AFFIRM; Opinion Filed May 26, 2016.

In The

Court of Appeals

Fifth District of Texas at Dallas

No. 05-15-00358-CV

BDO USA, LLP, Appellant

V.

LITEX INDUSTRIES, LIMITED, Appellee

On Appeal from the 14th Judicial District Court
Dallas County, Texas
Trial Court Cause No. DC-13-00344

MEMORANDUM OPINION

Before Justices Bridges, Lang, and O'Neill[1]
Opinion by Justice Lang

Appellee Litex Industries, Limited ("Litex" or "Plaintiff") filed this lawsuit against appellant BDO USA, LLP ("BDO" or "Defendant") claiming negligent misrepresentation based on financial statements audited by BDO. In accordance with the jury's verdict, the trial court signed a judgment awarding Litex $1.45 million.

In four issues on appeal, BDO asserts (1) Litex failed to introduce legally or factually sufficient evidence "that Litex was damaged and that such damages were proximately caused by BDO's negligent misrepresentation"; (2) the trial court improperly refused to submit to the jury "properly-tendered questions regarding Litex's proportionate responsibility, which were supported by BDO's answer and the evidence"; and (3) "this Court should suggest a remittitur of

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[1] The Hon. Michael J. O'Neill, Justice, Assigned

the damages awarded by the jury because such damages are excessive and against the great weight of the evidence."

We decide against BDO on its four issues. The trial court's judgment is affirmed. Because the law to be applied in this case is well settled, we issue this memorandum opinion. *See* TEX. R. APP. P. 47.2(a), 47.4.

I. FACTUAL AND PROCEDURAL CONTEXT

Litex manufactures and sells ceiling fans and light fixtures. In late 2009 and early 2010, Litex purchased approximately 14.5% of the outstanding stock of Craftmade International, Inc. ("Craftmade"), a competitor of Litex. Subsequently, Litex sought to acquire the remaining 85.5% of Craftmade's stock.

A written offer to purchase the remaining 85.5% of Craftmade's stock at $4.25 per share was made to the stockholders of Craftmade on September 2, 2011 (the "Tender Offer"). The Tender Offer (1) defined "Purchaser" as "Litex Acquisition #1, LLC, a Texas limited liability company and a wholly-owned subsidiary of Litex" that was "formed for the purpose of making this tender offer" and "ha[s] carried on no activities other than in connection with making the tender offer" ("Litex Acquisition") and (2) stated in part, "Litex and Purchaser are seeking to purchase all outstanding Shares of [Craftmade]." Further, the Tender Offer was subject to several conditions, including that (1) "Litex has received financing sufficient to fund the [Tender Offer]" and (2) the Tender Offer could be terminated "if, at any time on or after the date of this Offer to Purchase and at or prior to the expiration of the Offer, . . . [Litex Acquisition] become[s] aware of any facts that in [its] reasonable judgment, have or may have material adverse significance with respect to either the value of [Craftmade] or any of its subsidiaries or the value of the Shares to [Litex Acquisition] or any of [its] affiliates."

On October 7, 2011, Craftmade issued its 2011 annual report, which contained financial statements respecting its financial position as of June 30, 2011 (the "June 30, 2011 financial statements"). Those financial statements included an audit opinion by BDO, an independent public accounting firm retained by Craftmade. Specifically, BDO stated in part in the audit opinion (1) it had audited the financial statements of Craftmade "in accordance with auditing standards generally accepted in the United States of America" and (2) "[i]n our opinion, the consolidated financial statements referred to above present fairly, in all material respects, the financial position of [Craftmade] at June 30, 2011 and 2010, and the results of its operations and its cash flows for the three years in the period ended June 30, 2011, in conformity with accounting principles generally accepted in the United States of America."

The Tender Offer was "consummated" on November 30, 2011. On January 10, 2013, Litex filed this lawsuit against BDO, asserting a claim for negligent misrepresentation. In its petition, Litex asserted in part (1) the purchase price of $4.25 per share that was paid for Craftmade's stock was "roughly equal to Craftmade's audited tangible book value"; (2) in "deciding to make the purchase, and at what price," Litex reviewed and relied upon Craftmade's June 30, 2011 financial statements and BDO's audit opinion described above; and (3) after the stock purchase, a detailed review of those financial statements "disclosed several material errors," including improper valuation of inventory that resulted in the value of Craftmade's inventory being overstated. According to Litex, (1) BDO "supplied false information for the guidance of others in their business transactions" and "did not exercise reasonable care or competence in obtaining or communicating the information" and (2) "Litex's reliance on BDO's misrepresentations proximately caused damage to Litex."

BDO filed a general denial answer. Additionally, BDO stated in its answer (1) it "asserts all rights to proportionate responsibility permitted under Chapter 33 of the Texas Civil Practice

and Remedies Code," *see* TEX. CIV. PRAC. & REM. CODE ANN. §§ 33.001–.017 (West 2015), and (2) Litex's claim is barred in whole or in part by the "doctrine" of "proximate cause" and "because Plaintiff's harm was caused by its own comparative negligence."

Prior to trial, the parties filed a "Joint Pretrial Filing" that contained, among other things, BDO's proposed jury charge. In a question pertaining to calculation of damages, BDO's proposed jury charge asked the jury to (1) determine "[w]hat sum of money, if any, if paid now in cash, would fairly and reasonably compensate Litex for its damages, if any, that were proximately caused by [BDO's alleged] negligent misrepresentation" and (2) "[c]onsider the pecuniary loss proximately caused by Litex's reliance on upon [sic] the negligent misrepresentation found by you . . . if any, and none other." Also, BDO's proposed jury charge (1) asked the jury, "Did the negligence of Litex, if any, cause or contribute to causing in any way the damages, if any, found by you [in the previous question]?" and (2) provided for apportionment of "responsibility" for any damages to Litex in the event Litex was found negligent.

Additionally, the parties jointly filed "Stipulated and Contested Issues of Fact and Law" prior to trial. Among the parties' contested issues of law was the following: "What was Litex's duty if any? [Plaintiff contends it owed no duty to BDO and therefore chapter 33 does not apply to Litex's conduct; whereas, BDO contends that Litex owed a duty not to cause or contribute to its own damages and therefore chapter 33 applies to Litex's conduct]." Further, the parties' contested issues of fact included "What is the amount of Litex's damages, if any?"

At trial, Litex presented the expert testimony of James Smith, a certified public accountant. Smith stated in part (1) in the June 30, 2011 financial statements of Craftmade described above, inventory was overstated by approximately $1,771,000; (2) as a result of that overstatement of inventory, "the resulting net worth of the company, the equity of the company,

is also overstated"; (3) BDO's audit report respecting those financial statements was "directed to" the board of directors and shareholders of Craftmade; (4) the methodology used for certain inventory calculations reflected in Craftmade's financial statements from 2009 through 2011 did not comply with generally accepted accounting principles ("GAAP"); and (5) BDO's written notes pertaining to its auditing of Craftmade show that in approximately June 2009, BDO became aware of the methodology being used for those inventory calculations. On cross-examination, Smith testified in part that because inventory generally constitutes an "expense," it can be a basis for a "tax write-off" for the company holding that inventory. Additionally, on redirect examination, Smith testified that in his opinion, (1) "[i]f Litex's damage theory is that the damages are equal to the amount by which the tangible assets were overstated on the audited financials," the damages would be "the overstatements in the inventory due to the capitalization error" and (2) BDO's statement in the audit opinion that it conducted its audit "in accordance with auditing standards generally accepted in the United States of America" is "not a true statement."

John Mares testified he is president of Litex and an officer of Litex Acquisition. Mares stated in part that he used Craftmade's unaudited quarterly financial statements dated March 31, 2011, to calculate the estimated TNBV of Craftmade, then used that estimated TNBV to derive the price per share that was offered to acquire the shares of Craftmade in the Tender Offer. Specifically, Mares stated (1) according to his calculation, the estimated TNBV of Craftmade as of March 30, 2011, was $18,503,000; (2) he divided that number by the number of Craftmade shares Litex did not own, which resulted in $3.75 per share; and (3) based on Craftmade's shareholders' previous reluctance to sell their shares, he added a premium of $0.50 to the $3.75 per share, which resulted in the ultimate offer price of $4.25 per share. Further, Mares testified he subsequently read the June 30, 2011 financial statements and BDO's audit opinion and,

because there was no "material adverse change to those things that mattered" reflected in the June 30, 2011 financial statements, decided to move forward with the acquisition of Craftmade's shares and not terminate the Tender Offer. Specifically, he stated (1) he relied upon Craftmade's 2011 annual report, which included the June 30, 2011 financial statements and BDO's audit opinion, in deciding "to go ahead and complete the purchase of the shares of Craftmade" and (2) if he had known the inventory of Craftmade was overstated by $1.7 million, the Tender Offer would have been terminated and a new offer might have been made at a lower price.

On cross-examination, Mares testified (1) Litex made approximately eight unsuccessful attempts to acquire Craftmade from 2007–2011; (2) he conducted "full due diligence" on Craftmade starting in 2010; (3) the "due diligence information" he requested from Craftmade included, among other things, two "trial balances" containing detailed accounting records of Craftmade; (4) Craftmade did not provide those "trial balances" because it considered them to be "sensitive data"; (5) the information in the "trial balances" would have made him aware of the inventory overstatement described above; (6) the TNBV of Craftmade as of June 30, 2011, was $19,384,000; (7) Litex Acquisition is the entity that purchased the shares of Craftmade pursuant to the Tender Offer; and (8) Litex and its subsidiaries lost $2.1 million in 2012 and made a profit of $2.3 million the following year, which constituted a "4-million-dollar swing."

Further, on redirect examination, Mares testified Litex Acquisition (1) was formed by Litex specifically for the purpose of "doing this acquisition" and is "just a separate vehicle [Litex] used to acquire Craftmade" and (2) got "100 percent" of the "money to buy the [Craftmade] shares" from Litex. Also, as to the "tax write-off" described above, Mares (1) testified on redirect examination that Craftmade's "effective tax rate" for June 2011 was "approximately 17.5%" and (2) stated on re-cross-examination that 17.5% of $1,771,000 is "about $310,000."

BDO presented the expert testimony of accountant Horace Dale Kitchens. Kitchens testified in part that "with respect to this inventory issue," BDO "did sufficient audit procedures" and complied with all applicable "audit rules."

Additionally, Ted Charles Vaughan, II testified he is an accountant and partner with BDO and was in charge of the Craftmade audit in question. Vaughan testified BDO's statement described above that its audit of Craftmade was conducted "in accordance with auditing standards generally accepted in the United States of America," is a true statement.[2]

At the charge conference, BDO (1) objected to the charge of the court on the ground that BDO's proposed questions respecting Litex's proportionate responsibility were not included in the charge and (2) tendered its proposed questions described above respecting negligence of Litex. The trial court denied BDO's objection to the charge of the court and refused the tender of BDO's proposed jury questions.

During closing argument, counsel for Litex argued in part (1) "the damage is, we didn't get all that we thought we were buying" and (2) Litex's damages are "the amount of the overstatement of the inventory." Counsel for BDO argued in part that any damage amount should be calculated by (1) subtracting the overstated inventory amount, and any related tax benefits, from the June 30, 2011 TNBV in the audited financial statements; (2) calculating a new price per share based on that adjusted TNBV; and (3) multiplying the difference in the price per share by the number of shares purchased.

The charge of the court instructed the jury to "[b]ase your answers only on what was presented in Court and on the law that is in these instructions and questions."[3] In question

[2] Also, (1) Craftmade's former owner and its former president testified respecting Craftmade's accounting procedures and the Tender Offer and (2) numerous documents, including Craftmade's 2011 annual report and other financial documents, were admitted into evidence.

[3] Specifically, the charge of the court included, *inter alia*, the following definitions:

> 14. "PROXIMATE CAUSE" means a cause that was a substantial factor in bringing about an event, and without which cause such event would not have occurred. In order to be a proximate cause, the act or omission complained of must be

number one of the charge of the court, the jury found by a preponderance of the evidence that "BDO made a negligent misrepresentation in the 2011 Craftmade Annual Report on which Litex justifiably relied." Further, question number four of the charge stated as follows:

> What sum of money, if any, if paid now in cash, do you find from a preponderance of the evidence, would fairly and reasonably compensate Litex for its damages, if any, that were proximately caused by such negligent misrepresentation?
>
> Consider the pecuniary loss proximately caused by Litex's reliance upon the negligent misrepresentation found by you in [question number one], if any, and none other. Do not add any amount for interest on past damages, if any.

The jury's answer to question number four was "$1,450,000.00."

BDO filed a "Motion for Judgment Non-Obstante Veredicto or, in the Alternative, Request for Remittitur." Therein, BDO contended (1) because Litex Acquisition was "the entity that extended the tender offer to the Craftmade shareholders, and . . . paid to acquire the shares of Craftmade in 2011," only Litex Acquisition, and not Litex, "has standing to pursue claims to recover for injury resulting from any diminution in value of the Craftmade shares or any reduced value of Craftmade's assets"; (2) "Litex failed to offer evidence of any loss on the 'money' it provided to [Litex Acquisition] or any other direct injury resulting from the alleged misstatement of BDO"; (3) although Litex contends that "had the alleged accounting error been disclosed, [Litex Acquisition] or Plaintiff Litex would have offered a lower price for the Craftmade shares," no evidence shows Craftmade's stockholders would have sold their shares at the "hypothetical" lower price; (4) the evidence is "undisputed" that the $4.25 per share offer price for the Craftmade shares was based on March 2011 unaudited Craftmade financial statements, not the

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such that a person using ordinary care would have foreseen that the event, or some similar event, might reasonably result therefrom. There may be more than one proximate cause of an event.

15. "NEGLIGENT MISREPRESENTATION" occurs when:

a. a party makes a representation in the course of his business, profession, or employment, or in a transaction in which he has a pecuniary interest; and
b. the representation supplies false information for the guidance of others in their business; and
c. the party making the representation does not exercise reasonable care or competence in obtaining or communicating the information.

June 2011 audited financial statements, and therefore "[n]o evidence connects the misstatement with either the offer price or value of [the] Craftmade shares"; and (5) the jury's verdict in the amount of $1,450,000 is "excessive" and "against the weight of the evidence" because any damage amount should be calculated based on an "adjusted" TNBV and the resulting "share price differential."

Litex filed a response to BDO's motion for JNOV or remittitur in which it asserted, in part, (1) BDO violated a duty owed directly to Litex as a Craftmade shareholder; (2) "Litex has standing because it was the entity that was wronged and suffered damages, as the jury found"; (3) there is sufficient evidence to support the jury's finding of proximate cause because the record shows "BDO made false representations to Litex in the 2011 audit letter, upon which Litex relied when it decided not to terminate the Tender Offer or reduce its offer"; and (4) Litex's damages "are properly measured by the amount of the [inventory] overstatement" because the jury was not asked or instructed about any decrease in the value of the Craftmade shares, but rather was instructed only to consider Litex's "pecuniary loss," and BDO made no objection to that instruction.

Following a hearing on BDO's motion for JNOV or remittitur,[4] the trial court signed a final judgment in favor of Litex as described above. BDO filed a timely motion for new trial in which it restated several of its arguments described above and, additionally, (1) complained as to the omission in the charge of the court of the proposed jury questions respecting Litex's

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[4] During the portion of that hearing pertaining to BDO's contention that Litex lacks "standing" to assert its claim in question, counsel for BDO was asked by the trial court, "Was there pleading that—filed by the Defendant that said that the Plaintiff could not recover—the Plaintiff did not have the capacity to recover?" Counsel for BDO replied, "No, Your Honor, this is not—our argument's not a capacity argument." Then, BDO argued as follows respecting its "standing" argument:

> [W]e don't have a dispute in the evidence about who paid the money. . . . The evidence is undisputed that [Litex Acquisition] was the entity that paid for the shares, $4.25 per share, and bought them. There's also evidence . . . that Plaintiff Litex provided the money to Litex Acquisition. It's unclear whether that was a loan, whether it was a capital contribution to Plaintiff Litex, but that—it gets into—[Texas case law] says "To recover individually, a stockholder must prove a personal cause of action and personal injury." That's what we don't have, is we don't have the Plaintiff Litex having its own injury because it was not the one that bought the stock.

proportionate responsibility for its alleged injuries and (2) contended the evidence shows Litex was "negligent" respecting its "duty" to "act reasonably not to cause or contribute to causing their own damages" because Litex did not "insist" that Craftmade produce the trial balances described above prior to the closing of the Tender Offer and did not abandon its effort to acquire Craftmade after learning in July 2011 of a "sale/leaseback" by Craftmade and other information that indicated Craftmade was "struggling financially." Litex filed a response to BDO's motion for new trial in which it asserted in part that the trial court's refusal to submit jury questions on Litex's negligence and proportionate responsibility was proper because Litex "did not owe a legal duty to BDO or to the public" and "there is no evidence that Litex breached a legal duty."

After a hearing, BDO's motion for new trial was denied by the trial court. This appeal timely followed.

II. SUFFICIENCY OF THE EVIDENCE

A. Standard of Review

When an appellant challenges the legal sufficiency of the evidence on a matter for which he did not have the burden of proof, he must demonstrate on appeal that there is no evidence to support the adverse findings. *McCullough v. Scarbrough, Medlin & Assocs., Inc.*, 435 S.W.3d 871, 892 (Tex. App.—Dallas 2014, pet. denied) (citing *Croucher v. Croucher*, 660 S.W.2d 55, 58 (Tex. 1983)). Under a no-evidence point, we consider the evidence in the light most favorable to the verdict, indulging every reasonable inference in support. *Id.* (citing *City of Keller v. Wilson*, 168 S.W.3d 802, 822 (Tex. 2005)). We are mindful in our review that jurors are the sole judges of the credibility of the witnesses and the weight to be given their testimony. *Id.* A legal sufficiency challenge fails if there is more than a scintilla of evidence to support the judgment. *Id.* (citing *BMC Software Belg., N.V. v. Marchand*, 83 S.W.3d 789, 795 (Tex. 2002)). "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." *Id.* (quoting *City of Keller*, 168 S.W.3d at 827). Evidence that does no more than create a surmise or suspicion is insufficient to rise to the level of a scintilla and, in legal effect, is no evidence. *Id.* (citing *Ford Motor Co. v. Ridgway*, 135 S.W.3d 598, 601 (Tex. 2004)).

"When we evaluate a factual sufficiency challenge, we must consider and weigh all the evidence; we can set aside a verdict only if the evidence is so weak or if the finding is so against the great weight and preponderance of the evidence that it is clearly wrong and unjust." *Id.* If we affirm a challenged jury verdict as being supported by factually sufficient evidence, we need not detail all the evidence in support of the verdict. *Id.* (citing *In re Columbia Med. Ctr. of Las Colinas, Subsidiary, L.P.*, 290 S.W.3d 204, 211 (Tex. 2009) (orig. proceeding)). We must not substitute our judgment for that of the jury and should remain cognizant that the jury is the sole judge of witness credibility. *Id.*

B. Applicable Law

The supreme court has stated the damages recoverable for a negligent misrepresentation "are those necessary to compensate the plaintiff for the pecuniary loss to him of which the misrepresentation is legal cause, including (a) the difference between the value of what he has received in the transaction and its purchase price or other value given for it; and (b) pecuniary loss suffered otherwise as a consequence of the plaintiff's reliance upon the misrepresentation." *Fed. Land Bank Ass'n of Tyler v. Sloane*, 825 S.W.2d 439, 442 (Tex. 1991). Additionally, pecuniary loss has been defined as "including money and everything that can be valued in money." *Waste Mgmt. of Tex., Inc. v. Tex. Disposal Sys. Landfill, Inc.*, 434 S.W.3d 142, 151 (Tex. 2014) (citing BLACK'S LAW DICTIONARY 1030 (9th ed. 2009)). "[I]t is the court's charge, not some other unidentified law, that measures the sufficiency of the evidence when the opposing party fails to object to the charge." *Osterberg v. Peca*, 12 S.W.3d 31, 55 (Tex. 2000);

accord Zorrilla v. Aypco Constr. II, LLC, 469 S.W.3d 143, 154 (Tex. 2015); *Romero v. KPH Consolidation, Inc.*, 166 S.W.3d 212, 221 (Tex. 2005).

A plaintiff must have both standing and capacity to bring a lawsuit. *Nauslar v. Coors Brewing Co.*, 170 S.W.3d 242, 255 (Tex. App.—Dallas 2005, no pet.) (citing *Coastal Liquids Transp. L.P. v. Harris Cty. Appraisal Dist.*, 46 S.W.3d 880, 884 (Tex. 2001)). The issue of standing focuses on whether a party has a sufficient relationship with the lawsuit so as to have a "justiciable interest" in its outcome, whereas the issue of capacity "is conceived of as a procedural issue dealing with the personal qualifications of a party to litigate." *Austin Nursing Ctr., Inc. v. Lovato*, 171 S.W.3d 845, 848 (Tex. 2005). "A plaintiff has standing when it is personally aggrieved, regardless of whether it is acting with legal authority; a party has capacity when it has the legal authority to act, regardless of whether it has a justiciable interest in the controversy." *Id.* at 848–49 (quoting *Nootsie, Ltd. v. Williamson Cty. Appraisal Dist.*, 925 S.W.2d 659, 661 (Tex. 1996)). "Without a breach of a legal right belonging to a plaintiff, that plaintiff has no standing to litigate." *Nauslar*, 170 S.W.3d at 249. Issues of standing and capacity to sue are questions of law, which are reviewed de novo. *See id.* at 248; *Fitness Evolution, L.P. v. Headhunter Fitness, L.L.C.*, No. 05-13-00506-CV, 2015 WL 6750047, at *12 (Tex. App.—Dallas Nov. 4, 2015, no pet.) (mem. op.).

C. Application of Law to Facts

In its first and third issues, BDO asserts the evidence is not legally or factually sufficient to support the jury's finding that "Litex was damaged" and "the claimed misrepresentation proximately caused Litex's claimed damages." Specifically, as to legal insufficiency, BDO contends (1) there is no evidence of a "loss in value" respecting Craftmade's stock, the "value of any of [Craftmade's] assets as of the time the stock was purchased, November 30, 2011," or the "TNBV as of November 30, 2011"; (2) "Litex admits that its subsidiary [Litex Acquisition]

suffered no damages, which Litex cannot recover as a matter of law in any event"; (3) "Litex did not offer evidence of its own damages"; (4) the misrepresentation found by the jury "is too remote and attenuated to constitute legal causation of Litex's claimed damages"; (5) "the discretionary premium Litex added to the March 2011 TNBV destroys the causal link"; and (6) Litex's contention that it would have withdrawn the Tender Offer and might have made a new offer if it had known of the "alleged misstatement" cannot support legal causation because it is "nothing more than conjecture." Further, BDO contends that even if its legal insufficiency arguments fail, the evidence is factually insufficient for those same reasons. We address BDO's arguments in turn.

As to whether Litex was "damaged," BDO asserts (1) "[t]o recover damages based on a loss of value of corporate stock that is not publicly traded, a plaintiff must offer evidence of the value of the corporation *at the time of the alleged injury*" (emphasis original) and (2) the Texas Supreme Court has held that "without more, book value of stock constitutes nothing more than a scintilla of evidence as to its reasonable worth." In support of those assertions, BDO cites *Bendalin v. Delgado*, 406 S.W.2d 897, 900–01 (Tex. 1966), and *Pabich v. Kellar*, 71 S.W.3d 500, 509 (Tex. App.—Fort Worth 2002, pet. denied). Additionally, BDO contends (1) "evidence of an overstatement of the Inventory account from five months earlier, without more, is not evidence of damages" because "each asset and liability account changed as sales of inventory items occurred and other business was transacted during that five-month period" and (2) the undisputed evidence shows Litex's "net income" increased by $4 million after the acquisition of Craftmade, "a net benefit far in excess of its claimed damages."

Litex responds in part (1) "Litex's damages are not based on a loss of value of corporate stock" and therefore "Litex's pecuniary loss does not have to be tied to the value of Craftmade's stock"; (2) "[t]he financial condition or performance of Craftmade after June 30, 2011 is

irrelevant because BDO didn't make any representation about Craftmade's financial performance after June 30, 2011 and Litex didn't consider Craftmade's financial performance after June 30, 2011 when deciding whether to proceed with the Tender Offer"; and (3) the term "pecuniary loss" is "a very broad category of loss" and "certainly encompasses the financial loss suffered by Litex when it purchased a company that was represented to have $1.7 million more in inventory as of June 30, 2011, than it actually had." Further, Litex asserts "BDO's argument fails because it is improperly attempting to measure the evidence against a question that the jury was never asked."

The record shows (1) Smith testified in part "[i]f Litex's damage theory is that the damages are equal to the amount by which the tangible assets were overstated on the audited financials," the damages would be "the overstatements in the inventory due to the capitalization error"; (2) on cross-examination, Smith stated that because inventory generally constitutes an "expense," it can be a basis for a "tax write-off" for the company holding that inventory; (3) in the June 30, 2011 financial statements of Craftmade, inventory was overstated by approximately $1,771,000; (4) Mares testified Craftmade's "effective tax rate" for June 2011 was "approximately 17.5%," and 17.5% of $1,771,000 is "about $310,000"; (5) in question number one of the charge of the court, the jury found by a preponderance of the evidence that "BDO made a negligent misrepresentation in the 2011 Craftmade Annual Report on which Litex justifiably relied"; (6) in question number four of the charge, the jury was instructed to "[c]onsider the pecuniary loss proximately caused by Litex's reliance upon the negligent misrepresentation found by you in [question number one], if any, and none other"; and (7) BDO did not object to that instruction in question number four or request a definition of "pecuniary loss."

We disagree with BDO's position that the determination of "pecuniary loss" in this case requires evidence of "loss in value" respecting Craftmade's stock, the "value of any of [Craftmade's] assets as of the time the stock was purchased, November 30, 2011," or the "TNBV as of November 30, 2011." "Pecuniary loss," as inquired about in jury question number four, has been defined as "including money and everything that can be valued in money." *Waste Mgmt. of Tex., Inc.*, 434 S.W.3d at 151. BDO did not object to that definition. *See Osterberg*, 12 S.W.3d at 55; *see also EMC Mortg. Corp. v. Jones*, 252 S.W.3d 857, 869 (Tex. App.—Dallas 2008, no pet.) (measuring sufficiency of evidence by "commonly understood meaning" of term used in charge of court, where no definition or instruction as to meaning of term was provided in charge). On this record, we conclude there is more than a scintilla of evidence to support the jury's finding of a "pecuniary loss" to Litex in the amount of $1.45 million.

Next, we address together BDO's contentions that (1) "Litex admits that its subsidiary [Litex Acquisition] suffered no damages, which Litex cannot recover as a matter of law in any event" and (2) "Litex did not offer evidence of its own damages." According to BDO, (1) "[t]he Texas Supreme Court in *Wingate v. Hajdik* established that a corporate shareholder—like Litex here—cannot recover damages on its own behalf for a wrong done solely to its subsidiary or the property of the subsidiary, even though the shareholder might have been injured indirectly by that wrong," and (2) "[f]ollowing *Wingate*, this Court in *Nauslar v. Coors Brewing Co*. explained that '[a]n individual stakeholder in a legal entity does not have a right to recover personally for harms done to the legal entity.'" *See Wingate v. Hajdik*, 795 S.W.2d 717 (Tex. 1990), *superseded by statute on other grounds as stated in Sneed v. Webre*, 465 S.W.3d 169, 185 n.10 (Tex. 2015); *Nauslar,* 170 S.W.3d at 250. Additionally, BDO argues (1) "the key issue for whether Litex suffered damages is who purchased the Craftmade stock in November 2011—in this case, [Litex Acquisition]"; (2) "[t]he fact that Litex provided the funds to [Litex Acquisition]

for it to purchase the Craftmade stock would be relevant to damages only if Litex lost any of the money it provided to [Litex Acquisition]—but Litex offered no evidence of any such loss"; and (3) "Litex was required to have some evidence of its own injury separate from a loss of value in its stock in [Litex Acquisition] and separate from a reduction in the assets of Craftmade or [Litex Acquisition]."

Litex asserts, in part, (1) Litex Acquisition "did not rely on BDO's misrepresentations nor suffer any damages"; (2) Litex "was a Craftmade shareholder to whom BDO's audit letter was addressed"; (3) "the representations were made to Litex, Litex relied on them, made the payment, and suffered the injury"; and (4) "BDO's reliance on the 'derivative shareholder injury' cases is misplaced since that rule assumes that the corporation (i.e., Litex Acquisition) suffered a corporate injury and the shareholder (i.e., Litex) was harmed only derivatively through a reduction of the value of its shares in the corporation," which "simply did not occur" in this case.

We review now the *Wingate* and *Nauslar* cases urged by BDO. In *Wingate*, the sole shareholder of a corporation sued a former shareholder, claiming, in part, that the defendant misappropriated corporate assets to his personal use. *Wingate*, 795 S.W.2d at 718. On appeal to the supreme court, that court concluded "[t]his claim indisputably belongs to [the corporation], and [the plaintiff] is not entitled to recover personally for assets [the defendant] wrongly took from the corporation." *Id*. at 719. In reaching that conclusion, that court stated in part,

> A corporate stockholder cannot recover damages personally for a wrong done solely to the corporation, even though he may be injured by that wrong. . . . This rule does not, of course, prohibit a stockholder from recovering damages for wrongs done to him individually "where the wrongdoer violates a duty arising from contract or otherwise, and owing directly by him to the stockholder." However, to recover individually, a stockholder must prove a personal cause of action and personal injury.

Id. (citations omitted).

Nauslar involved a plea to the jurisdiction for lack of standing in a lawsuit brought by individual partners of a partnership against several outside entities. *Nauslar*, 170 S.W.3d at 247. Specifically, the plaintiff partners (the "partners") contended the defendants, Coors Brewing Co. and one of its affiliates, unreasonably disapproved and interfered with a proposed consolidation of the partnership with another entity. *Id*. The trial court dismissed the partners' causes of action for lack of standing and the partners appealed to this Court. *Id*.

This Court concluded the partners lacked standing to bring causes of action in their own right. *Id*. at 248. In reaching that conclusion, this Court first considered "the injury asserted," which this Court described as "damages for loss of the benefits of ownership" and "employment-related losses as an employee of [the partnership]." *Id*. This Court stated *Wingate* and other cases involving corporations "reaffirm that where damage is to the business entity's net worth, the individual stakeholder cannot personally recover, whether the damages sought are in terms of diminished value of an ownership interest or loss of employee benefits." *Id*. Then, this Court reasoned in part as follows:

> As the case law demonstrates, Plaintiffs do not have a separate, individual right of action for injuries to the partnership that diminished the value of their ownership interest in that entity. [The partnership] is the one who suffered the direct injury from the alleged harm to the partnership's worth, and any loss to Plaintiffs in the sale price is "both indirect to and duplicative of" the entity's right of action. The right of recovery is [the partnership's] right alone, even though the economic impact of the alleged wrongdoing may bring about reduced earnings, salary or bonus.

Id. at 250–51 (citations omitted).

In the case before us, BDO asserts in a footnote to its appellate argument respecting standing that if this issue is one of capacity rather than standing, BDO "was not required to plead lack of capacity" because "the issue of whether Litex could recover for losses suffered by [Litex Acquisition] was presented and ruled upon by the trial court in BDO's Motion for JNOV." Regardless of whether this issue is one of standing or capacity, and assuming without deciding

that BDO's arguments respecting both standing and capacity are properly before this Court, we cannot agree with BDO's position that there is no evidence "Litex was damaged."

Litex asserts in its appellate brief,

> [U]nlike the alleged injury to the plaintiffs in *Nauslar* and *Wingate*, Litex is not seeking any damages based on any loss of value of its stock in Litex Acquisition or reduction in the assets of Craftmade. Rather Litex's damage is directly tied to an overstatement of inventory as of June 30, 2011. In addition, neither of the plaintiffs in *Nauslar* or *Wingate* advanced money to make purchases under a contract, and thus neither suffered a direct injury or wrong. Simply put, here, BDO violated a duty owed directly to Litex, as a Craftmade shareholder. The injury suffered by Litex as a result of BDO's conduct gives Litex a "sufficient relationship" with the lawsuit so that it has a "justiciable interest" in the outcome, and is therefore the proper party to assert the claim.

We glean the following from the record and the arguments: (1) BDO's representation in question was made to Craftmade's shareholders, which included Litex, and (2) the Tender Offer stated it was conditioned upon Litex receiving financing to fund the offer. Further, Mares testified (1) if he had known the inventory of Craftmade was overstated by $1.7 million, the Tender Offer would have been terminated, and (2) Litex Acquisition was formed by Litex specifically for the purpose of "doing this acquisition" and is "just a separate vehicle [Litex] used to acquire Craftmade." On this record, we conclude the evidence does not show Litex is seeking damages personally for a wrong done solely to Litex Acquisition, but rather shows the damages sought by Litex are for wrongs to Litex individually based on violation of a duty owing directly by BDO to Litex. *See Wingate*, 795 S.W.2d at 719.

Now, we address together BDO's three legal insufficiency contentions pertaining to causation.[5] We begin by describing the parties' arguments as to each of those contentions. First,

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[5] As described above, the charge of the court stated in part,

> "PROXIMATE CAUSE" means a cause that was a substantial factor in bringing about an event, and without which cause such event would not have occurred. In order to be a proximate cause, the act or omission complained of must be such that a person using ordinary care would have foreseen that the event, or some similar event, might reasonably result therefrom. There may be more than one proximate cause of an event.

BDO contends in part that the misrepresentation found by the jury "is too remote and attenuated to constitute legal causation of Litex's claimed damages." Specifically, BDO asserts (1) "[n]o evidence connects the misrepresentation found by the jury in the 2011 Craftmade Annual Report with the tender offer price paid by [Litex Acquisition] for the Craftmade shares"; (2) the Tender Offer price "never changed from the calculation using the TNBV reported for March 31st (plus the 50¢ per share premium), even after the 2011 Craftmade Annual Report issued with a different TNBV"; and (3) "while the account balances changed from March 31st to June 30th and from June to November 2011, no evidence was introduced as to the amount of any overstatement of Inventory (or any other account) as of November 30, 2011, when the stock of Craftmade was acquired." Also, in its reply brief in this Court, BDO argues in part (1) "significant conjecture is required to . . . connect the overstatement of Craftmade's *inventory* as of June 30th to a loss on the Craftmade *stock* as of November 30th" (emphasis original) and (2) "[w]ithout evidence that Litex or its subsidiary [Litex Acquisition] received less value in the Craftmade stock purchased than what was paid, there can be no loss from acquiring the stock."

Litex responds (1) "[t]he fact that Litex relied upon the BDO 2011 audit opinion letter not to terminate the tender offer is evidence that Litex's damages were caused by BDO's misrepresentations—the deal would not have closed (and Litex would therefore not have been damaged) but for BDO's misrepresentations"; and (2) "[o]nce the sale closed, the deal was done and Litex was harmed because it purchased a company whose inventory was materially overstated as of the date of the audited financial on which the transaction proceeded."

Second, BDO contends "the discretionary premium Litex added to the March 2011 TNBV destroys the causal link." Specifically, according to BDO, (1) "[b]ecause the Tender Offer price included Litex's discretionary premium of 50¢ per share, legal causation of damages requires that the overstatement exceed that $2.464 million premium (4,928,000 shares times 50¢

per share)" and (2) "[b]ecause the claimed overstatement is less than the Litex premium, no legal causation from BDO's representation exists."

Litex responds (1) the amount of the premium is "irrelevant"; (2) "Litex's damages were based solely on the overstatement of inventory because it did not receive what it paid for as of June 30, 2011"; (3) "Litex did not seek any recovery of its discretionary premium"; and (4) "BDO has offered no evidentiary or legal basis that the fifty cent premium Litex paid destroyed the causal link between BDO's misrepresentation and Litex's damages."

Third, BDO contends Litex's "purported evidence of proximate causation," i.e. Litex's assertion that it would have withdrawn the Tender Offer if it had known of BDO's "alleged misstatement," is "nothing more than conjecture" because Litex (1) "admits that it was a mere possibility that Litex would have made a revised offer" and (2) "offered no evidence of what its new offer would have been or whether Craftmade's shareholders would have accepted a new offer." According to BDO, "[w]ithout evidence of these issues . . . it is speculative to assert that an overstatement of a single asset of Craftmade caused damages in a stock transaction occurring months later."

Litex responds (1) "the jury's damage award was not based on any hypothetical or speculative transaction"; (2) Litex's damages are measured by the actual overstatement of inventory ($1.7 million) on the financials that were used to decide to consummate the transaction"; and (3) "[i]t is completely irrelevant whether Craftmade would have accepted a lower price."

We concluded above that the determination of "pecuniary loss" in this case did not require evidence of a loss in value respecting Craftmade's stock. Additionally, the record shows Mares testified (1) after using Craftmade's unaudited quarterly financial statements dated March 31, 2011, to calculate the share price for the Tender Offer, he subsequently reviewed the audited

Craftmade financial statements for the period ending June 30, 2011, and, because there was no adverse material change in the financial condition of Craftmade as reflected in the financial statements for the period ending June 30, 2011, decided to move forward with the acquisition of Craftmade's shares and not terminate the Tender Offer, and (2) if he had known the inventory of Craftmade was overstated by $1.7 million, the Tender Offer would have been terminated and a new offer might have been made at a lower price. On this record, we disagree with BDO's position that Litex failed to introduce any evidence that the claimed misrepresentation proximately caused Litex's claimed damages.

We conclude there is more than a scintilla of evidence in the record to support the jury's finding that Litex was damaged and Litex's claimed damages were proximately caused by BDO's negligent misrepresentation. *See McCullough*, 435 S.W.3d at 892. Therefore, we decide against BDO on its first issue.

Additionally, in its factual insufficiency complaint, BDO contends that for the same "reasons set forth" in its argument pertaining to legal insufficiency, the evidence is factually insufficient to support the jury's finding in question number four of the charge of the court "that BDO's misrepresentation proximately caused the damages awarded to Litex." In the portions of its appellate brief and reply brief respecting factual insufficiency, BDO does not cite to the record or assert additional argument respecting particular evidence. We described above the "reasons set forth" by BDO in its legal insufficiency complaint. After considering and weighing all of the evidence, we conclude the evidence supporting the jury's finding in question number four is not so weak and the evidence to the contrary is not so overwhelming that the verdict is clearly wrong and unjust. *See id.*

We decide against BDO on its third issue.

III. JURY QUESTIONS RESPECTING PROPORTIONATE RESPONSIBILITY

A. Standard of Review

We review the trial court's submission of jury questions for an abuse of discretion. *Janga v. Colombrito*, 358 S.W.3d 403, 408 (Tex. App.—Dallas 2011, no pet.) (citing *MRT, Inc. v. Vounckx*, 299 S.W.3d 500, 505 (Tex. App.—Dallas 2009, no pet.)). A trial court abuses its discretion if it reaches a decision so arbitrary and unreasonable as to amount to a clear and prejudicial error of law or if it fails to analyze the law correctly or apply the law correctly to the facts. *See, e.g.*, *In re Cerberus Capital Mgmt., L.P.*, 164 S.W.3d 379, 382 (Tex. 2005).

The question of the existence of a legal duty for purposes of a negligence analysis is a question of law that we review de novo. *See, e.g.*, *Greater Houston Transp. Co. v. Phillips*, 801 S.W.2d 523, 525 (Tex. 1990); *Alcoa, Inc. v. Behringer*, 235 S.W.3d 456, 460 (Tex. App.—Dallas 2007, pet. denied).

B. Applicable Law

Section 33.003 of the Texas Civil Practice and Remedies Code is titled "Determination of Percentage of Responsibility." *See* TEX. CIV. PRAC. & REM. CODE ANN. § 33.003 (West 2015). That section provides,

> (a) The trier of fact, as to each cause of action asserted, shall determine the percentage of responsibility, stated in whole numbers, for the following persons with respect to each person's causing or contributing to cause in any way the harm for which recovery of damages is sought, whether by negligent act or omission, by any defective or unreasonably dangerous product, by other conduct or activity that violates an applicable legal standard, or by any combination of these:
>
> (1) each claimant;
> (2) each defendant;
> (3) each settling person; and
> (4) each responsible third party who has been designated under Section 33.004.
>
> (b) This section does not allow a submission to the jury of a question regarding conduct by any person without sufficient evidence to support the submission.

Id.; *see also Nabors Well Servs., Ltd. v. Romero*, 456 S.W.3d 553, 557–59 (Tex. 2015) (describing history of Texas law on proportionate responsibility).

The trial court must submit to the jury the questions raised by the written pleadings and the evidence. *Janga*, 358 S.W.3d at 408 (citing TEX. R. CIV. P. 278). The trial court may refuse to submit a properly requested question only if there is no evidence in the record to warrant its submission. *Id.* Section 33.003 "ties a determination of percentage of responsibility to the negligent causing of the claimant's injury." *Id.* at 409. "Thus, a person must be submitted in both the liability and percentage-of-responsibility questions if [he] falls within one of the categories listed in section 33.003(a) and if sufficient evidence supports [his] submission." *Id.*

"The elements of a negligence cause of action are the existence of a legal duty, a breach of that duty, and damages proximately caused by the breach." *Gharda USA, Inc. v. Control Sol., Inc.*, 464 S.W.3d 338, 352 (Tex. 2015); *Praesel v. Johnson*, 967 S.W.2d 391, 394 (Tex. 1998). The initial burden of proof for each element is on the plaintiff. *See, e.g.*, *Nelson v. Krusen*, 678 S.W.2d 918, 929 (Tex. 1984).

C. Application of Law to Facts

In its second issue, BDO contends "the trial court's refusal to submit to the jury the properly-tendered questions regarding Litex's proportionate responsibility, which were supported by BDO's answer and the evidence, compels reversal and remand for new trial." Specifically, BDO asserts (1) it "pleaded Litex's comparative fault, and introduced at least some evidence that Litex's negligence was a cause of its own damages"; (2) "[a] reasonable jury could have found that Litex failed to act as a reasonably prudent business in conducting due diligence, deciding to acquire Craftmade, or determining the tender offer price, and that, as a result, Litex bore a percentage of responsibility for its own damages"; and (3) "[b]ased on the evidence, pleadings, and the proposed jury questions tendered by BDO, the trial court was obligated to

submit the jury questions on Litex's negligence and proportionate responsibility for its own injury." Additionally, in its reply brief in this Court, BDO asserts in part that "[f]ollowing *Nabors*, the question now is not who had a duty or who caused the accident, but who caused the plaintiff's injuries."

Litex responds (1) a jury question respecting proportionate responsibility pursuant to section 33.003 "is proper only when a party commits a negligent act or omission or engages in other conduct or activity that violates an applicable legal standard"; (2) Litex is not liable for negligence as a matter of law because it owed no legal duty to BDO or the public at large respecting due diligence or discovery of the misrepresentation; (3) *Nabors* does not "stand[] for the proposition, as BDO argues, that proportionate responsibility must be allocated where there is no legal duty whatsoever"; and (4) there was no legally sufficient evidence presented at trial that Litex breached any legal duty.

In *Nabors*, a motorist and his passengers brought a negligence action against a truck driver and his employer arising out of a motor vehicle collision. *See* 456 S.W.3d at 555. The trial court rendered judgment on a jury verdict in favor of the plaintiffs and that judgment was affirmed by the court of appeals. *Id*. The supreme court reversed and remanded. In doing so, that court overruled the prohibition on seat belt evidence it had established in earlier cases and concluded relevant evidence of use or nonuse of seat belts is admissible for the purpose of apportioning responsibility in civil lawsuits under section 33.003. *Id*.

In reaching its conclusion, the supreme court stated that at the time its opinion imposing limits on the admissibility of seat belt evidence was issued more than forty years ago, (1) there was no law requiring seat belt use and (2) Texas courts operated under "an unforgiving all-or-nothing rule in negligence cases" that entirely barred a plaintiff from recovery if the plaintiff himself was negligent in any way. *Id*. at 556. Further, the case law in effect at that time was that

“[c]ontributory negligence must have the causal connection with the accident that but for the conduct the accident would not have happened” and “negligence that merely increases or adds to the extent of the loss or injury occasioned by another’s negligence is not such contributory negligence as will defeat recovery.” *Id.* at 557. The supreme court observed that changes implemented by the Texas Legislature since that time include (1) laws requiring seat belt use and (2) the enactment of the current version of section 33.003, which specifically allows for apportioning responsibility in civil cases. *Id.* at 558–59. That court stated,

> Under proportionate responsibility, the fact-finder apportions responsibility according to the relative fault of the actors, thus allowing a plaintiff to recover while reducing that recovery by the percentage for which the plaintiff was at fault. As long as the plaintiff’s own responsibility does not exceed 50%, he is entitled to a recovery reduced by his responsibility percentage. And the statute casts a wide net over conduct that may be considered in this determination, including negligent acts or omissions as well as any conduct or activity that violates an applicable legal standard. The directive is clear—fact-finders should consider each person’s role in causing, “in any way,” harm for which recovery of damages is sought.

Id. at 559–60 (citations omitted). Then, the supreme court considered the question of whether “the ‘sharp distinction’ between occurrence-causing and injury-causing negligence” established in its past opinions “is still viable in light of the Legislature’s current mandate,” i.e. whether “proportionate responsibility incorporates both occurrence-causing and injury-causing conduct.” *Id.* at 560–61. That court reasoned in part,

> Our precedents holding that a plaintiff’s injury-causing negligence cannot reduce a plaintiff’s recovery cannot stand if today’s proportionate-responsibility statute contradicts those precedents. And we hold it does. . . . Under [section 33.003], the fact-finder must allocate the “percentage of responsibility” for each claimant, defendant, settling person, and responsible third party. . . . [S]ection 33.003(a) also holds plaintiffs accountable for “causing or contributing to cause in any way the harm for which recovery of damages is sought.” “In any way” can mean only what it says—there are no restrictions on assigning responsibility to a plaintiff as long as it can be shown the plaintiff’s conduct “caused or contributed to cause” his personal injury or death. We cannot maintain a “sharp distinction” between two categories of evidence when the Legislature has instructed fact-finders to consider conduct that was “in any way” a cause of the plaintiff’s damages.

Id. at 561–62 (citations omitted). The supreme court concluded "for purposes of the proportionate-responsibility statute, the Legislature both intends and requires fact-finders to consider relevant evidence of a plaintiff's pre-occurrence, injury-causing conduct." *Id*. at 563. Specifically, that court stated (1) "[u]nder section 33.003(a), the fact-finder may consider relevant evidence of a plaintiff's failure to use a seat belt as a 'negligent act or omission' or as a violation of 'an applicable legal standard' in cases where the plaintiff was personally in violation of an applicable seat-belt law" and (2) "in cases in which an unrestrained plaintiff was not personally in violation of a seat belt law, the fact-finder may consider whether the plaintiff was negligent under the applicable standard of reasonable care." *Id*. at 563–64.

In the case before us, BDO contends *Nabors* supports its position that "the question now is not who had a duty . . . , but who caused the plaintiff's injuries." Specifically, BDO cites the supreme court's statements in *Nabors* that under section 33.003, (1) "the fact-finder *must allocate* the 'percentage of responsibility' for each *claimant*, defendant, settling person, and responsible third party" (emphasis added by BDO); (2) the trier of fact is to determine the percentage of responsibility with respect to each person's causing or contributing to cause "in any way" the harm for which recovery of damages is sought; and (3) "there are no restrictions on assigning responsibility to a plaintiff as long as it can be shown the plaintiff's conduct 'caused or contributed to cause' his personal injury." As described above, those statements were made by the supreme court in the context of its analysis as to whether proportionate responsibility incorporates both occurrence-causing and injury-causing conduct. *See id*. at 561–62. BDO cites no statement from *Nabors*, and we have found none, in which the supreme court concluded the elements of a "negligent act or omission" for purposes of section 33.003 differ from the elements of negligence generally. *Cf. Gharda USA, Inc.*, 464 S.W.3d at 352 ("The elements of a negligence cause of action are the existence of a legal duty, a breach of that duty, and damages

proximately caused by the breach."). To the extent BDO argues *Nabors* eliminated the element of duty for purposes of a "negligent act or omission" under section 33.003, we disagree with that position.

Next, we address whether, as alleged by BDO, Litex had a legal duty to "act as a reasonably prudent business in conducting due diligence, deciding to acquire Craftmade, or determining the tender offer price." "Duty, for purposes of a negligence claim, is a question of whether the defendant has a legally enforceable obligation to comply with a general standard of conduct." *Mary E. Bivins Found. v. Highland Capital Mgmt. L.P.*, 451 S.W.3d 104, 110 (Tex. App.—Dallas 2014 no pet.). In determining whether a duty of care exists, a court must consider "several interrelated factors, including the risk, foreseeability, and likelihood of injury weighed against the social utility of the actor's conduct, the magnitude of the burden of guarding against the injury, and the consequences of placing the burden on the defendant." *Id*. (quoting *City of Waco v. Kirwan*, 298 S.W.3d 618, 623–24 (Tex. 2009)); *accord Alcoa, Inc.*, 235 S.W.3d at 460; *see also Logsdon v. Cross*, No. 05-14-01328-CV, 2016 WL 531513, at *2 (Tex. App.—Dallas Feb. 10, 2016, pet. filed) (mem. op.) ("Under Texas law, the existence of a duty is determined by looking at three factors: '(1) the relationship between the parties; (2) the reasonable foreseeability of harm to the person injured; and (3) public policy considerations.'" (quoting *Tex. Home Mgmt., Inc. v. Peavy*, 89 S.W.3d 30, 34 (Tex. 2002)). BDO cites no authority, and we have found none, to support the existence of the alleged legal duty of Litex described above. Further, to the extent BDO's argument can be construed to assert this Court should create such a duty, BDO does not explain, and the record does not show, how the alleged injury from BDO's misrepresentation was foreseeable or how public policy considerations weigh in favor of allocating to Litex the burden of guarding against that injury. *See Mary E. Bivins Found.*, 451 S.W.3d at 110; *Logsdon*, 2016 WL 531513, at *2. Nor does BDO address any of the other

factors described above pertaining to duty. On this record, we conclude Litex did not owe the legal duty alleged by BDO. *See Vodicka v. Lahr*, No. 03-10-00126-CV, 2012 WL 2075713, at *8 (Tex. App.—Austin June 6, 2012, no pet.) (mem. op.) (declining to create new common-law duty of reasonable care in recommending brokers to potential investors where *Kirwan* factors were not addressed by party seeking to establish duty); *see also J.P. Morgan Chase Bank, N.A. v. Tex. Contract Carpet, Inc.*, 302 S.W.3d 515, 535 (Tex. App.—Austin 2009, no pet.) (intermediate appellate courts should be reluctant to recognize new common law duty that has no existence in established law). "The nonexistence of a duty ends the inquiry into whether negligence liability may be imposed." *Flores v. Intelligence Servs. of Tex., Inc.*, No. 05-12-01468-CV, 2014 WL 2152001, at *3 (Tex. App.—Dallas May 22, no pet.) (mem. op.) (citing *Van Horn v. Chambers*, 970 S.W.2d 542, 544 (Tex. 1998)); *see also J.P. Morgan Chase Bank*, 302 S.W.3d at 529 ("In the absence of a duty, there can be no negligence."). Accordingly, on this record, we conclude the trial court did not err by not submitting BDO's tendered jury questions respecting Litex's proportionate responsibility. *See Janga*, 358 S.W.3d at 408.

We decide against BDO on its second issue.

IV. BDO'S REQUEST FOR SUGGESTION OF REMITTITUR

In its fourth issue, BDO states that in the event the trial court's judgment is not reversed, BDO requests that this Court suggest a remittitur of the damages amount awarded to Litex pursuant to Texas Rule of Appellate Procedure 46.3. *See* TEX. R. APP. P. 46.3. According to BDO,

> Between March 31st and June 30th, every asset and liability balance changed, as did the resulting TNBV calculation. Mr. Mares testified that the TNBV as of June 30, 2011 was $19.384 million, an amount larger than the TNBV from March 2011. Because the TNBV increased significantly between March 31st and June 30th, any damages award based on just the Inventory balance is clearly wrong and unjust.

Further, BDO contends "[a]pplying the same methodology Litex used to calculate the Tender Offer price, but beginning with the allegedly overstated TNBV as of June 30, 2011, and deducting the alleged overstatement" results in "a maximum damages amount" of $887,040.00.

Litex responds that a remittitur in this case is "unwarranted" because "[t]he damage award was supported by the evidence and was clearly within the range of evidence presented at trial."

"[T]he proper remittitur standard is factual sufficiency." *Pope v. Moore*, 711 S.W.2d 622, 624 (Tex. 1986). Therefore, it is improper for a court of appeals to order a remittitur after finding factual sufficiency. *Id*. Because we concluded above the evidence is factually sufficient to support the damages awarded to Litex by the jury in this case, we conclude a remittitur is improper. *Id*.

We decide against BDO on its fourth issue.

V. CONCLUSION

We decide BDO's four issues against it. The trial court's judgment is affirmed.

/Douglas S. Lang/
DOUGLAS S. LANG
JUSTICE

150358F.P05

Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

BDO USA, LLP, Appellant

No. 05-15-00358-CV V.

LITEX INDUSTRIES, LIMITED, Appellee

On Appeal from the 14th Judicial District Court, Dallas County, Texas
Trial Court Cause No. DC-13-00344.
Opinion delivered by Justice Lang, Justices Bridges and O'Neill participating.

In accordance with this Court's opinion of this date, the judgment of the trial court is **AFFIRMED**.

It is **ORDERED** that appellee LITEX INDUSTRIES, LIMITED recover its costs of this appeal and the full amount of the trial court's judgment from appellant BDO USA, LLP and from U.S. Specialty Insurance Co. as surety on appellant's supersedeas bond.

Judgment entered this 26th day of May, 2016.