

REMEDIES FOR BREACH OF FIDUCIARY DUTY CLAIMS

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REMEDIES FOR BREACH OF FIDUCIARY DUTY CLAIMS

I. INTRODUCTION

A fiduciary owes its principal one of the highest duties known to law—this is a very special relationship. *See, e.g., Ditta v. Conte*, 298 S.W.3d 187, 191 (Tex. 2009) (“A fiduciary ‘occupies a position of peculiar confidence towards another.’... Because a trustee’s fiduciary role is a status, courts acting within their explicit statutory discretion should be authorized to terminate the trustee’s relationship with the trust at any time, without the application of a limitations period.”); *Rawhide Mesa-Partners, Ltd. v. Brown McCarroll, L.L.P.*, 344 S.W.3d 56, 60 (Tex. App.—Eastland 2011, no pet.) (“A fiduciary duty is the highest duty recognized by law.”).

The term “fiduciary relationship” means “legal relations between parties created by law or by the nature of the contract between them where equity implies confidence and reliance.” *Peckham v. Johnson*, 98 S.W.2d 408, 416 (Tex. Civ. App.—Fort Worth 1936), *aff’d sub nom.*, 132 Tex. 148, 120 S.W.2d 786 (1938). The expression of “fiduciary relation” is one of broad meaning, including both technical fiduciary relations and those informal relations that exist whenever one person trusts and relies upon another. *Texas Bank & Trust Co. v. Moore*, 595 S.W.2d 502, 507 (Tex. 1980); *Peckham*, 98 S.W.2d at 416. A fiduciary relationship is one of equity, and the circumstances out of which a fiduciary relationship will be said to arise are not subject to hard and fast rules. *Texas Bank & Trust Co.*, 595 S.W.2d at 508.

Fiduciary duties can arise in many different formal relationships, such as trustee/beneficiary, partners, lawyer/client, and joint venturers. *Thigpen v. Locke*, 363 S.W.2d 247, 253 (Tex. 1962). In addition, certain informal, confidential relationships can give rise to a fiduciary duty, “where one person trusts in and relies upon another, whether the relation is a moral, social, domestic or merely personal one.” *Fitz-Gerald v. Hull*, 150 Tex. 39, 237 S.W.2d 256, 261 (1951).

A fiduciary duty is a formal, technical relationship of confidence and trust imposing higher duties upon the fiduciary as a matter of law. *Central Sav. & Loan Ass’n v. Stemmons N.W. Bank, N.A.*, 848 S.W.2d 232, 243 (Tex. App.—Dallas 1992, no writ). The duty owed is one of loyalty and good faith, strict integrity, and fair and honest dealing. *Douglas v. Aztec Petroleum Corp.*, 695 S.W.2d 312, 318 (Tex. App.—Tyler 1985, no writ). When parties enter a fiduciary relationship, the fiduciary consents to have its conduct toward the other measured by high standards of loyalty as exacted by courts of equity. *Courseview, Inc. v. Phillips Petroleum Co.*, 158 Tex. 397, 312 S.W.2d 197, 205 (Tex. 1957). The term “fiduciary” refers to integrity and fidelity.

Kinzbach Tool Co. v. Corbett-Wallace Corp., 138 Tex. 565, 160 S.W.2d 509, 512 (Tex. 1942). To say the least, the law requires more of a fiduciary than arms-length marketplace ethics. *Id.* at 514.

The elements of a breach-of-fiduciary-duty claim are: (1) a fiduciary relationship existed between the plaintiff and defendant; (2) the defendant breached its fiduciary duty to the plaintiff; and (3) the defendant’s breach resulted in injury to the plaintiff or benefit to the defendant. *Lundy v. Masson*, 260 S.W.3d 482, 501 (Tex. App.—Houston [14th Dist.] 2008, pet. denied); *Jones v. Blume*, 196 S.W.3d 440, 447 (Tex. App.—Dallas 2006, pet. denied). A plaintiff does not need to prove that it reasonably or justifiably relied on the defendant’s conduct. *PAS, Inc. v. Engel*, 350 S.W.3d 602, 612-613 (Tex. App.—Houston [14th Dist.] 2011, no pet.).

Due to the special nature of the fiduciary relationship, there is likely no area of law that has such a wide range of remedies available to a plaintiff than in breach-of-fiduciary-duty cases. This paper is intended to provide general guidance on the available remedies for breach-of-fiduciary-duty claims.

II. PRE-TRIAL REMEDIES

A plaintiff often needs to seek a remedy before trial to protect it from immediate injury, to protect the assets made the basis of the suit, or to discover the real condition of the parties’ relationship. The following section discusses three pre-trial remedies that are potentially available to a plaintiff: temporary injunctive relief, receiverships, and audits.

A. Temporary Injunctions

1. General Requirements

A plaintiff may need to seek immediate relief from a court to prevent a fiduciary from selling assets, using assets, or failing to distribute assets to the plaintiff. *See, e.g., Hsin-Chi-Su v. Vantage Drilling Co.*, No. 14-14-00461-CV, 474 S.W.3d 284, 2015 Tex. App. LEXIS 7192, 2015 WL 4249265, at *5 n.5 (Tex. App.—Houston [14th Dist.] July 14, 2015, pet. denied) (court affirmed temporary injunction based on claim for disgorgement due to breach of fiduciary duty). Texas rules allow a plaintiff to request a temporary restraining order and/or a temporary injunction to provide such relief.

A court has the authority to enter temporary injunctive relief to protect a breach-of-fiduciary-duty plaintiff from irreparable injury and to maintain the status quo. *See, e.g., Glassman v. Goodfriend*, 347 S.W.3d 772 (Tex. App.—Houston [14th Dist.] 2011, pet. denied) (court signed a temporary injunction and order removing the trustee, terminating the trust, and appointing a successor trustee to wind up the trust); *Ryals v. Ogden*, No. 14-07-01008-CV, 2009 Tex. App. LEXIS 6634 (Tex. App.—Houston [14th] Dist. August

25, 2009, no pet.) (granted temporary injunction against trustee from selling trust property); *In re Holland*, No. 14-09-00656-CV, 2009 Tex. App. LEXIS 7635 (Tex. App.—Houston [14th] Dist. August 20, 2009, no pet.) (granted temporary injunction against executor from interfering with trial court’s orders); *Twyman v. Twyman*, No. 01-08-00904-CV, 2009 Tex. App. LEXIS 5552 (Tex. App.—Houston [1st] Dist. July 16, 2009, no pet.) (granted temporary injunction against trustee from withdrawing any additional funds from the trust while litigation was pending); *Farr v. Hall*, 553 S.W.2d 666, 672 (Tex. Civ. App.—Amarillo 1977, writ ref’d n.r.e.) (injunction to prohibit executor from proposed stock redemption).

The common law and Texas statutes provide authority for temporary injunctive relief. Texas Civil Practice and Remedies Code section 65.011 authorizes injunctive relief:

- 1) when the applicant is entitled to the relief demanded, and all or part of the relief requires the restraint of some act prejudicial to the applicant; 2) when a party performs or is about to perform, or is procuring or allowing the performance of, an act relating to the subject of pending litigation, in violation of the applicant’s rights, and the act would tend to render the judgment in that litigation ineffectual; 3) when the applicant is entitled to a writ of injunction under the principles of equity and the laws of Texas relating to injunctions; 4) when a cloud would be placed on the title of real property being sold under an execution, against a party having no interest in the real property, irrespective of any remedy at law; and 5) when irreparable injury to real or personal property is threatened, irrespective of any remedy at law.

Tex. Civ. Prac. & Rem. C. 65.011. Moreover, specific statutes may apply to fiduciaries. For example, Texas Trust Code Section 114.008(2) provides for injunctive relief as a remedy for breach of trust that “has occurred or may occur.” Tex. Prop. Code §114.008(2).

A temporary restraining order serves to provide emergency relief and to preserve the status quo until a hearing may be had on a temporary injunction. *Cannan v. Green Oaks Apts., Ltd.*, 758 S.W.2d 753, 755 (Tex. 1988). The purpose of a temporary injunction is to preserve the status quo pending a full trial on the merits. *Walling v. Metcalfe*, 863 S.W.2d 56, 58 (Tex. 1993); *Trostle v. Trostle*, 77 S.W.3d 908, 916 (Tex. App.—Amarillo 2002, no pet.). The status quo is the last actual peaceable, noncontested status that preceded the controversy. *In re Newton*, 146 S.W.3d 648, 651 (Tex. 2004). “The principles governing courts of

equity govern injunction proceedings unless superseded by specific statutory mandate. In balancing the equities, the trial court must weigh the harm or injury to the applicant if the injunctive relief is withheld against the harm or injury to the respondent if the relief is granted.” *Seaborg Jackson Partners v. Beverly Hills Sav.*, 753 S.W.2d 242, 245 (Tex. App.—Dallas 1988, writ dismissed).

To be entitled to temporary injunctive relief, a plaintiff must plead a cause of action, prove a probable right to relief, and prove an immediate, irreparable injury if temporary relief is not granted. *IAC, Ltd. v. Bell Helicopter Textron, Inc.*, 160 S.W.3d 191 (Tex. App.—Fort Worth 2005, no pet.). For example, in *183/620 Group Joint Venture v. SPF Joint Venture*, the court of appeals affirmed a temporary injunction prohibiting the defendants from using funds held by them as fiduciaries for the payment of attorney’s fees and expenses in defending the breach of fiduciary duty lawsuit. 765 S.W.2d 901 (Tex. App.—Austin 1989, writ dismissed. w.o.j.).

2. Probable Right To Recovery

To show a probable right of recovery, an applicant need not establish that it will finally prevail in the litigation, rather, it must only present some evidence that, under the applicable rules of law, tends to support its cause of action. *Camp v. Shannon*, 162 Tex. 515, 348 S.W.2d 517, 519 (Tex. 1961); *IAC, Ltd. v. Bell Helicopter Textron, Inc.*, 160 S.W.3d 191, 197 (Tex. App.—Fort Worth 2005, no pet.).

In a fiduciary case, there is authority that the usual burden of establishing a probable right of recovery does not apply if the gist of the complaint is that a fiduciary is guilty of self-dealing. *Health Discovery Corp. v. Williams*, 148 S.W.3d 167, (Tex. App.—Waco 2004, no pet.) (interested directors had burden to establish fairness of transaction in temporary injunction proceeding). In a fiduciary self-dealing context, the “presumption of unfairness” attaches to the transactions of the fiduciary, shifting the burden to the defendant to prove that the plaintiff will not recover. *Texas Bank & Trust Co. v. Moore*, 595 S.W.2d 502, 508-09 (Tex. 1980) (a profiting fiduciary has the burden of showing the fairness of the transactions). If the presumption cannot be rebutted at the temporary injunction stage, then the injunction should be granted as the plaintiff, by simply presenting a prima facie case of the existence of a fiduciary relationship and a probable breach of that duty has adduced sufficient facts tending to support his right to recover on the merits. *Camp v. Shannon*, 348 S.W.2d 517, 519 (Tex. 1961); *Health Discovery Corp. v. Williams*, 148 S.W.3d at 169-70; *Jenkins v. Transdel Corp.*, 2004 WL 1404464 (Tex. App.—Austin 2004, no pet.).

3. Irreparable Harm

Generally, to be entitled to a temporary injunction, the applicant must show a probable, imminent, and irreparable injury in the interim. *IAC, Ltd. v. Bell Helicopter Textron, Inc.*, 160 S.W.3d 191 (Tex. App.—Fort Worth 2005, no pet.). “Imminent” means that the injury is relatively certain to occur rather than being remote and speculative. *Limon v. State*, 947 S.W.2d 620, 625 (Tex. App.—Austin 1997, no writ); *City of Arlington v. City of Fort Worth*, 873 S.W.2d 765, 768-69 (Tex. App.—Fort Worth 1994, writ dismissed w.o.j.).

In *Gatlin v. GXG, Inc.*, the court of appeals affirmed a temporary injunction against a fiduciary, and regarding the irreparable injury requirement, the court stated:

Appellees’ evidence at the hearing revealed a long history of Gatlin transferring funds from Knox and GXG accounts to his own personal or company accounts, and vice versa. In addition, Jan Farmer, Southwest Industrial’s comptroller, testified that Gatlin frequently transferred large sums of money between his companies for reasons she could not explain, and that the documentation relating to these transfers, as well as to the subsidiary companies generally, were poorly maintained. This evidence, coupled with the testimony that Gatlin had in the past generated and backdated letters to himself and that he had been uncooperative when Knox sought the return of her records, was sufficient to justify the trial court’s conclusion that, if not restrained, Gatlin might continue to divert and conceal assets in his possession pending trial.

We have previously recognized that a legal remedy may be considered inadequate when there is a danger that a defendant’s funds will be reduced or diverted pending trial. As we noted in *Minexa*, the fact that damages may be subject to the most precise calculation becomes irrelevant if the defendants in a case are permitted to dissipate funds that would otherwise be available to pay a judgment. A number of our sister courts have likewise found a party’s remedy at law to be inadequate when a defendant’s funds will be reduced, pending final hearing, and will not be available in their entirety in the interim. Because there was at least some evidence from which it would be reasonable to infer that appellants’ funds would be diverted or dissipated pending trial, we conclude that the trial court did not abuse its discretion in

finding appellees’ remedy at law inadequate and granting the temporary injunction.

No. 05-93-01852-CV, 1994 Tex. App. LEXIS 4047 (Tex. App.—Dallas April 19, 1994, no pet.); *see also Coffee v. Hermann Hosp. Estate*, No. 01-85-00520-CV, 1986 Tex. App. LEXIS 12878 (Tex. App.—Houston [1st Dist.] May 1, 1986, no pet.) (not designated for publication) (probably injury was shown where “[t]here was testimony from which it might reasonably have been inferred that the Coffees were not cooperative in accounting for assets of the Estate, and that to insure the preservation of the Estate’s assets, temporary injunctive relief was necessary.”).

In a fiduciary case, there is also authority that the plaintiff is not required to show that it has an inadequate remedy at law. *183/620 Group Joint Venture v. SPF Joint Venture*, 765 S.W.2d 901 (Tex. App.—Austin 1989, writ dismissed w.o.j.) (authorities cited therein). In *183/620 Group Joint Venture*, the appellee and other landowners entrusted a large sum of money to the appellants to be held by them as fiduciaries and expended according to the parties’ contracts. 765 S.W.2d at 902-03. Pursuant to the contracts, the appellants were to serve as “project manager” of the landowners’ properties and expend the money to improve the properties. *Id.* at 902. The appellee subsequently sued the appellants, asserting that the appellants failed to properly manage the construction improvement projects. *Id.* The appellee sought an injunction to require the appellants to repay funds expended in defense of the pending lawsuit and to restrain the appellants from any future expenditures for the same purpose. *Id.* at 902-03. The trial court found that the parties’ contracts did not authorize the appellants to use the money entrusted to them for their defense. *Id.* at 903. The trial court further found that a temporary injunction was necessary to maintain the existing status of the trust funds even though there was no showing that appellants would be unable to pay a judgment for damages that might be based on their misappropriation of the funds. *Id.*

The court of appeals initially noted that an inadequate legal remedy must generally be shown before a trial court can grant a temporary injunction. *Id.* The court reasoned, however, that such a showing “is only an ordinary requirement; it is not universal or invariable.” *Id.* Where the injunction seeks to restrain a party from expending sums held by them as fiduciaries, the court held that damages would not be an adequate remedy “because the funds will be reduced, pending final hearing, so they will not be available in their entirety, in the interim, for the purposes for which they were delivered to the holder in the first place.” *Id.* at 904. Since a breach of fiduciary duty claim is by nature an “equitable” action, even in cases where damages may be sought, if the fiduciary relationship is still

continuing, the beneficiary has an equitable right to be protected from further harm. *See id.* Thus, there is never an adequate remedy at law for a breach of fiduciary duty claim. *See id. See also Hibbs v. Hibbs*, No. 13-97-755-CV, 1998 Tex. App. LEXIS 1876 (Tex. App.—Corpus Christi March 26, 1998, no pet.) (not designated for publication); *Coffee v. Hermann Hosp. Estate*, No. 01-85-00520-CV, 1986 Tex. App. LEXIS 12878 (Tex. App.—Houston [1st Dist.] May 1, 1986, no pet.) (not designated for publication). *But see Zaffirini v. Guerra*, No. 04-14-00436-CV, 2014 Tex. App. LEXIS 12761 (Tex. App.—San Antonio, Sept. 3, 2014, no pet.) (holding that a breach-of-fiduciary-duty plaintiff must still prove an inadequate remedy to obtain a temporary injunction).

There are many procedural rules that apply to an application for a temporary injunction. The author refers the reader to his lengthy paper “Temporary Injunctive Relief In Texas,” which can be found on his blog, www.txfiduciarylitigator.com.

B. Receiverships

1. General Authority

A plaintiff may wish to seek a receivership to have an independent third party manage assets pending the resolution of the plaintiff’s claims. “Chapter 64 of the Civil Practice and Remedies Code sets forth the circumstances under which a trial court may appoint a receiver.” *Perry v. Perry*, 512 S.W.3d 523 (Tex. App.—Houston [1st Dist.] Dec. 13, 2016, no pet.) (citing Tex. Civ. Prac. & Rem. Code Ann. §§ 64.001 et seq.). Section 64.001 provides:

- (a) A court of competent jurisdiction may appoint a receiver: (1) in an action by a vendor to vacate a fraudulent purchase of property; (2) in an action by a creditor to subject any property or fund to his claim; (3) in an action between partners or others jointly owning or interested in any property or fund; (4) in an action by a mortgagee for the foreclosure of the mortgage and sale of the mortgaged property; (5) for a corporation that is insolvent, is in imminent danger of insolvency, has been dissolved, or has forfeited its corporate rights; or (6) in any other case in which a receiver may be appointed under the rules of equity.
- (b) Under Subsection (a)(1), (2), or (3), the receiver may be appointed on the application of the plaintiff in the action or another party. The party must have a probable interest in or right to the property or fund, and the property or fund must be in danger of being lost, removed, or materially injured.
- (c) Under Subsection (a)(4), the court may appoint a receiver only if:(1) it appears that

the mortgaged property is in danger of being lost, removed, or materially injured; or (2) the condition of the mortgage has not been performed and the property is probably insufficient to discharge the mortgage debt.

- (d) A court having family law jurisdiction or a probate court located in the county in which a missing person, as defined by Article 63.001, Code of Criminal Procedure, resides or, if the missing person is not a resident of this state, located in the county in which the majority of the property of a missing person’s estate is located may, on the court’s own motion or on the application of an interested party, appoint a receiver for the missing person if: (1) it appears that the estate of the missing person is in danger of injury, loss, or waste; and (2) the estate of the missing person is in need of a representative.

Tex. Civ. Prac. & Rem. Code Ann. § 64.001.

Most likely, a breach-of-fiduciary-duty plaintiff seeking a receiver will rely on sub-section (a)(3). Section 64.001(a)(3) provides the court may appoint a receiver in an action between parties jointly interested in any property.” *Hawkins v. Twin Montana, Inc.*, 810 S.W.2d 441, 444 (Tex. App.—Fort Worth 1991, no writ). Prior to the appointment of a receiver under subsection (a)(3), the trial court must find that the party seeking appointment of the receiver has “a probable interest in or right to the property or fund, and the property or fund must be in danger of being lost, removed, or materially injured.” Tex. Civ. Prac. & Rem. Code Ann. § 64.001(b).

Even though “[a] receiver appointed pursuant to section 64.001(a) and (b) of the Texas Civil Practice and Remedies Code is not required to show that no other adequate remedy exists,” “[t]he appointment of a receiver is a harsh, drastic, and extraordinary remedy, which must be used cautiously.” *In re Estate of Trevino*, 195 S.W.3d 223, 231 (Tex. App.—San Antonio 2006, no pet.); *Akin, Gump, Strauss, Hauer & Feld, L.L.P. v. E-Court, Inc.*, No. 03-02-00714-CV, 2003 Tex. App. LEXIS 3966, 2003 WL 21025030, at *4 (Tex. App.—Austin May 8, 2003, no pet.).

2. Recent Cases

In *Estate of Benson*, a beneficiary of a trust sought to remove the trustee, her father, for allegedly violating his fiduciary duties in administering the trust assets. No. 04-15-00087-CV, 2015 Tex. App. LEXIS 9477 (Tex. App.—San Antonio Sept. 9, 2015, pet. dism. by agr.). The trustee’s relationship with the beneficiary and her adult children (who were remainder beneficiaries under the trust) became strained in December of 2014, when, according to the beneficiary, the trustee began exhibiting troubling behavior with

them, as well as other business associates involved in managing trust assets. In a two-day evidentiary hearing, the beneficiary presented evidence that her father had cut off contact with her, banned her and her children from the trust's assets' facilities, and made a substantial and abrupt withdrawal from Lone Star Capital Bank, which the trust owned a 97% interest in and which placed the bank in an urgent situation. The beneficiary also presented evidence that the trustee had secretly relocated the office of the trust's bookkeeper to the trustee's condominium without telling anyone where she was going. Although the trustee himself did not testify at the hearing, he presented evidence that his relationship with the beneficiary was strained and that he no longer wanted any contact with them.

Following the hearing, the trial court entered an order appointing two temporary co-receivers to take control of the trust and the estate that created the trust, and further authorized the co-receivers to manage the business and financial affairs of the trust and essentially perform any actions necessary to preserve the trust's value. A few days later, the court issued a temporary injunction enjoining the trustee from taking any action related to the trust.

The court of appeals rejected the trustee's challenges to the appointment of temporary co-receivers and affirmed that part of the trial court's order. The court determined that the trial court had some evidence that there was a breach of trust to support its decision to appoint co-receivers, relying on the evidence presented at the temporary injunction hearing. The trustee not only had a duty to exercise the care and judgment that he would exercise when managing his own affairs, but also a duty to fully disclose any material facts that *might* affect the beneficiary's rights. Rejecting the trustee's arguments that appointment of co-receivers could not be defended under requirements of equity, the court noted that the beneficiary had sought receivers under section 114.008(a)(5) of the Texas Property Code, not under equitable grounds. Under the statute, a movant need not prove the elements of equity; thus, the beneficiary in this case was not required to produce evidence of irreparable harm or lack of another remedy.

The court of appeals's holding that the requirements of equity need not be satisfied for receivership applications under section 114.008 of the Texas Trust Code appears to be an issue of first impression. In another recent case involving a receivership appointment over trust assets, *Elliott v. Weatherman*, the court recognized the Texas Trust Code as providing separate authority for receivership appointments but held that even if a specific statutory provision authorized a receivership, "a trial court should not appoint a receiver if another remedy exists at law or in equity that is adequate and complete." 396 S.W.3d 224, 228 (Tex. App.—Austin 2013, no pet.)

(holding trial court abused its discretion in appointing a receiver over the property and citing cases not involving receiverships over trust property).

In *In re Estate of Price*, Ray Price, a renowned country music singer and songwriter, died in 2013 and was survived by his wife and his biological son. 528 S.W.3d 591 (Tex. App.—Texarkana 2017, no pet.). Shortly before Price's death, and while he was in the hospital, he transferred most of his assets to his spouse via various deeds and assignment documents. The spouse's sister, who was a secretary, drafted the various documents. The spouse and son filed competing motions to probate wills purportedly executed by Price, as well as competing will contests. The court appointed a temporary administrator, but almost all of the assets did not belong to the estate due to the last-minute transfers to the spouse. So, the son filed an application to appoint a temporary administrator as receiver over the assets purportedly transferred to the spouse in the month of Price's death. The son alleged that Price did not have the mental capacity to execute the documents. The application for the receiver argued that the spouse had possession and control over all of the contested assets and that she could sell them or "allow them to waste away as she is currently doing."

The trial court appointed a receiver to take possession of property subject to the will contests. The spouse alleged that Price had capacity to execute the transfer documents, and appealed that order. The court of appeals cited to Section 64.001(a)(3) of the Texas Civil Practice and Remedies Code that provides that a court may appoint a receiver "in an action between parties jointly interested in any property." *Id.*

The court of appeals determined that due to the contest to the transfers, the son had a showing of the requisite interest in the property. The court also determined that the trial court did not abuse its discretion in determining that there was a danger that the property would be lost, removed, or materially injured:

The trial court heard evidence that Janie had disposed of, and believed she could dispose of, assets subject to the will contests and Clifton's petition to set aside the December 9 documents. In light of the pleadings and evidence presented in this case, we will not disturb the trial court's finding that property Clifton had a probable right or interest in was in danger of being lost, removed, or materially injured.

Id. Therefore, the court of appeals affirmed the appointment of the receiver.

C. Audit Relief

A plaintiff may want an independent third party to provide an accounting of the fiduciary relationship before trial. Texas Rule of Civil Procedure 172 allows a court to appoint an auditor to state the accounts between the parties and to make a report thereof to the court. Rule 172 states:

When an investigation of accounts or examination of vouchers appears necessary for the purpose of justice between the parties to any suit, the court shall appoint an auditor or auditors to state the accounts between the parties and to make report thereof to the court as soon as possible. The auditor shall verify his report by his affidavit stating that he has carefully examined the state of the account between the parties, and that his report contains a true statement thereof, so far as the same has come within his knowledge. Exceptions to such report or of any item thereof must be filed within 30 days of the filing of such report. The court shall award reasonable compensation to such auditor to be taxed as costs of suit.

Tex. R. Civ. P. 172. The auditor shall verify the report via an affidavit. *Id.* The court will award compensation to the auditor to be taxed as costs. *Id.* “The purpose of the appointment is to have an account so made up that the undisputed items upon either side may be eliminated from the contest, and the issues thereby narrowed to the points actually in dispute.” *In the Matter of Coastal Nejapa, Limited*, 2009 Tex. App. LEXIS 6382, 2009 WL 2476555 at *5 (Tex. App.—Houston [14th Dist.] Aug. 13, 2009, no pet.) (quoting *Dwyer v. Kaltayer*, 68 Tex. 554, 5 S.W. 75, 77 (1887)). For example, one court appointing an auditor to determine an accounting of a partnership. *Sanchez v. Jary*, 768 S.W.2d 933 (Tex. App.—San Antonio 1989, no writ). Either party may object to the report if such objection is filed within 30 days of the report. Tex. R. Civ. P. 172. If objections are filed, then when the report is admitted into evidence, the party preserves the right to offer evidence to contradict it.

Moreover, there may be more than one way to obtain audit relief from a court. *See, e.g., In re Estate of Hoskins*, 501 S.W.3d 295, 2016 Tex. App. LEXIS 9966 (Tex. App.—Corpus Christi Sept. 8, 2016, no pet.) (Appointing a receiver to create a report did not require a finding that all other measures would be inadequate; there was evidence of a breach of trust, and the order did not grant the duties and powers ordinarily conferred upon a receiver but instead resembled appointing an auditor.).

III. LEGAL DAMAGES

A plaintiff may be awarded his or her actual damages for breach of fiduciary duty. Actual damages are available for breach of fiduciary duty and include both general/direct damages and special/consequential damages. *Lesikar v. Rappeport*, 33 S.W.3d 282, 305 (Tex. App.—Texarkana 2000, no pet.); *Airborne Freight Corp. v. C.R. Lee Enters.*, 847 S.W.2d 289, 295 (Tex. App.—El Paso 1992, writ denied); *Duncan v. Lichtenberger*, 671 S.W.2d 948, 953 (Tex. App.—Fort Worth 1984, writ ref’d n.r.e). 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. *Lesikar*, 33 S.W.3d at 305.

A. Direct Damages

“Direct damages,” also known as “general damages,” are those inherent in the nature of the breach of the obligation between the parties, and they compensate a plaintiff for a loss that is conclusively presumed to have been foreseen by the defendant as a usual and necessary consequence of the defendant’s act. *Arthur Andersen & Co. v. Perry Equip. Corp.*, 945 S.W.2d 812, 816 (Tex. 1997). One measure of direct damages is the “benefit of the bargain” measure, which utilizes an expectancy theory and evaluates the difference between the value as represented and the value received. *See Mood v. Kronos Prods., Inc.*, 245 S.W.3d 8, 12 (Tex. App.—Dallas 2007, pet. denied) (generally, measure of damages for breach is that which restores injured party to position he would have had if contract had been performed); *Frost Nat’l Bank v. Heafner*, 12 S.W.3d 104, 111 n.5 (Tex. App.—Houston [1st Dist.] 1999, pet. denied).

Generally, the measure of damages for breach of contract is that which restores the injured party to the economic position he would have enjoyed if the contract had been performed. *Sava Gumarska v. Advanced Polymer Sciences, Inc.*, 128 S.W.3d 304, 317 n.6 (Tex. App.—Dallas 2004, no pet.). This measure may include reasonably certain lost profits. *Cnty. Dev. Serv., Inc. v. Replacement Parts Mfg., Inc.*, 679 S.W.2d 721, 725 (Tex. App.—Houston [1st Dist.] 1984, no writ.). Lost profits are damages for the loss of net income to a business. *Miga v. Jensen*, 96 S.W.3d 207, 213 (Tex. 2002). Lost profits may be in the form of direct damages, that is, profits lost on the contract itself, or in the form of consequential damages, such as profits lost on other contracts or relationships resulting from the breach. *Continental Holdings, Ltd. v. Leahy*, 132 S.W.3d 471, 475 (Tex. App.—Eastland 2003, no pet.).

Lost profit damages are recoverable for a breach of fiduciary duty claim. *ERI Consulting Eng'rs, Inc. v. Swinnea*, 318 S.W.3d 867, n. 3 (Tex. 2010) (citing *Waite Hill Servs., Inc. v. World Class Metal Works, Inc.*, 959 S.W.2d 182, 184-85 (Tex. 1998) (observing that lost profits are recoverable both as tort and contract damages, subject to the rule precluding double recovery for a single injury)). The rule concerning adequate evidence of lost profit damages is well established:

Recovery for lost profits does not require that the loss be susceptible of exact calculation. However, the injured party must do more than show that they suffered some lost profits. The amount of the loss must be shown by competent evidence with reasonable certainty. What constitutes reasonably certain evidence of lost profits is a fact intensive determination. As 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 supporting documentation may affect the weight of the evidence, it is not necessary to produce in court the documents supporting the opinions or estimates.

Holt Atherton Indus., Inc. v. Heine, 835 S.W.2d 80, 84 (Tex. 1992).

The plaintiff bears the burden of providing evidence supporting a single complete calculation of lost profits, which may often require certain credits and expenses. *ERI Consulting Eng'rs, Inc. v. Swinnea*, 318 S.W.3d 878 (citing *Holt Atherton*, 835 S.W.2d at 85 (“Recovery of lost profits must be predicated on one complete calculation.”)). The defendant has the burden of providing at least some evidence suggesting that an otherwise complete lost profits calculation is in fact missing relevant credits. *Id.* (citing *Brown v. Am. Transfer & Storage Co.*, 601 S.W.2d 931, 936 (Tex. 1980) (“The right of offset is an affirmative defense. The burden of pleading offset and of proving facts necessary to support it is on the party making the assertion.”)).

In addition, a plaintiff may be entitled to out-of-pocket damages. *Carr v. Weiss*, 984 S.W.2d 753, 769 (Tex. App.—Amarillo 1999, pet. denied). The out of pocket measure of damages requires a court to consider the difference between the value paid and the value received. *W.O. Bankston Nissan, Inc. v. Walters*, 754 S.W.2d 127, 128 (Tex. 1988). The out of pocket measure compensates only for actual injuries a party sustains through parting with something, not loss of profits not yet realized. *Formosa Plastics Corp. USA v.*

Presidio Eng'rs & Contractors, Inc., 960 S.W.2d 41, 49 (Tex. 1998).

The “value received” is determined by evidence of fair market value. *Sobel v. Jenkins*, 477 S.W.2d 863, 868 (Tex. 1972); *Morriss-Buick Co. v. Pondrom*, 131 Tex. 98, 100-01, 113 S.W.2d 889, 890 (1938); *Broadly v. Mitchell*, 572 S.W.2d 36, 42 (Tex. Civ. App.—Houston [1st Dist.] 1978, writ ref'd n.r.e.).

B. Consequential Damages

A plaintiff may be entitled to award consequential damages. Consequential damages are defined as “those damages which result naturally, but not necessarily, from the defendant’s wrongful acts.” *Baylor Univ. v. Sonnichsen*, 221 S.W.3d 632, 636 (Tex. 2007) (quoting *Henry S. Miller Co. v. Bynum*, 836 S.W.2d 160, 163 (Tex.1992) (Phillips, C.J., concurring)). Direct damages, on the other hand, compensate for the loss that is the necessary and usual result of the act. *Id.* (citing *Arthur Andersen & Co. v. Perry Equip. Corp.*, 945 S.W.2d 812, 816 (Tex.1997)). When special or consequential damages are sought, the plaintiff must demonstrate that those damages proximately resulted from the alleged wrongful act. *Libhart v. Copeland*, 949 S.W.2d 783, 800 (Tex. App.—Waco 1997, no writ).

For example, in *Wells Fargo v. Militello*, a trustee appealed a judgment from a bench trial regarding a beneficiary’s claims for breach of fiduciary duty, negligence, and fraud. No. 05-15-01252-CV, 2017 Tex. App. LEXIS 5640 (Tex. App.—Dallas June 20, 2017, pet. filed). Militello was an orphan when her grandmother and great-grandmother created trusts for her. She had health issues (Lupus) that prevented her from working a normal job, and she heavily relied on the trusts. When Militello was 25 years old, one of the trusts was terminating, and it contained over 200 producing and non-producing oil and gas properties. The trustee requested that Militello leave the properties with it to manage, and she created a revocable trust allowing the trustee to remain in that position.

Later, in late 2005 and early 2006, Militello advised the trustee that she was experiencing cash flow problems as a result of her divorce and expensive medical treatments. Instead of discussing all six accounts with Militello, the trustee suggested that she sell the oil and gas interests in her revocable trust. The trustee then sold those assets to another customer of the trustee; a larger and more important customer. There were eventually three different sales, and the buyer ended up buying the assets for over \$500,000 and later sold those same assets for over \$5 million. The trustee did not correctly document the sale, continued reporting income in the revocable trust, and did not accurately report the sales to the beneficiary. The failure to accurately document and report the sales and income caused Militello several tax issues, and she had

to retain accountants and attorneys to assist her in those matters.

The beneficiary sued, and the trial court held a bench trial in 2012. Later, the trial court awarded Militello: \$1,328,448.35 past economic damages, \$29,296.75 disgorgement of trust fees, \$1,000,000.00 past mental anguish damages, \$3,465,490.20 exemplary damages, and \$467,374.00 attorney's fees. The trustee appealed, alleging that the evidence was not sufficient to support many of the damages award but did not appeal the liability finding of breach of fiduciary duty.

The trial court awarded damages based on Militello's expenses associated with dealing with tax issues, including accountant fees and attorney's fees. The evidence at trial was that the trustee did not timely or properly document any of the sales from Militello's trust, did not notify the oil and gas producers of the transfer of Militello's interests, and did not prepare and record correct deeds until three years after the fact. It failed to amend its internal accounting, resulting in Militello's accounts showing the receipt of amounts that were no longer attributable to interests owned by her trust. These errors caused problems in the preparation of Militello's tax returns, and attracted the attention of various tax authorities. When Militello attempted to obtain information from the trustee to address these problems, it did not provide her with a correct accounting. It was necessary for Militello to retain and consult her own tax advisors in order to resolve these problems. At trial, Militello's tax lawyer gave expert testimony to explain and quantify Militello's damages relating to correcting her tax problems. The court of appeals affirmed the trial court's awards for the Militello for these issues.

C. Mental Anguish

One particular subset of actual damages is mental anguish damages. A plaintiff can potentially recover mental-anguish and/or emotional distress damages if the damages are a foreseeable result of a breach of fiduciary duty. *Perez v. Kirk & Carrigan*, 822 S.W.2d 261, 266-67 (Tex. App.—Corpus Christi 1991, writ denied) (client was entitled to mental anguish award in breach of fiduciary duty by an attorney regarding the disclosure of confidential information). In *Perez*, an attorney breached his fiduciary duty by disclosing a client's confidential information to district attorney and an allegation of emotional distress constituted sufficient damage to sustain the claim. *Id.*

In *Douglas v. Delp*, the Texas Supreme Court stated that mental-anguish damages were not allowed when the defendant's negligence harmed only the plaintiff's property. 987 S.W.2d 879, 885 (Tex. 1999). In those cases, damages measured by the economic loss would make the plaintiff whole. *Id.* Applying those concepts to attorney malpractice, the Court stated

that limiting the plaintiff's recovery to economic damages would fully compensate the plaintiff for the attorney's negligence. *Id.* The Court concluded "that when a plaintiff's mental anguish is a consequence of economic losses caused by an attorney's negligence, the plaintiff may not recover damages for that mental anguish." *Id.*

The Texas Supreme Court reiterated that when an attorney's malpractice results in financial loss, the aggrieved client is fully compensated by recovery of that loss; the client may not recover damages for mental anguish or other personal injuries. *Belt v. Oppenheimer, Blend, Harrison & Tate*, 192 S.W.3d 780, 784 (Tex. 2006). In *Tate*, the Court held that estate planning malpractice claims seeking purely economic loss are limited to recovery for property damage. *Id.* The Court held that when the damages are financial loss, a party is fully compensated by recovery of that loss. *Id.* So, if the plaintiff is seeking a claim for breach of fiduciary duty based on negligent conduct, a plaintiff may not be able to obtain mental anguish damages if the economic damages make the plaintiff whole.

In a situation where the plaintiff's breach of fiduciary duty claim is based on non-negligent conduct, such as fraud or malice, a plaintiff can "recover economic damages, mental anguish, and exemplary damages." *Tony Gullo Motors I, L.P. v. Chapa*, 212 S.W.3d 299, 304 (Tex. 2006) (mental anguish damages permissible for fraud claim); *City of Tyler v. Likes*, 962 S.W.2d 489, 497 (Tex. 1997) (stating that mental anguish damages are recoverable for some common law torts involving intentional or malicious conduct). For example, in *Parenti v. Moberg*, the court of appeals affirmed an award of mental anguish damages for a beneficiary suing a trustee for breach of fiduciary duty. No. 04-06-00497-CV, 2007 Tex. App. LEXIS 4210 (Tex. App.—San Antonio May 30, 2007, pet. denied). The court stated: "Here, the jury found that Parenti acted with malice, and Parenti does not challenge that finding. Therefore, because the jury found that Parenti acted with malice, we hold that the trial court did not err in awarding mental anguish damages to Moberg." *Id.*

Finally, even if allowed, mental anguish damages are difficult to prove. The Texas Supreme Court has noted: "The term 'mental anguish' implies a relatively high degree of mental pain and distress. It is more than mere disappointment, anger, resentment or embarrassment, although it may include all of these. It includes a mental sensation of pain resulting from such painful emotions as grief, severe disappointment, indignation, wounded pride, shame, despair and/or public humiliation." *Parkway Co. v. Woodruff*, 901 S.W.2d 434, 444 (Tex. 1995). The Court held that an award for mental anguish will normally survive appellate review if "the plaintiffs have introduced

direct evidence of the nature, duration, and severity of their mental anguish thus establishing a substantial disruption in the plaintiff's routine." *Id.*

In *Service Corp. International v. Guerra*, the Texas Supreme Court reversed an award of mental anguish damages. 348 S.W.3d 221, 231-32 (Tex. 2011). The Court held: "Even when an occurrence is of the type for which mental anguish damages are recoverable, evidence of the nature, duration, and severity of the mental anguish is required." *Id.* at 231. In *Guerra*, the jury awarded mental anguish damages to three daughters of the deceased when the cemetery disinterred and moved the body of their father. *Id.* at 232. One daughter testified that it was "the hardest thing I have had to go through with my family" and that she "had lots of nights that I don't sleep." *Id.* Another daughter testified, "We're not at peace. We're always wondering. You know we were always wondering where our father was. It was hard to hear how this company stole our father from his grave and moved him." *Id.* There was also evidence from third parties that the daughters experienced "strong emotional reactions." *Id.* Yet, the Court held that this was not sufficient to support an award of mental-anguish damages. *Id.* See also *Hancock v. Variyam*, 400 S.W.3d 59 (Tex. 2013) (reversing award of mental anguish damages).

In *Martin v. Martin*, the court of appeals reversed a mental anguish award against a trustee based on a claim of intentional breach of fiduciary duty because the beneficiary did not have sufficient evidence of harm. 363 S.W.3d 221 (Tex. App.—Texarkana 2012, pet. denied). The evidence of mental anguish was: "It's impacted our whole family. We don't -- for generations and generations to come, we don't have any -- it just hurts. It's affected my father. I worry about him every day talking to him on the phone, the stress. I worry about those in the company that have to deal with what's going on." *Id.* The court held that: "Courtney failed to establish a high degree of mental pain and distress that is more than mere worry, anxiety, vexation, embarrassment, or anger." *Id.* See also *Onyung v. Onyung*, No. 01-10-00519-CV, 2013 Tex. App. LEXIS 9190 (Tex. App.—Houston [1st Dist.] July 25, 2013, pet. denied) (reversed mental anguish damages because plaintiff did not have sufficient evidence of harm). However, in *Moberg*, the court of appeals affirmed the modest award of \$5,000 in mental anguish damages in a breach of fiduciary duty case against a trustee where the evidence showed that the beneficiary: "cried, lost sleep, vomited, and missed work for 'several days' . . ." 2007 Tex. App. LEXIS 4210. These are very fact-specific determinations.

In *Wells Fargo v. Militello*, a trustee appealed a judgment from a bench trial regarding a beneficiary's claims for breach of fiduciary duty, negligence, and fraud. No. 05-15-01252-CV, 2017 Tex. App. LEXIS

5640 (Tex. App.—Dallas June 20, 2017, no pet. history). Militello was an orphan when her grandmother and great-grandmother created trusts for her. She had health issues (Lupus) that prevented her from working a normal job, and she heavily relied on the trusts. When Militello was 25 years old, one of the trusts was terminating, and it contained over 200 producing and non-producing oil and gas properties. The trustee requested that Militello leave the properties with it to manage, and she created a revocable trust allowing the trustee to remain in that position.

Later, in late 2005 and early 2006, Militello advised the trustee that she was experiencing cash flow problems as a result of her divorce and expensive medical treatments. Instead of discussing all six accounts with Militello, the trustee suggested that she sell the oil and gas interests in her revocable trust. The trustee then sold those assets to another customer of the trustee; a larger and more important customer. There were eventually three different sales, and the buyer ended up buying the assets for over \$500,000 and later sold those same assets for over \$5 million. The trustee did not correctly document the sale, continued reporting income in the revocable trust, and did not accurately report the sales to the beneficiary. The failure to accurately document and report the sales and income caused Militello several tax issues, and she had to retain accountants and attorneys to assist her in those matters.

The beneficiary sued, and the trial court held a bench trial in 2012. Later, the trial court awarded Militello: \$1,328,448.35 past economic damages, \$29,296.75 disgorgement of trust fees, \$1,000,000.00 past mental anguish damages, \$3,465,490.20 exemplary damages, and \$467,374.00 attorney's fees. The trustee appealed.

The trustee challenged the trial court's award of \$1,000,000.00 in "past mental anguish damages pursuant to Texas Trust Code Section 114.008(a)(10)." *Id.* Section 114.008 is entitled "Remedies for Breach of Trust," and Subsection 114.008(a)(10) allows a court to "order any other appropriate relief" to "remedy a breach of trust that has occurred or might occur." *Id.* The court held that breaches of fiduciary duty can lead to awards of mental anguish damages. To sustain such an award "[t]here must be both evidence of the existence of compensable mental anguish and evidence to justify the amount awarded." *Id.* "Mental anguish is only compensable if it causes a 'substantial disruption in . . . daily routine' or 'a high degree of mental pain and distress.'" *Id.* "Even when an occurrence is of the type for which mental anguish damages are recoverable, evidence of the nature, duration, and severity of the mental anguish is required." *Id.*

The record included her testimony and months of communications between Militello and the bank showing multiple disruptions and mental distress in

Militello's daily life in attempting to obtain her own and her children's housing, medical care, and other needs. Militello established that she was entirely dependent on the trustee's competent administration of her trusts for her financial security and daily living expenses. The primary source of Militello's monthly income was permanently depleted, leaving her constantly worried about her financial security. Militello testified that the stress aggravated her Lupus, and that she suffered an ulcer and "broke out in shingles." *Id.* She received notices from the IRS and other tax authorities that tax was due on properties she did not own, and she owed thousands of dollars in penalties. Her trust officer refused to discuss these problems with her, referring her to its outside counsel. The court of appeals concluded that there was evidence to support an award of mental anguish damages.

The court next reviewed the amount of the award of mental anguish damages. Appellate courts must "conduct a meaningful review" of the fact-finder's determinations, including "evidence to justify the amount awarded." *Id.* The court held that the \$1 million award was not supported by the evidence and suggested a remittitur down to \$310,000 based on evidence of other actual damages:

[T]he record supports a lesser amount of mental anguish damages. The items making up the remainder of Militello's actual damages, net of the \$921,000 related to the market value of the oil and gas properties, represent expenses, fees, and losses Militello incurred as a direct result of Wells Fargo's gross negligence and breaches of fiduciary duty. These items include legal fees incurred relating to drafting, creation, and recording of void deeds, lost production revenue, improperly transferred money market funds, bank fees, and the tax-related amounts we have discussed in detail above, among other items. These amounts total \$310,608.89, after subtraction of the amounts Militello voluntarily remitted. Much of the mental anguish Militello described is a direct result of the bank's unresponsiveness and gross negligence in carrying out its fiduciary duties to her, and is reflected in these expenses. We conclude that the evidence is sufficient to support the amount of \$310,608.89, representing amounts of actual damages caused by the bank's breaches of fiduciary duty and gross negligence, but excluding the actual damages attributable to market value of the properties. We conclude that this amount would fairly and reasonably compensate Militello for the mental anguish she suffered.

Id.

D. Attorney's Fees

In Texas, attorney's fees are not recoverable unless authorized by statute or provided for by contract. *See Tony Gullo Motors I, L.P. v. Chapa*, 212 S.W.3d 299, 310-11 (Tex. 2006) ("Absent a contract or statute, trial courts do not have inherent authority to require a losing party to pay the prevailing party's fees."); *Travelers Indem. Co. of Connecticut v. Mayfield*, 923 S.W.2d 590, 593 (Tex. 1996). Generally, attorney's fees are not recoverable in tort actions unless provided by statute. *Huddleston v. Pace*, 790 S.W.2d 47, 49 (Tex. App.—San Antonio 1990, writ denied). Breach of fiduciary duty is a tort. *Hawthorne v. Guenther*, 917 S.W.2d 924, 936 (Tex. App.—Beaumont 1996, writ denied). As it is a tort claim, a plaintiff generally cannot recover attorney's fees for his breach of fiduciary duty claim. *W. Reserve Life Assurance Co. of Ohio v. Graben*, 233 S.W.3d 360, 368 (Tex. App.—Fort Worth 2007, no pet.); *Brosseau v. Ranzau*, 81 S.W.3d 381, 397 (Tex. App.—Beaumont 2002, pet. denied); *Maeberry v. Gayle*, 955 S.W.2d 875, 881 (Tex. App.—Corpus Christi 1997, no pet.); *Spangler v. Jones*, 861 S.W.2d 392, 397 (Tex. App.—Dallas 1993, writ denied).

There are some exceptions. First, there are specific statutes that may allow an award of attorney's fees in breach of fiduciary duty disputes. The Texas Property Code states: "In any proceeding under this code the court may make such award of costs and reasonable and necessary attorney's fees as may seem equitable and just." Tex. Prop. Code Ann. § 114.064. The granting or denying of attorney's fees to a trustee or beneficiary under section 114.064 is within the sound discretion of the trial court, and a reviewing court will not reverse the trial court's judgment absent a clear showing that the trial court abused its discretion by acting without reference to any guiding rules and principles. *Lee v. Lee*, 47 S.W.3d 767, 793-794 (Tex. App.—Houston [14th Dist.] 2001, pet. denied); *Lyco Acquisition 1984 Ltd. P'ship v. First Nat'l Bank*, 860 S.W.2d 117, 121 (Tex. App.—Amarillo 1993, writ denied).

Further, a party can seek an award of attorney's fees as damages, i.e., where the defendant's conduct has caused the plaintiff to incur attorney's fees in a separate suit. "If the underlying suit concerns a claim for attorney's fees as an element of damages, as with Porter's claim for unpaid fees here, then those fees may properly be included in a judge or jury's compensatory damages award." *In re Nalle Plastics Family Ltd. P'ship*, 406 S.W.3d 168 (Tex. 2013) (citing *Akin, Gump, Strauss, Hauer & Feld, L.L.P. v. Nat'l Dev. & Research Corp.*, 299 S.W.3d 106, 111 (Tex. 2009) (holding that a party may recover damages for attorney's fees paid in the underlying suit)). For

example, in *Wells Fargo v. Militello*, the court of appeals affirmed an award of attorney's fees that were incurred by a beneficiary in fighting tax issues that were caused by a trustee's breach of fiduciary duty. No. 05-15-01252-CV, 2017 Tex. App. LEXIS 5640 (Tex. App.—Dallas June 20, 2017, pet. filed).

E. Prejudgment Interest

A plaintiff may be entitled to an award of pre-judgment interest, but it is generally discretionary with the court. In *Phillips Petroleum Co. v. Stahl Petroleum Co.*, the Texas Supreme Court recognized two separate bases for the award of pre-judgment interest: (1) an enabling statute; and (2) general principles of equity. 569 S.W.2d 480, 485 (Tex. 1978). Statutory pre-judgment interest generally applies only to judgments in wrongful death, personal injury, property damage, and condemnation cases. Tex. Fin. Code Ann. §§ 304.102, 304.201 (Vernon Supp. 2004-05); *Johnson & Higgins of Tex., Inc. v. Kenneco Energy, Inc.*, 962 S.W.2d 507, 530 (Tex. 1998). There is no statutory authority for a recovery of pre-judgment interest for a breach of fiduciary duty claim. *Robertson v. ADJ Partnership, Ltd.*, 204 S.W.3d 484, 496 (Tex. App.—Beaumont 2006, no pet.).

Under an equitable theory, if no statute requires pre-judgment interest to be awarded, a court has the discretion to award pre-judgment interest if it determines an award is appropriate based on the facts of the case. See e.g., *City of Port Isabel v. Shiba*, 976 S.W.2d 856, 860 (Tex. App.—Corpus Christi 1998, pet. denied) (where no statute controls, decision to award pre-judgment interest left to discretion of trial court); *Larcon Petroleum, Inc. v. Autotronic Sys.*, 576 S.W.2d 873, 879 (Tex. App.—Houston [14th Dist.] 1979, no writ) (trial court may, but not is not required to, award pre-judgment interest under authority of statute or under equitable theory). One court has affirmed a trial court's decision to not award pre-judgment interest to a breach-of-fiduciary-duty plaintiff. *Robertson*, 204 S.W.3d at 496.

If a court awards pre-judgment interest for a breach of fiduciary duty claim, the court should award a rate that is equal to the post-judgment interest rate that applies at the time of the judgment. Tex. Fin. Code Ann. § 304.103.

A recent case has discussed the award of pre-judgment interest in relation to a forfeiture award. In *Holliday v. Weaver*, clients obtained a fee forfeiture award against an attorney for breach of fiduciary duty related to the improper use of settlement proceeds. No. 05-15-00490-CV, 2016 Tex. App. LEXIS 7264 (Tex. App.—Dallas July 7, 2016, no pet.). After a bench trial, the trial court found for the clients and further found that the appropriate remedy for the attorney's breach of fiduciary duty was "complete disgorgement of Holliday's fee including certain expenses" which

totaled \$10,786.84. The trial court also awarded almost \$3,000 in pre-judgment interest on the fee forfeiture award, and the attorney appealed.

The court of appeals affirmed the pre-judgment interest award. The court held that "[i]nterest is awarded as compensation for the loss of use of money" and that "[i]t is intended to fully compensate the injured party, not to punish the defendant." *Id.* "An award of pre-judgment interest may be based on either an enabling statute or general principles of equity." *Id.* Further, the court held that there is no statute authorizing an award of pre-judgment interest on amounts recovered for breach of fiduciary duty. Therefore, the court held that "[w]here no statute controls, the decision to award pre-judgment interest is left to the sound discretion of the trial court." *Id.*

The attorney argued that pre-judgment interest may not be awarded on fee forfeiture awards because those are allegedly not compensatory damages. The court disagreed and held that "[w]here there has been a clear and serious violation of a fiduciary duty, equity dictates not only that the fiduciary disgorge his fees, but also all benefit obtained from use of those fees," which included pre-judgment interest. *Id.* The court concluded: "Because the award of pre-judgment interest in this case fits the purpose of such interest, which is to fully compensate the Weavers, we conclude the trial court did not abuse its discretion in granting the award." *Id.* The court cited the following cases for further support: *Dernick Res., Inc. v. Wilstein*, 471 S.W.3d 468, 487 (Tex. App.—Houston [1st Dist.] 2015, pet. filed) (allowing pre-judgment interest on fee forfeiture award in a trustee's breach of fiduciary duty case); *Lee v. Lee*, 47 S.W.3d 767, 800 (Tex. App.—Houston [14th Dist.] 2001, pet. denied) (same).

F. Exemplary Damages

1. General Authority For Exemplary Damages

"Exemplary damages" means any damages awarded as a penalty or by way of punishment but not for compensatory purposes. Exemplary damages are neither economic nor noneconomic damages. "Exemplary damages" includes punitive damages. Tex. Civ. Prac. & Rem. Code Ann. §41.001(5). A jury may only award exemplary damages if the claimant proves, by clear and convincing evidence, that the harm resulted from: (1) fraud; (2) malice; or (3) gross negligence. *Id.* at §41.003(a). "Exemplary damages may be awarded only if the jury was unanimous in regard to finding liability for and the amount of exemplary damages." *Id.* at §41.003(d).

In determining the amount of exemplary damages, the trier of fact shall consider evidence, if any, relating to: (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; (5) the extent to which such conduct

offends a public sense of justice and propriety; and (6) the net worth of the defendant. *Id.* at §41.011.

Under Texas law, exemplary damages may be proper in a breach of fiduciary duty case where the plaintiff can prove by clear and convincing evidence that the action arose by actual fraud, malice, or gross negligence. *See, e.g., International Bankers Life Ins. Co. v. Holloway*, 368 S.W.2d 567, 584 (Tex. 1963); *Natho v. Shelton*, No. 03-11-00661-CV, 2014 Tex. App. LEXIS 5842, 2014 WL 2522051, at *2 (Tex. App.—Austin May 30, 2014, no. pet.); *Lesikar v. Rappeport*, 33 S.W.3d 282, 311 (Tex. App.—Texarkana 2000, pet. denied); *Fidelity Nat'l Title Co. v. Heart of Tex. Title Co.*, No. 03-98-00473-CV, 2000 Tex. App. LEXIS 72 (Tex. App.—Austin 2000, no pet.); *Hawthorne v. Guenther*, 917 S.W.2d at 936; *NRC, Inc. v. Huddleston*, 886 S.W.2d 526, 533 (Tex. App.—Austin 1994, no writ) (upholding portion of district court's judgment awarding actual and punitive damages for breach of fiduciary duty); *Murphy v. Canion*, 797 S.W.2d 944, 949 (Tex. App.—Houston [14th Dist.] 1990, no pet.); *Cheek v. Humphreys*, 800 S.W.2d 596, 599 (Tex. App.—Houston [14th Dist.] 1990, writ denied) (“Exemplary damages are proper where a fiduciary has engaged in self-dealing”); *Morgan v. Arnold*, 441 S.W.2d 897, 905–906 (Tex. Civ. App.—Dallas 1969, writ ref'd n.r.e.).

“Fraud” means fraud other than constructive fraud. Tex. Civ. Prac. & Rem. Code §41.001(6). “Malice” means a specific intent by the defendant to cause substantial injury or harm to the claimant. *Id.* at 41.001(7). “Gross negligence” means an act or omission: (A) which when viewed objectively from the standpoint of the actor at the time of its occurrence involves an extreme degree of risk, considering the probability and magnitude of the potential harm to others; and (B) of which the actor has actual, subjective awareness of the risk involved, but nevertheless proceeds with conscious indifference to the rights, safety, or welfare of others. *Id.* 41.001(11).

2. Caps To Exemplary Damages Claims And Exceptions Thereto

One important protection for defendants is the statutory cap on the amount of exemplary damages. The Texas Civil Practice and Remedies Code permits exemplary damages of up to the greater of: (1) (a) two times the amount of economic damages; plus (b) an amount equal to any noneconomic damages found by the jury, not to exceed \$750,000; or (2) \$200,000. Tex. Civ. Prac. & Rem. Code Ann. § 41.008(b). This cap need not be affirmatively pleaded as it applies automatically and does not require proof of additional facts. *Zorrilla v. Aypco Constr., II, LLC*, 469 S.W.3d 143 (Tex. 2015).

“Economic damages” means compensatory damages intended to compensate a claimant for actual economic or pecuniary loss; the term does not include exemplary damages or noneconomic damages. Tex. Civ. Prac. & Rem. Code §41.001(4). “Noneconomic damages” means damages awarded for the purpose of compensating a claimant for physical pain and suffering, mental or emotional pain or anguish, loss of consortium, disfigurement, physical impairment, loss of companionship and society, inconvenience, loss of enjoyment of life, injury to reputation, and all other nonpecuniary losses of any kind other than exemplary damages. *Id.* 41.001(12).

These limits do not apply to claims supporting misapplication of fiduciary property or theft of a third degree felony level. Tex. Civ. Prac. & Rem. Code Ann. § 41.008(c)(10). *Natho v. Shelton*, 2014 Tex. App. LEXIS 5842 at n. 4. The statute states that the caps “do not apply to a cause of action against a defendant from whom a plaintiff seeks recovery of exemplary damages based on conduct described as a felony in the following sections of the Penal Code if ... the conduct was committed knowingly or intentionally....” *Id.* Accordingly, if a defendant is found liable for one of these crimes with the required knowledge or intent, it cannot take advantage of the statutory exemplary damages caps.

A plaintiff must prove its entitlement to an exception to the exemplary damages cap. The Texas Pattern Jury Charge has the following as a proposed jury question that a plaintiff can seek to submit to the jury:

QUESTION _____

Did Don Davis intentionally misapply [identify property defendant held as a fiduciary, e.g., 300 shares of ABC Corporation common stock] in a manner that involved substantial risk of loss to Paul Payne [and was the value of the property \$1,500 or greater]?

“Misapply” means a person deals with property [or money] contrary to an agreement under which the person holds the property [or money].

“Substantial risk of loss” means it is more likely than not that loss will occur. A person acts with intent with respect to the nature of his conduct or to a result of his conduct when it is the conscious objective or desire to engage in the conduct or cause the result.

Answer “Yes” or “No.”

Answer: _____

This question presumes that a fiduciary relationship exists. If the existence of such a fiduciary relationship is disputed, the court should submit a preliminary question, and the question set out above should be made conditional on a “Yes” answer to the preliminary question. Further, the statute authorizes elimination of the limitation on exemplary damages awards if the conduct described in the applicable Texas Penal Code section was committed either knowingly or intentionally. If knowing instead of intentional conduct is alleged, the Texas Pattern Jury Charge suggests the following definition: “A person acts knowingly with respect to the nature of his conduct or to circumstances surrounding his conduct when he is aware of the nature of his conduct or that the circumstances exist. A person acts knowingly with respect to a result of his conduct when he is aware that his conduct is reasonably certain to cause the result.”

“A plaintiff can avoid the cap by pleading and proving the defendant intentionally or knowingly engaged in felonious conduct under criminal statutes expressly excluded from the cap under section 41.008(c).” *Zorrilla*, 469 S.W.3d at 157. In a civil case, a plaintiff must prove by clear and convincing evidence the elements of exemplary damages. Tex. Civ. Prac. & Rem. Code Ann. § 41.003(b). “‘Clear and convincing’ means the measure or degree of proof that will produce in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established.” *Id.* § 41.001(2).

However, the state has to prove the elements of a crime by the beyond-a-reasonable-doubt standard. See *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789, 61 L. Ed. 2d 560 (1979); *In re Winship*, 397 U.S. 358, 361, 90 S. Ct. 1068, 1071, 25 L. Ed. 2d 368 (1970); *Laster v. State*, 275 S.W.3d 512, 517 (Tex. Crim. App. 2009); *Marin v. IESI TX Corp.*, 317 S.W.3d 314, 330 (Tex. App.—Houston [1st Dist.] 2010, pet. denied) (holding evidence legally sufficient to support finding beyond reasonable doubt that defendant misapplied fiduciary property by depositing funds tendered for payment to one company’s account into another company’s account that she also controlled). A finding of liability in a civil case should not have any collateral estoppel or res judicata effect in a subsequent criminal trial as the burdens of proof are different. *Osborne v. Coldwell Banker United Realtors*, No. 01-01-00463-CV, 2002 Tex. App. LEXIS 4930 (Tex. App.—Houston [1st Dist.] July 11, 2002, no pet.) (citing *State v. Benavidez*, 365 S.W.2d 638, 640 (Tex. 1963)). If the criminal trial is first, and the jury does not find the defendant guilty, that also does not have collateral estoppel effect in a subsequent civil proceeding as the burden of proof is lighter in the civil case. See *Ex Parte Watkins*, 73 S.W.3d 24, n. 16 (Tex.

Crim. App. 2002) (citing *One Lot Emerald Cut Stones v. United States*, 409 U.S. 232, 235, 34 L. Ed. 2d 438, 93 S. Ct. 489 (1972) (noting that the difference between the burden of proof in criminal and civil trials prevents application of collateral estoppel in subsequent civil trial after acquittal on specific fact in criminal case with “beyond a reasonable doubt” standard)).

Interestingly, the crime of financial exploitation of the elderly is not an exception to the exemplary damages cap. Perhaps this is due to the fact that the Texas Legislature created the criminal charge in 2011 and it was not on the books at the time that the Legislature created the exemplary damages statute. In any event, at least one court has considered this criminal charge in determining whether exemplary damages awarded was reasonably proportioned to the actual damages. *Natho v. Shelton*, 2014 Tex. App. LEXIS 5842 at *8. The court held:

We conclude that the trial court’s award of \$20,000 in punitive damages is reasonably proportioned to actual damages in the amount of \$33,096.11, considering the following applicable factors: (1) the nature of the defendant’s wrongdoing (the unauthorized appropriation for Natho’s personal benefit of appellee’s personal and real property, including family heirlooms); (2) the character of the defendant’s conduct (effectuated under the apparent authority of a power of attorney with respect to an elderly and infirm woman); (3) the degree of the defendant’s culpability (despite his testimony at an earlier temporary-injunction hearing that he relied on the advice of financial advisers in spending appellee’s money to qualify her for Medicaid, Natho refused to answer questions at trial on the ground of protecting himself against self-incrimination with respect to concurrent criminal proceedings against him for the same conduct); (4) the situation and sensibilities of the parties concerned (Natho was the ex-grandson-in-law of appellee, who was elderly, infirm, and living in a nursing home); and (5) the extent to which such conduct offends a public sense of justice and propriety (the legislature has deemed the “improper use” of the resources of an elderly individual especially reprehensible, making it a third-degree felony, see Tex. Penal Code § 32.53).

Id. Accordingly, even though the crime of financial exploitation of the elderly is not an exception to the

exemplary damages cap, it may still be relevant in a civil proceeding.

3. Missapplication of Fiduciary Property

Misapplication of fiduciary property or property of a financial institution is a charge that has been in existence in Texas for over forty years. Tex. Penal Code Ann. § 32.45. A person commits the offense of misapplication of fiduciary property by intentionally, knowingly, or recklessly misapplying property he holds as a fiduciary in a manner that involves substantial risk of loss to the owner of the property. *Id.* at § 32.45(b). “Substantial risk of loss” means a real possibility of loss; the possibility need not rise to the level of a substantial certainty, but the risk of loss does have to be at least more likely than not. *Coleman v. State*, 131 S.W.3d 303 (Tex. App.—Corpus Christi 2004, pet. ref’d).

The statute defines “Fiduciary” to include: “(A) a trustee, guardian, administrator, executor, conservator, and receiver; (B) an attorney in fact or agent appointed under a durable power of attorney as provided by Chapter XII, Texas Probate Code; (C) any other person acting in a fiduciary capacity, but not a commercial bailee unless the commercial bailee is a party in a motor fuel sales agreement with a distributor or supplier, as those terms are defined by Section 162.001, Tax Code; and (D) an officer, manager, employee, or agent carrying on fiduciary functions on behalf of a fiduciary.” *Id.* at § 32.45(a)(1).

The phrase “acting in a fiduciary capacity” is not defined in the code, but the Texas Court of Criminal Appeals has construed the undefined phrase according to its plain meaning and normal usage to apply to anyone acting in a fiduciary capacity of trust. *Coplin v. State*, 585 S.W.2d 734, 735 (Tex. Crim. App. 1979). Based on the plain and ordinary meaning of the word “fiduciary” as “holding, held, or founded in trust or confidence,” one court has held that a person acts in a fiduciary capacity within the context of section 32.45 “when the business which he transacts, or the money or property which he handles, is not his or for his own benefit, but for the benefit of another person as to whom he stands in a relation implying and necessitating great confidence and trust on the one part and a high degree of good faith on the other part.” *Gonzalez v. State*, 954 S.W.2d 98, 103 (Tex. App.—San Antonio 1997, no pet.); see also *Konkel v. Otwell*, 65 S.W.3d 183 (Tex. App.—Eastland 2001, no pet.). Moreover, evidence that a defendant aided another person in misapplying trust property sufficed, under the law of parties as set forth in Texas Penal Code sections 7.01(a), 7.02(a)(2), to convict a defendant of misapplication of fiduciary property although the defendant did not personally handle the misapplied funds. *Head v. State*, 299 S.W.3d 414 (Tex. App.—Houston [14th Dist.] 2009, pet. ref’d).

An offense under this statute ranges from a Class C misdemeanor if the property is less than \$100 to a first degree felony if the property misapplied is over \$300,000. Tex. Penal Code Ann. § 32.45(c). Moreover, the punishment is increased to the next higher category if it is shown that the offense was committed against an elderly individual. *Id.* at § 32.45(d). For example, a court affirmed a sentence of 23 years for a conviction of this crime, and held that such was no cruel and unusual punishment. See *Holt v. State*, NO. 12-12-00337-CR, 2013 Tex. App. LEXIS 8393 (Tex. App.—Tyler July 10 2013, no pet.).

This criminal charge arises in the context of trustees misapplying trust property. *Bowen v. State*, 374 S.W.3d 427 (Tex. Crim. App. 2012); *Kaufman v. State*, No. 13-06-00653-CR, 2008 Tex. App. LEXIS 3880 (Tex. App.—Corpus Christi May 29, 2008, pet. dismiss.). It also arises in joint bank accounts situations and the use of funds therein. *Bailey v. State*, No. 03-02-00622-CR, 2003 Tex. App. LEXIS 10140 (Tex. App.—Austin Dec. 4, 2003, pet. ref’d). It also arises when a power of attorney holder makes gifts to himself or herself. *Natho v. State*, No. 03-11-00498-CR, 2014 Tex. App. LEXIS 1427 (Tex. App.—Austin Feb. 6 2014, pet. ref’d); *Tyler v. State*, 137 S.W.3d 261, 2004 Tex. App. LEXIS 3446 (Tex. App.—Houston [1st Dist.] 2004, no pet.). This can also apply in business contexts, where a business partner improperly diverts funds for personal use. *Bender v. State*, No. 03-09-00652-CR, 2011 Tex. App. LEXIS 3096 (Tex. App.—Austin Apr. 19 2011, no pet.); *Martinez v. State*, No. 05-02-01839-CR, 2003 Tex. App. LEXIS 9963 (Tex. App.—Dallas Nov. 21, 2003, pet. ref’d). Attorneys can be charged for misapplying clients’ funds. *Sabel v. State*, No. 04-00-00469-CR, 2001 Tex. App. LEXIS 6493 (Tex. App.—San Antonio Sept. 26, 2001, no pet.). It also arises where a defendant misapplies royalty owners’ money contrary to a gas lease agreement. *Coleman v. State*, 131 S.W.3d 303, 2004 Tex. App. LEXIS 2093 (Tex. App.—Corpus Christi 2004, pet. ref’d). It also arises in the abuse of guardianship relationships. *Latham v. State*, No. 14-04-00248-CR, No. 14-04-00249-CR, No. 14-04-00250-CR, 2005 Tex. App. LEXIS 6560 (Tex. App.—Houston [14th Dist.] Aug. 18, 2005, no pet.). Of course, the charge can apply in many other instances as well.

4. Financial Exploitation Of The Elderly

Financial exploitation of the elderly is a criminal offense in Texas that has been in the statutes since 2011. Tex. Penal Code Ann. § 32.53. “A person commits an offense if the person intentionally, knowingly, or recklessly causes the exploitation of a child, elderly individual, or disabled individual.” *Id.* at § 32.53(b). “Exploitation” means the illegal or improper use of a child, elderly individual, or disabled

individual or of the resources of a child, elderly individual, or disabled individual for monetary or personal benefit, profit, or gain. *Id.* at § 32.53(a)(2). A “child” means a person 14 years of age or younger, and an “elderly individual” means a person 65 years of age or older. *Id.* at § 22.04(c). A “disabled individual” means a person: (A) with one or more of the following: (i) autism spectrum disorder, as defined by Section 1355.001, Insurance Code; (ii) developmental disability, as defined by Section 112.042, Human Resources Code; (iii) intellectual disability, as defined by Section 591.003, Health and Safety Code; (iv) severe emotional disturbance, as defined by Section 261.001, Family Code; or (v) traumatic brain injury, as defined by Section 92.001, Health and Safety Code; or (B) who otherwise by reason of age or physical or mental disease, defect, or injury is substantially unable to protect the person’s self from harm or to provide food, shelter, or medical care for the person’s self. *Id.* This offense is a felony of the third degree. *Id.* at § 32.53(c).

5. Recent Cases

In *Davis v. White*, a lawyer sued his former partner over the application of a receivable. No. 02-13-00191-CV, 2016 Tex. App. LEXIS 3075 (Tex. App.—Fort Worth March 24, 2016, no pet.). A jury awarded the plaintiff over \$300,000 in actual damages and \$2.8 million in exemplary damages. The trial court awarded the plaintiff his actual damages, but applied the exemplary damages cap, and limited that award to around \$550,000. The plaintiff appealed, arguing that the cap should not have been applied because he pleaded and proved that the defendant’s actions fell within the “misapplication of fiduciary property” exception to the cap listed in Texas Civil Practice and Remedies Code section 41.008(c)(10). The court of appeals disagreed, holding that the plaintiff did not plead facts in support of the capbuster “in relation to his punitive damages claim.” The plaintiff also argued that he would have pled the capbuster and would have introduced proof of a violation of Penal Code section 32.45 if the defendant had pled the punitive damages cap. Following Texas Supreme Court precedent, the court of appeals held that the defendant did not need to plead the cap to be entitled to its application. Moreover, the court of appeals held that in light of the plaintiff’s concession that he did not plead and prove the capbuster, the trial court did not err in applying the cap and reducing the jury’s exemplary damages award.

In *Wells Fargo v. Militello*, a trustee appealed a judgment from a bench trial regarding a beneficiary’s claims for breach of fiduciary duty, negligence, and fraud. No. 05-15-01252-CV, 2017 Tex. App. LEXIS 5640 (Tex. App.—Dallas June 20, 2017, no pet. history). Militello was an orphan when her grandmother and great-grandmother created trusts for

her. She had health issues (Lupus) that prevented her from working a normal job, and she heavily relied on the trusts. When Militello was 25 years old, one of the trusts was terminating, and it contained over 200 producing and non-producing oil and gas properties. The trustee requested that Militello leave the properties with it to manage, and she created a revocable trust allowing the trustee to remain in that position.

Later, in late 2005 and early 2006, Militello advised the trustee that she was experiencing cash flow problems as a result of her divorce and expensive medical treatments. Instead of discussing all six accounts with Militello, the trustee suggested that she sell the oil and gas interests in her revocable trust. The trustee then sold those assets to another customer of the trustee; a larger and more important customer. There were eventually three different sales, and the buyer ended up buying the assets for over \$500,000 and later sold those same assets for over \$5 million. The trustee did not correctly document the sale, continued reporting income in the revocable trust, and did not accurately report the sales to the beneficiary. The failure to accurately document and report the sales and income caused Militello several tax issues, and she had to retain accountants and attorneys to assist her in those matters.

The beneficiary sued, and the trial court held a bench trial in 2012. Later, the trial court awarded Militello: \$1,328,448.35 past economic damages, \$29,296.75 disgorgement of trust fees, \$1,000,000.00 past mental anguish damages, \$3,465,490.20 exemplary damages, and \$467,374.00 attorney’s fees. The trustee appealed.

The court addressed the trustee’s challenge to the exemplary damages award. The trustee contended that Militello did not establish harm resulting from fraud, malice, or gross negligence by clear and convincing evidence, as required by section 41.003 of the Texas Civil Practice and Remedies Code. The trustee argued that breach of fiduciary duty, by itself, is insufficient predicate under section 41.003. The appellate court did not resolve that issue because it concluded there was clear and convincing evidence to support the trial court’s express finding that the trustee was grossly negligent.

Gross negligence consists of both objective and subjective elements. Under the objective component, “extreme risk” is not a remote possibility or even a high probability of minor harm, but rather the likelihood of the plaintiff’s serious injury. *Id.* The subjective prong, in turn, requires that the defendant knew about the risk, but that the defendant’s acts or omissions demonstrated indifference to the consequences of its acts. The court of appeals held that the evidence in the case supported the trial court’s findings:

The record reflects that Wells Fargo and its predecessors had served as Militello's fiduciaries since her childhood. As well as serving as trustee for the Grantor Trust, Wells Fargo also served as the trustee for several other family trusts of which Militello was a beneficiary. As trustee, Wells Fargo was aware of the amount of income Militello received each month from each trust, combining the amounts in a single monthly payment made to Militello. If Wells Fargo was not earlier aware that income from the trusts was Militello's sole source of income, it became aware when Militello first contacted the bank about her financial problems in 2005. She explained to Tandy that the income she received from the trusts was insufficient to meet her expenses and debts, and she asked for help. When Tandy retired, Militello again explained her financial situation to Randy Wilson, and made clear the source of her financial problems and her need for help in solving them. Wells Fargo was therefore actually aware of the risk to Militello's financial security from depletion of the Grantor Trust. As Wallace testified, however, Wells Fargo breached its fiduciary duty by failing to explore other possible options to assist Militello through her financial difficulties. Wallace testified that Wells Fargo's conduct involved an extreme degree of risk. He divided his evaluation of Wells Fargo's conduct as a fiduciary into three time periods. His first period, the "evaluation phase," began in December 2005 when Militello contacted Wells Fargo for help, and ended in late May 2006 when the decision to sell the properties was made. Wallace's second period covered the sale itself, including the marketing of the properties and the decision to sell. The third period covered the execution of the sale, and included Wells Fargo's adherence to its own internal policies and carrying out its duties to Militello in distribution of the properties after the sale. Wallace testified in detail regarding the duties that Wells Fargo, as Militello's fiduciary, should have carried out in each of the three periods. He testified that, among other deficiencies, Wells Fargo failed: to provide sufficient information to Militello to make an informed decision about sales from the Grantor Trust, to obtain a "current evaluation of the property prepared by a competent engineer" before the sales, to explain the valuation to Militello and discuss

the tax consequences of a sale, to market the properties to more than one buyer, to negotiate to get the best price possible for the properties, to negotiate a written purchase and sale agreement, to convey correct information to the attorneys preparing the deeds for the sales, to notify the oil and gas producers of the change in ownership, and to create a separate account after the sales, instead commingling the proceeds received "for a period of up to three years." . . . Under our heightened standard of review, we conclude the trial court could have formed a firm belief or conviction that Wells Fargo's conduct involved an extreme degree of risk, and Wells Fargo was consciously indifferent to that risk. We also conclude that Militello offered clear and convincing evidence to support the trial court's finding that Wells Fargo was grossly negligent, and therefore met her burden to prove the required predicate under section 41.003(a).

Id. The court also held that the amount awarded was supported by the evidence: "Having considered the relevant *Kraus* and due process factors, we conclude an exemplary damages award of \$2,773,826.67 is reasonable and comports with due process." *Id.* The court did suggest a remittitur due to the decrease in economic damages.

In *Swinnea v. ERI Consulting Eng'rs, Inc.*, the trial court entered judgment similar to the original judgment, awarding ERI and Snodgrass actual damages in the amount of \$178,601, disgorgement in the amount of \$720,700, and exemplary damages of \$1 million. 2016 Tex. App. LEXIS 1339. The court held that the exemplary damages award was not excessive. The court detailed the trial court's findings regarding Swinnea's breach of fiduciary duty and then applied the factors set forth in *Alamo Nat'l Bank v. Kraus*: (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 and propriety. 616 S.W.2d 908, 910 (Tex. 1981). The court stated that:

The nature of the wrong was the premeditated, intentional violation of Swinnea's fiduciary duty owed to his longtime business partner. The character of the conduct involved dishonesty and deceit. His wrongful conduct was committed over a long period of time, in bad faith, with malice, aimed at destroying ERI and Snodgrass. The parties were fiduciaries who had been in

business together for about a decade. Swinnea possessed proprietary information regarding ERI and had a longstanding confidential relationship with Snodgrass. Swinnea's culpability was significant and his conduct was highly offensive to a public sense of justice and propriety. While a considerable amount of the harm done was economic, here, there was also a considerable amount of damage done to the relationship of trust between Swinnea and ERI and Snodgrass.

Id. at *18. Swinnea's argument that the "punitive" award was excessive was improperly based on an assumption that the amounts ordered disgorged were included in the "punitive" award, which the court had previously rejected. Thus, rather than evaluating a "punitive" award of \$1,720,700 (exemplary damages plus amount of disgorgement), the court compared the \$1 million exemplary damages in proportion to the combined compensatory awards of \$899,301 (actual damages award plus disgorgement), which was well within constitutional parameters and not excessive. *Id.* at *13-21.

IV. DISGORGEMENT AND FORFEITURE RELIEF

The basis of a fiduciary relationship is equity. *Texas Bank & Trust Co. v. Moore*, 595 S.W.2d 502 (Tex. 1980). When a fiduciary breaches its fiduciary duties, a trial court has the right to award legal and equitable damages. It is common for a plaintiff to not have any legal or actual damages, but that does not prevent a trial court from being able to fashion an equitable remedy to protect the fiduciary relationship that has been violated. A trial court may order that the fiduciary forfeit compensation otherwise earned, disgorge improper gains and profits, or disgorge other consideration related to the breach of duty. This section of the paper will discuss the equitable remedies of forfeiture and disgorgement available to a trial court to remedy a breach of fiduciary duty.

Texas cases often use the terms interchangeably, but there may be a distinction between "disgorgement" of ill-gotten profit and "forfeiture" of agreed compensation. George Roach, *Texas Remedies in Equity for Breach of Fiduciary Duty: Disgorgement, Forfeiture, and Fracturing*, 45 ST. MARY'S L.J. 367, 372-73 (2014).

A. General Authority

The Texas Supreme Court has upheld equitable remedies for breach of fiduciary duty. *Burrow v. Arce*, 997 S.W.2d 229, 237-45 (Tex. 1999) (upholding remedy of forfeiture upon attorney's breach of fiduciary duty). For example, in *Kinzbach Tool Co. v.*

Corbett-Wallace Corp., the Texas Supreme Court stated the principle behind such remedies:

It is beside the point for [Defendant] to say that [Plaintiff] suffered no damages because it received full value for what it has paid and agreed to pay. . . . It would be a dangerous precedent for us to say that unless some affirmative loss can be shown, the person who has violated his fiduciary relationship with another may hold on to any secret gain or benefit he may have thereby acquired. It is the law that in such instances if the fiduciary "takes any gift, gratuity, or benefit in violation of his duty, or acquires any interest adverse to his principal, without a full disclosure, it is a betrayal of his trust and a breach of confidence, and he must account to his principal for all he has received."

138 Tex. 565, 160 S.W.2d 509, 514 (Tex. 1942) (quoting *United States v. Carter*, 217 U.S. 286, 306, 30 S. Ct. 515, 54 L. Ed. 769 (1910)). The Court later held that a fiduciary may be punished for breaching his duty: "The main purpose of forfeiture is not to compensate an injured principal Rather, the central purpose . . . is to protect relationships of trust by discouraging agents' disloyalty." *Burrow*, 997 S.W.2d at 238.

For instance, courts may disgorge all profits from a fiduciary when a fiduciary agent usurps an opportunity properly belonging to a principal, or competes with a principal. *See, e.g., Johnson v. Brewer & Pritchard, P.C.*, 73 S.W.3d 193, 200 (Tex. 2002) (stating the rule that courts may disgorge any profit where "an agent diverted an opportunity from the principal or engaged in competition with the principal, [and] the agent or an entity controlled by the agent profited or benefitted in some way"). A fiduciary may also be required to forfeit compensation for the fiduciary's work. *See, e.g., Burrow*, 997 S.W.2d at 237 ("[A] person who renders service to another in a relationship of trust may be denied compensation for his service if he breaches that trust.").

B. Compensation Forfeiture

1. General Authority

When a plaintiff establishes that a fiduciary has breached its duty, a court may order the fiduciary to forfeit compensation that it was paid or should be paid. Under the equitable remedy of forfeiture, a person who renders service to another in a relationship of trust may be denied compensation for her service if he breaches that trust. *Burrow*, 997 S.W.2d at 237. The objective of the remedy is to return to the principal the value of what the principal paid because the principal did not receive the trust or loyalty from the other party. *Id.* at

237-38; *McCullough v. Scarbrough, Medlin & Assocs., Inc.*, 435 S.W.3d 871, 904 (Tex. App.—Dallas 2014, pet. denied). The party seeking forfeiture need not prove damages as a result of the breach of fiduciary duty. *Burrow*, 997 S.W.2d at 240; *Brock v. Brock*, No. 09-08-00474-CV, 2009 Tex. App. LEXIS 5444, at *5 (Tex. App.—Beaumont July 16, 2009, no pet.).

In *Burrow v. Arce*, former clients sued their attorneys alleging breach of fiduciary duty arising from settlement negotiations in a previous lawsuit. 997 S.W.2d at 232-33. The Texas Supreme Court held that “a client need not prove actual damages in order to obtain forfeiture of an attorney’s fee for the attorney’s breach of fiduciary duty to the client.” *Id.* at 240. It repeated that “the central purpose of the remedy is to protect relationships of trust from an agent’s disloyalty or other misconduct.” *Id.* The Court cited section 469 of the Restatement (Second) of Agency, which states that if “conduct [that is a breach of his duty of loyalty] constitutes a wilful and deliberate breach of his contract of service, he is not entitled to compensation even for properly performed services for which no compensation is apportioned.” *Id.* at 237. The Court also stated:

[T]he possibility of forfeiture of compensation discourages an agent from taking personal advantage of his position of trust in every situation no matter the circumstances, whether the principal may be injured or not. The remedy of forfeiture removes any incentive for an agent to stray from his duty of loyalty based on the possibility that the principal will be unharmed or may have difficulty proving the existence or amount of damages.

Id. at 238.

Where equitable remedies exist, “the remedy of forfeiture must fit the circumstances presented.” *Id.* at 241. The court has listed several factors for consideration when fashioning a particular equitable forfeiture remedy:

“[T]he gravity and timing of the violation, its willfulness, its effect on the value of the lawyer’s work for the client, any other threatened or actual harm to the client, and the adequacy of other remedies.” These factors are to be considered in determining whether a violation is clear and serious, whether forfeiture of any fee should be required, and if so, what amount. The list is not exclusive. The several factors embrace broad considerations which must be weighed together and not mechanically applied. For example, the “willfulness” factor requires

consideration of the attorney’s culpability generally; it does not simply limit forfeiture to situations in which the attorney’s breach of duty was intentional. The adequacy-of-other-remedies factor does not preclude forfeiture when a client can be fully compensated by damages. Even though the main purpose of the remedy is not to compensate the client, if other remedies do not afford the client full compensation for his damages, forfeiture may be considered for that purpose.

Id. at 243-44. Citing to comment c to section 243 of the Restatement (Second) of Trusts, the Court held:

It is within the discretion of the court whether the trustee who has committed a breach of trust shall receive full compensation or whether his compensation shall be reduced or denied. In the exercise of the court’s discretion the following factors are considered: (1) whether the trustee acted in good faith or not; (2) whether the breach of trust was intentional or negligent or without fault; (3) whether the breach of trust related to the management of the whole trust or related only to a part of the trust property; (4) whether or not the breach of trust occasioned any loss and whether if there has been a loss it has been made good by the trustee; (5) whether the trustee’s services were of value to the trust.

Id. at 243. A party may seek forfeiture as a remedy for breach of a fiduciary duty, provided the party includes a request for forfeiture in its pleadings. *Lee v. Lee*, 47 S.W.3d 767, 780-81 (Tex. App.—Houston [14th Dist.] 2001, pet. denied); *Longaker v. Evans*, 32 S.W.3d 725, 733 n.2 (Tex. App.—San Antonio 2000, pet. withdrawn) (explaining that *Burrow v. Arce* did not apply where a party sought damages resulting from a fiduciary’s misconduct and did not seek forfeiture).

The Supreme Court has held, “Ordinarily, forfeiture extends to all fees for the matter for which the [fiduciary] was retained.” *Burrow*, 997 S.W.2d at 241 (quoting RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS, § 49 cmt. e); *see also Swinnea*, 318 S.W.3d at 873 (“[C]ourts may disgorge all ill-gotten profits from a fiduciary when a fiduciary agent usurps an opportunity properly belonging to a principal, or competes with a principal.”). As an example of when total fee forfeiture is not appropriate, the Court has cited a circumstance such as “when a lawyer performed valuable services before the misconduct began, and the misconduct was not so grave as to require forfeiture of the fee for all services.” *Burrow*, 997 S.W.2d at 241. It stated that

“[s]ome violations are inadvertent or do not significantly harm the client” and can “be adequately dealt with by . . . a partial forfeiture.” *Id.* (quoting RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS, § 49 cmt. b). Ultimately, fee forfeiture must be applied with discretion, based on all of the circumstances of the case. *Id.* at 241-42; *Swinnea*, 318 S.W.3d at 874-75.

So, a plaintiff who asserts a breach-of-fiduciary-duty claim may assert a claim that the defendant should forfeit its fees or compensation. The trial court should make that determination under the multiple-factor test based on the evidence in the case. The trial court can rule that the defendant should forfeit some, all, or none of the compensation. The remedy of forfeiture for a fiduciary’s breach is dependent upon the facts and circumstances in each case. *See Burrow*, 997 S.W.2d at 241-42 (“Forfeiture of fees, however, is not justified in each instance in which a [fiduciary] violates a legal duty, nor is total forfeiture always appropriate.”).

2. Recent Case

In *Ramin’ Corp. v. Wills*, an employer sued a former employee for breach of fiduciary duty and other claims based on the employee competing with the employer while she was an employee. No. 09-14-11168-CV, 2015 Tex. App. LEXIS 10612 (Tex. App.—Beaumont October 15, 2015, no pet.). The trial court found that the employee did breach her fiduciary duty, but held that the employer sustained no damages. The trial court also found for the employee on several of her counterclaims. Both parties appealed.

The court of appeals acknowledged that an employee does not owe an absolute duty of loyalty to her employer, and that absent an agreement to the contrary, an at-will employee may plan to compete with her employer, may take active steps to do so while still employed, may secretly join with other employees in a plan to compete with the employer, and has no general duty to disclose such plans. However, the at-will employee may not act for his future interests at the expense of his employer or engage in a course of conduct designed to hurt his employer.

One of the employer’s arguments was that the trial court erred in not awarding a forfeiture of profits. The court of appeals first held that a party must plead for forfeiture relief and held that the employer had adequately done so. The court then addressed the merits of the argument. It held that under the equitable remedy of forfeiture, a person who renders service to another in a relationship of trust may be denied compensation for her service if she breaches that trust. The court further stated that the objective of the remedy is to return to the principal the value of what the principal paid because the principal did not receive the trust or loyalty from the other party. Disgorgement also involves a fiduciary turning over any improper

profit that the fiduciary earned arising from a breach. The party seeking forfeiture and equitable disgorgement need not prove any damages as a result of the breach of fiduciary duty.

The court explained that a trial court has discretion in awarding disgorgement or forfeiture and may consider several factors, including (1) whether the agent acted in good faith; (2) whether the breach of trust was intentional or negligent or without fault; (3) whether the breach of trust related to the management of the whole or related only to a part of the principal’s interest; (4) whether the breach of trust by the agent occasioned any loss to the principal and whether such loss has been satisfied by the agent, and (5) whether the services of the agent were of value to the principal. A court may also consider evidence of the fiduciary’s salary, profits, or other income during the time the breach occurred.

The court affirmed the employer not receiving any disgorgement or forfeiture damages. The court held that there was evidence that the employee was not enriched by her activities: “we conclude that there is an absence of evidence to establish that Wills’ breach of her fiduciary duty was directly connected to her recovery of overtime, or that Ramin incurred any loss resulting from Wills’ breach, and there is no evidence that Wills’ services she performed for Ramin during the overtime hours were of no value to Ramin.” *Id.*

In *White v. Pottorff*, the court of appeals affirmed a compensation disgorgement where a manager breached fiduciary duties. 479 S.W.3d 409 (Tex. App.—Dallas August 18, 2015, pet. denied). The court stated:

The trial court also ordered White to disgorge the \$375,000 fee he received to manage WEIG. Appellants argue White should not be required to disgorge this sum because there is no evidence he received this fee as a result of any wrongdoing. A fiduciary may be required to forfeit the right to compensation for the fiduciary’s work when he has violated his duty. Appellants do not challenge the trial court’s finding that White breached his fiduciary duties with respect to the Scoular Transaction or in other non-Repurchase-related ways as found in Finding 175. Appellants only argue that White did not breach his fiduciary duties by failing to provide notice of Section 10.4 to WEIG and its members. Because the trial court concluded White breached his fiduciary duties with respect to the Scoular Transaction (and otherwise), the trial court did not err by ordering White to forfeit the \$375,000 compensation he received for managing WEIG.

Id. at 419.

In *Dernick Res., Inc. v. Wilstein*, the court affirmed a fee disgorgement award in breach of fiduciary duty case arising from a joint venture. 471 S.W.3d 468, 495 (Tex. App.—Houston [1st Dist.] 2015, pet. denied). The court of appeals held:

Whether a fee forfeiture should be imposed must be determined by the trial court based on the equity of the circumstances. However, certain matters—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—may present fact issues for the jury to decide. Once the factual disputes have been resolved, the trial court must determine whether the fiduciary’s conduct was a clear and serious breach of duty to the principal, whether any of the fees should be forfeited, and if so, what the amount should be.

Id. at 482. The court of appeals noted that the issues in the appeal were narrow:

The only question left to be answered was whether Dernick’s breach of its fiduciary duty by seizing the opportunity to purchase the majority interest in the McCourt Field and appoint Pathex as operator was “clear and serious” so as to justify equitable fee forfeiture and, if so, what amount of fees should be forfeited. These are questions that are properly determined by the trial court.

Id. at 483. Among other facts, the court noted as follows:

There was evidence that Dernick’s breach of its fiduciary duty in failing to notify the Wilsteins in writing of the opportunity to make the Snyder acquisition, and its seizure of the opportunity to become majority owner and appoint the operator of the field, was not a single limited, “technical” failure arising from the parties’ business practice, as Dernick argues. Rather, it was part of repeated conduct on Dernick’s part that involved concealing or failing to disclose information it was required to disclose, using the Wilsteins’ interest to enrich itself, and threatening further harm to the Wilsteins’ interest in the field. Thus, there is evidence that the violation had repercussions that were felt by the Wilsteins over a period of years,

from 1997 until the time of trial in 2013, and that it was willful.

Id. at 484. The court affirmed the disgorgement award. It also affirmed the award of prejudgment interest on the disgorgement award. *Id.*

Other recent cases have similarly affirmed fee forfeiture awards. *Gammon v. Henry I. Hank Hodes & Diag. Experts of Austin, Inc.*, No. 03-13-00124-CV, 2015 Tex. App. LEXIS 4235 (Tex. App.—Austin Apr. 24, 2015, pet. denied); *McCullough v. Scarbrough, Medlin & Associates, Inc.*, 435 S.W.3d 871, 912 (Tex. App.—Dallas 2014, pet. denied).

C. Disgorgement Of Profits Or Benefits

Disgorgement of profits or benefits is an equitable remedy appropriate when a party has breached his fiduciary duty; its purpose is to protect relationships of trust by discouraging disloyalty. *See, e.g., ERI Consulting Eng’rs, Inc. v. Swinnea*, 318 S.W.3d 867, 873 (Tex. 2010); *Burrow v. Arce*, 997 S.W.2d 229, 238 (Tex. 1999). Disgorgement of profits requires the fiduciary to yield to the beneficiary the profit or benefit gained during the time of the breach. *Int’l Bankers Life Ins. Co. v. Holloway*, 368 S.W.2d 567, 576-77 (Tex. 1963); *AZZ Inc. v. Morgan*, 462 S.W.3d 284 (Tex. App.—Fort Worth Apr. 9, 2015, no pet.) (To obtain disgorgement, “proof of the fiduciary’s salary, profits, or other income during the time of his breach of fiduciary duty is required[.]”); *Swinnea v. ERI Consulting Eng’rs, Inc.*, 236 S.W.3d 825, 841 (Tex. App.—Tyler 2007), *rev’d on other grounds*, 318 S.W.3d 867 (Tex. 2010) (“[A] fiduciary must account for, and yield to the beneficiary, any profit he makes as a result of his breach of fiduciary duty[.]”); *Daniel v. Falcon Interest Realty Corp.*, 190 S.W.3d 177, 187 (Tex. App.—Houston [1st Dist.] 2005, no pet.) (same).

The fiduciary only has to disgorge “profits” and does not have disgorge net revenues. *Longview Energy Co. v. Huff Energy Fund LP*, No. 15-0968, 2017 Tex. LEXIS 525 (Tex. June 9, 2017).

For example, in *Kinzbach Tool Co.*, a competitor of Kinzbach Tool Company (“Kinzbach”) contacted a “trusted employee” of Kinzbach and offered the employee a secret commission if he would negotiate the sale of the competitor’s product to Kinzbach for a minimum price. 160 S.W.2d at 510-11. The competitor instructed the employee not to reveal to Kinzbach the minimum price that the competitor was willing to accept. *Id.* During negotiations, the employee never revealed to Kinzbach, his employer, the minimum price the competitor was willing to accept, nor did he reveal his commission arrangement with the competitor. *Id.* After the deal was consummated, Kinzbach learned of the commission, fired the employee, and brought suit against the employee and

the competitor. *Id.* In finding for Kinzbach, the Court stated:

It is beside the point . . . to say that Kinzbach suffered no damages because it received full value for what it has paid and agreed to pay. A fiduciary cannot say to the one to whom he bears such relationship: You have sustained no loss by my misconduct in receiving a commission from a party opposite to you, and therefore you are without remedy. It would be a dangerous precedent for us to say that unless some affirmative loss can be shown, the person who has violated his fiduciary relationship with another may hold on to any secret gain or benefit he may have thereby acquired. It is the law that in such instances if the fiduciary takes any gift, gratuity, or benefit in violation of his duty, or acquires any interest adverse to his principal, without a full disclosure, it is a betrayal of his trust and a breach of confidence, and he must account to his principal for all he has received.

Id. at 514; *Siegrist v. O'Donnell*, 182 S.W.2d 403, 405 (Tex. Civ. App.—San Antonio 1944, writ ref'd) (holding that agent who agreed to accept \$ 2,000 profit from person with whom he was dealing on behalf of his “unsuspecting principal” must disgorge that profit).

Disgorgement of profits is an independent remedy from damages, and the two are not assumed to be interchangeable. *Happy Endings Dog Rescue v. Gregory*, 501 S.W.3d 287, 293 (Tex. App.—Corpus Christi 2016, pet. denied). “Disgorgement is compensatory in the same sense attorney fees, interest, and costs are, but it is not damages.” *Longview Energy*, 464 S.W.3d at 361; *see ERI Consulting Eng'rs, Inc. v. Swinnea*, 318 S.W.3d 867, 873 (Tex. 2010). The “universal rule for measuring damages for the breach of a contract is just compensation for the loss or damage actually sustained” by the party. *Adams v. H & H Meat Prods., Inc.*, 41 S.W.3d 762, 779 (Tex. App.—Corpus Christi 2001, no pet.). “By the operation of that rule a party generally should be awarded neither less nor more than his actual damages.” *Adams*, 41 S.W.3d at 779. This is contrasted with disgorgement, which is properly measured by the defendant’s unjust gains, not the plaintiff’s loss. *Happy Endings Dog Rescue v. Gregory*, 501 S.W.3d at 293; *FTC v. Washington Data Res., Inc.*, 704 F.3d 1323, 1326 (11th Cir. 2013) (per curiam); *see Longview Energy*, 464 S.W.3d at 361.

“The primary objective of awarding damages in civil actions has always been to compensate the injured plaintiff, rather than to punish the defendant.” *Smith v. Herco, Inc.*, 900 S.W.2d 852, 861 (Tex. App.—Corpus Christi 1995, writ denied). By comparison,

disgorgement is distinct from an award of actual damages in that the disgorgement award serves a separate function of deterring fiduciaries from exploiting their positions of confidence and trust. *Happy Endings Dog Rescue v. Gregory*, 501 S.W.3d at 293; *McCullough v. Scarbrough, Medlin & Assocs., Inc.*, 435 S.W.3d 871, 905 (Tex. App.—Dallas 2014, pet. denied). “Because of the strength of the harm principle ([i.e., to] avoid harming others), the ethical case for compensating for losses, whether or not they correspond to gains made by the tortfeasor, is generally thought to be stronger than that for requiring the disgorgement of gains which do not correspond to losses.” *Happy Endings Dog Rescue v. Gregory*, 501 S.W.3d at 293 (quoting JAMES J. EDELMAN, UNJUST ENRICHMENT, RESTITUTION, & WRONGS, 79 Tex. L. Rev. 1869, 1876 (2001)).

Because of the different purposes of the awards, the one-satisfaction rule does not preclude the recovery of both actual damages and the equitable remedy of disgorgement, as these remedies are intended to address separate and distinct injuries. *Saden v. Smith*, 415 S.W.3d 450, 469 (Tex. App.—Houston [1st Dist.] 2013, pet. denied).

Disgorgement of profits requires the fiduciary to yield to the beneficiary the profit or benefit gained during the time of the breach. *AZZ Inc. v. Morgan*, 462 S.W.3d 284 (Tex. App.—Fort Worth Apr. 9, 2015, no pet.) (To obtain disgorgement, “proof of the fiduciary’s salary, profits, or other income during the time of his breach of fiduciary duty is required[.]”); *Swinnea v. ERI Consulting Eng'rs, Inc.*, 236 S.W.3d 825, 841 (Tex. App.—Tyler 2007), *rev'd on other grounds*, 318 S.W.3d 867 (Tex. 2010) (“[A] fiduciary must account for, and yield to the beneficiary, any profit he makes *as a result of his breach* of fiduciary duty[.]”) (emphasis added); *Daniel v. Falcon Interest Realty Corp.*, 190 S.W.3d 177, 187 (Tex. App.—Houston [1st Dist.] 2005, no pet.) (same) (citing to *Int'l Bankers Life Ins. Co. v. Holloway*, 368 S.W.2d 567, 576-77 (Tex. 1963)). A defendant does not have to disgorge profits that were not related to its breach. *Id.*

A plaintiff asserting a breach of fiduciary duty claim can request that a trial court order the defendant to disgorge profits or benefits that were acquired by the defendant in relation to the breach of duty. *Johnson v. Brewer & Pritchard, PC*, 73 S.W.3d 193, 202 (Tex. 2002) (finding that an employee’s wrongful receipt of a fee or compensation from a third party without the employer’s consent must all be disgorged); *Int'l Bankers Life Ins. Co. v. Holloway*, 368 S.W.2d 567, 577 (Tex. 1963) (affirming disgorgement of 100% of the directors’ secret profits and the denial of any offsetting compensation). A recent law review article discusses the various cases that support the disgorgement of profits or gains. George Roach, *Texas Remedies in Equity for Breach of Fiduciary Duty*:

Disgorgement, Forfeiture, and Fracturing, 45 ST. MARY'S L.J. 367, 372-73 (2014).

There may be underlying fact issues that should go to a jury, such as the amount of the profit or gain and how much of same was related to the breach of duty. *Longview Energy Co. v. Huff Energy Fund LP*, No. 15-0968, 2017 Tex. LEXIS 525 (Tex. June 9, 2017) (“The amount of profit resulting from a breach of fiduciary duty will generally be a fact question.”). For example, in *Longview*, the Texas Supreme Court reversed a trial court’s award of profit disgorgement where the jury only found a revenue number and did not find the amount of profit made by the fiduciary defendant. *Id.*

It should also be noted that the trial court should order a fiduciary defendant to disgorge all improper profits, and there does not have to be a weighing of factors to determine whether and how much should be disgorged as there does in compensation forfeiture cases. “It is the law that in such instances if the fiduciary ‘takes any gift, gratuity, or benefit in violation of his duty, or acquires any interest adverse to his principal, without a full disclosure, it is a betrayal of his trust and a breach of confidence, and *he must account to his principal for all he has received.*” *Kinzbach Tool Co. v. Corbett—Wallace Corp.*, 138 Tex. 565, 160 S.W.2d 509, 514 (Tex. 1942) (emphasis added).

D. Contractual Consideration Disgorgement

A plaintiff can potentially seek the disgorgement of contractual consideration from a defendant. In *Swinnea v. ERI Consulting Engineers, Inc.*, Snodgrass and Swinnea owned equal interests in ERI, a small consulting company that managed asbestos abatement projects, for approximately ten years. 481 S.W.3d 747 (Tex. App.—Tyler 2016, no pet.). In August 2001, Snodgrass and ERI purchased Swinnea’s interest in ERI for \$497,500, after which Swinnea was to remain an ERI employee and not compete with ERI for six years. Prior to that time, Snodgrass and Swinnea had also been equal partners in Malmeba, which owned the building where ERI maintained its offices. As part of the buyout in August 2001, Snodgrass transferred his ownership interest in Malmeba, and ERI entered into a lease agreement for six years. Unbeknownst to Snodgrass, a month before the buyout, Swinnea’s wife and the wife of another ERI employee created a new company called Air Quality Associates, which they used to bid on ERI administered asbestos abatement contracts despite having no prior experience in the asbestos abatement field. Swinnea did not disclose the existence of Air Quality Associates during the ERI buyout negotiations. After the buyout, Swinnea’s revenue production decreased by 30%-50%. Swinnea subsequently learned of Snodgrass’s involvement when one of ERI’s biggest clients informed him and then

stopped bidding on ERI’s projects. The following year, in 2002, Swinnea’s wife started a new abatement contracting company, Brady Environmental, Inc., which they told Snodgrass they would use for cleaning homes and air duct. Instead, Brady Environmental began performing asbestos abatement and competed with ERI. Swinnea continued to be employed by ERI, but the evidence showed he encouraged ERI’s clients to use his company instead of ERI. ERI terminated Swinnea in June 2004. ERI and Snodgrass sued Swinnea and Brady Environmental for breach of fiduciary duty, breach of contract, and other related causes of action. After a bench trial, the trial court found for Snodgrass and ERI on the claims for statutory fraud, common law fraud, breach of the non-compete clause, and breach of fiduciary duty. It rendered judgment for ERI and Snodgrass for combined damages of \$1,020,700 and \$1 million in exemplary damages.

In the first appeal of that judgment, the court of appeals reversed and rendered judgment that ERI and Snodgrass take nothing. *Swinnea v. ERI Consulting Eng’rs, Inc.*, 236 S.W.3d 825 (Tex. App.—Tyler 2007), *rev’d*, 318 S.W.3d 867 (Tex. 2010). The Texas Supreme Court, however, reversed the court of appeals and remanded for consideration of the factors set forth in the Restatement (Second) of Trusts as to equitable forfeiture. *ERI Consulting Eng’rs, Inc. v. Swinnea*, 318 S.W.3d 867 (Tex. 2010). The Court stated that the trial court should have considered certain factors in determining whether to order the disgorgement of contractual consideration:

The gravity and timing of the breach of duty, the level of intent or fault, whether the principal received any benefit from the fiduciary despite the breach, the centrality of the breach to the scope of the fiduciary relationship, and any threatened or actual harm to the principal are relevant. Likewise, the adequacy of other remedies—including any punitive damages award—is also relevant. Above all, the remedy must fit the circumstances and work to serve the ultimate goal of protecting relationships of trust.

There is no indication the trial court followed these principles in fashioning its award. Accordingly, we direct the court of appeals to remand the case to the trial court for consideration of these factors upon resolution of the issues remaining for the court of appeals

Id. On remand, the court of appeals remanded to the trial court for review of the forfeiture award as discussed in the Supreme Court’s opinion. *Swinnea v.*

ERI Consulting Eng'rs, Inc., 364 S.W.3d 421 (Tex. App.—Tyler 2012, pet. denied).

The trial court entered judgment similar to the original judgment, awarding ERI and Snodgrass actual damages in the amount of \$178,601, disgorgement in the amount of \$720,700, and exemplary damages of \$1 million. Swinnea appealed to the court of appeals, which affirmed that judgment. The court first rejected Swinnea's argument that the disgorgement award was punitive, recognizing that while forfeiture of contractual consideration may have a punitive effect, that is not the focus of the remedy, which is to protect relationships of trust by discouraging agents' disloyalty. 2016 Tex. App. LEXIS 1339 at *7-8. The court held that actual damages are not a prerequisite to disgorgement of contractual consideration; thus, it is not punitive. Awards of equitable disgorgement and exemplary damages are not duplicative. Additionally, mutual restitution (which would require ERI and Snodgrass to return the consideration they received in the August 2011 buyout) was not applicable because Snodgrass and ERI were not seeking rescission of the contract; rather, the remedy of disgorgement was in response to Swinnea's breach of fiduciary duty. Finally, as to one specific component of the award, the court held that the rental payments from ERI to Malmeba after the August 2001 buyout were properly disgorged. In short, the court held the trial court did not abuse its discretion in determining the remedy or amount of the disgorgement. *Id.* at *13.

More recently, in *Cooper v. Sanders H. Campbell/Richard T. Mullen, Inc.*, a company filed suit under a promissory note against a former joint venture partner. No. 05-15-00340-CV, 2016 Tex. App. LEXIS 9253 (Tex. App.—Dallas August 24, 2016, no pet.). The defendant filed a counterclaim for breach of fiduciary duty and sought equitable forfeiture for the amount owed under the note. The trial court initially awarded the plaintiff \$1.4 million on the note, but later reduced that award by \$520,000 for the equitable forfeiture claim. Both parties appealed.

The court of appeals affirmed the plaintiff's note claim, and then turned to the defendant's equitable forfeiture claim. The defendant argued that the trial court should have awarded an amount of forfeiture for the entire note claim, and not just a partial award. The plaintiff argued that the forfeiture award should be reversed because "the record does not show the trial court made the required determination that the conduct of the Mullen Co. was a 'clear and serious' breach of fiduciary duty, which the trial court can conclude only after applying the factors identified by the Texas Supreme Court." *Id.* (citing *ERI Consulting Eng'rs, Inc. v. Swinnea*, 318 S.W.3d 867, 874, 875 (Tex. 2010)). The court first set out the standards for equitable forfeiture:

Courts may fashion equitable remedies such as disgorgement and forfeiture to remedy a breach of a fiduciary duty. Disgorgement is an equitable forfeiture of benefits wrongfully obtained. A party must plead forfeiture to be entitled to that equitable remedy. Whether a forfeiture should be imposed must be determined by the trial court based on the equity of the circumstances. 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. 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 monetary sum should be forfeited; and (3) if so, what the amount should be.

As stated above, the trial court's first step is to determine whether there was a "clear and serious" breach of duty. The trial court should consider factors such as: (1) the gravity and timing of the breach; (2) the level of intent or fault; (3) whether the principal received any benefit from the fiduciary despite the breach; (4) the centrality of the breach to the scope of the fiduciary relationship; (5) any other threatened or actual harm to the principal; (6) the adequacy of other remedies; and (7) whether forfeiture fits the circumstances and will work to serve the ultimate goal of protecting relationships of trust. 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.

Second, the trial court must determine whether any monetary sum should be forfeited. The central purpose of forfeiture as an equitable remedy is not to compensate the injured principal, but to protect relationships of trust by discouraging disloyalty. Disgorgement is compensatory in the same sense as attorney fees, interest, and costs, but it is not damages. As a result, equitable forfeiture is distinguishable from an award of actual damages incurred as a result of a breach of fiduciary duty. In fact, a claimant need not prove actual damages to succeed on a claim for forfeiture because they address different wrongs. 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. Third, if the trial court determines there should be a forfeiture, it must determine what the amount should be. The amount of disgorgement is based on the circumstances and is within the trial court's discretion. For example, it would be inequitable for an agent who performed extensive services faithfully to be denied all compensation if the misconduct was slight or inadvertent.

Id. (internal citations omitted).

The court then noted that the defendant did not plead for equitable forfeiture, though he did plead for breach of fiduciary duty and seek an award of damages. The defendant did not seek a jury finding on the plaintiff's mental state or culpability, the value of its services, or the existence and amount of harm to defendant. The jury found that the plaintiff breached its fiduciary duty to the defendant, but awarded him no damages. The defendant then asked the trial court to enter an award of forfeiture damages in his motion for judgment notwithstanding the verdict, and in other post-trial motions. However, the defendant did not adequately brief the issue and the factors relevant to such a claim. The court of appeals held that the record did not support the trial court's award, and remanded the case for further proceedings to allow the trial court to consider the appropriate legal standards, elements, and factors in finding that a forfeiture award should be entered:

Cooper did not identify or brief in the trial court the requirement that the trial court conclude there was a "clear and serious" breach of duty as a predicate to assessing a sum that should be awarded as an equitable forfeiture. Cooper does not cite to anything in the record, nor can we find anything in the record, to show that in the fashioning of the equitable forfeiture award the trial court considered the "principles" or "factors" enumerated in *ERI Consulting*. Accordingly, we conclude the claim of forfeiture should be remanded to the trial court for consideration of the factors described by the Texas Supreme Court.

Id.

Where the facts and factors support it, a trial court may award disgorgement relief concerning a defendant's contractual consideration. However, a party seeking that relief should be careful that the

record supports that relief and the trial court's consideration of same under the appropriate standards.

The court in *Haut v. Green Cafe Mgmt.*, affirmed a trial court's disgorgement of the defendant's ownership interests in companies due to his breach of fiduciary duty. 376 S.W.3d 171, 183 (Tex. App.—Houston [14th Dist.] 2012, no pet.).

V. OTHER POTENTIAL REMEDIES

A. Constructive Trust

1. General Authority

A plaintiff asserting a claim for breach of fiduciary duty may request the trial court to create a constructive trust as a remedy. *See, e.g., Bright v. Addison*, 171 S.W.3d 588, 601-03 (Tex. App.—Dallas 2005, pet. denied) (allowing actual damages and a constructive trust plus exemplary damages). This remedy will require the defendant to hold an asset in a constructive trust for the benefit of the plaintiff.

If the facts are properly pled, a party may maintain a claim for constructive trust. *Mowbray v. Kristin Avery*, 76 S.W.3d 663 (Tex. App.—Corpus Christi 2002, pet. denied). A constructive trust is used to remedy a wrong. *Meadows v. Bierschwale*, 516 S.W.2d 125 (Tex. 1974); *In the Matter of the Marriage of Loftes*, 40 S.W.3d 160 (Tex. App.—Texarkana 2001, no pet.); *Wheeler v. Blacklands Prod. Credit Ass'n*, 627 S.W.2d 846, 849 (Tex. App.—Fort Worth 1982, no writ).

"A constructive trust is a remedy—not a cause of action." *Sherer v. Sherer*, 393 S.W.3d 480, 491 (Tex. App.—Texarkana 2013, pet. denied); *In re Estate of Arrendell*, 213 S.W.3d 496, 504 (Tex. App.—Texarkana 2006, no pet.). Therefore, "[a]n underlying cause of action such as a breach of fiduciary duty, conversion, or unjust enrichment is required. The constructive trust is merely the remedy used to grant relief on the underlying cause of action." *Id.*

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). The equitable remedy of a constructive trust is broad and far reaching and is designed to circumvent technical legal principles of title and ownership in order to reach a just result. *Southwest Livestock & Trucking Co. v. Dooley*, 884 S.W.2d 805 (Tex. App.—San Antonio 1994, writ denied); *Newman v. Link*, 866 S.W.2d 721, 725 (Tex. App.—Houston [14th Dist.] 1993, writ denied); *Pierce v. Sheldon Petroleum Co.*, 589 S.W.2d 849, 853 (Tex. Civ. App.—Amarillo 1979, no writ).

In *Fitz-Gerald v. Hull*, the Texas Supreme Court explained:

In general, whenever the legal title to property, real or personal, has been obtained

through actual fraud, misrepresentations, concealments ... or through any other similar means or under any other similar circumstances which render it unconscientious for the holder of legal title to retain and enjoy the beneficial interest, equity impresses a constructive trust on the property thus acquired in favor of the one who is truly and equitably entitled to the same ... and a court of equity has jurisdiction to reach the property either in the hands of the original wrong-doer ...

150 Tex. 39, 237 S.W.2d 256, 262-63 (1951). A constructive trust must be instituted against specific property that has been wrongfully taken from another who is equitably entitled to it. *Wheeler*, 627 S.W.2d at 851. A constructive trust may be imposed where one acquires legal title to property in violation of a fiduciary or confidential relationship. *Binford v. Snyder*, 144 Tex. 134, 189 S.W.2d 471 (1945); *Hsin-Chi-Su v. Vantage Drilling Co.*, 474 S.W.3d 284 (Tex. App.—Houston [14th Dist.] July 14, 2015, pet. denied); *Lesikar v. Rappeport*, 33 S.W.3d 282 (Tex. App.—Texarkana 2000, no pet.); *Dilbeck v. Blackwell*, 126 S.W.2d 760 (Tex. Civ. App.—Texarkana 1939, writ ref'd).

A constructive trust is a legal fiction, a creation of equity to prevent a wrongdoer from profiting from his wrongful acts. *Ginther v. Taub*, 675 S.W.2d 724, 728 (Tex. 1984). Such trusts are remedial in character and have the broad function of redressing wrong or unjust enrichment in keeping with basic principles of equity and justice. *Meadows v. Bierschwale*, 516 S.W.2d 125, 131 (Tex. 1974). The form of a constructive trust is “practically without limit, and its existence depends upon the circumstances.” *Bocanegra v. Aetna Life Ins. Co.*, 605 S.W.2d 848, 851 (Tex.1980). A constructive trust does not arise because of a manifest intention to create it; rather, it is imposed in equity because the person holding the legal title to the property would otherwise profit by a wrong or would be unjustly enriched. *Andrews v. Andrews*, 677 S.W.2d 171, 173-74 (Tex. App.—Austin 1984, no writ). Under a constructive trust, a person holding legal title to property is subject to an equitable duty to convey that property to another when the title holder would be unjustly enriched if allowed to retain the property. *Halton v. Turner*, 622 S.W.2d 450, 458 (Tex. Civ. App.—Tyler, no writ).

Three elements are generally required for a constructive trust to be imposed under Texas law. The party requesting a constructive trust must establish the following: (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 v. Bradshaw, 457 S.W.3d 70, 88 (Tex. 2015) (citing *Matter of Haber Oil Co., Inc.*, 12 F.3d 426, 437 (5th Cir. 1994)). “Definitive, designated property, wrongfully withheld from another, is the very heart and soul of the constructive trust theory.” *Id.* Imposition of a constructive trust is not simply a vehicle for collecting assets as a form of damages. *Id.* The tracing requirement must be observed with “reasonable strictness.” *Id.* The party seeking a constructive trust on property has the burden to identify the particular property on which it seeks to have a constructive trust imposed. *Id.*; *Longview Energy Co. v. Huff Energy Fund LP*, No. 15-0968, 2017 Tex. LEXIS 525, 2017 WL 2492004 (Tex. June 9, 2017).

2. Recent Authority

The Texas Supreme Court recently discussed constructive trusts in the context of assets held in a trust that were wrongfully diverted due to mental incompetence. In *Jackson Walker LLPO v. Kinsel*, Lesey and E.A. Kinsel owned a ranch, and when E.A. died, he divided his half between his children and Lesey. *Jackson Walker, LLPO v. Kinsel*, No. 07-13-00130-CV, 2015 Tex. App. LEXIS 3586 (Tex. App.—Amarillo April 10, 2015), *aff'd in part*, 526 S.W.3d 411 (Tex. 2017). Lesey owned sixty percent at that point. Lesey placed her interest into an intervivos trust, which provided that upon her death, her interests would pass to E.A.’s children. Lesey became frail and moved near a niece, Lindsey, and nephew, Oliver. Lindsey and Oliver referred Lesey to an attorney to assist in drafting a new will. The attorney informed E.A.’s children that Lesey needed to sell the ranch to pay for her care. At that time, Lesey had approximately \$1.4 million in liquid assets and did not need to sell the ranch. Not knowing Lesey’s condition, E.A.’s children agreed to sell, and the ranch was sold. Lesey’s \$3 million in cash went into her trust. Lindsey, as a residual beneficiary in the trust, would receive most of the money – not E.A.’s children. The attorney also effectuated amending the trust to grant Lindsey and Oliver greater rights, while advising them to withhold that information from E.A.’s children. E.A.’s children sued Lindsey, Oliver, and the attorney for tortious interference with inheritance rights and other tort claims. The jury returned a verdict for E.A.’s children. The court of appeals affirmed the mental incompetence finding on the trust changes and sale of the ranch. The court then affirmed in part a finding of a constructive trust, making Lindsey hold any proceeds that should have gone to E.A.’s heirs in trust for them.

The Texas Supreme Court granted the petition for review in *Jackson Walker, LLPO v. Kinsel*, 526 S.W.3d 411 (Tex. 2017). The Court affirmed the finding of that Lesey did not have mental capacity to execute the documents. Regarding a constructive trust,

the Court held that there does not have to be a fiduciary duty owed by the defendants to the plaintiffs. The Court held: “It is true that we recently recognized that a ‘breach of a special trust or fiduciary relationship or actual or constructive fraud’ is ‘generally’ necessary to support a constructive trust. But in that same case we reaffirmed our statement in *Pope* that ‘[t]he specific instances in which equity impresses a constructive trust are numberless—as numberless as the modes by which property may be obtained through bad faith and unconscientious acts.’” *Id.* Even though the defendants did not breach any duty owed to the plaintiffs, the Court concluded that the trial court acted within its discretion in imposing a constructive trust: “We hold the mental-incapacity finding, coupled with the undue-influence finding, provided a more than adequate basis for the trial court to impose a constructive trust.” *Id.*

In *Longview Energy Co. v. The Huff Energy Fund, LP*, Longview Energy Company sued two of its directors and their affiliates after discovering one affiliate purchased mineral leases in an area where Longview had been investigating the possibility of buying leases. No. 15-0968, 2017 Tex. LEXIS 525 (Tex. June 9, 2017). A jury found that the directors breached their fiduciary duties in two ways: by usurping a corporate opportunity and by competing with the corporation without disclosing the competition to the board of directors. The trial court rendered judgment awarding a constructive trust to Longview on most of the leases in question and related property and also awarded Longview \$95.5 million in a monetary disgorgement award. *Id.* The court of appeals reversed and rendered judgment for the defendants, concluding that (1) the evidence was legally insufficient to support the jury’s finding that the directors breached their fiduciary duties by usurping a corporate opportunity, and (2) the pleadings were not sufficient to support a claim for breach of fiduciary duty by undisclosed competition with the corporation. *Longview Energy Co. v. The Huff Energy Fund*, 482 S.W.3d 184 (Tex. App.—San Antonio 2015).

The Texas Supreme Court affirmed the court of appeals’s judgment. *Longview Energy Co.*, 2017 Tex. LEXIS at 525. The Court first held that Delaware law prevailed in this case on substantive issues, but that Texas law prevailed on procedural issues. The Court addressed the issue of whether the plaintiff had to trace specific property that supported the constructive trust. Citing Delaware law, the Court held:

A “constructive trust is a remedy that relates to specific property or identifiable proceeds of specific property.” “The constructive trust concept has been applied to the recovery of money, based on tracing an identifiable fund to which plaintiff claims equitable ownership, or where the legal remedy is

inadequate—such as the distinctively equitable nature of the right asserted.” Thus, to obtain a constructive trust over these properties located in Texas, Longview must have procedurally proved that the properties, or proceeds from them, were wrongfully obtained, or that the party holding them is unjustly enriched. “Definitive, designated property, wrongfully withheld from another, is the very heart and soul of the constructive trust theory.” Imposition of a constructive trust is not simply a vehicle for collecting assets as a form of damages. And the tracing requirement must be observed with “reasonable strictness.” That is, the party seeking a constructive trust on property has the burden to identify the particular property on which it seeks to have a constructive trust imposed.

Id. at *15-16. The plaintiff argued that it did not have the burden to trace because that burden shifted to the defendants once the plaintiff proved the assets were commingled. The Court disagreed and noted that “the leases were separately identifiable, were not purchased with commingled funds, and were identified, lease by lease, in both the evidence and the judgment.” *Id.* The Court held that “[g]iven those facts, Longview had the burden to prove that, as to each lease for which it sought equitable relief of disgorgement or imposition of a constructive trust, Riley-Huff acquired that lease as a result of Huff’s or D’Angelo’s breaches of fiduciary duties.” *Id.* The Court concluded that there was no evidence that the defendants obtained any leases due to a breach of fiduciary duty:

There must have been evidence tracing a breach of fiduciary duty by Huff or D’Angelo to specific leases in order to support the imposition of a constructive trust on those leases. The court of appeals noted, and we agree, that there is no evidence any specific leases or acreage for leasing were identified by the brokers as possible targets for Longview to purchase or lease, nor is there evidence that any specific leases or acreage for leasing were recommended to or selected by Longview or its board for pursuit or purchase. Thus, the evidence in this case is legally insufficient to support a finding tracing any specific leases Riley-Huff acquired to a breach of fiduciary duty by either Huff or D’Angelo. Accordingly, Longview was not entitled to have a constructive trust imposed on any leases acquired by Riley-Huff or on property associated with them. Nor was Longview

entitled to have title to any of the leases or associated properties transferred to it. The trial court erred by rendering judgment imposing the constructive trust on and requiring the transfer of leases and properties to Longview.

Id. at *22-23.

The Court then turned to the award of disgorgement damages and noted that both Delaware and Texas limits disgorgement to a fiduciary's profit. "Thus, under either Delaware or Texas law, the disgorgement award must be based on profits Riley-Huff obtained as a result of Huff's or D'Angelo's breaches of fiduciary duties." *Id.* at *28. The Court noted that the amount of profit resulting from a breach of fiduciary duty will generally be a fact question. The jury question only required the jury to find the amount of *revenues* the defendants received. The Court held that because jury question submitted an incorrect measure for equitable disgorgement of profit, and there was no other finding that could be used to calculate the profit, there was no jury finding that supported the trial court's disgorgement award. Therefore, the Court affirmed the court of appeals's judgment for the defendants.

B. Accounting

A suit for an accounting is generally founded in equity. *Palmetto Lumber Co. v. Gibbs*, 124 Tex. 615, 80 S.W.2d 742, 748 (Tex. 1935); *Cooper v. Sanders H. Campbell/Richard T. Mullen, Inc.*, No. 05-15-00340-CV, 2016 Tex. App. LEXIS 9253, 2016 WL 4487924, at *4 (Tex. App.—Dallas Aug. 24, 2016, no pet.); *Sw. Livestock & Trucking Co. v. Dooley*, 884 S.W.2d 805, 809 (Tex. App.—San Antonio 1994, writ denied). The decision to grant an accounting is within the discretion of the trial court. *Sw. Livestock*, 884 S.W.2d at 809-10. To be entitled to an accounting, a plaintiff usually must have a contractual or fiduciary relationship with the party from which the plaintiff seeks the accounting. *T.F.W. Mgmt. v. Westwood Shores Prop. Owners Ass'n*, 79 S.W.3d 712, 717-718 (Tex. App.—Houston [14th Dist.] 2002), *rev'd on other grounds*, 162 S.W.3d 564 (2004).

In addition to a common law right to an accounting, a plaintiff may have a statutory right. For example, the Texas Property Code provides for a right of beneficiaries to demand an accounting from a trustee. Tex. Prop. Code §113.151. The accounting should include: all assets that belong to the trust (whether in the trustee's possession or not); all receipts, disbursements, and other transactions, including their source and nature, with receipts of principal and interest shown separately; Listing of all property being administered; cash balance on hand and the name and location of the depository where the

balance is maintained; and all known liabilities owed by the trust. Tex. Prop. Code §113.152. Section 152.211(b) of the Texas Business Organizations Code provides that, "A partner may maintain an action against the partnership or another partner for legal or equitable relief, including an accounting of partnership business," to enforce a right under the partnership agreement or other rights established in the statute. Tex. Bus. Orgs. Code Ann. § 152.211(b).

C. Permanent Injunction

A breach-of-fiduciary-duty plaintiff may be entitled to an award of a permanent injunction as a remedy. *Donaho v. Bennett*, No. 01-08-00492-CV, 2008 Tex. App. LEXIS 8783, at 10 (Tex. App.—Houston [1st Dist.] Nov. 20, 2008, no pet.) (providing injunctive relief for breach of fiduciary duty); *Elcor Chem. Corp. v. Agri-Sul, Inc.*, 494 S.W.2d 204 (Tex. App.—Dallas 1973, writ ref'd n.r.e.). The scope of the injunctive relief "must, of necessity, be full and complete so that those who have acted wrongfully and have breached their fiduciary relationship, as well as those who willfully and knowingly aided them in doing so, will be effectively denied the benefits and profits flowing from the wrongdoing." *Elcor*, 494 S.W.2d at 212. The purpose of an injunction is to remove the advantage created by the wrongful act. *Bryan v. Kershaw*, 366 F.2d 497, 502 (5th Cir. 1966). Although an injunction should ordinarily operate as a corrective rather than a punitive measure, if a choice must be made between the possible punitive operation of an injunction and the failure to provide adequate protection of a recognized legal right, we must follow the course that provides adequate protection because "the undoubted tendency of the law has been to recognize and enforce higher standards of commercial morality in the business world." See *Hyde Corp. v. Huffines*, 158 Tex. 566, 314 S.W.2d 763, 773 (Tex. 1958).

However, "[t]he issuance of a writ of injunction is an extraordinary equitable remedy, and its use should be carefully regulated." *City of Arlington v. City of Fort Worth*, 873 S.W.2d 765, 767 (Tex. App.—Fort Worth 1994, orig. proceeding); see also *Butnaru v. Ford Motor Co.*, 84 S.W.3d 198, 204 (Tex. 2002). The party seeking to enforce a judgment has the burden of establishing his right to do so. *In re C.H.C.*, 290 S.W.3d 929, 931 (Tex. App.—Dallas 2009, orig. proceeding); *Wrigley v. First Nat. Sec. Corp.*, 104 S.W.3d 252, 258 (Tex. App.—Beaumont 2003, no pet.). Moreover, the party seeking injunctive relief has the burden to establish all of the elements for that relief. *N. Cypress Med. Ctr. Operating Co. v. St. Laurent*, 296 S.W.3d 171, 175 (Tex. App.—Houston [14th Dist.] 2009, no pet.); *Harbor Perfusion, Inc. v. Floyd*, 45 S.W.3d 713, 718 (Tex. App.—Corpus Christi 2001, no pet.). Generally, to be entitled to a

permanent injunction, a plaintiff must plead and prove (1) a wrongful act, (2) imminent harm, (3) irreparable injury, and (4) absence of an adequate remedy at law. *In re Hardwick*, 426 S.W.3d at 159-60. The standard of review in an appeal from a permanent injunction is whether an abuse of discretion occurred. *Tyra v. City of Houston*, 822 S.W.2d 626, 631 (Tex. 1991); *City of Corpus Christi v. Five Citizens of Corpus Christi*, 103 S.W.3d 660, 662 (Tex. App.—Corpus Christi 2003, pet. denied).

Matters of form do not control whether an order is an injunction; rather, it is the character and function of an order that determine its classification. *In re Hardwick*, 426 S.W.3d 151, 158-60 (Tex. App.—Houston [1st Dist.] 2012, no pet.). An injunction may be either prohibitive, forbidding particular conduct, or mandatory, requiring particular conduct. *Id.*; *RP&R, Inc. v. Territo*, 32 S.W.3d 396, 400 (Tex. App.—Houston [14th Dist.] 2000, no pet.). For example, an order requiring specific performance is a permanent injunction. *Free v. Lewis*, No. 13-11-00113-CV, 2012 Tex. App. LEXIS 6639, at *11-12 (Tex. App.—Corpus Christi Aug. 9, 2012, no pet.) (citing *Cytogenix, Inc. v. Waldoff*, 213 S.W.3d 479 (Tex. App.—Houston [1st Dist.] December 14, 2006, pet. denied)); *see also S. Plains Switching, Ltd. Co. v. BNSF Ry. Co.*, 255 S.W.3d 690, 703 (Tex. App.—Amarillo 2008, pet. denied) (stating relief sought by party to enforce specific performance of agreement by ordering opposing party to perform under the contract was “in essence” a mandatory injunction).

A permanent injunction may be granted only after a hearing and a trial on the merits. *Houston Independent School Dist. v. City of Houston*, 443 S.W.2d 49 (Tex. 1969); *Young v. Gardner*, 435 S.W.2d 192 (Tex. Civ. App.—Houston [14th Dist.] 1968, no writ). A hearing on an application for a permanent injunction is conducted in accordance with the rules that govern the trial of civil suits generally, and the principles of equity govern the proceeding. Tex. Civ. Prac. & Rem. Code Ann. § 65.001; Tex. R. Civ. P. 693; *Walling v. Kimbrough*, 365 S.W.2d 941 (Tex. Civ. App.—Eastland 1963), *aff’d*, 371 S.W.2d 691 (Tex. 1963).

Because injunctive relief is an extraordinary remedy, the party seeking an injunction must be shown to be clearly entitled to it. *Sneed v. Ellison*, 116 S.W.2d 864 (Tex. Civ. App.—Amarillo 1938, writ *dism’d*). The right to an injunction must be supported by the evidence, and there must be a determination not only that a wrongful act occurred but also that injunctive relief is an essential remedy. *Dick v. Webb County*, 303 S.W.2d 385 (Tex. Civ. App.—San Antonio 1957, writ refused); *Thomas v. Bunch*, 41 S.W.2d 359 (Tex. Civ. App.—Fort Worth 1931), *aff’d*, 121 Tex. 225, 49 S.W.2d 421 (1932).

There must be evidence at the hearing on a request for injunctive relief. *Prappas v. Entezami*, 2006 Tex. App. LEXIS 2157 (Tex. App.—San Antonio Mar. 22, 2006, no pet.). The applicant has the burden to introduce competent evidence to support the injunction. *Bay Fin. Sav. Bank, FSB v. Brown*, 142 S.W.3d 586 (Tex. App.—Texarkana 2004, no pet.). Even if the party opposing the injunction does not appear, there must still be a hearing and evidence is required. *Millwrights Local Union v. Rust Eng’g*, 433 S.W.2d 683, 686-87 (Tex. 1968).

An injunction is improper without proof of unlawful conduct or proof of intent to commit such conduct. *Green v. Unauthorized Practice of Law Committee*, 883 S.W.2d 293, 299 (Tex. App.—Dallas 1994, no writ). Further, a court should not grant an injunction where there is a dispute as to the legal right involved and the petitioner’s right is doubtful. *McBride v. Aransas County*, 304 S.W.2d 450, 453 (Tex. Civ. App.—Eastland 1957, writ refused n.r.e.).

To be entitled to a permanent injunction, a plaintiff must plead and prove imminent, irreparable injury. *In re Hardwick*, 426 S.W.3d at 159-60; *see also Operation Rescue-Nat’l v. Planned Parenthood of Houston & Se. Tex., Inc.*, 975 S.W.2d 546, 554 (Tex. 1998). The injury must be actual and substantial. *Pallotta v. Tex. Dep’t of Licensing & Regulation*, No. 09-07-322-CV, 2008 Tex. App. LEXIS 5327, at *6 (Tex. App.—Beaumont 2008, no pet.); *Parkem Indus. Servs., Inc. v. Garton*, 619 S.W.2d 428, 430 (Tex. Civ. App.—Amarillo 1981, no writ). A prerequisite for injunctive relief is the threat of imminent harm, and fear or apprehension of the possibility of injury is not sufficient. *Matrix Network, Inc. v. Ginn*, 211 S.W.3d 944, 947-48 (Tex. App.—Dallas 2007, no pet.); *Vaughn v. Drennon*, 202 S.W.3d 308, 313 (Tex. App.—Tyler 2006, no pet.). The plaintiff must prove that the defendant has attempted or intends to harm the plaintiff in the future, and a court should deny relief where the threatened injury is merely possible. *Howell v. Texas Workers’ Compensation Com’n*, 143 S.W.3d 416, 432 (Tex. App.—Austin 2004, no pet.); *Brazoria County Appraisal Dist. v. Notlef, Inc.*, 721 S.W.2d 391, 393 (Tex. App.—Corpus Christi 1986, no writ).

“The principles governing courts of equity govern injunction proceedings unless superseded by specific statutory mandate. In balancing the equities, the trial court must weigh the harm or injury to the applicant if the injunctive relief is withheld against the harm or injury to the respondent if the relief is granted.” *Seaborg Jackson Partners v. Beverly Hills Sav.*, 753 S.W.2d 242, 245 (Tex. App.—Dallas 1988, writ *dism’d*). Further, a trial court is not free to ignore the equities on both sides, and abuses its discretion in so doing. *See id.* In balancing equities for an injunction, a court may consider whether the party opposing the injunction would suffer slight or significant injury if

the injunction is issued. *NMTC Corp. v. Conarro*, 99 S.W.3d 865, 869 (Tex. App.—Beaumont 2003, no pet.).

A party defending against a request for injunctive relief may raise equitable arguments that defeat a request for an injunction. An application for injunctive relief invokes a court's equity jurisdiction. *In re Gamble*, 71 S.W.3d 313, 317 (Tex. 2002). Texas Rule of Civil Procedure 693 states: "The principles, practice and procedure governing courts of equity shall govern proceedings in injunctions when the same are not in conflict with these rules or the provisions of the statutes." Tex. R. Civ. P. 693. Accordingly, a party defending a request for injunctive relief may raise various equitable defenses to a request for injunctive relief. *Alex Sheshunoff Management Services, L.P. v. Johnson*, 209 S.W.3d 644, 656 n.8 (Tex. 2006); *In re Gamble*, 71 S.W.3d 313, 317 (Tex. 2002); *Ethan's Glen Community Ass'n v. Kearney*, 667 S.W.2d 287, 290-91 (Tex. App.—Houston [1st Dist.] 1984, no pet.). For example, courts require a party seeking relief in equity to offer or plead willingness to do equity. *LDF Const., Inc. v. Bryan*, 324 S.W.3d 137, 149 (Tex. App.—Waco 2010, no pet.). When a party resorts to equity to assert a right not available under law, that party's own actions are to be measured by equitable standards, and he or she may not be relieved of the strict letter of the law to invoke equitable standards against an adversary and take cover under the strict letter of the law when his or her own acts are measured by equitable standards. *Meadows v. Bierschwale*, 516 S.W.2d 125, 132 (Tex. 1974); *Deep Oil Dev. Co. v. Cox*, 224 S.W.2d 312, 317 (Tex. Civ. App.—Fort Worth 1949, writ ref'd n.r.e.).

Rule 683 of the Texas Rules of Civil Procedure states that every order granting an injunction must "set forth the reasons for its issuance" and "be specific in its terms." Tex. R. Civ. P. 683. The Texas Supreme Court "interpret[s] Rule [683] to require . . . that the order set forth the reasons why the court deems it proper to issue the writ to prevent injury to the applicant in the interim; that is, the reasons why the court believes the applicant's probable right will be endangered if the writ does not issue." *Transp. Co. of Tex. v. Robertson Transps., Inc.*, 152 Tex. 551, 261 S.W.2d 549, 553 (Tex. 1953). The order must provide a "detailed explanation" of the reason for its issuance. *Adust Video v. Nueces County*, 996 S.W.2d 245, 249 (Tex. App.—Corpus Christi 1999, no pet.). The explanation must include specific reasons and not merely conclusory statements. *Kotz v. Imperial Capital Bank*, 319 S.W.3d 54, 56-57 (Tex. App.—San Antonio 2010, no pet.). This requirement for specificity is mandatory and must be strictly followed. *InterFirst Bank San Felipe, N.A. v. Paz Constr. Co.*, 715 S.W.2d 640, 641 (Tex. 1986); *City of Corpus Christi v. Friends of the Coliseum*, 311 S.W.3d 706, 708-09 (Tex. App.—

Corpus Christi 2010, no pet.). If an order fails to comply with these requirements, it is void and should be dissolved. *InterFirst Bank*, 715 S.W.2d at 641; *City of Corpus Christi*, 311 S.W.3d at 708; *Johnson v. Thomas*, 2001 Tex. App. LEXIS 2878 (Tex. App.—Houston [14th Dist.] May 3, 2001, no pet.) (injunction based on breach of fiduciary duty was reversed where order was not sufficiently specific).

Once again, specific statutes may allow for injunctive relief. For example, Texas Trust Code Section 114.008(2) provides for injunctive relief as a remedy for breach of trust that "has occurred or may occur." Tex. Prop. Code §114.008(2).

D. Rescission

A plaintiff may wish to rescind a transaction due to a breach of fiduciary duty. *See, e.g., Manges v. Guerra*, 673 S.W.2d 180, 181 (Tex. 1984) (upholding the award of actual and exemplary damages as well as cancelling a self-dealing lease); *Houston v. Ludwick*, No. 14-09-00600-CV, 2010 Tex. App. LEXIS 8415, at 8 (Tex. App.—Houston [14th Dist.] Oct. 21, 2010, pet. denied) (awarding rescission for two properties and actual damages for two properties that the lawyer purchased for inadequate consideration and in conflict with his representation); *Acevedo v. Stiles*, No. 04-02-00077-CV, 2003 Tex. App. LEXIS 3854, at 2 (Tex. App.—San Antonio May 7, 2003, pet. denied) ("If both rescission and damages are essential to accomplish full justice, they may both be awarded."); *Acevedo v. Stiles*, No. 04-02-00077-CV, 2003 Tex. App. LEXIS 3854, at 3 (Tex. App.—San Antonio May 7, 2003, pet. denied) (opining that the awards of rescission and damages are essential to accomplish full justice against lawyers); *Snyder v. Cowell*, 2003 Tex. App. LEXIS 3139, at 10 (Tex. App.—El Paso Apr. 10, 2003, no pet.) (mem. op.) (stating that if the trustee "violated his fiduciary duty not to self-deal, the beneficiary may have had a cause of action to repudiate the . . . transaction or to hold the trustee personally liable"); *Miller v. Miller*, 700 S.W.2d 941, 945-46 (Tex. App.—Dallas 1985, writ ref'd n.r.e.) (holding that trial court erred in denying rescission relief where plaintiff established a breach of fiduciary duty).

"Rescission" is a common shorthand for the composite remedy of rescission and restitution. *Cruz v. Andrews Restoration, Inc.*, 364 S.W.3d 817, 825 (Tex. 2012). "Rescission is an equitable remedy that operates to extinguish a contract that is legally valid but must be set aside due to fraud, mistake, or for some other reason to avoid unjust enrichment." *Gentry v. Squires Constr., Inc.*, 188 S.W.3d 396, 410 (Tex. App.—Dallas 2006, no pet.). Upon rescission, the rights and liabilities of the parties are extinguished, any consideration that was paid is returned, and the parties are restored to their respective positions as if no contract between them had ever existed. *Ginn v. NCI*

Bldg. Sys., 472 S.W.3d 802, 837 (Tex. App.—Houston [1st Dist.] 2015, no pet.); *Baty v. ProTech Ins. Agency*, 63 S.W.3d 841, 855 (Tex. App.—Houston [14th Dist.] 2001, pet. denied). A trial court may also order a party to pay damages equal to the value of any proceeds or profits the party earned from the consideration that was improperly obtained. *Meadows v. Bierschwale*, 516 S.W.2d 125, 128 (Tex. 1974). The decision to allow rescission lies strictly within the sound discretion of trial courts. *Schenck v. Ebbly Halliday Real Estate, Inc.*, 803 S.W.2d 361, 366 (Tex. App.—Fort Worth, 1990, no writ).

A plaintiff must generally show that there is no adequate remedy at law and that he or she will sustain serious and irreparable pecuniary injury if the relief is not granted. *Chenault v. County of Shelby*, 320 S.W.2d 431, 433 (Tex. Civ. App.—Austin 1959, writ ref'd n.r.e.). A court may deny rescission where the plaintiff fails to act with diligence in seeking relief after discovering the grounds for rescission. *Brandtjen & Kluge v. Tarter*, 236 S.W.2d 550, 554 (Tex. Civ. App.—Fort Worth 1951, writ ref'd n.r.e.); *Heffington v. Hellums*, 212 S.W.2d 245, 249 (Tex. Civ. App.—Austin 1948, writ ref'd n.r.e.).

To do equity, the party seeking rescission must generally offer and be prepared to return any consideration already received under the contract. *Ginn*, 472 S.W.3d at 802. In *Cruz*, the Texas Supreme Court relied heavily on the Restatement (Third) of Restitution and Unjust Enrichment in explaining the law of rescission. 364 S.W.3d at 825-27. The Court held that rescission is “generally limited to cases in which counter-restitution by the claimant will restore the defendant to the status quo ante.” *Id.* at 826 (citing Restatement (Third) of Restitution and Unjust Enrichment § 54(3)). The Court also held that a defendant’s wrongdoing may factor into whether it should bear an uncompensated loss in situations in which the claimant cannot restore the defendant to the status quo ante, but a defendant’s wrongdoing does not excuse the claimant from counter-restitution when counter-restitution is feasible. *Id.* (citing Restatement § 54(3)(b) & cmt. c).

Texas courts have applied a presumption of unfairness to transactions between a fiduciary and a party to whom he owes a duty of disclosure, thus casting on the fiduciary the burden to establish fairness. *Texas Bank & Trust Co. v. Moore*, 595 S.W.2d 502, 509 (Tex. 1980); *Stephens Cnty. Museum, Inc. v. Swenson*, 517 S.W.2d 257, 260 (Tex. 1974); *Archer v. Griffith*, 390 S.W.2d 735, 740 (Tex. 1964); *Lee v. Hasson*, 286 S.W.3d 1, 20-21 (Tex. App.—Houston [14th Dist.] 2007, pet. denied); *Ginther v. Taub*, 570 S.W.2d 516, 525 (Tex. Civ. App.—Waco 1978, writ ref'd n.r.e.). In establishing the fairness of a transaction between a fiduciary and his beneficiary, some of the most important factors are whether the

fiduciary made a full disclosure, whether the consideration (if any) is adequate, and whether the beneficiary had the benefit of independent advice. *Miller v. Miller*, 700 S.W.2d 941, 945-46 (Tex. App.—Dallas 1985, writ ref'd n.r.e.) (citing G. BOGERT, HANDBOOK OF THE LAW OF TRUSTS AND TRUSTEES § 544, at 446 (rev. 2d ed. 1978)). Other factors relevant to fairness include whether the beneficiary had the benefit of independent advice, whether the fiduciary benefited at the beneficiary’s expense, and whether the fiduciary significantly benefited from the transaction as viewed in light of circumstances existing at the time of the transaction. *International Bankers Life Insurance Co. v. Holloway*, 368 S.W. 2d 567, 576 (Tex. 1963); *Lee*, 286 S.W.3d at 21; *Gaynier v. Ginsberg*, 715 S.W.2d 749, 754 (Tex. App.—Dallas 1986, writ ref'd n.r.e.); *Cole v. McCanlies*, 620 S.W.2d 713, 715 (Tex. Civ. App.—Dallas 1981, writ ref'd n.r.e.). The transaction is unfair if the fiduciary significantly benefits from it at the expense of the beneficiary as viewed in the light of circumstances existing at the time of the transaction. *Archer*, 390 S.W.2d at 740.

A plaintiff who establishes a breach of fiduciary duty may opt to rescind an offending transaction with a fiduciary and potentially may have additional damages. Further, where a transaction with a third party may also potentially be rescinded where the third party was aware of the fiduciary’s breach of his or her duty. *Grupo v. Garcia*, No. 13-98-247-CV, 1999 Tex. App. LEXIS 5845, at 27 (Tex. App.—Corpus Christi Aug. 5, 1999, pet. denied). *See also Kline v. O’Quinn*, 874 S.W.2d 776, 786 (Tex. App. - Houston [14th Dist.] 1994, writ denied) (“It is settled law of this state that where a third party knowingly participates in the breach of duty of a fiduciary, such third party becomes a joint tortfeasor with the fiduciary and is liable as such.”).

E. Equitable Lien

A plaintiff may assert a right to an equitable lien on property. This would secure a money judgment and would attach to any trust property in the hands of the defendant. Tex. Prop. Code Ann. § 114.008(9); *Furrh v. Furrh*, 251 S.W.2d 927, 933 (Tex. Civ. App.—Texarkana 1952, writ ref'd n.r.e.); *Byrne v. First National Bank of Lake Charles*, 20 Tex. Civ. App. 194, 49 S.W. 706 (Tex. Civ. App.—Houston 1899, writ ref'd). This would allow the defendant to maintain title to the property, but allow the plaintiff to acquire an order that the property be sold and the proceeds paid to satisfy the judgment.

An equitable lien is not an estate in the thing to which it attaches, but merely an encumbrance against the property to satisfy a debt. *Chorman v. McCormick*, 172 S.W.3d 22 (Tex. App.—Amarillo 2005, no pet.) (citing *Day v. Day*, 610 S.W.2d 195, 199 (Tex. Civ. App.—Tyler 1980, writ ref'd n.r.e.)). It is not

necessary that a lien is created by express contract or by operation of statute. *Id.* (citing *First Nat'l Bank in Big Spring v. Conner*, 320 S.W.2d 391, 394 (Tex. Civ. App.—Amarillo 1959, writ ref'd n.r.e.)). Courts of equity will apply the relations of the parties and the circumstances of their dealings in establishing a lien based on right and justice. *Id.*

F. Declaratory Relief

1. General Authority

A plaintiff asserting a breach of fiduciary duty claim may request declaratory relief in addition to other remedies. *See, e.g., Murphy v. Am. Rice, Inc.*, No. 01-03-01357-CV, 2007 Tex. App. LEXIS 2031, at 34 (Tex. App.—Houston [1st Dist.] Mar. 9, 2007, no pet.) (granting declarative relief and actual damages).

Declaratory judgments are authorized by Section 37.003 of the Civil Practice and Remedies Code, which provides, “A court of record within its jurisdiction has power to declare rights, status, and other legal relations whether or not further relief is or could be claimed.” Tex. Civ. Prac. & Rem. Code § 37.003(a). A declaratory judgment is a remedial measure that determines the rights of the parties and affords relief from uncertainty with respect to rights, status, and legal relations. *Ysasaga v. Nationwide Mut. Ins. Co.*, 279 S.W.3d 858, 863 (Tex. App.—Dallas 2009, pet. denied). Where the undisputed evidence shows a party’s entitlement to declaratory relief, it is error for the trial court not to grant the relief requested. *Cont’l Homes of Tex., L.P. v. City of San Antonio*, 275 S.W.3d 9, 21 (Tex. App.—San Antonio 2008, pet. denied).

A trial court’s decision to enter or refuse a declaratory judgment therefore rests within the sound discretion of the trial court. *See, e.g., Space Master Int’l, Inc. v. Porta-Kamp Mfg. Co., Inc.*, 794 S.W.2d 944, 947 (Tex. App.—Houston [1st Dist.] 1990, no pet.). “It is . . . within the discretion of the trial court to refuse to enter a declaratory judgment or decree if the judgment or decree would not terminate the uncertainty or controversy giving rise to the proceeding.” *Id.*; *see also SpawGlass Constr. Corp. v. City of Houston*, 974 S.W.2d 876, 878 (Tex. App.—Houston [14th Dist.] 1998, pet. denied); *Scurlock Permian Corp. v. Brazos Cnty.*, 869 S.W.2d 478, 486 (Tex. App.—Houston [1st Dist.] 1993, writ denied).

The Texas Civil Practice and Remedies Code as an expansive list of topics on which trial courts can grant declaratory relief:

A person interested under a deed, will, written contract, or other writings constituting a contract or whose rights, status, or other legal relations are affected by a statute, municipal ordinance, contract, or franchise may have determined any question of construction or validity arising under the

instrument, statute, ordinance, contract, or franchise and obtain a declaration of rights, status, or other legal relations thereunder.

Tex. Civ. Prac. & Rem. Code § 37.004. Further, the statute specifically discusses certain fiduciary relationships:

A person interested as or through an executor or administrator, including an independent executor or administrator, a trustee, guardian, other fiduciary, creditor, devisee, legatee, heir, next of kin, or cestui que trust in the administration of a trust or of the estate of a decedent, an infant, mentally incapacitated person, or insolvent may have a declaration of rights or legal relations in respect to the trust or estate:(1) to ascertain any class of creditors, devisees, legatees, heirs, next of kin, or others; (2) to direct the executors, administrators, or trustees to do or abstain from doing any particular act in their fiduciary capacity; (3) to determine any question arising in the administration of the trust or estate, including questions of construction of wills and other writings; or (4) to determine rights or legal relations of an independent executor or independent administrator regarding fiduciary fees and the settling of accounts.

Id. at § 37.005. Courts have held that parties in a fiduciary case can seek declarations. *See, e.g., Myrick v. Moody Nat'l Bank*, 336 S.W.3d 795, 2011 Tex. App. LEXIS 949 (Tex. App.—Houston [1st Dist.] Feb. 10, 2011, no pet.) (declaration concerning trustee’s authority to borrow funds); *Twyman v. Twyman*, No. 01-08-00904-CV, 2009 Tex. App. LEXIS 5552 (Tex. App.—Houston [1st Dist.] July 16, 2009, no pet.) (declaration regarding trustee disbursing funds); *In re Estate of Moffatt*, No. 08-02-00210-CV, 2003 Tex. App. LEXIS 9063 (Tex. App.—El Paso Oct. 23, 2003, no pet.) (request for will construction); *Rice v. Gregory*, 780 S.W.2d 384 (Tex. App.—Texarkana 1989, writ denied) (declaration concerning ownership of stock converted by executor); *Frost Nat'l Bank v. Stool*, 575 S.W.2d 321, 1978 Tex. App. LEXIS 4131 (Tex. Civ. App.—Beaumont 1978, writ ref'd n.r.e.) (declaration regarding ownership of accounts). For example, this provision allows a devisee to seek a declaration of rights or legal relations to determine “any question arising in the administration” of an estate. *In re O'Quinn*, 355 S.W.3d 857, 865 (Tex. App.—Houston [1st Dist.] 2011, orig. proceeding). *But see In re Nunu*, No. 14-16-00394-CV, 2017 Tex. App. LEXIS 10306 (Tex. App.—Houston [14th Dist.] Nov.

2, 2017) (declaratory judgment act could not be used as vehicle for fee forfeiture request).

The plaintiff should remember that the Declaratory Judgment Act states that: “When declaratory relief is sought, all persons who have or claim any interest that would be affected by the declaration must be made parties. A declaration does not prejudice the rights of a person not a party to the proceeding.” Tex. Civ. Prac. & Rem. Code § 37.006; *In re Nunu*, No. 14-16-00394-CV, 2017 Tex. App. LEXIS 10306 (Tex. App.—Houston [14th Dist.] Nov. 2, 2017). If a court does not feel that all necessary parties are in the suit, it may deny the requested declaratory relief. *Id.*

Finally, a plaintiff may be entitled to an award of attorney’s fees regarding its declaratory judgment request: “In any proceeding under this chapter, the court may award costs and reasonable and necessary attorney’s fees as are equitable and just.” Tex. Civ. Prac. & Rem. Code § 37.009. This is not a “prevailing party” statute, and the court can award fees as it determines is equitable and just. *Hachar v. Hachar*, 153 S.W.3d 138, 2004 Tex. App. LEXIS 10477 (Tex. App.—San Antonio Nov. 24, 2004, no pet.). For example, in an action declaring that a decedent’s adopted grandchildren were not beneficiaries of a trust, it was equitable and just under Section 37.009 to award fees from the trust to the adopted grandchildren. *In re Ellison Grandchildren Trust*, 261 S.W.3d 111 (Tex. App.—San Antonio 2008, no pet.).

2. Recent Cases

In *Gause v. Gause*, a son brought suit to affirm the existence of a trust established by his father. 496 S.W.3d 913 (Tex. App.—Austin June 29, 2016, no pet.). The father had executed a will and a trust document. After his death, a child read the documents to the other children and took the documents to her home. The documents later became missing. A child then procured a deed to real property from the mother that was supposed to be in the trust. Another child sued to hold the deed void and to establish the terms of the trust. The trial court ruled that the trust was effective, set forth its terms, and otherwise voided the deed.

The court of appeals affirmed. The court held that a deed or other document is not made ineffective by its destruction or loss. Rather, production of the original document is excused when it is established that the document has been lost or destroyed, and parol evidence of the contents of a writing is admissible if the original has been lost or destroyed. Loss or destruction of the document is established by proof of search for this document and inability to find it.

The court acknowledged that trusts involving real property had to meet the statute of frauds writing requirement, but that rule did not remove a trust from the operation of the general rule for lost documents.

The court held that the evidence was sufficient to establish the terms of the trust and its existence.

In *In the Estate of Montemayor*, the trial court entered summary judgment for an estate beneficiary on a claim to quiet title as against the independent executor, who had deeded estate property to himself. No. 04-15-00397-CV, 2016 Tex. App. LEXIS 5749 (Tex. App.—San Antonio June 1, 2016, no pet.). The executor appealed, and the court of appeals affirmed. On appeal, the executor argued that the trial court erred by granting the motion for summary judgment because his affidavit allegedly raised a fact issue that when he sold and conveyed the property to himself, he had the authority to do so. The court of appeals noted that a personal representative of an estate may not purchase any estate property sold by the representative or any co-representative of the estate. The court also noted that there is an exception for when the will authorizes such a sale. The court concluded that: “It is undisputed that Montemayor was the independent executor of Luisa’s estate when he deeded the property to himself. The will did not authorize Montemayor to purchase the estate property. Therefore, Calentine established Montemayor’s claim to the property was invalid or unenforceable.” *Id.* The trial court correctly granted summary judgment, declaring the deed void and quieting title in the new representative of the estate.

G. Partition

1. General Authority

In the course of a breach-of-fiduciary-duty case, a plaintiff and defendant may jointly own property. A plaintiff may want to divide the jointly owned property, which is done via a partition suit. The Texas Rules of Civil Procedure provide a two-step procedure for partition of real estate. Tex. R. Civ. P. 756 et seq.; *Yturria v. Kimbro*, 921 S.W.2d 338, 341 (Tex. App.—Corpus Christi 1996, no writ).

In the first step, the trial court determines: (1) the share or interests of each of the owners, (2) all questions of law or equity affecting the title to the land, and (3) whether the property is susceptible to partition in kind or must be sold. Tex. R. Civ. P. 760, 761, 770. Texas Rule of Civil Procedure 760 provides that, “upon the hearing of the cause, the court shall determine the share or interest of each of the joint owners or claimants in the real estate sought to be divided, and all questions of law or equity affecting the title to such land which may arise.” Tex. R. Civ. P. 760. Rule 761 provides that “the court shall determine before entering the decree of partition whether the property, or any part thereof, is susceptible of partition.” Tex. R. Civ. P. 761. If the property is not partitionable in kind, the trial court orders partition by sale. Tex. R. Civ. P. 770. However, if the court determines the land to be partitionable in kind, it then appoints commissioners to make the partition and

instructs them in its decree concerning the share or interest of each party. Tex. R. Civ. P. 761.

Texas Rule of Civil Procedure 766 provides that “the commissioners, or a majority of them, shall proceed to partition the real estate described in the decree of the court, in accordance with the directions contained in such decree and with the provisions of law and these rules.” Tex. R. Civ. P. 766. Rules 764 and 767 provide that the court, or the commissioners on their own authority, may appoint a surveyor and cause the property in question to be surveyed. Rule 768 then instructs the commissioners as follows:

The commissioners shall divide the real estate to be partitioned into as many shares as there are persons entitled thereto, as determined by the court, each share to contain one or more tracts or parcels, as the commissioners may think proper, having due regard in the division to the situation, quantity and advantages of each share, so that the shares may be equal in value, as nearly as may be, in proportion to the respective interests of the parties entitled. The commissioners shall then proceed by lot to set apart to each of the parties entitled one of said shares, as determined by the decrees of the court.

Tex. R. Civ. P. 768. Rule 769 provides for a report of the division by the commissioners, and Rule 771 for objection to the report and appointment of new commissioners to re-partition the property if upon trial of the matter the original report is found to be “erroneous in any material respect, or unequal and unjust.” Tex. R. Civ. P. 769, 771. Otherwise, the trial court shall enter a second judgment confirming the partition made by the commissioners.

In addition to determining the basic issues of partitionability in kind and the fractional interests of the parties, the trial court also has the power during the initial stage of the partition proceeding to adjust all equities between the parties. *Sayers v. Pyland*, 139 Tex. 57, 161 S.W.2d 769 (Tex. 1942); *Becker v. Becker*, 639 S.W.2d 23, 25 (Tex. App.—Houston [1st Dist.] 1982, orig. proceeding). The trial court thus applies the rules of equity in determining the broad question of how property is to be partitioned. *Snow v. Donelson*, 242 S.W.3d 570, 572 (Tex. App.—Waco 2007, no pet.); *Moseley v. Hearrell*, 141 Tex. 280, 171 S.W.2d 337, 338-39 (Tex. 1943); *Cleveland v. Milner*, 141 Tex. 120, 170 S.W.2d 472, 476 (Tex. Comm’n App. 1943, opinion adopted).

Proof is made to the factfinder at trial of the existence and value of improvements to the property at the time of partition and of other equitable considerations which may warrant awarding a

particular portion of the property to one of the parties. *Burton v. Williams*, 195 S.W.2d 245, 247-48 (Tex. Civ. App.—Waco 1946, writ ref’d n.r.e.). Based on the findings of the judge or jury, the trial court then appoints commissioners to make the actual division of the property and instructs them to take these matters into account in making the partition. *Bouquet v. Belk*, 376 S.W.2d 361, 362-63 (Tex. Civ. App.—San Antonio 1964, no writ); *Burton*, 195 S.W.2d at 247-48. The existence and value of improvements is a question for the factfinder, while the exact manner of valuing the real property on which they are situated and dividing that property into shares among the parties is accomplished by the commissioners.

Commissioners in partition have no judicial powers and no authority to take into consideration equitable claims that have not already been determined by the factfinder at trial and embodied in the trial court’s instructions to them. *Stefka v. Lawrence*, 7 S.W.2d 894 (Tex. Civ. App.—Austin 1928, writ dismissed). Certainly the commissioners’ decisions about where to divide the property involve mixed considerations of equity and property valuation. The equitable considerations, therefore, must be spelled out adequately in the trial court’s instructions to the commissioners based on the findings or verdict. The commissioners’ faithfulness in following those instructions is then subject to scrutiny by the trial court in response to objections to the report of the commissioners under Rule 771.

2. Recent Cases

In *Byrom v. Penn*, Byrom was appointed executor of his mother’s estate, and he was later removed as executor for breach of fiduciary duty by using estate funds to build a house for himself. No. 12-15-00033-CV, 2016 Tex. App. LEXIS 7680 (Tex. App.—Tyler July 20, 2016, no pet.). The court imposed a constructive trust in the amount of \$200,000.00 on Byrom’s home. Later, a different court rendered an order authorizing a receiver to sell the home, pay fees and expenses, deposit the balance of funds, not to exceed \$200,000.00, into the registry of the court, and pay any remaining funds to Byrom and the other two co-owners, Dimple Byrom and Dorothy Berry. Byrom and his wife, Dimple, appealed and argued that the order of sale was void because it violated their constitutional and statutory homestead rights.

The court of appeals affirmed. The court held that “the homestead and exemption laws of this state are not ‘the haven of wrongfully obtained money or properties’” and “the homestead protection afforded by the Texas Constitution was never intended to protect stolen funds.” *Id.* Regarding Byrom, the court concluded: “Because the record indicated that Byrom had paid for the construction of the home with money he wrongfully obtained from his mother’s estate, he

was not entitled to use the homestead law to his advantage.” *Id.* Further, regarding Dimple, the court concluded: “A wife cannot acquire homestead rights in property held in trust by her husband that defeat or impair the rights of the beneficiary of the trust. Accordingly, Dimple had no homestead rights in the property.” *Id.*

In *Koda v. Rossi*, a mother created a trust that provided that her son was to serve as trustee and that she, he, and a daughter were the beneficiaries. No. 11-15-0150-CV, 2017 Tex. App. LEXIS 8194 (Tex. App.—Eastland August 26, 2017, no pet.). Upon the mother’s death, the trust was to terminate and the trust estate would be distributed to her son and daughter. After the mother died, the son never formally terminated the trust and never distributed the trust estate. The daughter sued the son for breach of fiduciary duty and sought partition of real property owned by the trust. Her claims for breach of fiduciary duty were that the son had used trust funds to pay his own personal and business obligations and expenses in the amount of \$21,921.28, and that he had never made any distributions to her. After a bench trial, the trial court entered a judgment terminating the trust, awarding her attorney’s fees and expenses of \$17,349.60, and assessed “damages” against the son in the amount of \$1,647.25. The trial court also held that each of the parties owned an undivided 50% interest the trust’s property, and found that the real property was susceptible to partition in kind, and it ordered a partition. The son appealed on multiple grounds.

The court of appeals first addressed the son’s argument that the trial court should have granted him a new trial because his attorney did not perform well by not admitting evidence and allowing other evidence to be admitted. The court of appeals first held that “the doctrine of ineffective assistance of counsel does not apply to civil cases where, as here, there is no constitutional or statutory right to counsel.” *Id.* The court then held that the trial court did not abuse its discretion in making its evidentiary rulings. The court of appeals also held that it could not grant a new trial based solely on the interest of justice where the trial court did not commit any error.

The court of appeals then turned to the partition issue. The son argued that the trial court should not have ordered a partition in kind, but rather, should have ordered a partition by sale. The court of appeals held: “Texas law favors partition in kind. The burden of proof is upon the party who opposes partition in kind and seeks instead a partition by sale. The party who seeks partition by sale bears the burden to prove that a partition in kind would not be fair and equitable.” *Id.* The court examined the record for the existence of testimony that would show that the real property could not be fairly and equitably partitioned in kind. The real property consisted of sixty acres that appraised for

approximately \$230,000, that there was a house on the property, that there was a mortgage on the real property, and that a third party leased fifty-five acres of the property for deer hunting. The court concluded that the son did not meet his burden to show that the real property was not subject to a fair and equitable division and was, therefore, incapable of an in-kind partition.

The daughter also appealed and complained that the trial court erred when it failed to find that the son’s “actions in using funds belonging to the Trust to pay his business debts, writing checks to his corporation, and depositing funds belonging to the Trust into his personal bank accounts were a breach of his fiduciary duty entitling Agnes Rossi to additional damages.” She argued that he owed her an additional \$20,274.03 in trust funds that he expended for his personal benefit prior to the mother’s death. The trial court held that, before the trust terminated, the son, as a beneficiary, had the right to use the funds for himself. The son presented some testimony about the reasons for some of the withdrawals and expenditures, but the court held that “a judgment based upon that incomplete testimony is against the great weight and preponderance of the evidence upon this record.” The court sustained her cross-point and remanded the case for further proceedings.

VI. STATUTORY REMEDIES FOR TRUSTS

The Texas Trust Code has many provisions that provide remedies to beneficiaries. Below are some of the more commonly used statutory remedies.

A. Termination, Modification or Termination of Trust

- (a) On the petition of a trustee or a beneficiary, a court may order that the trustee be changed, that the terms of the trust be modified, that the trustee be directed or permitted to do acts that are not authorized or that are forbidden by the terms of the trust, that the trustee be prohibited from performing acts required by the terms of the trust, or that the trust be terminated in whole or in part, if: (1) the purposes of the trust have been fulfilled or have become illegal or impossible to fulfill; (2) because of circumstances not known to or anticipated by the settlor, the order will further the purposes of the trust; (3) modification of administrative, nondispositive terms of the trust is necessary or appropriate to prevent waste or impairment of the trust’s administration; (4) the order is necessary or appropriate to achieve the settlor’s tax objectives or to qualify a distributee for governmental benefits and is not contrary to the settlor’s

intentions; or (5) subject to Subsection (d): (A) continuance of the trust is not necessary to achieve any material purpose of the trust; or (B) the order is not inconsistent with a material purpose of the trust.

- (b) The court shall exercise its discretion to order a modification or termination under Subsection (a) or reformation under Subsection (b-1) in the manner that conforms as nearly as possible to the probable intention of the settlor. The court shall consider spendthrift provisions as a factor in making its decision whether to modify, terminate, or reform, but the court is not precluded from exercising its discretion to modify, terminate, or reform solely because the trust is a spendthrift trust.
- (b-1) On the petition of a trustee or a beneficiary, a court may order that the terms of the trust be reformed if: (1) reformation of administrative, nondispositive terms of the trust is necessary or appropriate to prevent waste or impairment of the trust's administration; (2) reformation is necessary or appropriate to achieve the settlor's tax objectives or to qualify a distributee for governmental benefits and is not contrary to the settlor's intentions; or (3) reformation is necessary to correct a scrivener's error in the governing document, even if unambiguous, to conform the terms to the settlor's intent.
- (c) The court may direct that an order described by Subsection (a)(4) or (b-1) has retroactive effect.
- (d) The court may not take the action permitted by Subsection (a)(5) unless all beneficiaries of the trust have consented to the order or are deemed to have consented to the order. A minor, incapacitated, unborn, or unascertained beneficiary is deemed to have consented if a person representing the beneficiary's interest under Section 115.013(c) has consented or if a guardian ad litem appointed to represent the beneficiary's interest under Section 115.014 consents on the beneficiary's behalf.
- (e) An order described by Subsection (b-1)(3) may be issued only if the settlor's intent is established by clear and convincing evidence.
- (f) Subsection (b-1) is not intended to state the exclusive basis for reformation of trusts, and the bases for reformation of trusts in equity or common law are not affected by this section.

Tex. Prop. Code Ann. §112.054.

B. Bond

Any interested person may bring an action to increase or decrease the amount of a bond, require a bond, or substitute or add sureties. Notwithstanding Subsection (b), for cause shown, a court may require a bond even if the instrument creating the trust provides otherwise.

Tex. Prop. Code Ann. §113.058.

C. Demand for Accounting

- (a) A beneficiary by written demand may request the trustee to deliver to each beneficiary of the trust a written statement of accounts covering all transactions since the last accounting or since the creation of the trust, whichever is later. If the trustee fails or refuses to deliver the statement on or before the 90th day after the date the trustee receives the demand or after a longer period ordered by a court, any beneficiary of the trust may file suit to compel the trustee to deliver the statement to all beneficiaries of the trust. The court may require the trustee to deliver a written statement of account to all beneficiaries on finding that the nature of the beneficiary's interest in the trust or the effect of the administration of the trust on the beneficiary's interest is sufficient to require an accounting by the trustee. However, the trustee is not obligated or required to account to the beneficiaries of a trust more frequently than once every 12 months unless a more frequent accounting is required by the court. If a beneficiary is successful in the suit to compel a statement under this section, the court may, in its discretion, award all or part of the costs of court and all of the suing beneficiary's reasonable and necessary attorney's fees and costs against the trustee in the trustee's individual capacity or in the trustee's capacity as trustee.
- (b) An interested person may file suit to compel the trustee to account to the interested person. The court may require the trustee to deliver a written statement of account to the interested person on finding that the nature of the interest in the trust of, the claim against the trust by, or the effect of the administration of the trust on the interested person is sufficient to require an accounting by the trustee.

Tex. Prop. Code Ann. §113.151.

D. Removal of A Trustee

A trustee may be removed in accordance with the terms of the trust instrument, or, on the petition of an

interested person and after hearing, a court may, in its discretion, remove a trustee and deny part or all of the trustee's compensation if: (1) the trustee materially violated or attempted to violate the terms of the trust and the violation or attempted violation results in a material financial loss to the trust; (2) the trustee becomes incapacitated or insolvent; (3) the trustee fails to make an accounting that is required by law or by the terms of the trust; or (4) the court finds other cause for removal.

Tex. Prop. Code Ann. §113.082.

E. Trustee Liability

The trustee is accountable to a beneficiary for the trust property and for any profit made by the trustee through or arising out of the administration of the trust, even though the profit does not result from a breach of trust; provided, however, that the trustee is not required to return to a beneficiary the trustee's compensation as provided by this subtitle, by the terms of the trust instrument, or by a writing delivered to the trustee and signed by all beneficiaries of the trust who have full legal capacity.

A trustee who commits a breach of trust is chargeable with any damages resulting from such breach of trust, including but not limited to: (1) any loss or depreciation in value of the trust estate as a result of the breach of trust; (2) any profit made by the trustee through the breach of trust; or (3) any profit that would have accrued to the trust estate if there had been no breach of trust.

Tex. Prop. Code Ann. §114.001(a), (c).

F. Beneficiaries' Remedies

To remedy a breach of trust that has occurred or might occur, the court may: (1) compel the trustee to perform the trustee's duty or duties; (2) enjoin the trustee from committing a breach of trust; (3) compel the trustee to redress a breach of trust, including compelling the trustee to pay money or to restore property; (4) order a trustee to account; (5) appoint a receiver to take possession of the trust property and administer the trust; (6) suspend the trustee; (7) remove the trustee as provided under Section 113.082; (8) reduce or deny compensation to the trustee; (9) subject to Subsection (b), void an act of the trustee, impose a lien or a constructive trust on trust property, or trace trust property of which the trustee wrongfully disposed and recover the property or the proceeds from the property; or (10) order any other appropriate relief.

Tex. Prop. Code Ann. 114.008.

G. Forfeiture of Compensation

If the trustee commits a breach of trust, the court may in its discretion deny him all or part of his compensation.

Tex. Prop. Code Ann. 114.061.

H. Attorney's Fees and Costs

In any proceeding under this code the court may make such award of costs and reasonable and necessary attorney's fees as may seem equitable and just.

Tex. Prop. Code Ann. 114.064.

I. Court Jurisdiction

Except as provided by Subsection (d) of this section, a district court has original and exclusive jurisdiction over all proceedings by or against a trustee and all proceedings concerning trusts, including proceedings to: (1) construe a trust instrument; (2) determine the law applicable to a trust instrument; (3) appoint or remove a trustee; (4) determine the powers, responsibilities, duties, and liability of a trustee; (5) ascertain beneficiaries; (6) make determinations of fact affecting the administration, distribution, or duration of a trust; (7) determine a question arising in the administration or distribution of a trust; (8) relieve a trustee from any or all of the duties, limitations, and restrictions otherwise existing under the terms of the trust instrument or of this subtitle; (9) require an accounting by a trustee, review trustee fees, and settle interim or final accounts; and (10) surcharge a trustee.

- (a-1) The list of proceedings described by Subsection (a) over which a district court has exclusive and original jurisdiction is not exhaustive. A district court has exclusive and original jurisdiction over a proceeding by or against a trustee or a proceeding concerning a trust under Subsection (a) whether or not the proceeding is listed in Subsection (a).
- (b) The district court may exercise the powers of a court of equity in matters pertaining to trusts.
- (c) The court may intervene in the administration of a trust to the extent that the court's jurisdiction is invoked by an interested person or as otherwise provided by law. A trust is not subject to continuing judicial supervision unless the court orders continuing judicial supervision.

Tex. Prop. Code Ann. 115.001.

VII. DETERMINATION OF REMEDIES

One issue that arises is what fact finder determines the appropriateness or amount of a remedy. Is a plaintiff or defendant entitled to submit a requested remedy, or any aspect of it, to a jury or may a trial court alone determine the availability of the remedy?

If requested, a jury should determine the amount of damages at law that should be awarded to a plaintiff where there is a fact issue. *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 367 (Tex. 2000); *Ogu*

v. *C.I.A. Servs.*, No. 01-07-00933-CV, 2009 Tex. App. LEXIS 78 (Tex. App.—Houston [1st Dist.] Jan. 8, 2009, no pet.). In Texas, a jury’s verdict has a “special, significant sacredness and inviolability.” *Crawford v. Standard Fire Ins. Co.*, 779 S.W.2d 935, 941 (Tex. App.—Beaumont 1989, no writ). The Texas Constitution requires that the right to trial by jury remain inviolate. Tex. Const., art. I, § 15; *Crawford*, 779 S.W.2d at 941. Denial of the constitutional right to trial by jury amounts to an abuse of discretion for which a new trial is the only remedy. *McDaniel v. Yarbrough*, 898 S.W.2d 251, 253 (Tex. 1995).

Of course, a party must appropriately request a jury and object to any failure to provide one. *Duenas v. Duenas*, No. 13-07-089-CV, 2007 Tex. App. LEXIS 5622 (Tex. App.—Corpus Christi July 12, 2007, no pet.) (Because a party did not timely object regarding his right to a jury trial, the matter was waived.). Further, where there is no fact issue, then a trial court does not err in refusing to submit an issue to a jury. *See Willms v. Americas Tire Co.*, 190 S.W.3d 796 (Tex. App.—Dallas 2006, pet. denied) (the granting of summary judgment did not violate a constitutional right to a jury trial because no material issues of fact existed to submit to a jury.).

However, a court, in its equitable jurisdiction, should determine whether an equitable remedy should be granted. *See Wagner & Brown, Ltd. v. Sheppard*, 282 S.W.3d 419, 428-29 (Tex. 2008) (“As with other equitable actions, a jury may have to settle disputed issues about what happened, but “the expediency, necessity, or propriety of equitable relief” is for the trial court ...”). The Texas Supreme Court stated: “Although a litigant has the right to a trial by jury in an equitable action, only ultimate issues of fact are submitted for jury determination. The jury does not determine the expediency, necessity, or propriety of equitable relief. The determination of whether to grant an injunction based upon ultimate issues of fact found by the jury is for the trial court, exercising chancery powers, not the jury.” *State v. Texas Pet. Foods, Inc.*, 591 S.W.2d 800, 803 (Tex. 1979); *Bostow v. Bank of Am.*, No. 14-04-00256-CV, 2006 Tex. App. LEXIS 377 (Tex. App.—Houston [14th Dist.] Jan. 17, 2006, no pet.); *Shields v. State*, 27 S.W.3d 267, 272 (Tex. App.—Austin 2000, no pet.). The jury’s findings on issues of fact are binding; however, equitable principles and the appropriate relief to be afforded by equity are only to be applied by the court itself. *Shields*, 27 S.W.3d at 272. Because the court alone fashions equitable relief, it is not always confined to the literal findings of the jury in designing the injunction. *Id.*

For example, the Texas Supreme Court recently held: “A jury does not determine the expediency, necessity, or propriety of equitable relief such as disgorgement or constructive trust.” *Longview Energy*

Co. v. Huff Energy Fund LP, No. 15-0968, 2017 Tex. LEXIS 525, 2017 WL 2492004 (Tex. June 9, 2017) (citing *Burrow v. Arce*, 997 S.W.2d 229, 245 (Tex. 1999)). “Whether ‘a constructive trust should be imposed must be determined by a court based on the equity of the circumstances.’” *Id.* “The scope and application of equitable relief such as a constructive trust ‘within some limitations, is generally left to the discretion of the court imposing it.’” *Id.* (citing *Baker Botts, L.L.P. v. Cailloux*, 224 S.W.3d 723, 736 (Tex. App.—San Antonio 2007, pet. denied).

“If ‘contested fact issues must be resolved before a court can determine the expediency, necessity, or propriety of equitable relief, a party is entitled to have a jury resolve the disputed fact issues.’” *Id.* (citing *DiGiuseppe v. Lawler*, 269 S.W.3d 588, 596 (Tex. 2008)). “But uncontroverted issues do not need to be submitted to a jury.” *Id.* (citing *City of Keller v. Wilson*, 168 S.W.3d 802, 815 (Tex. 2005)). *See also Wilz v. Flournoy*, 228 S.W.3d 674, 676-77 (Tex. 2007) (noting that in the underlying trial, the jury found that no personal funds were used to purchase the farm, which justified the award of a constructive trust on the farm.); *Paschal v. Great W. Drilling, Ltd.*, 215 S.W.3d 437, 445 (Tex. App.—Eastland 2006, pet. denied) (“The jury found that all of the premiums on the four policies were paid with funds that Alan stole from Great Western. Accordingly, the trial court imposed a constructive trust on all of the funds remaining in existence from the life insurance proceeds.”).

So, if properly requested and preserved, a party is entitled to submit a fact issue on legal damages to a jury. However, if a party seeks an equitable remedy, the trial court normally has the sole right to resolve that request. If there is some underlying fact issue that must be resolved with regard to the equitable remedy, then that fact issue should be submitted to a jury. Parties should be very careful to evaluate all requested remedies before trial and determine what should be submitted to the court and what should be submitted to a jury. Otherwise, after trial, a court may determine that a party waived the right to a jury on a fact issue, and either refuse to award the remedy or grant the remedy and supporting findings may be found in support of a trial court’s judgment. Tex. R. Civ. P. 279; *Bostow v. Bank of Am.*, No. 14-04-00256-CV, 2006 Tex. App. LEXIS 377 (Tex. App.—Houston [14th Dist.] Jan. 17, 2006, no pet.) (“[T]he jury’s finding as to Bostow’s harassing conduct is a sufficient finding on the ultimate issues of fact to support the trial court’s exercise of discretion in granting a permanent injunction. Thus, the Bank did not abandon its claim for injunctive relief by failing to submit fact questions to the jury that would support its entitlement to injunctive relief.”). *See also Valenzuela v. Aquino*, 853 S.W.2d 512, 513 (Tex. 1993) (suggesting permanent injunction could be based on jury finding liability for

invasion of privacy); *Memon v. Shaikh*, 401 S.W.3d 407, 423 (Tex. App.—Houston [14th Dist.] 2013, no pet.) (holding jury's defamation finding supported permanent injunction).

VIII. THEORIES FOR JOINT AND SEVERAL LIABILITY

A. General Authority

A plaintiff may assert that multiple defendants are liable for the fiduciary's conduct if the facts support joint liability. The Texas Supreme Court held that there is a claim for knowing participation in a breach of fiduciary duty. *Kinzbach Tool Co. v. Corbett-Wallace Corp.*, 138 Tex. 565, 160 S.W.2d 509, 514 (1942). The general elements for a knowing-participation claim are: 1) the existence of a fiduciary relationship; 2) the third party knew of the fiduciary relationship; and 3) the third party was aware it was participating in the breach of that fiduciary relationship. *Meadows v. Harford Life Ins. Co.*, 492 F.3d 634, 639 (5th Cir. 2007).

Depending on how the Texas Supreme Court rules in the future, there may be a recognized aiding-and-abetting breach-of-fiduciary-duty claim in Texas. The Texas Supreme Court has stated that it has not expressly adopted a claim for aiding and abetting outside the context of a fraud claim. *Ernst & Young v. Pacific Mut. Life Ins. Co.*, 51 S.W.3d 573, 583 n. 7 (Tex. 2001); *West Fork Advisors v. Sungard Consulting*, 437 S.W.3d 917 (Tex. App.—Dallas 2014, no pet.). Notwithstanding, Texas courts have found such an action to exist. *endricks v. Thornton*, 973 S.W.2d 348 (Tex. App.—Beaumont 1998, pet. denied); *Floyd v. Hefner*, 556 F.Supp.2d 617 (S.D. Tex. 2008). One court identified the elements for aiding and abetting as the defendant must act with unlawful intent and give substantial assistance and encouragement to a wrongdoer in a tortious act. *West Fork Advisors*, 437 S.W.3d at 921.

There is not any particularly compelling guidance on whether these claims (knowing participation and aiding and abetting) are the same or different or whether they are recognized in Texas or not. And if they do exist and are different, what differences are there regarding the elements of each claim? The Texas Supreme Court still has much to explain related to this area of law.

The Texas Supreme Court does appear to clear up one important causation issue. There was confusion as to whether a finding of conspiracy or aiding and abetting or knowing participation automatically imposes joint liability on all defendants for all damages. Most of the cases seem to indicate that a separate damage finding is necessary for each defendant because the conspiracy may not proximately cause the same damages as the original bad act. *THPD, Inc. v. Continental Imports, Inc.*, 260 S.W.3d 593 (Tex.

App.—Austin 2008, no pet.); *Bunton v. Bentley*, 176 S.W.3d 1 (Tex. App.—Tyler 1999), *aff'd in part, rev'd in part on other grounds*, 914 S.W.3d 561 (Tex. 2002); *Belz v. Belz*, 667 S.W.2d 240 (Tex. App.—Dallas 1984, writ ref'd n.r.e.). The Court has now held that the conspiracy defendant's actions must cause the damages awarded against it, and a plaintiff cannot solely rely on just the original bad actor's conduct. *First United Pentecostal Church of Beaumont v. Parker*, 2017 Tex. LEXIS 295 (Tex. March 17, 2017). So, there should be a finding of causation and damages for each conspiracy defendant (unless the evidence proves as a matter of law that all conspiracy defendants were involved from the very beginning). For a great discussion of these forms of joint liability for breach of fiduciary duty, please see E. Link Beck, *Joint and Several Liability*, STATE BAR OF TEXAS, 10TH ANNUAL FIDUCIARY LITIGATION COURSE (2015).

B. Recent Cases

In *First United Pentecostal Church of Beaumont v. Parker*, a church hired an attorney to defend it against sexual abuse allegations. 2017 Tex. LEXIS 295 (Tex. March 17, 2017). During the same time, the church also engaged the attorney to assist in a hurricane/insurance claim. When the insurance company offered to pay over \$1 million to settle the claim, the attorney generously suggested that the church leave those funds in the attorney's trust account to assist with creditor protection. The attorney then withdrew those funds in 2008 and used them for his personal expenses and the expenses of his firm. The attorney had a contract attorney working with his firm. The contract attorney did not know about the improper use of the money at the time that it was done. Rather, he learned about it in 2010, but failed to disclose that information to the client. Eventually, the contract attorney did disclose the information and sent a letter wherein he repented and admitted to breaching his fiduciary duty. The original attorney fled to Arkansas, but was later caught. He pled guilty to misappropriation of fiduciary property and received a fifteen-year sentence.

Not in the forgiving mood, the church then filed a lawsuit against the attorney, his firm, and the contract attorney for a number of causes of action, including breach of fiduciary duty, conspiracy to breach fiduciary duty, and aiding and abetting breach of fiduciary duty. The contract attorney filed a no-evidence motion for summary judgment, mainly arguing that there was no evidence that his conduct caused any damages to the client. Basically, he argued that the deed was already done when he learned of the attorney's theft and his assistance in covering up the theft did not cause any damage. The trial court granted the motion for summary judgment, and the client

appealed. The court of appeals affirmed the judgment, though there was a dissenting justice.

The Texas Supreme Court first addressed whether the trial court correctly rendered judgment for the contract attorney on the breach-of-fiduciary-duty claim. The court held that the elements of a claim for breach of fiduciary duty are (1) the existence of a fiduciary duty, (2) breach of the duty, (3) causation, and (4) damages. The court agreed in part with the client's argument that under *Kinzbach Tool Co. v. Corbett-Wallace Corp.*, 160 S.W.2d 509, 514 (Tex. 1942), that proof of damages was not required when the claim is that an attorney breached his fiduciary duty to a client and that the client need not produce evidence that the breach caused actual damages. The court held that when the client seeks equitable remedies such as fee forfeiture or disgorgement, that the client does not need to prove that the attorney's breach caused any damages. However, the court held that when the client seeks an award of damages (a legal remedy) that the client does have to prove that the attorney's breach caused the client injury:

Plainly put, for the church to have defeated a no-evidence motion for summary judgment as to a claim for actual damages, the church must have provided evidence that Parker's actions were causally related to the loss of its money. It did not do so. On the other hand, the church was not required to show causation and actual damages as to any equitable remedies it sought.

Id. The contract attorney argued that the summary judgment should be affirmed because, although the client did plead equitable remedies in the trial court, that the client waived those claims by failing to raise them in its appellate briefing. The court held that, although the client did not use the terms "equitable," "forfeiture," or "disgorgement" in its brief, that the client's issue statement "fairly" included that argument. The court reversed the trial court's summary judgment regarding the client's equitable remedies because there was no causation requirement.

The court then turned to the conspiracy claim. The court held that an action for civil conspiracy has five elements: (1) a combination of two or more persons; (2) the persons seek to accomplish an object or course of action; (3) the persons reach a meeting of the minds on the object or course of action; (4) one or more unlawful, overt acts are taken in pursuance of the object or course of action; and (5) damages occur as a proximate result. The court explained:

An actionable civil conspiracy requires specific intent to agree to accomplish something unlawful or to accomplish

something lawful by unlawful means. This inherently requires a meeting of the minds on the object or course of action. Thus, an actionable civil conspiracy exists only as to those parties who are aware of the intended harm or proposed wrongful conduct at the outset of the combination or agreement.

Id. In this case, the client argued that there were two possible conspiracies: an initial conspiracy to steal its money, and a subsequent conspiracy to cover up the theft. Regarding the first theory, the court held that there was no evidence that the contract attorney knew that the original attorney had withdrawn and spent the money at the time that it happened and affirmed the trial court's summary judgment on that theory. Regarding the second theory, the court held that there was no evidence that the contract attorney's actions caused any damage. The court held that a conspiracy plaintiff must establish that a conspiracy defendant's actions caused an amount of harm, and thus prior actions by co-conspirators are not sufficient to prove causation:

The actions of one member in a conspiracy might support a finding of liability as to all of the members. But even where a conspiracy is established, wrongful acts by one member of the conspiracy that occurred before the agreement creating the conspiracy do not simply carry forward, tack on to the conspiracy, and support liability for each member of the conspiracy as to the prior acts. Rather, for conspirators to have individual liability as a result of the conspiracy, the actions agreed to by the conspirators must cause the damages claimed. Here the church does not reference evidence of a conspiracy between Parker and Lamb to take or spend the church's money. Rather, it points to evidence that once Parker learned that the church's money was gone, he was concerned—as he well should have been—and he agreed with Lamb to try to replace it. The evidence that Parker conspired with Lamb to cover up the fact that the money was missing and attempt to replace it was evidence that Parker tried to mitigate the church's loss, not that he conspired to cause it. The damage to the church had already been done when Parker and Lamb agreed to cover up the theft and try to replace the money.

Id. The court affirmed the trial court's summary judgment on the conspiracy claim.

The court reviewed the aiding and abetting breach of fiduciary duty claim. The court first held that the client did not adequately raise that claim in the summary judgment proceedings and waived it. In any event, assuming such a claim existed and assuming it was adequately raised, the court held that there was not sufficient evidence to support such a claim in this case:

Moreover, as noted above, although we have never expressly recognized a distinct aiding and abetting cause of action, the court of appeals determined that such a claim requires evidence that the defendant, with wrongful intent, substantially assisted and encouraged a tortfeasor in a wrongful act that harmed the plaintiff. Here the church references no evidence that Parker assisted or encouraged Lamb in stealing the church's money. In his response to the PSI report, Lamb disclaimed Parker's involvement, and Parker clearly and consistently disclaimed knowing that Lamb was taking the church's money from the firm's trust account until the summer of 2010 after the money was gone. While it is true that Parker helped Lamb cover up the theft, this cannot be the basis for a claim against Parker for aiding and abetting Lamb's prior theft or misapplication of the church's money when there is no evidence that Parker was aware of Lamb's plans or actions until after they had taken place. *See Juhl*, 936 S.W.2d at 644-45 (noting that courts should look to the nature of the wrongful act, kind and amount of assistance, relation to the actor, defendant's presence while the wrongful act was committed, and defendant's state of mind (citing RESTATEMENT (SECOND) OF TORTS § 876 cmt. d (1977))). As we discussed above, Lamb spent all of the church's money before Parker became involved, and there is no evidence the church was harmed by the only wrongful act in which Parker assisted or encouraged Lamb—covering up the fact that Lamb had spent the church's money.

Id. The court finally addressed a joint venture claim by the client. The court held that the elements of a joint venture are (1) an express or implied agreement to engage in a joint venture, (2) a community of interest in the venture, (3) an agreement to share profits and losses from the enterprise, and (4) a mutual right of control or management of the enterprise. "Joint venture liability serves to make each party to the venture an agent of the other venturers and hold each venturer responsible for the wrongful acts of the others in pursuance of the venture." The court reviewed

evidence offered by the client and held that it was taken out of context. The court held that none of the evidence provided support for the client's claim that there was "an express or implied agreement by Parker to be part of a joint venture with Lamb for the purpose of stealing the church's money." Therefore, the court affirmed the summary judgment on the joint venture claim.

In *Zaidi v. Shah*, business partners were involved in litigation regarding the purchase and sale of real property for the operation of a hospital. 502 S.W.3d 434 (Tex. App.—Houston [14th Dist.] 2016, pet. denied). The trial court found for the plaintiffs against all defendants, and awarded over \$13 million dollars in damages. One of the plaintiffs' claims was that the defendants breached a fiduciary duty, and the court found that the defendants, individually and collectively, owed fiduciary duties to the plaintiffs and committed various acts and omissions that would breach such duties, such as making material misrepresentations and failing to disclose material facts. One set of defendants challenged this holding because they did not owe fiduciary duties. The court of appeals held:

Fiduciary duties arise in two types of relationships. A confidential relationship—which may arise from a moral, social, domestic, or purely personal relationship of trust and confidence—may give rise to an informal fiduciary duty. An informal fiduciary duty will not be imposed in a business transaction unless the personal confidential relationship existed prior to, and apart from, "the agreement made the basis of the suit."

Id. The court noted that the plaintiffs neither alleged nor offered evidence of such a preexisting confidential relationship with any member of the appealing defendants. The court also noted that the plaintiffs did not dispute the absence of fiduciary duties, but instead argued only that one defendant was a fiduciary to many parties and that "all entities and individuals who conspired with, participated with, aided/abetted, or employed Zaidi while he was committing any breaches of fiduciary duty were also responsible for those breaches." *Id.* The court of appeals noted that there was a difference between a breach-of-fiduciary-duty claim and an aiding-and-abetting breach-of-fiduciary duty claim:

But, to hold the General Partner, Chagla, and Prestige liable for conspiring in Zaidi's breach of fiduciary duty is one theory of liability, and to hold them liable for breaching their own fiduciary duties is a

distinct theory of liability. Regardless of whether there is legally sufficient evidence that Zaidi's co-defendants conspired in his breach of fiduciary duty—a question we do not address—such evidence would not support a finding that each of the Turnaround Parties owed fiduciary duties to each of the Borrowers.

Id. The court of appeals reversed and remanded the case for a new trial because the trial court in a bench trial failed to adequately present findings of fact and conclusions of law that linked its damages findings to valid causes of action.

IX. CONCLUSION

Fiduciary relationships create broad rights and remedies. The law in Texas is ever changing and being refined by the courts. The Author regularly reports on fiduciary cases and damages precedent, which can be found on his blog, www.txfiduciaryliterator.com. The author hopes that this paper assists parties in Texas to understand their rights and remedies.

