SMU Annual Texas Survey

Volume 8 Article 12

2022

Professional Liability

Sven Stricker
Carrington, Coleman, Sloman, & Blumenthal

Jordan Brownlow
Carrington, Coleman, Sloman & Blumenthal

Tania Sethi
Carrington, Coleman, Sloman & Blumenthal

PROFESSIONAL LIABILITY

*Sven Stricker**
*Jordan Brownlow***
*Tania Sethi****

TABLE OF CONTENTS

https://doi.org/10.25172/smuatxs.8.1.12

* Sven Stricker is an associate at Carrington, Coleman, Sloman & Blumenthal. His practice is focused on commercial litigation, including real estate, construction, and securities. Sven graduated from the University of Texas School of Law in 2018.

** Jordan Brownlow is an associate of Carrington, Coleman, Sloman & Blumenthal. Her practice is focused on employment litigation and counseling, including discrimination and retaliation, wage and hour, and benefits and compensation. Jordan graduated from SMU's Dedman School of Law in 2020.

*** Tania Sethi is an associate at Carrington, Coleman, Sloman & Blumenthal. Her practice is focused on commercial litigation, including construction, surety, and railroad litigation. Tania graduated from Baylor Law School in 2017.

I. HEALTHCARE LIABILITY

A. Introduction

During the Survey period, the Texas Supreme Court addressed whether the Texas Medical Liability Act (TMLA) was preempted by 42 U.S.C. § 1983 and the scope of discoverable information in medical tort claims. In the former, the supreme court affirmed its support of the TMLA's expansive definition of health care claims and the expansive scope of the TMLA. In the latter, the supreme court expanded the scope of discoverable information for nonparties in medical tort claims.

B. Texas Supreme Court Concludes the TMLA is Not Preempted by 42 U.S.C. § 1983

In *Rogers v. Bagley*,[1] the Texas Supreme Court held that (1) claims asserted against a state mental health facility and its employees arising from the death of a patient, pleaded as claims under 42 U.S.C. § 1983, are health care liability claims under the TMLA; and (2) the TMLA's requirement to timely serve an expert report is not preempted by 42 U.S.C. § 1983.

In 2003, the Texas Legislature enacted the TMLA, which governs health care liability claims and requires that the plaintiff, to avoid dismissal, serve an expert report addressing liability and causation as to each defendant within 120 days after the defendant files an original answer.[2] The TMLA was enacted for the purpose of "deter[ring] frivolous lawsuits by requiring a claimant early in litigation to produce the opinion of a suitable expert that his claim has merit."[3] Forty-two U.S.C. § 1983 provides individuals with a cause of action against state actors for violations of the United States Constitution under color of state law.[4]

In this case, Plaintiff David Bagley sued Rio Grande State Center (RGSC) and several of its employees after the death of his thirty-seven-year-old son, Jeremiah Bagley.[5] Jeremiah had been committed to RGSC and was killed during an incident with several of RGSC's staff. The incident began when Jeremiah struck one of his monitors.[6] The staff intervened and gave him antipsychotic and sedative drugs.[7] After the incident, he fell into cardiac arrest and died.[8] His autopsy stated that the cause of death was "excited delirium due to psychosis with restraint-associated blunt force trauma."[9]

---

1. 623 S.W.3d 343, 343 (Tex. 2021), *cert. denied*, 142 S. Ct. 774 (2022).
2. Tex. Civ. Prac. & Rem. Code Ann. § 74.351(a).
3. Scoresby v. Santillan, 346 S.W.3d 546, 552 (Tex. 2011).
4. 42 U.S.C. § 1983; Nieves v. Bartlett, 139 S. Ct. 1715, 1730 (2019) (Gorsuch, J., concurring in part and dissenting in part).
5. Rogers, 623 S.W.3d at 347.
6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.*

David Bagley sued RGSC both individually and in the name of Jeremiah's estate, suing both RGSC and the individuals involved with the incident. He alleged negligence under the Texas Tort Claims Act for "dispens[ing] and/or administer[ing] various drugs proximately causing [Jeremiah's] personal injury and death."[10] Against the individuals, "Bagley asserted claims under 42 U.S.C. § 1983, alleging (1) excessive force in violation of the Fourth Amendment against the [PNAs]; (2) deliberate indifference by the supervisors in their training and supervision of the PNAs; and (3) deliberate indifference as to Bagley's medical care against" Bagley's doctor.[11]

When Bagley did not serve the expert reports after the 120-day deadline passed, the defendants moved to dismiss his claims for failure to serve the expert report. In response, Bagley alleged that his claims were not healthcare liability claims (as required to bring them under the TMLA), and even if they were, the TMLA's expert deadline was preempted by 42 U.S.C. § 1983.[12]

The supreme court first addressed whether Bagley's claims were health care claims subject to the TMLA.[13] The case turned on the second element required for a claim to be a health care claim—"whether . . . [his §] 1983 claims allege a cause of action for treatment, lack of treatment, or other claimed departure from accepted standards of medical care, or health care, or safety or professional or administrative services directly related to healthcare."[14]

The supreme court held that the claims were all health care claims "subject to the TMLA, including the expert-report [filing] requirement."[15] "The TMLA broadly defines 'health care' as 'any act or treatment performed or furnished, or that should have been performed or furnished, by any health care provider for, to, or on behalf of a patient during the patient's medical care, treatment, or confinement.'"[16] This definition plainly covered Bagley's claims, which alleged violations of the health care standard of care.[17] Physical restraint of violent psychiatric patients, training and staffing policies, and patient supervision fit squarely into the provision of health care services. That the plaintiff's claims even

---

10. *Id.* at 348.
11. *Id.*
12. *Id.*
13. Healthcare claims under the TMLA have three elements:

> (1) the defendant is a health care provider or physician; (2) the claimant's cause of action is for treatment, lack of treatment, or other claimed departure from accepted standards of medical care, health care, or safety or professional or administrative services directly related to health care; and (3) the defendant's alleged departure from acceptable standards proximately caused the claimant's injury or death.

Loaisiga v. Cerda, 379 S.W.3d 248, 255 (Tex. 2012) (citing Tex. Civ. Prac. & Rem. Code Ann. § 74.001(a)(13)).
14. Rogers, 623 S.W.3d at 350.
15. *Id.* at 349.
16. *Id.* at 350 (citing Tex. Civ. Prac. & Rem. Code Ann. § 74.001(a)(10)).
17. *Id.* at 351.

required expert testimony regarding the standards for restraining a psychiatric patient also indicated they were health care claims.[18] Thus, the plaintiff was required to have conformed with the 120-day expert deadline under the TMLA, unless the deadline was preempted by 42 U.S.C. § 1983.

The supreme court, however, held that the TMLA was not preempted by 42 U.S.C. § 1983.[19] Under the Supremacy Clause, when a plaintiff brings a federal cause of action in state court, federal law preempts state substantive law, but not state *procedural* law. The Texas Supreme court analyzed two cases: *Felder v. Casey*, 487 U.S. 131 (1988) and *In re GlobalSanteFe Corp.*, 275 S.W.3d 477 (Tex. 2008).

In *Felder*, the U.S. Supreme Court held that § 1983 preempted a Wisconsin statute that required that notice of a claim against the state be provided within 120 days of the alleged injury.[20] This deadline was preempted because it operated as an exhaustion requirement, forcing claimants to seek redress from the government before filing a lawsuit.[21] The statute also effectively created a statute of limitations for § 1983 claims, giving claimants only four months to bring their claims, whereas general Wisconsin law allowed tort claimants two years to bring their claims.[22] This rule more closely resembled a substantive rule and therefore preempted the imposed deadline.

Conversely, in *In re GlobalSanteFe Corp.*, the Texas Supreme Court held that a Texas statute requiring an expert report (not the TMLA) was not preempted by the Jones Act.[23] The expert report requirement was more procedural since the expert testimony would be required to establish the claims, regardless of when it was required.[24]

GlobalSanteFe controlled in this case. As in *GlobalSanteFe*, the report deadline merely adds advance notice of something that would ultimately be required regardless. The deadline rule would not produce different outcomes depending on whether the case was brought in state or federal court. Finally, the 120-day rule did not obstruct or discriminate against § 1983 claims, rather it merely requires an expert report be disclosed early on in the case.

The rule was thus more procedural in nature and therefore not preempted by 42 U.S.C. § 1983.[25] Claimants filing § 1983 health care claims in Texas must now be sure to adhere to the TMLA's requirement that mandates filing expert reports within 120 days after the defendant files an original answer. Additionally, throughout the opinion, the supreme court

18. *Id.*
19. *Id.* at 353.
20. Felder v. Casey, 487 U.S. 131, 138 (1988).
21. *Id.* at 142.
22. *Id.* at 141–42.
23. *In re* GlobalSantaFe Corp., 275 S.W.3d 477, 479 (Tex. 2008).
24. *Id.* at 485.
25. Rogers v. Bagley, 623 S.W.3d 343, 354 (Tex. 2021), *cert. denied*, 142 S. Ct. 774 (2022).

emphasized the TMLA's purpose—to deter frivolous health care liability claims. This opinion shows the supreme court's continued support for a broad interpretation of the TMLA and commitment to weeding out potentially frivolous claims, of all sorts, early in litigation.

C. Texas Supreme Court Extends Scope of Discoverable Information for Medical Providers

In *In re K & L Auto Crashers, LLC*,[26] the Texas Supreme Court extended its holding in *In re North Cypress Medical Center Operating Co., Ltd.*,[27] holding that a medical provider must produce its rates and billing practices to a tortfeasor who injured an insured patient.

Previously, in *North Cypress*, the Texas Supreme Court held that the negotiated rates a medical provider charged to patients' private insurers and public-entity payors were relevant and discoverable on the issue of the reasonableness of the "full" rates the provider charged to an uninsured patient for the same services.[28] From there, the supreme court concluded that the provider's negotiated rates were discoverable in a patient's suit challenging the reasonableness of the full rates the provider charged and secured with a medical lien.[29]

In re K & L Auto Crashers, LLC presented the same issue, but in a different context. The underlying dispute involved a motor-vehicle collision with a tractor-trailer rig.[30] The plaintiff, who was driving the motor vehicle that was allegedly hit by the tractor-trailer rig, sought medical treatment four days after the collision.[31] Five months later, the plaintiff underwent severe spine and shoulder surgeries "to repair injuries he claims he sustained in the accident."[32] His medical providers charged him around $1,200,000.00 for the total treatments.[33] He did not pay the balance directly; rather, his lawyers sent "'letters of protection' promising they would" pay for "reasonable and necessary medical charges" once the litigation was settled.[34]

The plaintiff then sued the tractor-trailer rig driver and his employer (the defendants) under § 18.001 of the Civil Practice and Remedies Code.[35] The defendants served subpoenas on plaintiff's health care providers, broadly requesting information "related to their billing practices and rates over a period of several years."[36] Several of the providers, along with the plaintiff, filed motions to quash and moved for a protective order, which the trial court granted. As the case progressed, the defendants

26. 627 S.W.3d 239, 245 (Tex. 2021) (orig. proceeding).
27. 559 S.W.3d 128, 129 (Tex. 2018) (orig. proceeding).
28. *Id.*
29. *Id.*
30. K & L Auto, 627 S.W.3d at 245.
31. *Id.*
32. *Id.*
33. *Id.*
34. *Id.*
35. *Id.*
36. *Id.*

requested reconsideration of the order quashing the subpoenas, arguing the information was necessary so that their experts could determine the reasonableness of the full rates charged.[37]

This time, the defendants narrowed their requests to only:

> (1) the amounts the providers charged insurance companies, federal insurance programs, and in-network healthcare providers for the services, materials, devices, and equipment billed to . . . [plaintiff] as of the date of . . . [plaintiff's] treatment, (2) the amounts the providers paid for the devices and equipment billed to . . . [plaintiff], and (3) the providers' chargemaster (full) rates for the devices and equipment billed to . . . [plaintiff] and how the providers determined those rates.[38]

However, the requests were still quite broad, covering "*all communications* between the providers and any manufacturer, seller, and distributor of any device used by the providers to treat [plaintiff];" and "*all documents* related to the services and devices provided."[39] The defendants agreed to enter into protective agreements with all the providers.[40] However, the plaintiff still argued that the requests were overbroad.

The trial court denied the motion for reconsideration without an explanation, and the court of appeals denied the defendants' petition for writ of mandamus.[41]

The supreme court opened its analysis with an acknowledgement that mandamus is an "extraordinary" remedy but that the defendants had demonstrated that such extraordinary relief was appropriate.[42]

The plaintiff argued that *North Cypress* did not apply "because that case involved a patient's challenge to a hospital's ability to enforce a lien securing medical charges," whereas the present "case involve[d] . . . [the] injured party's ability to recover . . . charges from . . . [the] tortfeaser."[43] Since medical liens are only valid for a "reasonable and regular rate,"[44] whether the rates were reasonable was "*the central issue*."[45] Here, the plaintiffs argued that they could recover whatever amount was "actually paid or incurred."[46]

The supreme court disagreed. Section 41.0105 does not give plaintiffs and providers a blank check; instead, it limits them to payments "paid or incurred" limited by "any other limitation under law."[47] The relevant lim-

---

37. *Id.* at 246.
38. *Id.*
39. *Id.*
40. *Id.*
41. *In re* K&L Auto Crushers, LLC, 607 S.W.3d 358, 359 (Tex. App.—Dallas 2019, orig. proceeding [mand. granted]) (mem. op.).
42. K & L Auto, 627 S.W.3d at 247.
43. *Id.* at 249.
44. *See* TEX. PROP. CODE ANN. § 55.004(d)(1).
45. K & L Auto, 627 S.W.3d at 249 (quoting In re North Cypress Med. Ctr. Operating Co., Ltd., 559 S.W.3d 128, 133 (Tex. 2018) (orig. proceeding)) (emphasis added).
46. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 41.0105.
47. *Id.*

itation here was "the common-law requirement that the amount of recoverable expenses be reasonable."[48] Section 41.0105 did not eliminate this requirement; in fact, by establishing a "purely procedural" process "to establish and challenge the reasonableness" of medical expenses,[49] it recognizes that medical expenses must be "reasonable at the time and place that the service was provided."[50]

In any event, compensating the plaintiff for unreasonably high medical fees would contradict the purpose of requiring tortfeasers to wholly compensate the victims, placing them in the position they would have been in "absent the defendant's tortious act."[51] Compensating plaintiffs for unreasonably high medical fees could mean that tortfeasers are forced to compensate plaintiffs for harm not caused by them but caused by the claimant or provider's conduct.[52] The requests, as narrowed, were therefore relevant.[53]

Nor were the requests, as narrowed, overbroad. The defendants had significantly narrowed their discovery as the discovery was nearly identical to the requests in *North Cypress*.[54] Additionally, given the relevance, the requests were not considered an undue burden.[55] Though some of the information requests could be discovered elsewhere, it was not proper to deny the whole request. The trial court should have limited the requests somehow. Finally, the defendants agreed to enter a protective order (though the defendants also promised they were not seeking any confidential or trade secret information).[56]

II. DIRECTOR AND OFFICER LIABILITY

A. Introduction

During the Survey period, the Houston Court of Appeals addressed the personal liability of company representatives for a company's debts and the application of an attorneys' fees statute with regard to derivative lawsuits.

B. Houston Court of Appeals Concludes CFO Not Personally Liable for Company's' Debts

In *Sherrard v. SignAd, Ltd.*,[57] the Court of Appeals for the Fourteenth

48. K & L Auto, 627 S.W.3d at 249.
49. *Id.* (citing Haygood v. De Escabedo, 356 S.W.3d 390, 393 (Tex. 2011)).
50. *Id.* (citing Tex. Civ. Prac. & Rem. Code Ann. § 18.001).
51. *Id.* at 250 (quoting J & D Towing, LLC v. Am. Alt. Ins. Corp., 478 S.W.3d 649, 655 (Tex. 2016)).
52. *Id.* at 250–51.
53. The supreme court did caution that, though these requests were relevant, this case did not mean that "*all communications* or *all documents* regarding these topics were discoverable." *Id.* at 251. The requests must, of course, still be proportional.
54. *Id.*
55. *Id.* at 255.
56. *Id.* at 256.
57. 637 S.W.3d 192, 200 (Tex. App.—Houston [14th Dist.] 2021, no pet.).

District of Texas at Houston affirmed previous Texas appellate court holdings in finding that a company's representative is not generally personally liable for a company's debts.

This case was centered on an advertising contract between Sometimes Spouse and SignAd, which called for SignAd to "post advertisements for Sometimes Spouse . . . on a shared-space digital billboard in" exchange for regular monthly payments from Sometimes Spouse.[58] Crystal Sherrard, Sometimes Spouse's CFO, signed the advertising contract on behalf of Sometimes Spouse.[59]

In September 2018, SignAd sued Sometimes Spouse for breach of contract, suit on sworn account, and quantum meruit, alleging that Sometimes Spouse's "account remained significantly unpaid after the performance term" of the advertising contract was complete.[60] SignAd "also named Crystal . . . [Sherrard] as a defendant[,] asserting the same claims against her" in its verified petition.[61] Sometimes Spouse and Sherrard both appeared and answered the lawsuit. Sherrard filed a general denial, which was not verified.[62]

SignAd appeared at trial; Sometimes Spouse and Sherrard did not.[63] The trial court entered a judgment against Sometimes Spouse and Sherrard.[64] Six months later, Sherrard filed her notice of restricted appeal.[65]

The appellate court first addressed the jurisdictional elements of Sherrard's restricted appeal, confirming that (1) Sherrard's notice of restricted appeal was filed within six months after the trial court's judgment was signed; (2) Sherrard was a party to the underlying lawsuit; and (3) Sherrard did not participate in the hearing that resulted in the complained-of judgment.[66]

Moving to the merits of Sherrard's appeal, the appellate court noted that "[r]eview by restricted appeal affords an appellant the same scope of review as an ordinary appeal" and "permits the courts of appeals to review legal and factual insufficiency claims."[67] For her part, Sherrard "contend[ed] that the record conclusively demonstrate[d] that she did not incur personal liability as a matter of law" because she signed the advertising contract "in her representative capacity . . . [of] CFO for Sometimes Spouse, and there [was] no [other] evidence" showing "she was bound in any other way."[68] And for its part, SignAd contended that it "established prima facie proof of its right to recover from" Sherrard because Sherrard "did not file a verified . . . [denial] challenging . . . [SignAd's] sworn-

58. *Id.* at 194.
59. *Id.*
60. *Id.*
61. *Id.*
62. *Id.* at 195.
63. *Id.*
64. *Id.*
65. *Id.*
66. *Id.* at 195–96.
67. *Id.* at 196.
68. *Id.* at 198.

account allegations."[69]

The appellate court turned to analyzing the advertising contract at issue, explaining that Texas law affords contract terms their plain and ordinary meaning and that "[a]n agent who contracts for a disclosed principal is generally not liable on the contract."[70] Here, the appellate court pointed out that the advertising "contract plainly show[ed] an agreement between SignAd and Sometimes Spouse."[71] Further, the signatures on the advertising "contract reflect[ed] that each company executed the agreement . . . [via] their corporate officers."[72] Critically, the appellate court noted that Sherrard was not otherwise identified as a party to the contract.[73] SignAd contended that Sherrard was bound, however, pursuant to the following contract language as a "signer": "Contract signer agrees to pay to the order of SignAd, Ltd. in Houston, Harris County, Texas. Signer(s) accept full financial responsibility."[74]

The appellate court disagreed. The court explained that the only "fair reading of the contract is that the term 'signer' refers to the advertiser or agency executing, or signing, the contract."[75] The court reasoned that Sometimes Spouse signed the contract via its corporate officer Sherrard and is therefore "the only party that can reasonably be construed as the 'signer' referenced . . . in the contract."[76]

The appellate court then addressed SignAd's second argument for upholding the trial court's ruling regarding its sworn account claim.[77] SignAd contended that because Sherrard "did not file a verified denial she forfeited her right to deny the 'capacity' in which she was sued."[78]

Under Texas Rule of Civil Procedure 185, the court explained that a party resisting a sworn account claim who does not timely file a sworn denial may not dispute the receipt of the items or services or the correctness of the stated charges.[79] Notably, one exception to Rule 185's procedural requirements is when it appears from the plaintiff's account that a named defendant was a *stranger* to the account.[80] In such a situation, the defendant is not required to file a sworn denial.[81] The rationale, as the court explained, is that a trial court cannot presume that an individual, who signed a contract on behalf of a company, retained any personal knowledge of an account beyond the date it was signed.[82] Sherrard fell

69. *Id.*
70. *Id.* at 198–99.
71. *Id.* at 199.
72. *Id.*
73. *Id.*
74. *Id.*
75. *Id.* at 200 (emphasis omitted).
76. *Id.*
77. *Id.* at 201.
78. *Id.*
79. *Id.* (citing TEX. R. CIV. P. 185).
80. *Id.*
81. *Id.*
82. *Id.* at 201–02.

squarely into this exception.[83]

SignAd's sworn account claim against Sherrard was based entirely on its specific account activity with Sometimes Spouse, which the court could not presume, for purposes of Rule 185, Sherrard had personal knowledge of.[84] The court concluded that SignAd therefore provided no proof that Sherrard was bound by the contract.[85] As a result, the appellate court reversed the trial court's judgment against Sherrard and rendered judgment dismissing Sherrard.[86]

C. Houston Court of Appeals Affirmed Trial Court's Attorneys' Fees Award in Derivative Lawsuit

In *Moody v. Nat'l W. Life Ins. Co.*,[87] the Court of Appeals for the First District of Texas at Houston determined that probative evidence supported a fees award pursuant to § 21.561(b)(2) of the Texas Business Organizations Code.

At the trial level, a shareholder of National Western Life Insurance Company brought a derivative suit against National Western, its subsidiary, and their respective directors, alleging that the directors breached their fiduciary duties regarding the sale of insurance in a foreign market.[88] "In 2005, a Brazilian court entered a default judgment against National Western for wrongful refusal to pay a life insurance claim."[89] This resulted in an eventual fine from a Brazilian regulatory authority because the authority asserted that National Western engaged in the unauthorized issuance of policies in Brazil.[90] Although National Western paid a reduced fine and believed it could legally sell insurance policies in Brazil, it decided to discontinue issuance of policies in Brazil based on the lack of profitably.[91]

Before filing his derivative lawsuit, Robert L. Moody Jr. sent an inquiry letter to National Western and his younger brother, National Western's COO and President.[92] Although this letter referenced the Brazilian fine, the gravamen of Moody's letter related to personal family disputes within National Western and other family-related entities. This letter also threatened the filing of a derivative suit.[93] Moody later "sent a demand letter to National Western[,] . . . alleging . . . [the] board members had breached their fiduciary duties" related to the enforcement action in Brazil.[94] The letter demanded that National Western implement a laundry list

83. *Id.* at 202.
84. *Id.*
85. *Id.*
86. *Id.*
87. 634 S.W.3d 256, 264–65 (Tex. App.—Houston [1st Dist.] 2021, no pet.).
88. *Id.* at 268–69.
89. *Id.* at 266.
90. *Id.*
91. *Id.*
92. *Id.* at 266–67.
93. *Id.* at 267.
94. *Id.*

of corrective actions.[95] The board of directors met, considered Moody's demand, and concluded that no further investigation was necessary and a suit by National Western against its board was not in the best interest of the business.[96] Moody then filed a derivative suit based on the board's refusal of his demands.[97]

National Western answered and counterclaimed, among other things, for expenses under Chapter 21 of the Texas Business Organizations Code and subsequently filed pleas to the jurisdiction.[98] The trial court granted those pleas.[99] Further, "[w]ithout expressly finding that Moody . . . filed suit without reasonable cause or for an improper purpose, the trial court granted" National Western's "request for attorneys' fees and expenses."[100] After the trial court entered a final judgment awarding National Western the attorneys' fees, Moody appealed, challenging, among other things, the trial court's award of attorneys' fees.[101]

The appellate court first determined that the trial court correctly granted the pleas to the jurisdiction because Moody failed to plead particularized facts showing that the board wrongfully refused his demands.[102] The court then turned to Moody's challenge regarding the trial court's award of attorneys' fees to National Western.[103] Finding Moody preserved error on this issue and the trial court did not err by ruling based on the written filings, the appellate court addressed Moody's sufficiency of the evidence challenge regarding the attorneys' fees award.[104]

Here, Moody argued that the evidence did "not support a finding that he filed" the derivative "lawsuit without reasonable cause or for an improper purpose" pursuant to § 21.561(b)(2).[105] The court first noted that although "[t]he trial court did not issue findings of fact on improper purpose or lack of reasonable cause . . . [an appellate court] may imply such findings . . . [when] supported by the record."[106]

The trial record demonstrated that National Western's response to Moody's demand letter stated that National Western (1) "obtained legal opinions regarding . . . its business practices" in Brazil; (2) "paid the Brazilian fine under protest[;] and [(3)] disclosed the Brazilian legal issues to [its] shareholders."[107] National Western also addressed the personal family disputes raised in Moody's demand, stating that a derivative lawsuit based on personal grievances is sanctionable.[108] The appellate court also

95. *Id.*
96. *Id.* at 267–68.
97. *Id.* at 268.
98. *Id.* at 269.
99. *Id.* at 270.
100. *Id.* at 271–72.
101. *Id.* at 272.
102. *Id.* at 272–80.
103. *Id.* at 280.
104. *Id.* at 280–83.
105. *Id.* at 283.
106. *Id.*
107. *Id.* at 283–84.
108. *Id.* at 284.

pointed out that Moody knew the board had met and considered his demand and that National Western was under investigation concerning its operations in Brazil.[109] Thus, Moody knew that filing suit could harm National Western by contradicting the company's position.[110] A simple inquiry by Moody would have revealed that National Western did not conceal the Brazilian fine from its shareholders and was disengaging from issuing policies to non-U.S. residents.[111] Based on this, the appellate court concluded "that a reasonable presuit inquiry" by Moody "would have revealed . . . there was no basis in fact to allege that rejection of" his letter "was a result of gross negligence."[112] As a result, there was probative evidence to support the trial court's implied finding that Moody's derivative suit was brought without reasonable cause.[113]

Additionally, the appellate court concluded that the probative evidence existed to support the trial court's implied finding that the suit was brought for an improper purpose.[114] Concerning this prong, the appellate court noted that Moody's initial inquiry letter referenced family disputes related to other family entities as well as Moody's dissatisfaction over the discontinuation of financial and in-kind benefits.[115]

Finally, the appellate court addressed Moody's argument that there was "no or insufficient evidence of a nexus between the amount of the fees awarded and . . . [the] derivative suit."[116] The court acknowledged the Texas Supreme Court's standard in *Nath v. Texas Children's Hospital*, stating "that there must be a 'direct nexus between the offensive conduct, the offender, and the sanction award.'"[117] Distinguishing *Nath*, the court explained that "[§] 21.561 is not a general sanctions statute—it is specific to . . . derivative suits."[118] The court further explained that sanctions awarded under general sanctions statutes often involve "more than one cause of action" or "causes of actions against different defendants."[119] "If a derivative suit is wrongfully brought," however, "the costs of investigating and defending the suit are necessarily incurred because of the wrongful conduct of *instituting* the suit."[120] As a result, the appellate court concluded that the *Nath* "nexus" is baked into § 21.561.[121]

109. *Id.*
110. *Id.*
111. *Id.*
112. *Id.*
113. *Id.*
114. *Id.* at 285.
115. *Id.*
116. *Id.*
117. *Id.* at 286 (quoting Nath v. Tex. Children's Hosp., 446 S.W.3d 355, 361 (Tex. 2014)).
118. *Id.*
119. *Id.*
120. *Id.* (emphasis added).
121. *Id.*

III. PROFESSIONAL LIABILITY

A. Introduction

During the Survey period, the Texas Supreme Court extended the application of the attorney immunity defense to actions taken on behalf of a client outside of the litigation context. The Texas Supreme Court also extended the right to bring an ineffective assistance claim against retained counsel to parents in government-initiated suits to terminate the parent-child relationship.

B. The Attorney Immunity Defense Can Be Raised in Both the Litigation Context and the Transactional Context

The attorney immunity defense "ensure[s] that attorneys may in all cases zealously represent their clients without the threat of suit from third parties compromising that representation" by "den[ying] a cause of action to all beneficiaries [to] whom the attorney did not represent.[122] The "defense exists to promote 'loyal, faithful, and aggressive representation' by attorneys, which it achieves . . . by removing the fear of personal liability."[123] Thus, the attorney immunity defense applies when a non-client's claim is based on an attorney's conduct within the scope of the attorney's representation as opposed to conduct that is outside the scope of the attorney's representation of a client or foreign to the duties of an attorney, such as an attorney's participation in fraudulent activities with a client.[124]

In Texas, attorney immunity protects an attorney against a non-client's claim when the claim is based on conduct that meets a two-prong test.[125] First, the conduct must "constitute[ ] the provision of 'legal' services involving the unique office, professional skill, training, and authority of an attorney."[126] Second, the attorney must engage in conduct "to fulfill the attorney's duties in representing the client within an adversarial context in which the client and the non-client do not share the same interests and[,] therefore[,] the non-client's reliance on the attorney's conduct is not justifiable."[127]

Prior to the *Haynes & Boone, LLP v. NFTD, LLC* case, the Texas Supreme Court discussed the attorney immunity defense only within the litigation context.[128] The supreme court now addresses the application of the attorney immunity defense in the transactional context.

In *Haynes & Boone, LLP v. NFTD, LLC*, after purchasing the Bernardo brand's assets, TEFKAB Footwear, LLC sued a number of competitors for infringing on Bernardo's patents only to realize that the

122. Haynes & Boone, LLP v. NFTD, LLC, 631 S.W.3d 65, 74 (Tex. 2021).
123. *Id.* at 76.
124. *Id.* at 76–77.
125. *Id.* at 78.
126. *Id.*
127. *Id.*
128. *See id.*

patents were invalid.[129] TEFKAB never notified the United States Patent and Trademark Office that the patents were invalid.[130]

TEFKAB then retained Haynes and Boone "to represent it in all of its 'business, financial, and legal matters,' including the sale of the Bernardo brand assets to NFTD, LLC; Bernardo Group, LLC; Bernardo Holdings, LLC; and Cooper Miller, LLC (collectively, NFTD)."[131] During negotiations, Haynes and Boone represented to NFTD that the patents bore significant value notwithstanding the fact that those patents were invalid.[132] After the sale, NFTD discovered the patents were invalid and then hired Haynes and Boone to handle the process of registering the patents.[133]

NFTD then "sold the Bernardo brand assets to . . . JPT Group, LLC."[134] During negotiations, NFTD expressly represented to JPT that all of the Bernardo patents were valid and enforceable, notwithstanding the fact that those patents were invalid.[135] After the sale, JPT discovered the patents were invalid and filed suit against NFTD.[136] In response, NFTD asserted third-party claims, in relevant part, against Haynes and Boone not arising out of the attorney-client relationship.[137]

The trial court granted Haynes and Boone's motion for summary judgment whereby the firm argued that the attorney immunity defense bars NFTD's claims because the claims are based on actions Haynes and Boone took within the scope of their representation of TEFKAB, in opposition to NFTD's interests.[138]

The court of appeals reversed, "holding the attorney immunity defense does not 'extend . . . beyond the litigation context' . . . to a business transaction."[139]

The supreme court then granted "Haynes and Boone's petition for review to address whether the attorney-immunity defense applies to a nonclient's claims based on an attorney's conduct performed outside of the litigation context."[140] The supreme court noted that there is no meaningful distinction between the purpose of the attorney immunity defense in the litigation context and non-litigation context.[141] Rather, in all professional functions, "attorneys are duty-bound to competently, diligently, and zealously represent their clients' interests while avoiding any conflicting obligations or duties to themselves or others."[142] "Allowing a nonclient to sue an attorney based on the 'kind' of conduct the immunity

129. *Id.* at 68.
130. *Id.*
131. *Id.* at 68–69.
132. *Id.* at 68.
133. *Id.* at 69.
134. *Id.*
135. *Id.*
136. *Id.*
137. *Id.* at 69–70.
138. *Id.* at 70.
139. *Id.*
140. *Id.*
141. *Id.* at 79.
142. *Id.*

defense protects would create as much of a risk of dividing an attorney's loyalties in a transactional context as it would in a litigation context."[143]

Considering the purposes of the attorney immunity defense, the supreme court held the attorney immunity defense can be raised in "all adversarial contexts in which an attorney must zealously and loyally represent his or her client, so long as the conduct constitutes the 'kind' of conduct attorney immunity protects."[144] In other words, if an attorney engages in conduct (1) that constitutes the provision of legal services involving the unique office, professional skill, training, and authority of an attorney; and (2) to fulfill the attorney's duties in representing the client within an adversarial context in which the client and the non-client do not share the same interests and, therefore, the non-client's reliance on the attorney's conduct is not justifiable, then the attorney—whether a litigator *or* a transactional attorney—may raise the attorney immunity defense.

C. Parents in Government-Initiated Suits to Terminate the Parent-Child Relationship May Assert a Claim for Ineffective Assistance of Counsel Against Retained Counsel

The Supreme Court of the United States has long since held "that the United States Constitution does not require the appointment of counsel for parents in every" parent-child termination proceeding but encouraged states to adopt higher standards "than those minimally tolerable under the [United States] Constitution."[145]

Pursuant to the Supreme Court's recommendation, Texas Family Code § 107.013 provides:

> (a) In a suit filed by a governmental entity under Subtitle E in which termination of the parent-child relationship . . . is requested, the court shall appoint an attorney ad litem to represent the interests of:
> (1) an indigent parent of the child who responds in opposition to the termination or appointment . . .
>
> (a-1) In a suit described by Subsection (a), if a parent is not represented by an attorney at the parent's first appearance in court, the court shall inform the parent of:
> (1) the right to be represented by an attorney; and
> (2) if the parent is indigent and appears in opposition to the suit, the right to an attorney ad litem appointed by the court.[146]

In *In re M.S.*, the Texas Supreme Court considered the foregoing statute and held that the statute required appointed counsel to also be com-

143. *Id.*
144. *Id.* at 79–80.
145. Interest of D.T., 625 S.W.3d 62, 69 (Tex. 2021) (discussing Lassiter v. Dep't of Soc. Servs., 452 U.S. 18, 31–33 (1981)).
146. Tex. Fam. Code Ann. § 107.013(a)(1), (a-1).

petent and effective counsel.[147] As such, "a parent with appointed counsel could challenge counsel's performance by asserting an ineffective assistance of counsel claim on appeal."[148]

Following the *In re M.S.* case, Texas courts of appeals generally limited the Texas Supreme Court's holding to "cases in which the parent opposing termination was indigent and had appointed counsel."[149] In *Interest of D.T.*, however, the supreme court considered a parent's right to raise an ineffective assistance of counsel claim on appeal against retained counsel.

In *Interest of D.T.*, the mother retained counsel to represent her during the course of the parent-child termination proceedings.[150] At the conclusion of the case, "[t]he jury unanimously found that grounds existed" to terminate the mother's relationship with her child "and that termination was in . . . [the child's] best interest."[151] The mother than appealed and raised an ineffective assistance of counsel claim, but the court of appeals held that she could not raise such a challenge because her counsel was retained.[152]

Texas Family Code "[§] 107.013(a-1)(1) unambiguously mandates that, if a parent in a government-initiated termination case is unrepresented at the parent's first appearance, trial courts shall inform the parent of 'the right to . . . represent[ion] by an attorney'" without regard for indigency or any other qualification.[153]

By enacting Texas Family Code § 107.013(a-1)(1), the Texas Legislature:

> [D]etermined that when the state seeks to terminate a parent's fundamental liberty interest in making decisions regarding the care of his or her child, gravely and permanently impacting both, the stakes justify affording all parents the right to effective counsel to reduce the risk of an erroneous deprivation and unjust outcome.[154]

The statute clearly "evidences the Legislature's intent to afford all parents appearing in opposition to state-initiated parental-rights termination suits the right to *effective* counsel regardless of whether counsel is appointed or retained."[155]

Furthermore, the Texas Supreme Court acknowledged that "[m]any of the same concerns that led courts to eliminate the distinction between appointed and retained counsel for ineffective-assistance claims in criminal cases are present in civil parental-rights termination cases initiated by the state."[156] Specifically:

147. Interest of D.T., 625 S.W.3d at 69–70.
148. *Id.* at 70.
149. *Id.*
150. *Id.* at 68.
151. *Id.*
152. *Id.*
153. *Id.* at 71.
154. *Id.* at 73.
155. *Id.* at 71.
156. *Id.* at 72.

> [J]ust like in criminal cases, the state is the actor seeking to curtail the parent's liberty interest, regardless of whether the parent's counsel is appointed or retained. The Legislature determined that when the state seeks to terminate a parent's fundamental liberty interest in making decisions regarding the care of his or her child, gravely and permanently impacting both, the stakes justify affording all parents the right to effective counsel to reduce the risk of an erroneous deprivation and unjust outcome.[157]

Given the unambiguous language of the statute and the liberty interests at stake in a parental-rights termination proceeding, the supreme court held that an attorney has a duty to provide the parent with competent and effective legal assistance.[158] Said differently, "a parent who responds in opposition to a government-initiated suit seeking termination of the parent-child relationship may assert a claim for ineffective assistance of counsel on appeal regardless of whether the parent's counsel was appointed or retained."[159]

157. *Id.* at 72–73.
158. *Id.* at 73.
159. *Id.*