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Professional Liability

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PROFESSIONAL LIABILITY

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I. DIRECTOR & OFFICER LIABILITY

During the Survey period, Texas courts released notable opinions related to individual liability for actions taken on behalf of a corporation. In the first case, the Eighth El Paso Court of Appeals affirmed that a sole owner of a corporate entity could not be personally liable for corporate obligations under the alter ego theory. In the second case, the Fourteenth Houston Court of Appeals clarified that, with respect to negotiable instruments, uncommunicated intent to sign a promissory note on behalf of a company could subject the representative signatory to individual liability.

A. THE EIGHTH EL PASO COURT OF APPEALS AFFIRMED THE AFFIRMATIVE DEFENSE AGAINST PERSONAL LIABILITY FOR OFFICERS OF ALTER EGO CORPORATE ENTITIES

Section 21.223 of the Texas Business Organizations Code (TBOC) creates an affirmative defense limiting a corporate owner or shareholder’s individual liability for obligations owed by the corporation, even if the individual is, in effect, the alter ego of the corporation.¹ In *Valley Forge Motor Co. v. Sifuentes*,² the Eighth El Paso Court of Appeals affirmed that the sole owner and employee of an incorporated car repair shop could take advantage of this affirmative defense where the owner signed documents on the shop’s behalf.

In this case, Valley Forge Motor Company (Valley Forge) leased a car to Marcus Hill in February 2014. A few months later, in April 2014, Mr. Hill was involved in a collision that required repairs to the car. Instead of taking the car to Valley Forge, Mr. Hill had a tow company take the car to Leo’s Auto Collision, Inc. (Leo’s) for repairs without Valley Forge’s knowledge or authorization.³ When Mr. Hill did not return the vehicle, Valley Forge filed a stolen vehicle report with the police in May 2014.⁴

1. TEX. BUS. ORGS. CODE ANN. § 21.223.

2. 595 S.W.3d 871, 879 (Tex. App.—El Paso 2020, no pet.).

3. *Id.* at 873.

4. *Id.*

Over a year later, on July 8, 2015, Ruben Sifuentes signed and sent a letter on behalf of Leo's informing Mr. Hill that he owed \$3,800.00 for car repairs, and that Leo's would file a mechanic's lien on the vehicle if Mr. Hill could not pay.⁵ Sifuentes included a copy of a repair estimate signed by Mr. Hill on the date of the tow that authorized repairs worth \$3,800.00. The president of Valley Forge, Lee Urias, responded to the letter, stating that Valley Forge owned the vehicle and had not authorized car repairs by Leo's. Urias warned that Valley Forge would take legal action if the vehicle was not returned within seven days. About a week later, Valley Forge received a letter from the El Paso County Tax Assessor stating that Leo's notified the assessor's office that it would file a mechanic's lien for \$3,800.00.⁶ The letter stated that the vehicle would be sold by public auction if the repairs were not paid or a lawsuit was not filed within thirty-one days after Valley Forge was first notified of the unpaid charges. Valley Forge took no action during this period, and Leo's foreclosed on the lien after the car was sold for \$800.00 at a public auction. A notice in the assessor's office showed that Sifuentes "appeared at the sale as the authorized agent of Leo's Auto Collision and authorized a sale of the vehicle to himself."⁷

Valley Forge filed a petition on October 28, 2015, naming Ruben Sifuentes d/b/a Leo's Auto Collision Inc. as the sole defendant, stating that Sifuentes "may be served with process by serving its registered agent Ruben Sifuentes."⁸ The lawsuit alleged that "Defendant LEO'S AUTO COLLISION INC. unlawfully and without authority assumed dominion and control over Plaintiff's vehicle."⁹ Valley Forge later amended the petition but did not make changes to the parties or claims.¹⁰

Sifuentes filed an amended answer containing an affirmative defense that he could not be sued in his individual capacity because he was employed as the president of the corporation, Sifu Enterprises, Inc. d/b/a Leo's Auto Collision.¹¹ Sifuentes then moved for summary judgment on the grounds that he could not be sued in his individual capacity as a shareholder, director, or officer of a corporate entity pursuant to § 21.223 of the TBOC.¹² Section 21.223 states that a holder, owner, or subscriber of shares

may not be held liable to the corporation or its obligees with respect to . . . any contractual obligation of the corporation or any matter relating to or arising from the obligation on the basis that the holder . . . is or was the alter ego of the corporation or on the basis of actual

5. *Id.*

6. *Id.*

7. *Id.* at 873–74.

8. *Id.* at 874.

9. *Id.*

10. *Id.*

11. *Id.* ("[T]he amended answer asserted an affirmative defense that Sifuentes could not be sued in an individual capacity because he was a shareholder, director, or officer of the corporate entity known as 'Sifu Enterprises, Inc. d/b/a/ Leo's Auto Collision.'").

12. *Id.*

or constructive fraud . . . or other similar theory.¹³

The protection from individual liability is “exclusive and preempts any other liability imposed for that obligation under common law or otherwise.”¹⁴

Sifuentes produced summary judgment evidence that Sifu Enterprises was incorporated as of April 2014, the date Leo’s took in the car for repair. The Articles of Incorporation “named Sifuentes as the initial registered agent and director of Sifu Enterprises,” and the assumed name certificate filed in October 2014 stated that Sifu Enterprises intended to conduct business as Leo’s Auto Collision.¹⁵ In response, Valley Forge claimed that the defendant used the names “RUBEN SIFUENTES and/or LEO’S AUTO COLLISION INC.” to conduct business and place the mechanics lien on the car.¹⁶ The district court granted Sifuentes’s motion for summary judgment, and Valley Forge appealed.

The court of appeals addressed whether Sifuentes met his evidentiary burden to establish the affirmative defense under § 21.223.¹⁷ The court began its analysis by noting that the Texas Legislature recognized that “an essential reason that entrepreneurs choose to incorporate their businesses” is to avoid personal liability and therefore “narrowly prescribed the circumstances under which a shareholder can be held liable for corporate debts.”¹⁸ The court agreed with the district court that Sifuentes’s summary judgment evidence established that he was a shareholder, director, or officer of Sifu Enterprises, Inc., and that he conducted the business at issue—repairs on Valley Forge’s car—on behalf of Leo’s Auto Collision, the assumed name of Sifu Enterprises, Inc.¹⁹ The burden then shifted to Valley Forge to raise a fact issue challenging Sifuentes’s affirmative defense.²⁰

Valley Forge’s first argument that Sifuentes was an alter ego of Leo’s or Sifu Enterprises was precluded by the language of § 21.223(a)(2).²¹ Valley Forge then argued that Sifuentes used his individual name along with the informal business name of Leo’s to conduct unauthorized repairs on Valley Forge’s vehicle. The court did not agree that this argument raised a fact issue with respect to whether Leo’s performed repairs on the car in the ordinary course of business.²² The court noted that Sifuentes’s use of his individual name “does nothing to negate the ultimate fact that Leo’s was registered as the assumed name under which the corporate entity operated.”²³ The court held that Valley Forge failed to present evidence

13. TEX. BUS. ORGS. CODE ANN. § 21.223(a)(2).

14. *Id.* § 21.224.

15. *Valley Forge Motor Co.*, 595 S.W.3d at 875.

16. *Id.*

17. *Id.* at 876.

18. *Id.* at 877 (citing *Willis v. Donnelly*, 199 S.W.3d 262, 271–72 (Tex. 2006)).

19. *Id.* at 878.

20. *Id.*

21. *Id.*

22. *Id.* at 879.

23. *Id.*

“defeating any of the elements addressing whether Sifu Enterprises, Inc. was a corporation, whether Sifuentes was properly affiliated with the corporation . . . or whether Sifuentes was an alter ego of the corporation.”²⁴ The court therefore affirmed the trial court’s judgment.²⁵

Valley Forge affirms that sole operators of incorporated businesses are as protected by the affirmative defense from personal liability as shareholders and directors of larger multilevel corporations. Because one person may be both the owner and sole employee of an incorporated business, there may be a concern that such unity of control renders the owner individually liable for corporate obligations. Sole proprietors or independent contractors in Texas considering whether to incorporate their businesses can be assured that they will not be individually liable for their business obligations under the alter ego theory.

B. THE FOURTEENTH HOUSTON COURT OF APPEALS REQUIRED
PROOF THAT A REPRESENTATIVE COMMUNICATED INTENT
TO ACT ON BEHALF OF THE CORPORATION TO
AVOID LIABILITY ON A PROMISSORY
NOTE

Section 3.402 of the Texas Business and Commerce Code governs the liability of a representative signing a negotiable instrument, such as a promissory note.²⁶ In *Zentech, Inc. v. Gunter*,²⁷ the Fourteenth Houston Court of Appeals addressed whether an agent could be liable for his signature on a promissory note if the note did not state that the agent was signing in a representative capacity. The court held that the agent must show that they communicated their intent to sign as a representative to the other contracting party to avoid liability.²⁸

In 2008 and 2009, S. Rao Guntur lent Zentech, Inc. (Zentech) a total of \$730,169.00 via two promissory notes (the Notes). While the Notes identified Zentech as the Borrower in the section titled “Borrower Information,” the president of Zentech, Ramesh Maini, signed his name in the blank designated for Borrower.²⁹ Guntur moved for summary judgment against both Zentech and Maini on the Notes, claiming that he was owed the total amount with interest. On October 10, 2018, the trial court granted summary judgment against Zentech and Maini “jointly and severally” for the full amount due on the Notes.³⁰

On appeal, Zentech and Maini argued that the judgment should not have been awarded against Maini because Maini was not referenced as the Borrower on the Notes, and he signed and executed the Notes as the president of Zentech. Section 3.402(b) states that when a representative

24. *Id.*

25. *Id.*

26. TEX. BUS. & COM. CODE ANN. § 3.402.

27. 606 S.W.3d 847, 853 (Tex. App.—Houston [14th Dist.] 2020, pet. denied).

28. *Id.* at 853–54.

29. *Id.* at 850–51.

30. *Id.* at 851.

signs his own name on a negotiable instrument, the representative is not liable “if the form of the signature shows unambiguously that the signature is made on behalf of the represented person who is identified in the instrument.”³¹ However, if the form of the signature is ambiguous as to whether the representative signed on behalf of another entity, “the representative is liable on the instrument unless the representative proves that the original parties did not intend the representative to be liable on the instrument.”³²

The court of appeals, citing comment 2 to § 3.402, held that Maini’s signature did not “unambiguously refute personal liability,” and thus Maini could only “escape liability by proving that Guntur and Maini did not intend for Maini to be liable on the Notes.”³³

To support appellants’ affirmative defense that Maini signed the notes as a representative of Zentech, the court reasoned that appellants would need to prove not only that Maini intended to sign as a representative, but also that he disclosed his representative capacity to Guntur.³⁴ The court discussed two precedential cases where a party escaped summary judgment for liability on a promissory note.³⁵ In both *Antil v. Southwest Envelope*³⁶ and *Eubank v. Myre Construction Company, Inc.*,³⁷ the parties signing the promissory notes presented evidence that they disclosed their status as president or officer of the corporation to the lender. Such evidence was sufficient to defeat summary judgment by raising a fact issue as to whether both parties to the promissory note understood that the signatory was signing in a representative capacity.³⁸

In the present case, Maini submitted an affidavit stating, “Guntur and I have been Officers and Directors of Zentech through at least 2016. . . . At the special request of, and agreement with, Guntur, I executed those documents [the Notes] as the President of Zentech. I did not execute them in my individual capacity as Guntur has alleged.”³⁹ The court found that this affidavit evidenced that Guntur knew that Maini was the president of Zentech and was signing the Notes as the president of Zentech.⁴⁰ Moreover, the partial payments made on the Notes were made from the corporate account of Zentech. The court held that this evidence created a fact issue “as to whether Guntur agreed and knew that Maini intended to sign

31. TEX. BUS. & COM. CODE § 3.402(b)(1).

32. *Id.* § 3.402(b)(2).

33. *Zentech, Inc.*, 606 S.W.3d at 853 (quoting TEX. BUS. & COM. CODE § 3.402 cmt. 2 to explain that the signatory is liable if “the form of the signature does not unambiguously refute personal liability.” However, the signatory “can escape liability by proving that the original parties did not intend that he be liable on the note”).

34. *Id.*

35. *Id.* at 853–54.

36. 601 S.W.2d 47, 47–48 (Tex. App.—Beaumont 1979, no writ).

37. No. 05-93-01536-CV, 1995 WL 238568, at *124 (Tex. App.—Dallas Apr. 24, 1995, writ denied).

38. *Zentech, Inc.*, 606 S.W.3d at 853–54.

39. *Id.* at 854.

40. *Id.*

the Notes only as a representative of Zentech.”⁴¹ The court therefore reversed the trial court’s judgment against Maini and remanded for further proceedings.⁴²

Zentech is significant because it shows that a representative must use caution when signing certain documents on behalf of the corporation. Texas law governing liability for promissory note obligations requires an unambiguous communication of representative status to the contracting party to avoid liability on the note.⁴³ Even if it appears obvious that a representative is signing on behalf of the corporation listed as the obligor on the promissory note, the representative must assert, preferably on the note, that they do not intend to be liable in an individual capacity.⁴⁴

II. HEALTHCARE LIABILITY

A. INTRODUCTION

During the Survey period, the Texas Supreme Court addressed the temporal interaction between two statutory provisions, both of which limit a claimant’s recovery in a medical malpractice lawsuit. In the same opinion, the supreme court also analyzed a trial court’s discretion to order a division between lump sum and periodic payments under the Texas Medical Leave Act (TMLA).

B. TEXAS SUPREME COURT CONCLUDED TRIAL COURT PROPERLY APPLIED SETTLEMENT CREDIT AND DAMAGES CAP UNDER TEXAS MEDICAL LIABILITY ACT

In 2003, the Texas Legislature enacted the TMLA, which provides for a statutory limit on noneconomic damages in medical malpractice lawsuits.⁴⁵ The TMLA, codified at Texas Civil Practice & Remedies Code § 74, limits civil liability for noneconomic damages to \$250,000.00 for each claimant.⁴⁶

Chapter 33 of the Civil Practice & Remedies Code (CPRC) also limits a claimant’s recovery in a healthcare liability claim if the claimant has settled with one or more persons.⁴⁷ Damages to be recovered by the claimant in a healthcare liability claim are reduced—at the defendant’s

41. *Id.*

42. *Id.*

43. *Id.* at 853 (quoting *Seale v. Nichols*, 505 S.W.2d 251, 255 (Tex. 1974)).

44. *See id.* at 852–54.

45. *See* Act of June 2, 2003, 78th Leg., R.S., ch. 204, § 10.01, 2003 Tex. Gen. Laws 847 (codified at TEX. CIV. PRAC. & REM. CODE ANN. § 74.301).

46. TEX. CIV. PRAC. & REM. CODE § 74.301. “Noneconomic damages” is defined in Chapter 74 of the Texas Civil Practice & Remedies Code as having “the meaning assigned by section 41.001.” *See id.* § 74.001(a)(20); *see id.* § 41.001 (noneconomic damages defined as “damages awarded for the purpose of compensating a claimant for physical pain and suffering, mental or emotional pain or anguish, loss of consortium, disfigurement, physical impairment, loss of companionship and society, inconvenience, loss of enjoyment of life, injury to reputation, and all other nonpecuniary losses of any kind other than exemplary damages.”).

47. *Id.* § 33.012(c).

election—by (1) the sum of the dollar amounts of all settlements, or (2) a percentage equal to each settling person's percentage of responsibility as found by the trier of fact.⁴⁸

Recently, the Texas Supreme Court addressed the interaction between these two statutes concerning their application to damages awarded in medical malpractice lawsuits. The events giving rise to *Regent Care of San Antonio, L.P. v. Detrick* began when Robert Detrick “was admitted to Regent Care . . . to receive short-term treatment for a rash prior to undergoing hip replacement surgery.”⁴⁹ Mr. Detrick “began experiencing incontinence after his admission” to Regent Care, but Regent Care’s nurses “failed to notify his treating physicians” of these complications.⁵⁰ Weeks later, “when he could no longer feel or move his legs,” Mr. Detrick was transferred to a hospital.⁵¹ At the hospital, “[a]n MRI revealed a tumor in Detrick’s spinal canal that had compressed his spinal cord. His paralysis proved to be permanent.”⁵²

As a result, “Detrick and his wife (collectively, Detrick) sued Regent Care,” a skilled nursing facility, claiming its nurses failed to notify Detrick’s doctors of the change in his condition.⁵³ “Detrick settled with all defendants other than Regent Care for a total of \$1,850,000.”

Following trial, the jury found that Regent Care and each of the settling defendants were negligent and proximately caused Mr. Detrick’s injury, and it apportioned 55% responsibility for the injury to Regent Care. The jury awarded economic damages of \$3 million for future medical expenses, \$390,000.00 for past medical expenses, and \$245,000.00 for loss of household services. It also awarded \$10,250,000 in noneconomic damages.⁵⁴

Finally, the trial court “calculated that prejudgment interest on past damages was \$51,375.”⁵⁵ The resulting amount of the verdict was \$13,936,375.00.⁵⁶

“In applying the dollar-for-dollar settlement credit” of \$1.85 million, the trial court first applied the credit to the prejudgment interest.⁵⁷ Then, “the trial court calculated the percentages of economic versus noneconomic damages awarded by the jury and allocated” the remaining \$1,798,625.00 credit using those relative percentages.⁵⁸ As a result, 27%

48. See *id.* § 33.012(c)–(d) (“An election made under Subsection (c) shall be made by any defendant filing a written election before the issues of the action are submitted to the trier of fact and when made, shall be binding on all defendants.”).

49. *Regent Care of San Antonio, L.P. v. Detrick*, 610 S.W.3d 830, 833 (Tex. 2020).

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.* at 834.

56. *Id.*

57. *Id.*; see *Battaglia v. Alexander*, 177 S.W.3d 893, 908 (Tex. 2005) (“A settlement payment should be credited first to accrued prejudgment interest as of the date the settlement payment was made . . .”).

58. *Detrick*, 610 S.W.3d at 833.

of the settlement credit (\$485,629.00) was subtracted from economic damages, and 73% of the settlement credit (\$1,312,996.00) was subtracted from noneconomic damages.⁵⁹ “This reduction left Detrick a recovery of \$3,149,371 in economic damages and \$8,937,004 in noneconomic damages.”⁶⁰ The trial court *then* further reduced the noneconomic damages from \$8,937,004.00 to \$250,000.00 as required by the TMLA, leaving a total judgment of \$3,399,371.00.⁶¹

“Regent Care appealed, challenging,” among other things, “the trial court’s application of the settlement credit.”⁶² The Fourth San Antonio Court of Appeals affirmed the trial court’s application.⁶³ Regent Care then petitioned the supreme court for review.⁶⁴ As a result, the question before the supreme court was whether the trial court correctly applied the settlement credit *before* imposing the statutory cap on noneconomic damages.⁶⁵

For its part, Regent Care asserted that the trial court should have allocated and applied the settlement credit only *after* capping noneconomic damages to \$250,000.00.⁶⁶ If the trial court first imposed the statutory cap on noneconomic damages, 93% of the remaining settlement credit (\$1,672,721.00) would have been subtracted from economic damages, and 7% of the settlement credit (\$125,904.00) would have been subtracted from the statutorily reduced noneconomic damages. This alternative application would have left Detrick a recovery of \$1,962,279.00 in economic damages and \$124,096.00 in noneconomic damages, totaling a judgment of \$2,086,375.00.

In support of its argument that the settlement credit should have been applied after capping the noneconomic damages, Regent Care asserted that, under Chapter 33.012 of the CPRC, “the amount received in settlement must reduce the ‘*damages to be recovered*,’ not the damages awarded by the jury.”⁶⁷ Accordingly, Regent Care argued that the settlement credit should have been applied to the \$250,000.00 and not to the full amount of noneconomic damages found by the jury.⁶⁸ In addressing Regent Care’s argument, the supreme court upheld the trial court’s application of the settlement credit for two primary reasons.

First, the supreme court leaned on its analysis in an earlier decision, in which it “considered whether a settlement must be offset before or after applying the Texas Tort Claims Act’s damages cap.”⁶⁹ In *Trevino*, a hospital authority argued that it was only liable for its liability cap *minus* the

59. *Id.* at 833, 835.

60. *Id.* at 835.

61. *Id.* at 833.

62. *Id.*

63. *Id.*

64. *Id.* at 834.

65. *Id.*

66. *Id.* at 835.

67. *Id.* (emphasis added).

68. *Id.*

69. *Id.* (citing *Edinburg Hosp. Auth. v. Trevino*, 941 S.W.2d 76, 81–82 (Tex. 1997)).

settlement amount.⁷⁰ The court “rejected the Hospital Authority’s argument,” explaining that the damages “cap in the Tort Claims Act did not ‘circumscribe a plaintiff’s total *recovery* for a given injury.’”⁷¹ Instead, the *Trevino* court took a consequentialist approach in determining the legislature’s intent concerning that damages cap statute.⁷² The court observed that a contrary application of the settlement credit (i.e., imposing the liability cap first) could completely bar recovery against a non-settling defendant if a plaintiff settled with another defendant for *more* than the applicable damages cap.⁷³

Second, the supreme court directly addressed Regent Care’s plain language argument, in which Regent Care asserted that Chapter 33 of the CPRC mandates that settlement credits reduce “the amount of damages *to be recovered* by the claimant.”⁷⁴ The court explained that the TMLA statute “limits an individual defendant’s ‘liability for noneconomic damages’; it does not address the total amount a claimant may recover from all defendants and settling persons.”⁷⁵ The court reasoned that Chapter 33 of the CPRC controls the claimant’s recovery while the TMLA governs the defendant’s liability.⁷⁶ In short, “the ‘damages to be recovered by the claimant’—the amount of damages found by the jury minus any settlement credits—are independent of a defendant health care institution’s ‘limit of civil liability for noneconomic damages’ under the TMLA.”⁷⁷ Accordingly, the supreme court agreed with the court of appeals and affirmed that the trial court properly applied the settlement credit before imposing the TMLA damages cap.⁷⁸

C. TRIAL COURT DID NOT ABUSE ITS DISCRETION BY DECLINING TO ORDER PERIODIC DAMAGES

Under § 74.503 of the TMLA, a trial court shall order future damages be paid, in whole or in part, in periodic payments rather than by a lump-sum payment if requested by a defendant or claimant.⁷⁹ In ordering periodic payments, a trial court must make a *specific finding* of the dollar amount of periodic payments that will compensate the claimant for the future damages, specifying the amount, number, timing, and recipient of those payments.⁸⁰

In other words, any division between lump-sum payments and periodic payments of damages that will be “incurred after the date of judgment” must be founded in the record. The party requesting an order for periodic

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.* at 835–36.

75. *Id.* at 836.

76. *Id.*

77. *Id.*

78. *Id.*

79. TEX. CIV. PRAC. & REM. CODE ANN. § 74.503(b).

80. *Id.* § 74.503(c)–(d).

payments has the burden to identify for the trial court evidence regarding each of the findings required by section 74.503, and the findings must be supported by sufficient evidence.⁸¹

In its second issue, Regent Care asserted the trial court abused its discretion by ordering that \$256,358.00 in future damages be paid periodically.⁸² “The jury found that \$3 million, ‘if paid now in cash,’ would compensate Detrick for his future medical expenses.”⁸³ After trial, Regent Care requested the trial court to order payment of the jury’s entire award periodically over five to eight years.⁸⁴

The trial court first subtracted Detrick’s attorney’s fees and expenses, leaving a remainder of \$1,256,358.00.⁸⁵ From there, the trial court then ordered Regent Care pay \$1 million in a lump-sum payment and the residual \$256,358.00 in twenty-four monthly installments.⁸⁶ Regent Care argued that the trial court’s division between the lump-sum payment (\$1 million) and periodic payments (\$256,358.00) was not supported by sufficient evidence in the record.⁸⁷

Applying the principles set out under § 74.503, the supreme court agreed with Regent Care that the trial court’s order concerning periodic payments was not supported by sufficient evidence.⁸⁸ Nevertheless, the supreme court concluded that Regent Care was not entitled to reversal of the \$1 million lump-sum payment because it “did not point the court to any evidence supporting its request that the entire \$3 million award be paid periodically, nor to evidence of *any* specific dollar amount of medical expenses that would be incurred periodically.”⁸⁹ Further, the supreme court reasoned that “simply ordering the jury’s present-value damages award to be paid in periodic installments—whether in whole or in part—would be an abuse of discretion here because it would effectively ‘double discount’ the award, undercompensating him for the expenses he would incur in each future period.”⁹⁰ Critical to the supreme court’s holding was that Regent Care had the burden to identify evidence to support an order for periodic payments and failed to do so.⁹¹

In *Columbia Valley Healthcare System L.P. v. Andrade*, the Thirteenth Corpus Christi–Edinburg Court of Appeals applied the Texas Supreme Court’s analysis in *Regent Care*, stating that “any division between lump-sum payments and periodic payments” must be supported by evidence in

81. *Detrick*, 610 S.W.3d at 837 (citing TEX. CIV. PRAC. & REM. CODE § 74.501(1)).

82. *Id.* at 836.

83. *Id.*

84. *Id.*

85. *Id.* at 838.

86. *Id.*

87. *Id.* at 837–38.

88. *Id.* at 838.

89. *Id.*

90. *Id.* (citing TEX. CIV. PRAC. & REM. CODE ANN. § 74.503(c)).

91. *Id.* at 837–39.

the record.⁹² In that case, the trial court awarded “five ‘periodic payments in the amount of \$604,000’” per year and “one lump-sum payment of \$7,310,000 in cash.”⁹³ On appeal, Columbia Valley “argue[d] that the trial court’s division between the lump sum and periodic payments disregarded the jury’s findings.”⁹⁴ In its analysis, the court of appeals distinguished its case from *Regent Care* because both parties in *Columbia Valley* submitted evidence to support periodic future payments.⁹⁵ As a result, the trial court’s order of periodic payments was based on sufficient evidence and thus upheld.⁹⁶

Interestingly, Columbia Valley also “argue[d] that the trial court erred by refusing to file findings of fact and conclusions of law.”⁹⁷ The appellate court noted that “findings of fact and conclusions of law are generally only required when requested by a party in a case tried in the district or county court *without a jury*.”⁹⁸ Additionally, the appellate court concluded that “*Regent* did not hold that a trial court’s ordering of periodic payments must be supported by findings of fact and conclusions of law.”⁹⁹ Instead, the appellate court interpreted *Regent Care* for the proposition that “the division between the lump sum and periodic payments needed to be based on *evidence in the record*.”¹⁰⁰

III. MALPRACTICE LIABILITY

During the Survey period, the Texas Supreme Court issued two opinions relating to tolling statute of limitations periods in legal malpractice claims.¹⁰¹

A. THE TEXAS SUPREME COURT HELD THAT LEGAL ADVICE THAT IS ONLY TANGENTIALLY RELATED TO A PROSECUTION OR DEFENSE OF A CLAIM CANNOT BE TOLLED UNDER THE *HUGHES* STATUTE OF LIMITATIONS RULE

1. Another Look at the Hughes Rule

In *Erikson v. Renda*, the Texas Supreme Court reexamined the long-standing *Hughes* tolling rule regarding statutes of limitations.¹⁰² The *Hughes* tolling rule provides that attorney malpractice claims that involve the attorney’s “prosecution or defense of a claim that results in litigation”

92. *Columbia Valley Healthcare Sys. L.P. v. Andrade ex rel.*, No. 13-18-00362-CV, 2020 WL 4382264, at *6 (Tex. App.—Corpus Christi–Edinburg July 30, 2020, pet. filed) (mem. op.).

93. *Id.*

94. *Id.*

95. *Id.* at *7.

96. *Id.*

97. *Id.*

98. *Id.* (citing TEX. R. CIV. P. 296).

99. *Id.*

100. *Id.* (emphasis added).

101. See *Erikson v. Renda*, 590 S.W.3d 557, 559 (Tex. 2019); *Gray v. Skelton*, 595 S.W.3d 633, 635 (Tex. 2020).

102. *Erikson*, 590 S.W.3d at 559.

are tolled until all appeals have been exhausted.¹⁰³ First, the supreme court provided clarity as to whether the *Hughes* rule's applicability should be determined on a case-by-case basis, or whether it categorically applies to all cases within the definition of legal malpractice committed in the prosecution or defense of a claim that results in litigation.¹⁰⁴ The supreme court mandated that *Hughes* should have a strict application and be categorically applied to all cases that fall within its definition.¹⁰⁵ The categorical approach means courts should not evaluate the policy reasons of the rule when applying it and instead use a bright-line approach to ensure "predictability and consistency."¹⁰⁶ Second, the supreme court rejected any approach to broaden the *Hughes* rule, reasoning that it would give plaintiffs unlimited reach without fair notice to attorney defendants.¹⁰⁷ Limitations periods serve the function of providing a reasonable time for plaintiffs to bring their claims while balancing avoidance of stale claims and prejudice to defendants.¹⁰⁸

The supreme court in *Erikson* reiterated the *Hughes* standard that legal malpractice claims' limitations periods are equitably tolled when the actions giving rise to the malpractice claim were committed in the prosecution or defense of a claim that resulted in litigation,¹⁰⁹ and provided guidance as to what falls within the boundaries of the rule. Specifically, the supreme court emphasized that not every legal malpractice claim that results in litigation will fall under the auspice of *Hughes*.¹¹⁰ The "critical limitation" is that the malpractice must be committed "in the prosecution or defense of a claim."¹¹¹

2. *Erikson's Holding that Legal Work Incidental to Litigation Does Not Fall Under Hughes*

In *Erikson*, the supreme court held that the legal advice at issue was not within the ambit of the *Hughes* tolling rule because it was only tangentially related to the prosecution or defense of a claim.¹¹² The underlying dispute involved legal advice from an attorney purportedly blessing asset transfers in connection with resolving debt obligations.¹¹³ The attorney advised that the client should pursue transferring its assets to eliminate debt obligations with creditors, rather than filing for bankruptcy.¹¹⁴ The debt obligations stemmed from litigation where a company was found liable to the U.S. government and was in a precarious financial

103. *Hughes v. Mahaney & Higgins*, 821 S.W.2d 154, 157 (Tex. 1991).

104. *Erikson*, 590 S.W.3d at 565–66.

105. *Id.* at 566.

106. *Id.* (quoting *Apex Towing Co. v. Tolin*, 41 S.W.3d 118, 122 (Tex. 2001)).

107. *Id.* at 569.

108. *Id.*

109. *Id.* at 563–64.

110. *Id.* at 566.

111. *Id.*

112. *Id.* at 559.

113. *Id.* at 566.

114. *Id.* at 560.

situation.¹¹⁵ Notably, the attorney did not represent the client in the litigation that brought these debt obligations.¹¹⁶ The supreme court held that the advice about the asset transfers was only tangentially related to the underlying claims that brought about the debt obligations and refused to broaden *Hughes*'s reach, rejecting a broad interpretation of what it means for legal malpractice to "aris[e] from," "relat[e] to," or "connect[] with" a claim's defense or prosecution.¹¹⁷

The attorney's legal advice in *Erikson* was incidental and tenuously related to the litigation that brought about the debt obligations which triggered the client's need to transfer assets to creditors.¹¹⁸ As the supreme court explained, litigation comes with many "ripple effects" and expanding the application of *Hughes* to include legal services that might have a tangential relationship to litigation would be an unreasonable expansion of the *Hughes* judicial exception to statutes of limitations.¹¹⁹ If legal work is only "incidentally related to activities undertaken to prosecute or defend a claim" it is not within the realm of the *Hughes* rule.¹²⁰

B. THE TEXAS SUPREME COURT CLARIFIED THE MEANING OF
"EXONERATED" UNDER ITS *PEELER* HOLDING AND ITS IMPLICATION
UNDER *HUGHES*'S EQUITABLE TOLLING PRINCIPLES

1. Exoneration Under the Peeler Doctrine Requires Proof of Innocence

In *Peeler v. Hughes & Luce*, a plurality of the Texas Supreme Court held that in order for a client convicted of a criminal charge to pursue a legal malpractice claim, the client must first obtain exoneration.¹²¹ The *Peeler* court did not define "exoneration," leaving the question open as to whether it constitutes establishing actual innocence or something else.¹²² The supreme court answered that open question in *Gray v. Skelton* and held that exoneration under the *Peeler* doctrine requires proof of actual innocence.¹²³ Accordingly, a finding of innocence is a predicate to any legal malpractice claim, even if a client's criminal conviction has been vacated.¹²⁴

Innocence can be demonstrated in different ways.¹²⁵ Innocence may be established when a criminal conviction is vacated because of an actual innocence finding, or if the conviction is vacated on grounds other than an actual-innocence finding, it can be proven in a malpractice suit against a criminal defense attorney.¹²⁶ Either way, innocence must be the crux of

115. *Id.*

116. *Id.* at 566.

117. *Id.*

118. *Id.* at 568.

119. *Id.*

120. *Id.*

121. *Peeler v. Hughes & Luce*, 909 S.W.2d 494, 497–98 (Tex. 1995).

122. *See id.* at 497.

123. *Gray v. Skelton*, 595 S.W.3d 633, 639 (Tex. 2020).

124. *Id.*

125. *Id.*

126. *Id.*

the consideration in analyzing “exoneration” under *Peeler*.¹²⁷ The supreme court emphasized that vacating a conviction is not equivalent to exoneration.¹²⁸ For example, a finding of ineffective assistance of counsel is grounds to vacate a conviction, but does not demonstrate a criminal defendant’s innocence.¹²⁹ A criminal defendant’s counsel falling below constitutional standards under the Sixth Amendment does not mean that the criminal defendant is innocent of the underlying crime—it means that the conviction is not constitutionally sufficient.¹³⁰ Moreover, the supreme court emphasized that exoneration requires an affirmative act.¹³¹

The exoneration requirement in *Peeler* stems from the overarching concept of proximate cause.¹³² Convicted criminals who want to pursue legal malpractice claims against their defense attorneys have to overcome “the proximate cause bar,” and they do so by being “exonerated.”¹³³ Without exoneration, a criminal defendant cannot demonstrate that it was the attorney’s negligence rather than the defendant’s own illegal or criminal conduct that proximately caused the conviction.¹³⁴

Traditional legal malpractice claims require a showing that the lawyer owed a duty of care to the client, that duty was breached, and the breach proximately caused damage.¹³⁵ In *Gray*, the supreme court added another element to a malpractice claim if an individual’s conviction was vacated on grounds other than actual innocence—“[t]hey must obtain a finding of their innocence as a predicate to the submission of their legal-malpractice claim.”¹³⁶ Accordingly, any submission of a legal malpractice claim by convicted criminals should be “conditioned on an affirmative finding that the malpractice plaintiffs are innocent of the crime of which they were formerly convicted” and the standard will be by a preponderance of the evidence.¹³⁷

2. *Equitable Tolling Under the Hughes Doctrine Is Not Limited to the Habeas Application Process but Includes the Period by Which a Criminal Defendant’s Case Is Pending a New Trial or the State’s Prosecution*

As discussed earlier, the *Hughes* doctrine is an equitable tolling rule that provides that attorney malpractice claims involving the attorney’s

127. *See id.* at 637–39 (describing the plurality and dissent’s repeated references to the word “innocence” in the *Peeler* decision).

128. *Id.*

129. *Id.* at 638.

130. *Id.*

131. *Id.* (defining exoneration as “[t]he clearing of someone’s name after that person has been accused of blameworthy conduct or wrongdoing” (citing *Exoneration*, BLACK’S LAW DICTIONARY (11th ed. 2019))).

132. *Id.* at 637 (“At its core, the *Peeler* doctrine rests on the notion of proximate cause.”).

133. *Id.* at 635 (citing *Peeler*, 909 S.W.2d at 498).

134. *Id.* at 638.

135. *See id.* at 639 (citing *Rogers v. Zanetti*, 518 S.W.3d 394, 400 (Tex. 2017)).

136. *Id.*

137. *Id.*

prosecution or defense of a claim that results in litigation are tolled until all appeals have been exhausted.¹³⁸ The supreme court in *Gray* explained that this tolling period includes the period after a habeas application, which is when a criminal defendant is awaiting the state's prosecution and pending a new trial.¹³⁹ This is because habeas relief does not end a criminal case against a defendant, but "merely vacate[s] the original conviction."¹⁴⁰ After a criminal defendant's conviction is vacated, charges may still materialize; thus, a criminal defendant's potential "malpractice claim remain[s] captive to the possibility of a second prosecution and conviction that might likewise bar her malpractice claim."¹⁴¹ Leaving this open would put the criminal defendant's ability to seek a malpractice claim against her attorney in the hands of the state, and would unfairly risk exceeding time limitations because of the state's delay or indecision to prosecute.¹⁴² Accordingly, equitable tolling principles and the standard under *Hughes* require limitations to be tolled after the habeas application process, and until litigation is finally concluded.¹⁴³

138. *Hughes v. Mahaney & Higgins*, 821 S.W.2d 154, 157 (Tex. 1991).

139. *Gray*, 595 S.W.3d at 640.

140. *Id.*

141. *Id.*

142. *Id.*

143. *See id.* at 640–41.