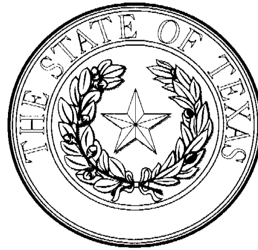
Opinion issued August 25, 2020



In The

Court of Appeals

For The

First District of Texas

NO. 01-19-00122-CV

MANISCH SOHANI AND ANIS VIRANI, Appellants

V.

NIZAR SUNESARA, Appellee

On Appeal from the County Civil Court at Law No. 1
Harris County, Texas
Trial Court Case No. 1058441

OPINION

This case is a dispute between former business associates. Appellants, Manisch Sohani and Anis Virani, sued appellee, Nizar Sunesara, for fraud and sought declaratory relief arising out of Sunesara's formation of three limited liability

companies. Sunesara asserted a counterclaim for declaratory relief, seeking a declaration that he was a member of each LLC and was entitled to one-third of the net profits from each LLC. A jury found that (1) Sunesara was a member of each LLC and was entitled to one-third of the net profits from each LLC, (2) Sohani and Virani were estopped from denying Sunesara's membership in the LLCs, and (3) Sunesara did not commit fraud. The trial court entered judgment on the jury verdict. In a prior appeal, this Court affirmed the judgment, but modified it to delete the portion providing that Sunesara was entitled to one-third of the net profits from the LLCs. *See Sohani v. Sunesara*, 546 S.W.3d 393, 410 (Tex. App.—Houston [1st Dist.] 2018, no pet.).

After this Court's mandate issued, Sohani and Virani filed two motions with the trial court: one seeking reconsideration of the court's award of attorney's fees in favor of Sunesara, and one seeking disgorgement of past profits previously distributed to Sunesara. The trial court denied both motions. In this appeal, Sohani and Sunesara argue (1) the trial court abused its discretion by failing to reconsider its award of attorney's fees and (2) recovery of profits previously paid to Sunesara is "necessary and proper further relief" authorized by the Texas Declaratory Judgments Act ("DJA" or "the Act").

We affirm.

Background

In 2002, Sunesara and Virani began selling smoking accessories at flea markets in Houston and Austin. In 2003, they decided to open up a brick-and-mortar retail store in Houston, called Zig Zag Smoke Shop, and they brought in Sohani as another owner. In 2012, Sunesara and Virani decided to expand their business, and they opened a second smoke shop called Burn Smoke Shop ("Burn I"). Toward the end of that year, another smoke shop, EZ Smoke Shop, sold its existing business to Sunesara, Virani, and Sohani, and they changed the name of this shop to Burn Smoke Shop Two ("Burn II").

Before the acquisition of Burn II was finalized, Sohani and Virani asked Sunesara to file paperwork to form three limited liability companies to own and operate the three smoke shops. Sunesara filed paperwork to create three LLCs: ZZSS, LLC (which managed Zig Zag Smoke Shop), BRNSS, LLC (which managed Burn I), and EZSS, LLC (which managed Burn II). The paperwork for the LLCs lists Virani, Sohani, and Sunesara as governing persons. Virani, Sohani, and Sunesara were also all listed as "members" of the LLCs on the signature cards for bank accounts that they opened up for the companies.

Over the next few years, the parties' working relationship deteriorated, and they began having disputes over whether Sunesara was entitled to profit distributions from the LLCs. Sohani and Virani filed suit against Sunesara in 2015, asserting

causes of action for fraud and declaratory relief. With respect to their fraud claim, they alleged that Sunesara improperly listed himself as a member of the LLCs on the paperwork that he filed with the State of Texas and that he fraudulently represented that he was a member entitled to profit distributions and access to the LLCs' books and records. With respect to their claims for declaratory relief, they sought declarations that Sunesara was not a member of the LLCs, he did not have a membership interest in the LLCs, he was not entitled to review the books and records of the LLCs, and he was not entitled to any profit distributions or other sums from the LLCs.

Sunesara filed several counterclaims against Sohani and Virani, including claims for breach of fiduciary duty, breach of the duty of good faith and fair dealing, quantum meruit, fraud, and promissory estoppel. He sought an accounting and a declaration that he was a member of the LLCs and was entitled to one-third of the profits from the LLCs. Sunesara later dropped his claims for monetary damages, and, at trial, he sought only non-monetary relief, specifically, declarations that he was a member of the LLCs, he was entitled to one-third of the net profits from the LLCs, and he was entitled to examine the books and records of the LLCs.

The jury found that Sunesara was a member of each of the LLCs and was entitled to a one-third profit distribution from each of the LLCs. The jury also found that Sohani and Virani were estopped from denying that Sunesara was a member of

the LLCs, and it found that Sunesara did not commit fraud against Sohani or Virani. The jury also made findings concerning both parties' attorney's fees. The trial court entered judgment on the jury verdict, declaring that Sunesara was a member of the LLCs and entitled to one-third of the profits from the LLCs, and awarding Sunesara $98,166 in trial-level attorney's fees and a total of $110,000 in conditional appellate attorney's fees.

Sohani and Virani appealed the trial court's judgment to this Court. In one of their issues on appeal, they argued that the trial court's declaration that Sunesara was a member of each of the LLCs and was entitled to one-third of the profits from the LLCs conflicted with Business Organizations Code section 101.201. Section 101.201 requires an LLC's allocation of profits and losses to be made "on the basis of the agreed value of the contributions made by each member, as stated in the company's records," but no written records demonstrated Sunesara's contributions to the LLCs or demonstrated that he was entitled to one-third of the profits. *See Sohani*, 546 S.W.3d at 404. Sohani and Virani did not raise any issues concerning the attorney's fees. In their prayer for relief, they requested that this Court "set aside the Final Judgment entered by the Trial Court, in particular, the Trial Court's judgment that [Sunesara] is entitled to profit distributions from the LLCs."

We construed two sections of the Business Organizations Code

> as requiring a limited liability company to include a statement of the amount of cash contributions made by each member and a statement of

> the agreed value of any other contribution made by each member in the written records of the company and that these records establish the allocation of a member's share of the profits and losses of the company.

Id. at 407 (construing TEX. BUS. ORGS. CODE ANN. §§ 101.201, 101.501(a)(7)). Because Sunesara offered only his testimony at trial that he made contributions to the LLCs and did not offer any written records reflecting his contributions, we concluded that he presented no evidence that he was entitled to one-third of the profits of the LLCs. *Id.* We therefore held that "[b]ecause Sunesara was not assigned a share of profits in the company agreements and presented no evidence that he was entitled to a one-third share of profits in the LLCs, he was not entitled to a share in profits as a matter of law" and that the trial court erred to the extent it ruled that Sunesara was entitled to one-third of the profits. *Id.* at 408. We modified the trial court's judgment to delete the declaration that Sunesara was entitled to one-third of the profits from the operation of the three LLCs and affirmed the remainder of the trial court's judgment. *Id.* at 410. We did not make any holdings concerning attorney's fees, nor were we asked to do so.

After our mandate issued, Sohani and Virani filed two motions with the trial court. In their first motion, entitled, "Plaintiff's Motion to Amend Judgment or Reconsideration," Sohani and Virani requested that the trial court, in light of this Court's opinion modifying the judgment, vacate the award of attorney's fees to Sunesara and award attorney's fees to Sohani and Virani. Sohani and Virani argued

that the trial court's initial attorney's fees award in favor of Sunesara was based on the fact that he was the prevailing party, pointing to a discussion between counsel and the trial court after the jury verdict in which the court stated that the "normal situation" is that the prevailing party receives attorney's fees but it wished to hear any arguments for why that practice should not be followed in this case. Sohani and Virani argued that, after this Court's opinion, "the circumstances have changed substantially" and Sunesara was not the prevailing party. They sought, pursuant to Civil Practice and Remedies Code section 37.009, an award of their trial-level attorney's fees, as well as their attorney's fees on appeal because they prevailed on appeal. Alternatively, they requested that the trial court award attorney's fees to all of the parties.

Sohani and Virani also filed a "Motion for Disgorgement of Ill-Gotten Gains." They pointed out that, prior to litigation, Sunesara had received profit distributions from the LLCs, totaling around $17,500. They argued that, based on this Court's opinion, which held that Sunesara was not entitled to profit distributions, "[i]t is now established that such distributions are ill-gotten gains or unjust enrichment," and they requested that the trial court order Sunesara to return the distributions.

In response, Sunesara argued that because Sohani and Virani did not challenge the attorney's fees award on appeal, this Court did not reverse the attorney's fees award or remand the case to the trial court for reconsideration of attorney's fees, and

this Court had issued its mandate and the trial court's plenary power had expired, it did not have jurisdiction to reconsider the attorney's fees award. He argued that the trial court only had jurisdiction to issue orders regarding enforcement of the judgment, but it could not issue an order that materially changes the relief awarded in the judgment. With respect to the motion for disgorgement of profits, Sunesara again argued that, because this Court remanded no portion of the judgment to the trial court, the trial court lacked jurisdiction to grant the relief that Sohani and Virani sought. Sunesara also pointed out that Sohani and Virani never sought a finding in the trial court that would support disgorgement as a remedy, and they did not raise the issue of disgorgement on appeal.

After a hearing, the trial court signed orders denying both of Sohani and Virani's motions on the basis that it lacked jurisdiction to vacate, modify, correct, or reform its final judgment. Sohani and Virani moved for reconsideration, arguing that under Civil Practice and Remedies Code section 37.011, the trial court has jurisdiction to grant supplemental relief based on a declaratory judgment, even after an appeal of the original declaratory relief. In response, Sunesara acknowledged that the trial court likely had jurisdiction to consider Sohani and Virani's motions, but he argued that they had waived their request for reconsideration of attorney's fees by not challenging the fee award on appeal and not requesting that this Court remand the fee award to the trial court.

The trial court withdrew its initial orders denying Sohani and Virani's motions on the basis of lack of jurisdiction, but it nevertheless denied both motions. This appeal followed.

Reconsideration of Attorney's Fees Award

In their first issue, Sohani and Virani contend that the trial court erred by failing to reconsider its award of attorney's fees to Sunesara. Specifically, they argue that, while Sunesara was the prevailing party in the trial court, this Court's previous opinion deleted a declaration in favor of Sunesara, and thus he was "no longer the undisputed prevailing party" in the dispute. Sohani and Virani argue that, in light of this Court's modification of the judgment, the trial court abused its discretion by failing to reconsider the attorney's fees award.

The DJA, Civil Practice and Remedies Code Chapter 37, governs declaratory judgments in Texas. *See* TEX. CIV. PRAC. & REM. CODE ANN. §§ 37.001–.011. Section 37.009 provides that, "[i]n any proceeding under [the DJA], the court may award costs and reasonable and necessary attorney's fees as are equitable and just." *Id.* § 37.009. The statute's "reasonable and necessary" requirements are questions of fact for the fact finder, but the "equitable and just" requirements are questions of law for the trial court. *Ridge Oil Co. v. Guinn Invs., Inc.*, 148 S.W.3d 143, 161 (Tex. 2004); *Bocquet v. Herring*, 972 S.W.2d 19, 21 (Tex. 1998). We review the trial court's decision to award or not award attorney's fees under the DJA for an abuse of

discretion. *Ridge Oil*, 148 S.W.3d at 163; *Vincent v. Bank of Am., N.A.*, 109 S.W.3d 856, 868 (Tex. App.—Dallas 2003, pet. denied) ("We broadly construe the trial court's discretion to award attorney's fees and costs in a declaratory judgment action."). A trial court abuses its discretion if it misinterprets or misapplies the law or acts arbitrarily or unreasonably. *Tanglewood Homes Ass'n, Inc. v. Feldman*, 436 S.W.3d 48, 69 (Tex. App.—Houston [14th Dist.] 2014, pet. denied).

The award of attorney's fees under the DJA "is clearly within the trial court's discretion and is not dependent on a finding that a party 'substantially prevailed.'" *Barshop v. Medina Cty. Underground Water Conservation Dist.*, 925 S.W.2d 618, 637 (Tex. 1996) (remanding case after rendition of judgment on merits for defendant for court to "consider and exercise its discretion on the amount of attorney's fees, if any, which should be awarded to the parties in this case"); *Approach Res. I, L.P. v. Clayton*, 360 S.W.3d 632, 639 (Tex. App.—El Paso 2012, no pet.) (stating that attorney's fees award in DJA action is not dependent on finding that party prevailed in action, and trial court may exercise its discretion and decline to award fees to either party); *State Farm Lloyds v. C.M.W.*, 53 S.W.3d 877, 894 (Tex. App.—Dallas 2001, pet. denied) ("[A] trial court may, in its discretion, award attorneys' fees to the nonprevailing party in a declaratory judgment action."). "A prevailing party in a declaratory judgment action is not entitled to attorney's fees simply as a matter of law; entitlement depends upon what is equitable and just, and the trial court's power

is discretionary in that respect." *Marion v. Davis*, 106 S.W.3d 860, 868 (Tex. App.—Dallas 2003, pet. denied). "[A]warding attorneys' fees to the nonprevailing party is not in itself an abuse of discretion." *Vincent*, 109 S.W.3d at 868; *Tanglewood Homes Ass'n, Inc. v. Henke*, 728 S.W.2d 39, 45 (Tex. App.—Houston [1st Dist.] 1987, writ ref'd n.r.e.) ("An award of attorney's fees under the [DJA] is not limited to the prevailing party."). "When an appellate court reverses a declaratory judgment, it may reverse an attorney's fee award, but it is not required to do so." *Kachina Pipeline Co. v. Lillis*, 471 S.W.3d 445, 455 (Tex. 2015); *City of Temple v. Taylor*, 268 S.W.3d 852, 858 (Tex. App.—Austin 2008, pet. denied) (reversing merits of trial court's declaratory judgment but declining to reverse attorney's fees award, noting that when appellant asserts no issues on appeal challenging award of attorney's fees under DJA, appellant "has waived all complaints in this regard").

The law presumes that a defendant will "recognize and respect the rights declared by a declaratory judgment and will abide by the judgment in carrying out [his] duties." *Howell v. Tex. Workers' Compensation Comm'n*, 143 S.W.3d 416, 433 (Tex. App.—Austin 2004, pet. denied). However, a party may obtain ancillary injunctive relief when the evidence shows the defendant will not comply with the judgment. *Id.*; *see Tex. Educ. Agency v. Leeper*, 893 S.W.2d 432, 446 (Tex. 1994) (holding that trial court's issuance of permanent injunction was unnecessary because no evidence existed that defendants would not abide by declaratory judgment). The

DJA provides that the trial court may grant "[f]urther relief based on a declaratory judgment or decree . . . whenever necessary or proper." TEX. CIV. PRAC. & REM. CODE ANN. § 37.011. Under the DJA, a party may obtain supplemental ancillary relief, including a permanent injunction, to enforce a declaratory judgment. *Funes v. Villatoro*, 352 S.W.3d 200, 214 (Tex. App.—Houston [14th Dist.] 2011, pet. denied); *see Feldman*, 436 S.W.3d at 76 ("Ancillary injunctive relief may be obtained when the evidence establishes that a defendant will not comply with a declaratory judgment.").

"Courts have granted supplemental relief under the declaratory judgment act after an appeal and may award relief not requested on appeal." *In re State of Texas*, 159 S.W.3d 203, 206 (Tex. App.—Austin 2005, orig. proceeding [mand. denied]); *Valley Oil Co. v. City of Garland*, 499 S.W.2d 333, 336 (Tex. App.—Dallas 1973, no writ) ("[T]he losing party in a declaratory judgment action can normally be expected to recognize the rights declared by the judgment and act accordingly, but . . . if he fails to do so, the court should have ample power to enforce the judgment by subsequent coercive orders, whether or not such relief was sought in the original action."). "Further relief" may be sought in the same proceeding or a later proceeding, but when it is sought in a later proceeding, it must be "'additional relief' arising out of the issues resolved by the prior declaratory judgment.'" *Lakeside Realty, Inc. v. Life Scape Homeowners Ass'n*, 202 S.W.3d 186, 191 (Tex.

App.—Tyler 2005, no pet.). Section 37.011 does not permit the relitigation of issues already resolved or the determination of new issues unrelated to the declaratory judgment. *Id.* We review a trial court's decision to grant or deny further relief under section 37.011 for an abuse of discretion. *Id.* at 190.

The Austin Court of Appeals has addressed whether the trial court can award attorney's fees as "further relief" under section 37.011 in *State v. Anderson Courier Service*. *See* 222 S.W.3d 62, 63 (Tex. App.—Austin 2005, pet. denied). In that case, Anderson Courier filed a declaratory judgment action seeking a declaration that a particular statute was unconstitutional, an injunction prohibiting the State from enforcing the statute, and attorney's fees. *Id.* at 64. The trial court ruled that the statute was valid. On appeal, Anderson Courier asked the Austin Court of Appeals to reverse and remand the case for further proceedings, but it did not mention attorney's fees. *Id.* The Austin Court agreed with Anderson Courier and rendered judgment declaring the statute was unconstitutional. *Id.* (citing *Anderson Courier Serv. v. State*, 104 S.W.3d 121, 123 (Tex. App.—Austin 2003, pet. denied)). Anderson Courier did not file a motion for rehearing asking the Austin Court to remand the case for consideration of attorney's fees. *Id.* After the Texas Supreme Court denied the State's petition for review, Anderson Courier filed a motion for supplemental relief under section 37.011 in the trial court, seeking permanent injunctive relief and an award of its attorney's fees for prosecuting the case. *Id.* The

trial court ordered the State to pay over $350,000 in attorney's fees as "further relief" under section 37.011. *Id.* The State appealed the fee award.

The Austin Court addressed other Texas cases construing section 37.011 and concluded that supplemental relief under that section "must serve to effectuate the underlying judgment" and that the relief "must be ancillary to the judgment" and that the parties may not "relitigate issues already resolved by a declaratory judgment." *Id.* at 65–66. The court noted that "a declaratory judgment does not necessarily bar supplemental relief even though such relief could have been granted in the original action." *Id.* at 66. It also noted that, typically, further relief under section 37.011 "is granted in the form of an injunction for the purpose of enforcing a declaratory judgment where the evidence shows that a party will not comply with the judgment." *Id.*

The court stated that "attorney's fees expended to obtain the initial declaratory relief" could not be considered as relief "in addition to" the judgment because attorney's fees are "part and parcel of the initial declaratory judgment action, not supplemental relief." *Id.* at 66. The court noted that Anderson Courier sought attorney's fees in its initial declaratory judgment action "but did not pursue the issue on appeal" and thus there was no reason for the Austin Court, in the first appeal of the case, to remand the attorney's fees issue for further consideration after declaring the statute unconstitutional. *Id.* The Austin Court noted that Anderson Courier could

have, on original submission of its first appeal, raised the attorney's fees issue and sought remand to the trial court in the event the appellate court agreed with it on the merits of the declaratory judgment action; or, after the initial opinion issued, it could have filed a motion for rehearing seeking remand for reconsideration of attorney's fees because it was now the prevailing party. *Id.* at 66–67. In either instance, the case could have been "remanded for consideration of attorney's fees as part of the appellate decision," but Anderson Courier did not raise attorney's fees with the Austin Court: it waited until the mandate had issued and then sought further relief under section 37.011 in the trial court. *Id.* at 67.

Anderson Courier argued that the award of attorney's fees as further relief under section 37.011 was proper by pointing to federal case law—in which courts awarded attorney's fees as further relief under the federal analogue to section 37.011—and section 37.002(c) of the DJA, which provides that the DJA should be interpreted and construed "to harmonize, as far as possible, with federal laws and regulations on the subject of declaratory judgments and decrees." *Id.*; *see* TEX. CIV. PRAC. & REM. CODE ANN. § 37.002(c). The Austin Court rejected that argument, noting that, under federal law, attorney's fees are "not considered with the merits of the case and must be sought by separate motion" after the judgment. *Anderson Courier*, 222 S.W.3d at 67 (citing FED. R. CIV. P. 54(d)(2)(B), (D)). Under Texas law, on the other hand, attorney's fees are submitted "with the merits of the

underlying dispute," and a judgment that does not dispose of attorney's fees is not final. *Id.* (citing *McNally v. Guevara*, 52 S.W.3d 195, 196 (Tex. 2001) (per curiam)).

Ultimately, the Austin Court concluded:

> [P]ost-judgment relief under section 37.011 of the declaratory judgment act must be *additional* relief arising out of the original declaratory judgment. Although this does not preclude any relief that might have been requested in the original action, it does not open a back door to seek relief that should have been included in the original judgment or granted by the appellate court. By awarding Anderson Courier's attorney's fees for the declaratory judgment absent a remand, the district court permitted Anderson Courier to litigate an issue that it had waived on appeal. The award of attorney's fees did not serve to effectuate the declaratory judgment.

Id. (internal citation omitted). The court held that the award of attorney's fees "in obtaining declaratory relief was not necessary or proper further relief under section 37.011," and the court reversed the attorney's fees award and rendered a take-nothing judgment in favor of the State. *Id.* at 67–68.

This case is virtually identical to *Anderson Courier*. At trial, Sohani and Virani asserted a fraud claim against Sunesara and also sought declaratory relief, including a declaration that Sunesara was not entitled to any profit distributions or other sums from the LLCs. Sunesara asserted competing claims for declaratory relief, including a declaration that he was entitled to one-third of the profits from the LLCs. The jury found in favor of Sunesara on his claims for declaratory relief, found that he did not commit fraud, and awarded attorney's fees. The trial court entered judgment on the jury verdict. On appeal, Sohani and Virani challenged, among other

things, the propriety of the declaration that Sunesara was entitled to one-third of the profits from the LLCs. We agreed with Sohani and Virani that, under two provisions of the Business Organizations Code, Sunesara was not entitled to profit distributions and the trial court erred to the extent that it declared otherwise. We modified the judgment of the trial court to delete this declaration.

On appeal, Sohani and Virani did not ask this Court to review the attorney's fees award in favor of Sunesara, nor did they ask us to remand the case for reconsideration of the fee award if we found that Sunesara was not entitled to the challenged declaratory relief. After we issued our opinion, in which we modified the judgment to delete the challenged declaration but otherwise affirmed the judgment as modified, Sohani and Virani did not move for rehearing and request that we remand the case for reconsideration of attorney's fees on the basis that Sunesara was no longer the undisputed prevailing party. Instead, after our mandate issued, Sohani and Virani filed a motion in the trial court seeking reconsideration of the attorney's fees award under section 37.011.

We agree with the Austin Court of Appeals in *Anderson Courier* that, under the circumstances of this case, an award of attorney's fees for prosecution of the original declaratory judgment action and for appeal of that action does not constitute necessary or proper further relief under section 37.011. *See id.* at 67–68. Unlike under federal law, in which attorney's fees are not sought until after the merits of the

underlying dispute have been decided and a judgment has been signed, under Texas law, attorney's fees issues are submitted and resolved simultaneously with the dispute and a judgment that does not dispose of a claim for attorney's fees is not final. *See id.* at 67; *compare Bilmar Drilling, Inc. v. IFG Leas. Co.* 795 F.2d 1194, 1202 (5th Cir. 1986) (stating that attorney's fees award under federal counterpart to section 37.011 "cannot be made until after a declaratory judgment has issued" and that motion for attorney's fees under that section "is collateral to an action, not precluding issuance of a final, appealable judgment on the merits"), *with McNally*, 52 S.W.3d at 196 (holding that judgment granting summary judgment motion that addressed only defendant's declaratory relief claims but not defendant's claim for attorney's fees was not final and appealable judgment "because it did not dispose of the defendants' claim for attorney fees"). The federal cases that Sohani and Virani cite in support of their argument that an award of their attorney's fees constitutes necessary and proper further relief under section 37.011 are therefore inapposite.

Sohani and Virani had options available to them to seek reconsideration of the attorney's fees award. They could have challenged the award in an issue on original submission of their prior appeal. Or, after this Court sustained their issue challenging the trial court's declaration that Sunesara was entitled to profit distributions from the LLCs and issued a judgment modifying the trial court's judgment and affirming the remainder of the judgment as modified, they could have filed a motion for rehearing

and argued that, as Sunesara was no longer the undisputed prevailing party, the attorney's fees award should be remanded to the trial court for reconsideration. *See Anderson Courier*, 222 S.W.3d at 66–67. They did not avail themselves of either of these options. We conclude that Sohani and Virani forfeited their ability to seek reconsideration of the attorney's fees award. *See id.* at 66–68.

Moreover, Sohani and Virani have not established that the trial court abused its wide discretion by declining to reconsider the attorney's fees award to Sunesara. The DJA—unlike, for example, Chapter 38 of the Civil Practice and Remedies Code—does not provide that only the prevailing party can recover attorney's fees. *Compare* TEX. CIV. PRAC. & REM. CODE ANN. § 37.009 ("In any proceeding under this chapter, the court may award costs and reasonable and necessary attorney's fees as are equitable and just."), *with* TEX. CIV. PRAC. & REM. CODE ANN. § 38.001 ("A person may recover reasonable attorney's fees . . . in addition to the amount of a valid claim and costs . . . ."), *and Green Int'l, Inc. v. Solis*, 951 S.W.2d 384, 390 (Tex. 1997) ("To recover attorney's fees under Section 38.001, a party must (1) prevail on a cause of action for which attorney's fees are recoverable . . . ."). A prevailing party in a declaratory judgment action is not entitled to attorney's fees as a matter of law, *see Marion*, 106 S.W.3d at 868, and an award of attorney's fees to a non-prevailing party is not, in itself, an abuse of discretion. *Vincent*, 109 S.W.3d at 868. Similarly, an appellate court that reverses a declaratory judgment may also

reverse the attorney's fees award, but it is not required to do so. *See Kachina Pipeline*, 471 S.W.3d at 455; *City of Temple*, 268 S.W.3d at 858.

This is a case in which all parties obtained relief in their favor. On appeal, this Court deleted one of the declarations in favor of Sunesara. However, Sohani and Virani did not challenge the other declaration in favor of Sunesara, and they also did not challenge the jury's findings that Sunesara did not commit fraud. Under the DJA, the trial court could have awarded attorney's fees to Sohani and Virani only, to Sunesara only, to all parties, or to none of the parties. We conclude that the trial court's decision not to reconsider the attorney's fees award to Sunesara was not an abuse of its wide discretion to award fees under the DJA.[1] *See Barshop*, 925 S.W.2d at 637.

We overrule Sohani and Virani's first issue.

Disgorgement of Profits

In their second issue, Sohani and Virani contend that the trial court erred by denying their motion seeking disgorgement of past profits distributed to Sunesara.

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[1] Sohani and Virani argue that the trial court's denial of their motion for reconsideration "was made without reference to any rules or principles and flies in the face of the trial court's own reasoning in issuing the attorneys' fee award in the first place," pointing out that, prior to entry of judgment, the trial court stated its belief that the "normal situation" was to award fees to the prevailing party. At the time of the original trial in this case in 2016, the presiding judge of the Harris County Civil Court at Law Number One was the Honorable Clyde Leuchtag. At the time Sohani and Virani filed their motion for reconsideration in 2018, the presiding judge was the Honorable George Barnstone.

They argue that, as a result of this Court's prior holding that Sunesara was not entitled to a share of the profits of the LLCs, the profits previously paid to Sunesara constitute ill-gotten gains and he should be ordered to repay them. They argue that the trial court abused its discretion by failing to grant this "further relief" collateral to the declaratory judgment award.

Disgorgement is an equitable forfeiture of benefits that were wrongfully obtained. *In re Longview Energy Co.*, 464 S.W.3d 353, 361 (Tex. 2015); *Henry v. Masson*, 333 S.W.3d 825, 849 (Tex. App.—Houston [1st Dist.] 2010, no pet.) ("[D]isgorgement of profits is an equitable remedy, appropriate for causes of action such as breach of fiduciary duty."). The main purpose of forfeiture as a remedy "is not to compensate an injured principal" but to "protect relationships of trust by discouraging agents' disloyalty." *ERI Consulting Eng'rs, Inc. v. Swinnea*, 318 S.W.3d 867, 872–73 (Tex. 2010) (quoting *Burrow v. Arce*, 997 S.W.2d 229, 238 (Tex. 1999)). The Texas Supreme Court has stated examples of when disgorgement is an appropriate remedy, including "when a fiduciary agent usurps an opportunity properly belonging to a principal," when "an agent divert[s] an opportunity from [a] principal or engage[s] in competition with the principal, [and] the agent . . . profit[s] or benefit[s] in some way," and when "a person who renders service to another in a relationship of trust . . . breaches that trust." *Longview Energy*, 464 S.W.3d at 361 (quoting *ERI Consulting Eng'rs*, 318 S.W.3d at 873, *Johnson v. Brewer & Pritchard,*

P.C., 73 S.W.3d 193, 200 (Tex. 2002), and *Burrow*, 997 S.W.2d at 237). Texas law limits disgorgement of profits to the amount of a fiduciary's profits obtained as a result of the fiduciary's breach of duty.[2] *Shannon Med. Ctr. v. Triad Hldgs. III, L.L.C.*, 601 S.W.3d 904, 916 (Tex. App.—Houston [14th Dist.] 2019, no pet.).

Sohani and Virani argue that because this Court held that Sunesara is not entitled, as a matter of law, to profit distributions from the LLCs, the profits distributions that he indisputably received "should not have been given to him in the first place" and were "essentially ill-gotten gains" that they are entitled to recover. Sunesara argues that no evidence was presented at trial that he wrongfully obtained the profit distributions or that he coerced or defrauded Sohani and Virani into making the distributions. He argues that the distributions were voluntary.[3] He further argues that Sohani and Virani never pleaded that he breached a fiduciary duty and the jury never made any such findings. As a result, there are no findings that can support disgorgement as a remedy under the facts of this case. We agree with Sunesara.

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[2] The Texas Supreme Court has stated, "While equitable disgorgement is a viable remedy for breach of trust by a fiduciary, we have not expressly limited the remedy to fiduciary relationships nor foreclosed equitable relief for breach of trust in other types of confidential relationships." *Sw. Energy Prod. Co. v. Berry-Helfand*, 491 S.W.3d 699, 729 (Tex. 2016).

[3] In their reply brief, Sohani and Virani agree that this is an accurate characterization of the distributions.

Sohani and Virani did not assert a breach of fiduciary duty claim against Sunesara, and they did not recover on their fraud claim. Instead, the jury found that Sunesara did not commit fraud, and Sohani and Virani did not challenge that finding on appeal. This Court held that Sunesara was not entitled to profit distributions from the LLCs, but we disagree that that holding necessarily means that the profit distributions Sunesara received prior to suit being filed were wrongful or "ill-gotten." Sunesara is not entitled to profit distributions, meaning that he does not have the right to *demand* distributions. The trial testimony, however, was that Sohani and Virani chose to give Sunesara a share of the profits from the LLCs. Under the Business Organizations Code, Sohani and Virani were not required to do this, but the fact that we later determined that Sunesara does not have an entitlement to a share of the profits does not make these distributions wrongful or ill-gotten.

In the absence of any pleadings to support a breach of fiduciary duty claim or jury findings that Sunesara breached a fiduciary duty or otherwise acted wrongfully, we conclude that Sohani and Virani were not entitled to seek post-appeal disgorgement of profits distributed to Sunesara. *See ERI Consulting Eng'rs*, 318 S.W.3d at 872–73 (stating that main purpose of disgorgement and forfeiture remedy "is to protect relationships of trust by discouraging agents' disloyalty"); *Stephens v. Three Finger Black Shale P'ship*, 580 S.W.3d 687, 714 (Tex. App.—Eastland 2019, pet. filed) (holding that trial court erred in awarding damages in form of

disgorgement when no evidence existed of relationship of trust "and a breach of the duties arising from it"). We hold that the trial court did not err by denying Sohani and Virani's motion seeking disgorgement of profits.

We overrule Sohani and Virani's second issue.

Conclusion

We affirm the judgment of the trial court.

Evelyn V. Keyes
Justice

Panel consists of Justices Keyes, Kelly, and Landau.