

**In The**  
***Court of Appeals***  
***Ninth District of Texas at Beaumont***

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**NO. 09-15-00197-CV**

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**MICHAEL ISHEE AND  
WORLD ENVIRONMENTAL, LLC, Appellants**

**V.**

**JANICE ISHEE, Appellee**

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**On Appeal from the 284th District Court  
Montgomery County, Texas  
Trial Cause No. 13-03-03184 CV**

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**MEMORANDUM OPINION**

Michael Ishee and a company that he partially owns, World Environmental, LLC, appeal from the trial court's judgment following a jury trial. At the conclusion of the trial, the jury found that Michael failed to comply with the fiduciary duties he owed Janice Ishee, his former spouse, under the decree that was rendered in their divorce. Janice filed a cross-appeal, and she argues should Michael prevail, the case should be remanded to the trial court to allow that court to consider rendering a

judgment against Michael based on the jury's breach of contract findings, which are also based on duties arising under the decree rendered following their divorce.

The case was tried on both breach of contract and breach of fiduciary duty theories of recovery. Before the trial court rendered the judgment that is at issue in the appeal, Janice elected to recover judgment against Michael based on the jury's breach of fiduciary findings. On her fiduciary duty theory, Janice recovered a judgment against Michael for \$361,040 in actual and punitive damages. The judgment consists of \$111,520 in compensation related to the breach of fiduciary duty the jury found Michael committed, \$111,520 in damages because in equity and good conscience, the jury determined that sum of money rightfully belonged to Janice, and \$130,000 in exemplary damages. The trial court also awarded Janice \$25,000 in attorney's fees. The judgment made Michael and World Environmental jointly and severally liable for the \$25,000 in attorney's fees that the trial court awarded Janice on her declaratory judgment claim. Finally, the trial court ordered that Michael pay Janice \$2,500 in sanctions for abusing discovery.

In five appellate issues, Michael argues that (1) the evidence is legally and factually insufficient to show that he breached the fiduciary duty he owed Janice; (2) the evidence is legally and factually insufficient to support the jury's award of \$111,520 in damages based on his failure to comply with the fiduciary duty the jury

concluded he owed Janice; (3) the trial court did not have jurisdiction to hear Janice's claims; (4) disgorgement is not an appropriate remedy because Michael's failure, if any, to comply with the fiduciary duty he owed Janice was unintentional and the amount of the jury's fiduciary duty damages award is excessive; and (5) the evidence is legally and factually insufficient to support the exemplary damages award.

World Environmental also appealed from the final judgment. In its first issue, World Environmental argues the trial court awarded declaratory relief exceeding that which Janice requested in her pleadings. In issue two, World Environmental argues the trial court committed error by making it jointly and severally liable with Michael for the attorney's fees awarded in the judgment.

We conclude that factually and legally sufficient evidence supports the jury's finding that Michael breached his fiduciary duty to Janice. We further conclude the evidence is legally sufficient to support a portion of the fiduciary duty damages award, but is factually insufficient to support an award of \$111,520. Because reversing the damages award also requires that we order a retrial on the issue of whether Michael breached the fiduciary duty he owed to Janice, we need not reach Michael's remaining issues because sustaining them would result in the same relief Michael has been given based on our resolution of his second issue.

With respect to World Environmental’s appellate issues, we are not persuaded that Janice received declaratory relief in excess of the relief to which she showed that she was entitled. *See* Tex. Bus. Orgs. Code Ann. § 101.109 (West 2012). With respect to World Environmental’s second issue, which concerns the attorney’s fees award, Janice represented in her brief that she “does not oppose modifying the judgment” to delete the language in the judgment making World Environmental jointly and severally responsible for paying the attorney’s fees the trial court awarded in its judgment. We reform the judgment so that World Environmental is not required to pay attorney’s fees.

### Background

Janice and Michael divorced in 2010. The divorce case was resolved in the 418th District Court in Montgomery County, Texas. When the 418th District Court granted the divorce, Michael owned a percentage interest in several closely held businesses, one of which was World Environmental. Under the terms of the decree in their divorce, (“the decree”), Janice was assigned a percentage of Michael’s interest in the businesses in which he held memberships at the time he and Janice divorced.

In 2013, Janice sued Michael, World Environmental, Charles Hall, who held a majority interest in World Environmental when Michael and Janice divorced, and

the other businesses mentioned in the decree. In Janice's second amended petition, her live pleading for the purposes of the trial, Janice alleged that after she and Michael divorced, Michael never paid her the money she was entitled to receive based on her assigned interest in the businesses identified in the decree. Additionally, Janice sued for declaratory relief, and she requested that the court declare her rights under the assignment she acquired in Michael's interest in the businesses identified in the decree when she and Michael divorced.

During the trial, Janice testified that Michael never distributed any of the benefits she should have received as his assignee in the businesses identified in the decree. According to Michael, he never sent Janice any money because after they divorced, the businesses identified in the decree never distributed any income, gains, losses, deductions, credits, distributions, or similar items. Additionally, Michael indicated that he never held a controlling interest in any of the businesses identified in the decree, and he suggested that he had no control over the manner the businesses accounted for their activities.

The evidence before the jury included Form 1065 K1s that Michael received annually from World Environmental after Michael and Janice divorced, tax returns filed by World Environmental after Janice and Michael divorced, and testimony of Theo Rivers, the accountant who performed the accounting work for World

Environmental. In large part, the parties' dispute centered on whether the rights Janice obtained in the businesses in which Michael held memberships required Michael to remit any of the amounts that he had received in guaranteed payments from the businesses after he and Janice divorced. According to Rivers, the guaranteed payments Michael received from World Environmental were reported on the K1s Michael received from the company, and the tax forms that she generated for the company reflected the company's income, loss, distributions, and business activities of the company. Janice did not call an accountant to dispute Rivers' testimony, so there is no testimony showing that the activities reflected in Michael's K1s were fraudulent, that World Environmental improperly accounted for its income or its expenses, or that Michael's K1s failed to properly reflect the monetary benefits that he received from World Environmental after he and Janice divorced.

In final argument, Janice's attorney essentially asked the jury to ignore the testimony and evidence about the manner World Environmental accounted for its activities. In final argument, Janice's attorney suggested to the jury that Janice was entitled to receive a percentage of all of the benefits Michael received from World Environmental based on the assigned interest she held in the business following the divorce, which included a percentage of the guaranteed payments Michael received as well as a percentage of the cash value of his fringe benefits, which included items

such as the value to Michael having a company car, a company cell phone, and company-provided health insurance.<sup>1</sup>

Did the 284th District Court have Jurisdiction over  
Janice's Claims Seeking to Enforce the Decree of Divorce?

We address Michael's challenge to the trial court's jurisdiction to hear the case first, which he raises in his third issue, because Michael's argument, if valid, would dispose of the other issues that Michael raised in his appeal. In issue three, Michael argues the 418th District Court, as the court that rendered the decree, enjoyed the right of exclusive jurisdiction over all post-divorce claims that Janice filed seeking to enforce the division of property imposed by the decree. After Janice sued, Michael filed a plea to the jurisdiction contesting the 284th District Court jurisdiction over the claims Janice filed against him in the 284th District Court. The 284th District Court denied the plea.

On appeal, Michael contends that sections 9.001(a) and 9.002 of the Texas Family Code required Janice to file her claims against him in the 418th District Court because they concern property divided in the decree rendered by the 418th District Court. Michael concludes that because the 418th District Court's jurisdiction was

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<sup>1</sup> The issue relevant to the jury's damage finding includes no instructions that would have guided the jury in deciding what evidence they should consider in determining the amount of money Janice was entitled to recover.

exclusive, the 284th District Court did not have jurisdiction over Janice’s post-divorce claims that concern enforcing the terms of the decree entered when they divorced. *See* Tex. Fam. Code Ann. §§ 9.001(a), 9.002 (West Supp. 2016).

In Texas, district courts possess jurisdiction over “all actions, proceedings, and remedies, except in cases where exclusive, appellate, or original jurisdiction may be conferred by this Constitution or other law on some other court, tribunal, or administrative body.” Tex. Const. art. V, § 8. The Texas Government Code provides that district courts “may hear and determine any cause that is cognizable by courts of law or equity[.]” Tex. Gov’t Code Ann. § 24.008 (West 2004). As courts of general jurisdiction, district courts in Texas “presumably have subject matter jurisdiction unless a contrary showing is made.” *Subaru of Am., Inc. v. David McDavid Nissan, Inc.*, 84 S.W.3d 212, 220 (Tex. 2002). Whether a trial court possesses subject-matter jurisdiction over a claim is a question of law, which is reviewed under a *de novo* standard if the ruling on the challenge to the trial court’s jurisdiction is appealed. *Tex. Dep’t of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226 (Tex. 2004).

Michael argues that section 9.001(a) and 9.002 of the Texas Family Code vest exclusive jurisdiction in the 418th District Court because it is the court that rendered the decree when he and Janice divorced. To support his argument, Michael points to



the language in section 9.002 that provides the court rendering the decree “retains the power to enforce the property division” in the decree. Tex. Fam. Code Ann. § 9.002. Michael also points to language in section 9.001(a) of the Family Code, which provides that a party who divorced “may request enforcement of [the] decree by filing a suit to enforce as provided by [Chapter 9] in the court that rendered the decree.” *Id.* § 9.001(a). Michael concludes that these provisions vest exclusive jurisdiction over post-divorce actions that concern whether property was divided upon a divorce in the court that rendered the decree.

In our opinion, section 9.001(a) does not evidence a legislative intent to make the court in which spouses obtain a divorce a court of exclusive jurisdiction for post-divorce actions that concern a dispute about property acquired after the parties divorced. The Family Code provides that a party affected by a divorce decree “*may* request enforcement of [the] decree by filing a suit to enforce . . . in the court that rendered the decree.” *Id.* § 9.001(a) (emphasis added). In our opinion, the fact that section 9.001 uses the auxiliary verb “*may*” reflects the Legislature intended to make the court that granted the decree a court of permissive but not exclusive jurisdiction over disputes involving property acquired after the spouses divorced. Our conclusion that the court that rendered the divorce does not have exclusive jurisdiction over disputes concerning property acquired after the spouses divorced is supported by

*Chavez v. McNeely*, 287 S.W.3d 840, 844 (Tex. App.—Houston [1st Dist.] 2009, no pet.). In *Chavez*, the First Court of Appeals decided that a district court, which was not the court that rendered the decree, possessed jurisdiction over a post-divorce action to enforce a party’s contract rights to property that were acquired based on the terms of a decree in a divorce. *Id.* at 844-45. In rejecting the argument that the court that rendered the divorce had exclusive jurisdiction over the parties’ dispute, the First Court noted that the language in section 9.001(a) is permissive in nature, that sections 9.001 and 9.002 do not use statutory language indicating that the Legislature intended to make the court rendering the decree a court of exclusive jurisdiction over post-divorce actions to enforce contract rights acquired under the decree, and that breach of contract actions that rely on the decree invoke a district court’s powers of general jurisdiction to decide a dispute. *Id.* at 844-45. Because Janice’s claims concern contract rights awarded to her in the decree, we conclude that the 284th District Court possessed jurisdiction over Janice’s post-divorce claims even though her claims, in part, are based on the terms of the decree. We overrule Michael’s third issue.

Does Legally or Factually Sufficient Evidence Support the Jury’s Finding that Michael Breached a Fiduciary Duty Owed to Janice?

In his first issue, Michael asserts the evidence is legally and factually insufficient to support the jury’s finding that he failed to comply with the fiduciary

duty that he owed to Janice after they divorced. We review factual and legal sufficiency challenges to the evidence supporting a jury's finding under well-established standards. In issue one, Michael attacks the legal sufficiency of the evidence supporting the jury's fiduciary duty finding, an issue on which Janice had the burden of proof. Therefore, Michael's challenge is characterized as a "no evidence" challenge. *See Raw Hide Oil & Gas, Inc. v. Maxus Expl. Co.*, 766 S.W.2d 264, 275 (Tex. App.—Amarillo 1988, writ denied). In a legal sufficiency review, evidence supporting a verdict will be deemed legally sufficient to support the jury's verdict if the evidence admitted during the trial was sufficient to enable "reasonable and fair-minded people to reach the verdict under review." *City of Keller v. Wilson*, 168 S.W.3d 802, 827 (Tex. 2005). When evaluating a legal sufficiency challenge, "we credit evidence that supports the verdict if reasonable jurors could, and disregard contrary evidence unless reasonable jurors could not." *Kroger Tex. Ltd. P'ship v. Suberu*, 216 S.W.3d 788, 793 (Tex. 2006) (citing *City of Keller*, 168 S.W.3d at 827). We will sustain a legal sufficiency challenge "when, among other things, the evidence offered to establish a vital fact does not exceed a scintilla." *Suberu*, 216 S.W.3d at 793. "Evidence does not exceed a scintilla if it is 'so weak as to do no more than create a mere surmise or suspicion' that the fact exists." *Id.* (citing *Ford Motor Co. v. Ridgway*, 135 S.W.3d 598, 601 (Tex. 2004)). To prevail on his

no evidence argument, Michael must demonstrate that there was no evidence before the jury that would have allowed reasonable jurors to conclude that he breached any fiduciary duties he owed Janice following their divorce. *See Exxon Corp. v. Emerald Oil & Gas Co., L.C.*, 348 S.W.3d 194, 215 (Tex. 2011) (citing *Croucher v. Croucher*, 660 S.W.2d 55, 58 (Tex. 1983)).

Michael also challenges the factual sufficiency of the evidence supporting the jury's fiduciary duty finding. In determining whether factually sufficient evidence supports a jury's verdict, we will "set aside the verdict only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust." *Cain v. Bain*, 709 S.W.2d 175, 176 (Tex. 1986). In our review, we weigh all the evidence admitted in the case, both the evidence that favors the verdict and the evidence that is contrary to the verdict. *See Dow Chem. Co. v. Francis*, 46 S.W.3d 237, 242 (Tex. 2001).

In part, Michael argues that he did not owe Janice a fiduciary duty following their divorce because the decree did not make Janice a member of the businesses in which he held memberships upon their divorce. Generally, when spouses to a divorce are independently represented by separate attorneys, any fiduciary duty that might have existed between the spouses terminates when they divorce. *See Solares v. Solares*, 232 S.W.3d 873, 881 (Tex. App.—Dallas 2007, no pet.) (holding that "in

a contested divorce where each spouse is independently represented by counsel, the fiduciary relationship terminates”); *In re Marriage of Notash*, 118 S.W.3d 868, 872 (Tex. App.—Texarkana 2003, no pet.) (noting that any fiduciary duty between spouses terminates upon divorce).

In this case, however, the decree the 418th District Court rendered when Michael and Janice divorced awarded Janice a percentage of the interest Michael held as a member in several limited liability companies. Based on the assigned interest, Janice had an interest in any income, losses, or distributions these companies made to Michael after he and Janice divorced. By awarding Janice a percentage interest in the limited liability companies identified in the decree, it appears that the 418th District Court intended to divide the marital estate in accord with the requirements of the Texas Business Organizations Code, which provides that “on the divorce of a member, the member’s spouse, to the extent of the spouse’s membership interest, if any, is an assignee of the membership interest[.]” Tex. Bus. Orgs. Code Ann. § 101.1115(a) (West 2012). Nevertheless, as an assignee of Michael’s interest, Janice did not have the same rights in the businesses that Michael had as a member. *Id.* § 101.108(b) (West 2012). For example, as an assignee whose membership has not been approved by the companies’ respective members, Janice does not have the right to participate in the management and affairs of the companies

or to become a member of the companies. On the other hand, the Business Organizations Code allows Janice, as Michael's assignee, the right to receive a percentage of the allocations the companies made going forward after the divorce of the net of the income, gain, loss, deduction, credit, or similar items that Michael was allocated by the limited liability companies identified in the decree. *Id.* § 101.109.

Nonetheless, nothing in Chapter 101 of the Business Organizations Code creates a statutory fiduciary duty between the members of a limited company and those who become assignees of a member's rights upon a member's divorce. *See id.* §§ 101.101-.114 (West 2012). We agree with Michael's argument that the fiduciary duty he owed to Janice is not a duty imposed on him under the provisions of Chapter 101 of the Business Organizations Code. *See Kohannim v. Katoli*, 440 S.W.3d 798, 810 (Tex. App.—El Paso 2013, pet. denied) (declining to recognize that a fiduciary duty existed under the Business Organizations Code between a member and the member's former spouse), *disapproved on other grounds by Ritchie v. Rupe*, 443 S.W.3d 856, 870-71 & n.17 (Tex. 2014).

In her brief, Janice argues that Michael's fiduciary duty to turn over the portion she was entitled to receive in the benefits he received from the businesses identified in the decree arose under the Family Code provision that required Michael to turn over property that he obtained that rightfully belonged to her. *See Tex. Fam.*

Code Ann. § 9.011(b) (West 2006). Section 9.011(b) provides that “[t]he subsequent actual receipt by the non-owning party of property awarded to the owner in a decree of divorce or annulment creates a fiduciary obligation in favor of the owner and imposes a constructive trust on the property for the benefit of the owner.” *Id.* In our opinion, as Michael’s assignee, Michael had a fiduciary duty to remit to Janice her percentage of the amount of income, loss, or distributions he actually received from the businesses identified in the decree. *See id.* § 9.011; *see also* Tex. Bus. Orgs. Code Ann. § 101.109.

Michael also argues that he never received any allocations of income, gains, losses, deductions, credits, similar items, or distributions from the limited liability companies subject to Janice’s assigned interests following their divorce. *See* Tex. Bus. Orgs. Code Ann. § 101.109. However, there is evidence admitted in the trial that allowed the jury to reasonably conclude that Michael actually received some distributions from World Environmental and CIT Partners, two of the limited liability companies identified in the decree. There was also evidence before the jury that allowed the jury to conclude that Michael did not distribute Janice’s rightful percentage to the distributions he acquired from these two companies after he and Janice divorced. Consequently, our review of the evidence indicates that sufficient evidence supports the jury’s finding that Michael failed to comply with the fiduciary

duty he owed to Janice after he and Janice divorced. We overrule Michael's first issue.

Does Legally or Factually Sufficient Evidence Support  
the Full Amount of the Jury's Damage Award?

In issue two, Michael argues the evidence is legally and factually insufficient to support the jury's decision that Janice suffered \$111,520 in compensatory damages based on his failure to comply with his fiduciary duty to turn over the money he owed Janice based on her assigned interest in the businesses identified in the decree. In response, Janice asserts that Michael failed to preserve his right to appeal whether sufficient evidence was before the jury to support the jury's damage award. *See* Tex. R. Civ. P. 324 (Prerequisites of Appeal).

Our review of the record shows that Michael preserved his right to challenge the legal and factual sufficiency of the damage award by filing a post-judgment motion complaining that the evidence was legally and factually insufficient to support the jury's damage awards. Janice's argument that Michael failed to properly preserve his issue two arguments is without merit. *See Cecil v. Smith*, 804 S.W.2d 509, 511-12 (Tex. 1991) (explaining that a party may raise both factual and legal sufficiency complaints about a jury's findings by filing a motion for new trial).

Because Michael preserved his sufficiency challenge, we turn to the merits of his complaint that the evidence is insufficient to support the amount of the jury's



damage award. In reviewing the legal sufficiency of the evidence supporting a damage award, we apply the *Keller* standards. *See* 168 S.W.3d at 807. In reviewing the evidence regarding the amount of the damages Janice proved as having been caused by Michael's breach, we consider the evidence in the light most favorable to Janice, crediting favorable evidence if reasonable jurors could do so, and we disregard contrary evidence unless reasonable jurors could not. *See id.* With respect to evidence supporting the award, the evidence must enable "reasonable and fair-minded people" to award the damages that are under review. *Id.* at 827.

In discussing Michael's first issue, we have explained that there was some evidence before the jury that would have allowed reasonable jurors to conclude that Michael received some distributions from World Environmental and CIT Partners, but only a percentage of them, fifty percent based on the decree, belonged to Janice. Because the evidence supports the jury's decision to award damages in some amount, we overrule Michael's argument that the evidence is legally insufficient to support any award. *Id.*

In issue two, Michael challenges the factual sufficiency of the evidence supporting the jury's award of \$111,520 in damages that relate to Michael's failure to turn over to Janice her percentage of the distributions he received from the businesses identified in the decree. Generally, when evaluating whether sufficient

evidence supports a damages award, we measure the amount the jury awarded against the instructions in the charge to determine whether factually sufficient evidence was before the jury that supports the amount of the award. *See Sw. Energy Prod. Co. v. Berry-Helfand*, 491 S.W.3d 699, 713 (Tex. 2016). However, in this case, except for an instruction indicating the amount the jury awarded should be reasonable, the charge gave the jury no guidance about how to measure the compensation Janice was entitled to receive based on Michael's breach.

Generally, juries may "award damages within the range of evidence presented at trial." *Id.* at 713 (citing *Gulf States Utils. Co. v. Low*, 79 S.W.3d 561, 566 (Tex. 2002)). In this case, the breach concerns Michael's failure to remit the amounts Janice was entitled to receive as his assignee of the net allocations the businesses identified in the decree paid to Michael for income, gains, losses, deductions, credits, or similar items and to remit to Janice her rightful share of any distributions from the businesses. While Janice's attorney asked the jury to award Janice damages based on the value of all of the benefits Michael received from these businesses identified in the decree, the decree did not assign Janice a right to every benefit Michael received from these businesses. Moreover, there was no evidence that any of the businesses identified in the decree distributed any income, gains, losses, deductions, or credits to their members. Instead, in years the businesses showed

gains, the members' capital accounts were adjusted but no cash was allocated to the members. In years the businesses had losses, the members' capital accounts were adjusted, but the losses were not allocated to the members. The evidence that shows how the income and losses were handled by the businesses includes World Environmental's tax returns for the years 2010-2013 and various K1s that Michael received from World Environmental. While five witnesses testified during the trial, only four of these addressed the activities conducted by the businesses identified in the decree: Charles Hall, Michael, Janice, and Rivers, who explained how she accounted for World Environmental's activities on the documents that it filed with the Internal Revenue Service. Generally, the testimony addressing the business activities of the businesses relevant to Janice's assigned interest reflects that the returns and K1's properly accounted for World Environmental's activities. Janice's testimony does not directly address whether the companies had properly accounted for the income and expenses they generated after she and Michael divorced. While Janice did testify at trial that World Environmental paid some of Michael's personal expenses, River's explained that the personal expenses that World Environmental paid on Michael's behalf were reflected in Michael's K1s as distributions the company made to him, and with respect to World Environmental, the distributions

Michael received because the company paid personal expenses are the only distributions he received from the company in which Janice had an assigned interest.

Based on the argument Janice made in the trial, it appears the bulk of the \$111,520 awarded by the jury consists of the income Michael received from World Environmental in return for the services that he provided to the company. World Environmental accounted for the guaranteed payment as an expense in its overall operations. The evidence in the trial also shows that both Charles and Michael received guaranteed payments. Charles, Michael, and Rivers explained that the guaranteed payments represented payments for the services that Charles and Michael provided to World Environmental in lieu of salaries. There is also evidence showing that the amount they received in guaranteed payment amounts was established based on the market for individuals with expertise similar to the expertise they provided to World Environmental, and there was no testimony in the trial from which the jury could reasonably conclude that the amounts they received in guaranteed payments in return for their services they provided to the company were excessive. The testimony and the records before the jury did not show that the guaranteed payments that World Environmental paid changed significantly after Michael and Janice divorced. Importantly, the decree in Janice and Michael's divorce did not give Janice a percentage interest in the payments, representing Michael's salary after the divorce

from his work as an environmental consultant. In our opinion, the guaranteed payments World Environmental paid Michael, standing alone, is but one part of World Environmental's operations so it was not individually an item that World Environmental allocated to its members, nor were the payments distributions allocated by World Environmental to its members. *See* Tex. Bus. Orgs. Code Ann. § 101.109(1), (2). It appears the jury's damage award is excessive primarily because the jury accepted the argument of Janice's attorney that Janice was entitled to half of all of the benefits Michael received from World Environmental without regard to whether such benefits were allocated to him on the basis of his ownership interest in World Environmental.

Our review of the evidence shows that Michael received distributions of approximately \$5,000 from the businesses in which Janice was his assignee after he and Janice divorced. Of the \$5,000 Michael actually received, only fifty percent, or approximately \$2,500 rightfully belongs to Janice. The evidence before the jury did not allow the jury to conclude that the limited liability companies allocated any net income, gains, losses, deductions, credits, or similar items to their members during the years following Janice and Michael's divorce. Although World Environmental's returns reflect that it had annual losses in some years and annual gains in others, these were accounted for by adjusting the member's capital accounts and the net

gains and net losses were not shown to have been allocated to the businesses' members in a way that resulted in a direct monetary benefit at year-end to the company's members. Finally, there was no testimony during the trial showing that the gains, losses, deductions, credits, similar items, or the distributions were not properly accounted for by World Environmental in the documents that it filed with the Internal Revenue Service.

In our opinion, the jury's award is not within the range of damages established based on the evidence admitted in the trial regarding the damages that resulted from Michael's breach of the fiduciary duty he owed to Janice. We hold that the jury's damage award is excessive, and we sustain Michael's second issue. *See Sw. Energy Prod. Co.*, 491 S.W.3d at 713.

In the remaining issues Michael raises in his brief, he complains that the evidence before the jury is insufficient to support the jury's award of \$130,000 in exemplary damages and \$111,520 for disgorgement. Rule 44.1 of the Texas Rules of Appellate Procedure provides that an appellate court "may not order a separate trial solely on unliquidated damages if liability is contested." Tex. R. App. P. 44.1(b). In the trial and in the appeal, Michael contested whether he breached the fiduciary duty that he owed to Janice. Given that the exemplary damage award is unliquidated, we are unable to suggest the amount of an appropriate remittitur for

that award. *See* Tex. R. App. P. 46.3. The disgorgement award appears to us to constitute a double recovery, as the jury awarded the same amount that it awarded to compensate Janice based on its answer to the breach of fiduciary duty question and there was no evidence showing that Michael used the approximately \$2,500 he withheld from Janice to obtain additional benefits that should, in fairness, also be disgorged. We further note that our impression that the award is a double recovery probably occurred because the damages issue on disgorgement failed to restrict the jury from compensating Janice twice for the same loss. *See Parkway Co. v. Woodruff*, 901 S.W.2d 434, 441 (Tex. 1995) (“Texas law does not permit double recovery.”).

Under the circumstances, and because we have sustained issue two, we remand Janice’s claims against Michael for retrial on all of Janice’s theories of recovery. Tex. R. App. P. 44.1; *see also Minn. Mining & Mfg. Co. v. Nishika Ltd.*, 953 S.W.2d 733, 740 (Tex. 1997).

Based on Janice’s Cross-Appeal, is Janice Entitled to Have  
the Trial Court consider Affirming the Judgment on  
the Jury’s Breach of Contract Findings?

In her cross-appeal, Janice argues that should Michael prevail, we should remand the case to the trial court with instructions to require the trial court to render judgment in Janice’s favor based on the jury’s breach of contract findings. However,

we disagree the judgment is sustainable on Janice's breach of contract theory. The jury awarded \$111,331 in contract damages, but the jury's award on Janice's contract theory suffers from the same flaws that has resulted in our reversing the fiduciary duty award. *See Sw. Energy Prod. Co.*, 491 S.W.3d at 713. In considering whether a judgment can be entered on Janice's breach of contract claim, it appears the jury improperly considered the guaranteed payments and fringe benefits Michael received from working for World Environmental as items Janice was entitled to participate in based on her assigned interest in World Environmental. We have explained that while Janice was entitled to receive a percentage of the benefits World Environmental allocated to its members, that interest did not give her the right to receive any of the income Michael received in return for the work he performed for the company. Janice is not entitled to a remand to require the trial court to perform a useless task. *See Mackey v. Lucy Prods. Corp.*, 239 S.W.2d 607, 608 (Tex. 1951) ("The law does not require the doing of a vain and useless thing, and by our opinions and judgments we will not so require."). We overrule Janice's request asking that we remand the case with instructions to render another judgment that is also excessive under the evidence admitted in the trial.



### Should the Judgment be Reformed?

In issue one, World Environmental complains that the trial court erred by rendering a judgment declaring that Janice “has owned” an interest in World Environmental. According to World Environmental, Janice does not own a membership interest as Michael’s assignee, but the language extending declaratory relief the trial court used in the judgment indicates she owns an interest in World Environmental.

While the judgment declares Janice has owned a percentage interest in World Environmental since she and Michael divorced, the sentence is then modified by a qualifying phrase, stating that Janice holds her interest “with the rights and duties of an assignee of a membership interest as set forth in Section 101.109” of the Texas Business Organizations Code. *See* Tex. Bus. Orgs. Code Ann. § 101.109. In our opinion, the qualifying phrase makes it clear that Janice is not an owner of the company, but instead that she has an interest in World Environmental allowing her to participate in the organization as an assignee.

For example, section 101.109 of the Business Organizations Code states that an assignee “is entitled to become a member of the company on the approval of all of the company’s members.” *See id.* § 101.109(b). Nothing in the record suggests that World Environmental’s members have approved Janice’s membership, and the

declaratory relief granted in the judgment does not suggest otherwise. As an assignee of a limited liability company whose membership has not been approved by the company's members, Janice is not entitled to participate in the management and affairs of the company, become a member of the company, or exercise any rights of a member of the company except with respect to the rights she has as an assignee under the provisions found in section 101.109. *See id.* § 101.108(b). As an assignee of Michael's membership interest, section 101.109 allows Janice, whose membership has not been approved, to receive the net of the businesses' respective incomes, gains, losses, deductions, credits, and similar items that Michael is entitled to receive, as well as distributions. *See id.* § 101.109(a). Based on the language the trial court used in granting Janice's claim for declaratory relief, the judgment is clear that Janice's rights are those of an assignee under the Business Organizations Act, and the language in the judgment does not grant Janice full ownership in the business with the same rights that are held by World Environmental's approved members. World Environmental's first issue is overruled.

In its second issue, World Environmental argues the trial court erred when it made World Environmental jointly and severally liable for the attorney's fees awarded on Janice's claim for declaratory relief. In her brief, Janice states that she agrees that the language in the judgment making World Environmental liable for

attorney's fees should be deleted from the judgment. Accordingly, we delete the paragraph in the judgment stating that World Environmental is "jointly and severally liable to [Janice] for \$25,000.00 in attorneys' fees determined by the Court as reasonable and necessary in obtaining [Janice's] requested declarations." We do not reach the merits of World Environmental's argument in issue two given that its complaint that it was cast in judgment to pay attorney's fees is now moot. *See* Tex. R. App. P. 47.1.

### Conclusion

We reverse and remand the judgment against Michael on Janice's fiduciary duty and breach of contract claims, and we order that on retrial, the trial court conduct another trial on Janice's claims against Michael regarding those claims. Michael did not raise any issues in his brief complaining about the trial court's award of declaratory relief, the trial court's award of attorney's fees against him on Janice's declaratory judgment claim, or the trial court's award of sanctions. As to Michael, the award of declaratory relief, attorney's fees, and sanctions are affirmed. Because resolving Michael's remaining issues would not result in relief greater than a new trial on Janice's breach of contract and breach of fiduciary duty claims, we do not reach his remaining issues. *See* Tex. R. App. P. 47.1. Finally, we reform the

judgment as to World Environmental to delete the language in the judgment making World Environmental liable for attorney's fees.

REVERSED AND REMANDED IN PART; AFFIRMED IN PART;  
AFFIRMED AS REFORMED IN PART.

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HOLLIS HORTON  
Justice

Submitted on May 4, 2016  
Opinion Delivered May 25, 2017

Before McKeithen, C.J., Kreger and Horton, JJ.