Affirmed as Modified and Opinion Filed May 18, 2016

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-15-00369-CV

MORGAN KEEGAN & CO., INC. AND
MORGAN ASSET MANAGEMENT, INC., Appellants and Cross-Appellees
V.
PURDUE AVENUE INVESTORS LP, AND
DANA HOWARD, AS TRUSTEE OF THE MOLLY A. HOWARD TRUST,
Appellees and Cross-Appellants

On Appeal from the 101st Judicial District Court
Dallas County, Texas
Trial Court Cause No. DC-09-14448

MEMORANDUM OPINION

Before Justices Francis, Lang-Miers, and Myers
Opinion by Justice Francis

Appellees sued appellants for securities fraud. After a bench trial, the trial court made findings of fact and conclusions of law and rendered judgment for appellees. Appellants contend:

- appellees' claims are barred by limitations;
- the trial court's rulings under the Texas Securities Act were erroneous;
- the trial court demonstrated bias and prejudice;
- the trial court erroneously admitted evidence; and
- the damages award did not include required offsets.

Appellees assert a cross-appeal for recovery of their attorney's fees. For the reasons stated below, we modify the trial court's judgment and affirm the judgment as modified.

BACKGROUND

Appellee Purdue Avenue Investors LP is a limited partnership owned by Robert and Dana Howard, who are husband and wife. Dana is the trustee of the Molly A. Howard Trust formed by the Howards on their daughter's behalf. In this capacity Dana is a party to the trial court's judgment and an appellee in this appeal. We will refer to appellees as "the Howards," or to Robert individually.[1] On the Howards' behalf, Robert invested more than $2 million in two bond funds, the RMK Advantage Income Fund and the RMK Strategic Income Fund (the "Funds"). Robert, a stockbroker, read the Funds' prospectuses prior to his purchase.

Appellant Morgan Keegan & Co., Inc. (MKC) was one of the primary underwriters of the Funds. Appellant Morgan Asset Management, Inc. (MAM) was the investment advisor that managed the Funds' portfolios. James Kelsoe, a former defendant in this case, was employed by MAM to manage the Funds day-to-day.

The Funds ultimately lost over $2 billion, and the Howards lost their investment. The Howards filed suit on October 23, 2009, alleging common law fraud and violations of the Texas Securities Act. *See* TEX. REV. CIV. STAT. ANN. art. 581-33 (West 2010) ("Civil Liability with Respect to Issuance or Sale of a Security"); *see also* TEX. REV. CIV. STAT. ANN. arts. 581-1 to 581-43 (West 2010 & Supp. 2015) (TSA). The Howards alleged that MKC and MAM misrepresented the Funds' investment strategy and failed to disclose the associated risks.

Two expert witnesses testified at trial. Craig McCann, the Howards' expert, opined that MKC and MAM failed to disclose the risks associated with the Funds' true investment strategy

[1] Mary Ann Howard, Robert's mother, was originally a plaintiff. She is now deceased, and Robert has been appointed the personal representative of her estate. The trial court granted appellants' motion for summary judgment against Mary Ann Howard on the ground that her claims were barred by limitations. This ruling is not challenged in this appeal.

and "overwhelming exposure" to mortgage-backed securities. Christopher Laursen, MKC and MAM's expert, rejected McCann's conclusions and testified that all risks were appropriately disclosed. Laursen attributed the Funds' losses to the 2007 global financial crisis.

The trial court's judgment recites that it is rendered under article "581-33(c)(2)" of the TSA, and that all other claims are denied. The trial court's findings of fact and conclusions of law, however, recite that MKC and MAM "are jointly and several [sic] liable to Plaintiffs for violations of Sections 33C and 33F(1) and (2)" of the TSA. The trial court also denied all parties' requests for attorney's fees. The parties' motions for new trial were overruled by operation of law, and this appeal followed.

STANDARDS OF REVIEW

Findings of fact made after a bench trial have the same force and effect as jury findings. *Jamison v. Allen*, 377 S.W.3d 819, 823 (Tex. App.—Dallas 2012, no pet.). The applicable standard of review is the same as that applied in the review of jury findings. *Id.* The test for legal sufficiency is whether the evidence would enable reasonable and fair-minded people to reach the verdict under review. *City of Keller v. Wilson*, 168 S.W.3d 802, 827 (Tex. 2005). In our review, we credit favorable evidence if a reasonable fact-finder could and disregard contrary evidence unless a reasonable fact-finder could not. *Id.* In reviewing a finding for factual sufficiency, we will set aside the finding only if the evidence supporting the finding is so weak or is so against the overwhelming weight of the evidence that the finding is clearly wrong and unjust. *Jamison*, 377 S.W.3d at 823.

We review de novo the trial court's conclusions of law. *See BMC Software Belgium, N.V. v. Marchand*, 83 S.W.3d 789, 794 (Tex. 2002). An appellant may not challenge a trial court's conclusions of law for factual insufficiency; however, the reviewing court may review the trial court's legal conclusions drawn from the facts to determine their correctness. *Id.*

Because a trial court's conclusions of law are not binding on us, we will not reverse a trial court's judgment based on an incorrect conclusion of law when the controlling findings of fact support the judgment on a correct legal theory. *Wise Elec. Coop., Inc. v. Am. Hat Co.*, 476 S.W.3d 671, 679 (Tex. App.—Fort Worth 2015, no pet.). Further, we must uphold a correct lower court judgment on any legal theory before it, even if the court gives an incorrect reason for its judgment. *In re Estate of Hutchins*, 391 S.W.3d 578, 585 (Tex. App.—Dallas 2012, no pet.) (quoting *Guaranty Cnty. Mut. Ins. Co. v. Reyna*, 709 S.W.2d 647, 648 (Tex. 1986)). But we will not affirm a trial court's judgment based on a legal theory not presented to the trial court and to which appellants had no opportunity to respond. *Victoria Gardens of Frisco v. Walrath*, 257 S.W.3d 284, 290 (Tex. App.—Dallas 2008, pet. denied).

DISCUSSION

A. Limitations

In their first issue MKC and MAM assert that the Howards' claims were barred by the TSA's statute of limitations. Section 33H(2) of the TSA provides that "[n]o person may sue under Section 33A(2), 33C, or 33F so far as it relates to 33A(2) or 33C: (a) more than three years after discovery of the untruth or omission, or after discovery should have been made by the exercise of reasonable diligence." TSA § 33H(2). "Inquiries involving the discovery rule usually entail questions for the trier of fact," but "commencement of the limitations period may be determined as a matter of law if reasonable minds could not differ about the conclusion to be drawn from the facts in the record." *Childs v. Haussecker*, 974 S.W.2d 31, 44 (Tex. 1998).

MKC and MAM argue that the Howards knew or should have known of the alleged misrepresentations "no later than the fall of 2004," but did not bring suit until 2009. MKC and MAM contend that the "exact risk" of which the Howards complained—that the Funds were concentrated in below investment-grade structured finance—was "expressly disclosed" in the

Funds' 2004 semi-annual report. Specifically, MKC and MAM maintain the report disclosed that more than 70% of the Funds were invested in asset-backed and mortgage-backed securities. They say Robert received the 2004 semi-annual report and read at least some of it, and as a stockbroker, had the knowledge and experience to understand it. In addition, MKC and MAM rely on a 2002 magazine article and a 2004 Morningstar report to argue that information about the Funds' risks was publicly available to the Howards. In sum, the Howards should have known the risks they were accepting when they invested in the Funds.

The Howards, however, introduced evidence at trial that the Funds' prospectuses[2] and other reports were materially misleading and did not disclose the true risks of investment. McCann testified that the principal investment strategy for the Funds and the principal associated risks were not disclosed until after the Funds lost 65 percent of their value in 2007. He explained that the Funds' losses were not typical of high-yield bond funds; other high-yield bond funds recovered from their 2007 losses but the Funds did not. Unlike other funds, these Funds concentrated their investments in the lowest level—the "mezzanine and subordinated tranches"—of structured finance securities. These levels involved the lowest-quality investments bearing the highest risk. McCann testified that the prospectuses did not disclose the heightened risk or lack of diversity of the Funds' investments.

Robert testified that the prospectuses and reports he read[3] did not reveal the extent to which the Funds were invested in structured finance, or the extent to which they were invested in low-priority tranches. He understood, and favorably viewed, the "junk bond category" of investments as "the opportunity to perhaps get a better yield," but explained that he sought to

[2] At trial Kelsoe testified that the prospectuses for the two Funds were "almost identical," although the holdings were not. The parties refer to "the prospectus" for the Funds in both the singular and plural, as do we.

[3] Robert testified that he "normally would have looked at" a Morningstar report, but was not aware of the 2002 article or the magazine in which it appeared. McCann said that the Morningstar report was not a disclosure document and in any event did not describe the principal strategy and risk of the Funds.

achieve "a consistent income level" through an investment "that had low volatility and was, you know, reasonably conservative." He explained that he considered high-yield junk bonds to be a conservative investment "if they're well diversified." Robert stated that the most important factor in his decision to invest in the Funds was the prospectuses' stated objective to invest "in a diversified portfolio of securities." He understood this objective to mean that "the fund would be buying a large variety of fixed income securities in all sorts of different sectors of the economy." Robert testified:

> Q. Did you see any language in anything you read in the prospectus that suggested that 60 percent of this fund would be invested in structured debt?
>
> A. Well, I wouldn't have even gone to the next sentence if they had said that.
>
> Q. Did you see anything like that?
>
> A. No, I did not see that.
>
> Q. Had you seen something like that, what would you have done?
>
> A. I would have looked for a different bond fund.

On cross-examination, Robert was questioned about the 2004 "Statements of Additional Information" for the Funds that contained "more detailed information about the types of instruments in which the Fund may invest, [and] strategies the Adviser[4] may employ in pursuit of the Fund's investment objectives and a discussion of related risks." Robert conceded that the Statements "disclosed the fact that the fund had the ability to purchase subordinated securities," but added, "they don't tell me they're going to put the vast majority of the portfolio in them."

Counsel for MKC and MAM also questioned Robert about the Funds' 2004 annual report, asserting that a review of the report "would have shown you that these funds had about 60 to 70 percent of their assets in asset-backed and mortgage-backed securities." Robert answered,

[4] In the Statements, MAM is identified as the "Adviser."

"[t]hat's not the way I read it." He admitted he understood the Funds would purchase both asset-backed and mortgage-backed securities. But on redirect, he explained that the report failed to reveal "the fact that there was a high concentration of low tranche securities in that fund," "how heavily any of those underlying assets might have been subordinated," or "the extent to which they were leveraged."

Robert also told the court he did not take his investment out of the Funds in 2007 when market turmoil began because "there was no evidence whatsoever that there was anything about this bond fund that was other than, you know, a market swoon." He explained, "I listened to a conference call that Kelsoe put on to shareholders sometime in the fall of '07. And, man, I was ready to buy more. And they continued to make their dividend distribution." Howard testified that "the way you really tell if things are a problem, they don't have the money to distribute." But the Funds "continued to pay the dividend." McCann did say, however, that the Funds "collapsed" around the same time, losing over 65 percent of their value. The Howards brought suit in 2009, less than two years later.

Robert's testimony and McCann's detailed analysis of the failures to disclose material information about the Funds provided evidence to support a finding that the Howards filed suit less than three years after they discovered, or should have discovered in the exercise of reasonable diligence, the "untruth or omission" that is the basis for their claims. TSA § 33H(2). The evidence supporting the trial court's implied finding and conclusion that the Howards' claims were not barred by limitations is not so weak or so against the overwhelming weight of the evidence that the finding is clearly wrong and unjust. *See Jamison*, 377 S.W.3d at 823. We overrule MKC and MAM's first issue.

B. Proper Legal Theory

The TSA establishes both "primary" and "secondary" liability for securities violations. *Darocy v. Abildtrup*, 345 S.W.3d 129, 136 (Tex. App.—Dallas 2011, no pet.) (citing *Sterling Trust Co. v. Adderley*, 168 S.W.3d 835, 839 (Tex. 2005)). TSA section 33 provides for primary liability of sellers (§ 33A), buyers (§ 33B), or "nonselling issuers which register" (§ 33C). Primary liability under section 33C is imposed on an issuer who registers securities for offer or sale "[i]f the prospectus required in connection with the registration contains, as of its effective date, an untrue statement of a material fact or an omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading," unless the issuer "sustains the burden of proof that the buyer knew of the untruth or omission." TSA § 33C(1), (2).

Secondary liability is derivative liability for another person's securities violation. *Sterling Trust Co.*, 168 S.W.3d at 839. It can "attach to either a control person, defined as '[a] person who directly or indirectly controls a seller, buyer, or issuer of a security' or to an aider, defined as one 'who directly or indirectly with intent to deceive or defraud or with reckless disregard for the truth or the law materially aids a seller, buyer or issuer of a security.'" *Id.* (quoting TSA § 33F(1)–(2)). Both control persons and aiders are jointly and severally liable with the primary violator "to the same extent as if [they] were" the primary violator. *Id.* (quoting TSA § 33F(1)–(2)). But the TSA provides different knowledge requirements for the two classes of defendants. *Id.* at 843.

We have applied a two-prong test to determine whether a defendant is a "control person" under the TSA. *Barnes v. SWS Fin. Servs.*, 97 S.W.3d 759, 764 (Tex. App.—Dallas 2003, no pet.). A defendant is a control person if it (1) exercised control over the operations of the corporation in general, and (2) had the power to control the specific activity upon which the

primary violation is predicated. *Id.* (citing *Frank v. Bear, Stearns & Co.*, 11 S.W.3d 380, 384 (Tex. App.—Houston [14th Dist.] 2000, pet. denied)). A control person is "absolved of liability" if he sustains the burden of proving that "he did not know, and in the exercise of reasonable care could not have known, of the existence of the facts by reason of which the liability is alleged to exist." *Sterling Trust Co.*, 168 S.W.3d at 844 (quoting TSA § 33F(1)).

To establish liability of an aider, a plaintiff must prove the aider acted "with intent to deceive or defraud or with reckless disregard for the truth or the law." *Id.* (quoting TSA § 33F(2)). The plaintiff must demonstrate (1) a primary violation of the securities laws occurred; (2) the alleged aider had "general awareness" of its role in this violation; (3) the actor rendered "substantial assistance" in this violation; and (4) the alleged aider either (a) intended to deceive the plaintiff or (b) acted with reckless disregard for the truth of the representations made by the primary violator. *Darocy*, 345 S.W.3d at 138–39 (quoting *Frank*, 11 S.W.3d at 384).

The trial court's judgment recites that MKC and MAM's liability is premised on section 33C(2), and states that "any and all other remaining claims, if any, are hereby DENIED." But in its conclusions of law, the trial court stated that MKC and MAM were liable as aiders and abettors and control persons under sections 33F(1) and 33F(2) in addition to their liability as issuers under section 33C. The trial court concluded:

> 29. Primary and secondary violations of the Texas Securities Act occurred.
>
> 30. Defendants MK and MAM had "general awareness" of their roles in these violations.
>
> 31. MK and MAM are liable as issuers and as aiders and abettors of violations of the Texas Securities Act.
>
> 32. Defendants MK and MAM rendered "substantial assistance" and aided each other and the Funds themselves in these violations.
>
> 33. Defendants MK and MAM either (a) intended to deceive Plaintiffs or (b) acted with reckless disregard for the truth of the representations

> and omissions in the funds' prospectuses, [statements of additional information] and other marketing materials.
>
> 34. Defendants MK and MAM are jointly and several [sic] liable to Plaintiffs for violations of Sections 33C and 33F(l) and (2) of the Texas Securities Act.

In their second and third issues, MKC and MAM contend the only theory of liability reflected in the judgment—primary liability under TSA section 33C—was not pleaded or proved. MKC and MAM also argue the evidence was insufficient to support the different theory—secondary liability under TSA section 33F(1) and (2)—reflected in the trial court's conclusions of law. MKC and MAM contend the judgment controls over a conflicting conclusion of law in any event, so that the trial court's conclusions of law regarding liability under section 33F should be disregarded. We address each contention in turn.

1. Pleading

"Count One" of the Howards' operative petition, entitled "Violations of Texas Securities Act; Aiding and Abetting; Control Persons," alleges that MKC and MAM made untrue statements of material facts and omitted material facts in prospectuses and other materials, and are therefore liable under article 581-33 of the TSA. "Count Two," entitled "Aider and Abettor Liability," includes allegations that MKC and MAM materially aided a seller, buyer, or issuer of a security, acting with intent to deceive or defraud or with reckless disregard for the truth or the law, citing TSA section 33F(2). "Count Three," entitled "Control Person Liability," includes the allegation that MKC and MAM are liable as control persons. The petition cites and quotes TSA section 33F(1) that "'[a] person who directly or indirectly controls a seller, buyer, or issuer of a security is liable under Section 33A, 33B, or 33C jointly and severally with the seller, buyer, or issuer, and to the same extent as if he were the seller, buyer, or issuer, unless the controlling person sustains the burden of proof that he did not know, and in the exercise of reasonable care

could not have known, of the existence of the facts by reason of which the liability is alleged to exist.'"

A party may not be granted relief in the absence of pleadings to support that relief. *Cunningham v. Parkdale Bank*, 660 S.W.2d 810, 813 (Tex. 1983). Ultimately, the purpose of pleadings is to give the adversary parties notice of each party's claims and defenses, as well as notice of the relief sought. *Perez v. Briercroft Serv. Corp.*, 809 S.W.2d 216, 218 (Tex. 1991). But "[o]ur procedural rules merely require that the pleadings provide fair notice of the claim and the relief sought such that the opposing party can prepare a defense." *In re Lipsky*, 460 S.W.3d 579, 590 (Tex. 2015) (citing TEX. R. CIV. P. 45, 47). If the cause of action "'may be reasonably inferred from what is specifically stated,'" then even the omission of an element is not fatal. *Id.* (quoting *Boyles v. Kerr*, 855 S.W.2d 593, 601 (Tex. 1993)).

Under these standards, we conclude the Howards' operative petition was sufficient to allege causes of action under sections 33C and 33F of the TSA.[5] The petition complains of false statements and material omissions in the Funds' prospectuses, the basis for liability under section 33C. And the petition includes allegations of both control person and aider and abettor liability under sections 33F(1) and (2). These allegations gave MKC and MAM fair notice of the Howards' claims. We reject MKC and MAM's argument to the contrary.

2. Evidence of primary and secondary violations

Confusion has resulted from the trial court's conclusion of law that MKC and MAM "are liable as issuers" in addition to their secondary liability as aiders. MKC and MAM contend they were not issuers as a matter of law and cannot be held liable for a primary violation of the TSA. They argue that the evidence undisputedly established that the Funds were the issuers of the

[5] The trial court reached a similar conclusion, stating that "I believe that there is a valid claim for liability under the Texas Securities Act based on the prospectus." The court explained that "I have considered the objection that the theory was not sufficiently pled," but "in reviewing the plaintiffs' live petition, there was reference to the overall section of the Securities Act that contains both seller and issuer liability provisions."

securities in question, not MKC and MAM. The Howards do not dispute that the Funds were the issuers; they assert that the Funds were the primary violators of the TSA. But the Howards maintain that MKC and MAM, as control persons and aiders and abettors under section 33F, are secondarily liable for the Funds' violations. MKC and MAM challenge the sufficiency of the evidence to support the trial court's findings and conclusions of both primary liability under section 33C and secondary liability under section 33F. All parties appear to agree that MKC and MAM are not primarily liable as issuers. Nonetheless, the Howards must prove that a primary violation occurred in order to establish MKC and MAM's secondary liability. *See Sterling Trust Co.*, 168 S.W.3d at 839.

As to primary liability under section 33C, the trial court found that there were affirmative misrepresentations and material omissions in the Funds' prospectuses, "including, but not limited to, the true risks and speculative natures of the securities to be acquired and actually acquired by the [F]unds." The court found, "[m]ore particularly, the prospectuses, while containing generic disclosures concerning risk, possible investment in asset-backed securities, and possible investment in subordinated securities, omitted disclosure of the facts concerning Kelsoe's actual intent with regard to the Funds' investment strategy necessary to make the Funds' prospectuses not materially misleading."

Both parties' experts testified at length about the adequacy of the disclosures in the Funds' prospectuses. McCann testified that the principal risk of investing in the Funds "was the highly leveraged credit risk, resulting from investing two-thirds of the portfolio in mezzanine and subordinated tranches and securities that were ultimately mostly backed by housing and housing finance." He explained, "losses in the overall portfolio are magnified or leveraged up on the investors in those bottom tranches," or as the trial court found, "the Funds' investment in a particular asset-backed security could be wiped out entirely if even a relatively small percentage

of the loans in the underlying pool of assets went into default." This principal risk should have been disclosed in the prospectuses, but was not. He testified that the prospectuses' statement that "[t]he Fund will seek to achieve its investment objectives by investing in a diversified portfolio of securities" was "just a false statement." And he said that "the portfolio was clearly not a diversified portfolio," having "an enormous concentration in structured finance securities that were ultimately backed by housing and leveraged that exposure. So these portfolios were the antithesis of a diversified portfolio." The Funds "did not invest in a diversified portfolio and didn't intend to invest in a diversified portfolio."

Laursen, in contrast, attested that the disclosures in the prospectuses were sufficient to advise investors of the risks associated with the Funds, and met the standards of the SEC. He relied on statements in the prospectuses that "the Fund's investments may be concentrated in below investment grade debt securities," and that "[t]he Fund's investment strategy of potentially investing the majority of its assets in below investment grade securities and its expected use of leverage involve a high degree of risk." He told the court that "this prospectus was actually quite good in comparison with others that I've looked at around that time, because the process is laid out, the philosophy is laid out, and so you can see the broad array of asset categories." He also described the Funds as "very diverse." He testified,

> But they held all different types of asset backed and mortgage-backed securities, and so some varying purposes of those loans. So you think about buying an aircraft or leasing an aircraft or getting a home equity revolving line of credit or taking out a closed-end, 30-year mortgage. Those are all different purposes, and they all have different people repaying them, so each individual security is diverse. But then if you look at the groupings that are listed, they are also quite diverse. The fact that there is real estate collateral underlying some of them is a credit support function. It's not a non-diversifying function.

Laursen disagreed with McCann's conclusion that lack of diversification caused the Funds' losses. Instead, he said "the [F]unds went down a lot because of systematic risk. And

Dr. McCann knows that systematic risk can't be diversified away." At the end of 2007, "all of the structured finance" securities "went down. Systematically, all of them went down." Laursen concluded that this "systematic meltdown" was the cause of the Funds' losses.

The experts offered conflicting analyses of the prospectuses at issue, the causes of the Funds' losses, and the adequacy of the disclosures made. Each expert provided supporting documentation for his opinions. The trial court determined the weight to be given each witness's testimony. *See Rich v. Olah*, 274 S.W.3d 878, 884 (Tex. App.—Dallas 2008, no pet.). Based on the evidence offered by the Howards, the trial court found that there were material misrepresentations and failures to disclose in the Funds' prospectuses, including the failure to disclose "the true risks and speculative natures of the securities to be acquired and actually acquired by the [F]unds." After reviewing the record, we conclude that the evidence would enable a reasonable fact-finder to reach this verdict. *See City of Keller*, 168 S.W.3d at 827 (test for legal sufficiency is whether reasonable and fair-minded people could reach verdict under review). In addition, we conclude the Howards' evidence supporting the trial court's findings is not so weak or so against the overwhelming weight of the evidence that the findings are clearly wrong or unjust. *See Jamison*, 377 S.W.3d at 823. There was legally and factually sufficient evidence to support a finding that the prospectuses for the Funds contained "an untrue statement of a material fact or an omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading." TSA § 33C(2). This is a primary violation of the TSA. *Id.*

Next we consider the evidence to support the trial court's findings of secondary violations by MKC and MAM. The Howards were required to prove that MKC and MAM directly or indirectly controlled the Funds or materially aided the Funds with the requisite intent. *See* TSA § 33F(1), (2). There was no dispute that MKC was the Funds' underwriter, or that

MAM, through its employee Kelsoe, selected the Funds' purchases and managed the Funds' investments.[6] The Funds' prospectus itself reveals that MKC is the underwriter and that MAM will serve as the Funds' investment adviser, with Kelsoe as the leader of a team responsible for day-to-day management of the Funds' portfolio. Kelsoe testified that the Funds were modeled after two existing funds he participated in creating, to "follow the same strategy and philosophy and were just different verses of the same song essentially." Although Kelsoe did not draft the prospectus himself, he "discussed general guidelines or general ideas for the fund" with the attorneys who drafted it, and stated "the prospectus was purposeful in allowing us a very wide latitude of what we could use in the portfolio." Kelsoe said the "wide latitude" was "one of those things that I had asked for. And in the proposals that I had put together for the fund, was that it should include a very wide latitude. And I thought it was something that would be unique in the fund universe versus other corporate high-yield funds that we would be competing with." He continued "I thought it would be an advantage to the fund to be able to use different asset categories rather than one particular type." He affirmed that the "basic idea of a broadly diversified bond fund" was his, not the lawyers' who drafted the prospectuses.

Consistent with Kelsoe's testimony, McCann told the court that MKC and MAM "knew with certainty" what the investment strategy of the Funds would be when the prospectus was issued. And the strategy and investment risks were not disclosed until 2007, after most of the losses occurred.

Based on the evidence offered by the Howards, the trial court made findings of fact regarding Kelsoe, MKC, and MAM. The trial court found Kelsoe was authorized by MAM to manage the Funds, and was acting in the scope of his employment when he did so. Kelsoe

[6] Finding of Fact 15 states, "MAM, through James C. Kelsoe Jr. ("Kelsoe"), a MAM employee and the Funds' Senior Portfolio Manager, selected securities purchased by the Funds." Findings of Fact 16, 17, and 18 state that Kelsoe "handled day-to-day management of the [F]unds," was "authorized by MAM to manage the [F]unds," and "was acting in the scope of his employment in managing the [F]unds." Kelsoe testified to these facts at trial.

"knew and intended" that the Funds would pursue an investment strategy that exposed investors to risk far greater than the risk associated with investment in "junk"-grade corporate bonds. MKC and MAM knew or should have known of the strategy and the risks to investors. Kelsoe, MKC, and MAM contributed to and were aware of the prospectuses and other reports created for the Funds. And the prospectuses "affirmatively misrepresented, and omitted, concealed, and failed to disclose material information regarding the [F]unds' assets and risks." The trial court's conclusions of law track the requirements for a secondary violation under section 33F. *See Darocy*, 345 S.W.3d at 138–39 (listing four requirements to establish liability of aider under § 33F). Under the standards of review set forth above, we conclude the evidence was legally and factually sufficient to support the trial court's findings of secondary liability under the TSA. *See City of Keller*, 168 S.W.3d at 827; *Jamison*, 377 S.W.3d at 823.

3. Error in the judgment

The judgment incorrectly reflects liability based only on TSA section 33C. The trial court's findings of fact and conclusions of law, filed after the judgment, correctly reflect the secondary liability of MKC and MAM under section 33F, although, as noted, they also incorrectly include the conclusion that MKC and MAM are liable as issuers. MKC and MAM concede that "typically when findings of fact and conclusions of law differ from a Judgment, the findings of fact and conclusions of law control absent objections being filed." *See Southwest Craft Ctr. v. Heilner*, 670 S.W.2d 651, 655 (Tex. App.—San Antonio 1984, writ ref'd n.r.e.) (findings and conclusions filed after judgment are controlling in event of conflict). But they argue that they did object, citing their objections to the Howards' proposed findings and conclusions and their request for additional and amended findings of fact and conclusions of law. And under rule of civil procedure 298, "[n]o findings or conclusions shall be deemed or

presumed by any failure of the court to make any additional findings or conclusions" after a party has timely requested them. TEX. R. CIV. P. 298.[7]

But even if, in light of MKC and MAM's objections, we do not make any presumption that the findings control over the judgment, we have concluded from our review of the record that the pleadings and evidence support a judgment against MKC and MAM for secondary violations of the TSA. We conclude the trial court's judgment in favor of the Howards was correct, even though it reflected an erroneous legal theory. In light of this conclusion, we must uphold the judgment. *In re Estate of Hutchins*, 391 S.W.3d at 585 (appellate court must uphold a correct lower court judgment on any legal theory before it, even if court gives incorrect reason for judgment).

We have explained that the proper legal theory actually must be "before the court." *See Victoria Gardens of Frisco*, 257 S.W.3d at 290. We will not affirm a judgment based on a legal theory not presented to the trial court and to which MKC and MAM had no opportunity to respond. *Id.* But MKC and MAM's secondary liability was "before the court." It is true that before and during trial the Howards argued that primary liability should be imposed under section 33A against the Funds as sellers, and MKC and MAM provided argument and authorities that section 33A did not apply to the Howards' claims. But the record also reflects that the pleadings, argument, and evidence (particularly the experts' reports and testimony) were directed primarily to the section 33C issue of fraud in the Funds' prospectuses and the section 33F issues of control and aid. The trial court concluded, and we have agreed, that section 33C was

[7] Additional findings are not required if the original findings and conclusions "properly and succinctly relate the ultimate findings of fact and law" to provide adequate information for the preparation of an appeal. *Main Place Custom Homes, Inc. v. Honaker*, 192 S.W.3d 604, 612 (Tex. App.—Fort Worth 2006, pet. denied). If the refusal to file additional findings does not prevent a party from adequately presenting an argument on appeal, there is no reversible error. *Id.* (citing *Jamestown Partners, L.P. v. City of Fort Worth*, 83 S.W.3d 376, 386 (Tex. App.—Fort Worth 2002, pet. denied)).

adequately pled. And equally important to the judgment, there was pleading and evidence to support the secondary liability of MKC and MAM under section 33F.

We have the authority to modify incorrect judgments when the necessary information is available to do so. *Mullins v. Mullins*, 202 S.W.3d 869, 878 (Tex. App.—Dallas 2006, pet. denied) (citing TEX. R. APP. P. 43.2(b)). Accordingly, we modify the second paragraph of the judgment (1) to strike the phrase "pursuant to TEX. REV. STAT. ANN. Art. 581-33(c)(2)," and (2) to add the following sentence at the end of the paragraph: "Judgment is rendered under sections 33C and 33F of the Texas Securities Act, TEX. REV. CIV. STAT. ANN. arts. 581-33C and 581-33F."

Having concluded that (1) the Howards adequately pled and proved a primary violation of section 33C by the Funds; and (2) the trial court's findings and conclusions of secondary liability under section 33F against MKC and MAM were supported by legally and factually sufficient evidence, we overrule MKC and MAM's second and third issues.

C. Recusal

In their fourth issue, MKC and MAM complain that the trial judge erred "by not recusing himself after demonstrating bias and prejudice and after expressing personal knowledge from an extrajudicial source about disputed material facts." MKC and MAM raised this complaint for the first time in their motion for new trial after the trial court rendered judgment against them. We review a trial court's ruling on a motion to recuse for abuse of discretion. *Hansen v. JP Morgan Chase Bank, N.A.*, 346 S.W.3d 769, 776 (Tex. App.—Dallas 2011, no pet.).

MKC and MAM contend that under rules 18b(b)(2) and (3), Texas Rules of Civil Procedure, the trial judge was required to recuse himself. These rules provide:

> (b) ***Grounds for Recusal.*** A judge must recuse in any proceeding in which: . . .
>
> (2) the judge has a personal bias or prejudice concerning the subject matter or a party;
>
> (3) the judge has personal knowledge of disputed evidentiary facts concerning the proceeding; . . . .

The test for recusal under these rules is "whether a reasonable member of the public at large, knowing all the facts in the public domain concerning the judge's conduct, would have a reasonable doubt that the judge is actually impartial." *Hansen*, 346 S.W.3d at 776. As we explained in *Hansen*, "judicial rulings alone almost never constitute a valid basis for a bias or antagonism that would make fair judgment impossible." *Id.* (quoting *Dow Chem. Co. v. Francis*, 46 S.W.3d 237, 240 (Tex. 2001) (per curiam)). "'[J]udicial remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge.'" *Francis*, 46 S.W.3d at 240 (quoting *Liteky v. United States,* 510 U.S. 540, 555 (1994)). Expressions of impatience, dissatisfaction, or annoyance do not establish bias or partiality. *Id.* The trial court has great discretion over the conduct of a trial, and has the authority to express itself in exercising this broad discretion. *Id.* at 240–41.

MKC and MAM contend that the trial judge "openly admitted his bias and personal knowledge," citing the following conduct:

> (1) At the close of the first day of trial, Judge Lowy asked counsel to join him in chambers and stated that, although he would "not say this on the record," he had pre-formed opinions about the case: "I am a student of the financial crisis. I would not spend much time talking about credit ratings because the rating agencies are part of the problem, no one should have relied upon their ratings."
>
> (2) Judge Lowy interrupted defense counsel's direct examination of Defendants' expert to inform counsel on the record that "prior to assuming this bench, [he] spent nine years as in-house counsel for Comerica" and thus was "familiar with basic financial principles."

> (3) At the commencement of the trial Judge Lowy inappropriately commented about Kelsoe "fiddling" with the values, which indicated he had predetermined issues before any evidence had been introduced.
>
> (4) The court encouraged Plaintiffs not to cross-examine Defendants' expert, and stated, "while Mr. Laursen is an extremely capable individual with a lot of very impressive experience, I didn't find his analysis or his opinions in this case persuasive at all."
>
> (5) The trial court found the testimony of appellees' expert, but not appellants' expert, to be relevant, even though the experts testified on the same subject.
>
> (6) The trial court "offered Plaintiffs a new theory of issuer liability—one they had not pleaded or argued—after the close of evidence, and after denying Defendants' renewed motion for directed verdict."

But the record as a whole demonstrates that the trial court was impartial. The trial court's familiarity with the general subject matter and specialized vocabulary of the case perhaps led to some expressions of impatience when the parties took time to explain concepts the court already understood, but these expressions were directed to both parties. For example, during cross-examination of Kelsoe, the trial court sustained MKC and MAM's objection to a question and commented to the Howards' lawyer, "[Counsel], I'm not finding these questions about generalities to be particularly helpful, sir." In the same examination, the court asked about the relevance of a line of questioning, stating "[t]he witness doesn't seem to know much about it. I'm not sure this is a good use of our time." The court also reprimanded the Howards' counsel for interrupting Kelsoe and making transcription difficult for the court reporter: "I don't want to have to tell you again. Do not interrupt the witness. If you think his answer is nonresponsive, you can object when he's done." And at the outset of trial, MKC and MAM sought the dismissal of claims by Mary Howard based on a prior order of the trial court. When the Howards argued that Mary Howard could assert additional claims, MKC and MAM responded that no such claims had been disclosed or pleaded. The Howards' counsel replied:

> MR. SPARKS: Your Honor, this is a notice filing state. We have pled —
>
> THE COURT: Spare me, Mr. Sparks.
>
> MR. SPARKS: Yes, Your Honor.
>
> THE COURT: There has been enough discovery in this case that that could have been fleshed out a long time ago. The order may be interlocutory, but it's also unequivocal. Ms. Howard's claims were dismissed with prejudice. There has been no motion to set aside that order. We are in trial, and I do think it would be prejudicial, on its face, to permit you to try to revive those claims at this stage of the proceedings.

At the end of trial, the court deferred ruling, explaining that "I want to try to get a little bit better sense of the governing law," as well as review the parties' proposed findings and conclusions. In giving its general impressions of the case, the court explained that it had not yet decided "[w]here I'm going to come down as far as the adequacy of the various disclosures," but was not persuaded by MKC and MAM's contention that the Funds' losses were entirely the result of "systematic risk." It was in this context that the court commented it did not find Laursen's analysis persuasive. But the court expressly stated that it had not yet decided whether "more specific disclosure" was required by law or whether any failure to disclose "renders these defendants liable." The court concluded:

> I do want to say that both sides have done a good job of presenting their position. Even though I have undoubtedly displayed a certain amount of boredom and impatience up here, because I'm not very good at concealing those things, it has actually been quite helpful and I've probably been paying more attention than you think.

The trial court was the sole judge of the credibility of the witnesses and the evidence. *See, e.g., Rich*, 274 S.W.3d at 884. The court assigns the weight to be given the witnesses' testimony, may accept or reject all or any part of their testimony, and resolves any conflicts or inconsistencies in the testimony. *Id.* This Court is not a fact finder and we may not pass on the credibility of the witnesses or substitute our judgment for that of the trier of fact, even if a different answer could be reached upon review of the evidence. *Id.* We conclude that the first

five of MKC and MAM's six complaints listed above were the result of the trial court's credibility determinations or the exercise of its discretion in controlling the conduct of the trial, and did not establish any improper bias, prejudice, or personal knowledge of the case.

MKC and MAM's final complaint, that the trial court "offered Plaintiffs a new theory of issuer liability" not pleaded or argued, is not supported by the record. As we have discussed at length above, there were pleadings and evidence to support the trial court's findings and conclusions of MKC and MAM's secondary liability under TSA section 33F for a primary violation of section 33C by the Funds. In sum, after review of the entire record, we conclude "a reasonable member of the public at large, knowing all the facts in the public domain concerning the judge's conduct," would not have reasonable doubt that the judge was actually impartial. *See Hansen*, 346 S.W.3d at 776. We overrule MKC and MAM's fourth issue.

D. Admission of Evidence

In their fifth issue MKC and MAM complain that the trial court erred by admitting plaintiffs' exhibits 12 and 17. Exhibit 12 is a 2011 order issued by the Securities and Exchange Commission of the United States entitled in part "Corrected Order Making Findings and Imposing Remedial Sanctions and a Cease-and-Desist Order . . . ." MKC, MAM, Kelsoe, and one other individual were respondents in the proceeding. Exhibit 17 is a 2010 "Joint Notice of Intent to Revoke Registration and Impose Administrative Penalty" against MKC, MAM, Kelsoe, and others in a joint administrative proceeding of the Alabama Securities Commission, the Kentucky Department of Financial Institutions, the Mississippi Secretary of State's Office, and the South Carolina Office of the Attorney General.

Whether to admit or exclude evidence is a matter committed to the trial court's sound discretion. *Interstate Northborough P'ship v. State*, 66 S.W.3d 213, 220 (Tex. 2001). To reverse a judgment based on a claimed error in admitting or excluding evidence, a party must

show that the error probably resulted in an improper judgment. *Id.* We review the entire record to determine if the trial court's ruling resulted in the rendition of an improper judgment. *Id.* Typically a successful challenge to a trial court's evidentiary rulings requires the complaining party to demonstrate that the judgment turns on the particular evidence excluded or admitted. *Id.*

MKC and MAM argue that the SEC Order is an inadmissible settlement agreement, citing *Davis v. Jordan*, 305 S.W.3d 895, 898–99 (Tex. App.—Amarillo 2010, no pet.). The Howards contend that both exhibits are admissible as public records under rule 803(8) of the Texas Rules of Evidence. *See* TEX. R. EVID. 803(8) (record of public office is not excluded as hearsay if it meets requirements of rule). MKC and MAM contend that even if rule 803(8) applies so that the exhibits are not hearsay, they are nonetheless inadmissible settlement agreements under rule 408. *See* TEX. R. EVID. 408(a)(2) (evidence of conduct or statements made during compromise negotiations about the claim are not admissible to prove or disprove validity of claim).

Federal courts have reached different conclusions on the admissibility of SEC consent orders. *See, e.g., Linde v. Arab Bank, PLC*, 97 F. Supp. 3d 287, 345–46 (E.D.N.Y. 2015) ("Courts have disagreed on Rule 408's effect on the admissibility of the factual findings of a government investigation, where the investigation ends in a settlement.") (collecting cases). We need not enter this debate. On this record, any error in admitting exhibits 12 and 17 was harmless because the trial court's judgment did not turn on the evidence. *See Interstate Northborough P'ship*, 66 S.W.3d at 220. The trial court expressly stated that the exhibits were at most "some evidence of the facts found," not conclusive proof of any issue; the court made clear that MKC and MAM were not "estopped from presenting evidence to the contrary or arguing that the factual findings are incorrect." And the trial court was clear that parts of the exhibits

were not relevant to the issues before it, and cautioned the parties to limit their presentations accordingly:

> I'll also say that, unless I have been misinformed about the fact that the plaintiffs had no contact with Morgan Keegan or its sales force, the information in the various regulatory proceedings about sales practices and failing to keep the sales force adequately informed as to the state of the funds, et cetera, et cetera, is not going to be relevant to this case. And the less time we spend on it, the happier I'll be.

McCann's report, supporting documentation, and testimony provided evidence to support the trial court's findings, conclusions, and judgment regardless of the admission or exclusion of exhibits 12 and 17. As we have discussed, McCann independently investigated the Funds' disclosures, investments, and ultimate collapse, and testified to his findings. Because the trial court's judgment did not turn on the particular evidence admitted, we overrule MKC and MAM's fifth issue. *See Interstate Northborough P'ship*, 66 S.W.3d at 220.

E. Calculation of Damages

In their sixth issue MKC and MAM complain of the trial court's (1) failure to offset amounts the Howards already recovered for their losses and (2) failure to subtract losses from investments made after the Howards filed their petition. Offset is an affirmative defense on which MKC and MAM bore the burden of pleading and proof. *See Tenet Health Sys. Hosps. Dallas, Inc. v. N. Tex. Hosp. Physicians Grp., P.A.*, 438 S.W.3d 190, 204 (Tex. App.—Dallas 2014, no pet.).

MKC and MAM argue that the Howards previously recovered $160,501.50 of their losses from the "SEC and State Fair Funds."[8] Robert acknowledged this recovery on the record; he testified that he received two checks for $2,683 "from the State Fund," and a check for

[8] Under the Sarbanes-Oxley Act of 2002, the SEC may prepare a distribution plan to distribute money to victims of securities fraud. *See, e.g., Official Comm. of Unsecured Creditors of WorldCom, Inc. v. SEC*, 467 F.3d 73, 75 (2d Cir. 2006) (citing 15 U.S.C.A. § 7246, "Fair funds for investors"). Paragraph IV.N of the SEC Order provides in part that "Pursuant to Section 308(a) of the Sarbanes-Oxley Act of 2002, as amended, a Fair Fund is created for the disgorgement, interest, and penalties described in Paragraphs IV.K, L and M and any funds paid in connection with related actions pursuant to Paragraph III.36, above."

$155,135.50 "for Purdue." MKC and MAM also argue the Howards made additional investments in the Funds until February 2010, despite filing their petition in this case in October 2009. They contend the Howards were fully aware of "any alleged misrepresentations or omissions in the offering documents by the time they filed their petition," so that "[i]t was legal error for the court to award damages based on the post-petition investments."

The Howards reply that MKC and MAM waived any defense of offset because they did not request affirmative findings to support it. In the alternative, they argue (1) MKC and MAM did not plead or prove the amount of any offset due to losses from investments made after October 2009, and (2) under the terms of the SEC Order, MKC and MAM are not entitled to offset damages awarded in this case.

MKC and MAM do not direct us to any pleading of offset made in the trial court or any request for a finding on the issue. They did not offer any evidence as to any amount they seek to seek to deduct for investments into the Funds between October 2009 and February 2010. And they do not explain why the restrictions on offsets imposed by the SEC Order do not apply here.[9] We conclude that MKC and MAM did not meet their burden of pleading and proving their claimed offset. *See Tenet Health Sys. Hosps. Dallas, Inc.*, 438 S.W.3d at 204. We overrule their sixth issue.

F. Attorney's Fees (Cross-Appeal)

Under TSA section 33D(7), a buyer "may also recover reasonable attorney's fees if the court finds that the recovery would be equitable in the circumstances." The Howards pleaded for recovery of attorney's fees in their operative petition. The Howards' sole issue in their cross-

[9] The SEC Order provides, "To preserve the deterrent effect of the civil penalty, Respondents [including MKC and MAM] agree that in any Related Investor Action [defined as a private damages action brought against any of the Respondents by an investor based on substantially the same facts as the Order], they shall not argue that they are entitled to, nor shall they benefit by, offset or reduction of any award of compensatory damages by the amount of any part of Respondent's payment of a civil penalty in this action ("Penalty Offset")." MKC and MAM argue that this restriction on offsets was limited to amounts they paid as a civil penalty. But they do not explain how or why this provision would apply to permit them to offset damages awarded to the Howards in this lawsuit.

appeal challenges the trial court's ruling that "each party will bear their own attorney's fees." They argue that the parties entered into a pretrial rule 11 agreement to defer discovery and any hearing on the issue of attorney's fees. *See* TEX. R. CIV. P. 11. They contend that the trial court violated a ministerial duty by refusing to allow discovery, hold a hearing, and determine the issue of attorney's fees in accordance with the parties' agreement. They rely on several cases, including *Fortis Benefits v. Cantu*, 234 S.W.3d 642, 650 (Tex. 2007). In *Fortis Benefits*, the court enforced a rule 11 agreement under which Fortis "unequivocally relinquished" certain claims. *See id.* The supreme court held, "[a]s this is a valid pretrial agreement under Rule 11, the trial court had a duty to enforce its terms." *Id.*

After trial the Howards requested an expedited hearing on attorneys' fees, seeking resolution of the issue before the end of Judge Lowy's term of office. MKC and MAM opposed the motion. The trial court heard the motion, requesting argument from the parties regarding "whether an award of attorneys' fees would be equitable in this case." Counsel for each party responded. Among other arguments, MKC and MAM urged the court to award them attorney's fees as the prevailing party on Mary Ann Howard's claims. The court then ruled that each party should bear its own attorney's fees:

> THE COURT: I am going to conclude that under all circumstances of this case, including the possibility of a claim for attorneys' fees by the defendants with respect to Mary Ann Howard—And, candidly, the fact that while I have ruled for the plaintiffs in this matter, as I commented I believe at the conclusion of the trial, I am also cognizant of the fact that Ms. [sic] Howard was a securities industry professional and should have understood that the laws of financial nature, if you will, dictate that you don't get that kind of return without taking on significant risk. I think it is equitable that he be compensated for his losses. But from those, I think he is going to have to bear his own attorneys' fees. Court costs will be taxed to the defendants.

The comment to section 33D(7) explains that "[a]n attorneys fee award is not automatic, but rests in the sound discretion of the trial court." TEX. REV. CIV. STAT. ANN. art. 581-33 cmt.

(West 2010).[10] The comment advises that "[a]ll the circumstances should be considered," giving as examples (1) the conduct of the defendant in the transaction, including whether the conduct was fraudulent; (2) the conduct of the plaintiff in the transaction; (3) the conduct of both parties in the lawsuit, (4) whether the defendant benefitted from the relationship, and (5) whether there was a special or fiduciary relationship between the plaintiff and defendant. *Id.* Here, there was evidence of fraudulent conduct but no special or fiduciary relationship between the Howards and MKC or MAM. The record reflects that the trial court considered "all the circumstances" and properly exercised its discretion in its ruling.

The Howards, however, contend that the trial court had no discretion with respect to the parties' rule 11 agreement. They argue the trial court was required to enforce the agreement's terms by deferring any ruling on attorney's fees until after full discovery had been completed. The agreement provided in relevant part:

> Specifically, the parties have agreed to defer until after trial all discovery pertaining to attorneys' fees (e.g. reports, experts, production of billing records and depositions). At the conclusion of the case, whether upon motion or after trial, if allowed by law, the prevailing parties may file a motion for attorney's fees and expenses.
>
> By entering into this Rule 11 agreement, no party has agreed that a prevailing party has any entitlement to attorneys' fees or expenses.

There was no agreement that either party was entitled to recover its fees. The parties' only agreement was to defer discovery on the subject of attorney's fees until after trial. The Howards' motion for an expedited hearing was filed on December 5, 2014, and sought a ruling from the court before December 31. The trial court conducted the hearing on December 12, and considered the parties' arguments regarding whether an award of attorney's fees, in any amount, would be equitable. The court's ruling on this question made discovery of specific amounts of

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[10] The "Comment—1977 Amendment" following the text of article 581-33 is by the Committee on Securities and Investment Banking of the Section on Corporation, Banking and Business Law of the State Bar of Texas.

fees unnecessary. We conclude that it was within the trial court's discretion to decide the preliminary question—whether it would be equitable to award fees at all—before it was required to enforce the parties' agreement that discovery on the subject would be conducted after the trial. Under similar circumstances, we recognized the rule in *Fortis Benefits* but concluded that any error in the timing of the trial court's decision to award fees was harmless. *See AmeriPath, Inc. v. Hebert*, 447 S.W.3d 319, 344 (Tex. App.—Dallas 2014, pet. denied). We overrule the Howards' cross-issue.

CONCLUSION

We modify the second paragraph of the judgment (1) to strike the phrase "pursuant to TEX. REV. STAT. ANN. Art. 581-33(c)(2)," and (2) to add the following sentence at the end of the paragraph: "Judgment is rendered under sections 33C and 33F of the Texas Securities Act, TEX. REV. CIV. STAT. ANN. arts. 581-33C and 581-33F." We overrule all issues and affirm the trial court's judgment as modified.

/Molly Francis/
MOLLY FRANCIS
JUSTICE

150369F.P05

Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

MORGAN KEEGAN & CO., INC. AND MORGAN ASSET MANAGEMENT, INC., Appellants and Cross-Appellees

No. 05-15-00369-CV V.

PURDUE AVENUE INVESTORS LP AND DANA HOWARD, AS TRUSTEE OF THE MOLLY A. HOWARD TRUST, Appellees and Cross-Appellants

On Appeal from the 101st Judicial District Court, Dallas County, Texas
Trial Court Cause No. DC-09-14448.
Opinion delivered by Justice Francis; Justices Lang-Miers and Myers participating.

In accordance with this Court's opinion of this date, the judgment of the trial court is **MODIFIED** as follows:

> In the second paragraph of the judgment, the phrase "pursuant to TEX. REV. STAT. ANN. Art. 581-33(c)(2)" is stricken, and the following sentence is added: "Judgment is rendered under sections 33C and 33F of the Texas Securities Act, TEX. REV. CIV. STAT. ANN. arts. 581-33C and 581-33F."

It is **ORDERED** that, as modified, the judgment of the trial court is **AFFIRMED**.

It is **ORDERED** that appellees Purdue Avenue Investors LP and Dana Howard, as Trustee of the Molly A. Howard Trust recover their costs of this appeal and the full amount of the trial court's judgment from appellants Morgan Keegan & Co., Inc. and Morgan Asset Management, Inc. and from Travelers Casualty and Surety Company of America as surety on appellants' supersedeas bond.

Judgment entered May 18, 2016.