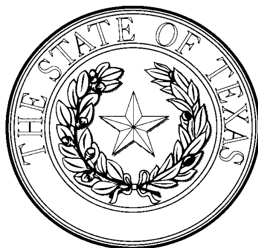
Opinion issued March 29, 2022



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

O P I N I O N

This is an appeal from a judgment entered after a jury trial. The underlying suit arises from disputes between the appellants, who are a limited partnership's

limited partners, and the appellees, who are the partnership's former general partner, the president of the former general partner, and another company he owns.

The main thrust of the appellants' claims at trial was that the appellees breached fiduciary or other obligations by acquiring several tracts of real property for themselves that belonged or should have belonged to the partnership. The appellees disputed these claims and asserted that the appellants violated the terms of the partnership agreement by the way in which they elected a new general partner.

The jury returned a mixed verdict finding for the appellants with respect to two tracts and against the appellants with respect to two others. The trial court entered judgment on the verdict and, among other things, ordered the partnership to be dissolved because the partnership agreement requires dissolution if, as here, the partnership does not properly elect a new general partner in a specified timeframe.

Both sides now appeal. The appellants raise six issues contending that:

(1) the evidence is legally and factually insufficient to support the jury's findings that the appellees did not breach a fiduciary or other obligation when they acquired two of the four tracts;

(2) if appellants prevail on their evidentiary sufficiency issue, this court should impose a constructive trust on those two tracts rather than remanding to the trial court to decide whether this equitable remedy is apt;

(3) the trial court erred in awarding the appellees an equitable reimbursement reflecting the costs they expended to acquire and hold the two tracts that the jury found they had misappropriated;

(4) the trial court erred in denying the appellants' request to dissolve two related agreements, given the jury's findings that the appellees had misappropriated two of the four tracts;

(5) the trial court erred in ordering the partnership to be dissolved; and

(6) the trial court erred in not awarding the appellants their costs and reasonable attorney's fees.

The appellees raise a single issue by way of cross-appeal. They too contend the trial court erred in not awarding their costs and reasonable attorney's fees.

For the reasons stated in our opinion, we hold that:

(1) the evidence is legally and factually sufficient to support the jury findings challenged by the appellants;

(2) because the evidence is legally and factually sufficient, the second issue as to whether we should impose a constructive trust on appeal is moot;

(3) the trial court erred in awarding the appellees an equitable reimbursement;

(4) the trial court did not err in denying the appellants' request to rescind the two related agreements;

(5) the trial court did not err in dissolving the partnership; and

(6) the trial court erred in not awarding costs and attorney's fees to the appellants but did not err in not awarding them to the appellees.

Therefore, we modify the trial court's judgment to delete the equitable reimbursement, reverse this cause in part and remand it to the trial court to conduct a new trial limited to the issue of the amount of the appellants' costs and reasonable attorney's fees, and otherwise affirm the trial court's judgment as modified.

BACKGROUND

Introduction

In 2002, Walker Royall and several of his cousins inherited some land along the Brazos River from an uncle. This land, known as the Blaffer Tract, had little

value. On it, sat a shopping center that had been vacant for more than five years. Before Walker and his cousins inherited the land, their uncle's estate had tried to give it to the City of Freeport in exchange for a tax write-off. The City declined after it learned that the shopping center had asbestos.

Walker and his cousins formed a limited partnership, Freeport Waterfront Properties, to manage the land with the aim of increasing its value. As Walker had 10 years' experience in commercial real estate, the partnership designated his wholly owned company Briarwood Capital Corporation the general partner, which wielded substantial decision-making authority. The limited partners of Freeport Waterfront Properties and their respective percentage interests have changed over time. But both then and now, the limited partners included the appellants: Camilla Hrdy, Catherine Hrdy, Nicholas Hrdy, Wirt Blaffer, Katherine Taylor, and Christie Taylor. Walker, or a company wholly owned by him, also has been a limited partner throughout the limited partnership's existence. As shorthand, we generally will refer to the appellants collectively as the Other Limited Partners.

Freeport Waterfront Properties pursued its goal of increasing the value of the Blaffer Tract for many years, but a rift gradually developed between Walker and the Other Limited Partners. After the Other Limited Partners removed Briarwood Capital as general partner and elected another company in its place without Walker's assent, Walker sued. He sought a declaration that the partnership agreement required

unanimity when designating a new general partner and that the election of the new company as general partner was therefore invalid. The Other Limited Partners countersued. They alleged Walker and Briarwood Capital had breached the fiduciary duties they owed to the limited partnership by acquiring additional tracts of land that had been bought or should have been bought by the partnership. The Other Limited Partners sought the return of these tracts and more than $1 million in damages.

Trial

The parties tried their claims to a jury, which heard testimony from several witnesses, including Catherine, Christie, Katherine, Nicholas, Walker, and Wirt. In addition, the jury heard from Van Taylor, who was a limited partner from 2003–05; Andrew Caplan, an attorney who represented Walker's companies and the limited partnership outside this litigation; David Fuller and Josh Korman, expert witnesses who opined on the value of the properties at issue; and Max Lummis, an expert who opined on the profits allegedly diverted from the partnership. Through these witnesses, the parties also introduced into evidence a multitude of documents.

In 2002, the City of Freeport approached Walker with a proposal to build a marina on the Brazos River in the vicinity of the Blaffer Tract. Part of this proposal included a plan to develop the Blaffer Tract to provide amenities complementary to the marina, like hotels and restaurants.

Walker negotiated with the City. He had dozens of meetings with the City's officials and its economic development corporation. According to Walker, none of the Other Limited Partners volunteered to participate in these meetings or negotiations. He periodically reported back to the Other Limited Partners when developments warranted it.

Under the initial plan, referred to as the First Development Agreement, Freeport Waterfront Properties was to contribute the waterfront portion of the Blaffer Tract to the marina. It also was to buy various additional properties necessary to build the marina and act as the marina's developer. The relevant additional properties were adjacent to the Blaffer Tract or near it. These included the City and District Tracts as well as the Henderson Tract. As part of the First Development Agreement, the City granted Freeport Waterfront Properties an option to buy the City and District Tracts, which the City owned, for $75,000. The City also committed to assist Freeport Waterfront Properties in acquiring the Henderson Tract, which the City did not own. In addition, the City agreed to loan $6 million to the limited partnership to build the marina. After the marina was completed, the City would then lease it from the partnership.

Neither Walker nor the Other Limited Partners wanted to incur the risks associated with building or operating the marina. So Walker negotiated with Sun Resorts, which had marina expertise, to act as the actual builder and operator.

Together, Sun Resorts and Freeport Waterfront Properties, formed a new company, Freeport Marina LP, for this purpose. Freeport Waterfront Properties was a limited partner in this new entity. The virtue of the arrangement, from the perspective of Freeport Waterfront Properties, was that its partners only had to contribute land to the marina project without putting money into the project or incurring other risks.

Before committing to the marina project, Walker sought the assent of the Other Limited Partners. All but one of them, Katherine, agreed to move forward with the project as outlined in the First Development Agreement.

The First Development Agreement was inked in November 2003. That same year, separate from the First Development Agreement, Walker also secured an option for Freeport Waterfront Properties to buy an additional property the City owned within the marina development area for $90,000. This additional property was known as the Stanley Tract.

In June 2004, Freeport Marina LP used $75,000 contributed by Freeport Waterfront Properties to buy the City and District Tracts. Walker testified that he sought and received the approval of the Other Limited Partners before its money was used to make this purchase.

Apart from the purchase of the City and District Tracts and property cleanup, not much happened in the way of marina construction between 2004 and 2006. During this time, the marina project became embroiled in controversy and litigation

involving the City and third parties due to the City's plan to use eminent domain to acquire other land in the vicinity to support the endeavor. The eminent-domain controversy also resulted in political opposition to the planned $6 million loan from the City required by the First Development Agreement. As a result, the First Development Agreement slowly unraveled.

In July 2006, the City indicated it was going to exercise its right to repurchase the City and District Tracts because marina construction had not begun within two years of their conveyance as required. When Walker negotiated with the City to stave off repurchase of these tracts, the City suggested it would refrain from doing so if the Stanley Tract was purchased as a sign of good faith that the project would move forward.

In August 2006, Walker proposed to the Other Limited Partners that the limited partnership buy the Stanley Tract. In particular, Walker conferred with Wirt, Van, who was no longer a partner at the time but spoke for the Taylor limited partners, and Dan Hrdy, an uncle who represented the Hrdy limited partners via power of attorney due to their youth. Walker told the Other Limited Partners that if the limited partnership was going to buy the Stanley Tract, he wanted 100-percent participation so that no one's interest would be diluted. If the partnership was not able or willing, Walker said he would buy the tract, given that it was in the marina development area and its purchase by a party unaffiliated with the project could be

disruptive.

Wirt stated he wished to participate in the purchase, and Dan did likewise on behalf of the Hrdys. But Katherine and Christie declined. As a result, Freeport Waterfront Properties did not buy the Stanley Tract.

It is undisputed that a simple majority of Freeport Waterfront Properties' ownership wanted to buy and could have bought the Stanley Tract. Walker testified that he nonetheless insisted on unanimity to avoid diluting any nonparticipating partners' percentage interests. As a result of a prior 2003 capital call, Katherine's interest had already been diluted from almost 10 percent to about 7 percent. According to Walker, she had threatened to sue him or the limited partnership itself if her interest was diluted again. Thus, Walker testified, he acquired the tract to protect the limited partnership from the potential lawsuit threatened by Katherine. Katherine denied complaining about dilution or threatening to sue. Nicholas indicated that Walker told him about Katherine's supposed threat of litigation at some point, but Nicholas said that he believed Katherine's denial.

Walker testified that he, Wirt, Dan, and possibly Van had a telephone call in late August 2006 after it became clear that not all partners would participate. Under the circumstances, Walker testified, everyone agreed that he should buy the Stanley Tract. But this telephone conversation is not memorialized in writing, and the Other Limited Partners dispute the conversation ever happened. Dan did not testify at trial,

and Van did not recall the August 2006 telephone call. Wirt testified the telephone call never took place. He further testified that Walker's explanation as to why the limited partnership did not buy the Stanley Tract has changed several times over the years.

Walker bought the Stanley Tract via a company he wholly owned called Second Street, formerly known as Briarwood Holdings, for $90,000. None of Freeport Waterfront Properties' money was used to buy the tract, but a September 2006 deed shows that the tract nonetheless was conveyed to the limited partnership. Walker testified that this was a mistake, which he corrected by transferring it to the actual purchaser, Second Street, in October 2006. He conceded that he did not discuss this error with the Other Limited Partners.

The purchase of the Stanley Tract notwithstanding, it became clear that without the $6 million loan from the City, the First Development Agreement was a dead letter and the parties would have to find a new way forward. In November 2006, Walker e-mailed the Other Limited Partners about a new development proposal. Under this proposal, the City would replace Freeport Marina LP as developer. The City would lease the waterfront portion of the Blaffer Tract, the City and District Tracts, and the Stanley Tract from the owners of these properties, build the marina on the City's dime, and then lease the completed marina to Freeport Marina LP to operate. The City's lease of the referenced tracts would run for 40 years, after which

all improvements, including the completed marina, would revert back with the land to the property owners.

In Walker's November 2006 e-mail, he noted that in addition to the City leasing the limited partnership's property under the new proposal, the City also would be leasing "other property" that Walker had "purchased to complete the marina site." In a follow-up e-mail the next month, December 2006, Walker again noted that the City would be leasing "additional property" from him under this new development proposal. At trial, Walker testified that these e-mails referencing the lease of his own property in addition to the property owned by Freeport Waterfront Properties, in conjunction with the various site plans that had been circulated, would have made it plain to the Other Limited Partners that he meant the Stanley Tract.

Nicholas agreed that Walker had disclosed in 2006 that he owned some property in the marina development area. Similarly, Katherine agreed that Walker had written more than once that he owned property in the marina development area. Wirt likewise acknowledged that Walker had disclosed his ownership of marina property in 2006 but testified that Walker was "never specific as to what he's referring to." In his testimony, Wirt seemed to suggest Walker may have been referring to a warehouse Walker had bought in the vicinity. But Walker testified without contradiction that this warehouse is not within the marina development area and is not part of the marina. Finally, Christie testified she knew in 2006 that Walker

"had property in the area" but "didn't know where it was or how he acquired it."

In December 2006, Walker's company, Second Street, acquired the City and District Tracts in one of two ways. It either bought these two tracts from Freeport Marina LP or it bought out Freeport Waterfront Properties' interest in Freeport Marina LP. Either way, Walker ultimately paid Freeport Waterfront Properties $75,000 in January 2007. Walker testified that the Other Limited Partners okayed his acquisition of the City and District Tracts during the same late August 2006 telephone call in which they authorized him to buy the Stanley Tract. He explained that after the First Development Agreement fell apart, Freeport Waterfront Properties wanted back the $75,000 it had used to buy these tracts in lieu of the tracts themselves. As with the Stanley Tract, no writing memorializes the Other Limited Partners' decision to allow Walker to acquire the City and District Tracts.

In February 2007, after receiving the assent of a majority of the Other Limited Partners to the City's new development proposal, Walker signed the Second Development Agreement. Though the Other Limited Partners assented at the time, they maintained at trial that they had not known Second Street had acquired the City and District Tracts as well as the Stanley Tract when they assented. Wirt testified he only learned of this fact during the course of the present lawsuit.

By May 2007, the City had acquired the Henderson Tract and gave Second Street the option to buy it for $200,000. But that month, Freeport elected a new

mayor and two new councilmen who were "not so friendly" to the marina-project parties. Walker testified that working with the City became more challenging afterward, and the City ultimately reneged on its agreement giving Second Street the option to buy the Henderson Tract.

Between November 2009 and January 2010, the partnership became ensnarled in litigation with the City. Initially, Second Street sued the City to enforce its option to buy the Henderson Tract. The City responded by filing suit against Second Street and several other parties, including Walker individually, Briarwood Capital, and Freeport Waterfront Properties. Among other things, the City sought to recover millions of dollars in cost overruns incurred in building the marina. The two suits were consolidated.

During the pendency of the consolidated suit, the City continued building the marina. At some point in 2010, the marina became operational.

The consolidated suit with the City dragged on for several years. During this time, Walker obtained summary judgment in his favor on the claims the City made against him individually. Later, in May 2014, Walker wrote the Other Limited Partners about the City's desire to settle the rest of the suit. Though the limited partnership agreement gave Briarwood Capital, as general partner, the authority to settle the suit, Walker wanted the approval of the Other Limited Partners due to the significance of the proposed terms. The proposed terms included the following:

- the City's leases of the waterfront portion of the Blaffer Tract, City and District Tracts, and Stanley Tract would terminate;
- Freeport Waterfront Properties and Second Street, as the owners of these tracts, would take over ownership and operation of the marina;
- Freeport Waterfront Properties and Second Street would each buy certain additional tracts, with the Henderson Tract going to the latter; and
- the City would pay these two companies' attorney's fees.

Initially, there was support for the proposed settlement. Nicholas e-mailed Walker approving it. In a private e-mail to his sister, Katherine, Van compared the terms to winning "the lottery." He elaborated, "To get the city to give you the marina that cost them $10 million to build is unbelievable. I think they are paying you to take it." But the enthusiasm for the settlement did not last. In late May 2014, Wirt informed Walker in writing that two-thirds of the Other Limited Partners had now concluded that Walker had a conflict of interest due to his representation of both Freeport Waterfront Properties and his own companies. Wirt requested that Walker retain separate counsel to represent the interests of Freeport Waterfront Properties in the settlement negotiations with the City. Wirt also stated that the Other Limited Partners wanted the limited partnership to participate in the purchase of any additional properties sold by the City.

At trial, Van discounted his e-mail to Katherine, explaining that he did not know Walker's companies owned a majority of the marina when he wrote it.

Similarly, Wirt testified that he did not think the proposed settlement with the City was good for Freeport Waterfront Properties, which is why he objected to it.

Walker testified that he tried to arrange a meeting to address the concerns Wirt raised but no one was willing to meet with him. In June 2014, Walker wrote to Wirt and others suggesting that if the Other Limited Partners had lost confidence in him, perhaps they should remove him as the de facto general partner:

> If a majority of the LPs (50.1%) do not trust me to handle the affairs of the partnership there are very clear terms to remove me as GP. I do not want this position under these circumstances . . . . Maybe you would be in a better position to represent the partnership than me since you do not own adjacent property.

But the Other Limited Partners did not remove him.

Walker postponed settlement of the City suit so that he and the Other Limited Partners could resolve their disputes first. In September 2014, they held a mediation. Walker invited all family members, not just the Other Limited Partners, to attend. But the only people who attended were Walker, Walker's wife, Walker's brother, Wirt, Nicholas, Caplan, who was the attorney representing Walker's companies and Freeport Waterfront Properties in the suit with the City, and John McFarland, who was the attorney representing the Other Limited Partners.

Walker testified he provided the Other Limited Partners with documents McFarland had requested relating to Freeport Waterfront Properties before the mediation took place. But the record also shows McFarland was still requesting

documents and information not long before the mediation. Caplan testified that McFarland did not contend during the mediation "that he didn't have full information to conduct the mediation."

The mediation was successful or so it initially seemed. Walker, Wirt, Nicholas, and the two attorneys initialed a mediated settled agreement that had 10 terms. One term was an agreement to allow Second Street to buy the Henderson Tract. Another term was an agreement that Freeport Waterfront Properties would amend its limited partnership agreement to provide for election of a new general partner by a simple majority, rather than requiring unanimity, "upon GP resignation." As part of the mediated settlement, Wirt and Nicholas also signed releases in which they discharged Walker "from any liabilities, claims, demands, or causes of action arising out of any actions taken by him" or through his companies "relating to the interests" of the limited partnership.

With respect to the mediated settlement term about amending the limited partnership agreement, Walker testified that he had objected to a broader proposal, which would have allowed for the election of a new general partner by a simple majority in any circumstance, including when a general partner has been removed, given the adversarial relationship that had developed between him and the Other Limited Partners. The broader proposal, Walker explained, would have made him powerless by allowing a simple majority to both remove him, which already was

allowed under the limited partnership agreement, and choose a new general partner without allowing him any say in that choice.

At trial, the Other Limited Partners asserted that Wirt and Nicholas represented only themselves at the mediation and thus did not bind any other limited partners by initialing the mediated settlement agreement. Christie, in particular, disputed that anyone represented her at the mediation, including McFarland, whom she said she had not retained as counsel at the time. But not all of the others' testimony was as unequivocal. At her deposition, Catherine had testified that Wirt and Nicholas represented the Other Limited Partners at the mediation, but she submitted written changes afterward denying that they had the right to execute a settlement on behalf of the others. The jury heard both her deposition testimony and the written changes. Similarly, Nicholas had testified during his deposition that he believed McFarland represented all the Other Limited Partners at the mediation, but at trial he testified that he was not certain who McFarland represented besides himself and Wirt. When pressed on the issue, Nicholas testified, "I don't know who he was representing. I guess I believed he was representing them, sure." Nicholas acknowledged that the participants in the mediation held a majority percentage of the ownership interests in the limited partnership. And Christie agreed that she understood herself to be "bound by the will of the majority" as reflected in the mediated settlement agreement executed by Walker, Wirt, and Nicholas.

In contrast, Caplan testified that a mediation with less than all the Other Limited Partners would have made no sense because the goal was to resolve all disputes so the settlement with the City could proceed, nobody claimed that less than all of them were represented at the mediation, and he understood McFarland represented all of them. For his part, Walker testified that he would not have agreed to the mediated settlement agreement if he thought it left any disputes with the Other Limited Partners unresolved. After the mediation, Walker e-mailed the Other Limited Partners and the attorneys stating, "I am happy to report to those who don't already know that we have successfully completed our mediation this evening." No one contemporaneously objected.

The mediated settlement agreement between Walker and the Other Limited Partners made it possible to settle the suit with the City. The settlement with the City was signed in November 2014. In the main, the settlement conformed to the prior proposal, except that it required the parties to bear their own attorney's fees. Afterward, per the terms of the mediated settlement agreement and the settlement with the City, Second Street bought the Henderson Tract from the City.

Most other terms of the mediated settlement agreement were satisfied. But Walker and the Other Limited Partners could not agree on language concerning the amendment of the limited partnership agreement.

In December 2015, the Other Limited Partners, who held a majority of the percentage interests in Freeport Waterfront Properties, removed Briarwood Capital as general partner, notifying Walker by e-mail. Afterward, in February 2016, the Other Limited Partners amended the limited partnership agreement to allow the election of a new general partner by simple majority under any circumstance. Then they elected a company wholly owned by Wirt and Nicholas as the new general partner. The new general partner then ratified the amendment after the fact.

At trial, Walker did not contest the propriety of Briarwood Capital's removal as the general partner of Freeport Waterfront Properties. But he objected to the amendment of the limited partnership agreement because an amendment required the approval of both a simple majority and the general partner, and there was no general partner after Briarwood Capital's removal. In addition, he objected to the subsequent election of the new general partner by a simple majority because the controlling unamended limited partnership agreement required the unanimous consent of the partners.

Among other things, the Other Limited Partners sought to recover millions of dollars in damages. Both sides presented expert testimony on the marina's value. But during closing argument, the Other Limited Partners effectively abandoned any claim for damages. Their attorney argued that they were entitled to recover the City, District, Stanley, and Henderson Tracts, but that the jury should disregard the

damages evidence and instead just award $1 for each category of damages in the jury charge.

Jury Verdict

The trial court submitted 26 separate questions to the jury.

As to the September 2014 mediated settlement agreement, the jury found that all the Other Limited Partners agreed to its terms. The jury further found that Freeport Waterfront Properties adopted the mediated settlement agreement.

The jury found that Briarwood Capital had not agreed as of December 2015, when it was removed as general partner, that a simple majority interest of Freeport Waterfront Properties' limited partners could elect a new general partner. The jury further found that neither Wirt nor the company that Freeport Waterfront Properties ostensibly elected as general partner after removing Briarwood Capital from that position had the authority in February 2016 to direct the partnership's accountants to change its ownership structure.

The jury found that Walker exercised such control over Briarwood Capital that he determined its conduct and was responsible for its conduct.

The jury found that a relationship of trust and confidence existed between Walker and the Other Limited Partners. It further found that Walker complied with all his fiduciary duties with respect to the transactions in which:

- Briarwood Capital caused the limited partnership to acquire the Stanley Tract and then transfer it to Second Street; and

- Briarwood Capital caused the limited partnership to execute a settlement agreement whereby Second Street acquired the Henderson Tract.

The jury likewise found that Briarwood Capital complied with the limited partnership agreement and with its duty of loyalty to the limited partnership with respect to the transactions involving the Stanley and Henderson Tracts.

However, the jury also found that Walker did not comply with all his fiduciary duties with respect to the transaction in which Briarwood Capital caused the City and District Tracts to be transferred to Second Street. The jury likewise found that Briarwood Capital failed to comply with the limited partnership agreement and with its duty of loyalty and knowingly participated in Walker's breach of his fiduciary duties as to this transfer. The jury further found that Briarwood Capital's failures were not excused by the doctrines of waiver or estoppel and that Briarwood Capital did not act in good faith with respect to the transfer of the City and District Tracts.

The jury found that the Other Limited Partners in the exercise of reasonable diligence should have discovered Walker's failure to comply with all his fiduciary duties by November 19, 2014. The jury likewise found that the Other Limited Partners should have discovered that Briarwood Capital failed to comply with the limited partnership agreement and with its duty of loyalty by the same date.

The charge contained a single question on damages. For any breach by Walker or Briarwood Capital, the jury was instructed to consider four elements of damages:

- the amount of profit, if any, that Briarwood Capital or Second Street gained through the transaction;
- the amount of profit, if any, that Second Street will in reasonable probability gain in the future due to the transaction;
- the amount of profit, if any, that the limited partnership would have realized in the past if Briarwood Capital had complied with its duties; and
- the amount of profit, if any, that in reasonable probability would have been gained in the future if Briarwood Capital had complied with its duties.

The jury awarded $2, one dollar for Second Street's past profit gained through the transaction and another dollar for the profit the limited partnership would have realized in the past if Briarwood Capital had complied with its duties.

Motions for Judgment

Walker moved for the entry of a take-nothing judgment. In addition, he requested that Freeport Waterfront Properties be dissolved, the court-appointed receiver liquidate the partnership's assets and disburse the proceeds in accord with the partners' percentage interests, and he recover his attorney's fees.

Walker argued that the trial court should disregard the jury's finding as to the City and District Tracts based on the jury's findings that the 2014 mediated settlement agreement was binding. His request for dissolution was based on the limited partnership agreement, which requires dissolution of the partnership if a general partner is removed and a new one is not unanimously elected within 90 days. Walker requested his attorney's fees under the partnership agreement and the Declaratory Judgments Act.

Walker also filed a separate application for attorney's fees in the amount of $1,583,108.71. His application was accompanied by fee summaries, billing invoices with time entries, and fee affidavits.

The Other Limited Partners filed a motion for the entry of judgment and to disregard certain jury findings. Among other things, they argued that the trial court should disregard the findings as to the Stanley and Henderson Tracts and impose a constructive trust on all marina properties. They also argued that the trial court should reject Walker's position that the mediated settlement agreement barred their claims on several grounds, including failure to submit the affirmative defense of release to the jury. In addition, the Other Limited Partners opposed Walker's request to dissolve Freeport Waterfront Properties. Finally, they likewise requested their attorney's fees.

The Other Limited Partners also filed a separate application for attorney's fees in the amount of $929,715.32. Their application was accompanied by billing invoices with time entries and fee affidavits. Like Walker, they based their fee claim on the partnership agreement and the Declaratory Judgments Act.

The trial court held a hearing on the parties' motions. During the hearing, the trial court summarily rejected all claims for attorney's fees. The judge stated:

> I can tell you both the last thing I will do ever in this case is award attorney's fees to either side. You know, you've gotten your clients this far, and they've been shelling out. And if they're going to keep on this—keep it up, they're going to keep shelling out. I'm not going to

> reward anybody for this litigation strategy. So you can just—both of you can forget attorney's fees. I don't want to hear a word about it.

The court otherwise indicated it intended to enter a judgment in accord with the verdict, dissolve the partnership and liquidate its assets, and give Walker an offset for whatever costs he incurred with respect to the City and District Tracts. It then instructed the parties to jointly submit a proposed judgment doing so and denying attorney's fees. The trial court noted that the parties only had to agree as to the judgment's form, not its substance.

The parties could not agree on the form of a proposed judgment. Both sides submitted proposed judgments drafted to reflect the trial court's guidance at the hearing. Both proposed judgments stated the parties approved in form only.

Trial Court's Judgment

Based on the verdict and post-trial motions, the trial court entered a final judgment imposing a constructive trust on the City and District Tracts for Freeport Waterfront Properties' benefit and ordering Second Street to convey these two tracts to Freeport Waterfront Properties. The court further ordered Freeport Waterfront Properties to reimburse Second Street $100,000 "as an equitable adjustment related to the cost of acquiring and holding" the City and District Tracts.

In addition, the trial court ordered a court-appointed receiver to wind down Freeport Waterfront Properties' affairs and then dissolve the limited partnership. As part of the dissolution, the trial court further ordered the receiver to liquidate all the

assets of the limited partnership by public auction or private sale. Subject to final approval by the trial court, the trial court directed that the proceeds of the sale were to be distributed to the limited partners, including Briarwood Capital and Second Street, in accord with their respective partnership percentage interests.

Finally, the final judgment recited that the proposed judgments submitted by the parties provided for each side to bear its own costs and attorney's fees. The trial court therefore ordered the parties to bear their own costs and fees.

The trial court stayed its judgment pending appeal.

Post-Judgment Motions

The Other Limited Partners moved for a partial new trial. Among other things, they argued the evidence is legally or factually insufficient to support the jury's findings as to the Stanley and Henderson Tracts.

The Other Limited Partners also moved to modify, correct, or reform the judgment. In particular, they requested deletion of the $100,000 equitable reimbursement to Second Street.

Both motions were overruled by operation of law. *See* TEX. R. CIV. P. 329b(c).

DISCUSSION

I. Evidentiary Sufficiency

The Other Limited Partners argue the evidence is legally and factually insufficient to support the jury's findings that Walker and Briarwood Capital did not breach their fiduciary duties by acquiring the Stanley and Henderson Tracts.

A. Standard of Review

The evidence is legally insufficient to support a finding if the record shows (1) a total absence of evidence of a vital fact, (2) legal or evidentiary rules bar us from crediting the only evidence supporting a vital fact, (3) the evidence supporting a vital fact is no more than a scintilla, or (4) the evidence conclusively proves the opposite of a vital fact. *Wooters v. Unitech Int'l*, 513 S.W.3d 754, 761 (Tex. App.—Houston [1st Dist.] 2017, pet. denied). We review the evidence in the light most favorable to the challenged finding, disregarding contrary evidence unless a reasonable jury could not. *Martinez v. Kwas*, 606 S.W.3d 446, 462 (Tex. App.—Houston [1st Dist.] 2020, pet. denied). If some evidence supports the finding, then we uphold it. *Wooters*, 513 S.W.3d at 761. If reasonable and fair-minded people could differ in their conclusions, then we must affirm the jury's finding. *Id.*

The evidence is factually insufficient to support a finding if, considering the record as a whole, the supporting evidence is so weak, or so contrary to the weight of all the evidence, as to make the finding clearly wrong and manifestly unjust. *AKIB*

Constr. v. Shipwash, 582 S.W.3d 791, 805 (Tex. App.—Houston [1st Dist.] 2019, no pet.). The jury resolves conflicts in the evidence. *Eagle Oil & Gas Co. v. Shale Expl.*, 549 S.W.3d 256, 269 (Tex. App.—Houston [1st Dist.] 2018, pet. dism'd). We may not substitute our judgment for the jury's simply because the evidence could support a different result. *Levco Constr. v. Whole Foods Mkt. Rocky Mtn./Sw.*, 549 S.W.3d 618, 632 (Tex. App.—Houston [1st Dist.] 2017, no pet.). The amount of evidence required to affirm a finding is far less than is required to reverse. *Id.*

B. Applicable Law

The law presumes transactions between a fiduciary and a party to whom he owes a duty of disclosure are unfair, which places the burden on the fiduciary to show the transactions were fair. *Webre v. Black*, 458 S.W.3d 113, 118 (Tex. App.—Houston [1st Dist.] 2015, no pet.). The same presumption of unfairness arises when a fiduciary is alleged to have engaged in self-dealing. *Cluck v. Mecom*, 401 S.W.3d 110, 114 (Tex. App.—Houston [14th Dist.] 2011, pet. denied). The fiduciary must show he acted in good faith and that the transactions were fair, honest, and equitable. *Webre*, 458 S.W.3d at 119. Important considerations in assessing the fairness of the transactions include whether (1) there was full disclosure, (2) the consideration was adequate, (3) the party to whom the fiduciary duty is owed had the benefit of independent advice, and (4) the fiduciary benefited at the other's expense. *Est. of Townes v. Townes*, 867 S.W.2d 414, 417 (Tex. App.—Houston [14th Dist.] 1993,

writ denied). When considering whether the fiduciary benefited at the other party's expense, we evaluate the transaction in light of the circumstances existing at the time of the transaction, without the benefit of hindsight. *Id.*

C. Analysis

1. The Stanley Tract

The Other Limited Partners argue the evidence is legally and factually insufficient to show that Walker fulfilled his fiduciary duty in buying the Stanley Tract because the evidence shows he did so surreptitiously, pretended the limited partnership required unanimity when it did not, and later lied about the circumstances under which he bought the tract. They further argue that no reasonable jury could believe Walker's testimony that the Other Limited Partners authorized him to buy the Stanley Tract over the telephone, given that the Other Limited Partners denied they did so and there is no written documentation of the call. They note that the jury did not credit Walker's testimony about this call with respect to the City and District Tracts, and they argue that it could not do so with respect to the Stanley Tract either. Finally, the Other Limited Partners argue that even if the jury could credit Walker's testimony about the call, he did not testify that he had divulged details that would constitute the kind of full disclosure required by the law, and they argue Walker did not show the transaction was fair to the limited partnership.

At the outset, we note that the Other Limited Partners' arguments largely depend on a recitation of the evidence favorable to them or viewed from their point of view, without accounting for contrary evidence the jury heard or the jury's role in resolving inconsistencies or conflicts in the evidence. This mode of argument is not consistent with either legal or factual sufficiency review, both of which necessarily entail consideration of Walker's evidence about the Stanley Tract.

For example, the Other Limited Partners claim the evidence shows Walker lied about buying the Stanley Tract after the fact and that this lie demonstrates a lack of disclosure. This claim rests on an e-mail exchange postdating the transaction by eight years. In May 2014, Wirt wrote to Walker asking if he recalled why the partnership had not bought the Stanley Tract. Walker wrote back: "I really don't." Apparently relying on the 2006 correspondence Wirt had forwarded with his e-mail, Walker elaborated: "I imagine it was that we had a few people that were objecting in some form or fashion and I seem to be asking for everyone's buy in before moving forward." At trial, Walker explained that he had expressed uncertainty in the May 2014 e-mail exchange because he "didn't do a deep dive" and replied "off the top of [his] head." While the jury was not required to accept Walker's later explanation about the 2006 transaction, it could have reasonably found that his lack of immediate recall about events eight years in the past reflected lack of memory rather than concealment. This is a question of credibility, which is the sole province of the jury.

Kubbernus v. ECAL Partners, 574 S.W.3d 444, 479 (Tex. App.—Houston [1st Dist.] 2018, pet. denied).

Notably, Walker was not the only person who did not immediately recollect what had happened vis-à-vis the Stanley Tract when asked about it many years afterward. A few days before Wirt e-mailed Walker in May 2014, Wirt e-mailed Dan Hrdy inquiring what happened when the limited partnership had the opportunity to buy the Stanley Tract. Dan initially responded, "I don't remember an opportunity. I'll check my old computer." A couple of days later, Dan wrote a follow-up response to Wirt, in which Dan stated: "I can't find my e-mails from that date. I sort of remember him saying he did not want to hassle with more contentious [limited partnership] issues." Given that more than one participant in the 2006 conversations about the Stanley Tract claimed lack of memory years later, the jury could have reasonably found that Walker's initial lack of recollection was genuine rather than feigned. Likewise, the jury could have reasonably found that Dan's later recollection of contentious partnership issues corroborated Walker's subsequent explanation as to why he, rather than the limited partnership, bought the Stanley Tract.

Similarly, while the Other Limited Partners characterize Walker as having merely pretended that unanimity was required for Freeport Waterfront Properties to buy the Stanley Tract, Walker acknowledged that unanimity was not required. He testified that he desired 100-percent participation as a precondition to the limited

partnership buying this tract so that no one's interest would be diluted because Katherine had threatened a lawsuit—either against Walker or the limited partnership itself—if her interest was diluted again. For her part, Katherine denied threatening to sue or being opposed to the further dilution of her interest. Presented with this testimonial conflict, the jury had to decide whose version of events to credit. *Eagle Oil & Gas*, 549 S.W.3d at 269. Like the question about Walker's memory, the jury's decision implicates witness credibility, which we cannot reassess secondhand based on a cold appellate record featuring conflicting testimony. The jury was entitled to believe Walker over Katherine. *Perez v. DNT Global Star*, 339 S.W.3d 692, 700 (Tex. App.—Houston [1st Dist.] 2011, no pet.).

Moreover, the record includes evidence from which the jury could have reasonably found that the Other Limited Partners were not misled by anything Walker said about his desire for unanimity. Excepting Nicholas Hrdy, who was a minor at the time, the Other Limited Partners or someone representing them signed the limited partnership agreement. Signatories of an agreement are charged as a matter of law with knowledge of its provisions absent evidence that they were tricked into signing it. *DeClaire v. G & B McIntosh Fam. Ltd. P'ship*, 260 S.W.3d 34, 47 (Tex. App.—Houston [1st Dist.] 2008, no pet.). The limited partnership agreement's provisions do not impose a unanimity requirement for the acquisition of property or

any other partnership activity, and none of the Other Limited Partners maintain they were tricked into signing the agreement.

There is also evidence that the Other Limited Partners understood that unanimity was not required by the limited partnership agreement. After Walker stated that he needed unanimous participation for the limited partnership to acquire the Stanley Tract so as to avoid another round of dilution, Dan Hrdy responded in writing that "if 1 or 2 people do not want to participate, it seems to me that there would be no problem with dilution, since the ownership fractions are mostly different now anyway, and it is just another accounting change." This discussion, on which Wirt and Van Taylor were copied, indicates that everyone contemporaneously understood that unanimity was not required by the limited partnership agreement. Or, at the very least, the jury could have reasonably inferred that this was the case based on Dan's discussion about unanimity and dilution.

At trial, Wirt testified that he knew of no provision in the limited partnership agreement that required unanimity to buy property. His testimony, in combination with the other evidence in the record, gave the jury ample basis to find that Walker did not mislead the Other Limited Partners into believing the partnership could not acquire the Stanley Tract without unanimity.

We also disagree with the Other Limited Partners' position that a reasonable jury could not credit Walker's account about the late August 2006 telephone call.

Once again, the evidence as to the call consists of conflicting testimony. Walker testified the call happened, and Wirt testified it did not. Dan, the third ostensible participant on this call, did not testify. Van, a possible but unconfirmed fourth participant, did not recall such a call happening. While there is no documentation memorializing the call, none is required. A witness's testimony that he had a conversation with another is direct evidence of the conversation. *See, e.g.*, *Eris v. Phares*, 39 S.W.3d 708, 714 (Tex. App.—Houston [1st Dist.] 2001, pet. denied) (party's testimony about conversation between himself and alleged wife was more than scintilla of direct evidence that parties agreed to be married). The jury, as the arbiter of witness credibility, was not obligated to resolve the conflict between Walker's and Wirt's testimony in Walker's favor, but it did so, and it was entitled to do so even though the conversation was not corroborated by a contemporaneous writing. *See Capcor at KirbyMain v. Moody Nat'l Kirby Houston S*, 509 S.W.3d 379, 386 (Tex. App.—Houston [1st Dist.] 2014, no pet.) (jury could credit testimony about content of conversations despite lack of supporting documentary evidence).

Furthermore, the record contains additional evidence that the parties did not exclusively communicate in writing about the Stanley Tract. Walker testified that multiple telephone calls on the subject took place. In addition, in an August 2006 e-mail from Sarah Hrdy, Dan's wife, to their children, Camilla and Nicholas, she wrote: "Dad and I talked to Walker this morning. Expect you saw his e-mail about

needing to buy the land adjacent to the marina. It is complicated and we need to talk." The jury could have reasonably found that this additional evidence lent credence to Walker's version of events, in which Dan, Wirt, and possibly Van gave him permission to buy the Stanley Tract in an otherwise undocumented telephone conversation occurring in the same basic timeframe.

To the extent the Other Limited Partners assert that a reasonable jury could not, as this one did, simultaneously find that they authorized Walker to buy the Stanley Tract but not the City and District Tracts, we again disagree. Though Walker testified that the Other Limited Partners authorized him to buy all these tracts during the same late August 2006 telephone call, a reasonable jury could have found that they authorized him to purchase the Stanley Tract alone on the disputed call.

The evidence is undisputed that Walker bought the Stanley Tract in September, within a week or two of the ostensible late August 2006 call. In contrast, he did not acquire the City and District Tracts until several months later, in December. Moreover, by Walker's own account, it was the partnership's opportunity to buy the Stanley Tract, and their lack of unanimity about doing so, that led to the call. Finally, e-mails from earlier in August 2006, before the disputed call, show Walker and the Other Limited Partners were discussing the opportunity to buy a property "marked 'Dorothy Stanley'" on an attached survey, but the e-mails made no mention of the City and District Tracts. From these circumstances, a reasonable

jury could have found that the Other Limited Partners authorized Walker to buy the Stanley Tract, but not the City and District Tracts, on the August 2006 telephone call. *See Primoris Energy Servs. Corp. v. Myers*, 569 S.W.3d 745, 757 (Tex. App.—Houston [1st Dist.] 2018, no pet.) (jury entitled to consider circumstantial evidence and draw reasonable inferences from evidence it chooses to believe). Thus, there is no inconsistency for us to reconcile between the jury's findings about the Stanley Tract on the one hand and the City and District Tracts on the other.

The Other Limited Partners further argue that even if one could conclude there was a telephone call about the Stanley Tract in late August 2006, Walker's disclosure about the potential transaction was so incomplete that it remained unfair. For example, they argue that the transaction was unfair because Walker did not tell them the City was willing to pay rent on the Stanley Tract. But the City did not propose doing so until the Second Development Agreement, which Walker first discussed with the Other Limited Partners in November 2006. The Other Limited Partners have not cited any evidence that the City had already made this proposal to Walker when the disputed telephone call took place in late August or when he bought the Stanley Tract in early September. Without evidence of this sort, the Other Limited Partners' argument invites us to hold that there is insufficient evidence of the transaction's fairness based on events that transpired afterward, rather than evaluating the transaction in light of the circumstances existing when it took place as we must. *See*

Est. of Townes, 867 S.W.2d at 417; *see also Collins v. Smith*, 53 S.W.3d 832, 840 (Tex. App.—Houston [1st Dist.] 2001, no pet.) (court evaluates whether fiduciary significantly benefits at expense of one to whom he owes fiduciary duty based on circumstances existing when transaction takes place).

The Other Limited Partners also suggest that the transaction remained unfair because it created a conflict of interest by making Walker and Freeport Waterfront Properties competitors in the marina development project. But this suggestion disregards the partnership agreement, which allows any partner to "engage in or possess an interest in other business ventures of any nature or description, independently or with others, similar to, or competitive with the business" of the limited partnership. Under Texas law, the parties were entitled to limit the scope of fiduciary duties in this manner in the partnership agreement. *Strebel v. Wimberly*, 371 S.W.3d 267, 284 (Tex. App.—Houston [1st Dist.] 2012, pet. denied). Thus, the existence of a conflict of interest resulting from competition, standing alone, does not establish the transaction's unfairness. *See id.* Consistent with the partnership agreement, the trial court's charge instructed the jury that possessing a competitive business interest was not a breach of the duty of loyalty. And we must assess evidentiary sufficiency based on the charge given when, as here, there was no objection to the instruction. *Sentinel Integrity Sols. v. Mistras Grp.*, 414 S.W.3d 911, 928 (Tex. App.—Houston [1st Dist.] 2013, pet. denied).

The Other Limited Partners further argue that Walker's conflict of interest resulting from his competition in the marina development project later ripened into self-dealing when Walker made a better deal for himself than the partnership in the marina operating agreement. Thus, they argue, his purchase of the Stanley Tract was unfair at the outset. But this argument again relies on events that transpired after the transaction. It is undisputed that the marina was not operational until 2010, the parties did not take over operations until after their lawsuit with the City settled, and their marina operating agreement was not executed until 2014. A transaction's fairness cannot be measured by events, like these, that happened years later. *See Est. of Townes*, 867 S.W.2d at 417. Walker testified without contradiction that little progress had been made in the marina development project and that its future was uncertain when he, rather than the partnership, bought the Stanley Tract.

The Other Limited Partners also argue that the unfairness of Walker's purchase of the Stanley Tract is manifest because Walker gave no consideration to the partnership for his purchase of the property. In support, they rely on *Crenshaw v. Swensen*, in which the Third Court held that a general partner violated her fiduciary duty by selling and leasing partnership property and depositing the proceeds into her own company's bank account without the knowledge of the limited partners. 611 S.W.2d 886, 888–91 (Tex. App.—Austin 1980, writ ref'd n.r.e.).

Crenshaw, which does not mention or turn on consideration, is not on point.

In that case, the dispositive facts were undisputed. *Id.* at 891. The issue was whether the undisputed facts constituted a breach of fiduciary duty entitling the limited partners to restitution of their partnership contributions. *See id.* at 890–91. The court of appeals held the general partner had breached her fiduciary duty as a matter of law, which, in turn, entitled the limited partners to the restitution they sought. *Id.*

Here, it is undisputed that Walker paid $90,000 for the Stanley Tract. Though he did not pay the partnership anything for the opportunity to buy the land, the jury did hear evidence from which it could have concluded the partnership benefited. Walker testified that "everybody was running for the hills" during this timeframe due to the marina development project's lack of progress and the eminent-domain controversy and litigation. The First Development Agreement was unraveling, and the City had informed Walker that it was going to exercise its right to rebuy the City and District Tracts due to the lack of progress. By purchasing the Stanley Tract, Walker staved off repurchase of the City and District Tracts, which helped protect Freeport Waterfront Properties' existing investment in the marina development area during a time of uncertainty. A reasonable jury could credit this testimony and find that the transaction also benefited the limited partnership.

Our dissenting colleague says that Walker's preservation of the marina development's viability is not adequate consideration to Freeport Waterfront Properties for his acquisition of the Stanley Tract. Our colleague reasons this is so

because Walker was already obligated to preserve the development's viability in his role as the limited partnership's general partner.

But Walker was not obligated to buy land at his expense to fulfill his duties as general partner. By Walker's account, which the jury credited after hearing the evidence, he bought the Stanley Tract to preserve the development's viability years before it was certain there ever would be an operational marina. Based on Walker's version of events, the limited partnership benefited in several ways, including:

- preservation of the partnership's marina-development strategy to increase the value of its initial asset, the Blaffer Tract, unaccompanied by the burden of raising the $90,000 required to buy the Stanley Tract under the purchase option granted by the City; and
- avoidance of the possibility of partnership-related litigation arising from the dilution of a dissatisfied partner's ownership interest that would have resulted if the partnership bought the tract without the unanimous participation of all the Other Limited Partners.

Contrary to the dissent's apparent view, Walker was not obligated to pay the limited partnership money to acquire its option to buy the Stanley Tract in order for there to be adequate consideration supporting the limited partnership's decision to allow him to do so. Consideration may be anything of value. *See Balaban v. Balaban*, 712 S.W.2d 775, 781 (Tex. App.—Houston [1st Dist.] 1986, writ ref'd n.r.e.). On this record, the jury could have reasonably found that the limited partnership received adequate consideration based on the benefits conferred on it by Walker's purchase of the tract without any other additional compensation.

To the extent our dissenting colleague suggests that Walker had to at least disclose to the Other Limited Partners that the limited partnership could seek monetary compensation for the relinquishment of its option to buy the Stanley Tract, we note that there is no evidence on this subject one way or the other. It is undisputed that the Other Limited Partners knew of the option's existence because Walker informed them in his initial August 2006 e-mail that the opportunity to buy the Stanley Tract arose "under an option that we secured a few years ago." But assuming for argument's sake that the Other Limited Partners did not understand that this purchase option was valuable in its own right, a fiduciary's disclosure obligations extend to material facts. *Capcor at KirbyMain*, 509 S.W.3d at 385. Which facts are material depends on the circumstances, such that materiality is a question of fact for the jury absent a legal rule to the contrary. *Id.* at 385–86. Having abandoned all claims for damages at trial, the Other Limited Partners' position before the jury was not that they would have demanded monetary compensation had they only known of the option's value. Instead, their position was that the limited partnership would have bought the Stanley Tract if Walker hadn't snookered them out of the opportunity. Under these circumstances, the jury could have reasonably found that anything Walker did or did not say about compensation for the surrender of the limited partnership's option to buy the Stanley Tract was immaterial.

Our dissenting colleague also says that the record conclusively shows Walker

misled the Other Limited Partners as to his willingness to set up a new entity to buy the Stanley Tract. But the record is more complicated than our colleague allows.

No one disputes that Walker ultimately created a new entity—Second Street—to buy the Stanley Tract after Freeport Waterfront Properties ostensibly passed on the opportunity to do so. But Walker never unequivocally stated that he would not set up a new entity for this purpose under any circumstances. Instead, in Walker's initial August 2006 e-mail to the Other Limited Partners about this opportunity, he wrote: "[I]t is such a small purchase it doesn't really make sense to set up a new partnership to buy it." Then, in a follow-up e-mail, Walker stated, "I am not prepared to go through another round of diluting people or setting up another entity for a $90,000 investment." Finally, after it became clear that fewer than all the Other Limited Partners would participate and dilution would be necessary for the limited partnership to buy the tract, Walker maintains that Dan, Wirt, and possibly Van authorized Walker to buy the tract for himself in a telephone call. At trial, when Walker was asked why he did not pursue the second possibility acknowledged in his follow-up e-mail—setting up a new business entity comprised of the Other Limited Partners who had initially expressed interest in participating in the purchase—Walker testified that the others did not pursue this possibility. In other words, there is evidence from which the jury could have reasonably found that Walker did not set up a new entity to buy the Stanley Tract until other options were exhausted and in

response to circumstances that were not within his control.

Finally, our dissenting colleague faults Walker for informing the Other Limited Partners of the need to acquire the Stanley Tract for "strategic reasons" but not explaining to them the nature of these "strategic reasons" in adequate detail. In particular, the dissent complains that the record contains no evidence that Walker told the Other Limited Partners the City had threatened to exercise its contractual right to repurchase the City and District Tracts due to the lack of progress in developing the marina or that he told them his proposed acquisition of the Stanley Tract was in part an effort to persuade the City not to repurchase these tracts.

We disagree that the record does not contain any evidence as to Walker's "strategic reasons" for proposing to acquire the Stanley Tract. In his initial August 2006 e-mail to the Other Limited Partners, Walker wrote: "The city is putting pressure on me to do something about this parcel and I have decided to go ahead and purchase it for strategic reasons. It is in the marina development site." Thus, Walker disclosed both that the City was applying pressure on him to buy the Stanley Tract and that he thought it was in the limited partnership's interest to do so because it was part of the site where the marina was to be built. In addition, the record contains evidence from which the jury could have reasonably inferred that the Other Limited Partners understood the Stanley Tract's strategic importance to the marina project, as both Dan and Wirt contemporaneously requested information about the tract's

location relative to the limited partnership's existing holdings. In writing, Walker told them the Stanley Tract did not abut the partnership's property but was "in the marina zone." Walker also sent them an image identifying the tract's location. Previously, Walker had sent the Other Limited Partners a copy of the First Development Agreement, in which the City committed to assist the limited partnership in acquiring properties in the marina zone, including the Stanley Tract. At trial, Walker testified that everyone knew where the marina would be built. He further testified that Dan, Wirt, and possibly Van ultimately authorized him to buy the Stanley Tract to assure the marina could in fact be built. Based on this evidence, the jury could have reasonably found that the Other Limited Partners were aware of the tract's strategic significance.

To the extent the dissent contends Walker was required to inform the limited partnership that the City had threatened to repurchase the City and District Tracts, the jury could have reasonably concluded that this information was immaterial. Once again, the Other Limited Partners claim that a majority of them were convinced that the limited partnership ought to buy the Stanley Tract based on what they already knew, not that they would have opted to do so if only Walker had given them some additional background about the "strategic reasons" informing their decision. On the facts of this case, it was the jury's province to pass on materiality. *See Capcor at KirbyMain*, 509 S.W.3d at 385–86. The jury's assessment of materiality must stand,

given the jury's role in assessing witness credibility and evidentiary conflicts.

In conclusion, some evidence supports the jury's findings that neither Walker nor Briarwood Capital breached any fiduciary duty or obligation as to the Stanley Tract. Moreover, considering the record as a whole, the evidence supporting the jury's Stanley Tract findings is not so weak, or so contrary to the weight of all the evidence, as to make these findings clearly wrong and manifestly unjust. Thus, we hold that the evidence is legally and factually sufficient to support these findings.

2. The Henderson Tract

The Other Limited Partners argue the evidence is legally and factually insufficient to show that Walker fulfilled his fiduciary duty in acquiring the right to buy the Henderson Tract because the evidence shows he received this right as part of a settlement he negotiated with the City on behalf of himself, his companies, and Freeport Waterfront Properties. The Other Limited Partners maintain that Walker's conflict of interest alone is enough to invalidate this transaction. In addition, they argue that while Walker gained handsomely from the settlement with the City, the partnership received comparatively little of value. In particular, the Other Limited Partners note that Walker obtained the Henderson Tract at the heart of the marina, while the partnership received peripheral properties of lesser value, one of which required asbestos remediation costing more than the property itself. Finally, they

note that Walker did better under the settlement in several other respects, none of which were divulged to the Other Limited Partners beforehand.

In their argument as to Walker's alleged breach of fiduciary duty in settling with the City, the Other Limited Partners give short shrift to certain events immediately preceding the settlement. When Walker conveyed the proposed terms of the settlement to the Other Limited Partners, Wirt objected. Wirt sent an e-mail notifying Walker that two-thirds of the Other Limited Partners thought he had a conflict of interest. Wirt also requested that the partnership hire separate counsel to represent its interests in the settlement. In the end, the Other Limited Partners hired their own attorney, McFarland. McFarland attended the mediation in which Walker and the Other Limited Partners resolved their disputes about the proposed settlement with the City as well as other partnership disputes in a mediated settlement agreement. That agreement gave Walker the right to buy the Henderson Tract. Though the Other Limited Partners disputed at trial that they all were bound by the mediated settlement agreement, the jury found otherwise and substantial evidence, including Walker's and Caplan's testimony as well as some of the Other Limited Partners' testimony, supports this finding. On appeal, the Other Limited Partners do not challenge this adverse finding. All agree that Walker only settled the litigation with the City and acquired the Henderson Tract after the mediated settlement agreement settling the partnership disputes was signed.

Viewed in the context of this additional evidence, we disagree with the Other Limited Partners' position that Walker's representation of multiple interests in settlement negotiations with the City, standing alone, was a breach of fiduciary duty. The Other Limited Partners knew of his conflict of interest and had the benefit of the advice of their own attorney when they executed the mediated settlement agreement that gave Walker the right to buy the Henderson Tract. On this record, a reasonable jury could have found, as this one did, that Walker's representation of multiple interests was entitled to little or no weight in assessing whether the settlement was fair to the limited partnership. *See Est. of Townes*, 867 S.W.2d at 417 (identifying benefit of independent advice as important consideration).

The Other Limited Partners disparage the mediated settlement agreement, arguing it is as tainted as the settlement with the City by virtue of Walker's failure to fully disclose the information they needed to understand both. But both sides presented evidence on this subject. Walker testified that he provided requested information about the limited partnership, and Caplan stated that nobody claimed that he or she lacked the information needed to mediate and resolve the disputes. Caplan further testified that Walker was "being transparent" with the Other Limited Partners about the proposed terms of the settlement with the City. As the arbiter of conflicts in the evidence, the jury was entitled to credit Walker's and Caplan's testimony over contrary accounts. *Eagle Oil & Gas*, 549 S.W.3d at 269.

The Other Limited Partners also argue that Walker breached his fiduciary duty in executing the settlement with the City because its terms favored his interests to the detriment of the limited partnership. In particular, the Other Limited Partners contrast Walker's acquisition of the Henderson Tract, which they describe as "a nearly million-dollar-property," for $200,000, with the limited partnership's acquisition of the Jones Tract, which required expensive asbestos remediation, for $150,000. But like the Henderson Tract, the Jones Tract was addressed by the parties in their mediated settlement agreement, and it is undisputed that Walker did not acquire the Henderson Tract beforehand. That is, represented by counsel, the Other Limited Partners negotiated for the partnership to receive the Jones Tract.

In addition, while the relative values of the Henderson and Jones Tracts may be lopsided when considered in isolation, the jury heard additional evidence from which it could have reasonably found that the settlement as a whole was not unfair. Korman, one of the Other Limited Partners' experts, valued the properties the limited partnership received as a result of the settlement, including the Jones Tract, at just under $370,000. Thus, the Jones Tract does not capture the full value of the real estate that Freeport Waterfront Properties acquired in the settlement.

The jurors also heard evidence that might have called into question the high value the Other Limited Partners attribute to the Henderson Tract. As support for their contention that it is worth about $1 million, they rely on the testimony of

Caplan, who testified that the City had bought the Henderson Tract for "a lot more than 200,000 bucks." Caplan could not recall the exact figure, but stated he thought "it was under a million dollars." Thus, Caplan's testimony was at best an approximate and imprecise valuation of the Henderson Tract. Furthermore, Walker disputed that the price the City paid reflected the tract's fair market value. He testified that it cost the City $950,000 to acquire the Henderson Tract because the acquisition displaced a business owned by Dennis Henderson and the City built Henderson a new facility elsewhere at its expense as part of the deal.

Moreover, Korman cautioned against equating a purchase price with fair market value in another exchange. Korman valued the Stanley Tract at about $69,000 in 2017 even though Walker bought it for $90,000 in 2006. When asked whether this meant the Stanley Tract had lost value, he answered: "Well, I should point out that that's consideration that was paid. That was a price. I don't know if that was the market value at the time. I didn't value it as of that date." In other words, Korman opined that the purchase price paid is not necessarily the same as fair market value. Based on Korman's opinion, a reasonable jury could have found that Caplan's testimony as to how much the City paid for the Henderson Tract—far more than $200,000 but under $1 million—was not necessarily representative of its value, particularly given that the Henderson Tract had been the subject of prolonged litigation before the City acquired it.

In sum, the Other Limited Partners' comparison of the Henderson and Jones Tracts does not capture the value of all the real estate that changed hands as a result of the settlement with the City, depends on imprecise testimony about the price the City paid to buy the Henderson Tract after litigation, overlooks Walker's testimony that the price the City paid was not fair market value, and ignores their own expert's caution to not conflate land's purchase price with its fair market value. The jurors, however, were not obliged to close their eyes to these circumstances in evaluating whether the settlement with the City was fair to Freeport Waterfront Properties.

The Other Limited Partners also argue the settlement with the City through which Walker acquired the Henderson Tract was unfair to the limited partnership in a variety of other ways that are not directly tied to the Henderson Tract itself or the tracts acquired by the limited partnership. For example, they maintain that Walker forced the limited partnership to fund the litigation even though it was "for his own personal benefit." They also posit that the limited partnership derived no value from key benefits of the settlement, such as the conveyance of the completed marina, because the marina had been built primarily on tracts Walker owned. In addition, they argue that Walker, or rather Second Street, received money in the settlement while the limited partnership actually owed money to the City.

But the evidence in the record is not as one-sided as the Other Limited Partners assert. Freeport Waterfront Properties became involved in the lawsuit with the City

because the City sued it. Once that happened, the partnership had no option but to defend itself. As Caplan testified, the City sought millions in damages from the limited partnership as well as the other defendants. In February 2010, Walker wrote Dan and Wirt about the partnership's answer to the City's suit and told them he was splitting the legal bills between the limited partnership and Second Street, with the former paying 65 percent and the latter paying 35 percent. Walker explained that these percentages reflected the share of income the entities derived from their respective leases to the City under the Second Development Agreement. Though Wirt objected to this arrangement, wanting other named defendants to shoulder some of the legal expenses as well, Walker testified that the split made sense because the limited partnership and Second Street were the only ones then profiting from the marina, so it made sense for them to bear the expenses as well. Given all the evidence, the jury could have reasonably found that the legal fees incurred were necessary and the fee-splitting arrangement was a fair one.

Similarly, while it is undisputed that most of the marina sat on the tracts then owned by Walker, the extent, if any, to which the limited partnership nonetheless benefited from the settlement was contested. It is undisputed that the City released its multi-million dollar claim against all the defendants, including Freeport Waterfront Properties. Moreover, Caplan testified that all properties conveyed in the settlement, including those without marina infrastructure allocated to the limited

partnership, would benefit from the settlement because the entire area would see further development due to the marina's presence.

Likewise, while it is undisputed that Second Street received $160,000 in back rent and fees owed by the City under the Second Development Agreement's ground leases, Walker testified that back rent and fees were also allocated to Freeport Waterfront Properties in the settlement. The settlement agreement corroborates his testimony. He elaborated that the limited partnership acquired more properties from the City in the settlement than Second Street did. As a result, the limited partnership's back rent and fees were offset by the purchase prices for these properties. According to Walker, this kind of offset, not unfairness in the settlement, is why Second Street ended up with cash in hand while Freeport Waterfront Properties did not.

The jury, of course, was not obligated to accept Walker's version of events. In the preceding discussion of the evidence on the fairness of the settlement with the City, we should not be misunderstood to suggest that the record is one-sided in Walker's favor, either with respect to the fairness of the settlement in general or his acquisition of the Henderson Tract in particular. The evidence is not one-sided. Both sides put on a good deal of proof relevant to the fairness of this transaction. Contrary to the Other Limited Partners' argument, however, we do not think the evidence as a whole is such that a reasonable jury was bound to find in their favor.

Like the Other Limited Partners, our dissenting colleague says that Walker's acquisition of the Henderson Tract was inequitable in light of the properties that Freeport Waterfront Properties received in the settlement with the City. In particular, our colleague faults Walker for saddling the limited partnership with the Jones Tract due to the expensive nature of the asbestos remediation it required.

We disagree with our dissenting colleague. The evidence as to how the limited partnership acquired the Jones Tract is more complicated than our colleague acknowledges and it does not suggest Walker misled the Other Limited Partners about this tract or others. Indeed, there is evidence that all the parties knew about the asbestos before the limited partnership agreed to buy the Jones Tract and that none of the parties knew how expensive the asbestos removal would be beforehand.

At trial, Wirt testified that Walker had initially suggested the limited partnership buy the Jones Tract. Wirt agreed it was good idea.

After the marina had become at least partly operational, Wirt pressed Walker to secure the Jones Tract on behalf of the limited partnership. In a series of June 2010 e-mails between Wirt and Walker concerning the possibility of buying the Jones Tract, Wirt indicated that he was already aware of the asbestos problem. Wirt wrote: "[L]et's find out how much to abate and demo."

But the limited partnership did not acquire the right to buy Jones Tract until 2014 as part of the settlement of the litigation with the City. Walker first informed

the Other Limited Partners of the City's settlement proposal in a May 2014 e-mail. An attachment outlined the settlement's proposed terms, one of which was that Freeport Waterfront Properties "will purchase Wanda Jones property for $150,000. FWP will pay to remove asbestos and demo building."

Afterward, Walker and the Other Limited Partners became embroiled in disagreements. In September 2014, they held a mediation, at which the Other Limited Partners were represented by counsel. One of the terms of the resulting mediated settlement agreement was that the limited partnership would buy the Jones Tract when the parties settled the litigation with the City. The parties and the City then settled the litigation in November 2014.

At trial, Walker testified that the limited partnership had "an idea" as to how much it would cost to remove the asbestos on the Jones Tract based on its prior removal of asbestos from the shopping center on the Blaffer Tract. But it turned out that Walker's estimate of the cost to remove the asbestos from the building on the Jones Tract was low. In December 2015, Walker learned that asbestos removal and demolition of the building on the tract would cost a little more than $155,000, which was far higher than he had anticipated.

Walker testified that he did not think he had ever provided his mistaken low estimate of the cost of asbestos remediation to the Other Limited Partners. No evidence in the record contradicts Walker's testimony on this point.

The Other Limited Partners were not pleased by the high cost to remediate the asbestos on the Jones Tract, and they initially balked at bearing it. But the limited partnership ultimately did pay the $155,000 required to remove the asbestos from the building and demolish it.

At trial, when asked if he had wanted to buy the Jones Tract, Nicholas answered, "Not in retrospect." Similarly, when Nicholas was asked whether he thought the price the limited partnership paid to the City for the Jones Tract—$150,000—was fair, he answered, "In retrospect, no."

One of the Other Limited Partners' experts, Korman, testified that "there's always a risk in buying real estate." Korman testified that the Jones Tract, now a vacant lot, had a value of $55,735 at the time of trial.

Based on the preceding evidence, the jury could have reasonably found that the Other Limited Partners agreed to buy the Jones Tract knowing that the building on the tract had an asbestos problem. Similarly, the jury could have reasonably found based on the evidence that the Other Limited Partners agreed to buy the tract before anyone appreciated how much it would cost to remove the asbestos and that they assumed the risk that it might cost more than anticipated. While their frustration and disappointment in hindsight is understandable, the fairness of the transaction must be evaluated based on the circumstances known to the parties when it happened. *See Est. of Townes*, 867 S.W.2d at 417; *see also Collins*, 53 S.W.3d at 840 (we must

evaluate whether fiduciary significantly benefited at expense of those to whom he owed fiduciary duty based on circumstances existing at time of transaction).

In conclusion, some evidence supports the jury's findings that neither Walker nor Briarwood Capital breached any fiduciary duty or obligation as to the Henderson Tract. Moreover, considering the record as a whole, the evidence supporting the jury's Henderson Tract findings is not so weak, or so contrary to the weight of all the evidence, as to make these findings clearly wrong and manifestly unjust. Thus, we hold that the evidence is legally and factually sufficient to support these findings.

II. Constructive Trust or Remand

In the event we hold that there is legally or factually insufficient evidence to support the jury's findings as to the Stanley and Henderson Tracts, the Other Limited Partners ask us to impose a constructive trust on these tracts rather than remanding to the trial court for a determination as to whether the imposition of a constructive trust is appropriate. Because we hold that the evidence is sufficient to support these findings, we need not resolve this issue. *See* TEX. R. APP. P. 47.1.

III. Equitable Reimbursement

The Other Limited Partners argue that the trial court erred in awarding Walker a $100,000 equitable reimbursement for acquiring and holding the City and District Tracts. They posit that the court erred in doing so because Walker neither pleaded a right to reimbursement nor obtained supporting jury findings, the evidence does not

support a reimbursement in any amount, and Walker cannot obtain such equitable relief because he has unclean hands due to his breach of fiduciary duty.

A. Standard of Review

We review a trial court's equitable decisions for abuse of discretion. *Wagner & Brown, Ltd. v. Sheppard*, 282 S.W.3d 419, 428–29 (Tex. 2008). A trial court abuses its discretion when, among other things, it exercises its discretionary authority without sufficient facts to allow it to make a rational decision. *Landon v. Jean–Paul Budinger, Inc.*, 724 S.W.2d 931, 938 (Tex. App.—Austin 1987, no writ); *see also Beaumont Bank v. Buller*, 806 S.W.2d 223, 226 (Tex. 1991) (existence of evidentiary support for trial court's decision is relevant consideration in determining whether trial court abused its discretionary authority).

B. Applicable Law

The trial court is responsible for deciding whether equitable relief is expedient, necessary, or proper. *Hill v. Shamoun & Norman, LLP*, 544 S.W.3d 724, 741 (Tex. 2018). But when contested fact issues must be resolved before equitable relief can be awarded, a party is entitled to have the jury resolve those issues. *Id.*

C. Analysis

Walker did not plead an entitlement to an equitable reimbursement. Nor did he seek or obtain jury findings as to the amount he incurred to acquire and hold the

City and District Tracts. Instead, the issue of equitable reimbursement was first raised by the trial court, not Walker, after the jury had rendered its verdict.

Walker nonetheless argues that his entitlement to reimbursement is apparent from the record. He notes, for example, that he paid $75,000 to the partnership for the City and District Tracts. Citing *Johnson v. Cherry*, Walker asserts that his failure to plead an entitlement to equitable reimbursement or to seek and obtain corresponding findings as to the amount he incurred to acquire and hold the tracts is of no moment, as the Court held that reimbursement was required there even though the issue had not been raised until appeal. 726 S.W.2d 4, 8 (Tex. 1987).

But *Johnson* is distinguishable. It arose out of a suit to cancel a deed that constituted an unconstitutional mortgage on a homestead. *Id.* at 5–7. Because the deed in question was subject to cancellation, the Court held that equity required the party seeking cancellation to reimburse the other party for the debt owed under the mortgage. *Id.* at 8. The rationale was that one who seeks an equitable remedy, like cancellation, must also do equity, like paying an acknowledged debt. *See id.* The entitlement to equitable reimbursement could be raised for the first time after trial because the trial record showed that reimbursement was required to avoid a wrong. *See id.*; *see also Wagner & Brown*, 282 S.W.3d at 429 (equitable reimbursement required because record showed substantial forfeiture otherwise would result).

The same cannot be said of this case. The jury found Walker acquired the City and District Tracts by breaching his fiduciary duty to the limited partnership. It also found that Second Street gained profits it otherwise would not have due to the wrongful acquisition of these tracts. Consistent with the closing argument of the Other Limited Partners, in which they abandoned their claim for damages, the jury did not decide the amount of these profits and instead awarded $1. But if equitable reimbursement had been on the table at the time, the Other Limited Partners might not have abandoned their claim for damages. While the propriety of equitable reimbursement is committed to the trial court, the Other Limited Partners were entitled to have material facts, like the amount of Second Street's profits and expenses related to these tracts, decided by the jury beforehand if reimbursement was going to be sought by Walker. *See Hill*, 544 S.W.3d at 741. In the same vein, without findings as to how much Second Street spent and profited as a result of its acquisition and holding of the City and District Tracts, the record does not show that reimbursement is required to avoid a wrong. One must know both how much expense Walker incurred and how much profit he gained as a result of acquiring and holding the City and District Tracts to ascertain whether equity requires that he be reimbursed. Without these findings, the trial court lacked sufficient facts to allow it to rationally exercise its discretionary authority as to reimbursement.

To the extent Walker claims the Other Limited Partners bore the burden to prove the amount of any profit that offset his undisputed expenses related to the City and District Tracts, we disagree for two reasons. First and foremost, as the party claiming an equitable reimbursement, Walker bore the burden of proof, not the Other Limited Partners. *Pathfinder Oil & Gas v. Great W. Drilling*, 574 S.W.3d 882, 890 (Tex. 2019). Second, Walker's argument overlooks the role his failure to seek reimbursement at trial played in thwarting the factfinding process on this subject.

Similarly, the Other Limited Partners claim that Walker should not have been allowed equitable reimbursement because he has unclean hands. Like equitable reimbursement, unclean hands was an issue for the trial court, not the jury. *Hill*, 544 S.W.3d at 741–42. But to obtain a ruling in their favor based on the doctrine of unclean hands, the Other Limited Partners would have had to prove they were seriously harmed by Walker's conduct. *Id.* at 742; *Kinsel v. Lindsey*, 526 S.W.3d 411, 426 (Tex. 2017). Had Walker sought reimbursement at trial, the Other Limited Partners could, in turn, have offered proof and requested jury findings about the extent to which they were harmed by Walker's conduct, such as the amount of the partnership's lost profits or other expenses incurred due to the wrongful acquisition of the City and District Tracts, in support of their unclean-hands defense. Without these findings, the trial court lacked sufficient facts to allow it to rationally exercise its discretionary authority as to whether unclean hands barred reimbursement.

In sum, Walker's failure to raise the issue of equitable reimbursement at trial short-circuited the factfinding process necessary for him to prove he would be wronged without reimbursement. Because the jury did not make the necessary findings, the trial court did not have sufficient facts to allow it to rationally exercise its discretion. The trial court therefore abused its discretion in deciding that Walker was entitled to equitable reimbursement in any amount, let alone $100,000.

IV. Rescission of Marina Agreements

The Other Limited Partners argue that the trial court erred in denying their posttrial request to rescind two marina-related agreements. Because these agreements allocate certain profits based on ownership of the underlying properties and the trial court's judgment restores the City and District Tracts to the limited partnership, the Other Limited Partners argue that the existing allocation of profits under the agreements is inequitable and rescission of the agreements is required.

A. Standard of Review

Rescission is a discretionary remedy. *Ginn v. NCI Bldg. Sys.*, 472 S.W.3d 802, 837 (Tex. App.—Houston [1st Dist.] 2015, no pet.). We therefore review a trial court's decision allowing or disallowing rescission for abuse of discretion. *Id.*

B. Applicable Law

Rescission is an equitable remedy. *Cruz v. Andrews Restoration*, 364 S.W.3d 817, 826 (Tex. 2012). Rescission extinguishes a valid contract when a party's

wrongful conduct makes it equitable to set the contract aside. *Kennebrew v. Harris*, 425 S.W.3d 588, 595 (Tex. App.—Houston [14th Dist.] 2014, pet. denied). For example, a court may order rescission when one party's wrong would result in unjust enrichment if the contract remains binding. *Ginn*, 472 S.W.3d at 837. In general, rescission is a substitute for money damages when damages would not provide an adequate remedy. *Kennebrew*, 425 S.W.3d at 595. Because rescission is equitable, it requires mutual restoration and accounting when feasible. *Cruz*, 364 S.W.3d at 825–26.

C. Analysis

The Other Limited Partners did not request or secure jury findings that Walker breached his fiduciary duty or another obligation in executing the marina-related agreements on behalf of the limited partnership. The Other Limited Partners nonetheless argue that rescission is required because the way in which these agreements allocate profits presupposes that Walker, rather than the limited partnership, owns the City and District Tracts. Because the jury found that Walker breached his fiduciary duty in acquiring these tracts and the trial court ordered them returned to the partnership, the Other Limited Partners maintain the agreements must be set aside and that the trial court abused its discretion by not rescinding them.

But the Other Limited Partners do not claim that money damages would be an inadequate remedy. Nor could they do so. At trial, the Other Limited Partners

initially sought damages relating to the marina's profits. They introduced the testimony of Max Lummis, a certified public accountant with a forensic accounting and valuation firm, about the marina's past and future profits. Lummis's damage model accounted for the alleged wrongful diversion of profits from the limited partnership. Ultimately, the Other Limited Partners abandoned their claims for damages during closing argument. But they did not abandon their claims for damages on the ground that damages did not provide an adequate remedy. Nor is there any evidence in the record indicating damages would be inadequate.

On this record, we hold the trial court did not abuse its discretion in refusing to rescind the marina-operating agreements after trial because the Other Limited Partners had an adequate legal remedy—money damages—that they voluntarily abandoned during trial. Their voluntary abandonment of an adequate legal remedy did not obligate the trial court to craft an equitable one. *See Kennebrew*, 425 S.W.3d at 595 (rescission generally appropriate only when damages are inadequate); *cf. Ferguson v. DRG/Colony N.*, 764 S.W.2d 874, 887 (Tex. App.—Austin 1989, writ denied) (holding lack of adequate remedy at law was tried by consent given witness's testimony that money damages would not make plaintiff whole and therefore rejecting defendant's contention that trial court erred in allowing rescission).

V. Partnership Dissolution

The Other Limited Partners argue that the trial court erred in dissolving the limited partnership because their replacement of Briarwood Capital with a new general partner was valid under the terms of the partnership agreement. They maintain that the court's contrary ruling was error for three reasons. First, the Other Limited Partners argue that their election of a new general partner was valid as a matter of law under the partnership agreement given the undisputed facts. Second, they argue that Walker failed to obtain a jury finding that their election of a new general partner was improper. Third, the Other Limited Partners argue that Walker is estopped from enforcing the relevant terms of the limited partnership agreement. Finally, they also oppose dissolution of the partnership on equitable grounds, asserting that dissolution will undermine the recovery they obtained at trial.

A. Standard of Review

When the terms of a partnership agreement are unambiguous and the material facts are undisputed, a party's compliance with those terms presents a question of law for the court, not a question of fact for the jury. *See Grohman v. Kahlig*, 318 S.W.3d 882, 887 (Tex. 2010) (per curiam) (security agreement); *Meek v. Bishop Peterson & Sharp, P.C.*, 919 S.W.2d 805, 808 (Tex. App.—Houston [14th Dist.] 1996, writ denied) (attorney-client contract). We review questions of law de novo.

See Credit Suisse v. Claymore Holdings, 610 S.W.3d 808, 819 (Tex. 2020) (questions of law and questions applying facts to law are reviewed de novo).

B. Applicable Law

We construe partnership agreements like contracts. *Sonwalkar v. St. Luke's Sugar Land P'ship*, 394 S.W.3d 186, 202 (Tex. App.—Houston [1st Dist.] 2012, no pet.). We ascertain the parties' intentions based on the agreement's terms, which we accord their plain, ordinary, and generally accepted meaning unless the agreement itself shows the parties used them in a technical or different sense. *Id.* In addition, we consider the agreement's terms as a whole to give effect to all of them so that none of its terms are rendered meaningless. *Id.* We cannot rewrite the agreement in the guise of construing it or add terms to it that it lacks. *Id.* We look to partnership law only if the agreement is silent on a given subject. *See Park Cities Corp. v. Byrd*, 534 S.W.2d 668, 673 (Tex. 1976) (agreement controls unless silent).

C. Analysis

The limited partnership was formed in 2002. Walker signed the partnership agreement on behalf of the general partner, Briarwood Capital. Excepting Nicholas Hrdy, all the limited partners, or their representatives, signed it as well.

Under the agreement, one or more of the limited partners holding a simple majority of the percentage interests in the partnership can remove the general partner. Upon removal of the general partner, however, the limited partners have to

unanimously elect to continue the partnership's business and designate a new general partner within 90 days. In the event that they fail to unanimously elect to continue and designate a new general partner in this timeframe, the agreement provides that the partnership "shall be terminated." It further provides that the partnership "shall be dissolved" and mandates the liquidation of the partnership's assets under these circumstances.

It is undisputed that the Other Limited Partners removed Briarwood Capital as general partner and that they had the simple majority of percentage interests in the partnership required to do so. But it also is undisputed that the limited partners, which included Walker or a company he owned, did not unanimously elect to continue or designate a new general partner within 90 days. Under these circumstances, the partnership agreement requires dissolution.

The Other Limited Partners tried to avoid dissolution by altering the terms of the partnership agreement. After they removed Briarwood Capital as general partner, they amended the partnership agreement to allow one or more limited partners holding a simple majority of the percentage interests in the partnership to elect to continue business and designate a general partner. In other words, they eliminated the unanimity requirement for continuing in business and designating a new general partner so that Walker's concurrence would no longer be required. The Other Limited Partners then designated a company owned by Nicholas and Wirt as the new

general partner. The new general partner, in turn, ratified the amended partnership agreement that allowed its designation as general partner.

But the Other Limited Partners' attempted amendment is not valid because it did not comply with the terms of the unamended partnership agreement. The partnership agreement provides that it can only be amended in a writing executed by both the general partner and one or more limited partners holding a simple majority of the percentage interests in the partnership. Because there was no general partner at the time of the amendment, it was not approved by one. And if the Other Limited Partners could simply violate this term of the unamended agreement and then ratify the violation afterward, the term would be rendered meaningless.

Nor does the unamended partnership agreement purport to give the general partner such sweeping ratification authority. Under ordinary principles of partnership law, the new general partner could only ratify acts of the Other Limited Partners that it could have authorized them to take in the first place. *See Laird Hill Salt Water Disposal v. E. Tex. Salt Water Disposal*, 351 S.W.3d 81, 90 (Tex. App.—Tyler 2011, pet. denied) (directors may ratify acts that other corporate actors take if directors could have authorized them to take these acts in first instance). Under the terms of the unamended partnership agreement, the general partner could neither amend the partnership agreement unilaterally nor authorize a simple majority to elect a new general partner after the removal of another one.

The Other Limited Partners maintain that the trial court nonetheless erred in ordering dissolution because Walker failed to secure jury findings that their amendment of the partnership agreement and designation of a new general partner were invalid. But the Other Limited Partners do not identify a question of fact material to the issue of dissolution that should have been submitted to the jury. When, as here, the relevant facts are undisputed and the partnership agreement is unambiguous, compliance with its terms presents a question of law for the court, not the jury. *See Grohman*, 318 S.W.3d at 887; *Meek*, 919 S.W.2d at 808; *see also Oiltanking Houston v. Delgado*, 502 S.W.3d 202, 210–11 (Tex. App.—Houston [14th Dist.] 2016, pet. denied) (rejecting argument that party waived issue by failing to secure supporting jury findings because party asserting waiver did not identify any material disputed facts bearing on issue, which thus was question of law).

The Other Limited Partners also argue that Walker is estopped from enforcing the partnership agreement's unanimity requirement for designating a new general partner after the removal of another. In support of estoppel, they rely on several documents that predate the partnership agreement, specifically:

- a 2002 letter agreement signed by Walker, Dan Hrdy, and Van Taylor, in which Walker agreed that (1) at the end of the second year, Briarwood Capital would step down as general partner if a simple majority thought it should do so, and (2) at the end of the fourth year, Dan could select a new general partner if he desired to do so;
- a 2002 chain of e-mails between Walker and Dan (that Walker later forwarded to Van), in which Dan proposed the two- and four-year general

partner replacement plan that they eventually memorialized in the letter agreement and in which Walker stated that a simple majority "can replace the gp at any time" and has "'veto' power" in the choice of a new one; and

- a 2002 e-mail to third parties, several persons at Houston Trust Company and Bessemer Trust, in which Walker stated a simple majority could replace Briarwood Capital as general partner at any time.

The Other Limited Partners maintain that the representations Walker made in these documents induced them to join the limited partnership and that Walker therefore is estopped from enforcing the partnership agreement's admittedly contrary terms about replacing the general partner.

The limited partnership agreement provides that it is "the entire agreement between the parties" and that there are "no other or further agreements outstanding not specifically mentioned in this agreement." The partnership agreement does not reference or incorporate the 2002 letter agreement or any other document providing that a simple majority can replace the general partner. But the partnership agreement's merger clause is boilerplate, which does not amount to a disclaimer of reliance that would bar the Other Limited Partners from alleging they relied on the representations made by Walker in the letter agreement or elsewhere in deciding to join the limited partnership or sign the partnership agreement. *See Italian Cowboy Partners v. Prudential Ins. Co. of Am.*, 341 S.W.3d 323, 331–32 (Tex. 2011) (holding as matter of law that standard merger clause did not disclaim reliance on representations that were basis of fraudulent-inducement claim).

Even so, we cannot accept the Other Limited Partner's position. The 2002 letter agreement addresses two contingencies that never arose: the possible removal of Briarwood Capital as general partner in 2004 and 2006. In the letter agreement, Walker does not commit to agree to Briarwood Capital's removal under all circumstances in perpetuity. Walker's statements in the chain of e-mails that preceded the letter agreement are ambiguous. He wrote both that the general partner could be replaced by a simple majority and that a simple majority had veto power over any replacement. These statements are inconsistent, as a veto power over the designation of a new general partner is more limited than a right to replace the general partner with another. At any rate, the record demonstrates that the Other Limited Partners did not rely on Walker's ambiguous statements about the authority of a simple majority because they insisted on the execution of the letter agreement, which unambiguously stated when and by whom the general partner could be replaced within the first four years of the limited partnership's existence. At trial, Van confirmed this understanding of these documents, testifying that the limited partnership "would not have been formed without this side letter."

As for the 2002 e-mail from Walker to the Houston Trust Company and Bessemer Trust, the record contains no evidence that the Other Limited Partners contemporaneously saw or were aware of this e-mail. On its face, the e-mail does not show any of them as recipients or as having been copied on it. Without evidence

that they contemporaneously saw this e-mail, they cannot show that they relied on it in a manner that would estop Walker from enforcing the unanimity requirement. *See Hendricks v. Thornton*, 973 S.W.2d 348, 361 (Tex. App.—Beaumont 1998, pet. denied) (lack of knowledge of representations negates reliance on them).

In short, the evidence conclusively forecloses the estoppel argument made by the Other Limited Partners because the evidence shows they did not rely on Walker's representations and instead required him to execute the letter agreement, which solely addressed replacement of the general partner during the first four years and made no commitments beyond that period. *See Vista Dev. Joint Venture II v. Pac. Mut. Life Ins. Co.*, 822 S.W.2d 305, 309 (Tex. App.—Houston [1st Dist.] 1992, writ denied) (detrimental reliance is element of affirmative defense of estoppel).

However, even if the 2002 letter agreement, associated chain of e-mails, or e-mail to third parties could reasonably be construed as raising a genuine issue of material fact on the issue of reliance, the Other Limited Partners did not request or secure a finding from the jury on this matter. The jury did, however, find that the Other Limited Partners agreed to the terms of the 2014 mediated settlement agreement, which provided that the partnership agreement would be amended to allow a simple majority to designate a new general partner solely in the event of the existing general partner's resignation, not its removal. Thus, even if Walker had at one time agreed that a simple majority could replace Briarwood Capital as general

partner when desired, the mediated settlement agreement conclusively shows that the parties had agreed this was no longer the case before the Other Limited Partners replaced Briarwood Capital. The Other Limited Partners' estoppel argument implicitly asks us to disregard the jury's finding about the mediated settlement agreement without actually challenging that finding. But we cannot do so because unchallenged jury findings are binding on appeal, provided that some evidence supports the findings, as the evidence does here. *Westside Wrecker Serv. v. Skafi*, 361 S.W.3d 153, 162–63 (Tex. App.—Houston [1st Dist.] 2011, pet. denied).

Finally, the Other Limited Partners assert that dissolution is inequitable because it undermines the relief they obtained at trial. But they do not cite any authority for the proposition that the trial court had any equitable discretion in this matter. Given the undisputed facts and the unambiguous terms of the partnership agreement, we hold that the trial court was required to dissolve the partnership.

VI. Costs and Attorney's Fees

Walker and the Other Limited Partners both contend that the trial court either:

(1) had no discretion to deny their application for costs and fees because they prevailed and the partnership agreement provides that the prevailing party "shall be entitled to recover" costs and reasonable attorney's fees; or

(2) abused its discretion in denying their application for costs and fees under the Declaratory Judgments Act, which gives the court the discretion to award costs and reasonable attorney's fees "as are equitable and just."

See TEX. CIV. PRAC. & REM. CODE § 37.009 (DJA fee provision); *Bocquet v. Herring*, 972 S.W.2d 19, 20–21 (Tex. 1998) (trial court has discretion to deny or award fees under DJA but not under statutes providing that party may recover fees, shall be awarded fees, or is entitled to fees).

A. Contrary to the trial court's judgment, the parties did not waive any entitlement to costs and attorney's fees in their proposed judgments.

In the judgment, the trial court stated it was ordering the parties to bear their own costs and fees because the proposed judgments they submitted provided that each side would bear its own costs and fees. This was error.

Both sides applied for fees, and their initial proposed judgments provided for the award of costs and attorney's fees. After the trial court summarily ruled that it would not consider awarding fees to either side and requested that they submit a proposed judgment conforming to this ruling, the parties submitted other proposed judgments that did not award costs or attorney's fees. These later proposed judgments, however, contained a notation that the attorneys who submitted them approved of them only as to form. By including this notation, the parties made it plain that they did not fully agree to these judgments on the merits.

A party's mere submission of a proposed judgment drafted to conform to a ruling announced by the trial judge in open court does not operate as a waiver of the right to appeal from that judgment should the judge sign it. *Glattly v. Air Starter Components*, 332 S.W.3d 620, 636–37 (Tex. App.—Houston [1st Dist.] 2010, pet.

denied). Nor can a trial judge rule against a party, request submission of a proposed judgment that conforms to the ruling, and then rely on the party's submission of such a judgment as the basis for the ruling as if the party itself had requested it. We therefore hold that the trial court erred by denying costs and attorney's fees based on the parties' submission of proposed judgments that omitted costs and fees only in an effort to conform to an adverse ruling the court had already announced.

B. The trial court abused its discretion in not awarding costs and attorney's fees to the prevailing party under the limited partnership agreement, but not under the Declaratory Judgments Act.

The rationale the trial court articulated on the record before entering judgment differs from the one it stated in the judgment itself. At the posttrial hearing, the trial court stated that it would not consider awarding fees to the parties due to their "litigation strategy." Read charitably, the trial court may be understood to mean that both sides were excessively litigious and thus did not deserve fees as a matter of equity. This rationale, however, cannot sustain the court's judgment.

The trial court could deny fees on equitable grounds under the Declaratory Judgments Act under these circumstances. For example, in *Robinson v. Budget Rent–A–Car Systems*, we held that a trial court did not abuse its discretion in denying fees under the Act to parties whose fees were excessive and incurred due to their own conduct, notwithstanding that these parties had legitimate positions, rights, and arguments to pursue. 51 S.W.3d 425, 433 (Tex. App.—Houston [1st Dist.] 2001,

pet. denied). Thus, if the parties claimed costs and fees under the Act alone, the trial court's decision denying costs and fees would not be an abuse of discretion.

In addition, we note that neither side has properly presented its Declaratory Judgments Act fee claim for review. In their opening brief, the Other Limited Partners' argument on this topic consists of a one-sentence assertion in a footnote. Walker, in turn, devotes about a page to this topic in his opening brief, which merely asserts that the trial court's denial of fees "appears to have been motivated not by a reasoned consideration of the applicable law but spite." These minimal assertions do not show that the trial court abused its discretion in denying fees under the Act. *See Robinson*, 51 S.W.3d at 433 (trial court's denial of fees under DJA "will not be reversed on appeal absent a clear showing of an abuse of discretion").

But the trial court had no such discretion under the limited partnership agreement. Unlike the Declaratory Judgments Act, the partnership agreement's fee provision is mandatory because, without exception, it provides that the prevailing party "shall be entitled to recover, in addition to all damages allowed by law and other relief, all court costs and reasonable attorney's fees incurred in connection with the litigation." *See Bocquet*, 972 S.W.2d at 20 (stating similar statutory fee provisions are mandatory); *Weng Enters. v. Embassy World Travel*, 837 S.W.2d 217, 222–23 & n.4 (Tex. App.—Houston [1st Dist.] 1992, no writ) (holding contractual fee provision providing that prevailing party "shall be entitled to recover" fees was

mandatory). Thus, the trial court could not refuse to award costs and fees under the agreement on equitable grounds. *See Peterson Grp. v. PLTQ Lotus Grp.*, 417 S.W.3d 46, 60 (Tex. App.—Houston [1st Dist.] 2013, pet. denied) (language of contractual fee provision is controlling); *Tex. Ear Nose & Throat Consultants v. Jones*, 470 S.W.3d 67, 93 (Tex. App.—Houston [14th Dist.] 2015, no pet.) (trial court has discretion to fix amount of attorney's fees, but not to deny fees entirely, if language of parties' contract requires fee award).

C. Based on the judgment and underlying jury verdict, the Other Limited Partners are the prevailing party entitled to costs and fees.

The question then becomes: who is the prevailing party under the partnership agreement? On appeal, both sides insist they prevailed at trial. The Other Limited Partners argue they prevailed on the main issue, breach of fiduciary duty, as to the most significant of the disputed tracts, which entitles them to costs and fees. Walker argues there are four main issues—Walker's declaratory judgment claim about the improper replacement of Briarwood Capital as general partner and three separate claims for breach of fiduciary duty relating respectively to the City and District Tracts, Stanley Tract, and Henderson Tract—and that he prevailed on at least three of them, entitling him to costs and fees. Walker further argues that he should be understood as having prevailed even with respect to the City and District Tracts, given that the Other Limited Partners abandoned their claims for millions of dollars in damages during closing arguments and these two tracts ultimately will be

liquidated as part of the partnership's dissolution.

1. Standard of Review

In general, whether a party is entitled to attorney's fees under an agreement is a question of law. *See WWW.URBAN.INC. v. Drummond*, 508 S.W.3d 657, 665 n.3 (Tex. App.—Houston [1st Dist.] 2013, no pet.). Our review is de novo. *Id.*

2. Applicable Law

A litigant "must obtain actual and meaningful relief, something that materially alters the parties' legal relationship," to qualify as the prevailing party. *Intercontinental Grp. P'ship v. KB Home Lone Star*, 295 S.W.3d 650, 652 (Tex. 2009). In other words, the litigant "must prove compensable injury and secure an enforceable judgment in the form of damages or equitable relief." *Id.* In deciding whether a litigant has prevailed, we look to the trial court's judgment, not the jury's verdict. *Id.* at 656; *see also Indian Beach Prop. Owners' Ass'n*, 222 S.W.3d 682, 697 (Tex. App.—Houston [1st Dist.] 2007, no pet.) (prevailing party is "party vindicated by the judgment rendered"). A defendant usually must obtain a take-nothing judgment on the main issue to be the prevailing party. *Rohrmoos Venture v. UTSW DVA Healthcare*, 578 S.W.3d 469, 486 (Tex. 2019); *e.g.*, *Weng Enters.*, 837 S.W.2d at 223 (defendant with take-nothing judgment was prevailing party).

In suits with multiples claims, the prevailing party is the one "who successfully prosecutes the action or successfully defends against the action on the

main issue." *Weng Enters.*, 837 S.W.2d at 222–23. To prevail on the main issue, a party need not recover to the full extent of its original claims. *Johns v. Ram–Forwarding, Inc.*, 29 S.W.3d 635, 638 (Tex. App.—Houston [1st Dist.] 2000, no pet.), *abrogated in part on other grounds by Intercontinental Grp.*, 295 S.W.3d at 654–55. For example, a plaintiff who alleges multiple breaches of contract but recovers on just one nonetheless is the prevailing party because the main issue is breach of contract, not the individual breaches alleged. *Flagship Hotel v. City of Galveston*, 117 S.W.3d 552, 564 (Tex. App.—Texarkana 2003, pet. denied).

In some cases, multiple claims may be so numerous and distinct from one another that the suit has more than one main issue. *See Rohrmoos*, 578 S.W.3d at 486 (indicating that case can have main issues); *e.g.*, *Bhatia v. Woodlands N. Houston Heart Ctr.*, 396 S.W.3d 658, 671 (Tex. App.—Houston [14th Dist.] 2013, pet. denied) (appellant claimed for breach of contract, breach of fiduciary duty, conversion, misappropriation, suit on sworn account, accounting, declaratory judgment, statutory and common-law fraud, violation of Theft Liability Act, and unjust enrichment, while appellee claimed for breach of fiduciary duty, conversion, misappropriation, violation of Theft Liability Act, and unjust enrichment). In this event, the court may need to look behind the judgment and ascertain which claims the parties focused on at trial to identify the main issues. *See Bhatia*, 396 S.W.3d at 671 (claims for breach of contract and fiduciary duty were focus of trial).

When there is more than one main issue and both sides prevail on one or more of them, it is possible for both sides to be prevailing parties in part. *See, e.g.*, *Mohican Oil & Gas v. Scorpion Expl. & Prod.*, 337 S.W.3d 310, 321–23 (Tex. App.—Corpus Christi 2011, pet. denied) (holding that both sides prevailed when one obtained declaratory relief and other won breach of contract claim and recovered damages, given that the two claims were factually distinct from each other). But the plain language of an agreement's fee-recovery provision may foreclose this possibility. In *Epps v. Fowler*, the Court construed a contractual fee provision that provided: "[T]he prevailing party in any legal proceeding related to the contract is entitled to recover reasonable attorney's fees and all costs of such proceedings incurred by the prevailing party." 351 S.W.3d 862, 865 (Tex. 2011). Given this language, the Court doubted "the parties to this agreement intended that there could be more than one prevailing party" under this fee provision. *Id.* at 869.

3. Analysis

Like the fee-recovery provision in *Epps*, the one in the limited partnership agreement before us contemplates a single prevailing party. In *Epps*, this was so because the contract provided for the recovery of fees by "the prevailing party" in "any legal proceeding." *See id.* at 865, 869. Similarly, the limited partnership agreement provides for the recovery of fees incurred in "the litigation" by "the Partner prevailing in such litigation." What both of these provisions share in

common is an understanding, indicated by the use of the definite article and singular noun with respect to the winner as well as the use of a singular noun with respect to the lawsuit, that in any given proceeding or litigation, there will be one who succeeds overall in the suit. *See id.*; *see also Phoenix Network Techs. (Europe) v. Neon Sys.*, 177 S.W.3d 605, 615 (Tex. App.—Houston [1st Dist.] 2005, no pet.) (use of definite article in contractual venue provision meant there was only one proper venue); *Shum v. Intel Corp.*, 629 F.3d 1360, 1367 (Fed. Cir. 2010) (reference to "the prevailing party" in federal rule governing award of costs means there can only be one, given use of singular noun and definite article). Thus, we must determine whether the Other Limited Partners or Walker prevailed in this suit.

As we must, we begin by examining the trial court's judgment, which:

- imposed a constructive trust on the City and District Tracts for the benefit of Freeport Waterfront Properties;
- ordered Second Street to transfer all right, title, and interest in these two tracts to Freeport Waterfront Properties;
- ordered Freeport Waterfront Properties to reimburse Second Street $100,000 for the cost of acquiring and holding the tracts;
- decreed that Freeport Waterfront Properties is dissolved and must be terminated after its affairs are wound down;
- ordered the court-appointed receiver to wind down the affairs of Freeport Waterfront Properties;
- ordered the receiver to liquidate the assets of Freeport Waterfront Properties in either a public auction or private sale; and
- ordered the receiver to distribute the proceeds of liquidation to all the

limited partners based on their respective percentage interests.

With the exception of the $100,000 equitable reimbursement, we have affirmed each of these aspects of the trial court's judgment on appeal.

Under this judgment, the Other Limited Partners prevailed. First and foremost, the judgment's first two provisions return two valuable tracts to the limited partnership based on Walker's and Briarwood Capital's wrongful acquisition. These two tracts comprise a majority of the disputed marina acreage.

Most of the judgment's remaining provisions relate to the trial court's declaration that the partnership must be terminated, which Walker sought. But for declaratory relief to confer prevailing-party status, the declaration must confer a meaningful victory, one which materially alters the relationship between the parties in a way that directly benefits the party seeking relief to the other's detriment. *See Intercontinental Grp.*, 295 S.W.3d at 654 (party prevails by obtaining "actual relief on the merits of his claim" that "materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff"). Here, the termination-related provisions of the trial court's judgment do not directly benefit Walker to the detriment of the Other Limited Partners.

Though the Other Limited Partners opposed termination of the partnership, the judgment's termination-related provisions are neutral in that they affect all partners in the same manner and thus favor none over the others, including the Other

Limited Partners on the one hand and Walker or his companies on the other. The relief that Walker secured based on his declaratory judgment claim—termination of the partnership—does not confer a direct benefit on him at the expense of the Other Limited Partners. Nor does it obligate the Other Limited Partners to modify their behavior as to Walker in a way that does not affect him equally. In this instance, termination essentially is a business divorce, in which all partners will receive their share of the proceeds, if any, resulting from the liquidation of the partnership's assets in proportion to their respective percentage interests of ownership and then go their separate ways unless they choose to associate with one another afterward.

As our Supreme Court has observed, the vindication of a legal right does not always constitute a victory. *Id.* at 656. Here, Walker was vindicated in his contention that the Other Limited Partners violated the partnership agreement by unilaterally designating a new general partner after properly removing Briarwood Capital from that position. But the resulting relief—termination—tempers that vindication by ending the partnership altogether and depriving all the parties, including Walker, of any future profits they could have earned through the partnership's share in the marina business. Thus, the termination-related provisions of the judgment do not alter the Other Limited Partners' status as the prevailing party. *See id.* at 657 (Pyrrhic victories do not make victor prevailing party for purposes of fee recovery).

Walker argues this suit involves multiple claims and that we must therefore

look behind the judgment to identify the main issues. He maintains he won most or all of the main issues and that this makes him the prevailing party.

Walker identifies four main issues. He posits that the Other Limited Partners submitted three breach of fiduciary duty claims: one for the City and District Tracts, one for the Stanley Tract, and one for the Henderson Tract. Walker argues that these are three separate issues and that he prevailed on the latter two outright. He further argues that he prevailed even as to the City and District Tracts once one accounts for the Other Limited Partners' abandonment of their damages claims and the fact that these tracts will be liquidated in the partnership's dissolution. Walker also maintains that he prevailed outright on the fourth main issue in the suit: his claim seeking a declaration that the Other Limited Partners improperly replaced Briarwood Capital as general partner and that the partnership must be terminated as a result.

We disagree that the Other Limited Partners' breach of fiduciary duty claims are properly characterized as three separate main issues. A party who alleges multiple breaches of fiduciary duty, as the Other Limited Partners did in this suit, but secures relief on just one is still a prevailing party because there is but one main issue, which is breach of fiduciary duty, not the individual breaches alleged. *See Flagship Hotel*, 117 S.W.3d at 564 (holding so as to contract claims). To hold otherwise would be inconsistent with the well-established rule that a party need not recover to the full extent of its original claims to be a prevailing party. *Johns*, 29

S.W.3d at 638.

We also disagree with the notion that the Other Limited Partners did not prevail with respect to the City and District Tracts in particular. They obtained a jury finding that Walker breached his fiduciary duty when he acquired these tracts, and the judgment imposes a constructive trust on them and requires their return. Securing this kind of equitable relief in an enforceable judgment suffices to make the Other Limited Partners prevailing parties. *Intercontinental Grp.*, 295 S.W.3d at 652. Their voluntary abandonment of their corresponding claims for damages during closing argument does not alter this result because, once again, they were not required to recover to the full extent of their original claims to prevail. *Johns*, 29 S.W.3d at 638; *see also Drummond*, 508 S.W.3d at 668 (issues fully litigated and submitted to jury for resolution provide compelling evidence as to identity of main issues in case); *Mohican Oil*, 337 S.W.3d at 322–23 (declining to treat equitable relief as being inferior to a judgment for money damages in terms of victory at trial).

For the reasons we have already discussed, we disagree that Walker secured relief on his declaratory judgment claim sufficient to make him the prevailing party. Moreover, on this record, we also disagree that Walker's declaratory judgment claim is a genuinely separate main issue in the suit. The Other Limited Partners removed Briarwood Capital as general partner and designated another in its place because they believed Walker had breached his fiduciary duty to the limited partnership, a

belief vindicated by the jury and judgment. Without Walker's breach of fiduciary duty, the parties' dispute over replacement of the general partner would not have arisen. Thus, Walker's declaratory judgment claim is part and parcel of the parties' disputes about whether he breached his fiduciary duty and is not a factually unrelated issue. His breach of fiduciary duty is the one and only main issue in the suit.

In support of his contrary position, Walker relies on *Mohican Oil*, in which a sister court held that a declaratory judgment claim was a second main issue. 337 S.W.3d at 321–23. But *Mohican Oil* is different both factually and legally.

In *Mohican Oil*, the court held that there were two main issues, one for declaratory judgment and one for breach of contract. *Id.* But these two claims comprised separate issues because the claims were distinct from one another in that they arose from unconnected facts: whether the plaintiff owed the defendant money under a daywork provision of a drilling contract and whether the plaintiff breached a different provision of the contract obligating it to supply the defendant with certain personnel during drilling. *Id.* at 323. The plaintiff secured a jury finding and declaratory judgment that it did not owe the defendant any money under the daywork provision. *Id.* at 316, 322–24. The defendant, in turn, secured a jury finding and judgment for damages based on the plaintiff's breach of the personnel provision. *Id.* at 316, 322–24. The court observed that the two claims "were essentially two suits brought on the drilling contract under different provisions of the contract and based

on different actions by the parties during the drilling." *Id.* at 323. So, unlike our suit, the facts giving rise to one dispute did not precipitate the other one.

In addition, the contractual fee-recovery provision in *Mohican Oil* materially differed from the one before us. Unlike the limited partnership agreement, the drilling contract did not unambiguously condition the recovery of fees on prevailing in the suit as a whole. *Id.* at 321. While the drilling contract provided for an award of fees to "the prevailing party," it also provided for recovery when one collected "any sums due" under the contract or successfully brought suit on it. *Id.* at 321. Because the plaintiff secured declaratory relief that he did not owe a sum allegedly due under the contract but the defendant collected a different sum due under another provision of the contract, both the plaintiff and the defendant prevailed under the contract's language. *See id.* at 322–24. In contrast, the limited partnership agreement only allows for a single prevailing party—the one who prevails in "the litigation." *See Epps*, 351 S.W.3d at 865 (saying so about similarly worded contract providing for award of fees to "the prevailing party" in "any legal proceeding").

Nor does our decision in *BSG–Spencer Highway Joint Venture v. Muniba Enterprises*, on which Walker also relies, compel a different result. In that case, adjacent landowners sued each other under an easement declaration asserting factually distinct claims. No. 01-15-01109-CV, 2017 WL 3261365, at *1–4 (Tex. App.—Houston [1st Dist.] Aug. 1, 2017, no pet.) (mem. op.). One side ultimately

obtained a declaration that its right of ingress and egress across the other side's property was enforceable, albeit not to the full extent claimed, and injunctive relief enjoining the other side from obstructing that ingress and egress. *Id.* at *4–9, *11–12. The other side successfully defended against a claim for breach of the easement and a separate claim contesting its right to construct an additional building on its property, but it lost on its own claim seeking injunctive relief as to parking on its property. *Id.* at *9–11, *13–14.

Faced with these disparate claims and results, we held that both sides prevailed in part and were entitled to recover attorney's fees. *Id.* at *14–15. In doing so, we relied on *Mohican Oil*, which also involved mixed results with respect to issues that were not factually intertwined with one another. *Id.* at *15. And, as in *Mohican Oil*, the fee-recovery provision in the easement declaration allowed for more than one prevailing party under such circumstances. While the declaration provided for recovery of fees by "the prevailing party," it conferred this status on "any person" who successfully "initiates or defends any legal action or proceeding to enforce or interpret any of the terms." *Id.* at *2. Both sides initiated and defended against legal actions, winning on some claims and losing on others. Thus, like *Mohican Oil*, *BSG–Spencer* materially differs from the present suit.

In sum, Walker asks us to declare him the prevailing party in a dispute triggered by his breach of fiduciary duty to the limited partnership, notwithstanding

a jury finding that he did breach his fiduciary duty and the trial court's corresponding judgment ordering him to return wrongfully acquired property, based on his successful invocation of a self-destruct clause in the limited partnership agreement after the Other Limited Partners became aware of his fiduciary lapse and took action to protect the limited partnership. That cannot be right. *See Intercontinental Grp.*, 295 S.W.3d at 657, 661–62 (anomalous result advocated by party that did not secure any relief of non-Pyrrhic variety in judgment could not be correct).

Thus, we hold that the Other Limited Partners are the prevailing party entitled to costs and attorney's fees under the partnership agreement. On remand, they are due a new trial on the limited issue of the amount of their "court costs and reasonable attorney's fees incurred in connection with the litigation." But in so holding, we note that while we have rejected Walker's position that he prevailed, the overall results obtained, including the mixed results and limited extent of relief that the Other Limited Partners secured at trial and on appeal, are a relevant consideration in assessing the amount of attorney's fees reasonably recoverable by the Other Limited Partners. *Smith v. Patrick W.Y. Tam Tr.*, 296 S.W.3d 545, 548 (Tex. 2009); *see also Shum*, 629 F.3d at 1370 (affirming trial court's award of costs to prevailing party that took into account party's wins and losses on various claims made in suit).

CONCLUSION

The trial court erred in equitably reimbursing Walker for the costs he incurred in acquiring and holding the City and District Tracts and in refusing to award the Other Limited Partners their costs and reasonable attorney's fees as the prevailing party. We therefore modify the trial court's judgment to delete the equitable reimbursement, reverse this cause in part and remand it to the trial court to conduct a new trial limited to the issue of the amount of the Other Limited Partners' costs and reasonable fees, and otherwise affirm the trial court's judgment as modified.

Gordon Goodman
Justice

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

Justice Farris, concurring in part and dissenting in part.