that simply raising an additional variable without directly and causally tying it to a clear and provable alternative scenario will not benefit their claims. In fact, calling attention to the number and variety of causal variables present and discussed in the *Rogers* case may even be a disservice if it makes proving that any one of them was a but-for cause more difficult.

2. The Texas Supreme Court Revisits Causation Evidence at Summary Judgment

The Texas Supreme Court once again considered whether an expert opinion was conclusory in *Starwood Management, LLC ex rel. Gonzalez v. Swaim*.[147] The legal issue that led to the malpractice claim involved Norma Gonzalez and her business, Starwood Management, LLC (Starwood), which owned a number of airplanes.[148] For reasons that need not be explored in this Survey, several of Starwood's airplanes were seized by the Drug Enforcement Agency (DEA).[149] Starwood's insurer hired attorney Don Swaim to take on the DEA with respect to one of the seized airplanes and hopefully secure its recovery.[150]

In order to contest the seizure, the DEA presented Swaim with three options.[151] He could file suit against the agency in federal court, file a petition for remission or mitigation with the agency's Forfeiture Counsel, or do both.[152] Federal regulations required that if Swaim intended to file suit in court, he would need to provide notice to the DEA's Forfeiture Counsel within thirty days of receiving the notice of the seizure.[153] Once in federal court, the DEA would be required to show by a preponderance

147. 530 S.W.3d 673, 676 (Tex. 2017).
148. *Id.* at 676–77.
149. *Id.*
150. *Id.*
151. *Id.* at 677.
152. *Id.*
153. *Id.*

of the evidence that the Agency's decision to seize the plane was legally proper.[154] By contrast, in proceedings before the Forfeiture Counsel initiated by the petition for remission or mitigation, federal regulations provide the Forfeiture Counsel complete discretion regarding whether to return seized assets.[155]

Swaim sought to pursue both actions simultaneously, but he failed to file the required notice with the Forfeiture Counsel regarding his claim in federal court.[156] Consequently, his claim in federal court was dismissed.[157] In response to his petition for remission or mitigation, the DEA sought to depose Gonzalez.[158] Gonzalez declined, citing her Fifth Amendment right to avoid self-incrimination, and her petition was denied.[159] Swaim moved to have the Forfeiture Counsel reconsider its decision, but while Gonzalez agreed to a limited deposition, she refused to waive her Fifth Amendment rights, and the Counsel denied the motion.[160] With no remaining avenues to challenge the seizure, Starwood and Gonzalez had lost the plane.[161] Starwood and Gonzalez sued Swaim for malpractice.[162]

All of this occurred while another attorney, George Crow, pursued the return of six other aircraft seized from Starwood.[163] Unlike Swaim, Crow filed the notice required to file suit in federal court, and by the time of the motion for summary judgement in the case against Swaim, Crow had secured the return of five of the aircraft.[164] In response to Swaim's motion for summary judgment, which alleged that Starwood had failed to show Swaim's actions caused Starwood's loss, Starwood offered the affidavits of Crow and another attorney named Steve Jumes.[165] Both opined that, based on Crow's experience with the other five aircraft, Swaim could have recovered the plane if he had filed the proper notice required to proceed in federal court.[166] Crow and Jumes stated that they felt the DEA had a weak case for seizure, that Swaim's factual circumstances with respect to the aircraft were identical to those faced by Crow, and that Swaim's failure to file the notice needed to proceed in court, where the DEA would have the burden, caused the loss of the plane.[167]

The district court refused to consider the affidavits of Crow and Jumes for purposes of summary judgment.[168] On appeal, the court of appeals

154. *Id.*
155. *Id.*
156. *Id.*
157. *Id.*
158. *Id.*
159. *Id.*
160. *Id.*
161. *Id.*
162. *Id.*
163. *Id.*
164. *Id.*
165. *Id.* at 678.
166. *Id.*
167. *Id.*
168. *Id.*

determined that Crow's affidavit was conclusory due to its failure to make a case-by-case comparison of the facts of Swaim's case with other aircraft seizure cases.[169] The court of appeals also rejected Jumes' affidavit on the grounds that it was unsupported by factual allegations.[170] Before the Texas Supreme Court, Starwood challenged the court of appeals' determination that Crow's affidavit was conclusory.[171]

The supreme court began its review of the case by laying out the elements of a malpractice claim and detailing what is required to prove causation.[172] Citing *Rogers*, the court emphasized that a plaintiff claiming malpractice must show cause-in-fact, which requires a showing of but-for causation demonstrated through the suit-within-a-suit inquiry.[173] And, as seen in the *Rogers* case, to do so at the summary judgment stage requires expert evidence on causation that is probative and raises a fact issue; testimony that is conclusory will not suffice.[174]

Swaim offered a variety of arguments for why the supreme court should consider Crow's affidavit to be conclusory. First, the supreme court considered Swaim's argument that Crow's affidavit was facially conclusory because it did not include a "demonstrable and reasoned basis" for his conclusion and did not engage in the requisite case-by-case factual comparison of Swaim's case with other cases of plane seizure.[175] The supreme court disagreed.[176] Instead, the supreme court stressed its explanation in *Rogers* that the principal consideration when determining whether expert testimony in a legal malpractice claim is conclusory is essentially whether that testimony explains why the expert reached a particular conclusion.[177] To do so, the expert "affidavit must explain the link between the facts the expert relied upon and the opinion reached."[178]

The supreme court, while acknowledging that Crow might have done a better job explaining the basis for his opinion, stated that Crow's lack of detail represented an issue of quality rather than adequacy and did not alter his underlying conclusion—that Swaim would have recovered the plane if he had filed the appropriate notice to pursue the matter in federal court.[179] The key question for the supreme court in assessing the adequacy of Crow's testimony was whether Crow had explained why he reached that conclusion.[180] In this case, the supreme court felt that he had.[181] Crow had followed the same course of action—which he claimed

169. *Id.* (citing *Elizondo v. Krist*, 415 S.W.3d 259, 265 (Tex. 2013)).
170. *Id.*
171. *Id.*
172. *Id.* at 678–79.
173. *Id.* (citing Rogers v. Zanetti, 518 S.W.3d 394, 402 (Tex. 2017)).
174. *Id.* at 679.
175. *Id.*
176. *Id.*
177. *Id.* (citing *Rogers*, 518 S.W.3d at 405).
178. *Id.* (citing *Rogers*, 518 S.W.3d at 405; *Elizondo v. Krist*, 415 S.W.3d 259, 266 (Tex. 2013)).
179. *Id.*
180. *Id.* (citing *Rogers*, 518 S.W.3d at 405).
181. *Id.*

Swaim should have followed—six times and had obtained the result Swaim desired five out of six times.[182] The court credited his explanation for his conclusion as both demonstrable and reasoned, explaining that he had demonstrated the merits of filing the required notice through success with his cases and that those wins provided a reasonable basis for his conclusion that such a filing probably would have obtained a similar result for Swaim.[183]

Swaim's characterization of Crow's affidavit as a conclusory *ipse dixit* was also rejected based on the relatively narrow gap between the data Crow relied upon—his success in the five other cases where he filed the notice—and his conclusion that Swaim would likely have obtained similar results if he had also filed the required notice.[184] Similarly, the supreme court dismissed Swaim's claim that Crow's failure to address the issue of Gonzalez's testimony, or lack thereof, rendered the affidavit conclusory.[185] From Crow's standpoint, looking to the hypothetical case in which Swaim had filed the notice, Crow concluded that Gonzalez likely never would have been called to testify because the case would have been resolved before she had been asked to do so, just as had happened in the cases Crow handled.[186] The supreme court agreed that such a conclusion was reasonable, not conclusory.[187] And, contrary to Swaim's argument, the addition of Crow's opinion that the DEA had a weak case also failed to render the affidavit conclusory.[188] The supreme court determined Crow's main conclusion had a demonstrable and reasoned basis regardless of any tangential opinions and conclusions with shakier support.[189]

Swaim also argued that Crow's affidavit was conclusory because it failed to offer a detailed comparison of the aircraft involved, including model, value, owners, and other distinguishing characteristics as well as the location of seizure.[190] But the supreme court rejected this argument too, viewing the basis for Crow's conclusion as procedural and thus unaffected by these superficial details about the planes.[191] Crow looked at two possible outcomes, the loss or return of the planes, which were seized under the same federal statute and governed by the same procedural rules.[192] Nothing about his conclusion hinged on details about the planes or where they were seized, so the supreme court considered those details immaterial.[193] But even if greater detail had been required, the supreme court was satisfied that Crow had included documents with detail on the

182. *Id.*
183. *Id.*
184. *Id.* at 680.
185. *Id.*
186. *Id.*
187. *Id.*
188. *Id.*
189. *Id.*
190. *Id.*
191. *Id.*
192. *Id.* at 680–81.
193. *Id.* at 681.

comparator cases with his affidavit and had referenced those documents, which the court considered adequate and not conclusory.[194]

Finally, Swaim argued that Crow's affidavit was conclusory because it failed to consider and explain away various ways in which the DEA might have prevailed if it had pushed the case at trial.[195] Looking again to *Rogers*, the supreme court reiterated that sufficient evidence of causation would show that the outcome in the hypothetical case would more likely than not be different than the outcome in the case that Swaim actually handled.[196] The supreme court found it "unnecessary for an expert in a case such as this to provide a legal analysis of every possible exigency, no matter how remote," and ultimately concluded that the affidavit was not conclusory for failure to do so.[197]

The *Starwood Management* case demonstrates that the burden required to defeat summary judgment is not unmanageable but still requires a heavy lift. Most plaintiffs alleging malpractice will not be fortunate enough to have five nearly identical cases to rely on when attempting to demonstrate that their case might have turned out differently but for a single act or omission. That said, *Starwood Management* does offer sound lessons for expert testimony offered in more difficult or closer cases. For example, to the greatest extent possible, an expert's opinion should be based in tangible outcomes which can be pointed to as the basis for arriving at the expert's conclusion. As the *Rogers* court made clear, basing an opinion on the opinion of someone else rather than concrete facts is almost certainly inadequate. As a general rule, the closer the nexus between the facts supporting the opinion and the opinion itself, the better. And while the basis for an opinion may seem obvious to an expert, the extraordinary difficulty of demonstrating causation dictates in favor of over-explaining and providing supporting documentation.

IV. DIRECTOR AND OFFICER LIABILITY

During the Survey period, Texas courts addressed several issues including the limited availability of constructive trusts for breaches of fiduciary duty, the relationship between indemnity and settlement agreements, the standard for piercing the corporate veil in reverse, and the apparent discrepancy between the statutory protections afforded to officers under the Texas Business Organizations Code and seemingly contradictory caselaw.

A. The Texas Supreme Court Issues an Opinion on the Limited Availability of Awarding Constructive Trusts for Breaches of Fiduciary Duty

On February 9, 2017, the Texas Supreme Court issued an opinion regarding constructive trusts—namely their limited availability and the

194. *Id.*
195. *Id.*
196. *Id.* (quoting Rogers v. Zanetti, 518 S.W.3d 394, 408 (Tex. 2017)).
197. *Id.*

proofs required to award a constructive trust to a party prevailing on a claim for breach of fiduciary duty.[198]

In *Longview*, the plaintiff, Longview Energy Company (Longview), sued two of its directors for breach of fiduciary duty, usurpation of corporate opportunity, and competing with the corporation.[199]

In 2006, the Huff Energy Fund (HEF) bought shares of Longview and appointed Bill Huff and Rick D'Angelo to Longview's board of directors.[200] Three years later, HEF independently and discretely opened dialogue with Bobby Riley about oil and gas investment opportunities in the Eagle Ford formation.[201] The discussions resulted in the formation of the Riley-Huff Energy Group LLC (Riley-Huff).[202] That same month, HEF told Longview that if Longview located an investment in the Eagle Ford formation, HEF would fund the acquisition.[203] As a result, Longview spent considerable time and money searching for an attractive opportunity.[204]

Longview met with brokers Tamara Ford and Pat Gooden (the Longview Consultants) who provided the company with a map of attractive and available acreage in the Eagle Ford formation.[205] Importantly, the map did not identify specific acreage or lease locations; it merely represented the available acreage in "blobs" measuring more than 235,000 acres each.[206] D'Angelo requested personal copies of the maps.[207]

Shortly thereafter, Longview called a board meeting to vote on acquiring some of the acreage identified by the Longview Consultants, relying on HEF's earlier representation that it would fund such acquisitions.[208] HEF's representative D'Angelo did not support the proposal; it was tabled.[209]

Longview brought breach of fiduciary duty claims against Bill Huff and Rick D'Angelo as directors of Longview when it learned that Riley-Huff had been formed, that Riley-Huff had purchased Eagle Ford leases from the Longview Consultants just three days before Longview's board meeting, and that 5,200 of the 50,000 acres acquired by Riley-Huff were located in the "blobs" on the maps considered by Longview's board.[210]

At trial, the jury returned a favorable verdict for Longview, determining that Huff and D'Angelo both breached their fiduciary duties to Longview by usurping corporate opportunities and engaging in direct

198. Longview Energy Co. v. Huff Energy Fund LP, 533 S.W.3d 866 (Tex. 2017).
199. *Id.* at 868.
200. *Id.* at 869.
201. *Id.*
202. *Id.*
203. *Id.*
204. *Id.*
205. *Id.* at 869–70.
206. *Id.* at 870.
207. *Id.*
208. *Id.*
209. *Id.*
210. *Id.* at 870–71.

competition.[211] The trial court awarded Longview $95.5 million and imposed a constructive trust on the vast majority of Riley-Huff's Eagle Ford acreage.[212] On appeal, the San Antonio Court of Appeals reversed the trial court because Longview failed to identify any specific leases in the Longview Consultant's proposal, and determined that Huff and D'Angelo's acquisitions did not "hinder or defeat the plans and purposes of the corporation."[213] The court of appeals also found that Longview did not have "an interest or a reasonable expectancy in the opportunity" because there were still millions of acres available for lease in the Eagle Ford.[214]

On review, the supreme court determined that the issue of remedies was dispositive, "assum[ed] without deciding[ ]" that the breach of fiduciary duty claims against Huff and D'Angelo were viable and supported by the evidence, and further found that there was no evidence to support the trial court's award of damages.[215]

Huff and D'Angelo argued that awarding a constructive trust was erroneous because Longview had not properly "traced" assets acquired from the breaches.[216] The supreme court agreed, holding that "the party seeking a constructive trust on property has the burden to identify the particular property on which it seeks to have a constructive trust imposed."[217] The supreme court further clarified that "[*d*]*efinitive, designated property*, wrongfully withheld from another, is the very heart and soul of the constructive trust theory."[218]

The supreme court distinguished its current disposition from its decision in *Wilz v. Flournoy*, which concerned a father's improper use of funds to pay monthly installments on his farm.[219] The supreme court characterized *Wilz* as only having dealt with a single property instead of multiple properties like the case at bar.[220] As such, and in contrast to *Wilz*, "the leases were separately identifiable, were not purchased with commingled funds, and were identified, lease by lease, in both the evidence and the judgment."[221] The supreme court determined that "Longview had the burden to prove that, as to each lease for which it sought equitable relief of disgorgement or imposition of a constructive trust, Riley-Huff acquired that lease as a result of Huff's or D'Angelo's

211. *Id.* at 871.
212. *Id.*
213. The Huff Energy Fund, L.P. v. Longview Energy Co., 482 S.W.3d 184, 191–94 (Tex. App.—San Antonio 2015), *aff'd sub nom.* Longview Energy Co. v. Huff Energy Fund LP, 533 S.W.3d 866 (Tex. 2017).
214. *Id.* at 193–94.
215. *Longview*, 533 S.W.3d at 872.
216. *Id.*
217. *Id.* at 873.
218. *Id.* (quoting KCM Fin. LLC v. Bradshaw, 457 S.W.3d 70, 88 (Tex. 2015) (emphasis added)).
219. *Id.* at 874; Wilz v. Flournoy, 228 S.W.3d 674, 676 (Tex. 2007).
220. *Longview*, 533 S.W.3d at 874.
221. *Id.*

breaches of fiduciary duties."[222]

The supreme court found that no such "tracing" had occurred, and in fact, tracing would have been impossible because the lease brokers only presented Longview with non-descriptive "blobs" representing 235,000 acres, only 21,000 of which were in dispute.[223] As such, there was a lack of "evidence tracing a breach of fiduciary duty by Huff or D'Angelo to specific leases . . . support[ing] the imposition of a constructive trust on those leases."[224]

The holding is a win for officers and directors generally, requiring plaintiffs to causally "trace" itemized damages (in this case, properties) to discrete breaches of fiduciary duties. Still, the *Longview* decision demonstrates that director and officer liability is severely limited—if not totally moot—where no remedy exists.

B. The First Houston Court of Appeals Grapples with the Relationship Between a Former Chief Executive Officer's Indemnity Provision and a Subsequently Executed Settlement Agreement

On July 27, 2017, the First Houston Court of Appeals held that a disgruntled former officer was prohibited from collecting judgment against the former Chief Executive Officer of his company because the officer and the company had entered into a settlement agreement providing that the officer would not seek damages from the company "directly or indirectly."[225]

In *Sandt*, the court of appeals sought to determine whether Energy Maintenance Services Group, I, LLC's (Energy Maintenance) agreement to indemnify its former Chief Executive Officer, Timothy Nesler (Nesler) obligated the company to indemnify Nesler from a judgment rendered against him in a separate suit, and whether a properly executed settlement agreement precluded collection of that judgment.[226]

In 2005, a former officer, Jim Sandt (Sandt), sued Energy Maintenance and Nesler for fraud and breach of fiduciary duty.[227] Two years after the filing, Energy Maintenance's board of directors decided to indemnify Nesler for any liability arising from Sandt's claims.[228]

In 2009, Sandt's claims were tried to a jury who found in favor of Sandt and awarded him $780,000 in damages and attorney's fees from Energy Maintenance and Nesler jointly and severally.[229] Sandt was also awarded $300,000 in punitive damages from Energy Maintenance and Nesler indi-

222. *Id.*
223. *Id.* at 875.
224. *Id.* at 875–76.
225. Sandt v. Energy Maint. Servs. Grp. I, LLC, 534 S.W.3d 626, 633 (Tex. App.—Houston [1st Dist.] 2017, pet. filed).
226. *Id.* at 632.
227. *Id.*
228. *Id.*
229. *Id.* at 632–33.

vidually.[230] Importantly, Sandt and Energy Maintenance had entered into a settlement agreement stipulating that Sandt would not seek recovery of Nesler's $300,000 from Energy Maintenance either "directly or indirectly."[231]

When Nesler sought indemnity from Energy Maintenance, the company denied his request and sought a declaratory judgment from the court that it was not responsible for the judgment against Nesler.[232] Further, Energy Maintenance sought to revoke its indemnity agreement with Nesler, arguing that the agreement was premised on Nesler's mischaracterization of his own actions, as proven by the jury's finding of fraud and breach of fiduciary duty.[233]

In the alternative, Energy Maintenance argued that, pursuant to the executed settlement agreement, Sandt could not collect the $300,000 judgment against Nesler if Energy Maintenance was required to indemnify Nesler.[234]

Both Energy Maintenance and Sandt appealed the trial court's judgment.[235] Energy Maintenance argued that the trial court errantly determined Energy Maintenance was obligated to indemnify Nesler.[236] Sandt argued that the trial court mistakenly determined Sandt's settlement agreement with Energy Maintenance precluded Sandt from collecting its judgment against Nelser.[237]

The court of appeals settled Energy Maintenance's indemnity issue based on Delaware law, holding that Energy Maintenance had the proper authority and had indemnified Nesler when it entered into the agreement with Nesler in 2005.[238]

However, Sandt's issue regarding the effect of the settlement agreement was properly considered under Texas law.[239] The court sided with Energy Maintenance.[240] Energy Maintenance had agreed to indemnify Nesler, and Sandt had agreed not to "directly or indirectly" collect damages from Energy Maintenance.[241] Therefore, the court determined that Sandt could not collect on its judgment against Nesler.[242]

The court paid particular attention to two provisions in the settlement agreement: (1) Sandt's release of Energy Maintenance and its officers "from any and all claims, liabilities, actions, causes of action, demands, damages, payments, reimbursements, remedies or relief of any kind or

230. *Id.* at 633.
231. *Id.*
232. *Id.*
233. *Id.*
234. *Id.* at 633–34.
235. *Id.* at 634.
236. *Id.*
237. *Id.* at 634–35.
238. *Id.* at 639.
239. *Id.*
240. *Id.* at 643.
241. *Id.*
242. *Id.*

nature"; and (2) Sandt's promise that it would "not seek to execute and w[ould] not accept recovery, in each case whether directly or indirectly, against" Energy Maintenance for any additional liability in the suit.[243]

Finally, the court disposed of Sandt's argument that the parties had not intended to foreclose collection from Nelser by executing a joint motion to release the appeal bond and an agreement to suspend enforcement of the judgment pending Nesler's appeal.[244] The court held that the two documents were not admissible to contradict the settlement agreement because they were not annexed into the settlement agreement, which contained an integration clause.[245]

The takeaway is simple: Texas courts will give full effect to an officer's indemnity agreement with his company even if strict adherence to that indemnity agreement bars a third party's recovery from the company. Notably, officers and their companies will not always be absolved of liability when one of the two parties enters into a settlement agreement with a third party, but if the settlement contains a provision excluding the third party from "direct or indirect" collection against the company, an indemnity agreement between the company and the officer should protect both parties from paying the other's damages and, ultimately, from compensating the third party.

C. The First Houston Court of Appeals Narrows "Alter Ego" Theory and "Reverse Veil Piercing"

On October 24, 2017, the First Houston Court of Appeals held that a corporate entity was not responsible for a non-shareholder's liability under the theory of reverse veil piercing.[246]

In *NRMO Holdings*, the court of appeals was tasked with determining whether Appellees Anna Williams (Williams) and CD Homes (CD Homes) were liable to NMRO Holdings, LLC (NMRO), under the theories of alter ego, partnership, joint enterprise, or conspiracy, for the debts of Williams's husband Robert Parker (Parker).[247]

Parker was the owner and operator of a residential construction company which had been sued and owed a $604,871 judgment to Finger Interests Number One, Ltd. (Finger Interests).[248] Finger Interests assigned its judgment against Parker to NMRO.[249]

In November 2005, Williams formed a company that facilitated auctions for charities and non-profits called Profit for Non-Profits, LLC (Profit for Non-Profits).[250] Notably, Profit for Non-Profits was formed

243. *Id.* at 643.
244. *Id.* at 644.
245. *Id.*
246. NMRO Holdings, LLC v. Williams, 01-16-00816-CV, 2017 WL 4782793, at *1 (Tex. App.—Houston [1st Dist.] Oct. 24, 2017, no pet.) (mem. op.).
247. *Id.*
248. *Id.*
249. *Id.*
250. *Id.*

before Williams met Parker.[251] One year later, after Williams and Parker had met, Williams converted her company into a residential home building business and renamed the company CD Homes.[252]

In April 2007, Parker and his wife divorced.[253] Seven months later, and subject to a premarital agreement limiting Parker's liabilities and obligations to his separate and personal property, Williams and Parker were married.[254]

The suit arose from NMRO's desire to hold Williams and CD Homes liable for the judgment obtained against Parker and purchased from Finger Interests.[255] NMRO's amended petition alleged theories of liability including alter ego, fraudulent transfer, conspiracy, partnership, and joint enterprise.[256]

The trial court granted Williams and CD Homes' motion for summary judgment on all of NMRO's claims.[257] NMRO appealed the trial court's ruling.[258]

The court of appeals systematically affirmed the trial court's ruling with respect to each of NMRO's theories of liability—most importantly, the theory of alter ego.[259] Generally, NMRO claimed that Williams and Parker used CD Homes as a shell corporation to avoid paying Parker's judgment to NMRO, and as such, NMRO argued that the court should have pierced the corporate veil in reverse, holding CD Homes liable for Parker's debts.[260]

The court of appeals cited appellate and supreme court precedent to establish the test for corporate veil-piercing: "a plaintiff must show that (1) the persons or entities on whom he seeks to impose liability are alter egos of the debtor, and (2) that the corporate fiction was used for an illegitimate purpose."[261] The court described "basic veil-piercing alter ego principles [as] apply[ing] to reverse veil-piercing . . ." and that "[u]nder a reverse-piercing theory, a creditor seeks . . . to hold a corporation's assets accountable for the liability of individuals who treated the corporation as their alter ego."[262] However, the court noted that reverse veil-piercing only applies in "exceptional circumstances."[263]

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251. *Id.*
252. *Id.*
253. *Id.*
254. *Id.*
255. *Id.*
256. *Id.*
257. *Id.*
258. *Id.*
259. *Id.* at *4.
260. *Id.*
261. *Id.* at *2 (quoting Tryco Enters., Inc. v. Robinson, 390 S.W.3d 497, 508 (Tex. App.—Houston [1st Dist.] 2012, pet. denied) (citing SSP Partners v. Gladstrong Invs. (USA) Corp., 275 S.W.3d 444, 456, 456 n.57 (Tex. 2008)).
262. *Id.* at *3 (citing Rocklon, LLC v. Paris, No. 09-16-00070-CV, 2016 WL 6110911, at *4 (Tex. App.—Beaumont Oct. 20, 2016, no pet.) (mem. op.); Zahra Spiritual Trust v. United States, 910 F.2d 240, 243–44 (5th Cir. 1990)).
263. *Id.* (citing Wilson v. Davis, 305 S.W.3d 57, 71 (Tex. App.—Houston [1st Dist.] 2009, no pet.)).

The court directly addressed two of NMRO's arguments: first, that Williams changed the name of her business to CD Homes and the nature of her business to residential real estate only after she met Parker.[264] Second, that even though Parker was not the owner of CD Homes, he was the de facto owner because of his exercise of substantial decision-making power and his management and control over the operations of CD Homes.[265]

The court disposed of NMRO's first argument, stating that "the act of renaming a company is not tantamount to forming a new company . . . [and] the transformation of Williams's event planning business into a homebuilding business does not change the undisputed fact that she is the sole legal de jure owner of her company."[266]

The court then disposed of NMRO's second argument by distinguishing the three cases NMRO cited as dealing with bankruptcies or applying to shareholders.[267] The court held that though some courts "have applied veil piercing principles in exceptional circumstances to impose alter ego liability on an individual shareholder . . . [they] have not recognized the imposition of liability on a corporation for a judgment debt of a *non*-shareholder unrelated to any corporate activity. We likewise decline to do so here."[268]

This court's opinion is significant to the extent that it narrows, or at least clarifies, the scope of a plaintiff's ability to pierce the corporate veil. The court was clear that individuals cannot be held responsible for the wrongs of a corporation, and a corporation cannot be held responsible for the wrongs of an individual that has no stake in the corporation. Directors and officers ought to consider this rule of law when evaluating their own prospective liability, the liability of the companies they manage, and their resultant inability to distribute a portion of the damages to another individual.

D. The Fourteenth Houston Court of Appeals Reaffirms the Protections of Texas Business Organizations Code Section 21.223.

On July 27, 2017, the Fourteenth Houston Court of Appeals held that the protections of Section 21.223 of the Texas Business Organizations Code prevented Josephine Treurniet (Treurniet), the President of defendant corporation TecLogistics, from being held individually liable for an admitted fraud committed against plaintiff Dresser-Rand Group, Inc. (Dresser-Rand).[269]

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264. *Id.*
265. *Id.* at *4.
266. *Id.* at *3.
267. *Id.* at *4.
268. *Id.*
269. TecLogistics, Inc. v. Dresser-Rand Grp., Inc., 527 S.W.3d 589 (Tex. App.—Houston [14th Dist.] 2017, no pet.).

The facts are relatively simple. Dresser-Rand routinely contracted with TecLogistics for freight forwarding, and TecLogistics routinely subcontracted with Pentagon Freight Services to complete the shipments.[270] Dresser-Rand was billed for "passed-through charges" based on amounts represented in Pentagon's invoices.[271]

The pertinent issue arises from Dresser-Rand requesting and receiving an invoice directly from Pentagon and discovering that TecLogistics had created false invoices from Pentagon, overcharging Dresser-Rand roughly $6,000.[272] When questioned about the falsified invoices, TecLogistics President, Treurniet, admitted that she had personally drafted the false invoices.[273]

After the close of evidence, the trial court refused to submit Dresser-Rand's proposed jury question regarding Treurniet's fraud-liability.[274] On that issue and others, both parties appealed.[275]

On the issue of Treurniet's fraud, the court of appeals spent significant effort analyzing the scope of Texas Business Organizations Code Section 21.223, which outlines a number of elements that must be proven in order to hold a corporate shareholder or officer personally and individually liable.[276] Subsection (a)(1)–(2) of the statute eliminates personal liability for "holder[s] of shares, as owner[s] of any beneficial interest in shares, or a subscriber for shares . . . or any affiliate [of the previous designations]"[277] concerning corporate obligations or "matter[s] relating to or arising from the obligation on the basis that the holder, beneficial owner, subscriber, or affiliate is or was the alter ego of the corporation or on the basis of actual or constructive fraud, a sham to perpetrate a fraud, or other similar theory . . ."[278] Importantly however, Subsection (a)(2)

> does not prevent or limit the liability of a holder, beneficial owner, subscriber, or affiliate if the obligee demonstrates that the [individual] caused the corporation to be used for the purpose of perpetrating and did perpetrate an actual fraud on the obligee *primarily for the direct personal benefit* of the [individual].[279]

First, the court of appeals held that Treurniet was not shielded from liability by function of Subsection (a)(2) because: (1) Treurniet had a relationship with TecLogistics, which was a corporation; (2) Treurniet was both a "shareholder" and an "affiliate" because of her position as President; (3) Dresser-Rand's fraud claim against Treurniet "relat[ed] to and ar[ose] from" TecLogistics's contractual obligations to Dresser-Rand; (4)

270. *Id.* at 592.
271. *Id.*
272. *Id.*
273. *Id.*
274. *Id.*
275. *Id.* at 593.
276. *Id.* at 596 (citing TEX. BUS. ORGS. CODE ANN. § 21.223 (West 2012)).
277. TEX. BUS. ORGS. CODE ANN. § 21.223(a) (West 2012).
278. *Id.* § 21.233(a)(2).
279. *Id.* § 21.233(b) (emphasis added).

Dresser-Rand was an "obligee" of TecLogistics; and (5) Dresser-Rand was seeking to prove a claim against Treurniet for "actual fraud."[280]

Next, the court turned its attention to Dresser-Rand's alternative argument that the trial court should have found Treurniet liable for fraud despite the statute's terms by relying exclusively on the common law.[281] The court dispensed of this argument by citing Section 21.224,which provides that liability "'for an obligation that is limited by section 21.223 is exclusive and preempts any other liability imposed for that obligation under common law or otherwise.'"[282]

However, the court was not satisfied with its threadbare reliance on Section 21.224.[283] The court noted that its own disposition "does not explain why, at first blush, many cases—a number of which are cited by Dresser-Rand—appear to hold an individual liable with respect to a matter relating to or arising from a corporate obligation even when the requirements of section 21.223(a)(2) have been satisfied."[284] To explain those inconsistencies, the court turned to the statute's history.[285]

The court clarified that before 1993, the statute "did not expressly preempt the common law"[286] and it was "not until 1997 that the statute reached its current breadth."[287] In 1997, the statute was amended to protect not only shareholders, subscribers, and beneficial interest owners, but also "any affiliate thereof or of the corporation."[288] The court aptly noted that "[w]ith this change, the statute began to shield those with the right to control the corporation, even if they had no actual or beneficial ownership interest."[289] Remarkably, this included officers and directors.

Finally, the court turned its attention to Section 21.223(b), reasoning that Treurniet could still be liable if she "'caused the corporation to be used for the purpose of perpetrating and did perpetrate an actual fraud on the oblige primarily for [her] *direct personal benefit*.'"[290] The court concluded that because Dresser-Rand did not adequately plead Treurniet's motivations, the court could not find Treurniet liable pursuant to Section 21.223(b).[291]

As such, the Fourteenth Houston Court of Appeals concluded that the trial court did not abuse its discretion by refusing to submit a jury question about Treurniet's personal liability to Dresser-Rand for fraud.[292]

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280. *TecLogistics, Inc.*, 527 S.W.3d at 597–98.
281. *Id.* at 598.
282. *Id.* at 598–99 (quoting TEX. BUS. ORGS. CODE ANN. § 21.224 (West 2012)).
283. *Id.* at 599.
284. *Id.*
285. *Id.*
286. *Id.*; *see* Act of May 12, 1989, 71st Leg., R.S., ch. 217, § 1, 1989 Tex. Gen. Laws 975.
287. *TecLogistics, Inc.*, 527 S.W.3d at 599.
288. *Id.* at 600; Act of May 13, 1997, 75th Leg., R.S., ch. 375, § 7, 1997 Tex. Gen. Laws 1516, 1522–23 (eff. Sept. 1, 1997).
289. *TecLogistics, Inc.*, 527 S.W.3d at 600.
290. *Id.* at 602 (quoting TEX. BUS. ORGS. CODE ANN. § 21.223(b) (West 2012)) (emphasis added).
291. *Id.*
292. *Id.*

The court's holding in *TecLogistics* is most significant for clarifying the scope of protection under Section 21.223(a) of the Texas Business Organizations Code and for its exhaustive recounting of the statute's development, which reaffirms the statute's protections in the face of seemingly contradictory case law. And still, the court's determination that officers—non-shareholders—are properly considered "affiliates" is an important interpretation for director and officer liability jurisprudence.