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## Misreading Menetti: The Case Does Not Help You Avoid Liability for Your Own Fraud

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## ARTICLE

### MISREADING *MENETTI*: THE CASE DOES NOT HELP YOU AVOID LIABILITY FOR YOUR OWN FRAUD

VAL RICKS\*

*Several decades ago, an incorrect legal idea surfaced in Texas jurisprudence: that business entity actors are immune from liability for fraud that they themselves commit, as if the entity is solely responsible. Though the Supreme Court of Texas has rejected that result several times, it keeps coming back. The most recent manifestation is as a construction of Texas’s unique veil-piercing statute. Many lawyers have suggested that this view of the veil-piercing statute originated in Menetti v. Chavers, a San Antonio Court of Appeals case decided in 1998. Menetti has in fact played a prominent role in the movement to construe the statute this way. This Article shows that Menetti held no such view of the veil-piercing statute. Menetti has been misread.*

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I. WHY MISREADING *MENETTI* IS A PROBLEM

An odd legal idea has popped up in Texas jurisprudence several times in the last forty years—a person acting for or within a business entity should not be individually or personally liable for tortious misrepresentations the person makes while working for the business. The law in the United States is exactly the opposite—every tortfeasor is personally liable for the torts that person commits.<sup>1</sup> That is the law in Texas,

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1. Agency law leaves tort law to do its work. "An agent is subject to liability to a third party harmed by the agent's tortious conduct. Unless an applicable statute provides otherwise, an actor remains subject to liability although the actor acts as an agent or an employee, with actual or apparent authority, or within the scope of employment." RESTATEMENT (THIRD) OF AGENCY § 7.01 (AM. L. INST. 2006); see also *id.* § 7.01, reporter's notes (listing cases). "Only an agent's own tortious conduct subjects the agent to liability under this rule." *Id.* § 7.01 cmt. d. The Restatement explains,

The justification for this basic rule is that a person is responsible for the legal consequences of torts committed by that person. A tort committed by an agent constitutes a wrong to the tort's victim independently of the capacity in which the agent committed the tort. The injury suffered by the victim of a tort is the same regardless of whether the tortfeasor acted independently or happened to be acting as an agent or employee of another person.

....

It is consistent with encouraging responsible conduct by individuals to impose individual liability on an agent for the agent's torts although the agent's conduct may also subject the principal to liability.

too,<sup>2</sup> but some lawyers continue to state the opposite.

Though it is easy to imagine why defense counsel would want such an argument, it is hard to say what justifies this idea. Some lawyers repeat a misleading line: “[A] corporation is a separate legal entity that normally insulates its owners or shareholders from personal liability.”<sup>3</sup> That sentence might suggest a person acting for or through a corporation is immune, as if forming a corporation puts the person in a bubble. But that is not true, and more careful formulations avoid making the entity more than it is: “[A] legitimate purpose of forming a corporation is to limit individual liability for *the corporation’s obligations*.”<sup>4</sup> The Supreme Court of Texas’s latest misrepresentation opinion, *Anderson v. Durant*,<sup>5</sup> (i) analyzed the potential liability of an individual who made misrepresentations in the course of

....

An agent’s liability is based on the agent’s conduct . . . . It is ordinarily immaterial to an agent’s liability that the agent’s tortious conduct may, additionally, subject the principal to liability. However, a statute may make an agent immune from liability when the agent commits a tort while acting within the scope of employment or duty, for example by limiting a plaintiff injured by a tort committed by an agent of a public body to a claim against only the body.

An agent’s individual tort liability extends to negligent acts and omissions as well as to intentional conduct.

*Id.* at cmt. b (providing illustrations).

2. See *Anderson v. Durant*, 550 S.W.3d 605, 614 (Tex. 2018) (“Texas law has long imposed a duty to abstain from inducing another to enter into a contract through the use of fraudulent misrepresentations.”); *Miller v. Keyser*, 90 S.W.3d 712, 717 (Tex. 2002) (“[A] corporate agent is personally liable for his own fraudulent . . . acts.”); *Formosa Plastics Corp. U.S. v. Presidio Eng’rs & Contractors Inc.*, 960 S.W.2d 41, 47 (Tex. 1998) (“[A]n independent legal duty, separate from the existence of the contract itself, precludes the use of fraud to induce a binding agreement.”); *Leyendecker & Assocs. v. Wechter*, 683 S.W.2d 369, 375 (Tex. 1984) (“A corporation’s employee is personally liable for tortious acts which he directs or participates in during his employment.”). Justice Spears in *Light v. Wilson*, 663 S.W.2d 813 (Tex. 1983) (Spears, J., concurring), cited a long list of cases and then stated, “Liability in these cases is based on the agent’s own actions, not his status as agent.” *Id.* at 815. This statement was specifically approved by the Supreme Court of Texas in *Miller v. Keyser*, 90 S.W.3d 712, 717 (Tex. 2002) (“We agree with this statement. Thus, if there is evidence that the agent personally made misrepresentations, then that agent can be held personally liable.”).

3. *E.g.*, *In re Marriage of Morris*, 12 S.W.3d 877, 885 (Tex. App.—Texarkana 2000, no pet.) (citing but not quoting *Castleberry v. Branscum*, 721 S.W.2d 270, 271 (Tex. 1986)).

4. *SSP Partners & Metro Novelty, Inc. v. Gladstrong Invs. (USA) Corp.*, 275 S.W.3d 444, 455 (Tex. 2008) (emphasis added); see *Willis v. Donnelly*, 199 S.W.3d 262, 271 (Tex. 2006) (“A bedrock principle of corporate law is that an individual can incorporate a business and thereby normally shield himself from personal liability for *the corporation’s contractual obligations*.” (emphasis added)); *Castleberry v. Branscum*, 721 S.W.2d 270, 271 (Tex. 1986) (“The corporate form normally insulates shareholders, officers, and directors from liability for *corporate obligations* . . . .” (emphasis added)).

5. *Anderson v. Durant*, 550 S.W.3d 605 (Tex. 2018).

employment for and ownership of a corporation and (ii) remanded that individual's case to the court of appeals, where individual liability was affirmed<sup>6</sup>—an impossible result if the corporation is supposed to act as some kind of general shield or immunity, like a bubble from personal responsibility.

From a policy perspective, can such an immunity be justified?<sup>7</sup> Essentially, a personal immunity from fraud for a business entity actor will increase instances of fraud; removing a disincentive is equivalent to creating an incentive, so at the margins, fraud will increase.<sup>8</sup>

Who will pay for this fraud? The assumption seems to be the entity should. If the entity is a going concern and has assets to pay for the fraud, then the cost of it is borne by non-tortfeasor owners and innocent

6. The individual referred to in the case was Jerry Durant acting for Jerry Durant Auto Group, Inc. *Id.* at 610. The court explained, “Durant says he offered Anderson a general manager position at both Granbury dealerships and the opportunity to earn a ten-percent ownership interest in [one of them] if—and only if—the store had a net profit of \$400,000 . . .” *Id.* The promise only bound Jerry Durant Auto Group, Inc. if Durant was acting as agent of the entities for which Anderson was employed—Durant was the only speaker for the corporations. *See id.* at 610–13, 617; *see also infra* notes 13–32 and accompanying text (outlining vicarious liability law). The court analyzed the potential liability of both Jerry Durant Auto Group, Inc. and Jerry Durant himself for Durant's fraudulent promise. *Anderson*, 550 S.W.3d at 613–17; *see* Petition for Review, No. 16-0842, 2017 WL 2200346, at \*vi–vii (Jan. 9, 2017) (listing Jerry Durant as respondent and appellant); Respondents' Brief on the Merits, No. 02-14-00283, 2017 WL 4460779, at \*79 (Sept. 27, 2017) (naming Jerry Durant as a joint party to the brief of respondents; all of respondents' arguments in the supreme court relating to fraud applied equally to Jerry Durant and to his corporations); *Durant v. Anderson*, No. 02-14-00283-CV, 2016 WL 552034, at \*1–3, (Tex. App.—Fort Worth, Feb. 11, 2016), *aff'd in part, rev'd in part*, 550 S.W.3d 605 (Tex. 2018) (“Jerry Durant [and others] appeal . . .” after being held liable for fraud). In short, Durant committed fraud, and the entity for which he acted was also liable. *See Anderson*, 550 S.W.3d at 617 (holding “jury findings are sufficient to support a finding of fraudulent inducement because the fraud submissions incorporate the necessary elements for recovery”); *Durant v. Anderson*, No. 02-14-00283-CV, 2020 WL 1295058, at \*4–13 (Tex. App.—Fort Worth, Mar. 19, 2020, no pet.) (on remand from the supreme court's rejection of Durant's arguments, affirming the jury verdict for fraud against Jerry Durant and his two corporations); *id.* at \*37 (“We affirm the trial court's judgment as to Durant's and the Granbury dealerships' liability for fraudulent inducement . . . . We affirm the fraudulent-inducement damages award . . .”). A fraudulent promise made as part of a contract offer such as Durant's clearly relates to a contractual obligation of the corporation. *Cf.* TEX. BUS. ORGS. CODE ANN. § 21.223(a)(2). Yet the courts held both the manager-shareholder and the entity for which he acted liable. This is the meaning of “Texas law has long imposed a duty to abstain from inducing another to enter into a contract through the use of fraudulent misrepresentations.” *Anderson*, 550 S.W.3d at 614.

7. On this issue, see Val Ricks, *Fraud Is Now Legal in Texas (for Some People)*, 8 TEX. A&M L. REV. 1, 53–60 (2020) (“Trust makes a market possible and successful; it makes freedom of contract possible. The ‘rules of the game’ in a free economy require that businesses make profits ‘without deception or fraud.’”).

8. *See id.* at 55 (giving a more complete analysis of this conclusion).

customers. Over time, perhaps the business might be less profitable than an honest one, but quite a lot of fraud can be hidden in a profit margin, and surely risk-taking fraudsters will bank on that if the law declares them immune from liability. That is moral hazard. If the entity lacks the assets to pay for the fraud, then the fraud's cost will be borne by the innocent victim while the law protects the tortfeasor.

Neither result is efficient or fair. The common law has always preferred to impose the cost of fraud first and foremost on the person who commits the fraud, because the tortfeasor is the “person primarily responsible for his own behavior and best able to avoid the foreseeable risks of that behavior.”<sup>9</sup> The damages from tort should be the tortfeasor's obligation.

In contrast, what are the corporation's obligations? An entity can function as a legal person to own and operate a business.<sup>10</sup> What the entity does alone—owe taxes, own property, and form and breach contracts (no one reasonably believes the agents who identify their principal and speak only for the principal are parties to the principal's contracts<sup>11</sup>)—the entity alone is liable for.<sup>12</sup>

Vicarious tort liability is different. Tort liability attaches to individuals who commit torts; it is first the individual's obligation.<sup>13</sup> The law imposes liability also on an employer for an employee's torts when, for instance, the individual tortfeasor was acting within the scope of employment or with apparent authority.<sup>14</sup> In those cases, the employer's liability is

9. *Graff v. Beard*, 858 S.W.2d 918, 922 (Tex. 1993); see *Anderson*, 550 S.W.3d at 613–17 (recognizing the jury's fraud-damages findings in favor of Anderson); Ricks, *supra* note 7, at 60; *Grynberg Prod. Corp. v. British Gas, P.L.C.*, 817 F. Supp. 1338, 1350–51 (E.D. Tex. 1993).

10. *E.g.*, TEX. BUS. ORG. CODE ANN. § 2.101 (listing the general powers of a business entity).

11. “A third party who enters into a contract with a disclosed principal through an agent does so in anticipation of receiving performance from the principal and rendering performance to the principal.” RESTATEMENT (THIRD) OF AGENCY § 7.01 cmt. b (AM. L. INST. 2006).

12. “The rule stated in [section 7.01] differs from a basic rule applicable to agents' liability stemming from contracts. An agent who makes a contract on behalf of a disclosed principal does not become a party to the contract, and is not subject to liability on it, unless the agent and the third party so agree.” *Id.*

13. *See, e.g.*, RESTATEMENT (THIRD) OF TORTS § 9 (AM. L. INST. 2010) (“One who fraudulently makes a material misrepresentation of fact, opinion, intention, or law, for the purpose of inducing another to act or refrain from acting, is subject to liability for economic loss caused by the other's justifiable reliance on the misrepresentation.”); *see generally id. passim* (establishing liability for persons who commit torts).

14. RESTATEMENT (THIRD) OF AGENCY § 7.07 (AM. L. INST. 2006) (“An employer is subject to vicarious liability for a tort committed by its employee acting within the scope of employment.”); *id.* § 7.08 (“A principal is subject to vicarious liability for a tort committed by an agent in dealing or communicating with a third party on or purportedly on behalf of the principal when actions taken by

vicarious.<sup>15</sup> “[A] principal’s vicarious liability turns on whether the agent is liable.”<sup>16</sup> Imposing vicarious liability on the employer is a deliberate allocation of risk to another who has a right to direct how the agent performs and whether the agent continues as an agent.<sup>17</sup> Because vicarious liability cannot exist without the direct liability of the tortfeasor, vicarious liability is by nature in addition to the employee’s direct liability.

Direct, non-vicarious liability would result if the employer committed the tort by its own negligent or intentional action.<sup>18</sup> It would also occur if the employer directed or authorized its agent to commit a tort,<sup>19</sup> in which case both employer and employee would have direct liability (and the employer would also be liable vicariously). “In most cases, direct liability requires fault on the part of the principal whereas vicarious liability does not require that the principal be at fault.”<sup>20</sup> But can an *entity* be held directly liable for intentional misrepresentation? An entity, being a fiction, cannot form the mental state required to commit the tort of fraud; an entity—being mere legal fiction—cannot itself intend to deceive.<sup>21</sup> (It might be possible to gather up the elements of a tort from different agents whose intent and acts are imputed to the entity, but this is exceedingly rare.) So, entity liability for such things is vicarious: the entity is liable on condition that someone else is liable.<sup>22</sup> When an entity is liable for fraud (or negligence), it is because an individual acting within it has violated a general duty—independent of that individual’s status as agent, owner, or manager—not to defraud (or

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the agent with apparent authority constitute the tort or enable the agent to conceal its commission.”). Even if fraud is successful because the agent has actual authority to make statements about a subject or appears to have such authority, that is not a case of apparent authority to commit a tort—only to make the statement; liability remains vicarious.

15. See *supra* note 14.

16. RESTATEMENT (THIRD) OF AGENCY § 7.03 cmt. b (AM. L. INST. 2006).

17. *Painter v. Amerimex Drilling I, Ltd.*, 561 S.W.3d 125, 130–31 (Tex. 2018).

18. See, e.g., RESTATEMENT (THIRD) OF TORTS (AM. L. INST. 2010); *supra* notes 1–2.

19. See, e.g., RESTATEMENT (THIRD) OF AGENCY § 7.04 (AM. L. INST. 2006) (“A principal is subject to liability to a third party harmed by an agent’s conduct . . .”).

20. *Id.* § 7.03 cmt. b.

21. See *Anderson v. Durant*, 550 S.W.3d 605, 614 (Tex. 2018) (stating the following requirements, among others, for intentional misrepresentation: “(1) a material misrepresentation, (2) made with knowledge of its falsity or asserted without knowledge of its truth, (3) made with the intention that it should be acted on by the other party”); *GTE Sw., Inc. v. Bruce*, 998 S.W.2d 605, 618 (Tex. 1999) (“Corporations can act only through their agents.”).

22. RESTATEMENT (THIRD) OF AGENCY § 7.03 cmt. b (AM. L. INST. 2006) (“[A] principal’s vicarious liability turns on whether the agent is liable.”); see also *GTE Sw., Inc.*, 998 S.W.2d at 617–18 (reviewing ways in which an entity can be held liable for an intentional tort).

unreasonably endanger others).<sup>23</sup> Unsurprisingly, employer liability for fraud in Texas law has occurred under the “scope of employment” test and is vicarious.<sup>24</sup>

Of course, once an entity is vicariously liable, that entity has an obligation—a “corporate obligation.” Vicarious liability creates an entity obligation for an entity employer. But it does not destroy the tortfeasor’s own obligation. The defrauder’s own primary and direct liability is a personal liability, not a corporate liability. Forming a business entity does not create some sort of individual free pass to engage in intentional misrepresentation.

Yet lawyers continue to claim that individuals acting within a business should not be liable for the fraud they commit. The most recent legal argument for fraud immunity for business people springs from a couple of decisions by appellate courts in Houston (the 14th) and Texarkana.<sup>25</sup> A

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23. See *supra* note 2 and accompanying text.

24. See *Bank of Tex., N.A. v. Glenny*, 405 S.W.3d 310, 316–17 (Tex. App.—Dallas 2013, no pet.) (reversing summary judgment for an employer because a fact issue existed as to whether an employee made tortious misrepresentations within the scope of employment); *Hedley Feedlot, Inc. v. Weatherly Tr.*, 855 S.W.2d 826, 837 (Tex. App.—Amarillo 1993, writ denied); *Campbell v. Hamilton*, 632 S.W.2d 633, 634–35 (Tex. App.—Dallas 1982, writ ref’d n.r.e.); see also *Celtic Life Ins. Co. v. Coats*, 885 S.W.2d 96, 98–99 (Tex. 1994) (“An insurance company is generally liable for any misconduct by an agent that is within the actual or apparent scope of the agent’s authority.”). It could also occur under the “vice principal” doctrine; this is also vicarious. See Ricks, *supra* note 7, at 37–38 & n.175 (explaining why “vice principal” liability is vicarious rather than direct).

25. See *Hong v. Havey*, 551 S.W.3d 875 (Tex. App.—Houston [14th Dist.] 2018, no pet.); *TecLogistics, Inc. v. Dresser-Rand Group, Inc.*, 527 S.W.3d 589 (Tex. App.—Houston [14th Dist.] 2017, no pet.); *Tex.-Ohio Gas, Inc. v. Mecom*, 28 S.W.3d 129 (Tex. App.—Texarkana 2000, no pet.). The position has been adopted also (without much analysis) by the El Paso Court of Appeals. See generally *Valley Forge Motor Co. v. Sifuentes*, 595 S.W.3d 871 (Tex. App.—El Paso 2020, no pet.) (abandoning, *sub silentio*, what the same court said in *Chico Auto Parts & Serv., Inc. v. Crockett*, 512 S.W.3d 560, 575 (Tex. App.—El Paso 2017, pet. denied) (“We agree . . . that a plaintiff may sue a corporation’s affiliate for his torts, including fraud, without the need to pierce the corporate veil.”)). The 14th’s position has been rejected by the courts of appeals in Corpus Christi, San Antonio, Fort Worth, and Beaumont. See *Kingston v. Helm*, 82 S.W.3d 755, 764–67 (Tex. App.—Corpus Christi–Edinburg 2002, pet. denied) (holding “Kingston is not required to meet the standard for piercing the corporate veil . . . in order to impose personal liability” on an individual); *Sanchez v. Mulvaney*, 274 S.W.3d 708, 712 (Tex. App.—San Antonio 2008, no pet.) (purporting to follow *Kingston* to impose individual liability); *Spicer v. Maxus Healthcare Partners, LLC*, 616 S.W.3d 59, 118–19 (Tex. App.—Fort Worth 2020, no pet.); *Texienne Oncology Ctrs., PLLC v. Chon*, No. 09-19-00356-CV, 2021 WL 4994622, at \*6–7 (Tex. App.—Beaumont Oct. 28, 2021, pet. filed) (holding “section 21.223 does not preclude direct liability for a corporate employee’s tortious actions”). Texas attorneys know that two appellate courts, the 1st and 14th, have concurrent jurisdiction in Houston, so when the positions of the two courts conflict, trial courts—whose judgments might be reviewed by either the 1st or the 14th—can have no idea what the law will be. See generally Andrew T. Solomon, *A Simple Prescription for Texas’s Ailing Court System*:



recent publication addressed this argument.<sup>26</sup> The 14th Court of Appeals attempts to rest this result on the language of Texas's statute governing veil-piercing (veil-piercing law controls whether a corporate or LLC actor or owner can become liable for the obligations of the corporation or LLC).<sup>27</sup> But the statute's language provides no support for the courts' results.<sup>28</sup> The legislative history also provides no support.<sup>29</sup> Moreover, these courts' reading of the statute results in several unhelpful, disruptive, and surely unintended results, strongly suggesting that these courts have misread the statute.<sup>30</sup> And finally, it seems doubtful that the Texas legislature meant to exempt a small, somewhat random class of persons—including some within the population who can do the most harm by committing fraud—from personal responsibility for taking others' property by lying.<sup>31</sup> I am encouraged that the Fort Worth Court of Appeals, Beaumont Court of Appeals, and some local federal courts have thoughtfully rejected the position.<sup>32</sup>

However, these fairly recent judicial decisions by the 14th Court of Appeals are not the first time this notion has surfaced in Texas jurisprudence. Perhaps it first appeared in the February 1983

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*Stronger Stare Decisis*, 37 ST. MARY'S L.J. 417, 436–50 (2006) (providing a general discussion about the origins and difficulties of Texas intermediate appellate courts). Houston's 1st Court of Appeals appeared to follow *Kingston* in *Wilmot v. Bouknight*, 466 S.W.3d 219, 230 (Tex. App.—Houston [1st Dist.] 2015, pet. denied), rejecting the argument that the defendant could not be held liable for fraud because “he acted at all times as an agent” of the counterparty to the contract. It is possible the law in Houston is internally inconsistent as a result.

26. Ricks, *supra* note 7.

27. *Id.* at 5–8. The statute is TEX. BUS. ORGS. CODE ANN. §§ 21.223–225. Its application to the LLC or limited liability company reflects TEX. BUS. ORGS. CODE ANN. § 101.002.

28. See Ricks, *supra* note 7, at 8–17, 22–30 (“[T]he court read two clauses in Section 21.223(a)(2) as if they were not part of the statute.”).

29. *Id.* at 30–37.

30. See *id.* at 37–53 (reviewing at length a wide variety of probably unintended consequences of the 14th Court of Appeals' reading).

31. See *id.* at 53–62 (reviewing and rejecting potential policy justifications for the proposed immunity).

32. See *Spicer v. Maxus Healthcare Partners, LLC*, 616 S.W.3d 59, 118–19 (Tex. App.—Fort Worth 2020, no pet.); *Texienne Oncology Ctrs., PLLC v. Chon*, No. 09-19-00356-CV, 2021 WL 4994622, at \*6–7 (Tex. App.—Beaumont Oct. 28, 2021, pet. filed); *Bates Energy Oil & Gas v. Complete Oilfield Servs.*, 361 F. Supp. 3d 633, 664–74 (W.D. Tex. 2019). *Bates Energy* contains a particularly thoughtful discussion of Texas precedent. See *Bates Energy Oil & Gas*, 361 F. Supp. 3d at 664–74 (following *Kingston*, after discussing Texas precedent). The more recent *In re Jamieson*, No. 19-41433, 2021 WL 438868, at \*10 (Bankr. E.D. Tex. Feb. 8, 2021), noted the split in Texas appellate courts and opted to continue to follow the common law until the Texas Supreme Court resolves the issue.

opinion entitled *Karl & Kelly Co., Inc. v. McLerran*.<sup>33</sup> There, the Supreme Court of Texas erroneously held that corporate officers were not individually liable for misrepresentations they made to corporate customers as part of corporate business.<sup>34</sup> “It is true that [the officers] made representations,” the court confessed.<sup>35</sup> The court continued,

However, since the contract was with the corporation and not with [the officers], any representations made by [the officers] were made as agents of the corporation. We hold there is no evidence in the record before us that Karl and Kelly Company was the alter ego of either [the corporate owner or agent]. The courts below erred in rendering a personal judgment against them . . . .<sup>36</sup>

The court appeared to say that only the corporation had spoken.

The court seemed eager to say so. Writing that opinion required someone at the court to check the trial record for evidence presented by the plaintiffs.<sup>37</sup> But that was done, and the court decided the case without oral argument and wrote only a per curiam opinion.<sup>38</sup> Perhaps the court felt comfortable with a quick decision because it did not declare a winner in the litigation but only concluded that the case should be retried.<sup>39</sup> The *McLerran* facts and holding are oddly similar to what the 14th has tried to do with the veil-piercing statute.

Ten months after deciding *McLerran*, the Supreme Court of Texas implicitly overruled it. In *Light v. Wilson*,<sup>40</sup> on facts quite similar to *McLerran*'s and against almost identical arguments,<sup>41</sup> the court implied that the officer defendant could be liable if there had been a “finding of fact that [the officer], individually, violated” the DTPA.<sup>42</sup> Justice Spears wrote in concurrence that *McLerran* was “clearly erroneous” and as a result of *Light*

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33. *Karl & Kelly Co., Inc. v. McLerran*, 646 S.W.2d 174 (Tex. 1983), *overruled by* *Light v. Wilson*, 663 S.W.2d 813 (Tex. 1983), *as recognized in* *Miller v. Keyser*, 90 S.W.3d 712, 717 (Tex. 2002).

34. *Id.* at 175.

35. *Id.*

36. *Id.*

37. *See id.* (reporting a review of evidence or the lack thereof).

38. *Id.*

39. *Id.*

40. *Light v. Wilson*, 663 S.W.2d 813 (Tex. 1983).

41. *See id.* at 814 (contending that the officer “is not liable in the individual capacity in which he [was] sued because he was acting in the capacity of an officer” of the corporation, and “assert[ing] the corporate veil has not been drawn”).

42. *Id.* at 814–15.

“implicitly overruled.”<sup>43</sup> “The rule in Texas has always been that an agent is personally liable for his own torts.”<sup>44</sup>

The implied overruling of *McLerran* was confirmed seven months later—July 1985—in *Weitzel v. Barnes*.<sup>45</sup> The officer defendants in *Weitzel* also argued that they “should not be liable in their individual capacities” for misrepresentations.<sup>46</sup> The court rejected that argument with a citation to *Light*: “Implicit in our holding in [*Light*] is that there can be individual liability on the part of a corporate agent for misrepresentations made by him.”<sup>47</sup>

So much for *McLerran* as precedent. Yet the Supreme Court of Texas waited until 2002 to declare in a majority opinion—*Miller v. Keyser*<sup>48</sup>—the court’s eighteen-year disagreement with *McLerran*, and the court even at that late date did not say explicitly that *McLerran* was overruled.<sup>49</sup> Perhaps lawyers defending business people, given a weapon in *McLerran* so many years ago, are loathe to lay it down in part because the overruling was not very clear.<sup>50</sup> The case had sunken into their legal assumptions. Several intermediate appellate court opinions and various lawyers’ arguments during the eighteen years show considerable confusion about *McLerran*’s status.<sup>51</sup>

*McLerran* is gone now, but its ghost haunts another precedent, and many lawyers have cited this precedent to support the immunity from fraud that

43. *Id.* at 815 (Spears, J., concurring).

44. *Id.*

45. *Weitzel v. Barnes*, 691 S.W.2d 598 (Tex. 1985).

46. *Id.* at 601.

47. *Id.* (footnote omitted).

48. *Miller v. Keyser*, 90 S.W.3d 712 (Tex. 2002).

49. *See id.* at 717 (“Justice Spears . . . asserted that *Light* implicitly overruled . . . *McLerran*. As stated by Justice Spears, “[l]iability in these cases is based on the agent’s own actions, not his status as agent. We agree with this statement.”). They could have agreed with both statements but did not, though they left little doubt about the content of the law: “Our holdings in *Light* and *Weitzel* comport with Texas’ longstanding rule that a corporate agent is personally liable for his own fraudulent or tortious acts.” *Id.*

50. Amazingly, a litigant tried to pass off *McLerran* as precedent in 2015, at which time the Fort Worth Court of Appeals finally declared the obvious. *See Alexander v. Kent*, 480 S.W.3d 676, 697–98 (Tex. App.—Fort Worth 2015, no pet.) (citations omitted) (“*McLerran* was implicitly overruled by the supreme court in *Light v. Wilson*. *See Miller v. Keyser*.”). Thank you, Fort Worth Court of Appeals.

51. *See Kingston v. Helm*, 82 S.W.3d 755, 759–61 (Tex. App.—Corpus Christi–Edinburg 2002, pet. denied) (noting this confusion); *Keyser v. Miller*, 47 S.W.3d 728, 729–32 (Tex. App.—Houston [1st Dist.] 2001), *rev’d*, 90 S.W.3d 712 (Tex. 2002) (attempting to parse *McLerran* as precedent from *Light* and *Weitzel*, among other cases); *see also* Petitioners’ Brief on the Merits at 33–40, *King v. Graham*, 126 S.W.3d 75 (2003), No. 01-0171 (“The Court [in *Light*] did not directly address these individual allegations, but rather noted that personal liability had been predicated upon the alter ego theory.”).

the 14th has lately claimed to find in the veil-piercing statute.<sup>52</sup> The case is *Menetti v. Chavers*,<sup>53</sup> from the San Antonio Court of Appeals, and as I have discussed the issue with lawyers throughout the state, the case keeps coming up as supportive of the 14th's reading. Indeed, some courts, also, have cited it as precedent for immunity from fraud based on the veil-piercing statute,<sup>54</sup> and lawyers have argued it to them as such.<sup>55</sup>

Citations lessened after a thoughtful federal district court opinion in 2019, *Bates Energy Oil & Gas v. Complete Oilfield Services*,<sup>56</sup> declared “the plaintiff [in *Menetti*] asserted only veil-piercing theories of liability and made no arguments about direct personal liability.”<sup>57</sup> But that is not entirely clear. The *Menetti* court seemed to report that arguments about direct personal liability occurred:

The Chaverses' petition raised both liability claims and claims that would allow them to pierce the corporate veil.<sup>58</sup>

Vincent and Felecia Menetti assert . . . that the trial court denied them the opportunity to present a defense as to their individual liability claims arising from faulty construction of an addition to the Chaverses' home. The Menettis

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52. To its credit, the 14th did not. See *TecLogistics, Inc. v. Dresser-Rand Group, Inc.*, 527 S.W.3d 589 (Tex. App.—Houston [14th Dist.] 2017, no pet.).

53. *Menetti v. Chavers*, 974 S.W.2d 168 (Tex. App.—San Antonio 1998, no pet.).

54. See *In re Antone's Recs, Inc.*, 445 B.R. 758, 788–89 (Bankr. W.D. Tex. 2011); *Wooley v. Lucksinger*, 14 So. 3d 311, 408–15 (La. App.—1st Cir. 2008), *rev'd*, 61 So. 3d 507, 582–84, 586–89, 594–602 (La. 2011); *Boyo v. Boyo*, 196 S.W.3d 409, 419 n.4 (Tex. App.—Beaumont 2006, no pet.) (dicta); *Metal Bldg. Components, LP v. Raley*, No. 03-05-00823-CV, 2007 WL 74316, at \*14 (Tex. App.—Austin Jan. 10, 2007, no pet.); *Plas-Tex, Inc. v. Jones*, No. 03-99-00286-CV, 2000 WL 632677, at \*4 & n.9 (Tex. App.—Austin May 18, 2000, pet. denied) (handling a breach of fiduciary duty claim as if it were a veil-piercing case, citing the predecessor of Texas Business Organization Code Section 21.223 and *Menetti*); *Tex.-Ohio Gas, Inc. v. Mecom*, 28 S.W.3d 129, 137 n.8 (Tex. App.—Texarkana 2000, no pet.).

55. See GENEVIEVE HEBERT FAJARDO & RAMONA L. LAMPLEY, CONSUMER RIGHTS AND REMEDIES, 27 TEX. PRACTICE § 1.15 n.13 (June 2020 update); Appellee's Brief at 9–12, *Pelco Constr., Co. v. Chambers Cnty.*, No. 01-14-00317-CV, 2015 WL 711539 (Tex. App.—Houston [1st Dist.] Jan. 28, 2015); Reply Brief of Appellant CRS Mktg. Agency, Inc. at 4–6, *Nat'l Plan Adms', Inc. v. Nat'l Health Ins. Co.*, No. 03-03-00306-CV, 2004 WL 1292109 (Tex. App.—Austin Apr. 12, 2004).

56. *Bates Energy Oil & Gas v. Complete Oilfield Servs.*, 361 F. Supp. 3d 633 (W.D. Tex. 2019).

57. *Id.* at 671 n.13.

58. *Menetti*, 974 S.W.2d at 171.

also claim that they were denied the opportunity to challenge a claim that they were their corporation's alter ego.<sup>59</sup>

The *Menetti* court's report of the Chaverses' complaint is consistent: "The Chaverses sued Menetti & Co., Inc., and the Menettis individually for damages arising from faulty construction . . . . They sued under several theories: DTPA, fraud, breach of contract, negligence, and piercing the corporate veil."<sup>60</sup> Moreover, the facts as reported by the court strongly suggest the Chaverses dealt almost exclusively with the Menettis and through them the corporation.<sup>61</sup> If the corporation committed fraud, it would have been fraud committed by the Menettis, and they would have been individually liable for their own fraud. In fact, the court reviewed several allegations that the Menettis had committed misrepresentations.<sup>62</sup> What plaintiff's lawyer would have failed to argue that the Menettis were liable for their own fraud?

The *Bates Energy* opinion correctly concluded that the *Menetti* court did not address direct personal liability in its discussion of the veil-piercing statute.<sup>63</sup> But the rest of *Bates Energy*'s assessment does not hold. The Chaverses did in fact—as the rhetoric of the case suggests—claim the Menettis (Vincent Menetti in particular) committed intentional misrepresentation and negligence.<sup>64</sup> That these claims disappeared in between complaint and appellate ruling on the veil-piercing statute lends credence to the idea that veil-piercing was the only way to pin liability on Vincent Menetti for anything related to his corporation's contracts, including Menetti's own fraud. This is why *Menetti* keeps coming up.<sup>65</sup>

But *Bates Energy* was right to reject *Menetti* as precedent for the fraud immunity reading of the veil-piercing statute. In this Article, I show that the San Antonio Court of Appeals' opinion in *Menetti v. Chavers*—this

59. *Id.* at 169, 170 & n.2–4 (reporting that the Menettis' argued on appeal that judgment on the Chaverses' DTPA and negligence claims was erroneous separately from the corporation's default and the alter ego claims, suggesting the Menettis were indeed sued for their own obligations).

60. *Id.* at 169.

61. *Id.* at 175.

62. *Id.*

63. *Bates Energy Oil & Gas v. Complete Oilfield Servs.*, 361 F. Supp. 3d 633, 665–66 (W.D. Tex. 2019).

64. *See infra* Part II.

65. The best reading of *Menetti* may well be found in *Kingston v. Helm*, 82 S.W.3d 755, 760–61, 767 n.4 (Tex. App.—Corpus Christi 2002, pet. denied), and this Article largely agrees with *Kingston* on *Menetti*'s import.

precedent—offers no support for the 14th’s reading of the veil-piercing statute. *Menetti* provides no justification for the idea that the veil-piercing statute protects individual corporate actors from liability for the misrepresentations or fraud they themselves commit. What *Menetti* held on that score rests on *McLerran* and is now gone. *Menetti* does not carry on the *McLerran* position through a construction of the veil-piercing statute. That is a misreading of *Menetti*.

As the reader will see, I am respectful of the misreading. *Menetti* is easy to misread. The case was poorly litigated, and the opinion leaves out enough detail that the case’s meaning has become less clear over time, especially as surrounding Texas jurisprudence has changed.

Fortunately, the *Menetti* trial record is still largely intact. With more facts and a clear, hindsight view of *McLerran*, the meaning of *Menetti*—both then and now—is clear. Taking those facts and the assumption—which the *Menetti* court made—that *McLerran* was live precedent, we can see what a modest opinion *Menetti* actually is.

I will review in Part II what happened in the trial court. In Part III, I will walk through the court of appeals’ opinion, pointing out how the court buried the plaintiffs’ claims that the individual defendants should be liable for their own torts—*McLerran* was both shovel and sod. In Part IV, I will discuss the confusing language *Menetti* offered about veil-piercing and show that the language is in fact benign and completely consistent with the Texas Supreme Court’s statement in *Miller* that “a corporate agent is personally liable for his own fraudulent . . . acts.”<sup>66</sup>

## II. MENETTI AT TRIAL: HOW THE PERSONAL LIABILITY CLAIMS SURVIVED

As the *Menetti* court of appeals stated, “[t]he Chaverses sued Menetti & Co., Inc., and the Menettis individually for damages arising from faulty construction . . . . They sued under several theories: DTPA, fraud, breach of contract, negligence, and piercing the corporate veil.”<sup>67</sup> What seems implied by those sentences was in fact true; in their complaints, the Chaverses accused the Menettis (Vincent in particular) of negligence, fraud, and violating the DTPA.<sup>68</sup>

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66. *Miller v. Keyser*, 90 S.W.3d 712, 717 (Tex. 2002).

67. *Menetti*, 974 S.W.2d at 169.

68. Plaintiff’s Second Amended Original Petition at 2, *Chavers v. Menetti*, No. 95-CI-07512 (288th Jud. Dist., Bexar Cnty., Tex. filed 1996); *see* Plaintiff’s Original Petition at 1, *Chavers v. Menetti*,

As late as the first day of trial, the Chaverses probably intended to testify that Vincent Menetti committed fraud.<sup>69</sup> But an odd thing happened the day the jury was selected. Understanding it requires knowing some of the troubled history of this litigation.

The Chaverses original, May 1995 complaint named only Vincent and the corporation as defendants;<sup>70</sup> those defendants soon answered.<sup>71</sup> But then formal litigation paused until early in 1996, when the trouble started.

Sometime early in 1996, Vincent Menetti filed a motion for summary judgment.<sup>72</sup> Ironically, the summary judgment motion made the very kinds of arguments that the court of appeals' opinion was later misread to support—probably reliant on *McLerran*, though no authority was cited. The motion denied “that [Vincent] is . . . liable to Plaintiffs in his individual capacity” because he, at all times, acted “as the fully disclosed and authorized corporate representative of Menetti & Co.”<sup>73</sup> “Therefore, the defense that Defendant Vincent Menetti is not liable to Plaintiffs in his individual capacity is established as a matter of law.”<sup>74</sup> The motion noted that Vincent “signed the contract which is the subject of this suit as the Vice-President of Menetti & Co., Inc.,”<sup>75</sup> but the motion's argument is not limited only to the contract claim.<sup>76</sup> The record contains no resolution of this motion, however.

No. 95-CI-07512 (288th Jud. Dist., Bexar Cnty., Tex. 1995) (defining “Defendant” as Vincent Menetti and alleging that “Defendant” (singular) did the acts complained of, even though the corporation was also named as a defendant).

69. The Chaverses Second Amended Original Petition, containing these claims, was filed on Nov. 6, 1996, the day of jury voir dire. See Plaintiff's Second Amended Original Petition, *supra* note 68, at 5; Record by Mary Oralla Berry, CSR, Chavers v. Menetti, No. 95-CI-07512 (288th Jud. Dist., Bexar Cnty., Tex. stamped Nov. 1, 1996).

70. Plaintiff's Original Petition, *supra* note 68, at 1.

71. See Defendants' Original Answer at 1, Chavers v. Menetti, No. 95-CI-07512 (288th Jud. Dist., Bexar Cnty., June 3, 1995).

72. Motion for Summary Judgment at 1, 3, Chavers v. Menetti, No. 95-CI-07512 (288th Jud. Dist., Bexar Cnty., Tex. 1996). The unsigned Certificate of Service attached to the motion has a printed date of March 1996; the motion is otherwise undated; but the attached affidavit, referenced in the motion, was sworn before a notary on October 24, 1995, and the motion was signed by attorney Halter, who withdrew from the litigation in April 1996. *Id.* at 2–3, Exhibit A.

73. *Id.* at 1.

74. *Id.* at 2.

75. *Id.* The contract's signature line says “Contractor: *Vincent Menetti* Title: *VP.*” Plaintiff's Original Petition, *supra* note 68, at Exhibit A.

76. The motion reflects the position of Vincent Menetti's first amended answer, filed in mid-1995. See Defendants' First Amended Original Answer at 1–3, No. 95-CI-07512 (288th Jud. Dist., Bexar Cnty., Tex. July 17, 1995).

The summary judgment motion seemed to jumpstart the litigation. The Chaverses became active. Unfortunately, the Menetti effort then collapsed.

First, the Menettis failed to cooperate with discovery. Probably in response to the summary judgment motion, the Chaverses sent notice on March 27, 1996, to Vincent Menetti for a deposition on April 3 at 2 p.m.<sup>77</sup> At 1 p.m. on that day, the Menettis' lawyer called to reschedule, claiming Vincent was ill.<sup>78</sup> The deposition was rescheduled for April 15.<sup>79</sup> Vincent appeared but only brought part of the records requested.<sup>80</sup> The plaintiffs gave notice for a follow-up deposition on May 10th, but Vincent again failed to appear.<sup>81</sup> The Chaverses served notice on Felecia Menetti as president of Menetti & Co. to attend a separate May 10 deposition, but she also did not appear.<sup>82</sup> The trial record does not show that the Menettis ever produced the rest of the records.

Perhaps they failed to appear because they were no longer represented by counsel. The same lawyer had been representing both Vincent and Menetti & Co., but he said the Menettis failed to pay him.<sup>83</sup> The attorney warned them he might withdraw,<sup>84</sup> and he was allowed to withdraw on April 16th.<sup>85</sup>

Faced with the Menettis' recalcitrance, in mid-May the Chaverses moved to compel the Menettis to litigate.<sup>86</sup> Vincent Menetti—probably still with no attorney—did not show up for the hearing.<sup>87</sup> The court found the Menettis' failures willful and without reasonable excuse.<sup>88</sup> As a result, on May 22nd, the court ordered the Menettis to appear for depositions and charged them \$500 in plaintiffs' attorneys fees.<sup>89</sup>

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77. Order at 1, *Chavers v. Menetti*, No. 95-CI-07512 at 1 (288th Jud. Dist., Bexar Cnty., Tex. May 22, 1996) (an order against Menetti personally) [hereinafter Order (Personal)].

78. *Id.*

79. *Id.*

80. *Id.* at 1–2.

81. *Id.* at 2.

82. *Id.*

83. Motion to Withdraw as Counsel at 1, *Chavers v. Menetti*, No. 95-CI-07512 (288th Jud. Dist., Bexar Cnty., Tex. Apr. 4, 1996).

84. *Id.*

85. Order Permitting Withdrawal at 1, No. 95-CI-07512 (288th Jud. Dist., Bexar Cnty., Tex. Apr. 16, 1996).

86. Order (Personal), *supra* note 77, at 1.

87. *Id.*

88. *Id.* at 2.

89. *Id.* at 3.



Because the Menettis were officers in their corporation and had been summoned to speak for it, the Menettis' failure to appear meant that the corporation also failed to appear.<sup>90</sup> When the Chaverses moved to compel the Menettis to appear and pay costs, they also moved that the corporation be ordered to obtain counsel.<sup>91</sup> Neither the Menettis nor their lawyer-less corporation showed up for the hearing, so on May 22nd, the court also ordered the corporation to retain counsel within three days or its pleadings would be struck.<sup>92</sup>

Still, the Menettis dallied. On May 22nd, the court ordered them to attend depositions on May 29th,<sup>93</sup> but the Menettis apparently did not appear then, either,<sup>94</sup> so the Chaverses moved that the Menettis be sanctioned.<sup>95</sup> I did not find in the records a resolution of this motion. I also did not see an immediate resolution of the motion that the corporation's pleadings be struck.

In the meantime, the Chaverses upped the stakes. In early May, they filed an amended complaint adding details and naming Felecia Menetti as a defendant.<sup>96</sup> Perhaps the Menettis awoke a bit. They hired a new attorney, and on June 24, 1996, Felecia Menetti served an answer.<sup>97</sup> Vincent's and the corporation's new answer followed in October.<sup>98</sup>

At any rate, by the week of trial, which took place November 6–8, 1996, the full panoply of alleged claims against both the corporation and the Menettis, for contract breached, torts committed, and DTPA violations, remained.<sup>99</sup> In turn, the Menettis' final pleadings denied the personal liability claims against the Menettis on the merits.<sup>100</sup> On the eve of trial,

90. Order at 1, *Chavers v. Menetti*, No. 95-CI-07512 (288th Jud. Dist., Bexar Cnty., Tex. May 22, 1996) (an order against Menetti & Co., Inc.) [hereinafter Order (Corporate)].

91. *See id.* (reporting the Chaverses had filed a "Motion to Show Authority").

92. *See id.* at 2.

93. *See* Order (Personal), *supra* note 77, at 3.

94. Motion for Sanctions at 3, *Chavers v. Menetti*, No. 95-CI-07512 (288th Jud. Dist., Bexar Cnty., Tex. May 22, 1996).

95. *Id.*

96. Plaintiff's First Amended Original Petition was filed May 9, 1996. Letter from David DeWall to David J. Garcia (Feb. 29, 1997).

97. Defendant Felecia Menetti's Original Answer at 1, *Chavers v. Menetti*, No. 95-CI-07512 (288th Jud. Dist., Bexar Cnty., Tex. served June 24, 1996).

98. Defendants' Second and First Amended Original Answer at 1, *Chavers v. Menetti*, No. 95-CI-07512 (288th Jud. Dist., Bexar Cnty., Tex. filed Oct. 28, 1996).

99. *See* Plaintiff's Second Amended Original Petition, *supra* note 68, at 5–10 (alleging nine causes of action under part seven of Plaintiff's Second Amended Original Petition).

100. Defendants' Second and First Amended Original Answer, *supra* note 98, at 2–4.

both parties still appeared to be litigating claims that Vincent Menetti, in particular, committed torts.

Then something appeared to change in the mind of the judge.

On November 6th, voir dire occurred<sup>101</sup> and the judge received two important pre-trial motions: (1) Plaintiffs' Motion for Default Judgment<sup>102</sup> and (2) Plaintiffs' Motion to Strike Pleadings.<sup>103</sup>

The motion for default judgment recited the court's earlier order that Menetti & Co. retain counsel within three days or have its pleadings struck.<sup>104</sup> Notwithstanding that Menetti & Co. had been represented by counsel for some time and had served additional pleadings in October, the Chaverses claimed (i) the "three days" limit in the court's May 22nd order and (ii) that the pleadings named "were never filed of record."<sup>105</sup>

The motion to strike pleadings argued Menetti & Co., Inc. had forfeited its corporate privileges for failure to pay taxes.<sup>106</sup> Citing TEXAS TAX CODE ANN. SECTION 171.252, the Chaverses argued that, as a result, Menetti & Co. "shall be denied the right to sue or defend in a court of this state."<sup>107</sup> The Chaverses attached a certificate from the Secretary of State stating Menetti & Co. was "not in good standing."<sup>108</sup>

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101. According to notes made by Mary Oralla Berry, CSR, the jury was selected on Nov. 6, 1996. Record by Mary Oralla Berry, CSR, *supra* note 69.

102. Plaintiff's Motion for Default Judgment at 1, Chavers v. Menetti, No. 95-CI-07512 (288th Jud. Dist., Bexar Cnty., Tex. Nov. 6, 1996).

103. Plaintiffs' Motion to Strike Pleadings at 1, Chavers v. Menetti, No. 95-CI-07512 (288th Jud. Dist., Bexar Cnty., Tex. Nov. 6, 1996).

104. Plaintiffs' Motion for Default Judgment, *supra* note 102, at 1–2.

105. *Id.* at 2. The court of appeals noted "the corporation . . . ( . . . did retain a lawyer several months before trial)." Menetti v. Chavers, 974 S.W.2d 168, 170 (Tex. App.—San Antonio 1998, no pet.).

106. Plaintiffs' Motion to Strike Pleadings, *supra* note 103, at 1.

107. The provision reads in full,

Section 171.252. EFFECTS OF FORFEITURE. If the corporate privileges of a corporation are forfeited under this subchapter:

- (1) the corporation shall be denied the right to sue or defend in a court of this state; and
- (2) each director or officer of the corporation is liable for a debt of the corporation as provided by Section 171.255 of this code.

TEX. TAX CODE ANN. § 171.252. On forfeitures generally, see Elizabeth S. Miller, *The Walking Dead: Forfeitures and Involuntary Terminations of Filing Entities*, 38 CORP. COUNS. REV. 1 (2019). On Section 171.252 in particular, see Elizabeth S. Miller, *The Walking Dead: Forfeitures and Involuntary Terminations of Filing Entities*, 38 CORP. COUNS. REV. 1, 5–8 & n.19–24 (2019).

108. Plaintiffs' Motion to Strike Pleadings, *supra* note 103, at Exhibit A.

The trial court granted judgment against Menetti & Co., Inc. the next day, November 7th—presumably before the jury heard testimony.<sup>109</sup> According to the court, the corporation's pleadings “have been stricken. . . . [And the corporation,] by virtue of the fact that its pleadings have been stricken, defaulted and admitted the allegations of Plaintiffs’ petition . . . .”<sup>110</sup> Which petition? The court specified “Plaintiffs’ Original Petition or Second Amended Original Petition,” even though the Second Amended was not filed until the eve of trial.<sup>111</sup> The court left the amount of damages for proof at trial.<sup>112</sup>

The language of the court's judgment suggests that the May 22nd, contingent order to strike the corporation's pleadings was the ground for striking the corporation's pleadings.<sup>113</sup> The court of appeals later suggested that the grounds in the plaintiffs' November 6th motion to strike pleadings were also persuasive:

[T]he trial court held that the corporation could not defend itself in court because it was behind on its franchise taxes and was thus not . . . in good standing. The corporation's lawyer asked if the corporation could defend [itself] if the taxes were paid the following day; the trial judge refused the request.<sup>114</sup>

The effect of judgment against the corporation, in the mind of the trial judge, was to focus the trial on the liability of the Menettis for the judgment against the corporation—the veil-piercing liability claims.

At the same time, something related occurred that is less apparent in the record. The trial judge appears to have come to believe—notwithstanding the live pleadings—that the Menettis were not directly liable as tortfeasors. The immediate result of this assumption is that the court refused to allow the Menettis to defend themselves on the merits. I believe the lawyers did not know quite what to make of this.

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109. Interlocutory Judgment by Default at 1, *Chavers v. Menetti*, No. 95-CI-07512 (288th Jud. Dist., Bexar Cnty., Tex. Nov. 7, 1996).

110. *Id.* at 1–2.

111. *Id.* at 2.

112. *Id.*

113. *See id.* at 1 (indicating the corporation's stricken pleadings caused the acceptance of the allegations in Plaintiffs' petition).

114. *Menetti v. Chavers*, 974 S.W.2d 168, 170 (Tex. App.—San Antonio 1998, no pet.).

The jury heard testimony on November 7th and 8th.<sup>115</sup> During trial, the Menettis tried to submit evidence of their innocence of any tort, but the court would not allow it. In their motion for new trial, filed afterward, the Menettis complained,

No Court Order was entered before or during this trial striking the pleadings of THE MENETTIS, individually, nor barring THE MENETTIS from presenting evidence as to their innocence of fraud, negligence, breach of contract or knowing misconduct. Nevertheless, the Trial Judge repeatedly and erroneously sustained objections by the Plaintiffs' attorney throughout the trial preventing THE MENETTIS from presenting evidence as to their innocence of any fraud, negligence, breach of contract, or knowing misconduct, or fraudulent misuse of the corporation.<sup>116</sup>

Why would the trial court sustain such objections? It is almost as if the trial court had conceded the argument in the Menettis' summary judgment motion, that the Menettis themselves were not personally responsible for their actions in this case because they were acting as agents. Perhaps that is so: in September 1994, the San Antonio Court of Appeals, in *Leitch v. Hornsby*,<sup>117</sup> firmly indicated *McLerran* was live precedent:

An employee, who is not party to the contract, cannot be held liable for a breach of that contract, *or for a deceptive act growing out of that contract*, unless he violated the DTPA or committed a separate tort himself. For instance, in the Texas Deceptive Trade Practices Act case of *Karl and Kelly Company, Inc. v. McLerran*, . . . the dispute grew out of a contract with a corporation to which the individual agents were not parties. Therefore, a finding of alter ego was necessary for liability to attach to the agents individually.<sup>118</sup>

*Leitch* was written by Justice Hardberger, the same judge who would write *Menetti*.<sup>119</sup> Though the San Antonio Court of Appeals in *Leitch* found the

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115. Record by Mary Oralla Berry, CSR, *supra* note 69. The 8th was a Friday, and the Monday following was Veteran's Day, so the jury did not convene again until Tuesday the 12th, when closing arguments occurred. *Id.*

116. Motion for New Trial of Individual Defendants Vincent Menetti and Felecia Menetti at 4–5, *Chavers v. Menetti*, No. 95-CI-07512 (288th Jud. Dist., Bexar Cnty., Tex. filed Jan. 2, 1997).

117. *Leitch v. Hornsby*, 885 S.W.2d 243 (Tex. App.—San Antonio 1994), *rev'd*, 935 S.W.2d 114 (Tex. 1996).

118. *Id.* at 249 (emphasis added).

119. *Id.* at 245 (opinion by Hardberger, J.); *Menetti*, 974 S.W.2d at 168 (opinion by Hardberger, J.).

corporate actors individually liable,<sup>120</sup> it did so over a dissent,<sup>121</sup> and the Supreme Court of Texas had already taken up review of *Leitch* when the *Menetti* trial occurred.<sup>122</sup>

Add to this the Supreme Court of Texas's then-recent dicta in *Holloway v. Skinner*,<sup>123</sup> issued in 1995.<sup>124</sup> In deciding whether corporate actors could be sued for tortious interference with their corporation's contract, the court said this:

As a general rule, the actions of a corporate agent on behalf of the corporation are deemed the corporation's acts. For this reason, we have held that "an officer or director [of a corporation] may not be held liable in damages for inducing the corporation to violate a contractual obligation, provided that the officer or director acts in good faith and believes that what he does is for the best interest of the corporation." "Even the officers and directors of an ordinary corporation, while acting as such, are not personally liable even though they recommend a breach of a valid contract."<sup>125</sup>

This set of sentences harks back to *McLerran* as well. This language, read quickly, suggests that acts done in good faith for the corporation regarding corporate contracts are corporate acts, not the acts of the individual, for purposes of tort law. What better evidence would the lower courts need that the Supreme Court of Texas was headed straight back to the *McLerran* position? It turned out that the so-called "general rule" as stated was an overstatement.<sup>126</sup> When the Supreme Court of Texas decided *Leitch* itself the next year, the court said (even while ruling the *Leitch* corporate actors not liable), "A corporate officer or agent can be liable to others . . . for his or her own negligence."<sup>127</sup> But it cited *McLerran* as precedent for that very

120. See *Leitch*, 885 S.W.2d at 249–50 (indicating *Leitch* and *Crews* were liable because there was evidence and a specific jury finding they were negligent and their negligence was the proximate cause of the plaintiff's alleged injuries).

121. *Id.* at 251 (Peeples, J., concurring and dissenting) (arguing the employer, not the individual, has the duty to provide equipment, contrary to the court's holding).

122. The writ was granted May 10, 1996. *Leitch v. Hornsby*, 39 Tex. Sup. Ct. J. 574 (May 10, 1996).

123. *Holloway v. Skinner*, 898 S.W.2d 793 (Tex. 1995).

124. *Id.*

125. *Id.* at 795 (internal citations and quotations omitted); see also *id.* at 800 (Hecht, J., concurring) ("When a person is authorized to act for another, his action[s] are the other's.").

126. I discuss *Holloway's* statement at length also at Val Ricks, *Fraud Is Now Legal in Texas (for Some People)*, 8 TEX. A&M L. REV. 1, 24–28 (2020).

127. *Leitch v. Hornsby*, 935 S.W.2d 114, 117 (Tex. 1996).

sentence!<sup>128</sup> Now, heads are spinning. If you were reading tea leaves from the Supreme Court of Texas at the time, you probably thought *McLerran* was good law. *Miller v. Keyser*<sup>129</sup> (“a corporate agent is personally liable for his own fraudulent or tortious acts”)<sup>130</sup> is still six years away. It is possible the trial court was following *McLerran* and the dicta from *Holloway*. The Menettis’ summary judgment motion cited no legal authority at all, in the entire document,<sup>131</sup> but *McLerran* (and the *Holloway* dicta) certainly would have supported it, without the insight of later developments.

Why did the plaintiffs object? They brought personal liability claims.<sup>132</sup> One would think they would also want to prove them, even though that would allow the Menettis to defend. Reconstructing an attorney’s strategy is difficult, but for all we know, plaintiffs decided to bank on their win with the corporation’s pleadings. That would be a plausible response to the trial court’s ruling. The trial court’s default judgment order required the corporation to pay damages “as may be proved upon the trial of this cause *as to damages only* as hereinafter provided.”<sup>133</sup> The court seems from that point forward to have interpreted its own order to be that the amount of damages was the only live issue. Later, in both their motion for new trial<sup>134</sup> and on appeal, “[t]he Menettis allege[d] that they were not given the opportunity to defend the piercing-the-corporate-veil allegations,” either.<sup>135</sup> I imagine plaintiffs’ counsel thinking, “Well, the judge thinks damages are the only issue and won’t let the Menettis defend themselves on anything. We don’t understand it, but let’s just roll with it.”

The default judgment against the corporation was particularly harmful to the Menettis either way. This harm is illustrated by the instructions the trial court later gave the jury. Question and Instruction Number Two said, flat out, “You are instructed that the Defendant Menetti & Co., Inc. committed fraud against the Plaintiffs.”<sup>136</sup> The instruction named the elements of the

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128. *Id.*

129. *Miller v. Keyser*, 90 S.W.3d 712 (Tex. 2002).

130. *Id.* at 717.

131. *See generally* Defendant’s Motion for Summary Judgment, *supra* note 72.

132. *See supra* text accompanying notes 58–62.

133. Interlocutory Judgment by Default, *supra* note 109, at 2 (emphasis added). Yes, it can be read different ways depending on what *only* modifies.

134. Motion for New Trial of Individual Defendants Vincent Menetti and Felecia Menetti, *supra* note 116, at 1–3.

135. *Menetti v. Chavers*, 974 S.W.2d 168, 173 (Tex. App.—San Antonio 1998, no pet.).

136. Charge of the Court, Question and Instruction at Question and Instruction 2, *Chavers v. Menetti*, No. 95-CI-07512 (288th Jud. Dist., Bexar Cnty., Tex. 1996).

tort.<sup>137</sup> The court also instructed the jury that the corporation “engaged in false, misleading, unfair or deceptive acts or practices and were a producing cause of damages to the Plaintiffs.”<sup>138</sup> The court then said that the corporation did all this with “actual awareness of the falsity, deception, or unfairness.”<sup>139</sup> The jury was well aware that the corporation primarily acted through Vincent Menetti. After such instructions, whatever the litigants could have submitted as actual evidence might well not have mattered.

And for the plaintiffs, some evidence of tort came in anyway. Because the court allowed in evidence related to veil-piercing, the court allowed evidence that the Menettis committed “actual fraud,” reflecting a requirement of the veil-piercing statute.<sup>140</sup> Rather than adopt “actual fraud” requirements from veil-piercing law, however, the court instructed the jury with elements of the tort of misrepresentation.<sup>141</sup> In that way, the court allowed evidence that the Menettis had committed the tort of intentional misrepresentation, something the Chaverses’ complaint alleged the Menettis had done.<sup>142</sup> The plaintiffs were therefore getting most of what they wanted either way.

The plaintiffs also reasoned, perhaps, that *McLerran* might control, or at least that the Menettis’ summary judgment position might be right. If it was, then no evidence related to personal liability would be allowed anyway, and the jury would be instructed only about veil-piercing. So, the plaintiffs probably played along. The trial appears to have focused mostly on damages and whether the Chaverses could pierce the corporate veil to make the Menettis liable.

137. *Id.*

138. *Id.* at Question and Instruction 3.

139. *Id.* at Question and Instruction 4. The court used the plural verb perhaps because the corporation was named “Menetti & Co., Inc.”

140. TEX. BUS. CORP. ACT ANN. Art. 2.21(A)(2), Act of May 28, 1997, 75th Leg., R.S., ch. 375, § 7, 1997 Tex. Gen. Laws 1516, 1522 (expired Jan. 1, 2010) (allowing veil piercing if the corporate actor “caused the corporation to be used for the purpose of perpetrating and did perpetrate an actual fraud on the [corporate] obligee primarily for the direct personal benefit of” the corporate actor); *see also* TEX. BUS. ORG. CODE ANN. § 21.223(b) (reading in substance identically).

141. Charge of the Court, Question and Instruction, *supra* note 136, at Question and Instruction 11. On the distinction between the veil-piercing requirement and the elements of the tort, *see infra* notes 237–57 and accompanying text.

142. *Id.* (“You are further instructed that fraud occurs when . . .”); *see* Plaintiff’s Second Amended Original Petition, *supra* note 68, at 4 (“Plaintiffs allege that Defendants [plural, which includes the Menettis, as only one defendant was an entity] made material misrepresentations to the Plaintiffs . . .”).

Even that was not categorical, however. The jury instructions and interrogatories were mostly written for damages and veil-piercing.<sup>143</sup> Question and Instruction Two, for instance, asked what the Chaverses' damages were from the corporation's fraud.<sup>144</sup> But stuck in the middle of the instructions was a radical departure. Question and Instruction Eleven began as a follow-up to veil-piercing: "Did [the Menettis] commit actual fraud in the transactions involving the home improvement agreement . . . primarily for the[ir] direct personal benefit . . . ?"<sup>145</sup> "[A]ctual fraud . . . primarily for the direct personal benefit" of the Menettis is only a veil-piercing question. It comes directly from the language of the statute governing veil-piercing.<sup>146</sup> The court defined *fraud* by the elements of the tort, however,<sup>147</sup> as noted; then, if the jury said yes, fraud occurred, the instructions asked a question not related to veil-piercing at all: "What sum of money, if any, if paid now in cash would fairly and reasonably compensate

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143. See generally Charge of the Court, Question and Instruction, *supra* note 136 (instructing the jury primarily regarding damages and veil piercing). Question and Instructions 1–6 ask solely about damages. Question and Instructions 7, 8, and 11 ask about veil-piercing. No. 9 addressed the so-called "trust fund doctrine;" No. 10 attorneys' fees; and Nos. 13–14 "denuding" the corporation. *Id.*

What was the "trust fund doctrine"? In *Lyons-Thomas Hardware Co. v. Perry Stove Mfg. Co.*, 86 Tex. 143, 155–66, 24 S.W. 16, 20–25 (1893), the court declared the assets of a dissolved corporation a trust for the benefit of creditors, with the manager a trustee: "[W]hen the corporation is hopelessly insolvent . . . and these facts are known to its officers and directors, then all of the assets of the corporation become a trust fund in the hands of the directors . . . for the equal benefit of all the creditors of the concern, and any attempted preference in favor of the directors themselves . . . will not be upheld." *Lyons-Thomas Hardware Co. v. Perry Stove Mfg. Co.*, 86 Tex. 143, 155–66, 24 S.W. 16, 23 (1893) (citing corporate dissolution statutes and equitable principles). Nine decades later, *Henry I. Siegel Co. v. Holliday*, 663 S.W.2d 824 (Tex. 1984), opined based on more recent statutes that the liability of directors "is limited . . . to the extent of corporate assets that come into their hands." *Henry I. Siegel Co. v. Holliday*, 663 S.W.2d 824, 828 (Tex. 1984). This was the extent of the trust fund doctrine at the time of *Menetti*.

Denuding the corporation appears to have been a related theory. See *Fagan v. La Gloria Oil & Gas Co.*, 494 S.W.2d 624, 632 (Tex. App.—Houston [14th Dist.] 1973, no writ) ("To the extent that they, as shareholders . . . , took to themselves the corporate assets, they are personally liable . . ."); *Francis v. Beaudry*, 733 S.W.2d 331, 335 (Tex. App.—Dallas 1987, writ ref'd n.r.e.).

144. Charge of the Court, Question and Instruction, *supra* note 136, at Question and Instruction 2.

145. *Id.* at Question and Instruction 11.

146. See TEX. BUS. CORP. ACT ANN. Art. 2.21, Act of May 28, 1997, 75th Leg., R.S., ch. 375, § 7, 1997 Tex. Gen. Laws 1516, 1522 (expired Jan. 1, 2010) (the predecessor to TEX. BUS. ORGS. CODE ANN. § 21.223(a)(2)).

147. Better ways to define *actual fraud* exist, and most courts have employed them. See *infra* notes 237–57 and accompanying text.



[the Chaverses] for their damages, if any, that resulted from said fraud?”<sup>148</sup> That is not a veil-piercing question. If the point of this question were veil-piercing, then the damages resulting from it would already be answered by Question and Instruction Two. This question instead asked what damages were caused by the Menettis’ committing the tort of fraud, and the jury assessed an amount.<sup>149</sup>

It became worse. Question and Instruction Twelve A asked, “What sum of money, if any, if paid in cash, should be assessed against Vincent Menetti and Fel[e]cia Menetti . . . as exemplary damages, if any, for such fraud described in Question Number 11?”<sup>150</sup> The jury assessed damages against the Menettis under Question Twelve A, also.<sup>151</sup> The jury had already imposed corporate liability for exemplary damages against the corporation under Question 5,<sup>152</sup> so this was again a separate issue addressing direct, personal liability. The jury verdict clearly imposed personal liability on the Menettis for fraud apart from the corporation’s obligation. (The jury also awarded \$10,000 damages total for “denuding” the corporation,<sup>153</sup> and this is not something the corporation itself could do, either. Denuding liability is derivative liability<sup>154</sup> and is similar in some respects to veil piercing, but the harm from it requires acts the corporation itself cannot do.)

So, it is clear some tort claims against individuals for their own torts limped on until the end of the trial court litigation. It is also clear that neither the parties nor the trial judge clearly demarcated—at least in the historical record we have—a difference between (i) claims for which the corporation was primarily liable (contract breach), (ii) claims for which the corporation could only have been vicariously liable (fraud, negligence, DTPA), and (iii) claims against individuals for their own torts (e.g., the Menettis’ alleged fraud, which was the basis for a vicarious liability claim in (ii)). The trial court appears to have tried to think of the plaintiffs’ live claims as solely corporate and veil-piercing, but it was not successful.

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148. Charge of the Court, Question and Instruction, *supra* note 136, at Question and Instruction 12.

149. *See id.* (finding for fraud, \$2,500 per each individual defendant).

150. *Id.* at Question and Instruction 12A.

151. *See id.* (finding for fraud, \$2,500 per each individual defendant, and for exemplaries, \$5,000 jointly against both).

152. *Id.* at Question and Instruction 5.

153. *Id.* at Question and Instruction 13 & 14.

154. *Nw. Cattle Feeders, LLC v. O’Connell*, 554 S.W.3d 711, 729 (Tex. App.—Fort Worth 2018, pet. denied).

These ambiguities were never resolved, but they might have been buried. After the jury's verdict, the Chaverses moved for judgment in the amount of \$137,000, a number reached simply by adding up everything the jury awarded.<sup>155</sup> "The trial judge reduced this amount to \$97,000,"<sup>156</sup> the court of appeals later said, but no rationale for the reduction appears in the record. The trial judge and the parties simply crossed out the amounts typed in the plaintiff's submission and wrote and initialed others instead.<sup>157</sup> As a consequence, we have no idea what jury verdict amounts made their way into the final judgment.<sup>158</sup> It might have been only veil-piercing liability, but it might have been any combination of that and any other finding.

### III. THE APPEAL: WHAT HAPPENED TO THE PERSONAL LIABILITY CLAIMS

Given such a trial record, we should not be surprised that hints of tort claims against individuals appear in the appellate opinion.<sup>159</sup> Even so, the *Bates Energy* opinion correctly read that the San Antonio Court of Appeals took no account of them.<sup>160</sup> By the time the San Antonio court reached the substance of the Menettis' appeal, only the veil-piercing claims were left.<sup>161</sup>

What happened to the claims sounding in tort against the Menettis? The court followed *McLerran* and held that none existed. The court did this obliquely, in its section on "Standing."<sup>162</sup>

The Menettis appealed almost everything the trial court did. (1) For starters, the Menettis complained that the corporation should not have been

155. See Charge of the Court, Question and Instruction, *supra* note 136, at Question and Instruction 1–14.

156. *Menetti v. Chavers*, 974 S.W.2d 168, 170 (Tex. App.—San Antonio 1998, no pet.).

157. Final Judgment at 2, *Chavers v. Menetti*, No. 95-CI-07512 (288th Jud. Dist., Bexar Cnty., Tex. 1996).

158. The jury awarded \$62,000 for contract breach, and inclusion of this amount is necessary in any event to reach \$97,000. However, the other amounts awarded are, against the corporation, \$5,000 for fraud, \$5,000 for DTPA, \$35,000 for knowingly violating the DTPA, \$5,000 for exemplaries for fraud, and \$5,000 for negligence. Against the Menettis, the jury awarded \$2,500 x 2 for fraud damages, \$5,000 in exemplaries, and \$5,000 x 2 for denuding. Any combination of the contract breach damages and these other amounts could equal \$97,000. For all of these amounts, see generally Charge of the Court, Question and Instruction, *supra* note 136, at Question and Instruction 1–14.

159. See *supra* notes 58–62 and accompanying text.

160. See *supra* notes 56–63 and accompanying text.

161. See *Menetti*, 974 S.W.2d at 172–73. This is the thesis of this Part III.

162. *Id.* at 170–73.

held liable.<sup>163</sup> Let's call those the "corporate liability" claims. (2) The Menettis also argued, as noted, that the trial court should have allowed the Menettis to defend themselves against claims that they themselves had breached a contract and committed torts.<sup>164</sup> Let's call those "personal liability" claims.<sup>165</sup> (3) Finally, the Menettis claimed they should not be held liable for the corporation's liability.<sup>166</sup> Let's call those the "veil-piercing liability" claims. (By handling all remaining issues as veil-piercing claims, the court seemed more or less to lump in with veil-piercing the "violation of the Trust Fund doctrine" and "denuding the corporation."<sup>167</sup>)

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163. *Id.* at 169.

164. *See id.* at 169–70 & nn.2–3; *see also supra* text accompanying note 116.

165. The court of appeals confusingly referred to veil-piercing claims as "individual liability." *Menetti*, 974 S.W.2d at 170–75.

166. *Id.* at 171.

167. *See id.* at 174 ("The Menettis raise several claims regarding the issue of piercing the corporate veil."); *see also id.* at 175 ("Because article 2.21 requires fraud to pierce . . . [also] by 'other similar' theories, this finding eliminates individual liability for all the other theories pleaded by the Chaverses, as well," and mentioning the "Trust Fund Doctrine" by name). The court offered an alternative holding for the so-called "Trust Fund" doctrine, discussed *supra* note 143:

In the first place, there is case law suggesting that the doctrine only applies when a corporation is dissolved. In the second place, the doctrine provides no basis for personal liability of corporate directors. It merely allows corporate creditors to follow *corporate assets that are traceable* and to subject those assets to their claims. In order to rely on this theory, . . . the Chave[r]ses needed to demonstrate the amount of corporate assets (probably of a dissolved corporation) received and held by the Menettis. No such showing was made.

*Menetti*, 974 S.W.2d at 175–76 n.8 (citations omitted) (citing *Kern v. Gleason*, 840 S.W.2d 730, 738 (Tex. App.—Amarillo 1992, no writ); *Siegel v. Holliday*, 663 S.W.2d 824, 827 (Tex. 1984)). For subsequent developments regarding the trust fund doctrine, see 20A ELIZABETH S. MILLER & ROBERT A. RAGAZZO, TEXAS PRACTICE, BUSINESS ORGANIZATIONS §§ 36.13, 41.3 (3d ed. Nov. 2020); *see generally* Christian Otteson, *Current Application of the Trust Fund Doctrine in Texas*, 55 BAYLOR L. REV. 313, 314 (2003) (addressing trust fund doctrine viability in Texas for corporate creditors).

*Castleberry* itself approved of the "denuding" theory as an alternative to veil-piercing, *Castleberry v. Branscum*, 721 S.W.2d 270, 271 n.1 (Tex. 1986), but some courts soon lumped it with the veil-piercing doctrine, as *Menetti* seemed to. *See Francis v. Beaudry*, 733 S.W.2d 331, 335 (Tex. App.—Dallas 1987, writ *ref'd n.r.e.*) ("This theory also supports piercing the corporate veil."); *Hovel v. Batzri*, 490 S.W.3d 132, 147 (Tex. App.—Houston [1st Dist.] 2016, *pet. denied*) (reporting *Castleberry* as "recognizing denuding theory as doctrine for disregarding corporate fiction"). *See generally* 13 ELIZABETH S. MILLER & ROBERT A. RAGAZZO, TEXAS PRACTICE, TEXAS METHODS OF PRACTICE § 46:2 (Feb. 2021) (discussing common law approaches to Texas veil-piercing law). The theory is still alive as an alternative to veil-piercing but recognized as "derivative of the corporation's liability for some obligation." *Nw Cattle Feeders, LLC v. O'Connell*, 554 S.W.3d 711, 729 (Tex. App.—Fort Worth 2018, *pet. denied*); *Tunad Enters. Inc. v. Palma*, No. 05-19-00497-CV, 2020 WL 3410633, at \*3 (Tex. App.—Dallas June 22, 2020, no *pet.*).

The court somewhat confusingly referred to veil-piercing liability as “individual liability,” which is the way many—perhaps most—lawyers talk about what we are calling personal liability.<sup>168</sup> The court suggested at the beginning of its opinion that “individual liability” meant veil-piercing liability—individual liability for the corporation’s obligations: “To establish individual liability, the Chaverses claimed that the Menettis were the alter egos of their corporation, that the corporation was a sham, that it was formed for an illegal purpose, that the Menettis had violated the Trust Fund Doctrine, and/or that they were guilty of denuding the corporation.”<sup>169</sup>

Part of the misread of *Menetti* stems from this confusing use of *individual liability*, and the court itself was not entirely consistent.<sup>170</sup> To clearly avoid this ambiguity and still distinguish personal liability from veil-piercing liability, I will not use *individual liability* to mean either, but you will see it in quotes from the opinion, and the *Menetti* court *almost* always meant by it veil-piercing liability.

In the opinion, the San Antonio Court of Appeals dealt first with the argument that the corporation should not have been held liable. The corporation itself, which initially appealed along with the Menettis, had voluntarily dismissed its appeal,<sup>171</sup> so by the time of decision only the Menettis—shareholders, officers, and agents of the corporation—were before the court. The court held that the Menettis did not have standing to argue against corporate liability.<sup>172</sup> “The Menettis are only injured when the corporation’s veil is pierced, and that is the only issue about which the Menettis have standing to complain.”<sup>173</sup>

But wait! What about the claims that they committed fraud, and the jury’s imposition on them of damages—including exemplary damages—for fraud? The court confessed, “The Chaverses’ petition raised both liability claims and claims that would allow them to pierce the corporate veil.”<sup>174</sup>

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168. See, e.g., *supra* text accompanying notes 46–47.

169. *Menetti*, 974 S.W.2d at 170 n.1.

170. See *supra* text accompanying note 59 and *infra* notes 189–91 and accompanying text.

171. *Menetti*, 974 S.W.2d at 171 n.6.

172. *Id.* at 171 (“[T]he default against the corporation on the liability issues does not injure or prejudice the Menettis so as to give them standing to complain of that default judgment.”).

173. *Id.* at 172. This holding has been followed by other courts, even though the precedent cited by *Menetti* in support was primarily *McLerran*. E.g., *Stover v. ADM Milling Co.*, No. 05-17-00778-CV, 2018 WL 6818561, at \*5 (Tex. App.—Dallas Dec. 28, 2018, pet. denied).

174. *Menetti*, 974 S.W.2d at 171.

These personal liability claims more or less disappear, however. The legal sleight of hand is jarring when you see it. Here is the beginning of the court's explanation:

In a sense, these [liability claims and veil-piercing claims] are joint claims. The liability of the Menettis individually necessarily depends on a finding of liability against the corporation. However, a finding of liability against the corporation does not necessarily amount to a finding of liability against the Menettis individually. The corporate structure is designed to shield shareholders from just such liability.<sup>175</sup>

Reading this from back to front, the premise is that the corporate structure is designed to shield shareholders—this is more or less the “general shield” or bubble shield theory of the corporation: that it somehow protects corporate actors not just from corporate liability but also from their own. It follows from this premise that veil-piercing is the only way to reach the Menettis.

The premise is incorrect.<sup>176</sup> A Texas appellate court in 1998, however, was probably just trying not to be reversed. In late 1996, the Supreme Court of Texas in *Leitch v. Hornsby*<sup>177</sup> reversed a San Antonio Court of Appeals opinion by Justice Hardberger and held corporate officers and employees not liable for an unsafe workplace even though the officers were—as officers—in charge of workplace safety; the supreme court cited *McLerran* in the opinion as live precedent.<sup>178</sup> In the process, they said the officers' alleged acts “were actions of a corporate officer on behalf of [the corporation] and deemed [the corporation's] acts,” citing *Holloway*.<sup>179</sup> The court suggested the officers could only be reached through “alter ego.”<sup>180</sup>

Given those signals from the Supreme Court of Texas, that *Menetti* rested heavily on *McLerran* is no surprise at all. Even Justice Hardberger had referred to *McLerran* as live precedent four years earlier—in *Leitch v. Hornsby*.<sup>181</sup> Recall his own language: “An employee, who is not party to the contract, *cannot be held liable* for a breach of that contract, or *for a deceptive act growing out of that contract*, unless he violated the DTPA or committed a

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175. *Id.*

176. *See supra* notes 1–6 and accompanying text.

177. *Leitch v. Hornsby*, 935 S.W. 2d 114 (Tex. 1996).

178. *Id.* at 118; *see supra* text accompanying notes 117–31.

179. *Leitch*, 935 S.W. at 117; *see infra* note 218 (discussing *Holloway*'s subsequent effect).

180. *Leitch*, 935 S.W. at 117.

181. *See supra* notes 117–31 and accompanying text.

separate tort himself.”<sup>182</sup> The Menettis were accused of DTPA violations and separate torts. But after the justice wrote that in 1994, *Leitch* had been reversed, *McLerran* had been cited by the higher court, and *Holloway*’s dicta had been declared and applied. Whereas in *Leitch*, Justice Hardberger also cited *Light v. Wilson* and other cases and attempted to negotiate the conflict between them and *McLerran*;<sup>183</sup> in *Menetti*, Justice Hardberger does not cite *Light v. Wilson* once, or any other contrasting precedent on the issue. It appears the justice decided to bank on *McLerran* alone. At any rate, in a world where *McLerran* triumphs, *McLerran* is fully able to stop a corporate actor from being “held liable . . . for a deceptive act growing out of that contract,”<sup>184</sup> and in such a case, the only other alternative would be veil-piercing.

In *Menetti*, Justice Hardberger explained that *McLerran* is “strongly analogous.”<sup>185</sup> Recall that, in *McLerran*, plaintiffs sued the corporation and its officers, just as here. The *Menetti* court recounted, “The [*McLerran*] trial court ordered a default judgment against all defendants after the defendants failed to appear at trial,” and the “individual officers complained that they could not be held liable for corporate acts in the absence of a veil-piercing allegation and proof of that allegation.”<sup>186</sup> Noting the *McLerran* plaintiffs’ contract was with the corporation, *Menetti* said the *McLerran* court concluded that without veil piercing “the individual officers could not be held liable.”<sup>187</sup> The court added “for corporate acts,”<sup>188</sup> but *McLerran*’s effect is to make the acts of the corporate actors only corporate acts, not their own. I believe the justice read *McLerran* correctly. That is what the *McLerran* court held.

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182. *Leitch v. Hornsby*, 885 S.W.2d 243, 249 (Tex. App.—San Antonio 1994), *rev’d*, 935 S.W.2d 114 (Tex. 1996) (emphasis added).

183. In *Leitch*, Justice Hardberger offered this way to massage the two cases together: “In [*Light*], the court held that an agent is not liable for the acts of the corporation unless there is a finding of individual wrongdoing supported by pleadings and evidence.” *Id.* Justice Hardberger also cited *Leyendecker & Assocs., Inc. v. Wechter*, 683 S.W.2d 369, 375 (Tex. 1984), which held, “A corporation’s employee is personally liable for tortious acts which he directs or participates in during his employment.”

184. *Leitch*, 885 S.W.2d at 249.

185. *Menetti v. Chavers*, 974 S.W.2d 168, 172 (Tex. App.—San Antonio 1998, no pet.).

186. *Id.* (footnote omitted).

187. *Id.*

188. *Id.* There was liability only for corporate acts because the court assumed that personal liability disappeared; that is why *McLerran* was later overruled.

After reciting the facts and holding of *McLerran* this way—the same way I do in the introduction<sup>189</sup>—the *Menetti* court concluded that the “strongly analogous” *McLerran* was “highly instructive. *Because individual liability is impossible without some piercing of the corporate veil, the Menettis were not injured by the default judgment against the corporation.*”<sup>190</sup> We are supposed to read this odd sentence even more broadly than the court instructs. In this sentence, the court probably departs from its specialized meaning of “individual liability.” If we take the court’s earlier use of *individual liability* to include only veil-piercing claims, this sentence is a tautology. But the court in this sentence means *individual liability* to include personal liability. In the full passage, the court reasons that personal liability of agents, officers, and directors is impossible under *McLerran*:

[*McLerran*] is highly instructive. Because individual liability is impossible without some piercing of the corporate veil, the Menettis were not injured by the default judgment against the corporation. In fact, under the reasoning in [*McLerran*], absent a piercing of the veil, *the Menettis did not commit the complained-of acts*: “[S]ince the contract was with the corporation and not with [the individual defendants], any representations made by [the individual defendants] were made as agents of the corporation. . . . [T]here is no evidence in the record before us that [the corporation] was the alter ego of either [individual defendant]. The courts below erred in rendering a personal judgment against them on this theory.”<sup>191</sup>

See what happened to the personal liability claims? They disappeared in a puff of legal cannon shot from an overruled decision. Under the authority of *McLerran*, the Menettis did not commit any breach of contract or any torts. That legal turn of phrase is the *Menetti* court’s justification for disregarding—treating as if non-existent—all of the personal liability claims against the Menettis.

The logic of the sentence itself requires some explanation: “[A]bsent a piercing of the veil, the Menettis did not commit the complained-of acts.”<sup>192</sup> So, if the veil is pierced, then they did commit the complained-of acts? Obviously, the court has discarded thinking of committing a tort as

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189. See *supra* notes 33–51 and accompanying text.

190. *Menetti*, 974 S.W.2d at 172 (emphasis added).

191. *Id.* (quoting *Karl & Kelly Co., Inc. v. McLerran*, 646 S.W.2d 174, 175 (Tex. 1983), *overruled by* *Light v. Wilson*, 663 S.W.2d 813 (Tex. 1983), *as recognized in* *Miller v. Keyser*, 90 S.W.3d 712, 717 (Tex. 2002) (emphasis added)).

192. *Menetti*, 974 S.W.2d at 172.

something that a person does; the court is no longer thinking factually. Whether a corporate actor commits a tort in this mindset depends solely on whether the law attributes the acts to that actor. Under *McLerran*, *Menetti* said the acts of corporate actors are only the acts of the corporation. The court explained elsewhere how they could become, again, the acts of those people who actually performed them: “If the corporate veil is pierced, the shareholders are considered the equivalent of the corporation, not separate parties with individual defenses. The corporation’s liability becomes the shareholder’s liability absolutely.”<sup>193</sup> And that is how, if veil-piercing is proved, the Menettis would have committed the complained-of acts.

Thus, absent veil-piercing, the Menettis needed no defense against such claims, the court said, because no such claims existed. By the very next paragraph, there are no personal liability claims left and only veil-piercing claims remain:

The Menettis’ lack of standing disposes of all claims that the trial court erred in finding liability for fraud, DTPA violations, breach of contract, and negligence. We further find that the Menettis were not entitled to present a defense as to the existence of liability for the underlying claims. . . . We need only address the sufficiency of the evidence supporting the determination to pierce the corporate veil.<sup>194</sup>

In the final section of the opinion, “Piercing the Corporate Veil,” the court thus dealt with the only issue it thought remained in the case: the Menettis’ responsibility for the corporation’s liability—the veil-piercing claims. That is the section of the opinion that addresses the veil-piercing statute. The language introducing this section quite clearly justifies the *Bates Energy* conclusion that *Menetti*’s language about the veil-piercing statute addressed only veil-piercing claims.<sup>195</sup>

The Menettis allege that they were not given the opportunity to defend the piercing-the-corporate-veil allegations. Undoubtedly, the Menettis were entitled to defend this claim, as it was the sole basis for finding them liable for the liability of the corporation. . . . However, because we find that the Chaverses failed to introduce legally sufficient evidence to support their

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193. *Id.* at 171 n.5.

194. *Id.* at 172–73.

195. *Bates Energy Oil & Gas v. Complete Oilfield Servs.*, 361 F. Supp. 3d 633, 671 n.13 (W.D. Tex. 2019); *see supra* text accompanying notes 56–63.



piercing the corporate veil, we do not reach the issue of whether the Menettis were deprived of the opportunity to present a viable defense.<sup>196</sup>

And at the conclusion of that section, after discussing the veil-piercing claims, the court harks back to its sweeping away all other claims in reliance on *McLerran*: “All other claims are unaddressed either because the Menettis lack standing to bring them or they are unnecessary to the disposition of this appeal.”<sup>197</sup>

And that is what happened in *Menetti* to the claims that the corporate actors themselves committed misrepresentations, negligence, and breach of contract—such claims were deemed non-existent on the authority of the overruled case.

#### IV. WHAT *MENETTI* ACTUALLY SAID ABOUT THE STATUTE

In line with the limited nature of what the *Menetti* court thought was at issue when it discussed the veil-piercing statute—only claims that the corporate actors were liable for the corporation’s liabilities—the meaning of the *Menetti* opinion’s confusing verbiage about the veil-piercing statute becomes clear.

I wish to stress again my respect for the misreading; without the full context, the language of this section is easy to misread. With the context firmly in mind, however, the language of *Menetti* regarding the statute becomes quite clear. In fact, the court probably read the statute correctly.

Here is the most confusing passage from the San Antonio court’s opinion—the very crux of the opinion regarding the veil-piercing statute:

Under 1997 amendments, article 2.21(A)(2) appears to blur the distinction between contractual obligations and other claims. The provision now states that it covers all contractual obligations of the corporation “*or any matter relating to or arising from the obligation.*” TEX. BUS. CORP. ACT ANN. art. 2.21 (A)(2) (Vernon Supp. 1998) (amended by Act of May 1, 1997, ch. 375, § 7, 1997 Tex. Sess. Law Serv. 1522-3) (emphasis added). . . . For all matters covered by this provision, the corporate veil may not be pierced absent a showing of actual fraud. The commentary following the 1996 amendments suggests that the actual fraud requirement should be applied, by analogy, to tort claims,

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196. *Menetti*, 974 S.W.2d at 173.

197. *Id.* at 176.

especially those arising from contractual obligations. See TEX. BUS. CORP. ACT. ANN. art. 2.21 comment (Vernon Supp. 1998).

In the case before the court, both contract and tort claims have been brought against the Menettis. Whether a showing of actual fraud is required to pierce the corporate veil in this case is, we believe, a question of some difficulty. However, after surveying the case law and the legislation, which seem to be somewhat at odds on the entire issue of corporate-veil piercing, we conclude that the claims before us do relate to or arise from a contractual obligation and therefore fall under the amended article 2.21. Thus, the Chaverses were required to demonstrate actual fraud to pierce the corporate veil and hold the Menettis individually liable. We are persuaded that this is the correct course because we believe the traditional concerns of tort cases, that the parties have not encountered each other voluntarily, do not apply here, where the Menettis and the Chaverses did in fact enter a bargain knowingly.<sup>198</sup>

These two paragraphs could easily trip up readers. On their face, forgetting everything else we now know about the case and the appellate court's opinion, these paragraphs seem to assert the following:

- (a) “[O]r any matter relating to or arising from the obligation,” quoted here without the context of the rest of the statute, appears exceedingly broad. It seems to include claims of personal liability brought against individual entity actors for their own torts. Those are usually related to a business entity's contractual obligations (which (i) only form when its agents induce other parties to contract and (ii) are performed by the entity's agents).<sup>199</sup>
- (b) The next paragraph begins, “In the case before the court, both contract and tort claims have been brought against the Menettis.”<sup>200</sup> This sounds exactly like the court is addressing personal liability claims.
- (c) The next two sentences then end with this statement: “[W]e conclude that the claims before us do relate to or arise from a contractual

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198. *Id.* at 174.

199. The court's conditional, “[f]or all matters covered by this provision,” *id.*, does not help the reader but only pushes the analysis back one step to the statute itself, which the court fails to quote in full.

200. *Id.*

obligation and therefore fall under the amended article 2.21.”<sup>201</sup> If (a) and (b) mean what they seem to say facially, then the premise for application of the veil-piercing statute is simple: All claims that relate to or arise from a contractual obligation are covered by the veil-piercing statute, whether they are made against the individual for the individual’s own torts or against the entity for the entity’s torts. After all, that broad phrase when taken by itself outside of the statute covers both.

- (d) Against the backdrop of (c), the next sentence, which would normally not apply to claims against individuals for their own fraud, appears to take on new meaning: “Thus, the Chaverses were required to demonstrate actual fraud to pierce the corporate veil and hold the Menettis individually liable.”<sup>202</sup> The way we are reading this passage, out of context, this sentence seems to say that now the veil-piercing statute is to apply to claims against individuals for their own personal liability for fraud they commit.

And one more thing. Perhaps we should call it

“(e)”: After all that, the court applied the exception to the statute that required the plaintiffs to show “actual fraud.” In applying this exception, the court talked as if actual fraud required the plaintiffs to show that the defendant had committed the tort of intentional misrepresentation; the court listed the elements of the tort.<sup>203</sup> This is confusing because if a defendant has committed a tort, then the defendant should already be liable—both in Texas and nationally—under the common law referred to at the beginning of this article.<sup>204</sup> Proving up the elements of the tort seems duplicative in a case like *Menetti* where the defendants were already accused of fraud. The elements of the tort are also not related to traditional veil-piercing principles but instead constitute an entirely separate basis for liability in tort, so the lawyer is apt to wonder what they are doing in a veil-piercing case. But the reader of *Menetti* might perhaps think, *well, if we have to prove the elements of the tort of fraud to get veil-piercing, then personal*

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201. *Id.*

202. *Id.*

203. *Id.* at 175.

204. *See supra* notes 1–2.

*liability for fraud—the elements for which the court is requiring be proved for veil-piercing—must be abrogated as a ground for separate liability.* And that is another way to misread this case.

This reading of these moves, which supports the statutory fraud immunity reading of *Menetti*, is plausible if the paragraphs are read in isolation, out of the case’s context, and without knowing the case’s history.

But knowing what we now know, and reading the passage in context, such conclusions are untenable. Consider each one:

A. *The phrase “or any matter relating to or arising from the obligation” only refers to the corporation’s liability.*

*Menetti* obviously did not mean this phrase to apply to personal liability of corporate actors—recall that by “personal liability” we mean direct liability for the torts those actors themselves commit. *Menetti* meant the phrase to apply only to claims of veil-piercing liability. Several reasons support this conclusion.

1. The only claims left were veil-piercing claims.

First, by the time the *Menetti* court used the phrase, it had made clear that it was addressing only a small set of claims: that the entity actors in the case, the Menettis, were liable for the obligations of the entity. The court was addressing only veil-piercing liability. As shown in Part III, the *Menetti* court thought that *McLerran* was good law and had already applied it to remove from the litigation any claims that the Menettis were personally liable for their own torts: “[U]nder the reasoning in [*McLerran*], absent a piercing of the veil, *the Menettis did not commit the complained-of acts.*”<sup>205</sup> As the court noted before it began discussing the statute, “We need only address the sufficiency of the evidence supporting the determination to pierce the corporate veil.”<sup>206</sup> So when the court said that the statute was to apply to any entity contractual obligation “or any matter relating to or arising from the obligation,” the court meant only veil-piercing liability—only the liability of corporate actors for the contract and tort obligations of the entity.<sup>207</sup> Only claims for veil-piercing liability were left. The court could not have been addressing anything more.

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205. *Menetti*, 974 S.W.2d at 172 (emphasis added).

206. *Id.* at 173.

207. *Id.* at 174.

2. The statute only covers veil-piercing claims.

Second, the court read the statute correctly. The statute does not do what *McLerran* does. It has no effect on personal liability. Though the *Menetti* court quoted the “relating to” phrase alone, the statute read as a whole quite clearly covers only veil-piercing liability claims. Here is the code provision, in relevant part, in force when *Menetti* was decided:

Art. 2.21. Liability of Subscribers and Shareholders

A. A holder of shares, an owner of any beneficial interest in shares, or a subscriber for shares whose subscription has been accepted, or any affiliate thereof or of the corporation, shall be under no obligation to the corporation or to its obligees with respect to:

(1) such shares other than the obligation, if any, of such person to pay to the corporation the full amount of the consideration, fixed in compliance with Article 2.15 of this Act, for which such shares were or are to be issued;

(2) any contractual obligation of the corporation or any matter relating to or arising from the obligation on the basis that the holder, owner, subscriber, or affiliate is or was the alter ego of the corporation, or on the basis of actual fraud or constructive fraud, a sham to perpetrate a fraud, or other similar theory, unless the obligee demonstrates that the holder, owner, subscriber, or affiliate caused the corporation to be used for the purpose of perpetrating and did perpetrate an actual fraud on the obligee primarily for the direct personal benefit of the holder, owner, subscriber, or affiliate; or

(3) any obligation of the corporation on the basis of the failure of the corporation to observe any corporate formality, including without limitation: (a) the failure to comply with any requirement of this Act or of the articles of incorporation or bylaws of the corporation; or (b) the failure to observe any requirement prescribed by this Act or by the articles of incorporation or bylaws for acts to be taken by the corporation, its board of directors, or its shareholders.<sup>208</sup>

Compare that language with the current formulation in the Business Organizations Code. It has not changed in substance.

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208. Act of May 28, 1997, 75th Leg., R.S., ch. 375, § 7, 1997 Tex. Gen. Laws 1516, 1522 (expired Jan. 1, 2010).

## Sec. 21.223. LIMITATION OF LIABILITY FOR OBLIGATIONS.

(a) A holder of shares, an owner of any beneficial interest in shares, or a subscriber for shares whose subscription has been accepted, or any affiliate of such a holder, owner, or subscriber or of the corporation, may not be held liable to the corporation or its obligees with respect to:

(1) the shares, other than the obligation to pay to the corporation the full amount of consideration, fixed in compliance with Sections 21.157-21.162, for which the shares were or are to be issued;

(2) any contractual obligation of the corporation or any matter relating to or arising from the obligation on the basis that the holder, beneficial owner, subscriber, or affiliate is or was the alter ego of the corporation or on the basis of actual or constructive fraud, a sham to perpetrate a fraud, or other similar theory; or

(3) any obligation of the corporation on the basis of the failure of the corporation to observe any corporate formality, including the failure to:

(A) comply with this code or the certificate of formation or bylaws of the corporation; or

(B) observe any requirement prescribed by this code or the certificate of formation or bylaws of the corporation for acts to be taken by the corporation or its directors or shareholders.

(b) Subsection (a)(2) does not prevent or limit the liability of a holder, beneficial owner, subscriber, or affiliate if the obligee demonstrates that the holder, beneficial owner, subscriber, or affiliate caused the corporation to be used for the purpose of perpetrating and did perpetrate an actual fraud on the obligee primarily for the direct personal benefit of the holder, beneficial owner, subscriber, or affiliate.<sup>209</sup>

The limited reach of the coverage clause becomes immediately apparent. “[O]r any matter relating to or arising from the obligation” is a small part of a much longer phrase that includes the preamble in subsection (a) as well as subsection (a)(2). Read together in the context of the whole statute’s

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209. TEX. BUS. ORGS. CODE ANN. § 21.223. *Affiliate* is a defined term; it “means a person who controls, is controlled by, or is under common control with another person.” *Id.* § 1.002(1). This probably includes corporate officers, parent and subsidiary corporations, and non-officer managers who are not shareholders. On its face, it might include common agents of business entities, as these are subject to the entities’ control.

language, the phrase is quite clearly limited to veil-piercing. The larger clause reads as follows (under the latest version, but the differences are formal):

(a) A holder of shares, an owner of any beneficial interest in shares, . . . or any affiliate of such a holder [or] owner . . . may not be held liable to the corporation or its obligees with respect to: . . . (2) any contractual obligation of the corporation or any matter relating to or arising from the obligation on the basis that the holder, beneficial owner, subscriber, or affiliate is or was the alter ego of the corporation or on the basis of actual or constructive fraud, a sham to perpetrate a fraud, or other similar theory . . . .<sup>210</sup>

The whole passage has a limited effect. The corporate actor may not be held liable to the corporation's obligees with respect to any contractual obligation or any matter "relating to or arising from the obligation *on the basis that the [corporate actor] is or was the alter ego of the corporation or on the basis of actual or constructive fraud, a sham to perpetrate a fraud, or other similar theory.*"<sup>211</sup> All of the theories named in the statute are veil-piercing theories. These are theories of "derivative liability"<sup>212</sup> that—predating *Castleberry*—have been used to impose on entity actors the liability of an entity.<sup>213</sup> The theories remain current today.<sup>214</sup> What the statute covers, then, is not everything relating to an entity contractual obligation but everything related to an entity obligation for which the person is charged with liability on the basis of a

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210. *Id.* § 21.223(a)(2).

211. *Id.* (emphasis added).

212. The phrase comes from *Willis v. Donnelly*, 199 S.W.3d 262, 273 (Tex. 2006).

213. See *Willis v. Donnelly*, 199 S.W.3d 262, 273 (Tex. 2006) ("We hold that characterizing the theory as 'ratification' rather than 'alter ego' is simply asserting a 'similar theory' of derivative liability that is covered by the statute."); *Castleberry v. Branscum*, 721 S.W.2d 270, 272 (Tex. 1986) ("[A]lter ego is only one of the bases for disregarding the corporate fiction . . . . The basis used here to disregard the corporate fiction . . . is separate from alter ego."); *id.* at 278 (Gonzalez, J., dissenting) ("Castleberry . . . had to produce some evidence either under an alter ego theory or under a use of the corporate entity as a sham to perpetrate a fraud theory."); *Lucas v. Texas Indus.*, 696 S.W.2d 372, 374–75 (Tex. 1984) (employing "alter ego" as a general name for all veil-piercing or derivative shareholder liability theories); *Rose v. Intercontinental Bank, N.A.*, 705 S.W.2d 752, 756 (Tex. App.—Houston [1st Dist.] 1986, writ ref'd n.r.e.) ("Basing a claim of alter ego on fraudulent intent is only one manner to establish the claim."); *Tigrett v. Pointer*, 580 S.W.2d 375, 385 (Tex. Civ. App.—Dallas 1978, writ ref'd, n.r.e.) (describing alter ego, fraud, and constructive fraud). On this, West and Chao agree. See Glenn D. West & Susan Y. Chao, *Corporations*, 56 S.M.U. L. REV. 1395, 1407 (2003) ("The phrase 'or other similar theory' does not relate only to alter ego—a piercing the corporate veil theory—but to 'actual fraud,' 'constructive fraud,' and 'a sham to perpetrate a fraud.'").

214. *E.g.*, *Endsley Elec., Inc. v. Altech, Inc.*, 378 S.W.3d 15, 22–23 (Tex. App.—Texarkana 2012, no pet.) (laying out the current law and definitions for corporate veil-piercing).

veil-piercing or similar theory.<sup>215</sup> In other words, the statute is limited to derivative liability—to what we have called veil-piercing liability claims.<sup>216</sup>

This limitation is shored up by the phrase “on the basis” in subsection (a)(2). The only liability limited by Section 21.223(a)(2) (or Article 2.21) is liability “on the basis” of a veil-piercing or similar theory. Liability on other bases, including on the basis of tort law for the tortfeasor’s own torts, is not “on the basis” of any theory named in the statute or any similar theory.<sup>217</sup> Personal liability for the torts one commits is not derivative liability at all. It is based on tort law. Duties not to commit fraud and negligence are general, primary, and owed by each individual to each other individual.<sup>218</sup> Derivative or veil-piercing liability, on the other hand, does not depend on the individual’s commission of a tort. It depends on (i)

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215. See also Ricks, *supra* note 7, at 10–13, 22–24 (showing how the language of the statute establishes this coverage).

216. Sections 21.224 and 21.225 provide no booster to the already preclusive, preemptive language of Section 21.223; they can do no more than Section 21.223 itself does. On these sections, see Ricks, *supra* note 7, at 13–17 & n.69–74 (“Nothing in Section 21.224 or 21.225 helps the *TecLogistics* court,” which made an argument it claimed was based on Section 21.223).

217. See Ricks, *supra* note 7, at 11–14, 24–28 (“Veil-piercing theories are what the statute names.”).

218. See *supra* notes 1–2 and accompanying text (especially note 2 regarding misrepresentation). The same is true of negligence. See *Leitch v. Hornsby*, 935 S.W.2d 114, 117 (Tex. 1996) (“[A]n agent whose negligence causes an auto accident may be held individually liable along with his or her employer when driving in the course and scope of employment. Because the agent owes a duty of reasonable care to the general public regardless of whether the auto accident occurs while driving for the employer, individual liability may attach.” (citations omitted)); *Perez v. Home Depot U.S.A., Inc.*, No. 4:19-cv-388-SDJ-KPJ, 2019 WL 7859560, at \*3–5 (E.D. Tex. Nov. 12, 2019) (allowing a negligence claim to go forward against one who participated in the tortious act); *Cola v. Dow Chem. Co.*, No. 3:19-CV-00199, 2019 WL 5558247, at \*3–5 (S.D. Tex. Oct. 1, 2019); *Morales v. Alcoa World Alumina L.L.C.*, No. 13-17-00101-CV, 2018 WL 2252901, at \*3–5 (Tex. App.—Corpus Christi—Edinburg May 17, 2018, pet. denied) (allowing a negligence claim to go forward against an employee who participated in the tort); *Richardson v. Wal-Mart Stores Tex., LLC*, 192 F. Supp. 3d 719, 723 (S.D. Tex. 2016); *Andrade v. Terminal Link Tex., LLC*, No. H-09-2214, 2009 WL 5195974, at \*3 (S.D. Tex. Dec. 19, 2009) (“[A] vehicle operator[] owed an independent duty to [the plaintiff] to use reasonable care in his operation of the vehicle.”). On the limited meaning of the Texas Supreme Court’s unfortunate dicta in *Holloway v. Skinner*, 898 S.W.2d 793, 795 (Tex. 1995) (“[I]he actions of a corporate agent on behalf of the corporation are deemed the corporation’s acts.”), see Ricks, *supra* note 7, at 24–28 (“*Holloway*’s language applies (to hold that the corporation alone is liable) only when the agent has no independent duty.”). In a nutshell, *Holloway* and subsequent decisions made clear that the agent’s tortious acts, except in limited circumstances (inducing breach of the corporation’s contract obligations when the agent is acting for the corporation’s interests, not solely for its own), remain the agent’s acts, also. Ricks, *supra* note 7, at 24–28.



the relationship between the entity actor and the entity and (ii) what misuse the entity actor has made of the entity.<sup>219</sup>

3. *McLerran* was necessary in *Menetti* because the court knew the statute applied only to veil-piercing claims.

Third, the *Menetti* court's use of *McLerran* signals clearly that the court properly read the statute's reach. The statute only applies to veil-piercing claims, which was why the court had to sweep the case clear of personal liability with a citation to *McLerran*. If the statute did what the court thought *McLerran* does (or would if it had not been overruled), the *Menetti* court would not have needed *McLerran* to deal with the personal liability claims.

4. The statute distinguishes between tort claims against the corporation and tort claims against an individual.

Read out of context, the court's language could easily be misread. The court means to apply the statute to contract-related tort claims. Fraud in the inducement, fraud in the performance, and negligent performance are clearly those kinds of torts. The statute is obviously supposed to apply to them. But whose torts? Because the statute only applies to limit derivative liability, the statute only limits liability for *the entity's* torts.

In order to understand the statute and the *Menetti* court's application of it, lawyers must be able to distinguish

- (i) a claim that an individual committed a tort such as fraud (a personal liability claim),
- (ii) a claim that an entity should be liable for the tort that an individual committed (a corporate liability claim which for this tort is vicarious and therefore must rest on the liability of such an individual as in (i)), and
- (iii) a claim that an individual should be liable for the obligation of an entity to pay damages for the tort because the veil should be pierced (a veil-piercing liability claim which is derivative of a corporate

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219. *SSP Partners v. Gladstrong Invs. (USA) Corp.*, 275 S.W.3d 444, 451 (Tex. 2008) (quoting *Castleberry*, 721 S.W.2d 270, 271 (Tex. 1986) (“[T]he corporate structure can be ignored . . . ‘when the corporate form has been used as part of a basically unfair device to achieve an inequitable result.’”)); *see Ricks*, *supra* note 7, at 11–13 (showing that fraud and alter ego are ways to prove an inequitable result).

liability claim and may or may not be brought against the individual in (i)).

All three involve liability that begins in tort, but the statute, whether Article 2.21 or Section 21.223, requiring as it does that the liability be “on the basis of” a veil-piercing theory, either one named or an “other similar theory,” addresses only (iii) veil-piercing liability. But if the lawyer does not keep in mind the distinction between those three, the lawyer could misunderstand the statute, especially in a case like *Menetti* where the individual and the entity were accused of exactly the same torts and the alleged tortfeasor was also the shareholder against whom veil-piercing claims were brought.<sup>220</sup>

Nowhere in the entire passage does the *Menetti* court make clear the distinction between those three claims, and the court refers to those “contract and tort claims . . . brought against the Menettis.”<sup>221</sup> But the court should not have needed to clarify, because the court did say unambiguously that only veil-piercing liability was at issue at that point in *Menetti*. When read as the court meant it, to apply only to veil-piercing claims, the language it used is perfectly sensible.

The court referred obliquely to the legislative history of the statute by referring to the Bar Committee comment in Vernon’s 1997 Pocket Part.<sup>222</sup> That comment was dated 1996, before the statute was amended in 1997 to apply to veil-piercing liability for corporate torts; prior to 1997, the statute applied only to veil-piercing liability for corporate contractual obligations and did not apply to veil-piercing for tort liability, which is why the “relating to or arising from” clause was added.<sup>223</sup> In its comment, the Bar Committee noted, “The amendments should also be considered by analogy in the context of tort claims, in particular contractually based tort claims,

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220. On this distinction at length, see Ricks, *supra* note 7, at 34–37. Curiously (or perversely), neither counsel’s arguments nor the court’s analysis take account of Felecia Menetti’s separate interests. Ms. Menetti was not included as a defendant in the Chavers’s original complaint alleging fraud. See Plaintiff’s Original Petition, *supra* note 68. She was added when the veil-piercing claims were added and probably appeared because she was a corporate shareholder and officer. See Plaintiff’s Second Amended Original Petition, *supra* note 68, at 3–13 (naming Felecia Menetti with regard to veil-piercing facts, but for other facts naming “Defendants”). If this is so, then veil-piercing was the only way to attach liability to her, but nothing is made of that distinction.

221. *Menetti v. Chavers*, 974 S.W.2d 168, 174 (Tex. App.—San Antonio 1998, no pet.).

222. *Id.* (citing TEX. BUS. CORP. ACT art. 2.21 cmt. (Vernon Supp. 1998)).

223. See Ricks, *supra* note 7, at 30–37 (discussing the statute’s legislative intent, such as can be discerned).

and reflect a clear public policy that the corporate fiction should be recognized absent compelling circumstances to the contrary.”<sup>224</sup> By the time *Menetti* was decided, the committee’s exhortation had become law with the addition to the statute of the very phrase the court quoted: “or any matter relating to or arising from the obligation.”<sup>225</sup> But nothing in the Bar Committee’s comment recommends abrogation of personal liability, and its policy exhortation is solely limited to veil-piercing claims: that the statute be applied to tort claims so that “the corporate fiction should be recognized.”<sup>226</sup> This comment and the statute’s actual legislative history quite clearly show that the 1997 amendment meant to address only veil-piercing for tort liability—not the personal liability of corporate actors.<sup>227</sup> The *Menetti* court correctly interpreted the statute to apply only to the Menettis’ veil-piercing liability for the corporation’s torts.

B. and C. *The court applied the statute only to the Menettis’ responsibility for the corporation’s liability in contract and tort.*

The *Menetti* court said, “In the case before the court, both contract and tort claims have been brought against the Menettis.”<sup>228</sup> Now we know that the contract and tort claims the court was discussing at this point were claims that the corporation had breached a contract, that the corporation had engaged in misrepresentation and fraud, and that the corporation had engaged in negligence. The court had already declared that “under the reasoning in [*McLerran*], absent a piercing of the veil, *the Menettis did not commit the complained-of acts.*”<sup>229</sup> The court on the authority of *McLerran* had already attributed those acts wholly to the entity. At the point where the court addresses these “contract and tort claims,” it had therefore already concluded that it “need only address the sufficiency of the evidence supporting the determination to pierce the corporate veil.”<sup>230</sup> These “contract and tort claims brought against the Menettis” are thus only claims

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224. TEX. BUS. CORP. ACT art. 2.21 cmt. (Vernon Supp. 1998).

225. Act of May 28, 1997, 75th Leg., R.S., ch. 375, § 7, 1997 Tex. Gen. Laws 1516, 1522 (expired Jan. 1, 2010) (adding the clause to the statute).

226. TEX. BUS. CORP. ACT art. 2.21 cmt. (Vernon Supp. 1998).

227. See Ricks, *supra* note 7, at 30–37 (reviewing the statute’s legislative history).

228. *Menetti v. Chavers*, 974 S.W.2d 168, 174 (Tex. App.—San Antonio 1998, no pet.).

229. *Id.* at 172 (emphasis added).

230. *Id.* at 173–74.

that the Menettis are liable for their corporation's breach of contract and tort.<sup>231</sup> These are merely derivative claims of veil-piercing liability.

Therefore, when the court said, “[W]e conclude that the claims before us do relate to or arise from a contractual obligation and therefore fall under the amended article 2.21,”<sup>232</sup> it was referring only to claims against the corporation. Those were the only claims before the court (given *McLerran*) as well as the only claims on which the statute could have had effect.

Given that the court is dealing only with claims that the Menettis should pay for the corporation's obligations in contract and tort, the court's holding is a straightforward application of the language of then-Article 2.21 (and would be just as straightforward an application of the current statute).<sup>233</sup> A corporation's liability for (i) contract and (ii) contract-related torts can only be imposed on corporate actors through veil-piercing. As noted, if the lawyer does not keep in mind the distinction between corporate liability, veil-piercing liability, and personal liability while reading this passage, the lawyer could misunderstand, especially when the individual corporate actor and the entity are accused of exactly the same tort, because the entity liability is (i) only vicarious and (ii) based on that individual's tort. But now we know that only veil-piercing liability was at issue.

D. *Because only veil-piercing liability was at issue, the statute applied.*

The court also said, “Thus, the Chaverses were required to demonstrate actual fraud to pierce the corporate veil and hold the Menettis individually liable.”<sup>234</sup> Given what we now know, this sentence is simple and clear as well. Because only the Menettis' derivative liability for the contract and tort liability of their corporation was at issue, the statute applied. When the statute applies, as the court said, “the corporate veil may not be pierced absent a showing of actual fraud.”<sup>235</sup> This necessitated the court's review of the Chaverses' evidence that the Menettis committed fraud. The court concluded that the Chaverses did not make the requisite showing.<sup>236</sup>

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231. *See supra* Part III.

232. *Menetti*, 974 S.W.2d at 174.

233. *Compare* Act of 1997, 75th Leg., R.S., ch. 375, § 7, 1997 Tex. Sess. Law Serv. (expired Jan. 1, 2010) with TEX. BUS. ORGS. CODE ANN. §§ 21.22–3.225; *see supra* text accompanying notes 208–10.

234. *Menetti*, 974 S.W.2d at 174.

235. *Id.*

236. *Id.* at 174–76.

E. “Actual fraud” does not mean the elements of any tort, and no tort law was preempted.

As noted, a reader might take the *Menetti* court’s use of the elements of the tort to define the exception in Article 2.21(A)(2) (now Section 21.223(b)) to suggest that personal liability for the tort had been abrogated. This would be a misreading, first of all, because Article 2.21(A)(2) (and Section 21.223(a)(2)) did not address personal liability; it (they) limited only veil-piercing liability. Reading an exception to a limit on veil-piercing liability to be a positive abrogation of tort law is a real stretch. If the legislature meant to free business actors from individual responsibility for the fraud they commit, that would be an unbelievable means of attempting it.

But second, most courts have not followed *Menetti* on this issue but have more reasonably concluded that the reference to “actual fraud” in the exception does not require that the elements of the tort be shown. Most courts instead require only intentionally deceptive conduct, following a suggestion from *Castleberry*.<sup>237</sup> To the *Menetti* court’s credit, it quoted this

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237. Most courts require only intentionally deceptive conduct, following *Castleberry v. Branscum*, 721 S.W.2d 270, 273 (Tex. 1986) (opining actual fraud involves “dishonesty of purpose or intent to deceive”). See *Spring St. Partners-IV, L.P. v. Lam*, 730 F.3d 427, 442–43 (5th Cir. 2013) (supporting *Castleberry*’s usage); *Ritz v. Ritz (In re Ritz)*, 513 B.R. 510, 536 (Bankr. S.D. Tex. 2014) (“Within the meaning of the Business Organizations Code for piercing the corporate veil regarding a contractual obligation, ‘actual fraud’ . . . ‘involves dishonesty of purpose or intent to deceive.’”); *Ogbonna v. USPLabs, LLC*, No. EP-13-CV-347-KC, 2014 WL 2592097, at \*8–12 (W.D. Tex., June 10, 2014) (“Actual fraud, in this context, involves dishonesty of purpose or intent to deceive, and is not equivalent to the tort of fraud.”); *Maxwell v. Neri N. Am.*, No. 4:13-cv-269, 2014 WL 2441200, at \*4–5 (S.D. Tex., May 30, 2014); *Weston Grp., Inc. v. Sw. Home Health Care, LP*, No. 3:12-CV-1964-G, 2014 WL 940329, at \*4–5 (N.D. Tex., Mar. 11, 2014); *In re Arnette*, 454 B.R. 663, 694–95 (Bankr. N.D. Tex. 2011) (“In the context of piercing the corporate veil, the concept of ‘actual fraud’ contained in section 21.223 is not the same as the common law tort of fraud . . . .”); *R&M Mixed Beverage Consultants, Inc. v. Safe Harbor Benefits, Inc.*, 578 S.W.3d 218, 231 (Tex. App.—El Paso 2019, no pet.); *AvenueOne Props., Inc. v. KP5 Ltd. P’ship*, 540 S.W.3d 643, 649 (Tex. App.—Amarillo 2018, no pet.); *U.S. KingKing, LLC v. Precision Energy Servs., Inc.*, 555 S.W.3d 200, 213 (Tex. App.—Houston [1st Dist.] 2018, no pet.); *Weaver & Tidwell, L.L.P. v. Guarantee Co. of N. Am. USA*, 427 S.W.3d 559, 574 (Tex. App.—Dallas 2014, no pet.); *Fin & Feather Club v. Leander*, 415 S.W.3d 548, 556 (Tex. App.—Texarkana 2013, no pet.); *Metroplex Mailing Servs., LLC v. RR Donnelley & Sons Co.*, 410 S.W.3d 889, 896–97 (Tex. App.—Dallas 2013, no pet.); *Tryco Enters., Inc. v. Robinson*, 390 S.W.3d 497, 508 (Tex. App.—Houston [1st Dist.] 2012, no pet.); *Shook v. Walden*, 368 S.W.3d 604, 621–22 (Tex. App.—Austin 2012, pet. denied); *Latham v. Burgher*, 320 S.W.3d 602, 607 (Tex. App.—Dallas 2010, no pet.) (“[I]n the context of piercing the corporate veil, actual fraud is not equivalent to the tort of fraud. Instead, in that context, actual fraud involves ‘dishonesty of purpose or intent to deceive.’”); *Dick’s Last Resort W. End, Inc. v. Market/Ross, Ltd.*, 273 S.W.3d 905, 908–09

one, too.<sup>238</sup> It should have let that quote stand; it would have reached the same conclusion.<sup>239</sup>

*Actual fraud* is a term of art. The phrase *actual fraud* did not spring from tort law. Its longest use in Texas stems instead from contract, property, and estate law.<sup>240</sup> (Tort law preferred to require “misrepresentation” rather than “fraud” or “actual fraud.”<sup>241</sup>) The phrase *actual fraud* means fraud that is not constructive fraud; usually it requires some intent to deceive, including such as is shown by a knowing, actual misrepresentation.<sup>242</sup> The phrase has been used with various effects in contract and property cases for a very long time.<sup>243</sup>

(Tex. App.—Dallas 2008, no pet.); *Solutioneers Consulting, Ltd. v. Gulf Greyhound Partners, Ltd.*, 237 S.W.3d 379, 387–89 (Tex. App.—Houston [14th Dist.] 2007, no pet.).

238. *Menetti*, 974 S.W.2d at 174 (“Actual fraud in the corporate-veil context involves ‘dishonesty of purpose or intent to deceive.’ *Castleberry*, 721 S.W.2d at 273.”).

239. The *Menetti* court held that the plaintiffs “failed to show that any of the relevant representations were material or knowingly or recklessly false.” *Id.* at 175. “[T]here is little, if any, proof that any misrepresentations were made”—the statements were not false, in other words, and the promises were made with intent to perform. *Id.* “There was also no evidence that [the person who made the statements about which the plaintiffs complained] knew that any of the allegedly false statements were false . . .” *Id.* And even if these did not hold, the other part of the veil-piercing exception, that the fraud be “primarily for the direct personal benefit of” the corporate actor, was not satisfied because no personal benefit was obtained from the alleged trickery related to the transaction between the parties. *Id.* All of these conclusions equally support a result of “no veil-piercing” under the “dishonesty of purpose or intent to deceive” standard of actual fraud.

240. *See Cummings v. Powell*, 8 Tex. 80, 90 (1852) (using actual fraud in contract law); *Burleson v. McGehee*, 15 Tex. 375, 377 (1855) (using actual fraud in property law); *Crain v. Crain*, 17 Tex. 80, 96 (1856) (using actual fraud in estate law).

241. *See Wilson v. Jones*, 45 S.W.2d 572, 573 (Tex. [Comm’n Op.] 1932) (requiring a material misrepresentation be made for “actionable fraud” suits). Before the phrase crept into tort law, an early mention of actual fraud rejects it as a necessary ground for relief in tort. *Harris v. Shear*, 177 S.W. 136, 137 (Tex. Civ. App.—Austin 1915, no writ).

242. *See Archer v. Griffith*, 390 S.W.2d 735, 740 (Tex. 1964) (distinguishing actual fraud from constructive fraud); *Singleton v. Houston*, 79 S.W. 98, 99 (1904, writ ref’d) (“It is legal, if not actual, fraud.”); *Flack v. Neill*, 22 Tex. 253, 254 (1858) (“If a party is guilty of misrepresentation and falsehood, . . . such conduct would constitute actual fraud . . .”); *Wright v. Calhoun*, 19 Tex. 412, 418 (1857) (distinguishing “[a]ctual fraud, that is, acts done with an intent to defraud others” from “constructive fraud by doing any acts which injure or impair the rights of others, whether they intended fraud or not”); *Crain v. Crain*, 17 Tex. 80, 96 (1856) (asserting conduct can be “in fraud of the custom, though not an actual fraud”); *Burleson v. McGehee*, 15 Tex. 375, 377 (1855) (asserting conduct can be “fraud, not legal and technical, but actual and positive fraud, in fact”); *infra* note 243.

243. In veil-piercing cases, see Ricks, *supra* note 7, at 30–37. *See also Castleberry v. Branscum*, 721 S.W.2d 270, 271–73 (Tex. 1986) (distinguishing actual fraud from constructive fraud); *Rose v. Intercontinental Bank, N.A.*, 705 S.W.2d 752, 756 (Tex. App.—Houston [1st Dist.] 1986, writ ref’d n.r.e.) (“Basing a claim of alter ego on fraudulent intent is only one manner to establish the claim.”); *Tigrett v. Pointer*, 580 S.W.2d 375, 385 (Tex. Civ. App.—Dallas 1978, writ ref’d n.r.e.) (describing alter

Texas veil-piercing law adopted the term of art. Veil-piercing law has long allowed corporate actors to be liable “where it appears that the [corporate actors] are using the corporate entity as a sham to perpetrate a fraud”<sup>244</sup> or “when necessary for the prevention of fraud.”<sup>245</sup> Clearly some of these cases involved actual fraud.<sup>246</sup> Later, whether constructive fraud might also suffice became an issue.<sup>247</sup> *Castleberry* addressed that very issue and held outright that “[t]o prove there has been a sham to perpetrate a fraud, tort claimants and contract creditors must show only constructive fraud.”<sup>248</sup> But that was only an issue because no one disputed that actual fraud would suffice. *Castleberry* itself distinguished actual from constructive fraud with a cite to a constructive fraud case that gave an unsurprising, traditional

ego, fraud, and constructive fraud). In contract and property cases, see *Wright v. Calhoun*, 19 Tex. 412, 420 (Tex. 1857) (holding the principal’s purchase from an agent voidable because the agent who entered into the contract on behalf of the principal “acted . . . in actual fraud of the known rights” of the third party); *Tillman v. Janks*, 15 S.W. 39, 40 (Tex. Ct. App. 1890) (denying a right to sequester three barrels of whisky on grounds that the plaintiff had “perpetrate[d] an actual fraud” upon the defendant who bought them in good faith believing the plaintiff had no right to them); *Collins v. Chipman*, 95 S.W. 666, 673 (Tex. Civ. App.—San Antonio 1906, writ ref’d) (distinguishing between “actual legal fraud” which requires scienter and “actual fraud in equity” which may be made “without any intent to deceive”).

244. *Bell Oil & Gas Co. v. Allied Chemical Corp.*, 431 S.W.2d 336, 340 (Tex. 1968); *Drye v. Eagle Rock Ranch, Inc.*, 364 S.W.2d 196, 202 (Tex. 1962); *Pace Corp. v. Jackson*, 155 Tex. 179, 194, 284 S.W.2d 340, 351 (1955).

245. *Pacific Am. Gasoline Co. v. Miller*, 76 S.W.2d 833, 851 (Tex. Civ. App.—Amarillo 1934, writ ref’d) (“when necessary for the prevention of fraud”); *O’Neal v. Jones*, 34 S.W.2d 689, 692 (Tex. Civ. App.—Dallas 1930, no writ) (“ignore its existence to . . . circumvent fraud”).

246. See *Five Star Transfer & Terminal Warehouse Corp. v. Flusche*, 339 S.W.2d 384, 386 (Tex. App.—Texarkana 1960, writ ref’d n.r.e.); *Cont’l Supply Co. v. Forrest E. Gilmore Co.*, 55 S.W.2d 622, 628 (Tex. Civ. App.—Amarillo 1932, writ dism’d); *O’Neal*, 34 S.W.2d at 692; *Fowler v. Small*, 244 S.W. 1096, 1097 (Tex. Civ. App.—San Antonio 1922, no writ). I have not attempted an exhaustive study. The facts of cases decided under the general rubric of “fraud” must be mined for those containing actual misrepresentations and/or intent to deceive. Some cases decided under that rubric clearly did not. See *Tigrett*, 580 S.W.2d at 385 (holding Pointer liable individually for the corporation’s debts because “he ignored his substantive duties as a corporate officer and director and acted solely in his own interest,” although no one factor independently justified piercing the corporate veil). Other veil-piercing cases in the caselaw record are more obviously cases of alter ego and involved no fraud at all. See *Buie v. Chicago, R.I. & P. Ry. Co.*, 95 Tex. 51, 63–67, 65 S.W. 27, 29–32 (1901) *abrogated by* *Peterson v. Railway Co.*, 205 U.S. 364, 393–94 (1907) *as recognized in* *Pecos & N.T.R.Y. Co. v. Cox*, 106 Tex. 74, 78, 157 S.W. 745, 747 (1913) (determining whether one company was a “mere mask” used by another corporation to conduct business in the state); *Bell Oil & Gas Co. v. Allied Chemical Corp.*, 420 S.W.2d 779, 784 (Tex. Civ. App.—Houston [1st Dist.] 1967), *rev’d* 431 S.W.2d 336 (Tex. 1968).

247. See *Castleberry*, 721 S.W.2d at 271–73 (addressing whether constructive fraud is sufficient as a showing of inequity to justify veil-piercing); *Tigrett*, 580 S.W.2d at 385–86 (describing alter ego, fraud, and constructive fraud as veil-piercing grounds).

248. *Castleberry*, 721 S.W.2d at 273.

definition to actual fraud: “Actual fraud usually involves dishonesty of purpose or intent to deceive, whereas constructive fraud is the breach of some legal or equitable duty which . . . the law declares fraudulent because of its tendency to deceive others, to violate confidence, or to injure public interests.”<sup>249</sup> The veil-piercing statute, in turn, was written to (i) reverse the holding of *Castleberry* that constructive fraud would suffice and (ii) tighten up veil-piercing standards to something more predictable.<sup>250</sup> Moreover, the statute’s limitation on veil-piercing theory refers explicitly to actual fraud as a veil-piercing theory in the same category as “sham to perpetrate” and alter ego. The statute’s only other use of the exact same phrase—in the exception—should have the same meaning. Against this background, *actual fraud* is the technical term with further context supplied by the law of veil-piercing.<sup>251</sup> It is not the tort of fraud.

That conclusion is only emphasized once the modesty of the statute’s reach is realized. The statute does not abrogate tort law; it has no effect on tort liability.<sup>252</sup> It addresses only veil-piercing (which itself is not even a cause of action<sup>253</sup>). A tortfeasor who has committed fraud is already liable for it under tort law.<sup>254</sup> If the exception incorporated the elements of intentional misrepresentation by its use of *actual fraud*, that would require that veil-piercing liability could exist only for someone already liable in tort.

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249. *Id.* (quoting *Archer v. Griffith*, 390 S.W.2d 735, 740 (Tex. 1964)); see *supra* note 242.

250. See 13 MILLER & RAGAZZO, *supra* note 167, at §§ 46:2–46:3 (describing pre-*Castleberry* law, *Castleberry* itself, its aftermath, and the legislative response); James C. Chadwick, *Corporations and Partnerships*, 41 SW. L.J. 201, 220–21 (1987); Paul S. Leslie, *Corporations—Disregarding Corporate Entity—in Suit by Contract Creditor, Corporate Entity May Be Disregarded upon Showing of Constructive Fraud when Entity Used as Sham to Perpetrate Fraud*, 18 ST. MARY’S L.J. 1441, 1443–45 (1987).

251. See Ricks, *supra* note 7, at 22–24 (discussing the meaning of *actual fraud* in the veil-piercing statute).

252. Except of course to render an entity actor liable for the entity’s torts, a veil-piercing liability.

253. “An attempt to pierce the corporate veil, in and of itself, is not a cause of action but rather is a means of imposing liability on an underlying cause of action such as a tort or breach of contract.” *Gallagher v. Bintliff*, 740 S.W.2d 118, 119–20 (Tex. App.—Austin 1987, writ denied); *Spring Street Partners-IV, L.P. v. Lam*, 730 F.3d 427, 443 (5th Cir. 2013) (Texas law); *Dodd v. Savino*, 426 S.W.3d 275, 291 (Tex. App.—Houston [14th Dist.] 2014, no pet.); *Phillips v. United Heritage Corp.*, 319 S.W.3d 156, 158 (Tex. App.—Waco 2010, no pet.) (“[T]hese theories and the attempts to utilize them are not substantive causes of action.”); *Wilson v. Davis*, 305 S.W.3d 57, 68 (Tex. App.—Houston [1st Dist.] 2009, no pet.); *Cox v. S. Garrett, L.L.C.*, 245 S.W.3d 574, 582 (Tex. App.—Houston [1st Dist.] 2007, no pet.); *Specialty Retailers, Inc. v. Fuqua*, 29 S.W.3d 140, 147 (Tex. App.—Houston [14th Dist.] 2000, pet. denied); *Farr v. Sun World Sav. Ass’n*, 810 S.W.2d 294, 297 (Tex. App.—El Paso 1991, no writ); *Gulf Reduction Corp. v. Boyles Galvanizing & Plating Co.*, 456 S.W.2d 476, 479 (Tex. Civ. App.—Fort Worth 1970, no writ).

254. See *supra* notes 1–2.



But justifications for veil-piercing do not require that the tort of fraud be committed. The law has long said that “the corporate structure can be ignored . . . ‘when the corporate form has been used as part of a basically unfair device to achieve an inequitable result.’”<sup>255</sup> Though the statute specifies that “[i]n some instances, the imposition of liability is limited . . . to situations involving actual fraud,”<sup>256</sup> nothing about using the corporate form as part of an unfair device in order to achieve an inequitable result requires the commission of a tort, and if it did, tort law already provides—and exactly to that extent—a complete remedy. The purposes of veil-piercing law require that veil-piercing law not be limited by the tort of intentional misrepresentation.

At any rate, given

- (i) these differences of purpose;
- (ii) that *actual fraud* is a term of art in veil-piercing law;
- (iii) that by far the majority of courts appear to have followed veil-piercing law rather than tort law in defining *actual fraud*;
- (iv) that the *Menetti* court’s conclusion did not depend on its use of tort elements; and
- (v) that the *Menetti* court clearly was only addressing veil-piercing liability claims, having disposed of the personal liability claims earlier in the opinion;

no inference can be drawn from *Menetti*’s use of the elements of the tort to suggest the opinion meant to say that the statute abrogated tort law.<sup>257</sup>

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255. *SSP Partners v. Gladstrong Invs. (USA) Corp.*, 275 S.W.3d 444, 451 (Tex. 2008) (quoting *Castleberry v. Branscum*, 721 S.W.2d 270, 271 (Tex. 1986)).

256. *Id.* at 451–52 (citing both Article 2.21 and Section 21.223).

257. The statute’s drafters’ use of *actual fraud* in both the limitation and the exception could be confusingly circular except that the exception allows liability for actual fraud only if certain other conditions are met. The statute allows no liability for corporate contractual and related tort obligations on the basis of actual fraud alone, but you can hold the corporate actors liable for those obligations if you show they “caused the corporation to be used for the purpose of perpetrating and did perpetrate an actual fraud on the obligee primarily for the direct personal benefit of the holder, owner, subscriber, or affiliate . . . .” Act of May 28, 1997, 75th Leg., R.S., ch. 375, § 7, 1997 Tex. Gen. Laws 1516, 1522 (expired Jan. 1, 2010). The addition of “caused the corporation to be used” and “on the obligee” were probably implied in the old law, but “primarily for the direct personal benefit of” the corporate actor was new. *Id.* Moreover, none of the other theories of veil-piercing are now sufficient—only the theory in the exception will work. The circularity is still confusing and certainly a signal not to interpret either use of *actual fraud* in the statute as a reference to the tort, but the circularity is not logically fatal.

V. CONCLUSION: WHAT *MENETTI* DID NOT DO,  
AND WHAT *MENETTI* DID

The foregoing show that *Menetti* did *not* hold that our veil-piercing statute's near-identical predecessor somehow created an immunity or exemption from liability for persons who commit fraud and similar torts while acting within or for a corporation or other business entity. The *Menetti* court never addressed such a question. The plaintiffs in the case brought claims against the individual corporate actor defendants, alleging that those defendants had committed fraud and negligence, but the San Antonio Court of Appeals rejected those claims—declared them non-existent—on the strength of *Karl & Kelly Co., Inc. v. McLerran*, a case that was implicitly overruled almost immediately and has now long been explicitly rejected. The court of appeals opinion, read carefully, never gives support to the idea that the statute resurrected *McLerran*'s ghost (not surprisingly, as the court thought *McLerran* quite alive and well).

Clarifying the modesty of *Menetti* is necessary. Reading the veil-piercing statute to authorize such an immunity or exemption would stray from the statute's language, context, and history; jeopardize Texas's history of holding personally responsible those who obtain money and property from others through fraud; socialize the costs of personal fraud liability on innocent deal parties and innocent customers;<sup>258</sup> increase the cost of doing business in Texas; and prohibit some deals at the margin where the risk of fraud becomes an issue.<sup>259</sup> The legislature wisely avoided such results with careful statutory language. The *Menetti* court only followed the statute.

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258. See *supra* text accompanying notes 7–9; *Grynberg Prod. Corp. v. British Gas, P.L.C.*, 817 F. Supp. 1338, 1350–51 (E.D. Tex. 1993) (choosing, in a conflict of law case, Texas law and rejecting the Kazakh law requiring such an immunity or exemption, on the basis of Texas's “strong interest in ensuring that its residents do not [perpetrate] fraud on its own residents or anyone else” because “[t]o do otherwise would enable Texas residents to hide behind the corporate veil and discourage responsible individual behavior”).

259. See generally Ricks, *supra* note 7, at 21–59.