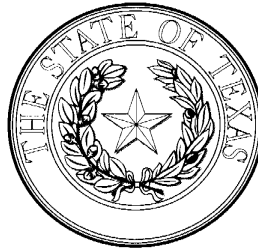


Opinion issued July 27, 2021



In The
Court of Appeals
For The
First District of Texas

NO. 01-18-01106-CV

ROBERT L. MOODY, JR., Appellant

V.

**NATIONAL WESTERN LIFE INSURANCE COMPANY; NATIONAL
WESTERN LIFE GROUP, INC.; ROSS RANKIN MOODY; ELVIN
JEROME PEDERSON; STEPHEN EDWARD GLASGOW; CHARLES D.
MILOS; ERLE DOUGLAS MCLEOD; LOUIS EDWARD PAULS, JR.; AND
FRANCES ANNE MOODY-DAHLBERG, Appellees**

**On Appeal from the 122nd District Court
Galveston County, Texas
Trial Court Case No. 17-CV-1196**

OPINION ON REHEARING

Robert L. Moody, Jr. filed a shareholder's derivative suit challenging business practices of National Western Life Insurance Company, a wholly owned subsidiary of National Western Life Group, Inc. Both the businesses and the individual board members filed pleas to the jurisdiction, which the trial court granted. The trial court also awarded the defendants a total of \$1,314,053.73 in trial attorney's fees and expenses and up to \$505,000 in appellate attorney's fees. In three issues on appeal, Moody Jr. challenges the rulings on the pleas to the jurisdiction, the award of attorney's fees and expenses, and the dismissal of a counterclaim.

We originally issued our opinion in this appeal on December 10, 2020. We modified the judgment to condition the award of appellate attorney's fees on success in the appellate court, and as modified we affirmed the trial court's judgment. Moody Jr. filed a motion for rehearing challenging this court's analysis of his attorney's fees issue.

We grant the motion for rehearing. On rehearing, we conclude that Moody Jr.'s challenge to the trial court's denial of a trial on attorney's fees and expenses was preserved by an implicit ruling, but the denial of a trial on attorney's fees and expenses did not deprive Moody of due process. We withdraw our opinion and judgment of December 10, 2020, and we issue this opinion and judgment on their stead. Our disposition remains the same.

We modify the judgment to condition the award of appellate attorney's fees on success in the appellate court, and as modified we affirm the trial court's judgment.

Background

I. The companies and the family

National Western Life Insurance Company ("National Western") was founded in 1956 by Robert L. Moody, who served as Chairman and Chief Executive Officer of the company until June 2015. National Western is incorporated in Colorado and has maintained its principal place of business in Austin, Texas since 1963. In 1968, National Western acquired by merger a company that had in force numerous policies insuring citizens of Central and South America. National Western assumed these international policies and thereafter accepted by mail applications for insurance from residents of other countries. National Western took the position that it did not need to be licensed in other countries because it was licensed in Texas, received applications and issued policies in Texas, and worked only with independent international brokers.¹

¹ In its brochures and policies, National Western included the following disclamatory language about its sales to international residents.

National Western Life Insurance Company offers a full line of life insurance and annuity products through general independent agencies in 49 states, the District of Columbia, four U.S. territories or possessions, and Haiti. The Company does not maintain offices in any other country, but it does accept applications at its Home Office in Austin, Texas from—and issues policies to—non-U.S. residents.

Robert L. Moody, Jr. (“Moody Jr.”) is the eldest son of Robert L. Moody (“Moody Sr.”). Moody Jr. owns Moody Insurance Group, Inc. (“Moody Insurance”), an insurance marketing business. By contract, both Moody Insurance and Moody Jr., individually, are “independent contractor” agents for National Western. They earn commissions for sales of National Western products based on standard commission schedules. Moody Jr. purchased shares of National Western between 2008 and January 1, 2012.

Ross Rankin Moody is Moody Jr.’s younger brother, and he has been President and Chief Operating Officer of National Western since 2000. Other family members who serve on the board of directors of National Western include: Moody Jr.’s stepmother, Ann M. Moody; his half-sister, Frances A. Moody-Dahlberg; and his stepmother’s brother, E. Douglas McLeod.

In the early 2000s, National Western’s issuance of policies to non-U.S. residents increased steeply. Texas insurance regulators raised concerns about National Western’s activities in Argentina and Russia. Based on advice of counsel,

As the Company makes no representation regarding the advisability, suitability, or legality of your application for, and purchase of, a policy from the Company, you should consult with your own independent advisors if you have questions.

National Western responded in writing that it “does not market or solicit products in foreign countries” and that it works with independent brokers abroad.²

II. The Brazilian enforcement action

In 2005, a Brazilian court entered a default judgment against National Western for wrongful refusal to pay a life insurance claim.³ As a result of that judgment, the Brazilian regulatory authority (“SUSEP”)⁴ initiated an infraction proceeding against National Western, alleging that it had operated as an insurance company without due authorization. In 2011, SUSEP assessed an ex parte penalty in an amount equal to about \$6 billion U.S.⁵ When National Western learned of the fine in late October

² National Western’s counsel also acknowledged that there was a “possibility of money laundering attempts” in various aspects of its business, and around 2002, National Western implemented an anti-money-laundering program. In addition, between 2000 and 2010, National Western developed new products for the international market, approval for which was obtained from Moody Sr. In January 2000, Moody Insurance executed its executive general agent contract with National Western.

³ *See Naves v. Nat’l W. Life Ins. Co.*, No. 03-08-00525-CV, 2009 WL 2900755, at *1 (Tex. App.—Austin Sept. 10, 2009, pet. denied) (mem. op.). Naves later attempted to domesticate the judgment, but Texas courts concluded that the Brazilian court lacked jurisdiction over National Western. *Id.*

⁴ SUSEP is an acronym for the Portuguese term for the Superintendence of Private Insurance.

⁵ SUSEP determined that it had jurisdiction over National Western, relying in part on National Western’s website, which boasted that it had a presence in Brazil for 26 years. In imposing the \$6 billion penal fine, SUSEP concluded that the independent, non-exclusive, commission-only Brazilian brokers constituted a “sales force” of National Western representatives.

2011, it obtained an additional legal opinion from a Brazilian law firm confirming its position that Brazilian law did not prohibit it from issuing policies to Brazilian residents or bring it within the jurisdiction of Brazilian authorities.

National Western disclosed the situation in 2011 and 2012 Securities and Exchange Commission filings. On advice of counsel, National Western appeared in the Brazilian infraction proceeding, and on further appeal the fine was reduced to approximately \$960,000 U.S. National Western paid the fine without admitting liability and stopped selling insurance policies to Brazilian residents. Brazilian authorities then opened a criminal investigation regarding the sales of insurance to its residents.

Meanwhile, in 2013 National Western hired Price Waterhouse to study the feasibility of becoming licensed to sell insurance in Brazil. The study concluded it would not be profitable to operate in that manner because National Western's business advantage was the ability to denominate policies in stable U.S. dollars as opposed to the volatile Brazilian real.

III. Creation of the holding company

In March 2015, National Western Life Group, Inc. ("Group") was incorporated in Delaware.⁶ National Western shares were converted one-for-one to

⁶ The restated certificate of incorporation provided for governance by a board of directors, whose liability was expressly limited: "[N]o director of [Group] shall be

shares in Group, which holds all of the currently issued stock of National Western. Group does not issue insurance or conduct any insurance business.

IV. A family matter

In 2016, National Western’s audit committee discontinued some of Moody Jr.’s financial and in-kind benefits. In a series of text messages, Moody Jr. informed Ross of his opposition to these actions. The same year, Ross’s daughter, Elizabeth, was appointed as Trustee of the Moody Foundation, the family charitable entity. Moody Jr., who had by then been thrice overlooked for appointment as trustee, also expressed his opposition to this appointment.

V. The inquiry and the demand

In January 2017, Moody Jr.’s attorney sent a letter to Ross and National Western. The letter noted the SUSEP fine and proceeding, discounted National Western’s jurisdictional defense, and questioned the company’s decision to continue issuing insurance policies to non-U.S. residents. The letter also questioned Ross’s “competency to serve on any board representing Moody family interests.” The letter identified eight questions, most of which did not relate to National Western’s sales to foreign residents or the SUSEP infraction proceeding.⁷ The letter also threatened

personally liable to [Group] or its stockholders for monetary damages for breach of fiduciary duty as a director.”

⁷ The eight questions raised were:

the filing of a derivative suit. Counsel for Group contested the facts of Moody Jr.'s January 2017 letter and concluded that the matters raised in that letter related to Ross and the Moody family personally, not to National Western or Group.

In April 2017, Moody Jr. sent a demand letter to National Western and Group alleging that board members had breached their fiduciary duties. It focused on the enforcement action in Brazil, and it demanded that the boards of directors take eight corrective actions including: (1) removing Ross as Chairman and Chief Executive

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1. In November of 2016, although you remained the CEO, you resigned your position as President of National Western. Were these matters, and your role in them, fully disclosed to the board before your resignation?
 2. With regard to National Western, what was the Audit Committee's role in authorizing this conduct?
 3. In November 2016, you were named to the board of directors for American National Insurance Company. Have these events, and your role in the events, been disclosed to the ANICO board? If not, why? Has this matter been brought to the attention of the ANICO ethics committee?
 4. Both you and your daughter sit on the board of the Moody Foundation giving your direct family considerable control of this important Foundation. Have you disclosed this conduct to the rest of the family?
 5. Has legal counsel disclosed your conduct to the following entities: (1) ANICO; (2) The Moody Foundation; (3) The Moody Endowment; or (4) Galtex Hotel Corporation?
 6. Have you directly disclosed this information to John Smith, trustee at Moody National Bank for the benefit of Robert L. Moody, Sr.?
 7. Why have you never disclosed your conduct to Robert L. Moody, Jr. or other family members?
 8. Has an independent investigation been conducted to determine the facts and assess the potential liability or impact on National Western on other parties and their trustees, shareholders and directors? If so, will you provide it to Bobby, Jr.?

Officer of Group; (2) filing a civil action for breach of fiduciary duty against the board members; (3) making additional disclosures to shareholders; (4) ending sales without licenses in foreign jurisdictions; and (5) reimbursing Moody Jr. for attorney's fees and costs.⁸

VI. The companies' response

The boards of directors of National Western and Group met jointly on June 6, 2017.⁹ They considered available information pertaining to:

- (1) discontinuation of benefits previously given to Moody Jr.;
- (2) legal standards relevant to a shareholder's demand and the filing of a derivative claim;
- (3) the history of National Western's international business model;
- (4) prior legal opinions regarding the international business model;
- (5) legal disclaimers in applications, policies, and brochures;
- (6) application of Brazilian law regarding the sale of insurance;
- (7) the historical practice of following advice of legal counsel;

⁸ In the letter, Moody Jr. stated that by "making this demand," he did "not concede that the Board is disinterested and independent." He asserted that his intention was to permit the Board to take the necessary corrective action.

⁹ The record of proceedings shows the individual board members who participated from Group: (1) three class A directors (David S. Boone, Stephen E. Glasgow, and E.J. Pederson); (2) six class B directors (Ross R. Moody, Ann M. Moody, Frances A. Moody-Dahlberg, E. Douglas McLeod, Charles D. Milos, Louis E. Pauls, Jr.); and (3) one advisory director (Russell S. Moody). Directors who attended on behalf of National Western directors were: Ross R. Moody, Stephen E. Glasgow, E.J. Pederson, David S. Boone, Brian M. Pribyl, and Rey Perez.

- (8) the Price Waterhouse feasibility study about becoming licensed to sell insurance in Brazil;
- (9) Brazilian business practices that differ from American practices, including corruption and bribery;
- (10) the growth and profitability of the business over the time period when it made disclosures about the SUSEP proceeding;
- (11) the advantages and disadvantages to National Western and Group of filing of a lawsuit challenging the conduct of its boards of directors;
- (12) the relatively small size of the fine assessed by Brazilian authorities compared to 30 years of profit in that market;
- (13) Moody Jr.'s role in selling insurance on a commission basis;
- (14) Moody Jr.'s continued involvement with the international business and role as an executive general agent;
- (15) the ongoing Brazilian criminal investigation; and
- (16) Moody Jr.'s status as potential beneficiary of his father's significant interest in Group.

The boards concluded that no further investigation was necessary and that a suit by Group or National Western against its board of directors was not in the best interest of the business. The boards voted to reject all of Moody Jr.'s demands; Ross did not participate in the vote.

VII. Moody Jr. files this lawsuit

Moody Jr. filed a derivative suit based on the boards' refusal of his demands, and he sought damages and equitable relief, including attorney's fees. Moody Jr. made the following allegations:

- The boards failed to act in good faith and conduct a reasonable and independent investigation.¹⁰
- The directors were not independent and should have appointed an independent committee.
- The directors should have conducted interviews of board members and Brazilian agents, examined the evidence considered by SUSEP, and regarded inquiries from the Texas Department of Insurance about business in Argentina and Russia as red flags to prompt an investigation.
- The boards did not review the opinions of Brazilian officials or documents relevant to the history of doing business in Brazil.
- The boards should have produced a written report and failed to obtain a legal opinion about conducting business in Brazil.¹¹
- The defendant directors “failed to act in good faith or with the honest belief that their actions taken in approving the unlawful sale of insurance to international markets, was in the best interests of the company.”
- The directors breached their fiduciary duties in relation to the sale of insurance policies in international markets without first having obtained licenses to sell insurance in each foreign country.¹²

¹⁰ The suit is filed by Moody, Jr. derivatively on behalf of National Western and Group. The defendants are Ross Rankin Moody, Elvin Jerome Pederson, Stephen Edward Glasgow, Charles D. Milos, Earle Douglas McLeod, Louis Edward Pauls, and Frances Anne Moody-Dahlberg.

¹¹ Moody Jr. relied on the conclusion of Brazilian officials that the independent brokers working in Brazil were actually employees of National Western.

¹² Moody Jr.’s live pleading alleges that the director defendants breached their fiduciary duties by:

The director defendants answered with a general denial and affirmative defenses. National Western and Group pleaded a general denial and affirmative defenses, and they counterclaimed for (1) expenses under chapter 21 of the Texas Business Organizations Code and (2) breach of the managing general agent contract, which they contended barred Moody Jr. from filing the shareholder derivative suit.

Moody Jr. filed a general denial and pleaded affirmative defenses in response to the counterclaims. He also pleaded a claim for declaratory judgment construing the managing general agent contract. He specifically asked the trial court to declare

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- (a) Knowingly or recklessly approving the unlawful sale of insurance in the country of Brazil resulting in a \$6 billion fine to the company;
 - (b) Knowingly or recklessly approving the unlawful sale of insurance in other foreign jurisdictions including the countries of Taiwan, Venezuela and others without making a reliable determination of whether such conduct was, in fact, legal;
 - (c) Knowingly or recklessly placing policy holders and brokers in the country of Brazil in the position of violating criminal law by failing to inform brokers and policyholders that the purchase or sale of the company's insurance was illegal;
 - (d) Failing to obtain a full and comprehensive explanation of the requirements for doing business in Brazil, the ramifications of selling insurance in Brazil without a license, and the regulatory proceedings in Brazil and failing to take appropriate remedial actions; and
 - (e) Knowingly and recklessly engaging in a pattern and practice of continuing and repeated unlawful conduct, with regard to the sale of insurance in international markets, by failing to comply with foreign laws and regulations.

that the managing general agent contract did not prevent him from instituting a shareholder derivative suit and that he did not breach the contract by filing a shareholder derivative suit. Moody Jr. sought attorney's fees for his declaratory judgment claim.

VIII. Pleas to the jurisdiction

National Western and Group filed a plea to the jurisdiction asserting that Moody Jr. lacked standing to pursue the derivative action. They asserted three grounds for dismissal for lack of standing: (1) the agency contract prohibited Moody Jr. from suing on behalf of the companies; (2) Moody Jr.'s pleading was insufficient to show that the boards wrongfully refused his demand for action; and (3) Moody Jr. is not an adequate representative of Group stockholders, which is a standing requirement under applicable Delaware law.

The director defendants also filed a plea to the jurisdiction. They asserted that (1) Moody Jr. failed to plead facts sufficient to overcome the business judgment rule and show that the boards wrongfully refused his demand for action; (2) Moody Jr. is not an adequate representative of Group stockholders; and (3) Moody Jr. did not plead facts establishing that he had a continuous interest in National Western stock because the alleged wrong—selling insurance policies to Brazilian residents—began long before he acquired any National Western stock.

Moody Jr. filed a response to both pleas to the jurisdiction to which he attached only one exhibit, a photocopy of an article from the August 1987 *Texas Monthly* entitled, “The Sleaziest Man in Texas,” about Moody Jr.’s uncle, Shearn Moody, Jr., who was charged with swindling the Moody Foundation. Moody Jr. relied on his pleadings and argued that he had pleaded particularized facts showing the boards breached their duty of care by investigating his demand in a grossly negligent way and that they had breached their duty of good faith by failing to appoint an independent and disinterested committee to investigate his demand and by deciding to refuse his demand.¹³

¹³ Specifically, Moody Jr. argued that the boards acted with gross negligence by:

- (1) failing to appoint an independent and disinterested committee;
- (2) failing to interview potential fact witnesses;
- (3) failing to refute the facts upon which SUSEP imposed the ex parte \$6 billion fine; and
- (4) failing to include written legal opinions and written information about the ongoing criminal investigation in the materials presented to the board.

Moody Jr. argued that the boards did not act in good faith because the boards, which included many members of the extended Moody family, were not independent and disinterested. He also argued that the refusal of his demands was inexplicable and therefore in bad faith in light of the following facts:

- (1) the formation of Group as a holding company;
- (2) a comment from Standard & Poor’s about governance deficiencies;
- (3) National Western relied on a jurisdictional defense in opposing the fine in Brazil;

The trial court granted both pleas to the jurisdiction. In doing so, it expressly concluded that additional repleading would be futile.

IX. Attorney's fees and expenses

National Western and Group filed a motion seeking expenses and reasonable and necessary attorney's fees incurred in their defense and on behalf of the director defendants. They argued that the record demonstrated that the boards acted within the bounds of the business judgment rule and that text messages and other evidence showed that the Moody Jr. was motivated by personal animus. To establish the amount of the expenses and attorney's fees, they attached affidavits from three attorneys, who attested to the *Arthur Andersen* factors and proved up the accompanying contemporaneous billing statements as business records.¹⁴ The motion for expenses was set for an oral hearing.

Moody Jr. responded with a motion to vacate the trial court's order on the pleas to the jurisdiction. In that motion, he also replied to the request for expenses

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- (4) the size of the initial fine;
 - (5) discontinuation of sales to Brazilians;
 - (6) the ongoing Brazilian criminal investigation.

Finally, he argued that the directors knowingly authorized unlawful business practices and that they faced a substantial threat of personal liability because their actions were illegal and in bad faith and therefore indemnity would not apply.

¹⁴ *Arthur Andersen & Co. v. Perry Equip. Corp.*, 945 S.W.2d 812, 813 (Tex. 1997).

and attorney's fees. Moody Jr. asserted that National Western had defrauded the court by finalizing its exit from the international market while defending against the derivative suit.¹⁵ One of Moody Jr.'s demands had been for National Western to leave the international market, and he argued that the company's action was an admission that the prior business model was illegal and unprofitable.

Moody Jr. argued that he was entitled to attorney's fees. He asserted that because his suit prompted National Western to leave the international market, it had conferred a benefit on the company by reducing the risk of criminal and regulatory penalties. He opposed the defendants' motion for attorney's fees and expenses on the grounds that: (1) they had not shown that his suit was maintained without reasonable cause or for an improper purpose; (2) the attorney's fees affidavits were inadmissible hearsay; (3) he had not had an opportunity to conduct discovery on attorney's fees and expenses; and (4) a bench trial was required.

National Western and Group opposed Moody Jr.'s request for attorney's fees because "he achieved nothing through his lawsuit," "obtained nothing of value to the company," and "obtained none of the relief he requested." Group also reiterated

¹⁵ As proof, he attached an email indicating that National Western intended to finalize its exit from the international market on May 11, 2018. He argued that this was one of the demands in his April 17, 2017 demand letter. The email indicated that the move was made due to "severe changes in financial markets around the world which in turn [have] required an increased monitoring structure over the company."

its arguments that Moody Jr. filed his suit for an improper purpose and without reasonable cause.

Moody Jr. set his motion to vacate the pleas to the jurisdiction for hearing at the same date and time as National Western and Group's hearing on their motion for expenses. The entirety of the one-hour hearing was occupied with argument of counsel on the motion to vacate. At the end of the hearing, the trial court took the matters under advisement and invited the parties to file supplemental briefing. Moody Jr. asserted that a bench trial on attorney's fees and expenses was required and suggested resetting the motion for attorney's fees and expenses for another time.¹⁶ National Western and Group argued that a summary disposition was appropriate.¹⁷ The court responded: "I will review what you have put in writing, and I am not prepared to make a call off the top of my head on that, not having reviewed the law or your pleadings."

After the hearing, Moody Jr. filed supplemental briefing on his motion to vacate the pleas to the jurisdiction and on attorney's fees. In that document, he stated

¹⁶ Moody Jr.'s counsel stated: "Your Honor, we do think it might be helpful, actually, to have some discussion about the attorney's fees issue and the motion to transfer; and we believe that with respect to the attorney's fees that a bench trial is actually required. And we would like the opportunity to have that discussion with you. So perhaps you could address the motion to vacate issue, and then we could reset these other things for another time."

¹⁷ Counsel for the companies responded: "Your Honor, just so we are clear, our position is, as set forth in our pleadings, that it's wrong on this idea for a bench trial. It's a matter of law, and the Court can decide all that on the papers."

that he had objected to the motion for attorney's fees and expenses on the grounds that the affidavits are hearsay and a bench trial is required. He also argued that because the statute authorizing an award of attorney's fees and expenses does not mandate a particular procedure, the issue must be determined by summary judgment or trial. He did not specifically request a ruling on any evidentiary objection or whether a bench trial was required.

The trial court denied the motion to vacate the pleas to the jurisdiction. Without expressly finding that Moody Jr. filed suit without reasonable cause or for an improper purpose, the trial court granted the request for attorney's fees and expenses.¹⁸

¹⁸ The trial court awarded:

- \$522,055.50 for reasonable and necessary fees and expenses charged by Beck Redden LLP for investigation and defense of this matter on behalf of National Western;
- \$36,200 for reasonable and necessary fees and expenses charged by S.R. Lewis, Jr. in investigation and defense of this matter on behalf of National Western;
- \$755,798.23 for National Western's indemnification of the director defendants;
- Reasonable and necessary appellate attorney's fees of \$250,000 in the event of any appeal to the intermediate court of appeals;
- \$65,000 for a petition for review in supreme court;
- \$125,000 for appellate fees for Texas Supreme Court merits briefs; and

The corporate and individual defendants jointly moved for entry of final judgment and set the motion for hearing. They argued that the granting of the pleas to the jurisdiction mooted National Western and Group's counterclaim for damages for breach of the managing general agent contract and Moody Jr.'s declaratory judgment claim about the same contract. They also argued that Moody Jr.'s declaratory judgment claim was improper because it was "merely the mirror image" of the breach of contract claim.

Moody Jr. objected to the proposed final judgment in writing, arguing that: (1) he had paid the jury fee and was entitled to a jury trial on attorney's fees; (2) he was entitled to an opportunity for discovery on attorney's fees; and (3) the dismissal of his counterclaims would deny him due process.

The trial court entered final judgment dismissing the contract claims and awarding the attorney's fees as previously ordered. Moody Jr. appealed.

Analysis

On appeal, Moody Jr. raises three issues, complaining of: (1) the trial court's ruling on the pleas to the jurisdiction; (2) the trial court's award of attorney's fees; and (3) the trial court's dismissal of his counterclaim for a declaratory judgment construing the managing general agent contract.

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- \$65,000 for oral argument at the Texas Supreme Court.

I. The trial court correctly granted the pleas to the jurisdiction because Moody Jr. failed to plead with particularity facts showing that the boards wrongfully refused his demands.

A. Standard of review

Standing is a component of subject-matter jurisdiction that focuses on the question of who may bring an action. *Vernco Constr., Inc. v. Nelson*, 460 S.W.3d 145, 149 (Tex. 2015); *Patterson v. Planned Parenthood of Hous. & Se. Tex., Inc.*, 971 S.W.2d 439, 442 (Tex. 1998). “Courts lack subject-matter jurisdiction to adjudicate disputes initiated by parties lacking standing.” *Vernco Constr.*, 460 S.W.3d at 149. Whether a court has subject-matter jurisdiction is a question of law. *Id.*; *Tex. Dep’t of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226 (Tex. 2004); *see Levine v. Smith*, 591 A.2d 194, 200 (Del. 1991), *overruled on other grounds by Brehm v. Eisner*, 746 A.2d 244 (Del. 2000) (“The demand requirements of Rule 23.1 represent a procedural restatement of these bedrock principles of Delaware law of corporate governance in the context of *standing* to maintain a derivative shareholder’s suit.”).

A party may challenge a trial court’s subject-matter jurisdiction by filing a plea to the jurisdiction. *See Bland Indep. Sch. Dist. v. Blue*, 34 S.W.3d 547, 554 (Tex. 2000). We review a trial court’s ruling on a plea to the jurisdiction de novo. *Univ. of Tex. M.D. Anderson Cancer Ctr. v. McKenzie*, 578 S.W.3d 506, 512 (Tex. 2019) (citing *Miranda*, 133 S.W.3d at 226); *cf. Brehm*, 746 A.2d at 254 (courts

review de novo claims of pleading sufficiency under Delaware Court of Chancery Rule 23.1).

Ordinarily a plea to the jurisdiction challenges the plaintiff's pleadings, asserting that the alleged facts do not affirmatively demonstrate the court's jurisdiction. *See Mission Consol. Indep. Sch. Dist. v. Garcia*, 372 S.W.3d 629, 635 (Tex. 2012). We "construe the plaintiff's pleadings liberally, taking all factual assertions as true, and look to the plaintiff's intent." *Heckman v. Williamson Cty.*, 369 S.W.3d 137, 150 (Tex. 2012). A plea to the jurisdiction may also challenge the existence of jurisdictional facts, and when it does, the parties may present evidence. *Mission Consol. Indep. Sch. Dist.*, 372 S.W.3d at 635. "When a jurisdictional issue is not intertwined with the merits of the claims, which is the case here, disputed fact issues are resolved by the court, not the jury." *Vernco Constr.*, 460 S.W.3d at 149.

When a plea to the jurisdiction challenges the existence of jurisdictional facts, "a trial court's review of a plea to the jurisdiction mirrors that of a traditional summary judgment motion." *Mission Consol. Indep. Sch. Dist.*, 372 S.W.3d at 635. The movant must present summary-judgment proof demonstrating that the court lacks jurisdiction. *Id.* The burden then shifts to the nonmovant to show that there is a disputed material fact on the jurisdictional issue. *Id.*; *see* TEX. R. CIV. P. 166a(c) (providing that to prevail on traditional summary judgment motion, movant must

establish that no genuine issues of material fact exist and that it is entitled to judgment as matter of law).

B. Delaware law applies

“In a derivative action brought on behalf of a Delaware corporation, Delaware law applies to substantive issues, and Texas law governs procedural matters and remedies.” *Lapiner v. Maimon*, 429 S.W.3d 816, 823 (Tex. App.—Houston [14th Dist.] 2014, pet. denied); *see* TEX. BUS. ORGS. CODE § 21.562(a); *Neff v. Brady*, 527 S.W.3d 511, 523 (Tex. App.—Houston [1st Dist.] 2017, no pet.) (“[T]he ‘internal affairs doctrine’ provides that, with respect to foreign entities, the laws of the entity’s jurisdiction of formation govern its internal affairs.”).

The business and affairs of a Delaware corporation are managed by or under the direction of a board of directors, who owe to the corporation fiduciary duties of loyalty and care. DEL. CODE tit. 8, § 141(a); *Stone v. Ritter*, 911 A.2d 362, 370 (Del. 2006). The duty of loyalty, which encompasses the duty of good faith, requires that directors pursue the best interests of the corporation. *See Stone*, 911 A.2d at 370; *In re Walt Disney Co. Derivative Litig.*, 906 A.2d 27, 53 (Del. 2006); *In re Caremark Int’l Inc. Derivative Litig.*, 698 A.2d 959, 967 (Del. Ch. 1996). Failure to act in good faith may be shown with evidence that a director acted for “some purpose other than a genuine attempt to advance corporate welfare,” or knowingly violated an applicable positive law. *Gagliardi v. TriFoods Int’l, Inc.*, 683 A.2d 1049, 1051 n.2

(Del. Ch. 1996). The duty of care requires directors to “inform themselves, before making a business decision, of all material information reasonably available to them.” *Benihana of Tokyo, Inc. v. Benihana, Inc.*, 891 A.2d 150, 192 (Del. Ch. 2005), *aff’d*, 906 A.2d 114 (Del. 2006). Director liability is predicated on concepts of gross negligence, which is “conduct that constitutes reckless indifference or actions that are without the bounds of reason.”¹⁹ *McPadden v. Sidhu*, 964 A.2d 1262, 1274 (Del. Ch. 2008); *see Stone*, 911 A.2d at 370; *Walt Disney*, 906 A.2d at 53; *Malpiede v. Townson*, 780 A.2d 1075, 1096 (Del. 2001). “[C]ompliance with a director’s duty of care can never appropriately be judicially determined by reference to *the content of the board* decision that leads to a corporate loss, apart from consideration of the good faith or rationality of the process employed.” *Caremark*, 698 A.2d at 967.

A stockholder’s derivative suit is “an action in which the individual shareholder steps into the shoes of the corporation and usurps the board of directors’ authority to decide whether to pursue the corporation’s claims.” *In re Crown Castle Int’l Corp.*, 247 S.W.3d 349, 355 (Tex. App.—Houston [14th Dist.] 2008, no pet.). “The derivative action developed in equity to enable shareholders to sue in the

¹⁹ The reckless indifference element refers to a reckless indifference to or deliberate disregard of the stockholders. *Rabkin v. Philip A. Hunt Chem. Corp.*, 547 A.2d 963, 970 (Del. Ch. 1986) (acknowledging that this formulation creates a “higher threshold for liability than does the definition of gross negligence in general tort law”).

corporation's name where those in control of the company refused to assert a claim belonging to it." *Aronson v. Lewis*, 473 A.2d 805, 811 (Del. 1984), *overruled on other grounds by Brehm*, 746 A.2d at 254. Because a derivative suit "impinges on the managerial freedom of directors," a stockholder's right to pursue a derivative suit is "limited to situations where either the stockholder has demanded the directors pursue a corporate claim and the directors have wrongfully refused to do so, or where demand is excused because the directors are incapable of making an impartial decision regarding whether to institute such litigation." *Stone*, 911 A.2d at 366–67.

Delaware Court of Chancery Rule 23.1 imposes on the would-be derivative plaintiff a heightened pleading standard to "allege with particularity the efforts, if any, made by the plaintiff to obtain the action the plaintiff desires from the directors or comparable authority and the reasons for the plaintiff's failure to obtain the action or for not making the effort." Del. Ct. Ch. R. 23.1. Conclusory statements and notice pleading are insufficient; the plaintiff must plead "particularized factual statements that are essential to the claim." *Brehm*, 746 A.2d at 254. A stockholder who makes a presuit demand tacitly concedes the independence of a majority of the board and the absence of futility. *Spiegel v. Buntrock*, 571 A.2d 767, 775 (Del. 1990). The making of the demand places control of the derivative litigation in the hands of the board of directors. *Id.* (citing *Zapata Corp. v. Maldonado*, 430 A.2d 779, 784–86

(Del. 1981)). As a result, in a demand refused case like this one, the board’s decision is subject to the business judgment rule. *Spiegel*, 571 A.2d at 775.

The business judgment rule is “a presumption that ‘in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company [and its shareholders].’” *Emerald Partners v. Berlin*, 787 A.2d 85, 90 (Del. 2001) (quoting *Aronson*, 473 A.2d at 812). “It is the essence of the business judgment rule that a court will not apply ^{20/20} hindsight to second guess a board’s decision, except in rare cases [where] a transaction may be so egregious on its face that the board approval cannot meet the test of business judgment.” *Brehm*, 746 A.2d at 260.

In a demand refused case, a derivative plaintiff must plead facts sufficient to overcome the presumption of the business judgment rule as well as pleading facts sufficient to state a claim on the corporation’s behalf. *Ironworkers Dist. Council of Phila. & Vicinity Ret. & Pension Plan v. Andreotti*, CV 9714-VCG, 2015 WL 2270673, at *2 (Del. Ch. May 8, 2015), *aff’d*, 132 A.3d 748 (Del. 2016). Because the derivative plaintiff who has made a demand has tacitly conceded the independence of the board, the only issues to be considered to overcome the business judgment rule are the good faith and reasonableness of the board’s refusal. *See Spiegel*, 571 A.2d at 777–78; *Zapata Corp.*, 430 A.2d at 784 (“[A]bsent a wrongful refusal, the stockholder in such a situation simply lacks legal managerial power.”).

C. The trial court correctly granted the pleas to the jurisdiction because Moody Jr. did not plead facts sufficient to overcome the business judgment rule.

In his first issue on appeal, Moody argues that the court reversibly erred by granting the pleas to the jurisdiction. He states four subsidiary issues attacking the arguments made by the appellees in their pleas to the jurisdiction. We focus on the fourth, whether Moody satisfied the pleading requirements necessary to pursue a derivative action, and because we find that the trial court could have properly granted the pleas on that basis, we do not need to address his other arguments. *See* TEX. R. APP. P. 47.2.

1. Moody Jr. conceded the independence of the boards by making a presuit demand.

Moody argues that he pleaded sufficient facts to show the boards were not independent.²⁰ In this case, Moody Jr. presented a demand to National Western before filing suit, and the boards refused that demand. Because Moody Jr. made a presuit demand, he conceded the independence of the boards and placed control of the litigation in their hands. *See Spiegel*, 571 A.2d at 775; *Zapata Corp.*, 430 A.2d

²⁰ In particular, he relies on allegations in his live pleading that: (1) the boards did not appoint an independent committee to investigate his demand; (2) the directors, who were accused of wrongdoing, conducted the investigation with corporate counsel; (3) the directors face a substantial likelihood of personal liability for engaging in profitable but illegal activities; (4) the boards failed to conduct interviews of potential fact witnesses and reviewed few documents; (5) the board of National Western is comprised mostly of Moody family members, who are heavily influenced by Ross, and the family control was noted as a governance deficiency by Standard & Poor's in 2016.

at 784–86. Moreover, “[t]o establish that a *board* was interested or lacked independence, a plaintiff must allege facts as to the interest and lack of independence of the *individual members* of that board.” *Orman v. Cullman*, 794 A.2d 5, 22 (Del. Ch. 2002). Moody Jr. did not allege facts pertaining to the interest or lack of independence of individual board members. *See id.* Accordingly, we conclude that his appellate argument that the boards were not independent lacks merit. *See id.*

2. Moody Jr. did not plead particularized facts showing that the boards breached their duty of good faith.

The fiduciary duty of loyalty encompasses both the duty to be disinterested and independent as well as the duty of good faith. *Cf. id.* at 23. On appeal, Moody Jr. argues about the boards’ lack of independence. He does not, however, articulate an argument that the boards breached their duty of good faith by, for example, acting for some purpose other than a genuine attempt to advance corporate welfare. *See Gagliardi*, 683 A.2d at 1051 n.2. Instead, Moody Jr. relies on the same evidence and analysis to argue that the boards did not act with due care and that they acted in bad faith.

More important, Moody Jr. did not plead particularized facts showing that the directors breached their duty of good faith. Moody Jr. makes numerous conclusory and speculative statements in his pleading suggesting the directors may have been motivated by some interest other than a genuine attempt to advance the best interest of the corporations. None of these statements, however, satisfy the heightened

pleading standard that required Moody Jr. to plead particularized facts showing that the boards acted in bad faith by refusing his demand.²¹ *See* Del. Ct. Ch. R. 23.1; *Brehm*, 746 A.2d at 254.

Moreover, “[d]emonstrating that directors have breached their duty of loyalty by acting in bad faith goes far beyond showing a questionable or debatable decision on their part.” *Ironworkers*, 2015 WL 2270673, at *27. “In order to adequately allege

²¹ The following statements from Moody Jr.’s pleading are examples of these conclusory statements:

- National Western “did not take any of the actions which might reasonably be anticipated in view of the gravity of the charges.”
- “It is a shocking indictment of the conduct of the Boards, which could only be motivated by their desire to protect themselves in spite of what is in the best interests of the companies.”
- “[N]o one on the Boards was independent.”
- The boards were “heavily influenced by the Moody family.”
- The boards disregarded the governance deficiency that had been noted by Standard & Poor’s “in favor of their own interests.”
- The absence of an investigation report “raises a reasonable inference that the Boards did not want a thorough and independent committee to investigate and report on its findings, which would show the Boards['] wrongdoing.”
- “The very Boards that decided to engage in the unlawful business, conducted in Brazil throughout the 2000’s, has now decided it is not in the company’s best interest to pursue claims for losses arising from their misconduct.”
- “Consequently, the Boards’ decision to refuse the Plaintiff’s April 17, 2017, demand, could not be independent and disinterested because they were, at all times personally involved and vested in these transactions.”
- “Accordingly, the evidence will show that National Western’s refusal of the Plaintiff’s Demand was improper because the refusal was not based upon a disinterested, thorough, and impartial analysis of the misconduct alleged by Plaintiff, Robert L. Moody, Jr.”

bad faith demand refusal, a complaint must plead particularized facts showing that ‘the directors . . . acted with scienter, *i.e.*, with a motive to harm, or with indifference to harm that will necessarily result from the challenged decision—here, that decision being rejection of the Plaintiff’s demand.’” *Andersen v. Mattel, Inc.*, CV 11816-VCMR, 2017 WL 218913, at *5 (Del. Ch. Jan. 19, 2017). Moody Jr. did not plead with particularity facts showing that the directors acted with motive to harm or with reckless indifference when they voted to refuse his demand.

3. Moody Jr. did not plead particularized facts showing that the boards breached their duty of care.

Moody Jr. argues that the directors breached their fiduciary duty of care by failing to conduct a sufficient and independent investigation of the matters in his demand. Specifically, he argues that: (1) the boards did not secure independent advice about the legality of their practices and relied on advice of counsel about the legality of sales to residents of Argentina and Russia; (2) the boards did not interview any witnesses; (3) the boards considered only a package of materials provided to them at the joint board meeting; (4) the boards disregarded prior inquiries about their sales to residents of Argentina and Russia that raised red flags about their international business; and (5) the boards issued no investigation report or written analysis of their findings.

First, Moody Jr.'s pleading includes many conclusory statements that do not satisfy the heightened pleading burden under Rule 23.1.²² See Del. Ct. Chancery R. 23.1; *Brehm*, 746 A.2d at 254. Other facts were pleaded based upon “information and belief.”²³ Allegations pleaded on information and belief do not satisfy the

²² Moody Jr. included the following conclusory statements in his pleading regarding the alleged breach of the duty of care:

- “[B]ecause of fear of personal exposure and the significant influence of Ross Moody, the Boards did not independently, disinterestedly, or with due care in response to the Plaintiff’s demand.”
- “The Boards did not become sufficiently informed to make an independent business decision.”
- “The Boards did not inform themselves of material information reasonably available to them and conducted such an inadequate investigation in light of the seriousness of the demand, that the Court should infer a breach of the Boards’ duty of care.”
- “The Boards were mere passive recipients of a presentation orchestrated by Ross Moody and counsel.”

²³ Some facts pleaded on information and belief include:

- “Upon information and belief, the company knew the facts found by SUSEP and affirmed by the Board of Appeals, and continued to operate in Brazil anyway.”
- “Upon information and belief, the company knew or acted with reckless disregard as to whether its sales in Brazil were unlawful based upon any objective review of the facts and the law.”
- “Upon information and belief, neither of the Boards, nor anyone on their behalf interviewed any of the current members of the Boards, the relevant current and former officers of the company, the current or former heads of international sales, or any of the advisors who played a role in the underlying events.”
- “Upon information and belief, the Boards did not interview any of the Executive General Agents/Broker who manage the Company’s

heightened pleading requirement to plead with particularity. *Cf. Metro Commc'n Corp. BVI v. Advanced Mobilecomm Techs. Inc.*, 854 A.2d 121, 149 n.57 (Del. Ch. 2004) (rejecting allegations made on “information and belief” as insufficient to satisfy the burden to plead claims of fraud with particularity); *Nutt v. A.C. & S., Inc.*, 466 A.2d 18, 23 (Del. Super. Ct. 1983), *aff'd sub nom. Mergenthaler v. Asbestos Corp. of Am.*, 480 A.2d 647 (Del. 1984).

Moody Jr. argues that the directors breached their duty of care by relying on opinions of counsel relating to sales to residents in other countries. The minutes of the June 6, 2017 joint board meeting, which was attached to the director-defendants’ plea to the jurisdiction, showed that the boards considered the opinions of in-house counsel and Brazilian counsel, both of which concluded National Western had not acted unlawfully by selling life insurance to residents of Brazil. The minutes also noted that the boards had historically relied on and followed advice of counsel.

distribution network of international independent agents or any of the independent agents.”

- “Upon information and belief, the Boards did not consider the evidence illustrating National Western’s unlawful conduct in Brazil that led the company to stop accepting applications in Brazil and other markets.”
- “Upon information and belief, the Boards did not analyze the documentary history of the decisions to do business in Brazil.”
- “Upon information and belief, the Boards engaged no reasoned consideration of the evidence in support of the demand.”

Moody Jr.'s argument is that it was improper for the boards to rely on advice of counsel.

To satisfy the pleading requirement of Rule 23.1 in a case alleging breach of the duty of care in which

an expert has advised the board in its decisionmaking process, the complaint must allege particularized facts (not conclusions) that, if proved, would show, for example, that: (a) the directors did not in fact rely on the expert; (b) their reliance was not in good faith; (c) they did not reasonably believe that the expert's advice was within the expert's professional competence; (d) the expert was not selected with reasonable care by or on behalf of the corporation, and the faulty selection process was attributable to the directors; (e) the subject matter (in this case the cost calculation) that was material and reasonably available was so obvious that the board's failure to consider it was grossly negligent regardless of the expert's advice or lack of advice; or (f) that the decision of the Board was so unconscionable as to constitute waste or fraud.

Brehm, 746 A.2d at 262. Moody Jr.'s live pleading does not meet these pleading requirements.

Moody also argues—and pleads—that the investigation was insufficient for lack of interviews, consideration of only certain documents, and failure to prepare a report of the investigation. These arguments and the factual allegations in the pleading are about the method the boards used to consider Moody Jr.'s demand. However, “while a board of directors has a duty to act on an informed basis in responding to a demand,” “there is obviously no prescribed procedure that a board must follow.” *Levine*, 591 A.2d at 214.

In addition, directors are required to “inform themselves, before making a business decision, of all material information reasonably available to them.” *Benihana*, 891 A.2d at 192. Moody Jr. did not plead which specific facts could have been shown by the interviews he contends should have been conducted, nor did he make any such argument on appeal. In this case, all the parties agree that National Western sold insurance policies to residents of Brazil, without a Brazilian license, by accepting, through independent brokers, applications that were received in Texas and issuing the policies in Texas. Moody Jr. contends that this was a violation of Brazilian law, based on the administrative penalty assessed by SUSEP and affirmed as modified by CRNSP. The directors, however, relying on advice of both U.S. and Brazilian counsel, maintained that National Western’s business model did not violate Brazilian law because it did not operate in Brazil or sell insurance in Brazil. Moody Jr. has not shown how further investigation of facts would have informed the boards’ decision to refuse his demand.

Finally, Moody Jr. pleaded that the boards failed to perform a detailed review of the ongoing Brazilian criminal investigation. He asserted that the directors breached their fiduciary duty by failing to conduct a meaningful analysis of the SUSEP opinion and by failing to investigate and refute the facts on which SUSEP based the fine. However, the issues in this case were based on facts that no party disputed. The boards took a legal position based on advice of counsel with which

Moody Jr. disagreed. That is not evidence of breach of the duty of care. *See Caremark*, 698 A.2d at 967 (holding that compliance with directors' duty of care cannot be determined by considering correctness of board decision).

4. The defendants' jurisdictional evidence supports a finding that the directors complied with the business judgment rule.

In addition to considering Moody Jr.'s pleadings, we may also consider the defendants' jurisdictional evidence, which showed that the boards of National Western and Group met jointly, considered evidence regarding business practices in Brazil, legal advice from counsel, the SUSEP and CRNSP decisions, and evidence of longstanding animosity between Moody Jr. and Ross. The boards also considered the fact of the ongoing criminal investigation and how acceding to Moody Jr.'s demands would affect National Western in that investigation. *See South v. Baker*, 62 A.3d 1, 25 (Del. Ch. 2012) (pursuing a derivative claim based on breach of the duty of care "during the pendency of the underlying litigation or governmental investigation may well compromise the corporation's position on the merits"). Having considered the available evidence that was material to Moody Jr.'s demands, the boards voted to refuse his demands, with Ross not participating in the vote. This jurisdictional evidence supports a finding that the business judgment rule applies in this case to bar Moody Jr.'s suit. *See Emerald Partners*, 787 A.2d at 90.

5. Moody Jr. was not entitled to supplement his pleading with facts that he learned during the litigation.

Finally, in the alternative, Moody Jr. argues that the trial court erred by denying him the opportunity to amend his pleading. He contends that while the pleas to the jurisdiction were pending, he learned that National Western had decided to end sales to non-U.S. residents. From that, he reasons that the directors acted in bad faith by denying his demands but later acceding to one of them.

In his April 2017 demand letter, Moody Jr. demanded that “National Western Life Insurance Group or its subsidiaries cease and desist from selling any insurance in any foreign jurisdiction without a proper license or authorization.” Minutes from the April 2018 meeting of the board of directors of National Western show that, due to “the various political, social, economic, and increasing regulatory issues impacting the markets,” senior management recommended that the company “cease accepting applications for the Company’s international products and instead focus the Company’s resources on the development of the foreign nationals market.”

The trial court denied Moody Jr.’s request to amend his pleading on the ground that amendment would be futile. We agree. Nothing in the facts that Moody Jr. alleges to have newly discovered would change the analysis on whether the directors satisfied the business judgment rule. *See Brehm*, 746 A.2d at 260 (“It is the essence of the business judgment rule that a court will not apply ²⁰/₂₀ hindsight to second guess a board’s decision . . .”).

* * *

Having concluded that Moody Jr. failed to meet the heightened pleading requirement of Rule 23.1 to plead a claim for wrongful refusal of his demand, that the appellees demonstrated with unrebutted jurisdictional evidence that the boards' refusal of Moody Jr.'s demand was a valid exercise of sound business judgment, and that repleading would be futile, we hold that the trial court correctly granted the pleas to the jurisdiction. We overrule Moody Jr.'s first issue.

II. The trial court did not abuse its discretion by awarding attorney's fees to National Western and Group.

In his second issue, Moody Jr. challenges the trial court's award of attorney's fees to National Western and Group. He specifically challenges the trial court's use of a summary proceeding to award attorney's fees and the sufficiency of the evidence to support the award.

A. Moody Jr. preserved error regarding the denial of a trial on attorney's fees.

On original submission, we concluded that Moody Jr. had not preserved error as to his challenge to the award of attorney's fees because he did not obtain an explicit ruling on a request for an evidentiary trial on attorney's fees. On rehearing, Moody Jr. argues that his appellate issue was preserved by an implicit ruling. He contends that his request was apparent from the record and context of proceedings and that the trial court's judgment awarding attorney's fees without a contested

evidentiary hearing was an implicit denial of his request for a trial on attorney's fees. We agree.

Generally, to preserve a complaint for appellate review, a party must make the complaint known to the trial court by "a timely request, objection, or motion that . . . stated the grounds for the ruling that the complaining party sought from the trial court with sufficient specificity to make the trial court aware of the complaint, unless the specific grounds were apparent from the context" TEX. R. APP. P. 33.1(a). The party generally must also obtain a ruling on "the request, objection, or motion, either expressly or implicitly." *Id.*

In this case, Moody Jr. requested a trial on attorney's fees no less than four times: (1) in response to the corporate defendants' "application" for expenses and attorney's fees; (2) at the hearing on the motion to vacate and application for expenses and attorney's fees; (3) in briefing filed about a week after the hearing; and (4) in a written objection filed five days before the hearing set for entry of final judgment. Moody Jr. asserted that a summary proceeding was improper absent a motion for summary judgment and repeatedly asked for a bench trial and, later, a jury trial. He specifically argued that a trial was required to resolve questions of fact relating to the corporate defendants' entitlement to attorney's fees and the reasonableness of the fees to be awarded.

First, in his response to the corporate defendants' "application" for attorney's fees and expenses, Moody Jr. asserted:

[D]efendants have . . . filed an application supported by affidavit testimony for attorney's fees. This is the improper procedure for attorney's fees [D]efendants request cannot be determined by motion. Plaintiff is entitled to a bench trial on Plaintiff's claim for expenses and attorney's fees; specifically, on the issues of whether this suit was brought for an improper purpose and the reasonableness of the amount of any fees and expenses."

Second, at the hearing set for the "application" for attorney's fees and expenses, as well as for Moody Jr.'s motion to vacate the order granting the pleas to the jurisdiction, Moody Jr. argued that, as to the attorney's fees, "a bench trial is actually required." Third, after the hearing, and before the trial court ruled, Moody Jr. filed supplemental briefing entitled, "Plaintiff's Supplemental Briefing in Support of Plaintiff's (1) Motion to Vacate the Court's Order on the Pleas to the Jurisdiction Based on Concealment of Material Facts, (2) Response to Defendants' Request for Attorney's fees, and (3) Request for Attorney's fees." Moody Jr. again argued that a bench trial was required. He relied on *Campbell v. Walker*, No. 14-96-01425-CV, 2000 WL 19143, at *7 (Tex. App.—Houston [14th Dist.] Jan. 13, 2000, no pet.), in which the Fourteenth Court of Appeals reversed due to the trial court's failure to conduct a bench trial on a counterclaim for attorney's fees and expenses. Moody Jr. argued, "This is exactly what Plaintiff is requesting—a bench trial on whether this suit was brought for an improper purpose and the reasonableness of the

expenses.” He further argued that “the issues have to be determined in accordance with the rules of procedure by (1) a motion for summary judgment . . . or (2) by trial.”

Fourth and finally, five days before the hearing set for entry of final judgment, Moody Jr. filed “Plaintiff’s Objections to Proposed Final Judgment and Plaintiff’s Objection to Proposed Order on Attorney’s fees.” He objected to the entry of an order or judgment relating to attorney’s fees, arguing that the “reasonableness of attorney’s fees cannot be decided without a trial,” and that “the reasonableness of attorney’s fees is a fact question for the jury’s determination.” He further argued that, having paid the jury fee, he did not waive his right to a jury trial on attorney’s fees.

The trial court did not expressly rule on Moody Jr.’s requests or objections, but it entered final judgment awarding attorney’s fees to the corporate defendants without holding an evidentiary hearing or a trial on the merits of the counterclaim for attorney’s fees. This implicitly overruled Moody Jr.’s objection and implicitly denied his requests.

B. The trial court did not err by ruling based on written filings.

Having concluded that this issue was preserved for appeal, we must consider the merits of Moody Jr.’s issue, which we did not determine on original submission. In his brief, Moody Jr. argued that denial of a trial on attorney’s fees was reversible

error. He asserted that section 21.561 was not a fee-shifting statute that enabled a prevailing party to obtain reasonable and necessary attorney's fees. He also argued that section 21.561 was penal in nature, and the court was required to afford him due process in the form of an evidentiary hearing on his state of mind.

“On termination of a derivative proceeding, the court may order . . . the plaintiff to pay expenses the corporation or other defendant incurred in investigating and defending the proceeding if the court finds the proceeding has been instituted or maintained without reasonable cause or for an improper purpose” TEX. BUS. ORGS. CODE § 21.561(b)(2). Moody Jr. argues that this statute goes beyond “a mere fee shift.” We agree. Section 21.561(b)(2) requires the movant to demonstrate that the lawsuit was brought without reasonable cause or for an improper purpose. *See id.* Whether a case was filed without reasonable cause or for an improper purpose is a question of law for the court. *See Campbell*, 2000 WL 19143, at *4. Moody Jr. contends that by granting the motion based on the writings, as opposed to live testimony, the trial court treated section 21.561 as a fee shift. This argument ignores the argument and evidence as to lack of reasonable cause and improper purpose that was included in and attached to the motion for expenses.

Moody Jr. also argues that it was improper for National Western and Group to ask the court to take judicial notice of the contents of the case file. This court has previously held that a trial court did not abuse its discretion by denying a motion for

expenses in a derivative suit based in part on the court’s familiarity with the case. *Pace v. Jordan*, 999 S.W.2d 615, 626 (Tex. App.—Houston [1st Dist.] 1999, pet. denied) (“The trial court was privy to all the arguments made by all the parties in consideration of the interlocutory summary judgment. Based on this record, and on the trial court’s obvious familiarity with this suit, we cannot say that the trial court abused its discretion in denying expenses.”).

In addition to his arguments about the nature of the section 21.561, Moody Jr. argues that the trial court’s failure to hold an evidentiary hearing on the motion for expenses deprived him of due process. Due process requires notice and a meaningful opportunity to be heard. *See Mathews v. Eldridge*, 424 U.S. 319, 349 (1976); *Univ. of Tex. Med. Sch. at Hous. v. Than*, 901 S.W.2d 926, 930 (Tex. 1995). Moody Jr. had notice of the motion for expenses and the hearing thereon. He had a meaningful opportunity to be heard by filing a written response, by raising his concerns at the hearing, and by filing additional briefing after the hearing, which the court invited the parties to do. The court stated on the record that it would read and study everything the parties filed.

Moody Jr.’s reliance on authority in which sanctions were sought under Rule of Civil Procedure 13 is misplaced because unlike Rule 13, section 21.561 does not expressly require a hearing. *Compare* TEX. BUS. ORGS. CODE § 21.561(b)(2) (“On termination of a derivative proceeding, the court may order . . . the plaintiff to pay

expenses the corporation or other defendant incurred in investigating and defending the proceeding if the court finds the proceeding has been instituted or maintained without reasonable cause or for an improper purpose”), *with* TEX. R. CIV. P. 13 (“If a pleading, motion or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, after notice and hearing, shall impose an appropriate sanction available under Rule 215, upon the person who signed it, a represented party, or both.”) (Emphasis added).

In *Rohrmoos Venture v. UTSW DVA Healthcare, LLP*, 578 S.W.3d 469, 503 (Tex. 2019), the Texas Supreme Court explained that “satellite litigation as to attorney’s fees” is disfavored:

The fact finder will generally not benefit from attorneys cross-examining each other point-by-point on every billable matter. *See Hensley [v. Eckerhart]*, 461 U.S. [424, 437 (1983)] (“A request for attorney’s fees should not result in a second major litigation. Ideally, of course, litigants will settle the amount of a fee. Where settlement is not possible, the fee applicant bears the burden of establishing entitlement to an award and documenting the appropriate hours expended and hourly rates.”). Parties should use discovery and pretrial procedure to evaluate attorney’s fee claims and the evidence supporting them, then present to the fact finder the evidence relevant to determining a reasonable and necessary fee as discussed in this opinion.

578 S.W.3d at 503.

Moody Jr. had notice and multiple meaningful opportunities to be heard in regard to the motion for expenses filed by National Western and Group. We

conclude that the trial court did not deprive Moody Jr. of due process by denying his request for a trial on attorney's fees.

C. Sufficient evidence supports the trial court's award of attorney's fees.

Having concluded that the trial court did not deprive Moody Jr. of due process, we now consider the merits of his challenges to the sufficiency of the evidence to support the attorney's fee award.

1. Standard of review

"Texas has long adhered to the American Rule with respect to awards of attorney's fees, which prohibits the recovery of attorney's fees from an opposing party in legal proceedings unless authorized by statute or contract." *Tucker v. Thomas*, 419 S.W.3d 292, 295 (Tex. 2013). "On termination of a derivative proceeding, the court may order . . . the plaintiff to pay expenses the corporation or other defendant incurred in investigating and defending the proceeding if the court finds the proceeding has been instituted or maintained without reasonable cause or for an improper purpose . . ." TEX. BUS. ORGS. CODE §21.561(b)(2). We review a trial court's award of fees in a derivative action for an abuse of discretion. *See J.C. Penney Co., Inc. v. Ozenne*, 453 S.W.3d 509, 512–13 (Tex. App.—Dallas 2014, pet. denied). A trial court abuses its discretion by acting in an arbitrary or unreasonable manner or without reference to any guiding rules or legal principles. *K-Mart Corp.*

v. Honeycutt, 24 S.W.3d 357, 360 (Tex. 2000); *Worford v. Stamper*, 801 S.W.2d 108, 109 (Tex. 1990) (per curiam).

Under an abuse-of-discretion standard, legal and factual insufficiency are not independent grounds of error; they are relevant factors in assessing whether the trial court abused its discretion. *In re J.J.G.*, 540 S.W.3d 44, 55 (Tex. App.—Houston [1st Dist.] 2017, pet. denied); *Ozenne*, 453 S.W.3d at 513. We consider whether the trial court had sufficient information upon which to exercise its discretion and whether it erred in its application of discretion. *J.J.G.*, 540 S.W.3d at 55; *Ozenne*, 453 S.W.3d at 513. No abuse of discretion occurs when there is some probative evidence to support the trial court’s decision. *J.J.G.*, 540 S.W.3d at 55; *Ozenne*, 453 S.W.3d at 513.

When no findings of fact or conclusions of law are requested or filed, we imply all facts necessary to support the judgment that are supported by the evidence. *BMC Software Belg., N.V. v. Marchand*, 83 S.W.3d 789, 795 (Tex. 2002); *Worford*, 801 S.W.2d at 109; *Ozenne*, 453 S.W.3d at 513. We will affirm the trial court’s judgment if it can be upheld on any legal theory finding support in the evidence. *Worford*, 801 S.W.2d at 109; *Ozenne*, 453 S.W.3d at 513.

2. Probative evidence supports the trial court's implied finding that Moody Jr.'s suit was filed without reasonable cause and was filed for an improper purpose.

Moody Jr. argues that the evidence does not support a finding that he filed his lawsuit without reasonable cause or for an improper purpose. The trial court did not issue findings of fact on improper purpose or lack of reasonable cause, but we may imply such findings if they are supported by the record. *See BMC Software*, 83 S.W.3d at 795; *Worford*, 801 S.W.2d at 109; *Ozenne*, 453 S.W.3d at 513. In this case, they are.

Section 21.561(b)(2) permits a court to order an award of attorney's fees if it finds that the suit was either instituted without reasonable cause or for an improper purpose. TEX. BUS. ORGS. CODE § 21.561(b)(2). National Western and Group attached evidence to support such findings to their application for expenses. In particular, they attached the response to Moody Jr.'s April 17, 2017 demand letter and text messages from Moody Jr. to his brother Ross.

The response to the demand letter states that Moody Jr.'s demands are meritless, the practice of selling insurance to people living outside the United States was a well known company business practice, National Western had obtained legal opinions regarding the propriety of its business practices, and the company had paid the Brazilian fine under protest and disclosed the Brazilian legal issues to shareholders. The letter also described the disputes among the family and

intertwined with the family’s charitable and business interests. And it asserted that a lawsuit “based on personal grievances” would be sanctionable and would tarnish the family reputation.

Nevertheless, the boards investigated the allegations made in Moody Jr.’s demand letter, and they responded to him. National Western and Group permitted Moody Jr.’s counsel to examine the materials that the boards reviewed at the joint meeting to consider his demand. When he filed suit, Moody Jr. was aware that the boards had met and considered material information and determined that initiating a suit would injure the company and the shareholders.²⁴

Moody Jr. was also aware that National Western was under criminal investigation and that it had relied on advice of U.S. and Brazilian legal counsel in maintaining that it did not operate in Brazil and that its activities were lawful. This should have put him on notice that filing suit accusing the directors of unlawful action could harm National Western and Group shareholders by contradicting the company’s position. *See South*, 62 A.3d at 23–24 (pursuing derivative claim “during

²⁴ The letter sent in response to Moody Jr.’s demand letter stated: “The Directors are firmly of the belief that no benefit to National Western could come from their authorizing the company to file a lawsuit challenging [National Western’s] own conduct and business model as illegal, particularly where, as here, the Boards believe in good faith that [National Western’s] business model is legal. Such a lawsuit would injure [National Western] and damage [Group’s] shareholders by effectively eliminating [National Western’s] issuance of policies to citizens of other countries—a highly profitable part of [National Western’s] business.”

the pendency of the underlying litigation or a governmental investigation may well compromise the corporation's position on the merits").

In addition, reasonable presuit inquiry would have revealed that National Western had not concealed the Brazilian fine from its stockholders and that it had already begun disengaging from the practice of selling insurance to non-U.S. residents, including Brazilians. Both of these matters were documented in the materials reviewed by the boards before they rejected Moody Jr.'s demand and provided to Moody Jr. before he filed suit.

In this case, the evidence shows that a reasonable presuit inquiry would have revealed that there was no basis in fact to allege that rejection of Moody Jr.'s demand was a result of gross negligence. *See Hughes v. Hous. Nw. Med. Ctr., Inc.*, 680 S.W.2d 838, 843 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.) (holding, under predecessor statute with identical fee shifting language, that evidence was sufficient to show that suit was initiated without reasonable cause because “[a] reasonable inquiry by plaintiffs before suit would have revealed no reasonable cause to bring a derivative suit”); *Bass v. Walker*, 99 S.W.3d 877, 885 (Tex. App.—Houston [14th Dist.] 2003, pet. denied) (holding, under predecessor statute with identical fee shifting language, that plaintiff initiates suit without reasonable cause when his claims are not warranted by existing law or good faith argument for

extension, modification or reversal of existing law or when his allegations are not well grounded in fact after reasonable inquiry).

The evidence also supports a finding that the suit was filed for an improper purpose. First, text messages from Moody Jr. to Ross and Moody-Dahlberg that were attached to the pleas to the jurisdiction and the motion for expenses described, in sometimes caustic and vulgar language, Moody Jr.'s disappointment and anger over being excluded from a position as trustee of the Moody Foundation. *See Pace v. Jordan*, 999 S.W.2d 615, 626 (Tex. App.—Houston [1st Dist.] 1999, pet. denied) (considering summary judgment evidence regarding the business judgment rule to determine whether trial court abused its discretion by denying attorney's fees under predecessor statute for derivative suits). The text messages also described Moody Jr.'s preoccupation with serving in a high position with the Moody Foundation or the Moody Endowment. In addition, the text messages included his heated response when he learned that certain recreational benefits associated with business travel had been discontinued. After that, he threatened to file a derivative suit regarding National Western. This is some evidence that Moody Jr. filed the derivative suit due to personal animus, which is an improper purpose for filing a shareholder derivative suit.

Second, in January 2017, before sending the demand letter, Moody Jr. sent a letter to Ross and National Western. The letter accused Ross of engaging in unlawful

conduct in connection with sales of insurance to non-U.S. citizens. Moody Jr.'s accusations were not limited to matters involving National Western.²⁵ Moody asked a number of questions that were not related to National Western, sales of life insurance to residents of foreign countries, or the SUSEP fine. Instead, he asked about the audit committee, the Moody Foundation, other Moody family-related entities, and communications with other family members. Although his accusations and questions cast a wide net, Moody Jr. concluded by threatening a derivative lawsuit and “initiation of litigation” by “multiple law firms, both in Texas and internationally” that had already been retained. In April 2017, Moody initiated the derivative lawsuit.

The text messages and the January 2017 letter are probative evidence that supports to support the trial court's implied finding that the suit was brought for an improper purpose. *See J.J.G.*, 540 S.W.3d at 55; *Ozenne*, 453 S.W.3d at 513.

3. Probative evidence supports a conclusion that fees awarded were incurred in investigating and defending the proceeding.

Relying on *Nath v. Texas Children's Hospital*, 446 S.W.3d 355 (Tex. 2014), Moody Jr. argues that there is no or insufficient evidence of a nexus between the amount of the fees awarded and his shareholder derivative suit. *Nath* was an appeal from “one of the highest monetary sanctions awards in Texas history stemming from

²⁵ “This is not the kind of leadership which the Moody *family* can tolerate.” (Emphasis added.)

baseless pleadings and one of the largest such awards in the United States.” *Nath*, 446 S.W.3d at 358.

Nath was a plastic surgeon employed by Baylor College of Medicine and affiliated with Texas Children’s Hospital. *Id.* at 359. After his faculty appointment was not renewed, Nath sued Baylor, the Hospital, and his supervisor asserting multiple causes of action, including: (1) defamation, (2) tortious interference with business relations, (3) negligent supervision and training, (4) and a request for a declaratory judgment regarding the actions of his supervisor. *Id.* The procedural history is complicated as the litigation spanned four years. *Id.* The trial court eventually sanctioned Nath, who was an active participant in the litigation, for pursuing “time-barred claims and irrelevant issues in order to leverage a more favorable settlement.” *Id.* at 361. Nath was ordered to pay Baylor’s attorney’s fees, the court of appeals affirmed, and Nath appealed to the Supreme Court of Texas. *Id.*

The Supreme Court of Texas said that there must be a “direct nexus between the offensive conduct, the offender, and the sanction award.” *Id.* (citing *TransAmerican Natural Gas Corp. v. Powell*, 811 S.W.2d 913, 917 (Tex. 1991)). *Nath* concerned a sanction issued pursuant to the general standards in Chapter 10 of the Texas Civil Practice and Remedies Code and Texas Rule of Civil Procedure 13, not section 21.561 of the Texas Business Organizations Code. Section 21.561 is not a general sanctions statute—it is specific to shareholder derivative suits. TEX. BUS.

ORGS. CODE § 21.561(b) (“On termination of a derivative proceeding, the court may order . . . the plaintiff to pay expenses the corporation . . . incurred in investigating and defending the proceeding if the court finds the proceeding has been instituted or maintained without reasonable cause or for an improper purpose.”). In cases in which sanctions are applied under a more general rule or statute, a plaintiff may bring more than one cause of action, and he may assert different causes of action against different defendants. *See Nath*, 446 S.W.3d at 358. In *Nath*, the sanctions were granted based on some but not all of the claims made in that case. *Id.* In a derivative proceeding, a plaintiff institutes suit on behalf of the corporation. *See* TEX. BUS. ORGS. CODE § 21.551(1); *Sneed v. Webre*, 465 S.W.3d 169, 178 (Tex. 2015). If a derivative suit is wrongfully brought, either because it was filed without reasonable cause or for an improper purpose, then the costs of investigating and defending the suit are necessarily incurred because of the wrongful conduct of instituting suit. Thus, the “nexus” that Moody Jr. asserts must be shown is already incorporated into the “payment of expenses” statute.

National Western and Group provided as evidence extensive, detailed, contemporaneous billing records that showed what specific services were performed, who performed those services, approximately when those services were performed, the amount of time required to perform the services, and the hourly rate for each person performing such services. They also provided information regarding

the experience and qualifications of each attorney whose work was included in the billing records. The defendants' attorneys' affidavits expressly stated that the contemporaneous billing records reflected the amount of time and fees that were reasonably necessary to represent the defendants. They also proffered evidence in the form of affidavit testimony and news articles regarding the reasonableness of hourly rates for attorney's fees generally charged in the area. To the extent that Moody Jr. now attempts to object to the affidavits, such objection is waived by his failure to obtain a ruling from the court. *See Mansions in the Forest, L.P. v. Montgomery Cty.*, 365 S.W.3d 314, 317 (Tex. 2012); TEX. R. APP. P. 33.1.

The lodestar evidence supplied by National Western and Group was of the type, quality, and quantity of evidence that the Texas Supreme Court has repeatedly held is sufficient to prove reasonable and necessary attorney's fees. *See Rohrmoos Venture*, 578 S.W.3d at 498; *El Apple I, Ltd. v. Olivas*, 370 S.W.3d 757, 760 (Tex. 2012). Under our standard of review, we conclude that the trial court had sufficient information upon which to exercise its discretion when it ruled on the motion for expenses. *See J.J.G.*, 540 S.W.3d at 55; *Ozenne*, 453 S.W.3d at 513. We hold that the trial court did not abuse its discretion by awarding attorney's fees for trial to National Western and Group because there was some probative evidence to support its decision. *See J.J.G.*, 540 S.W.3d at 55; *Ozenne*, 453 S.W.3d at 513.

D. The trial court should have conditioned the award of appellate attorney's fees on success.

Moody Jr. argues that the trial court erred by awarding the defendants appellate attorney's fees not conditioned on success on appeal. We agree. "An unconditional award of appellate attorney's fees is improper." *Austex Tree Serv., Inc. v. UniFirst Holdings, Inc.*, No. 01-18-00050-CV, 2019 WL 2621732, at *9 (Tex. App.—Houston [1st Dist.] June 27, 2019, no pet.) (mem. op.); see *Ansell Healthcare Prods., Inc. v. United Med.*, 355 S.W.3d 736, 745 (Tex. App.—Houston [1st Dist.] 2011, pet. denied). The appellees have conceded error on this subsidiary issue. "Since an unconditional award of appellate attorney's fees does not require reversal, we may modify a trial court's judgment to make the award of appellate attorney's fees contingent upon the receiving party's success on appeal." *Austex Tree Serv.*, 2019 WL 2621732, at *9; see *Ansell*, 355 S.W.3d at 745. Accordingly, we hold that the trial court erred by awarding "the reasonable and necessary appellate fees set forth in the Court's November 14, 2018 Order in the event that Plaintiff appeals this judgment." We sustain Moody Jr.'s second issue in part, and we modify the judgment as follows:

2. It is further ORDERED that Plaintiff Robert L. Moody, Jr. pay to National Western Life Insurance Co. and National Western Life Group, Inc. the following sums:

- (a) Reasonable and necessary appellate attorney's fees of \$250,000.00 in the event of an appeal to the intermediate court of appeals unless Moody Jr. prevails in the court of appeals and petition for review is not granted by the Texas Supreme Court or unless Moody Jr. prevails in the Texas Supreme Court.

- (b) Reasonable and necessary appellate attorney’s fees of \$65,000.00 in the event of any appeal involving briefing related to a petition for review at the Texas Supreme Court unless Moody Jr. prevails in the Texas Supreme Court.
- (c) Reasonable and necessary appellate attorney’s fees of \$125,000.00 in the event of any merits briefing at the Texas Supreme Court (whether before or after a petition for review is granted) unless Moody Jr. prevails in the Texas Supreme Court.
- (d) Reasonable and necessary appellate attorney’s fees of \$65,000.00 in the event of any oral argument and related procedures at the Texas Supreme Court if a petition for review is granted unless Moody Jr. prevails in the Texas Supreme Court.

III. The trial court did not err by dismissing Moody Jr.’s contract claim because it was not justiciable.

On appeal, Moody Jr. argues that the trial court erred by dismissing his claim for declaratory judgment regarding the managing general agent contract. On appeal, he argues that his counterclaim was not moot because it had greater ramifications than the defendants’ nonsuited claim for breach of contract.

“A declaratory judgment is available only when there is a justiciable controversy between the parties.” *Hous. Chronicle Publ’g Co. v. Thomas*, 196 S.W.3d 396, 401 (Tex. App.—Houston [1st Dist.] 2006, no pet.) (citing *Brooks v. Northglenn Ass’n*, 141 S.W.3d 158, 163–64 (Tex. 2004)). “A declaratory-judgment action does not give a court jurisdiction ‘to pass upon hypothetical or contingent situations, or to determine questions not then essential to the decision of an actual

controversy, although such questions may in the future require adjudication.” *Tesco Corp. (US) v. Steadfast Ins. Co.*, No. 01-13-00091-CV, 2015 WL 456466, at *2 (Tex. App.—Houston [1st Dist.] Feb. 3, 2015, pet. denied) (mem. op.) (quoting *Bexar Metro. Water Dist. v. City of Bulverde*, 234 S.W.3d 126, 130–31 (Tex. App.—Austin 2007, no pet.)). “Justiciability is a matter of concern in every civil case and remains a live concern from the first filing through the final judgment.” *Heckman*, 369 S.W.3d at 147. For an issue to be justiciable, “there must be a real controversy between the parties that will be actually resolved by the judicial relief sought.” *State Bar of Tex. v. Gomez*, 891 S.W.2d 243, 245 (Tex. 1994).

In the trial court, Moody Jr. argued that dismissal of his declaratory judgment counterclaim would deny him due process because his request for interpretation of the managing general agent contract was not related to the shareholder derivative suit and because “other controversies may arise involving this contract.” He argued that interpretation of the contract had “ramifications entirely separate from” his right to bring a shareholder derivative suit. Because the only ramification identified in the trial court or on appeal is the potential for future controversies to arise involving the contract, we conclude that Moody Jr.’s declaratory judgment claim was no longer a live controversy after the court granted the pleas to the jurisdiction. Because resolution of the declaratory judgment claim would require the trial court to determine a hypothetical or contingent question, the claim was no longer justiciable.

See Tesco Corp., 2015 WL 456466, at *2; *Bexar Metro. Water Dist.*, 234 S.W.3d at 130–31.

Accordingly, we hold that the trial court correctly dismissed Moody Jr.’s declaratory judgment claim. We overrule Moody Jr.’s third issue.

Conclusion

We modify the judgment to condition the award of appellate attorney’s fees on success in the appellate court, and as modified we affirm the trial court’s judgment.

Peter Kelly
Justice

Panel consists of Justices Kelly, Goodman, and Countiss.