DAVID FOWLER JOHNSON
DFJOHNSON@WINSTEAD.COM
www.txfiduciarylitigator.com
300 Throckmorton, Suite 1700
Fort Worth, Texas 76102
(817) 420-8223

David Fowler Johnson is widely recognized as one of the go-to fiduciary litigators in Texas. David's practice focuses on trust, estate, and closely-held business disputes. A frequent writer and speaker, David is known around the state as a thought leader in the fiduciary area. His award-winning blog, Texas Fiduciary Litigator, features recent case law, legislative changes, and other precedent that impacts fiduciaries in Texas. David received the JD Supra 2020 Readers' Choice Award for Wealth Management, which was his third year in a row for such an award. He was also named a "Go-To Thought Leader" in Fiduciary Litigation by the National Law Review in 2020.

David's experience in trust and estate disputes includes will contests, elder abuse, mental competency, undue influence, trust modification/reformation/clarification, breach of fiduciary duty and related claims. He also handles matters involving trust decanting, trust severance and joinder, account disputes, power of attorney disputes, suits for judicial instruction and discharges, heirship proceedings, suits to remove a fiduciary, and accountings. Additionally, David has a transactional practice for trust departments in providing legal opinions on the construction of trust documents, documenting release and consent agreements, resignations, successor appointments, modification of trusts, trust mergers, trust severances, etc.

David's experience in closely-held business disputes (business divorce) includes enforcing minority ownership rights, shareholder-derivative litigation, advising majority owners regarding disputes with the minority owners.

David is one of twenty attorneys in Texas (of the 84,000 licensed) that has the triple Board Certification in Civil Trial Law, Civil Appellate and Personal Injury Trial Law by the Texas Board of Legal Specialization. David is currently on the board of the Texas Board of Legal Specialization, the Texas State Bar's group that certifies attorneys in specialties. He was previously on the commission that wrote and graded the civil trial law examination.

David also served as an adjunct professor at Baylor University Law School and Texas Wesleyan Law School. Over the course of his career, David has given over 300 legal education presentations to bar groups, industry groups, and clients in the fiduciary and general litigation areas. David has published twenty law review articles. These articles have been cited as authority repeatedly by the Texas Supreme Court and the Texas courts of appeals located in Amarillo, El Paso, Waco, Texarkana, Tyler, Beaumont, and Houston. Other jurisdictions also cite David's articles, such as the Supreme Court of Iowa and a federal district court in Pennsylvania.

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LITIGATING SELF-DEALING FIDUCIARY TRANSACTIONS

I. INTRODUCTION

Frequently in fiduciary litigation parties challenge self-interested transactions. Examples of self-interested transactions involve: 1) a fiduciary receiving a "gift" from a principal; 2) a fiduciary purchasing an asset from the principal; 3) a fiduciary receiving a loan from a principal or making a loan to the principal; or 4) a fiduciary obtaining release or indemnity from a principal. These all involve a fiduciary using his, her, or its position to obtain a potential benefit at the expense of the principal. In Texas, there is a presumption that these types of transactions are unfair and voidable. The burden is on the fiduciary to prove the fairness of the transaction. There are many procedural and substantive issues involved in litigating a self-interested transaction. This article will attempt to address this complex and interesting area of the law.

II. FIDUCIARY RELATIONSHIPS

In considering issues that arise from self-interested transactions, one should first consider what the fiduciary relationship means. A fiduciary owes its principal one of the highest duties known to law—this is a very special relationship. *See, e.g., Ditta v. Conte*, 298 S.W.3d 187, 191 (Tex. 2009) ("A fiduciary 'occupies a position of peculiar confidence towards another.'... Because a trustee's fiduciary role is a status, courts acting within their explicit statutory discretion should be authorized to terminate the trustee's relationship with the trust at any time, without the application of a limitations period."); *Rawhide Mesa-Partners, Ltd. v. Brown McCarroll, L.L.P.*, 344 S.W.3d 56, 60 (Tex. App.—Eastland 2011, no pet.) ("A fiduciary duty is the highest duty recognized by law.").

The term "fiduciary relationship" means "legal relations between parties created by law or by the nature of the contract between them where equity implies confidence and reliance." *Peckham v. Johnson,* 98 S.W.2d 408, 416 (Tex. Civ. App.—Fort Worth 1936), *aff'd sub nom.*, 132 Tex. 148, 120 S.W.2d 786 (1938). The expression of "fiduciary relation" is one of broad meaning, including both technical fiduciary relations and those informal relations that exist whenever one person trusts and relies upon another. *Texas Bank & Trust Co. v. Moore*, 595 S.W.2d 502, 507 (Tex. 1980); *Peckham,* 98 S.W.2d at 416.

III. DUTY OF LOYALTY

A. Duty of Loyalty

A fiduciary duty is a formal, technical relationship of confidence and trust imposing higher duties upon the fiduciary as a matter of law. *Central Sav. & Loan Ass'n v. Stemmons N.W. Bank, N.A.*, 848 S.W.2d 232, 243 (Tex. App.—Dallas 1992, no writ). The duty owed is one of loyalty and good faith, strict integrity, and fair and honest dealing. *Douglas v. Aztec Petroleum Corp.*, 695 S.W.2d 312, 318 (Tex. App.—Tyler 1985, no writ). When parties enter a fiduciary relationship, the fiduciary consents to have its conduct toward the other measured by high standards of loyalty as exacted by courts of equity. *Courseview, Inc. v. Phillips Petroleum Co.*, 158 Tex. 397, 312 S.W.2d 197, 205 (Tex. 1957). The term "fiduciary" refers to integrity and fidelity. *Kinzbach Tool Co. v. Corbett-Wallace Corp.*, 138 Tex. 565, 160 S.W.2d 509, 512 (Tex. 1942). The law requires more of a fiduciary than simply arms-length marketplace ethics. *Id.* at 514.

In describing the "much higher standard for measuring conduct" of a fiduciary, the Texas Supreme Court stated:

> As forcefully and tersely put by Mr. Justice Cardoza in *Meinhard v. Salmon*, 249 N.Y. 458, 164 N.E. 545, 546, 62 A.L.R. 1, '... Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. As to this there has developed a tradition that is unbending and inveterate. Uncompromising rigidity has been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty by the "disintegrating erosion" of particular exceptions...'
>
> When persons enter into fiduciary relations each consents, as a matter of law, to have his conduct towards the other measured by the standards of the finer loyalties exacted by courts of equity. That is a sound rule and should not be whittled down by exceptions. . . . Mischief would result more often from engrafting exceptions upon the general rule than from a strict adherence thereto.

Johnson v. Peckham, 120 S.W.2d at 788.

B. Trustees' Duties of Loyalty

One of the more common fiduciary relationships that involve self-interested transactions involve a trustee and beneficiary. After reviewing the trust document, a trustee should be aware of the statutory duty of loyalty. Though the Texas Property Code does not go into much detail about a trustee's duties, it does provide: "A trustee shall invest and manage the trust

assets solely in the interest of the beneficiaries." Tex. Prop. Code. Ann. § 117.007. The Texas Property Code also provides that a trustee is accountable to a beneficiary for the trust property and for any profit made by the trustee through or arising out of the administration of the trust, even though the profit does not result from a breach of trust. Tex. Prop. Code §114.001(a). Therefore, the Texas Property Code does set forth a general duty of loyalty owed by a trustee to a beneficiary.

The Texas Property Code advises that trustees must follow the common law regarding its duties to beneficiaries. "A trustee shall administer the trust in good faith according to its terms and this subtitle. In the absence of any contrary terms in the trust instrument or contrary provisions of this subtitle, in administering the trust, a trustee shall perform all of the duties imposed on trustees by the common law." Tex. Prop. Code § 113.051. Under the common law, a trustee owes a trust beneficiary an unwavering duty of good faith, loyalty, and fidelity over the trust's affairs and its corpus.

To uphold its duty of loyalty, a trustee must meet a sole interest standard and handle trust property solely for the benefit of the beneficiaries. Tex. Prop. Code § 117.007; *InterFirst Bank Dallas, N.A. v. Risser*, 739 S.W.2d 882, 898 (Tex. App.—Texarkana 1987, no writ). This sole interest standard can be contrasted with the best interest standard for registered investment advisors, where an advisor does not violate the duty of loyalty merely because its conduct furthers its own interest.

For example, in *Slay v. Burnett Trust*, the Texas Supreme Court found a breach of loyalty where trustees loaned funds to a venture in which the trustees had an ownership interest. 187 S.W.2d 377 (Tex. 1945). Profits for the venture were divided between the trustees. The Court stated:

> It is a well-settled rule that a trustee can make no profit out of the trust. The rule in such case springs from his duty to protect the interests of the estate, and not to permit his personal interest in any wise to conflict with his duty in that respect. The intention is to provide against any possible selfish interest exercising an influence which can interfere with the faithful discharge of the duty which is owing in a fiduciary capacity.

Id. The Court noted: "Funds of the Trust were loaned and used to make the investment and to enter upon the venture. The Trust had all of the risk of loss and the parties named had all of the opportunity for profit." *Id.*

In *InterFirst Bank Dallas, N.A. v. Risser*, the court commented on the sole-interest standard: "The trustee holds a duty of loyalty to the beneficiaries to administer the affairs of the trust in the interest of the beneficiaries alone, and to exclude from consideration its own advantage as well as the welfare of third persons." 739 S.W.2d 882, 898 (Tex. App.—Texarkana 1987, no writ) (citing G. G. BOGERT & G. T. BOGERT, LAW OF TRUSTS § 95 (5th ed. 1973)). *See also Humane Soc'y of Austin & Travis County v. Austin Nat'l Bank*, 531 S.W.2d 574, 577 (Tex. 1975); *Snyder v. Cowell,* No. 08-01-00444-CV, 2003 Tex. App. LEXIS 3139, 2003 WL 1849145 (Tex. App.—El Paso Apr. 10, 2003, no pet.); *Lesikar v. Rappeport*, 33 S.W.3d 282, 297 (Tex. App.—Texarkana 2000, pet. denied); *Mainland Sav. Assn. v. Cothran*, 1985 Tex. App. LEXIS 12765 (Tex. App.—Houston [1st Dist.] Dec. 5, 1985, no pet.); *Crenshaw v. Swenson*, 611 S.W.2d 886 (Tex. Civ. App.—Austin 1980, writ ref'd n.r.e.). More recently, one court of appeals has held: "a trustee's duty of loyalty prohibits him from using the advantage of his position to gain any benefit for himself at the expense of his trust and from placing himself in any position where his self-interest will or may conflict with his obligations as trustee." *Musquiz v. Keesee*, No. 07-15-00461-CV, 2017 Tex. App. LEXIS 9214 (Tex. App.—Amarillo September 28, 2017, pet. denied).

The author relies on the Restatement of Trusts in many aspects of trust law. Texas courts routinely cite to the Restatement of Trusts as authority in trust-related issues. *Westerfeld v. Huckaby*, 474 S.W.2d 189 (Tex. 1971); *Messer v. Johnson*, 422 S.W.2d 908 (Tex. 1968); *Mason v. Mason*, 366 S.W.2d 552, 554-55 (Tex. 1963); *Lee v. Rogers Agency*, 517 S.W.3d 137, 160-61 (Tex. App.—Texarkana 2016, pet. denied); *Woodham v. Wallace*, No. 05-11-01121-CV, 2013 Tex. App. LEXIS 50 (Tex. App.—Dallas January 2, 2013, no pet.); *Wolfe v. Devon Energy Prod. Co. LP*, 382 S.W.3d 434, 446 (Tex. App.—Waco 2012, pet. denied); *Longoria v. Lasater,* 292 S.W.3d 156, 168 (Tex. App.—San Antonio 2009, pet. denied).

The Restatement (Third) of Trusts discusses the concept of a trustee's duty of loyalty thusly:

> (1) Except as otherwise provided in the terms of the trust, a trustee has a duty to administer the trust solely in the interest of the beneficiaries, or solely in furtherance of its charitable purpose.
> (2) Except in discrete circumstances, the trustee is strictly prohibited from engaging in transactions that involve self-dealing or that otherwise involve or create a conflict between the trustee's fiduciary duties and personal interests.
> (3) Whether acting in a fiduciary or personal capacity, a trustee has a duty in dealing with a beneficiary to deal

> fairly and to communicate to the beneficiary all material facts the trustee knows or should know in connection with the matter.
>
> ....
>
> Perhaps more subtle, but broader in application, is the general requirement that trustees act solely in the interest of the beneficiary in matters of trust administration. Furthermore, a trustee must refrain, whether in fiduciary or personal dealings with third parties, from transactions in which it is reasonably foreseeable that the trustee's future fiduciary conduct might be influenced by considerations other than the best interests of the beneficiaries.
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> In transactions that violate the trustee's duty of undivided loyalty, under the so-called "no further inquiry" principle it is immaterial that the trustee may be able to show that the action in question was taken in good faith, that the terms of the transaction were fair, and that no profit resulted to the trustee.
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> ....
>
> The fiduciary duty of undivided loyalty in the trust context, as stated in Subsection (1) and amplified in Subsection (2), is particularly intense so that, in most circumstances, its prohibitions are absolute for prophylactic reasons. The rationale begins with a recognition that it may be difficult for a trustee to resist temptation when personal interests conflict with fiduciary duty. In such situations, for reasons peculiar to typical trust relationships, the policy of the trust law is to prefer (as a matter of default law) to remove altogether the occasions of temptation rather than to monitor fiduciary behavior and attempt to uncover and punish abuses when a trustee has actually succumbed to temptation. This policy of strict prohibition also provides a reasonable circumstantial assurance (except as waived by the settlor or an affected beneficiary) that beneficiaries will not be deprived of a trustee's disinterested and objective judgment.

RESTATEMENT (THIRD) OF TRUSTS, § 78.

Accordingly, a trustee has a strict duty of loyalty concerning the trust's assets and the administration of the trust. This duty means that a trustee should generally only be concerned with the beneficiary's interest. A trustee cannot profit from its position as trustee, except for reasonable compensation for its work as trustee.

IV. SELF-INTERESTED TRANSACTIONS

As part of a duty of loyalty, a fiduciary should generally only benefit from the relationship by being fairly compensated where allowed. Reasonable compensation is an exception to the sole-interest duty of loyalty. As the Restatement provides:

> Exception for trustee's compensation. The strict prohibitions against transactions by trustees involving conflicts between their fiduciary duties and personal interests do not apply to the trustee's taking of reasonable compensation for services rendered as trustee.

RESTATEMENT (THIRD) OF TRUSTS, § 78(c)(4). Uniform Trust Code § 802.

So, in general, a fiduciary does not violate its fiduciary duty by paying itself reasonable compensation. *In Matter of Nathan Trust*, 618 N.E.2d 1343 (Ind. App. 1993), *opinion vacated (result undisturbed)*, 638 N.E.2d 789 (1994) (allowing the trustees, on termination of a trust and over objection by a remainder beneficiary, to exercise their power to sell land held in the trust for the purpose of paying expenses and costs of administration, which included compensation and reimbursement for the trustees). *See also Nickel v. Bank of Am. Nat'l Trust & Sav. Ass'n*, 290 F.3d 1134, 1139(9th Cir. 2002), *as amended on denial of reh'g* (June 19, 2002) (finding bank did breach fiduciary duty of loyalty by overcompensating itself).

For example, where a trust document is silent on compensation, the Texas Trust Code provides that unless the trust does not allow compensation or only limited compensation, a trustee's payment of reasonable compensation to itself is not a breach of fiduciary duty. Tex. Prop. Code § 114.061; *InterFirst Bank Dallas, N.A. v. Risser,* 739 S.W.2d 882 (Tex. App.—Texarkana 1987, no writ). Similarly, unless a will does not allow compensation or only limited compensation, Texas Estate Code states that the standard compensation is "five percent commission on all amounts that he or she actually receives or pays out in cash in the administration of the estate," but may be different upon court order depending on the issues in the estate. Tex. Est. Code § 352.002. Similarly, power of attorney agents are entitled to reasonable compensation. Texas Estate Code Section 751.024 provides: "Unless the durable power of attorney otherwise provides, an agent is entitled to: (1) reimbursement of reasonable expenses incurred on the

principal's behalf; and (2) compensation that is reasonable under the circumstances." Tex. Est. Code § 751.024.

However, other benefits are generally prohibited. *Slay v. Burnett Trust*, 187 S.W.2d 377 (Tex. 1945). *See also Humane Soc'y of Austin & Travis County v. Austin Nat'l Bank*, 531 S.W.2d 574, 577 (Tex. 1975) (trustee cannot profit from trust relationship); *Lesikar v. Rappeport*, 33 S.W.3d 282, 297 (Tex. App.—Texarkana 2000, pet. denied) (same); *Furr v. Hall*, 553 S.W.2d 666 (Tex. Civ. App.—Amarillo 1977, writ ref'd n.r.e.) (executors prohibited from placing themselves in any position where self-interest would or may have conflicted with their obligations as trustees even though they may have acted in good faith and the beneficiary suffered no damage); *Daniel v. Henderson*, 183 S.W.2d 242, (Tex. Civ. App.—El Paso 1944, no writ) (trustee violates his duty if he sells trust property to a firm of which he is a member or to a corporation in which he has a controlling or substantial interest).

For example, in *In the Estate of Montemayor*, the trial court entered summary judgment for an estate beneficiary on a claim to quiet title as against the independent executor, who had deeded estate property to himself. No. 04-15-00397-CV, 2016 Tex. App. LEXIS 7616 (Tex. App.—San Antonio June 1, 2016, no pet. history). The executor appealed, and the court of appeals affirmed. On appeal, the executor argued that the trial court erred by granting the motion for summary judgment because his affidavit allegedly raised a fact issue that when he sold and conveyed the property to himself, he had the authority to do so. The court of appeals noted that a personal representative of an estate may not purchase any estate property sold by the representative or any co-representative of the estate. The court also noted that there is an exception for when the will authorizes such a sale. The court concluded that: "It is undisputed that Montemayor was the independent executor of Luisa's estate when he deeded the property to himself. The will did not authorize Montemayor to purchase the estate property. Therefore, Calentine established Montemayor's claim to the property was invalid or unenforceable." *Id.* The trial court correctly granted summary judgment, declaring the deed void and quieting title in the new representative of the estate.

So, where a transaction involves self-dealing, a fiduciary in Texas usually has the burden of proof to establish that the transaction was fair to the principal. "Texas courts have applied a presumption of unfairness to transactions between a fiduciary and a party to whom he owes a duty of disclosure, thus casting upon the profiting fiduciary the burden of showing the fairness of the transactions." *Collins v. Smith,* 53 S.W.3d 832, 840 (Tex. App.—Houston [1st Dist.] 2001, no pet.) (citing *Texas Bank & Trust Co. v. Moore*, 595 S.W.2d 502, 507-08 (Tex. 1980); *Stephens County Museum, Inc. v. Swenson*, 517 S.W.2d 257, 261 (Tex. 1974); *Int'l. Bankers Life Ins. Co. v. Holloway,* 368 S.W.2d 567, 576 (Tex. 1963).); *see also See Harrison v. Harrison Interests,* No. 14-15-00348-CV, 2017 Tex. App. LEXIS 1677 (Tex. App.—Houston [14th Dist.] February 28, 2017, no pet. history). Where a party attacks a transaction between a fiduciary and a beneficiary, it is the fiduciary's burden of proof to establish the fairness of the transaction. *Fitz-Gerald v. Hull*, 150 Tex. 39, 49, 237 S.W.2d 256, 261 (1951); *Harrison,* 2017 Tex. App. LEXIS 1677. *See also Keck, Mahin & Cate v. Nat'l Union Fire Ins. Co.*, 20 S.W.3d 692, 699 (Tex. 2000) (considering whether a release agreement could bar claims arising from a fiduciary relationship and holding that the presumption of unfairness or invalidity applied).

The presumption includes transactions involving the fiduciary and a third party, conducted on behalf of the beneficiary of the fiduciary relationship. *See Stephens Co. Museum, Inc. v. Swenson*, 517 S.W.2d 257, 260-61 (Tex. 1974) (when brother, acting under power-of-attorney for sisters, made large gifts of sisters' wealth to museum, "equity indulges the presumption of unfairness and invalidity, and requires proof at the hand of the party claiming validity and benefits of the transaction that it is fair and reasonable").

For example, in *Sorrell v. Elsey*, the plaintiff sued her nephews to void a gift deed to them. 748 S.W.2d 584, 585 (Tex. App.—San Antonio 1988, writ denied). After the trial court ruled for the defendants, the plaintiff appealed. The court of appeals reversed, and in so doing, stated:

> "When persons enter into fiduciary relations each consents, as a matter of law, to have his conduct towards the other measured by the standards of the finer loyalties exacted by courts of equity. That is a sound rule and should not be whittled down by exceptions." *Johnson v. Peckham,* 132 Tex. 148, 120 S.W.2d 786, 788 (Tex. 1938). Even in the case of a gift, in transactions involving parties with a fiduciary relationship,
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> Equity indulges the presumption of unfairness and invalidity, and requires proof at the hand of the party claiming validity and benefits of the transaction that it is fair and reasonable. Pomeroy, Equity Jurisprudence § 956 (5th ed. 1941); *Archer v. Griffith*, 390 S.W.2d 735 (Tex.1965); *Cooper v. Lee*, 75 Tex. 114, 12 S.W. 483 (1889); *see also Tippett v. Brooks,* 28 Tex.Civ.App. 107, 67 S.W. 512, writ ref'd, 95 Tex. 335, 67 S.W. 495, 512 (1902)."

> *Stephens County Museum, Inc. v. Swenson*, 517 S.W.2d 257, 260 (Tex.1974).
>
> Under these circumstances, the burden cast upon the party claiming validity of the transaction not only includes presenting evidence but securing findings of the "material issues -- those being whether [the validity claiming party] had made reasonable use of the confidence placed in him and whether the transactions were ultimately fair and equitable to [the complaining party]." *Stephens County Museum, Inc. v. Swenson*, 517 S.W.2d at 261; *Cole v. Plummer*, 559 S.W.2d 87, 90 (Tex. Civ. App.—Eastland 1977, writ ref'd n.r.e.).
>
> Whether the complaining party in a fiduciary transaction understood the transaction in question is not the critical issue. Rather, the "conduct as a fiduciary" of the validity claiming party is the critical aspect which coincides with the special burden placed upon him by the presumption of invalidity. In particular, "a determination of whether there was under the circumstances a good faith effort on the part of [the validity claiming party] to fully inform [the complaining party] of the nature and effect of the transactions" is critical in deciding whether there was a breach of the fiduciary duty.

Id. See also Jurgens v. Martin, No. 11-18-00316-CV,2021 Tex. App. LEXIS 2053, 2021 WL 1033306, at *21(Tex. App.—Eastland Mar. 18, 2021, no pet.) (credit card statements did not rebut presumption); *Alford v. Marino*, 2005 Tex. App. LEXIS 10162, No. 14-04-00912-CV, 2005 WL 3310114, at *3-4 (Tex. App.—Houston [14th Dist.] Dec. 8, 2005, no pet.) (requiring the guardian to rebut the presumption the withdrawals he made from the principal's account during her lifetime were unfair); *Vogt v. Warnock*, 107 S.W.3d 778, 783 (Tex. App.—El Paso 2003, pet. denied) (establishing that the fiancée fiduciary had to rebut the presumptions of unfairness regarding the testator's transfers of real property during his lifetime); *Evans v. First Nat'l Bank of Bellville*, 946 S.W.2d 367, 379-80 (Tex. App.—Houston [14th Dist.] 1997, writ denied) (stating that the presumption may apply when ownership of the CDs is resolved); *Townes v. Townes*, 867 S.W.2d 414, 417-18 (Tex. App.—Houston [14th Dist.] 1993, writ denied) (applying the presumption after the fiduciary, and also a signatory on the CDs owned by the decedent, made withdrawals before the decedent's death); *Tuttlebee v. Tuttlebee*, 702 S.W.2d 253, 256-57 (Tex. App.-Corpus Christi 1985, no writ) (concluding that the son, as the fiduciary, needed to rebut the presumption of unfairness after receiving a deed of property during the mother's lifetime).

Only when the presumption of unfairness does not arise will the burden of persuasion not fall on the fiduciary. *Nat'l Plan Adm'rs, Inc. v. Nat'l Health Ins. Co.*, 150 S.W.3d 718, 740(Tex. App.—Austin 2004), *rev'd on other grounds*, 235 S.W.3d 695 (Tex. 2007) (citing Comm. on Pattern Jury Charges, State Bar of Tex., Texas Pattern Jury Charges: Business, Consumer, Insurance, Employment, PJC 104.2 cmt. (2002)). So, a fiduciary has the burden to produce evidence to show the fairness of the transaction and the duty to persuade the finder of fact regarding the fairness of the transaction.

To establish the fairness of a transaction between a fiduciary and his principal, relevant factors include: (1) there was full disclosure regarding the transaction, (2) the consideration (if any) was adequate, (3) the beneficiary had the benefit of independent advice, (4) the party owing the fiduciary duty benefited at the expense of the beneficiary, and (5) the fiduciary significantly benefited from the transaction as viewed in light of the circumstances in existence at the time of the transaction. *Jordan v. Lyles*, 455 S.W.3d 785, 792 (Tex. App.—Tyler 2015, no pet.); *Lee v. Hasson*, 286 S.W.3d 1, 21 (Tex. App.—Houston [14th Dist.] 2007, pet. denied).

As the first factor to prove fairness, full disclosure is also a very important aspect of proving the fairness of self-interested transactions. For example, in *Jordan v. Lyles*, heirs accused a power of attorney of holder of breaching fiduciary duties by transferring a significant portion of the principal's property into accounts that named her as a pay on death beneficiary or giving her survivorship rights. 455 S.W.3d 785 (Tex. App—Tyler 2015, no pet.). The jury found for the heirs, but the trial court awarded the agent a judgment notwithstanding the verdict. *Id.* The agent argued that the transactions were fair to the principal, but was unable to prove that she specifically discussed the transactions with the principal and informed him of the material facts relating to them. *Id.* Because the agent failed to show that she had fully disclosed the transactions, there was evidence that she breached her fiduciary duty. The court of appeals reversed and reinstated the jury verdict. *Id.*

Put in context, the presumption in fairness only applies to the breach element of a breach of fiduciary duty claim. A plaintiff has the burden to prove that a fiduciary relationship exists, that a self-interested transaction occurred and the amount of damages/benefits. *See Dyke v. Hall*, No. 03-18-00457-CV,2019 Tex. App. LEXIS 9136, 2019 WL 5251139, at *10(Tex. App.—Austin Oct. 17, 2019, no pet.) (presumption of unfairness applies to the breach element of a breach of fiduciary duty claim). For

example, in *Schlein v. Griffin*, the court held that the presumption of unfairness did not arise where there was no evidence of a self-interested transaction. No. 01-14-00799-CV,2016 Tex. App. LEXIS 3715, 2016 WL 1456193 (Tex. App.—Houston [1st Dist.] Apr. 12, 2016, pet. denied). In *Spradley v. Michael E. Orsak, LP*, the presumption of unfairness did not apply where the defendant did not owe fiduciary duties at the time of the transaction. 2020 Tex. App. LEXIS 9849, 020 WL 7349490 (Tex. App.—Houston [1st Dist.] Dec. 15, 2020, no pet.).

V. GIFTS

A common issue involving self-interested transactions is gifts from a principal to the fiduciary. For example, it is common for a parent to name a child as his or her power of attorney and then later want to give a gift to the child/agent. Is that gift presumptively unfair and void?

Ordinarily, transfers from the principal to the fiduciary without adequate consideration are considered unfair transactions that are void. *See Miller v. Unger*, No. 03-10-00795-CV, 2011 Tex. App. LEXIS 6125 (Tex. App.—Austin August 4, 2011, no pet). However, though the fiduciary has the burden to prove the fairness, he or she can do so by showing that the principal wanted to make a gift and had mental capacity to do so. *Vogt v. Warnock*, 107 S.W.3d 778 (Tex. App.—El Paso 2003, pet. denied) (burden on the power of attorney agent to show fairness of the gift, which was done as a matter of law).

In *Vogt v. Warnock*, Warnock named Vogt, a woman forty years his junior, as his attorney-in-fact; he later transferred several parcels of real property to her. 107 S.W.3d 778 (Tex. App.—El Paso 2003, pet denied). After Warnock died, the executor of his estate sued Vogt, alleging several causes of action. *Id.* at 781. At trial, the estate dropped all of its claims except for the fiduciary duty claim, and it "stipulated that [Warnock] had done what he wanted to do in transferring property, and his competency and undue influence were no longer questions that would be submitted to the jury." *Id.* The trial court ruled as a matter of law that Vogt was Warnock's fiduciary, thereby shifting the burden of proof to Vogt to prove that the property transfers to her were fair. *Id.* The jury then found after trial that some of the transfers were unfair, and the trial court rendered judgment voiding those transfers. *Id.* On Vogt's appeal, the court of appeals affirmed the trial court's legal conclusion that Vogt was a fiduciary solely on the basis of the power of attorney, even though Vogt never actually performed any actions as Warnock's attorney-in-fact. *Id.* at 782. However, the court of appeals concluded that Vogt proved the fairness of the transactions as a matter of law due to the mental competence of Warnock and the fact that he wanted to make the gifts. *Id.*

In *Wade vs. Wade*, a son sued another son arising from the sale of real estate by the mother to the defendant son. No. 03-15-00100-CV, 2017 Tex. App. LEXIS 2809 (Tex. App.—Austin March 31, 2017, pet. denied). After the jury found for the defendant, the plaintiff appealed. The court of appeals, affirmed and stated:

> The jury concluded that Johnny and Amanda in accepting the modification agreement complied with their fiduciary duty to Edell. Bud argues that the modification of the promissory note benefitted only Johnny and Amanda and not Edell. As such, he contends the transaction was unfair to Edell and constitutes a breach of fiduciary duty as a matter of law. Johnny and Amanda respond that acceptance of Bud's argument would, in practical effect, bar a beneficiary from making a gift to a fiduciary.
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> Bud's claim is contrary to law. "[W]e find it worth repeating that fiduciary status does not prohibit the beneficiary from giving the fiduciary gifts or bequests; instead it insures that the fiduciary will be prepared to prove the transaction was conducted with scrupulous fairness."
>
> The evidence is both legally and factually sufficient to support the jury's answers. Edell disliked paying taxes on the interest income generated from the note, so she wanted to reduce the interest rate to zero. She also wanted to make a gift to Johnny by reducing the amount of the note. Edell made the decision to modify the promissory note voluntarily with full mental capacity, and upon the advice and counsel of her attorney, Mike Martin. Neither Johnny nor Amanda solicited the modification. Rather, Edell herself voluntarily made the decision upon the advice of her attorney.

Id.

A federal district stated the law concerning self-interested transactions thusly:

> While an agent who benefits from a transaction carried out on behalf of his principal bears the burden of showing that the transaction was fair, he can meet that burden by showing that the transaction was authorized by the principal. The grant of a power of attorney creates an agency

> relationship, which is a fiduciary relationship as a matter of law. A fiduciary owes his principal a high duty of good faith, fair dealing, honest performance, and strict accountability. Multiple courts have noted that the fiduciary relationship does "no more than cast upon the profiting fiduciary the burden of showing the fairness of the transactions." The court in Vogt found it "worth repeating that fiduciary status does not prohibit the beneficiary from giving the fiduciary gifts or bequests; instead, it insures that the fiduciary will be prepared to prove the transaction was conducted with scrupulous fairness." One way to establish decisively that a transaction was fair to the principal is to show that the principal consented to it. Texas courts have recognized the significance of the principal's consent in determining whether a transaction by a profiting agent was fair or constituted self-dealing. "Unless otherwise agreed, an agent is subject to a duty to his principal to act solely for the benefit of the principal in all matters connected with his agency." Accordingly, "absent the principal's consent, an agent must refrain from using his position or the principal's property to gain a benefit for himself at the principal's expense."

Transamerica Life Ins. Co. v. Quarm, No. EP-16-CV-295-KC, 2017 U.S. Dist. LEXIS 192192 (W.D. Tex. November 13, 2017) (internal citation omitted).

VI. BUSINESS SELF-INTERESTED TRANSACTIONS

"[O]fficers of a corporation, by virtue of their authority, privileges and trust, have a strict fiduciary obligation to their corporation." *General Dynamics v. Torres*, 915 S.W.2d 45, 49 (Tex. App.—El Paso 1995, writ denied) (citing *International Bankers Life Ins. Co. v. Holloway*, 368 S.W.2d 567, 576 (Tex. 1963)). That fiduciary obligation gives rise to a duty of loyalty such that a corporate officer or director cannot place their personal interests over those of the corporation. *Loy v. Harter*, 128 S.W.3d 397, 407 (Tex. App.—Texarkana 2004, pet. denied)("The duty of loyalty dictates that a corporate officer or director must act in good faith and must not allow his or her personal interest to prevail over the interest of the corporation.").

Once again, however, self-dealing transactions are not automatically void. Instead, they were "voidable for unfairness and fraud with the burden upon the fiduciary of proving fairness." *Holloway*, 368 S.W.2d at 576. Additionally, at common law a vote by disinterested board members could ratify an otherwise voidable transaction. *Tenison v. Patton*, 95 Tex. 284, 67 S.W. 92, 95 (Tex. 1902). Other courts upheld self-dealing transactions when they are fair to the corporation and after full disclosure, the majority of the stockholders ratified the transaction. *Wiberg v. Gulf Coast Land & Dev. Co.*, 360 S.W.2d 563, 567 (Tex. Civ. App.--Beaumont 1962, writ ref'd n.r.e.). These common law savings rules are now codified by Section 21.418 of the Texas Business Organizations Code. That provision states that an otherwise valid and enforceable transaction "is not void or voidable," if one of several conditions are met. The stated conditions include:

> (1) the material facts as to the relationship or interest . . . and as to the contract or transaction are disclosed to or known by:
>
> (A) the corporation's board of directors or a committee of the board of directors, and the board of directors or committee in good faith authorizes the contract or transaction by the approval of the majority of the disinterested directors or committee members, regardless of whether the disinterested directors or committee members constitute a quorum; or
>
> (B) the shareholders entitled to vote on the authorization of the contract or transaction, and the contract or transaction is specifically approved in good faith by a vote of the shareholders; or
>
> (2) the contract or transaction is fair to the corporation when the contract or transaction is authorized, approved, or ratified by the board of directors, a committee of the board of directors, or the shareholders.

Tex. Bus. Orgs. Code § 21.418. See also Tex. Bus. Orgs. Code § 101.255 (similar provision for LLCs). The burden to prove this statutory safe harbor is on the defendant/officer/director.

VII. POD/JTROS DESIGNATIONS MAY NOT REQUIRE PRESUMPTION OF UNFAIRNESS

In *Porter v. Denas*, defendants appealed an adverse judgment concerning an individual naming them as POD beneficiaries on an IRA account. No. 04-05-00455-CV, 2006 Tex. App. LEXIS 5259, 2006 WL 1686515 (Tex. App.—San Antonio June 21, 2006, pet. denied). The court affirmed the judgment, but stated:

> The IRA was payable on the death of Alice, thus there could be no present delivery to the Porters. *See Punts v. Wilson*, 137 S.W.3d 889, 893 (Tex. App.—Texarkana 2004, no pet.) (holding that the transfer on death of a typical P.O.D. account is not a gift because no delivery is involved and the owner never divests title, dominion, or control). If the alleged donor has the power to revoke, then a gift was not made. *Chaison v. Chaison*, 154 S.W.2d 961, 964 (Tex. Civ. App.—Beaumont 1941, writ ref'd w.o.m.). Here, as the owner, Alice had the ability to change the beneficiary at any time, thus the IRA was not a gift.
>
> Although we can find no case which states the presumption applies only when a gift is given by the principal to the fiduciary; every case that applies the presumption does so with intervivos transactions only. An intervivos transfer is "[a] transfer of property made during the transferor's lifetime." BLACK'S LAW DICTIONARY 1536 (8th ed. 2004). The transfer was payable on Alice's death, thus no transfer took place during her lifetime. The trial court erred when it required the Porters to rebut the presumption.

Id. But see Fuller v. Fuller, NO. W-10-CA-115, 2011 U.S. Dist. LEXIS 166124 (W.D. Tex. June 9, 2011).

VIII. RELEASE AGREEMENTS

One self-interested transaction that most fiduciaries do not consider as such are release agreements with the principal.

A. Presumption Generally Applies To Releases

When a fiduciary enters into a transaction with a principal, there is a negative presumption that the transaction is invalid and the burden is on the fiduciary to prove the fairness and enforceability of the transaction. The issue is whether this presumption applies to release agreements between a fiduciary and a principal, and if so, how can a fiduciary meet this burden.

In *Keck, Mahin & Cate v. Nat'l Union Fire Ins. Co.*, the Texas Supreme Court considered whether a release agreement could bar claims arising from a fiduciary relationship. 20 S.W.3d 692, 699 (Tex. 2000). The court determined that the release did not preclude claims brought against an attorney. The plaintiff challenged the validity of the release on the grounds that the insured did not understand the agreement, was not fully informed before signing it, or, alternatively, that there were fact questions as to whether the release was negotiated at arms-length and in good faith. *Id.* at 698-99. The Court held that because the relationship was fiduciary in nature and the release was negotiated during the attorneys' representation of the insured, the presumption of unfairness or invalidity applied. *Id.* at 699. The attorneys had the burden to show the release was fair or valid. *Id.* at 699. The court stated:

> Contracts between attorneys and their clients negotiated during the existence of the attorney-client relationship are closely scrutinized. Because the relationship is fiduciary in nature, there is a presumption of unfairness or invalidity attaching to such contracts.
>
> . . .
>
> KMC had the burden on summary judgment to prove that the release agreement it negotiated with Granada was fair and reasonable. Further, it was KMC's burden as a fiduciary to establish that Granada was informed of all material facts relating to the release. The present summary judgment record does not establish the state of Granada's information or that the agreement was fair and reasonable. The only evidence that KMC identifies is a recitation in the release that KMC "advised Granada in writing that independent representation [would be] appropriate in connection with the execution of this Agreement." This bare recitation is not sufficient to rebut the "presumption of unfairness or invalidity attaching to the contract." Accordingly, KMC has not carried its summary judgment burden... KMC has not established that the release agreement is a complete defense to National's and INA's equitable subrogation claim...

Id. at 699. However, the Court noted the presumption would not have arisen had the insured hired new attorneys before agreeing to the release. *Id.* at 699 n. 3. In other words, after the fiduciary relationship terminates, agreements between the former fiduciary and the former principal are not presumptively unfair. *Id. See also* David F. Johnson, *The Use of Presumptions In Summary Judgment Procedure In Texas and Federal Courts*, 54 BAYLOR L. REV. 605 (2002).

In *Harrison v. Harrison Interests*, a beneficiary of an estate and multiple trusts had a dispute with the executors and trustees. No. 14-15-00348-CV, 2017 Tex. App. LEXIS 1677 (Tex. App.—Houston [14th Dist.] February 28, 2017, pet. denied). The parties

then executed a master settlement agreement that allowed the parties to dissociate themselves, distribute property, and that agreement contained releases for the fiduciaries. After the agreement was signed, the beneficiary had additional complaints and filed suit. The fiduciaries argued that the releases in the agreement precluded the beneficiary's breach of fiduciary duty claim. The beneficiary argued that certain portions of the agreement were unfair and contended that because the defendants owed him fiduciary duties, as a matter of law, the defendants were required to rebut a presumption that the transactions are unfair. The trial court granted summary judgment for the defendants based on the release language, and the beneficiary appealed.

The court of appeals held: "Texas courts have applied a presumption of unfairness to transactions between a fiduciary and a party to whom he owes a duty of disclosure, thus casting upon the profiting fiduciary the burden of showing the fairness of the transactions." *Id.* "Where a transaction between a fiduciary and a beneficiary is attacked, it is the fiduciary's burden of proof to establish the fairness of the transaction." *Id.* The beneficiary argued that because the agreement was a transaction between fiduciaries and a beneficiary that the presumption of unfairness applied. The court did not expressly hold that the presumption of unfairness would apply to every such contract. But the court did review the agreement, and ultimately hold that a presumption of unfairness was rebutted in the case.

The court of appeals noted that it must balance the principle that fiduciary duties arise as a matter of law with an obligation to honor the contractual terms that parties use to define the scope of their obligations and agreements, including limiting fiduciary duties that might otherwise exist. "This principle adheres to our public policy of freedom of contract." *Id.*

The court noted that the record reflected that the agreement was not executed solely for the purpose of prematurely distributing assets to the beneficiary but also to terminate his relationship with the fiduciaries and settle all claims against them. The court noted: "This severance of the relationship is achieved not only through purchasing each other's interest in commonly-held assets, but by releasing Dan and Ed from their fiduciary duties." *Id.*

The court held that in deciding whether the release is valid, the court should consider the following: "(1) the terms of the contract were negotiated, rather than boilerplate, and the disputed issue was specifically discussed; (2) the complaining party was represented by counsel; (3) the parties dealt with each other in an arms-length transaction; (4) the parties were knowledgeable in business matters; and (5) the release language was clear. *Id.* The court also emphasized that the fact that the parties "are effecting a 'once and for all' settlement of claims" weighed in favor of upholding the release. *Id.*

Regarding the underlying facts, the court noted that the beneficiary was of legal age and had capacity. He attended college for several years and studied business. He sought a split of interest in assets that were held in common with the fiduciaries, as well as early distribution of assets. He was represented by counsel that he described as "talented and intelligent" throughout the negotiations of the agreement. *Id.* He was very involved in the negotiations and suggested many of the terms in the agreement himself. He actively participated in the decisions on the agreement. The releases were disputed and specifically discussed. The agreement clearly and unequivocally released the fiduciaries, in all capacities, from any and all claims, excluding breaches or defaults under the agreement. The court held that "the record before this court rebuts the presumption of unfairness or invalidity attaching to the release. Accordingly, William's only remaining claim for breach of fiduciary duty is precluded and the judgment of the trial court is affirmed." *Id.*

More recently, in *Austin Trust Co. v. Houren*, beneficiaries of a trust executed a family settlement agreement with the trustee and the former trustee's estate. No. 14-19-00387-CV, 2021 Tex. App. LEXIS 1955 (Tex. App.—Houston March 16, 2021, pet. filed). After the settlement agreement was executed, one of the parties sued the former trustee's estate for over a $37 million debt (or due to over distributions). The estate then filed a motion for summary judgment based on the release in the settlement agreement, which the trial court granted. The court held that the fact that the decedent may have owed fiduciary duties did not impact the enforcement of the release:

> The fact that the Mayor and Houren may have owed the other parties a fiduciary duty, a question we need not reach, does not change this analysis....
> This court held that six factors were key to their decision to affirm the settlement agreement: (1) the terms of the contract were negotiated rather than boilerplate, and the disputed issue was specifically discussed; (2) the complaining party was represented by legal counsel; (3) the negotiations occurred as part of an arms-length transaction; (4) the parties were knowledgeable in business matters; (5) the release language was clear; and (6) the parties were working to achieve a once and for all settlement of all claims so they could permanently part ways. An examination of the record reveals that all of these factors are present here with respect to appellants, the

> complaining parties. We therefore conclude that even if the Mayor and Houren owed appellants fiduciary duties, appellants released any claims for breach of those duties when they executed the FSA. Id. This decision adheres to the public policy in favor of Texas courts upholding contracts negotiated at arms-length by knowledgeable and sophisticated business players represented by highly competent and able legal counsel.

Id. (citing *Harrison v. Harrison Interests, Ltd.*, 14-15-00348-CV, 2017 Tex. App. LEXIS 1677, 2017 WL 830504, at *4 (Tex. App.—Houston [14th Dist.] Feb. 28, 2017, pet. denied)).

B. Releases in Trust Situations

As Texas statutes expressly allow beneficiaries to release trustees, a fact that was not mentioned in the *Harrison* and *Houren* opinions mentioned above, it is unclear whether the same presumption should apply in the trust/beneficiary context.

In Texas, beneficiaries can release a trustee from certain duties or for certain claims. *Harrison v. Harrison Interests*, No. 14-15-00348-CV, 2017 Tex. App. LEXIS 1677 (Tex. App.—Houston [14th Dist.] February 28, 2017, pet. denied); *Interfirst Bank-Houston, N.A. v. Quintana Petroleum Corp.*, 699 S.W.2d 864 (Tex. App.—Houston [1st Dist.] 1985, writ ref'd n.r.e.) (release and indemnity agreement was enforceable by successor trustee regarding the elimination of the duty to investigate prior trustee's actions); *Burnett v. First Nat'l Bank*, 536 S.W.2d 600 (Tex. App.—Eastland 1976, writ ref'd n.r.e.) ("Letters and instruments delivered to the bank by Burnett established his consent, acquiescence, ratification, and/or release of the acts of the trustee in making the loans to Fidelity Finance and to the JPG oil venture."). *See also K3 Equipment Corp. v. Kintner*, 233 A.D.2d 556, 558, 649 N.Y.S.2d 535, 536 (3d Dep't 1996) (upholding the validity of a general release executed among three equal shareholders in a closely held corporation with respect to the claim that one of them had taken money out of corporate coffers without authorization, but where the plaintiff "made no showing that its execution of the release was tainted by fraud"); *Mergler v. Crystal Props. Assocs., Ltd.*, 179 A.D.2d 177, 181-82, 583 N.Y.S.2d 229, 232 (1st Dep't 1992) (declining to "extend[]" the doctrine of constructive fraud to agreements between attorneys and their former clients).

Texas statutes expressly discuss a trustee obtaining an enforceable and effective release from beneficiaries. Unless the terms of the trust provide otherwise, the Texas Trust Code governs the duties and powers of a trustee, relations among trustees, and the rights and interests of a beneficiary. Tex. Prop. Code Ann. § 111.0035(a). The Texas Trust Code expressly states: "The trustee shall administer the trust in good faith according to its terms and this subtitle. In the absence of any contrary terms in the trust instrument or contrary provisions of this subtitle, in administering the trust the trustee shall perform all of the duties imposed on trustees by the common law." Tex. Prop. Code Ann. § 113.051 (emphasis added). Therefore, the duties set forth under the common law are subject to the trust's terms and the statutes.

The Texas Trust Code expressly states that beneficiaries can release a trustee. A beneficiary who has full capacity and acting on full information may relieve a trustee from any duty, responsibility, restriction, or liability that would otherwise be imposed by the Texas Trust Code. Tex. Prop. Code Ann. § 114.005. To be effective, this release must be in writing and delivered to the trustee. *Id.* The trustee should be careful to properly word the release or else certain conduct may be outside of the scope of the release. *See, e.g., Estate of Wolf*, 2016 NYLJ LEXIS 2965 (July 19, 2016) (release did not protect trustee from diversification claim that arose after the effective dates for the release).

Further, writings between the trustee and beneficiary, including releases, consents, or other agreements relating to the trustee's duties, powers, responsibilities, restrictions, or liabilities, can be final and binding on the beneficiary if they are in writing, signed by the beneficiary, and the beneficiary has legal capacity and full knowledge of the relevant facts. Tex. Prop. Code Ann. § 114.032. Minors are bound if a parent signs, there are no conflicts between the minor and the parent, and there is no guardian for the minor. *Id.*

Once again, both of the Texas Trust Code provisions set forth above require that the beneficiary act "on full information" and full knowledge of the relevant facts. Tex. Prop. Code Ann. §§ 114.005, 114.032. This is important because releases can be voided on ground of fraud, like any other contract. *Williams v. Glash*, 789 S.W.2d 261 (Tex. 1990). So, fiduciaries should be very careful to provide full disclosures to beneficiaries before execution of a release regarding all material facts concerning the released matter. The trustee should offer to provide access to its books and records and require the beneficiary to confirm that they had access to that information. *See Le Tulle v. McDonald*, 444 S.W.2d 794 (Tex. Civ. App.—Beaumont 1969, writ ref'd n.r.e.) (court reversed summary judgment based on release of trustee where disclosure was not adequate).

The majority of jurisdictions hold that a court may not enforce a release if disclosure was inadequate. *See, e.g., In re Mi-Lor Corp.*, 348 F.3d 294, 303 (1st Cir. 2003) (fiduciaries owe a duty of full

disclosure of material facts in connection with a self-dealing transaction, and "in the case of a self-dealing release, information about the conduct of the potential recipients of the release is necessary for deciding whether to grant the release..."); *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1481 (6th Cir. 1989) (holding that federal law applies to the validity of releases and that federal law at a minimum requires the standards of the Restatement of Contract 2d § 173, which states "[i]f a fiduciary makes a contract with his beneficiary relating to matters within the scope of the fiduciary relation, the contract is voidable by the beneficiary unless... all parties beneficially interested manifest assent with full understanding of their legal rights and of all relevant facts that the fiduciary knows or should know."); *Shane v. Shane*, 891 F.2d 976, 986 (1st Cir. 1989) (a release will not bar subsequent claims if the release was obtained by fraud or misrepresentation, and "where a release is obtained without full disclosure of the relevant facts by one who is under a duty to reveal them, it can be set aside."); *Hale v. Moore*, 2008 WL 53871 (Ky. Ct. App. January 4, 2008); *Wal-Mart, Inc. v. Coughlin*, 255 S.W.3d 424 (Ark. S. Ct. 2007); *Cwikla v. Sheir*, 345 Ill. App. 3d 23, 801 N.E.2d 1103, 1112, 280 Ill. Dec. 158 (Ill. App. 2003) ("Parties in a fiduciary relationship owe one another a duty of full disclosure of material facts when... obtaining a release.... [A] severance agreement arising out of a fiduciary relationship is voidable if one party withheld facts that were material to the agreement.... A withheld fact is material if plaintiff would have acted differently had he been aware of the withheld fact."); *Blue Chip Emerald LLC v. Allied Partners, Inc.*, 299 A.D.2d 278, 750 N.Y.S.2d 291 (N.Y. App. Div. 2002) (a release is voidable if a fiduciary, in furtherance of his individual interests, fails to make full disclosure of all material facts that could reasonably bear on the corporation's decision to grant the release); *Old Harbor Native Corp. v. Afognak Joint Venture*, 30 P.3d 101, 105 (Ala. 2001) (a release is "susceptible to attack under the legal theories of mistake, fraud, and misrepresentation" and a release may be ineffective if a fiduciary breaches his affirmative duty of full disclosure of material facts); *Soderquist v. Kramer*, 595 So. 2d 825, 830 (La. App. 1992) ("The duty imposed on a fiduciary embraces the obligation to render a full and fair disclosure to the beneficiary of all facts which materially affect his rights and interest" and a material question of fact existed as to whether an attorney disclosed to his client the extent of a conflict of interest when obtaining a release as the release would not bar a claim for legal malpractice if full disclosure was not made); *Pacelli Bros. Transp., Inc. v. Pacelli*, 189 Conn. 401, 456 A.2d 325, 329 (Conn. 1983) (a "general release cannot shield an officer or director who has failed in his fiduciary duty to disclose information relevant to a transaction with those whose confidence he has abused..."); *State ex rel. Hayes Oyster Co. v. Keypoint Oyster Co.*, 64 Wn.2d 375, 391 P.2d 979, 986 (Wash. 1964) (corporation's release of former president was not binding because the president had failed to make full disclosure of material facts, and "[a] corporation cannot ratify the breach of fiduciary duties unless full and complete disclosure of all facts and circumstances is made by the fiduciary and an intentional relinquishment by the corporation of its rights"); *Norris v. Cohen*, 223 Minn. 471, 27 N.W.2d 277, 281 (Minn. 1947) ("a general release does not extend to claims of which one party thereto was wrongfully kept in ignorance by the other" and "the wrongful concealment of facts by one party to a release affords sufficient ground to the other for setting it aside, particularly where the information concealed is not equally within the knowledge of both parties."). Accordingly, release agreements should have detailed disclosures in the recitals, and there should be written disclosures explaining release language.

There is a good argument that because there are two provisions in the Texas Trust Code that expressly permit releases by trust beneficiaries that such a release should not be presumptively invalid. In this circumstance, the beneficiary could have the burden of proving that there was not adequate disclosure or that the transaction was otherwise unfair.

IX. EXCULPATORY CLAUSES

A common issue that arises in self-interested transaction cases is the exculpatory clause defense. A fiduciary will argue that he or she is entitled to enter into a self-interested transaction, and such is valid due to a clause in a trust document (or other document) that expressly allows the fiduciary to enter into the transaction. Perhaps the clause states that a trustee can buy assets from the trust. Where a fiduciary enters into such a transaction based on such a clause, is that valid and what factors go into proving the validity of such a defense?

A. Types of Exculpatory Clauses

There are two primary types of clauses that are discussed in this article. The first is an exculpatory clause that relieves a trustee from liability for breaching a duty. This type of clause is typically more general in nature. "[A]n exculpatory clause is '[a] contractual provision relieving a party from any liability resulting from a negligent or wrongful act.'" Holland A. Sullivan, Jr., *The Grizzle Bear: Lingering Exculpatory Clause Problems Posed By Texas Commerce Bank, N.A. v. Grizzle*, 56 BAYLOR L. REV. 253, 256 (2004) (hereinafter "Grizzle Bear"). "A trustee's breach may give rise to liability, and the exculpatory clause purports to excuse the trustee from

that liability." *Id.* This type of clause may state: "The trustee is not liable for any loss to the trust that arises from the trustee's actions or inactions unless done in bad faith or with reckless disregard."

The second is a type of clause that relieves a trustee from a particular duty or directs the trustee to do something that might ordinarily be a breach of duty. It is a more specific type of clause. For example, such a clause may state: "The trustee is relieved of the duty to investigate the actions of any prior trustee and has no duty to bring any claim against any prior trustee."

B. Texas Trust Code 114.007(a)

Section 114.007 discusses the two different types of clauses mentioned earlier in this article. Section 114.007(a) provides:

> (a) a term of a trust relieving a trustee of liability for breach of trust is unenforceable to the extent that the term relieves a trustee for liability: (1) a breach of trust committed: (A) in bad faith; (B) intentionally; or (C) with reckless indifference to the interest of the beneficiary; or (2) any profit derived by the trustee from a breach of trust.

Tex. Prop. Code Ann. § 114.007(a).

Section 114.007(a) focuses on a general type of exculpatory clause that provides that a trustee is not liable for any improper action. Section 114.007(a) provides that an exculpatory clause is not be enforceable if: 1) a trustee breached its duties in bad faith, intentionally, or with reckless indifference to the beneficiary's interests, *or* 2) where the trustee acted with or without negligence where the trustee derived a profit. This provision discusses two different types of events: 1) actions where the trustee does not profit (an exculpatory clause is enforceable where the trustee does not act with "bad faith, intentionally, or with reckless indifference to the beneficiary's interests"; and 2) actions where the trustee does profit (where the exculpatory clause is not enforceable in any event).

C. Definitions For Bad Faith, Intentional Conduct, and Reckless Indifference

If a trustee wants to rely on a broad exculpatory clause, it needs to know what the words "intentional," "bad faith," and "reckless indifference" mean. One court has held that bad faith in the context of trustee's actions is as follows:

> The opposite of "good faith," generally implying or involving actual or constructive fraud, or a design to mislead or deceive another, or a neglect or refusal to fulfill some duty or some contractual obligation, not prompted by an honest mistake as to one's rights or duties, but by some interested or sinister motive. It has been held that a finding of bad faith requires some showing of an improper motive, and that improper motive is an essential element of bad faith.

InterFirst Bank Dallas, N.A. v. Risser, 739 S.W.2d 882, 888-89(Tex. App.—Texarkana 1987, no writ) (citing Black's Law Dictionary). To the contrary, one Texas court has held that a standard of good faith for an executor is part subjective and part objective. *See Lee v. Lee*, 47 S.W.2d 767, 795 (Tex. App.—Houston [14th Dist.] 2001, pet. denied). A fiduciary acts in good faith when he or she: (1) subjectively believes his or her defense is viable, and (2) is reasonable in light of existing law. *Id. See also In re Estate of Numu*, 542 S.W.3d 67, 81 (Tex. App.—Houston [14th Dist.] 2017, pet. denied).

Intentional acts are typically those that the actor consciously desires to engage in the conduct or cause the result. The Texas Penal Code provides that "A person acts intentionally, or with intent, with respect to the nature of his conduct or to a result of his conduct when it is his conscious objective or desire to engage in the conduct or cause the result." Tex. Pen. Code §6.03(a).

Reckless indifference has been equated to a finding of gross negligence. *Wells Fargo v. Militello*, No. 05-15-01252-CV, 2017 Tex. App. LEXIS 5640 (Tex. App.—Dallas June 20, 2017, no pet.) (finding of gross negligence negated impact of exculpatory clause). "Gross negligence" means an act or omission:

> (A) which when viewed objectively from the standpoint of the actor at the time of its occurrence involves an extreme degree of risk, considering the probability and magnitude of the potential harm to others; and
> (B) of which the actor has actual, subjective awareness of the risk involved, but nevertheless proceeds with conscious indifference to the rights, safety, or welfare of others.

Tex. Civ. Prac. & Rem. Code § 41.001(11) (definition of "gross negligence"). The Texas Supreme Court has explained that "gross negligence consists of both objective and subjective elements." *U-Haul Int'l, Inc. v. Waldrip*, 380 S.W.3d 118, 137 (Tex. 2012). The Court also explained:

> Under the objective component, "extreme risk" is not a remote possibility or even a high probability of minor harm, but rather the likelihood of the plaintiff's serious

> injury. The subjective prong, in turn, requires that the defendant knew about the risk, but that the defendant's acts or omissions demonstrated indifference to the consequences of its acts.

Id. (citations omitted). The Texas Penal Code provides:

> A person acts recklessly, or is reckless, with respect to circumstances surrounding his conduct or the result of his conduct when he is aware of but consciously disregards a substantial and unjustifiable risk that the circumstances exist or the result will occur. The risk must be of such a nature and degree that its disregard constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the actor's standpoint.

Tex. Pen. Code §6.03(c).

D. Texas Trust Code Section 114.007(c)

Section 114.007(c) deals with the second type of clause and deals with specific duties and actions. For example, a trust may specifically provide that a trustee has no duty to investigate the actions of a predecessor trustee. The first place to look regarding a trustee's rights is the trust document itself. Tex. Prop. Code §113.001, 113.051. *See Myrick v. Moody Nat'l Bank*, 336 S.W.3d 795, 801 (Tex. App.—Houston [1st Dist.] 2011, no pet.) (terms of trust instrument may limit or expand trustee powers supplied by the Trust Code). Generally, a trust document's terms govern, and a trustee should follow them. Tex. Prop. Code Ann §§ 111.0035(b), 113.001; RESTATEMENT (THIRD) OF TRUSTS § 76(1) (2007) ("The trustee has a duty to administer the trust ... in accordance with the terms of the trust . . . ."); RESTATEMENT (SECOND) OF TRUSTS § 164(a) (1959). "The nature and extent of a trustee's duties and powers are primarily determined by the terms of the trust." RESTATEMENT (THIRD) OF TRUSTS § 90 cmt. B; *Stewart v. Selder*, 473 S.W.2d 3 (Tex. 1971); *Beaty v. Bales,* 677 S.W.2d 750, 754 (Tex. App.—San Antonio 1984, no writ). If the language of the trust instrument unambiguously expresses the intent of the settlor, the instrument itself confers the trustee's powers and neither the trustee nor the courts may alter those powers. *Jewett v. Capital National Bank of Austin*, 618 S.W.2d 109, 112 (Tex. Civ. App.—Waco 1981, writ ref'd n.r.e.); *Corpus Christi National Bank v. Gerdes,* 551 S.W.2d 521, 523 (Tex. Civ. App.—Corpus Christi 1977, writ ref'd n.r.e.).

One commentator has stated:

> The single most important source of rules governing a trustee's liability to beneficiaries is the language contained in the document creating the trust. With few exceptions, a settlor of an express trust in Texas may add to or subtract from the statutory and common-law fiduciary obligations imposed on a trustee by expressing a contrary intent in the trust instrument. Texas courts have consistently upheld the settlor's right to control the scope of the trustee's liability, unless the instrument attempts to completely abrogate basic fiduciary duties.

4 Texas Probate, Estate and Trust Administration § 84.03

Section 114.007(c) provides:

> (c) This section applies only to a term of a trust that may otherwise relieve a trustee from liability for a breach of trust. Except as provided in Section 111.0035, this section does not prohibit the settlor, by the terms of the trust, from expressly: (1) relieving the trustee from a duty or restriction imposed by this subtitle or by common law; or (2) directing or permitting the trustee to do or not to do an action that would otherwise violate a duty or restriction imposed by this subtitle or by common law.

Id. at § 114.007(c). This states that a settlor can relieve a trustee from a specific duty or to allow a trustee to do or not do some action otherwise restricted by law. There are no express restrictions regarding bad faith, intentionally, or with reckless indifference to the beneficiary's interests *or* where the co-trustees acted with or without negligence where the trustee derived a profit.

However, Section 114.007(c) does provide that it applies "except as provided in Section 111.035..." Tex. Prop. Code § 114.007(c). Section 111.035

> (b) The terms of a trust prevail over any provision of this subtitle, except that the terms of a trust may not limit: ... (2) the applicability of Section 114.007 to an exculpation term of a trust; ... (4) a trustee's duty: ... (B) to act in good faith and in accordance with the purposes of the trust . . .

Tex. Prop. Code Arm. § 111.0035. Importantly, this provision states, in part, that a trust term may not limit a trustee's "duty to act in good faith and in accordance with the purposes of the trust." Tex. Prop. Code § 111.0035(b)(4)(B); *Martin v. Martin*, 363 S.W.3d

221, 2012 Tex. App. LEXIS 2146 (Tex. App.—Texarkana Mar. 20, 2012, no pet.) (even though a trust provision allowed the trustee to have conflicts of interest, the provision was not enforceable as a jury found that the trustee did not act in good faith). There is no statutory exception to this duty of good faith. The duty to act in good faith appears to apply at all times to every provision of a trust agreement.

Section 114.007(c) expressly discusses two types of powers clauses: those that eliminate a duty that generally exists and those that allow a trustee to do some act that ordinarily it cannot do. The first type of powers clause (eliminating a duty), would seemingly be enforceable even if the trustee failed to take some act in bad faith. A trustee cannot breach a duty, even in bad faith, that the trustee does not owe. For example, if a trust states that the trustee has no duty to investigate or raise claims against a prior trustee, can a trustee be liable for failing to do so in bad faith? What if the trustee knows that the prior trustee stole assets from the trust, is a friend or relative of the prior trustee, and intentionally refuses to sue the prior trustee for breaching fiduciary duties? In this circumstance, can a beneficiary hold the trustee liable despite the trust clause to the contrary?

As described in more detail below, at least one court has held that trustees can rely on a broad powers clause relieving them of the duty to sue prior trustees even where they a conflict of interest. *Benge v. Roberts,* No. 03-19-00719-CV, 2020 Tex. App. LEXIS 6335 (Tex. App.—Austin August 12, 2020, no pet. history). The court disagreed with the beneficiary's argument that the trustees could be held liable for proceeding while they had a conflict of interest, i.e., acting in bad faith or with intent:

> Benge contends that cause exists for the co-trustees' removal because they have "actual conflicts of interest" due to their participation in the Consolidated Matter, rendering them incapable of "impartially evaluat[ing]" whether to "continue to fight" Benge in the appeal of the Consolidated Matter and incur attorney's fees, depleting the Trust. She contends that removal of the co-trustees because of their conflict of interest is a distinct claim from one alleging that they have liability for Missi's alleged breaches of fiduciary duty and, therefore, is not subject to the exculpatory clause.
>
> We reject this argument because it directly conflicts with the broad language in the exculpatory clause relieving the co-trustees from any "duty, responsibility, [or] obligation" for the "acts, defaults, or omissions" of Missi. While ordinarily a successor trustee has the duty to "make a reasonable effort to compel a redress" of any breaches by a predecessor, see Tex. Prop. Code § 114.002(3)—which presumably would include impartially evaluating whether to "fight" Benge in the appeal of the Consolidated Matter—the exculpatory clause in the Trust relieves the co-trustees of that duty, as permitted by the Trust Code. *See id.* §§ 111.0035(b), 114.007(c). The co-trustees cannot as a matter of law have a conflict of interest due to allegedly lacking the ability to be "impartial" about deciding whether or how to redress Missi's alleged breaches when they have no duty to redress such breaches in the first instance.

Id.

The other type of powers clause is the type that allows a trustee to do something that it ordinarily cannot do. For example, a trust may allow a trustee to purchase property from the trust. The trustee ordinarily cannot enter into a self-dealing transaction with the trust, but this type of provision would allow a trustee to do so. However, the trustee would have to do so in good faith. So, if the trustee paid only half the market value for the property, or it did the transaction via a loan and provided a below market interest rate or with under secured collateral, then the trustee may not be in good faith and may not be able to take advantage of the powers clause.

E. Exculpatory Clauses May Not Impact Requests For Non-Monetary Relief

There is an argument that exculpatory clauses that relieve a trustee from liability (but not breach) may not prevent a beneficiary from seeking non-monetary relief. One commentator provides in part that: "Although an exculpatory clause may relieve the trustee from liability for damages, there may be other remedies available to the beneficiary, for example, removal of the trustee, enjoining the trustee from committing an improper act, of denial or reduction of the trustee's compensation." BOGERT, TRUSTS & TRUSTEES (SECOND ED. REV.) § 542. Another commentator states:

> The effect of a provision relieving the trustee of liability for a breach of trust is not to extend the trustee's powers but to limit the trustee's liability. Such a provision does not prevent an act or omission from being a breach of trust, even if it does relieve the trustee of liability for the consequences of committing a particular act or omission. The courts have sometimes recognized this distinction in determining, for example, that although a trustee who has committed a

> breach of trust is not subject to liability for the consequences, the trustee may nonetheless not be entitled to compensation with respect to any transaction that was in breach of trust...
>
> There is, however, reason to believe that the significance of the distinction between a provision enlarging the trustee's powers and an exculpatory provision may sometimes be dramatically overstated, if not in fact badly abused. It is sometimes said that because an exculpatory clause merely relieves the trustee of liability for committing a breach of trust, a trustee who does exactly what an exculpatory clause contemplated can (and perhaps should) be denied all compensation, or even removed, for having committed the very breach of trust contemplated in the exculpatory provision. Certainly the courts have (and should have) broad discretion in respect of trustee compensation and removal. Likewise, the commission of a breach of trust is (and should be) among those factors that a court may properly consider in deciding the appropriate level of trustee compensation or whether to remove a trustee. But particularly with respect to a narrowly drafted exculpatory provision that contemplates a particular breach of trust, the very inclusion of the provision in the governing instrument may well have been simply the settlor's way of inviting the trustee to do the act in question.

SCOTT AND ASCHER ON TRUSTS, §24.27.1 (5th Edition)

The Texas Trust Code provides many different forms of relief and remedies other than monetary damages. For example, Texas Trust Code section 114.008 allows a court to compel a trustee to act, enjoin a trustee from breaching a duty, compel a trustee to redress a prior breach, order a trustee to account, appoint a receiver, suspend the trustee, remove the trustee, reduce or deny compensation, void an act of the trustee, impose a lien or a constructive trust, or order any other appropriate relief. Tex. Prop. Code Ann. § 114.008. Trust Code Section 113.082 provides that a court may remove a trustee if: the trustee materially violated a term of the trust or attempted to do so and that resulted in a material financial loss to the trust; the trustee fails to make an accounting that is required by law or by the terms of the trust; or the court finds other cause for removal. *Id.* § 113.082. Court may reduce or deny a trustee compensation for breaches of duty. *Id.* §§ 114.008, 114.061. A plaintiff only needs to prove a breach (and not causation or damages) when she seeks to forfeit some portion of trustee compensation. *Longaker v. Evans*, 32 S.W.3d 725, 733 n.2 (Tex. App.—San Antonio 2000, pet. withdrawn). Texas Trust Code section 114.064 provides: "In any proceeding under this code the court may make such award of costs and reasonable and necessary attorney's fees as may seem equitable and just." *Id.* § 114.064. The Texas Trust Code allows for judicial approval, declarations, and instructions regarding the administration of a trust. Tex. Prop. Code Ann. §115.001. The Texas Civil Practice and Remedies Code also allows a court to declare the rights or legal relations regarding a trust and to direct a trustee to do or abstain from doing particular acts or to determine any question arising from the administration of a trust. Tex. Civ. Prac. & Rem. Code Ann. § 37.005.

Thus, depending on the wording of the trust, a beneficiary may be able to introduce evidence that the trustee breached a duty even if an exculpatory clause protects the trustee from liability for actual damages for the breach. *See Frank N. Ikard, Jr., Exculpatory Clauses, Trial of a Fiduciary Litigation Case*, State Bar of Texas, 2009.

F. Procedural Issues In Litigating Exculpatory Clauses

There are procedural differences between general exculpatory clauses and powers clauses. An exculpatory clause is an affirmative defense in that a defendant/trustee does not argue that it has not breached a fiduciary duty, it argues that is it relieved from any liability for such a breach. *Kohlhausen v. Baxendale*, No. 01-15-00901-CV, 2018 Tex. App. LEXIS 1828 (Tex. App.—Houston [1st Dist.] March 13, 2018, no pet.) (general exculpatory clause is an affirmative defense). It assumes that the plaintiff can prove all of the elements of a breach of fiduciary duty claim and should prevail because of this independent reason. David F. Johnson, *Can a Party File a No-Evidence Motion for Summary Judgment Based upon an Inferential Rebuttal Defense?*, 53 BAYLOR L. REV. 763 (2001). One commentator describes an affirmative defense as follows:

> An avoidance denial, more commonly called an affirmative defense, is not a denial of an element of the plaintiff's claim; rather, it sets forth an independent reason why the plaintiff should not recover even though all of the elements of the plaintiff's claim may be established. 30Link to the text of the note An affirmative defense allows a defendant to avoid liability for a plaintiff's claim although all of the plaintiff's claim's elements are proven. Examples of affirmative defenses are: (1) a statute of limitations, (2)

> proportionate responsibility or contributory negligence, and (3) estoppel. In other words, even though a party may be able to establish every element of his claim or defense, there is some independent reason that the party should not be entitled to recover under his claim or be protected by his defense.

Id. at 769 (internal citations omitted).

Importantly, "At trial the party alleging an affirmative defense has the burden of persuasion and production to support such." *Id.* Once again, the commentator states:

> The burden of proof has two separate components. First, the burden of proof means the burden of persuasion, i.e., the burden to persuade the trier of fact that evidence supports a proposition. This burden of persuasion remains with the same party throughout the trial and never shifts. Secondly, the burden of proof means the burden of production, i.e., the burden to go forward and produce sufficient evidence in order to meet a prima facie case. The burden of production can shift back and forth between the parties depending upon the evidence that is produced. Normally, the burden of persuasion and the burden of production both fall on the same party at the beginning of a trial, and the burden of persuasion does not shift; however, the burden of production may shift back and forth as each side produces evidence.

Id. at 774-75.

A party asserting an affirmative defense, like an exculpatory clause, has the duty to plead that defense, submit evidence to support it, and make sure that there is a submission in the charge to support it. *Id.* An affirmative defense can be its own question in the charge or can be submitted as an instruction. *Id.* Moreover, the party wanting the affirmative defense submitted has the burden to request, in substantially correct wording, a charge question or instruction. Tex. R. Civ. P. 278-79. If the party fails to submit a question or instruction, and it is not otherwise partially submitted, then the party waives the defense. Tex. R. Civ. P. 279. If the defense is partially submitted, then the parties can expressly request that the court find the omitted elements or such elements will be presumed found in favor of the judgment. *Id.*

Further, a party asserting an exculpatory clause can file a traditional motion for summary judgment and argue that it is entitled to judgment as a matter of law because the uncontradicted evidence attached to the motion proves the application of the exculpatory clause. *See Goughnour v. Patterson*, No. 12-17-00234-CV, 2019 Tex. App. LEXIS 1665 (Tex. App.—Tyler March 5, 2019, pet. denied) (sustaining summary judgment for a trustee on an exculpatory clause defense where the trustee produced evidence that he did not act with gross negligence); *Kohlhausen v. Baxendale*, 2018 Tex. App. LEXIS 1828 ("A trustee may file a traditional motion for summary judgment establishing the exculpatory clause as an affirmative defense.").

However, because it is a defense upon which the defendant has the ultimate burden of proof (burden of production and persuasion), the trustee cannot file a no-evidence motion on an exculpatory clause defense. Tex. R. Civ. P. 166a(i). The no-evidence summary judgment rule states, and Texas courts have held, that a party is not allowed to file a no-evidence motion for summary judgment based upon a claim that it is allocated the burden of proof, i.e., that party's own affirmative defense. *Id.*

A powers clause defense, however, is much more akin to an inferential rebuttal defense. An inferential defense is a hybrid between an affirmative defense and a direct denial defense:

> An inferential rebuttal issue is somewhere between a direct denial and an avoidance denial. It is a defensive theory that, if decided in the party's favor, would disprove by inference the existence of an essential element of one of the opposing party's grounds of recovery. Therefore, it is a defensive issue that is contradictory of the opposing party's claim. Basically, an inferential rebuttal issue is an independent set of facts that acts to disprove the existence of one of the elements of the opposing party's claim....
>
> Argumentative denials rather than direct negatives, because they disprove by establishing the truth of a positive factual theory that is inconsistent with the existence of some factual element of the ground of recovery or defense relied upon by the opponent; they are to be distinguished from a flat denial, a negative response to the disputed question.

Id. at 770 (internal citations omitted).

In a powers clause defense the trustee argues that the plaintiff's breach of fiduciary duty claim is not valid because one of the elements of the claim is missing due to a clause in the trust. For example, the trustee argues that the plaintiff's claim fails because the trustee had no duty to diversify assets due to a clause allowing the trustee to retain all assets originally funded into the trust.

An inferential rebuttal defense is procedurally different from an affirmative defense. *Id.* Most courts correctly hold that a party has no duty to plead an inferential rebuttal, and a general denial is sufficient to support it: "because the inferential rebuttal theory does not set forth independent grounds but rather attacks the opposing party's prima facie case, it is not an affirmative defense and Texas Rule of Civil Procedure 94 does not require a party to plead an inferential rebuttal before relying upon it in trial." *Id.* at 273. However, in an abundance of caution, a party should still plead inferential rebuttals defenses because of older precedent. *Id.* Moreover, a party is not entitled to a jury question on an inferential rebuttal defense, they can only request that such a defense be submitted as an instruction. *Id.*

Further, the burdens of production and persuasion are split for an inferential rebuttal defense:

> The party that is relying on the inferential rebuttal has the burden of production with regards to that theory and he is not automatically entitled to an inferential rebuttal instruction as he must present some evidence to support it. However, a party always has the burden of persuasion on each element of his claim during a trial. Therefore, as an inferential rebuttal defense attacks an element of a party's claim, the party that opposes the inferential rebuttal theory has the burden of persuasion on the inferential rebuttal theory once it has been raised by sufficient evidence. Stated another way, a party has the burden of persuasion on a negative issue when that negative issue is essential to establishing his cause of action, i.e., the accident was not caused by an act of God.

Id. at 775-76. Accordingly, a trustee has the initial burden of production to produce some evidence to support a powers clause defense, i.e., produce the trust document, and at that point the plaintiff has the burden of persuasion to convince the fact finder that that the evidence support's his or claim. Once the trustee does produce the trust document and evidence of a power clause defense, then the plaintiff has both the burden of production, which shifts to him or her, and the constant burden of persuasion.

In the charge, the trustee has the burden to submit an instruction, in substantially correct wording, that instructs the jury on the powers clause argument. If the trustee fails to submit such an instruction, then the trustee may waive such a defense.

Further, a trustee may file a traditional motion for summary judgment on a powers clause defense as it would attach evidence and take on the burden of proving such a defense as a matter of law. There is some dispute or argument as to whether a trustee can file a no-evidence motion for summary judgment on a powers clause defense. David F. Johnson, *Can a Party File a No-Evidence Motion for Summary Judgment Based upon an Inferential Rebuttal Defense?*, 53 BAYLOR L. REV. 763 (2001). As the commentator states:

> One argument is that Texas has long made too much out of inferential rebuttal theories, and that a party should be entitled to file a no-evidence motion upon any ground that the movant does not have the affirmative duty to plead under Texas Rule of Civil Procedure 94. Following this argument, a party should be able to file a no-evidence motion upon his own inferential rebuttal theory because: (1) he is not required to specifically plead it, (2) the theory contradicts an element of the nonmovant's claim or defense upon which the non-movant has the burden of production, and (3) the non-movant has the burden of persuasion to contradict the inferential rebuttal.

Id. at 777-778. However, that commentator ultimately argued that a defendant that had the initial burden of production on an inferential rebuttal defense could not file a no-evidence motion because the rule expressly states that only a party without the burden of proof can file such a motion. *Id.*

When that article was written in 2001, the no-evidence summary judgment rule was only four years old. Since that time, some courts have held that a party can rely on his own evidence in filing a no-evidence motion. There is an argument that if the plaintiff attaches the trust document to his or her petition or it is otherwise stipulated to, and the trust document contains the powers clause, then the initial burden of production is satisfied, and the trustee can file a no-evidence motion on the powers clause defense because the plaintiff has the ultimate burden of production and the initial burden of production has already shifted to the plaintiff.

For example, in *Kohlhausen v. Baxendale*, the trustee simply attached the trust document and the court of appeals held that the beneficiary had the burden to produce evidence to show that the trustee acted in bad faith. 2018 Tex. App. LEXIS 1828. The Court held: "After the trustee establishes the existence of the exculpatory clause, the burden shifts to the nonmovant to bring forward evidence negating its applicability." *Id.* at *6. The court held:

> In this case, Baxendale pleaded the exculpatory clause and attached a copy of the Will containing the clause to his summary judgment motion. The Will plainly states that Kelley is not liable for any acts or omissions so long as such conduct was done "in good faith and without gross negligence." Because Baxendale established that he was entitled to summary judgment as a matter of law on all of Kohlhausen's claims based on the plain language of the Will, Kolhausen was required to bring forth more than a scintilla of evidence creating a fact issue as to the applicability of the clause, i.e., evidence that Kelley's acts or omissions were done in bad faith or with gross negligence.

Id. at *7. It is questionable whether this analysis is correct regarding a general exculpatory clause, but it should be correct regarding a party filing a no-evidence motion on a powers clause inferential rebuttal defense.

X. LEGAL AUTHORITY ON PRESUMPTIONS

Because a self-dealing transaction raises a presumption of unfairness, it is important to understand the legal concept of a presumption.

A. General Authority On Presumptions

There are many presumptions in the law that allow a party to prove one fact and presume another. Johnson, *The Use of Presumptions in Summary Judgment Procedure in Texas and Federal Courts*, 54 BAYLOR L. REV. 605 (2002) (hereinafter "Johnson Article"). A presumption shifts the burden of production from the party relying upon it to the other party regarding the presumed fact. *Id.*

A presumption is a procedural rule of law that attaches specific probative value to particular facts. *See Forder v. State*, 456 S.W.2d 378, 387 (Tex. Crim. App. 1970); *Combined Am. Ins. Co. v. Blanton*, 163 Tex. 225, 353 S.W.2d 847, 849 (1962); *Vise v. Foster*, 247 S.W.2d 274, 277 (Tex. Civ. App.—Waco 1952, writ ref'd n.r.e.); *Fox v. Grand Union Tea Co.*, 236 S.W.2d 561, 563 (Tex. Civ. App.—Austin 1951, mand. overruled). A court has defined a presumption as a rule of law "by which the finding of a basic fact gives rise to the existence of the presumed fact, until the presumption is rebutted." *Hunter v. Palmer*, 988 S.W.2d 471, 473 (Tex. App.—Houston [1st Dist.] 1999, no pet.). Procedurally, a presumption is a device that guides a trial court in locating the burden of production at a particular time. *See Tex. A&M Univ. v. Chambers,* 31 S.W.3d 780, 784 (Tex. App.—Austin 2000, pet. denied); *Allred v. Harris County Child Welfare Unit,* 615 S.W.2d 803, 806 (Tex. Civ. App.—Houston [1st Dist.] 1980, writ ref'd n.r.e.). Some examples of presumptions are: (1) a child born in wedlock is presumed legitimate; *See Gravley v. Gravley*, 353 S.W.2d 333, 336 (Tex. Civ. App.—Dallas 1961, writ dism.'d w.o.j.); (2) agents are presumed to act in good faith on behalf of their principals; *See Reynolds v. Reynolds*, 224 S.W. 382, 384 (Tex. Civ. App.—Amarillo 1920, no writ); (3) a party is presumed to know the terms of a signed contract; *See Cities Serv. Oil Co. v. Brown,* 119 Tex. 242, 27 S.W.2d 115, 115 (1930); (4) a party is presumed to intend an act's consequences where he willfully committed it; *See Norris v. Stoneham*, 46 S.W.2d 363, 366 (Tex. Civ. App.—Eastland 1932, no writ); (5) a presumption arises that evidence would have been unfavorable to a party where he deliberately destroys it; *See Wal-Mart Stores, Inc. v. Middleton,* 982 S.W.2d 468, 470 (Tex. App.—San Antonio 1998, pet. denied); and (6) a person who dies is presumed not to have committed suicide. *See Reserve Life Ins. Co. v. Estate of Shacklett,* 412 S.W.2d 920, 922 (Tex. Civ. App.—Tyler 1967, writ ref'd n.r.e.).

A presumption is not evidence—it takes the place of evidence. *See Green v. State,* 893 S.W.2d 536, 545 (Tex. Crim. App. 1995) (Clinton, J., dissenting); *Republic Nat'l Life Ins. Co. v. Heyward*, 536 S.W.2d 549, 558 (Tex. 1976); *Empire Gas & Fuel Co. v. Muegge*, 135 Tex. 520, 143 S.W.2d 763, 767-68 (1940); *Still v. Liberty Leasing Co., Inc.*, 570 S.W.2d 93, 94 (Tex. Civ. App.—Waco 1978), aff'd, 582 S.W.2d 255 (Tex. Civ. App.—Houston [1st Dist.] 1979, no writ).

There are two types of presumptions: conclusive and rebuttable. A conclusive presumption cannot be rebutted, and once it is established, the opposing party cannot offer evidence to contradict it. *See Stooksberry v. Swann,* 85 Tex. 563, 22 S.W. 963, 966 (1893). A rebuttable presumption, however, can be rebutted by evidence. *See Davis v. Austin*, 632 S.W.2d 331, 333 (Tex. 1982); *Empire Gas & Fuel Co.*, 143 S.W.2d at 767; *Beken v. Hoffman*, 196 S.W.2d 548, 551 (Tex. Civ. App.—Galveston 1946, writ ref'd n.r.e.). It compels a factfinder to make a conclusion in the absence of any evidence to the contrary. *See Davis*, 632 S.W.2d at 333; *Farley v. M.M. Cattle Co.,* 529 S.W.2d 751, 756 (Tex. 1975); *Sanders v. Davila*, 593 S.W.2d 127, 130 (Tex. Civ. App.—Amarillo 1979, writ ref'd n.r.e.).

Where there is evidence to the contrary, the presumption simply disappears, and a factfinder cannot weigh it or treat it as evidence. *See White v. Smyth*, 147 Tex. 272, 214 S.W.2d 967, 974 (1948); *Dodson v. Watson*, 110 Tex. 355, 220 S.W. 771, 772 (1920); *Perry v. Breland*, 16 S.W.3d 182, 186 (Tex. App.—Eastland 2000, pet. denied); *Gant v. Dumas Glass & Mirror, Inc.*, 935 S.W.2d 202, 212 (Tex.

App.—Amarillo 1996, no writ); *Sanders*, 593 S.W.2d at 130. But where the party opposing the presumption fails to produce any contrary evidence, the presumption is established conclusively. *See Pete v. Stevens*, 582 S.W.2d 892, 894 (Tex. Civ. App.—San Antonio 1979, writ ref'd n.r.e.); *Mitchell v. Stanton*, 139 S.W. 1033, 1036 (Tex. Civ. App.—San Antonio 1911, writ ref'd). A party attempting to use a presumption must prove the underlying facts for the presumption with direct evidence. *See Easdon v. State*, 552 S.W.2d 153, 155 (Tex. Crim. App. 1977); *Pekar v. St. Luke's Episcopal Hosp.*, 570 S.W.2d 147, 150 (Tex. Civ. App.—Waco 1978, writ ref'd n.r.e.). Where the party opposing the presumption produces contrary evidence and the presumption disappears, the evidence that originally gave rise to the presumption still retains whatever independent evidentiary value that it has and may be considered by the factfinder in determining the issue. *See Employers' Nat'l Life Ins. Co. v. Willits*, 436 S.W.2d 918, 921 (Tex. Civ. App.—Amarillo 1968, writ ref'd n.r.e.); *Cimarron Ins. Co. v. Price*, 409 S.W.2d 601, 607 (Tex. Civ. App.—Austin 1966, writ ref'd n.r.e.).

The main reason for a presumption is its impact on the burden of proof. The burden of proof has two separate components. First, the burden of proof means the burden of persuasion, i.e., the burden to persuade the trier of fact that evidence supports a proposition. *See e.g., Clark v. Hiles,* 67 Tex. 141, 2 S.W. 356, 359 (1886); *Dwyer v. Cont'l Ins. Co.*, 57 Tex. 181, 182 (1882); *Azores v. Samson,* 434 S.W.2d 401, 405 (Tex. Civ. App.—Dallas 1968, no writ); *Walter E. Heller & Co. v. Allen,* 412 S.W.2d 712, 718-19 (Tex. Civ. App.—Corpus Christi 1967, writ ref'd n.r.e.); *Gooch v. Davidson*, 245 S.W.2d 989, 991 (Tex. Civ. App.—Amarillo 1952, no writ); *Finney v. Finney*, 164 S.W.2d 263, 266 (Tex. Civ. App.—Fort Worth 1942, writ ref'd w.o.j.). This burden of persuasion generally stays on the same party throughout the trial and never shifts. *See Grieger v. Vega*, 153 Tex. 498, 271 S.W.2d 85, 90 (1954); Walker v. Money, 132 Tex. 132, 120 S.W.2d 428, 431 (1938). Secondly, the burden of proof means the burden of production, i.e., the burden to go forward and produce sufficient evidence in order to meet a prima facie case. *See e.g., Ellsworth v. Ellsworth*, 151 S.W.2d 628, 633 (Tex. Civ. App.—El Paso 1941, writ ref'd); *Cameron Compress Co. v. Kubecka*, 283 S.W. 285, 286 (Tex. Civ. App.—Austin 1926, writ ref'd); *Producers' Oil Co. v. State*, 213 S.W. 349, 353 (Tex. Civ. App.—San Antonio 1919, no writ). Prima facie evidence is evidence that, until its effect is overcome by other evidence, will suffice as proof of a fact in issue. *See Dodson v. Watson,* 110 Tex. 355, 220 S.W. 771, 772 (1920). The burden of production can shift back and forth between the parties depending upon the evidence that is produced. *See Tex. & Pac. Ry. Co. v. Moore*, 329 S.W.2d 293, 297 (Tex. Civ. App.—El Paso 1959, writ ref'd n.r.e.); *Ellsworth*, 151 S.W.2d at 628; *Producers' Oil Co.,* 213 S.W. at 353. Normally, one party will initially bear both the burden of persuasion and the burden of production, and where the burden of persuasion does not shift to the other party, the burden of production may shift back and forth as each side produces evidence. *See Simpson v. Home Petroleum Corp.*, 770 F.2d 499, 503 (5th Cir. 1985); *Tex. & Pac. Ry. Co.*, 329 S.W.2d at 297; *Producers' Oil Co.,* 213 S.W. at 353.

Normally, once a presumption is established it only shifts the burden of production, and places the burden on the opposite party to produce evidence to the contrary. *See GMC v. Saenz*, 873 S.W.2d 353, 359 (Tex. 1993); *Combined Am. Ins. Co. v. Blanton,* 163 Tex. 225, 353 S.W.2d 847, 849 (1962); *Moore v. Tex. Bank & Trust Co.*, 576 S.W.2d 691, 695 (Tex. Civ. App.—Eastland 1979), *rev'd on other grounds*, 595 S.W.2d 502 (Tex. 1980); *DeMuth v. Head*, 378 S.W.2d 389, 390 (Tex. Civ. App.—Dallas 1964, writ ref'd n.r.e.); *Amarillo v. Attebury*, 303 S.W.2d 804, 806 (Tex. Civ. App.—Amarillo 1957, no writ). A presumption places on the opposing party the burden to produce sufficient evidence to justify a finding that is contrary to the presumed fact. *See Empire Gas & Fuel Co. v. Muegge,* 135 Tex. 520, 143 S.W.2d 763, 767-68 (1940); *Gant v. Dumas Glass & Mirror, Inc.,* 935 S.W.2d 202, 212 (Tex. App.—Amarillo 1996, no writ); *DeMuth*, 378 S.W.2d at 390. It generally does not, however, shift the burden of persuasion to the other side. *See DeMuth,* 378 S.W.2d at 390; *Nat'l Aid Life Ass'n v. Driskill*, 138 S.W.2d 238, 242 (Tex. Civ. App.—Eastland 1940, no writ). Thereafter, when the party opposing the presumption produces contrary evidence that is sufficient to support a finding contrary to the presumption, the presumption is rebutted and disappears, and the burden of production shifts back to the party originally relying upon the presumption. *See First Nat'l Bank of Mission v. Thomas,* 402 S.W.2d 890, 893 (Tex. 1965); *Southland Life Ins. Co. v. Greenwade*, 138 Tex. 450, 159 S.W.2d 854, 857 (1942); Gant, 935 S.W.2d at 212; *Allred v. Harris County Child Welfare Unit,* 615 S.W.2d 803, 806 (Tex. Civ. App.—Houston [1st Dist.] 1980, writ ref'd n.r.e.).

B. Burden Shifting for Presumption of Unfairness

There is authority, however, that regarding the presumption of unfairness for fiduciary self-interested transactions, that both the burden of persuasion and production shift to the fiduciary. The Texas Pattern Jury Charge states: "In fiduciary duty cases, however, the presumption of unfairness operates to shift both the burden of producing evidence and the burden of persuasion to the fiduciary." Tex. Pat. J. Ch. 232.2

cmt. (citing *Sorrell v. Elsey*, 748 S.W.2d 584, 586 (Tex. App.—San Antonio 1988, writ denied); *Miller*, 700 S.W.2d at 945–46; *Fillion v. Troy*, 656 S.W.2d 912, 914 (Tex. App.—Houston [1st Dist.] 1983, writ ref'd n.r.e.); *Cole v. Plummer*, 559 S.W.2d 87, 89 (Tex. App.—Eastland 1977, writ ref'd n.r.e.)). In *Sorrell,* the court stated: "the burden cast upon the party claiming validity of the transaction not only includes presenting evidence but securing findings of the "material issues—those being whether [the validity claiming party] had made reasonable use of the confidence placed in him and whether the transactions were ultimately fair and equitable to [the complaining party]." *Sorrell v. Elsey*, 748 S.W.2d at 586. More recently, a court has held: "[t]his presumption of unfairness shifted both the burden of producing evidence and the burden of persuasion to Douglas." *Musquiz v. Keesee*, No. 07-15-00461-CV, 2017 Tex. App. LEXIS 9214 (Tex. App.—Amarillo Sep. 28, 2017, pet. denied).

Further, in *Moore v. Texas Bank & Trust Co.*, the court of appeals held:

> Once a fiduciary or confidential relationship is established, a presumption arises that a gift from the principal to the fiduciary is unfair and invalid. *Stephens County Museum, Inc. v. Swenson*, supra. The effect of the presumption is to place upon the fiduciary the burden of going forward with evidence from which the jury could find the nonexistence of the presumed fact. 1 McCormick & Ray, Texas Law of Evidence § 53 (2d ed. 1956). See Stephens County Museum, Inc. v. Swenson, supra. If the fiduciary succeeds, a fact issue is presented; if not, an instructed verdict should be rendered against him. The general rule in Texas is that the sole effect of a presumption is to fix the burden of producing evidence and does not affect the burden of persuasion. 1 McCormick & Ray, § 53, supra. We hold that the fiduciary has the burden of persuasion on the issue of whether the transaction was ultimately fair and equitable. *See Archer v. Griffith*, supra.

576 S.W.2d 691, 695 (Tex. App.—Eastland 1979), *rev'd on other grounds*, 595 S.W.2d 502 (Tex. 1980) (citing *Archer v. Griffith*, 390 S.W.2d 735 (Tex.1964)). *See also National Plan Administrators, Inc. v. National Health Ins. Co.*, No. 03-03-00306-CV, 2004 Tex. App. LEXIS 10257 (Tex. App.—Austin September 10, 2004, pet. denied) ("The burden cast upon the fiduciary not only includes presenting evidence but securing findings of the material issues--whether the fiduciary had made reasonable use of the confidence placed in him and whether the transactions were ultimately fair and equitable.").

According to this authority the presumption of unfairness is a super presumption that shifts both the burden of production and persuasion to the fiduciary. But it is still a rebuttable presumption, and a fiduciary can produce evidence to rebut the presumption though it will continue to have the burden of persuasion to prove the fairness. In other words, in a normal presumption situation, a plaintiff has the burden of proof (production and persuasion) on its claim. The plaintiff supports its claim, or some element of its claim, by using a presumption: plaintiff proves X, which equals Y. The burden of production then switches to the defendant to prove that Y does not exist. If the defendant does so, then the presumption falls away and the plaintiff has the burden to produce evidence of Y and to convince the finder of fact that Y existed.

In the super presumption of unfairness, a plaintiff has the burden to prove breach of fiduciary duty: the defendant owes a fiduciary duty, the defendant breached the duty, that breach caused some harm to the plaintiff or benefit to the defendant. The plaintiff establishes breach by proving that a self-interested transaction occurred. If the plaintiff proves such a transaction, then the defendant has the burden to produce evidence of the fairness of the transaction and also persuade the finder of fact that the transaction was fair. If the defendant produces evidence of fairness, the presumption does not fall away; rather, the defendant still has the burden to persuade the finder of fact that the transaction was fair.

There is authority that the presumption of unfairness is not a super presumption; but just a normal presumption. *Fielding v. Tullos*, No. 09-17-00203-CV, 2018 Tex. App. LEXIS 7136, 2018 WL 4138971 (Tex. App.—Beaumont Aug. 20, 2018, no pet.). The court held that the presumption is a rebuttable presumption that is extinguished with the offering of contrary evidence, not one that shifted the ultimate burden of proof of unfairness:

> Fielding had the burden of establishing that a fiduciary relationship existed between Tullos and Charles. Once a contestant presents evidence of a fiduciary relationship, a presumption of undue influence may arise and the other party then bears the burden to come forward with evidence to rebut the presumption. Such a rebuttable presumption shifts the burden of producing evidence to the party against which it operates. Once evidence contradicting the presumption has been offered, the presumption is extinguished. *Id.* The case then proceeds as if no presumption ever existed. A rebuttable

> presumption does not shift the ultimate burden of proof. The Plaintiff acknowledges the Estate did not state a claim for breach of a fiduciary duty, however the Plaintiff argues that a fiduciary relationship existed between Charles and Tullos, the effect of which is to shift the burden of proof onto Tullos to disprove undue influence. Assuming without deciding that Tullos owed Charles a fiduciary duty, it would not shift the ultimate burden of proof in the case to Tullos, but it would invoke the application of a rebuttable presumption. Tullos could rebut the presumption by coming forward with evidence showing the fairness of the transaction. If Tullos's summary judgment evidence contradicted the presumption, the presumption was extinguished. Plaintiff retained the ultimate burden of proof on her claims.

Id. (internal citation omitted). *See also Cardona v. Cardona*, No. 09-19-00118-CV, 2020 Tex. App. LEXIS 3644 (Tex. App.—Beaumont December 2, 2019, no pet.); *Lee v. Kline*, No. 14-98-00268-CV,2000 Tex. App. LEXIS 290, 2000 WL 19227 (Tex. App.—Houston [14th Dist.] Jan. 13, 2000, pet. denied) (after defendant offered evidence of fairness, the presumption disappeared and the defendant had no duty to obtain a jury finding on fairness).

In *Estate of Grogan*, the court seemed to equate the presumption of unfairness with the presumption of undue influence:

> This Court has not expressly applied this presumption in the context of a will contest, though we have recognized that "Texas appellate courts have held that when a fiduciary transacts with the principle [sic] or accepts a gift or bequest from the principal, a burden is placed on the fiduciary to demonstrate the fairness of the transaction." Nevertheless, the presumption is rebuttable. "Once evidence contradicting the presumption has been offered, the presumption is extinguished," and "[t]he case then proceeds as if no presumption ever existed." In other words, the rebuttable presumption shifts only the burden of production and "does not shift the ultimate burden of proof."

595 S.W.3d 807 (Tex. App.—Texarkana 2019, no pet.) (internal citations omitted).

One could argue that these opinions are wrong or that they deal with a different presumption: the presumption of undue influence based on a fiduciary duty.

At least one court has disagreed with these opinions and held that the presumptions are the same and that it is super presumption. In *In re Estate of Klutts*, the court held:

> While the Beaumont court in *Fielding* did hold that the presumption is a rebuttable presumption that is extinguished with the offering of contrary evidence, not one that shifted the ultimate burden of proof of unfairness, none of the cases cited in Fielding regarding this burden-shifting proposition involved undue influence in a fiduciary self-dealing situation. Accordingly, we are unpersuaded by Michael's argument.
>
> To the contrary, *Danford* and case law from the supreme court and other courts of appeals reflect that in situations involving self-dealing in fiduciary or confidential relationships, a presumption of unfairness arises that shifts both the burden of production and the burden of persuasion to the fiduciary seeking to uphold the transaction. *See Moore*, 595 S.W.2d at 509; *see also Stephens Cty. Museum, Inc. v. Swenson*, 517 S.W.2d 257, 260 (Tex. 1974) (observing that when a fiduciary relationship existed between sisters and their brother, who was operating under their power of attorney and who was also a director of the museum to which the sisters had made a contribution that they later sought to set aside, "[u]nder such conditions, equity indulges the presumption of unfairness and invalidity, and requires proof at the hand of the party claiming validity and benefits of the transaction that it is fair and reasonable"); *Archer v. Griffith*, 390 S.W.2d 735, 740 (Tex. 1964) (noting that after respondent "established that the conveyance was executed and delivered during the existence of the attorney-client relationship, the burden was on petitioner to show that his acquisition of the interest conveyed by the deed was fair, honest[,] and equitable"); *Int'l Bankers Life Ins. Co. v. Holloway,* 368 S.W.2d 567, 576 (Tex. 1963) ("Contracts between a corporation and its officers and directors are not void but are voidable for unfairness and fraud with the burden upon the fiduciary of proving fairness."); *McAuley v. Flentge*, No. 06-15-00051-CV, 2016 Tex. App. LEXIS 6039, 2016 WL 3182667, at *7

(Tex. App.—Texarkana June 8, 2016, pet. denied) (mem. op.) (citing *Swenson,* 517 S.W.2d at 260; Archer, 390 S.W.2d at 740); *Jordan v. Lyles,* 455 S.W.3d 785, 792 (Tex. App.—Tyler 2015, no pet.) (op. on reh'g) ("Even in the case of a gift between parties with a fiduciary relationship, equity indulges the presumption of unfairness and invalidity, and requires proof at the hand of the party claiming validity of the transaction that it is fair and reasonable."). Thus, we decline Michael's invitation to follow *Fielding*.

No. 02-18-00356-CV, 2019 Tex. App. LEXIS 11063 (Tex. App.—Fort Worth December 19, 2019, settled by agr.). So, Texas currently has authority that the presumption of unfairness is a super presumption and some authority that it is just a regular presumption.

XI. SUMMARY JUDGMENT PROCEDURE: THE PARTIES' BURDENS

A. Traditional Summary Judgment

The traditional summary judgment movant moves for summary judgment as a matter of law under Texas Rule of Civil Procedure 166a(a) and (b). A party moving for traditional summary judgment meets its burden by proving that there is no genuine issue of material fact and it is entitled to judgment as a matter of law. *KMS Retail Rowlett, LP v. City of Rowlett,* No. 17-0850, 2019 Tex. LEXIS 463 (Tex. May 17, 2019); *First United Pentecostal Church of Beaumont v. Parker*, 514 S.W.3d 214 (Tex. 2017). It has the burden of production and persuasion in a summary judgment proceeding, and the court must resolve against the movant all doubts as to the existence of a genuine issue of fact so that all evidence favorable to the nonmovant will be taken as true. *Provident Life Ins. Co. v. Knott,* 128 S.W.3d 211, 215-16 (Tex. 2003); *Park Place Hosp. v. Estate of Milo*, 909 S.W.2d 508, 510 (Tex. 1995); *see also Kassen v. Hatley*, 887 S.W.2d 4, 8 n.2 (Tex. 1994). Further, the court must indulge every reasonable inference in favor of the nonmovant and resolve doubts in his favor. *KMS Retail Rowlett, LP v. City of Rowlett,* No. 17-0850, 2019 Tex. LEXIS 463 (Tex. May 17, 2019); *Park Place Hosp.*, 909 S.W.2d at 510.

The nonmovant is not required to respond to the movant's motion if the movant fails to carry his or her burden. *Amedisys, Inc. v. Kingwood Home Health Care, LLC*, 437 S.W.3d 507, 511-12 (Tex. 2014) ("[I]f the movant does not satisfy its initial burden, the burden does not shift and the non-movant need not respond or present any evidence."); *State v. Ninety Thousand Two Hundred Thirty-Five Dollars and No Cents in U.S. Currency ($90,235)*, 390 S.W.3d 289, 292 (Tex. 2013); *M.D. Anderson Hosp. & Tumor Inst. v. Willrich*, 28 S.W.3d 22, 23 (Tex. 2000). This is because traditional "summary judgments must stand or fall on their own merits, and the non-movant's failure to answer or respond cannot supply by default the summary judgment proof necessary to establish the movant's right" to judgment. *McConnell v. Southside Indep. Sch. Dist.*, 858 S.W.2d 337, 343 (Tex. 1993). Thus, a non-movant who fails to raise any issues in response to a summary judgment motion may still challenge, on appeal, "the legal sufficiency of the grounds presented by the movant." *Id.*

If the movant has established a right to a summary judgment, the burden shifts to the nonmovant. *Katy Venture, Ltd. v. Cremona Bistro Corp.,* 469 S.W.3d 160, 163 (Tex. 2015); *Clarendon Nat'l Ins. Co. v. Thompson*, 199 S.W.3d 482, 486-487 (Tex. App.—Houston [1st Dist.] 2006, no pet.). The nonmovant must then respond to the summary judgment motion and present to the trial court summary judgment evidence raising a fact issue that would preclude summary judgment. *Id.* If the non-movant does so, summary judgment is precluded. *See Clarendon Nat'l Ins. Co. v. Thompson,* 199 S.W.3d at 486-487. If he does not do so, then the trial court should grant summary judgment. *Amedisys, Inc. v. Kingwood Home Health Care, LLC*, 437 S.W.3d 507, 517 (Tex. 2014).

In *Yancy v. United Surgical Partners International, Inc.*, the Texas Supreme Court stated that once the non-movant files evidence, the reviewing court must consider all of the evidence to determine if a reasonable juror could find a fact issue: "When reviewing a summary judgment, we 'must examine *the entire record* in the light most favorable to the nonmovant, indulging every reasonable inference and resolving any doubts against the motion.'" 236 S.W.3d 778, 782 (Tex. 2007).

B. No-Evidence Motion

The trial court's review of a no-evidence summary judgment filed under Texas Rule of Civil Procedure 166a(i) differs from that of a traditional summary judgment.

Under the no-evidence motion, the movant does not have the burden to produce evidence; the burden is on the non-movant. The no-evidence non-movant has the initial burden to present sufficient evidence to warrant a trial. *KMS Retail Rowlett, LP v. City of Rowlett,* No. 17-0850, 2019 Tex. LEXIS 463 (Tex. May 17, 2019); *Fort Worth Osteopathic Hosp., Inc. v. Reese*, 148 S.W.3d 94, 99 (Tex. 2004); *Walmart Stores v. Rodriguez*, 92 S.W.3d 502 (Tex. 2002); *Robinson v. Warner-Lambert & Old Corner Drug*, 998 S.W.2d 407 (Tex. App.—Waco 1999, no pet.); *Lampasas v. Spring Center, Inc.*, 988 S.W.2d 428, 432 (Tex. App.—Houston [14th Dist.] 1999, no pet.). When a sufficient no-evidence motion is filed and served, the various burdens are split – the burden of

production (burden to produce evidence) is placed on the non-movant, however, the burden of persuasion (burden to persuade the court that no genuine issue of fact exists) is on the movant. David F. Johnson, *Can A Party File a No-Evidence Motion for Summary Judgment Based Upon an Inferential Rebuttal Defense*? 53 BAYLOR L. REV. 762, 767-68 (2001). Under this standard, as the Supreme Court stated:

> A motion for summary judgment must be granted if, after adequate time for discovery, the moving party asserts that there is no evidence of one or more specified elements of a claim or defense on which the adverse party would have the burden of proof at trial and the respondent produces no summary judgment evidence raising a genuine issue of material fact on those elements.

LMB, Ltd. v. Moreno, 201 S.W.3d 686, 687 (Tex. 2006); *Sudan v. Sudan*, 199 S.W.3d 291 (Tex. 2006). A court must review the summary judgment evidence in the light most favorable to the non-movant, disregarding all contrary evidence and inferences. *Timpte Indus. Inc. v. Gish*, 286 S.W.3d 306, 310 (Tex. 2009); *Walmart Stores v. Rodriguez*, 92 S.W.3d 502 (Tex. 2002); *Morgan v. Anthony*, 27 S.W.3d 928, 929 (Tex. 2000). The inferences that are in favor of the non-movant trump all other inferences that may exist. *Orangefield I.S.D. v. Callahan & Assocs.*, No. 09-00-171-CV, 2001 Tex. App. LEXIS 5066 (Tex. App.—Beaumont July 26, 2001, no pet.) (not design. for pub.); *Tucco Inc. v. Burlington Northern R.R. Co.*, 912 S.W.2d 311 (Tex. App.—Amarillo 1995), *aff'd as modified*, 960 S.W.2d 629 (Tex. 1997).

A no-evidence motion for summary judgment must be granted if the respondent fails to bring forth evidence to raise a genuine issue of material fact on the challenged element. *First United Pentecostal Church of Beaumont v. Parker*, 514 S.W.3d 214 (Tex. 2017); *KCM Fin. LLC v. Bradshaw,* 457 S.W.3d 70 (Tex. 2015); *Fort Worth Osteopathic Hosp., Inc. v. Reese*, 148 S.W.3d at 99. If the nonmovant presents more than a scintilla of evidence to support the challenged ground, the court should deny the motion. *Forbes, Inc. v. Granada Biosciences*, 124 S.W.3d 167, 172 (Tex. 2003); *King Ranch v. Chapman,* 118 S.W.3d 742, 750 (Tex. 2003); *Wal-Mart Stores, Inc. v. Rodriguez*, 92 S.W.3d 502, 506 (Tex. 2002). A genuine issue of material fact exists if the nonmovant produces more than a scintilla of evidence establishing the existence of the challenged element. *Ford Motor Co. v. Ridgway*, 135 S.W.3d 598 (Tex. 2004); *Morgan v. Anthony*, 27 S.W.3d 928 (Tex. 2000). Less than a scintilla of evidence exists when the evidence is so weak as to do no more than create a mere surmise or suspicion of fact. *KMS Retail Rowlett, LP v. City of Rowlett,* No. 17-0850, 2019 Tex. LEXIS 463 (Tex. May 17, 2019); *Special Car Servs. v. AAA Texas, Inc.*, No. 14-98-00628-CV, 1999 Tex. App. LEXIS 4200 (Tex. App.—Houston [14th Dist.] June 3, 1999, no pet.) (not design. for pub.); *Medrano v. City of Pearsall*, 989 S.W.2d 141, 143 (Tex. App.—San Antonio 1999, no pet.).

More than a scintilla of evidence exists when the evidence rises to a level that would enable reasonable and fair-minded people to differ in their conclusions. *Ford Motor Co. v. Ridgway*, 135 S.W.3d 598. On the other hand, if "the evidence offered to prove a vital fact is so weak as to do no more than create a mere surmise or suspicion of its existence, the evidence is no more than a scintilla and, in legal effect, is no evidence." *Ford Motor Co. v. Ridgway*, 135 S.W.3d at 598.

For clarification of the terms "genuine" and "material fact," as they are used in Rule 166a(i), Texas courts have turned to federal law. *Isbell v. Ryan*, 983 S.W.2d 335, 338 (Tex. App.—Houston [14th Dist.] 1998, no pet.). Materiality is a criterion for categorizing factual disputes in relation to the legal elements of the claim. The materiality determination rests on the substantive law and those facts that are identified by the substantive law as critical are considered material. Stated differently, "[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). A material fact issue is genuine if the evidence is such that a reasonable jury could find the fact in favor of the non-moving party. If the evidence simply shows that some metaphysical doubt exists as to a challenged fact, or if the evidence is not significantly probative, the material fact issue is not genuine.

Both direct and circumstantial evidence may be used to establish any material fact. *Lozano v. Lozano*, 52 S.W.3d 141, 149 (Tex. 2001); *Ford Motor Co. v. Ridgway*, 135 S.W.3d at 598. To raise a genuine issue of material fact, however, the evidence must transcend mere suspicion. *Ford Motor Co. v. Ridgway*, 135 S.W.3d at 598. Evidence that is so slight as to make any inference a guess is in legal effect no evidence. *Id.*

C. Scope of Review For Summary Judgment Motions

1. Scope of Review For Traditional Motions for Summary Judgment

The scope of review refers to what evidence a court can examine in determining the merits of a motion for summary judgment. In other words, can the trial court, and on appeal the court of appeals, review evidence submitted by the movant, the non-movant, or both?

Regarding a traditional motion filed under Texas Rules of Civil Procedure 166a(b), the court should first review the evidence submitted by the movant to determine if the movant proved its entitlement to summary judgment as a matter of law. *City of Houston v. Clear Creek Basin Auth.*, 589 S.W.2d 671, 678 (Tex. 1979). Therefore, at that stage, the court can review the movant's evidence. If the movant meets its burden, the burden then shifts to the nonmovant to produce evidence to create a fact issue. *Id.* At this stage, the Texas Supreme Court stated that the reviewing court must consider all of the evidence to determine if a reasonable juror could find a fact issue: "When reviewing a summary judgment, we 'must examine *the entire record* in the light most favorable to the nonmovant, indulging every reasonable inference and resolving any doubts against the motion.'" *Yancy v. United Surgical Partners International, Inc.*, 236 S.W.3d 778, 782 (Tex. 2007).

Further, a court can review the nonmovant's evidence attached to its response against the nonmovant:

> Pasko also complains that the trial court improperly considered Pasko's own summary judgment evidence against him. Pasko argues that Schlumberger was not entitled to rely on his summary judgment evidence because Schlumberger did not serve it on Pasko at least twenty-one days prior to the hearing on Schlumberger's motion. See Tex. R. Civ. P. 166a(c) (requiring affidavits supporting a summary judgment motion to filed and served at least twenty-one days before the hearing on the motion). According to Pasko, Schlumberger was required to seek leave of court to submit new evidence less than twenty-one days before the hearing, and to reset the hearing to no sooner than twenty-one days after it filed its reply relying on Pasko's evidence. We disagree. Rule 166a(c) plainly provides for the court to consider evidence in the record that is attached either to the motion or a response. *Wilson v. Burford*, 904 S.W.2d 628, 629 (Tex. 1995). Schlumberger was allowed to rely on, and the trial court could consider, the evidence and pleadings Pasko filed.

Schlumberger Tech. Corp. v. Pasko, 544 S.W.3d 830, 835 (Tex. 2018).

The scope of review becomes broader once the parties file cross-motions for summary judgment. *Tarr v. Timberwood Park Owners Ass'n*, 556 S.W.3d 274, 278(Tex. 2018). When competing summary-judgment motions are filed, "each party bears the burden of establishing that it is entitled to judgment as a matter of law." *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 356 (Tex. 2000). In that instance, if "the trial court grants one motion and denies the other, the reviewing court should determine all questions presented" and "render the judgment that the trial court should have rendered." *Id.; see also Comm'rs Court of Titus Cty. v. Agan*, 940 S.W.2d 77, 81 (Tex. 1997) (requiring appellate courts to "review the summary judgment evidence presented by both sides" when making this inquiry); *Guynes v. Galveston Cty.*, 861 S.W.2d 861, 862 (Tex. 1993) (reviewing cross-motions for summary judgment where the facts were undisputed by "determining all legal questions presented"). When both parties file motions for summary judgment, the court may consider all of the summary judgment evidence filed by either party. *Comm'rs Court v. Agan,* 940 S.W.2d 77, 81 (Tex. 1997); *Rose v. Baker & Botts,* 816 S.W.2d 805, 810 (Tex. App.—Houston [1st Dist.] 1991, writ denied). When both motions are before it, the trial court may consider all of the evidence in deciding whether to grant either motion, and may rely upon one party's evidence to supply missing proof in the other party's motion. *DeBord v. Muller*, 446 S.W.2d 299, 301 (Tex. 1969); *United Food and Commercial Workers Int'l Union v. Wal-Mart Stores, Inc.*, No. 02-15-00374-CV, 2016 WL 6277370, *6 (Tex. App.—Fort Worth Oct. 27, 2016, pet. denied) ("Here, the parties filed cross-motions for summary judgment; therefore, we consider the entire record and determine whether there is more than a scintilla of probative evidence raising genuine issues of material fact on each element of the challenged claims and on all questions presented by the parties."); *Estate of Huffhines,* No. 02-15-00293-CV, 2016 WL 1714171, *5 (Tex. App.—Fort Worth Apr. 28, 2016, pet. denied) (same); *Russell v. Panhandle Producing Co.*, 975 S.W.2d 702, 708 (Tex. App.—Amarillo 1998, no pet); *Martin v. Harris Cnty. Appraisal Dist.*, 44 S.W.3d 190, 193 (Tex. App.—Houston [14th Dist.] 2001, pet. denied) (citing *City of Houston v. McDonald*, 946 S.W.2d 419, 420 (Tex. App.—Houston [14th Dist.] 1997, writ denied)); *see also Embrey v. Royal Ins. Co. of Am.*, 22 S.W.3d 414, 415-16 (Tex. 2000) ("When both sides move for summary judgment and the trial court grants one motion and denies the other, the reviewing court considers both sides' summary judgment evidence and determines all questions presented.").

For example, in *Farmers Texas County Mutual Insurance Company v. Griffin*, the court held: "On appeal, this Court considers all evidence accompanying both motions in determining whether to grant either party's motion." 868 S.W.2d 861, 863 (Tex. App.—Dallas 1993, writ denied); *see also Edinburg Consol. Indep. Sch. Dist. v. St. Paul Ins. Co.,* 783 S.W.2d 610, 612 (Tex. App.—Corpus Christi

1989, no writ); *Villarreal v. Laredo National Bank*, 677 S.W.2d 600, 605 (Tex. App.—San Antonio 1984, writ ref'd n.r.e.). So, by that plain wording, an appellate court can review evidence attached to a response to a cross motion to support a ground contained in a motion. For example, in *Dallas National Insurance Company v. Calitex Corp.*, the court reversed the denial of summary judgment on grounds that evidence submitted with the movant's response to a cross-motion for summary judgment supported the judgment sought in the movant's motion. 458 S.W.3d 210 (Tex. App.—Dallas 2015, no pet.).

2. Scope of Review For No-Evidence Motion for Summary Judgment

A party filing a no-evidence motion for summary judgment does not have to file any evidence with its motion. Is the scope of review the same as a traditional motion?

Texas Rule of Civil Procedure 166a(i) provides that "a party *without presenting summary judgment evidence* may move for summary judgment on the ground that there is no evidence . . ." Tex. R. Civ. P. 166a(i) (emphasis added). One view is that a court can only look to the summary judgment evidence offered by the non-movant, and that any evidence offered by the movant should be disregarded for all purposes. There is language in opinions from the Eastland Court of Appeals that may support this view. *Padron v. L&M Props.*, No. 11-02-001510-CV, 2003 Tex. App. LEXIS 1229 (Tex. App.—Eastland February 6, 2003, no pet.); *Herod v. Baptist Found of Texas*, 89 S.W.3d 689 (Tex. App.—Eastland 2002, no pet.); *Kelly v. LIN TV of Texas*, 27 S.W.3d 564 (Tex. App.—Eastland 2000, pet. denied); *Hight v. Dublin Veterinary Clinic*, 22 S.W.3d 614 (Tex. App.—Eastland 2000, pet. denied). These cases dealt with a movant arguing that its evidence proves that the non-movant does not have any evidence to support a challenged element. The court found that the movant could not do so.

Another view is that a court may consider all summary judgment evidence in determining whether a fact issue exists — even the movant's evidence. *Louck v. Olshan Found. Repair Co.*, 14-99-00076-CV, 2000 Tex. App. LEXIS 5337 (Tex. App.—Houston [14th Dist.] August 10, 2000, pet. denied) (not desig. for pub.); *Saenz v. Southern Union Gas. Co.*, 999 S.W.2d 490 (Tex. App.—El Paso 1999, pet. denied); *Jackson v. Fiesta Mart, Inc.*, 979 S.W.2d 68, 70 (Tex. App.—Austin 1998, no pet.). This view provides that the movant's evidence is nonetheless before the court and, if applicable, can be used to support the non-movant's position. However, those courts would not review the movant's evidence to support the movant's position that no evidence existed to support the non-movant element. The movant's evidence could only be used against it.

The Texas Supreme Court has previously implied that this view is correct. In *Binur v. Jacobo*, the Court stated: "Similarly, if a motion brought solely under subsection (i) attaches evidence, that evidence should not be considered unless it creates a fact question. . ." 135 S.W.3d 646 (Tex. 2004). This language would support the position that if a movant files evidence with a no-evidence motion, the evidence should be disregarded unless it helps the non-movant and creates a fact issue.

Following *Jacobo*, several courts of appeals similarly stated that they would ignore evidence that a movant attached or referred to in its no-evidence motion for summary judgment unless the evidence created a fact issue. *See, e.g., Hernandez v. Select Med. Corp.*, 2013 Tex. App. LEXIS 8930 (Tex. App.—Eastland July 18, 2013, no pet.); *Davis v. Dillard's Dep't Store, Inc.*, No. 11-06-00027-CV, 2008 Tex. App. LEXIS 3201 (Tex. App.—Eastland May 1, 2008, no pet.); *Poteet v. Kaiser*, No. 2-06-397-CV, 2007 Tex. App. LEXIS 9749, fn. 6 (Tex. App.—Fort Worth Dec. 13, 2007, pet. denied); *Southtex 66 Pipeline Co. v. Spoor*, 238 S.W.3d 538 (Tex. App.—Houston [14th Dist.] 2007, pet. denied); *Dunlap-Tarrant v. Association Cas. Ins. Co.*, 213 S.W.3d 452, 453 (Tex. App.—Eastland 2006, no pet.); *DeLeon v. DSD Devel. Inc.*, 2006 Tex. App. LEXIS 7799 (Tex. App.—Houston [1st Dist] August 31, 2006, pet. denied); *Green v. Lowe's Home Centers, Inc.*, 199 S.W.3d 514, 518 (Tex. App.—Houston [1st Dist.] 2006, pet denied); *Seaway Prods. Pipeline Co. v. Hanley*, 153 S.W.3d 643, 650 n.7 (Tex. App.—Fort Worth 2004, no pet.). One court stated thusly:

> In a no-evidence motion for summary judgment, the non-movant bears the burden of producing competent summary judgment evidence; therefore in this case, Space Place bore the burden of producing proper summary judgment evidence, not Midtown. *See* TEX. R. CIV. P. 166a(i). Pursuant to this rule, we have not considered the evidence attached by Midtown in conjunction with its motion. *See Southtex 66 Pipeline Co., Ltd. v. Spoor*, 238 S.W.3d 538, 542 n.1 (Tex. App.—Houston [14th Dist.] pet. denied) (stating even though the movant in a no-evidence summary judgment attached evidence, the appellate court did not consider the evidence). As a result, Space Place's objections to Midtown's evidence were irrelevant; therefore, we need not address Space Place's second issue on the merits.

SP Midtown, Ltd v. Urban Storage, L.P., No. 14-07-00717-CV2008 Tex. App. LEXIS 3364 (Tex. App.—Houston 14th Dist. May 8, 2008, pet. denied).

A case from the Fourteenth Court of Appeals frames this exact issue. *Gallien v. Goose Creek Consol. Indep. Sch. Dist.*, 2013 Tex. App. LEXIS 2790 (Tex. App.—Houston [14th Dist.] Mar. 19, 2013, pet. dism.). The movant filed a dual traditional and no-evidence motion that had evidence attached. *Id.* The majority affirmed the no-evidence summary judgment because the nonmovant did not file a response, and the court refused to review the evidence attached to the motion. *Id.* A concurring justice disagreed with this approach and argued that the court should have reviewed the evidence attached to the motion to see if it created a fact issue. *Id.*

Another case posits that a nonmovant can rely on the movants evidence to create a fact issue only where the nonmovant files a response and directs the trial court to the evidence. *Dyer v. Accredited Home Lenders, Inc.*, No. 02-11-0046-CV, 2012 Tex. App. LEXIS 877, 2012 WL 335858, at *3 (Tex. App.—Fort Worth Feb. 2, 2012, pet. denied). It held that a nonmovant cannot rely on a movant's evidence to create a fact issue where it did not file a response. *Id.* ("Although it appears to be a triumph of procedure over substance, we cannot create a rule that the trial court disposing of a combined motion has a duty to look at the traditional summary judgment evidence to see if it defeats the movant's right to no-evidence summary judgment when the rules of procedure place the burden on the nonmovant to produce evidence.").

After the *City of Keller* opinion, one commentator has argued that the scope of review for a no-evidence motion has been expanded. *See* Tim Patton, *Standard and Scope of Review Spotlight: "No-Evidence" Summary Judgment*, 17th Annual Conference on State and Federal Appeals, University of Texas School of Law, (June 1, 2007). In 2005, the Texas Supreme Court revisited the no-evidence standard of review. In *City of Keller v. Wilson*, the Court engaged in an extensive analysis of legal sufficiency principles. 168 S.W.3d 802 (Tex. 2005). The Court found that the standard should remain the same and does not change depending on the motion in which it is asserted. *Id.* at 823. "Accordingly, the test for legal sufficiency review should be the same for summary judgments, directed verdicts, judgments notwithstanding the verdict, and appellate no-evidence review." *Id.* That test is:

> The final test for legal sufficiency must always be whether the evidence at trial would enable reasonable and fair-minded people to reach the verdict under review. Whether a reviewing court begins by considering all the evidence or only the evidence supporting the verdict, legal-sufficiency review in the proper light must credit favorable evidence if reasonable jurors could, and disregard contrary evidence unless reasonable jurors could not.

Id. at 827. *First United Pentecostal Church of Beaumont v. Parker*, 514 S.W.3d 214 (Tex. 2017) ("A genuine issue of material fact exists if the evidence 'rises to a level that would enable reasonable and fair-minded people to differ in their conclusions.'"). The evidence does not create an issue of material fact if it is "so weak as to do no more than create a mere surmise or suspicion" that the fact exists. *Kia Motors Corp. v. Ruiz*, 432 S.W.3d 865, 875 (Tex. 2014).

Under the *City of Keller*, some of the exceptions to the general rule, which requires that evidence contrary to the non-movant's position be disregarded, are:

(1) contextual evidence – "The lack of supporting evidence may not appear until all the evidence is reviewed in context;" *Id.* at 811.
(2) competency evidence – "Evidence that might be 'some evidence' when considered in isolation is nevertheless rendered 'no evidence' when contrary evidence shows it to be incompetent;" *Id.* at 813.
(3) circumstantial equal evidence – "When the circumstances are equally consistent with either of two facts, neither fact may be inferred.' In such cases, we must 'view each piece of circumstantial evidence, not in isolation, but in light of all the known circumstances.'" *Id.* at 813-14. ; and
(4) consciousness evidence – when reviewing "consciousness evidence," a no evidence review must encompass "all of the surrounding facts, circumstances, and conditions, not just individual elements or facts."

Id. at 817-18. Accordingly, a court may not disregard certain types of evidence when a reasonable juror could not do so – the scope of review has been enlarged in the context of legal sufficiency of the evidence after a jury trial. Accordingly, the Court's categories concern not only evidence that jurors must consider but also evidence a reviewing court should not disregard in conducting a legal sufficiency review. The issue is whether a trial court can review evidence filed by a no-evidence movant in determining that the non-movant has no evidence to support a challenged element of its claim or defense.

In discussing the standards for a no evidence motion for summary judgment, one court cited *City of*

Keller and stated: "We view the evidence in the light most favorable to the non-movant, disregarding all contrary evidence and inferences, *unless there is no favorable evidence or contrary evidence renders supporting evidence incompetent or conclusively establishes the opposite*." *Brent v. Daneshjou*, No. 03-04-00225-CV, 2005 Tex. App. LEXIS 9249 (Tex. App.—Austin Nov. 4, 2005, no pet.). This language would support the position that a court could look to "contrary evidence" to determine that the non-movant's evidence was incompetent. *Id.*

In the *City of Keller*, however, the Court acknowledged that a party moving for summary judgment may not be able to take advantage of the expanded scope of review. 168 S.W.3d at 825. In a section of the opinion discussing how the no-evidence standard is the same no matter how it is raised, the Court specifically excepted summary judgment motions:

> In practice, however, a different scope of review applies when a summary judgment motion is filed without supporting evidence. *In such cases, evidence supporting the motion is effectively disregarded because there is none; under the rule, it is not allowed.* Thus, although a reviewing court must consider all the summary judgment evidence on file, in some cases that review will effectively be restricted to the evidence contrary to the motion.

Id.

Courts of appeals have found that the *City of Keller* opinion stands for the proposition that a party may not attach evidence to a no-evidence motion, and that if attached, it should not be considered. For example, in *AIG Life Insurance v. Federated Mutual Insurance Co.*, the court of appeals addressed whether a vague motion was a traditional motion or a no-evidence motion – or both. 200 S.W.3d 280, 283 (Tex. App.—Dallas 2006, pet. denied). The court stated:

> The motions do not include a standard of review and do not clearly delineate whether they are traditional motions for summary judgment under Texas Rule of Civil Procedure 166a(c) or no-evidence motions for summary judgment under Texas Rule of Civil Procedure 166a(i). Attached to each motion was a substantial amount of summary judgment evidence, indicating the motions sought a traditional summary judgment. *See City of Keller v. Wilson*, 168 S.W.3d 802, 825, 48 Tex. Sup. Ct. J. 848 (Tex. 2005) (evidence supporting motion not allowed under rule 166a(i)).

Id. The court concluded that the motion solely sought traditional grounds.

Similarly, in *Mathis v. Restoration Builders, Inc.*, the Fourteenth Court of Appeals found that a reviewing court should only review the evidence attached to the non-movant's response:

> However, per *City of Keller*, although we "must consider all the summary judgment evidence on file, in some cases, that review will effectively be restricted to the evidence contrary to the motion." Thus, in this case, our review is limited to the evidence favoring Mathis that was attached to the Response to the Motions for Summary Judgment, even though the body of Restoration's Motion for Summary Judgment, which was both a traditional and no-evidence motion, contained testimony on which Restoration relied.

231 S.W.3d 47, 52 (Tex. App.—Houston [14th Dist.] 2007, no pet.).

However, the Texas Supreme Court indicated that the enlarged scope of review may apply to no-evidence summary judgment proceedings. In *Mack Trucks, Inc. v. Tamez*, the Court held that the plaintiff's expert testimony had been properly excluded, and therefore, a no-evidence motion for summary judgment was correctly granted on causation grounds. 206 S.W.3d 572 (Tex. 2006). The Court stated:

> A summary judgment motion pursuant to Tex. R. Civ. P. 166a(i) is essentially a motion for a pretrial directed verdict. Once such a motion is filed, the burden shifts to the nonmoving party to present evidence raising an issue of material fact as to the elements specified in the motion. We review the evidence presented by *the motion and response* in the light most favorable to the party against whom the summary judgment was rendered, crediting evidence favorable to that party if reasonable jurors could, and disregarding contrary evidence unless reasonable jurors could not.

Id. at 581-82. In a *per curiam* opinion, the Court has reaffirmed that: "An appellate court reviewing a summary judgment must consider *all* the evidence...." *Goodyear Tire & Rubber Co. v. Mayes*, 236 S.W.3d 754 (Tex. 2007) (emphasis added). In *Goodyear*, the Court reversed a court of appeals that disregarded uncontroverted evidence in reversing a traditional and no-evidence motion for summary judgment. *Id. See also Gonzalez v. Ramirez,* 463 S.W.3d 499, 504 (Tex.

2015) "*We review the evidence presented by a no-evidence motion* for summary judgment and response "in the light most favorable to the party against whom the summary judgment was rendered, crediting evidence favorable to that party if reasonable jurors could, and disregarding contrary evidence unless reasonable jurors could not." *Id.* (emphasis added); *Boerjan v. Rodriguez*, 436 S.W.3d 307, 311-12 (Tex. 2014).

Generally, courts of appeals have cited to *Mack Trucks* and found that under the review of a no-evidence motion that the court of appeals must review the evidence attached to the motion and response in the light most favorable to the non-movant. *See, e.g., Anderson v. Limestone County,* No. 10-07-00174-CV, 2008 Tex. App. LEXIS 5041 (Tex. App.—Waco July 2, 2008, pet. denied); *Acad. of Skills & Knowledge, Inc. v. Charter Sch., USA, Inc.*, 260 S.W.3d 529 (Tex. App.—Tyler June 25, 2008, pet. denied); *Abendschein v. GE Capital Mortg. Servs.*, No. 10-06-00247-CV, 2007 Tex. App. LEXIS 9761 (Tex. App.—Waco December 12, 2007, no pet.); *Packwood v. Touchstone Cmtys*, No. 06-07-00020-CV, 2007 Tex. App. LEXIS 7935 (Tex. App.—Texarkana October 5, 2007, no pet.); *State v. Beeson*, 232 S.W.3d 265 (Tex. App.—Eastland 2007, pet. abated); *Paragon General Contractors, Inc. v. Larco Constr., Inc.*, 227 S.W.3d 876, 2007 Tex. App. LEXIS 4949 (Tex. App.—Dallas 2007, no pet.). These opinions, however, merely state the rule as described in *Mack Trucks*, and do not discuss the issue in any depth.

One exception is the Dallas Court of Appeals, which stated that with regards to a no-evidence motion the "scope of our review includes both the evidence presented by the movant and the evidence presented by the respondent." *Highland Crusader Offshore Partners., L.P. v. Andrews & Kurth, L.L.P.*, 248 S.W.3d 887 (Tex. App.—Dallas 2008, no pet.). Therefore, that court is using the expanded *City of Keller* standard with regards to a no-evidence motion review.

Once again, in *Mack Trucks, Inc. v. Tamez*, the Texas Supreme Court stated "We review the evidence presented by the motion and response in the light most favorable to the party against whom the summary judgment was rendered, *crediting evidence favorable to that party if reasonable jurors could, and disregarding contrary evidence unless reasonable jurors could not.*" 206 S.W.3d 572, 582 (Tex. 2006). Therefore, it is clear under this standard that if the non-movant attaches evidence that hurts its position to the point that a reasonable juror could not disregard it, a reviewing court can use that evidence to show that there is no evidence. The issue is whether the reviewing court can also look to evidence filed by the movant and use the same standard. One commentator has noted that to enlarge the scope of review to include both the movant's evidence and the nonmovant's evidence would be consistent with the practice in the federal court system. Tim Patton, *Standard and Scope of Review Spotlight: "No-Evidence" Summary Judgment*, 17th Annual Conference on State and Federal Appeals, University of Texas School of Law, (June 1, 2007) (citing *Celotex Corp v. Catrett*, 477 U.S. 317, 323 (1986); BRUNER & REDISH, SUMMARY JUDGMENT: FEDERAL LAW & PRACTICE, § 5:7 (3d ed. 2006)).

The Texas Supreme Court has never really discussed this issue in depth. Accordingly, the issue of whether a court may review evidence attached to a no-evidence motion in determining whether the non-movant's evidence raises a fact question for a reasonable juror is still unresolved. In *City of Dish v. Atmos Energy*, the Court did not expressly discuss the scope of review issue but seemingly used evidence attached to a dual motion to show that the plaintiff had no evidence. 519 S.W.3d 605 (Tex. 2017). In this case, the plaintiffs asserted nuisance and trespass claims against the defendants due to a grouping of compressor stations. One defendant did not have a compressor station; it had a metering station. That defendant filed a dual motion, asserting both traditional and no-evidence grounds, on the issue that it was not the same as the other defendants and did not contribute to any of the complained-of activities. The Court referred to evidence filed by the defendant showing that it solely had a metering station, it was a closed-in system, and that it did not have any emissions or noise, and showed that the plaintiffs did not present any evidence to establish that the pipeline company (as opposed to the other defendants) did anything wrong. Though there was no express discussion by the Court regarding the use of evidence filed by the movant to support a no-evidence motion, the Court did just that. *Id.*

Another potential basis for a court to review evidence attached to a no-evidence motion is where the parties file cross-motions of summary judgment. In *Trial v. Dragon*, the Court discussed the standards of review for cross-motions for summary judgment and stated: "Because the parties presented the case through competing summary judgment motions, *both traditional and no-evidence*, and the trial court granted the Trials' motions while denying the Dragons', *we review the summary judgment evidence presented by both sides and render judgment that the trial court should have rendered.*" No. 18-0203, 2019 Tex. LEXIS 637 (Tex. June 21, 2019) (emphasis added). This quote would indicate that a reviewing court can consider any evidence submitted by either party (including the no-evidence movant) and render judgment.

XII. USE OF PRESUMPTIONS IN SUMMARY JUDGMENT PROCEDURE

"Whenever a party to a lawsuit invokes a presumption in order to prevail on a motion for summary judgment, the litigation assumes a complex posture; indeed, the laws of evidence and procedure, as well as substantive law, are simultaneously called into question." Steven David Smith, *Comment, The Effect of Presumptions on Motions for Summary Judgment in Federal Court*, 31 UCLA L. Rev. 1101, 1103 (1984). The issue is whether a summary judgment movant or non-movant can use a presumption to shift the burden of production to the opposing party. Historically, Texas courts did not go to great lengths to analyze the appropriateness of a summary judgment movant using a presumption in a summary judgment proceeding to shift the burden of production to the nonmovant. Several Texas cases allowed the use of presumptions in summary judgment proceedings. *See, e.g., Pachter v. Woodman,* 547 S.W.2d 954, 957 (Tex. 1977); *Sudduth v. Commonwealth County Mut. Ins. Co.,* 454 S.W.2d 196, 197-98 (Tex. 1970); *Estate of Galland v. Rosenberg*, 630 S.W.2d 294, 296-97 (Tex. App.—Houston [14th Dist.] 1981, writ ref'd n.r.e.); *Williams v. Hill*, 396 S.W.2d 911, 912-13 (Tex. Civ. App.—Dallas 1965, no writ).

In 1981, however, the Texas Supreme Court did an about-face in *Missouri-Kansas-Texas Railroad Co. v. City of Dallas*, and held that a movant in a traditional summary judgment proceeding could not rely upon a presumption to shift the burden of production to the opposing party:

> The court of civil appeals made the same error by holding that Dallas, as taxing agencies, enjoyed a number of presumptions which then shifted the burden to produce evidence at the hearing away from movants and onto nonmovant Railroad. The presumptions and burden of proof for an ordinary or conventional trial are immaterial to the burden that a movant for summary judgment must bear.

623 S.W.2d 296, 298 (Tex. 1981).

The Texas Supreme Court basically held that because the burden of proof is always on the movant in a summary judgment proceeding, it would be inconsistent to allow the movant to use a presumption to shift that burden to the non-movant. Though not cited by the Texas Supreme Court, *Brown v. Parrata Sales, Inc.* arguably supports the Court's finding that a movant in a traditional summary judgment proceeding cannot rely upon a presumption to shift the burden of production. 521 S.W.2d 359, 361-63 (Tex. Civ. App.—Dallas 1975, no writ). This reasoning, however, is flawed. The court failed to distinguish between the burden of persuasion and the burden of production, which are both called the burden of "proof." *See id.* The use of a presumption by a movant would not shift the burden of persuasion to the non-movant; that burden would remain at all times on the movant. The use of a presumption only shifts the burden of production. If a party has the burden of production to come forward with evidence at trial, but cannot, then there is no reason to make both parties incur the expense of trial when the case can be resolved by a summary judgment motion. Accordingly, a party should be allowed to use a presumption to shift the burden of production in a summary judgment proceeding, just as he or she would be allowed to do at trial. Therefore, there is nothing inconsistent with the use of presumptions in a summary judgment proceeding and the summary judgment rule that the burden of persuasion always remains on the movant.

The Texas Supreme Court confused a presumption with an inference. Inferences and presumptions are conceptually very similar but procedurally very different. An inference is a conclusion that a factfinder can, but is not required to, make from a proved fact. *See Lozano v. Lozano,* 52 S.W.3d 141, 148-49 (Tex. 2001) (holding that a jury is entitled to consider the circumstantial evidence, weigh witnesses' credibility, and make reasonable inferences from the evidence it chooses to believe); *Mathews v. Warren*, 522 S.W.2d 569, 570 (Tex. Civ. App.—Austin 1975, writ ref'd n.r.e.); *Navarro Seed Co., Inc. v. Arant,* 428 S.W.2d 152, 153 (Tex. Civ. App.—Amarillo 1968, no writ); *Ice Serv. Co. v. Scruggs,* 284 S.W.2d 185, 188 (Tex. Civ. App.—Fort Worth 1955, writ ref'd n.r.e.). An inference has been described as a natural prompting that is derived directly from circumstances of a particular case; it is a deduction that is sufficient to satisfy understanding and conscience of a factfinder. *See Johnson's Adm'r. v. Timmons*, 50 Tex. 521, 535-36 (1878). An inference is an evidentiary tool, rather than a procedural one. A presumption is a procedural or legal tool used to determine which party should have the burden to come forward with evidence, whereas an inference is an evidentiary tool that allows, but does not demand, a factfinder to determine an issue by using evidence of another. In the context of summary judgments, just as the burden of persuasion is always on the movant, a non-movant should be allowed every inference. Furthermore, the movant in a traditional summary judgment proceeding should not be allowed to rely upon an inference to prove his ground. *See MMP, Ltd. v. Jones*, 710 S.W.2d 59, 60 (Tex. 1986); *Huckabee v. Time Warner Entm't Co. L.P.,* 19 S.W.3d 413, 434 (Tex. 2000) (Hecht, J., dissenting); *McConnell v. Ford & Ferraro*, No. 05-99-01932-CV, 2001 Tex. App.

LEXIS 4560, at *3-4 (Tex. App.—Dallas July 6, 2001, no pet.) (not designated for publication); *Maberry v. Julian*, 456 S.W.2d 234, 23738 (Tex. Civ. App.—Texarkana 1970, writ ref'd n.r.e.). But this does not limit or impact the use of presumptions in the context of summary judgments. The Texas Supreme Court likely confused the fact that a traditional summary judgment movant cannot use an inference to support his summary judgment ground with the issue of whether the movant could use a presumption to shift the burden of production to the non-movant.

Once again, in a traditional summary judgment proceeding, once the movant produces sufficient evidence to meet his initial burden of production, the burden shifts to the non-movant. The use of a presumption would only short-cut shifting the burden of production to the non-movant. Therefore, a traditional summary judgment movant should be able to rely upon a presumption.

Since the Supreme Court's decision in 1981, courts of appeals have been inconsistent regarding the use of presumptions by movants in traditional summary judgment proceedings. Some courts of appeals have followed the Supreme Court and have held that a traditional summary judgment movant could not rely upon a presumption to shift the burden of production to the non-movant. *See Garcia v. John Hancock Variable Life Ins. Co.*, 859 S.W.2d 427, 435 (Tex. App.—San Antonio 1993, writ denied); *Mayhew v. Town of Sunnyvale*, 774 S.W.2d 284, 287 (Tex. App.—Dallas 1989, writ denied), subsequent opinion at 905 S.W.2d 234, rev'd on other grounds, 964 S.W.2d 922 (Tex. 1998); *McCord v. Avery*, 708 S.W.2d 954, 956 (Tex. App.—Fort Worth 1986, no writ) (involving presumption that doctor performed duties properly was not applicable to summary judgment proceeding); *Garcia v. Fabela*, 673 S.W.2d 933, 937 (Tex. App.—San Antonio 1984, no writ) (involving presumption that dealing between fiduciary and principal was unfair was not applicable in summary judgment proceeding).

Seemingly more courts, however, have held that a movant in a traditional summary judgment proceeding can rely upon a presumption to shift the burden of production to the non-movant. *See e.g., Hunter v. Palmer*, 988 S.W.2d 471, 473 (Tex. App.—Houston [1st Dist.] 1999, no pet.); *Speegle v. Crowder*, 1997 Tex. App. LEXIS 814, at *10-11(Tex. App.--Houston [1st Dist.] 1997, no pet.) (not designated for publication); *see In re J.A.M.*, 945 S.W.2d 320, 322-23 (Tex. App.—San Antonio 1997, no pet.); *Milligan v. Homeowner Ass'n of Bellfort Place,* No. 14-95-00764-CV, 1996 Tex. App. LEXIS 2115, at *2-3 (Tex. App.—Houston [14th Dist.] May 23, 1996, no writ) (not designated for publication); *Maewal v. Adventist Health Sys.*, 868 S.W.2d 886, 891-92 (Tex. App.—Fort Worth 1993, writ denied); *Masterson v. Hogue*, 842 S.W.2d 696, 697 (Tex. App.--Tyler 1992, no writ); *Grossman v. Grossman,* 799 S.W.2d 511, 513 (Tex. App.--Corpus Christi 1990, no writ); *Hancock v. State Bd. Of Ins.,* 797 S.W.2d 379, 382 (Tex. App.--Austin 1990, no writ); *Simpson v. MBank Dallas, N.A.,* 724 S.W.2d 102, 107 (Tex. App.—Dallas 1987, writ ref'd n.r.e.); *First Nat'l Bank of Libby, Mont. v. Rector*, 710 S.W.2d 100, 103 (Tex. App.—Austin 1986, writ ref'd n.r.e.). However, if the non-movant produces evidence to contradict the presumption, the presumption disappears and summary judgment is not appropriate. *See Milligan*, 1996 Tex. App. LEXIS 2115, at *2-3.

Issues are more complex for the use of presumptions by a no-evidence motion movant. A no-evidence summary judgment movant cannot file such a motion on a claim or defense on which it has the burden of proof. *See* Tex. R. Civ. P. 166a(i). Normally, a breach of fiduciary duty plaintiff has the burden of proof on his or her claim and cannot file a no-evidence motion on that claim. *Estate of Boyle*, No. 11-13-00151-CV,2014 Tex. App. LEXIS 13553, 2014 WL 7332761(Tex. App.—Eastland Dec. 18, 2014, no pet.). He or she cannot force the defendant to produce evidence to prove that he or she did not breach a fiduciary duty via a no-evidence motion. However, in a self-interested transaction situation, as detailed above, the defendant/fiduciary has the burden to prove the fairness of the transaction, that he or she did not breach a fiduciary duty. A movant usually has to submit evidence to create a prima facie case for a presumption. For example, a trust beneficiary may have to submit evidence to prove that the trustee had a self-interested transaction. Once that is established, there is a presumption of unfairness that the trustee has a burden of production to prove was fair. If a plaintiff cannot attach any evidence to a no-evidence motion, how can it ever set up the presumption?

Undoubtedly, some courts will hold that they cannot review evidence to set up a no-evidence ground, and will deny the motion outright. But, as shown above, some courts would allow a court to review evidence attached to the no-evidence motion. This would allow a plaintiff to attach evidence to a no-evidence motion to set up the fact that a self-interested transaction occurred, and then the no-evidence burden would initially be on the defendant to create an issue of fact on the fairness of the transaction. Alternatively, a movant could file a dual motion for summary judgment, raising both traditional and no-evidence grounds. The movant could move on a traditional ground, citing to evidence, to establish the fact of a self-interested transaction. Then once that is done in the motion, the movant could assert a no-evidence ground that the defendant has no evidence to create a genuine issue of material fact on issue of fairness. There is no reason that a plaintiff in a self-

interested transaction by a fiduciary case cannot move for summary judgment before trial and place the burden on the fiduciary to create an issue of fact as to fairness: at trial the fiduciary will have that initial burden of production why should that be different pre-trial?

Moreover, a fiduciary in a self-interested transaction case should not be able to file a no-evidence because it would have the burden of proof to establish the fairness of the transaction and a no-evidence movant cannot file such a motion on a claim or defense that it has the burden of proof to establish. *See Estate of Boyle*, No. 11-13-00151-CV,2014 Tex. App. LEXIS 13553, 2014 WL 7332761(Tex. App.—Eastland Dec. 18, 2014, no pet.) (affirmed no-evidence summary judgment for fiduciary where the case did not involve a self-interested transaction and implied that, if the case did involve such a transaction, the fiduciary would not be able to file such a motion).

Texas courts have always allowed a non-movant, in either a traditional or no-evidence summary judgment proceeding, to use a presumption to rebut a summary judgment motion, i.e., to create a fact question on a challenged claim by shifting the burden of production back to the movant by way of a presumption. *See Keck v. Nat'l Union Fire Ins. Co.*, 20 S.W.3d 692, 699 (Tex. 2000); *City of College Station v. Turtle Rock Corp.*, 680 S.W.2d 802, 805 (Tex. 1984); *Stewart v. Transit Mix Concrete & Materials Co.*, 988 S.W.2d 252, 255-56 (Tex. App.—Texarkana 1998, pet. denied); *Swate v. Schiffers*, 975 S.W.2d 70, 74-75 (Tex. App.—San Antonio 1998, pet. denied); *Ruiz v. City of San Antonio*, 966 S.W.2d 128, 132 (Tex. App.—Austin 1998, no pet.); *York v. Flowers,* 872 S.W.2d 13, 15 (Tex. App.--San Antonio 1994, writ denied); *Cable v. Estate of Cable,* 480 S.W.2d 820, 821 (Tex. Civ. App.--Fort Worth 1972, no writ); *see also* Charles T. Frazier, Jr. et al., *Celotex Comes to Texas: No-Evidence Summary Judgments and Other Recent Developments in Summary Judgment Practice*, 32 TEX. TECH. L. REV. 111, 126 (2000).

For example, the Texas Supreme Court held that a trial court erred in granting summary judgment where the movant failed to rebut the presumption that a release between an attorney and the client is presumptively unfair. *See Keck*, 20 S.W.3d at 699. If the movant fails to rebut the presumption as a matter of law, then a fact issue is raised and summary judgment is not appropriate. *See Brown v. Big D Transp., Inc.*, 45 S.W.3d 703, 705 (Tex. App.—Eastland 2001, no pet.); Cable, 480 S.W.2d at 821. Under traditional summary judgment procedure, if a movant rebuts a non-movant's presumption as a matter of law, then the presumption disappears and summary judgment can be granted. *See Alexander Oil Co. v. Fawnwood Mart, Inc.*, No. 07-00-0447-CV, 2001 Tex. App. LEXIS 4862, at *4-6 (Tex. App.—Amarillo July 24, 2001, no pet.) (not designated for publication); *Swate,* 975 S.W.2d at 74-75. Therefore, in a traditional summary judgment motion proceeding, the burden of production can shift back and forth until one side wins as a matter of law. Presumably, however, after a few rocks, there should be a fact issue as there is likely evidence on both sides of the issue.

A no-evidence summary judgment may be different in this respect. Some courts hold that once the non-movant meets his initial burden of production and it shifts to the movant, the movant cannot then shift the burden back to the non-movant because a court cannot review a movant's summary judgment evidence to support a no-evidence motion. *See Hight v. Dublin Veterinary Clinic*, 22 S.W.3d 614, 618-19 (Tex. App.—Eastland 2000, pet. denied). Therefore, once the nonmovant shifts the burden back to the movant by way of a presumption, the court must deny the no-evidence motion. *See Brown,* 45 S.W.3d at 705. A no evidence summary judgment respondent meets its burden by simply setting up the underlying facts that creates a presumption, and the presumption meets the burden and shifts the burden onto movant, which cannot be done in the context of a no-evidence motion. *Patton v. Harris Cty. Cmty. Supervision & Corrs. Dep't,* No. 14-04-00683-CV, 2005 Tex. App. LEXIS 9767 (Tex. App.—Houston [14th Dist.] Nov. 23, 2005, pet. denied) (citing Johnson Article). The *Patton* Court explained that a party can meet their no-evidence burden by setting up a legal presumption:

> By filing only a no-evidence motion for summary judgment, HCCSCD not only forced Patton to produce evidence of causation, but also tied its own hands by precluding an evidentiary response to Patton's production. The presumption of causation raised by Patton would, in a trial on the merits, shift the burden to HCCSCD to produce sufficient evidence to justify a contrary finding. But HCCSCD cannot undertake this burden in the context of a no-evidence motion for summary judgment. A party may seek summary judgment on no-evidence grounds "without presenting summary judgment evidence." HCCSCD may only point out essential elements of Patton's claim which lack sufficient proof to survive. Because HCCSCD cannot rebut the presumption raised by Patton, the presumed fact of causation remains and HCCSCD cannot prevail on this argument.

Id. *16-18 (citing *Stewart v. Transit Mix Concrete & Materials, Inc.*, 988 S.W.2d 252, 255 (Tex. App.—

Texarkana 1998, pet. denied) (reversing trial court's grant of defendant's no-evidence motion for summary judgment when a fact issue remained as to whether plaintiffs were entitled to a presumption of causation in a failure-to-warn case and stating that, to defeat no-evidence motion, plaintiffs could either present evidence to support causation or rely upon a presumption of causation)). *See also Wilson v. Fleming*, 566 S.W.3d 410, 423 (Tex. App.—Houston [14th Dist.] 2018, pet. filed) (summary judgment on release agreement between principal and fiduciary was improper because fiduciary did not prove fairness of the agreement); *Ulrickson v. Hibbs*, No. 02-02-00161-CV, 2003 Tex. App. LEXIS 9482, 2003 WL 22514689, at *8 (Tex. App.—Fort Worth Nov. 6, 2003, no pet.) (holding that trial court erred in granting law firm's motion for summary judgment on release defense when firm offered no summary judgment evidence that release was fair and reasonable).

In *Adobe Land Corp. v. Griffin, L.L.C.*, the court of appeals held that a trial court erred in granting a no-evidence summary judgment where the defendant established that spoliation occurred. 236 S.W.3d 351(Tex. App.—Fort Worth July 12, 2007, pet. denied). The court explained:

> When the non-spoliating party is unable to prove its prima facie case without the destroyed evidence, a spoliation presumption will support that party's assertions and serves as some evidence of the particular issue or issues that the destroyed evidence might have supported. Here, the destroyed sample could have provided Appellants with some of the evidence they now lack on both defect and causation. Therefore, the presumption in this case will enable Appellants to survive Griffin's no-evidence motion for summary judgment.

Id.

As stated earlier, other courts may allow a court to review evidence submitted by a no-evidence movant to establish that there is no evidence on an issue. In those courts, perhaps a movant can produce evidence to defeat a non-movant's presumption. Of course, there is no rule that limits the movant to only filing a no-evidence motion—he could file a traditional motion with summary judgment evidence that contradicts the non-movant's presumption.

Federal courts allow a party to rely upon a presumption in a summary judgment proceeding. *See Gasmark Ltd. Liquidating Trust v. Louis Dreyfus Natural Gas Corp.*, 158 F.3d 312, 315 (5th Cir. 1998); *Liquid Controls Corp. v. Liquid Control Corp.*, 802 F.2d 934, 935 (7th Cir. 1986); *Long v. Comm'r*, 757 F.2d 957, 959 (8th Cir. 1985); *Sandoz v. Fred Wilson Drilling Co.*, 695 F.2d 833, 839 (5th Cir. 1983); *Coca-Cola Co. v. Overland, Inc.*, 692 F.2d 1250, 1253 (9th Cir. 1982); *United States v. Gen. Motors Corp.*, 518 F.2d 420, 441-42 (D.C. Cir. 1975); *Johnson v. Henderson*, No. C-00-4618EDL, 2001 U.S. Dist. LEXIS 14705, at *28 (N.D. Cal. September 14, 2001); *see also Boe v. AlliedSignal Inc.*, 131 F. Supp. 2d 1197, 1199 (D.C. Kan. 2001); *Sea-Roy Corp. v. Parts R Parts*, 1997 U.S. Dist. LEXIS 21809 (D.C.N.C. 1997); *Urantia Found. v. Maaherra*, 895 F. Supp. 1338, 1341 (D.C. Ariz. 1995). As one court has stated, "A party moving for summary judgment is entitled to the benefit of any relevant presumptions that would be available at trial, provided that the facts giving rise to the presumption are undisputed." *Johnson*, 2001 U.S. Dist. LEXIS 14705, at *28. If controverting evidence is produced by the party opposing the presumption, however, the presumption disappears. *See Liquid Controls Corp.*, 802 F.2d at 934. Further, the use of presumptions is just as available to the summary judgment non-movant as it is to the movant. *See Ennis v. United of Omaha Life Ins. Co.*, 825 F. Supp. 962, 963 (D.C. Kan. 1993). It should be noted that one commentator has disagreed with the use of presumptions in the context of a summary judgment proceeding in federal court. *See* Steven David Smith, Comment, *The Effect of Presumptions on Motions for Summary Judgment in Federal Court,* 31 UCLA L. Rev. 1101, 1133-38 (1983).

XIII. USE OF PRESUMPTION OF UNFAIRNESS IN SUMMARY JUDGMENT PROCEEDINGS

The courts in Texas are, not surprisingly, inconsistent on how they analysis and use the presumption of unfairness in summary judgment proceedings.

A. Traditional Motions For Summary Judgment

In *Garcia v. Fabela*, the court of appeals reversed a summary judgment and held that a traditional summary judgment movant could not rely on the presumption of unfairness to shift the burden of production to the nonmovant:

> Their argument that the burden was on the Garcias is without merit for the presumptions and burden of proof for an ordinary or conventional trial are immaterial to the burden that a movant for summary judgment must bear. The correct rule is that the movants, the Fabelas, had to show that they were "entitled to judgment

> as a matter of law." This the Fabelas failed to show.

673 S.W.2d 933, 937 (Tex. App.—San Antonio 1984, no writ).

In *Miller v. Lucas*, the court held that a power of attorney agent breached his fiduciary duty as a matter of law via summary judgment by transferring the principal's real estate to himself. No. 02-13-00298-CV,2015 Tex. App. LEXIS 5195, 2015 WL 2437887 (Tex. App.—Fort Worth May 21, 2015, pet. denied). The court of appeals stated:

> Lucas's motion for summary judgment pleaded that Mitchell had signed a statutory durable power of attorney on June 29, 2006, and attached a copy of the power of attorney that Mitchell executed. Lucas pleaded that on March 9, 2007, Miller utilized the durable power of attorney to "executed a self[-]serving deed whereby Defendant Deeded to himself, without consideration, the real property belonging to [Mitchell]." A copy of the deed was attached to Lucas's summary-judgment motion. Viewing the summary-judgment evidence in the light most favorable to Miller, the evidence conclusively establishes that Miller breached his fiduciary duty to Mitchell by utilizing the power of attorney to transfer the Property belonging to Mitchell to himself.

Id.

In *Keck, Mahin & Cate v. Nat'l Union Fire Ins. Co.*, the Texas Supreme Court held that a fiduciary/defendant did not carry its summary judgment burden to prove the fairness of a release agreement and reversed summary judgment. 20 S.W.3d 692 (Tex. 2000). The Court stated:

> KMC had the burden on summary judgment to prove that the release agreement it negotiated with Granada was fair and reasonable. Further, it was KMC's burden as a fiduciary to establish that Granada was informed of all material facts relating to the release. The present summary judgment record does not establish the state of Granada's information or that the agreement was fair and reasonable. The only evidence that KMC identifies is a recitation in the release that KMC "advised Granada in writing that independent representation [would be] appropriate in connection with the execution of this Agreement." This bare recitation is not sufficient to rebut the "presumption of unfairness or invalidity attaching to the contract." Accordingly, KMC has not carried its summary judgment burden.

Id.

In *Robinson v. Garcia*, the court of appeals affirmed the denial of a summary judgment filed by a client against an attorney regarding the fairness of their fee agreement. 804 S.W.2d 238 (Tex. App.—Corpus Christi 1991, writ denied). The court noted:

> Attached to Garcia's response is his own affidavit in which he details the facts surrounding the execution of the third contract and asserts that the Robinsons agreed to its execution. Garcia has thus raised a fact issue. While we recognize that a presumption of unfairness exists regarding the execution of the third contract, the presumption is neither conclusive nor irrebuttable. Garcia will have the burden to prove to the trier of fact that the employment contract was fair and reasonable. The Robinsons have not provided summary judgment proof showing that they are entitled to judgment as a matter of law.

Id.

B. No-Evidence Summary Judgment Motion

In *Cluck v. Mecom*, the court questioned whether a fiduciary could file no-evidence motion on allegations dealing with self-interested transactions:

> Additionally, when a plaintiff alleges self-dealing by the fiduciary as part of a breach-of-fiduciary-duty claim, a presumption of unfairness automatically arises, which the fiduciary bears the burden to rebut. *See Houston v. Ludwick*, No. 14-09-00600-CV, 2010 Tex. App. LEXIS 8415, 2010 WL 4132215, at *7 (Tex. App.—Houston [14th Dist.] Oct. 21, 2010, pet. denied) (mem. op.); *Chappell*, 37 S.W.3d at 22 (citing *Stephens County Museum, Inc. v. Swenson,* 517 S.W.2d 257, 261 (Tex. 1974); *Int'l Bankers Life Ins. Co. v. Holloway*, 368 S.W.2d 567, 576 (Tex. 1963)). Mecom admitted in his deposition that he owed a fiduciary duty to manage the assets for appellants' benefits and a duty to disclose his personal transactions with the trust. We question whether a no-evidence summary judgment could be appropriate under the

> circumstances of this case because Mecom bears the burden to fully disclose his activities as fiduciary and prove the fairness of his personal transactions with the trust. *See Houston*, 2010 Tex. App. LEXIS 8415, 2010 WL 4132215, at *7; *Chappell*, 37 S.W.3d at 22. Nevertheless, to the extent that a no-evidence summary judgment could be appropriate, appellants presented sufficient evidence to defeat this ground by offering Mecom's testimony demonstrating his inability thus far to fully explain his activities as trustee, including his personal transactions involving trust assets.

401 S.W.3d 110, 118(Tex. App.—Houston [14th Dist.] 2011, pet. denied).

In *Estate of Boyle*, the trial court granted summary judgment to JPMorgan , as successor guardian to a decedent's estate, on all claims asserted by Jones, a beneficiary, against JPMorgan. No. 11-13-00151-CV,2014 Tex. App. LEXIS 13553, 2014 WL 7332761(Tex. App.—Eastland Dec. 18, 2014, no pet.). The court held that the claims did not involve self-interested transactions and therefore defendant could file a no-evidence motion. The court implied that such a motion would not be appropriate for self-interested transactions:

> The presumption of unfairness applies to transactions between a fiduciary and a principal in which the fiduciary profits or obtains a benefit. *Tex. Bank & Trust Co. v. Moore*, 595 S.W.2d 502, 508-09 (Tex. 1980) (presumption applied to transactions in which the fiduciary transferred the principal's money to the fiduciary's personal account); *Celmer v. McGarry,* 412 S.W.3d 691, 706 (Tex. App.—Dallas 2013, pet. denied) (presumption applied to a fee agreement between a fiduciary (lawyer) and his client). In such cases, the profiting fiduciary bears the burden to rebut the presumption by proving the fairness of the questioned transaction. *Moore*, 595 S.W.2d at 508-09; *Lundy v. Masson*, 260 S.W.3d 482, 505 (Tex. App.—Houston [14th Dist.] 2008, pet. denied). ... Jones's "self-dealing" claims do not involve alleged transactions between JPMorgan, as a party, and Sweetie Boyle's estate, as a party, in which JPMorgan allegedly profited or obtained a benefit. He did not allege that JPMorgan entered into an agreement with the estate or that JPMorgan transferred estate assets to itself. Instead, Jones alleged that JPMorgan transferred estate assets to other parties, including P M Adams Inc., Adalin, Inc., and Anadarko. We conclude that the presumption of unfairness does not apply to the alleged transactions involving these parties. Therefore, JPMorgan did not have the burden of proof to rebut a presumption of unfairness with respect to the transactions. Instead, Jones carried the burden of proof on his breach of fiduciary duty claims.

Id.

In *In re Estate of Klutts*, a son held his mother's power of attorney when he assisted in securing a new 2008 will, which enhanced his share of the estate. No. 02-18-00356-CV, 2019 Tex. App. LEXIS 11063 (Tex. App.—Fort Worth December 19, 2019, settled by agr.). Siblings attempted to probate an earlier will and alleged that the new will was the product of undue influence. The son filed a traditional and no-evidence motion for summary judgment on the undue influence claim, which the trial court granted. The siblings appealed.

The court of appeals held that the son's fiduciary status shifted the burden to him to overcome the resulting presumption of unfairness. The court stated:

> The person challenging the validity of an instrument generally bears the burden of proving the elements of undue influence by a preponderance of the evidence. This general rule applies to transfers from parent to child. Such transfers, standing alone, do not give rise to a presumption of undue influence, leaving the burden with the party challenging the transaction's validity. This is because "nothing is more common or natural than for a [parent] to bestow gifts upon his [or her] children." However, in cases involving fiduciary relationships, a presumption of undue influence may arise, requiring the person receiving the benefit to prove the fairness of the transaction. And "a power of attorney creates an agency relationship, which is a fiduciary relationship as a matter of law." Thus, an attorney in fact, as a fiduciary, carries the burden of proof to overcome the presumption of unfairness that arises in self-dealing transactions... [I]n situations involving self-dealing in fiduciary or confidential relationships, a presumption of unfairness arises that shifts both the burden of production and the burden of persuasion to the fiduciary seeking to uphold the transaction.

Id.

The court held that because the burden of proof shifted to the son, the trial court was precluded from granting his no-evidence motion on that basis:

> It is undisputed that Michael held his mother's power of attorney when he assisted in securing the 2008 will, which enhanced his share of the estate13Link to the text of the note and upon which he relies in attempting to show that she revoked the 2007 will. As the holder of his mother's power of attorney, Michael was her fiduciary. Thus, Michael's fiduciary status shifted the burden to him to overcome the resulting presumption of unfairness. Because the burden of proof shifted to Michael, the trial court was precluded from granting his no-evidence motion on that basis.

Id.

In *Danford*, the deceased executed a will naming Robert Stawarczik as the executor and sole beneficiary of her estate on the same day in 2010 that she executed a general power of attorney in his favor. *Estate of Danford*, 550 S.W.3d 275, 282 (Tex. App.—Houston [14th Dist.] 2018, no pet.). All of these documents were executed at the deceased's home in front of witnesses whom Stawarczik had brought and who had not previously met her. *Id.* Her nephews opposed the will's admission to probate, arguing that she had lacked testamentary capacity and that Stawarczik had exercised undue influence over their aunt. *Id.* at 278-79.

Stawarczik filed a traditional and no-evidence motion for summary judgment, arguing in his no-evidence motion that there was no evidence of the lack of testamentary capacity or undue influence. *Id.* The nephews responded by attaching a copy of the general power of attorney appointing Stawarczik as their aunt's agent, *id.* at 279, and argued that this evidence of a fiduciary relationship shifted the burden of proving lack of undue influence to Stawarczik. *Id.* at 285. The court agreed, holding that when the nephews presented some evidence of a fiduciary relationship—i.e., Stawarczik's appointment as attorney-in-fact on the same day as the will's execution—this raised a presumption of undue influence sufficient to defeat Stawarczik's no-evidence motion. *Id.* at 285-86.

In *Fielding*, the estate's independent administrator (the deceased's niece) challenged the deceased's having changed the beneficiary designation on his accounts to his caretaker, complaining that a fiduciary relationship had existed between the deceased and the caretaker that gave rise to a presumption of undue influence. *Fielding v. Tullos*, No. 09-17-00203-CV, 2018 Tex. App. LEXIS 7136, 2018 WL 4138971 (Tex. App.—Beaumont Aug. 20, 2018, no pet.). The caretaker moved for summary judgment on undue influence. In her response, the administrator pointed out that the caretaker had signed one of the account agreements as "agent" and that the deceased had executed a power of attorney for his accounts naming the caretaker as his agent. 2018 Tex. App. LEXIS 7136, [WL] at *3.

The court held that the presumption is a rebuttable presumption that is extinguished with the offering of contrary evidence, not one that shifted the ultimate burden of proof of unfairness:

> Fielding had the burden of establishing that a fiduciary relationship existed between Tullos and Charles. *See In re Estate of Coleman*, 360 S.W.3d 606, 611 (Tex. App.—El Paso 2011, no pet.). Once a contestant presents evidence of a fiduciary relationship, a presumption of undue influence may arise and the other party then bears the burden to come forward with evidence to rebut the presumption. *Estate of Pilkilton*, 2013 Tex. App. LEXIS 1080, at *31 (citing *Spillman*, 587 S.W.2d at 172; Price, 254 S.W.2d at 163); *see also Quiroga*, 2011 Tex. App. LEXIS 1959, at **12-13. Such a rebuttable presumption shifts the burden of producing evidence to the party against which it operates. *See Hot-Hed, Inc. v. Safehouse Habitats (Scotland), Ltd.*, 333 S.W.3d 719, 730 (Tex. App.—Houston [1st Dist.] 2010, pet. denied); *Long v. Long*, 234 S.W.3d 34, 37 (Tex. App.—El Paso 2007, pet denied); *All Am. Builders, Inc. v. All Am. Siding, Inc.*, 991 S.W.2d 484, 489 (Tex. App.—Fort Worth 1999, no pet.) (citing *Gen. Motors Corp. v. Saenz*, 873 S.W.2d 353, 359 (Tex. 1993)). Once evidence contradicting the presumption has been offered, the presumption is extinguished. *Id.* The case then proceeds as if no presumption ever existed. *See Tex. Nat. Res. Conservation Comm'n v. McDill,* 914 S.W.2d 718, 724 (Tex. App.—Austin 1996, no writ). A rebuttable presumption does not shift the ultimate burden of proof. *See Garza v. Mission*, 684 S.W.2d 148, 152 (Tex. App.—Corpus Christi 1984, writ dism'd w.o.j.); *see also Saenz*, 873 S.W.2d at 359. The Plaintiff acknowledges the Estate did not state a claim for breach of a fiduciary duty, however the Plaintiff argues that a fiduciary relationship existed between Charles and Tullos, the effect of which is to

> shift the burden of proof onto Tullos to disprove undue influence. Assuming without deciding that Tullos owed Charles a fiduciary duty, it would not shift the ultimate burden of proof in the case to Tullos, but it would invoke the application of a rebuttable presumption. Tullos could rebut the presumption by coming forward with evidence showing the fairness of the transaction. *See Young v. Fawcett*, 376 S.W.3d 209, 216 (Tex. App.—Beaumont 2012, no pet.); *Vogt v. Warnock*, 107 S.W.3d 778, 784 (Tex. App.—El Paso 2003, pet. denied). If Tullos's summary judgment evidence contradicted the presumption, the presumption was extinguished. Plaintiff retained the ultimate burden of proof on her claims. *See Saenz*, 873 S.W.2d at 359.

Id.

XIV. USE OF PRESUMPTION IN TRIAL PROCEEDINGS

Trying a case involving the presumption of unfairness has several interesting procedural and evidentiary issues.

A. Right to Open and Close

The presumption of unfairness may impact who has the right to open and close in the case. If the only issue in the case is the breach of fiduciary duty issue, which the defendant has the burden of proof on, then the defendant may be able to file a motion to have the court allow it to open and close the case. Texas Rule of Civil Procedure 266 states:

> Except as provided in Rule 269 the plaintiff shall have the right to open and conclude both in adducing his evidence and in the argument, unless the burden of proof on the whole case under the pleadings rests upon the defendant, or unless the defendant or all of the defendants, if there should be more than one, shall, after the issues of fact are settled and before the trial commences, admit that the plaintiff is entitled to recover as set forth in the petition, except so far as he may be defeated, in whole or in part, by the allegations of the answer constituting a good defense, which may be established on the trial; which admission shall be entered of record, whereupon the defendant, or the defendants, if more than one, shall have the right to open and conclude in adducing the evidence and in the argument of the cause. The admission shall not serve to admit any allegation which is inconsistent with such defense, which defense shall be one that defendant has the burden of establishing, as for example, and without excluding other defenses: accord and satisfaction, adverse possession, arbitration and award, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, release, res judicata, statute of frauds, statute of limitations, waiver, and the like.

Tex. R. Civ. P. 266. Rule 269 provides:

> (a) After the evidence is concluded and the charge is read, the parties may argue the case to the jury. The party having the burden of proof on the whole case, or on all matters which are submitted by the charge, shall be entitled to open and conclude the argument; where there are several parties having separate claims or defenses, the court shall prescribe the order of argument between them.

Tex. R. Civ. P. 269(a).

As one commentator provides:

> Defendants may alter the usual order of proceedings and gain the right to open and close the case whenever they have the burden of proof "on the whole case." This reversal of the ordinary situation of the plaintiffs proceeding first to make an opening statement and put on their case-in-chief can come about in one of two ways. First, the pleadings may show that the burden of proof on the only issue to be determined by the jury is on the defense [*Ocean Transport, Inc. v. Greycas, Inc.*, 878 S.W.2d 256, 269 (Tex. App.—Corpus Christi 1994, writ denied) (pleadings showed plaintiff had burden on some issues, including claim for attorney's fees, to preclude defendant from having right to open and close)]. For example, the defendants may not have specifically denied a proper claim on a sworn account [Tex. R. Civ. P. 185] but alleged the plaintiff's breach of warranty as a set-off to liability. Or, the defendants may admit, on the record, that the plaintiff is entitled to recover as alleged in the petition except so far as the plaintiff may be defeated, in whole or in part, by proof of an affirmative defense alleged in the answer [Tex. R. Civ. P. 266; see Tex. R. Civ. P. 94].

William V. Dorsaneo, 8 Dorsaneo, Texas Litigation Guide § 120A.01[4].

So, where the defendant/fiduciary has the burden on the claim in the case, it can file a motion to allow it to offer evidence first in the case and to open and close the closing argument. *Ramsay v. Tex. Trading Co.,* 254 S.W.3d 620, 2008 Tex. App. LEXIS 3223 (Tex. App.—Texarkana May 5, 2008, no pet.) (because defendants had the burden of proof on all matters submitted by the charge, they had the right to open and conclude argument); *Mullins v. State*, 256 S.W. 2d 454 (Tex. Civ. App.—Waco 1953, no writ).

B. Dead-Man's Rule

A fiduciary often wants to introduce evidence that the principal wanted the transaction to occur. This type of evidence often consists of what the principal said or allegedly said. This brings up the dead man's rule.

The Dead Man's Rule ("the Rule") was codified in 1871. See Roy R. Ray, *Dead Man's Statutes*, 24 OHIO ST. L.J. 89, 110 (1963). The overarching goal of the Rule is to prevent interested parties from taking advantage of fact that "the lips of the deceased have been sealed." *See Lewis v. Foster*, 612 S.W.2d 400, 402 (Tex. 1981). For decades, the Rule precluded all of a decedent's transactions from being entered into evidence, but in 1983 the Rule was culled to apply only to oral statements made by a decedent. *See* Tex. R. Evid. 601(b).

The rule states:

> (b) The "Dead Man's Rule."
>
> (1) Applicability. The "Dead Man's Rule" applies only in a civil case:
>
> (A) by or against a party in the party's capacity as an executor, administrator, or guardian; or
> (B) by or against a decedent's heirs or legal representatives and based in whole or in part on the decedent's oral statement.
>
> (2) General Rule. In cases described in subparagraph (b)(1)(A), a party may not testify against another party about an oral statement by the testator, intestate, or ward. In cases described in subparagraph (b)(1)(B), a party may not testify against another party about an oral statement by the decedent.
> (3) Exceptions. A party may testify against another party about an oral statement by the testator, intestate, ward, or decedent if:
> (A) the party's testimony about the statement is corroborated; or
> (B) the opposing party calls the party to testify at the trial about the statement.
>
> (4) Instructions. If a court excludes evidence under paragraph (b)(2), the court must instruct the jury that the law prohibits a party from testifying about an oral statement by the testator, intestate, ward, or decedent unless the oral statement is corroborated or the opposing party calls the party to testify at the trial about the statement.

Tex. R. Evid. 601(b). As a general rule, where applicable, Rule 601 prohibits one party from testifying against an heir of a deceased declarant about an oral statement made by the deceased declarant. *Musquiz v. Keesee*, No. 07-15-00461-CV, 2017 Tex. App. LEXIS 9214, at *7-8 (Tex. App.—Amarillo Sep. 28, 2017, pet. denied) (mem. op.) (citing *In re Estate of Wright*, 482 S.W.3d 650, 655 (Tex. App.—Houston [14th Dist.] 2015, pet. denied)).

The Rule applies to anyone "who has a direct and substantial interest in the issue to which the testimony related and who is either an actual party to the suit or who will be bound by any judgment entered therein." *Defoeldvar v. Defoeldvar*, 666 S.W.2d 668, 670 (Tex. App.—Fort Worth 1984, no writ); *Chandler v. Welborn*, 294 S.W.2d 801, 809 (Tex. 1956). So, where a witness was not a party to the lawsuit and the opposing party failed to contend that the witness had an interest in the claims being litigated, the complaints about the admission of the evidence was meritless because Rule 601(b) applied to testimony of a party or one having an interest in the matter. *Pasley v. Pasley*, No. 07-03-0540-CV, 2005 Tex. App. LEXIS 6680 (Tex. App. Amarillo—August 18, 2005, no pet.).

There are two exceptions to the Rule. An interested party may testify about the oral statement of the decedent if:

1. The interested party's testimony about the statement is corroborated; or
2. If the opposing party calls the interested party to testify about the decedent's statement.

Tex. R. Evid. 601(b)(3).

Corroborating evidence must "tend to confirm and strengthen the testimony of the witness and show the probability of its truth." *Fraga v. Drake*, 276 S.W3d 55, 61 (Tex. App.—El Paso 2008, no pet.); *see also Coleman v. Coleman*, 170 S.W.3d 231, 235 (Tex. App.—Dallas 2005, pet. denied). Corroborating

evidence need not be sufficient standing alone, but it must tend to confirm and strengthen the testimony of the witness and show the probability of its truth. *See id.* Corroboration may come from any other competent, disinterested witness or other legal source, including documentary evidence. *See Parham v. Wilbon*, 746 S.W.2d 347, 350 (Tex. App.—Fort Worth 1988, no writ). If the statement is corroborated, it is admissible. *See Powers v. McDaniel*, 785 S.W.2d 915, 920 (Tex. App.—San Antonio 1990, writ denied).

Generally speaking, the Rule is construed narrowly by Texas courts. *See Quitta v. Fossati,* 808 S.W.2d 636, 641 (Tex. App.—Corpus Christi 1991, writ denied). Consistent with that approach, Texas courts do not strictly require disinterested witnesses or documents for corroboration purposes. The decedent's conduct is sufficient to satisfy the Rule in corroborating a decedent's oral statement, so long as the conduct is "generally consistent with the testimony concerning the deceased's statements." *See id.*

For example, in one case, a mother brought suit against her daughter-in-law, the executrix of her son's estate, to recover a half-interest in real property. *Powers v. McDaniel*, 785 S.W.2d at 916. The mother introduced her deceased son's oral statements as evidence that the he intended to devise his one-half interest in the property should he predecease his mother. *Id.* at 917. The mother claimed that she purchased the property in question fifteen years before her son's death and deeded the property in both of their names. She further claimed that they made an oral agreement that her son would devise his one-half interest back to his mother should he predecease her. The trial court allowed the evidence, over the executrix's objection, and the mother prevailed. The appellate court affirmed the evidentiary ruling because the oral statement was corroborated by the son's first will as well as documentary evidence of the mother paying for the property.

Regarding the second exception, when the party entitled to the protection of the Rule calls the adverse party to the stand and asks about a statement by the decedent, the Dead Man's Rule is waived as to that statement. *Lewis v. Foster*, 621 S.W.2d 400, 403 (Tex. 1981); *Dyson v. Parker*, No. 10-14-00232-CV, 2015 Tex. App. LEXIS 9044 (Tex. App.—Waco August 27, 2015, no pet.). This is likewise true when the matters are inquired about in a deposition, written interrogatories, or requests for admissions. *Id.* Specifically, when a party by those types of pre-trial procedures initiates an inquiry and requires testimony by the other party relative to a statement with a decedent which is covered by Rule 601(b), the statute is waived by the inquiring party, and at trial, the other party may testify fully regarding such statement. *Fleming v. Baylor University Medical Center,* 554 S.W.2d 263, 266 (Tex. Civ. App.—Waco 1977, writ ref'd n.r.e.); *see Lewis*, 621 S.W.2d at 403 n. 3 (waiver language expressly approved by Texas Supreme Court).

C. Objections to the Sufficiency of the Evidence

1. Factual and Legal Sufficiency Standards

Many commentators and authors have written extensively on the standards of review. Many call this a "Spectrum" of review: no-evidence challenges, factual insufficiency challenges, against the great weight challenges, and as a matter of law challenges. *See* MCDONALD & CARLSON, TEXAS CIVIL PRACTICE, VOL. 6, §44:3. The Author referred to Professor Carlson's Texas Civil Practice treatise extensively in the general discussion regarding the standards of review. Depending upon who has the burden of proof, these challenges will be different. It is outside the scope of this paper to give a detailed description of these challenges in the context of the appropriate evidentiary standard. However, a brief description of the standards and the method to preserve error concerning those standards are set forth below.

Regarding factual sufficiency, when a party challenges a positive finding on an issue that the opponent has the burden of proof on at trial, the party asserts a factual insufficiency challenge. This review requires that the appellant establish that the evidence, considering all the evidence, is so contrary to the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust. *See Cain v. Bain*, 709 S.W.2d 75, 176 (Tex. 1986). When a party challenges the negative finding on an issue that it had the burden of proof on at trial, the party asserts a great weight and preponderance of the evidence challenge on appeal. This review requires that the appellant show that, considering all the evidence, the failure of the jury or court to find in favor of the issue is against the great weight and preponderance of the evidence. *See Ortiz v. Jones*, 917 S.W.2d 770, 772 (Tex. 1996). The court of appeals should only reverse when the great weight and preponderance of the evidence supports an affirmative answer. *See Ames v. Ames*, 776 S.W.2d 154, 159 (Tex. 1989).

Under either standard, the court should not substitute the fact finders' opinion regarding the credibility of the witnesses and the weight to be given to their testimony merely because it may have reached a different conclusion. *See M.D. Anderson Hosp. v. Felter*, 837 S.W.2d 245 (Tex. App.—Houston [1st Dist.] 1992, no writ). To preserve a factual sufficiency of the evidence challenge in a jury trial, a party must file a motion for new trial that alleges a factual sufficiency challenge. Tex. R. Civ. P. 324 (b); *Cecil v. Smith*, 804 S.W.2d 509, 510 (Tex. 1991). In a non-jury trial, it is not necessary to preserve a factual

sufficiency challenge. *See* Tex. R. App. P. 33.1; *O'Farrill Avila v. Gonzalez*, 974 S.W.2d 237 (Tex. App.—San Antonio 1998, pet denied). Only the intermediary courts of appeals have jurisdiction to consider factual sufficiency issues. *See* Tex. Const. art. V, §6; Tex. Gov't Code Ann., §22.225.

Regarding legal sufficiency, when a party challenges the negative finding on an issue that he had the burden of proof on at trial, the party raises a "matter of law" challenge. Under this challenge, the appellant must show that "reasonable minds can draw only one conclusion from the evidence." *See Collera v. Navarro*, 574 S.W.2d 65, 68 (Tex. 1978). If there is any evidence of probative force to raise a fact issue on the question, the court of appeals should deny the challenge. *Id.*

When a party challenges the positive finding on an issue that his opponent has the burden of proof on at trial, the party raises a legal insufficiency or no-evidence issue. No evidence points must, and may only, be sustained when the record discloses one of the following situations: (a) a complete absence of evidence of a vital fact; (b) the court is barred by rules of law or of evidence from giving weight to the only evidence offered to prove a vital fact; (c) the evidence offered to prove a vital fact is no more than a mere scintilla; (d) the evidence establishes conclusively the opposite of the vital fact. *King Ranch, Inc. v. Chapman*, 118 S.W.3d 742 (Tex. 2003).

In 2005, the Texas Supreme Court revisited the no-evidence standard of review. In *City of Keller v. Wilson*, the Court engaged in an extensive analysis of legal sufficiency principles. 168 S.W.3d 802 (Tex. 2005). The Court found that the standard should remain the same and does not change depending on the motion in which it is asserted. *See id.* at 823. "Accordingly, the test for legal sufficiency review should be the same for summary judgments, directed verdicts, judgments notwithstanding the verdict, and appellate no-evidence review." *Id.* That test is:

> The final test for legal sufficiency must always be whether the evidence at trial would enable reasonable and fair-minded people to reach the verdict under review. Whether a reviewing court begins by considering all the evidence or only the evidence supporting the verdict, legal-sufficiency review in the proper light must credit favorable evidence if reasonable jurors could, and disregard contrary evidence unless reasonable jurors could not.

Id. at 827. This standard shifts the review from a traditional legal sufficiency review to a "reasonable juror" standard. William V. Dorsaneo, *Evolving Standards of Evidentiary Review: Revising the Scope of Review*, 47 S. TEX. L. REV. 225, 233-43 (2005).

To preserve a legal sufficiency review issue, a party may do so (1) in a motion for directed verdict; (2) by objecting to a submission in the charge; (3) in a motion to disregard the jury's answer; and (4) in a motion for judgment notwithstanding the evidence. *See Aero Energy, Inc. v. Circle C. Drilling Co.*, 699 S.W.2d 821, 822-23 (Tex. 1985). The point may also be preserved in a motion for new trial, but if sustained, the appellant will only be entitled to a new trial. *Horrocks v. Texas Dept. of Transp.* 852 S.W.2d 498, 499 (Tex. 1993). Both the Texas Supreme Court and the intermediary courts of appeals have jurisdiction to review legal sufficiency issues. *See* TEX. CONST. ART. V, §6; TEX. GOV'T CODE ANN., §§ 22.001(a), 22.225.

So, in the context of a self-interested transaction dispute, if the defendant has the burden of proof regarding the fairness of the transaction, if the defendant loses on that issue at trial, the defendant should raise against the great weight challenge for factual sufficiency and/or an as a matter of law challenge for legal sufficiency. *Adam v. Marcos*, 620 S.W.3d 488 (Tex. App.—Houston [14th Dist.] 2021, pet. denied). Conversely, an unsuccessful plaintiff should raise a factual insufficiency and no-evidence challenge. *Estate of Townes v. Townes*, 867 S.W.2d 414 (Tex. App.—Houston [14th Dist.] 1993, writ denied) (plaintiff could allege no evidence challenge to jury's verdict). These challenges would be on the breach/fairness element of the breach of fiduciary duty claims. *See Dyke v. Hall*, No. 03-18-00457-CV,2019 Tex. App. LEXIS 9136, 2019 WL 5251139, at *10(Tex. App.—Austin Oct. 17, 2019, no pet.) (presumption of unfairness applies to the breach element of a breach of fiduciary duty claim).

D. Directed Verdict

A motion for instructed or directed verdict is a motion that is made by a party before the case is sent to jury deliberations and it seeks to have the trial court instruct or direct the jury to render a particular finding on an issue in the charge. A party is entitled to a directed verdict when: 1) the evidence shows that reasonable minds could reach only one conclusion – i.e., no evidence or conclusive evidence, *Vance v. My Apartment Steak House*, 677 S.W.2d 480, 483 (Tex. 1984); *Hyman Farm Serv. V. Earth Oil & Gas Co.*, 920 S.W.2d 452, 455-57 (Tex. App.—Amarillo 1996, no writ); and 2) the law does not allow a cause of action or defense. *See Tana Oil & Gas Corp v. McCall*, 104 S.W.3d 80, 82 (Tex. 2003); *Anderson v. Vinson Expl.*, 832 S.W.2d 657, 665 (Tex. App.—El Paso 1992, no writ). The motion must be specific, and an appellate court will not affirm a directed verdict on a ground not raised in the motion. *See* Tex.

R. Civ. P. 268; *Kassen v. Hatley*, 887 S.W.2d 4, 12 (Tex. 1994); *Cooper v. Lyon Fin. Servs.*, 65 S.W.2d 197, 207 (Tex. App.—Houston [14th Dist.] 2001, no writ).

A motion for directed or instructed verdict may be made at the end of the plaintiff's case or the end of the close of all the evidence in a jury trial. *See* Tex. R. Civ. P. 268; *see also McKinley Iron Works v. TEC*, 917 S.W.2d 468, 469-70 (Tex. App.—Fort Worth 1996, no writ) (motion for judgment is correct term in non-jury trial as there is no jury to direct or instruct). When the ground is based on the weight of the evidence, only the defendant can raise a directed verdict motion after the plaintiff rests. *See Cecil Pond Constr. Co v. Ed Bell Invs.*, 864 S.W.2d 211, 214 (Tex. App.—Tyler 1993, no writ). Either party can raise a motion on any ground after both parties close their evidence. If the trial court errantly grants a directed verdict before it is appropriate, the complaining party must show that it was harmed by admitting the evidence that it was not allowed to present to the jury in the record. *See Tana Oil & Gas Corp v. McCall*, 104 S.W.3d at 82.

This motion may be in writing or may be oral. *See Dillard v. Broyles,* 633 S.W.2d 636, 645 (Tex. App.—Corpus Christi 1982, writ ref'd n.r.e.); *Castillo v. Euresti*, 579 S.W.2d 581 (Tex. Civ. App.—Corpus Christi 1979, no writ). To preserve error on the court's denial of a motion for directed verdict, a party must show a record that the party presented the motion to the trial court, and that the court denied the motion. *See City of San Benito v. Cantu*, 831 S.W.2d 416, 422 (Tex. App.—Corpus Christi 1992, no writ). Although Rule of Appellate Procedure 33.1 expressly provides that a written order is not required to preserve error, it should be noted that one court has held that a trial court must make its ruling either in a separate written order or in the judgment. *See City of Alamo v. Casas*, 960 S.W.2d 240, 248 (Tex. App.—Corpus Christi 1998, pet. denied and dism'd by agr.) (holding that written order is necessary); *Soto v. Southern Life & Health Ins. Co.*, 776 S.W.2d 752, 754 (Tex. App.—Corpus Christi 1989, no writ). Moreover, if the motion is made during the trial, and the moving party offers evidence after its denial, then the moving party must make a second motion at the close of all the evidence in order to preserve error. *See Horton v. Horton*, 965 S.W.2d 78, 86 (Tex. App.—Fort Worth 1998, no pet.).

At the end of the evidence, where appropriate, a plaintiff in a self-interested transaction case should move for a directed verdict that the evidence proves as a matter of law that a fiduciary relationship exists, that there was a self-interested transaction, and that there is no evidence to support the fairness of the transaction. A defendant, however, should move, where appropriate, that there is no evidence of a fiduciary relationship, no evidence of a self-interested transaction, and that it proved the fairness of the transaction as a matter of law.

E. Charge Issues

1. General Charge Discussion

The charge is the document that the court gives the jury to decide the case – it frames the controlling factual issues. *Aero Energy, Inc. v. Circle C Drilling Co.*, 699 S.W.2d 821, 823 (Tex. 1985). As the charge is the controlling document that the jury uses to decide the factual issues of the case, it is of extreme importance. If this document is wrong, then the jury's answer is likely wrong. Thus, in Texas the charge is "a prolific source of reversals." JURY TRIAL: CHARGE, MCDONALDS TEXAS CIVIL PRACTICE, § 22:1.

The trial court has broad discretion in framing the issues for the jury, and this discretion is solely limited by the requirement that the charge be limited to the controlling issues of fact. *Doe v. Mobile Tapes, Inc.*, 43 S.W.3d 40, 50-51 (Tex. App.—Corpus Christi 2001, no pet.). A controlling issue may be submitted via questions, instructions, and definitions—or a combination of all three. *Id.*

Further, "a party shall not be entitled to any submission of any question raised only by a general denial and not raised by affirmative written pleadings by that party." Tex. R. Civ. P. 278. Accordingly, if an issue is properly pleaded and is supported by some evidence, a litigant is entitled to have questions relevant to a controlling issue submitted to the jury. *Triplex Comm., Inc. v. Riley*, 900 S.W.2d 716, 718 (Tex. 1995).

In addition to questions, a trial court should submit instructions that help frame the question: "The court shall submit such instructions and definitions as shall be proper to enable the jury to render a verdict." Tex. R. Civ. P. 277. An instruction is proper if it (1) assists the jury, (2) accurately states the law, and (3) finds support in the pleadings and evidence. *Thota v. Young*, 366 S.W.3d 678 (Tex. 2012). When a trial court refuses to submit a requested instruction, the question on appeal is whether the request was reasonably necessary to enable the jury to render a proper verdict. *Texas Workers' Com. Ins. Fund v. Mandlbauer*, 34 S.W.3d 909, 912 (Tex. 2000). a trial court can reversibly err in failing to submit a proper instruction. *Seger v. Yorkshire Ins. Co.*, 503 S.W.3d 388 (Tex. 2016) ("While trial courts have wide discretion in determining the necessity of explanatory instructions and definitions in the jury charge, the trial court must give definitions of legal and other technical terms."); *H.E. Butt Grocery Co. v. Bilotto*, 985 S.W.2d 22, 23 (Tex. 1998); *Standley v. Sansom*, 367 S.W.3d 343, 350 (Tex. App.—San Antonio 2012, pet. denied); *Watson v. Brazos Elec. Power Coop.*, 918 S.W.2d 639, 643-44 (Tex. App.—Waco 1996, no

writ) (trial court erred in failing to submit spoliation instruction where supported by evidence).

Trial courts can reversibly err in submitting inappropriate instructions. *See, e.g., Dryzer v. Bundren*, No. 07-12-00167-CV,2014 Tex. App. LEXIS 4875, 2014 WL 1856849 (Tex. App.—Amarillo May 6, 2014, pet. denied); *United Enters. v. Erick Racing Enters.*, No. 07-01-0467-CV, 2002 Tex. App. LEXIS 9271, at *19 (Tex. App.—Amarillo Dec. 31, 2002, pet. denied). Reversible error may result from the inclusion in the charge of unnecessary jury instructions focusing the jury's attention on issues not belonging in the case. *Wal-Mart Stores, Inc. v. Middleton,* 982 S.W.2d 468, 469-70 (Tex. App.—San Antonio 1998, pet. denied) (citing *Lemos v. Montez*, 680 S.W.2d 798, 799 (Tex. 1984)).

In addition to questions and instructions, a trial court should submit definitions of the controlling legal terms in the charge. The purpose of a definition is to allow the jurors to understand the legal terms and phrases used in the charge so that they can properly answer the questions and render a verdict. *Oadra v. Stegall*, 871 S.W.2d 882, 890 (Tex. App.—Houston [14th Dist.] 1994, no writ). However, a court should only define legal or technical terms. *Allen v. Allen*, 966 S.W.2d 658, 660 (Tex. App.—San Antonio 1998, pet. denied); *Turner v. Roadway Express, Inc.*, 911 S.W.2d 224, 227 (Tex. App.—Fort Worth 1995, writ denied). The failure to define a legal or technical term in the charge can be harmful error requiring reversal.

2. Objection to Sufficiency of the Evidence

A party can object to a charge question because there is no evidence to support it or because it has been established a matter of law. A court should only submit a charge question when there is a fact question. Texas Rule of Civil Procedure 279 provides that "[a] claim that the evidence was legally or factually insufficient to warrant the submission of any question may be made for the first time after verdict, regardless of whether the submission of such question was made by the complainant." Tex. R. Civ. P. 279; *Musallam v. Ali,* 560 S.W.3d 636 (Tex. 2018). While a party may preserve a no evidence issue by objecting to submission of the issue to the jury, a motion for judgment notwithstanding the verdict or motion to disregard the jury's answer will also preserve error. *Musallam v. Ali,* 560 S.W.3d at 636; *Steves Sash & Door Co., Inc. v. Ceco Corp.*, 751 S.W.2d 473, 477 (Tex. 1988). A party does not forfeit the right to later challenge the legal sufficiency of the evidence to support it by failing to object in the charge conference. *See Simon v. Henrichson*, 394 S.W.2d 249, 257 (Tex. Civ. App.—Corpus Christi 1965, writ ref'd n.r.e.) ("Objection of no evidence can be made for the first time after verdict, regardless of whether the submission of such issue was requested by the complaining party or not." (citing Tex. R. Civ. P. 279)). Evidence is legally insufficient "when (a) there is a complete absence of evidence of a vital fact, (b) the court is barred by rules of law or of evidence from giving weight to the only evidence offered to prove a vital fact, (c) the evidence offered to prove a vital fact is no more than a scintilla, or (d) the evidence conclusively establishes the opposite of the vital fact." *Regal Fin. Co. v. Tex Star Motors, Inc.*, 355 S.W.3d 595, 603 (Tex. 2010). Interestingly, a party cannot object to factually sufficiency regarding a charge submission, and a motion for new trial is the only way to preserve that issue.

3. Objections To the Charge

It is outside the scope of this article to discuss the rules regarding objecting to and requesting a charge question, instruction, or definition. For a more detailed discussion of charge preservation of error please see David F. Johnson, *Jury Charge*, Advanced Civil Appellate Course, State Bar of Texas, Austin, Texas, September 9, 2020.

However, preserving error is very important for charge error. If a complaining party raised a proper objection to the charge error, then the evidence is reviewed against the correct legal issue. *Seger v. Yorkshire Ins. Co.*, 503 S.W.3d 388, 407 (Tex. 2016); *St. Joseph Hosp. v. Wolff*, 94 S.W.3d 513, 530 (Tex. 2002). However, where there is unobjected to charge error, the evidence should be reviewed against the charge as submitted. *Seger v. Yorkshire Ins. Co.*, 503 S.W.3d at 407; *Columbia Med. Ctr. of Las Colinas, Inc. v. Hogue*, 271 S.W.3d 238, 254 (Tex. 2008).

So, if the charge has the wrong burden of proof on a self-interested transaction claim, and there is no objection to the charge, the court of appeals will review the evidence against the charge as given, not against the charge as it should have been given. *Adam v. Marcos*, 620 S.W.3d 488 (Tex. App.—Houston [14th Dist.] 2021, pet. denied) (weighing evidence against charge submission in self-interested transaction case); *Critical Path Res., Inc. v. Huntsman Int'l, LLC,* No. 09-17-00497-CV, 2020 Tex. App. LEXIS 2310, 2020 WL 1291327, at *17 n.66 (Tex. App.—Beaumont Mar. 19, 2020, no pet.) (same).

4. Burden of Proof In The Charge

The court must place the proper burden of proof on each question. *TEIA v. Olivarez*, 694 S.W.2d 92, 93-94 (Tex. App.—San Antonio 1985, no writ). Generally, this is done such that the party with the burden of proof has the burden to obtain an affirmative finding to the question. *Turk v. Robles*, 810 S.W.2d 755, 759 (Tex. App.—Houston [1st Dist.] 1991, writ denied). To properly place the burden of proof, the court's jury charge must be worded so that the jury's answer indicates that the party with the

burden of proof on that fact established the fact by a preponderance of the evidence. *Maxus Energy Corp. v. Occidental Chem. Corp.*, 244 S.W.3d 875, 883(Tex. App.—Dallas 2008, pet. denied); *Turk v. Robles,* 810 S.W.2d 755, 759 (Tex. App.—Houston [1st Dist.] 1991, writ denied). For example, if a plaintiff has the burden to prove that the defendant was negligent, a charge question on that issue may read: "Do you find from the preponderance of the evidence that [Defendant] was negligent, if any, in the incident made the basis of this suit?" If the plaintiff sustains his burden, the jury will find in the affirmative.

In some issues it is difficult to determine who has the burden of proof and how to word the question – particularly using broad form. In those cases, the burden of proof can be properly explained in an instruction. *Walker v. Eason*, 643 S.W.2d 390, 391 (Tex. 1982); *Hoppenstein Props., Inc. v. Schober*, 329 S.W.3d 846, 854 (Tex. App.—Fort Worth 2010, no pet.) *Austin State Hosp. v. Kitchen*, 903 S.W.2d 83, 93 (Tex. App.—Austin 1995, no writ). Indeed, Rule 277 provides that "[t]he placing of the burden of proof may be accomplished by instructions rather than by inclusion in the question." Tex. R. Civ. P. 277. "Thus, the Rules of Civil Procedure contemplate that the jury can be instructed about applying the burden of proof in two ways: [by] an admonitory instruction or by placement of the burden through the question." *In re Commitment of Beasley*, No. 09-08-00371-CV, 2009 Tex. App. LEXIS 8664, 2009 WL 3763771, at *7 (Tex. App.—Beaumont Aug. 6, 2009, pet. denied).

A preponderance of the evidence is the burden of proof for all Texas civil cases unless the case involves "extraordinary circumstances, such as when we have been mandated to impose a more onerous burden." *Ellis Cty. State Bank v. Keever,* 888 S.W.2d 790, 792 (Tex. 1994). A court should instruct the jury on the correct burden of proof. *Durant v. Anderson*, No. 02-14-00283-CV, 2020 Tex. App. LEXIS 2319 (Tex. App.—Fort Worth March 19, 2020, no pet.). To preserve error, a party need only object to the question as improperly shifting the burden of proof. *Maxus Energy Corp. v. Occidental Chem. Corp.*, 244 S.W.3d 875, n. 8 (Tex. App.—Dallas 2008, pet. denied).

In *Nat'l Plan Adm'rs, Inc. v. Nat'l Health Ins. Co.,* the court of appeals discussed a charge question that placed the burden of proof on the plaintiff to establish the defendant's breach of duty but an instruction correctly placed the burden on the defendant. 150 S.W.3d 718, 740(Tex. App.—Austin 2004), *rev'd on other grounds*, 235 S.W.3d 695 (Tex. 2007). The court held:

> In this case, the court submitted the following relevant language: "Did [National Plan Administrators] fail to comply with its fiduciary duty to [National Health]? You are hereby instructed that, in its role as [National Health's] third-party administrator, [National Plan Administrators] owed [National Health] a fiduciary duty. To prove that it complied with its duty, [National Plan Administrators] must show. . . .
>
> Thus, the question submitted to the jury--whether National Plan Administrators failed to comply with its fiduciary duty--placed the burden of persuasion on National Health. See id. The instruction, in contrast, by requiring National Plan Administrators to prove that it complied with its duty, placed the burden of persuasion on National Plan Administrators, where it properly belonged. See id. Thus, the error in this case possibly shifted the burden to National Health and could only have prejudiced National Health, the party who ultimately prevailed. As a result, we believe that this error did not harm National Plan Administrators.

Id.

5. Pattern Jury Charge Submissions

The State Bar of Texas authored a multi-volume set of books that give examples for questions, instructions, and definitions – the Texas Pattern Jury Charge. Trial courts usually look to the Texas Pattern Jury Charge as a sacred script and are not likely to deviate from it. And for the most part, Texas appellate courts have looked favorably upon the submissions found in the Texas Pattern Jury Charge. *See e.g., H.E. Butt Grocery Co. v. Bilotto*, 985 S.W.2d 22, 24 (Tex. 1998); *Pacencio v. Allied Indus. Int'l., Inc.*, 724 S.W.2d 20 (Tex. 1987); *Wilson v. Kaufman & Broad Home Sys.*, 728 S.W.2d 874, 875-76 (Tex. App.—Beaumont 1987, writ ref'd n.r.e.). In fact, the Texas Supreme Court has encouraged the "bench and bar" to use the Texas Pattern Jury Charges. *Fleishman v. Guadiano*, 651 S.W.2d 730, 731 (Tex. 1983). However, there have been occasions where Texas courts have not followed the Pattern Jury Charge. *See e.g., State v. Williams,* 940 S.W.2d 583, 584 (Tex. 1996); *Keetch v. Kroger Co.*, 845 S.W.2d 262 (Tex. 1992); *Plas-Tex, Inc. v. U.S. Steel Corp.*, 772 S.W.2d 442 (Tex. 1989). So, counsel should not use a Texas Pattern Jury Charge suggested submission without any thought. Counsel should consider the current state of the law, the facts of the case, and determine how the jury should be charged on a breach of fiduciary duty based on a self-interested transaction.

In the law, there are usually several different ways of doing something correctly. The charge is no different. There are usually several different correct potential submissions, and the Texas Pattern Jury

Charge is intended to provide one example of a correct submission. Even though a party wants to use a charge submission from the Texas Pattern Jury Charge, it should still carefully research the law and make sure that the submission is indeed correct, complete, and properly places the burden of proof.

The Texas Pattern Jury Charge, Family Law and Probate has several proposed questions on self-interested transactions. Regarding an estate representative, Texas Pattern Jury Charge 232.2 states:

> QUESTION _____
> Did PERSONAL REPRESENTATIVE comply with his fiduciary duty in connection with [describe self-dealing transaction]?
> In administering the estate, PERSONAL REPRESENTATIVE owed the beneficiaries of the estate a fiduciary duty. To prove he complied with this duty in connection with [describe self-dealing transaction], PERSONAL REPRESEN-TATIVE must show that, at the time of the transaction in question—
> [Use only the items that are relevant in the particular case.]
> 1. the transaction in question was fair and equitable to the beneficiaries, considering PERSONAL REPRESENTATIVE's obligations in administering the estate; [and]
> 2. PERSONAL REPRESENTATIVE made reasonable use of the confidence placed in him as the result of his appointment; [and]
> 3. PERSONAL REPRESENTATIVE acted in the utmost good faith and exercised the most scrupulous honesty toward the beneficiaries in connection with the transaction in question; [and]
> 4. PERSONAL REPRESENTATIVE placed the interests of the beneficiaries before his own and did not use the advantage of his position to gain any benefit for himself at the expense of the beneficiaries; [and]
> 5. PERSONAL REPRESENTATIVE fully and fairly disclosed to the beneficiaries all material facts known to PERSONAL REPRESENTATIVE concerning the transaction in question that might affect the rights of the beneficiaries.
> "Good faith" means an action that is prompted by honesty of intention and a reasonable belief that the action was probably correct.
> Answer "Yes" or "No."
> Answer: _____

V Texas Pattern Jury Charge 232.2. The comments to this question note: "If there is no evidence rebutting the presumption of unfairness that arises when a fiduciary profits or benefits in any way from the transaction with the beneficiary, the question should not be submitted for that transaction." *Id.* Further, the comments state:

> When a fiduciary profits or benefits in any way from a transaction with the beneficiary, a presumption of unfairness arises that shifts the burden of persuasion to the fiduciary or the party claiming the validity or benefits of the transaction to show that the transaction was fair and equitable to the beneficiary. *Keck, Mahin & Cate v. National Union Fire Insurance Co.*, 20 S.W.3d 692, 699 (Tex. 2000); *Texas Bank & Trust Co. v. Moore*, 595 S.W.2d502, 508–09 (Tex. 1980); *Archer,* 390 S.W.2d at 739; *Lesikar v. Rappeport*, 33 S.W.3d282, 298 (Tex. App.—Texarkana 2000, pet. denied). A presumption of unfairness also arises and the burden of proof shifts to the fiduciary if the fiduciary places himself in a position in which his self-interest might conflict with his obligations as a fiduciary. *Stephens County Museum, Inc.*, 517 S.W.2d at 260–61 (fiduciary's positions as attorney for donors and as director and officer of donee created presumption of unfairness in transactions). By definition, in any self-dealing transaction the personal representative is in such a position. The presumption may be rebutted by the fiduciary. *Stephens County Museum, Inc.*,517 S.W.2d at 261; *see also Texas Bank & Trust Co.*, 595 S.W.2d at 509. Normally, are rebuttable presumption shifts the burden of producing evidence to the party against whom it operates but does not shift the burden of persuasion to that party. *General Motors Corp. v. Saenz,* 873 S.W.2d 353, 359 (Tex. 1993). In fiduciary duty cases, however, the presumption of unfairness operates to shift both the burden of producing evidence and the burden of persuasion to the fiduciary. *Sorrell v. Elsey*, 748 S.W.2d 584,586 (Tex. App.—San Antonio 1988, writ denied); *Miller,* 700 S.W.2d at 945–46; *Fillion v. Troy*, 656 S.W.2d 912, 914 (Tex. App.—Houston [1st Dist.] 1983, writ ref'd n.r.e.); *Cole v. Plummer*, 559 S.W.2d 87, 89 (Tex. App.—Eastland 1977, writ ref'd n.r.e.); *see also Peckham*, 120 S.W.2d at 788 (issue of whether beneficiary of fiduciary relationship

> relied on fiduciary to perform his duties was immaterial). If there is no evidence rebutting the presumption, no breach of fiduciary duty question is necessary. *Texas Bank & Trust Co.*, 595 S.W.2d at 509. Liability questions normally place the burden of proof on the plaintiff, who is required to obtain an affirmative finding. When the burden is shifted to the fiduciary, however, a "No" answer supports liability.

Texas Pattern Jury Charge 232.2 cmt.

Regarding trustees having self-interested transactions, the Texas Pattern Jury Charge has several different versions of questions. For a self-dealing transaction where the duties have not been modified, the question is:

> QUESTION _____
> Did TRUSTEE comply with his fiduciary duty to BENEFICIARY in connection with [describe self-dealing transaction]?
> TRUSTEE owed BENEFICIARY a fiduciary duty. To prove he complied with this duty in connection with [describe self-dealing transaction], TRUSTEE must show that, at the time of the transaction in question—[Use only the items that are relevant in the particular case.]
> 1. the transaction in question was fair and equitable to BENEFICIARY; [and]
> 2. TRUSTEE made reasonable use of the confidence placed in him by SETTLOR; [and]
> 3. TRUSTEE acted in good faith and in accordance with the purposes of the trust in connection with the transaction in question; [and]
> 4. TRUSTEE placed the interests of BENEFICIARY before his own and did not use the advantage of his position to gain any benefit for himself at the expense of BENEFICIARY; [and]
> 5. TRUSTEE fully and fairly disclosed to BENEFICIARY all material facts known to TRUSTEE concerning the transaction in question that might affect BENEFICIARY's rights.
> "Good faith" means an action that is prompted by honesty of intention and a reasonable belief that the action was probably correct.
> Answer "Yes" or "No."
> Answer: _____

Texas Pattern Jury Charge 235.10. The comments state:

> The foregoing question should be submitted when the trustee is accused of self-dealing and the duties of loyalty and full disclosure have been neither modified nor eliminated by the trust instrument or by statute. If there is no evidence rebutting the presumption of unfair-ness that arises when a fiduciary profits or benefits in any way from a transaction with the beneficiary, or if the transaction is expressly prohibited by Tex. Prop. Code §§ 113.052–.055, the question should not be submitted for that transaction.

Texas Pattern Jury Charge 235.10 cmt.

For self-dealing transactions where duties have been modified by not eliminated, the question is:

> QUESTION _____
> Did TRUSTEE comply with his duties as trustee in connection with the purchase of trust property?
> TRUSTEE complied with his duties if his purchase of the trust property was for fair and adequate consideration and he acted in good faith and in accordance with the purposes of the trust.
> "Good faith" means an action that is prompted by honesty of intention and a reasonable belief that the action was probably correct.
> Answer "Yes" or "No."
> Answer: _____

Texas Pattern Jury Charge 235.11. The comments state:

> The foregoing question and instruction should be submitted in cases in which the trustee is accused of self-dealing and the trust agreement permits self-dealing under stated circumstances or otherwise modifies the duty of loyalty but does not completely eliminate it. Care should be taken to track the language of the document verbatim.

Texas Pattern Jury Charge 235.11 cmt.

For self-dealing transactions where duties have been eliminated, the question is:

> QUESTION _____
> Did TRUSTEE fail to comply with his duty as trustee when he purchased the trust property?
> A trustee fails to comply with his duty as trustee if he fails to act in good faith or fails to act in accordance with the purposes of the trust.

"Good faith" means an action that is prompted by honesty of intention and a reasonable belief that the action was probably correct.
Answer "Yes" or "No."
Answer: _____

Texas Pattern Jury Charge 235.12.
The comments state:

The foregoing question and instructions should be submitted in cases in which the trustee is accused of self-dealing and the trust agreement permits self-dealing by completely eliminating the duty of loyalty.

Texas Pattern Jury Charge 235.12 cmt.
In the Business Section, PJC 104.2 states:

QUESTION _____
Did Don Davis comply with his fiduciary duty to Paul Payne?
[Because a relationship of trust and confidence existed between them,] [As Paul Payne's attorney,] [As Paul Payne's agent,] Don Davis owed Paul Payne a fiduciary duty.
To prove he complied with his duty, Don Davis must show—
1. the transaction[s] in question [was/were] fair and equitable to Paul Payne; and
2. Don Davis made reasonable use of the confidence that Paul Payne placed in him; and
3. Don Davis acted in the utmost good faith and exercised the most scrupulous honesty toward Paul Payne; and
4. Don Davis placed the interests of Paul Payne before his own and did not use the advantage of his position to gain any benefit for himself at the expense of Paul Payne; and
5. Don Davis fully and fairly disclosed all important information to Paul Payne concerning the transaction[s].
Answer "Yes" or "No."
Answer: _____

Texas Pattern Jury Charge 104.2. The comment states:

PJC 104.2 submits the question of breach of fiduciary duty defined by the common law, whether the duty is based on a formal or an informal relationship, when the fiduciary bears the burden of proof. The burden of proof is on the fiduciary when the fiduciary has profited or benefited from a transaction with the beneficiary or has placed himself in a position in which his self-interest might conflict with the beneficiary.

Texas Pattern Jury Charge 104.2 cmt. *See Critical Path Res., Inc. v. Huntsman Int'l, LLC*, No. 09-17-00497-CV, 2020 Tex. App. LEXIS 2310, 2020 WL 1291327 (Tex. App.—Beaumont Mar. 19, 2020, no pet.). Regarding a breach of fiduciary duty where the duty is defined by statute or agreement, the PJC provides:

QUESTION _____
Did Don Davis comply with all of the following duties?
[List duties alleged to have been breached and the standard of care using language from the applicable statute or agreement or both. Also list any applicable common-law duties as provided in PJC 104.2.]
Answer "Yes" or "No."
Answer: _____

Texas Pattern Jury Charge 104.4.
The comments state:

PJC 104.4 submits the question of breach of fiduciary duty defined by a statute or an agreement when the fiduciary bears the burden of proof. *See National Plan Administrators, Inc. v. National Health Insurance Co.*, 235 S.W.3d 695,700–704 (Tex. 2007); *Sterling Trust Co. v. Adderley,* 168 S.W.3d 835, 846–47 (Tex.2005). *See, e.g., Tex. Bus. Orgs. Code* §§ 152.203–.207 ("TBOC," which replaced the Texas Revised Partnership Act ("TRPA")) regarding duties applicable to partners. If the duty is defined by a trust agreement or the Texas Trust Code (Tex. Prop. Code tit.9, subtit. B), see the current edition of State Bar of Texas, Texas Pattern Jury Charges—Family & Probate PJC 235.9–235.15. If the duty is defined by an agreement relating to oil and gas exploration or production, see the current edition of State Bar of Texas, Texas Pattern Jury Charges—Oil & Gas PJC 304.1–304.2. If the duty arises from an attorney-client relationship, see the current edition of State Bar of Texas, Texas Pattern Jury Charges—Malpractice, Premises & Products PJC 61.12. The burden of proof is on the fiduciary when the fiduciary has profited or benefited from a transaction with the beneficiary and a presumption of unfairness therefore arises. For cases arising from a statute or an agreement in which the

beneficiary has the burden of proof, see PJC 104.5.

Texas Pattern Jury Charge 104.4 cmt.

F. Motion For JNOV

A motion for judgment notwithstanding the verdict or a motion to disregard a jury answer requests the trial court to disregard all or some of the jury's answers to the jury questions and to render judgment for the movant. The motion for JNOV requests the court to disregard all of the jury's answers, whereas a motion to disregard a jury answer requests the court to disregard only some of the jury's answers and render judgment on the remaining answers. *See Teston v. Miller*, 349 S.W.2d 296, 299 (Tex. Civ. App.—Beaumont 1961, writ ref'd n.r.e.). The motion must be in writing. *See* Tex. R. Civ. P. 301; *Lamb v. Franklin*, 976 S.W.2d 339, 343 (Tex. App.—Amarillo 1998, no writ). The motion must identify the findings to be disregarded, present the reasons and authority to disregard them, and request the court to render either judgment on the remaining findings or, if all the findings are to be disregarded, a judgment contrary to all the findings. *See Dupree v. Piggly Wiggly Shop Rite Foods, Inc.*, 542 S.W.2d 882, 892 (Tex. App.—Corpus Christi 1976, writ ref'd n.r.e.).

The types of complaints that can support such a motion are: 1) there is no evidence to support a jury finding; 2) the evidence proves an answer contrary to a jury finding as a matter of law; 3) there is a legal principle that prevents a party from prevailing upon a jury finding; and 4) a jury finding is immaterial as submitted or due to other findings. *See e.g., Brown v. Bank of Galveston*, 963 S.W.2d 511, 513 (Tex. 1998) (no evidence); *TRT Dev. Co. v. Meyers*, 15 S.W.3d 281, 287 (Tex. App.—Corpus Christi 2000, no pet.) (evidence contrary to jury finding); *UPS, Inc. v. Tasdemiroglu*, 25 S.W.3d 914, 916 n.4 (Tex. App.—Houston [14th Dist.] 2000, pet. denied) (legal bar); *Quick v. City of Austin*, 7 S.W.3d 109, 116 (Tex. 1998) (immaterial finding); *see also, David F. Johnson, Employers' Liability for Independent Contractors' Injuries*, 51 BAYLOR L. REV. 1 (2000) (legal issue of duty can be raised in a motion for JNOV). The safest practice is to file this type of motion after verdict and before a judgment is signed, but no later than thirty days after the trial court signs the judgment. *See Commonwealth Lloyd's Ins. Co. v. Thomas*, 825 S.W.2d 135, 141 (Tex. App.—Dallas 1992, writ dism. as moot) (motion jnov must be filed within thirty days of signing of judgment); *but see* Tex. R. Civ. P. 301 (not stating a deadline to file motion jnov); *Needville ISD v. S.P.J.S.T. Rest Home*, 566 S.W.2d 40, 42 (Tex. Civ. App.—Beaumont 1978, no writ) (motion jnov can be filed at any time during trial court's plenary jurisdiction). Like any motion, the movant should seek an express ruling on his motion for jnov in order to ensure preservation of error. *See Spiller v. Lyons*, 737 S.W.2d 29, 29 (Tex. App.—Houston [14th Dist.] 1987, no writ) (failure to obtain ruling waived error); *but see* Tex. R. App. P. 33.1(a)(2)(A) (implicit ruling preserves error). There is currently a split in the appellate courts regarding whether a motion for jnov or motion to disregard a jury finding extends the appellate deadlines. *Compare Kirschberg v. Lowe*, 974 S.W.2d 844, 847-48 (Tex. App.—San Antonio 1998, no pet.) (motion extends deadlines); *First Freeport Nat'l Bank v. Brazoswood Nat'l Bank,* 712 S.W.2d 168, 170 (Tex. App.—Houston [14th Dist.] 1986, no writ) (motion does not extend deadline).

After the verdict, where appropriate, a plaintiff in a self-interested transaction case should move for a judgment NOV that the evidence proves as a matter of law that a fiduciary relationship exists, that there was a self-interested transaction, and that there is no evidence to support the fairness of the transaction. The plaintiff can also move that it proved the unfairness of the transaction as a matter of law. A defendant, however, should move, where appropriate, that there is no evidence of a fiduciary relationship, no evidence of a self-interested transaction, and that it proved the fairness of the transaction as a matter of law.

G. Remedies

A plaintiff can obtain many different forms or relief when challenging a self-interested transaction via a breach of fiduciary duty claim. For a detailed discussion of potential remedies, please see David F. Johnson *Remedies for Breach of Fiduciary Duty*, Fiduciary Litigation Course, State Bar of Texas, San Antonio, December 4-6, 2019. Basically, a plaintiff can potentially obtain actual damages, interest, attorney's fees if there is a statutory basis for such an award, mental anguish, fee forfeiture, profit disgorgement, disgorgement of an interest in a business, rescission, equitable liens, etc. Moreover, there may be injunctive relief to stop a proposed self-interested transaction that unfair. There is no area of law that has as may remedies as fiduciary litigation.

XV. CONCLUSION

Fiduciary litigation often involves litigating self-interested transactions. Fiduciaries often enter into transactions with their principals. These are often appropriate and authorized by the principal and the controlling documents. However, these transactions are also often inappropriate as the fiduciary is abusing its position to take an unfair advantage of the principal. There is a presumption of unfairness that generally arises that forces the fiduciary to prove the fairness of the transaction. This presumption impacts the burden of production and may impact the burden

of persuasion. This creates complex procedural issues at various stages of the litigation: summary judgment, trial, charge, and post-trial. There are many different issues that arise in litigating these types of claims, and this article attempts to address many of them.