AFFIRMED and Opinion Filed August 14, 2025

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-23-00679-CV

GAIL CORDER FISCHER, Appellant
V.
CLIFF FISCHER, TED UZELAC, AND CLIFFORD FISCHER & COMPANY, Appellees

On Appeal from the 68th Judicial District Court
Dallas County, Texas
Trial Court Cause No. DC-19-17340

MEMORANDUM OPINION

Before Justices Garcia and Rodriguez[1]
Opinion by Justice Garcia

Appellant Gail Corder Fischer sued appellees Cliff Fischer and Ted Uzelac on claims including breach of fiduciary duty and fraud. Appellee Clifford Fischer & Company intervened and asserted claims against Gail, but it eventually nonsuited those claims. The trial judge rendered a take-nothing summary judgment against Gail, and she appeals. We affirm.

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[1] The Hon. Yvonne T. Rodriguez, Senior Justice, Assigned.

I. BACKGROUND

A. Factual Allegations

We draw these factual allegations from appellant's live pleading, her Sixth Amended Petition, unless otherwise stated.

Appellant Gail Fischer and appellee Cliff Fischer married in 1986. Together they built a successful business called Clifford Fischer & Company, which was at all relevant times a Subchapter S corporation under Chapter 1 of the Internal Revenue Code. The Company provides consulting, brokerage, and technology solutions to corporate real-estate users. Appellee Ted Uzelac is the Company's president. Larry Teel is the Company's executive vice president.[2]

In 2008, Gail and Cliff executed a post-marital agreement that converted the entire common stock of the Company into community. In 2017, Gail and Cliff ceased living together as husband and wife. A year later, Gail filed for divorce. Once the final divorce decree was signed, it awarded Gail and Cliff each half of the stock in the Company and ordered the Company to be sold.

The summary-judgment evidence shows that Gail appealed the divorce decree's property division, and we affirmed the decree. *See In re Marriage of A.W.E. & D.M.F.N.*, No. 05-19-01303-CV, 2021 WL 822492 (Tex. App.—Dallas Mar. 4,

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[2] Teel was a defendant in this case and obtained a take-nothing summary judgment against Gail. She does not challenge that judgment, so we exclude Teel from the list of appellees. *See* TEX. R. APP. P. 3.1(c) (defining *appellee* as a party adverse to an appellant).

2021, no pet.) (mem. op.). Our opinion discusses the divorce proceedings in some detail. *See id*. at *2.

Meanwhile, Gail filed this lawsuit about a week after the divorce decree was signed. In general, Gail alleged that once she and Cliff separated in 2017, Cliff engaged in numerous tortious acts designed to freeze her out of the Company, take money out of the Company improperly for his own benefit, and deny Gail financial benefits from the Company that she is legally entitled to. She also alleged that Uzelac and Teel breached fiduciary duties to her and conspired with Cliff in his wrongdoing.

B. Procedural History

Gail filed this suit in October 2019. Although her original petition is not in the clerk's record, the docket sheet indicates that the original defendants were Cliff, Uzelac, and Teel. Cliff and Uzelac asserted counterclaims against Gail.

The docket sheet further indicates that the Company intervened in the lawsuit in December 2019. The clerk's record contains a fifth amended petition in intervention in which the Company sued Gail for claims including breach of fiduciary duty and trade-secret misappropriation.

In February 2020, the Company obtained a temporary injunction that, among other things, barred Gail from entering the Company's premises and from contacting the Company's clients and potential clients. Gail appealed the temporary injunction, and we affirmed. *See Fischer v. Clifford Fischer & Co.*, No. 05-20-00196-CV, 2022 WL 3367559 (Tex. App.—Dallas Aug. 16, 2022, no pet.) (mem. op.).

In her Sixth Amended Petition,[3] Gail asserted the following counts against the specified appellees:

1. breach of fiduciary duty	Cliff and Uzelac
2. conspiracy to breach fiduciary duties and aid and abet such breaches, commit fraudulent conduct, cause wrongful transfers, and freeze Gail out of the Company	Cliff and Uzelac
3. fraud	Cliff
4. negligent misrepresentation	Cliff
5. wrongful/fraudulent transfer and/or constructive fraud	Cliff and Uzelac
6. fraud, fraudulent inducement, and fraud by nondisclosure	Cliff
7. fraud and fraud by nondisclosure	Cliff
8. promissory estoppel	Cliff
10.[4] constructive trust/unjust enrichment	Cliff and Uzelac
11. declaratory judgment	Cliff and Uzelac
12. appointment of a receiver or custodian over the Company	

In December 2021, the trial judge signed an order appointing an auditor. This order was supplanted on January 7, 2022, by an amended order that appointed auditor James A. Smith to investigate several specified issues and directed him to file a verified report by January 31, 2022. The parties later filed a Rule 11 agreement extending the auditor's report deadline to February 28, 2022. On February 28, 2022, the auditor filed an unverified report.

[3] All parties treat the Sixth Amended Petition as Gail's live petition at the time of judgment. We note that Gail moved for leave to file the Sixth Amended Petition and that no order granting leave appears in the record. However, Cliff and Uzelac specifically attacked Gail's Sixth Amended Petition by name in their summary-judgment motions, and the trial judge granted those summary-judgment motions, so we conclude that the Sixth Amended Petition was tried by consent. *See Via Net v. TIG Ins. Co.*, 211 S.W.3d 310, 313 (Tex. 2006) (per curiam) (applying trial-by-consent doctrine in summary-judgment context).

[4] There is no count 9.

Also during this timeframe, the trial judge signed a partial-summary-judgment order establishing that Cliff never owed Gail any formal fiduciary duties in his capacities as a shareholder, officer, or director of the Company. The judge also ruled that Cliff did not owe Gail a formal fiduciary duty on account of their marriage once she filed for divorce on May 31, 2018.

On March 28, 2022, Cliff and the Company filed a joint summary-judgment motion based on the auditor's report. It does not appear that this motion was ever ruled on.

On April 20, 2022, Gail filed a motion for amended scheduling order and for additional time to file exceptions to the auditor's report. On May 31, 2022, she filed exceptions to the auditor's report and, in the alternative, motion for leave to file exceptions. Cliff and the Company filed a motion to strike the latter document, arguing that the exceptions were untimely and that Gail's excuses were "flimsy." After a hearing, the trial judge granted Cliff and the Company's motion to strike. Gail sought mandamus relief from this order, and we denied her mandamus petition. *In re Fischer*, No. 05-22-00787-CV, 2022 WL 4354172 (Tex. App.—Dallas Sept. 20, 2022, orig. proceeding) (mem. op.).

Then Cliff and Uzelac filed the summary-judgment motions that led to the final judgment. Uzelac filed a traditional and no-evidence summary-judgment motion on October 26, 2022. A few days later, Cliff filed a summary-judgment motion based solely on the auditor's report. A few days after that, Cliff filed a separate traditional and no-evidence summary-judgment motion.

Gail then filed new exceptions to the auditor's report, and Cliff and the Company moved to strike the exceptions. Gail also filed responses to Cliff's and Uzelac's summary-judgment motions. The parties also filed various summary-judgment replies, supplements, and objections.

The trial judge heard the summary-judgment motions on December 16, 2022, and March 20, 2023. On April 12, 2023, he signed the following:

- an order that granted Uzelac's summary-judgment motion and both of Cliff's summary-judgment motions;
- an order that sustained Cliff's objections to Gail's summary-judgment evidence and granted Cliff's motion to strike Gail's second exceptions to the auditor's report; and
- a final judgment that incorporated the summary-judgment order and also granted nonsuits of the Company's claims in intervention and the defendants' counterclaims against Gail.

Gail timely filed a motion for new trial, which was overruled by operation of law, and she timely filed her notice of appeal.

II. Issues Presented

Gail raises four issues on appeal, which we summarize as follows:

1. The trial judge erred by granting Cliff's summary-judgment motion based on the auditor's report.
2. The trial judge erred by granting Cliff's traditional and no-evidence summary-judgment motion.
3. The trial judge erred by granting Uzelac's traditional and no-evidence summary-judgment motion.

4. The trial judge abused his discretion by sustaining appellees' evidentiary objections.

III. STANDARDS OF REVIEW

We review a summary judgment de novo. *Trial v. Dragon*, 593 S.W.3d 313, 316 (Tex. 2019).

A traditional summary judgment in favor of a defendant is proper if the defendant conclusively disproves an element of the plaintiff's claim or conclusively proves every element of an affirmative defense. *Alexander v. Wilmington Sav. Fund Soc'y, FSB*, 555 S.W.3d 297, 299 (Tex. App.—Dallas 2018, no pet.). We take evidence favorable to the nonmovant as true, and we indulge every reasonable inference and resolve every doubt in the nonmovant's favor. *Id*. A matter is conclusively established if ordinary minds could not differ as to the conclusion to be drawn from the evidence. *Id*.

We review a no-evidence summary judgment under the same legal-sufficiency standard as a directed verdict. *Merriman v. XTO Energy, Inc.*, 407 S.W.3d 244, 248 (Tex. 2013). The nonmovant bears the burden of producing enough evidence to raise a genuine issue of material fact as to each challenged element. *Id*. A no-evidence summary judgment is proper if

- there is a complete absence of evidence of a vital fact,
- the court is barred by rules of law or evidence from giving weight to the only evidence offered to prove a vital fact,
- the evidence offered to prove a vital fact is no more than a scintilla, or

- the evidence conclusively establishes the opposite of a vital fact.

See id. We consider the evidence in the light most favorable to the nonmovant, crediting evidence favorable to the nonmovant if a reasonable jury could and disregarding contrary evidence and inferences unless a reasonable jury could not. *Id*.

We review a trial judge's summary-judgment evidentiary rulings for abuse of discretion. *Nguyen v. Allstate Ins. Co.*, 404 S.W.3d 770, 775 (Tex. App.—Dallas 2013, pet. denied).

IV. SUMMARY-JUDGMENT GROUNDS

To aid us in sorting out Gail's issues on appeal, we summarize the summary-judgment grounds asserted by appellees in their motions.

First, Cliff filed a motion based entirely on the auditor's report. He argued that the auditor's report was conclusive evidence of the facts stated therein because no exceptions to the report were timely filed. And he argued that the facts established in the report negated all of Gail's claims against him.

Cliff also filed a separate traditional and no-evidence summary-judgment motion on the following grounds as to the following counts of Gail's Sixth Amended Petition:

Res judicata and the compulsory-counterclaim rule	counts 1–3, 5–7, 10, and 11
Judicial estoppel	all counts
The evidence negates the existence of a fiduciary duty running from Cliff to Gail and the existence of any breach	count 1 (breach of fiduciary duty) count 5 (fraudulent transfer/constructive fraud)
Because Cliff owed Gail no fiduciary duty, her conspiracy claim fails	count 2 (conspiracy)

The evidence negates the existence of a fiduciary duty and negates injury	count 4 (negligent misrepresentation)
The evidence negates injury; statute of limitations; the evidence negates the existence of fraudulent inducement; Gail has pleaded no post-divorce-decree concealed facts	count 6 (fraudulent inducement and fraud by nondisclosure)
The evidence negates the existence of a post-divorce fiduciary duty and of any unjust enrichment	count 10 (constructive trust and unjust enrichment)
The evidence establishes that a certain voting agreement is valid and enforceable; there is no justiciable controversy regarding payments owed between the parties; this court cannot clarify the divorce decree rendered by another court	count 11 (declaratory judgment)
Gail has pleaded facts that negate the availability of a receivership	count 12 (receivership)
No evidence of various essential elements	counts 1, 3, 4, 5, 6, 7, 8, 10, 11, 12

Finally, Uzelac asserted the following grounds in his traditional and no-evidence summary-judgment motion:

The evidence establishes that Uzelac did not owe Gail a fiduciary duty	counts 1, 2, and part of 5
Gail has no evidence of any of the three elements of breach of fiduciary duty	count 1 and part of count 5
Gail has no evidence of any of the elements of fraudulent transfer	part of count 5
Gail has no evidence of any of the elements of constructive trust or unjust enrichment	count 10
Gail has no evidence of any of the elements of civil conspiracy	count 2
Gail has no evidence of any element of aiding and abetting breach of fiduciary duty	part of count 2

The trial judge did not specify the grounds on which he granted the motions, so we must affirm if any proffered grounds are meritorious. *Merriman*, 407 S.W.3d at 248.

V. ISSUE FOUR: EVIDENTIARY RULINGS

We first consider Gail's fourth issue, in which she complains that the trial judge erred by sustaining Cliff's objections to some of her summary-judgment evidence.

We conclude that Gail failed to preserve this issue in the trial court. A party must object to the trial judge's sustaining of objections to her summary-judgment evidence to preserve the right to complain about that ruling on appeal. *Beinar v. Deegan*, 432 S.W.3d 398, 402 (Tex. App.—Dallas 2014, no pet.); *see also* TEX. R. APP. P. 33.1(a). Here, the record does not show that Gail filed any response to Cliff's objections so as to put her current arguments for admissibility before the trial judge. She complained about the judge evidentiary rulings in her motion for new trial, but only in a single sentence: "Furthermore, the Court erred in granting Defendants' objections to Plaintiff's summary judgment evidence." This was not specific enough to satisfy Rule 33.1(a)(1)(A), and the specific arguments for admissibility that Gail raises on appeal were not apparent from the context.

Additionally, given our resolution of Gail's issues challenging the summary judgment in Cliff's favor, *infra*, we also conclude that any error in the trial judge's order sustaining Cliff's objection to Gail's expert witness's affidavit was harmless. *See* TEX. R. APP. P. 44.1(a).

For the foregoing reasons, we overrule Gail's fourth issue on appeal.

VI. ISSUES ONE AND TWO: CLIFF'S SUMMARY JUDGMENT

We next address Gail's two issues challenging the summary judgment in favor of Cliff.

Because judicial estoppel is dispositive, we begin with that summary-judgment ground. Cliff argued that all of Gail's claims against him were barred by the doctrine of judicial estoppel. Gail challenges that ground in her second issue on appeal.

Judicial estoppel bars a party from contradicting its prior litigation positions under some circumstances. *Fleming v. Wilson*, 694 S.W.3d 186, 191 (Tex. 2024). The doctrine applies if (1) the party to be estopped took an inconsistent position in prior litigation or in another phase of the same case, (2) the party prevailed in its position by persuading the court to adopt that position and to grant relief that the party sought, and (3) the prior statement was deliberate, clear, and unequivocal. *Id*. at 191–93.

In his summary-judgment motion, Cliff argued that, during the divorce case, Gail prevailed on a position that is inconsistent with her claims in the instant case. Specifically, Cliff argued that he and Gail entered an Agreement to Convert whereby he agreed to convert his separate-property interest in the Company to community property. In the Agreement to Convert, Gail stated, "I fully understand that, by signing this Agreement and accepting any benefit whatsoever under it, I will be estopped from making any claim of any kind at any time by my separate property estate against the converted property, except as expressly provided for in this Agreement." Then an agreed judgment was signed in the divorce action, and Gail agreed in that judgment that her representation in the Agreement to Convert was valid and legally enforceable. And ultimately the final divorce decree incorporated that agreed judgment. The divorce decree also recited that Gail initially challenged the enforceability of the Agreement to Convert but by the time of trial agreed with Cliff that it was enforceable, and the decree determined that the Agreement to Convert was enforceable. Thus, Cliff urged, Gail successfully took the position in the divorce case that the Agreement to Convert was enforceable—including its recitation that she was estopped from making claims against "the converted property." Finally, Cliff argued that all of Gail's claims against him in the instant lawsuit are claims against converted property in the form of assets that Cliff has received from the Company.

In her appellant's brief, Gail devotes only two paragraphs to Cliff's judicial-estoppel ground. The first paragraph discusses the law of judicial estoppel in the abstract. The second purports to apply the law to the facts of this case, but it contains no record references and gives almost no guidance as to what flaws might exist in Cliff's judicial-estoppel argument. The paragraph says:

> Cliff failed to identify any inconsistent position taken by Gail that either advantaged Gail or disadvantaged Cliff, regarding any issue on which Gail prevailed in the divorce proceeding. "The doctrine of judicial estoppel simply does not apply" when there is no advantage to one party. *See Ferguson* [*v. Bldg. Materials Corp. of Am.*, 295 S.W.3d 642, 644 (Tex. 2009) (per curiam)] (finding trial court erred in applying judicial estoppel absent any showing of advantage or disadvantage). The trial court erred in granting summary judgment under these circumstances.

Reading this paragraph as generously as possible, we construe it to challenge the element of judicial estoppel that the party to be estopped must have obtained some benefit by taking the position she took in the prior litigation. *See Fleming*, 694 S.W.3d at 191–92. But the summary-judgment evidence shows that Gail benefited from the divorce court's acceptance of her position that the Agreement to Convert was enforceable because that Agreement made the Company Cliff and Gail's community property rather than Cliff's separate property. This in turn allowed the divorce court to award her half of the Company's shares as part of the division of the community estate.

In her reply brief, Gail further argues that we rejected a variation of Cliff's judicial-estoppel argument in our opinion in her appeal from the divorce decree. In that case, Cliff argued that Gail's entire appeal was barred by the acceptance-of-benefits doctrine, and we rejected his arguments. *See In re Marriage of A.M.E. & D.M.F.N.*, 2021 WL 822492, at *2–5. Gail suggests that we should reject Cliff's judicial-estoppel argument for the same reasons. We disagree because the elements of the two doctrines are different. In the divorce case, we focused on whether Gail's conduct under the divorce decree was inconsistent with her appellate claims of error and on whether Cliff was prejudiced by Gail's conduct. *See id*. For judicial-estoppel purposes, however, the focus is on whether Gail took a position during the divorce case—not after the decree was rendered—and whether she persuaded the trial judge to adopt that position and grant her relief. *See Fleming*, 694 S.W.3d at 191–92. Our rejection of the acceptance-of-benefits doctrine in the divorce appeal does not imply that judicial estoppel is inapplicable in this separate litigation.[5]

We conclude that Gail has not shown error with respect to Cliff's judicial-estoppel ground for summary judgment.[6] Because Cliff's judicial-estoppel summary-judgment ground attacked all of Gail's claims against him, our conclusion supports affirmance of the judgment in Cliff's favor, and we need not address any of Cliff's other summary-judgment grounds. We overrule Gail's second issue on appeal and need not address her first issue.

VII. Issue Three: Uzelac's Summary Judgment

Next we consider Gail's challenges to Uzelac's take-nothing summary judgment. She contends that the trial judge erred by granting summary judgment on her claims against Uzelac for breach of fiduciary duty, various theories of

[5] Gail also raises some entirely new arguments in her reply brief, but we do not consider them. *See Hunter v. PriceKubecka, PLLC,* 339 S.W.3d 795, 803 n.5 (Tex. App.—Dallas 2011, no pet.) ("[W]e do not consider arguments raised for the first time in a reply brief.").

[6] We note that our holding is limited to the argument Gail raised in her opening brief, and we express no opinion about any other aspect of Cliff's judicial-estoppel argument. *See Wells Fargo Bank, N.A. v. Murphy*, 458 S.W.3d 912, 916 (Tex. 2015) ("A court of appeals commits reversible error when it sua sponte raises grounds to reverse a summary judgment that were not briefed or argued in the appeal.").

participation in Cliff's fiduciary breaches, fraudulent transfer, and unjust enrichment.

A. Breach of Fiduciary Duty

In his summary-judgment motion, Uzelac argued that (1) the evidence negated the existence of a fiduciary relationship between him and Gail, (2) Gail had no evidence of such a relationship, (3) Gail had no evidence that Uzelac breached any fiduciary duty, and (4) Gail had no evidence that any such breach proximately caused an injury to her or resulted in a benefit to him. We conclude that Uzelac's second ground is valid and need not address the others.

The first element of a claim for breach of fiduciary duty is the existence of a fiduciary relationship between the plaintiff and the defendant. *Cardwell v. Gurley*, No. 05-09-01068-CV, 2018 WL 3454800, at *4 (Tex. App.—Dallas July 18, 2018, pet. denied) (mem. op.). A fiduciary relationship may be formal or informal. *Id*. Fiduciary duties arise in certain formal relationships, such as those between partners, between principals and agents, and between attorneys and clients. *Id*. An informal relationship may give rise to a fiduciary duty when one person trusts and relies on another, whether the relationship is moral, social, domestic, or purely personal. *Id*. However, a person is justified in believing another to be her fiduciary only if she is accustomed to being guided by the other's judgment and advice, and there exists a long association in a business relationship as well as a personal friendship. *Id*.

Gail argues that some evidence supports the existence of an informal fiduciary relationship between her and Uzelac because they have worked with each other for many years and because Uzelac is an executive and a "central decision-maker[]" at the Company.

Although the evidence generally supports Gail's factual assertions, we conclude that those facts are insufficient to support the existence of an informal fiduciary relationship between her and Uzelac. The fact that Gail and Uzelac worked together for a long time is no evidence of a fiduciary relationship. *See PlainsCapital Bank v. Reaves*, No. 05-17-01184-CV, 2018 WL 6599020, at *5 (Tex. App.—Dallas Dec. 17, 2018, pet. denied) (mem. op.) (holding that evidence of a longstanding and cordial business relationship in which the plaintiff considered the defendant a trusted advisor and friend was no evidence of an informal fiduciary relationship).

We further conclude that Uzelac's status as an officer of and decision-maker for the Company also constitutes no evidence of an informal fiduciary relationship between him and Gail. Under Texas law, the directors and officers of business entities owe fiduciary duties to those entities and not to each of the entities' individual shareholders. *Transcor Astra Grp. S.A. v. Petrobras Am. Inc.*, 650 S.W.3d 462, 476 (Tex. 2022). Thus, Uzelac's status as an officer of and decision-maker for the Company does not give rise to an informal fiduciary relationship between him and Gail.

In sum, Gail has not shown any error in the summary judgment on her breach-of-fiduciary-duty claim against Uzelac.

B. Liability for Cliff's Alleged Fiduciary Breaches

In her second count, Gail alleged that Uzelac is liable for Cliff's alleged breaches of fiduciary duty for three reasons: because Uzelac conspired in those breaches, aided and abetted those breaches, and knowingly participated in those breaches. Uzelac raised the following summary-judgment grounds in attacking count two: (1) Gail's conspiracy claim failed because Uzelac negated the existence of a fiduciary relationship between him and Gail, (2) Gail's conspiracy claim failed because she had no evidence of any of the five elements of civil conspiracy, and (3) Gail's claim for "aiding and abetting" failed because she had no evidence of any of that theory's elements as identified in *Restatement (2d) of Torts* § 876.

1. Applicable Law

The elements of civil conspiracy are: (1) two or more persons, (2) an object to be accomplished, (3) a meeting of the minds on the object or course of action, (4) one or more unlawful, overt acts, and (5) damages as a proximate result of a conspirator's tortious act committed pursuant to the conspiracy. *See Agar Corp., Inc. v. Electro Circuits Int'l, LLC*, 580 S.W.3d 136, 141–42 (Tex. 2019). Civil conspiracy requires specific intent to agree to accomplish an unlawful purpose or to accomplish a lawful purpose by unlawful means. *First United Pentecostal Church of Beaumont v. Parker*, 514 S.W.3d 214, 222 (Tex. 2017). And it requires more than an agreement to the conduct in question; it requires agreement as to the injury to be accomplished. *Chu v. Hong*, 249 S.W.3d 441, 446 (Tex. 2008). If the underlying tort fails for any reason, there can be no liability for civil conspiracy. *W. Fork Advisors, LLC v. SunGard Consulting Servs., LLC*, 437 S.W.3d 917, 920 (Tex. App.—Dallas 2014, pet. denied).

The Texas Supreme Court has never decided whether Texas law recognizes "aiding and abetting" as a distinct theory of liability. *See First United Pentecostal Church*, 514 S.W.3d at 224. But we have said that if the theory is valid in Texas, it requires proof that the defendant (1) acted with unlawful intent (2) to give substantial assistance and encouragement to a wrongdoer (3) in a tortious act. *W. Fork Advisors*, 437 S.W.3d at 921.[7] Like conspiracy, aiding and abetting is a derivative tort that is premised on some other underlying tort. *Id*. If the underlying tort fails, there can be no liability for aiding and abetting. *Id*.

Finally, a person can be liable as a joint tortfeasor for knowingly participating in another's breach of a fiduciary duty. *O'Donnell v. Roo Inv. Fund II, LLC*, No. 05-23-00238-CV, 2024 WL 469558, at *8 (Tex. App.—Dallas Feb. 7, 2024, no pet.) (mem. op.). Such a claim requires proof that the other person owed a fiduciary duty to the plaintiff, that the defendant knew of the fiduciary relationship, and that the

[7] On another occasion, we analyzed a trial court's finding of aiding-and-abetting liability as though it were a finding of knowing participation in breach of fiduciary duty. *See Darocy v. Abildtrup*, 345 S.W.3d 129, 137–38 (Tex. App.—Dallas 2011, no pet.).

defendant was aware of his participation in the fiduciary's breach of fiduciary duty. *Id*. Thus, like conspiracy and like Gail's aiding-and-abetting theory, participation in breach of fiduciary is a derivative claim that depends on the underlying fiduciary-breach claim to be viable. *See Straehla v. AL Global Servs., LLC*, 619 S.W.3d 795, 804 (Tex. App.—San Antonio 2020, pet. denied) ("Knowing participation in breach of fiduciary duty is a derivative claim, requiring an underlying breach of fiduciary duty, in which the defendant knowingly participates.").

2. Application of the Law to the Facts

a. Civil Conspiracy

Uzelac made a no-evidence challenge to every element of Gail's civil-conspiracy claim. One element of that claim is specific intent to agree to accomplish an unlawful purpose or to accomplish a lawful purpose by unlawful means. *First United Pentecostal Church*, 514 S.W.3d at 222. Thus, in the context of this case, Gail was required to produce evidence that Uzelac had the specific intent to agree with Cliff to accomplish, either as an end or as a means to an end, a breach of a fiduciary duty Cliff owed to Gail. To prove such specific intent, Gail necessarily had to prove that Uzelac knew that Cliff owed Gail a fiduciary duty. But Gail's only appellate argument that Uzelac knew that Cliff owed Gail a fiduciary duty at the relevant times is an assertion that Uzelac "knew of Cliff's obligations under the Divorce Decree." For support, she cites two pieces of evidence. One is Cliff's deposition testimony that he informed Uzelac about the divorce decree when Uzelac was brought into this lawsuit "if [the divorce decree] was an attachment to it." The other is a notice of a special shareholders meeting that is dated November 12, 2019, and that is not addressed to Uzelac. Neither piece of evidence raises an inference that Uzelac knew that Cliff owed Gail a fiduciary duty at any relevant time; thus, these exhibits necessarily constitute no evidence that Uzelac acted with specific intent that Cliff should breach that duty. Accordingly, Gail has not shown that the trial judge erred by granting summary judgment for Uzelac on her civil-conspiracy claim.

b. Aiding and Abetting

Uzelac also challenged all the elements of Gail's aiding-and-abetting liability theory. Although he did not list exactly the same elements for that theory that we identified in *West Fork Advisors*, *see* 437 S.W.3d at 921, Uzelac argued that the theory's elements include (1) knowledge that the primary actor's conduct constituted a tort and (2) intent to assist the primary actor in committing the tort. This account reasonably matches the first element in our recitation of aiding and abetting's elements: (1) acting with unlawful intent (2) to give substantial assistance and encouragement to a wrongdoer (3) in a tortious act. *See id*. We conclude that Uzelac sufficiently challenged the unlawful-intent element of aiding and abetting.

Just as with civil conspiracy, Gail's aiding-and-abetting claim fails because she identifies no evidence that Uzelac knew at any relevant time that Cliff owed Gail a fiduciary duty, and thus no evidence that Uzelac ever acted with the required unlawful intent to assist and encourage Cliff to breach such a duty. Accordingly, Gail has not shown that the trial judge erred in granting Uzelac summary judgment on her aiding-and-abetting theory.

c. Knowing Participation in Fiduciary Breach

Finally, we address Gail's theory of knowing participation in a breach of fiduciary duty. Gail first asserts in a footnote in her brief that Uzelac's summary judgment on this liability theory must be reversed because Uzelac did not attack it in his summary-judgment motion. Uzelac responds that he sufficiently attacked this theory by attacking all of Gail's derivative-liability theories in his motion. We will assume without deciding that Gail is correct, i.e., that Uzelac's summary-judgment motion did not challenge Gail's knowing-participation claim, and that the trial judge erred by granting Uzelac summary judgment on this unaddressed liability theory. Nevertheless, we conclude that any error is harmless and therefore not reversible error.

A trial judge errs by granting summary judgment on a claim not addressed in the summary-judgment motion, but the error is harmless if the omitted claim is precluded as a matter of law by other grounds raised in the case. *G&H Towing Co. v. Magee*, 347 S.W.3d 293, 297–98 (Tex. 2011) (per curiam). Here, Uzelac expressly presented summary-judgment grounds that bar Gail's knowing-participation claim.

The elements of knowing participation in breach of fiduciary duty include that the defendant knew of the other person's fiduciary relationship with the plaintiff and that the defendant was aware of his participation in the other's fiduciary breach. *O'Donnell*, 2024 WL 469558, at *8. We have already concluded in our analyses of Gail's conspiracy theory and her aiding-and-abetting theory that Gail has identified no summary-judgment evidence that Uzelac knew that Cliff owed Gail a fiduciary duty. This conclusion is equally fatal to her knowing-participation theory against Uzelac. Thus, even assuming that the trial judge erred by granting Gail summary judgment on her knowing-participation claim against Uzelac, the error was harmless and not reversible. *See G&H Towing Co.*, 347 S.W.3d at 297–98.

3. Conclusion

We conclude that Gail has not shown that the trial judge committed reversible error by granting Uzelac summary judgment on Gail's derivative-liability theories.

C. Fraudulent Transfer and Unjust Enrichment

Gail briefs these two claims together. We address each in turn.

1. Fraudulent Transfer

Gail challenges the summary judgment in favor of Uzelac on her claim for fraudulent transfers in violation of the Texas Uniform Fraudulent Transfer Act. *See* TEX. BUS. & COM. CODE ANN. §§ 24.001–.013. Uzelac's summary-judgment motion noted that Gail's petition did not specify the TUFTA provisions that she relied on, but he identified the elements of a fraudulent transfer under both § 24.005(a)(1) and § 24.005(a)(2), and he argued that she had no evidence to support any of those elements. In her summary-judgment response, Gail confirmed that she was relying on § 24.005(a) for her claim. On appeal, Gail argues specifically that genuine fact issues preclude summary judgment as to whether Uzelac "received fraudulent transfers."

Under § 24.005(a)(1), a transfer made by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or within a reasonable time after the transfer was made was incurred, if the debtor made the transfer with the actual intent to hinder, delay, or defraud any creditor of the debtor. *Id.* § 24.005(a)(1). Under § 24.005(a)(2), a transfer made by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or within a reasonable time after the transfer was made was incurred, if the debtor made the transfer without receiving a reasonably equivalent value in exchange for the transfer and (A) the debtor was engaged or about to engage in a business or a transaction for which the remaining assets of a debtor were unreasonably small in relation to the business or transaction or (B) the debtor intended to incur, or believed, or reasonably should have believed that the debtor would incur, debts beyond the debtor's ability to pay as they became due. *Id.* § 24.005(a)(2).

As to § 24.005(a)(1), we conclude that Gail cites no evidence that raises a genuine fact issue that any transfers to Uzelac were made with the actual intent to hinder, delay, or defraud any creditor of a debtor. For support, Gail cites a few documents showing the amounts of Uzelac's compensation by the company and one paragraph of an expert's affidavit. But she filed these documents in response to

Cliff's summary-judgment motion, and she did not cite them in her response to Uzelac's summary-judgment motion. Thus, we cannot consider them as evidence bearing on Uzelac's motion. *See Skrastina v. Breckinridge-Taylor Design, LLC*, No. 05-17-00796-CV, 2018 WL 3078689, at *4 (Tex. App.—Dallas June 20, 2018, no pet.) (mem. op.) (stating that when reviewing a no-evidence summary judgment, a court of appeals can consider only the evidence that the nonmovant specifically relied on in the trial court). She also refers us generally to other sections of her brief that relate to her fiduciary-duty and conspiracy claims against Cliff, but that is insufficient to direct us to specific evidence of the actual intent that is required for a § 24.005(a)(1) claim. *See Manautou v. Ebby Halliday Real Est., Inc.*, No. 05-13-01035-CV, 2015 WL 870215, at *3 (Tex. App.—Dallas Feb. 27, 2015, pet. denied) (mem. op.) (stating that a nonmovant appealing from no-evidence summary judgment must cite the specific evidence in the record that it relied on to defeat summary judgment and explain how that evidence raised a fact issue). We conclude that Gail has not shown that she raised a genuine fact issue as to every element of her § 24.005(a)(1) claim.

We reach a similar result with respect to Gail's claim against Uzelac under § 24.005(a)(2). This claim required her to show, among other things, that the compensation Uzelac received from the Company was paid without receiving a reasonably equivalent value in exchange for the transfer. *See* BUS. & COM. § 24.005(a)(2). Although Gail asserts that Uzelac's compensation was "vastly disproportionate to current industry standards," she does not cite any evidence to show that the Company paid Uzelac without receiving reasonably equivalent value for the transfer. And again, her only citations to evidence in this section of her brief refer to evidence that she did not rely on in her response to Uzelac's summary-judgment motion. We cannot consider that evidence. *See Skrastina*, 2018 WL 3078689, at *4. Accordingly, we conclude that Gail has not shown that she raised a genuine fact issue as to each element of her § 24.005(a)(2) claim.

2. Unjust Enrichment

In his summary-judgment motion, Uzelac argued that a plaintiff suing from unjust enrichment must prove that the defendant obtained a benefit from the plaintiff by fraud, duress, or the taking of unfair advantage. *See Heldenfels Bros., Inc. v. City of Corpus Christi*, 832 S.W.2d 39, 41 (Tex. 1992) ("A party may recover under the unjust enrichment theory when one person had obtained a benefit from another by fraud, duress, or the taking of an undue advantage."). He contended that Gail had no evidence that he obtained any benefit from her by fraud, duress, or the taking of undue advantage.

Gail does not specifically address Uzelac's challenge in her brief. The only part of her combined fraudulent-transfer and unjust-enrichment argument that arguably addresses Uzelac's challenge is an assertion that a disparity between Uzelac's compensation and Gail's income resulted from Uzelac's knowing participation in Cliff's violations of his obligations under the divorce decree and

Cliff's fiduciary duties to Gail. But Gail cites no evidence to support this premise; instead, she refers us generally to other sections of her brief relating to her fiduciary-duty and conspiracy claims against Cliff. This is insufficient to raise a fact issue that Uzelac obtained a benefit from her by fraud, duress, or the taking of undue advantage. *See Manautou*, 2015 WL 870215, at *3.

We conclude that Gail has not shown that she raised a genuine fact issue as to the challenged element of her unjust-enrichment claim against Uzelac.

D. Conclusion

We overrule Gail's third issue on appeal.

VIII. DISPOSITION

Having overruled all of Gail's issues, we affirm the trial court's judgment.

/Dennise Garcia/
DENNISE GARCIA
JUSTICE

Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

GAIL CORDER FISCHER, Appellant

No. 05-23-00679-CV V.

CLIFF FISCHER, TED UZELAC, AND CLIFFORD FISCHER & COMPANY, Appellees

On Appeal from the 68th Judicial District Court, Dallas County, Texas
Trial Court Cause No. DC-19-17340.
Opinion delivered by Justice Garcia. Justice Rodriguez participating.

In accordance with this Court's opinion of this date, the judgment of the trial court is **AFFIRMED**.

It is **ORDERED** that appellees Cliff Fischer, Ted Uzelac, and Clifford Fischer & Company recover their costs of this appeal from appellant Gail Corder Fischer.

Judgment entered this 14th day of August 2025.