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Professional Liability

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ABSTRACT

This Article describes and analyzes major developments in professional liability law that occurred in Texas between December 1 and November 30 of 2022.

I. HEALTH CARE LIABILITY

A. Introduction

During the Survey period, the Texas Supreme Court (1) addressed whether the Texas Medical Liability Act (TMLA)[1] prohibits a claimant from filing an amended petition after missing the statutory deadline to file an expert report and (2) examined the scope of permissible discovery under the TMLA before an expert report is filed.[2] In the former, the supreme court determined that the TMLA does not prohibit, and courts therefore should consider, such an amended pleading in evaluating a motion to dismiss under the TMLA for failure to file an expert report.[3] In the latter, the supreme court concluded that a health-care facility's policies and procedures are not discoverable under the TMLA until a claimant has filed an expert report.[4]

B. TMLA Does Not Prohibit Filing Amended Petition After Missing Deadline to File Expert Report

In *Lake Jackson Medical Spa, Ltd. v. Gaytan*,[5] in a matter of first impression, the Texas Supreme Court held that the TMLA does not prohibit trial courts from considering an amended petition filed in response to a motion to dismiss for failure to file an expert report.[6] Analyzing the entire record, including the amended petition, the supreme court nevertheless concluded that the plaintiff's claims were health-care liability claims subject to the TMLA.[7] Because the plaintiff did not file an expert report within 120 days, the supreme court therefore ordered dismissal of her claims.[8]

The Texas Legislature enacted the TMLA, which governs health-care liability claims, in 2003.[9] Like the legislation that preceded it, the TMLA's fundamental purpose was to increase the affordability of, and access to, health care by mitigating the costs of health-care liability claims.[10] To deter

1. Tex. Med. Liab. Act, Tex. Civ. Prac. & Rem. Code Ann. §§ 74.001–74.507.
2. *See* Lake Jackson Med. Spa, Ltd. v. Gaytan, 640 S.W.3d 830, 834 (Tex. 2022); *In re* LCS SP, LLC, 640 S.W.3d 848, 850 (Tex. 2022).
3. *See Gaytan*, 640 S.W.3d at 839, 847.
4. *See LCS*, 640 S.W.3d at 856.
5. 640 S.W.3d 830 (Tex. 2022).
6. *See id.* at 837, 847.
7. *See id.* at 847.
8. *See id.*
9. Act of June 2, 2003, 78th Leg., R.S., ch. 204, §§ 10.01, 10.11, 2003 Tex. Gen. Laws 847, 864–82, 884–85 (codified at Tex. Civ. Prac. & Rem. Code Ann. §§ 74.001–74.507).
10. *See* Scoresby v. Santillan, 346 S.W.3d 546, 552 (Tex. 2011).

frivolous lawsuits, the TMLA therefore requires a health-care liability plaintiff to produce an expert report within 120 days after a defendant files an original answer.[11] Under the TMLA, if the plaintiff fails to produce an expert report in time, upon a defendant's motion, the court "shall" dismiss the plaintiff's claim(s) against that defendant with prejudice.[12]

In *Gaytan*, Erika Gaytan sued Lake Jackson Medical Spa, Ltd., its employee, aesthetician Jamie Gutzman, and its owner, Dr. Robert Yarish, for alleged injuries from dermatological treatments.[13] Gaytan accused Lake Jackson and Gutzman of "medical negligence" in her original petition.[14] In her first amended petition, Gaytan added Dr. Yarish as a defendant and similarly accused him of negligence with respect to the administration of "medical treatments."[15]

The defendants moved to dismiss Gaytan's claims under section 74.351 of the Texas Civil Practice and Remedies Code (Section 74.351) after she failed to file an expert report within the statutorily prescribed window.[16] In her response to the defendants' motion, Gaytan argued that her claims are not health-care liability claims subject to the TMLA because the treatment she complains about was "cosmetic" and "purely for aesthetic reasons."[17] In support of her argument, Gaytan included an affidavit in which she testified that she received no medical referral to Lake Jackson, sought only "cosmetic treatment" for acne, did not seek to address any "disease, disorder or injury," does not recall completing any medical-history or patient-consent forms, never met or received treatment from Dr. Yarish, and did not receive any prescription medication.[18]

The day before the hearing on defendants' motion to dismiss, Gaytan then filed a second amended petition recasting her claims.[19] Gaytan removed all references to the TMLA and to "medical" treatments or negligence.[20] For example, Gaytan generally replaced the word "medical" with "cosmetic" and "patient" with "patron" or "customer."[21] The trial court denied the defendants' dismissal motion but did not indicate whether it considered Gaytan's second amended petition in its disposition.[22] The court of appeals affirmed, concluding that the trial court should have focused on the second amended petition.[23] On this threshold issue of first impression, the Texas

11. *See id.*; Tex. Civ. Prac. & Rem. Code § 74.351(a). During the last Survey period, the Texas Supreme Court held that 42 U.S.C. § 1983 does not preempt this requirement. *See Rogers v. Bagley*, 623 S.W.3d 343, 356 (Tex. 2021), *cert. denied*, 142 S. Ct. 774 (2022).
12. Tex. Civ. Prac. & Rem. Code § 74.351(b).
13. *See Gaytan*, 640 S.W.3d at 834.
14. *Id.*
15. *Id.*
16. *See id.*
17. *Id.*
18. *Id.*
19. *See id.*
20. *Id.*
21. *Id.* at 834–35.
22. *See id.* at 836.
23. *See id.* at 836–37.

Supreme Court agreed that the trial court's evaluation of the dismissal motion should have centered around Gaytan's second amended petition.[24]

The supreme court noted first that the TMLA's 120-day deadline applies only to the filing of the expert report—not amended pleadings.[25] Second, the supreme court observed that the TMLA does not impose any timing requirements for pleadings.[26] Accordingly, Rule 63 of the Texas Rules of Civil Procedure applies as it would in a typical case, freely allowing any pleading amendment that does not "operate as a surprise to the opposite party."[27] Because the defendants in *Gaytan* made no such argument of unfair surprise, neither the TMLA nor the Texas Rules of Civil Procedure prohibited Gaytan's filing of her second amended petition.[28]

The supreme court then explained that considering the amended pleading coheres with the courts' general approach for determining whether a claimant has asserted a health-care liability claim.[29] When deciding whether a claimant has asserted a claim subject to the TMLA, courts must evaluate "the underlying nature of the plaintiff's claim rather than its label" by considering "the entire record."[30] Accordingly, just as a claimant cannot escape the TMLA through "artful" pleading, a claimant should not subject herself to the TMLA through inartful pleading.[31]

The supreme court then considered and rejected the defendants' argument that Gaytan's original and first amended petitions contained judicial admissions that her claims were health-care liability claims subject to the TMLA because allegations in superseded pleadings are not judicial admissions.[32] The supreme court then summarily concluded that Gaytan's second amended petition did not contain any such judicial admissions but left open the questions generally "whether and how a claimant may judicially admit that a claim is a health[-]care liability claim."[33]

Lastly, the supreme court concluded that the process for dismissal outlined in the TMLA supports consideration of amended pleadings.[34] Because Section 74.351 provides for dismissal only upon a defendant's motion, the claimant presumably must be allowed an opportunity to respond to the motion.[35] The supreme court also reiterated that the trial court must evaluate "the entire record" in ruling on such a motion and noted that courts generally must allow claimants to amend their pleadings

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24. *See id.* at 837.
25. *See id.*
26. *See id.*
27. *Id.*; TEX. R. CIV. P. 63.
28. *See Gaytan*, 640 S.W.3d at 837.
29. *See id.*
30. *Id.* at 837–38 (quoting Baylor Scott & White, Hillcrest Med. Ctr. v. Weems, 575 S.W.3d 357, 363 (Tex. 2019) and Loaisiga v. Cerda, 379 S.W.3d 248, 258 (Tex. 2012)).
31. *Id.* at 838.
32. *See id.* at 838–39 (citing Sosa v. Cent. Power & Light, 909 S.W.2d 893, 895 (Tex. 1995)).
33. *Id.* at 839.
34. *See id.*
35. *See id.*; TEX. CIV. PRAC. & REM. CODE ANN. § 74.351(b).

before dismissing their claims.[36] The supreme court therefore concluded that courts ruling on Section 74.351 dismissal motions should consider amended petitions, even if they are filed after the expert report deadline, as part of the "entire court record."[37]

Based on the record as a whole, the supreme court nevertheless concluded that Gaytan had asserted health-care liability claims subject to the TMLA.[38] For a claim to be subject to the TMLA, (1) the defendant must be a physician or health-care provider; (2) the claim must concern "treatment, lack of treatment, or a departure from accepted standards of medical care, or health care, or safety or professional or administrative services directly related to health-care"; and (3) the defendant's conduct must proximately cause the claimant's injury or death.[39] Because Gaytan alleged that the defendants' conduct proximately caused her injuries, the third element was not at issue.[40]

Accordingly, the supreme court considered first whether the defendants were physicians or health-care providers.[41] Gaytan conceded that Dr. Yarish is a physician.[42] Because Gaytan alleged that Dr. Yarish owned and operated Lake Jackson and that Gutzman was acting within the scope of her employment with him when she treated her, the supreme court concluded that Lake Jackson and Gutzman were both health-care providers.[43]

The supreme court then addressed the second element, focusing on the nature of Gaytan's claims.[44] The supreme court explained that this element requires that Gutzman treated Gaytan (a) based on a doctor-patient relationship between Gaytan and Dr. Yarish and (b) during Gaytan's "medical care, treatment, or confinement."[45]

The supreme court concluded first that Gutzman treated Gaytan as Dr. Yarish's patient.[46] The supreme court explained that while a physician-patient relationship must be "contractual, consensual, and voluntary," it "does not require the formalities of a contract" and can be implied from the circumstances.[47] The supreme court therefore rejected Gaytan's arguments and the court of appeals' conclusions that the absence of a formal contract or any interaction between Gaytan and Dr. Yarish were dispositive factors on this point.[48]

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36. *Gaytan*, 640 S.W.3d at 839.
37. *Id.*
38. *See id.* at 839–40.
39. *Id.* at 840–41.
40. *See id.* at 841.
41. *See id.*
42. *See id.*
43. *See id.*
44. *See id.* at 841–47.
45. *Id.* at 841.
46. *See id.* at 841–43.
47. *Id.* at 842 (quoting St. John v. Pope, 901 S.W.2d 420, 424 (Tex. 1995)).
48. *See id.*

The supreme court determined instead that Gaytan sought treatment from Dr. Yarish by seeking treatment from Gutzman.[49] Under Texas law, a physician is legally responsible for training and supervising providers of "nonsurgical medical cosmetic procedures."[50] By seeking and receiving such treatment from a facility that Dr. Yarish owned and operated, Gaytan therefore agreed for him to treat her.[51] Moreover, by alleging that Dr. Yarish failed to adequately train and supervise Gutzman's provision of such treatment, Gaytan sought to hold Dr. Yarish liable as her physician and thereby conceded that Dr. Yarish treated her as his patient.[52] The supreme court similarly concluded that Gaytan based her complaint on the provision of "medical care or treatment."[53] The establishment of the physician-patient relationship made this presumptively true, with Gaytan bearing the burden of rebutting the presumption.[54]

The supreme court concluded that Gaytan could not meet her burden in this case for two reasons.[55] First, expert testimony would have been required to prove Gaytan's claims because the proper administration of and standard of care for the dermatological treatments Gaytan complained about do not fall "within the common knowledge of laypersons."[56] Second, even if she would not have needed expert testimony to prove her claims, Gaytan complained of conduct that was an "inseparable or integral part of the rendition of health care."[57] A "nonsurgical medical cosmetic procedure[]" is a medical treatment under Texas law.[58] While the law does not define this term, the treatments Gaytan complain about fall within its ordinary meaning.[59] Moreover, Gaytan sought treatment for acne, which is a disease.[60] She also sought treatment from a medical spa, which is required to have its services performed or supervised by a physician.[61] The supreme court therefore concluded that all the treatments Gaytan complained about were inseparable from the "course of treatment[]" she sought and received from the defendants.[62]

While litigants should take note that courts will allow putative health-care liability claimants to amend their pleadings even after missing the deadline to file an expert report, the supreme court in *Gaytan* repeatedly articulated

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49. *See id.* at 842–43.
50. *Id.* at 843 (citing 22 Tex. Admin. Code § 193.17(d)).
51. *See id.*
52. *See id.*
53. *Id.* at 843–47.
54. *See id.* at 844 (citing Loaisiga v. Cerda, 379 S.W.3d 248, 256 (Tex. 2012)).
55. *See id.* at 844–47.
56. *Id.* at 845.
57. *Id.* at 846 (quoting Tex. W. Oaks Hosp., LP v. Williams, 371 S.W.3d 171, 180 (Tex. 2012)).
58. *Id.* (citing 22 Tex. Admin. Code § 193.17(a)).
59. *See id.*
60. *See id.* at 846–47 (citing *Acne*, The American Heritage Medical Dictionary 6 (2008)).
61. *See id.* at 847.
62. *Id.*

the mantra that courts should focus on the true nature of the underlying claims in evaluating a Section 74.351 dismissal motion.[63] Gaytan's efforts to recast her claims, although procedurally permitted, were therefore unsuccessful.[64] Accordingly, defendants should not expect the supreme court's holding in *Gaytan* to materially alter judicial inquiry into whether a claimant's claim is subject to the TMLA. Additionally, the defendants in *Gaytan* made no argument that Rule 63 should have barred Gaytan's second amended pleading.[65] When faced with a similar situation, would-be health-care liability defendants should therefore consider making such an argument—particularly where a court has already stayed discovery under the TMLA and a claimant seeks to recast her claims on the eve of a Section 74.351 dismissal motion hearing. Finally, the supreme court in *Gaytan* expressly left open the questions of whether and how claimants could judicially admit, through their pleadings, that their claims are health-care liability claims subject to the TMLA.[66] While defendants could consider making such arguments, based on the thrust of *Gaytan*, courts will likely focus still on the underlying nature of the claims themselves in determining whether the TMLA governs the claims.

C. Policies and Procedures Not Discoverable Under TMLA Until Claimant Files Expert Report

In *In re LCS SP, LLC*,[67] the Texas Supreme Court determined that a health-care liability defendant's general policies and procedures are not discoverable under the TMLA until the claimant has filed an expert report.[68] Section 74.351(s) of the TMLA establishes an automatic stay of discovery in health-care liability cases—except for information "related to the patient's health care"—until the claimant has filed an expert report under Section 74.351(a).[69] As the supreme court explained, the TMLA's expert report requirements are intended to increase health care access by defraying costs incurred by health-care providers in defense of frivolous lawsuits.[70]

In *LCS*, Donna Smith had resided for several months at a nursing facility owned by LCS SP, LLC.[71] Kenneth Smith, Donna's husband, sued LCS based on alleged injuries from falls suffered by Donna while under LCS's care.[72] Before filing an expert report, Smith served discovery on LCS

63. *See id.* at 836–40.
64. *See id.* at 847.
65. *See id.* at 837; Tex. R. Civ. P. 63.
66. *See Gaytan*, 640 S.W.3d at 839.
67. 640 S.W.3d 848 (Tex. 2022).
68. *See id.* at 856.
69. Tex. Civ. Prac. & Rem. Code § 74.351(s); *id.* at 851.
70. *See* LCS, 640 S.W.3d at 852.
71. *See id.* at 850.
72. *See id.*

requesting production of its general operating policies and procedures.[73] LCS subsequently objected under Section 74.351(s).[74] Smith moved to compel the discovery, and the trial court denied the motion.[75] The court of appeals, however, reversed, concluding that the policies and procedures bore on the standard of care that LCS owed to Donna.[76] The Texas Supreme Court, on the other hand, concluded that the trial court did not abuse its discretion in denying the discovery Smith sought from LCS.[77] The supreme court noted at the outset that Section 74.351(s) places "strict limits" on pre-report discovery to minimize costs from meritless claims.[78]

The supreme court first addressed Smith's argument that the trial court should have compelled production of LCS's policies and procedures because the law obligated LCS to make at least some of them publicly available.[79] To the extent the policies and procedures were publicly available and therefore could have been obtained without discovery, the supreme court considered this to weigh against compelling discovery.[80]

The supreme court next rejected Smith's argument that it should read "related to the patient's health care" broadly because it generally reads the phrase "related to" broadly.[81] Because the Texas Legislature, through Section 74.351(s), intentionally limited discovery in health-care liability cases, "related to" cannot be construed so broadly that its exception would "swallow" the rule.[82] Section 74.351(s) identifies the patient's "medical or hospital records" as permissible exceptions to the rule, and a facility's general operating policies and procedures do not similarly "relate to the patient's health care."[83] Moreover, as Smith argued to the contrary, by virtue of the fact that they would "relate to" *all* patients' health care at the facility, such a reading of the exception would effectively nullify Section 74.351(s)'s general rule.[84]

The supreme court similarly rejected Smith's argument and the court of appeals' conclusion that the policies and procedures were discoverable based on their bearing on the appropriate standard of care.[85] Such a reading of Section 74.351(s), the supreme court concluded, would likewise result in its exception swallowing the rule.[86] The supreme court explained further that an expert can opine on the standard of care based on a

73. *See id.* at 851.
74. *See id.*
75. *See id.*
76. *See id.* at 851–52.
77. *See id.* at 852–55.
78. *Id.* at 852 (citing *In re* Jorden, 249 S.W.3d 416, 420 (Tex. 2008)).
79. *See id.* at 852–53.
80. *See id.* The supreme court, however, did not examine whether LCS had in fact made its policies and procedures publicly available as legally required. *See id.*
81. *Id.* at 853.
82. *Id.*
83. *Id.*
84. *Id.*
85. *See id.* at 854.
86. *See id.*

patient's medical records without analyzing a particular facility's policies and procedures.[87] The supreme court therefore concluded that operating policies and procedures do not fall within Section 74.351(s)'s exception because they do not relate to any particular patient's health care.[88]

Because the supreme court determined only whether the trial court abused its discretion in denying Smith's motion to compel discovery—and considered the public availability of the information in question in reaching its disposition—its general statements about the pre-report discoverability of operating policies and procedures are arguably dicta. However, health-care litigants should keep the supreme court's strong, repeated statements in this respect in mind when faced with pre-report discovery of any such information that does not directly relate to a particular patient's health care.

II. DIRECTOR AND OFFICER LIABILITY

A. Introduction

During the Survey period, the Texas Supreme Court addressed whether a director is able to owe an "informal" fiduciary duty to manage a corporation in the best interests of a stockholder and whether a director and officer's alleged attempt to bribe an opposing party to enter into a settlement agreement invalidated the agreement.

B. Texas Supreme Court Holds Directors Do Not Owe "Informal" Fiduciary Duties to Individual Stockholders to Manage Corporation in their Best Interest

In *In re Estate of Poe*,[89] the Texas Supreme Court clarified what fiduciary duties corporate directors owe to individual stockholders of a corporation following the supreme court's 2014 decision in *Ritchie v. Rupe*.[90] *In re Estate of Poe* is a corporate succession case centering on a fight for control of a family-owned corporation after the death of Dick Poe, the family patriarch.[91] Dick was a businessman known in El Paso primarily for his car dealership operations, of which he was involved in the daily operations until his death.[92] His eldest son, Richard, assumed that he would succeed his father and control the family corporate enterprise following Dick's death.[93]

Shortly before he died, Dick created a new corporate entity called PMI and restructured his businesses so that control of all of the businesses was

87. *See id.*
88. *See id.* at 854–55.
89. 648 S.W.3d 277 (Tex. 2022).
90. 443 S.W.3d 856 (Tex. 2014); *see In re Estate of Poe*, 648 S.W.3d at 287.
91. *See In re Estate of Poe*, 648 S.W.3d. at 280.
92. *See id.*
93. *See id.*

consolidated in PMI.[94] As the single entity with control of the business, PMI acted as the general partner of five limited partnerships, and those limited partnerships predominantly owned and operated Dick's various car dealerships.[95] Upon its formation, PMI had authority to issue 10,000 common stock shares.[96] It issued 1,000 shares to Richard, who subsequently ceded control of PMI to his father, Dick.[97] For the entirety of its corporate existence, Dick controlled PMI.[98] On his deathbed, as the sole director of PMI, Dick authorized an issuance of 1,100 shares of PMI common stock to himself for $3.2 million without Richard's knowledge.[99]

Richard filed suit against Dick's estate, alleging that the share issuance was invalid because (1) the issuance violated Dick's fiduciary duties to PMI as it constituted a self-dealing transaction; and (2) the issuance violated Dick's fiduciary duty to Richard arising from their relationship of trust and confidence.[100] The probate court submitted questions to the jury regarding whether Dick violated his fiduciary duty to PMI and whether Dick owed and violated an informal fiduciary duty to Richard.[101] The jury found that Dick owed an informal fiduciary duty to Richard and breached that duty in the share issuance transaction.[102]

The Estate appealed, asserting that the trial court's issuance to the jury of questions regarding an alleged informal fiduciary duty to Richard confused and misled the jury as to the question regarding the formal fiduciary duty to PMI.[103] In finding that the share issuance was valid and enforceable under the Texas Business Organizations Code, the court of appeals concluded it was not necessary to address the validity of Richard's informal fiduciary duty theory.[104]

Dick's Estate petitioned the Supreme Court of Texas for review of the informal fiduciary duty findings.[105] The supreme court held that, as a matter of law, a corporate director "cannot owe an informal duty to operate or manage the corporation in the best interest of or for the benefit of an individual shareholder."[106] The supreme court first outlined the longstanding rule that directors who manage the business and affairs of a corporation owe the corporation fiduciary duties.[107] That fiduciary duty, the supreme court continued, does not run to the individual shareholders of

94. *See id.*
95. *See id.*
96. *See id.* at 281.
97. *See id.*
98. *See id.*
99. *See id.*
100. *See id.*
101. *See id.* at 282–84.
102. *See id.* at 284.
103. *See id.* at 286.
104. *See id.* at 284.
105. *See id.* at 285.
106. *Id.* at 289.
107. *See id.* at 286–87.

the corporation nor does the duty run even to a majority of shareholders.[108] The supreme court has recognized that a corporate director can owe informal fiduciary duties to an individual shareholder where there exists a relationship of trust and confidence between them.[109] However, this informal fiduciary duty had not been extended to support the proposition that a director must operate or mange the corporation according to that informal duty where corporate directors "have clearly defined duties to exercise their business judgment for the sole benefit of the corporation."[110]

Both petitioner and respondent offered the supreme court's decision in *Ritchie v. Rupe* to support their conclusions.[111] In *Ritchie*, the Texas Supreme Court held that a corporate officer or director has no duty to conduct corporate business according to an individual shareholder's best interest absent some independent contractual or legal obligation to the shareholder.[112] In so holding, the supreme court explicitly adhered to the longstanding rule that the officers and directors of a corporation owe a duty to the corporation to apply their business judgement for the benefit of the corporation.[113] Richard asserted that *Ritchie v. Rupe* held that corporate directors could owe fiduciary duties to individual stockholders arising from independent legal obligations that directly conflict with a director's duty to the corporation.[114] Dick's Estate argued that *Ritchie v. Rupe* suggests that such conflicting duties cannot arise as a matter of law.[115]

The supreme court agreed with the Estate, holding that a corporate director cannot simultaneously owe fiduciary duties to the corporation and also potentially conflicting duties to individual corporate directors.[116] The supreme court explained that when Dick formed PMI as a corporation, the parties disclaimed any duties as to corporate management outside of those arising by statute, the corporation's formation documents, or other agreement.[117] As a "director's fiduciary duty in the management of a corporation is solely for the benefit of the corporation," a corporate director "cannot owe an informal duty to operate or manage the corporation in the best interest of or for the benefit of an individual shareholder."[118]

Throughout the opinion, the supreme court emphasized that corporate directors owe fiduciary duties to the corporation—rather than its individual stockholders—to exercise their business judgement to manage the corporation for the corporation's sole benefit.[119] Following the formation

108. *See id.* at 287.
109. *See id.*
110. *Id.*
111. *See id.*
112. *See* Ritchie v. Rupe, 443 S.W.3d 856, 888–89 (Tex. 2014).
113. *See id.* at 868.
114. *See In re Estate of Poe*, 648 S.W.3d. at 287–88.
115. *See id.* at 287.
116. *See id.* at 288.
117. *See id.*
118. *Id.* at 289.
119. *See id.* at 280–89.

of a corporation, a director owes to shareholders only those fiduciary duties as to corporate management that are raised by statute, or corporate formation document, or other agreement. Accordingly, as a matter of law, a corporate director "cannot owe an informal duty to operate or manage the corporation in the best interest of or for the benefit of an individual shareholder."[120]

C. Texas Supreme Court Holds Director and Officer's Alleged Attempts to Offer Bribes to Induce Entrance into Settlement Agreement Did Not Invalidate the Agreement and Discusses Lifespan of Corporate Fiduciary Duties Owed by Directors and Officers

In *Transcor Astra Group S.A. v. Petrobras America Inc.*,[121] the Texas Supreme Court addressed whether a settlement agreement releasing certain claims against corporate entities also acted to release those claims against the individual employees of those corporate entities.[122] Petrobras and Astra are two international petroleum corporations who entered into a joint venture involving a Texas oil refinery.[123] The parties encountered a number of disputes, eventually resulting in the termination of the joint venture, requiring Astra to sell its interest to Petrobas.[124] The parties' relationship further dissolved during the sale, and eventually they entered into a comprehensive settlement agreement after extended negotiations.[125] The agreement provided that each party agreed to release any and all claims against the other and contained an express disclaimer of reliance on any of representations of the other party leading to the agreement.[126]

Petrobas brought suit against Astra and several Astra employees in their individual capacities, asserting claims for fraud and breached fiduciary duties stemming from their allegedly offering bribes to induce Petrobas to enter into the settlement agreement.[127] Petrobas asserted that the individual Astra employees owed Petrobas fiduciary duties stemming from their service as officers and directors of the joint-venture entities that Astra and Petrobas created during their earlier joint venture, notwithstanding the dissolution of the joint venture or the following years of bitter disputes and litigation.[128] The trial court granted the summary judgement motions of Astra and its employees, holding that the settlement agreement and release

120. *Id.* at 289.
121. 650 S.W.3d 462 (Tex. 2022), *cert. denied*, No. 22-518, 2023 WL 3571493, at *1 (2023).
122. *See id.* at 468.
123. *See id.*
124. *See id.*
125. *See id.*
126. *See id.* at 468, 472 n.10.
127. *See id.* at 468–69.
128. *See id.* at 470.

barred Petrobas's claims.[129] Petrobas subsequently appealed.[130] The court of appeals held in part that the settlement agreement's reliance disclaimer barred Petrobas's fraud claims against any Astra entity but did not bar Petrobas's claims against the individual Astra employees who were sued in their individual capacities.[131]

The supreme court reversed in part the court of appeals' opinion and held that the settlement agreement did bar Petrobas's claims for breach of fiduciary duty against the Astra employees sued in their individual capacities.[132] The settlement agreement at issue explicitly provided it should be "construed as the broadest type of general release" and released "any and all claims . . . of whatever kind or character . . . based on any acts or omissions, whether known or unknown, that have occurred on or before [Agreement's effective date]."[133] However, the agreement further stated that the released claims "[n]otwithstanding anything to the contrary . . . shall not include any and all claims . . . arising out of, related to, or connected in any way with the alleged breach, enforcement, or interpretation" of the agreement.[134] Petrobas did not dispute that the settlement agreement was broad enough in scope to release the breach of fiduciary duty claims, but rather asserted that because the employees actions involved allegedly offering a bribe to induce entrance into the agreement, their claims fell within the "notwithstanding" provision and were therefore not covered by the release.[135]

The supreme court disagreed with Petrobas's position, finding that the breach of fiduciary duty claims did not relate to "the alleged breach, enforcement, or interpretation" of the settlement agreement.[136] If the "notwithstanding" provision merely stated that the released claims "shall not include any and all claims . . . arising out of, related to, or connected in any way with" the settlement agreement, Petrobas's position would have merit, but the subsequent limiting language defeated the argument.[137] Rather, the Astra employees' alleged conduct in offering inducement bribes leading up to the settlement agreement fell squarely within the settlement agreement's language releasing "any and all claims . . . based on acts or omissions, whether known or unknown, that have occurred on or before [Agreement's effective date]."[138] To construe the agreement according to Petrobas's reading would essentially gut the broad language regarding the released claims.[139]

129. *See id.* at 469.
130. *See id.*
131. *See id.*
132. *See id.* at 467–68, 483.
133. *Id.* at 470.
134. *Id.*
135. *Id.* at 470, 472.
136. *Id.* at 470–71.
137. *Id.*
138. *Id.* at 470.
139. *See id.* at 472.

The supreme court also noted it was skeptical that the Astra employees still owed Petrobras lingering fiduciary duties from their time as officers and directors of the joint venture.[140] Initially, it would be difficult to reconcile such a finding with the longstanding rule that officers and directors of jointly owned entities owe fiduciary duties to the entities themselves rather than to the entities' stockholders individually.[141] The supreme court further explained that it was "difficult to accept" that the former officers and directors owed perpetual fiduciary duties to Petrobas even years after vacating their positions and despite bitter dispute and litigation between the employees' current employer, Astra, and Petrobras.[142] While the supreme court declined to rule on this matter, it foreshadows the supreme court's potential unwillingness to find that corporate officers' and directors' fiduciary duties extend into perpetuity, especially after the officers and directors vacate their positions and engage in protracted disputes with the entities to which they formerly owed such duties.

III. PROFESSIONAL LIABILITY

A. Introduction

During the Survey period, the Texas Supreme Court extended two longstanding attorney malpractice principles: (1) attorney immunity and (2) *Hughes* tolling. The supreme court analyzed whether attorney immunity is a defense to civil suits brought under criminal statutes. It also addressed whether *Hughes* tolling applies when co-parties appeal but the malpractice plaintiff does not.

B. Texas Supreme Court Considers Whether Attorney Immunity Applies to Civil Suits Brought Under Criminal Statutes

Texas law provides attorneys immunity from civil suit from nonclients based on actions the attorney took in representing a client.[143] For the immunity to apply, the attorney's actions must have been "the kind of conduct" attorneys engage in when performing professional duties for a client.[144] When applying this immunity, Texas courts focus on the function and role the attorney was performing rather than the alleged wrongfulness of the attorney's conduct.[145]

During the Survey period, the Texas Supreme Court considered whether an exception to the attorney immunity rule applies when a private civil

140. *See id.* at 476.
141. *See id.*
142. *Id.*
143. *See* Taylor v. Tolbert, 644 S.W.3d 637, 642 (Tex. 2022).
144. *Id.* (citing Landry's, Inc. v. Animal Legal Def. Fund, 631 S.W.3d 40, 51 (Tex. 2021) and Cantey Hanger, LLP v. Byrd, 467 S.W.3d 477, 482 (Tex. 2015)).
145. *See id.* at 642.

litigant alleges an attorney violated a criminal statute.[146] According to the supreme court, in such cases, "the attorney-immunity is neither categorically inapplicable nor automatically available."[147] Rather, it depends on the criminal statute at issue.[148]

The case, *Taylor v. Tolbert*, involved the federal and Texas wiretap statutes.[149] Vivian Robbins brought a civil suit under each statute against defendant attorney Terisa Taylor.[150] Taylor had represented Mark Broome in child-custody modification proceedings between Robbins and Broome pertaining to their child, N.B.[151] While the modification proceedings were pending, N.B. visited her aunt, who was Broome's sister.[152] During the visit, N.B. signed into her aunt's iPad using Robbins's login credential.[153] The iPad began receiving text messages and emails between Robbins and at least 30 other individuals without Robbins's knowledge.[154] The aunt mailed the iPad to her brother, Broome, who then shared the emails with attorney Taylor to use in the modification proceedings against Robbins.[155]

Robbins alleged that Taylor's use of her text messages and emails violated federal and Texas wiretap statutes.[156] Both statutes are criminal in nature but provide for civil claims.[157] Under the federal statute, a civil cause of action may be brought by "any person whose wire, oral, or electronic communication is intercepted, disclosed, or intentionally used in violation of this chapter[][.]"[158] Texas's statute allows a private cause of action by "[a] person whose wire, oral, or electronic communication is intercepted, disclosed, or used in violation of" certain Texas statutes.[159] Robbins alleged Taylor improperly "used" and "disclosed" her communications in the modification proceedings.[160]

The trial court granted summary judgment for Taylor on the pleadings.[161] The court found Taylor was immune from the suit as a matter of law because Robbins's allegations stemmed from Taylor's conduct as an attorney.[162] The Court of Appeals for the Fourteenth District of Texas at Houston reversed

146. *See id.*
147. *Id.*
148. *See id.*
149. *See id.* at 643.
150. *See id.*
151. *See id.*
152. *See id.*
153. *See id.*
154. *See id.*
155. *See id.*
156. *See id.*
157. *See id.*
158. 18 U.S.C. § 2520(a).
159. Tex. Code Crim. Proc. Ann. art. 18A.502.
160. *Taylor*, 644 S.W.3d at 643–44. Robbins alleged several ways Taylor improperly used or disclosed her communications. One allegation was that Taylor told opposing counsel that she planned to use a nude photograph Robbins had sent to her boyfriend as a poster-sized demonstrative at the jury trial. *See id.*
161. *See id.* at 644.
162. *See id.*

and remanded in a split decision.[163] The court of appeals reasoned that "[a] criminal violation of either the [federal or Texas wiretap] statute would be foreign to the duties of an attorney and thus precludes application of attorney [] immunity."[164] The Texas Supreme Court granted Taylor's petition for review.[165]

The issue before the supreme court was whether the attorney immunity defense applies to conduct that is criminalized by statute.[166] In typical law school professor fashion, the supreme court held "it depends."[167] The supreme court explained that, in general, the dispositive facts for the attorney immunity defense are: (1) the type of conduct at issue, and (2) whether an attorney-client relationship existed when the conduct occurred.[168] After establishing those facts, the supreme court determined whether the attorney's conduct was within the scope of the relationship.[169]

The supreme court explained that the *type* of conduct is what's relevant—not the alleged wrongfulness of the conduct.[170] This is why the supreme court held in *Bethel* that there is no categorical "crime exception" to the attorney immunity defense.[171] The supreme court explained that such an exception would "significantly undercut" the defense by allowing plaintiffs to sue attorneys for any conduct the plaintiff characterized as "criminal."[172] The supreme court reasoned that there is a wide range of criminal conduct that may fall outside the scope of the attorney's representation.[173] According to the supreme court, such conduct is not an "exception" to the immunity defense but rather "fails to satisfy the requirements for invoking the defense in the first instance."[174]

Applying this standard to Taylor's case, the supreme court found Taylor's conduct was encompassed by the attorney immunity defense.[175] The supreme court held that Taylor's conduct was within the scope of her representation of Broome and was not foreign to the duties of a lawyer.[176] However, it noted that its *Bethel* decision involved common law spoliation—not statutory claims.[177] So, the *Taylor* supreme court moved on to consider Robbins's argument that the common law attorney immunity

163. *See id.* at 644 n.13.
164. *Id.* (internal citations omitted).
165. *See id.* at 645.
166. *See id.*
167. *Id.* at 648.
168. *See id.* at 646.
169. *See id.*
170. *See id.*
171. *Id.* at 647; *see also* Bethel v. Quilling, Selander, Lownds, Winslett & Moser, P.C., 595 S.W.3d 651 (Tex. 2020).
172. *Taylor*, 644 S.W.3d at 647.
173. *See id.* at 648.
174. *Id.*
175. *See id.*
176. *See id.*
177. *See id.* at 649; *see also* Bethel v. Quilling, Selander, Lownds, Winslett & Moser, P.C., 595 S.W.3d 651 (Tex. 2020).

defense was categorically unavailable for statutory claims, including her wiretapping claims.[178]

The supreme court first considered whether the attorney-immunity defense was available in a civil action brought under the Texas wiretap statute.[179] The supreme court held it was.[180] The supreme court explained that it assumes the Texas legislature enacts laws with the backdrop of common law defenses in mind.[181] The supreme court reasoned that since the Texas wiretap statute does not clearly repudiate the attorney immunity defense, the supreme court presumes the legislature intended the defense to apply.[182] Therefore, the supreme court held that the attorney immunity defense was available and that Taylor was immune from Robbins's Texas wiretap claims.[183]

The supreme court came to a different conclusion as to the federal wiretap statutes.[184] The supreme court held that the Texas attorney immunity defense was inapplicable to those statutes because a state's common law does not apply to federal statutes.[185] The supreme court explained that federal courts routinely refuse to apply state common law defenses.[186] The supreme court further reasoned that the federal wiretap statute applies to "any person" "[*e*]*xcept as otherwise specifically provided*" by the statute.[187] The supreme court found that language made the federal statute materially different from the Texas statute, which did not contain such language.[188] Therefore, the supreme court held that Taylor could not invoke the attorney immunity defense as to the federal wiretap claims.[189]

This case provides an important clarification on the attorney immunity defense. Attorneys should take note that the defense is not a categorical bar on civil actions brought by nonclients. The *Taylor* supreme court made clear that the applicability of the defense will depend on the conduct and statute at issue.[190]

C. Co-Party Appeals Do Not Extend Hughes Tolling

Most Texas lawyers are familiar with *Hughes* tolling for attorney malpractice claims. The Texas Supreme Court held in *Hughes*, "[W]hen an attorney commits malpractice in the prosecution or defense of a claim that results in litigation, the statute of limitations on the malpractice claim

178. *See Taylor*, 644 S.W.3d at 649.
179. *See id.*
180. *See id.* at 652.
181. *See id.* at 650.
182. *See id.*
183. *See id.* at 652.
184. *See id.* at 653.
185. *See id.*
186. *See id.* at 655.
187. *Id.* (emphasis in original).
188. *See id.*
189. *See id.* at 656.
190. *See id.*

against the attorney is tolled until all appeals on the underlying claim are exhausted."[191] Since the supreme court's decision over 20 years ago, one issue had yet to be addressed: Does *Hughes* toll the limitations period for a malpractice plaintiff when a co-party appeals the underlying claim, but the malpractice plaintiff does not? In *Zive v. Sandberg*,[192] the supreme court held the answer is no.[193]

In *Zive*, City Bank loaned Grapevine Diamond, LP "over six million dollars" to purchase a tract of land outside Grapevine, Texas, from Jonathan Aflatouni.[194] Youval Zive, the president of Grapevine Diamond's general partner, and Nasser Shafipour personally guaranteed the loan.[195] Grapevine Diamond defaulted on the loan and filed for bankruptcy.[196] City Bank foreclosed on the property, but it sold for "substantially less than the loan balance" due to irregularities in the sale.[197] City Bank sued the guarantors, Zive and Shafipour, to recover the balance.[198] Shafipour filed third parties claims against Aflatouni and Grapevine Diamond.[199]

Attorney Jeffrey R. Sandberg and Palmer & Manuel P.L.L.C. (collectively, Sandberg) represented both Aflatouni and Zive in the litigation.[200] During mediation, City Bank offered to dismiss its claims against Aflatouni and Zive if they would dismiss their claims against City Bank.[201] However, the settlement failed.[202] Zive stated that he "strongly urged" Sandberg to accept, but Sandberg declined to do so because he believed Alfatouni could obtain a larger settlement.[203] Sandberg argued it was Aflatouni's decision to decline the settlement that ultimately killed the deal—"not Sandberg's failure to accept [it] on Zive's behalf . . . ."[204]

The trial court went on to grant summary judgment for City Bank.[205] Zive, Aflatouni, and Grapevine Diamond appealed.[206] The court of appeals affirmed the trial court's judgment.[207] All three parties appealed to the Texas Supreme Court.[208] On April 1, 2016, the supreme court denied the petitions.[209] Zive took no further action on his petition.[210] Aflatouni and

191. Hughes v. Mahaney & Higgins, 821 S.W.2d 154, 157 (Tex. 1991).
192. 664 S.W.3d 169 (Tex. 2022).
193. *See id.* at 171.
194. *See id.*
195. *See id.* at 171–72.
196. *See id.* at 172.
197. *See id.*
198. *See id.*
199. *See id.*
200. *See id.*
201. *See id.*
202. *See id.*
203. *Id.*
204. *See id.*
205. *See id.*
206. *See id.*
207. *See id.*
208. *See id.*
209. *See id.*
210. *See id.*

Grapevine Diamond filed a petition for writ of certiorari with the United States Supreme Court.[211] Zive "did not file a document or otherwise attempt to participate" in the appeal to the Supreme Court, which denied Aflatouni and Grapevine Diamond's petition on October 3, 2016.[212]

On October 1, 2018, Zive filed suit against Sandberg for attorney malpractice.[213] Sandberg moved for summary judgment on grounds that Zive's claim accrued on April 1, 2016, when the Texas Supreme Court denied his petition.[214] Sandberg therefore argued that the two-year statute of limitations for attorney malpractice claims barred Zive's claim.[215] Zive argued that *Hughes* tolled his claim until October 3, 2016, when the Supreme Court denied Aflatouni and Grapevine Diamond's petition.[216] The trial court granted Sandberg summary judgment, and the court of appeals affirmed.[217] The supreme court granted Zive's petition for review.[218]

The supreme court considered whether *Hughes* tolling applied to Zive's claim because his co-parties appealed, holding it did not.[219] The supreme court explained that under its *Apex Towing* decision, *Hughes* tolling applies "until all appeals on the underlying claim are exhausted or the litigation is otherwise finally concluded."[220] Zive argued that "all appeals" included co-parties' appeals, even if the malpractice plaintiff did not participate.[221]

The supreme court rejected this argument for three reasons.[222] First, limiting *Hughes* tolling to appeals that the malpractice plaintiff actually participated in provides a bright line rule for calculating the deadline for filing.[223] The rule is predictable and consistent.[224] Second, the limitation does not burden the malpractice plaintiff.[225] The malpractice plaintiff can participate in the appellate proceedings, which would continue *Hughes* tolling.[226] Third, the limitation is consistent with the general rule that reversal on appeal as to one party does not apply to all parties.[227]

The supreme court explained that tolling for Zive's malpractice claim ended on April 1, 2016, when the supreme court denied his petition for review.[228] Since Zive did not file his malpractice claim against Sandberg until October 1, 2018, his claim was barred by the two-year statute of

211. *See id.*
212. *See id.*
213. *See id.*
214. *See id.* at 173.
215. *See id.* at 171.
216. *See id.* at 173.
217. *See id.*
218. *See id.*
219. *See id.* at 175.
220. *Id.* at 175; *see* Apex Towing Co. v. Tolin, 41 S.W.3d 118, 119 (Tex. 2001).
221. *Zive*, 644 S.W.3d at 175.
222. *See id.* at 176.
223. *See id.*
224. *See id.* at 178.
225. *See id.* at 176.
226. *See id.*
227. *See id.*
228. *See id.* at 177.

limitations.[229] Accordingly, the supreme court affirmed the court of appeals' judgment.[230] *Zive* is an important extension on *Hughes* tolling.[231] Its holding is relatively simple, but it is one that Texas attorneys should keep in mind when advising malpractice clients.

229. *See id.*
230. *See id.* at 179.
231. *See id.*