# COURT OF APPEALS
**SECOND DISTRICT OF TEXAS**
**FORT WORTH**

**NO. 02-15-00357-CV**

M&M JOINT VENTURE AND LEDFORD E. WHITE AND LEDFORD E. WHITE, P.C. — APPELLANTS

V.

GWENDOLYN GENE LAYTON AND TROYLYNN ANN LAYTON — APPELLEES

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FROM THE 141ST DISTRICT COURT OF TARRANT COUNTY
TRIAL COURT NO. 141-271449-14

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## MEMORANDUM OPINION[1]

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Appellees Gwendolyn Gene Layton (Gwen) and Troylynn Ann Layton, husband and wife, sued appellants Ledford E. White and Ledford E. White, P.C. (White P.C.) (collectively the White Appellants) and appellant M&M Joint Venture

[1]*See* Tex. R. App. P. 47.4.

when they were not repaid funds they had provided, at White's suggestion, to White's friends. After a jury trial, the trial court rendered a judgment awarding the Laytons actual damages against the White Appellants and M&M, jointly and severally; additional actual damages and exemplary damages against the White Appellants; and expert witness fees, court costs, and costs for deposition copies against the White Appellants and M&M, jointly and severally. The White Appellants and M&M appeal. We affirm in part and reverse in part.[2]

## I. Background

The Laytons have known White, an attorney, since the early 1980s. He represented them in various transactions, including the sale of their business in 1999. Over the years, the Laytons occasionally made loans to some of White's acquaintances. The Laytons were repaid for each loan, with the following exceptions relevant to this appeal:

- a $30,000 loan they made in 1997 to White and his friend and client Alton Isbell for paving roads on property that Isbell was developing in Crowley, Texas (the $30K Crowley Loan);
- a $250,000 loan to Isbell in 2000 (the $250K Crowley Loan) for developing property in Crowley;

[2]The undersigned was assigned authorship when the originally designated author retired on December 31, 2016.

- $200,000 provided to White in 2000 to hold in escrow for White's friend and client Mike Parks to use as a line of credit for buying inventory for Parks's used car business (the First Floor Plan); and
- $200,000 given to White in 2001 for use by other car dealerships to buy inventory (the Second Floor Plan).

The Laytons' claims arise out of these four deals, which are discussed more below.[3]

*Isbell Acquires Property in Crowley*

In the early 1990s, Isbell owned Alco Contractors & Associates, Inc., and through Alco acquired multiple tracts making up approximately 512 acres in Crowley (the Crowley Property). White represented Isbell in the purchase. White was then a partner in a law firm with Kent Davis.

Through Alco, Isbell deeded 308.11 acres of the Crowley Property to Stone Gate Village,[4] Inc., an entity that he and his wife owned, and the remaining 204.67 acres to Deer Creek Estates, another entity that they owned. White prepared the deeds for both conveyances. Isbell began developing parts of the Crowley Property.

[3]The Laytons testified below that they were also not repaid for two smaller loans: a $50,000 loan to Isbell in 2001, unrelated to development of the Crowley property, and $13,000 to White at his request for unspecified reasons in 2013. However, these loans were not the basis of their claims against the White Appellants.

[4]In the record, this entity is sometimes spelled as "Stonegate." The deed lists the entity's name as "Stone Gate," and we use that spelling.

*1997–2001: White Solicits the Funds from the Laytons for the Crowley Property Development and Involves the Laytons in Two Floor Plans*[5]

White solicited the $30K Crowley Loan from the Laytons in 1997. He told the Laytons that Isbell needed the money to pave roads on part of the Crowley Property, and they agreed to provide the funds. White drew up a promissory note naming himself and Isbell as the note's makers. Under the note's terms, each maker was responsible for the entire amount of the note. The note, due in twenty-one days, was not timely paid. Gwen asked White about repayment, but White told him not to worry about it because the loan was accruing interest.

In December 1999, the Laytons sold their business for $2.3 million. White represented them in the sale.

In early 2000, White asked the Laytons to loan Isbell another $250,000 for development on the Crowley Property. White told Gwen that Isbell was working on a deal to sell some of the land to Kroger and that the Laytons would be repaid from the sale proceeds. The Laytons agreed to make the $250K Crowley Loan and on March 10, 2000, wrote a check for $250,000, payable to White's law firm. White did not advise the Laytons to obtain collateral for the $250K Crowley Loan or to get the agreement in writing.

In November 2000, White approached Gwen about the First Floor Plan for Parks's benefit. White proposed that the Laytons provide $200,000 to White to

[5]A "floor plan" is a revolving line of credit used by car dealerships to finance inventory. The titles to the cars purchased by the dealership serve as security for money advanced under the line of credit.

hold in escrow for Parks to use as a line of credit to purchase inventory for his dealership. Under the proposed plan, if Parks drew on the funds to buy a car, he would give the car title to White to hold as collateral. Once Parks sold the car, he would return the purchase money and retrieve the title from White. Parks would pay the Laytons draft fees of $100 per car and ten percent interest on the sale.

The Laytons agreed to the First Floor Plan[6] and gave White two checks: a personal check for $100,000, written on November 29, 2000, payable to White, and a cashier's check for $100,000, dated November 28, 2000, payable to and endorsed by the Laytons. White did not advise the Laytons to obtain a written contract. For seven years, the Laytons received interest payments and the car draft fees from the First Floor Plan.

In August 2001, White approached Gwen about the Second Floor Plan. White told Gwen that Parks knew other car dealers who could benefit from a similar arrangement. Under this proposed deal, instead of giving the draft fees directly to the Laytons, White would hold the draft fees and interest payments in an account and ultimately distribute fifty percent to the Laytons, twenty-five percent to Parks, and twenty-five percent to White.[7] The Laytons agreed and

[6]The Laytons had previously made loans to Parks through White, and those loans had been repaid.

[7]Gwen testified that White told him that the other fifty percent would be paid to Parks, but Parks testified that he and White had agreed that White would receive twenty-five percent.

gave White a check for $200,000, payable to White, again without a written agreement or note.

Also in 2001, Isbell, White, and Gwen went on a hunting trip to Alaska. While there, Isbell told Gwen that he was working on the deal to sell land to Kroger, and he told Gwen, "I bet you'll be glad to get your money back."

*2003: Isbell & White Create M&M and Lucky IW*

In 2003, Isbell and White created M&M as co-joint venturers, each with a fifty-percent ownership interest. M&M's stated purpose was to hold approximately forty-eight acres[8] of the Crowley Property for investment purposes (the M&M Acreage). Isbell and White also formed Lucky IW, a partnership in which they were the only members.

*2005–2007: Gwen Begins to Ask White about His Money*

White periodically reported to Gwen's wife Troylynn how much interest had accrued in the account holding the Second Floor Plan funds. In 2005, after White told them that the account had stopped drawing interest, the Laytons decided to end the arrangement. White told Gwen, however, that he no longer had the Laytons' money in the account because Parks had withdrawn it all. Gwen asked if he could sue Parks for embezzlement; White said that "the correct term would be fraud, but no, [he would] take care of it."

[8]As discussed below, the deeds that conveyed or attempted to convey property to M&M conveyed less than forty-eight acres.

In 2006 or 2007, Gwen drove by part of the Crowley Property and discovered that a shopping center had been built on part of it, including a Kroger store. He called White and asked about the return of the $280,000 that he and Troylynn had provided under the two Crowley Loans. White told him that Isbell needed all the proceeds from the Kroger sale for further development of the Crowley Property. White assured him, however, that there were forty-eight acres "left on there" that Gwen was "vested" in.

White gave Gwen's phone number to Isbell and asked him to invite Gwen out to the M&M Acreage and reassure Gwen that his money was safe. Isbell drove Gwen around the M&M Acreage and told him, "Here is your property, here is where your money is right here."[9] Gwen accepted White's and Isbell's reassurances that he would be repaid from the M&M Acreage.

When Gwen and White met over the following years, Gwen asked White about the sale of the M&M Acreage, and on each occasion, White told Gwen that he had had some interest from potential buyers but no sale yet.[10]

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[9]Gwen testified that Isbell drove him around the M&M Acreage in 2006 or 2007. Later, after M&M's attorney reminded Gwen of his prior deposition testimony that this drive occurred in 2008, he testified that if he had previously said it was 2008, then his prior statement was probably correct. Isbell, however, testified that it was prior to 2008.

[10]White made similar representations to Davis, his then-law partner. *See Davis v. White*, No. 02-13-00191-CV, 2014 WL 7387045, at *3 (Tex. App.—Fort Worth Dec. 29, 2014) (mem. op.), *vacated and remanded*, 475 S.W.3d 783 (Tex. 2015). Isbell gave shares of M&M to White as payment for legal services rendered by White. *Id.* at *1. Under their partnership, Davis was entitled to a share of fees generated by White. *Id.* White failed to pay Davis his share of fees

*2007–2010: White Dissolves Law Firm and Tells Gwen About the Sarita House, and M&M Sells Interests in M&M Acreage*

In late 2006 to early 2007, White and Davis dissolved their law firm.

Payments under the First Floor Plan slowed down after 2005 and stopped by 2007. That year, Gwen asked to end the First Floor Plan. White told Gwen that Parks had all the funds from the plan, but Gwen need not worry because White held the deed to Parks's home on Sarita Drive in Fort Worth (the Sarita house). White told Gwen he would work to get the money back, but if Parks could not repay the money, they could foreclose on the house.

White drove the Laytons by the Sarita house and told them that it was worth over $1,000,000 and had only a "small" home improvement loan on it. In reality, the home was burdened with a $450,000 home equity loan, borrowed by White (primarily for Parks's benefit[11]), and the bank that made the home equity loan had appraised the house at $795,000. Although White represented to the Laytons that the house belonged to Parks, the deed was in White's name.

Parks explained at trial why White held the deed to the house. In 1998, Parks and his wife wanted to buy the home through Parks's mother's trust (a trust that White had set up). The trustee signed the sales contract for the house, but the mortgage company would not loan money to the trust, so Parks asked

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from the proceeds generated from sales of the M&M Acreage, and when Davis asked White about the property in 2010, White told him that "'we' were 'still trying to sell it.'" *Id.* at *3.

[11]White used $20,000 of the funds for a vacation.

White to take out the loan to fund the $295,000 purchase price. Parks asked White for his help "[b]ecause the Trust had helped [White] out over the years."[12] White agreed to take out the loan to finance the purchase, borrowing the money from a mortgage company he had previously done work for. White acknowledged at trial that the Sarita house "was supposed to be [Parks]'s house" and was "[g]oing to be [Parks's] house." Parks testified that White was given a check for the down payment from trust funds, that trust funds paid the mortgage and taxes on the property for fourteen years, and that he and his wife spent another $400,000 of trust money and his wife's inheritance remodeling the home. Parks believed his mother's trust owned the house.

Meanwhile, at some point in 2007 or 2008, Gwen drove by the M&M Acreage and saw tank batteries on it. Believing that he and his wife Troylynn were "vested" in the M&M Acreage, he asked White if "we" held the mineral rights, and White told him no, "[w]e don't have any." In 2007, M&M signed a ratification of mineral leases that had been executed by Deer Creek, for which Chesapeake Exploration, L.P. paid M&M $650,000. That same year, M&M sold five acres of the surface to Chesapeake for $179,000. M&M received mineral royalties of $89,000 in 2008 and of $57,000 in 2009.

[12]Parks testified that he had twice asked his mother to loan money to White, once to put in a swimming pool at White's house and once for White to purchase some property.

In 2008, White assigned his interest in their Lucky IW partnership to Isbell "in so far as it affects the partnership property in Johnson County, Texas."[13] In October 2010, Isbell assigned his interest in M&M to White by an assignment retroactively effective as of September 22, 2008.

In March 2010, M&M sold an overriding royalty interest to a group of investors for $180,000. White contended that M&M executed the assignment because the assignees would not "do the deal" without M&M's signature because Chesapeake had "tagged" ownership on M&M. Nevertheless, White did not dispute that M&M received the proceeds, and he acknowledged that he had not submitted documentation to Chesapeake to clarify ownership. In 2011, M&M sold another 2.5 acres of the M&M Acreage to the City of Crowley for $152,000. The transactions were conducted through the real estate escrow account of White P.C. The Laytons were not informed of these sales and received none of the proceeds.

Also in 2010, Gwen asked White to foreclose on the Sarita house so that he could recoup the $400,000 they had provided for the First and Second Floor Plans. White told Gwen not to worry and that he was working with Parks for payment.

In December 2011, Davis, White's former law partner, sued White. *See Davis*, 2014 WL 7387045, at *4.

[13]The assignment stated that Lucky IW owned properties in Johnson County and Tarrant County.

*2012–2013: White Evicts Parks and Gwen Learns the Laytons' Money is Gone*

In November 2012, White and Gwen went on a hunting trip together, and during that trip, they discussed the M&M Acreage. White told Gwen that Isbell was "out of the project" and had no ownership in the property any more, and "there was nobody left in it" but Gwen and White. On the same trip, Gwen and White spoke about the money owed to the Laytons under the Crowley Loans and the First and Second Floor Plans. White assured him the money would be repaid. According to Parks's trial testimony, however, he had already repaid White all the money he owed the Laytons from the First and Second Floor Plans.

In November or December 2012, White began eviction proceedings against Parks. Parks wanted to pay off the mortgage and keep the house, but White refused and evicted him. White sold the house for $630,000 but failed to give the Laytons any proceeds from the sale. Although White had taken out the home equity loan on the Sarita house, he told Gwen that he had been surprised to discover that there was a $500,000 loan against it.[14] White told Gwen that because of that loan, there were no funds remaining after the sale to pay the Laytons.

In April 2013, Davis prevailed in his suit against White, recovering actual and exemplary damages, and the trial court imposed a constructive trust

[14]White told Gwen that the loan amount was for $500,000, rather than the actual amount of $450,000.

awarding Davis fifty-percent ownership of M&M. *See Davis*, 2014 WL 7387045, at *4; *Davis v. White*, No. 096-257264-11, 2013 WL 6432019 (Tex. Dist. 2013).

That same month, White and Gwen went on another hunting trip together. At the end of the trip, as White was leaving, he told Gwen that the Laytons would never get all their money back from the two Crowley Loans. When Gwen asked about the money from the First and Second Floor Plans, White gave no answer and just stared at him. Gwen finally turned around and walked off.

In August 2013, the Laytons sued White, Isbell, and M&M. After Isbell filed for bankruptcy,[15] the trial court granted the Laytons' motion to sever the claims against Isbell.

*The Laytons' Suit*

The Laytons sued for, among other claims, common law fraud, statutory fraud, negligent and grossly negligent misrepresentation, breach of fiduciary duty, theft, conspiracy, and aiding and abetting. They also sought a declaratory judgment and a constructive trust, and they raised the doctrines of fraudulent concealment and the discovery rule.

The case was tried to a jury in February 2015. The court's charge instructed the jury that, as the Laytons' attorney, White owed them a fiduciary

[15]Deer Creek also filed for bankruptcy. White paid the retainer for Deer Creek's attorney in the bankruptcy.

duty.[16] The jury found that the White Appellants committed fraud and statutory fraud against the Laytons; that White had actual awareness of the falsity of the representations on which the jury based its fraud finding; that White and White P.C. breached their fiduciary duties to the Laytons; that White committed theft of the Laytons' property; that White was 100% responsible and Parks was 0% liable for the Laytons' injuries from the theft; that the White Appellants and the Laytons were all negligent; and that White was 60% liable for the Laytons' injuries from the negligence, White P.C. was 10% liable, and Gwen and Troylynn were 20% and 10% responsible, respectively.

The jury further found that White made a negligent misrepresentation on which Gwen justifiably relied, that $400,000 would fairly and reasonably compensate the Laytons for their damages with respect to the First and Second Floor Plans, and that $280,000 would compensate them for the amount of money they parted with in connection with the Crowley Property. The jury awarded the Laytons $4,000 for their theft claims.

With respect to M&M, the jury found that M&M committed fraud against the Laytons, that $280,000 would compensate the Laytons for their damages from that fraud, that the Laytons substantially relied to their detriment on M&M's promises, and that the reliance was foreseeable, but that their damages from that

[16]The White Appellants do not argue what White P.C. is not responsible for White's acts as an attorney. *See GTE Sw., Inc. v. Bruce*, 998 S.W.2d 605, 618 (Tex. 1999) ("When actions are taken by a vice-principal of a corporation, those acts may be deemed to be the acts of the corporation itself.").

reliance were $0. The jury found that M&M was part of a conspiracy relating to the Crowley Property that damaged the Laytons and that M&M aided and abetted White and White P.C. The jury assessed the Laytons' reasonable attorney's fees at $150,000 and found that the Laytons' expert witness fees, costs for copies of depositions, and costs of court totaled $12,008.

The jury further found that by April 2013, the Laytons, in the exercise of reasonable diligence, should have discovered the White Appellants' fraud, that the White Appellants knowingly and actively concealed their tortious acts or failed to disclose them, and that the Laytons should have discovered the concealment or failure to disclose by April 2013. Finally, the jury found that the harm to the Laytons resulted from malice, fraud, or gross negligence of the White Appellants, and the jury awarded exemplary damages of $100,000 against White and $100,000 against White P.C.

The trial court signed a final judgment awarding the Laytons $280,000 from White, White P.C., and M&M, jointly and severally, for damages relating to the Crowley Property; $400,000 against the White Appellants, jointly and severally, for damages relating to the two Floor Plans; exemplary damages of $100,000 against White and $100,000 against White P.C.; $100,000 in attorney's fees against White; and $12,008 for expert witness fees, costs of copies of depositions, and courts costs against White and M&M, jointly and severally. The trial court imposed a constructive trust on the M&M Acreage "pursuant to and consistent with the aforementioned liability findings against and to prevent the

unjust enrichment of [the White Appellants] and M&M Joint Venture," "including the proceeds from M&M Joint Venture's sale of the M&M Acreage. The White Appellants and M&M then filed this appeal.

## II. Legal and Factual Sufficiency

M&M and the White Appellants challenge the legal and factual sufficiency of the evidence supporting a number of the jury's findings.

We may sustain a legal sufficiency challenge only when (1) the record discloses a complete absence of evidence of a vital fact, (2) the court is barred by rules of law or of evidence from giving weight to the only evidence offered to prove a vital fact, (3) the evidence offered to prove a vital fact is no more than a mere scintilla, or (4) the evidence establishes conclusively the opposite of a vital fact. *Ford Motor Co. v. Castillo*, 444 S.W.3d 616, 620 (Tex. 2014); *Uniroyal Goodrich Tire Co. v. Martinez*, 977 S.W.2d 328, 334 (Tex. 1998), *cert. denied*, 526 U.S. 1040 (1999). In determining whether there is legally sufficient evidence to support the finding under review, we must consider evidence favorable to the finding if a reasonable factfinder could and disregard evidence contrary to the finding unless a reasonable factfinder could not. *Cent. Ready Mix Concrete Co. v. Islas*, 228 S.W.3d 649, 651 (Tex. 2007); *City of Keller v. Wilson*, 168 S.W.3d 802, 807, 827 (Tex. 2005).

Anything more than a scintilla of evidence is legally sufficient to support the finding. *Cont'l Coffee Prods. Co. v. Cazarez*, 937 S.W.2d 444, 450 (Tex. 1996); *Leitch v. Hornsby*, 935 S.W.2d 114, 118 (Tex. 1996). More than a scintilla of

evidence exists if the evidence furnishes some reasonable basis for differing conclusions by reasonable minds about the existence of a vital fact. *Rocor Int'l, Inc. v. Nat'l Union Fire Ins. Co.*, 77 S.W.3d 253, 262 (Tex. 2002).

When reviewing an assertion that the evidence is factually insufficient to support a finding, we set aside the finding only if, after considering and weighing all the evidence in the record pertinent to that finding, we determine that the credible evidence supporting the finding is so weak, or so contrary to the overwhelming weight of all the evidence, that the answer should be set aside and a new trial ordered. *Pool v. Ford Motor Co.*, 715 S.W.2d 629, 635 (Tex. 1986) (op. on reh'g); *Cain v. Bain*, 709 S.W.2d 175, 176 (Tex. 1986); *Garza v. Alviar*, 395 S.W.2d 821, 823 (Tex. 1965).

### III. The White Appellants' Appeal

In eight issues, the White Appellants argue that limitations barred the Laytons' claims; challenge the factual sufficiency of the jury's findings regarding when the Laytons should have discovered White's wrongdoings; and challenge the legal sufficiency of the evidence to support the jury's findings (on common law fraud, statutory fraud, theft, and negligent misrepresentation), the award of attorney's fees, and the award of exemplary damages.

### A. Factual Sufficiency of the Jury's Findings on Questions 19 and 21

In their first issue, the White Appellants challenge the factual sufficiency of jury's answers to questions 19 and 21 in the court's charge.[17] Those questions addressed whether the doctrines of the discovery rule and fraudulent concealment applied to the Laytons' claims. Question 19 asked by what date the Laytons, in the exercise of reasonable diligence, should have discovered the White Appellants' fraudulent acts. Question 21 asked by what date the Laytons, in the exercise of reasonable care and diligence, should have discovered the White Appellants' knowing and active concealment or failure to disclose. For both questions, the jury answered April 2013.

#### 1. The Discovery Rule and Fraudulent Concealment

Both the discovery rule and fraudulent concealment can delay the accrual of a cause of action. *S.V. v. R.V.*, 933 S.W.2d 1, 4, 6 (Tex. 1996). For both doctrines, their estoppel effect ends when a party has actual knowledge of their injury or "when a party learns of facts, conditions, or circumstances which would cause a reasonably prudent person to make inquiry, which, if pursued, would lead to the discovery of the concealed cause of action." *Borderlon v. Peck*, 661

[17]The White Appellants assert in their brief that their first issue calls for a legal-sufficiency review. However, they complain that the jury's findings to questions 19 and 21 "are against the great weight and preponderance of the evidence," describe the factual-sufficiency standard of review, and cite case law describing and applying the factual-sufficiency standard. Accordingly, we read their issue as challenging the jury's findings on questions 19 and 21 for factual sufficiency.

S.W.2d 907, 909 (Tex. 1983) (discussing fraudulent concealment); *see also Valdez v. Hollenbeck*, 465 S.W.3d 217, 229 (Tex. 2015) (stating essentially the same about the discovery rule). "Knowledge of such facts is in law equivalent to knowledge of the cause of action." *Borderlon*, 661 S.W.2d at 909.

"Repeated assurances of the truth of the original representation may constitute an affirmative concealment of the fraud and excuse a failure to exercise diligence in discovering the falsity thereof" in the absence of actual knowledge of the extent of the false representations. *Stafford v. Wilkinson*, 304 S.W.2d 364, 367 (Tex. 1957). Further, for both fraudulent concealment and the discovery rule, the existence of a fiduciary relationship may affect a person's ability to discover a concealed cause of action. "A person to whom a fiduciary duty is owed may be unable to inquire into the fiduciary's actions or may be unaware of the need to do so." *Valdez*, 465 S.W.3d at 231. "Moreover, even if inquiry is made, '[f]acts which might ordinarily require investigation likely may not excite suspicion where a fiduciary relationship is involved.'" *Id.* Thus, a "defendant [who] is under a duty to make a disclosure but conceals the existence of a cause of action from the party to whom it belongs . . . is estopped from relying on the defense of limitations until the party learns of the right of action or should reasonably have discovered it." *Id.* at 229–30; *see also Bright v. Addison*, 171 S.W.3d 588, 597 (Tex. App.—Dallas 2005, pets. denied) ("The breach of the duty of full disclosure by a fiduciary is tantamount to fraudulent concealment.").

"Still, when the fact of misconduct is evident, diligent inquiry is required." *Valdez*, 465 S.W.3d at 231.

The White Appellants had the burden to plead, prove, and secure findings to sustain their defense of limitations, *see Woods v. William M. Mercer, Inc.*, 769 S.W.2d 515, 517 (Tex. 1988), while the Laytons had the burden to prove the applicability of the discovery rule and fraudulent concealment. *See id.* (putting burden of proving applicability of discovery rule on its proponent); *Weaver v. Witt*, 561 S.W.2d 792, 793 (Tex. 1977) (putting burden of proving fraudulent concealment on the plaintiff).

**2. Knowledge of Claims Related to the Crowley Loans**

The White Appellants contend that by 2008, the Laytons had actual knowledge of their causes of action related to the two Crowley Loans or had knowledge of facts that should have prompted their investigation. They rely on two events for this argument. First, they cite Isbell's statements to Gwen on the 2001 hunting trip about negotiations with Kroger and about Gwen getting his money back. The White Appellants argue that when the Laytons were not repaid soon after that trip, the Laytons were on notice to investigate, and they should have exercised reasonable diligence to discover whether Kroger had bought the land and why they had not been repaid. Second, the White Appellants contend that the Laytons had actual knowledge by 2008 because by that time, Gwen had discovered that Kroger had bought the land, and both knew that they had not

been repaid. We disagree that the jury's findings on the discovery rule[18] or fraudulent concealment were against the great weight and preponderance of the evidence.

Regarding Isbell's statements on the 2001 hunting trip, they were not the kind of statements that should have prompted the Laytons, with reasonable diligence, to discover White's wrongful acts. There was no evidence that the Laytons were experienced in real estate investments or had knowledge of how long commercial real estate transactions take to negotiate and close. Isbell did not represent to Gwen that the sale was on the verge of closing; his statement suggested only that he was working on selling the land. On the other hand, there was evidence that the Laytons relied on White, their longtime friend and attorney, to keep them informed of the progress of the sale and that White failed to do so.

Similarly, Gwen's learning of the Kroger sale did not give him or Troylynn actual knowledge of their injury. There was no contractual agreement requiring repayment of the funds by a certain date. Thus, that the Laytons had not been repaid by a certain date would not give them actual knowledge of injury and did not make the injury evident. At best, it gave the Laytons reason to investigate. And Gwen did investigate—he asked White about their money. White reassured Gwen that their money was being used on the M&M Acreage and that the

[18]The White Appellants do not argue that the Laytons' claims are not the types of claims to which the discovery rule applies. *See Valdez*, 465 S.W.3d at 229 (stating that whether the discovery rule applies is decided on a categorical basis rather than a fact-specific inquiry).

Laytons were "vested" in that property, that they would be repaid when that property sold, and that the property was on the market. When Gwen asked White about whether any of the M&M Acreage had been sold, White lied to him, and he did so while M&M was selling interests in that same property. And Gwen testified that he had always been paid back on other business dealings White had involved him in over the years and that White was his longtime lawyer and friend whom he had not previously had any reason to doubt.

Thus, the jury heard evidence that White actively concealed the status of sales on the M&M Acreage while assuring the Laytons they would be repaid when sales were made. Given their longstanding friendship, their previous experience with investments with White, and—importantly—the fiduciary nature of their relationship, the Laytons' suspicions, if any, were assuaged by White's representations after the Kroger sale, and the Laytons were unaware of the need to inquire further into White's actions. *See id.* The jury's findings in questions 19 and 21 are not against the great weight and preponderance of the evidence with respect to the Crowley Loans.[19]

[19]The White Appellants additionally argue that White's representations made to the Laytons prior to April 2013 regarding repayment were "an honest opinion that the Laytons would be repaid in the future." As we discuss, the jury heard evidence from which it could conclude that White's representations were not honest opinions and were instead efforts to conceal the Laytons' injuries from them.

### 3. Knowledge of Claims Arising from the Floor Plans

Regarding the Laytons' claims arising from the two Floor Plans, the White Appellants contend that two events gave the Laytons actual knowledge of their injury before 2013. First, in 2005, White told Gwen that Parks had all the money from the Second Floor Plan, and Gwen asked if he could sue Parks for embezzlement. The White Appellants assert that this testimony shows Gwen's actual knowledge of the Laytons' injury from the Second Floor Plan. Second, in 2007, when the Laytons stopped receiving payments under the First Floor Plan, Gwen asked White to return the First Floor Plan funds, and White informed him that Parks had taken it all. The White Appellants argue that this evidence shows that by 2007 at the latest, the Laytons had actual knowledge of their injury from the First Floor Plan. However, these arguments do not account for the additional representations that White made to the Laytons to conceal who had the funds and to lull them into taking no action to recover their money.

When Gwen asked White about the Second Floor Plan funds, White initially told him not worry and that he would take care of getting the money back. When Gwen asked about the return of the First Floor Plan funds, White told him not to worry about the fact that the money had not yet been repaid because White could foreclose on the Sarita house if Parks failed to return to money. Not only that, White went out of his way to drive the Laytons by the Sarita house to show it to them while misrepresenting the Sarita house's ownership, value, and equity. Further, the Floor Plans were not secured by a lien on the Sarita house,

and therefore the Laytons had no legal right to foreclose on the house to satisfy the debt, even if the Sarita house had been in Parks's name.[20]

Then, in 2010, after Gwen and Troylynn received the final payment from the buyout of their company, Gwen told White that he needed all the money back from the First and Second Floor Plans and that White needed to foreclose on and sell the Sarita house. White assured Gwen that he was still making efforts to collect from Parks and that Gwen had no reason to worry about the safety of his and Troylynn's money. Under the Floor Plans, Parks had no specific date by which to return the money, and thanks to White's assurances, the Laytons had no reason to believe that they would not receive their money back.

The jury heard this evidence of the steps that White took to prevent the Laytons from knowing that their investment was not protected and from taking any steps to recover it. White's repeated assurances that Gwen need not worry about repayment from Parks, that he was working with Parks on repayment, and that the Laytons' full investment in the two Floor Plans could be recovered by the sale of the Sarita house, constituted affirmative concealment of the fraud. *See Stafford*, 304 S.W.2d at 367. And, due to the fiduciary relationship between

[20]White acknowledged in his testimony that he also did not have a lien on the Sarita house he owned and therefore could not legally foreclose on the house. He denied offering to foreclose on it and denied misrepresenting its ownership. He testified that he told the Laytons he had the deed to the Sarita house and that it secured Parks's debt, so they need not worry about the debt Parks owed. He did not explain why he offered to sell a house he owned to pay what he claimed was Parks's debt.

White and the Laytons, the Laytons were unaware that they needed to inquire further into White's actions. Further, their long history with White and his status as a fiduciary meant that his delay in returning the money did not cause the suspicion it might otherwise have caused. *See Valdez*, 465 S.W.3d at 231. It was White's own concealment of his actions and the Laytons' reliance on and trust in White that caused the Laytons to delay taking action to recover their money, and White may not now benefit from that concealment. Accordingly, the jury's findings to questions 19 and 21 were not against the great weight and preponderance of the evidence with respect to the Floor Plans.

At the end of their briefing on this issue, the White Appellants further assert that no evidence supports the jury's finding in question 20 of the charge that White concealed his tortious acts or failed to disclose acts. This part of their first issue, unlike the rest of the issue, challenges the legal sufficiency of the jury's finding. *See Cont'l Coffee*, 937 S.W.2d at 450. From the evidence we have already discussed, the record supports the jury's finding.

Because sufficient evidence supports the jury's findings in questions 19, 20, and 21, we overrule the White Appellants' first issue.

### B. Limitations and the Laytons' Claims

Under their second issue, the White Appellants contend that the Laytons' claims are barred by the applicable statutes of limitation as a matter of law. With the exception of the Laytons' breach-of-fiduciary duty claims, the White Appellants rely on the same circumstances they relied on under their first issue to

argue that the relevant limitation periods started running by 2008 at the latest. However, under the jury's findings with respect to the discovery rule and fraudulent concealment, the Laytons' claims based on those events did not accrue until 2013. For the same reasons that we overruled the White Appellant's first issue, we overrule their arguments under their second issue as to all the Laytons' claims except the breach-of-fiduciary duty claims.

With respect to the fiduciary duty claims, the White Appellants argue that the discovery rule does not apply because the Laytons knew sometime in 2008 that White had an ownership interest in the M&M Acreage. The White Appellants assert that because a breach of fiduciary duty occurs if a fiduciary gains a benefit for himself at the expense of his beneficiary, the Laytons' knowledge that White had an interest in the property gave them knowledge that White had breached his fiduciary duty.

The White Appellants do not explain how knowledge that White held an interest in the M&M Acreage equates to knowledge that White had gained a benefit for himself at the expense of the Laytons. *See, e.g.*, *Nguyen v. Hoang*, 507 S.W.3d 360, 379 (Tex. App.—Houston [1st Dist.] 2016, no pet.) (stating that as a fiduciary, a managing partner owes to the partnership "a duty to administer the partnership affairs solely for the benefit of the partnership and may not place himself in a position where it benefits him to violate this duty," but that "[a] partner does not violate such a duty merely because his conduct furthers his own interest"). White led the Laytons to believe that sales from the M&M Acreage

would provide proceeds to compensate them for what they were owed, but they never believed that they were the sole owners of the M&M Acreage. Given the representations White made to the Laytons about how they would be repaid, knowing that White also held an ownership interest in the property did not give them actual notice that White was or would be taking profits from the sales of the property *at their expense* or that White's ownership interest conflicted with his obligations as a fiduciary. We overrule the White Appellants' second issue.

### C. Sufficiency of the Evidence as to Common Law Fraud

The White Appellants contend in their third issue that the evidence is legally insufficient to support the jury's finding that they committed common law fraud. They argue that any representations White made about repayments were statements of opinion, not statements of present fact, and that a fraud claim must be made on a representation of fact. However, the jury was instructed in the fraud question that "[m]isrepresentation" means "[a] false statement of fact" *or* "[a] promise of future performance made with an intent, at the time the promise was made, not to perform as promised." White made no objection to this question, and we must therefore measure the sufficiency of the evidence by the charge given. *See Romero v. KPH Consol., Inc.*, 166 S.W.3d 212, 221 (Tex. 2005).

The jury heard evidence from which it could conclude that White was involved with Isbell in Isbell's land development, that White was taking some of the Laytons' money for himself, that he failed to disclose when the Kroger sale

occurred and when some of the borrowed funds had been repaid, and that he actively dissuaded the Laytons from taking action to recover their money while keeping proceeds he promised them for repayment. *Russell v. Russell*, 865 S.W.2d 929, 933 (Tex. 1993) (stating that "[a]ny ultimate fact may be proved by circumstantial evidence" and that "[a] fact is established by circumstantial evidence when the fact may be fairly and reasonably inferred from other facts proved in the case"). The evidence supports a finding that White made promises of future performance and, at the time he made them, did not intend to perform as promised.[21]

The White Appellants contend that no evidence shows that White knew that Isbell or Parks did not intend to repay the Laytons. However, the jury heard evidence from which it could conclude that at the time White solicited the funds from the Laytons, he did not intend to repay them.

"[A] party's intent is determined at the time the party made the representation, [but] it may be inferred from the party's subsequent acts after the representation is made." *Aquaplex, Inc. v. Rancho La Valencia, Inc.*, 297 S.W.3d 768, 774–75 (Tex. 2009). White named himself as a maker of the note for the $30K Crowley Loan, but he did not do so for the $250K Crowley Loan. He

[21]Additionally, White is incorrect that he made no statements of present fact to the Laytons. He told Gwen that Parks had all the funds from the two Floor Plans, that he could foreclose on "Parks's" house, that there had been no sales from the M&M Acreage, and that Gwen and Troylynn were "vested" in the M&M Acreage. He also misrepresented the ownership, value, and equity of the Sarita house.

drafted no promissory note, no security agreement, and no other documentation for the $250K Crowley Loan.

Further, when Gwen asked about the $30,000 owed under the promissory note's stated repayment period, White told him not to worry about repayment and that it would be repaid upon the Kroger sale, but then he failed to tell Gwen when the Kroger sale occurred. After Gwen learned of the Kroger sale, White told Gwen that he and Troylynn were "vested" in the M&M Acreage, so Gwen acquiesced to repayment from sales of that property. White sold interests in the M&M Acreage through M&M and received proceeds from the sales while repeatedly representing to Gwen that no such sales had occurred. The jury could have determined from the evidence that when White made statements about the Laytons being repaid from Kroger and then from the M&M Acreage that White either had no intention of repaying them or knew that Isbell had no intention of repaying them.

As for the Floor Plans, White told the Laytons that Parks had all the money from the two Floor Plans, and the jury was free to believe Parks's testimony to the contrary—that he had repaid everything he had borrowed—and to further believe that White had kept the money. White continually represented that the Laytons need not worry about collecting from Parks because White could foreclose on the Sarita house he claimed belonged to Parks. White misrepresented the Sarita house's ownership, value, and equity. These representations are circumstantial evidence that White did not intend for the

Laytons to be repaid. *See id.* Thus, the jury heard some evidence that White made representations about the investment and repayment schemes that were not true when made and that he continued to make false representations designed to keep the Laytons from taking some action to recover their money. We overrule the White Appellants' third issue.

### D. Sufficiency of the Evidence as to Statutory Fraud

The White Appellants challenge the legal sufficiency of the evidence to support the jury's finding that White committed statutory fraud—that is, fraud under business and commerce code section 27.01. *See* Tex. Bus. & Com. Code Ann. § 27.01 (West 2015). The White Appellants argue that there was no evidence that they engaged in a real estate transaction. We agree.

Section 27.01 provides a cause of action for "[f]raud in a transaction involving real estate."[22] *Id.* § 27.01(a). Fraud under that section occurs when a person makes a false representation or promise to induce another to enter into a contract for real estate. *Id.* Not all fraud that is in some way incidental or ancillary to a real estate transaction is actionable under section 27.01. *See Ginn v. NCI Bldg. Sys., Inc.*, 472 S.W.3d 802, 823 (Tex. App.—Houston [1st Dist.] 2015, no pet.) (stating that for "fraud in a transaction to be actionable under section 27.01, the contract must 'actually effect the conveyance' of real estate or

[22]The statute further provides a cause of action for fraud in a transaction involving stock in a corporation or joint stock company. *Id.* § 27.01(a). No transaction of that kind is at issue in this case.

stock between the parties" and that it "'cannot merely be tangentially related or a means for facilitating a conveyance' of real estate or stock"). A "transaction" for purposes of section 27.01 "occurs when there is a sale or a contract to sell real estate . . . between the parties." *Id.*; *see Am. Title Ins. Co. v. Byrd*, 384 S.W.2d 683, 685 (Tex. 1964) (construing predecessor statute and stating that the legislative intent to limit the scope of the statute "is clear by its terms" and from the statute's legislative history); *Nolan v. Bettis*, 577 S.W.2d 551, 556 (Tex. Civ. App.—Austin 1979, writ ref'd n.r.e.). Thus, conduct not involving a sale or a contract to sell real estate between the parties does not constitute fraud under section 27.01, even if it would constitute common law fraud.

The Laytons contend that the record contains sufficient evidence to establish that a real estate transaction occurred. They rely on Isbell's and White's promises about the Laytons' right to M&M Acreage proceeds when they induced the Laytons to give up their share of funds from the Kroger sale. However, while the representations and promises made by White to Gwen may have been designed to stop Gwen from pushing for their share of Kroger sale proceeds, the representations were not made to induce Gwen to enter into a contract for the sale of land. Gwen testified that he understood when he gave the money for the two Crowley Loans that he was not buying land. When the Laytons later gave up their right to the Kroger sale proceeds, in exchange they accepted an entitlement to proceeds from the M&M Acreage, not an ownership interest in the land, as Gwen acknowledged at trial. *Cf. Devine v. Devine*, No.

07-15-00126-CV, 2015 WL 2437949, at *3 (Tex. App.—Amarillo May 20, 2015, order [mand. denied]) (recognizing that an award of an interest in as-yet-unrealized proceeds from a property sale is not a direct recovery of an interest in real property); *Sewing v. Bowman*, 371 S.W.3d 321, 330 (Tex. App.—Houston [1st Dist.] 2012, pet. dism'd) (stating that an agreement to share in the profits of a contemplated real estate deal does not involve the transfer of real estate or an interest in real estate and holding that the plaintiff could redeem his partnership interest, which included an interest in the proceeds from the sale of two properties, without violating the statute of frauds). Accordingly, White's representations did not give rise to a statutory fraud claim under section 27.01. *See Ginn*, 472 S.W.3d at 823. We sustain the White Appellants' fourth issue. *See Cont'l Coffee*, 937 S.W.2d at 450.

**E. Sufficiency of the Evidence as to Theft**

The White Appellants argue in their fifth issue that there was no evidence to support the jury's finding of theft. We disagree.

The Laytons asserted a claim against White under the Texas Theft Liability Act (TTLA). *See* Tex. Civ. Prac. & Rem. Code Ann. § 134.002 (West Supp. 2016). The Laytons based their TTLA claim on theft as defined in penal code section 31.03. *See id.* (incorporating penal code definitions of theft); Tex. Penal Code Ann. § 31.03 (West Supp. 2016). Under that section, a person commits theft if the person "unlawfully appropriates property with intent to deprive the owner." Tex. Penal Code Ann. § 31.03. The court's charge used section 31.03's

definition of theft and further explained that "[a]ppropriation of property is unlawful if it is without the owner's effective consent" and that "[c]onsent is not effective if induced by deception or coercion." *See id.* § 31.01 (West Supp. 2016) (defining "effective consent"). The jury found that White committed theft of the Laytons' property.

No party disputes that it was White who asked for the money for the First Floor Plan and for the two Crowley Loans. Although White disputed setting up the Second Floor Plan, the Laytons and Parks testified that White solicited the money from the Laytons and proposed the terms to them. White did not dispute that the Laytons provided the money for the two Crowley Loans and the two Floor Plans to him through checks written either to him individually or to his law firm. No party disputes that the Laytons were never repaid for the $280,000 loaned under the two Crowley Loans or for the $400,000 advanced under the two Floor Plans. On appeal, however, the White Appellants argue that there is no evidence that White appropriated the Laytons' property or that he did so without the Laytons' consent and with the intent to deprive them of their property.

The White Appellants contend that no evidence shows an intent to deprive because White was nothing more than a middleman passing money and information from the Laytons to Isbell and Parks and vice versa and that there is no evidence he appropriated the funds. The penal code defines "appropriate" as "to bring about a transfer or purported transfer of title to or other nonpossessory interest in property, whether to the actor *or another*." *See id.* § 31.01(4)(A)

(emphasis added). Consequently, for purposes of the theft claim, White could appropriate property even if he then passed it on to Isbell or Parks.

Regarding the Floor Plans, the Laytons produced more than a scintilla of evidence of their claim. The evidence shows that the Laytons consented to depositing money in White's escrow account for the two Floor Plans but not to White's taking the money for himself, and White does not argue that they did. *Bailey v. State*, 885 S.W.2d 193, 197 (Tex. App.—Dallas 1994, pet. ref'd) (holding that fiduciary's diverting of funds from a bank account to which he had a right of possession as the funds' owner's investment advisor to his personal bank account was appropriation because although the fiduciary had a right to possession of funds when placed in the first account, when he moved them to his personal account to use for his personal benefit, his control over the funds was no longer consensual). The jury also heard evidence that White covered up his movement of the money by telling the Laytons that Parks had the money but that no legal action was necessary to recover it because he was working with Parks to get the money repaid and because, if necessary, he could foreclose on the Sarita house that he claimed belong to Parks. Parks testified that he repaid to White all the money he borrowed under the two Floor Plans. White, however, never repaid the Laytons the funds they had advanced. The jury thus heard some evidence that White took the money, that he knew he did not have the Laytons' consent to do so, and that he did so with the intent to deprive the

Laytons of it.[23] We overrule the White Appellants' arguments about appropriation and lack of consent as to the Floor Plan funds. *See Spoljaric v. Percival Tours, Inc.*, 708 S.W.2d 432, 435 (Tex. 1986) ("[I]ntent . . . must be proven by circumstantial evidence."); *Amado v. State*, 983 S.W.2d 330, 333 (Tex. App.—Houston [1st Dist.] 1998, pet. ref'd) (stating that intent to deprive a person of their property may be inferred from the failure to return the property).

The Laytons also produced some evidence that White appropriated the money from the two Crowley Loans without their consent. For the $30K Crowley Loan, White and Isbell both signed the promissory note as makers and promised to repay the funds within twenty-one days—something White would have no reason to do as a mere middleman. Isbell testified that, at White's request, he repaid the $30K Crowley Loan with interest by putting the cash in an envelope and leaving it at White's law office with the Laytons' name on it.[24] White did not

[23]Parks also testified that at one point, White told him that he and Isbell were going to buy a DeLorean using some of the Laytons' money that White held in escrow for the Floor Plan funds. Isbell and White testified at trial that Isbell bought a DeLorean at some point, but White denied using the Laytons' money for that purpose and denied buying the DeLorean with Isbell. Isbell testified at first he paid for the car by selling property, but he later testified that he did not remember where the money came from.

[24]Isbell told the jury that White told him the Laytons wanted the money for a cruise they were taking. Isbell did not say on what date he brought the money to White's office, but he believed it was "long before" Davis and White dissolved their law partnership in December 2006–January 2007. Isbell did not specify if he handed the money to a person at the law firm and if so, to whom. He testified only that he brought the money to White's office, and he assumed that White would have told him if White did not receive it.

return the $30,000 to the Laytons. When the Laytons were not timely repaid, White told Gwen "not to worry about it. It was accruing interest." When Gwen periodically asked about it, White told him he "didn't have to worry about it because there was a property that [Isbell] was developing down there . . . and it would accrue interest on it." The Laytons never received repayment of that loan.

For the unpaid $250K Crowley Loan, the jury heard evidence that White asked for the money for Isbell; passed the money to Isbell; did not document the loan; did not advise the Laytons that they should sign a contract for the money, obtain collateral, or obtain a promissory note; failed to tell the Laytons about the Kroger sale; represented to them that they were "vested" in the M&M Acreage; told Gwen that they would be paid back from sales of that property; failed to disclose that ownership of the property was held by a joint venture in which White and Isbell, but not the Laytons, were partners; made profits from sales of the property that he never disclosed to the Laytons; and lied to the Laytons that no sales had occurred. The jury thus had some evidence that White brought about the transfer of the Laytons' property with an intent to deprive them of it and that he did so without their effective consent. *See Spoljaric*, 708 S.W.2d at 432.

Because the Laytons produced some evidence from which the jury could find that White intended to deprive the Laytons of their property and that he used deception to appropriate their funds, the evidence is sufficient to support the jury's theft finding. We overrule the White Appellants' fifth issue. *See Cont'l Coffee*, 937 S.W.2d at 450.

### F. Sufficiency of the Evidence as to Negligent Misrepresentation

In their sixth issue, the White Appellants challenge the jury's negligent misrepresentation finding. Because the damages awarded to the Laytons on their negligent misrepresentation claim are the same as the damages awarded to them on their common law fraud claim, which we have upheld, we need not address this issue. *See* Tex. R. App. P. 47.1.

### G. Award of Attorney's Fees and Costs

In their seventh issue, the White Appellants challenge the award of attorney's fees, expert witness fees, costs for deposition copies, and court costs. Regarding the attorney's fees, the White Appellants argue that the question in the charge asking the jury to determine attorney's fees was predicated on an affirmative finding of theft or statutory fraud, and, consequently, because the jury's findings on those claims must be set aside, the award of attorney's fees to the Laytons must also be set aside. Because we have upheld the jury's theft finding, we overrule this part of the White Appellants' seventh issue. *See* Tex. Civ. Prac. & Rem. Code Ann. § 134.005 (West 2011) (allowing the recovery of attorney's fees by a person who has sustained damages under the TTLA). Further, the Laytons are entitled to court costs under the TTLA, and we therefore overrule the part of the White Appellants' seventh issue challenging the award for court costs. *See id.* § 134.005(b).

As for the remainder of their argument, the White Appellants are correct that the statutory fraud finding must be set aside and that, therefore, the Laytons

cannot recover the costs for copies of depositions and expert witness fees under business and commerce code section 27.01. And because the term "court costs" does not include expert witness fees and costs for copies, those costs are not recoverable under the TTLA. *See id.* § 134.005; *Bundren v. Holly Oaks Townhomes Ass'n, Inc.*, 347 S.W.3d 421, 440 (Tex. App.—Dallas 2011, pet. denied) (noting expert witness fees are not recoverable except by statute). Accordingly, we sustain the White Appellants' seventh issue in part as to the award of expert witness fees and costs for copies of depositions.[25]

### H. Exemplary Damages Award

Finally, in their eighth issue, the White Appellants challenge the award of exemplary damages. They assert that the evidence does not support a finding of fraud, malice, or gross negligence, which are required for an award of exemplary damages under civil practice and remedies code section 41.003(a). *See* Tex. Civ. Prac. & Rem. Code Ann. § 41.003(a) (West 2015). Because we have upheld the fraud finding, we overrule the White Appellant's eighth and final issue.

[25]The jury made one aggregate finding of the total amount of court costs, expert fees, and copy costs. However, the lack of a specific finding by the jury of the amount of each category is no impediment to the Laytons' recovery of court costs because it is the role of the court clerk to tax court costs, and the clerk may still do so. *See Wright v. Pino*, 163 S.W.3d 259, 261 (Tex. App.—Fort Worth 2005, no pet.) (observing that "the court's role is to determine which party . . . is to bear the costs of court, not to adjudicate the correctness of specific items" and that "[t]he inclusion of specific items taxed as costs is a ministerial duty performed by the clerk").

## IV. M&M's Appeal

In four issues, M&M challenges the sufficiency of the evidence tracing the Crowley Loans to any identifiable M&M property, the jury's fraud finding against M&M, the jury's conspiracy finding against M&M, and the sufficiency of the evidence to support the imposition of a constructive trust.

### A. The Finding Against M&M Based on Statutory Fraud Must Be Reversed, but the Evidence Supports the Jury's Finding of Conspiracy

We begin with M&M's third issue in which it challenges the evidence to support the jury's finding that it was part of a conspiracy to commit common law fraud, statutory fraud, breach of fiduciary duty, or theft or that it aided and abetted one of those torts.

The trial court's judgment on the jury's verdict held M&M jointly and severally liable with the White Appellants for actual damages of $280,000. Based on the jury's statutory fraud finding against White, it further held M&M jointly and severally liable with the White Appellants for $12,008 in expert witness fees, costs for copies of depositions, and court costs. Because we have already held that White is not liable for statutory fraud, we further hold that there is no evidence to support a finding that M&M conspired with White to commit statutory fraud. We therefore reverse the part of the judgment awarding the Laytons $12,008 against M&M for those fees and costs.

After M&M's formation, White breached his fiduciary duties to the Laytons. Among other bad acts, White pocketed M&M Acreage sale proceeds that should

have been turned over to the Laytons while affirmatively representing that no sales had occurred. The jury heard evidence that Isbell knowingly participated in White's breach. White, Isbell's business partner, asked Isbell to drive Gwen around and assure him that his money was safe and secure, and Isbell did so, telling Gwen that the Laytons' money was in the M&M Acreage. Isbell knew that White had represented to the Laytons that they had an interest in the M&M Acreage. Isbell acknowledged that the M&M Acreage produced enough proceeds to pay back the Laytons and that, nevertheless, neither he nor White repaid them. Instead, they pocketed the proceeds for themselves. The jury thus heard evidence that Isbell was aware, at the least, that White had failed to act in the utmost good faith or to exercise the most scrupulous honesty toward the Laytons, that White had placed his own interests before the Laytons' interests and had gained a benefit for himself at their expense, and that he had failed to fully and fairly disclose all important information to them regarding the Crowley Loans and the sales from the M&M Acreage.[26] *See Kirby v. Cruce*, 688 S.W.2d

[26]The court's charge instructed the jury that a breach of fiduciary duty occurred if

> 1. the transaction[*s*] in question [*was/were*] not fair and equitable to the Laytons; or
>
> 2. White or White PC did not make reasonable use of the confidence that the Laytons placed in them; or
>
> 3. White or White PC failed to act in the utmost good faith or exercise the most scrupulous honesty toward the Laytons; or

161, 166 (Tex. App.—Dallas 1985, writ ref'd n.r.e.) (op. on reh'g) ("[W]here a third party knowingly participates in the breach of a fiduciary, such third party becomes a joint tortfeasor with the fiduciary and is liable as such.").

The jury further heard evidence that M&M, through White and Isbell, knowingly participated in White's breaching his fiduciary duties by promising the Laytons that they were vested in the M&M Acreage and would receive proceeds from its sales, by backing up White's promise to that effect, by failing to sign any sort of documentation or security interest protecting the Laytons' right to the proceeds, and by selling interests in M&M's property and dispersing the proceeds to White and Isbell and not to the Laytons.[27] *Id.* at 164 ("[I]t is not essential that each conspirator have knowledge of the details of the conspiracy."). From this evidence, the jury's finding that M&M knowingly participated in White's breach of his fiduciary duties after M&M's formation is

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> 4. White or White PC placed their own interests before the Laytons used the advantage of their position to gain a benefit for themselves at the expense of the Laytons, or placed themselves in a position where their self-interest might conflict with their obligations as a fiduciary; or
>
> 5. White or White PC failed to fully and fairly disclose all important information to the Laytons concerning the transaction[*s*].

[27]Although Isbell testified that at some point he had repaid the $30K Crowley Loan, he did not give the money directly to White, did not obtain a receipt, and did not verify that White had received the money, and he did not give any money directly to the Laytons. The jury could believe that Isbell had repaid the money and that White kept it, that Isbell had never repaid the money, or that Isbell left the money at the office and some unknown third person kept it.

supported by legally and factually sufficient evidence. *See Cotten v. Weatherford Bancshares, Inc.*, 187 S.W.3d 687, 702 (Tex. App.—Fort Worth 2006, pet. denied) (upholding jury verdict finding conspiracy to commit fraud between two officers of a corporation and the corporation through the acts of the officers), *disapproved of on other grounds by Ritchie v. Rupe*, 443 S.W.3d 856 (Tex. 2014); *Kirby*, 688 S.W.2d at 164–65 (affirming finding of conspiracy against corporation's officers individually and that corporation knowingly participated in the conspiracy through the officers). The same evidence evinced an intent by M&M to agree to an unlawful objective to be accomplished—allowing White and Isbell to pocket proceeds promised and owed to the Laytons in breach of White's fiduciary duties. *See Kirby*, 688 S.W.2d at 164 ("[B]ecause civil conspiracies to defraud are conceived in secrecy and executed in such a manner as to avoid detection and exposure, a civil conspiracy need not be shown by direct evidence and is ordinarily established by circumstantial evidence.").

From the same evidence, the jury could find that when White and Isbell failed to pay the Laytons as promised from the M&M Acreage proceeds, in addition to acting as M&M's representatives, they were also acting for a personal purpose of their own—increasing their personal profits by hiding the existence of the proceeds from the Laytons—and, thus, that White and Isbell had conspired with M&M. *See Cotten*, 187 S.W.3d at 702; *Kirby*, 688 S.W.2d at 164–65. And although M&M contends that the Laytons' damages occurred prior to M&M's

formation, the Laytons suffered damages when White and Isbell retained the proceeds for themselves instead of distributing them to the Laytons as promised.

Therefore, the jury heard legally and factually sufficient evidence to support a finding that Isbell and M&M conspired with White in his breach of his fiduciary duties to the Laytons. We overrule the part of M&M's second issue challenging the jury's finding of conspiracy to commit a breach of fiduciary duty.

As for M&M's other arguments under this issue, we have upheld the jury's finding of conspiracy against M&M based on White's breach of his fiduciary duties, and, accordingly, we uphold the trial court's judgment awarding actual damages against M&M on that basis. Because the actual damages award against M&M can be affirmed based on that finding, we need not consider M&M's arguments that it cannot be held liable for conspiracy to commit or aiding and abetting in common law fraud or theft. We overrule the remainder of M&M's third issue.

**B. Sufficient Evidence Supports the Imposition of a Constructive Trust**

In its first issue, M&M challenges the imposition of the constructive trust. "A constructive trust is an equitable remedy created by the courts . . . ." *Hubbard v. Shankle*, 138 S.W.3d 474, 485 (Tex. App.—Fort Worth 2004, pet. denied). "[T]he imposition of a constructive trust requires unjust enrichment of the wrongdoer and the identification of a specific res that can be traced back to the original res acquired by fraud or breach of a confidential relationship." *Lee v. Holoubek*, No. 06-15-00041-CV, 2016 WL 2609294, at *6 (Tex. App.—Texarkana

May 6, 2016, no pet.) (mem. op.). "To prove an identifiable res, the proponent of the constructive trust must show that the specific property that is subject to the constructive trust is the same property—or the proceeds from the sale thereof or revenues therefrom—that was somehow wrongfully taken." *In re Hayward*, 480 S.W.3d 48, 52 (Tex. App.—Fort Worth 2015, no pet.) (orig. proceeding). "When the beneficiary can point to the specific property that was purchased or inherited, or to its mutation, the tracing burden is met." *Peirce v. Sheldon Petroleum Co.*, 589 S.W.2d 849, 853 (Tex. Civ. App.—Amarillo 1979, no writ).

M&M contends that the Laytons failed to strictly trace the $280,000 from the two Crowley Loans to the M&M Acreage. M&M argues that the evidence conclusively established that the Laytons' money was not used to purchase the M&M Acreage and that the Laytons did not trace their money to proceeds from sales of that property. M&M further contends that "Isbell's unequivocal trial testimony was that the Layton's money was used on development on the **West** side of Highway 731," "[i]t is also undisputed . . . that the M&M Acreage came from property owned by Deer Creek," and "[t]he Deer Creek property is on the **East** side of Highway 731." Thus, M&M argues, the evidence at trial showed that while the M&M Acreage was on the east side of Highway 731, Isbell spent the Laytons' money on the west side, and consequently the Laytons' money could not have been spent on the M&M Acreage. M&M argues that the Laytons therefore failed to meet their burden to show an identifiable res. *See Hayward*, 480 S.W.3d at 52.

Although the Laytons were told that Isbell needed the money and would repay them after he sold land to Kroger, the evidence supports the trial court's conclusion that Isbell spent the Laytons' money on the M&M Acreage. The only evidence of how the Laytons' money was used came from Isbell, and Isbell testified that he spent their money on the M&M Acreage. Isbell testified that he used the Laytons' money on preparing the land for development—moving a creek bed, doing dirt work, and surveying (and that he did so after M&M's formation and while he was still a joint venturer). Isbell's testimony is, admittedly, contradictory.[28] However, a jury is free to believe or disbelieve the testimony of a witness, in whole or in part, and may resolve any inconsistencies in a witness's testimony. *United Parcel Serv., Inc. v. Rankin*, 468 S.W.3d 609, 615 (Tex. App.—San Antonio 2015, pet. denied). Thus, the jury could believe that Isbell spent the Laytons' money on the M&M Acreage.

Further, Isbell testified that M&M's property was on the west side of Highway 731, and evidence supports this testimony. The record includes multiple deeds conveying property to M&M and including references to Highway

[28]At another point in Isbell's testimony, he testified that while the Laytons' money was all spent on the west side of Highway 731, it was not spent exclusively on the M&M acreage. However, he denied M&M's attorney's suggestion that all the money was used on the development of a shopping center that, while west of Highway 731, was not on the M&M Acreage. The jury then heard that Isbell had previously stated in a deposition that the Laytons' money *was* used exclusively in the shopping center development. Then, when Isbell was asked if it was correct that the money was not used in the development of the M&M Acreage, he disagreed.

731 in their property descriptions. In 2003, Isbell signed a deed on behalf of Stone Gate conveying land to M&M (Deed No. 1). In August 2007, Isbell signed a deed on behalf of Deer Creek conveying substantially the same land to M&M (Deed No. 2). Isbell and White both testified that Isbell executed Deed No. 2 because they had realized that Deer Creek, not Stone Gate, owned the land described in in Deed No. 1, so Isbell signed Deed No. 2 as a correction deed to convey the land to M&M from the correct entity. (Deed No. 2 also included a mineral reservation, which Deed No. 1 did not, probably because in 2005, Deer Creek had purported to convey to Lucky IW the minerals in a 48.198-acre tract that appeared to include the property conveyed in Deed No. 1 and Deed No. 2.) It is this testimony, along with White's testimony that the land owned by Deer Creek was on the east side of Highway 731 while the land owned by Stone Gate was primarily on the west side of Highway 731,[29] that M&M puts together to argue that M&M's property was on the east side of Highway 731 (and thus that if Isbell spent the Laytons' money west of Highway 731, he did not spend it on the M&M Acreage).

However, the deeds in the record, though inconsistent in some respects, support Isbell's testimony about the location of the M&M Acreage being west of Highway 731. White, who is board certified in commercial real estate law,

[29]In fact, Stone Gate and Deer Creek have each owned this property at one time. And the tract was once part of a larger tract, owned by an Isbell entity, that was partly on the east side and partly on the west side of Highway 731.

drafted Deed No. 1 and Deed No. 2, both of which required corrections. The legal description in Deed No. 2 differed somewhat from the description in Deed No. 1; Deed No. 1 conveyed approximately 44 acres, while Deed No. 2 conveyed approximately 46 acres. And although White and Isbell testified that the purpose of Deed No. 2 was to correct Deed No. 1, Deed No. 2 recited that it corrected a different deed—one recorded under instrument number D206162491 in the Tarrant County property records, which is not Deed No. 1.[30] But whichever entity owned the land before M&M did, both deeds' legal descriptions describe substantially the same tract of land—and that land appears to be on the west side of Highway 731, as Isbell testified.[31]

Isbell testified that he used the Laytons' money on development work on the M&M Acreage, and no other witness or documentary evidence showed that the money went elsewhere. The jury could believe this testimony. The Laytons

[30]Deed No. 1 is instrument number D203468395 in the Tarrant County property records.

[31]A month after recording Deed No. 2, in September 2007, Isbell executed another deed from Deer Creek to M&M (Deed No. 3). This deed had an effective date of March 5, 2005, and was "for the purpose of correcting the legal description in the prior deed and to cure a gap in title." However, its legal description was identical to the legal description in Deed No. 2; thus, it appears to have been executed only to correct Deed No. 2 to make it effective as of March 5, 2005.

therefore sufficiently traced their money to the M&M Acreage.[32] *See Peirce*, 589 S.W.2d at 853.

M&M argues next that the Laytons failed to show unjust enrichment because "the evidence is conclusive that the Laytons' loan money was not used on the M&M Acreage . . . and that any value in M&M or the M&M Acreage that was realized with its sale does not derive from" the two Crowley Loans. We have already held that evidence supports a finding that the Laytons' money was spent on M&M's property, and M&M produced none of its own records to the contrary.

Finally under this issue, M&M argues that the Laytons failed to show fraud or breach of fiduciary duty, and as such, failed to show their entitlement to a constructive trust. *See Baker Botts, L.L.P. v. Cailloux*, 224 S.W.3d 723, 736 (Tex. App.—San Antonio 2007, pet. denied) ("A constructive trust is justified when one party commits fraud or . . . breaches a fiduciary relationship."). Because we have upheld the conspiracy finding, we overrule the remainder of M&M's first issue.

[32]We observe that in Davis's suit against White, we affirmed the trial court's imposition of a constructive trust against M&M and in favor of Davis, and in that case, neither Davis nor his and White's law firm advanced money for the purchase or development of the M&M Acreage. *See Davis*, 2014 WL 7387045, at *2. Davis sued to recover his share of fees owed to him as White's law partner for White's work for Isbell, which was supposed to come from sales of the M&M Acreage. *Id.* at *4, *7. The trial court imposed a constructive trust on an undivided fifty percent of M&M and its assets. *Id.* Davis is now the managing member of M&M.

### C. M&M's Challenge to the Fraud Finding

In its second issue, M&M argues that the jury's fraud finding is not supported by legally or factually sufficient evidence. Because the actual damages award against M&M can be affirmed based on the conspiracy finding, we need not consider M&M's arguments under this issue. *See* Tex. R. App. P. 47.1. We overrule M&M's second issue.

### D. Sufficiency of the Evidence to Support Declaratory Judgment

In its judgment, the trial court declared that "the Laytons had an equity interest in the Crowley Property[33] up to and including the amount of all monies due and owing to the Laytons at the time the Crowley Property was sold and that the Laytons continue to have an interest in any funds received from the sale of that property." In its fourth issue, M&M argues that the declaratory judgment should be reversed because (1) the subject matter of the Laytons' claims was not within the scope of Texas's Declaratory Judgments Act (the DJA) and (2) the evidence is legally and factually insufficient to show any actual, promised, or anticipated ownership, security, or equity interest of the Laytons in M&M or in any specific and identifiable property of M&M.

Because we have upheld the constructive trust, M&M has not shown that it was harmed by the declaration. The trial court did not award the Laytons

[33]The judgment does not specify what property constitutes "the Crowley Property" for purposes of the judgment, but the only property alleged and shown to be owned by M&M was the M&M Acreage.

attorney's fees against M&M under the DJA, and the declaration did nothing more than declare what the trial court's judgment otherwise provides—that the Laytons have an equitable interest in the property up to the amount they were owed for the two Crowley Loans. *See* Tex. R. App. P. 44.1. We overrule M&M's fourth issue.

## V. Conclusion

Having sustained the White Appellants' seventh issue in part, we modify the trial court's judgment to omit the award of $12,008 against the White Appellants and M&M for expert witness fees, costs for copies of depositions, and court costs. We affirm the remainder of the trial court's judgment. We order the court clerk to tax costs consistent with this opinion.

/s/ Terrie Livingston

TERRIE LIVINGSTON
CHIEF JUSTICE

PANEL: LIVINGSTON, C.J.; and SUDDERTH, J.

DELIVERED: August 10, 2017