Opinion issued July 28, 2022

In The

Court of Appeals

For The

First District of Texas

NO. 01-20-00114-CV

MANISCH SOHANI AND ANIS VIRANI, Appellants

V.

NIZAR SUNESARA, Appellee

On Appeal from the 295th District Court
Harris County, Texas
Trial Court Case No. 2016-08068

MEMORANDUM OPINION

This is the third appeal arising out of a dispute between former business partners. Appellee Nizar Sunesara sued appellants Manisch Sohani and Anis Virani for fraud and breach of fiduciary duty. After a bench trial, the trial court found that

Sohani and Virani had engaged in fraud and had breached their fiduciary duties to Sunesara. The trial court awarded Sunesara $61,300 in actual damages and $111,000 in exemplary damages from both Sohani and Virani.

Sohani and Virani raise six issues on appeal. They first challenge the judgment against them for fraud, arguing that the judgment is not supported by the pleadings or the evidence presented at trial; Sunesara did not present sufficient evidence of fraud; the judgment violates due process because Sohani and Virani lacked adequate notice of the fraud theory that served as the basis for the judgment; and the claim is barred by res judicata. In their remaining issues, Sohani and Virani argue that (1) the trial court erred by finding that they breached a fiduciary duty; (2) the actual damages awarded were not caused by the alleged fraudulent misrepresentations or the alleged breach of duty; (3) exemplary damages are not appropriate; (4) the trial court erred by not awarding supplemental relief under the Declaratory Judgments Act; and (5) the trial court erred by considering Sunesara's late-filed responses to two post-judgment motions.

We affirm in part and reverse and remand in part.

Background

A. Factual Background

Sunesara and Virani are first cousins. They went into business together twenty years ago, in 2002. Sunesara and Virani started selling smoking products and

accessories in flea markets in Austin and Houston. Finding success, they opened a retail smoke shop in Houston called Zig Zag Smoke Shop. Sohani, a college friend and fraternity brother of Sunesara, owns a wholesale distribution business. He provided inventory for the smoke shop. The parties created a corporation—MNA Corporation—to run the smoke shop. Sunesara, Virani, and Sohani each owned one-third of this corporation, and they agreed to split profits equally. Initially, Sunesara was the only employee of Zig Zag Smoke Shop, although Virani started working there as well several years later.

In 2007, the parties planned to open a second smoke shop called Burn Smoke Shop I. In preparation, they created a new corporation—SSV Corporation—to operate both smoke shops. SSV Corporation initially had the same ownership structure as MNA Corporation, but at some point Sohani requested that he be removed as an owner of SSV Corporation due to personal financial obligations. After that change, Sunesara and Virani each had a fifty percent ownership interest in SSV Corporation.

In 2012, the parties decided to acquire an already-existing smoke shop, which they ultimately called Burn Smoke Shop II. Around this same time, they also decided to create three individual limited liability companies ("the LLCs") to own and operate each of the three smoke shops. The parties transferred Zig Zag Smoke Shop to ZZSS, LLC from SSV Corporation. They transferred Burn Smoke Shop I to

BRNSS, LLC from SSV Corporation. When the parties purchased Burn Smoke Shop II, EZSS, LLC took ownership of that smoke shop.

With Virani's and Sohani's authorization, Sunesara prepared the certificates of formation for the LLCs. These documents were filed with the Texas Secretary of State. They listed Sunesara, Virani, and Sohani as "governing persons" of each LLC. The parties also filed a "Form 2553"[1] with the Internal Revenue Service for each of the LLCs. These forms reflected that Sunesara was a member of the LLCs with a one-third ownership interest. Each of the parties signed these forms.

Sunesara testified that neither Virani nor Sohani told him that they did not want him to be a member of the LLCs. Sunesara would not have consented to the formation of the LLCs if he was not going to be a member of the entities. If the LLCs had not been created, SSV Corporation would have continued to own and operate Zig Zag Smoke Shop and Burn Smoke Shop I. Sunesara also testified that neither Sohani nor Virani ever told him that the ownership of the LLCs would be different than the ownership of SSV Corporation.

In 2012 and 2013, federal authorities began targeting the distribution and sale of synthetic marijuana products, and they conducted a series of nationwide raids. Sunesara spoke with Virani and Sohani and suggested that the smoke shops stop

[1] In a "Form 2553," an entity elects to be treated as an S-Corporation for federal income tax purposes.

selling these products. Although the authorities did not conduct a raid of any of the individual smoke shops, they did search the warehouse for Sohani's wholesale business. After this raid, Sunesara decided to take a leave of absence. He had minimal communication with Sohani and Virani about the smoke shops during this time, but he did not tell either of them that he no longer wanted to be a member of the LLCs.

Sohani and Virani never told Sunesara that he was not a member of the LLCs, but they prepared a tax return with their accountant that led Sunesara to believe that they "wanted to take [him] off the LLCs." The 2013 tax returns for each of the LLCs filed with the IRS included a Schedule K-1, which shows an individual's ownership interest in a company, as well as the business's income and losses. The 2013 Schedule K-1s reflected that Sohani and Virani each had a fifty percent ownership interest in the LLCs. These documents did not show that Sunesara was a member of the LLCs. By the time these tax returns were filed, Sohani and Virani had stopped communicating with Sunesara about business matters. Sunesara learned about these tax returns only through speaking with the accountant for the LLCs.

Sunesara was audited by the IRS for the 2012 and 2013 tax years. He testified that he received cash profit distributions from the LLCs during those tax years, but he never received a Schedule K-1 and had no way of reporting that extra income to

the IRS. Sunesara had to pay $13,300 in taxes, penalties, and accountant fees due to this audit.

Sunesara later learned that, in 2013, Sohani and Virani executed operating agreements for each of the LLCs. These operating agreements listed only Sohani and Virani as members of the LLCs. The agreements also stated, for both Sohani and Virani, that they made "50% of contributions" and they own "50% of profits and assets." Sohani and Virani did not present these agreements to Sunesara before they were executed. Additionally, the 2018 Texas franchise tax returns—filed during the pendency of this litigation—reflected only Sohani and Virani as members of the LLCs.

B. Procedural Background

Sunesara requested that Sohani and Virani allow him access to the books and records of the LLCs, and he hired an attorney to assist him. In response, Sohani and Virani filed suit against Sunesara, and the case was assigned to the County Civil Court at Law Number 1 of Harris County.

Sohani and Virani asserted a cause of action against Sunesara for fraud. They also sought declaratory relief, including declarations that Sunesara was not a member of the LLCs, he did not have a membership interest in the LLCs, and he was not entitled to any profit distributions from the LLCs. *See Sohani v. Sunesara*, 546 S.W.3d 393, 400 (Tex. App.—Houston [1st Dist.] 2018, no pet.) ("*Sohani I*"). In

that proceeding, Sunesara asserted counterclaims for breach of fiduciary duty, breach of the duty of good faith and fair dealing, quantum meruit, fraud, and promissory estoppel. *Id.* He also sought declarations that he was a member of the LLCs and that he was entitled to one-third of the profits from the LLCs. *Id.*

The day before trial in the county court, Sunesara filed an amended answer and counterclaim that dropped all his claims for monetary relief. *Id.* at 401. When the parties proceeded to trial in the county court, Sunesara's only affirmative claims were for declaratory judgment. *Id.*

Sunesara re-filed his claims against Sohani and Virani for monetary relief in the Harris County district courts.[2] His lawsuit—the suit underlying this appeal—was assigned to the 295th District Court. In his breach of fiduciary duty claim, Sunesara alleged that Sohani and Virani, as fellow members of the LLCs, had a fiduciary duty to act for Sunesara's benefit, but they failed to properly account for the assets and profits of the LLCs. In his fraud claim, Sunesara alleged that Sohani and Virani had established that Sunesara was a member of the LLCs and entitled to one-third of the profits, but they fraudulently did not include him as a member on LLC documents and fraudulently refused to distribute his one-third share of the LLC profits. Sunesara also re-asserted his claims for breach of the duty of good faith and fair

[2] In an amended petition, Sunesara also asserted claims against each of the LLCs. The trial court, in its final judgment, did not order the LLCs to pay any monetary damages to Sunesara. The LLCs are not parties to this appeal.

dealing and quantum meruit. Further, he sought an accounting and declarations that (1) he was entitled to have the LLCs' assets partitioned; and (2) that Sohani and Virani violated provisions of the Business Organizations Code by failing to keep accurate books and records. He also requested exemplary damages.

Meanwhile, the parties' claims in the county court were heard by a jury. The jury determined that Sunesara was a member of each LLC and was entitled to a one-third profit distribution at the time each LLC was formed. *Id.* The jury also determined that Sunesara did not commit fraud against Sohani or Virani. *Id.* The county court rendered judgment on the jury verdict, ruling that Sunesara was a member of each LLC and entitled to one-third of the profits from each LLC. *Id.* at 402. The county court also awarded trial-level and conditional appellate attorney's fees to Sunesara. *Id.*

Sohani and Virani appealed the judgment of the county court to this Court. Among other issues, Sohani and Virani argued that the trial court improperly declared that Sunesara was entitled to one-third of the profit distributions from the LLCs because the companies' records did not reflect that Sunesara had made contributions to the LLCs. *See* TEX. BUS. ORGS. CODE § 101.201 (stating that profits and losses of limited liability company shall be allocated to each member on basis of agreed value of member's contributions "as stated in the company's records required under Section 101.501"); *id.* § 101.501 (stating specific records that limited

liability companies are required to keep, including written statement of amount of cash contributions made by each member); *id.* § 3.151 (requiring all "filing entities" to keep certain books and records). Sohani and Virani argued that Sunesara's trial testimony that he made cash contributions to the LLCs, unsupported by any documentary evidence, did not establish that he was entitled to a one-third profit distribution.

A panel of this Court agreed with Sohani and Virani. The panel acknowledged Sunesara's testimony that he had made cash contributions to the LLCs, but noted that he presented no company documents reflecting his contributions. We held:

> We construe these sections [section 101.201 and 101.501] as requiring a limited liability company to include a statement of the amount of cash contributions made by each member and a statement of the agreed value of any other contribution made by each member in the written records of the company and that these records establish the allocation of a member's share of the profits and losses of the company. Because Sunesara did not introduce any records of the LLCs reflecting the contributions that he made to the LLCs, we conclude that he has presented no evidence that he is entitled to one-third of the profits of the LLCs under section 101.201.

Sohani I, 546 S.W.3d at 407. We held that the county court erred to the extent that it declared Sunesara was entitled to one-third of the profits from each LLC, and we modified the county court's judgment to delete this ruling. *Id.* at 408. We affirmed the remainder of the county court's judgment. *Id.* at 410.

After this Court's mandate issued, Sohani and Virani filed two motions in the county court. In the first motion, they argued that, in light of the appellate ruling in

Sohani I, circumstances had substantially changed and Sunesara was no longer the "prevailing party." *Sohani v. Sunesara*, 608 S.W.3d 532, 536 (Tex. App.—Houston [1st Dist.] 2020, no pet.) ("*Sohani II*"). They requested that the county court vacate the fee award in favor of Sunesara and award them their trial-level and appellate attorney's fees as "supplemental relief" under the Uniform Declaratory Judgments Act ("DJA"). *Id.* at 536–37. They also filed a motion for disgorgement of ill-gotten gains, requesting that the trial court order Sunesara to return the cash profit distributions that he had received in 2012 and 2013 because he was not entitled to these distributions. *Id.* at 537. The trial court denied both motions, and Sohani and Virani again appealed. *Id.*

On appeal, we noted that attorney's fees under the DJA are discretionary with the trial court and are not automatically awarded to a "prevailing party." *Id.* at 538. We further noted that although the law presumes that a defendant will comply with a declaratory judgment, the DJA includes a provision allowing a plaintiff to obtain supplemental ancillary relief to enforce a declaratory judgment. *Id.* at 538–39. Parties may not, however, use this provision to relitigate issues already determined in the declaratory judgment proceeding or to determine new issues unrelated to the declaratory judgment. *Id.* at 539.

After reviewing caselaw from other intermediate appellate courts concerning whether a party's attorney's fees in the original declaratory judgment proceeding

can qualify as "further relief" under the DJA, we concluded that Sohani and Virani's request for trial and appellate-level attorney's fees incurred in the original declaratory judgment action did not constitute proper "further relief." *Id.* at 539–41. We concluded that they had forfeited reconsideration of their attorney's fees and, moreover, the trial court did not abuse its wide discretion by failing to reconsider the fee award in favor of Sunesara. *Id.* at 542. With respect to the disgorgement claim, we concluded that Sohani and Virani were not entitled to seek post-appeal disgorgement of profits when they had not asserted a breach of fiduciary duty claim against Sunesara in the county court and had not recovered on their fraud claim. *Id.* at 543–44. We affirmed the trial court's judgment denying these two post-appeal motions. *Id.* at 544.

While *Sohani II* was pending in this Court, the underlying proceeding went to trial before the 295th District Court. After a bench trial, the trial court rendered judgment in favor of Sunesara. The trial court awarded Sunesara $61,300 in actual damages against Sohani and Virani, jointly and severally. The court further ordered both Sohani and Virani, individually, to pay $111,000 in exemplary damages. The court ordered all defendants to provide Sunesara with full and complete access to the books and records of each of the LLCs. The court also awarded pre- and post-judgment interest to Sunesara. The trial court issued findings of fact and conclusions of law to support its judgment.

Sohani and Virani filed a post-judgment motion to amend or reconsider the final judgment. They also filed a post-judgment motion for supplemental relief under the DJA. In this motion, Sohani and Virani argued that they were entitled to their attorney's fees because Sunesara's lawsuit effectively tried to undo the county court's and this Court's prior rulings, and Sohani and Virani were forced to incur attorney's fees to defend those rulings. Sunesara's counsel attempted to file a response in advance of the hearing set on these motions, but counsel was unsuccessful. Ultimately, Sunesara's responses were not filed until the day of the hearing, and they were accompanied by a motion for leave to late-file the responses.

The trial court granted Sunesara's motion for leave to late-file the responses, and it considered these responses—along with arguments of counsel at the hearing—in denying the motions. This appeal followed.

Sufficiency of the Evidence

In their first issue, Sohani and Virani challenge the trial court's ruling on Sunesara's fraud claim. They argue that the facts as found by the trial court on the fraud claim are not supported by the pleadings or the evidence presented at trial. Because the judgment was based on facts not pleaded by Sunesara, Sohani and Virani argue that they lacked adequate notice, and the judgment on the fraud claim violates due process. Sohani and Virani also argue that Sunesara presented no evidence that they made any promises or representations to him that induced him to

take any action. Additionally, they argue that the fraud claim is barred by res judicata because it was, or should have been, litigated in the county court case.

A. Standard of Review

In an appeal from a bench trial, the trial court's findings of fact have the same weight as a jury's verdict. *HTS Servs., Inc. v. Hallwood Realty Partners, L.P.*, 190 S.W.3d 108, 111 (Tex. App.—Houston [1st Dist.] 2005, no pet.). We therefore review the trial court's findings for legal and factual sufficiency by applying the same standards that we use to review a jury verdict. *Tex. Outfitters Ltd. v. Nicholson*, 572 S.W.3d 647, 653 (Tex. 2019); *HTS Servs.*, 190 S.W.3d at 111. When there is a complete reporter's record, findings of fact are not conclusive, and they are binding only if supported by the evidence. *HTS Servs.*, 190 S.W.3d at 111.

When an appellant attacks the legal sufficiency of an adverse finding on an issue on which he did not have the burden of proof, he must demonstrate that no evidence supports the finding. *See Exxon Corp. v. Emerald Oil & Gas Co.*, 348 S.W.3d 194, 215 (Tex. 2011); *Woods v. Kenner*, 501 S.W.3d 185, 195–96 (Tex. App.—Houston [1st Dist.] 2016, no pet.). We consider the evidence in the light most favorable to the finding and indulge every reasonable inference that would support it. *Woods*, 501 S.W.3d at 196. We credit favorable evidence if a reasonable factfinder could do so and disregard contrary evidence unless a reasonable factfinder could not. *Thompson v. Smith*, 483 S.W.3d 87, 93 (Tex. App.—Houston [1st Dist.] 2015, no

pet.). If there is more than a scintilla of evidence to support the challenged finding, we must uphold it. *Woods*, 501 S.W.3d at 196; *see Tex. Outfitters Ltd.*, 572 S.W.3d at 653.

In a bench trial, the trial court is the sole judge of the witnesses' credibility. *Woods*, 501 S.W.3d at 196 (citing *Golden Eagle Archery, Inc. v. Jackson*, 116 S.W.3d 757, 761 (Tex. 2003), and *Zenner v. Lone Star Striping & Paving, L.L.C.*, 371 S.W.3d 311, 314 (Tex. App.—Houston [1st Dist.] 2012, pet. denied)). The trial court may resolve any inconsistencies in a witness's testimony, but it is not free to believe testimony that is conclusively negated by undisputed facts. *Zenner*, 371 S.W.3d at 314 (quoting *City of Keller v. Wilson*, 168 S.W.3d 802, 820 (Tex. 2005)). We may not substitute our judgment for that of the trial court. *McKeehan v. Wilmington Sav. Fund Soc'y, FSB*, 554 S.W.3d 692, 698 (Tex. App.—Houston [1st Dist.] 2018, no pet.); *Woods*, 501 S.W.3d at 196.

We review de novo a trial court's conclusions of law, and we uphold these conclusions on appeal if the judgment can be sustained on any legal theory supported by the evidence. *HTS Servs.*, 190 S.W.3d at 111. If a conclusion of law is erroneous, but the trial court rendered the proper judgment, the erroneous conclusion does not require reversal. *Bos v. Smith*, 556 S.W.3d 293, 299 (Tex. 2018).

B. Governing Law

To prevail on a claim for common-law fraud, the plaintiff must prove that: (1) the defendant made a material representation that was false; (2) the defendant knew the representation was false or made it recklessly as a positive assertion without any knowledge of its truth; (3) the defendant intended to induce the plaintiff to act upon the representation; and (4) the plaintiff actually and justifiably relied upon the representation and suffered injury as a result. *JPMorgan Chase Bank, N.A. v. Orca Assets G.P., L.L.C.*, 546 S.W.3d 648, 653 (Tex. 2018); *Zorrilla v. Aypco Constr. II, LLC*, 469 S.W.3d 143, 153 (Tex. 2015).

A trial court's judgment "shall conform to the pleadings, the nature of the case proved and the verdict, if any, and shall be so framed as to give the party all the relief to which he may be entitled either in law or equity." TEX. R. CIV. P. 301; *Tex. Tax Sols., LLC v. City of El Paso*, 593 S.W.3d 903, 909 (Tex. App.—El Paso 2019, no pet.) (stating that judgment shall conform to pleadings and proof, and party may not be granted relief in absence of pleadings to support it). "Pleadings define the issues and parameters of a contest." *Gordon v. S. Tex. Youth Soccer Ass'n*, 623 S.W.3d 25, 36 (Tex. App.—Austin 2021, pet. denied); *King v. Lyons*, 457 S.W.3d 122, 126 (Tex. App.—Houston [1st Dist.] 2014, no pet.) ("The purpose of pleadings is to define the issues at trial.") (quoting *Garvey v. Vawter*, 795 S.W.2d 741, 742 (Tex. 1990) (per curiam)). A party's pleading invokes the trial court's jurisdiction, and a judgment

not supported by the pleadings is void. *Guillory v. Boykins*, 442 S.W.3d 682, 690 (Tex. App.—Houston [1st Dist.] 2014, no pet.).

Texas follows the "fair notice" standard of pleading. *Horizon/CMS Healthcare Corp. v. Auld*, 34 S.W.3d 887, 896 (Tex. 2000). An original pleading which sets forth a claim for relief shall contain "a short statement of the cause of action sufficient to give fair notice of the claim involved." TEX. R. CIV. P. 47(a); *see also* TEX. R. CIV. P. 45(b) (providing that pleading shall "consist of a statement in plain and concise language of the plaintiff's cause of action or the defendant's grounds of defense"). The purpose of the fair notice standard is to ensure that the petition gives notice of the alleged facts, the claim, and the relief sought such that the opposing party can prepare a defense and ascertain the nature and basic issues of the controversy and what testimony will be relevant. *See Montelongo v. Abrea*, 622 S.W.3d 290, 300 (Tex. 2021). When no special exceptions are made to a pleading, we liberally construe the pleadings in the pleader's favor.[3] *Bos*, 556 S.W.3d at 306. However, "a liberal construction 'does not require a court to read into a petition what

[3] Special exceptions "are designed to provide notice of pleading defects and allow the pleader to cure the defect." *Bos v. Smith*, 556 S.W.3d 293, 306 (Tex. 2018); *Horizon/CMS Healthcare Corp. v. Auld*, 34 S.W.3d 887, 897 (Tex. 2000) ("An opposing party should use special exceptions to identify defects in a pleading so that they may be cured, if possible, by amendment."). When a pleading is not defective, but instead pleads a specific theory of liability, the opposing party is entitled to rely on the pleaded theory and has no reason to specially except. *Bos*, 556 S.W.3d at 306.

is plainly not there.'" *Id.* (quoting *Heritage Gulf Props., Ltd. v. Sandalwood Apartments, Inc.*, 416 S.W.3d 642, 658 (Tex. App.—Houston [14th Dist.] 2013, no pet.)); *King*, 457 S.W.3d at 126 (noting that while we liberally construe petitions to include claims that may be reasonably inferred from language used, we may not use this as license to read into petition claims that it does not contain).

A plaintiff is not required to plead every fact in his petition; instead, we "look to what 'can reasonably be inferred from what is specifically stated.'" *Bos*, 556 S.W.3d at 306 (quoting *Roark v. Allen*, 633 S.W.2d 804, 809 (Tex. 1982)). When a plaintiff provides both general and specific allegations in his petition, the specific controls, and the plaintiff cannot rely on the general allegations to expand the scope of his claim. *Id.*

When issues that are not raised by the pleadings are tried by express or implied consent of the parties, they "shall be treated in all respects as if they had been raised in the pleadings." TEX. R. CIV. P. 67; *Stoner v. Thompson*, 578 S.W.2d 679, 682 (Tex. 1979) ("[A] plaintiff may not sustain a favorable judgment on an unpleaded cause of action, in the absence of trial by consent . . . ."). Trial by consent can cure the lack of pleading, "but an issue is not tried by consent merely because evidence regarding it is admitted." *Bos*, 556 S.W.3d at 306–07. We must examine the record not for evidence of the issue, but rather for evidence of *trial* of the issue. *Id.* at 307; *Sage Street Assocs. v. Northdale Constr. Co.*, 863 S.W.2d 438, 446 (Tex. 1993)

("Certainly issues are not *tried* merely by the hearing of testimony thereon.") (quoting *Harkey v. Tex. Emps. Ins. Ass'n*, 208 S.W.2d 919, 922 (Tex. 1948)). When both parties present evidence on an issue at trial and the issue is developed without objection, any defects in the pleadings are cured at trial, and the defects are waived. *Ingram v. Deere*, 288 S.W.3d 886, 893 (Tex. 2009).

"A party's unpleaded issue may be deemed tried by consent when evidence on the issue is developed under circumstances indicating both parties understood the issue was in the case, and the other party failed to make an appropriate complaint." *King*, 457 S.W.3d at 127 (quoting *Case Corp. v. Hi-Class Bus. Sys. of Am., Inc.*, 184 S.W.3d 760, 771 (Tex. App.—Dallas 2005, pet. denied)). An issue is not tried by consent if the evidence on that issue is also relevant to other issues raised by the pleadings. *Id.* The doctrine of trial by consent is "only intended to cover the exceptional case in which it clearly appears from the record as a whole that the parties tried the unpleaded issue." *Guillory*, 442 S.W.3d at 690. This doctrine is "not intended to establish a general rule of practice," and it "should be applied with care." *Id.*

C. Analysis

In this case, it is undisputed that Sunesara's live pleading asserted a fraud claim against Sohani and Virani. Among the factual allegations, Sunesara alleged that he formed a limited liability company for each of the three smoke shops at the

request of Sohani and Virani. He alleged that he, Sohani, and Virani were "one-third members" of the LLCs. He further alleged that the assets of ZZSS, LLC "were the original 'Zig Zag Smoke Shop' opened in 2003 by MNA Corporation, subsequently transferred to SSV Corporation and then transferred to ZZSS, LLC as an on-going concern." He alleged that the assets of BRNSS, LLC "were the 'Burn Smoke Shop' opened in 2012 and transferred as an on-going concern by SSV Corporation." He also alleged that in 2014, Sohani and Virani "intentionally and fraudulently failed to include" him as a member on the LLCs' federal income tax returns.

With respect to his fraud claim specifically, Sunesara alleged as follows:

> **Count 3 – Fraud**
>
> Plaintiff hereby incorporates by reference the allegations contained in paragraphs 8 through 15 above as if fully set forth herein. Plaintiff is a member of the LLCs. Defendants have fraudulently and intentionally not included Plaintiff as a member on LLC documents and have fraudulently and intentionally refused to provide Plaintiff access to the books and records of the LLCs as required [by] Sections 3.152 and 3.153 of the Texas Business Organizations Code.
>
> The actions taken by Defendants were fraudulent, intentional, and malicious and entitle Plaintiff to exemplary damages under Texas Civil Practice & Remedies Code §41.003(a).

While Sohani and Virani were undoubtedly on notice that Sunesara was asserting a fraud claim against them, the cause of action as pleaded alleged only that Sohani and Virani committed fraud by failing to include Sunesara as a member on LLC documents and by failing to provide him with access to the LLCs' books and records.

The allegations in the petition do not mention any material misrepresentations made by Sohani and Virani to Sunesara.

After the bench trial, the trial court made the following findings of fact relevant to Sunesara's fraud claim:

> 21. Defendant Sohani engaged in conduct that is fraudulent, dishonest, in bad faith and demonstrates untrustworthiness when he induced [Sunesara] to transfer the assets of SSV Corporation to ZZSS LLC and BRNSS LLC by representing to [Sunesara] that [Sunesara] would have a one-third ownership interest in each of the LLCs.
>
> 22. Defendant Sohani made false promises to [Sunesara] that influenced [Sunesara] to transfer the assets of SSV Corporation to ZZSS LLC and BRNSS LLC and Defendant Sohani did not intend to keep the promises when made.
>
> 23. Defendant Sohani made a material representation to [Sunesara] that [Sunesara] had a one-third ownership interest in each of the LLCs when Defendant Sohani executed IRS Form 2553 for each of the LLCs.

The trial court made identical findings of fact with respect to Virani's conduct. In its conclusions of law, the trial court concluded that Sohani and Virani committed fraud and that this fraud "consisted of material misrepresentations made by Defendants, Sohani and Virani[,] in connection with [Sunesara's] ownership interest in each of the LLCs . . . ."

Although Sunesara was not required to plead every relevant fact in his petition, he was required to give Sohani and Virani fair notice of the fraud claim asserted against them so that they could prepare a defense. *See Bos*, 556 S.W.3d at

305–06. In determining whether a judgment is supported by the pleadings, we liberally construe the pleadings to include claims that can be reasonably inferred from the language used in the pleadings, but we may not read into the pleadings claims that it does not contain. *See id.* at 306; *King*, 457 S.W.3d at 126. Sunesara's live pleading alleges a fraud claim based on Sohani and Virani's alleged failure to include Sunesara "as a member on LLC documents" and refusal to provide access to the LLCs' books and records. The pleading alleges that Sohani and Virani failed to include Sunesara as a member on the LLCs' 2013 tax returns, but it does not allege any misrepresentations made to Sunesara, let alone misrepresentations of his ownership interest in the LLCs, that allegedly induced him to transfer ownership of two of the smoke shops from SSV Corporation to the LLCs. We conclude that the pleadings do not support the judgment for fraud. We therefore turn to whether the issue was tried by consent. *See Bos*, 556 S.W.3d at 306–07.

On appeal, Sunesara argues that the issue of whether Sohani and Virani made misrepresentations to him concerning his ownership interest in the LLCs that induced him to transfer two of the smoke shops from SSV Corporation to the LLCs was tried by consent, pointing out that Sohani and Virani did not file special exceptions to Sunesara's pleadings.

With respect to his fraud claim, Sunesara's live pleading alleged a particular theory: that Sohani and Virani committed fraud by failing to include him as a

member on LLC documents and refusing to allow him access to the LLCs' books and records. Throughout the discovery process, Sunesara maintained that his fraud claim was based on Sohani and Virani's failure to list him as a member on LLC documents, including the operating agreements for the LLCs, and their refusal to acknowledge him as a member of the LLCs.[4] Sunesara's live pleading stated the alleged fraudulent conduct committed by Sohani and Virani; they did not have reason to file special exceptions when the theory behind Sunesara's fraud claim was clear in his pleading. *See id.* at 306 (stating that when pleading pleads specific theory of liability, opposing party is entitled to rely on theory pleaded and has no reason to file special exceptions).

Sunesara also argues that the issue was tried by consent because Sohani and Virani did not object during trial to Sunesara's testimony. Sunesara, however, never testified that Sohani or Virani made misrepresentations to him that induced him to transfer the smoke shops from SSV Corporation to the LLCs. Sunesara testified that "we created LLCs" in 2012 to transfer the assets of SSV Corporation—the first two

---

[4] Sohani and Virani attached Sunesara's interrogatory answers as an exhibit to their post-judgment motion for reconsideration. When asked to identify the facts that support his claims for breach of fiduciary duty and fraud, Sunesara responded by stating, among other things, that Sohani and Virani had "failed to include [him] in the Operating Agreements for the LLCs even though they knew that [Sunesara] was listed as a member of the LLCs on the Certificates of Formation and the banking documents establishing the checking accounts for the LLCs." Sunesara did not mention any alleged misrepresentations by Sohani or Virani in his interrogatory answers.

smoke shops that the parties operated. Sunesara did not provide details concerning how the parties decided to create the LLCs, such as who had the initial idea or what was said during discussions concerning the formation of the LLCs and the ownership structure of the new entities. He testified that, with the authorization of Sohani and Virani, he prepared the Certificate of Formation for each LLC and filed these documents with the Texas Secretary of State. Each Certificate of Formation listed all three parties—Sohani, Virani, and Sunesara—as "governing persons" of the LLCs. The Secretary of State filed the Certificate of Formation for EZSS, LLC on September 21, 2012, and the certificates for ZZSS, LLC and BRNSS, LLC on October 15, 2012.

Sunesara testified that when ZZSS, LLC was created, no part of the operation of Zig Zag Smoke Shop changed; instead, the assets just moved "on paper" from SSV Corporation to ZZSS, LLC. Sunesara had the following exchange with his counsel:

> Q. At any time before the LLCs were created, did Mr. Sohani ever tell you that: We don't want you to be a member of the LLCs we're creating?
>
> A. No.
>
> Q. At any time before the LLCs were created, did Mr. Virani ever tell you that: I don't want you to be a member of the LLCs we're creating?
>
> A. No.

Q. Would you have consented to the creation of the LLCs if you were not going to be a member?

A. No, I would not.

Q. If the LLCs had not been created, would Zig Zag Smoke Shop have continued to operate under MNA Corporation?

A. It would have been SSV Corporation.

Q. Sorry, SSV.

A. But yes, it would have continued to operate.

Sunesara testified that Sohani and Virani never told him that he was not a member of the LLCs, but after they filed the 2013 tax returns for the LLCs that did not list him as a member with an ownership interest, he believed "they wanted to take [him] off the LLCs."

Sunesara also testified that neither Sohani nor Virani ever told him that the percentage ownership of the LLCs would be any different from the ownership of the corporation. He also clarified that MNA Corporation and SSV Corporation had different ownership structures. Each of the parties were one-third owners of MNA. However, while the parties started out as one-third owners of SSV, at the time the assets were transferred to the LLCs, Sunesara and Virani owned fifty percent each of SSV, and Sohani did not have an ownership interest in this entity. Sunesara testified that Sohani had been removed as an owner because of personal financing issues, but those issues had been resolved by the time the parties discussed creating

the LLCs, and Sohani "wanted to be added back on to the LLCs." He stated, "[T]hat's really the reason why we created the LLCs."

Neither Sohani nor Virani provided live testimony at trial. Sunesara's counsel read into evidence a portion of Sohani's and Virani's testimony from the county court trial. During that trial, Sohani was asked about the Certificate of Formation for EZSS, LLC and whether Sunesara's name should have been listed as a "governing person" on that document. Sohani responded, "No. It should not be." When asked the same question during the county court trial, Virani testified, "No, his name should not have been there." He testified that only his and Sohani's names should have been listed on the certificate. Sohani and Virani did not object to any of the above testimony on the basis that it was outside Sunesara's pleadings.

Sunesara did not testify that Sohani and Virani made any promises to him concerning an ownership interest, or a share of profits, in the LLCs when the parties discussed forming the LLCs. There is no testimony that either Sohani or Virani told Sunesara that he would be entitled to one-third of the profits from the LLCs and that, based on this representation, Sunesara agreed to transfer two of the smoke shops from SSV Corporation. At most, there is testimony that Sohani and Virani did not tell Sunesara that they did not want him to be a member of the LLCs, and they did not tell him that the ownership structure of the LLCs would be different from their prior entities, in which the parties had an equal ownership share.

This testimony—that Sohani and Virani failed to tell Sunesara certain things—is not testimony that Sohani and Virani made affirmative misrepresentations to him.[5] In short, there is no *testimony* about anything Sohani and Virani said to Sunesara during this time period. The trial court's findings that Sohani and Virani "represent[ed] to [Sunesara] that [Sunesara] would have a one-third ownership interest in each of the LLCs," and that these representations induced Sunesara to transfer the assets of SSV Corporation to two of the new LLCs, is not supported by evidence that amounts to more than mere surmise or suspicion. *See Ford Motor Co. v. Ridgway*, 135 S.W.3d 598, 601 (Tex. 2004) (stating that when evidence offered to prove vital fact is so weak as to create only mere surmise or suspicion of fact's existence, evidence is less than scintilla and is, in legal effect, no evidence); *Woods*, 501 S.W.3d at 196 (stating that we must uphold challenged fact finding if finding is supported by more than scintilla of evidence). We conclude that the trial court's findings are not supported by legally sufficient evidence.

The trial court also found that Sohani and Virani made material representations to Sunesara that he had a one-third ownership interest in each of the LLCs when Sohani and Virani executed the Form 2553s reflecting that each party had an equal percentage ownership and filed them with the IRS. The trial court admitted the Form 2553 for EZSS, LLC and ZZSS, LLC, in which the entities

[5] Sunesara has not argued fraud by omission or non-disclosure.

elected to be treated as an S-Corporation for federal income tax purposes.[6] The forms were signed by all three parties, and both forms reflected that each party had a 33.3 percent ownership.

Although Sunesara undoubtedly saw the Form 2553s, given that he signed them, there is no evidence in the record that he saw these forms before SSV Corporation transferred the smoke shops to the LLCs. The parties signed the forms on October 25, 2012, and the IRS received the forms on October 31, 2012. The Certificates of Formation for the LLCs reflect that they were filed with the Texas Secretary of State on September 21, 2012, for EZSS, LLC, and on October 15, 2012, for BRNSS, LLC and ZZSS, LLC. The record does not indicate when the asset transfer to the LLCs occurred.[7] No evidence in the record supports a finding that Sohani's and Virani's representation on the Form 2553s that Sunesara had a one-third ownership interest in the LLCs occurred before the smoke shops were transferred to the LLCs and thus induced Sunesara to transfer the smoke shops from SSV Corporation.

---

[6] Sunesara did not offer the actual Form 2553 for BRNSS, LLC, but the trial court admitted a letter from the IRS to Sunesara stating that it had received BRNSS, LLC's Form 2553 and accepted the entity's election to be treated as an S-Corporation.

[7] When asked if paperwork existed showing the transfer of SSV Corporation's assets and liabilities to the LLCs, Sunesara testified: "So just to clarify, we didn't really keep a lot of paperwork, especially between ourselves. So there's no paperwork that shows the assets, just like there was no paperwork that showed the assets going from MNA Corporation to SSV."

Sunesara's unobjected-to testimony about the creation of the LLCs, the Certificates of Formation, and the Form 2553s does not constitute trial by consent of the issue of alleged fraudulent misrepresentations by Sohani and Virani that induced Sunesara to transfer assets from SSV Corporation to the LLCs. But even if we were to conclude otherwise,[8] Sunesara presented no evidence of any misrepresentation by Sohani and Virani that induced Sunesara to transfer the smoke shops from SSV Corporation to ZZSS, LLC and BRNSS, LLC. *See JPMorgan Chase Bank*, 546 S.W.3d at 653 (stating elements of common-law fraud). We therefore hold that the trial court's fact findings that Sohani and Virani fraudulently represented to Sunesara that he would have a one-third ownership interest in the LLCs, inducing him to transfer the smoke shops from SSV Corporation, are supported by neither the pleadings nor the evidence at trial. *See* TEX. R. CIV. P. 301; *Tex. Tax Sols.*, 593 S.W.3d at 909 (stating that judgment shall conform to pleadings and proof, and party may not be granted relief in absence of pleadings to support it). We sustain Sohani and Virani's first issue.

---

[8] In closing argument, Sunesara's counsel stated: "But [Sohani and Virani] said: Hey, let's take these corporations and—and move all the assets over to the LLC. That way we don't get double taxed and we'll have them in the LLCs. So what—we're all one-third in these corporations and we'll all take our one-third and move them into the LLCs." Counsel then pointed to Sohani and Virani's testimony from the county court case that they did not intend to give Sunesara a one-third ownership interest in the LLCs and argued that this constituted fraud. Sohani and Virani did not object to this argument. As discussed above, however, Sunesara never testified that Sohani and Virani made these statements.

The question then becomes whether Sunesara is entitled to a remand on the factual theory that he pleaded. Errors in findings of fact or conclusions of law do not require a judgment to be reversed if the judgment is otherwise correct on the merits. *Lee v. Lee*, 981 S.W.2d 903, 906 (Tex. App.—Houston [1st Dist.] 1998, no pet.). However, when findings of fact are filed by the trial court, these findings "shall form the basis of the judgment upon all grounds of recovery and of defense embraced therein." TEX. R. CIV. P. 299. When a trial court makes express findings, those findings "cannot be extended by implication to cover further independent issuable facts." *Nguyen v. Nguyen*, 355 S.W.3d 82, 92 (Tex. App.—Houston [1st Dist.] 2011, pet. denied); *Jones v. Smith*, 291 S.W.3d 549, 554 (Tex. App.—Houston [14th Dist.] 2009, no pet.); *Intec Sys., Inc. v. Lowrey*, 230 S.W.3d 913, 919 (Tex. App.—Dallas 2007, no pet.).

Here, the trial court's express findings with respect to an affirmative misrepresentation cannot be "extended by implication to cover" the independent issuable facts asserted in the fraud claim as pleaded by Sunesara. *See Nguyen*, 355 S.W.3d at 92. Accordingly, we must determine whether we may affirm the judgment based upon Sunesara's breach of fiduciary duty claim.

Breach of Fiduciary Duty

In their second issue, Sohani and Virani argue that the trial court erred by finding that they owed Sunesara a fiduciary duty and that they breached this duty.

They argue that in the absence of a managing or majority member, members of limited liability companies only owe fiduciary duties to the company itself, not to each other.

In response, Sunesara argues that although the trial court made findings and conclusions relevant to his breach of fiduciary duty claim—including a conclusion that Sunesara sustained $43,300 in damages as a result of Sohani and Virani's breach of duty and conclusions that Sunesara was entitled to $111,000 in exemplary damages from each defendant as a result of this breach of duty—the trial court based its judgment and damages award solely on Sunesara's fraud claim. In its findings and conclusions, the trial court concluded that Sunesara was entitled to $61,300 in damages as a result of Sohani and Virani's fraudulent conduct, and he was entitled to $111,000 in exemplary damages from both Sohani and Virani as a result of their fraud. In its final judgment, the trial court awarded Sunesara $61,300 in actual damages and $111,000 in exemplary damages from both Sohani and Virani. In their reply brief, Sohani and Virani agree that the trial court's judgment is based solely on Sunesara's fraud claim.

When a party tries a case on alternative theories of recovery and the factfinder returns favorable findings on two or more theories, the party has a right to a judgment on the theory that entitles him to the greatest or most favorable relief. *Boyce Iron Works, Inc. v. Sw. Bell Tel. Co.*, 747 S.W.2d 785, 787 (Tex. 1988). Double recovery

for a single injury is not permitted, so if the prevailing party fails to make an election, the trial court should utilize the findings affording the greater recovery and render judgment accordingly. *Hatfield v. Solomon*, 316 S.W.3d 50, 59 (Tex. App.—Houston [14th Dist.] 2010, no pet.) (citing *Birchfield v. Texarkana Mem'l Hosp.*, 747 S.W.2d 361, 367 (Tex. 1987)). If the judgment is reversed on appeal, the party may seek recovery under the alternate theory. *Boyce Iron Works*, 747 S.W.2d at 787. If the parties brief issues relating to recovery under the alternative theory, we may address the alternative theory on original submission of the appeal. *2001 Trinity Fund, LLC v. Carrizo Oil & Gas, Inc.*, 393 S.W.3d 442, 455 (Tex. App.—Houston [14th Dist.] 2012, pet. denied); *Hatfield*, 316 S.W.3d at 60 n.3; *see also Beal Bank, S.S.B. v. Schleider*, 124 S.W.3d 640, 650 & n.4 (Tex. App.—Houston [14th Dist.] 2003, pet. denied) (declining to consider alternative theory when parties did not brief issue on original submission, but considering theory on rehearing after both parties briefed issue).

Here, Sohani and Virani have raised issues relating to Sunesara's fraud claim and his breach of fiduciary duty claim. Although Sunesara argued that this Court need not address issues relating to his fiduciary duty claim because the judgment could be affirmed solely on his fraud claim, he has also presented arguments that the trial court's findings and conclusions related to the fiduciary duty claim were supported by the law and the evidence. Accordingly, because the parties have briefed

issues relating to Sunesara's fiduciary duty claim, we examine that claim. *See Boyce Iron Works*, 747 S.W.2d at 787; *2001 Trinity Fund*, 393 S.W.3d at 455.

A. Governing Law

Fiduciaries owe several duties to their principals, including the duty of loyalty and utmost good faith; duty of candor; duty to refrain from self-dealing; duty to act with integrity; duty of fair, honest dealing; and the duty of full disclosure. *Wolf v. Ramirez*, 622 S.W.3d 126, 142 (Tex. App.—El Paso 2020, no pet.); *Jordan v. Lyles*, 455 S.W.3d 785, 792 (Tex. App.—Tyler 2015, no pet.) ("A fiduciary owes her principal a strict duty of good faith and candor, as well as the general duty of full disclosure respecting matters affecting the principal's interests."). Fiduciaries have an affirmative duty to "make a full and accurate confession" of all fiduciary activities, transactions, profits, and mistakes. *Cluck v. Mecom*, 401 S.W.3d 110, 114 (Tex. App.—Houston [14th Dist.] 2011, pet. denied).

Courts recognize both formal and informal fiduciary duties. *Meyer v. Cathey*, 167 S.W.3d 327, 330–31 (Tex. 2005) (per curiam); *see Ritchie v. Rupe*, 443 S.W.3d 856, 874 n.27 (Tex. 2014) ("Texas law recognizes different kinds of fiduciary duties owed under different circumstances."). In certain formal relationships, such as the attorney-client or trustee relationship, fiduciary duties arise as a matter of law. *Meyer*, 167 S.W.3d at 330. It is well established that the relationship between partners is fiduciary in character. *See, e.g., Johnson v. Brewer & Pritchard, P.C.*, 73

S.W.3d 193, 199 (Tex. 2002); *Bohatch v. Butler & Binion*, 977 S.W.2d 543, 545 (Tex. 1998).

Texas law also recognizes an informal fiduciary duty that arises from a moral, social, domestic, or purely personal relationship of trust and confidence. *Ritchie*, 443 S.W.3d at 874 n.27; *Meyer*, 167 S.W.3d at 331; *see Ins. Co. of N. Am. v. Morris*, 981 S.W.2d 667, 674 (Tex. 1998) ("Outside of the cases in which formal fiduciary duties arise as a matter of law, confidential relationships may arise when the parties have dealt with each other in such a manner for a long period of time that one party is justified in expecting the other to act in its best interest."); *Associated Indemn. Corp. v. CAT Contracting, Inc.*, 964 S.W.2d 276, 287 (Tex. 1988) ("[T]he law recognizes the existence of confidential relationships in those cases in which influence has been acquired and abused, in which confidence has been reposed and betrayed.") (internal quotations omitted). "A person is justified in believing another to be his fiduciary 'only where he or she is accustomed to being guided by the judgment and advice of the other party, and there exists a long association in a business relationship, as well as a personal friendship.'" *McAfee, Inc. v. Agilysys, Inc.*, 316 S.W.3d 820, 829 (Tex. App.—Dallas 2010, no pet.).

An informal fiduciary relationship is not created lightly. *Meyer*, 167 S.W.3d at 331. Thus, to impose an informal fiduciary duty upon a party in the context of a business transaction, the special relationship of trust and confidence must exist prior

to, and apart from, the agreement or transaction that forms the basis of the suit. *Ritchie*, 443 S.W.3d at 874 n.27; *Meyer*, 167 S.W.3d at 331; *see Morris*, 981 S.W.2d at 674 (stating that mere subjective trust does not transfer arm's length dealing into fiduciary relationship). The existence of an informal fiduciary duty is typically a question of fact, but it becomes a question of law when there is no evidence of such a relationship. *Siddiqui v. Fancy Bites, LLC*, 504 S.W.3d 349, 365 (Tex. App.—Houston [14th Dist.] 2016, pet. denied).

The Business Organizations Code does not directly address the duties that members of a limited liability company owe to one another. *See Houle v. Casillas*, 594 S.W.3d 524, 546 (Tex. App.—El Paso 2019, no pet.). Section 101.401 merely states, "The company agreement of a limited liability company may expand or restrict any duties, including fiduciary duties, and related liabilities that a member, manager, officer, or other person has to the company or to a member or manager of the company." TEX. BUS. ORGS. CODE § 101.401. In a memorandum opinion, the Dallas Court of Appeals concluded that this section presumes the existence of fiduciary duties owed by members, noting that the section provides that "a limited liability company may 'expand or restrict' any duties (including fiduciary duties) of a member, manager, officer, or other person." *Cardwell v. Gurley*, No. 05-09-01068-CV, 2018 WL 3454800, at *5 (Tex. App.—Dallas July 18, 2018, pet. denied) (mem. op.); *see also Straehla v. AL Global Servs., LLC*, 619 S.W.3d 795, 805 (Tex. App.—

San Antonio 2020, pet. denied) (presuming "based on the assumption inherent in section 101.401" that member owed same fiduciary duties to company that corporate executive or partner owes to corporation or partnership, unless company agreement demonstrates otherwise).

In an earlier opinion, however, the Dallas Court of Appeals construed the predecessor statute[9] to section 101.401 and concluded that the statute did not "mandate a fiduciary relationship between members" of a limited liability company as a matter of law. *Suntech Processing Sys., L.L.C. v. Sun Commc'ns, Inc.*, No. 05-99-00213-CV, 2000 WL 1780236, at *6 (Tex. App.—Dallas Dec. 5, 2000, pet. denied) (mem. op., not designated for publication). The court considered a prior case addressing the same issue in the context of shareholders in a closely held corporation and concluded that whether a fiduciary relationship exists is a fact question dependent upon the unique circumstances of the case. *Id.* One circumstance that the trial court could take into consideration was whether the members had an equal ownership interest or whether the member allegedly owing fiduciary duties held a majority interest. *Id.* at *6–7; *see also Siddiqui*, 504 S.W.3d at 365–69 (declining to

[9] This statute provided: "To the extent that at law or in equity, a member, manager, officer, or other person has duties (including fiduciary duties) and liabilities relating thereto to a limited liability company or to another member or manager, such duties and liabilities may be expanded or restricted by provisions in the regulations." Act of May 13, 1997, 75th Leg., R.S., ch. 375, § 58, 1997 Tex. Gen. Laws 1516, 1565 (expired Jan. 1, 2010).

recognize informal fiduciary duty among members of LLC in part because investments in LLC were arm's length transactions and company agreement provided that three members had equal ownership interests and none had contractual right to greater control over company than another member).

This Court has declined to recognize a "broad formal fiduciary relationship" between members in a limited liability company. *See Allen v. Devon Energy Holdings, L.L.C.*, 367 S.W.3d 355, 391 (Tex. App.—Houston [1st Dist.] 2012, pet. granted, judgm't vacated w.r.m.) (op. on reh'g). However, we acknowledged that formal fiduciary duties may be owed between members of a limited liability company in certain circumstances, such as when a member who holds a majority ownership interest offers to redeem the interest of a minority member. *Id.* at 394–95.

B. Analysis

Here, in its findings of fact and conclusions of law, the trial court found that:

- A relationship of trust and confidence existed between Sohani and Virani and Sunesara with respect to the LLCs;
- Sohani and Virani owed Sunesara, as a member of the LLCs, a duty of good faith and fair dealing;
- Sohani and Virani did not act in the utmost good faith or exercise the most scrupulous honesty;
- Sohani and Virani did not disclose all important information to Sunesara with respect to the LLCs;

- Sohani and Virani did not place the interests of Sunesara before their own interests; and
- Sohani and Virani used their positions as members of the LLCs to gain a benefit for themselves at Sunesara's expense.

The trial court concluded that a fiduciary relationship existed between the parties. It concluded that Sunesara trusted and relied upon Sohani and Virani. He was accustomed to being guided by their judgment and advice. The parties had a long business association, as well as a personal friendship. The court also concluded that this relationship existed prior to and apart from the relationships and agreements that formed the basis of this lawsuit. The trial court did not conclude that Sohani and Virani owed fiduciary duties to Sunesara solely because they are all members of a limited liability company. *See id.* at 391.

Sunesara testified that he has known Virani, his younger cousin, for Virani's entire life. Sunesara met Sohani around 2000, while they were both members of the same college fraternity. Sunesara testified that he trusted Sohani and Virani, and that they also trusted him. Sunesara and Virani decided to go into business together in 2002, and Sohani became involved afterwards. The parties were in business together for approximately ten years before the events that formed the basis of this dispute occurred.

Sunesara thus presented some evidence of a familial relationship and a longstanding friendship, in addition to the parties' business relationship. This

relationship pre-dated the formation of the LLCs by over a decade. He expressly testified that the parties trusted each other. We conclude that Sunesara presented some evidence to support the trial court's fact finding that an informal fiduciary relationship existed among the parties. *See Ritchie*, 443 S.W.3d at 874 n.27; *Meyer*, 167 S.W.3d at 331.

We overrule Sohani and Virani's second issue.

Actual Damages Award

In their third issue, Sohani and Virani argue that the trial court erred in awarding actual damages to Sunesara because the amount of damages awarded are not related to the claims he asserted. Because we have concluded that the trial court's fact findings relating to Sunesara's fraud claim are not supported by the pleadings or the evidence, we address only whether the damages awarded relate to Sunesara's breach of fiduciary duty claim.

Generally, the elements of a breach of fiduciary duty claim are (1) the existence of a fiduciary duty; (2) breach of the duty; (3) causation; and (4) damages. *First United Pentecostal Church of Beaumont v. Parker*, 514 S.W.3d 214, 220 (Tex. 2017). Damages can be in the form of an injury to the plaintiff or a benefit to the defendant that results from the defendant's breach of duty. *Priddy v. Rawson*, 282 S.W.3d 588, 599 (Tex. App.—Houston [14th Dist.] 2009, pet. denied). The plaintiff must demonstrate that the damages were proximately caused by a breach of the

defendant's duty. *Bos*, 556 S.W.3d at 303; *Finger v. Ray*, 326 S.W.3d 285, 291 (Tex. App.—Houston [1st Dist.] 2010, no pet.).

A. Damages for Initial Start-Up Contributions

In addition to the findings stated above relating to Sohani and Virani's breaches of their fiduciary duties, the trial court also made findings and conclusions concerning Sunesara's damages. Specifically, the court found:

- Sunesara provided valuable services to Sohani and Virani in connection with the creation and operation of the LLCs.
- Sohani and Virani accepted the services provided by Sunesara and used and enjoyed those services.
- The value of the services provided by Sunesara and used and enjoyed by Sohani and Virani is $18,000.00.
- The sum of $30,000 was given by Sunesara to Sohani and Virani as initial start-up contributions.
- Sunesara was required to pay $13,300.00 in penalties to the IRS based upon filings by the LLCs.

The court also concluded that Sohani and Virani's breach of their fiduciary duties to Sunesara proximately caused damage to Sunesara. As a result of Sohani and Virani's breach of their fiduciary duties, Sunesara sustained $43,300 in damages. This amount corresponds to the total of Sunesara's initial start-up contributions plus the penalties Sunesara paid to the IRS.

Sunesara testified that he made capital contributions to help start each of the three smoke shops. Specifically, he testified that he contributed "a few thousand

dollars" to start the "original flea market business that became Zig Zag" Smoke Shop. He later clarified, in response to questioning by his counsel and the trial court, that he contributed $10,000 in cash to Zig Zag Smoke Shop. Sohani and Virani's counsel asked whether "that ten thousand for the Zig Zag Smoke Shop" was contributed when Sunesara and Virani started selling products at the flea markets, and Sunesara stated that it was. Sunesara also testified that he contributed $10,000 toward Burn Smoke Shop I and $10,000 toward Burn Smoke Shop II. He testified that he contributed a total of $30,000 to the smoke shops. He has not been repaid for any of these capital contributions. He agreed that there is no documentary evidence reflecting his contributions.

On appeal, Sohani and Virani argue that the evidence does not support the trial court's finding that Sunesara contributed $10,000 to each of the smoke shops, pointing to Sunesara's initial testimony that he contributed "a few thousand dollars" to start the business that became Zig Zag Smoke Shop. Sunesara later testified, however, that his initial contribution was $10,000. The trial court, as the factfinder, was entitled to resolve the inconsistencies in favor of Sunesara's testimony that he contributed $10,000 to the first smoke shop and made a total of $30,000 in contributions to the smoke shops. *See Zenner*, 371 S.W.3d at 314.

Sohani and Virani also argue that, even if Sunesara did contribute $30,000 to the LLCs, Sunesara's claims are based on allegations that Sohani and Virani

committed fraud on LLC documents, but there is no argument or evidence that they defrauded Sunesara into making the contributions. We agree.

The trial court found that Sohani and Virani breached their fiduciary duties to Sunesara by not disclosing "all important information to [Sunesara] regarding the LLCs," not placing Sunesara's interests above their own interests, and using their positions as members of the LLCs to gain a benefit for themselves at Sunesara's expense. The trial court had evidence before it that Sunesara was listed as a governing person on the LLCs' Certificates of Formation and was listed on the Form 2553s as a member of the LLCs with a one-third ownership interest. However, in 2013, unbeknownst to Sunesara, Sohani and Virani executed company agreements for each of the LLCs that named themselves as the sole members and stated that they were each entitled to 50% of the LLCs' profits. These documents did not mention Sunesara. Similarly, the LLCs' federal income tax returns for the 2013 tax year reflected that only Sohani and Virani were members of the LLCs, and only they received a Schedule K-1. Sunesara was not mentioned on these tax returns, and he did not receive a Schedule K-1.

There is evidence that Sohani and Virani breached their fiduciary duties to Sunesara by not including him on the LLCs' governing documents without his knowledge or consent. They also did not identify Sunesara as a member of the LLCs on federal tax documents. However, there is no evidence in the record that these

actions by Sohani and Virani caused Sunesara to make his contributions to the LLCs. To the contrary, Sunesara testified that he contributed $10,000 to Zig Zag Smoke Shop when he and Virani started selling smoking products at flea markets in 2002. He also testified that he contributed $10,000 to Burn Smoke Shop I, which the parties opened in 2007. Both contributions therefore occurred years before Sohani and Virani took actions with respect to LLC documents in 2013.

Similarly, Sunesara did not provide a date for when he contributed $10,000 to EZSS, LLC, in connection with Burn Smoke Shop II. To the extent he argues that Sohani and Virani made representations about the ownership structure of the LLCs, as we have stated above with respect to Sunesara's fraud claim, there is no testimony in the record of any specific representations made, nor is there testimony concerning the timing of any alleged representations and Sunesara's contribution.

Moreover, Sunesara has presented no authority that he is entitled to a return of his initial contributions from the LLCs. At the time of trial, the LLCs were all still operating and in business. Sunesara testified that he has never withdrawn his membership in the LLCs. He is, therefore, not entitled to a distribution as a withdrawing member of a limited liability company. *See* TEX. BUS. ORGS. CODE § 101.205 ("A member of a limited liability company who validly exercises the member's right to withdraw from the company granted under the company agreement is entitled to receive, within a reasonable time after the date of

withdrawal, the fair value of the member's interest in the company as determined as of the date of withdrawal."); *see also id.* § 101.203 ("Distributions of cash and other assets of a limited liability company shall be made to each member of the company according to the agreed value of the member's contribution to the company as stated in the company's records required under Sections 3.151 and 101.501.").

We conclude that there is no evidence that Sohani and Virani's breach of their fiduciary duties proximately caused Sunesara to make $30,000 in initial start-up contributions. We hold that no evidence supports the trial court's conclusion that Sunesara suffered $30,000 in damages as a result of Sohani and Virani's breach of their fiduciary duties. *See Bos*, 556 S.W.3d at 303; *Finger*, 326 S.W.3d at 291.

B. Damages for IRS Taxes and Penalties

The Form 2553s filed with the IRS in October 2012 for each of the LLCs listed three members—Sohani, Virani, and Sunesara—with an equal 33.3% ownership interest in the LLCs. The 2013 federal income tax returns for each of the three LLCs, however, reflected that each LLC had two members—Sohani and Virani—and that each of them owned a 50% ownership interest of the LLCs.

Sunesara received cash distributions from the LLCs during 2012 and 2013. He did not, however, receive a Schedule K-1 from the LLCs for the 2013 tax year. The IRS conducted an audit of Sunesara for the 2012 and 2013 tax years. He testified:

> Not receiving any contributions is incorrect. Reporting those contributions. So there was—there was money that was received, but it was not reported. And so when [the IRS] did [an] audit and they got my bank statements, there was excess cash in my account and I had no way of declaring that income.

Sunesara also believed that the IRS conducted the audit in part because the Form 2553s for the LLCs reflected that he was a member of the LLCs, but the LLCs' tax returns did not, and the discrepancy confused the IRS. As a result of the audit, Sunesara paid a total of $13,300 in taxes, penalties, and accountant fees. The trial court found that Sunesara was "required to pay $13,300.00 in penalties to the IRS based upon filings by the LLCs" and included this amount in the damages that Sunesara sustained as a result of Sohani and Virani's breach of their fiduciary duties.

Sohani and Virani argue that the amounts Sunesara paid to the IRS are not attributable to any of their actions, but are instead due to Sunesara's failure to report all his income to the IRS. We disagree.

Sunesara presented evidence that the Form 2553s filed with the IRS in October 2012 reflected that each LLC had three members and each member had an equal one-third ownership interest in the respective LLC. The trial court admitted the LLCs' 2013 tax returns which reflected that each LLC had two members and each member had an equal one-half ownership interest. Sunesara was listed as a member on the Form 2553s, but not on the 2013 tax returns. He did not receive a Schedule K-1 from the LLCs for that tax year showing the distributions paid to him,

and he did not report that income to the IRS. He testified that due to Sohani and Virani's manipulation of the LLCs' records and their failure to issue a K-1 to him, he had "no way" of declaring the distribution income that he did receive.

We conclude that Sunesara has presented some evidence that the IRS's audit was caused in part by the failure to list him as a member of the LLCs on the 2013 tax returns and failure to issue him a K-1. Sufficient evidence therefore supports the trial court's findings and conclusions that Sunesara sustained damages in the amount of $13,300—the amount he paid in taxes, penalties, and fees as a result of the audit—due to Sohani and Virani's breach of their fiduciary duties.[10]

We sustain Sohani and Virani's third issue in part.

Exemplary Damages Award

In their fourth issue, Sohani and Virani argue that the trial court's award of exemplary damages to Sunesara is not appropriate in this case. Specifically, they argue that this case involves a mere business dispute among former business

[10] "Prejudgment interest is compensation allowed by law as additional damages for lost use of the money due as damages during the lapse of time between the accrual of the claim and the date of judgment." *Ventling v. Johnson*, 466 S.W.3d 143, 153 (Tex. 2015). In its final judgment, the trial court awarded Sunesara "pre-judgment interest on the award of actual damages." Because we modify the trial court's actual damages award, we reverse the portion of the judgment awarding prejudgment interest on that damages award. We remand the case for the limited purpose of recalculating the award of prejudgment interest in light of the modified actual damages award.

partners, and Sunesara did not present clear and convincing evidence of any fraud, malice, or gross negligence, as required to sustain an exemplary damages award.

Exemplary damages may be awarded only if the claimant proves by clear and convincing evidence that the harm with respect to which the claimant seeks recovery of exemplary damages results from fraud, malice, or gross negligence. TEX. CIV. PRAC. & REM. CODE § 41.003(a). The Civil Practice and Remedies Code defines "fraud," as used in this context, as "fraud other than constructive fraud," and it defines "malice" as "a specific intent by the defendant to cause substantial injury or harm to the claimant." *Id.* § 41.001(6)–(7). "Clear and convincing" evidence is defined as "the measure or degree of proof that will produce in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established." *Id.* § 41.001(2).

A defendant's intentional breach of fiduciary duty is a tort for which a plaintiff can recover exemplary damages. *In re Estate of Preston*, 346 S.W.3d 137, 170 (Tex. App.—Fort Worth 2011, no pet.); *Lesikar v. Rappeport*, 33 S.W.3d 282, 311 (Tex. App.—Texarkana 2000, pet. denied). In *Lesikar*, the Texarkana Court of Appeals stated:

> While it is a general rule that Texas courts allow the recovery of punitive damages where the defendant, in committing a tort, acted willfully, maliciously, or fraudulently, where punitive damages are awarded for breach of fiduciary duty the actual motives of the defendant and whether the defendant acted with malice are immaterial. But something more than a simple breach is required for the recovery of

> punitive damages; the acts constituting the breach must have been fraudulent, or at least intentional.

33 S.W.3d at 311. A court may find that an intentional breach of fiduciary duty has occurred when the fiduciary "intends to gain an additional benefit for himself." *Id.* (citing *Int'l Bankers Life Ins. Co. v. Holloway*, 368 S.W.2d 567, 583–84 (Tex. 1963)). Thus, exemplary damages are proper when a fiduciary has engaged in self-dealing. *Id.* (citing *Tex. Bank & Tr. Co. v. Moore*, 595 S.W.2d 502, 510 (Tex. 1980)).

Here, the trial court concluded that Sohani and Virani "willfully and intentionally breached their fiduciary duty" to Sunesara. The court also concluded, by clear and convincing evidence, that Sohani and Virani breached their fiduciary duties. Further, the court found that, as a result of this breach, Sunesara was entitled to recover $111,000 in exemplary damages from Sohani and $111,000 in exemplary damages from Virani.

The record supports the trial court's finding that Sohani and Virani willfully and intentionally breached their fiduciary duties to Sunesara. As we have already discussed, the Certificates of Formation for the LLCs and the Form 2553s for the LLCs all reflect that Sohani, Virani, and Sunesara were members of the LLCs and each had an equal one-third ownership interest in each entity. However, less than a year after the LLCs were formed, Sohani and Virani executed company agreements for each LLC that omitted any reference to Sunesara. Instead, they listed themselves as the sole members of the LLCs and stated that they each "made 50% of

contributions" and own "50% of profits and assets." These are the only records of the LLCs admitted into evidence that reflect an agreement on profit division or that reference contributions to the LLCs. Additionally, although Sunesara received at least some cash profit distributions in 2012 and 2013, Sohani and Virani did not list him as a member of the LLCs on the 2013 tax returns and did not issue a Schedule K-1 to him. Sunesara was later audited by the IRS for these tax years. Sunesara has not received any distributions from the LLCs since 2013.

By executing the company agreements and the 2013 tax returns, Sohani and Virani effectively froze Sunesara out of the LLCs, increasing their share of profit distributions from the LLCs and eliminating Sunesara's profit share. This is evidence that Sohani and Virani gained a benefit for themselves at Sunesara's expense. We therefore conclude that the evidence supports the trial court's finding that Sohani and Virani willfully and intentionally breached their fiduciary duties to Sunesara. We hold that the trial court did not err by concluding that exemplary damages were appropriate in this case. *See In re Estate of Preston*, 346 S.W.3d at 170; *Lesikar*, 33 S.W.3d at 311.

We overrule Sohani and Virani's fourth issue.

Supplemental Relief

In their fifth issue, Sohani and Virani argue that they are entitled to supplemental "further relief" under the DJA, and the trial court erred by denying

their post-judgment motion requesting this relief. Specifically, they argue that Sunesara improperly sought a declaration that he was entitled to a portion of the LLCs' assets and improperly requested that the trial court disregard this Court's holding that he was not entitled to a share of the LLCs' profits. As a result, Sohani and Virani were required to expend attorney's fees to defend the prior rulings of the county court and this Court, and the trial court should have awarded them their fees as supplemental relief.

Civil Practice and Remedies Code section 37.011 provides that "[f]urther relief based on a declaratory judgment or decree may be granted whenever necessary or proper." TEX. CIV. PRAC. & REM. CODE § 37.011. The law presumes that parties to a declaratory judgment action will recognize and respect the rights declared by a declaratory judgment and will abide by the judgment in carrying out their duties. *Sohani II*, 608 S.W.3d at 538 (quoting *Howell v. Tex. Workers' Compensation Comm'n*, 143 S.W.3d 416, 433 (Tex. App.—Austin 2004, pet. denied)); *State v. Anderson Courier Serv.*, 222 S.W.3d 62, 65 (Tex. App.—Austin 2005, pet. denied). For example, after a declaratory judgment is rendered, injunctive relief may be available as supplemental relief under the DJA, but only upon a showing that a party will not comply with the judgment. *Anderson Courier Serv.*, 222 S.W.3d at 65.

Supplemental relief under section 37.011 must "serve to effectuate the underlying judgment." *Id.*; *Howell*, 143 S.W.3d at 433 ("The uniform declaratory

judgments act authorizes a party to obtain supplemental ancillary relief, including a permanent injunction, to enforce a declaratory judgment."). Section 37.011 does not permit parties to relitigate issues already resolved by a declaratory judgment, nor does it permit determination of new issues unrelated to the declaratory judgment. *Sohani II*, 608 S.W.3d at 539; *Lakeside Realty, Inc. v. Life Scape Homeowners Ass'n*, 202 S.W.3d 186, 191 (Tex. App.—Tyler 2005, no pet.). "Further relief" may be sought in the same proceeding as the original declaratory judgment or in a later proceeding, but if sought in a later proceeding, it must be "additional relief arising out of the issues resolved by the prior declaratory judgment." *Lakeside Realty*, 202 S.W.3d at 191. We review a trial court's decision to grant or deny further relief under section 37.011 for an abuse of discretion. *Sohani II*, 608 S.W.3d at 539.

This is the second time that Sohani and Virani have sought attorney's fees as supplemental relief under the DJA. After this Court ruled in *Sohani I* that Sunesara was a member of the LLCs but was not entitled to one-third of the profits because the books of the LLCs did not contain a record of his contributions, Sohani and Virani requested that the county court vacate the attorney's fees award in favor of Sunesara and award them their attorney's fees expended in prosecuting the county court action and the appeal from that judgment as supplemental relief under section 37.011. *See id.* at 536–37. We held that, under the facts of that case, attorney's fees for prosecution of the original declaratory judgment action and the appeal from that

action were not proper relief under section 37.011. *Id.* at 541. In reaching this conclusion, we reasoned that Sohani and Virani had options concerning consideration of the fee award. When they appealed in *Sohani I*, they could have challenged the original fee award in favor of Sunesara. Alternatively, after this Court partially ruled in their favor and held that Sunesara was not entitled to a distribution of profits, they could have filed a motion for rehearing and sought reconsideration of the fee award. *Id.* at 541–42. Sohani and Virani did not choose either option. Consequently, we concluded that they forfeited their ability to seek reconsideration of the fee award. *Id.* at 542.

In this case, after the trial court rendered judgment in favor of Sunesara, Sohani and Virani again sought their attorney's fees as supplemental relief. Sohani and Virani argued that Sunesara filed the underlying proceeding in the district court "seeking to re-litigate whether he is entitled to profits or assets," and his "primary claim was for declaratory relief undoing the judgment of the County Court Case and the Appeal Case [*Sohani I*]." As a result, Sohani and Virani were required to expend attorney's fees because Sunesara refused to accept the prior declaratory judgment ruling.

Sunesara did argue in the underlying proceedings that *Sohani I* should not be followed under the law of the case doctrine because of additional facts that had come to light since the county court's judgment and this Court's opinion. *See, e.g.*, *Hudson*

v. Wakefield, 711 S.W.2d 628, 630 (Tex. 1986) (stating that law of the case doctrine "does not necessarily apply when either the issues or the facts presented at successive appeals are not substantially the same as those involved on the first trial"). Specifically, Sunesara argued that, in the interim period between the county court trial in 2016 and the district court trial in 2019, he obtained the Form 2553s for the LLCs. Those forms were signed by both Sohani and Virani and stated that all three parties had an equal one-third ownership interest in the LLCs. During the county court trial, however, both Sohani and Virani testified unequivocally that they had not signed the Form 2553s.

Sunesara argued to the district court that Sohani and Virani had committed perjury in the county court case and that the Form 2553s, signed by all three parties, demonstrated that records existed showing Sunesara's ownership interest in the LLCs, undermining a key portion of our opinion in *Sohani I*. Sunesara thus requested that the district court decline to consider *Sohani I* as law of the case and instead rule that Sunesara was entitled to profits and assets of the LLCs. The trial court did not agree, and it applied *Sohani I* as law of the case.[11]

---

[11] In his appellee's brief, Sunesara requests that, in light of Sohani and Virani's perjured testimony in the county court case, this Court revisit our holding in *Sohani I* that the written books and records of the LLCs do not establish that Sunesara had a one-third ownership interest. Sunesara, however, did not file a notice of appeal from the trial court's judgment. We therefore decline to reconsider our opinion in *Sohani I* and the issue of whether Sunesara is entitled to one-third of the profits and assets of the LLCs.

Although Sunesara did seek reconsideration of this Court's ruling in *Sohani I*, he did so supported by well-established caselaw holding that, in some situations, the facts have developed after a prior appeal such that application of the rulings from the prior appeal is no longer appropriate and the law of the case doctrine no longer applies. *See, e.g.*, *id.* Sunesara was entitled to make this argument to the district court. Furthermore, as Sunesara points out, although he sought a redetermination of the question whether he was entitled to profits and assets of the LLCs, he also asserted additional affirmative claims that were not related to this question. He non-suited his counterclaims in the county court case and filed suit in the district court before the county court case proceeded to trial. The majority of his claims in the district court did not seek to relitigate claims and issues asserted before the county court.

An award of Sohani and Virani's attorney's fees for prosecuting the underlying case will not serve to "effectuate the underlying [declaratory] judgment" rendered in the county court case and modified on appeal in *Sohani I*. *See Anderson Courier Serv.*, 222 S.W.3d at 65; *Howell*, 143 S.W.3d at 433. We hold that the trial court did not abuse its discretion by denying Sohani and Virani's request for supplemental relief under section 37.011 of the DJA.

We overrule Sohani and Virani's fifth issue.

Consideration of Late-Filed Response

Finally, in their sixth issue, Sohani and Virani argue that the trial court erred by considering Sunesara's response to Sohani and Virani's post-judgment motions because Sunesara did not file his response until the day of the hearing on the motions. He further argues that the trial court erroneously granted Sunesara's motion for leave to late-file his response because the court ruled on the motion after Sohani and Virani had already filed their notice of appeal and thus the court lacked plenary power to rule on the motion.

The trial court signed its final judgment in favor of Sunesara on December 18, 2019. On December 26, 2019, Sohani and Virani filed two post-judgment motions: (1) a motion to amend or reconsider the final judgment; and (2) a motion for supplemental relief under the DJA. These motions were set for a hearing on Monday, January 27, 2020.

At the hearing on the motions, counsel for both parties appeared. Sunesara's counsel handed Sohani and Virani's counsel written responses to the motions. Sunesara's counsel represented that the responses were filed the preceding Friday, but the responses were not file-stamped by the clerk's office until after the hearing on Sohani and Virani's motions had adjourned. The trial court allowed Sunesara's counsel to make oral arguments in support of the responses, and Sohani and Virani's counsel did not object. At the close of the hearing, the trial court denied Sohani and

Virani's motion for supplemental relief, and it took their motion for reconsideration under advisement. Later that same day, Sunesara filed a motion for leave to late-file his responses to the motions.

Also on January 27, 2020, the trial court signed an order denying both of Sohani and Virani's motions.[12] In this order, the court stated that it "review[ed] the motions, responses, and arguments of counsel." Sohani and Virani filed their notice of appeal on January 30, 2020. On February 11, 2020, the court signed an order granting Sunesara's motion for leave to late-file the responses.

Assuming without deciding that the trial court erred by considering the late-filed responses and granting Sunesara's motion for leave to late-file the responses after the notice of appeal had been filed, we conclude that any error does not constitute reversible error. Sunesara's counsel appeared at the hearing on Sohani and Virani's post-judgment motions and presented argument opposing the requested relief. Although Sohani and Virani's counsel stated that he had not received written responses to the motions before the hearing, he did not object to Sunesara's counsel providing argument at the hearing. The argument presented by Sunesara's counsel largely mirrors the arguments made in the written responses filed immediately after

[12] This order was file-stamped on January 28, 2020, but the body of the order states that it was signed on January 27, 2020.

the hearing. In its order denying the post-judgment motions, the trial court stated that it considered the responses and arguments of counsel.

Sohani and Virani have not demonstrated that the trial court's consideration of the written responses—as opposed to its consideration of the same oral arguments presented at the hearing—and its granting of Sunesara's motion for leave to late-file the responses probably caused the rendition of an improper judgment. *See* TEX. R. APP. P. 44.1(a). We hold that the trial court did not commit reversible error by considering Sunesara's written responses or by granting the motion for leave to late-file the responses.

We overrule Sohani and Virani's sixth issue.

Conclusion

We modify the judgment of the trial court to order that Sunesara recover from Sohani and Virani, jointly and severally, the sum of $13,300 in actual damages. We reverse the portion of the trial court's judgment that awards prejudgment interest and remand the case to the trial court for the limited purpose of recalculating the award of prejudgment interest based on the modified award of actual damages. We affirm the judgment in all other respects.

April L. Farris
Justice

Panel consists of Justices Kelly, Hightower, and Farris.