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Professional Liability

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PROFESSIONAL LIABILITY

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TABLE OF CONTENTS

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DURING the latest Survey period, Texas courts addressed many important issues regarding the liability of professionals, including attorneys, accountants, doctors, and corporate officers and directors. Although malpractice plaintiffs scored a few victories during the period, the courts issued several opinions that will make it increasingly difficult to prevail in a professional liability case in Texas, including a refusal to extend the Hughes Tolling Rule to cases of transactional attorney malpractice, a rejection of claims based on violations of the attorney disciplinary rules, and a continued insistence that plaintiffs provide competent evidence that a different and better result likely would have occurred "but for" the professional's alleged negligence.

Plaintiffs were also stymied by the courts of appeals in medical malpractice cases. The courts resisted attempts to exclude claims from coverage under medical practices legislation, finding that the nature of the claim meant more than the wording of a pleading, and required plaintiffs to adhere to stricter causation standards and a more limited statute of limitations. Plaintiffs in officer and director liability cases fared no better. Directors and officers predominantly prevailed in personal jurisdiction cases applying section 171.255(a) of the Texas Tax Code and in cases addressing standing in derivative claims against directors and officers. Courts also interpreted a director and officer insurance notice provision and determined that an officer's oral resignation is effective.

I. LEGAL MALPRACTICE

A. THE TEXAS SUPREME COURT ALLOWS CLAIM BROUGHT BY ESTATE REPRESENTATIVES FOR MALPRACTICE IN DRAFTING ESTATE-PLANNING DOCUMENTS

In an opinion released on May 5, 2006, the Texas Supreme Court considered for the first time whether personal representatives of a deceased client's estate have standing to bring legal malpractice claims on behalf of the estate, and it held that they do, reversing the two court of appeals'

opinions that had held to the contrary.[1] The supreme court held that (1) a legal malpractice claim survives the client's death, (2) the estate has a justiciable interest in the controversy sufficient to confer standing, and (3) the estate's personal representative has the capacity to bring that claim on the estate's behalf.[2] Because the estate "stands in the shoes" of the decedent, it is in privity with the decedent's estate-planning attorney.[3]

The Texas Supreme Court had previously held in *Barcelo v. Elliot*[4] that "an attorney retained by a testator or settlor to draft a will or trust owes no professional duty of care to persons named as beneficiaries under the will or trust."[5] The supreme court held that barring claims by beneficiaries helps ensure that estate planners "zealously represent" their clients.[6] The court reconciled its *Belt* holding with its previous *Barcelo* opinion by noting that "while the interests of the decedent and a potential beneficiary may conflict, a decedent's interests should mirror those of his estate."[7] In allowing a claim by the estate's representative, the supreme court hoped to "strike[ ] the appropriate balance between providing accountability for attorney negligence and protecting the sanctity of the attorney-client relationship."[8]

B. Statute of Limitations in Cases Alleging Transactional Malpractice

In *J.M.K. 6, Inc. v. Gregg & Gregg, P.C.*,[9] the Fourteenth District Court of Appeals [Houston] agreed with recent cases from the First District [Houston] and the Dallas Court of Appeals in holding that the Hughes Tolling Rule[10] does not apply to malpractice claims based on transactional work.[11] The case was brought by a developer, JMK, who hired the

1. Belt v. Oppenheimer, Blend, Harrison & Tate, Inc., 192 S.W.3d 780, 782 (Tex. 2006); *see also*, O'Donnell v. Smith, 197 S.W.3d 394 (Tex. 2006) (vacating court of appeals' judgment and remanding for reconsideration in light of the supreme court's decision in *Belt*).

2. *Belt*, 192 S.W.3d at 786.

3. *Id.* at 787.

4. Barcelo v. Elliot, 923 S.W.2d 575, 579 (Tex. 1996).

5. *Barcelo*, 923 S.W.2d at 579 (affirming summary judgment in favor of defendant-attorney).

6. *Id.* at 578-79.

7. *Belt*, 192 S.W.3d at 787.

8. *Id.* at 789.

9. 192 S.W.3d 189, 198-99 (Tex. App.—Houston [14th Dist.] 2006, no pet.).

10. The Hughes Tolling Rule tolls the statute of limitations "when an attorney commits malpractice in the prosecution or defense of a claim that results in litigation . . . until all appeals on the underlying claim are exhausted" or the litigation is otherwise finally concluded. Hughes v. Mahaney & Higgins, 821 S.W.2d 154, 157 (Tex. 1991); *see also* Apex Towing Co. v. Tolin, 41 S.W.3d 118, 121 (Tex. 2001) (restating the rule).

11. Murphy v. Mullin, Hoard & Brown, L.L.P., 168 S.W.3d 288, 292 (Tex. App.—Dallas 2005, no pet.) (same result in case involving alleged malpractice in connection with estate planning); Vacek Group, Inc. v. Clark, 95 S.W.3d 439 (Tex. App.—Houston [1st Dist.] 2002, no pet.) (same result in case involving alleged malpractice in connection with the drafting of "corporate divorce" agreement); *see also*, McCranie v. Chamberlain, Hrdlicka, White, Williams & Martin, P.C., No. 14-04-00793-CV, 2006 WL 278276 (Tex. App.—Houston [14th Dist.] Feb. 7, 2006, pet. denied) (same result in case alleging malpractice in connection with merger).

defendant, Gregg to assist in converting apartment buildings to condominiums. JMK claimed Gregg advised it that the properties complied with all legal requirements and were ready for sale. The condos did not comply with the legal requirements, however, and the city would not permit the buyers to proceed with the conversion.

Gregg contended that the legal malpractice claim accrued when the paperwork for the condos was filed in August 2000 or, at the latest, by June 26, 2001, when the buyer went before the city's planning committee, and the city unanimously passed a motion disapproving the type of condominium conversion at issue in the project. JMK admitted knowing about the potential claims on June 25 but believed the commissioners would change their minds. JMK argued its cause of action did not accrue until December 2001, when the planning committee "definitively informed" JMK that it would have to spend $2 million on various improvements and modifications before the city would recognize the conversion. JMK then realized that compliance was "not a viable solution."[12]

The court rejected JMK's argument: "This is an objective inquiry into whether the plaintiff should have discovered the injury, and not an inquiry into the plaintiff's subjective belief as to whether the injury could be remedied affordably."[13] The court also declined JMK's invitation to extend the Hughes Tolling Rule, holding that the Rule could not be applied on a case-by-case basis but must be applied with a bright-line approach.[14] "Following the bright-line approach set forth in *Apex Towing Co.*, [the court] therefore limit[ed its] inquiry to determining whether the malpractice is alleged to have occurred 'in the prosecution or defense of a claim that results in litigation.'"[15] Because the alleged malpractice occurred in connection with a business transaction, rather than litigation, the tolling rule did not apply.

C. Personal Jurisdiction Over Out-Of-State Lawyers

Another issue recently faced by the Texas courts was when to allow non-Texas attorneys to be sued in Texas by Texas citizens. In *Bergenholtz v. Cannata*, the Dallas Court of Appeals determined whether the State of Texas had personal jurisdiction over attorneys licensed and working in California when their clients became involved in litigation in Texas.[16] The court considered how and to what extent the California attorneys were involved in the Texas litigation in order to determine if they had purposefully availed themselves of the privileges and benefits of conducting business in Texas.[17] Because one attorney's representation of a Texas citizen was limited to a California lawsuit, was not the result of the

12. *J.M.K. 6, Inc.*, 192 S.W.3d at 194.
13. *Id.* at 197.
14. *Id.* at 198.
15. *Id.* (citing *Apex Towing Co.*, 41 S.W.3d at 121).
16. 200 S.W.3d 287, 290 (Tex. App.—Dallas 2006, no pet.).
17. *Id.* at 292-93.

attorney seeking clients in Texas, and did not involve communication with Texas other than regarding the California lawsuit, the court held that he was not purposefully availing himself of the privileges and benefits of doing business in Texas.[18] Therefore, the Texas court did not have personal jurisdiction over him.[19] The court found that the second attorney was not subject to personal jurisdiction either. She had not chosen the Texas forum for the bankruptcy case at issue, and she had only agreed to assist in the Texas bankruptcy case because of the original California lawsuit.[20] The fact that the bankruptcy was pending in Texas was fortuitous as it related to the second attorney, rather than the result of her purposeful availment of the benefit of Texas law.[21]

Accordingly, for Texas courts to find personal jurisdiction over an out-of-state attorney, the attorney must take affirmative action to do business in the state, rather than simply being involved in an out-of-state litigation, part of which ends up in Texas.[22]

D. Violations of the Disciplinary Rules as a Basis for Claim

Two Texas courts recently have confirmed there is no private right of action for a violation of the State Bar disciplinary rules.[23] In *Jones v. Blume*, for example, one plaintiff's attorney sued another over the allegedly improper division of a contingent fee, asserting, among other things, that the defendant attorney violated the disciplinary rules of professional conduct.[24] The Dallas Court of Appeals affirmed summary judgment on behalf of the defendant on that claim, however, holding that a "private cause of action does not exist for violation of the disciplinary rules."[25] The court found that the disciplinary rules set forth the proper conduct of lawyers "solely for the purpose of discipline within the profession," and any claim for breach of those rules should be addressed in a disciplinary proceeding.[26] Likewise, the San Antonio Court of Appeals held that a violation of the disciplinary rules does not, standing alone, give rise to a claim for legal malpractice.[27]

E. The Difficulties of Proving Causation (Part 1)

During the Survey period, the Texas appellate courts added to the string of recent opinions finding plaintiffs' legal malpractice cases fatally

18. *Id.* at 295.
19. *Id.*
20. *Id.* at 296-97.
21. *Id.* at 296.
22. *Id.* at 296-97.
23. Lajzerowicz v. McCormick, No. 04-05-00681-CV, 2006 WL 2871298, at *1 (Tex. App.—San Antonio Oct. 11, 2006, no pet.); Jones v. Blume, 196 S.W.3d 440, 450 (Tex. App.—Dallas 2006, pet. denied).
24. *Jones*, 196 S.W.3d at 444-45.
25. *Id.* at 450.
26. *Id.* (quoting from 1 J. Hadley Edgar, Jr. & James B. Sales, Texas Torts and Remedies § 12.02[1][a][ii][A] (2000)).
27. *Lajzerowicz*, 2006 WL 2871298, at *1.

flawed due to a lack of evidence of causation.[28]

The San Antonio Court of Appeals reiterated in *Collins v. Snow*: If "'a legal malpractice case arises from prior litigation, a plaintiff must prove that, but for the attorney's breach of his duty, the plaintiff would have prevailed in the underlying case.'"[29] The plaintiff Collins originally filed suit against Dr. David H. Gordon for damages arising out of the death of Collins's wife. Collins later sued his former attorney, alleging that the attorney had failed to "plead, prove and submit the lack of informed consent claim . . . to the jury."[30] The court of appeals affirmed summary judgment for the defendant attorney on the grounds that Collins had failed to provide evidence that a lack of informed consent claim would have been successful against Dr. Gordon.[31] Particularly, the court found that Collins had failed to raise a genuine issue of material fact as to one of the essential elements of such a claim—that Mrs. Collins, or a reasonable person in her position, would have refused the treatment at issue had she been adequately informed of the potential risks.[32]

In a similar case, *Cantu v. Horany*, the clients brought a claim against their lawyer alleging he failed to fully investigate the cause of their son's death and adequately prosecute their medical malpractice claim.[33] The Dallas Court of Appeals affirmed summary judgment in favor of the defendant-attorney on the grounds that the plaintiffs had no evidence to show they could have prevailed in the underlying medical malpractice action and, therefore, had no evidence that the attorney's alleged negligence caused any damages.[34]

The Houston Court of Appeals also affirmed summary judgment in favor of the defendant attorney in *Lewis v. Nolan*.[35] In that case, the client sued his attorney, alleging the attorney had committed legal malpractice in defending an underlying suit on a note. It was undisputed that the attorney neither responded to a dispositive motion for summary judgment in the underlying case nor appeared at the summary judgment hearing, and that the motion was granted, resulting in a $13,229.26 judgment against the client. In the subsequent malpractice case, the client contended that causation was so obvious that expert testimony was not required. The client argued that the lawyer's failure to respond to the underlying summary judgment motion, in spite of the client's "iron-clad

28. *See, e.g.*, Alexander v. Turtur & Assocs., 146 S.W.3d 113, 117 (Tex. 2004); Rangel v. Lapin, 177 S.W.3d 17 (Tex. App.—Houston [1st Dist.] 2005, pet. denied); *see also infra* note 43 (discussion of *Bd. of Trs. of Fire and Police Retiree Health Fund v. Towers, Perrin, Forster & Crosby, Inc.*, in accounting malpractice section).

29. Collins v. Snow, No. 04-05-00903-CV, 2006 WL 2955478, at *1 (Tex. App.—San Antonio Oct. 18, 2006, no pet.) (quoting Hoover v. Larkin, 196 S.W.2d 227, 231 (Tex. App.—Houston [1st Dist.] 2006, pet. denied)).

30. *Id.*

31. *Id.* at *2.

32. *Id.*

33. 195 S.W.3d 867, 869 (Tex. App.—Dallas 2006, no pet.).

34. *Id.* at 874.

35. No. 01-04-00865-CV, 2006 WL 2864647, at *1 (Tex. App.—Houston [1st Dist.] Oct. 5, 2006, no pet.).

defense," was "tantamount to a 'fail[ure] to appear at trial' and thus to the situation in which counsel allows a default judgment to be entered against his client."[36]

The court of appeals disagreed, holding that because the intricacies of summary-judgment burdens and procedure are beyond the understanding of jurors, expert testimony is needed to prove the legal effect of a party's failure to respond.[37] In addition, expert testimony was necessary to prove the viability of the client's purported "iron-clad defense."[38] Accordingly, since the client produced no expert testimony regarding causation, summary judgment for the defendant attorney was appropriate.[39]

Because lack of causation renders all other issues immaterial, the trial court abated all discovery on the merits pending a decision on causation in the appellate malpractice case of *In re Clare Constat, Ltd.*[40] The court held that whether the clients' appeal would have been successful in the absence of alleged negligence was a question of law for the court and should be decided via summary judgment before any discovery on the merits was allowed.[41] The Amarillo Court of Appeals agreed and denied the clients' petition for writ of mandamus seeking to conduct discovery before the court considered the defendants' summary-judgment motion.[42]

II. ACCOUNTING MALPRACTICE

A. The Difficulties of Proving Causation (Part 2)

Proof of causation was also the missing element in the accounting liability case of *Board of Trustees of Fire and Police Retiree Health Fund v. Towers, Perrin, Forster & Crosby, Inc.*[43] The Fire and Police Retiree Health Care Fund, the City of San Antonio, and its Board of Trustees brought a claim for actuarial malpractice against Towers Perrin and two individuals. Plaintiffs claimed the defendants had negligently underestimated the pre-funding and contribution rates necessary to adequately fund the city's Fire and Police Retiree Health Care Fund. Based in part on the actuarial evaluation prepared by Towers Perrin, the City and the police and fire unions agreed upon the levels of contribution for both the City and the participants.

The trial court granted Towers Perrin's motion for summary judgment on the grounds that, among other things, plaintiffs had no evidence that Towers Perrin's alleged negligence proximately caused any damages to the fund. The appellate court agreed, noting that the element of proximate causation "'cannot be satisfied by mere conjecture, guess, or specu-

36. *Id.* at *4.
37. *Id.* at *2.
38. *Id.* at *5.
39. *Id.* at *5-6.
40. No. 07-05-0347-CV, 2005 WL 3062023, at *1 (Tex. App.—Amarillo Nov. 15, 2005, no pet.).
41. *Id.*
42. *Id.* at *2.
43. 191 S.W.3d 185, 187 (Tex. App.—San Antonio 2005, pet. denied).

lation.'"[44] The City and the hundreds of union members had to negotiate the pre-funding rate during the collective bargaining process and neither side could unilaterally or immediately change the pre-funding rate. Accordingly, plaintiffs had no evidence that, "if Towers Perrin had recommended a higher pre-funding rate, it would have been adopted by the City and the unions in collective bargaining agreements."

The plaintiffs attempted to introduce two lead union negotiators' testimony that, based on the long history of relying on Towers Perrin, it was their opinion that the parties would have adopted higher contribution rates had it been known that the recommended contribution rates were too low. The court struck these affidavits, however, finding they did not constitute competent evidence. The court of appeals agreed: "A *speculative opinion*, such as an opinion on what someone else was thinking at a specific time, does not help the jury to either (1) understand the witness's testimony better, or (2) decide the question of the other person's intent. Mere conjecture does not assist the jury."[45] In the absence of any other evidence of causation, summary judgment was appropriate.[46]

B. Unsettled Law Regarding Negligent Misrepresentation

For accountants, the scope of potential liability for negligent misrepresentation was not resolved during the Survey period. Section 552 of the Restatement (Second) of Torts provides that liability for negligent misrepresentation is limited to the loss suffered by the person or group of persons for whose benefit and guidance the speaker intends to supply the information or knows that the recipient intends to supply it.[47] Accordingly, the Restatement requires actual knowledge that a particular person would rely on the provided information. In the 1986 accounting malpractice case of *Blue Bell, Inc. v. Peat, Marwick, Mitchell & Co.*, however, the Dallas Court of Appeals held that limiting liability to those third persons, who an accountant specifically knew would rely on the information, was "too artificial a distinction."[48] The court therefore broadened the group of potential plaintiffs to all those whom, "under current business practices and the circumstances of that case, an accountant . . . knows or should know" would rely on the information.[49]

In *Abrams Centre National Bank v. Farmer, Fuqua & Huff, P.C.*,[50] the El Paso Court of Appeals, sitting in place of the Dallas Court of Ap-

44. *Id.* at 190 (quoting HIS Cedars Treatment Ctr. of Desoto, Tex. v. Mason, 143 S.W.3d 794, 798 (Tex. 2004)).

45. *Id.* at 193 (quoting Fairow v. State, 920 S.W.2d 357, 361 (Tex. App.—Houston [1st Dist.] 1996), *aff'd*, 943 S.W.2d 895 (Tex. Crim. App. 1997)).

46. *Id.* at 194.

47. Restatement (Second) of Torts § 552(2) (1977).

48. 715 S.W.2d 408, 412 (Tex. App.—Dallas 1986, writ ref'd n.r.e.).

49. *Id.* at 412.

50. No. 08-05-00140-CV, 2005 WL 2806316 (Tex. App.—El Paso Oct. 27, 2005, no pet.).

peals,[51] held that *Blue Bell* had been overruled by the Texas Supreme Court's decision in *McCamish, Martin, Brown & Loeffler v. F.E. Appling Interests*,[52] a legal malpractice case in which the supreme court "wholly adopted Section 552" and stated that a non-client can only sustain an action for negligent misrepresentation "when information is transferred by an attorney to a known party for a known purpose."[53] The El Paso Court of Appeals thus concluded that in accounting malpractice, as with legal malpractice, liability for negligent misrepresentation is limited to (1) plaintiffs specifically identified as recipients of the representation, and (2) plaintiffs who, although not specifically named, belong to a group or class the professional knew would receive the information.[54]

The Dallas Court of Appeals was faced with this issue once again in *Prospect High Income Fund v. Grant Thornton, LLP*,[55] and, although it cited the *Abrams Centre* case with approval, it expressly declined to decide whether *McCamish* did, in fact, overrule *Blue Bell*, holding instead that plaintiffs had raised a fact issue regarding their right to bring suit even under the *McCamish* test.[56] Accordingly, the Dallas Court of Appeals left room for argument that the "knew or should have known" standard articulated in *Blue Bell* remains the relevant standard.

III. MEDICAL MALPRACTICE

A. The Who and What of Health-Care Claims

During this Survey period, the Texas courts were called upon to determine exactly what makes a claim a health-care claim, what makes a provider a health-care provider, and who is qualified to serve as an expert to report on health-care claims. In *Diversicare General Partner, Inc. v. Rubio*, the Supreme Court of Texas addressed for the first time whether "the Medical Liability Insurance Improvement Act [("MLIIA")] . . . governs a patient's claims that a nursing home's negligence in failing to provide adequate supervision and nursing services proximately caused her injuries from a sexual assault by another patient."[57] The supreme court held a resident's claims seeking to recover for injuries resulting from sexual abuse and sexual assault by another resident amounted to causes of action for departures from accepted standards of professional health care.[58] Because of this, the causes of action were health-care liability claims under the MLIIA[59] and therefore were governed by a two-year statute of

51. The case was transferred from the Dallas Court to the El Paso Court as a result of the Texas Supreme Court's docket-equalization plan. *Id.* at *6 n.3.

52. 991 S.W.2d 787 (Tex. 1999).

53. *Abrams Centre*, 2005 WL 2806316, at *5-6 (citing *McCamish*, 991 S.W.2d at 792-94).

54. *Id.* at *6.

55. 203 S.W.3d 602 (Tex. App.—Dallas 2006, pet. filed).

56. *Id.* at 616.

57. 185 S.W.3d 842, 844-45 (Tex. 2005).

58. *Id.* at 845.

59. "While this case was pending on appeal, the Legislature repealed the MLIIA, amended parts of the previous article 4590i, and recodified it in 2003 as chapter 74 of the

limitations.[60]

The plaintiff Maria Rubio was a resident of the Goliad Manor Nursing Home and suffered from senile dementia. In July of 1999, Rubio's daughter brought suit against the business entity that ran Goliad Manor ("Diversicare") for injuries "Rubio sustained in two different falls while a resident at the facility. In September of 2000, Rubio amended her petition to include damages arising from the alleged failure of Diversicare . . . to adequately supervise and monitor Rubio"[61] after a nurse had discovered a male resident assaulting Rubio. Both Rubio's daughter and her physician were informed of this incident shortly after it occurred, but Rubio remained a resident at Goliad Manor for another three-and-a-half years. Diversicare filed a motion for summary judgment on all of Rubio's claims arising from the alleged sexual assaults, arguing that the MLIIA's two-year statute of limitations barred recovery on these claims. The district court severed the claims arising from the assault and granted the motion.

Rubio appealed to the Corpus Christi Court of Appeals. Although Rubio amended her complaint to plead the sexual assault claims five-and-a-half years after they allegedly occurred, the plaintiff argued that her claims were not health-care liability claims governed by the two-year statute of limitations under the MLIIA, which cannot be tolled due to mental incapacity, but rather were governed by the general statute of limitations for personal injury claims, which can be tolled due to mental incapacity.[62] The court of appeals reversed the trial court and held the plaintiff's claims arose from common-law negligence and therefore were not covered by the MLIIA; Diversicare appealed.[63]

Under the MLIIA, health care is defined as "any act or treatment performed or furnished, or which 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."[64] A nursing home qualifies as a health-care provider under the MLIIA. A cause of action against a health-care provider falls under MLIIA if "it is based on a claimed departure from an accepted standard of medical care, health care, or safety of the patient, whether the action sounds in tort or contract. A cause of action alleges a departure from accepted standards of medical care or health care if the act or omission complained of is an inseparable part of the rendition of medical services."[65] The supreme court concluded that "because the supervision of Rubio and the patient

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Texas Civil Practice and Remedies Code. Act of June 2, 2003, 78th Leg., R.S., ch. 204, 2003 Tex. Gen. Laws 847. Because article 4590i . . . govern[ed] this case, [the supreme court] cite[d] the former article rather than the Civil Practice and Remedies Code." *Id.* at 846 n.1.

60. *Id.* at 845.
61. *Id.*
62. *Id.* at 847.
63. *Id.* at 845-46.
64. *Id.* at 847 (citing former TEX. REV. CIV. STAT. art. 4590i, § 1.03(a)(2)).
65. *Id.* at 848 (citing former TEX. REV. CIV. STAT. art. 4590; § 1.03(a)(4)).

who assaulted her and the protection of Rubio are inseparable from the health care and nursing services provided to her," the causes of action were claims of breaches of the standard of care of the health-care provider.[66]

The plaintiff attempted to argue that if Rubio had simply been visiting the health-care facility, the lack of supervision leading to the assault would not have been considered part of a health-care program. The supreme court, however, distinguished between the relationship between premises owners and invitees on the one hand and health-care facilities and their patients on the other, with the latter relationship revolving around the health care provided to the patients.[67] Therefore, the obligation of a health-care facility to its patients is not the same as a general duty of a premises owner.[68] The supreme court also noted that expertise in the health-care field would be required in this case because it would not be "within the common knowledge of the general public to determine the ability of patients in weakened conditions to protect themselves, nor whether a potential target of an attack in a health-care facility should be better protected and by what means."[69] Therefore, the plaintiff's allegations were held to be health-care claims.[70]

Next, the Dallas Court of Appeals had to determine just how far to extend the term "health-care provider" regarding independent contractors working for health-care providers. In *MacPete v. Bolomey*, the plaintiff John MacPete sued defendants Kristin Bolomey and the Holiner Psychiatric Group on behalf of his child.[71] His action was dismissed due to his failure to timely file an expert report under the MLIIA. On appeal, MacPete claimed the trial court should not have dismissed the suit because Bolomey was not a health-care provider within the meaning of the MLIIA and also because his causes of action against Bolomey and Holiner for negligence were not within the scope of a health-care liability claim under the MLIIA.

Prior to the suit, a doctor had referred MacPete's six-year-old child to Bolomey, a licensed psychologist employed by Holiner and under contract with Medical City Hospital. The doctor suspected the child was being sexually abused. Based on meetings with the child, Bolomey agreed with the doctor's suspicions and notified Child Protective Services. This led to a series of investigations into and criminal proceedings against MacPete, none of which substantiated the claim of sexual abuse. MacPete sued Bolomey, Holiner, and Medical City, alleging that Bolomey was negligent in her misdiagnosis of sexual abuse against the child. MacPete alleged that Holiner was negligent for failure to train and supervise Bolomey and was vicariously liable for Bolomey's negligence.

66. *Id.* at 849.
67. *Id.* at 850-51.
68. *Id.*
69. *Id.* at 851.
70. *Id.* at 853.
71. 185 S.W.3d 580, 582 (Tex. App.—Dallas 2006, no pet.).

Finally, MacPete alleged that Medical City was negligent for failure to supervise and that it too was vicariously liable for Bolomey.[72]

MacPete argued that, as a psychologist, Bolomey was not covered as a health-care provider under the MLIIA, but the Dallas Court of Appeals disagreed. A health-care provider under the MLIIA is "any person, partnership, professional association, corporation, facility, or institution duly licensed, certified, registered, or chartered by the State of Texas to provide health care, including: (i) a registered nurse; (ii) a dentist; (iii) a podiatrist; (iv) a pharmacist; (v) a chiropractor; (vi) an optometrist; or (vii) a health-care institution."[73] A health-care provider also includes "an employee, independent contractor, or agent of a health-care provider or physician acting in the course and scope of the employment or contractual relationship."[74] The court stated that to come within the scope of a covered health-care provider under the MLIIA, "an employee or agent of a health-care provider need not independently qualify as a listed health-care provider."[75] Even if Bolomey independently would not qualify as a health-care provider, because she was a contractor with Medical City, a health-care provider, she was covered under the MLIIA.[76]

MacPete also contended that the allegations of failure to properly train and supervise do not constitute health-care liability claims. But the court looked to the underlying nature of the claim, noting that "[t]he complained-of act or omission must be an inseparable part of the rendition of medical services."[77] If it is, then the cause of action against the health-care provider falls under the MLIIA and is based on a departure from a standard of medical or health care. In this case, Bolomey's treatment of J.M.M. was a direct result of a referral by a doctor who had requested that she determine whether sexual abuse was the cause of the child's medical condition. The court concluded that Bolomey's services were an inseparable part of the child's health care treatment, so the services fell within the standard of health care as defined by the MLIIA.[78] In addition, the allegations of Bolomey's negligence necessarily invoked the issue of whether Bolomey's treatment of the child fell below the accepted standard of medical or health care and therefore fell within the definition of a health-care liability claim.[79] Finally, the training and supervision claims necessarily related to training and supervision over the care Bolomey gave, which implicates a standard of health care. Making allegations of negligence in that situation also creates a health-care liability claim.[80] The court of appeals therefore affirmed the trial court's order

72. *Id.*
73. *Id.* at 583 (quoting TEX. CIV. PRAC. & REM. CODE § 74.001(a)(12)(A) (Vernon 2005)).
74. *Id.* (quoting TEX. CIV. PRAC. & REM. CODE § 74.001(12)(B)(ii) (Vernon 2005)).
75. *Id.*
76. *Id.*
77. *Id.* at 584.
78. *Id.* at 585-86.
79. *Id.*
80. *Id.*

granting the motions to dismiss.[81]

Finally, the Eastland Court of Appeals dealt with the issue of who may serve as an expert in a medical malpractice claim. In *Pisasale v. The Ensign Group*,[82] the plaintiff sued a nursing home for medical malpractice. In order to sustain an allegation of medical malpractice in Texas, a plaintiff must comply with an expert-report requirement.[83] One of the reports in this case was prepared by a state investigator of nursing homes. Although the court acknowledged that the state investigator likely had general knowledge of federal and state regulations pertaining to nursing homes, neither his report nor his curriculum vitae indicated that the investigator had any sort of training, certification, or experience working as a nurse or as any other kind of health care provider.[84] Thus, the state investigator could not be considered an expert for purposes of the expert report.[85] The court also noted that even if the state investigator were a registered nurse, he still would be unable to render an opinion as to causation, because nurses are prohibited from acts of medical diagnosis. The expert report was therefore deemed insufficient.[86]

B. The Difficulties of Proving Causation (Part 3)

The San Antonio Courts of Appeals also considered the element of causation necessary for a successful medical malpractice claim. In *Arredondo v. Rodriguez*,[87] parents of a deceased newborn brought a medical malpractice claim against an obstetrician and several nurses for the death of their newborn child. The parents alleged that the newborn died because, prior to delivery, the attending doctor did not treat either the mother or the newborn child for a strep infection. The doctor won a motion for summary judgment on the basis that there was no evidence of causation. The doctor argued that any delay in treatment did not cause the child's death because no expert could say whether the child's death would have been prevented with an earlier administration of antibiotics. In a medical malpractice case, a successful plaintiff must show a reasonable medical probability that his injuries were proximately caused by the negligence of the defendant.[88] However, if there is a greater than fifty-percent likelihood that a patient would die or suffer impairment in the absence of the alleged negligence, traditional causation principles bar recovery, even if negligence deprives the patient of a chance of avoiding harm. "Thus, recovery is barred when the defendant's negligence deprive[s] the patient of only a fifty percent or less chance of survival."[89]

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81. *Id.*
82. Pisasale v. The Ensign Group, No. 11-05-00196-CV, 2006 WL 2567400 (Tex. App.—Eastland Sept. 7, 2006, pet. denied).
83. *Id.* at *4.
84. *Id.*
85. *Id.*
86. *Id.*
87. 198 S.W.3d 236 (Tex. App.—San Antonio 2006, no pet.).
88. *Id.* at 239 (citing Park Place Hosp. v. Milo, 909 S.W.2d 508, 511 (Tex. 1995)).
89. *Id.*

The court held that plaintiffs' experts had not raised a fact issue about the child's chances for survival. The first expert stated that the child's chances would have been better if antibiotics had been administered; however, he would not commit to the chances of survival being more than fifty percent. The second doctor stated that, had the child been treated with antibiotics within thirty minutes of arriving at the ER, he would have had a fifty-one percent chance or more of surviving. However, the court found this testimony to be merely speculative and conclusory because the testifying expert could not identify any literature upon which his evidence was based.[90] His testimony therefore, amounted to no evidence of causation.[91] With no evidence of causation, the plaintiffs could not sustain their objection to the motion for summary judgment, which was affirmed.[92]

In *Hamilton v. Wilson*,[93] the plaintiff Nadine Lambert, appealed from a summary judgment entered in favor of Dr. Selma Wilson. Lambert sued for damages arising from alleged negligence when Wilson intubated Lambert, who later suffered a torn esophagus. The trial court granted a no-evidence motion for summary judgment on behalf of Wilson. Lambert appealed, alleging that she had shown more than a scintilla of evidence illustrating the standard of care, its breach, and the proximate nexus between the breach and her resulting injuries. The Amarillo Court of Appeals first noted that to recover on a claim of medical malpractice, a complainant must prove "(1) the physician had a duty to act according to a certain standard, (2) he breached that standard, and (3) the breach proximately caused the complainant to sustain injury."[94] When an expert is needed to establish any of these elements, the expert's opinion must be more than mere speculation or surmise.[95] The court stated that because the issue was whether or not the endotracheal tube actually entered Lambert's esophagus, Lambert had to show more than a scintilla of evidence that Wilson had inserted a tube into her esophagus.[96] If she could not, there was no evidence that Wilson breached any of the standards of care propounded by Lambert or that Wilson had caused Lambert to suffer the injury underlying her claim, i.e., a torn esophagus.[97]

Wilson acknowledged she could not discount the "possibility" that she had placed the tube into Lambert's esophagus, but because opinion evidence must be based on more than possibilities, the court stated that "what Wilson described as a possibility [wa]s of no import."[98] Lambert's expert had testified to his belief that the tube was in the esophagus be-

90. *Id.* at 240.
91. *Id.*
92. *Id.*
93. Hamilton v. Wilson, No. 07-06-0071-CV, 2006 WL 3095541 (Tex. App.—Amarillo Nov. 1, 2006, pet. filed).
94. *Id.* at *1.
95. *Id.*
96. *Id.* at *2.
97. *Id.*
98. *Id.*

cause, at one point, it became too tight for Lambert to breathe comfortably. But the expert cited no facts beyond Lambert's statement that the tube was too tight, and he cited no evidence from any other medical report or study to support his belief. Therefore, because the expert only discussed possibilities, his statements were conclusory and did not constitute summary judgment evidence.[99] Finally, the surgeon who fixed the tear in Lambert's esophagus opined that it must have occurred during Wilson's intubation of Lambert, but this testimony also was held deficient because it was nothing more than conjecture without explanation.[100] "In sum, the possibility and subjective belief that Wilson inserted an endotracheal tube into Lambert's esophagus are simply conclusions. As such, they are not evidence that proves the questioned fact."[101] Because the court found no evidence that the tube was inserted into Lambert's esophagus, it affirmed the summary judgment.[102]

C. Discipline and the Doctor

In a rather shocking case bridging both causation and discipline, a medical malpractice claim became much more when a doctor was indicted for murdering her patient.[103] Dr. Lydia Grotti was charged with murdering her patient, Lettie McGhee, by occluding the patient's endotracheal ("ET") tube with her finger.

McGhee visited John Peter Smith Hospital in December of 2000 complaining of abdominal pain. When McGhee became unresponsive in the emergency room, efforts to resuscitate McGhee began. McGhee lacked any palpable pulse, and, when Grotti learned that the resuscitation efforts had lasted forty-five minutes, Grotti commented that McGhee had lost any chance of recovery and that McGhee was either brain dead or would soon be pronounced brain dead.[104] After Grotti left, the other doctors continued. McGhee regained a palpable pulse. The doctors therefore summoned Grotti to transport McGhee to the ICU. At that point, Grotti returned and assumed care of McGhee.[105]

Grotti assessed McGhee and described McGhee's pulse as "thready" before it disappeared.[106] Grotti then ended the code, discontinued the IV, disconnected the ventilator, and pronounced McGhee dead at 8:50 p.m. The code sheet from the time Grotti pronounced McGhee dead, however, indicated that McGhee did have a palpable pulse and a heart rate in the sixties but no blood pressure and no respiration. An emergency medical technician also testified that she examined McGhee after Grotti ended her treatment, and she detected a pulse in two separate

99. *Id.*
100. *Id.*
101. *Id.* at *3.
102. *Id.*
103. Grotti v. State, 209 S.W.3d 747, 753 (Tex. App.—Fort Worth 2006, pet. filed).
104. *Id.* at 755.
105. *Id.*
106. *Id.*

places. Shortly thereafter, a nurse observed McGhee's chest rising and falling, saw condensation in the ET tube, and stated that McGhee was breathing. Grotti believed the respirations were "agonal"—air was being expelled from her body—but McGhee was not taking any air back in. Grotti requested permission from the medical examiner to remove McGhee's ET tube, but the medical examiner refused. Another nurse told Grotti that McGhee was breathing. Grotti responded that McGhee was getting air to her central airways but not to her lungs and that her brain stem was continuing to fire causing muscle contractions. Grotti insisted that McGhee was cardiopulmonarily dead and that the movements observed were agonal respirations or spinal reflexes.

At 9:50 p.m., Grotti occluded McGhee's ET tube with her finger. According to witnesses, McGhee's head and neck moved during the occlusion. Her activity was observed by another doctor, who said that Grotti occluded McGhee's ET tube for a solid five minutes. Grotti admitted that she occluded the ET tube but claimed she only occluded the ET tube for about one minute, approximately one hour after the patient had been pronounced dead. When another doctor learned about Grotti's actions, he reported them to the Fort Worth Police Department. Grotti was convicted by a jury of criminally negligent homicide and was sentenced to a two-year confinement. Grotti appealed, and the Fort Worth Court of Appeals considered the issue of whether McGhee was alive when Grotti occluded the ET tube. The court held that the evidence was factually insufficient to show that McGhee was alive when Grotti occluded the ET tube and therefore reversed the trial court's judgment and remanded the case for a new trial.[107]

On appeal, Grotti argued the evidence was insufficient to show that McGhee was alive at the time Grotti allegedly caused McGhee's death. Under the Texas Penal Code, a person commits criminal homicide "if he intentionally, knowingly, recklessly, or with criminal negligence causes the death of an individual."[108] An individual is defined in the Penal Code as "a human being who is alive."[109] In addition, a "but for causal connection must be established between the defendant's conduct and the resulting harm."[110] Because homicide requires the death of an individual and an individual is one who is alive, it was the state's burden to show McGhee was alive at the time of the alleged homicide. The Fort Worth Court of Appeals therefore examined the evidence to determine whether it was legally and factually sufficient to show that McGhee was alive when Grotti occluded the ET tube.[111]

Because the Texas Penal Code does not define the term death, the court had to determine "whether the definition attributed to that term by

107. *Id.*
108. *Id.* at 758 (citing TEX. PENAL CODE ANN. § 19.01(a) (Vernon 2003)).
109. *Id.* (citing TEX. PENAL CODE ANN. § 1.07(a)(26) (Vernon 2003 & Supp. 2006)).
110. *Id.* (citing TEX. PENAL CODE ANN. § 6.04(a) (Vernon 2003)).
111. *Id.* at 759.

both parties in this case would have been included in a hypothetically correct charge."[112] Both of the parties presented evidence that assumed section 671.001(a) of the Texas Health and Safety Code was the applicable and appropriate definition of death. That section states:

> (a) A person is dead when, according to ordinary standards of medical practice, there is irreversible cessation of the person's spontaneous respiratory and circulatory functions; (b) If artificial means of support preclude a determination that a person's spontaneous respiratory and circulatory functions have ceased, the person is dead when, in the announced opinion of a physician, according to ordinary standards of medical practice, there is irreversible cessation of all spontaneous brain function. Death occurs when the relevant functions cease.[113]

Throughout the trial, the defendant's counsel asked witnesses to assume that section (a) applied, which addresses cardiopulmonary death. In the appeal, neither party challenged this definition nor the omission of any other definition in the charge. The court noted that section 671.001 of the Texas Health and Safety Code was enacted to give guidance to medical professionals regarding the time of death. Thus, the court reasoned the term "death"

> has acquired a legislatively defined, technical meaning, and—in the context of a homicide prosecution of a medical professional who has been accused of causing the death of a patient in the course of performing a medical procedure—we are compelled to construe the term death in Penal Code section 19.01(a) according to this technical definition.[114]

Therefore, the court held that a hypothetically correct jury charge would have followed the definition of death as defined in section 671.001(a).[115]

In order to determine the sufficiency of the evidence regarding whether McGhee was alive or dead at the time that Grotti occluded her ET tube, the court reviewed the testimony of the expert witnesses. The court concluded that only one witness, the chief medical examiner for San Antonio, had testified unconditionally that McGhee's respiratory activity after Grotti had ended the code at 8:50 p.m. was sufficient to maintain life. However, multiple expert witnesses attributed the post-call respiratory activity to brain stem activity and stated that McGee's respirations were inadequate to maintain life. Those experts concluded that McGhee had experienced irreversible cessation of her spontaneous respiratory and circulatory functions prior to the time that Grotti occluded the ET tube. The court held that the evidence showing McGhee was not alive at 9:50 p.m. so greatly outweighed the evidence supporting the conviction that

112. *Id.* at 759-60.

113. *Id.* at 760 (citing TEX. HEALTH & SAFETY CODE ANN. § 671.001 (Vernon 2004 & Supp. 2006)).

114. *Id.* at 761.

115. *Id.*

the jury's verdict was manifestly unjust.[116]

In *Chalifoux v. Texas State Board of Medical Examiners*,[117] a doctor appealed the district court's judgment affirming a final order of the Texas State Board of Medical Examiners (the "Board") that revoked his license to practice medicine in Texas. The Board found that the doctor Roland Chalifoux violated accepted medical standards and failed to practice medicine in an acceptable, professional manner in the treatment of three patients.

In the three cases, the Board found that Dr. Chalifoux had performed unnecessary surgery for which he was not adequately trained, that he had prematurely released a patient from the hospital without stabilizing the patient's condition, and that he had harmed a patient during a surgical procedure.[118] The Board found Dr. Chalifoux's actions fell far below the acceptable level of medical care. The administrative-law judge, before whom the hearing was held, recommended that Dr. Chalifoux's medical license be suspended for five years. The Board instead revoked Dr. Chalifoux's medical license. Dr. Chalifoux sought judicial review. The district court affirmed the Board's final order, and Dr. Chalifoux appealed.[119] The doctor claimed that the Board had violated his due-process rights, that the final order was arbitrary and capricious, and that the decision was unsupported by substantial evidence.

Dr. Chalifoux contended that the Board's complaint lacked the specificity required in the Texas Medical Practices Act's ("MPA") notice provision,[120] under which Dr. Chalifoux alleged that a formal complaint must have the certainty of a criminal indictment. But the Austin Court of Appeals disagreed, noting that Board proceedings are civil in nature and therefore lack the characteristics of criminal prosecutions.[121] Thus, the Board was not required to comply with criminal standards.[122] The complaint alleged by the Board was sufficiently specific to inform Dr. Chalifoux of the nature of the complaint and to provide him with notice of each statute allegedly violated.[123]

Dr. Chalifoux then claimed that the Board's conclusion that he violated the accepted medical standard of care did not support the subsequent conclusion that he violated sections 164.051(a)(6) and 164.052 (a)(5) of the MPA.[124] In fact, Dr. Chalifoux argued the Board had misinterpreted these sections because the legislature intended the sections to address "grossly immoral, dishonorable, or disreputable acts in connection with the practice of medicine."[125] Dr. Chalifoux therefore alleged that evi-

116. *Id.* at 761-62.
117. No. 03-05-00320-CV, 2006 WL 3196461 (Tex. App.—Austin Nov. 1, 2006, no pet.).
118. *Id.* at *1-5.
119. *Id.* at *5-6.
120. TEX. OCC. CODE ANN. § 164.005(f) (Vernon 2004).
121. *Chalifoux*, 2006 WL 3196461, at *12.
122. *Id.*
123. *Id.*
124. *Id.* at *14.
125. *Id.*

dence of a violation would require more than just a mere deviation or violation of an accepted medical standard, such as complete disregard for public health and welfare, or grossly negligent conduct. The court of appeals disagreed. Although a subcommittee had recommended an amendment to the MPA that would limit the suspension or revocation of a physician's license to violations amounting to gross professional misconduct, the final version of the subcommittee's report did not incorporate this recommendation.[126] In fact, the report recommended the MPA be broadened to allow the Board to discipline physicians for failure or inability to practice medicine in an acceptable manner.[127]

Dr. Chalifoux then argued that the legislative history of the MPA had originally provided for the discipline of a physician who had failed to practice medicine within the standard of care of a reasonable prudent physician. Once enacted, the bill did not include the standard-of-care language. The court of appeals, however, noted that the language actually might have unnecessarily limited the Board's authority, and, therefore, the omission of such language would actually increase the Board's authority, rather than limit it as Dr. Chalifoux alleged.[128] The court could not conclude, as a matter of law, that the legislature did not intend to allow the Board to discipline a physician for a violation of the accepted standard of care.[129] The court also noted that under section 164.051(a)(6) of the MPA, the Board adopted a rule providing that

> the failure to practice medicine in an acceptable professional manner consistent with public health and welfare includes, but is not limited to, such acts as: (1) failure to treat a patient according to the generally accepted standard of care; (2) negligence in performing medical services; (3) failure to use proper diligence in one's professional practice; and (4) failure to safeguard against potential complications.[130]

This list showed that a doctor's conduct could be inconsistent with public health and welfare, even if such conduct neither resulted in actual harm to the public nor stemmed from fraudulent acts. In section 164.052, the legislature provided a list of prohibited practices, which included unprofessional dishonorable conduct likely to deceive the public. The court of appeals noted that the use of the word "likely" indicates that a finding of actual harm is unnecessary.[131] Other examples of dishonorable conduct include providing false information to the Board, failing to cooperate with the Board's staff, or failing to complete the necessary amounts of continuing medical education. The court of appeals concluded that these examples of acts considered to be unprofessional or dishonorable, in addition to the legislature's use of the phrase "likely to deceive or defraud

126. *Id.* at *15.
127. *Id.*
128. *Id.*
129. *Id.*
130. *Id.*
131. *Id.* at *16.

the public," showed that this section of the MPA was not intended to apply only to extremely egregious or grossly negligent conduct.[132]

Dr. Chalifoux also contended that the Board adopted its final order in violation of his due-process rights because two doctors who had previously served on a disciplinary panel that had suspended Dr. Chalifoux's license temporarily in 2002 participated on the Board. Noting that due process "requires that parties be accorded a full and fair hearing on disputed fact issues," the court began from a presumption that decision makers were unbiased.[133] Therefore, in order to overcome this presumption, Dr. Chalifoux had to establish that the doctors participating on the temporary-suspension panel closed their minds to the matters at issue in the Board's final order. The court held that the record did not show that the doctors unduly influenced the Board's final decision, only that they were present at the meeting.[134] Dr. Chalifoux's assertion that mere participation in the meeting was improper and violative of his due-process rights was insufficient to overcome a presumption that those on the panel would conduct themselves in a fair and unbiased manner.[135] The court also noted that Dr. Chalifoux had not requested either doctor to recuse himself, as would have been permitted under the Board's rules.[136] Therefore, the court viewed this as an unsubstantiated claim that did not affect the ruling.[137]

Finally, Dr. Chalifoux alleged that the Board's final order was arbitrary and capricious. "An agency's decision is arbitrary or results from an abuse of discretion if the agency: (1) failed to consider a factor the legislature directs it to consider; (2) considers an irrelevant factor; or (3) weighs only relevant factors that the legislature directs it to consider but still reaches a completely unreasonable result."[138] Dr. Chalifoux contended that the Board's final order showed the Board had considered mitigating evidence that would have supported a lesser sanction but still unreasonably revoked his license. The court of appeals disagreed, noting that the Board's conclusions were explicitly based on findings and evidence presented at the hearing. And, although the Board's findings may have included mitigating evidence that could have supported the lesser sanction, the evidence also supported the Board's decision to revoke the doctor's license.[139] The court of appeals stated that it was not allowed to substitute its own judgment for that of the Board and held the Board's final order was neither arbitrary nor capricious.[140]

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132. *Id.*
133. *Id.* at *19.
134. *Id.*
135. *Id.*
136. *Id.*
137. *Id.*
138. *Id.*
139. *Id.* at *20.
140. *Id.*

IV. OFFICER AND DIRECTOR LIABILITY

A. TEXAS COURTS OF APPEALS LIMIT PERSONAL JURISDICTION OF OFFICERS AND DIRECTORS OF SUSPENDED CORPORATIONS

Two Texas courts addressed individual director and officer personal jurisdiction pursuant to the Texas Tax Code during this Survey period. In *Tri-State Building Specialties, Inc. v. NCI Building Systems, L.P.*, the First District [Houston] Court of Appeals limited the application of section 171.255(a) of the Texas Tax Code in considering personal jurisdiction over a nonresident officer.[141] Tri-State Building Specialties, Inc. ("Tri-State"), a California corporation, purchased garage doors from Building Systems, L.P. ("NCI"). Tri-State and NCI entered into an application for credit by which the parties agreed to a forum-selection clause, providing that "all claims and disputes arising out of any transactions between NCI and Tri-State" would be brought in state court in Harris County, Texas.[142] NCI sued Tri-State and its president Susan Hollister and its vice-president Jennie Bush in Harris County for a suit on account and for breach of contract. NCI obtained a default judgment when none of the defendants answered. A month later, the defendants filed a special appearance.

NCI asserted that Hollister and Bush were individually subject to the jurisdiction of Texas because Tri-State was not a viable corporation, its corporate privileges having been suspended by the California Secretary of State. Consequently, NCI argued that Hollister and Bush were individually responsible for the company debts under section 171.255(a) of the Texas Tax Code and therefore were *de facto* personally doing business in Texas.[143] Hollister and Bush asserted that they had no contacts with Texas to support jurisdiction over them and that they were "merely employees" and could not be held personally liable for Tri-State's debts. The trial court denied the defendants' special appearances.[144]

The court of appeals recognized that individual jurisdiction over nonresident officers and directors can be established when a corporation's privileges have been suspended.[145] The court first addressed the defendants' burden to negate all bases for personal jurisdiction, acknowledging that one exception to that rule arises when the claimant asserts that personal jurisdiction exists based on an alter-ego theory. It is clear under Texas law that jurisdiction based on an alter-ego theory cannot be found unless the claimant seeking jurisdiction proves the defendant disregarded

141. 184 S.W.3d 242, 251 (Tex. App.—Houston [1st Dist.] 2005, no pet.).

142. *Id.* at 247.

143. Under the Texas Tax Code § 171.255(a), if the corporate privileges of a corporation are forfeited due to the corporation's failure to file a report or pay a tax or penalty, the directors and officers of the corporation are individually liable for each debt of the corporation that is created or incurred after the date on which the report, tax, or penalty is due but before the corporate privileges are revived. TEX. TAX CODE ANN. § 171.255(a) (Vernon 2007).

144. *Tri-State Bldg.*, 184 S.W.3d at 246.

145. *Id.* at 252.

the corporate entity.[146] The court extended the alter-ego burden-shifting analysis to the assertion of officer liability because the same presumption of legal separateness exists with regard to a corporation and its officers.[147] Consequently, NCI had the burden to show section 171.255(a) applied.[148]

The court of appeals found NCI failed to establish its burden of proof in two ways. First, NCI failed to establish the date on which the report, tax, or penalty at issue was due—a critical issue for determining jurisdiction pursuant to the statute.[149] Second, Tri-State's corporate privileges were suspended in California, not in Texas.[150] The court of appeals held that section 171.255(a) applies only when a corporation has its corporate privileges forfeited in Texas, not in another state.[151] Ultimately, the court found that because NCI failed to establish officer liability, the trial court had improperly denied Hollister's and Bush's special appearances.[152]

In *Virtual Healthcare Service, Ltd. v. Laborde*,[153] a case concerning individual officer jurisdiction and the forfeiture of corporate privileges under section 171.255(a), the Eastland Court of Appeals held that the statutorily required notice that directors and officers are potentially liable for a corporation's debts does not justify a conclusion that "nonresident officers and directors could reasonably anticipate being called into a Texas court."[154] The trial court granted a Louisiana nursing-home operator's special appearance against Virtual Healthcare Services, Ltd., a nurse-staffing provider. Laborde, the defendant, was the sole director and president of the Louisiana corporation Cross Timbers Care Center, Inc., which had a certificate of authority to transact business in Texas. Cross Timbers operated a nursing home in Flower Mound, Texas. On February 23, 2000, the Texas Comptroller of Public Accounts forfeited Cross Timbers's corporate privileges after it failed to comply with franchise-tax requirements. The comptroller twice mailed notice to Cross Timbers's management company Tutera Health Care Services, L.L.C., but not to Cross Timbers as required by the statute. Virtual Healthcare subsequently provided nurse-staffing services to Cross Timbers at its nursing home in Texas, and Cross Timbers failed to pay for those services.[155] Virtual Healthcare filed a lawsuit against Cross Timbers and Tutera. After Cross Timbers failed to answer, the trial court entered default judgment in favor of Virtual Healthcare. Tutera answered the lawsuit, and Virtual Healthcare filed an amended petition adding Laborde and seeking to hold him personally liable for Cross Timbers's debt under

146. *See* BMC Software Belgium, N.V. v. Marchand, 83 S.W.3d 789, 798 (Tex. 2002).
147. *Tri-State Bldg.*, 184 S.W.3d at 250.
148. *Id.*
149. *Id.* at 251.
150. *Id.*
151. *Id.*
152. *Id.* at 252.
153. 193 S.W.3d 636 (Tex. App.—Eastland 2006, no pet.).
154. *Id.* at 644.
155. *Id.* at 641.

section 171.255(a) of the Texas Tax Code. Laborde filed his special appearance contesting personal jurisdiction, which the trial court granted.

Virtual Healthcare appealed, arguing that the trial court had personal jurisdiction over Laborde because the corporation had forfeited its rights to do business in Texas, and section 171.255(a), by implication, conferred specific personal jurisdiction over him. In response, Laborde provided an affidavit specifically setting out his lack of contacts with Texas and indicating that his limited contact with Texas had not been for any personal business interests. Finding no other sufficient minimum contacts indicating Laborde "purposely availed" himself to the privilege of conducting activities within Texas, the court of appeals held that mere notice under section 171.255(a) that an officer may be liable for corporate debt "does not justify a conclusion that the nonresident officer or director could reasonably anticipate being called into a Texas court."[156] The court also held that because the comptroller did not comply with statutory notice requirements in forfeiting Cross Timbers's corporate privileges in Texas, Laborde had presented evidence that established he did not know of the forfeiture before Cross Timbers had incurred its debt to Virtual Healthcare.[157] Affirming Laborde's special appearance, the court of appeals found the exercise of jurisdiction over Laborde would not comport with traditional notions of fair play and substantial justice.[158]

In *Lewis v. Indian Springs Land Corp.*,[159] the Dallas Court of Appeals found personal jurisdiction over Indian Springs's former president Thomas Lewis. In that case the corporation and its shareholders brought multiple claims against Lewis, a resident of Florida, in connection with his distribution of Indian Springs Land Corporation ("ISLC") funds. Lewis was a limited partner of a Texas real estate development corporation, ISIP, which had its principal place of business in Addison, Texas. ISLC was a closely held Nevada S corporation, whose shareholders were Lewis, ISIP, Daryl Snadon, and James Durbin, all of whom were venturers in a Texas joint venture called "Indian Springs Joint Venture." The lawsuit involved a series of business transactions between Lewis and the above-listed entities, which culminated in the challenged disbursement of ISLC's funds by Lewis in 2004. All of the transactions related to the acquisition and development of a tract of real estate in Los Angeles County, California. After the parties sued Lewis, Lewis filed a special appearance, which was denied by the trial court. No findings of fact and conclusions of law were requested or filed.

The Dallas Court of Appeals noted that under *Michiana Easy Livin' Country, Inc. v. Holten*[160] consideration of purposeful availment involves three important aspects.[161] First, only the defendant's contacts with the

156. *Id.* at 644.
157. *Id.* at 645.
158. *Id.*
159. 175 S.W.3d 906 (Tex. App.—Dallas 2005, no pet.).
160. 168 S.W.3d 777 (Tex. 2005).
161. *Lewis*, 175 S.W.3d at 913-14.

forum are relevant.[162] Second, the conduct must be purposeful rather than "random, isolated or fortuitous."[163] Finally, the defendant must seek some benefit, advantage, or privilege by availing itself to the jurisdiction.[164] A defendant can purposefully avoid jurisdiction by structuring transactions so as to neither profit from the forum's laws or be subject to its jurisdiction.[165] In this case, Lewis had extensive contacts with Texas that he voluntarily made, but he argued that the fiduciary-shield doctrine applied because any Texas contacts by him were not in his individual capacity and, therefore, could not be used as a basis for the exercise of specific personal jurisdiction.[166] The Dallas Court of Appeals noted that the Texas Supreme Court has never specifically recognized the fiduciary-shield doctrine and that Texas courts of appeals have only applied the doctrine to the question of general jurisdiction. Additionally, the court could not conclude that Lewis's contacts with Texas did not include at least some contacts in his individual capacity as a partner or venturer in the Texas-based entities.[167]

In the final director and officer special appearance case during this Survey period, the Dallas Court of Appeals reversed the denial of a nonresident CEO's special appearance, locating no support for the finding that the CEO had acted individually.[168] In *Hoffmann v. Dandurand*, Dandurand filed suit against Hoffmann, DHR International, Inc., an executive search firm based in Chicago, Illinois, and Riverwalk International, Inc. Dandurand alleged breach of contract against the defendants after Dandurand entered into an agreement with DHR to buy rights to purchase stock. The agreement was signed by Hoffmann on behalf of DHR. Dandurand alleged that he received the first four annual payments owed for the sale of his stock-purchase rights but that he never received the final fifth payment. Hoffmann filed a special appearance, which was denied by the trial court. Hoffmann appealed, and the Dallas Court of Appeals reversed the judgment and remanded the case. On remand, Hoffmann filed proposed amended findings of fact and conclusions of law, which the trial court refused and denied. The trial court once again denied Hoffmann's special appearance based on the alter-ego theory, and Hoffmann appealed again.

The court of appeals first noted that where the defendant is expected to negate all bases of jurisdiction, the jurisdictional basis must be pleaded clearly and concisely.[169] Specifically, a defendant cannot be expected to negate the alter-ego theory of jurisdiction when it is "buried in the pleadings."[170] Notwithstanding the improper pleading, the court addressed the

162. *Id.* at 914.
163. *Id.*
164. *Id.*
165. *Id.*
166. *Id.* at 917.
167. *Id.* at 916-17.
168. Hoffmann v. Dandurand, 180 S.W.3d 340, 352 (Tex. App.—Dallas 2005, no pet.).
169. *Id.* at 350.
170. *Id.*

alter-ego theory finding, holding the plaintiff had the burden of proving the theory of alter ego before the burden shifted to defendant Hoffmann to negate it.[171] In this case, the only evidence offered, that Hoffmann was a majority stockholder, officer, and director, was insufficient to support the finding of alter ego. Thus, there was no evidence to support the alter-ego theory.[172]

Additionally, absent a finding of alter ego, there was no basis for individual general jurisdiction based on the fiduciary-shield doctrine, and there was no basis for specific jurisdiction because Hoffman did not purposefully avail himself of the privilege of conducting activities within the state.[173]

B. The Houston and Tyler Courts of Appeals Further Define Derivative Standing

The First District [Houston] Court of Appeals found investors lacked standing to bring claims against a CEO in *Highland Capital Management, L.P. v. Ryder Scott Co.*[174] In that case, the holders of a bankrupt oil and gas company's unsecured subordinated notes brought claims ranging from conspiracy and defraud to aiding and abetting against the company's chief executive officer Heffner and also Ryder Scott Co., a reservoir evaluation consulting firm that had prepared reports on the company's proven reserves.

As a basis for the conspiracy and aiding and abetting claims, the plaintiffs asserted a plan existed to defraud the investors by issuing and purchasing secured notes so as to decrease the assets available to investors. The investors brought the lawsuit after a group of unsecured creditors, including the underlying plaintiffs, filed an involuntary petition for relief against Seven Seas Petroleum, Inc., the corporation, under Chapter 7, and after the trustee filed a complaint in an adversary proceeding against Seven Seas and its former officers and directors, including Heffner, alleging, among other things, breach of fiduciary duties. The court of appeals concluded that the nature of the injury for which relief was sought against Heffner in the latter state court case, which could only be described as the depletion of Seven Seas's assets to the detriment of the creditors, was derivative in nature and, therefore, only the trustee had standing to assert such a cause of action.[175]

In *Redmon v. Griffith*,[176] the Tyler Court of Appeals explored the connection between individual and derivative claims in the context of director and officer liability. In that case, two families, the Redmons and the Griffiths, owned a company called G.E.M. Transportation. Redmon

171. *Id.*
172. *Id.* at 351.
173. *Id.* at 352.
174. 212 S.W.3d 522, 532 (Tex. App.—Houston [1st Dist.] 2006, no pet.).
175. *Id.*
176. 202 S.W.3d 225 (Tex. App.—Tyler 2006, pet. filed).

owned twenty-five percent of the stock and was the operations manager, vice-president, and director. Griffith owned seventy-five percent of the stock and was the president and a director. The Redmons filed individual and derivative claims against G.E.M. and the Griffiths in various capacities. The Redmons asserted shareholder oppression and breach of fiduciary duty claims, alleging that the Griffiths, as officers and directors of G.E.M., diverted corporate opportunities, funds, and revenues and made illegal disbursements of corporate assets for their own personal use and benefit. Following Mr. Griffith's death, Mrs. Griffith put G.E.M. into Chapter 11 bankruptcy. The Redmons subsequently abandoned any claims made by them on behalf of G.E.M. derivatively and removed G.E.M. as a defendant in the lawsuit.[177]

The trial court granted summary judgment in favor of Mrs. Griffith on the basis that the Redmons lacked standing. The court of appeals first disagreed with the trial court that the Redmons lacked standing for their claim for shareholder oppression, finding individual harm.[178] The court of appeals, however, did agree with the trial court's finding that the Redmons lacked standing for their breach of fiduciary duty claims.[179] The court reasoned those claims centered on Griffith's violation of fiduciary duties owed to G.E.M., not the Redmons individually.[180] Because the Redmons had abandoned their derivative claims on behalf of G.E.M., the Redmons were not alleging breach of a legal duty owed to them individually. Therefore, they did not have standing to recover from the Griffiths for their alleged breach of fiduciary duty.[181]

C. The Dallas Court of Appeals Clarifies Director and Officer Insurance Notice Provision

In *Prodigy Communications Corp. v. Agricultural Excess & Surplus Insurance Co.*, an insured brought an action against Agricultural Excess & Surplus Insurance Company ("AESIC"), a director and officer liability insurer, to recover for breach of contract when the insurer denied a claim based on late notice.[182] In that case, the trial court entered summary judgment in favor of AESIC, finding improper notice because the insured, Prodigy, was served with a lawsuit on June 20, 2002, but did not give written notice of the lawsuit to AESIC until June 6, 2003, nearly one year later.

The notice provision in the policy stated as follows:

> The Directors and Officers shall, as a condition precedent to their rights under this Policy, give the Insurer notice, in writing, as soon as practicable of any Claim first made against the Directors and Of-

177. *Id.* at 231.
178. *Id.* at 236.
179. *Id.* at 237.
180. *Id.*
181. *Id.* at 236-37.
182. 195 S.W.3d 764, 766 (Tex. App.—Dallas 2006, pet. filed).

> ficers during the Policy Period, or Discovery Period (if applicable), but in no event later than ninety (90) days after the expiration of the Policy Period or Discovery Period, and shall give the Insurer such information and cooperation as it may reasonably require.[183]

Prodigy argued that it gave timely notice because the policy language, stating "but in no event later than ninety (90) days after the expiration of the Policy Period or Discovery Period," modified the "as soon as practicable" language, thereby creating a safe harbor by allowing notice of a claim at any time before the end of the ninety-day period, regardless of when the claim was made or when Prodigy received notice of the claim. AESIC countered that the policy required written notice to be given "as soon as practicable," and notice more than eleven months after service of the lawsuit was not "as soon as practicable" as a matter of law. The trial court and the court of appeals agreed that Prodigy's interpretation was contrary to the plain meaning of the words used in the policy.[184] The court also held that the insurance company was not required to prove it was prejudiced as a result of the untimely notice.[185]

D. Oral Resignation of Corporate Position is Sufficient

In *Lacey v. State*,[186] the Austin Court of Appeals addressed, in part, what a director or officer is required to do to resign from his or her position. In *Lacey*, the trial court granted summary judgment against Hollis Petroleum, Inc. and its officers and directors, including Lacey, for civil and administrative penalties resulting from violations of an agreed order between Hollis Petroleum and the Texas Natural Resource Conservation Commission regarding the operation of underground storage tanks. Lacey appealed, arguing that there was a fact issue as to whether he was an officer or director of Hollis at the time of the order or any time thereafter, and therefore whether he should be held personally liable. The court of appeals agreed and reversed and remanded the case.[187]

The State asserted that Hollis's 1992 public information report listed Lacey as an officer of the corporation and that conclusively established his role as an officer from 1995 to 1996. For support, the State cited *Jonnet v. State*, in which the court held two old reports, an expired public information report and a report filed with the Railroad Commission, presented convincing evidence of the identity of the directors of the corporation.[188] However, in *Lacey*, unlike in *Jonnet*, Lacey presented evidence in the form of an affidavit that he was not an officer or director during the relevant period and that he had told another officer of Hollis

183. *Id.*
184. *Id.* at 766-67.
185. *Id.* at 768.
186. No. 03-02-00601-CV, 2005 WL 2312485 (Tex. App.—Austin Sept. 21, 2005, no pet.).
187. *Id.* at *1.
188. *Id.* at *2 (citing Jonnet v. State, 877 S.W.2d 520, 524 (Tex. App.—Austin 1994, writ denied)).

that he was resigning as an officer and director and separating himself from all affiliations with Hollis. After his oral resignation, Hollis moved to North Carolina and had no further contact with the corporation. Additionally, in *Jonnet*, the Railroad Commission form required stringent reporting, including requiring amendments immediately if there were any substantive changes, such as resignation of officers and directors. No similar requirement existed in *Lacey*.[189]

Ultimately, the court of appeals held that the 1992 report was not conclusive evidence of Lacey's position as an officer and director and that, even if it was sufficient to raise a presumption that Lacey was an officer or director at the relevant time, Lacey's affidavit raised an issue of fact sufficient to preclude summary judgment on the issue.[190] Lacey's affidavit set out clear and specific facts relating to his resignation and indicating his subsequent move to North Carolina. Citing a 1931 case, the court agreed that a verbal resignation is sufficient and that a "resignation from a corporate position is not required to be in writing, nor is it required to be in any special form."[191]

V. CONCLUSION

During this Survey period, Texas courts strictly applied the law in the realm of professional liability, requiring proof of the elements necessary to bring a successful claim. The courts have expanded the application of legislation that narrows causes of action or requires specific types of proof in a case, for example, the expert-report requirements of the Medical Practices Act. This Survey period clearly suggests that plaintiffs need to pay close attention to the manner and means by which they attempt to prove the validity of a claim against a professional, whether the professional be a lawyer, a doctor, an accountant, or an officer or director.

189. 2005 WL 2312485, at *2.
190. *Id.* at *3.
191. *Id.* at *3 (citing Bell v. Tex. Employers Ass'n, 43 S.W.2d 290, 293 (Tex. Civ. App.—Dallas 1931, writ dism'd)).