

Opinion issued May 3, 2012



In The
Court of Appeals
For The
First District of Texas

NO. 01-11-00382-CV

JEANNE KIRKPATRICK, Appellant

V.

LVNV FUNDING, LLC, Appellee

**On Appeal from the 165th District Court
Harris County, Texas
Trial Court Cause No. 2009-37721**

MEMORANDUM OPINION

Appellant, Jeanne Kirkpatrick, challenges the trial court's judgment, entered after a bench trial, in favor of appellee, LVNV Funding, LLC ("LVNV"), in

LVNV's suit against Kirkpatrick for breach of contract. In three issues, Kirkpatrick contends that the evidence is legally and factually insufficient to support the trial court's judgment and the trial court erred in admitting into evidence LVNV's business records affidavit and denying her motion for instructed verdict.

We affirm.

Background

In its petition,¹ LVNV, as the assignee of the "Original Creditor" Sears, alleged that Kirkpatrick received and used, or authorized the use of, a Sears credit card; she defaulted on her payment obligation; and the "entire balance" became due. In support of its breach of contract claim, LVNV asserted that Sears made Kirkpatrick an offer of credit; Kirkpatrick's use of the Sears card constituted her acceptance of the Sears card member agreement; Sears had sent Kirkpatrick monthly bills reflecting all charges, payments, and balances due; Kirkpatrick owed a balance of \$18,080.32; and Kirkpatrick had not satisfied LVNV's demand for payment.²

¹ At the beginning of its petition, LVNV identified the defendant as "Jeanne Kirkpatrick" with a specific social security number. As is explained below, the trial court's judgment is similarly limited by reference to "Jeanne Kirkpatrick" with the same specific social security number.

² LVNV also asserted causes of action against Kirkpatrick for money had and received, account stated, and quantum meruit.

Kirkpatrick filed an answer generally denying LVNV's allegations and asserting multiple verified denials. She denied that the account "was true," she had agreed to pay for the services, she had entered into any transactions with LVNV, and LVNV had presented the claim to her.

At the beginning of the trial, LVNV sought to admit into evidence the business records of Tobie Griffin, a designated agent of LVNV. Attached to Griffin's affidavit were records pertaining to the Sears credit card allegedly issued to Kirkpatrick. Kirkpatrick objected to the admission of this affidavit on the ground that it was not based upon the personal knowledge of the previous account owner's records. Kirkpatrick complained that although LVNV had identified Sears as the "Original Creditor," neither the affidavit nor the attached documents reflect how "Citibank" had "acquired the Sears account." The trial court overruled Kirkpatrick's objection and admitted into evidence the business records affidavit and the attached documents.

In her affidavit, Griffin testified that she had personal knowledge of the books and records of LVNV concerning its claim against Kirkpatrick. And Griffin explained that she attached to her affidavit forty-eight pages of records, kept by LVNV in the regular course of its business, which pertained to "Jeanne Kirkpatrick" with the same specific social security number alleged in LVNV's

petition. Griffin noted that this “was the name carried in [LVNV’s] books and records” and it was in the regular course of its business for an employee with personal knowledge of the act to make the records or to transmit the information, the records were made at or near the time of the acts indicated in the records, the records were originals or exact duplicates of those records maintained by LVNV pertaining to the account of Jeanne Kirkpatrick, and, per LVNV’s petition, there was an outstanding balance of \$18,080.32.

The first document attached to Griffin’s business records affidavit is the affidavit of Nikki Foster, an “authorized representative” of LVNV, who testified that the sum of \$18,080.32, with interest at 6% “per the terms and conditions,” was due and owing and that “all just and lawful offsets, payments, and credits have been allowed.” Foster referenced the account number that appears in the attached documentation. The second attached document, an electronic record generated by LVNV, reflects an outstanding account balance of \$18,080.32, identifies Jeanne Kirkpatrick as the account holder, identifies the account number and the last four digits of the specific security number alleged by LVNV in its petition, and lists Kirkpatrick’s specific address in Houston, Texas. The statement further identifies the “current owner” of the account as LVNV, the “Original Creditor” on the account as “Sears/Sears MasterCard Classic,” and the “Previous Owner” of the

account as “Citibank.” Finally, the document reflects an “LVNV Purchase Date” of “6/02/2006” and an “Account Origination Date” as “7/01/1975.”

The next document attached to Griffin’s affidavit is the affidavit of C. Sue Aaron, an employee of Citicorp Credit Services, Inc. (“CCSI”), who testified that she had personal knowledge of and was familiar with Citibank’s records and her testimony was based upon her personal knowledge and review of the records. Aaron explained that CCSI is a subsidiary of Citibank (South Dakota) N.A. and CCSI services credit card accounts for Citibank. Such services included maintaining records as they relate to credit cards owned by Citibank, including accounts previously owned by Citibank USA, NA, which merged into Citibank in October 2006. As custodian of records for Citibank, Aaron stated that records are kept by CCSI on behalf of Citibank in the regular course of business and it was in the regular course of business for an employee with knowledge to make the records. Aaron noted that CCSI, in the regular course of business, provided credit card processing services, including “causing to be sent to customers periodic billing statements reflecting true and correct activities on the customers’ respective accounts.” Aaron further noted that Citibank’s records indicated that an account was opened on “7/1/1975” “in the name of Jeanne Kirkpatrick” with the same specific social security number listed in LVNV’s petition, Citibank’s records showed that when the account was sold on “6/2/2006” there was a balance of

\$18,080.32, and the last payment that was made on the account was made on “11/13/2005.” Aaron stated that Kirkpatrick’s account had been sold by Citibank to Sherman Originator LLC (“Sherman”) pursuant to a purchase and sale agreement.

The next group of documents attached to Griffin’s affidavit includes twenty-one pages of statements identified as “Sears Statement Transaction” “Reference Reports.” All of these statements reflect a “Report Date” of October 2006 and a “Statement Date” including various dates from the years 2004, 2005, 2006. These statements set forth the same account number referenced in the affidavits and refer to “Jeanne E. Kirkpatrick” as the debtor. These statements also reflect various charges and payments, corresponding dates, and account balances. Some of the statements also include the remark, “Thank you,” in acknowledgement of a payment made by the debtor. Although the statements themselves do not include an address or any other indication on their face reflecting if and when they were sent, Aaron, as noted above, testified in her affidavit that Citibank sent to their customers “periodic billing statements.”

The next document attached to Griffin’s affidavit is a Bill of Sale, which states that Citibank assigned to Sherman “Accounts described in Section 1.2 of the Agreement.” The separate agreement referenced in this document was not included in the documents attached to the business records affidavit. The next

document attached to Griffin's affidavit is a "Sale and Assignment," which states that Sherman assigned to LVNV certain "Receivable Assets" as defined in the "Agreement" and identified on the "Receivable File (Exhibit A)." Again, the separate agreement referenced in this document is not attached to Griffin's affidavit. However, there is a document entitled "Exhibit A Receivables File" attached, and this document includes a series of twenty-six separate four digit numbers. There was no evidence introduced to explain the meaning of these numbers.

The next set of documents attached to Griffin's affidavit is fourteen pages of computer printouts, each containing a single row of electronic information. Among the electronic entries included in these documents is a reference to an account number that is consistent with the number listed in the "Sears Statement Transaction" "Reference Reports." These records identify the "debtor" as Jeanne Kirkpatrick, a debtor's address that matches the address listed in LVNV's electronic records attached to Giffin's affidavit, and a "debtor's ssn," which matches the last three digits of the social security number alleged in LVNV's petition. Additionally, there is a reference to an account opening date of "07011975," a "charge off amount" of \$18,080.32, a last payment date of "11132005," a last purchase date of "20050909," a current balance of \$18,080.32,

a date of original delinquency of “11232005,” an “OfficerName” of “Sears MasterCard Classic,” and a “Buyers Code” of “SHMC.”

The next document attached to Griffin’s affidavit is her second affidavit, in which she testified that she was an authorized representative of Sherman, from which LVNV acquired Jeanne Kirkpatrick’s account.

The final document attached to Griffin’s affidavit is a document titled “Sears National Bank Sears MasterCard Card Account Cardholder Account and Security Agreement.” This document consists of multiple pages and sets forth terms and conditions for an account.³

LVNV’s counsel then testified as to her attorney’s fees,⁴ to which Kirkpatrick objected on the ground that LVNV had failed to present its claim. In response, LVNV’s counsel presented a demand letter that she stated was sent to

³ Although LVNV did not offer any testimony or evidence to explain the information contained in these documents, counsel for LVNV, before testifying to her attorney’s fees, sought to provide an explanation. She stated that the documents attached to the business records affidavit included (1) “an affidavit from Citibank showing that they are the original creditor, showing the account originated with them, showing the amount due, and that it was transferred to Sherman,” (2) a “plethora of credit card statements,” (3) a bill of sale showing “how Citibank transferred the account to Sherman,” (4) a document showing that Sherman transferred the account to LVNV, (5) a document showing “the list of accounts that were transferred because accounts are transferred in bundles,” (6) a series of documents (presumably the fourteen pages of single-row electronic entries that we reference above) that are “data lines transfer of the account,” and (7) the terms and conditions of a credit card.

⁴ Although counsel cited multiple tasks for which she was seeking to recover fees, her testimony did not reference preparing and sending a demand letter.

Kirkpatrick. This demand letter, written on the letterhead of counsel's law firm "Hull & Associates P.C.," contains a signature block for "James N. Hull" and a recipient's address block for "Jeanne Kirkpatrick," which matches the address listed in LVNV's electronic records attached to Giffin's affidavit. It also identifies the "Previous Creditor" as Sears and the "Current Creditor" as LVNV, and it states that LVNV purchased the account from the "previous creditor." Kirkpatrick objected to the admission of the demand letter, noting, among other things, that it was not signed. She also complained that it did not include any reference to having been sent by certified mail, and she asserted that there is no evidence that she had received it. LVNV's counsel responded, "I believe the address on the demand letter is the same address [Kirkpatrick] responded to in interrogatories."⁵ Following this exchange, LVNV rested its case without introducing any further evidence.

Kirkpatrick requested an instructed verdict, which the trial court denied.⁶

Kirkpatrick then testified that her name, in 1975, was "Jeanne Keller" and she did

⁵ These interrogatories were not introduced into evidence. And, although counsel argued that the demand letter had been sent, LVNV did not offer any testimony that the letter was actually sent.

⁶ Kirkpatrick contended that LVNV had not proven that she was "the one and the same [person] as set forth in the business records affidavit." The trial court remarked, "Well, she may not be Jeanne Kirkpatrick, but [LVNV] has proved [its] case regarding a Jeanne Kirkpatrick, so it's denied."

not become “Jeanne Kirkpatrick” until she married her husband in 1978.⁷ She noted that she had divorced Mr. Kirkpatrick in 2006. She denied that she was the holder of the account, stating, “I have never seen this account.” When asked whether she had ever been the holder of a Sears MasterCard, Kirkpatrick stated, “Not that I can ever remember.” When asked to look through the various charges and payments on the statements, she stated that she did not make the charges or payments, did not know if anyone had made payments on her behalf, and did not know whether her husband had made any charges. She also denied ever having seen a demand letter from LVNV.

On cross-examination, Kirkpatrick stated that she had one credit card, which was a Visa, but she agreed that she had previously shopped at Sears. When asked whether she had ever dined at Macaroni Grill and Steak and Ale, charges for which appeared on the statements, Kirkpatrick stated that she had. When asked whether she had shopped at “the big liquor store,” Kirkpatrick stated she had not. When asked how she had paid for items when she shopped at Sears, Kirkpatrick stated that it had been a “long time” since she had been to Sears but that she used “check or cash usually.” She further stated, “I may have charged something at Sears but I don’t ever remember doing it. . . . I had a Sears card that you could charge on but

⁷ When asked about when she married her husband, the record reflects that she stated “1975—‘8,” and, when asked again, she repeated 1978.

not a MasterCard from Sears.” Following this answer, LVNV’s counsel asked the trial court “to take judicial notice that [Kirkpatrick] has admitted that she had a Sears card that she charged on.” Kirkpatrick then stated, “I have never said I didn’t have a Sears credit card. I just didn’t have their —a Sears charge card. You can’t use those at Macaroni Grill, can you?” Finally, Kirkpatrick provided her “current address,” which matches the address listed in LVNV’s electronic records attached to Giffin’s affidavit.

On re-direct examination, Kirkpatrick stated that she had no knowledge of receiving any statements from the Sears MasterCard or the Citibank MasterCard referenced in the lawsuit at her home address. Kirkpatrick also stated that, despite having asked for it, LVNV was not able to produce a copy of the original agreement between her and Sears, there are no documents showing that she had ever applied for the account, and there are no originals or copies of actual statements sent to her in the case.

The trial court entered judgment in favor of LVNV against “Jeanne Kirkpatrick” with the same specific social security number alleged in LVNV’s petition. It awarded LVNV \$18,080.32, plus interest at 6%, and \$5,000 in attorney’s fees. In its findings of fact and conclusions of law, the trial court found that Kirkpatrick and LVNV entered into an account agreement, Kirkpatrick purchased goods and services on the account, Kirkpatrick promised to pay for the

account, and Kirkpatrick breached the account agreement by not paying the balance of \$18,080.32. The trial court concluded that Kirkpatrick was also responsible for interest and attorney's fees and LVNV had standing to sue for breach of the account agreement.

Legal and Factual Sufficiency

In her first issue, Kirkpatrick argues that the evidence is legally and factually insufficient to support the trial court's judgment and its awards of actual damages and attorney's fees because there is no evidence of a valid existing agreement between her and LVNV, she breached the agreement, LVNV tendered performance, LVNV sustained damages, or LVNV presented the claim to her. Kirkpatrick asserts that she presented the trial court with "irrefutable evidence" that she did not enter into any agreement with Sears. Kirkpatrick also complains that, in the business records affidavit of Tobie Griffin and the attached documents, there "is no mention of how Citibank acquired the account from Sears."

In an appeal of a judgment rendered after a nonjury trial, a trial court's findings of fact have the same weight as a jury's verdict, and we review the legal and factual sufficiency of the evidence used to support them just as we would review a jury's findings. *Catalina v. Blasdel*, 881 S.W.2d 295, 297 (Tex. 1994). In conducting a legal-sufficiency review of the evidence, we must consider all of the evidence in the light most favorable to the verdict and indulge every reasonable

inference that would support it. *City of Keller v. Wilson*, 168 S.W.3d 802, 822 (Tex. 2005). In determining whether legally-sufficient evidence supports the finding under review, we must consider evidence favorable to the finding, if a reasonable fact finder could consider it, and disregard evidence contrary to the finding, unless a reasonable fact finder could not disregard it. *Id.* at 827. When a party attacks the legal sufficiency of an adverse finding on which it did not have the burden of proof, it must demonstrate that there is no evidence to support the adverse finding. *Croucher v. Croucher*, 660 S.W.2d 55, 58 (Tex. 1983); *Bellino v. Comm'n for Lawyer Discipline*, 124 S.W.3d 380, 385 (Tex. App.—Dallas 2003, pet. denied). We will sustain a legal-sufficiency or “no evidence” challenge if the record shows one of the following: (1) a complete absence of evidence of a vital fact, (2) rules of law or evidence bar the court from giving weight to the only evidence offered to prove a vital fact, (3) the evidence offered to prove a vital fact is no more than a scintilla, or (4) the evidence establishes conclusively the opposite of the vital fact. *City of Keller*, 168 S.W.3d at 810.

In reviewing a factual-sufficiency challenge, we consider and weigh all of the evidence supporting and contradicting the challenged finding and set aside the finding only if the evidence is so weak as to make the finding clearly wrong and manifestly unjust. *Cain v. Bain*, 709 S.W.2d 175, 176 (Tex. 1986). When a party attacks the factual sufficiency of an adverse finding on an issue on which it did not

have the burden of proof at trial, it must show that there is insufficient evidence to support the adverse finding. *Vongontard v. Tippit*, 137 S.W.3d 109, 112 (Tex. App.—Houston [1st Dist] 2004, no pet.).

We review a trial court's conclusions of law de novo, and we will uphold the conclusions if the judgment can be sustained on any legal theory supported by the evidence. *BMC Software Belgium, N.V. v. Marchand*, 83 S.W.3d 789, 794 (Tex. 2002). Although a trial court's conclusions of law may not be challenged for factual sufficiency, we may review the legal conclusions drawn from the facts to determine whether the conclusions are correct. *BMC Software Belgium, N.V.*, 83 S.W.3d at 794. If we determine that a conclusion of law is erroneous, but that the trial court nevertheless rendered the proper judgment, the error does not require reversal. *BMC Software Belgium, N.V.*, 83 S.W.3d at 794. Finally, we note that the trial court acts as fact-finder in a bench trial and is the sole judge of the credibility of witnesses. *HTS Servs., Inc. v. Hallwood Realty Partners, L.P.*, 190 S.W.3d 108, 111 (Tex. App.—Houston [1st Dist.] 2005, no pet.).

Breach of Contract

To recover on its breach of contract claim against Kirkpatrick, LVNV had to establish that (1) a valid contract existed; (2) it performed or tendered performance; (3) Kirkpatrick breached the contract; and (4) LVNV was damaged as a result of Kirkpatrick's breach. *See Winchek v. Am. Express Travel Related*

Servs. Co., 232 S.W.3d 197, 202 (Tex. App.—Houston [1st Dist.] 2007, no pet.). Parties form a binding contract when the following elements are present: (1) an offer; (2) an acceptance in strict compliance with the terms of the offer; (3) meeting of the minds; (4) each party’s consent to the terms; and (5) execution and delivery of the contract with the intent that it be mutual and binding. *See Winchek*, 232 S.W.3d at 202.

Here, LVNV presented evidence that, in 1975, Citibank extended an offer of credit to “Jeanne Kirkpatrick” with a specific social security number, Kirkpatrick used the card by incurring charges and making payments, Kirkpatrick was provided statements reflecting her charges, payments, and balances, and Kirkpatrick defaulted by failing to make payments. *See Winchek*, 232 S.W.3d at 202 (holding that “conduct in using the card and making payments on the account for the purchases and charges reflected on [defendant’s] monthly billing statements manifested her intent that the contract become effective”). In regard to the discrepancy regarding the identity of the original creditor, although LVNV certainly could have offered additional testimony explaining the documents attached to Griffin’s business records affidavit, the trial court could have reasonably concluded that the actual original owner of the account was Citibank. LVNV presented affidavit and documentary testimony demonstrating that Citibank

originated the account in 1975, assigned the account to Sherman, and Sherman then assigned the account to LVNV.

In sum, although Kirkpatrick denied being the account holder, the record reflects that she did have the same name as the debtor, and she agreed that she lived at the same address of the debtor identified in the documents that were attached to Griffin's business records affidavit. In addition, LVNV's business records affirmatively show that Kirkpatrick, who LVNV more specifically identified with the last four digits of her social security number, had an account with Citibank and had purchased goods and services on that account. The monthly statements show Kirkpatrick's name, reflect the specific charges, payments, and balances, and identify the same account number that is referred to in all of the supporting affidavits and documents. We conclude that LVNV presented some evidence that Kirkpatrick had an account with Citibank and owed an outstanding balance on the account.

Viewing the evidence in the light most favorable to the trial court's judgment, we hold that the evidence is legally sufficient to support the trial court's findings that Kirkpatrick and Citibank entered into an account agreement; Kirkpatrick purchased goods and services upon her account; by failing to pay her outstanding balance, she breached the account agreement; and LVNV, as the assignee of the account, was damaged in the amount of \$18,080.32. Moreover,

after considering all of the evidence in a neutral light, we hold that the evidence is factually sufficient to support the trial court's findings that Kirkpatrick breached her contract by failing to pay her account and damaged LVNV in the amount of \$18,080.32.

Presentment

A party may recover reasonable attorney's fees if its claim is for "an oral or written contract." TEX. CIV. PRAC. & REM. CODE ANN. § 38.001(8) (Vernon 2008). To recover attorney's fees under section 38.001(8), a claimant must: (1) be represented by an attorney; (2) present the claim to the opposing party or to a duly authorized agent of the opposing party; and (3) show that payment was not tendered before the expiration of the 30th day after the claim was presented. *Id.* § 38.002(1)–(3) (Vernon 2008). Presentment of a claim is required to allow the debtor to pay the claim before incurring an obligation to pay attorney's fees. *Panizo v. Young Men's Christian Ass'n of the Greater Houston Area*, 938 S.W.2d 163, 168 (Tex. App.—Houston [1st Dist.] 1996, no writ).

While the filing of a lawsuit does not, by itself, constitute presentment, no particular form of presentment is required—it may be written or oral. *Id.* "[A]ll that is necessary is that a party shows that its assertion of a debt or claim and a request for compliance was made to the opposing party, and the opposing party refused to pay the claim." *Standard Constructors, Inc. v. Chevron Chem. Co.*, 101

S.W.3d 619, 627 (Tex. App.—Houston [1st Dist.] 2003, pet. denied). Nonpayment of a bill or invoice for thirty days has been held to satisfy the presentment requirement. *See De Los Santos v. Sw. Tex. Methodist Hosp.*, 802 S.W.2d 749, 757 (Tex. App.—San Antonio 1990, no writ), *overruled on other grounds*, 876 S.W.2d 314 (Tex. 1994). Here, the affidavit of Aaron and the account statements contained in the record provided some evidence that Citibank sent Kirkpatrick billing statements requesting payment for outstanding amounts. Moreover, although Kirkpatrick denied receiving it, Citibank introduced into evidence a copy of a demand letter that was addressed to Kirkpatrick. On cross-examination, Kirkpatrick agreed that she lived at this address. Accordingly, we hold that the evidence is legally and factually sufficient to support the trial court’s finding that LVNV presented its claim to Kirkpatrick. *See City of Keller*, 168 S.W.3d at 819; *Cain*, 709 S.W.2d at 176.

We overrule Kirkpatrick’s first issue.

Business Records Affidavit

In her second issue, Kirkpatrick argues that the trial court erred in admitting into evidence LVNV’s business records affidavit because there is no evidence that LVNV or Sherman “relied upon the accuracy of the Sears account,” no evidence as to how Citicorp or Citibank “acquired the Sears account,” and “the records

attached to the affidavit show that the records are not trustworthy based on inconsistent records within the same affidavit.”

We review a trial court’s decision to admit or exclude evidence for an abuse of discretion. *In re J.P.B.*, 180 S.W.3d 570, 575 (Tex. 2005). A document authored or created by a third party may be admissible as business records of a different business if: (a) the document is incorporated and kept in the course of the testifying witness’s business; (b) that business typically relies upon the accuracy of the contents of the document; and (c) the circumstances otherwise indicate the trustworthiness of the document. *Simien v. Unifund CCR Partners*, 321 S.W.3d 235, 240–41 (Tex. App.—Houston [1st Dist.] 2010, no pet.) (citing *Bell v. State*, 176 S.W.3d 90, 92 (Tex. App.—Houston [1st Dist.] 2004, no pet.)); *Harris v. State*, 846 S.W.2d 960, 963–64 (Tex. App.—Houston [1st Dist.] 1993, pet. ref’d).

Here, Tobie Griffin testified that the records were kept by LVNV in the regular course of its business and she had personal knowledge of the books and records concerning LVNV’s claim against Kirkpatrick. Thus, LVNV presented evidence that the documents attached to Griffin’s affidavit were incorporated into and kept in the course of LVNV’s business. *See id.* Moreover, given Griffin’s affidavit testimony that she had personal knowledge of the records retained by LVNV pertaining to Kirkpatrick’s account, and Aaron’s supporting affidavit testimony, LVNV presented evidence that it relied upon the accuracy of the

contents of the documents it maintained. *See id.* Finally, because Citibank “must keep careful records of its customer’s credit card debt,” and because “failure to keep accurate records could result in criminal or civil penalties,” the circumstances indicate the trustworthiness of the documents attached to Griffin’s affidavit. *See id.* (citing *Harris*, 846 S.W.2d at 963). In regard to Kirkpatrick’s primary complaint that there is no evidence demonstrating an assignment from Sears to Citibank, the trial court could have reasonably found that Aaron’s affidavit constituted some evidence that Citibank, not Sears, was actually the original owner of the account. We conclude that the records attached to Griffin’s affidavit, which were authored or created by a third party other than LVNV, were admissible as business records. Accordingly, we hold that the trial court did not err in admitting into evidence the business records affidavit of Griffin and the attached documents.

We overrule Kirkpatrick’s second issue.

Instructed Verdict

In her third issue, Kirkpatrick argues that the trial court erred in denying her motion for instructed verdict because there is legally insufficient evidence to support a finding that she had an agreement with LVNV, she breached the agreement, LVNV performed, or LVNV sustained damages.

Having held that the evidence is legally sufficient evidence to support the trial court's judgment in favor of LVNV on its claim for breach of contract, we overrule Kirkpatrick's third issue.⁸

Conclusion

We affirm the judgment of the trial court.

Terry Jennings
Justice

Panel consists of Justices Jennings, Massengale, and Huddle.

⁸ Kirkpatrick waived any error in the denial of her motion for directed verdict by introducing her own evidence after LVNV had rested and not reurging her motion at the close of all of the evidence. *See Shindler v. Marr & Assoc.*, 695 S.W.2d 699, 706 (Tex. App.—Houston [1st Dist.] 1985, writ ref'd n.r.e.). However, because she was not required to preserve her legal sufficiency challenge after the bench trial, we have addressed Kirkpatrick's legal sufficiency challenge. *See* TEX. R. APP. P. 33.1(d) ("In a nonjury case, a complaint regarding the legal or factual sufficiency of the evidence . . . may be made for the first time on appeal in the complaining party's brief.").