

Opinion issued June 5, 2008



In The
Court of Appeals
For The
First District of Texas

NO. 01-06-00605-CV
NO. 01-06-00505-CV

**ROBERT ALPERT, ROMAN ALPERT, AND RENEE PICAZO,
GUARDIAN OF THE ESTATE OF DANIEL ALPERT, A MINOR,
Appellants**

V.

MARK RILEY, INDIVIDUALLY AND AS TRUSTEE, Appellee

**On Appeal from Probate Court No. 2
Harris County, Texas
Trial Court Cause No. 305,232-401**

OPINION

In this trust management dispute involving three separate trusts, Roman Alpert and Renee Picazo, Guardian of the Estate of Daniel Alpert, a minor (collectively, the beneficiaries), appeal the trial court's judgment. Specifically, they contend that the trial court erred in granting summary judgment that Mark Riley, appellee, was trustee of the three trusts as a matter of law, and in denying their motion urging the opposite conclusion—that, as a matter of law, he was not. The beneficiaries also ask that we reverse the judgment for other reasons, asserting that the trial court erred in (1) disregarding the jury's finding that Riley breached his fiduciary duty; (2) confirming Riley's payment of attorney's fees and refusing to enter judgment against Riley for their attorney's fees; and (3) reappointing Riley as his own successor trustee.

Robert Alpert, the trusts' settlor and father of the trust beneficiaries, also appeals the trial court's judgment, which finds him liable for breach of fiduciary duty and awards over \$4 million in damages and attorney's fees to Riley on behalf of the trusts, pursuant to the trial court and jury findings that Alpert breached his fiduciary duty to the beneficiaries. Alpert contends that, as settlor of the trusts, (1) he had no fiduciary duty to the trusts, and (2) Riley has no standing to sue him absent such a duty.

We conclude that (1) the trial court erred in declaring Riley to be trustee of the three trusts as a matter of law because fact issues exist as to his status as trustee for two of the trusts, and he is not a trustee of the third trust pursuant to the express terms of the trust instrument; (2) the judgment against Alpert for breach of fiduciary duty must be reversed because, under the terms of these trusts, the settlor owes no fiduciary obligation to the trust's beneficiaries and Riley, as trustee, has no standing to sue the parent of a trust beneficiary for breach of a parent's fiduciary duty to a minor child; (3) the trial court erred in disregarding the jury's verdict as to Riley's breach of fiduciary duty but, as the jury awarded no damages, the beneficiaries recover nothing on the jury verdict; (4) while a remand is appropriate after reinstatement of the verdict as to Riley's breach of fiduciary duty to consider the remedy of equitable disgorgement of trustee compensation, a remand is unnecessary here because Riley is not entitled to trustee compensation as a matter of law; and (5) the trial court's award of attorney's fees, and the denial of the beneficiaries' claim for fees, must be reversed and remanded for further proceedings, given our resolution of the merits.

Alpert and the beneficiaries also filed a separate appeal challenging the trial court's denial of their request that Riley post a security bond

pending appeal.¹ Because the trial court's decision on the bond does not constitute a final judgment, we lack jurisdiction over that appeal and dismiss it for that reason, but consider its substance as a request for relief under the main appeal pursuant to Texas Rule of Appellate Procedure 24. TEX. R. APP. P. 24.4(a). As to the merits, we conclude that the trial court properly denied the request for a security bond and deny the requested relief.

Facts

In 1990, Alpert, as settlor, created the Roman Merker Alpert Trust (RAT) and the Daniel James Alpert Trust (DAT), to benefit each of his sons. Both trusts name Lisa D. Santos, M.D., as the original trustee, and, in identical language, empower Santos to appoint a successor trustee, who in turn would have

the power and authority to appoint a successor or successors to himself, to take office as Trustee hereunder, and if more than one, singly, in the order named, upon such Trustee's ceasing to act hereunder.

The trusts further provide that, if Santos ceased to act as trustee and no trustee is appointed as provided, "the successor Trustee shall be Sandra Shulak," Robert's sister.

In 1996, Alpert created another trust for his children's benefit. That trust holds a minority interest in a company which in turn holds restricted

¹ The appeal is filed in our court under cause number 01-06-00505-CV.

shares of a public company that Alpert co-founded. The 1996 trust names Anna DiLieto as the original trustee. If the trustee position becomes vacant, “and a successor Trustee who is willing and able to serve” is not “otherwise provided for,” the 1996 trust reserves to the grantor the power to appoint a successor trustee within thirty days. If the grantor fails to appoint a successor within the thirty-day period, the appointment power shifts to the trust beneficiaries or their guardian. The 1996 trust further provides that, “[a]ny successor Trustee, on executing an acknowledged acceptance of the trusteeship and upon receipt of those assets which are actually delivered to each successor Trustee by the prior Trustee, shall be vested without further act on the part of anyone with all of the estates, titles, rights, powers, duties, immunities and discretion granted to the prior Trustee.”

Mark Riley is Alpert’s former attorney, having assisted him from 1994 through 1998 in the administration of his business and legal affairs. Among other duties, Riley acted as legal counsel to the three trusts, as well as to various businesses in which Alpert had an interest.

The parties vigorously contest whether Riley was properly appointed as trustee of the RAT and DAT. Among other evidence, the record contains

- Letters from successor trustee Barbara Nussbaum Carmichael to Alpert dated August 1, 1997, tendering her resignation as trustee of the RAT and DAT and appointing Riley as trustee² of those trusts;
- Testimony from Alpert and an affidavit from Carmichael stating that Carmichael's employer informed them that Carmichael had to stop acting as trustee of the RAT and DAT as of September 9, 1996; and
- A July 1997 wire transfer request signed by Carmichael as trustee of the RAT and DAT.

The parties likewise clash over whether Riley was properly appointed trustee of the 1996 trust. Salient evidence concerning this dispute includes

- An April 3, 1997 letter from DiLieto resigning as trustee of 1996 Trust effective immediately, without naming a successor; and
- A letter dated April 3, 1997 from Riley to Alpert purporting to accept designation as trustee to the 1996 Children's Trust.³

The relationship between Alpert and Riley soured in 1998, and Riley's professional dealings with Alpert ended. By that time, Riley came to

² Computer word processing records and testimony in evidence demonstrate that these letters were created on September 12 and 30, 1997, not on August 1.

³ Riley's paralegal admitted that she did not prepare the April 3, 1997 letter until November 18, 1997, which is consistent with the computer's word processing records. Alpert testified that he did not see that letter until 1999.

believe that Alpert had sold his own stocks to trigger a tax loss, and then caused the RAT and DAT to buy those same stocks, which allegedly resulted in the overpayment of taxes by the trusts. Without Alpert's knowledge and without notifying the beneficiaries, Riley approached the Internal Revenue Service with information and records relating to those transactions and became an informant against Alpert and the trusts.

The IRS did not pursue charges against Alpert, but Riley, purporting to be trustee of the RAT and DAT, sued Alpert to recover the tax overpayments, based on the theory that Alpert had breached fiduciary duties he owed to the beneficiaries. The beneficiaries intervened in the suit, seeking a declaration that Riley was not trustee of the RAT or DAT or, alternatively, an order removing him as trustee for breach of fiduciary duties.

After Riley allegedly intercepted a tax refund check issued to the 1996 trust, its putative trustee initiated a separate suit, seeking a declaration that Riley was not trustee of the 1996 trust. The trial court consolidated that suit with the previously filed suit involving the RAT and DAT.

On April 11, 2003, the beneficiaries moved to dismiss with prejudice all claims brought by Riley on their behalf against Alpert in this suit. The beneficiaries renewed this request in September 2003 and again in March 2005, and reiterated their wish that Riley discontinue this lawsuit.

Trial Court Proceedings

The parties filed cross-motions for summary judgment addressing whether Riley was the properly appointed trustee of the three trusts. The trial court granted Riley's motion for summary judgment against the beneficiaries as to the RAT and DAT, determining as a matter of law that Riley had been properly appointed, and had served as trustee of those trusts since August 1, 1997. With respect to the 1996 trust, the trial court initially denied summary judgment, but reconsidered that decision at the pretrial hearing and ruled that Riley also had been properly appointed trustee of the 1996 trust as a matter of law. The trial court incorporated its rulings on all three trusts into its charge to the jury. The jury found that Riley breached his fiduciary duty to the trusts, but awarded nothing to the beneficiaries in damages.

As to Riley's claims against Alpert, the trial court also granted Riley's motion for summary judgment, establishing as a matter of law Alpert's liability for breach of fiduciary duty and the amount of damages suffered by the three trusts as a result of Alpert's stock transactions. On those issues, the charge instructed the jury that Alpert owed fiduciary duties to the beneficiaries, which included a duty of loyalty to the beneficiaries, and that he had breached those duties by engaging in acts of self-dealing with trust

assets. The trial court also incorporated into the charge synopses of its summary judgment rulings as to each of five stock transactions that, according to the trial court, Alpert had undertaken in violation of his fiduciary duties. The trial court informed the jury of its rulings concerning the dollar value that had accrued to Alpert's benefit as a result of the breach of his duties, which it determined by tallying the losses to the trust and the profit to Alpert resulting from each of those transactions. These amounts, according to the trial court, totaled about \$2 million in tax losses to the trusts and profits enjoyed by Alpert. The court's charge did not ask the jury for liability findings on these matters, but did inquire whether Alpert breached his fiduciary duty with respect to certain other transactions, with the jury concluding that he did, but awarding nothing in damages. The jury also awarded Riley's attorneys \$1,517,348 in attorney's fees for the work done on behalf of the RAT and DAT trusts, and \$57,038 for the 1996 trust.

On March 28, 2006, following post-trial hearings, the trial court entered judgment on the jury's findings against Alpert. The trial court awarded \$1,234,445.50 to Riley, for each of the RAT and DAT trusts, attorney's fees of \$656,200.78, prejudgment interest, additional attorney's fees of \$208,688.03 incurred for each trust and appellate fees against Alpert in connection with its summary judgment findings on the stock transactions

granted in favor of Riley. Finally, the trial court disregarded the jury's breach finding against Riley and its award of attorney's fees to the beneficiaries.

The trial court's judgment confirms the trial court's interim orders that Riley was properly appointed as trustee of the RAT, the DAT, and the 1996 trust, and that he is trustee of those trusts. The judgment also terminates Riley's trusteeship, but then reappoints Riley to serve as trustee of the three trusts until this appeal is final. The trial court reconfirmed its approval of Riley's accountings for the trusts and requests for attorney's fees and reimbursement of expenses incurred in connection with the litigation on behalf of the trusts, as well as an earlier distribution of \$40,000 in trustee compensation. None of the appellants challenges the propriety or adequacy of those accountings on appeal, and so they remain undisturbed, except to the extent that they are affected by reversal of certain of the trial court's other rulings.

On April 21, 2006, the beneficiaries asked the trial court to vacate the judgment based on their renewed request that Riley stop prosecuting the claims against Alpert in exchange for a release. The trial court denied this request, and Alpert and the beneficiaries gave timely notice of their appeal.

Discussion

I. Trustee Status

The beneficiaries challenge the trial court's pretrial rulings declaring Riley to be trustee of the RAT, the DAT, and the 1996 trust as a matter of law, contending that the plain language of the trust instruments require the opposite conclusion. Alternatively, the beneficiaries contend, the summary judgments should be reversed because fact issues exist concerning whether Riley is trustee. We address the trust instruments in turn.

A. Standard of review

To prevail on summary judgment, the movant has the burden of proving that there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. TEX. R. CIV. P. 166a(c); *Cathey v. Booth*, 900 S.W.2d 339, 341 (Tex. 1995). A defendant moving for summary judgment must either (1) disprove at least one element of the plaintiff's cause of action or (2) plead and conclusively establish each essential element of an affirmative defense to rebut plaintiff's cause. *Cathey*, 900 S.W.3d at 341. In deciding whether there is a disputed material fact precluding summary judgment, we take as true evidence favorable to the non-movant, indulging every reasonable inference and resolving any doubts in its favor. *Provident Life & Accid. Ins. Co. v. Knott*, 128 S.W.3d 211, 215 (Tex. 2003).

A matter is conclusively established if reasonable people could not differ as to the conclusion to be drawn from the evidence. *City of Keller v. Wilson*, 168 S.W.3d 802, 816 (Tex. 2005). When, as here, both sides move for summary judgment and the trial court grants one motion and denies the other, we review the summary judgment proof presented by both sides and determine all questions presented. *See CenterPoint Energy Houston Elec., L.L.P. v. Old TJC Co.*, 177 S.W.3d 425, 430 (Tex. App.—Houston [1st Dist.] 2005, pet. denied).

B. Waiver

Riley claims that the beneficiaries waived any objection they may have had to Riley's status as trustee by failing to object to the trial court's inclusion in the jury charge of its summary judgment decisions. Riley cites *Uro-Tech, Ltd. v. Somerset Partners, Corp.*, No. 05-96-01455-CV, 1999 WL 153130 (Tex. App.—Dallas Mar. 23, 1999, no pet.) (mem. op.), for the proposition that an appellant waives any error by failing to object to inclusion in the jury charge of issues previously decided on partial summary judgment. *See* 1999 WL 153130 at *2–4. Without deciding whether we agree with *Uro-Tech's* holding, we find it distinguishable. In that case, the parties contested whether a new statute applied to calculate royalty payments under their contract. *Id.* at *1. The trial court decided that it did not apply.

Id. at *1–2. In accordance with that decision, the charge instructed the jury to decide the amount of damages based on the legal standard stated in the older version of the statute. *Id.* at *3. The Dallas Court of Appeals held that the appellant waived its challenge to the summary judgment ruling by failing to object to that jury instruction. *Id.*

In contrast to *Uro-Tech*, the jury charge in this case did not instruct the jury to apply any law or make any fact finding that the trial court decided in the summary judgments. Although the issue of Riley’s trustee status was strenuously litigated both before and after trial, it was not placed at issue during the trial, and the jury was not asked to decide the issue because the trial court already had done so. The charge does not submit the issue to the jury; rather, in asking the jury to make other findings, it merely reiterates the trial court’s summary judgment rulings.⁴ When a trial court grants a partial summary judgment, the issue is ripe for appeal on final judgment if no

⁴ In *Bennett v. Coghlan*, No. 01-04-00104-CV, 2007 WL 2332969 (Tex. App.—Houston [1st Dist.] Aug. 16, 2007, pet. denied) (mem. op.), this Court decided that any error in granting a partial summary judgment determining an attorney’s hourly rate was rendered harmless by having that issue fully litigated at trial and submitted to the jury without objection. That decision primarily relied on the principle underlying the Texas Supreme Court’s holding in *Progressive County Mutual Insurance Co. v. Boyd*, 177 S.W.3d 919 (Tex. 2005), that subsequent events at trial can render harmless an erroneous grant of partial summary judgment. 2007 WL 2332969 at *2 (citing *Progressive County Mut. Ins. Co.*, 177 S.W.3d at 921). Here, in contrast, none of the parties requested the jury to determine trustee status; and such determination would have contravened the trial court’s legal decisions.

contested issue of fact on this matter is presented to the jury. Because the issue of whether Riley was trustee was never presented to the jury for resolution, Alpert and the beneficiaries were not required to object to the charge in order to preserve their complaints concerning the trial court's summary judgment rulings on appeal.⁵

C. Principles of Trust Construction

We interpret trust instruments the same way as wills, contracts, and other legal documents. *Lesikar v. Moon*, 237 S.W.3d 361, 366 (Tex. App.—Houston [14th Dist.] 2007, pet. denied). The meaning of the trust instrument is a question of law when no ambiguity exists. *Nowlin v. Frost Nat'l Bank*, 908 S.W.2d 283, 286 (Tex. App.—Houston [1st Dist.] 1995, no writ). If the court can give a definite legal meaning or interpretation to an instrument's words, it is unambiguous, and the court may construe the instrument as a matter of law. *Coker v. Coker*, 650 S.W.2d 391, 393 (Tex. 1983). If the language is uncertain or reasonably susceptible to more than one meaning, however, it is ambiguous, and its interpretation presents a fact issue precluding summary judgment. *Id.* at 394.

⁵ Nevertheless, we observe that, during the charge conference, Alpert objected to the jury instruction that Riley was trustee and offered jury questions on trusteeship issues, thus informing the trial court that the issue was contested.

A trust instrument need not contain any particular language to be effective. For an express trust to be shown, however, “(1) the words of the settlor ought to be construed as imperative and thus imposing an obligation on the trustee, (2) the subject to which the obligation relates must be certain, and (3) the person intended to be the beneficiary must be certain.” *Brelsford v. Scheltz*, 564 S.W.2d 404, 406 (Tex. Civ. App.—Houston [1st Dist.] 1978, writ ref’d n.r.e.), *quoted in Pickelner v. Adler*, 229 S.W.3d 516, 526 (Tex. App.—Houston [1st Dist.] 2007, pet. denied).

D. RAT and DAT

With respect to the trusteeship of the RAT and DAT, the beneficiaries assert that the trial court’s summary judgment rulings must be reversed and rendered in their favor because they conclusively proved that Riley was never properly appointed trustee. The beneficiaries’ assertion rests on their interpretation of the interplay between the trustee appointment and default trusteeship provisions in the DAT and RAT. They observe that the trustee appointment provision confers on the trustee the authority “to appoint a successor Trustee . . . upon her ceasing to act as a trustee hereunder,” and then states that the appointed successor is to take office “upon such Trustee’s ceasing to act hereunder.” The default trusteeship provision states that, if the trustee “shall cease to act as Trustee and there shall be no Trustee

appointed as provided . . . still able to qualify, the successor Trustee shall be Sandra Shulak.”

According to the beneficiaries, these provisions, as applied to the facts, require the conclusion that Carmichael “ceased to act” as trustee on September 9, 1996, without appointing a successor. The failure to appoint a successor at that time, the beneficiaries contend, triggered the default trusteeship provision, making Sandra Shulak the successor trustee, and thus, any subsequent act by Carmichael—namely, her August 1997 letter appointing Riley as trustee—was ineffective as a matter of law.

While we agree that the beneficiaries’ interpretation is a reasonable one, it is not the only reasonable interpretation of the trust language as applied to these facts. The problem lies in the trusts’ use of the term “ceasing to act” without temporal constraint or other definite limitation. In some instances, it may be obvious when a trustee ceases to act, such as when the trustee resigns or dies. At other times, however, it may not be clear whether the trustee’s lack of action is temporary because of a lull in trust activity, or whether the trustee has abandoned the position. Carmichael’s actions and testimony concerning whether she was still trustee when she signed the letter appointing Riley are equivocal, giving rise to a material

dispute about when Carmichael “ceased to act” as trustee, and therefore, whether Shulak or Riley was the proper trustee of the RAT and DAT.

That evidence falls into three categories. The first category consists of communications relating to Carmichael’s employer’s notice that Carmichael could not serve as trustee of the RAT and DAT after September 9, 1996. They include (1) an August 1996 letter from Carmichael’s employer to a financial institution in possession of trust assets, notifying the institution that Carmichael was permitted to serve as trustee only for an additional 30 days, and that a successor trustee was being appointed; (2) a September 1996 letter from Alpert to a brokerage firm notifying it that Carmichael was no longer serving as trustee; and (3) evidence that Riley and another individual engaged in activities relating to management of the trusts between September 1996 and August 1997.

The second category of evidence consists of documents identifying Carmichael as trustee on behalf of the RAT and DAT during the summer of 1997. The record reveals that (1) Carmichael’s name still appeared on some trust accounts; (2) Carmichael signed a wire transfer request for one of the trusts, on which she hand wrote “Trustee” following her signature; and (3) Carmichael signed and sent a letter to Alpert notifying him that she was

resigning as trustee of the RAT and DAT and appointing Mark Riley as her successor.

The third category of evidence consists of sworn statements made during this litigation. They include (1) Carmichael's deposition testimony that she told Riley and Alpert that she could no longer serve as trustee of the RAT and DAT during a discussion in the summer of 1997; (2) Carmichael's affidavit in which she attests that she resigned as trustee on September 9, 1996; and (3) Carmichael's second affidavit in which she attests that she either resigned or ceased to act as trustee on September 9, 1996.

The contemporaneous recorded evidence and Carmichael's testimony cannot be reconciled without determining the credibility and weight that should be attributed to each piece, a job that belongs to the fact finder. Accordingly, the trial court erred in granting summary judgment declaring Riley as the properly appointed trustee of the RAT and DAT.

E. 1996 trust

In complaining that the trial court erred in declaring Riley as trustee of the 1996 trust, the beneficiaries contend that the undisputed evidence conclusively shows that Riley did not accept trusteeship of the 1996 trust in accordance with the trust's terms. We agree.

According to the plain language of the 1996 trust instrument, before a named successor can become vested with the authority to act as trustee, the named successor must execute “an acknowledged acceptance of the trusteeship” The only evidence of Riley’s written acceptance of trusteeship of the 1996 trust is his letter, dated April 3, 1997, and addressed to Alpert, stating that Riley accepted designation as trustee “effective immediately.” This letter contains Riley’s signature, but does not contain a formal acknowledgment, such as one that a notary would execute. In considering whether Riley’s acceptance of the trusteeship was effective, the trial court stated

I think it all comes down to an interpretation of the trust agreement as to what 4.3 requires. And I don’t think acknowledged means acknowledgment. It means acknowledge. If there’s not acceptance at all, then it’s never acknowledged, and the trustee can’t be blamed for taking over because he never took over.

Thus, the trial court viewed “acknowledged” and “accepted” as more or less synonymous with respect to the express language of the 1996 trust. As a result, the trial court construed the term “acknowledged acceptance” as if “acknowledged” did not modify “acceptance” in any meaningful way and was merely redundant. This view is contrary to the applicable rules of construction.

In interpreting a contract, courts must, if possible, give effect to all its terms so none will be rendered meaningless. *Kelley-Coppedge, Inc v. Highlands Ins. Co.*, 980 S.W.2d 462, 464 (Tex. 1998). Courts must read all provisions together, interpreting the instrument so as to give each provision its intended effect. *Forbau v. Aetna Life Ins. Co.*, 876 S.W.2d 132, 133 (Tex. 1994). In ascertaining the parties' intent, we must be particularly wary of isolating individual words, phrases, or clauses and reading them out of the context of the document as a whole. *State Farm Life Ins. Co. v. Beaston*, 907 S.W.2d 430, 433 (Tex. 1995). For example, courts should presume that words that follow one another are not intended to be redundant. *See Gulf Metals Indus., Inc. v. Chicago Ins. Co.*, 993 S.W.2d 800, 805 (Tex. App.—Austin 1999, pet. denied) (interpreting “sudden,” in phrase “sudden and accidental,” as having temporal meaning because “accidental” describes unforeseen or unexpected event and ascribing same meaning to “sudden” would render terms redundant and violate rule that each word in contract be given effect); *see also McCreary v. Bay Area Bank & Trust*, 68 S.W.3d 727, 731 (Tex. App.—Houston [14th Dist.] 2001, pet. disp'd) (refusing to construe addendum to IRA deposit contract as merely promise to pay interest on interest-bearing savings account until date of its maturity because such construction would render the addendum redundant and reduce it to

superfluous agreement to abide by agreement). Accordingly, we reject the trial court's construction of the 1996 trust's "execute[] an acknowledged acceptance," to mean mere written acceptance, and consider the definition of "acknowledged" as it might reasonably apply in the context of the trust instrument.

Acknowledgments commonly appear in documents effecting property transfers, such as car titles and deeds. "The general purpose of a [formal] acknowledgment is to authenticate an instrument as being the act of the person executing the instrument." *Onwuteaka v. Cohen*, 846 S.W.2d 889, 894 (Tex. App.—Houston [1st Dist.] 1993, writ denied). In the case of a person acknowledging her acts as a trustee, executor, or administrator of an estate, a Texas statute expressly provides that "acknowledged" means that "the person personally appeared before the officer taking the acknowledgment and acknowledged executing the instrument by proper authority in the capacity stated and for the purposes and consideration expressed in it." TEX. CIV. PRAC. & REM. CODE ANN. § 121.006(b)(5) (Vernon 2005).

The term "acknowledged acceptance"—set forth in a legal instrument drafted by lawyers and documenting a conveyance of property rights conditioned on the execution of fiduciary duties—can only be reasonably

interpreted as requiring the prospective trustee to personally appear before a notary public or other authorized officer to accept the appointment and acknowledge executing the instrument. Riley concedes that he did not do this, but contends that the Texas Trust Code⁶ requires only that the trustee execute a “separate written acceptance”; consequently, Riley claims, his acceptance of the trusteeship was effective without an acknowledgment. *See* TEX. PROP. CODE ANN. § 112.009(a) (Vernon 2007). The Trust Code, however, recognizes the primacy of the settlor’s intent as manifested in the trust language. *See* TEX. PROP. CODE ANN. § 111.0035(b) (Vernon 2007) (declaring that “[t]he terms of a trust prevail over any provision of this subtitle,” save certain unrelated exceptions). The Trust Code thus requires adherence to the 1996 trust’s requirement that a trustee’s acceptance be acknowledged.

Because Riley did not accept the trusteeship in accordance with the plain terms of the trust’s requirements, we hold that he was not, as a matter of law, properly appointed trustee of the 1996 trust.

F. Equitable defenses

As alternative grounds for his claim to trustee status, Riley asserted in the trial court that the appellants’ acquiescence in, and ratification of, Riley’s

⁶ The Texas Trust Code appears in Title 9 of the Property Code. *See* TEX. PROP. CODE ANN. §§ 101.001 – 123.005 (Vernon 2007).

assumption of trustee duties for the three trusts bars them from obtaining a declaration that Riley is not trustee. The summary judgment rulings, however, cannot be sustained on those grounds.

We have not located, and Riley does not identify, any authority that recognizes a trustee by estoppel in the presence of express trust language outlining the procedure for appointment of a successor trustee. Riley first points to *Coffee v. William Marsh Rice University*, which was decided before the Legislature enacted the Texas Trust Code and involved a charitable trust. 408 S.W.2d 269, 284 (Tex. Civ. App.—Houston 1966, writ ref’d n.r.e.). In charitable trusts, “there is greater occasion for the exercise of the power of the court to permit or direct a deviation from the terms of the trust” because of the *cy pres* doctrine. *Id.* at 285. This doctrine does not apply to private express trusts like those at issue here, and “goes quite beyond anything which is permitted in the case of private trusts.” *Id.* (internal quotation omitted); see *Amalgamated Transit Union, Loc. Div. 1338 v. Dallas Public Transit Bd.*, 430 S.W.2d 107, 117 n.6 (Tex. Civ. App.—Dallas 1968, writ ref’d n.r.e.). Riley’s reliance on *Brault v. Bigham*, 493 S.W.2d 576 (Tex. Civ. App.—Waco 1973, writ ref’d n.r.e.), is also misplaced. In *Brault*, the trial court imposed a constructive trust on life insurance proceeds held by the named beneficiary under an insurance policy

for the benefit of four children and removed the beneficiary as trustee. *Id.* at 578–79. In contrast to *Brault*, this case involves express trusts, not constructive trusts.

Further, *Brault*, like *Coffee*, predates the enactment of the Texas Trust Code, which governs express trusts such as those at issue here. *See* TEX. PROP. CODE ANN. § 111.005 (Vernon 2007) (“If the law codified in this subtitle repealed a statute that abrogated or restated a common law rule, that common law rule is reestablished, except as the contents of the rule are changed by this subtitle.”). A court’s authority to modify a trust’s terms is subject to section 112.054(a) of the Texas Trust Code, which provides that

(a) On the petition of a trustee or 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 avoid impairment of the trust’s administration

TEX. PROP. CODE ANN. § 112.054(a) (Vernon 2007). Under this provision’s

plain language, a court may order modification of trust terms only on the petition of a trustee or beneficiary. *Id.* Because Riley is not trustee of the 1996 trust as a matter of law, he lacks the authority to petition for a modification of that trust. Further, with respect to the RAT and DAT, the only reason Riley advances for deviating from the trust terms concerns Alpert's mishandling of trust property, but the RAT and DAT do not contain any provisions authorizing Alpert, the settlor, to conduct transactions on behalf of the trusts, and thus his conduct should not subvert the express language of the trust instrument.

Riley has not identified any of the factors under section 112.054(a) as grounds for his request that the trial court authorize a deviation from the trusts' terms. Without basis in one of the statutory grounds, the trial court lacked the power to deviate from the trusts' terms.

Texas law prohibits the equitable rule proposed by Riley for other reasons as well. The Texas Trust Code requires adherence to the trustee selection method prescribed in the trust instrument, which necessarily forecloses the exercise of equitable discretion unless that method fails. *See* TEX. PROP. CODE ANN. § 113.083(a) (Vernon 2007). The record does not reveal that the trial court ever attempted to apply the trustee selection method prescribed by any of the trusts before appointing Riley. As the

Supreme Court has observed, “[w]hen a valid [instrument] already addresses the matter, recovery under an equitable theory is generally inconsistent with the express [instrument].” *Fortune Prod. Co. v. Conoco, Inc.*, 52 S.W.3d 671, 684 (Tex. 2000); *see also Ledig v. Duke Energy Corp.*, 193 S.W.3d 167, 176 (Tex. App.—Houston [1st Dist.] 2006, no pet.) (affirming summary judgment that rejected claim for unjust enrichment, noting that, “when a valid, express contract covers the subject matter of the parties’ dispute, there can be no recovery under a quasi-contract theory . . .”). Consequently, Riley’s claim to trusteeship cannot be upheld on any equitable ground.

II. Breach of Fiduciary Duty Claims against Alpert

Alpert and the beneficiaries contend that the trial court erred in entering judgment on Riley’s breach of fiduciary duty claims against Alpert because, among other reasons, Riley lacks standing to bring the claims. We agree that Riley has no standing.

A. Standing

Standing is a necessary component of a court’s subject matter jurisdiction. *Tex. Ass’n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 444–45 (Tex. 1993). To have standing a party must have a “sufficient relationship with the lawsuit so as to have a ‘justiciable interest’ in its

outcome.” *Austin Nursing Ctr. v. Lovato*, 171 S.W.3d 845, 848 (Tex. 2005) (quoting 6A CHARLES ALAN WRIGHT, ARTHUR R. MILLER, AND MARY KAY KANE, WRIGHT, MILLER & KANE, FEDERAL PRACTICE AND PROCEDURE: CIVIL 2D § 1559, 441 (2d ed. 1990)). A plaintiff must affirmatively show, through pleadings and other evidence pertinent to the jurisdictional inquiry, a distinct interest in the asserted conflict, such that the defendant’s actions have caused the plaintiff some particular injury. *Hunt v. Bass*, 664 S.W.2d 323, 324 (Tex. 1984); see *County of Cameron v. Brown*, 80 S.W.3d 549, 555 (Tex. 2002). Whether a plaintiff has standing is a legal question we determine de novo. See *Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922, 928 (Tex. 1998).

To determine whether Riley has standing to assert the breach of fiduciary duty claims against Alpert, we consider (1) the scope of Riley’s duties as a trustee, which dictates the bounds of his interest, and (2) the nature of Alpert’s alleged wrongs. To create an irrevocable trust, the settlor—in this case, Alpert—transfers legal title to specific property along with the obligation to administer the trust for the benefit of the named beneficiaries in accordance with the terms of the trust instrument. See TEXAS PROP. CODE ANN. § 111.004(4) (Vernon 2007) (defining “express trust”); RESTATEMENT (THIRD) OF TRUSTS §§ 70, 76–79, 82–84 (2003)

(defining the duties of a trustee). Once a settlor completes a transfer of assets to a trust, the beneficiaries gain beneficial title and the trustee gains sole legal title in, and exclusive control over, the trust property, subject to the trust instrument. BLACK'S LAW DICTIONARY 1546 (8th ed. 2004) (explaining characteristics of various trusts); *see also Pickelner*, 229 S.W.3d at 526. At the same time, the trustee, as a fiduciary, has equitable duties to hold and manage the property for the benefit of the beneficiaries. TEX. PROP. CODE ANN. §§ 113.051, 113.056(a) (Vernon 2007). Certain of those fiduciary duties are nondelegable. *See Tex. Commerce Bank, N.A. v. Grizzle*, 96 S.W.3d 240, 249 (Tex. 2002); *Slay v. Burnett Trust*, 187 S.W.2d 377, 387–88 (Tex. 1945); *see also Transamerican Leasing Co. v. Three Bears, Inc.*, 586 S.W.2d 472, 476 (Tex. 1979) (“The general rule is that a trustee may not delegate his discretionary power to another. A trustee may, however, . . . give authority to another to carry out ministerial or mechanical acts”); *see generally* TEX. PROP. CODE ANN. § 113.018 (Vernon 2007) (allowing trustee to employ investment agents and brokers “as reasonably necessary in the administration of the trust estate”). Unless the trust instrument expressly provides otherwise, a settlor has no duty to manage

trust property, and the trustee alone is responsible as a fiduciary if he allows the settlor to mismanage trust property to the detriment of the trust.⁷

None of the three trusts assigned any duty to Alpert, and thus Alpert could not otherwise owe any fiduciary duty. Absent some assignment of duty to the settlor in the trust instrument, a trustee has no cause of action to sue the settlor of a trust for a breach of fiduciary duty to the trust beneficiaries. *Cf. Ray Malooly Trust v. Juhl*, 186 S.W.3d 568, 570 (Tex. 2006) (noting that under Texas law, a trust refers to “the fiduciary relationship governing the *trustee* with respect to the trust property”) (emphasis added) (quoting *Huie v. DeShazo*, 922 S.W.2d 920, 926 (Tex. 1996) (per curiam). A trust settlor has no fiduciary obligation to a trust beneficiary once that trust is created, and control of the trust assets is vested with the trustee. *See id.*; *see also* TEX. PROP. CODE ANN. § 111.004(4) (Vernon 2007 & Supp.) (defining “express trust”).

Acknowledging that Alpert, in his capacity as settlor, has no fiduciary duty to the trust, Riley contends that “[t]he basis of [his] assertion was not the settlor-beneficiary relationship, but rather the *parent-minor child* relationship.” But Riley has no standing to sue Alpert for such a claim—it

⁷ Riley also sued Alpert for conversion of trust assets, but the trial court granted a directed verdict on that theory in favor of Alpert, and Riley does not appeal it. We therefore do not consider a trustee’s standing to sue a settlor for losses to a trust under that theory.

belongs to Alpert's children as his children, not to Riley as holder of the legal interest in trust property held for its beneficial owners. Riley does not stand *in loco parentis* to Alpert's children. Any legal interest in the trust property or fiduciary duty to the beneficiaries does not provide Riley with standing to assert claims against Alpert based on the alleged breach of a father's fiduciary duty to his sons.

The cases Riley cites, *S.V. v. R.V.*, 933 S.W.2d 1 (Tex. 1996), and *Thigpen v. Locke*, 363 S.W.2d 247 (Tex. 1962), recognize that a parent owes a fiduciary duty to his child, but in neither case does the Texas Supreme Court commit the prosecution for a breach of that duty to a trustee who has no guardianship over the child. On the contrary, the Court has made it clear that a child, who fundamentally holds the justiciable interest in the outcome of a suit for breach of a parent's fiduciary duty, may appear in court only "through a legal guardian, a 'next friend,' or a guardian ad litem." See *Austin Nursing Ctr., Inc. v. Lovato*, 171 S.W.3d 845, 849 (Tex. 2005). We hold that Riley, as trustee, lacks standing to sue Alpert, as a father for breach of his parental duties to his children and thus the trial court lacked subject matter jurisdiction over this claim.

B. Other theories

In his brief, Riley advances two other bases for affirming the trial court's judgment against Alpert: violation of federal tax law and constructive trust. To the extent Riley attempts to sue Alpert for violation of federal income tax regulations through a breach of fiduciary duty theory, that theory is also unavailing. No private cause of action lies for violation of regulations promulgated under Internal Revenue Code except against the U.S. Government. *See Tax Analysts v. I.R.S.*, 214 F.3d 179, 185 (D.C. Cir. 2000) (finding no private right of action under section 6104 of the Internal Revenue Code); *Sigmon v. Sw. Airlines Co.*, 110 F.3d 1200, 1203–05 (5th Cir. 1997); *see also* 26 U.S.C.S. § 7422(a) (LEXIS 2008) (“No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected . . . until a claim for refund or credit has been duly filed with the Secretary. . . .”); 26 U.S.C.S. § 7422(f)(1) (LEXIS 2008) (“A suit [for erroneously or illegally assessed or collected taxes] may be maintained only against the United States”).

The federal income tax law's pervasive “administrative scheme of enforcement is strong evidence that Congress intended the administrative remedy to be exclusive.” *Sigmon*, 110 F.3d at 1206 (quoting *Till v. Unifirst*

Fed. Sav. & Loan Ass'n, 653 F.2d 152, 160 (5th Cir. 1981)). A recently enacted provision to the Internal Revenue Code underscores this conclusion. The new section provides the Treasury Secretary with the authority to reward whistleblowers who aid the Internal Revenue Service in “(1) detecting underpayments of tax, or (2) detecting and bringing to trial and punishment persons guilty of violating internal revenue laws or conniving at the same” 26 U.S.C.S. § 7623(a) (LEXIS 2008) (eff. Dec. 20, 2006). “When Congress acts to amend a statute, we presume it intends its amendment to have real and substantial effect.” *Stone v. I.N.S.*, 514 U.S. 386, 397, 115 S. Ct. 1537, 1545 (1995), *quoted in Peavy v. WFAA-TV, Inc.*, 221 F.3d 158, 169 (5th Cir. 2000). The enactment of the new whistleblower reward statute suggests that Congress intended both to provide a financial incentive where none existed before and to make such a reward available exclusively through an administrative route. *See* 26 U.S.C.S. § 7263(b)(1), (3), (4) (LEXIS 2008) (empowering IRS Whistleblower Office with broad discretion to determine amount, if any, of award, and providing for appeal of award determination to Tax Court). Consequently, the judgment against Alpert cannot be sustained under federal tax law.

Riley also urges that the judgment can be sustained under either a constructive trust theory, or the theory that Alpert knowingly participated in

a breach of trust, as recognized by the Texas Supreme Court in *Kinzbach Tool Co. v. Corbett-Wallace Group*. 160 S.W.2d 509, 514 (Tex. 1942). Here, however, the questions posed to the jury asked only whether Alpert's conduct in certain specified transactions constituted a breach of Alpert's duty to the trusts. None asked the jury to find whether Alpert knowingly participated in or aided or abetted a breach fiduciary duty, or asked the jury to make any findings that would furnish grounds to impose a constructive trust on the trust assets. Consequently, Riley waived any claim under those theories. See TEX. R. CIV. P. 279; *Yellow Cab & Baggage Co. v. Green*, 277 S.W.2d 92, 93 (Tex. 1955); *Jarrin v. Sam White Oldsmobile Co.*, 929 S.W.2d 21, 25 (Tex. App.—Houston [1st Dist.] 1996, writ denied).

We conclude that Riley lacked standing to pursue the only claim presented to the jury. Accordingly, we reverse the trial court's judgment on the breach of fiduciary duty claims against Alpert and dismiss them for lack of subject matter jurisdiction.

III. Breach of Trust Claim Against Riley

The beneficiaries challenge the trial court's decision to disregard the jury's finding of liability on their breach of trust claim against Riley. They contend that the trial court erred in concluding that the evidence was not legally sufficient to support that finding. As support for their contention that

the evidence is legally sufficient to sustain the finding, the beneficiaries point to (1) testimony from witnesses including Larry St. Martin, the Alpert Companies' former controller, that Riley had general knowledge about and assisted in executing many of Alpert's stock sales to the trusts; (2) evidence that Riley intercepted a tax refund check to the trust and used it to pay his trustee fees and the lawyers; (3) the fact that Riley pursued the claims against Alpert in this litigation despite the beneficiaries' protest; (4) multiple instances in which Riley failed to communicate with the beneficiaries, including regarding the filing of this lawsuit and his discussions with the IRS; and (5) Riley's representation of both Alpert and the trusts, which potentially posed a conflict of interest.

The charge instructed the jury that Riley, as trustee, owed the beneficiaries, among other duties, (1) the duty of loyalty to the beneficiaries to administer the affairs of the trust in their interest alone, and (2) a duty to disclose all material facts known to the trustee that affect the beneficiaries' rights. The express language of the RAT and DAT trusts requires the trustee to notify each of the beneficiaries annually of their right to withdraw an amount equal to the aggregate amount contributed by each donor for that calendar year, or \$20,000, whichever is less. Roman Alpert, one of the beneficiaries, testified that he received no communications from Riley

concerning that annual right of withdrawal, and Riley admitted that he did not communicate with the beneficiaries concerning that matter, this suit, or his dealings with the IRS on behalf of the trust. Based on this evidence and the express terms of the trust, we conclude that a rational trier of fact could conclude that Riley breached his fiduciary duty to the trusts by failing to communicate material information. The trial court therefore erred in granting the judgment notwithstanding the verdict on the beneficiaries' breach of fiduciary duty claim, and we restore the jury's verdict.

The jury, however, also found zero damages in connection with its finding against Riley for breach of fiduciary duty. The beneficiaries do not appeal the no damages finding, but instead ask that we remand the case for the court to consider equitable disgorgement based on the finding of breach. *See* TEX. PROP. CODE ANN. § 114.061(b) (Vernon 2007) (“If the trustee commits a breach of trust, the court may in its discretion deny him all or part of his compensation.”); *Burrow v. Arce*, 997 S.W.2d 229, 238–41 (Tex. 1999). Given the jury's conclusion that no damages obtained, any breach might not amount to the kind of “clear and serious” breach of fiduciary duty that would lead a court, acting in equity, to require the fiduciary to disgorge his fees. *See Arce*, 997 S.W.2d at 241. The beneficiaries were apprised of trust expenses through service with Riley's court filings, they do not

challenge the trial court's approval of Riley's accountings for the trusts, and the failures to communicate happened, in the main, after the beneficiaries and Riley became adversaries in this suit. While the absence of actual damages is not determinative, we hold that we need not remand for consideration of equitable disgorgement, because, as we discuss in part VI of the opinion, we reverse the award of trustee compensation on other legal grounds. Our reversal of the trial court's award of trustee compensation obviates the need for consideration of the equitable remedy of disgorgement.

V. Attorney's Fees and Trustee Compensation

The beneficiaries assert that the trial court abused its discretion in refusing to order Riley to pay their attorney's fees. Section 114.064 of the Trust Code, which furnishes the authority for the beneficiaries' request, provides that "[i]n 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 (Vernon 2007). The charge asked the jury to determine "the reasonable fee for the necessary services of the Beneficiaries [sic] attorneys in this case" The jury made affirmative findings, based on uncontroverted evidence, that (1) \$162,288 for preparation and trial, (2) \$35,000 for appeal to the court of appeals, and (3) \$15,000 for appeal to the Texas Supreme Court were reasonable fees for

those necessary services. The trial court, in the exercise of its discretion, declined to award fees.

“[O]nce the jury has found the value of reasonable and necessary services, the court must decide whether the award would be equitable and just.” *Arce*, 997 S.W.2d at 245–46. Given our disposition of other legal issues in the case, the issue of whether any award would be equitable and just warrants reconsideration. Accordingly, we reverse the trial court’s denial of the beneficiaries’ request for attorney’s fees and remand for further proceedings on that issue.

The beneficiaries also challenge the trial court’s award of attorney’s fees and trustee compensation to Riley. Our reversal of the trial court’s judgment as it pertains to Riley’s trustee status and the breach of trust issue requires us to reverse the confirmation of Riley’s payment of attorney’s fees and remand for further proceedings on that issue as well.

We further observe that, if Riley is found to have been properly appointed trustee of the RAT and DAT, he was statutorily prohibited from prosecuting the damages claims against Alpert on behalf of the trusts after April 21, 2006. Section 113.028 of the Texas Trust Code became effective in 2005. *See* TEX. PROP. CODE ANN. § 113.028 (Vernon 2007). That section provides

A trustee may not prosecute or assert a claim for damages in a cause of action against a party who is not a beneficiary of a trust if each beneficiary of the trust provides written notice to the trustee of the beneficiary's opposition to the trustee's prosecuting or asserting the claim in the cause of action.

Id. § 113.028(a). The beneficiaries had previously expressed their opposition to Riley's prosecution of the claims against Alpert, but those expressions occurred before section 113.028's effective date, when Riley retained discretion to continue the prosecution. The Legislature removed that discretion before the beneficiaries filed their April 21, 2006 written notice of opposition. Accordingly, when Riley received that opposition, he had no choice but to heed their wishes and stop prosecuting the claims against Alpert.

Any attorney's fees or legal expenses incurred in prosecuting the damages claims against Alpert after the beneficiaries' written notice of opposition are not authorized by the Trust Code, and are not reasonable or necessary as a matter of law. As a result, we hold that Riley is not entitled to reimbursement for any attorney's fees or expenses incurred after April 21, 2006 in connection with his prosecution of the claims against Alpert.

Nor is Riley entitled to recover compensation. Both the RAT and DAT specify that "[n]either the original Trustee nor any successor named herein or appointed pursuant hereto shall be entitled to commissions or other

compensation for acting as Trustee hereunder.” The plain language of these instruments thus precludes any recovery of trustee compensation regardless of whether Riley was an authorized trustee of those trusts. And our holding that Riley is not the authorized trustee under the 1996 trust precludes any recovery of compensation as a matter of law for actions taken in connection with that trust. We therefore reverse the trial court’s award and render judgment that Riley take nothing on his claim for trustee compensation.

VI. Riley’s Appointment as Successor Trustee

The beneficiaries assert that the trial court’s appointment of Riley as successor trustee of the three trusts violates the Texas Trust Code and the trusts themselves. We agree. The Code provides that

a successor trustee shall be selected according to the method, if any, prescribed in the trust instrument. If for any reason a successor is not selected under the terms of the trust instrument, a court may and on petition of any interested person shall appoint a successor in whom the trust shall vest.

TEX. PROP. CODE ANN. § 113.083(a). Each of the three trust instruments expressly provides a method for appointing a successor trustee. Nothing in the record indicates that those methods have been tried and failed. The trial court abused its discretion by resorting to its equitable appointment power without first attempting to follow the trustee selection methods prescribed by

the trust instruments. Consequently, we reverse the portion of the judgment appointing Riley as successor trustee of the trusts.

Because the both RAT and DAT expressly preclude any compensation for acting as trustee, the trial court also abused its discretion in ordering that Riley receive “reasonable compensation to be approved by the Court” for his service as successor trustee of the RAT and DAT. Riley may not recover compensation as a successor trustee in equity that he would not be entitled to receive under the valid express contract. *See Woodward v. Sw. States, Inc.*, 384 S.W.2d 674 (Tex. 1964); *Allen v. Berrey*, 645 S.W.2d 550, 553 (Tex. App.—San Antonio 1982, writ ref’d n.r.e.); *see also* TEX. PROP. CODE ANN. § 111.0035(b) (terms of trust instrument prevail over provisions of Trust Code); *Sorrell v. Sorrell*, 1 S.W.3d 867, 870 (Tex. App.—Corpus Christi 1999, no pet.) (holding that when language of trust instrument is unambiguous, that language controls; neither trustee nor courts can modify trustee’s powers, but must adhere to settlor’s intent). Because the RAT and DAT expressly foreclose the possibility that the original or any successor trustee be compensated for his service, Riley is not entitled to recover any compensation as successor trustee of those trusts under the judgment.

VII. Request for Security Bond

Alpert and the beneficiaries filed a separate appeal challenging the trial court's denial of their request that Riley post security pending appeal. The general rule is that an appeal may be taken only from a final judgment. *Lehmann v. Har-Con Corp.*, 39 S.W.3d 191, 195 (Tex. 2000). This rule has exceptions, but none applies here. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 15.003 (Vernon 2002 & Supp. 2007), § 51.012 (Vernon 1997), § 51.014 (Vernon Supp. 2007). The appellants cannot appeal the trial court's denial of security bond because that decision does not constitute a final judgment. *See Lehmann*, 39 S.W.3d at 195 ("A judgment is final for purposes of appeal if it disposes of all pending parties and claims in the record, except as necessary to carry out the decree."). The proper avenue for seeking the requested relief is to challenge that decision in the cause in which the appeal is pending pursuant to Texas Rule of Appellate Procedure 24. TEX. R. APP. P. 24.4(a). We therefore dismiss appellate cause number 01-06-00505-CV for want of jurisdiction. *See New York Underwriters Ins. Co. v. Sanchez*, 799 S.W.2d 677, 679 (Tex. 1990) (holding that appellate court's assumption of jurisdiction over interlocutory order when not expressly authorized by statute is fundamental jurisdictional error).

We consider the substance of appellants' request for relief as a motion ancillary to their appeal on the merits. *See Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 242 (Tex. 2004) ("It has long been our practice to consider the substance of motions rather than their form."); *Doctor v. Pardue*, 186 S.W.3d 4, 16 (Tex. App.—Houston [1st Dist.] 2005, pet. denied) ("[W]e look to an instrument's substance rather than its form.").

Alpert and the beneficiaries' request arises out of the trial court's denial of their motion pursuant to Texas Rule of Appellate Procedure 24.2(a)(3) that the trial court set an amount of security to supersede Riley's appointment pending this appeal after the trial court reappointed Riley as trustee of the three trusts. Alpert and the beneficiaries contend that the trial court erroneously disregarded the mandatory language of the rule in failing to set an amount of security sufficient to supersede Riley's reappointment.

Rule 24.2(a)(3) provides

When the judgment is for something other than money or an interest in property, the trial court must set the amount and type of security that the debtor must post.

TEX. R. APP. P. 24.2(a)(3). We agree that this language is mandatory, but disagree that it applies to the reappointment of Riley as trustee. The provision refers to the security that the judgment debtor must post. The record demonstrates that Riley urged the court to reappoint him as trustee

pending this appeal, and that the reappointment is adverse to the appellants' position, not his. Further, as the appellants acknowledge, the judgment awards Riley, as trustee, a money judgment. Riley is the judgment creditor, not a judgment debtor. Thus, Rule 24.2(a)(3) does not apply. We conclude that the trial court did not err in denying the appellants' request to set security and likewise decline to do so.

Conclusion

Based on the holdings set forth in this opinion, we rule as follows:

(1) We reverse part I of the judgment in which the trial court disregarded the jury's answer to Juror Question No. 8, i.e., the affirmative answer to whether Riley breached his fiduciary duty to the trusts or the beneficiaries, but render judgment that the beneficiaries take nothing on this claim because the jury awarded nothing in damages, and our other rulings obviate the claim for equitable disgorgement of trustee compensation. We remand the beneficiaries' claim for attorney's fees to the trial court for further proceedings.

(2) We reverse part II of the judgment ratifying and confirming the trial court's June 21, 2004, September 30, 2004, December 14, 2004, December 21, 2004, January 31, 2004, and April 4, 2005 orders authorizing payments of expenses to Riley and fees to his counsel, and remand for

further proceedings consistent with this opinion. We reverse and render judgment that Riley take nothing on his claims for trustee compensation.

(3) We reverse parts III and IV of the judgment, in which the trial court orders that Riley, as trustee of the RAT and DAT, and on behalf of the RAT and DAT, have judgment against Alpert and awards him attorney's fees and interest relating to those claims, and render judgment that Riley on behalf of the trusts take nothing on the claims against Alpert.

(4) We reverse part VI of the judgment, in which the trial court ratifies and confirms prior payments of attorney's fees and expenses to Riley, and remand for further proceedings consistent with this opinion.

(5) We affirm parts VII, VIII, and IX of the judgment.⁸

(6) We reverse part X of the judgment, in which the trial court ratifies its prior declarations that Riley was properly appointed Trustee of the RAT, the DAT, and the 1996 trust, and that Riley is the trustee of those trusts and has all the powers conferred by the Texas Trust Code and the trust instruments, and (a) with respect to the findings relating to the RAT and DAT, remand for further proceedings consistent with this opinion, and (b) with respect to the findings relating to the 1996 trust, render a declaration that Riley was not properly appointed trustee of the 1996 trust, is not and has

⁸ These parts concern issues not raised on appeal.

not been trustee of the 1996 trust, and does not hold any of the powers conferred on trustees by the 1996 trust instrument and applicable statute.

(7) We reverse the portion of part XI of the judgment that approves any award of trustee compensation for Riley and render judgment on Riley's requests for trustee compensation that Riley take nothing. We affirm the remainder of part XI.

(8) We reverse part XII of the judgment concerning attorney's fees and remand for further proceedings consistent with this opinion.

(9) We affirm part XIII of the judgment only to the extent it recognizes the release of Riley as trustee and termination of his trusteeship as pertains to any trusteeship that may later be found to be valid. We reverse the remainder of part XIII and render judgment that any successor trustees for the RAT, DAT, and 1996 trust are to be selected in accordance with the terms of the applicable trust instrument, after identification of the valid trustee for each trust.

(10) We deny the appellants' request that Riley post a security bond pending appeal.

We dismiss the security bond appeal filed under number 01-06-00505-CV for lack of jurisdiction. We grant appellants' agreed motion to substitute counsel and to designate lead counsel. All other pending

motions are dismissed as moot. All stays granted are lifted upon the issuance of this opinion and judgment.

Jane Bland
Justice

Panel consists of Chief Justice Radack and Justices Jennings and Bland.