629 S.W.3d 377
Court of Appeals of Texas, Dallas.

Michael D. HEATLEY, Heatley Capital Corporation, and HC Developers, LLC, Appellants

v.

RED OAK 86, L.P. and Charles Johnson, Appellees

No. 05-18-01083-CV
|
Opinion Filed August 17, 2020

Synopsis

Background: Investors in land investment limited liability company (LLC) filed petition to intervene in prior action against company founder and two of his companies, which were manager and managing member of LLC, seeking temporary restraining order (TRO) and declaratory judgment stating that forfeiture provision in LLC's operating agreement was an unlawful penalty. The trial court entered order granting investors a TRO, and later granted a temporary injunction. After investors filed a third amended complaint, trial court granted defendants' motion for summary judgment as to investors' claims for breach of fiduciary duty, declaratory judgment, and minority member oppression. Following trial, jury rendered verdict finding that defendants breached their fiduciary duties to investors, but that neither investor suffered monetary damages from breach and that defendants were not unjustly enriched, and the 134th District Court, Dallas County, entered a take-nothing judgment. Investors filed motion for judgment notwithstanding the verdict seeking equitable relief, and the trial court entered an amended judgment awarding equitable forfeiture against defendants, jointly and severally, for $256,933 plus pre- and post-judgment interest and costs of court. Defendants filed motion to modify, which the trial court denied. Defendants appealed.

Holdings: The Court of Appeals, Carlyle, J., held that:

evidence supported finding that founder and companies failure to disclose note-repurchase plan constituted a clear and serious breach of fiduciary duty;

record demonstrated that company founder companies were given a full and fair opportunity to litigate breach of fiduciary duty claim, thus, jury's findings in favor of claim supported equitable forfeiture award; and

evidence supported finding that founder and companies committed the same breaches of fiduciary duty against investors.

Affirmed.

***380 On Appeal from the 134th Judicial District Court, Dallas County, Texas, Trial Court Cause No. DC-08-09010, Honorable Dale B. Tillery, J.**

Attorneys and Law Firms

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Jeffrey M. Goldfarb, Keith Koshkin, Goldfarb PLLC, Dallas, for Appellees.

Before Justices Myers, Schenck, and Carlyle

OPINION

Opinion by Justice Carlyle

Michael D. Heatley, Heatley Capital Corporation, and HC Developers, LLC ("the Heatley parties") appeal from the trial court's judgment awarding equitable fee forfeiture in favor of Charles Johnson and Red Oak 86, L.P. The Heatley parties contend reversal is required because: (1) Johnson and Red Oak did not obtain a jury finding on the level of the Heatley parties' culpability; (2) the evidence is legally insufficient to support the trial court's forfeiture award; (3) Red Oak's claim for breach of fiduciary duty was resolved against it on summary judgment; (4) there was no basis to hold the Heatley parties jointly and severally liable for the forfeiture; and (5) Johnson and Red Oak did not seek prejudgment interest in their pleading. We affirm.

Background

We set forth the facts in some detail.

Appellants Michael D. Heatley and Heatley Capital located an opportunity to invest in land in Royse City near I-30. According to Heatley, after Heatley Capital found the opportunity and performed its initial due diligence, another of his companies, HC Land Company, formed a partnership ***381** and presented the opportunity to investors. The single-purpose entity formed as the vehicle for the investment was named Royse City/I-30, LLP. The entity later converted into a limited-liability company with the same general ownership and management structure.

Royse City/I-30

HC Developers, another of Heatley's companies, was the managing member of Royse City/I-30. Each investor was a Class A member with an ownership interest commensurate with the investor's initial capital contribution. Class B members were not required to make capital contributions but were given a 30% interest in Royse City/I-30's "after-payout profits," those remaining after all Class A investors recouped their capital contributions. HC Land Company was the entity's only Class B member.

As the managing member, HC Developers had a 1% interest in Royse City/I-30's after-payout profits. In addition, Heatley Capital, "an affiliate of the Managing Partner," would "receive an Organization Fee from [Royse City/I-30] in the amount of $483,716" when the land was purchased, as well as an additional "annual management fee of $26,604."[1]

The agreement empowered the managing member to issue annual assessments to Class A investors to cover Royse City/I-30's operating costs and debt servicing. Class A investors were obligated to pay those assessments within 30 days, and any Class A investor failing to timely pay an assessment was subject to having its ownership interests either diluted or forfeited at the managing member's discretion.

Heatley and Bryan Crow executed the Royse City/I-30 formation agreements on behalf of the managing member, HC Developers. Crow, a Heatley Capital employee, was heavily involved in the early stages of the investment as its co-manager. Both Heatley, contributing $80,000, and Crow, contributing $60,000, personally invested as Class A members.

Johnson and Red Oak were Class A investors. Johnson had successfully partnered in several other deals with Heatley starting in the late 1980s, and invested $136,500 to acquire a 5% interest in Royse City/I-30. Red Oak, a family partnership controlled by Jason Dodd, initially invested $97,400 for a 3.5678% interest. He came to the deal based on his previous interactions with Crow, and all of Dodd's communications with the Heatley parties in the early stages of the investment were through Crow. Dodd testified at trial to an extensive background in "real estate investment, real estate partnerships, private equity investments, [and] private equity capital structure" and was qualified as an expert on the obligations of general partners. He provided testimony in both fact- and expert-witness capacities.

Royse City/I-30 purchased the land in November 2006 for nearly $4.7 million, with an additional $468,907.02 going to Heatley Capital. After other third-party fees and costs, Royse City/I-30 paid approximately $5.5 million for the property, financing approximately $2.9 million of that through a five-year loan.

Issues with the investment

Red Oak and Johnson did not pay their 2008 and 2009 assessments. Johnson testified that when he received the 2008 assessment, he contacted Heatley and told him, "I was uncomfortable making this payment, I was uncomfortable with what was ***382** happening with the property, uncomfortable that we have a bank note coming due." Johnson said Heatley agreed he did not have to pay his assessment until they addressed these issues.

Heatley could not remember the details of his conversations with Johnson but did not deny telling Johnson that his interest would not be forfeited if he failed to timely pay his 2008 and 2009 assessments, noting, "So long as he was working to make efforts to get his money in, that's true."

Johnson testified that, although he had a prior relationship with Heatley, Crow was his primary source of information about the investment in 2007 and 2008. At some point in 2008, however, Crow seemed to disappear. He would not return Johnson's phone calls, and Johnson became concerned about his investment. In fact, Crow had initiated this litigation in August 2008. The property did not sell as quickly as Johnson believed Heatley had represented it would, there was an issue with an exit ramp that needed to be moved to make the property more marketable, and Johnson was concerned about the loan on the property maturing before the property could be sold.

Johnson contacted Heatley during 2008 with a number of questions, including: "What are we going to do about the bank loan? Can we get the bank to extend it, can we get a change in the interest rates?" Johnson explained to Heatley that he was aware that, in the financial crisis of 2008, banks were unloading their assets and were willing to sell the loans at a discount. He asked Heatley whether they were "trying to do that" but, according to Johnson, Heatley provided no specific information about Royse City/I-30's plans. Johnson was uncomfortable with Heatley's answers, believed Heatley was spread too thin with his other investments, and, with Crow seemingly out of the picture, was worried nothing was getting done with Royse City/I-30.

Johnson continued to seek answers throughout 2009. He testified he communicated with Heatley at least six times that year, mostly concerning the bank note, and Heatley never gave him any details about Royse City/I-30's plans. Johnson decided he wanted out of the investment, and asked Heatley to either buy him out or help find an investor who would. According to Johnson, Heatley expressed confidence that if Johnson would offer his interest at a significant discount, he could find someone willing to purchase it. He asked Johnson to send him an email authorizing him to market his interest at a discount.

On December 19, 2009, Johnson emailed Heatley:

> I need your help. 2009 has been a very difficult year for my aviation business. My income has fallen to the point that I need to find an alternative to funding my Royse City partnership obligations. I would like to find a way to sell my interest. I propose to offer someone my interest for half of what I paid for it. As an alternative, if there is a way to delay our bank principal call interest payments until the property is sold, I would prefer that alternative as all partners would then be able to lower their carrying cost.

Tawny Nuñez, an administrative assistant at Heatley Capital, responded two days later: "Mike wanted you to know a notice is going out to the other partners to see if there is any interest in buying out your ownership in Royse City/I-30, LLC at a 50% discount. The partners are aware, however, if they do nothing, they will all receive a portion of your ownership if you default." She attached a demand letter the partnership had received from Wells Fargo, notifying the partnership that it had defaulted on the loan secured by the property ***383** both by failing to make principal and interest payments and by failing to provide required financial information.

Meanwhile, Dodd was having his own concerns about the investment. Like Johnson, Dodd testified his conversations with Crow began to change in 2008, as he learned Crow was involved in a dispute with Heatley. He still thought Crow was the co-manager of Royse City/I-30 until the end of 2009, when he realized Heatley had shut Crow out. Crow, of course, had initiated this litigation in August 2008.

In late 2009, Dodd began contacting Heatley directly, although it was difficult to get Heatley to return his calls. Dodd said he spoke with Heatley only once or twice during 2009, and one of those conversations took place on December 1, 2009. They discussed the market conditions and the fact that Dodd had not yet paid Red Oak's 2009 assessment. During the call, Heatley revealed to Dodd that the loan had been placed in what Heatley described as a "strategic default." Heatley assured Dodd both that Royse City/I-30 would have a partner meeting to discuss the investment and that Red Oak's interest would not be forfeited for failing to pay the assessment, as long as Dodd "work[ed] on getting it in."

Dodd memorialized that conversation in a December 1, 2009 letter to Heatley Capital, stating:

> This morning, I spoke with Mike Heatley to receive a better understanding of the debt status on the project. Additionally, I committed to Mike that I would soon figure out my contribution ability while trying to manage multiple other cash requirements. In return, he committed that I would not forfeit the 3.57% ownership in the partnership.

Heatley corroborated part of the conversation Dodd described:

> The only phone call I ever got from Jason Dodd was that he was working to get his money in. He was out juggling a lot of things to stay in his partnerships. And I said, [a]s long as you are willing to keep working to get your payments in, we won't forfeit you out.

With respect to the "strategic default" discussed during the call, Heatley testified the default was part of a strategy to get Wells Fargo's attention. Wells Fargo had purportedly made an error in the way it charged principal and interest, and Heatley intentionally put the loan into default to get Wells Fargo to correct the error.

Dodd testified he thought it was very risky to intentionally default on a loan held by Wells Fargo: "[T]o be playing with matches like that with Wells Fargo, the fifth largest bank in

the world, didn't seem like that great of a strategy on the surface." Indeed, "it was very possible that Wells Fargo could accelerate that note, foreclose -- this is a very foreclosure-friendly state -- and the partnership could completely melt down in a very short period of time." Moreover, in Dodd's expert opinion, intentionally defaulting on a note secured by a partnership's sole asset is never something a general partner should do without first discussing it with the other partners.

By early 2010, Crow resurfaced and had introduced Dodd to Johnson. The three of them began asking Heatley to set up a partnership meeting to discuss the plan for Royse City/I-30 going forward. In a January 20, 2010 email, Dodd responded to the notion, apparently suggested by Heatley, that it would not make sense to schedule a meeting unless a majority of the partners could attend, stating: "It doesn't really matter how many partners may show up. It matters that you host the meeting and give partners the opportunity to show up and ask questions. If they don't show up, ***384** you have done the right thing by hosting the meeting." Dodd proposed an agenda for the meeting, which included discussions of the details about the loan, the "strategic default," and Royse City/I-30's accounting. Heatley responded that he would get back to Dodd early the following week.

He did not. Dodd followed up on January 26 and again on February 3. Heatley responded to the February 3 email, saying, "Jason, we have a team huddle on that this p.m." Dodd replied:

> I'm not sure how to interpret your message. On January 20, your answer to my same email question was "will get back to you on this after we huddle on this Mon a.m.". Then in another email, you suggested a meeting might be scheduled for 2/24. To date, I have no confirmation of any meeting and I have received no information from you regarding the status of the partnership.
>
> After reviewing my complete partnership file and looking at the dates, it seems possible that the property's note has matured and could be currently in default. If this is true, and you are unwilling to communicate that to the partnership, you are going to have a tough time explaining that to your partners if their investment is compromised.
>
> Mike, this is serious. You need to call a meeting and you need to open up communication.

On March 16, 2010, Crow sent an email directed at Heatley, copying all but one of Royse City/I-30's partners, stating that Crow "learned last week through conversations with the loan officer ... that [Heatley] received a default notice on this loan on 12/11/2009 and that this default has not been cured." Crow demanded a special meeting of the partners "to get full disclosure regarding the issues facing this partnership" and noted that he spoke on behalf of investors holding 35.29% of Royse City/I-30, including himself, Red Oak, Johnson, and five others.

Heatley responded on March 18 by letter to all partners, signed by Heatley as a member of "HC Land Developers, LLC"[2] but sent on Heatley Capital's letterhead. Heatley explained that a meeting had been scheduled in February but was postponed because his assistant, Nuñez, had become unavailable due to a death in her family. The meeting was rescheduled for March 11 but again postponed after receiving "affirmative RSVPs from members owning less than 25% of the interests in the company."

Heatley's March 18 letter disclosed, apparently for the first time to many of Royse City/I-30's investors, that the loan on the property "was allowed to go into default in late 2009." Heatley explained the purported error made by Wells Fargo and stated that, once outstanding interest payments were caught up, the loan would no longer be in default. Heatley also responded to Crow's request for a partnership meeting by stating that, although Crow's request "did not meet the formal requirements set forth in the Company Agreement ..., we do not stand on ceremony when it comes to being accessible to our investors." Nevertheless, Heatley thought it was "important to make sure that a majority of the members [could] be available to attend a meeting."

They eventually held the meeting at the end of April 2010, and a recording of the meeting was introduced into evidence at trial. Topics discussed included many of those requested by Crow and Dodd—details of the debt, purported reasons for ***385** defaulting, purported strategies for addressing the note, accounting, and plans to market the property. Heatley disclosed he was involved in litigation with Crow. Some Royse City/I-30 members insisted at the meeting that others who had not paid their assessments, like Red Oak and Johnson, should have their interests forfeited.

After the meeting, Nuñez sent letters by certified mail notifying both Johnson and Dodd that if their shares of the 2008 and 2009 assessments were not received by May 12, their membership interests in Royse City/I-30 would be forfeited and divided among the remaining partners. Dodd

received the notice, but Johnson's notice was returned as undeliverable after failed attempts to deliver on May 5, 12, and 22. Johnson testified he was out of the country at the time and never received the letter.

Heatley sent Johnson an email on May 11 informing him of the next day's deadline, noting that "as we all heard from the meeting the partners were very clear on Heatley Capital's fiduciary responsibility. Our only option is to default you out of the partnership if your delinquency is not cured." Heatley emailed again the next day. Neither Johnson nor Dodd paid their assessments. Johnson responded to Heatley's emails, noting their past investments together and closing with: "I hope you will continue to try to find a better answer than kicking me when I am down."

The litigation

Crow sought and obtained a temporary restraining order against the various Heatley-controlled entities on May 13, prohibiting the defendants from forfeiting any investors' interests. That TRO was set to expire on May 27, but Crow and Heatley agreed to settle their claims before then, and they jointly moved to dissolve the TRO on May 24. The trial court signed the order dissolving Crow's TRO on May 25.

On May 26, Johnson and Red Oak filed their petition in intervention seeking their own TRO. In their original petition, Johnson and Red Oak asserted various claims against the Heatley entities: (1) breach of fiduciary duty based on alleged mismanagement, nondisclosure, and self-dealing; (2) minority-shareholder oppression based on the managing member's decision to forfeit rather than dilute their interests; and (3) breach of contract based on the managing member's purported failure to give Johnson and Red Oak valid notice of a required capital contribution before declaring their interests forfeited. Johnson and Red Oak also sought a declaratory judgment stating that the operating agreement's forfeiture provision was an unlawful penalty under Texas law. The trial court granted Johnson and Red Oak a TRO, and later a temporary injunction. According to the Heatley parties, however, the injunction had no effect, because they forfeited Johnson's and Red Oak's membership interests in the period between the dissolution of Crow's TRO on May 25 and the entry of Johnson's and Red Oak's TRO on May 26.

Royse City/I-30 later sold the property at a substantial profit, while the case was abated due to Crow's bankruptcy. Later discovery confirmed that the profit was realized in no small part because of a plan Heatley and his entities set into motion well before Johnson's and Red Oak's interests were forfeited in 2010, but that Heatley, either himself or via an entity of his, did not disclose to either of them.

Trial evidence showed Heatley and his entities engaged banking consultant Danny Yoo in 2009 to advise them on negotiations with banks holding notes on their properties. Yoo advised Heatley to intentionally put the Royse City/I-30 loan into default to get the bank's attention and bring it to the negotiating table. And, Yoo helped Heatley ***386** and his companies develop a plan to use a Yoo-controlled intermediary entity to acquire the Royse City/I-30 note from Wells Fargo at a significant discount.

In 2011, Yoo's entity—for a $20,000 fee—used Royse City/I-30's funds to acquire the loan from Wells Fargo at a discount, saving Royse City/I-30 approximately $736,000. Royse City/I-30 realized those savings when it sold the land in 2015 for $8 million, resulting in more than $2.1 million in after-payout profits to Royse City/I-30's members. Johnson and Red Oak, whose interests had been forfeited by that point, neither recouped their investments nor shared in any profits.

Heatley recouped his initial $80,000 investment and more than $68,000, for an 85% profit. HC Land Company profited by more than $326,000, and HC Developers profited by more than $22,000. Heatley Capital, though neither a member nor the nominal manager of Royse City/I-30, received more than $963,000 in various fees over the course of the investment.

Both Johnson and Dodd testified they were never informed about the plan to repurchase the note at a discount, including at the meeting called in part to discuss addressing the note, despite having repeatedly and specifically asked Heatley about Royse City/I-30's plans to address the note.

Heatley testified he may not have told Johnson and Dodd about the plan to repurchase the note because it was "still in the incubation stage" and was not "fully formed." According to Heatley, the note-purchase strategy was not "ready to dispense to the partnership until we had it in place." But deposition testimony presented to the jury showed Heatley told at least one of his longtime investing partners, Royce Hunter, about the plan in advance of the April 2010 meeting:

> A. I do recall him saying that we were going to buy the note back through another intermediary from the bank, which later did occur, and he explained what they were trying to do and I was okay with that.

> Q. And that was in this 2010 -- March 2010 time frame?
>
> A. In that time frame.

The jury also heard evidence contradicting Heatley's assertion that the plan was not "fully formed" when Red Oak and Johnson were seeking information about plans to address the note. Heatley Capital employee Nathan Chandler testified in his 2016 deposition that the decision to purchase the note was made "really early in 2009." Chandler's testimony is consistent with the March 2011 letter he sent to Royse City/I-30's investors, admitted at trial, stating: "Heatley Capital negotiated the note purchase for Royse City/I-30 LLC concluding a 25-month process." Chandler contradicted his deposition testimony at trial. Heatley confirmed in his deposition that it was "about a two-year process."

According to Johnson:

> If I had known what the formula was, what the discount was, what my portion would have been and that [the repurchase] would have resolved the loan totally so that my continued payment of interest and principal was gone, I would have carefully evaluated and, you know, likely made a decision to participate.

Dodd testified that the repurchasing strategy "was a pretty good idea," and if they had shared it with him, he might have been able to help develop the negotiating strategy. Dodd said he had sufficient cash on hand to pay his assessment at the end of 2009, and knowing about the plan to repurchase the note "would have made a huge difference."

***387** The Heatley parties moved in early 2017 for partial summary judgment on a portion of the claims asserted in Johnson's and Red Oak's second amended petition in intervention. As relevant here, the trial court granted partial summary judgment on Red Oak's: (1) "claim against Defendants HC Developers, LLC, Heatley Capital Corporation, and Michael D. Heatley for breach of fiduciary duty with respect to Royse City/I-30, LLC"; (2) claim for declaratory judgment that the forfeiture provision was unenforceable; and (3) claim for "minority member oppression" based on the forfeiture. Though Red Oak and Johnson had filed a third amended petition in intervention before the trial court granted the partial summary judgment, the trial court based its ruling on the second amended petition.

The third amended petition included factual details of the Heatley parties' failure to disclose the note-purchase plan. In addition to seeking actual damages, it requested "appropriate equitable relief (including, but not limited to, forfeiture of all fees received by Heatley, [Heatley Capital], and HC Developers and an order requiring the repurchase of Intervenors' interests in the Companies)." Notably, this third amended petition also alleged that Heatley and Heatley Capital "knowingly participated in and/or directed the breaches of fiduciary duty" carried out by HC Developers.

The Heatley parties moved to strike this third amended petition, but nothing in the record indicates the court ruled on their motion. Before trial, the Heatley parties noted that it was "not fully clear" which of Red Oak's claims were pending, but both parties presented their evidence at trial as if all claims were pending.

At the charge conference, however, the Heatley parties objected to asking the jury questions concerning whether they had breached fiduciary duties owed to Red Oak in the management of Royse City/I-30, arguing that the issue had been resolved by summary judgment. The trial court overruled that objection, and Red Oak's claim for breach of fiduciary duty concerning the management of Royse City/I-30 went to the jury.

Neither side objected to the charge on the ground that it did not include questions addressing factual issues relevant to the trial court's determination of Red Oak's and Johnson's request for equitable relief. And neither side submitted a question on the issue. The Heatley parties did submit questions addressed to "business judgment, gross negligence, and fraud" that included a culpability assessment: (1) "Was the act or omission found by you to be a breach of fiduciary duty performed in good faith and within the scope of the agreement?" and (2) "Was the act or omission found by you to be a breach of fiduciary duty the result of gross negligence or fraud?" These questions address an affirmative defense based on a disclaimer in the operating agreement—if their breach of fiduciary duty was performed in good faith and the act or omission was within the scope of the agreement, they could be liable for "damages or otherwise" only if they acted with gross negligence or fraud. The trial court denied the Heatley parties' request to include these questions in the charge.

Ultimately, the jury determined, as relevant: (1) Heatley Capital owed a fiduciary duty to Johnson and Red Oak; (2) all three Heatley parties breached their fiduciary duties to Johnson and Red Oak in the management of Royse City/I-30; (3) neither Johnson nor Red Oak suffered monetary

damages proximately caused by the Heatley parties' breaches of fiduciary duties; (4) none of the Heatley parties was unjustly enriched at the expense of Johnson; and (5) both Johnson and Red Oak ***388** failed to pay assessments properly made by Royse City/I-30's manager.

Neither side objected to the jury's verdict, and the trial court entered a take-nothing judgment. Johnson and Red Oak moved for judgment notwithstanding the verdict, asking the court to grant them equitable relief requiring Heatley Capital to forfeit all fees it collected on the Royse City/I-30 project and holding all three of the Heatley parties jointly and severally liable for the forfeiture.

After a hearing on the motion, the trial court entered an amended judgment and awarded equitable forfeiture against all three Heatley parties for $256,933 ($149,942 to Johnson and $106,991 to Red Oak, which accounted for their total contributions to Royse City/I-30) plus pre- and post-judgment interest and costs of court. The Heatley parties filed a motion to modify, correct, or reform the judgment, arguing that there was no basis for the court's equitable award, and it was overruled by operation of law.

The trial court issued findings of fact and conclusions of law that apply the factors identified by the supreme court in *ERI Consulting Engineers, Inc. v. Swinnea*, 318 S.W.3d 867, 874 (Tex. 2010), and *Burrow v. Arce*, 997 S.W.2d 229, 243 (Tex. 1999), to support its conclusion that equitable fee forfeiture is appropriate under the circumstances.

The court concluded that, although the jury found no damages proximately caused by the Heatley parties' conduct, the Heatley parties committed clear and serious breaches of their fiduciary duties by failing to disclose material information to Johnson and Red Oak, despite Johnson's and Red Oak's repeated requests for such information, despite knowing they had a duty to disclose the information, and despite sharing that information with other investors.

The court concluded that a forfeiture award would protect relationships of trust by discouraging disloyalty, and allowing the Heatley parties to escape liability would undermine fiduciary relationships. Forfeiture would also discourage Heatley from committing similar violations in the numerous other investments he controls. And awarding an amount equal to Johnson's and Red Oak's capital contributions, which is significantly less than the fees Heatley Capital received from the investment, would serve the interests of justice.

The trial court also concluded that the Heatley entities should be jointly and severally liable for the award. It found that at all relevant times, Heatley exercised exclusive control over both Heatley Capital and HC Land Company, and both Heatley and Heatley Capital exercised control and managerial discretion over Royse City/I-30. It noted that Heatley described his control over the investment and his relationship with Heatley Capital at the April 2010 investor meeting by saying: "It's me, Heatley Capital." It further noted that the jury determined all three Heatley parties committed the same breaches of fiduciary duties, and the court concluded they did so "in lockstep with" Heatley Capital. The Heatley parties were "indistinguishable as actors in control of the Royse City investment," and Heatley and HC Developers should not avoid liability based on how they "papered the transaction."

The Heatley parties contend the trial court abused its discretion by awarding equitable forfeiture, by holding Heatley and HC Developers jointly liable for forfeiting fees paid to HC Capital, and that the trial court erred by awarding prejudgment interest for which Johnson and Red Oak did not plead.

Standard of Review

We review a trial court's equitable-forfeiture determination for abuse of discretion. ***389** *See Cooper v. Campbell (Cooper I)*, No. 05-15-00340-CV, 2016 WL 4487924, at *10 (Tex. App.—Dallas Aug. 24, 2016, no pet.) (mem. op.) (citing *Burrow*, 997 S.W.2d at 243). Thus, we "will not disturb the trial court's ruling on a claim seeking equitable relief unless it is arbitrary, unreasonable, and unsupported by guiding rules and principles." *Cooper v. Campbell/Richard T. Mullen, Inc. (Cooper II)*, No. 05-17-00878-CV, 2018 WL 5919030, at *6 (Tex. App.—Dallas Nov. 13, 2018, pet. denied) (mem. op. on reh'g).

Rule 278's error-preservation requirements prevent reversal based on the Heatley parties' complaint that the jury did not determine the level of their culpability.

The Heatley parties first complain that equitable forfeiture was inappropriate because Red Oak and Johnson failed to request a jury question regarding the Heatley parties' level of intent when breaching their fiduciary duties. Red Oak and Johnson bore the burden to plead, prove, and obtain

any necessary findings on fee forfeiture. Texas Rule of Civil Procedure 278 states that "[f]ailure to submit a question shall not be deemed a ground for reversal of the judgment, unless its submission, in substantially correct wording, has been requested in writing and tendered by the party complaining of the judgment."

A trial court may order fee forfeiture as equitable relief when normal damages measures may not adequately address a breach of fiduciary duty. *ERI Consulting*, 318 S.W.3d at 874 (quoting *Burrow*, 997 S.W.2d at 243). In ruling on a request for forfeiture, a trial court must determine three elements: [1] whether a "violation is clear and serious, [2] whether forfeiture of any fee should be required, and [3] if so, what amount." *Id.* In making that determination, the court must consider non-exclusive factors: "[t]he gravity and timing of the breach of duty"; "the level of intent or fault"; "whether the principal received any benefit from the fiduciary despite the breach"; "the centrality of the breach to the scope of the fiduciary relationship"; "any threatened or actual harm to the principal"; "the adequacy of other remedies"; and "[a]bove all" whether "the remedy fit[s] the circumstances and work[s] to serve the ultimate goal of protecting relationships of trust." *Id.* at 875.

These "several factors embrace broad considerations which must be weighed together and not mechanically applied." *Id.* at 874 (quoting *Burrow*, 997 S.W.2d at 243). Thus, for example, "the 'willfulness' factor requires consideration of the [fiduciary's] culpability generally; it does not simply limit forfeiture to situations in which the [fiduciary's] breach of duty was intentional." *Id.* (quoting *Burrow*, 997 S.W.2d at 243). Nor would "the adequacy-of-other-remedies factor ... preclude forfeiture in circumstances where the principal could be fully compensated by damages." *Id.* (quoting *Burrow*, 997 S.W.2d at 243). The Heatley parties correctly note that, in the fee-forfeiture context, "when contested fact issues must be resolved before equitable relief can be determined, a party is entitled to have that resolution made by a jury." *Burrow*, 997 S.W.2d at 245. And "a dispute concerning an agent's culpability—whether he acted intentionally, with gross negligence, recklessly, or negligently, or was merely inadvertent—may present issues for a jury." *Id.*

The Heatley parties argue that because there was a fact issue requiring jury determination on their level of intent or fault, the lack of a jury question and answer is fatal to the trial court's conclusion to order fee forfeiture. We cannot reverse on this ***390** basis because they neither objected nor submitted a question "in substantially correct wording." *See* Tex. R. Civ. P. 274, 278.

In the absence of a submitted question, an objection will preserve error where, as here, the party seeking reversal did not have the burden of proof with respect to the question at issue. *See* Tex. R. Civ. P. 278; *Childress Eng'g Servs. Inc. v. DeLeon*, No. 05-16-00429-CV, 2017 WL 5898520, at *2 & n.2 (Tex. App.—Dallas Nov. 29, 2017, pet. denied) (mem. op.). Objections to a jury charge must be made "before the charge is read to the jury" and "must be specific, pointing out 'distinctly the objectionable matter and the grounds of the objection.' " *DeLeon*, 2017 WL 5898520, at *2 (quoting Tex. R. Civ. P. 272, 274). "Failure to timely object to error in a jury charge waives that error." *Id.*

The Heatley parties did not tender a question related to fee forfeiture, addressing the level of intent with which they breached their fiduciary duties or specifically addressing any other *Burrow* factor. They did not object to the lack of such a question. *See* Tex. R. App. P. 274, 278. Thus, we cannot reverse in their favor, as parties who failed to object to the absence of a jury question or to submit one at all.[3] *See id.*

We note the Heatley parties did request the court to submit two questions, but those questions did not satisfy rule 278 for the fee-forfeiture issue on which they seek reversal on appeal. In their written submission, the Heatley parties addressed the two questions specifically to "business judgment, gross negligence, and fraud", not to the fee-forfeiture issue, and they were as follows:

> [1] Was the act or omission found by you to be a breach of fiduciary duty performed in good faith and within the scope of the agreement?
>
> [2] Was the act or omission found by you to be a breach of fiduciary duty the result of gross negligence or fraud?

The trial court denied the Heatley parties' request to include these questions in the charge.

A question is submitted in "substantially correct wording" if it is in substance and in the main correct and is not affirmatively incorrect. *Placencio v. Allied Indus. Int'l, Inc.*, 724 S.W.2d 20, 21 (Tex. 1987); *see* Tex. R. Civ. P. 278. Although this does not require that a question be "absolutely correct," a question that is "merely sufficient to call the matter to the attention of the court" will not suffice. *Placencio*, 724 S.W.2d at 21. Rather, "[t]he question must be in such form as the court could properly submit it as presented." ***391** *Servs.*

Loadway of Dallas, Inc. v. Harris, No. 05-91-01899-CV, 1992 WL 193476, at *4 (Tex. App.—Dallas July 31, 1992, no writ) (not designated for publication) (citing *Moore v. Lillebo*, 674 S.W.2d 474, 476 (Tex. App.—El Paso 1984), *rev'd on other grounds*, 722 S.W.2d 683 (Tex. 1986)); *see Sky Interests Corp. v. Moisdon*, No. 05-18-00160-CV, 2019 WL 3423279, at *5 (Tex. App.—Dallas July 30, 2019, no pet.) (mem. op.).

The Heatley parties' proposed questions did not seek a determination as to their general "level of intent or fault" relevant to the fee-forfeiture analysis. *See ERI Consulting*, 318 S.W.3d at 875 (requiring trial court to consider, among other things, the fiduciary's "level of intent or fault" in its analysis); *Burrow*, 997 S.W.2d at 243 (requiring consideration of whether a breach is "willful," which in turn requires consideration of the fiduciary's "culpability generally"), 245 ("[A] dispute concerning an agent's culpability—whether he acted intentionally, with gross negligence, recklessly, or negligently, or was merely inadvertent—may present issues for a jury."). The questions included a culpability assessment, but were specifically directed at business judgment, gross negligence, and fraud, *not fee forfeiture.* In any event, the proposed questions directly addressed only one of the five levels of culpability identified by the supreme court in *Burrow*, gross negligence. *See Burrow*, 997 S.W.2d at 245.

And they interjected other concepts with little relationship to fee forfeiture, such as whether the acts were "within the scope of the agreement," which speaks to a liability disclaimer. That liability disclaimer was the ultimate basis for these questions, by which the Heatley parties sought to introduce an affirmative defense. The disclaimer in the operating agreement provided that if their breach of fiduciary duty was performed in good faith and the act or omission was within the scope of the agreement, then the Heatley parties would only be liable for "damages or otherwise" if they acted with gross negligence or fraud.

Submitting these questions was not even sufficient to call the fee-forfeiture matter the Heatley parties now complain of "to the attention of the court." *See Placencio*, 724 S.W.2d at 21; *see also Baylor Univ. v. Coley*, 221 S.W.3d 599, 607 (Tex. 2007) (Johnson, J., concurring). We conclude these questions were not submitted in "substantially correct wording" for purposes of resolving any factual dispute as to the Heatley parties' "intent or fault" as to the fee-forfeiture inquiry and thus could not provide a basis for satisfying the prohibition against reversal in the absence of an objection to the failure to submit a question. *See* Tex. R. Civ. P. 274, 278; *Placencio*, 724 S.W.2d at 21; *Baylor Univ.*, 221 S.W.3d at 607 (Johnson, J., concurring).

The evidence sufficiently supported the trial court's exercise of discretion to order the Heatley parties' fees partially forfeited.

We next address the second argument the Heatley parties make to support their first issue: that the evidence was legally insufficient to support forfeiture and thus that the court abused its discretion by awarding forfeiture. The Heatley parties initially recite that their complaints are to the sufficiency of evidence supporting the three elements of fee forfeiture, set by the *Burrow* court for the trial judge to determine: (1) clear and serious breach of fiduciary duty; (2) whether and (3) in what amount fees should be forfeited. *ERI Consulting*, 318 S.W.3d at 874 (quoting *Burrow*, 997 S.W.2d at 243). But they make no actual argument addressing these elements and instead quickly shift to challenging the evidence supporting some, but ***392** not all, of the factors a trial court "should" consider. *See Burrow*, 997 S.W.2d at 246.[4]

As we have noted, the supreme court has set forth factors for a court to consider when determining whether to forfeit fees. *See Burrow*, 997 S.W.2d at 243–44. The Heatley parties ask us to conclude the trial court abused its discretion in finding partial forfeiture appropriate because there was no jury determination on what they characterize as a fact issue regarding one of the factors. There are six other listed factors, and an endless number of situation-specific factors.

First, the Heatley parties claim there is no evidence regarding the gravity or centrality of the breaches of fiduciary duty. This is patently incorrect. The entire trial focused on the seriousness of the breach and how integral it was to the parties' relationship, and the trial court made findings to that effect. Indeed, the court concluded the nondisclosed information went to the heart of the investment—a defaulted loan secured by the partnership's only significant asset—and was central to Johnson's and Dodd's decisions whether to stay in the partnership. Moreover, the trial court concluded the gravity of the Heatley parties' nondisclosure was enhanced by the fact they selectively disclosed the information to other investors and had no legitimate reason to withhold the information from Johnson and Red Oak.

Second, the Heatley parties claim there was no evidence they acted intentionally, recklessly, or with gross negligence.

Notably, they make no argument that their conduct was not knowing or negligent with respect to a breach of their fiduciary duty, levels of intent that unquestionably support fee forfeiture. *See id.* at 241–44. Making no argument as to those levels of intent means this argument is incomplete, and in the face of a trial court finding that they withheld information they knew they had a duty to disclose, the Heatley parties cannot prevail.

Even so, when setting forth the factors in *Burrow*, the supreme court cited the Restatement (Second) of Trusts § 243, cmt. c, which defines the intent factor as "whether the breach of trust was intentional or negligent or without fault." *Id.* at 243. This confirms that the fee-forfeiture analysis shares a common feature of other multi-factor analyses: that a court can order forfeiture in the absence of one of the factors, here, intent. *See id.* Although the supreme court explained in *Burrow* that it "would be inequitable for an agent who had performed extensive services faithfully to be denied all compensation for some slight, inadvertent misconduct that left the principal unharmed," it did not suggest it would be inequitable to award forfeiture where a breach was more than slight or where it harmed the principal, even if inadvertent. ***393** *Burrow* thus counsels that a specific level of intent is merely one relevant consideration to be weighed along with other factors; it is neither a necessary element of forfeiture nor determinative in assessing whether forfeiture is appropriate.

In any event, sufficient evidence supports the court's finding of knowing behavior. A trial court does not abuse its discretion by basing its decision on conflicting evidence, as long as "some evidence reasonably supports the trial court's decision." *Cooper II*, 2018 WL 5919030, at *5. Here, there was conflicting evidence concerning when exactly the note-purchasing plan was adopted, but some evidence supports the trial court's conclusion that the Heatley parties adopted that plan in early 2009. A reasonable manager would have known the plan to pay a third party to acquire a note that was secured by the entity's only significant asset—especially after the note was intentionally placed in default as part of the plan—would be material information to an investor contemplating whether to pay an assessment to maintain his ownership interest.

There was some evidence that the Heatley parties had a motive to induce Johnson and Red Oak to forfeit their interests, both to increase their own distributions upon payout and to mollify other investors who wanted them out. And there was evidence the Heatley parties did not disclose the note-purchase plan to Johnson and Red Oak despite (1) knowing they had a fiduciary obligation to disclose such material information, (2) receiving repeated requests from Johnson and Dodd for information concerning their plans to address the Royse City/I-30 note, and (3) disclosing that plan to other investors.

The trial court could find from this evidence that the Heatley parties' actions were intentional or, at the very least, not "merely inadvertent." *See Burrow*, 997 S.W.2d at 245 (describing the various levels of a fiduciary's culpability as "whether he acted intentionally, with gross negligence, recklessly, or negligently, or was merely inadvertent"). In this second sub-argument, the Heatley parties also repeat their earlier complaint, blaming Red Oak and Johnson for not securing jury findings concerning intent, and we again reject that complaint.

Third, the Heatley parties argue they received no benefit from breaching their fiduciary duties. Even in the absence of an additional benefit beyond the fees appellees did pay, partial fee forfeiture can be appropriate. *See ERI Consulting*, 318 S.W.3d at 873–74. The Heatley parties do not and cannot argue otherwise. By this argument, the Heatley parties ask us to reweigh the evidence and reach a different conclusion than the trial court.

Fourth, the Heatley parties complain the jury found they were not unjustly enriched and that their breaches of fiduciary duty caused no harm to appellees. This argument ignores a central tenet of forfeiture: "The main purpose of forfeiture is not to compensate an injured principal.... Rather, the central purpose is to protect relationships of trust by discouraging agents' disloyalty.... or other misconduct." *Burrow*, 997 S.W.2d at 238, 240; *see also Kinzbach Tool Co. v. Corbett-Wallace Corp.*, 138 Tex. 565, 160 S.W.2d 509, 514 (Tex. 1942). A "client need not prove actual damages in order to obtain forfeiture" for breach of fiduciary duty. *Burrow*, 997 S.W.2d at 240. And, "even if a fiduciary does not obtain a benefit ... by violating his duty, a fiduciary may be required to forfeit the right to compensation for the fiduciary's work." *ERI Consulting*, 318 S.W.3d at 873. Forfeiture punishes a breach of fiduciary duty and exists as an equitable manner of compensating principals ***394** in situations where strict legal analysis does not support traditional measures of damages. The "threatened or actual harm to a principal" is only one relevant factor to be considered, while the most important consideration, "[a]bove all," is whether "the remedy ... fit[s] the circumstances and work[s] to serve the ultimate goal of

protecting relationships of trust." *ERI Consulting*, 318 S.W.3d at 875; *see Burrow*, 997 S.W.2d at 238.

And, contrary to the Heatley parties' argument, the jury's refusal to find unjust enrichment cannot prevent forfeiture in this case. Here, unjust enrichment required the jury to find they acted intentionally; forfeiture, as we have noted, can be based on less than intentional conduct. *Burrow*, 997 S.W.2d at 243. In any event, the Heatley parties acquired interests adverse to their principals, Johnson and Red Oak, "without a full disclosure," a betrayal of "trust and a breach of confidence." *See Burrow*, 997 S.W.2d at 249 (quoting *Kinzbach Tool*, 160 S.W.2d at 514).

In sum, we are not persuaded by the Heatley parties' arguments. It was up to the trial court to weigh the forfeiture factors and determine whether the Heatley parties' breaches were "clear and serious" and whether forfeiture was warranted. *See ERI Consulting*, 318 S.W.3d at 874. It did so, and its conclusions in that regard were not "made in an arbitrary or unreasonable manner without reference to any guiding rules or principles." *Bowie Memorial Hosp. v. Wright*, 79 S.W.3d 48, 52 (Tex. 2002). To the contrary, the trial court's extensive findings reflect careful attention to the *Burrow* factors. We conclude the trial court did not abuse its discretion by awarding forfeiture.

The trial court implicitly modified its prior partial summary judgment, allowing the jury's findings on breach of fiduciary duty to support the trial court's award.

The Heatley parties next contend the trial court abused its discretion by awarding forfeiture to Red Oak because the trial court initially granted summary judgment against Red Oak on its claim that the Heatley parties breached their fiduciary duties in the management of Royse City/I-30. Because the trial court never vacated its prior ruling, the Heatley parties say the jury's finding that they breached their fiduciary duties to Red Oak is immaterial, and there is no legal basis to support the judgment in favor of Red Oak.

But the Heatley parties' summary judgment was directed at Johnson's and Red Oak's second amended petition, and though the latter parties filed their third amended petition more than seven days before the summary-judgment hearing, the court's order does not refer to that petition, noting that "[a]ll relief not expressly granted is denied."[5] *See* Tex. R. Civ. P. 63; *Sosa v. Cent. Power & Light*, 909 S.W.2d 893, 895 (Tex. 1995). Thus, as the Heatley parties acknowledged at the trial, it is "not fully clear" which of Red Oak's claims in the third amended petition, if any, were resolved by the trial court's partial summary judgment.

Even if we assume the trial court's partial summary judgment addressed Red Oak's claim for breach of fiduciary duty as asserted in the third amended petition, the Heatley parties are incorrect in asserting that the partial summary judgment is controlling. "A trial court may change or modify a partial summary ***395** judgment at any time before its plenary power expires because it is an interlocutory order." *Fabio v. Ertel*, 226 S.W.3d 557, 560, 563 (Tex. App.—Houston [1st Dist.] 2007, no pet.). The trial court in this case never explicitly withdrew its partial summary judgment, but it was implicitly modified or withdrawn to the extent it was inconsistent with the trial court's final findings of fact and conclusions of law. *See id.* at 557.

That said, if a trial court reverses course on issues it decided as a matter of law prior to trial, it must allow the parties the "opportunity to litigate the issues" at the trial. *See Bi-Ed, Ltd. v. Ramsey*, 935 S.W.2d 122, 123 (Tex. 1996) (per curiam). The record demonstrates the Heatley parties were given a full and fair opportunity to litigate Red Oak's claim for breach of fiduciary duty, and they did just that. Red Oak presented evidence on the disclosure issues during its case in chief, the Heatley parties cross-examined Red Oak's witness on those issues, and the Heatley parties presented their own evidence aimed at refuting the Johnson and Red Oak disclosure-based claims.

We overrule the Heatley parties' second issue.

The trial court did not abuse its discretion by holding the Heatley parties jointly and severally liable to pay the forfeiture.

The Heatley parties next contend the trial court abused its discretion by holding Heatley and HC Developers jointly liable for the forfeiture, arguing that Johnson and Red Oak neither pleaded nor proved any basis for joint liability. We disagree. Johnson's and Red Oak's third amended petition specifically alleges Heatley and Heatley Capital "knowingly participated in and/or directed" breaches of fiduciary duties committed by HC Developers as the manager of Royse City/I-30.

As the supreme court stated in *ERI Consulting*, "the rule allowing such equitable remedies to protect relationships of trust encompasses the ability to fashion such remedies against those who would conspire to abuse such relationships." *ERI Consulting*, 318 S.W.3d at 881. Moreover, the supreme court noted that "[i]t is settled as the law of this State that where a third party knowingly participates in the breach of duty of a fiduciary, such third party becomes a joint tortfeasor with the fiduciary and is liable as such." *Id.* (quoting *Kinzbach Tool Co.*, 160 S.W.2d at 514). The supreme court ultimately concluded in *ERI Consulting* that joint liability did not "fit the circumstances presented" in that case, because "the trial court's award included no equitable remedy tied to conduct in which [the third party] participated." *Id.* That is not the case here.

The evidence supports the trial court's finding that Heatley and HC Developers "committed the same breaches of duty in lockstep with" Heatley Capital and that all three of the Heatley parties were "indistinguishable as actors in control of the Royse City investment." Indeed, Heatley was the person who disclosed the note-purchase plan to other investors while withholding it from Johnson and Red Oak. Heatley sent the March 2010 letter, purportedly on behalf of HC Developers but on Heatley Capital's letterhead, which the trial court found was incomplete and misleading. And Heatley sent the May 2010 email stating that Heatley Capital had a fiduciary obligation to its other partners to forfeit Johnson's interest. The trial court did not abuse its discretion by fashioning the remedy to prevent Heatley and HC Developers from avoiding liability based on how they "papered the transaction."

***396** The Heatley parties further contend Johnson and Red Oak waived joint liability both because they did not specifically cite "knowing participation" in their request for equitable forfeiture and because they failed to obtain a jury finding on the issue of knowing participation. Johnson and Red Oak were not required to use magic words to invoke the trial court's equitable power to fashion a remedy. Johnson and Red Oak asked the trial court to hold Heatley and HC Developers jointly and severally liable for forfeiture under principles of equity—principles which, as we noted above, allow the trial court to fashion its remedies against those who participate in breaching fiduciary duties. The Heatley parties cite no authority—and we are aware of none—that required Johnson and Red Oak to specify the legal theory underlying the trial court's equitable discretion.

The argument that Johnson and Red Oak waived joint liability because they failed to obtain a jury finding on knowing participation is equally flawed. Even if we accept the premise of their argument, that both Heatley's and HC Developer's "knowing participation" in Heatley Capital's breach of fiduciary duty was not established as a matter of law, an issue we need not decide, the charge asked the jury whether Heatley Capital breached a fiduciary duty to Johnson and Red Oak, which it answered in the affirmative. That question addressed an element of recovery under a theory of joint liability based on knowing participation. Thus, the issue was not waived, and as long as the evidence is factually sufficient to support a finding of knowing participation—which we conclude it is—the judgment would not be subject to reversal on the ground that Johnson and Red Oak failed to obtain such a finding from the jury. *See* Tex. R. Civ. P. 279.[6] We overrule the Heatley parties' third issue.

The Heatley parties waived any error in awarding prejudgment interest.

Finally, the Heatley parties contend the trial court erred by granting prejudgment interest because Johnson and Red Oak did not plead for it. The Heatley parties did not object to the prejudgment-interest award in the trial court. They have waived that issue on appeal. *See* Tex. R. App. P. 33.1; *Keene Corp. v. Gardner*, 837 S.W.2d 224, 231 (Tex. App.—Dallas 1992, writ denied) (preservation required for prejudgment interest complaint).

* * *

We overrule the Heatley parties' issues and affirm the judgment of the trial court.

All Citations

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Footnotes

1 We quote the partnership agreement here, which was in effect when the entity purchased the property.

2 It is unclear from the record whether HC Land Developers, LLC is an entity distinct from either HC Developers, LLC or HC Land Company.

3 The Heatley parties contend a seven-sentence portion of a case in the opposite procedural posture from this one requires reversal here. *See* *Dallas Fire Ins. Co. v. Tex. Contractors Sur. & Cas. Agency*, 128 S.W.3d 279, 303 (Tex. App.—Fort Worth 2004), *rev'd on other grounds*, 159 S.W.3d 895 (Tex. 2004). In *Dallas Fire*, the trial court denied a plaintiff's request for fee forfeiture in the absence of a culpability finding because the plaintiff failed to request the jury to make one. The specific issue before the court of appeals was whether the jury's finding of breach of fiduciary duty required forfeiture as a matter of law, and thus, the plaintiff's failure to seek jury questions addressing any of the forfeiture factors contributed to the failure to establish entitlement to forfeiture as a matter of law. *Id.*

Here, we evaluate a trial court grant of forfeiture in the absence of a culpability-level finding. Because we cannot reverse solely on the absence of the intent question due to the Heatley parties' failure to object and, because we conclude below that there is otherwise sufficient evidence to support the trial court's exercise of discretion, *Dallas Fire* does not change our analysis.

4 We pause to note that because the Heatley parties' level of culpability is not a necessary element of fee forfeiture, it does not implicate Texas Rule of Civil Procedure 279's waiver based on omissions from the charge. That rule focuses on elements of claims, not factors in a legal analysis. In the fee-forfeiture context, the trial court determines the elements and considers factors to decide whether to award forfeiture; also, the supreme court has not required a particular level of intent or fault as a necessary element of recovery for equitable forfeiture. *See* *ERI Consulting*, 318 S.W.3d at 875.

The jury was asked to determine whether the Heatley parties breached their fiduciary duties, and the jury's affirmative findings on that issue necessarily refer to Johnson's and Red Oak's request for an equitable remedy premised on those breaches of duties. As we discuss, the evidence was sufficient to support a finding that the Heatley parties' nondisclosures, at the very least, were not merely inadvertent. In any event, the jury never considers the “elements” of fee forfeiture; that inquiry is specifically reserved to the trial court in its equitable capacity, and thus rule 279 has no operation here.

5 The Heatley parties moved to strike the third amended petition, it appears the trial court denied that motion, and the Heatley parties answered the third amended petition soon after.

6 The Heatley parties cite *Gulf States Utilities Co. v. Low*, 79 S.W.3d 561, 565 (Tex. 2002), where the supreme court held that the court of appeals misapplied rule 279 in a case where an issue was not submitted to the jury because the court of appeals used deemed findings to contradict, rather than support, the trial court's judgment. *See* *id.* at 564–65. Here, any deemed finding necessary to support joint liability would support, not contradict, the trial court's judgment. Thus, even if we were to assume Heatley's and HC Developers' knowing participation is not established as a matter of law, rule 279 would apply, and *Low* would be inapposite.

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