Reversed in Part; Affirmed in Part; Remanded; and Opinion filed June 4, 2020.

In The

Fourteenth Court of Appeals

NO. 14-18-01086-CV

BARBARA CARMICHAEL, HUGH CARMICHAEL, MARY DOYLE, ED KIEKE, JOY BLEVINS, CHARLIE SCOTT, ANGELA SOLCE, DAVID SOLCE, DONNA YACOE, PETER YACOE, AND NICOLE MCNALLY, ON BEHALF OF COMMERCE TOWERS CONDOMINIUM ASSOCIATION, INC., Appellants

V.

TARANTINO PROPERTIES, INC., PREMIER TOWERS LP, ANTHONY TARANTINO, JOHN P. FRESE, CHARLES L. VICKERS, AND COMMERCE TOWERS CONDOMINIUM ASSOCIATION, INC., Appellees

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On Appeal from the 270th District Court
Harris County, Texas
Trial Court Cause No. 2017-73895

O P I N I O N

In this appeal from an order granting a plea to the jurisdiction, the plaintiff condominium owners argue that they have statutory and common-law standing to assert representative claims on behalf of the condominium owners' association. We

agree that they have statutory standing under Texas Business Organizations Code section 20.002(c)(2) to assert the association's *ultra vires* claims against the association's present or former officers or directors; however, we disagree that the condominium owners have standing to assert claims on the association's behalf on other grounds or against other defendants. Thus, we reverse in part, affirm in part, and remand the case for further proceedings consistent with this opinion.

I. FACTS

Appellee Premier Towers, LP,[1] established a condominium regime over most of a building it owns in Harris County, Texas; only the areas designated as "Retail Space" are excepted from the regime. The condominium regime consists of individually owned condominium "units," together with the non-retail space, which the individual unit owners own as tenants in common.

A. The defendants

Commerce Towers Condominium Association, Inc. ("the Association), is a nonprofit corporation formed to provide for the maintenance and preservation of the properties within the condominium development and to promote the unit owners' health and welfare. The Association's members consist solely of the condominium-unit owners, and the Association's three directors are appellant Barbara Carmichael and appellees John Patrick Frese and Larry Vickers. Frese, Vickers, and appellee Anthony J. Tarantino are the officers of both the Association and of Tarantino Properties, Inc. ("the Management Company"), which manages the condominium property pursuant to a Management Agreement. We refer to Frese, Vickers, and Tarantino collectively as "the Officers."

[1] Premier is referred to as Premier Towers, LP, in court documents but as Premier Tower, LP, in the Condominium Declaration.

B. The claims

Carmichael and certain other Association members ("the Carmichael Members"),[2] acting individually and on behalf of the Association, sued the Officers, Premier, and the Management Company (as well as the Association, as a nominal defendant), asserting the following claims:

1. Against the Officers alone for the following breaches of fiduciary duty:
   - (a) committing *ultra vires* acts by
     - (i) causing the Association to enter into a "Joint Use and Reciprocal Easements Agreement" ("JUA") with Premier so that Premier and its retail tenants could use and benefit from the common areas without paying a share of the costs to maintain and operate them;
     - (ii) causing the Association to enter into, and continually renew, a Management Agreement with the Management Company under which the Association pays the full-time salaries and benefits of the Management Company's employees who work only part-time for the Association; and
     - (iii) failing to maintain adequate reserves and deferring assessments and maintenance for the benefit of Premier and the Management Company;
   - (b) engaging in self-dealing transactions by
     - (i) personally profiting from the JUA, the Management Agreement, the payments to the Management Company, and the deferments and deficits;
     - (ii) acting in bad faith against the Association's interests; and
     - (iii) failing to exercise ordinary care;
   - (c) failing to exercise judgment by
     - (i) failing to negotiate the JUA with Premier;

[2] The Carmichael Members are appellants Barbara Carmichael, Hugh Carmichael, Mary Doyle, Ed Kieke, Joy Blevins, Charlie Scott, Angela Solce, David Solce, Donna Yacoe, Peter Yacoe, and Nicole McNally.

(ii) failing to consider other companies to manage the condominium properties;

(iii) refusing to allow the Association's board to vote on whether to renew the Management Agreement; and

(iv) refusing, in bad faith, to allow the Association's board to consider whether the Association should sue the Officers, Premier, or the Management Company;

2. Against Premier alone for

(a) trespass to try title over the Retail Space, which the Carmichael Members allege belongs to the Association's members as a result of the Condominium Declaration;

(b) receipt, by the Association on behalf of its members, of rent, profits, and damages from Premier's leasing operations; and

(c) equitable contribution from Premier for funds expended by the Association and its members to benefit the common estate;[3]

3. Against both Premier and the Management Company for

(a) breaching their own fiduciary duties to the Association and its members;

(b) aiding and abetting the Officers' respective breaches of fiduciary duties; and

(c) knowing participation in the Officers' respective breaches of fiduciary duties;

and

4. Against Premier, the Management Company, and the Officers for

(a) conspiring in the Officers' respective breaches of fiduciary duty, and

(b) unjust enrichment.

[3] This is an alternative claim asserted if the trial court determines that Premier owns the Retail Spaces.

C. The plea to the jurisdiction

The Officers and the Management Company challenged the Carmichael Members' derivative standing to assert claims on behalf of the Association, arguing that (1) the Texas Business Organizations Code confers derivative standing on shareholders of a for-profit corporation but not on members of a nonprofit corporation; (2) the condominium regime's governing documents authorize a unit owner to sue only to enforce the Condominium Declaration's provisions, and this is not such a suit; (3) they committed no *ultra vires* acts; and (4) Texas common law does not confer derivative standing upon members of nonprofit corporations.

The Carmichael Members responded that (1) Texas Business Organizations Code section 20.002(c)(2) authorizes members to sue a nonprofit corporation's officers or directors for exceeding that person's authority; (2) the *ultra vires* complaints are meritorious, but the court should not consider the merits of the claims when ruling on a plea to the jurisdiction; and (3) they have derivative standing under the common law.[4]

The trial court granted the plea, and although Premier did not join in the plea to the jurisdiction, the trial court dismissed all of the Carmichael Members' "representative claims and causes of action," including those brought against Premier.[5] The Carmichael Members then nonsuited the claims they had asserted in

[4] The Carmichael Members also argued in the trial court that section 16.6 of the Condominium Declaration prescribes the standard of conduct applicable to the Association's directors and officers and authorizes members of the Association to sue on its behalf. The cited provision does not discuss the right to sue, and the Carmichael Members do not reurge this argument on appeal.

[5] On appeal, the Carmichael Members do not argue that the trial court erred in including Premier among the movants, and in any event, a party can assert lack of standing for the first time during an appeal. *Tex. Ass'n of Bus. v. Tex. Air Control Bd*., 852 S.W.2d 440, 444–45 (Tex. 1993).

their individual capacities, and the order granting the plea to the jurisdiction merged into the trial court's final judgment dismissing the nonsuited claims.

In the sole issue presented, the Carmichael Members argue that the trial court erred in concluding that they lacked standing to sue the Officers, Premier, and the Management Company on the Association's behalf.

II. ANALYSIS

Standing is a constitutional prerequisite to maintaining suit. *Sneed v. Webre*, 465 S.W.3d 169, 179–80 (Tex. 2015). A court has no jurisdiction over a claim made by a party who lacks standing to assert it. *Gribble v. Layton*, 389 S.W.3d 882, 886 (Tex. 2012). We therefore analyze standing on a claim-by-claim basis. *See Heckman v. Williamson Cty.*, 369 S.W.3d 137, 153 (Tex. 2012).

To sufficiently plead standing, a plaintiff must allege that (1) the plaintiff has suffered a personal injury, (2) the injury is fairly traceable to the defendant's unlawful conduct, and (3) the injury is likely to be redressed by the requested relief. *See id.* at 154. To meet the injury requirement, the plaintiff must plead facts demonstrating that the plaintiff, rather than a third party or the public at large, suffered the injury. *Id.* at 155 (citing *S. Tex. Water Auth. v. Lomas*, 223 S.W.3d 304, 307 (Tex. 2007) (per curiam)).

Standing may by challenged through a plea to the jurisdiction, and we review the ruling on the plea de novo. *See id.* at 149–50. We first look to the pleadings to determine if the pleader has alleged facts that affirmatively demonstrate the court's jurisdiction to hear the cause. *See Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226 (Tex. 2004). We construe the pleadings liberally in favor of the plaintiff, look to the pleader's intent, and accept as true the unchallenged factual allegations in the pleadings. *See id.* If the issue is one of pleading sufficiency, the

plaintiff should be afforded the opportunity to amend unless the pleadings affirmatively negate jurisdiction. *Id*. at 227.

If the defendant challenges the plaintiff's factual allegations with supporting evidence, the standard of review mirrors that of a summary judgment. *See Sampson v. Univ. of Tex. at Austin*, 500 S.W.3d 380, 384 (Tex. 2016)."[I]f the relevant evidence is undisputed or fails to raise a fact question on the jurisdictional issue, the trial court rules on the plea to the jurisdiction as a matter of law." *Miranda*, 133 S.W.3d at 228. But "[i]f the evidence creates a fact question regarding the jurisdictional issue, then the trial court cannot grant the plea to the jurisdiction, and the fact issue will be resolved by the fact finder." *Id*. at 227–28.

A. Texas Business Organizations Code section 20.002(c)(2) confers derivative standing on the Carmichael Members to assert *ultra vires* claims on the Association's behalf against its current or former officers or directors.

Title 2 of the Texas Business Organizations Code addresses Texas law concerning corporations. Within the Code, chapter 20 contains general provisions; chapter 21 pertains to for-profit corporations; and chapter 22 deals with nonprofit corporations. The Officers, Premier, and the Management Company correctly point out that chapter 21 confers derivative standing on shareholders of for-profit corporations,[6] and that chapter 22 lacks a parallel provision conferring derivative standing on members of nonprofit corporations.

Chapter 20, however, applies to both for-profit and nonprofit corporations, and section 20.002(c)(2) provides in relevant part as follows:

> The fact that an act or transfer is beyond the scope of the expressed purpose or purposes of the corporation or is inconsistent with an expressed limitation on the authority of an officer or director may be

[6] *See* TEX. BUS. ORGS. CODE ANN. § 21.552.

> asserted in a proceeding . . . through members in a representative suit, against an officer or director or former officer or director of the corporation for exceeding that person's authority . . . .

TEX. BUS. ORGS. CODE ANN. § 20.002(c)(2). As the terms are used in this section, the Association is a "corporation"[7] and the Carmichael Members are "members."[8] Thus, this section grants the Carmichael Members standing to assert claims that the Association's present and former officers and directors Tarantino, Frese, and Vickers breached fiduciary duties to the Association by their *ultra vires* conduct.

In arguing to the contrary, the Officers, Premier, and the Management Company rely on *Tran v. Hoang*, 481 S.W.3d 313 (Tex. App.—Houston [1st Dist.] 2015, pet. denied), which did not address this issue. Our sister court held in *Tran* only that chapter 22 of the Texas Business Organizations Code does not confer derivative standing on members of a nonprofit corporation. Because the plaintiffs in that case did not assert *ultra vires* claims on behalf of a nonprofit corporation, the question of whether Chapter 20 conferred representative standing to bring such claims was neither presented nor addressed.

B. Disputed material facts concerning the ultra vires claims are intertwined with jurisdiction.

The Officers also assert that they did not commit any *ultra vires* acts, which is an argument about the merits of the Carmichael Members' claims. When the facts underlying the merits and subject-matter jurisdiction are intertwined, plaintiffs need only show that there is a disputed material fact regarding the jurisdictional issue. *Miranda*, 133 S.W.3d at 228.

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[7] *See id.* § 1.002(14) (defining "corporation" to include both for-profit and nonprofit corporations).

[8] *See id.* § 1.002(53)(B) ("member" includes "a person who has membership rights in the nonprofit corporation under its governing documents").

The Carmichael Members have met that requirement. They point out that Article IV of the Association's Articles of Incorporation states, "The Association is formed for the purposes of providing for the maintenance and preservation of all of the properties within Commerce Towers, a condominium development located in Harris County, Texas, and promoting the health and welfare of the unit owners within Commerce Towers . . . ."

The Condominium Declaration, however, excepts the Retail Space from the condominium regime; thus, the Retail Space arguably is not a property within "the condominium development." The Carmichael Members therefore have demonstrated a factual basis for their claim that the Officers, in causing the Association to provide for the maintenance and preservation of the Retail Space and in promoting the welfare of the retail tenants and their landlord, committed acts "beyond the scope of the purpose or purposes of the corporation as expressed in the corporation's certificate of formation"[9]

1. Corporation's purposes v. corporate Officers' powers

The Officers contend that they did not act outside the Association's *purposes* because they have the *power* to "exercise any and all powers, rights and privileges which a corporation organized under the Texas Non-Profit Corporation Act, the Texas Uniform Condominium Act, or any other laws of the State of Texas may now or hereafter have or exercise." But as the Third Court of Appeals has explained, the "purpose" clause and the "power" clause "play different roles," and of the two, "[t]he purpose clause is dominant. It, not the power clause, is the real measure of corporate

[9] *See* TEX. BUS. ORGS. CODE ANN. 20.002(b)(2); *see also id.* § 1.006(1) ("certificate of formation" is synonymous with "articles of incorporation").

authority." *Abbott v. Blue Cross & Blue Shield of Tex., Inc.*, 113 S.W.3d 753, 761 (Tex. App.—Austin 2003, pet. denied).

The preeminence of the purpose clause can be seen on the face of the Articles of Incorporation, which state that the Association has enumerated powers "for these purposes," that is, for the benefit of all the "properties" within the "condominium development." The Articles do not authorize officers or directors to use power for the benefit of their affiliates, particularly at the expense of the Association's members.

The importance of the corporation's stated purpose is also seen in section 20.002(c)(2), which used the disjunctive in conferring derivative standing on members of a nonprofit corporation to challenge an officer's or director's act that is "*beyond the scope of the expressed purpose* or purposes of the corporation *or* is inconsistent with an expressed limitation." Under the statute, members have standing to sue on behalf of the Association to challenge the *ultra vires* use of authorized powers for unauthorized purposes, and this is what the Carmichael Members have alleged.

2. Express limitations of the Officers' authority

The Carmichael Members also argue that the Officers contravened an express limitation of their authority set forth in Article X of the Articles of Incorporation. This provision allows the Association to contract or transact business with affiliates of its directors or officers, provided that (a) the interest in the affiliate is disclosed, and (b) the act is approved or ratified by a majority of the disinterested directors. The Officers maintain that this provision is not yet effective because Premier has a right to appoint two of the three board members until 75% of the units in the regime have been sold, at which time the board size will increase to five, all of whom must

be elected by the unit owners. The Officers say that as long as Premier controls the board, the board will be made up of "interested directors."

The Officers are mistaken. If the Association contracts or transacts business with an entity in which no director or officer has a financial stake or other interest, then there are no directors or officers interested in the transaction. The Association also can contract with an entity in which a director or officer appointed by Premier has a financial stake if the contract is approved by the majority of disinterested directors.

Currently, the Association's only disinterested director is Barbara Carmichael, and the Carmichael Members allege that the Association's two remaining directors—Vickers and Frese—refuse to fully disclose information about the Officers' financial conflicts of interest, or to allow a board meeting, or to vote on whether to renew the JUA and the Management Agreement. By these unchallenged factual allegations, the Carmichael Members have sufficiently pleaded conduct "inconsistent with an expressed limitation on the authority of an officer or director."[10]

3. TEX. BUS. ORGS. CODE ANN. § 22.230

Both sides in this appeal also argue about the effect of Texas Business Organizations Code section 22.230. That section provides that an "otherwise valid and enforceable contract" between a nonprofit corporation and an affiliate or associate of a director, officer or member is not void or voidable despite the interested party's involvement if the material facts about the interest are disclosed

[10] The Officers argue that this interpretation would prevent the Association from contracting with the developer—Premier—to finish the building. But, Article XV of the Condominium Declaration reserved to Premier a ten-year period in which it had the right to complete the development without seeking or obtaining the approval of the Association or its board of directors.

and "the contract or transaction is fair to the corporation when the contract or transaction is authorized, approved, or ratified by the board of directors, a committee of the board of directors, or the members." TEX. BUS. ORGS. CODE ANN. § 22.230(b). If this condition is satisfied, "neither the corporation nor any of the corporation's shareholders will have a cause of action" against the interested director, officer, member, or affiliate "with respect to the making, authorization, or performance of the contract or transaction." *Id.* § 22.230(e).

The Carmichael Members allege that the contracts are not fair to the corporation because, for example, the Management Agreement requires the Association to pay full-time salaries and benefits to the Management Company's employees who work part-time for the Association and part-time as Premier's leasing agents. Moreover, as previously discussed, the Carmichael Members allege that (a) the interested directors failed to fully disclose the Officers' financial conflicts of interest, and (b) the transactions were not approved by the sole disinterested director. Premier, the Officers, and the Management Company presented no evidence challenging any of these factual allegations. Because we must assume that unchallenged factual allegations are true,[11] we conclude that section 22.230 does not apply.

We conclude that Texas Business Organizations Code section 20.002(c)(2) confers derivative standing on the Carmichael Members to assert the Association's claims against its current or former officers or directors for acts or transfers that allegedly are (1) beyond the Association's expressed purposes, or (2) inconsistent with an expressed limitation on the officer or director's authority. We therefore hold that the trial court erred in dismissing the Carmichael Members' derivative claims

[11] *Miranda*, 133 S.W.3d at 226.

against the Officers for their allegedly *ultra vires* acts. We accordingly reverse that portion of the judgment.

C. The Carmichael Members do not have common-law standing to assert the Association's claims.

The Carmichael Members' claims against Premier and the Management Company are not claims against "an officer or director or former officer or director of the corporation." Similarly, their claims against the Officers for self-dealing and for failing to exercise judgment are not claims that the Officers committed acts beyond the scope of the Association's expressed purposes or that the Officers' actions are inconsistent with an expressed limitation on the Officers' authority. Thus, Texas Business Organizations Code section 20.002(c)(2) does not confer derivative standing on the Carmichael Members to bring these claims.

The Carmichael Members instead argue that they have derivative standing to assert these claims under the common law, particularly under the trio of cases *Cates v. Sparkman*, 73 Tex. 619, 11 S.W. 846 (1889), *superseded by statute as stated in Sneed v. Webre*, 465 S.W.3d 169 (Tex. 2015), *Mitchell v. LaFlamme*, 60 S.W.3d 123 (Tex. App.—Houston [14th Dist.] 2000, no pet.), and *Governing Board v. Pannill*, 561 S.W.2d 517 (Tex. App.—Texarkana 1977, writ ref'd n.r.e.). We do not find these arguments persuasive.

1. *Cates* and the history of general derivative standing

The Carmichael Members begin with the premise that the Supreme Court of Texas recognized circumstances in *Cates* in which "an individual stockholder of shares in an incorporated company" may bring, on behalf of all others similarly situated, an equitable suit against the corporation's officers and directors if the corporation actually or virtually refuses to sue. *See Cates*, 73 Tex. at 621, 11 S.W. at 849. *Cates* concerned only a for-profit corporation, and in 1973, the legislature

amended article 5.14 of the former Texas Business Corporation Act[12] to codify derivative standing on behalf of for-profit corporations.[13] The statutory enactment supplanted the equitable common-law theory. *Sneed*, 465 S.W.3d at 182–83. No such general derivative-proceedings provision was included in the Texas Non-Profit Corporation Act.

Thirty years later, the legislature adopted the Texas Business Organizations Code, which included both the former Texas Business Corporation Act and the former Texas Non-Profit Corporation Act.[14] Like its statutory predecessors, the Texas Business Organizations Code authorizes shareholders or members to bring a derivative suit for the *ultra vires* conduct of present or former officers or directors of nonprofit as well as for-profit corporations,[15] but confers more general derivative standing only upon shareholders of for-profit corporations.[16] The parties disagree about the effect of including such a general derivative-standing provision only in Texas For-Profit Corporation Law.[17]

According to the Officers, Premier, and the Management Company, the legislature's decision to include a general derivative-standing provision only as to

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[12] Texas Business Corporation Act, 54th Leg., R.S., ch. 64, art. 5.14, 1955 TEX. GEN. LAWS 239, 282.

[13] Act of May 26, 1973, 63d Leg., R.S., ch. 545, § 37, 1973 TEX. GEN. LAWS 1486, 1508–09 (amended 1997; expired 2010).

[14] Act of May 13, 2003, 78th Leg., R.S., ch. 182, § 1, 2003 TEX. GEN. LAWS 267, 267.

[15] *See* TEX. BUS. ORGS. CODE ANN. § 20.002 (applicable to both non-profit and for-profit corporations); Texas Non-Profit Corporation Act, 56th Leg., R.S., ch. 162, Art. 2.03(B)(2), 1959 TEX. GEN. LAWS 286, 290 (applicable to nonprofit corporations) (expired 2010); Texas Business Corporation Act, 54th Leg., R.S., ch. 64, Art. 2.04(B)(2), 1955 TEX. GEN. LAWS 239, 245 (applicable to for-profit corporations) (expired 2010).

[16] Act of May 13, 2003, 78th Leg., R.S., ch. 182, § 1, sec. 21.552, 2003 TEX. GEN. LAWS 267, 448–49 (amended 2005, 2011, & 2019).

[17] *See id.*; *see also* TEX. BUS. ORGS. CODE ANN. § 1.008(c).

for-profit corporations must be seen as deliberate. As the Supreme Court of Texas explained in *Sneed*, "'When the Legislature includes a right or remedy in one part of a code but omits it in another, that may be precisely what the Legislature intended,' and 'we must honor that difference." *Sneed*, 465 S.W.3d at 183 (quoting *PPG Indus., Inc. v. JMB/Hous. Ctrs. Partners Ltd. P'ship*, 146 S.W.3d 79, 84 (Tex. 2004)).

The Carmichael Members, on the other hand, argue that because general derivative standing to sue on behalf of a nonprofit corporation has not been codified, it is governed by the common law. But the Supreme Court of Texas rejected a similar argument in *Hunter v. Fort Worth Capital Corp.*, 620 S.W.2d 547 (Tex. 1981), to which we now turn.

2. *Hunter v. Fort Worth Capital Corp*.

Where *Cates* concerned the equitable theory of general derivative standing, *Hunter* concerns the equitable "trust fund theory." *See id.* at 549–50. The theory evolved because a corporation that had been dissolved could not sue or be sued, and to mitigate that result, the equitable trust-fund theory allowed a creditor of the dissolved corporation to pursue former corporate assets in the hands of shareholders or other third parties. *See id.* at 550.

In former Article 7.12 of the Texas Business Corporation Act, the legislature codified the equitable theory only as it applied to claims accruing before the company dissolved, allowing a claimant to sue the company up to three years after its dissolution. *See id.* at 548–49. In *Hunter*, however, work performed by the corporation before its dissolution allegedly injured the plaintiff more than a decade after the company was dissolved. The plaintiff in that case argued that because the Texas Business Corporation Act codified the trust fund theory only as applied to pre-dissolution claims, he could assert his post-dissolution claim under the common law. The Supreme Court of Texas disagreed, instead holding that Article 7.12

"expresse[d] a legislative policy to restrict the use of the trust fund theory to pre-dissolution claims." *Id.* at 551.

We conclude that the same reasoning applies here. Just as the plaintiff in *Hunter* argued that codification of an equitable theory as to only one class of claims left the common law intact as to those classes of claims not encompassed by the statute, the Carmichael Members argue that the legislature's codification of general derivative standing only as to for-profit corporations leaves the common law to govern general derivative standing as applied to nonprofit corporations. And just as the common law did not recognize two equitable trust fund theories—one applicable to pre-dissolution claims and one applicable to post-dissolution claims—it did not recognize separate equitable theories of general derivative standing applicable, respectively, to for-profit and nonprofit corporations. Indeed, *Cates* addressed general derivative standing to assert a *for*-profit corporation's claims, and the Carmichael Members apply it to a non-profit only by analogy. But as the Supreme Court of Texas explained in *Sneed*, equitable derivative standing as set forth in *Cates* has been supplanted by statute. *See Sneed*, 465 S.W.3d at 182 ("[W]hen the Legislature codifies common law corporate principles, '[t]he effect of these statutes was to supplant the equitable [common law] theory by declaring a statutory equivalent.'" (quoting *Hunter*, 620 S.W.2d at 550)).

We conclude that under the reasoning of *Hunter* and *Sneed*, the equitable theories of derivative standing on which the Carmichael Members rely are now wholly statutory, and we hold that they do not have general derivative standing under the common law. For the reasons explained below, the Carmichael Members' reliance on the cases of *Mitchell* and *Pannill* does not change our conclusion.[18]

[18] At oral argument, counsel for the Carmichael Members additionally argued that general derivative standing was codified only as to for-profit corporations to prevent abusive strike suits

3. Mitchell and *Pannill*

In *Mitchell*, townhome owners, acting solely in their individual capacities, sued their nonprofit owners' association for failure to maintain the common areas and exteriors of their homes, and seeking damages for (a) costs of repair of their homes' interiors, (b) loss of use, and (c) costs of repairs to the exteriors and the common areas. *Mitchell*, 60 S.W.3d at 126–27. The jury awarded damages in all three categories. *Id.* Unlike the present case, however, the owners' association in *Mitchell* owned the common areas. *Id.* at 128. This Court wrote, "We thus hold that recovery for damages done [to] the common areas belong solely to the Association, and to sue for those damages, the Owners were required to bring a representative suit on behalf of the corporation." *Id.* at 129.

Although the Carmichael Members read this language as authority for their common-law general derivative standing to assert claims on behalf of a nonprofit corporation, the statement is merely non-binding obiter dictum.[19] The issue presented in *Mitchell* was whether the trial court erred in determining, as a matter of law, that the owners who did *not* purport to act on behalf of the association could personally recover damages for harm to the association's property. *See id.* at 128. The Court reasoned that "an owner cannot personally recover damages for a wrong done solely to the corporation, even though the owner may be injured by that

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by minority shareholders, which are not an issue for nonprofit corporations. In support of this position, counsel cited J. Leon Lebowitz, *Recent Developments in Texas Corporation Law - Part I*, 28 Sw. L.J. 641 (1974). But the only statute that Lebowitz identified as intended to curtail strike suits was a 1965 security-for-expenses statute requiring a shareholder in a derivative suit to secure the for-profit corporation's indemnifiable expenses unless the shareholder owned shares of a certain percentage or value. *Id.* at 773 & nn. 671–674 (discussing Act of May 21, 1965, 59th Leg., R.S., ch. 332, § 1, 1965 TEX. GEN. LAWS 698, 698). Lebowitz's comment about the expense statute's purpose could not have applied to the statute codifying general derivative standing for shareholders of for-profit corporations, which was not enacted for another eight years. *See supra* note 13.

[19] *See Seger v. Yorkshire Ins. Co.*, 503 S.W.3d 388, 399 (Tex. 2016).

wrong." *Id.* at 128. Because the owners did not sue on behalf of the owners' association, the case did not present the question of whether the owners *could* have maintained such a suit if they had pleaded it. *See also Tran*, 481 S.W.3d at 317 (recognizing that *Mitchell* did not present the question whether a derivative suit is available to the members of a nonprofit corporation); *Flores v. Star Cab Coop. Ass'n, Inc.*, No. 07-06-0306-CV, 2008 WL 3980762, at *7 (Tex. App.—Amarillo Aug. 28, 2008, pet. denied) (mem. op.) (same).

Pannill likewise affords the Carmichael Members no assistance because that case did not rely on the common law, but on the version of the *ultra vires* statute then in effect. *See Pannill*, 561 S.W.2d at 524–25 (citing TEX. BUS. CORP. ACT, Art. 1396-2.03(B)(2)).[20] To place the claim in context, the authoring court stated, "Throughout their petition and summary judgment proof, the appellants have sought to show that Mrs. Pannill in her capacity as State Regent (analogous to a corporate president or the chairman of the board of directors) exceeded her authority granted by the corporation's by-laws." *Id.* at 524. The court explained that the Texas Non-Profit Corporation Act's "Article 1396-2.03(B)(2) allows such an action to be maintained by the corporation or through members in a representative suit '. . . against the incumbent or former officers or directors of the corporation for exceeding their authority . . .' if all procedural prerequisites are properly met." *Id.*. The court determined that the prerequisites were satisfied and wrote, "We conclude

[20] The statute stated,

> [T]hat [an] act, conveyance or transfer was, or is, beyond the scope of the purpose or purposes of the corporation as expressed in its articles of incorporation or inconsistent with any such expressed limitations of authority, may be asserted . . . [i]n a proceeding by the corporation, whether acting directly or through . . . members in a representative suit, against the incumbent or former officers or directors of the corporation for exceeding their authority.

Texas Non-Profit Corporation Act, 56th Leg., R.S., ch. 162, Art. 2.03(b)(2), 1959 TEX. GEN. LAWS 286, 290.

that the suit brought by the member chapters of the Society is sanctioned by Article 1396-2.03(B)(2)." *Id.* at 525. Thus, the *Pannill* court concluded, as we have, that members of a nonprofit corporation have statutory derivative standing to sue the corporation's officers or directors for *ultra vires* acts.

III. CONCLUSION

We partially sustain the Carmichael Members' sole issue. While we agree with the Carmichael Members that they have standing under Texas Business Organizations Code section 20.002(c)(2) to assert the Association's claims against the Officers for acts that are "beyond the scope of the expressed purpose or purposes of the corporation" or "inconsistent with an expressed limitation on the authority of an officer or director," we disagree that they have standing under the common law to assert the Association's remaining claims. We accordingly reverse the trial court's judgment to the extent that it grants the plea to the jurisdiction as to the Carmichael Members' derivative claims that the Officers breached fiduciary duties to the Association by committing *ultra vires* acts encompassed by section 20.002(c)(2). We affirm the remainder of the trial court's judgment, and we remand the case for further proceedings consistent with this opinion.

/s/ Tracy Christopher

Tracy Christopher
Justice

Panel consists of Justices Christopher, Bourliot, and Hassan.