

VACATE and DISMISS; and Opinion Filed January 26, 2016.



**In The
Court of Appeals
Fifth District of Texas at Dallas**

No. 05-15-00031-CV

ROBERT PHALEN, Appellant

V.

MICHAEL MAUCELI, REEF OIL & GAS PARTNERS, L.P. (F/K/A REEF OIL & GAS PARTNERS, LLC), REEF SECURITIES, INC. (F/K/A WESTERN AMERICAN SECURITIES CORP.), REEF EXPLORATION, L.P., AND PAUL MAUCELI, Appellees

**On Appeal from the 191st Judicial District Court
Dallas County, Texas
Trial Court Cause No. DC-13-00528**

MEMORANDUM OPINION

**Before Justices Fillmore, Myers, and Whitehill
Opinion by Justice Fillmore**

In a single issue, appellant Robert Phalen asserts the trial court erred in granting summary judgment in favor of appellees Michael Mauceli, Reef Oil & Gas Partners, L.P. (f/k/a Reef Oil & Gas Partners, LLC), Reef Securities, Inc. (f/k/a Western American Securities Corp.), Reef Exploration, L.P., and Paul Mauceli.¹ We vacate the trial court's order granting summary judgment and dismiss the cause for lack of subject matter jurisdiction.

¹ On appeal, Phalen stated for the first time in his reply brief that he does not contest the summary judgment granted in favor of appellees Michael Mauceli; Reef Securities, Inc.; Reef Exploration, L.P.; and Paul Mauceli.

Background

In May 2007, Phalen purchased 2.5 units of partnership interest in a Texas limited partnership, Reef & Oil Gas Income and Development Fund II, L.P. (Income Fund II), for the total price of \$250,000. Phalen made the investment through his broker, Curtis J. Sathre III (Sathre), who was employed by WFP Securities, Inc. (WFP).

By letter dated August 15, 2009, Phalen wrote to Michael Mauceli, as chief executive officer of Reef Oil & Gas Partners, L.P. (ROGP), requesting redemption of his investment in “Reef.” According to that letter, Phalen’s attorney had previously requested redemption by ROGP of Phalen’s investment. In his letter, Phalen stated he had spoken that week to a senior investigator in the Enforcement Division of the Financial Industry Regulatory Authority (FINRA) “handling his case,” who was “surprised that my advisor had made such inappropriate investment recommendations.” According to his letter, Phalen had filed a complaint with FINRA against the broker who sold him the Income Fund II investment, intended to retain a securities attorney to file a FINRA complaint against the broker, and was cooperating in three Securities and Exchange Commission investigations of other companies “this broker sold me.” In April 2009, Phalen filed an arbitration proceeding against Sathre and WFP based, in part, on the Income Fund II investment.

On January 24, 2012, plaintiff Frank Stevenson and other plaintiffs filed their sixth amended original petition in Cause Number 10-10647, 191st Judicial District Court, Dallas County, Texas (the *Stevenson* litigation).² In addition to appellees Michael Mauceli, ROGP, Reef Securities, Inc. (Reef Securities), Reef Exploration, L.P. (Reef Exploration), and Paul

² The plaintiffs in the *Stevenson* litigation are: Frank Stevenson on Behalf of, and in his Custodial Capacity for IRA Resources, Inc. No. XXX22, f/b/o Frank Stevenson; Frank and Donna Stevenson as Joint Tenants with Rights of Survivorship; Donna Stevenson on Behalf of, and in her Custodial Capacity for IRA Resources, Inc. No. XXX23, f/b/o Donna Stevenson; James and Carol Estle as Joint Tenants with Rights of Survivorship; James Estle on Behalf of, and in his Custodial Capacity for IRA Resources, Inc. No. XXX56, f/b/o James Estle; Carol Estle on Behalf of, and in her Custodial Capacity for IRA Resources, Inc. XXX55, f/b/o Carol Estle; Nancy Thurmond as Trustee for the Nancy Lola Thurmond Revocable Trust; and Jaimie A. Davis.

Mauceli (collectively referred to by the *Stevenson* litigation plaintiffs as the “Reef Defendants”),³ the *Stevenson* litigation plaintiffs sued numerous other defendants: individual Wayne Kirk and “oil and gas projects” Reef Global Energy Ventures II, L.P.; Reef Global Energy Ventures V, L.P.; Reef Global Energy Ventures VI, L.P.; Reef Global Energy Ventures VII, L.P.; Reef Oil & Gas Income and Development Fund, L.P.; Reef Oil & Gas Partners L.P. Reef-Gumbo II, Sweet Bay, Grand Lake Joint Venture, L.P.; Reef Oil & Gas Partners, L.P. Reef Private Drilling Venture 2006 IV Joint Venture; Reef Energy Partners, G.P.; Reef Energy Partners, L.P.; Reef Oil & Gas Companies; Reef Oil & Gas Partners, L.P. Backridge Infield Drilling Joint Venture I; Reef Oil & Gas Partners, L.P. Bell City South Infield Development Joint Venture; Reef Oil & Gas Partners, L.P. Corpus Christi Bay Joint Venture; Reef Oil & Gas Partners, L.P. East Euterpe & Gumbo Infield Joint Venture; Reef Oil & Gas Partners, L.P. North Gata Prospect Joint Venture; Reef Oil & Gas Partners, L.P. Reef White Castle Field 2007-I Joint Venture; Reef Oil & Gas Partners, L.P. South Central 3 Well Infield Development Joint Venture; Reef Oil & Gas Partners, L.P. Treasure Isle & Hog Island Infield Joint Venture; Reef Partners, LLC; Reef Partners - 2000 - A Income Fund Joint Venture; Reef Oil & Gas Income Fund IX, LP; Reef Partners Income Fund; Reef Oil & Gas Partners, LLC; Reef Exploration, Inc. - Baton Rouge Infield Development Joint Venture; Reef Global Energy Ventures; Reef Global Energy Ventures I; and Reef Global Energy Ventures IV (collectively referred to by the *Stevenson* litigation plaintiffs as the “Projects”).

In the “Background Facts” section of their sixth amended original petition, the *Stevenson* litigation plaintiffs alleged they invested in the defendant Projects, which had failed to perform as the Reef Defendants had represented. Specifically, the *Stevenson* litigation plaintiffs alleged

³ Michael Mauceli is the manager of Reef Oil & Gas Partners, G.P., L.L.C. (Reef GP), which is the general partner of ROGP. Reef GP is also the general partner of Reef Exploration. ROGP is the “Managing Venturer” and general partner of Income Fund II. Michael Mauceli’s brother, Paul Mauceli, is the sole shareholder, director, president, and chief executive officer of Reef Securities, Inc., the “dealer manager” for the Income Fund II private offering.

that the Reef Defendants: (1) misstated the status of operations of the Projects, allocation of funds invested by plaintiffs, and application of revenues generated through production of wells; (2) wrongfully and illegally misallocated costs, expenses, and deductions; (3) used investor funds in material contravention to the terms of private placement memoranda and “related agreements”; and (4) failed to provide an accounting with regard to funds plaintiffs invested in the Projects. The *Stevenson* litigation plaintiffs asserted various causes of action arising from their investments in the Projects: fraud, fraudulent inducement, violations of the Texas Securities Act,⁴ breach of fiduciary duty, breach of contract, violations of the Texas Theft Liability Act,⁵ negligent misrepresentation, and fraudulent concealment. The *Stevenson* litigation plaintiffs sought actual and exemplary damages and attorney’s fees.

On September 20, 2012, Phalen filed a petition in intervention in the *Stevenson* litigation. Phalen asserted claims “complaining of” the same defendants named in the *Stevenson* litigation, including appellees. In the “Background and Causes of Action” section of his petition in intervention, Phalen “adopt[ed] and incorporate[d] . . . for all purposes the allegations, background facts and causes of action set forth in” plaintiffs’ sixth amended original petition in the *Stevenson* litigation. In addition, Phalen alleged that he had made an investment in 2.5 units of Income Fund II, the general partner of which is ROGP. “As a direct and proximate result of the conduct as set forth” in plaintiffs’ sixth amended original petition in the *Stevenson* litigation, Phalen alleged he sustained actual damages. Phalen also sought recovery of exemplary damages and attorney’s fees. On December 18, 2012, the trial court severed Phalen’s claims into the separate lawsuit underlying this appeal, Cause No. DC-13-00528, 191st Judicial District Court, Dallas County, Texas (the *Phalen* litigation).

⁴ See TEX. REV. CIV. STAT. ANN. art. 581–33 (West 2010).

⁵ See TEX. CIV. PRAC. & REM. CODE ANN. §§ 134.001–.005 (West 2011).

Appellees moved for traditional summary judgment in the *Phalen* litigation. Appellees asserted they were entitled to summary judgment because Phalen had merely adopted allegations made in the sixth amended original petition in the *Stevenson* litigation and the defendant Projects in the *Stevenson* litigation did not include Income Fund II, the only limited partnership in which Phalen invested. Therefore, appellees argued Phalen lacked standing to assert the claims he adopted from the *Stevenson* litigation. See *Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 443 (Tex. 1993) (standing is component of subject matter jurisdiction and constitutional prerequisite to maintaining lawsuit under Texas law); *Coons-Andersen v. Andersen*, 104 S.W.3d 630, 633 (Tex. App.—Dallas 2003, no pet.); see also *Bland Indep. Sch. Dist. v. Blue*, 34 S.W.3d 547, 554 (Tex. 2000) (absence of subject matter jurisdiction may be raised by motion for summary judgment). In their motion for summary judgment, appellees also contended Phalen's assertion of the claims made in the sixth amended original petition in the *Stevenson* litigation are barred by applicable statutes of limitations or repose, and, as a matter of law, there is no genuine issue of material fact concerning Phalen's claims of misrepresentation and breach of contractual and fiduciary duties.

According to his response to appellees' motion for summary judgment, Phalen "adopted" the sixth amended original petition in the *Stevenson* litigation, and his petition in intervention involved "similar issues" to those involved in the *Stevenson* litigation. Phalen challenged appellees' motion for summary judgment based on applicable statutes of limitations or repose, but he did not specifically address that portion of appellees' motion for summary judgment arguing that Phalen lacked standing. Phalen tendered no summary judgment evidence.

Phalen non-suited all defendants other than appellees.⁶ Thereafter, the trial court signed the order granting summary judgment in favor of appellees and dismissing Phalen’s claims with prejudice; the order does not specify the grounds upon which the summary judgment was granted. Phalen’s motion for new trial was overruled by operation of law, and he filed this appeal.⁷

Standing

Because standing is a component of subject matter jurisdiction and a constitutional requisite for maintaining a lawsuit under Texas law, *see Tex. Air Control Bd.*, 852 S.W.2d at 443, Phalen’s standing to maintain his claims against appellees is a threshold issue. Therefore, we first address appellees’ contention that Phalen lacks standing to maintain the claims in his petition in intervention

The standard of review applicable to subject matter jurisdiction also applies to standing. *Id.* at 446; *Coons-Andersen*, 104 S.W.3d at 633–34. Under that standard, the pleader is required to allege facts affirmatively demonstrating the trial court’s jurisdiction to hear the cause. *Tex. Air Control Bd.*, 852 S.W.2d at 446; *Coons-Andersen*, 104 S.W.3d at 634 (party’s standing to pursue a cause of action is question of law). “Whether a pleader has alleged facts that affirmatively demonstrate a trial court’s subject matter jurisdiction is a question of law reviewed *de novo*.” *Tex. Dep’t of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226 (Tex. 2004); *see also Norris v. Brookshire Grocery Co.*, 362 S.W.3d 226, 231 (Tex. App.—Dallas 2012, pet. denied) (issue of standing focuses on who may bring an action). We construe pleadings liberally in favor of conferring jurisdiction. *Tex. Dep’t of Transp. v. Ramirez*, 74 S.W.3d 864, 867 (Tex. 2002).

⁶ Phalen states in his appellate brief that the “defendants remaining at the time of the summary judgment hearing were” appellees Michael Mauceli, Paul Mauceli, ROGP, Reef Securities, and Reef Exploration.

⁷ On appeal, Phalen stated for the first time in his reply brief that he does not challenge the trial court’s summary judgment on his causes of action for civil theft, negligent misrepresentation, and violations of the Texas Securities Act, however he “challenges the trial court’s summary judgment in favor of [Reef Oil & Gas Partners, L.P.] on his causes of action for fraud (including inducement), breach of fiduciary duty, and breach of contract.”

“Any party may intervene by filing a pleading, subject to being stricken out by the court for sufficient cause on the motion of any party.” TEX. R. CIV. P. 60. A non-party who seeks to intervene before judgment must have standing. *State v. Naylor*, 466 S.W.3d 783, 797 (Tex. 2015) (Boyd, J., concurring); *see also Mendez v. Brewer*, 626 S.W.2d 498, 499 (Tex. 1982). A showing of standing requires that the intervenor have some present justiciable interest in the subject matter of the suit. *Mendez*, 626 S.W.2d at 499. “A party has a justiciable interest in a lawsuit, and thus a right to intervene, when his interests will be affected by the litigation.” *Law Offices of Windle Turley, P.C. v. Ghiasinejad*, 109 S.W.3d 68, 70 (Tex. App.—Fort Worth 2003, no pet.). “To constitute a justiciable interest, ‘[t]he intervenor’s interest must be such that if the original action had never been commenced, and he had first brought it as the sole plaintiff, he would have been entitled to recover in his own name to the extent at least of a part of the relief sought’ in the original suit.” *In re Union Carbide Corp.*, 273 S.W.3d 152, 155 (Tex. 2008) (orig. proceeding) (quoting *King v. Olds*, 12 S.W. 65, 65 (Tex. 1888)). “In other words, a party may intervene if the intervenor could have ‘brought the [pending] action, or any part thereof, in his own name.’” *Id.* (quoting *Guar. Fed. Sav. Bank v. Horseshoe Operating Co.*, 793 S.W.2d 652, 657 (Tex. 1990)); *Tex. Supply Ctr., Inc. v. Daon Corp.*, 641 S.W.2d 335, 337 (Tex. App.—Dallas 1982, writ ref’d n.r.e.).

In the “Background Facts and Causes of Action” section of Phalen’s petition in intervention, he “adopt[ed] and incorporate[d] for all purposes the allegations, background facts and causes of action” of the *Stevenson* litigation plaintiffs in their sixth amended original petition. In his response to appellees’ motion for summary judgment, Phalen stated his petition in intervention involved “similar issues” to those in the *Stevenson* litigation. The *Stevenson* litigation plaintiffs sued appellees and the Project defendants based on causes of action relating to plaintiffs’ investments in the Projects. Phalen did not invest in any of the Projects that are the

subject of the *Stevenson* litigation, and his alleged damages resulted solely from his investment in Income Fund II. Income Fund II was not a defendant in the *Stevenson* litigation, none of the plaintiffs' allegations in the *Stevenson* litigation concerned Income Fund II, and none of the relief sought by plaintiffs in the *Stevenson* litigation was based on investment in Income Fund II. The only conduct complained of in Phalen's petition in intervention was the "conduct set forth in Plaintiffs' Sixth Amended Original Petition." Phalen has no interest in the Projects that are the subject of the *Stevenson* litigation or in allegations against appellees in the *Stevenson* litigation based on the plaintiffs' investments in those Projects; therefore, Phalen has no interest to protect that could have been affected by the *Stevenson* litigation. *See Ghiasinejad*, 109 S.W.3d at 70.

Even construing his pleadings liberally, Phalen alleged claims in his petition in intervention that belonged to the plaintiffs in the *Stevenson* litigation and for which Phalen had no standing to assert. Any cause of action Phalen may have against appellees with regard to his investment in Income Fund II would be unresolved by a judgment in the *Stevenson* litigation. Phalen simply did not possess any justiciable interest in the *Stevenson* litigation; on this record, he did not show he had standing to have brought, and recovered for, any part of the plaintiffs' claims in the *Stevenson* litigation. *See In re Union Carbide Corp.*, 273 S.W.3d at 155; *see also Henderson Edwards Wilson, L.L.P. v. Toledo*, 244 S.W.3d 851, 855 (Tex. App.—Dallas 2008, no pet.) ("Because a potential settlement credit in a separate lawsuit does not create a justiciable interest in a suit on a contract to which Henderson is not a party, Henderson had no standing and the trial court did not err by striking the intervention.").

Because Phalen lacked standing to assert the claims in his petition in intervention, the trial court lacked subject matter jurisdiction over Phalen's intervention. Accordingly, we vacate the trial court's order in the *Phalen* litigation granting summary judgment and dismiss the *Phalen* cause for lack of subject matter jurisdiction. *See Dallas Cty. Appraisal Dist. v. Funds Recovery*,

Inc., 887 S.W.2d 465, 468 (Tex. App.—Dallas 1994, writ denied) (if trial court lacked jurisdiction, then appellate court only has jurisdiction to set judgment aside and dismiss the cause).

/Robert M. Fillmore/

ROBERT M. FILLMORE
JUSTICE

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**Court of Appeals
Fifth District of Texas at Dallas**

JUDGMENT

ROBERT PHALEN, Appellant

No. 05-15-00031-CV V.

MICHAEL MAUCELI, REEF OIL & GAS
PARTNERS, L.P. (F/K/A REEF OIL &
GAS PARTNERS, LLC), REEF
SECURITIES, INC. (F/K/A WESTERN
AMERICAN SECURITIES CORP.), REEF
EXPLORATION, L.P., AND PAUL
MAUCELI, Appellees

On Appeal from the 191st Judicial District
Court, Dallas County, Texas,
Trial Court Cause No. DC-13-00528.
Opinion delivered by Justice Fillmore,
Justices Myers and Whitehill participating.

In accordance with this Court's opinion of this date, the trial court's order granting summary judgment is **VACATED** and the cause is **DISMISSED** for lack of subject matter jurisdiction.

It is **ORDERED** that appellees Michael Mauceli, Reef Oil & Gas Partners, L.P. (f/k/a Reef Oil & Gas Partners, LLC), Reef Securities, Inc. (f/k/a Western American Securities Corp.), Reef Exploration, L.P., and Paul Mauceli recover their costs of this appeal from appellant Robert Phalen.

Judgment entered this 26th day of January, 2016.