Opinion issued March 29, 2022

In The

Court of Appeals

For The

First District of Texas

NO. 01-19-00194-CV

CAMILLA HRDY, CATHERINE HRDY, NICHOLAS HRDY, WIRT BLAFFER, KATHERINE TAYLOR, AND CHRISTIE TAYLOR, INDIVIDUALLY AND DERIVATIVELY ON BEHALF OF FREEPORT WATERFRONT PROPERTIES, L.P., Appellants

V.

SECOND STREET PROPERTIES LLC, BRIARWOOD CAPITAL CORPORATION AND H. WALKER ROYALL, Appellees

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On Appeal from the 189th District Court
Harris County, Texas
Trial Court Case No. 2017-07497

CONCURRING AND DISSENTING OPINION

All self-dealing transactions are presumptively unfair, and the burden lies on the fiduciary to overcome that presumption. A fiduciary cannot overcome that

presumption simply by proving that he acquired some benefit for his principals, while acquiring ever greater benefits for himself. Texas law demands much more: proof of the fiduciary's utmost good faith, scrupulous honesty, and full disclosure of all important information to his principals.

The evidence in this case conclusively proves that Appellees Briarwood Capital Corporation and H. Walker Royall did not meet this high bar when they acquired the Stanley and Henderson Tracts. Accordingly, I respectfully dissent from the majority's holdings in Parts I and II that Appellees did not breach their fiduciary duties in these transactions. I join Part III of the majority opinion and agree that the trial court abused its discretion in determining that Royall was entitled to equitable reimbursement. I also join Parts IV and V of the majority opinion, and I would affirm the portions of the judgment addressed therein. I concur with the majority's conclusion in Part VI to remand the case for a redetermination of attorney fees, but I would order the trial court to redetermine attorney's fees after Appellees' liability for breach of fiduciary duty with respect to the Stanley and Henderson Tracts is established.

I. The Stanley Tract: Breach of Fiduciary Duty

Under Texas common law, parties have a duty to refrain from fraud when transacting with one another. *See Russell v. Indus. Transp. Co.*, 258 S.W. 462, 462 (Tex. 1924) (op. on reh'g) (defining "fraud" as "an act or concealment involving a

breach of legal duty, trust or confidence justly reposed"); *Chien v. Chen*, 759 S.W.2d 484, 494–95 (Tex. App.—Austin 1988, no writ). A fiduciary relationship is a special relationship that imposes "additional and higher duties" beyond this common-law baseline. *Chien*, 759 S.W.2d at 495. The Texas Supreme Court has held that the relationship between partners is "fiduciary in character" and "imposes upon all the participants the obligation of loyalty to the joint concern and of the utmost good faith, fairness, and honesty in their dealings with each other with respect to matters pertaining to the enterprise." *Bohatch v. Butler & Binion*, 977 S.W.2d 543, 545 (Tex. 1998) (quoting *Fitz–Gerald v. Hull*, 237 S.W.2d 256, 264 (Tex. 1951)); *see Bombardier Aerospace Corp. v. SPEP Aircraft Holdings, LLC*, 572 S.W.3d 213, 220 (Tex. 2019) (continuing to acknowledge partnership as giving rise to formal fiduciary duties). It is undisputed that Royall owed fiduciary duties to the Limited Partners—Appellants Camilla Hrdy, Catherine Hrdy, Nicholas Hrdy, Wirt Blaffer, Katherine Taylor, and Christie Taylor—based on his 100% ownership of Briarwood Capital, the general partner of Freeport Waterfront Properties, L.P. ("the Partnership").

Given the special nature of a fiduciary relationship, when a plaintiff alleges self-dealing by the fiduciary as part of a claim for breach of fiduciary duty, a presumption of unfairness automatically arises. *See Cluck v. Mecom,* 401 S.W.3d 110, 114 (Tex. App.—Houston [14th Dist.] 2011, pet. denied); *Houston v. Ludwick*,

No. 14–09–00600–CV, 2010 WL 4132215, at *7 (Tex. App.—Houston [14th Dist.] Oct. 21, 2010, pet. denied) (mem. op.); *see also Int'l Bankers Life Ins. Co. v. Holloway*, 368 S.W.2d 567, 576 (Tex. 1963) (noting "equitable principle" that corporate officers and directors must account to corporation for "personal profits realized by them in breach of their fiduciary duties"). The same presumption applies to a transaction between a fiduciary and his principal. *Webre v. Black*, 458 S.W.3d 113, 118 (Tex. App.—Houston [1st Dist.] 2015, no pet.). The burden is on the profiting fiduciary to overcome this presumption of unfairness with proof. *Cluck*, 401 S.W.3d at 114.

Courts should begin with the jury charge when analyzing whether sufficient evidence supports a finding that a party complied with his fiduciary duties. *See Osterberg v. Peca*, 12 S.W.3d 31, 55 (Tex. 2000); *Lee v. Hasson*, 286 S.W.3d 1, 20 (Tex. App.—Houston [14th Dist.] 2007, pet. denied). As required by Texas law, Question 19 of the charge placed the burden on Royall to prove that he complied with all fiduciary duties to the Limited Partners in acquiring the Stanley and Henderson Tracts and conveying them to his own company, Second Street. The question read as follows:

> *Did Royall comply with his fiduciary duties to the Limited Partners?*
>
> Because a relationship of trust and confidence existed between them, Royall owed the Limited Partners a fiduciary duty.
>
> To prove he complied with his duty, Royall must show—

(1) the transaction in question was fair and equitable to the Limited Partners; and

(2) Royall made reasonable use of the confidence that the Limited Partners placed in him; and

(3) Royall acted in the utmost good faith and exercised the most scrupulous honesty toward the Limited Partners[;] and

(4) Royall placed the interests of the Limited Partners before his own and did not use the advantage of his position to gain any benefit for himself at the expense of the Limited Partners; and

(5) Royall fully and fairly disclosed all important information to the Limited Partners concerning the transaction.

Critically, to answer "yes" to the subparts of this question, the jury had to find that Royall had proven *all five* criteria by a preponderance of the evidence. The jury answered "yes" with respect to (1) the "transactions through which Briarwood caused the Limited Partnership to acquire the Stanley Tract and transfer it to Second Street"; and (2) the "transaction through which Briarwood caused the Limited Partnership to agree to the settlement agreement of the Freeport EDC Litigation through which Second Street acquired the Henderson Tract." If the evidence is legally or factually insufficient to support even one of those five criteria, then the judgment must be reversed as to that tract. *See Lee*, 286 S.W.3d at 20–21; *see also Gen. Dynamics v. Torres*, 915 S.W.2d 45, 49–50 (Tex. App.—El Paso 1995, writ denied) (concluding that fiduciary did not rebut presumption of unfairness and fraud in self-dealing transaction and therefore did not carry burden to prove utmost fairness and good faith of transaction); *Estate of Townes v. Townes*, 867 S.W.2d 414,

418 (Tex. App.—Houston [14th Dist.] 1993, writ denied) (concluding that fiduciary did not rebut presumption of unfairness in self-dealing transaction and, instead, evidence conclusively established breach of fiduciary duty).

In conducting this review, evidence is legally insufficient to support a jury finding when: (1) the record discloses a complete absence of evidence of a vital fact; (2) the court is barred by rules of law or of evidence from giving weight to the only evidence offered to prove a vital fact; (3) the evidence offered to prove a vital fact is no more than a mere scintilla; or (4) the evidence establishes conclusively the opposite of a vital fact. *Gunn v. McCoy*, 554 S.W.3d 645, 658 (Tex. 2018). Nevertheless, "[w]hen evidence contrary to a verdict is conclusive, it cannot be disregarded." *City of Keller v. Wilson*, 168 S.W.3d 802, 817 (Tex. 2005). We may not disregard undisputed evidence that "allows of only one logical inference" because this evidence, by definition, "can be viewed in only one light, and reasonable jurors can reach only one conclusion from it." *Id.* at 814. "[T]he final test is whether the evidence would enable reasonable and fair-minded people to make the finding under review." *Lee*, 286 S.W.3d at 20 (citing *City of Keller*, 168 S.W.3d at 827).

A. Royall's Fiduciary Duties

The basic nature of the Stanley Tract transaction is undisputed: Royall exercised the Partnership's written purchase option from the City, thus putting title

to the Stanley Tract into the Partnership. Then, without any exchange of consideration, Royall caused the Partnership to transfer the Stanley Tract to an entity he owned exclusively and had just created a few days prior: Briarwood Holdings, LLC, *n/k/a* Second Street Properties, LLC ("Briarwood Holdings/Second Street").

As explained below, I would find that the evidence conclusively establishes that Royall did not act with utmost good faith and exercise the most scrupulous honesty in undertaking this transaction. Moreover, there is no evidence that Royall fully and fairly disclosed all important details pertaining to the transaction to the Limited Partners. Appellees cannot overcome these deficiencies by arguing that the Limited Partners consented to the transaction, benefited from it, and were better off for it than they would have been without Royall's involvement in the Partnership.

1. Utmost Good Faith and Most Scrupulous Honesty

To overcome the presumption of unfairness, Royall was required to prove that he acted with utmost good faith and exercised the most scrupulous honesty toward the Limited Partners in the Stanley Tract transaction. Here, the evidence conclusively proves that Royall made misstatements to the Limited Partners regarding details of the transaction which were never corrected. Even taking Royall's testimony about the August 2006 phone call as true, Royall's misstatements preclude a finding that Royall satisfied his fiduciary duty.

At common law, the term "fraud" refers to an "act, omission, or concealment *in breach of a legal duty, trust, or confidence justly imposed*, when the breach causes injury to another or the taking of an undue and unconscientious advantage." *Chien*, 759 S.W.2d at 494. "A false representation of a past or present material fact, when one has a duty to speak the truth, is of course a frequent ground for recovery in fraud when another relies thereon to his detriment, *even in an ordinary arms-length transaction in which no 'fiduciary duties' exist* and only the ethics of the marketplace apply." *Id.* at 495 (citing *Jeffcoat v. Phillips*, 534 S.W.2d 168, 171 (Tex. App.—Houston [14th Dist.] 1976, writ ref'd n.r.e.)).

Here, the fiduciary duty of utmost good faith and scrupulous honesty imposes an "additional and higher" duty beyond merely refraining from fraud. *See id.* Because there is no proof that Royall corrected misstatements that he made to the Limited Partners in the course of dealings surrounding the Stanley Tract transactions, Royall did not satisfy his additional and higher duty of utmost good faith and scrupulous honesty. *See Kinzbach Tool Co. v. Corbett-Wallace Corp.*, 160 S.W.2d 509, 514 (Tex. 1942) ("[O]ne occupying a fiduciary relationship to another must measure his conduct by high equitable standards, and not by the standards required in dealings between ordinary parties.").

To explain the significance of these misstatements, it is helpful to discuss them in the context in which they arose. The following facts are undisputed: Royall

volunteered to serve as general partner and manage the affairs of the Partnership through his wholly-owned company Briarwood Capital Corporation ("Briarwood Capital"). Royall's first order of business was to continue the family's longstanding discussions with the City of Freeport (the "City") about a plan for developing a marina on the Blaffer Tract.

Royall eventually signed a Development Agreement with the City under which the Partnership would build a marina—on land the Partnership owned or would acquire—using a $6 million loan from the City, then lease the completed marina to the City to operate. As part of this arrangement, the City agreed to help the Partnership acquire several adjacent properties to complete the marina site, including the Stanley Tract.

In late 2002, the Partnership negotiated a contract to purchase the Stanley Tract for $90,000. As the Development Agreement with the City took shape, but before it was signed, the Partnership allowed the City to purchase the Stanley Tract to secure the property. But the City gave the *Partnership an exclusive written option* to repurchase the Stanley Tract for the same price at any time. The City also gave the Partnership an option under the Development Agreement to purchase the City and District Tracts—properties already owned by the City and its affiliates—and agreed to help the Partnership acquire the Henderson Tract.

Several years then passed without progress on the marina. In the meantime, the political winds shifted and the initial plan—in which the City would lend $6 million to a private entity—became unviable. With newly-elected leadership, the City shifted gears and decided to build the marina itself through its Economic Development Corporation ("EDC"). Because the Partnership had not commenced marina construction within two years, the City had a contractual right to repurchase the City and District Tracts and attempted to exercise it. Royall managed to talk the City out of that proposed repurchase and turned his attention to acquiring the Stanley Tract.

Then came the August 2006 emails. In an email chain from August 8 and 9, 2006, Royall told the Limited Partners that he wanted to acquire the Stanley Tract for "strategic reasons" and asked if they wanted to participate under the "option that we secured a few years ago." Wirt Blaffer and Dan Hrdy—still representing his three children's interests—said they wanted in.

Undisputedly, under the Partnership Agreement, this majority vote was enough for the Partnership to purchase the Stanley Tract and issue a capital call to fund the purchase price. Any Limited Partners who declined to participate would have had their partnership interests reduced to account for the new capital balances, as had been done in the past.

Royall did not purchase the tract for the Partnership, however. Instead, he responded that "[t]he one issue I have is that I need everyone's participation and funding. I am not prepared to go through another round of diluting people or setting up another entity for a $90,000 investment." Neither statement proved true. Under the terms of the Partnership Agreement, Royall did not "need" everyone's participation to make the purchase on the Partnership's behalf. Although Royall might have *preferred* to have a unanimous vote, it is undisputed that the Partnership Agreement did not require one. There is no evidence in the record that Royall ever explained to the Limited Partners that the Partnership Agreement did not require unanimity on this point.

Further, Royall's statement that he was not prepared to set up "another entity for a $90,000 investment"—even if true at the time—proved false just days later. Exactly six days after sending that email, Royall set up Briarwood Holdings/Second Street as a new entity to own the Stanley Tract. Royall owned this new entity exclusively. Yet there is no testimony in the record—from Royall or anyone else—that he ever told the Limited Partners about his newfound willingness to create a new entity for a $90,000 investment.

At common law, when no fiduciary relationship exists, a party's silence may equate to a misrepresentation of material fact in certain situations, such as when a change of events makes the party's prior representation untrue. *See Comiskey v. FH*

Partners, LLC, 373 S.W.3d 620, 642 (Tex. App.—Houston [14th Dist.] 2012, pet. denied); *Ho v. Univ. of Tex. at Arlington*, 984 S.W.2d 672, 691 (Tex. App.—Amarillo 1998, pet. denied); *see also Hart v. Wright*, 16 S.W.3d 872, 878 n.3 (Tex. App.—Fort Worth 2000, pet. denied) ("A duty to speak may arise when a fiduciary relationship exists between parties, or when a party makes a material representation relied upon by the other party that the party later finds out to be untrue and fails to reveal this change in events.") (citations omitted). Without alerting the Limited Partners to this change in events, Royall could not satisfy his higher duty of utmost good faith and scrupulous honesty.

Nevertheless, Appellees argue that there is evidence that the Limited Partners benefitted from Royall's decision to buy the Stanley Tract, and at Royall's expense. They point to evidence that the Blaffer Tract's value has increased from zero to over $450,000, and the Partnership has seen steady profits from the marina. The Stanley Tract's value, by contrast, has declined since 2006. The test for whether a fiduciary has breached his duty is not all is well that ends well. Per the jury charge, Royall had to pass five tests, and one of them was whether he acted with utmost good faith and most scrupulous honesty. I would hold that there is legally insufficient evidence that he satisfied this test.

2. Full Disclosure of All Important Information and Making Reasonable Use of Confidence

I would also hold that there is legally insufficient evidence to support the verdict on two other criteria: whether Royall "fully and fairly disclosed all important information to the Limited Partners concerning the transaction" and whether he made "reasonable use of the confidence" that the Limited Partners placed in him. Because facts "often pertain to more than one of the five factors required for compliance" with fiduciary duties, I analyze these factors together. *See Lee*, 286 S.W.3d at 21.

A fiduciary's burden of disclosure is strict. A fiduciary must "make a good faith effort to fully inform [the principal] not only of the facts, but the consequences, that is the nature and effect" of the fiduciary's act and any actions the principal takes based on the fiduciary's advice. *Sorrell v. Elsey*, 748 S.W.2d 584, 586–87 (Tex. App.—San Antonio 1988, writ denied) (concluding that fiduciaries did not obtain finding that they made good faith effort to fully inform principal of nature and effect of her signature on deed presented to her by fiduciaries). A fiduciary "breaches his duty where he fails to fully disclose important facts." *Lee*, 286 S.W.3d at 31.

Here, there is no evidence that Royall explained the "strategic reasons" for the Partnership to purchase the Stanley Tract from the City/EDC. For example, Royall did not testify to disclosing to the Limited Partners that the City had threatened to exercise its right to repurchase the City and District Tracts, making the Stanley Tract

an important piece of leverage if the Partnership wanted to have a stake in the future marina. Although Appellees insist that the Limited Partners wanted to pursue a low-risk strategy, the Limited Partners could not meaningfully assess the risk without knowing the strategic benefits of purchasing the Stanley Tract. Likewise, the record contains no proof that Royall informed the Limited Partners that the Partnership had the right to compensation for Royall's use of the purchase option to benefit Briarwood Holdings/Second Street. As such, there is no evidence that Royall "fully and fairly disclosed the material facts [the Limited Partners] needed to consider" in choosing whether to exercise the Partnership's purchase option. *See id.* at 34.

Furthermore, there is no proof that Royall informed the Limited Partners of the "consequences" or "the nature and effect" of the Stanley Tract transaction. *See Sorrell*, 748 S.W.2d at 587. Specifically, there is no evidence that Royall ever told the Limited Partners about creating Briarwood Holdings/Second Street and transferring the Stanley Tract title from the Partnership to Briarwood Holdings/Second Street. Instead, the evidence is that when Wirt asked Royall in a 2014 email about what happened to the Stanley Tract, Royall responded that "I really don't" remember—even though he was receiving monthly rental checks from the City for the Stanley Tract's use.

These same facts preclude a finding that Royall made reasonable use of the confidence that the Limited Partners placed in him. In Texas, "[a] fiduciary

relationship exists where a party is under a duty to act or give advice for the benefit of another or where a special confidence is reposed in one who in equity and good conscience should be bound to act in the best interests of the one reposing confidence." *Brazosport Bank of Tex. v. Oak Park Townhouses*, 889 S.W.2d 676, 683 (Tex. App.—Houston [14th Dist.] 1994, writ denied).

Undisputedly, the Limited Partners had asked Royall to manage the partnership because Royall had a "real estate background" and the other Limited Partners did not. Consequently, it was incumbent upon Royall to walk the Limited Partner through all the important details of this real estate transaction, including the value of the purchase option that Royall took for Briarwood Holdings/Second Street and the strategic benefits of purchasing the Stanley Tract. Royall did not do so. Consequently, a reasonable jury could not find that Royall satisfied his fiduciary duty to the Limited Partners with respect to the Stanley Tract.

3. Fairness and Equity of the Transaction, and Royall's Obligation to Place the Interests of the Partnership Above His Own

Finally, I would hold that legally insufficient evidence supported the findings that the Stanley Tract transaction was "fair and equitable" to the Limited Partners and that Royall placed the interest of the Partnership above his own. Rather, conclusive evidence that Royall paid no consideration for the Stanley Tract precludes a finding that Royall satisfied these duties.

In self-interested transactions, Texas law "indulges the presumption of unfairness and invalidity, and requires proof at the hand of the party claiming validity and benefits of the transaction that it is fair and reasonable." *Stephens Cty. Museum, Inc. v. Swenson*, 517 S.W.2d 257, 260 (Tex. 1974); *Cluck*, 401 S.W.3d at 114. Royall bore the burden of rebutting the presumption that the Stanley Tract transaction was unfair to the Limited Partners. *See Collins v. Smith*, 53 S.W.3d 832, 840 (Tex. App.—Houston [1st Dist.] 2001, no pet.) ("The fiduciary must show proof of good faith and that the transaction was fair, honest, and equitable."). A key factor in examining fairness is whether the "consideration (if any) was adequate." *Lee*, 286 S.W.3d at 21.

Undisputedly, Royall gave no monetary consideration to the Partnership for exercising the Partnership's written purchase option from the City and then causing the Partnership to transfer the Stanley Tract to Royall's own Briarwood Holdings/Second Street entity. Royall did not plead that the Stanley Tract was a gift from the Partnership. *See Sorrell*, 748 S.W.2d at 588 (holding that plea that asset was "a gift and did not require consideration is . . . an affirmative defense" that must be "affirmatively pleaded" on penalty of waiver). Yet outside the gift context, Appellees identify no case in which courts have upheld a finding that a zero-compensation transaction was fair to the principal. Likewise, the principal's exchange of something valuable for no consideration precludes a finding that the

fiduciary placed the principal's interests before his own. *See Lee*, 286 S.W.3d at 27–28 (holding that reasonable jury could not conclude that fiduciary placed principal's interests before his own where principal paid $120,000 to company controlled by fiduciary without receiving any service in exchange).

Appellees respond that Royall provided adequate "non-monetary consideration" for this asset by sparing the Partnership of undesirable risks and costs while preserving the marina's viability. I disagree. As the owner of the Partnership's general partner, Royall was already obligated to work to preserve the marina's viability. Doing what he was already required to do is not consideration for taking the Partnership's purchase option asset. *See Okemah Constr., Inc. v. Barkley–Farmer, Inc.*, 583 S.W.2d 458, 460 (Tex. App.—Houston [1st Dist.] 1979, no writ) (stating that commitment to continue preexisting contractual duty is not consideration for amended agreement to assume new or additional obligation).

Nor does Katherine's threat to sue change the calculus. Per Royall's testimony, Katherine threatened to sue *Royall*—not the Partnership—for diluting her partnership interest. Even if Katherine's threat posed some legal risk to the Partnership, there is no proof that Royall ever consulted a lawyer about the merits of such a suit or quantified the risk to the Limited Partners. And there is no proof that taking the purchase option without compensation was a reasonable response to those risks.

These facts make this case analogous to *Lee*, wherein the Fourteenth Court of Appeals found legally insufficient evidence to support the jury's finding that the fiduciary satisfied his duty to his principal. In *Lee*, the fiduciary engaged in a self-interested transaction by which he arranged for the formation of a company as an asset protection mechanism for the principal. 286 S.W.3d at 30–32. The fiduciary had an ownership interest in the new company. *Id.* at 9. The fiduciary defended the transaction on the basis that the new company would shield the principal from a potential lawsuit by her adult son's judgment creditors. *Id.* at 32. But there was no proof in the record that the fiduciary "sought to determine" whether the principal would "face any legal liability for the actions of her adult son," or that the fiduciary explained to her "the limits of any such liability." *Id.* Further, the Fourteenth Court found that "even assuming" that the principal faced such liability, there was "no evidence" that the proposed solution was "an appropriate or effective one." *Id.* The same result should follow here.

Appellees also respond that Royall satisfied his fiduciary duties by using his substantial business acumen to "greatly enhance" the value of the "worthless" Blaffer Tract inherited by the cousins, who were more than happy to let Royall do the "heavy lifting" on his own. Yet after the marina was finished, they were "[s]till dissatisfied with all [Royall] had done for them" and "wanted more"—demanding to reap where they had not sown.

It is true that upon the death of his uncle, Royall had no obligation to help his cousins maximize the value of the inherited parcel. That changed when Royall took up the mantle of having his own company serve as the Partnership's general partner. From then on, Royall had a duty to put the Partnership's interest above his own. This duty applied not just to the inherited parcel, but also to the Partnership's other assets, including the Stanley Tract purchase option. *See Hughes v. St. David's Support Corp*., 944 S.W.2d 423, 426 (Tex. App.—Austin 1997, writ denied) (holding that general partner of controlling partnership had fiduciary duty to notify limited partners of proposed sale of assets of operating partnerships, even though their ownership interest in operating partnerships was infinitesimal).

As a fiduciary, Royall could not forsake his duty to protect the Partnership's other assets on the ground that he had enhanced the value of the original inherited tract. Royall's use of the Partnership's purchase option for no consideration conclusively establishes that Royall breached his fiduciary duties to the Limited Partners with respect to acquisition of the Stanley Tract. *See Gunn*, 554 S.W.3d at 658; *City of Keller*, 168 S.W.3d at 817.

B. Briarwood Capital's Fiduciary Duty

The Texas Business and Organizations Code codifies a partner's duty of loyalty to the partnership. TEX. BUS. ORGS. CODE § 152.205. Tracking that statute, the charge asked the jury to find whether Royall's Briarwood Capital company—the

Partnership's general partner—breached its fiduciary duty to the Partnership. Question 14 reads as follows:

> *Did Briarwood as General Partner of the Limited Partnership comply with its duty of loyalty?*
>
> As the Limited Partnership's General Partner, Briarwood's duty of loyalty included:
>
> (1) accounting to and holding for the partnership property, profit, or benefit derived by the partner:
>
> (A) in the conduct and winding up of the partnership business; or
>
> (B) from use by the partner of partnership property;
>
> (2) refraining from dealing with the partnership on behalf of a person who has an interest adverse to the partnership; and
>
> (3) refraining from dealing with the partnership in a manner adverse to the partnership.

This question included the following instructions:

> As the Limited Partnership's General Partner, Briarwood did not violate the duty of loyalty merely because its conduct furthered Briarwood's own interest.
>
> As the Limited Partnership's General Partner, Briarwood did not violate the duty of loyalty merely by engaging in or possessing an interest in other business ventures of any nature or description, independently or with others, similar to, or competitive with the business conducted by the Limited Partnership.

The jury answered "no"—Briarwood Capital had not complied with its duty of loyalty—as to the transaction through which Briarwood caused Freeport Marina, L.P., to transfer the City Tracts and the District Tract to Second Street. The jury

answered "yes"—Briarwood Capital had complied with its duty of loyalty—as to (1) the "transactions through which Briarwood caused the Limited Partnership to acquire the Stanley Tract and transfer it to Second Street"; and (2) the "transaction through which Briarwood caused the Limited Partnership to agree to the settlement agreement of the Freeport EDC Litigation through which Second Street acquired the Henderson Tract."

For the reasons given above with respect to Royall, I would find that there is legally insufficient evidence to support the jury's finding that Briarwood Capital complied with its duty of loyalty with respect to the Stanley Tract transactions. It is well settled that the relationship between partners "is fiduciary in character, and imposes upon all the participants the obligation of loyalty to the joint concern and of the utmost good faith, fairness, and honesty in their dealings with each other with respect to matters pertaining to the enterprise." *Bohatch*, 977 S.W.2d at 545 (quoting *Fitz-Gerald*, 237 S.W.2d at 264). A partner is under the same obligation as a corporate fiduciary not to usurp corporate opportunities. *Lifshutz v. Lifshutz*, 199 S.W.3d 9, 19 (Tex. App.—San Antonio 2006, pet. denied); *see Holloway*, 368 S.W.2d at 576–77 (setting out law with respect to duty of corporate fiduciary not to usurp corporate opportunities for personal gain). In *Lifshutz*, the San Antonio Court of Appeals found "conclusive[]" evidence that a partner had breached his fiduciary

duty to the partnership where he diverted opportunities from the partnership for personal gain. *See* 199 S.W.3d at 19.

As in *Lifshutz*, the evidence here conclusively establishes a breach of fiduciary duty. General partner Briarwood Capital caused the Stanley Tract's title to be transferred from the Partnership to Briarwood Holdings/Second Street for no consideration. By doing so, Briarwood Capital dealt with the Partnership in a manner that was adverse to the Partnership. *See id.*

II. The Henderson Tract: Breach of Fiduciary Duty

I also dissent from the majority's conclusion that legally sufficient evidence supports the jury's finding that Appellees complied with their fiduciary duties in the Henderson Tract transaction.

It is undisputed that, in 2002, the City committed to assist the Partnership to the extent it could in acquiring the Henderson Tract. Yet in the course of settling litigation against the City in 2014, Royall's Second Street company walked away with the right to purchase the income-producing Henderson Tract and a $100,000 cash payout. By contrast, the settlement yielded the Partnership only peripheral, non-income-producing properties, including one contaminated by asbestos. Analyzing the specific elements of the jury charge, no reasonable jury could conclude that Appellees complied with their fiduciary duties in this transaction.

A. Royall's Fiduciary Duties

Texas courts "severely scrutinize[] transactions between parties where trust and confidence is reposed by one, and personal profit is gained by another." *Tex. Bank & Tr. Co. v. Moore*, 595 S.W.2d 502, 508 (Tex. 1980). Undisputedly, the Henderson Tract transaction was a self-interested transaction. Consequently, Royall was required to overcome the presumption that the transaction was fraudulent and void. *See Lee*, 286 S.W.3d at 21, 35; *Chien*, 759 S.W.2d at 495. The jury charge required Royall to prove all five criteria listed in Question 19. If even one of those criteria falters for insufficient evidence, then the verdict cannot stand. I would find that legally insufficient evidence supports at least two of these criteria.

First, conclusive evidence precluded a finding that Royall "placed the interests of the Limited Partners before his own and did not use the advantage of his position to gain any benefit for himself at the expense of the Limited Partners" when "Briarwood caused the Limited Partnership to agree" to the City/EDC Settlement.

The following facts are undisputed: Royall acquired the Henderson Tract through the City/EDC Settlement which resolved the lawsuit he had initiated and that was funded in part by the Partnership. As part of the settlement, the City/EDC offered Royall and the Partnership a variety of benefits including back rent and the right to purchase certain marina properties. Those benefits were allocated in a

related-party agreement that Royall signed in both his personal and fiduciary capacity. Anything that Royall got in the settlement, the Partnership did not get.

Under the City/EDC Settlement, Royall paid nothing out-of-pocket and obtained the right to purchase the Henderson Tract in the heart of the marina for $200,000. The Partnership, on the other hand, had to pay more than $350,000 in cash to purchase some peripheral properties, one of which (the Jones Tract) required asbestos remediation that cost more than the property itself.

Further, Royall got back more than $100,000 of the Partnership's money in the settlement. Royall sent the Limited Partners an initial term sheet and summary of the proposed settlement agreement indicating that, together, Royall and the Partnership would "pay to [the] City" more than $600,000. When the time came for Royall to cash in on the settlement, he communicated directly with the title company and requested that it pay "the balance" of the transaction directly to him.

This undisputed evidence "allows of only one inference": Royall placed his own interests above those of the Partnership, and he used his position to obtain benefits that should have belonged to the Partnership. *See City of Keller*, 168 S.W.3d at 822. Royall acknowledged that in 2002, the City committed to assist *the Partnership*—not Royall or his other companies—to the extent it could in acquiring

the Henderson Tract.[1] In the City/EDC Settlement—which Royall signed on the Partnership's behalf—Royall usurped the Partnership's opportunity to acquire the income-producing Henderson Tract. *See Lifshutz*, 199 S.W.3d at 19 (concluding that evidence conclusively established partner usurped partnership opportunity for personal gain and breached fiduciary duty). By doing so, and by selecting the best property for himself, he failed to put the Partnership's interests ahead of his own. *See id.*

Second, I would find that there is no evidence that Royall "fully and fairly disclosed all important information to the Limited Partners concerning the transaction." For example, there is no proof that Royall disclosed the fact that he would be making money from the settlement and that the Partnership would be the only party putting up any cash. The initial term sheet and summary of the proposed settlement indicated that, together, Royall and the Partnership would "pay to [the] City" more than $600,000. This gave no indication that Royall would be making money on the deal.

Furthermore, it is undisputed that Royall did not disclose the nature of the properties he allowed the Limited Partners to purchase—including the Jones Tract,

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[1] Royall later testified that as of 2009, "Briarwood Holdings" had an agreement with the City that the City would sell the Henderson Tract to "Briarwood Holdings for $200,000." This testimony does not mean that no usurpation occurred. Instead, it suggests that the usurpation was in the works as early as 2009.

which had an asbestos problem. Royall does not dispute that he alone had the information about the relative values of these properties.

Although the majority is correct that there is proof that Royall did disclose some important information to the Limited Partners concerning the City/EDC Settlement, disclosure of "some" information is not the standard. The transaction was void unless Royall proved that he "fully and fairly disclosed all important information to the Limited Partners concerning the transaction." Here, no reasonable jury could find that he did so.

Appellees further argue that, even if Royall breached his fiduciary duty to the Limited Partners, this Court must affirm the judgment nevertheless because they conclusively proved the affirmative defense of waiver. Specifically, they invoke the Mediated Settlement Agreement, reached just before Royall represented the Partnership in the City/EDC Settlement. Undisputedly, this agreement expressly gave Royall the right to buy the Henderson Tract. The jury found that the Limited Partners agreed to the terms of the Mediated Settlement Agreement and that both the general partner—Briarwood Capital—and limited partners holding at least 50.1% of the percentage interest of all Limited Partners adopted that agreement in September 2014.

The Limited Partners disagree. They argue that the mere fact that an individual principal consents to such a transaction, even through the adoption of a written

document, does not rebut the presumption of invalidity. *See Sorrell*, 748 S.W.2d at 586 (stating that in context of fiduciary relationship, claim that transaction occurred through execution of document does not preclude inquiry into fairness of entire transaction). The fiduciary must still prove that he fully informed each principal of all important facts, including the nature, effect, and consequences of the transaction. *Id.* at 587. They contend that Royall did not meet his full-disclosure obligations with respect to the Mediated Settlement Agreement, so that document could not effectively waive anything. *See Sorrell*, 748 S.W.2d at 586 (stating that fiduciaries still had burden to prove that deed signed by principal was fair and equitable under circumstances of case); *see also Tenneco Inc. v. Enter. Prods. Co.*, 925 S.W.2d 640, 643 (Tex. 1996) (stating that waiver requires intentional relinquishment of known right or engagement in intentional conduct inconsistent with claiming that right).

According to the Limited Partners, Royall did not inform them that he had transferred the City and District Tracts and the Stanley Tract to himself in self-dealing transactions—and that the Henderson Tract would complete his collection of central marina properties. The jury findings confirm this lack of disclosure with respect to the City and District Tracts in Questions 8, 17, and 23. The jury found that the Limited Partners could not have discovered Royall's breaches of contract and breaches of fiduciary duties until November 19, 2014—two months after the execution of the Mediated Settlement Agreement.

I would not reach this issue. The jury charge included a question on whether Royall's failure to comply was excused by waiver or estoppel. The jury was instructed to answer this question with respect to a given transaction only if it found that Royall had not complied with his fiduciary duty in that transaction. Because the jury found that Royall had complied with his fiduciary duty with respect to the Henderson Tract transaction, the jury never determined whether Royall's failure to comply was excused. Nor did the trial court rule on such excuses as a matter of law. I would remand these issues to the trial court for resolution in the first instance.[2]

B. Briarwood Capital's Fiduciary Duties

For the reasons given above, I would find that there is legally insufficient evidence to support the jury's finding that Briarwood Capital complied with its duty of loyalty with respect to the Henderson Tract transaction. There is conclusive evidence that Briarwood Capital acted adversely to the Partnership when it failed to put the Partnership's interests ahead of its own, including by usurping the Henderson Tract opportunity. *See Lifshutz*, 199 S.W.3d at 19.

Likewise, Briarwood Capital acted adversely to the Partnership when it withheld crucial information that was significant to the Limited Partners' decisions,

[2] For the same reasons, the jury did not reach the question about whether Briarwood Capital's failure to comply with its fiduciary duties was excused by waiver or estoppel. I would remand this issue as well for resolution in the trial court.

including the fact that Royall had transferred the City, District, and Stanley Tracts to himself in self-dealing transactions.

III. Remedies, Further Proceedings, and Attorney Fees

Because I would reverse the judgment as to the Stanley and Henderson Tracts on grounds of legal insufficiency, I do not reach Appellants' factual sufficiency arguments. *See Dynacq Healthcare, Inc. v. Seth*, No. 01-06-00188-CV, 2007 WL 2005023, at *7 (Tex. App.—Houston [1st Dist.] July 12, 2007, pet. denied) (mem. op.). I would remand these two breach-of-fiduciary-duty claims to the trial court for further proceedings with respect to Appellees' affirmative defenses and the Limited Partners' remedies.

I concur in Part VI of the majority opinion. Like the majority, I would find that it is appropriate to vacate the award of attorney fees and remand to the trial court for a new award. The award would be determined only after resolving ultimate liability on the remanded issues pertaining to breach of fiduciary duty.

April L. Farris
Justice

Panel consists of Chief Justice Radack and Justices Goodman and Farris.

Justice Farris, concurring in part and dissenting in part.