Opinion filed August 31, 2017

In The

Eleventh Court of Appeals

No. 11-15-00207-CV

DAVID H. ARRINGTON, Appellant

V.

ARANDA POOLS, INC., Appellee

On Appeal from the 441st District Court
Midland County, Texas
Trial Court Cause No. CV 49667

M E M O R A N D U M O P I N I O N

David H. Arrington sued Aranda Pools, Inc. for breach of contract and breach of expressed and implied warranties that arose out of the construction of a residential pool in Midland. Aranda Pools countersued with claims of breach of contract and quantum meruit. The jury found that Arrington breached the contract and awarded Aranda Pools $77,032.82 in actual damages and $300,000 in attorney's fees. Arrington presents three issues on appeal. We affirm in part and reverse and remand in part.

Arrington hired Aranda Pools for the construction of a residential pool at Arrington's home. Arrington and Aranda agreed on a price of $579,465.12 to construct the pool. Arrington promised to pay the agreed upon price according to a preset schedule. However, when the pool was filled, Arrington discovered problems with the completed pool, and as a result, he did not pay the last payment due. Problems that Arrington claims he discovered with the pool included a decorative waterfall that was not working correctly, a cracked skimmer, an improperly installed diving board, and electrical problems.

Paul Benedetti, a pool expert hired by Arrington to inspect the pool, concluded in his report that the pool might pose a safety risk to swimmers, including the risk of electrocution and entrapment under water. Aranda offered to make some of the repairs, but Arrington and Aranda could not come to an agreement on all the repairs that needed to be completed, so no repairs were made. Despite their disagreement as to repairs, Aranda had personnel from the City of Midland conduct a final inspection of the pool. The pool passed that final inspection, and when Aranda received the "green tag," it demanded final payment before it would do anything further to the pool. Arrington did not make the final payment, and this suit followed.

In Arrington's first issue, he argues that the evidence conclusively established that the pool was not built to code. Specifically, Arrington argues that the trial court ruled that the International Building Code (IBC) applied to the construction and that he conclusively proved that the pool did not comply with the IBC. Arrington contends that, because he proved that Aranda Pools violated the IBC, the trial court should have directed a verdict or granted his motion for judgment notwithstanding the verdict in favor of Arrington on both the contract and warranty claims. In the alternative, Arrington asserts that the evidence was factually insufficient to support the verdict.

At trial, it was heavily disputed as to what code applied to the construction of Arrington's pool. Arrington argued that the IBC—the commercial code—and the federal statute known as the "Virginia Graeme Baker" Act (VGB) applied. 15 U.S.C. § 8001. The IBC incorporates the pool safety standards of the VGB. Aranda contended that the IBC was not applicable to the Arrington pool and that the International Residential Code (IRC) applied instead.

However, the question of which code applied hinged on whether Arrington's home had a fourth story. The 2009 IBC included an exception that stated: "Detached one- and two-family *dwellings* and multiple single-family *dwellings (townhouses)* not more than three *stories* above *grade plane* in height with a separate *means of egress* and their accessory structures shall comply with the *International Residential Code*." INTERNATIONAL BUILDING CODE § 101.2 (INT'L CODE FAMILY 2009).

Outside the presence of the jury, Arrington testified that his house is four stories high. Arrington explained that the attic is on the third floor but that the area his family can inhabit extends four stories off the ground. Arrington described the fourth floor as the playroom where a slide begins. He also explained that the fourth floor does not have a bathroom but that "the kids sleep up there quite often."

David Peterson, a civil engineer, testified at trial on behalf of Arrington that the IBC governed the construction of the pool. Peterson attested that Arrington's home was four stories. Peterson said that he had been "up there" and had gone down the slide. He explained that, because the house had four stories, the IBC should apply. No photographs of the fourth floor were admitted into evidence.

Aranda, however, presented evidence that was contrary to Arrington's contention that his home had four stories. John McIntyre, a structural engineer, testified that, based on the definitions in the IRC, a finished-out, occupiable space in an attic is considered a "habitable attic" and is not considered a separate story. Further, McIntyre explained that the building permit for Arrington's home showed

that it was a two-story home. Aranda argued at trial that the fourth floor was "more or less an attic space that has been converted to a play space."

Aranda also asks this court to take judicial notice of a notarized, recorded, and certified copy—included in his brief as an appendix—of the deed restrictions for the subdivision where Arrington's home is situated. This court may take judicial notice of adjudicative facts that are not subject to reasonable dispute because they are capable of being accurately and readily determined by resort to sources whose accuracy cannot reasonably be questioned. TEX. R. EVID. 201(b). We may do so, whether requested or not, and may do so for the first time on appeal. TEX. R. EVID. 201(c), (d); *Granados v. State*, 843 S.W.2d 736, 738 (Tex. App.—Corpus Christi 1992, no writ). The deed restrictions are contained in a certified document that was recorded with the county clerk of Midland County and, thus, meets the requirements of Rule 201. Accordingly, we will take judicial notice of the deed restrictions. The deed restrictions state that homes built in such subdivision shall not be built to "exceed two and one-half stories in height." As such, Aranda contends that, if Arrington's home is four stories, then there is a violation of the deed restrictions.

"[A] party [that] attacks the legal sufficiency of an adverse finding on an issue on which [it] has the burden of proof . . . must demonstrate on appeal that the evidence establishes, as a matter of law, all vital facts in support of the issue." *Dow Chem. Co. v. Francis*, 46 S.W.3d 237, 241 (Tex. 2001). When we consider a legal sufficiency challenge, we review all the evidence in the light most favorable to the verdict and indulge every reasonable inference in its favor. *City of Keller v. Wilson*, 168 S.W.3d 802, 822 (Tex. 2005). We credit any favorable evidence if a reasonable factfinder could and disregard any contrary evidence unless a reasonable factfinder could not. *Id.* at 827. We may sustain a no-evidence or legal sufficiency challenge only when (1) the record discloses a complete absence of a vital fact, (2) the court is

barred by rules of law or of evidence from giving weight to the only evidence offered to prove a vital fact, (3) the only evidence offered to prove a vital fact is no more than a mere scintilla, or (4) the evidence conclusively establishes the opposite of a vital fact. *Id.* at 810 (citing Robert W. Calvert, *"No Evidence" and "Insufficient Evidence" Points of Error*, 38 TEX. L. REV. 361, 362–63 (1960)). "Evidence is conclusive only if reasonable people could not differ in their conclusions, a matter that depends on the facts of each case." *Id.* at 816 (footnote omitted).

We have carefully examined the record and have concluded that the evidence raised a question of fact as to whether Arrington's home was four stories. Accordingly, we cannot agree with Arrington's contention that he conclusively established that Aranda violated the IBC.

We also disagree with Arrington's alternative argument that the evidence was factually insufficient to support the jury's verdict that Arrington failed to comply with the contract and that the failure to comply was not excused. In a factual sufficiency challenge, we must consider and weigh all of the evidence and should set aside the verdict only if the evidence is so weak or the finding is so against the great weight and preponderance of the evidence that it is clearly wrong and unjust. *Pool v. Ford Motor Co.*, 715 S.W.2d 629, 635 (Tex. 1986).

The evidence shows that, upon completion of the pool, Arrington found several problems with the pool that required repairs. As a result, Arrington did not make the final payment. While there was a disagreement as to what repairs needed to be made—depending on what code applied—the "punch list" showed that Aranda was willing to take "full responsibility to correct or complete" what Aranda agreed needed to be remedied. Further, Aranda issued a credit for several items that needed to be repaired under the warranty. The final bill submitted by Aranda reflects a total amount owed by Arrington less the credits issued by Aranda. Accordingly, we cannot say that the evidence is so weak or the finding is so against the great weight

and preponderance of the evidence that it is clearly wrong and unjust. Arrington's first issue is overruled.

In Arrington's second issue, he argues that the trial court abused its discretion when it permitted testimony about the IRC. Arrington specifically complains of the testimony given by Liovaldo "Leo" Aranda and McIntyre on the applicability of the IRC. Arrington contends that the evidence was irrelevant because the trial judge had determined that, as a matter of law, the IBC applied. We first note that the trial judge is not tied to his pretrial decisions; he is entitled to change his mind during trial. As Arrington points out in his brief, evidence is admissible if it is "sufficiently tied to the facts of the case that it will aid the jury in resolving a factual dispute." *Exxon Pipeline Co. v. Zwahr*, 88 S.W.3d 623, 629 (Tex. 2002) (quoting *E.I. du Pont de Nemours & Co. v. Robinson*, 923 S.W.2d 549, 556 (Tex. 1995)). Because we determined in the first issue that there was a fact issue as to whether Arrington's home is four stories—the controlling question as to which code was applicable—the testimony regarding the applicability of the IRC was relevant. Therefore, the trial court did not abuse its discretion. Arrington's second issue is overruled.

In Arrington's third issue, he argues that the award of $300,000 in attorney's fees was not supported by sufficient evidence. An award of attorney's fees generally is within the discretion of the trial court. *El Apple I, Ltd. v. Olivas*, 370 S.W.3d 757, 761 (Tex. 2012). Aranda used the "lodestar" method to prove its claim for reasonable and necessary attorney's fees. Under the lodestar method, a two-step process is required to determine what constitutes a reasonable attorney's fee. *Id.* at 760. First, the court must determine the reasonable hours spent by the attorneys in the case and a reasonable hourly rate for such work. *Id.* The reasonable hours determined are then multiplied by the applicable rate, the result of which is the lodestar. *Id.* A party that seeks an award of attorney's fees using the lodestar method bears the burden of proof. *Id.* at 761. Such proof should include evidence "of the

services performed, who performed them and at what hourly rate, when they were performed, and how much time the work required." *Id.* at 764.

Here, counsel for Aranda presented a spreadsheet that summarized the fees and expenses incurred in their representation of Aranda. The spreadsheet was broken down month by month and included, for each specified month, the total number of hours worked by the attorneys and the fees associated with the time worked, the paralegal hours and fees, and the expenses and costs associated with the representation. The spreadsheet did not specify which attorney performed such work, what specific services or tasks were performed, or the time devoted to specific tasks. *See City of Laredo v. Montano*, 414 S.W.3d 731 (Tex. 2013) (The Supreme Court of Texas reversed and remanded to determine attorney's fees when the attorney testified to the time expended and the hourly rate but failed to provide evidence of the time devoted to specific tasks.).

Joe Lovell, an attorney at Lovell, Lovell, Newsom, and Isern, the firm representing Aranda Pools, testified that the total attorney's fees shown on the spreadsheet was "just a running total of the attorney's fees that have been built up." Lovell explained that there were various rates depending on who the attorney was but that there were primarily only two attorneys that were billing. Lovell explained that Tim Newsom charged $300 an hour in this case and that Newsom's rate encompasses almost all of the attorney's fee amount seen on the spreadsheet until around March. Lovell asserted that he began to help in March and that his rate was $375 an hour but that his time expended on the Aranda case was on a contingent basis. Barbara Bauernfeind also worked on the case, and her rate was $250 an hour.

Lovell also explained why some months incurred more attorney's fees than others. Lovell testified that, starting in January of 2015, depositions started "getting taken" along with "motion practice and people will file various motions, and there was some of that happening." Pretrial began in May, and Lovell asserted that

"pretrial is almost as much work as the trial, because that's where the Court sets deadlines." "[T]he Court wants us to make sure we've marked our exhibits and we've identified our witnesses and we've exchanged all those things with the other party. And we've gotten everything organized. And we have hearings after hearings after hearings on motions after motions after motions." Lovell testified that they had reasonably accumulated 656 hours in this case and "applying [Newsom's] rate and mine and what little bit Barbara had done, carries that out to the $206,500."

Similarly, in *City of Laredo v. Montano*, the court held that testimony that the attorneys spent a lot of time preparing for the lawsuit, conducted a lot of research, visited the premises involved in the lawsuit "many, many, many, many times," and spent many hours on motions and depositions was not evidence of a reasonable attorney's fee under lodestar. 414 S.W.3d at 736.

In *Long*, the evidence indicated that one attorney spent 300 hours on the case and another spent 344.50 hours at their respective hourly rates. *Long v. Griffin*, 442 S.W.3d 253, 255 (Tex. 2014). Comparable to this case, the evidence in *Long* showed that the case involved extensive discovery, several pretrial hearings, and multiple motions. *Id.* The court held that such evidence merely offered generalities about the work performed and, as such, was not sufficient evidence under the lodestar method. *Id.* at 255–56; *see El Apple*, 370 S.W.3d at 763 ("generalities such as the amount of discovery in the case, the number of pleadings filed, the number of witnesses questioned, and the length of the trial" are relevant but provide "none of the specificity needed for the trial court to make a meaningful lodestar determination").

Taking into consideration *El Apple*, *Long*, and *City of Laredo*, the evidence in this case lacked the specificity required under the lodestar method. Accordingly, we agree with Arrington that the evidence is insufficient to support the amount of attorney's fees awarded. Arrington's third issue is sustained.

We reverse that portion of the judgment in which the trial court awarded $300,000 in attorney's fees, and we remand this cause to the trial court for a redetermination of attorney's fees consistent with this opinion. In all other respects, we affirm the judgment of the trial court.

JIM R. WRIGHT
CHIEF JUSTICE

August 31, 2017

Panel consists of: Wright, C.J.,
Willson, J., and Bailey, J.