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## **Lucke v. Kimball**

Court of Appeals of Texas, Thirteenth District, Corpus Christi

January 22, 2004, Delivered ; January 22, 2004, Filed

13-01-362-CV

### **Reporter**

2004 Tex. App. LEXIS 604 \*; 2004 WL 102830

ALAN F. **LUCKE**, Appellant, v. JANICE E. **KIMBALL**, Appellee.

**Subsequent History:** [\*1] Motion for Rehearing and Motion for en banc Overruled May 20, 2004.

Petition for review denied by [Lucke v. Kimball, 2004 Tex. LEXIS 827 \(Tex., Sept. 10, 2004\)](#)

**Prior History:** On appeal from the 319th District Court of Nueces County, Texas.

**Disposition:** Affirmed.

### **Core Terms**

partnership, dissolution, partnership agreement, partner, damages, partnership interest, withdrawal, dissolve, partnership dissolution, trial court, net assets, challenges, argues, prejudgment interest, net amount, winding up, legal-sufficiency, breached, parties, declaratory judgment, rights, terms, partnership property, vital fact, wrongfully, ambiguous, overrule, buy-out, surplus, finder

### **Case Summary**

#### **Procedural Posture**

Appellee withdrawing partner brought suit against appellant remaining partner when the remaining partner refused to pay the full amount of the withdrawing partner's demand for her percentage of the partnership's net assets. The 319th District Court of Nueces County, Texas, found in the withdrawing partner's favor, finding that the remaining partner breached his fiduciary duty to the withdrawing partner. The remaining partner appealed.

#### **Overview**

On review, the remaining partner contended, inter alia,

that the withdrawing partner was not entitled to receive the net value of her partnership interest, but, rather, was limited to an amount specified in the parties' partnership agreement. The appellate court found that the withdrawing partner's withdrawal from the partnership and the withdrawals of the other partners all had the same effect: dissolution of the partnership. Thus, the appellate court held that the withdrawing partner exercised her inherent power to dissolve the partnership when she gave the remaining partner oral notice of her withdrawal and that she was entitled to payment in cash of the net amount owing to her from any surplus after discharge of the partnership's liabilities. Further, the jury's answer on the damages question was within the range of evidence presented by the withdrawing partner's expert witness; the evidence was legally sufficient to support the jury's damages finding. As the prejudgment interest rate was controlled under the common law, the 10-percent prejudgment interest rate was correct.

#### **Outcome**

The judgment was affirmed.

### **LexisNexis® Headnotes**

Contracts Law > Contract  
Interpretation > Ambiguities & Contra  
Proferentem > General Overview

Contracts Law > Defenses > Ambiguities &  
Mistakes > General Overview

**HN1** **Contract Interpretation, Ambiguities & Contra Proferentem**

When the interpretation of a contract is at issue, the trial



court must first determine whether the provisions in question are ambiguous. The question of whether a contract is ambiguous is a question of law for the trial court's determination. A contract is ambiguous if it is reasonably susceptible of more than one meaning.

Business & Corporate Law > General  
Partnerships > Formation > Partnership Agreements

Contracts Law > Contract  
Interpretation > Ambiguities & Contra  
Proferentem > General Overview

Contracts Law > Defenses > Ambiguities &  
Mistakes > General Overview

### [HN2](#) Formation, Partnership Agreements

A disagreement over the meaning of a contract provision does not render the provision ambiguous.

Contracts Law > Contract Interpretation > Intent

Contracts Law > Contract Interpretation > General  
Overview

### [HN3](#) Contract Interpretation, Intent

When the parties disagree over the meaning of an unambiguous contract, the court must determine the parties' intent by examining and considering the entire writing in an effort to give effect to the parties' intentions as expressed in the contract. The intent of the parties must be taken from the agreement itself, not from the parties' present interpretation. The trial court must enforce an unambiguous agreement as it is written.

Civil Procedure > Appeals > Standards of  
Review > De Novo Review

### [HN4](#) Standards of Review, De Novo Review

Legal conclusions of the trial court are always reviewable. The appellate court is not obligated to give any particular deference to those conclusions. The appellate court reviews questions of law de novo. As the final arbiter of the law, the appellate court has the power and the duty to independently evaluate the legal determinations of the trial court.

Civil Procedure > Appeals > Standards of  
Review > Clearly Erroneous Review

### [HN5](#) Standards of Review, Clearly Erroneous Review

The appellate court upholds a trial court's legal conclusions unless they are erroneous as a matter of law. In reviewing challenges to the trial court's conclusions of law, the appellate court sustains the judgment on any legal theory supported by the evidence. The appellate court does not reverse an incorrect conclusion of law if the findings of fact support a correct legal theory.

Business & Corporate Law > ... > Dissolution &  
Winding Up > Dissolution > General Overview

Business & Corporate Law > General  
Partnerships > General Overview

Business & Corporate Law > General  
Partnerships > Dissolution & Winding Up > General  
Overview

Business & Corporate Law > ... > Dissolution &  
Winding Up > Winding Up > General Overview

Business & Corporate Law > ... > Dissolution &  
Winding Up > Winding Up > Termination

### [HN6](#) Dissolution & Winding Up, Dissolution

The Uniform Partnership Act of Texas, [Tex. Rev. Civ. Stat. Ann. arts. 6132b-1.01](#) to -11.04 (Supp. 2004), addresses three different concepts: "dissolution," "winding up," and "termination." Dissolution is defined as the change in the relationship of the partners caused by any partner ceasing to be associated in the carrying on of the partnership. [Tex. Rev. Civ. Stat. Ann. art. 6132b, § 29](#) (Supp. 2004). Dissolution is distinguished from both the winding up of the business of the partnership and its termination. Generally, when a partnership dissolves, the partnership continues during the period of winding up until all pre-existing matters are concluded. [Tex. Rev. Civ. Stat. Ann. art. 6132b, § 30](#) (Supp. 2004). As an act that actually changes the legal relationships between the partners, dissolution has nothing to do with whether the partnership business is continuing or winding up. Dissolution is a technical legal concept,



unlike the concept of dissolution in other areas, such as the partnership relationship cease to exist.  
corporations.

Business & Corporate Law > ... > Dissolution &  
Winding Up > Dissolution > Withdrawal of Partners

Business & Corporate Law > General  
Partnerships > General Overview

Business & Corporate Law > General  
Partnerships > Dissolution & Winding Up > General  
Overview

Business & Corporate Law > ... > Dissolution &  
Winding Up > Dissolution > General Overview

#### [HN7](#) **Dissolution, Withdrawal of Partners**

Causes of dissolution are set out in the Uniform Partnership Act of Texas, [Tex. Rev. Civ. Stat. Ann. art. 6132b, §§ 31, 32](#) (Supp. 2004). Dissolution occurs immediately on the happening of the specified event. At common law, a partner could dissolve a partnership by giving explicit notice to the other partners. [Tex. Rev. Civ. Stat. Ann. art. 6132b, § 31\(b\)](#) (Supp. 2004) codifies this common-law rule by providing that dissolution can be caused by the "express will" of any partner. The causes for dissolution set out in [Tex. Rev. Civ. Stat. Ann. art. 6132b, § 31\(b\)](#) (Supp. 2004) are automatic.

Business & Corporate Law > ... > Dissolution &  
Winding Up > Dissolution > General Overview

Business & Corporate Law > General  
Partnerships > Dissolution & Winding Up > General  
Overview

Business & Corporate Law > ... > Dissolution &  
Winding Up > Winding Up > General Overview

Business & Corporate Law > ... > Dissolution &  
Winding Up > Winding Up > Termination

#### [HN8](#) **Dissolution & Winding Up, Dissolution**

Dissolution does not necessarily terminate the partnership business. Even if the business does not continue, the partnership continues to exist for the limited purpose of winding up. [Tex. Rev. Civ. Stat. Ann. art. 6132b, § 30](#) (Supp. 2004). Only on termination does

Business & Corporate  
Compliance > Contracts > Types of  
Contracts > Partnership Agreements  
Contracts Law > Types of Contracts > Partnership  
Agreements

Business & Corporate Law > General  
Partnerships > Dissolution & Winding Up > General  
Overview

#### [HN9](#) **Types of Contracts, Partnership Agreements**

See [Tex. Rev. Civ. Stat. Ann. art. 6132b, § 38](#) (Supp. 2004).

Business & Corporate Law > ... > Management  
Duties & Liabilities > Causes of Action > General  
Overview

Contracts Law > Breach > General Overview

Business & Corporate Law > General  
Partnerships > General Overview

Business & Corporate Law > General  
Partnerships > Dissolution & Winding Up > General  
Overview

Business & Corporate Law > ... > Dissolution &  
Winding Up > Dissolution > General Overview

Business & Corporate Law > ... > Dissolution &  
Winding Up > Dissolution > Breach of Agreement &  
Expulsion

Business & Corporate Law > ... > Dissolution &  
Winding Up > Dissolution > Withdrawal of Partners

Business & Corporate Law > General  
Partnerships > Management Duties &  
Liabilities > General Overview

Business & Corporate Law > ... > Management  
Duties & Liabilities > Rights of Partners > General  
Overview

Contracts Law > Types of Contracts > General  
Overview



Business & Corporate  
 Compliance > Contracts > Types of  
 Contracts > Partnership Agreements  
 Contracts Law > Types of Contracts > Partnership  
 Agreements

#### [HN10](#) **Management Duties & Liabilities, Causes of Action**

The Uniform Partnership Act of Texas, [Tex. Rev. Civ. Stat. Ann. arts. 6132b-1.01](#) to -11.04 (Supp. 2004), codifies the common-law rule that every partner has the inherent power to dissolve a partnership even if the partnership agreement attempts to limit the right to do so. This is true even if a partner's exercise of the right to dissolve breaches the partnership agreement. [Tex. Rev. Civ. Stat. Ann. art. 6132b, §§ 31, 32, 38](#) (Supp. 2004). Dissolution that breaches the partnership agreement renders the dissolving partner liable for damages resulting from the breach. Further, dissolution occurs when any partner withdraws from the partnership, no matter the number of remaining partners.

Business & Corporate Law > ... > Management  
 Duties & Liabilities > Causes of Action > General  
 Overview

Contracts Law > Breach > General Overview

Business & Corporate Law > General  
 Partnerships > General Overview

Business & Corporate Law > General  
 Partnerships > Dissolution & Winding Up > General  
 Overview

Business & Corporate Law > ... > Dissolution &  
 Winding Up > Dissolution > General Overview

Business & Corporate Law > ... > Dissolution &  
 Winding Up > Dissolution > Breach of Agreement &  
 Expulsion

Business & Corporate Law > ... > Dissolution &  
 Winding Up > Dissolution > Continuation

Business & Corporate Law > ... > Management  
 Duties & Liabilities > Rights of Partners > General  
 Overview

Contracts Law > Types of Contracts > General  
 Overview

Business & Corporate  
 Compliance > Contracts > Types of  
 Contracts > Partnership Agreements  
 Contracts Law > Types of Contracts > Partnership  
 Agreements

Torts > Business Torts > General Overview

#### [HN11](#) **Management Duties & Liabilities, Causes of Action**

If a partner's dissolution of a partnership does not breach the partnership agreement, she is entitled to payment in cash of the net amount owing to her from any surplus after the partnership property is applied to discharge its liabilities. Tex. Rev. Civ. Stat. Ann. art. 6132b, § 38(1) (Supp. 2004). If: (1) the partner's dissolution of the partnership breached the partnership agreement; and (2) the partnership business continued, she is entitled to the value of her partnership interest paid to her in cash without considering the value of the good will of the business, less damages for the breach, and indemnity for any existing liabilities. Tex. Rev. Civ. Stat. Ann. art. 6132b, § 38(2)(c)(II) (Supp. 2004). If: (1) the partner's dissolution of the partnership breached the partnership agreement; and (2) the partnership business did not continue, she is entitled to payment in cash of the net amount owing to her from any surplus after discharge of the partnership's liabilities, less damages for the breach. Tex. Rev. Civ. Stat. Ann. art. 6132b, § 38(2)(c)(I) (Supp. 2004).

Civil Procedure > Appeals > Standards of  
 Review > General Overview

Evidence > Burdens of Proof > General Overview

#### [HN12](#) **Appeals, Standards of Review**

The appellate court addresses legal-sufficiency challenges as either "no-evidence" or "matter-of-law" issues. The appellate court analyzes the issue as a "no-evidence" challenge when the party complaining on appeal did not bear the burden of proof at trial. In challenging the legal sufficiency of the evidence to support a finding on which an adverse party bore the burden of proof, the appellant must show that the record presents no evidence to support the adverse finding. In performing a legal-sufficiency review, the appellate court considers only the probative evidence and inferences that support the challenged finding, disregarding all evidence and inferences to the contrary. The appellate



court overrules a legal-sufficiency issue if the record reflects any evidence of probative force to support the finding.

Civil Procedure > Appeals > Standards of Review > General Overview

### [HN13](#) Appeals, Standards of Review

The appellate court sustains a legal-sufficiency challenge when: (1) the record conclusively establishes the complete absence of evidence of a vital fact; (2) the court is barred by rules of law or of evidence from giving weight to the only evidence offered to prove a vital fact; (3) the evidence offered to prove a vital fact is no more than a mere scintilla; or (4) the evidence conclusively establishes the opposite of a vital fact. If there is more than a scintilla of evidence to support the finding, the legal-sufficiency challenge fails. More than a scintilla exists when the evidence rises to a level that would enable reasonable and fair-minded people to differ in their conclusions.

Civil Procedure > Appeals > Standards of Review > General Overview

Evidence > Burdens of Proof > General Overview

### [HN14](#) Appeals, Standards of Review

Unlike legal-sufficiency challenges, factual-sufficiency issues concede that the record presents conflicting evidence on an issue. Like legal-sufficiency challenges, the standard of review on factual-sufficiency issues depends on the burden of proof at trial. The party attacking a finding on which an adverse party bore the burden of proof must show that the record presents "insufficient evidence" to support the finding. In reviewing an insufficient-evidence issue, the appellate court examines and considers all of the evidence, not just the evidence that supports the verdict, to see whether it supports or undermines the finding. The appellate court sets aside the finding for factual insufficiency if the evidence in support of the vital fact, even if it is the only evidence on an issue, is factually too weak to support it.

Civil Procedure > Appeals > Standards of Review > General Overview

Civil Procedure > Remedies > Damages > General Overview

### [HN15](#) Appeals, Standards of Review

The appellate court considers only the evidence and inferences that support the fact finder's damages finding. The appellate court disregards all evidence and inferences to the contrary. Under a proper measure-of-damages instruction, a fact finder has the discretion to find damages within the range of evidence presented at trial.

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FOR APPELLEE: Audrey Muller Vicknair, Bracewell & Patterson, L.L.P., Corpus Christi, TX. Lance K. Bruun, Attorney at Law, CORPUS CHRISTI, TX.

**Judges:** Before Justices Yanez, Castillo, and Dorsey.<sup>1</sup> Opinion by Justice Castillo. Retired Justice Dorsey not participating.

**Opinion by:** ERLINDA CASTILLO

## Opinion

### MEMORANDUM OPINION

Opinion by Justice Castillo

This is a breach-of-fiduciary-duty suit for dissolution of an accounting partnership and distribution of its assets. In four issues, appellant Alan F. Lucke asserts: (1) appellee Janice E. Kimball, as a withdrawing partner, was not entitled to receive the net value of her partnership interest but rather was limited to an amount specified in the parties' partnership agreement; (2) the evidence is insufficient to support the damages found by the jury; (3) Kimball is not entitled to ten percent [\*2] prejudgment interest; and (4) Kimball is not entitled to a declaratory judgment because she sought declaratory relief on issues either not in controversy or that mirrored

<sup>1</sup>The assignment to this Court of retired Justice J. Bonner Dorsey by the Supreme Court of Texas pursuant to section 74.003 of the government code expired on August 31, 2003. See TEX. GOV'T CODE ANN. § 74.003 (Vernon Supp. 2004). Accordingly, Justice Dorsey did not participate in this decision.



the monetary judgment she received. Kimball raises two conditional issues on cross-appeal: (1) the jury's failure to find fraud or malice is against the great weight and preponderance of the evidence; and (2) the trial court abused its discretion in refusing to admit evidence that Lucke and Kimball agreed before Kimball's withdrawal that the parties' partnership agreement was no longer in effect. We affirm.

## **I. BACKGROUND FACTS**

### **A. The Partnership Interests**

Lucke formed an accounting partnership with Rogers Rainey in 1987. Initially, Lucke and Rainey were equal partners. Kimball and a fourth accountant, Thomas Schroeder, joined the partnership in 1991. Expressly electing to be governed by the Texas Uniform Partnership Act,<sup>2</sup> the four partners signed an agreement for Rainey, Lucke and Associates, L.L.P. in January 1992 (the "Partnership Agreement"). The Partnership Agreement reflected that as of January 1, 1991, Rainey and Lucke each sold 9% of their respective interests to Schroeder and 6% to [\*3] Kimball. Thus, Rainey and Lucke each retained a 35% interest in the partnership, Schroeder acquired an 18% interest, and Kimball acquired 12%. The initial value assigned to the partnership's assets was \$ 5,000.00. Therefore, the Partnership Agreement provided that Schroeder paid \$ 900.00 for his interest and Kimball \$ 600.00 for hers. The Partnership Agreement also required Schroeder and Kimball to make guaranteed payments to Rainey and Lucke over time. Kimball's guaranteed payments over six years totaled \$ 38,400.00, which she paid in full.

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<sup>2</sup> TEX. REV. CIV. STAT. ANN. art. 6132b, §§ 1-47 (Vernon Supp. 1992) (expired) (amended 1994 & 1997) (current version at TEX. REV. CIV. STAT. ANN. art. 6132b-1.01 to -11.04 (Vernon Supp. 2004)). Citation throughout this opinion is to the version of the Texas Uniform Partnership Act in effect when the parties signed the partnership agreement at issue here. The Revised Texas Partnership Act was effective January 1, 1994. The 1994 revised act was not retroactive. See Bohatch v. Butler & Binion, 977 S.W.2d 543, 545-46, 41 Tex. Sup. Ct. J. 308 (Tex. 1998); see also Tex. Westheimer Corp. v. 5647 Westheimer Assocs., 68 S.W.3d 15, 21 (Tex. App.-Houston [1st Dist.] 2001, pet. denied). The parties did not elect to be governed by the 1997 revised act. See TEX. REV. CIV. STAT. ANN. art. 6132b-11.03 (Vernon Supp. 2004).

[\*4] A fifth accountant, Ward McCampbell, joined the partnership in January 1993. He acquired an 11% interest. Rainey and Lucke's interests each dropped to 31%, Schroeder's to 16%, and Kimball's to 11%. In June 1993, Rainey died. The partners reallocated Rainey's interest, so that Lucke then owned 44.93%, Schroeder 32.19%, and Kimball and McCampbell 15.94% each. The partnership began making payments to Rainey's estate in accordance with the Partnership Agreement.

Schroeder withdrew from the partnership in October 1993. The parties negotiated a buy-out of Schroeder's partnership interest in the net amount of \$ 50,000.00-\$ 60,000.00, including work-in-progress, accounts receivable, and 32.19% of the partnership's net profits, less his unpaid guaranteed payments. The partners reallocated the remaining partners' interests. Lucke's interest increased to 58.8%. Kimball and McCampbell's interests each increased to 20.75%. In January 1995, the three remaining partners agreed to another reallocation of partnership interests. Lucke's interest decreased to 51%. Kimball and McCampbell's interests each increased to 24.5%.

McCampbell withdrew from the partnership in September or October 1996. The [\*5] parties negotiated a buy-out of McCampbell's partnership interest in the net amount of \$ 31,933.00, including work-in-progress, accounts receivable, and 24.5% of the partnership's net profits, less his unpaid guaranteed payments. Following McCampbell's withdrawal, Lucke's interest increased to 67.55% and Kimball's to 32.45%.

Kimball gave oral notice of her withdrawal from the partnership effective January 31, 1997. In February 1997, Lucke informed Kimball in writing that he would continue the partnership's business without liquidation. Kimball objected. Lucke tendered \$ 600.00 to Kimball as payment for her interest. Kimball demanded 32.45% of the partnership's net assets. Lucke refused. The partnership's final tax return showed that it operated only in January of 1997. Lucke began operating Rainey, Lucke and Associates as a sole proprietorship.

### **B. The Terms of the Partnership Agreement at Issue**

Lucke relies on two provisions of the Partnership Agreement as support for his position that Kimball is limited to recovering \$ 600.00 for her partnership interest:

5.04 Payment for Partnership Interest. Within thirty (30) days after the withdrawal, death or



retirement [\*6] of Kimball, she or her beneficiary shall be paid \$ 600 for her interest in the partnership.

\*\*\*

9.01 Events of Dissolution. The partnership shall be dissolved upon the affirmative vote of fifty-one percent (51%) in interest, not in numbers, of the partners or upon the sale of substantially all of the assets of the partnership. It is the intention of the partners that this be the exclusive method of dissolving the partnership and each partner agrees that if he takes any other action which would cause dissolution of the partnership under the Texas Uniform Partnership Act, such action shall be deemed to be an election by such partner to withdraw from the partnership in accordance with Section 8.01.

Section 8.01 reads:

8.01 Withdrawal of a Partner. Any partner may withdraw from the partnership at the end of any calendar quarter by giving sixty (60) days written notice thereof to the other partners. . . .

Kimball relies on the following provisions as supporting her position that she is entitled to the net value of her partnership interest:

9.02 Dissolution and Winding Up. Upon the dissolution of the partnership, the partners shall have the responsibility [\*7] for expeditiously liquidating the assets of the partnership. They shall promptly proceed to wind up the affairs of the partnership, and after payment (or making provision for payment) of liabilities owing to creditors (excluding partners), shall cause the remaining net assets to be distributed to the partners as follows:

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(c) There shall be distributed to each partner, out of the next available net assets, an amount equal to his percentage interest in the partnership multiplied by \$ 5000.

(d) The remaining net assets, if any, shall be distributed to the partners in proportion to their respective percentage interests in the profits of the partnership. . . .

The trial court agreed with Kimball as a matter of law. It instructed the jury that "upon dissolution, the partners are entitled to have the partnership property applied to discharge the liabilities and the surplus applied to pay in cash the net amount owing to the respective partners."

### C. The Jury Verdict

The jury found Kimball's share of the value of the net assets of the partnership as of January 31, 1997 to be \$ 85,000.00. The jury also found that Lucke breached his fiduciary duty [\*8] to Kimball. It declined to find fraud or malice. Finally, the jury found \$ 36,735.00 in reasonable attorney fees for trial of the case.

### D. The Judgment

The judgment awarded Kimball \$ 85,000 plus 10% pre-judgment interest from March 13, 1997 through the date of judgment in the amount of \$ 33,347.85. It also awarded Kimball \$ 36,735.00 as trial attorney fees, conditional appellate attorney fees, and 10% post-judgment interest. Finally, the trial court granted the following declaratory relief:

(1)

The partnership between Plaintiff and Defendant known as Rainey, Lucke & Associates, L.L.P., dissolved as of January 31, 1997; and

(2)

Plaintiff is entitled to her share of the value of the net assets of the partnership, as determined by the jury.

## II. THE CONTRACT INTERPRETATION ISSUE

Lucke first challenges the trial court's legal conclusion that Kimball is entitled to any amount other than the \$ 600.00 recited in paragraph 5.04 of the Partnership Agreement. He argues that the Partnership Agreement expressly provided that an exiting partner would receive more than the initial cash investment in only three circumstances: death, [\*9] retirement, or a majority-approved dissolution. He maintains that only on a majority-approved dissolution would the exiting partner be entitled to receive a percentage of the partnership's net assets. Since Kimball and he were the only remaining partners, he argues, Kimball's unilateral withdrawal without his consent effected a dissolution of the partnership by operation of law, not a majority-approved dissolution pursuant to paragraph 9.02.

Kimball responds that the initial \$ 5,000.00 valuation of the partnership, and the resulting nominal valuation of her partnership interest as \$ 600.00, was for tax purposes only. She argues that future amounts paid to withdrawing, retiring, or deceased partners in excess of the agreed nominal values were tax deductible by the



partnership. She points out that Schroeder and McCampbell received the net value of their partnership interests when they withdrew, not the nominal value.

Lucke counters that the terms of Schroeder's buy-out were different because Schroeder left the firm at Lucke's request as a result of a client conflict. He points out that the parties acknowledged in a written "Agreement Incident to Withdrawal" that Schroeder's buy-out [\*10] conflicted with the terms of the Partnership Agreement. Further, Lucke argues, the terms of McCampbell's buy-out were different because McCampbell had not signed the Partnership Agreement.

### A. The Standard of Review

**HN1** [↑] When the interpretation of a contract is at issue, the trial court must first determine whether the provisions in question are ambiguous. Coker v. Coker, 650 S.W.2d 391, 394, 26 Tex. Sup. Ct. J. 368 (Tex. 1983); Pegasus Energy Group, Inc. v. Cheyenne Petroleum Co., 3 S.W.3d 112, 120 (Tex. App.-Corpus Christi 1999, pet. denied). The question of whether a contract is ambiguous is a question of law for the trial court's determination. Coker, 650 S.W.2d at 394; Pegasus Energy Group, 3 S.W.3d at 120. A contract is ambiguous if it is reasonably susceptible of more than one meaning. Coker, 650 S.W.2d at 393; Pegasus Energy Group, 3 S.W.3d at 120. Here, neither of the parties argues that the terms of the Partnership Agreement are ambiguous; they simply disagree over the construction and interpretation of its terms. **HN2** [↑] A disagreement over the meaning of a contract provision does not render the [\*11] provision ambiguous. Pegasus Energy Group, 3 S.W.3d at 121 (citing First City Nat'l Bank of Midland v. Concord Oil Co., 808 S.W.2d 133, 136 (Tex. App.-El Paso 1991, no writ)).

**HN3** [↑] When the parties disagree over the meaning of an unambiguous contract, the court must determine the parties' intent by examining and considering the entire writing in an effort to give effect to the parties' intentions as expressed in the contract. Coker, 650 S.W.2d at 393; Pegasus Energy Group, 3 S.W.3d at 121 (citing First City Nat'l Bank, 808 S.W.2d at 136; KMI Continental Offshore Prod. Co. v. ACF Petroleum Co., 746 S.W.2d 238, 241 (Tex. App.-Houston [1st Dist.] 1987, writ denied)). The intent of the parties must be taken from the agreement itself, not from the parties' present interpretation. Pegasus Energy Group, 3 S.W.3d at 121 (citing Sun Oil Co. (Delaware) v.

Madeley, 626 S.W.2d 726, 731-32, 25 Tex. Sup. Ct. J. 101 (Tex. 1981)). The trial court must enforce an unambiguous agreement as it is written. Pegasus Energy Group, 3 S.W.3d at 121 (citing Sun Oil Co., 626 S.W.2d at 731-32). [\*12]

**HN4** [↑] Legal conclusions of the trial court are always reviewable. Pegasus Energy Group, 3 S.W.3d at 121. We are not obligated to give any particular deference to those conclusions. *Id.* (citing Montanaro v. Montanaro, 946 S.W.2d 428, 431 (Tex. App.-Corpus Christi 1997, no writ)). We review questions of law de novo. Pegasus Energy Group, 3 S.W.3d at 121 (citing State v. Heal, 917 S.W.2d 6, 9, 39 Tex. Sup. Ct. J. 221 (Tex. 1996) (op. on reh'g); Marsh v. Marsh, 949 S.W.2d 734, 739 (Tex. App.-Houston [14th Dist.] 1997, no writ)). As the final arbiter of the law, we have the power and the duty to independently evaluate the legal determinations of the trial court. Pegasus Energy Group, 3 S.W.3d at 121 (citing Purvis Oil Corp. v. Hillin, 890 S.W.2d 931, 935 (Tex. App.-El Paso 1994, no writ); Sears, Roebuck & Co. v. Nichols, 819 S.W.2d 900, 903 (Tex. App.-Houston [14th Dist.] 1991, writ denied); MJR Corp. v. B & B Vending Co., 760 S.W.2d 4, 10 (Tex. App.-Dallas 1988, writ denied)).

**HN5** [↑] We uphold a trial court's legal conclusions unless they are erroneous as a matter [\*13] of law. Pegasus Energy Group, 3 S.W.3d at 121 (citing Montanaro, 946 S.W.2d at 431; Hofland v. Fireman's Fund Ins. Co., 907 S.W.2d 597, 599 (Tex. App.-Corpus Christi 1995, no writ)). In reviewing challenges to the trial court's conclusions of law, we sustain the judgment on any legal theory supported by the evidence. In re A.M., 101 S.W.3d 480, 484-85 (Tex. App.-Corpus Christi 2002, no pet.). We do not reverse an incorrect conclusion of law if the findings of fact support a correct legal theory. *Id.* at 485.

### B. The Uniform Partnership Act of Texas

#### 1. Dissolution

**HN6** [↑] The Uniform Partnership Act of Texas (the "Partnership Act")<sup>3</sup> addresses three different concepts: "dissolution," "winding up," and "termination." Woodruff v. Bryant, 558 S.W.2d 535, 538 (Tex. Civ. App.-Corpus Christi 1977, writ ref'd n.r.e.). Dissolution is defined as the change in the relationship of the partners caused by

<sup>3</sup> See note 2.



any partner ceasing to be associated in the carrying on of the partnership. TEX. REV. CIV. STAT. ANN. art. 6132b, § 29; Woodruff, 558 S.W.2d at 538-39. [\*14] Dissolution is distinguished from both the winding up of the business of the partnership and its termination. Generally, when a partnership dissolves, the partnership continues during the period of winding up until all pre-existing matters are concluded. See TEX. REV. CIV. STAT. ANN. art. 6132b, § 30; Woodruff, 558 S.W.2d at 538-39. As an act that actually changes the legal relationships between the partners, dissolution has nothing to do with whether the partnership business is continuing or winding up. Woodruff, 558 S.W.2d at 538-39. Dissolution is a technical legal concept, unlike the concept of dissolution in other areas, such as corporations. *Id.*

**HN7** [↑] Causes of dissolution are set out in sections 31 and 32 of the Partnership Act. TEX. REV. CIV. STAT. ANN. art. 6132b, §§ 31, 32; Woodruff, 558 S.W.2d at 539. Dissolution occurs immediately on the happening of the specified [\*15] event. Woodruff, 558 S.W.2d at 539. At common law, a partner could dissolve a partnership by giving explicit notice to the other partners. *Id.* (citing Green v. Waco State Bank, 78 Tex. 2, 14 S.W. 253 (Tex. 1890)). Section 31 codifies this common-law rule by providing that dissolution can be caused by the "express will" of any partner. TEX. REV. CIV. STAT. ANN. art. 6132b, §§ 31(b); Woodruff, 558 S.W.2d at 539. The causes for dissolution set out in section 31 are automatic. Woodruff, 558 S.W.2d at 539.

**HN8** [↑] Dissolution does not necessarily terminate the partnership business. Woodruff, 558 S.W.2d at 538-39. Even if the business does not continue, the partnership continues to exist for the limited purpose of winding up. TEX. REV. CIV. STAT. ANN. art. 6132b, § 30; Tex. Westheimer Corp. v. 5647 Westheimer Assocs., 68 S.W.3d 15, 22 (Tex. App.-Houston [1st Dist.] 2001, pet. denied); Woodruff, 558 S.W.2d at 539. Only on termination does the partnership relationship cease to exist. Woodruff, 558 S.W.2d at 539. [\*16]

## **2. Distribution of Assets**

Section 38 of the Partnership Act governs the rights of partners to application of partnership property on dissolution:

**HN9** [↑] (1) When dissolution is caused in any way, except in contravention of the partnership agreement, each partner, as against his co-partners and all persons claiming through them in respect of their interests in the partnership, unless otherwise

agreed, may have the partnership property applied to discharge its liabilities, and the surplus applied to pay in cash the net amount owing to the respective partners. But if dissolution is caused by expulsion of a partner, bona fide under the partnership agreement and if the expelled partner is discharged from all partnership liabilities, either by payment or agreement under Section 36(2), he shall receive in cash only the net amount due him from the partnership.

(2) When dissolution is caused in contravention of the partnership agreement the rights of the partners shall be as follows:

(a) Each partner who has not caused dissolution wrongfully shall have,

(I) All the rights specified in paragraph (1) of this Section, and

(II) The right, as against each partner who [\*17] has caused the dissolution wrongfully, to damages for breach of the agreement.

(b) The partners who have not caused the dissolution wrongfully, if they all desire to continue the business in the same name, either by themselves or jointly with others, may do so, during the agreed term for the partnership and for that purpose may possess the partnership property, provided they secure the payment by bond approved by the court, or pay to any partner who has caused the dissolution wrongfully, the value of his interest in the partnership at the dissolution, less any damages recoverable under clause (2aII) of this Section, and in like manner indemnify him against all present or future partnership liabilities.

(c) A partner who has caused the dissolution wrongfully shall have:

(I) If the business is not continued under the provisions of paragraph (2b) all the rights of a partner under paragraph (1), subject to clause (2aII), of this Section,

(II) If the business is continued under paragraph (2b) of this Section the right as against his co-partners and all claiming through them in respect of their interests in the partnership, to have the value of his interest in the partnership, less [\*18] any damages caused to his co-partners by the dissolution, ascertained and paid to him in cash, or the payment secured by bond approved by the



court, and to be indemnified against all existing liabilities of the partnership; but in ascertaining the value of the partner's interest the value of the good-will of the business shall not be considered.

[TEX. REV. CIV. STAT. ANN. art. 6132b, § 38.](#)

## **C. Application of the Law to the Facts**

### **1. Dissolution**

Lucke argues that Kimball could exercise her power to dissolve the partnership only if she complied with the dissolution procedures contemplated by the Partnership Agreement. This is not so. [HN10](#) [↑] The Partnership Act codified the common-law rule that every partner has the inherent power to dissolve a partnership even if the partnership agreement attempts to limit the right to do so. *Id.*; [Woodruff, 558 S.W.2d at 539.](#) This is true even if a partner's exercise of the right to dissolve breaches the partnership agreement. [TEX. REV. CIV. STAT. ANN. art. 6132b, §§ 31, 32, 38; Woodruff, 558 S.W.2d at 539.](#) Dissolution that [\*19] breaches the partnership agreement renders the dissolving partner liable for damages resulting from the breach. [Woodruff, 558 S.W.2d at 539.](#) Further, dissolution occurs when any partner withdraws from the partnership, no matter the number of remaining partners. *See id.* Thus, Kimball's withdrawal from the partnership and the withdrawals of Schroeder and McCampbell all had the same effect: dissolution of the partnership. *See id.* Accordingly, we hold that Kimball exercised her inherent power to dissolve the partnership when she gave Lucke oral notice of her withdrawal effective January 31, 1997. *See id.*

### **2. Distribution**

[HN11](#) [↑] If Kimball's dissolution of the partnership did not breach the Partnership Agreement, she is entitled to payment in cash of the net amount owing to her from any surplus after the partnership property is applied to discharge its liabilities. *See TEX. REV. CIV. STAT. ANN. art. 6132b, § 38(1).* If: (1) Kimball's dissolution of the partnership breached the Partnership Agreement; and (2) the partnership business continued, she is entitled to the value of her partnership interest paid to her in cash [\*20] without considering the value of the good will of the business, less damages for the breach, and indemnity for any existing liabilities. *See TEX. REV. CIV. STAT. ANN. art. 6132b, § 38(2)(c)(II).* If: (1) Kimball's dissolution of the partnership breached the Partnership Agreement; and (2) the partnership

business did not continue, she is entitled to payment in cash of the net amount owing to her from any surplus after discharge of the partnership's liabilities, less damages for the breach. *See TEX. REV. CIV. STAT. ANN. art. 6132b, § 38(2)(c)(I).*

Thus, the Partnership Act provides that Kimball is entitled to payment in cash for her partnership interest even if she breached the Partnership Agreement in dissolving the partnership. *See id.* Lucke's only justification for paying Kimball less than the value of her partnership interest arises from any claim he may have to an offset for damages for the breach. *See id.* Lucke did not counterclaim for any offset. Further, the parties do not dispute that the business of the partnership did not continue after Kimball's withdrawal. Accordingly, we hold that Kimball [\*21] is entitled to payment in cash of the net amount owing to her from any surplus after discharge of the partnership's liabilities. *See id.*

We overrule Lucke's first issue. We next address Kimball's sufficiency challenges to the evidence supporting the jury's damages finding.

## **III. SUFFICIENCY OF DAMAGES EVIDENCE**

Kimball's expert witness testified that the partnership's assets included cash, accounts receivable, and work-in-progress. He calculated the partnership's net assets as of the date of dissolution. The expert valued Kimball's interest at \$ 126,885.09. In his second issue, Lucke complains that Kimball was required to provide a single damage calculation, net of lost profits. He concludes that the expert's testimony did not support the \$ 85,000 in damages found by the jury.

Kimball responds that Lucke did not introduce his own expert valuation. Instead, Kimball notes, Lucke vigorously cross-examined Kimball's expert regarding the expert's net profit calculations. Therefore, Kimball argues, Lucke cannot now challenge the jury's exercise of discretion in apparently giving effect in its damages finding to Lucke's challenges to the expert's conclusions.

### **[\*22] A. Sufficiency Standards of Review**

#### **1. Legal Sufficiency**

[HN12](#) [↑] We address legal-sufficiency challenges as either "no-evidence" or "matter-of-law" issues. *See Ed Rachal Found. v. D'Unger, 117 S.W.3d 348, 372 (Tex.*



[App.-Corpus Christi 2003, pet. filed](#)) (en banc) (Castillo, J., concurring and dissenting) (and cited cases). We analyze the issue as a "no-evidence" challenge when the party complaining on appeal did not bear the burden of proof at trial. *Id.* In challenging the legal sufficiency of the evidence to support a finding on which an adverse party bore the burden of proof, the appellant must show that the record presents no evidence to support the adverse finding. *Id.* In performing a legal-sufficiency review, we consider only the probative evidence and inferences that support the challenged finding, disregarding all evidence and inferences to the contrary. *Id.* We overrule a legal-sufficiency issue if the record reflects any evidence of probative force to support the finding. *Id.* [HN13](#) [↑] We sustain a legal-sufficiency challenge when: (1) the record conclusively establishes the complete absence of evidence of a vital fact; (2) the court is barred [\*23] by rules of law or of evidence from giving weight to the only evidence offered to prove a vital fact; (3) the evidence offered to prove a vital fact is no more than a mere scintilla; or (4) the evidence conclusively establishes the opposite of a vital fact. *Id.* [at 372-73](#). If there is more than a scintilla of evidence to support the finding, the legal-sufficiency challenge fails. *Id.* [at 373](#). More than a scintilla exists when the evidence "rises to a level that would enable reasonable and fair-minded people to differ in their conclusions." *Id.* (quoting [Transp. Ins. Co. v. Moriel](#), 879 S.W.2d 10, 25, 37 Tex. Sup. Ct. J. 883 (Tex. 1994) (op. on reh'g)).

## 2. Factual Sufficiency

[HN14](#) [↑] Unlike legal-sufficiency challenges, factual-sufficiency issues concede that the record presents conflicting evidence on an issue. [D'Unger](#), 117 S.W.3d [at 373](#). Like legal-sufficiency challenges, the standard of review on factual-sufficiency issues depends on the burden of proof at trial. *Id.* The party attacking a finding on which an adverse party bore the burden of proof must show that the record presents "insufficient evidence" to support the finding. [\*24] *Id.* In reviewing an insufficient-evidence issue, we examine and consider all of the evidence, not just the evidence that supports the verdict, to see whether it supports or undermines the finding. *Id.* We set aside the finding for factual insufficiency if the evidence in support of the vital fact, even if it is the only evidence on an issue, is factually too weak to support it. *Id.*

## B. Sufficiency Analysis

### 1. Legal Sufficiency

[HN15](#) [↑] We consider only the evidence and inferences

that support the fact finder's damages finding. See *id.* [at 372](#). We disregard all evidence and inferences to the contrary. See *id.* Under a proper measure-of-damages instruction, a fact finder has the discretion to find damages within the range of evidence presented at trial. See [Gulf States Utils. Co. v. Low](#), 79 S.W.3d 561, 566, 45 Tex. Sup. Ct. J. 724, 45 Tex. Sup. Ct. J. 793 (Tex. 2002). On appeal, Lucke does not assert charge error in the damages question, which did not include a measure-of-damages instruction. The damages question asked only for the jury's finding regarding "Kimball's share of the value of the net assets of the partnership" as of the date of dissolution. The jury's answer [\*25] of \$ 85,000.00 is within the range of evidence presented by Kimball's expert witness. See *id.* We find more than a scintilla of evidence in the record to support the jury's damages finding. See [D'Unger](#), 117 S.W.3d [at 373](#). We hold the evidence legally sufficient to support the jury's damages finding of \$ 85,000.00. See *id.*

## 2. Factual Sufficiency

We have reviewed the entire record. See *id.* [at 373](#). We are satisfied there is sufficient evidence from Kimball's expert witness to show the value of both the partnership and Kimball's net interest. See [State v. Dehnisch](#), 437 S.W.2d 46, 49 (Tex. Civ. App.-Corpus Christi 1968, no writ). The fact finder's damages finding is within the limits of the expert's testimony. See [Gulf States Utils. Co.](#), 79 S.W.3d [at 566](#); see also [Dehnisch](#), 437 S.W.2d [at 49](#). We will not substitute our valuation for that of the fact finder, which had before it competent evidence as to damages. See [Dehnisch](#), 437 S.W.2d [at 49](#). The jury's finding of \$ 85,000.00 as the value of Kimball's partnership interest was within its province as fact finder. See *id.* [\*26]. We hold the evidence factually sufficient to support the jury's damages finding of \$ 85,000.00. See [D'Unger](#), 117 S.W.3d [at 373](#).

We overrule Lucke's second issue. We turn to Kimball's issue challenging the rate of prejudgment interest applied by the trial court.

## IV. PREJUDGMENT INTEREST

The judgment awarded prejudgment interest at the rate of ten percent, for a total of \$ 33,347.85. Lucke does not complain on appeal about the trial court's calculation of the amount of the prejudgment interest or the date of accrual. Rather, in his third issue, Lucke asserts that the Partnership Agreement is a contract that is silent on the interest question. Therefore, he argues, [section 302.002 of the finance code](#) in effect on the date of judgment



controls. See [TEX. FIN. CODE ANN. § 302.002](#) (Vernon Supp. 2001). He concludes that a six-percent prejudgment interest rate applies. Kimball responds that Lucke is a judgment debtor, not an obligor as defined by the finance code. See [TEX. FIN. CODE ANN. § 301.002\(a\)\(13\)](#) (Vernon Supp. 2001). She argues that the prejudgment interest rate is controlled under [\*27] the common law by the supreme court's holding in [Johnson & Higgins of Tex. v. Kenneco Energy, Inc., 962 S.W.2d 507, 532, 41 Tex. Sup. Ct. J. 268 \(Tex. 1998\)](#) (op. on reh'g). She concludes that a ten-percent prejudgment interest rate is correct. We agree with Kimball. See *id.* We overrule Lucke's third issue.

reach Kimball's conditional issues on cross-appeal. See [TEX. R. APP. P. 47.1](#). We affirm the judgment of the trial court.

ERRLINDA CASTILLO

Justice

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## **V. DECLARATORY JUDGMENT**

In his fourth issue, Lucke asserts that Kimball is not entitled to a declaratory judgment because she sought declaratory relief on issues either not in controversy or that mirrored the monetary judgment she received. Kimball responds that the declaratory judgment she sought directly affected her legal relations with Lucke. We note that the stated purpose of the Declaratory Judgment Act is "to settle and afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations." [TEX. CIV. PRAC. & REM. CODE ANN. § 37.002\(b\)](#) (Vernon 1997); [Garcia v. Comm'r's Court, 101 S.W.3d 778, 784 \(Tex. App.-Corpus Christ 2003, no pet.\)](#). We find that Kimball's rights on dissolution of the partnership were in controversy. See [TEX. CIV. PRAC. & REM. CODE ANN. § 37.002\(b\) \[\\*28\]](#) (Vernon 1997). The first jury question asked the jury to find the value of Kimball's partnership interest. The jury then found that Lucke breached his fiduciary duty to Kimball.<sup>4</sup> The charge did not ask the jury to find damages for Lucke's breach. The jury refused to find that Lucke acted with fraud or malice and did not reach the conditional exemplary damages question. Thus, the only damages question answered by the jury was not conditioned on any finding of breach of fiduciary duty. We conclude that the only claim supporting the \$ 85,000 finding is Kimball's request for a declaratory judgment. We overrule Lucke's fourth issue.

## **VI. CONCLUSION**

Having overruled each of Lucke's issues, we do not

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<sup>4</sup>The jury charge did not contain a breach-of-contract question.