

**CASE LAW UPDATE:  
A SURVEY OF RECENT TEXAS  
PARTNERSHIP AND LLC CASES**

By

Elizabeth S. Miller  
Professor of Law  
Baylor University School of Law  
Waco, Texas

The University of Texas School of Law

2015 LLCs, LPs and PARTNERSHIPS

July 9 & 10, 2015  
Austin, Texas

## TABLE OF CONTENTS

Page

I.	Introduction.....	1
II.	Recent Texas Cases Involving Partnerships.....	1
A.	Creation/Existence of General Partnership.....	1
B.	Partner’s Personal Liability; Partner’s Power to Bind Partnership.....	7
C.	Limitations in Suit Against Partners After Suit Against Partnership.....	10
D.	Fiduciary Duties of Partners and Affiliates.....	11
E.	Partnership Property.....	17
F.	Interpretation and Enforcement of Partnership Agreement.....	20
	1. Fiduciary Duties.....	20
	2. Financial Rights.....	23
	3. Admission of Limited Partner.....	25
	4. Attorney’s Fees.....	26
G.	Withdrawal of Partner.....	27
H.	Standing: Direct Versus Derivative Claims.....	27
I.	Injunctive Relief.....	30
J.	Personal Jurisdiction.....	31
K.	Limited Partner Class Certification in Breach-of-Fiduciary-Duty Case.....	35
L.	Receivership.....	36
M.	Bankruptcy.....	37
N.	Fraudulent Transfer.....	39
III.	Recent Texas Cases Involving Limited Liability Companies.....	41
A.	Nature of Limited Liability Company.....	41
B.	Pre-Formation Transactions.....	42
C.	Purpose Clause of LLC.....	43
D.	LLC Property and LLC Membership Interest.....	44
E.	Fiduciary Duties and Oppression.....	45
F.	Personal Liability of Members Under Agency or Other Law.....	47
G.	Authority of Member, Manager, or Officer.....	50
H.	Transfer Restrictions and Buyout Provisions.....	53
I.	Record Keeping Requirements and Access to Books and Records.....	56
J.	Dissolution/Winding Up.....	59
K.	Withdrawal or Expulsion of Member.....	61
L.	Veil Piercing.....	62
M.	Creditor’s Remedies: Charging Order.....	65
N.	Recovery of Attorney’s Fees.....	66
O.	Arbitration.....	66
P.	Standing or Capacity to Sue.....	68
Q.	Receivership.....	69
R.	Bankruptcy.....	69
S.	Securities Laws.....	73
T.	Eminent Domain.....	74
U.	Effect of Reorganization.....	74
V.	Pro Se Representation.....	75

# **Case Law Update: A Survey of Recent Texas Partnership and LLC Cases**

**Elizabeth S. Miller**

## **I. Introduction**

This paper summarizes recent Texas cases involving issues of partnership and limited liability company law. This paper only includes cases that have appeared since the paper for last year's program was prepared. The cases included in this paper will be added to lengthier case law surveys that include cases from prior years, and those surveys will be accessible on the author's profile page at the Baylor Law School web site.

## **II. Recent Texas Cases Involving Partnerships**

### **A. Creation/Existence of General Partnership**

*Shafipour v. Rischon Development Corporation*, No. 11-13-00212-CV, 2015 WL 3454219 (Tex. App.—Eastland May 29, 2015, no pet. h.) (mem. op.).

Nasser Shafipour sued Rischon Development Corporation ("Rischon"), asserting various claims in connection with a real estate development deal that did not come to fruition. Rischon sued Shafipour and claimed that Rischon and Shafipour formed a partnership with respect to a tract of land owned by NMV, Inc. ("NMV"), a corporation in which Shafipour was an officer and shareholder, and that Shafipour breached fiduciary duties owed to Rischon. The jury found that Shafipour and Rischon formed a partnership for the real estate transaction in question and that Shafipour breached his fiduciary duty. The court of appeals examined the evidence as to the five factors used to determine the existence of a partnership and concluded that there was no evidence that Rischon and Shafipour, individually, formed a partnership. To the extent there was evidence of the formation of a partnership, the evidence pointed to a partnership between Rischon and NMV rather than Shafipour.

The court of appeals relied on the Texas Revised Partnership Act because the events in question occurred while that statute was in effect. The court noted that a partnership is created when two or more persons associate to carry on a business for profit as owners regardless of what the association is called, and a partnership can be formed through an oral or written agreement. Whether a partnership exists is determined by the totality of the circumstances with regard to five statutory factors. The jury charge in this case set forth the five statutory factors: (1) receipt or right to receive a share of profits of the business; (2) expression of an intent to be partners in the business; (3) participation or right to participate in control of the business; (4) sharing or agreeing to share losses of the business or liability for claims by third parties against the business; and (5) contributing or agreeing to contribute money or property to the business. The trial court also instructed the jury that an agreement to share losses is not necessary to create a partnership and that a representation or other conduct indicating that a person is a partner with another partner, if that is not the case, does not itself create a partnership. The court noted that more than one factor is ordinarily necessary to establish a partnership, and the first and third factors are the most important.

The court of appeals examined the evidence in light of the five factors and concluded that there was no evidence to support the jury's finding of a partnership between Rischon and Shafipour. Although there was some evidence that Rischon and NMV's representative may have agreed to share profits, there was no evidence that Rischon and Shafipour, individually, agreed to share profits, liability, or losses. Rischon never contributed money or other property to the alleged partnership, and the evidence showed that Rischon demanded that the property be sold to Rischon before the development began. Neither NMV nor Shafipour ever signed the proposed sales contract sent by Rischon to NMV. The speech, writings, and conduct of Rischon pointed to only one conclusion regarding the intent to form a partnership: Rischon intended to partner with NMV, the property owner, and not with Shafipour as an individual. Thus, the court of appeals held that there was no partnership between Rischon and Shafipour and no fiduciary duty owed or breached by Shafipour.

***Trinh v. Elmi***, No. 01–14–00204–CV, 2015 WL 3424373 (Tex. App.–Houston [1<sup>st</sup> Dist.] May 28, 2015, no pet. h.) (mem. op.).

Trinh sued Elmi alleging claims related to an alleged oral partnership agreement. Trinh alleged that Elmi agreed to sell Trinh a 40% interest in her pharmacy for \$30,000. According to Elmi, although she and Trinh discussed the possibility of his purchasing 40% of her pharmacy for \$30,000, they never entered into an agreement. Elmi testified that Trinh paid her \$10,000 but that she later returned the \$10,000 to him. The jury found that Elmi agreed with Trinh that he would own a 40% interest in her pharmacy and that Elmi failed to comply with this agreement, but the jury found no damages for breach of contract. The jury awarded a small amount of damages on Trinh’s quantum meruit claim.

On appeal, Trinh contended that the trial court erred in rendering judgment on the jury's verdict awarding him no damages on his breach-of-contract claim and no attorney's fees based on this claim. He argued that the jury found that a partnership agreement existed and that Elmi breached that agreement. Because Trinh's expert witnesses provided uncontroverted testimony regarding Trinh's damages and attorney's fees, Trinh argued that the jury's award of no damages or attorney's fees was outside the range of evidence or against the great weight and preponderance of the evidence. The parties disputed the meaning of the jury's answers to the questions in the jury charge. Trinh contended that the jury's answers to the first two questions clearly demonstrated that the jury found that a partnership agreement existed and that Elmi breached it. Elmi argued that the jury's answers to those questions represented a finding that the parties had agreed to form a partnership but that a partnership agreement was never consummated. The court of appeals concluded that the jury's answers, while seemingly conflicting, were not irreconcilable. Trinh testified that he entered into an agreement with Elmi under which he was to pay Elmi \$30,000 for a 40% ownership interest in the pharmacy, but he only paid Elmi \$10,000, and Elmi never conveyed the interest in the pharmacy to him. The jury found that the parties had reached an agreement that Trinh would own a 40% interest in the pharmacy, but the jury was never asked about Trinh's concomitant obligations under the agreement. Although the jury found that Elmi breached the agreement, presumably when she failed to convey the ownership interest to Trinh, the jury could also have found that a partnership was never created because Trinh did not perform his obligations under the agreement. Thus, the jury could have determined that there was an agreement and that Elmi breached the agreement but that Trinh was not entitled to damages because he did not perform his obligations under the agreement. Thus, the trial court did not err in rendering judgment on the jury's verdict.

***BV Energy Partners, L.P. v. Cheatham***, No. 05-14-00373-CV, 2015 WL 2205682 (Tex. App.–Dallas May 12, 2015, no pet. h.).

BV Energy Partners, LP and BV Real Estate Management, Inc. (collectively “BV”) sued Richard Cheatham, alleging that BV and Cheatham formed a partnership to invest in the Marcellus Shale and that Cheatham breached his fiduciary duty to BV by taking BV’s money and investing it in deals without BV. BV claimed that Cheatham owed BV a share of the profits from the Marcellus Shale in excess of \$21 million. The jury answered the question inquiring whether BV and Cheatham formed a partnership in the negative, and BV complained on appeal about the wording of the jury question. The court of appeals found that the trial court did not err in the wording of the question.

In 2004, BV and Cheatham formed an LLC to invest in oil and gas interests. Cheatham was the managing member of the LLC, and the LLC’s regulations had an exclusivity provision that required Cheatham to devote 100% of his time during normal work hours to the LLC’s business and prohibited Cheatham from entering into any oil and gas ventures with anyone other than a member of the LLC. That LLC invested in only one deal, and the regulations were then amended to delete the exclusivity provision in 2007 when the LLC owned no assets and was being dissolved. In the years following formation of the LLC, Cheatham brought oil and gas investment opportunities to BV, and BV invested in some of them. In 2007, the parties had some communications regarding opportunities to invest in the Marcellus Shale, and BV furnished Cheatham funds to invest in certain projects. Over the next few years, Cheatham acquired and sold leases in the Marcellus Shale resulting in millions of dollars in profits. BV periodically asked for information but was not satisfied with Cheatham’s explanations. BV sued Cheatham and alleged that BV had formed a partnership with Cheatham to invest in the Marcellus Shale and that BV was entitled to more than \$21 million. Cheatham denied that it had a partnership with BV to invest in the Marcellus Shale and claimed that BV invested in only three leases. Cheatham calculated BV’s share of those leases as between \$1.6 million and \$2.5 million and tendered \$2.5 million. BV initially claimed that Cheatham was obligated to bring BV the Marcellus Shale opportunities under the exclusivity provision in the LLC regulations,