

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

Elizabeth S. Miller  
Professor of Law  
M. Stephen and Alyce A. Beard Chair  
in Business and Transactional Law  
Baylor Law School  
Waco, Texas

Douglas K. Moll  
Beirne, Maynard & Parsons, L.L.P. Professor of Law  
University of Houston Law Center  
Houston, Texas

The University of Texas School of Law

2023 LLCs, LPs and PARTNERSHIPS

July 13–14, 2023



## TABLE OF CONTENTS

Page

I.	Introduction . . . . .	1
II.	Recent Texas Cases Involving Partnerships . . . . .	1
A.	Creation/Existence of General Partnership. . . . .	1
B.	Partner's Personal Liability for Obligations of Partnership . . . . .	12
C.	Authority and Power of Partner or Other Agent to Bind Partnership . . . . .	16
D.	Fiduciary Duties of Partners and Affiliates . . . . .	17
E.	Partnership Property and Partnership Interest . . . . .	41
F.	Interpretation and Enforcement of Partnership Agreement . . . . .	47
	1. Contractual Modification of Fiduciary Duties; Exculpation. . . . .	47
	2. Restriction on Transfer of Partner's Interest . . . . .	56
	3. Indemnification . . . . .	57
	4. Injunctive Relief . . . . .	59
	5. Arbitration . . . . .	64
G.	Access to Books and Records. . . . .	67
H.	Dissolution/Winding Up. . . . .	72
I.	Expulsion of Partner . . . . .	76
J.	Creditor's Remedies: Charging Order, Turnover Order. . . . .	79
K.	Standing or Capacity to Sue . . . . .	84
L.	Derivative Litigation. . . . .	90
M.	Divorce of Partner. . . . .	100
N.	Bankruptcy . . . . .	101
O.	Receivership . . . . .	103
P.	Pro Se Representation. . . . .	115
Q.	Texas Citizens Participation Act . . . . .	116
III.	Recent Texas Cases Involving Limited Liability Companies . . . . .	117
A.	Nature of Limited Liability Company . . . . .	117
B.	Limited Liability of Member or Manager; Personal Liability of Member or Manager Under Agency or Other Law. . . . .	119
C.	Authority of Member, Manager, Officer or Other Agent. . . . .	121
D.	Fiduciary Duties . . . . .	126
E.	LLC Property and LLC Membership Interest. . . . .	151
F.	Interpretation and Enforcement of Company Agreement. . . . .	151
	1. Contractual Modification of Fiduciary Duties; Exculpation. . . . .	151
	2. Amendment and Restatement . . . . .	160
	3. Reformation or Rescission. . . . .	163
	4. Bankruptcy Blocking Provision. . . . .	165
	5. Injunctive Relief . . . . .	168
G.	Access to Books and Records. . . . .	173
H.	Distributions. . . . .	179
I.	Merger. . . . .	184
J.	Forfeiture and Involuntary Termination. . . . .	186
K.	Veil Piercing. . . . .	187
L.	Creditor's Remedies: Charging Order, Turnover Order. . . . .	193
M.	Attorney's Fees. . . . .	195

N.	Standing or Capacity to Sue .....	196
O.	Derivative Litigation. ....	199
P.	Receivership .....	215
Q.	Bankruptcy .....	223
R.	Arbitration. ....	228
S.	Diversity Jurisdiction .....	231
T.	Fraudulent Transfer .....	232
U.	Personal Jurisdiction. ....	236
V.	Service of Process. ....	237
W.	Misnomer, Misidentification .....	239
X.	Venue .....	239
Y.	Pro Se Representation. ....	240
Z.	Right to Appointed Counsel .....	241

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

Elizabeth S. Miller  
Douglas K. Moll

## I. Introduction

This paper summarizes recent Texas cases involving issues of partnership and limited liability company law (excluding federal tax). This paper only includes cases that have appeared since the paper for last year's program was prepared. Case law surveys that include cases from prior years are available on Professor Miller's profile page at the Baylor Law School web site.

## II. Recent Texas Cases Involving Partnerships

### A. Creation/Existence of General Partnership

*Magee v. Nike Inc.*, No. 3:21-cv-01726-G-BT, 2023 WL 3357594 (N.D. Tex. Apr. 24, 2023), report and recommendation adopted, 2023 WL 3362607 (N.D. Tex. May 10, 2023).

The plaintiff failed to sufficiently allege a partnership between two entities in this trademark infringement action.

In this pro se trademark infringement case, the plaintiff was given an opportunity to amend and shore up his claims that Nike Inc. should be vicariously liable for trademark infringement by two other entities, Hooplif Basketball Academy, LLC ("HLBA") and BSN Sports, LLC ("BSN Sports"). In response, the plaintiff added a number of new allegations, including that of a partnership between BSN Sports and Nike and the content of conversations the plaintiff allegedly had with Nike. The court concluded that the plaintiff's allegations were inadequate to support a claim for vicarious liability on the part of Nike, stating:

Vicarious liability for trademark infringement requires "a finding that the defendant and the infringer have an apparent or actual partnership, have authority to bind one another in transactions with third parties or exercise joint ownership or control over the infringing product." ... When reviewing whether an agency relationship exists, courts "reference [ ] traditional vicarious liability rules" and "look [ ] to the Restatement (Second) of Agency [ ] in determining those rules. ... "[V]ague, puffery-like references to a 'partnership' " between entities are insufficient to support vicarious liability. ...

Magee fails to sufficiently allege any agency relationship between a direct infringer and Nike to support a claim for vicarious trademark infringement. ... Magee's assertion of a "partnership"—devoid of any reference to authority, representations, control, or supervision—merely recites the elements required for vicarious liability. ...

... Because Magee's formulaic and conclusory allegations do not support a claim for vicarious liability, Nike's motion to dismiss on this ground should be granted.

*Liserio v. Colt Oilfield Services, LLC*, No. SA-19-CV-01159-XR, 2022 WL 16542585 (W.D. Tex. Oct. 28, 2022).

The court concluded that the plaintiff was a mere employee (rather than a partner) of the venture. As a result, the defendants' motion for partial summary judgment was granted.

Defendant Colt, a Texas LLC, was formed on October 24, 2008 to conduct "torque and testing" operations for oilfields. Devin Nevilles managed Colt's operations. Terry Booker provided consulting services and acquired business for Colt. In late 2009, Nevilles hired plaintiff Robert Liserio as the Wyoming field manager to oversee all torque and testing operations within the state.

Colt's certificate of formation showed defendant Eddie Aguilar as its sole member and manager. Nevertheless, plaintiff alleged that himself, Nevilles, and Booker were "silent partners" and part owners of Colt. Plaintiff claimed that in 2010, Booker told him that plaintiff, Booker, and Nevilles were silent partners, that

plaintiff's ownership share in the company was 15% (which later increased to 25% after Nevilles left in 2016), and that plaintiff would receive a 15% annual "distribution" pursuant to that ownership interest. Plaintiff claimed that this conversation was evidenced by three writings: (1) a December 21, 2009 paystub that states "Equity Robert Liserio" in the description category; (2) an August 25, 2010 letter from David Ryza, Colt's Chief Financial Officer, that was on Colt letterhead and that stated that "Robert Liserio received a check at the end of each year for his partnership interest in Colt Oilfield Services, LLC"; and (3) A 2010 "Texas Franchise Public Information Report" that listed plaintiff as a "member" of Colt.

Plaintiff's relationship with the defendants soured in late 2016. The plaintiff alleged that he did not receive distributions in 2017 or 2018, and he ultimately left Colt in 2018. Defendant Aguilar sold Colt to PetroStar Services, LLC later in 2018. The sale price was \$32,318,140. Plaintiff alleged that, unbeknownst to him, defendants Booker and Aguilar had marketed Colt for sale in 2017. Plaintiff claimed that he left Colt in 2018 without knowledge of Colt's impending sale and that defendants schemed to cause his departure and the loss of his share of the sale proceeds.

Plaintiff sued and asserted, among other claims, a breach of fiduciary duty cause of action against the defendants. He alleged that Aguilar and Booker owed him fiduciary duties because all three were partners in Colt. He further claimed that "these fiduciary duties were breached when Aguilar and Booker refused to account for the 2017-2018 distributions, improperly denied Plaintiff distributions for those years, hid the sale negotiations from Plaintiff, and forced Plaintiff to quit and forfeit his 25% of the Colt sale proceeds." The defendants moved for summary judgment on the basis that plaintiff was a mere employee rather than a partner or owner of Colt.

The court began its analysis by citing the five-factor partnership test under § 152.052 of the Business Organizations Code:

A partnership is "an association of two or more persons to carry on a business for profit as owners," regardless of whether: (1) the persons intend to create a partnership; or (2) the association is called a partnership, joint venture, or other name. Tex. Bus. Orgs. Code Ann. § 152.051. Whether a partnership exists requires an examination of the totality of the circumstances. Texas law establishes five factors that indicate whether persons have created a partnership, although no one factor is decisive: (1) the right to receive a share of profits of the business; (2) an expression of intent to be partners in the business; (3) the right to participate in control of the business; (4) an agreement to share: (a) losses of the business; or (b) liability for claims by third parties against the business; (5) agreement to contribute or contribution of money to the business. Tex. Bus. Orgs. Code § 152.052(a)(1)-(5). However, the receipt of, or right to receive, a share of profits as payment of wages or other compensation to an employee does not indicate that a person is a partner. *Id.* § 152.052(b)(1)(B). Finally, a "representation or other conduct indicating that a person is a partner in an existing partnership, if that is not the case, does not of itself make that person a partner in the partnership." Tex. Bus. Orgs. Code Ann. § 152.054.

With respect to the right to receive a share of the profits, the court noted that both parties agreed that defendants and plaintiff shared profits of the business. The court cited § 152.052(b)(1)(B) of the TBOC, however, and observed that sharing profits does not necessarily make someone a partner. According to the court, Colt paid plaintiff as it would pay an employee. For example, plaintiff testified that he received his distributions "sometimes" through Form 1099s, typically reserved for independent contractors, and sometimes through the typical payroll process. Further, plaintiff testified that he never received a K-1 form from Colt. The court observed that "[c]orporations should report partner interests through K-1 forms; the absence of such forms is thus telling evidence." Although plaintiff shared in profits, "his own testimony that he received the distributions through the typical payroll process indicates that such distributions were made as part of his compensation package as an employee and not as a partner."

The court then turned to the expression of an intent to be partners. Plaintiff cited to Nevilles' and Aguilar's depositions, arguing that their testimony demonstrated that plaintiff was a partner. The court disagreed:

An objective reading of the depositions does not support Plaintiff's conclusion. Nevilles' deposition indicates, at best, that Nevilles spoke with Aguilar generally about hiring Nevilles' former employees. It does not support Plaintiff's claim that Nevilles and Aguilar specifically

Find the full text of this and thousands of other resources from leading experts in dozens of legal practice areas in the [UT Law CLE eLibrary \(utcle.org/elibrary\)](http://utcle.org/elibrary)

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

First appeared as part of the conference materials for the  
32<sup>nd</sup> Annual LLCs, LPs and Partnerships session  
"Case Law Update"