No. 16-0256
Supreme Court of Texas.

Archer v. Anderson

556 S.W.3d 228 (Tex. 2018)
Decided Jun 22, 2018

No. 16–0256

06-22-2018

Richard T. ARCHER, David B. Archer, Carol Archer Bugg, John V. Archer, Karen Archer Ball, and Sherri Archer, Petitioners, v. T. Mark ANDERSON and Christine Anderson, as Co–Executors of the Estate of Ted Anderson, Respondents

Laurie E. Ratliff, Frank N. Ikard Jr., Ikard Ratliff P.C., Austin, TX, for Petitioners. Scott R. Kidd, Scott V. Kidd, Kidd Law Firm, Austin, TX, for Respondents. Philip M. Ross, Attorney at Law, San Antonio, TX, for Amicus Curiae John Schaefer, Jessica Schaefer, Hilary Kulik, Gretchen Thompson, Ronald Schaefer, Jr. and Matthew Schaefer. Philip M. Ross, Attorney at Law, San Antonio, TX, for Amicus Curiae Jo Ann Rivera.

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Philip M. Ross, Attorney at Law, San Antonio, TX, for Amicus Curiae John Schaefer, Jessica Schaefer, Hilary Kulik, Gretchen Thompson, Ronald Schaefer, Jr. and Matthew Schaefer.

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Chief Justice Hecht delivered the opinion of the Court, in which Justice Green, Justice Guzman, Justice Devine, and Justice Blacklock joined.

Last Term, in *Kinsel v. Lindsey* , we noted that Texas has never recognized a cause of action for intentional
229 interference with inheritance but left open the *229 question whether we should do so.[1] Today, to eliminate continuing confusion over the matter and resolve a split among the courts of appeals, we answer that question. Because existing law affords adequate remedies for the wrongs the tort would redress, and because the tort would conflict with Texas probate law, we hold that there is no cause of action in Texas for intentional interference with inheritance. We affirm the judgment of the court of appeals.[2]

1 526 S.W.3d 411, 423 (Tex. 2017) ("Neither our precedent nor the Legislature has blessed tortious interference with an inheritance as a cause of action in Texas. Its viability is an open question.").

2 490 S.W.3d 175 (Tex. App.—Austin 2016).

I

John R. "Jack" Archer, a successful oil-and-gas businessman, married and divorced 4 times but had no children. His closest family was a brother, Richard Archer, and Richard's 6 children (loosely referred to as "the Archers").[3] Jack executed a will in 1991 that left the bulk of his roughly $7.5 million estate to the Archers, including a 1,000–acre ranch, mineral interests, homes, life insurance, bank accounts, a large coin collection, and many other assets. The little Jack did not leave to them—part of his mineral interests worth some $90,000—Jack left to 12 Christian charities.[4]

[3] Five of the children—Carol A. Bugg, David B. Archer, John V. Archer, Karen A. Ball, and Sherri Archer—are petitioners. The sixth, James Michael Archer, has never been a party to the suit. Their father, Richard, died in 2009, prior to trial. In our review of the events leading up to this case, we mean by "the Archers" the Richard Archer family. In discussing the contentions of the parties, we use "the Archers" to refer to Richard Archer's 5 children who remain parties to the case.

[4] The charities were Campus Crusade for Christ at Arrowhead Springs, San Benito, California; Young Life, Corpus Christi, Texas; Child Evangelism Fellowship, Warrenton, Missouri; Laity Lodge, Kerrville, Texas; Christian Associates International, Orange, California; Bill Glass Evangelistic Association, Dallas, Texas; Agape Foundation, Donna, Texas; The Bible League, South Holland, Illinois; Moral Majority, Forrest, Virginia; Intervarsity Christian Fellowship, Madison, Wisconsin; James Robison Ministries, Fort Worth, Texas; and Prison Fellowship Ministries, Washington, D.C.

In August 1998, Jack, then 71, suffered a stroke and was hospitalized for several weeks. When he returned home, the Archers assisted with his care. He regularly misidentified people, was delusional, and was sometimes disoriented. He never fully recovered.

A few weeks after Jack's stroke, Ted Anderson, an attorney and Jack's longtime friend, drafted durable and medical powers of attorney appointing himself as Jack's attorney-in-fact. Jack signed the documents, but his medical records showed that the day he signed them he was delusional and appeared confused. Anderson also tried to have Jack change his estate plan. Anderson proposed that Jack sell his ranch and transfer the proceeds into a charitable remainder trust with the 12 charities as beneficiaries so that Jack's entire estate would go to the charities and the Archers would be disinherited. Jack complained that Anderson was forcing him to sell the ranch against his will, so Anderson dropped the proposal.

Anderson then hired attorneys Richard Leshin and Buster Adami to draft estate planning documents for Jack. Jack began distancing himself from the Archers, and for a while they lost all contact. So in the fall of 1999, the Archers instituted guardianship proceedings for Jack in Blanco County. Leshin and Adami appeared for Jack
230 and agreed to the appointment of *230 temporary guardians of his person and estate. Leshin advised Anderson that further estate planning for Jack would have to await termination of the guardianship. But Anderson retained a new lawyer for Jack, who repudiated the agreed guardianship. At Anderson's request, Leshin had Jack sign wills and trust documents, all disinheriting the Archers and leaving Jack's entire estate to the charities. Leshin later testified that he received all his instructions from Anderson, did not talk with Jack before preparing the wills and trust documents, and knew doctors disagreed about Jack's mental capacity. Leshin also testified that he did not determine for himself whether Jack had the mental capacity to validly execute the documents but instead relied on Anderson's representations.

The Archers nonsuited the guardianship proceeding in Blanco County and refiled it in Bexar County. Over Jack's new attorney's opposition, the court appointed guardians of Jack's person and estate. After an accounting of Jack's estate was filed, showing that all his assets were in trust, the Archers learned of the wills and trust disinheriting them. Rather than wait until Jack's death and challenge the charities in a will contest, the Archers

decided to immediately challenge the trust. The Archers agreed to pay their attorneys, who had been charging hourly rates, a contingent fee of 40% of all Jack's assets recovered. With Jack still alive, the Archers sued for a declaratory judgment that Jack had lacked the mental capacity to execute the wills and trust documents. The charities, the beneficiaries of the trust, were defendants. In May 2002, the parties settled. The charities agreed not to probate Jack's post–1991 wills, and the Archers agreed to give the charities Jack's coin collection and pay their attorney fees. Those fees and the value of the coin collection, which was in addition to what the charities would receive under Jack's 1991 will, totaled $588,054.

The Archers sued Anderson on Jack's behalf for breach of fiduciary duty, intentional infliction of emotional distress, and legal malpractice. The Archers also sued others on Jack's behalf and settled for, in their words, "hundreds of thousands of dollars". Anderson died in March 2006, and Jack died a month later. Jack's 1991 will was probated, and the Archers took their bequests under it. The following year, the Archers brought this action against Anderson's estate for intentional interference with their inheritance, alleging that Anderson influenced Jack to disinherit them. They concede that Anderson never profited personally from his efforts and that they have never been able to show his motivation other than some unexplained personal malice. They also concede that in the end, they received all that Jack left them in his 1991 will, but they claim as damages the $588,054 they gave the charities in settlement, plus $2,865,928 in attorney fees and litigation expenses they incurred avoiding Jack's post–1991 wills and trusts. The jury found in favor of the Archers but awarded only $2,006,150 in damages. The trial court rendered judgment on the verdict but added $588,054.

Both sides appealed. The court of appeals concluded that this Court has never recognized tortious interference with inheritance as a cause of action in Texas and deferred to this Court to decide whether to do so.[5] The
231 appeals court reversed and rendered judgment for Anderson.[6] We granted the Archers' petition for review.[7] *231

II

5 490 S.W.3d at 177.

6 *Id.* at 179.

7 60 Tex. Sup. Ct. J. 1230 (June 16, 2017).

The Archers argue that tortious interference with an inheritance has long been part of Texas law, but as we noted at the outset, less than a year ago we stated in *Kinsel v. Lindsey* that neither this Court nor the Legislature has ever recognized such an action.[8] The appellate courts that have recognized the tort, we explained, largely relied on *King v. Acker* , a decision of the Court of Appeals for the First District of Texas in Houston.[9] *King* concluded that this Court impliedly recognized the cause of action in *Pope v. Garrett* .[10] But this, we said, was "an inaccurate reading of our precedent", and whether to recognize the tort remained "an open question" that could be answered only by weighing the factors that we have repeatedly held must be considered in determining whether to recognize a new cause of action.[11] We declined to consider the matter further because the claimants had another adequate remedy—the imposition of a constructive trust.[12]

8 526 S.W.3d 411, 423 (Tex. 2017).

9 *Id.* (citing *King v. Acker* , 725 S.W.2d 750 (Tex. App.—Houston [1st Dist.] 1987, no writ)).

10 *King* , 725 S.W.2d at 754 (citing *Pope v. Garrett* , 204 S.W.2d 867 (Tex. Civ. App.—Galveston 1947), *rev'd in part* , 147 Tex. 18, 211 S.W.2d 559, 562 (1948)).

11 *Kinsel* , 526 S.W.3d at 423–424 & n.6.

12 *Id.* at 424.

The court of appeals in the present case, which issued its opinion before *Kinsel* , correctly concluded that this Court has not recognized a tort of intentional interference with inheritance.[13] Further, the court of appeals acknowledged, neither the appellate courts nor the trial courts should recognize the tort "in the first instance".[14] "Absent legislative or supreme court recognition of the existence of a cause of action," the court wrote, "we, as an intermediate appellate court, will not be the first to do so. We must ... follow the existing law rather than change it".[15]

13 490 S.W.3d 175, 177 (Tex. App.—Austin 2016).

14 *Id.*

15 *Id.* (citations omitted).

Since *Kinsel* , both courts of appeals sitting in Houston have considered whether the tort should be recognized. In *Yost v. Fails* , the Court of Appeals for the First District of Texas continued to follow its precedent, *King* , in holding that a cause of action for intentional interference with an inheritance exists.[16] *Yost* neither cited *Kinsel* nor analyzed the factors for deciding whether to recognize a new cause of action; it simply followed *King* .[17] A few weeks later, in *Rice v. Rice* , the Court of Appeals for the Fourteenth District of Texas, also in Houston, reached the opposite conclusion.[18] The court acknowledged that it had recognized the tort in *Brandes v. Rice Trust, Inc.* , relying on *King* , which had relied on *Pope* .[19] But following *Kinsel* 's contrary analysis of *Pope* ,
232 the court concluded that it was relieved of its *stare* *232 *decisis* obligation to follow *Brandes* .[20] Nor would it follow *Yost* , the *Rice* court said, because that court had neither cited *Kinsel* nor analyzed the factors noted in that case to be considered in determining whether to recognize a new cause of action.[21] Ultimately, it concluded that the case before it did "not warrant an extension of existing law" because "the parties ... already [had] an adequate remedy."[22]

16 534 S.W.3d 517, 529–530 (Tex. App.—Houston [1st Dist.] 2017, no pet.).

17 *See id.*

18 533 S.W.3d 58, 62–63 (Tex. App.—Houston [14th Dist.] 2017, no pet.).

19 *Id.* at 60 (citing *Brandes v. Rice Trust, Inc.* , 966 S.W.2d 144, 146–147 (Tex. App.—Houston [14th Dist.] 1998, pet. denied) (acknowledging *King* 's holding "that a cause of action for tortious interference with inheritance rights exists in Texas" (quoting *King v. Acker* , 725 S.W.2d 750, 754 (Tex. App.—Houston [1st Dist.] 1987, no writ)))).

20 *Id.* at 62.

21 *Id.* at 63.

22 *Id.*

The First and Fourteenth Courts of Appeals' 10–county districts completely overlap.[23] Cases are randomly assigned between them.[24] In the aftermath of *Kinsel* , judges, lawyers, and parties in cases in those districts must follow opposite rules: a cause of action for intentional interference with an inheritance does and may not exist. The concurring opinion minimizes this confusion, speculating that the cases will be relatively few, and courts will eventually follow *Kinsel* 's holding that a tort does not exist when there is another adequate remedy.[25] As we will explain, whether to recognize a tort to provide an adequate remedy begs the question of

what remedy is adequate. Existing remedies are not inadequate merely because they do not provide the relief a tort would. The fundamental difficulty with the tort is that it claims for the judiciary the authority to supplant or augment statutory probate law and settled remedies and principles whenever they are perceived to be unfair. Whether there will be many cases or few in the Houston courts of appeals districts and throughout Texas, we think we should avoid the waste of public and private resources arguing over a question we can answer, especially when the answer is as clear as we think it is.

[23] *See* Tex. Gov't Code § 22.201(b), (o) ; *see also id.* §§ 22.202–.2021, –.215.

[24] *Id.* § 22.202(h).

[25] *Post* at 243.

III

A

Courts that have recognized the tort of intentional interference with inheritance have mostly relied on Section 774B of the *Restatement (Second) of Torts* , which provides that "[o]ne who by fraud, duress or other tortious means intentionally prevents another from receiving from a third person an inheritance or gift that he would otherwise have received is subject to liability to the other for loss of the inheritance or gift."[26] Section 774B has been replaced by Section 18 of the *Restatement (Third) of Torts: Liability for Economic Harm* ,[27] which states:

[26] Restatement (Second) of Torts § 774B (Am. Law Inst. 1979).

[27] Restatement (Third) of Torts: Liab. for Econ. Harm § 18 (Am. Law Inst. , Tentative Draft No. 3, approved May 21, 2018).

> (1) A defendant is subject to liability for interference with an inheritance or gift if:
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> (a) the plaintiff had a reasonable expectation of receiving an inheritance or gift;
>
> (b) the defendant committed an intentional and independent legal wrong;
>
> (c) the defendant's purpose was to interfere with the plaintiff's expectancy;
>
> (d) the defendant's conduct caused the expectancy to fail; and
>
> (e) the plaintiff suffered injury as a result.

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> (2) A claim under this Section is not available to a plaintiff who had the right to seek a remedy for the same claim in a probate court.

Section 18(1) changes 4 elements of the tort:

- the inheritance or gift is one the plaintiff "had a reasonable expectation of receiving" rather than one the plaintiff "would otherwise have received";

- the defendant must commit an "independent legal wrong" rather than act by "fraud, duress or other tortious means";

- the defendant's conduct must "cause[ ] the expectancy to fail" rather than "prevent[ ] [the plaintiff] from receiving" the property; and

- the plaintiff must incur simply an "injury" rather than the "loss of the inheritance or gift."

None of these differences appears to be material. But Section 18(2) is a substantive change, at least insofar as it makes explicit that the tort is "not available to a plaintiff who had the right to seek a remedy for the same claim in a probate court."

While a cause of action for intentional interference with an inheritance might take other forms, we focus our analysis on Sections 774B and 18. We have repeatedly explained the policy analysis we use in deciding whether to recognize a new cause of action:

> The considerations include social, economic, and political questions and their application to the facts at hand. We have weighed the risk, foreseeability, and likelihood of injury against the social utility of the actor's conduct, the magnitude of the burden of guarding against the injury, and the consequences of placing the burden on the defendant. Also among the considerations are whether one party would generally have superior knowledge of the risk or a right to control the actor who caused the harm.[28]

[28] *Pagayon v. Exxon Mobil Corp.* , 536 S.W.3d 499, 504 (Tex. 2017) (quoting *Humble Sand & Gravel, Inc. v. Gomez* , 146 S.W.3d 170, 182 (Tex. 2004)); *see also Kinsel v. Lindsey* , 526 S.W.3d 411, 423–424 n.6 (Tex. 2017) ; *Ritchie v. Rupe* , 443 S.W.3d 856, 878 (Tex. 2014) ; *Roberts v. Williamson* , 111 S.W.3d 113, 118 (Tex. 2003).

The issue here is not whether these considerations support remedies for misconduct that prevents a person from disposing of his estate as he wishes. They all certainly do. Rather, the issue is whether these considerations support additional or different remedies than those already afforded by statutory probate law and a suit in equity for unjust enrichment. We begin by examining the conflicts between existing law and the Section 774B and Section 18 tort and then turn to whether an additional tort remedy is needed.

B

Harvard Law Professors John C.P. Goldberg and Robert H. Sitkoff have made a strong case against recognizing the tort in a lengthy article recently published in the *Stanford Law Review* .[29] They conclude that the tort

[29] John C.P. Goldberg & Robert H. Sitkoff, *Torts and Estates: Remedying Wrongful Interference with Inheritance* , 65 Stan. L. Rev. 335 (2013).

> is conceptually and practically unsound.... [I]t is deeply problematic from the perspectives of both inheritance law and tort law. It undermines the core principle of freedom of disposition that undergirds American inheritance law. It invites circumvention of principled policies encoded in the specialized rules of procedure applicable in

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> inheritance disputes. In many cases, it has displaced venerable and better-fitting causes of action for equitable relief. It has a derivative structure that violates the settled principle that torts identify and vindicate rights personal to the plaintiff.... [T]he emergence of the interference-with-inheritance tort is symptomatic of two related and unhealthy tendencies in modern legal thought: the forgetting of restitution and equitable remedies, and the treatment of tort as an unstructured delegation of power to courts to impose liability whenever doing so promises to deter antisocial conduct or compensate victims of such conduct.[30]

30 *Id.* at 335–336.

There are opposing views, Professors Goldberg and Sitkoff acknowledge,[31] but their rebuttals of contrary arguments are convincing.

31 Specifically, their article notes that Professor Diane J. Klein at the University of La Verne College of Law has written most extensively in favor of recognizing the tort. *See id.* at 363 & n.188, 365 n.198; *see also* Diane J. Klein, *"Go West, Disappointed Heir": Tortious Interference with Expectation of Inheritance—A Survey with Analysis of State Approaches in the Pacific States* , 13 Lewis & Clark L. Rev. 209 (2009) ; Diane J. Klein, *River Deep, Mountain High, Heir Disappointed: Tortious Interference with Expectation of Inheritance—A Survey with Analysis of State Approaches in the Mountain States* , 45 Idaho L. Rev. 1 (2008) ; Diane J. Klein, *A Disappointed Yankee in Connecticut (or Nearby) Probate Court: Tortious Interference with Expectation of Inheritance—A Survey with Analysis of State Approaches in the First, Second, and Third Circuits* , 66 U. Pitt. L. Rev. 235 (2004) [hereinafter *A Disappointed Yankee in Connecticut*]; Diane J. Klein, *The Disappointed Heir's Revenge, Southern Style: Tortious Interference with Expectation of Inheritance—A Survey with Analysis of State Approaches in the Fifth and Eleventh Circuits* , 55 Baylor L. Rev. 79 (2003).

Fundamentally, probate law protects a donor's right to freely dispose of his property as he chooses.[32] An interference tort, it is argued, reinforces that protection.[33] But a prospective beneficiary has no right to a future inheritance; he has only an expectation that is dependent on the donor's exercise of his own right. The tort of intentional interference with inheritance gives a beneficiary his own right, one he does not otherwise have. That right is sometimes said to be derivative of the donor's right, but the beneficiary's exercise of his own right may or may not protect the donor's right of free disposition.[34] A beneficiary's interests and motives and those of his donor may be consistent, but they may also conflict. Family relationships and the very personal feelings they involve change. An expectancy is powerful motivation to ignore reality and misperceive a donor's true intent.

32 Goldberg & Sitkoff, *supra* note 29, at 338.

33 *A Disappointed Yankee in Connecticut* , *supra* note 31, at 238–240.

34 Goldberg & Sitkoff, *supra* note 29, at 379.

Intentional interference with inheritance is thus different from intentional interference with a business opportunity, another kind of expectancy. Like the beneficiary of an inheritance, a competitor has no right to a future opportunity.[35] But he does have the right not to be disadvantaged by unfair competition that is tortious or
235 wrongful.[36] The plaintiff and defendant *235 share that right, and the question is whether the defendant crossed the line. When there is unlawful interference with a commercial or business opportunity, tort law recognizes a remedy.[37] A remedy is warranted because the defendant's unlawful behavior impeded the plaintiff's liberty interest, that is, "an interest in pursuing productive activity free from wrongful interference."[38] The expectation of a prospective beneficiary is different. He has no right to fairness; he gets only what the donor chooses to give, fairly or unfairly. Probate law protects the donor's interest in making that choice freely.

35 *See id.* at 387; *Wal–Mart Stores, Inc. v. Sturges* , 52 S.W.3d 711, 727 (Tex. 2001) (observing that cases involving tortious interference with prospective business relations involve "two parties ... competing for interests to which neither is entitled").

36 *See* Goldberg & Sitkoff, *supra* note 29, at 387; *Wal–Mart Stores, Inc.* , 52 S.W.3d at 726 ("We therefore hold that to recover for tortious interference with a prospective business relation a plaintiff must prove that the defendant's conduct was independently tortious or wrongful.").

37 *Wal–Mart Stores, Inc.* , 52 S.W.3d at 726.

38 Goldberg & Sitkoff, *supra* note 29, at 387–388.

Tort law "is ill-suited to posthumous reconstruction of the true intent of a decedent."[39] Even before his death, a donor may not wish to disclose his true intentions, offending family and friends. Probate law employs specialized doctrines and procedures to arrive at the testator's true intent. Courts use principles of "undue influence" and "duress" to distinguish the unclear demarcation between legitimate persuasion and overbearing influence.[40] These carefully developed doctrines take into account the context of "nuanced family dynamics and customs that are often inaccessible to outsiders."[41]

39 *Id.* at 338.

40 *Id.*

41 *Id.*

Moreover, the evidentiary rules and procedures in probate law strike a balance between honoring a testator's actions while addressing situations where those actions were wrongfully taken. "Safeguarding freedom of disposition requires the court to invalidate a disposition that was not volitional because it was procured by undue influence. But openness to circumstantial evidence facilitates the bringing of strike suits by disgruntled family members whom the decedent truly meant to exclude."[42] This justifies the rule that a will contestant has the burden of proving that a will was wrongfully procured.[43] These and other carefully constructed provisions were enacted by the Legislature and should be respected. It is not prudent for the Court to recognize a new tort simply because probate procedures sometimes present hardships or even bar a plaintiff's recovery.

42 *Id.* at 346 (footnotes omitted).

43 *See id.* ("The contestant normally has the burden of proving that a will was procured by undue influence.").

Comment a to Section 18 states that the tort "is not meant to interfere with probate law or to provide a way for a plaintiff to avoid its limits and restrictions" but is "to provide relief when ... no remedy is available in probate."[44] It is not enough, according to comment c, that probate law "offers less generous relief than would be attainable in tort."[45] The tort is available only "if a probate court, for whatever reason, lacks the power to provide redress."[46] But limits on a probate court's power are among the "limits and restrictions" of probate law
236 with which the tort "is not meant *236 to interfere".[47] Given probate law's extensive and thorough provisions to protect an owner's free devise of his property, the lack of further remedies must be viewed not as legislative oversight but legislative choice.

44 Restatement (Third) of Torts: Liab. for Econ. Harm § 18 cmt. a (Am. Law Inst. , Tentative Draft No. 3, approved May 21, 2018).

45 *Id.* cmt. c.

46 *Id.*

47 *Id.* cmt. a.

C

A tort of intentional interference with inheritance is needed, it is argued, as a gap-filler when probate and other law do not provide an adequate remedy.[48] Texas law thoroughly governs inheritance through probate and restitution and, as we noted in *Kinsel* , provides remedies for unfairness, such as a constructive trust.[49] If these remedies are inadequate, it is because of legislative choice or inaction, and filling them is work better suited for further legislation than judicial adventurism.

48 Goldberg & Sitkoff, *supra* note 29, at 365.

49 526 S.W.3d 411, 425 (Tex. 2017) ("A constructive trust is an equitable, court-created remedy designed to prevent unjust enrichment." (quoting *KCM Fin. LLC v. Bradshaw* , 457 S.W.3d 70, 87 (Tex. 2015))).

A court already has broad authority to rectify inequity using a constructive trust in an action for restitution to prevent unjust enrichment.[50] As early as the first *Restatement of Restitution* , published in 1937, the underlying principle has been stated as thus: "Where a disposition of property by will or an intestacy is procured by fraud, duress or undue influence, the person acquiring the property holds it upon a constructive trust, unless adequate relief can otherwise be given in a probate court."[51] Most recently, the *Restatement (Third) of Restitution and Unjust Enrichment* explains liability in restitution owing to wrongful interference with a donor's freedom of disposition as follows: "If assets that would otherwise have passed by donative transfer to the claimant are diverted to another recipient by fraud, duress, undue influence, or other intentional misconduct, the recipient is liable to the claimant for unjust enrichment."[52] The doctrine, therefore, is malleable to fit the particular needs of each situation.

50 *See* Goldberg & Sitkoff, *supra* note 29, at 350 ("A constructive trust is a flexible remedy that courts of equity have long used to prevent unjust enrichment."); *Meadows v. Bierschwale* , 516 S.W.2d 125, 131 (Tex. 1974) ("Constructive trusts, being remedial in character, have the very broad function of redressing wrong or unjust enrichment in keeping with basic principles of equity and justice.").

51 Restatement (First) of Restitution § 184 (Am. Law Inst. 1937).

52 Restatement (Third) of Restitution and Unjust Enrichment § 46(1) (Am. Law Inst. 2011).

"[R]estitution by way of constructive trust" operates as "a gap-filling complement, rather than a rival, to the will contest in probate."[53] Most importantly, the body of restitution law "is sensitive to 'the rules of procedure, standards of proof, and limitations periods applicable in probate cases,' so that [it] cannot be used 'to circumvent' probate[ ] ... procedures."[54] In *Kinsel* , we concluded that the constructive trust remedy was adequate to redress the alleged injuries.[55] Suits on established torts, such as fraud, conversion, theft, and breach of fiduciary duty, as well as suit under the Declaratory Judgment Act, may also be available. The Court has never been persuaded that the remedies provided by probate law and established torts are inadequate.*237 In *Kinsel* , we left open the possibility that situations could arise to justify recognition of the tort of intentional interference with inheritance, but we did not hint at what they might be.[56] Nor are we able to do so. Professor Diane Klein, a prominent proponent of the tort, posits 4 specific factual scenarios in which the probate system falls short, justifying the need for a tort action. None of the situations warrants recognition of the tort.

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53 Goldberg & Sitkoff, *supra* note 29, at 351.

54 *Id.* (quoting Restatement (Third) of Restitution & Unjust Enrichment § 46 cmt. c).

55 526 S.W.3d 411, 424 (Tex. 2017).

56 *See id.* at 423–425.

One scenario is when an intestate heir tortiously induces the testator to make a will that is more favorable to the tortfeasor than to another heir.[57] The estate's payment of the expenses of a good-faith will contest would diminish the value of the challenger's share, and if the will is struck down, the tortfeasor would still collect through intestacy or a prior will, leaving the offender unpunished.[58] But the rule that costs of a good-faith will contest are paid from the estate is established by the law of probate.[59] Good policy arguments can certainly be made that the rule punishes the innocent and provides no deterrence to wrongdoing. But to use this example to argue for a tort remedy is to say, not that probate law is inadequate, but that it is wrong, and that courts should circumvent legislative policy.

57 *See A Disappointed Yankee in Connecticut* , *supra* note 31, at 247.

58 *Id.*

59 Tex. Est. Code § 352.052(a) –(b).

Another proffered scenario justifying recognition of the tort is when a would-be beneficiary lacks standing to contest a will.[60] But standing rules are broad. A person interested in the outcome of an estate plan has standing,[61] including anyone having "a property right in or claim against [the] estate being administered".[62] An interested person also may file an application admitting a will to probate, even when the will has been destroyed.[63] To the extent that these rules might not include someone with some expectation of a gift is, again, a legislative choice.

60 *A Disappointed Yankee in Connecticut* , *supra* note 31, at 247.

61 Tex. Est. Code § 55.001.

62 *Id.* § 22.018(1).

63 *Id.* § 256.051(a).

A third situation posited by Professor Klein is when someone obtains a gift in place of the testator's originally named beneficiary through undue influence.[64] Even if the will provision is invalidated in probate, it is argued, the gift may not be restored, and the tortfeasor will not be penalized.[65] The tortfeasor may even still benefit if he is a residuary beneficiary.[66] Further, the wrongdoing may be concealed until probate is closed. But in such circumstances, restitution may afford relief, and if the relief is lacking, the reason is legislative choice. Against the policy argument for relief is the policy argument that probate proceedings should not be retried in a tort action, certainly a reasonable view.

64 *A Disappointed Yankee in Connecticut* , *supra* note 31, at 248.

65 *Id.*

66 *Id.*

Professor Klein's fourth scenario is when a tortfeasor uses undue influence or fraud to induce the testator to make inter vivos transfers depleting the estate.[67] The transfers might not be discovered until after the testator's death, and while the property might be recovered through restitution, it might also be beyond reach. But *238 the limits of restitution simply recognize that not every wrong can be remedied.

67 *Id.*

The factual scenarios posited by Professor Klein are by no means an exhaustive list of cases in which proponents of recognizing the tort argue that it is necessary to fill a gap left open by probate procedures. Still, we are unable to imagine a situation in which the lack of a full remedy is not a legislative choice or a matter for targeted legislative amendments to probate law and procedures. A general interference tort is not a solution.

D

The Archers argue that probate and other remedies are inadequate because they do not allow recovery of their attorney fees incurred in setting aside Jack's post–1991 wills and trust and their expenses in settling with the charities. But settling their declaratory judgment action against the charities was the Archers' choice, as were their decisions not to seek attorney fees against the charities and to pay the charities' fees. The Archers argue that their remedies were inadequate because they did not punish Anderson, the wrongdoer. And they argue more broadly that a beneficiary wrongfully deprived of an inheritance should not be limited to reimbursement of expenses by the estate in a will contest.

At bottom, the Archers' argument is for a different probate process than the Legislature has created, specifically attorney fee shifting so that an award of fees does not diminish the estate. We agree generally that the law should discourage wrongdoing and punish wrongdoers. But the Archers asserted 3 other causes of action against Anderson—breach of fiduciary duty, intentional infliction of emotional distress, and legal malpractice. The law provided adequate remedies for the Archers' injuries. Even if a tort of intentional interference with inheritance were recognized, the Archers would not recover based on *Kinsel* .[68]

68 526 S.W.3d 411, 424 (Tex. 2017) (holding that the plaintiffs were not entitled to recover for tortious interference with an inheritance because a constructive trust provided an adequate remedy).

E

But the case prompts us to answer the question left open there. We have now had 2 opportunities in successive Terms to consider the creation of a new tort. Neither case calls for one, and the circumstances involved in each, along with thorough analyses of the issues in judicial opinions and legal scholarship, provide compelling reasons not to recognize the tort.

The concurring opinion's "overriding concern" is that we have too little information to know whether to recognize the tort of intentional interference with inheritance.[69] In the concurring opinion's view, there is little risk in deferring the issue again, as we did in *Kinsel* . There do not appear to be many such cases, and the risk of confusion, the concurring opinion believes, is low.[70] The concurring opinion argues that courts will get the message after *Kinsel* that the tort would only be available in extraordinary circumstances.[71] We do not share so rosy a view of things. We have called the tort of intentional infliction of emotional distress a "gap-filler",[72] but it is nevertheless invoked in a great many cases. We believe the bench, bar, and public deserve a straight answer when one is as clear as here.*239 We share fully, of course, the concurring opinion's concern that the elderly and disabled not be taken advantage of. But all the good efforts to assure their protection to which the concurring opinion points are legislative.[73] The concurring opinion argues that a new tort is needed to assure free

disposition of estates.[74] But as we have noted, the tort creates rights in expectancies that are often in conflict with those of property owners. With our state's extensive, settled probate procedures and its attention to and improvements in guardianship processes,[75] the Legislature has shown itself to be active and creative in protecting the vulnerable. An expansion of tort law is not needed.

69 *Post* at 244.

70 *Id.* at 241.

71 *Id.* at 240.

72 *Standard Fruit & Vegetable Co. v. Johnson* , 985 S.W.2d 62, 68 (Tex. 1998).

73 *See post* at 241.

74 *Id.* at 242.

75 *See, e.g.* , Tex. Est. Code § 1101.151(a) (providing for court appointment of a guardian with full authority over an incapacitated person upon a finding "that the proposed ward is totally without capacity to care for himself or herself, manage his or her property, operate a motor vehicle, make personal decisions regarding residence, and vote in a public election"); Tex. Gov't Code § 155.102 (requiring certification for certain guardians).

Importantly, the concurring opinion agrees that "the Archers had adequate remedies"[76] even though those remedies do not allow them to recover their attorney fees and settlement costs in litigating with the charities. The concurring opinion does not explain why the limits of the law of probate and unjust enrichment might be expanded for some, just not the Archers. Our decision that any expansion should be left to the Legislature is a principled reason for concluding that the Archers' remedies were adequate. The concurring opinion does not agree with our analysis but offers no reason of its own for reaching the same conclusion.

76 *Post* at 240.

Finally, the concurring opinion argues that other states that have recognized the tort "have adopted what are seemingly pragmatic and workable standards."[77] If that is true, and it is far from clear what the effects of the tort have been in other jurisdictions, we think a new tort is not needed in Texas. The fundamental question is why tort law should provide a remedy in disregard of the limits of statutory probate law. We think here it should not.

77 *Id.* at 245.

The tort of intentional interference with inheritance is not recognized in Texas. The decisions of the courts of appeals to the contrary are overruled.[78]

78 These include *Yost v. Fails* , 534 S.W.3d 517, 530 (Tex. App.—Houston [1st Dist.] 2017, no pet.) ; *Stern v. Marshall* , 471 S.W.3d 498, 516 (Tex. App.—Houston [1st Dist.] 2015, no pet.) ; *In re Estate of Valdez* , 406 S.W.3d 228, 233 (Tex. App.—San Antonio 2013, pet. denied) ; *In re Estate of Russell* , 311 S.W.3d 528, 535 (Tex. App.—El Paso 2009, no pet.) ; *Brandes v. Rice Trust, Inc.* , 966 S.W.2d 144, 146–147 (Tex. App.—Houston [14th Dist.] 1998, pet. denied) ; *King v. Acker* , 725 S.W.2d 750, 754 (Tex. App.—Houston [1st Dist.] 1987, no writ).

* * * * *

The judgment of the court of appeals is

Affirmed .

Justice Johnson filed an opinion, concurring in part and dissenting in part, and concurring in the judgment, in which Justice Lehrmann, Justice Boyd, and Justice Brown joined.

I. It's Too Soon

240 I agree with the Court's conclusion that in this case, as was the situation in *240 *Kinsel v. Lindsey* , 526 S.W.3d 411 (Tex. 2017), there is no need to allow the Archers[1] to recover for harm they suffered due to Ted Anderson's intentional interference with the inheritance benefit that in reasonable likelihood they were to receive from Jack Archer. That is because the Archers had adequate remedies otherwise. *Ante* at 238. But just as the Court did not see the need to completely reject the cause of action in *Kinsel* , I see no need to do so today. To the contrary, I see the need *not* to do so. Accordingly, I join the Court's judgment but dissent from its blanket rejection of the type of cause of action the Archers asserted. The cause of action is designed to protect persons damaged by another's intentional interference with a benefit that the persons in reasonable likelihood would have received as an inheritance absent the interference. The exact label and elements of such a cause of action vary slightly from jurisdiction to jurisdiction, between the Restatement (Second) of Torts and the Restatement (Third) of Torts, and commentator to commentator. *See ante* at 232–33 (discussing amendments to the Restatement); *see generally* Diane J. Klein, *River Deep, Mountain High, Heir Disappointed: Tortious Interference with Expectation of Inheritance—A Survey with Analysis of State Approaches in the Mountain States* , 45 IDAHO L. REV. 1 (2008) (discussing the adoption of the cause of action in the various Mountain States). The Court refers to the cause of action generally as "intentional interference with inheritance," so for consistency and ease of reference, I will also use that label.

[1] Five of Jack Archer's nieces and nephews are parties to this suit—David B. Archer, Carol Archer Bugg, John V. Archer, Karen Archer Ball, and Sherri Archer.

The Court says that probate law protects a donor's right in freely choosing how to dispose of his or her property. *Ante* at 234. Of course it does, at least to a large degree. But not always. Where I part ways with the Court is over its conclusion that there are and will be no circumstances under which a tort for intentional interference with inheritance need be available to Texans, even though such a cause of action might be the only viable avenue of relief against someone who wrongfully took or diverted assets in frustration of the asset owner's intent. The Court's justification? "Because existing law affords adequate remedies for the wrongs the tort [of intentional interference with an inheritance] would redress, and because the tort would conflict with Texas probate law ...." *Ante* at 229.

I disagree with both reasons. As to the first reason, I disagree that the Court can realistically predict that the law in its current state affords adequate remedies for all situations that might arise in the future where bad actors wrongfully relieve elderly persons of assets intended for others. With respect, the Court's confidence in existing remedies is too great in light of human experience with those among us who prey on the elderly. As to the second reason, the cause of action would not conflict with probate law but would augment it when properly cabined in. Both probate law and the cause of action for intentional interference with inheritance are designed to protect persons' rights to transfer their property to whomever they choose.

At a minimum, withholding a decision about whether to recognize or reject the tort until the full effects of our decision in *Kinsel* can be seen and evaluated poses little downside. To begin with, *Kinsel* and this case are the first two cases in which the Court has directly addressed the cause of action. Next, the courts of appeals have
241 considered the cause of action in only a relatively small number of cases, and that *241 small number does not portend a large number of such claims waiting to be pursued. That is especially so in light of our explaining the

limits of the cause of action in *Kinsel.* And an increase in cases would be even less likely if, in this case, we were to follow and reinforce *Kinsel* 's lead. Were we to do so, then between *Kinsel* and this case, we would have firmly clarified just when the cause of action could be maintained: only if no other theory of liability or avenue of relief is available. Under the circumstances, there likely would be little confusion about if and when the cause of action would be viable.

II. Diminished Capacity in the Elderly—A Growing Issue

Jack Archer's stroke left him with diminished capacity to manage his affairs and susceptible to manipulation by his long-time friend, Anderson. Anderson did not take advantage of Jack's condition to benefit himself. But whether his actions benefitted him is not the real question. The question is who had the right to determine how Jack's assets would be disposed of and who would receive his estate. Here, the evidence supports the jury's finding that Anderson did not, and that his actions in relation to Jack, Jack's assets, and Jack's estate were tortious.

Jack's condition of diminished capacity is not unusual among the aging population where stroke, illness, or just the general infirmities of age can reduce the ability to manage one's affairs generally, properly care for one's business and assets, and resist the influence of others over those decisions. Such reduced capacity creates opportunities for the elderly to be taken advantage of, even to the point of their being persuaded or coerced into taking actions that directly contradict earlier, competently professed desires regarding disposition of their estates, as happened with Jack. The problem is not inconsequential and it is growing. Texas has the third largest elderly population among the states. *See* TEXAS DEMOGRAPHIC CTR., AGING IN TEXAS: INTRODUCTION 2–3 (2016) (defining "older" or "elder" population as "those aged 65 years and older"). The elderly population in Texas grew by 49.5% from nearly 2.1 million in 2000 to nearly 3.1 million in 2014. *Id.* at 3. This type of growth will inexorably lead to more and more Texans being in the position in which Jack and the Archer family found themselves—an older person with diminished capacity being taken advantage of to the detriment of that person's desires as expressed before his capacity became diminished, or if no desires had been expressed, then to the detriment of the natural objects of his affections.

Texas is making progress in providing protections for its aging citizens and their assets. *See, e.g.* , TEX. EST. CODE § 1101.151 (providing for the court appointment of a guardian with full authority over an incapacitated person upon a finding that the proposed ward is totally without capacity to care for himself, manage his property, operate a motor vehicle, make personal decisions regarding residence, and vote in a public election); TEX. GOV'T CODE § 155.102 (requiring certification for certain guardians). This Court has brought issues relating to Texas's expanding elderly population to the forefront in several ways. Two of these are the establishment of a Working Interdisciplinary Network of Guardianship Stakeholders (WINGS), and calling for the Texas Judicial Council, the policy-making body of the judicial branch of government, to study issues related to the aging population and make recommendations for reforming Texas's approach to issues involving our elderly.

242 But even with these efforts, experience teaches that where there is opportunity for *242 persons to take advantage of others, they will do so in inventive and unusual ways that simply cannot be fully anticipated. In written testimony to the United States House of Representatives Committee on Ways and Means dated March 22, 2017, David Slayton, the Administrative Director for the Texas Office of Court Administration (OCA), reported that pursuant to a pilot project to assist Texas courts in monitoring guardianship cases, OCA has reviewed over 13,600 guardianship cases in fourteen Texas counties. According to Slayton's testimony:

1. As of December 31, 2016, there were 51,388 active guardianships in Texas; the number had increased by 37% in the preceding five years; guardianships were one of the fastest growing case types in the state; and the estimated value of estates under guardianship in Texas exceeded 5 billion dollars.

2. The majority of guardians appointed in Texas are licensed attorneys, family members, or friends of the ward.

3. Forty-three percent of guardianship cases were out of compliance with reporting requirements of law, and the large majority of those cases were cases in which family members of friends were guardians.

4. A review of accountings that *were* filed showed that on a regular basis there were: unauthorized withdrawals from accounts, unauthorized gifts to family members and friends; unsubstantiated and unauthorized expenses, and a lack of backup data to substantiate accountings.

Examining the Social Security Administration's Representative Payee Program: Joint Hearing on Who Provides Help Before the Oversight Subcomm. and Social Sec. Subcomm. of the H. Ways & Means Comm. , 115th Cong. (2017) (statement of David Slayton, Administrative Director, Office of Court Administration, Texas Judicial Branch).

The OCA study did not include the innumerable elderly for whom no formal guardianship was established, as was Jack's situation from August 1998 until December 1999. And even if formal guardianship proceedings have shortcomings in protecting the elderly with diminished capacity and their assets as is shown by the OCA's study, how much more protection do the elderly with diminished capacity need when there is no formal guardianship and no pretense of supervision such as is provided for in a formal guardianship proceeding? In my view, much. And the family or other persons who have expectations of inheriting from an older family member or friend are logically the most likely to raise the question of whether improper advantage has been taken of an older person. This case demonstrates how such a tort, properly limited, works to enforce the principle that when testators have freely made provision for disposition of their estates, those decisions will be protected by the law.

III. An Expectancy Based on More Than Speculation

Before his stroke, Jack executed his 1991 will. No one questions the validity of that will, which left the bulk of his estate to his family. The evidence is practically uncontroverted that the 1991 will was the last valid instrument expressing Jack's freely adopted intended disposition of his estate. So the distribution of Jack's estate was effectively locked in before Anderson began influencing Jack's post-stroke decisions. Thus, the expectancy of inheritance the Archers had as to Jack's estate was more than a speculative hope. If, after Jack's stroke, Anderson had convinced him to transfer assets to a third party who then consumed or dissipated the
243 assets *243 before Jack died, or to a third party who disappeared, and the Archer family did not discover the transfers until after Jack's death, then both Jack's reasonable expectancy that his last valid will would control the disposition of his estate, and the Archers' reasonable expectancy of inheriting the bulk of his estate in accordance with his last competent intentions would have been frustrated. Why? Because there would have been no estate. Under those circumstances, the remedies of a constructive trust and restitution would have been of little, if any, benefit to the Archers in enforcing Jack's intent regarding his estate. Thus, the existence of a gap-filling cause of action against Anderson for interference with the Archers' expectancy of inheritance might well have been the only viable vehicle to remedy Anderson's actions. Even if a remedy other than tortious interference with expectancy of inheritance was viable in such a situation, then having the tortious interference

remedy as a backup would do no harm. And if, under all the facts, another remedy was not viable, the tortious interference cause of action might well afford relief where otherwise there would be none. However, the situation where after his stroke, Jack's estate was intentionally diverted or dissipated and the perpetrators or assets gone, is not before us. In the case that *is* before us, the Archers had, and took advantage of, adequate remedies available to them, other than a claim for tortious interference with their reasonable certainty of inheriting from Jack in accordance with the intentions he expressed in his 1991 will. That is also what the plaintiffs in *Kinsel* did. There we noted that although this Court has not recognized a cause of action for intentional interference with inheritance, some courts of appeals had—including in two cases where we denied petitions for review. *Kinsel* , 526 S.W.3d at 422–23 & n.4 (citing *Stern v. Marshall* , 471 S.W.3d 498, 516 (Tex. App.—Houston [1st Dist.] 2015, no pet.) ; *Magana v. Citibank, N.A.* , 454 S.W.3d 667, 685 (Tex. App.—Houston [14th Dist.] 2014, pet. denied) ; *In re Estate of Valdez* , 406 S.W.3d 228, 233 (Tex. App.—San Antonio 2013, pet. denied) ; *In re Estate of Russell* , 311 S.W.3d 528, 535 (Tex. App.—El Paso 2009, no pet.)). Nevertheless, we saw "no compelling reason to consider a previously unrecognized tort if the constructive trust [awarded in the case] proved to be an adequate remedy." *Id.* at 424 (noting that a relevant factor when considering an unrecognized cause of action is the existence and adequacy of other protections). We went on to conclude that the constructive trust provided redress for the injuries, so the facts did not warrant enlarging the body of Texas's tort law by recognizing a new cause of action. *Id.* at 425.

In regard to the intentional interference with expectation of inheritance question, this case is postured similarly to *Kinsel* . The Court concludes that the Archers had an adequate remedy because they ultimately received their inheritance, albeit minus attorney's fees and a settlement with the charities. *Ante* at 239. But rather than leaving open the issue of whether to recognize the cause of action as we did in *Kinsel* , the Court changes course and closes that door. It does so even though that door might, in some instances, provide the only avenue to relief for parties who suffer loss at the hands of actors who intentionally—not merely negligently—caused the loss. The Court indicates that we should do so now in order to eliminate confusion based on conflicting decisions in the courts of appeals in Houston. *Ante* at 232. The Court points out that after our opinion in *Kinsel* issued, the
244 Court of Appeals for the First District recognized the cause of action in *244 *Yost v. Fails* , 534 S.W.3d 517, 530 (Tex. App.—Houston [1st Dist.] 2017, no pet.), while the Court of Appeals for the Fourteenth District declined to do so in *Rice v. Rice* , 533 S.W.3d 58, 63 (Tex. App.—Houston [14th Dist.] 2017, no pet.). But in *Yost* , the first court did not award damages for intentional interference with an inheritance. 534 S.W.3d at 531–33. So even taking these two cases into consideration, I am confident that Texas courts are fully capable of prospectively applying the guidance in *Kinsel* regarding intentional interference with inheritance cause of action—guidance that would be emphasized and more fully explained in this case should we choose to follow the same path we took in *Kinsel.*

The Court says that a judicially recognized gap-filler cause of action is unnecessary because statutory probate law provides adequate remedies. *Ante* at 236. My overriding concern is that neither we nor the courts of appeals have considered a sufficient spectrum of factual circumstances for us to confidently conclude that foreclosing the cause of action will not leave parties without any avenue of relief against those whose actions intentionally and wrongfully divest an elderly person with diminished capacity of assets and thus interfere with that person's last-expressed true intentions about the disposition of his or her property.

The Court addresses and dismisses four fact scenarios that commentator Diane J. Klein argues necessitate the recognition of the tort of intentional interference with an inheritance. *Ante* at 237–38 (citing Diane J. Klein, *A Disappointed Yankee in Connecticut (or Nearby) Probate Court: Tortious Interference with Expectation of Inheritance—A Survey with Analysis of State Approaches in the First, Second, and Third Circuits* , 66 U. PITT.

L. REV. 235, 247 (2004)). While acknowledging that these scenarios are "by no means an exhaustive list," the Court concludes that it is "unable to imagine a situation in which the lack of a full remedy is not a legislative choice or a matter for targeted legislative amendments to probate law and procedures." *Ante* at 239. But even allowing for what the Court describes as the Legislature being "active and creative in protecting the vulnerable," *ante* at 238, it is beyond reasonable belief that all the possible circumstances and designs of persons focused on taking advantage of those with diminished capacity have been anticipated, or are even capable of being anticipated. After all, that is the reason common law causes of action and remedies have arisen —although I do not dispute that probate law will be applicable and provide an adequate remedy in many situations.

Nevertheless, under certain circumstances probate proceedings may not be a viable option for relief to a would-be beneficiary. For example, such a proceeding might offer no relief in a case where the statutory probate limitations period expired before the would-be beneficiary learned of the testator's death, as was the situation in *Schilling v. Herrera* , 952 So.2d 1231, 1237 (Fla. Dist. Ct. App. 2007) (holding that the plaintiff's tort claim was not barred by the plaintiff's failure to appear in a probate proceeding when the defendant concealed the testator's death until after the expiration of the statutory limitations period). And another example might be where the wrongful interference occurs with a decedent's nonprobate assets, such as payable on death accounts or life insurance proceeds. *See Valdez v. Ramirez* , 574 S.W.2d 748, 750 (Tex. 1978). But as I have noted above, experience teaches that it is impossible to anticipate the limitless ways in which unscrupulous persons can take advantage of others, in this instance elderly persons. Indeed, if those ways could be anticipated, then
245 preventative measures would already have been devised, publicized, and widely adopted. And there *245 would be negligible (well, at least a reduction of) fleecing of our older population. But that is not going to happen. So long as humans with human traits and desires exist, there will be those among us who devise new and more effective ways of taking advantage of the vulnerable elderly who have assets.

The Court recognizes that a constructive trust can provide a remedy for unfairness. *Ante* at 236. But the typical remedy of imposing a constructive trust resulting from a successful restitution action is not always available or may not provide an adequate remedy, as this Court has recognized. While we have stated that "[t]he specific instances in which equity impresses a constructive trust are numberless," *Pope v. Garrett* , 147 Tex. 18, 211 S.W.2d 559, 560 (1948) (quoting 4 POMEROY'S EQUITY JURISPRUDENCE § 1045, at 97 (5th ed. 1941)), we have also acknowledged that "the reach of a constructive trust is not unlimited." *KCM Fin. LLC v. Bradshaw* , 457 S.W.3d 70, 87 (Tex. 2015). The imposition of a constructive trust generally requires the requesting party to establish (1) a breach of a special trust or fiduciary relationship or actual or constructive fraud, (2) unjust enrichment of the wrongdoer, and (3) an identifiable res that can be traced back to the original property. *Id.* As applied in the inheritance context, the would-be beneficiary must trace the fraudulently obtained property to funds received by the wrongdoer. *See Meadows v. Bierschwale* , 516 S.W.2d 125, 133 (Tex. 1974) (stating that "[w]hen property subject to a constructive trust is transferred, a constructive trust fastens on the proceeds"). However, if the property has been dissipated or traceable funds have been depleted, there will be nothing remaining upon which to impose a constructive trust. A judgment obtained from a tort action, on the other hand, would provide the expectant beneficiary with at least potential redress.

Some states have recognized the tort of interference with inheritance and have adopted what are seemingly pragmatic and workable standards. *See, e.g.* , *Doughty v. Morris* , 117 N.M. 284, 871 P.2d 380, 384 (N.M. Ct. App. 1994) (recognizing the tort of tortious interference with an expected inheritance and requiring a plaintiff to prove "(1) the existence of an expectancy; (2) a reasonable certainty that the expectancy would have been realized, but for the interference; (3) intentional interference with that expectancy; (4) tortious conduct

involved with interference, such as fraud, duress, or undue influence; and (5) damages"); *DeWitt v. Duce* , 408 So.2d 216, 218 (Fla. 1981) (discussing a claim for wrongful interference with a testamentary expectancy and when such a claim is considered a collateral attack on a probate decree). Of course, the elements of a cause of action in Texas would not necessarily mirror the elements of the action in other states. But the experience of other states can give focus and guidance.

In the end, it is hard to overestimate the creativity of those seeking to obtain or redirect money or assets that belong to another. Members of the increasing aging population with money and assets are ripe targets for predators. Said another way, the current target-rich environment for those who would prey on our elderly is expanding. I would not now foreclose the option of a tort action for intentional interference with inheritance to be used in circumstances where no alternative adequate remedy is available, and the tort would provide the only avenue for relief. The appropriate situation for recognizing the tort did not present itself in this case. However, the past does not control the future—it only undergirds it. The number of cases in which the cause of
246 action has *246 been asserted in the past indicates the potential for an increase in the number of cases asserting such claims. And if we were to use this case to reinforce what we said in *Kinsel* , it would surely foreclose most claims for intentional interference with inheritance.

Finally, the persons benefitted by the Court's action today are those who prey on some of the most vulnerable among us—seniors who have worked to accumulate estates to care for themselves in their twilight years, and to at death, either pass those estates on to their loved ones or distribute however else they might decide. We should be both sensitive to the needs of that vulnerable segment of the population and protective of their right to distribute the fruit of their life's work to whomever they competently and validly choose. I would not run the risk of shielding those who prey on them from being held responsible for their actions.

IV. Conclusion

I join the Court's judgment affirming that of the court of appeals. But I respectfully dissent from the Court's barring the possibility of tort relief to those persons damaged by another's intentional interference with a benefit that the person in reasonable likelihood would have received as an inheritance. I would follow the approach we took in *Kinsel* . That is, I would go no further than to hold that we need not recognize the cause of action in this case and reserve judgment about whether to completely foreclose it.

No. 08-16-00223-CV
COURT OF APPEALS EIGHTH DISTRICT OF TEXAS EL PASO, TEXAS

Armstrong v. Armstrong

570 S.W.3d 783 (Tex. App. 2018)
Decided Jul 31, 2018

No. 08-16-00223-CV

07-31-2018

Quentin Cole ARMSTRONG, Jr., Appellant, v. Paul C. ARMSTRONG, Appellee.

ATTORNEY FOR APPELLEE: Hon. C. Tony Wright, The Wright Lawfirm P.L.L.C., 6440 N Central Expy., Ste. 820, Dallas, TX 75206-4136. ATTORNEY FOR APPELLANT: Hon. Tommy D. Sheen, 1931 East 37th Street, Suite 2, Odessa, TX 79762.

ANN CRAWFORD McCLURE, Chief Justice

ATTORNEY FOR APPELLEE: Hon. C. Tony Wright, The Wright Lawfirm P.L.L.C., 6440 N Central Expy., Ste. 820, Dallas, TX 75206-4136.

ATTORNEY FOR APPELLANT: Hon. Tommy D. Sheen, 1931 East 37th Street, Suite 2, Odessa, TX 79762.

Before McClure, C.J., Rodriguez, and Palafox, JJ.

OPINION

ANN CRAWFORD McCLURE, Chief Justice

This appeal arises from a purported oral agreement between two brothers, Quentin Cole Armstrong, Jr., Appellant, and Paul C. Armstrong, Appellee, regarding the conveyance of an interest in real estate from Paul to Cole. After a dispute arose regarding an alleged breach of the oral agreement, Paul filed suit against Cole. In his petition, Paul claimed that Cole had failed to re-convey the real property interest as agreed, and had wrongfully received oil and gas revenues that were properly payable to Paul. His suit also sought an accounting and payment.

After a bench trial, the trial court ruled in Paul's favor and ordered Cole to convey Paul's interests by special warranty deed, and to provide true and correct copies of any mineral or surface lease affecting the property as well as an accounting under oath of all income received from the property. The trial court did not award damages but did issue findings of fact and conclusions of law. We reverse the trial court's judgment and render judgment for Cole.

FACTUAL SUMMARY

Paul's Testimony

786 Paul testified that after their father died, he and Cole each inherited a one-quarter *786 interest, and their stepmother inherited a one-half interest, in the family land. In 2009 or 2010, Paul was in the midst of a divorce, and claimed to be in a poor emotional state. According to Paul, Cole was concerned about Paul's potential actions regarding his portion of the family land and leases, and asked him to convey his interest with the understanding that Cole would later convey that interest back to Paul. Paul was divorced on or about March 18, 2011.

Multiple deeds were introduced into evidence. The first from Paul as Grantor to Cole as Grantee was dated May 12, 2010. The deed was recorded on May 19. Paul identified his divorce attorney as the person who had prepared the deed, confirmed his own signature on the document, and recalled signing it. He admitted that the property conveyance had been his attorney's idea. The second general warranty deed showed a typed date of May 12, 2010, but the typed date had been scratched out and replaced by hand with "10 August 11." This document was dated and filed on August 10, 2011, and was recorded on August 26, 2011. Paul did not recall going to a notary and never knew that a deed dated August 10, 2011, had been filed. Nor did he know why the first deed was filed a second time. Paul also apparently signed a quitclaim deed that was the last of the several conveyances. Although he verified his signature and did not deny signing the instrument, Paul did not remember signing it. But he would have signed whatever his brother had given him and would only have signed the document at his brother's request. The typewritten date on the quitclaim deed is February 22, 2012, but is followed by the typed phrase, "effective, however, as of September 1, 2011." The quitclaim deed was filed February 27, 2012.

A general warranty deed purporting to re-convey the property from Cole to Paul bears a typewritten date of March 29, 2011. Above the notary's signature line is typed, "on this the _____ day of March, 2011 by Quentin Cole Armstrong." The document was notarized by Jessica Abila, who had been employed by Paul's divorce attorney.[1] The deed was filed for record on May 25, 2011, and was recorded on June 7, 2011. When shown this instrument at trial, Paul declared it was the first time he had seen the document, and did not know that his brother had ever signed the property back to him. Paul had no recollection of the document, did not know who had prepared the deed, had no knowledge regarding its authenticity, did not know the notary public, and did not know that the document had been filed.

[1] The notary public was subsequently terminated from her employment.

In the spring of 2013, Paul asked Cole to re-convey the property interest but Cole's response was, "Not yet." Near the end of 2013, Paul asked again. This time, Cole declared that he would not re-convey the property to Paul. Paul trusted his brother, felt hurt and deceived by Cole's refusal, and believed his brother had breached that trust. Paul admitted that he had no written documentation other than the deeds.

Paul's testimony took a twist when he later testified that he had approached Cole about the proposed transfer of interest. When his divorce attorney had asked Paul to identify a trustworthy person to whom Paul could "convey [the property] so [he] could give it back," Paul answered, "My brother." Paul admitted that he "obviously" brought up the subject, and when asked whether the purpose of the conveyance was to "get it out
787 of [his] name" in relation to his divorce, Paul testified, *787 "Well, obviously it was."[2]

[2] Paul then denied transferring his property interest in an attempt to cheat his wife during their divorce, and explained that he had not been "feeling right" and had transferred the property to his brother who he trusted "a hundred percent."

Cole was to re-convey the property whenever Paul asked him to do so, and no length of time was established.

The trial court judicially noticed the court's divorce file. His wife's inventory listed the land at issue as being Paul's separate property. In other words, she did not claim a community property interest therein.

Cole's Testimony

Cole admitted that he had not paid any consideration as recited in the deeds, and acknowledged that the conversations occurred prior to May 12, 2010. He denied that that the conveyance was due to Paul's depression or pending divorce. He also denied he had promised to re-convey the property. He had not provided an accounting because he did not feel it was necessary. When asked why he would not re-convey the property, Cole testified:

A. He deeded it to me, and I told him I'm going to keep it.

Q. Pardon?

A. He deeded it to me, and I told him I'm going to keep it.

Q. Did you tell him in the spring of 2013 you weren't going to transfer it to him, ‘not yet,’ those exact words?

A. I don't recall saying ‘not yet.’ I told him it was my—he deeded it to me and I'm going to keep it.

Q. There wasn't any real consideration for this transfer, was there?

A. No.

Q. Huh?

A. There was no money.

* * * * *

Q. Isn't it true that you were supposed to go back by his attorney’s office and sign the deed back to him and a memorandum back to him?

A. No.

Q. So you just want something free. You want his one-fourth interest free.

A. No.

Q. Why—why are you saying that?

A. Well, I'm taking care of it. That’s all I can tell you.

Q. Pardon?

A. I'm taking care of it properly. That’s all I can tell you.

Q. And who are you taking care of it for?

A. The family.

Q. Whose family?

A. Our immediate family.

> Q. Pardon?
>
> A. The immediate family.
>
> Q. Who specifically are you taking care of his one-fourth interest that he deeded it to you for?
>
> A. I'm just taking care of his sons if they need any help.
>
> Q. So you admit that you took this property basically as trustee for your brother's interest.
>
> A. Yes.
>
> Q. And now, as a trustee, when he wants it back, you refuse to give it back to him.
>
> MR. SCOGIN: Object to the question that he's a trustee.
>
> MR. WRIGHT: He admitted he was, Your Honor.
>
> THE COURT: Well, that has legal connotations. I'm not going to hold this witness as an expert. But I'll overrule

788 *788

> the objection, understanding that, you know, 'trustee' has a certain legal meaning that we may understand that he may not.

Although Cole admitted that earnings had resulted relative to "the leases," he was uncertain of the amount.

Cole delivered to his attorney a letter he had received from Paul's attorney requesting that he re-convey the property to Paul. Cole had not received any recorded deeds from the county clerk, and did not recall who had prepared them. Regarding the general warranty deed that purported to re-convey the property, Cole denied that the signature was his. He had learned about it when someone from the bank told him that Paul had come in with "this document."

On October 4, 2011, Cole filed in the clerk's office an affidavit of fact. He declared he had "acquired all of the one-fourth (1/4) interest of my brother, Paul C. Armstrong" in the property and had discovered "a general warranty deed dated March 29, 2011, recorded in Book 880, page 722, of the Official Public Records of Reeves County, Texas" showing that he had re-conveyed the property. He further declared, "I did not sign such document nor have I ever agreed to convey or re-convey this interest to anyone. As of this date, I still claim all of the interest conveyed to me under the General Warranty Deed, dated May 12, 2010, recorded in Book 843, page 182, of the Official Records of Reeves County, Texas."

Trial Court's Ruling

After considering closing arguments, the trial court took the matter under advisement, and requested production of authorities, proposed judgments, and findings of fact. Findings and conclusions were timely filed. The court entered judgment "in favor of [Paul,]" ordered Cole to re-convey the property and to provide an accounting of

all income received as well as copies of mineral or surface leases affecting the property. The trial court did not award damages.

In eleven issues for review, Cole challenges all but one of the trial court's findings of fact, and all its conclusions of law, complaining that they are not supported by legally or factually sufficient.

STANDARDS OF REVIEW

Unless the contrary is established as a matter of law or there is no evidence to support the finding, unchallenged findings of fact are binding on an appellate court. *Zaragoza v. Jessen* , 511 S.W.3d 816 (Tex.App.—El Paso 2016, no pet.). Challenged findings have the same force and dignity as a jury's verdict upon questions. *Zaragoza* , 511 S.W.3d at 816. Evidence supporting findings of fact are reviewable for legal and factual sufficiency under the same standards for evidence supporting a jury's answer. *Zaragoza* , 511 S.W.3d at 816.

We review *de novo* a trial court's conclusions of law. *Staley Family P'ship, Ltd. v. Stiles* , 483 S.W.3d 545, 548 (Tex. 2016)*, citing City of Austin v. Whittington,* 384 S.W.3d 766, 788 (Tex. 2012). We will uphold a trial court's conclusions of law if the judgment can be sustained on any legal theory supported by the evidence. *See Zaragoza v. Jessen* , 511 S.W.3d 816 (Tex.App.—El Paso 2016, no pet.). Incorrect conclusions of law will not require reversal if the controlling findings of fact will support a correct legal theory. *Zaragoza* , 511 S.W.3d at 816.

BREACH OF FIDUCIARY DUTY

We begin our analysis by examining Cole's fifth issue. In its findings of fact and conclusions of law, the trial
789 court concluded *789 a fiduciary relationship existed between the brothers and determined that Cole had breached his duty to re-convey the real property to Paul. Cole contends this is erroneous because Paul did not plead a breach-of-fiduciary-duty cause of action and the issue was not tried by consent. We agree.

An original pleading which sets forth a claim for relief must contain a short statement of the cause of action sufficient to give fair notice of the claim involved. TEX.R.CIV.P. 47(a). A judgment must conform to the pleadings and proof, and a party may not be granted relief in the absence of pleadings to support it. *Phillips v. Phillips* , 296 S.W.3d 656, 670 (Tex.App.—El Paso 2009, pet. denied)*, citing Stoner v. Thompson,* 578 S.W.2d 679, 682, 683-84 (Tex. 1979) ; *Marrs and Smith Partnership v. D.K. Boyd Oil and Gas Co., Inc.,* 223 S.W.3d 1, 18 (Tex.App.—El Paso 2005, pet. denied).

When issues not raised by the pleadings are tried by consent, they must be treated in all respects as if they had been raised in the pleadings. TEX.R.CIV.P. 67 ; *Compass Bank v. Nacim* , 459 S.W.3d 95, 113 (Tex.App.—El Paso 2015, no pet.) ; *Phillips v. Phillips,* 296 S.W.3d 656, 670 (Tex.App.—El Paso 2009, pet. denied) ; *Gutierrez v. Gutierrez,* 86 S.W.3d 721, 729 (Tex.App.—El Paso 2002, no pet.). This rule applies to those exceptional cases when it clearly appears from the record as a whole that the parties tried an unpled issue by consent. *Nacim* , 459 S.W.3d at 113 ; *Gutierrez,* 86 S.W.3d at 729. The trial-by-consent rule is not a general rule of practice but one that should be applied with care, and never in a doubtful situation. *Nacim* , 459 S.W.3d at 113 ; *Marrs and Smith Partnership v. D.K. Boyd Oil and Gas Co., Inc.,* 223 S.W.3d 1, 18 (Tex.App.—El Paso 2005, pet. denied). Trial by consent "applies only where it appears from the record that the issue was actually tried, although not pleaded." *Marrs and Smith Partnership,* 223 S.W.3d at 18, *quoting Johnston v. McKinney American, Inc.,* 9 S.W.3d 271, 281 (Tex.App.—Houston [14th Dist.] 1999, pet. denied). To determine whether the issue was tried by consent, we must examine the record not for evidence of the issue, but rather for evidence of *trial* of the issue. *Nacim* , 459 S.W.3d at 113 ; *Marrs and Smith Partnership,* 223 S.W.3d at 18 (plaintiff not entitled to favorable judgment on un-pled cause of action unless tried by consent).

Paul failed to allege breach of fiduciary duty in either his original or supplemental petitions. We must next determine whether the issue was tried by consent. *See Nacim* , 459 S.W.3d at 113 ; *Marrs and Smith Partnership,* 223 S.W.3d at 18.

Formal and informal relationships may provide a basis on which fiduciary duties may be founded. *Crim Truck & Tractor Co. v. Navistar Int'l Transp. Corp.,* 823 S.W.2d 591, 593-94 (Tex. 1992), *superseded by statute on other grounds as stated in Subaru of Am., Inc. v. David McDavid Nissan, Inc.,* 84 S.W.3d 212, 225-26 (Tex. 2002) (op. on reh'g); *see also Lindley v. McKnight,* 349 S.W.3d 113, 124 (Tex.App.—Fort Worth 2011, no pet.) (Texas courts are reluctant to recognize fiduciary relationships). An informal fiduciary duty may arise from a moral, social, domestic, or purely personal relationship of trust and confidence, generally called a confidential relationship. *Crim Truck,* 823 S.W.2d at 594 ; *Lindley,* 349 S.W.3d at 124-25. A person is justified in placing confidence in the belief that another party will act in his best interest only where he is accustomed to being guided by the judgment or advice of the other party and there exists a long association in a business
790 relationship as well as personal friendship. *Lindley,* 349 S.W.3d at 125 ; *see* *790 *also Trostle v. Trostle* , 77 S.W.3d 908, 914 (Tex.App.—Amarillo 2002, no pet.) (where one person is accustomed to being guided by judgment or advice of another or is justified in believing one will act in best interest of another because of family relationship, confidential relationship may arise)*, citing Thigpen v. Locke,* 363 S.W.2d 247, 253 (Tex. 1962).

As we have previously observed:

> Texas courts are reluctant to recognize informal fiduciary relationships. *See Schlumberger Tech. Corp. v. Swanson,* 959 S.W.2d 171, 177 (Tex. 1997) ; *Jones v. Thompson* , 338 S.W.3d 573, 583-584 (Tex.App.—El Paso 2010, pet. denied). Accordingly, not every relationship that involves a high degree of trust and confidence will give rise to a fiduciary duty. *Meyer v. Cathey* , 167 S.W.3d 327, 330 (Tex. 2005). Because subjective trust is insufficient to create a fiduciary relationship, the mere fact that one party trusts another does not transform a business arrangement into a fiduciary relationship. *Id.* at 331. The trust must be 'justifiable.' *Thigpen v. Locke,* 363 S.W.2d 247, 253 (Tex. 1962). When 'one person is accustomed to being guided by the judgment or advice of another or is justified in believing one will act in the best interest of another because of a family relationship, a confidential relationship may arise.' *Trostle v. Trostle,* 77 S.W.3d 908, 914 (Tex.App.—Amarillo 2002, no pet.). The existence of a confidential relationship depends on the 'actualities' of the particular relationship. *Thigpen* , 363 S.W.2d at 253. **The confidential relationship must exist prior to, and apart from, the transaction that forms the basis of the lawsuit** . *Meyer* , 167 S.W.3d at 331 ; *Hamblet v. Coveney* , 714 S.W.2d 126, 129 (Tex.App.—Houston [1st Dist.] 1986, writ ref'd n.r.e.). [Emphasis added].

Garcia v. Vera , 342 S.W.3d 721, 724 (Tex.App.—El Paso 2011, no pet.) (granting summary judgment on claims of fraud and breach of fiduciary duty); *see also Ins. Co. of N. Am. v. Morris,* 981 S.W.2d 667, 675 (Tex. 1998) (before imposing "such a relationship in a business transaction, there must be a fiduciary relationship before, and apart from, the agreement made the basis of the suit."); *see Crim Truck,* 823 S.W.2d at 594 ("that one businessman trusts another, and relies upon his promise to perform a contract, does not rise to a confidential relationship."); *Rice v. Metro. Life Ins. Co.,* 324 S.W.3d 660, 679 (Tex.App.—Fort Worth 2010, no pet.) (appellants failed to direct court to any other evidence concerning their relationship with insurance carrier apart from coverage at issue).

A fiduciary owes duties of "loyalty and good faith, integrity of the strictest kind, fair, honest dealing, and the duty not to conceal matters which might influence his actions to his principal's prejudice." *See Hartford Cas. Ins. Co. v. Walker Cnty. Agency, Inc.* , 808 S.W.2d 681, 687-88 (Tex.App.—Corpus Christi 1991, no writ), *citing Douglas v. Aztec Petroleum Corp.* , 695 S.W.2d 312, 318 (Tex.App.—Tyler 1985, no writ). For example, when shown by evidence, extraneous facts and conduct such as excessive lender control, or influence in a borrower's business activities have formed the basis for finding the existence of a special relationship between a borrower and a lender. *Crim Truck,* 823 S.W.2d at 594 ; *Davis v. West,* 317 S.W.3d 301, 312 (Tex.App.—Houston [1st Dist.] 2009, no pet.). However, "mere subjective trust," as a matter of law, is insufficient to
791 transform arm's-length dealing into a fiduciary relationship. *791 *Schlumberger Tech. Corp. v. Swanson,* 959 S.W.2d 171, 177 (Tex. 1997) ; *see Meyer v. Cathey,* 167 S.W.3d 327, 329-31 (Tex. 2005) (declining to recognize a fiduciary relationship between plaintiff and defendant, friends who dined together for lunch every day over a four-year period).

Although a confidential relationship is ordinarily a question of fact for the fact-finder, it becomes a question of law when the issue is one of no-evidence. *Crim Truck,* 823 S.W.2d at 594 ; *Lindley,* 349 S.W.3d at 125 ; *Thigpen v. Locke,* 363 S.W.2d 247, 253 (Tex. 1962). Although Texas courts have categorized certain relationships as "special," as would give rise to a tort duty of good faith and fair dealing, the Supreme Court of Texas has cautioned that the duty merely requires parties to "deal fairly" with one another and does not encompass the often more onerous burden that requires a party to place the interest of the other party before his own, which is often attributed to a fiduciary duty. *Crim Truck,* 823 S.W.2d at 594. In this case, the evidence wholly fails to establish that Cole acted as a trustee for Paul or had over a long period of time acted as an advisor with regard to the mineral leases or any other business. There is no evidence that a moral, social, domestic, or purely personal relationship of trust and confidence existed between the brothers before and apart from Paul's conveyance. *See Morris,* 981 S.W.2d at 675 ; *Crim Truck,* 823 S.W.2d at 594. Paul offered no evidence to prove facts beyond the real estate transaction itself and he admitted, at least once, that the idea was his attorney's. *Schlumberger Tech. Corp.* , 959 S.W.2d at 177 (Tex. 1997) (while fiduciary or confidential relationship may arise from circumstances of particular case, to impose such relationship in business transaction, relationship must exist prior to, and apart from, agreement made basis of suit), *citing Transport Ins. Co. v. Faircloth,* 898 S.W.2d 269, 280 (Tex. 1995). Paul's subjective trust of Quentin, without more, is insufficient to transform the family relationship into an informal fiduciary relationship existing prior to, and apart from, the real estate agreement that forms the basis of the suit. *See Thigpen,* 363 S.W.2d at 253 (fact that parties to transaction trust one another will not, in and of itself, establish finding of confidential relationship). Consequently, the trial court erred in concluding that a fiduciary relationship existed and that Paul and Cole. For this reason, the trial court's judgment does not conform to the pleadings and proof. *Phillips* , 296 S.W.3d at 670 *, citing Stoner,* 578 S.W.2d at 682, 683-84 ; *Marrs and Smith Partnership,* 223 S.W.3d at 18.

In his brief, Paul claimed the oral agreement should be enforced in equity under the partial performance exception to the statute of frauds for the purpose of avoiding a virtual fraud, and contended that specific performance in lieu of actual damages is appropriate when required to ensure a just result. Although not raised in the trial court nor in the briefing on appeal, Paul alleged during oral argument that an "oral" constructive trust existed between the brothers, and that Cole's alleged fiduciary agreement arose therefrom. Counsel then argued that the trial court judicially imposed such a trust. In response, we noted that the trial court did not find the existence of a constructive trust. On rebuttal, Cole's appellate counsel argued that the issue was not properly before us because it was not addressed in the judgment or the trial court's findings of fact and conclusions of law. We agree, and observe the following.

A constructive trust is a court-created equitable remedy designed to prevent unjust enrichment. *Kinsel v.*
792 *Lindsey* , 526 S.W.3d 411, 425 (Tex. 2017) ; *792 *KCM Fin. LLC v. Bradshaw* , 457 S.W.3d 70, 87 (Tex. 2015) ; *Omohundro v. Matthews* , 161 Tex. 367, 373, 341 S.W.2d 401, 405 (1960). To impose a constructive trust under Texas Law, the Supreme Court has delineated three elements that the proponent must establish: (1) breach of a special trust or fiduciary relationship or actual or constructive fraud; (2) unjust enrichment of the wrongdoer; and (3) an identifiable res that can be traced back to the original property. *KCM Fin. LLC* 457 S.W.3d at 87. Because we have concluded Paul failed to establish the first element, his argument is to no avail. We sustain Issue Five, and having done so, need not address the remaining points. We reverse and render judgment for Quentin Cole Armstrong.

No. 2-91-107-CV
Court of Appeals of Texas, Fort Worth

Dearing Inc. v. Spiller

824 S.W.2d 728 (Tex. App. 1992)
Decided Mar 10, 1992

No. 2-91-107-CV.

February 5, 1992. Rehearing Denied March 10, 1992.

Appeal from the 271st District Court, Jack County

729 *729

The Montgomery Law Firm, P.C., and Elton M. Montgomery, Graham, for appellants.

Sewell and Forbis, James E. Forbis and Christopher N. Forbis, Decatur, for appellees.

Before JOE SPURLOCK II, HILL and DAY, JJ.

730 *730

OPINION

DAY, Justice.

Defendants Dearing, Inc. and Royal Petroleum Corporation appeal from an adverse judgment based upon jury findings that they breached their duty of utmost good faith. Plaintiffs sought, and were awarded a variety of damages, including exemplary damages against both defendants. We affirm.

In 1943, a 600-acre tract of land owned by the Haag family was conveyed to R.H. Dearing Sons. The deed conveyed the property in its entirety to Dearing but reserved to the Haags an undivided 1/2 interest in the minerals. The lease also granted Dearing the exclusive right to execute leases on the minerals provided that the royalty reserved was "no . . . less than the usual one eighth (1/8) royalty." Dearing is the successor in interest to R.H. Dearing Sons, and appellees, plaintiffs below, are successors in interest to the Haag family.

In 1944, Dearing exercised its executive leasing rights and entered into an oil and gas lease with Shell, said lease providing for a 1/8 royalty. The lease covered the entire 600-acre tract. By 1980 production had reached a virtual standstill on this land. The only well left producing was the "Old Spaeth Well" on a 20-acre tract. Because of the lack of a Pugh[1] clause, production from this one well held the entire 600-acre tract and prevented the Shell lease from terminating.

[1] A continuous development clause, or Pugh clause, provides that drilling operations on, or production from, pooled units shall maintain the lease only as to the lands that are included in such producing unit(s).

By the early 1980s, the area in which the 600 acres was located became "hot" for mineral development by reason of the discovery of a new formation in the area. In 1981, Dearing had received a written offer from World Producers, to lease the 600 acres (within 120 days of the land becoming available for lease) for a 3/16 royalty and bonus payments of $35 an acre. Unfortunately, the old Spaeth well was still producing and keeping the Shell lease alive on the entire 600 acres. Dearing then began negotiating
731 to purchase the old Spaeth well *731 and ultimately purchased it for $150,000. Dearing then stopped production on the Spaeth well which "killed" the old Shell lease on the 600 acres.[2]

2 The plaintiffs were never notified of Dearing's negotiations in connection with "killing the Shell lease and freeing up the 600 acres for mineral exploration." Although the plaintiffs owned 1/2 of the minerals, they were not given the opportunity to share in the cost of purchasing the Spaeth well.

After the Shell lease expired, Dearing received a written offer from Max Poynor who offered to lease the property for a royalty of 1/4 and bonus payments of $100 an acre. This offer also included a continuous drilling clause (so that wells would have to be drilled periodically or the lease would expire as to all land not included in a producing unit). In 1982 Dearing leased the 20 acres upon which the Spaeth well was located as well as the remaining 580 acres to themselves by executing a mineral lease to Royal Petroleum Corporation, another Dearing family corporation.[3] The "insider" leases provided for no bonuses, only a 1/8 royalty and the larger lease contained no Pugh clause or continuous drilling clause even though the lease covered 580 acres. Herman Dearing, president of both corporations, admitted that he did not make any effort to lease the property to anyone else, explaining that he wanted to "keep it in the family."

3 Both Dearing and Royal Petroleum Corporation have an identity of officers, directors and shareholders. Both also share the same business address, phone number and are engaged in the ownership and development of minerals.

Appellees, plaintiffs below, brought suit against Dearing and Royal seeking actual and exemplary damages for the breach of the duty of utmost good faith, cancellation of the leases between Dearing and Royal, termination of Dearing's executive leasing rights over the mineral interests owned by plaintiffs, and for an accounting of the profits made under the Dearing/Royal leases.

By their verdict, the jury found: Dearing breached its duty of utmost good faith to the plaintiffs by leasing to Royal Petroleum Corporation; the Dearing/Royal leases were acts of self-dealing on the part of such corporations; family corporations in entering into the leases were conspiring to deprive the plaintiffs of benefits they would have received in a lease to a disinterested party; and the acts of Dearing and Royal were malicious, wanton, and in willful and unconscionable disregard of the rights and interests of plaintiffs. The jury assessed exemplary damages of $300,000 against each of the defendants.

The judgment entered on the jury's verdict provides for the cancellation of the Dearing/Royal leases, cancellation of the executive rights of Dearing over mineral interests of the plaintiffs, and the establishment of the plaintiffs as co-tenants of Dearing with respect to the production on the premises. The judgment also ordered an accounting with respect to all of the production and expenditures incident to the development of the premises through the Dearing/Royal lease; and after such accounting reduced the claims to a fixed dollar amount, the judgment further apportioned the revenues, less the applicable costs of development, to the appropriate parties. Finally, the judgment awarded the plaintiffs $300,000 in exemplary damages from each defendant.

In fourteen points of error, defendants Dearing and Royal bring this appeal. Essentially, their complaint can be broken into three parts, and this is how this court will address their appeal. First, does the case of *Manges v. Guerra,* 673 S.W.2d 180 (Tex. 1984), permit the recovery of damages in a case such as this when there is no explicit duty of "utmost good faith" specified in the original deed? Second, if *Manges* does apply, was the duty of Dearing fully discharged by entering into a lease which granted the bare terms of the 1944 deed, although leases which covered the surrounding property were entered into on far

more favorable terms? Finally, was the judgment of the trial court a final judgment disposing of all
732 parties and all issues? *732

Applicability of Manges v. Guerra

Texas courts have generally accepted the standard of "utmost good faith" to apply to one who exercises executive rights to lease or develop minerals. *Schlittler v. Smith,* 128 Tex. 628, 101 S.W.2d 543, 545 (Tex.Comm'n.App. 1937, opinion adopted). This is a more stringent standard than simple good faith but has generally been considered one step below a true fiduciary obligation.[4]

> [4] Incidentally, we note that the *Schlittler* case was decided in 1937 — seven years before the original deed in this case. Thus, even at the time the initial conveyance was made to Dearing, he, as executive, owed the "utmost good faith" to the Spiller/Haag group.

However, the Texas Supreme Court's decision in *Manges v. Guerra,* 673 S.W.2d 180 (Tex. 1984) used the terminology of "utmost good faith" and specifically equated that standard with a fiduciary obligation. Based upon the violations of the utmost good faith standard, the court in *Manges* upheld an award of exemplary damages. *Id.*

Appellants claim that the "facts in *Manges v. Guerra* are thousands of miles or light years removed from the facts of the instant case." From our reading of the facts, it would be difficult to determine how a fact situation could be more analogous to the first cause of action in the *Manges* case.

In *Manges,* the plaintiff was a mineral co-tenant with the defendant who held the executive rights over all the property. The property ownership in this case is identical. In *Manges,* the only limitation on the executive right was that no lease could be entered into that provided for less than a 1/8 royalty. The pertinent language in the case at hand is identical. In *Manges* the defendant did not breach the terms of the original lease, but merely did not obtain terms as favorable as could have been obtained from a disinterested party. In the case at hand, at least two parties made offers substantially better than the lease entered into by Dearing and Royal. In *Manges,* the Texas Supreme Court held that under these facts, the holder of the executive right had breached the duty of utmost good faith. *Id.* In this case, the trial court properly entered judgment on the jury's verdict that Dearing breached its duty of utmost good faith by entering into a lease with an "inside" party. Appellants' points of error one through four are overruled.

Breach of the Duty of "Utmost Good Faith"

As we have determined that the *Manges* standard of "utmost good faith" applies, we must next answer whether the actions of Dearing were in derogation of this duty. Appellants focus on the fact that the 1943 lease did not specify the duty of utmost good faith, and thus they are not bound by this standard. This contention is in patent disregard of the law.

Because the non-participating royalty owner must depend upon the mineral fee owner for the enjoyment of his interests, the courts have implied a covenant of the utmost fair dealing in the exercise of the executive rights to lease or develop the minerals. *Schlittler,* 101 S.W.2d at 545.

A mineral fee owner has a possessory estate in the land. As such he has the exclusive power to lease the land to another for mineral development or to develop the minerals himself. *Elick v. Champlin Petroleum Co.,* 697 S.W.2d 1, 3-4 (Tex.App. — Houston [14th Dist.] 1985, writ ref'd n.r.e.). On the other hand, a non-participating royalty owner has no possessory estate in the land, and hence, no right to lease the land to another for mineral development, nor does he have the right to produce the minerals himself. *Martin v. Schneider,* 622 S.W.2d 620, 622 (Tex.App. — Corpus Christi 1981, writ ref'd n.r.e.).

In *Pickens v. Hope,* 764 S.W.2d 256 (Tex.App. — San Antonio 1988, writ denied), the court of appeals distinguished *Manges* on the basis that in *Pickens* there was no duty to manage the non-participating royalty interest because the amount of that royalty was specifically set out as 1/4 and could not be altered. However, in *Manges,* the executive rights holder had a duty to manage the
733 interest by obtaining *733 the highest royalty possible and was prohibited from self-dealing. *Manges,* 673 S.W.2d at 181-82. The court reached this determination from the language of the deed which specified that no royalty less than 1/8 was acceptable. Unlike *Pickens,* the present lease does not have or require a fixed royalty. Instead, it contains the *Manges* language calling for a royalty of no less than 1/8. Thus, the entire percentage return is left to the efforts of the executive. We hold that as the language in the Haag/Dearing deed is the same as the language in the *Manges* deed, Dearing had a duty to manage the executive interest by obtaining the highest royalty possible, and was likewise prohibited from self-dealing. Consequently, we hold that this duty was breached when the lease he awarded himself did not provide for at least the fair market royalty prevalent in the surrounding area at that time.

The present case is analogous to *Comanche Land and Cattle Co. v. Adams,* 688 S.W.2d 914 (Tex.App. — Eastland 1985, no writ). In that case, the non-participating royalty interest was set at 1/2 of the royalty interest obtained by the executive rights holder. In *Comanche Land,* the court followed the *Manges* decision, quoting the language from that opinion which stated that the executive rights owner owed a duty of utmost good faith to the non-participating royalty owner. *Id.*

The court in *Comanche* noted that the facts in *Manges* once again were analogous to the facts in that case insofar as the non-participating interest owners in *Manges* were also co-tenants with the executive rights owners, and Manges' management determined not only the amount of royalties received by these non-participating interest owners but also the amount of bonus and delay rentals. The fact that the non-participating interest owners were co-tenants with Manges did not create the fiduciary relationship in the absence of an agreement or contract providing for such. Instead, the significant relationship which gives rise to the fiduciary duty is the *exercise* of the executive rights over the non-participating interest. The court in *Comanche* held that this duty should apply when the executive controls only the amount of the royalty just as it does when the executive controls both the amount of the royalty interest and the bonus and delay rentals. *Id.* However, our case is not even as far afield from *Manges.* Here, Dearing controlled not only the royalty interest, but the payment, if any, of bonuses and delay rentals. Indeed, Dearing was the only party who held the right to develop the land at all. Clearly, when Dearing exercised this right, the duty imposed upon him was that of utmost good faith. The fact that Dearing was co-tenant with the plaintiffs is irrelevant to a determination of the duty owed by an executive. If Dearing owned no interest in the land, and only owned the executive rights on the property, this duty would still be imposed.

Generally, where a party having executive leasing privileges enters into a transaction in which he and the non-executive mineral holders are both interested, and the executive is authorized to act for both parties, he must exact for the non-executive every benefit that he exacts for himself. If he could obtain overriding royalties or cash bonuses for the non-executive and himself, it was his duty to have done so. *Portwood v. Buckalew,* 521 S.W.2d 904, 912-14 (Tex.Civ.App. — Tyler 1975, writ ref'd n.r.e.) (citations omitted).

The court in *Mims v. Beall,* 810 S.W.2d 876, 879 (Tex.App. — Texarkana 1991, no writ) further held that when the standard is one of fiduciary obligation, any self-dealing is prohibited. Even if the duty of the executive does not rise to the unequivocal level of fiduciary, we agree with the

Mims court that this rule should extend to the exercise of an executive power. An executive is forbidden from self-dealing through spouses, children (as was the case in *Mims*), agents (including, as here, closely held corporations), employees, and all others whose interests are closely identified with those of the fiduciary. *Id.*

Appellants argue that because they relied on the advice of counsel in choosing their course of action, they have not breached any duty. We
734 disagree. The *734 principal testimony relied upon by the appellant in *Portwood* to raise the issue of "utmost fairness" was the executive's own testimony wherein she testified she relied upon the advice of her attorney and believed she was authorized to take the royalty as compensation for surface damages. As that court viewed it, the evidence relied upon by appellant constituted nothing more than a self-serving denial merely denying that she breached her obligation to deal with the other co-tenants in utmost fairness. *Portwood,* 521 S.W.2d at 914.

Appellants rely on *Pickens,* 764 S.W.2d at 263-65 for the proposition that Dearing owed no fiduciary duty to the Haag successors. However, *Pickens* is distinguishable in that there was no co-tenancy with regard to the minerals. The relationship was merely that of fee mineral owner and non-participating royalty owner. Pickens was charged with the failure to lease or develop his own property, and he had not been entrusted with the executive management of royalties belonging to Hope. Pickens, as 100% owner of the mineral estate, was the executive as a matter of law, and not because of a special relationship undertaken to manage the royalty belonging to another, as was the case in *Manges,* and as is the case here.

We do not mean to imply that an executive is barred, as a matter of law, from developing the premises himself. However, when the market value of a lease is so much greater than the terms the executive grants to himself, this is clear evidence of a breach of his duty of utmost good faith. Appellants' points of error five through nine are overruled.

In points of error ten through twelve, appellants complain that there were no pleadings, proof, or jury findings to support an award of exemplary damages.

In *Texas Bank and Trust Co. v. Moore,* 595 S.W.2d 502 (Tex. 1980), the court held that an award of exemplary damages is proper against a fiduciary who has been guilty of unfair self-dealing. The malicious breach of a fiduciary duty will support an award of exemplary damages. *Manges,* 673 S.W.2d at 194. It is necessary to allege, prove, and secure jury findings on the existence and amount of actual damage sufficient to support an award of punitive damages. *Fort Worth Elevators Co. v. Russell,* 123 Tex. 128, 70 S.W.2d 397, 409 (1934).

In their original petition, plaintiffs requested an award of punitive damages in the amount of $500,000 from each defendant.

Furthermore, there was evidence here from which a jury could conclude that the breach was malicious. Dearing himself testified that he was not interested in leasing the land to an outside party; he wanted to "keep it in the family," apparently regardless of how this would affect the rights of the non-participating royalty holders' interests.

Even though there were pleadings and evidence to support this award, punitive damages are not recoverable absent an award of actual damages. When a distinct, willful tort is alleged and proved in connection with a suit upon a contract, one may recover punitive damages, but even in that instance the complainant must prove that he suffered some actual damages. *Amoco Production Co. v. Alexander,* 622 S.W.2d 563, 564 (Tex. 1981). Punitive damages must bear a reasonable proportion to actual damages. *Alamo Nat'l Bank v. Kraus,* 616 S.W.2d 908, 909 (Tex. 1981). Punitive damages must be contingent upon a finding of

actual damages since actual damage is a necessary element of the underlying tort upon which the punitive damages are based. *Nabours v. Longview Sav. Loan Ass'n,* 700 S.W.2d 901, 903-04 (Tex. 1985). Although the judgment did not provide for actual damages in a sum certain, this is not tantamount to a judgment of "no damages." The trial court ordered the damages due the plaintiffs be determined through an accounting of all expenses and revenues since the date of the new lease. This relief was in addition to equitable relief of rescission of the lease and cancellation of Dearing's executive leasing rights. Points of error
735 ten, eleven and twelve are overruled. *735

Finality of the Judgment

Finally, appellants contend that the judgment (from which they have taken appeal) is not a final judgment disposing of all parties and all issues. Prior to trial, appellants filed a counterclaim in the trial court for an equitable lien on the proceeds of the new wells sufficient to cover Dearing/Royal's costs of production, and for partition of the interests. The action for partition of the interests was severed out and is pending in the trial court. The judgment provided for an accounting of all expenses and revenues since the date of the Dearing/Royal lease; and after such accounting reduced the claims to a fixed dollar amount, the judgment further apportioned the revenues, less the applicable costs of development, to the appropriate parties.

Appellants contend that because the judgment ordered an accounting and other ministerial acts, this judgment is not final. A judgment is not interlocutory merely because it orders an accounting. *Ferguson v. Ferguson,* 161 Tex. 184, 338 S.W.2d 945, 947 (1960). The finality of this judgment is not displaced, despite the fact that it calls for an accounting from Royal. Point of error thirteen is overruled.

Appellants further contend that if the judgment is final, the trial court abused its discretion in severing the defendant's claims for partition. We disagree.

Severance of a counterclaim may be proper if it is part of a controversy which involves more than one cause of action. *Cherokee Water Co. v. Forderhause,* 641 S.W.2d 522, 525-26 (Tex. 1982). The trial court has broad discretion in severing or consolidating causes. *McGuire v. Commercial Union Ins. Co. of N.Y.,* 431 S.W.2d 347 (Tex. 1968). No abuse of discretion occurs when a court severs a claim for partition or reformation from an original action seeking a declaration of the rights of the parties under a deed. *Cherokee,* 641 S.W.2d at 526. As a co-tenant with the plaintiffs, even if there were no controversy regarding the exercise of the executive right, Dearing was entitled, as a separate and distinct cause of action, to bring a partition suit. Thus, this counterclaim was a distinct cause of action, and the trial court did not abuse its discretion by severing this action for later trial. Appellants' fourteenth point of error is overruled.

The judgment of the trial court is affirmed.

No. 14-07-00619-CV
Court of Appeals of Texas, Fourteenth District, Houston

Duerr v. Brown

262 S.W.3d 63 (Tex. App. 2008)
Decided Jul 3, 2008

No. 14-07-00619-CV.

July 3, 2008.

Appeal from the 334th District Court, Harris
64 County, Sharon McCally, Judge *64

Georganna L. Simpson, Dallas, TX, for Appellants.

G. Sean Jez, Kenneth R. Breitbeil, Richard G. Wilson, Houston, TX, for Appellees.

Panel consists of Chief Justice HEDGES, and Justice BOYCE and Senior Justice HUDSON.–

– Senior Justice J. Harvey Hudson sitting by assignment.

66 *66

OPINION

WILLIAM J. BOYCE, Justice.

Scott Duerr appeals from orders granting summary judgment on his claims for breach of fiduciary duty against Ron Brown, Aaron Dickey, Brown Crouppen, P.C., (collectively "Brown"), and George Fleming, Andres Pereira, and Fleming Associates, L.L.P., (collectively "Fleming"). Duerr also contends the trial court abused its discretion in striking Duerr's legal malpractice expert and denying Duerr's request for a continuance to conduct additional discovery before deciding the case on summary judgment. We affirm.

Background

Duerr received two Sulzer hip replacement implants in 2000. Duerr underwent additional surgeries after the implants failed. Duerr hired Brown to represent him against Sulzer in connection with the failed hip implants. Brown associated with Fleming to handle the case because Fleming already was engaged in implant litigation against Sulzer.

Duerr had the option to pursue his claim individually or as part of a class. In April 2002, Duerr chose to pursue his claim individually; after Sulzer threatened bankruptcy, however, he changed his mind based upon consultation with Brown and Fleming. Duerr signed a letter revoking his initial opt-out and agreed to rejoin the class settlement. Duerr received $1.6 million as payment for revoking his opt-out and becoming a part of the settlement class; of this amount, $960,000 was paid directly to him after attorney's fees were deducted.

Duerr contends Fleming and Brown promised he would receive additional compensation from his participation in the class settlement as an inducement to re-join the class. When combined with his existing recovery of $960,000, Duerr says
67 *67 he was promised a total payment of $1.68 million after attorney's fees.

Duerr was eligible for additional settlement benefits pursuant to the Sulzer hip implant class settlement if he could show his injury fell within the purview of the "Affected Product Revision Surgery" (APRS) fund or the "Extraordinary Injury Fund" (EIF). APRS provided benefits to implant recipients who developed major

complications from removal or replacement of the defective hip implants. EIF benefits were available to implant recipients who demonstrated permanent injury as a result of the defective hip implants. These benefits were computed under a complex system of matrices, ranging from Matrix I to Matrix V, with each having specific qualification criteria.

Duerr contends that Fleming and Brown incorrectly filed Duerr's requests for additional benefits under the Matrix IV and V benefit schemes, and that his requests were denied as a result. Duerr contends Fleming and Brown did not properly appeal the denial of additional benefits, and that he received no benefits under Matrix IV and V as a result. Duerr also contends he had a valid claim under the EIF Matrix II settlement scheme; that Fleming and Brown failed to pursue his claim, leaving him to file his own Matrix II claim; and that he received only $36,000 in additional benefits as a result. Duerr contends he was damaged because he did not receive all of the additional settlement benefits after attorney's fees that he was promised.

Duerr received another $320,000 after attorney's fees from his APRS claims, leaving him with a total recovery of nearly $1.3 million. This amount still is less than the $1.68 million recovery net of attorney's fees that Duerr says he was promised.

On February 16, 2006, Duerr and his wife sued Fleming and Brown asserting claims for legal malpractice, breach of contract, breach of fiduciary duty, and Deceptive Trade Practices Act violations. On April 21, 2006, the trial court issued a docket control order under which Duerr's expert witnesses would be designated by December 22, 2006; discovery would end on February 22, 2007; and trial would begin on April 23, 2007.

On February 16, 2007, Fleming filed a combined traditional and no-evidence motion for partial summary judgment. Fleming challenged Duerr's claims for breach of contract, breach of fiduciary duty, and DTPA violations. Fleming contended that these claims were an impermissible attempt to fracture a single legal malpractice claim into multiple causes of action, and that Duerr could proffer no evidence to support these claims. Fleming did not seek summary judgment on Duerr's legal malpractice claim.

On February 23, 2007, Brown filed a traditional motion for summary judgment challenging all of Duerr's claims. Like Fleming, Brown contended that Duerr's claims for breach of contract, breach of fiduciary duty, and DTPA violations were an impermissible attempt to fracture a single legal malpractice claim into multiple causes of action. Brown asserted additional grounds for dismissal of the DTPA and breach of contract claims. Brown denied any liability for the legal malpractice claim because Fleming was the principal attorney to whom the case had been referred. Both summary judgment motions were set for hearing on March 23, 2007.

Duerr filed a response to these motions on March 16, 2007. On the day of the summary judgment hearing he filed a motion seeking to continue the hearing and the trial, and to reopen the discovery period.

On March 26, 2007, the trial court (1) denied
68 Duerr's motion for a continuance of *68 the summary judgment hearing; (2) denied Duerr's motion for a continuance of the trial; (3) granted Fleming's motion for partial summary judgment; (4) granted Brown's motion for summary judgment on all claims asserted by Duerr; and (5) dismissed all claims against Brown. At that point, only the legal malpractice claim against Fleming remained pending.

On March 28, 2007, Fleming filed a no-evidence summary judgment motion targeting Duerr's remaining legal malpractice claim and set the motion for hearing on April 16, 2007. Fleming contended that Duerr was unable to proffer evidence of a breach of duty, causation, or damages. Fleming noted that the discovery cutoff

was February 22, 2007. Fleming contended that Duerr unilaterally cancelled the deposition of his only legal malpractice expert set for February 27, 2007; although the deposition initially had been rescheduled by agreement for March 1, 2007, that date too was passed because Duerr's legal malpractice expert wanted more time to consider the summary judgment motions. Duerr offered to have his legal malpractice expert available on dates in late March or early April. Fleming insisted on dates in early March. No agreement was reached.

On April 3, 2007, Fleming filed a motion to strike Duerr's legal malpractice expert, contending that Duerr had not made his expert available for deposition. On April 13, 2007, Duerr filed a motion requesting a continuance of the summary judgment hearing set for April 16, 2007; a response to Fleming's motion to strike his legal malpractice expert; and a response to Fleming's motion for summary judgment subject to the continuance.

On April 20, 2007, the trial court signed an order granting Fleming's motion to strike Duerr's legal malpractice expert; denying Duerr's motion for a continuance of the summary judgment hearing; and granting Fleming's second summary judgment motion on the remaining legal malpractice claim. Duerr's motion for a continuance of the trial was denied as moot.

With that order, all of Duerr's claims against Fleming and Brown were resolved against Duerr. Duerr field a motion for new trial on May 22, 2007, which was denied on July 3, 2007, and Duerr appealed.[1]

[1] Duerr's wife does not challenge the dismissal of her claims on appeal.

Standards of Review

Summary Judgment

An appellate court applies *de novo* review to a grant of summary judgment, using the same standard that the trial court used in the first instance. *Valence Operating Co. v. Dorsett*, 164 S.W.3d 656, 661 (Tex. 2005). A party may move for a traditional summary judgment after the adverse party has appeared or answered, and for a no-evidence summary judgment after an adequate time for discovery has passed. Tex.R. Civ. P. 166a(a), (i); *McMahan v. Greenwood*, 108 S.W.3d 467, 498 (Tex.App.-Houston [14th Dist.] 2003, pet. denied).

A traditional summary judgment may be granted if the motion and evidence show there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Tex.R. Civ. P. 166a(c); *Nixon v. Mr. Prop. Mgmt. Co.*, 690 S.W.2d 546, 548 (Tex. 1985). In reviewing a summary judgment we take as true all evidence favorable to the nonmovant, indulge every reasonable inference in favor of the nonmovant, and resolve any doubts in the nonmovant's favor. *Sudan v. Sudan*, 199 S.W.3d 291, 292 (Tex. 2006).

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A no-evidence motion for summary judgment must be granted if (1) the moving party asserts that there is no evidence of one or more specified elements of a claim or defense on which the adverse party would have the burden of proof at trial; and (2) the respondent produces no summary judgment evidence raising a genuine issue of material fact on those elements. *See* Tex.R. Civ. P. 166a(i). In reviewing a no-evidence motion for summary judgment, we view all of the summary judgment evidence in the light most favorable to the nonmovant, "crediting evidence favorable to that party if reasonable jurors could, and disregarding contrary evidence unless reasonable jurors could not." *Mack Trucks, Inc. v. Tamez*, 206 S.W.3d 572, 582 (Tex. 2006). The non-moving party is not obligated to marshal its proof, but it is required to present evidence that raises a genuine

fact issue on the challenged element. *Sw. Elec. Power Co. v. Grant*, 73 S.W.3d 211, 215 (Tex. 2002).

Sanctions

We review a trial court's decision imposing sanctions for discovery abuse under an abuse of discretion standard. *Am. Flood Research, Inc. v. Jones*, 192 S.W.3d 581, 583 (Tex. 2006). To establish an abuse of discretion, the complaining party must show that the trial court's actions were arbitrary or unreasonable in light of all the circumstances. *Id.* at 583.

Continuance

A trial court's order denying a continuance of a summary judgment hearing will not be disturbed except for a clear abuse of discretion. *See Joe v. Two Thirty Nine Joint Venture*, 145 S.W.3d 150, 161 (Tex. 2004). Factors to consider when deciding whether a trial court abused its discretion in denying a continuance include the length of time the case has been on file; the materiality and purpose of the discovery sought; and whether the party seeking the continuance exercised due diligence to obtain the requested discovery. *Id.*

Analysis

The arguments on appeal focus primarily on whether Duerr has stated a claim for breach of fiduciary duty that is distinct from his claim for legal malpractice. Duerr abandoned his breach of contract claim in his response to Brown's and Fleming's motions for summary judgment, conceding that it was an improperly fractured legal malpractice claim. Duerr abandoned his DTPA claim on appeal because he has not challenged the granting of summary judgment on that claim. Duerr challenges on appeal the dismissal of his breach of fiduciary duty claim against Brown and Fleming. Duerr challenges the dismissal of his legal malpractice claim against Fleming based upon the trial court's decision to strike Duerr's only legal malpractice expert. Duerr also challenges the dismissal of his legal malpractice claim against Fleming and Brown based upon the trial court's refusal to grant a continuance of summary judgment hearings and allow additional time for discovery. We address each issue in turn.

Breach of Fiduciary Duty

Attorneys Fleming and Brown owed a fiduciary duty to their client Duerr. *See Archer v. Griffith* 390 S.W.2d 735, 739 (Tex. 1965). Duerr's first issue contends that the trial court erred in granting summary judgment on his claim that Fleming and Brown breached their fiduciary duty to him. Fleming's motion was presented as both a traditional motion under Rule 166a(a) and a no-evidence motion under Rule 166a(i). Brown filed only a traditional motion. Duerr's claim for breach of fiduciary duty was resolved as to all defendants in the March 26, 2007 order. *70

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Fleming and Brown predicated their traditional motions for summary judgment on the impermissibility of fracturing a single legal malpractice claim into multiple causes of action. *See Goffney v. Rabson*, 56 S.W.3d 186, 190 (Tex.App.-Houston [14th Dist.] 2001, pet. denied) (Texas law does not permit a plaintiff to fracture legal malpractice claims). They contend Duerr improperly attempted to split a single claim for legal malpractice based on the alleged mishandling of his request for additional benefits into separate claims for legal malpractice and breach of fiduciary duty. "Whether allegations against a lawyer, labeled as breach of fiduciary duty, fraud, or some other cause of action, are actually claims for professional negligence or something else is a question of law to be determined by the court." *Murphy v. Gruber*, 241 S.W.3d 689, 692 (Tex.App.-Dallas 2007, pet. denied); *see also Greathouse v. McConnell*, 982 S.W.2d 165, 172 (Tex.App.-Houston [14th Dist.] 1998, pet. denied) (the appellate court is tasked with determining the precise nature of the claims

before deciding whether the trial court's grant of summary judgment to the defendant was appropriate).[2]

[2] In Duerr's response to an individual defendant's special appearance, Duerr stated: "Plaintiffs bring this cause of action basically as one of legal malpractice. . . ." Brown contends this statement is a judicial admission that confines Duerr to bringing only a malpractice claim. *See Horizon/CMS Healthcare Corp. v. Auld*, 34 S.W.3d 887, 905 (Tex. 2000) (a judicial admission may be made in live pleadings); *Holy Cross Church of God in Christ v. Wolf*, 44 S.W.3d 562, 568 (Tex. 2001) (a judicial admission may also be made in a response to a motion or counter-motion). The judicial admission, however, must be clear and unequivocal. *See Holy Cross Church of God in Christ*, 44 S.W.3d at 568. We do not believe this statement is so unequivocal as to constitute a judicial admission.

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The prohibition against fracturing a legal malpractice claim does not necessarily foreclose the simultaneous pursuit of a negligence-based malpractice claim and a separate breach of fiduciary duty claim. "[W]hen cases say that clients cannot divide or fracture their negligence claims against their attorneys into other claims, this does not mean that clients can sue their attorneys only for negligence." *Deutsch v. Hoover, Box Slovacek*, 97 S.W.3d 179, 189 (Tex.App.-Houston [14th Dist.] 2002, no pet.). But the plaintiff must do more than merely reassert the same claim for legal malpractice under an alternative label. The plaintiff must present a claim that goes beyond what traditionally has been characterized as legal malpractice. *See Kimleco Petroleum, Inc. v. Morrison Shelton*, 91 S.W.3d 921, 924 (Tex.App.-Fort Worth 2002, pet. denied) ("Regardless of the theory a plaintiff pleads, as long as the crux of the complaint is that the plaintiffs attorney did not provide adequate legal representation, the claim is one for legal malpractice").

In *Deutsch*, this court discussed the analysis for determining when a single legal malpractice claim has been fractured improperly into multiple causes of action.

> If the gist of a client's complaint is that the attorney did not exercise that degree of care, skill, or diligence as attorneys of ordinary skill and knowledge commonly possess, then that complaint should be pursued as a negligence claim, rather than some other claim. If, however, the client's complaint is more appropriately classified as another claim, for example, fraud, DTPA, breach of fiduciary duty, or breach of contract, then the client can assert a claim other than negligence.

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97 S.W.3d at 189 (citations omitted). A legal malpractice claim focuses on whether an attorney represented a client with the requisite level of skill, while a breach of fiduciary duty claim encompasses whether an attorney obtained an improper benefit from the representation. *See Aiken v. Hancock* 115 S.W.3d 26, 28 (Tex.App.-San Antonio 2003, pet. denied). Breach of fiduciary duty involves conduct including failure to disclose conflicts of interest; a failure to deliver funds belonging to the client; placing personal interests ahead of a client's interests; misuse of client confidences; taking advantage of the client's trust; engaging in self-dealing; and making material misrepresentations. *See Goffney*, 56 S.W.3d at 193.

In determining whether Duerr asserted a breach of fiduciary claim that is distinct from his legal malpractice claim, we examine the petition; Duerr's response to the defendants' motions for summary judgment; and Duerr's deposition. Duerr alleges as follows in his First Amended Petition:

> Plaintiffs restate and incorporate herein the factual background and allegations above and would show unto the Court the following:
>
> At all times mentioned herein an attorney/client relationship existed between Defendants and Plaintiff which required Defendants to exercise the highest degree of care and loyalty to their client and to place the client's interest above that of their own firms. This duty was breached and the breach of that duty proximately caused damages to Plaintiff in the amount within the jurisdictional limits of this Court.

From Duerr's petition, therefore, it is not clear what conduct he targets as a breach of a fiduciary duty.

Brown and Fleming contend that Duerr's breach of fiduciary duty claim is merely a fractured legal malpractice claim because Duerr's petition sets forth no facts under the label "Second Cause of Action: Breach of Fiduciary Duty." *See Greathouse*, 982 S.W.2d at 172 (plaintiff determined to have impermissibly fractured a legal malpractice claim after simply listing a number of identical paragraphs under different headings, including negligence, breach of fiduciary duty, and breach of duty of good faith and fair dealing, without separate and specific allegations of wrong-doing); *see also O'Donnell v. Smith*, 234 S.W.3d 135, 146 (Tex.App.-Dallas 2007, pet. granted) (merely asserting attorney did not "exercise the highest degree of care, good faith, and honest dealing" is insufficient to make an independent claim for breach of fiduciary duty without presenting some additional evidence); *cf. Deutsch*, 97 S.W.3d at 190 (a party may allege the same facts under legal malpractice and under breach of fiduciary duty; Texas Rule of Civil Procedure 48 allows a party to plead in the alternative).

Duerr predicates his legal malpractice claim on allegations that Fleming and Brown mishandled the filing of Duerr's requests for additional benefits under the settlement matrices and mishandled the appeal of the benefit decision. In this appeal, Duerr predicates his breach of fiduciary claim on three theories: (1) Brown and Fleming induced Duerr to rejoin the class settlement by promising him a recovery of $1.68 million net of attorney's fees, but Duerr's recovery was less; (2) Brown and Fleming had a "conflict of interest" because they used the settlement of Duerr's valuable claim as leverage to obtain a larger settlement for four other plaintiffs and larger fees for themselves; and (3) Brown and
72 Fleming did not disclose *72 the "conflict of interest" to Duerr.[3]

> 3 Plaintiff's First Amended Petition makes no reference to an asserted conflict of interest, a failure to disclose the asserted conflict of interest, or to the settlement of claims by other hip implant recipients. Duerr's summary judgment response and appellate briefs contain passing references to the asserted conflict, the failure to disclose, and the other claimants.

Duerr's first theory is that Brown and Fleming breached their fiduciary duty to him because they promised him a larger recovery net of attorney's fees than he ultimately received. Duerr alleges that the proper information was not filed under the matrices governing additional compensation; items were filed incorrectly; improper information was filed; and an administrative appeal from the denial of benefits was not pursued timely or to its fullest extent. Duerr alleged that Brown and Fleming had opportunities to correct these asserted errors, and "may have mitigated the negligence of all Defendants" had they done so.

These are allegations that Duerr's "attorney[s] did not exercise that degree of care, skill, or diligence as attorneys of ordinary skill and knowledge commonly possess." *See Deutsch*, 97 S.W.3d at 189; *see also Murphy*, 241 S.W.3d at 692-93

(giving erroneous legal opinion or advice, delaying or failing to handle a matter, or not using ordinary care in preparing, managing, and prosecuting a case constitutes legal malpractice); *Goffney*, 56 S.W.3d at 193 (allegations attorney abandoned client at trial, did not properly prepare lawsuit for trial, and misled client into believing attorney was prepared for trial were claims for legal malpractice). Because Duerr's first theory focuses on the quality of representation provided, it alleges legal malpractice and nothing more. *See Greathouse*, 982 S.W.2d at 172 (when the crux of complaint is failure to provide adequate legal representation, the claim asserts legal malpractice).

Duerr's second theory is that Brown and Fleming had a conflict of interest arising from the settlement of Duerr's claim together with claims by four other hip implant recipients who were less severely injured. Duerr contends that his more valuable claim was used as leverage to increase the amount paid to the other four claimants. In Duerr's summary judgment response, he asserts that his lawyers wanted to "force Plaintiff to rejoin the class for $1.6 million so that the four less injured clients would be paid a total of $900,000 [out] of which Fleming and Associates would receive a large fee." Duerr points to a letter from Sulzer's attorney to Fleming memorializing a confidential agreement under which Sulzer agreed to pay $2.5 million to five Sulzer claimants represented by Fleming (Duerr and four others) in exchange for each claimant signing a revocation of "prior written opt-outs" and agreeing to participate in the class settlement. The letter indicated that Duerr would receive $1.6 million; litigant Cassone would receive $100,000, litigant Martin would receive $250,000, litigant Heathington would receive $300,000, and litigant Retherford would receive $250,000.

Because Duerr's petition makes only a perfunctory reference to breach of fiduciary duty, Duerr's deposition testimony necessarily assumes an important role in answering the legal question of whether the "conflict of interest" theory describes a breach of fiduciary duty claim distinct from any alleged legal malpractice. Duerr's deposition identifies the reason he is suing, which in turn helps to focus the analysis of whether Duerr asserts a free-standing breach of fiduciary duty claim or *73 instead simply affixes a different label to his legal malpractice claim.

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Duerr testified as follows:

> Q. Now, I believe that the crux of the lawsuit is that you are upset because you believe that you were promised that you would receive in your pocket $1,680,000; is that correct?
>
> A. Yes.
>
> * * *
>
> Q. So with regard to your lawsuit or your claims against Sulzer because of the hips that were defective, you pocketed approximately $1.3 million; is that right?
>
> A. That sounds about right, yes.
>
> Q. So that leaves a net difference of approximately $300,000 that you believe —
>
> A. 380 —
>
> Q. $380,000 that you believe was promised to you?
>
> A. Yes
>
> Q. And that's why you filed this lawsuit?
>
> A. Yes.

When he was asked to discuss fiduciary duty specifically, Duerr testified that "I think [Fleming and Brown] . . . took me and used me as a trump card and used my case as leverage to better all the other cases that they had; therefore, making more money for them and then throwing me to the wayside." Duerr also testified as follows:

> Q. What facts do you have to support your allegation, Mr. Duerr, that you believe Fleming Associates or Brown Crouppen used your case to better all their other cases?
>
> A. Pretty much common sense.
>
> Q. You're basing that opinion on common sense, your common sense?
>
> A. I have no answer.
>
> Q. So you don't know why you've made that allegation?
>
> A. Because of conversations with [an attorney from Brown Crouppen] . . . that brought me to that.
>
> Q. What conversations?
>
> A. That I was one of the worst cases that they had and that Fleming had and that with me now with them they would be able to pursue more and harder.

Immediately following his statement about having been thrown "to the wayside," Duerr described his belief that Fleming and Brown failed to prosecute a timely and proper administrative appeal within the class settlement structure from the denial of his requests for additional benefits. Elsewhere in his deposition, Duerr testified as follows:

> Q. You claim in your petition that the defendants abandon[ed] you; is that correct?
>
> A. Yes.
>
> Q. When do you believe that they abandon[ed] you?
>
> A. Right after they collected their 40 percent off the 1.6 million to opt back in.

In light of this deposition testimony, Duerr's "conflict of interest" theory boils down to a contention that other hip replacement claimants represented by his lawyers obtained greater recoveries than they otherwise would have obtained because of Duerr's participation in the class settlement, and that his lawyers thereby obtained additional fees. But the "crux" of Duerr's lawsuit remains his contention that he got less than the promised $1.68 million recovery net of attorney's fees. *74

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Duerr does not attribute his failure to obtain the promised $1.68 million net recovery to the participation of other hip implant claimants who allegedly received larger recoveries than they otherwise would have received. Duerr does not attribute this failure to his attorneys' receipt of fees in connection with recoveries by these other claimants. Rather, Duerr attributes this failure to being thrown "to the wayside" and "abandon[ed]" by attorneys who allegedly mishandled his requests for additional benefits within the settlement class structure, and then allegedly mishandled an appeal from the denial of those requests. Given his testimony, Duerr's "conflict of interest" theory does not describe a breach of fiduciary duty claim distinct from his legal malpractice allegations. *See Judwin Props., Inc. v. Griggs Harrison*, 911 S.W.2d 498, 507 (Tex.App.-Houston [1st Dist.] 1995, no pet.) (breach of fiduciary duty claim was impermissibly fractured legal malpractice claim because plaintiff failed to demonstrate how alleged breach of fiduciary duty benefitted fiduciary at the expense of the beneficiary).

Duerr tries to bolster his position by stressing that he has requested fee forfeiture, which is a remedy available for breach of fiduciary duty. *See Burrow v. Arce*, 997 S.W.2d 229, 246 (Tex. 1999). Duerr's invocation of fee forfeiture does not change the analysis. During his deposition, Duerr testified as follows:

> Q. Okay. And why, if they did get you so much money, should they give you back half of the fee you paid them?

> A. Because they didn't do what they promised and they cause me hardships to this day.

This testimony confirms that Duerr's breach of fiduciary duty contention (1) centers on the lawyers' alleged failure to "do what they promised" by failing to deliver a $1.68 million net recovery; and (2) does not assert that he suffered this specific monetary consequence because his interests were subordinated to those of his attorneys or other claimants.

This analysis also addresses Duerr's third theory predicated on a failure to disclose the asserted "conflict of interest." Duerr's deposition testimony establishes that breach of fiduciary duty arising from a "conflict of interest" is merely an alternative label for Duerr's underlying legal malpractice complaint about receiving less money than he was promised. The "conflict of interest" contention is not a distinct breach of fiduciary duty claim that stands apart from the asserted legal malpractice. Because the "conflict of interest" is not a distinct claim, the asserted failure to disclose the "conflict of interest" also is not a distinct breach of fiduciary duty claim that stands apart from the alleged legal malpractice.

In sum, Duerr does not state a separate breach of fiduciary duty claim based on the failure to deliver a promised level of recovery because that failure is attributed to mishandling of Duerr's claims within the class settlement structure. That is a malpractice claim as a matter of law. Duerr does not state a separate breach of fiduciary duty claim based on a "conflict of interest" arising from the settlement of multiple claims because Duerr contends his interests were compromised by the failure to deliver a promised level of recovery attributable to his lawyers' inattention to his benefit requests and appeal. That is a malpractice claim as a matter of law. *See Deutsch*, 97 S.W.3d at 188-90 (failure to represent client on appeal is claim for legal malpractice, not breach of fiduciary duty). Duerr does not state a separate breach of fiduciary duty claim based on a failure to disclose the asserted 75 "conflict of *75 interest" because the "conflict of interest" is not a separate claim, and because Duerr contends his interests were compromised by the failure to deliver a promised level of recovery attributable to his lawyers' inattention. That too is a malpractice claim as a matter of law.

We overrule Duerr's first issue.

Legal Malpractice

Duerr next claims that the trial court erred in striking his legal malpractice expert and in granting summary judgment in favor of Fleming on Duerr's legal malpractice claim.[4] This claim against Fleming was the only claim remaining after the trial court's March 26, 2007 order. Duerr concedes that in striking his expert, the trial court dealt a fatal blow to his legal malpractice claim.

> [4] The dispute over striking Duerr's legal malpractice expert does not affect the summary judgment granted in favor of Brown on Duerr's legal malpractice claim. By the time Duerr's expert was stricken, summary judgment already had been granted in favor of Brown on all claims against Brown, including legal malpractice.

Duerr filed this lawsuit on February 16, 2006. On April 21, 2006, the trial court issued a docket control order mandating that Duerr designate his experts by December 22, 2006, and stated that failure to timely respond would be governed by Texas Rule of Civil Procedure 193.6. The docket control order set a discovery deadline of February 22, 2007. Trial was set for April 23, 2007. On June 22, 2006, Duerr amended his petition for the first and only time.

In the months that followed, Duerr deposed no witnesses and engaged in no discovery beyond mandated written disclosures under Texas Rule of Civil Procedure 194. Duerr complied with the docket control order by designating attorney Robert Charles Lyon as his testifying expert. His designation was made in this response:

> It is expected Mr. Lyon will testify on the issues of the Defendant's failure to comply with the standard of care, that their conduct was negligent, that their conduct was a proximate cause of the damages claimed by the Plaintiffs; and that a fiduciary relationship existed between Plaintiffs and Defendants which was violated and a refund of all or a part of the attorney's fees received should be made.

Because Lyon provided no report, Duerr was obligated to make Lyon available for deposition "reasonably promptly" after designating him. *See* Tex.R. Civ. P. 195.3. Under Texas Rule of Civil Procedure 194.2(f)(3), Lyon's deposition was necessary to provide the "general substance of the expert's mental impressions and opinions and a brief summary of the basis for them," which had not been made available through the designation *or* through any supplementation.

Duerr initially agreed to make Lyon available for deposition on February 6, 2007 — before the discovery cutoff. Lyon cancelled this deposition, and it was rescheduled by agreement after the discovery cutoff on March 1, 2007. Lyon again cancelled. Fleming insisted on a new date within the next two weeks because of the looming trial scheduled to begin on April 23, 2007. Fleming offered to depose Lyon in early March, but Lyon had other commitments. Duerr offered to make Lyon available on dates in late March or early April. Fleming contended that these dates were too close to the April 23, 2007 trial. On April 3, 2007, Fleming moved to strike Lyon as an expert witness in the case.

Duerr filed three documents on April 13, 2007: a response to Fleming's motion for summary
76 judgment; a motion for a continuance *76 of the summary judgment hearing; and a response to Fleming's motion to strike Duerr's legal malpractice expert. In his response to Fleming's motion to strike, filed on April 3, 2007, Duerr included a report by Lyon addressing the scope and basis of his opinion. The trial court considered these motions on April 20, 2007, only three days before the scheduled trial, at a single hearing that encompassed Fleming's motion for final summary judgment filed March 28, 2007.

The trial court heard both sides with respect to all motions pending at the hearing, and thereafter signed its order granting Fleming's motion for final summary judgment and simultaneously granting Fleming's motion to strike Lyon. The trial court stated:

> The record of the cause seems undisputed: It was not until April 13, 2007, via response to motion for summary judgment and ten days prior to the trial setting, that Defendants were afforded their first peek at the nature of Mr. Lyon's expert opinions in this cause. Prior to that time, Plaintiffs disclosures provided nothing more than an indication that Mr. Lyon would testify about the standard of care and breach thereof. The Court is mindful of and sympathetic with Plaintiffs counsel's personal issues; however, those issues, which occurred during 2006, do not explain a failure to comply with expert disclosures in 2007 of failure to timely seek relief from the Court's scheduling order. The Court determines that the motion must be GRANTED.

The failure to provide expert information as required by the rules is sanctionable by exclusion of that expert's report. *See* Tex.R. Civ. P. 193.6; *Moore v. Mem'l Hermann Hosp. Sys., Inc.*, 140 S.W.3d 870, 875 (Tex.App.-Houston [14th Dist.] 2004, no pet). To avoid this sanction, Duerr had to demonstrate that his failure to make such disclosures would not have unfairly surprised or prejudiced Fleming, or that his failure to make such disclosures was for good cause. *See* Tex.R. Civ. P. 193.6; *Moore*, 140 S.W.3d at 875.

The trial court acted within its discretion in striking Lyon and his affidavit. The trial court was entitled to conclude that Fleming was prejudiced by the failure to (1) make Lyon available for deposition, or (2) provide Fleming with Lyon's expert report. Similarly, Duerr did not establish good cause for waiting until the eve of trial to begin engaging in discovery, or for failing to make his expert witness available until after the close of discovery. Duerr's only argument was that Fleming did not make sufficient concessions to Duerr in scheduling Lyon, and that any failure to make Lyon available was not due to Duerr's lack of willingness. The trial court acted within its discretion in concluding that Duerr failed to establish good cause under Rule 193.6.

Duerr cannot prevail on appeal even if Lyon's affidavit is considered. A legal malpractice plaintiff must prove: (1) the attorney owed the plaintiff a duty of care; (2) the attorney breached that duty; (3) the breach proximately caused the plaintiff's injuries; and (4) damage occurred. *Farah v. Mafrige Kormanik, P.C.*, 927 S.W.2d 663, 670 (Tex.App.-Houston [1st Dist.] 1996, no writ). A legal malpractice claim must be supported by expert testimony. *See Alexander v. Turtur Assocs., Inc.*, 146 S.W.3d 113, 119-20 (Tex. 2004). When the asserted legal malpractice involves the results of prior litigation, the plaintiff bears the additional burden of proving that, "but for" the attorney's breach of duty, he would have prevailed on the underlying cause of action and would have
77 been entitled to judgment. *77 *See Greathouse*, 982 S.W.2d at 172; *Schlager v. Clements*, 939 S.W.2d 183, 186-87 (Tex.App.-Houston [14th Dist.] 1996, writ denied). This requirement is known as the "suit within a suit" requirement. *See Greathouse*, 982 S.W.2d at 173.

Fleming's no-evidence motion for summary judgment on legal malpractice contends that Duerr failed to raise a fact issue as to whether the alleged legal malpractice was the proximate cause of Duerr's damages. Even if Lyon's report had been considered, that expert report could not forestall summary judgment because Lyon failed to establish that Duerr would have prevailed in his underlying claims for additional benefits.[5] The expert report by Robert Charles Lyon makes several conclusory statements to the effect that Fleming's negligent acts were the proximate cause of Duerr's damages. However, Lyon does not state that Duerr would have prevailed on the underlying requests for additional benefits. Lyon does not establish that Duerr was eligible for a greater recovery than that already received under the settlement agreement. Fleming has contended that Duerr was not entitled to any greater payout than that already received because (1) Duerr's hip dislocation occurred four days before his covered revision surgery, making him ineligible for Matrix IV recovery;[6] (2) Duerr's own physician provided the report upon which his claim was denied in regards to Matrix V, and he failed to establish that Duerr was more severely injured; (3) Duerr himself filed for recovery under Matrix II and successfully recovered $36,000, negating any harm done by defendants as to the Matrix II claims; and (4) all appeals had been exhausted when the final order of the special master declined Duerr's claims.

5 Duerr also contends that Fleming failed to file for $36,000 under Matrix II. Duerr had shown no damage because he filed for the recovery and was paid the full $36,000 available under Matrix II. Even if Fleming was negligent with regard to a Matrix II filing, Duerr suffered no harm.

6 Duerr's hip dislocation occurred on September 29, 2000, and his covered revision surgery (CRS) occurred on October 3, 2000. To be eligible for benefits under Matrix IV, an individual's hip dislocation had to have taken place within 90 days following the CRS.

To establish a viable legal malpractice claim, Duerr had to establish that he would have prevailed on the allegedly mishandled claims. Lyon's affidavit did not establish this requirement.

Aiken, 115 S.W.3d at 29; *Greathouse*, 982 S.W.2d at 172. Therefore, Duerr's legal malpractice against Fleming would not have survived Rule 166(a)(i) even if Lyon's affidavit had been considered.

Accordingly, Duerr's second issue is overruled.

Continuance

Duerr's third issue contends that the trial court abused its discretion in denying a continuance to the summary judgment hearings. Duerr twice moved for continuances. The first motion was filed in response to Fleming's February 16, 2007 partial summary judgment motion and Brown's February 23, 2007 full summary judgment motion. This first motion for a continuance included a request for a new trial date and an extension for discovery. This motion was filed on the same day of the hearing on the Brown and Fleming motions for summary judgment. Although Duerr contends there is some doubt about whether the trial court ruled on this motion for continuance, the trial court specifically denied Duerr's request in an order signed March 26, 2007, which also granted the summary judgments that had been requested
78 by Brown and Fleming. *78

Duerr's second motion for continuance was filed on April 13, 2007 — on the eve of trial scheduled for April 23, 2007 — in response to Fleming's motion for final summary judgment on Duerr's malpractice claim. Duerr requested a continuation of the hearing, reopening of discovery, and a new scheduling order. On April 20, 2007, the trial court denied these requests and granted summary judgment to Fleming on Duerr's legal malpractice claim.

Courts have considered the following nonexclusive factors when deciding whether a trial court abused its discretion in denying a motion for continuance seeking additional time to conduct discovery: the length of time the case has been on file; the materiality and purpose of the discovery sought; and whether the party seeking the continuance has exercised due diligence to obtain the discovery sought. *Two Thirty Nine Joint Venture*, 145 S.W.3d at 161.

The first factor is the length of time the case has been on file. *McMahan v. Greenwood* is instructive in this regard. *See McMahan*, 108 S.W.3d at 498. The lawsuit in *McMahan* was filed nearly 28 months before the granting of summary judgment, with 16 months in between subject to a bankruptcy stay, allowing the parties a full year to conduct discovery. *Id.* at 498-99, the trial court found this to be sufficient time for discovery and denied the continuance; on appeal we concluded that the trial court acted within its discretion is so determining. *Id.* at 499.

In the case before us, the parties had from February 16, 2006 — when the original petition was filed — until February 22, 2007 — when the docket control order ended discovery — to conduct discovery and to prepare for an April, 23 2007 trial. The trial court acted within its discretion in concluding that this was sufficient time for discovery. This factor weighs in favor of Fleming and Brown. *See Perrotta v. Farmers Ins. Exch.*, 47 S.W.3d 569, 576 (Tex.App.-Houston [1st Dist.] 2001, no pet.) (plaintiff has obligation to research a case before bringing suit; trial court within discretion to deny continuance, noting seven months was sufficient to effect discovery and motion for summary judgment was reasonable).[7]

[7] Brown points out that the second motion for a continuance was filed after all claims against it already had been resolved in the first order granting motion for summary judgment.

The second factor considers the materiality and purpose of the discovery sought. When the basis for the requested continuance is "want of testimony," the movant must show that (1) the testimony is material; (2) due diligence has been used to obtain the testimony; (3) there is an explanation given for the failure to obtain the

testimony; and (4) the testimony cannot be procured from another source. Tex.R. Civ. P. 252; *see Blake v. Lewis*, 886 S.W.2d 404, 409 (Tex.App.-Houston [1st Dist.] 1994, no writ) (proponent of a motion for continuance should state what specific discovery is material and show why it is material). While Duerr asserted his need to depose the attorneys for Fleming and Brown, he never states what their depositions would demonstrate or how this information would assist Duerr or the court. *See Perrotta*, 47 S.W.3d at 576 (appellant failed to show how additional discovery was pertinent). A motion for a continuance must "reflect any need for additional discovery or what might be expected to be developed as evidence with additional depositions." *Gabaldon v. Gen. Motors Corp.*, 876 S.W.2d 367, 370 (Tex.App.-El Paso 1993, no writ) (without this showing, the
79 record reflects no basis for determining *79 that the trial court abused its discretion). Because Duerr did not satisfy this standard, this factor weighs in the favor of Fleming and Brown.

Finally, we consider the diligence of the party seeking continuance. It is "well established that the failure of a litigant to diligently utilize the rules of civil procedure for discovery purposes will not authorize the granting of a continuance." *State v. Wood Oil Distrib., Inc.*, 751 S.W.2d 863, 865 (Tex. 1988); *see also Schmidt v. Bell*, No. 01-06-00161-CV, 2008 WL 921702, at *1 (Tex.App.-Houston [1st Dist.] April 3, 2008, no pet. h.) (in addition to describing the evidence sought, a verified motion must state with particularity the diligence used to obtain the evidence, and explain why the continuance is necessary). In this case, Duerr had nearly a year to engage in discovery and failed to utilize available discovery methods until after the discovery period ended. When a party is prevented from deposing opponents because it failed to act timely, that is a "predicament of its own making" and the "risk" a party takes by not "diligently pursuing discovery." *Wood Oil Distrib., Inc.*, 751 S.W.2d at 865.

In this case, "nothing prevented [Duerr] from conducting discovery earlier in the case, and his failure to make diligent efforts to secure discovery did not authorize the granting of a continuance." *See Perrotta*, 47 S.W.3d at 576-77; *see also Carbonara v. Tex. Stadium Corp.*, 244 S.W.3d 651, 659 (Tex.App.-Dallas Jan.24, 2008, no pet. h.) (while appellant explained unsuccessful discovery attempts since filing of summary judgment, appellant never explained why discovery was not conducted before). This factor also weighs in favor of Fleming and Brown.

Because all of the pertinent factors weigh in favor of Fleming and Brown, we conclude that the trial court acted within its discretion in denying both requests for a continuance. Accordingly, Duerr's third issue is overruled.

Conclusion

The trial court's judgment is affirmed.

NO. 02-15-00220-CV
COURT OF APPEALS SECOND DISTRICT OF TEXAS FORT WORTH

Episcopal Church v. Salazar

547 S.W.3d 353 (Tex. App. 2018)
Decided Apr 5, 2018

NO. 02-15-00220-CV

04-05-2018

THE EPISCOPAL CHURCH, the Local Episcopal Parties, the Local Episcopal Congregations, and the Most Rev. Katharine Jefferts Schori, Appellants v. Franklin SALAZAR and Intervening Congregations, Appellees

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PANEL: SUDDERTH, C.J.; GABRIEL, J.

360 BONNIE SUDDERTH, CHIEF JUSTICE*360 **I. Introduction**

The parties' long-running dispute involves, among other things, title to and possession of church property.[1] In 2014, on a direct appeal,[2] the Supreme Court of Texas identified the appropriate methodology to determine the property ownership issue—neutral principles of law—and remanded this case to the trial court. *See Episcopal Diocese of Fort Worth v. Episcopal Church* , 422 S.W.3d 646, 647 (Tex. 2013), *cert. denied* , —— U.S. ——, 135 S.Ct. 435, 190 L.Ed.2d 327 (2014) ; *see also Masterson v. Diocese of Nw. Tex.* , 422 S.W.3d 594, 596, 608 (Tex. 2013), *cert. denied* , —— U.S. ——, 135 S.Ct. 435, 190 L.Ed.2d 327 (2014). No one disputes that the Corporation of the Episcopal Diocese of Fort Worth (the Corporation) holds legal title to the property or that the Corporation holds the property in trust for the Episcopal Diocese of Fort Worth (EDFW). Rather, at its heart, the parties' dispute is over who has the right to control the Corporation and EDFW as legal entities.

1 For a review of how such disputes have affected jurisprudence and religious groups over the past decade, *see* Michael W. McConnell & Luke W. Goodrich, *On Resolving Church Property Disputes* , 58 Ariz. L. Rev. 307, 308–10 (2016) ("Hundreds of local congregations have voted to withdraw from these national denominations, raising the question: Who owns the church property?" (footnote omitted)).

2 *See* Tex. Gov't Code Ann. § 22.001(c) (West Supp. 2017).

In a single issue containing multiple sub-issues, Appellants The Episcopal Church (TEC), the Most Reverend Katharine Jefferts Schori, The Local Episcopal Parties, and The Local Episcopal Congregations (collectively, the TEC parties) appeal the trial court's summary judgment for Appellees Franklin Salazar and the Intervening Congregations (collectively, Appellees).[3]

3 The Appellees include Bishop Jack Leo Iker, Jo Ann Patton, Walter Virden III, Rod Barber, and Chad Bates.

For ease in navigating this highly complex case, we set forth the following roadmap: Part II of this opinion contains EDFW's history and the procedural background of this case as pertinent to its disposition. Part III sets out the standard of review and the case's legal framework, starting with the binding precedent of the United States Supreme Court and the Supreme Court of Texas and followed by persuasive authorities that inform our judgment before addressing the applicable state substantive law on associations, corporations, and trusts and then applying these authorities to the case's dispositive issues in parts III.B.2–B.4. Part IV sets out in full our conclusion, which is that we affirm the trial court's judgment in part and reverse it in part and remand the case to the trial court for further proceedings.

II. Background

361 Religious schisms that give rise to property disputes are not unprecedented.[4] *361 TEC, for example, was founded in 1789 after its revolutionary constituents broke away from the Church of England. *See Episcopal Diocese* , 422 S.W.3d at 647 ; *Bennison v. Sharp* , 121 Mich.App. 705, 329 N.W.2d 466, 468 (1982) ; Hon. John E. Fennelly, *Property Disputes and Religious Schisms: Who is the Church?* , 9 St. Thomas L. Rev. 319, 347 n.251 (1997). The Church of England, in turn, began with Henry VIII's break with the Roman Catholic Church in 1534. Fennelly, 9 St. Thomas L. Rev. at 347 & n.251 (referencing *Protestant Episcopal Church v. Barker* , 115 Cal.App.3d 599, 171 Cal.Rptr. 541, 544 (Cal. Dist. Ct. App.), *cert. denied* , 454 U.S. 864, 102 S.Ct. 323, 70 L.Ed.2d 163 (1981)). And, as observed by the United States Supreme Court, "14 autocephalous hierarchical churches ... came into existence following the schism of the universal Christian church in 1054." *Serbian E. Orthodox Diocese for U.S. of Am. & Canada v. Milivojevich* , 426 U.S. 696, 699, 96 S.Ct. 2372, 2376, 49 L.Ed.2d 151 (1976) ; *see also Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church* , 344 U.S. 94, 100, 73 S.Ct. 143, 146, 97 L.Ed. 120 (1952) ("The schism of 1054 A.D. split the Universal Church into those of the East and the West.").

4 *See* McConnell & Goodrich, 58 Ariz. L. Rev. at 311 & n.11 (stating that church property disputes are as old as any church and referring to an excommunicated bishop's refusal in 269 A.D. to relinquish control of a church building and the early church's subsequent appeal to the Roman emperor for assistance).

A. The Hierarchical Church

TEC has been identified by our supreme court as a "hierarchical" type of religious organization, composed of tiers,[5]

5 Factors Texas courts have used to characterize a church as hierarchical include (1) the local church's affiliation with a parent church; (2) an ascending order of ecclesiastical judicatories in which the local church's government is subject to review and control by higher authorities; (3) subjugation of the local church to the jurisdiction of a parent church or to a constitution promulgated by the parent church; (4) a charter from the parent church governing the affairs of the local church and specifying ownership of local church property; (5) the repository of legal title; and (6) the licensing or ordination of local ministers by the parent church. *Green v. Westgate Apostolic Church* , 808 S.W.2d 547, 550–51 (Tex. App.—Austin 1991, writ denied) (citing *Templo Ebenezer, Inc. v. Evangelical Assemblies, Inc.* , 752 S.W.2d 197, 198–99 (Tex. App.—Amarillo 1988, no writ)).

"The terms hierarchical and congregational are poles on a continuum along which church organizations fall." *Id.* at 551. A congregational church is governed primarily by the will of the local assembly, while a hierarchical church submits certain issues to the rules and control of a larger religious organization. *Id.* A congregational church is independent of any other ecclesiastical association, owes no obligation to any higher authority, and "totally controls its own destiny." *Templo Ebenezer, Inc.* , 752 S.W.2d at 198. Because a congregational form of church government vests the ultimate decision-making authority in its members, if the controversy cannot be decided by the application of neutral principles, then the court defers to the majority vote of the congregation. *Libhart v. Copeland* , 949 S.W.2d 783, 793 (Tex. App.—Waco 1997, no writ) (explaining ecclesiastical deference in congregational church context).

> [t]he first and highest [of which] is the General Convention. The General Convention consists of representatives from each diocese and most of TEC's bishops. It adopts and amends TEC's constitution and canons. The second tier is comprised of regional, geographically defined dioceses.[6] Dioceses are governed by their own conventions. Each diocese's convention adopts and amends its own constitution and canons[ ] but must accede to TEC's constitution and canons. The third tier is comprised of local congregations.

6 The record reflects that TEC also groups its dioceses into provinces, each of which contains a synod consisting of a house of bishops and a house of deputies. While many of the provinces are geographically determined, some of TEC's provinces consist of TEC dioceses outside of the United States.

362 *362

> Local congregations are classified as parishes, missions, or congregations.[7]

7 This framework ignores TEC's self-identification as a constituent member of an even larger community, which TEC acknowledges in the preamble to its constitution, stating,

> The Protestant Episcopal Church in the United States of America, otherwise known as The Episcopal Church (which name is hereby recognized as also designating the Church), *is a constituent member of the Anglican Communion* , a Fellowship with the One, Holy, Catholic, and Apostolic Church, of those duly constituted Dioceses, Provinces, and regional Churches in communion with the See of Canterbury, upholding and propagating the historic Faith and Order as set forth in the Book of Common Prayer. [Emphasis added.]

> While occasional references are made to the Anglican Communion throughout the record of this case, no one has explained what form of organization is involved in its membership, and no property interests are asserted on its behalf.

Episcopal Diocese , 422 S.W.3d at 647–48 ; *Masterson* , 422 S.W.3d at 608 ("We agree with the court of appeals that the record conclusively shows TEC is a hierarchical organization.").

TEC's constitution and canons "establish the structure of the denomination and rules for how it operates." *Masterson* , 422 S.W.3d at 600. As set out in its constitution and canons, TEC's Presiding Bishop is its "chief pastor," elected by the General Convention—consisting of the House of Bishops and the House of Deputies—to a multi-year term of office and "charged with responsibility for leadership in" initiating, developing, and implementing TEC's policy and strategy. In addition to the Presiding Bishop's policy and leadership tasks, he or she also presides over meetings of TEC's House of Bishops and performs ecclesiastical tasks, including, "[i]n the event of an Episcopal vacancy" in a diocese, consulting with that diocese's "Ecclesiastical Authority to ensure that adequate interim Episcopal Services are provided." The Presiding Bishop "shall perform such other functions as shall be prescribed in" TEC's canons and may delegate some duties and responsibilities to officers in the General Convention's Executive Council, which is responsible for carrying out the General Convention's programs and policies and exercises "powers conferred upon it by Canon, and such further powers as may be designated by the General Convention." The Presiding Bishop is the chair and president of the Executive Council.

The bishop in each diocese is chosen by the rules prescribed by the convention of that diocese but cannot be ordained and consecrated without the consent of a majority of the standing committees of all of the dioceses and without the consent of a majority of TEC's bishops.[8] If one of TEC's bishops abandons communion with TEC by open renunciation, formal admission into any religious body not in communion with TEC, or other activities, subject to the procedures set out in TEC's canons and the consent of the majority of TEC's bishops, the Presiding Bishop may depose that bishop.[9]

> [8] If a majority of the diocesan standing committees or a majority of TEC's bishops do not consent to the bishop's election within 120 days from the date of notification of the election, the Presiding Bishop "shall declare the election null and void," and the diocesan convention can then proceed to a new election.
>
> [9] TEC's governing documents define "Deposition" as "a Sentence by which a Member of the Clergy is deprived of the right to exercise the gifts and spiritual authority of God's word and sacraments conferred at ordination."

The convention of each diocese must appoint a standing committee, which acts as the council of advice for the
363 diocese's bishop or substitutes as the diocese's ecclesiastical authority if there is no bishop *363 canonically authorized to act. Under TEC's canons, a diocese without a bishop may, by an act of its convention and in consultation with the Presiding Bishop, "be placed under the provisional charge and authority of a bishop of another diocese or of a resigned bishop, who shall by that act be authorized to exercise all the duties and offices of the Bishop of the Diocese until a Bishop is elected and ordained" for that diocese or until the act of the diocese's convention is revoked.

Each diocese's secretary of convention has the responsibility to forward to the secretary of TEC's House of Deputies a copy of the latest journal of the diocesan convention. Each diocese's bishop has the duty to forward to TEC's Recorder an annual report certifying information such as the names of clergy canonically resident in the diocese and their status, including suspension, removal, deposition, or restoration.

TEC's Executive Council sets a budget that, once approved by TEC's General Convention, is sent to each diocese, setting out each diocese's proportionate part of estimated expenditures. Each diocese then notifies each parish and mission therein of its individual "apportionment" to be raised, "which shall include both its share of the proposed Diocesan Budget and its share of the objective apportioned to the Diocese by the Executive Council."[10] Each diocese accounts annually to the Executive Council for its receipts and distributions,[11] and each diocese submits an annual report that contains statistical information concerning the diocese's parishes and missions and other "relevant information." TEC established and administers a pension fund for TEC's clergy supported by the royalties from publications authorized by the General Convention and by collections levied upon "all Parishes, Missions, and other ecclesiastical organizations or bodies subject to the authority of this Church."

10 The amount of "apportionment" suggested by the Executive Council is based on the income of the parishes in the dioceses, and TEC uses these funds for administration and to carry out the Church's programs nationally.

11 TEC makes loans to facilitate the acquisition of real property and construction of church buildings through various programs and entities.

A parish, part of the third tier identified by the supreme court, is governed by a rector or priest-in-charge and a vestry comprised of lay persons elected by parish members. *Masterson* , 422 S.W.3d at 600. Members of the vestry must meet certain qualifications, including committing to "conform to the doctrine, discipline and worship of The Episcopal Church." *Id.* To be accepted into union with TEC, a local congregation must accede to and agree to be subject to the constitutions and canons of both TEC and the diocese in which the
364 congregation is located.[12] *Id.* *364 Every parish and other congregation prepares an annual report to the bishop of its diocese, who then sends a copy to TEC's Executive Council. The annual report covers not only the number of baptisms, confirmations, marriages, and burials during the year and the total number of baptized persons and communicants in good standing but also a summary of receipts and expenditures and "such other relevant information as is needed to secure an adequate view of the state of this Church, as required by the approved form." At the time that EDFW joined TEC, "other relevant information" included a statement of the real and personal property held by each parish with an appraisal of its value, the parish's indebtedness for the property, and the amount of insurance carried on the property.

12 By way of illustration, the record contains a copy of a March 15, 2002 letter from Bishop Iker to the rector, wardens, and vestry of one of EDFW's churches, informing them that "[n]either the Episcopal Church nor this Diocese are congregational in nature" and that the vestry accordingly could not fire their congregation's rector. Rather, he advised that the vestry and rector were to work with each other "until such time as the relationship is broken by the death or resignation of the priest" or is dissolved by the bishop "acting with the counsel of the Diocesan Standing Committee."

The record also contains the memoir of Rector Emeritus William A. Komstedt, who observed that "in the Bible Belt, most people have a congregational understanding of church administration" and that he was frequently asked why the people of the St. Francis Mission would pay for land and buildings that EDFW would end up owning. He wrote that "[i]n time, most warmed to the idea after they were taught that the diocese was like a house and its missions and parishes were like rooms in it." He also described the efforts taken by the mission's congregation to pay off the $31,500 no-interest, five-year loan obtained from one of TEC's programs, wiping out $21,000 of the debt in one night by holding a gala Barbeque, Country Dance, and Wild West show.

B. The Episcopal Diocese of Fort Worth (EDFW)

1. Diocese's Origins

In 1849, "[t]he Church in the State of Texas accede[d] to the Constitution of the Protestant Episcopal Church in the United States of America" and "acknowledg[ed] its authority," and in 1850, the Diocese of Texas was admitted into union with TEC. In 1874, a missionary bishop of Northern Texas was elected and consecrated and the Diocese of Texas was delimited to set apart the area to the north and west as the Missionary District of Northern Texas. Four years later, the 1878 Journal of the Fourth Annual Convocation of the Protestant Episcopal Church in the Missionary District of Northern Texas set out the form for a constitution of a parish acceding to the TEC and diocesan constitutions and canons:

> This Parish, as a constituent part of the Protestant Episcopal Church in the Missionary District of Northern Texas, expressly accedes to, recognizes and adopts the Constitution, Canons, Doctrines, Discipline and Worship of the Protestant Episcopal Church in the United States of America, and the Constitution and Canons of the Protestant Episcopal Church in this jurisdiction, and acknowledges their authority accordingly.

In 1893, TEC's constitution provided that no churches or chapels would be consecrated until the bishop sufficiently certified that the property was "secured, by the terms of the devise, or deed, or subscription by which they are given, from the danger of alienation, either in whole or in part, from those who profess and practise the doctrine, discipline, and worship of the Protestant Episcopal Church in the United States of America."

Two years later, the Diocese of Dallas held its first diocesan convention. The preamble to its originating December 1895 constitution states,

> We, the Clergy and Laity, of the Protestant Episcopal Church, in the United States of America, resident in that portion of the State of Texas which, by the General Convention of said Church, was in the year A.D. 1874 set off as the Missionary District of Northern Texas, having been convened by the Missionary Bishop of Northern Texas, for the purpose of organizing a Diocese whose territorial limits shall be co-extensive with those of said Missionary District, do now, by and with the consent of said Bishop and in order to effect the organization

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> of said Diocese, ordain and establish this Constitution.

Over half a century later, at its 53rd annual convention held in 1948, the Diocese of Dallas amended its constitution's article 13, "On Title to Church Property." That article provided that title to all real property acquired "for the use of the Church in this Diocese," including the real property of all parishes and missions, "shall be vested in the Bishop and his successors in office, in trust."[13]

13 Alexander C. Garrett, who had been the Missionary Bishop of Northern Texas, served as the Bishop of Dallas from 1874 to 1924 and was succeeded in that office by Harry T. Moore (who served from 1924 to 1946), Charles Avery Mason, (who served from 1946 to 1970), and A. Donald Davies (who served from 1970 until 1982, when Bishop Davies opted to become the bishop of the newly formed EDFW). Clarence C. Pope served in the office of EDFW's bishop from 1986 until 1994, when he retired to become a Roman Catholic. Bishop Iker was elected by EDFW's convention as bishop coadjutor in 1992 but was not consecrated until 1993, when he received consent from TEC's other dioceses.

More than three decades after that, in June 1982, the Diocese of Dallas held a special convention to consider a resolution to divide itself and, if approved, to request that TEC's General Convention ratify the division.[14] The resolution passed.

14 Under Article V of TEC's constitution, one of the three ways that a new diocese may be formed is through the division of an existing diocese with the consent of the General Convention "and under such conditions as the General Convention shall prescribe by General Canon or Canons." Under TEC's constitution, a new diocese may also be formed through the joining of two or more dioceses or parts thereof or from mission territory, which is "an unorganized area evangelized" by TEC but not yet included in any of TEC's dioceses.

TEC held its General Convention that same year, from September 5 to 15, 1982. On the fourth day, the motion to adopt Resolution B-18, providing for the division of the Diocese of Dallas, carried in the House of Bishops. On the seventh day, the House of Deputies concurred, ratifying the division to create EDFW (known at that time only as the "Western Diocese") based on, among other things, the certificate of the Diocese of Dallas's Chancellor that all of the requisite documents had been executed and "that all of the appropriate and pertinent provisions of the Constitution and Canons of the General Convention of the Episcopal Church in the USA and the Constitution and Canons of the Diocese of Dallas have been fully complied with in respect of this submission."

The October 1982 Annual Meeting Journal of the Diocese of Dallas reflected that seventy-two years after the division issue was first raised in 1910, the Diocese of Dallas was finally sharing "in the trauma and excitement of such a division," resulting, at least in part, from the area's significant population growth over time and the size of the diocese (larger than 43 other dioceses, including some dioceses that covered entire states).[15] Bishop Davies observed that the General Convention had ratified the action of the diocesan convention when it voted to divide the Diocese of Dallas, that the new diocese planned to come into existence as of January 1, 1983, with the filing of its documents with the Secretary of TEC's General Convention, and that the new diocese would hold its primary convention on November 13, 1982, to name itself, organize committees and officers, accede to
366 the national constitution *366 and charters, adopt its own constitution and charters, and implement a budget.

15 In his address to the diocesan convention, Bishop Davies noted that the "twin cities of Dallas and Fort Worth are growing like young giants" and that "[t]he little towns in between are stretching out their steel fingers with emerald rings strung all along to bind each other together in bonds of common life."

One of the resolutions promulgated at the Diocese of Dallas's October 1982 Annual Meeting declared that "[t]itle to all real property ... located within the territorial boundaries of the western diocese shall be transferred to the western diocese."[16] During the meeting, the Diocese of Dallas's Chancellor was granted permission to initiate and conduct for the diocese "such action in the courts of the State of Texas as may be necessary and prudent for the accomplishment of the goals and purposes of the foregoing resolution, including partition actions, cy-pres actions, and other actions under the laws of Texas or the United States." Additionally, the resolution provided that the division of all corporations, foundations, and funds "shall be made subject to the terms, conditions[,] and purposes of the instruments establishing them and any amendments thereto."

16 The resolution provided that title to all such real property would be transferred except for some small oil and gas interests owned by Episcopal Funds, Inc., and the ad valorem tax liability of Camp Crucis, which would be divided 65/35 between the two dioceses.

EDFW adopted its constitution and canons on November 13, 1982. It was admitted into union with TEC on December 31, 1982.

2. 1983–1990

Article 13 of EDFW's constitution provided that "title to all real estate acquired for the use of the Church in this Diocese ... shall be held subject to control of the Church in the Episcopal Diocese of Fort Worth acting by and through a corporation" and that "[a]ll such property as well as all property hereafter acquired for the use of the Church and the Diocese, including parishes and missions, shall be vested in [the] Corporation of the Episcopal Diocese of Fort Worth."[17] EDFW's canons established the parameters for the Corporation's management. *See Episcopal Diocese* , 422 S.W.3d at 648. Specifically, canon 11, "Corporation of the Episcopal Diocese of Fort Worth," set out,

17 The Diocese of Dallas adopted a similar provision in December 1983.

> Sec. 11.1 Corporation of the Episcopal Diocese of Fort Worth is a non-profit benevolent[18] and charitable organization organized under Texas laws, also known as the "Diocesan Corporation". In addition to its regular powers, it may receive, hold, manage and administer funds and properties acquired by gift or by will or otherwise for the use and benefit of the Diocese and any Diocesan Institutions.
>
> Sec. 11.2 The management of its affairs shall be conducted and administered by a Board of Trustees of five (5) elected members, all of whom are either Lay persons[19] in good standing of a parish or mission in the Diocese, or members of the Clergy canonically resident in the Diocese, in addition to the Bishop of the Diocese who shall serve as Chairman of the Board or may designate the President or other officer of the corporation to serve as such. The Board of Trustees shall have the power and authority to conduct the affairs of said corporation in accordance with its charter and by-laws and in accordance with the Constitution and Canons of the Diocese from time to time adopted.
>
> Sec. 11.3 One member of the Board of Trustees shall be elected at each Annual

18 "Benevolent" was removed from the canon in 1989.

19 "Persons" was changed to "communicants" in 1989.

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> Convention and each member shall serve a term of five (5) years. The terms of members shall be so arranged that the term of only one (1) member shall expire annually. The Board of Trustees shall fill any vacancy which occurs on the Board until the annual election. The Bishop shall nominate the members of the Board of Trustees.
>
> Sec. 11.4 The Board of Trustees shall adopt its own by-laws and shall elect such officers as its by-laws may require.
>
> Sec. 11.5 The Board of Trustees shall submit a report at each Annual Convention covering its operations for the preceding fiscal year and showing its financial condition. If and when required by the Standing Committee of the Diocese, the Board of Trustees shall make such additional reports and furnish such additional information as may [be][20] requested. The books and records of the Board of Trustees shall at all times be open for inspection and examination by the Standing Committee of the Diocese or its representatives.

20 By 1989, this typographical error in the original 1982 canon had been corrected.

EDFW filed articles of incorporation for the Corporation on February 28, 1983. The 1983 articles established that the Corporation was a nonprofit corporation of perpetual duration with the following purposes set out as follows, in pertinent part:

> (1) To receive and maintain a fund or funds or real or personal property, or both, from any source including all real property acquired for the use of the Episcopal Diocese of Fort Worth as well as the real property of all parishes, missions and diocesan institutions. Subject to the limitations and restrictions hereinafter set forth, to use and apply the whole or any part of the income therefrom and the principal thereof exclusively for charitable, religious, scientific, literary, or educational purposes either directly or by contributions to organizations that qualify as exempt organizations under Section 501(c)(3) of the Internal Revenue Code and its Regulations as they now exist or as they may hereafter be amended.
>
> (2) The property so held pursuant to (1) supra shall be administered in accordance with the Constitution and Canons of the Episcopal Diocese of Fort Worth as they now exist or as they may hereafter be amended.

The articles also set out that the election of the Corporation's board of directors ("Board of Trustees") and their terms of office "shall be fixed by the by-laws of the corporation as the same may be adopted and from time to time amended."

The Corporation adopted its bylaws on May 17, 1983. Article I, "Authority," states,

> Section 1. General The affairs of this nonprofit corporation shall be conducted in conformity with the Constitution and Canons of the Episcopal Church in the United States of America and the Constitution and Canons of the Episcopal Diocese of Fort Worth, as they may be amended or supplemented from time to time by the General Convention of the Church or by the Convention of the Diocese. In the event of any conflict between these Bylaws and any part or all of said Constitution or Canons, the latter shall control.

The bylaws conferred general power to perform all lawful acts and things "as are not by statute or by the Articles of Incorporation or by these Bylaws prohibited." With regard to the number and election of the board
368 of directors and their terms of office, the bylaws paralleled EDFW's constitutional *368 and canonical provisions, stating,

> The Bishop of the Diocese of Fort Worth shall be the Chairman of the Board of Trustees of the Diocesan Corporation. In addition to the Bishop the number of elected Trustees which shall constitute the Board shall be five. The term of office for each elected Trustee shall be for five years and each Trustee shall hold office from the date of his election until his successor shall have been duly elected and qualified, or until his death, resignation, disqualification or removal. There shall be elected at each annual meeting one Trustee. Trustees may be either lay persons in good standing of a parish or mission in the Diocese of Fort Worth, or members of the Clergy canonically resident within the Diocese, in addition to the Bishop.

See Tex. Bus. Orgs. Code Ann. § 22.207 (West 2012) ("Election and Control by Certain Entities"). The bylaws also provided for holding regular meetings and special meetings whenever called by the President—designated in the bylaws as the chairman of the board—"or by any two Trustees." They further provided that the quorum

necessary to transact business would be not less than a majority of the total number of trustees then acting and set forth the procedures for resignation, board vacancies, and the removal of trustees: "Any Trustee of the Diocesan Corporation may be removed by the Bishop of the Diocese of Fort Worth." The bylaws also included a provision for amendment, stating,

These Bylaws may be amended, altered, changed, added to or repealed, in whole or in part, by the affirmative vote of a majority of the total number of Trustees at any regular or special meeting of the Board, if notice of the proposed change is included in the notice of such meeting.

In 1984, a civil court judgment transferred part of the Diocese of Dallas's real and personal property to EDFW and vested legal title of the property in the Corporation,[21] except for certain assets for which the Diocese of Dallas's bishop and his successors had been designated as trustee; those assets transferred to EDFW's bishop as trustee and to his successors in office.[22] *Episcopal Diocese* , 422 S.W.3d at 648.

21 The 1984 judgment likewise vested legal title of the property remaining with the Diocese of Dallas in the Corporation of the Episcopal Diocese of Dallas.

22 The Diocese of Dallas and its diocesan corporation, EDFW and its diocesan corporation, and the Dioceses' bishops as trustees were parties to the 1984 judgment. In the 1984 judgment, the trial court stated, "Nothing in this judgment shall be deemed to deal with, or otherwise affect, properties, real or personal, disposed of under testamentary or inter vivos gift executed or effective prior to December 31, 1982, which bequest is to the Diocese of Dallas or the Bishop thereof," but it also noted that the two dioceses had resolved that their "various assets, properties, investments, trusts and related matters" would be divided in an equitable manner.

3. 1991–2005

Less than ten years after its admission into union with TEC, conflicts based on differing theological views began to arise between both TEC and EDFW and EDFW and some of its congregations.

In 1991, the Episcopal Church of St. Mary the Virgin withdrew from TEC and EDFW to join a Roman Catholic
369 Diocese.[23] *369 And at a standing committee meeting, after TEC assigned an apportionment of approximately $230,000 to EDFW, the committee noted that "the withholding of apportionment is regarded by some as sanctions against immorality." The committee agreed to allow the individual parishes within EDFW to choose whether to fund TEC's Executive Council's activities by apportionment through vestry action indicating whether the individual parish's percentage of the diocesan assessment would be forwarded to TEC's Executive Council or should remain under EDFW's control.

23 EDFW's standing committee unanimously recommended that the parish be allowed to withdraw upon receipt and review of proper documentation, and in 1993, the standing committee approved the Roman Catholic Diocese's board of trustees' resolution to pay off the loan on the former Episcopal parish's property and to transfer title to the property to the Roman Catholic Diocese.

During the 1990s, the standing committee received a letter from another diocese that "encouraged the Diocese of Fort Worth to remain in the Episcopal Church" and other correspondence "from those dioceses questioning the intentions of [EDFW] of remaining in the Episcopal Church in the United States of America and the reasons why [EDFW] had reduced its apportionment to the Executive Council's program."

In 1992, the rector and vestry of Holy Apostles Episcopal Church, one of EDFW's parishes, announced the parish's intent to seek membership in the Antiochean Orthodox Church and to sever its relationship with EDFW, TEC, and "the rest of the Anglican Communion."[24] Around then, EDFW's standing committee

discussed developing a "future strategy regarding a parish that may try to leave and take diocesan property with them," and in early 1994, the committee finalized the membership of a "Protection of Diocesan Property Committee."[25] The president of the standing committee was named as the property protection committee's chairman. Also during the same time period, the standing committee questioned whether it had veto power over the Corporation's trustees. At their June 1993 meeting, the standing committee received the answer to its question—after a lengthy discussion between Canon James DeWolfe, Bishop Iker, and the Corporation's trustees, it was determined that the Corporation's trustees "had final authority in matters concerning Diocesan property."

24 The standing committee agreed that the Holy Apostles rector and vestry had left them "no choice but to pursue in the manner required under the Canons of the Episcopal Church and the Diocese of Fort Worth," including obtaining a temporary restraining order and notices to inhibit and to excommunicate. Three years later, a negotiated settlement cut short litigation between EDFW and the breakaway parish and returned full possession of the property in question to EDFW.

25 Later in 1994, one of the standing committee's members, the Reverend Keith L. Ackerman, resigned to become the Bishop of the Diocese of Quincy, which subsequently faced property issues similar to the ones in the instant case. *See Diocese of Quincy v. Episcopal Church* , 2014 IL App (4th) 130901, ¶¶ 1, 383 Ill.Dec. 634, 14 N.E.3d 1245, 1249–50 (Ill. App. Ct. 2014), *appeal denied* , 386 Ill.Dec. 794, 21 N.E.3d 713 (Ill. 2014).

By 2000, TEC's General Convention had formed a task force to visit EDFW regarding the implementation of some of TEC's resolutions. In 2000 and 2001, the standing committee was faced with ecclesiastical charges involving Samuel L. Edwards, one of the priests then canonically resident in EDFW. Edwards had moved from Texas to begin acting as the rector of a parish in the Diocese of Washington despite having not been licensed to do so by the bishop pro tempore of the diocese in which that parish was located. *See Dixon v. Edwards* , 290 F.3d 699, 703, 705, 707 (4th Cir. 2002).[26] On December 17, 2001, the standing committee issued a presentment
370 *370 against Edwards on one of the three ecclesiastical charges, *id.* at 707, and the following year the standing committee consented to Edwards's deposition.

26 A federal lawsuit filed not long after the ecclesiastical charges against Edwards were transferred to EDFW sought a declaration that Edwards was not the parish's rector based on his not being found "duly qualified" under a TEC canon, in part on Edwards's having advised the bishop pro tempore that "he would not guarantee her that he would not attempt to lead Christ Church out of [TEC] or attempt to take Church property as part of that effort." *Dixon* , 290 F.3d at 703, 705–08 & nn.5, 8. Along with then-Bishop of the Diocese of Pittsburgh Robert William Duncan Jr., Bishop Iker filed an amicus brief in the federal suit in support of Edwards on January 8, 2002. In the brief, the two bishops stated that an Episcopal bishop "is governed by the constitution and canons of the Church" and that an Episcopal bishop does not act "independently of the checks and balances of the legal system of which they are a part. A bishop must adhere to the constitution and canons of the Church or be subject to discipline." They also stated that "[t]he dioceses have canons that cannot be inconsistent with national canons." The district court awarded summary judgment to Washington's bishop pro tempore, and the Fourth Circuit affirmed the district court's judgment in May 2002. *Id.* at 703.

Presiding Bishop Schori deposed Duncan on September 19, 2008, and on October 4, 2008, the majority of the Pittsburgh Diocese voted to secede from TEC and align with the Anglican Province of the Southern Cone. *Calvary Episcopal Church, Pittsburgh v. Duncan* , No. 293 C.D. 2010, 2011 WL 10841592, at *2, *5 (Pa. Commw. Ct. Feb. 2, 2011) (construing "the Episcopal Diocese of Pittsburgh of the Episcopal Church of the United States of America" as used in stipulation to mean the loyalist faction that remained with TEC), *appeal denied* , 612 Pa. 705, 30 A.3d 1193 (Pa. 2011).

In 2003, EDFW continued to object to actions by TEC and other dioceses with which it disagreed, and the standing committee unanimously agreed "to work together in initiating a gathering ... in [EDFW] of the Network of Confessing Dioceses in order to work on the realignment of the Anglican Communion." The standing committee met with a bishop of the Reformed Episcopal Church (REC) in May 2003, and decided to meet with REC in the future to further discuss their relationship.[27]

27 REC was organized in 1873 after a schism with TEC. *See* The Reformed Episcopal Church, *An Overview of the REC* , http://www.recus.org/about.html (last visited Mar. 28, 2018). REC's vision, as set out in a paper by its bishop that was distributed at a 2003 standing committee meeting, was the formation of an Anglican Province of America outside of TEC.

EDFW was not the only diocese experiencing strife in its relationship with TEC during this time. In addition to the Diocese of Quincy[28] and the Diocese of Pittsburgh,[29] which were experiencing their own differences with TEC, in 2004, the Diocese of San Joaquin began the process of amending its governing documents, including the articles of incorporation for "the corporation sole," which held title to the diocese's trust funds and real property, redefining how the vacancy of a bishop was to be filled, and omitting the requirements that the local choice of bishop be approved by the national church as provided in TEC's constitution and canons. *See Diocese of San Joaquin v. Gunner* , 246 Cal.App.4th 254, 202 Cal.Rptr.3d 51, 56–57 (2016, pet. denied) (op. on reh'g).
371 Nevertheless, even as St. Michael's Episcopal Church in Fort Worth considered holding *371 a parish vote to leave TEC and affiliate with the Anglican Church in America, in 2005, Bishop Iker and the standing committee still expressed hope that "all of us will stand together during this time of difficulty in the Episcopal Church."

28 *See Diocese of Quincy* , 2014 IL App (4th) 130901, ¶ 9, 383 Ill.Dec. 634, 14 N.E.3d at 1250 ("Over the years a doctrinal controversy developed....").

29 *See Calvary* , 2011 WL 10841592, at *1 (noting that in 2003, Calvary Episcopal Church filed a complaint against Duncan and members of the Diocese of Pittsburgh's standing committee, alleging that they "intended to extinguish the property rights and interests of" TEC).

4. 2006–2008

In June 2006, immediately after Presiding Bishop Schori's election, Bishop Iker and the standing committee approved the following statement,

> The Bishop and the Standing Committee of the Episcopal Diocese of Fort Worth appeal in good faith to the Archbishop of Canterbury, the Primates of the Anglican Communion, and the Panel of Reference for immediate alternative Primatial Oversight and Pastoral Care following the election of Katharine Jefferts Schori as Presiding Bishop of the Episcopal Church.
>
> This action is taken as a cooperative member of the Anglican Communion Network in light of the Windsor Report and its recommendations.

A month later, Bishop Iker discussed with the standing committee a recent meeting of EDFW's Constitution and Canons Committee and its proposed resolutions, additions, and changes to EDFW's constitution and canons "in light of recent developments in our Church," which would be submitted to the diocesan convention in November 2006.[30]

30 In July 2006, Bishop Iker, along with the bishops of Dallas, Pittsburgh, San Joaquin, South Carolina, Springfield, and Central Florida, appealed to the Archbishop of Canterbury, asserting, "Seven dioceses are seeking to reshape their life together as dioceses ... under the oversight of a Canterbury appointed Commissary, temporarily exercising some of the

responsibilities normally assigned to the American primate."

On August 15, 2006, the Corporation amended its bylaws to remove all references to TEC. *Episcopal Diocese* , 422 S.W.3d at 648. Article I, "Authority," was amended to provide that the Corporation's affairs

> shall be conducted in conformity with the body now known as the Episcopal Diocese of Fort Worth's acknowledgment of and allegiance to the One, Holy, Catholic and Apostolic Church of Christ; recognizing the body known as the Anglican Communion to be a true branch of said Church; with all rights and authority to govern the business and affairs of the Corporation being solely in the board of trustees (as hereinafter defined, the "Board") of the Corporation.

This amendment also deleted the reference to "the Constitution and Canons of the Episcopal Church in the United States of America and the Constitution and Canons of the Episcopal Diocese of Fort Worth." A new section was added to Article II, "Directors," which stated,

> Section 2. The Bishop. The bishop recognized by the body now known as the Episcopal Diocese of Fort Worth (the "Bishop") shall be a trustee and a member of the Board. The Bishop shall be the Chairman of the Board of the Corporation.
>
> In the event of a dispute or challenge regarding the identity of the Bishop of the body now known as the Episcopal Diocese of Fort Worth, the Elected Trustees (as hereinafter defined in Article II, Section 3) shall have the sole authority to determine the identity of the Bishop for purposes of the Corporation's Articles of Incorporation, as amended from time to time, and these Bylaws.
>
> In the event the body now known as the Episcopal Diocese of Fort Worth is without a Bishop, a majority of the Elected Trustees shall have the sole authority

372 *372

> to appoint a Chairman of the Board who shall, for purposes of the Corporation's Articles of Incorporation, as amended from time to time, and these Bylaws, have all the rights and privileges of the Bishop of the body now known as the Episcopal Diocese of Fort Worth.
>
> If a determination pursuant to this Article II becomes necessary in the discretion of any member of the Board, the Board member may call a special meeting of the Board, subject to the notice provisions set forth in these Bylaws, for the purpose of making the determination. The vote of a majority of members of the Board present at the special meeting, wherein a quorum is present, shall be decisive.

There was no change to the number, election, or terms of office for trustees other than to clarify that the trustees, who were elected at a rate of one per annual meeting, could be either lay persons in good standing of a parish or mission "in the body now known as the Episcopal Diocese of Fort Worth" or members of the clergy "canonically resident within the geographical region of the body now known as the Episcopal Diocese of Fort Worth." The rest of the sections remained substantively unchanged except for the section pertaining to removal of trustees. While the previous version of the section provided that any trustee could be removed by the bishop, the amended section stated that any elected trustee could be removed by a majority of the remaining members of the board. The amended bylaws also stated, "These Bylaws were considered and unanimously approved at the Board's annual meeting August 15, 2006, at which every Board member was present."

On September 5, 2006, the Corporation's board likewise amended the Corporation's articles of incorporation. *Id.* The preamble recited that articles IV, V, and VI had been revised and approved by a unanimous vote by the board on August 15, 2006.

Section 1 of article IV was amended to state that the Corporation was organized "[t]o receive and maintain a fund or funds or real or personal property, or both, from any source," deleting the portion of the earlier article that specified that "any source" included "all real property acquired for the use of [EDFW] as well as the real property of all parishes, missions and diocesan institutions."

Section 2 of article IV was amended to state that the property held under section 1 "shall be administered in accordance with the Bylaws of the Corporation as they now exist or as they may hereafter be amended," deleting reference to EDFW's constitution and canons. Article VI incorporated a provision to identify the Corporation's chairman, paralleling and referencing the amended bylaws. Article VI also listed the names of the trustees serving at that time: Salazar, Barber, Bates, Virden, Patton, and Bishop Iker. According to Virden, the 2006 amendments to the Corporation's bylaws "were not adopted as part of any plan to withdraw from TEC, as those discussions did not begin until the summer of 2007."

On October 19, 2006, Presiding Bishop Schori informed Bishop Iker that some of the provisions in EDFW's constitution and canons were contrary to TEC's constitution and canons and that those provisions needed to be changed. Otherwise, Presiding Bishop Schori said that she would have to consider what sort of action to take to bring EDFW into compliance. On November 15, 2006, TEC's Executive Council received a task force report
373 identifying EDFW as a "problem diocese" that needed to be monitored.*373 On June 14, 2007, TEC's Executive Council declared some of EDFW's constitutional and canonical amendments to be "null and void." Four days later, Bishop Iker and the standing committee released a statement noting that an adversarial relationship had developed between EDFW and TEC, asserting that TEC's Executive Council "ha[d] no legislative authority, and its resolutions [were] not binding on anyone," and further positing that it was the Executive Council's resolution "in this matter that is null and void, and it is of no force or effect in this Diocese."

On November 8, 2007, the week before EDFW's November 17, 2007 Annual Convention, Presiding Bishop Schori published an open letter to Bishop Iker, stating that several of the proposed changes to EDFW's constitution would violate the requirement in TEC's constitution for the diocese's "unqualified accession."[31] In the letter, she warned Bishop Iker of the potential canonical consequences and asked him to lead EDFW "on a new course that recognizes the interdependent and hierarchical relationship between the national Church and its dioceses and parishes" instead of in a direction "that would purportedly permit [EDFW] to depart from [TEC]." The Episcopal Church, *Fort Worth bishop receives notice of possible consequences if withdrawal effort continues* (Nov. 8, 2007), at https://www.episcopalchurch.org/library/article/fort-worth-bishop-receives-noticepossible-consequences-if-withdrawal-effort.

31 In the interest of time, instead of requesting that the already voluminous record be supplemented, we have opted to take judicial notice sua sponte of Presiding Bishop Schori's letter and Bishop Iker's response—both of which were published on the internet and referenced, but not included, in the record—for the sole purpose of providing context for the parties' dispute. *See* Tex. R. Evid. 201.

On November 12, 2007, Bishop Iker responded by publishing his own open letter, in which he stated,

> While I do not wish to meet antagonism with antagonism, I must remind you that 25 years ago this month, the newly formed Diocese of Fort Worth voluntarily voted to enter into union with the General Convention of the Episcopal Church. If circumstances warrant it, we can likewise, by voluntary vote, terminate that relationship. Your aggressive, dictatorial posturing has no place in that decision. Sadly, however, your missive will now be one of the factors that our Convention will consider as we determine the future course of this diocese for the next 25 years and beyond, under God's grace and guidance.

The Episcopal Diocese of Fort Worth, *A letter from Bishop Iker to the Presiding Bishop* (Nov. 12, 2007), at http://www.fwepiscopal.org/bishop/bishoppbreply.html.

In his November 17, 2007 address at the Annual Convention, Bishop Iker recounted the Executive Council's resolution and stated "that such declarations exceeded the authority of the Executive Council, which is responsible for the program and budget of the General Convention, and that they had no legislative or judicial authority to make such a pronouncement." Bishop Iker stated, "The Council's declaration about the legitimate legislative process in this Diocese is, in fact, null and void." Bishop Iker also voiced his objection "to the claim that the Presiding Bishop has any canonical authority in this Diocese or any legitimate power over the leadership of this Diocese" and stated that "[t]here is no such thing as 'the national Church,' " but rather a
374 confederation of dioceses.*374 At the standing committee's follow-up meeting on November 19, 2007, Bishop Iker expressed his desire that his convention address be shown in all of EDFW's parishes and missions prior to each congregation's annual parish meeting. The standing committee discussed with Bishop Iker "the need to begin immediate study of the Constitution and Canons of the Province of the Southern Cone."

In January 2008, Bishop Iker sent a directive to appoint clerical members of the standing committee plus four rectors "who have said they want to remain in TEC and four who believe it is time to separate," asking for their assistance in addressing conflicts in EDFW "concerning the plan to separate from The General Convention of The Episcopal Church." Three months later, at the March 2008 meeting, the standing committee also discussed, among other things, "the current situation in the Diocese of San Joaquin."[32]

> 32 A month after EDFW's November 2007 convention, the annual convention of the Diocese of San Joaquin voted to leave TEC and to affiliate with the Anglican Province of the Southern Cone. *Diocese of San Joaquin* , 202 Cal.Rptr.3d at 57. The bishop of that diocese then filed with the California Secretary of State an amendment to the articles of incorporation of the corporate sole to change its name from "The Protestant Episcopal Bishop of San Joaquin" to "The Anglican Bishop of the Diocese of San Joaquin." *Id.* In March 2008, the San Joaquin bishop was deposed by TEC. *Id.* at 57–58. The Right Reverend John Clark Buchanan, a member of TEC's House of Bishops, averred that since 2006, the leaders of five of TEC's 109 dioceses—including EDFW, the Diocese of Pittsburgh, and the Diocese of San Joaquin —had purported to remove their dioceses from TEC over internal disputes.

A month later, the committee's notes reflect that Bishop Iker was "trying to work out a pastoral plan and provision" for the parishes "who may wish to remain in TEC following [the] November Diocesan Convention," with the assistance of Dallas's bishop and standing committee. Bishop Iker and the standing committee sent a letter to the Internal Revenue Service to inform the IRS that EDFW "no longer desires to be included under the group ruling of the Protestant Episcopal Church of the United States of America." In May 2008, the standing committee approved a new civil employment contract with Bishop Iker and ended the former employment agreement.

Reverend Buchanan declared in his affidavit that in 2008, prior to EDFW's purported disaffiliation, TEC's House of Bishops had "affirmed that diocesan leaders have no authority to remove their dioceses from The Episcopal Church." But by September 2008, the standing committee was poised to recommend that EDFW

"affiliate with the Anglican Province of the Southern Cone as a member diocese, on a temporary, pastoral basis, until such time as an orthodox Province of the Anglican Communion can be established in North America." The standing committee's members unanimously approved and endorsed the following resolution from EDFW's Convention Resolutions Committee:

> BE IT RESOLVED, that the Episcopal Diocese of Fort Worth, meeting in its 26th Annual Convention, does hereby accept the provision made by the Anglican Province of the Southern Cone, and the Episcopal Diocese of Fort Worth does hereby immediately enter into membership with the Anglican Province of the Southern Cone as a full and equal constituent member of such Province, and the Episcopal Diocese of Fort Worth does hereby accede to the authority of the Constitution and Canons of the Anglican Province of the Southern Cone to the extent such Constitution and Canons are not contrary to Holy Scripture

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> and the Apostolic teaching of the one holy, catholic and apostolic Church.

In September 2008, Bishop Iker sent a letter to the rector of All Saints Episcopal Church, Christopher Jambor, stating that properties located at 4936, 4939, 5001, and 5005 Dexter Avenue, Fort Worth, were not "picked up" by the 1984 declaratory judgment nor held by the Corporation but rather were held in the name of All Saints Episcopal Church. In the letter, Bishop Iker asked that a deed be executed to transfer the parcels to the Corporation.

On November 15, 2008, in his address at the 26th Annual Convention, Bishop Iker observed that EDFW had come "to this historic moment of decision making" during which EDFW would "vote to rescind" its accession to TEC's constitution and canons and to align itself "instead with an orthodox Province of the Anglican Communion, the Province of the Southern Cone." Bishop Iker stated,

> Some have asked, "Will we still be Episcopalians after our realignment vote is taken?" And the answer is, "Well, yes and no—that all depends!" After all, no one can "un-Episcopalian-ize you, and no one is being kicked out of the family. We will still be The Episcopal Diocese of Fort Worth. We are not changing our name, because we are not changing our identity. We will still have an Episcopal form of polity, which means being in a church that is under a Bishop. We will continue to stand for what our forebears meant when they called themselves Episcopalians. But we will no longer be a part of the ecclesiastical structure sometimes known as the Protestant Episcopal Church in the United States of America, which is governed by the General Convention. TEC is not the only Episcopal Church in the Anglican Communion, and it does not own the name "Episcopalian."
>
> ....
>
> ... [T]he proposals before this Convention have one clear message: We here in the Episcopal Diocese of Fort Worth intend to be who we have always been, to believe what we have always believed, and to do what we have always done. We are not going away, nor are we abandoning anything. We are not leaving the Church—we are the Church. We will remain an orthodox diocese of catholic Christians, full members of the worldwide Anglican Communion.

The majority of EDFW's Annual Convention voted to leave TEC and to affiliate with the Anglican Province of the Southern Cone.[33]

33 The proposed constitutional amendments under consideration at the Annual Convention were the same ones presented the previous year that required a second reading.

Following the 26th Annual Convention in November, EDFW published a statement on its website, declaring,

> We remain a member diocese of the Anglican Communion.
>
> We remain the Episcopal Diocese of Fort Worth. The word "episcopal" identifies us as part of the apostolic succession, with a bishop as our elected chief pastor.
>
> We remain in communion with other Episcopalians. We share fellowship with all those in any Province who recognize the authority of Scripture and the faith and order of historic Anglicanism.

Shortly thereafter, TEC issued a letter of inhibition, to which Bishop Iker replied three days later, stating that "the inhibition is of no force or effect, since the Bishop and Diocese, meeting in annual convention, constitutionally realigned with another province of the Anglican Communion on Saturday, Nov. 15, and are
376 now *376 constituent members of the Anglican Province of the Southern Cone." Bishop Iker further clarified his position, stating,

> Katharine Jefferts Schori has no authority over me or my ministry as a Bishop in the Church of God. She never has, and she never will.
>
> Since November 15, 2008, both the Episcopal Diocese of Fort Worth and I as the Diocesan Bishop have been members of the Anglican Province of the Southern Cone. As a result, canonical declarations of the Presiding Bishop of The Episcopal Church pertaining to us are irrelevant and of no consequence.

On December 5, 2008, TEC accepted Bishop Iker's November 24, 2008 renunciation and removed and released him from the obligations of all ministerial offices of TEC. On December 16, 2008, at a special meeting of the standing committee, the Corporation's board, and the chairman of the constitution and canons committee, the first item of discussion addressed parishes and individuals who wanted to stay with TEC. Of particular concern was the perception that the "Steering Committee of North Texas Episcopalians" and the " 'Remain Episcopal' folks" were using the official Diocesan shield "in lots of their publicity—in newspaper ads and on the web, etc. —identifying themselves boldly as 'the Episcopal Diocese of Fort Worth in the Episcopal Church U.S.A,' " which the meeting's attendees said was confusing and misleading. Those attending unanimously agreed to send a "cease and desist" letter regarding use of EDFW's official seal and shield in publicity. They then discussed the "very conflicted situation which now exists at All Saints' Church, Fort Worth."

5. 2009

Presiding Bishop Schori issued a "Notice of Special Meeting of the Convention of the Episcopal Diocese of Fort Worth, Saturday, February 7, 2009." In that notice, she stated that as there was no bishop nor any qualified members of the standing committee in the diocese, she had called the meeting "in consultation with the Steering Committee of faithful Episcopalians of that Diocese," to elect a provisional bishop and to elect or appoint members of the standing committee, executive council, and other officers, to adopt a budget, and to consider resolutions relating to "recent purported amendments to the Constitution and canons of the Diocese," as well as other resolutions relating to the TEC-affiliated diocese's organization and governance.

The emergency convention convened at Trinity Episcopal Church under Presiding Bishop Schori. After quorums were verified and the "parliamentary necessities were accomplished," the first order of business was to elect a provisional bishop. Edwin F. Gulick Jr., who was elected to the post, thereafter made appointments to various commissions and committees for the vacancies resulting from the schism. Bishop Gulick also appointed trustees for the Corporation, on the basis that the previous trustees' effective resignation occurred when they left TEC by the "irregular, illegal action of the convention in 2008."[34]

34 Additionally, Bishop Gulick testified in his deposition that "sufficient persons" were elected in offices "necessary to conduct the business of the Diocese."

In his deposition, Bishop Gulick acknowledged that the Corporation's board members were supposed to be elected one per year and, between sessions, replacements would be voted on by the board. And despite his inability to point to specific language authorizing EDFW to remove all of the trustees, he nevertheless
377 explained that "in the unforeseen, unanticipated *377 emergency moment," everything possible had been done to comply with EDFW's and TEC's constitutions and canons.

On April 14, 2009, the TEC parties adopted amended and restated articles of incorporation for the Corporation and filed them with the Texas Secretary of State. These amended and restated articles purported to return to the Corporation's original articles of incorporation (i.e., administration in accordance "with the Constitution and Canons of the Episcopal Diocese of Fort Worth and the Episcopal Church of the United States"), and listed Bishop Gulick, James Hazel, John Stanley, Robert Bass, Cherie Shipp, and Trace Worrell as the current members of the board of trustees.[35]

35 A week later, Bishop Iker sent a certificate of correction to the secretary of state regarding the Corporation's articles.

At the 27th Annual Meeting of the Diocesan Convention on November 14, 2009, the TEC-affiliated EDFW ratified the actions of the February 7, 2009 special meeting, and after Bishop Gulick's resignation, C. Wallis Ohl was elected and installed as the TEC-affiliated EDFW's bishop. The same individuals who were put into place at the February 7, 2009 special meeting were elected to the TEC-affiliated diocese's standing committee and the Corporation's board of trustees. The convention also ratified the resolutions made and actions taken at the February 7, 2009 special meeting and brought EDFW's constitution and canons back into compliance with TEC's constitution and canons. Bishop Ohl testified that the faction headed by Bishop Iker was not the "Episcopal Diocese of Fort Worth," that he—not Bishop Iker—was the legitimate and properly elected EDFW Bishop, and that he, Hazel, Shipp, Worrell, Bass, and Stanley—and not Bishop Iker, Salazar, Patton, Virden, Barber, and Bates—were the Corporation's legitimate and properly elected trustees. *See Episcopal Diocese* , 422 S.W.3d at 647–49.

C. The Lawsuit

On the same day that the TEC parties' amended and restated Articles of Incorporation were filed—April 14, 2009—the TEC parties filed suit for conversion and violations of business and commerce code section 16.29.[36] Additionally, the TEC parties sought declaratory and injunctive relief regarding who could act as EDFW's representatives and who had use and control of EDFW's real and personal property.[37] *See In re Salazar* , 315 S.W.3d 279, 282 (Tex. App.—Fort Worth 2010, orig. proceeding).

36 Business and commerce code section 16.29 is now section 16.103, "Injury to Business Reputation; Dilution." *See* Tex. Bus. & Com. Code Ann. § 16.103 (West Supp. 2017).

37 In 2009, the Corporation transferred titles to Trinity Episcopal Church (Fort Worth) and St. Martin-in-the-Fields Episcopal Church (Southlake) to the rector, wardens, and vestry of these parishes that stayed with TEC. It also transferred title to St. Luke's Episcopal Church (Stephenville) to the rector, wardens, and vestry of that parish after evidence of satisfactory removal of the Corporation's name from any encumbrances on the property. Bishop Iker thereafter issued orders dissolving the relationship between the diocese and these churches.

1. Summary Judgment—First Round

The parties filed competing motions for summary judgment. As explained by the supreme court,

> In its motion for summary judgment TEC argued, in part, that the actions of the Board of Trustees in amending the Fort Worth Corporation's articles of incorporation were void because the actions went beyond the authority of the corporation, which was created and existed

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> as an entity subordinate to a Diocese of TEC. TEC argued that "[t]he secular act of incorporation does not alter the relationship between a hierarchical church and one of its subordinate units" and that finding otherwise "would risk First Amendment implications." The Diocese, on the other hand, argued that the case was governed by the Texas Non-Profit Corporation Act and the Texas Uniform Unincorporated Nonprofit Association Act; under those statutes a corporation may amend its articles of incorporation and bylaws; and TEC had no power to limit or disregard amendments to the Corporation's articles and bylaws.

Episcopal Diocese , 422 S.W.3d at 650 (footnotes omitted).

After the trial court granted summary judgment and issued a declaratory judgment for the TEC parties in 2011, stating that the changes made by Appellees to the Corporation's articles and bylaws were ultra vires and void,[38] Appellees appealed directly to the supreme court. The heart of the dispute, as identified by the supreme court, was "whether the 'deference' (also sometimes referred to as the 'identity') or 'neutral principles of law' methodology should be applied to resolve the property issue." *Id.* at 649.

38 The original cause number in the trial court was 141-237105-09. The trial court granted Appellees' motion to sever to make the trial court's interlocutory judgment for the TEC parties final and appealable. The trial court severed the claims subject to the summary judgment into cause number 141-252083-11 and stayed the remainder of the unfinished action. Among others, the petitioners in the direct appeal included Bishop Iker, Salazar, Patton, Virden, Barber, Bates, several clergy, and 47 churches.

The court's opinion in the direct appeal issued in 2013. In it, the court reversed the trial court's judgment and remanded the case to the trial court to be considered under the neutral principles methodology. *Id.* at 647. In its opinion, the court stated that under this methodology, ownership of disputed property is to be determined by considering evidence such as the deeds to the properties, the terms of the local church charter (including articles of incorporation and bylaws, if any), the relevant provisions of governing documents of the general church and local church entities, the governing state statutes, and other items as applicable. *Id.* at 651–52 ("[O]n remand the trial court is not limited to considering only the four factors listed in *Jones* [*v. Wolf* , 443 U.S. 595, 99 S.Ct. 3020, 61 L.Ed.2d 775 (1979)].... [t]he elements listed in *Jones* are illustrative."). It also referenced *Masterson* , which issued on the same day, as applicable to this case regarding church canons and Texas law. *Id.* at 653.

In *Episcopal Diocese* as well as in *Masterson* , the court established guidance for the case on remand. In *Episcopal Diocese* , the court observed, "[A]bsent agreement or conclusive proof of title to the individual properties and the capacities in which titles were taken, fact questions exist under neutral principles of law, at a minimum, about who holds title to each property and in what capacity." *Id.* at 652. The court also instructed,

> While we agree that determination of who is or can be a member in good standing of TEC or a diocese is an ecclesiastical decision, the decisions by Bishops Gulick and Ohl and the 2009 convention do not necessarily determine whether the earlier actions of the corporate trustees were invalid under Texas law. The corporation was incorporated pursuant to Texas corporation law and that law dictates how the corporation can be operated, including determining the terms of office of corporate directors,

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> the circumstances under which articles and bylaws can be amended, and the effect of the amendments.

Id. The court concluded that the record failed to conclusively show as a matter of law that the Corporation's trustees had been disqualified from serving as such at the relevant times, whether the 2009 appointments to the Corporation's board by Bishop Ohl were valid or invalid under Texas law, or whether, under Texas law, the actions taken by the trustees appointed by Bishop Ohl in 2009 were valid or invalid. *Id.* at 652–53.

2. Summary Judgment—Second Round

Upon remand to the trial court, the TEC parties filed an amended petition in which they renewed their severed claims.[39] By this time the severed claims included not only conversion and business and commerce code section 16.29 violations but also breach of fiduciary duty, breach of trust, trespass to try title, and an action to quiet title. Additionally, the TEC parties had pleaded for the imposition of a constructive trust under a number of theories, including estoppel. They also continued to seek declaratory and injunctive relief and an accounting.[40]

39 Prior to the TEC parties' filing the amended petition, the trial court had denied their motion to consolidate their previously severed claims.

40 Appellees moved to strike the renewed claims, but the trial court denied the motion.

The parties once more filed competing motions for partial summary judgment.[41]

41 We note here that in considering the competing summary judgment motions, the trial court was faced with the same herculean task that has been presented to us on appeal. First, it was required to read a record totaling over 10,000 pages on remand, a task that would take an above-average reader, such as a trial judge, an estimated 200 hours, or between five and six weeks, assuming he or she devoted 40 hours per week solely to the endeavor. (Including the portions of the record developed prior to the direct appeal, the record currently totals over 14,000 pages.) Then the trial court was presented with the daunting task of conducting the research and analysis necessary to apply to that voluminous record such exceedingly complex legal issues as state corporations, associations, and trust law, heavily overlaid by the U.S. Supreme Court's First Amendment jurisprudence, an endeavor that could easily have taken as much time—if not a good deal more—than the reading of the record. All the while, the trial court was expected to carry out its other obligations of attending to the hundreds of cases pending on its docket that were, likewise, deserving of the trial court's attention. On appeal, as acknowledged by Appellees in their February 12, 2018 "Supplemental Response to Latest Letter Brief," we have received an additional "346 pages of briefing from the parties in this appeal" to consider and address.

a. Appellees' Motion and the TEC Parties' Response

In their motion, Appellees argued:

• that the deeds, the 1984 judgment, the Diocese's charters, and adverse possession vested the Corporation with title and control, that TEC's charters made no claim to title and only asserted an invalid trust, and that the TEC parties' pleadings conceded that title was in the Corporation;

• that state corporations and associations law requires adherence to the Corporation's and Association's bylaws, making Appellees the Corporation's elected trustees and Bishop Iker the chairman of the Corporation's board and depriving the TEC parties of standing when TEC's own charters prevented the TEC parties from convening
380 the special convention upon which their claims were based;*380 • that state law prohibits an express, implied, or constructive trust interest for the TEC parties;

• that the same rules that allocated control to Appellees of the real property also applied to the funds, trusts, and endowments that the TEC parties sought; and

• that estoppel and quasi-estoppel did not apply because Appellees only wanted a declaration to be left alone.

The TEC parties responded that Appellees had judicially admitted that the Corporation held all property in trust for EDFW and its congregations, and since those entities were subordinate affiliates of the hierarchical church, the Corporation therefore held the property in trust for the TEC parties because they were the only parties recognized by TEC as those entities. They also argued, as they do on appeal, that the Dennis Canon, in addition to Appellees' words and actions prior to the schism, imposed a trust—express, contractual, or constructive—in their favor. And they argued that Appellees' adverse possession claim failed because there was no "adverse" interest until the 2008 schism.

b. The TEC Parties' Motion and Appellees' Response

In their summary judgment motion, the TEC parties contended:

• that because TEC had determined that Appellees *did not* represent EDFW and its congregations and that the TEC parties *did* represent them, the property held in trust by the Corporation was held in trust for the TEC parties;

• that Appellees had no right to control the Corporation because, in addition to the plain terms of the Corporation's bylaws, it was a subordinate entity of EDFW that only the TEC parties could control;

• that state associations law favored the TEC parties because local chapters are treated as constituents of larger organizations;

• that an express trust was created when EDFW agreed to TEC's rules in exchange for formation, membership, and property, including the Dennis Canon, but that even without an express trust, the TEC parties were entitled to a constructive trust;

• that Appellees' adverse possession claim failed because they did not meet all of the necessary elements to establish that claim;

• that Appellees were estopped from raising claims and defenses that contradicted their commitments, conduct, and prior statements to courts and other federal and state authorities;

• that, contrary to Appellees' assertion, the TEC parties did have standing; and

• that based on all of the above, the trial court should grant summary judgment on the TEC parties' trespass-to-try-title claim and their request for attorney's fees and for declaratory judgment.[42]

42 The TEC parties also raised retroactivity and deference, re-urging their original, pre-*Episcopal Diocese* and *Masterson* arguments.

Appellees responded that the supreme court had rejected the TEC parties' deference theory in favor of neutral principles, that there was no express or irrevocable trust in TEC's favor nor a contractual or constructive trust, that there was no breach of fiduciary duty, and that the TEC parties' remaining grounds were baseless.*381 **c. Supplemental Motions**

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On March 2, 2015, the trial court, except as to claims involving All Saints Episcopal Church, granted Appellees' motion and denied the TEC parties' motion. The parties filed supplemental summary judgment motions to address the All Saints issues[43] and agreed that the remaining claims in cause number 141-252083-11—the claims for attorney's fees, conversion, violations of business and commerce code section 16.29, damages for breach of fiduciary duty (as opposed to the predicate for a constructive trust), the action to quiet title, and for an accounting—should be severed and stayed.

43 The record reflects that All Saints had a troubled history with EDFW's leadership. Four years after the 1986 agreement between All Saints and EDFW to designate All Saints as EDFW's Cathedral Church, in October 1990, a dispute arose between then-Bishop Pope and All Saints with regard to cathedral status and how the property was held—the bishop wanted title to the property to be held in conformity with EDFW's constitution and canons, while All Saints's vestry wanted to hold it in trust for TEC in conformity with TEC's constitution and canons.

In their summary judgment motion relating to All Saints Episcopal Church,[44] Appellees argued that the Corporation held legal title to two of the All Saints properties—the sanctuary and parish hall on 5001 Crestline and the rectory on 5003 Dexter—by virtue of the 1984 judgment's property transfer and that beneficial title was held by the group affiliated with them. Ergo, applying the same reasoning as the trial court's previous summary judgment, Appellees were entitled to summary judgment as to those two properties. Appellees waived their claims to the remaining four All Saints properties "so as to resolve this case without a trial."[45]

44 The articles of incorporation for All Saints Episcopal Church are contained in the record and indicate that it was incorporated for a fifty-year term in 1953. No one has indicated whether any efforts were taken to maintain its incorporated status after 2003 or what effect the lack of status might have, but in their reply to the TEC parties' All Saints motion for summary judgment, Appellees asserted that All Saints's incorporation "in the 1950s has no bearing on this dispute" and that all parties agreed that under EDFW's canons, the All Saints Corporation is merely an "adjunct or instrumentality" of the parish that cannot hold real property.

45 5001 Crestline and 5003 Dexter are adjacent to the properties referenced by Bishop Iker in his September 2008 letter to the All Saints rector.

The TEC parties, in their All Saints summary judgment motion, asked the trial court to construe the deeds, to declare the TEC parties the properties' equitable owners, and to remove Appellees as the trustees or owners of legal title.[46] The trial court disposed of the All Saints summary judgment motions in its final summary judgment.

46 The TEC parties also revisited all of their prior arguments in the case, prompting Appellees to remark in their summary judgment response that "the Court should reject these 95 pages that summarize what the Court rejected when it was 153 pages" and that "[t]he last 95 pages of the 111 pages of Plaintiffs' motion can be ignored because Plaintiffs admit their

'global arguments' merely re-assert the same grounds this Court rejected in its Partial Summary Judgment of March 2, 2015."

3. Trial Court's Judgment

On July 24, 2015, the trial court signed a final judgment in this case, consolidating its prior orders.

In the judgment, the trial court granted Appellees' motion as to All Saints on the two pieces of property under dispute and denied the TEC parties' opposing motion. The trial court recited in its judgment that the claims for
382 attorney's fees in both the original and severed action, the claims in *382 the severed action for conversion, damages for breach of fiduciary duty, to quiet title and for an accounting, and the claims under business and commerce code section 16.29 remained pending in the original action, cause number 141-237105-09, and ordered that those remaining claims, "to the extent they are also pending in this cause," were dismissed without prejudice and preserved for litigation in cause number 141-237105-09.

The trial court made the following declarations in its judgment:

> 1. Neutral principles of Texas law govern this case, and applying such law is not unconstitutionally retroactive.[47]
>
> 2. The Corporation of the Episcopal Diocese of Fort Worth and Defendant Congregations hold legal title to all the properties listed on Exhibit 1 attached to this Order, subject to control by the Corporation pursuant to the Diocese's charters.[48]
>
> 3. The Episcopal Diocese of Fort Worth and the Defendant Congregations in union with that Diocese hold beneficial title to all the properties listed on Exhibit 1 attached to this Order.
>
> 4. Defendants Dr. Franklin Salazar, Jo Ann Patton, Walter Virden, III, Rod Barber, and Chad Bates are, and have been since 2005, the properly elected Trustees of the Corporation for the Episcopal Diocese of Fort Worth.
>
> 5. Defendant Jack Iker is, and has been since 2005, the proper Chairman of the board and one of the Trustees of the Corporation for the Episcopal Diocese of Fort Worth.
>
> 6. Defendants are the proper representatives of the Episcopal Diocese of

47 In this, the trial court was merely obeying the law of the case: the supreme court stated in *Episcopal Diocese* that it had "concluded in *Masterson* that the neutral principles methodology was the substantive basis [for the supreme court's] decision in *Brown v. Clark* , 102 Tex. 323, 116 S.W. 360 (1909)," and that "as to the argument that application of neutral principles may pose constitutional questions if they are retroactively applied, we note that over a century ago in *Brown* ... our analysis and holding substantively reflected the neutral principles methodology." 422 S.W.3d at 650–51, 653. Based on the supreme court's determination that the neutral principles methodology had substantively applied to this type of case since 1909, the trial court did not err by determining that its application here would not be retroactive. *See Farmers Grp. Ins., Inc. v. Poteet* , 434 S.W.3d 316, 329 (Tex. App.—Fort Worth 2014, pet. denied) (explaining that the law of the case doctrine is the principle under which questions of law decided on appeal to a court of last resort will govern the case throughout its subsequent stages). Therefore, to the extent that the TEC parties have raised subissues in footnote 5 of their appellants' brief with regard to their issues 1(a) and 1(b), in which they re-urge their pre-*Episcopal Diocese* and *Masterson* retroactivity and deference methodology arguments, we overrule these subissues without further discussion. *But see* Eric G. Osborne & Michael D. Bush, *Rethinking Deference: How the History of Church*

Property Disputes Calls into Question Long-Standing First Amendment Doctrine , 69 SMU L. Rev. 811, 813 (2016) (suggesting that the deference model itself is fundamentally flawed and that its result "has been to empower denominational hierarchies, thus making divisions and intra-church fights for control especially bitter").

48 The supreme court acknowledged in *Episcopal Diocese* that "[t]he 1984 judgment [transferring real and personal property from the Diocese of Dallas] vested legal title of the transferred property in the Fort Worth Corporation, except for certain assets for which the presiding Bishop of the Dallas Diocese and his successors in office had been designated as trustee." 422 S.W.3d at 648. Those other assets were transferred by the 1984 judgment to the Bishop of the Fort Worth Diocese and his successors in office as trustee. *Id.* ; *see Farmers Grp.* , 434 S.W.3d at 329 (law of the case doctrine). Ultimately, legal title to that property was also placed under the Corporation's control. *See* Tex. Bus. Orgs. Code Ann. § 252.015 (West 2012). No one disputes that the Corporation holds legal title.

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Fort Worth, the Texas unincorporated association formed in 1982.

7. The Defendants hold legal title and control of the funds and endowments listed on Exhibit 2 attached to this Order, subject to the terms of each.

8. Plaintiffs have no express, implied, or constructive trust in the properties or funds listed in the Exhibits attached to this Order.

9. Defendants have not breached any fiduciary duty to or special relationship with any Plaintiffs.

Exhibit 1 attached to the order listed 121 properties. Exhibit 2 listed four funds for which the Corporation is listed as trustee, six funds for which Bishop Iker is listed as trustee, and one fund for which the EDFW Treasurer, the EDFW Chancellor, and Bishop Iker are listed as trustees.

The TEC parties filed a joint notice of appeal.

III. Discussion

TEC argues that the trial court erred as a matter of law in its application of the "neutral principles" approach by failing to defer to and apply TEC's ecclesiastical determination of which entity constitutes EDFW. The TEC parties argue that the trial court erred by denying their motion for summary judgment and granting summary judgment for Appellees by:

a. Violating *Masterson* , *Episcopal Diocese* , and the First Amendment by overriding the Episcopal Church on who may control an Episcopal Diocese and Episcopal Congregations;

b. Violating *Masterson* , *Episcopal Diocese* , and the First Amendment's limits on neutral principles by refusing to "accept as binding" the Church's determination of ecclesiastical issues within this property case;

c. Failing to apply neutral principles of Texas Associations law, including an association's right to interpret and enforce its own rules;

d. Failing to apply this Court's holding in *Shellberg v. Shellberg* , 459 S.W.2d 465, 470 (Tex. Civ. App. —Fort Worth 1970, writ ref'd n.r.e.), the law in effect when the Diocese made its contract;

e. Violating Texas trust law by refusing to enforce the express, unrevoked trusts in favor of the Church in fifty-five individual recorded deeds;

f. Failing to find breach of fiduciary duty and to impose a constructive trust where Appellees broke a century's worth of oaths and commitments;

g. Failing to estop Appellees from contradicting their own statements to other courts and parties;

h. Failing to apply Texas Corporations law to the undisputed facts, including a plain application of the Corporation's bylaws;

i. Failing to reject Appellees' claim to title by adverse possession;

j. Holding, if it did, that Appellants did not have standing; and

k. Denying Appellants' trespass-to-try-title claim.

Because TEC also adopted and incorporated by reference all of the TEC parties' issues and arguments, we will address their dispositive issues together.

A. Standard of Review

In a summary judgment case, the issue on appeal is whether the movant met the summary judgment burden by establishing that no genuine issue of material fact exists and that the movant is entitled to judgment as a matter of law. Tex. R. Civ. P. 166a(c) ; *Mann Frankfort Stein & Lipp Advisors, Inc. v. Fielding* , 289 S.W.3d 844, 848 (Tex. 2009). We review a summary judgment de novo. *384 *Travelers Ins. Co. v. Joachim* , 315 S.W.3d 860, 862 (Tex. 2010). When both parties move for summary judgment and the trial court grants one motion and denies the other, the reviewing court should review both parties' summary judgment evidence and determine all questions presented. *Mann Frankfort* , 289 S.W.3d at 848. The reviewing court should render the judgment that the trial court should have rendered. *See Myrad Props., Inc. v. LaSalle Bank Nat'l Ass'n* , 300 S.W.3d 746, 753 (Tex. 2009) ; *Mann Frankfort* , 289 S.W.3d at 848.

B. Jurisdiction

Standing is a threshold issue that implicates subject matter jurisdiction, focuses on the question of who may bring an action, and presents the issue of whether a court may consider a dispute's merits. *See In re J.W.L.* , 291 S.W.3d 79, 85 (Tex. App.—Fort Worth 2009, orig. proceeding [mand. denied]). "To have standing, a plaintiff must be personally aggrieved, and his alleged injury must be concrete and particularized, actual or imminent, and not hypothetical." *Heat Shrink Innovations, LLC v. Med. Extrusion Techs.–Tex., Inc.* , No. 02-12-00512-CV, 2014 WL 5307191, at *7 (Tex. App.—Fort Worth Oct. 16, 2014, pet. denied) (mem. op.) (citing *DaimlerChrysler Corp. v. Inman* , 252 S.W.3d 299, 304–05 (Tex. 2008)). "A party may be personally aggrieved if it has a legal or equitable interest in the controversy." *Id.* (citing *Goswami v. Metro. Sav. & Loan Ass'n* , 751 S.W.2d 487, 489 (Tex. 1988) (holding that plaintiff had standing to contest sale of property in which he had an equitable interest), *$ 574.37 U.S. Coin & Currency v. State* , No. 02-06-00434-CV, 2008 WL 623793, at *6 (Tex. App.—Fort Worth Mar. 6, 2008, no pet.) (mem. op.) (holding that although vehicle was owned by another person, plaintiff had equitable interest in truck to confer standing to contest forfeiture), and *First Nat'l Bank of El Campo, TX v. Buss* , 143 S.W.3d 915, 922 (Tex. App.—Corpus Christi 2004, pet. denied) (noting that a person in possession of a vehicle who is the intended owner of the vehicle has an equitable possessory right in the vehicle even if that person is not named on the vehicle's title)). Without a breach of a legal right belonging to a specific party, that party has no standing to litigate. *Cadle Co. v. Lobingier* , 50 S.W.3d 662, 669–70 (Tex. App.—Fort Worth 2001, pets. denied) (en banc op. on reh'g). We review standing de novo and may review the entire record to determine whether any evidence supports it. *Senger Creek Dev., LLC v. Fuqua* , No. 01-15-01098-CV, 2017 WL 2376529, at *13 (Tex. App.—Houston [1st Dist.] June 1, 2017, no pet.) (mem. op.) (citing *Mayhew v. Town of Sunnyvale* , 964 S.W.2d 922, 928 (Tex. 1998) ; *Tex. Ass'n of Bus. v. Tex. Air Control Bd.* , 852 S.W.2d 440, 444–45 (Tex. 1993)).

The TEC parties argue that a party has standing as long as he or she alleges a pecuniary interest. They contend that they have done so as "(1) the displaced minority that formerly enjoyed use of the property and as the only parties authorized by the Church to lead the Diocese; and (2) the Church that formed the Diocese and received a trust interest in the property," citing *Getty Oil Company v. Insurance Company of North America* , 845
385 S.W.2d 794, 798–99 (Tex. 1992),[49] *cert. denied* , *385 510 U.S. 820, 114 S.Ct. 76, 126 L.Ed.2d 45 (1993), and *Hunt v. Bass* , 664 S.W.2d 323, 324 (Tex. 1984).[50]

[49] In *Getty* , a chemical buyer sued the seller and the seller's insurers after the chemicals exploded and killed someone and a wrongful death judgment was obtained against it; the buyer claimed in its subsequent suit that the seller and the seller's insurers were contractually obligated to provide insurance to cover the judgment against it. 845 S.W.2d at 796–98. The court held that res judicata barred the claims against the seller because the buyer could have asserted those claims in the earlier suit despite their contingency. *Id.* at 799. From this, Appellants draw their argument that once their identity has been established, their claims will no longer be contingent.

[50] In *Hunt* , several plaintiffs filed a petition for writ of mandamus after their separate lawsuits were delayed because the commissioners' court and commissioners failed to provide adequate courtroom space and personnel. 664 S.W.2d at 324. The trial court determined that the plaintiffs had no standing to sue for mandamus relief and dismissed their petition. *Id.* The supreme court held that because each plaintiff was a party to a lawsuit pending in the district court (as distinguished from the general public, which did not have lawsuits pending), and because they had each alleged a failure of the court system to provide trials in those lawsuits in a reasonable time, which potentially deprived each plaintiff of a valuable property right, the plaintiffs had made sufficient allegations concerning the infringement of their private rights to present justiciable interests, providing them with standing for the mandamus action. *Id.*

According to Appellees, in contrast,

> No matter how [the TEC parties] claim to have suffered injury, a state statute says they have no standing to sue the Corporation or its Trustees for violating fiduciary duties or corporate charters. Any claim for breach of fiduciary duty owed to the Diocese or the Corporation must be brought by those entities. Since [the TEC parties'] counsel represent neither, they have no authority to bring such claims for them.
>
> Additionally, lawsuits claiming that the acts or property transfers of a Texas nonprofit corporation violate its corporate purposes can be brought only by a member or the Attorney General. [The TEC parties] are neither; the Corporation has no "members," and the Attorney General is not a party.
>
> Since [the TEC parties] severed all connection with the Diocese and the Corporation and have no right to represent either, they have no standing to complain about how either is governed.

[Footnotes omitted.] Appellees refer us to articles 1396-2.03(B)[51] and 1396-2.08(A) 52 of the revised civil statutes[53] and *Cotten v. Weatherford Bancshares, Inc.* , 187 S.W.3d 687, 698 (Tex. App.—Fort Worth 2006, pet. 386 denied),[54] *disapproved of on other grounds by* *386 *Ritchie v. Rupe* , 443 S.W.3d 856, 865 n.9, 871 n.17, 877 (Tex. 2014), in support of their argument.

51 Act of Apr. 23, 1959, 56th Leg., R.S., ch. 162, art. 2.03(B), 1959 Tex. Gen. Laws 286, 290 (listing who may bring a proceeding against the corporation with regard to an ultra vires act—a member, the corporation itself through a receiver, trustee, or other legal representative, or the Attorney General) (current version at Tex. Bus. Orgs. Code Ann. § 20.002(c)(1)–(3) (West 2012)).

53 In their pleadings in the trial court, the parties appear to have at least implicitly agreed that the applicable provisions of the former statutes and current statutes in the business organizations code are largely the same, and neither party has indicated to us that there are any substantive differences between the Corporation's law of formation and the current law. Accordingly, in the interest of judicial economy, we will cite to the current sections of the business organizations code.

54 We stated in *Cotten* ,

> While corporate officers owe fiduciary duties to the corporation they serve, they do not generally owe fiduciary duties to individual shareholders unless a contract or confidential relationship exists between them in addition to the corporate relationship. Due to its extraordinary nature, the law does not recognize a fiduciary relationship lightly. Therefore, whether such a duty exists depends on the circumstances.

187 S.W.3d at 698 (citations omitted).

With regard to this particular case, standing turns at least in part on the neutral principles analysis with which we have been tasked by the supreme court.[55] From the application of these neutral principles, we will determine whether the TEC parties have an interest in the property or entities that would give them standing for the claims that were resolved by the trial court's final judgment.[56]

55 The standing debate arose several times during the course of the proceedings, summed up by Appellees at one hearing as,

> The only argument that they [the TEC parties] have the right to argue is whether they're—the individuals are duly elected.... Because it's the nature of the claims that the individuals are bringing that only the diocese and the diocesan corporation could bring. An individual who sues in a representative capacity is suing on behalf of the individual entity that the person represents.

56 We touched on this issue in *In re Salazar* , when Appellees filed a petition for writ of mandamus after the trial court denied part of their motion to show authority under rule of civil procedure 12 as to attorneys hired by the TEC parties to represent the Corporation and EDFW in the property dispute. 315 S.W.3d at 281. The essence of that original proceeding was one of identity. *See id.* at 282, 284 (observing that both plaintiffs and defendants purported to represent EDFW and the Corporation and that plaintiffs argued that the issue of the identity of the true bishop and trustees was at the heart of the suit). We did not reach the question of the "true identity" of the bishop and trustees because we agreed with the trial court that a rule 12 motion was not the appropriate vehicle to reach the merits of an intra-church dispute. *Id.* at 285.

Instead, because neither side challenged the trial court's finding that the two attorneys did not discharge their burden of proof, we concluded that the trial court abused its discretion by not striking the pleadings filed by those attorneys on behalf of the Corporation and EDFW. *Id.* at 286. We granted mandamus relief because a corporation cannot sue itself, and we reasoned that presentations from two opposing factions each claiming to be the Corporation and EDFW could unnecessarily confuse a trier of fact. *Id.* at 287.

Additionally, we note that the ecclesiastical abstention doctrine, which arises from the Free Exercise Clause of the First Amendment to the United States Constitution, may also affect our jurisdiction to consider some of the claims. *See* U.S. Const. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."); *Masterson* , 422 S.W.3d at 601 (observing that the Free Exercise clause severely circumscribes the role that civil courts may play in resolving church property disputes by prohibiting civil courts from inquiring into matters concerning theological controversy, church discipline, ecclesiastical government, or conformity of church members to the church's moral standards).

1. Neutral Principles Framework

The structural underpinning of our review of the trial court's judgment begins with a review of cases from the U.S. Supreme Court on the evolution of the applicable law, followed by a closer look at *Masterson* and other cases to which the parties have referred us.

a. Precedent and Persuasive Authority

(1) United States Supreme Court Cases

(a) *Watson v. Jones* , 80 U.S. (13 Wall.) 679, 20 L.Ed. 666 (1871).

Watson , which set out the original "deference" methodology applicable to hierarchical churches, arose from a schism that presented the question "as to which of two bodies shall be recognized as the Third or Walnut Street
387 Presbyterian Church," as well as who had the authority to lead it *387 and to possess the church's property. 80 U.S. at 717–18. The local church's trustees had incorporated to hold title to the property in trust "for the use of the persons who by the constitution, usages, and laws of the Presbyterian body, are entitled to that use," and were elected by the local church's congregation for two-year terms. *Id.* at 720.

The Court noted that for congregational—that is, independent, stand-alone—churches undergoing a schism into "distinct and conflicting bodies, the rights of such bodies to the use of the property must be determined by the ordinary principles which govern voluntary associations." *Id.* at 724–25. In such circumstances, if no trust was previously imposed upon the property when purchased or given, the court would not imply one, the majority

would keep the property, and "[t]he minority in choosing to separate themselves into a distinct body, and refusing to recognize the authority of the governing body, can claim no rights in the property from the fact that they had once been members of the church or congregation." *Id.* at 725.

But the Court treated a local church's membership in a hierarchical church—part of a large and general organization of some religious denomination that is "more or less intimately connected by religious views and ecclesiastical government"—differently. *Id.* at 726. The Court acknowledged that the property's legal documents did not indicate its disposition.[57] *Id.* Rather, the property was purchased for the use of a religious congregation, "and so long as any existing religious congregation can be ascertained to be *that* congregation, or its regular and legitimate successor, it is entitled to the use of the property." *Id.* (emphasis added). Instead of looking to the rules that govern voluntary associations to determine identity or succession, the Court stated that in cases involving a hierarchical church,[58] "we are bound to look at the fact that the local congregation is itself but a member of a much larger and more important religious organization, and is under its government and control, and is bound by its orders and judgments" with regard to "questions of discipline, or of faith, or ecclesiastical rule, custom, or law" that have been decided by the highest of the hierarchical church's judicatories, and to accept those decisions as final and binding "in all cases of ecclesiastical cognizance." *Id.* at 726–27, 729.

[57] The Court stated, "Here is no case of property devoted forever by the instrument which conveyed it, or by any specific declaration of its owner, to the support of any special religious dogmas, or any peculiar form of worship...." *Watson* , 80 U.S. at 726.

[58] The Court specifically identified the "Protestant Episcopal" church as one of the "large and influential bodies [with] ... a body of constitutional and ecclesiastical law of its own, to be found in [its] written organic laws, [its] books of discipline, in [its] collections of precedents, in [its] usage and customs, which as to each constitute a system of ecclesiastical law and religious faith that tasks the ablest minds to become familiar with." *Watson* , 80 U.S. at 729.

In resolving the matter in favor of the local faction that had remained with the national, hierarchical church, the Court stated,

> Whatever may have been the case before the Kentucky court, the appellants in the case presented to us have separated themselves wholly from the church organization to which they belonged when this controversy commenced. They now deny its authority, denounce its action, and refuse to abide by its judgments. They have first erected themselves into a new organization, and have since joined themselves to another totally

388 *388

> different, if not hostile, to the one to which they belonged when the difficulty first began.

Id. at 734. Accordingly, the Court concluded, "the appellants, in their present position, have no right to the property, or to the use of it, which is the subject of this suit." *Id.*

Watson governed church property disputes until neutral principles made an appearance, *see Windwood Presbyterian Church, Inc. v. Presbyterian Church (U.S.A.)* , 438 S.W.3d 597, 602 (Tex. App.—Houston [1st Dist.] 2014, no pet.) (op. on reh'g) (referencing Justice Brennan's concurring opinion in *Maryland & Va. Eldership of Churches of God v. Church of God at Sharpsburg, Inc.* , 396 U.S. 367, 370, 90 S.Ct. 499, 501, 24 L.Ed.2d 582 (1970) (Brennan, J., concurring)),[59] and elements of it remain in play. *See Masterson* , 422 S.W.3d at 602 (stating that deference is not optional when ecclesiastical questions are at issue).

59 *Maryland* ended in dismissal from the U.S. Supreme Court because the state court's resolution of the church property dispute involved no inquiry into religious doctrine. 396 U.S. at 367–68, 90 S.Ct. at 499–500. In his concurring opinion, Justice Brennan recited that under *Watson* , a majority of a congregational church or the highest authority of a hierarchical church could make the property decision "unless 'express terms' in the 'instrument by which the property is held' condition the property's use or control in a specified manner" as long as those express conditions may be effected without consideration of doctrine and as long as the appropriate church governing body can be determined without the resolution of doctrinal questions and without extensive inquiry into religious policy. 396 U.S. at 368–70 & n.2, 90 S.Ct. at 500–01 & n.2 (Brennan, J., concurring).

(b) *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in North America* , 344 U.S. 94, 73 S.Ct. 143, 97 L.Ed. 120 (1952).

Kedroff involved a dispute over the right to use and occupy a church building. 344 U.S. at 95, 73 S.Ct. at 144. The American branch of the Russian Orthodox Church had created a corporation under New York state law in 1925 to acquire a cathedral as "a central place of worship and residence of the ruling archbishop." *Id.* , 73 S.Ct. at 144. Title was in the corporation's name. *Id.* at 96 n.1, 73 S.Ct. at 144 n.1. The only issue was who had the right to use the cathedral—Archbishop Leonty, who was elected to his ecclesiastical office by the American churches, or Archbishop Benjamin,[60] who was appointed by the Supreme Church Authority of the Russian Orthodox Church in Moscow. *Id.* at 96 & n.1, 73 S.Ct. at 144 & n.1. The Court observed that determination of the right to use and occupy the cathedral depended "upon whether the appointment of Benjamin by the Patriarch or the election of the Archbishop for North America by the convention of the American churches validly selects the ruling hierarch for the American churches." *Id.* at 96–97, 73 S.Ct. at 144.

60 Benjamin ordained Kedroff as a priest, and Kedroff then "gave" the cathedral to Benjamin. *See Saint Nicholas Cathedral of Russian Orthodox Church in N. Am. v. Kedroff* , 302 N.Y. 1, 96 N.E.2d 56, 67 (1950), *rev'd sub nom. Kedroff* , 344 U.S. 94, 73 S.Ct. 143, 97 L.Ed. 120 (1952).

The lower state courts concluded that the cathedral had to be occupied by an archbishop appointed by the central authorities in Moscow (i.e., Benjamin). *Saint Nicholas* , 96 N.E.2d at 67. The highest state court disagreed, relying on a state statute that "had a conclusive effect upon the issues presented," in addition to the fact that the lower courts had not determined whether Benjamin et al. "could be relied upon to carry out
389 faithfully and effectively the purposes of the religious *389 trust," and the fact that the Moscow patriarchy functioned "as an arm of the Russian Government to further its domestic and foreign policy." *Id.* at 67–68, 96 N.E.2d 56, 67. The statute upon which the state court relied purported to define the "Russian Church in America," and to define "Russian Orthodox church" as a term of art "to denote the particular local buildings or organizations of the Russian Orthodox faith as distinguished from the spiritual church" and, using that term of art, purported to identify who was the church's leader. *Id.* at 69–70, 96 N.E.2d 56, 67 (quoting the statute, which provided, in pertinent part, that "[e]very Russian Orthodox church in this state ... shall recognize and be and remain subject to the jurisdiction and authority of the ... governing bodies and authorities of the Russian Church in America, pursuant to the statutes for the government thereof adopted at a general convention ... held in the city of New York"). The state court relied on the legislative determination that the "Russian Church of America" was the trustee that could be relied upon "to carry out more effectively and faithfully the purposes of th[e] religious trust." *Id.* at 72, 96 N.E.2d 56, 67.

Predictably, the losing party in the state court appealed to the Court, challenging the state statute as invalid based on interference with the exercise of religion. *Kedroff* , 344 U.S. at 100, 73 S.Ct. at 146. The statute had come into being because of "differences between the Mother Church and its American offspring." *Id.* at 105, 73 S.Ct. at 149. The Court concluded that because the statute undertook by its terms to transfer the control of the

New York churches of the Russian Orthodox religion from the central governing hierarchy of the Russian Orthodox Church—the Patriarch of Moscow and the Holy Synod—to the governing authorities of the Russian Church in America, it violated the Fourteenth Amendment. *Id.* at 107–08, 73 S.Ct. at 150 ("Legislation that regulates church administration, the operation of the churches, [and] the appointment of clergy, by requiring conformity to church statutes" adopted by the general convention of the Russian Church in America held in New York City in 1937 "prohibits the free exercise of religion"). This was impermissible, even though the legislature had sought to protect "the American group from infiltration of [the Russian Government's] atheistic or subversive influences" when the legislature gave the use of the churches to the American group "on the theory that this church would most faithfully carry out the purposes of the religious trust." *Id.* at 109–10, 73 S.Ct. at 151.

The Court then proceeded to review its precedent with regard to hierarchical churches, which it defined as "those organized as a body with other churches having similar faith and doctrine with a common ruling convocation or ecclesiastical head." *Id.* at 110–14, 73 S.Ct. at 151–53 (referencing *Watson* , 80 U.S. at 727). The Court concluded that the controversy over the right to use the cathedral was "strictly a matter of ecclesiastical government, the power of the Supreme Church Authority of the Russian Orthodox Church to appoint the ruling hierarch of the archdiocese of North America," and that the statute, by fiat, displaced one church administrator with another and passed the control of strictly ecclesiastical matters from one church authority to another in violation of the federal constitution. *Id.* at 115–16, 119, 73 S.Ct. at 154–56 ("Freedom to select the clergy, where no improper methods of choice are proven ... must now be said to have federal constitutional protection as a part of the free exercise of religion against state interference.").

390 In sum, then, the transfer by statute of control over churches, including the *390 determination thereby of church leadership, violates the constitutional rule of separation between church and state. *Id.* at 110, 73 S.Ct. at 151 ; *see also Kreshik v. Saint Nicholas Cathedral* , 363 U.S. 190, 191, 80 S.Ct. 1037, 1038, 4 L.Ed.2d 1140 (1960) (applying the same rule to judicial pronouncements). But at issue in the case before us is not a statute that may or may not unconstitutionally infringe upon the parties' freedom of religion or the identification of religious leadership. Rather, we are to consider our business organizations, property, and trust statutes within the confines of the nondoctrinal portions of the parties' governing documents to determine whether the Corporation followed its articles and bylaws and whether a trust or trusts were created, and if so, for whom.

(c) *Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church* , 393 U.S. 440, 89 S.Ct. 601, 21 L.Ed.2d 658 (1969).

Presbyterian Church , which involved a church property dispute in which two local churches withdrew from a hierarchical national church, formalized the neutral principles framework as an option for resolving such disputes. 393 U.S. at 441, 449, 89 S.Ct. at 602, 606. In 1966, the membership of two local churches, under the leadership of their ministers and most of their ruling elders, voted to withdraw and reconstitute themselves as autonomous organizations after they concluded that some of the national church's actions and pronouncements violated the organization's constitution and departed from the doctrine and practice that were in force at the time they affiliated. *Id.* at 442–43, 89 S.Ct. at 602–03. The state courts considered the implied trust theory and integrated a departure-from-doctrine element that allowed a jury to conclude that the local churches should retain their property. *Id.* at 443–44, 449–50, 89 S.Ct. at 603, 606.

The Court noted that while the First Amendment severely circumscribes the role that civil courts may play in resolving church property disputes, not all such disputes are precluded from the civil courts' consideration. *Id.* at 447, 449, 89 S.Ct. at 605–06 (observing that in *Kedroff* , the Court converted into a constitutional rule

Watson 's principle as to the binding and conclusive nature of a hierarchical court's ecclesiastical decisions in the absence of fraud or collusion, even when affecting civil rights). Specifically, "there are neutral principles of law, developed for use in all property disputes, which can be applied without 'establishing' churches to which property is awarded." *Id.* at 449, 89 S.Ct. at 606. But to do this, states, religious organizations, and individuals must structure relationships involving church property so as not to require the civil courts to resolve ecclesiastical questions. *Id.* , 89 S.Ct. at 606.

Accordingly, the Court reversed the decision of the state court as violating the First Amendment because the departure-from-doctrine element required the state court to determine matters at the very core of a religion—whether the general church's challenged actions departed substantially from prior doctrine pursuant to the court's interpretation of the doctrine's meaning and then, after assessing the relative significance to the religion of the tenets from which departure was found, whether the issue on which the general church departed "holds a place of such importance in the traditional theology as to require that the trust be terminated." *Id.* at 449–50, 89 S.Ct. at 606–07. The Court remanded the case for further proceedings. *Id.* at 452, 89 S.Ct. at 607 (stating that a civil court may no more review a church decision applying a state departure-from-doctrine standard than it may
391 apply that standard itself).*391 On remand, the state court held that, in light of the Supreme Court's pronouncement on the departure-from-doctrine element, the implied-trust theory itself was no longer valid. *Presbyterian Church in U.S. v. E. Heights Presbyterian Church* , 225 Ga. 259, 167 S.E.2d 658, 659 (1969), *cert. denied* , 396 U.S. 1041, 90 S.Ct. 680, 24 L.Ed.2d 685 (1970). Accordingly, because no trust was created for the general church in the property's deed or required by the general church's constitution, and because the general church had put no funds into the property, legal title to the property remained with the local churches. *Id.* at 659–60.

(d) *Serbian Eastern Orthodox Diocese for the United States of America & Canada v. Milivojevich* , 426 U.S. 696, 96 S.Ct. 2372, 49 L.Ed.2d 151 (1976).

Milivojevich involved a challenge to the suspension, removal, and defrocking of a bishop in—and the reorganization of his diocese into three dioceses by—the Serbian Orthodox Church. 426 U.S. at 697–98, 96 S.Ct. at 2375. The basic dispute, according to the Court, arose from a quarrel over control of the Serbian Eastern Orthodox Diocese for the United States of America and Canada, its property, and its assets. *Id.* at 698, 96 S.Ct. at 2375. Years before the dispute arose, the Serbian Eastern Orthodox Diocese for the United States and Canada and other nonprofit corporations were organized under the state laws of Illinois, New York, California, and Pennsylvania to hold title to property. *Id.* at 701–02, 96 S.Ct. at 2377. In the years immediately before the dispute, the bishop had been the subject of numerous complaints challenging his fitness to serve and his administration of the diocese. *Id.* at 702, 96 S.Ct. at 2377. He subsequently refused to accept either his suspension or the reorganization of his diocese on the basis that they were not done in compliance with the Mother Church's constitution and laws and his diocese's constitution. *Id.* at 704, 96 S.Ct. at 2378. This ultimately led to his defrocking and his diocese's declaration that it was autonomous. *Id.* at 705–06, 96 S.Ct. at 2379.

Prior to his defrocking, the bishop had sued to enjoin the Mother Church from interfering with the assets of the nonprofit corporations and to have himself declared the true bishop. *Id.* at 706–07, 96 S.Ct. at 2379. The Mother Church's representatives counterclaimed for a declaration that he had been removed as bishop and that the diocese was properly reorganized, and they sought control of the reorganized dioceses and diocesan property. *Id.* at 707, 96 S.Ct. at 2379. The Illinois trial court granted summary judgment for the ex-bishop and

dismissed the Mother Church's countercomplaints. *Id.* , 96 S.Ct. at 2379. After the intermediate appellate court reversed that judgment and remanded the case for a trial on the merits, the trial court gave each side some relief. *Id.* at 707–08, 96 S.Ct. at 2379–80.

In its judgment on remand, the trial court concluded that no substantial evidence was produced that fraud, collusion, or arbitrariness existed in any of the actions or decisions before or during the final proceedings of the defrocking decision; that the property held by the corporations was held in trust for all members of the American-Canadian Diocese; that the Mother Church exceeded its authority by dividing the diocese into three new dioceses; and that the new bishop was validly appointed as temporary administrator of the whole diocese in place of the defrocked bishop. *Id.* , 96 S.Ct. at 2379–80.

The Illinois Supreme Court reversed part of the trial court's judgment, holding that the ex-bishop's removal and
392 defrocking *392 had to be set aside because the proceedings resulting in those actions "were procedurally and substantively defective under the internal regulations of the Mother Church and were therefore arbitrary and invalid" when not conducted according to the court's interpretation of the Mother Church's constitution and penal code, and it purported to reinstate him. *Id.* at 698, 708, 96 S.Ct. at 2375, 2380. But it affirmed part of the trial court's judgment, agreeing that the diocesan reorganization was invalid as beyond the Mother Church's scope of authority to do so without diocesan approval. *Id.* at 708, 96 S.Ct. at 2380.

Thirteen years after the litigation's inception, the U.S. Supreme Court reversed the Illinois Supreme Court's judgment, holding that the inquiries that the Illinois court had made "into matters of ecclesiastical cognizance and polity and [its] actions pursuant thereto contravened the First and Fourteenth Amendments." *Id.* at 698, 706–07, 96 S.Ct. at 2375, 2379.

Specifically, the Court stated that the "fallacy fatal to the judgment of the Illinois Supreme Court is that it rests upon an impermissible rejection of the decisions of the highest ecclesiastical tribunals of this hierarchical church upon the issues in dispute" and that the court had impermissibly substituted its own inquiry into church polity and the resolutions based thereon to those disputes. *Id.* at 708, 96 S.Ct. at 2380. The state supreme court's conclusion that the Mother Church's decisions were "arbitrary" was based on the court's conclusion that the Mother Church had not followed its own laws and procedures in arriving at those decisions. *Id.* at 712–13, 96 S.Ct. at 2382. But, as the Court pointed out, there is no "arbitrariness" exception to the First Amendment. *Id.* at 713, 96 S.Ct. at 2382. "[R]ecognition of such an exception would undermine the general rule that religious controversies are not the proper subject of civil court inquiry, and that a civil court must accept the ecclesiastical decisions of church tribunals as it finds them." *Id.* , 96 S.Ct. at 2382.

Because the case's resolution "essentially involve[d] not a church property dispute, but a religious dispute the resolution of which ... is for ecclesiastical and not civil tribunals," the state supreme court had overstepped its authority. *Id.* at 709, 717, 721, 96 S.Ct. at 2380, 2384, 2386 (observing that there was no dispute that questions of church discipline and the composition of the church hierarchy were at the core of ecclesiastical concern). The hierarchical church's religious bodies made the decisions to suspend and defrock the bishop, and the authority to make those decisions was vested solely in them. *Id.* at 717–18, 96 S.Ct. at 2384. And as to the diocesan reorganization, the court had impermissibly substituted its own interpretations of the diocesan and Mother Church's constitutions for that of the highest ecclesiastical tribunals in which church law vested authority. *Id.* at 720–21, 96 S.Ct. at 2386 (noting that reorganization of the diocese involved a matter of internal church government, an issue at the core of ecclesiastical affairs).

The Court noted in a footnote, "No claim is made that the 'formal title' doctrine by which church property disputes may be decided in civil courts is to be applied in this case."[61] *Id.* at 723 n.15, 96 S.Ct. at 2387 n.15.

The Court observed, "Whether corporate bylaws or other documents governing the individual property-holding
393 corporations may affect any desired disposition *393 of the Diocesan property is a question not before us."[62] *Id.* at 724, 96 S.Ct. at 2387. The Court nonetheless noted that the Mother Church's decisions to defrock the bishop and to reorganize the diocese "in no way change[d] formal title to all Diocesan property, which continue[d] to be in the respondent property-holding corporations in trust for all members of the reorganized Dioceses; only the identity of the trustees is altered by the Mother Church's ecclesiastical determinations." *See id.* at 723 n.15, 96 S.Ct. at 2387 n.15.

61 The "formal title" doctrine became the neutral principles approach. *See Milivojevich* , 426 U.S. at 723 n.15, 96 S.Ct. at 2387 n.15.

62 A dissenting justice would have held that the state court's jurisdiction had been invoked by both parties with regard to the church property and claims to diocesan authority, thus entitling the state court to ask "if the real Bishop of the American-Canadian Diocese would please stand up." 426 U.S. at 725–26, 96 S.Ct. at 2388 (Rehnquist, J., dissenting).

Accordingly, *Milivojevich* instructs us to confine our analysis to formal title, corporate bylaws, and other documents prevalent in the management of non-religious entities rather than to attempt to interpret internal church government—the core of which pertains not to business but rather to the mysteries of faith—and to avoid ecclesiastical determinations like any other proverbial plague.

(e) *Jones v. Wolf* , 443 U.S. 595, 99 S.Ct. 3020, 61 L.Ed.2d 775 (1979).

In *Jones* , the United States Supreme Court addressed a dispute over the ownership of church property following a schism in a local church affiliated with a hierarchical church organization; in particular, it considered the question of which faction of a formerly united congregation was entitled to possession and enjoyment of the disputed property. 443 U.S. at 597, 602, 99 S.Ct. at 3022, 3024. The Court once more acknowledged that the First Amendment "prohibits civil courts from resolving church property disputes on the basis of religious doctrine and practice." *Id.* at 602, 99 S.Ct. at 3025 (citing *Milivojevich* , 426 U.S. at 710, 96 S.Ct. at 2381 ; *Maryland* , 396 U.S. at 368, 90 S.Ct. at 500 (Brennan, J., concurring); *Presbyterian Church* , 393 U.S. at 449, 89 S.Ct. at 606). That is, a civil court can resolve a church property dispute " 'so long as it involves no consideration of doctrinal matters, whether the ritual and liturgy of worship or the tenets of faith.' " *Id.* , 99 S.Ct. at 3025 (quoting *Maryland* , 396 U.S. at 368, 90 S.Ct. at 500 (Brennan, J., concurring)). It held that the neutral principles approach was consistent with the federal constitution when merely looking to the language of the deeds, the terms of the local church charters, state statutes, and the provisions of the constitution of the general church concerning the ownership and control of church property. *Id.* at 602–03, 99 S.Ct. at 3025.

The Court approved of this methodology because before any dispute arises, a religious group could determine its priorities as to the disposition of church property and enshrine those priorities under the applicable civil law, making it easy both on themselves and the court system:

> [t]hrough appropriate reversionary clauses and trust provisions, religious societies can specify what is to happen to church property in the event of a particular contingency, or what religious body will determine the ownership in the event of a schism or doctrinal controversy [and] ... [i]n this manner, a religious organization can ensure that a dispute over the ownership of church property will be resolved in accord with the desires of the members.
>
> ....
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> ... At any time before the dispute erupts, the parties can ensure, if they so desire, that the faction loyal to the hierarchical

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> church will retain the church property. They can modify the deeds or the corporate charter to include a right of reversion or trust in favor of the general church. Alternatively, the constitution of the general church can be made to recite an express trust in favor of the denominational church. The burden involved in taking such steps will be minimal. And the civil courts will be bound to give effect to the result indicated by the parties, provided it is embodied in some legally cognizable form.

Id. at 603–04, 606, 99 S. Ct. at 3025–26, 3027.

The Court cautioned that in reviewing church documents, if the interpretation of instruments of ownership would require a civil court to resolve a religious controversy, then the court would have to defer to the resolution of the doctrinal issue by the authoritative ecclesiastical body. *Id.* at 604, 99 S.Ct. at 3026.

In addressing which faction was entitled to control local church property, the Court identified as a fact question for remand whether Georgia had adopted a presumptive rule of majority representation with regard to a voluntary religious association's being represented by the majority of its members or whether the corporate charter or constitution of the general church set out how the identity of the local church was to be established if not by majority rule. *Id.* at 607–08, 99 S.Ct. at 3027–28 (observing that majority rule is generally employed in the governance of religious societies and that a majority faction generally can be identified without resolving any question of religious doctrine or polity). The Court observed that if state law provided for the identity of the church to be determined according to the general hierarchical church's "laws and regulations," then the First Amendment would require the civil courts to give deference to the church's determination of the local church's identity. *Id.* at 609, 99 S.Ct. at 3028. The implicit corollary of this statement would be that if state law did *not* provide for the church's identity to be determined by the general hierarchical church's laws and regulations, then the court would need to examine everything else to identify the property's owners.[63]

63 The parties have brought no such state statute to our attention—and we have found none—that would allow us to so facilely dispose of this appeal. *Cf.* Calvin Massey, *Church Schisms, Church Property & Civil Authority* , 84 St. John's L. Rev. 23, 34 (2010) ("Virginia has adopted a statute directing courts how to decide church property disputes when churches divide into contending factions." (citing Va. Code Ann. § 57-9)). On remand from the U.S. Supreme Court, the state court in *Jones* held that while the state's rebuttable presumption of majority rule could be overcome by reliance on neutral statutes, corporate charters, relevant deeds, and the organizational constitutions of the denomination, none of these sources in that case disclosed a provision that would rebut the majority-rule presumption. *Jones v. Wolf* , 244 Ga. 388, 260 S.E.2d 84, 84–85 (1979), *cert. denied* , 444 U.S. 1080, 100 S.Ct. 1031, 62 L.Ed.2d 763 (1980).

Accordingly, *Jones* instructs us that we must perform a non-religious-doctrine-related review, within the context of our state law, of the language of the deeds and the provisions dealing with ownership and control of property contained within the local and general churches' governing documents—i.e., the plain language to ascertain the parties' intent—but that if we attempt to divine ownership from the church's ritual and liturgy of worship or the tenets of its faith, or if interpreting the parties' documents would require us to resolve a faith-
395 based controversy, then we veer into constitutionally-prohibited territory.*395 **(f) *Hosanna–Tabor Evangelical Lutheran Church & School v. E.E.O.C.* , 565 U.S. 171, 132 S.Ct. 694, 181 L.Ed.2d 650 (2012).**

In *Hosanna–Tabor* , the Court recently addressed a related ecclesiastical matter, reviewing whether the Establishment and Free Exercise Clauses of the First Amendment bar an employment discrimination lawsuit when the employer is a religious group and the employee is one of the group's ministers. 565 U.S. at 176–77, 132 S.Ct. at 699. Cheryl Perich went from an elementary school "lay" (also known as "contract") teacher to a "called" (also known as "Minister of Religion, Commissioned") teacher—both positions of which generally performed the same duties—at a religious school. *Id.* at 177–78, 132 S.Ct. at 699–700. Following an employment dispute, Perich's employer's congregation voted to rescind her "call," and her employment was terminated. *Id.* at 178–79, 132 S.Ct. at 700. After reviewing *Kedroff* and *Milivojevich* , among others, the Court reaffirmed that it is impermissible for the government to contradict a church's determination of who can act as its ministers and recognized the "ministerial exception" as to the employment relationship between a religious institution and its ministers. *Id.* at 185–88, 132 S.Ct. at 704–06 (reasoning that to require a church to accept or retain an unwanted minister, or to punish a church for failing to do so, intrudes not upon a mere employment decision but rather interferes with the church's internal governance and infringes upon the religious group's right to shape its own faith and mission through its appointments).[64] *But see* McConnell & Goodrich, 58 Ariz. L. Rev. at 336 (explaining that in contrast to the ministerial exception set out in *Hosanna–Tabor* , church property cases present a conflict between two church entities through which state trust and property law is used to discern the church's original decision and to give legal effect to that decision, not a conflict between civil law and internal church rules).

64 In *Hosanna–Tabor* , the Court concluded that the ministerial exception applied to Perich based on the circumstances of her employment: her ministerial title in becoming a "called" teacher reflected the six years of religious education that she had pursued to obtain the designation; her election by the congregation, "which recognized God's call to her to teach"; Perich's having claimed a religious exemption's housing allowance on her taxes; and Perich's having taught religion four days a week and led her students in prayer three times a day, performing "an important role in transmitting the Lutheran faith to the next generation." 565 U.S. at 190–92, 132 S.Ct. at 707–08. Accordingly, the Court held that because Perich was a minister under the exception, the First Amendment required dismissal of her employment discrimination suit against her religious employer. *Id.* at 194–95, 132 S.Ct. at 709 (observing that the exception ensures "that the authority to select and control who will minister to the faithful—a matter 'strictly ecclesiastical'—is the church's alone").

(2) Supreme Court of Texas Cases

(a) *Masterson v. Diocese of Northwest Texas* , 422 S.W.3d 594 (Tex. 2013), *cert. denied* , —— U.S. ——, 135 S.Ct. 435, 190 L.Ed.2d 327 (2014).

As instructed by our supreme court in *Episcopal Diocese* , we also look to *Masterson* . *See Episcopal Diocese* , 422 S.W.3d at 653. In *Masterson* , the court addressed what happens to property when a majority of the membership of a local church—rather than an entire diocese—votes to withdraw from the larger religious bodies of which it has previously been a part—specifically, TEC and the Episcopal Diocese of Northwest Texas. 422 S.W.3d at 596. As in the case before us, legal title to the local church's property was held by a Texas

396 nonprofit corporation. *Id.* A doctrinal *396 dispute with TEC led a majority of the local church's members to vote to amend the corporation's articles of incorporation and bylaws to revoke any trusts in favor of TEC or the diocese that were on the property. *Id.* at 596, 598. Predictably, a lawsuit over the property's possession and use followed. *Id.*

The court traced the parties' background, starting in 1961 when individuals bought some of the land at issue and donated it to the Northwest Texas Episcopal Board of Trustees for establishment of a mission church. *Id.* at 597. Four years later, a group of worshippers filed an application with the diocese to organize a mission, which the diocese approved. *Id.* TEC made loans and grants to the church to assist its growth. *Id.* More individuals bought more land and donated it to the church's board of trustees, and in 1974, the church applied for parish status with the diocese and received it. *Id.* The diocesan canons required that parishes be corporations,[65] so the church incorporated under Texas law. *Id.* All of the property was conveyed to the corporation; none of the deeds to the corporation provided for or referenced a trust in favor of TEC or the diocese. *Id.*

65 In contrast, here, under EDFW's canons, parishes and missions may form a corporation as an adjunct or instrument but may not incorporate themselves.

The corporation's bylaws provided that it would be managed by a vestry elected by members of the parish and that those elected members "shall hold office in accordance with the Church Canons." *Id.* at 597 & n.1. The bylaws also described the qualifications for voting at parish meetings—being a communicant of the parish as shown on the parish register, at least sixteen years old, baptized, and a regular contributor according to the treasurer's records—and specified that amendments to the bylaws would be by majority vote at an annual parish meeting or at a special meeting called for that purpose by a majority vote of the duly qualified voters of the parish. *Id.* at 597 & nn.2–3.

Pursuant to the bylaws, the parish held a called meeting in November 2006, seeking—among other things—to amend the corporate bylaws to remove all references to TEC and the diocese and to revoke any trusts that may have been imposed on any of the corporation's property by TEC, the diocese, or the original trustees. *Id.* at 598. After the resolutions passed by majority vote, amended articles of incorporation changing the corporate name from "The Episcopal Church of the Good Shepherd" to the "Anglican Church of the Good Shepherd" were filed. *Id.* In conjunction with these acts, the majority of the church's members withdrew from the diocese and TEC and retained possession of the parish property. *Id.*

Like the first round of the case before us, in the ensuing litigation between the church's withdrawing faction and the faction that remained loyal to TEC and to the diocese, the parties' focus was on deference rather than the application of neutral principles. *Id.* at 599. The trial court and the intermediate appellate court both relied on deference to identify the continuing parish and the proper custodians of the church's property. *Id.* After reviewing both its own and U.S. Supreme Court precedent, our supreme court acknowledged the "neutral principles" methodology as the sole applicable methodology, requiring courts to decide non-ecclesiastical issues such as property ownership based on the same neutral principles of law applicable to other entities while
397 deferring to religious entities' decisions on ecclesiastical and church polity issues. *Id.* at 596, 601–07.*397 The supreme court concluded that TEC is a hierarchical organization. *Id.* at 608. But the court clarified that the question of identifying who owns the property is not necessarily inextricably linked to or determined by ecclesiastical matters, explaining that

> [t]here is a difference between (1) the Bishop's determining which worshipers are loyal to the Diocese and TEC, whether those worshipers constituted a parish, and whether a parish properly established a vestry, and (2) whether the corporation's bylaws were complied with when the vote occurred to disassociate the corporation from the Diocese and TEC.

Id. That is, the corporation, with its secular existence derived from state law and its articles of incorporation and bylaws, is subject to a neutral principles determination. *Id.* Accordingly, the court reversed the judgment of the court of appeals and remanded the case to the trial court to apply the neutral principles methodology. *Id.*

The court noted that the trial court lacked jurisdiction over whether the diocese's bishop was authorized to form a new parish and recognize its membership and whether he could or did authorize that parish to establish a vestry or recognize members of the vestry because these items were ecclesiastical matters of church governance, questions upon which the trial court properly deferred to the bishop's exercise of ecclesiastical authority. *Id.*

The court also took the opportunity, in the interest of judicial economy, to address issues likely to be raised on remand in the trial court, some of which apply directly to the case now before us and are summarized as follows:

• Absent specific, lawful provisions in a corporation's articles of incorporation or bylaws otherwise, whether and how a corporation's directors or those entitled to control its affairs can change its articles of incorporation and bylaws are secular, not ecclesiastical matters, and an external entity—under the former or current statutory scheme—is not empowered to amend them absent specific, lawful provision in the corporate documents. *Id.* at 609–10 (citing Tex. Bus. Orgs. Code § 3.009 ; Tex. Rev. Civ. Stat. Ann. art. 1396–2.09).

• The TEC-affiliated bishop could, as an ecclesiastical matter, determine which faction of believers was recognized by and was the "true" church loyal to the Diocese and TEC, and courts must defer to such ecclesiastical decisions, but his decision identifying the loyal faction as the continuing parish does not necessarily determine the property ownership issue, and his decisions on secular legal questions such as the validity of the parish members' vote to amend the bylaws and articles of incorporation are not entitled to deference. *Id.* at 610.

• If the title to the real property is in the corporation's name and the language of the deeds does not provide for an express trust in favor of TEC or the Diocese, then the corporation owns the property. *Id.*

• As to the Dennis Canon's terms, which provide in part that "all real and personal property held by or for the benefit of any Parish, Mission or Congregation is held in trust for TEC,"—assuming, without deciding, that the Dennis Canon attempted to impose a trust on the nonprofit corporation's property and limited the nonprofit corporation's authority over the property—these terms do not make a trust *expressly* irrevocable under Texas
398 law. *Id.* at 613. To the contrary, "[e]ven if the Canon could be read to *imply* the trust was irrevocable, that *398 is not good enough under Texas law. The Texas statute requires *express* terms making it irrevocable." *Id.*

(b) *Brown v. Clark* , 102 Tex. 323, 116 S.W. 360 (1909).

In *Brown* , the 1909 case upon which the supreme court relied to resolve the initial methodology issue in *Masterson* and *Episcopal Diocese* , the supreme court was faced with a task similar to the one before us: two groups litigated over property deeded "by different persons at different times to trustees for the Cumberland

Presbyterian Church at Jefferson, Tex." 116 S.W. at 361. One group claimed to constitute "the church session of the Cumberland Presbyterian Church at the city of Jefferson, Tex.," while the other claimed to be "the church session of the Presbyterian Church in the United States of America at Jefferson, Tex." *Id.*

At the time, nationally, the Cumberland Presbyterian Church and the Presbyterian Church of the United States of America (PCUSA) had overcome their differences and reunited. *Id.* The members of the Jefferson church held differences of opinion "upon the subject of reunion," and those who opposed the reunion sued those who claimed that the reunion had transferred the property to PCUSA. *Id.* at 362. Upon the conclusion of a bench trial, the trial court agreed with the PCUSA faction; the intermediate appellate court disagreed and reversed the trial court's judgment. *Id.*

The supreme court declined to address the argument that the national churches could not reunite because the highest court of the church—to which the decision of doctrine and the modification of the confession of faith were directed—had exclusive jurisdiction over that question. *Id.* at 363–64. Instead, the only question that the supreme court had jurisdiction to address was the effect the reunion had on the property when the deed's plain language was made "to the trustees of the Cumberland Presbyterian Church at Jefferson, Tex."[66] *Id.* at 364.

66 The property had been paid for by the local church "in the ordinary way of business." *Brown* , 116 S.W. at 364.

The supreme court concluded that the church to which the deed was made still owned the property and that "whatever body is identified as being the church to which the deed was made must still hold the title." *Id.* at 364–65. In reaching the conclusion that the property resided with the PCUSA faction, the court traced the identity from the Cumberland-PCUSA reunion, stating,

> The Cumberland Presbyterian Church at Jefferson was but a member of and under the control of the larger and more important Christian organization, known as the Cumberland Presbyterian Church, and the local church was bound by the orders and judgments of the courts of the church. The Jefferson church was not disorganized by the act of union. It remained intact as a church, losing nothing but the word "Cumberland" from its name. Being a part of the Cumberland Presbyterian Church, the church at Jefferson was by the union incorporated into the Presbyterian Church of the United States of America.... those members who recognize the authority of the Presbyterian Church of the United States of America are entitled to the possession and use of the property sued for.

Id. at 365. The supreme court affirmed the trial court's judgment. *Id.*

(c) *Westbrook v. Penley* , 231 S.W.3d 389 (Tex. 2007).

399 Our supreme court has previously acknowledged that when a church dispute *399 involves property or a contract and is purely secular, we have jurisdiction to consider it. *See Westbrook* , 231 S.W.3d at 398–99. *Westbrook* involved a tort action that arose from an act of church discipline (shunning) resulting from counseling performed by the church's pastor. *Id.* at 391.

The court first observed that the First Amendment prohibits governmental action, including court action, that would burden the free exercise of religion by encroaching on a church's ability to manage its internal affairs, presenting a question of subject matter jurisdiction reviewed sua sponte and de novo. *Id.* at 394 & n.3, 395 ("[T]he majority of courts broadly conceptualize the prohibition as a subject-matter bar to jurisdiction."); *see M.O. Dental Lab v. Rape* , 139 S.W.3d 671, 673 (Tex. 2004) ("[W]e are obligated to review *sua sponte* issues affecting jurisdiction."). To gauge the constitutional validity of a particular civil action, a court must identify the nature of the constitutional and other interests at stake. *Westbrook* , 231 S.W.3d at 396 ; *see* David J. Young

& Steven W. Tigges, *Into the Religious Thicket-Constitutional Limits on Civil Court Jurisdiction over Ecclesiastical Disputes* , 47 Ohio St. L.J. 475, 499 (1986) (describing some steps to take in analyzing intrachurch litigation). "In determining whether subject matter jurisdiction exists, courts must look to the 'substance and effect of a plaintiff's complaint to determine its ecclesiastical implication, not its emblemata.' " *Westbrook* , 231 S.W.3d at 405 (quoting *Tran v. Fiorenza* , 934 S.W.2d 740, 743 (Tex. App.—Houston [1st Dist.] 1996, no writ)). The difficulty comes in determining whether a particular dispute is "ecclesiastical" or simply a civil law controversy in which church officials happen to be involved. *Tran* , 934 S.W.2d at 743 (holding that whether priest had been excommunicated—divesting him of his priestly authority—was unavoidably an ecclesiastical matter even if the truth of that fact would bar his defamation claim).

" 'Membership in a church creates a different relationship from that which exists in other voluntary societies formed for business, social, literary, or charitable purposes.' " *Westbrook* , 231 S.W.3d at 398 (quoting *Minton v. Leavell* , 297 S.W. 615, 622 (Tex. Civ. App.—Galveston 1927, writ ref'd)). Because a church's autonomy in managing its affairs has long been afforded broad constitutional protections, the court must ask whether its decision of the issues would "unconstitutionally impede the church's authority to manage its own affairs." *Id.* at 397.

Ultimately, in *Westbrook* , the court concluded that subjecting the church's pastor to tort liability for professional negligence as a counselor for engaging the church's disciplinary process once facts were revealed that triggered such discipline would have a "chilling effect" on the church's ability to discipline members and deprive churches of their right to construe and administer church laws. *Id.* at 400. The court reasoned that

> while the elements of Penley's professional-negligence claim can be *defined* by neutral principles without regard to religion, the *application* of those principles to impose civil tort liability on Westbrook would impinge upon [the church's] ability to manage its internal affairs and hinder adherence to the church disciplinary process that its constitution requires.

Id. The secular confidentiality interest represented by Penley's professional-negligence claim failed to override the strong constitutional presumption that favors preserving the church's interest in managing its affairs, particularly when the pastor's actions did nothing to endanger Penley's or the public's health or safety. *400 *Id.* at 402, 404. The values underlying the constitutional interest in prohibiting judicial encroachment upon a church's ability to manage its affairs and discipline its members, who have voluntarily united themselves to the church body and impliedly consented to be bound by its standards, must be zealously protected, and when presented with conflicting interests like those presented in *Westbrook* , generally "a 'spirit of freedom for religious organizations' prevails, even if that freedom comes at the expense of other interests of high social importance." *Id.* at 403 (internal citations omitted). Accordingly, after liberally construing Penley's pleadings, the court held that the trial court properly dismissed the case on Westbrook's plea to the jurisdiction. *Id.* at 405.

(3) Intermediate Appellate Court Cases

This court's cases involving churches have run the gamut, from the relationship between a church and its ministers, which we recognized as of "prime ecclesiastical concern," to whether a church incorporated under the nonprofit corporations act gave proper notice of a business meeting. *Compare Smith v. N. Tex. Dist. Council of Assemblies of God & House of Grace* , No. 02-05-00425-CV, 2006 WL 3438077, at *3 (Tex. App.—Fort Worth Nov. 30, 2006, no pet.) (mem. op.) (affirming dismissal for want of jurisdiction when appellants sued for declaration that church's district council did not follow church constitution, bylaws, and rules of procedure and for a division of church's assets between two congregations), *Dean v. Alford* , 994 S.W.2d 392, 395 (Tex. App.—Fort Worth 1999, no pet.) (holding that the vote on a pastor's removal in a congregational church involved a

purely ecclesiastical, administrative matter), *and Patterson v. Sw. Baptist Theological Seminary* , 858 S.W.2d 602, 603–04 (Tex. App.—Fort Worth 1993, no writ) (affirming dismissal in wrongful termination suit because case essentially involved a religious dispute, the "key inquiry under the First Amendment [being] whether a religious organization is making an ecclesiastical decision"), *with Kelly v. Church of God In Christ, Inc.* , No. 02-10-00047-CV, 2011 WL 1833095, at *13 n.18 (Tex. App.—Fort Worth May 12, 2011, pet. denied) (mem. op.) (avoiding issue of whether negligence claims were barred by First Amendment by concluding that the trial court properly granted summary judgment on the negligence claims), *and Randolph v. Montgomery* , No. 02-06-00087-CV, 2007 WL 439026, at *1–2 (Tex. App.—Fort Worth Feb. 8, 2007, no pet.) (mem. op.) (holding no intrusion into ecclesiastical matters when issue was whether proper notice of business meeting was given by church incorporated under nonprofit corporations act and trial court merely had to apply statute's plain language and apply neutral principles of law). Yet, to the extent the application of neutral principles requires discussion and analysis, the issues now before us appear to be of first impression. *Cf. Smith* , 2006 WL
401 3438077, at *3.[67] *401 This is not so with some of our sister courts.

67 *Smith* involved an intracongregational dispute that arose after some church members unsuccessfully sought a division of church assets. 2006 WL 3438077, at *1. One of the complaints raised in the ensuing litigation was that the church constitution, bylaws, and rules of procedure had not been followed. *Id.* at *2. We agreed that the trial court correctly dismissed the case for want of jurisdiction when the plaintiffs' claims asked the trial court to determine matters involving clergy, church discipline, and ecclesiastical governance. *Id.* We noted that the difficulty—as here—lies in determining whether a particular dispute is ecclesiastical or simply a civil law controversy in which church officials happen to be involved. *Id.* at *3. We held that "[m]atters involving the interpretation of church bylaws and constitutions, the relationship between an organized church and its minister, and the division of church assets are all ecclesiastical concerns." *Id.* (citing *Milivojevich* , 426 U.S. at 708–09, 724–25, 96 S.Ct. at 2380, 2387–88). However, per the supreme court's instructions in *Episcopal Diocese* and *Masterson* , we are required to consider the division of church assets insofar as we can determine ownership through the application of neutral principles and are required in that analysis to consider church bylaws and constitutions. *See Episcopal Diocese* , 422 S.W.3d at 651–52 ; *see also Masterson* , 422 S.W.3d at 606 (observing that many disputes "will require courts to analyze church documents and organizational structures to some degree").

For example, the Amarillo court discussed the issue in *African Methodist Episcopal Church, Allen Chapel v. Independent African Methodist Episcopal Church* (*AMEC*), within the context of what the case was not: " [T]his is *not* one of those suits where the local congregation becomes divided and each division claims to have the right to the property to the exclusion of the other members." 281 S.W.2d 758, 759 (Tex. Civ. App.—Amarillo 1955, writ ref'd n.r.e.) (emphasis added). In *AMEC* , all of the property was bought and paid for by the local church, the deed was made out to the trustees of the African Methodist Church of Vernon and not to the mother church, and the entire membership of the local church—including the pastor—quit the mother church. *Id.* at 759–60. When *all* of the members withdrew from the mother church, dissolved the local church, and organized under the name of Independent AMEC of Vernon, Texas, because the trustees held the property in trust for the benefit of those who had bought and paid for it, the court concluded that the property belonged to the local church. *Id.* at 760. Part of the rationale, however, was that this case preceded the ability of unincorporated nonprofit associations to hold property in any form other than under trustees. *See id.* ; *cf.* Tex. Bus. Orgs. Code Ann. § 252.003 (West 2012) (providing that nonprofit associations may acquire, hold, encumber, and transfer real and personal property in this state).

The Texarkana court discussed the issue before us in *Presbytery of the Covenant v. First Presbyterian Church of Paris, Inc.* , 552 S.W.2d 865 (Tex. Civ. App.—Texarkana 1977, no writ). In that case, the majority of the members of the First Presbyterian Church of Paris sought to withdraw from the national church, PCUSA, and

to affiliate with another group. *Id.* at 867. The Presbytery of the Covenant—one of PCUSA's governing layers—sought to prevent the withdrawing faction from taking possession of and asserting ownership to the church property, and the withdrawing faction sued the Presbytery and others to try title. *Id.* After a jury trial, the trial court rendered judgment for the withdrawing faction. *Id.* The appellate court reversed the trial court's judgment. *Id.* at 872.

On appeal, the court determined that prior to June 17, 1973—the date of the attempted withdrawal—there was only one First Presbyterian Church of Paris, which was affiliated with PCUSA and which had acquired all of the real property involved at a time when there was no disagreement over the church property. *Id.* at 867–69. Each of the deeds named as grantee either First Presbyterian Church of Paris U.S. or the corporation First Presbyterian Church U.S. of Paris, Inc., which was chartered in Texas in 1966 to hold property for the First Presbyterian Church of Paris U.S. *Id.* at 869. On February 13, 1973, the Presbytery established an administrative commission in anticipation that some of the local congregations might attempt to withdraw from
402 PCUSA and a pastoral letter*402 required written notices prior to calling a congregational meeting to consider a proposal to withdraw. *Id.* The required written notices were not given; rather, on June 10, 1973, oral notice was given from the pulpit of the congregational meeting to be held on June 17 to consider a resolution to withdraw from PCUSA. *Id.*

At the June 17, 1973 meeting, 101 of the 149 members on the church's active roll attended the meeting and voted for the withdrawal. *Id.* The Presbytery turned the matter over to the administrative commission, which began a process that resulted in the formal suspension and divestiture of the local church's leadership, and in July 1973, the commission declared that the action taken to withdraw was null and void. *Id.* at 869–70. The withdrawing faction transferred the real property and assets owned by the First Presbyterian Church of Paris U.S. to a corporation that they attempted to create by way of an amendment to the charter of the First Presbyterian Church U.S. of Paris, Inc., and they affiliated with a schismatic organization, the Vanguard Presbytery of the Continuing Presbyterian Church. *Id.* at 870. Of the 149 members, 30 signed statements of loyalty and desire to remain in the PCUSA-recognized church, and on September 13, 1973, the administrative commission recognized them as constituting the First Presbyterian Church of Paris U.S. *Id.*

The Texarkana court first identified the two general types of religious organizations recognized in the law: (1) congregational, which is strictly independent of any other ecclesiastical association and owes no fealty or obligation to any higher authority, and (2) hierarchical, in which the local congregation is but a subordinate member of some general church organization in which there are superior ecclesiastical tribunals with general and ultimate power of control more or less complete in some supreme judicatory over the whole membership of that general organization. *Id.* PCUSA—like TEC—is recognized as a hierarchical church, "at least as to ecclesiastical matters and church government." *Id.*

The Texarkana court acknowledged that civil courts' power to resolve disputes relating to church property was restricted to an adjudication of property rights by the application of neutral principles of law developed for use in all property disputes and that when a hierarchical organization is involved, the decisions of the highest church judicatory to which the question has been taken, as to questions of church discipline or government, are—so far as they are relevant—final and binding on the civil courts, subject only to narrow review if found to have resulted from fraud or collusion. *Id.* at 870–71. With regard to the issue before it, the Texarkana court recited that

> [w]hen a division occurs in a local church affiliated with a hierarchical religious body, and a dispute arises between rival groups as to the ownership or control of the local church property, the fundamental question as to which faction is entitled to the property is answered by determining which of the factions is the representative and successor to the church as it existed prior to the division, and that is determined by which of the two factions adheres to or is sanctioned by the appropriate governing body of the organization. *It is a simple question of identity.* In making such a determination, the civil court exercises no role in determining ecclesiastical questions. It merely settles a dispute as to identity, which in turn necessarily settles a dispute involving property rights. In doing so, the court applies neutral principles of law....

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Id. at 871 (citations omitted) (emphasis added).

Accordingly, the court reasoned that prior to June 17, 1973, the First Presbyterian Church of Paris U.S. and all of its members were part of PCUSA's organization, and there was no question that members dissatisfied with PCUSA's actions could withdraw their membership from the First Presbyterian Church of Paris U.S. and thus their affiliation with PCUSA. *Id.* But by their unilateral action, the withdrawing members could not dissolve the local church that was an integral part of PCUSA when the PCUSA constitution expressly vested in the presbytery the power to dissolve a local church. *Id.* When the local church was not dissolved and still existed after June 17, it became the prerogative of PCUSA's governing judicatories to determine who constituted the lawful congregation of the First Presbyterian Church of Paris U.S. *Id.* Because the loyal faction had submitted itself to PCUSA's judicatories and had been recognized as such as the duly existing local congregation, they had "the identity to make of them the First Presbyterian Church of Paris U.S., and they are entitled to possession and control of the property conveyed to that church." *Id.*

Specifically, despite the vote by the majority to withdraw from PCUSA, the members of a church organization "which is hierarchical as to church government cannot dissolve a local church in contravention of the governing rules or edicts of the mother church, and then re-establish themselves as an independent church or one associated with a schismatic group and take the church property with them." *Id.* at 871–72. The church existed prior to the schism, still existed, and was composed of those members who remained loyal to PCUSA and who had been recognized by the governing judicatories as the local church. *Id.* at 872. The question of the church's right to withdraw from PCUSA without the consent of the Presbytery was one of church government determined adversely to the withdrawing faction by the appropriate church tribunals. *Id.* ; *see also Green* , 808 S.W.2d at 548–49, 552 (relying on *Presbytery of the Covenant* to affirm trial court's judgment awarding possession of church property to loyalist group affiliated with United Pentecostal Church International, Inc., a hierarchical church, which had adopted UPCI's bylaws for local church government prior to the dispute over property ownership). *But see Masterson* , 422 S.W.3d at 605 & n.5 (listing *Presbytery of the Covenant* as one of the court of appeals cases reading *Brown* as applying a deference approach and applying deference principles to hierarchical church property dispute cases); *Schismatic & Purported Casa Linda Presbyterian Church in Am. v. Grace Union Presbytery, Inc.* , 710 S.W.2d 700, 705 (Tex. App.—Dallas 1986, writ ref'd n.r.e.) (stating that although the Texarkana court purported to apply neutral principles in *Presbytery of the Covenant* , "the court in fact applied the deference rule in reaching its decision"),[68] *cert. denied* , 484 U.S. 823, 108 S.Ct. 85, 98 L.Ed.2d
404 46 (1987).*404 Because the foregoing cases involved facts, legal principles, and analysis similar to those facing us here, they provide guidance to us in conducting our analysis.

68 Constitutionally speaking, the court in *Presbytery of the Covenant* did not have a choice about applying deference in that case. Deed construction was not an issue because each of the deeds named either First Presbyterian Church of Paris U.S. or the First Presbyterian Church of Paris U.S., Inc. as grantee. 552 S.W.2d at 869. Instead, the primary questions before the court were (1) whether PCUSA was hierarchical or congregational as to property and (2) who was the "First Presbyterian Church of Paris U.S."? *Id.* at 868, 870–72. The court's answer to the first question—PCUSA was hierarchical—determined the answer to the second. *Id.* at 870–72 ; *see Brown* , 116 S.W. at 364–65 (holding that the church that recognized the authority of PCUSA was "identified as being the church to which the deed was made").

(4) Other States' Cases

Because other courts have previously faced strikingly similar facts, we also examine these cases to determine how those situations have been resolved.

(a) Diocese of San Joaquin

The annual convention of the Diocese of San Joaquin voted to leave TEC and affiliate with the Anglican Province of the Southern Cone in December 2007. *Diocese of San Joaquin* , 202 Cal.Rptr.3d at 57. In January 2008, TEC disciplined then-Bishop John-David Schofield, and Presiding Bishop Schori ordered him to stop all "episcopal, ministerial, and canonical acts, except as relate to the administration of the temporal affairs of the Diocese of San Joaquin." *Id.* Approximately a week later, Schofield filed with the California Secretary of State an amendment to the articles of incorporation of the corporation sole[69] to change its name from "The Protestant Episcopal Bishop of San Joaquin" to "The Anglican Bishop of San Joaquin." *Id.* He represented in the document that the amendment had been duly authorized by the diocese, whose consent by annual convention was required; however, the annual convention had neither considered nor authorized any such amendment. *Id.* at 56–57.

69 Under California law, a corporation sole is a perpetual entity through which a religious organization can administer and manage property dedicated to the benefit of that organization. *Diocese of San Joaquin* , 202 Cal.Rptr.3d at 56 n.1.

Presiding Bishop Schori issued Schofield's deposition on March 12, 2008, terminating and vacating his ecclesiastical and related secular offices. *Id.* at 57–58. Nonetheless, on March 27, 2008, Schofield began retitling twenty-seven pieces of real property, first granting them to "The Anglican Bishop of San Joaquin, a Corporate Sole," and then transferring them to the "Anglican Diocese Holding Corporation," which he had formed to perform the same function as the corporation sole and to protect the property from the provisional bishop elected by the minority of parishes and members who had not seceded from TEC. *Id.* at 58. In its lawsuit, TEC and its affiliated diocese sought to reclaim possession of property, among other things. *Id.* California's intermediate appellate court concluded that the dispute regarding the identity of the incumbent "Episcopal Bishop of the Diocese of San Joaquin" was "quintessentially ecclesiastical," as was the continuity of the diocese as an entity within TEC. *Id.* at 58–59. On remand, it instructed the trial court to apply neutral principles of law to resolve the property disputes on the remaining causes of action. *Id.* at 59.

At trial, the parties stipulated that all of the dates of Schofield's transfer of the property had occurred after he had been removed as TEC's bishop. *Id.* Accordingly, the trial court concluded that the property transfers were void either because the property was held in trust for TEC or because Schofield lacked the authority to make the transfers. *Id.* at 59–60.

On appeal, the court noted that deciding whether a diocese can leave TEC does not resolve the property dispute; rather, sources such as deeds, bylaws, articles of incorporation, and relevant statutes must be considered under the neutral principles analysis. *Id.* at 63–64. The court also observed *405 that the trial court

erred in its trust finding because the Dennis Canon imposed by its terms an express trust in favor of TEC on property held by a parish, not by a diocese. *Id.* at 64. It refused to imply a trust on church property because that

> almost inevitably puts the civil courts squarely in the midst of ecclesiastical controversies, in that every dispute over church doctrine that produces strongly held majority and minority views forces the court to determine the true implied beneficiaries of the church entities involved. The court would be required to determine which faction continued to adhere to the "true" faith. This is something a civil court is not permitted to do. "If the civil courts cannot properly determine which competing group is the bearer of the true faith, they cannot determine for whose benefit title to church property is impliedly held in trust."

Id. (quoting *Barker* , 171 Cal.Rptr. at 551).

The court looked at how title to the property was held and the structure of the corporation sole when Schofield attempted to make the transfers. *Id.* The validity of the 2007 amendments to the diocesan constitution and canons were not determinative because the corporation sole, not the diocese, held title to the property. *Id.* Because TEC had ordered Schofield to continue administering the diocese's temporal affairs in the January 11, 2008 order, he remained the chief officer of the corporation sole until he was deposed on March 12, 2008. *Id.* at 65. However, his attempted amendment was not authorized at the 2007 diocesan convention as required to be valid under California law. *Id.* at 65. And the diocesan convention did not attempt to ratify the action of the diocesan council in trying to amend the canon requiring title of the corporation sole to be "The Protestant Episcopal Bishop of San Joaquin" until October 2008. *Id.* at 65–66. Thus, under the terms of the diocese's canons, the amendment was invalid. *Id.* at 66.

Consequently, Schofield's January 22, 2008 attempt to amend the articles of incorporation was invalid and of no effect. *Id.* And because that amendment was invalid, his attempt to transfer property from the corporation sole known as "The Protestant Episcopal Bishop of San Joaquin" to "The Anglican Bishop of San Joaquin, a Corporation Sole" also failed, because no such entity existed when he executed and recorded those deeds between March and August 2008. *Id.* Likewise, Schofield's attempt to transfer the disputed property from "The Anglican Bishop of San Joaquin, a Corporation Sole" to "The Anglican Diocese Holding Corporation" also failed, and title therefore remained with the Protestant Episcopal Bishop of San Joaquin. *Id.* at 66–67. The court affirmed the judgment returning the property to TEC and the TEC-affiliated diocese. *Id.* at 67.

(b) Diocese of Quincy

The Diocese of Quincy voted to end its association with TEC and entered into membership with the Anglican Church of the Southern Cone in November 2008. *Diocese of Quincy* , 2014 IL App (4th) 130901, ¶¶ 1, 383 Ill.Dec. 634, 14 N.E.3d at 1249–50. The dissenters formed the "Diocese of Quincy of the Episcopal Church," and they and TEC (collectively, the TEC dissenters) informed the bank holding approximately $3 million in church assets that a dispute had arisen over the funds' ownership. *Id.* ¶ 1, 383 Ill.Dec. 634, 14 N.E.3d at 1249. After the bank froze the assets, all parties sought a declaratory judgment on the assets' ownership. *Id.* ¶ 2, 383 Ill.Dec. 634, 14 N.E.3d at 1249. After a three-week bench trial, the trial court, applying neutral principles of
406 law, found against the TEC dissenters *406 and issued twenty-one pages of findings with its order. *Id.* ¶¶ 2, 19, 27, 383 Ill.Dec. 634, 14 N.E.3d at 1249, 1252–53.

In affirming the trial court's judgment, the court recounted that in 1893, the diocese had formed a state nonprofit corporation called "The Trustees of Funds and Property of the Diocese of Quincy" (hereafter, Corporation #1) to hold, manage, and distribute the diocese's funds. *Id.* ¶ 6, 383 Ill.Dec. 634, 14 N.E.3d at

1249–50. TEC was not a party to the 1999 contract between the bank and Corporation #1. *Id.* ¶ 7, 383 Ill.Dec. 634, 14 N.E.3d at 1250. Then in 2005, the diocese incorporated as a state nonprofit corporation called the Diocese of Quincy (hereafter, Corporation #2). *Id.* ¶ 8, 383 Ill.Dec. 634, 14 N.E.3d at 1250. Corporation #2's directors were members of the diocese, and in March 2009, Corporation #2 filed its annual corporate report with the state, listing its directors. *Id.* ¶¶ 8, 10, 383 Ill.Dec. 634, 14 N.E.3d at 1250. In April 2009, TEC declared void the diocese's November 2008 decision to disaffiliate and elected a new bishop and other new leaders for the diocese. *Id.* ¶ 12, 383 Ill.Dec. 634, 14 N.E.3d at 1250. That same month, Corporation #1 filed its annual report with the state, listed its directors, and amended its bylaws to remove references to TEC. *Id.* ¶ 11, 383 Ill.Dec. 634, 14 N.E.3d at 1250. Corporation #1's amended bylaws provided that directors did not have to be Illinois residents but "shall be communicants in good standing with their parish or mission church within the Diocese of Quincy." *Id.* , 383 Ill.Dec. 634, 14 N.E.3d at 1250. TEC asked the court to hold that the individuals listed as directors of Corporations #1 and #2 had vacated their offices by leaving TEC and to declare the new persons that had been elected as the corporations' directors. *Id.* ¶ 17, 383 Ill.Dec. 634, 14 N.E.3d at 1251.

The court observed that Illinois had adopted the neutral principles approach, "whereby a court may objectively examine pertinent church characteristics, constitutions and bylaws, deeds, state statutes, and other evidence to resolve the matter as it would a secular dispute." *Id.* ¶ 44, 383 Ill.Dec. 634, 14 N.E.3d at 1256. The court further noted that deference is unavailable when the determination of a church's hierarchical structure is not easily discernible. *Id.* ¶ 47, 383 Ill.Dec. 634, 14 N.E.3d at 1256. It pointed out that the trial court—after hearing conflicting evidence—had concluded that it could not "constitutionally determine the highest judicatory authority or the locus of control regarding the property dispute to which it would be required to defer," because the diocese's status as a subordinate in a hierarchy was "not clear or readily apparent," rendering deference unavailable. *Id.* ¶¶ 20–22, 27, 47, 383 Ill.Dec. 634, 14 N.E.3d at 1252–53, 1256 ; *cf. Masterson* , 422 S.W.3d at 608 ("We agree with the court of appeals that the record conclusively shows TEC is a hierarchical organization.").

Because the central matter underlying the parties' dispute was "who owns the disputed property," the court did not have to determine whether the diocese could leave TEC or identify the leaders of the continuing diocese. *Diocese of Quincy* , 2014 IL App (4th) 130901, ¶ 48, 383 Ill.Dec. 634, 14 N.E.3d at 1257. For the property at issue—funds in the bank account and the deed to the "Diocesan House"—the deed reflected that title to the property was held by Corporation #1, and its language did not provide for an express trust in favor of TEC; TEC was likewise not a party to the contract between Corporation #1 and the bank, and it was undisputed that TEC had never had any involvement with the bank account. *Id.* ¶ 50, 383 Ill.Dec. 634, 14 N.E.3d at 1257. The
407 corporations were not organized under Illinois's Religious *407 Corporation Act, which would have imposed certain requirements on the incorporating body with regard to trustee membership. *Id.* ¶ 51, 383 Ill.Dec. 634, 14 N.E.3d at 1257. And the evidence—including the deed, the bank contract, and the diocese's constitution and canons—revealed nothing to show an express or implied trust or any other interest vested in TEC. *Id.* ¶ 54, 383 Ill.Dec. 634, 14 N.E.3d at 1258. The Dennis Canon provided that parish property was held in trust for the diocese and TEC but included no "similar language with respect to diocesan property being held in favor of" TEC. *Id.* , 383 Ill.Dec. 634, 14 N.E.3d at 1258. Accordingly, the court affirmed the trial court's judgment.[70] *Id.* ¶ 57, 383 Ill.Dec. 634, 14 N.E.3d at 1259.

70 In *Diocese of San Joaquin* , the court distinguished *Diocese of Quincy* , observing that the Quincy diocese (Corporation #2) was incorporated as a nonprofit corporation under Illinois law and the property was held, managed, and distributed by another nonprofit corporation (Corporation #1), the directors of whom were members of Corporation #2. 202 Cal.Rptr.3d at 60–61. In contrast, in the San Joaquin Diocese, the property was held in the name of the corporation sole with the incumbent bishop as the single officeholder. *Id.* at 61. The *San Joaquin* court noted that because the Quincy

diocese was organized under the Illinois Not-For-Profit Corporation Act instead of the Illinois Religious Corporation Act, TEC had no authority to remove and replace the incorporated diocese's directors, whereas TEC had more influence and control over the California corporation sole because any amendments to its articles of incorporation had to be "authorized by the religious organization." *Id.* (observing that under the Illinois Religious Corporation Act "a trustee of a religious corporation can be removed from office for, inter alia, abandonment of the denomination"); *see* 805 Ill. Comp. Stat. Ann. 110/46d (West, Westlaw through 2018 Legis. Sess.) (providing that the trustee of a corporation organized under the Illinois Religious Corporation Act "may be removed from office whenever his office shall be declared vacant ... for an abandonment of the faith of the congregation, church, society, sect, or denomination, or for failure to observe the usages, customs, rules, regulations, articles of association, constitution, by-laws or canons of the congregation, church or society, or of the ecclesiastical body, or diocesan, or like ecclesiastical officer, having jurisdiction over any ecclesiastical district or diocese).

(c) Diocese of South Carolina

During the pendency of this appeal, the Supreme Court of South Carolina issued an opinion—or rather, five opinions, as each justice wrote separately—touching on some of the issues before us. *See Protestant Episcopal Church in the Diocese of S.C. v. The Episcopal Church* , 421 S.C. 211, 806 S.E.2d 82, 84, 93 (2017), *cert. de n ie d* , No. 17-1136, 2018 WL 838170 (Feb. 9, 2018). As recounted by one of the justices, a majority of three agreed that in secular church disputes, neutral principles of law should be applied to resolve the case, while a different majority of three held that, with regard to the twenty-eight church organizations that acceded to the Dennis Canon, a trust in favor of TEC is imposed on the property, putting title in the national church. *Id.* at 125 n.72 (Toal, Acting J., dissenting).

(5) Commentary

Unsurprisingly, cases involving church property have attracted a number of scholarly articles weighing in on various aspects of the tension between the First Amendment and state secular law. *See* McConnell & Goodrich, 58 Ariz. L. Rev. at 321–22 (observing the common pattern of church property disputes and the arguments made by each side); Valerie J. Munson, *Fraud on the Faithful? The Charitable Intentions of Members of Religious Congregations & the Peculiar Body of Law Governing Religious Property in the United States* , 44 Rutgers L.J.
408 471, 509 (2014)*408 (observing that history suggests that religion-based property disputes will always be around and that "the only constant in that body of law has been its utter inconsistency and uncertainty"); Bertie D. Jones, *Litigating the Schism & Reforming the Canons: Orthodoxy, Property & the Modern Social Gospel of the Episcopal Church* , 42 Golden Gate U. L. Rev. 151, 215 (2012) (asserting that the property disputes within TEC are about theology and proposing that ecclesiastical property courts would be more efficient to determine the Dennis Canon trust question); R. Gregory Hyden, Comment, *Welcome to the Episcopal Church, Now Please Leave: An Analysis of the Supreme Court's Approved Methods of Settling Church Property Disputes in the Context of the Episcopal Church & How Courts Erroneously Ignore the Role of the Anglican Communion* , 44 Willamette L. Rev. 541, 560 (2008) ("By ignoring the judicatory procedures outside of the national polity of the Episcopal Church, courts are not following the principles they set out for a hierarchical church in either a deference approach or a neutral principles approach."); Jeffrey B. Hassler, Comment, *A Multitude of Sins? Constitutional Standards for Legal Resolution of Church Property Disputes in A Time of Escalating Intradenominational Strife* , 35 Pepp. L. Rev. 399, 455 (2008) ("Churches have not ordered their affairs in ways that lend themselves to easy civil court resolution."); Fennelly, 9 St. Thomas L. Rev. at 357 ("The unintended consequence of neutral principles has been ... an unwarranted intrusion into a sphere that lies outside government's legitimate boundaries of authority."); Patty Gerstenblith, *Civil Court Resolution of Property Disputes Among Religious Organizations* , 39 Am. U. L. Rev. 513, 519–20 (1990) (observing that Supreme

Court jurisprudence that grants greater deference in property disputes to hierarchical religious organizations than to congregational religious organizations "would seem to create a structural relationship violative of the establishment clause"). These commentaries have provided valuable guidance to us.

(6) Summary

Under the neutral principles methodology, we are required to apply neutral principles of law to issues such as land titles, trusts, and corporate formation, governance, and dissolution, even when religious entities are involved, *Masterson* , 422 S.W.3d at 606, and "what happens to the property is not [an ecclesiastical matter], unless the congregation's affairs have been ordered so that ecclesiastical decisions effectively determine the property issue." *Id.* at 607. That is, as set out above, per *Jones* and *Milivojevich* , we must perform a non-religious-doctrine-related review of the plain language of the deeds and the provisions dealing with ownership and control of property contained within the local and general churches' governing documents, confining ourselves to formal title, corporate documents, and other items used in the secular world to determine ownership issues, while avoiding questions about the tenets of faith, including any religious test as to the parties' leadership or identity. If a case requires the court only to interpret a contract or deed but not to intervene in matters of church discipline, internal administration, or membership—or matters of morality or church doctrine—then it should be a simple matter to resolve a basic civil law controversy that just happens to involve a church. *See Episcopal Diocese* , 422 S.W.3d at 650 (stating that under neutral principles, courts "defer to religious entities' decisions on ecclesiastical and church polity issues such as who may be members of the
409 entities and whether to remove a bishop" while deciding issues like property ownership and the *409 existence of a trust "on the same neutral principles of secular law that apply to other entities"). But whether the application of the neutral principles approach is unconstitutional depends on how it is applied. *Id.* at 651 ; *see also Westbrook* , 231 S.W.3d at 400, 403. *Milivojevich* , *Kedroff* , and *Hosanna–Tabor* warn us, at all costs, to avoid becoming unconstitutionally entangled in the parties' theological, hierarchical web of who is or can be the "real" bishop or diocese for religious purposes. We have translated these and other strictures into a flow
410 chart.*410 *See* Young & Tigges, 47 Ohio St. L.J. at 498–99 ("[I]ndeed it is the presence of such a doctrinal issue which turns a case concerning church discipline, organization, or government into an ecclesiastical one calling for deference. Once a doctrinal question is present in a case, it cannot be avoided through neutral principles or any other approach." (footnote omitted)); *see also* Hyden, 44 Willamette L. Rev. at 569–70 (recommending that courts should ensure that churches wishing to disaffiliate have first exhausted all remedies available to them within the structure of the national and international church and, if so, then give the deference courts traditionally give to administrative agency decisions). *Compare Gonzalez v. Roman Catholic Archbishop of Manila* , 280 U.S. 1, 16, 50 S.Ct. 5, 7–8, 74 L.Ed. 131 (1929) (observing that in the absence of fraud or collusion, "the decisions of the proper church tribunals on matters purely ecclesiastical, although affecting civil rights, are accepted in litigation before the secular courts as conclusive, because the parties in interest made them so by contract or otherwise"), *and Singh v. Sandhar* , 495 S.W.3d 482, 490 (Tex. App.—Houston [14th Dist.] 2016, no pet.) ("While the Supreme Court left open the possibility that fraud or collusion claims may serve as vehicles for civil court review of ecclesiastical decisions, we have found no Texas case that has applied such an exception."), *with Libhart* , 949 S.W.2d at 794 (citing a Washington case for the proposition that when church proceedings are tainted by fraud, judicial review is appropriate).[71]

71 In considering whether a former pastor fraudulently misrepresented material facts in selling church facilities, the *Libhart* court quoted the Supreme Court of Washington as prohibiting the use of "chicanery, deceit, and fraud" to divert church property "to a purpose entirely foreign to the purposes of the organization[ ] for ... selfish benefit." 949 S.W.2d at 794 (quoting *Hendryx v. People's United Church of Spokane* , 42 Wash. 336, 84 P. 1123, 1127 (1906)). The parties in the instant case have not specified any fraud claims.

b. State Substantive Law

Within the neutral principles framework, we must consider our state's associations, corporations, and trust law as applicable to the case.

(1) Associations Law

EDFW is a Texas nonprofit association governed by chapter 252 of the business organizations code. *See* Tex. Bus. Orgs. Code Ann. §§ 1.103, 252.001 (West 2012). These days, a nonprofit association may be the beneficiary of a trust, contract, or will. *See id.* § 252.015 (noting that until September 1, 1995, a nonprofit association could not hold an estate or interest in real or personal property, so the interest was held in trust by a fiduciary, but after September 1, 1995, the fiduciary could transfer the interest to the nonprofit association in the nonprofit's name). The nonprofit association is separate from its members for purposes of determining and enforcing its rights, duties, and liabilities in contract and tort. *Id.* § 1.002(57)–(58) (West Supp. 2017), §§ 3.002, 252.006(a) (West 2012). Under chapter 252, a "member" is a person who, under the association's rules or practices, may participate in the selection of persons authorized to manage association affairs or in the development of association policy. *Id.* § 252.001(1). "A member of, or a person considered as a member by, a nonprofit association may assert a claim against the nonprofit association," and vice versa. *Id.* § 252.006(d).

"It is generally held that the constitution and by-laws of a voluntary association, whether incorporated or not,
411 *411 are controlling as to its internal management." *Dist. Grand Lodge No. 25 Grand United Order of Odd Fellows v. Jones* , 138 Tex. 537, 160 S.W.2d 915, 922 (1942) ; *Juarez v. Tex. Ass'n of Sporting Officials El Paso Chapter* , 172 S.W.3d 274, 279 (Tex. App.—El Paso 2005, no pet.) ("[T]he courts of this state recognize the right of a private association to govern its own affairs."). Texas courts have recognized that an association's bylaws constitute a contract between the parties. *Monasco v. Gilmer Boating & Fishing Club* , 339 S.W.3d 828, 838 n.14 (Tex. App.—Texarkana 2011, no pet.). *But see Westbrook* , 231 S.W.3d at 398 (quoting *Minton* , 297 S.W.2d at 621–22, for the proposition that church membership creates a different relationship from that of other voluntary associations); *Harden v. Colonial Country Club* , 634 S.W.2d 56, 60 (Tex. App.—Fort Worth 1982, writ ref'd n.r.e.) (stating that a suit on bylaws and policies is not the type of breach-of-contract suit contemplated by the legislature with regard to the recovery of attorney's fees). The constitution and bylaws of an association confer no legal rights on nonmembers. *Schooler v. Tarrant Cty. Med. Soc'y* , 457 S.W.2d 644, 647 (Tex. Civ. App.—Fort Worth 1970, no writ).

By becoming a member of an association, an individual "subjects himself, within legal limits, to the association's power to administer as well as its power to make its rules." *Harden* , 634 S.W.2d at 59. The actions of the association's leadership are permissible and binding on the association's membership so long as they are not illegal, against some public policy, or fraudulent. *Id.* at 60 (refusing judicial intervention in association's internal dispute over rules pertaining to sale of country club membership); *see also Whitmire v. Nat'l Cutting Horse Ass'n* , No. 02-08-00176-CV, 2009 WL 2196126, at *4 (Tex. App.—Fort Worth July 23, 2009, pet. denied) (mem. op.) ("Judicial review is only proper when the actions of the organization are illegal, against some public policy, arbitrary, or capricious."). *But see Milivojevich* , 426 U.S. at 713, 96 S.Ct. at 2382 (disavowing an exception for arbitrariness as to religious associations). Legislative enactment dictates what is public policy in this state. *See Dist. Grand Lodge No. 25* , 160 S.W.2d at 920 ; *see also Dickey v. Club Corp. of Am.* , 12 S.W.3d 172, 177 (Tex. App.—Dallas 2000, pet. denied) (holding that membership in a golf club is not a valuable property right, particularly when plaintiffs did not allege gender inequity or discrimination and there was no claim of fraud or illegality, and that "[i]f the courts were to intervene each time members of a golf club felt that restrictions on tee times were unreasonable, operation of such clubs would become unmanageable and valuable judicial resources would be wasted"). Complaints that attract judicial review are those that "allege a

wholesale deprivation of due process or the opportunity to be heard in violation of some civil or property right." *Whitmire* , 2009 WL 2196126, at *5 ; *see Stevens v. Anatolian Shepherd Dog Club of Am., Inc.* , 231 S.W.3d 71, 74–75 (Tex. App.—Houston [14th Dist.] 2007, pet. denied) (reciting that despite the general rule of noninterference with a voluntary association's internal management, courts will interfere in a private association's inner-dealings if a valuable right or property interest is at stake or if association fails to accord members "something similar to due process").

The TEC parties assert that Appellees lost EDFW's property when they disassociated from TEC, and they refer us to several cases to support their position. *See* *412 *Int'lPrinting Pressman v. Smith* , 145 Tex. 399, 198 S.W.2d 729, 736 (1946) ;[72] *Dist. Grand Lodge No. 25* , 160 S.W.2d at 920 ;[73] *see also* *413 *Progressive Union of Tex. v. Indep. Union of Colored Laborers* , 264 S.W.2d 765, 768 (Tex. Civ. App.—Galveston 1954, writ ref'd n.r.e.) ;[74] *see generally* Tex. Bus. Orgs. Code Ann. § 23.110(a) (West 2012) (providing that when a subordinate body attached to a grand body is wound up and terminated, "all property and rights existing in the subordinate body pass to and vest in the grand body to which it was attached, subject to the payment of any debt owed by the subordinate body").

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72 In *International Printing* , Smith sued the parent union for his wrongful expulsion from the local union, a chartered subordinate organization, after it failed to follow the parent union's rules in expelling him. 198 S.W.2d at 731–32. After a jury trial, the trial court issued a JNOV for the union, but the supreme court rendered judgment for Smith. *Id.* at 731, 738. The court held that Smith's expulsion was illegal and void—the result of "a breach of the fundamental guarantees established by the union for the protection of the rights of the individual member," *id.* at 732, and while the parent union contended that it was not responsible for its subordinate unit's actions, the local union had acted as its agent and was "but the alter ego of the national organization" when it breached the contract—constitution and bylaws—between the organization and its members. *Id.* at 733–34, 736, 742–43. That is, while the local union could elect its own officers and adopt its own constitution and bylaws, the parent union's constitution and bylaws took precedence, regulating in detail how the local union could operate and its officers' performance of their duties. *Id.* at 733. The parent union could also forfeit the local union's charters, take over the administration of its affairs, and remove and expel its officers for a failure to perform their duties. *Id.* And while the parent union's constitution and bylaws did not contain any express promise to allow union members to remain members and enjoy the benefits thereof, the court held that there was an implied obligation to allow a member to enjoy the benefits of his membership "so long as he complies with the obligations imposed by the constitution and by-laws." *Id.* at 737–38.

73 In *Grand Lodge* , the supreme court considered whether the property held by a defunct local fraternal lodge would go to its members or to the grand lodge of which the local lodge had been a constituent member. 160 S.W.2d at 920. Grand Lodge, a fraternal benefit society organized in 1890, sued members of the defunct local lodge in a trespass-to-try-title action involving three lots. *Id.* at 917–18. The local lodge had been one of Grand Lodge's subordinate lodges when it acquired the lots but became "defunct" in 1936, paying no membership dues or assessments to either Grand Lodge or the national organization. *Id.* at 918. The lots, acquired between 1909 and 1920, were paid for by the local lodge's members, and none of Grand Lodge's or the national organization's funds were used directly or indirectly in purchasing the lots or making improvements upon them. *Id.* The deeds were executed to named members of the local lodge "*as trustees of said Local Lodge and to their successors in trust for said lodge.* " *Id.* In 1936, the self-described duly elected and qualified trustees of the local lodge executed general warranty deeds conveying the lots to thirty-four individuals (including themselves) as "all of the present qualified and paid up members" of the lodge, which "is contemplated to be dissolved." *Id.*

The court construed Grand Lodge's constitution and bylaws, which had been in effect since 1908 and which provided that title to all property acquired by subordinate lodges was as trustee for and for the benefit of Grand Lodge, that no property held by a subordinate lodge could be mortgaged, sold, or otherwise encumbered without written permission and consent from Grand Lodge, and that when a subordinate lodge became defunct, all of the property held in trust by

the local lodge "shall be taken over ... and re-possessed by the District Grand Lodge" and "shall vest absolutely in the District Grand Lodge." *Id.* at 918–19. The court then looked to the statutory provisions relating to incorporated lodges —even though Grand Lodge was not incorporated—to determine whether Grand Lodge's constitution and bylaws were contrary to the public policy stated therein and observed that the statutory language "is clear and unequivocal and plainly states what is to become of the property of a defunct local lodge"—i.e., it passes to and vests in the grand body to which it was attached. *Id.* at 920–21 (referring to the statute "merely as a legislative statement of the [underlying] public policy"). Accordingly, the court held that the applicable provisions in Grand Lodge's constitution and bylaws were not contrary to public policy, making Grand Lodge the lots' owner because its constitution and bylaws "became a part of the contract entered into by the defendants when they became members of the order and whatever rights defendants had in the lots in controversy were merely incidental to their membership and terminated absolutely with such membership." *Id.* at 920. While the local lodge had held superior equitable title based on the deeds' language, when it became defunct, it lost its interest in the lots. *Id.* at 920, 923 ; *cf. Simpson v. Charity Benevolent Ass'n* , 160 S.W.2d 109, 109–10, 112–13 (Tex. Civ. App.—Fort Worth 1942, writ ref'd w.o.m.) (holding claimants did not show title vested in them when local lodge purchased property three years before adoption of bylaws upon which claimants relied and entity under which claimants claimed title was not local lodge's parent organization).

74 In *Progressive* , the court observed that it "is well settled that when a person ceases to be a member of a voluntary association, his interest in its funds and property ceases and the remaining members become jointly entitled thereto," even when the majority secedes and organizes a new association. 264 S.W.2d at 768. In that context, 17 individual incorporators obtained a charter for a union in 1930 and became the union's supreme council, which supplied a franchise to Lodge No. 1, an unincorporated association. *Id.* at 766. The franchise authorized the organization of Lodge No. 1 and gave it a constitution, bylaws, and a password. *Id.* Lodge No. 1 collected dues and assessments from its members and regularly paid dues to the supreme council. *Id.* Lodge No. 1 subsequently acquired some property and purported to adopt a constitution and bylaws authorizing its officers to execute legal documents in connection therewith. *Id.* at 766–67. By 1951, Lodge No. 1 had over 1,000 members, had paid off the indebtedness on its land, and had around $8,500. *Id.* at 767. As resentment towards the supreme council festered, some of the officers of Lodge No. 1 became incorporators of the Progressive Union of Texas, to which the State of Texas issued a charter. *Id.* Those incorporators/officers executed a deed conveying Lodge No. 1's property to Progressive and withdrew Lodge No. 1's funds but continued to make reports to the supreme council as Lodge No. 1 for two or three months. *Id.* The majority of Lodge No. 1's members ultimately affiliated with Progressive, while 60 or 70 members of Lodge No. 1 continued to hold meetings separately. *Id.* Litigation ensued, and the remaining members of Lodge No. 1 prevailed in a jury trial. *Id.* Progressive appealed, complaining that the trial court's judgment affected the rights of 900 persons, representing 96% of Lodge No. 1's former membership, but to no avail. *Id.* at 768. The court likewise observed that the evidence was sufficient to support the jury's finding that the incorporator/officers had withdrawn as members from Lodge No. 1 before executing the deed, leaving them without the power to convey Lodge No. 1's property. *Id.*

The business organizations code has a separate chapter for "special-purpose" corporations. *See* Tex. Bus. Orgs. Code Ann. §§ 23.001 –.110 (West 2012). This category applies to business development corporations, which are formed "to promote, develop, and advance the prosperity and economic welfare of this state," *id.* § 23.052, and to "Grand Lodges," such as the Free Masons, Knights Templar, Odd Fellows, or "similar institution or
414 order organized for charitable or benevolent purposes."[75] *Id.* § 23.101; *see also* *414 *CKB & Assocs., Inc. v. Moore McCormack Petroleum, Inc.* , 734 S.W.2d 653, 655 (Tex. 1987) (explaining the maxim *expressio unius est exclusio alterius* to mean "that the naming of one thing excludes another"); *Johnson v. Second Injury Fund* , 688 S.W.2d 107, 108–09 (Tex. 1985) ("The legal maxim *Expressio unius est exclusio alterius* is an accepted rule of statutory construction in this state" through which the express mention or enumeration "of one person, thing, consequence or class is equivalent to an express exclusion of all others"). While the facial simplicity of comparing grand lodges to the types of associations here is alluring, we cannot conclude that the statutory principles applicable to grand lodges apply to entities that lack grand lodges' defining characteristics.[76]

75 In addition to the implied exclusion of other types of associations based on the list in the "special-purpose" statute, grand lodges can be fraternal benefit societies, subject to additional rules applicable to their unique character. *See* Tex. Ins. Code Ann. § 885.051 (West 2009) (defining "fraternal benefit society" in part as a corporation, society, order, or voluntary association that has a lodge system and representative form of government, with or without limiting its membership to a secret fraternity); *Wonderful Workers of the World v. Winn* , 31 S.W.2d 879, 881 (Tex. Civ. App.—Waco 1930, writ dism'd w.o.j.) ("The charter, constitution, bylaws, and rules of appellant offered in evidence show that it consists of a grand lodge with subordinate lodges, and is a fraternal benefit society as contemplated by articles 4820, 4821, 4822, 4823, 4824, and 4834 of the Revised Statutes."); *see also State v. The Praetorians* , 143 Tex. 565, 186 S.W.2d 973, 975–76 (1945) (observing that respondent, a fraternal benefit association operating under a lodge system of government, was the type of association "dealt with in a separate chapter of the statutes ... and ... regulated by laws applicable to them alone," and "regarded by the Legislature as being different from ordinary insurance companies and all other organizations").

76 For example, under section 23.104, "Subordinate Lodges," "[a] subordinate body is subject to the jurisdiction and control of its respective grand body, and the warrant or charter of the subordinate body may be revoked by the grand body." Tex. Bus. Orgs. Code Ann. § 23.104(c). But TEC's constitution and canons do not provide for the complete disassociation—voluntary or involuntary—of a diocese by somehow revoking its membership in the hierarchical church. Indeed, part of the problem in this case is that there was no established framework for disaffiliation. *See* Hassler, 35 Pepp. L. Rev. at 455 (observing "an integral part of the nature of the belief systems of religious communities is the hope that their shared beliefs will make their temporal unity lasting and secure").

Furthermore, labor unions and lodges—and the policies and law applicable to them—have more in common with each other than with hierarchical religious associations. *Compare Westbrook* , 231 S.W.3d at 398 (identifying distinction between church membership and that of other voluntary associations formed for business, social, literary, or charitable purposes), *with* Comment, *State Court Holds Union Must Reinstate & Compensate Members Wrongfully Expelled for Intra-Union Political Activity: Madden v. Atkins* , 59 Colum. L. Rev. 190, 190 (1959) ("Labor unions were early characterized as unincorporated associations not for profit and thus were governed by legal principles which had been formulated for social and benevolent organizations." (footnotes omitted)). As one commentator has noted,

> The explicitly stated purpose of limiting the local union's retention of its property is to strengthen the national labor organization and increase its bargaining power. In the context of church property disputes, the goal of favoring and strengthening the religious hierarchy is not legitimate because it would clearly violate the establishment clause of the [F]irst [A]mendment.

Gerstenblith, 39 Am. U.L. Rev. at 570–71 (footnote omitted) (referencing *Int'lBhd. of Boilermakers v. Local Lodge D474* , 673 F.Supp. 199, 203 (W.D. Tex. 1987) ("Other courts have held that disaffiliation does justify a trusteeship since disaffiliation would have a detrimental effect on the collective bargaining process.")).

Accordingly, the law applicable to lodges, unions, or other special-purpose corporations does not apply to the case before us, and we overrule this portion of the TEC parties' issue 1(c). We will address the remainder of
415 their associations sub-issue in our analysis below.*415 **(2) Corporations Law**

The Corporation, formed under Texas law, came into existence when its certificate of formation was filed. *See* Tex. Bus. Orgs. Code Ann. § 1.002(22) (explaining that one of the "filing" entities is a domestic entity that is a corporation), § 1.101 (West 2012) (stating that Texas law governs the formation and internal affairs of an entity if the entity files a certificate of formation in accordance with the provisions of the business organizations code), § 3.001(c) (West 2012) ("Formation and Existence of Filing Entities"). A nonprofit corporation must include in its certificate of formation whether it will have members and the number of directors constituting the

initial board of directors and their names and addresses, among other things. *Id.* § 3.009(1) – (3). In a religious nonprofit corporation, as here, the board of directors may be affiliated with, elected, and controlled by "an incorporated or unincorporated convention, conference, or association organized under the laws of this or another state, the membership of which is composed of representatives, delegates, or messengers from a church or other religious association." *Id.* § 22.207(a).[77] The board of directors of such a corporation may be wholly or partly elected by one or more associations organized under state law if the corporation's certificate of formation or bylaws provide for that election and the corporation has no members with voting rights. *Id.* § 22.207(b).

77 Revised civil statute article 1396, section 2.14(B) contained the same provisions. *See* Act of Apr. 23, 1959, 56th Leg., R.S., ch. 162, art. 2.14, 1959 Tex. Gen. Laws 286, 294.

A nonprofit corporation's board of directors is "the group of persons vested with the management of the affairs of the corporation, regardless of the name used to designate the group," and its bylaws are the rules adopted to regulate or manage the corporation. *Id.* § 22.001(1), (2) (West Supp. 2017). Unless a director of a nonprofit corporation resigns[78] or is removed, he or she holds office for the period specified in the certification of formation or bylaws and until a successor is elected, appointed, or designated and qualified. *Id.* § 22.208(a)–(b) (West 2012). A director may be removed from office under any procedure provided by the certificate of formation or bylaws. *Id.* § 22.211(a) (West 2012). "In the absence of a provision for removal in the certificate of formation or bylaws, a director may be removed from office, with or without cause, by the persons entitled to elect, designate, or appoint the director." *Id.* § 22.211(b). If the director was elected to office, his or her removal requires an affirmative vote equal to the vote necessary to elect the director. *Id.* Unless otherwise provided by the certificate of formation or bylaws, a vacancy in the board of directors shall be filled by the affirmative vote of the majority of the remaining directors, regardless of whether that majority is less than a quorum. *Id.* § 22.212(a) (West 2012).

78 Except as provided by the certificate of formation or bylaws, a director of a corporation may resign at any time by providing written notice to the corporation. Tex. Bus. Orgs. Code Ann. § 22.2111 (West 2012).

As to the general standards applicable to the directors of a nonprofit corporation's board, a director shall discharge his or her duties "in good faith, with ordinary care, and in a manner the director reasonably believes to be in the best interest of the corporation," and he or she "is not liable to the corporation, a member, or another person for an action taken or not taken as a director if the director acted in compliance with" section 22.221. *Id.* § 22.221(a), (b) (West 2012). A director is not considered to have the duties of a trustee of a trust
416 *416 with respect to the corporation or with respect to property held or administered by the corporation, including property subject to restrictions imposed by the donor or transferor of the property.[79] *Id.* § 22.223 (West 2012).

79 Depending on a nonprofit corporation's federal tax qualification, the nonprofit corporation may also serve as the trustee of a trust. Tex. Bus. Orgs. Code Ann. § 2.106(a) (West 2012).

In construing bylaws, we apply the rules that govern contract interpretation. *In re Aguilar* , 344 S.W.3d 41, 49 (Tex. App.—El Paso 2011, orig. proceeding). We also apply the general rules of contract construction, as expressed in Texas case law, to interpret a Texas corporation's articles of incorporation. *Corcoran v. Atascocita Cmty. Improvement Ass'n* , No. 14-12-00982-CV, 2013 WL 5888127, at *2 (Tex. App.—Houston [14th Dist.] Oct. 31, 2013, pet. denied) (mem. op.) (citing *Highland Crusader Offshore Partners, L.P. v. Andrews & Kurth, L.L.P.* , 248 S.W.3d 887, 891 (Tex. App.—Dallas 2008, no pet.)). We attempt to harmonize and give effect to every provision, and we presume that the parties intended to impose reasonable terms. *Aguilar* , 334 S.W.3d at

50. We examine the document as a whole in light of the circumstances present when it was written. *Corcoran* , 2013 WL 5888127, at *2. If the bylaw or article is written so that it can be given a definite interpretation, it is not ambiguous and the court will construe it as a matter of law. *See Aguilar* , 334 S.W.3d at 50.

Appellees refer us to *Chen v. Tseng* , No. 01-02-01005-CV, 2004 WL 35989, at *6 (Tex. App.—Houston [1st Dist.] Jan. 8, 2004, no pet.) (mem. op.), a corporation case, to support their argument that "[i]t is easy to separate ecclesiastical and property disputes in most cases." The TEC parties respond that the First court subsequently held that case irrelevant under the circumstances presented here, citing *Greanias v. Isaiah* , No. 01-04-00786-CV, 2006 WL 1550009, at *9 (Tex. App.—Houston [1st Dist.] June 8, 2006, no pet.) (mem. op.).

In *Chen* , the First court, citing our opinion in *Dean* , 994 S.W.2d at 395, noted—as set out above—that civil courts have jurisdiction over matters involving churches and their civil, contract, and property rights as long as neutral principles of law may be applied to decide the issues. 2004 WL 35989, at *6. The membership of a religious group had formed a corporation to build a temple; the corporation's bylaws set out the requirements for an annual meeting of the membership to elect directors, the length of their terms, how vacancies would be filled, and the date of the annual meeting. *Id.* at *1. In conducting corporate affairs, the directors frequently consulted with the religion's patriarch and generally followed his instructions. *Id.* at *2. After he died, a dispute arose with regard to the composition of the corporation's board. *Id.* at *2–3.

Chen, who had served as the patriarch's assistant and who subsequently attempted to reorganize the corporation outside the parameters of the corporation's bylaws, conceded that the trial court applied neutral principles of law in interpreting and applying the bylaws. *Id.* at *2, *6. After a four-day bench trial, the trial court "merely applied the bylaws to make a determination of the validity of the selection of directors of the [c]orporation." *Id.* at *3, *6. While the corporation's board controlled the corporation's membership, it did not control membership in the religious group. *Id.* at *6.

417 In *Greanias* , the court considered a plea to the jurisdiction brought in a suit to *417 determine the rightful board of trustees (parish council) of the Annunciation Greek Orthodox Cathedral, organized as a Texas nonprofit corporation, after the hierarch of the regional division of the Greek Orthodox Archdiocese of America removed some of the trustees (10 of 15 total, elected to three-year, staggered terms, from 2000–2002) from office. 2006 WL 1550009, at *1. Prior to the trustees' removal from the board, the Cathedral had adopted its own bylaws rather than the Archdiocese's uniform parish regulations. *Id.*

Internal strife occurred in 2001, with the appointment by the hierarch of a priest with whom the subsequently removed board members did not get along. *Id.* at *2–3 (recounting that the board members had the priest followed by a private investigator and twice notified the IRS about his personal finances). In 2002, the hierarch refused to ratify the purported election of new board members because the priest had refused to sign the election results, as required by the local bylaws. *Id.* at *2. The board members also ignored the hierarch's request that they amend the local bylaws to conform to the archdiocese's uniform parish regulations. *Id.* at *1. In 2003, the hierarch demanded that board members with uncompleted terms submit their resignations. *Id.* at *2. When only three did so, he rescinded his ratification of the remaining original board members' elections. *Id.* at *2–3 (quoting the hierarch's statement that "[i]t does not take a rocket scientist to see that there is no working cooperation between the spiritual head of the parish and those who took the oath to assist him in his work"). The hierarch and the local priest organized an interim council, which elected officers and assumed control of the Cathedral—actions that ultimately led to a lawsuit seeking a declaratory judgment that the corporation's bylaws were the controlling document governing the Cathedral's affairs. *Id.* at *3. The trial court granted the hierarch's plea to the jurisdiction. *Id.* at *4.

On appeal, the board members complained that under the local bylaws, the hierarch lacked the power to dismiss them and to create an interim council and that only they—as the original parish council—had the right to serve and act on the Cathedral's behalf. *Id.* The court recited the neutral-principles template before noting that "if an issue—even one that is claimed to be based solely on neutral principles of law—cannot be decided without determining prohibited religious matters, the court must defer to the ecclesiastical authority's resolution of that issue." *Id.* at *5. Accordingly, the court had to examine the substance and effect of the plaintiff's petition, without considering the technical claims asserted, to determine the suit's ecclesiastical implications. *Id.*

The Cathedral's bylaws set out a corporate purpose that included maintaining, conducting, and operating "a church in conformity with the doctrine, canons, worship, discipline, usages and customs of the Greek Orthodox Church," and required that candidates for parish council be members of the Cathedral in good standing for at least a year before the election. *Id.* at *7. To be in good standing, the member was required to, among other things, live "according to the faith and canons of the [Greek Orthodox] Church." *Id.* The bylaws also required newly elected parish council members to have their election ratified by the hierarch and to be administered the oath of office by the parish priest. *Id.* And they required the parish council to conduct the Cathedral's secular business "in furtherance of the aims and purposes of the [Greek Orthodox] Church and in accordance with ... the constitution, canons, discipline, and regulations of the Archdiocese," and to refer all spiritual questions to
418 the hierarch. *Id.* *418 Although the board members argued that the controversy involved a simple determination of which bylaws applied and the application of the nonprofit corporation act's provisions to the corporate organization, the First court observed that "[t]he controversy inherently and inextricably involves a presiding hierarch's power to discipline a local parish council; his power to determine whether that council's members have violated their oath to obey the church's hierarchy, discipline, and canons; and an archdiocese's right to insist on what by-laws may be adopted by its subordinate parishes," all of which constituted ecclesiastical matters inextricably intertwined with the board members' request for a declaration that the local bylaws controlled. *Id.* at *7–8. And such inextricable intertwining prevented the court from resolving the dispute on purely neutral principles. *Id.* at *8.

Specifically, in affirming the trial court's judgment granting the plea to the jurisdiction, the court observed that there was a question as to whether the local bylaws or the uniform parish regulations controlled when the uniform regulations provided that the mere assignment of a parish priest would bind the parish to the regulations—"[t]hose matters are at the heart of this dispute, and they are inextricably intertwined with ecclesiastical issues of church governance, polity, and doctrine that we may not determine." *Id.* The court distinguished *Chen* in part based on the lack of a preserved challenge in that case concerning which bylaws applied and what they required, pointing out that the *Chen* dispute had only involved whether various elections and appointments had been lawful under those bylaws. *Id.* at *9. The court observed that *Chen* did not involve a situation "in which a higher authority, external of the local congregation, was disputing what the document governing the local congregation was" and that the evidence in *Chen* showed that membership in the religious corporation was not co-extensive with membership in the religion. *Id.*

Chen and *Greanias* were both decided before the supreme court fleshed out the neutral principles analysis in *Episcopal Diocese* and *Masterson* but, to some extent, they represent the range of religious corporation cases, from the most neutral—was there compliance with the bylaws?—to the most inextricably intertwined—which bylaws apply and do they involve a religious test or religious governance? When we review the Corporation's bylaws in our analysis below, we will consider these questions to determine where the case before us rests on that spectrum. *See Mouton v. Christian Faith Missionary Baptist Church* , 498 S.W.3d 143, 150 (Tex. App.—Houston [1st Dist.] 2016, no pet.) (concluding that *Masterson* did not alter the principle for which *Westbrook*

stands: courts may apply neutral principles of law in cases involving religious entities only if doing so does not implicate inherently ecclesiastical concerns). Whether neutral principles may be applied to a claim turns on the substance of the issues it raises. *Id.*

(3) Trust Law

In addition to the questions of association and corporate control, at issue is whether the property claimed by both parties is held in trust and if so, for whom. *See Perfect Union Lodge No. 10, A.F. & A.M., of San Antonio v. Interfirst Bank of San Antonio, N.A.* , 748 S.W.2d 218, 220 (Tex. 1988) ("It is well established that the legal and equitable estates must be separated; the former being vested in the trustee and the latter in the beneficiary. This separation of legal and equitable estates in the trust property is the basic hallmark of the trust entity."
419 (citations omitted)); *see also* Tex. Prop. Code Ann. § 111.004(4) *419 (West 2014) (stating that an express trust "means a fiduciary relationship with respect to property which arises as a manifestation by the settlor of an intention to create the relationship and which subjects the person holding title to the property to equitable duties to deal with the property for the benefit of another person"). When an express trust fails, the law implies a resulting trust with the beneficial title vested in the settlor, to prevent unjust enrichment. *Pickelner v. Adler* , 229 S.W.3d 516, 526–27 (Tex. App.—Houston [1st Dist.] 2007, pet. denied).[80]

80 If fraud is involved, a constructive trust—an equitable remedy implied by operation of law to prevent unjust enrichment —may be imposed, under the theory that equitable title should be recognized in someone other than the holder of legal title. *Pickelner* , 229 S.W.3d at 527 ; *see also Kinsel v. Lindsey* , 526 S.W.3d 411, 426 (Tex. 2017) (noting that the specific instances in which equity may impress a constructive trust are as numberless as the modes by which property may be obtained through bad faith and unconscientious acts); *KCM Fin. LLC v. Bradshaw* , 457 S.W.3d 70, 87 (Tex. 2015) (observing that constructive trusts have historically been applied to ameliorate harm arising from a wide variety of misfeasance).

(a) Law of Situs

Texas law governs the transfer of Texas land. *Welch v. Trs. of Robert A. Welch Found.* , 465 S.W.2d 195, 198, 200 (Tex. Civ. App.—Houston [1st Dist.] 1971, writ ref'd n.r.e.) (op. on reh'g) (stating that "[t]he general rule that the law of the state in which real estate is situated governs its descent, alienation, and transfer is not questioned," and that "the law of this state controls and governs the transmission by will of real estate located therein and the construction and effect of all instruments intended to convey such real estate"); *see Toledo Soc'y for Crippled Children v. Hickok* , 152 Tex. 578, 261 S.W.2d 692, 694, 697 (1953) ("[T]he law of the situs governs the matter of testamentary or intestate succession to land."), *cert. denied* , 347 U.S. 936, 74 S.Ct. 631, 98 L.Ed. 1086 (1954).

(b) Standard of Review

The construction of a trust instrument is a question of law for the court. *Eckels v. Davis* , 111 S.W.3d 687, 694 (Tex. App.—Fort Worth 2003, pet. denied). We look to the law that was in effect at the time that the trust became effective. *See Carpenter v. Carpenter* , No. 02-10-00243-CV, 2011 WL 5118802, at *3 (Tex. App.—Fort Worth Oct. 27, 2011, pet. denied) (mem. op.); *see also* Act of May 26, 1983, 68th Leg., R.S., ch. 576, § 7, 1983 Tex. Gen. Laws 3475, 3730 (stating that the 1984 Act was intended only as a recodification and that no substantive change was intended); *Perfect Union Lodge No. 10* , 748 S.W.2d at 220 (stating that the new trust code provides that the Texas Trust Act, which was repealed in 1984, will govern the creation of trusts entered into while the Act was in effect); *Cutrer v. Cutrer* , 162 Tex. 166, 345 S.W.2d 513, 519 (1961) ("It would be

quite strange to ascertain th[e settlor's] intention by looking to the provisions of statutes enacted after the trust instruments became effective or considering changes in public policy as reflected thereby."). Accordingly, we review our trust statutes and case law for the defining characteristics of trusts.

Trust statutes were "framed to supplement rather than to supplant the desires of a trustor." *St. Marks Episcopal Church, Mt. Pleasant, Tex. v. Lowry* , 271 S.W.2d 681, 684 (Tex. Civ. App.—Fort Worth 1954, writ ref'd n.r.e.). Thus, we look to the words of the instrument first, seeking to uphold rather than destroy a trust, and then turn to statutory provisions to fill in any gaps. *See id.* at 684–85 (construing will to determine deceased's intent with
420 regard to trust income); *see also* *420 *Runyan v. Mullins* , 864 S.W.2d 785, 789 (Tex. App.—Fort Worth 1993, writ denied) ("[W]hen the terms of a trust set out a specific method or manner in which to amend the trust, the Texas Trust Code indicates that those terms are controlling and must be followed."); *Commercial Nat'l Bank in Nacogdoches v. Hayter* , 473 S.W.2d 561, 565 (Tex. Civ. App.—Tyler 1971, writ ref'd n.r.e.) ("Since the Testator did not choose to direct the manner of apportionment, it would seem to follow that he intended the Texas Trust Act to govern."); *see generally* Tex. Prop. Code Ann. § 111.002 (West 2014) ("This subtitle and the Texas Trust Act, as amended ... shall be considered one continuous statute, and for the purposes of any statute or of any instrument creating a trust that refers to the Texas Trust Act, this subtitle shall be considered an amendment to the Texas Trust Act."), § 111.0035(b) (West Supp. 2017) (stating that the trust's terms prevail over statutory provisions except as to items such as illegal purposes, exculpation for breaches of trust, limitations periods, and a court's jurisdiction to take certain actions, including modifying or terminating a trust or removing a trustee).[81] But "under general rules of construction[,] we avoid strictly construing an instrument's language if it would lead to absurd results." *Hemyari v. Stephens* , 355 S.W.3d 623, 626–27 (Tex. 2011).

81 Section 111.0035 was added in 2005 and became effective January 1, 2006. *See* Act of May 12, 2005, 79th Leg., R.S., ch. 148, §§ 2, 32, 2005 Tex. Gen. Laws 287, 287–88, 296, *amended by* Act of May 11, 2007, 80th Leg., R.S., ch. 451, § 2, 2007 Tex. Gen. Laws 801, 801–02, *amended by* Act of May 21, 2009, 81st Leg., R.S., ch. 414, § 2, 2009 Tex. Gen. Laws 995, 995, *and amended by* Act of May 9, 2017, 85th Leg., R.S., ch. 62, § 1, 2017 Tex. Sess. Law Serv. 135, 135 (West). For trusts existing on January 1, 2006, that were created before that date, the 2005 changes apply only to an act or omission relating to the trust that occurred on or after January 1, 2006. Act of May 12, 2005, 79th Leg., R.S., ch. 148, § 31(b), 2005 Tex. Gen. Laws at 296.

(c) Trust Formation

"We look to the settlor's intent to determine whether a trust was created." *Hubbard v. Shankle* , 138 S.W.3d 474, 484 (Tex. App.—Fort Worth 2004, pet. denied). "The intent of the settlor must be ascertained from the language used within the four corners of the instrument," and we must harmonize all terms to properly give effect to all parts of the trust instrument and construe it to give effect to all provisions so that none is rendered
421 meaningless.[82] *Eckels* , 111 S.W.3d at 694.*421 There are no particular words required to create a trust if there exists reasonable certainty as to the intended property, the subject to which the trust obligation relates, and the beneficiary, *Hubbard* , 138 S.W.3d at 483–84, but "[t]o create a trust by a written instrument, the beneficiary, the *res,* and the trust purpose must be identified." *Perfect Union Lodge No. 10* , 748 S.W.2d at 220 (construing trust created by will); *Alpert v. Riley* , 274 S.W.3d 277, 286 (Tex. App.—Houston [1st Dist.] 2008, pet. denied) (op. on reh'g) ("[T]he person intended to be the beneficiary must be certain."); *see* Tex. Prop. Code Ann. § 112.001(1) (stating that a trust may be created by a property owner's declaration that the owner holds the property as trustee for another person). The mere designation of a party as "trustee" does not create a trust. *Nolana Dev. Ass'n v. Corsi* , 682 S.W.2d 246, 249 (Tex. 1984). If the trust's language is unambiguous and clearly expresses the settlor's intent, it is unnecessary to construe the instrument because it speaks for itself. *Eckels* , 111 S.W.3d at 694.

82 Although a settlor's manifestation of intent to create a trust was not an express statutory requirement until the legislature's replacement of the Texas Trust Act with the Texas Trust Code in 1983 (effective January 1, 1984), *see* Act of May 24, 1983, 68th Leg., R.S., ch. 576, art. 2, § 2, 1983 Tex. Gen. Laws at 3654–3731 (current version at Tex. Prop. Code Ann. §§ 111.001 –117.012 (West 2014 & Supp. 2017)), the requirement that the settlor clearly express the intention to create a trust had already long been embedded in our case law. *See Mills v. Gray* , 147 Tex. 33, 210 S.W.2d 985, 987 (1948) (quoting 54 Am. Jur. 22, sec. 5, for the proposition that a trust "intentional in fact"—i.e., one in which the "execution of an intention" occurs—is an express trust); *see also Omohundro v. Matthews* , 161 Tex. 367, 341 S.W.2d 401, 405 (1960) (stating that an express trust arises because of a manifestation of intention to create it); *Fitz–Gerald v. Hull* , 150 Tex. 39, 237 S.W.2d 256, 260 (1951) ("[W]e believe that the Texas cases hold that an express trust 'can come into existence only by the execution of an intention to create it by the one having legal and equitable dominion over the property made subject to it.' " (quoting *Mills* , 210 S.W.2d at 987)). The 1983 Texas Trust Code repeated the requirement that a settlor could revoke a trust "unless it is irrevocable by the express terms of the instrument creating it or of an instrument modifying it." *See* Act of May 24, 1983, 68th Leg., R.S., ch. 576, art. 2, § 2, 1983 Tex. Gen. Laws at 3659 (current version at Tex. Prop. Code Ann. § 112.051); *see also Ayers v. Mitchell* , 167 S.W.3d 924, 931 (Tex. App.—Texarkana 2005, no pet.) (observing that when there is only one settlor and he or she dies, the trust becomes irrevocable but that when one of multiple settlors dies and there are purposes of the trust yet unfulfilled, the trust does not become irrevocable).

A trust in real property is enforceable only if there is written evidence of the trust's terms bearing the signature of the settlor or the settlor's authorized agent. *See* Tex. Prop. Code Ann. § 112.004 ; Act of April 15, 1943, 48th Leg., R.S., ch. 148, § 7, 1943 Tex. Gen. Laws 232, 234, *repealed by* Act of May 24, 1983, 68th Leg., R.S., ch. 576, §§ 6, 8, 1983 Tex. Gen. Laws at 3729–30 (rev. civ. stat. art. 7425b-7). And an entity cannot unilaterally name itself as the beneficiary of a trust involving another entity's property. *See Best Inv. Co. v. Hernandez* , 479 S.W.2d 759, 763 (Tex. Civ. App.—Dallas 1972, writ ref'd n.r.e.) (reciting the requirement of a written instrument for a real property trust and that "[d]eclarations of the purported beneficiary of the trust are not competent to establish the trust"). So while a person can establish a trust for his or her own benefit, he or she must own the property that is transferred in order to create the trust. *See Lipsey v. Lipsey* , 983 S.W.2d 345, 351 n.7 (Tex. App.—Fort Worth 1998, no pet.) (citing Tex. Prop. Code Ann. § 112.001); *see also Elbert v. Waples-Platter Co.* , 156 S.W.2d 146, 152 (Tex. Civ. App.—Fort Worth 1941, writ ref'd w.o.m.) (citing *Wise v. Haynes* , 103 S.W.2d 477, 483 (Tex. Civ. App.—Texarkana 1937, no writ), for the proposition that the declarations of a beneficiary are not competent to establish a trust).

(d) Trust Statutes

In 1943, the legislature enacted the Texas Trust Act to govern express trusts. *See* Act of Apr. 15, 1943, 48th Leg., R.S., ch. 148, § 48, 1943 Tex. Gen. Laws 232, 232–47 (effective as of April 19, 1943, as revised civil statute articles 7425b-1 –b-47); *see also* Tex. Prop. Code Ann. § 111.003 (stating that trust statutes do not govern resulting, constructive, or business trusts or security instruments). Under the 1943 Act, a trust "in relation to or consisting of real property" was invalid unless created, established, or declared by a written instrument "subscribed by the trustor or by his agent" or by any other instrument under which the trustee claimed the affected estate. Act of Apr. 15, 1943, 48th Leg., ch. 148, § 7, 1943 Tex. Gen. Laws at 234. And "[e]very trust shall be revocable by the trustor during his lifetime, unless expressly made irrevocable by the
422 terms of the instrument creating the same or by a supplement or *422 amendment thereto." *Id.* § 41, 1943 Tex. Gen. Laws at 246.[83]

83 Prior to April 19, 1943, trusts in Texas were considered irrevocable unless an expressed power of revocation was reserved in the trust's terms. *See Citizens Nat'l Bank of Breckenridge v. Allen* , 575 S.W.2d 654, 657 (Tex. Civ. App.—Eastland 1978, writ ref'd n.r.e.).

The 1945 amendments to the Texas Trust Act did not affect the above provisions. *See generally* Act of Apr. 5, 1945, 49th Leg., R.S., ch. 77, 1945 Tex. Gen. Laws 109, 109–14. Likewise, although the Dennis Canon—one of the trust provisions to which we are referred—was added by TEC to its canons in September 1979, the above provisions were not substantially modified during the intervening decades. *See* Tex. Rev. Civ. Stat. Arts. 7425b-2, b-7, b-41, Texas Historical Statutes Project, West's Texas Statutes 1979 Supp. vol. 2, https://www.sll.texas.gov/assets/pdf/historical-statutes/1979-2/1979-2-supplement-to1974-wests-texas-statutes-and-codes.pdf; *id.* , West's Texas Statutes 1974, vol. 5, https://www.sll.texas.gov/assets/pdf/historical-statutes/1974-5/1974-5wests-texas-statutes-and-codes.pdf.

(e) Trespass to Try Title and Adverse Possession

The TEC parties brought a trespass-to-try-title claim, while Appellees argued, to the contrary, that they adversely possessed any interest that might otherwise exist for the TEC parties.

An action of trespass to try title may be brought on an equitable title. *Longoria v. Lasater* , 292 S.W.3d 156, 165 (Tex. App.—San Antonio 2009, pet. denied) (op. on reh'g) ("A suit to resolve a dispute over title to land is, in effect, a trespass to try title action regardless of the form the action takes and whether legal or equitable relief is sought."). An owner of a superior equitable title may recover in a trespass-to-try-title action if the record shows the equitable title is superior to the defendant's bare legal title. *Id.* (citing *Binford v. Snyder* , 144 Tex. 134, 189 S.W.2d 471, 474 (1945)). And, of course, here we must look to any subsequent arrangements—such as the 1984 consent judgment—to determine whether any equitable interests were modified. *See* , *e.g.* , *Allstate Ins. Co. v. Clarke* , 471 S.W.2d 901, 907–08 (Tex. Civ. App.—Houston [1st Dist.] 1971, writ ref'd n.r.e.) (considering whether earlier trust agreement was superseded by a subsequent one based on the clear intention of the parties).

The plaintiff in a trespass-to-try-title suit must recover on the strength of his own title and not on the weakness of the defendant's title. *Bellaire Kirkpatrick Joint Venture v. Loots* , 826 S.W.2d 205, 209 (Tex. App.—Fort Worth 1992, writ denied) (citing *Adams v. Rowles* , 149 Tex. 52, 228 S.W.2d 849, 853 (1950)). When title is controverted, the defendant admits possession of the subject property but claims better title, and the burden of proof is on the plaintiff to establish a superior title in himself by an affirmative showing. *Id.*

When a trustee's legal title is adversely possessed, the equitable interest goes with it. *See Capps v. Gibbs* , No. 10-12-00294-CV, 2013 WL 1701772, at *7 (Tex. App.—Waco Apr. 18, 2013, pet. denied) (mem. op.) (concluding legal and equitable title obtained by adverse possession); *Broussard Tr. v. Perryman* , 134 S.W.2d 308, 313 (Tex. Civ. App.—Beaumont 1939, writ ref'd) (stating that "when the bar of the statute is complete against the legal title vested in the trustee, it applies also to the equitable title of the cestui que trust").

423 The applicable adverse possession standard depends on whether the *423 person claiming to have adversely possessed the interest is a stranger or a cotenant. *See Rife v. Kerr* , 513 S.W.3d 601, 616 (Tex. App.—San Antonio 2016, pet. denied). For example, "[c]otenants must surmount a more stringent requirement because acts of ownership 'which, if done by a stranger, would per se be a disseizin,' are not necessarily such when cotenants share an undivided interest." *BP Am. Prod. Co. v. Marshall* , 342 S.W.3d 59, 70 (Tex. 2011) (quoting *Todd v. Bruner* , 365 S.W.2d 155, 160 (Tex. 1963)). Under such circumstances, the proponent must prove ouster—unequivocal, unmistakable, and hostile acts the possessor took to disseize the other cotenants. *Id.*

2. Ownership of Equitable Title

In response to the TEC parties' issues, Appellees assert that they hold both legal and beneficial title and are the Corporation's and EDFW's rightful officers. They argue that the TEC parties' case is based on revoked trusts, superseded deeds, repealed bylaws, and oral statements and that the TEC parties' "scattershot defenses don't annul neutral principles" because this is not an ecclesiastical dispute. They urge that associations are governed by neutral principles and that a Fort Worth case (*Shellberg*) from almost 50 years ago is no basis for defying the supreme court's mandate.

As previously stated, no one disputes that the Corporation holds *legal* title to the various items of property at issue. *See Houston First Am. Sav. v. Musick* , 650 S.W.2d 764, 767 (Tex. 1983) ("Assertions of fact, not pled in the alternative, in the live pleadings of a party are regarded as formal judicial admissions."). The crux of the parties' dispute, however, is ownership of *equitable* title. We therefore turn, as directed by the supreme court, to the application of our state law on trusts, corporations, and associations to the deeds and the various entities' formative documents, to determine the property ownership issue before us.

a. Trust Law Application

The TEC parties argue that the Dennis Canon sets forth an enforceable, irrevocable trust for TEC under Texas trust law, as well as under *Jones v. Wolf* irrespective of state law requirements, and under this court's *Shellberg* opinion as a contractual trust. They further argue that even if a trust was not established for TEC in the Dennis Canon, the deeds of various properties set forth trusts for EDFW or the congregations.

(1) Dennis Canon

Although the TEC parties "contend that the Dennis Canon is enforceable under Texas trust law," we disagree.

The Dennis Canon was adopted in 1979 and purports to impose a trust for TEC and TEC's diocese on parish, mission, and congregation real and personal property, stating,

> All real and personal property held by or for the benefit of any Parish, Mission or Congregation is held in trust for this Church and the Diocese thereof in which such Parish, Mission o[r] Congregation is located. The existence of this trust, however, shall in no way limit the power and authority of the Parish, Mission or Congregation otherwise existing over such property so long as the particular Parish, Mission or Congregation remains a part of, and subject to, this Church and its Constitution and Canons.

The section that follows essentially provides that no other action need be taken for the trust to be enforceable but that dioceses can take additional action, stating,

> The several Dioceses may, at their election, further confirm the trust declared

424 *424

> under the foregoing Section 4 by appropriate action, but no such action shall be necessary for the existence and validity of the trust.

But Texas law requires a writing signed by the *settlor* or the settlor's agent to create a trust with regard to real property. *See* Tex. Prop. Code Ann. § 112.004 ; Act of Apr. 15, 1943, 48th Leg., R.S., ch. 148, § 7, 1943 Tex. Gen. Laws at 234, *repealed by* Act of May 24, 1983, 68th Leg., R.S., ch. 576, §§ 6, 8, 1983 Tex. Gen. Laws at 3729–30 (rev. civ. stat. art. 7425b-7). As stated above, a proposed beneficiary cannot unilaterally name itself as the beneficiary of a trust involving another entity's property. *See Lipsey* , 983 S.W.2d at 351 n.7 ; *Best Inv. Co.* , 479 S.W.2d at 763 ; *see also* Tex. Prop. Code Ann. § 111.004(14) (defining "settlor" as a person who creates a trust or contributes property to a trustee of a trust; "settlor" means the same as "grantor" and

"trustor"), § 112.001 (defining the methods of creating a trust: through a property owner's declaration, intervivos transfer, or testamentary transfer, through the power of appointment to another person as trustee for the donee of the power or for a third person, or through a promise to another person whose rights under the promise are to be held in trust for a third person), § 112.005 ("A trust cannot be created unless there is trust property."); McConnell & Goodrich, 58 Ariz. L. Rev. at 322, 335 (reasoning that "[d]enominations cannot create a trust in favor of themselves in property they did not previously own" and that "[c]hurches can adopt any internal rules they wish, but those rules do not have legal force unless they are embodied in the forms required by state law"). Because under Texas law, an entity that does not own the property to be held in trust cannot establish a trust for itself simply by decreeing that it is the beneficiary of a trust,[84] the Dennis Canon, by itself, did not establish a trust under Texas law,[85] and we overrule this portion of the TEC parties' argument.

84 *See also* Gerstenblith, 39 Am. U. L. Rev. at 566 (explaining that implied trusts serve to obfuscate land titles and may discourage productive use of the land because "any investment in the property would be lost if the local entity chose to disaffiliate").

85 In *Masterson* , the supreme court did not determine whether the Dennis Canon imposed a trust but stated that even assuming that it had created one, its terms did not make it expressly irrevocable. 422 S.W.3d at 613. Based on our resolution here, we do not reach the question of irrevocability with regard to the Dennis Canon.

(2) Application of *Jones v. Wolf*

The TEC parties also argue that regardless of the content of our state law requirements, a trust is enforceable by virtue of the Dennis Canon, contending that *Jones* requires the enforcement of express trusts recited in governing church documents irrespective of state law. But in *Jones* , the Court merely referenced the need for "some legally cognizable form." 443 U.S. at 603–04, 606, 99 S.Ct. at 3025–26, 3027. And our supreme court has already stated, "We do not read *Jones* as purporting to establish substantive property and trust law that state courts must apply to church property disputes." *Masterson* , 422 S.W.3d at 612. That is, in Texas, the required legally cognizable form is the one provided by our statutes and case law.[86] We overrule this portion of the TEC
425 *425 parties' argument. Having concluded that a trust—revocable or not—was not imposed for TEC through the Dennis Canon, we do not reach the TEC parties' *Shellberg* argument. *See* Tex. R. App. P. 47.1.

86 The Supreme Court of Tennessee recently reviewed the two schools of thought that interpret what the Court meant by its "legally cognizable form" phraseology, characterizing them as the "Strict Neutral-Principles Approach" and the "Hybrid Neutral-Principles Approach." *See Church of God in Christ, Inc. v. L.M. Haley Ministries, Inc.* , 531 S.W.3d 146, 168 (Tenn. 2017) (observing that most neutral-principles-related litigation has arisen "where a hierarchical religious organization includes a provision in its constitution and/or other governing documents providing that local church property is held in trust for the hierarchical organization and a local church fails or declines to include the trust provision in deeds or other documents of conveyance"). The Tennessee court described the strict approach as only giving effect to provisions in church constitutions and governing documents of hierarchical religious organizations "if the provisions appear in civil legal documents or satisfy the civil law requirements and formalities for imposition of a trust." *Id.* (citing McConnell & Goodrich, 58 Ariz. L. Rev. at 324–25, defining strict approach's construction of "legally cognizable form" as complying with the formalities of property, trust, or contract law). The court described the hybrid approach—which the majority of states addressing the issue have followed—as deferring to and enforcing trust language contained in the constitutions and governing documents even if the language would not satisfy the civil law formalities normally required to create a trust but recognized that Texas has adopted the strict approach. *Id.* (citing *Masterson* , 422 S.W.3d at 611–12).

(3) Other Trusts

The TEC parties complain about the misallocation of 55 properties that contain what they describe as express trusts in favor of TEC, EDFW, and the congregations, "with similar language" to the following set out in their brief:

> This Conveyance, however, is in trust for the use and benefit of the Protestant Episcopal Church, within the territorial limits of what is now known as the said Diocese of Dallas, in the State of Texas....

But in their brief, they point to only one deed of dubious legibility appearing in the record to support this assertion.[87] Additionally, the TEC parties fail to inform us as to the degree of similarity they contend this one deed bears to the 54 others. Therefore, in our analysis and application of the law, we will consider only the
426 language of (1) this deed, as discussed by the TEC parties in their brief, which is to one *426 of the properties claimed by All Saints; (2) the other All Saints deed, also discussed by the TEC parties in their brief; and (3) any other documents related to these two deeds.

87 In their brief, the TEC parties do refer us to "Table E—'In Trust for The Episcopal Church' " appearing on 23 pages in volume 30 of the clerk's record. The footnote to Table E states that it covers "Episcopal Property held in trust for The Episcopal Church, held in trust for The Episcopal Church and its Constituent Diocese, held in trust for a Congregation, and/or held outright by a Congregation or a related entity but is not limited to the properties listed in Table E." While Table E contains references to the Bates numbers of the joint appendix created by the parties during the summary judgment phase in which the deeds themselves can be found, it does not recite the trust language at issue for any of the deeds listed therein. Rather, it contains the legal description of each property.

Appellees argue in this appeal that 35 deeds that "placed title in the bishop of Dallas 'for the use and benefit of the Protestant Episcopal Church, within the territorial limits of what is now known as the said Diocese of Dallas, in the State of Texas,' " imposed a trust for the Diocese of Dallas, not TEC, and that EDFW and its congregations "inherited all those rights upon division" in the 1984 judgment. They refer us to a chart in one of the supplemental volumes of the clerk's record that identifies various deeds in the joint appendix. The chart contains property descriptions, identifies the grantee of each deed, and contains Appellees' opinion of whether a trust is stated in each deed, along with their statement of which church uses the property.

We decline the parties' invitation to parse through this voluminous record on their behalf to confirm that the conveyance instruments for 35–55 properties contain "similar language" and do or do not create trusts. *See Rogers v. Ricane Enters., Inc.* , 772 S.W.2d 76, 81 (Tex. 1989) ("[A] general reference to a voluminous record which does not direct the trial court and parties to the evidence on which the movant relies is insufficient."). In light of our disposition below, the parties will have the opportunity to sort out and present these arguments to the trial court on remand.

(a) Deeds, Judgment, and Trust Language

(i) 1947 Warranty Deed

The snippet of language that the TEC parties claim is similar to 54 other properties is contained in a 1947 warranty deed transferring "[a]ll of Block 14, Chamberlain Arlington Heights"[88] from John P. King and J. Roby Penn to Charles Avery Mason, as Bishop of the Protestant Episcopal Church for the Diocese of Dallas, his successors, and assigns, "for and in consideration of the sum of" $5,000. This deed states, in pertinent part,

88 This corresponds to the All Saints property at 5001 Crestline (sanctuary).

TO HAVE AND TO HOLD, all and singular the above described premises until the said CHARLES AVERY MASON, as aforesaid, his successors in said office of Bishop aforesaid and his and their assigns forever, upon condition and in trust, however, for the purposes declared and set forth.

....

It being expressly agreed between the grantors aforesaid and the grantee aforesaid, and binding upon his successors in office and assigns, that the above described land shall be used only for the building site of a church and/or for the erection of buildings appertaining to a church, subject however to the following conditions....

....

This Conveyance, however, is in trust for the use and benefit of the Protestant Episcopal Church, within the territorial limits of what[ ] is now known as the Diocese of Dallas, in the State of Texas, and for this purpose the said CHARLES AVERY MASON, as aforesaid, and his successors in office, shall hold, use, improve, manage and control the above described property in such manner as to him or them, may seem best for the interest of said Church within said Diocese. And the said CHARLES AVERY MASON, as aforesaid, and his successors in office, shall have, and by these presents, do have, the right, power, and authority, whenever it may to him or them seem best for the interest of said Church within said Diocese so to do, lease, mortgage, sell and otherwise encumber or dispose of the aforesaid premises, upon such terms, for such prices and in such manner as to him or them may seem best. And for this purpose he or they may make, execute and deliver all such leases, mortgages, deeds of trust, deeds and other written instruments, as the circumstances of the case may render necessary and expedient. But neither the said CHARLES AVERY MASON nor any one else shall ever have any right, power or authority during the continuance of this trust to in anywise encumber or create a lien upon or any liability against the above described premises except by an instrument in writing expressly giving a lien upon said premises, and duly signed and acknowledged by the said CHARLES AVERY MASON, as aforesaid, or by some one of his successors in said office of Bishop.[89]

And in the event of death, resignation, suspension, deposition or removal

89 *See* , *e.g.* , McConnell & Goodrich, 58 Ariz. L. Rev. at 342–43 ("Placing title in a denominational official ensures that the property will always remain within the denomination.").

427 *427

from office for any cause of any Bishop in whom may at the time of such death, resignation, suspension, deposition or other removal from office, be vested the title to the above described premises, as trustee under this instrument, then, and in that event, the senior Bishop of the Protestant Episcopal Church in the United States of America shall be held and deemed to be, for the purpose of sustaining and p[e]rp[e]tuating this trust, the successor in office of said Bishop, until vacancy shall have been regularly filled; provided, however, that said senior Bishop of the Protestant Episcopal Church in the United States of America shall have no power while thus temporarily holding the title as trustee to the above described property to sell, mortgage, lease or in any manner encumber or dispose of said property. [Emphasis added.]

(ii) 1950 Warranty Deed

The record also contains the June 1950 deed for 5003 Dexter, the other All Saints property, which Robert McCart Jr., his wife Alice W. McCart, Fannie Belle Hackney, her husband T.E.D. Hackney, and John Lee McCart conveyed to C. Avery Mason, "Bishop of the Protestant Episcopal Church, Diocese of Dallas, in the State of Texas, and his successors in office" for $4,000. It contains no trust language.

(iii) 1984 Judgment

The 1984 judgment transferred legal title to both properties to the Corporation. In the 1984 judgment, the trial court stated,

> [L]egal title to the following real and personal property shall be as follows ... [w]ith respect to the Diocese of Fort Worth, title to the following assets and property shall be vested by this declaratory judgment in Corporation ... [a]ll real property which as of December 31, 1982, stands in the name of Episcopal Diocese of Dallas or in the name of any of its Bishops as Bishop of Dallas, including ... Bishop Charles Avery Mason ... which is physically located within the Count[y] of ... Tarrant ... described on Exhibit B attached hereto and incorporated herein by reference....

The trial court further stated, "Nothing in this judgment shall be deemed to deal with, or otherwise affect, properties, real or personal, disposed of under testamentary or inter vivos gift executed or effective prior to December 31, 1982, which bequest is to the Diocese of Dallas or the Bishop thereof."

(iv) EDFW's Constitutional and Canonical Trust Provisions

EDFW's constitution states that title to all real property acquired "for the use of the Church in this Diocese," including the real property of all parishes, missions, and diocesan institutions, shall be held "subject to control of the Church in the[90] Episcopal Diocese of Fort Worth acting by and through a corporation known as 'Corporation of the Episcopal Diocese of Fort Worth.' " The Corporation is to hold real property acquired for the use of a particular parish or mission in trust for that parish or mission's use and benefit, but if that mission or parish were to dissolve, the property would revert to the Corporation for EDFW's use and benefit.

90 By 2006, the word "the" was capitalized, reciting that the property would be held "subject to control of the Church in The Episcopal Diocese of Fort Worth."

EDFW's canon 18.2 (previously canon 12.4), revised in 1989, provides that real property acquired by the
428 Corporation for the use of a particular parish, mission, or *428 diocesan school would be held in trust for the use and benefit of such entities and that it was "immaterial whether said acquisition is by conveyance to the Corporation by a Parish, Mission or Diocesan School now holding title, by the Bishop now holding title as a corporate sole, by a declaratory judgment upon division from the Diocese of Dallas, or by subsequent conveyance to the Corporation, so long as such property was initially acquired by a Parish, Mission or Diocesan School by purchase, gift or devise to it, as a Parish, Mission or Diocesan School." Canon 18.4, added by 1989, states that all other property of the Corporation held for EDFW is held for exempt religious purposes —as defined by the Internal Revenue Code and determined by EDFW's convention "and the appropriate officers elected by it."[91]

91 Pursuant to the 1989 revisions, section 18.4 also expressly disclaims any beneficial interest for TEC.

Since EDFW's inception, under EDFW's canons, a parish can organize a corporation "to use in connection with the administration of its affairs," but it is "merely an adjunct or instrumentality," because the parish itself, "being the body in union with Convention, shall not be incorporated." The adjunct corporation "shall not hold

title to real estate acquired for the use of the Church in the Diocese, which title must be vested and dealt with in accordance with the provisions" in EDFW's constitution.

(v) All Saints Episcopal Church, Inc.

All Saints Episcopal Church incorporated an entity, and in its 1991 bylaws, it added a clause as follows with regard to property:

> All real and personal property held by or for the benefit of All Saints' Episcopal Church *is held in trust for The Episcopal Church and the Diocese thereof in which the Church is located.* The existence of this trust, however, shall in no way limit the power and authority of All Saints' Episcopal Church otherwise existing over such property so long as the Church remains a part of, and subject to The Episcopal Church General Convention Constitution and Canons. *Title I, Canon 7, Section 4* [the Dennis Canon] *of the General Convention Canons is hereby ratified and confirmed in its entirety.* [Emphasis added.]

These amendments were signed by All Saints's clerk and rector. All Saints subsequently deleted the last sentence, "Title I, Canon 7, Section 4 of the General Convention Canons is hereby ratified and confirmed in its entirety," in 2001, but the remainder went unchanged.

(b) Identification of Beneficiaries

(i) Other Summary Judgment Evidence

We have previously set out the history of TEC's presence in Texas, beginning in 1849 with the formation of the Diocese of Dallas, which gave birth to EDFW, which in 1982 received approval from TEC and acceded to TEC's constitution and canons.

(A) TEC's Constitution and Canons

There was no substantive change in TEC's relevant constitutional and canonical provisions between 1979 and 2006. The preamble to TEC's constitution states that the association's name is the Protestant Episcopal Church in the United States of America, "otherwise known as The Episcopal Church (which name is hereby recognized
429 as also designating the Church)." The constitution also sets out the method *429 that EDFW followed in becoming a TEC diocese. Other provisions explain how two dioceses can be reunited into one (essentially, the dissolution of one of two dioceses into its originating diocese) and that for missionary dioceses *outside* the territory of the United States of America, TEC's presiding bishop can consult "with the appropriate authorities in the Anglican Communion" and "take such action as needed for such Diocese to become a constituent part of another Province or Regional Council in communion with" TEC. There is no corresponding provision in TEC's constitution and canons for a diocese—missionary or not—within the United States to separate from TEC.

Although the Dennis Canon did not set forth a valid express trust under Texas law, its language provides some indication of how TEC views Church property: parish property is held for "this Church and the Diocese thereof in which such Parish, Mission or Congregation is located." Likewise, TEC's canons provide that "[n]o Church or Chapel shall be consecrated until the Bishop shall have been sufficiently satisfied that the building and the ground on which it is erected are secured for ownership and use by a Parish, Mission, Congregation, or Institution affiliated with this Church and subject to its Constitution and Canons."

(B) EDFW's Constitution and Canons

(I) EDFW's Geographic Description

EDFW's constitution and canons, as adopted by conventions from 1982 to 2006, included the following geographic description of EDFW:

> The Diocese of Fort Worth shall consist of those Clergy and Laity of the Episcopal Church in the United States of America resident in that portion of the State of Texas including the twenty-three (23) Counties of Archer, Bosque, Brown, Clay, Comanche, Cooke, Dallas (only that portion of the County that includes the City of Grand Prairie), Eastland, Erath, Hamilton, Hill, Hood, Jack, Johnson, Mills, Montague, Palo Pinto, Parker, Somervell, Stephens, Tarrant, Wichita, Wise, and Young.

This provision was omitted in the 2008 constitution and canons.

Pursuant to the 1982 constitution, every parish and mission in EDFW

> *in existence at the time of the organization of the Diocese* and every Parish and Mission which shall have been created and admitted in accordance with the Constitution and Canons of this Diocese, shall be deemed to be in union with and entitled to representation in the Convention of the Diocese, unless deprived of such right either through suspension or dissolution. [Emphasis added.]

By 2006, the provision about existence at the time of EDFW's organization had been deleted and was modified to read, "Every Parish and Mission which shall have been created *or* admitted in accordance with the Constitution and Canons of this Diocese...." [Emphasis added.] There was no substantive change between 2006 and 2008 as to the definition of who would be considered "in union with" EDFW.

(II) 1982

On November 13, 1982, "pursuant to the approval of the 67th General Convention of The Episcopal Church," EDFW acceded to TEC's constitution and canons and adopted its own constitution and canons. The preamble of that constitution states, "We, the Clergy and Laity of the Episcopal Church, resident in that portion of the State of Texas, constituting what is known as the Episcopal Diocese of Fort Worth, do hereby ordain and
430 establish the following constitution[.]" The original governing *430 EDFW documents consisted of 18 articles and 39 canons. They set out recognition of the authority of TEC's General Convention by "The Church in this Diocese," and set out governing procedures for EDFW's conventions, its annual meeting, voting,[92] and amending the constitution.[93] Canons that were "not inconsistent" with the diocesan convention or with TEC's constitution and canons could be adopted, altered, amended, or repealed at any annual convention by a majority vote, subject to notice requirements. We have already set out above the constitutional and canonical provisions dealing with real property.

92 The constitution provided for majority rule "[u]nless a vote by orders is determined or required or otherwise provided by the Constitution or Canons" or where the constitution or canons require a two-thirds vote.

93 The constitution provided for majority vote in the first year of the constitutional amendment's consideration by the annual convention, and then a concurrent majority of the vote of both orders in the second year of its consideration by the annual convention.

(III) 2006

By 2006, over two decades later, EDFW's constitution increased from 18 to 19 articles, and its number of canons increased to 42. There was no change to the preamble, but the first article, "Authority of General Convention," was modified to state,

> The Church in this Diocese accedes to the Constitution and Canons of The Episcopal Church, and recognizes the authority of the General Convention of said Church *provided that no action of General Convention which is contrary to Holy Scripture and the Apostolic Teaching of the Church shall be of any force or effect in this Diocese.* [Emphasis added.]

Additionally, the article on canons saw a rephrasing that allowed greater latitude in EDFW's discretion, from the earlier, "Canons *not inconsistent* with this Constitution, or the Constitution and Canons of the General Convention, may be adopted, altered, amended, or repealed at any Annual Convention by a majority vote of the Convention," to "Canons *consistent* with this Constitution, and the Constitution and Canons of the Episcopal Church, may be adopted, altered, amended, or repealed at any Annual Convention by a majority vote of the Convention." [Emphasis added.]

(IV) 2008

In 2008, EDFW's constitution retained 19 articles but the number of canons increased from 42 to 44, and the diocese's geographic description was deleted. The constitution and canons were significantly modified, beginning with the preamble, from the original, "We, the Clergy and Laity *of The Episcopal Church, resident in that portion of the State of Texas, constituting what is known as The Episcopal Diocese of Fort Worth* ," from 1982–2006, to "We, the Clergy and Laity *of The Episcopal Diocese of Fort Worth.* " [Emphasis added.]

Article 1, previously "Authority of General Convention," was replaced with "Anglican Identity," stating,

> The Episcopal Diocese of Fort Worth is a *constituent member of the Anglican Communion* , a Fellowship within the Only Holy Catholic and Apostolic Church, consisting of those duly constituted Dioceses, Provinces and regional Churches in communion with the See of Canterbury, upholding and propagating the historic Faith and Order as set forth in the Old and New Testaments and expressed in the Book of Common Prayer. [Emphasis added.]

431 *431

Article 18, "Canons," was amended to delete reference to the Constitution and Canons of TEC's General Convention.[94] Most of EDFW's canons that contained references to "The Episcopal Church in the United States of America" were amended to remove those references,[95] although the express denial of a beneficial interest in TEC in property held by the Corporation in canon 18 was retained.[96] A new constitutional article was added to provide for deputies or delegates to "extra-diocesan conventions or synods." Canon 32, previously entitled "Controversy between Rector and Vestry," was amended to cover controversies "between a Parish and the Diocese."

94 The new provision stated, "Canons consistent with this Constitution may be adopted, altered, amended, or repealed at any Annual Convention of the Episcopal Diocese of Fort Worth by a majority vote of the Convention."

95 For example, whereas the 2006 canons on missions and new parishes required in the application to join EDFW that aspirant members of missions or parishes "promise to abide by and to conform to the Constitution and Canons of the General Convention, and of the Diocese of Fort Worth," the 2008 canons required that they "promise to abide by and to conform to the Constitution and Canons of the Episcopal Diocese of Fort Worth." The annual parochial report that every parish and mission was required to prepare "upon the form provided by The Executive Council of The Episcopal Church in the United States of America" was changed in the 2008 amendments to "upon the form provided by The Episcopal Diocese of Fort Worth." The 2006 canons provided that books and accounts in every congregation in EDFW

"shall conform to *THE MANUAL OF BUSINESS METHODS IN CHURCH AFFAIRS* of The Episcopal Church in the United States of America." This requirement was changed in 2008 to require conformance "to generally accepted accounting principles."

96 Article 17, "Election of Bishops and Calling of an Assistant Bishop," in an apparent oversight, continued to provide that the bishop "may call an Assistant Bishop *in accordance with the Constitution and Canons of the Episcopal Church.* " [Emphasis added.] The standing rules of procedure of the annual convention with regard to appointments, in another apparent oversight, continued to provide that

> The Bishop shall have the authority to appoint all Board members, Trustees, Committee members, and fill other positions which are not required to be elected or otherwise selected *by the Constitution or Canons of the Episcopal Church in the United States of America* , the Constitution or Canons of the Diocese of Fort Worth or any other lawful authority. [Emphasis added.]

The record reflects that on three occasions during 2008—January 9, February 12, and September 8—Bishop Iker and the standing committee presented reports to EDFW on the constitutional and canonical implications and means of becoming a member diocese of the Anglican Province of the Southern Cone. The third report recommended that EDFW affiliate with the Anglican Province of the Southern Cone as a member diocese "until such time as an orthodox Province of the Anglican Communion can be established in North America." Bishop Iker likewise issued a statement entitled, "10 Reasons Why Now Is the Time to Realign," which included observing that "[a]t this time there is nothing in the Constitution or Canons of TEC that prevents a Diocese from leaving ... [s]o we have this window of opportunity to do what we need to do" before TEC's General Convention could adopt amendments making it more difficult to separate.

(ii) Associations Law versus Identity

(A) The Parties' Arguments

The TEC parties apply a macro-level approach to the associative relationship between TEC and EDFW by arguing that the First Amendment forbids us from overriding TEC on the question of who can represent an
432 Episcopal diocese or congregation *432 and that under associations law, only the TEC parties are entitled to control EDFW. That is, the TEC parties view Appellees' claimed disaffiliation as void under the larger association's rules and the General Convention's determination that the alleged disaffiliation was a nullity. They also argue that the All Saints properties are held in trust for TEC and for the All Saints Church affiliated with TEC.

Appellees respond that this is not an ecclesiastical dispute and claim that "[s]ince a dispute about the officers of a Texas corporation is not ecclesiastical, then a dispute about the officers of a Texas unincorporated association isn't either." They also argue that the highest authority on property issues—within or outside of TEC—is the local bishop, not TEC's administrative officers, reciting terminology from TEC's Canons, Title IV, "Ecclesiastical Discipline," which defines "ecclesiastical authority" as the diocese's bishop or standing committee "or such other ecclesiastical authority established by the Constitution and Canons of the Diocese."

Appellees further argue that "[t]he founders of TEC had made similar solemn engagements to the Church of England—but they certainly didn't forfeit church property in America when those churches separated."[97] And they argue, "[N]one of the property documents incorporate religious tests, and neither side has asked the courts to decide who can lead worship or attend church conventions," nor have the courts been asked "to decide who can lead any religious body, or whether dioceses can withdraw from TEC."[98]

97 Appellees conveniently ignore the revolutionary reason for the separation and the geopolitical and logistical complexity in the 1700s that recuperating such property would have entailed.

98 As noted by the court in *Diocese of San Joaquin* , we do not have to decide whether a diocese can leave TEC to resolve this property-based dispute. *See* 202 Cal.Rptr.3d at 63–64. And per *Westbrook* , we cannot decide whether a diocese can leave TEC. *See* 231 S.W.3d at 403 (referring to the spirit of freedom for religious organizations "even if that freedom comes at the expense of other interests of high social importance").

Appellees point out that Texas law dictates how the association's and corporation's officers can be elected or replaced, and Texas law governs the Corporation's and EDFW's amendments to drop any reference to TEC. Appellees rely on the Corporation's holding legal title and their defendant-congregations holding beneficial title based on their union with the diocesan convention. They argue: (1) EDFW's constitution and canons define missions and parishes as unincorporated associations in union with the diocesan convention; those not "in union" are not entities for which the Corporation holds property and those "in union" are those who send delegates to the convention's annual meeting; (2) Texas law makes EDFW's constitution and bylaws controlling, and the annual convention elected Bishop Iker and opted to disaffiliate; and (3) TEC's "newly
433 formed" diocese did not inherit the property of the existing diocese simply by adopting the same name.[99] *433
The TEC parties reply that Appellees' own theory concedes that the neutral principles analysis establishes legally-enforceable trusts for EDFW and its congregations, which leads to the ecclesiastical question of who may control these religious entities and puts the case squarely within the exception *Masterson* and *Episcopal Diocese* detailed (i.e., ecclesiastical structure determines property dispute). They further argue that the All Saints properties are in trust for the TEC-affiliated All Saints based on All Saints's governing documents, particularly the All Saints 2001 bylaws.

99 Perhaps learning from other dioceses' experience, one of Appellees' theories appears to be "Keep the name, keep the stuff." *See Diocese of San Joaquin* , 202 Cal.Rptr.3d at 66–67 (holding attempts to transfer property from The Protestant Episcopal Bishop of San Joaquin to The Anglican Bishop of San Joaquin invalid). They also argued in the trial court that turning churches over to congregations that do not use them would violate the express trust in EDFW's charters for the benefit of those who actually use them and that to hold against them would unjustly enrich a minority group "too small to impose its will" during the schism.

(B) Analysis

We must initially determine whether this is an associations-law question or an identity question.[100] To do so, we must look at the substance and effect of the TEC parties' live pleading. In their live pleading, the TEC parties intermingled a number of claims seeking legal and equitable relief with others seeking relief based on doctrine and internal procedures. Some of their claims, particularly as beneficiaries of trusts—as set out above—are claims that we may legitimately consider in our neutral-principles review. Based on the above, we have determined that there is a question about who is the "Protestant Episcopal Church, within the territorial limits of what is now known as the said Diocese of Dallas, in the State of Texas," referred to in the 1947 deed.

100 If it is an identity question—i.e., whether Appellees are "Episcopal" (capital-E) or merely "episcopal" (lowercase-e) as pertains to "of, being, or suited to a bishop," *see* episcopal, Webster's 3rd New Int'l Dictionary 764 (3rd ed. 2002)—then the First Amendment bars our consideration of this religious issue within the limits set out by U.S. Supreme Court jurisprudence. Webster's second definition of "episcopal" has two parts: (a) "of, advocating, or governed by an episcopacy," and (b) "of or relating to the Protestant Episcopal Church or the Episcopal Church in Scotland." *Id.* at 764–65. Webster's defines "episcopalian" as (1) an adherent to the episcopal form of church government and (2) "a member of an episcopal church (as the Protestant Episcopal Church)." *See id.* at 765.

With that in mind, we note that our supreme court has already identified TEC as a hierarchical organization and has stated that whether TEC's appointed bishop can take such actions as forming a parish, recognizing membership, and authorizing the establishment of a vestry "are ecclesiastical matters of church governance" over which the court lacks jurisdiction. *Masterson* , 422 S.W.3d at 608. Our supreme court has also acknowledged that TEC's appointed bishop could, "as an ecclesiastical matter, determine which faction of believers was recognized by and was the 'true' church loyal to the Diocese and TEC." *Id.* at 610. TEC has recognized the TEC parties as the Episcopal Diocese of Fort Worth.

And notwithstanding any ecclesiastical implications, where the internal actions of TEC and EDFW are not illegal in the nonecclesiastical sense, fraudulent, against public policy, or a threat to public health and safety, judicial review of these actions would be improper. *See Westbrook* , 231 S.W.3d at 392, 402, 404 ; *Whitmire* , 2009 WL 2196126, at *4–5 ; *Harden* , 634 S.W.2d at 59–60. One of the questions before us, then—to the extent we can consider it—is whether this record reflects that their actions were illegal, against public policy, fraudulent, or a threat to public health and safety, or whether, instead, they were proper actions that were permissible and binding on their members under their internal rules. To the limited extent that we can consider these organizations' internal actions, we do not think that the record affirmatively reflects any activities that
434 were per se illegal in a nonecclesiastical *434 sense or against public policy, fraudulent, or against public health and safety.

Although Appellees argue that under state associations law they were within their rights to remove the diocese and diocesan property from TEC, such law applies to the rules used by associations to regulate, within legal limits, their *own* internal affairs, not to the question of an association's identity. *Compare Juarez* , 172 S.W.3d at 279 (private association's right to govern its affairs), *with Jones* , 443 U.S. at 604, 99 S.Ct. at 3026 (stating that if the interpretation of an ownership instrument requires resolution of a religious controversy, the court must defer to resolution of the doctrinal issue by the authoritative ecclesiastical body), *and Westbrook* , 231 S.W.3d at 398, 400 (quoting *Minton* , 297 S.W. at 621–22, to explain why courts must decline jurisdiction over disputes concerning church membership and holding that while neutral principles may *define* a dispute, their *application* may impinge on a church's ability to manage its internal affairs). Further, their assertion ignores the fact that EDFW was part of the larger, hierarchical association and subject to the larger association's constitution and canons until disaffiliation.[101]

101 Representatives from each parish and mission voted in EDFW's conventions; EDFW representatives, until 2008, voted in TEC conventions. TEC set up rules over EDFW, and EDFW set up rules over parishes, missions, and other congregations, which were also governed by TEC's rules until 2008.

Under associations law, while the members of EDFW were within their rights to modify their governing documents however they saw fit as long as they did so by following their own internal rules, EDFW was also a member entity of a larger association, and its actions in modifying its governing documents directly conflicted with the larger association's governing documents. When it defied the governing strictures of the association of which it was a member, and particularly when it declared itself apart from that organization, it lost its identity as a part of *that* larger association.[102] *See Green* , 808 S.W.2d at 550–51 (listing factors courts consider to identify whether a church is hierarchical); *Templo Ebenezer, Inc.* , 752 S.W.2d at 198 (distinguishing hierarchical churches from congregational churches based on the congregational-type church's independence and ability to "totally control[ ] its own destiny").

102 The obedience or disobedience of TEC to an even larger body—the Anglican Communion—is not a question before us and not one that we could address even if it were.

TEC's dioceses are members of TEC, identified by the dioceses' accession to TEC's governing rules, just as parishes simultaneously accede both to TEC's governing rules and to their governing diocese's rules. Individual members of a parish may decide to worship elsewhere; a majority of individual members of a parish or diocese may decide to do so. But when they leave, they are no longer "Episcopalians" as identified by TEC;[103] they become something else. And that something else is not entitled to retain property if that property, under the terms of the deed, is held in trust for a TEC-affiliated diocese or congregation. By rejecting TEC, Appellees also rejected any claim to items and property affiliated with TEC or with being a TEC-affiliated diocese to the extent that the instruments of ownership spell out an express interest. While a decision to disaffiliate is an
435 ecclesiastical matter, what happens to the property is not, unless the *435 affairs have been ordered so that the ecclesiastical decisions effectively determine the property issue, *see Masterson* , 422 S.W.3d at 607, and the macro-level view of the associations' relationship is consistent with the deference we are required to give to the ecclesiastical determination by a hierarchical church. *See id.* ("Civil courts are constitutionally required to accept as binding the decision of the highest authority of a hierarchical religious organization to which a dispute regarding internal government has been submitted.").

103 Under article V of TEC's constitution, there are only three ways to create a new diocese, voiding Appellees' argument that the TEC-affiliated diocese is a "new" diocese.

The plain language of the 1947 deed sets forth a trust with the identified beneficiary as "the Protestant Episcopal Church" as it was located within the territorial limits of what was formerly the Diocese of Dallas. As set out above, it was within those territorial limits that the Diocese of Dallas gave birth to EDFW. From the various documents in the record of this case, the "Protestant Episcopal Church" identified in the deed at the time of the deed's making is TEC, thus making TEC's local Fort Worth affiliate the beneficiary of the trust. That is, the trust did not make TEC itself the beneficiary; rather, by its language, the trust identified the diocese *affiliated with TEC as located within that territory* as the beneficiary. This is most clear when considering that the 1984 judgment did not actually touch the property's equitable title, which was vested in the Church in a diocese whose name and geographic configuration might change as, anticipated since 1910, the giant Diocese of Dallas would—and subsequently did—pursuant to its division into two TEC dioceses. TEC continues to exist and has identified its affiliate within the territory. *See Episcopal Diocese* , 422 S.W.3d at 652 ("[D]etermination of who is or can be a member in good standing of TEC or a diocese is an ecclesiastical decision.").

Plugging these answers into our flow chart leads us to the conclusion that the TEC-affiliated EDFW holds the equitable interest under the 1947 deed.[104] That is, because there is a question about who is "the Protestant Episcopal Church, within the territorial limits of what is now known as the Diocese of Dallas," we must ask whether TEC is a hierarchical church. Because our supreme court has already determined that TEC is a hierarchical church, *see Masterson* , 422 S.W.3d at 608, we must defer to TEC's identification of its affiliated diocese when no claim of fraud or collusion for secular purposes, or a threat to public health and safety, has been raised.

104 Although EDFW's canon on real property purported to create a trust on real property acquired by the Corporation "for the use of a particular parish or mission," neither the 1947 deed nor the canon itself identifies All Saints as the beneficiary of the trust, and there is no indication that the property "was initially acquired by" All Saints Parish "by purchase, gift or devise to it" as a parish. Accordingly, no trust was expressly created for All Saints by EDFW in its governing documents.

436 *436

Apply neutral principles: • Legal title in the Corporation; • Equitable title for "the Protestant Episcopal Church, within the territorial limits of what is now known as the Diocese of Dallas." There is a question about who is "the Protestant Episcopal Church, within the territorial limits of what is now known as the Diocese of Dallas." Per *Masterson,* 422 S.W.3d at 608, TEC is a hierarchical church. TEC has decided who its affiliated diocese is. There is no claim of fraud or collusion for secular purposes (or a threat to public health and safety) pertaining to the parties' actions. Defer to TEC's decision on identity.

As to the 1947 deed presented to us for review, we cannot say—because we may not delve into questions of theology—whether the group that left TEC shares the same beliefs as the original EDFW's membership at the time of the deed. We may not consider the religious beliefs of anyone when making a legal determination under
437 neutral principles. *See Jones* , 443 U.S. at 604, 99 S.Ct. at 3026 (stating that *437 when the deed incorporates religious concepts in the provisions relating to the ownership of property, if the interpretation of the ownership instrument requires the court to resolve a religious controversy, "then the court must defer to the resolution of the doctrinal issue by the authoritative ecclesiastical body"); *Presbyterian Church* , 393 U.S. at 450, 89 S.Ct. at 606–07 (stating that the First Amendment forbids civil courts from considering whether general church's actions constitute a substantial departure from the tenets of faith and practice existing at the time of the local churches' affiliation); *Brown* , 116 S.W. at 364–65 ("[T]he church to which the deed was made still owns the property, and ... whatever body is identified as being the church to which the deed was made must still hold the title."); *cf. Diocese of Quincy* , 2014 IL App (4th) 130901, ¶ 47, 383 Ill.Dec. 634, 14 N.E.3d at 1256 (concluding deference does not apply when hierarchical structure is not discernible). All we have done here is apply the binding precedent of the United States and Texas Supreme Courts to the plain language of the instruments of title.

As to the 1950 deed, although EDFW attempted to impose a trust for All Saints in its governing documents, per *Masterson* , based on the plain language of the deed and the 1984 judgment, the Corporation holds both legal and equitable title to this property. *See* 422 S.W.3d at 610 ("Under neutral principles of law, the deeds conveying the property to Good Shepherd corporation 'expressed no trust nor limitation upon the title,' and therefore the corporation owns the property."). As such, EDFW could not declare itself or anyone else as the beneficiary of property to which it held neither a legal nor equitable interest.[105] *See Lipsey* , 983 S.W.2d at 351 n.7 ; *Best Inv. Co.* , 479 S.W.2d at 763.

105 All Saints likewise attempted to impose a trust on this property for EDFW and TEC, but it held no interest that would have allowed it to do so. Further, it did so through its incorporated entity, which also held neither a legal nor an equitable interest. Therefore, its attempted trust also failed.

We sustain the TEC parties' subissues 1(a) and 1(b) and part of subissue 1(c), and we sustain TEC's sole stand-alone issue with regard to whether the trial court erred as a matter of law in its application of neutral principles by failing to defer to TEC's ecclesiastical determination of which entity constitutes EDFW.

(c) Adverse Possession

Appellees argue that 1989's canon 18 expressly disclaimed any beneficial interest for TEC and that because EDFW was a separate legal entity controlled by its own convention, TEC's claim for a trust interest was barred by limitations. But we have already held that TEC has no trust interest in the two properties at issue.

With regard to a trust interest by the remaining TEC parties, until 2008, when Appellees formally severed ties to TEC, Appellees' possession of the properties was not adverse—"hostile," under a claim of right inconsistent with another's claim—to them. *See* Tex. Civ. Prac. & Rem. Code Ann. § 16.021(1) (West 2002). Accordingly,

the trial court erred by granting summary judgment for Appellees on the two pieces of property at issue if it granted summary judgment on this basis, and we sustain the TEC parties' subissue 1(i).

(d) Conclusion

To avoid delving into ecclesiastical matters—considerations forbidden to us by the First Amendment and U.S.
438 Supreme Court and Texas Supreme Court precedent—we *438 conclude that the Corporation holds the property identified in the 1947 deed in trust for the TEC-affiliated EDFW and holds legal and equitable title to the property identified in the 1950 deed. We sustain the TEC parties' subissue 1(e) as it relates to the 1947 deed and their subissue 1(k) as to the 1947 deed and remand this portion of the case for reconsideration of the other deeds containing the language "similar" to that identified above.

3. Control of the Corporation

We must now determine who controls the Corporation.[106] As stated by the supreme court in *Masterson* , the principles set out in our business organizations code govern because the Corporation "was incorporated pursuant to secular Texas corporation law and Texas law dictates how the corporation can be operated, including how and when corporate articles and bylaws can be amended and the effect of the amendments." 422 S.W.3d at 613 ; *see* Tex. Bus. Orgs. Code Ann. §§ 1.002(59), 22.001(3) ; *see also id.* § 2.002(1) (West 2012).

106 This issue will determine standing for the ownership issue as to the 1950 deed.

a. The Corporation's Formation and Governance

(1) Articles and Bylaws

As set out in our factual recitation, the Corporation's articles of incorporation were filed in the Texas Secretary of State's Office on February 28, 1983, and established that the Corporation's purpose was "[t]o receive and maintain a fund or funds or real or personal property, or both, from any source including all real property acquired *for the use of the Episcopal Diocese of Fort Worth as well as the real property of all parishes, missions and diocesan institutions.* " [Emphasis added.] Property held by the Corporation was to be "administered in accordance with the Constitution and Canons of the Episcopal Diocese of Fort Worth as they now exist or as they may hereafter be amended." The Corporation's articles also set out that its bylaws would address the election of its board of directors and their terms of office.

The 1983 bylaws specified that the Corporation's affairs would be "conducted in conformity with the Constitution and Canons of the Episcopal Church in the United States of America and the Constitution and Canons of the Episcopal Diocese of Fort Worth, as they may be amended or supplemented from time to time by the General Convention of the Church or by the Convention of the Diocese," and that any conflict between the bylaws and the constitution and canons would be resolved in favor of the constitution and canons.

With regard to the number, election, and term of office of trustees for the "Diocesan Corporation," the bylaws provided for EDFW's bishop to be the chairman, plus five elected trustees serving five-year terms, with one trustee to be elected every year at the annual convention. Each of the elected trustees would serve until his successor's election and qualification or "until his death, resignation, disqualification or removal." The bylaws specified that to be qualified, a trustee "may be either lay persons in good standing of a parish or mission in the Diocese of Fort Worth, or members of the Clergy canonically resident within the Diocese." Any trustee at that time could be removed by EDFW's bishop. The bylaws also provided for amendment "by the affirmative vote

of a majority of the total number of Trustees at any regular or special meeting of the Board, if notice of the
439 proposed change is included in the notice of such meeting."*439 The 2006 bylaw amendments provided that the Corporation's affairs

> shall be conducted in conformity with the body *now known as the Episcopal Diocese of Fort Worth* 's acknowledgment of and allegiance to the One, Holy, Catholic and Apostolic Church of Christ; recognizing the body known as the Anglican Communion to be a true branch of said Church; with all rights and authority to govern the business and affairs of the Corporation being solely in the board of trustees (as hereinafter defined, the "Board") of the Corporation. [Emphasis added.]

This amendment deleted prior reference to "the Constitution and Canons of the Episcopal Church in the United States of America and the Constitution and Canons of the Episcopal Diocese of Fort Worth."

A new section was added to facilitate identification of the EDFW bishop as chairman of the board, stating, in pertinent part, "The bishop recognized by the body *now known as the Episcopal Diocese of Fort Worth* (the "Bishop") shall be a trustee and a member of the Board." [Emphasis added.]

There was no change to the number, election, or term of office for trustees other than to clarify that the trustees, who were elected at a rate of one per annual meeting, could be either lay persons in good standing of a parish or mission "in the body *now known as* the Episcopal Diocese of Fort Worth" or members of the clergy "canonically resident within the geographical region of the body *now known as* the Episcopal Diocese of Fort Worth." [Emphasis added.] The rest of the sections remained substantively unchanged except for the section pertaining to removal of trustees—while the previous section provided that any trustee could be removed by the bishop, the amended section stated that any elected trustee could be removed by a majority of the remaining members of the board.

The Corporation's September 2006 amended and restated articles of incorporation deleted the portion of the earlier article with regard to real property acquired for the use of the diocese, parishes, missions, and diocesan institutions and stated that the Corporation was organized "[t]o receive and maintain a fund or funds or real or personal property, or both, from any source." The articles were also amended to delete reference to EDFW's constitution and canons with regard to the administration of the property held by the Corporation. The articles incorporated the same provision as the amended bylaws to identify the Corporation's chairman.

(2) Corporate Records

Virden, who had been the Corporation's secretary since 1983, averred in his affidavit that he was the custodian of the Corporation's business records. He sponsored excerpts from the Corporation's official minutes, which showed that on August 15, 2006, the board of trustees voted to amend the Corporation's articles and bylaws. Between February 1, 2005 and 2014, the record reflects no change in the Board's composition of Bishop Iker, Salazar, Patton, Bates, Barber, and Virden. None of the Corporation's minutes reflect the removal or resignation of any trustee nor the election of any other trustees.

At the August 15, 2006 meeting, all of the trustees—Bishop Iker, Salazar, Patton, Bates, Barber, and Virden—were present. Bishop Iker requested that the minutes "reflect that due notice was given to all trustees that the meeting would include consideration and voting on the adoption of Amended and Restated Articles of Incorporation for the Corporation ... and proposed amendments to the bylaws of the [C]orporation." Bates
440 moved to adopt the *440 proposed amendments to the bylaws, Patton seconded the motion, and the motion passed unanimously. Patton moved to approve the amended and restated articles of incorporation, Bates seconded her motion, and the motion passed unanimously.

(3) Other Documents

EDFW's constitution and canons provided for the establishment of the Corporation. Article 13 of the 1982 Constitution, "Title to Church Property," provides—in pertinent part to the corporations law question before us—that title to the real property of all parishes, missions, and diocesan institutions "acquired for the use of the Church in this Diocese" before or after the constitution's adoption, would be vested in the Corporation and "shall be held subject to control of the Church in the Episcopal Diocese of Fort Worth acting by and through" the Corporation. The Corporation, in turn, would hold real property acquired "for the use of a particular parish or mission in trust for the use and benefit of such parish or mission." The Corporation could not convey, lease, or encumber such property without the consent of the rector, wardens, and vestry of such parish or mission. If a parish or mission were dissolved, the property held in trust by the Corporation "shall revert to said Corporation for the use and benefit of the Diocese, as such." The same article in the 1989, 2006, and 2008 EDFW constitution and canons reflects no change other than renumbering. The corresponding canon, "Corporation of the Episcopal Diocese of Fort Worth," established the Corporation's purposes and management of its affairs.

b. Application

(1) The Parties' Arguments

The TEC parties argue that either the TEC parties control the Corporation or Appellees are in breach. Specifically, they complain that the trial court failed to apply the portion of the 2006 corporate bylaws requiring each director to be a member in good standing of a parish in the diocese when, by December 5, 2008 (or February 2009 at the latest), Appellees held no role in the diocese, making them "disqualified." They refer us to *Byerly v. Camey* , 161 S.W.2d 1105, 1111 (Tex. Civ. App.—Fort Worth 1942, writ ref'd w.o.m.),[107] to support this proposition. They further argue that the Corporation is bound by its fiduciary duties as a trustee to EDFW and its congregations so, if we find that Appellees legitimately control the Corporation, then the Corporation
441 should be removed as trustee, citing *Ditta v. Conte* , 298 S.W.3d 187, 192 (Tex. 2009).[108] *441 Appellees respond that the articles and bylaws provide for trustees to be elected one per year at EDFW's annual convention and identify their qualifications. They further respond that courts cannot just remove trustees for good-faith disagreements about trust management. To support these arguments, they refer us to *Hill v. Boully* , No. 11-08-00289-CV, 2010 WL 2477868, at *4 (Tex. App.—Eastland June 17, 2010, no pet.) (mem. op.),[109] *Kappus v. Kappus* , 284 S.W.3d 831, 837 (Tex. 2009),[110] section 22.212 of the business organizations code,[111]
442 and section 112.054 of the property code.[112] *442 **(2) Corporation's Owner**

107 In *Byerly* , we observed that the absence of a corporation's directors was insufficient to dissolve the corporation or show that it had ceased to exist. 161 S.W.2d at 1111 ("[N]o court would declare the corporation out of existence simply because it found itself without directors."). Instead, under general principles of corporation law, the stockholders either would have the inherent power to elect new directors or a court could bring about the selection of new directors "as may be done in certain cases where a trust estate finds itself without a trustee." *Id.* The appeal was brought from a dismissal, though, and the observations about corporate law had no bearing on the case's ultimate affirmance. *Id.* at 1106–11. A treatise has indicated that our 1942 observation was a reflection of the common law for when a corporation's charter or bylaws made no provision for filling a board vacancy in the event of death below the minimum number prescribed by the charter. *See* 2 Fletcher Cyc. Corp. § 286. *By whom directors and officers are to be nominated, elected or appointed—In case of vacancies on the board of directors* (Sept. 2017).

108 In *Ditta* , the supreme court held that no statutory limitations period restricts a court's discretion to remove a trustee. 298 S.W.3d at 188, 191 (observing that a removal decision turns on the special status of the trustee as a fiduciary and the ongoing relationship between trustee and beneficiary, not on any particular or discrete act of the trustee). Trustee removal actions are sometimes premised on the trustee's prior behavior but exist to prevent the trustee from engaging in

further behavior that could potentially harm the trust. *Id.* at 192. As long as potential harm to the trust remains, an action to remove the trustee should be allowed to proceed. *Id.* A trustee may be removed by a court under property code section 113.082 for various reasons. Tex. Prop. Code Ann. § 113.082 (listing as grounds material violation or attempted violation of the terms of the trust resulting in a material financial loss, incapacitation or insolvency of the trustee, failure of the trustee to make an accounting required by law or the trust's terms, and, broadly, "other cause for removal").

109 *Hill* involved the construction and application of the bylaws of Sportsman's World Ranch Owners' Association, Inc., a Texas nonprofit corporation created in connection with a real estate development, and the declaration of covenants, conditions, and restrictions associated with the development, which provided that record property owners were members of the corporation, with one vote per acre owned. 2010 WL 2477686, at *1–2. The bylaws provided for a board of three trustees and that any trustee could be removed, with or without cause, by a majority vote of the corporation's membership; if a trustee died, resigned, or was removed, his successor would be selected by the two remaining board members to serve out his predecessor's unexpired term. *Id.* at *2. The corporation's members sought to remove two of the three trustees and asked the remaining trustee to appoint two new ones; he did so. *Id.* at *3. The court held that this complied with the bylaws, which logically must have envisioned "member" as either singular or plural, in anticipation of two trustees resigning or dying at the same time. *Id.* at *6.

110 In *Kappus* , the court addressed an alleged conflict of interest between the independent executor of an estate and a good-faith dispute over his percentage ownership of estate assets. 284 S.W.3d at 833. The court held that "conflict of interest" was not a ground listed in the probate code for removing an executor and that it would not engraft one onto the statute; there was no evidence to support the executor's removal under the statutory grounds (such as dishonesty or misappropriation, gross misconduct or gross mismanagement, or legal incapacity). *Id.* at 833, 836–38 (observing that a potential conflict does not equal actual misconduct or make one mentally or physically impaired to the extent that personal decision-making is impossible). The court noted that the fiduciary duties owed by both an executor and a trustee are similar but that removal of a trustee under property code section 113.082 gives the trial court more leeway. *Id.* at 838 (holding that the trial court did not abuse its discretion by not removing executor as trustee of testamentary trust when, viewing the same conduct, it was not error to keep him as independent executor).

111 Business organizations code section 22.212, "Vacancy," does not address what happens if there are *no* qualified directors left on the board to fill a vacancy. *See* Tex. Bus. Orgs. Code Ann. § 22.212(a). Apparently, neither the parties nor our legislature has considered what might happen if a disaster were to wipe out an entire corporate board.

112 Property code section 112.054, "Judicial Modification, Reformation, or Termination of Trusts," states in subsection (a) that on the petition of a trustee or a beneficiary, the court may order, among other things, that the trustee be changed. Tex. Prop. Code Ann. § 112.054(a). Subsection (b) states that the court has the discretion to order a modification, termination, or reformation of the trust "in the manner that conforms as nearly as possible" to the settlor's probable intent. *Id.* § 112.054(b).

There is no question that the Corporation became a nonprofit corporation under Texas law in 1983 and that its board was allowed to amend its bylaws and articles. As pointed out by the supreme court in *Masterson* ,

> Absent specific, lawful provisions in a corporation's articles of incorporation or bylaws otherwise, whether and how a corporation's directors or those entitled to control its affairs can change its articles of incorporation and bylaws are secular, not ecclesiastical, matters.... The current statutory scheme changes the default rule on who is authorized to amend the bylaws, but under neither the former nor the current statute is an *external* entity empowered to amend them absent specific, lawful provision in the corporate documents.

422 S.W.3d at 609–10 (emphasis added) (referencing revised civil statutes article 1396-2.09 and business organizations code section 22.102).

According to the supreme court in *Masterson* , if nothing in the corporate documents requires amendments to be subject to approval of *TEC* , and no Texas law precludes such a corporation from amending its articles and bylaws to exclude references to TEC, then there is no requirement under Texas corporations law to otherwise subject the Corporation to *TEC* 's attempted interference. *See id.* at 613 ("To the contrary, the articles of incorporation and bylaws specified that qualified parish members were entitled to elect the vestry and amend the bylaws"). As nothing in the Corporation's documents provides for TEC's approval and nothing in our law precludes the amendments to exclude references to TEC, TEC lacks standing for a claim as to the Corporation, and to the extent the trial court granted summary judgment on this basis, it did not err.

Further, according to the amended bylaws, the board of directors identifies the "Bishop" for the Corporation's purposes. Although this might otherwise be considered an "ecclesiastical" determination, because the bylaws treat the identification of the "Bishop" as merely the identification of the Corporation's chairman of the board, we cannot say that a title alone, under the circumstances presented in the bylaws here, requires "consideration of doctrinal matters," i.e., "the ritual and liturgy of worship or the tenets of faith," *see Jones* , 443 U.S. at 602, 99 S.Ct. at 3025, particularly as the bylaws provide the methodology for the Corporation's board to identify the "Bishop" for the Corporation's purposes.

However, the bylaws were amended on August 15, 2006, when there was only one "body *now known as* the Episcopal Diocese of Fort Worth," from which lay and clergy members of the board were drawn and the bishop identified, and that body was affiliated with TEC. [Emphasis added.] Over two years later, on November 15, 2008, Appellees voted to leave TEC. The schism gave rise to two distinct entities: one recognized by TEC as the Episcopal Diocese of Fort Worth and one *self* -identified by Appellees as such. The bylaws and articles do not provide a description of the characteristics of the diocese self-identified by Appellees, but they do require that elected trustees be either lay persons in good standing of a parish or mission, or canonically resident, in the entity identified by the Corporation's board as "the body *now known as* the Episcopal Diocese of Fort Worth." [Emphasis added.] As set out above, it is within TEC's province to identify its diocese in the geographic area
443 identified as Fort Worth and what it takes to be a member in good *443 standing or canonically resident therein. Accordingly, on November 15, 2008, when Appellees voted to disaffiliate, it was TEC's prerogative to determine whether the board members of the diocese formerly associated with TEC had become disqualified under the Corporation's bylaws.

We conclude that the TEC-affiliated EDFW controls appointment to the Corporation's board and therefore that the TEC parties identified within the TEC-affiliated EDFW have standing for these related complaints. We sustain the TEC parties' subissue 1(h).

4. Remaining Arguments: Constructive Trust, Estoppel

Paralleling the complaints in their live pleading, the TEC parties refer us to TEC canon I.17.8, "Fiduciary responsibility," which refers to a TEC officer's duty to "well and faithfully" perform the duties of that office in the Church and to a lay person's responsibility to be a communicant in good standing. They further refer us to the "Declaration of Conformity" that Bishop Iker and "every dissident cleric" signed, refer us to prior statements by Bishop Iker and others in previous cases involving dissidents that could be read to contradict Bishop Iker's nouveau-dissident position here, and complain that the trial court allowed Bishop Iker et al. "to renege on their promises, break their commitments, and breach relationships of trust and confidence as Church officers."

The TEC parties base their constructive trust argument on the basis of a fiduciary duty owed to them as the diocese and congregations that remained loyal to TEC, asserting that Appellees "broke a century's worth of oaths and commitments" when they left and took the TEC-affiliated property, resources, and name. They rely on IRS disclosures and assertions in other lawsuits as a basis for estoppel. Based on our resolution above, however, we need not address these arguments with regard to any of the TEC parties except for TEC itself.

As to TEC, these arguments misplace the measuring stick and would require us to delve into the mysteries of faith, when—on the face of the documents before us—procedure, not position, at least with regard to the causes of action that have not been severed out, determines the outcome of this portion of the case. Specifically, this case does not turn on a breach of contract in the usual transactional sense. Indeed, the TEC parties did not bring a claim for any such breach of an actual contract. Instead, their causes of action were for

- "Breach of Express Trust," based on, among other things,
    - the November 13, 1982 subscription to TEC's constitution and canons;
    - the June 29, 1984 petition in the friendly lawsuit between the Diocese of Dallas and EDFW; and
    - "the associational benefits of affiliation," described as consideration and the basis of a contractual trust;
- "Constructive Trust—Conveyance," based on the exchange of property for accession as consideration;
- "Constructive Trust—Fiduciary Commitments," based on a "confidential relationship with [TEC] and its subordinate entities" and commitments on how they would hold the property;
- "Estoppel," which the TEC parties further clarify is actually "quasi-estoppel," based on some of the same actions above;
- "Diocesan Trust" and "Congregation-level Trust," based on the same express and constructive trust arguments;
- "Promissory Estoppel," based on "promises to [TEC] as a condition of" EDFW's formation, "receipt of disputed *444 property," and the same actions as relied upon in their other claims;
- "Conversion," by unlawfully retaining and claiming property—sacramental and liturgical instruments and materials, bank and brokerage accounts, monies, valuable chattels, personnel records, financial records, real property records and deeds, and historical records—"in a way that departed from the conditions under which it was received";
- " Texas Business & [Commerce] Code § 16.29," for using EDFW's trade names and trademarks without permission "and in a manner likely to dilute the distinctive quality of the foregoing trade names and marks";
- "Breach of Fiduciary Duty," with regard to Appellees' "constitutional and canonical obligations to the Diocese, the Church, and the Episcopal Parishes and Missions," among other misfeasance;
- "Action to Quiet Title" with regard to the disputed property on a table attached to their petition; and
- "Trespass to Try Title," with regard to the same property in their quiet title claim.[113]

[113] They also sought declaratory and injunctive relief and an accounting.

Of these, conversion, damages for breach of fiduciary duty, the action to quiet title and for an accounting, and the claims under business and commerce code section 16.29 were severed out of the instant case and remain pending in the original action, cause number 141-237105-09.

As to the claims not severed out, and as to the relief sought in the form of a constructive trust, TEC relies on the idea of a confidential relationship that is more intimate than any kind generally considered under our law outside of the divorce context. Just as the dissolution of a long-term marriage involving allegations of infidelity and abuse can result in a messy, unpleasant divorce for all involved, likewise, the disassociation of a faction within a religious entity can be (and, as here, has been) equally messy and unpleasant for everyone involved. Whether, in a religious or personal sense, Bishop Iker and the rest are the perfidious oath-breakers characterized by the TEC parties is not for us to determine because such questions are inextricably intertwined with First Amendment implications. To the extent TEC has rights outside of the ones brought by the other TEC parties,[114] we have not found a legal or equitable basis under our neutral principles analysis and the documents in the record before us for imposing a constructive or resulting trust. *See* McConnell & Goodrich, 58 Ariz. L.
445 Rev. at 354 ("Courts that have applied ordinary principles *445 of trust law have generally found that internal church rules and relationships fail to create either a resulting trust or a constructive trust.").

114 Many of the assertions set out above pertain to ecclesiastical matters. And much like the end of a fiduciary duty between marital partners at divorce, when Bishop Iker et al. excised their faction from TEC, any fiduciary duty obligations to TEC ended. *See , e.g. , In re Marriage of Notash* , 118 S.W.3d 868, 872 (Tex. App.—Texarkana 2003, no pet.) ("The fiduciary duty between husband and wife terminates on divorce."); *Parker v. Parker* , 897 S.W.2d 918, 924 (Tex. App.—Fort Worth 1995, writ denied) ("While marriage may bring about a fiduciary relationship, such a relationship terminates in a contested divorce when a husband and wife each have independent attorneys and financial advisers."), *disapproved of on other grounds by Formosa Plastics Corp. USA v. Presidio Eng'rs & Contractors, Inc.* , 960 S.W.2d 41 (Tex. 1998) (op. on reh'g). Jane R. Parrott, a financial records custodian, stated in an affidavit that all loans from TEC prior to the 2008 disaffiliation "were fully repaid before that date." Parrott also attached a summary of the financial contributions and receipts between EDFW and TEC showing that EDFW had contributed more than $2 million to TEC during the years of affiliation.

Accordingly, we overrule subissues 1(f) and (g) as they pertain to TEC; as to the remaining TEC parties, based on our disposition of the associations, corporations, and trust questions above, we need not reach them. *See* Tex. R. App. P. 47.1.

IV. Conclusion

Based on all of the above, to the extent that TEC has standing, we sustain its sole stand-alone issue with regard to its ecclesiastical determination of which entity constitutes EDFW but overrule its portion of the TEC parties' subissues (f), (g), and (j) as they pertain to the issues in this appeal.

We sustain all of the TEC parties' subissues (a), (b), (h), and (i). As to all of the TEC parties except for TEC itself, we sustain in part subissues (c), (e), (j), and (k) and do not reach subissue (d) or the remaining TEC parties' subissues (f) and (g). We thereby hold as follows in response to the questions directed on remand by the Supreme Court of Texas:

(1) Appellees' actions, as corporate trustees, were invalid under Texas law after disaffiliation in 2008.

(2) Under Texas Corporations Law, the articles of incorporation and bylaws at issue were amenable to amendment but the plain language used in 2006—"now known as"—prior to disaffiliation in 2008 means that the TEC-affiliated EDFW controls appointment to the Corporation's board.

(3) To the extent that the Dennis Canon could be construed as attempting to create a trust, it did not impose one on EDFW's property in favor of TEC.

(4) Equitable title to the property in the 1947 deed is held for the TEC-affiliated EDFW; the Corporation holds legal and equitable title to the property in the 1950 deed.

(5) Based on the above, all of the TEC parties except for TEC have standing to bring the above claims that are not barred by ecclesiastical abstention, and on remand, TEC may have standing with regard to some of the severed claims.

Accordingly, we affirm in part and reverse in part the trial court's judgment and remand the case to the trial court for further proceedings not inconsistent with this opinion.

GABRIEL, J., concurs without opinion.

Erwin Cruz & the Erwin A. Cruz Family Ltd. v. Ghani

Decided Dec 13, 2018

No. 05-17-00566-CV

12-13-2018

ERWIN CRUZ AND THE ERWIN A. CRUZ FAMILY LIMITED PARTNERSHIP, BOTH OF THEM INDIVIDUALLY AND ON BEHALF OF NORTH DALLAS MEDICAL IMAGING, LP, PLANO AMI, LP, AND GHANI MEDICAL INVESTMENTS, INC., Appellants v. MEHRDAD GHANI, Appellee

Opinion by Justice Stoddart

On Appeal from the 101st Judicial District Court Dallas County, Texas
Trial Court Cause No. DC-10-16274

MEMORANDUM OPINION ON REHEARING

Before Justices Francis, Myers, and Stoddart
Opinion by Justice Stoddart

We deny appellants' and appellee's motions for rehearing. On the Court's own motion, we withdraw our opinion issued on August 20, 2018 and vacate our judgment of that date. The following is now the opinion of this Court.

This lawsuit involves the interests of two medical imaging centers, North Dallas Medical Imaging, LP ("NDMI") and Plano AMI, LP. Appellant Dr. Erwin Cruz was involved in the formation of both businesses with appellee Mehrdad Ghani. After NDMI was dissolved and Cruz was expelled from Plano AMI, he filed this lawsuit in his own name and on behalf of the Erwin A. Cruz Family Limited Partnership, NDMI, Plano AMI, and Ghani Medical Investments, Inc. (collectively as appellants, "Cruz"). Following a multi-day trial, the jury resolved most questions *2 in Cruz's favor and awarded actual and punitive damages. The trial court granted Ghani's motion for judgment notwithstanding the verdict ("JNOV") and entered judgment for Ghani on all claims, including his counterclaim. In three primary issues, Cruz argues the trial court erred by entering JNOV because the evidence supports the jury's findings and entitled him to judgment; the trial court erred by entering judgment on Cruz's claim that Ghani improperly paid himself compensation; and the trial court failed to provide due process before entering judgment on Ghani's counterclaim. Cruz also asserts four contingent issues in the event the Court does not find in his favor on his JNOV arguments. In twenty cross-issues, Ghani argues the evidence is insufficient to support several of the jury's answers and many of the jury's answers are against the great weight and preponderance of the evidence. We affirm the trial court's judgment in part and we reverse the trial court's judgment in part. We remand for the trial court to enter judgment in favor of appellants on those portions of the jury's verdict we conclude are supported by the evidence, to consider Cruz's request for equitable relief, and to conduct further proceedings on Ghani's counterclaim.

2

BACKGROUND

Ghani and Cruz were friends. Ghani owned and operated businesses in the clothing industry and Cruz is a neurologist. They decided to open a medical imaging business, primarily offering MRI scans, in which they would be majority owners. They planned to offer financial incentives to

doctors interested in buying into the business. The doctors would refer their patients for medical imaging and receive a share of the proceeds from the business.

A. Formation of NDMI and Plano AMI

In April 2002, Ghani, Cruz, and Mark Mendes formed NDMI. They each owned a 30.33% limited partner interest. Each partner performed a specific function: Cruz referred his patients for scans and persuaded other doctors to refer patients; Ghani managed the business; and
3 Mendes had *3 a technical role. Cruz's office was in the same building as NDMI and he was a primary referral source. The corporate general partner, MCG Group, Inc. ("MCG"), held a 1% limited partner interest and the remaining 8% was held by physician investors. Limited partner investors who bought interests in NDMI included Dr. Michael Taba (an orthopedic surgeon), Debra Brown (a physician's assistant), Drs. Robert Ippolito and Henry Raroque, and Adam Hardison (a lawyer). Taba, Ippolito, and Raroque all referred patients to NDMI. NDMI borrowed approximately $1.5 million to start the business and Ghani, Cruz, and Mendes personally guaranteed the loan.

Shortly after NDMI opened, Cruz and Mendes had a dispute, which ultimately led to Cruz and Ghani exercising a corporate protection or "bad boy" provision in the limited partnership agreement to expel Mendes from NDMI. Mendes sued Cruz, Ghani, NDMI, and MCG and they ultimately reached a settlement. Cruz and Ghani split Mendes's limited partner interest between themselves.

NDMI became profitable and, in 2004, Cruz, Ghani, and Taba created Ghani Medical Investments, Inc. ("GMI") and Plano AMI, LP to operate a second imaging center. Taba sent most of his patients to Plano AMI because his primary practice was in Plano and he only maintained a small satellite office in Dallas. At trial, the parties disputed the ownership structure of GMI and Plano AMI. However, they agreed Cruz, Ghani, and Taba owned equal interests in Plano AMI, directly or indirectly through GMI.

The businesses relied on physicians referring patients for scans and, without such referrals, they were not sustainable. Ghani testified that as long as the doctors referred patients, they were financially strong.

B. Operation and Management of the Centers

Other than a brief period in 2005-2006, Ghani managed the day-to-day operation of both centers. Taba explained Ghani was to consult Cruz and
4 himself "if there was any issue or anything *4 else that had to be decided by the three of us." Otherwise, Taba trusted Ghani. Ghani testified: "[B]asically, everybody trusted me and . . . I didn't have anybody to question me."

There were common expenses shared by NDMI and Plano AMI, and Ghani moved money between the two entities. For example, the businesses shared a single software system, which was purchased by NDMI for approximately $100,000; some employees worked for both entities but were on the payroll of only one; and the centers shared a management office. The businesses hired a third-party certified public accountant, Hossein Zamanian, who worked for both entities. One of his employees, Tammy Boynton, testified Ghani determined how to allocate expenses between the entities and NDMI often transferred money to Plano AMI. Boynton believed Ghani used money transfers to even-out income between the partners because NDMI performed better than Plano AMI; she believed Ghani was "trying to redistribute the money so there was enough money there to pay the Plano partners and shareholders." Frequently, at the end of the month, Ghani instructed Boynton to transfer a specific amount of money from NDMI to Plano AMI, but Boynton never saw reports supporting these transfers. Cruz testified

Ghani began "running both businesses together," inferring Ghani comingled funds from the two businesses.

C. Selling the Businesses

In the spring of 2007, Cruz, Taba, and Ghani decided to sell the businesses. They hired a broker, Steve Denn Company & Associates ("Denn"), to market NDMI and Plano AMI to potential buyers. Cruz, Ghani, and Taba decided on an asking price of $5.9 million. Although there were numerous interested potential buyers, including some who provided letters of intent, they did not close a sale. Ghani testified he wanted to sell but, over time, realized this type of business "cannot be sold, because most of the referral[s] . . . come from the investor, and the minute you buy out those investors, they have no incentive to sell the business anymore." Ghani created an impediment for potential buyers by requiring interested parties to pay a $50,000 nonrefundable *5 earnest money deposit as a condition to examine the businesses' books. Denn considered Ghani's condition, which he had not seen in another transaction, to be an unreasonable barrier that would "scare off everyone."

On July 25, 2008, Denn emailed Ghani and Cruz stating: "I have raised the asking price, based on revenues trending up by 15% [sic] or better as you had told me!" When asked about the email at trial, Denn testified Ghani informed him revenue was up by 15 to 20% so they should raise the asking price.

Denn began finding Ghani increasingly unresponsive when he sought updated financial documents about the businesses. On July 29, 2008, Denn emailed Ghani and Cruz with a list of financial documents he needed and noted he received no response from Zamanian. On August 21, 2008, Denn emailed Cruz because his "calls and emails to Mike Ghani go unanswered." Approximately two weeks later, Ghani unilaterally terminated Denn's contract without consulting Cruz or Taba. Denn forwarded Ghani's termination email to Cruz and Taba, stating: "In my opinion, there is a conflict of interest here. Mike is unwilling to share information, and had [sic] decided on his own, that he does not want to Sell [sic]." Cruz replied: "It has always been obvious [Ghani's] lack of respect and fiduciary responsibilities not to communicate or consider our opinions on these important issues."

D. Dissolution of NDMI

As 2008 progressed, the relationship between Cruz and Ghani became increasingly tense. In December 2008 or January 2009, a decision was made to dissolve NDMI. The dissolution forms the basis of some of the claims in this lawsuit, and Cruz and Ghani provided the jury with different accounts of what occurred. *6

1. Ghani's Account

Ghani believed NDMI should be dissolved because reimbursement rates from insurance companies were falling, which reduced profitability; key referring physicians, including Taba and Raroque, were relocating and wanted to redeem their partnership shares; NDMI was unable to recruit other physicians to refer business; the MRI machine was nearing the end of its recommended life; and the lease was expiring and the renewal term was five years. Ghani testified he and Cruz agreed it was better to have one thriving business rather than two weak ones. Because their referral base was moving to Plano, they decided to keep the Plano location and close the Dallas one, NDMI.

In September 2008, Ghani stopped making distributions to the NDMI partners. Ghani testified he and Cruz believed this strategy would allow them to "pay the loan very aggressively" in less than a year. From December 2008 until April 2010 when NDMI closed, they used the revenue to pay off debt on which they were personally liable. Ghani stated: "All the decision was [sic] made between Dr. Cruz and I [sic]."

Taba testified Ghani explained the reduced distributions to him as being necessary to pay down NDMI's debt. Ghani told Taba referrals had declined and he believed they would continue to do so, which would adversely impact the financial profitability of NDMI.

2. Cruz's Account

Cruz believed NDMI was profitable. However, because Ghani no longer wanted to operate NDMI, Ghani stopped providing Cruz with financial information so that Cruz would believe NDMI faced financial problems and agree to close the businesses. Cruz was concerned that Ghani was misusing his management authority, including comingling money between the businesses. In September 2008, Ghani stopped providing financial reports to him and Cruz did not receive financial reports for September, October, November, or December 2008 even though he
7 requested *7 them from Ghani and Zamanian. Cruz testified: "So there was no way to get financials to see the veracity, the truth, behind what Mike was saying."

Cruz knew Taba and Raroque intended to reduce their referrals to NDMI, but testified this would impact NDMI "minimally" because the business could recruit other doctors. Cruz attempted to discuss marketing plans and new business strategies with Ghani, but Ghani refused to consider them. Ghani told Cruz: "[I]t's too late. I already committed the machines." Cruz asked Ghani for clarification and Ghani told Cruz he committed to selling NDMI's machines.

When Boynton left her employment with Zamanian on August 30, 2008, she was not concerned about NDMI's financial ability to pay distributions. Although her desk was outside Ghani's office, she did not hear him express any concerns about financial matters. She stated: "He was just saying that he felt that he wanted out of that company because he didn't take it on to do that job for his entire life."

Cruz stated that if he had known the true financial status of NDMI, he would not have agreed to close it. But he believed Ghani who told him "there was no money in 2008. . . that the business was losing money." Ghani asked Cruz to consent to closing NDMI and, eventually after being pressured by Ghani and Doug Brady, a lawyer hired by Ghani, Cruz agreed.

3. NDMI is Dissolved

Cruz and Ghani, acting as directors of NDMI's general partner, executed a resolution dated December 5, 2008, authorizing Ghani to oversee the dissolution of NDMI. NDMI continued operating as a business until April 2010, during which time Cruz, Taba, and Raroque continued sending patients to NDMI. Cruz believed the business was busy.

Net revenue for NDMI in 2007 was approximately $1.7 million, it was approximately $1.8 million in 2008 and approximately $1.75 million in 2009. Of those three years, taxable income for NDMI was the highest in 2009. Ghani explained that 2009
8 numbers were "healthy" because *8 he reduced expenses by $230,000. He conceded that "if the business is making that kind of an income, you don't close. But that's not the only reason we decided to close down."

E. Debra Brown Lawsuit

Debra Brown, a physician's assistant who was a limited partner in NDMI, sued Ghani, Taba, and Cruz in August 2009 for breach of contract and breach of fiduciary duty. Brown believed Ghani did not disclose relevant information and there "was no transparency." Brown testified Ghani stopped paying her distributions from NDMI in September 2008 without providing an explanation even though NDMI was profitable. She alleged NDMI was mismanaged and money was improperly moved from NDMI to Plano AMI.

In December 2008, Brown began communicating with Adam Hardison, another NDMI limited partner and a lawyer. During discovery in the

Brown lawsuit, Brown produced documents showing Cruz sent approximately ninety-five emails to Hardison in September 2008 (before Brown filed her lawsuit), which included tax returns from NDMI and Plano AMI. Hardison and Brown were not limited partners in Plano AMI and were not entitled to financial information about the entity. Cruz acknowledged he shared the information with Hardison and explained he sought legal consultation from Hardison as part of selling the businesses through Denn.

Ghani, Cruz, and Taba hired a lawyer, Shawn Tuma, to represent them in Brown's lawsuit. Ghani asked Tuma to convene a meeting in Tuma's office. Ghani was "extremely upset" at the meeting and stated he discovered emails showing Cruz was communicating with Brown "behind the scenes." According to Cruz, during the meeting, Ghani threatened him, saying: "Dr. Cruz, you are a traitor. You're a traitor, and I'm going to hire my attorneys. I'm going to destroy you, and I'm going to take your license away." Cruz then left the meeting. Taba felt betrayed by Cruz's actions and said it was "dishonest[], disloyal toward the rest of the partners." After the meeting in Tuma's office, Taba and Ghani consulted with Doug Brady about removing Cruz from Plano AMI *9 and GMI. Ghani believed removing Cruz was necessary because Cruz shared confidential information about Plano AMI with Debra Brown and Adam Hardison.

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F. Plano Open

In 2007 or 2008, Cruz, Ghani, and Taba discussed acquiring an open MRI machine to create an additional revenue stream for Plano AMI. Although Plano AMI could have acquired an open MRI machine, Ghani and Taba created new two new entities in January 2010: Plano Open MRI, LP and its general partner Ghani Medical Investment #2, LLC. Taba testified Ghani made the decision to create new entities rather than extending Plano AMI or GMI, but they planned to eventually "bring[] all the limiteds on board with an open." Cruz was not invited to join or informed about the venture. In May 2010, Taba apologized to Cruz for not including him and said: "Look, Mr. Ghani had said he doesn't want to [do] any business with you and you had said you don't want to do any business with him." Taba testified it was impossible for Ghani and Cruz to form another business venture together.

Plano Open was located across the parking lot from Plano AMI, and Ghani managed both entities. When Plano Open began operating, Taba's referrals to Plano AMI declined. Plano Open was profitable and, because the open MRI machine was not expensive, margins were high. In the first year, Ghani and Taba made over $100,000 each in profit.

Cruz asserts Ghani breached his fiduciary duties to Plano AMI and GMI by pursuing Plano Open. Ghani testified he discussed Plano Open with attorney Doug Brady who looked at the partnership documents and told him he could pursue Plano Open.

G. Jury Verdict and JNOV

The jury returned a verdict nearly entirely favorable to Cruz. It determined Ghani failed to comply with his fiduciary duties to NDMI with respect to the dissolution, that failure was not excused, and it damaged NDMI. The jury likewise concluded Ghani breached his fiduciary duties *10 to Plano AMI and GMI with respect to the pursuit of Plano Open, those breaches were not excused, and they caused damages. The jury found Cruz was a limited partner in Plano AMI; Ghani directed or participated in GMI's conversion of Cruz's shares in Plano AMI and GMI[1]; and Cruz suffered damages.

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[1] The conversion of Cruz's interests in Plano AMI and GMI are discussed below.

Ghani filed a motion for JNOV challenging most of the jury's findings. The trial court granted the motion in its entirety and entered judgment favorable to Ghani. This appeal followed.

LAW & ANALYSIS

In his first issue, Cruz argues the trial court erred by granting Ghani's motion for JNOV because the evidence supports the jury's findings and entitles him to judgment. In twenty cross-issues, Ghani argues the evidence is insufficient to support several of the jury's answers and many of the jury's answers are against the great weight and preponderance of the evidence.

A. Standard of Review

We review a trial court's decision to grant JNOV under a no-evidence standard, examining whether any evidence supports the jury's findings. *Gharda USA, Inc. v. Control Solutions, Inc.*, 464 S.W.3d 338, 347 (Tex. 2015); *see also City of Keller v. Wilson*, 168 S.W.3d 802, 823 (Tex. 2005) (test for legal sufficiency is same for summary judgment, directed verdict, JNOV, and appellate no-evidence review). No evidence exists when there is:

> (a) a complete absence of evidence of a vital fact; (b) the court is barred by rules of law or of evidence from giving weight to the only evidence offered to prove a vital fact; (c) the evidence offered to prove a vital fact is no more than a mere scintilla; (d) the evidence establishes conclusively the opposite of a vital fact.

Gharda USA, Inc., 464 S.W.3d at 347 (quoting *City of Keller*, 168 S.W.3d at 810). We uphold the jury's finding if more than a scintilla of competent evidence supports it. *Id.* More than a scintilla of evidence exists when the evidence supporting the finding "rises to a level that would enable *11 reasonable and fair-minded people to differ in their conclusions." *Id.* (quoting *Burroughs Wellcome Co. v. Crye*, 907 S.W.2d 497, 499 (Tex. 1995)). We review only the evidence tending to support the jury's verdict and "must disregard all evidence to the contrary." *Id.* (quoting *Mancorp, Inc. v. Culpepper*, 802 S.W.2d 226, 227 (Tex. 1990)). We consider the evidence and possible inferences in the light most favorable to the finding under review and indulge every reasonable inference that would support it. *Id.*; *City of Keller*, 168 S.W.3d at 822. When a party attacks the legal sufficiency of an adverse finding on an issue on which it had the burden of proof, the party must demonstrate on appeal that the evidence establishes, as matter of law, all vital facts in support of the issue. *Dow Chem. Co. v. Francis*, 46 S.W.3d 237, 241 (Tex. 2001) (per curiam).

When a party complains about the factual sufficiency of the evidence, it must show the adverse finding is against the great weight and preponderance of the evidence. *Id.* at 242; *PopCap Games, Inc. v. MumboJumbo, LLC*, 350 S.W.3d 699, 722 (Tex. App.—Dallas 2011, pet. denied). We consider and weigh all of the evidence and set aside the verdict only if the supporting evidence is so weak or the finding is so against the great weight and preponderance of the evidence that it is clearly wrong and unjust. *Dow Chem.*, 46 S.W.3d at 242; *PopCap Games*, 350 S.W.3d at 722.

We measure the sufficiency of the evidence by the jury charge as it was submitted. *Romero v. KPH Consol., Inc.*, 166 S.W.3d 212, 221 (Tex. 2005). When conducting our review of both legal and factual sufficiency of the evidence, we are mindful that the jury, as fact finder, was the sole judge of the credibility of the witnesses and weight to be given their testimony. *City of Keller*, 168 S.W.3d at 819; *Wash Techs. of Am. Corp. v. Pappas*, No. 05-16-00633-CV, 2018 WL 718550, at *5 (Tex. App.—Dallas Feb. 6, 2018, pet. denied) (mem. op.). The jury is free to believe some, all, or none of a witness's testimony. *Pappas*, 2018 WL 718550, at *5. We may not substitute our judgment for that of the fact finder's. *Id.* *12

B. NDMI Claim

The jury found Ghani failed to comply with his fiduciary duties to NDMI with respect to the dissolution of NDMI and that failure was not excused. The trial court granted Ghani's motion for JNOV as to these findings. In his first issue, Cruz argues, in part, the trial court erred by entering JNOV on his NDMI claim. In his first

and third cross-issues, Ghani asserts the evidence is insufficient to support the jury's answers to Questions 1 and 3, respectively, and in his second cross-issue, he argues the jury's answer to Question 2 is against the great weight and preponderance of the evidence.

1. Jury Charge, Jury's Findings, and JNOV

Question 1 of the jury charge states MCG owed fiduciary duties as the general partner of NDMI. To the extent Ghani exercised a degree of control over MCG such that he directed MCG's conduct as the general partner regarding the dissolution of NDMI, Ghani owed fiduciary duties to NDMI. To show Ghani failed to comply with his fiduciary duties to NDMI, Cruz was required to show:

> a. The dissolution transaction was not fair and equitable to NDMI;
> b. Ghani did not make reasonable use of the confidence that NDMI placed in him;
> c. Ghani did not act in the utmost good faith or exercise the most scrupulous honesty toward NDMI;
> d. Ghani placed his own interests before the interests of NDMI, used the advantage of his position to gain a benefit for himself at the expense of NDMI, or placed himself in any position where his self-interest might conflict with his obligations to NDMI; or
> e. Ghani failed to fully and fairly disclose all important information to NDMI.

The jury answered "yes," finding Ghani failed to comply with his fiduciary duties to NDMI with respect to the dissolution.

In Questions 2 and 3, the jury determined Cruz did not waive Ghani's failure to comply with his fiduciary duties and $2.075 million would fairly and reasonably compensate NDMI for the damages caused by Ghani's breach of fiduciary duty. Ghani moved for JNOV on the grounds *13 there is no evidence to support the jury's answer to Question 1, the jury's answer to Question 2 should be disregarded because he established waiver as a matter of law, and there is no evidence to support the jury's answer to Question 3 awarding damages. Ghani's motion for JNOV did not challenge that he owed fiduciary duties to NDMI.

2. Background Facts

Evidence, including Ghani's own testimony, shows Ghani exercised control over NDMI and directed the day-to-day operations. Ghani explained NDMI needed to be closed because the referral stream from doctors was declining and not being replaced, Ghani and Cruz were personally liable for debt on the equipment, and insurance reimbursement rates were dropping. However, ample evidence shows NDMI was not facing a financial crisis and could have continued operating successfully, but Ghani wanted to end his partnership with Cruz. There is evidence showing Ghani withheld financial information while misrepresenting the status of NDMI to induce Cruz to agree to close NDMI.

a. **Access to Financial Data**

Ghani and Cruz presented contradictory evidence about whether Cruz had access NDMI's complete financial data before he agreed to the dissolution.

i. GHANI'S EVIDENCE

NDMI's financial information was maintained on a computer using the software QuickBooks. Zamanian testified the computer was maintained in NDMI's office and approximately twenty to thirty steps outside of Cruz's personal office. Ghani explained one of the reasons they employed Zamanian, a third-party CPA, was to provide all partners access to financial information. Cruz and Taba also used Zamanian for personal tax returns and had relationships with him. Ghani stated that "everybody felt comfortable with him." *14

According to Ghani, in August or September 2008, Cruz began complaining about access to financial information even though he "always had access" through Zamanian and Tammy Boynton.

Ghani testified: "I never sent [Cruz] any financials, because I didn't want to be responsible for that financial [sic]. That's why we had the CPA. . . . So we had all the same source where we get our information from." Ghani testified that in late 2008 he sent an email to Zamanian (copying Cruz) stating Cruz was entitled to all financial information and Zamanian needed to make sure Cruz had what he needed. The email was not shown at trial.

Boynton testified that while she worked for Zamanian, she provided Cruz with any financial information he requested about NDMI and Plano AMI, but she did not believe Cruz reviewed it. Zamanian and Ghani knew she provided this information. Before she stopped working for Zamanian in August 2008, she gave CDs containing backup copies of QuickBooks records for the businesses to Cruz.

Taba testified the financial information "was always there to be looked at, if someone wanted to look at it" and the information was always available through Ghani or Zamanian. Zamanian testified financial information was timely provided to any client who requested it, "especially for someone who is so close to me. His office was next door to me. How could I not do this?"

ii. CRUZ'S EVIDENCE

Cruz testified he stopped receiving financial information about the businesses in September 2008 when Boynton stopped working for Zamanian. Taba also testified that although Ghani provided "all the documents" to Cruz and himself when the business started, he stopped doing so in later years. On January 5, 2009, Cruz emailed Taba asking if Taba received his Schedule K-1, a tax document, or "financial [sic] for 2008." Cruz's email states he left a multitude of messages for Zamanian, but did not receive any response. He
15 stated "[i]t is like hitting a wall." Taba replied *15
he had not. When asked whether a person could expect to receive a Schedule K-1 by January 5, Zamanian replied "absolutely not" because the entire year's financial data must be compiled before a Schedule K-1 can issue and, at best, that would not be finished before the end of January. Zamanian testified the Schedule K-1 usually issued in the summer.

On April 3, 2009, Cruz emailed Zamanian and Ghani "requesting again the detailed financial reports of Plano and Dallas MRI business, P and L and everything you agreed to provide me this past Monday." Cruz testified he was concerned about the financial status of the partnerships. When asked about the same email, Zamanian stated he provided all information and did not know what Cruz was seeking. Zamanian recalled an instance when he had to deliver the same information to Cruz's office two or three times. Cruz emailed Zamanian and Ghani again on April 16, 2009 stating: "Despite multiple verbal and written communications, you both have decided not to give me the information I requested for my tax return. Because of that I have to request an extension. You both have provided me with partial information which has not helped me at all. My K-1s do not match my records and I am at an impasse. As a general partner I have the right to have such documents. I should not even have to ask for them." Although Cruz testified he needed tax information and he was trying to determine how Ghani spent money, Zamanian believed this information was provided to Cruz.

On July 2, 2009, Doug Brady wrote a letter on Cruz's behalf to Ghani and Zamanian requesting numerous financial reports for NDMI and Plano AMI. The letter states Cruz, a limited partner, is entitled to the information. Cruz testified that when this letter was sent, he had not received financials for nearly one year.

Kimberly Ault Robinson worked for NDMI in the summer of 2008. When asked whether Ghani instructed her not to share information with Cruz, she answered affirmatively and explained: "[I]t was a very broad instruction. It was to never
16 discuss anything that I heard in any of the *16

facilities regarding business to Dr. Cruz. If I were to go in his office and market to him or check on how referrals were, I was just not to talk or discuss anything business related with Dr. Cruz. . . . it was very vague. There was some talks about that the Dallas location was going to close down and the partners were not going to ask Dr. Cruz to go to the new investment. They were doing it hush-hush without his knowledge."

William Meier, an attorney who drafted some documents for NDMI, testified that several NDMI limited partners voiced concerns about the lack of timely information from Ghani. Cruz frequently called Meier and complained he was not receiving access to basic information about NDMI. During board meetings, Meier, Cruz, and Ghani discussed that Ghani needed to be more transparent and make information available to Cruz so he could have meaningful input as a member of the board.

Adam Hardison, a lawyer and NDMI limited partner, testified Ghani did not provide sufficient financial information. On September 3, 2008, Hardison sent a letter to Ghani to force Ghani "to be transparent to the partners, to comply with the fiduciary duty that we all have, to provide this information to potential buyers, and why it's not happening." The letter requested Ghani provide numerous pieces of information about NDMI.

While the evidence shows that until approximately September 1, 2008, Cruz had ready access to financial data through Zamanian and Boynton, some evidence, including Cruz's testimony, indicates access to financial information stopped once Boynton left Zamanian's employment. Additionally, although the decision to dissolve NDMI was made in December 2008 or January 2009, evidence shows Cruz's difficulty obtaining financial information continued into 2009. Cruz's assertion that it was difficult to obtain financial information from Ghani and Zamanian was confirmed by Denn's, Hardison's, and Meier's testimony. *17

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b. **NDMI Financially Sound**

Scott Hakala, Ph.D., testified as Cruz's damages expert. Hakala works for a firm that values businesses and business interests. To value NDMI, he focused on the "market approach" to valuation, meaning he looked at how much a buyer would pay for the business based on its present value. The first step in performing the analysis is to identify the value of similar businesses in the market. He looks for transactions involving companies of similar size and type to determine which multiple of earnings, multiple of revenue, or other measure that the businesses are being bought and sold for. Hakala testified the market for MRI centers was active from 2005 through 2012. It was a "very active acquisition market" with private groups looking to buy imaging practices of "a certain size and type and profitability, and they were paying a certain known rate for those businesses."

He noted there were several indications of interest or offers to purchase NDMI along with Plano AMI. He testified: "we had a number of offers that we could look at and see what people were offering and then compare that with what we were seeing in reported general stories of what these firms were being bought, as well as specific identifiable transactions." He considered the offers "conservative but reasonable offers consistent with what we were seeing in the imaging business." He testified acquiring companies were generally paying "somewhere between three and six, sometimes a little more than six times EBITDA,[2] so they would look at EBITDA as their primary focus."

[2] EBITDA is an acronym for the calculation of earnings before interest, taxes, depreciation, and amortization.

When determining which EBITDA multiple to use, one consideration is the life of the MRI machine. If the machine is nearing the end of its useable life, then the multiple is lower because a buyer will need to retrofit the existing machine or purchase a new unit. However, if the MRI

machine has more than half its life remaining and the practice is still growing, a buyer may pay *18 four or five times EBITDA. Other considerations are the referral base and the extent a buyer thinks it could expand that base and the level of competition among MRI service providers in the area. Hakala looked at the referral base for NDMI and its historic performance from the time of its inception until the date he valued the business. He also examined tax returns, portions of the general ledger in QuickBooks, partnership and organizational documents, and deposition transcripts of "various individuals" taken during the litigation to ensure he understood how the business operated as well as its "unique factors."

Hakala opined NDMI would fall in the "lower middle part" of the EBITDA multiplier range. He testified it had a "good base of revenue, a good history, a good trend, but they appeared to have . . . basically leveled out." The machines would be good for four and a half to five years. On the conservative side, he estimated "about four times EBITDA was about what we would typically expect NDMI to be sold for."

Hakala attempted to determine annual earnings for NDMI by analyzing historical financial statements. An exhibit used during his testimony shows:

NDMI Tax Return and Adjusted Financial Statements

	2010	2009	2008	2007	2
Net Revenue	$ 422,761	$ 1,747,645	$ 1,779,761	$ 1,717,099	$ 2
Gross Profits	$ 314,828	$ 1,282,806	$ 1,358,686	$ 1,213,819	$ 1
Other Income	**$ 32,212**	$ -	$ -	$ 217,159	$
Expenses	**$ 359,985**	**$ 719,081**	**$ 954,461**	**$ 1,073,846**	**$ 1**
Taxable Income	**$ (12,944)**	**$ 563,725**	**$ 404,225**	**$ 357,132**	**$**
EBIT	$ (9,877)	$ 588,559	$ 448,971	$ 426,605	$
EBITDA	$ (9,877)	$ 695,911	$ 626,352	$ 650,542	$

Hakala explained net revenue declined for NDMI from 2006 to 2007 because the MRI reimbursement rates were reduced. Net revenue from 2007 through 2009 was stable. It fell again in 2010, which Hakala attributed to NDMI closing its operation in early 2010. The EBITDA, which Hakala testified is a "pretty good measure of the true profitability of the business," also fell from 2006 to 2007 but remained relatively stable in 2007, 2008, and 2009, increasing slightly from *19 2008 to 2009. Once Hakala had these numbers, he conducted a "normalizing process" to show how much profit the business actually generated.

Hakala testified that at the end of 2008, the owners could have sold NDMI for approximately $3.5 million. Once the net debt of $561,773 was subtracted, the equity value of NDMI at the end of 2008 was about $2.95 million. Based on his calculations, Hakala did not believe the decision to dissolve NDMI was justified. NDMI's value was not maximized by dissolving the business and, unless the business was sold, a better strategy would have been to continue operating until it became unprofitable to do so.

When asked whether doctors referring fewer patients to NDMI would affect the future financial viability of NDMI, Hakala testified: "Some, but not that much." The potential for reduced referrals was one of the reasons he used a lower multiplier range for NDMI. Looking at the net revenue numbers for NDMI in 2008 and 2009, Hakala stated NDMI was not teetering on the "brink of financial viability." He believed NDMI "would probably have to lose half or more of its revenue

before you can really start seeing it get to a negative EBITDA where you'd no longer continue to try and operate it."

Hakala also used an income-valuation approach to value NDMI, which produced a value about 30 to 50 percent higher. Hakala testified: "Basically, you get more value if you continue to own and run it than if you try and sell it to somebody else, because they're going to discount it for the risks." Generally, he explained, the value to the existing owner is higher than to a potential buyer in the MRI business.

c. Ghani motivated to close NDMI

Some evidence shows Ghani no longer wanted to operate NDMI and was entering into a new MRI business venture that did not include Cruz. Kimberly Ault Robinson, a former employee, testified: "There was some talks [sic] about that the Dallas location was going to close down and
20 *20 the partners were not going to ask Dr. Cruz to go to the new investment. They were doing it hush-hush without his knowledge." Boynton stated Ghani "was just saying that he felt that he wanted out of that company because he didn't take it on to do that job for his entire life."

Additionally, in December 2008, Ghani formed a new business venture, Mesquite AMI, with his friend Reza Nabavi. Cruz testified Ghani created Mesquite AMI at the same time he sought to close NDMI by telling Cruz: "We've got to close. There is no money, no business going on." When Cruz wanted to discuss marketing plans for NDMI so the business would not need to close, Ghani told Cruz: "[I]t's too late. I already committed the machines." Cruz asked Ghani for clarification, and Ghani told Cruz he committed to selling NDMI's machines. Cruz testified: "And that's the exact time he was in the business, or he's registered this business with our machines."

NDMI eventually closed in April 2010 and Nabavi came to NDMI to collect the MRI machine. Nabavi told Cruz he was going into business with "Mike." The record includes a service price quote given to "SASAN, Ltd. or assignee Reza Nabavi, Partner" and made to the attention of Mike Ghani to de-install an MRI machine located in Dallas and re-install it at a location within 20 miles. The date on the invoice is April 23, 2010.

Ghani testified Cruz gave him authority to sell all of the equipment. Nabavi was interested in buying the MRI machine and offered to pay more than any other potential buyers. Nabavi bought the machine and opened a business that Ghani is not part of. The Mesquite AMI proposal never came to fruition. Ghani denied he planned to open an MRI facility with Nabavi in 2010.

3. Analysis of NDMI Claim

Although Ghani provided an explanation about why NDMI needed to be dissolved and why the dissolution was not a breach of his fiduciary duties, evidence presented at trial allowed jurors to reach the opposite conclusion. Some evidence shows Ghani withheld financial information from Cruz immediately before seeking Cruz's consent
21 to close the business. That *21 information would have shown NDMI was not in financial straits and could continue operating as a profitable entity. Although Ghani stated the financial problems were due, in part, to declining reimbursement rates, Hakala testified that occurred in 2006-2007 and the businesses had recovered financially. Further, although Ghani asserted referrals were declining because Taba and Raroque were moving their practices away from Dallas, Hakala testified a change would have "some, but not that much" impact on future financial viability and Cruz stated the impact would be minimal.

A jury could reasonably infer that Ghani acted as he did because he no longer wanted to be in business with Cruz and wanted to pursue an opportunity with Nabavi. To accomplish this goal, Ghani falsely told Cruz there was "no money coming in, and we have big debt" to scare him into agreeing to close NDMI. Even as Ghani testified he was concerned about reimbursement rates

going down and the medical imaging industry becoming less profitable, he formed a new MRI entity with Nabavi to invest in and pursue opportunities in the same industry and in the same geographic area. Based on the contradictory evidence, the jury could have disregarded Ghani's explanation in favor of the one provided by Cruz.

This is some evidence Ghani placed his own interests before the interests of NDMI, used the advantage of his position to gain a benefit for himself at the expense of NDMI, or placed himself in a position where his self-interest might conflict with his obligations to NDMI. Thus, we conclude there is some evidence to support the jury's answer to Question 1 that Ghani failed to comply with his fiduciary duties to NDMI.

Additionally, Hakala's testimony is sufficient to support the jury's answer to Question 3 awarding $2.075 million for Ghani's breach. Hakala testified that the equity value of NDMI at the end of 2008 was about $2.95 million. Hakala provided a step-by-step process explaining his methodology to the jury. He stated buyers of medical imaging businesses were paying between three and six times EBITDA. He explained why, for NDMI, he
22 used a lower multiplier, which *22 included some of the concerns raised by Ghani. However, Hakala also explained to the jury how to reach its own calculation if it believed his numbers were too low or high. He testified: "So it's simply multiplication. You have an earnings number, a multiplier to apply the earnings. That gives you the value of the business." From that, the jurors could subtract the debt to find the net equity value of the business, meaning what the business is worth to the partners.

The jury's damages award is approximately three times EBITDA, which is within the range of the evidence presented at trial. *See Basic Capital Mgmt., Inc. v. Dynex Commercial, Inc.*, 402 S.W.3d 257, 265 (Tex. App.—Dallas 2013, pet. denied) (jury has discretion to award damages within range of evidence presented at trial so long as there is a rational basis for calculation). We conclude there is some evidence to support the jury's answer to Question 3.

In response to Question 2, the jury determined Ghani's failure to comply with his fiduciary duties to NDMI was not excused. The charge instructed the jury that failure to comply is excused if Cruz waived compliance. The charge defined waiver as the "intentional surrender of a known right or intentional conduct inconsistent with claiming it." Although Cruz consented to closing NDMI, Cruz testified he relied on Ghani's representations there was "no money coming in, and we have big debt," which "came out to be not true." Cruz stated: "[B]asically, if I would have known the financial status of the North Dallas Medical Imaging, which was shut down from Mr. Ghani explaining to me that there was no money in 2008," he would not have agreed to dissolution. Cruz also testified he did not know about Mesquite AMI or that this potential venture was a reason Ghani sought to close NDMI.

From this evidence, the jury could have concluded that, although Cruz consented to closing NDMI, he did not intentionally surrender a known right. He relied on false information from Ghani, at the same time Ghani withheld accurate financial
23 information, and he would not have *23 consented had he known NDMI was profitable. The evidence does not conclusively establish Cruz intentionally surrendered a known right.

4. Conclusion

Because more than a scintilla of competent evidence supports the jury's answers to Questions 1, 2, and 3, we conclude the trial court erred by disregarding the jury's answers and entering JNOV in Ghani's favor on these questions. Additionally, the jury's answers to these questions are not against the great weight and preponderance of the evidence. We sustain Cruz's first issue to this extent and we overrule Ghani's first, second, and third cross-issues.

C. Plano Open Claim

In his first issue, Cruz argues, in part, the trial court erred by granting Ghani's motion for JNOV on his Plano Open claim. In his fourth through seventh cross-issues, Ghani asserts the jury's answers to Questions 4A, 4B, 5A, and 5B are against the great weight and preponderance of the evidence. Ghani's eighth, ninth, and nineteenth cross-issues state the evidence is insufficient to support the jury's answers to Questions 6A, 6B, and 22.

1. Jury Charge, Jury's Findings, and JNOV

Question 4A asked the jury whether Ghani failed to comply with his fiduciary duties, if any, owed to Plano AMI with respect to the pursuit of Plano Open. The charge stated that, as the general partner of Plano AMI, GMI owed fiduciary duties to Plano AMI, and, to the extent Ghani exercised a degree of control over GMI such that he directed GMI's conduct as a general partner regarding the pursuit of Plano Open, Ghani "also owed the fiduciary duties." The charge quoted paragraphs 6.1(a) and (f) of the Plano AMI Limited Partnership Agreement ("Plano AMI Agreement"), which are discussed below.

To prove he complied with his fiduciary duties to Plano AMI, Question 4A required Ghani to show that: *24

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a. the transactions were fair and equitable to Plano AMI;
b. Ghani made reasonable use of the confidence that Plano AMI placed in him;
c. Ghani acted in the utmost good faith and exercised the most scrupulous honesty toward Plano AMI;
d. Ghani did not place his own interests before the interests of Plano AMI, did not use the advantage of his position to gain a benefit for himself at the expense of Plano AMI, and did not place himself in any position where his self-interest might conflict with his obligations to Plano AMI; and,
e. Ghani fully and fairly disclosed all important information to Plano AMI.

The jury answered "No," meaning Ghani did not comply.

In Question 4B, the jury concluded that failure to comply was not excused. The jury was instructed that the failure to comply was excused if compliance was waived by Plano AMI. Question 5A asked the jury whether Ghani complied with his fiduciary duties to GMI with respect to the pursuit of Plano Open. To prove he complied with his fiduciary duties to GMI, Question 5A required Ghani to show that:

> a. the transactions were fair and equitable to GMI;
> b. Ghani made reasonable use of the confidence that GMI placed in him;
> c. Ghani acted in the utmost good faith and exercised the most scrupulous honesty toward GMI;
> d. Ghani did not place his own interests before the interests of GMI, did not use the advantage of his position to gain a benefit for himself at the expense of GMI, and did not place himself in any position where his self-interest might conflict with his obligations to GMI; and,
> e. Ghani fully and fairly disclosed all important information to GMI.

The jury answered "No," meaning Ghani did not comply. In response to Question 5B, the jury found the failure to comply was not excused.

In Questions 6A and 6B, the jury was asked what sum of money would compensate appellants for the damages caused by the breaches of fiduciary duty found in response to Questions 4A and 5A. The jury provided the same response to both Questions 6A and 6B: $1.657 million. Finally, in response to Question 22, the jury found by clear and convincing evidence that the injuries found in response to Question 6 resulted from malice or
25 fraud by Ghani. *25

Ghani moved for JNOV on the grounds the jury's answers to Question 4A, 4B, 5A, and 5B should be disregarded because the issues were established as a matter of law by the undisputed evidence. He asserts there is no evidence to support the jury's answers to Questions 6A, 6B, and 22. Ghani's motion for JNOV does not challenge that he owed a fiduciary duty to Plano AMI and GMI. The trial court granted Ghani's motion for JNOV as to these findings.

2. Fiduciary Duties Owed to Plano AMI

Cruz asserts Ghani breached his fiduciary duties to Plano AMI and GMI by pursuing Plano Open. Ghani maintains the Plano AMI Agreement expressly permitted him to open and operate Plano Open. Paragraph 6.1 of the Plano AMI Agreement includes the following two provisions:

> (a) *Management*. . . . [T]he General Partner shall have the full power and authority, except as otherwise expressly provided in this Agreement, to do all things deemed necessary or desirable by it to conduct the business of the Partnership, including, without limitation: (i) the determination of the activities in which the Partnership will participate. . . .
>
> (f) *Outside Activities and Conflicts of Interest*. The General Partner or any Affiliate thereof and any director, officer, employee, agent, or representative of the General Partner or any Affiliate thereof shall be entitled to and may have business interests and engage in business activities in addition to those relating to the Partnership, including business interests and activities in direct competition with the Partnership. Neither the Partnership nor any of the Partners shall have any rights by virtue of this Agreement or the partnership relationship created hereby in any business ventures of the General Partner, any Affiliate thereof, or any director, officer, employee, agent, or representative of either the General Partner or any affiliate thereof.

Ghani asserts paragraph 6.1(f) expressly permitted any of the partners, officers, directors, or employees to open competing businesses. Therefore, Ghani argues, this paragraph expressly allowed him to pursue Plano Open, a competing business. Cruz disagrees paragraph 6.1(f) gave Ghani such authority because Ghani owed fiduciary duties to Plano AMI and GMI.

Chapter 153 of the Texas Business Organizations Code governs limited partnerships. Section 153.152 is titled "General Powers and Liabilities of General Partner" and states in part: *26

> Except as provided by this chapter, the other limited partnership provisions, *or a partnership agreement*, a general partner of a limited partnership: (1) has the rights and powers and is subject to the restrictions of a partner in a partnership without limited partners; and (2) has the liabilities of a partner in a partnership without limited partners to the partnership and to the other partners.

TEX. BUS. ORGS. CODE ANN. § 153.152(a) (emphasis added). While chapter 153 does not directly address the extent to which duties and liabilities of general partners in a limited partnership may be altered by agreement, the italicized language indicates a limited partnership agreement may modify the liabilities of a general partner.

Section 153.003 states that "in the case not provided for by this chapter and the other limited partnership provisions, the provisions of Chapter 152 governing partnerships that are not limited partnerships and the rules of law and equity govern." *Id*. § 153.003; *see also Doctors Hosp. at Renaissance, Ltd. v. Andrade*, 493 S.W.3d 545, 547 (Tex. 2016). With exceptions, a "partnership agreement governs the relations of the partners and between the partners and the partnership." TEX. BUS. ORGS. CODE ANN. § 152.002(a). The partnership agreement may not eliminate the duty of loyalty, duty of care, and obligation of good faith. *Id*. § 152.002(b)(2)-(4). However, by agreement, the partners "may identify specific types of activities or categories of activities that do not violate the duty of loyalty if the types or categories are not manifestly unreasonable." *Id*. § 152.002(b)(2). A partner's duty of loyalty includes refraining from competing or dealing with the partnership in a manner adverse to the partnership. *Id*. § 152.205(3).

Additionally, Texas has a strong policy favoring freedom of contract. *ConocoPhillips Co. v. Koopmann*, 547 S.W.3d 858, 877 (Tex. 2018) (quoting *Phila. Indemnity Ins. Co. v. White*, 490 S.W.3d 468, 471 (Tex. 2016)). "Absent compelling reasons, courts must respect and enforce the terms of a contract the parties have freely and voluntarily entered." *Id*. (quoting *Phila. Indemnity Ins. Co.*, 490 S.W.3d at 471). Generally parties may contract as they wish so long as their agreement "does not violate positive law or offend public policy." *Id*. (quoting *Phila. Indemnity* *27 *Ins. Co.*, 490 S.W.3d at 475). "In certain contexts where the Legislature sets certain rights and obligations between parties, it has explicitly allowed parties to contract around those rights to a certain extent." *Id*. (citing TEX. BUS. ORGS. CODE § 152.002 (detailing the rights and duties a partnership agreement can and cannot waive); TEX. PROP. CODE § 92.061). Courts honor the contractual terms parties use to define the scope of their obligations and agreements, including limiting fiduciary duties that might otherwise exist. *See Strebel v. Wimberly*, 371 S.W.3d 267, 284 (Tex. App.—Houston [1st Dist.] 2012, pet. denied) (citing *Nat'l Plan Adm'rs, Inc. v. Nat'l Health Ins*. Co., 235 S.W.3d 695, 703 (Tex.2007)); *see also Harrison v. Harrison Interests, Ltd*., No. 14-15-00348-CV, 2017 WL 830504, at *4 (Tex. App.—Houston [14th Dist.] Feb. 28, 2017, pet. denied) ("we must balance the principle that fiduciary duties arise as a matter of law with our obligation to honor the contractual terms that parties use to define the scope of their obligations and agreements, including limiting fiduciary duties that might otherwise exist.").

Here, paragraph 6.1(f) of the Plano AMI Agreement expressly permitted GMI or any of its directors, officers, employees, agents, or representatives to "engage in business activities in addition to those relating to the Partnership,

including business interests and activities in direct competition with the Partnership." Through paragraph 6.1(f), the Plano AMI Agreement identified a specific type of activity or category of activities that do not violate the duty of loyalty. *See* TEX. BUS. ORGS. CODE ANN. § 152.002(b)(2). Cruz does not argue the type of activity or category of activities identified in paragraph 6.1(f) are manifestly unreasonable. *See id*. We will honor the contractual terms the parties used to define the scope of their obligations and agreements, including limiting fiduciary duties that might otherwise exist. *See Strebel*, 371 S.W.3d at 284 (citing *Nat'l Plan Adm'rs*, *Inc*., 235 S.W.3d at 703).

Ghani, an officer or director of GMI, pursued Plano Open, which was a business interest in direct competition with Plano AMI. The parties, 28 through the Plano AMI Agreement, expressly *28 allowed Ghani to engage in a business in direct competition with Plano AMI. Because Ghani's actions about which Cruz complains were expressly permitted by the Plano AMI Agreement, we conclude the express limitation of fiduciary duties in the Plano AMI Agreement forecloses Cruz's Plano Open claim. Therefore, we conclude the trial court did not err by granting Ghani's motion for JNOV on Question 4A.

3. Fiduciary Duties Owed to GMI

In its response to Question 5A, the jury found Ghani failed to comply with his fiduciary duties owed to GMI with respect to the pursuit of Plano Open. Cruz argues Ghani breached his fiduciary duty to GMI by creating GMI #2 and usurping the Plano Open opportunity from GMI.

The jury was instructed that as an officer or director of GMI, Ghani owed fiduciary duties to GMI. The charge required Ghani to establish he, among other things, made reasonable use of the confidence GMI placed in him, acted in the utmost good faith and exercised the most scrupulous honesty toward GMI, did not place his own interests before those of GMI, and did not place himself in any position where his self-interest might conflict with his obligations to GMI in order to show he complied with his fiduciary duties to GMI. The jury found he did not, and there is some evidence to support that conclusion.

Cruz, Ghani, and Taba discussed acquiring an open MRI machine to create an additional revenue stream for Plano AMI. Although the parties would have needed to lease additional space to add another machine, some evidence shows the open MRI could have been added to the existing business. Instead of pursuing the open MRI opportunity through GMI, Ghani and Taba created a new entity, GMI #2. For Ghani and Taba, because the open MRI machine was not expensive and margins were high, the venture was profitable. This is some evidence Ghani placed his own interests before the interests of GMI or placed himself in a position where his self-interest might 29 *29 conflict with his obligations to GMI. Thus, we conclude there is some evidence to support the jury's answer to Question 5A that Ghani failed to comply with his fiduciary duties to GMI.[3]

[3] We do not conclude Ghani was required to use GMI as the general partner for the new open MRI entity as a matter of law. We only conclude that, in light of the jury charge as given, Ghani did not show he complied with his fiduciary obligations to GMI.

In response to Question 5B, the jury concluded the failure was not excused. The jury was instructed that the "[f]ailure to comply is excused if compliance is waived by Cruz." The evidence does not show Cruz waived compliance, that he intentionally surrendered a known right or intentionally engaged in conduct inconsistent with claiming it. Rather, there is some evidence Cruz was interested in adding an open MRI machine to Plano AMI. Ghani, Taba, and Cruz discussed adding an open MRI machine several times because they considered it a potential additional revenue stream. Cruz testified he never stated he was against the idea of an open MRI machine or

would veto it. Instead, he explained, Ghani and Taba took the open MRI opportunity from him. Taken together, this is some evidence Cruz did not waive Ghani's compliance with his fiduciary duties and there is some evidence to support the jury's answer to Question 5B.

Question 6B asked the jury what sum of money would fairly and reasonably compensate Cruz for the damages proximately caused by the breach of fiduciary duty found in response to Question 5A. The jury was instructed to consider the following elements of damages and none other: "The fair market value of Plano Open as of December 31, 2011, plus the total distributions that Ghani and Taba had received from Plano Open before that date." The jury answered: $1.657 million.

Hakala testified the value of Plano Open at the end of 2011 was between $1.4 million and $1.75 million. The jury's damages award is within the range of the evidence presented at trial. *See Basic Capital Mgmt.*, 402 S.W.3d at 265 We conclude there is some evidence to support the jury's answer to Question 6B. *30

In Question 22, the jury was asked: "Do you find by clear and convincing evidence that the injuries, if any, you found in response to Question 6 resulted from malice or fraud by" Ghani? The jury answered "Yes." Question 22 was part of the jury's determination of punitive damages. *See Transp. Ins. Co. v. Moriel*, 879 S.W.2d 10, 16 (Tex. 1994) (punitive damages are damages assessed to punish a defendant for outrageous, malicious, or otherwise morally culpable conduct). When reviewing the legal sufficiency of the evidence to support a finding that must be proven by clear and convincing evidence, we look at all the evidence in the light most favorable to the finding to determine whether a reasonable trier of fact could have formed a firm belief or conviction that its finding was true." *Horizon Health Corp. v. Acadia Healthcare Co., Inc.*, 520 S.W.3d 848, 866 (Tex. 2017). We assume the finder of fact resolved disputed facts in favor of its finding if a reasonable fact finder could do so. *Id.*

The evidence shows Ghani pursued Plano Open after consulting with legal counsel who informed Ghani he could pursue the opportunity based on paragraph 6.1(f) of the Plano AMI Agreement. Additionally, Taba testified that by the time Plano Open was established, neither Cruz nor Ghani wanted to pursue new businesses together. Although Cruz testified he wanted to add an open MRI machine to the services offered by Plano AMI in 2007 or 2008, that was before his relationship with Ghani became acrimonious. Reviewing the evidence under the applicable standard of review, we conclude there is not clear and convincing evidence that the injuries resulted from malice or fraud by Ghani. *31

4. Conclusion

We conclude the trial court did not err by granting Ghani's motion for JNOV on the jury's answers to Questions 4A and 22. We overrule Cruz's first issue to this extent and we sustain Ghani's fourth and nineteenth cross-issues. Because the jury should not have considered whether Ghani's failure to comply with his fiduciary duty to Plano AMI was excused (Question 4B) or what amount of damages would compensate for his failure to comply (Question 6A), we do not consider Cruz's first issue to this extent or Ghani's fifth and eight cross-issues.

Because the evidence is sufficient to support the jury's answers to Questions 5A, 5B, and 6B, we conclude the trial court erred by disregarding the jury's answers to and entering JNOV in Ghani's favor on these questions. We sustain Cruz's first issue to this extent and we overrule Ghani's sixth, seventh, and ninth cross-issues.

D. Plano AMI & GMI Claims

In his first issue, Cruz argues, in part, the trial court erred by entering JNOV in Ghani's favor on his Plano AMI and GMI claims. In his tenth

through sixteenth cross-issues, Ghani argues the evidence is insufficient to support the jury's answers to Question 7, 8, 9A, 9B, 10, and 12, and the jury's answer to Question 11 is against the great weight and preponderance of the evidence.

1. Plano AMI Claim: Jury Charge, Jury's Findings, and JNOV

Question 7 asked the jury whether Ghani actively directed or participated in GMI's conversion of the GMI shares belonging to Cruz. The jury answered "Yes." In response to Question 8, the jury determined $8,000 would compensate Cruz for his damages proximately caused by the conversion. Questions 9A and 9B asked the jury whether there was an agreement that Cruz would be a limited partner in Plano AMI and, if so, what percentage interest he owned. The jury concluded Cruz possessed a 24% limited partnership interest in Plano AMI as of August 2010. Question 10 asked the jury whether Ghani actively directed or
32 participated in GMI's *32 conversion of Cruz's limited partnership interest in Plano AMI and the jury answered "Yes." Question 11 asked the jury whether Ghani complied with his fiduciary duties to Cruz with respect to treatment of Cruz as a limited partner in Plano AMI after August 11, 2010. The jury answered "No," meaning Ghani failed to comply with his fiduciary duties. In response to Question 12, the jury determined $617,000 would compensate Cruz for his damages proximately caused by the conduct found in response to Question 10 or 11. Ghani's motion for JNOV asserted there is no evidence to support the jury's answers to Questions 7, 8, 9A, 9B, and 10, and the jury's answer to Question 11 should be disregarded because the issue was established as a matter of law.

2. Plano AMI Claim: Background Facts & Analysis

The parties disputed the ownership structure of GMI and Plano AMI. Cruz maintained he was a limited partner in Plano AMI and held stock in GMI while Ghani asserted Cruz only owned stock in GMI. Some evidence shows Cruz was a limited partner in Plano AMI, owned stock in GMI, and Ghani directed or participated in the conversion of both interests.

a. Cruz Owned a Limited Partnership Interest in Plano AMI

Cruz testified he was a limited partner in Plano AMI. Cruz claimed he, Ghani, and Taba each owned a 24% limited partnership interest directly in Plano AMI; GMI owned 1% as the corporate general partner; and physician investors owned the remainder. The Plano AMI limited partnership agreement lists GMI as the general partner and Ghani, Taba, and Cruz as limited partners. Ghani signed the Plano AMI Agreement as president of GMI and individually as a limited partner. Taba and Cruz each signed individually as limited partners. Exhibit A to the Plano AMI Agreement is titled "List of Partners and Percentage Interest." It lists GMI as the general partner owning a 60% interest. Ghani is listed as a limited partner, but no percentage interest is given. Taba and Cruz are not listed on Exhibit A. Likewise, Exhibit B titled "Description of Property Contributed by the Partners" lists GMI as the general partner, but
33 does *33 not provide the amount of property GMI contributed. Ghani, individually, is listed as a limited partner, but, again, no amount of property is provided. Taba and Cruz are not listed on Exhibit B. From 2004 to 2010, Plano AMI made distributions directly to Cruz and Taba, but they did not receive distributions from GMI. The tax returns for those six years, which Ghani signed, show Cruz was a limited partner in Plano AMI.

In contrast, Ghani asserted GMI owned 60% of Plano AMI and physician investors owned the remaining 40%. Cruz, Ghani, and Taba each owned one-third of the GMI stock, but were not limited partners in Plano AMI. According to Ghani, Cruz and Taba preferred this structure because holding their ownership interests through GMI concealed their large interests from physician

investors. Cruz was particularly concerned because he would be referring fewer patients to Plano AMI than he did to NDMI.

Ghani explained Doug Brady, a lawyer hired by Plano AMI, discovered in 2010 that the tax returns filed for Plano AMI incorrectly showed Cruz and Taba were limited partners in Plano AMI. Brady instructed Zamanian to file amended tax returns for 2004 through 2010, and the amended returns only changed the designations reflecting which people were shareholders in GMI and limited partners in Plano AMI. The amended tax returns show Cruz was a shareholder in GMI rather than a limited partner in Plano AMI. Ghani explained the error in the tax return occurred because Zamanian assumed the corporate structure for GMI and Plano AMI mirrored the structure of MCG and NDMI when it did not.

Although Ghani asserts the documents showing Cruz was a limited partner in Plano AMI were inaccurate and reflect a series of mistakes, the jury was free to disbelieve this testimony and instead credit the substantial contradicting evidence. Documentary evidence and Cruz's testimony constitute more than a scintilla of competent evidence to support the jury's answers to
34 Questions *34 9A and 9B, in which it concluded there was an agreement for Cruz to be a limited partner in Plano AMI and he owned a 24% interest as of August 2010.

b. Conversion of Cruz's Plano AMI Limited Partnership Interest

It is uncontested that Ghani was president of GMI and exercised full control over Plano AMI. By the summer of 2010, there was conflict between Ghani and Cruz and they no longer wanted to be business partners. Over the next eighteen months, Ghani dissolved NDMI after inducing Cruz's consent by withholding financial information and misrepresenting the status of the business. Additionally, Ghani started Plano Open, which siphoned customers from Plano AMI. Two former employees claimed Ghani and his wife, Rona,[4] were looking for a way to exclude Cruz from the partnerships. One former employee testified she heard Rona talk about their plans to "get [Cruz] out of the business." When asked about her understanding of the plan, the former employee responded: "[T]hey were just going to get him out of the partnership. How that was going to take place, I don't know." The other former employee testified she knew the Ghanis were unhappy with Cruz and wanted him out of the business. Rona expressed her displeasure that Cruz "wasn't carrying his weight, he wasn't bringing enough business, and [Rona] didn't feel that he earned or deserved to have any part of the [distribution] checks or any of the money of the shareholders."

[4] Because Rona Ghani has the same surname as her husband who is a party to this appeal, we will call her by her first name.

At a meeting in June 2010, Ghani was angry with Cruz. According to Cruz, Ghani threatened him, saying: "Dr. Cruz, you are a traitor. You're a traitor, and I'm going to hire my attorneys. I'm going to destroy you, and I'm going to take your license away." After this meeting, Ghani and Taba consulted Brady about removing Cruz.

In July 2010, after Cruz sued Ghani, Ghani realized the Plano AMI tax returns erroneously showed Cruz was a limited partner and no
35 dividends had been declared from GMI. Ghani *35 instructed Zamanian to amend the tax returns and he began recognizing dividends for GMI. Once the tax returns were amended, they showed Cruz owned his interest only in GMI. Cruz no longer held any interest in Plano AMI.

Taken together, there is some evidence showing Ghani actively directed or participated in GMI's conversion of Cruz's limited partnership interest in Plano AMI. Because there is sufficient evidence to support the jury's answer to Question 10 and it was instructed to consider damages based on its answer to Question 10 or Question 11, we need

36 not consider the evidence supporting the jury's response to Question 11. *See* TEX. R. APP. P. 47.1.

c. Damages for conversion of Plano AMI Interest

The jury concluded $617,000 would compensate Cruz for his damages proximately caused by the conversion of his interest in Plano AMI. Ghani's motion for JNOV asserted there is no evidence to support this amount.

Hakala performed a similar valuation for Plano AMI as he did for NDMI and used a similar exhibit during his testimony.

Summary of Plano AMI L.P. Tax Returns Financial Statements and Adjustments

	2010	2009	2008	2007
Net Revenue	$ 2,185,739	$ 2,746,895	$ 2,507,464	$ 1,833,590
Gross Profits	$ 1,501,971	$ 2,222,860	$ 1,972,551	$ 1,291,235
Other Income				$ 96,580
Expenses	**$ 1,017,210**	**$ 1,070,078**	**$ 979,184**	**$ 865,248**
Taxable Income	**$ 484,761**	**$ 1,152,782**	**$ 993,367**	**$ 522,567**
EBIT	$ 497,476	$ 1,164,108	$ 1,013,785	$ 536,185
EBITDA	$ 667,054	$ 1,322,855	$ 1,203,162	$ 797,525

Plano AMI's revenue and profitability steadily increased in 2008 and 2009. Hakala used the adjusted EBITDA for Plano AMI and, based on the offers from potential buyers, multiplied it by four. A high-end multiplier of five would reflect Plano, Texas, as a "premium area" with a good *36 growth trend. The product would be between about $6 million and $7.5 million. He testified the net equity value was between $5.65 million and $7.15 million.

However, by August 2010, the EBITDA "had been reduced substantially." Hakala testified "some of the referrals went down and there was a clinic opened really close by called Plano Open AMI that began to draw revenue off and also incur expenses." He used a lower multiplier of 3.5 and 4.0 because "they were now facing direct competition nearby, and they had suffered a significant decline in revenue, so a buyer would be concerned about that." He estimated the value was between $2.8 million and $3.2 million. He concluded the net equity was $2.275 million to $2.675 million. Cruz was a 24% limited partner, meaning his share was worth $546,000 to $642,000. Ghani argues these calculations fail to account for Cruz's status as a limited partner with a minority interest.

Hakala was asked: "If you wanted to find out . . . just what Dr. Cruz's interest in Plano AMI was worth, could you take these numbers to do that calculation?" Hakala stated he could and would do so by multiplying Cruz's percentage interest by the value of his net equity. "He would get a pro rata share of his net equity." When asked why he could calculate Cruz's share in that manner, he testified:

> The discounts for lack of marketability and some of the other factors, minority interest discounts, are already built into the prices that are paid for these. So to this extent, a lot of that's already factored in.
>
> We are also assuming in a fair market value sense, a willing buyer, willing seller, and neither under duress. So . . . if Dr. Cruz is not in a financial position where he has to sell his interests, he doesn't really want to sell the interest, this is an awful lot of good income that's throwing off of [Plano AMI]. He's getting 30 percent of this income every year. He's getting a lot of value out of Plano AMI for his money. He wouldn't ordinarily want to or need to sell, so the question is what do I have to offer to entice him to sell to me? Because he's not openly saying, I want to sell.

Hakala's testimony shows he considered Cruz's status as a limited partner and determined, in this situation, the minority interest discount was "already built into the prices." *37

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The jury's damages award is within the range of evidence presented at trial. *See Basic Capital Mgmt.*, 402 S.W.3d at 265. We conclude there is more than a scintilla of competent evidence to support the jury's answer to Question 12.

d. Malice or Fraud in the Conversion of Cruz's Interest in Plano AMI

Question 23 asked, in part, whether the jury found by clear and convincing evidence the injuries it found in response to Question 12 resulted from malice or fraud by Ghani.[5] Malice is defined as "a specific intent by Ghani to cause substantial injury or harm to Cruz." Evidence shows Ghani converted Cruz's interest in Plano AMI after telling him: "Dr. Cruz, you are a traitor. You're a traitor, and I'm going to hire my attorneys. I'm going to destroy you, and I'm going to take your license away." He then had the tax returns for six years amended to show Cruz only owned an interest in GMI, thereby converting Cruz's shares in Plano AMI.

> [5] Question 23 was premised on the jury's response to Question 8 or Question 12. As discussed below, we conclude no evidence supports the jury's response to Question 8. Therefore, we limit our analysis of Question 23 to Question 12.

Viewing the evidence in the light most favorable to the jury's finding, a reasonable fact finder could have formed a firm belief that Ghani had a specific intent to cause substantial injury or harm to Cruz. We conclude the evidence is legally sufficient to support the jury's answer to Question 23.

3. Conclusion: Plano AMI Claim

Because the evidence is legally sufficient to support the jury's answers to Questions 9A, 9B, 10, 12, and 23, we conclude the trial court erred by disregarding the jury's answers to and entering JNOV in Ghani's favor on these questions. We sustain Cruz's first issue to this extent and we overrule Ghani's twelfth, thirteenth, fourteenth, sixteenth, and twentieth cross-issues. We need not consider whether the evidence is sufficient to support the jury's answers to Question 11 *38 and, thus, we do not consider Cruz's first issue to this extent or Ghani's fifteenth cross-issue. *See* TEX. R. APP. P. 44.1.

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4. Conversion of Cruz's Shares of GMI

The jury found Ghani participated in the conversion of Cruz's shares in GMI (Question 7) and $8,000 would compensate him for the conversion (Question 8). Ghani's motion for JNOV asserted there is no evidence to support the jury's answers to Questions 7 and 8. Because we conclude there is no evidence to support the jury's answer to Question 8, the damages question, we need not consider whether the evidence supports its answer to Question 7.

It is uncontested that Cruz was removed as a shareholder from GMI and was paid nothing for his shares. The parties dispute whether Ghani and Taba were justified in removing Cruz. Assuming, as the jury found, that they were not justified, Cruz presented no evidence of his damages. Hakala testified about the value of NDMI, Plano AMI, and Plano Open. He offered no testimony about the value of GMI and, more specifically, the value of Cruz's interest in GMI. We have found no other evidence in the record that would show the value of Cruz's interest in GMI on August 11, 2010, the date provided in the jury charge. In his brief, Cruz makes no argument in support of the jury's response to Question 8. Based on our review of the record, we conclude there is no evidence supporting the jury's answer to Question 8. We overrule Cruz's first issue to this extent and sustain Ghani's eleventh cross-issue. We need not consider Ghani's tenth cross-issue asserting the evidence is insufficient to support the jury's answer to Question 7. *See* TEX. R. APP. P. 47.1.

39 *39

E. Ault Claims

In his first issue, Cruz argues, in part, the trial court erred by entering JNOV in Ghani's favor on his claims arising from litigation filed by Kimberly Ault Robinson,[6] a former employee. In his seventeenth and eighteenth cross-issues, Ghani argues the jury's answer to Question 19 is against the great weight and preponderance of the evidence and the evidence is insufficient to support the jury's answer to Question 20.

> 6 At the time Kimberly Ault Robinson filed her lawsuit, she was known as Kimberly Ault. At the time of trial in this matter, her name was Kimberly Ault Robinson. Because all parties refer to the underlying litigation as the Ault claims or Ault litigation, we will do so as well and, for purposes of this analysis, we will refer to Kimberly Ault Robinson as "Ault." --------

1. Jury Charge, Jury's Findings, and JNOV

Question 19 asked the jury whether Ghani failed to comply with his fiduciary duties to NDMI with respect to payments made concerning the Ault litigation on behalf of Rona Ghani. The charge states that Ghani had to show:

> a. the payments were fair and equitable to NDMI;
> b. Ghani made reasonable use of the confidence that NDMI placed in him;
> c. Ghani acted in the utmost good faith and exercised the most scrupulous honesty toward NDMI;
> d. Ghani did not place its [sic] own interests before the interests of NDMI, did not use the advantage of his position to gain a benefit for himself at the expense of NDMI, and did not place himself in any position where his self-interest might conflict with his obligations to NDMI; and,
> e. Ghani fully and fairly disclosed all important information to NDMI.

The jury answered "No," meaning Ghani did not comply with his fiduciary duties and, in response to Question 20, determined the amount of $95,000 would compensate NDMI for its damages.

2. Background Facts

Rona Ghani worked as the marketing director for NDMI and Plano AMI. Ault was hired to work with Rona and she worked for NDMI for approximately 90 days in 2008. After leaving NDMI, Ault sued Rona and NDMI alleging Rona forged her name on a non-compete agreement and sent the forged document to her new employer,

40 causing her new employment to be terminated. *40 NDMI paid legal fees on behalf of Rona and itself to defend the lawsuit and paid to settle the lawsuit. NDMI did not seek indemnification from Rona.

Cruz testified Ghani did not inform him about the Ault litigation and he did not participate in the decision to pay expenses related to the litigation or settlement. Ghani testified he did inform Cruz

who replied: "I want you to handle it. I don't have time." Taba testified Ghani told him that Rona contacted all of the NDMI partners and told them NDMI was paying the defense costs.

3. Law & Analysis

Cruz argues Ghani breached his fiduciary duties by not causing NDMI to seek indemnification from Rona. Under Texas law, the availability of common law indemnity is extremely limited. *Mahrouq Enterprises Intern. (MEI), Inc. v. Griffin*, No. 05-10-00071-CV, 2012 WL 1537460, at *4 (Tex. App.—Dallas May 1, 2012, no pet.) (mem. op.) (citing *Affordable Power, L.P. v. Buckeye Ventures, Inc.*, 347 S.W.3d 825, 833 (Tex. App.—Dallas 2011, no pet.)). Common law indemnity survives in Texas only in products liability actions to protect an innocent retailer in the chain of distribution and in negligence actions to protect a defendant whose liability is purely vicarious in nature. *Id.* (citing *Affordable Power*, 347 S.W.3d at 833). Vicarious liability is liability placed upon one party for the conduct of another, based solely upon the relationship between the two. *Id.* (citing *Affordable Power*, 347 S.W.3d at 833). In a case in which one defendant's liability is premised solely on respondeat superior, that defendant's liability is purely vicarious, and a claim for common law indemnity exists. *Id.* (citing *Affordable Power*, 347 S.W.3d at 833). There is no right of indemnity against a defendant who is not liable to the plaintiff. *Id.* (citing *Affordable Power*, 347 S.W.3d at 833).

When a party seeking indemnity, as Cruz argues NDMI should have, settles the claim of the potential indemnitor (Rona) without a judicial determination of the indemnitor's liability to the plaintiff (Ault), the party "must satisfy three elements in order to be entitled to indemnity: 1) that *41 it was potentially liable to the plaintiffs; 2) that the settlement was made in good faith; and 3) that the settlement was a reasonable amount under the circumstances." *Id.* at *5 (citing *St. Anthony's Hosp. v. Whitfield*, 946 S.W.2d 174, 179-80 (Tex. App.—Amarillo 1997, writ denied)). Upon such a showing, the indemnitee may recover the amount paid in settlement of the claim. *Id.* (citing *St. Anthony's Hosp.*, 946 S.W.2d at 179-80).

There was no judicial determination of Rona's liability to Ault. There is no evidence that in this record showing NDMI could have met the three elements listed above that are required to be entitled to indemnity. *See id.* at *4. Even if we assume NDMI was potentially liable to Ault, there is no evidence the settlement was made in good faith or the amount of the settlement was reasonable.

Because we conclude there is no evidence NDMI was entitled to indemnification against Rona, we also conclude there is no evidence Ghani breached his fiduciary duty by not seeking that indemnification. Additionally, the jury's finding that Ghani breached his fiduciary duty by not seeking indemnification from Rona is against the great weight and preponderance of the evidence.

To the extent Cruz argues in his brief that the trial court erred by excluding evidence concerning Ault's allegations of forgery, Cruz provides no explanation of how the trial court's decision was an abuse of discretion, *see In re J.P.B.*, 180 S.W.3d 570, 575 (Tex. 2005), or caused reversible error, *see* TEX. R. APP. P. 44.1(a). Having reviewed Cruz's offer of proof of the evidence excluded by the trial court, we cannot conclude the trial court abused its discretion or the exclusion of evidence resulted in reversible error.

4. Conclusion

We conclude the trial court did not err by granting Ghani's motion for JNOV on the jury's answers to Questions 19 and 20. We overrule Cruz's first issue to this extent. We sustain Ghani's *42 seventeenth cross-issue and we need not consider his eighteenth cross-issue challenging the damages awarded by the jury based on its finding of breach of fiduciary duty.

F. Salary Claims

In his second issue, Cruz argues the trial court erred by refusing to enter judgment on his claim that Ghani improperly paid a salary to himself.

1. Background Facts

Ghani believed he should be compensated for managing the businesses because he performed the same functions as a management company, which would be paid for its services. Cruz opposed paying Ghani because he believed the partners were compensated through distributions.

The NDMI partnership agreement precludes the general partner from receiving compensation for services rendered on behalf of the partnership. However, the Plano AMI partnership agreement permits the general partner to receive compensation. Ghani wrote a letter dated November 1, 2007, to Taba and himself, stating GMI, the general partner of Plano AMI and manager of its business affairs, would begin paying compensation to Ghani and Taba. Ghani would receive $8,000 per month for acting as GMI's president and overseeing the day-to-day affairs of Plano AMI on behalf of GMI. Taba would receive $2,500 per month for providing contrast services for patients. The minutes of the annual meeting of the GMI board of directors reflect Ghani, Taba, and Cruz were present at a meeting held on November 15, 2007. Cruz disputed he was present and Taba's testimony indicates Cruz may not have been. The meeting minutes state: "IT IS FURTHER RESOLVED, that the compensation agreement entered into by the officers of the Corporation on or about November 1, 2007, a copy of which is attached hereto, is hereby adopted, approved and ratified by the Board of Directors of the Corporation." The
43 *43 minutes are signed by Taba as the secretary and Ghani as the chairman. Taba testified the November 1, 2007 letter may have been created after September 1, 2008.

From December 2008 through April 2010, Plano AMI paid $8,000 per month to MG International. The record shows MG stands for Mike Ghani. Ghani told Taba that the salary was less than a management company would be paid and Taba did not consider the salary unfair.

2. Jury's Findings

The jury found Ghani failed to comply with his fiduciary duties to Plano AMI with respect to the payments made to himself (Question 13), but awarded $0 in damages (Question 14). Ghani did not move for JNOV on the liability question and, thus, has not challenged the finding he breached his fiduciary duties by making payments to himself. The trial court did not award damages to Cruz on this claim. On appeal, Cruz argues the trial court should have entered judgment ordering disgorgement of Ghani's compensation.

3. Law & Analysis

Courts may fashion equitable remedies such as disgorgement and forfeiture to remedy a breach of a fiduciary duty. *Cooper v. Campbell*, No. 05-15-00340-CV, 2016 WL 4487924, at *10 (Tex. App.—Dallas Aug. 24, 2016, no pet.) (mem. op.) (citing *ERI Consulting Eng'r, Inc. v. Swinnea*, 318 S.W.3d 867, 874, 873-75 (Tex. 2010); *Burrow v. Arce*, 997 S.W.2d 229 (Tex. 1999); *Dernick Resources, Inc. v. Wilstein*, 471 S.W.3d 468, 482 (Tex. App.—Houston [1st Dist.] 2015, pet. denied)). Disgorgement is an equitable forfeiture of benefits wrongfully obtained. *Id.* (citing *In re Longview Energy Co.*, 464 S.W.3d 353, 361 (Tex. 2015) (orig. proceeding); *Swinnea v. ERI Consulting Eng'r, Inc.*, 481 S.W.3d 747, 752 (Tex. App.—Tyler 2016, no pet.)). A party may be required to forfeit benefits when a person rendering services to another in a relationship of trust breaches that trust. *See In re Longview*
44 *Energy Co.*, 464 S.W.3d 361. *44

"We have said that such equitable forfeiture 'is not mainly compensatory . . . nor is it mainly punitive' and 'cannot . . . be measured by . . . actual

damages.'" *Id*. (quoting *Burrow*, 997 S.W.2d at 240). Disgorgement is compensatory in the same sense attorney fees, interest, and costs are, but it is not damages. *Id*. As a result, equitable forfeiture is distinguishable from an award of actual damages incurred as a result of a breach of fiduciary duty. *Cooper*, 2016 WL 4487924, at *10 (citing *Burrow*, 997 S.W.2d at 240; *McCullough v. Scarbrough, Medlin & Assocs., Inc.*, 435 S.W.3d 871, 905 (Tex. App.—Dallas 2014, pet. denied); *Swinnea*, 481 S.W.3d at 753). A claimant need not prove actual damages to succeed on a claim for forfeiture because they address different wrongs. *Id*. (citing *Burrow*, 997 S.W.2d at 240; *Swinnea*, 481 S.W.3d at 753). In addition to serving as a deterrent, forfeiture can serve as restitution to a principal who did not receive the benefit of the bargain due to his agent's breach of fiduciary duty. *Id*. (citing *Swinnea*, 481 S.W.3d at 753 (citing *Burrow*, 997 S.W.2d at 237-38)). However, forfeiture is not justified in every instance in which a fiduciary violates a legal duty because some violations are inadvertent or do not significantly harm the principal. *Cooper*, 2016 WL 4487924, at *10 (citing *Burrow*, 997 S.W.2d at 241; *Dernick*, 471 S.W.3d at 482; *Miller*, 142 S.W.3d at 338).

Whether a forfeiture should be imposed must be determined by the trial court based on the equity of the circumstances. *Cooper*, 2016 WL 4487924, at *10 (citing *Burrow*, 997 S.W.2d at 245; *Swinnea*, 481 S.W.3d at 753; *Dernick*, 471 S.W.3d at 482). However, certain matters may present fact issues for the jury to decide, such as whether or when the alleged misconduct occurred, the fiduciary's mental state and culpability, the value of the fiduciary's services, and the existence and amount of harm to the principal. *Id*. (citing *Dernick*, 471 S.W.3d at 482; *Miller*, 142 S.W.3d at 338). Once the factual disputes have been resolved, the trial court must determine: (1) whether the fiduciary's conduct was a "clear and serious" breach of duty to the principal; (2) whether any *45 monetary sum should be forfeited; and (3) if so, what the amount should be. *Id*. (citing *Swinnea*, 481 S.W.3d at 753 (citing *Burrow*, 997 S.W.2d at 245-46); *Dernick*, 471 S.W.3d at 482).

The record shows Ghani failed to comply with his fiduciary duties to Plano AMI with respect to the payments made to himself. The jury found the injury resulted from Ghani's malice (Question 24). Although Cruz, in his sixth amended petition, sought "disgorgement/fee forfeiture" for Ghani's misconduct and the issue was argued by counsel at the hearing on Ghani's motion for JNOV, the record does not show whether the trial court considered an equitable forfeiture award. Because Cruz requested the remedy and it was timely brought to the trial court's attention, we conclude the request for equitable relief should be remanded to the trial court for consideration of the factors described by the Texas Supreme Court in *ERI Consulting Engineers, Inc. v. Swinnea*, 318 S.W.3d 867, 875 (Tex. 2010). We sustain Cruz's second issue to this extent.

G. Ghani's Counterclaim

In his third issue, Cruz argues the trial court denied his right to due process when it awarded judgment on Ghani's counterclaim without any adjudicatory proceeding. In 2012, Cruz obtained a judgment against Ghani for over $4 million. *See Plano AMI v. Cruz*, No. 05-12-01480-CV, 2015 WL 128592 (Tex. App.—Dallas Jan. 9, 2015, no pet.). Ghani appealed, but did not supersede the judgment. While Ghani's appeal was pending, Cruz obtained a writ of execution and caused a condominium owned by Ghani to be sold for $25,000. After the execution sale, this Court reversed the judgment on which execution issued. On remand, Ghani asserted a counterclaim for wrongful execution, which Cruz generally denied. The trial court rendered judgment that Ghani recover $217,500, the stipulated fair market value of Ghani's condominium at the time of the execution sale, on his counterclaim. The trial court also awarded Ghani prejudgment interest, post-

judgment interest, and costs. *See Cruz v. Ghani*, No. 05-17-00566-CV, 2018 WL 446425, at *1
46 (Tex. App.—Dallas Jan. 17, 2018, no pet.). *46

Cruz asserts the trial court conducted no adjudication on Ghani's right to relief, either through a trial or motion for summary judgment, before entering judgment in Ghani's favor. Thus, Cruz argues, judgment on Ghani's counterclaim is improper and, by entering the judgment, the trial court denied his right to due process. Ghani responds the parties presented their legal and factual arguments on the condominium issue to the trial court.

Before trial began, Ghani's counsel informed the court there were two "administrative issues" the parties "agreed to put off until after [the] verdict. One is we have a claim for wrongful foreclosure with respect to a condominium that was foreclosed on judgment. We've agreed to just hold that and deal with that in the future." Five months after the trial concluded, the trial court held a hearing on Ghani's motion for JNOV. During the hearing, the trial court stated:

> THE COURT: Let's talk about the condominium. Defendants argue that they should be awarded judgment on the counterclaim for the levy of execution on the condominium. Help me. . . . I don't remember hearing about this during trial.
> [Counsel for Ghani]: You didn't. . . . That's the reason . . . you wouldn't remember. . . . [W]hat you may recall faintly at this point was before the trial started in one of the final pretrial conferences, [counsel for both parties] agreed to reserve the condominium issue until after the trial was over.

The parties then presented brief arguments on the condominium issue. No evidence was admitted. Six months after the hearing, the trial court entered its final judgment which states, in part:

> By stipulation of the parties, the issues raised by defendant Ghani's counterclaim were reserved for future determination by the Court. The parties have stipulated that on February 4, 2012, a condominium located at . . . , belonging to defendant Ghani was sold at execution sale pursuant to this Court's judgment of August 7, 2012, which was later reversed on appeal, and that the fair market value of the condominium on the date of sale was $217,500. Plaintiff Cruz has deposited in the registry of the Court the $25,000 received from the execution sale. The Court concludes that defendant Ghani is entitled to restitutionary remedies to recover what was taken from him pursuant to a judgment later reversed.

Cruz filed a motion to modify the judgment or for new trial on Ghani's counterclaim.

Due process requires that a party receive "reasonable notice" of trial. *Boateng v. Trailblazer Health Enterprises, L.L.C.*, 171 S.W.3d 481, 492
47 (Tex. App.—Houston [14th Dist.] *47 2005, no pet.) (quoting *Peralta v. Heights Med. Ctr., Inc.*, 485 U.S. 80, 84 (1988)). The record shows the trial court ruled on the merits of Ghani's counterclaim without giving notice that the JNOV hearing would also be a trial on the counterclaim. Rather, the trial judge raised the issue of the counter-claim at the JNOV hearing and the parties then briefly presented arguments. There was no opportunity to present evidence. The purpose of the hearing was to determine the merits of the motion for JNOV, not to adjudicate the merits of Ghani's counterclaim. Thus, we conclude that the trial court erred by considering the JNOV hearing a trial on the merits of Ghani's counter-claim and entering judgment on the claim. *See Knutson v. Friess*, No. 09-08-00181-CV, 2009 WL 1331100, at *4 (Tex. App.—Beaumont May 14, 2009, no pet.) (citing *Mocega v. Bradford Urquhart M.D.*, 79 S.W.3d 61, 64-65 (Tex. App.—Houston [14th Dist.] 2002, pet. denied) (reversing dismissal of

medical malpractice action because trial court did not give notice of hearing on motion to dismiss); *Green v. McAdams*, 857 S.W.2d 816, 819 (Tex. App.—Houston [1st Dist.] 1993, no writ) (holding trial court erred by rendering post-answer default judgment after party failed to appear at trial because trial court gave defaulting party no notice of trial setting); *Seckers v. Ocean Chems., Inc.*, 845 S.W.2d 317, 318-319 (Tex. App.—Houston [1st Dist.] 1992, no writ) (holding trial court erred in dismissing case as a discovery sanction because trial court gave no notice of sanctions hearing to the sanctioned party); *Palmer v. Cantrell*, 747 S.W.2d 39, 41 (Tex. App.—Houston [1st Dist.] 1988, no writ) (same as *Seckers*)). We sustain Cruz's third issue.

CONCLUSION

In accordance with this opinion, we affirm the trial court's judgment in favor of Ghani on Cruz's claim Ghani failed to comply with his fiduciary duty to Plano AMI by pursuing Plano Open, Cruz's GMI claim, and the Ault claim. We reverse the trial court's judgment in favor of Ghani on Cruz's claim Ghani failed to comply with his fiduciary duties to GMI by pursuing Plano Open, Cruz's NDMI claim, the Plano AMI claim, and his salary claim.
48 We reverse the trial court's *48 judgment in favor of Ghani on his counterclaim. We remand for the trial court to enter judgment in favor of appellants on the NDMI claim, Plano AMI claim, salary claim, and claim Ghani failed to comply with his fiduciary duties to GMI by pursuing Plano Open; to consider Cruz's request for equitable relief on the salary claim; and to conduct further proceedings on Ghani's counterclaim.

/Craig Stoddart/

CRAIG STODDART

49 JUSTICE 170566HF.P05 *49

JUDGMENT

On Appeal from the 101st Judicial District Court, Dallas County, Texas
Trial Court Cause No. DC-10-16274.

Opinion delivered by Justice Stoddart. Justices Francis and Myers participating.

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

We **REVERSE** that portion of the trial court's judgment in favor of appellee Mehrdad Ghani on his counterclaim.

We **REVERSE** that portion of the trial court's judgment in favor of appellee Ghani on the claims by appellants Erwin Cruz and the Erwin A. Cruz Family Limited Partnership, both of them individually and on behalf of the North Dallas Medical Imaging, L.P. ("NDMI"), Plano AMI, LP ("Plano AMI"), and Ghani Medical Investments, Inc. ("GMI") that Ghani failed to comply with his fiduciary duties to GMI by pursuing Plano Open, failed to comply with his fiduciary duties to NDMI, the failure was not excused, and NDMI suffered damages; that Cruz was a 24% limited partner of Plano AMI, Ghani actively directed or participated in GMI's conversion of Cruz's Plano AMI limited partnership interest, and Cruz suffered damages as a result; and that Ghani failed to comply with his fiduciary duties to Plano AMI with respect to salary payments made to himself.

We **AFFIRM** that portion of the trial court's judgment in favor of appellee Ghani on the claims by appellants that Ghani failed to comply with his fiduciary duties to Plano AMI by pursuing Plano Open, Ghani actively directed or participated in GMI's conversion of shares belonging to Cruz, which caused damages to Cruz; and Ghani failed
50 to comply with his fiduciary *50 duties to NDMI with respect to payments made concerning the Ault Litigation on behalf of Rona Ghani.

We **REMAND** this cause to the trial court for further proceedings consistent with this opinion.

It is **ORDERED** that each party bear its own costs of this appeal. Judgment entered this 13th day of December, 2018.

NUMBER 13-15-00496-CV
COURT OF APPEALS THIRTEENTH DISTRICT OF TEXAS CORPUS CHRISTI - EDINBURG

Hughes v. Hughes

Decided Apr 20, 2017

NUMBER 13-15-00496-CV

04-20-2017

BRENDA W. HUGHES, Appellant, v. DAN A. HUGHES, Appellee.

Memorandum Opinion by Justice Benavides

On appeal from the 36th District Court of Bee County, **Texas.**

MEMORANDUM OPINION

Before Chief Justice Valdez and Justices Rodriguez and Benavides
Memorandum Opinion by Justice Benavides

This is an appeal from a final divorce decree of the marriage of appellant Brenda W. Hughes (Brenda) and appellee Dan A. Hughes, Sr. (Dan).[1] By four issues, Brenda asserts that: (1) the trial court erred in granting Dan's motion for partial summary judgment; (2) the trial court erred in partially granting Dan's motion for directed verdict; (3) *2 the trial court erred in its submission of the jury charge; and (4) the evidence is legally insufficient to support the jury's verdict. We affirm in part and reverse and render in part.

2

[1] Dan's counsel notified this Court that during the pendency of this appeal, Dan passed away.

I. BACKGROUND

Dan and Brenda wed in 2003—his and her third marriage. Dan was a well-known and affluent member of the Beeville community, having made his wealth in the oil and gas business beginning in the early 1960s. Brenda is a San Antonio-native who met Dan socially in Beeville through a mutual acquaintance. At the time of trial, Dan was eighty-six years old, and Brenda was fifty-seven.

A. Pre-Marital Agreement

Shortly before their marriage, Dan and Brenda executed a twenty-eight-page premarital agreement. Among the stipulations in this agreement was that "no community property will be created during their marriage." Furthermore, the agreement stated that the parties would have the option to "acquire assets together in their joint names" and if such joint acquisition takes place, "they will each own an undivided interest in the jointly acquired assets as their respective sole and separate property in an amount equal to the percentage of their respective contributions toward the purchase of the assets." Lastly, the agreement stated the following:

> Any property that is held by title, as in a deed, in a certificate, or by account name, may not be effectively transferred to the party claiming it as a gift unless, in fact, the deed, certificate, or account is transferred by name to the party claiming the gift.

Slightly more than three years into their marriage, Dan and Brenda signed a "Ratification and Amendment of Premarital Agreement." (collectively "the premarital agreement" unless otherwise stated). In this new agreement, Dan and Brenda confirmed and ratified the original premarital agreement and agreed to amend the
3 original premarital *3 agreement, so that in the event that their marriage is dissolved, Brenda would be entitled to receive and own in fee simple, as her sole and separate property: (1) the couple's homestead located on Business Highway 181 North in Beeville; (2) all "tangible personal property" located inside of the homestead; (3) approximately 1,711 acres of land in Bee County, commonly known as Charco Ranch; (4) cash or property having a value of $10 million as of the date of the dissolution of marriage; and (5) "such assets and property interests, if any, which Dan might give to Brenda by gifts, inter vivos transfers, testamentary transfers, non-testamentary transfers, survivorship agreements, or other written agreements in addition to those amounts" of the aforementioned property.

B. The Divorce Proceedings

In the months leading up to the filing of their divorce, Dan attempted to conduct some estate planning on his vast estate in preparation for his death. According to Dan, this required Brenda's consent to make some of those plans regarding his property. The couple was unable to reach an agreement regarding Dan's separate property, so Dan filed a declaratory judgment action to interpret the premarital agreement. In his pleading, Dan alleged that Brenda "improperly claim[ed] full or partial ownership interests in assets purchased entirely with [Dan's] separate funds . . . in excess of $30,000,000.00." On January 8, 2015—after Brenda unsuccessfully attempted to file for divorce in Bexar County—Dan filed for divorce in Bee County. The declaratory action and the
4 divorce action were consolidated. *4

Before trial, the trial court granted Dan's motion for partial summary judgment and held that pursuant to the premarital agreement, Dan owned "an undivided interest in jointly acquired assets, including, but not limited to, jointly titled real property and joint brokerage accounts, as his sole and separate property in an amount equal to the percentage of his contribution toward the purchase of said assets." A jury was asked to determine the remaining issues of the divorce proceeding, including: (1) the characterization of the marital estate; (2) any money owed to Brenda pursuant to the premarital agreement; (3) whether Brenda committed fraud with respect to Dan's separate property; and (4) whether Brenda breached her fiduciary duty to Dan.

Dan hired certified booking account and forensic accounting expert Scott Turner to investigate Dan's finances and trace the character of all of the property at issue in this case. Turner prepared various tracing reports regarding Dan and Brenda's assets, reports which were admitted into evidence during the trial. Turner testified that the first asset he analyzed was Danville, LLC (Danville). Danville is a limited liability company that owned various condominium units in Beeville. Dan and Brenda were member-managers of Danville. According to Turner, Dan was credited with contributing more than $7 million in capital contributions to Danville while Brenda contributed nothing. Turner's next report concerned an analysis of the source of funds used to buy jointly-titled property. These jointly-titled assets included: (1) various pieces of real estate located in Texas, Colorado, and Montana; (2) Danville; (3) various accounts known as JM Texas Land Funds; (4) four bank accounts from First National Bank; and (5) four brokerage accounts. With the exception of real estate in Colorado, Aransas County, one land fund account, and three bank accounts, Turner concluded that all of these
5 assets were Dan's separate property. *5

Turner testified that he also analyzed bank records, deeds, and other documents to prepare a report supporting Dan's allegation that Brenda committed fraud. According to Turner, from April of 2012 through June of 2013, Brenda made more than thirty money transfers ranging from $50,000 to $150,000 from Dan and Brenda's joint

account to Brenda's personal account at Prosperity Bank or to an account belonging to Dog & Bee, LLC.[2] Turner testified that Dan had zero interest in Dog & Bee, LLC and that Brenda was the sole member of that company. Turner also discovered that Brenda transferred money from the joint bank account to Kel-Lee Properties, a company owned by Brenda and Kelly, Brenda's daughter from a previous marriage. During her testimony, Brenda confirmed Turner's conclusions by testifying that she would transfer money from the joint account to either her personal account, the Dog & Bee, LLC account, or the Kel-Lee Properties account "depending on what the situation was."

[2] The record shows that Dog & Bee, LLC was a short-lived restaurant in Beeville.

After the conclusion of evidence, the trial court granted a directed verdict on several pieces of property, deeming those properties to be Dan's separate property, including: (1) Farish I Ranch in Bee County; (2) Stringfellow Ranch in Edwards County; (3) 29 Albatross in Aransas County; (4) mineral interests in Bee County, less the 1,711.01 acres of property known as Charco Ranch; (5) Danville; (6) fifty-percent of the Charco Ranch First National Bank account; (7) fifty-percent of the Trail Creek First National Bank account; (8) fifty-percent of the Real Estate First National Bank account; (9) the Herndon Plant Oakley account ending in 3538; (10) the JP Morgan account ending in 4394; (11) the Morgan Stanley account ending in 325; (12) the Goldman Sachs account ending in 671-0; and (13) one fifty-two carat diamond necklace valued at $160,000. *6

The jury made the following findings with regard to the value and characterization of the remainder of the marital estate:

Property	**Gift to Brenda(yes or no)**	**Husband'sSeparateProperty**	**Wife'sSeparateProperty**
1. Trail Creek Ranch, Montana	No	100%	0%
2. 170 Village Walk, Avondale, Colorado	No	100%	0%
3. 115 Dickerson Road, Bee County	No	100%	0%
4. JM Texas Land Fund No. 1	No	100%	0%
5. JM Texas Land Fund No. 2	No	100%	0%
6. JM Texas Land Fund No. 3	No	100%	0%
7. JM Texas Land Fund No. 4	No	70%	30%
8. JM Texas Land Fund No. 6	No	100%	0%
9. JM Texas Land Fund No. 7	No	100%	0%
10. FNB 9557 Joint Acct.	No	50%	50%
11. Brenda W. Hughes'interest in Kel-Lee Properties, LLC	No	50%	50%

12. Note receivable fromKel-Lee Properties LLC	No	50%	50%
13. The parties' interest in105 Marion Drive, Rockport	No	50%	50%
14. Prosperity Bank acct. #5073	No	50%	50%
15. Herndon Plant Oakley acct. #577	Yes	0%	100%
16. Herndon Plant Oakley acct. #9290	Yes	0%	100%
17. Herndon Plant Oakley acct. #6943	Yes	0%	100%
18. Note Receivable from sale of 3138N. Airport Rd.	No	50%	50%
7 *7 19. Dog & Bee LLC	No	50%	50%

The jury also found that among the cash and assets owned by Brenda in the jury's answers to the value and characterization of the marital estate, $1,536,053.85 should be considered "as part of the $10,000,000.00 described in [the premarital agreement]." Furthermore, the jury found that Brenda committed fraud with regard to Dan's separate property and that Dan was entitled to compensation of $2,393,206.90 in damages. Lastly, the jury found that Brenda failed to comply with her fiduciary duty owed to Dan and that Dan was entitled to $2,393,206.90 in damages. This appeal followed.

II. SUMMARY JUDGMENT

By her first issue, Brenda asserts that the trial court erred by granting Dan's motion for partial summary judgment.

A. Standard of Review

We review a grant of summary judgment de novo. *Cantey Hanger, LLP v. Byrd*, 467 S.W.3d 477, 481 (Tex. 2015). A party moving for traditional summary judgment has the burden to prove that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. *Id*.

B. Discussion

Dan sought partial summary judgment on his declaratory judgment claim regarding the interpretation of language in the premarital agreement. Specifically, Dan sought a declaration as a matter of law that: (1) Dan and Brenda own an undivided interest in jointly acquired assets as their respective sole and separate property in an amount equal to the percentage of their respective contributions toward the purchase of said assets; and (2) 8 Brenda was estopped and barred from making any claim "of any kind at any time to any *8 of [Dan's] separate property or to any property designated as belonging to [Dan's] separate estate."

In construing a written contract, the primary concern of the court is to ascertain the true intentions of the parties as expressed in the instrument. *Coker v. Coker*, 650 S.W.2d 391, 393 (Tex. 1983). To achieve this objective, courts should examine and consider *the entire writing* in an effort to harmonize and give effect to *all the provisions* of the contract so that none will be rendered meaningless. *Id*. (emphasis in original). No single provision taken alone will be given controlling effect; rather, all the provisions must be considered with reference to the whole instrument. *Id*. Whether a contract is ambiguous is a question of law for the court to decide by looking at the contract as a whole in light of the circumstances present when the contract was entered. *Id*. A contract, however, is ambiguous when its meaning is uncertain and doubtful or it is reasonably susceptible to more than one meaning. *Id*. Only where a contract is first determined to be ambiguous may the courts consider the parties' interpretations and admit extraneous evidence to determine the true meaning of the instrument. *Kelley-Coppedge*, *Inc. v. Highlands Ins. Co.*, 908 S.W.2d 462, 464 (Tex. 1998). Finally, when a contract contains an ambiguity, the granting of a motion for summary judgment is improper because the interpretation of the instrument becomes a fact issue. *Coker*, 650 S.W.2d at 394.

In support of his argument in favor of partial summary judgment, Dan argues that the unambiguous language of paragraphs 7.1 and 18.4 of the original premarital agreement controls. The relevant language of each paragraph
9 is as follows: *9

7.1 Joint Acquisition of Assets

The parties will have the option, but not the obligation, to acquire assets together in their joint names. If the parties jointly acquire assets following their marriage, they will each own an undivided interest in the jointly acquired assets as their respective sole and separate property in an amount equal to the percentage of their respective contributions toward the purchase of the assets. If the parties jointly acquire assets, and to the extent legal title to any or all of the assets can be perfected in their joint names, such as title to an automobile, boat, or real property, they will obtain title in their joint names. However, even though title to an asset acquired by the parties is held in their joint names, the percentage of ownership of such an asset will be controlled by the provisions of this article, and the taking of title in their joint names may not be interpreted to mean that each party has an undivided 50 percent ownership interest in jointly acquired assets. . . . Jointly acquired property may not be deemed to be community property but instead will constitute each party's separate property in proportion to that party's contribution to the purchase price; provided, however, that if there are no records verifying the amount of each party's contribution toward the purchase of an asset, each party will own an undivided 50 percent interest in that asset. If the evidence of title reflects both parties' names, the parties will own that property as joint tenants with right of survivorship.

. . . .

18.4 Enforceability

This agreement may be enforced by suit in law or equity by either of the parties . . . . Each party agrees that, by signing this agreement and accepting any benefit whatsoever under it, he or she is estopped and barred from making any claim of any kind at any time to any separate property or the separate estate of the other party or to any property described in this agreement as being the separate property of the other party. Each party waives his or her right to make claims to any separate property of the other party or to any property designated as belonging to the separate estate of the other party, whether the property is acquired before or after this agreement is signed.

In her defense, Brenda asserts that Article III, paragraph B.5 of the amended premarital agreement amended the two paragraphs quoted above from the original premarital agreement. That paragraph states as follows: *10

> B. Obligations of Dan Upon Dissolution of Marriage. Any provision of the Premarital Agreement or this Ratification and Amendment Agreement to the contrary notwithstanding, in the event of the dissolution of the marriage by court order or by the death of Dan, Dan hereby agrees that in either event, Brenda shall be entitled to receive and to own, in fee simple, as her sole and separate property, either by reason of transfer incident to the dissolution of the marriage by court order or by testamentary, non-testamentary or survivorship agreements by reason of Dan's death, the following:
>
> . . . .
>
> 5. Such assets and property interests, if any, which Dan might give to Brenda by gifts, inter vivos transfers, testamentary transfers, non-testamentary transfers, survivorship agreements, or other written agreements in addition to those amounts provided in Paragraphs B.1 through B.4 of this Article III; provided, however, it is expressly agreed by the parties that Dan is under no obligation to make any provisions for Brenda other than those provided for in Paragraphs B.1 through B.4 of this Article III.

In reading the relevant portions of the premarital agreement together, we hold that the language of the premarital agreements unambiguously state as a matter of law that: (1) any jointly acquired assets by Dan and Brenda would be "own[ed in] an undivided interest . . . as their respective sole and separate property in an amount equal to the percentage of their respective contributions toward the purchase of the assets"; (2) "the taking of title in their joint names may not be interpreted to mean that each party has an undivided 50 percent ownership interest in jointly acquired assets"; and (3) jointly acquired property may not be deemed to be community property but instead will constitute each party's separate property in proportion to that party's contribution to the purchase price, and if there are no records verifying the amount of each party's contribution toward the purchase of an asset, each party will own an undivided 50 percent interest in that asset. Furthermore, Brenda is entitled to own as her sole and separate property any assets and property interests that Dan gives to Brenda by "gifts, inter vivos transfers, testamentary transfers, non-testamentary transfers, survivorship agreements, or other written *11 agreements." Nothing in this language amends or contradicts the unambiguous provisions of Paragraph 7.1 of the original premarital agreement. Lastly, because we hold that the language of the premarital agreement is unambiguous, the trial court did not abuse its discretion is sustaining Dan's objections to consider any evidence outside of the agreement in construing the agreement. *See Kelley-Coppedge*, *Inc*., 908 S.W.2d at 464. Accordingly, we disagree with Brenda, agree with Dan's interpretation, and conclude the trial court's non-dispositive, pre-trial ruling was not erroneous.

11

We overrule Brenda's first issue.

III. DIRECTED VERDICT

By her second issue, Brenda asserts that the trial court erred by granting Dan's motion to direct a verdict regarding the characterization of various marital assets.

A. Standard of Review

We review a trial court's decision to grant a directed verdict under the legal sufficiency standard of review. *See Mikob Props*. *Inc*. *v*. *Joachim*, 468 S.W.3d 587, 594 (Tex. App.—Dallas 2015, pet. denied). When reviewing a directed verdict, we consider all the evidence in a light most favorable to the nonmovant, and we resolve all reasonable inferences that arise from the evidence admitted at the trial in the nonmovant's favor. *Id*. In conducting a legal sufficiency review, we will sustain a legal sufficiency point if the record reveals the following: (a) the complete absence of a vital fact; (b) the court is barred by rules of law or of evidence from

giving weight to the only evidence offered to prove a vital fact; (c) the evidence offered to prove a vital fact is no more than a mere scintilla; or (d) the evidence establishes conclusively the opposite of the vital fact.
12 *Playboy Enters., Inc.* *12 *v. Editorial Caballero, S.A. de C.V.*, 202 S.W.3d 250, 263-64 (Tex. App.—Corpus Christi 2006, pet. denied) (citing *City of Keller v. Wilson*, 168 S.W.3d 802, 807 (Tex. 2005).

B. Discussion

Brenda challenges the trial court's directed verdict on the following pieces of property:

1. Real Property

First, Brenda asserts that the evidence is legally insufficient to establish that Farish I Ranch is one-hundred percent Dan's property because the evidence offered to prove that fact "is no more than a mere scintilla and that the evidence conclusively establishes that the Farish I Ranch is, at a minimum, fifty percent Brenda's separate property" based on Brenda's own testimony.

The record shows that Farish I Ranch was purchased by two payments out of Dan's separate property. On October 2, 2009, Dan A. Hughes Company made a $300,000 earnest money contract deposit for the Farish I Ranch. Next, on November 3, 2009, Dan Hughes directed that $6,552,323.67 from his Morgan Stanley account ending in 5703 be wired to Bedgood Title Company for the purchase of the Farish I Ranch. Under Paragraph 7.1 of the premarital agreement, Dan conclusively established that one-hundred percent of the consideration paid on Farish I Ranch came out of his separate property, and no contributions were made out of Brenda's separate property. The only evidence put forth by Brenda is her own testimony stating that Dan orally told her after purchasing the Farish I Ranch that it would "make [her] ranch bigger," which, according to Brenda, makes it a transfer of separate property by gift from Dan to Brenda under Article III B.5 of the premarital agreement.
13 Three elements are necessary to establish the existence of a gift: *13 (1) intent to make a gift; (2) delivery of the property, and (3) acceptance of the property. *Grimsley v. Grimsley*, 632 S.W.2d 174, 177 (Tex. App.—Corpus Christi 1982, no writ). Based on these elements, Brenda's testimony regarding an ambiguous and fleeting comment by Dan is legally insufficient to create a genuine issue of material fact that Farish I Ranch was a gift under Article III B.5 because such testimony is no more than a mere scintilla to prove-up the existence of a gift. *See Grimsley*, 632 S.W.2d at 177.

Second, Brenda asserts that the evidence is legally insufficient to support the trial court's directed verdict that Stringfellow Ranch was one-hundred percent Dan's separate property. The record shows that an earnest money check totaling $25,000 was issued out of Dan's separate bank account from First National Bank for Stringfellow Ranch, followed by a wire transfer from Dan's separate account at First National Bank totaling $1,273,317.72. Scott Turner, Dan's expert, testified that he could not clearly identify a .97 percent interest of the Stringfellow Ranch, and allocated that percentage of ownership to Brenda. However, Turner testified that his conclusion was not based on evidence that Brenda contributed .97 percent of her separate property to Stringfellow Ranch, but rather it was based on an absence of evidence. In support of her argument, Brenda directs us to her own conclusory testimony that she understood the Stringfellow Ranch to be a gift from Dan as well. Examining all of the evidence in the light most favorable to Brenda, we nonetheless conclude that the evidence is legally sufficient to support the trial court's directed verdict that the Stringfellow Ranch was one-
14 hundred percent Dan's separate property, or that Dan did not gift the property to Brenda. *14

Next, Brenda challenges the trial court's directed verdict on the characterization of the 29 Albatross home in Aransas County. The record shows that a $786,759.10 check was issued from the Dan A. Hughes Company toward the purchase of the 29 Albatross property. Turner testified that 99.67 percent of the 29 Albatross

property was acquired with Dan's separate property, but could not identify the source of the remaining .33 percent of the purchase. The record shows, however, that nothing in his analysis indicated that any of the funds used to purchase the 29 Albatross property came from Brenda's separate property. Furthermore, Brenda testified that all jointly-held real estate was paid for by Dan's separate property, but argues that this property was at least fifty percent her separate property because Dan told her after purchasing the Albatross property that it would be hers because she "picked it out without [him]." After reviewing all of the evidence in the light most favorable to Brenda, we conclude that the evidence was legally sufficient for the trial court to grant Dan's directed verdict rendering the property one-hundred percent his separate property.

Fourth, Brenda challenges the trial court's directed verdict that 2,184.16 acres of the 3,895.17 total acres of mineral estate in Bee County were Dan's separate property. The record conclusively shows that the 3,895.17-acre mineral estate in Bee County was purchased with Dan's separate property of $50,000 in earnest money and $2,519,651.49 for the remaining balance of the property. The 1,711.01-acre surface estate known as Charco Ranch was located within the 3,895.17-acre mineral estate. Charco Ranch's 1,711.01-acre surface estate was acquired by a separate deed. The premarital agreement in this case granted Brenda Charco Ranch upon the couple's divorce. The parties disputed, however, whether the provision granting Brenda Charco Ranch included
15 the *15 associated mineral estate. The trial court granted a directed verdict that the entire mineral estate was Dan's separate property less the 1,711.01 mineral estate beneath Charco Ranch. After reviewing all of the evidence in the light most favorable to Brenda, we conclude that the evidence was legally sufficient for the trial court to grant Dan's directed verdict rendering the 3,895.17-acre mineral estate, less the 1,1711.01 mineral estate beneath the Charco Ranch, one-hundred percent Dan's separate property.

Fifth, Brenda challenges the trial court's directed verdict that Danville was owned by Dan as his separate property. The record shows that Danville was a limited liability company that owned various condominium units in Beeville in which Dan and Brenda were member-managers. According to Turner, Dan contributed more than $7 million in capital to Danville while Brenda contributed nothing. Furthermore, the company agreement states that distributions of Danville "shall be made to [Dan] until the aggregate amount of all such distributions is equal to the amount of all capital contributions made by [Dan] to [Danville] as of date of any such distribution." Turner testified that there is more money "owed to Dan in the value of the [Danville property] . . . so effectively I would say he owns it." After reviewing all of the evidence in the light most favorable to Brenda, we conclude that the evidence was legally sufficient for the trial court to grant Dan's directed verdict that Dan owned one-hundred percent of Danville.

2. Brokerage Accounts

Next, Brenda challenges the trial court's directed verdict with regard to the separate-property characterization of four brokerage accounts, one each at Goldman Sachs, Herndon Plant Oakley, JP Morgan, and Morgan Stanley. Turner testified that all of the deposits into each of these four brokerage accounts were traced to Dan's
16 separate *16 property accounts and that none of the contributions came from Brenda's separate property. After reviewing all of the evidence in the light most favorable to Brenda, we conclude that the evidence was legally sufficient for the trial court to grant a directed verdict that each of the four brokerage accounts were Dan's separate property.

3. Diamond Necklace

Last, Brenda challenges the trial court's directed verdict that a Royal Gem of Israel diamond necklace purchased by Brenda was one-hundred percent Dan's separate property. Brenda testified that she purchased a fifty-two-carat diamond necklace from Royal Gem of Israel, a jewelry dealer. Turner's tracing report uncovered

a $154,000 transfer to the Royal Gem of Israel from Brenda's Herndon Plant Oakley account ending in 6943-1. Turner traced the funds located in the Herndon Plant Oakley 6943-1 account directly to a Goldman Sachs account that was funded by Dan's separate property. In making its ruling, the trial court denied Dan's motion for directed verdict on the Herndon Plant Oakley 6943-1 account but granted a directed verdict with regard to the diamond necklace. The jury eventually determined that the Herndon Plant Oakley 6943-1 account was a gift from Dan to Brenda, and thus was, Brenda's one-hundred percent separate property. Dan does not challenge the jury's finding on appeal. Therefore, because the record conclusively shows that Brenda purchased the necklace with funds from an account that the jury ultimately determined was Brenda's separate property, the evidence is legally insufficient to support the trial court's directed verdict. Instead, we conclude that the necklace is one-hundred percent Brenda's separate property in light of the jury's verdict on the Herndon Plant Oakley 6943-1 account. *17

17

4. Summary

We overrule Brenda's second issue challenging the trial court's granting of Dan's motion for directed verdict with regard to all of the real property at issue and the brokerage accounts at issue. We sustain Brenda's second issue to the extent it challenges the trial court's granting of Dan's motion for directed verdict solely with regard to the 52-carat diamond necklace.

IV. JURY CHARGE

By her third issue, Brenda asserts that the trial court committed jury charge error.

A. Standard of Review

We review an allegation of jury charge error for an abuse of discretion. *See Tex. Dep't of Human Servs. v. E.B.*, 802 S.W.2d 647, 649 (Tex. 1990). A trial court abuses it discretion if its acts are arbitrary, unreasonable, or without consideration of guiding principles. *Walker v. Gutierrez*, 111 S.W.3d 56, 62 (Tex. 2003). Finally, error in the jury charge is reversible only if, in the light of the entire record, it was reasonably calculated to and probably did cause the rendition of an improper judgment. *Reinhart v. Young*, 906 S.W.2d 471, 473 (Tex. 1995).

B. Discussion

Brenda contends that the trial court abused its discretion by submitting jury questions one, four, five, six, seven, eight, and nine. We will address each in turn.

1. Jury Question Number One

Question one asked jurors to determine whether the remaining property at issue of the marital estate was Dan's gift to Brenda and what percentage, if any, the property was Dan or Brenda's separate property. On appeal, Brenda complains that the trial court failed *18 to instruct jurors that any finding of a gift from Dan to Brenda resulted in the gift becoming Brenda's sole and separate property under the premarital agreement. Dan responds that Brenda failed to preserve error on this jury question. We agree with Dan.

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Rule of civil procedure 278 states that a trial court's "failure to submit a definition or instruction shall not be deemed a ground for reversal of the judgment unless a substantially correct definition or instruction has been requested in writing and tendered by the party complaining of the judgment." TEX. R. CIV. P. 278. The record reveals that Brenda did not request a substantially correct definition or instruction with regard to her complaints as to question one. Therefore, such error, if any, is waived and not preserved for our review. *See id.*

2. Jury Questions Four and Five

Next, Brenda complains about questions four and five. Question four asked jurors whether the cash and assets owned in question one, other than the residence at 5156 Business Highway 181 North in Beeville, Charco Ranch, and all gifts found in question one, should be considered as part of the $10 million described in the premarital agreement. Question five then asked what amount should be considered if the jury answered question four in the affirmative.

With regard to question four, Dan also argued to the trial court and now on appeal that question four concerned an impermissible question of contract interpretation outside the jury's role as a fact finder. We agree. Brenda argues that the question is based upon an affirmative defense of offset that Dan did not properly plead. In response to Brenda's failure-to-plead argument, Dan asserts that the arguments are waived. We agree with Dan.
19 Rule 274 of civil procedure expressly states that "any complaint as to a question, *19 definition, or instruction, on account of any defect, omission, or fault in pleading, is waived unless specifically included in the objections." TEX. R. CIV. P. 274. Brenda failed to raise the affirmative defense objection below at the charge conference, and such argument is now waived on appeal.

With regard to Brenda's first argument, the record presents a question of fact as what was to be considered with regard to Brenda's rights under the premarital agreement. For example, Dan testified that he was aware of the $10 million payout to Brenda under the premarital agreement, but he made several transfers to Brenda's checking account, Morgan Stanley account, and accounts at Herdon Oakley Plant not as gifts, but rather as part of the $10 million that she was entitled to in the case of Dan's death or their divorce. This testimony thus created a fact issue as to what Brenda was to receive under the premarital agreement. We further note that this fact question does not disturb our holding in our analysis of Brenda's first issue that the language of the premarital agreement is unambiguous. Accordingly, we hold that the trial court's inclusion of questions four and five, which was premised on an affirmative finding in question four, was not an abuse of discretion. *See Tex. Dep't of Human Servs.*, 802 S.W.2d at 649.

3. Questions Six and Seven and Eight and Nine

Next, Brenda complains about questions six and seven, and eight and nine. Question six asks the jury whether Brenda committed fraud with respect to Dan's separate property. Question seven then asks, what sum of money, if paid now in cash, would fairly and reasonably compensate Dan's separate estate for the damages, if any,
20 resulting from Brenda's fraud. *20

On appeal, Brenda argues that such inquiries in questions six and seven were immaterial because it was in "sum and substance" a breach of fiduciary question and should not have been submitted to the jury. At the charge conference, however, Brenda objected to question six on the grounds that it was "overbroad" and "does not make a specific inquiry of conduct which could result in liability on the part of [Brenda]," and with regard to question seven, Brenda objected that the way the question was asked was an impermissible comment on the evidence. Brenda's objections made on appeal with regard to questions six and seven do not comport with those made below and are thus waived. *See* TEX. R. CIV. P. 274.

Question eight asked jurors to find whether Brenda complied with her fiduciary duty to Dan. Question nine asks what sum of money, if paid now in cash, would fairly and reasonably compensate Dan's separate estate for damages resulting from Brenda's breach of fiduciary duty. At the charge conference, Brenda objected that the definition of fiduciary duty was improper in this context and, further, that question eight did not "identify the

transactions which are inquired about to be a breach of fiduciary duty in question." Specifically, Brenda requested a definition from the Texas Pattern Jury Charge book as it related to a breach of duty by a trustee sale that was less "onerous" as the one proposed in the charge.

Dan responded to the objection by claiming that Brenda's proposed instruction is to be "used when the trustee of an expressed trust is being sued," which would be inapplicable here. The definition used by the trial court in question eight tracks the exact language of pattern jury charge 104.2, entitled "Question and Instruction—
21 Breach of Fiduciary Duty with Burden on Fiduciary." *See Texas Pattern Jury Charges—Business*, *21 *Consumer*, *Insurance*, *& Employment*, Committee on Pattern Jury Charges of the State Bar of Texas, PJC 104.2 (2010). The commentary for this particular question and instruction advises to submit this question "whether the duty is based on a formal or an informal relationship, when the fiduciary bears the burden of proof." *Id*. A fiduciary duty exists between spouses. *See Solares v*. *Solares*, 232 S.W.3d 873, 881 (Tex. App.—Dallas 2007, no pet.). Assuming without deciding that submitting question eight to the jury was error, we nevertheless could not conclude that such charge was reasonably calculated to or probably caused the rendition of an improper judgment because the amount of damages awarded to Dan under the breach of fiduciary duty claim is the same compensation as the amount of damages awarded in the actual fraud claim. Furthermore, Dan recovered this amount only once rather than twice in the judgment. *See Reinhart v*. *Young*, 906 S.W.2d 471, 473 (Tex. 1995). Moreover, as to question nine, we hold that the trial court did not abuse its discretion in submitting question eight to the jury, and Brenda's objections to question nine on appeal do not comport with those raised at the trial court and are thus waived. *See* TEX. R. CIV. P. 274.

4. Summary

We conclude that the trial court did not abuse its discretion by submitting the challenged charge questions in this case and overrule Brenda's third issue.

V. THE JURY'S VERDICT

22 By her fourth issue, Brenda challenges the legal sufficiency of the evidence regarding several jury findings. *22

A. Standard of Review

In reviewing the legal sufficiency of the evidence, we view the evidence in the light favorable to the verdict, crediting favorable evidence if reasonable jurors could, and disregarding contrary evidence unless reasonable jurors could not. *Playboy Enters*., *Inc*., 202 S.W.3d at 263 (citing *City of Keller*, 168 S.W.3d at 807). In conducting a legal sufficiency review, we will sustain a legal sufficiency point if the record reveals the following: (a) the complete absence of a vital fact; (b) the court is barred by rules of law or of evidence from giving weight to the only evidence offered to prove a vital fact; (c) the evidence offered to prove a vital fact is no more than a mere scintilla; or (d) the evidence establishes conclusively the opposite of the vital fact. *Id*. When the evidence offered to prove a vital fact is so weak as to do no more than create a mere surmise or suspicion of its existence, the evidence is no more than a scintilla and, in legal effect, is no evidence. *Jelinek v*. *Casas*, 328 S.W.3d 526, 532 (Tex. 2010).

B. Discussion

Brenda challenges the jury's answers to several questions, and we will address each argument in turn.

1. Answers to Question One

a. Real Property

Brenda first argues that the evidence is legally insufficient to establish that Trail Creek Ranch in Montana was one-hundred percent Dan's separate property despite being jointly titled in Dan's name and Brenda's name because the evidence supporting such finding is no more than a mere scintilla. Turner's forensic tracing report
23 presented documentary evidence, including: the warranty deed; the settlement statement; earnest *23 money payment of $300,000; and the balance of funds payment of $8,232,525.18 related to the purchase of the Trail Creek Ranch. The record shows that the payments for the ranch all derived from Dan's separate property. As we have already held, under the premarital agreement in this case, jointly acquired property may not be deemed to be community property but instead will constitute each party's separate property in proportion to that party's contribution to the purchase price. Accordingly, we conclude the evidence was legally sufficient to support the jury's verdict that Trail Creek Ranch was one-hundred percent Dan's separate property.

Brenda next challenges the jury's finding that the Village Walk Condominium in Colorado, jointly titled in Dan's name and Brenda's name, was one-hundred percent Dan's separate property. With regard to this property, the evidence shows that the Village Walk Condominium was purchased with money from the sale of a previous condominium that was purchased with Dan's separate property. Dan then paid $500,000 in earnest money and another $3,925,272.13 from his separate property to acquire this condominium. Accordingly, we conclude that the evidence is legally sufficient to support the jury's verdict that the Village Walk Condominium was Dan's separate property.

Brenda then challenges the jury's finding that the property at 115 Dickerson Road[3] in Bee County, jointly titled in Dan's name and Brenda's name, was one-hundred percent Dan's separate property. With regard to this property, the evidence shows that an earnest money deposit of $1,000 and a payment at closing of $144,291.59 was made toward the property out of Dan's separate property, specifically, from the Dan A. Hughes Company
24 *24 account. Accordingly, the evidence is legally sufficient to support the jury's finding on this property.

> 3 Throughout trial and briefing before this Court, the parties refer to the property as "115 Dickerson Road." However, the documentary evidence attached to Scott Turner's tracing report identifies the property's location at 1115 Dickerson Road. For consistency, we will refer to the property as "115 Dickerson Road," but we note the discrepancy.

Lastly, Brenda challenges the jury's finding that the house on Marion Drive in Rockport, Texas was fifty percent Dan's separate property and fifty percent Brenda's separate property. Brenda testified that she purchased the Marion Drive house for her sister in the amount of $250,000. According to Brenda, she gifted $80,000 of the purchase price to her sister. Of the total purchase price for the Marion Drive home, Brenda testified that she believed that she "pulled money" from her Herndon Oakley Plant account to purchase the house. Turner testified that the Marion Drive property listed Brenda as the sole owner of the property and valued at $233,640 and did not trace the source of the funds used to purchase the house. Despite these facts, Turner testified that Brenda had no funds or assets entering into the marriage, and he saw "no indication of any other funds coming in during the course of the marriage." Accordingly, after viewing the evidence in the light favorable to the verdict, crediting favorable evidence if reasonable jurors could, and disregarding contrary evidence unless reasonable jurors could not, the evidence is legally sufficient to find that Dan and Brenda owned the Marion Drive property in equal fifty percent separate property interests.

b. Land Funds

Brenda challenges the jury's findings that JM Land Funds Numbers 1, 2, 3, 6, and Opportunity Land Fund Number 7 were one-hundred percent Dan's separate property and JM Land Fund Number 4 was seventy percent Dan's separate property. Turner's forensic accounting report showed that the jury's findings
25 corresponded with the percentage of contribution to the funds with Dan's separate property. *25

First, Turner testified that with regard to JM Land Fund Number 1, two separate capital contributions of $150,000 were made to the fund from Dan's separate property and none from Brenda's separate property. Accordingly, we find the jury's finding with regard to JM Land Fund Number 1 legally sufficient. With regard to JM Land Fund Number 2, the evidence showed that Dan made four capital contributions totaling $306,816.00 out of his separate property, while Brenda contributed none of her separate property. Accordingly, the jury's finding with regard to the characterization of JM Land Fund Number 2 is legally sufficient. Next, with regard to JM Land Fund Number 3, Turner's forensic accounting report revealed that it was funded by $300,000 of Dan's separate property. Accordingly, the jury's finding with regard to the characterization of JM Land Fund Number 3 is legally sufficient. Next, the forensic account record shows that JM Texas Land Fund Number 4 was funded by seventy percent of Dan's separate property and thirty percent of Brenda's separate property. Accordingly, the jury's finding on JM Land Fund Number 4 is legally sufficient. Next, Turner's forensic accounting report shows that Dan made an initial capital contribution of $500,000 to JM Land Fund Number 6, and later reinvested income of $42,733.00 from his separate property into the fund. Therefore, the jury's finding on JM Land Fund Number 6 is legally sufficient. Finally, Turner's forensic accounting report showed that Dan contributed $500,000 of his separate property into Opportunity Land Fund Number 7 and that Brenda contributed no separate property. As a result, the jury's finding on Opportunity Land Fund Number 7 is legally sufficient.

c. Note Receivable from Kel-Lee Properties, LLC

Next, Brenda challenges the jury's finding that the note receivable from Kel-Lee Properties, LLC was fifty
26 percent Dan's separate property is legally insufficient because *26 Brenda and her daughter were the sole members of Kel-Lee Properties, LLC. Turner's forensic accounting report shows that while Dan had no legal ownership or association with Kel-Lee Properties, LLC, its operations were financed entirely by Dan's separate property. During her testimony, Brenda admitted that money "that started out as [Dan's] separate property money wound up purchasing some properties in the name of Kel-Lee [Properties, LLC] . . . ." Turner testified that Kel-Lee Properties LLC's 2013 tax return showed that Brenda loaned Kel-Lee Properties LLC $1,868,164.00. Turner classified this loan as an asset "controlled by Brenda in which [Dan] has no interest," but, according to Turner, the money that was loaned to Kel-Lee Properties was traced from Dan's sole separate property. After viewing this evidence in the light favorable to the verdict, crediting favorable evidence if reasonable jurors could, and disregarding contrary evidence unless reasonable jurors could not, we conclude that the jury's finding regarding the ownership and characterization of the note receivable to Kel-Lee Properties, LLC is legally sufficient.

d. Prosperity Bank Account

Brenda next argues that the evidence is legally insufficient to establish that the Prosperity Bank account is fifty percent Dan's separate property because Dan judicially admitted that any assets acquired with money from the couple's joint account at First National Bank could be treated as a gift. We disagree.

Brenda specifically points to the following testimony by Dan:

> Q. Ok and anything that she bought for herself with money out of that joint account to transfer to [the Prosperity Bank account] is not a gift?
>
> A. Well, it's okay with me as her gift. I didn't give it to her.

Dan's testimony clearly contradicts itself and his position. The law states that when a party's testimony
27 contradicts its own position, courts treat them as quasi-admissions *27 rather than conclusive evidence against the admitter. *See Mendoza v. Fid. and Guar. Ins. Underwriters, Inc.*, 606 S.W.2d 692, 694 (Tex. 1980). Instead, the weight to be given to such quasi-admissions is left to the jury. *See id.*

Here, the evidence is legally sufficient to supports the jury's finding that funds in the First National Bank joint account were owned equally by the parties. The evidence is also legally sufficient to support the finding that the funds that flowed from the FNB joint account to the Prosperity Bank account maintained those ownership interests and that characterization.

e. Note from 3138 North Airport Road

Brenda next argues that the evidence is legally insufficient to establish that the note from 3138 North Airport Road is fifty percent Dan's separate property because the evidence conclusively shows that the North Airport property was purchased by Kel-Lee Properties, LLC and sold with the note receivable for $209,950.00 owed to Kel-Lee Properties, LLC. Furthermore, Brenda argues that she and her daughter are the only members of Kel-Lee Properties, LLC and the monies used to fund this transaction came from Brenda's Prosperity Bank account. For the reasoning discussed in Parts V.B(1)(C) and (D) of this opinion regarding the tracing evidence of Kel-Lee Properties, LLC and the Prosperity Bank account, we conclude that the evidence is legally sufficient to support the jury's finding that this property is fifty percent Dan's separate property and fifty percent Brenda's
28 separate property. *28

f. Dog & Bee, LLC

Brenda's last challenge to the jury's finding under question one attacks the jury's finding that Dan owned Dog & Bee, LLC as fifty percent separate property because the evidence conclusively shows that Dog & Bee, LLC is one-hundred percent Brenda's separate property. Furthermore, Brenda again refers to Dan's testimony regarding the Prosperity Bank account as further evidence that the money used to fund Dog & Bee, LLC was a gift from Dan to Brenda. Turner's tracing report shows that the money used to fund Dog & Bee, LLC flowed from the joint account at First National Bank to the Prosperity Bank Account to Kel-Lee Properties, LLC, which then funded Dog & Bee, LLC. Based upon the reasoning discussed in Part V B(1)(C) and (D) regarding the tracing evidence of Kel-Lee Properties, LLC and the Prosperity Bank account, we conclude that the evidence is legally sufficient to support the jury's finding that Dog & Bee, LLC is fifty percent Dan's separate property and fifty percent Brenda's separate property.

2. Answer to Questions Four and Five

Brenda also argues that the jury's answers to question four and five of the jury charge were legally insufficient to be considered as part of the $10 million payout as described in the premarital agreement.

Question four was submitted to the jury to answer a disputed question of whether any other marital estate property, except the residence on Business Highway 181 North, Charco Ranch, and all of the gifts found by the jury in question one as dictated by the premarital agreement, should be considered as part of the $10 million cash and property payout included in the premarital agreement. Dan's expert, Turner, put forth evidence that
29 based upon his review, certain pieces of property that were not gifts should be credited *29 toward the $10 million cash and property payout of the premarital agreement, including: (1) $2,064,583 in real estate; (2) $952,586.01 in cash and investments; (3) $525,042.90 in Dog & Bee, LLC equipment; as well as the $1,868,164 loan from Brenda to Kel-Lee Properties, LLC. Furthermore, as discussed above, the evidence was legally sufficient to support the jury's finding that Brenda owned: (1) thirty percent of JM Texas Land Fund

Number 4; (2) fifty percent of the joint account at First National Bank; (3) fifty percent of the interest in Kel-Lee Properties, LLC; (4) fifty percent of the note receivable from Kel-Lee Properties, LLC; (5) fifty percent of the Marion Drive property; (5) fifty percent of the Prosperity Bank account; (6) fifty percent of the note receivable from the sale of the Airport Road property; and (7) fifty percent of Dog & Bee, LLC.

Thus, after viewing this evidence in the light favorable to the verdict, crediting favorable evidence if reasonable jurors could, and disregarding contrary evidence unless reasonable jurors could not, the evidence is legally sufficient for the jury to find that: (1) these various pieces of property and cash were not gifts; (2) Brenda had partial ownership interest in these items; and (3) $1,536,053.85 should be considered as part of the $10 million cash and property payout.

3. Answers to Questions Six and Seven

Next, Brenda attacks the jury's verdict with regard to questions six and seven in the charge. Question six asked the jury whether Brenda committed actual fraud with respect to Dan's separate property, and question seven asked for an amount of damages if question six was found in the affirmative.

The jury was instructed pursuant the pattern jury charge on actual fraud by a spouse against the separate estate as follows: *30

> A spouse commits fraud if that spouse transfers separate property of the other spouse or expends separate funds of the other spouse for the primary purpose of depriving the other spouse of the use and enjoyment of that property or those funds. Such fraud involves dishonesty of purpose or intent to deceive.

The record shows that Brenda testified she believed that when she moved money from the couple's joint account to her sole account that she became "100 percent owner of that money." Turner outlined Brenda's self-admitted transfers by Brenda to her sole account or the Dog & Bee, LLC account by examining handwritten checks drawn from the couple's joint bank account in the following amounts over the course of slightly more than three years:

- $100,000 on March 6, 2012;
- $50,000 on April 2, 2012;
- $150,000 on April 19, 2012;
- $50,000 on June 1, 2012;
- $50,000 on June 7, 2012;
- $50,000 on June 8, 2012;
- $50,000 on July 5, 2012;
- $150,000 on August 13, 2012;
- $50,000 on September 4, 2012;
- $200,000 on October 9, 2012;
- $100,000 on October 25, 2012;

- $50,000 on October 30, 2012;
- $150,000 on November 9, 2012;
- $125,000 on December 3, 2012; *31
- $150,000 on December 18, 2012;
- $100,000 on January 7,2013;
- $50,000 on February 15, 2013;
- $50,000 on March 22, 2013;
- $100,000 on March 26, 2013;
- $50,000 on April 25, 2013;
- $75,000 on May 17, 2013;
- $50,000 on June 5, 2013;
- $50,000 on June 13, 2013;
- $100,000 on June 27, 2013;
- $50,000 on July 2, 2013;
- $50,000 on July 26, 2013;
- $75,000 on August 19, 2013;
- $50,000 on August 20, 2013;
- $50,000 on August 28, 2013;
- $80,000 on September 20, 2013;
- $100,000 on October 4, 2013;
- $50,000 on October 24, 2013;
- $150,000 on December 23, 2013;
- $50,000 on February 26, 2014;
- $50,000 on March 17, 2014;
- $50,000 on March 31, 2015;
- $150,000 on May 5, 2014; and *32
- $50,000 on June 18, 2014.

Turner testified that based on his accounting, over the course of eight years, Dan deposited $19,014,574.82 of his separate property into the couple's joint account. Of that money, $9,293,742.80 was spent on the couple's "joint expenditures," $0 for Dan's sole benefit, and $10,162,085.72, less $55,631.62 of Brenda's funds, or

$10,106,454.40 for Brenda's benefit. Turner further testified that Dan told him that the purpose of the transferring of funds was to fund the $10 million payout under the premarital agreement not for her separate property.

After viewing this evidence in the light favorable to the verdict, crediting favorable evidence if reasonable jurors could, and disregarding contrary evidence unless reasonable jurors could not, the evidence is legally sufficient for the jury to find that: (1) Brenda committed actual fraud with respect to Dan's separate property; and (2) the $2,393,206.90 award of fraud damages was within the range of evidence presented at trial. *See Gulf States Utils. Co. v. Low*, 79 S.W.3d 561, 566 (Tex. 2002) ("In determining damages, the jury has discretion to award damages within the range of evidence presented at trial.").

4. Answers to Questions Eight and Nine

Finally, Brenda attacks the jury's verdict as legally insufficient with regard to questions eight and nine. Question eight asks whether Brenda breached a fiduciary duty to Dan, and question nine asks what amount of damages would compensate Dan if question eight is found in the affirmative. *33

Brenda argues that the evidence is legally insufficient to support the jury's verdict as to question eight on the basis that she and Dan did not owe each other a fiduciary duty because no community property was created during the marriage under the premarital agreement. In support of this argument, Brenda cites *Knight v. Knight*, which held that "a fiduciary duty exists between a husband and a wife as to the community property controlled by each spouse." 301 S.W.3d 723 (Tex. App.—Houston [14th Dist.] 2009, no pet.). While we recognize the holding in *Knight* and other cases that a fiduciary duty exists between spouses with regard to their community estate, we do not read those cases so narrowly as to foreclose that spouses do not owe other fiduciary duties to one another by virtue of their marital relationship. The Texas Supreme Court appears to take a similar view by observing in non-divorce case the vibrant and fluid nature of the marital relationship:

> [T]he marital relationship between spouses is a fiduciary relationship. That special relationship is of course more than the sum of discrete actions taken by one spouse toward another. . . . The effect of that conduct on the special relationship of trust and confidence between spouses may continue and change over time.

Ditta v. Conte, 298 S.W.3d 187, 191 (Tex. 2009).

Accordingly, we decline to adopt Brenda's argument. Here, a fiduciary relationship was nevertheless created by Brenda's "special relationship of trust and confidence" as Dan's spouse and joint account holder, regardless of the separate character of the property. As a result, we adopt the evidence and analysis discussed in Part V.3 of this *34 opinion to support our conclusion that legally sufficient evidence supported the jury's finding of a breach of fiduciary duty by Brenda to Dan and its subsequent damages award.[4]

[4] Dan notes in his briefing—and we confirmed by our review of the judgment—that the damages figures awarded by the jury for actual fraud and breach of fiduciary duty are identical ($2,393,206.90). The final judgment reflects that Dan recovered only once for these damages awards, not twice. --------

5. Summary

Having held that the evidence is legally sufficient to support the jury's verdict in this case, we overrule Brenda's fourth issue.

VI. CONCLUSION

We reverse the trial court's directed verdict awarding the fifty-two-carat diamond necklace purchased from the Royal Gem of Israel as Dan's separate property and render judgment that the necklace is Brenda's separate property. We affirm the remainder of the judgment.

GINA M. BENAVIDES,

Justice Delivered and filed the 20th day of April, 2017.

No. 04-05-00567-CV
Court of Appeals of Texas, Fourth District, San Antonio

In re Estate of Wallace

Decided Dec 13, 2006

No. 04-05-00567-CV.

December 13, 2006.

From the County Court, Uvalde County, Texas Trial Court No. 5964-01 Honorable Polly Jackson Spencer, Judge Presiding[1].

[1] Sitting by special assignment pursuant to Tex. Gov't Code Ann. § 25.00222 (Vernon 2004).

Sitting: Catherine Stone, Justice Karen Angelini, Justice Rebecca Simmons, Justice.

Opinion by: KAREN ANGELINI, Justice

MEMORANDUM OPINION

AFFIRMED

This is a suit for unjust enrichment and for imposition of a constructive trust upon property claimed to be the subject of an oral agreement to make a will. William Riddick asserts that the trial court erred in granting summary judgment dismissing his causes of action. We disagree.

Factual And Procedural Background

Riddick and the decedent, Willard Wallace, were distant cousins.[2] Wallace owned approximately 500 acres of land in Uvalde County, a large portion of which comprises a park otherwise known as Chalk Park Bluff. Beginning around 1973, Riddick began visiting the park with regularity, during which time, he claims, "a close personal relationship developed between [him] and Wallace." According to Riddick, Wallace had no children of his own and viewed him as the son he never had. Riddick claims that in 1977, Wallace spoke to him of future plans to sell the property, whereupon Riddick expressed an interest in buying the property himself. Riddick states that Wallace agreed to sell the entire 500 acre tract to him at a later unspecified date and that the underlying consideration for this promise to sell was Riddick's performance of personal services.[3] Additionally, Riddick claims to have purchased, at Wallace's request, 160 acres of land across the river from the park "to protect and preserve the Park's beauty and sanctity."[4]

[2] Riddick's great grandfather was Wallace's grandfather.

[3] Riddick claims he performed a myriad of services for Wallace, including: rewiring the park's outside lights; developing an inner tube concession; hiring labor for building projects; cleaning and maintaining septic tanks; fencing the property; irrigation; hay baling, farming and cattle working; grading of roads; building a beam to protect the waterfront; and, repairing, maintaining, and purchasing farm equipment.

[4] It is unclear from the record when this transaction took place.

In 1991, Wallace contracted to sell 400 of the approximately 500 acres in the park to Claude E. Arnold, an unrelated third party. Riddick, who is a lawyer, admits that he assisted Wallace in

"properly document[ing] the sale"; but, after Arnold defaulted, Riddick contends he threatened Wallace with legal action if he did not live up to his promise to sell him the property. Riddick claims that in exchange for his promise not to sue, Wallace and his wife, Sibyl, agreed to bequeath Riddick an undivided one-half interest in 100 acres, rather than selling him the entire 500 acres as previously promised.[5] Indeed, in 1993, Wallace and his wife provided Riddick with a copy of their newly executed mutual wills wherein they devised to Riddick an undivided one-half interest in 100 acres.

[5] Wallace planned to sell 400 acres and to continue living on the remaining 100 acres. According to the 1993 will, upon Wallace's death, Riddick would receive an undivided one-half share in the 100 acres.

Wallace died on October 12, 2001, and on December 3, 2001, his widow, Sibyl, filed an Application to Probate the Last Will and Testament of Willard Wallace and for Letters Testamentary. The will offered for probate, however, was not the 1993 will that left Riddick an undivided one-half interest in the 100 acres, but rather, a 1996 will that completely excluded Riddick from receiving any interest in the estate.[6] In response, Riddick filed an Opposition to Probate of Will and to Issuance of Letters Testamentary, claiming undue influence. On February 14, 2002, the trial court admitted the 1996 will to probate and authorized the letters testamentary. Riddick did not appeal this order but instead brought this suit. During a three year period, the following petitions and dispositive motions were filed and heard: June 24, 2002 Plaintiff's Original Petition, which alleged breach of contract and sought the imposition of a constructive trust upon the property allegedly promised to Riddick;

[6] The 1996 will stated that the Wallaces had recently entered into an earnest money contract to sell 400 acres to Fred Wallace and his wife, while the remaining 100 acres, containing Willard and Sibyl's homestead, were to be left to the surviving spouse.

January 27, 2004 Defendant's Motion for Summary Judgment, which argued that Riddick's claims were barred as a matter of law and public policy pursuant to § 59A of the Probate Code;

May 6, 2004 Plaintiff's First Amended Petition, which continued to assert breach of contract, but added a claim of promissory estoppel, and alternatively, breach of fiduciary duties;

July 7, 2004 Plaintiff's Second Amended Petition, which discarded his cause of action for breach of contract and instead, plead fiduciary relationship or alternatively, a relationship of special trust and confidence, unjust enrichment, and constructive trust;

September 17, 2004 Defendants' Amended Motion for Summary Judgment, which argued that there was no legal contract to make a will and no fiduciary relationship;

April 26, 2005 Trial court's order, granting partial summary judgment, dismissing all of Plaintiff's causes of action with the exception of unjust enrichment, which the court found the defendant had not addressed in its amended motion;

May 6, 2005 Defendants' Motion for Final Summary Judgment, which addressed the issue of unjust enrichment;

June 17, 2005 Plaintiff's Third Amended Petition, which alleged unjust enrichment and constructive trust; and, July 13, 2005 Trial court's order which granted Defendants' Motion for Final Summary Judgment.

Riddick now brings this appeal, raising the following issues: the trial court erred in granting the Final Summary Judgment and dismissing Riddick's claim for unjust enrichment without affording him an opportunity to replead; and, the trial court erred in granting summary judgment because there was an issue of material fact regarding whether a fiduciary relationship existed between Riddick and Wallace "sufficient to support the imposition of a constructive trust."

Standard of Review

To obtain a traditional summary judgment, a party moving for summary judgment must show that no genuine issue of material fact exists and that the party is entitled to judgment as a matter of law. Tex. R. Civ. P. 166a (c); *Randall's Food Mkts., Inc. v. Johnson*, 891 S.W.2d 640, 644 (Tex. 1995); *Nixon v. Mr. Prop. Mgmt. Co.*, 690 S.W.2d 546, 548 (Tex. 1985). In reviewing the grant of a summary judgment, we must indulge every reasonable inference and resolve any doubts in favor of the respondent. *Johnson*, 891 S.W.2d at 644; *Nixon*, 690 S.W.2d at 549. In addition, we must assume all evidence favorable to the respondent is true. *Johnson*, 891 S.W.2d at 644; *Nixon*, 690 S.W.2d at 548-49. A defendant is entitled to summary judgment if the evidence disproves as a matter of law at least one element of the plaintiff's cause of action. *Lear Siegler, Inc. v. Perez*, 819 S.W.2d 470, 471 (Tex. 1991). Once the movant has established a right to summary judgment, the burden shifts to the respondent to present evidence that would raise a genuine issue of material fact. *City of Houston v. Clear Creek Basin Auth.*, 589 S.W.2d 671, 678 (Tex. 1979). When the order granting summary judgment does not specify the grounds upon which the trial court relied, we must affirm the judgment if any of the theories raised in the motion for summary judgment are meritorious. *See State Farm Fire Cas. Co. v. S.S.*, 858 S.W.2d 374, 380 (Tex. 1993).

Under Rule 166a (i), a party may move for a no-evidence summary judgment on the ground that there is no evidence of one or more essential elements of a claim or defense on which an adverse party would have the burden of proof at trial. Tex. R. Civ. P. 166a (i). We review a no-evidence summary judgment de novo by construing the record in the light most favorable to the respondent and disregarding all contrary evidence and inferences. *Merrell Dow Pharm., Inc. v. Havner*, 953 S.W.2d 706, 711 (Tex. 1997); *Reynosa v. Huff*, 21 S.W.3d 510, 512 (Tex.App.-San Antonio 2000, no pet.); *Moore v. K Mart Corp.*, 981 S.W.2d 266, 269 (Tex.App.-San Antonio 1998, pet. denied). A no-evidence summary judgment is improperly granted when the respondent brings forth more than a scintilla of probative evidence that raises a genuine issue of material fact on the challenged elements. Tex. R. Civ. P. 166a (i); *Gomez v. Tri City Cmty. Hosp., Ltd.*, 4 S.W.3d 281, 283 (Tex.App.-San Antonio 1999, no pet.). Less than a scintilla of evidence exists when the evidence is "so weak as to do no more than create a mere surmise or suspicion" of a fact, and the legal effect is that there is no evidence. *Kindred v. Con/Chem, Inc.*, 650 S.W.2d 61, 63 (Tex. 1983).

Unjust Enrichment

Unjust enrichment occurs when a person obtains a "benefit from another by fraud, duress, or the taking of an undue advantage." *Villarreal v. Grant Geophysical, Inc.*, 136 S.W.3d 265, 270 (Tex.App.-San Antonio 2004, pet. denied) (quoting *Heldenfels Bros., Inc. v. City of Corpus Christi*, 832 S.W.2d 39, 41 (Tex. 1992)). It is an equitable rule providing a remedy for one who has conferred benefits upon another who has received those benefits unjustly. *Id.* Unjust enrichment occurs when "the person sought to be charged [has] wrongfully secured a benefit or [has] passively received one which it would [be] unconscionable to retain." *City of Corpus v. S.S.*

Smith Sons Masonry, Inc., 736 S.W.2d 247, 250 (Tex.App.-Corpus Christi 1987, writ denied). Because the doctrine of unjust enrichment is premised on restitution, the underlying purpose is to place "an aggrieved plaintiff in the position he occupied prior to his dealings with the defendant." *Burlington N. R.R. v. Southwestern Elec. Power Co.*, 925 S.W.2d 92, 97 (Tex.App.-Texarkana 1996), *aff'd*, 966 S.W.2d 467 (Tex. 1998). Further, restitution has been defined as the "[r]eturn or restoration of some specific thing to its rightful owner or status." *Black's Law Dictionary* 1339 (8th ed. 2004). It is "[a] body of substantive law in which liability is based not on tort or contract but on the defendant's unjust enrichment." *Id.*

"Unjust enrichment is not a proper remedy merely because it `might appear expedient or generally fair that some recompense be afforded for an unfortunate loss' to the claimant, or because the benefits to the person sought to be charged amount to a windfall." *Heldenfels*, 832 S.W.2d at 42 (quoting *Austin v. Duval*, 735 S.W.2d 647, 649 (Tex.App.-Austin 1987, writ denied)). Riddick initially brought suit claiming that Wallace breached an oral agreement to devise him an undivided one-half interest in 100 acres. However, section 59A (a) and (b) of the Texas Probate Code, which was enacted in 1979, provides that:

(a) A contract to make a will or devise, or not to revoke a will or devise, if executed or entered into on or after September 1, 1979, can be established only by provisions of a will stating that a contract does exist and stating the material provisions of the contract.

(b) The execution of a joint will or reciprocal wills does not by itself suffice as evidence of the existence of a contract.

Tex. Prob. Code Ann. § 59A (Vernon Supp. 2006).[7] Prior to the enactment of § 59A, contractual wills were considered "litigation breeders" and this statute was passed in an attempt to eradicate some of the litigation resulting from both contractual wills and contracts concerning succession. Ozgur K. Bayazitoglu, *Applying Realist Statutory Interpretation To Texas Probate Code § 59A—Contracts Concerning Succession*, 33 Hous. L. Rev. 1175, 1185-86 (1996) (discussing the history and development of 59A).[8]

[7] Although later amended, this is the statute in effect at the time suit was filed.

[8] Given the scant number of cases filed after 1979 involving the enforcement, either in equity or at law, of an oral agreement to make a will, it would appear that the legislature was successful in this endeavor. *See, e.g.*, *Hearn v. Hearn*, 101 S.W.3d 657, 660 (Tex.App.-Houston [1st Dist.] 2003, pet. denied) (legislative intent of § 59A clearly establishes that extrinsic evidence cannot be considered in determining whether a contractual will exists); *Stephens v. Stephens*, 877 S.W.2d 801, 804 (Tex.App.-Waco 1994, writ denied) (making a contractual will pursuant to § 59 does not remove right of party to revoke it); *Taylor v. Johnson*, 677 S.W.2d 680, 682 (Tex.App.-Eastland 1984, writ ref'd n.r.e.) (holding that the oral agreement was not probative evidence of a contract to make a will pursuant to § 59A).

On appeal, Riddick concedes that although § 59A of the probate code bars him from maintaining a breach of contract claim he is, nevertheless, entitled to enforce the oral agreement between himself and the decedent and recover either the deed to the undivided one-half interest in the 100 acre tract, or its equivalent value, based solely on equity. Riddick argues that the trial court erred in granting the Motion for Final Summary Judgment wherein the estate contended that Riddick's claim for unjust enrichment was barred as a matter of law because § 59A bars the enforcement of the oral agreement to make a will and, therefore, Riddick was not entitled to the relief requested.[9]

[9] Riddick contends in his first issue that the trial court erred in granting both the amended summary judgment and the final summary judgment. However, the amended summary judgment addressed the issues of a contractual claim, which Riddick concedes he is barred from making, and the claim for breach of a fiduciary relationship, which we address last in this opinion. The final summary judgment addressed the remaining issue of unjust enrichment, which Riddick presents as his second issue and which we have addressed in this opinion as Riddick's first issue.

Riddick cites to several cases in support of his position that "an action for unjust enrichment is proper where there is no contract or when a contract is unenforceable or void for other reasons." *See*, *e.g.*, *Conoco*, *Inc. v. Fortune Prods. Co.*, 35 S.W.3d 23, 28 (Tex.App.-Houston [1st Dist.] 1998), *aff'd and rev'd in part on other grounds*, 52 S.W.3d 671 (Tex. 2000) (involving action by natural gas sellers to recover for fraud in the inducement and unjust enrichment in sale of field liquids) *; R. Conrad Moore Assoc. v. Lerma*, 946 S.W.2d 90, 97 (Tex.App.-El Paso 1997, writ denied) (involving a suit for return of earnest money after purchaser was unable to obtain financing); *Burlington*, 925 S.W.2d at 97 (involving suit against a railroad for alleged overcharges under coal transportation contracts); *City of Harker Heights v. Sun Meadows Land, Ltd.*, 830 S.W.2d 313, 319 (Tex.App.-Austin 1992, no writ) (involving an alleged breach of contract by city). However, while unjust enrichment may be an appropriate remedy when a contract is invalid or otherwise enforceable, unjust enrichment does not provide for enforcement of the contract but rather, for restitution of benefits unjustly conferred. *Villarreal*, 136 S.W.3d at 270 (holding that unjust enrichment provides that one who receives benefits unjustly should make restitution for *those benefits*).

Unjust enrichment is an equitable remedy that places an aggrieved plaintiff in the position he occupied prior to his dealings with the defendant. *Burlington*, 925 S.W.2d at 97. This remedy is distinct from expectancy damages that allow a plaintiff to receive the benefit of the bargain by placing him in as good a position as he would have been had the contract been performed. *Hart v. Moore*, 952 S.W.2d 90, 97 (Tex.App.-Amarillo 1997, writ denied). Here, Riddick claims he performed various services that benefitted Wallace. He does not, however, seek to be placed in the position he occupied prior to his dealings with Wallace by recovering the value of the services performed.[10] Instead, he has consistently maintained that he should receive the property promised to him because "an agreement implied in law under principles of equity arose compelling delivery of the contested tract to Plaintiff." To hold otherwise, Riddick argues, would result in Wallace's estate being unjustly enriched by having received benefits for which compensation was promised to Plaintiff but not delivered. However, equitable relief is not available merely because it might appear expedient or generally fair that some recompense be afforded for an unfortunate loss to the claimant, or because the benefits to the person sought to be charged amount to a windfall. *Burlington*, 925 S.W.2d at 97 (citing *Heldenfels*, 832 S.W.2d at 42).

[10] Riddick admits he can not provide any receipts or other documentation reflecting the value of the services performed and further, has never attempted to place a value on these services. Moreover, counsel for Riddick stated at the hearing on the motion for final summary judgment that Riddick had no intention of seeking restitution for the value of labor performed or materials furnished.

Riddick, as a matter of law, cannot recover expectancy damages which are only available pursuant to a contract.[11] *See id*. Accordingly, we

overrule Riddick's first issue.

[11] Riddick further sought to recover title to the property under a constructive trust theory; however, this equitable remedy is also unavailable to Riddick given our conclusion, addressed subsequently in this opinion, that there was no evidence of a confidential/fiduciary relationship between the parties. See *Stout v. Clayton*, 674 S.W.2d 821, 823 (Tex.App.-San Antonio 1984, writ ref'd n.r.e.).

In his second issue, Riddick argues that rather than granting summary judgment on Riddick's claim for unjust enrichment, the trial court should have afforded Riddick the opportunity to replead.

While the general rule is that summary judgments should not be used to attack a deficiency in the opposing party's pleading, *In re B.I.V.*, 870 S.W.2d 12, 13 (Tex. 1994), summary judgment may be appropriate when the pleading deficiency cannot be cured. *Friesenhahn v. Ryan*, 960 S.W.2d 656, 658 (Tex. 1998). Thus, if the pleadings show that the plaintiff has no viable cause of action, summary judgment is proper. *See id*.

The record reflects that, before the trial court's July 13, 2005 final order granting summary judgment, Riddick filed four petitions, with Plaintiff's Third Amended Petition and Plaintiff's Response to the Motion for Final Summary Judgment being filed on June 17, 2005. In each of his pleadings, Riddick sought an interest in the property, or the value thereof, that formed the basis of the alleged oral agreement between the deceased and Riddick based on unjust enrichment. Given our prior conclusion that Riddick was not entitled to the equitable relief requested, and that this is the exclusive relief he has ever sought or continues to seek, summary judgment was proper in this instance. *Id.* Riddick's second issue is overruled.

In his final issue, Riddick claims there was an issue of material fact with respect to the existence and breach of "an informal fiduciary/confidential relationship" between him and the decedent. Specifically, Riddick argues that "based on the close personal relationship" and the promises allegedly made to Riddick by Wallace, there existed a fiduciary relationship, or alternatively, a relationship of special trust and confidence that compelled each to act in "a manner exhibiting the highest degree of loyalty and fair dealing." We disagree.

Fiduciary Relationship

In *Meyer v. Cathey*, 167 S.W.3d 327, 331 (Tex. 2005) (quoting *Associated Indem. Corp. v. CAT Contracting, Inc*., 964 S.W.2d 276, 287 (Tex. 1998)), the court stated that "an informal fiduciary duty . . . arises from `a moral, social, domestic or purely personal relationship of trust and confidence.'" However, the court in *Cathey* went on to caution that informal fiduciary relationships are not created lightly. *Id.* Further, the court emphasized that "[i]t is well settled that `not every relationship involving a high degree of trust and confidence rises to the stature of a fiduciary relationship.'" *Id. (*quoting *Schlumberger Tech. Corp. v. Swanson*, 959 S.W.2d 171, 176-77 (Tex. 1997)). A fiduciary duty may arise as a result of dominance on the part of one or weakness on the part of another. *See id.*; *Associated Indem. Corp*., 964 S.W.2d at 287. The determination of whether a fiduciary duty exists or has been breached is a question of law where the underlying facts are not in dispute. *See Cathey*, 167 S.W.3d at 331 (holding that there was insufficient evidence of a fiduciary relationship despite Cathey's assertions that he trusted Meyer in a business matter and had a close personal friendship with him). Before an informal fiduciary duty in a business transaction will be imposed, it must be established that the special relationship of trust and confidence existed prior to, and separate from, the agreement made

the basis of the suit. *Id.* Further, subjective trust alone will not create a fiduciary relationship; instead the nature of the relationship must be established from objective facts. *See id.*; *Trostle v. Trostle*, 77 S.W.3d 908, 914 (Tex.App.-Amarillo 2002, no pet.).

The estate asserted in its amended motion for summary judgment that there was no evidence of a fiduciary relationship between the decedent and Riddick and further, that there was no fiduciary obligation between the parties as a matter of law. Riddick responded to the estate's motion by arguing that his deposition testimony and affidavit, along with the affidavit of Jess Mayfield, created a question of material fact regarding the existence of a fiduciary relationship between Riddick and the deceased.[12]

[12] The estate's objections to the affidavits of Riddick and Mayfield were sustained, whereupon the trial court granted partial summary judgment, thereby dismissing the claim for breach of fiduciary duty. On appeal, Riddick does not complain that the trial court erred in granting these objections. *See Cmty. Initiatives, Inc. v. Chase Bank*, 153 S.W.3d 270, 281 (Tex.App.-El Paso 2004, no pet.) .

We review a no-evidence summary judgment de novo by construing the record in the light most favorable to the respondent. *Havner*, 953 S.W.2d at 711; *Reynosa*, 21 S.W.3d at 512. In doing so, the record reflects that Riddick and the deceased were distant relatives; that Riddick performed various personal and legal services for Wallace pertaining to the property in question, including providing legal advice and representation, as well as maintaining and improving the property; that Riddick stated Wallace promised to sell him the entire tract but instead, in the early 1990's, Wallace sold 400 acres to Arnold; that Riddick, despite learning of this betrayal continued to provide personal and legal services to Wallace, including documenting the conveyance, as well as the reconveyance, of the property following Arnold's default; that according to Riddick, after reacquiring the property and upon being threatened with suit, Wallace agreed to give Riddick an undivided one-half interest in 100 acres which Wallace subsequently bequeathed to Riddick in a will made jointly with his wife, Sibyl in 1993; that in the summer of 1995, Willard promised to give Riddick his half of the park and sell him Sibyl's half for $400,000; that in 1996, Wallace instead sold the 400 acres to Fred Wallace, a relative; that Riddick learned of this sale from his wife and became very upset, resulting in his visits to Wallace diminishing greatly; and, that without notice to Riddick, Willard and Sibyl Wallace revoked their 1993 wills and executed new wills in 1996, omitting any mention of Riddick as a beneficiary.

Riddick asserts that these facts somehow reflect "a moral, social, domestic or purely personal relationship of trust and confidence" and are sufficient to raise a genuine issue of material fact regarding the existence of a fiduciary duty owed by Wallace to Riddick. However, notwithstanding Riddick's assertions that he and the deceased "had a close personal relationship," "'the fact that the relationship has been a cordial one, of long duration, [is not] evidence of a confidential relationship.'" *Cathey*, 167 S.W.3d at 331 (quoting *Crim Truck Tractor Co. v. Navistar Intern. Transp. Corp.*, 823 S.W.2d 591, 595 (Tex. 1992). Riddick also points to the 1993 will as evidence that he trusted Willard and Sibyl Wallace and relied on their representation that they would devise an undivided one-half interest in the 100 acres to him; however, this too is insufficient to create a fiduciary relationship. *See id.* at 330 (explaining that not every relationship involving trust and confidence rises to the level of a fiduciary relationship). Moreover, it is well settled that before an informal fiduciary duty in a business transaction will be found to have existed, it must

be shown that the special relationship of trust and confidence existed prior to, and apart from, the agreement made the basis of the suit. *Id.*; *Associated Indem. Corp.*, 964 S.W.2d at 287. Here, although Riddick claims he relied on Wallace's assurance that he would sell or devise the property to him, Riddick did not present any evidence of a special relationship of trust and confidence which existed prior to, and apart from, the agreement made the basis of this suit. *See Havner*, 953 S.W.2d at 711; *Associated Indem. Corp.*, 964 S.W.2d at 287. Instead, Riddick presents his subjective belief, unsupported by objective facts, that he trusted Wallace to act in "a manner exhibiting the highest degree of loyalty and fair dealing." *See Trostle*, 77 S.W.3d at 914. In sum, the evidence presented by Riddick to support his claim of an informal fiduciary/confidential relationship is "so weak as to do no more than create a mere surmise or suspicion" and amounts to less than a scintilla of evidence. *Kindred*, 650 S.W.2d at 63.

The estate further argues that there was no fiduciary duty owed by Wallace to Riddick as a matter of law given Riddick's admission that he both represented and provided legal advice to Wallace throughout the years regarding the property in question.[13]

[13] Although Riddick claims he did not actively practice law during the times relevant to the events in this lawsuit, he states in his brief that over the years he assisted Wallace by:

a. "mediating the resolution of a gun-toting fence dispute between Wallace and his neighbor Elmo Jones over Jones's cattle crossing Wallace['s] property to water at the river";

b. "facilitating the redrafting of the Contract for Deed between Wallace and Arnold";

c. "easing the eventual repossession of the Park after Arnold defaulted";

d. "appearing at administrative hearings in front of the Nueces River Water Authority to establish Wallace's water rights";

e. "aiding, at Wallace's direction and insistence, the reacquisition by Wallace and Defendant Sibyl Wallace of a four-acre tract of land previously deeded to Sibyl's daughter and son-in-law to preclude the sale of the property to a third party as the daughter and son-in-lawn [sic] divorced by reimbursing the daughter for their expenditures installing electricity, propane, and a well on the property";

f. "advising Wallace whether to pay attorney's fees that he questioned as excessive from litigation over the Park in the early `70's between Wallace and his brothers and sisters";

g. "responding to an accident caused by Wallace's cows getting out on the highway and obtaining liability insurance for Wallace where he previously had none";

h. "resolving Wallace's concern regarding his potential liability when one of his [sic] workers fell off a ladder"; and

i. "advising Wallace on structuring his will to accomplish his desired purpose."

Riddick denies that his role in providing legal advice to Wallace "on an irregular and infrequent basis over the course of a decades-long relationship" resulted in an attorney-client relationship between him and Wallace; nevertheless, Riddick testified as follows:

Q. (By Mr. Drought) All right. Okay. Let's go back to the legal work that you were doing for Mr. Wallace. What — other than the two things that you've mentioned, what other legal work did you do for him that you can recall?

A. [by Riddick] Well, I was on 24-hour call if he had any kind of problem, because I had a law background . . .

Thus Riddick's admission that he was on call to provide legal advice and services to Wallace on a 24-hour basis, in addition to the legal services admittedly performed and set forth in footnote 13 of this opinion, clearly indicates an attorney client relationship, thereby obviating any finding that Wallace owed a fiduciary duty to Riddick. *Cathey*, 167 S.W.3d at 330 (holding that an attorney-client relationship establishes a fiduciary duty, as a matter of law, from the attorney to the client). Riddick's third issue is overruled.

Conclusion

Accordingly, we affirm the trial court's order granting summary judgment in favor of the estate.

Karen Angelini, Justice

No. 06-98-00126-CV
Court of Appeals of Texas, Sixth District, Texarkana

Lesikar v. Rappeport

33 S.W.3d 282 (Tex. App. 2000)
Decided Sep 12, 2000

No. 06-98-00126-CV.

Submitted April 20, 2000.

Decided September 12, 2000. Opinion Granting Appellee's Motion for Rehearing and Overruling Appellant's Motion for Rehearing December 6, 2000.

Appeal from the 188th Judicial District Court Gregg County, Texas Trial Court Nos. 92-2292-A-
283 1 and 94-2369-A. *283

S. Gary Werley, Law Office of S. Gary Werley, Fort Worth, Gregory D. Smith, Ramey Flock, Tyler, Alison H. Moore, Beth D. Bradley, Jacquelyn A. Chandler, Thompson, Coe, Cousins Irons, Dallas, for appellants.

Jerry S. Harris, David R. Watson, Harbour, Smith, Harris Merritt, Longview, for appellees.

Before CORNELIUS, C.J., GRANT and ROSS, JJ.

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OPINION

WILLIAM J. CORNELIUS, Chief Justice.

Lynwood and Harriet Lesikar appeal from an adverse judgment in Jenny Rappeport's suit against them to impose a constructive trust and recover damages for fraud and breach of fiduciary relationship.

In 1935, H. G. Lewis bought the working interest in the T. W. Lee oil lease located in Longview, Texas, and assigned half of the interest to J. C. Robbins. Lewis operated the entire lease under the name L G Oil Company until his death in 1980. In 1964, Lewis and Robbins each assigned to the Clark, Thomas, Winters Shapiro law firm of Austin, Texas (Clark, Thomas), a 1/12 working interest in oil wells 2 and 5 on the lease, or collectively a 1/6 interest. In the early 1970s, Lewis drilled two new wells on the lease, wells 3A and 7A. Thereafter, although the 1964 assignment to Clark, Thomas explicitly covered only wells 2 and 5, Lewis paid Clark, Thomas for oil produced and billed the firm for operating expenses as though it owned a 1/6 working interest not only in wells 2 and 5, but also in wells 3A and 7A.

In 1980, Lewis died leaving a will that named his two daughters, Jenny Rappeport and Harriet Lesikar, co-independent executrices of his estate. In his will, Lewis gave Jenny and Harriet each an undivided fifty percent interest in his estate for life with remainders to their children. Among Lewis's
291 assets at his death was his *291 one-half interest in the T. W. Lee lease, which the estate, through Jenny and Lewis's widow, Fay Lewis, continued to operate under the name L G Oil Company. In 1985, Clark, Thomas determined that it had no assignment to it of an interest in wells 3A and 7A and notified L G Oil Company of that fact. An L G employee wrote Clark, Thomas stating that she searched L G's files for an assignment concerning wells 3A and 7A, but found none. Nevertheless, L G continued to bill Clark, Thomas for operating

expenses associated with wells 3A and 7A, and continued to pay the firm as though it owned an interest in those wells.

In 1992, Harriet and her husband Lynwood (Lyn) Lesikar sued Jenny, Fay, and others seeking a declaratory judgment as to each party's ownership in the Lewis estate and an accounting. In 1993, the Lesikars added Clark, Thomas as a defendant, seeking to recover under a theory of unjust enrichment, the "overpayment" the estate had made on wells 3A and 7A. In response, a Clark, Thomas attorney, Barry Bishop, contacted the Lesikars' attorney, Gary Werley. According to Bishop's testimony, he and Werley agreed that Clark, Thomas would disclaim its interest in wells 2 and 5 if Werley would drop Clark, Thomas from the lawsuit and not seek to recover the overpayment. Bishop wrote a letter to Werley describing their understanding, referred to by the parties as the "Rule 11 agreement," but Werley did not sign and return it at that time. The agreement stated only that Clark, Thomas would disclaim any interest it might have in wells 3A and 7A in exchange for the "plaintiffs," Harriet and Lyn, not pursuing their overpayment claim against the firm.

On April 14, 1994, the trial court ordered the Lewis estate closed. On July 13, 1994, Werley sent a letter to Bishop claiming Clark, Thomas owed the estate for the overpayment the estate had made on wells 3A and 7A. The next day, Werley sent Bishop a letter with a proposed assignment attached whereby Clark, Thomas would assign its interest in wells 2 and 5 to Harriet's husband Lyn alone; the letter stated that Lyn would be calling Bishop concerning a "settlement offer." On July 18, Bishop notified Jenny's attorney, Jerry Harris, about the proposed assignment, who agreed that the estate would be willing to completely settle the overpayment claim in exchange for Clark, Thomas's interest in wells 2 and 5. Despite Jenny's interest, Bishop later agreed with Werley that because the court had ordered the estate closed, the estate would be unable to settle the overpayment claim in exchange for Clark, Thomas's interest in wells 2 and 5 because that would subject the estate to ongoing liability for any third-party claims against the Clark, Thomas interest. They agreed that Lyn's settling the litigation in exchange for Clark, Thomas's interest in wells 2 and 5 would be acceptable.

In preparation for trial, Harris, on July 19, 1994, deposed the Lesikars. Lyn stated at his deposition that he had spoken to Clark, Thomas about acquiring the firm's interest in wells 2 and 5. After the deposition, Harris wrote Werley and Bishop advising them not to enter into an agreement unless Jenny was made a party to it. On August 3, Bishop amended the assignment to add provisions that, among other provisions, Lyn would indemnify Clark, Thomas not only for the overpayment but for all claims connected with wells 2 and 5, and also with wells 3A and 7A, and he sent a copy of the assignment to Werley. That same day, Werley agreed to the assignment and returned it to Bishop. A few days later, Werley signed and returned to Bishop the Rule 11 agreement that Bishop still required, and pursuant to that agreement, Werley dropped Clark, Thomas from the lawsuit. On August 9, Clark, Thomas signed the assignment and returned it to Lyn. On August 14, the trial to close the Lewis estate began, and the overpayment claim against Clark,
292 Thomas was severed into its own suit. *292

On August 17, 1994, Lyn recorded the assignment from Clark, Thomas. Later that same day, the parties met to negotiate a settlement of the litigation. At the meeting, Lyn indicated he did not wish to discuss the Clark, Thomas negotiations, and Harriet stated she did not know anything about the assignment. The discussions resulted in a settlement of the litigation concerning the Lewis estate. On October 17, at Harriet's request, the overpayment claim against Clark, Thomas was dismissed without prejudice. A final judgment was signed on October 18. Attached to it was a mutual release in which each party released the other from

liability; however, the release contained a clause which provided that neither party was released from liability concerning the overpayment.

In early October 1994, Jenny learned that Lyn had gotten permission from the Railroad Commission to replace L G as operator of the lease. On October 31, Jenny, individually and on behalf of L G Oil Company and as "co-trustee of the testamentary trust pursuant to Lewis's will" and several working interest owners, brought suit against the Lesikars for the overpayment and for an injunction, alleging that the Lesikars had taken and converted to their own use income from estate property. On November 18, Jenny brought suit in the same capacity against the Lesikars for breach of fiduciary duty and fraud. The court granted a temporary restraining order that allowed Jenny to re-enter the lease and operate it as L G. The suits were joined, and together they form the suit from which the Lesikars bring this appeal.

The trial court submitted special questions to the jury on all theories of recovery and defense. We omit the instructions and definitions. The jury answered as follows:

> QUESTION NO. 1
>
> Did Harriet Lewis Lesikar breach her fiduciary duty to Jenny Lou Lewis Rappeport in any of the following respects:
>
> . . . .
>
> Answer "Yes" or "No" to each of the following:
>
> YES NO
>
> a.) Failing to disclose to Jenny Lou Lewis Rappeport and Fay Jeter Lewis on or before August 17, 1994 that her husband had acquired the Clark, Thomas interest in the T. W. Lee Lease?
>
> Yes
>
> b.) Failing to disclose to Jenny Lou Lewis Rappeport and Fay Jeter Lewis on or before August 17, 1994 that the assignment of the Clark, Thomas law firm was recorded in the deed records of Gregg County, Texas at approximately 8:30 a.m. on the morning of August 17, 1994? Yes
>
> c.) In settling the Clark[,] Thomas overpayment litigation by allowing the Clark[,] Thomas interest to be assigned to her husband and then dismissing the overpayment litigation after her husband acquired the Clark[,] Thomas interest in the T. W. Lee Lease?
>
> Yes
>
> d.) By her husband acquiring the Clark[,] Thomas interest which had been offered to the Estate of H. G. Lewis Jr.?
>
> Yes
>
> e.) In spending funds deposited with her agent in trust for payment of professional accounting costs of the estate?
>
> Yes
>
> f.) Transferring the operating interest in the T. W. Lee Lease to her husband without payment of any consideration?
>
> Yes
>
> g.) Transferring the operating interest in the T. W. Lee Lease to her husband without previously disclosing to all beneficiaries her intention to do so?
>
> Yes
>
> h.) Secreting the transfer of the operating interest in the T. W. Lee lease to her husband until such time as the beneficiaries could not challenge such transfer with the Texas Railroad Commission?
>
> Yes

QUESTION [NO.] 2

Did Lynwood Lesikar commit fraud against Jenny Lou Lewis Rappeport?

. . . .

Answer "Yes" or "No"

ANSWER: Yes

QUESTION [NO.] 3

Did Harriet Lesikar commit fraud against Jenny Lou Lewis Rappeport?

. . . .

Answer "Yes" or "No"

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ANSWER: Yes

QUESTION [NO.] 4

Do you find that any of the following parties were part of a conspiracy that damaged Jenny Lou Lewis Rappeport?

. . . .

Did Conspire Did not Conspire

A. Harriet Lewis Lesikar x

B. Lynwood Lesikar x

C. Others x

QUESTION NO. 5

Did Lynwood Lesikar acquire the Operations of the T. W. Lee Lease by deception?

. . . .

Answer "Yes" or "No."

ANSWER: Yes

[QUESTION NO.] 6

Do you find that the Clark, Thomas law firm did not own an interest in Wells 3A and 7A on the T. W. Lee Lease?

. . . .

Answer "Did Not Own" or "Did Own"

ANSWER: Did Not Own

QUESTION NO. 7

Do you find that Jenny Rapppeport [sic] is estopped from asserting the overpayment claim against Clark[,] Thomas, if any, out of Wells 3A and Wells 7A in the T. W. Lee Lease?

. . . .

Answer "Yes" or "No"

ANSWER: No

QUESTION NO. 8

Do you find that the Clark, Thomas law firm and it's [sic] successor in interest, if any, was overpaid on the production of the T. W. Lee Lease?

Answer "Yes" or "No"

ANSWER: Yes

If you have answered Question No. 8 "Yes" then answer Question No. 9, otherwise do not answer Question No. 9.

QUESTION NO. 9

Do you find that the overpayment was the result of a mutual mistake?

. . . .

Answer "Yes" or "No"

ANSWER: Yes

If you have answered Question No. 8 "Yes" then answer Question No. 10, otherwise do not answer Question No. 10.

QUESTION NO. 10

What amount, if any, do you find the Clark[,] Thomas law firm or its successor Lynwood Lesikar was overpaid on the production of the T. W. Lee Lease

a.) October 1989 to the present? $298,547

b.) For the calendar years 1980 through September 1989? $239,152

If you have answered Question No. 8 "Yes" then answer Question No. 11, otherwise do not answer Question No. 11.

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QUESTION NO. 11

When did a representative of the Estate of H. G. Lewis Jr. know or should they have known of the existence of a potential overpayment claim?

Answer by Month and Year

ANSWER: June 1985

QUESTION [NO.] 12

Did Lynwood Lesikar intentionally interfere with the existing operating agreement between Jenny Lou Lewis Rappeport d/b/a L G Oil Company and the working interest owners of the T. W. Lee Lease that was not justified?

. . . .

Answer "Did Interfere" or "Did Not Interfere"

ANSWER: Did Interfere

If you have answered Question No. 1, 2, 3, 4, or 5 "Yes" then answer Question No. 13, otherwise do not answer Question No. 13.

QUESTION NO. 13

Do you find that a Constructive Trust should be imposed on the Clark[,] Thomas interest in the T. W. Lee Lease transferred to Lynwood Lesikar?

. . . .

Answer Yes or No:

ANSWER: Yes

QUESTION [NO.] 14

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What sum of money, if any, if paid now in cash, would fairly and reasonably compensate Jenny Lou Lewis Rappeport for her damages, if any, that resulted from such wrongful act you have found in Questions 1, 2, 3, 4, 5 or 12?

Consider the following elements of damages, if any, and none other.

Answer separately in dollars and cents, if any, for each of the following:

1. Costs incurred in correcting the wrongful conduct?

ANSWER: $12,000.00

2. Loss to business reputation?

ANSWER: $0

3. Loss of the value of the Clark[,] Thomas interest on August 9, 1994?

ANSWER: $88,000.00

4. Failure to pay reasonable operational expenses on the T. W. Lee Lease?

ANSWER: $26,122.00

5. Unpaid estate income tax return preparation expense for tax year 1994?

ANSWER: $1,750.00

. . . .

QUESTION [NO.] 15

What is a reasonable fee for the necessary services of Jenny Lou Lewis Rappeport's attorney in this case, stated in dollars and cents?

Answer in Dollars and Cents with an amount for each of the following:

a. For preparation and trial.

ANSWER: $253,444

b. For an appeal to the Court of Appeals.

ANSWER: $30,000

c. For making or responding to a petition for review to the Supreme Court of Texas.

ANSWER: $15,000

If you have found by clear and convincing evidence your answers to Question Nos. 1, 2, 4, 5 or 12 then answer Question No. 16, otherwise do not answer Question No. 16.

QUESTION [NO.] 16

What sum of money, if any, should be assessed against Lynwood Lesikar and awarded to Jenny Lou Lewis Rappeport as exemplary damages for the conduct found in response to Question[s] 1, 2, 4, 5, or 12?

. . . .

Answer in dollars and cents, if any.

ANSWER: $2 million

If you have found by clear and convincing evidence your answers [to] Question Nos. 1, 3, or 4 then answer Question No. 17, otherwise do not answer Question No. 17.

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QUESTION [NO.] 17

What sum of money, if any, should be assessed against Harriet Lesikar and awarded to Jenny Lou Lewis Rappeport as exemplary damages for the conduct found in response to Question 1, 3, or 4?

. . . .

Answer in dollars and cents, if any.

ANSWER: $500,000.00

QUESTION NO. 18

Do you find that Jenny Lou Rappeport and L G Oil Company ratified the assignment by Clark, Thomas, Winters Shapiro to Lynwood Lesikar by sending invoices for expenses, and receiving payments on some of the invoices?

. . . .

Answer "Yes" or "No"

ANSWER: No

QUESTION NO. 19

Do you find that Jenny Lou Rappeport and L G Oil Company have waived the ability to contest the assignment to Lynwood Lesikar by Clark, Thomas, Winters Shapiro by sending invoices for expenses, and receiving payments on some of the invoices?

. . . .

Answer "Yes" or "No"

ANSWER: No

QUESTION NO. 20

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Do you find that Jenny Lou Rappeport and/or L G Oil Company committed waste in selling the oil from the T. W. Lee Lease for a price lower than that available, to the detriment of all working interest owners?

. . . .

Answer "Yes" or "No"

ANSWER: No

If you have answered Question No. 20 "Yes" then answer Question No. 21, otherwise do not answer Question No. 21.

QUESTION NO. 21

What sum of money, if any, do you find to be the damages sustained by Lynwood Lesikar as a proximate cause of the conduct of Jenny Lou Rappeport?

Answer in Dollars and Cents, if any.

ANSWER: $0

QUESTION NO. 22

Do you find that Jenny Lou Rappeport committed malicious prosecution of Lynwood Lesikar that proximately caused Lynwood Lesikar to suffer damages?

. . . .

Answer "Yes" or "No"

ANSWER: No

If you have answered Question No. 22 "Yes" then answer Question No. 23, otherwise do not answer Question No. 23.

QUESTION NO. 23

What sum of money, if any, do you find would fairly and reasonably compensate Lynwood Lesikar for his damages and losses that were proximately caused by Jenny Lou Rappeport on the occasion in question, if any?

. . . .

Answer in Dollars and Cents

ANSWER: $0

QUESTION NO. 24

What is a reasonable fee for the necessary services of Lynwood Lesikar's attorney in this case in reference to the title dispute?

Answer in Dollars and Cents with an amount for each of the following:

Preparation and trial ANSWER: $35,000.00

For representation on appeal, if any, to the Court of Appeals ANSWER: $30,000.00

For representation on appeal, if any, to the Supreme Court of Texas ANSWER: $15,000.00

The court rendered judgment based on the jury's answers.

The Lesikars challenge the jury answers in Jenny's favor regarding breach of fiduciary duty, fraud, ratification, waiver, and conspiracy on the basis that they are not supported by legally and/or factually sufficient evidence. They also challenge the actual damages awards, including the constructive trust and overpayment awards, as well as the punitive damages awards.

Breach of Fiduciary Duty and Fraud

The jury found that Harriet breached her fiduciary duty to Jenny in many respects and that both Harriet and Lyn were guilty of fraud. The Lesikars contend that the assignment from Clark, Thomas to Lyn did not amount to a breach of fiduciary duty or fraud by Harriet, and they contend that the trial court erred in failing to disregard jury findings 1a, 1b, 1c, 1d, 2, and 3 because there is no evidence or factually insufficient evidence to support them. They also contend that Harriet's dismissing the suit against Clark, Thomas for the overpayment did not amount to a breach of fiduciary duty or fraud, and they contend that the trial court erred in failing to disregard the jury's answers to questions 1c, 2, and 3. They also contend that the transfer of the operations of the T. W. Lee oil lease to Lyn did not amount to breach

of fiduciary duty or fraud, and they contend that the trial court erred in failing to disregard the jury's answers to questions 1f, 1g, 1h, 2, and 3.

The Lesikars attack all of the jury's findings related to breach of fiduciary *296 duty. In their first point, they attack the legal and factual sufficiency of findings 1a through 1d. In their third point, they attack the legal sufficiency of findings 1f through 1h. In a later point regarding actual damages, they attack the legal sufficiency of finding 1e. If any one of the findings of breach may be upheld, the jury's finding that Harriet breached her fiduciary duty may be upheld. We will first address finding 1c, which speaks to the heart of this case, the assignment and dismissal, or the settling of the estate's overpayment claim.

A challenge on appeal that the trial court failed to disregard a jury finding must be construed as a legal sufficiency challenge. *See Brown v. Bank of Galveston, Nat'l Ass'n*, 930 S.W.2d 140, 145 (Tex.App.-Houston [14th Dist.] 1996), *aff'd*, 963 S.W.2d 511 (Tex. 1998). In reviewing a legal sufficiency or "no evidence" question, we consider all the evidence in the light most favorable to the jury finding, indulging every reasonable inference in favor of the finding. *Associated Indem. Corp. v. CAT Contracting, Inc.*, 964 S.W.2d 276, 285-86 (Tex. 1998); *Transp. Ins. Co. v. Moriel*, 879 S.W.2d 10, 25 (Tex. 1994). If there is more than a scintilla of competent evidence to support the jury finding, we will affirm the finding. The evidence supporting the finding amounts to more than a scintilla if it supplies a reasonable basis for reasonable minds to reach differing conclusions as to the existence of the crucial fact. *Transp. Ins. Co. v. Moriel*, 879 S.W.2d at 25; *Orozco v. Sander*, 824 S.W.2d 555, 556 (Tex. 1992).

When reviewing the factual sufficiency of the evidence to support the jury's verdict, we examine all of the evidence. *Lofton v. Texas Brine Corp.*, 720 S.W.2d 804, 805 (Tex. 1986); *Hollander v. Capon*, 853 S.W.2d 723, 726 (Tex.App.-Houston [1st Dist.] 1993, writ denied). After considering and weighing all of the evidence, we will set aside the verdict only if the evidence is so weak, or the finding is so against the great weight and preponderance of the evidence, that it is clearly wrong and unjust. *Cain v. Bain*, 709 S.W.2d 175, 176 (Tex. 1986). When undertaking a factual sufficiency review, we may not merely substitute our opinion for that of the trier of fact and determine that we would reach a different conclusion. *Merckling v. Curtis*, 911 S.W.2d 759 (Tex.App.-Houston [1st Dist.] 1995, writ denied); *Hollander v. Capon*, 853 S.W.2d at 726. The jury is the sole judge of the credibility of the witnesses and the weight to be given their testimony, and we may not act as a thirteenth juror in assessing the evidence and the credibility of the witnesses. *Seelbach v. Clubb*, 7 S.W.3d 749, 755 (Tex.App.-Texarkana 1999, pet. denied).

It is undisputed that Harriet and Jenny were both co-executrices and beneficiaries of the Lewis estate. As both co-executrices and beneficiaries, each owed the other a fiduciary duty, and each was entitled to the other's fulfilling her fiduciary obligations.

An executrix of an estate is a fiduciary of the estate beneficiaries. As a fiduciary, she owes the beneficiaries a strict duty of good faith and candor, as well as the general duty of full disclosure respecting matters affecting the beneficiaries' interests. *Montgomery v. Kennedy*, 669 S.W.2d 309, 313 (Tex. 1984); *Welder v. Green*, 985 S.W.2d 170, 175 (Tex.App.-Corpus Christi 1998, pet. denied); *Hawthorne v. Guenther*, 917 S.W.2d 924, 934 (Tex.App.-Beaumont 1996, writ denied); *Chien v. Chen*, 759 S.W.2d 484, 495 (Tex.App.-Austin 1988, no writ). The existence of strained relations between the parties does not lessen the fiduciary's duty of full and complete disclosure. *Montgomery v. Kennedy*, 669 S.W.2d at 313. The executrix of an estate is held to the same high fiduciary duties and standards in the administration of a decedent's estate that are applicable to trustees. *Humane Soc'y of Austin Travis County v. Austin Nat'l Bank*, 531 S.W.2d

574, 577 (Tex. 1975); *Evans v. First Nat'l Bank of*
297 *Bellville*, 946 S.W.2d 367, *297 379 (Tex.App.-Houston [14th Dist.] 1997, writ denied); *Ertel v. O'Brien*, 852 S.W.2d 17, 20 (Tex.App.-Waco 1993, writ denied). In discussing the fiduciary duties of trustees, the Texas Supreme Court has stated that the trustee's duty of loyalty prohibits him from using the advantage of his position to gain any benefit for himself at the expense of his trust and from placing himself in any position where his self-interest will or may conflict with his obligations as trustee. *Slay v. Burnett Trust*, 143 Tex. 621, 187 S.W.2d 377, 388 (1945).

> It is a well-settled rule that a trustee can make no profit out of his trust. The rule in such cases springs from his duty to protect the interests of the estate, and not to permit his personal interest to in any wise conflict with his duty in that respect. The intention is to provide against any possible selfish interest exercising an influence which can interfere with the faithful discharge of the duty which is owing in a fiduciary capacity.

Slay v. Burnett Trust, 187 S.W.2d at 388; *accord Humane Soc'y of Austin Travis County v. Austin Nat'l Bank*, 531 S.W.2d at 577.

Generally, there is a presumption that property acquired during marriage is community property. *Wilson v. Wilson*, 145 Tex. 607, 201 S.W.2d 226, 227 (1947). Because Lyn acquired Clark, Thomas's interest in wells 2 and 5 as community property in exchange for the claim of overpayment, Harriet also acquired the interest in wells 2 and 5 in exchange for the claim of overpayment. The Lesikars argue that the interest Clark, Thomas assigned to Lyn was not *estate* property, and therefore Harriet, by obtaining it through the assignment to Lyn, did not breach her fiduciary duty by acquiring estate property in violation of the statute. We agree that Clark, Thomas's interest in wells 2 and 5 was not property belonging to the estate. The estate, however, owned the claim of overpayment on wells 3A and 7A, a valuable right. Harriet did more than simply acquire the Clark, Thomas interest; through Lyn, she acquired it in exchange for indemnifying Clark, Thomas against this claim of overpayment.

The Lesikars argue that Harriet did not breach her duty by doing so because Jenny, rather than looking to Clark, Thomas, could look to Lyn and Harriet, who merely "indemnified" Clark, Thomas, for reimbursement of the overpayment. If the overpayment claim was valid, Harriet indeed had a duty not to obtain for Lyn and herself the interest in wells 2 and 5 in exchange for indemnifying the overpayment claim. By doing so, she created a conflict of interest between herself and the estate, which alone the law considers a breach of fiduciary duty. As co-executrix of the estate, she was an estate-creditor; she was required to pursue the claim for overpayment on behalf of the estate. As Lyn's wife, she stepped into Clark, Thomas's shoes and became an estate-debtor; if the overpayment claim was valid, she was required to pay the estate for the overpayment. As an estate-debtor, Harriet had no incentive to aggressively pursue the claim for overpayment against herself which, as an estate-creditor, she was required to do. In fact, Lyn agreed to do more than indemnify Clark, Thomas; he agreed that he and Harriet would not pursue the overpayment claim, and Harriet ultimately dismissed the overpayment litigation.

In addition, notwithstanding that Lyn bargained for Clark, Thomas's interest by promising to abandon the overpayment claim, the Lesikars contend that "there is no evidence that an actual overpayment existed" and that Harriet dismissed the overpayment litigation in good faith. However, Clark, Thomas admitted and no one disputed that Clark, Thomas did not own an interest in wells 3A and 7A and yet received payment for those wells. The Lesikars' true dispute regarding the validity of the overpayment is that the evidence was factually insufficient to prove the *amount* of the

overpayment. In addition, all the parties acted as if
298 the claim had *298 value; otherwise, they would not have exchanged it or used it as a bargaining tool to acquire the interest in wells 2 and 5. Harriet, therefore, had a duty to pursue the claim on behalf of the estate and not to dismiss the litigation. Her good faith is irrelevant to her breach of duty. By acquiring the interest in wells 2 and 5 and then dismissing the overpayment litigation, Harriet not only created a conflict of interest between herself and the estate, but also she acquired property for her personal benefit while acting as a fiduciary.

All transactions between a fiduciary and his principal are presumptively fraudulent and void; therefore, the burden lies on the fiduciary to establish the validity of any particular transaction in which he is involved. *Chien v. Chen*, 759 S.W.2d at 495. Where a fiduciary relationship exists, the burden is on the fiduciary to show that he acted fairly and informed the other party of all material facts relating to the challenged transaction. *Hoggett v. Brown*, 971 S.W.2d 472, 487 (Tex.App.-Houston [14th Dist.] 1997, pet. denied). The Lesikars' attempts to overcome this presumption fail.

As evidence of the fairness of the actions in question, the Lesikars contend that Harriet's actions do not amount to breach of fiduciary duty or fraud because Harriet's primary duty was to "wind up" the estate. In April of 1994, the trial court gave directives that the lingering estate be closed. According to the Lesikars, winding up required only that Harriet pay estate debts and distribute property. While it is true that the purpose of administering an estate is to satisfy the claims of the decedent's creditors and to distribute the remainder of the estate among the decedent's heirs, included within the executor's many duties is the duty to collect all claims and debts due the estate and to recover possession of all property of the estate to which its owners have claim or title. *See* Tex. Prob. Code Ann. § 233(a) (Vernon Supp. 2000). Administration therefore protects both the rights of the decedent's heirs and the interests of the decedent's creditors. *Patterson v. Allen*, 50 Tex. 23 (1878); *So. Underwriters v. Lewis*, 150 S.W.2d 162 (Tex.Civ.App. Texarkana 1941, no writ). The whole scheme of probate law favors speedy administration, commensurate with the reasonable protection of all interests involved. *Ryan v. Flint*, 30 Tex. 382 (1867). We fail to see how a directive to close the estate entitled Harriet and Lyn to acquire the Clark, Thomas interest for themselves in settlement of the estate's claim for overpayment.

The Lesikars further contend that when Harriet dismissed the claim against Clark, Thomas on October 17, 1994, the claim had already been distributed to estate beneficiaries who could make their own choices about prosecuting it. Their argument is that the estate had been closed in *August* of 1994 and therefore the claim was not a claim of the estate. The final settlement of the estate, however, was not filed until *October* 18, 1994, one day after Harriet dismissed the claim. In addition, in that settlement agreement, the parties executed a mutual release in which each party released the other from liability. But that document stated that each party was released from liability "with the exception of claims or obligations related to . . . operation of the T.W. Lee Oil Lease subsequent to August 17, 1994, and the interest of the Clark, Thomas, Winters Shapiro Law Firm in the T.W. Lee Oil Lease and debts and overpayments relating thereto." So, that claim remained a claim of the estate. Regardless, it is a duty of a co-executor, not the beneficiaries, to prosecute claims owed to the estate. Tex. Prob. Code Ann. § 233(a).

The Lesikars further contend that the trial court erred in failing to disregard findings 2 and 3, in which the jury found that Harriet and Lyn committed fraud. They insist that the assignment and dismissal did not amount to fraud. The court
299 instructed the jury that fraud occurs when: *299

> a. a party conceals or fails to disclose a material fact within the knowledge of that party,
>
> b. the party knows that the other party is ignorant of the fact and does not have an equal opportunity to discover the truth,
>
> c. the party intends to induce the other party to take some action by concealing or failing to disclose the fact, and
>
> d. the other party suffers injury as a result of acting without knowledge of the undisclosed fact.

The fraud findings were broad and were not based on any particular act. A challenge on appeal that the trial court failed to disregard a jury's finding must be construed as a legal sufficiency challenge. *See Brown v. Bank of Galveston, Nat'l Ass'n*, 930 S.W.2d at 145. Thus, looking only at the evidence that favors the jury's findings and ignoring all evidence to the contrary, the question before us is whether there is more than a scintilla of competent evidence to support the jury finding that Harriet and Lyn committed fraud.

Fraud requires a material misrepresentation that was false; was either known to be false when made or was asserted without knowledge of its truth; was intended to be acted on; was relied on; and that caused injury. *Formosa Plastics Corp. USA v. Presidio Eng'rs Contractors, Inc.*, 960 S.W.2d 41, 47 (Tex. 1998). Silence is equivalent to a false representation where circumstances impose a duty to speak and one deliberately remains silent. *Spoljaric v. Percival Tours, Inc.*, 708 S.W.2d 432, 435 (Tex. 1986). So, for there to be actionable nondisclosure fraud, there must be a duty to disclose. *Bradford v. Vento*, 997 S.W.2d 713, 725 (Tex.App.-Corpus Christi 1999, pet. granted); *Hoggett v. Brown*, 971 S.W.2d at 487-88. Whether such a duty exists is a question of law. *Bradford v. Vento*, 997 S.W.2d at 725. A duty to disclose may arise in four situations: (1) where there is a special or fiduciary relationship; (2) where one voluntarily discloses partial information, but fails to disclose the whole truth; (3) where one makes a representation and fails to disclose new information that makes the earlier representation misleading or untrue; and (4) where one makes a partial disclosure and conveys a false impression. *Id.; Hoggett v. Brown*, 971 S.W.2d at 487 (citing *Formosa Plastics Corp. v. Presidio Eng'rs Contractors, Inc.*, 941 S.W.2d at 146-47).

Although Harriet notified Jenny and collaborated with her to some extent with regard to the initial settlement negotiations between the estate and Clark, Thomas about exchanging the interest in wells 2 and 5 for the overpayment claim, when those negotiations broke down Harriet did not notify Jenny that Lyn was acquiring the Clark, Thomas interest for himself until well after the fact.

Considering only the evidence that favors the jury's findings and ignoring all evidence to the contrary, we find some evidence to support the jury's findings that Lyn and Harriet committed fraud on Jenny and the estate by failing to disclose their dealings in exchanging the overpayment for Clark, Thomas's interest in wells 2 and 5.

The Lesikars contend that the trial court erred in failing to disregard jury findings 1f, 1g, 1h, and 5, by which the jury found that Harriet breached her fiduciary duty to Jenny by,

> 1f transferring the operating interest in the T.W. Lee Lease to her husband without payment of any consideration;
>
> 1g transferring the operating interest in the T.W. Lee Lease to her husband without previously disclosing to all beneficiaries her intention to do so;
>
> 1h secreting the transfer of the operating interest in the T.W. Lee Lease to her husband until such time as the beneficiaries could not challenge such transfer with the Texas Railroad Commission.

300 *300

In question 5, the jury found that Lyn acquired the operations of the lease by deception.

We have already determined there is legally sufficient evidence to support the findings of breach of fiduciary duty in findings 1a, 1b, 1c, 1d, and 1e; therefore, we will not address whether the evidence is legally sufficient to support findings 1f, 1g, and 1h. We also find sufficient evidence to support the jury's answer to question 5.

Ratification and Waiver

After learning of Clark, Thomas's assignment of its interest in wells 2 and 5 to Lyn, Jenny began to bill Lyn for operating expenses associated with those wells. In questions 18 and 19, the jury failed to find that by this conduct Jenny ratified the assignment or waived her right to complain of the assignment. On appeal, the Lesikars challenge the legal and factual sufficiency to support the jury's failure to find ratification or waiver.

Ratification and waiver are affirmative defenses that the defendant must prove. The party with the burden of proof who challenges the legal sufficiency to support the jury's failure to find must surmount two hurdles. *Sterner v. Marathon Oil Co.*, 767 S.W.2d 686, 690 (Tex. 1989); *Seelbach v. Clubb*, 7 S.W.3d at 755; *Neese v. Dietz*, 845 S.W.2d 311, 313 (Tex.App.-Houston [1st Dist.] 1992, writ denied). The party must show that no evidence supports the failure to find and that the evidence establishes the desired finding as a matter of law. *Ramsey v. Lucky Stores, Inc.*, 853 S.W.2d 623 (Tex.App.-Houston [1st Dist.] 1993, writ denied). First, we review the evidence in the light most favorable to the jury finding, indulging every reasonable inference in favor of the finding. *Associated Indem. Corp. v. CAT Contracting, Inc.*, 964 S.W.2d at 285-86. If there is more than a scintilla of competent evidence to support the jury finding, we will affirm the finding. *Orozco v. Sander*, 824 S.W.2d at 556. Evidence amounts to more than a scintilla if it supplies a reasonable basis for reasonable minds to reach differing conclusions as to the existence of the crucial fact. *Id.* If there is no evidence to support the finding, then an examination of the entire record must demonstrate that the contrary proposition is established as a matter of law. *Seelbach v. Clubb*, 7 S.W.3d at 755. If the proposition asserted by the appellant is established as a matter of law, the point of error will be sustained. *Id.*

Great weight points are factual sufficiency challenges. Only one standard of review is used in reviewing factual sufficiency challenges, regardless of whether the court of appeals is reviewing a negative or affirmative jury finding or whether the complaining party had the burden of proof on the issue. *M. J. Sheridan Son Co. v. Seminole Pipeline Co.*, 731 S.W.2d 620, 623 (Tex.App.-Houston [1st Dist.] 1987, no writ). Therefore, we apply the appropriate standard of review, which we have set out above.

Ratification is the adoption or confirmation by a person, with knowledge of all material facts, of a prior act that did not then legally bind that person and which that person had the right to repudiate. *Facciolla v. Linbeck Constr. Corp.*, 968 S.W.2d 435, 440 (Tex.App.-Texarkana 1998, no pet.). Ratification may be either express or implied, but it must result from acts clearly evidencing an intention to ratify. *Id.* Waiver is the intentional relinquishment of a known right, or intentional conduct inconsistent with claiming that right. *Sun Exploration Prod. Co. v. Benton*, 728 S.W.2d 35, 37 (Tex. 1987). Thus, like ratification, waiver is largely a question of intent. *Kennedy v. Bender*, 104 Tex. 149, 135 S.W. 524, 525 (1911). There can be no waiver unless so intended by one party and so understood by the other. *Vessels v. Anschutz Corp.*, 823 S.W.2d 762, 765 (Tex.App.-Texarkana 1992, writ denied).

Although in their brief to this Court the Lesikars argue that a great many of Jenny's actions
301 evidence ratification and waiver, *301 the questions to the jury based ratification and waiver

only on Jenny's having sent invoices to Lyn and having accepted payments from him. The Lesikars do not argue that they submitted a different question to the jury, that the court refused their request, or that the question submitted was too specific or otherwise improper. Thus, the narrow issue before us is whether Jenny's sending invoices to Lyn and accepting payments from him established either ratification or waiver as a matter of law, and whether the jury's failure to find ratification or waiver on the basis of that conduct is against the great weight of the evidence.

Ratification was not established as a matter of law merely from Jenny's billing Lyn for lease expenses and receiving payments from him. Jenny's actions in this regard could have reflected only that she knew Lyn had received a purported assignment of Clark, Thomas's interest in wells 2 and 5. Certainly, the assignment was notice to her that Lyn *claimed* to own the interest, but even if Jenny's acts were a recognition that Lyn had acquired title to the interest, her dealing with him on that basis did not, as a matter of law, ratify Lyn's fraudulent acts in acquiring that interest. If Lyn had acquired the interest directly from Jenny, her acts in dealing with him as the owner would have constituted a ratification of his title. But since he acquired the title from a third party, Jenny could treat him as the owner, but still seek to recover damages from him because of his fraud in acquiring the interest, or seek to impose a constructive trust on the interest. *See Ford v. Culbertson*, 158 Tex. 124, 308 S.W.2d 855, 865 (1958); *Vessels v. Anschutz*, 823 S.W.2d at 764-65. We also find that the jury's failure to find ratification is not against the great weight of the evidence.

Similarly, the fact that Jenny billed Lyn for expenses and otherwise dealt with him as if he were the owner of the Clark, Thomas interest falls short of establishing as a matter of law that she intended thereby to waive Harriet's breach of fiduciary duty and Lyn's and Harriet's fraud. Her lack of intent to waive is indicated by the fact that she brought suit against the Lesikars well before she began to bill Lyn for expenses. Waiver was not established as a matter of law, and we do not find that the jury's failure to find waiver is against the great weight of the evidence.

Conspiracy

In question 4, the jury found that Harriet, Lyn, and "others" were part of a conspiracy that damaged Jenny. The Lesikars complain of the legal and factual sufficiency of the evidence to support the jury's finding that Harriet, Lyn, and "others" engaged in a conspiracy. They first contend that there can be no liability for conspiracy because there was no valid underlying tort. They also contend that the evidence negates the finding of a conspiracy because the evidence established the contrary as a matter of law, or the great weight of the evidence demonstrated that neither Lyn nor Harriet knowingly conspired to commit any wrong. We overrule these contentions.

The Lesikars challenge both the legal sufficiency and the factual sufficiency of the evidence to support the jury's finding. We apply the appropriate standards of review, which we have already set out above.

A civil conspiracy is a combination by two or more persons or entities to accomplish an unlawful purpose, or a lawful purpose by unlawful means. *Massey v. Armco Steel Co.*, 652 S.W.2d 932, 934 (Tex. 1983); *Facciolla v. Linbeck Constr. Corp.*, 968 S.W.2d at 444-45. The elements of a civil conspiracy are: (1) two or more persons; (2) an object to be accomplished; (3) a meeting of the minds; (4) one or more unlawful, overt acts; and (5) damages as the proximate result. *Massey v. Armco Steel Co.*, 652 S.W.2d at 934; *Facciolla v. Linbeck Constr. Corp.*, 968 S.W.2d at 445. It is not the agreement itself, but an injury to the plaintiff
302 resulting *302 from an act done pursuant to the common purpose that gives rise to a cause of action for civil conspiracy. *Carroll v. Timmers Chevrolet, Inc.*, 592 S.W.2d 922, 925 (Tex. 1979). In other words, recovery is not based on the

conspiracy; instead, it is based on an underlying tort. *Tilton v. Marshall*, 925 S.W.2d 672, 681 (Tex. 1996); *Fisher v. Yates*, 953 S.W.2d 370, 381 (Tex.App.-Texarkana 1997), *pet. denied per curiam*, 988 S.W.2d 730 (Tex. 1998). Types of torts or unlawful acts on which a cause of action for conspiracy may be based include breach of a fiduciary duty and fraud, as in this case. *See, e.g., Phippen v. Deere Co.*, 965 S.W.2d 713, 722 (Tex.App.-Texarkana 1998, no pet.); *Fisher v. Yates*, 953 S.W.2d at 381; *Vinson Elkins v. Moran*, 946 S.W.2d 381, 411-13 (Tex.App.-Houston [14th Dist.] 1997, writ dism'd by agr.).

We have held that the evidence in this case is legally sufficient to support the jury's findings of breach of fiduciary duty and fraud; therefore, we hold that valid underlying torts were established capable of providing the basis for the conspiracy finding.

The Lesikars also contend that neither Harriet nor Lyn knowingly conspired to commit any wrong. Specifically, they contend that Harriet did not know of the assignment of the Clark, Thomas interest when she dismissed Clark, Thomas from the lawsuit. They contend that Lyn acted independently as well, without knowledge of Harriet's dismissing Clark, Thomas from the lawsuit.

One of the essential elements required to establish a civil conspiracy is a meeting of the minds on the object or course of action. *Massey v. Armco Steel Co.*, 652 S.W.2d at 934. Therefore, for conspiracy, the participants must at least have knowledge of the object and purpose of a conspiracy. One without knowledge of the object and purpose of a conspiracy cannot be a co-conspirator; he cannot agree, either expressly or tacitly, to the commission of a wrong of which he is not aware. *Schlumberger Well Surveying Corp. v. Nortex Oil Gas Corp.*, 435 S.W.2d 854, 857 (Tex. 1968); *Pairett v. Gutierrez*, 969 S.W.2d 512, 516 (Tex.App.-Austin 1998, pet. denied).

Conspiracy may be established by circumstantial evidence. *Int'l Bankers Life Ins. Co. v. Holloway*, 368 S.W.2d 567 (Tex. 1963); *Fisher v. Yates*, 953 S.W.2d at 379. The Texas Supreme Court has stated, "A conspiracy may be proven as well by the acts of the conspirators, as by anything they may say, touching what they intended to do." *Int'l Bankers Life Ins. Co. v. Holloway*, 368 S.W.2d at 581 (quoting *Whitmore v. Allen*, 33 Tex. 355 (1870)). The Supreme Court has further stated:

> The general rule is that conspiracy liability is sufficiently established by proof showing concert of action or other facts and circumstances from which the natural inference arises that the unlawful, overt acts were committed in furtherance of common design, intention, or purpose of the alleged conspirators.
>
> . . . . It is not required that each and every act of a conspirator be shown to have been in concert with the others or that it be established by direct evidence that all combined at a given time prior to each transaction. Inferences of concerted action may be drawn from joint participation in the transactions and from enjoyment of the fruits of the transactions. . . .

Int'l Bankers Life Ins. Co. v. Holloway, 368 S.W.2d at 581-82 (citations omitted); *accord Fisher v. Yates*, 953 S.W.2d at 379.

We conclude that the evidence is sufficient to support an inference that Lyn and Harriet participated jointly, and knowingly conspired to commit wrongs. As we have noted, while Harriet testified that she did not know about the assignment from Clark, Thomas to Lyn until well after it was executed, she admitted that she had knowledge that Lyn was interested in acquiring the Clark, Thomas interest. Without stating that
303 she actually read any *303 correspondence about the assignment, Harriet also testified that copies of any correspondence from Werley regarding the estate would have been sent to her. In fact, the

record reflects that Werley copied "Mr. and Mrs. Lesikar" on both the proposed assignment dated July 14, 1994, which he sent to Bishop, and the "Rule 11 agreement" that he accepted and returned to Bishop on August 8, 1994. In addition, Harriet testified that Werley had advised her on several occasions to dismiss the overpayment litigation, but it was not until a few days after Lyn acquired the interest that Harriet decided to do so. This is sufficient evidence that Harriet knew of the scheme to acquire the Clark, Thomas interest in wells 2 and 5 in exchange for the estate's overpayment claim.

Although Lyn claims he acted independently of Harriet without knowledge of the dismissal, in other matters relating to the estate he acted on Harriet's behalf and with Harriet's knowledge. For example, at Harriet's direction he reviewed the deed records and discovered the overpayment claim. He also calculated the amount of the overpayment, on which Harriet relied in filing suit against Clark, Thomas for the overpayment. In addition, Lyn promised, in agreeing to the "Rule 11 agreement," that in exchange for Clark, Thomas's interest in wells 2 and 5, not that he would simply indemnify Clark, Thomas, but that he and Harriet would not pursue the overpayment claim against Clark, Thomas. A promise that *Lyn* would not seek to collect the overpayment was worthless, because the overpayment claim did not belong to him, but belonged to the estate. Harriet, as a co-executrix of the estate, was needed to fulfill Lyn's purported independent promise, which she did by dropping Clark, Thomas from the lawsuit just days after the assignment to Lyn was recorded. This is sufficient evidence for the jury to find that Lyn knew of the scheme to acquire the Clark, Thomas interest in wells 2 and 5 in exchange for the estate's overpayment claim.

We conclude that there is sufficient evidence that Lyn and Harriet knowingly conspired to breach Harriet's fiduciary duty to Jenny and other estate beneficiaries, and to fraudulently acquire the Clark, Thomas interest in wells 2 and 5 in exchange for the estate's overpayment claim.

Constructive Trust

The Lesikars challenge the jury findings and the trial court's judgment imposing a constructive trust on the working interest in wells 2 and 5 acquired by Lyn from Clark, Thomas. We find there is sufficient evidence to justify the imposition of a constructive trust.

A constructive trust is a device equity uses to remedy a wrong. *See Meadows v. Bierschwale*, 516 S.W.2d 125 (Tex. 1974); *Cawthorn v. Cochell*, 121 S.W.2d 414 (Tex.Civ.App. Amarillo 1938, writ dism'd). When property has been acquired under circumstances where the holder of legal title should not in good conscience retain the beneficial interest, equity will convert the holder into a trustee. *Talley v. Howsley*, 142 Tex. 81, 176 S.W.2d 158 (1943). A classic case for the imposition of a constructive trust is where one party fraudulently uses something of value belonging to another to acquire title to property for himself. *See Lotus Oil Co. v. Spires*, 240 S.W.2d 357, 359 (Tex.Civ.App. El Paso 1950, writ ref'd n.r.e.); *Collins v. Griffith*, 105 S.W.2d 895 (Tex.Civ.App. Amarillo 1937, no writ). A constructive trust may be imposed where one acquires legal title to property in violation of a fiduciary relationship. *See Binford v. Snyder*, 144 Tex. 134, 189 S.W.2d 471 (1945); *Dilbeck v. Blackwell*, 126 S.W.2d 760 (Tex.Civ.App. Texarkana 1939, writ ref'd).

There is ample evidence to justify imposing a constructive trust on the interest acquired by the Lesikars. Although the title to the working interest was assigned to Lyn, the legal title was acquired by Lyn as community property of himself and
304 Harriet. Thus, Harriet also became a *304 holder of an interest in the property by virtue of the assignment. We have previously held that Harriet breached her fiduciary duty in dismissing the

overpayment claim and acquiring the Clark, Thomas working interest. Lyn was likewise guilty of fraud and deceit in procuring the interest.

The final judgment awarded as damages not only a constructive trust over the Clark, Thomas interest in wells 2 and 5, but also part of the overpayment. The Lesikars contend that the overpayment award, in addition to the constructive trust award, is a windfall. We agree.

When one's funds or other assets are used by a fiduciary to acquire property for himself, the aggrieved party may seek the property itself or its value. *See D. Sullivan Co. v. Ramsey*, 155 S.W. 580, 586 (Tex.Civ.App. San Antonio 1913, no writ); *Ingenhuett v. Hunt*, 39 S.W. 310 (Tex.Civ.App. 1897, writ ref'd); 90 C.J.S. *Trusts* § 450, at 865 (1955). Thus, the beneficiary may elect which remedy to pursue. Jenny prayed for recovery of the overpayment, or alternatively for a constructive trust on the Clark, Thomas working interest in wells 2 and 5. The jury awarded Jenny both the overpayment and the working interest, and neither the estate nor Jenny has elected between those recoveries. Under the authority of *Birchfield v. Texarkana Mem'l Hosp.*, 747 S.W.2d 361 (Tex. 1987), we hold that Jenny should recover her rightful interest in the property, which the evidence shows to be of a greater value than her share of the claim for overpayment. *See Birchfield v. Texarkana Mem'l Hosp.*, 747 S.W.2d at 367, holding that where the prevailing party fails to elect between alternative measures of damages, the court should use the findings affording the greater recovery and render judgment accordingly.

The amount the jury awarded as the recoverable overpayment was $298,547.00. James Davis's testimony was that the present market value of the working interest in wells 2 and 5 was $207,842.69. We are aware that the amount of the recovery for the overpayment might suggest that it is more valuable than the recovery of the 1/6 working interest in wells 2 and 5; however, we must remember that the claim for overpayment was not certain. Jenny's or the estate's ability to recover all the alleged overpayment was speculative at best. Moreover, the current market value does not give adequate consideration to future revenues that wells 2 and 5, which are producing wells, will generate. In addition, through all of their conduct, Harriet and Lyn certainly acted as if the working interest in wells 2 and 5 was more valuable than the claim for overpayment.

We therefore delete the overpayment award from the judgment and uphold the imposition of a constructive trust, with modification. The final judgment held the entire interest in the Clark, Thomas interest in constructive trust and distributed it in equal thirds to Jenny for life, Harriet for life, and Fay in fee simple. However, Lewis bought the interest in the T. W. Lee lease before he and Fay were married; therefore, it was his separate property, which in his will he gave in equal portions to Harriet and Jenny. If the estate had recovered the overpayment, Harriet and Jenny, as co-equal beneficiaries under Lewis's will, each would have received one half. As such, Lyn holds the Clark, Thomas interest in wells 2 and 5 in constructive trust only as to Jenny's one half. Jenny should receive that one half, while Harriet keeps the other.

As we have stated, the Lesikars argue that they did not release the Clark, Thomas overpayment claim, so the estate lost nothing when they acquired the working interest. They argue that Lyn only indemnified Clark, Thomas against any claims for the overpayment, and Lyn now, in effect, still owes the overpayment to Jenny and the estate. We disagree. Even if Lyn's indemnification to Clark, Thomas on the overpayment only substitutes one
305 debtor for another, that *305 substitution was not authorized by Jenny or the estate, and it deprives them of a valuable asset — the availability of recovery from Clark, Thomas. Additionally, as we have already noted, substituting Lyn and Harriet as

debtors in the place of Clark, Thomas places Harriet in a conflict of interest relationship to the estate.

Actual Damages

The final judgment indicates that the trial court awarded part of the overpayment as actual damages. The Lesikars raise several contentions relating to that recovery. We have held that because of the election of remedies rule, Jenny cannot recover both the property through a constructive trust and the claim for overpayment that was used to acquire the property. We have sustained the recovery of the working interest by a constructive trust and will eliminate the recovery of the overpayment, thus making it unnecessary to discuss the Lesikars' remaining contentions pertaining to that recovery.

In question 14, the jury awarded Jenny additional actual damages for 1) "costs incurred in correcting the wrongful conduct," 2) "failure to pay operational expenses on the T. W. Lee Lease," 3) loss of the value of the Clark, Thomas interest on August 9, 1994," and 4) "unpaid estate income tax return preparation expense for tax year 1994." The judgment indicates that the trial court, rather than awarding the third element, imposed a constructive trust over the interest in wells 2 and 5. The Lesikars contend that the form of Question 14 was error and that the first, second, and fourth damage awards are unrecoverable for various reasons.

Form of the Question

Question 14 asked, "What sum of money, if any, if paid now in cash, would fairly and reasonably compensate Jenny Lou Lewis Rappeport for her damages, if any, that *resulted from* such wrongful act you have found in Questions 1, 2, 3, 4, 5 or 12?" (emphasis added). In questions 1, 2, and 3, the jury found Harriet liable for breach of fiduciary duty and Harriet and Lyn liable for fraud. The Lesikars contend that the breach of fiduciary duty and fraud theories on which the damage question was partly predicated limit recovery to damages that are proximately caused by their actions. They contend that the submission of question 14 was error because the court used the words "resulted from" and did not require the jury to find that the damages were proximately caused by the wrongful acts, thereby lessening Jenny's burden of proof. We overrule this contention.

Actual damages available for breach of fiduciary duty and fraud include both general or direct damages and special or consequential damages. *See Airborne Freight Corp. v. C. R. Lee Enters., Inc.*, 847 S.W.2d 289, 295 (Tex.App.-El Paso 1992, writ denied). Direct damages compensate the plaintiff for loss that is conclusively presumed to have been foreseen by the defendant from his wrongful act. *Arthur Andersen Co. v. Perry Equip. Corp.*, 945 S.W.2d 812, 816 (Tex. 1997). Consequential damages, unlike direct damages, are not presumed to have been foreseen or to be the necessary and usual result of the wrong. Plaintiff must plead and prove them separately, and they must be premised on a finding that they proximately resulted from the wrongful conduct of the defendant. *Arthur Andersen Co. v. Perry Equip. Corp.*, 945 S.W.2d at 816; *Airborne Freight Corp. v. C. R. Lee Enters., Inc.*, 847 S.W.2d at 295. Thus, courts speak of a proximate cause or a foreseeability showing in the context of special or consequential actual damages only, not in the context of direct actual damages. Additionally, the Texas Pattern Jury Charges suggest that a damage question asking the jury to assign *direct* damages resulting from fraud should use the words "resulted from," while a question asking the jury to assign *consequential* damages should use the words "proximately caused by." *See*
306 4 Comm. on Pattern *306 Jury Charges, State Bar of Tex., Texas Pattern Jury Charges PJC 110.19, 110.20 (1990).

In the trial court, the Lesikars objected simply that question 14 contained "no issues of proximate cause." On appeal, they do not contend that question 14 asks the jury to award special or

consequential damages. Instead, they argue simply that the breach of fiduciary duty and fraud theories require a finding that the damages were proximately caused by their actions. Assuming the Lesikars' objection preserved error, their argument is incorrect, and we overrule the contention.

Costs Incurred in Correcting the Wrongful Conduct

After the assignment of wells 2 and 5 to Lyn, and on the Lesikars' application made without Jenny's knowledge, the Railroad Commission transferred the operations of the T. W. Lee lease from L G to Lyn. As a result, Jenny incurred attorneys' fees in contesting the transfer of operations before the Railroad Commission. In question 14(1), the jury awarded Jenny $12,000.00 as "costs of correcting wrongful conduct." The parties have stipulated that the "cost of correcting wrongful conduct" award refers to the Austin attorneys' fees. The Lesikars challenge the award of the Austin attorneys' fees on several grounds. One of their arguments is that Jenny was required, but failed, to present expert testimony that the fees were reasonable and necessary. Without addressing the Lesikars' other arguments, we sustain the point on this ground.

As a general rule, unless expressly provided for by statute or contract, attorneys' fees incurred in the defense or prosecution of a lawsuit are not recoverable. *Turner v. Turner*, 385 S.W.2d 230, 233 (Tex. 1964). But, attorneys' fees incurred in prior litigation with a third party are recoverable in a subsequent suit as actual damages.[1] *See Turner v. Turner*, 385 S.W.2d at 234; *Standard Fire Ins. Co. v. Stephenson*, 963 S.W.2d 81, 90 (Tex.App.-Beaumont 1997, no pet.); *Crum Forster, Inc. v. Monsanto Co.*, 887 S.W.2d 103, 129 (Tex.App.-Texarkana 1994, judgm't vacated w.r.m.);
307 *Nationwide Mut. Ins. Co. v. Holmes*, 842 S.W.2d 335, 340-41 (Tex.App.-San Antonio 1992, writ denied); *Baja Energy, Inc. v. Ball*, 669 S.W.2d 836 (Tex.App.-Eastland 1984, no writ); *Powell v. Narried*, 463 S.W.2d 43 (Tex.Civ.App. El Paso 1979, writ ref'd n.r.e.). The recovery in such a case is based on equitable grounds because the claimant was required to prosecute or defend litigation as a consequence of the wrongful act of the defendant. As in the traditional recovery of attorneys' fees, the plaintiff may recover as damages only those attorneys' fees that are reasonable and necessary. *See Turner v. Turner*, 385 S.W.2d at 234; *Nationwide Mut. Ins. Co. v. Holmes*, 842 S.W.2d at 340-41; *Powell v. Narried*, 463 S.W.2d at 46. As stated by the court of appeals in *Powell*,

> [1] Several courts of appeals have held that the recovery of attorneys' fees is allowed only when provided for by statute or contract, even where such fees were incurred in other litigation and are sought as actual damages. *See, e.g.*, *Peterson v. Dean Witter Reynolds, Inc.*, 805 S.W.2d 541, 549 (Tex.App.-Dallas 1991, no writ); *Cupples Coiled Pipe, Inc. v. Esco Supply Co.*, 591 S.W.2d 615 (Tex.Civ.App. El Paso 1979, writ ref'd n.r.e.); *Dalton S.S. Corp. v. W. R. Zanes Co.*, 354 S.W.2d 621, 624 (Tex.Civ.App. Fort Worth 1962, no writ). We agree with other courts and hold that a plaintiff may recover attorneys' fees as damages where the defendant's wrongful conduct forces the plaintiff to prosecute or defend litigation in another proceeding.

> [W]here the natural and proximate consequence of a wrongful act has been to involve a plaintiff in litigation with others, there may, as a general rule, be a recovery in damages of the *reasonable* expenses incurred in such prior litigation . . . but such expenses . . . must have been incurred *necessarily and in good faith, and the amount thereof must be reasonable.*

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Powell v. Narried, 463 S.W.2d at 46 (emphasis added); *accord Nationwide Mut. Ins. Co. v. Holmes*, 842 S.W.2d at 340-41.

At trial, Jenny's attorney asked Jenny only whether she deemed the Austin attorneys' *services*, not *fees*, reasonable and necessary. Jenny answered that she did. The Lesikars objected that "what [Jenny] deems reasonable and necessary . . . is not relevant." They did not offer any controverting evidence. The Lesikars' first contention is that the trial court erred in overruling their objection to Jenny's testimony, in which they claim she testified that her Austin attorneys' fees were reasonable and necessary. They argue that Jenny is not qualified to testify as to the reasonableness and necessity of attorneys' fees.

We do not decide whether Jenny's opinion that her attorneys' fees were reasonable and necessary, had she given it, is irrelevant to that issue. Jenny's testimony was only that she considered the Austin attorneys' work on her case, not their fees, reasonable and necessary. Whether the admission of this particular testimony was irrelevant generally, we need not decide, because this testimony certainly is irrelevant to our determination of the Lesikars' second contention that without expert testimony, there is insufficient evidence of reasonable and necessary attorneys' fees.

Other than Jenny, no witness testified regarding the Austin attorneys' fees. Thus, there was no testimony, expert or otherwise, regarding whether those fees were reasonable and necessary. The only other evidence related to the Austin attorneys' fees were invoices the Austin attorneys sent to Jenny for payment, which indicated the amount of the fees but did not indicate the number of hours worked or an hourly rate.

Jenny has cited no authority, and we have found none, expressly setting out a standard for determining reasonableness in cases where attorneys' fees are sought as damages. We note that in *Powell*, in denying recovery of attorneys' fees because of several inadequacies in the record, the court suggested that some testimony that the fees are reasonable and necessary is required. *See Powell v. Narried*, 463 S.W.2d at 46. Rather than address the sufficiency of her evidence, Jenny argues that pursuant to Section 38.003 of the Texas Civil Practice and Remedies Code, she is entitled to the presumption that "the usual and customary attorney's fees for a claim of the type described in Section 38.001 are reasonable." Tex. Civ. Prac. Rem. Code Ann. §§ 38.001, 38.003 (Vernon 1997). However, Jenny's action before the Railroad Commission was not brought under Section 38.001; therefore, Jenny cannot benefit from any presumption that statute allows. Further, the presumption necessitates some showing that the fees were usual and customary. Here, the record contains no testimony that the Austin attorneys' fees were usual and customary.

In addition, Jenny cites *Musgrave v. Brookhaven Lake Prop. Owners Ass'n*, 990 S.W.2d 386 (Tex.App.-Texarkana 1998, pet. denied), for the proposition that the trial court can take judicial notice of records in its court in deciding that attorneys' fees are reasonable and necessary. Attorneys' fees in *Musgrave* were awarded by this Court pursuant to Section 5.006 of the Texas Property Code, which is inapplicable to this case. *See Musgrave v. Brookhaven Lake Prop. Owners Ass'n*, 990 S.W.2d at 400. Moreover, in this case, the jury was the trier of fact, and while a party enjoys a presumption of reasonableness and the availability of judicial notice for claims brought under Chapter 38 of the Texas Civil Practice and Remedies Code, neither does that statute apply, and Jenny has not demonstrated that the trial court did, in fact, take judicial notice of anything. *See* Tex. Civ. Prac. Rem. Code Ann. § 38.001.

Finally, Jenny contends that her uncontroverted testimony may be taken as true as a matter of law. The general rule is that the testimony of an
308 interested witness, *308 though not contradicted, does no more than raise a fact issue to be determined by the jury. *Ragsdale v. Progressive Voters League*, 801 S.W.2d 880, 882 (Tex. 1990);

Disbrow v. Healey, 982 S.W.2d 189, 192 (Tex.App.-Houston [1st Dist.] 1998, no pet.). However, there is an exception to the rule:

> There may be cases in which the expert testimony as to the value of an attorney's services is so free from inconsistencies, so thoroughly supported by undisputed facts in evidence, and so clearly in accord with knowledge and experience which the jury must have had and with the information obtained by them on the trial, that the court would be justified in accepting that testimony as conclusive. . . .

Gulf Paving Co. v. Lofstedt, 144 Tex. 17, 188 S.W.2d 155, 161 (1945). Thus, this exception applies, in the context of proving reasonable attorneys' fees, only to competent evidence of reasonable attorneys' fees. Only Jenny testified, and she testified only that the Austin attorneys' *services* were reasonable.

Jenny has cited no authority as to why we should not apply in this case the established rules of law pertaining to the reasonableness of attorneys' fees, and we perceive no reason not to, simply because the attorneys' fees here have been awarded as actual damages. Thus, in cases where attorneys' fees incurred in the present litigation are sought, while an attorneys' testimony as to the reasonableness of fees is not conclusive proof of that issue, such testimony is generally required. *Gulf Paving Co. v. Lofstedt*, 188 S.W.2d at 161; *Nguyen Ngoc Giao v. Smith Lamm, P.C.*, 714 S.W.2d 144, 149 (Tex.App.-Houston [1st Dist.] 1986, no writ). Generally, the issue of reasonableness and necessity of attorneys' fees requires expert testimony; an attorney testifies as to reasonableness, and the testifying attorney must be designated as an expert before he testifies. *See E. F. Hutton Co. v. Youngblood*, 741 S.W.2d 363, 364 (Tex. 1987).

We conclude that the attorneys' bills, in the absence of expert testimony as to the reasonableness and necessity of the fees, is insufficient evidence that the fees were reasonable and necessary. We therefore reform the judgment to delete Jenny's recovery of $12,000.00 for costs incurred in correcting the wrongful conduct.

Unpaid Operational Expenses

In question 14(4), Jenny recovered as actual damages $26,122.00 for "unpaid operational expenses," the amount that she alleged the Lesikars owed from 1996 through 1998 for their proportionate share of expenses of operating the lease, which Jenny sought under theories of reimbursement, unjust enrichment, and *quantum meruit*. The Lesikars contend that the trial court erred in refusing to disregard the jury's award for these unpaid operating expenses, which they contend is immaterial because the predicating theories of recovery, breach of fiduciary duty, fraud, and conspiracy do not establish any obligation to pay the expenses, but such obligation sounds in contract. We hold that the point has been waived.

A motion to disregard a jury finding may properly be granted only if the finding has no support in the evidence or the issue is immaterial. *Spencer v. Eagle Star Ins. Co. of Am.*, 876 S.W.2d 154 (Tex. 1994). The Lesikars argue that the question regarding unpaid operating expenses should not have been submitted because it is an improper measure of damages under the theories of recovery submitted. This argument amounts to an objection to the charge, which the Lesikars must have made in the trial court, or it is waived. *See* Tex.R.Civ.P. 274. Because the Lesikars failed to object to question 14 on this ground, they have waived the alleged error. *See id.*

Unpaid Estate Income Tax Return Preparation Expenses

In question 1(e), the jury found that Harriet
309 breached her fiduciary duty by *309 improperly spending funds that Jenny deposited in trust with Werley for the purpose of paying Harriet's share of accounting costs for the estate's income tax return preparation in 1994. Based on that finding, in

question 14(5), the jury awarded Jenny $1,750.00 for Harriet's "unpaid estate income tax return preparation expense for tax year 1994." This figure represents Harriet's one-half share of the total accounting costs which Jenny, on behalf of the estate, ultimately paid to the accountants. The Lesikars concede that the funds Werley held in trust for payment of Harriet's share of accounting costs were not paid to the accountants, but they contend that Harriet cannot be held liable for the failure to pay them. They argue in part that the funds are still being held in trust, and that there is no evidence that Harriet spent the funds. We sustain the point on this ground.

While there may be evidence that Werley and Harriet were obligated to pay the funds to the accountants but failed to do so, we agree that there is no evidence that Harriet spent the funds. Jenny has pointed out no evidence, and we have found none, showing that Harriet actually spent the funds held in trust. The only question on which the actual damages award for unpaid income tax return preparation expenses could have been based was question 1(e), which was a pointed question, asking specifically whether Harriet breached her fiduciary duty "in *spending* funds deposited with her agent in trust for payment of professional accounting costs of the estate" (emphasis added). Because we find no evidence that Harriet actually spent the funds, we reform the judgment to delete Jenny's recovery of $1,750.00 for unpaid estate income tax preparation expenses.

Punitive Damages

In findings 1 through 5 and 12, the jury found that Harriet breached her fiduciary duty, that both Harriet and Lyn committed fraud and engaged in a conspiracy, and that Lyn acquired operation of the lease by deception and intentionally interfered with an operating agreement. Based on the conduct it found in questions 1 through 5 *or* 12, the jury awarded actual damages. Based on that same conduct, the jury awarded $2,000,000.00 in punitive damages against Lyn. Based on the conduct it found in Questions 1, 3, *or* 4 (breach of fiduciary duty, fraud, and conspiracy), the jury awarded $500,000.00 in punitive damages against Harriet, which the trial court reduced to $200,000.00. The Lesikars contend that the trial court erred in awarding any punitive damages because 1) there are defects in the actual damages awards and the theories of recovery underlying the punitive damages awards, and 2) Texas procedures for assessing punitive damages violate due process protections. In the alternative, they contend that the punitive damages awards are excessive.

Defective Basis Supporting Punitive Damages

The Lesikars contend that there must be an award of actual damages in tort before an award of punitive damages is proper, and further that the actual damages awards here were not awarded in tort, so we must reverse the punitive damages awards. Citing *Lovelace v. Sabine Consol., Inc.,* 733 S.W.2d 648, 654-55 (Tex.App.-Houston [14th Dist.] 1987, writ denied), they also contend that there must be a finding of liability on a theory of recovery that supports punitive damages, and further, because the punitive damages question was asked in the disjunctive, we must reverse the punitive damages awards if any one of the theories of recovery in questions 1 through 5 or 12 cannot support punitive damages. We overrule these contentions.

The Lesikars first contend that none of the actual damages awards was awarded in tort, which defeats the punitive damages recovery. However, the trial court granted Jenny's plea to impose a constructive trust on the interest in wells 2 and 5 310 that the Lesikars wrongfully *310 acquired. We disagree that a defect in the actual damages awards would defeat the punitive damages awards in this case, because a wholly independent ground for the recovery of punitive damages exists. *See Lovelace v. Sabine Consol., Inc*. 733 S.W.2d at 654-55.

Generally, there must be an award of actual damages in tort before an award of punitive damages is proper. *See Jim Walter Homes, Inc. v. Reed*, 711 S.W.2d 617, 618 (Tex. 1986). But the Supreme Court has authorized the recovery of punitive damages in actions sounding in equity, even where there is no award of typical actual damages. *See Nabours v. Longview Sav. Loan Ass'n*, 700 S.W.2d 901, 904 n. 3 (Tex. 1985); *Int'l Bankers Life Ins. Co. v. Holloway*, 368 S.W.2d at 584. In *Holloway,* the plaintiff corporation elected to sue for the profits gained by the defendants in breach of their fiduciary duties. *See Int'l Bankers Life Ins. Co. v. Holloway*, 368 S.W.2d at 584. In upholding an award of punitive damages, the Supreme Court stated,

> It is consistent with equitable principles for equity to exact of a defaulting corporate fiduciary not only the profits rightfully belonging to the corporation but an additional exaction for unconscionable conduct. There should be a deterrent to conduct which equity condemns and for which it will grant relief.

Id. at 584. In *Nabours*, the Supreme Court rejected the contention that a mere grant of injunctive relief will support an award of punitive damages, but stated its holding "should not be confused with an absolute refusal to allow punitive damages in a case where equitable relief is had." *See Nabours v. Longview Sav. Loan Ass'n*, 700 S.W.2d at 905. Recognizing a "recovery of property" exception to the rule requiring actual damages, the court stated, "[W]here equity requires the return of property, this `recovery of the consideration paid as a result of fraud constitutes actual damages and will serve as a basis for the recovery of exemplary damages.'" *See Nabours v. Longview Sav. Loan Ass'n*, 700 S.W.2d at 904 (quoting *Int'l Bankers Life Ins. Co. v. Holloway*, 368 S.W.2d at 568). We note that in a recent court of appeals case, *ProCom Energy L.L.A. v. Roach*, although the equitable relief did not pertain to the *return* of property, the court held that a lack of finding of actual damages did not preclude an award of punitive damages to an operator who recovered a constructive trust on an overriding royalty interest acquired by a gas producer, because of fiduciary-breach and fraud relating to the gas producer's promise to jointly acquire interest in the property and its subsequent failure to convey the interest. *See ProCom Energy L.L.A. v. Roach*, 16 S.W.3d 377, 385 (Tex.App.-Tyler 2000, no pet. h.).

We conclude that the estate's recovery of the interest in wells 2 and 5 based on breach of fiduciary duty and fraud may support an award of punitive damages. The fact that the jury awarded other actual damages for the conduct it found in questions 1 through 5 and 12 does not render punitive damages improper, because the property recovered by the estate is an award of actual damages that will support an award of punitive damages.

Next, citing *Lovelace v. Sabine Consol., Inc.,* the Lesikars contend that because the punitive damages question was asked in the disjunctive, the punitive damages awards must be reversed if any one of the theories of recovery in questions 1 through 5 or 12 cannot support punitive damages. The only theory of recovery the Lesikars fault is the theory in question 1 regarding breach of fiduciary duty. They argue that this theory is incapable of supporting punitive damages because an issue on the requisite intent or malice needed to support a punitive damages award was not submitted to the jury, and it was improper for the trial court to make its own finding on that element.

In *Lovelace*, the jury found that the defendant had
311 breached two contracts, *311 breached his fiduciary duty, and committed fraud. The jury then awarded actual damages attributable to the defendant's conduct, without separation of damages according to the theory of liability, whether contract or tort. Finally, the jury awarded punitive damages. The court of appeals reversed

the award of punitive damages. *See Lovelace v. Sabine Consol., Inc.*, 733 S.W.2d at 654-55. The court stated:

> An appellant cannot be held accountable for the failure of an appellee to secure separate jury findings upon which an accurate judgment could be based. Nor can an appellate court imply a finding of actual damages in tort, because a court of appeals cannot make original findings of fact; it can only "unfind" facts. For the foregoing reasons, we hold that the trial court erred in awarding punitive damages where there was no independent finding of actual damages in tort.

Id. at 655 (citations omitted). Our case is somewhat different from *Lovelace*, because here, the court awarded a constructive trust for the conduct it found in questions 1 through 5 or 12, which amounts to actual damages, which in turn support punitive damages. However, we agree that punitive damages may not be sustained where one of the theories of recovery on which punitive damages were disjunctively awarded does not support punitive damages.

A defendant's intentional breach of fiduciary duty is a tort for which a plaintiff may recover punitive damages. *See Int'l Bankers Life Ins. Co. v. Holloway*, 368 S.W.2d at 583-84; *Hawthorne v. Guenther*, 917 S.W.2d at 936; *InterFirst Bank Dallas, N.A. v. Risser*, 739 S.W.2d 882, 907 (Tex.App.-Texarkana 1987, no writ). While it is a general rule that Texas courts allow the recovery of punitive damages where the defendant, in committing a tort, acted willfully, maliciously, or fraudulently, where punitive damages are awarded for breach of fiduciary duty the actual motives of the defendant and whether the defendant acted with malice are immaterial. But something more than a simple breach is required for the recovery of punitive damages; the acts constituting the breach must have been fraudulent, or at least intentional. *See Int'l Bankers Life Ins. Co. v. Holloway*, S.W.2d at 584; *InterFirst Bank of Dallas, N.A. v. Risser*, 739 S.W.2d at 907. An intentional breach may be found where the fiduciary intends to gain an additional benefit for himself. *See Int'l Bankers Life Ins. Co. v. Holloway*, 368 S.W.2d at 583-84. In *Holloway*, the Supreme Court suggested that willful and fraudulent acts are presumed when the fiduciary, as in *Holloway*, gains an additional benefit for himself as a result of his breach. In *Texas Bank Trust Co. v. Moore*, 595 S.W.2d 502, 507 (Tex. 1980), the Supreme Court held that exemplary damages are proper when self-dealing by a fiduciary has occurred. Where, as here, a fiduciary in fact gains a benefit by breaching her fiduciary duty, willful and fraudulent acts may be presumed. In fact, the jury found that Harriet breached her fiduciary duty *and* committed fraud. There was no evidence of any conduct amounting to fraud apart from the conduct found to be a breach of Harriet's fiduciary duty. Thus, the same conduct underlying the finding of breach also amounted to fraud.

Omitted Element in the Charge

Question 1 asked whether Harriet breached her fiduciary duty in various respects. No question asked whether Harriet acted intentionally, willfully, or fraudulently, or whether she intended to gain an additional benefit for herself. In its final judgment, the trial court supplied the alleged omitted element, finding not only that Harriet engaged in conduct in breach of her fiduciary duty but also that she did so willfully and maliciously. Even if a question on intent were required in this case, the Lesikars have failed to preserve the error.

Where a jury awards damages based on a charge that omits an element 312 *312 necessary to sustain a ground of recovery, the trial court may either file a written finding regarding the missing element, or may render judgment without one. If the trial court does not file a written finding, the omitted element is deemed found in support of the judgment so long as no objection was made or issue requested,

and the evidence supports such a finding. *See* Tex.R.Civ.P. 279; *State Farm Life Ins. Co. v. Beaston*, 907 S.W.2d 430, 436 (Tex. 1995).

The Lesikars contend that the trial court's finding of willfulness and malice was improper because of the Texas Supreme Court's holding in *Martin v. McKee Realtors, Inc.*, 663 S.W.2d 446 (Tex. 1984). In that case, the trial court awarded discretionary damages under the DTPA where the plaintiffs obtained a jury finding that the defendants acted "knowingly," a requirement for the recovery of discretionary damages under the DTPA, but where they failed to request a jury issue on discretionary damages. The plaintiff-appellees contended that since the "knowingly" issue had been submitted to the jury, it was proper under Texas Rule of Civil Procedure 279 for the issue of punitive damages to have been deemed found in support of the discretionary damages award. In rejecting this argument, the Supreme Court noted a court of appeals case, *Holland v. Lesesne*, 350 S.W.2d 859 (Tex.Civ.App. San Antonio 1961, writ ref'd n.r.e.), wherein punitive damages were held to be in the nature of an independent theory of recovery and could not be awarded absent a special issue thereon. The court then held that a plaintiff seeking to recover discretionary damages under the DTPA must request a jury issue on such damages to avoid waiver of the recovery of those damages. *See Martin v. McKee Realtors, Inc.*, 663 S.W.2d at 448.

McKee does not parallel the present situation. Here, a question on punitive damages, being in the nature of an independent ground of recovery, was submitted, but a question on an aggravating factor necessary to sustain a heightened damage award was omitted. In *McKee*, the Supreme Court cited *Holland* in support of its statement that a trial court may not make findings of fact where the omitted issue is an independent ground of recovery. In *Holland* the San Antonio Court of Appeals held that a finding that the conversion was either malicious or willfully done, essential to a recovery of punitive damages, was the plaintiff's issue, and that the issue was waived in the absence of a request by the plaintiff for submission of the issue. *See Holland v. Lesesne*, 350 S.W.2d at 865.

Despite the Supreme Court's citation to *Holland*, more recent holdings of the Supreme Court suggest that the trial court may make a finding of intent when an issue on it is omitted, if an issue on punitive damages is submitted. In *State Farm Life Ins. Co. v. Beaston*, 907 S.W.2d at 437, the Supreme Court stated that the trial court, in expressly excluding the award of mental anguish damages where the jury awarded them without finding that the defendant acted knowingly, must not have found that the defendant acted knowingly, although the trial court could have so found under Rule 279. In *Ramos v. Frito-Lay, Inc.*, 784 S.W.2d 667, 668 (Tex. 1990), the court held that although the jury awarded punitive damages despite finding that the appellee was acting in his managerial capacity, the finding would be deemed found since there was no objection. In addition, the Beaumont Court of Appeals squarely addressed the issue presented here and held that where punitive damages were awarded for breach of fiduciary duty, but the issue of intent, self-dealing, or malice necessary to support the award was omitted, the defendant was required to object to the omission under Rule 279, and failing to do so, the element could be deemed found under Rule 279. *See Hawthorne v. Guenther*, 917 S.W.2d at 936.

We hold that even if the submission of a question
313 of intent was required in this *313 case, the submission of the punitive damages question along with the submission of the issue of breach of fiduciary duty required the Lesikars to object to the omitted issue of intent. *See* Tex.R.Civ.P. 279; *State Farm Life Ins. Co. v. Beaston*, 907 S.W.2d at 437; *Ramos v. Frito-Lay, Inc.*, 784 S.W.2d at 668; *Hawthorne v. Guenther*, 917 S.W.2d at 936. Pursuant to Rule 279, where a ground of recovery consists of more than one element, and one or more essential elements necessarily referable

thereto are submitted and found by the jury, but one element is omitted, that element may be found by the court or may be deemed found in support of the judgment if the opposing party does not object to its omission or request an issue thereon, and there is factually sufficient evidence to support the omitted finding. Tex.R.Civ.P. 279. The Lesikars failed to object or request an issue, so the trial court could properly find the omitted element if there is sufficient evidence to support it. *See id.; State Farm Life Ins. Co. v. Beaston*, 907 S.W.2d at 437. Without detailing again the evidence supporting fraud, we find there is sufficient evidence to support the court's finding.

Due Process

The Lesikars contend that Texas procedures for reviewing punitive damages violate constitutional due process protections, specifically because (1) Texas trial courts are not required to affirmatively justify the punitive awards on the record and (2) the Texas Supreme Court does not consider the excessiveness of punitive damage awards, but considers only whether courts of appeals applied an erroneous standard of review. We overrule this contention.

The United States Supreme Court has held that due process imposes constraints on the size of punitive damages awards and on the procedures under which punitive damages are awarded and reviewed. *See Honda Motor Co. v. Oberg*, 512 U.S. 415, 114 S.Ct. 2331, 129 L.Ed.2d 336 (1994); *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 113 S.Ct. 2711, 125 L.Ed.2d 366 (1993); *Pac. Mut. Life Ins. Co. v. Haslip,* 499 U.S. 1, 111 S.Ct. 1032, 113 L.Ed.2d 1 (1991). The Court's recent opinions, however, do not provide specific due process guidelines for lower courts to follow. *Transp. Ins. Co. v. Moriel*, 879 S.W.2d 10, 12 n. 1, 27 (Tex. 1994). Instead, the Court has simply evaluated the constitutionality of punitive damages awards on a case-by-case basis, holding that certain states' procedures in a given case either violate or comport with due process. *See Honda Motor Co. v. Oberg*, 512 U.S. at 432 (holding that Oregon's procedure, which failed to provide any post-verdict review of the amount of punitive damages, was unconstitutional); *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 465 (upholding the award as constitutional); *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. at 23-24 (upholding the award as constitutional). In *Haslip*, the Court advised, "We need not, and indeed we cannot, draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case." *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. at 18, 111 S.Ct. 1032.

The Texas Supreme Court in *Moriel*, in remanding the case for retrial, considered it advisable to articulate procedural standards for the trial courts to be applied to all subsequent punitive damages cases in Texas. *See Transp. Ins. Co. v. Moriel*, 879 S.W.2d at 26. The *Moriel* case contains our current procedural standards. Because it had no "bright line guidance" from the Supreme Court, the court compared Texas procedures to the procedures examined by the Supreme Court in *Haslip* and *TXO Production*. The court concluded that our procedures did not compare favorably. It recognized as disparate that Texas trial courts, unlike other courts, are not required to scrutinize each award and set forth reasons on the record for refusing to disturb a jury verdict. In addition, our
314 *314 Supreme Court, unlike its counterparts in other states, is precluded from reviewing the evidence supporting a punitive damages award for factual sufficiency. *See Transp. Ins. Co. v. Moriel*, 879 S.W.2d at 28.

In *TXO Production*, the Supreme Court analyzed punitive damages in a case where the trial court had not articulated on the record its reasons for denying motions for judgment notwithstanding the verdict and for remittitur. Although the Court stated that it is always helpful for trial courts to explain the basis for their rulings, it held that this failure was not a constitutional violation. *See TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. at 465. The *Moriel* court also addressed the Lesikars'

first argument. It recognized that other jurisdictions expressly require the trial court to articulate its reasons for refusing to disturb a punitive damages award, most adopting them after *Haslip*. In addition, it observed that several federal appellate courts reviewing punitive damages awards since *Haslip* have remanded the cases to the trial court with instructions to articulate the reasons for upholding the award. *See Transp. Ins. Co. v. Moriel*, 879 S.W.2d at 32. But, rather than make this a requirement, the court noted that such findings would obviously be helpful and urged that they should be made to the extent practicable. *Id.* at 33.

With regard to the argument that our Supreme Court does not consider the excessiveness of punitive damages awards, the *Moriel* court noted that while our punitive damages awards are scrutinized less closely on appeal to the highest court than in other states, due process does not require two levels of appellate review. *See Transp. Ins. Co. v. Moriel,* 879 S.W.2d at 29. We note that the question of excessiveness is purely a factual inquiry and is beyond the Texas Supreme Court's jurisdiction and that the court has jurisdiction to determine only whether the courts of appeals properly review such factual inquiries. *See Ellis County State Bank v. Keever*, 915 S.W.2d 478, 479 (Tex. 1995); *Alamo Nat'l Bank v. Kraus*, 616 S.W.2d 908, 910 (Tex. 1981). However, it is significant that the Texas Supreme Court also has jurisdiction to evaluate punitive damages awards in light of constitutional substantive due process claims, as in this case. *See Owens-Corning Fiberglas Corp. v. Malone,* 972 S.W.2d 35, 45 (Tex. 1998).

To address the disparities and bring Texas procedure in line as providing adequate procedural safeguards to protect against grossly excessive awards, the *Moriel* court made the following two changes: It adopted the requirement, upon request, of bifurcated trials in punitive damage cases, and held that the court of appeals, when conducting a factual sufficiency review of a punitive damages award, must detail the relevant evidence explaining why that evidence either supports or does not support the award. *Transp. Ins. Co. v. Moriel*, 879 S.W.2d at 31. Several courts of appeals have held that this heightened post-judgment procedure for reviewing punitive damages awards mandated by *Moriel* satisfies due process. *See Convalescent Servs., Inc. v. Schultz*, 921 S.W.2d 731, 740-41 (Tex.App.-Houston [14th Dist.] 1996, writ denied); *I-Gotcha, Inc. v. McInnis*, 903 S.W.2d 829, 844-45 (Tex.App.-Fort Worth 1995, writ denied). Since *Moriel*, the United States Supreme Court has held that Oregon's post-verdict procedures for reviewing punitive damages violated due process. *See Honda Motor Co. v. Oberg*, 512 U.S. 415. The procedure in Oregon, however, was significantly dissimilar to the procedure in Texas, and the holding in that case would not require that we find Texas procedures unconstitutional. *See Honda Motor Co. v. Oberg*, 512 U.S. 415; *see also Convalescent Servs., Inc. v. Schultz*, 921 S.W.2d at 740.

In light of the United States Supreme Court's holdings, the Texas Supreme Court's reasoned opinion in *Moriel,* and the decisions of other courts of appeals, we 315 *315 hold that current Texas procedures do not offend constitutional due process protections.

Excessiveness

The Lesikars contend not only that the trial court erred in awarding punitive damages, but also that the punitive damages awards are excessive. We have overruled their first contention, but we agree that the punitive damages awards are excessive.

Punitive damages must be reasonably proportional to actual damages, although there can be no set ratio between actual and punitive damages that will be considered reasonable. *InterFirst Bank Dallas, N.A. v. Risser*, 739 S.W.2d at 909. The amount of punitive damages is largely within the jury's discretion. We may reverse a punitive damage award or suggest a remittitur only if we determine the evidence supporting the award is

factually insufficient or the verdict is so against the great weight and preponderance of the evidence as to be manifestly unjust. *See Transp. Ins. Co. v. Moriel,* 879 S.W.2d at 30; *see also Pool v. Ford Motor Co.*, 715 S.W.2d 629, 635 (Tex. 1986).

Whether an award of punitive damages is excessive is measured by the factors set out in *Alamo Nat'l Bank v. Kraus*, 616 S.W.2d at 910. Those factors include: (1) the nature of the wrong, (2) the character of the conduct involved, (3) the degree of culpability of the wrongdoer, (4) the situation and sensibilities of the parties concerned, and (5) the extent to which such conduct offends a public sense of justice. *Alamo Nat'l Bank v. Kraus*, 616 S.W.2d at 910.

In order to assess the reasonableness of a punitive damages award, we are required to detail the relevant evidence and explain why the evidence either supports or does not support the punitive damages award. *Ellis County State Bank v. Keever*, 888 S.W.2d at 798; *Transp. Ins. Co. v. Moriel*, 879 S.W.2d at 31.

Assessing the criteria set out in the *Kraus* case, we find that the $2,000,000.00 punitive damages award against Lyn is excessive. The loss experienced by the estate and Jenny because of Lyn's acts was purely financial, and in the judgment as we reform it, they will fully recover their financial loss and more. Unlike personal injury cases where monetary damages cannot replace a lost life or restore a maimed body, the actual recovery in this case will make the injured parties completely whole. There was no mental or physical abuse, personal outrage, insult, or opprobrious conduct. Lyn's acts were not calculated to injure anyone's personal sensibilities, and Jenny certainly had not reposed any personal trust in Lyn. In fact, the parties have been adversaries feuding and litigating for nearly fifteen years over their family property. Lyn's motive was financial, not spite. Considering the positions of the parties and the ongoing legal disputes involving them and their property, a $2,000,000.00 punitive damages award against Lyn appears to be the result of passion rather than the result of an objective assessment of the evidence. *See InterFirst Bank of Dallas, N.A. v. Risser*, 739 S.W.2d at 909-10 (Cornelius, C.J., concurring). We will therefore suggest a remittitur of $1,400,000.00 of the punitive damages award against Lyn, leaving the punitive damages against him at $600,000.00.

Additional Errors in the Judgment

The Lesikars contend that the judgment contains additional errors. Specifically, they complain of the trial court's order granting a temporary injunction keeping Lyn from being operator on the T. W. Lee lease, as well as that part of the judgment that confirms L G, Jenny, and Fay as the current operators of the lease.

In August of 1994, Harriet, in her capacity as co-independent executrix of the Lewis estate, submitted a "P-4" form to the Railroad
316 Commission seeking to *316 change the operator of the T. W. Lee oil lease on Commission records from L G to Lyn. The Railroad Commission approved the change. In November of 1994, Jenny appealed to the Railroad Commission, arguing that Harriet did not have authority to file the application. The Railroad Commission disagreed with Jenny and decided that she did not satisfy her burden of showing that she had a good-faith claim to operate the lease and that Lyn did not. Jenny appealed to the trial court in this case seeking a temporary injunction against Lyn. The court granted a temporary restraining order, pursuant to which L G has been operating the lease to date. The Lesikars now contend that the trial court erred both in granting the temporary restraining order and in stating that Jenny is the operator of the lease; they request that we set that part of the judgment aside. They argue that these rulings amount to impermissible collateral attacks on a Railroad Commission ruling. We agree.

Section 85.241 of the Natural Resources Code sets out the procedure for appealing from a Railroad Commission ruling. That section provides:

> Any interested person who is affected by the conservation laws of this state or orders of the commission relating to oil or gas and the waste of oil or gas, and who is dissatisfied with any of these laws or orders, may file suit against the commission or its members in a court of competent jurisdiction in Travis County to test the validity of the law or order.

Tex. Nat. Res. Code Ann. § 85.241 (Vernon 1993). Jenny has not addressed this provision or stated that she followed this procedure. Instead, she sought a temporary injunction against Lyn in the trial court below, and sought to have the ruling permanently set aside. These amount to collateral attacks.

A collateral attack on a judgment is an attempt to avoid its binding force in a proceeding not instituted for the purpose of correcting, modifying, or vacating it, but in order to obtain some specific relief against which the judgment stands as a bar. Our Court in recent opinions has held that the rules concerning collateral attack apply to orders or judgments of quasi-judicial bodies, such as the Railroad Commission, as well as to the courts. *Arkla Exploration Co. v. Haywood, Rice William Venture*, 863 S.W.2d 112 (Tex.App.-Texarkana 1993, writ dism'd by agr.). The exception to the general rule is that a collateral attack upon an agency order may be maintained successfully on one ground alone-that the order is void. An agency order may be void in the requisite sense on either of two grounds: 1) the order shows on its face that the agency exceeded its jurisdiction, or 2) a complainant shows that the order was procured by extrinsic fraud. *Gulf States Utils. Co. v. Coalition of Cities for Affordable Util. Rates,* 883 S.W.2d 739, 758 (Tex.App.-Austin 1994) (Powers, J., dissenting), *rev'd on other grounds,* 947 S.W.2d 887 (Tex. 1997). Neither of these exceptions applies in this case. We therefore hold that the trial court was without authority to circumvent Railroad Commission authority, and we reform the judgment to delete that part of Jenny's recovery.

Attorneys' Fees

Jenny sought attorneys' fees at law or in equity, and/or pursuant to Sections 37.001 and 38.001 of the Texas Civil Practice and Remedies Code. Tex. Civ. Prac. Rem. Code Ann. §§ 37.001, 38.001 (Vernon 1997). Section 37.001 is the Declaratory Judgments Act, and Section 38.001 allows the recovery of attorneys' fees for various claims. The trial court submitted a broad attorney-fee question to the jury: "What is a reasonable fee for the necessary services of Jenny Lou Lewis Rappeport's attorney in this case, stated in dollars and cents?" The jury answered $253,444.00. The Lesikars contend that while Jenny's claim for declaratory judgment will support attorneys' fees, her remaining tort claims will not. Thus, they
317 contend that the court *317 erred in awarding attorneys' fees because Jenny failed to segregate her fees among her various claims or offer proof that her claims are sufficiently interrelated or so incapable of segregation that she should be excused from segregating them. Jenny contends that the Lesikars have waived the alleged error. The Lesikars respond, arguing that they have preserved error because their appellate position is not that Jenny failed to segregate, but that there is legally insufficient evidence that her claims are interrelated, which they have preserved in their post-verdict motions. We reject the Lesikars' distinction and hold that the error has been waived.

As a general rule, a party seeking to recover attorneys' fees carries the burden of proof to establish that he is entitled to them. *Stewart Title Guar. Co. v. Sterling*, 822 S.W.2d 1, 10 (Tex. 1991). When a plaintiff seeks to recover attorneys' fees in a case in which he asserts multiple claims, at least one of which supports an award of fees and at least one of which does not, as the Lesikars contend is the case here, the plaintiff must offer

evidence segregating attorneys' fees among his various claims. *See id.* at 10-11. An exception to this duty to segregate arises when the attorneys' fees are in connection with claims arising out of the same transaction and are so interrelated that their award or denial depends essentially on the same facts. In that circumstance, segregation is not required. *Id.* at 11; *Flint Assocs. v. Intercontinental Pipe Steel, Inc.*, 739 S.W.2d 622, 624-25 (Tex.App.-Dallas 1987, writ denied). Thus, a plaintiff must either segregate his fees among his claims or establish that his claims are sufficiently interrelated.

Jenny's attorney, Jerry Harris, testified to the hours worked and the hourly rate of several attorneys who worked on Jenny's behalf, and the amount he calculated corresponded to the amount awarded. The Lesikars failed to object to his testimony on the basis that Jenny failed to segregate fees among her various claims. Furthermore, although the Lesikars recognize in their brief that without legally sufficient evidence that the claims are interrelated a jury finding of the amount of Jenny's fees is immaterial, the Lesikars failed to object to the submission of the broad attorney-fee question. As a result of these failures, they have waived their complaint in this regard. Where no objection is made to the failure to segregate attorneys' fees, either at the time evidence of attorneys' fees is presented or to the charge, the error is waived. *Green Int'l, Inc. v. Solis*, 951 S.W.2d 384, 389 (Tex. 1997); *Hruska v. First State Bank of Deanville*, 747 S.W.2d 783, 785 (Tex. 1988); *Stewart Title Guar. Co. v. Sterling*, 822 S.W.2d at 11 (stating that remand is appropriate "[i]f a party refuses, *over objection*, to offer evidence segregating attorney's fees among various claims or parties, and an appellate court determines that segregation was required" (emphasis added), and providing that an objection to the failure of the trial court to allocate or segregate the fees in the jury charge is sufficient to preserve error); *see also* Tex.R.Civ.P. 274.

The Lesikars say their argument is not that Jenny *failed to segregate* but that she failed to offer proof that her claims are interrelated, which they may assert in post-verdict motions. These arguments are effectively the same. The rule requiring segregation and the exception requiring proof that the claims are interrelated have been called "corollary" rules. *See 4M Linen Unif. Supply Co. v. W. P. Ballard Co.*, 793 S.W.2d 320, 327 (Tex.App.-Houston [1st Dist.] 1990, writ denied); *Flint Assocs. v. Intercontinental Pipe Steel, Inc.*, 739 S.W.2d at 624-25. Indeed, the Lesikars' attempt to distinguish the arguments fails because they ultimately state, " *where plaintiffs refuse to segregate attorneys' fees*, Texas courts routinely deny any fee recovery" (emphasis
318 added). *318

Where the appellant has waived the error, a trial court may disregard the jury finding only if it is unsupported by the evidence or it is immaterial. *Green Int'l, Inc. v. Solis*, 951 S.W.2d at 389-90 (citing *Spencer v. Eagle Star Ins. Co. of Am.*, 876 S.W.2d at 157); *Norrell v. Aransas County Navigation Dist. No.*, 1 S.W.3d 296, 303-04 (Tex.App.-Corpus Christi 1999, pet. dism'd). The jury awarded $253,444.00 in attorneys' fees. This finding was material and was supported by the uncontroverted testimony of Jenny's attorney. We, therefore, overrule the Lesikars' point and hold that Jenny may recover these attorneys' fees.

The Werley Summary Judgment

In 1994, Jenny amended her pleadings to add Werley as a counter-defendant asserting claims against Werley for civil conspiracy, negligent misrepresentation, and breach of fiduciary duty. Werley moved for summary judgment, which the trial court granted. Jenny has filed a cross-appeal complaining of the trial court's rendition of the adverse summary judgment on her counterclaims against Werley.

To prevail on a motion for summary judgment, a movant must establish that there is no genuine issue of material fact and that he is entitled to

judgment as a matter of law. Tex.R.Civ.P. 166a(c). Summary judgment for a defendant is proper when he negates at least one element of each of the plaintiff's theories of recovery, or pleads and conclusively establishes each element of an affirmative defense. *Science Spectrum, Inc. v. Martinez*, 941 S.W.2d 910, 911 (Tex. 1997). When reviewing a summary judgment, we take as true all evidence favorable to the nonmovant. *Rhone-Poulenc, Inc. v. Steel*, 997 S.W.2d 217, 223 (Tex. 1999). We indulge every reasonable inference and resolve any doubt in the nonmovant's favor. On appeal, the movant still bears the burden of showing that there is no genuine issue of material fact and that he is entitled to judgment as a matter of law.

Conspiracy

Jenny contends that Werley engaged in a conspiracy with Lyn and Harriet to defraud her of her interest in reimbursement for the overpayment to Clark, Thomas. She also contends that Werley conspired with Harriet to assist her in breaching her fiduciary duties to the estate. We have set out the elements of civil conspiracy above. They are: (1) two or more persons; (2) an object to be accomplished; (3) a meeting of the minds; (4) one or more unlawful, overt acts; and (5) damages as the proximate result. *Massey v. Armco Steel Co.*, 652 S.W.2d at 933.

In his summary judgment motion and on appeal, Werley contends that (1) an attorney cannot conspire with his client; (2) he did not commit an underlying fraudulent act on which conspiracy could be based; (3) Lyn and Harriet did not commit an underlying fraud or breach of fiduciary duty and, therefore, could not have conspired with him to engage in those activities; and (4) Jenny did not suffer any damage.

Regarding Werley's first contention, we hold that an attorney may be liable for conspiracy to defraud if he knowingly agrees with others to defraud a third person. *Likover v. Sunflower Terrace II, Ltd.*, 696 S.W.2d 468, 472 (Tex.App.-Houston [1st Dist.] 1985, no writ). Regarding his second contention, even if Werley did not commit a fraudulent act, he could be liable for conspiring to assist the Lesikars in perpetrating their fraud. *Bernstein v. Portland Sav. Loan Ass'n*, 850 S.W.2d 694, 709 n. 12 (Tex.App.-Corpus Christi 1993, writ denied), *overr. on other grounds*, *Crown Life Ins. Co. v. Casteel*, 22 S.W.3d 378, 389 (Tex. 2000). Regarding his third contention, we have already held that there is sufficient evidence to support the jury's findings that Lyn and Harriet committed fraud.

Breach of Fiduciary Duty and Negligent Misrepresentation

Jenny contends that Werley negligently misrepresented material facts to *319 her and that those misrepresentations damaged her. In *McCamish, Martin, Brown Loeffler v. F.E. Appling Interests*, 991 S.W.2d 787 (Tex. 1999), the Texas Supreme Court recognized a cause of action for negligent misrepresentation against an attorney by a nonclient. In this case, Jenny contends that the misrepresentations originate from Werley's failure to disclose certain information, i.e., that Lyn was acquiring Clark, Thomas's interest in wells 2 and 5.

Werley contends that he had no duty to Jenny. He argues that the duty an attorney has in this context does not extend to a plaintiff, like Jenny, on the opposing side of litigation. He also contends that there was no duty because the misrepresentation, if any, was not material and was not such that Jenny was justified in relying on it.

In *McCamish*, the court outlined the scope of the duty imposed on an attorney to a nonclient. Relying on Restatement (Second) of Torts § 552(2) (1977), the court held that the duty arises when (1) the attorney is aware of the nonclient and intends that the nonclient rely on the representation, and (2) the nonclient justifiably relies on the attorney's representation of a material fact. For purposes of determining whether there is

justifiable reliance, a reviewing court must consider the nature of the relationship between the attorney, client, and nonclient.

Jenny contends that Werley made misleading statements to her attorney that nothing was happening with respect to Lyn's effort to acquire the Clark, Thomas interest. She alleges that Werley also denied contacting Clark, Thomas on Lyn's behalf. She contends Werley later admitted sending an assignment to Clark, Thomas, but denied having heard anything from them about it. Within thirty days of these statements, the assignment from Clark, Thomas to Lyn was consummated. Jenny further contends that after completing the assignment arrangement, Werley misrepresented the terms of the assignment to her attorney.

Taking all of these assertions as true, we hold that Werley did not have a duty to Jenny. This case is distinguishable from *McCamish*, which occurred in a transactional, as opposed to a litigation, setting. In this case, the parties had engaged in numerous, protracted suits. The summary judgment evidence reveals, and Jenny admits, that she was aware that Clark, Thomas was interested in settling the overpayment claim and had contacted each of the co-executrices. Under these facts, she was not justified in relying on Werley's statements, even if they were material and Werley intended that she rely on them.

Jenny also contends that Werley misrepresented material facts by failing to disclose information when he had a duty to speak. She argues that as the attorney for the estate representative, he had a duty to disclose that the estate could recover the Clark, Thomas interest, a thing of value. She also contends that Werley had a duty to disclose the extent to which Lyn was attempting to acquire the Clark, Thomas interest. She says she was harmed by her agreement to close the estate, which was based on her belief that the issue of the estate's claims against Clark, Thomas for overpayment would be severed out for further proceedings.

For there to be actionable nondisclosure fraud, there must be a duty to disclose. *Bradford v. Vento*, 997 S.W.2d at 725. Whether such a duty exists is a question of law. *Id.* A duty to disclose may arise in four situations: (1) when one is in a fiduciary relationship; (2) when one voluntarily discloses some information, but not all of the pertinent information; (3) when new information makes an earlier representation misleading or untrue; and (4) when one makes a partial disclosure and conveys a false impression.

Nevertheless, an attorney has no duty to reveal information about a client to a third party when
320 that client is *320 perpetrating a nonviolent, purely financial fraud through silence. *Bernstein v. Portland Sav. Loan Ass'n*, 850 S.W.2d at 704. When an attorney does make misrepresentations on behalf of a client, the general standard for fraud applies. But the attorney has no duty to correct representations that prove to be false. *Id.* We hold that Werley did not have a duty to disclose this fact to Jenny or to correct any representation that proved to be false.

Jenny contends that, by assisting Lyn in acquiring the Clark, Thomas interest, Werley breached his fiduciary duty to the estate beneficiaries "to collect for them any money or other thing of value that might have been received in settlement of the overpayment claim against Clark, Thomas." She predicates the imposition of a duty on Werley's duty to Harriet, and Harriet's duty as co-executrix.

As Jenny candidly admits, however, there are Texas cases holding that a third party does not have a cause of action in negligence against an attorney when there is a lack of privity. *See, e.g., Thompson v. Vinson Elkins*, 859 S.W.2d 617, 621 (Tex.App.-Houston [1st Dist.] 1993, writ denied). She argues for an extension of the law under the facts of this case because of the symmetry between each co-executrix's duties and responsibilities. Privity arises, she contends, because in prosecuting a claim for the estate, the attorney has the same duty he would have if

employed by the other co-executrix — to recover what is owed to the estate. She contends that, in the absence of this privity, one co-executrix cannot protect herself from the fraud of the other.

In making this argument, however, Jenny blurs the respective roles of an executrix and her attorney. The executrix's duty is to prosecute claims on behalf of the estate; the attorney's duty is to give the executrix candid legal advice. The executrix is liable for breach of fiduciary duties to the beneficiaries; the attorney is liable for breach of fiduciary duties to the executrix.

Co-executrices may have the same duties, but their opinions may differ about how best to fulfill those duties. Candid advice from an attorney is invaluable in weighing those competing options. We see no reason to risk diluting the value of that advice by requiring the attorney of one co-executrix to effectively represent the other co-executrix. Each co-executrix can protect herself adequately by entering into a joint representation arrangement with a single attorney where appropriate, or by employing her own attorney. We conclude that the trial court properly granted summary judgment for Werley.

Conclusion

For the reasons stated, we modify the trial court's judgment to delete Jenny Rappeport's recovery of $12,000.00 as costs and $1,750.00 awarded by the jury as unpaid accounting expenses in answer to questions 14(1) and 14(4), and to delete the recovery by Jenny of the "overpayment," $298,547.00 according to the jury's answer to question 10(a). We also modify the judgment to correct the constructive trust recovery to cover all of the Clark, Thomas working interest in wells 2 and 5, rather than the interest shown in the judgment as it now stands. We also modify the judgment to delete the award of an injunction against Lyn with regard to the operations of the lease, and to eliminate the provision of the judgment restoring Jenny to the position of operator. We further modify the judgment to award Jenny $38,245.22 as prejudgment interest rather than the amount contained in the judgment. We will affirm the judgment as modified if Jenny, within fifteen days from the date of our opinion, files a remittitur of $1,400,000.00 from the punitive damages awarded her against Lyn Lesikar. If Jenny fails to file such a remittitur, the judgment will be reversed, and the cause will be remanded for a new trial.

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CONCURRING OPINION

BEN Z. GRANT, Justice.

I would recommend that the Legislature revisit Section 240 of the Probate Code, Joint Executors or Administrators. Tex. Prob. Code Ann. § 240 (Vernon 1980). I would strongly suspect that most of the time when joint executors are named in a will, the testator intends that these joint executors will be a check on each other. As this case indicates, it does not work that way. Section 240 provides that the executors (or administrators) may act independently of each other. This creates a hydra-headed administration of the estate in which there is no guarantee that there will not be a duplication of effort, as well as each being able to hire an attorney to be paid out of the estate which would result in double attorneys' fees. (The only exception under Section 240 that requires the signatures of all executors or administrators is in the conveyance of real estate.) I would recommend Section 240 be amended to require that the joint executors or administrators act jointly on all matters involving the estate.

My next concern is in the construction of the law that the attorney retained by an executor or administrator does not represent the estate, but rather represents the executor or administrator. *See Huie v. DeShazo*, 922 S.W.2d 920 (Tex. 1996).

The court in the *Huie* opinion cited a study that recommended the following:

> The fiduciary's duty is to administer the estate or trust for the benefit of the beneficiaries. A lawyer whose assignment is to provide assistance to the fiduciary during the administration is also working, in tandem with the fiduciary, for the benefit of the beneficiaries, and the lawyer has the discretion to reveal such information to the beneficiaries. . . .[2]
>
> [2] Based on "a study by the Section of Real Property, Probate and Trust Law of the American Bar Association entitled *Report of the Special Study Committee on Professional Responsibility Counselling the Fiduciary*. *See* 28 Real Prop., Prob. Tr. J. 823 (1994)."

On the basis of precedent, the Texas Supreme Court declined to adopt the approach recommended by this study.

Because most beneficiaries do not have their own attorney and rely on the attorney handling the estate to see that it is properly administrated according to law, I would recommend that the Supreme Court consider changing the legal obligation in accordance with the recommendations in the report.

ON MOTION FOR REHEARING

S. Gary Werley and the law firm of Bishop, Payne, Williams Werley, L.L.P. (collectively, Werley) have filed a motion for rehearing in which they contend that we should clarify our judgment to reflect that no costs on appeal are assessed against Werley. The judgment in the case reads, "It is further **ORDERED** that the parties each pay one half of the costs incurred by reason of this appeal." We intended that costs be divided equally between Jenny and the Lesikars. We therefore modify our judgment to provide that Jenny Rappeport and the Lesikars each pay one half of the costs incurred by reason of this appeal.

The Lesikars have also filed a motion for rehearing in which they contend we erred in holding that they failed to preserve error on the issue of attorneys' fees. We held that the Lesikars waived any error with respect to attorneys' fees by failing to object to Jenny's attorney's testimony on the ground that she failed to segregate the fees among her various claims. We also found that they failed to object to the submission of the broad attorneys' fee question. We further held that the trial court could only disregard the jury finding if it was unsupported by the evidence or was
322 immaterial, neither of which we found. *322

In their motion for rehearing, the Lesikars cite to the reporter's record showing where they objected to the jury charge. Nevertheless, their contention on rehearing must be viewed within the context of their appeal. In their initial brief on appeal, they contended there was no evidence or insufficient evidence that Jenny's claims were sufficiently intertwined to avoid the requirement that attorneys' fees be segregated among her various claims. Jenny responded that the Lesikars failed to preserve error because they failed to object to the evidence or to the jury charge. In their reply brief, the Lesikars reasserted their no evidence and insufficient evidence contentions with citations to their post-verdict and post-judgment motions, apparently believing that the jury's verdict on attorneys' fees was immaterial without evidence that Jenny's claims were intertwined, and thus their motions preserved error. But unless the Lesikars brought to the trial court's attention Jenny's responsibility to segregate her attorneys' fees or to demonstrate that her claims were too intertwined to segregate them, it does not matter whether there was evidence that her claims were intertwined. Therefore, the Lesikars' argument on rehearing (that they objected to the jury charge) is at variance with their argument on appeal (that there was insufficient evidence that Jenny's claims were intertwined).

Moreover, the Lesikars had the burden to point out specifically in the record where they made the proper objection. Tex.R.App.P. 38.1(f), (h). The Lesikars' citations to the record were not before this Court on appeal. The appeal involved twenty-six issues, seven briefs totaling over 260 pages, sixteen volumes of the clerk's record, and twenty-five volumes of the reporter's record. Without proper citation to the record, an objection to the charge is difficult to find in the reporter's record, which is not indexed by objection or otherwise. Thus, the issue was improperly briefed.

Even if we were to consider their citations, Jenny's contention that the Lesikars' objection was not plainly stated is persuasive. The Lesikars contend they objected on the grounds (1) that Jenny failed to segregate her request for attorneys' fees, and (2) that there was no evidence regarding segregation. Reviewing their citations to the record, we agree they objected that there was no evidence regarding segregation. But they also were required to object to the broad-form nature of the attorneys' fees question to preserve error on their contention that the jury charge should have segregated the fee request among the claims. The only statement by their attorney that can be construed as an objection to the broad-form nature of the jury charge came when he stated: "As a result, there is no evidence to submit this question to the jury. *And the question itself is not phrased to cover attorneys' fees that would be compensable as a matter of statute*." (Emphasis added.) The first sentence is clearly a no evidence objection. The second sentence is an objection to the phrasing of the jury charge, but arguably would not have put the trial court on notice of the nature of the objection.

The objection here contrasts with the objection lodged in *Stewart Title Guar. Co. v. Sterling*, 822 S.W.2d 1, 10 (Tex. 1991), where Stewart Title objected, " *[T]here has been no breakdown or allocation* to the — of the fees incurred in connection with this defendant, as well as numerous other defendants, *in order to show what is allocable as a reasonable amount for the prosecution of the suit against the defendant*." In that case, the objection notified the trial court of Stewart Title's request that the jury be charged to segregate attorneys' fees between defendants. In this case, the Lesikars' attorney's statement must be read in the context of their overall objection, the thrust of which was clearly a complaint about the sufficiency of the evidence regarding whether Jenny's claims were sufficiently intertwined to avoid the segregation requirement. That objection
323 *323 was insufficient to notify the trial court that Jenny was required to prove that her claims were intertwined in the first place, or that the trial court was required to charge the jury to segregate attorneys' fees among Jenny's claims. We overrule the Lesikars' motion for rehearing.

Robbins Ranch Subdivision Homeowners' Ass'n v. Partners of Benchmark Props., L.P.

Decided May 15, 2019

NO. 12-18-00317-CV

05-15-2019

ROBBINS RANCH SUBDIVISION HOMEOWNERS' ASSOCIATION AND WILLIAM A. RHYNE, ET UX, INDIVIDUALLY, APPELLANTS v. PARTNERS OF BENCHMARK PROPERTIES, L.P., ET AL, APPELLEES

BRIAN HOYLE Justice

APPEAL FROM THE COUNTY COURT AT LAW NO. 2 GREGG COUNTY , ***TEXAS***

MEMORANDUM OPINION

Robbins Ranch Subdivision Homeowner's Association (Robbins Ranch) and William Rhyne, et ux, Individually (Rhyne) appeal the trial court's grant of a directed verdict in favor of Partners of Benchmark Properties, L.P. (Benchmark). We affirm.

BACKGROUND

Benchmark is the developer of the Robbins Ranch Subdivision, Phase 2, in Gregg County, Texas. Benchmark is a limited partnership. The general partner is Benchmark Properties, L.C., and the limited partners are Henry Boswell, III and Robert Farrell. Boswell and Farrell are also members of Farrell and Boswell Realty, L.C. (Farrell and Boswell Realty), a real estate firm. In that capacity, Boswell and Farrell each hold broker's real estate licenses.

Rhyne and his wife purchased a lot in the subdivision from Benchmark. The unimproved property contract lists Rhyne and his wife as the purchasers and Benchmark as the seller. It also identifies Farrell and Boswell Realty as the seller's real estate broker. The contract states that membership in the property owner's association is
2 mandatory and the buyer agrees to be bound by *2 the Declaration of Restrictions, Covenants, and Conditions. Those Declarations state that the private road shown on the subdivision plat shall be owned and maintained by Robbins Ranch.

After Rhyne purchased the property, a dispute arose as to the condition of the private road. According to Robbins Ranch and Rhyne, the road is of "questionable standards" and the use of the road by oilfield vehicles has compromised the road's surface. They alleged that the road's condition impacted home values and the enjoyment of the subdivision by the members of Robbins Ranch. Benchmark contended that Robbins Ranch is responsible for maintaining the road. When an agreement could not be reached, Robbins Ranch and Rhyne sued Benchmark, Chinn Exploration, Inc., and Trivium Operating L.L.C. Their petition included causes of action for fraud by non-disclosure, breach of formal and/or informal fiduciary relationship, breach of implied

warranty, and violations of the Deceptive Trade Practices Act (DTPA) against Benchmark. They also alleged Chinn was liable for breach of contract and nuisance and that Trivium was liable for nuisance. Prior to trial, Chinn obtained a summary judgment dismissing the breach of contract claim. Robbins Ranch and Rhyne withdrew the causes of action for fraud by non-disclosure and breach of implied warranty.

At trial, following the presentation of evidence, the trial court granted a directed verdict on the fiduciary duty and nuisance causes of action. The jury found in favor of Benchmark on the DTPA claim, and the trial court entered judgment in accordance with the jury's verdict.[1] This appeal followed.

[1] Only the directed verdict in favor of Benchmark is currently before us. On March 12, 2019, this Court granted an agreed motion to dismiss the appeal with respect to Chinn and Trivium. *See* ***Robbins Ranch Subdivision Homeowner's Ass'n v . Partners of Benchmark Properties*** , ***L.P.***, ***et al.***, No. 12-18-00317-CV, 2019 WL 1141775 (Tex. App.—Tyler Mar. 12, 2019, no pet) (mem. op.). Accordingly, they are no longer parties to this appeal.

DIRECTED VERDICT

In their sole issue, Robbins Ranch and Rhyne contend the trial court erred when it granted Benchmark's motion for directed verdict. Specifically, they argue legally sufficient evidence was presented that Benchmark owed Robbins Ranch a formal or informal fiduciary duty. **Standard of Review**

In reviewing the grant or denial of a directed verdict, an appellate court follows the standards for assessing the legal sufficiency of the evidence. ***Hunter v. PriceKubecka*** , ***PLLC*** , 339 S.W.3d 795, 802 (Tex. App.—Dallas 2011, no pet.). This requires a determination of whether there *3 is any evidence of probative force to raise a fact issue on the question presented. ***Id.*** In reviewing the legal sufficiency of the evidence, we view the evidence in the light most favorable to the fact finding, crediting favorable evidence if reasonable persons could, and disregarding contrary evidence unless reasonable persons could not. ***Id.*** A directed verdict is proper if a party fails to present evidence raising a fact issue essential to the right of recovery or if the party either admits or the evidence conclusively establishes a defense to the cause of action. ***Id.*** A reviewing court may affirm a directed verdict even if the trial court's rationale for granting the directed verdict is erroneous, provided the directed verdict can be supported on another basis. ***Id.*** **Applicable Law**

A viable breach of fiduciary duty claim requires the following proof: (1) a fiduciary relationship between the plaintiff and the defendant, (2) a breach of the fiduciary duty to the plaintiff, and (3) injury to the plaintiff (or benefit to the defendant) as a result of the breach. ***Flagstar Bank*** , ***FSB v. Walker*** , 451 S.W.3d 490, 499 (Tex. App.—Dallas 2014, no pet.). At issue in this case is whether a fiduciary relationship existed between Benchmark and Robbins Ranch, including its members.

Texas courts are reluctant to recognize a fiduciary relationship because it requires a person to place someone else's interests above his own. *See* ***Lindley v . McKnight*** , 349 S.W.3d 113, 124 (Tex. App.—Fort Worth 2011, no pet.). The term "fiduciary" applies to any person who occupies a position of peculiar confidence towards another and can arise in formal and informal relationships. *See* ***Lee v . Hasson*** , 286 S.W.3d 1, 14 (Tex. App.—Houston [14th Dist.] 2007, pet. denied). A fiduciary relationship exists when "the parties are under a duty to act for or give advice for the benefit of another upon matters within the scope of the relationship." ***Tex. Bank & Trust Co. v. Moore*** , 595 S.W.2d 502, 507 (Tex. 1980). Fiduciary duties may arise from formal and informal relationships. Formal fiduciary relationships, such as attorney-client, partnership, and trust relationships, arise as a matter of law. *See* ***Crim Truck & Tractor v . Navistar Int'l Transp. Corp.***, 823 S.W.2d 591, 594 (Tex. 1992), *superseded by statute on other grounds as noted in* ***Subaru of Am .***, ***Inc. v. David McDavid Nissan*** , ***Inc.***, 84 S.W.3d 212, 225-26 (Tex. 2002). A real estate broker owes a fiduciary duty while acting on behalf of a client. 22 TEX. ADMIN. CODE § 531.1.

Informal fiduciary relationships, sometimes referred to as "confidential relationships," may give rise to a
4 fiduciary duty where one person trusts in and relies on another, whether the relation *4 is a moral, social, domestic, or purely personal one. *See* ***Thigpen v . Locke*** , 363 S.W.2d 247, 253 (Tex.1962); ***Lee*** , 286 S.W.3d at 14. An informal fiduciary relationship exists where influence has been acquired and abused, and confidence has been reposed and betrayed. ***Prime Prods.***, ***Inc. v. S.S.I. Plastics*** , ***Inc.***, 97 S.W.3d 631, 638 (Tex. App.—Houston [1st Dist.] 2002, pet. denied). However, in the context of a business transaction, to impose an informal fiduciary duty, the special relationship of trust and confidence must exist prior to, and apart from, any agreement made the basis of the suit. ***Meyer v. Cathey*** , 167 S.W.3d 327, 331 (Tex. 2005). Courts do not create such relationships lightly. ***Id.***; ***Schlumberger Tech. Corp. v. Swanson*** , 959 S.W.2d 171, 177 (Tex. 1997).

A party claiming the existence of an informal fiduciary relationship (confidential relationship) must have been accustomed to being guided by the judgment or advice of the other. ***Thigpen*** , 363 S.W.2d at 253; *see also* ***Lee*** , 286 S.W.3d at 14 (citations omitted). The existence of an informal fiduciary relationship is generally a question of fact. Lee, 286 S.W.3d at 14. But the issue is a question of law when the facts are undisputed or there is no evidence to show the existence of an informal fiduciary relationship. *See* ***Meyer*** , 167 S.W.3d at 330-31; ***Trostle v. Trostle*** , 77 S.W.3d 908, 914-15 (Tex. App.—Amarillo 2002, no pet.). To determine whether a fiduciary relationship exists, courts review the actualities of the relationship between the parties involved. *See* ***Thigpen*** , 363 S.W.2d at 253. Not every relationship involving a high degree of trust and confidence rises to the stature of a fiduciary relationship. ***Meyer*** , 167 S.W.3d at 330. **Claims Through Real Estate Act**

Robbins Ranch and Rhyne urge that because Boswell and Farrell did not keep their real estate company, Boswell and Farrell Realty, completely separate and apart from the development company, Benchmark, they owed the members of Robbins Ranch the same fiduciary duty as if they were acting as real estate agents.[2]

[2] Robbins Ranch and Rhyne did not allege theories of alter-ego, vicarious liability, or piercing the corporate veil. --------

Barbara Tarin, who has over fifty years of real estate experience, testified as an expert at trial. According to Tarin,

> The defendants, Benchmark Partners, LP, the partners in that -- in that organization were Mr. Farrell ... the two partners, that Farrell and Boswell also were a real estate organization that listed the

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> development that they -- that is in question, Robbins Ranch. And they took -- the relationship was between a development entity and a real estate licensed organization or individuals.
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> . . .
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> The two licensees, Mr. Farrell and Mr. Boswell, as licensees, real estate licensees, have an obligation to act through the standards of the Texas Real Estate License Act, which is the Texas Occupations Code 1101.651. The fact that they were a development company, but they were also involved as two real estate licensees, bound them by those -- by that Occupations Code. They have certain duties under that code to clients that they deal with.
>
> . . .
>
> Basically, not to hold their personal interest above the interest of any client, whatever side of the transaction they're on. To treat all parties to a transaction truthfully and honestly, and to have full disclosure of anything that impacts the acquisition of a real estate asset that might affect someone's decision to purchase or not purchase a particular real estate asset.

When asked if Farrell and Boswell were relieved of their fiduciary duties as real estate agents because they had created a development company, Tarin responded:

> No. If they had maintained total separation of duties and functions, it would be one thing, but Mr. Farrell and Mr. Boswell, along with Benchmark Partners, did not keep everything separate and apart. As licensees, they are not relieved from following the standards of the Texas Occupations Code.

On appeal, Robbins Ranch posits that Tarin's testimony is sufficient to defeat the motion for directed verdict. Benchmark urges that the trial court properly disregarded Tarin's testimony because it is incorrect and contrary to Texas law. Benchmark further urges that it owed no fiduciary duty to the members of Robbins Ranch because its partners did not act as a real estate agent for anyone other than themselves.

Rhyne's property contract listed Benchmark as the seller of the property and lists Farrell and Boswell Realty as the broker for the seller. This fact is insufficient to establish a formal or informal fiduciary relationship. Benchmark is not a real estate broker and Farrell and Boswell Realty did not represent Rhyne (or the other buyers). Consequently, no formal fiduciary relationship existed between Benchmark and Appellants. *See* 22 TEX. ADMIN. CODE § 531.1.

Furthermore, the record contains no evidence of a confidential relationship between the buyers and Benchmark. The extent of the relationship between Benchmark and Rhyne is that of buyer and seller. This is not the type of relationship in which one person trusts in and relied on another. *See* ***Thigpen*** , 363 S.W.2d at 253. Nor is it the
6 type of relationship in which influence *6 has been acquired and abused and confidence reposed and betrayed. *See* ***Prime Prods .***, ***Inc.***, 97 S.W.3d at 638. Furthermore, no evidence was admitted to make the requisite showing of a prior relationship of trust and confidence between Benchmark and Rhyne before Rhyne purchased his property in the subdivision. *See* ***Meyer*** , 167 S.W.3d at 331. As a result, despite Tarin's testimony, no evidence of an informal fiduciary relationship via the Texas Real Estate Act was presented. **Claim Through Covenants**

Robbins Ranch and Rhyne further allege that evidence was presented to demonstrate the creation of an informal fiduciary relationship through the covenants and restrictions.

Under the Declarations of Covenants, Conditions, and Restrictions, Benchmark retained control over Robbins Ranch until all lots of the development were sold to a first purchaser. The evidence showed that Benchmark purchased the land for the development of a subdivision. This included configuration and construction of roads in conjunction with Chinn. Chinn held an oil and gas lease and began drilling five wells on the property in accordance with that lease. Benchmark sold lots to purchasers, including Rhyne, who were members of Robbins Ranch. Farrell and Boswell Realty represented Benchmark in those transactions.

No evidence was presented at trial showing that Rhyne or any other purchaser had any dealings, connection, or relationship with Benchmark, Boswell, or Farrell prior to contacting Boswell and Farrell Realty concerning the purchase of lots in the subdivision. Nor was evidence introduced showing any dealings, connection, or relationship between Rhyne or any other purchaser and Benchmark as developer of the subdivision before they became members of Robbins Ranch. For an informal fiduciary duty to exist in a business transaction, the special relationship of trust and confidence must exist prior to, and apart from, any agreement made the basis of the suit. ***Meyer*** , 167 S.W.3d at 331; ***Associated Indem. Corp. v. CAT Contracting*** , ***Inc.***, 964 S.W.2d 276, 288 (Tex. 1998); *see* ***Envtl . Procedures*** , ***Inc. v. Guidry*** , 282 S.W.3d 602, 628 (Tex. App.—Houston [14th Dist.] 2009, pet. denied). Here, the evidence demonstrates that no such relationship existed apart from the contract. As a result, the evidence would not enable reasonable and fair-minded people to conclude that a confidential relationship existed between Robbins Ranch, Rhyne, and Benchmark prior to the transaction that is the subject of Robbins Ranch and Rhyne's claims. **Conclusion**

Based on the foregoing, we hold that no formal or informal fiduciary duty existed between Benchmark and the
7 members of Robbins Ranch and Rhyne as a matter of law. *See* ***Meyer*** , 167 *7 S.W.3d at 330-31. Because the trial court properly granted a directed verdict in favor of Benchmark on breach of fiduciary duty, Robbins Ranch's and Rhyne's sole issue is overruled.

DISPOSITION

Having overruled Robbins Ranch's and Rhyne's sole issue, we ***affirm*** the judgment of the trial court.

BRIAN HOYLE

Justice Opinion delivered May 15, 2019.
Panel consisted of Worthen, C.J., Hoyle, J., and Neeley, J.

(PUBLISH)

8 *8

COURT OF APPEALS TWELFTH COURT OF APPEALS DISTRICT OF TEXAS

JUDGMENT

Appeal from the County Court at Law No. 2 of Gregg County, Texas (Tr.Ct.No. 2015-251-CCL2)

THIS CAUSE came to be heard on the appellate record and briefs filed herein, and the same being considered, it is the opinion of this court that there was no error in the judgment.

It is therefore ORDERED, ADJUDGED and DECREED that the judgment of the court below **be in all things affirmed**, and that all costs of this appeal are hereby adjudged against the Appellants, **ROBBINS RANCH SUBDIVISION HOMEOWNERS' ASSOCIATION AND WILLIAM A. RHYNE, ET UX**,

INDIVIDUALLY, for which execution may issue, and that this decision be certified to the court below for observance.

Brian Hoyle, Justice.

Panel consisted of Worthen, C.J., Hoyle, J., and Neeley, J.

No. 08-15-00383-CV
COURT OF APPEALS EIGHTH DISTRICT OF TEXAS EL PASO, TEXAS

Salas v. Total Air Servs., LLC

550 S.W.3d 683 (Tex. App. 2018)
Decided Feb 14, 2018

No. 08-15-00383-CV

02-14-2018

Heriberto SALAS, Individually and d/b/a Iceland Refridgeration, Appellant, v. TOTAL AIR SERVICES, LLC, Appellee.

ATTORNEY FOR APPELLANT: Hon. James D. Lucas, 2316 Montana Ave., El Paso, TX 79903. ATTORNEY FOR APPELLEE: Hon. Cori A. Harbour-Valdez, The Harbour Law Firm, P. C., P.O. Box 13268, El Paso, TX 79913.

ANN CRAWFORD McCLURE, Chief Justice

ATTORNEY FOR APPELLANT: Hon. James D. Lucas, 2316 Montana Ave., El Paso, TX 79903.

ATTORNEY FOR APPELLEE: Hon. Cori A. Harbour-Valdez, The Harbour Law Firm, P. C., P.O. Box 13268, El Paso, TX 79913.

Before McClure, C.J., Rodriguez, and Palafox, JJ.

OPINION

687 ANN CRAWFORD McCLURE, Chief Justice*687 This appeal turns our attention to the fiduciary duty that an employee may owe an employer when the employee starts a competing business. At-will employees (who have not entered valid non-compete agreements) are free in Texas to leave and form competing businesses. Even while still employed, the employee can take preparatory steps to that end. In this case, however, the employee actually ran a competing business while still drawing a salary with his employer. For the reasons stated below, we affirm the judgment obtained by the employer against the employee, subject to a suggested remittitur.

FACTUAL SUMMARY

Total Air Services, LLC sued its former employee, Heriberto Salas after it learned he opened and operated a competing company—Iceland Refrigeration—while still working for Total Air. Total Air is a heating, ventilation, and air-conditioning contractor. Brandon Brooks and his wife, Janette Brooks, started the company in 2007. At the time of the events we describe here, the company employed between six to twelve workers, depending on seasonal workload. Before starting Total Air, Brandon had worked as an employee for other similar companies. He met Salas in 2004 when they both worked for AC Experts, and he considered Salas a friend. They both left AC Experts, but met again in 2008 when Brandon loaned Salas a set of study books so that Salas could take the test to obtain his own air-conditioning license. Salas had intended to start his own company, though he later told Brandon he failed the test and put the issue off to the side.

Brandon met Salas again in early 2011. Salas complained about his then employer, and asked if he and Brandon could form a partnership. Brandon declined, but soon thereafter offered Salas a job. According to Brandon, he hired Salas as a crew manager. The position entrusted Salas with supervising a crew, obtaining city required permits, getting inspections completed by the city, installing air-conditioning systems, and "whatever it takes to continue the success and the growth of

the company." While Brandon prepared the quotes for all the bigger jobs, Salas occasionally had to deliver them to the customer. Salas would also generate the numbers for some quotes. Each bid form contained a job costing analysis that listed all of Total Air's confidential component costs. Brandon claimed that only he, his wife, and Salas were privy to that information. Salas worked on a straight salary, and at $52,000 a year, he was the highest paid employee, including the owners. When hired in April 2011, Salas was also the only employee paid an annual salary.

Conversely, Salas contended that he was hired as an "installer." He acknowledged being in charge of installation jobs, but was only supervising his helper, who was his younger brother, Richard. His job also required him to troubleshoot other jobs, and when he did so, he oversaw those other jobs. He claimed to prepare quotes "every now and then" but denied he was hired to solicit sales. Salas denied that he was a "manager" but defined that term to mean setting crews up, sitting back and "just kind of supervise and stuff."

Salas worked for Total Air from April 2011 until March 28, 2012, when he and his brother resigned. This suit arose when Total Air learned that while employed, Salas had been actively competing against it. On March 31, 2011, a few weeks prior to being hired by Total Air, Salas submitted an application for a contractor's license to *688 the Texas Department of Licensing and Regulation under the name Iceland Refrigeration (Iceland). On May 20, 2011, (at 2:25 pm during the middle of workday with Total Air), Salas filed an assumed names form with the county clerk for Iceland. Records from the Better Business Bureau, and an on-line referral site, note that Salas started Iceland in 2011. Iceland's own website similarly reflects it started business in 2011. Salas opened a bank account under his name, "dba Iceland Refrigeration" in January 2012. Iceland operates the same kind of business as Total Air—both sell, install, and service residential and industrial air-conditioning.

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Moreover, Iceland was actually doing business while Salas was still employed with Total Air. We note a few examples from the trial. Bank records show that on July 25, 2011, Salas deposited $13,600 into his personal account from a bus company for "A/C Service." Salas admitted to performing air-conditioning work for the owner of the company. A few days later, he deposited another check into his personal account for $122.50, which also indicated it was for air-conditioning services. In September 2011, Total Air had prepared a quote for a potential customer, David Grau, for an air-conditioning system costing between $13,689 to $18,634, depending on the options selected. Total Air did not get the job, but the city issued a permit the same month to Iceland to perform the work at the same address. Salas made two large cash deposits—$4,000.00 on the same day the city approved a portion of the Grau job—and another larger cash deposit, $6,500, within two weeks of when the job was completed.

Iceland also issued a February 9, 2012 quote to Santiago Soto for a job proposed between $5,995 and $6,695. Two weeks later, Iceland pulled a mechanical permit from the city to do the work. The customer wrote a check to Iceland for $7,220 for "AC/Furnace Installation" on February 27, 2012. On March 14, 2012, Iceland issued a quote to Manny Martinez for work estimated at between $5,595 and $5,895. The customer ended up paying at total of $6,381.34 to Iceland on March 27, 2012, the day before Salas resigned from Total Air. Iceland issued another quote to Robert Cervantes on March 23, 2012 for $6395; the city issued a permit for the same address and Cervantes paid for the job on April 3, 2012. Salas admitted quoting the job while he still was employed with Total Air.

The issue came to a head when Brandon became suspicious of Salas' absences in March 2012. After learning of Iceland through an internet search, he confronted Salas, who then tendered his resignation. Before that time, Salas never

disclosed that he intended to go into business for himself, or was in business for himself, while employed by Total Air.

A jury found that found Salas breached his fiduciary duty to Total Air and that Total Air lost $50,000 of profits because of that breach. The jury also found that Salas acted with malice, and assessed an additional $20,000 in punitive damages. The trial court entered judgment only on the actual damages along with pre-judgment interest and court costs.

Salas brings nine issues for our review. He challenges: (1) the sufficiency of the evidence to support the liability and damages findings; (2) the trial court's formulation of the jury charge; and (3) the trial court's refusal to remit a portion of the verdict. We re-order his issues for the sake of clarity.

THE COURT'S CHARGE—FIDUCIARY DUTY

Salas' sixth and seventh issues challenge how the 689 trial court submitted the breach of *689 the fiduciary duty to the jury. The jury was asked if Salas failed to comply with his fiduciary duty to Total Air. The question instructed the jury that as an employee, Salas owed Total Air a fiduciary duty. It further instructed that to prove its claim, Total Air must show:

> 1. Heriberto Salas failed to act in the utmost good faith or exercise the most scrupulous honesty toward Total Air Services, LLC; or
>
> 2. Heriberto Salas placed his own interests before Total Air Services, LLC's, used the advantage of his position to gain a benefit for himself at the expense of Total Air Services, LLC, or placed himself in a position where his self-interest might conflict with his obligations as a fiduciary; or
>
> 3. Heriberto Salas failed to fully and fairly disclose all important information to Total Air Services, LLC concerning the transactions.[1]
>
> [1] The question followed the format suggested in State Bar of Texas , Texas Pattern Jury Charges—Business , Consumer , Insurance , Employment , PJC 104.3 (2014).

Salas' seventh issue specifically claims that the trial court erred by instructing the jury that Salas owed a fiduciary duty to Total Air. His sixth issue complains that the trial court refused his tendered question inquiring, "Did a fiduciary relationship of agency exist between [Salas] and [Total Air]?

Standard of Review

We review charge error for an abuse of discretion. *Shupe v. Lingafelter* , 192 S.W.3d 577, 579 (Tex. 2006) ; *Financial Ins. Co. v. Ragsdale* , 166 S.W.3d 922, 926 (Tex.App.—El Paso 2005, no pet.). "A trial court abuses its discretion if it acts in an arbitrary or unreasonable manner without reference to any guiding rules or principles." *Walker v. Gutierrez* , 111 S.W.3d 56, 62 (Tex. 2003), *citing Downer v. Aquamarine Operators, Inc.* , 701 S.W.2d 238, 241-42 (Tex. 1985). The trial court must submit in the charge all questions, instructions, and definitions raised by the pleadings and the evidence. *See* TEX.R.CIV.P. 278

; *Hyundai Motor Co. v. Rodriguez* , 995 S.W.2d 661, 663 (Tex. 1999). In reviewing the charge, we consider the pleadings, the evidence presented at trial, and the charge in its entirety. *De Leon v. Furr's Supermarkets, Inc.* , 31 S.W.3d 297, 300 (Tex.App.—El Paso 2000, no pet.). Even if the trial court has abused its discretion, we reverse only when the error is shown to be harmful. *Boatland of Houston, Inc. v. Bailey* , 609 S.W.2d 743, 749-50 (Tex. 1980). "We may not reverse unless the error, when viewed in light of the totality of the circumstances, amounted to such a denial of the rights of the complaining party as was reasonably calculated and probably did cause rendition of an improper judgment." *Braudrick v. Wal–Mart Stores, Inc.* , 250 S.W.3d 471, 475 (Tex.App.—El Paso 2008, no pet.), *quoting De Leon* , 31 S.W.3d at 300.

Controlling Law

Texas law recognizes two types of fiduciary relationships. *Meyer v. Cathey* , 167 S.W.3d 327, 330-31 (Tex. 2005) ; *Jones v. Blume* , 196 S.W.3d 440, 447 (Tex.App.—Dallas 2006, pet. denied). "The first is a formal fiduciary relationship, which arises as a matter of law and includes the relationships between attorney and client, principal and agent, partners, and joint venturers." *Abetter Trucking Co. v. Arizpe* , 113 S.W.3d 503, 508 (Tex.App.—Houston [1st Dist.] 2003, no pet.), *citing Ins. Co. of N. Am. v. Morris* , 981 S.W.2d 667, 674 (Tex. 1998). "The second is an informal fiduciary relationship, which may arise 690 from 'a moral, social, domestic or *690 purely personal relationship of trust and confidence, generally called a confidential relationship.' " *Abetter Trucking Co.* , 113 S.W.3d at 508, *quoting Associated Indem. Corp. v. CAT Contracting, Inc.* , 964 S.W.2d 276, 287 (Tex. 1998). Whether an informal relationship rises to the level of a fiduciary relationship is often a question of fact. *Crim Truck & Tractor Co. v. Navistar Intern. Transp. Corp.* , 823 S.W.2d 591, 594 (Tex. 1992). Nonetheless, " '[w]here the underlying facts are undisputed, determination of the existence, and breach, of fiduciary duties are questions of law, exclusively within the province of the court.' " *National Medical Enterprises, Inc. v. Godbey* , 924 S.W.2d 123, 147 (Tex. 1996), *quoting Lacy v. Ticor Title Ins. Co.* , 794 S.W.2d 781, 787 (Tex. App.—Dallas 1990), *writ refused per curiam,* 803 S.W.2d 265 (Tex. 1991).

An agent generally has a fiduciary duty to act for the benefit of his principal in all matters connected with the agency. *Johnson v. Brewer & Pritchard, P.C.* , 73 S.W.3d 193, 200 (Tex. 2002) ; *Abetter Trucking Co.* , 113 S.W.3d at 510. "Among the agent's fiduciary duties to the principal is ... the duty not to compete with the principal on his own account ... in matters relating to the subject matter of the agency, and the duty to deal fairly with the principal in all transactions between them." *Johnson* , 73 S.W.3d at 200, *quoting* RESTATEMENT (SECOND) OF AGENCY § 13, cmt. a (Am. Law Inst. 1958); *see also* RESTATEMENT (THIRD) AGENCY § 8.01 (Am. Law Inst. 2005) ("An agent has a fiduciary duty to act loyally for the principal's benefit in all matters connected with the agency relationship."). Furthermore, an agent who uses his position to gain a business opportunity belonging to the principal commits an actionable wrong. *Abetter Trucking Co.,* 113 S.W.3d at 510, *citing Bray v. Squires* , 702 S.W.2d 266, 270 (Tex.App.—Houston [1st Dist.] 1985, no writ).

A master and servant (or employer—employee) are a species of the formal principal-agent relationship. RESTATEMENT (SECOND) AGENCY §§ 2, 25 (Am. Law Inst. 1958) ; RESTATEMENT (THIRD) AGENCY § 1.01 (Am. Law Inst. 2005) ("The elements of common-law agency are present in the relationships between employer and employee[.]"). As such, employment relationships may impose *some* fiduciary duties. *See Johnson* , 73 S.W.3d at 201-02. Thus, when a fiduciary relationship of agency exists between employee and employer, an employee has a duty to act primarily for the benefit of his employer in matters connected with

his employment. *Daniel v. Falcon Interest Realty Corp.* , 190 S.W.3d 177, 185 (Tex.App.—Houston [1st Dist.] 2005, no pet.). Additionally, an employee may not (1) appropriate company trade secrets; (2) solicit the former employer's customers while still working for his employer; (3) solicit the departure of other employees while still working for his employer; or (4) carry away confidential information. *Abetter Trucking Co.* , 113 S.W.3d at 512 ; *Wooters v. Unitech Intl., Inc.* , 513 S.W.3d 754, 762-63 (Tex.App.—Houston [1st Dist.] 2017, pet. denied).

But an employee's fiduciary duty is not unlimited. "[A]n employer's right to demand and receive loyalty must be tempered by society's legitimate interest in encouraging competition." *Johnson* , 73 S.W.3d at 201. As a Massachusetts court (quoted approvingly by the Texas Supreme Court) explained:

> An at-will employee may properly plan to go into competition with his employer and may take active steps to do so while still employed. Such an employee has no general duty to disclose his plans to his employer, and generally he may secretly join other employees in the endeavor without violating any duty to his employer. The general policy considerations are that at-will employees should be allowed to change employers freely and competition should be encouraged. If an employer wishes to restrict the post-employment competitive activities of a key employee, it may seek that goal through a non-competition agreement. The plaintiffs did not do so in this case.
>
> There are, however, certain limitations on the conduct of an employee who plans to compete with his employer. He may not appropriate his employer's trade secrets. He may not solicit his employer's customers while still working for his employer, and he may not carry away certain information, such as lists of customers. Of course, such a person may not act for his future interests at the expense of his employer by using the employer's funds or employees for personal gain or by a course of conduct designed to hurt the employer.

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Johnson, 73 S.W.3d at 201-02, *quoting Augat, Inc. v. Aegis, Inc.* , 409 Mass. 165, 565 N.E.2d 415, 419-20 (1991) (fiduciary duty claim against senior management at will employee who left to start own company) [omitting internal citations to authority].

The Texas Supreme Court probed these opposing principles in *Johnson.* That case raised the issue in the context of an associate attorney of one law firm accused of steering a prospective client (and the fee which would be generated) to another firm that the associate allegedly planned to join. *Johnson* , 73 S.W.3d at 197-98. The associate attorney had obtained summary judgment on the singular ground that he did not owe a fiduciary duty as a matter of law to his law firm employer. *Id.* at 203. While noting that it was not setting a

broad rule governing all employees who divert business opportunities without receiving some return benefit, the court held:

> We hold only that an associate may participate in referring a client or potential client to a lawyer or firm other than his or her employer without violating a fiduciary duty to that employer as long as the associate receives no benefit, compensation, or other gain as a result of the referral. However, an associate owes a fiduciary duty not to accept or agree to accept profit, gain, or any benefit from referring or participating in the referral of a client or potential client to a lawyer or firm other than the associate's employer.

Johnson , 73 S.W.3d at 203.

Application

Salas contends that whether he owed a fiduciary duty is a jury question. We disagree. While not every employee may owe a fiduciary duty as described in the jury charge here, the trial court did not err in holding that Salas owed at least some measure of a fiduciary duty. Importantly, Salas did not object to the scope of the duty described in the charge. Rather, he claimed only that a jury had to decide whether a duty existed at all. He objected to this statement in the jury charge: "As [Total Air's] employee, Heriberto Salas, owed [Total Air], a fiduciary duty." While Salas disputes whether he performed certain job duties, those facts that are not in dispute dictate that Salas owed his employer some measure of a fiduciary duty and thus the statement in the charge is correct.

Brandon hired Salas as a crew supervisor who had the authority to pull city permits, obtain final city inspections, assist in presenting quotes, and trouble-shoot problems. Salas does not contest that he performed these duties, but labels his position as an installer. Nor does Salas deny that he was a salaried employee, and in fact, the highest paid employee in the company. *692 While Salas denied 692 being a manager, he did so employing an overly restrictive definition of what that term means. By delivering, and at least making some quotes, he was in a position to know what work his employer was bidding on, and the price it was quoting. As is evident here, he was in a position to compete against Total Air on the very jobs that it was bidding on.

The Texas Supreme Court in *Kinzbach Tool Co. v. Corbett-Wallace Corp.* , 138 Tex. 565, 160 S.W.2d 509, 513 (1942) held that a "trusted" salesman occupied the relationship of a fiduciary to his employer. The salesperson used his position to obtain an undisclosed benefit in the sale of his employer's property. In *Johnson* , the associate attorney moved for summary judgment solely on the basis that he did not owe any fiduciary duty to his employer. *Johnson* , 73 S.W.3d at 204. The Texas Supreme Court quickly dispensed with that argument, stating, "[w]e have no difficulty in concluding that under common-law agency principles, an associate owes a fiduciary duty not to accept a fee or other compensation for referring a matter to a lawyer or law firm other than the associate's employer without the employer's consent." *Id.* at 202. Nor do we have a similar hesitation in concluding that Salas owed a duty not to solicit for himself and accept compensation for doing the very same type work that he was salaried to perform for Total Air. It is undisputed that he did so on at least some jobs that Total Air was also pursuing.

Salas might have contested the scope of his agency, and particularly whether his job included generating new work for the firm. *See National Plan Adm'rs, Inc. v. Natl. Health Ins. Co.* , 235 S.W.3d 695, 700-02 (Tex. 2007) (party raising the question of whether it owed a general fiduciary duty or one limited to specific obligations); RESTATEMENT (THIRD) AGENCY § 8.01, cmt c (Am. Law Inst. 2005)(noting the scope of the duty is not "monolithic in its operation" and may vary depending on the parties' agreement). Yet the question and instruction that Salas submitted (and

which is the basis of his sixth issue) would not reach that issue. It only asks whether a fiduciary relationship exists at all. Nothing in the tendered instruction inquired about the scope of the relationship, or whether sales and solicitation were within the scope of Salas' duties.[2]

[2] Salas' requested question ("Did a fiduciary relationship of agency exist between [Salas] and [Total Air]?) is accompanied by this requested instruction:

> An agent is a person who contracts to act on behalf of a principal and is subject to the principal's right of control except with respect to the agent's physical conduct. *Royal Mortg. Corp. v. Montague* , 41 S.W.3d 721, 733 (Tex.App.—Fort Worth 2001, no pet.) [.] An agent is authorized to act on behalf of the principal when the principal has granted the agent authority to act and there is a meeting of the minds about the nature of their relationship. *Carr v. Hunt* , 651 S.W.2d 875, 879 (Tex.App.—Dallas 1983, writ ref'd n.r.e.) [citations included as part of the requested instruction].

We conclude that the trial court did not abuse its discretion by instructing the jury that Salas owed a fiduciary duty to his employer.[3] Nor did the trial court err in refusing Salas' tendered question and instruction. We overrule Issues Six and Seven.

[3] We note again that Salas did not object below, nor challenge on appeal, how the trial court formulated the scope of the duty, and that issue is not before us today.

SUFFICIENCY OF THE EVIDENCE

Salas' first five issues all challenge either the legal or the factual sufficiency of the evidence to support the jury's findings. We first take up his challenge to the liability question (Issue Two) and
693 then address *693 the challenges to the damage finding (Issues One, Three, Four, and Five).

Standard of Review

The test for legal sufficiency of the evidence "must always be whether the evidence at trial would enable [a] reasonable and fair-minded [fact finder] to reach the [result] under review." *City of Keller v. Wilson* , 168 S.W.3d 802, 827 (Tex. 2005). We review the evidence in the light most favorable to the verdict. *See AutoZone, Inc. v. Reyes* , 272 S.W.3d 588, 592 (Tex. 2008) ; *El Paso Independent School Dist. v. Pabon* , 214 S.W.3d 37, 41 (Tex.App.—El Paso 2006, no pet.). We credit favorable evidence if a reasonable fact finder could, and disregard contrary evidence unless a reasonable fact finder could not. *City of Keller* , 168 S.W.3d at 827. An appellate court will sustain a legal sufficiency or "no-evidence" challenge, if the record shows: (1) the complete absence of a vital fact; (2) the court is barred by rules of law or evidence from giving weight to the only evidence offered to prove a vital fact; (3) the evidence offered to prove a vital fact is no more than a scintilla; or (4) the evidence establishes conclusively the opposite of the vital fact. *Id.* at 810.

When reviewing the factual sufficiency of the evidence we consider all the evidence, including that which tends to prove the existence of a vital fact, as well as evidence to the contrary. *Cain v. Bain* , 709 S.W.2d 175, 176 (Tex. 1986) ; *Sotelo v. Gonzales* , 170 S.W.3d 783, 787 (Tex.App.—El Paso 2005, no pet.). We will not reverse for factual sufficiency unless the trial court's finding was so against the great weight and preponderance of the evidence that it was manifestly unjust. *Pool v. Ford Motor Co.* , 715 S.W.2d 629, 635 (Tex. 1986) ; *Sotelo* , 170 S.W.3d at 787. This court is not a factfinder. *See Maritime Overseas Corp. v. Ellis* , 971 S.W.2d 402, 407 (Tex. 1998). We may not pass upon the witnesses' credibility or

substitute our judgment for that of the jury, even if the evidence would clearly support a different result. *Id.*

Sufficiency of the Liability Finding

In his second issue, Salas contends the evidence is factually insufficient to support the liability finding. The jury found that Salas failed to comply with his fiduciary duty to Total Air. To sustain that finding under the charge, we look for evidence that Salas placed his own interests before Total Air, or used his position to gain a benefit for himself at the expense of Total Air, or placed himself in a position where his self-interest might conflict with his obligations to Total Air. The evidence sufficiently supports one or more of those alternatives.

Considering the evidence favorable to the verdict, Salas set up and actually operated a company in the very same market as his employer. He would necessarily have been conflicted about where to direct business. Moreover, the evidence shows that Salas actively competed against Total Air on several jobs.

We also note that Total Air submitted a bid to David Grau, only to have Salas obtain the very same job through Iceland, as evidenced by city permits for the same customer. As another example, Total Air submitted a bid on March 14, 2012 to the Center for Employment Training ("CET") for heating and cooling classrooms. Brandon along with his estimator, as well as Salas and his brother, participated in generating this quote. They toured the building, took measurements, and according to Brandon, collectively arrived at a $29,378.21 bid. The next day, and while still in the employ of Total Air, Salas provided CET a competing Iceland quote of
694 *694 $34,000.00 for the same job.[4] Iceland ultimately got the job and completed the work shortly after Salas resigned from Total Air. Brandon also testified that part of Salas' duties included passing out flyers door to door to solicit business for Total Air. According to Brandon, Salas would also pass out Iceland business cards at the same time, or even go back to customers for whom Total Air had submitted bids, and solicit for Iceland several days later. Although he equivocated at times, Salas admitted that he competed against Total Air while still its employee.[5] Salas did not contest that Iceland bid for, and obtained several jobs while Salas worked for Total Air. He claimed getting work was not part of his job, and any Iceland work he did was done in his off-hours. Salas also viewed the people he solicited as his friends and contacts. Yet for the CET job, the jury could have concluded that he met the contact person when he and the other Total Air employees were there to formulate Total Air's bid. When he met the contact, Salas volunteered that he had his own license, and submitted his own bid the next day. In that way, he used his position with Total Air to gain a benefit for himself.

[4] Iceland's bid included different air-conditioning units which explains why it was somewhat higher.

[5] When called adversely to the stand, Salas testified:

> [ATTORNEY]: Iceland Refrigeration, you agree with me, is a competitor of Total Air Services, correct?
>
> [SALAS]: Yes.
>
> [ATTORNEY]: It's a competitor now, yes?
>
> [SALAS]: Yes.
>
> [ATTORNEY]: It was a competitor whenever you started it, right?
>
> [SALAS]: They can see it like that.
>
> [ATTORNEY]: Yes or no?
>
> [SALAS]: A. Yes.

We might agree that some of Salas' conduct—obtaining a license, or filing an assumed name certificate—were preparatory acts and thus permitted. Taking the next step and actually conducting a competing business in the same market, and at times soliciting the very same customers that his employer was pursuing, goes well beyond a preparatory act. The conduct is by definition "compet[ing] with the principal on his own account ... in matters relating to the subject matter of the agency[.]" *Johnson* , 73 S.W.3d at 200.

Salas' factual sufficiency challenge claims that the jury incorrectly considered an employment handbook and disregarded the at-will nature of the employment relationship. In October of 2011, some six months after he started with Total Air, Salas signed an acknowledgment of an employee handbook containing these policies:

> We respect the right for employees to hold second jobs but require that such employment not interfere with your performance or attendance at Total Air. Also, your second job may not be with one of our competitors. This company does not permit anyone to perform any work of the same type as ours for other employers or individuals during off-hours.... [and must also be cleared with a manager]
>
> I will not compete with the company by offering similar services, working for the competition, or using company assets or knowledge to benefit my own personal interests.
>
> I will act in the best interest of the company and will not let my loyalty be influenced by outside interests or relationships that could jeopardize the company's reputation or my own personal integrity.

The handbook further admonishes that all employees are "at will" and the employee handbook does not constitute an employment
695 agreement.*695 The Texas Supreme Court in *Johnson* concluded that an employer's policies did not add to the fiduciary duties owed by employees. *Johnson* , 73 S.W.3d at 203 ("But a contractual obligation does not generally give rise to a fiduciary duty."). Total Air's employee handbook, however, was admitted without objection, or any kind of limiting instruction, and Salas makes no separate claim that the trial court erred in admitting the handbook. Once admitted, the provisions of the handbook were admissible for all purposes. *See Nissan Motor Co. Ltd. v. Armstrong* , 145 S.W.3d 131, 143 (Tex. 2004) ; TEX.R.EVID. 105(a). The jury could have considered them as a promise by Salas not to engage in the described conduct from the time he

acknowledged the policies, and we thus reject Salas claim that the jury improperly relied on the handbook.

Nor do we find the "at will" nature of Salas employment determinative. Salas suggests that an at-will employee cannot breach a fiduciary duty by moonlighting in the absence of a binding contractual obligation to the contrary. The fiduciary duty arises out the agent and principal's relationship, and not as a matter of contract. The associate attorney in *Johnson* appears to have also been an at will employee. Yet the court had no problem in stating he had a fiduciary duty not to refer prospective clients for personal gain to the detriment of his employer. *Johnson* , 73 S.W.3d at 202. The record supports that Salas did just that while employed with Total Air. We overrule Issue Two.

Evidence of Damages

Salas next challenges the legal and factual sufficiency of the evidence supporting the jury's award for lost profits in the past. Lost profits are recoverable for a breach of a fiduciary duty when it is shown that the loss is the natural and probable consequence of the complained of act. *Texas Instruments, Inc. v. Teletron Energy Management, Inc.* , 877 S.W.2d 276, 279 (Tex. 1994) ; *Miller v. Argumaniz* , 479 S.W.3d 306, 311 (Tex.App.—El Paso 2015, pet. denied). In reviewing the legal sufficiency of a lost profits award, we must determine whether the amount awarded was established with reasonable certainty through competent evidence. *Formosa Plastics Corp. USA v. Presidio Engineers and Contractors, Inc.* , 960 S.W.2d 41, 50 n.3 (Tex. 1998). "When a review of the surrounding circumstances establishes that the profits are not reasonably certain, there is no evidence to support the lost profits award." *Id., citing Texas Instruments* , 877 S.W.2d at 279-81. At a minimum, opinions or estimates of lost profits must be based on objective facts, figures, or data from which the amount of lost profits can be ascertained, although the loss need not be susceptible to exact calculation. *Holt Atherton Industries, Inc. v. Heine* , 835 S.W.2d 80, 84 (Tex. 1992) ; *Argumaniz* , 479 S.W.3d at 311.

Total Air's damage model starts with the claim that Iceland grossed $125,951.05 during and shortly after Salas's employment with Total Air. The total $125,951.05 can be divided into three categories of jobs: (1) those that Iceland obtained while Total Air was actively pursuing the same work; (2) those that Iceland performed where Total Air had no particular connection with the customer, but than Salas could have steered the work to Total Air; and (3) unexplained cash deposits by Salas that Total Air contends were for air conditioning work. Total Air then multiplied the total from all three categories by its usual 40% profit margin to arrive at its lost profits ($50,380.04). The jury appears to have largely accepted that model, awarding $50,000 in lost
696 profits.*696 Salas' factual and legal sufficiency challenges in varying ways complain that the evidence cannot sustain the total award. He claims that Total Air did not show that it would have gotten any of the jobs itself, and thus Salas was not a substantial cause of any lost profits (Issues One and Three). He alternatively claims in his fourth issue that the amount is excessive, and the jury at most could have awarded the profit that Total Air might have made on its $29,378.21 bid to CET and the "$4,000 Salas collected on the David Grau job" (resulting in a total net profit of $13,351.28). Finally, Issue Five contends that because there is no evidence of a total sum of $50,000 in lost profits, the entire award must be deleted.

We find it useful to consider the three categories of jobs separately. For the first category—those where Iceland affirmatively competed against Total Air—we find the evidence sufficient to support at least a portion of the total lost profits claim. Total Air had a pending bid of between $13,689.00 and $18,634.00 to potential customer David Grau. Based on city permits, Iceland obtained and completed the job while Salas was

still employed with Total Air. Salas did not produce its project file on the job, but Salas made large cash deposits totaling $10,500 within days of an interim city inspection and the date the job was completed. Two other jobs in this category involve internet referrals through a service known as Service Magic. Total Air paid a fee to the service for the names of potential customers that described needed work. In March 2012, Service Magic provided the names of two persons to Total Air who needed air-conditioning work. Iceland, who also signed up to the same service, bid on and obtained jobs for both customers in March 2012. The two bids total $12,596.34 ($6301.34 and $6,295). The last job in this category includes the CET bid that Total Air bid upon, but which Iceland obtained for $34,000. Totaling these jobs, Iceland generated gross revenue of $57,096.34, and based on a profit margin of 40%, Total Air lost a net profit of $22,838.53.[6]

[6] The jobs include the $10,500 attributable to the Grau job, Manual Martinez ($6,301.34), Keith Polette ($6,295), and the CET ($34,000). We use the final amount of the contract, and not the bid, as that is the best representation of the value of the work for which the customer would actually contract.

The second category were those bids made to persons with whom Total Air had no apparent connection. As an example, while employed with Total Air, Salas submitted a bid for Iceland to a bus company for $13,600.00. He knew the owner and learned of the potential business through that friendship. Unless Salas had directed the work to his employer, there is no suggestion that Total Air would have known about, bid upon, or obtained the work. In this way, these jobs are akin to the referral in *Johnson* . The associate attorney in *Johnson* had a personal friendship with the decision maker and consulted with the decision maker on where to direct the lawsuit. 73 S.W.3d at 197. And like in *Johnson* , we would not hold Salas to a duty to refer friends or family to his own employer. He might legitimately believe they could be better served elsewhere. But neither could he direct the work to himself and profit to the exclusion of his employer. We find the evidence sufficient to include this category of jobs as those that Total Air could have obtained but for Salas' breach. The jury could have inferred from Salas' relationship with these persons that he could have directed the work to Total Air, had he chosen to do so. The total jobs *697 in this category generated gross receipts of $29,752.50, and a net profit of $11,901.[7]

[7] These jobs include the Los Paisanos Bus Company ($13,600), Veronica Macias ($122.50), Santiago Soto ($7,220), Robert Cervantes ($6,395), Maria Salas ($2350), and Maria Mata ($65).

The last category presents the closest question. Total Air obtained Salas' banking records. The records showed several large cash deposits while Salas worked for Total Air. Salas was paid a gross salary by Total Air of $1000 a week, which after deductions yielded a paycheck of $778.50. Yet Salas made *cash* deposits, in odd amounts throughout the time of his Total Air employment. Total Air linked some of these amounts to particular jobs, through either bids, or city permits. However, for many of the deposits, it had no such connecting evidence. It asked the jury to first assume that that these were Iceland jobs. Next, it asked the jury to assume that Salas could have directed the work to Total Air.

Salas himself testified that for the most part he did not recall the source of the deposits. As to one deposit, he speculated that it might have been his $5,000 tax refund. For another series of deposits, he testified it was for work he did for a relative that had nothing to do with air-conditioning. He also testified to doing odd jobs in other trades in his spare time. Finally, Salas claimed that he usually cashed any check, including his paycheck, at the issuing bank and then deposited the cash

funds in his own bank. He also suggested the odd amounts could have been from several paychecks that he deposited all at once.[8]

> [8] The only paychecks actually deposited into his account were from his wife's employer. The frequency and amounts of the cash deposits do not fit any clear pattern. For instance, in May 2011, Salas would have netted approximately $3114 from his weekly salary. Yet he deposited only $2000 into his account that month (excluding his wife's salary check). In July 2011, however, he deposited $22,424.71 in cash to his account, which greatly exceeded his salary. He made no cash deposits in June, August, or October. Total Air did not attempt to reconcile the total amounts deposited against the total that it paid Salas to determine if there were a discrepancy.
>
> --------

While we agree that the jury could have discounted Salas's explanations, we nonetheless conclude that the evidence is insufficient to allow the jury to conclude that the deposits were necessarily related to air-conditioning jobs, much less for customers who would have hired Total Air. At least for the second category of jobs that we describe above, the jury heard some evidence about the nature of Salas' relationship with the customer, such that the jury could infer that Salas could have directed the work to Total Air. But we can make no such leap for unknown jobs for unknown customers under unknown circumstances. As the Texas Supreme Court has cautioned, "some suspicion linked to other suspicion produces only more suspicion, which is not the same as some evidence." *Johnson.* , 73 S.W.3d at 210, *quoting Browning–Ferris, Inc. v. Reyna,* 865 S.W.2d 925, 927 & n.3 (Tex. 1993). We thus sustain Issue Four to the extent it seeks a remittitur, and we suggest that in lieu of a new trial, Total Air accept $34,739.53 as the total for lost profits. *See* TEX.R.APP.P. 46.3.

In Issue Five, Salas challenges the legal sufficiency of the evidence to support the $50,000 award. Because we have found that there is evidence to support a portion of the total award, we will not render judgment for Salas on a "no evidence" point. *ERI Consulting Engineers, Inc. v. Swinnea* , 318 S.W.3d 867, 880 (Tex. 2010). At most, we would consider *698 a remittitur. *Id.* Because we have sustained Issue Four and suggested a remittitur, we overrule Issue Five as moot.

ADDITIONAL CHARGE OBJECTION

In Issue Eight, Salas faults the trial court for not including this instruction in the charge:

> For Lost Profits to be recoverable in this case, they must naturally and proximately arise from the defendant's wrong. In other words, they must be a foreseeable consequence of the Defendant's misconduct. [internal quotations and case citations omitted].

However, the trial court did instruct the jury it should only award damages that are "proximately caused" by the conduct it found in the liability question. Proximate cause was in turn defined in the charge:

> 'Proximate cause' means a cause that was a substantial factor in bringing about an event, and without which cause such event would not have occurred. In order to be a proximate cause, the act or omission complained of must be such that a person using the degree of care required of him would have foreseen that the event, or some similar event, might reasonably result therefrom.

Every aspect of Salas' requested instruction was already contained in the proximate cause instruction actually given to the jury. Question Two of the court's charge required that the damages awarded be proximately caused by the

conduct. The definition of proximate cause then instructed the jury on foreseeability. Because Salas fails to convince us that his requested instruction was necessary or added anything to the charge, we overrule Issue Eight.

MOTION FOR NEW TRIAL

Finally, Salas complains in Issue Nine that the trial court abused its discretion in not granting that portion of his motion for new trial seeking a reduction of the damages awarded. We have agreed in part with the same argument advanced under Issue Four, and thus overrule Issue Nine as moot.

CONCLUSION

We overrule Issues One through Three, and Five through Nine. We sustain Issue Four, but only to the extent that we suggest a remittitur of $15,260.47 ($50,000 minus $34,739.53) and a proportionate adjustment to prejudgment interest. If a remittitur in this amount is filed by Total within fifteen days of the date of this opinion, we will modify the judgment with respect to the damages awarded and affirm as modified. Absent the remittitur, we remand for a new trial.

Shearer v. Shearer

Decided May 27, 2016

NO. 12-14-00302-CV

05-27-2016

CORRINE AUGUSTINE NICHOLS HILL SHEARER, APPELLANT v. DAVID SHEARER, INDIVIDUALLY AND AS INDEPENDENT ADMINISTRATOR OF THE ESTATE OF JOHN WILLIAM SHEARER, III, APPELLEE

GREG NEELEY Justice

APPEAL FROM THE COUNTY COURT AT LAW NO. 2 GREGG COUNTY , ***TEXAS***

MEMORANDUM OPINION

Corrine Augustine Nichols Hill Shearer appeals the trial court's judgment in favor of David Shearer, individually and as independent administrator of the estate of John William Shearer, III. Corrine raises two issues on appeal. We affirm.

BACKGROUND

Corrine married David's father, John, in 1990, when David was a young adult. In February 2008, Corrine and John divorced, although they continued to cohabit.[1] John had long-standing health issues and on November 2, 2009, sought care at Overton Brooks VA Medical Center in Shreveport, Louisiana. Corrine accompanied John to the Shreveport VA where he was found to be seriously ill and admitted. Corrine told the Shreveport VA staff
2 that she and John were divorced. Consequently, according to medical records, Corrine was informed that she *2
would not be able to make decisions on John's behalf. Corrine submitted John's general power of attorney, but according to the social worker, the document did not authorize Corrine to make medical decisions for John. John also had another child, Wendy, but she did not regularly maintain close contact with John and Corrine. Therefore, the social worker told Corrine that David had the authority to consent to medical procedures for John since he was John's closest available relative. The social worker called David and left him a voicemail informing him of his rights.

[1] Corrine claimed at trial that they continued to live as husband and wife after their divorce, and that she was John's common law wife. She stated at trial that they cohabited and that they represented themselves to others as husband and wife. However, she acknowledged in her deposition that they did not intend to live as husband and wife after their divorce. Nevertheless, David admitted that the divorce was primarily for financial reasons and they continued to act as a married couple "for the most part."

While at the Shreveport VA, John's condition continued to deteriorate and on November 5, 2009, he was transported by helicopter to Michael E. DeBakey VA Medical Center in Houston, Texas. Corrine traveled to the Houston VA in John's truck where, in contrast to her actions in Shreveport, she claimed she was John's wife.

David and Corrine spoke with each other by telephone nearly every day after John's transfer to the Houston VA.[2] In Houston, Corrine consented to several surgical procedures, some of which were exploratory in nature and carried with them a significant risk of death. Corrine remained at the hospital during John's entire stay.

[2] David's last direct conversation with John was before he was transported to Houston. Shortly after John arrived in Houston, an endotracheal tube was inserted in John's neck. Later, John was placed on a ventilator and sedated, which prevented John from communicating verbally with David.

David traveled to the Houston VA to visit John on November 21, 2009, which was his only visit to the hospital. Although John was on a ventilator and under heavy sedation, he was able to open his eyes and squeeze David's hand, which led David to believe John was aware of his presence. During this visit, the treating physician discussed John's condition with David and Corrine, including the possibility of executing a "Do Not Resuscitate" (DNR) order. David recalled that he and Corrine decided the family would monitor John's condition and make a decision later as a family. David returned home.

David remembered speaking with Corrine on the phone the following day and being told that John's condition had slightly improved. David claimed that Corrine never told him in subsequent conversations that John's condition was any worse than he observed on November 21. However, John's condition was deteriorating. On December 7, 2009, Corrine spoke with John's treating physicians about possible end of life issues and determined that it might be time to consider a DNR. According to hospital records, Corrine informed the staff
3 that she would consult with family members to make a decision. But she did not consult David. *3 Corrine nevertheless executed the DNR the following morning, and the hospital withdrew all life sustaining care. On December 9, 2009, John died. Corrine never informed David of her decisions, even though they spoke on the telephone during those days. David did not learn of his father's death until after he died. Corrine had John cremated, and she spread his ashes over his mother's grave. David believed that John wished to have his ashes spread from a battleship because he was in the Navy.

David believed Corrine made the correct decision concerning the DNR. However, he took issue with Corrine's nondisclosure of her decisions that deprived him of the chance to see his father prior to his death, and her decision to spread his ashes in a manner different from what he believed his father desired. Consequently, David filed suit against Corrine asserting, among other causes of action not relevant to this appeal, breach of fiduciary duty and intentional infliction of emotional distress.

After a jury trial, the jury found, in relevant part, that Corrine and David had an informal fiduciary relationship, Corrine breached her fiduciary duty, and Corrine intentionally inflicted emotional distress upon David.[3] The jury awarded David $35,000.00 for past mental anguish for Corrine's breach of fiduciary duty and $0.00 for future mental anguish. It also awarded David $1,500.00 for past mental anguish arising from Corrine's intentional infliction of emotional distress, and $0.00 for future mental anguish. Finally, the jury found that Corrine acted with malice in breaching her fiduciary duty, and awarded David $10,000.00 in exemplary damages. The parties filed various posttrial motions. After a hearing, the trial court granted David's motion, denied Corrine's motions, and signed a judgment in accordance with the jury's verdict. This appeal followed.

[3] At the close of evidence, the parties filed competing motions for directed verdict on various issues. The trial court granted Corrine's motion for directed verdict in part, concluding that there was no evidence to support David's conversion action, but denied her motion in all other respects. The trial court also denied David's motion for directed verdict.

LEGAL AND FACTUAL SUFFICIENCY OF THE EVIDENCE

In Corrine's first issue, she challenges the legal and factual sufficiency of the evidence to support the jury's finding that she owed David a fiduciary duty. *4 **Standard of Review**

An appellate court conducting a legal sufficiency review considers the evidence in the light most favorable to the verdict, indulging every inference that would support it. ***City of Keller v. Wilson*** , 168 S.W.3d 802, 824 (Tex. 2005). A party attacking the legal sufficiency of the evidence to support an adverse finding on an issue for which it did not have the burden of proof at trial must show that no evidence supports the adverse finding. ***Exxon Corp. v. Emerald Oil & Gas Co., L.C.***, 348 S.W.3d 194, 215 (Tex. 2011). We also apply a legal sufficiency standard applicable to denial of a directed verdict based on a lack of evidence. ***City of Keller*** , 168 S.W.3d at 823.

The appellate court must credit favorable evidence if a reasonable fact finder could, and disregard contrary evidence unless a reasonable fact finder could not. ***Id.*** at 807. A "no evidence" challenge must be sustained when (1) the record discloses a complete absence of a vital fact, (2) the court is barred by the rules of law and evidence from giving weight to the only evidence offered to prove a vital fact, (3) the evidence offered to prove a vital fact is no more than a scintilla, or (4) the evidence conclusively establishes the opposite of a vital fact. ***Id.*** at 810. The record contains more than a mere scintilla of evidence if reasonable minds could form differing conclusions about a vital fact's existence. ***Kindred v. Con/Chem*** , ***Inc.***, 650 S.W.2d 61, 63 (Tex. 1983). Conversely, the record is insufficient when the evidence offered to prove a vital fact is so weak as to do no more than create a mere surmise or suspicion of its existence. ***Id.***

An appellate court reviews the factual sufficiency of the evidence supporting a finding by considering and weighing all the evidence in a neutral light. ***Cain v. Bain*** , 709 S.W.2d 175, 176 (Tex. 1986). The reviewing court will set aside the verdict only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. ***Id.*** However, the reviewing court is not a fact finder, and it may not pass on the credibility of the witnesses or substitute its judgment for that of the trier of fact, even if a different answer could be reached on the evidence. ***Maritime Overseas Corp. v. Ellis*** , 971 S.W.2d 402, 407 (Tex. 1998). In other words, we may not merely substitute our opinion for that of the trier of fact and determine that we would reach a different conclusion. ***Lesikar v. Rappeport*** , 33 S.W.3d 282, 296 (Tex. App.—Texarkana 2000, pet. denied). *5 **Applicable Law**

There are two types of fiduciary relationships in Texas: (1) a formal fiduciary relationship arising as a matter of law, such as between partners or an attorney and a client, and (2) an informal or confidential fiduciary relationship arising from a moral, social, domestic, or merely personal relationship where one person trusts in and relies upon another. ***Crim Truck & Tractor v. Navistar Int'l Transp. Corp.***, 823 S.W.2d 591, 594 (Tex. 1992), *superseded by statute on other grounds as recognized in* ***Subaru of Am ., Inc. v. David McDavid Nissan*** , ***Inc.***, 84 S.W.3d 212 (Tex. 2002). Informal fiduciary relationships are not created lightly. ***Schlumberger Tech. Corp. v. Swanson*** , 959 S.W.2d 171, 177 (Tex. 1997). When the evidence is disputed, the existence of an informal confidential relationship is a question of fact. ***Lee v. Hasson*** , 286 S.W.3d 1, 14 (Tex. App.—Houston [14th Dist.] 2007, pet. denied).

Fiduciary relationships juxtapose trust and dependence on one side with dominance and influence on the other. *See* ***Tex . Bank and Trust Co. v. Moore*** , 595 S.W.2d 502, 508 (Tex. 1980). Whether a confidential relationship exists is "determined from the actualities of the relationship between the persons involved." ***Thigpen v. Locke*** , 363 S.W.2d 247, 253 (Tex.1962). "The problem is one of equity[,]" and the circumstances giving rise to the confidential relationship "are not subject to hard and fast lines." ***Tex. Bank & Trust Co.***, 595 S.W.2d at 508.

We consider a variety of factors to determine whether an informal fiduciary relationship exists. *See* ***Gregan v . Kelly*** , 355 S.W.3d 223, 228 (Tex. App.—Houston [1st Dist.] 2011, no pet.). A confidential fiduciary relationship may exist where influence has been acquired and abused or where confidence has been reposed and betrayed. ***Crim Truck & Tractor*** , 823 S.W.2d at 594. A confidential relationship "exists where a special confidence is reposed in another who in equity and good conscience is bound to act in good faith and with due regard to the interest of the one reposing confidence." *See* ***Tex . Bank & Trust Co.***, 595 S.W.2d at 507; *see also* ***Pope v . Darcey*** , 667 S.W.2d 270, 275 (Tex. App.—Houston [14th Dist.] 1984, writ ref'd n.r.e.) ("A confidential relationship exists where one person has a special confidence in another to the extent that the parties do not deal with each other equally, either because of dominance on one side or weakness, dependence, or justifiable trust on the other.").

We also consider whether the plaintiff justifiably relied on the defendant for support, the plaintiff's physical and
6 mental condition, and evidence of the plaintiff's trust. *See* ***Lee*** , 286 *6 S.W.3d at 14-16; ***Trostle v. Trostle*** , 77 S.W.3d 908, 914-15 (Tex. App.—Amarillo 2002, no pet.); ***Hatton v. Turner*** , 622 S.W.2d 450, 458 (Tex. Civ. App.—Tyler 1981, no writ). However, subjective trust alone is not sufficient to establish a confidential relationship. ***Thigpen*** , 363 S.W.2d at 253. Rather, the trust must be justifiable. *See* ***id .*** There must be additional circumstances, or a relationship that induces the trusting party to relax the care and vigilance that he would ordinarily exercise for his own protection. *See* ***R .R. St. & Co.***, ***Inc. v. Pilgrim Enters.***, ***Inc.***, 81 S.W.3d 276, 306 (Tex. App.—Houston [1st Dist.] 2001), *rev'd in part on other grounds*, 166 S.W.3d 232 (Tex. 2005) (discussed in unpublished portion of the opinion). In examining whether the plaintiff's trust is justified, we examine whether he actually relied on the other "for moral, financial, or personal support or guidance." ***Trostle*** , 77 S.W.3d at 915. We examine whether, because of a close or special relationship, the plaintiff "is in fact accustomed to being guided by the judgment or advice" of the other. ***Gregan*** , 355 S.W.3d at 228 (quoting ***Thigpen*** , 363 S.W.2d at 253).

Another factor is the length and depth of the parties' relationship, although a long personal relationship alone is insufficient to create a fiduciary relationship. *See* ***Lee*** , 286 S.W.3d at 15; ***Hoggett v. Brown*** , 971 S.W.2d 472, 488 (Tex. App.—Houston [14th Dist.] 1997, pet. denied). For example, a familial relationship, while considered a factor, does not by itself establish a fiduciary relationship. ***Tex. Bank & Trust Co.***, 595 S.W.2d at 508. Confidential relationships may arise when the parties have dealt with each other in such a manner for a sufficient period of time that one party is justified in expecting the other to act in his best interest. *See* ***Ins . Co. of N. Am. v. Morris*** , 981 S.W.2d 667, 674 (Tex. 1998). There is no bright line temporal requirement to establish a confidential relationship, except that in circumstances involving a business transaction, the special relationship of trust and confidence must exist prior to, and apart from, the agreement made the basis of the suit. *See* ***Meyer v . Cathey*** , 167 S.W.3d 327, 331 (Tex. 2005). **Waiver**

David argues that Corrine did not preserve her sufficiency issues. This is because, his argument continues, the court's unobjected to jury charge, as submitted, requires only proof that David justifiably placed trust in Corrine, and not the other factors we examine in assessing the relationship. Moreover, David contends
7 Corrine's brief does not address the necessary finding under the charge as given. We disagree. *7

The parties' proposed charges requested essentially identical language in substantially the same form as submitted by the court. The trial court charged the jury, in relevant part, as follows:

> Did a relationship of trust and confidence exist between DAVID SHEARER and CORRINE SHEARER at the time of the occurrence?
>
> A relationship of trust and confidence existed if DAVID SHEARER justifiably placed trust and confidence in CORRINE SHEARER to act in DAVID SHEARER's best interests. DAVID SHEARER's subjective trust and feelings alone do not justify transforming arms-length dealings into a relationship of trust and confidence.

This question and instruction mirrors the standard submission for the existence of an informal fiduciary relationship in the Texas Pattern Jury Charge. *See* Comm. on Pattern Jury Charges, State Bar of Tex., *Texas Pattern Jury Charges: Business*, *Consumer*, *Insurance & Employment*, PJC 104.1 (2014). In her brief, not only did Corrine attempt to negate the finding required by the court's charge—that David must have justifiably placed trust and confidence in Corrine—but she attempted to negate all of the factors we examine in analyzing whether the parties had an informal fiduciary relationship.

Moreover, Corrine filed motions for directed verdict, judgment notwithstanding the verdict, and to disregard jury findings challenging the legal sufficiency of the evidence to support whether an informal fiduciary relationship existed between them. *See* ***Cecil v . Smith*** , 804 S.W.2d 509, 511 (Tex 1991) (holding that these motions preserve legal sufficiency challenges). She also filed a motion for new trial challenging the factual sufficiency of the evidence to support the relevant finding on the relevant grounds. *See* ***In re C .E.M.***, 64 S.W.3d 425, 428 (Tex. App.—Houston [1st Dist.] 2000, no pet.) (holding motion for new trial preserves factual sufficiency issue). We hold that Corrine preserved her legal and factual sufficiency issues. Therefore, we examine all relevant factors in determining whether Corrine owed David an informal fiduciary duty under the specific facts presented in this case. *See* ***Power Reps*** , ***Inc. v. Cates*** , No. 01-13-00856-CV, 2015 WL 4747215, at *11-12 (Tex. App.—Houston [1st Dist.] Aug. 11, 2015, no pet.) (mem. op.) (describing the considerations in assessing informal fiduciary relationships as factors, not elements that must all be satisfied in a particular case).

8 *8 **Informal Fiduciary Relationship**

Corrine first argues that the special relationship, if any, with David did not exist prior to and apart from the transaction at issue. As we have stated, there is no bright line temporal requirement to establish a confidential relationship, except that in circumstances involving a business transaction, the special relationship of trust and confidence must exist prior to, and apart from, the agreement made the basis of the suit. ***Meyer*** , 167 S.W.3d at 331. The facts in this case do not relate to a business transaction, and this factor is inapplicable.

A confidential relationship also can arise when the parties have dealt with each other in such a manner for a sufficient period of time that one party is justified in expecting the other to act in his best interest. *See* ***Ins . Co. of N. Am.***, 981 S.W.2d at 674. What may suffice to create the relationship in one case may not in another case, because the problem is one of equity and there are no hard and fast lines. *See* ***Tex . Bank & Trust Co.***, 595 S.W.2d at 508. Corrine argues that David's trust is purely subjective, he is unaccustomed to being guided by Corrine's judgment or advice, and he was not justified in believing that Corrine would act in his best interest.

Corrine was David's stepmother. She married John in 1990 when David was a young adult. David and John, and later Corrine, worked together for many years selling automobiles. In 2003, Corrine discovered that David used some of the company's assets for personal expenses. She called a family meeting to confront David on the matter, which created discord between them. John told Corrine that he authorized the transactions. Their business struggled due to the economy, and David left the company in 2005 to pursue other opportunities because of his financial obligations to his wife and children. Corrine was upset with David because he left the

company when it was heavily in debt and it ultimately failed. She testified that "her heart has never been the same." Corrine also worked with David's wife, Angela, in the real estate business. Corrine developed relationship problems with Angela, resulting in Angela's departing the business. Corrine ceased attending Christmas parties at David and Angela's home after the 2003 meeting. There is certainly no evidence that Corrine and David shared a confidential relationship prior to John's illness.

Corrine learned at the Shreveport hospital that, due to her divorce from John, she had no authority to consent to his medical care. Contrary to what she told the Shreveport hospital staff, Corinne represented herself to the staff
9 of the Houston hospital as being John's wife. Corrine *9 and David had near daily phone discussions concerning John's condition. During John's hospital stay, David contended with a number of personal issues. He had a shooting accident, resulting in the partial amputation of one of his fingers. He was an hourly employee and = missed over a week of work recovering from the incident. David's wife, Angela, was diagnosed with brain cancer during this time, making it difficult for her to work. David and Angela have four children, who at the time were from two to twelve years old. David's family depended on his continuing to work. Corrine knew that David had these personal issues.

David visited John at the Houston hospital on November 21, 2009. According to David, the treating physicians visited with him and Corrine concerning John's condition, and the possibility of executing a DNR order at some point. David also testified that they agreed to defer any decisions on that matter, hoping John's condition would improve, and that they would agree as a family. Corrine initially denied that the meeting occurred, but ultimately testified that she simply did not recall the meeting. David testified that after he returned home, Corrine told him that John's condition had improved, and that the DNR was "off the table." Corrine denied that this conversation occurred, and contends that the telephone records conclusively prove they did not have a discussion on the date David believed they discussed this matter. But even assuming that the telephone records show he was mistaken about the date, the jury could credit David's testimony that the conversation occurred.[4] The jury, as factfinder, was free to believe David, and we cannot substitute our judgment for that of the jury. *See* ***City of Keller*** , 168 S.W.3d at 819, 822; *see also* ***Rubio v . Klein*** , No. 11-13-00189-CV, 2015 WL 4720792, at *3 (Tex. App.—Eastland July 30, 2015, no pet.) (mem. op.).

4 Much of Corrine's testimony was argumentative.

As John's condition continued to deteriorate, hospital staff discussed possible end of life issues with Corrine. She told them that she would discuss the issue with her family. However, she never informed David, even though they briefly spoke that evening. The next morning, she executed the DNR order, and hospital staff ceased all care. John died the following day. David did not know the sequence of events preceding his father's death until he later read John's medical records.

Viewing the evidence in the light most favorable to the verdict, David and Corrine were not close prior to John's illness, but banded together during the family crisis. Corrine gained control by informing the hospital
10 staff in Houston that she was John's wife. Corrine regularly *10 communicated with David concerning his father's condition during the course of his illness. A rational jury could believe that she earned David's trust during this time. David and Corrine developed a pattern of communication in which Corrine gave David almost daily updates on John's condition. Corrine was aware of David's personal issues, including the shooting accident and Angela's cancer diagnosis. Corrine admitted that she knew David relied on her to relay updates on John's condition. Specifically, the following colloquy illustrates her knowledge and acceptance of his reliance.

Q My question was, you knew David was trusting you to accurately provide the information about his father, yes or no?

A Yes.

Q And you also knew that if David's father's condition, John's condition, got to the point where death was going to happen for sure, he was trusting you to give him a call?

A I don't know.

. . . .

Q You remember giving a deposition in this case?

A Yes.

. . . .

Q [Reading from Corrine's deposition] Question. Did you believe David trusted that you would tell him if his father's condition got to a point where death was likely? Answer. Death was always likely, but, yes. Did I read that correctly?

A Yes.

Q So you knew that he was trusting you that if that point came --

A Well, yes, sir. Everybody was trusting me. I had to tell them everything.

Then, Corrine admitted that at the critical moment, when she decided to execute the DNR and withdraw all life support, she did not disclose her decisions to David, even though she spoke with him on those days. A rational jury could infer that she failed to disclose this information because, according to her admission, she harbored feelings of angst against David after their family business failed.

Corrine relies on ***Trostle v. Trostle*** as support for her contention that her relationship with David does not give
11 rise to a confidential relationship. *See* ***Trostle*** , 77 S.W.3d at 914. In *11 ***Trostle*** , a stepson filed suit against his stepmother in part for failing to inform him that he was not a party to a wrongful death suit based on the circumstances surrounding his father's death. ***Id.*** at 911. The trial court granted the stepmother's motion for summary judgment, holding that she and the stepson did not have an informal fiduciary relationship requiring her to act in his best interest. ***Id.*** The appellate court affirmed, holding that the stepson could not have relied on his stepmother for moral, financial, or personal support or guidance. ***Id.*** at 914. This was because they were not particularly close, the stepson's wife had personal issues with the stepmother, and they had not spoken to each other much prior to his father's death and not at all at the funeral. ***Id.*** Moreover, the evidence showed that the stepmother made no representations to the stepson concerning his status in the wrongful death suit. ***Id.***

The facts here are distinguishable. Although David and Corrine were not close prior to his father's illness, there is evidence that in the time of crisis, Corrine acquired David's trust, perpetuated it over the course of John's treatment, and then failed to inform David of her decisions at the critical time, thereby purposefully depriving him of the ability to see his dying father. Although David subjectively trusted Corrine, it did not stop there. Corrine admitted that she knew David relied on her to accurately report information concerning his father's condition. She also knew of all the personal difficulties David faced during his father's illness.

In summary, viewed in the light most favorable to the verdict, there were peculiar circumstances inducing David to relax the care and vigilance that he would ordinarily exercise for his own protection. *See* ***R .R. St. & Co.***, 81 S.W.3d at 306. Thus, the jury could rationally have concluded that Corrine acquired influence over David and abused it, and that David's confidence had been reposed and betrayed. *See* ***Crim Truck & Tractor*** , 823 S.W.2d at 594; ***Young v. Fawcett*** , 376 S.W.3d 209, 215 (Tex. App.—Beaumont 2012, no pet.). Moreover, a rational jury could have concluded that David was in a position of relative weakness and Corrine was in a position of dominance due to David's personal issues. *See* ***Tex . Bank & Trust Co.***, 595 S.W.2d at 507; ***Pope*** , 667 S.W.2d at 275. Finally, the time period in question was not particularly long. But the law requires only that the parties have the relationship long enough for David to be justified in expecting Corrine to act in his best interest. *See* ***Ins . Co. of N. Am.***, 981 S.W.2d at 674. Because the issue is one of equity, under these unique facts, a reasonable jury could have concluded that the relationship developed sufficiently during the relevant time period to justify David's reliance on Corrine. ***Tex. Bank & Trust Co.***, 595 S.W.2d at 508. *12
12

We recognize that "[r]elatives assist people of advanced years or those who have health problems, and acts of kindness do not ordinarily give rise to fiduciary duties." ***Young*** , 376 S.W.3d at 215. However, the jury found that a fiduciary relationship existed. Reasonable and fair-minded jurors may differ with an appellate court on that conclusion, but on this record of disputed facts, the "jurors must be allowed to do so." *See* ***City of Keller*** , 168 S.W.3d at 822. "Jury trials are essential to our constitutionally provided method for resolving disputes when parties themselves are unable to do so." ***In re Columbia Med. Ctr. of Las Colinas*** , 290 S.W.3d 204, 211 (Tex. 2009). Fair-minded jurors could reasonably conclude that a confidential relationship existed, and that the confidence was betrayed.

Finally, Corrine argues as part of her factual sufficiency challenge that David knew he had the ability to contact the doctors and obtain information concerning his father. It is true that other than his November 21, 2009 visit, David did not independently speak with the doctors concerning John's care. He testified that he did not even consider whether he would have to provide consent to the medical procedures, because he just thought the doctors and hospital staff were doing what was necessary to improve John's condition. A reasonable jury could infer that, under this unique record, David contended with personal issues during the relevant time, and that he did not take a more active role in John's care because Corrine stepped into that role to provide David with accurate information concerning his father's condition. Viewing the evidence in a neutral light, we cannot say the jury's findings are contrary to the overwhelming weight of the evidence and clearly wrong and unjust.

We hold the evidence is legally and factually sufficient to support the jury findings challenged on appeal. Corrine's first issue is overruled.

INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

In her second issue, Corrine challenges the award of damages for intentional infliction of emotional distress.

Standard of Review and Applicable Law

To recover for intentional infliction of emotional distress, a plaintiff must show that (1) the defendant acted intentionally or recklessly, (2) the defendant's conduct was extreme and outrageous, (3) the defendant's actions caused the plaintiff emotional distress, and (4) the resulting emotional distress was severe. ***Hoffmann-LaRoche*** , ***Inc. v. Zeltwanger*** , 144 S.W.3d *13 438, 445 (Tex. 2004). Intentional infliction of emotional distress is a "gap-filler" tort, judicially created for the limited purpose of allowing recovery in those rare instances in which a defendant intentionally inflicts severe emotional distress in a manner so unusual that the victim has no other recognized theory of redress. ***Id.*** at 447. Where the gravamen of a plaintiff's complaint is really another tort, intentional infliction of emotional distress should not be available, regardless of whether the plaintiff chooses to assert the alternative claim, the plaintiff succeeds on the alternative claim, or the claim is barred. ***Id.*** at 447-48. The tort of intentional infliction of emotional distress is available only in those situations in which severe emotional distress is the intended consequence or primary risk of the actor's conduct. ***Standard Fruit & Vegetable Co. v. Johnson*** , 985 S.W.2d 62, 67 (Tex. 1998). Where emotional distress is solely derivative of or incidental to the intended or most likely consequence of the actor's conduct, recovery for such distress must be had, if at all, under some other tort doctrine. ***Id.*** **Discussion**

Corrine does not challenge whether her conduct was intentional, whether it was extreme and outrageous, or whether it caused David to suffer severe emotional distress. Rather, she contends that IIED should not serve as a "gap-filler" tort under these facts because another tort alleged by David could have compensated David for this harm. Specifically, Corrine argues that David's invasion of privacy claim for Corrine's alleged intrusion upon his seclusion in disposing of John's ashes without David's consent was an adequate theory of recovery to compensate him for his mental anguish. Consequently, her argument continues, the trial court should not have submitted his IIED claim to the jury.

Texas recognizes several forms of invasion of privacy, including intrusion upon a person's seclusion. ***Cain v. Hearst Corp.***, 878 S.W.2d 577, 578 (Tex. 1994); ***Blanche v. First Nationwide Mortg. Corp.***, 74 S.W.3d 444, 454 (Tex. App.—Dallas 2002, no pet). This type of invasion of privacy is generally associated with either a physical invasion of a person's property or eavesdropping on another's conversation with the aid of wiretaps, microphones, or spying. ***Clayton v. Wisener*** , 190 S.W.3d 685, 696 (Tex. App.—Tyler 2005, pet. denied). "The core of this claim is the offense of prying into the private domain of another, not publication of the results of such prying." ***Blanche*** , 74 S.W.3d at 455.

Here, the basis for David's intrusion upon seclusion claim was Corrine's usurping David's right to make medical decisions on John's behalf and deciding to execute the DNR and *14 withdraw life support.[5] For his IIED claim, David pleaded the same facts as his intrusion upon seclusion claim. But he also pleaded another set of facts to support his IIED claim—Corrine's dispersion of his father's ashes in a manner inconsistent with his wishes caused David severe emotional distress.

[5] David had the authority to make medical decisions on John's behalf. *See* TEX. HEALTH & SAFETY CODE ANN. § 166.039(b) (West Supp. 2015).

Separately, David pleaded that Corrine's action in spreading his father's ashes supported a conversion theory. At a pretrial hearing on Corrine's special exceptions, the parties understood that David contended that his IIED theory pertaining the disposition of his father's ashes was a "gap-filler" in the event that the trial court found that his conversion theory was invalid. At the close of evidence, the trial court granted Corrine's motion for directed verdict on the conversion theory. The trial court reasoned that Texas law recognizes that human remains are treated as quasi-property, and that the next of kin has a right to immediate possession of the remains for the purpose of directing the burial. *See* ***Evanston Ins . Co. v. Legacy of Life*** , ***Inc.***, 370 S.W.3d

377, 384-85 (Tex. 2012). The court also recognized that Texas law authorizes the recovery of mental anguish damages without physical injury for negligent mishandling of human remains or tissues, typically against morticians, funeral homes, and cemetery management companies. *See* ***id .*** However, neither the procedural vehicle nor the cause of action has been clearly delineated. *See* ***id .***

The trial court here held that the conversion action was not an appropriate means of redress because Texas law does not yet recognize a conversion claim for human remains. Additionally, the court held that a conversion claim requires proof of the value of the property at the time of conversion, but there is no evidence proving the value of John's remains. David does not challenge the disposition of his conversion claim in this appeal. The trial court submitted the IIED claim to the jury over Corrine's objection. Implicitly, the trial court concluded that IIED was an appropriate "gap-filler" tort. David argued to the jury that his IIED claim related only to the emotional distress he suffered from the disposition of John's remains, not the ground he pleaded that mirrored the intrusion upon seclusion theory.

Corrine argues only that the intrusion upon seclusion claim would have been an appropriate tort to compensate David for his emotional distress related to the disposition of his father's ashes. And we have stated that the core
15 of intrusion upon seclusion is the offense of *15 prying into the private domain of another. *See* ***Blanche*** , 74 S.W.3d at 455. Therefore, we hold that the intrusion upon seclusion tort is not an appropriate vehicle to compensate David under these facts. Moreover, the trial court held that David had no basis to support his conversion claim. Although the supreme court has authorized a common law right to recover mental anguish in mishandling human remains in certain circumstances, it has not clearly identified the appropriate cause of action in circumstances like these or its elements.[6] *See* ***Evanston Ins . Co.***, 370 S.W.3d at 384-85. Consequently, IIED is an appropriate cause of action under the unique procedural posture and circumstances of this case.

6 David had the right to dispose of John's remains. *See* TEX. HEALTH & SAFETY CODE ANN. § 711.002(a) (West Supp. 2015). But Section 711.002 does not expressly authorize mental anguish damages when the decedent's remains are disposed of in a manner inconsistent with his desires. *See* ***id .***

Finally, Corrine argues that ***Priebe v. A'Hearn*** supports her argument. *See generally* ***Priebe v . A'Hearn*** , No. 01-09-00129-CV, 2011 WL 1330808 (Tex. App.—Houston [1st Dist.] Apr. 6, 2011, no pet.) (mem. op. on reh'g). In ***Priebe*** , a stepdaughter filed suit against her stepmother under an IIED theory for, among other things, failing to include her in the discussion concerning the treatment of her father's remains. *See* ***id .*** at *6. Importantly, the appellate court held that the stepmother, as the surviving spouse, had the right to control the disposition of the stepdaughter's father's remains, and consequently, she had no duty to inform her stepdaughter of her father's death or the disposition of his remains.[7] In contrast, David had a higher priority to dispose of John's remains than Corrine because she and John were divorced.[8] *See* TEX. HEALTH & SAFETY CODE ANN. § 711.002(a) (West Supp. 2015); ***In re Estate of Woods*** , 402 S.W.3d 845, 849 (Tex. App.—Tyler 2013, no pet.). Therefore, ***Priebe*** is distinguishable.

7 The appellate court also held that the stepmother's conduct, although rude and unkind, was not extreme or outrageous as a matter of law. *See* ***Priebe*** , 2011 WL 1330808, at *7. However, Corrine does not rely on ***Priebe*** for that point, or otherwise argue in her brief that the evidence does not support the jury's finding that her conduct was extreme or outrageous.

8 Section 711.002(a-1) sets out a procedure whereby a person's right to control the disposition of the decedent's remains terminates ten days after the decedent dies by virtue of a statutory presumption that the person is unable or unwilling to act. We note that this provision of the statute was added in 2011, approximately two years after John's death. Act of

May 17, 2011, 82d Leg., R.S., ch. 532, §§ 2, 17, 2011 Tex. Gen. Laws 1311, 1318. Accordingly, the version of the statute in existence at the time of John's death did not contain a mechanism whereby David's right to control the disposition of his father's remains would terminate after the passage of the specified number of days. --------

16 Corrine's second issue is overruled. *16

DISPOSITION

Having overruled Corrine's first and second issues, we ***affirm*** the trial court's judgment.

GREG NEELEY

Justice Opinion delivered May 27, 2016.
Panel consisted of Worthen, C.J., Hoyle, J., and Neeley, J.

(PUBLISH)

17 *17

JUDGMENT

Appeal from the County Court at Law No. 2 of Gregg County, Texas (Tr.Ct.No. 2011-1919-CCL2)

THIS CAUSE came to be heard on the oral arguments, appellate record and briefs filed herein, and the same being considered, it is the opinion of this court that there was no error in the judgment.

It is therefore ORDERED, ADJUDGED and DECREED that the judgment of the court below be in all things affirmed, and that all costs of this appeal are hereby adjudged against the Appellant, CORRINE AUGUSTINE NICHOLS HILL SHEARER, for which execution may issue, and that this decision be certified to the court below for observance.

Greg Neeley, Justice.

Panel consisted of Worthen, C.J., Hoyle, J., and Neeley, J.

NO. 14-16-00357-CV
State of Texas in the Fourteenth Court of Appeals

Walker v. Walker

Decided Mar 30, 2017

NO. 14-16-00357-CV

03-30-2017

GLYNN WALKER AND MELINDA DEA WALKER, Appellants v. WILLIAM RALPH LAYNE WALKER AKA LAYNE WALKER & RONALD LINN WALKER, Appellees

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John Donovan Justice

On Appeal from the 10th District Court Galveston County, Texas
Trial Court Cause No. 15-CV-0354

MEMORANDUM OPINION

Appellants Glynn and Melinda Walker sued Glynn's father and brother regarding the ownership of a beach house in Port Bolivar, Texas. Glynn and Melinda claim that Glynn's father, appellee Ronald Walker, orally gave them the property on which they built a beach house, and then after a dispute arose wrongfully conveyed the property and beach house to Glynn's brother, appellee Layne Walker. Glynn and Melinda brought suit to quiet title based on a claim of *2 oral parol gift of realty, and also asserted claims for damages based on promissory estoppel, unjust enrichment, and breach of fiduciary duty. The trial court granted summary judgment against Glynn and Melinda on all claims.

We conclude that the trial court properly granted summary judgment on the claim for an oral parol gift of realty because there is no evidence of an intent to make a gift *in praesenti*, or present gift, of the property. The trial court also properly granted summary judgment on the claim for breach of fiduciary duty because there was no evidence of a fiduciary duty owed to Glynn or Melinda. The trial court erred, however, in granting summary judgment on the claims for promissory estoppel and unjust enrichment. We thus affirm in part, and reverse and remand in part, the trial court's judgment.

BACKGROUND

Layne Walker located six beach front lots in the Bolivar township of Galveston County, Texas. Layne approached his father Ronald about purchasing the lots. Ronald, who had owned a beach cabin in Port Bolivar when he was a young man, wanted to provide his sons Glynn and Layne with a beach experience similar to his own and decided to purchase the six lots. According to Glynn, Ronald told him that he, Ronald, would purchase the six lots (known as lots 13, 14, 15, 16, 17, and 18) and would give them to the brothers, but the brothers would "have the burden" of building houses on the lots. In July 2013, Ronald purchased the lots for $15,000 per lot in two closings.[1] The deeds to the lots were put in Ronald's name alone. *3

1 At closing, Ronald obtained title to 75 percent of the interest in the lots. The Bolivar Development Corporation, a defunct company, retained 25 percent of the interest in the lots. Ronald filed a lawsuit in January 2014 to obtain the remaining 25 percent title to the property. That lawsuit was concluded in the Fall of 2014, with Ronald being declared the owner of full title to the lots.

Though they initially planned to use three lots each in building their respective homes, ultimately Glynn and Layne agreed that Glynn would use lots 17 and 18, and Layne would use lots 13, 14, 15, and 16. Ronald told the boys "design your own places and build them," and he would "help [them] as far as I can." Shortly after Ronald purchased the lots, each of his sons set up a bank account for the construction of the beach houses. Glynn's account was named "Glynn Walker Construction Account." Ronald was a co-owner and signer on the account. Glynn took out a home equity loan on his current home in Port Neches in the amount of $135,000. All proceeds of that loan went directly into the Glynn Walker Construction Account. Ronald knew of the home equity loan and went to the bank with Glynn when he obtained the loan. Though the record does not provide details, it appears that Glynn's brother Layne also took out a home equity loan to use in building a beach house on the lots designated for his use.

In September 2013, construction began on the side-by-side beach homes and was largely completed by March of the following year. Glynn and Melinda made all of the decisions regarding the building of their beach home. For example, they chose the flooring, granite, colors, door knobs, light fixtures, and cabinets for the house. Glynn testified that he used the funds in the Glynn Walker Construction Account to pay for construction on his beach house and that he also did some of the work himself. The funds in the Glynn Walker Construction Account contained the money from the home equity loan Glynn took on his Port Neches home, as well as funds from Ronald. From the time construction began, Ronald had been making monthly deposits into both Glynn's and Layne's construction accounts. The amounts deposited each month varied, but over the course of
4 approximately eighteen months, Ronald had deposited over $110,000 into each of their accounts. *4 Glynn testified that the construction of his beach house ultimately cost between $230,000 and $240,000.

From March 2014, when the homes were completed, until March 2015, the parties and their families appear to have used the beach homes. Ronald would visit the beach homes when the families were present and stated that he always stayed in Layne's beach home when he was at the beach because Layne had built an extra room for his use.[2] Though he had visited the home built by Glynn, he had never spent the night in Glynn's beach house. Ronald paid the property taxes on the home and Glynn paid the insurance and utilities.

2 The room also was to be used for Ronald's handicapped nephew who visited the beach with them on occasion.

In March 2015, Ronald was visiting Layne's beach house with Layne's family. An issue arose regarding the presence of Glynn's high school aged son and the son's girlfriend at Glynn's beach house without any adults present. Ronald called Glynn and voiced his concerns regarding the use of Glynn's house and Glynn's son then left. Shortly thereafter, Glynn and Melinda went to the beach house and began removing their personal property and furnishings from the beach house. Ronald asked that the two families sit down for a talk. Ronald, Layne, Layne's wife Cynthia, Glynn and Melinda did so, but during the course of the meeting things got heated and Ronald went back to Layne's house next door. Layne and his wife Cynthia came over to Ronald and told him of a statement made by Melinda after Ronald left. According to Ronald, they told him that Melinda said she could rent her beach house to whoever she wanted and "there is nothing you can do about it." Melinda disputes using the words they attribute to her and contends she said only that it was within her right to invite whoever she
5 wanted to the beach house. Ronald testified that, after the meeting, he knew that "there would *5 never be a relationship between the two families that could in any way be continued" and he had a concern that this would

"become the worst nightmare that two families could endure." Ronald instructed Layne[3] to prepare two deeds for execution. Layne did so and on March 26, 2015, Ronald executed two deeds that conveyed to Layne by "Special Warranty Gift Deed," all of the lots, including lots 17 and 18 containing Glynn's beach house.

[3] Layne is a licensed attorney in the State of Texas.

Glynn learned of the conveyance a few days later. Layne and Glynn communicated by phone and text, and Layne eventually told Glynn not to return to the property. Glynn then hired a moving company to remove the remainder of his personal property from the house, including certain fixtures such as appliances and built-ins. Glynn and Melinda state they continue to make payments in the amount of $1,015 per month on the home equity loan used to construct the beach house they are no longer able to use. Layne and Ronald both said they "begged" Glynn to sit down with them and bring receipts for costs spent on the house so that they could pay Glynn for those costs, but that Glynn would not do so.

Shortly after they removed their property and fixtures, Glynn and Melinda filed this lawsuit. In their live pleading, Glynn and Melinda allege that they own equitable title to lots 17 and 18, along with the improvements to the property, through an oral parol gift of realty from Ronald. They also seek to enforce his promise and obtain monetary damages from Ronald under a theory of promissory estoppel, and from Layne under theories of unjust enrichment and breach of fiduciary duty. The trial court initially granted a request for a temporary restraining order against Ronald and Layne, but dissolved the restraining order and denied a request
6 for injunctive relief against them after an evidentiary hearing. *6

Ronald and Layne filed a traditional and no-evidence motion for summary judgment on all claims asserted by Glynn and Melinda. In the motion, Ronald and Layne argued that Ronald had an absolute right to dispose of the property, the statute of frauds barred any oral promise to transfer real property, and Glynn and Melinda had waived or were estopped to deny Ronald's ownership of the property. Ronald and Layne also asserted that neither attorneys' fees nor exemplary damages were recoverable, and that they had not been unjustly enriched at Glynn and Melinda's expense. Ronald and Layne then included a paragraph under the heading "No Evidence," stating that "Plaintiffs have produced no evidence, whatsoever, of an enforceable gift of real property, or entitlement to monetary damages, including, but not limited to, exemplary damages or attorney's fees. . . . undue influence, fiduciary breach, or unjust enrichment."

The trial court granted summary judgment on all claims of Glynn and Melinda without specifying the grounds for its decision, or whether it was granting traditional or no-evidence summary judgment. Glynn and Melinda filed a motion to modify, correct, or reform the judgment, which was overruled by operation of law. This appeal followed.

ANALYSIS

In one issue Glynn and Melinda challenge the trial court's order granting summary judgment on all of their claims against Ronald and Layne. For the reasons set forth below, we overrule in part, and sustain in part, Glynn and Melinda's issue.

A. *Standards of review.*

The summary judgment standards of review are well-known. We review de novo the trial court's order granting
7 summary judgment. *Ferguson v. Bldg.* *7 *Materials Corp. of Am.*, 295 S.W.3d 642, 644 (Tex. 2009) (per curiam); *Wyly v. Integrity Ins. Solutions*, 502 S.W.3d 901, 904 (Tex. App.—Houston [14th Dist.] 2016, no pet.). We consider the evidence in the light most favorable to the non-movant, and indulge reasonable inferences and

resolve all doubts in its favor. *See City of Keller v. Wilson*, 168 S.W.3d 802, 824 (Tex. 2005); *Wyly*, 502 S.W.3d at 904. "We credit evidence favorable to the non-movant if reasonable fact finders could and disregard contrary evidence unless reasonable fact finders could not." *Wyly*, 502 S.W.3d at 904.

When both no-evidence and traditional grounds for summary judgment are asserted, we first review the trial court's order under the no-evidence standard. *PAS, Inc. v. Engel*, 350 S.W.3d 602, 607 (Tex. App.—Houston [14th Dist.] 2011, no pet.). To prevail on a no-evidence summary judgment, the movant must allege that no evidence exists to support one or more essential elements of a claim for which the non-movant bears the burden of proof at trial. Tex. R. Civ. P. 166a(i); *Kane v. Cameron Int'l Corp.*, 331 S.W.3d 145, 147 (Tex. App.—Houston [14th Dist.] 2011, no pet.). A no-evidence motion may not be conclusory, but must instead give fair notice to the non-movant as to the specific element of the non-movant's claim that is being challenged. *See Timpte Indus., Inc. v. Gish*, 286 S.W.3d 306, 310-11 (Tex. 2009). The non-movant must then present evidence raising a genuine issue of material fact on the challenged elements. *Kane*, 331 S.W.3d at 147. A fact issue exists where there is more than a scintilla of probative evidence. *See Buck v. Palmer*, 381 S.W.3d 525, 527 (Tex. 2012) (per curiam). More than a scintilla of evidence exists if the evidence rises to a level that would allow reasonable and fair-minded people to differ in their conclusions as to the existence of a vital fact. *Dworschak v. Transocean Offshore Deepwater Drilling, Inc.*, 352 S.W.3d 191, 196 (Tex. App.—Houston [14th
8 Dist.] 2011, no pet.) (citing *8 *Ford Motor Co. v. Ridgway*, 135 S.W.3d 598, 601 (Tex. 2004)).

To prevail on a traditional motion for summary judgment, a movant must establish that no genuine issue of material fact exists so that the movant is entitled to judgment as a matter of law. Tex. R. Civ. P. 166a(c); *Mann Frankfort Stein & Lipp Advisors, Inc. v. Fielding*, 289 S.W.3d 844, 848 (Tex. 2009). Summary judgment is appropriate if the movant conclusively negates at least one essential element of the plaintiff's claim. *Wyly*, 502 S.W.3d at 905.

B. *Glynn and Melinda's claims for relief.*

Glynn and Melinda contend on appeal that the trial court erred in granting summary judgment on their claims for an oral parol gift of real property, promissory estoppel, unjust enrichment, and breach of fiduciary duty. We address the trial court's summary judgment with regard to each claim in turn.

1. *Oral parol gift of realty.*

The well-settled general rule in Texas is that a conveyance of real property must be in writing. *See Dawson v. Tumlinson*, 242 S.W.2d 191, 192 (Tex. 1951) ("The law in this state as to parol sales and parol gifts of real property was fully and carefully stated in *Hooks v. Bridgewater*, 111 Tex. 122, 229 S.W. 1114 (1921), 15 A.L.R. 215, and the law as there stated has been consistently followed."); *see also* Tex. Prop. Code § 5.021 (West 2004) ("A conveyance of an estate of inheritance, a freehold, or an estate for more than one year, in land and tenements, must be in writing and must be subscribed and delivered by the conveyor or by the conveyor's agent authorized in writing."); Tex. Bus. & Com. Code § 26.01(a), (b)(4) (West 2009) ("Statute of Frauds.").

An exception to the requirement of a written conveyance exists, however, if a party establishes the elements of
9 a parol gift of real estate in equity. *See Dawson*, *9 242 S.W.2d at 192-93; *Estate of Wright*, 482 S.W.3d 650, 657 (Tex. App.—Houston [14th Dist.] 2015, pet. denied). To establish a valid parol gift of realty enforceable in equity, a party must show: (1) a gift *in praesenti*, that is a present gift; (2) possession of the realty by the donee with the donor's consent; and (3) permanent and valuable improvements to the realty by the donee with the donor's consent, or other facts demonstrating that the donee would be defrauded if the gift were not enforced. *Estate of Wright*, 482 S.W.3d at 657; *see also Flores v. Flores*, 225 S.W.3d 651, 655 (Tex. App.—El Paso 2006,

pet. denied). The requirements are strictly construed and, at trial, are subject to a heightened burden of proof. *See Estate of McNutt*, No. 04-14-0010-CV, 2016 WL 519732, at *3 (Tex. App.—San Antonio Feb. 10, 2016, pet. pending); *see also Oadra v. Stegall*, 871 S.W.2d 882, 892 (Tex. App.—Houston [14th Dist.] 1994, no writ) (clear and convincing evidence applies to claims involving inter vivos gifts).[4]

[4] Ronald and Layne urge us to apply the heightened clear and convincing evidence standard of review to this appeal. We decline to do so. Courts do not apply the clear and convincing evidence standard at the summary judgment stage. *See Huckabee v. Time Warner Entm't Co., L.P.*, 19 S.W.3d 413, 421-22 (Tex. 2000) (noting difficulties involved if heightened standard were applied to summary judgment review).

a. *The motion for summary judgment.*

Ronald and Layne moved for a no-evidence summary judgment on the ground that Glynn and Melinda have no evidence of "an enforceable gift of real property." On appeal, Glynn and Melinda contend that this fails to sufficiently specify the elements of the oral parol gift claim for a no-evidence summary judgment. We agree that the no-evidence portion of the motion for summary judgment does not specify the three elements outlined above regarding an oral gift of realty. We conclude, however, that the motion was sufficiently specific under the facts of this case with regard to the oral gift of realty claim. Ronald and Layne argued that there was no gift *in*
10 *praesenti* and that there was no evidence of an *10 enforceable gift. Glynn and Melinda were able to respond thoroughly and did so by pointing out the evidence they contended raised genuine issues of material fact on each element of the claim. *See Timpte Indus.*, 286 S.W.3d at 311 (fair notice given where record revealed no confusion as to the assertions of no evidence and non-movant was able to respond thoroughly as to elements challenged). And, because both sides attached evidence in the context of the motions, our task is simply to determine whether a fact issue exists. *See Buck*, 381 S.W.3d at 527 n.2 (in hybrid no-evidence and traditional motion for summary judgment where both sides attach evidence, "[t]he ultimate question is simply whether a fact issue exists.").

b. *There is no evidence of a present gift.*

To establish a gift *in praesenti*, or present gift, the purported donee must show that the donor, at the time he makes the gift, intended an immediate divestiture of the rights of ownership out of himself, and a consequent immediate vesting of such rights in the donee. *Estate of Wright*, 482 S.W.3d at 657; *Thompson v. Dart*, 746 S.W.2d 821, 825 (Tex. App.—San Antonio 1988, no writ) ("'In praesenti' means at the present time; it is used in opposition to *in futuro*."). The possession asserted by the donee must be in the nature of an owner's right to control the property. *Thompson*, 746 S.W.2d at 825; *Troxel v. Bishop*, 201 S.W.3d 290, 297 (Tex. App.—Dallas 2006, no pet.). Statements to the effect that a donor is "going to give," or will give the gift at some later date, do not show an intent to make a present gift. *See Flores*, 225 S.W.3d at 657; *Thompson*, 746 S.W.2d at 827; *Massey v. Lewis*, 281 S.W.2d 471, 474 (Tex. App.—Texarkana 1955, writ ref'd n.r.e.).

Glynn and Melinda attached to their response to the motion for summary judgment various affidavits and the
11 transcript from the evidentiary hearing on their *11 request for a temporary injunction. That evidence included the following concerning the alleged gift:

• Glynn testified: "in the Summer of 2013, my dad bought six lots in the Bolivar town site of which he gifted to my brother and I."

• According to Glynn, Ronald said "I'll buy the lots. I'll give them to y'all, but y'all have the burden of building the houses. And we talked about it and we both thought that was a very good deal, and we did it."

• Glynn stated in his affidavit that Ronald said he was purchasing beach lots for both Glynn and Layne.

• Ronald did not tell Glynn that he would retain ownership of the lots until Ronald's death.

• Ronald told Glynn and Layne "y'all design your own place, build it. I will help you as far as I can."

• Ronald knew that Glynn and Melinda were taking out a home equity loan for the construction of the beach house, and in fact was present with Glynn at the bank at the time Glynn got the loan.

• Ronald referenced the houses as "Glynn's house" or "Layne's house."

• Ronald told Melinda "It is his (Glynn[sic]) house, he can build whatever he wants it doesn't matter to me." He then proceeded to state that he "was excited to have purchased the property for his boys."

• With regard to getting an actual deed, Glynn said that Ronald told him "I'll transfer to y'all whenever you're ready." There was no controversial discussion about transferring the deed and Glynn "couldn't feel better about my deed being secured than with my dad." They discussed it a couple of times as the months went on and they decided to wait to transfer the deed until the suit to quiet title against the Bolivar Development Company concluded.

• When the suit to quiet title against the Bolivar Development Company finished, Ronald called Glynn and said "Hey, congratulations. You now own 100 percent of your property."

12 *12

• Two family friends testified that they understood from talking to Glynn and Layne that the land was purchased and given to the brothers.

Ronald also testified regarding his intent with regard to the beach lots. Ronald stated that he never intended to deed the property to Glynn and Layne. Rather, he always intended that the brothers would inherit the property upon Ronald's death. To that end, he executed a will in January 2014 specifically bequeathing the properties to Glynn and Layne respectively.[5] Ronald further stated that he intended for the brothers to independently construct homes on the lots with the understanding that they would not get them until he died, and that he hoped to fund most, if not all, of the construction. Ronald placed over $110,000 in a joint bank account for the construction of the house and maintained the account in his name as well as Glynn's name. Ronald contemplated making the beach property his home during his lifetime if he could get a homestead exemption on both of the properties but ultimately did not do so.

[5] Ronald and Layne argue on appeal that the will "conclusively negates any alleged present intent." Ronald and Layne did not make this argument in their motion for summary judgment and it, therefore, cannot support the trial court's summary judgment on appeal. *See Sci. Spectrum, Inc. v. Martinez*, 941 S.W.2d 910, 912 (Tex. 1997) ("A motion for

summary judgment must itself expressly present the grounds upon which it is made, and must stand or fall on these grounds alone."). Even if the argument had been preserved, we do not agree that the will conclusively negated a present intent in this case. A will speaks only "at the time of the testator's death, and the estate's property cannot be assessed until that date. The will can only give things possessed by the testator at his death." *Estate of Wright*, 482 S.W.3d at 658. Similarly, the will in this case, executed in January 2014, cannot negate as a matter of law an oral gift of property allegedly made in July 2013 (if a gift had been made).

Reviewing the evidence in the light most favorable to Glynn and Melinda, and indulging all inferences in their favor as we must, we conclude that there is no evidence that Ronald intended an *immediate* divestiture of the rights of ownership out of himself, and a consequent immediate vesting of such rights in Glynn. The statements
13 of Ronald pointed to by Glynn were all to the effect that Ronald would *13 give the title to the property to Glynn at some point in the future. Ronald told Glynn he *would* give him the property (as opposed to he *immediately* gives) and that he *would* transfer the property whenever Glynn was ready. In fact, the description of the land Glynn alleges was given changed over time—*i.e.*, what would originally be three lots each to both brothers became two lots for Glynn and four lots for Layne, and the original 75 percent interest originally purchased by Ronald became 100 percent after the Bolivar Development Company litigation concluded. We hold that these are not statements of an immediate gift but rather reflect an intent to give the land to Glynn at some point in the future. *See*, *e.g.*, *Flores*, 225 S.W.3d at 657 (offer to give property to son to live in when son finished his enlistment in military not sufficient); *Thompson*, 746 S.W.2d at 826-27 (statements of "going to give" or "was giving them the ranch" not sufficient); *Massey*, 281 S.W.2d at 474 (statements "stay with me, take care of me, and the place is yours" or "do what you want, the property is yours" were not sufficient to show intent to make present gift).

In *Estate of Wright*, we addressed the sufficiency of the evidence to support a trial court's finding of a present intent to make an oral gift of real property. *See Estate of Wright*, 482 S.W.3d at 653, 657-58. We found sufficient evidence of a present intent to make a gift existed where the donor stated "that was it," the house was the donee's and at the same time discontinued any additional rental payments from the donee. *Id*. Language by Ronald in this case, after the completion of the Bolivar Development Company litigation congratulating Glynn for "now owning 100% of his property" at first appears similar to the language found sufficient in *Estate of Wright*. We find it distinguishable, however, because the language used by Ronald in this case referred to the fact that the remaining 25 percent previously held by the Bolivar Development Company was now owned
14 based on the *14 conclusion of the Bolivar litigation. It does not establish that Ronald intended an immediate gift of the property.

Ronald instead continued to act as the owner of the property even after Glynn's home was built. For example, Ronald paid all of the property taxes on the home and voiced his concerns over how Glynn's high school aged son was using the home. *See Thompson*, 746 S.W.2d at 827 (alleged donor paying property taxes and continuing to generally act as owner is indication no divestiture of property had occurred); *see also Troxel*, 201 S.W.3d at 296 (to constitute gift, owner must release all dominion and control over the property). After the disagreement at the family meeting, Glynn began moving his property out of the home and ultimately removed all of his belongings and fixtures from the property in response to Layne's demand to leave. Glynn's conduct in vacating the premises, even if done to maintain the peace, was inconsistent with his claim of being the owner of the property. *See Thompson*, 746 S.W.2d at 827; *see also Dawson*, 242 S.W.2d at 194 (noting importance of showing possession was held by the alleged donee in the nature of an owner of the property).

There is testimony that Ronald referred to the home as Glynn's home, that he purchased the property for his boys, and that Glynn could build whatever home he wanted. The statements, however, do not show an intent to make an immediate transfer of the property to Glynn as an owner of the property, as opposed to a permitted user of the property as Ronald claimed was his intent. *See Sharp v. Stacey*, 535 S.W.2d 345, 351 (Tex. 1976) (references to "Junior's place" or that farm belonged to Junior was equally consistent with status as tenant farmer and thus "did not constitute any evidence that Junior occupied the farm as owner."). The statements are equally consistent with Ronald's contention that he purchased the property for the boys to build homes on and
15 use with their families during his *15 lifetime and then pass to the boys upon his death. Likewise, the statements from the two family friends that they understood the property to be Glynn's because of their discussions with Glynn and Layne are no evidence of *Ronald's* intent with regard to the lots.

The record does set forth evidence that Ronald intended at some point in the future to give Glynn and Layne the lots for the beach homes. In fact, Ronald states in his motion for summary judgment that "Ronald L. Walker at one time intended to bequeath the two beach houses to his two sons." There is simply no evidence, however, that Ronald intended an immediate divestiture of all of his rights and control to the lots in favor of his sons. As a result, there is no evidence of a gift *in praesenti*, and the trial court properly granted summary judgment on the claim for title to the property based on an oral parol gift. We overrule Glynn and Melinda's challenge to the summary judgment on that claim.

2. *The promissory estoppel claim*.

Glynn and Melinda assert that they may recover reliance damages under a claim of promissory estoppel. Although promissory estoppel is generally used as a defensive theory, it may be asserted as an affirmative claim for damages. *See Boales v. Brighton Builders, Inc.*, 29 S.W.3d 159, 166 (Tex. App.—Houston [14th Dist.] 2000, pet. denied); *see also Mann v. Robles*, No. 13-14-00190-CV, 2016 WL 1274690, at *3 (Tex. App.—Corpus Christi-Edinburg Mar. 31, 2016, pet. denied). Glynn and Melinda argue that theirs is an affirmative claim for damages. The elements of an affirmative claim for promissory estoppel are: (1) a promise; (2) foreseeability by the promisor of reliance on the promise; and (3) substantial reliance by the promisee to its detriment. *See Boales*, 29 S.W.3d at 166 (citing *English v. Fischer*, 660 S.W.2d 521, 524 (Tex. 1983)); *see also*
16 *Collins. v. Walker*, 341 S.W.3d 570, 573-74 (Tex. App.—Houston [14th Dist.] 2011, no pet.) (claim *16 applies where enforcing the promise is necessary to avoid injustice). The damages in an affirmative claim for promissory estoppel are the amounts necessary to restore the promisee to the position in which he would have been had he not relied on the promise. *See Fretz Constr. Co. v. S. Nat'l Bank*, 626 S.W.2d 478, 483 (Tex. 1981); *Allied Vista, Inc. v. Holt*, 987 S.W.2d 138, 142 (Tex. App.—Houston [14th Dist.] 1999, pet. denied); *see also Frost Crushed Stone Co., Inc. v. Odell Geer Constr. Co., Inc.*, 110 S.W.3d 41, 47 (Tex. App.—Waco 2002, no pet.).

Defensively, promissory estoppel may be applied to bar the application of the Statute of Frauds and allow the enforcement of an otherwise unenforceable oral agreement. *See generally Exxon Corp. v. Breezevale Ltd.*, 82 S.W.3d 429, 438 (Tex. App.—Dallas 2002, pet. denied). In their motion, Ronald and Layne asserted only traditional grounds for summary judgment on the promissory estoppel claim. Specifically, they argued (1) Ronald could "never have anticipated that his alleged promise might cause any injury to Plaintiffs" and (2) Glynn and Melinda have not sustained a definite and substantial injury. Ronald and Layne further moved for summary judgment on the ground that promissory estoppel is available only if there was a promise to sign an existing document transferring title. However, these elements relate only to a defensive use of promissory estoppel and not to an affirmative claim for damages.

In their motion for summary judgment, Ronald and Layne relied on *Nagle v. Nagle*, a case in which the Texas Supreme Court addressed the elements for promissory estoppel when asserted as a counter-defense to a claim to enforce an agreement barred by the Statute of Frauds. 633 S.W.2d 796, 800 (Tex. 1982). The *Nagle* court explained: "[C]ourts will enforce an oral promise to sign an instrument complying with the Statute of Frauds if: (1) the promisor should have expected that his promise would lead the promisee to some definite and
17 substantial injury; (2) *17 such an injury occurred; and (3) the court must enforce the promise to avoid injustice." *Id*. (citing *"Moore" Burger, Inc. v. Phillips Petroleum Co*., 492 S.W.2d 934 (Tex. 1973)). Glynn and Melinda argue on appeal that they do not attempt, by their promissory estoppel claim, to enforce the terms of the oral parol gift of realty. Instead, they seek reliance damages based on the promise made by Ronald that he would transfer title to the property to them.[6] Their live pleading, however, asks for both reliance damages and an exemption from the Statute of Frauds to enforce Ronald's oral promise to transfer the property. As Glynn and Melinda do not address the defensive use of a promissory estoppel cause of action in their issues or briefing to this Court, we conclude they have waived any error on appeal concerning the defensive use of promissory estoppel to preclude application of the Statute of Frauds. *See* Tex. R. App. P. 38.1(h) (failure to provide substantive analysis waives issue on appeal).

6 Ronald and Layne argue that Glynn and Melinda have asserted a new argument on appeal by recognizing in their briefing that promissory estoppel is not a proper vehicle for obtaining actual title to the property. *See Wheeler v. White*, 398 S.W.2d 93, 97 (Tex. 1965) (under promissory estoppel, promisee may recover "no more than reliance damages measured by the detriment sustained."). We disagree that they have made a new argument. Glynn and Melinda pleaded for reliance damages under their promissory estoppel claim in their Third Amended Petition. In their response to the motion for summary judgment, Glynn and Melinda made clear that "[t]his promissory estoppel claim is only brought in the alternative if there is a finding that there was no present gift under oral parol gift."

Nevertheless, we review Ronald and Layne's summary judgment evidence to determine whether they conclusively negated any element of Glynn and Melinda's affirmative promissory estoppel claim for reliance
18 damages. As to foreseeability of reliance[7] and substantial reliance to Glynn and Melinda's *18 detriment, Ronald and Layne made only a conclusory statement in their motion that Ronald could never have anticipated that his alleged promise might cause any injury to Glynn and Melinda. Reviewing all of the evidence in the light most favorable to the non-movants shows the opposite. Ronald concedes that he encouraged Glynn and Melinda to build a house on the lot—he said to them "y'all design your own place, build it. I will help you as far as I can." Glynn testified that Ronald also told him that he would transfer the deed to Glynn whenever Glynn was ready. Ronald knew that Glynn and Melinda were taking out a home equity loan of $135,000 to use in building the beach house. In fact, Ronald went to the bank with Glynn when he obtained the loan and knew of the joint banking account Ronald had with Glynn for construction of the house. Ronald conceded at the temporary injunction hearing that he legitimately owed Glynn "approximately $80,000 but he still won't give me the verified receipts." This evidence is sufficient to raise a genuine issue of material fact with regard to whether Ronald could have anticipated that his promise would lead to Glynn and Melinda's reliance and that Glynn and Melinda substantially relied upon Ronald's promise to their detriment.[8]

7 In their appellees' brief, Ronald and Layne also argue that Glynn and Melinda could not have justifiably relied on Ronald's promise to provide them with legal title given that the terms of Ronald's will granted legal title only upon his death. Ronald and Layne did not assert this ground in their motion for summary judgment. We will not consider it on appeal. *See Sci. Spectrum*, 941 S.W.2d at 912.

8 Ronald and Layne also argue that the promissory estoppel claim is not available because there was no promise to sign an existing written document transferring title. In support, they cite *Exxon Corp*., 82 S.W.3d at 429 and *Beta Drilling*, *Inc*. *v*. *Durkee*, 821 S.W.2d 739 (Tex. App.—Houston [14th Dist.] 1992, pet. denied). These cases both involve the defensive use of promissory estoppel, which Glynn and Melinda have waived. Further, the written document requirement does not apply to an affirmative promissory estoppel claim for reliance damages. *See Mann*, 2016 WL 1274690, at *3 & n.7.

We conclude that Glynn and Melinda waived any error as to a defensive use of promissory estoppel with respect to title to the property and affirm the summary judgment as to that portion of the promissory estoppel claim. We conclude further that there are genuine issues of material fact with regard to the affirmative claim of
19 promissory estoppel for reliance damages. We thus sustain Glynn and Melinda's *19 issue with respect to the trial court's order granting summary judgment on that claim.

3. *The unjust enrichment claim*.

Unjust enrichment is an equitable doctrine that allows recovery in quasi-contract or restitution if a contemplated agreement is "unenforceable, impossible, not fully performed, thwarted by mutual mistake, or void for other legal reasons." *French v*. *Moore*, 169 S.W.3d 1, 11 (Tex. App.—Houston [1st Dist.] 2004, no pet.). It is typically found to apply where one person has obtained a benefit from another by fraud, duress, or the taking of an undue advantage. *Burlington N*. *R*. *Co*. *v*. *S.W*. *Elec*. *Power Co*., 925 S.W.2d 92, 97 (Tex. App. —Texarkana 1996), *aff'd sub nom S.W*. *Elec*. *Power Co*. *v*. *Burlington N*. *R*. *Co*., 966 S.W.2d 467 (Tex. 1998). The remedy is not proper simply because it might be more expedient or generally fair that some compensation be afforded or because the benefits amount to a windfall. *See Heldenfels Bros*. *v*. *City of Corpus Christi*, 932 S.W.2d 39, 42 (Tex. 1992). The right to recover under an unjust enrichment theory does not depend on the existence of a wrong. *See Bransom v*. *Standard Hardware*, *Inc*., 874 S.W.2d 919, 927 (Tex. App.—Fort Worth 1994, writ denied); *see also Oxford Fin*. *Cos*., *Inc*. *v*. *Velez*, 807 S.W.2d 460, 465 (Tex. App.—Austin 1991, writ denied). The doctrine is based on the equitable principle that one who receives benefits, even passively, which would be unjust to retain ought to make restitution for those benefits. *See Mowbray v*. *Avery*, 76 S.W.3d 663, 679 (Tex. App.—Corpus Christi 2002, pet. denied).

In the motion for summary judgment, Ronald and Layne state summarily in the no-evidence paragraph that Glynn and Melinda produced no evidence of unjust enrichment. They do not specify what element of the unjust
20 enrichment theory they are challenging. As a result, the no evidence motion was deficient and will not *20 support summary judgment. *See Wyly*, 502 S.W.3d at 907 (conclusory no-evidence motion that did not specify elements was improper and would not support summary judgment).

Ronald and Layne also challenged the unjust enrichment theory on traditional grounds. Without citing any legal authority, they argued summary judgment should be granted because the transfer of ownership from Ronald to Layne was "entirely legal" and thus not in any manner unjust. This ground does not entitle Ronald and Layne to summary judgment. To obtain restitution on a theory of unjust enrichment, a wrongful act need not be shown. *See Oxford Fin*. *Cos*., 807 S.W.2d at 466; *see also Bransom*, 874 S.W.2d at 927 ("A right of recovery under unjust enrichment is essentially equitable and does not depend on the existence of a wrong."). Whether the conveyance from Ronald to Layne was "entirely legal" does not conclusively negate the unjust enrichment claim and summary judgment on that ground is improper.

We conclude that Ronald and Layne did not conclusively establish their right to judgment as a matter of law on the claim for unjust enrichment. We sustain Glynn and Melinda's issue to the extent that the trial court granted summary judgment on the unjust enrichment claim.

4. *The breach of fiduciary duty claim*.

Glynn and Melinda alleged that Layne owed them a fiduciary duty based on years of handling family transactions and that he breached that duty by obtaining their beach home. Layne moved under Rule 166a(i) for summary judgment on the grounds that there was no evidence of a fiduciary breach. He also asserted he did not owe a fiduciary duty based on mere subjective trust by Glynn or Melinda. We agree that Glynn and Melinda
21 failed to adduce evidence that Layne owed either of *21 them a fiduciary duty with respect to the beach home, and thus there is no evidence of a fiduciary breach.

It is well-settled that certain relationships, such as attorney-client, partnership, or trustee, give rise to a fiduciary duty as a matter of law. *Meyer v. Cathey*, 167 S.W.3d 327, 330-31 (Tex. 2005). Our law also recognizes that certain relationships may give rise to an informal fiduciary duty based on "a moral, social, domestic or purely personal relationship of confidence and trust." *Id*. at 331; *see Assoc. Indem. Corp. v. CAT Contracting, Inc.*, 964 S.W.2d 276, 287 (Tex. 1998); *Lee v. Hasson*, 286 S.W.3d 1, 14 (Tex. App.—Houston [14th Dist.] 2007, pet. denied). Informal fiduciary duties will not be created lightly. *See Schlumberger Tech. Corp. v. Swanson*, 959 S.W.2d 171, 177 (Tex. 1997); *Hasson*, 286 S.W.3d at 14. Some relationships involving trust and confidence simply do not rise to the stature of a fiduciary relationship. *See Schlumberger Tech. Corp.*, 959 S.W.2d at 176-77. Subjective trust of one person in another is also not sufficient to create a duty. *See Swinehart v. Stubbeman, McRae, Sealy, Laughlin & Browder, Inc.*, 48 S.W.3d 865, 880 (Tex. App.—Houston [14th Dist.] 2001, pet. denied). "[A] confidential relationship is a two-way street: 'one party must not only trust the other, but the relationship must be mutual and understood by both parties.'" *Id*. at 882 (citing *Hoover v. Cooke*, 566 S.W.2d 19, 26 (Tex.Civ.App.—Corpus Christi 1978, writ ref'd n.r.e.)).

Family relationships may give rise to an informal fiduciary duty between family members where there is sufficient evidence of a relationship of trust and confidence. *See Young v. Fawcett*, 376 S.W.3d 209, 214 (Tex. App.—Beaumont 2012, no pet.) ("[F]amily relationships—where a person trusts in and relies upon a close member of her core family unit—may give rise to a fiduciary duty when equity requires."). A mere family
22 relationship, however, by itself is generally not *22 sufficient. *Tex. Bank & Trust Co. v. Moore*, 595 S.W.2d 502, 508 (Tex. 1980) (aunt/nephew relationship, even where nephew assisted aunt, was not, standing alone, sufficient to establish fiduciary relationship); *Kilpatrick v. Kilpatrick*, No. 02-12-00206-CV, 2013 WL 3874767, at *4 (Tex. App.—Fort Worth July 25, 2013, pet. denied) ("[t]he fact that Kelly, Tim, and Devin are brothers does not, by itself, establish that a fiduciary relationship existed between them."). We will examine the actualities of the relationship between the parties in determining the existence of a confidential fiduciary relationship. *Swinehart*, 48 S.W.3d at 880. Where there is no evidence to establish the relationship or the facts are undisputed, a court may determine the question as a matter of law. *See Meyer*, 167 S.W.3d at 330; *Swinehart*, 48 S.W.3d at 880.

In response to the motion for summary judgment, Glynn and Melinda stated "Plaintiffs placed their trust and confidence in Defendant Layne Walker based on years of handling family transactions." Melinda, however, produced no evidence showing any facts establishing a relationship of trust and confidence specifically between her and Layne. The fact that Layne is Melinda's brother-in-law alone is not sufficient. *See Moore*, 595 S.W.2d at 508; *see also Kilpatrick*, 2013 WL 3874767, at *4 ("Similarly, family relationships, although a factor in determining whether a fiduciary duty exists, are not enough alone to establish a fiduciary relationship."). There is no evidence showing that she sought Layne's advice or guidance on any matter, nor evidence of any other circumstances suggesting a relationship of trust and confidence between them. The trial court properly granted summary judgment on Melinda's claim against Layne for breach of fiduciary duty.

In support of his claim that a special relationship of trust and confidence existed, Glynn cites the following as
23 evidence creating a fiduciary duty: *23

- Layne contacted the sellers of the six beach lots and negotiated the price of the lots that Ronald then purchased;

- Layne stated in his deposition that he has either officially or unofficially (the record is not clear as to which) bailed Glynn's "butt out of cracks behind closed doors." There is no evidence as to when this occurred or under what circumstances.

- Layne had a power of attorney with regard to his mother and Layne drafted sales documents and correspondence for their deceased mother's home, which Layne and Glynn jointly owned through inheritance.

- Layne acted as the "liaison attorney" between the family and Tom McQuage, the attorney of record for Ronald in the Bolivar Development Company litigation.

- Layne handled legal issues with regard to the "family mineral interests" owned by Ronald.

We conclude that the evidence cited by Glynn is no more than a scintilla of evidence of a fiduciary duty owed by Layne to Glynn. There is no evidence showing that Glynn was often guided by the judgment or advice of Layne, or that Glynn put any particular trust and confidence in Layne with regard to Glynn's financial decisions. *See*, *e.g.*, *Lee*, 286 S.W.3d at 15 (long-time family friend helped plaintiff going through divorce, who was inexperienced in financial issues, make financial decisions and provided extensive emotional support). Nor is there any evidence indicating that Layne recognized that Glynn was relying on him to the extent that a fiduciary duty arose. *See Young*, 376 S.W.3d at 215 (under "extraordinary facts of case," evidence indicated the parties' recognized that a confidential relationship existed and a fiduciary duty had been imposed). Glynn argues generally that there was a history of Layne handling "family transactions," but he does not point to any evidence establishing that he relied upon or put his confidence in Layne with regard to any specific "family
24 transactions." *24

The bulk of the evidence pointed to by Glynn relates to interests owned by Ronald, not Glynn. The negotiation of the beach lots, acting as the liaison attorney in the Bolivar Development Company litigation, and handling legal issues for the "family mineral interests" were done by Layne on behalf of Ronald, not on behalf of Glynn. Ronald was the purchaser of the lots, Ronald was the named party in the Bolivar Development Company litigation, and Ronald was the owner of the mineral interests. Thus, any duty owed by Layne would be to Ronald, not Glynn.

The statement that Layne, an attorney, had represented Glynn, either officially or unofficially, to get Glynn out of trouble, is also not evidence of a fiduciary duty in this case. There is no evidence as to the date or circumstances of this representation. Even if a fiduciary duty could be established with regard to those circumstances, it would not necessarily establish a fiduciary duty for every transaction between Layne and Glynn. *See Heritage Gulf Coast Props*., *Ltd*. *v*. *Sandalwood Apartments*, *Inc*., 416 S.W.3d 642, 651 (Tex. App. —Houston [14th Dist.] 2013, no pet.) (existence of fiduciary relationship between parties in one transaction does not always give rise to fiduciary relationship in any transaction involving those parties).

With regard to the sales documents and correspondence on the mother's house that Layne and Glynn inherited and presumably owned as cotenants, there is no evidence that Layne was acting as an attorney or agent on behalf of Glynn. We note that cotenants in real property do not ordinarily owe fiduciary duties to each other. *See Scott v. Scruggs*, 836 S.W.2d 278, 282 (Tex. App.—Texarkana 1992, writ denied) ("Absent a special relationship there is no fiduciary obligation owed by one cotenant to the others."). Layne did state that he handled the paperwork part of the sales transaction for their mother's property with his brother's permission, but
25 that alone does not establish a fiduciary duty. *See id*. Even if a fiduciary *25 obligation arose with respect to that property, however, it would not establish a fiduciary relationship with regard to the beach property at issue in this case. *See Sandalwood*, 416 S.W.3d at 651 (mere existence of a pre-existing and contemporaneous relationship between parties on one transaction does not create fiduciary relationship for all transactions involving the parties).

The evidence adduced by Glynn does not rise to the level of an informal fiduciary relationship of trust and confidence. The trial court properly granted summary judgment on the breach of fiduciary duty claim. We overrule Glynn and Melinda's issue as to that claim.

5. *The claims for attorneys' fees and exemplary damages.*

In their motion for summary judgment, Ronald and Layne argued that Glynn and Melinda cannot recover attorneys' fees or exemplary damages on any of their claims. Glynn and Melinda do not challenge the summary judgment granted on their request for attorneys' fees and exemplary damages. We thus affirm the trial court's judgment on the attorneys' fees and exemplary damages claims. *See Jarvis v. Rocanville Corp.*, 298 S.W.3d 305, 313 (Tex. App.—Dallas 2009, pet. denied) (party asserting general issue complaining of trial court's summary judgment must provide argument negating all grounds on which summary judgment was granted).

C. *Ronald and Layne's Affirmative Defenses.*

Ronald and Layne also moved for summary judgment against Glynn and Melinda on grounds of waiver and estoppel. In support, Ronald and Layne pointed to an application for a sewer permit that Glynn submitted for his beach house. In that sewer application, the owner of the property is listed as Ronald. According to Ronald and Layne, the statement on the sewer application listing Ronald as the owner waived or estopped Glynn and
26 Melinda from denying Ronald's ownership *26 of the property. We disagree.

Waiver and estoppel are affirmative defenses on which Ronald and Layne bore the burden of proof. *See Nowak v. DAS Inv. Corp.*, 110 S.W.3d 677, 680 (Tex. App.—Houston [14th Dist.] 2003, no pet.) ("Only when a party conclusively proves every element of its affirmative defense is it entitled to summary judgment."). We conclude that Ronald and Layne did not meet their summary judgment burden of establishing the affirmative defenses of waiver and estoppel.

Waiver is an intentional relinquishment of a known right or intentional conduct inconsistent with claiming the right. *Clear Lake Ctr., L.P. v. Garden Ridge, L.P.*, 416 S.W.3d 527, 542 (Tex. App.—Houston [14th Dist.] 2013, no pet.). The elements of waiver are: (1) an existing right, benefit, or advantage held by a party; (2) the party's actual knowledge of its existence; and (3) the party's actual intent to relinquish the right, or intentional conduct inconsistent with the right. *Ulico Cas. Co. v. Allied Pilots Ass'n*, 262 S.W.3d 773, 778 (Tex. 2008). Ronald and Layne failed to establish as a matter of law that Glynn actually intended to relinquish his right to deny Ronald's ownership by filing the sewer permit. The evidence establishes, at a minimum, a fact issue as to why Glynn listed Ronald as the owner on the sewer permit application.

Glynn testified that he listed Ronald as the owner because Ronald was still the record title holder and he was told to use Ronald's name. Equitable title and legal title are distinct bases for establishing ownership to property. *See Neeley v. Intercity Mgmt. Corp.*, 623 S.W.2d 942, 951 (Tex. App.—Houston [1st Dist.] 1981, no writ) (recognizing distinction between equitable and legal title). Listing Ronald as owner based on the deed
27 records was not inconsistent with the claim that *27 Glynn held an equitable interest in the property, and does not show a waiver of his rights in this case.[9]

[9] In their appellees' brief, Ronald and Layne argue that Glynn and Melinda waived their claim because they failed to intervene in the trespass to try title action against the Port Bolivar Development Company. Although Ronald and Glynn argued below that "Glynn Walker's failure to intervene in that [Bolivar Development Company] case forever bars his right to complain of the decision," they did not argue, as they now do on appeal, that the failure to intervene constituted a waiver of their right to claim an equitable interest. We therefore do not consider this new waiver argument as grounds for affirming the summary judgment. *Sci. Spectrum, Inc.*, 941 S.W.2d at 912. --------

Estoppel "generally prevents one party from misleading another to the other's detriment or to the misleading party's own benefit." *Ulico Cas. Co.*, 262 S.W.3d at 778. Estoppel requires proof of, among other things, detrimental reliance on the statement by the party asserting estoppel. *See id.* Ronald and Layne failed to establish any detrimental reliance by them on the statement made in the sewer permit application. In their motion for summary judgment, they state simply that Glynn made a statement that he now contends was untrue so that he could obtain the benefit of a wastewater system. This is not proof, nor even an argument, that Ronald and Layne (the parties asserting estoppel) relied on the statement to their detriment. As a result, Ronald and Layne failed to meet their summary judgment burden to conclusively establish each element of their affirmative defense and summary judgment on that ground was improper. *See Clear Lake Ctr.*, 416 S.W.3d at 542-43.

We sustain Glynn and Melinda's issue with regard to the affirmative defenses of waiver and estoppel.

D. *The timing of the summary judgment.*

Glynn and Melinda argue that the trial court erred in granting summary judgment prior to the expiration of the
28 discovery deadline. In support, they point to *28 the comment to Rule 166a(i) indicating a motion should not be filed prior to the expiration of the discovery period and to their request for a continuance.

We review a trial court's order denying additional time for discovery under a clear abuse of discretion standard of review. *See Joe v. Two Thirty Nine Joint Venture*, 145 S.W.3d 150, 161 (Tex. 2004); *Carter v. MacFadyen*, 93 S.W.3d 307, 310 (Tex. App.—Houston [14th Dist.] 2002, pet. denied). A party seeking additional time to respond to a motion for summary judgment must file an affidavit specifying the evidence sought, the materiality of the evidence, and due diligence exercised to obtain the evidence. *Carter*, 93 S.W.3d at 310. Conclusory allegations of a need for additional time are not sufficient. *Id.*

Glynn and Melinda included a paragraph in their response to the motion for summary judgment asking for additional time for discovery if the trial court felt evidence was lacking. They did not explain to the trial court what additional discovery was necessary, the materiality of such evidence, or the due diligence exercised to obtain such evidence. As a result, the trial court did not abuse its discretion in denying more time to conduct discovery. *Id.* at 310-11.

Glynn and Melinda also contend the trial court erroneously granted judgment prior to the end of the discovery period. We disagree. Though the motion was filed prior to the expiration of the discovery period, the trial court did not grant summary judgment until after the period ended. Texas Rule of Civil Procedure 166a(i) allows a

party to file a no-evidence motion for summary judgment after "an adequate time for discovery." Tex. R. Civ. P. 166a(i). An adequate time for discovery is determined by the nature of the claims, the evidence needed to controvert the motion, the length of time the case has been on file and any deadlines set by the court. *Carter*, 93 S.W.3d at 311.

29 In this case, Glynn and Melinda asserted four causes of action, all centered *29 on the allegation that Ronald had wrongfully conveyed the beach property to Layne. When the motion for summary judgment was filed, the parties had conducted discovery over the course of several months, parties had been deposed, and the trial court had already conducted an evidentiary hearing on the request for temporary injunctive relief. The motion was filed approximately a month and a half before discovery closed, and was set for submission without oral hearing thirty-nine days later. Glynn and Melinda were able to respond to the motion and attach deposition testimony, affidavits, and documentary evidence in support of their response. The trial court did not grant the motion for another eighteen days after the submission date. Reviewing these factors, we cannot say that the trial court abused its discretion with regard to the timing of the summary judgment. *See Carter*, 93 S.W.3d at 311; *see also Joe*, 145 S.W.3d at 162. Finding no abuse of discretion, we overrule this complaint.

DENIAL OF REQUEST FOR SANCTIONS

Ronald and Layne request sanctions against Glynn and Melinda for filing a frivolous appeal. We deny the request for sanctions. Texas Rule of Appellate Procedure 45 authorizes a court of appeals, in its discretion, to award just damages in cases where an appeal is objectively frivolous. *See Glassman v. Goodfriend*, 347 S.W.3d 772, 782 (Tex. App.—Houston [14th Dist.] 2011, pet. denied) (en banc). Given that we have reversed the trial court's order granting summary judgment on several of Glynn and Melinda's claims, we conclude the appeal was not frivolous. The motion for sanctions under Texas Rule of Appellate Procedure 45 is denied.

CONCLUSION

Accordingly, we reverse the trial court's judgment in favor of appellees Ronald Walker and Layne Walker on the claims for promissory estoppel and unjust enrichment, and on the affirmative defenses of waiver and
30 estoppel. We *30 affirm the trial court's judgment on the remaining claims and remand for further proceedings.

/s/ John Donovan

Justice Panel consists of Justices Christopher, Jamison, and Donovan.

No. 09-06-045 CV
Court of Appeals of Texas, Ninth District, Beaumont

Wilcox v. Wilcox

Decided Dec 28, 2006

No. 09-06-045 CV.

December 28, 2006.

Appeal from the 172nd District Court, **Jefferson County**, **Texas Trial Cause No. D-171,492-A**.

Before MCKEITHEN, C.J., GAULTNEY and KREGER, JJ.

MEMORANDUM OPINION

CHARLES KREGER, Justice.

Mary Lou Wilcox appeals a summary judgment rendered in favor of her brother, Peter Vann Wilcox. Mary Lou presents three issues for our consideration. Finding no error, we affirm.

BACKGROUND

Mary Lou Wilcox and her brothers, H. Douglas Wilcox ("Doug"), Rex E. Wilcox, and Peter Vann Wilcox, were the only children born to Howard R. Wilcox and Irma Lou Wilcox ("Irma"). Howard died in 1987, and Irma died in February 1999. Howard's probated will created two trusts — a Marital Trust and a Family Trust. The will named Doug and Rex as co-trustees of each trust, as well as co-executors of Howard's will. With regard to the Marital Trust, the trustee was to distribute the net income of the trust to Irma in installments for her "health, support, and maintenance." The Marital Trust's terms further provided that upon Irma's death, the trustee was to pay the trust's principal to each of Howard's surviving children, per stirpes. Howard's purpose for creating the marital trust appears twofold: (1) to provide income for Irma during her lifetime; and (2) to protect the corpus of the trust for future distribution to each child who survives Irma. The purpose and provisions of the Family Trust appear similar to those of the Marital Trust. A further provision in Howard's will states that the trustee "is authorized to use Trust income and/or principal for the maintenance and improvement of Trust property and for the disbursement of any obligations outstanding or secured by such Trust property." Howard also directed that the executor of his estate was authorized to pay taxes and administrative costs of the estate from assets or property dedicated to the Family Trust, but the executor was explicitly prohibited from using assets or property dedicated to the Marital Trust for the payment of such expenses.

Irma's will provided that Doug and Rex were to serve as independent co-executors of her estate, co-trustees of all trusts created by her will, and further provided that all four children were equal beneficiaries to her estate and trusts.[1] Irma died on February 19, 1999. On February 24, 1999, Doug and Rex filed an application for probate of Irma's will and for letters testamentary. The will was admitted to probate and letters testamentary issued on March 16, 1999. On February 18, 2003, Mary Lou sued Doug, Rex, and Peter, as well as an accounting firm and two of its partners, in County Court at Law No. 1 of Jefferson County, Texas. Doug and

Rex were sued in their individual capacities and as co-executors of Irma's estate, and as co-trustees of the Family and Marital Trusts. Mary Lou alleged, *inter alia*, that upon her mother's death, Doug, Rex, and Peter "embarked upon a scheme to remove [Irma's] property, to convert it, to use it for their own purposes, and to conceal it from Mary Lou."

[1] Irma's will appoints Doug and Rex as co-trustees, and Peter as alternate co-trustee, of all trusts created by her Will. As the instant litigation involves only the Marital or Family Trusts created by Howard's will, Peter's "alternate co-trustee" status is not implicated.

Mary Lou amended her petition a number of times. On November 24, 2003, the claims involving the trusts were filed in state district court. This was possibly necessitated by the fact that district courts and statutory probate courts are the only courts with jurisdiction over trust proceedings. *See* Tex. Prop. Code Ann. § 115.001 (Vernon Supp. 2006).[2] Peter moved for summary judgment in the county court estate suit, with the judge granting same, and severing the summary judgment from the remaining litigation. Mary Lou appealed and we affirmed the trial judge's summary judgment. *In re Estate of Wilcox*, 2006 WL 1280904, at *4 (Tex.App.-Beaumont May 11, 2006, pet. filed).

[2] Since the filing of Mary Lou's suit, the legislature has amended section 115.001 of the Texas Property Code. *See* Act of May 12, 2005, 79th Leg., R.S., ch. 148, § 22, section 115.001, 2005 Tex. Gen. Laws 287, 294. Because the changes do not affect our analysis, we refer to the current version of the statute.

Meanwhile, in state district court, Mary Lou's amended petition filed on October 12, 2005, was the live pleading at the time of the trial court's summary judgment from which this appeal proceeds. Mary Lou's district court action again included Doug, Rex, Peter, and the accounting firm as co-defendants, but included only one of the firm's partners. Causes of action against Doug and Rex included, *inter alia*, breach of fiduciary duty, breach of trust, common law fraud, and civil conspiracy. Mary Lou also made a demand for an accounting as to the assets in the trusts and requested the trial court remove Doug and Rex as trustees of the Marital and Family Trusts. With regard to Peter, Mary Lou alleged breach of fiduciary duty, breach of trust, common law fraud, constructive fraud, and civil conspiracy. Peter answered raising affirmative defenses and a counterclaim. Peter later filed both traditional and no-evidence motions for summary judgment. Tex. R. Civ. P. 166a(c), (i). Mary Lou filed responses to the summary judgment motions. The trial court granted Peter's traditional summary judgment motion but did not rule on his no-evidence motion. Over Mary Lou's objection, the trial court severed Mary Lou's claims against Peter from her claims against the remaining defendants. Mary Lou's appeal raises the following three issues:

1. Did the trial court err when it granted Appellee's motion for summary judgment disposing of all causes of action against him?

2. Did the trial court err when it signed an order that made final a summary judgment that failed to dispose of all claims against Appellee? 3. Did the trial court abuse its discretion when it severed the claims against the Appellee that involve the same facts and issues against the other defendants, who would be jointly and several [sic] liable with Appellee for an indivisible injury? The trial court's order granting summary judgment for Peter reads, in pertinent part, as follows:

The Court, having considered Peter V. Wilcox's Motion For Summary Judgment [p]ursuant to T.R.C.P. 166a(c) in the above referenced action, finds the Motion was made in proper form and time. After considering the motion, response, and arguments of counsel, if any, this Court is of the opinion that summary judgment is proper as a matter of law. It is therefore,

ORDERED that Peter V. Wilcox's Motion for Summary Judgment is GRANTED, and that Plaintiff Mary Lou Wilcox's [sic] take nothing as to her claims against Defendant Peter Wilcox.

SUMMARY JUDGMENT

Texas uses summary judgment "`to eliminate patently unmeritorious claims and untenable defenses.'" *See Casso v. Brand*, 776 S.W.2d 551, 556 (Tex. 1989) (quoting *City of Houston v. Clear Creek Basin Authority*, 589 S.W.2d 671, 678 n. 5 (Tex. 1979). To obtain summary judgment, the movant has the burden of showing that there is no genuine issue of material fact and that he is entitled to judgment as a matter of law. Tex. R. Civ. P. 166a(c). "In deciding whether there is a disputed material fact issue precluding summary judgment, evidence favorable to the nonmovant will be taken as true. Every reasonable inference must be indulged in favor of the nonmovant and any doubts resolved in its favor." *Nixon v. Mr. Prop. Mgmt. Co.*, 690 S.W.2d 546, 548-49 (Tex. 1985).

Summary judgment for a defendant is proper when the summary judgment evidence negates an essential element of the plaintiff's cause of action as a matter of law or conclusively establishes all elements of an affirmative defense as a matter of law. *See Black v. Victoria Lloyds Ins. Co.*, 797 S.W.2d 20, 27 (Tex. 1990). Once the defendant produces sufficient evidence to establish the right to summary judgment, the burden shifts to the nonmovant to produce controverting evidence raising a fact issue as to the elements negated. *See Torres v. Western Cas. Sur. Co.*, 457 S.W.2d 50, 52 (Tex. 1970). When the order granting summary judgment does not specify the particular grounds the trial court sustained, on appeal, the summary judgment opponent must defeat each summary judgment ground argued by the movant. *See Carr v. Brasher*, 776 S.W.2d 567, 569 (Tex. 1989). Otherwise, an appellate court must uphold the summary judgment on any ground that is supported by the evidence and the pleadings. *Id.* Peter distilled the bases for his summary judgment motion in the following manner:

Peter owed no legal duty to Mary Lou. Pete is not the Trustee or Co-Trustee of the Marital Trust or the Family Trusts, has not served as same, and has not participated in any funding or distribution of Marital Trust or Family Trust properties. Pete and Mary Lou have no fiduciary or confidential relationship. Pete has not made any representations to Mary Lou, and has not made false representations with intent that she rely upon them to her detriment.

ISSUE ONE

A. Breach of Fiduciary Duty and Breach of Trust.

A fiduciary relationship is said to exist when one person has a duty to act for or give advice for the benefit of another. *Kline v. O'Quinn*, 874 S.W.2d 776, 786 (Tex.App.-Houston [14th Dist.] 1994, writ denied). In a fiduciary relationship, one person "binds himself to subvert his own interest to those of his principal. If the relationship between two parties does not involve the element of a solely subordinated interest, . . . it is not a fiduciary relationship." *See Walker v. Federal Kemper Life Assur. Co.*, 828 S.W.2d 442, 452 (Tex.App.-San Antonio 1992, writ denied). Because certain relationships always have these characteristics, such relationships are categorized as fiduciary relationships as a matter of law. *See Thigpen v. Locke*, 363 S.W.2d 247, 253 (Tex. 1962). For example, attorneys owe fiduciary duties to their clients, partners in a general partnership owe each other fiduciary duties, and general partners in a limited partnership owe fiduciary duties to the limited partners. *See id.; Brazosport Bank v. Oak Park Townhouses*, 889 S.W.2d 676, 683 (Tex.App.-Houston [14th Dist.] 1994, writ denied).

A second type of fiduciary relationship is referred to as either a "confidential," or "informal" fiduciary relationship. *See Crim Truck Tractor Co. v. Navistar Int'l Transp. Corp.*, 823 S.W.2d 591, 594 (Tex. 1992); *see also Meyer v. Cathey*, 167 S.W.3d 327, 331 (Tex. 2005). To establish a confidential or informal fiduciary relationship, a party must show that a special relationship of trust and confidence existed prior to, and apart from, any purported agreement made the basis of the suit. *See Associated Indem. Corp. v. CAT Contracting, Inc.*, 964 S.W.2d 276, 288 (Tex. 1998); *Schlumberger Tech. Corp. v. Swanson*, 959 S.W.2d 171, 177 (Tex. 1997). Additionally, such a relationship is a "two-way street" in that one party must not only trust the other, but the relationship must be mutual and understood as such by both parties. *See Swinehart v. Stubbeman, McRae, Sealy, Laughlin Browder, Inc.*, 48 S.W.3d 865, 882 (Tex.App.-Houston [14th Dist.] 2001, pet. denied) (citing *Hoover v. Cooke*, 566 S.W.2d 19, 26 (Tex.Civ.App. — Corpus Christi 1978, writ ref'd n.r.e.)). A family relationship, while it is considered as a factor, does not, by itself, establish a fiduciary relationship. *See Texas Bank Trust Co. v. Moore*, 595 S.W.2d 502, 508 (Tex. 1980). Fiduciary relationships are not lightly created. *See Schlumberger*, 959 S.W.2d at 594. Although the existence of an informal fiduciary relationship is ordinarily a question of fact, it becomes a question of law when there is no evidence on the issue. *See Crim*, 823 S.W.2d at 177.

The elements of a breach of fiduciary duty action are: (1) a fiduciary relationship between the plaintiff and defendant; (2) the defendant must have breached its fiduciary duty to the plaintiff; and (3) the defendant's breach must result in injury to the plaintiff or benefit to the defendant. *Punts v. Wilson*, 137 S.W.3d 889, 891 (Tex.App. — Texarkana 2004, no pet.) It must be remembered that only the trust issues were before the trial court at the time it rendered summary judgment in favor of Peter.[3] In that vein, Peter's summary judgment motion asserted that a fiduciary relationship was never established between Peter and Mary Lou. Because he was not a trustee or co-trustee to either the family or marital trusts, no formal fiduciary relationship was proven, and because there was no confidential relationship between Peter and Mary Lou, the existence of an informal fiduciary relationship was equally lacking in proof.[4] The record evidence is uncontroverted that Peter was neither named nor appointed as a trustee or co-trustee to the trusts. Mary Lou agrees that no formal fiduciary relationship existed between herself and Peter, and points out she did not sue him in the capacity of a trustee. Thus, Peter's summary judgment evidence focuses on negating the existence of an informal fiduciary relationship.

[3] The remaining portion of Mary Lou's suit pertaining to Irma's estate was still pending in County Court at Law No. 1 of Jefferson County when the trial court granted Peter's summary judgment motion in the trust causes of action.

[4] Contrary to an assertion in Mary Lou's brief, Peter's summary judgment motion does address the issue of the lack of an informal fiduciary relationship.

Peter's affidavit establishes that he has not made personal decisions or used personal judgment "concerning any Trust distributions or non distributions made or not made to Mary Lou Wilcox." His affidavit concludes with the following statement:

I have never acted on behalf of my sister, Mary Lou Wilcox, regarding any financial matters, Estate matters, personal matters, or Trust matters, nor have I provided guidance, judgment, advice, or influence to her on any other matters. For many years prior to my mother's death, Mary Lou and I saw each other only on rare occasions and spoke on the telephone no more than two to three times a year.

Additionally, Peter's summary judgment evidence includes the following exchange between Peter's trial counsel and Mary Lou during her deposition:

Q.[Peter's Counsel] Fair enough. Do you know what a fiduciary duty is? A.[Mary Lou] I don't know about the legal definition of fiduciary duty. Q. What's your understanding of what fiduciary duty is? A. An obligation to carry out certain functions in a bipartial [sic] manner. Q. And you've alleged breached [sic] of fiduciary duty in this case. Correct? A. Yes. Q. And I understand that you're alleging that the executors, your brother Doug and your brother Rex have breached fiduciary duties. Correct? A. Yes. Q. Do you have any personal knowledge as to whether your brother Pete ever had a — any type of fiduciary duty to you? A. I don't know quite how to answer that.

Q. All right.

A. I think Pete had a duty to — to — to help protect his younger sister.

Although brother and sister, Peter's evidence indicates his relationship with Mary Lou was never one of trust and confidence with regard to personal or financial matters. In reply, Mary Lou's evidence does not raise a fact issue with regard to the nature of her prior relationship with Peter. Her only responsive evidence pertinent to this issue appears to be found in excerpts from Peter's deposition, and her own affidavit. Within Peter's deposition, the lone exchange pertaining to his relationship with Mary Lou appears as follows:

Q.[Mary Lou's Counsel] When you went back to — one, to the funeral and then, two, at your mom's house.

A.[Peter] Yes, sir.

Q. Do you recall any discussions that you had or conversations at all, any kind of encounter you had with Mary Lou at your mother's house after the funeral? A. No, sir.

Q. Have you had any discussions with Mary Lou about your mother at any time since she died?

A. Since she died?

Q. Uh-huh. A. I don't recall. Q. Can you not recall one meeting, encounter, discussion, conversation, phone call with Mary Lou since your mother passed away? A. Specifically, no, sir. Q. Do you not think much of your sister? A. No, sir. Q. I don't know that I gave you a fair question. Do you — tell me what you think of your sister. A. I love my sister. . . . .

Q. (By [Mary Lou's Counsel]) If you can remember a conversation or an encounter you've had since your mother died, tell me about it. A. Specifically, no, sir.

Mary Lou's affidavit is silent as to the state of her relationship with Peter at any point in time. Her affidavit essentially contains accusations of mismanagement of the trusts by the co-trustees (Doug and Rex), and names Peter as having "assisted and served as Doug's minion in secreting trust and estate assets, falsifying asset inventories, and distributing assets without including me as a distributee." Mary Lou fails to produce any controverting evidence to raise a fact issue on the existence of an informal fiduciary or confidential relationship with Peter prior to the death of their mother. *See Hubbard v. Shankle*, 138 S.W.3d 474, 483 (Tex.App.-Fort Worth 2004, pet. denied); *Thames v. Johnson*, 614 S.W.2d 612, 614 (Tex.Civ.App.-Texarkana 1981, no writ). "The existence of the fiduciary relationship is to be determined from the actualities of the relationship between the persons involved." *Thigpen*, 363 S.W.2d at 253. We therefore find that the trial court did not err in granting Peter's summary judgment as to Mary Lou's causes of action for breach of fiduciary duty and breach of trust.[5]

[5] Although no authority is cited by Mary Lou, it would appear that an action for breach of trust also requires proof of the prior existence of either a formal or informal fiduciary relationship. *See Burrow v. Arce*, 997 S.W.2d 229, 240 (Tex. 1999) (Supreme Court held a client need not prove actual damages to obtain forfeiture of attorney's fee for the

attorney's breach of fiduciary duty to the client, relying, *inter alia*, on the general rule for breach of trust.).

B. Common Law Fraud and Constructive Fraud.

Constructive fraud is the breach of a legal or equitable duty that the law declares fraudulent because it violates a fiduciary relationship. *See Archer v. Griffith*, 390 S.W.2d 735, 740 (Tex. 1964). As noted above, Peter conclusively established the absence of a fiduciary relationship between himself and Mary Lou. Therefore, summary judgment was proper as Peter's evidence also negated the "fiduciary relationship" element in Mary Lou's constructive fraud cause of action as a matter of law. *See Black*, 797 S.W.2d at 27.

The elements of common law fraud are: "(1) that a material representation was made; (2) the representation was false; (3) when the representation was made, the speaker knew it was false or made it recklessly without any knowledge of the truth and as a positive assertion; (4) the speaker made the representation with the intent that the other party should act upon it; (5) the party acted in reliance on the representation; and (6) the party thereby suffered injury." *See Johnson*, 73 S.W.3d at 211 n. 45 (quoting *In re FirstMerit Bank, N.A.*, 52 S.W.3d 749, 758 (Tex. 2001)). As for the common law fraud claim, in addition to establishing the absence of a fiduciary relationship between himself and Mary Lou, Peter's summary judgment evidence indicated he and Mary Lou spoke on very few occasions, and that he could not recall any conversations with Mary Lou at all since the death of their mother. "As a general rule, a failure to disclose information does not constitute fraud unless there is a duty to disclose the information." *Bradford v. Vento*, 48 S.W.3d 749, 755 (Tex. 2001). Therefore, it is only when the particular circumstances impose a duty on a party to speak and he deliberately remains silent that his silence may be found equivalent to a false representation for purposes of proving fraud. *See id*. Thus, Peter affirmatively negated the elements requiring a representation of some kind be made to Mary Lou that was both "material" and "false."

Mary Lou's response regarding the fraud allegation reads as follows:

There are also material issues of fact regarding claims for common law and constructive fraud. Defendant's obligation as a fiduciary is to provide full disclosure to Mary Lou regarding the transactions in which he has knowledge. Defendant owed a duty to speak and inform Mary Lou as a fiduciary, yet he deliberately remained silent — this is equivalent to a false representation. As a fiduciary, Defendant had a duty to speak and disclose his knowledge of the transactions and be fair about them. A false impression arises when the defendant discloses some facts and conceals others with the knowledge that the plaintiff is ignorant of the undisclosed facts and does not have an equal opportunity to discover the truth. Defendant's deliberateness is also an issue for the jury. Deceptive conduct also is equivalent to a false statement of fact giving rise to fraud liability. As discussed above, Defendant's actions and assistance provided to Doug demonstrate more than a scintilla of evidence of his liability for fraud. Mary Lou has been damaged as a result of these actions. Therefore, material fact issues exist regarding Defendant's liability for fraud and as a result his no-evidence motion should be denied. (citations and footnotes omitted.)

We initially note that a response to a summary judgment motion is a pleading and does not, standing alone, constitute competent summary judgment evidence. *See City of Houston v. Clear Creek Basin Auth.*, 589 S.W.2d 671, 678 (Tex. 1979). Mary Lou's response assumes the existence of a fiduciary relationship between herself and Peter. Using this assumption as the basis for her response, she points to places in the record where fact issues are raised requiring reversal of the summary judgment. She relies on her affidavit, upon Peter's affidavit, and upon a portion of Peter's deposition. Her evidence does not indicate what specific statement or

representation Peter made to her with regard to the trusts that was false or that misrepresented a material fact. Again, Mary Lou has failed to carry her burden to produce controverting evidence raising a fact issue as to the elements negated. Summary judgment was proper for Peter on the common law fraud cause of action.

C. Civil Conspiracy.

Lastly, Mary Lou contends that, fiduciary status notwithstanding, Peter is also liable as a joint tortfeasor for the breaches of fiduciary duty allegedly perpetrated by co-trustees, Doug and Rex. In Texas, a party who knowingly participates in another's breach of fiduciary duty may be liable for the breach as a joint tortfeasor. *See Kinzbach Tool Co. v. Corbett-Wallace Corp.*, 138 Tex. 565, 160 S.W.2d 509, 514 (1942). Similarly, a party may be held liable for another's breach of fiduciary duty if the party is a co-conspirator in the breach. Under Texas law, actionable civil conspiracy occurs when there is a "combination by two or more persons to accomplish an unlawful purpose or to accomplish a lawful purpose by unlawful means." *Firestone Steel Prods. Co. v. Barajas*, 927 S.W.2d 608, 614 (Tex. 1996); *Massey v. Armco Steel Co.*, 652 S.W.2d 932, 934 (Tex. 1983). The "gist of a civil conspiracy" is the injury the co-conspirators intend to cause. *Triplex Commc'n, Inc. v. Riley*, 900 S.W.2d 716, 720 (Tex. 1995) (quoting *Schlumberger Well Surveying Corp. v. Nortex Oil Gas Corp.*, 435 S.W.2d 854, 856 (Tex. 1968)). Mary Lou's amended petition alleges that Peter, along with the remaining individual and corporate co-defendants, conspired against her in a number of general ways. The only specific allegation contends the defendants "had a meeting of the minds as to how to misrepresent assets on the 706 Estate Tax Return, the inventory of the estate, the tax returns of the Trusts, the assets of the Trusts and the accountings of the Trusts."

With regard to the trusts, Mary Lou's conspiracy action as to Peter alleged misrepresentation of the tax returns of the trusts, and misrepresentation of the assets of the trusts and of the accountings of the trust. "The general rule is that a trustee may not delegate his discretionary power to another." *Transamerican Leasing Co. v. Three Bears, Inc.*, 586 S.W.2d 472, 476 (Tex. 1979). However, a trustee may, after determining how to exercise his discretion, give authority to another to carry out ministerial or mechanical acts to effectuate the trustee's decisions. *Id.* In his affidavit attached to his summary judgment motion, Peter stated:

I have not participated in any Trustee or Co-Trustee decisions concerning the Trusts. I have not participated in any decisions concerning the funding or distribution of the Marital or Family Trusts. I have not used my personal judgment or my personal discretion concerning any decisions concerning Trust business and/or distribution or non distribution of the Trusts or property belonging to the Trusts. I have not made personal decisions or used my personal judgment concerning any Trust distributions or non distributions made or not made to Mary Lou Wilcox.

Additionally, Mary Lou's deposition testimony indicated her assertions of wrongdoing with regard to the trusts were neither based in fact nor on her personal knowledge. For example, she agreed that "some of the estate and the trusts have been distributed[.]" Yet, when asked if she agreed that Peter did not participate in determining how much of a share each beneficiary received, Mary Lou replied that she had no personal knowledge of Peter's role in making such a determination and also agreed she had not seen any documents showing Peter's involvement in such determinations. She also agreed it was not Peter's responsibility to provide her with an accounting. At one point, a response by Mary Lou included that it was her "belief" that Peter performed "some functions" during a time when Rex was ill. When asked if she had any personal knowledge that Peter actually functioned as a co-trustee and made decisions in that capacity, she replied, "I don't have personal knowledge

that he made a decision to do something." When asked if she was aware of Peter's participation in the "formal distribution" of "trust monies and things like that," Mary Lou responded, "I'm not aware of that, you know, specifically." She also admitted that she had no documents to that effect either.

Peter's summary judgment evidence established that he did not participate in making any decisions with regard to management or distribution of the estate or trust assets, including the bank accounts. He further established that Mary Lou was unable to provide a factual basis for any alleged wrongdoing on his part regarding the trusts that would preclude summary judgment in his favor. Peter's evidence established he was entitled to summary judgment as a matter of law as to Mary Lou's joint tortfeasor/civil conspiracy cause of action. Mary Lou's response evidence includes, *inter alia*, her affidavit and copies of two wire transfers. The pertinent portion of her affidavit reads:

The trustees have also commingled trust and estate assets. The trustees and Peter have taken distributions from the trust and estate during this time and used the assets for their own personal benefit and gain. I am and was familiar with the assets my mother and father had prior to their deaths. The value of the assets that have not been safeguarded and have "disappeared" is at least $12,500.00.

The one assertion in her summary judgment response for which she attempts to supply a proper factual basis reads: "[Doug and Rex] have also commingled the trust assets with the assets in their mother's estate during this time [time period since mother's death on February 19, 1999]."

Rule 166a(f) of the Rules of Civil Procedure requires that "[s]upporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." Tex. R. Civ. P. 166a(f).[6] Conclusory statements in an affidavit are not competent to serve as summary judgment evidence. *Tex. Division — Tranter, Inc. v. Carrozza*, 876 S.W.2d 312, 314 (Tex. 1994). "A conclusory statement is one that does not provide the underlying facts to support the conclusion." *1001 McKinney Ltd. v. Credit Suisse First Boston Mortg. Capital*, 192 S.W.3d 20, 27 (Tex.App.-Houston [14th Dist.] 2005, pet. denied).

> [6] Pertinent to Rule 166a(f) are the provisions of Rule 602 of the Rules of Evidence, which reads, in pertinent part: "A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the testimony of the witness." Tex. R. Evid. 602.

Except for the assertions that trust and estate assets have been commingled and that $12,500 of "assets" have not been "safeguarded," the remaining assertions and conclusions in Mary Lou's affidavit are not supported by underlying facts. Mary Lou's response does contain "Exhibit B," copies of two separate wire-transfers of cash from what appears to be two separate accounts held at a branch of Hibernia Bank, with both accounts containing assets from the Marital Trust. Both transactions from Hibernia Bank appear to authorize a wire-deposit of funds to an account designated as an estate account maintained at a branch of Community Bank located in Kirbyville, Texas. Both transfer slips provide a "customer signature" line, and on both slips someone with the last name of "Wilcox" has signed. However, we are unable to determine which Wilcox signature appears as the initials preceding the sur-name are virtually illegible. Furthermore, there is nothing in the record identifying the signatures on the two transfer slips.

From Peter's deposition, it appears that Doug established the Community Bank estate account and had Peter listed as a signatory on the account. There is no evidence, however, that Peter had any involvement, signatory or otherwise, with the trust accounts, other than his status as a beneficiary. A careful reading of Peter's

deposition testimony indicates that any checks he signed on the Community Bank estate account had already been made out as to payee and amount by someone at the co-defendant accounting firm, and always according to prior instructions from Doug. Peter was not asked about the two wire transfers contained in Mary Lou's Exhibit B. The record does not contain any other documents, testimony based upon personal knowledge, or otherwise proper summary judgment evidence that would permit us to infer the transfers in question were in furtherance of an agreement between Doug and Peter to ultimately deprive Mary Lou of her proper share of the Marital and Family Trusts.

While the Trust Code, as well as the trusts themselves, require the trustee to distribute the assets of the trusts to the appropriate beneficiaries upon the termination of the trusts, the trustee is still permitted to exercise trustee powers "for the reasonable period of time required to wind up the affairs of the trust[.]" Tex. prop. Code Ann. § 112.052. Although the transfer slips indicate the two transactions occurred almost ten months after the terminating event (Irma's death), we find no authority permitting us to elevate these circumstances, without more, to an *intentional* breach of fiduciary duty in furtherance of a conspiracy to deprive Mary Lou of her interest in the trusts. *See Barajas*, 927 S.W.2d at 614 (parties cannot engage in a civil conspiracy to be negligent).

There is a distinct paucity of solid facts allowing a reasonable inference that either of the co-trustees, Doug or Rex, engaged in post-termination transactions specifically involving identifiable trust assets for personal gain or that Peter knowingly assisted them in doing so. We are presented with nothing closely akin to the evidence set out in our opinion in *Reed v. Stringer*, 472 S.W.2d 329, 330-31 (Tex.Civ.App.-Beaumont 1971, writ ref'd n.r.e.), in which we reversed summary judgment for a trustee-defendant, finding the record-evidence did indeed raise a fact issue on whether the trustee breached his fiduciary duty. By contrast, Mary Lou provides only subjective beliefs and conclusory allegations in support of her civil conspiracy/joint tortfeasor theory of Peter's liability. "[S]ubjective beliefs are no more than conclusions and are not competent summary judgment evidence." *Texas Division-Tranter, Inc. v. Carrozza*, 876 S.W.2d 312, 314 (Tex. 1994). Peter's evidence firmly established that all of his actions involving the trusts were merely "ministerial or mechanical acts" undertaken upon instruction from either Doug or Rex in their discretionary authority as co-trustees. *See Transamerican Leasing Co.*, 586 S.W.2d at 476. Mary Lou failed to respond with competent summary judgment evidence raising a fact issue and, therefore, failed to carry her burden in the face of Peter's proof.

In her brief, Mary Lou contends that summary judgment in favor of Peter on the civil conspiracy action was improper as Peter's motion for summary judgment failed to address civil conspiracy. Peter's summary judgment motion recognized the civil conspiracy claim, averring that because he owed no legal duty to Mary Lou, he could not be liable for any torts she alleged. If it had been shown that an express fiduciary intentionally breached a duty to Mary Lou, such breach may have been imputed to Peter as a joint tortfeasor if it was further shown Peter intentionally agreed to aid or facilitate the fiduciary in such breach. *See Kinzbach Tool Co.*, 160 S.W.2d at 514. As discussed above, however, there is no record-evidence of any intentional wrongdoing by Doug or Rex with regard to the trusts, including the two wire-transfer transactions. Therefore, the trial court properly rendered summary judgment in Peter's favor as to the civil conspiracy claim.[7] Mary Lou's first issue is overruled.

[7] Our opinion in this particular cause should not be understood or taken as a ruling or comment on potential liability, if any, of the remaining co-defendants, nor taken as a ruling or comment on the merits of any cause of action or defense still subject to being litigated in either action still pending below.

ISSUE TWO

Issue two complains summary judgment was improper as it failed to dispose of all claims brought against Peter by Mary Lou. At the outset, we note the summary judgment order recites that Peter's summary judgment motion is granted, "and that Plaintiff Mary Lou Wilcox's [sic] take nothing as to her claims against Defendant Peter Wilcox." Such language has been held to indicate finality. *See Lehmann v. Har-Con Corp.*, 39 S.W.3d 191, 200 (Tex. 2001). At any rate, following its rendition of the summary judgment in favor of Peter, the trial court entered an order severing Mary Lou's claims against Peter from those against the remaining co-defendants. In pertinent part, the severance order reads as follows:

[U]pon the Court's signing of this Order, the Order Granting Summary Judgment in favor of Peter V. Wilcox dated December 19, 2005 will become the final order in the Severed Cause. The Court finds that, because of the severance ordered herein, all issues and matters between Peter V. Wilcox and Mary Lou Wilcox have been decided, that Mary Lou Wilcox take nothing from Peter V. Wilcox, and that this Order constitutes a final judgment in the Severed Cause.

We find the severance order unequivocally makes the summary judgment order final. *See id.* The combined language contained in both orders clearly expresses the trial court's intent to finally dispose of the entire cause between Mary Lou and Peter, including any of Peter's counterclaims then still pending. *See id.* Additionally, all of Mary Lou's contentions regarding alleged deficiencies in Peter's summary judgment motion have been addressed and rejected under issue one. Therefore, the trial court did not grant more relief than Peter was entitled. Issue two is overruled.

ISSUE THREE

In her final issue, Mary Lou contends there was error by the trial court when it severed her claims against Peter from those remaining against his co-defendants. We review the trial court's decision to grant a severance under an abuse of discretion standard. *See Guaranty Fed. Sav. Bank v. Horseshoe Operating Co.*, 793 S.W.2d 652, 658 (Tex. 1990). "The controlling reasons for a severance are to do justice, avoid prejudice, and further convenience." *Id.* A claim is properly severable if (1) the controversy involves more than one claim; (2) the severed claim is one that would be the proper subject of a lawsuit if independently asserted; and (3) the severed claim is not so interwoven with the remaining action that the claims involve the same facts and issues. *Id.* Rule 41 of the Texas Rules of Civil Procedure provides discretion to the trial court in severing cases. *See* Tex. R. Civ. P. 41; *Guaranty Fed. Sav. Bank*, 793 S.W.2d at 658. Although a reviewing court will not reverse the trial court's severance absent an abuse of discretion, if any of the three criteria is not met, then the trial court has abused its discretion and reversal is warranted. *See State Dept. of Highways Pub. Transp. v. Cotner*, 845 S.W.2d 818, 819 (Tex. 1993) (holding the trial court erred in severing claim because the severed claim was so interwoven with the remaining action that they involved the same facts and issues).

Contrary to the assertion in her brief, the various pleadings filed by Mary Lou in this cause do not "make clear" any role Peter played in the various causes of action she alleges regarding the trusts. Indeed, her position on all her claims against Peter started at one fixed point — that Peter was an informal fiduciary as to her and therefore owed her such obligations and duties as the law required of a fiduciary. The record-evidence, however, establishes as a matter of law that no fiduciary relationship has ever existed between Mary Lou and Peter. As discussed in issue one, our examination of the record-evidence concluded that Mary Lou failed to respond with competent evidence to raise fact issues for her claims against Peter. From the state of the record before us, we conclude the severed actions against Peter meet the severance criteria. As such, we cannot say the trial court abused its discretion in severing Mary Lou's claims against Peter from the remaining lawsuit. *See Guaranty Fed. Sav. Bank*, 793 S.W.2d at 658. Issue three is overruled. The trial court's order granting summary judgment in favor of Peter V. Wilcox is affirmed.

AFFIRMED.