Affirmed in part, Reversed and Remanded in part, and Opinion filed January 13, 2000.

In The

Fourteenth Court of Appeals

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NO. 14-96-01425-CV

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TRAVIS B. CAMPBELL, EDWARD BASS, AND CARY L. BASS, Appellants

V.

T. DELBERT WALKER, WALKER SAND, INC., ELLINGTON DIRT, INC., CAMILLE BUTLER, AND ED ROBEAU, Appellees

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On Appeal from the 269th District Court
Harris County, Texas
Trial Court Cause No. 91-08515

O P I N I O N

This is a shareholder derivative suit, with a counterclaim for expenses under article 5.14, section F of the Texas Business Corporation Act. Travis B. Campbell, Edward Bass, and Cary L. Bass, appellees, filed suit against Ellington Dirt, Inc., T. Delbert Walker, Camille Butler, Ed Robeau, and Walker Sand, Inc., appellants. The trial court granted an instructed verdict in favor of Camille Butler and Ed Robeau. Following a jury trial, the trial court entered judgment for appellees in the amount of $411,449.00. On appeal, appellants raise six points of error. We affirm in part and reverse and remand in part.

I. THE PARTIES

Ellington Dirt, Inc. ("Ellington Dirt") is a closely held corporation formed for the purpose of utilizing two adjacent tracts of land in southeast Harris County. T. Delbert Walker ("Walker"), Camille Butler[1] ("Butler"), and Ed Robeau ("Robeau") are the directors of Ellington Dirt. Travis B. Campbell ("Campbell"), Edward Bass ("E. Bass"), and Cary L. Bass ("C. Bass") are minority stockholders in Ellington Dirt. Walker Sand, Inc. ("Walker Sand) is a corporation in which Walker is the principal stockholder.

II. THE FACTS

In 1982, Walker, Robeau, Campbell, Dr. Butler, Dr. Barfield[2], and a group of people, that primarily included members of the Bass family, formed Ellington Dirt for the purpose of acquiring approximately 116 acres of land. The plan was to lease the property to Walker Sand for excavation of sand and fill material in return for royalties. In accordance with the plan, Ellington Dirt leased the property to Walker Sand under a 1982 lease entitled "Lease for the Purpose of Removal and Sale of Sand and Related Fill Material." The term of the lease was 15 years.

As to the terms, the lease provided, in part, that (1) during the first four years, Walker Sand would pay Ellington Dirt $0.50 per cubic yard for all sand, fill dirt, and topsoil removed from the property; and (2) for the succeeding four years, Walker Sand would pay $0.60 per cubic yard, and then increase that amount by 5% for each succeeding year. The lease also stated that if Walker Sand failed to pay the royalties as specified in the lease, Ellington Dirt had the right to immediately terminate the lease, re-lease the property, and, if it desired, bring suit against Walker Sand. The lease further provided that if Walker Sand did not work the lease or move sand, fill dirt, or topsoil for nine months, Ellington Dirt had the option to terminate the lease. Finally, under the terms of the lease, Walker Sand agreed to excavate all material

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[1] Butler acquired her shares in Ellington Dirt upon the death of her husband, one of the original investors.

[2] Dr. Barfield's shares were ultimately purchased by Walker.

on the land to a depth of 35 feet. Once the excavation was complete, Ellington Dirt would have the option to sell the land to Walker Sand at fair market value or receive one-tenth of all revenues generated from the operation of the property as a landfill. This, according to appellants, implied that Ellington Dirt could force Walker Sand to operate the property as a landfill. In connection with the landfill option, it was Walker Sand's responsibility to obtain any necessary landfill permits and otherwise comply with the law relevant to the operation of landfills.

Less than two years after the lease was signed, the problems began. First, the economy suffered a downturn. Because of economic conditions and other factors, the lease was not generating much income and, in 1986, Ellington Dirt agreed not to escalate the royalties as provided in the lease. Then, Walker, according to his testimony, told the shareholders of Ellington Dirt that circumstances made it unlikely that a landfill permit could be acquired for the property. In 1989, appellants began to suspect that the property was being used as a dump site. According to testimony in the record, Campbell and E. Bass found concrete, rebar, pipe, tires, and other trash on the property. At a shareholder's meeting in October of 1990, appellants asked Walker about the apparent dumping on the property. According to appellants, Walker initially denied it, but then admitted that seven to ten acres had been used for dumping, but permits were unnecessary because he only dumped "dirt and crushed concrete." Appellants feared that the material dumped on the property might be debris from an explosion at the Phillips Plant in 1989, and, therefore, might contain hazardous waste.

Walker claimed that he invited appellants to inspect and test the property, but instead, E. Bass resigned from Ellington Dirt's board of directors and appellants filed suit in February of 1991. Any dumping on the property apparently ceased before the suit was filed based on a resolution passed by the Ellington Dirt shareholders in December of 1990.

On October 8, 1991, several months after appellants filed suit, the lease between Walker Sand and Ellington Dirt was amended. The amended lease provided for the removal of

two and a half acres from the area subject to excavation. This land was ultimately sold to the City of Houston. The amended lease also provided that the royalty payment would remain at $.50/cubic yard with no escalations. The amended lease further provided that Walker Sand would have the right to excavate 93 acres to a depth of 35 feet and to move any unmarketable material without payment of royalty. This amended lease was approved after Ellington Dirt named Butler and Robeau as directors.

The suit filed by appellants alleged several causes of action including, among other things, breach of the 1982 lease by Walker Sand, breach of fiduciary duty by the directors of Ellington Dirt, and negligence by Walker Sand. Prior to submission to the jury, the trial court granted a directed verdict to Walker Sand on all claims except breach of the lease and negligence. The trial court also granted a directed verdict on all claims alleged against directors Butler and Robeau. The remaining issues were submitted to the jury. The jury found Walker Sand breached the lease, however, the jury found the breach was excused. The jury found no breach of fiduciary on the part of Delbert Walker. Finally, as to appellees' counterclaim under article 5.14F, the jury found appellants brought their shareholder derivative suit without reasonable cause. Based on its rulings and the jury's findings, the trial court entered judgment in favor of appellees on their counterclaim in the amount of $411,499.00. Appellants perfected this appeal.

III. POINTS OF ERROR

A. Points of Error One and Two: "Reasonable Cause" Under Article 5.14, Section F of the Texas Business Corporation Act

In points of error one and two, appellants contend, among other things, that the trial court erred in allowing the jury to determine whether appellants filed suit without "reasonable cause" under article 5.14, section F ("5.14F") of the Texas Business Corporation Act. *See* Act of Aug. 27, 1973, 63rd Leg., ch. 545, §37, 1973 Tex. Gen. Laws 1508. Appellants contend it is a question of law for the court.

Under article 5.14F, as it existed at the time of this action, if a shareholder of a corporation brings an action against the corporation without "reasonable cause," the court may award expenses to the defendant corporation. *See id.* The statute, however, does not specifically address whether the determination of reasonable cause is a question of law for the court or a question of fact for the jury. This case is of first impression, and, therefore, the language, history, and circumstances surrounding the statute will be reviewed. *See* TEX. GOV'T CODE ANN. § 311.023 (Vernon 1998); *Dallas Market Center Development Co. v. Beran & Shelmire,* 824 S.W.2d 218, 221 (Tex. App.--Dallas 1991, writ denied).

1. Construing Section 5.14F

We are required to liberally construe this statue to achieve its purpose and to promote justice. *See* TEX. GOV'T CODE ANN. § 312.006(a) (Vernon 1998). In addition, we are to diligently attempt to ascertain legislative intent and shall consider at all times the old law, the evil, and the remedy. *See id.* at § 312.005. When the language of the statute is unambiguous, we must gather the intent of the legislature from the plain and common meaning of words and terms used. *See Martin v. Texas Dental Plans, Inc.,* 948 S.W.2d 799, 803 (Tex. App.--San Antonio 1997, writ denied).

5.14F, as it existed at the time appellants filed suit, stated:

> **Judgment for expenses.** The court having jurisdiction in a derivative suit may, upon final judgment for one or more defendants and a finding that the suit was brought without reasonable cause against such defendants, require the plaintiff to pay expenses to such defendants, whether or not security has been required.

Act of Aug. 27, 1973, 63rd Leg., ch. 545, §37, 1973 Tex. Gen. Laws 1508.

The main sentence of article 5.14F is clear–the court is given discretion to award expenses if (1) a final judgment is rendered, and (2) there is a finding the suit was brought without reasonable cause. *See id.* It is axiomatic that only courts can render final judgments. *See* TEX. R. CIV. P. 300, 301, 306a(2). Thus, the only remaining question is whether the existence of reasonable cause is to be determined by the trial court or the jury. The main

sentence in 5.14F reads, "the court having jurisdiction in a derivative suit may, . . . , require the plaintiff to pay expenses to such defendants . . ." Act of Aug. 27, 1973, 63rd Leg., ch. 545, §37, 1973 Tex. Gen. Laws 1508. The use of the word *may,* as defined in the Texas Government Code, gives the trial court discretion, and, in this circumstance allows, the court to award expenses after the mandates of 5.14F are met. *See* TEX. GOV'T CODE ANN. §§ 311.016(1), 312.002(a) (Vernon 1998). While that part of the statute is unambiguous, the determination of who, trial court or jury, must resolve whether the shareholder filed suit without reasonable cause is ambiguous. When a statute is ambiguous or unclear, the court can look beyond its plain meaning to ascertain legislative intent and purpose of the statute. *See* TEX. GOV'T CODE ANN. § 311.023 (Vernon 1998); *Texas Water Comm'n v. Brushy Creek Mun. Util. Dist.,* 917 S.W.2d 19, 21 (Tex. 1996). Specifically, we may look to three sources for guidance: (1) the rules of construction in Section 311.023 of the Government Code; (2) commentary and subsequent amendments to the section in question; and, (3) other rules and statutes with similar wording.

a. The Rules of Construction

We turn first to the rules of construction under section 311.023 of the Texas Government Code to pinpoint legislative intent. *See* TEX. GOV'T CODE ANN. § 311.023 (Vernon 1998). In ascertaining legislative intent, words and phrases shall be read in context and construed according to rules of grammar and common usage. *See id.* at § 311.011(a); *Linick v. Employers Mut. Cas. Co.,* 822 S.W.2d 297, 301 (Tex. App.--San Antonio 1991, no writ).

There are three things to consider when interpreting 5.14F. First, under the rules of grammatical construction, the phrase "upon final judgment . . . and a finding that the suit was brought without reasonable cause," is a modifying clause that supports the main sentence. More specifically, the phrase modifies the subject of the sentence, "court." There is no other subject in 5.14F. Therefore, because "court" is the only subject in the entire statute, arguably, it must be the entity intended to determine the existence of reasonable cause.

Second, the legislature is presumed to be aware of existing law. *See Glasscock Underground Water Conservation Dist. v. Pruit,* 915 S.W.2d 577, 581-82 (Tex. App.--El Paso 1996, no writ); *City of Ingleside v. Johnson,* 537 S.W.2d 145, 153-54 (Tex. App.--Corpus Christi 1976, orig. proceeding). Therefore, we begin with the presumption that the legislature knew only courts may render final judgments. When the legislature included "a finding of reasonable cause" in the same modifying clause as "upon final judgment," it is likely that the legislature intended that both be performed by the court.

Finally, - and most importantly in this case - the reviewing court can take into consideration consequences of alternative constructions when interpreting a statute. *See Holmans v. Transource Polymers, Inc.,* 914 S.W.2d 189, 191 (Tex. App.--Fort Worth 1995, writ denied). If we assume, *arguendo*, the legislature intended the jury to determine the existence of reasonable cause, the decision to award expenses would still be within the court's discretion. Under this interpretation, if the jury found that the shareholder filed suit without reasonable cause, the court could ignore this finding, and not award expenses. This makes the jury determination that the shareholder filed suit without reasonable cause a mere recommendation to the judge to award expenses. Jury recommendations are generally not recognized under Texas civil law.[3]

Thus, when we apply the rules of construction to the plain language of 5.14F it appears that the court is to decide if the shareholder filed suit without reasonable cause. This conclusion is supported by the second method of discovering a statute's meaning - commentary and subsequent amendments.

b. Commentary and Subsequent Amendments to 5.14F

[3] Advisory jury verdicts are permitted only under section 105.002(c) of the Texas Family Code. *See* TEX. FAM. CODE ANN. § 105.002(c) (Vernon 1993).

A court may use the legislative history of a statute to determine the meaning of the statute even if the statute is unambiguous. *See Collins v. Collins,* 904 S.W.2d 792, 797 (Tex. App.--Houston [1st Dist.] 1995), *writ denied per curiam*, 923 S.W.2d 569 (Tex. 1996); TEX. GOV'T CODE ANN. § 311.023(3) (Vernon 1998). When a statute is ambiguous, a court is to consult related legislative history. *See City of Dallas v. Cornerstone Bank, N.A.,* 879 S.W.2d 264, 270 (Tex. App.--Dallas 1994, no writ).

In 1965, section 5.14 of the Texas Business Corporation Act was passed by the legislature, but it did not contain any reference to payment of expenses by a shareholder who filed suit without reasonable cause. *See* Act of Aug. 30, 1965, 59th Leg., ch. 332, § 1, 1965 Tex. Gen. Laws 698-99. Then, in 1973, the legislature amended section 5.14 to include several subsections, including part F. *See* Act of Aug. 27, 1973, 63rd Leg., ch. 545, §37, 1973 Tex. Gen. Laws 1508. When part F was added, a committee of the Texas State Bar made a direct commentary on that provision, which can be used for interpretation. *See Houston Bank & Trust Co. v. Lee,* 345 S.W.2d 320, 323 (Tex. Civ. App.--Houston 1961, writ dism'd). Commentaries are not authoritative, but they are persuasive. *See id.* The comment of the Bar committee to 5.14F states:

> An important new provision is that the court may award attorney's fees and other expenses against a losing plaintiff (whether or not security has been required or regardless of the amount of security) if the court finds that the suit was without reasonable cause.

TEX. BUS. CORP. ACT ANN. art. 5.14 § F cmt. (Vernon 1973) *amended by* TEX. BUS. CORP. ACT. ANN art. 5.14 § J (Vernon Supp. 1997).

According to the comment of the Bar committee, *the court* is required to determine the existence of reasonable cause, thereby making it a question of law.

In addition to looking at commentary, we also are to look at subsequent amendments of a statute to ascertain legislative intent. *See City of Corpus Christi v. Herschbach,* 536 S.W.2d 653, 656 (Tex. Civ. App.-- Corpus Christi 1976, writ ref'd n.r.e.). When the meaning

of an existing law is uncertain, a legislature's subsequent interpretation of the statute is highly persuasive. *See Brushy Creek,* 917 S.W.2d at 21. In 1997, the legislature amended section 5.14F, essentially codifying the comments made by the Bar committee in 1973:

> **J. Payment of Expenses.** (1) On termination of a derivative proceeding, *the court may order*:
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> * * *
>
> (b) the plaintiff to pay the expenses of the domestic or foreign corporation or any defendant incurred in investigating and defending the proceeding if *it finds that the proceeding was commenced or maintained without reasonable cause* or for an improper purpose.

TEX. BUS. CORP. ACT ANN art. 5.14 § J (Vernon Supp. 1999) (emphasis added).[4]

The addition of the word *it* before the phrase "finds the proceeding was commenced . . . without reasonable cause," clearly refers to the previous subject, *court,* in the first part of the statute. TEX. BUS. CORP. ACT ANN. art. 5.14 § J (Vernon Supp 1997). This is unambiguous and clearly makes the determination of reasonable cause a question for the court, not the jury.

Thus, the second method of construction also leads us to conclude that the existence, if any, of reasonable cause is a determination that must be made by the trial court, not the jury. That leaves us with the final method of construction - a comparison with statutes containing similar provisions. It leads us to the same conclusion.

c. Other Rules and Statutes

In determining whether "reasonable cause" is a question of law, we will look at other statutes that have similar provisions. *See Texas Co. v. Schriewer,* 38 S.W.2d 141, 143 (Tex. Civ. App.--Waco 1931), *modified on other grounds*, 53 S.W.2d 774 (Tex. Comm'n App. 1932).

Section 17.50(c) of the Texas Deceptive Trade Practices Act allows a defendant to recover attorney's fees and court costs if the court finds the action was groundless in fact or

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[4] When the statute was amended, the legislature relettered part F and it became part J.

law or brought in bad faith. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 17.50(c) (Vernon 1987). The Texas Supreme Court held that whether a suit is "groundless" or brought in "bad faith" is a question of law for the court. *See Donwerth v. Preston II Chrysler-Dodge, Inc.,* 775 S.W.2d 634, 636-37 (Tex. 1989). The court reasoned that the trial court must make the finding because evidence that is legally inadmissible or subject to other defects may be considered when determining whether a suit is groundless or brought in bad faith. *See id.* at 637.

Similarly, rule 13 of the Texas Rules of Civil Procedure allows for sanctions if an action is brought in bad faith or is known to be groundless. *See* TEX. R. CIV. P. 13. The Texas Supreme Court has held this is a question of law for the court to decide and is within its broad range of discretion. *See Brantley v. Etter*, 677 S.W.2d 503, 504 (Tex. 1984); *see also Hawkins v. Estate of Volkman,* 898 S.W.2d 334, 346 (Tex. App.--San Antonio 1994, writ denied).

Additionally, under rule 45 of the Texas Rules of Appellate Procedure Rule, the appellate courts may award sanctions against a party for filing a frivolous appeal. *See* TEX. R. APP. P. 45. This determination is solely within the court's discretion. *See Rios v. Northwestern Steel and Wire Co.,* 974 S.W.2d 932, 936 (Tex. App.--Houston [14th Dist.] 1998, no writ).

Finally, if a state agency files a suit against a party and the trial court finds the suit is frivolous, unreasonable, or without foundation, that party is entitled to recover costs. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 105.002 (Vernon 1986). This determination is for the trial court, not the jury. *See Morales ex rel. State v. Cartwright,* 874 S.W.2d 210, 216-17 (Tex. App.--Houston [14th Dist.] 1994, writ denied).

Thus, other Texas rules and statutes permitting sanctions for frivolous or unreasonable suits, lead us to the same conclusion: absent an express provision to the contrary, the court is to determine if a suit is brought without reasonable cause.

In summary, each of the methods of construction lead us to conclude that the court was to decide if the suit was brought without reasonable cause. However, here, the trial court did not make this decision; the jury did. This was error, but as we discuss below, it was not reversible error unless it prejudiced appellants.

2. Harmful Error

Even if the court submits a question of law to the jury, the error is harmless absent some showing of extraneous prejudice. *See University Sav. Ass'n v. Burnap,* 786 S.W.2d 423, 427 (Tex. App.--Houston [14th Dist.] 1990, no writ.). Here, the error would be prejudicial if the jury answered the question contrary to the law. From this record, we cannot tell if the jury's answer followed the law because appellants were limited in what they could present to the jury.

An attorney's decision to file suit involves many things, including examining inadmissible information. If the issue had been presented to the court for determination, evidence other than that which was admitted before the jury could have been submitted and considered. Arguments not available to counsel before the jury could have been presented to the trial court. Because the parties were not given an opportunity to present the issue to the trial court, and thus, were denied the opportunity to present evidence and argument that may not have been admissible before the jury, we cannot determine whether the jury's answer followed the law.

3. Conclusion

We hold that the determination of the absence or existence of reasonable cause is a question for the trial court. As to the issue of reversible error, we find the error below prejudicial because evidence that is legally inadmissible to a jury or subject to other defects may be considered when determining whether a suit is brought without reasonable cause. *See Donwerth,* 775 S.W.2d at 636-37. Accordingly, we sustain those portions of appellant's first and second points of error that complain of the trial court's decision to submit the issue of reasonable cause to the jury. Given our disposition of this point, we find it would be improper

to address appellants' remaining contentions within points of error one and two. Because the parties, specifically appellants, were denied the opportunity to present evidence and argument that may not have been admissible before the jury, we must remand the case to the trial court on appellees' counterclaim brought pursuant to 5.14F. The trial court must determine whether appellants' suit was brought without reasonable cause and what amount, if any, appellees should recover as expenses.

B. Point of Error Three: Submission of Jury Question Two

In point of error three, appellants contend the trial court erred in submitting jury question two because, as submitted, it did not "address the controlling issue of whether Ellington Dirt properly agreed to a modification of the lease." In jury question one, the jury was asked whether Walker Sand failed to comply with the June 28, 1982, lease agreement with Ellington Dirt. The jury found it did. In question two, the jury was then asked whether the failure to comply was "excused." The jury was instructed that the failure to comply is excused if: (1) the parties agreed that a new term would take the place of the term not complied with; (2) compliance is waived by Ellington Dirt; or (3) the parties agreed that a new agreement would take the place of the previous one.

In this point of error, appellants appear to argue, though somewhat inartfully, that the trial court should have submitted the issue of excuse solely within the confines of article 235-1 of the Texas Business Corporation Act. In other words, appellants seem to argue that the only way a breach could be excused is if the Ellington Dirt board of directors (Walker, Butler, and Robeau) authorized the amended lease and this authorization was in compliance with the mandates of article 235-1. Even if we assume appellants are correct, we find there was compliance with article 235-1.

Article 235-1 provides that a transaction between one corporation and another corporation may still be valid even though a director of the first corporation is a director of, or has a financial interest in, the second corporation if (1) the material facts as to the interested director's relationship or interest and as to the contract are disclosed or are known to the board of directors and the board, in good faith, authorizes the contract by vote of a

majority of the disinterested directors; (2) the material facts as to the interested director's relationship or interest and as to the contract are disclosed or are known to the voting shareholders and those shareholders, in good faith, approves the contract; or (3) the contract is fair to the corporation at the time it is authorized, approved, or ratified by the board of directors or the shareholders. *See* TEX. BUS. CORP. ACT ANN. art. 235-1 (Vernon Supp. 1999).

An interested director is one who (1) makes a personal profit from a transaction by dealing with the corporation or usurps a corporate opportunity; (2) buys or sells assets of the corporation; (3) transacts business in his director's capacity with a second corporation of which he is also a director or significantly financially associated with, or (4) transacts business in his director's capacity with a family member. *See Gearhart v. Smith*, 741 F.2d 707, 719-20 (5th Cir. 1984). The shareholder bears the burden to show a director is interested. *See id.* at 722; *International Bankers Life Ins. Co. v. Holloway*, 368 S.W.2d 567, 576 (Tex. 1963). We have carefully reviewed the record and find there is no evidence to establish that either Butler or Robeau are interested directors. Thus, if there was proper disclosure, Butler and Robeau, as disinterested directors, could have authorized the amended lease under article 235-1.

The evidence shows that Butler and Robeau, disinterested directors, were well aware that Walker, an interested director, was the president and operator of Walker Sand. Though Butler and Robeau did not seek an outside evaluation of the terms of the amended lease, the evidence shows they both believed the terms of the amended lease were adequately disclosed and benefitted Ellington Dirt in light of past and present circumstances. There is evidence to support a finding that Butler and Robeau, in good faith, authorized the amended lease.

Thus, the amended lease, which excused any breach by Walker Sand, was approved in accordance with the requirements of article 235-1: the material facts as to Walker's relationship and the amended lease were disclosed or were known to Butler and Robeau, and they, in good faith, authorized the amended lease by their vote, a majority of the disinterested directors. Accordingly, even if the trial court erred in refusing to submit jury question two as requested by appellants, any error was harmless given the evidence in the record. We overrule point of error three.

C. Point of Error Four: Sufficiency of the Evidence to Support the Jury's Answer to Question Two

As stated above, jury question two, which was only to be answered if the jury found Walker Sand failed to comply with the 1982 lease, asked whether Walker Sand's failure to comply with the lease was excused. The jury found there was a breach of the lease, but in question two, found the breach was excused. Appellants argue the evidence is insufficient to support the jury's finding that the breach was excused. We disagree.

When reviewing the legal sufficiency of the evidence, we consider only evidence and inferences tending to support the jury findings, disregarding all evidence and inferences to the contrary. *See Weirich v. Weirich*, 833 S.W.2d 942, 945 (Tex. 1992). Challenges to the legal sufficiency of the evidence,

> must be sustained when the record discloses one of the following: (1) a complete absence of evidence of a vital fact; (2) the court is barred by rules of law or of evidence from giving weight to the only evidence offered to prove a vital fact; (3) the evidence offered to prove a vital fact is no more than a mere

scintilla; or (4) the evidence established conclusively the opposite of a vital fact.

Merrell Dow Pharms., Inc. v. Havner, 953 S.W.2d 706, 711 (Tex. 1997), *cert. denied*, ___ U.S. ___, 118 S.Ct. 1799, 140 L.Ed.2d 939 (1998) (citing Robert W. Calvert, *"No Evidence" and "Insufficient Evidence" Points of Error*, 38 TEX. L. REV. 361, 362-63 (1960)), *see also* W. Wendell Hall, *Standards of Review*, 29 ST. MARY'S L.J. 351, 477 (1998). Thus, if we find any evidence of probative force to support the jury's finding, the point must be overruled and the findings upheld.

A review for factual insufficiency, on the other hand, requires the court of appeals to consider, weigh, and examine all of the evidence that supports and that is contrary to the jury's determination. *See Plas-Tex, Inc. v. United States Steel Corp.*, 772 S.W.2d 442, 445 (Tex. 1989). Where there is conflicting evidence, the jury's verdict is conclusive. We will set aside the verdict only where we find the evidence standing alone to be so weak as to be clearly wrong and manifestly unjust. *See Cain v. Bain*, 709 S.W.2d 175, 176 (Tex.1986).

The jury was instructed on several types of excuse. The jury was specifically instructed that failure to comply with one agreement is excused if the parties agreed that a new agreement would take its place. The evidence is undisputed that the directors of Ellington Dirt agreed that the amended lease, which excused any breach by Walker Sand, would take the place of the 1982 lease. We have already determined the directors' authorization of the amended lease was proper under article 235-1. Accordingly, we find the evidence was sufficient, both legally and factually, to support the jury's finding that any failure to comply with the 1982 lease was excused. Point of error four is overruled.

D. Point of Error Five: Instructed Verdict in Favor of Ellington Dirt Directors, Butler and Robeau

In their fifth point of error, appellants contend the trial court erred in granting an instructed verdict for Butler and Robeau, directors of Ellington Dirt. Specifically, appellants raise three arguments within this point of error: (1) Butler and Robeau breached their duty of obedience to Ellington Dirt in approving the amended lease by violating article 235-1 of the Business Corporation Act; (2) Butler and Robeau breached their duty of obedience to Ellington Dirt in approving the

amended lease by violating articles 5.10 and 5.11 of the Business Corporation Act; and (3) Butler and Robeau breached their duty of due care in approving the amended lease by "rubber-stamping" it without exercising independent judgment.

An instructed verdict is reviewed in the light most favorable to the non-movant. *See S.V. v. R.V.*, 933 S.W.2d 1, 8 (Tex. 1996); *Gonzales v. Hearst Corp.*, 930 S.W.2d 275, 277 (Tex. App.–Houston [14th Dist.] 1996, no writ). "An instructed verdict is proper when the evidence is such that no other verdict can be rendered and the moving party is entitled to judgment as a matter of law." *Gonzales*, 930 S.W.2d at 278. This court is to determine if there is any evidence to raise fact issues on material questions in the trial, or if reasonable minds may differ as to the truth. *See id; Edlund v. Bounds*, 842 S.W.2d 719, 723 (Tex. App.–Dallas 1992, writ denied). If the court concludes there is any evidence to raise a fact issue on material questions, we must reverse. *See Henderson v. Travelers Ins. Co.*, 544 S.W.2d 649, 650 (Tex. 1976); *Gonzales,* 930 S.W.2d at 278; *Zimmerman v. First American Title Ins. Co.*, 790 S.W.2d 690, 694 (Tex. App.--Tyler 1990, writ denied).

Under Texas law, corporate directors owe three broad fiduciary duties to the corporation: obedience, loyalty, and due care. *See Gearhart*, 741 F.2d at 719. However, for over a hundred year - since 1889 - Texas courts have refused to impose liability upon a non-interested corporate director who breached a fiduciary duty unless the challenged action is ultra vires or is tainted by fraud. *See id.* at 721 (citing *Cates v. Sparkman*, 73 Tex. 619, 11 S.W. 846 (1889); *Robinson v. Bradley*, 141 S.W.2d 425 (Tex. Civ. App.–Dallas 1940, no writ); *Bounds v. Stephenson*, 187 S.W. 1031 (Tex. Civ. App.–Dallas 1916, writ ref'd); *Caffall v. Bandera Tel. Co.*, 136 S.W. 105 (Tex. Civ. App. 1911); *Farwell v. Babcock*, 65 S.W. 509 (Tex. Civ. App. 1901)). As the Texas Supreme Court stated,

> [I]f the acts or things are or may be that which the majority of the company have a right to do, or if they have been done irregularly, negligently, or imprudently, or are within the exercise of their discretion and judgment in the development or prosecution of the enterprise in which their interests are involved, these would not constitute such a breach of duty, however unwise or inexpedient such acts might be, as would authorized interference by the courts at the suit of a shareholder.

See Cates, 11 S.W. at 849. This is known as the business judgment rule. *See Gearhart*, 741 F.2d at 721. Thus, in this case, the first question is whether Butler and Robeau are interested directors. *See id.*

As we stated above, an interested director is one who:

(1) makes a personal profit from a transaction by dealing with the corporation or usurps a co

(2) buys or sells assets of the corporation;

(3) transacts business in his director's capacity with a second corporation of which he is also a director or significantly financially associated;

(4) transacts business in his director's capacity with a family member.

See Gearhart, 741 F.2d at 719-20.

The shareholder bears the burden to show the directors are interested. Only when the shareholder has met this burden does the burden shift to the director to prove the transaction was fair to the corporation. *See id.* at 722; *Holloway*, 368 S.W.2d at 576. As we held in our review of points of error three and four, a thorough review of the record reveals there is no evidence to establish that Butler and Robeau are interested, thus appellants have not met their initial burden. Given that Butler and Robeau are non-interested directors, liability for any breach of fiduciary duty may be imposed only if the challenged action, i.e., approval of the amended lease, is ultra vires or tainted with fraud.

An ultra vires act is an act that is beyond the scope of the powers of the corporation as defined by its charter or the law of the state of incorporation. *See Gearhart*, 741 F.2d at 719. In addition, a violation of a statute by a director may also be an ultra vires act. *See Staacke v. Routledge,* 111 Tex. 489, 241 S.W. 994, 998-99 (1922). Further, a director may be personally liable if the act, or violation of the statute in question, is also illegal. *See id; see also* TEX. BUS. CORP. ACT. art. 2.01 (Vernon 1980).

Appellants first argue that approval of the amended lease violated article 235-1 of the Business Corporation Act. As we have already held, however, the amended lease, which excused any breach by Walker Sand, was approved *in accordance with the requirements of article 235-1*: the material facts as to Walker's relationship and the amended lease were disclosed or were known to Butler and Robeau, and they, in good faith, authorized the amended lease by their vote, a majority of the disinterested directors. Accordingly, there was no ultra vires act based on non-compliance with article 235-1.

Appellants next argue that Butler and Robeau violated articles 5.10 and 5.11 of the Business Corporation Act because the amended lease, in essence, was a sale or lease of substantially all of Ellington Dirt's assets and was not approved by a vote of two-thirds of the shareholders after notice and an opportunity to dissent. *See* TEX. BUS. CORP. ACT ANN. art. 5.10-5.11 (Vernon Supp. 1999). Article 5.10 provides that a sale, lease, exchange or other disposition of all or substantially all of a corporation's assets, which is not made in the usual or regular course of business, requires a recommendation by the board of directors to the shareholders and approval of the transaction by two-thirds of the shareholders entitled to vote. *See* TEX. BUS. CORP. ACT ANN. art. 5.10 (Vernon Supp. 1999). Article 5.11 provides, among other things, for a shareholder's right to dissent from a transaction that disposes of all or substantially all of a corporation's assets. *See* TEX. BUS. CORP. ACT ANN. art. 5.11 (Vernon Supp. 1999).

Appellants contend the amended lease is a disposition of all or substantially all of Ellington Dirt's assets and was not made in the regular course of business. Appellants further contend the approval of the amended lease was outside Ellington Dirt's ordinary course of business and the board of directors did not follow the requirements in article 5.10 to approve such a lease. Butler and Robeau, however, argue the new lease *was* made in the ordinary course of business, and

therefore, under article 5.09 of the Business Corporation Act, the directors were not required to comply with the requirements of article 5.10. *See* TEX. BUS. CORP. ACT ANN. art. 5.09, § A (Vernon 1980).

Article 5.09, section A provides that the directors may authorize the sale, lease, exchange, or other disposition of all or substantially all of a corporation's assets when it is done in the usual or regular course of business; no shareholder approval is required. *See* TEX. BUS. CORP. ACT ANN. art. 5.09, § A (Vernon 1980). A transaction under article 5.09 or 5.10 is in the "usual and regular course of business" if the corporation shall "directly or indirectly either continue to engage in one or more businesses. *See* TEX. BUS. CORP. ACT ANN. art. 5.09, § B (Vernon Supp. 1999). Assuming that approval of the amended lease was, in fact, a disposition of all or substantially all of Ellington Dirt's assets, it is undisputed that Ellington Dirt continued to do business after the amended lease was approved. Accordingly, under article 5.09, no shareholder approval was required; article 5.10 is simply inapplicable. Thus, there was no ultra vires act based on a violation of articles 5.10 and 5.11.

Finally, appellants argue the trial court erred by granting an instructed verdict for Butler and Robeau because they breached their duty of care in approving the amended lease. Appellants contend Butler and Robeau were "grossly" negligent in adopting the am

The duty of care requires a director to be diligent and prudent in managing the corporation's affairs. *See Gearhart,* 741 F.2d at 720. We note that in *McCollum v. Dollar,* 213 S.W. 259, 261 (Tex. Comm'n App. 1919, holding approved), the court held that directors must handle their corporate duties with the same care as an ordinarily prudent director would under similar circumstances; it also stated that the question of director negligence is a question of fact and must be decided on a case by case basis. Despite this, however, in Texas, courts will not impose liability upon a non-interested director unless the challenged action is ultra vires or is tainted by fraud. *See Gearhart*, 741 F.2d at 721.

Our review of the entire record establishes that there is no evidence to support appellants' allegation that the approval of the amended lease was ultra vires, fraudulent, or grossly negligent. While Butler and Robeau did rely on information from Walker and his attorney, they did so because of their dealings with him in the past. They testified they had never known Walker to mislead them and that he had more to lose if Ellington Dirt suffered than they did in that he held more stock than any other shareholder. Thus, we hold there is no evidence to support appellants' allegation that Butler and Robeau violated their duty of care.

In conclusion, we hold appellants failed to present any evidence that Butler or Robeau violated their fiduciary duties to Ellington Dirt or the minority shareholders. Accordingly, we overrule point of error five.

E. Point of Error Six: Failure to Require a Shareholder's Meeting Under Article 2.24, section B of the Texas Business Corporation Act

In their sixth point of error, appellants claim the trial court erred in refusing to order Ellington Dirt to resume holding shareholder meetings. It is undisputed that Ellington Dirt did not hold shareholder meetings after May of 1991, i.e., after suit was filed. The corporation discontinued the meetings upon the advice of corporate counsel because the shareholder meetings had become "nothing but chaos."

We agree that the failure to hold shareholder meetings violated Ellington Dirt bylaws and article 2.24, section B of the Texas Business Corporation Act. Under article 2.24, section B, if an annual meeting is not held within any 13-month period, a shareholder may apply to any court of competent jurisdiction in the county in which the principal office of the corporation is located and request that the court order the corporation to hold a shareholder meeting. *See* TEX. BUS. CORP. ACT ANN. art. 2.24 § B (Vernon 1980). We find, however, that appellants did not request the court to order Ellington Dirt to resume holding shareholder meetings.

On page seven of their seventh amended petition, appellants pleaded independent director liability as a cause of action. Under that cause of action, the petition specifically alleges, among other things, that Walker, Butler, and Robeau, individually and as directors of Ellington Dirt, breached their duties and obligations and were grossly negligent by failing to hold shareholder meetings. Appellants asked for damages for this alleged conduct. Appellants did not, however, ask the court to require Ellington Dirt to resume holding shareholder meetings. Hence, we hold appellants did not comply with article 2.24, section B. The trial court cannot be faulted for failing to take an action that was never requested.

Moreover, appellants had the power to call a shareholder meeting if they so desired. Article 2.24, section C states that a shareholder meeting may be called by the holders of at

least ten percent of all the shares of the corporation. *See* TEX. BUS. CORP. ACT ANN. art. 2.24 § C (Vernon Supp. 1999). The record shows that appellants hold over ten percent of the shares in Ellington Dirt. Thus, appellants could have called a meeting at any time; they did not have to rely on the board of directors to call for a meeting. We overrule point of error six.

F. Cross-Point: Frivolous Appeal

In a single cross-point, appellees Ellington Dirt, Butler, and Robeau request that we find the appeal was frivolous and award damages. *See* TEX. R. APP. P. 45. Given that we have found merit in appellants' contention regarding the submission of reasonable cause to bring suit to the jury, we decline to find the appeal frivolous. We overrule the cross-point.

IV. CONCLUSION

We sustain points of error one and two insofar as they complain of the trial court's decision to submit the issue of reasonable cause under article 5.14F to the jury. The issue was one for the trial court and we remand the case for further action in accordance with our holding on this issue. The remainder of the trial court's judgment is affirmed.

/s/ Wanda McKee Fowler
Justice

Judgment rendered and Opinion filed January 13, 2000.

Panel consists of Justices Amidei, Fowler and Cannon.[5]

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[5] Senior Justice Bill Cannon sitting by assignment.