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15-26-00012-CV
FIFTEENTH COURT OF APPEALS
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NO. 15-26-00012-CV

IN THE FIFTEENTH COURT OF APPEALS

ROBIN BALEY d/b/a H2O SERVICES,

Appellant,

VS.

RCH WATER SUPPLY CORPORATION,

Appellee.

Appeal from the 382nd Judicial District Court
Rockwall County, Texas
Hon. Carolyn Wright, sitting by assignment
(Transfer appeal from the Fifth Court of Appeals)

APPELLANT'S REPLY BRIEF

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SUMMARY

Five facts direct the analysis and outcome of this appeal--only two of which are challenged in any measure:

- RCH Water Supply (RCH) authorized Robin Baley to write checks
- Baley was the only person who wrote checks
- RCH agreed to reimburse Baley for expenses, including rent, regulatory fees, and other fees she "fronted"[1]
- RCH had knowledge of the 40 reimbursement checks in question, having been provided with Baley's invoices and having issued 1099's to her
- Records supporting Baley's reimbursement checks were turned over to RCH and were stored at RCH's pump station[2]

After determining in discovery that Baley had handed over all copies of the invoices and receipts supporting the reimbursement checks, CR.87, RCH proceeded to trial on its breach-of-fiduciary duty claim, believing it would shift the burden of proof to Baley to present the evidence that is now in RCH's possession. *See* CR.215. Thus, RCH pursued its claim without presenting affirmative proof of liability or damages.

[1] RCH's board president testified to his "assumption" that Baley's base compensation included overhead. He did not address other expenses. *See* discussion *infra* 35-37.

[2] RCH challenges this fact with incomplete testimony. *See* discussion *infra* 28-29.

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Sitting in equity, the trial court erred by shifting the burden of proof to Baley. It was error to shift the burden when RCH held all the proof. It was also error to predicate liability upon a shifted burden. Further, imposing liability upon Baley where RCH authorized Baley to write checks and had knowledge of her reimbursement checks, is erroneous. In addition, it was error to invoke the court's equity jurisdiction *and* award a remedy at law—assuming that is what the court actually did. Regardless of the jurisdictional basis for the award, the evidence is legally insufficient to support the award because there is no evidence of the total amount of undisputed expenses that were included in the $808,098.77.

Notwithstanding the above, the court erred by imposing a fiduciary duty on Baley. And it erred by failing to specify the basis of the fiduciary duty as well as what specific duty was breached. Even if Baley was a fiduciary, the existence and scope of specific duties owed is not all-encompassing.

Further, the court erred by holding that Baley's reimbursement was a breach of any duty. RCH's uncontroverted authorization and knowledge of the reimbursements forecloses the finding of a breach, or the shifting of any burden of proof. Finally, the trial court's disgorgement of the entire $808,098.77 was improper without assessment of factors required by the Texas Supreme Court.

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ARGUMENT

I. The court erred in finding and concluding that Baley owed and breached a fiduciary duty

A. RCH fails to defend the "employee" finding

RCH asserts that the record conclusively establishes that Baley was RCH's employee. But RCH makes no effort to address the controlling test from *Limestone Prods. Distribution v. McNamara*, 71 S.W.3d 308, 312 (Tex. 2002). Instead, RCH relies upon Naylor's "understanding" and Baley's testimony that she was an employee. *Appellee's Brief at 19-20*. The *Limestone* factors do not include what the worker or others believed or understood the worker's status was. Such conclusory testimony is not competent evidence. *Cf. City of Keller v. Wilson*, 168 S.W.3d 802, 812 & n.31 (Tex. 2005). The evidence addressed in the Appellant's Brief at 34-41 establishes that Baley was an independent contractor.

RCH points to evidence that it issued W-2's as conclusive. *Appellee's Brief at 19 n.7*. But RCH does not acknowledge Baley's cited authorities showing that receipt of W-2's is not conclusive, including the result in *Limestone* where the employer issued W-2's but the supreme court held that the worker was an independent contractor. *Limestone*, 71 S.W.3d at 309-10.

RCH misunderstands Baley's assertion that the judgment must be reversed if the trial court incorrectly found that she was RCH's employee. As a general rule,

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Baley was *either* RCH's employee, *or* she was an independent contractor. *See Painter v. Amerimex Drilling I, Ltd.,* 561 S.W.3d 125, 133 (Tex. 2018) (rejecting piecemeal task-based approach). If the judgment rests upon an error that caused the rendition of an improper judgment or one that prevented a proper presentation to this Court, Appellate Rule 44.1(a) requires reversal. If the trial court erred in its determination that Baley was an employee, that error necessarily affected what duties she may have owed and the scope of those duties, or the erroneous classification probably prevented Baley from properly presenting her case to the Court. Reversal and remand in the interests of justice would be required. *See* Tex. R. App. P. 43.3(b); *Layla's Day Spa, Inc. v. HD Salon Grp. LLC*, No. 05-24-00065-CV, 2025 Tex. App. LEXIS 3453, *39-40 (Tex. App.—Dallas May 21, 2005, no pet.).[3]

B. RCH does not address the erroneous imposition of an informal fiduciary duty

RCH does not answer Baley's challenge to the erroneous determination that she had an informal fiduciary relationship with RCH, except to state that the imposition of an informal fiduciary relationship is "supported by sufficient evidence." *Appellee's Brief at 22*. RCH does not recite what the evidence purportedly is nor does it address Baley's authorities holding that an informal

[3] This appeal is a transfer and requires application of precedent from the transferor court. Tex. R. App. P. 41.3.

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fiduciary relationship cannot be based upon subjective trust, the trust ordinarily present in any business dealings, or the duration of a relationship. *Appellant's Brief at 42-43*. And importantly, RCH points to no evidence that Baley held such a position of confidence prior to her business relationship with RCH. *See id.*

Because the court erred in determining that Baley had an informal fiduciary relationship, the judgment must be reversed, or, alternatively, the case must be remanded in the interests of justice. *See* Tex. R. App. P. 43.3; *Layla's Day Spa,* 2025 Tex. App. LEXIS 3453, *39-40.

II. The court erred by finding that Baley breached any fiduciary duty

A. Evidence of breach—what was the breach?

The court's findings state that Baley committed a breach of an unspecified duty "by writing forty (40) checks to herself totaling $808,098.77 without any documentation to back up, explain, or support the checks." CR.287 (COL No. 7). But the evidence is legally insufficient to support any constituent piece of this finding.

The writing of checks by Baley and payable to Baley is not a *per se* breach of any duty. Critically, RCH does not dispute (or address) the uncontroverted and undisputed fact that it authorized and consented to Baley writing checks to herself to reimburse expenses. *Appellant's Brief at 44-45*. Given this authorization and

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consent, there is no evidence of any breach arising from the mere act of Baley writing checks to herself. *Id.*

As to the number of checks or the amount (in the finding), RCH presented no evidence that it limited Baley to writing a specified number of checks or that it limited the total amount of the reimbursement. Thus, there is no legally sufficient evidence that would make these constituent pieces of the finding the "tipping point" to constitute a *breach* of any duty.

That leaves only the last piece of the finding—that the checks were written "without any documentation to back up, explain, or support the checks"—as the triggering facts for liability. Undisputed facts contradict this constituent piece of the finding.

RCH does not contradict several facts that must be accepted as true, including that (1) Baley fronted expenses for RCH and incurred expenses for RCH, (2) RCH reimbursed Baley for expenses such as rent, utilities, office expenses, and regulatory fees, (3) Baley itemized expenses on monthly invoices and submitted them to RCH, and (4) the invoices subsequently were put in binders and then put in boxes and stored at RCH's pump house. Tex. R. App. P. 38.1(g); *Wolfe v. Wolfe Madewell 2019 LLC*, No. 05-24-01430-CV, 2025 LX 214275, at *3 n.3 (Tex. App.—Dallas July 17, 2025, no pet.). Additionally, RCH does not contradict that Baley turned over the remainder of the financial information she possessed to RCH's board president

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and she advised him that all previous financial information was at RCH's pump station. *See Appellant's Brief at 24.* These uncontradicted facts also must be accepted as true. Tex. R. App. P. 38.1(g). The trial court's finding is contrary to the undisputed evidence and has no evidence supporting it.

RCH's brief does not address the fact that it presented no affirmative evidence that Baley *failed* to support each check with documentation. Nor does RCH address the testimony that Baley's invoices were provided to RCH's board, which never questioned the invoices. RCH does not address the fact that it issued 1099's that reflected the very expenses involved. Baley challenged the court's finding that there was no documentation to support the checks on both legal and factually sufficiency grounds. *Appellant's Brief at 43-36*. Based upon the uncontradicted facts and RCH's lack of response, the Court should reverse the judgment and render a take-nothing judgment. Alternatively, the Court should reverse the judgment and remand for a new trial.

To the extent RCH's brief can be construed to address breach, the brief is circular, referring back to the finding itself to assert that Baley wrote checks to herself without providing any documentation. *Appellee's Brief at 26*. The findings and conclusions of the court are not the evidence of the facts. *Vidaurri v. Ensey*, 58 S.W.3d 142, 146 (Tex. App.—Amarillo 2001, no pet.). And, as discussed, the finding is not supported by the record.

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RCH's brief also references the "finding" that Baley's testimony that she submitted "vouchers" to RCH was not credible. *Appellee's Brief at 26 n.10*. Baley never testified about submitting "vouchers." She never used the term "voucher." Accordingly, the finding does not impact the relevant testimony, nor does it impact the corroborating testimony from other witnesses. Nevertheless, sufficiency-of-the-evidence review does not allow the fact finder to substitute opinions on credibility for undisputed truths. *City of Keller v. Wilson*, 168 S.W.3d 802, 816-17, 820 (Tex. 2005).

The undisputed, uncontradicted facts establish as a matter of law that Baley *did* submit invoices and receipts, that RCH's board had the opportunity to review them, that RCH's accountant issued 1099's based on the documentation, and that the documentation for the checks was put in boxes and stored at RCH's pump house. Accordingly, the evidence supporting the finding that the checks had no documentation to back up, explain, or support them is contrary to established, undisputed facts.

Further, RCH does not challenge the fact that it authorized and consented to the Baley's writing of reimbursement checks. *See Appellant's Brief at 44*. Under the undisputed facts, there is no evidence of breach.

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B. What duty was breached?

The findings reference several duties the court concluded Baley owed, *see* CR287 (COL# 6 & & 7), but the court found "that Baley has breached her fiduciary duty to RCH" without identifying *what* specific duty Baley breached. Though RCH drafted the findings, RCH's appellate brief fails to identify and defend any *specific* duty that Baley allegedly owed and allegedly breached.

Its appellate brief disputes that the court was careless in its application of fiduciary duties to Baley. Nevertheless, RCH parrots the trial court's recitals of a list of several duties, without regard for the nature of the parties' relationship and without any fact-sensitive analysis. The Texas Supreme Court warned against taking such an approach to imposing liability in both *National Plan Admin., Inc. v. National Health Ins. Co.,* 235 S.W.3d 695, 700 (Tex. 2007), and *Johnson v. Brewer & Pritchard, P.C.*, 73 S.W.3d 193, 203 (Tex. 2002). *See also* RESTATEMENT (THIRD) OF AGENCY § 8.01 cmt. c ("Fiduciary obligation, although a general concept, is not monolithic in its operation."). However, the findings—and now RCH in its brief—see no difference as to any duty Baley might have owed or the scope of the duty, depending on (1) whether she was an employee or an independent contractor, (2) whether she had a formal or informal fiduciary relationship, or (3) what particular activity Baley was performing. Moreover, both the trial court and RCH appear to impose any and all fiduciary duties on Baley based upon the attachment of the

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"fiduciary" label However, not all fiduciaries are burdened with the same duties. And the scope of any specific duty owed may vary. Because the court indiscriminately lumped a host of duties together (*see* COL No.7 at CR.287) and found that Baley breached an unspecified duty (*see* COL No.10 at CR.288), it is impossible to determine on appeal what the actual liability basis was, or whether, if any one piece of the analysis was incorrect, whether liability might still be found.

While RCH argues that the court was *not* careless in its sweeping application of multiple fiduciary duties, RCH's brief does not single out any duty or duties. RCH's brief is silent insofar as any discrete discussion of the duty (1) not to put her interests over RCH's as to loyalty, fair dealing, and financial accountability, (2) of loyalty and utmost good faith, (3) to act with integrity of the strictest kind, (4) of fair, honest dealing, (5) of full disclosure. These were all duties the court broadly referenced. CR.287. This Court cannot assume that the trial court found any of the listed duties to be the basis of liability, nor can the Court make arguments on behalf of RCH as to which listed duty serves as the basis of Baley's liability. *See Dallas Cty. v. Crestview Corners Car Wash,* 370 S.W.3d 25, 57 (Tex. App.—Dallas 2012, no pet.).

Instead of discussing duties mentioned the conclusions of law, RCH's brief argues that Baley's liability rests upon unlawful self-dealing. *Appellee's Brief at 23*. RCH did not plead self-dealing. *See* CR.135. The findings include no finding that

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Baley engaged in self-dealing. RCH's fundamental misunderstanding of "self-dealing" as a basis of liability is reflected in the manner in which it labels Baley's writing of checks to herself as "self-dealing." *See Appellant's Brief at 23*. Self-dealing has at least two requirements that are material to RCH's misuse of the label: (1) the fiduciary's use of position to gain a benefit (2) at the expense of the one to whom a fiduciary duty is owed. *Mims-Brown v. Brown*, 428 S.W.3d 366, 374 (Tex. App.—Dallas 2014, no pet.); BLACK'S LAW DICTIONARY 1632 (11th ed. 2019). Given the uncontradicted facts that RCH authorized Baley to pay expenses RCH owed, RCH failed to show that Baley "gained a benefit" by writing reimbursement checks to herself. RCH also failed to show that it suffered any expense (apart from payment of expenses legally owed).

Citing *Johnson v. Brewer & Pritchard*, RCH argues that Baley's writing of checks to herself without documentation violates the duty to account for profits and the duty to deal fairly in all transactions with the principal. *Appellee's Brief at 26*. The trial court made no finding that Baley violated the duty to account for profits nor did it find that Baley breached the duty to deal fairly with RCH. *See* CR.283. Moreover, as discussed, the premise of RCH's assertion—that there was no documentation—is contradicted by established fact. Further, with respect to the duty to account for profits, *Johnson* cites Section 13 of the RESTATEMENT (SECOND) OF AGENCY for the general authority that there is a duty to account for profits, but

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Section 13 does not itself explain what this duty means or requires. *Johnson v. Brewer & Pritchard*, 73 S.W.3d 193, 200 & n.14 (Tex. 2002). For the meaning, one must go to Section 388, which then leads to Section 404. Section 404 makes it a violation of an agent's duty to her principal for using the principal's assets *for her own purposes*. RESTATEMENT (SECOND) OF AGENCY § 404 (1958). But this duty presumes that RCH met its burden of proof to establish that Baley used RCH's assets for her own purposes. There is no such proof. The only evidence shows that Baley reimbursed herself for expenses RCH agreed to pay. If RCH wanted to prove that *any* payment or *any part* of any payment was not for a reimbursable expense, RCH could have done so using the documents in its possession.

The court's application of broad, sweeping sets of duties without regard to Baley's position, Baley's activity, or to RCH's authorizations and knowledge, is just the sort of careless application of duties disapproved of in *Johnson v. Brewer & Pritchard, P.C.*, 73 S.W.3d 193, 201 (Tex. 2002) (discussing *Bray v. Squires*, 702 S.W.2d 266, 270 (Tex. App.—Houston [1st Dist.] 1985, no writ)).

The trial court erred in its imposition of fiduciary duties and in its finding that Baley's authorized reimbursements violated any fiduciary duty.

C. No breach necessary for liability?

After failing to identify any *specific duty* the trial court listed or to recite even a scintilla of evidence to support a breach of a specific duty, RCH finally offers the

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possibility that a finding of a breach might not be required to impose liability. *Appellant's Brief at 27-28* (quoting *Texas Bank & Trust Co. v. Moore*, 595 S.W.2d 502, 509 (Tex. 1980)). This is a remarkable suggestion, not merely because "breach" is part of the name of the cause of action, but because the courts regularly identify breach as a required element. *See, e.g., First United Pentecostal Church of Beaumont v. Parker,* 514 S.W.3d 214, 220 (Tex. 2017); *Parker v. Parrack*, No. 15-24-00075-CV, 2026 LX 276307, at *5, 2026 WL 1595380 (Tex. App.—15th Dist. June 4, 2026, pet. denied); *see also* O'CONNOR'S CAUSES OF ACTION Ch. 11, § 2.2 (2026 ed.).

RCH misapplies its cited authority. RCH cherry-picks an incomplete quotation from *Texas Bank & Trust Co. v. Moore*, 595 S.W.2d 502, 509 (Tex. 1980), to assert that if there is no evidence to rebut a presumption of fairness, no finding of breach is required. *See Appellee's Brief at 27-28*. This is not a holding of *Moore*. In fact, the *complete* statement from *Moore* is this:

> "The presumption of unfairness stands unrebutted in any respect and *in this posture of the case* the Bank as plaintiff was not required to request an issue inquiring if Moore breached a fiducial obligation to Mrs. Littell."

Moore, 595 S.W.2d at 509 (emphasis added). Thus, *Moore* does not contain a broad holding that a finding of breach is not required. Furthermore, it is important to understand the posture of *Moore* to know how its posture differs from the posture of the present case.

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From start to finish, the court in *Moore* was sitting in equity. The administrator of the Estate of Maggie Littel sued Ms. Littel's nephew for an equitable accounting. *Id.* at 504. The trial court granted the accounting and appointed a Master in Chancery to perform the accounting. *Id.* The Master's report determined that after the death of the decedent, the decedent's nephew closed four bank accounts belonging to the decedent and transferred the funds into his personal accounts. *Id.* at 505-06. In the subsequent trial, the only issue the jury found was that the decedent did not intent to make gifts to her nephew of two of the accounts he transferred. *Id.* at 506. The court of appeals reversed a judgment against the nephew requiring the return of the bank accounts because there was no issue submitted on the breach element of the breach of fiduciary duty claim. *Id.* at 507.

The Texas Supreme Court reversed the court of appeals. The court recited undisputed evidence from the accounting that the nephew made a profit by his transfer of the accounts to himself, and the court invoked equitable principles to impose an informal fiduciary relationship and to require the fiduciary to establish the fairness of the transaction he profited from to the principal. *Id.* at 508-09. The court "emphasized that the imposition by equity of a fiduciary relationship in such circumstances does no more than cast upon the profiting fiduciary the burden of showing the fairness of the transactions." *Id.* at 509. Noting that Moore did nothing to rebut the presumption of unfairness of the undisputed evidence he profited by his

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taking of the bank accounts, the court held that under that posture of the case, the plaintiff did not need an issue inquiring about breach. *Id.* In short, the *undisputed facts from the accounting established Moore's breach* without the need for an issue to go to the jury.

In the present case, there was no equitable accounting. There is no undisputed evidence that Baley made any profit or that RCH's money went toward anything other than covering expenses, so as to establish as undisputed fact any self-dealing. Moreover, Baley's engagement in check-writing was authorized. In contrast, Moore had no legitimate reason for putting the decedent's bank accounts into his personal account.

III. The court erred by shifting the burden of proof

RCH's brief does not dispute the premise that if there was no fiduciary relationship, there would be no burden-shifting. The same result should apply if there is a fiduciary relationship, but the scope of any duty owed does not extend to the activity involved—authorized expense reimbursement.

However, RCH appears to argue that the existence of a fiduciary relationship itself shifts the burden of proof—even for establishing a breach (or for eliminating that element altogether). *See Appellee's Brief at 26-29*. This argument is not correct.

Burden-shifting is performed by a court sitting in equity. *See Archer v. Griffith*, 390 S.W.2d 735, 739 (Tex. 1964); *Bell v. Ramirez,* 299 S.W. 655, 658 (Tex.

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Civ. App.—Austin 1927, writ ref'd).[4] Equitable principles are designed to alleviate harsh results caused by rigid application of legal principles. *Slaughter v. Cities Serv. Oil Co.*, 660 S.W.2d 860, 862 n.* (Tex. App.—Amarillo 1983, no writ). Generally, the existence of an adequate remedy at law bars equitable relief. *Campbell v. Wilder*, 487 S.W.3d 146, 152 (Tex. 2016); *Arneson v. Shary*, 32 S.W.2d 907, 910 (Tex. Civ. App. 1930, no writ); *see Huynh v. Blanchard,* 694 S.W.3d 648, 687 n.58 (Tex. 2024) (legal remedy is not adequate when damages must be based on conjecture). A court's exercise of its equitable jurisdiction must be made on a case-by-case basis. *Holland v. Florida*, 560 U.S. 631, 649-50 (2010). The mere fact that there is an agency relationship, or that the agent received something from the principal, does not afford the principal the right to force the agent to account. *Richardson v. First Nat'l Life Ins. Co.*, 419 S.W.2d 836, 838 (Tex. 1967); RESTATEMENT (SECOND) OF AGENCY § 399, cmt. e (1958); *see also id.* § 388, cmt. a (duty to account for "unexpected accretions" made "without knowledge of the principal"). The plaintiff must show a proper case for a court to exercise its equity jurisdiction, and where a complete remedy at law is provided, equitable relief is not proper. *Rogers v. Daniel Oil & Royalty Co.*, 110 S.W.2d 891, 894 (Tex. 1937).

[4] *Bell* has the precedential value of a Texas Supreme Court opinion. *See Ferreira v. Butler*, 575 S.W.3d 331, 335 n.29 (Tex. 2019).

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RCH had an adequate remedy at law. It did not plead otherwise. It is uncontroverted that (1) the documentation supporting the checks was presented to RCH for its review, (2) RCH's accountant issued 1099's based upon the documentation, and (3) Baley transferred the documents to RCH's pump station. Under this circumstance, the principal has a legal remedy and does not require the aid of equity to shift the burden to the agent. *See* RESTATEMENT (THIRD) AGENCY § 8.01, cmt. b ("The agent bears this burden because evidence of dealings and of assets received is more likely to be accessible by the agent than the principal."); George P. Roach, *Texas Remedies in Equity for Breach of Fiduciary Duty: Disgorgement, Forfeiture, and Fracturing*, 45 ST. MARY'S L.J. 367, 406 (2014) ("The principle of shifting burdens of proof in the law of equity is based on the assumption that the defendant is a fiduciary in control of the relevant documents and data."); George P. Roach, *Compensation Forfeiture: Stacking Remedies Against Disloyal Agents and Employees*, 47 ST. MARY'S L.J. 249, 302 (2015) ("The burden shifts under the law in equity because it is assumed that the fiduciary generally has better access to all relevant information." [citing RESTATEMENT (THIRD) RESTITUTION & UNJUST ENRICHMENT § 51(5)(d) (Am. Law Inst. 2011)]).

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Equity does not intervene simply because RCH failed to act, or failed to offer the evidence as proof at trial.[5] Equity intervenes only in the circumstance of an unforeseen and unexpected event for which the principal's own acts are not a causative factor. *Lott v. Kaiser*, 61 Tex. 665, 668-69 (1884). Equity will not intervene when a party is in a position to learn the facts for itself but simply fails to do so. *Oualline v. Champion Paper & Fibre Co.*, 206 S.W.2d 267, 269 (Tex. Civ. App.—Beaumont 1947, writ ref'd n.r.e.). Courts of equity cannot exercise their power to care for and protect the slothful or those merely dull of apprehension. *Ricketts v. Ferguson*, 64 S.W.2d 416, 417 (Tex. Civ. App.—Dallas 1933, writ ref'd);[6] *Coker v. Benjamin*, 83 S.W.2d 373, 377 (Tex. Civ. App.—Beaumont 1935, no writ). Thus, equity will not aid RCH where it declined opportunities to review Baley's invoices, issued 1099's based upon the payments, and then affirmatively chose not to tender evidence it exclusively holds in its possession.

RCH's brief makes a misleading attempt to say that Baley controlled the relevant evidence. In doing so, RCH selectively quotes testimony from Baley. *See Appellee's Brief at 28.* First, Baley's testimony is that she retained the billing

[5] In fact, because RCH possessed the documentation, the claim for an equitable accounting would be unavailable to RCH. *See Rye Police Ass'n v. Chittenden*, 43 Misc. 3d 471, 475, 980 N.Y.S.2d 728, 731 (N.Y. Sup. Ct. 2014).

[6] *Ricketts* has the precedential value of a Texas Supreme Court opinion. *See Ferreira*, 575 S.W.3d at 335 n.29.

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registry for each "customer" each month. 3RR156. Consistently during the trial, when the parties used the term "customer" they referred to RCH's water customers, sometimes called "members". *See, e.g.,* 3RR13 ("[RCH] has been serving customers in this county since the 1960s."); 3RR14 ("She sent out customer bills. She received customer payments. She interfaced with customers regarding their water bills."); 3RR31 ("Any costs that are incurred or borne by our members or our customers."); 3RR136 ("We provide water billing services, water billings to customers.").

Significantly, RCH's brief omits Baley's subsequent testimony wherein she gave the location of the records:

> Q. Were those destroyed?
>
> A. No.
>
> Q. You're saying one copy was made and was given to RCH?
>
> A. No. I'm saying that we made copies each month of all the reports. Those reports were then put on a mailer's box or a bank box. And it was stored in our storeroom until the storeroom got full, and then we took it to the pump station.
>
> Q. Who took it to the pump station?
>
> A. Normally Dwight Lindop.
>
> Q. But H2O Services and yourself, you never retained copies of those invoices?
>
> A. I had the copies in the pump station. I never filed -- I would have to --

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> Q. Are those RCH records?
>
> * * *
>
> THE WITNESS: What was the question? Did I retain copies?
>
> Q. (BY MR. WELDON) Yes.
>
> A. Yes. I mean, I made a copy each month for RCH. Did H2O retain a copy? No.

3RR156-57. Additionally, RCH filed a pretrial brief expressly acknowledging that "Baley has no records, invoices, or supporting documentation to support the checks." CR.214; *see also* CR.217; CR.247-48. RCH should not be permitted to argue the opposite to this appellate court. *Teal Trading & Dev., LP v. Champee Springs Ranches Prop. Owners Ass'n*, 593 S.W.3d 324, 337 (Tex. 2020).

The trial court also erred because it shifted the burden to Baley without *first* determining that Baley had *breached* a duty. The fact that Baley wrote reimbursement checks does not establish wrongful conduct or the existence of "profit." RCH agreed to reimburse expenses. It also authorized Baley to write checks, and she was the only person who wrote checks. As discussed in the prior section, the authority RCH cited does not stand for the proposition that no predicate finding of a breach is required. Indeed, the RESTATEMENT (THIRD) OF AGENCY explains that it is the agent's *breach* that puts the agent in the posture of accounting or explaining:

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> The agent's breach subjects the agent to liability to account to the principal. In general, an agent has the burden of explaining to the principal all transactions that the agent has undertaken on the principal's behalf.

RESTATEMENT (THIRD) OF AGENCY § 8.01, cmt. b; *see also Manges v. Guerra,* 673 S.W.2d 180, 184 (Tex. 1984) ("Recovery against a *breaching fiduciary* is not limited to an accounting of profits received by the fiduciary, but can also include exemplary damages." [emphasis added]); *Daniel v. Falcon Interest Realty Corp.,* 190 S.W.3d 177, 187 (Tex. App.—Houston [1st Dist.] 2005, no pet.) ("A fiduciary must account for, and yield to the beneficiary, any profit he makes *as a result of his breach* of fiduciary duty." [emphasis added]).[7]

Even RCH's cited authorities include this predicate requirement. *See Daniel v. Falcon Int. Realty Corp.*, 190 S.W.3d 177, 187 (Tex. App.—Houston [1st Dist.] 2005, no pet.) ("A fiduciary must account for, and yield to the beneficiary, any profit he makes *as a result of his breach* of fiduciary duty." [emphasis added]). Thus, a predicate breach is required before the burden can be shifted, and only then is it possible to shift under equitable principles.

None of the authorities RCH cites in its brief support the proposition that the existence of a fiduciary relationship shifts the burden to a fiduciary even on the

[7] The RESTATEMENT (SECOND) OF AGENCY indicates that the right to an accounting or equitable relief does not arise in every principal-agent relation where an agent receives something of value from the principal. This is particularly so when the principal has a remedy at law. RESTATEMENT (SECOND) OF AGENCY § 399, cmt. e. (Amer. Law Institute 1958).

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breach element. In *Critical Path Res., Inc. v. Huntsman Int'l, LLC,* No. 09-17-00497-CV, 2020 WL 1291327, at *6 (Tex. App.—Beaumont Mar. 19, 2020, no pet.), the fiduciary bore the burden to account for profits. However, the burden of proof was not shifted as to the breach element. The principal met its burden to show a breach by affirmative evidence that fiduciary failed to fully disclose his financial interests and that he would benefit from the transactions in question.

RCH also cites *Texas Bank & Trust Co. v. Moore*, 595 S.W.2d 502, 509 (Tex. 1980), for the proposition that a presumption of unfairness arises when a fiduciary benefits or profits in any way from a transaction with the principal. *Appellant's Brief at 27.* This proposition is not found in *Moore.* Instead, the presumption *Moore* discusses arises when a *gift* is made between a principal and fiduciary. *Id.* at 507. The facts in the present case do not involve a gift. *See also* discussion *supra* 22-24.

The court erred by shifting the burden to Baley to account without any predicate determination of a breach or any evidence of lack of authority to write checks or to recover expenses.

IV. The court erred by rendering judgment for $808,098.77 (Issue 2)

RCH's brief rewrites the second issue by its assertion that the judgment awards the legal remedy of "economic loss" damages, as opposed to an equitable remedy of disgorgement or forfeiture. Whether measured as an award of actual damages at law, or an equitable award of disgorgement or forfeiture, the award was

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required to be *net of* RCH's expenses. And there was no dispute that RCH had expenses. *See* Tex. R. App. P. 38.1(g). Thus, the judgment must be reversed.

A. RCH's assertion that the court awarded a remedy at law is revisionist and contradicts the record

The record establishes that RCH invoked the court's equitable jurisdiction insofar as the proof submitted, the standards applied, and the recovery elected. RCH filed a pretrial brief invoking the court's equity jurisdiction and asking the court to "fashion an appropriate equitable remedy, including forfeiture of fees and disgorgement of any profit made at the expense of the employer." CR.215. RCH concluded the brief by "requesting that the Court disgorge Baley of the compensation she paid to herself via the checks from January 2020 to December 2022, totaling $808,098.77." CR.217-18.

Following trial, RCH filed a supplemental trial brief that again asked to put the burden on Baley, asserted that the "**Remedy of Disgorgement of the Funds Baley Paid to Herself is Appropriate**," stated that this "equitable remed[y]" is available, and expressly "request[ed] that the Court disgorge Baley of the compensation she paid to herself via the checks from January 2020 to December 2022, totaling $808,098.77." CR.248-49 (emphasis in original). RCH concluded by praying that the court "enter judgment granting RCH's claim for breach of fiduciary duty against Baley, disgorge Baley of the compensation she received

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($808,098.77)." CR.249. RCH's appellate brief makes no mention of either trial brief.

Consistent with RCH's sum-specific prayers for equitable relief, the judgment orders that RCH "recover of and from Defendant the sum of $808,098.77." CR.271.

RCH's appellate brief challenges the notion that the judgment awards equitable disgorgement since the judgment does not label the award. *Appellee's Brief at 30-31.* But neither does the judgment label the award "economic loss." *See* CR.271. Nevertheless, whether RCH made a choice between the remedy at law or the remedy in equity, the trial court was required to make one for RCH. *City of Glenn Heights v. Sheffield Dev. Co.*, 55 S.W.3d 158, 166-67 (Tex. App.—Dallas 2001, pet. denied); *McCullough v. Scarbrough, Medlin & Assocs.*, 435 S.W.3d 871, 917 (Tex. App.—Dallas 2014, pet. denied); *see generally* George P. Roach, *Compensation Forfeiture: Stacking Remedies Against Disloyal Agents and Employees,* 47 ST. MARY'S L.J. 249, 294-95 (2015).

Fortunately, this Court and the parties have the trial court's findings of fact to inform them as to the basis of the judgment. Indeed, when a trial court makes findings, the findings "must form the basis of the judgment upon all grounds of recovery…" Tex. R. Civ. P. 299; *County of Dallas. v. Poston*, 104 S.W.3d 719, 722 (Tex. App.—Dallas 2003, no pet.).

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The court's findings indicate that the judgment rests upon its equitable jurisdiction. *See* CR.285-86 (FOF Nos. 14 & 15 [putting burden on Baley]); CR.287-88 (COL Nos. 7-10 [putting burden on Baley]; CR.288 (COL No. 11 [reciting benefit to Baley]). When a court sits in equity, the remedies of forfeiture and disgorgement are available to remedy a breach of fiduciary duty. *ERI Consulting Eng'rs, Inc. v. Swinnea*, 318 S.W.3d 867, 873 (Tex. 2010). Accordingly, the judgment awarding RCH the disgorgement damages RCH prayed for are subject to the standards set out in *Burrow v. Arce,* 997 S.W.2d 229, 241 (Tex. 1999), and *ERI Consulting Eng'rs,* 318 S.W.3d at 875. *See Appellant's Brief at 55-56*.

B. Even if the judgment awards a remedy at law, the award is not supported by sufficient evidence

RCH cannot invoke the trial court's equitable jurisdiction and also seek remedies at law. Nevertheless, RCH's brief asserts that the court awarded it a remedy at law, which RCH describes as "economic loss" damages. *Appellee's Brief at 30-31.* Even if the award of $808,098.77 is a remedy at law, the evidence is insufficient to support it.

At law, a party may recover economic losses it sustains proximately caused by a defendant's breach of fiduciary duty. *See Sharyland Water Supply Corp. v. City of Alton,* 354 S.W.3d 407, 418 (Tex. 2011); *Slay v. Burnett Tr.*, 187 S.W.2d 377, 380 (Tex. 1945). RCH points to the tenth conclusion of law describing the

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$808,098.77 as an "economic loss to RCH" in its argument that the award is a remedy at law. *See* CR.288 (COL No. 10).

Economic loss is a monetary loss such as lost profits. *Goodyear Tire & Rubber Co. v. Rogers*, 538 S.W.3d 637, 652 (Tex. App.—Dallas 2017, no pet.); *see also* BLACK'S LAW DICTIONARY 649 (11th ed. 2019). The loss must be measured as net of expenses, not as a gross loss without accounting for expenses. *See Miller v. Argumaniz,* 479 S.W.3d 306, 311 (Tex. App.—El Paso 2015, pet. denied); *Barton v. Resort Dev. Latin Am., Inc.*, 413 S.W.3d 232, 235-36 (Tex. App.—Dallas 2013, pet. denied); *Examination Mgmt. Servs., Inc. v. Kersh Risk Mgmt., Inc*., 367 S.W.3d 835, 840 (Tex. App.—Dallas 2012, no pet.). The only evidence of economic loss rests upon an assumption RCH's witness made and RCH didn't meet its burden to show that the accuracy of the assumption, making the evidence no evidence to support the award of damages. Moreover, the assumption was contrary to other undisputed testimony, and now uncontradicted facts.

RCH relies upon the testimony of board president, David Naylor, to characterize the $808,098.77 award as "economic loss." Naylor's testimony is not legally sufficient evidence. Naylor was not elected to the Board until a month prior to Baley's resignation and he lacked the personal knowledge of Baley's agreement with RCH to reimburse expenses. The full context of his testimony was that he

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acknowledged the expenses, but he *assumed* that Baley compensation included her overhead:

> [Q. by Morgan] Now, as you sit here today, you are aware that Ms. Baley had expenses through H2O Services?
>
> A. I'm aware that she has --
>
> Q. Okay. Fair enough. Now, let's talk about RCH financial loss.
> Isn't it true, in front of this justice,
> that you cannot say a specific amount of money that you think RCH sustained as a financial or economic loss due to Ms. Baley H2O Services?
>
> A. No. It's $808,098.77.
>
> Q. Okay. But that was the gross amount of checks, right?
>
> A. No. My assumption -- that is the gross amount of checks. My assumption is all of her overhead, all of her payroll is embedded in the $7.50 she received as an ACH transaction.
>
> MR. MORGAN: All right. I'm going to object as nonresponsive.
>
> Q. (BY MR. MORGAN) But I'll ask the question anyway, okay?
> You just told the Court that's your assumption, correct?
>
> A. That's correct.
>
> Q. So you've made an assumption?
>
> A. I agree.

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3RR.88-89. Testimony that rests upon assumptions where the record is devoid of evidence establishing the assumption as fact or the facts contradict the assumption, is legally insufficient evidence. *See Houston Unlimited, Inc. v. Mel Acres Ranch*, 443 S.W.3d 820, 832 (Tex. 2014); *Thompson & Knight LLP v. Patriot Expl., LLC*, 444 S.W.3d 157, 170-71 (Tex. App.—Dallas 2014, no pet.); *see, e.g., Horizon Health Corp. v. Acadia Healthcare Co.,* 520 S.W.3d 848, 862 (Tex. 2017). RCH presented no affirmative testimony that Baley's compensation *in fact* included overhead. Moreover, Baley testified that expenses were *in addition to* her per-meter compensation. 3RR149-51; 4RR59-61, 65-66, 73, 131-32, 207. RCH presented no controverting testimony. RCH does not contradict these facts in its brief. Thus, Naylor's testimony is legally insufficient to support the $808,098.77. Even if Naylor's "assumption" was afforded evidentiary weight, his assumption was limited to "overhead" and thus faileds to address the many undisputed items that are expenses to RCH, not Baley. *See, e.g.,* 4RR74-75 (RCH letterhead); 4RR57, 74-75, 82 (blue flags to mark water lines and website hosting); 4RR56-57, 76-78 (regulatory fees); 4RR205 (meter lock-out expenses).

To recover its net losses, RCH had the burden to present a "single complete calculation" that reflected the net loss it sustained. *Cf. Univ. Gen. Hosp., LLC v. Prexus Health Consultants, LLC*, 403 S.W.3d 547, 555 (Tex. App.—Houston [14th Dist.] 2013, no pet.); *Zeno Dig. Sols., L.L.C. v. K Griff Investigations, Inc.,* No. 14-

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09-00473-CV, 2010 Tex. App. LEXIS 7505, at *7, 2010 WL 3547708 (Tex. App.—Houston [14th Dist.] Sep. 14, 2010, no pet.) (lost profits must be based on net profits, not gross). If the plaintiff presents no evidence of the offsetting expenses, then the evidence is legally insufficient to support the award of damages. *Richman Trs. v. Time*, No. 05-22-00445-CV, 2024 LX 135567, at *46, 2024 WL 510339 (Tex. App.—Dallas Feb. 9, 2024, pet. denied); *Univ. Gen. Hosp.*, 403 S.W.3d at 556-57; *Zeno Dig. Sols.*, 2010 Tex. App. LEXIS 7505, at *12. Because RCH's evidence is no evidence of economic loss, the judgment must be reversed, and a take-nothing judgment rendered.

In the alternative, the evidence is factually insufficient to support the award of economic loss of $808,098.77, requiring that the judgment be reversed and the case remanded for a new trial.

C. The court abused its discretion by never engaging in the required process of determining whether equitable or legal relief should be awarded, and if equitable relief, what scope of the relief to provide based upon proscribed considerations

RCH's defense of the trial court's discretion is flawed. RCH first argues that the court didn't award equitable relief. But then argues that *if* it did so, then the court was not precluded from ordering forfeiture and that trial court's "findings in total" suffice to support complete forfeiture. *Appellee's Brief at 34-35*; *see also id. at 37* (describing additional required findings as "overly formalistic"). RCH's brief misses the point of Baley's complaint.

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Baley is not complaining of the court's failure to make findings required by Rules 297 through 298. The findings here are required by caselaw and would be required after a liability determination whether this case was tried to a jury or to the bench.[8] Baley has complained that the court never engaged *in the procedure* of considering and applying the factors set out in *Burrow*, 997 S.W.2d at 241, and *ERI Consulting*, 318 S.W.3d at 875, and therefore abused its discretion. It is no substitute for the court's mandate of engaging in the exercise of considering these factors and rendering findings on them to argue in hindsight the outcome nonetheless is justified based upon *other* findings. As held by the Dallas Court of Appeals in *Heatley v. Red Oak 86, L.P.,* 629 S.W.3d 377, 389 (Tex. App.—Dallas 2020, no pet.), a trial court is required to determine certain predicate elements before ordering forfeiture, as well as assess a series of relevant factors. The trial court did not do this, which is an abuse of discretion. When there is no indication the trial court followed these principles in fashioning its award, the case must be remanded. *ERI Consulting*, 318 S.W.3d at 875; *see also* Tex. R. Civ. P. 298 ("no findings or conclusions shall be deemed or presumed"). RCH's appellate arguments are not a substitute for the trial court's obligation. *Cooper v. Sanders H. Campbell/Richard T. Mullen, Inc.,* No. 05-15-00340-CV, 2016 Tex. App. LEXIS 9253, at *31 (Tex. App.—Dallas Aug. 24, 2016,

[8] Some of the factors the court was required to consider might not even be relevant to the issues to be tried by the finder of fact.

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no pet.) (remand required where plaintiff did not identify or brief *ERI* factors in trial court); *see also* Tex. R. App. P. 41.3 (applicable precedent). The fact that the court made *other findings* relevant to *other* determinations is not a substitute nor is it an indication the court followed the proscribed principles. Thus, remand is required. *See also Transitional Entity LP v. Elder Care LP*, No. 05-14-01615-CV, 2016 Tex. App. LEXIS 5711, *23 (Tex. App.—Dallas May 27, 2016, no pet.).

Regardless of whether the court made the findings required by *Burrow* and *ERI*, Baley has challenged the award of complete forfeiture as an abuse of discretion, unsupported by legally sufficient, or alternatively factually sufficient, evidence. *Appellant's Brief at 57-60*. As discussed in Baley's Appellant's Brief, to order complete forfeiture, there must be evidence of a clear and serious violation, which requires proof that Baley knew the relevant facts and that her conduct was wrongful. RCH's brief has no response.

In addition, forfeiture is equitable, and equity does not support denial to the agent of compensation for faithfully performed services. *Burrow*, 997 S.W.2d at 241. Thus, where some of the $808,098.77 was reimbursement for undisputed expenses of RCH, the court abused its discretion by ordering complete forfeiture. Accordingly, the judgment for $808,098.77 must be reversed.

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CONCLUSION AND PRAYER

Appellant prays that the Court reverse the judgment and render a take nothing judgment. Alternatively, Appellant prays that the Court reverse the judgment and remand for a determination as to the proper amount of disgorgement or forfeiture. In the further alternative, Appellant prays that the Court reverse the judgment and remand for a new trial. Appellant further prays for a judgment releasing the surety U.S. Specialty Insurance Company from its obligation on **Bond No. 1001233981.** *See* CR.340. Appellant requests such further and additional relief to which she is entitled at law and in equity.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that on the 16th day of November 2026, a true and correct copy of this Appellant's Reply Brief was delivered via Electronic Service to the counsel of record listed below.

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