In the
Court of Appeals
Fifth District of Texas at Dallas

No. 05-03-00381-CV

SIGNAL PEAK ENTERPRISES OF TEXAS, INC., and CECIL STEPHENS, Appellants,

v.

BETTINA INVESTMENTS, INC., and OAKHILL, INC., Appellees.

On Appeal from the 68th Judicial District Court
Dallas County, Texas
Trial Court Cause No. 00-06462-C

Appellees' Brief

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Oral Argument Requested

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Request for Oral Argument

Pursuant to Rule 39.7 of the Texas Rules of Appellate Procedure, appellees, Bettina Investments, Inc., and Oakhill, Inc., respectfully request oral argument in this cause. They respectfully submit that oral argument will materially aid the court n resolving the issues presented in this appeal.

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To the Honorable Justices of the Court of Appeals:

Bettina Enterprises, Inc., and Oakhill, Inc., Appellees herein, respectfully submit the following brief to demonstrate why the judgment of the trial court must be affirmed:

Statement of the Case

A Texas charity, Oakhill, Inc., and Bettina Investments, Inc., brought suit against Signal Peak Enterprises of Texas, Inc., and its principal, Cecil Stephens, for damages. Bettina leased space to a number of charities in the Dallas area for operation of bingo halls, halls regulated and controlled by the Texas Lottery Commission. Beginning in January of 1999, Bettina leased space in these bingo halls to Signal Peak to operate game rooms, Plaintiffs' Exhibits 1 - 8, C.R. 274 -280; this space was segregated from the bingo halls, as required by the Lottery Commission. 2 R.R. 34, 5 to

14.[1] Profits from the operation were to be divided equally between Bettina and Signal Peak. 2 R.R., 34, 5 to 14. As Bettina was an entity created to comply with technical Lottery Commission regulations, had no employees, had no bank account of its own and made no profit, 2 R.R. 27, 21 to 28, 2, it assigned the proceeds of these leases to Oakhill. Oakhill in turn either used those funds for its own charitable purposes or distributed the funds to the other charities operating in the Bettina bingo halls according to the needs of those charities. After Signal Peak had ceased to operate the game rooms, Bettina and Oakhill (collectively, the "Charities") brought suit against Signal Peak for breach of contract and against Signal Peak and Stephens for fraud, seeking both compensatory and exemplary damages for under-reporting the income from the game rooms and for deducting illegitimate and falsified expenses. In addition, the Charities sought a finding that Signal Peak was the alter ego of Stephens.

The jury returned a verdict against Signal Peak for breach of contract, awarding $425,000 in actual damages ($94,444.44 was added for prejudgment interest) and $75,000 in attorney's fees, and for fraud, awarding $100,000 in compensatory damages and $100,000 in punitive damages. It returned a verdict against Stephens for $250,000 in damages for fraud and $1,000,000 in punitive damages and also found that Signal Peak was the alter ego of Stephens, with Stephens held jointly and severally liable for the $794,444.44 damages assessed against Signal Peak.

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[1]The Appellants in their brief have noted the necessity for numbering the volumes of the reporters' record since each volume of the transcript begins with page one (necessary because a the reporter who took down the first day's testimony did not take down the remainder of the trial). Appellants have used Roman numerals for the five volumes of the reporters' record; Appellees have chosen to use Arabic numerals.

Statement of Facts

It is necessary for the Charities to present their own Statement of Facts since the Statement of Facts prepared by Appellants relies on a highly selective winnowing of the trial testimony, ignoring virtually all of the Charities' evidence, a substantial amount of the Appellants' own evidence and the vast majority of the documentary evidence.

Bettina leased space to charities to operate bingo halls in the Dallas area. The Texas Lottery Commission regulated bingo operations in these halls. Bettina subleased space to Signal Peak to operate game rooms. See Plaintiffs' Exhibits 1-8, C.R. 274-280. Signal Peak was to collect funds from the operations of the game rooms, deduct expenses and then pay over to Bettina one-half of the profit in the game rooms. 2 R.R. 34, 15 to 35, 2. Since Bettina existed only to satisfy certain technical requirements of the Lottery Commission, Bettina had no employees and no bank account and made no profit. 2 R.R. 26, 21 to 28, 2.[2] It assigned the proceeds of the leases to Oakhill, one of the bingo charities. Oakhill in turn either used those funds for its own charitable purposes or distributed the funds to the other charities operating in the Bettina bingo halls according to the needs of those charities.

In the beginning of 1999, Bettina, acting out of competitive necessity, 2 R.R. 29, 21 to 30, 22, engaged Signal Peak to operate game rooms in its bingo halls. Signal Peak was owned by Cecil Stephens, a 70% owner, and Rusty Stephens, his son, a 30% owner. 4 R.R. 15, 21 to 25. As will be set out below, it was Cecil Stephens who ran the business and made the decisions; he considered its money his money, and his money its money. As his son Rusty said of him: "he *is* Signal Peak." 5 R.R. 35, 3 to 8. Signal Peak hired Terry Wylie as its local manager, who reported to Cecil Stephens.

In running the game rooms, Signal Peak collected all the cash out of the machines and sent a weekly check for each of the game rooms to the Charities as their 50% share of the profits of the

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[2]Nor did Daniel Hennessy, a founding partner of the Dallas law firm Hughes and Luce, who organized and supervised the bingo halls, make any money from their operation or from the operation of the game rooms. 2 R.R. 28,5 to 29, 1.

game room, along with a weekly summary report showing the gross amount taken in and various expenses deducted. 3 R.R. 194, 25 to 195, 7. All the back-up documentation for these reports was destroyed after the reports were prepared so that there was no way at a later date to determine whether any of the numbers on the reports reflected reality in any way. 3 R.R. 28, 17 to 30, 8. Only one example of those reports was in evidence at the trial, Plaintiffs' Exhibit 12, C.R. 387, and of that report, Stephens at his deposition had agreed that "every number on here is incorrect." 4 R.R. 60, 13 to 61, 2.

During the period that Signal Peak was operating the game rooms, there was continuing suspicion that Signal Peak was not rendering all it should to Oakhill. For example, when Ms. Hunsicker, the bookkeeper for the Charities, would call asking about some amount of money that was missing, she would receive an oral explanation, but never received any documents backing up the oral explanation. 3 R.R. 198, 19 to 199, 7. Moreover, there were numbers in the Signal Peak reports on the operation of the game rooms that raised questions. There were, for example, continuous deductions under the heading of "Replacement," "Replc" or "Over/Short." Plaintiffs' Exhibit 12 and 13, C.R. 387, 402. These entries on Signal Peak's records apparently were actual cash shortages, 2 R.R. 49, 21 to 50, 4, and over the course of the Signal Peak operation of the game rooms added up to $37,107.56.[3] Plaintiff's Exhibit 13 and 14, C.R. 285-299. There was another category of deductions entitled "Miscellaneous." This category was a wholly unexplained category of losses, adding up to $68,646.94 over the course of Signal Peak's operation of the game rooms.

[3]It is significant that there were, in the year and a half of Signal Peak operation, only six instances of there being an overage, apparently an unexplained excess of funds, in the weekly operation of any game room, for a total of $304, C.R. 394,400, 401. On the other hand, there were in that same time period 66 shortages, as high as $4,088, and averaging $567 per shortage. Moreover, the shortages increased in velocity with time: there were no such shortages in the first six months of operation, 20 in the second six months, and 46 in the final six months as the Appellants caught on to a good way to cover some of their pilferage.

Id.[4] There was a total of over $100,000 in deductions in these two categories alone. There was no explanation of what these deductions were for and there was no supporting documentation for these deductions.

Eventually Signal Peak agreed to allow Ms. Hunsicker to perform random audits. 4 R.R. 97, 13 to 16. Ms. Hunsicker only did one random audit. The discoveries made during that one random audit, as recounted in Ms. Hunsicker's uncontradicted testimony, were highly instructive. In the first game room Ms. Hunsicker went to, she found that the operating cash fund, called the bank, was short, and the woman in charge pulled $500 out of her purse, saying that that cash belonged in the bank. But even after that unorthodox addition to the bank, it was still $694 short. At the next game room she visited, the bank was again short. Suddenly Terry Wylie, Signal Peak's manager, appeared and threw a stack of money at her – again $500 – saying that it was part of the bank. Once again the bank was still short, but this time by only $67. 3 R.R. 208, 18 to 209, 6. At the third and final game room she audited, the bank balanced, but the employee on site said that Mr. Wylie had previously been there, added cash to the bank to make it come out right and told the employee not to tell Ms. Hunsicker what had happened. 3 R.R. 209, 13 to 25. After the audit, Mr. Stephens personally called Ms. Hunsicker directly, sharply rebuked her and immediately stopped paying her the money that he had been paying her to audit Signal Peak. 3 R.R. 210, 25 to 211, 14. Shortly after this, Mr. Hennessy terminated the lease with Signal Peak under the provision that allowed either party to terminate on thirty days' notice. Plaintiffs' Exhibit 9, C.R. 282, 2 R.R. 52, 25 to 53, 22. At that time, Signal Peak had operated the game rooms for about a year and a half. After Signal Peak left the game rooms, F&H Investments, Inc., took over their operation and was still operating them

[4]The Charities' accounting expert said that the Miscellaneous category in an accounting system is ordinarily to cover those minor expenditures where "the cost of accounting for it would exceed the value of the item that you're trying to account for," which is normally "a small number." 4 R.R. 165, 6 to 15. Clearly Signal Peak's $68,646.94 total for miscellaneous is not in that category. This is a large number, and because the miscellaneous category is undefined and the number without any documentary support, it is in and of itself evidence of fraudulent activity.

at the time of trial. 3 R.R. 112, 7 to 113, 1; 115, 3 to 118, 6.

This lawsuit began as a small lawsuit, for about $20,000 in unpaid rent under the leases for the period immediately antecedent to Signal Peak's leaving the game rooms and other minor amounts. But in the course of discovery, the Charities unearthed more and more suspicious activity. Every time they turned over a rock, something ugly crawled out from underneath.

The first area of suspicion was the purchase of phone cards, ostensibly done to make sure the game machines were legal. 2 R.R. 36, 12 to 37, 7; 5 R.R. 22, 19 to 24, 12; 25, 24 to 26, 9. The Appellants claimed that the cards, one of which was generated for each dollar put into one of the machines, cost eight cents each. The Appellants had represented to the Charities that this was market cost and that there was no mark-up for the cards.4 R.R. 117, 25 to 118, 2. Because it was supposed that an eight-cent card was generated for each dollar put into the machines, Signal Peak simply deducted eight percent of the total played in the machines. 2 R.R. 37, 8 to 10. Signal Peak purported that those funds were paid to Prepaid Solutions, which the Appellants identified as their supplier of phone cards, but the eight percent was not paid over to Prepaid Solutions but went into Signal Peak's account. 5 R.R. 43, 6 to 10.

There were two problems associated with the phone cards. The first was that an enormous number of the phone cards went unused. 4 R.R. 186, 4 to 9 (Signal Peak's manager threw out "huge garbage bags full of" unused phone cards). The total cost for phone cards over the course of Signal Peak's operation of the game rooms was over $320,000. See Plaintiffs' Exhibits 13, 390, and 14, 399. Since that was $160,000 out of Signal Peak's pocket as well as the Charities', the question arose why so much money was being spent for something that was not being used. At least one plausible answer came with the discovery of the previously unknown and important fact that Prepaid Solutions was half owned by Cecil and Rusty Stephens. 4 R.R. 54, 16 to 24. If the money were going into their pockets, contrary to their representations made to the Charities, that would explain why they continued to make an otherwise inexplicable expenditure. The search to find out whether Prepaid Solutions was a profit center for the Appellants was long, arduous and ultimately frustrating; documents came in disorganized piles, the pieces never connected, and the Charities' trial counsel

could not make head or tail of them. 5 R.R. 14, 23 to 17, 7.

The other, more fundamental problem was that the machines were not dispensing the phone cards at all. Mr. Whittington, who worked for Signal Peak in the game rooms, testified that Signal Peak simply stopped restocking the phone card dispensers and that thereafter the machines operated without dispensing cards. 3 R.R. 51, 23 to 53, 4. Nevertheless, during all the time that Signal Peak operated the game rooms, deductions were made for phone cards. See Plaintiffs' Exhibits 13 and 14, C.R. 389 - 403. Thus the eight percent was being deducted even though the phone cards, which the eight percent was supposed to pay for, were not being provided to the game rooms' customers as the Appellants had represented.

Later the Charities made an even more important discovery about Signal Peak's operation of the game rooms. In 2002, having heard that the Charities' take from the game rooms had increased substantially in the year and a half that F&H had then operated the game rooms, the Charities' trial counsel requested the Charities' bookkeeper to prepare a comparison of the operation between the two operators for the year and a half that each had then operated the game rooms. The results were stunning: it appeared that F&H, in its first year and a half, had paid the Charities more than three times as much as Signal Peak had paid them in its year and a half. That comparison was introduced at trial as Plaintiffs' Exhibit 15. C.R. 300. That initial comparison was not completely fair to Signal Peak since F&H in its first year and a half had operated more game rooms than Signal Peak had. During the trial, the Charities' counsel discovered that error, revealed the error to the jury, apologized to the jury for misleading them and produced a corrected comparison. The corrected comparison, introduced at trial as Plaintiffs' Exhibit 22, C.R. 312-326, showed that F&H had paid Oakhill $1,109,788.40 for 173 weeks in three of the halls it operated while Signal Peak had only paid $426,312.10 for its 173 weeks in the same three halls. This comparison was scrupulously fair. The trial record shows that F&H operated the same game rooms, under the same conditions, 3 R.R. 139,12-15, at the same locations, for the same number of hours per day (or fewer, 3 R.R. 134, 2-13), with the same clientele, with the same employees, 3 R.R. 139, 6-11, and with the same number of the same games, 3 R.R. 64, 7 to 13; 3 R.R.156, 11-12 (at the outset, though, with fewer games, 3

R.R. 49, 14 to 24). And for this serendipitously equivalent operation, F&H had produced over two and a half times the profit reported by Signal Peak. John diPalma, one of the owners of F&H, stated that

> The only conclusion I can draw from those records is that Signal Peak must have been pocketing unreported income from the operation of the game rooms and thereby cheating the Plaintiffs of income they deserved to receive. . . . Mere efficiencies of operation cannot account for that steep a rise in profits. We're good, but we're not that good.

C.R. 339-340. He testified that in the past he had taken over other operators' locations and outperformed them, but his increase in those cases was "probably 10 percent." 3 R.R. 186.

At this point the focus of the case changed. The only reasonable inference to be drawn from the huge jump in income to the Charities under F&H was that drawn by Mr. DiPalma: that Signal Peak had been making much, much more than it had reported to the Charities and had been pocketing what it didn't report. At that point, the Charities then had substantial, concrete evidence that, as they had suspected, Signal Peak had been massively defrauding them. On July 16, 2002, almost immediately after having made the initial comparison between operators, the Charities provided identical to Plaintiffs' Exhibit 15, C.R. 300, to Hayward Rigano, trial counsel for the Appellants, and Mr. diPalma, in his deposition that day, adverted to the obvious inference to be drawn from this spectacular increase in income. C.R. 570 - 571.

Both at trial and on appeal, Cecil Stephens had tried to distance the Appellants from the operation of the game rooms. He testified that Signal Peak did not run game rooms. 4 R.R. 65, 10. The very leases on which Signal Peak was sued, however, contradicted him: those documents leased space to Signal Peak for use as a "vending outlet and promotional center." Plaintiffs' Exhibits 1-8, C.R.274-281. No subletting was permitted; Signal Peak was clearly running this show. Even his own appellate lawyers contradict him in the first two sentences of their Statement of the Case in the Appellants' Brief.[5]

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[5] "This suit arises out of a suit over percentage leases . . . under which Signal Peak would operate eight-liner gaming machines . . . . Under the leases, Signal Peak was to operate the game rooms." Appellants' Brief, page xii.

Cecil Stephens went on to testify that all of the gameroom employees were paid by Hennessy or the Charities, 4 R.R. 21, 4-18; 2 R.R. 61, 14 to 22; that Mr Wiley reported to Mr Hennessy, 2 R.R. 61, 25 to 62, 5; and that James Jackson, the bingo manager, was in charge of the gameroom. 4 R.R. 23, 2 to 5. Every other witness contradicted him.

Let us look first at the Charities' witnesses: Mr. Hennessy denied that either he or any of the charities operating in Bettina's halls paid the game room employees, 2 R.R. 61, 23 to 24, and denied that Mr. Wylie reported to him. 2 R.R. 62, 6 to 7. He testified that all the game room employees were employees of Signal Peak; that none were paid for game room work by any of the charities operating bingo sessions, 2 R.R. 58, 15 to 59, 5; and that Mr. Wylie was a Signal Peak employee, 2 R.R. 44, 22 to 45, 17. Ms. Hunsicker, the bookkeeper for the Charities, testified that she never wrote any checks from any of the charities to the employees who worked in the game rooms. 3 R.R. 194, 7 to 13; 3 R.R. 223, 7 to 11. Mr. Whittington, a bingo employee who also worked in the game rooms, testified that when he did work for the game rooms, he received a paycheck from Signal Peak, 3 R.R. 38, 5 to 11; 39, 7 to 12, and that his boss was not Mr. Hennessy, but Terry Wylie. 3 R.R. 39, 13 to 40, 2.

The Appellants' witnesses, too, contradicted Mr. Stephens. Mr. Wylie testified that he himself was in charge of the game rooms. 4 R.R. 32, 14-16; 137 1 to 2 ("I was responsible for every one of the game rooms."). In both his testimony at trial and in deposition testimony read into the record, Mr. Wylie testified that Cecil Stephens was his boss. 4 R.R. 183, 24; 4. R.R. 136, 19 to 25. Mr. Wylie expressly denied that Mr. Jackson was his boss. 4 R.R.183, 19 to 24. Stephens' son Rusty, called as Appellants' witness, testified that Terry Wylie was overseeing the game rooms for Signal Peak. 5 R.R. 48, 17 to 25.

Perhaps the most telling witness from Appellants' side was Terry Ligon, a former game room employee. While Appellants' other witnesses tried to dance around this issue of control, only admitting what they had to, Ligon had obviously not been prepared to spout the party line. He had worked in all the game rooms and had been a manager of one of the game rooms, 5 R.R. 86, 8 to 10, and testified that he was a Signal Peak employee, 5 R.R. 92, 21 to 23; that Terry Wylie was the

manager of the game rooms, 5. R.R. 86, 6 to 7; that Terry Wylie was his, Mr. Ligon's, boss, 5 R.R. 92, 24 to 25; that Terry Wylie had hired him, 5 R.R. 93, 8 to 9; that Terry Wylie's boss was Cecil Stephens, 5 R.R. 93, 10 to 11; and that his boss was not Mr. Jackson. In fact, he said he had never heard of James Jackson. 5 R.R. 93, 1 to 7.

Cecil Stephens also tried to distance himself personally from the operation of the game rooms. He claimed that he had only been in the game rooms twice. 4 R.R. 26, 7; 53, 17 to 19; 112, 12 to 13; 137 17 to 18; 138, 16 to 17. But Wylie, his on-site manager, said that either Cecil or Rusty Stephens, usually Cecil, visited Wylie in the game rooms every two weeks. 4 R.R. 137, 22 to 138, 13. Mr. Stephens claimed that he visited with Mr. Wylie very little, 4 R.R. 70, 1 to 2, but Mr. Wylie testified that he talked to Mr. Stephens once a week. 4 R.R. 184, 18 to 19.

Signal Peak's accounting system, or rather the lack of any accounting system, the lack, more fundamentally, of any system of control over cash, came in for substantial criticism at the trial. For example, money was left in an unlocked drawer in the game rooms. 4 R.R. 110, 14 to 111, 5. Plaintiffs' accounting expert, Denis Burns, summing it up, said

> they did not control the very basics that went into an accounting system. They did not control the counters. They did not control the access to the machines. They did not control the theft. They did not -- those things were not controlled.

4 R.R., 150, 5 to 10. He said that this is the system he would want if he wanted to be fraudulent in his dealings, 4 R.R. 153, 4 to 5, because with an accounting system like Signal Peak's, a system without controls, one could take cash out of the business and "nobody [would] ever know." 4 R.R. 152, 18 to 19. Mr. Burns further opined that there was, in fact, no accounting system because there were no controls, 4 R.R. 150, 3 to 151, 1, and said that he was "shocked" when he learned, through reviewing the depositions in the case, what was happening to cash in the game rooms, that it could go in and out of the game rooms with no controls and with no records made. 4 R.R. 156 4 to 21.

Signal Peak destroyed every original document, 3 R.R. 28, 17 to 30, 8, so that there was and is no way for anyone to go back and determine whether its numbers were correct. Mr. Hennessy testified that he had dealt with many leases where the lease payment was a percentage of the money taken in by the business and in those businesses, records were kept of all expenses and all income

so that the records would match the actual income "to the penny." 3 R.R. 17, 20. He testified that the weekly reports produced by Signal Peak were "meaningless" because Signal Peak had not produced supporting records in discovery. 3 R.R. 19, 18 to 20, 8.

At trial, Cecil Stephens tried to avoid any responsibility for the bookkeeping. He testified that the same Mr. Jackson who he said had run the game rooms (contrary to the testimony of every other witness in the case) had set up the accounting system used in the game rooms. Mr. Stephens went on to claim that he didn't know how the accounting system in the game rooms in the Hennessy halls worked, 4 R.R. 93, 7 to 24. But in his deposition, when he was being examined regarding one of Signal Peak accounting documents, the document admitted as Plaintiffs' Exhibit 12 at trial, C.R. 283-284, he interrupted the questioner and said "No. No. No. Now, *this is my bookkeeping. Let me explain how it works.*" 4. R.R. 93, 25 to 94, 17 (emphasis added). Moreover, although he claimed to know nothing about how the bookkeeping was done at the game rooms, he displayed detailed knowledge of how Signal Peak did its audits. 4 R.R. 97, 20 to 99, 3. At trial, Mr. Stephens claimed he knew nothing about the bank accounts of Signal Peak. 4 R.R. 44, 16 to 18. Yet in his deposition, when he was testifying about account number 0001390003266, he testified "We don't pay expenses out of there." 4 R.R.45, 2 to 11. When asked at trial how he could explain that if he didn't know anything about Signal Peak's accounts, he could have so confidently stated that Signal Peak didn't pay expenses out of account 0001390003266, he testified – pitifully – that he could not explain how he knew that. 4 R.R. 45, 16. Obviously, he did not want to explain it because the only explanation was that he was lying on the witness stand about his knowledge of how Signal Peak ran its business.

When Stephens was challenged at trial that he should have kept more backup documents, Stephens said that "we keep whatever the IRS requires us to keep." 4 R.R. 37, 16 to 20. When asked what the IRS required him to keep, he said he had no idea what the IRS required and that to find out what the IRS required, "you would have to talk to an accountant." 4 R.R. 37 22 to 23. The Charities talked to an accountant: their accounting expert testified that the records kept by Signal Peak would "definitely not" satisfy the IRS. 4 R.R. 146, 12 to 147, 15.

It is important for the court to know that there was substantial evidence in the trial record,

beyond what has already been cited, from which the jury could have drawn – indeed, could not have helped but to have drawn – the inference that Mr. Stephens was not only a consummate liar, but a thug. He changed his testimony and contradicted himself time and again. Note the following examples:

> In his deposition he said he threatened to kill an employee of Oakhill if $20,000 owed him was not repaid and that he made it a practice to threaten to kill people who took his money, 4 R.R. 17, 17 to18, 5; he said, indeed, that "It was not a threat. It was a promise,"4 R.R. 17, 18 to19; at trial, he denied that he made such a threat until he actually read for himself those precise words in his deposition, 4 R.R. 16, 15 to 22.
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> In his deposition and then at trial he denied that the gameroom employees were Signal Peak employees, 4 R.R. 21, 4 to18, then admitted that they were on the Signal Peak payroll. 4 R.R. 23, 25 to 24, 9.
>
> At the outset of his testimony, he said that he hadn't been actively involved in the business of Signal Peak for the past ten years. 4 R.R. 16, 1 to 3. Later he admitted that everyone at Signal Peak referred to him as the boss and that he ran things there. 5 R.R. 65, 16 to 25.
>
> At trial he said he did not know whether Signal Peak's records documenting the expenses of the game rooms were destroyed. 4 R.R. 62, 6 and 7. At his deposition he said that those documents were all destroyed. 4 R.R. 14 to 19.
>
> He testified, 4 R.R. 70, 9 to 11, that he didn't put any money into Prepaid Solutions, the purported provider to Signal Peak of telephone cards and a corporation of which he and his son were half owners, 4 R.R. 54, 16 to 24. At his deposition, on the other hand, he testified that he put "lots of money" into Prepaid Solutions "probably half a million." 4 R.R. 70, 25 to 71, 7.
>
> He said that $990,000 was paid to the game rooms in the year 2000, 4 R.R. 82, 9, and then in his next answer he said he had "no idea" to whom the checks were made out. 4 R.R. 82, 11 to 13. He said that if he had any questions about where this $990,000 went, he would have asked his bookkeeper to explain it to him – but that he never asked him about this. 4 R.R. 82, 22 to 83, 3.[6]
>
> He said that Signal Peak had "very little assets . . . some vehicles and trailers and stuff we use to move equipment with." 4 R.R. 80, 21 to 25. But when shortly thereafter being presented with Signal Peak's balance sheet showing that it owned $753,000 worth of assets, including a Cessna airplane valued at $352,000 and video games valued at $303,000, he suddenly reverted to ignorance, claiming that he didn't

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[6]Mr. Hennessy testified that the Charities never received anything close to $990,000 from Signal Peak. 2 R.R. 60, 5 to 24. The records of the bingo halls show that in the entire time that Signal Peak operated the game rooms, they paid less than half of that amount to the Charities. See Plaintiffs' Exhibits 13 and 14, C.R. 284 - 299.

know what assets his company owned. 4 R.R. 85, 15 to 18.[7]

Cecil Stephens was lying and he was lying because he had a lot to cover up.

Summary of Argument

The Appellants' brief shows the marks of desperation in trying to appeal a case which was listlessly defended in the trial court and in which few issues were preserved for appeal.

Appellants' main argument is that the contract on which damages were awarded was illegal and therefore unenforceable. To this, the Charities respond first, that this is utterly contrary to the position unvaryingly maintained at trial by the Appellants and by Mr. Rigano, their trial counsel, that the operation of the game rooms was completely legal. The appellate courts of Texas do not permit this kind of jumping from one position at trial to its contrary on appeal as suits the convenience of a party. Second, the issue of the illegality of the contract, required to be pled as an affirmative defense, was never raised below and cannot therefore be reviewed by this court. To counter this, the Appellants raise the argument that it was "fundamental error" for the trial court to fail to recognize this contractual flaw, but they have omitted to note that the Texas Supreme Court has termed fundamental error a "discredited doctrine," and presently only recognizes its application in two categories of cases, neither one of which applies here. Appellants, in raising this issue, ask this court to take random bits of evidence from the trial transcript to find facts as though this court were the jury, even though it was the Appellants' failure to raise the issue in the trial court that prevented the actual jury, the only body that should ever have passed on the facts underlying any such contention, from getting the chance to find the facts that would be necessary to establish an illegality defense.

The Appellants' second argument is that it was error for the trial court to have denied Appellants' motion for continuance made on October 7, 2002. The problem with this argument is

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[7]Stephens was also given to mouthing the utterly incredible: He said he didn't have any cash or any bank accounts. 4 R.R. 77, 16 to 20. He said that a random audit is one where you give advance notice that you are coming to audit. 4 R.R. 97, 20 to 99, 3.

that the motion about which they complain was not a motion concerning the actual trial date, which was November 5, 2002, but a motion directed to the trial setting of October 15, 2002, on which date no trial was had. The issues raised with respect to the October 15, 2002, trial setting were never raised with respect to the November 5, 2002, trial date.

The Appellants' other arguments are also without merit. There is an abundance of evidence supporting all the jury's findings. The million dollars in exemplary damages awarded against Cecil Stephens is not excessive in light of the facts of this case, nor is it in violation of the exemplary damages cap set out in Section 41.008 of the Texas Civil Practice and Remedies Code since, first, the acts for which Mr. Stephens was found liable are criminal acts with respect to which the damage cap does not apply and, second, the award is less than twice the economic damages, which were not less than $775,000.

Argument

I.

THIS COURT CANNOT RULE ON THE ALLEGED ILLEGALITY OF THE CONTRACT BECAUSE THE APPELLANTS' POSITION IS INCONSISTENT WITH THEIR POSITION IN THE TRIAL COURT; MOREOVER, THE DEFENSE OF ILLEGALITY WAS NOT RAISED IN THE TRIAL COURT

Appellants' attorneys have argued that the leases between Signal Peak and Bettina were illegal, a violation of Sections 47.03(a) and 47.04(a) of the Texas Penal Code, and for that reason, unenforceable. The position that the leases were illegal is inconsistent with the Appellants' unvarying position at trial. In the courtroom, Cecil Stephens, his son Rusty Stephens (the other shareholder in Signal Peak) and Mr. Rigano, their trial counsel, all uniformly maintained that the operation of the game rooms was legal because Appellants supplied phone cards with each play.[8]

[8]In his opening statement, Mr. Rigano stated that the manner in which the Appellants operated the games made them legal, 2 R.R. 16, 3 to 17, 5; Cecil Stevens claimed that he spent a half-million dollars on research to make the operation of the games legal, 4 R.R. 124, 125, 126; Rusty Stevens testified that the addition of phone cards made the operation legal. 5 R.R. 23, 24, 26. All of the Charities' witnesses, as well, agreed that the

This court should not now allow the Appellants to argue otherwise on appeal. The courts of Texas are loath to allow parties so to shift their positions from trial to appeal, saying whatever is most expeditious in the particular court where they find themselves. *Rylander v. Bandag Licensing Corp*., 18 S.W.3d 296, 302 (Tex. App – Austin 2000, pet'n denied); *Baptist Memorial Hospital System v. Smith,* 822 S.W.2d 67, 73 (Tex. App. – San Antonio 1991, writ denied)("We cannot countenance such an inconsistency in appellant's contentions."). In the trial court, it was useful for the Appellants to claim the phone cards made the operation legal; it provided a reason for their fraudulent phone card expenses. On appeal, it is useful for them to claim that the operation was illegal, to get them out from under a multimillion dollar judgment. The legal system frowns on this sort of gaming of the courts.[9]

Appellants' problems with their illegality argument, however, only begin with this unacceptable inconsistency. As Appellants admit in their brief, Appellants' Brief at 11 (hereafter "Brief"), this defense was not raised in the trial court, and this court cannot review an issue which has not been raised in the court below. Tex. R. App. P. 33.1.

To evade the restrictions of Rule 33.1, Appellants state that "it is well-settled in Texas jurisprudence that the appellate courts must consider unpreserved error if it is fundamental." In fact

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operation was legal. Dan Hennessy testified that he only opened the game rooms on the assurance that they would be legal, which assurance he received both from the Appellants and their attorney, Mr. Rigano. 2 R.R. 36, 9 to 18. He further testified that the Lottery Commission was fully aware of the game rooms' operation. 2 R.R. 34, 7 to 9. John diPalma testified that his game room at the bingo hall in Richardson was run with the express permission of the city of Richardson. 3 R.R. 133, 4 to 10; 3 R.R. 174, 17 to 21; 3 R.R. 187, 1 to 7. Larry Whittington testified that certificates, such as bingo discount cards, 3 R.R. 99, 15 to 100, 13, were given as prizes because if money had been given it would have been illegal gambling. 3 R.R.111, 1 to 3.

[9]In addition, Appellants' counsel's assertion that the lease Appellants entered into was illegal, looks very much like a judicial admission of the commission of a crime. For that reason, the Charities suspect that this is not a position authorized by the Appellants themselves, but rather put forward by their lawyers.

the reverse is true, for the Texas Supreme Court has declared that "Fundamental or unassigned error is a discredited doctrine." *Cox v. Johnson*, 638 S.W.2d 867, 868 (Tex. 1982). Most recently the court has stated that the doctrine's use is "rare,"and that it is presently used only in cases where the trial court lacked jurisdiction or in juvenile delinquency cases. *In the Interest of B.L.D.*, 46 Tex. Sup. Ct. J. 978 (2003), rehearing denied August 21, 2003.[10]

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[10]In *B.L.D.*, the Texas Supreme Court refused to extend the doctrine to parental termination cases. The Court noted that Texas *criminal* jurisprudence recognizes a broad right to review of unassigned error and that this criminal right bears on allowing such review in juvenile delinquency proceedings which, although technically civil proceedings, are "quasi-criminal" in nature. It appears that fundamental error is the doctrine of last resort of the lawyer who has failed to preserve error on appeal.

The Appellants cite three cases for the proposition that the doctrine of fundamental error is "well-settled" in Texas law. The 1846 Texas Supreme Court case cited, *Jones v. Black*, 1 Tex. 527 (1846), is irrelevant since it was decided long before *Cox* labeled fundamental error a "discredited doctrine" and it held, moreover, that issues of venue, if not raised below, do not constitute fundamental error. *Price v. Anderson's Estate*, 522 S.W.2d 690, 691 (Tex. 1975), is a misnomer case that has nothing to do with the fundamental error doctrine. *Estate of C.M. v. S.G.*, 937 S.W.2d 8, 9 (Tex. App. – Houston [14th Dist.] 1996, no writ) holds that lack of jurisdiction may be raised on appeal for the first time. That is in fact the law, but since there is no issue that the trial court was without jurisdiction over the Appellants, the case is wholly irrelevant to this appeal. Similarly, *Texas Department of Transportation v. T. Brown Constructors, Inc.*, 947 S.W.2d 655, 659 (Tex. App. – Austin 1997, pet'n denied), cited by Appellants, which held that because "the trial court lacked jurisdiction to render the . . . judgment, [the judgment] is void," is likewise irrelevant.

The Appellants also cite other irrelevant cases on the subject of fundamental error. *Operation Rescue v. Planned Parenthood*, 975 S.W.2d 546, 569 (Tex. 1997), found that the issue of whether the awarding of punitive damages without an unambiguous finding of actual damages was not fundamental error and could not be raised for the first time on appeal; *Pirtle v. Gregory*, 629 S.W.2d 919 (Tex. 1982)(per curiam), held that the omission of an allegedly indispensable party was not fundamental error such that the issue could be raised for the first time on appeal.; *Galveston v. Russo,* 508 S.W.2d 882, 885 (Tex. Civ. App – Houston [14th District] 1974, writ ref'd n.r.e.), sua sponte

The doctrine of fundamental error has its basis, not so much in reason, as in history. In the early days of the State of Texas, the Texas Supreme Court had the express authority under Article 1837 of the Revised Statutes of Texas to review errors in law "either assigned or apparent on the face of the record." That statute was repealed in 1940 and replaced by the contrary provisions of the Texas Rules of Civil Procedure. See *Ramsey v. Dunlop,* 146 Tex. 196, 200-202, 205 S.W.2d 979, 981-983 (1947). While *Ramsey* in 1947 was reluctant to yield the Court's power to review unassigned error, *Cox* in 1982 made it clear that the doctrine of fundamental error has virtually disappeared from the civil jurisdiction of the Texas court system. In *Pirtle v. Gregory*, 629 S.W.2d 919, 919 (Tex. 1982), decided thirty-five years after *Ramsey*, the Texas Supreme Court declined to find fundamental error in a case where a judgment had been entered in the absence of a purportedly indispensable party and emphasized that the "practice of the appellate courts in considering unassigned errors was the source of much mischief . . . ." This court should not perpetuate that mischief.

With respect to the defense of the illegality in a contract action, the Texas Rules of Civil Procedure present an additional barrier: Rule 94 provides that illegality is an affirmative defense which must be expressly set forth in the defendant's pleadings. It is fairly clear that Rule 94 trumps the doctrine of fundamental error, as it was clear even when fundamental error doctrine was a live item. *Free-Flow Muffler Co. v. Kliewer,* 283 S.W.2d 778, 793 (Tex. Civ. App. – Texarkana 1955, writ ref'd n.r.e.). The Texas Supreme Court's only recent comment on whether a contract's illegality might be reviewed absent pleadings raising the issue was Justice Greenhill's off-handed comment in a 1971 concurrence that a contract to murder might present "illegality . . . so flagrant as to warrant the court's noticing it in the absence of pleadings raising the question." *Sherrard v. After Hours, Inc.,* 464 S.W.2d 87, 90 (Tex. 1971). This contract certainly does not rise to that level. Murder is

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struck a provision in the trial court's judgment allowing execution against a political subdivision of the state and . *G.A.O. v. State*, 854 S.W.2d 710, 715 (Tex. App. – San Antonio 1993, no writ) is a juvenile delinquency case. None of these cases assists Appellants.

a capital crime; gambling offenses are misdemeanors.

And despite Appellants' bold statement that there is "no doubt" that penal statutes were violated, that is simply not the case. In the first place, an essential element of both of the gambling statutes that Appellants cite is intent, a specific criminal intent, different for each crime.[11] Intent is a question of fact, which is a question for the jury, not for this appellate court. The jury never considered this issue; neither should this court. Second, Appellants dismiss out of hand the position taken by all parties in this case – that the provision of phone cards with every play rendered the operation of the game legal – and ignore the fact that no Texas court has ever held otherwise.[12] Finally, they have misled the court in two significant ways. In the paragraphs setting out the facts on which they base their conclusion that the criminal law was "no doubt" broken, Appellants on 24

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[11]The only fact that the Appellants point to in concluding that it is "clear" that Bettina and Oakhill acted "knowingly or intentionally" is that "Hennessy, who is a licensed real estate attorney and Bettina's founder, drafted the leases." Brief at 17(omitting citations to the record). Few prosecuting attorneys, counsel suspects, would go to a jury on such thin gruel as this.

[12]Appellants claim that *Jester v. State*, 64 S.W.2d 553 (Tex. App. – Texarkana 2001, no pet'n) holds that the provision of a phone card does not render a game machine legal. That is not the holding of *Jester*. In that case, Jester had been convicted of gambling offenses involving game machines that dispensed phone cards. An element of all gambling offenses is that the player of the game give consideration for the chance of winning. Jester argued in the trial court that the provision of a phone card to each customer negated the essential issue of consideration, since the customer was not buying a chance, but a phone card. That was an issue of fact for the jury, and on that issue, the jury found against him. On appeal, he argued that there was insufficient evidence for that finding in the trial court. The court, having reviewed the record in detail on appeal, found that there was sufficient evidence. The court made no ruling that as a matter of law the provision of a phone card fails to make the operation of a game machine legal. It merely affirmed a jury finding. The important fact to note is that the issue is not a matter of law, but of fact – that is, an issue for the jury. The jury in this case never considered that issue. The Appellants ask this court to pile impropriety on impropriety – to make findings of fact that only a jury can make in order to enable the Appellants to argue issues of law they never raised in the trial court. This court should decline that invitation.

occasions cite deposition transcripts which were not admitted into evidence at trial and which therefore cannot form the basis of this court's decision. Brief pp 13-14, 16. Also, they have failed to mention that, in addition to the prizes they list, noncash certificates for the adjoining bingo halls were given as prizes, certificates which could be used nowhere other than in these halls. 3 R.R. 99, 15 to 17; 3 R.R. 100, 5 to 13. Indeed, some halls only gave out those certificates. 3 R.R. 132, 20 to 25. These noncash certificates appear on their face to fit within the statutory exception for gambling devices in Section 47.01 (4)(B), Texas Penal Code, an exception whose parameters remain undefined, as the Texas Supreme Court pointed out in *Hardy v. State,* 102 S.W.3d 123, 131 n.6 (Tex. 2003). The Charities have found no case dealing with this issue. If the machines gave bingo coupons as prizes, then the legality of their operation (i.e., whether the game machines were, in the circumstances of the Bettina halls, gambling devices) would be an issue of fact based on a wide range of relevant factors, all to be sorted out by a jury. This analysis makes clear that in reviewing any defense of illegality, the court should operate only from a jury verdict based on a full evidentiary record. Since there is no such verdict and no such record in this case, the court should decline to examine the issue of illegality.

It is worth noting, too, that just because an agreement is found illegal is not an absolute bar to recovery by a party to the agreement. In *Lewis v. Davis*, 145 Tex. 468, 477, 199 S.W.2d 146, 151 (1947), the Texas Supreme Court set out the general proposition of law as follows:

> The general rule that denies relief to a party to an illegal contract is expressed in the maxim, In pari delicto portior est conditio defendentis. . . . The rule is adopted, not for the benefit of either party and not to punish either of them, but for the benefit of the public. . . . In many cases relief is granted to the party who is not in pari delicto. . . . It has been said that even where the parties are in pari delicto relief will sometimes be granted if public policy demands it. . . . There is often involved, in reaching a decision as to granting or withholding relief, the question whether the policy against assisting a wrongdoer outweighs the policy against permitting unjust enrichment of one party at the expense of the other. The solution of the question depends upon the peculiar facts and the equities of the case, and the answer usually given is that which it is thought will better serve public policy. [citations omitted]

It is precisely this development of the "peculiar facts and equities of the case" with regard to any purported illegality which Appellants' failure to plead the issue of illegality has prevented. The facts in the record do tend to indicate that an illegality defense, even if it had been raised, would not have

barred the Charities' recovery. Not only did the Appellants blatantly defraud the Charities of millions of dollars, but also the Charities had no intention to violate the law and relied on the factual representations (e.g., that phone cards were actually being dispensed in the game rooms) and legal advice of the Appellants and their attorney in believing that the operation was n fact legal; moreover, the Appellants wholly controlled the game rooms' operation. Under these circumstances equity would seem to demand that even if the alleged illegality of the transaction were proved, the Charities should not be barred form recovering on their contract claim. See *Graham v. Dean,* 144 Tex. 61, 64-65, 188 S.W.2d 372, 373 (1945) ("plaintiff had no intention of violating the law. . . . Under the circumstances the illegality of the transaction does not preclude a recovery by plaintiffs . . . ."). In the cases following *Graham v. Dean*, the rule is that when the parties are not *in pari delicto*, an illegal agreement may still be enforceable against the more culpable party. See, e.g., *New Boston General Hospital, Inc., v. Texas Workforce Commission,* 47 S.W.3d 34, 41 (Tex. App. – Texarkana 2001, no pet'n).

II.

NO MOTION FOR CONTINUANCE WAS MADE OR DENIED WITH RESPECT TO THE ACTUAL TRIAL DATE ON THE GROUNDS ALLEGED IN APPELLANTS' BRIEF

Appellants argue in their second issue that the denial of a motion for continuance filed on October 7, 2002, was an abuse of discretion. They claim that the motion should have been granted because new matters were alleged in Plaintiffs' Third Amended Petition of which Appellants had no prior notice and which allegations they had no opportunity to investigate through discovery. Their argument fails for several reasons, the most substantial of which is that the denial of the motion for continuance to which the appellants refer was not a motion addressed to the actual trial

date, November 5, 2002, but to an earlier trial date, October 15, 2002, and these issues were never raised with respect to the November 5, 2002, trial date.

The motion which the appellants claim should have been granted was a motion directed to an October 15, 2002, trial date. C.R.234. Judge Hall referred that motion to Civil Master Mark Greenberg, who heard the motion on October 10, 2002, and after examining evidence, denied the motion. C.R. filed July 30, 2003, at 5. The case did not go to trial on October 15, 2002 because the judge's schedule that week did not permit a jury trial of the length of this case. Instead, the parties appeared at a docket call on October 15, 2002, in the 68th Judicial District Court, and the case was reset to November 5, 2002. Mr. Rigano did not renew his motion for continuance, nor did he raise the issue that he needed additional time for discovery. Since Judge Hall had not heard the motion for continuance, he did not know about the issues raised in that motion, nor did Mr. Rigano make him aware of those issues. Indeed, since the reset date was entirely within the discretion of Judge Hall and since, unlike the case where a continuance has been requested, there can have been no reliance by any party on a set date, Judge Hall certainly would have reset the case at a greater distance from October 15, 2002, had any substantial argument been made for doing that. By not raising those issues with respect to the November 5th trial date, Appellants waived any objection to the new trial date based on the claims in their October 7 motion.

The only motion for continuance made with respect to the November 5, 2002, trial date was filed on October 30, 2002, and the sole basis for that motion was Mr. Rigano's conflicting engagement in another court. C.R. 238. The conflict was resolved by discussions between Judge Hall and the judge of the other court, but in the course of that resolution, counsel for both sides had telephone conferences with Judge Hall, in which Mr. Rigano once again failed to raise the issues raised in the October 7 motion.[13]

Not only is denial of the October 7 motion irrelevant, but it was also proper. The claim by

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[13]Mr. Rigano did finally bring up the issue before Judge Hall, late in the trial in requesting to put on a witness not revealed in discovery, and admitted that Judge Hall had never heard any of these issues previously. 5 R.R. 70, 5 to 9.

the Appellants in that motion that they did not have knowledge of the new matters alleged in the Third Amended Petition is simply and demonstrably untrue. On July 16, 2002, three months prior to the trial date, Appellants took the deposition of John DiPalma. At that deposition, Mr. Rigano received a copy of a document, C.R. 584, identical to Plaintiffs' Exhibit 15 at trial, C.R. 404, showing the huge leap in income to the Charities when Signal Peak was replaced by F&H, a document which, as corrected, was the key evidence in establishing that the Appellants had failed to report income from the game rooms. Mr. DiPalma testified regarding the numbers on that document, with which he was familiar, stating, as was stated in the Third Amended Petition, that these numbers implied that Appellants had received three million dollars, but only reported one million to the Plaintiffs. C.R. 570-571. Mr. Rigano did not choose to examine him regarding this matter. Later that afternoon, Mr. Rigano deposed Plaintiff's accounting expert, Denis Burns. Mr. Rigano never asked any questions regarding what Mr. Burns' expert opinions were, but Mr. Burns volunteered that the lack of accounting controls was a "clear indication of an intent to defraud." C.R. 462. Mr. Rigano never examined him on this opinion or with respect to the document at C.R. 584. The deposition was adjourned, not concluded, and Mr. Rigano never thereafter sought to complete Mr. Burns' deposition.[14] At the hearing on the motion for continuance, Master Greenberg received copies of the Burns and DiPalma depositions, with the relevant language highlighted, and was told that Mr. Rigano had received a copy of the document at C.R. 584 at the DiPalma deposition, which

[14]This is typical of Appellants' indifference to obtaining discovery. The only written discovery they did in the trial court was in May of 2002 (almost two years after the case had been filed) to serve requests for disclosure. They asked no interrogatories, made no requests for production, made no requests for admission. They took only four brief depositions, none of which was used for any purpose at trial. The Charities gave Mr. Rigano the document at C.R. 584 (introduced at trial as Plaintiffs' Exhibit 15, C.R. 404) not because it was responsive to any request from Appellants, but because the Charities knew that this document showing the enormous increase of income to the Charities under Signal Peak's successor was the Charities' strongest evidence of concealed and fraudulently misappropriated income. The Charities wanted the Appellants to know about this evidence so that the Appellants might be inclined to settle.

document was before Master Greenberg. After the arguments of counsel were concluded, Master Greenberg stepped back into chambers with the deposition transcripts and the other documents then before the court on the various motions before him (including the C.R. 584 document), and when he returned some minutes later, denied the motion for continuance. It is clear that on July 16, 2002, Appellants had full knowledge of the claims which were incorporated into the Third Amended Petition, but thereafter knowingly failed to do any discovery with respect to those claims. The denial of the motion for continuance was appropriate.[15]

Appellants' second issue on appeal is thus without merit.

III.

THERE IS SUFFICIENT EVIDENCE IN THE RECORD TO SUPPORT THE JURY'S FINDINGS OF A BREACH OF CONTRACT AND OF ACTUAL DAMAGES ARISING FROM THAT BREACH

Appellants complain that there is insufficient evidence of breach of contract to sustain the jury's verdict. They then wander through convoluted arguments about whether Appellants were obliged to keep records. That discussion is irrelevant because the failure to keep adequate records is not the breach of contract about which the Charities were suing. The breach of contract that is at the center of this lawsuit is that Signal Peak and Stephens did not give Oakhill one-half of the profits of the game room operations as they were clearly required to do under their lease agreements. The evidence at trial showed that during the time it operated the game rooms, Signal Peak made at least two million dollars in profits, but instead of giving Oakhill half of that amount, gave it only about

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[15]Although Appellants claim in their brief that they did not have an opportunity to do discovery on the allegedly new issues raised in the Third Amended Petition, Appellants never requested to do any further discovery in the fifty-three days between receipt of the petition and the commencement of the trial in this case. Had Mr. Rigano asked for further discovery, the undersigned counsel, who was the Charities' trial counsel, certainly would have allowed him to do further discovery, irrespective of whether discovery was closed or not. Counsel had every incentive for the Appellants to know the strength of the Charities' case, in hopes that recognition of that strength would produce a settlement.

$426,000. The testimony on what records were kept and how they were kept served two primary purposes: first, to discredit the amount of income shown on Signal Peak's records as having no basis in verifiable reality and, second, to show Signal Peak's and Stephens' intent to defraud.

It is always difficult to show the misappropriation of money when there are no reliable records that accurately show what the amount taken in was. In this case, the Charities had extraordinarily accurate evidence which showed how much the game rooms actually made during the year and a half in which the game rooms were operated by Cecil Stephens and Signal Peak. After Appellants ceased to operate the game rooms, a new operator, F&H Investments, Inc., came in. F&H operated the same game rooms, under the same conditions, 3 R.R. 139,12-15, at the same locations, for the same number of hours per day (or fewer, 3 R.R. 134, 2-13), with the same clientele, with the same employees, 3 R.R. 139, 6-11, and with the same number of the same games, 3 R.R. 64, 7 to 13; 3 R.R.156, 11-12 (at the outset, though, with fewer games, 3 R.R. 49, 14 to 24)[16]. When compared week-for-week over an equivalent period of time, F&H paid $1,109,788.40 to Oakhill, while Appellants paid $426,312.10.[17] The uncontradicted evidence of the Charities' accounting expert that the methodology used by the Charities in estimating was an accurate and reliable way of

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[16]At one point Mr. Stephens claimed that F&H was operating different games, 4 R.R. 89, 2 to 4, but since that testimony was based on hearsay, it was struck. 4 R.R. 89, 10 to 20. There is no other evidence in the record that supports his conjecture. Indeed, all the evidence in the record, cited in text above, was that the machines used by F&H were the same types of machine used by Signal Peak.

[17]See Plaintiff's Exhibit 22, C.R. 312, and 24, C.R.332. These figures represent operations at the same three halls, for virtually identical numbers of weeks in each hall, a total of 173 weeks in the three halls. Signal Peak's operation began early in 1999 and ended in mid-2000; F&H operation began shortly thereafter and ran to the end of 2001. There was no evidence of any difference in the Dallas economy in these periods of time to explain this difference. Since the payments to Oakhill were, in the cases of both operations, one-half of gross profits, the total gross profit for F&H operation for its 173 weeks was $2,219,576.80, C.R. 332, and for Signal Peak, $852,624.20. F&H outperformed Signal Peak by 260%.

estimating loss – indeed, the only way that one could reliably estimate the losses. 4 R.R. 153, 22 to 155, 16.

These are astounding numbers. There is no reasonable explanation for this apparently spectacular rise in income other than that Cecil Stephens and Signal Peak were making the same amount of money and were only reporting and sharing a portion of that money with the Charities. Even Mr. Stephens admitted that the $426,000 Signal Peak made from the Charities' bingo halls "wasn't much money at all" compared to what the game rooms should have been making; and, just as the Charities do, Mr. Stephens blamed the failure to make the larger amount on theft. 4 R.R. 28, 14 to 16; 29, 3 to 21. The parties are thus in agreement on the basic issue: they agree that a vast amount of money disappeared out of the game rooms because of theft. The only difference between the Charities' position and the Appellants' position is that Mr. Stephens did not identify the thieves; the Charities, on the other hand, have identified the thief: Cecil Stephens.

Mr. DiPalma said that he was a good operator, but not that good; his statements in evidence were that "Mere efficiencies of operation cannot account for that steep a rise in profits" and that "the only conclusion I can draw from those records is that Signal Peak must have been pocketing unreported income from the operation of the game rooms." C.R. 340 In the past he had taken over other operators' locations and outperformed them, but his increase in those cases was "probably 10 percent." 3 R.R. 186. In the Oakhill locations, on the other hand, Mr. DiPalma earned more than two and a half times as much as Signal Peak. Plaintiffs' Exhibit 22, C.R. 413. At trial the Appellants offered no explanation that held any water[18] for why F&H did so much better than they had done in

[18]The only explanation that Signal Peak and Stephens gave was that these were going concerns when F&H took them over. 4 R.R. 91, 5; 5 R.R. 60, 8 to 14. This is, of course, pure speculation since Mr. Stephens did not claim that he observed any of F&H's operations and did not claim that he knew what F&H was doing in the game rooms. His speculation is contradicted by the evidence before the jury. Plaintiff's Exhibit 22, C.R. 312, which has all the relevant records attached, shows that there was a gap of a few weeks between Signal Peak's cessation of operation and F&H's recommencement in all three halls involved and that once F&H began operations, the first four weeks of operation under F&H were down 36% from the last four weeks of operation under Signal

operating the game rooms.

If the jury found that the income of the game rooms was greater than that reported by Signal Peak, it would then have found a breach of contract. Signal Peak was obliged to pay over to the Charities one-half of the net income of the game rooms; if the income was higher than what Signal Peak reported, Signal Peak breached its contract. Plaintiff's Exhibit 22 showed an Underpayment Due to Missing Funds as $529,905.94. The jury found contract damages in the amount of $425,000, hence finding that the game rooms made $850,000 more than Signal Peak reported for the time it was running the game rooms. The finding of breach of contract and the amount of damages are fully supported by the trial record.

The Appellants claim that the evidence of profits under F&H is not evidence of what could have been made under Signal Peak's operation. They claim that the comparison of Signal Peak and F&H is not proper because "it was not a projection of revenues less operating expense." Brief at 42. But that is precisely what it was. The $1.1 million dollars that F&H paid over to the Charities was the net revenue, after all expenses had been deducted – just as was the case with Signal Peak. That is readily shown in the records that were part of Plaintiffs' Exhibit 22, the comparison of Signal Peak and F&H. C.R. 413 to 421 The Appellants claim that "the evidence did not make clear that F&H had the same kind and quantity of machines as Signal Peak." Brief at 42. The trial evidence, however, was that F&H operated with the same number of the same games. 3 R.R. 64, 7 to 13; 3 R.R.156, 11-12 (at the outset, though, with fewer games, 3 R.R. 49, 14 to 24). Appellants claim that the Charities arrived at their numbers by comparing F&H's four or five halls, with Signal Peak's three or four. That is completely untrue. Appellants have clearly failed to look at the evidence before the jury. While the initial comparison did make the error of comparing the overall performance of the two operators without noting that Signal Peak operated fewer game rooms, the

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Peak. This is hardly an indication that a going concern was passed along. Mr. Whittington, who had closely observed the operation of the game rooms both under Signal Peak and under F&H, testified that the crowds dropped substantially when the game rooms were closed after Signal Peak left, but eventually the crowds were about the same. 3 R.R. 49, 25 to 50, 19)

Charities' trial counsel discovered that error during the trial, apologized to the jury for having misled it and produced a corrected comparison,[19] which is Plaintiffs' Exhibit 22, the key evidence comparing Signal Peak and F&H. Exhibit 22, contrary to the assertions of the Appellants, compares three of the halls operated by Signal Peak with the *exact same halls* when operated by F&H for the *same lengths of time*[20] and the times during which the comparison is made with F&H are the periods when F&H operated *immediately following* the operation by Signal Peak, when, of course, the circumstances of operation would have been most similar.[21]

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[19]The documents making the error were Plaintiff's Exhibits 15, (C.R. 300) and 16 (C.R. 301). During the course of the trial the Charities discovered that the comparison was invalid since it included in the F&H totals, operations at the Plano hall for a year and a half, while Signal Peak had only operated there for half a year, and included F&H operations in the I-30 hall where Signal Peak had had virtually no operations. 4 R.R. at 10, 13 to 12, 20. The Charities corrected the errors by recalculating the disparity using only the halls in which both Signal Peak and F&H operated and in those halls for comparable periods of time; Oakhill's counsel apologized to the jury for the error. 4 R.R. 12, 21 to13, 3. The recalculated numbers are those in Exhibits 22 and 24.

[20]There is a tiny difference in the number of weeks in each hall for each operator: Signal Peak was in the Jupiter hall for 74, F&H for 72; Signal Peak was in the Arapaho hall for 72 weeks, F&H for 73; Signal Peak was in the Plano hall for 27 weeks, F&H for 28 weeks. The total for each operator was 173 weeks. The differences are insignificant and are apparent on the face of Plaintiffs' Exhibit 22.

[21]The Appellants complain that the operations of F&H were not similar to those of Signal Peak because F&H decided not to vend phone cards but to make them available as an option. Brief at 42. The jury was not confused by that difference. Plaintiffs' Exhibit 22 makes clear what Signal Peak's purported expenses for phone cards were and shows that there were no such expenses by F&H. The jury was free to remove the phone cards cost from the calculation of the Charities losses and had the available information to do so. The Appellants' argument, however, ignores the uncontroverted testimony of Mr. Whittington that Signal Peak stopped restocking the phone cards and no phone cards were in fact dispensed. That being the case, the whole expense of the phone cards, as was set out in the section on fraud, was a sham and in fact the total numbers were comparable without an adjustment for phone cards. The difference between Signal and F&H was that F&H was being honest about not dispensing

The Appellants claim the amount of money lost is not shown with reasonable certainty. The only witness who testified as to whether using F&H's figures was a reasonable way to determine damages was Mr. Burns, the Charities' accounting expert. He stated that it was not only a good way, but the only reliable way. The Appellants had no experts on damages – or really, any testimony at all on damages. Once again the Appellants are attempting to try a factual issue in this court on which they presented no evidence below.

IV.

THERE IS SUFFICIENT EVIDENCE IN THE RECORD TO SUPPORT THE JURY'S FINDINGS OF FRAUD AND OF ACTUAL DAMAGES ARISING FROM THAT FRAUD

Appellants argue that there is insufficient evidence of fraud and damages from fraud to sustain the verdicts against Signal Peak and Stephens. There is sufficient evidence with respect to both of them.

1. Phone Card Fraud

There are two main areas of fraud by Signal Peak and Stephens. First is the fraud with respect to the phone cards. Signal Peak was charging eight percent of every play for providing a phone card which was supposedly dispensed automatically on each play of the machine. Larry Whittington's uncontradicted testimony, as set out above in the Statement of Facts, was that Signal Peak did not restock the machines with phone cards when they ran out so that when the machines were played, no phone card was produced. The reports from Signal Peak, however, continued automatically to deduct eight percent of the gross to pay for phone cards which were never dispensed. This is clearly fraud. Over $320,000 went into Signal Peak's bank accounts from this fraud. See Plaintiffs' Exhibits 13, 390, and 14, 399.

2. Understated Income

The other major fraud was in the fraudulently understated revenue in the weekly reports that

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phone cards; Signal Peak was collecting money to reimburse expenses it never incurred.

Signal Peak provided to the Charities. The primary evidence of that fraud is the enormous and otherwise inexplicable rise in reported income when the operation of the game rooms went from Signal Peak to F&H. That evidence is set out above in detail.

Signal Peak Liability

The cover-up of massive theft, the misrepresentation of the actual income of the game rooms, is the fraud in this lawsuit. There was substantial evidence from which the jury could have concluded that the funds were stolen by Signal Peak and not by some low level employees. Larry Whittington worked in the game rooms, working for Wylie, and also managed the Arapaho bingo hall for the Charities. He testified that he saw Wylie coming into the game rooms two or three times a day and opening the machines. 3 R.R. 43, 16 to 44, 1. Working in the game rooms, he noticed that although the game rooms were consistently busy, 3 R.R. 42, 25 to 43, 6, frequently there would be unexplainable and sudden, drastic drops in income for some of the machines. 3 R.R. 44, 7 to 12. One evening he himself played a hundred dollars into one of the machines, but when he opened it up the next day to take the funds to the bank, there was less than $100 in the machine; when he asked Wylie questions about this, Wylie fired him. 3 R.R. 44, 15 to 25; 45, 17 to 46, 16.

From this the jury could have concluded that Wylie had knowledge of the fact that funds were missing and was trying to protect that fact from being discovered, not to protect some thieving employee, but to protect himself and to protect Signal Peak from being found out. The same inference could be drawn from Wylie's actions with respect to Hunsicker's random audit. And the same inference could be drawn from Stephens' termination of Hunsicker with respect to the same audit. Wylie was a managerial employee, and Stephens was the majority stockholder of Signal Peak; the inferences drawn against the two of them are, as a matter of law, inferences drawn against Signal Peak. Signal Peak must bear responsibility for their fraudulent activities.

Cecil Stephens' Liability

Just as Cecil Stephens' firing of Hunsicker was evidence of Signal Peak's complicity in the ongoing fraud, so was it evidence of his own complicity. The jury also heard evidence that at several points in his depositions, Mr. Stephens promised under oath to provide names of people who had

worked for him or been otherwise associated with him or to provide documents and that he never provided those names or those documents. See, e.g. 4 R.R. 76, 14 to 18. The jury could have concluded that he was evading these obligations in order to conceal what actually went on in his business. And then, of course, there are Stephens' own vain, pitiful efforts to distance himself from any responsibility for the operation of the game rooms and from the operation of the accounting system, set out at some length in the Statement of Facts, above – efforts in which Mr. Stephens' testimony was contradicted again and again, not only by the Charities' witnesses, but also by his own witnesses, and, most tellingly, by his own deposition testimony.

Queen Gertrude in Shakespeare's Hamlet memorably said "The lady protests too much, methinks." And so it is here. Why would Stephens go to such lengths, make up so many excuses, try to evade responsibility at every turn, not give a single answer that might involve him in any way in the business of which he eventually admitted he was the boss? Obviously the only rational explanation for his hyperkinetic efforts to portray himself as wholly uninvolved in any aspect of the operation of the game rooms, contrary to the testimony of every other witness with any knowledge of the operation of the game rooms, is that he was attempting to hide the facts of his own complete and total involvement in and control of every aspect of the operation – including the theft. Again the Charities and Mr. Stephens do not differ. Both agree that the game rooms were rife with theft. They only disagree on who was doing the stealing.

The jury cannot but have drawn the conclusion that Stephens was an inveterate liar, and that conclusion would have led the jurors to more than the inevitable conclusion that not a word coming out of Mr. Stephens mouth could be trusted. The jury would have further inferred that Mr. Stephens had something to hide, that what the Charities accused him of and what he was lying to evade, was true. This is a rational inference and one that the jury doubtless drew in this case.

There is one other important factor that has a bearing on the jury's conclusions regarding Stephens. Recollect that Stephens admitted that he had threatened to kill an employee of the Charities if he was not repaid $20,000 that was owed to him. He said, indeed, that "It was not a threat. It was a promise,"4 R.R. 17, 18 to19, and that he made it a practice to threaten to kill people

who took his money. 4 R.R. 17, 17 to 18, 5. When asked if he had ever killed anyone he answered, "No, never had a reason to," 4 R.R.18, 23 to 24, an answer that must have chilled the jurors. If the records of the game rooms were so poorly kept that theft would go undetected and its operation was rife with theft, how likely is it that a man like this – who would threaten to kill to get $20,000 back – would tolerate that system of record keeping or that way of doing business? It is, of course, not likely at all – unless he were the one who was doing the stealing, in which case he would want the records to be as poor as possible, the controls as loose as possible, so he couldn't be caught. As the Charities' accounting expert testified, "This is the accounting system I would use if I was wanting to be fraudulent in my dealings." 4 R.R. 153, 4 to 5.

In the same vein, Stephens testified that he fired all his Signal Peak employees when he was missing $38,000 from his accounts at a time after Signal Peak had ceased to run the game rooms. 4 R.R.19, 15 to 25. He admitted that the $426,000 Signal Peak made from the Charities' bingo halls was not much compared to what the game rooms should have been making and blamed the failure to make the larger amount on theft. 4 R.R. 28, 14 to 16; 29, 3 to 21. But even though he knew that there was theft in the game rooms, 4 R.R. 30, 18 to 22, Stephens claimed he never fired anybody. 4 R.R. 30, 12 to 15. All he claimed that he ever did was make a phone call to James Jackson; Stephens did nothing further even though he knew that the thefts continued even after the call to Jackson. 4 R.R. 30, 23 to 31, 7. Again, given what we know about Stephens' passionate attachment to his money, how likely is it that Stephens would have allowed rampant theft to go unchecked? He never even showed the anger one would have expected of him if in fact someone other than he were doing the stealing. Even if we accept Stephens' fiction that bingo employees were running the game rooms and that Stephens had no authority over them, certainly a man who cared as much about his money as Cecil Stephens did would have taken direct and immediate action to cut these enormous losses. Had the game rooms in fact been run by the Charities, at the very least Mr. Stephens would have stopped the continuing theft by pulling the machines or by taking over their operation. It is wholly inconceivable that this man would have sat back and allowed the theft to continue – unless, of course, as we have said, it was he who was committing the theft.

There is sufficient evidence to support the jury's verdict of fraud and damages against both the Appellants.[22]

V.

THERE IS SUFFICIENT EVIDENCE IN THE RECORD TO SUPPORT THE JURY'S FINDING THAT SIGNAL PEAK WAS STEPHENS' ALTER EGO

There is substantial evidence that Signal Peak was the alter ego of Cecil Stephens.

First of all, the evidence which shows that Cecil Stephens was involved in the fraud perpetrated by Signal Peak is substantial evidence of the fact that Signal Peak was his alter ego. Since we know what extreme lengths Mr. Stephens would go to in order to protect or obtain amounts of money far less than what both sides agree was lost from the game rooms, it is inconceivable that the proceeds of the theft would have gone to anyone other than Mr. Stephens himself. Mr. Stephens would never have been so passive in protesting against or taking measures against theft unless he had been its beneficiary.

At trial, Stephens admitted that he ran things at Signal Peak, 5 R.R. 65, 16 to 25, and it was clear that he was fully in control of even the smallest aspect of the business, despite his protestation that he had "very little" to do with Signal Peak and was only acting "on a consulting basis" 4 R.R.43, 12. When Ms. Hunsicker, the Charities' bookkeeper, called up Signal Peak for documents, Stephens returned her call personally, rebuking her and saying that he was the only one to authorize documents being sent to her. 3 R.R. 203, 16 to 204, 8. He didn't talk to Ms. Hunsicker much, but he was all over her when, as a result of her surprise audit of the game rooms, she found substantial evidence that funds were being mishandled. In his deposition, before he realized that his role in micromanaging Signal Peak might have some adverse consequences for him, he was insistent that the accounting system was his and was vehement in wanting to explain that system to opposing

[22]The Appellants' arguments regarding the sufficiency of evidence of damages for both contract and fraud damages were combined and have been dealt with in the contract section, above.

counsel. He knew by number which bank accounts were used for which purposes. Wylie, his on-site manager, said that either Cecil or Rusty Stephens, usually Cecil, visited Wylie in the game rooms every two weeks, 4 R.R. 137, 22 to 138, 13, and he further testified that he talked to Mr. Stephens once a week. 4 R.R. 184, 18 to 19.

Perhaps most tellingly, both at trial and in his depositions, Stephens consistently spoke of his money as Signal Peak's and vice versa. In his deposition, he said of the cash being used in the banks at the game rooms that "The bank is my money, *belongs to Cecil Don Stephens personally* for them to operate out of." 4 R.R. 20, 13 and 14. (Emphasis added) At the trial his deposition was read to show that Stephens thought of this as his money and no one else's. 4 R.R. 113, 24 to 114, 7. Asked about this testimony at trial, Mr. Stephens said that when he referred to the banks as "my money," that "my" meant Signal Peak, 4 R.R., 114, 9 to 13. Again, in his deposition testimony read into the record at trial, regarding the Signal Peak banks in the game rooms, he had said: "No. No. No. No. Absolutely not. Let's get it straight. This is *my* bank." (emphasis added to conform to the manner in which this word was spoken at the deposition). At trial, Mr. Stephens was asked whose bank it was: "I put it in. Signal Peak put it in." In the mind of Mr. Stephens himself, Signal Peak and Cecil Stephens were one and the same. When Ms. Hunsicker had tried to do a random audit on the banks, as Stephens had agreed to let her do, Mr. Stephens once again told her that the money in the banks was "his money." 3 R.R. 210, 20.

The capstone of this vein of testimony came when his son, minority owner of Signal Peak, was testifying. When asked why he used the names Signal Peak and of his father interchangeably, he said "he *is* Signal Peak." 5 R.R. 35, 3 to 8.

There is sufficient evidence that Signal Peak was Mr. Stephens' alter ego.

VI.

THE EXEMPLARY DAMAGES DO NOT EXCEED THE STATUTORY CAP

The jury awarded $1,000,000 in punitive damages against Cecil Stephens. Since the jury

only found $250,000 actual damages against him for fraud, he argues on appeal that the award of exemplary damages exceeds the cap on exemplary damages found in Section 41.008(b) of the Texas Civil Practice and remedies code. That cap reads as follows:

> (b) Exemplary damages awarded against a defendant may not exceed an amount equal to the greater of:
>
> (1) (A) two times the amount of economic damages; plus
> (B) an amount equal to any noneconomic damages found by the jury, not to exceed $ 750,000; or
>
> (2) $ 200,000.

That cap does not, however, limit the exemplary damages in this case.

In the first place, there is an exception to the statutory cap in Section 41.008(c), which section reads, in relevant part:

> [c] Subsection (b) does not apply to a cause of action against a defendant from whom a plaintiff seeks recovery of exemplary damages based on conduct described as a felony in the following sections of the Penal Code if, except for Sections 49.07 and 49.08, the conduct was committed knowingly or intentionally:
>
> * * *
>
> (10) Section 32.45 (misapplication of fiduciary property or property of financial institution);
>
> * * *
>
> (13) Chapter 31 (theft) the punishment level for which is a felony of the third degree or higher

In this case, these two subsections, 10 and 13, were both satisfied. The scienter element of both crimes is satisfied by the jury's finding of intent in the fraud claim. In both cases the offenses are felonies when over $1,500 worth of property is involved; here the damages were in the hundreds of thousands of dollars.

With respect to subsection 10, section 32.45 of the Texas Penal Code states that the crime of Misapplication of Fiduciary Property occurs when a person

> intentionally, knowingly or recklessly misapplies property he holds as a fiduciary . . . in a manner that involves substantial risk of loss to the owner of the property or to a person for whose benefit the property is held.

The definition of fiduciary is open-ended, *Coplin v. State,* 585 S.W.2d 734, 735 (Tex. Cr. App.

1979) (term "embraces any fiduciary"), and encompasses any person who handles property or business which

> is not his or for his own benefit, but for the benefit of another person as to whom he stands in a relation implying and necessitating great confidence and trust on the one part and a high degree of good faith on the other part.

Gonzalez v. State, 954 S.W.2d 98, 103 (Tex. App. – San Antonio 1997, no writ). Clearly that part of the statute is satisfied. Signal Peak, Stephens' alter ego, operated a system where the funds it handled were fifty percent the property of the Charities. Signal Peak and Stephens kept the books, they kept the records. Since Cecil Stephens admitted that he knew that there was continuing theft in the game rooms, there can be no doubt that he knew that the funds were handled in a way which involved a substantial risk of loss. The Charities' accounting expert said that there were no controls over cash and that the cash in the game rooms floated into workers purses, into their trucks, in and out of their pockets, and eventually disappeared – so that when an honest operator came in to run the same business, the Charities' yield from their fifty percent share of the profit jumped to more than two and a half times what Signal Peak had paid them.

With respect to subsection 13, the crime of theft under Chapter 31 of the Texas Penal Code occurs when a person "unlawfully appropriates property with an intent to deprive the owner of property," where unlawful appropriation is unlawful "if it is without the owner's effective consent." Section 31.03 (a), (b), Texas Penal Code. Consent is not effective if it is "induced by deception." Section 31.01 (3)(A), Texas Penal Code. The finding of fraud with economic damages against Stephens by the jury, supported by the substantial evidence cited above, satisfies these requirements.

Appellants complain that in order to qualify for the Section 41.008(c) exception, the Charities needed to have pleaded a criminal violation and have had specific jury findings of that criminal violation. The law in Texas does not require that. Neither of the two reported cases in Texas which have dealt with Section 41.008(c) have required this. *Myers v. Walker*, 61 S.W.3d 722, 732 (Tex. App. – Eastland 2001, pet'n denied)("fraudulent conduct fell within the exceptions enumerated in Section 41.008[c]"); *Konkel v. Otwell,* 65 S.W.3d 183, 188 (Tex. App. – Eastland 2001, no pet'n)("appellees presented adequate proof of misapplication of fiduciary property"). In this case,

however, the Third Amended Petition of the Charities does in fact describe conduct that pleads every element of both these crimes. C.R. 68- 70. And almost the first words out of the Charities' counsel's mouth once the jury was sworn was how this case was about theft.[23] The jury knew just what this case was all about and found accordingly.

In addition, and secondarily, the economic damages in this case were substantially more than the $100,000 fraud damages found against Stephens. The jury gave an affirmative answer to the question: "Is Cecil Stephens responsible for the conduct of Signal Peak?" Thus it knew that every penny it assessed against Signal Peak was money that Cecil Stephens would be obliged to pay, that Signal Peak's fraud (for which $250,000 damages were assessed) was also Cecil Stephens' fraud. Even the contract damages are truly inseparable from the fraud: they are both based on essentially the same facts – the disappearance of a vast amount of money from the game rooms. The evidence that supports contract damage supports fraud damage, and would have supported actual damages in excess of over $2,000,000. Since the fraud and contract damages are all economic damages arising out of the same transactions, they must be considered together in considering the exemplary damage cap. And the economic damages assessed against Signal Peak, $100,000 fraud damages and $425,000 breach of contract damages, added to Stephens' $250,000 fraud damages shows the total economic damage to have been $775,000 – a figure which would be even more if prejudgment interest and attorney's fees were added in. Looking in this realistic way at economic damages, there is sufficient economic injury to support these exemplary damages.

VII.

THE EXEMPLARY DAMAGES AWARDED ARE NOT EXCESSIVE.

Finally, Appellant Stephens argues that the punitive damages award against him is excessive. The only argument that he presents is that "the evidence is undisputed that Cecil Stephens'

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[23] In his opening statement, he said, that the case was "about lying and cheating and stealing." 2 R.R. 5, 16-17. He made the same assertion during the unrecorded closing.

involvement in the events at the Team Bingo halls was minimal." Brief at 44. As is set out above in dealing with Stephens' liability for fraud and the finding of alter ego, the evidence that he was only minimally involved comes only from Mr. Stephens' patently untrustworthy mouth and is hotly disputed. All the evidence underlying the jury's verdict that Cecil Stephens was guilty of fraud; his termination of Hunsicker when she did a random audit that found financial manipulation; his repeated denials of any involvement in the operation, in the face of uniformly contrary testimony from the Charities' witnesses, the Appellants' witnesses, and his own testimony, at trial and in deposition – all point to significant concern about and involvement in the operation of the game rooms. Similarly, his indifference to theft from the game rooms, especially in light of the fact that he values his money so highly that he threatened to kill some one to get back $20,000 owed to him, indicates that it was he who was benefitting from the theft.

The Charities have discussed the ratio of the award to actual damages above, but even if we assume that the relevant ratio is the ratio of the million dollar award against the $250,000 in fraud damages, that standing by itself is insufficient to set aside the award. This court has upheld a nine to one ratio, and in so doing, noted that the Texas Supreme Court has upheld a ratio of sixteen to one and twenty-five to one and other courts in Texas have upheld ratios of twenty to one, twenty-eight to one, and 2,250 to one. *Ellis County State Bank v. Keever,* 936 S.W.2d 683, 690, n.12 (Tex. App. – Dallas 1996, no pet'n).

Let us briefly look at the factors derived from *Alamo National Bank v. Kraus*, 616 S.W.2d 908, 910 (Tex. 1981), as ill-defined as they are under Texas law. See *Keever,* 936 S.W.2d at 686

Nature of the Wrong

The theft that went on has been set out at great length above. It is significant that the victims of this theft were all charities. No one other than charities received benefit from the game rooms; no one other than charities suffered the loss from the theft. Stephens was stealing from the poor box.

Character of the Conduct and Degree of Culpability

The degree of culpability is magnified because of Stephens' wholly transparent attempts to evade any responsibility for the theft from the Charities. He continued to lie and evade on the

witness stand, to contradict every other witness at the trial. His intransigence, his arrogance, his supposition that he could bamboozle the jury point to the fact that this man needs to be severely punished for his pillage of the Charities.

Situation and Sensibilities of the Parties

This factor concerns "evidence of such things as remorse, remedial measures and ability to pay the punitive damages." *Keever*, 936 S.W.2d at 688. Stephens has never shown one whit of remorse, no indication that if he were running the game rooms today he would do anything differently. In discovery Stephens produced a net worth statement dated June 1, 2002, five months before the trial, showing his net worth to be $3.9 million. Plaintiffs' Exhibit 17, C.R. 406. Clearly in terms of net worth, there is no indication that he cannot pay the award.

Extent the Conduct Offends a Public Sense of Justice and Propriety

Shameless theft from charitable institutions offends every fiber of the Anglo-American sense of justice, as do Stephens' clumsy attempts to extricate himself from liability by piling lies upon lies and his utter and his complete contempt for the oath he took as a witness If ever a defendant deserved to be punished by a jury, it is Stephens. Don't let him avoid his just desserts.

Prayer

The Charities pray that this court affirm the judgment below.

Respectfully submitted

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Certificate of Service

The undersigned attorney hereby certifies that he served the attached Appellees' Brief on counsel for Appellants on the _____ day of _____, 2003, by serving by hand delivery the following counsel:

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