REMITTITURS SUGGESTED, MODIFY and AFFIRM; Opinion Filed June 20, 2017.

In The

Court of Appeals
Fifth District of Texas at Dallas

No. 05-15-01252-CV

WELLS FARGO BANK, N.A., AS SUCCESSOR TRUSTEE TO CHASE BANK OF TEXAS, N.A., FOR THE REVOCABLE TRUST ESTABLISHED BY ANGELA LEIGH SIMPSON STARRETT BY AGREEMENT DATED SEPTEMBER 8, 1999, Appellant

V.

ANGELA LEIGH MILITELLO, F/K/A ANGELA LEIGH SIMPSON STARRETT, Appellee

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On Appeal from the 298th Judicial District Court
Dallas County, Texas
Trial Court Cause No. DC-10-06211

MEMORANDUM OPINION

Before Justices Bridges, Lang-Miers, and Schenck
Opinion by Justice Lang-Miers

Appellant Angela Leigh Militello sued appellant Wells Fargo Bank, N.A., for breach of fiduciary duty, fraud, negligence, and gross negligence arising from its management of several trusts. After a bench trial, the trial court rendered judgment for Militello on all of her claims and made findings of fact and conclusions of law in support of the judgment. In this appeal, Wells Fargo challenges the legal and factual sufficiency of the evidence to support the trial court's awards of actual, exemplary, and mental anguish damages. Wells Fargo also challenges the trial court's award of prejudgment interest, and contends the trial court erred by rejecting an agreed settlement credit and by refusing to enforce an exculpatory clause in one of the trusts.

Militello concedes that the trial court erred by rejecting the settlement credit,[1] and further agrees to remit several specific damage amounts awarded by the trial court. But she contends the evidence was sufficient to support the trial court's awards in all other respects, and she argues that the trial court did not err regarding the exculpatory clause or in its prejudgment interest award. We conclude:

- the evidence is legally and factually sufficient to support the trial court's actual damage awards, as partially remitted;
- the evidence is legally and factually sufficient to support an award of mental anguish damages, but we suggest remittitur of a portion of the trial court's award;
- the evidence is legally and factually sufficient to support an award of exemplary damages, adjusted by the voluntary remittitur and the suggested remittitur, if accepted, and the award is not excessive;
- the trial court did not abuse its discretion in its award of prejudgment interest; and
- the trial court did not err by refusing to enforce the exculpatory clause in the trust agreement between Wells Fargo and Militello.

Accordingly, we modify the trial court's judgment to delete the amounts remitted by Militello. We suggest remittitur of a portion of the mental anguish damages, and adjustment of the exemplary damages award by the voluntary remittitur and suggested remittitur, if accepted. In all other respects, we affirm the trial court's judgment.

BACKGROUND

Militello was orphaned at the age of seven. Her grandmother and great-grandmother created trusts for her benefit. Wells Fargo and its predecessors administered these trusts in the bank's Midland Texas branch. The trusts included millions of dollars in assets, including stocks, bonds, cash, and producing and non-producing oil and gas properties. These trusts remained

[1] *See* TEX. CIV. PRAC. & REM. CODE ANN. § 33.012(b) (West 2015) (if claimant has settled with one or more persons, court shall reduce amount of damages to be recovered by claimant with respect to a cause of action by sum of dollar amounts of all settlements).

Militello's primary source of income after she reached adulthood because her ongoing health problems prevented regular employment.

Over the years, Militello came to know Mike Tandy, the bank's trust officer. Tandy and Militello "had a good working relationship," according to Militello. At trial, she described him as a "strong mentor for me." She looked to Tandy for advice "all the time" after she became an income beneficiary of the trusts at age 18. In 1999, when Militello was 25 years old, one of the trusts of which she was a beneficiary was ending. It contained over 200 producing and non-producing oil and gas properties. Tandy requested that Militello leave the properties with Wells Fargo so that Tandy could continue as her trust officer. Tandy did not suggest that Militello obtain any legal or financial advice before making a decision. He represented that she would benefit from the experience and expertise of the bank's oil and gas department, but did not explain that the bank's fees for managing the properties would exceed $20,000 per year. Relying on Tandy's representations, Militello signed a revocable trust agreement with the bank on September 8, 1999. The trust was referred to by the parties at trial as the "Grantor Trust." Its assets consisted of Militello's share of oil and gas properties from her great-grandmother's estate.

Militello offered evidence at trial that the Grantor Trust's small interests in a large number of properties were marketable and attractive to investors during the relevant time period. Dee Patterson, a petroleum engineer and one of Militello's expert witnesses, explained:

> Q. Now, when you have a group of properties like that and you have a small interest in each one of the properties, is—would you consider those to be good properties or bad properties?
>
> A. Given the location of these properties, I would consider them to be very good properties. The reason why is, they are in the Permian Basin, which is one of the most—or predominantly in the Permian Basin, which is one of the most prolific oil and gas basins in the world.

> It's also a diverse set of assets, where you avoid concentration risk. Concentration risk is somewhat defined as, if there is one specific property that generates most of the revenue, if something happens to it and it stops producing, then you stand to lose a significant portion of income. These properties were diverse enough where not any one property was predominant in generating income for the trust.

In late 2005 and early 2006, Militello advised Tandy that she was experiencing cash flow problems as a result of her divorce and expensive medical treatments. Militello suffers from lupus. Part of her treatment involved intravenous infusions costing approximately $8,000 per month that were only initially covered by insurance. She also saw a rheumatologist for kidney problems related to lupus and underwent chemotherapy. She also owed approximately $20,000 to her divorce lawyer. In 2005, Militello became concerned about keeping up with her expenses, and "[p]retty immediately" contacted Tandy for help. She asked for advice and recommendations for addressing her problems, and specifically asked if it would be possible to sell "a small portion of the oil," as well as other options.

Bruce Wallace, Militello's expert witness on fiduciary matters, testified that at the time of Militello's request for assistance, "all of the assets that were available to [her] were, in fact, managed by Wells Fargo." Wallace also explained that "it would have been incumbent on Wells Fargo," as Militello's fiduciary, "to sit down with her immediately following [her request] and begin working through the assets that were available to her and the alternatives that were available to her from these . . . six different accounts before any decisions would be made as to what steps should be taken to accomplish her objectives." Although Wells Fargo advised Militello not to sell her minerals, it did not offer any other possible solutions to her financial difficulties.

Instead, Wells Fargo proceeded to advise Militello about the sale of oil and gas properties from the Grantor Trust. Although Tandy did not have expertise in valuing oil and gas assets, he told Militello that "[w]e probably can sell 1/2 of your minerals and get close to $300,000 for them." Wallace testified that at the time, the minerals were producing a revenue stream of $24,000 per month, indicating that they had "significantly more value" than Tandy's estimate. Militello's petroleum engineer expert Patterson estimated that the 2006 fair market value of the properties was $1,451,000, a "best estimate" from a range of $1,196,000 to $1,860,000.

Militello traveled to Midland to obtain additional information from Wells Fargo about the sale of the minerals. She met with Tandy and Dottie McLaughlin, the Wells Fargo trust department's oil and gas asset manager. McLaughlin provided a one-page sheet showing net income from the Grantor Trust for 2004 and 2005. The sheet also showed first quarter 2006 income from the Grantor Trust of $71,550, and $286,200 annualized. The source of these figures is unclear from the record. Wells Fargo provided only this one-page sheet to inform Militello's decision whether to sell the properties in her trust. Although Wells Fargo relies on Militello's instructions to sell the properties, Wallace testified that Wells Fargo did not provide sufficient information for Militello to give Wells Fargo "any type of direction." Further, the record reflects that Militello does not have a college degree or other experience in making investment decisions.

After further communications, Tandy advised Militello that according to McLaughlin, "we could sell as little as 35% of your minerals and receive at least $200,000 for them." This percentage resulted from McLaughlin's contact to Ernest Kuehne Jr., a Wells Fargo customer. Kuehne owned beneficial interests in certain royalty trusts managed by Wells Fargo's trust department. Wells Fargo trust administrator John Michael Talley (Tandy's supervisor) testified that he, McLaughlin, and the bank's "relationship manager" for the royalty trusts had dinner with Kuehne during the relevant time period because Kuehne had "substantial assets" and "was in the process of doing some estate planning" that could involve additional trust management business for Wells Fargo that Talley hoped to secure.

Kuehne was also interested in buying oil and gas properties and had asked to be put on a bid list with Wells Fargo to be contacted about potential sales. McLaughlin contacted Kuehne in 2006, explaining that a trust beneficiary wanted to sell an interest in her oil and gas properties. McLaughlin first asked Kuehne if he was interested in purchasing specific properties from the trust. When he declined, McLaughlin then asked him whether he would be interested "in buying $200,000 worth of what was in this trust." He explained:

> Q. And would that require you then to give her a percentage value of what you would be willing to give in return for $200,000?
>
> A. Yes, ma'am.
>
> Q. And in your four decades of experience in selling oil and gas, have you had other transactions where they tell you the price they want you to pay, and then you tell them what percentage?
>
> A. No, ma'am.

Kuehne named a percentage, and through an entity called Falon Partners, LLC, eventually purchased all of the oil and gas properties in the Grantor Trust for $530,000 in three transactions that occurred in May 2006, October 2006, and March 2007. Eighteen months later, Kuehne sold the same properties to Baloney Feathers, LLC, for $5,175,000.

McLaughlin also testified that she was the sole person at Wells Fargo involved in the negotiation and sale of the properties in the Grantor Trust. She said that in response to Militello's inquiry, she "hired an engineer to do an evaluation of the properties." She identified Robert Leonard, Jr. as the person she hired, but the record reflected that Leonard was a landman, not an engineer, and Leonard's evaluation was made before Militello said she wanted to consider selling. Based on Leonard's report, Wells Fargo valued the Grantor Trust's properties at approximately $400,000.

Tandy instructed McLaughlin that Militello wanted to sell "enough properties to get $200,000," and "to see what percentage of her properties would need to be sold to—to get that amount." McLaughlin did not undertake any analysis to determine this percentage. She contacted Kuehne after a call to one other potential investor was unsuccessful, and made no other attempt to market the properties or obtain an updated appraisal prior to the second and third sales. As will be discussed further below, Leonard's valuation was made as of May 2005, and was almost two years old at the time of the final sale, and in any event did not include all of the properties in the trust. With each sale, McLaughlin accepted the offer Kuehne made, without negotiation. According to Patterson, Wells Fargo sold the properties for nearly $1 million less than their fair market value.

The purchaser, Falon, wrote three one-sentence letters to Wells Fargo stating its offers, the only documentation for the sales. Wallace testified that Wells Fargo's failure to negotiate and prepare written purchase and sale agreements was a breach of Wells Fargo's fiduciary duties to Militello. Wallace also testified that deeds should have been prepared and recorded and notification should have been given to the oil companies in question so that they knew to distribute future proceeds to the new owner. Wallace explained that under Wells Fargo's own internal policy, these steps should have been completed within 120 days of the sales, but instead, "Wells Fargo was still working on the deeds three years after the initial sale." McLaughlin conceded that she did not timely handle the preparation and filing of the deeds, in violation of Wells Fargo's policy.

Wells Fargo contended, however, that it acted reasonably by retaining a well-respected law firm to prepare the deeds. Nonetheless, Wallace testified that Wells Fargo was responsible for providing correct information to the law firm, including a purchase and sale agreement, from which deeds could be prepared. Because there were no purchase and sale agreements, "there was no basis for the attorney or for Ms. McLaughlin to rely on to properly oversee the preparation of the deed . . . to comport with the terms of the sale." Kuehne testified that he paid the same law firm to prepare the deeds for the third sale, but the deeds "failed on their face" because "they didn't really convey anything." Kuehne also explained that some of the properties were conveyed directly from the Grantor Trust to Baloney Feathers because correct deeds had never been recorded to convey the property from the Grantor Trust to Falon, and there was no record of Falon's ownership. Kuehne testified that he finally paid to fix the deeds himself because Wells Fargo never did so.

McLaughlin also testified that she was responsible for leaving the oil and gas properties in Militello's account until 2008 or 2009. Wells Fargo did not notify the oil and gas producers of the sales from the Grantor Trust to Falon or instruct them that income should be sent to Falon instead of the Grantor Trust. Only after Falon's sale to Baloney Feathers did McLaughlin instruct someone from her office to notify the producers. Until 2008, Wells Fargo continued to charge Militello's trust account for taxes, insurance, and fees associated with the property and income that Militello no longer owned. When questioned about a 2008 account statement for the Grantor Trust, McLaughlin testified:

> Q. So can we agree that in 2008 Ms. Militello's trust account was still being used to filter income payable to Falon?
>
> A. Yes.
>
> . . .
>
> Q. [C]an we agree that . . . Ms. Militello's account [was] still being charged for . . . insurance and taxes and expenses related to the 160 acres in Pecos, Texas?
>
> A. Yes.
>
> Q. And can we agree . . . that [the property] was deeded to Falon?
>
> A. Yes.
>
> Q. So we can agree that none of these charges to her trust account is appropriate because it pertains to property she doesn't own?
>
> A. Yes.

McLaughlin testified that from the time of the first sale in May 2006 until 2008, Wells Fargo used Militello's account to receive income that belonged to both Militello and Falon. In addition, some checks made out to the Grantor Trust were deposited into Kuehne's account. Neither Militello nor Kuehne gave Wells Fargo permission to commingle funds in their accounts.

In July 2007, Tandy retired, and Randy Wilson succeeded him as Militello's trust officer. At first, Militello directed her questions to Randy Wilson. She explained the financial difficulties she had encountered since her divorce and as a result of her illness. The record reflects that Militello attempted to obtain basic information about the trusts managed by Wells Fargo for her benefit and her overall financial situation, hoping to "at least pay a small amount on my taxes, and not be 'late' on anything." She told Randy Wilson, "I need to try and keep my credit in good standing." She requested statements, purchase and sale agreements for the sales made from the Grantor Trust, and other information. Within a month, Randy Wilson refused to speak directly to Militello, telling her that she would need to speak to the bank's lawyer, Mike Willson, if she wanted any additional information about her trusts. Although Militello complied, asking attorney Chris Parvin to correspond with Mike Willson, months later she was still attempting to obtain basic information about the sales. In January 2008, and again in April 2008, Militello attempted to find out why the Grantor Trust was still holding income on which she was paying taxes and the bank's monthly fees. She had not received any deeds reflecting the sales, and was not even aware of Falon's identity, referring to "the properties that the 'mystery men' bought." The record reflects that the Grantor Trust account was not finally closed until August 2009.

Militello testified that Wells Fargo's actions caused problems with numerous taxing authorities, including the IRS. She received 1099 forms showing receipt of income on properties she no longer owned. A taxing authority in New Mexico levied $17,000 from her bank account in 2011 for income allegedly earned on property owned by the Grantor Trust after the sales to Falon. Because she had no written information from Wells Fargo, she had nothing to present to the IRS or other authorities to demonstrate that she no longer owned the properties. Militello brought suit against Wells Fargo in 2010, alleging breach of fiduciary duty and other causes of action.

The case was tried to the court over eight days in April 2012. Over 20 witnesses testified, and over 4,500 pages of exhibits were admitted into evidence. The parties filed post-trial briefing and a stipulation regarding attorney's fees in May and June 2012. The trial court did not render judgment, however. Militello filed a motion for judgment in July 2013, and again requested entry of judgment by letters to the court dated September 23, 2013, March 28, 2014, and March 19, 2015. Wells Fargo responded once, on March 24, 2015, requesting entry of a take-nothing judgment. After Militello filed a petition for mandamus in this Court, the trial court rendered judgment on June 30, 2015, and rendered an amended final judgment on September 11, 2015, more than three years after the conclusion of the trial. In the judgment, Militello was awarded:

$1,328,448.35	past economic damages
$29,296.75	disgorgement of trust fees
$1,000,000.00	past mental anguish damages
$3,465,490.20	exemplary damages
$467,374.00	attorney's fees

Militello was also awarded amounts for her appellate attorney's fees in the event of an unsuccessful appeal by Wells Fargo. The judgment includes awards of prejudgment and postjudgment interest and costs. The trial court also made findings of fact and conclusions of law, including Finding of Fact 2, that the following actions by Wells Fargo were breaches of its fiduciary duties to Militello:

- "not disclosing basic, necessary information to Militello relating to the creation of the revocable trust and the subsequent sales of 100% of her oil [and] gas interests"
- "failing to investigate alternatives to selling her assets when she came to them for help in 2005"
- "failing to properly value and market Militello's oil and gas properties"
- "profiting from the sale of Militello's oil and gas assets at a discount to another high-profile bank client"
- "failing to prepare purchase and sale agreements for the sale of her trust assets"
- "failing to prepare and properly record deeds upon the sale of her assets"
- "failing to notify the producers of the change in ownership of the oil and gas assets after they were sold"
- "continuing to use Militello's trust account for the benefit of another customer"
- "keeping the trust account open until 2009, years after all of the assets had been sold" and
- "continuing to use Militello's trust account through 2008 (at which time she no longer owned any of the oil and gas properties from the trust) as a means to receive income from producers, report the income under Militello's social security number, and then distribute that income to another Wells Fargo client."

Finding of Fact 2. Wells Fargo does not challenge Finding of Fact 2 on appeal.

STANDARDS OF REVIEW

In an appeal from a bench trial, we review a trial court's findings under the same legal and factual sufficiency of the evidence standards used when determining if sufficient evidence exists to support the answer to a jury question. *Catalina v. Blasdel*, 881 S.W.2d 295, 297 (Tex. 1994). We review de novo the trial court's conclusions of law. *R.J. Suarez Ents., Inc. v. PNYX L.P.*, 380 S.W.3d 238, 242 (Tex. App.—Dallas 2012, no pet.). If the trial court rendered the proper judgment, we will not reverse based on an erroneous conclusion of law.

When a party attacks the legal sufficiency of an adverse finding on which it did not have the burden of proof at trial, it must demonstrate there is no evidence to support the finding. *Croucher v. Croucher*, 660 S.W.2d 55, 58 (Tex. 1983). Conversely, when the party who had the burden of proof at trial complains on appeal that the evidence is legally insufficient to support an adverse finding, that party must demonstrate that the evidence establishes, as a matter of law, all vital facts in support of the issue. *Dow Chem. Co. v. Francis*, 46 S.W.3d 237, 241 (Tex. 2001) (per curiam). In determining whether the evidence is legally sufficient to support a finding, we consider the evidence in the light most favorable to the judgment and indulge every reasonable inference that would support it. *City of Keller v. Wilson*, 168 S.W.3d 802, 807, 827 (Tex. 2005). We credit favorable evidence if a reasonable factfinder could and disregard contrary evidence unless a reasonable factfinder could not. *Id.* "The final test for legal sufficiency must always be whether the evidence at trial would enable reasonable and fair-minded people to reach the verdict under review." *Id.* at 827.

In evaluating a factual sufficiency challenge, we consider and weigh all of the evidence, not just the evidence supporting the finding. *Maritime Overseas Corp. v. Ellis*, 971 S.W.2d 402, 406–07 (Tex. 1988). We may set aside the finding only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. *Id.*; *Cain v. Bain*, 709 S.W.2d 175, 176 (Tex. 1986) (per curiam).

In considering a challenge to a finding of gross negligence as a predicate for exemplary damages, our standard of review is heightened. *Columbia Med. Ctr. of Las Colinas, Inc. v. Hogue*, 271 S.W.3d 238, 248 (Tex. 2008). We review all of the evidence to determine whether the trial court could have formed a firm belief or conviction that (1) the defendant's conduct involved an extreme degree of risk when viewed objectively from the defendant's standpoint at the time of the occurrence, considering the probability and magnitude of the potential harm to others; and (2) the defendant was subjectively aware of, but consciously indifferent to, this risk. *Id.* at 249; TEX. CIV. PRAC. & REM. CODE ANN. § 41.001(11) (West Supp. 2016). We assume the trial court resolved disputed facts in Militello's favor if a reasonable factfinder could do so. *Columbia Med. Ctr.*, 271 S.W.3d at 248.

The factfinder is the sole judge of the credibility of the witnesses and the weight to be given their testimony. *City of Keller*, 168 S.W.3d at 819 (legal sufficiency review); *Golden Eagle Archery, Inc. v. Jackson*, 116 S.W.3d 757, 761 (Tex. 2003) (factual sufficiency review). We will not substitute our judgment for that of the trial court merely because we might reach a different conclusion. *City of Keller*, 168 S.W.3d at 819, 822; *Golden Eagle Archery, Inc.*, 116 S.W.3d at 761.

REMITTITUR OF ECONOMIC DAMAGES

We first address Militello's agreed remittitur of several amounts of economic damages awarded in the trial court's judgment. Militello's appellate brief includes a "statement of remittitur" of certain amounts challenged in Wells Fargo's appeal. She "does not oppose a remittitur" of five items of damages, but she asserts that "[t]he Court should include the amount of the settlement credit in the total amount of actual damages used to calculate the amount of exemplary damages permitted under Section 41.008(b) of the Texas Civil Practice and Remedies Code." The amounts Militello has agreed to remit are:

$213,000.00	credit for settlement with former defendant
$25,000.00	for legal services rendered to Militello by Dale Strauss
$35,350.25	for legal services rendered to Militello by Chris Parvin
$65,151.96	tax levy addressed to Chesapeake Operating Inc.
$634.00	federal tax levy resolved in Militello's favor
$339,136.21	**Total statement of remittitur**

If part of a damages award lacks sufficient evidentiary support, the proper course is to suggest a remittitur of that part of the verdict. *Larson v. Cactus Util. Co.*, 730 S.W.2d 640, 641 (Tex. 1987); *see also* TEX. R. APP. P. 46.3 (court of appeals may suggest remittitur). As the prevailing party at trial, appellees must be given the option of accepting the remittitur or having the case remanded for a new trial. *See* TEX. R. APP. P. 46.3; *Larson*, 730 S.W.2d at 641; *McLeod v. Gyr*, 439 S.W.3d 639, 650 (Tex. App.—Dallas 2014, pet. denied). Here, however, because Militello has already consented to remittitur, we modify the trial court's judgment to delete these items.

ECONOMIC DAMAGES

After Militello's remittitur, the following items of economic damages remain in dispute:

- $150,000 in "tax-related damages" (consisting of $50,000 for a forensic accounting, $29,000 for past legal fees, $20,000 for future legal fees, $41,000 in penalties and interest related to capital gains taxes, and $10,000 for future tax return amendments);
- $17,000 tax levy by the State of New Mexico,
- $75,000 in lost production revenue, and
- $24,856.96 from Militello's money market account.

In its second issue, Wells Fargo challenges the sufficiency of the evidence to support these awards. We conclude that Militello presented sufficient evidence to support each of these amounts.

A. Tax-related damages

The evidence at trial was that Wells Fargo did not timely or properly document any of the sales from Militello's trust to Falon, and did not notify the oil and gas producers of the transfer of Militello's interests, or prepare and record correct deeds until three years after the fact. And it failed to amend its internal accounting, resulting in Militello's accounts showing the receipt of amounts that were no longer attributable to interests owned by her trust. These errors caused problems in the preparation of Militello's tax returns, and attracted the attention of various tax authorities. When Militello attempted to obtain information from Wells Fargo to address these problems, Wells Fargo did not provide her with a correct accounting. It was necessary for Militello to retain and consult her own tax advisors in order to resolve these problems. At trial, Militello's tax lawyer Andrea Winters gave expert testimony to explain and quantify Militello's damages relating to correcting her tax problems. We summarize Winters's testimony before addressing Wells Fargo's specific complaints about it.

1. Winters's testimony

Winters testified that she first met with Militello in 2011 and reviewed IRS notices and other information revealing that Militello had "some pretty extensive tax problems." To determine the extent of the problems, Winters ordered an account transcript from the IRS and interviewed Militello. She formed the opinion that Militello's tax issues were "extensive and complicated," and that Militello "was fairly unsophisticated in these matters." Winters attempted to obtain relevant financial and transactional information from Randy Wilson at Wells Fargo. Although Wilson sent some documents, Winters never received the information she needed from Wells Fargo. Militello offered evidence from two Wells Fargo employees that spreadsheets showing at least some of the information Winters needed could be generated in five or ten minutes.

Winters reiterated that Militello did not appear to have an understanding of capital gains taxes. She testified that in her review of the relevant documents she saw no indication that Wells Fargo had ever suggested to Militello that she "get any kind of tax advice at the time of these sales." In 2006, "virtually all" of the $400,000 value of property sold from the Grantor Trust was subject to capital gains taxes. Winters estimated that approximately $58,800 would have been "immediately owed as tax." She explained that if Wells Fargo had wanted to generate

$200,000 for Militello for the sale, the sale price would have to have been "considerably more than $200,000" because of the capital gains taxes that would be owed. Winters also testified that it would have been helpful to Militello if Wells Fargo had given her "just a pretty simple analysis of the assets" and "the amount that you would net," and if tax withholding had been done at the time of the sale to set aside an amount to pay the capital gains taxes when due.

In addition to capital gains tax issues, Winters testified to problems arising from Wells Fargo's failures to prepare deeds transferring the property to Falon or to notify oil and gas producers of the change in ownership. Winters testified that the IRS notified Militello in 2010 that she owed an additional $634 in taxes and interest for the tax year 2008. Winters investigated the problem and corresponded with the IRS on Militello's behalf. She testified that the IRS had received an IRS Form 1099 from "JM Cox Resources LP" showing Militello's receipt of $1,344 in income in 2008. The evidence showed, however, that the $1,344 was paid to Falon, not to Militello. Winters explained that the burden of proving to the IRS that a Form 1099 is erroneous is on the taxpayer, and described it as a "big problem." Winters was never given any documentation, such as purchase and sale agreements or deeds, that she could have shown to the IRS to prove the error.

Winters testified that as of the time of trial, she was still concerned about both state and federal tax issues remaining to be resolved regarding the three sales from the Grantor Trust. She testified that a forensic accounting would be necessary to resolve those issues. She explained that in a forensic accounting, an accountant would review "all of the extensive documentation prepared by whoever was generating it and come[ ] up with balance sheets, asset analysis, transactions—information regarding the transactions that occur[red], the tax and consequences, and give[ ] you a detail of what the transactions were." Although she would not perform the forensic accounting herself, she relied on her expertise as a tax attorney to opine that a forensic accounting would be necessary. Winters testified that she has worked with forensic accountants in the Dallas area before and is familiar with their general range of fees. She testified that for working on "a matter of this complexity," fees could range from $30,000 to $70,000, and a "conservative number" would be $50,000.

2. Wells Fargo's complaints

Wells Fargo argues that:

- Militello failed to designate Winters to testify about the necessity of a future forensic accounting;
- Winters's testimony that a future forensic accounting is necessary is speculation;
- there is no evidence that any tax returns must be amended in the future;
- Winters's testimony about her past and future fees is conclusory;
- Winters's opinions of penalties and interest related to capital gains taxes are speculative; and
- there is no causation between any tax penalties and interest and Wells Fargo's conduct because Wells Fargo was not responsible for giving Militello tax advice.

a. Forensic accounting and amendment of tax returns

Wells Fargo objected that Winters had not been designated to testify about the necessity of a forensic accounting, and she is not a forensic accountant and, as a result, lacked expertise to testify on the subject. The court asked for the subjects on which Winters was designated to testify. Militello's counsel responded that Winters was designated to quantify Militello's damages relating to "fixing these tax problems that she had." Winters testified to her experience in resolving clients' tax problems, including the need to obtain "a detail of what the transactions were" to determine "the tax and consequences." She testified to working with forensic accountants as a regular part of her practice to undertake this analysis. The court overruled Wells Fargo's objections, and said the court would "give the testimony whatever weight I think it's entitled to." We conclude the trial court did not err by ruling that the necessity for and cost of a forensic accounting were within the scope of Winters's designation and her expertise.

Wells Fargo also contends that Winters's testimony about the forensic accounting and the need for future amendments to Militello's tax returns was speculative. Wells Fargo argues that "Winters wanted $50,000 to investigate damages that might not even exist." The record reflects, however, that the reason for the uncertainty is Wells Fargo's breaches of fiduciary duty in transferring the assets and documenting the sale. Moreover, the record reflects that the oil and gas interests in the Grantor Trust were numerous and complex.[2] The annual account statements prepared by Wells Fargo showing one year's transactions run almost 200 pages each. In addition, Kuehne testified that as of the time of trial in 2012, problems remained with the documentation and deeds for "[t]he Woodward County properties, the Fasken Hills properties in New Mexico, and probably the Cox properties." Kuehne also testified:

> Q. Did you have any problems figuring out what the list of assets were that were covered by this sale?
>
> A. Yes.
>
> Q. Can you tell the Court what problems you had in that regard?
>
> A. Well, Your Honor, I was —I thought I was buying the assets that—or, I did buy the assets that were being managed by Wells Fargo. It turns out that the last information I had is there's, like, three separate lists, and the lists are not the same.
>
> . . .
>
> Q. Yes, sir. And is it typical in your work in the oil and gas field that you have a reliable asset list of what you own in a given field or a given entity?
>
> A. Yes.
>
> Q. And did you ever have that in this case?

[2] For example, Patterson testified that there were approximately 450 total properties in the Grantor Trust, about 175 of which were producing oil and gas volumes. Patterson explained that "[i]t was a fairly difficult and involved process" even to create a "definitive property list of the assets that were in the trust."

A. No.

In addition, Wallace testified that "without a proper accounting and without the ability to ascertain what was [Militello's], what was Falon's and what was ultimately Baloney Feathers', there was no possible way for Ms. Militello to tell, or for anyone else to tell, for that matter, whether the distributions were taking place correctly, and we know that certain distributions did not take place correctly."

Due to these and other problems, Winters also testified that some of Militello's tax returns would need to be amended. The amendments would need to be prepared by a certified public accountant. Winters testified that she has worked with certified public accountants for over 26 years on similar issues, and stated that "a reasonable accounting fee" to have Militello's tax returns "redone" would be approximately $10,000. Based on all of the evidence, the trial court could have believed Winters's testimony that an accounting was necessary, would be complex, and would cost an estimated $50,000, and that future amendment to Militello's tax returns would be required.

b. Winters's fees

Winters testified that her fees to the date of trial were "a little bit over $29,000." Winters estimated that to solve the remaining tax problems relating to the sales, her professional fees would be approximately $20,000 to $25,000. Quoting our opinion in *Woodhaven Partners, Ltd. v. Shamoun & Norman, L.L.P.*, Wells Fargo argues that Militello may not recover Winters's fees as actual damages. 422 S.W.3d 821, 839 (Tex. App.—Dallas 2014, no pet.) ("Well-settled law recognizes that attorneys' fees and expenses are not recoverable as damages in and of themselves."). As we explained in *Woodhaven*, however, the "evidence in this case shows that the only damages stated by appellants consist of legal fees and expenses they incurred in defending against *this* lawsuit brought by appellee and in prosecuting *their* counterclaims." *Id.*

Similarly, in *Haden v. David J. Sacks, P.C.*, also relied on by Wells Fargo, an attorney sued clients for unpaid fees. 332 S.W.3d 503, 521 (Tex. App.—Houston [1st Dist.] 2009, pet. denied). The clients counterclaimed, but their damages "consist[ed] solely of claims for legal fees that they incurred in defending against the lawsuit filed by [the attorney] for unpaid fee invoices." *Id.* The court held that the clients could not recover these fees, relying on "well-settled law" that attorney's fees incurred to defend a lawsuit filed by another are not recoverable. *Id.*

Here, in contrast, Winters was not representing Militello in "prosecuting [her] claims" in this lawsuit. Instead, she was offering advice and expertise to Militello in addressing the tax consequences of Wells Fargo's undisputed breaches of fiduciary duty. In *G.R.A.V.I.T.Y. Enterprises, Inc. v. Reece Supply Co.*, 177 S.W.3d 537, 546–47 (Tex. App.—Dallas 2005, no pet.), we recognized the rule that "[o]rdinarily, attorney's fees cannot be recovered as damages." We explained, however, that one of the exceptions to this rule "applies 'where the defendant's tort requires the plaintiff to act in the protection of his interests by bringing or defending an action against a third party.'" *Id.* (quoting *Qwest Commc'ns Int'l, Inc. v. AT&T Corp.*, 114 S.W.3d 15, 33 (Tex. App.—Austin 2003), *rev'd in part on other grounds*, 167 S.W.3d 324 (Tex. 2005) (per curiam)). In such a case, "the plaintiff 'is entitled to recover compensation for the reasonably necessary loss of time, attorney fees and other expenditures thereby suffered or incurred.'" *Id.* (quoting *Qwest Commc'ns Int'l, Inc.*, 114 S.W.3d at 33). Here, the evidence was that Wells Fargo's breaches of fiduciary duty made it necessary for Militello to obtain the advice and assistance of a lawyer with expertise in tax matters to represent her before the IRS and other tax authorities and to correct Wells Fargo's errors as they affected Militello's tax liability. We conclude that the trial court did not err by including Winters's fees in the damages awarded to Militello.

c. Tax penalties and interest

Winters testified that if Wells Fargo had given Militello "the proper information on the capital gains tax and the fact that it needed to be paid and the time at which it needed to be paid," Militello would not have "ended up with a[n] . . . ongoing penalty for not paying that tax and interest on that tax liability." It was her opinion that "Wells Fargo should be liable for the penalties and interest that resulted" from the tax liability, even though Militello, not Wells Fargo, owed the underlying capital gains tax. Winters testified to penalties and interest for 2006 to 2007 of $41,000. On cross-examination, Winters testified that she received this number from the IRS, but did not have at trial the account transcript she received from the IRS showing this amount.

Wells Fargo contends it was not responsible to give tax advice to Militello and should not be held liable for penalties and interest. Wells Fargo was aware, however, of Militello's lack of sophistication in her financial matters. And Militello told Wells Fargo what amount of money she needed to meet her obligations. Wells Fargo was not only the trustee for the Grantor Trust, but also was the trustee for the trust from which the Grantor Trust was created, many years before Militello reached adulthood. In that capacity, Wells Fargo was aware of tax consequences to Militello from the sale of the properties. Militello's complaint is not that Wells Fargo failed to advise her about a particular tax strategy to address those consequences. Rather, it is that Wells Fargo entirely failed to communicate basic information about the transaction. She contends that, at a minimum, Wells Fargo failed to advise her that (1) there were (or even, that there might be) tax consequences from a sale of properties from the trust; (2) she needed to get advice about those consequences that Wells Fargo could not provide to her; and (3) she could not obtain the $200,000 she needed by selling the assets for the $200,000 price Wells Fargo recommended.

We agree with Wells Fargo that Winters's legal opinion regarding the Bank's liability for penalties and interest was not binding on the trial court. *See City of Keller*, 168 S.W.3d at 820 (even uncontroverted expert testimony does not bind finder of fact unless subject matter is one for experts alone). We conclude, however, that Winters's testimony provided evidence based on which the trial court could find that the $41,000 tax penalty was properly included in the damages awarded to Militello, given Winters's testimony that the penalty was the result of the bank's failures, as Militello's fiduciary, to provide her with necessary information.

d. Conclusion

We conclude that sufficient evidence supports the $150,000 awarded by the trial court for Militello's damages relating to tax issues. We overrule this portion of Wells Fargo's second issue.

B. New Mexico tax levy

Both Winters and Militello testified that the New Mexico state taxing authority levied Militello's checking account for taxes it believed were due and owing from Militello. Winters communicated with the New Mexico authorities to explain that Militello no longer owned the property in question. The authorities responded that Militello must prove that she does not own the property. To Winters's knowledge, none of the money seized had been returned to Militello as of the date of trial. Militello testified that the amount seized was $17,000. Randy Wilson testified that although Militello made him aware of "a huge mess wrapped up with the New Mexico state tax department," he did nothing to help solve the problem. This evidence is sufficient to support the trial court's inclusion of $17,000 in the judgment attributable to the New Mexico tax levy.

C. Lost production revenue

The trial court's judgment includes $75,000 for production revenue lost as a result of Wells Fargo's failure to properly document the sales to Falon. Wallace testified to this amount. Wells Fargo contends that Wallace's testimony is "conclusory and speculative" because it is "based on guesswork and conjecture," citing *In re Whataburger Rests., L.P.*, 429 S.W.3d 597, 599 (Tex. 2014) (per curiam). In that case the supreme court stated that "[g]enerally, . . . testimony about what a person 'would have' done or what 'would have' happened under different circumstances is speculative and conclusory in the absence of some evidentiary support." *Id.* Wells Fargo also argues that Wallace impermissibly stated a conclusion without any explanation, citing *Natural Gas Pipeline Co. of America v. Justiss*, 397 S.W.3d 150, 156 (Tex. 2012).

We disagree with Wells Fargo's argument that Wallace's opinions regarding lost production revenue were speculative or conclusory. Wallace explained that in the sale of producing properties, "the timing of the conveyance of the property" is very important, as is a written purchase and sale agreement between the buyer and the seller. Wells Fargo failed to negotiate purchase and sale agreements and failed to negotiate a date certain on which the transfers were effective. Instead, the sales to Falon were made "based on receipts of a certain date." Wallace explained that oil production is paid at least 30 days in arrears. At the time of the sales, Militello was receiving $24,000 per month in production revenue. Wallace testified that if she had "sold effective with production," Militello would have been entitled to revenue checks attributable to production prior to the sale date but received after the date of sale. But because the sales were "done on the basis of receipts, whatever came in after [the date of sale] was automatically shipped to Falon." Wallace testified that this "would have been true in all three sales." Although his opinion as to the amount of lost production was an estimate, it was based on his review of the records regarding actual revenue attributable to the Grantor Trust during the relevant time period. Wallace explained, "[h]ad there been a proper purchase and sale agreement spelling out production as of a certain date, Ms. Militello would have been entitled to those proceeds."

Wells Fargo offers an alternative theory that, based on the date of payment in an account statement for the Grantor Trust after the first sale, the first production payment "was as likely to 'belong' to Falon as it did to Plaintiff." But the trial court was not required to accept this alternative theory, nor are we. The problem identified by Wallace is that there was no written agreement to establish a date certain. If there were, there would be no question whether the payment was "likely" to have been made to the correct person.

In *Justiss*, relied on by Wells Fargo, the supreme court concluded that a property owner offering an opinion of market value failed to provide the factual basis on which his opinion rested. *Id.* at 159–61. And in *Whataburger*, also relied on by Wells Fargo, the evidence supported a conclusion contrary to a witness's speculative testimony. 429 S.W.3d at 599–600. But Wallace's testimony did not suffer from either of these shortcomings. Based on his review of the records relating to the Grantor Trust, his expertise in fiduciary matters, and his expertise in the purchase and sale of oil and gas properties, Wallace testified that in each of the three sales, Militello lost approximately one month's revenue due to Wells Fargo's failure to properly document the sales and negotiate the date on which the transfer would be effective. Any lack of specificity in Wallace's estimate is due to Wells Fargo's failure to negotiate a date certain in a written contract to protect Militello's interests, not Wallace's speculation. We conclude that the evidence supports the trial court's inclusion of $75,000 in lost production revenue in its award of actual damages.

D. Money market account

The 2007 statement for the Grantor Trust admitted into evidence showed, under "Cash and Equivalents," a money market account valued at $24,856.96. Militello testified that she did not agree to sell any cash out of the money market account to Kuehne. She asked Wells Fargo on more than one occasion what happened to the money market account, but did not receive an answer.

Wells Fargo does not dispute that the $24,856.96 was paid to Kuehne, but argues that the money was rightfully Kuehne's after Falon purchased 100 percent of the Grantor Trust's mineral assets. Wells Fargo relies on Randy Wilson's testimony that $25,000 from the money market account was disbursed to Falon on January 2, 2008:

> Q. What was that disbursement related to?
>
> A. It was the oil and gas received.
>
> Q. For the prior month or for some other month?
>
> A. Yeah, I would say for December.

He continued,

> Q. And in reviewing the annual statements [for the Grantor Trust], did you see any monies disbursed from the money market account to Falon that were not for oil and gas revenues related to the interest that it acquired?
>
> A. Not that I know of.[3]

Wells Fargo argues that Militello "ignores this evidence, hangs on to her faulty assumption, and fails to prove that she owned the money." But the uncertainty regarding the ownership of the funds is due to Wells Fargo's own record-keeping. As we have discussed,

[3] Wells Fargo also relies on an email from its tax accountant, Patti Harrell, to Randy Wilson explaining that $25,000 paid to Falon in December 2008 was an allocation of oil and gas income. Although this email was admitted into evidence during the playing of Harrell's video deposition at trial, Harrell's direct testimony is not included in the appellate record. In the portion of the deposition that was read into evidence as cross-examination by Militello's counsel, Harrell testified that she did not have personal knowledge of the numbers included in Wells Fargo's account statements. Consequently, Harrell did not have personal knowledge regarding the source of the funds in question.

Wells Fargo continued to use the Grantor Trust to account for all transactions for almost three years after the sales to Falon. The trial court was the sole judge of the credibility of the witnesses and the evidence, and we conclude that there was some evidence to support the award.

E. Conclusion

We conclude that there is sufficient evidence to support the four items of economic damages challenged by Wells Fargo that were not the subject of Militello's remittitur. We also reject Wells Fargo's argument that these awards "have no causal connection to anything Wells Fargo did." As we have discussed, there was evidence that the four items were the direct result of Wells Fargo's failure to properly document the sales, notify the oil and gas producers of the transfer, amend its internal accounting, ensure that correct deeds were prepared and recorded, and respond to Militello's requests for information or provide her with a correct accounting, among other problems. We decide Wells Fargo's second issue against it.

The trial court awarded $1,328,448.35 in past economic damages. Given Militello's remittitur of $339,136.21 and our disposition of Wells Fargo's second issue, we modify the trial court's judgment to reflect an award of $989,312.14 in past economic damages.

MENTAL ANGUISH

In Finding of Fact 20, the trial court found that "Militello provided evidence of past mental anguish that warranted an award of $1,000,000." Conclusion of Law 41 states, "[b]ecause of Wells Fargo's conduct, Militello is owed $1,000,000.00 in mental anguish damages." Accordingly, the trial court's judgment includes an award of $1,000,000.00 in "past mental anguish damages pursuant to Texas Trust Code Section 114.008(a)(10)[4] and the Texas

[4] The Texas Trust Code is found in Title 9, Subtitle B of the Texas Property Code. TEX. PROP. CODE ANN. §§ 111.001–117.012 (West 2014 & Supp. 2016). Section 114.008 is entitled "Remedies for Breach of Trust." Subsection 114.008(a)(10) allows a court to "order any other appropriate relief" to "remedy a breach of trust that has occurred or might occur."

common law on breach of fiduciary duty, fraud, and negligence." In its first issue, Wells Fargo contends the evidence is both legally and factually insufficient to support this award.

A. Evidence of mental anguish

Appellate courts must "closely scrutinize" awards of damages for mental anguish. *Universe Life Ins. Co. v. Giles*, 950 S.W.2d 48, 54 (Tex. 1997) (citing *Parkway Co. v. Woodruff*, 901 S.W.2d 434, 444 (Tex. 1995)); *see also Bennett v. Grant*, No. 15-0338, 2017 WL 1553157, at *3 (Tex. Apr. 28, 2017) (appellate courts must conduct "meaningful evidentiary review" of mental anguish damages). The supreme court has explained that "[t]here must be both evidence of the existence of compensable mental anguish and evidence to justify the amount awarded." *Hancock v. Variyam*, 400 S.W.3d 59, 68 (Tex. 2013). "Mental anguish is only compensable if it causes a 'substantial disruption in . . . daily routine' or 'a high degree of mental pain and distress.'" *Id.* (quoting *Parkway Co.*, 901 S.W.2d at 444, and *Bentley v. Bunton*, 94 S.W.3d 561, 606 (Tex. 2002)). "'Even when an occurrence is of the type for which mental anguish damages are recoverable, evidence of the nature, duration, and severity of the mental anguish is required.'" *Id.* (quoting *Service Corp. Int'l v. Guerra*, 348 S.W.3d 221, 231 (Tex. 2011)).

In support of her claim for mental anguish, Militello testified:

> Q. And when you reached out to Wells Fargo as your trustee, were you able to get any help or any assistance?
>
> A. No, ma'am, not after 2007.
>
> Q. And has that fact, that fact that you were not able to get that assistance, been upsetting to you?
>
> A. Yes, ma'am.
>
> Q. Was it also upsetting to you for Mr. Tandy to tell you things that turned out not to be true?
>
> A. It was—it was very upsetting.

Q. And what about Ms. McLaughlin, when she tells you what the value of your property is, or tells you this and that about your trust account, that those things are not true, is that upsetting to you?

A. Yes ma'am. It's almost unbelievable.

She continued,

Q. Just in very brief form, would you try to explain . . . what has been emotionally upsetting to you about this case and the degree of that upset?

A. It's been humiliating and embarrassing. My—the fact that I don't trust anybody anymore has been really tough, because I really don't trust anyone anymore. That's hard.

Not having the ability to go out and just remedy all of this on my own has been difficult. . . . [I]t doesn't matter what I—I do, I can't fix—I couldn't work 60 hours a week, with my lack of education, and ever pay the IRS off now.

I mean, there are so many things that I can't do. . . . I have been in a really crummy situation for the past few years. I never ever would have subjected my children or myself to it, had I had full knowledge of everything . . . .

Q. Has it caused you any type of physical symptoms or distress?

A. I mean, yeah, my disease is not—lupus and stress don't go well together, and I constantly, constantly, constantly, constantly worry. Constantly. I have an ulcer from it. I broke out in shingles during all of this. It's just not a good mix at all, and I don't know, it's changed me.

She concluded,

A. I'm—it's just been really difficult. It—it's hard because I can—I sort of consider myself a—really kind of strong and honored [sic]. This has broke me. I mean, it has emotionally broke me, and I don't know. I'm working through a lot of—a lot of stuff with it now.

Wells Fargo contends that even if Miltello's testimony was truthful, it was inadequate to establish the high degree of mental pain and distress required to support an award of mental anguish damages. *See Hancock*, 400 S.W.3d at 68. Wells Fargo also argues that a physician's expert testimony was required to link Militello's physical symptoms, such as aggravation of lupus, to her mental distress, and in any event, Militello "did not require or seek out medical attention for alleged stress-induced aggravation of lupus or other physical manifestations." None of the cases on which Wells Fargo relies, however, requires a plaintiff to proffer expert testimony in order to recover for mental anguish.[5]

The record contains other evidence supporting Militello's testimony. One example is an email she wrote to Randy Wilson in 2008, in all capital letters, expressing her extreme frustration with the bank and its lack of responsiveness to her requests. She requested a "definitive breakdown of fees incurred," explaining, "you guys are making a tremendous amount of money considering how my accounts are in such disarray. With $31,000 a year, 2007 should be refunded considering you have not done anything that I requested from you." The email continues with a detailed complaint about the bank's failure to respond to her request for $1,500 to pay an insurance deductible when her son suffered a severe hand injury. The bank did not send the money until ten days after her request, and Militello's son received seventeen stiches instead of the corrective surgery that he needed to have within four days of his accident. The email concludes:

> My life has been short of hell for the last ten months. Now, could you please show me the due respect, and spend some real time on my trusts? While you are at it, please find the deeds on my oil properties. I mean I know you stated there . . . were not any, but we both know that could not possibly be the case.

The record contains numerous other emails from Militello to the bank in 2007 and 2008, seeking explanations, basic documentation, and information, that received only cursory replies.

[5] None of the cases cited by Wells Fargo addresses recovery of damages for mental anguish. Instead, the cases arise from the well-settled proposition that "expert testimony is required to establish causation as to medical conditions outside the common knowledge and experience of jurors." *Guevara v. Ferrer*, 247 S.W.3d 662, 663, 665 (Tex. 2007) (expert medical evidence required to prove that automobile accident caused all of medical expenses claimed by plaintiff); *Ins. Co. of N. Am. v. Myers*, 411 S.W.2d 710, 712–13 (Tex. 1966) (expert testimony required to establish whether work-related injury aggravated existing brain tumor, causing worker's death); *Roark v. Allen*, 633 S.W.2d 804, 809 (Tex. 1982) (expert testimony required in medical malpractice case to determine whether doctor breached standard of care by failing to advise parents of risk of baby's skull fracture); *Kaster v. Woodson*, 123 S.W.2d 981, 982–83 (Tex. Civ. App.—Austin 1938, writ ref'd) (expert testimony required to establish cause of infection); *State Office of Risk Mgmt. v. Adkins*, 347 S.W.3d 394, 401 (Tex. App.—Dallas 2011, no pet.) (expert testimony required to determine whether aggravation of preexisting condition constituted compensable injury in worker's compensation case). Here, Militello was not seeking damages as a result of a medical condition; instead, her testimony addressed the severity of her mental anguish.

Militello also testified that she has been ill for many years and cannot work for prolonged periods seated in one location. Militello explained that she suffers from lupus, which at first caused seizures and then, kidney failure. She testified that because her health prevented her holding a full-time job, she "had a huge thing about credit." She described herself as a "stickler for credit" because "I had a very hard time obtaining credit, because I've never worked a 9:00 to 5:00 job." She continued, "[s]o, my credit was very important to me, to—building it to where I got it. Credit is important. It's very important." Her rating was "consistently in the mid-700s" before her financial problems began in 2005.

Wells Fargo compares Militello's testimony to the evidence found insufficient in *Hancock* and in *Gunn Infiniti, Inc. v. O'Byrne*, 996 S.W.2d 854, 860 (Tex. 1999). In *Hancock*, the defendant sent a letter to colleagues and others accusing the plaintiff, a fellow physician, of lacking veracity and speaking in half-truths. *Hancock*, 400 S.W.3d at 62. In *Gunn*, a customer sued a car dealership for selling a damaged and repaired automobile as new. *Gunn*, 996 S.W.2d at 855–56.

In *Hancock*, the plaintiff testified that Hancock's attack on his reputation had "affected [him] emotionally," had been "disruptive to [him] and [his] family," and had been "embarrassing," "distracting," "stressful," and humiliating. *Id.* at 69. He testified that he was "more introspective" and had "emotional difficulties." *Id.* The supreme court concluded that the plaintiff's testimony did "not reflect a substantial disruption in daily routine or a high degree of mental pain and distress." *Id.* at 70. The plaintiff did not require medical attention, and did not elaborate on the impact of anxiety or depression in his life. *Id.* He testified that the letter did not affect his care of patients. *Id.* The court relied on *Gunn*, citing it for the proposition that there was no evidence of mental anguish where the claimant testified he had "a lot of anguish, a lot of grief," and disappointment and humiliation. *Id.* (citing *Gunn*, 996 S.W.2d at 860–61). This testimony did not rise to the level of a high degree of mental pain and distress or indicate a substantial disruption of the plaintiff's daily routine. *Id.* (citing *Gunn*, 996 S.W.2d at 860–61).

In neither *Hancock* nor *Gunn* did the defendant's conduct arise from an undisputed breach of trust by a long-term fiduciary. Here, the record includes months of communications between Militello and the bank showing multiple disruptions and mental distress in Militello's daily life in attempting to obtain her own and her children's housing, medical care, and other needs. Militello established that she was entirely dependent on Wells Fargo's competent administration of her trusts for her financial security and daily living expenses. The primary source of Militello's monthly income is permanently depleted, leaving her constantly worried about her financial security. Militello testified that the stress aggravated her lupus, and that she suffered an ulcer and "broke out in shingles." She received notices from the IRS and other tax authorities that tax was due on properties she did not own, and according to Winters, owes thousands of dollars in penalties. Her trust officer refused to discuss these problems with her, referring her to its outside counsel. We conclude there is evidence to support an award of mental anguish damages to Militello.

B. Amount of award

The supreme court also requires appellate courts to "conduct a meaningful review" of the fact-finder's determinations, including "evidence to justify the amount awarded." *Grant*, 2017 WL 1553157, at *3. The mental anguish damages awarded by the trial court are less than the actual damages Militello proved. *See Bunton v. Bentley*, 153 S.W.3d 50, 52–53 (Tex. 2004) (per curiam) (award of $150,000, also the amount assessed by the jury for damage to plaintiff's character and reputation, was reasonable compensation for mental anguish). But the mental anguish awards upheld by the supreme court, such as the $150,000 in *Bunton* and the $5,000 in *Grant*, are far below the $1 million awarded to Militello here, on similar evidence. *See Bunton*, 153 S.W.3d at 52–53 (plaintiff suffered sleep deprivation, embarrassment in community, and distress over disruption of his family); *Grant*, 2017 WL 1553157, at *3 (plaintiff suffered headaches, weak stomach, loss of appetite, and sleep deprivation; daily routine also substantially disrupted by four moves to keep family safe from defendant). Although Militello argues that Wells Fargo failed to challenge the fairness or reasonableness of the amount awarded, we construe Wells Fargo's first issue alleging the evidence is legally and factually insufficient "to support the award of $1,000,000 in mental anguish damages" to include this challenge. *See* TEX. R. APP. P. 38.1(f) (appellant's statement of issue "will be treated as covering every subsidiary question that is fairly included").

To support its argument that the amount of the award was excessive, Wells Fargo cites Militello's pretrial disclosures of the damages she sought for mental anguish:

> Mental anguish damages
>
> There is no specific calculation that can be used for recovery of mental anguish damages as they are within the discretion of the finder of fact. Plaintiff will request that the fact finder award her at least $1,000 per month for the two-year period when she could get no proper information from Wells Fargo.
>
> **$24,000.00 (requested)**

Militello responds that this request was for "at least" $24,000, "not 'at most' or 'precisely.'" She also points to her motion for judgment, in which she requested mental anguish damages "in the amount of $4,645,000.00, which represents the difference between the total sales price Mr. Kuehne obtained for Ms. Militello's properties ($5,175,000.00) and the total sales price Wells Fargo obtained for Ms. Militello's properties ($530,000.00)." The actual damages awarded in the judgment, however, already include compensation to Militello for the difference between the fair market value of her oil and gas properties at the time of the sales to Falon (valued by Patterson at $1,451,000) and the price Falon paid ($530,000), in the amount of $921,000.00. We conclude that although there is sufficient evidence to support an award of mental anguish damages to Militello, the $1 million awarded by the trial court is not supported by the evidence.

In *Bishop Abbey Homes, Ltd. v. Hale*, we concluded that the Hales offered sufficient evidence of their mental anguish but insufficient evidence to support the $1.6 million in mental anguish damages awarded by the jury. No. 05-14-01137-CV, 2015 WL 9167799, at *18 (Tex. App.—Dallas Dec. 15, 2015, pet. denied) (mem. op.). We therefore suggested a remittitur of mental anguish damages in excess of an amount supported in the record. *Id.* at *19. Similarly here, the record supports a lesser amount of mental anguish damages. The items making up the remainder of Militello's actual damages, net of the $921,000 related to the market value of the oil and gas properties, represent expenses, fees, and losses Militello incurred as a direct result of Wells Fargo's gross negligence and breaches of fiduciary duty. These items include legal fees incurred relating to drafting, creation, and recording of void deeds, lost production revenue, improperly transferred money market funds, bank fees, and the tax-related amounts we have discussed in detail above, among other items. These amounts total $310,608.89, after subtraction of the amounts Militello voluntarily remitted.[6] Much of the mental anguish Militello described is a direct result of the bank's unresponsiveness and gross negligence in carrying out its fiduciary duties to her, and is reflected in these expenses.

We conclude that the evidence is sufficient to support the amount of $310,608.89, representing amounts of actual damages caused by the bank's breaches of fiduciary duty and gross negligence, but excluding the actual damages attributable to market value of the properties. We conclude that this amount would fairly and reasonably compensate Militello for the mental anguish she suffered.

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[6] We do not, however, subtract the remitted $213,000.00 settlement credit. Militello has already deducted this amount from the total actual damages awarded in the judgment, and it has no bearing on the amounts we considered in determining fair and reasonable compensation for mental anguish.

If, as we conclude here, part of a damages verdict lacks sufficient evidentiary support, the proper course is to suggest a remittitur of that part of the verdict. *Larson*, 730 S.W.2d at 641; TEX. R. APP. P. 46.3 (court of appeals may suggest remittitur). Consequently, we suggest a remittitur of the portion of the mental anguish damages awarded to Militello that exceeds $310,608.89. As the prevailing party at trial, Militello must be given the option of accepting the remittitur or having the case remanded for a new trial. *Bechtel Corp. v. CITGO Prods. Pipeline Co.*, 271 S.W.3d 898, 922 (Tex. App.—Austin 2008, no pet.).

C. Effect of remittitur on attorney's fees award

Citing *Young v. Qualls*, 223 S.W.3d 312, 314–15 (Tex. 2007) (per curiam), and *Barker v. Eckman*, 213 S.W.3d 306, 314–15 (Tex. 2006), Wells Fargo also argues that if we reverse the trial court's award of mental anguish damages, we must also reverse the award of attorney's fees for reconsideration by the trial court. Following *Barker*, the court in *Young* explained that unless an appellate court is "'reasonably certain that the jury was not significantly influenced by the erroneous amount of damages it considered,'" the issue of attorney's fees should be retried if the damages awarded are reduced on appeal. *Young*, 223 S.W.3d at 314 (quoting *Barker*, 213 S.W.3d at 314). The court reasoned that one of the factors the trial court considers in assessing attorney's fees is "results obtained," and on appeal, the jury's award of damages was "reduced by nearly two-thirds." *Id*. at 315. Therefore, the supreme court could not be "reasonably certain that the trial court was not significantly affected by the error," even though the fees were awarded by the trial court rather than the jury. *Id.*

Similarly, in *Barker*, the court determined that, "considering both the absolute value of the difference between the erroneous and correct amounts of damages, and the fact that the correct damages were one-seventh of the erroneous damages," remand was required. *Barker*, 213 S.W.3d at 314. The court explained, "we are not reasonably certain that the jury was not significantly affected by the error" in its consideration of the "results obtained." *Id.*

The court also explained, however, that "[n]ot every appellate adjustment to the damages which a jury considered as 'results obtained' when making attorney's fees findings will require reversal." *Id.* We conclude that this is such a case. The agreed remittitur of $126,136.21 (exclusive of the settlement credit) and our $689,391.11 reduction of mental anguish damages result in a total reduction of $815,527.32 of the actual damages awarded in the judgment. As we discuss in this opinion, however, the actual and exemplary damages awarded in the judgment and upheld in this appeal exceed $4.3 million. The largest single element of economic damages, the $921,000 difference in the fair market value of the oil and gas properties and their sales price, is unchallenged on appeal. As discussed above, we have concluded that the evidence was sufficient to support the items of actual damages remaining in dispute after Militello's voluntary remittitur. Even as reduced, the award of mental anguish damages is significant, as is the award of exemplary damages. On this record, we can be reasonably certain that the trial court was not significantly affected by the erroneous amount of mental anguish damages in making its award of attorney's fees in the judgment. *See id.*

We overrule the portion of Wells Fargo's first issue challenging the award of any mental anguish damages to Militello. We sustain the portion of the issue that challenges the sufficiency of the evidence to support mental anguish damages exceeding $310,608.89, but overrule the portion of the issue seeking reversal of the award of attorney's fees.

PREJUDGMENT INTEREST

In its fourth issue, Wells Fargo challenges the trial court's award of prejudgment interest. The trial court awarded prejudgment interest "on the amount of $2,328,448.35 (past economic damages plus past mental anguish damages) calculated from May 21, 2010 to the day before the judgment is rendered at the annual rate of 5%." Militello filed her original petition on May 21, 2010, and the trial court rendered the amended final judgment on September 11, 2015. Wells Fargo complains of the portion of the award that accrued in the three-year period between the conclusion of trial in 2012 and the date of judgment in 2015, arguing that it is attributable to the trial court's unexcused delay in rendering judgment.

We review the trial court's award of prejudgment interest under an abuse of discretion standard. *Wilmer-Hutchins Indep. Sch. Dist. v. Smiley*, 97 S.W.3d 702, 706 (Tex. App.—Dallas 2003, pet. denied). An award of prejudgment interest may be based on an enabling statute or, as here, on general principles of equity. *See Bufkin v. Bufkin*, 259 S.W.3d 343, 356 (Tex. App.—Dallas 2008, pet. denied) (discussing scope of finance code's prejudgment interest provision).[7]

Wells Fargo requests that we disallow the award of prejudgment interest attributable to the trial court's delay in signing the judgment. Citing rule of judicial administration 7(a)(2), Wells Fargo contends "the Court should cut off prejudgment interest for the period starting at the Rule 7(a)(2) date line, which was July 26, 2012." *See* TEX. R. JUD. ADMIN. 7(a)(2) ("A district or statutory county court judge shall . . . rule on a case within three months after the case is taken under advisement."). Relying on *Johnson & Higgins of Tex., Inc. v. Kenneco Energy, Inc.*, Wells Fargo argues that the purposes of prejudgment interest, to encourage settlement and to remove incentives for defendants to delay, would be frustrated by allowing interest for a trial court's "unexcused delay." 962 S.W.2d 507, 529 (Tex. 1998).

[7] Militello argues that prejudgment interest in this case falls within finance code section 304.102, providing that "[a] judgment in a wrongful death, personal injury, or property damage case earns prejudgment interest." TEX. FIN. CODE ANN. § 304.102 (West 2016). At least one of our sister courts has concluded that section 304.102's predecessor did not apply to an award of damages for breach of fiduciary duty where there was no evidence of damages for personal injury or damage to tangible property. *Welder v. Green*, 985 S.W.2d 170, 179–80 (Tex. App.—Corpus Christi 1998, pet. denied); *see also Meaux Surface Protection, Inc. v. Fogleman*, 607 F.3d 161, 172 n.4 (5th Cir. 2010) (citing *Welder* for the proposition that claims for breach of fiduciary duty are not covered under section 304.102). We conclude that the prejudgment interest award is appropriate based on principles of equity, regardless of the statute's applicability. *See Citizens Nat'l Bank v. Allen Rae Invs., Inc.*, 142 S.W.3d 459, 487–88 (Tex. App.—Fort Worth 2004, no pet.) ("Where no statute controls the award of prejudgment interest, the decision to award prejudgment interest is left to the sound discretion of the trial court, which should rely on equitable principles and public policy in making this decision.").

A trial court has a ministerial duty to enter a final judgment upon the disposition of all issues pending in a case, or to proceed with the consideration of issues that remain pending before it. *In re Reynolds*, No. 14-14-00329-CV, 2014 WL 3002429, at *6 (Tex. App.—Houston [14th Dist.] July 1, 2014, orig. proceeding) (per curiam) (mem. op.). In addition, a trial court is required to consider and rule upon a motion within a reasonable time. *In re Ramirez*, 994 S.W.2d 682, 683 (Tex. App.—San Antonio 1998, orig. proceeding); *see also In re Chavez*, 62 S.W.3d 225, 228–29 (Tex. App.—Amarillo 2001, orig. proceeding) (discussing factors to determine whether trial court has ruled within a reasonable time). The question presented here, however, is the effect of the three-year delay between the end of trial and the date the trial court rendered judgment.

We have not previously decided this question or been asked to determine which party should bear the prejudgment interest cost of a trial court's delay in rendering judgment. We have considered the effect of delays attributable to the trial court in other contexts, however. In *Lloyd's of London v. Walker*, 716 S.W.2d 99, 100–01 (Tex. App.—Dallas 1986, writ ref'd n.r.e.), we concluded that the trial court did not abuse its discretion by granting a motion to reinstate a case and rendering judgment six years after a nonjury trial. We stated that "the burden to show unreasonableness and harm rests upon the appellant," and concluded that the appellant failed to satisfy that burden. *Id.* at 101. We cited cases from other jurisdictions in which delays of five, seven, and nine years were not shown to be unreasonable. *Id.* We concluded, "[a]lthough we cannot condone this delay by the judge, if it was his delay, we hold that, absent proof of some significant injury to appellant Lloyd's, or of some other factor rendering the delay unreasonable, a six-year delay between trial and rendition of judgment is not unreasonable as a matter of law, and thus the trial court did not commit reversible error." *Id.* at 102.

Here, all but one of the efforts to obtain a ruling from the trial court were made by Militello, with the single exception of a letter from Wells Fargo's counsel to the trial court on March 24, 2015, responding to Militello's letter and requesting the entry of a take-nothing judgment in its favor. Militello moved for entry of judgment in July 2013. The trial court heard this motion in September 2013, and Militello submitted a form judgment for the trial court's approval and signature after the hearing. In March 2014, and again in March 2015, Militello requested by letter that the trial court sign the proposed judgment. On June 22, 2015, Militello filed an unopposed petition for writ of mandamus in this Court, requesting that we order the trial court to render judgment. We dismissed the mandamus proceeding at Militello's request after she informed us that the trial court had rendered judgment on June 30, 2015. *In re Militello*, No. 05-15-00772-CV (Tex. App.—Dallas Jul. 15, 2015) (Order).

As the supreme court has explained, "[p]rejudgment interest is awarded to fully compensate the injured party, not to punish the defendant." *Brainard v. Trinity Universal Ins. Co.*, 216 S.W.3d 809, 812 (Tex. 2006). If we were to sustain Wells Fargo's complaint, Militello would not be fully compensated for "lost use of the money due as damages during the lapse of time between the accrual of the claim and the date of judgment." *Id.* (internal quotations omitted). As between Militello, who established Wells Fargo's liability for breaches of its duties to her, and Wells Fargo, we conclude that Wells Fargo should bear the prejudgment interest cost of the delay. *See Lloyd's of London*, 716 S.W.2d at 101 (declining to "depriv[e] a successful litigant of judgment on a meritorious claim" because of judge's failure to rule). We overrule Wells Fargo's fourth issue.

EXEMPLARY DAMAGES

Wells Fargo's fifth issue challenges the $3,465,490.20 exemplary damage award. The judgment provides:

> It is further ORDERED that Plaintiff is awarded exemplary damages pursuant to Texas Trust Code Section 114.008(a)(1), Texas Civil Practice and Remedies Code Section 41.003 and the Texas common law on breach of fiduciary duty, fraud, negligence, and gross negligence in the amount of $3,465,490.20.

Militello's motion for judgment reveals that the amount awarded is a calculation of "two times economic damages plus $750,000, which equals $3,465,490.20." *See* TEX. CIV. PRAC. & REM. CODE ANN. § 41.008(b) (West 2015) (exemplary damages may not exceed two times amount of economic damages plus amount equal to noneconomic damages found by jury, not to exceed $750,000). As we explain in more detail below, making the section 41.008(b) calculation after accounting for the voluntary and suggested remittiturs we have discussed above results in a $2,773,826.67 award of exemplary damages. We therefore consider Wells Fargo's issue as a challenge to an exemplary damage award of $2,773,826.67.[8]

Wells Fargo contends that the award must be reversed because Militello failed to make a predicate showing by clear and convincing evidence of aggravated wrongdoing. In the alternative, Wells Fargo argues that the award should be reduced because it is excessive.

A. Predicate showing

Wells Fargo contends that Militello did not establish harm resulting from fraud, malice, or gross negligence by clear and convincing evidence, as required by section 41.003 of the civil practice and remedies code. CIV. PRAC. & REM. CODE § 41.003(a). The parties join issue on whether (1) breach of fiduciary duty, by itself, is a sufficient predicate under section 41.003; and (2) whether Militello proved fraud by clear and convincing evidence. We need not resolve either of these issues because we conclude there is clear and convincing evidence to support the trial court's express finding that Wells Fargo was grossly negligent. *See* CIV. PRAC. & REM. CODE § 41.003(a)(3) (exemplary damages may be awarded if claimant proves by clear and convincing

[8] If Militello does not accept our suggestion of remittitur, then the trial court's judgment as to both liability and damages must be reversed. TEX. R. APP. P. 44.1(b) (court of appeals may not order separate trial solely on unliquidated damages if liability is contested).

evidence that harm with respect to which claimant seeks recovery of exemplary damages results from gross negligence).

In finding of fact 21, the trial court found that "Militello's harm resulted from the gross negligence of Wells Fargo," and conclusion of law 33 provides that "Wells Fargo's conduct constituted gross negligence." This finding and conclusion was supported by findings of fact 13, 14, and 15:

> 13. The conduct of Wells Fargo, when viewed objectively from its standpoint at the time the conduct occurred, involved an extreme degree of risk, considering the probability and magnitude of the potential harm to others.
>
> 14. Wells Fargo had an actual subjective awareness of the risk involved.
>
> 15. Wells Fargo proceeded with conscious indifference to the rights and welfare of others.

These findings incorporate the elements of gross negligence as defined in Chapter 41 of the civil practice and remedies code. CIV. PRAC. & REM. CODE § 41.001(11) (definition of "gross negligence"). The supreme court has explained that "gross negligence consists of both objective and subjective elements." *U-Haul Int'l, Inc. v. Waldrip*, 380 S.W.3d 118, 137 (Tex. 2012). The court also explained:

> Under the objective component, "extreme risk" is not a remote possibility or even a high probability of minor harm, but rather the likelihood of the plaintiff's serious injury. The subjective prong, in turn, requires that the defendant knew about the risk, but that the defendant's acts or omissions demonstrated indifference to the consequences of its acts.

Id. (citations omitted).

Wells Fargo argues that Militello did not establish the objective and subjective prongs of gross negligence by clear and convincing evidence, and did not prove either "extreme risk" or the bank's actual, subjective awareness of the risk involved. Wells Fargo also argues that the trial court's gross negligence findings and conclusions are "irrelevant" because Militello did not rely on them in her appellate briefing. But if the findings and conclusions are supported by clear and convincing evidence, they are a sufficient predicate for an award of exemplary damages, and we may rely on them in affirming the trial court's judgment. "Clear and convincing" is defined in Chapter 41 as "the measure or degree of proof that will produce in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established." CIV. PRAC. & REM. CODE § 41.001(2).

The record reflects that Wells Fargo and its predecessors had served as Militello's fiduciaries since her childhood. As well as serving as trustee for the Grantor Trust, Wells Fargo also served as the trustee for several other family trusts of which Militello was a beneficiary. As trustee, Wells Fargo was aware of the amount of income Militello received each month from each trust, combining the amounts in a single monthly payment made to Militello. If Wells Fargo was not earlier aware that income from the trusts was Militello's sole source of income, it became aware when Militello first contacted the bank about her financial problems in 2005. She explained to Tandy that the income she received from the trusts was insufficient to meet her expenses and debts, and she asked for help. When Tandy retired, Militello again explained her financial situation to Randy Wilson, and made clear the source of her financial problems and her need for help in solving them. Wells Fargo was therefore actually aware of the risk to Militello's financial security from depletion of the Grantor Trust. As Wallace testified, however, Wells Fargo breached its fiduciary duty by failing to explore other possible options to assist Militello through her financial difficulties.

Wallace testified that Wells Fargo's conduct involved an extreme degree of risk. He divided his evaluation of Wells Fargo's conduct as a fiduciary into three time periods. His first period, the "evaluation phase," began in December 2005 when Militello contacted Wells Fargo for help, and ended in late May 2006 when the decision to sell the properties was made. Wallace's second period covered the sale itself, including the marketing of the properties and the decision to sell. The third period covered the execution of the sale, and included Wells Fargo's adherence to its own internal policies and carrying out its duties to Militello in distribution of the properties after the sale.

Wallace testified in detail regarding the duties that Wells Fargo, as Militello's fiduciary, should have carried out in each of the three periods. He testified that, among other deficiencies, Wells Fargo failed:

- to provide sufficient information to Militello to make an informed decision about sales from the Grantor Trust,
- to obtain a "current evaluation of the property prepared by a competent engineer" before the sales,
- to explain the valuation to Militello and discuss the tax consequences of a sale,
- to market the properties to more than one buyer,
- to negotiate to get the best price possible for the properties,
- to negotiate a written purchase and sale agreement,
- to convey correct information to the attorneys preparing the deeds for the sales,
- to notify the oil and gas producers of the change in ownership, and
- to create a separate account after the sales, instead commingling the proceeds received "for a period of up to three years."

Wallace also testified that Wells Fargo's promotion of Falon's and its own interests over Militello's were breaches of fiduciary duty.

Under our heightened standard of review, we conclude the trial court could have formed a firm belief or conviction that Wells Fargo's conduct involved an extreme degree of risk, and Wells Fargo was consciously indifferent to that risk. *See Columbia Med. Ctr.*, 271 S.W.3d at 249. We also conclude that Militello offered clear and convincing evidence to support the trial court's finding that Wells Fargo was grossly negligent, and therefore met her burden to prove the required predicate under section 41.003(a).

B. Excessiveness

The amount of exemplary damages awarded by the trial court was the maximum amount available under section 41.008. If both the voluntary and the suggested remittitur are taken into account, the maximum award of exemplary damages under section 41.008 would be $2,773,826.67, that is, two times actual damages of $1,231,608.89,[9] plus noneconomic damages of $310,608.89 (the amount of noneconomic damages under our suggested remittitur). We therefore consider whether a $2,773,826.67 award of exemplary damages is excessive.[10]

1. *Kraus* factors

The factors we consider in determining whether an award of exemplary damages is reasonable include (1) the nature of the wrong; (2) the character of the conduct involved; (3) the degree of culpability of the wrongdoer; (4) the situation and sensibilities of the parties concerned; and (5) the extent to which such conduct offends a public sense of justice and propriety. *Alamo Nat'l Bank v. Kraus,* 616 S.W.2d 908, 910 (Tex. 1981); *see also* CIV. PRAC. & REM. CODE § 41.001 (listing same factors to be considered by trier of fact in determining amount of exemplary damages).

The nature of the wrong is Wells Fargo's gross negligence in carrying out its fiduciary duties to Militello. "High fiduciary standards are imposed upon trustees, who must handle trust property solely for the beneficiaries' benefit." *Ditta v. Conte*, 298 S.W.3d 187, 191 (Tex. 2009). A fiduciary "occupies a position of peculiar confidence" to its beneficiary, *id.*, owing "an

[9] Actual damages in the judgment included economic damages of $1,328,448.35 and disgorgement of trust fees in the amount of $29,296.75, for a total of $1,357,745.10. Subtracting Militello's voluntary remittitur of $126,136.21 results in actual damages of $1,231,608.89. In making this calculation, we do not subtract Militello's voluntary remittitur of the $213,000.00 settlement payment. Militello proved actual damages that included the $213,000.00; therefore, that amount is properly included in actual damages when considering whether exemplary damages are excessive. *See Gilcrease v. Garlock, Inc.*, 211 S.W.3d 448, 458 (Tex. App.—El Paso 2006, no pet.) (exemplary damage calculations are based on award of compensatory damages, not amount actually recovered; therefore appellants were entitled to recover exemplary damages on jury's award of actual damages even though actual damages were offset by settlement credit).

[10] Our only inquiry is the reasonableness of the amount as reduced by our suggested remittitur. If Militello does not accept our suggestion of remittitur, then the case will be remanded for new trial on all issues. *Bechtel Corp.*, 271 S.W.3d at 922 (prevailing party has option of accepting remittitur or having case remanded for new trial); TEX. R. APP. P. 44.1(b) (court of appeals may not order separate trial solely on unliquidated damages if liability contested).

unwavering duty of good faith, fair dealing, loyalty, and fidelity." *Estate of Boylan*, No. 02-14-00170-CV, 2015 WL 598531, at *4 (Tex. App.—Fort Worth Feb. 12, 2015, no pet.) (mem. op.). As Wallace testified, Wells Fargo breached its duty in advising Militello, in selling her properties based on an unreliable valuation to a "high profile" bank customer, and by commingling funds in the Grantor Trust account, subjecting Militello to tax liability and penalties for property she did not own. Militello did not have a college education, was ill, was facing large debts, was going through a difficult divorce, and relied on Wells Fargo to advise her. The evidence was that Wells Fargo pursued its own interests in serving a larger customer and by neglecting Militello entirely, refusing to speak with her directly or to take action to remedy any of the serious problems created by its gross negligence in handling the sale of her properties. We may also consider Wells Fargo's unwillingness to accept responsibility for its actions, including its contentions that (1) it merely acceded to Militello's "direct orders" by agreeing to sell the property in the trust for a particular amount, (2) it was Militello's rush to sell, not any conduct on its part, that caused the low sales price, and (3) Militello's testimony that she had "no one to blame but herself" for her financial difficulties. But acceptance of these contentions would ignore Wells Fargo's fiduciary duties to Militello. *See, e.g.*, *Bright v. Addison*, 171 S.W.3d 588, 605 (Tex. App.—Dallas 2005, pet. denied) (lack of remorse for intentional breach of fiduciary duty was relevant to review of *Kraus* factors). We conclude that the trial court's award of exemplary damages satisfies the criteria set forth in *Kraus.*

2. Due process factors

We also consider whether the award is unconstitutionally excessive because it violates due process constraints. *Bennett v. Reynolds*, 315 S.W.3d 867, 873 (Tex. 2010). To apply this standard, we consider (1) the degree of reprehensibility of the defendant's conduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the exemplary damages award; and (3) the difference between the exemplary damages awarded by the factfinder and the civil penalties authorized or imposed in comparable cases. *Id.* (citing *State Farm Mut. Ins. Co. v. Campbell*, 538 U.S. 408, 418 (2003)); *Grant*, 2017 WL 1553157, at *5. The supreme court recently discussed the application of these factors in *Horizon Health Corp. v. Acadia Healthcare Co., Inc.*, No. 15-0819, 2017 WL 2323106, at *15–17 (Tex. May 26, 2017).

In considering the first due process factor, the degree of reprehensibility, we consider five nonexclusive factors, whether (1) the harm inflicted was physical rather than economic; (2) the tortious conduct showed an indifference to or a reckless disregard for the health and safety of others; (3) the target of the conduct had financial vulnerability; (4) the conduct involved repeated actions, not just an isolated incident; and (5) the harm resulted from intentional malice, trickery or deceit, as opposed to mere accident. *Reynolds*, 315 S.W.3d at 874 (citing *State Farm*, 538 U.S. at 419); *Grant*, 2017 WL 1553157, at *5; *Horizon Health Corp.*, 2017 WL 2323106, at *16.

Here, the harm inflicted was economic, but the target of the conduct had financial vulnerability. Militello had also made clear to Wells Fargo that her financial situation was affecting, among other things, her own medical care and treatment as well as her son's. Consequently, Militello offered some evidence to establish two of the first three reprehensibility factors.

Wells Fargo engaged in repeated actions over the course of several years, detailed by Wallace in his analysis of the bank's failures to advise Militello and its breaches of fiduciary duties in evaluating and executing the sales. But the court in *Horizon Health Corp.* explained that the fourth reprehensibility factor, whether the conduct involved repeated actions, "is about recidivism, not the course of conduct giving rise to the plaintiff's ultimate harm." 2017 WL 2323106, at *16. The defendant's "past transgressions," not its actions that were "part of an overall scheme" to harm the plaintiff, are relevant to the fourth reprehensibility factor. *Id.* On this record, there is some evidence that Wells Fargo also breached its fiduciary duty to Kuehne by commingling his funds with Militello's. This "transgression," however, was part of the breaches of duty to Militello; there is no evidence of similar breaches of duty in unrelated transactions. There is no evidence of recidivism, *see id.*, and consequently no evidence of the fourth reprehensibility factor.

There is some evidence of the fifth reprehensibility factor. Although under section 41.008, gross negligence is a sufficient aggravating factor for an exemplary damages award, we also note that the trial court made numerous findings of breaches of fiduciary duty and intentional fraud on the part of Wells Fargo.[11] Trustees owe beneficiaries a fiduciary duty of full disclosure of all material facts known to them that might affect the beneficiaries' rights. *Ins. Co. of N. Am. v. Morris*, 981 S.W.2d 667, 674 (Tex. 1998). Militello sought information from Wells Fargo about her accounts for over two years after the sale of properties from the Grantor Trust in order to respond to demands from tax authorities. Wells Fargo failed to provide her with the information. Militello was not aware of, and Wells Fargo failed to disclose, any of the post-sale problems subsequently revealed such as commingling of trust accounts, erroneous deeds, and failures to notify oil and gas producers of the sales. These failures were not "mere accident." In sum, Militello offered evidence on at least three of the five reprehensibility factors. *See McCullough v. Scarbrough, Medlin & Assocs., Inc.*, 435 S.W.3d 871, 914–15 (Tex. App.—Dallas 2014, pet. denied) (exemplary damages award upheld where at least three reprehensibility factors favored award).

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[11] Wells Fargo does not challenge the trial court's findings regarding breaches of fiduciary duty, but does assert that Militello failed to establish intentional fraud. The trial court's findings include a list of material misrepresentations made to Militello that are the basis for the trial court's legal conclusion that "Militello's harm resulted from the fraud of Wells Fargo." Wells Fargo challenges each of the alleged misrepresentations as the basis for a finding of fraud. The trial court's legal conclusion is also supported, however, by the numerous failures to disclose established in the record. *See Hernandez v. Sovereign Cherokee Nation Tejas*, 343 S.W.3d 162, 175 (Tex. App.—Dallas 2011, pet. denied) (breach of duty of full disclosure by fiduciary is tantamount to fraudulent concealment). These failures to disclose are relevant to our analysis here, even though we rely on the trial court's gross negligence findings as the predicate for the award under civil practice and remedies code section 41.003.

In considering the second due process factor, disparity between the actual harm suffered by the plaintiffs and the exemplary damages awarded, the supreme court has explained that although there is no "bright-line ratio," "few awards exceeding a single digit ratio satisfy due process standards." *Grant*, 2017 WL 1553157, at *6 (citing *State Farm*, 538 U.S. at 425). In evaluating the ratio, "we must ask 'whether there is a reasonable relationship between the punitive damages award and *the harm likely to result* from the defendant's conduct as well as the harm that has likely occurred.'" *Id*. (quoting *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 460 (1993)). This requires a three-part inquiry, looking at (1) the exemplary damages awarded; (2) the actual damages, defined as the harm that has likely occurred, and (3) "potential damages," defined as the harm likely to result from the defendant's conduct. *Id.* at *6 and n.34.

Here, the award of two times economic damages plus the reduced amount of noneconomic damages does not "exceed[ ] a single digit ratio," *id.* at *6, and is within the statutory cap prescribed in section 41.008. There is both past and future harm from the sale of all of the assets in the Grantor Trust. The past harm includes the sale of the properties below market value and the tax penalties and fees incurred from the grossly negligent execution of the sales. Future harm includes not only the remaining issues to be resolved regarding past due taxes and penalties, but also the permanent loss of Militello's primary source of income. We conclude there is a reasonable relationship between the exemplary damages awarded and the actual and potential damages suffered by Militello, so that the second due process factor is met. *See id.* at *6; *see also McCullough*, 435 S.W.3d at 915 (affirming exemplary damages award that slightly exceeded 4:1 ratio when three out of five reprehensibility factors present).

The third due process factor is disparity between the award of exemplary damages and the civil penalties authorized or imposed in comparable cases. *Id.* at *5. The parties do not suggest any analogous civil penalties,[12] and in any event, the trial court's exemplary damage award (and an award based on the voluntary and suggested remittiturs we have discussed) is within the section 41.008 cap. *See Bishop Abbey Homes, Ltd.*, 2015 WL 9167799, at *22 (considering section 41.008 cap as relevant to third due process factor).

Having considered the relevant *Kraus* and due process factors, we conclude an exemplary damages award of $2,773.826.67 is reasonable and comports with due process. Accordingly, we suggest remittitur of $691,663.53 of the exemplary damages awarded in paragraph 4 of the trial court's judgment if Militello accepts our suggestion of remittitur of mental anguish damages discussed above. We overrule Wells Fargo's fifth issue.

CONTRACTUAL EXCULPATORY CLAUSE

In its sixth issue, Wells Fargo contends the trial court erred by "refusing to enforce the trust instrument's exculpatory clause." Wells Fargo argues the exculpatory clause in the Grantor Trust bars Militello's negligence claim. Wells Fargo concedes that the record supports a finding of ordinary negligence, but contends that the exculpatory clause precludes recovery of any resulting damage.[13]

By its express terms, the exculpatory clause does not preclude Wells Fargo's liability for gross negligence, bad faith, or willful breach of the trust's provisions:

[12] There are criminal penalties for "intentionally, knowingly, or recklessly misappl[ying] property [a person] holds as a fiduciary . . . that involves substantial risk of loss to . . . a person for whose benefit the property is held." TEX. PENAL CODE ANN. § 32.45 (West 2016) ("Misapplication of Fiduciary Property or Property of Financial Institution"). Under penal code section 32.45(c), whether the offense is a misdemeanor or a felony and the degree of the offense are determined by the value of the property misapplied. If the value of the property misapplied is $2,500 or more, the offense is a felony. PENAL CODE § 32.45(c)(4)–(7). Punishment for a felony may include a fine that does not exceed $10,000. PENAL CODE §§ 12.32(b), 12.33(b), 12.34(b); 12.35(b) (West 2011) (fines imposed for first, second, and third degree felonies and state jail felony). The Chapter 41 damages cap does not apply to a cause of action based on conduct described as a felony under penal code section 32.45. CIV. PRAC. & REM. CODE § 41.008(c)(10). Possible criminal penalties, however, have "less utility" in evaluating the third due process factor, *Reynolds*, 315 S.W.3d at 881 (quoting *State Farm*, 538 U.S. at 428), and Militello did not seek to prove the inapplicability of the cap on this basis. *See Zorrilla v. Aypco Constr. II, LLC*, 469 S.W.3d 143, 157 (Tex. 2015) (plaintiff can avoid section 41.008 cap by pleading and proving that defendant intentionally or knowingly engaged in felonious conduct under statutes specified in subsection 41.008(c)).

[13] Wells Fargo also argues there is no evidence to support a finding of bad faith or intentional conduct, so that the clause is not barred under trust code section 114.007. *See* TEX. PROP. CODE ANN. § 114.007 (West 2014) (trust term is unenforceable to extent it relieves trustee of liability for breach of trust committed in bad faith, intentionally, or with reckless indifference to beneficiary's interest). As we discuss, the exculpatory clause at issue expressly provides an exception for the trustee's gross negligence, making analysis of bad faith, intentional conduct, or reckless indifference under section 114.007 unnecessary.

> The Trustee shall not be liable for any loss or depreciation in value of the properties of the Trust, except as such loss is attributable to gross negligence, willful breach of the provisions of this Trust, or bad faith on the part of the Trustee. The Trustee shall not be responsible for any act or omission of any agent of the Trustee, if the Trustee has used good faith and ordinary care in the selection of the agent.

Wells Fargo contends that the property code "expressly allows exculpatory clauses to shield a trustee from ordinary negligence." *See* PROP. CODE § 114.007. Wells Fargo further argues that it "used good faith and ordinary care" in selecting its agents, including (1) the law firm that prepared the erroneous deeds, (2) Leonard, who prepared the mineral interest valuation used by the bank, and (3) Harrell, who prepared erroneous tax returns, and consequently is not liable for errors made by those agents.

We have concluded that the evidence supports the trial court's finding that Wells Fargo's conduct constituted gross negligence. As we have discussed, this finding is supported by Wallace's testimony as well as other evidence. Wallace detailed Wells Fargo's conduct in the three phases of his analysis. He was then asked to assume the statutory definition of "gross negligence," and testified that Wells Fargo's conduct that he had described met that standard. *See* CIV. PRAC. & REM. CODE § 41.001(11). He also testified that Wells Fargo's actions taken with regard to the sale of the mineral interest were intentional and willful breaches of the Grantor Trust.

In addition, there was evidence that the bank failed to use ordinary care in its selection of Leonard, if not its other agents. Leonard was not a petroleum engineer, and, according to Wallace, did "not have the qualifications or the ability to prepare an evaluation for purposes of the sale of a valuable stream of oil and gas assets." Further, Leonard's report did not cover all of the properties in the Grantor Trust. Regarding the report, Wallace testified, "So, first of all, I would never have solicited it. Secondly, after spending two minutes looking at it, I would have thrown it away." Wallace explained that the report was prepared in May 2005 and delivered to

Wells Fargo in November 2005, before Militello had asked Wells Fargo for help, and could not have been prepared to analyze a sale of the properties in light of Militello's needs. And Patterson testified that Leonard's lack of expertise and his faulty methodology, including the failure to value the "entire set of assets," contributed to the report's unreliability. Patterson opined that Leonard's report "was completely inadequate for setting the value" of the Grantor Trust's oil and gas properties. Although five months elapsed between Militello's request for help and the first sale, no further analysis was done then or in the months between the subsequent sales by Leonard or any other agent of Wells Fargo. Wallace described these criticisms as "very significant deviations from what a trustee should do in meeting its obligations to its beneficiaries."

Because the exculpatory clause in the Grantor Trust does not apply to losses "attributable to gross negligence," we conclude that the trial court did not err in refusing to enforce it to bar Militello's claims. We decide Wells Fargo's sixth issue against it.

CONCLUSION

Militello has conceded Wells Fargo's third issue, and its second issue in part. We overrule Wells Fargo's fourth and sixth issues, and the remainder of its second issue. We sustain Wells Fargo's first issue only to the extent of suggesting remittitur of mental anguish damages exceeding $310,608.89, and its fifth issue only to the extent of suggesting remittitur of exemplary damages exceeding $2,773,826.67. In accordance with rule 46.3, Texas Rules of Appellate Procedure, if Militello files with this Court within fifteen (15) days from the date of this opinion a remittitur of $689,391.11 in mental anguish damages and a remittitur of $691,663.53 in exemplary damages, we will modify the trial court's judgment to award her economic, noneconomic, and exemplary damages in accordance with her remittiturs and to reflect the settlement credit, and affirm the trial court's judgment as modified.

If the suggested remittiturs are not filed timely, we will reverse the trial court's judgment and remand the cause for new trial. TEX. R. APP. P. 44.1(b).

/Elizabeth Lang-Miers/
ELIZABETH LANG-MIERS
JUSTICE

151252F.P05

Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

WELLS FARGO BANK, N.A., AS SUCCESSOR TRUSTEE TO CHASE BANK OF TEXAS, N.A., FOR THE REVOCABLE TRUST ESTABLISHED BY ANGELA LEIGH SIMPSON STARRETT BY AGREEMENT DATED SEPTEMBER 8, 1999, Appellant

No. 05-15-01252-CV   V.

ANGELA LEIGH MILITELLO, F/K/A ANGELA LEIGH SIMPSON STARRETT, Appellee

On Appeal from the 298th Judicial District Court, Dallas County, Texas
Trial Court Cause No. DC-10-06211.
Opinion delivered by Justice Lang-Miers; Justices Bridges and Schenck, participating.

In accordance with this Court's opinion of this date, the judgment of the trial court is **MODIFIED** as follows:

> Paragraph 1 of the trial court's judgment is MODIFIED to award appellee Angela Leigh Militello, f/k/a Angela Leigh Simpson Starrett past economic damages in the amount of $989,312.14, in accordance with her voluntary remittitur.

Also in accordance with this Court's opinion of this date, we suggest remittiturs in the amount of $689,391.11 of the mental anguish damages awarded in paragraph 3 of the trial court's judgment, and in the amount of $691,663.53 of the exemplary damages awarded in paragraph 4 of the trial court's judgment. In accordance with rule 46.3 of the Texas Rules of Appellate Procedure, if appellee files with this Court within fifteen (15) days from the date of this opinion remittiturs in these amounts, we will modify the trial court's judgment to award appellee mental anguish damages of $310,608.89 and exemplary damages in the amount of $2,773,826.67, and affirm as modified. If the suggested remittiturs are not filed timely, we will reverse the trial court's judgment and remand the cause for new trial.

It is **ORDERED** that appellee Angela Leigh Militello, f/k/a Angela Leigh Simpson Starrett recover her costs of this appeal from appellant Wells Fargo Bank, N.A., as Successor

Trustee to Chase Bank of Texas, N.A., for the Revocable Trust Established by Angela Leigh Simpson Starrett by Agreement Dated September 8, 1999.

Judgment entered this 20th day of June, 2017.