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

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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. Case law surveys that include cases from prior years are available on Professor Miller's profile page at the Baylor Law School web site.

II. Recent Texas Cases Involving Partnerships

A. Creation/Existence of General Partnership

J. Michael Ferguson, P.C. v. Ghrist Law Firm, PLLC, No. 02-18-00332-CV, 2021 WL 2006321 (Tex. App.—Fort Worth May 20, 2021, no pet. h.) (mem. op.).

Because there was no objection to the instruction provided to the jury with respect to the formation of a joint venture, the court analyzed the sufficiency of the evidence to support the jury's finding of a joint venture based on the instruction rather then the statutory factors considered in determining whether a partnership or joint venture has been created. Because there was no evidence of an agreement to share losses, and the jury instruction stated that there must be an agreement to share losses, the evidence did not support the finding of a joint venture.

Among the issues addressed in this appeal of a dispute arising out of the relationship between a law firm (the "Ferguson Firm") and Ian Ghrist—a lawyer with whom the Ferguson Firm had an oral fee sharing agreement—was whether the oral fee sharing agreement amounted to a joint venture between the parties.

The court began its discussion of this issue by stating that "[t]he formation of a joint venture is governed by the same law as governs partnerships," citing Tex. Bus. Orgs. Code § 152.051(b) (providing "an association of two or more persons to carry on a business for profit as owners creates a partnership, regardless of whether ... the association is called a 'partnership,' 'joint venture,' or other name"). The court then listed the five factors considered in determining whether a partnership or joint venture exists as set forth in the Texas Business Organizations Code: (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) agreement to share or sharing: (A) losses of the business; or (B) liability for claims by third parties against the business; and (5) agreement to contribute or contributing money or property to the business. Tex. Bus. Orgs. Code § 152.052(a). The court noted that the statute does not require proof of all factors and that formation of a partnership is determined by the totality of the circumstances, citing *Ingram v. Deere*, 288 S.W.3d 886, 896 (Tex. 2009).

Based on the oral fee sharing agreement, Ghrist testified that he and the Ferguson Firm were engaged in a joint venture to represent clients and to split the attorney's fees 2/3 to the firm and 1/3 to himself, with each case being a separate joint venture. The Ferguson Firm argued that there could be no joint venture because there was no evidence that Ghrist had any right of control or that he agreed to share business losses. Ghrist responded, in reliance on *Ingram*, that he was not required to present evidence of those factors and that whether the parties entered a joint venture is determined by the totality of the circumstances. The court stated that Ghrist was "correct that, in the usual case, a party seeking to establish a joint venture need not prove every element listed in Section 152.052 or required by the common law. *See id.* But the sufficiency of the evidence is not measured by the usual case. Rather, it is measured by the particular charge given to the jury when there has been no objection to that charge."

The jury in this case was instructed: "A joint venture must be based on an agreement that has *all the following elements*: l. A community of interest in the venture[,] 2. An agreement to share profits, 3. An express agreement to share losses, and 4. A ... mutual right of control or management of the venture." [Emphasis added by the court of appeals.] Because the record did not reflect any objection to this instruction, the instruction governed the court's review of the sufficiency of the evidence.

The court looked no further than the element of an agreement to share losses. The Ferguson Firm fronted the expenses for cases that were worked jointly with Ghrist, and those expenses were then reimbursed from the client's recovery. The firm took the risk that the expenses would not be recouped if there was no recovery. Ghrist had no liability to pay any expenses that were not reimbursed by the client. The court further explained that reimbursed case expenses were not losses, and deducting those expenses before splitting attorney's fees under the fee sharing agreement did not constitute a sharing of losses. The court stated that unreimbursed expenses that exceed collected fees, such as expenses fronted on cases that ultimately resulted in no recovery, were losses, but the evidence was undisputed that Ghrist did not agree to pay any portion of those unreimbursed expenses. Since Ghrist did not agree to share losses, the evidence as measured by the charge submitted to the jury was legally insufficient to support the finding that Ghrist entered into a joint venture with the Ferguson Firm.

Hautanen v Picinic, No. 02-20-00049-CV, 2021 WL 1229964 (Tex. App.—Fort Worth Apr. 1, 2021, no pet. h.) (mem. op.).

The court of appeals concluded that the plaintiff waived his argument that the trial court's finding that the parties created a joint venture required the trial court to impose loss sharing on the parties even though the trial court found that there was no express or implied agreement to share losses.

Osmo Hautanen, John Picinic, and James Mannering decided to renovate and sell a house in the Crestwood area of Fort Worth and split the profits, 50%, 25%, and 25%, respectively. Hautanen testified that he bore the financial risk, and Picinic testified that he had no obligation to cover any losses. Hautanen bought the house for $390,000, and they hoped to renovate it and resell it for $650,000. The project was fraught with problems, and the Hautenan ultimately spent $142,000 for renovations and an additional $10,000 for repairs. The house was on the market for more than a year and finally sold for $480,000. Hautanen sued Picinic, Mannering, and two general contractors, but only Picinic remained as a defendant at the time of trial.

After a two-day bench trial, the court asked the parties each to submit a short letter brief addressing "whether or not a joint[-]venture agreement necessarily implies an obligation or agreement to share losses." Both parties responded that an agreement to share losses is one factor to consider when determining whether a joint venture has been formed but that it is not determinative. In its findings of fact and conclusions of law, the court concluded that the parties entered into a joint-venture agreement and that Picinic did not breach the agreement or any fiduciary duty owed to Hautanen or make any negligent misrepresentation. The court further concluded that Hautanen's losses, if any, were not the result of negligence or gross negligence by Picinic. The court made a fact finding that "[t]here was no agreement, expressed or implied, to share any losses arising from the [joint-venture agreement]."

Hautanen contended that the trial court erred as a matter of law by failing to assign a proportionate share of the joint venture's losses among the joint venturers. He characterized his complaint as seeking review of "the trial court's conclusion of law that an absence of an express or implied agreement to share losses means the parties do not share the losses of the joint venture," but the court of appeals said that the trial court did reach such a conclusion. According to the court of appeals, Hautanen's real contention was that the Texas statute provides for loss sharing as a default mechanism in the absence of an express or implied agreement on loss sharing and that the court thus should have rendered judgment allocating a portion of the joint venture's losses to Picinic.

Hautanen's loss-sharing theory of recovery was based on Chapter 152 of the Business Organizations Code, which provides that "an association of two or more persons to carry on a business for profit as owners creates a partnership, regardless of whether: (1) the persons intend to create a partnership; or (2) the association is called a 'partnership,' 'joint venture,' or other name." Tex. Bus. Orgs. Code § 152.051(b). The court pointed out that, subject to certain exceptions not relevant here, "a partnership agreement governs the relations of the partners and between the partners and the partnership." *Id.* § 152.002(a). The statute governs those relationships "[t]o the extent that the partnership agreement does not otherwise provide." *Id*.

The parties did not contest the trial court's conclusion that Hautanen, Picinic, and Mannering formed a joint venture or its finding that there was no express or implied agreement to share losses, but Hautanen argued that the absence of such an agreement left a gap that is filled by Texas law, pointing specifically to Section 152.202, which provides:

> (b) Each partner is charged with an amount equal to:
> (1) ...

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