SUMMARY JUDGMENT PRACTICE IN FIDUCIARY LITIGATION IN TEXAS

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I. INTRODUCTION

The use of summary judgment motions has exploded in Texas over the past forty years.[1] Historically, Texas courts did not grant many summary judgment motions because it was thought that a party should be entitled to their day in court (no matter the merits of the claim), and that a judge would never be reversed for denying such a motion.[2] Parties were required to file

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1. David Johnson, *Summary Judgments in Texas*, WINSTEAD, https://www.fiduciarylitigator.com/files/2017/08/Summary-Judgments-in-Texas_PPT-Presentation.pdf [https://perma.cc/YU9H-TEV6] (last visited Feb. 4, 2026).

2. *Id.*

motions with evidence to meet their burden of production and persuasion to prove that there were no questions of fact.[3] But as the political climate in Texas changed, so did the use of summary judgment motions.[4] Indeed, Texas courts even adopted a new form of summary judgment in 1997, the no-evidence summary judgment, which allowed parties to file summary judgment motions without attaching any evidence and placed the burden of producing evidence on the non-movant.[5] Courts are now receptive to granting both types of motions for summary judgment.[6] Recently, the Texas Supreme Court adopted a new version of Texas Rule of Civil Procedure 166a to create more onerous deadlines on responses and hearings for summary judgment motions.[7] Today, parties file motions for summary judgment seeking to resolve the entire case or certain aspects of it in almost every civil case.[8]

The explosion of summary judgment practice certainly includes fiduciary cases.[9] Frequently in fiduciary litigation, parties challenge fiduciaries' self-interested transactions, transactions in which a fiduciary uses its position to obtain a benefit at the expense of the principal.[10] There is a presumption that these types of transactions are unfair and voidable.[11] Courts hold that the burden is on the fiduciary to prove the fairness of the transaction.[12] So, the question posed is how do the burden-shifting procedures in summary judgment practice apply to fiduciary cases, when the defendant often bears the initial burden to prove the fairness of a transaction?[13] This article will attempt to address this complex and interesting issue.[14]

II. TRIAL COURT'S STANDARD OF REVIEW

Any analysis of summary judgment procedure as it applies to fiduciary cases must start at the beginning: a trial court's standard of review in ruling on the motions.[15]

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3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.*
7. *Final Approval of Amendments to Texas Rule of Civil Procedure 166a, Misc. Docket No. 26-9012*, TEX. SUP. CT. (Mar. 1, 2026), https://www.txcourts.gov/media/1462277/269012.pdf [https://perma.cc/CGQ6-BUTG].
8. *Id.*
9. *Id.*
10. *See infra* Part IV.
11. *See infra* Part IV.
12. *See infra* Part IV.
13. Author's original thought.
14. *See infra* Parts II–VI.
15. *See generally* Gill v. Hill, 688 S.W.3d 863 (Tex. 2024) (explain summary judgment proceedings in Texas courts).

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.[16] A party moving for traditional summary judgment meets their burden by proving that there is no genuine issue of material fact and they are entitled to judgment as a matter of law.[17] The movant 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 non-movant will be taken as true.[18] Further, the court must indulge every reasonable inference in favor of the non-movant and resolve doubts in their favor.[19] The Texas Supreme Court has recently described the burden as follows:

> A court must grant a "traditional" motion for summary judgment "forthwith if [the summary judgment evidence] show[s] that . . . there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law on the issues expressly set out." This rule is similar to the federal rule, which courts have interpreted to permit "summary judgment, after adequate time for discovery and upon motion, against a party who fails to . . . establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial."
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> We have interpreted the Texas rule differently, explaining that "[t]he presumptions and burden of proof for an ordinary or conventional trial are immaterial to the burden that a movant for summary judgment must bear." Under our traditional rule, courts "never shift the burden of proof to the non-movant unless and until the movant has 'establish[ed] his entitlement to a summary judgment . . . by conclusively proving all essential elements of his cause of action or defense as a matter of law.'" "[T]he non-movant's failure to answer or respond cannot supply by default the summary judgment proof necessary to establish the movant's right."[20]

So, the non-movant is not required to respond to the movant's motion if the movant fails to carry their burden.[21] This is because "summary judgments

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16. *Id.*

17. *Id.* at 868; Draughon v. Johnson, 631 S.W.3d 81, 85 (Tex. 2021); KMS Retail Rowlett, LP v. City of Rowlett, 593 S.W.3d. 175, 181 (Tex. 2019); First United Pentecostal Church of Beaumont v. Parker, 514 S.W.3d 214, 220 (Tex. 2017). See also Tex. R. Civ. P. 166a(h)(2).

18. Provident Life & Accident 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 (Tex. 1994).

19. *KMS Retail Rowlett, LP*, 593 S.W.3d at 181; *Park Place Hosp.*, 909 S.W.2d at 510.

20. *Draughon*, 631 S.W.3d at 86 (citations omitted).

21. Wal-Mart Stores, Inc. v. Xerox State & Local Sols., Inc., 663 S.W.3d 569, 583 (Tex. 2023); 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

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.[22] 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."[23] In other words, if the movant does not meet their burden of proof, there is no burden on the non-movant.[24]

However, if the movant has established a right to a summary judgment, the burden shifts to the non-movant.[25] The non-movant must then respond to the summary judgment motion and present evidence to the trial court, raising a fact issue that would preclude summary judgment.[26] If the non-movant does so, summary judgment is precluded.[27] If they do not do so, then the trial court should grant summary judgment.[28]

When both parties move for summary judgment, each party must carry their own burden as the movant.[29] Also, to win, each party must bear the burden of establishing that they are entitled to summary judgment as a matter of law.[30] Each party must also carry their own burden as the non-movant in response to the other party's motion.[31] If neither party bears their burden, a trial court should not grant either party's motion.[32] As one court stated:

> When both parties move for summary judgment on the same issue, the reviewing court considers the evidence presented by both parties, determining all questions presented. If we determine that the trial court erred in granting summary judgment, and therefore the court of appeals erred in affirming the trial court's judgment, we render the judgment the trial court should have rendered.[33]

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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).

22. McConnell v. Southside Indep. Sch. Dist., 858 S.W.2d 337, 343 (Tex. 1993).

23. *Id.*

24. City of Houston v. Clear Creek Basin Auth., 589 S.W.2d 671, 678 (Tex. 1979).

25. 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.).

26. *Katy Venture, Ltd*., 469 S.W.3d at 163; *Clarendon Nat'l Ins. Co.*, 199 S.W.3d at 486–87.

27. *See Clarendon Nat'l Ins. Co.*, 199 S.W.3d at 486–87.

28. Amedisys, Inc. v. Kingwood Home Health Care, LLC, 437 S.W.3d 507, 517 (Tex. 2014).

29. *See, e.g.*, Barbara Techs. Corp. v. State Farm Lloyds, 589 S.W.3d 806, 826 (Tex. 2019); Tarr v. Timberwood Park Owners Ass'n, 556 S.W.3d 274, 278 (Tex. 2018); Perryman v. Spartan Tex. Six Cap. Partners, Ltd., 546 S.W.3d 110, 115–16 (Tex. 2018); Moayedi v. Interstate 35/Chisam Rd., L.P., 438 S.W.3d 1, 4 (Tex. 2014); Dallas Cnty. Cmty. Coll. Dist. v. Bolton, 185 S.W.3d 868, 871 (Tex. 2005); James v. Hitchcock Indep. Sch. Dist., 742 S.W.2d 701, 703 (Tex. App.—Houston [1st Dist.] 1987, writ denied).

30. *Perryman*, 546 S.W.3d at 115–16; Guynes v. Galveston Cnty., 861 S.W.2d 861, 862 (Tex. 1993).

31. *James*, 742 S.W.2d at 703.

32. *Barbara Techs. Corp.*, 589 S.W.3d at 811.

33. Colo. Cnty. v. Staff, 510 S.W.3d 435, 444 (Tex. 2017).

When the plaintiff moves for summary judgment on their own cause of action, they must present competent summary judgment evidence proving each element as a matter of law.[34] If the plaintiff meets their burden, the trial court may grant a final summary judgment or a partial summary judgment on liability alone, holding a hearing on unliquidated damages.[35] Similarly, if the defendant moves for summary judgment on their own counterclaim rather than on a defensive claim, they bear the same burden as the plaintiff moving for summary judgment on their cause of action.[36] Accordingly, the plaintiff can thwart a defendant's summary judgment motion by: (1) presenting summary judgment evidence creating a fact question on those elements of the plaintiff's case under attack by the defendant, (2) creating a fact question on at least one element of each affirmative defense advanced by the defendant, or (3) conceding the material facts and showing that the defendant's legal position is unsound.[37] When the defendant moves for summary judgment on the plaintiff's claim, they must either disprove at least one essential element of each theory of recovery pleaded by the plaintiff or plead and conclusively prove each essential element of an affirmative defense.[38]

B. No-Evidence Motion

The trial court's review of a no-evidence summary judgment filed under Texas Rule of Civil Procedure 166(a) differs from that of a traditional summary judgment.[39] The Texas Supreme Court explained the genesis of the rule as follows:

> A court must grant a "traditional" motion for summary judgment "forthwith if [the summary judgment evidence] show[s] that . . . there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law on the issues expressly set out." This rule is similar to the federal rule, which courts have interpreted to permit "summary judgment, after adequate time for discovery and upon motion, against a party who fails

34. MMP Ltd. v. Jones, 710 S.W.2d 59, 60 (Tex. 1986); Geiselman v. Cramer Fin. Grp., Inc., 965 S.W.2d 532, 535 (Tex. App.—Houston [14th Dist.] 1997, no writ).

35. TEX. R. CIV. P. 166a(a).

36. Daniell v. Citizens Bank, 754 S.W.2d 407, 409 (Tex. App.—Corpus Christi Edinburg, 1988, no writ).

37. Torres v. W. Cas. & Sur. Co., 457 S.W.2d 50, 52 (Tex. 1970); Maranatha Temple, Inc. v. Enter. Prods. Co., 893 S.W.2d 92, 97 (Tex. App.—Houston [14th Dist.] 1994, writ denied).

38. Draughon v. Johnson, 631 S.W.3d 81, 88 (Tex. 2021); Cantey Hanger, LLP v. Byrd, 467 S.W.3d 477, 481 (Tex. 2015); KCM Fin. LLC v. Bradshaw, 457 S.W.3d 70, 71 (Tex. 2015); Friendswood Dev. Co. v. McDade & Co, 926 S.W.2d 280, 282 (Tex. 1996); Doe v. Boys Club of Greater Dallas, Inc., 907 S.W.2d 472, 476–77 (Tex. 1995).

39. TEX. R. CIV. P. 166a(h)(3).

> to . . . establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial."
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> We have interpreted the Texas rule differently, explaining that "[t]he presumptions and burden of proof for an ordinary or conventional trial are immaterial to the burden that a movant for summary judgment must bear." Under our traditional rule, courts "never shift the burden of proof to the non-movant unless and until the movant has 'establish[ed] his entitlement to a summary judgment . . . by conclusively proving all essential elements of his cause of action or defense as a matter of law.'" "[T]he non-movant's failure to answer or respond cannot supply by default the summary judgment proof necessary to establish the movant's right."
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> Texas brought its summary judgment practice closer to that of the federal courts by adopting a distinct "no evidence" motion for summary judgment in 1997. Similar to a pre-trial motion for directed verdict, this motion allows a party to seek summary judgment without presenting evidence by asserting, after adequate time for discovery, that no evidence supports one or more essential elements of a claim or defense on which the adverse party would have the burden of proof at trial. The burden then falls entirely on the adverse party to produce summary judgment evidence raising a genuine issue of material fact. Conclusory evidence, for example, is insufficient to meet the non-movant's burden under Rule 166a(i). The no-evidence rule does not, however, modify the standards for granting a traditional motion for summary judgment under Rule 166a(c).[40]

Under the no-evidence motion, the movant does not have the initial burden to produce evidence; the initial burden is on the non-movant.[41] When a sufficient no-evidence motion is filed, the burden of proof is split: the burden of production (burden to produce evidence) is placed on the non-movant, and the burden of persuasion (burden to persuade the court that no genuine issue of fact exists) is on the movant.[42] Similar to the traditional motion, a court must review the summary judgment evidence in the light most favorable to the non-movant, disregarding all contrary evidence and inferences.[43] A no-evidence motion for summary judgment must be granted if the respondent fails to present evidence raising a genuine issue of material fact on the

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40. *Draughon*, 631 S.W.3d at 88.

41. KMS Retail Rowlett, LP v. City of Rowlett, 593 S.W.3d. 175, 181 (Tex. 2019); Boerjan v. Rodriguez, 436 S.W.3d 307, 310 (Tex. 2014); Fort Worth Osteopathic Hosp., Inc. v. Reese, 148 S.W.3d 94, 99 (Tex. 2004); Wal-Mart Stores v. Rodriguez, 92 S.W.3d 502, 506 (Tex. 2002); Robinson v. Warner-Lambert & Old Corner Drug, 998 S.W.2d 407, 410 (Tex. App.—Waco 1999, no pet.); Lampasas v. Spring Ctr., Inc., 988 S.W.2d 428, 432 (Tex. App.—Houston [14th Dist.] 1999, no pet.).

42. 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).

43. Timpte Indus. Inc. v. Gish, 286 S.W.3d 306, 310 (Tex. 2009); *Rodriguez*, 92 S.W.3d at 503; Morgan v. Anthony, 27 S.W.3d 928, 929 (Tex. 2000).

challenged element.[44] If the non-movant presents more than a scintilla of evidence to support the challenged ground, the court should deny the motion.[45]

In 2005, the Texas Supreme Court revisited the no-evidence standard of review in *City of Keller v. Wilson*.[46] The Court held that the standard should remain the same and does not change depending on the motion in which it is asserted.[47] 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.[48]

Under the *City of Keller*, 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;"
> (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;"
> (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.'"
> (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."[49]

Accordingly, in a summary judgment context, a court may not disregard certain types of evidence if a reasonable juror could not.[50]

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44. First United Pentecostal Church of Beaumont v. Parker, 514 S.W.3d 214, 219 (Tex. 2017); KCM Fin. LLC v. Bradshaw, 457 S.W.3d 70, 71 (Tex. 2015); *Fort Worth Osteopathic Hosp.*, 148 S.W.3d at 99.

45. 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); *Rodriguez*, 92 S.W.3d at 506.

46. City of Keller v. Wilson, 168 S.W.3d 802, 807 (Tex. 2005).

47. *Id.* at 823.

48. *Id.* at 827; *see also First United Pentecostal Church*, 514 S.W.3d at 220 ("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.'").

49. *City of Keller*, 168 S.W.3d at 811, 813–14, 817–18 (citations omitted).

50. *Id.* at 827.

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.[51] 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?[52] Regarding a traditional motion filed under Texas Rules of Civil Procedure 166(a), the court should first review the evidence submitted by the movant to determine if the movant proved their entitlement to summary judgment as a matter of law.[53] Therefore, at that stage, the court can review the movant's evidence.[54] If the movant meets their burden, the burden then shifts to the non-movant to produce evidence to create a fact issue.[55] 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.'"[56] However, the higher court should not consider evidence that the trial court struck and did not consider because such evidence is not a part of the summary-judgment record.[57] Further, a court can review the non-movant's evidence attached to its response against the non-movant.[58]

The scope of review broadens once the parties file cross-motions for summary judgment.[59] When both parties file motions for summary judgment, the court may consider all of the summary judgment evidence filed by either party.[60] When both motions are before the trial court, it may consider all of the evidence when deciding whether to grant either motion, including the use of one party's evidence to supply missing proof in the other party's motion.[61]

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51. *See id.* at 809–10.

52. Author's original thought.

53. City of Houston v. Clear Creek Basin Auth., 589 S.W.2d 671, 678 (Tex. 1979).

54. *Id.* at 678–79.

55. *Id.*

56. Yancy v. United Surgical Partners Int'l, Inc., 236 S.W.3d 778, 782 (Tex. 2007).

57. *See* Sauls v. Munir Bata, LLC, No. 02-14-00208-CV, 2015 WL 3905671, at *4 (Tex. App.—Fort Worth June 11, 2015, no pet.).

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

59. Tarr v. Timberwood Park Owners Ass'n, 556 S.W.3d 274, 278 (Tex. 2018).

60. 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).

61. DeBord v. Muller, 446 S.W.2d 299, 301 (Tex. 1969); United Food and Comm. 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, at *5 (Tex.

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 their motion.[62] Is the scope of review the same as a traditional motion?[63] Former Texas Rule of Civil Procedure 166(a)(i) provides that "a party *without presenting summary judgment evidence* may move for summary judgment on the ground that there is no evidence."[64] So, can a court review evidence attached to the no-evidence summary judgment, i.e., is that evidence within its scope of review?[65]

One view is that a court can consider only the summary judgment evidence offered by the non-movant, and that any evidence offered by the movant should be disregarded for all purposes.[66] Another view is that a court may consider all summary judgment evidence in determining whether a fact issue exists—even the movant's evidence; however, that court would not review the movant's evidence to support the movant's position that no evidence existed.[67]

App.—Fort Worth Apr. 28, 2016, pet. denied); 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.").

62. TEX. R. CIV. P. 166a(i).

63. Author's original thought.

64. Former TEX. R. CIV. P. 166a(i) (emphasis added). New Rule 166a does not include the italicized language, which may mean that there is no intent to preclude a no-evidence movant from attaching evidence to the motion and that a court can review such evidence in determining the merits of the motion. However, the comments to the new rule state: "Other than the deadline changes, Rule 166a's rewrite is not intended to substantively change the law." Tex. R. Civ. P. 166a 2026 cmts. So, the rewrite of Rule 166a does not seem to have any intent to change the scope of review of a no-evidence motion. The issue, as stated in this article, is what is that scope.

65. Author's original thought.

66. Padron v. L&M Props., No. 11-02-001510-CV, 2003 Tex. App. LEXIS 1229, at *5 (Tex. App.—Eastland February 6, 2003, no pet.); Herod v. Baptist Found of Texas, 89 S.W.3d 689, 692 (Tex. App.—Eastland 2002, no pet.); Kelly v. LIN TV of Texas, 27 S.W.3d 564, 568 (Tex. App.—Eastland 2000, pet. denied); Hight v. Dublin Veterinary Clinic, 22 S.W.3d 614, 618 (Tex. App.—Eastland 2000, pet. denied).

67. Binur v. Jacobo, 135 S.W.3d 646, 657 (Tex. 2004); Williams v. Williams, No. 03-21-00109-CV, 2022 Tex. App. LEXIS 8164, at *6 (Tex. App.—Austin November 4, 2022, no pet.); Hernandez v. Select Med. Corp., 2013 Tex. App. LEXIS 8930, at *12 (Tex. App.—Eastland July 18, 2013, no pet.); Dyer v. Accredited Home Lenders, Inc., No. 02-11-00046-CV, 2012 Tex. App. LEXIS 877, at *9 (Tex. App.—Fort Worth Feb. 2, 2012, pet. denied); Davis v. Dillard's Dep't Store, Inc., No. 11-06-00027-CV, 2008 Tex. App. LEXIS 3201, at *3 (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, 541–549 (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.); Louck v. Olshan Found. Repair Co., No. 14-99-00076-CV, 2000 Tex. App. LEXIS 5337, at *9–*10 (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, 491 (Tex. App.—El Paso 1999, pet. denied); Jackson v. Fiesta Mart, Inc., 979 S.W.2d 68, 70 (Tex. App.—Austin 1998, no pet.).

The last view is that a court can review the movant's evidence to establish that the non-movant has no evidence.[68] After the *City of Keller* opinion, one commentator argued that the scope of review for a no-evidence motion has been expanded.[69] In *City of Keller*, as shown above, the Texas Supreme Court included a lengthy discussion of the contrary evidence that the jury cannot disregard when rendering a verdict, and that the appellate court cannot disregard on no-evidence grounds.[70] 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.[71]

The issue is whether a trial court can review evidence filed by a no-evidence movant to determine that the non-movant has no evidence to support a challenged element of its claim or defense.[72] 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.[73] 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.[74]

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.[75]

However, the Texas Supreme Court later indicated that the enlarged scope of review may apply to no-evidence summary judgment proceedings.[76] In *Mack Trucks, Inc. v. Tamez*, the court held that the plaintiff's expert testimony had been properly excluded; therefore, a no-evidence motion for

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68. City of Keller v. Wilson, 168 S.W.3d 802, 810–11 (Tex. 2005).

69. *See* Tim Patton*, Standard and Scope of Review Spotlight: "No-Evidence" Summary Judgment*, 17th Annual Conference on State and Federal Appeals, UNIV. OF TEX. SCH. OF L., (June 1, 2007).

70. *City of Keller*, 168 S.W.3d at 810–18.

71. *Id.* at 818.

72. *Id.* at 821–25.

73. *Id.* at 825.

74. *Id.* (emphasis added).

75. *See, e.g.*, Mathis v. Restoration Builders, Inc., 231 S.W.3d 47, 52 (Tex. App.—Houston [14th Dist.] 2007, no pet.); AIG Life Insurance v. Federated Mutual Ins. Co., 200 S.W.3d 280, 283 (Tex. App.—Dallas 2006, pet. denied).

76. Mack Trucks, Inc. v. Tamez, 206 S.W.3d 572, 582 (Tex. 2006).

summary judgment was correctly granted on causation grounds.[77] 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.[78]

Generally, courts of appeals have cited *Mack Trucks* and held that under the review of a no-evidence motion, courts must review the evidence attached to the motion and respond in the light most favorable to the non-movant.[79] These opinions, however, merely state the rule, as described in *Mack Trucks,* and do not discuss the issue in any depth.[80] One exception is the Dallas Court of Appeals, which stated that with regard 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."[81] Therefore, that court is applying the expanded *City of Keller* standard to a no-evidence motion review.[82]

It seems reasonably clear under this standard that if the non-movant attaches evidence that hurts their 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.[83] The issue is whether the reviewing court may also consider the movant's evidence and apply the same standard.[84] One commentator has noted that expanding the scope of review to include both the movant's and the non-movant's evidence would be consistent with practice in the federal court system.[85] The Texas Supreme Court has never

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77. *Id.* at 582.

78. *Id.* at 581–82; *see also* Goodyear Tire & Rubber Co. v. Mayes, 236 S.W.3d 754, 756 (Tex. 2007) (emphasis added).

79. *See, e.g.*, Anderson v. Limestone Cnty., No. 10-07-00174-CV, 2008 Tex. App. LEXIS 5041, at *6–7 (Tex. App.—Waco July 2, 2008, pet. denied); Acad. of Skills & Knowledge, Inc. v. Charter Sch., USA, Inc., 260 S.W.3d 529, 535 (Tex. App.—Tyler 2008, pet. denied); Abendschein v. GE Capital Mortg. Servs., No. 10-06-00247-CV, 2007 Tex. App. LEXIS 9761, at *5 (Tex. App.—Waco Dec. 12, 2007, no pet.); Packwood v. Touchstone Cmtys., Inc., No. 06-07-00020-CV, 2007 Tex. App. LEXIS 7935, at *4 (Tex. App.—Texarkana Oct. 5, 2007, no pet.); State v. Beeson, 232 S.W.3d 265, 267 (Tex. App.—Eastland 2007, pet. abated); Paragon Gen. Contractors, Inc. v. Larco Constr., Inc., 227 S.W.3d 876, 880 (Tex. App.—Dallas 2007, no pet.).

80. *Mack Trucks, Inc.*, 206 S.W.3d at 582.

81. Highland Crusader Offshore Partners, L.P. v. Andrews & Kurth, L.L.P., 248 S.W.3d 887, 894 (Tex. App.—Dallas 2008, no pet.).

82. *See id.*; City of Keller v. Wilson, 168 S.W.3d 802, 827 (Tex. 2005).

83. *Highland Crusader Offshore Partners*, 248 S.W.3d at 892.

84. *Id.*

85. TIM PATTON, STANDARD AND SCOPE OF REVIEW SPOTLIGHT: "NO-EVIDENCE" SUMMARY JUDGMENT, 17th Annual Conference on State and Federal Appeals (Univ. of Tex. Sch. of L. June 1, 2007)

really discussed this issue in depth.[86] 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.[87] 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.[88]

Finally, it must be noted that another potential basis for a court to review evidence attached to a no-evidence motion is when the parties file cross-motions for summary judgment.[89] 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.*"[90] This quote indicates that a reviewing court may consider any evidence submitted by either party, including the no-evidence movant, and render judgment.[91]

III. BURDEN OF PROOF ON FIDUCIARY CLAIMS WITHOUT A SELF-INTERESTED TRANSACTION

Turning to fiduciary relationships, the intricate burden-shifting analysis involved in summary judgment practice may clash with fiduciary burdens.[92] To put this in context, the nature of a fiduciary relationship is important.[93] A fiduciary owes their principal one of the highest duties known to law—this is a very special relationship.[94] 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 . . . ."[95] 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.[96]

(citing Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986); BRUNER & REDISH, SUMMARY JUDGMENT: FEDERAL LAW & PRACTICE, § 5:7 (3d ed. 2006)).

86. *See* Town of Dish v. Atmos Energy Corp., 519 S.W.3d 605, 608 (Tex. 2017).

87. *Id.*

88. *Id.*

89. Trial v. Dragon, 593 S.W.3d 313, 321 (Tex. 2019).

90. *Id.* (emphasis added).

91. *Id.*

92. *See, e.g.*, Ditta v. Conte, 298 S.W.3d 187, 191 (Tex. 2009).

93. *Id*.

94. *See id.*; Rawhide Mesa–Partners, Ltd. v. Brown McCarroll, L.L.P., 344 S.W.3d 56, 60 (Tex. App.—Eastland 2011, no pet.).

95. Peckham v. Johnson, 98 S.W.2d 408, 416 (Tex. Civ. App.—Fort Worth 1936), aff'd sub nom. 120 S.W.2d 786 (1938).

96. Tex. Bank & Tr. Co. v. Moore, 595 S.W.2d 502, 507 (Tex. 1980); *Peckham*, 98 S.W.2d at 416.

Self-interested transactions implicate many of a fiduciary's duties, including the duty of good faith and loyalty.[97] Self-dealing can generally be defined as an occurrence in which the fiduciary uses the advantage of their position to gain a benefit at the expense of those to whom they owe a fiduciary duty.[98] Where a plaintiff challenges a fiduciary's conduct that does not involve a self-interested transaction, the plaintiff has the burden to prove that the conduct was improper.[99] So, in this circumstance, the plaintiff has the initial burden of proof (persuasion and production) to prove each element of a breach of fiduciary duty claim.[100]

IV. SELF-INTERESTED TRANSACTIONS AND THE PRESUMPTION OF UNFAIRNESS

As part of a duty of loyalty, a fiduciary should generally benefit only from the relationship by being fairly compensated; a fiduciary does not violate their fiduciary duty by paying themselves reasonable compensation.[101] However, other benefits are generally prohibited.[102] So, where a transaction involves self-dealing, a fiduciary in Texas usually has the burden of proving that the transaction was fair to the principal.[103] "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."[104] When a party attacks a transaction between a fiduciary and

97. *See* KCM Fin. LLC v. Bradshaw, 457 S.W.3d 70, 83 (Tex. 2015); Gonzales v. Am. Title Co., 104 S.W.3d 588, 598 (Tex. App.—Houston [1st Dist.] 2003, pet. denied).

98. *KCM Fin. LLC*, 457 S.W.3d at 83.

99. *Id.* at 79.

100. White v. White, 704 S.W.3d 250 (Tex. App.—El Paso 2024, no pet.).

101. *See generally In re* Nathan Tr., 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); s*ee also* Nickel v. Bank of Am. Nat'l Tr. & 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).

102. Slay v. Burnett Tr., 187 S.W.2d 377 (Tex. 1945); s*ee also* Humane Soc'y of Austin & Travis Cnty. 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); *see generally* Furr v. Hall, 553 S.W.2d 666 (Tex. Civ. App.—Amarillo 1977, writ ref'd n.r.e.) (showing 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); *see generally* Daniel v. Henderson, 183 S.W.2d 242 (Tex. Civ. App.—El Paso 1944, no writ) (showing a 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).

103. *White*, 704 S.W.3d at 250.

104. Collins v. Smith, 53 S.W.3d 832, 840 (Tex. App.—Houston [1st Dist.] 2001, no pet.) (citing Tex. Bank & Tr. Co. v. Moore, 595 S.W.2d 502, 507–08 (Tex. 1980); Stephens Cnty. 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* Harrison v. Harrison Interests, No. 14-15-00348-CV, 2017 Tex. App. LEXIS

a beneficiary, it is the fiduciary's burden of proof to establish the fairness of the transaction.[105] To establish the fairness of a transaction between a fiduciary and his principal, relevant factors include whether: (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.[106] Put in context, however, the presumption of unfairness only applies to the breach element of a breach of fiduciary duty claim.[107] A plaintiff has the burden to prove that a fiduciary relationship exists, that a self-interested transaction occurred, and the amount of damages and benefits.[108]

V. LEGAL AUTHORITY ON PRESUMPTIONS

A. General Authority on the Use of Presumptions

Because a self-dealing transaction raises a presumption of unfairness, it is important to understand the legal concept of presumptions.[109] There are many presumptions in the law that allow a party to prove one fact and presume another.[110] A presumption shifts the burden of production from the

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1677, at *6–7 (Tex. App.—Houston [14th Dist.] Feb. 28, 2017, no pet.).

105. Fitz-Gerald v. Hull, 150 Tex. 39, 49, 237 S.W.2d 256, 261 (1951); *Harrison*, No. 14-15-00348-CV, 2017 Tex. App. LEXIS 1677, at *6–7; *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); Roels v. Valkenaar, No. 03-19-00502-CV, 2020 WL 4930041, at *6 (Tex. App.—Austin Aug. 20, 2020, no pet.) (mem. op.).

106. 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) (Otherwise stated, "The burden would then require Hetzler 'to prove (a) that the questioned transaction was made in good faith, (b) for a fair consideration, and (c) after full and complete disclosure of all material information to the principal.'"); Collins v. Hetzler, 2025 Tex. App. LEXIS 2085, at *12–*13 (Tex. App.—Fort Worth Mar. 27, 2025); Jackson L. Off., P.C. v. Chappell, 37 S.W.3d 15, 22 (Tex. App.—Tyler 2000, pet. denied).

107. *White*, 704 S.W.3d at 250.

108. *See* Dyke v. Hall, No. 03-18-00457-CV, 2019 Tex. App. LEXIS 9136, at *10 (Tex. App.—Austin Oct. 17, 2019, no pet.) (holding that the presumption of unfairness applies to the breach element of a breach of fiduciary duty claim); *see also* Collins v. Hetzler, No. 02-24-00078-CV, 2025 Tex. App. LEXIS 2085, at *9–10 (Tex. App.—Fort Worth Apr. 10, 2025, no pet.) (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, at *7–8 (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, No. 01-19-00122-CV, 2020 Tex. App. LEXIS 9849, at *12–13 (Tex. App.—Houston [1st Dist.] Dec. 15, 2020, no pet.)).

109. *White*, 704 S.W.3d at 250.

110. David F. Johnson, *The Use of Presumptions in Summary Judgment Procedure in Texas and Federal Courts*, 54 BAYLOR L. REV. 605 (2002).

party relying upon it to the other party regarding the presumed fact.[111] There are two types of presumptions: conclusive and rebuttable.[112] A conclusive presumption cannot be rebutted, and once it is established, the opposing party cannot offer evidence to contradict it.[113]

A rebuttable presumption allows the opposing party the opportunity to present contradictory evidence.[114] When there is evidence to the contrary, the presumption simply disappears, and a fact finder cannot weigh it or treat it as evidence.[115] But when the party opposing the presumption fails to produce any contrary evidence, the presumption is established conclusively.[116] A party attempting to use a presumption must prove the underlying facts for the presumption with direct evidence.[117] When 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.[118]

The main reason for a presumption is its impact on the burden of proof.[119] The burden of proof has two separate components.[120] 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.[121] This burden of persuasion generally stays on the same party throughout the trial and never

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111. *Id.*

112. Willis v. State, 790 S.W.2d 307 (Tex. Crim. App. 1990) (en banc).

113. *See* Stooksberry v. Swann, 85 Tex. 563, 22 S.W. 963, 966 (1893) (A rebuttable presumption may be overcome by evidence to the contrary); *see* Davis v. Austin, 632 S.W.2d 331, 333 (Tex. 1982); Empire Gas & Fuel Co. v. Muegge, 143 S.W.2d 763, 767 (Tex. 1940); Beken v. Hoffman, 196 S.W.2d 548, 551 (Tex. Civ. App.—Galveston 1946, writ ref'd n.r.e.) (Such a presumption compels the factfinder to reach a particular conclusion in the absence of contrary evidence); *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.).

114. Weed v. Frost Bank, 565 S.W.3d 397, 412–13 (Tex. App.—San Antonio 2018, pet. denied).

115. White v. Smyth*,* 147 Tex. 272, 214 S.W.2d 967, 974 (1948); Dodson v. Watson, 220 S.W. 771, 772 (Tex. 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 v. Davila, 593 S.W.2d 127, 130 (Tex. Civ. App.—Amarillo 1979, writ ref'd n.r.e.).

116. 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).

117. 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.).

118. 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.).

119. Willis v. State, 790 S.W.2d 307 (Tex. Crim. App. 1990) (en banc).

120. *Id.*

121. *See, e.g.*, Clark v. Hiles, 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.).

shifts.[122] Secondly, the burden of proof means the burden of production—i.e., the burden to go forward and produce sufficient evidence to meet a prima facie case.[123] Prima facie evidence is evidence that, until its effect is overcome by other evidence, will suffice as proof of a fact in issue.[124] The burden of production can shift back and forth between the parties depending on the evidence produced.[125] Normally, one party will initially bear both the burden of persuasion and the burden of production, and when 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.[126]

Normally, once a presumption is established, it shifts the burden of production to the opposite party, who must produce evidence to the contrary.[127] It generally does not, however, shift the burden of persuasion to the other side.[128] 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.[129]

One court has discussed the application of another type of rebuttal presumption that shifts both the burden of production and persuasion.[130] The court first discussed the typical rebuttable presumption that only shifts the burden of production:

> Over the years, numerous approaches to the treatment of presumptions [in civil cases] have been urged. One, traditionally associated with James Bradley Thayer, gives presumptions only minor effect. A Thayer-type presumption shifts only the burden of production to the opponent of the presumption. In other words, once the presumption's proponent establishes

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122. *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).

123. *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).

124. Dodson v. Watson, 110 Tex. 355, 220 S.W. 771, 772 (1920).

125. 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.

126. 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.

127. GMC v. Saenz, 873 S.W.2d 353, 359 (Tex. 1993); Combined Am. Ins. Co. v. Blanton, 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).

128. *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).

129. First Nat'l Bank of Mission v. Thomas, 402 S.W.2d 890, 893 (Tex. 1965); Southland Life Ins. Co. v. Greenwade, 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.).

130. Weed v. Frost Bank, 565 S.W.3d 397, 412–13 (Tex. App.—San Antonio 2018, pet. denied).

> the existence of the basic fact, the factfinder must find the presumed fact exists unless the opponent meets the burden of production as to the presumed fact. This means that the opponent must produce enough evidence so that a reasonable juror could find the non-existence of the presumed fact. If the opponent meets this burden, the presumption disappears from the case; the case proceeds as if there were no presumption. If, however, the opponent fails to meet its burden of production, the factfinder must find that the presumed fact exists. Under a Thayer-type presumption, the burden imposed on the party seeking to rebut the presumption "is slight." All a party must do to eliminate the presumption from the case is produce enough evidence so that a reasonable juror could find the non-existence of the presumed fact. As a result of the ease with which Thayer-type presumptions can be defeated, they are frequently referred to as 'bursting bubble' presumptions. Many presumptions in Texas are given the minimal, Thayer-type effect.[131]

The court then went on to discuss the other type of rebuttable presumption that shifts both the burden of production and persuasion and remains in the case even if contradictory evidence is presented:

> Another type of presumption, called a "Morgan Presumption" after Professor Edmund M. Morgan, shifts to the opponent not only the burden of producing evidence but the burden of persuasion as well. Thus, once the proponent establishes the basic facts of a presumption, the factfinder would be required to find the presumed fact unless the opponent actually satisfies the factfinder of the presumed fact's nonexistence. Merely offering evidence of its non-existence would not suffice to remove the presumption from the case.[132]

B. Burden Shifting for Presumption of Unfairness

There is authority holding that, under the presumption of unfairness, the burden of persuasion and production shifts to the fiduciary.[133] 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."[134] 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

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131. *Id.* at 412.

132. *Id.* at 413.

133. *See infra* J. Ch. N. 133.

134. 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 v. Miller, 700 S.W.2d 941, 945–46 (Tex. App.—Dallas 1985, writ ref'd n.r.e.); 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.)).

reasonable use of the confidence placed in him and whether the transactions were ultimately fair and equitable to [the complaining party]."[135] More recently, a court has held: "[t]his presumption of unfairness shifted both the burden of producing evidence and the burden of persuasion to [the fiduciary]."[136]

According to this authority, the presumption of unfairness is a super presumption that shifts both the burden of production and persuasion to the fiduciary.[137] But it is still a rebuttable presumption, and a fiduciary can produce evidence to rebut it, though it will continue to bear the burden of persuasion to prove fairness.[138] In other words, in a normal presumption situation, the plaintiff has the burden of proof (production and persuasion) on their claim.[139] The plaintiff supports their claim, or some element of their claim, by using a presumption: the plaintiff proves X, which equals Y.[140] The burden of production then switches to the defendant to prove that Y does not exist.[141] 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.[142]

In the super presumption of unfairness, the plaintiff has the burden to prove breach of fiduciary duty: the defendant owes a fiduciary duty, the defendant breached the duty, and that breach caused some harm to the plaintiff or benefit to the defendant.[143] The plaintiff establishes breach by proving that a self-interested transaction occurred.[144] 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.[145] 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.[146]

There is authority that the presumption of unfairness is not a super presumption, but just a normal presumption.[147] The court held that the

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135. *Sorrell*, 748 S.W.2d at 586.

136. Musquiz v. Keesee, No. 07-15-00461-CV, 2017 Tex. App. LEXIS 9214, at *17 (Tex. App.—Amarillo Sep. 28, 2017, pet. denied). *See also* Moore, 576 S.W.2d at 695; Nat'l Plan Administrators, Inc. v. Nat'l Health Ins. Co., 150 S.W.3d 718, 733 (Tex. App.—Austin 2004), (rev'd, 235 S.W.3d 695, 733 (Tex. 2007)) ("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.").

137. *Musquiz*, 2017 Tex. App. LEXIS 9214, at *17

138. *In re* Estate of Grogan, 595 S.W.3d 807, 817–18 (Tex. App.—Texarkana 2020, no pet.).

139. *Id.*

140. Author's Original Thought.

141. *Id.*

142. *Id.*

143. Anderton v. Cawley, 378 S.W.3d 38, 51 (Tex. App.—Dallas 2012, no pet.).

144. Lee v. Hasson, 286 S.W.3d 1, 35 (Tex. App.—Houston [14th Dist.] 2007, pet. denied)

145. *Id.* at 21.

146. *Id.* at 34.

147. Fielding v. Tullos, No. 09-17-00203-CV, 2018 Tex. App. LEXIS 7136, at *21–*22 (Tex. App.—

presumption is a rebuttable presumption that is extinguished with the offering of contrary evidence, not one that shifts 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. 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.[148]

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.[149] At least one court has disagreed with these opinions, holding that the presumptions are the same and that it is a super presumption.[150] 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.

Beaumont Aug. 20, 2018, no pet.).

148. *Id.* (citation omitted).

149. Author's original thought.

150. *See In re* Estate of Klutts, No. 02-18-00356-CV, 2019 LEXIS 11063, at *11–12 (Tex. App.—Fort Worth Dec. 19, 2019).

> 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.[151]

So, it is unclear in Texas whether the presumption of unfairness is a super presumption that shifts both the burden of production and persuasion, or just a normal rebuttable presumption that only shifts the burden of production.[152]

VI. USE OF PRESUMPTIONS IN SUMMARY JUDGMENT PROCEDURE

Parties often attempt to invoke the use of presumptions in summary judgment practice.[153] "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."[154] 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.[155] Historically, Texas courts did not go to great lengths to analyze the appropriateness of a summary judgment movant's use of a presumption in a summary judgment proceeding to shift the burden of production to the non-movant.[156] Several Texas cases allowed the use of presumptions in summary judgment proceedings.[157]

In 1981, however, the Texas Supreme Court changed directions 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.[158] The court 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.[159]

Since the Supreme Court's decision in 1981, courts of appeals have inconsistently applied the use of presumptions by movants in traditional summary judgment proceedings.[160] Some courts of appeals have followed the

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151. *Id.*

152. *Id.*

153. *See* Steven David Smith, *The Effect of Presumptions on Motions for Summary Judgment in Federal Court*, 31 UCLA L. REV. 1101, 1103 (1984).

154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.*

158. Mo.-Kan.-Tx. R.R. Co. v. City of Dallas, 623 S.W.2d 296, 298 (Tex. 1981).

159. *Id.*; *see also* Scott & White Mem'l Hosp. v. Thompson, 681 S.W.3d 758. (Tex. 2023); Chavez v. Kan. City S. Ry. Co., 520 S.W.3d 898, 900 (Tex. 2017).

160. *Compare* Stillwell v. Stevenson, 668 S.W.3d 844, 854–55 (Tex. App.—El Paso 2023, pet. denied), and Garcia v. John Hancock Variable Life Ins. Co., 859 S.W.2d 427, 435 ((Tex. App.—San

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.[161] 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.[162] Courts have held that when there is a presumption against a movant, the movant can still rebut that presumption as a matter of law and be entitled to a summary judgment.[163]

The issues become even more complex when presumptions arise in a no-evidence motion for summary judgment.[164] A no-evidence summary judgment movant cannot file such a motion on a claim or defense on which they have the burden of proof.[165] Normally, a breach-of-fiduciary-duty plaintiff has the burden of proof on their claim and cannot file a no-evidence motion on that claim.[166] They cannot, via a no-evidence motion, force the defendant to produce evidence to prove that they did not breach a fiduciary duty.[167] However, in a self-interested transaction, as detailed above, the defendant/fiduciary has the burden to prove the transaction's fairness—that he or she did not breach a fiduciary duty.[168] A movant usually has to submit evidence to create a prima facie case for a presumption.[169] For example, a trust beneficiary may have to submit evidence to prove that a trustee had a self-interested transaction.[170] Once that is established, there is a presumption of unfairness, and the trustee has the burden of production to prove that the transaction was fair.[171] If a plaintiff cannot attach any evidence to a no-evidence motion, how can it ever set up the presumption?[172]

Antonio 1993, writ denied), *with In re* J.A.M., 945 S.W.2d 320, 322–23 ((Tex. App.—San Antonio 1993, no pet.).

161. *See Sitwell*, 608 S.W.3d at 854–55; *see Garcia*, 859 S.W.2d at 435.

162. *See In re J.A.M.*, 945 S.W.2d at 322–23; *see* Bush v. Fayette Cty., No. 03-05-00274-CV, 2006 Tex. App. LEXIS 3052, at *9 (Tex. App.—Austin Apr. 13, 2006, no pet.) ("While a presumption does not result in shifting the burden of proof, it does shift the burden of producing or going forward with the evidence to the party against whom it operates. In the context of a summary judgment, this principle requires Bush as the nonmovant to produce evidence creating a genuine issue of material fact to challenge this element.").

163. *See* Levin v. Harrington, No. 14-99-01094-CV, 2001 WL 422072, at *21 (Tex. App.—Houston [14th Dist.] April 26, 2001, no pet.) (not designated for publication); Swate v. Schiffers, 975 S.W.2d 70, 74–75 (Tex. App.—San Antonio 1998, pet. denied) (presumption does not preclude summary judgment).

164. *See* TEX. R. CIV. P. 166a(i).

165. *See id.*

166. *In re* Estate of Boyle, No. 11-13-00151-CV, 2014 WL 7332761, at 5* (Tex. App.—Eastland Dec. 18, 2014, no pet.).

167. *Id.*

168. *See* Schlein v. Griffin, No.01-14-00799-CV, 2016 WL 1456193, at *14 (Tex. App.—Houston [1st Dist.] 2016, pet. denied).

169. *Id.*at *13.

170. *Id.*at *13–14.

171. *Id.*

172. Author's original thought.

Undoubtedly, some courts will hold that they cannot review evidence to create a no-evidence ground and will deny the motion outright.[173] But, as shown above, some courts would review evidence attached to the no-evidence motion.[174] This would allow the plaintiff to attach evidence to a no-evidence motion to establish that a self-interested transaction occurred, shifting the burden to the defendant to create an issue of fact on the transaction's fairness.[175] Alternatively, the movant could file a dual motion for summary judgment, raising both traditional and no-evidence grounds.[176] The movant could move on a traditional ground—citing to evidence—to establish the fact of a self-interested transaction.[177] Then, the movant could assert a no-evidence ground that the defendant has no evidence to create a genuine issue of material fact on the issue of fairness.[178] There is no reason that the 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?[179]

Moreover, the fiduciary in a self-interested transaction case should not be able to file a no-evidence motion for summary judgment because they 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 they have the burden of proof to establish.[180]

Texas courts have always allowed the non-movant, in either a traditional or no-evidence summary judgment proceeding, to use a presumption to rebut the 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.[181] If the

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173. *Id.*

174. *See Schlein,* 2016 WL 1456193, at *14.

175. *See id.*

176. *See generally id.* (describing the process of summary judgment motions on no-evidence grounds). *See also* Tex. R. Civ. P. 166a(b)(1) ("A party may move for summary judgment on a claim or defense. A motion may combine both traditional and no-evidence motions.").

177. *See id.*

178. *See id.*

179. Author's original thought.

180. *See In re* Estate of Boyle, No. 11-13-00151-CV, 2014 WL 7332761, at 5* (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).

181. *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); Brown v. Big D Transp., Inc., 45 S.W.3d 703, 705–06 (Tex. App.—Eastland 2001, no pet.) (reversing no-evidence summary judgment because nonmovant was entitled to presumptions of material facts in its favor); 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 S.A., 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. Est. 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*

movant fails to rebut the presumption as a matter of law, then a fact issue is raised, and summary judgment is not appropriate.[182] Under the 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.[183] Therefore, in a traditional summary judgment motion, the burden of production can shift back and forth until one side prevails as a matter of law.[184] Presumably, however, after a few shifts, there should be a fact issue, as there is likely evidence on both sides.[185]

A no-evidence summary judgment may be different in this respect.[186] 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.[187] Therefore, once the non-movant shifts the burden back to the movant by way of a presumption, the court must deny the no-evidence motion.[188] A no-evidence summary judgment respondent meets their burden by simply setting up the underlying facts that create a presumption, shifting the burden onto the movant, which cannot be done in the context of a no-evidence motion.[189]

As stated earlier, other courts may allow the review of evidence submitted by a no-evidence movant to establish that there is no evidence on an issue.[190] In those courts, perhaps a movant can produce evidence to defeat

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Judgments and Other Recent Developments in Summary Judgment Practice, 32 TEX. TECH. L. REV. 111, 126 (2000); *but see* Scott & White Mem'l Hosp. v. Thompson, 681 S.W.3d 758, n. 4 (Tex. 2023) ("[O]n summary judgment, Thompson [the nonmovant] cannot rely on the presumption to create a fact issue and shift the burden to Scott & White [the movant] to negate the presumption.").

182. *See Brown*, 45 S.W.3d at 705; see also *Cable*, 480 S.W.2d at 821.

183. *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.

184. *Swate*, 975 S.W.2d at 74–75.

185. *Id.*

186. *Id.*

187. *See* Hight v. Dublin Veterinary Clinic, 22 S.W.3d 614, 618–19 (Tex. App.—Eastland 2000, pet. denied).

188. *See Brown*, 45 S.W.3d at 705.

189. Patton v. Harris Cty. Cmty. Supervision & Corrs. Dep't, No. 14-04-00683-CV, 2005 Tex. App. LEXIS 9767, at *7–*8 (Tex. App.—Houston [14th Dist.] Nov. 23, 2005, pet. denied) (citing David F. Johnson, *The Use of Presumptions in Summary Judgment Procedure in Texas and Federal Courts*, 54 BAYLOR L. REV. 605 (2002).). *Stewart*, 988 S.W.2d at 255 (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).

190. *See supra* note 174.

a non-movant's presumption.[191] Of course, there is no rule that limits the movant to only filing a no-evidence motion; they could file a traditional motion with summary judgment evidence that contradicts the non-movant's presumption.[192] Federal courts allow a party to rely upon a presumption in a summary judgment proceeding.[193] Further, the use of presumptions is just as available to the summary judgment non-movant as it is to the movant.[194]

VII. USE OF PRESUMPTION OF UNFAIRNESS IN SUMMARY JUDGMENT PROCEEDINGS

Based on this history of inconsistent summary judgment precedent, it is not surprising that Texas courts are inconsistent in how they analyze and use the presumption of unfairness in summary judgment proceedings.[195]

A. Traditional Motions for Summary Judgment

As the Texas Supreme Court has previously held, some courts have not allowed a traditional summary judgment movant to use the presumption of unfairness in a fiduciary case to shift the initial burden of production to the non-movant.[196] 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.

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191. Author's original thought.

192. *Summary Judgments in Texas*, *supra* note 1. *See also* Tex. R. Civ. P. 166a(b)(1).

193. *See* Gasmark Ltd. Liquidating Tr. v. Louis Dreyfus Nat. 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. Sep. 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, No. 1:94CV00059, 1997 U.S. Dist. LEXIS 21809, at *84–*86 (M.D.N.C. Dec. 2, 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.

194. *See* Ennis v. United of Omaha Life Ins. Co., 825 F. Supp. 962, 963 (D.C. Kan. 1993).

195. Author's original thought.

196. Garcia v. Fabela, 673 S.W.2d 933, 937–38 (Tex. App.—San Antonio 1984, no writ).

> 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.[197]

Similarly, in *Fleming v. Curry*, the court of appeals analyzed the use of the self-dealing presumption in a traditional summary judgment motion and stated:

> If the client alleges that the attorney has engaged in self-dealing, then a presumption of unfairness arises. At trial, the fiduciary bears the burden to rebut that presumption by proving that the questioned transaction was made in good faith for a fair consideration after full and complete disclosure of all material information to the principal. By moving for traditional summary judgment, however, Fleming's clients assumed the burden to establish their entitlement to judgment as a matter of law. They therefore were required to conclusively disprove Fleming's compliance with a fiduciary duty.[198]

Other courts applied the presumption of unfairness in the summary judgment context, placing the burden on the defendant fiduciary to create a fact issue on fairness.[199] In *Ramos v. Cisneros*, the plaintiff filed a traditional motion for summary judgment to establish that the defendant owed him duties based on a confidential relationship and breached those duties.[200] After the trial court granted the motion, the court of appeals affirmed.[201] The court of appeals noted the presumption of unfairness and stated: "Because of the parties' informal fiduciary relationship, Ms. Ramos bore the burden to rebut the presumption of unfairness. Such fiduciaries must prove they acted in good faith and that the transactions were fair, honest, and equitable."[202] The court reviewed the defendant's evidence and held that it was not sufficient to meet her burden of proof on fairness.[203]

Similarly, in *Miller v. Lucas*, the court held that a power of attorney agent breached their fiduciary duty as a matter of law via summary judgment by transferring the principal's real estate to themself.[204] The court of appeals stated:

> Lucas's motion for summary judgment pleaded that [the principal] had signed a statutory durable power of attorney on June 29, 2006, and attached a copy of the power of attorney that [the principal] executed. Lucas pleaded

197. *Id.*

198. Fleming v. Curry, 412 S.W.3d 723, 732 (Tex. App.—Houston [14th Dist.] Aug. 20, 2013, no pet.) (citations omitted).

199. *See* Ramos v. Cisneros, No. 05-21-0006-CV, 2022 WL 1222827, at *6 (Tex. App.—Dallas Apr. 26, 2022, no pet.).

200. *Id.* at *3.

201. *Id.* at *7.

202. *Id.* at *6 (citations omitted).

203. *Id.* at *5.

204. Miller v. Lucas, No. 02-13-00298-CV, 2015 WL 2437887, at *4 (Tex. App.—Fort Worth May 21, 2015, pet. denied).

> that on March 9, 2007, Miller utilized the durable power of attorney to 'execute[ ] a self[-]serving deed whereby Defendant Deeded to himself, without consideration, the real property belonging to [the principal].' 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 the principal by utilizing the power of attorney to transfer the Property belonging to [the principal] to himself.[205]

Other courts have held that a defendant creates a fact issue regarding the transaction's fairness by attaching evidence to rebut the presumption.[206] In *Robinson v. Garcia*, the court of appeals affirmed the denial of summary judgment filed by a client against an attorney regarding the fairness of their fee agreement.[207] 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.[208]

Other courts held that when the defendant-fiduciary moved for summary judgment on the breach of fiduciary duty claim, they did not overcome the presumption of unfairness by filing scant evidence.[209] In *Keck, Mahin & Cate v. National Union Fire Insurance Co.*, the Texas Supreme Court held that a defendant-fiduciary did not carry their summary judgment burden to prove the fairness of a release agreement and reversed summary judgment.[210] 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

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205. *Id.*
206. *See* Robinson v. Garcia, 804 S.W.2d 238, 248 (Tex. App.—Corpus Christi 1991, writ denied).
207. *Id.*
208. *Id.*
209. *See* Keck, Mahin & Cate v. Nat'l Union Fire Ins. Co. of Pittsburg, Pa., 20 S.W.3d 692, 699 (Tex. 2000).
210. *Id.*

> 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.[211]

Other courts have held that a defendant-fiduciary can present sufficient evidence as a movant to overcome the presumption of unfairness.[212] In *Fielding*, the estate's independent administrator (the deceased's niece) challenged the deceased's change of beneficiary designation on his accounts to his caretaker, arguing that a fiduciary relationship existed between the deceased and the caretaker that gave rise to a presumption of undue influence.[213] The caretaker moved for summary judgment on that claim.[214] 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.[215] The court held that the presumption is rebuttable and is extinguished with the offering of contrary evidence, not one that shifts 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. 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

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211. *Id.*; *see also* KCM Fin. LLC v. Bradshaw, 457 S.W.3d 70, 75 (Tex. 2015) (citations omitted) (reversing summary judgment when fiduciary claim involved self-dealing: "because some evidence supports Bradshaw's allegation that the mineral lease was the product of self-dealing on [KMC Financial]'s part, [KMC Financial] was not entitled to summary judgment.").

212. *See* Fielding v. Tullos, No. 09-17-00203-CV, 2018 Tex. App. LEXIS 7136, at *5 (Tex. App.—Beaumont Aug. 20, 2018, no pet.).

213. *Id.* at *1.

214. *Id.* at *5.

215. *Id.* at *3.

> presumption was extinguished. Plaintiff retained the ultimate burden of proof on her claims.[216]

Accordingly, there are cases that would support contrary views on how the presumption of unfairness is used in a traditional summary judgment proceeding and what evidence is required to defeat or support that presumption.[217]

B. No-Evidence Summary Judgment Motion

As mentioned earlier, when the fiduciary case does not concern a self-interested transaction, the defendant-fiduciary should be able to file a no-evidence motion on the plaintiff's breach element.[218] If the defendant-fiduciary pleads facts that establish that a self-interested transaction occurred, there is no reason that that admission cannot be used by the plaintiff to then use the presumption of unfairness to file a no-evidence motion on the breach element of the plaintiff's claim.[219] However, one issue concerning filing a no-evidence motion for summary judgment in a fiduciary case, in which the defendant-fiduciary does not judicially admit a self-interested transaction, is whether a plaintiff may simply plead or prove via evidence a self-interested transaction and then place the burden on the defendant to create a fact question on the fairness of the transaction.[220]

In *Williams v. Williams*, the court of appeals questioned whether a plaintiff could file a no-evidence motion with evidence establishing self-interested transactions and then place the no-evidence burden on the defendant to establish the fairness of those transactions:

> Marcia has not cited, and we have not found, authority that would allow a trial court to render a no-evidence summary judgment awarding damages for breach of fiduciary duty that is dependent on the movant's own evidence to identify alleged self-dealing transactions to shift the burden of proof as to those transactions.
>
> Further, even if it were proper to consider Marcia's evidence in the context of her motion for no-evidence summary judgment to shift the burden to Darrell to prove that the identified transactions were fair and equitable, Marcia would still have the burden of proof as to any damages.[221]

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216. *Id.* at *7; *see* Young v. Fawcett, 376 S.W.3d 209, 216 (Tex. App.—Beaumont 2012, no pet.); *see also* Vogt v. Warnock, 107 S.W.3d 778, 784 (Tex. App.—El Paso 2003, pet. denied).

217. GMC v. Saenz, 873 S.W.2d 353, 359 (Tex. 1993)

218. *See supra* Part III.

219. *See supra* Part III.

220. Williams v. Williams, No. 03-21-00109-CV, 2022 Tex. App. LEXIS 8164, at *16–17 (Tex. App.—Austin Nov. 4, 2022, no pet.) (mem. op.).

221. *Id.* at *10–11.

It is still very unclear in Texas law whether a plaintiff can establish, via evidence, that a self-interested transaction occurred and then allege no-evidence grounds for breach or fairness.[222]

Further, another issue is whether the defendant-fiduciary can file a no-evidence motion against a plaintiff when there is a presumption of unfairness.[223] In *Cluck v. Mecom*, the court questioned whether a fiduciary could file a 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. 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. 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.[224]

In *Estate of Boyle*, the trial court granted summary judgment to JPMorgan, a successor guardian to a decedent's estate, on all claims asserted by Jones, a beneficiary, against JPMorgan.[225] The court held that the claims did not involve a self-interested transaction; therefore, the defendant could file a no-evidence motion.[226] In so doing, 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. In such cases, the profiting fiduciary bears the burden to rebut the presumption by proving the fairness of the questioned transaction. . .
>
> 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

222. *Id.* at *16.
223. Cluck v. Mecom, 401 S.W.3d 110, 114–15 (Tex. App.—Houston [14th Dist.] 2011, pet. denied).
224. *Id.*
225. *In re* Estate of Boyle, No. 11-13-00151-CV, 2014 Tex. App. LEXIS 13553, at *7 (Tex. App.—Eastland Dec. 18, 2014, pet. denied) (mem. op.).
226. *Id.* at *18–19.

> 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 PM 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.[227]

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.[228] There, his siblings attempted to probate an earlier will and alleged that the new will was the product of undue influence.[229] The son filed a traditional and no-evidence motion for summary judgment on the undue influence claim, which the trial court granted.[230] The siblings appealed, and the court held that the son's fiduciary status shifted the burden to him to overcome the resulting presumption of unfairness.[231] 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.[232]

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227. *Id.*

228. *In re* Estate of Klutts, No. 02-18-00356-CV, 2019 Tex. App. LEXIS 11063, at *12 (Tex. App.—Fort Worth Dec. 19, 2019, pet. denied) (mem. op.).

229. *Id.* at *3.

230. *Id.* at *4–5.

231. *Id.* at *12–13.

232. *Id.* at *6–12.

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 estate 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.[233]

A defendant-fiduciary should be able to file a no-evidence motion on whether there is a fiduciary relationship or on damages, but when the pleadings allege a self-interested transaction, the defendant-fiduciary should not be able to file a no-evidence motion on the breach element, as they have the initial burden of production to prove the fairness of the transaction.[234] Potentially, such a defendant could file a dual motion, providing evidence in a traditional ground for summary judgment that there was no self-interested transaction, and then alleging a no-evidence ground on the breach element.[235]

Further, another issue is whether the non-movant plaintiff can use the presumption of unfairness to rebut a no-evidence motion filed by the defendant-fiduciary without any other evidence.[236] 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 also in his favor.[237] 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.[238] Her nephews opposed the will's admission to probate, arguing that she lacked testamentary capacity and that Stawarczik exercised undue influence over their aunt.[239] 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.[240] The nephews responded by attaching a copy

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233. *Id.* at *13.

234. *See* TEX. R. CIV. P. 166a(i); Williams v. Williams, No. 03-21-00109-CV, 2022 Tex. App. LEXIS 8164, at *16–17 (Tex. App.—Austin Nov. 4, 2022, no pet.) (mem. op.); Cluck v. Mecom, 401 S.W.3d 110, 114–15 (Tex. App.—Houston [14th Dist.] 2011, pet. denied); *In re* Estate of Klutts, No. 02-18-00356-CV, 2019 Tex. App. LEXIS 11063, at *12–13 (Tex. App.—Fort Worth Dec. 19, 2019, pet. denied) (mem. op.).

235. City of Dish v. Atmos Energy Corp., 519 S.W.3d 605, 607–08 (Tex. 2017). *See* Tex. R. Civ. P. 166a(b)(1).

236. *In re* Estate of Danford, 550 S.W.3d 275, 286 (Tex. App.—Houston [14th Dist.] 2018, pet. denied).

237. *Id.* at 279–80.

238. *Id.* at 279.

239. *Id.* at 280.

240. *Id.* at 281.

of the general power of attorney appointing Stawarczik as their aunt's agent and argued that this evidence of a fiduciary relationship shifted the burden of proving the absence of undue influence to Stawarczik.[241] The court agreed, holding that when the nephews presented some evidence of a fiduciary relationship, that is, 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.[242]

In *Parsons v. Trichter & LeGrand P.C.*, the defendant filed a no-evidence motion for summary judgment against the plaintiff, alleging that there was no evidence of a breach of fiduciary duty because "the fee was not unconscionable and there is no evidence that it was."[243] After the trial court granted the motion, the court of appeals noted that "[w]hen self-dealing by the fiduciary is alleged, a presumption of unfairness automatically arises, and the burden is placed on the fiduciary to prove that the questioned transaction (1) was made in good faith, (2) for fair consideration, and (3) after full disclosure of all material information to the principal."[244] However, instead of discussing whether this presumption alone could meet the burden, the court, in its response, reviewed the plaintiff's evidence, found a fact issue, and reversed the judgment.[245]

In *Donnelly v. Donnelly*, the plaintiff challenged certain transactions and alleged that the presumption of unfairness applied.[246] The defendant filed a no-evidence motion, and after the trial court granted the motion, the plaintiff appealed.[247] The trial court struck the plaintiff's affidavit, and she had no evidence attached to her response.[248] Notwithstanding, the plaintiff argued that the no-evidence motion was not appropriate because the defendant had the burden of proof on the self-interested transactions.[249] The court of appeals rejected this argument because there was no evidence to establish that the transactions existed or that they were self-interested transactions:

> 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. In some cases involving confidential or fiduciary relationships, however, the burden shifts to the person receiving the benefit to prove the fairness of the transaction. In other words, when a fiduciary transacts with the principal or accepts a gift or bequest from the principal, a

241. *Id.* at 282.

242. *Id.* at 286.

243. Parson v. Trichter & LeGrand P.C., No. 14-21-00284-CV, 2022 Tex. App. LEXIS 8569, at *4 (Tex. App.—Houston [14th] Nov. 22, 2022, pet. denied).

244. *Id.*

245. *Id.*

246. Donnelly v. Donnelly, No. 14-21-00592-CV, 2022 WL 7188634, at *11 (Tex. App.—Houston [14th Dist.] Oct. 13, 2022, no pet.).

247. *Id.*

248. *Id.*

249. *Id.*

> burden is placed on the fiduciary to demonstrate the fairness of the transaction . . . .
>
> The gravamen of Maria's complaint on this issue is that George told John to change the beneficiary of the IRA and John refused to do so and failed to tell George that he had not done so. Maria's only evidence of an alleged transaction was her own self-serving affidavit, which the trial court properly excluded. Maria, therefore, offered no evidence of a transaction on which John could be required to offer evidence of fairness. Because there was no evidence of a transaction, the presumption of unfairness was never triggered.[250]

A plaintiff who is a non-movant should be able to use the presumption of unfairness to shift the burden of production in a summary judgment proceeding to the defendant-fiduciary on the breach element of the breach of fiduciary duty claim.[251] However, the plaintiff must first establish that the claim involves a self-interested transaction, either through evidence or by the defendant admitting that the self-interested transaction occurred.[252]

VIII. CONCLUSION

Fiduciary litigation often involves litigating self-interested transactions.[253] There is a presumption of unfairness that generally arises, requiring the fiduciary to prove the fairness of the transaction.[254] This presumption impacts the burden of production and may impact the burden of persuasion.[255] This creates complex procedural issues at various stages of the litigation, including summary judgment practice.[256] This Article attempts to address these issues.[257] The author hopes this Article will help inform attorneys who need to file or respond to a summary judgment motion in a fiduciary litigation case.[258]

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250. *Id.*

251. Parson v. Trichter & LeGrand P.C., No. 14-21-00284-CV, 2022 Tex. App. LEXIS 8569, at *17–18 (Tex. App.—Houston [14th] Nov. 22, 2022, pet. denied).

252. *Donelly*, 2022 WL 7188634, at *26.

253. Deborah A. DeMott, *Breach of Fiduciary Duty: On Justiciable Expectations of Loyalty and Their Consequences*, 48 ARIZ. L. REV. 925, 926–29 (2006).

254. *Id.*

255. Author's original thought.

256. *Id.*

257. *Id.*

258. *Id.*