

REVERSE and REMAND and Opinion Filed November 12, 2020



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

No. 05-19-00493-CV

**BARBARA J. LIPSHY, DEBRA KAPLAN, AND
ELLEN LEWIS, Appellants**

V.

**LAWRENCE R. BURK, CREDIT FINANCE CORPORATION, AND
THE MAIN STREET MANAGEMENT CORPORATION, Appellees**

**On Appeal from the 191st Judicial District Court
Dallas County, Texas
Trial Court Cause No. DC-15-14245**

MEMORANDUM OPINION

**Before Chief Justice Burns, Justice Myers, and Justice Evans
Opinion by Justice Evans**

The trial court granted appellees Lawrence R. Burk, Credit Finance Corporation, and The Main Street Management Corporation's (collectively General Partners) plea to the jurisdiction concluding that appellants Barbara J. Lipshy, Debra Kaplan and Ellen Lewis (collectively Limited Partners) lacked standing to assert their breach of contract and other claims against General Partners for their handling of certain partnerships. In four issues, Limited Partners generally contend the trial court abused its discretion in granting General Partners' plea to the jurisdiction,

impliedly denying Limited Partners’ motion for leave to amend, and striking their second amended petition. The recent Texas supreme court opinion *Pike v. Texas EMC Management, LLC*, No. 17-0557, 2020 WL 3405812 (Tex. June 19, 2020) controls the disposition of this appeal and compels our conclusion the trial court abused its discretion in granting General Partners’ plea to the jurisdiction.¹ Accordingly, we reverse the trial court’s order granting the plea and remand this cause to the trial court for further proceedings consistent with this opinion.

BACKGROUND

This appeal revolves around a dispute between the parties involving several closely held real estate partnerships including Garland Gardens, Ltd., Leigh Ann Apartments, Ltd., Burk Lipshy & Marcus, and BJB Real Estate Holdings, Ltd. Appellee Lawrence Burk, appellant Barbara Lipshy’s brother in law, managed the partnerships and managed and controlled the Main Street Management Corporation and Credit Finance Corporation, the general partners for the partnerships and manager of Burk, Lipshy & Marcus.²

In 2014 and 2015, two apartment complexes, each owned by one of the partnerships, were sold. After the sales, Limited Partners began to suspect

¹ Although the panel prepared to question counsel about *Pike*, Robert B. Gilbreath, counsel for appellees, began oral arguments by citing *Pike* and acknowledging it is controlling authority fulfilling his ethical duty of candor to this Court. See TEX. DISCIPLINARY R. PROF. CONDUCT 3.03(a)(4), reprinted in TEX. GOV’T CODE. tit. 2, subtit. G app. (State Bar Rules art. X, § 9) (“A lawyer shall not knowingly . . . fail to disclose to the tribunal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel.”).

² Burk was also uncle to appellants Debra Kaplan and Ellen Lewis.

misconduct in General Partners' management of the partnerships. Lipsky filed this lawsuit in November 2015 against General Partners asserting claims for breach of fiduciary duty, common law fraud, declaratory and other relief with respect to the sale of the two apartment complexes. In 2017, Kaplan and Lewis intervened in Lipsky's lawsuit asserting similar claims against General Partners, as well as a claim for breach of contract of one of the partnership agreements. Limited Partners later filed a joint first amended petition consolidating their claims. General Partners filed their plea to the jurisdiction and motion to strike the first amended petition arguing the trial court did not have subject matter jurisdiction over the lawsuit because Limited Partners' claims actually belonged to the partnerships and therefore Limited Partners lacked standing to assert them. Limited Partners filed a response to the plea and also filed their second amended petition, along with a motion for leave, clarifying their claims were brought individually and derivatively on behalf of the partnerships. General Partners then moved to strike the second amended petition. After hearings, the trial court struck Limited Partners' pleadings, granted General Partners' plea to the jurisdiction and dismissed Limited Partners' lawsuit.³ This appeal followed.

³ The trial court held a separate hearing on the motion to strike and motion for leave with respect to Limited Partners' second amended petition.

ANALYSIS

In four issues, Limited Partners generally argue that the trial court abused its discretion in granting General Partners' plea to the jurisdiction. We agree for the reasons that follow.

We review a trial court's ruling on a plea to the jurisdiction de novo. *See Presidio Indep. Sch. Dist v. Scott*, 309 S.W.3d 927, 929 (Tex. 2010). We also review questions of standing de novo because standing is an issue of subject matter jurisdiction. *Farmers Tex. Cty. Mut. Ins. Co. v. Beasley*, 598 S.W.3d 237, 240 (Tex. 2020). When applying the de novo standard, we construe the pleadings in favor of the plaintiff but also consider any relevant evidence offered by the parties. *Id.* (citations omitted).

In their plea and motion to strike, General Partners argued the trial court lacked subject matter jurisdiction over the suit because the Limited Partners lacked standing to pursue the claims they asserted. Specifically, General Partners contended the allegations set forth in Limited Partners' petition all involve alleged wrongs committed against and injuring the partnerships, rather than injuries suffered by the Limited Partners themselves. General Partners relied largely on a line of our cases beginning with *Nauslar v. Coors Brewing Company*, 170 S.W.3d 242 (Tex. App.—Dallas 2005, no pet.) which in turn cited *Wingate v. Hajdik*, 795 S.W.2d 717, 719 (Tex. 1990) for the proposition that “[a]n individual stakeholder in a legal entity

does not have a right to recover personally for harm done to the legal entity.”⁴ In *Nauslar*, we, as have other Texas appellate courts, relied on *Wingate* to hold limited partners do not have an individual right to sue for the diminished value of their ownership interests in a partnership, and thus, lacked standing to pursue that claim. *Nauslar*, 170 S.W.3d 250–51. Accordingly, we affirmed the trial court’s granting of the plea to the jurisdiction in *Nauslar* for lack of standing. *Id.* at 258.

However, as General Partners candidly acknowledge on appeal,⁵ *Nauslar* and the other cases upon which they rely have been implicitly overruled by the Texas Supreme Court’s recent opinion in *Pike* which held that a limited partner in a partnership does indeed have constitutional standing to sue for an alleged loss in value of its interest in the partnership even if the limited partner does not have capacity to bring such a claim. *Pike*, 2020 WL 3405812 at *6–10.⁶

In *Pike*, a limited partner recovered a \$7 million damage award for other partners’ breach of the partnership agreement. Relying largely on *Wingate*, the *Pike* appellants challenged the limited partner’s standing to recover the award, asserting the injury was suffered by the partnership, not the limited partner. The supreme

⁴ General Partners also cited *Asshauer v. Wells Fargo Foothill*, 263 S.W.3d 468, 471 (Tex. App.—Dallas 2008, pet. denied), *Hall v. Douglas*, 380 S.W.3d 860, 872–73 (Tex. App.—Dallas 2012, no pet.), *Hodges v. Rajpal*, 459 S.W.3d 237, 248–49 (Tex. App.—Dallas 2015, no pet.), along with *Swank v. Cunningham*, 258 S.W.3d 647 (Tex. App.—Eastland 2008, pet. denied) to support their position that Limited Partners lacked standing to bring the claims presented in their lawsuit.

⁵ See *supra* n.1.

⁶ Attorneys for General Partners submitted a post-submission letter brief reiterating their statements at oral argument that *Pike* “appears to have implicitly overruled the prior decisions by this Court that [they] relied on in their brief.”

court held the prohibition in *Wingate* does not implicate constitutional standing to sue for an alleged loss in value of a limited partner's interest in the partnership. *Id.* at *7–*11. In rejecting the standing argument, the supreme court reasoned “the question of whether a claim brought by a partner actually belongs to the partnership is . . . a matter of capacity because it is a challenge to the partner's legal authority to bring suit.” *Id.* at *11. The court indicated that question, in turn, should be decided on the merits and does not affect the trial court's subject matter jurisdiction to address the claim. *Id.* at *10.

[W]e hold that a partner or other stakeholder in a business organization has constitutional standing to sue for an alleged loss in the value of its interest in the organization. In so holding, we are mindful of the statutory provisions that define and limit a stakeholder's ability to recover certain measures of damages, which protect the organization's status as a separate and independent entity. Those provisions, however, go to the merits of the claim; they do not strip a court of subject matter jurisdiction . . . if the stakeholder fails to meet the statutory requirements [of the business organizations code].

Id. at *10.

In the case before us, Limited Partners' first amended petition asserted claims individually for damages based on the reduction in value to their limited partnership interest. In other words, the legal injury giving Limited Partners standing is their diminution in value of equity interest. Because *Pike* makes clear Limited Partners do not lack constitutional standing to assert such claims, the trial court erred in

granting General Partners' plea to the jurisdiction.⁷ In light of our resolution of this issue, we need not address Limited Partner's remaining arguments on appeal with respect to the trial court's rulings.

CONCLUSION

Because Limited Partners had jurisdictional standing to assert a claim for the reduction in value of their respective partnership interests, the trial court erred in granting General Partners' plea to the jurisdiction. We therefore reverse the trial court's order granting the plea and remand this cause to the trial court for further proceedings consistent with this opinion.

/David Evans/

DAVID EVANS
JUSTICE

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⁷ “[A] court’s jurisdiction is determined claim by claim, not damage element by damage element. As we explain below, whether a plaintiff can recover a particular element of damages for its injury is a merits issue.” *Id.* at *6 n.7.



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Fifth District of Texas at Dallas**

JUDGMENT

BARBARA J. LIPSHY, DEBRA
KAPLAN AND ELLEN LEWIS,
Appellants

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District Court, Dallas County, Texas
Trial Court Cause No. DC-15-14245.
Opinion delivered by Justice Evans,
Chief Justice Burns and Justice
Myers participating.

In accordance with this Court's opinion of this date, the trial court's March 25, 2019 order granting appellees' plea to the jurisdiction and order of dismissal of suit is **REVERSED** and this cause is **REMANDED** to the trial court for further proceedings consistent with this opinion.

It is **ORDERED** that appellants Barbara J. Lipshy, Debra Kaplan and Ellen Lewis recover their costs of this appeal from appellees Lawrence R. Burk, Credit Finance Corporation, and Main Street Management Corporation.

Judgment entered this 12th day of November 2020.