Affirmed in Part, Reversed in Part, and Remanded, and Majority Opinion filed July 14, 2020.

In The

Fourteenth Court of Appeals

NO. 14-16-00633-CV

WAUGHSUP, LLC, JOSEPH MARTIN, CALTECH MANAGEMENT, INC., AND TURNO INTERNATIONAL, INC., Appellants and Cross-Appellees

V.

CHARLES WATKINS AND PAULA DAVILA, Appellees and Cross-Appellants

On Appeal from the 269th District Court
Harris County, Texas
Trial Court Cause No. 2012-64701

MAJORITY OPINION

Appellees and cross-appellants Charles Watkins and Paula Davila filed suit against appellants and cross-appellees Waughsup, LLC, Joseph Martin, Caltech Management, Inc., and Turno International, Inc. (collectively appellants). Watkins and Davila alleged that appellants had not paid them their share of the profits obtained from the sale of real estate. Appellants filed counterclaims and third-

party claims against Watkins, Houston Sierra Grill Properties, Ltd. (HSGP), 5968 CTW Family Partnership, Ltd. (CTW), and Southern Sierra Management, LLC (SSM). The trial court signed a final judgment in favor of Watkins and Davila following a three-week jury trial. Both sides appealed. We affirm in part, reverse in part, and remand to the trial court.

BACKGROUND

Watkins and his brother, Tarry Watkins, owned HSGP, which they formed to purchase the real estate where Sierra Grill, a restaurant operated by Watkins, was located.[1] SSM served as the general partner of HSGP. Watkins was the manager and sole owner of SSM. From this beginning, HSGP began purchasing other properties. The first of these was a restaurant located on West Gray near downtown Houston. This restaurant would eventually become the Tavern on Gray (the Tavern). The Tavern was operated by 1326 Tavern on West Gray, LLC, a separate entity from HSGP.

The brothers developed a plan to buy the entire block where the Tavern was located so they could ultimately sell the consolidated property to a developer at a significant profit. Watkins started working to acquire as many lots on the block as possible. By 2005, Watkins individually-owned three houses and a duplex on the block. HSGP owned the land where the Tavern and Sierra Grill were located. Watkins also jointly purchased a house with his then-girlfriend, Paula Davila.

Tarry Watkins died in early 2006. His ownership interest in HSGP, the Tavern, and the Lounge on Montrose passed to his estate. Jari Watkins, Tarry's widow, was the executor of Tarry's estate. Watkins did not get along with his

[1] Trial evidence shows that Sierra Grill, located on Montrose Boulevard, was very successful for several years, but it fell on hard times as a result of freeway construction. At that time, Watkins closed Sierra Grill and turned the location into a nightclub, the Lounge on Montrose.

brother's wife and he encouraged a friend, Martin, to purchase Tarry's interest in HSGP, the Tavern, and the Lounge on Montrose. During the negotiations that resulted in Martin purchasing the estate's interest, Watkins made the books and records of the various businesses available for Martin and his accountant, Keith Koteras, to check. Martin, who viewed his purchase of the estate's interest in the various businesses as primarily a land deal, did not perform an extensive review of the various companies' books. Martin instead had Koteras review only their tax records and "look at the numbers."[2] One of Martin's companies, Turno, actually purchased the estate's interest in HSGP, the Tavern, and the Lounge on Montrose at the end of 2006.

Martin viewed the purchase as a land deal because he believed Watkins' plan to purchase, bundle, and then sell the West Gray block containing the Tavern was a good idea. Martin, through Turno, bought six of the properties on the block in the first six months of 2007. Davila then bought a seventh house. At this point, they owned all but three of the lots on the block, a total of 105,000 square feet. Martin and Watkins orally agreed how they would split the profits once the consolidated property was sold: (1) Watkins would receive 100 percent of the profits from the sale of the lots that he contributed to the consolidated property;[3] (2) Martin and Watkins would each receive 50 percent of the profits from the lots that Martin and Turno contributed; (3) Watkins and Martin would each receive 50 percent of the profits from the land HSGP owned prior to December 29, 2006;[4] and (4) Davila, Watkins, and Martin would each receive one-third of the profits

[2] Koteras, on the other hand, testified that he did not review any financial records, including tax returns, prior to the closing.

[3] This included the lot that Watkins purchased jointly with Davila.

[4] December 29, 2006 was the date that Martin/Turno's purchase of Tarry's interest in HSGP, the Tavern, and the Lounge on Montrose closed.

from the lot Davila purchased. There was a disputed term to the oral agreement. Martin claimed that he was also to receive the first $2.2 million of the proceeds after the debts on the various lots were paid and before any profits were split among Watkins, Martin, and Davila. Watkins denied this term was included in the oral agreement.

The lots were each financed under separate notes totaling $4.27 million with a combined monthly payment of approximately $36,000. Martin worked out a deal in which Patriot Bank would refinance the various lots under a single interest-only note. According to Martin, this would reduce the monthly payment to $18,000, which would be paid from the Tavern's profits. To complete the deal, all of the properties were transferred to HSGP, Patriot Bank loaned HSGP $4.5 million, which was used to pay off the individual notes, and both Watkins and Martin personally guaranteed the Patriot Bank note. A surplus of $220,000 remained after the individual notes were paid off. According to Watkins, this money was to be kept in reserve to pay expenses incurred by HSGP. Martin took possession of the money. Martin never deposited the money into HSGP's bank account. The Patriot Bank note was an 18-month note which would mature in the fall of 2009. The investors believed this would provide enough time to sell the consolidated property and pay off the note.

Watkins began immediately marketing the property. A developer offered $13 million in 2007, but this deal fell through because of a storm-sewer easement. Hanover, a developer of high rise apartments and mixed-use complexes, made an offer on the property, which Watkins and Martin accepted. This deal fell through when the 2008 stock market crash occurred, Hanover lost their financing source, and then backed out of the deal.

After the collapse of the Hanover deal, HSGP received no further offers on

the property and thus still owned the property when the Patriot Bank note matured in November 2009. Watkins and Martin obtained two ninety-day extensions of the interest-only loan. At the same time, business at the Tavern declined and HSGP struggled to make the monthly loan payments. The Lounge on Montrose's business also declined until it closed. While Watkins was able to find a renter who opened another nightclub in the building, it closed within a few months of opening. Watkins was not able to find another renter so the Lounge on Montrose property sat vacant putting an even larger strain on the declining revenues of the Tavern. HSGP sold the Montrose lot where Sierra Grill and then the Lounge on Montrose had operated in an effort to raise funds to make the Patriot Bank note payments. An adjacent lot that Watkins owned personally was included in the sale. The two lots sold for $1.2 million and after the notes were paid off, $175,000 remained. Martin asked Watkins to let him take the $175,000 and deposit it into his account where he would hold it until they needed the funds. Watkins agreed and he gave the proceeds from the sale to Martin.

Martin arranged for the fixtures and furnishings of the Lounge on Montrose to be auctioned off around the time of the property sale and he also took possession of the auction proceeds. Martin claimed he used the proceeds from these sales to pay the 2009 property taxes on the consolidated West Gray block. In fact, Martin did not use the proceeds to pay the 2009 taxes. Instead, Patriot Bank paid the taxes in February 2010 because they remained unpaid. Martin did not reimburse Patriot Bank for this payment.

Martin met with Eddie Parise, Patriot Bank's chief credit officer, and two other Patriot Bank employees, Bob Evans and Randy Hernandez, in April 2010. At Martin's request, Parise did not invite Watkins to the meeting. During the meeting, Martin discussed possibly taking control of HSGP. Evans announced

during the meeting that he had formed a new business venture and was interested in purchasing the consolidated West Gray property. Among other things, they discussed the possibility of Martin individually purchasing the HSGP note.

The second HSGP note extension expired in June or July 2010. On July 21, 2010, the Patriot Bank loan committee, in an internal communication, recommended extending the note for 180 days. While it was to be an interest-only loan, the bank required a monthly escrow for property taxes. A handwritten note on the approval form stated Patriot Bank was considering selling the note, and the note would not be renewed if it was sold. On August 18, 2010, Patriot Bank employee Lewis Kaufman sent a memo to the Patriot Bank loan committee recommending approval of the renewal conditioned on a monthly escrow for property taxes, plus a deposit at closing of eight months' worth of property taxes into an escrow account. Kaufman wrote in his memo that the property had an appraised value of $6,270,000, the note payments had been made in a timely manner, and the borrower's credit was strong. Watkins and Martin would not agree to the property tax escrow. On August 31, 2010, the president of Patriot Bank, Don Ellis, directed Patriot Bank employees Parise and David Keene in an email to waive the escrow and extend the note.

Despite that instruction, Parise and Keene did not extend the HSGP note. Instead, Patriot Bank accelerated the payments on the note and posted the property for foreclosure. Then, instead of proceeding with the foreclosure, Parise arranged the sale of the HSGP note to Martin. On September 27, 2010, Keene prepared a memo to Patriot Bank's loan committee recommending sale of the note to a single-asset limited liability company to be formed by Martin. Through the single-asset entity, Patriot Bank would loan Martin the funds to purchase the HSGP note. Keene wrote that Martin intended to foreclose on the note and that Martin's

purchase of the HSGP note had to close by September 30, 2010. The entity Martin created, Waughsup, acquired the HSGP note on September 30, 2010.

Martin told Watkins that he was purchasing the HSGP note, but he did not tell Watkins he intended to foreclose. But, just twelve days after acquiring the HSGP note, Waughsup served HSGP and Watkins with notice of a substitute trustee's sale scheduled for early November. After serving the foreclosure sale notice, Martin and Watkins met to discuss options other than foreclosure. At the meeting, Martin told Watkins there was going to be a new agreement wherein Watkins would sign over HSGP's interest in the consolidated West Gray property to Waughsup and there would also be a separate distribution agreement to divide the proceeds of the sale of the consolidated property. According to Watkins, Martin told him there would be a new agreement signed at the meeting or the property would be foreclosed. Additionally, Martin told Watkins that Watkins would receive 40 percent of the profits after Martin "took out some expenses" once the consolidated West Gray property sold. As a result of that meeting, HSGP signed a Purchase and Sale Agreement with Waughsup. Pursuant to this agreement, HSGP executed and delivered a deed in lieu of foreclosure to Waughsup.

Watkins and Waughsup also signed an associated Disbursement of Proceeds Agreement, referred to by the parties as "the Waterfall Agreement," to govern division of the proceeds Waughsup would receive once it sold the consolidated West Gray property. Pursuant to the Waterfall Agreement, the proceeds from any sale of the consolidated West Gray property would be distributed in the following order: (1) the balance of the Patriot Bank note would be paid; (2) Waughsup would be reimbursed for funds deducted from a certificate of deposit Waughsup posted to secure the Patriot Bank loan for acquiring the HSGP note; (3) Waughsup would be

paid principal, interest, and "commercially reasonable fees" arising out of or related to Waughsup's note with Patriot Bank; (4) Waughsup would be paid past due rents owed by the Tavern; (5) Waughsup would be paid "commercially reasonable expenses incurred in maintaining, enforcing, sustaining, protecting and/or securing this Agreement, the Waughsup Note, the Note and/or the Property;" (6) Davila would receive $10,000; (7) Waughsup would receive $500,000; (8) Davila would receive another $10,000; (9) Waughsup would then receive sixty percent and Watkins would receive forty percent of any remaining funds. Additionally, Waughsup and Watkins would each pay Davila the first $10,000 out of their respective share of the proceeds. Finally, Watkins was required to pay Waughsup five percent interest on the expenses paid to Waughsup earlier in the order of distribution.

Waughsup sold the property to Hanover in early 2011 for $6.5 million. The sale closed in September. Waughsup and Martin left the closing with at least $1,695,927.05 in profits.[5] Watkins asked Martin and Waughsup to pay him and Davila their share of the profits on several occasions. Martin and Waughsup never paid.

After a year passed with no payment, Watkins sued Martin, Turno, Waughsup, and Waughsup's managing member, Caltech Management, Inc.[6] Watkins sought damages under the original oral agreement, damages under the subsequent Waterfall Agreement, and money had and received by Waughsup and Martin. Martin and Waughsup filed counterclaims and third-party claims asserting causes of action for breach of contract, failure to contribute to the partnership,

[5] Martin's CPA, Keith Koteras, testified that Martin and Waughsup also got $150,000 in earnest money which raised the total to $1.84 million.

[6] Watkins also sued Patriot Bank, but they settled their dispute prior to trial.

breach of fiduciary duty, and fraud. Both sides sought to recover their attorney's fees.

During a lengthy trial, Martin admitted he owed money to Watkins. He testified as follows:

> Q. Do - - as you sit here today, do you acknowledge that you still owe money to Mr. Watkins under the Disbursement of Proceeds Agreement?
>
> A. I don't dispute that.
>
> Q. Okay. You've never disputed that, right?
>
> A. I have never disputed it, correct.
>
> . . .
>
> Q. You've just never paid him, correct?
>
> A. I have not paid him.

Later, Martin testified regarding Davila's share of the deal. Here, Martin testified:

> Q. So your contention is that when you entered into the Distribution of Proceeds Agreement and it had clauses in there that said, we agree to pay Paula Davila 10,000, pay Paula Davila - - it is - - your position is that you didn't owe that?
>
> A. No, I owed it. And then after one year, I was sued by Charlie Watkins and three years later by Paula Davila for the money. So when I got sued, I just stopped doing anything on that particular proceeds agreement.
>
> Q. Well, okay. So is it your contention that at one time you owed it to her but now you don't?
>
> A. I did owe it to her at one time; and after this lawsuit, we'll figure out what she's due.

. . .

> Q. And she sued you because you never paid her, correct?
>
> A. I never paid her because I got sued. I always was going to pay

her. I never disputed that.

Martin testified that he assigned Koteras, his CPA, to calculate the amounts owed to Watkins and Davila under the Waterfall Agreement.[7] Koteras did several draft calculations of the payouts under the Waterfall Agreement and each time the amount owed to Watkins increased. In his first calculation, which Koteras described as a rough draft, Koteras determined that Watkins was owed $105,000. Koteras then did a second "rough draft" calculation and the total owed to Martin increased to $106,000. Koteras could not explain during his trial testimony why that number was different from his first calculation. Koteras did a third calculation of the amount owed to Watkins in 2014. In that third calculation Koteras determined Martin owed Watkins $225,000. Watkins, on the other hand, testified that he was owed $405,741 under the Waterfall Agreement and that he owed Davila $10,000 out of that amount. Koteras calculated that Davila was owed a total of $20,000 in direct payments under the Waterfall Agreement and that Martin owed her an additional $10,000 out of his share of the proceeds. Neither Watkins, nor Davila, had received any payments from Martin or Waughsup at the time of trial.

At the conclusion of the evidence, the trial court submitted a 44-question charge to the jury. The jury found that Waughsup retained $305,258 belonging to Watkins and $30,000 belonging to Davila. The trial court subsequently signed an amended final judgment based on the jury's verdict. This appeal followed.

ANALYSIS

Appellants bring four issues on appeal while Watkins and Davila respond with three cross-issues. We address them in order.

[7] Martin testified that he believed the Purchase and Sale Agreement and the associated Waterfall Agreement supplanted the original oral agreement between the parties.

I. Appellants' issues on appeal

A. Appellants did not preserve their first issue for appellate review.

The evidence was undisputed that Watkins, Martin, and Turno entered into an oral agreement to (1) buy as many properties as possible on the same West Gray block where the Tavern was located; (2) sell the consolidated property to a real estate developer; and (3) distribute the profits in a particular manner. The trial court instructed the jury on the undisputed terms. There was however, a dispute over whether the parties had agreed Turno would receive the first $2.2 million from the sale of the consolidated West Gray property as a guaranteed return after payment of the Patriot Bank note. As a result of this dispute, the trial court submitted the issue of the existence of this disputed term to the jury through Question Number 2 of the charge.[8] The jury found that the parties did not agree Turno would get the first $2.2 million. In their first issue, appellants argue that the trial court erred when it signed a take-nothing judgment on their breach of the oral agreement cause of action because the evidence conclusively established that Watkins agreed Turno would receive the first $2.2 million in proceeds from the sale of the consolidated West Gray property after the note was paid. In other words, appellants argue the evidence is legally insufficient to support the jury's "No" answer to Question 2 of the charge.

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[8] The trial court's charge asked:

Question No. 2

In addition to the terms of the oral agreement described in Question No. 1, did Mr. Watkins, Mr. Martin, and Turno agree that Turno should receive the first $2.2 million from the sale of the Property as a guaranteed return after the payment of the Note to Patriot Bank?

In deciding whether the parties reached an agreement, you may consider what they said and did in light of the surrounding circumstances, including any earlier course of dealing. You may not consider the parties' unexpressed thoughts or intentions.

Answer __NO___

Watkins and Davila assert that appellants did not preserve this issue for appellate review. In a case tried to a jury, a legal sufficiency complaint must be preserved in the trial court. *Garden Ridge, L.P. v. Clear Lake Center, L.P.*, 504 S.W.3d 428, 435 (Tex. App.—Houston [14th Dist.] 2016, no pet.). The complaint may be preserved in one of five ways: (1) a motion for instructed verdict, (2) a motion for judgment notwithstanding the verdict, (3) an objection to the submission of the issue to the jury, (4) a motion to disregard the jury's answer to a vital fact issue, or (5) a motion for new trial. *Id.* If a legal sufficiency complaint is not raised by one of these procedural steps, then it is waived. *Aero Energy, Inc. v. Circle C Drilling Co.*, 699 S.W.2d 821, 822 (Tex. 1985).

Appellants respond that they preserved their issue on appeal through paragraph e of their "Motion for Judgment Partially Based Upon the Verdict and Partial N.O.V. and Response in Opposition to Plaintiff's Motion for Entry of Judgment Partially Based Upon the Verdict and Partial N.O.V." (Post-Judgment Motion"). Paragraph e states:

> Enter judgment in favor of [appellants] on Plaintiff's claim or [sic] breach of the oral agreement between the parties on question nos. 1, 5 and 7, and notwithstanding the verdict on question nos. 2, 3, 4, 6, and 8.

Because paragraph e asked the trial court to only render judgment against Watkins and Davila on their breach of the oral agreement cause of action, we conclude that it does not preserve error for appellants' first issue which seeks a reversal of the trial court's take-nothing judgment on appellants' breach of the oral agreement cause of action. This conclusion is reinforced by paragraph 38 of appellants' Post-Judgment Motion which asked the trial court to render judgment on all parties' claims for breach of the oral agreement consistent with the jury's

verdict.[9] Because appellants did not include their legal sufficiency complaint made in their first issue on appeal in their Post-Judgment Motion, we conclude it was not preserved and is therefore waived. *See Lowry v. Tarbox*, 537 S.W.3d 599, 608–09 (Tex. App.—San Antonio 2017, pet. denied) (concluding appellate complaint was not preserved and therefore waived because while defendant filed motion for new trial, he did not include the specific sufficiency challenge advanced on appeal in the motion); *Halim v. Ramchandani*, 203 S.W.3d 482, 487 (Tex. App.—Houston [14th Dist.] 2006, no pet.) (holding no error preserved where arguments raised in motion for new trial differed from legal-sufficiency argument made on appeal). We overrule appellants' first issue.

B. Appellants have not established that the trial court's judgment based on Watkins and Davila's money-had-and-received causes of action should be reversed.

In their second issue, appellants ask this court to reverse the trial court's final judgment in favor of Watkins and Davila because (1) Watkins' unclean hands preclude recovery; and (2) an express contract between the parties forecloses a money-had-and-received claim. Watkins and Davila respond that neither contention prevents their money-had-and-received recovery. We agree with Watkins and Davila.

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[9] Paragraph 38 provides in full:

> [Appellants] move the Court to enter judgment consistent with the verdict with respect to the Jury's answers to question nos. 1, 2, 3, 4, 5, 6, 7, and 8 regarding [appellees'] and [appellants'] cross claims for breach of the oral agreement, and order that, consistent with those answers, [Watkins and Davila] take nothing with respect to such claims. Legally and factually sufficient evidence in support of the Jury's answers regarding [Watkins and Davila's] breach of oral agreement claim was presented at trial. Therefore, the Court must render judgment on the verdict because there is no basis for avoiding entry of the Jury's verdict.

An action for money had and received is an equitable doctrine applied by courts to prevent unjust enrichment. *London v. London*, 192 S.W.3d 6, 13–14 (Tex. App.—Houston [14th Dist.] 2005, pet. denied). A money-had-and-received cause of action arises when a party obtains money that, in equity and good conscience, belongs to another. *MGA Ins. Co. v. Charles R. Chesnutt, P.C.*, 358 S.W.3d 808, 813 (Tex. App.—Dallas 2012, no pet.) (citing *Staats v. Miller*, 243 S.W.2d 686, 687–88 (Tex. 1951)). A money-had-and-received claim is not based on wrongdoing. *London*, 192 S.W.3d at 13. Instead, all a plaintiff must show to prove a money-had-and-received claim is that the defendant holds money that, in equity and good conscience, rightfully belongs to the plaintiff. *Norhill Energy, LLC v. McDaniel*, 517 S.W.3d 910, 917 (Tex. App.—Fort Worth 2017, pet. denied) (citing *Plains Expl. & Prod. Co. v. Torch Energy Advisors, Inc.*, 473 S.W.3d 296, 302 n.4 (Tex. 2015)); *MGA Ins. Co.*, 358 S.W.3d at 814.

As a general rule, the trial court, not a jury, determines the expediency, necessity, or propriety of equitable relief. *Hill v. Shamoun & Norman, LLP*, 544 S.W.3d 724, 741 (Tex. 2018). When equitable relief is at issue, a trial court must first determine whether there are contested fact issues that must be resolved by a jury. *Hudson v. Cooper*, 162 S.W.3d 685, 688 (Tex. App.—Houston [14th Dist.] 2005, no pet.). "Once any such necessary factual disputes have been resolved, the weighing of all equitable considerations [such as whether the defendant has been unjustly enriched, the plaintiff would be unjustly penalized if the defendant retained the benefits of the partial performance without paying for them, and the plaintiff had unclean hands] and the ultimate decision of how much, if any equitable relief should be awarded, must be determined by the trial court." *Hill*, 544 S.W.3d at 741 (quoting *Hudson*, 162 S.W.3d at 688). A trial court's decision regarding equitable relief is reviewed under an abuse of discretion standard and

may only be overturned if the decision was arbitrary or unreasonable. *See id.* at 742.

1. The unclean hands doctrine does not bar Watkins and Davila's equitable recoveries.

Unclean hands is a concept that "'relates to the equities necessary to determine liability in the first instance.'" *Jackson Walker, LLP v. Kinsel*, 518 S.W.3d 1, 24 (Tex. App.—Amarillo 2015) *aff'd Kinsel v. Lindsey*, 526 S.W.3d 411 (Tex. 2017) (quoting *Best Buy Co. v. Barrera*, 248 S.W.3d 160, 163 (Tex. 2007)). Knowledge of the improprieties involved, such as unclean hands, is relevant to a trial court's weighing of the equities and determining in whose favor they fall. *Id.* The doctrine of unclean hands requires one who seeks equity to come with clean hands. *Id.* Therefore, a court acting in equity will refuse to grant relief to a plaintiff who has been guilty of unlawful or inequitable conduct with regard to the issue in dispute. *Id.* The unclean hands doctrine cannot be used if the plaintiff's conduct is merely collateral to the plaintiff's cause of action. *Id.* In addition, the party invoking the unclean hands doctrine must show that he himself, and not a third party, has been injured by the conduct. *Id.* at 25. Additionally, the harm must have been serious and the type that can only be remedied by denying the plaintiff recovery. *Cantu v. Guerra & Moore, LLP*, 448 S.W.3d 485, 496 (Tex. App.—San Antonio 2014, pet. denied).

We turn first to the question whether appellants' unclean hands argument impacts Davila's recovery under the money had and received cause of action. On appeal, appellants have not cited any allegedly wrongful or fraudulent conduct by Davila. Indeed, their entire discussion on unclean hands does not once mention Davila. Therefore, we hold that appellants' unclean hands argument has no impact on Davila's money had and received claim.

With respect to Watkins, appellants argue that the judgment in his favor cannot stand because the jury found that he committed fraud against the "Martin Parties,"[10] and also because of his "incessant falsehoods under oath." While it is true the jury found that Watkins committed fraud, appellants overlook the fact that the jury also found that the "Martin Parties" suffered no damages as a result of that conduct. Because appellants suffered no damages as a result of Watkins' fraud, the trial court was within its discretion to disregard the fraud in its determination of the equitable relief to award. *Jackson Walker, LLP*, 518 S.W.3d at 25; *Cantu*, 448 S.W.3d at 496.

Next, appellants assert that the judgment in favor of Watkins cannot stand because Watkins lied under oath. Appellants then cite seven instances of alleged lying under oath during a trial that stretched weeks in length and covers thousands of pages of the Reporter's Record. In each instance, appellants' attorney questioned Watkins during cross-examination regarding a possible inconsistency with prior deposition or trial testimony. The subjects discussed included (1) Watkins' salary, or lack thereof, as manager of the Tavern; (2) the frequency of Watkins' trips to Thailand and their impact on his ability to make an in-person demand for payment at Martin's office; (3) whether a semester course in college accounting qualifies as having some accounting training; (4) Watkins admitting he was mistaken when he previously testified that Patriot Bank did not have the right to market the $4.5 million note; (5) the exact means by which Watkins notified Martin that his trip to Hong Kong was for the purpose of selling the consolidated West Gray property and would be expensed as such; (6) the accounting decision to convert the classification of Martin's purchase of West Gray properties from loans to HSGP to a capital contribution; and (7) the relative size of Martin and Watkins'

[10] The jury charge defined the "Martin Parties" as Waughsup, Caltech, Turno, and Martin.

liabilities should Patriot Bank foreclose.

Even if we assume this testimony supports the jury's fraud finding,[11] appellants cannot overcome the jury's finding that they suffered no damages as a result of Watkins' fraud. Because appellants suffered no damages as a result of Watkins' false testimony, the trial court, which heard all of the cited testimony and observed Watkins while he testified, was within its discretion to disregard the allegedly false testimony in its determination of the equitable relief to award. *Jackson Walker, LLP*, 518 S.W.3d at 25; *Cantu*, 448 S.W.3d at 496; *see Hill*, 544 S.W.3d at 741 (stating that trial court weighs equitable considerations after factual disputes have been resolved by the jury and it then makes the ultimate decision of how much, if any, equitable relief to award). Additionally, the trial court could have also reasonably determined that the alleged falsehoods under oath were merely collateral to Watkins' cause of action and then disregarded them. *Jackson Walker, LLP*, 518 S.W.3d at 24.

2. An express contract does not bar Watkins and Davila's recoveries.

Appellants assert that Watkins and Davila cannot recover under their money-had-and-received cause of action because an express contract covers the subject matter of the dispute. As discussed below in section II(B), there is no express contract covering Davila's claim. While there is a contract covering Watkins' claim and the general rule provides that equitable recovery is barred when an express contract defines the parties' obligations, the Supreme Court has stated that this rule is not absolute and observed that exceptions exist. *Fortune*

[11] The jury charge included an instruction defining fraud. The charge instructed the jury that fraud occurs, in part, when "a party makes a material misrepresentation." The charge also instructed the jury that a misrepresentation means a "false statement of fact" or a "promise of future performance made with an intent, at the time the promise was made, not to perform as promised."

Production Co. v. Conoco, Inc., 52 S.W.3d 671, 684 (Tex. 2000). We therefore turn to whether an exception to the general rule covers the circumstances present with respect to Watkins' money-had-and-received claim.

This issue was recently addressed by the Fort Worth Court of Appeals in a similar case. *See Norhill Energy, LLC v. McDaniel*, 517 S.W.3d 910, 919 (Tex. App.—Fort Worth 2017, pet. denied). In *Norhill*, Norhill sued McDaniel alleging causes of action for breach of contract, promissory estoppel, money had and received, and fraud. *Id.* at 915. The jury found in favor of Norhill on all its causes of action except fraud, but it awarded damages only for the money-had-and-received claim. *Id.* McDaniel filed a motion for judgment notwithstanding the verdict arguing that the trial court should disregard the jury's damages finding because Norhill could not recover on its money-had-and-received claim because the jury found "a valid express contract." *Id.* The trial court granted McDaniel's motion, disregarded the jury's money-had-and-received damage award, and signed a take-nothing judgment as to all parties. *Id.*

The court of appeals reversed. *Id.* at 919. It explained that

> Norhill did not seek to vary the terms of the express agreement between the parties. At trial, McDaniel admitted, and the jury found, that on October 19, McDaniel agreed to pay Norhill $50,000 within thirty days in exchange for Norhill's assignment of the lease back to McDaniel. McDaniel admitted that instead, he sold that lease to a third party, and Selinger testified that McDaniel told him he had sold the lease for $60,000 and had received those funds. Out of that $60,000, Norhill sought recovery of only the amount that the contract specified McDaniel would pay to Norhill, $50,000. Based on the evidence, the jury found that—in equity and good conscience—McDaniel held $50,000 that belonged to Norhill, and the jury awarded to Norhill $50,000 of the $60,000 that the evidence showed McDaniel received from his assignment of the lease to a third party. Under these facts, we hold that Norhill's claim for money had and received was

> not barred by the existence of the express contract and that the trial court erred by granting JNOV for McDaniel and by rendering a take-nothing judgment against Norhill on its money-had-and-received claim. We sustain Norhill's third issue.

Id. at 919. The jury's money-had-and-received award does not exceed the maximum amounts the evidence suggests Watkins was entitled to under the terms of the oral agreement or the Waterfall Agreement.[12] In addition, Martin testified that the "Martin parties" held money owed to both Watkins and Davila and his only reason for not paying them was the filing of the lawsuit against him. For the reasons stated in *Norhill Energy*, we conclude that, under the facts present in this case, the existence of an express contract does not bar Watkins' recovery under his money-had-and-received cause of action. *Id.* at 917–20. We overrule appellants' second issue.

C. Appellants did not preserve their third issue for appellate review.

In their third issue, appellants challenge the trial court's take-nothing judgment on their claim for breach of the Purchase and Sale Agreement. Questions 9 through 15 of the Jury Charge address this cause of action. In response to Question 9, the jury found that Waughsup failed to comply with the Purchase and Sale Agreement. Question 10 asked whether HSGP failed to comply with the Purchase and Sale Agreement. The jury answered "No." In response to Question 11, which asked which entity failed to comply first, the jury answered "N/A." In response to Question 12, the jury found that Waughsup's failure to comply was not excused. In response to Question 13, which asked whether HSGP's failure to comply was excused, the jury answered "N/A." Question 14 asked the jury the amount of damages Waughsup's failure to comply caused

[12] Watkins testified that he would receive $1,332,566 under the oral agreement and $405,000 under the Waterfall agreement.

Watkins and Davila. The jury answered "$0" for both. Question Number 15 asked the jury the amount of damages HSGP's failure to comply caused Waughsup. The jury answered "N/A." The trial court's amended final judgment entered a take-nothing judgment on both sides' claims for breach of the Purchase and Sale Agreement based on the jury's verdict.

In paragraph f of their Post-Judgment Motion, appellants asked the trial court to sign a take-nothing judgment "in favor of [appellants] on Plaintiffs claim for breach of the Purchase and Sale Agreement consistent with the verdict on Question no. 14 and notwithstanding the verdict on question nos. 9, 10, 11, 12, 13, and 15." Later, in that same motion, appellants asked the trial court:

> to enter judgment consistent with the verdict with respect to the Jury's answers to question nos. 9, 10, 11, 12, 13, 14, and 15 regarding [Watkins and Davila's] and [appellants'] cross claims for breach of the Purchase and Sale Agreement, and order that, consistent with those answers, [Watkins and Davila] take nothing with respect to such claims. Legally and factually sufficient evidence in support of the Jury's answers regarding [Watkins and Davila's] breach of the Purchase and Sale Agreement claim was presented at trial. Therefore, the Court must render judgment on the verdict because there is no basis for avoiding entry of the Jury's verdict.

The trial court did exactly as appellants requested when it rendered a judgment based on the verdict that included a take-nothing judgment on Watkins and Davila's claims for breach of the Purchase and Sale Agreement.

Now, in their third issue on appeal, appellants argue that the trial court erred when it denied their motion for judgment partially based on the verdict and partial motion for judgment notwithstanding the verdict on their own breach of the Purchase and Sale Agreement contract "because the evidence conclusively establishes the opposite of the Jury's verdict." Because the trial court granted the relief appellants requested, and they did not request the relief they now ask for on

appeal, we conclude appellants did not preserve this complaint for appellate review. *See* Tex. R. App. P. 33.1(a)(1) ("As a prerequisite to presenting a complaint for appellate review, the record must show that . . . the complaint was made to the trial court by a timely request, objection, or motion."); *Burbage v. Burbage*, 447 S.W.3d 249, 258 (Tex. 2014) ("Preservation of error reflects important prudential considerations recognizing that the judicial process benefits greatly when trial courts have the opportunity to first consider and rule on error."); *Houston Med. Testing Serv., Inc. v. Mintzer*, 417 S.W.3d 691, 697 (Tex. App.—Houston [14th Dist.] 2013, no pet.) (holding party failed to preserve issue for appellate review because it did not raise the issue with the trial court); *Garcia v. Alvarez*, 367 S.W.3d 784, 788 (Tex. App.—Houston [14th Dist.] 2012, no pet.) (party's argument on appeal must comport with its argument in the trial court). Because we may not consider unpreserved issues, we overrule appellants' third issue. *See Home Comfortable Supplies, Inc. v. Cooper*, 544 S.W.3d 899, 909 n.5 (Tex. App.—Houston [14th Dist.] 2018, no pet.) (stating that an appellate court must determine whether an appellate complaint was preserved); *Patel v. Hussain*, 485 S.W.3d 153, 174 (Tex. App.—Houston [14th Dist.] 2016, no pet.) (citing *Fed. Deposit Ins. Corp. v. Lenk*, 361 S.W.3d 602, 604 (Tex. 2012)).

D. Martin did not have standing to pursue a breach of the partnership agreement cause of action.

Appellants assert in their fourth issue that the trial court erred when it denied their Post-Judgment Motion on their breach of the partnership agreement cause of action. This issue relates to Questions 16, 17, and 18 of the Jury Charge. In Question 16, the jury found that Watkins failed to comply with the HSGP Partnership Agreement. In Question 17 the jury found that Watkins' failure to comply was not excused. Question 18 asked the jury "what sum of money, if any, if paid now in cash would fairly and reasonably compensate Mr. Martin for his

damages, if any, that resulted from such failure to comply?"[13] The charge then submitted four separate categories of damages. The jury answered "$0" for all four categories of damages. Appellants argue they conclusively proved that Martin, individually, suffered damages as a result of Watkins' unexcused breach. Watkins and Davila respond that (1) the trial court committed no error because Martin did not have standing to recover damages on this claim; and (2) even if Martin had standing, the evidence supports the take-nothing judgment. We agree.

Standing, a component of subject-matter jurisdiction, is a constitutional prerequisite to maintaining suit under Texas law. *Tex. Ass'n. of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 444–45 (Tex. 1993); *Concerned Cmty. Involved Dev., Inc. v. City of Houston*, 209 S.W.3d 666, 670 (Tex. App.—Houston [14th Dist.] 2006, pet. denied). Standing requires that a real controversy exist between the parties that will actually be determined by the judicial declaration sought. *Sammons & Berry, P.C. v. Nat'l Indem. Co.*, No. 14-13-00070-CV, 2014 WL 3400713, at *3 (Tex. App.—Houston [14th Dist.] July 10, 2014, no pet.) (mem. op.) (citing *Nootsie, Ltd. v. Williamson Cnty. Appraisal Dist.*, 925 S.W.2d 659, 662 (Tex. 1999)). Only the party whose primary legal right has been breached may seek redress for the injury. *Nauslar v. Coors Brewing Co.*, 170 S.W.3d 242, 249 (Tex. App.—Dallas 2005, no pet.). Without a breach of a legal right belonging to a specific party, that party has no standing to litigate. *Cadle Co. v. Lobingier*, 50 S.W.3d 662, 669–70 (Tex. App.—Fort Worth 2001, pet. denied). Standing cannot be waived and can be raised for the first time on appeal. *Tex. Ass'n. of Bus.*, 852 S.W.2d at 444–45. Whether a party has standing to bring a claim is a question of

[13] To the extent the other appellants may have suffered damages as a result of Watkins' failure to comply with the HSGP partnership agreement, appellants waived those claims when they did not submit that issue to the jury. *See* Tex. R. Civ. P. 279; *May v. Ticor Title Ins.*, 422 S.W.3d 93, 100 (Tex. App.—Houston [14th Dist.] 2014, no pet.).

law reviewed de novo. *Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922, 928 (Tex. 1998).

While there is no doubt that Martin made many of the decisions underlying the events at issue in this lawsuit, it is undisputed that he, individually, had no ownership interest in HSGP and that he, individually, was not a party to the HSGP limited partnership agreement. Instead, Martin had Turno purchase Tarry Watkins' limited partnership interest in HSGP and become the limited partner in HSGP. In addition, Martin formed Waughsup to purchase the Patriot Bank note out of foreclosure. Martin, HSGP, Turno, and Waughsup are all separate legal entities. *See TecLogistics, Inc. v. Dresser-Rand Group, Inc.*, 527 S.W.3d 589, 596 (Tex. App.—Houston [14th Dist.] 2017, no pet.) (corporations); *Sherman v. Boston*, 486 S.W.3d 88, 94 (Tex. App.—Houston [14th Dist.] 2016, pet. denied) (limited liability company); *Nauslar*, 170 S.W.3d at 250 (limited partnership). We must treat each as a separate and distinct legal entity when deciding the question of Martin's standing. *ASR 2620-2630 Fountainview, LP v. ASR 2620-2630 Fountainview GP, LLC*, 582 S.W.3d 556, 563 (Tex. App.—Houston [14th Dist.] 2019, no pet.).

The evidence Martin points to in support of his argument that he individually was damaged by Watkins' failure to comply with the HSGP partnership agreement is unavailing because even he recognizes in his appellate briefing that, at best, his damages were derivative because it was Turno and Waughsup that actually suffered the harm. *See Sherman*, 486 S.W.3d at 95 (holding sole member of limited liability company did not have standing to individually pursue conversion cause of action for checks belonging to company); *Hodges v. Rajpal*, 459 S.W.3d 237, 249–50 (Tex. App.—Dallas 2015, no pet.) ("In other words, these damages, although cast as personal damages, belong to the

limited partnership alone. Appellants do not have a separate, individual right of action for injuries to the partnership, even if the injuries diminished the value of their ownership interest in the entity.") For example, Martin asserts that Watkins' breach caused Patriot Bank to initiate foreclosure proceedings on the consolidated West Gray property note "resulting in damages to Turno." Martin next argues that, as a result of Patriot Bank beginning foreclosure proceedings, he was forced to purchase the Patriot Bank note or risk foreclosure. But, it was Waughsup, not Martin, that purchased the note out of foreclosure. Finally, Martin argues that he, "through Waughsup," suffered further losses by giving Watkins another chance when he entered into the Purchase and Sale Agreement and the Waterfall Agreement, and that when Watkins defaulted on the Tavern lease, "Waughsup had to pay out of pocket on the note." While this may be evidence that Turno and Waughsup suffered injury as a result of Watkins' failure to comply with the HSGP partnership agreement, it does not establish that Martin, in his individual capacity, was injured as a result of Watkins' failure to comply. *See Nauslar*, 170 S.W.3d at 250 ("An individual stakeholder in a legal entity does not have a right to recover personally for harms done to the legal entity."). We hold that Martin lacks standing to pursue a claim for breach of the HSGP partnership agreement.

Even if Martin had standing, we conclude that the trial court did not err when it rendered a take-nothing judgment on Martin's breach of contract cause of action. The breach of contract question asked what sum of money would compensate Martin for his damages, if any, that resulted from Watkins' failure to comply with the HSGP partnership agreement. As explained above, there is no evidence that Martin, in his individual capacity, suffered any damages as a result of Watkins' failure to comply. The fact there is evidence in the record that other plaintiffs, such as Turno and Waughsup, may have been injured as a result of

Watkins' breach, cannot support a judgment in favor of Martin. *See ASR 2620-2630 Fountainvew, LP*, 582 S.W.3d at 563 (stating appellate court must treat each actor involved in the case as a separate legal entity); *Tanglewood Homes Ass'n, Inc. v. Feldman*, 436 S.W.3d 48, 61 (Tex. App.—Houston [14th Dist.] 2014, pet. denied) (stating that it is each plaintiff's burden to secure jury findings that could support a judgment in its favor). We overrule appellants' fourth issue.

II. Appellees' cross-issues on appeal

A. The evidence supports the jury's finding that Martin and Turno did not breach the oral agreement.

The first question in the jury charge asked the jury to decide whether Martin and Turno failed to comply with the oral agreement. The jury answered "No" for both. Watkins and Davila filed a "Motion for Entry of Judgment Partially Based Upon the Verdict and Partially N.O.V." asking the trial court to "enter judgment in favor of the Watkins parties on their claim for breach of the Oral Agreement, consistent with the verdict on Question No. 2, and notwithstanding the verdict on Question Nos. 1 & 7[.]" Despite that request, the trial court rendered a take-nothing judgment on Watkins and Davila's breach of the oral agreement causes of action based on the jury's verdict. In their first cross-issue on appeal, Watkins and Davila argue the trial court erred when it did so because the evidence conclusively established (1) that Martin and Turno breached the oral agreement, and (2) the amount of damages they sustained as a result of those breaches. Appellants respond that Watkins and Davila have not shown any error because the evidence supports the jury's negative answers.

A party attacking the legal sufficiency of the evidence supporting an adverse finding on an issue on which it had the burden of proof must demonstrate that the evidence conclusively establishes all vital facts in support of the issue. *Dow Chem.*

Co. v. Francis, 46 S.W.3d 237, 241 (Tex. 2001). In conducting a legal-sufficiency review, we consider the evidence in the light most favorable to the challenged finding and indulge every reasonable inference that supports it. *Univ. Gen. Hosp., L.P. v. Prexus Health Consultants, LLC,* 403 S.W.3d 547, 550 (Tex. App.–Houston [14th Dist.] 2013, no pet.). The evidence is legally sufficient if it would enable reasonable and fair-minded people to reach the decision under review. *Id.* at 551. We must credit favorable evidence if a reasonable trier of fact could, and disregard contrary evidence unless a reasonable trier of fact could not. *Id.* The trier of fact is the sole judge of the witnesses' credibility and the weight to afford their testimony. *Id.*

Watkins and Davila are correct that it was undisputed Watkins, Martin, and Turno entered into an oral agreement regarding the plan to purchase various lots, consolidate those lots, sell the consolidated property, and distribute the profits from the sale in a particular manner. But, none of those parties ultimately sold the consolidated property. Instead, it was Waughsup that sold the consolidated property after HSGP transferred ownership to it through the Purchase and Sale Agreement. In addition, Martin specifically testified that the "oral agreement disappeared when we went into the purchase agreement with Charlie Watkins." Because none of the parties to the oral agreement were involved in the sale of the consolidated property, we conclude the jury could have reasonably found that neither Martin nor Turno breached the oral agreement. Because legally sufficient evidence supports the jury's negative answers to Question 1 of the charge, we overrule Watkins and Davila's first cross-issue on appeal.

B. Because there is more than a scintilla of evidence that Watkins suffered damages as a result of Waughsup's breach of the Waterfall Agreement, we must remand for a new trial.

In their second cross-issue on appeal Watkins and Davila argue that the trial

court erred when it rendered a take-nothing judgment on their breach of the Purchase and Sales Agreement and the Waterfall Agreement causes of action. This cross-issue relates to Questions 9 through 14 of the Charge. The Charge defined the term "Purchase and Sale Agreement" to include both agreements. We are concerned here only with the jury's answers to Question 9, 12, and 14. In response to Questions 9 and 12, the jury found that Waughsup failed to comply with the Purchase and Sale Agreement and its failure to comply was not excused. Question 14 asked the jury the amount of damages Waughsup's failure to comply caused Watkins and Davila. The jury answered "$0" for both.

Watkins and Davila filed a "Plaintiffs' Motion for Entry of Judgment Partially Based Upon the Verdict and Partially N.O.V." In the motion, Watkins and Davila asked the trial court to disregard the jury's answer to Question 14 because no evidence supported the jury's zero damages answer. They then pointed out the conflicting evidence on the amount of Watkins and Davila's damages and argued the trial court "should award Watkins and Davila damages of no less than $225,000 and $40,000, respectively." Finally, they argued that the trial court could reconcile the verdict by using the jury's answers to the money-had-and-received damages questions and award them damages of "$305,268 and $30,000, respectively." As mentioned above, the trial court rendered a take-nothing judgment on Watkins and Davila's breach of contract claims. On appeal, Watkins and Davila argue that the evidence is legally insufficient to support the jury's answers and the trial court's take- nothing judgment because the evidence at trial was undisputed that they were harmed as a result of Waughsup's breach. They ask us to reverse and render judgment on their breach of contract claim. We turn first to Davila's claim.

To prevail on a breach of contract claim, one generally must be a party to the

contract. *First Bank v. Brumitt*, 519 S.W.3d 95, 102 (Tex. 2017). It is undisputed that Davila was not a party to the Waterfall Agreement, the contract addressing distribution of the profits from the sale of the consolidated West Gray property. In addition, Davila cannot recover as a third-party beneficiary because the Waterfall Agreement expressly disclaims the existence of any third-party beneficiaries. *See id.* ("To determine whether the contracting parties intended to directly benefit a third party and entered into the contract for that purpose, courts must look solely to the contract's language, construed as a whole."). Because Davila was not a party to the contract and was not a third-party beneficiary, we conclude that the jury could have reasonably found that Waughsup did not agree in the Waterfall Agreement to pay her anything. We conclude that the trial court did not err when it entered a take-nothing judgment on Davila's breach of contract cause of action.

We turn next to Watkins' breach of contract cause of action. During the trial, Martin testified that he did not dispute that he owed money to Watkins pursuant to the Waterfall Agreement. Martin also testified that his own accountant calculated that Watkins was owed $225,000 pursuant to the Waterfall Agreement. Martin's accountant testified he told Martin that Watkins was owed at least $225,000 pursuant to the Waterfall Agreement. Watkins also testified regarding his damages caused by the breach of the Waterfall Agreement. According to Watkins, he should receive $405,000 under the terms under the Waterfall Agreement. We conclude this constitutes more than a scintilla of evidence that Watkins suffered damages as a result of Waughsup's failure to comply with the Waterfall Agreement. Therefore, the jury's $0 damages answer as to Watkins is not supported by the evidence. We sustain Watkins and Davila's second cross-issue in part.

The question now becomes to what relief is Watkins entitled? On appeal,

Watkins simply asks this court to reverse and render judgment. Watkins does not, however, suggest a specific amount of damages supported by the evidence. He instead points to the range of damages the evidence could support.[14] In this situation, we cannot render judgment, but must instead remand for a new trial on Watkins' breach of contract claim. *See Formosa Plastics Corp. USA v. Presidio Eng'rs & Contractors, Inc.*, 960 S.W.2d 41, 51 (Tex. 1998) (op. on reh'g) (holding that appellate court can remand for a new trial when no evidence supports damages awarded but there is evidence of some damages); *Garza v. Cantu*, 431 S.W.3d 96, 108–09 (Tex. App.—Houston [14th Dist.] 2013, pet. denied) (holding that appellant who shows an error in the judgment entitling appellant to a reversal and remand is entitled to that appellate remedy even if the appellant requested a rendition in its appellate briefing and did not request a remand). Because liability was contested and the damages are unliquidated, we must remand for a new trial on both liability and damages on Watkins' breach of contract claim. *See* Tex. R. App. P. 44.1(b); *Garza*, 431 S.W.3d at 108.

C. We remand Watkins' claim for attorneys' fees.

In their third cross-issue, Watkins and Davila ask this court to render judgment for their reasonable attorneys' fees as found by the jury. Because we have affirmed the take-nothing judgment on Davila's breach of contract cause of action and there is no other basis to support an award of attorneys' fees to her, we overrule the part of their third cross-issue addressing Davila's claim for attorneys' fees. *See Ashford Partners, Ltd. v. ECO Res., Inc.*, 401 S.W.3d 35, 40 (Tex. 2012) (holding that to recover attorneys' fees under section 38.001, a litigant must prevail

[14] As mentioned above, Watkins argued in the trial court that the trial court could use the jury's money-had-and-received damages answer, $305,268, to provide the amount of his contract damages. Watkins did not point out any authority to the trial court that would authorize such an action. In addition, he has not repeated that argument on appeal.

on a breach of contract claim and recover damages). With respect to Watkins' claim for attorneys' fees, because we have remanded his breach of contract cause of action for a new trial, we reverse the trial court's take-nothing judgment with respect to the award of Watkins' attorneys' fees and remand it to the trial court for a new trial.

CONCLUSION

Having sustained Watkins and Davila's second cross-issue on appeal in part, we reverse the trial court's take-nothing judgment on Watkins' cause of action for breach of the Waterfall Agreement and on his claim for attorneys' fees, and remand them to the trial court for a new trial. We affirm the remainder of the trial court's amended final judgment.

/s/ Jerry Zimmerer
Justice

Panel consists of Justices Wise, Zimmerer, and Spain (Spain, J. concurring without opinion).