Affirmed and Memorandum Opinion filed July 27, 2010.

In The

Fourteenth Court of Appeals

NO. 14-08-00890-CV

E & A UTILITIES, INC., Appellant

V.

RONNIE JOE, Appellee

On Appeal from the County Civil Court at Law No. 3
Harris County, Texas
Trial Court Cause No. 875009

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

E & A Utilities, Inc. ("E & A") filed suit against Ronnie Joe alleging that Joe failed to pay for construction services provided by E & A. The jury rejected E & A's breach-of-contract claim but awarded E & A $4,500 in quantum-meruit damages. In six issues, E & A challenges the trial court's judgment. We affirm.

I. BACKGROUND

E & A connects sewer lines from private properties to sewer lines owned by the City of Houston ("the City"). In April 2006, E & A and Joe entered into an agreement for E & A to connect Joe's house at 5814 Tautenhahn ("the property") to the City's sewer

lines. E & A alleges that the parties agreed to a price of $6000. Era Land, Jr. ("Land") is president and founder of E & A. Land testified that he inspected and measured the property before proposing to perform the work for $6,000. According to Land, Joe failed to sign any proposal or agreement but told Land, "Go ahead and do the work." Land procured a work permit from the City for the project. At trial, Land described the services and materials provided by E & A, which included the removal of Joe's existing septic tank. Land testified that, after he completed the project, Joe refused to pay $6,000, instead offering $1,000.

Joe's version of events differs significantly. Joe is employed as a truck driver and lives at 5814 Tautenhahn but testified that another person owns the property. He testified that he had an agreement with E & A to connect the property to the City's sewer line for $2,500. Joe admitted that E & A connected the property to the City's sewer line but testified that E & A did not remove the existing septic tank. Joe testified that upon completion of the project, he tendered $2,500 to E & A, but Land responded he was owed $6,000.

The jury found that Joe did not fail to fulfill his contract with E & A. However, the jury found that E & A provided compensable services to Joe, the reasonable value of which was $4,500, and awarded E & A attorney's fees. The trial court rendered judgment on the jury's verdict.

II. LATE-FILED PLEADING

In its first issue, E & A contends the trial court erred by allowing Joe to file an untimely amended answer in which a verified denial and new defense were asserted.

We review a trial court's decision on whether to allow the amendment of pleadings under an abuse-of-discretion standard. *Air Prods. & Chems., Inc. v. Odfjell Seachem A/S*, 305 S.W.3d 87, 92 (Tex. App.—Houston [1st Dist.] 2009, no pet.). A trial court abuses its discretion when its ruling is arbitrary, unreasonable, or without reference

to any guiding rules or legal principles. *K-Mart Corp. v. Honeycutt*, 24 S.W.3d 357, 360 (Tex. 2000).

Under the Texas Rules of Civil Procedure, "any pleadings, responses or pleas offered for filing within seven days of the date of trial or thereafter . . . shall be filed only after leave of the judge is obtained, which leave shall be granted by the judge unless there is a showing that such filing will operate as a surprise to the opposite party." Tex. R. Civ. P. 63. Even when leave of court is required to file an amended pleading, the trial court may not refuse an amended pleading unless (1) the opposing party presents evidence of surprise or prejudice, or (2) the amendment asserts a new cause of action or defense and thus is prejudicial on its face, and the opposing party objects to the amendment. *Greenhalgh v. Serv. Lloyds Ins. Co.*, 787 S.W.2d 938, 939 (Tex. 1990).

In determining whether an amendment is prejudicial on its face, the amendment must be evaluated in the context of the entire case. *See Stephenson v. LeBoeuf*, 16 S.W.3d 829, 839 (Tex. App.—Houston [14th Dist.] 2000, pet. denied). An amendment is prejudicial on its face if (1) it asserts a new substantive matter that reshapes the nature of the trial itself, (2) the opposing party could not have anticipated the amendment in light of the prior development of the case, and (3) the opposing party's presentation of the case would be detrimentally affected. *Dunnagan v. Watson*, 204 S.W.3d 30, 38 (Tex. App.—Fort Worth 2006, pet. denied).

E & A presented no evidence of surprise or prejudice. Thus, the trial court abused its discretion by allowing the amendment only if it was prejudicial on its face. We first consider whether the amendment asserted a new substantive matter that reshaped the nature of the trial itself.

Joe's inclusion of a verified denial in his amended answer did not involve a new substantive matter but was merely an attempt to "comply with a procedural requirement of contesting [E & A's] sworn account by a verified denial pursuant to a rule that functions to allocate the burden of proof." *Smith Detective Agency*, 938 S.W.2d at 749; *see also Chapin & Chapin, Inc. v. Tex. Sand & Gravel Co.*, 844 S.W.2d 664, 664–65

(Tex. 1992) (per curiam) (holding that amendment adding a verified denial filed the morning of trial "did not change a single substantive issue for trial"). Thus, the verified denial was not prejudicial on its face.

Joe also added the following sentence to his amended answer: "Defendant does not own the property located as 5814 Tatenhahn Road, Houston, Texas 77016 . . . ." We fail to understand how this amendment reshaped the nature of the underlying contract dispute. Joe admitted at trial that he entered into an agreement with E & A to connect the property to the City's sewer system. Whether Joe owned the property was inconsequential to the existence of the parties' agreement but instead related to whether E & A could foreclose on a mechanic's lien on the property. The existence of a lien was beyond the scope of trial; E & A's counsel explained before trial that the lien is "not relevant to the issues here. [It's] relevant to whether or not we can collect on any judgment, if we should get one." Therefore, the sentence added in Joe's amended answer did not assert a new substantive matter that reshaped the nature of the trial.

Accordingly, we hold that the trial court did not abuse its discretion in allowing the amended answer. We overrule E & A's first issue.

III. FACTUAL SUFFICIENCY

In its fifth issue, E & A argues that the evidence is factually insufficient to support the jury's award of damages and attorney's fees.

In a factual-sufficiency review, we consider and weigh all the evidence, both supporting and contradicting the finding. *Mar. Overseas Corp. v. Ellis*, 971 S.W.2d 402, 406–07 (Tex. 1998); *Thomas v. Uzoka*, 290 S.W.3d 437, 452 (Tex. App.—Houston [14th Dist.] 2009, pet. denied). When, as here, a party attacks factual sufficiency with respect to an adverse finding on which it had the burden of proof, it must demonstrate on appeal that the finding is against the great weight and preponderance of the evidence. *Dow Chem. Co. v. Francis*, 46 S.W.3d 237, 242 (Tex. 2001). We will set aside the finding only if it is so contrary to the overwhelming weight of the evidence as to be clearly

wrong and unjust. *Id.* The trier of fact is the sole judge of the credibility of witnesses and the weight to be given to their testimony. *GTE Mobilnet of S. Tex. Ltd. P'ship v. Pascouet*, 61 S.W.3d 599, 615–16 (Tex. App.—Houston [14th Dist.] 2001, pet. denied). Because we are not a fact finder, we may not pass upon the witnesses' credibility or substitute our judgment for that of the jury, even if the evidence would support a different result. *Mar. Overseas Corp.*, 971 S.W.2d at 407; *Thomas*, 290 S.W.3d at 452. The amount of evidence necessary to affirm a judgment is far less than the amount necessary to reverse it. *Thomas*, 290 S.W.3d at 452; *Pascouet*, 61 S.W.3d at 616. Thus, if we reverse a judgment for factual insufficiency, we must detail the evidence relevant to the issue and state how the contrary evidence greatly outweighs the evidence in support of the verdict; we need not do so when affirming a jury's verdict. *Mar. Overseas Corp.*, 971 S.W.2d at 407; *Thomas*, 290 S.W.3d at 453.

A. Damages

E & A first argues that the jury's award of $4,500 is against the great weight and preponderance of the evidence. The proper measure of damages for a claim in quantum meruit is the reasonable value of the work performed and materials furnished. *City of Houston v. Swinerton Builders, Inc.*, 233 S.W.3d 4, 10 n.7 (Tex. App.—Houston [1st Dist.] 2007, no pet.).

At trial, Land described the equipment, materials, and labor provided by E & A in completing the project. E & A presented an invoice for $6,000 that was purportedly sent to Joe. The value or price of the services provided and materials used were not itemized in the invoice.[1] E & A's services included digging multiple trenches, connecting the property to the City's sewer main, and destruction and removal of the existing septic tank. Land testified that $6,000 was a "fair amount" for the work performed. We conclude this testimony constitutes some evidence of the reasonable value for the work performed. *See Brender v. Sanders Plumbing, Inc.*, No. 02-05-00067-CV, 2006 WL

[1] The only evidence supporting itemized prices for any parts of the project was Land's testimony that the project required $1,120 worth of stabilized sand and evidence that E & A paid $25 for a work permit.

2034244, at *4 (Tex. App.—Fort Worth July 20, 2006, pet. denied) (mem. op.) ("To establish the right to recover reasonable charges, a claimant need not use the word 'reasonable'; a claimant need only present sufficient evidence to justify a jury's finding that the costs were reasonable."); *see also Elec. Wire & Cable Co. v. Ray*, 456 S.W.2d 260, 263 (Tex. Civ. App.—Houston [14th Dist.] 1970, writ ref'd n.r.e.) (testimony that the price charged for services was reasonable was some evidence relative to the reasonable value of the services).

Consequently, E & A presented evidence supporting its contention that the reasonable value of services rendered was $6,000. No other evidence regarding reasonable value of the services was presented. However, Joe's testimony that E & A failed to remove his septic tank provided the jury with a rational basis to award damages below $6,000. Accordingly, we cannot conclude that the jury's award of $4,500 in quantum-meruit damages was so against the overwhelming weight of the evidence as to be clearly wrong and unjust.

B. Attorney's Fees

E & A next argues that the jury's finding regarding attorney's fees was against the great weight and preponderance of the evidence. The jury awarded E & A $2,000 in attorney's fees for trial preparation, $1,000 in attorney's fees for appeal to the court of appeals, $1,000 for petition for discretionary review to the supreme court, and $1,000 for briefing in the supreme court if petition is granted.

The reasonableness of attorney's fees is ordinarily left to the factfinder, and a reviewing court may not substitute its judgment for the jury's. *Smith v. Patrick W.Y. Tam Trust*, 296 S.W.3d 545, 547 (Tex. 2009); *Ragsdale v. Progressive Voters League*, 801 S.W.2d 880, 881 (Tex. 1990) (per curiam). Factors to be considered in determining the amount of attorney's fees to be awarded include the following: (1) the time and labor required, novelty and difficulty of the question presented, and the skill required; (2) the likelihood that acceptance of employment precluded other employment; (3) the fee customarily charged for similar services; (4) the amount involved and the results

obtained; (5) the time limitations imposed by the client or the circumstances; (6) the nature and length of the professional relationship with the client; (7) the expertise, reputation, and ability of the lawyer performing the services; and (8) whether the fee is fixed or contingent. *Arthur Andersen & Co. v. Perry Equip. Corp.*, 945 S.W.2d 812, 818 (Tex. 1997).

E & A's counsel, Michael Jones, testified that he has been licensed to practice law in Texas since 1980 and is board certified in civil trial law. Jones testified that he has known Land for ten years and has previously represented E & A. Jones testified that E & A incurred approximately $11,400.00 in attorney's fees and expenses for trial preparation, which was a reasonable, necessary, and customary amount. His firm's invoices were admitted and itemized most of the legal services performed before trial. The invoices indicated that the attorneys who worked on this case billed at hourly rates of between $100 and $300 and that almost sixty hours of legal services had been provided. Jones testified that the hourly rates his firm charged were customary with those of other attorneys in Harris County, Texas. When asked to explain why his attorney's fees exceeded the amount in controversy, Jones testified that E & A incurred $5,000 in attorney's fees attempting to serve Joe, including seventeen visits by the process server to Joe's house and an eventual motion for substituted service; Jones testified that he believes Joe evaded service. Jones also testified that additional fees were incurred because the case was set for trial several times but never reached, thus necessitating preparation for trial multiple times. Finally, Jones testified that $15,000 was the necessary amount for attorney's fees for each stage of the appellate process.

We recognize nothing controverted that Jones's firm's hourly rates of between $100 and $300 were reasonable and necessary in Harris County. *See Cullins v. Foster*, 171 S.W.3d 521, 539–40 (Tex. App.—Houston [14th Dist.] 2005, pet. denied) (holding award of attorney's fees factually insufficient because jury's implicit finding regarding the necessary amount of time expended by attorneys was unreasonably low). Dividing the $2,000 awarded in attorney's fees by $200 (the median hourly rate charged)

indicates the jury awarded E & A attorney's fees for ten hours of service. Jones testified that he and co-counsel had each provided one-and-a-half hours of legal services on the day of trial, which, at the time of Jones's testimony, did not yet include Joe's case-in-chief or closing arguments. Thus, approximately half of the jury's ten-hour finding involves services Jones's firm provided on the day of trial. Nevertheless, we conclude there were facts and circumstances weighing against the requested amount of fees.

During cross examination, Jones agreed that few documents were filed in this case and only minimal discovery was conducted. The jury was aware of the simplistic nature of E & A's case, which was presented through the relatively short testimony of Land, a handful of exhibits, and Jones's testimony and documents regarding attorney's fees. The amount E & A sought in attorney's fees was more than double the amount awarded in quantum meruit. *See Inwood N. Homeowners' Ass'n, Inc. v. Wilkes*, 813 S.W.2d 156, 157–58 (Tex. App.—Houston [14th Dist.] 1991, no writ) (determining that amount in controversy is attendant circumstance); *see also Travis Law Firm v. Woodson Wholesale, Inc.*, No. 14-07-00204-CV, 2008 WL 4647380, at *4 (Tex. App.—Houston [14th Dist.] Oct. 21, 2008, no pet.) (mem. op.) (holding that attendant circumstances supported amount of fees awarded). Further, when asked by Joe's counsel whether it would have been more reasonable to attempt personal service on Joe three or four times, as opposed to seventeen times, and then move for substituted service, Jones did not answer "no" but replied, "We did all those things." The jury could have rationally determined that ten hours was a reasonable amount of time to expend in legal services for this case. Accordingly, we hold that the jury's award of $2,000 in attorney's fees for trial preparation is not so against the overwhelming weight of the evidence as to be clearly wrong and unjust.

We next consider whether the jury's award of $1,000 for each stage in the appellate process is against the great weight and preponderance of the evidence. As mentioned above, Jones testified that $15,000 was the necessary attorney's fees for each of the three appellate stages. Although Joe's counsel did not cross examine Jones

regarding, or present evidence controverting, the requested appellate fees, there were circumstances under which the jury could have questioned the reasonableness of these fees. Again, the jury was aware of the simplistic nature of the case; at $200 per hour, the jury's $1000 award allows for five hours of legal services per appellate stage. Further, the $45,000 requested for all three appellate stages significantly exceeded the amount awarded in quantum-meruit damages. Therefore, we cannot conclude the jury's award of $1,000 for each stage of appeal was so against the great weight and preponderance of the evidence as to be clearly wrong and unjust.

Having rejected each factual-sufficiency challenge, we overrule E & A's fifth issue.

IV. EXPERT TESTIMONY

In its third issue, E & A contends the trial court erred in allowing Joe to offer expert testimony when he was not qualified as an expert.

The following exchange occurred at trial:

> [Joe's Counsel]: Now, are you familiar with what is necessary to do what you asked Mr. Land to do, tap into the existing City of Houston water tank?
>
> [Joe]: Yes, I am.
>
> [E & A's Counsel]: Objection, Your Honor. Calls for expert testimony. This man has not been qualified as an expert witness.
>
> [Trial Court]: Okay. Well, he already answered, so overruled.
>
> [Joe's Counsel]: And how did you get that experience?
>
> [Joe]: Well, I ran a water line on my dad's property and tapped it into the city.
>
> [Joe's Counsel]: The same thing that Mr. Land did for you?
>
> [Joe]: Something like that.
>
> [Joe's Counsel]: So, you knew what needed to be done.
>
> [Joe]: Right.

> [Joe's Counsel]: And you went there and you observed everything that took place?
>
> [Joe]: Right.

E & A argues the trial court erred by failing to require Joe to demonstrate education, experience, and training in the relevant area of sewer construction. According to E & A, Joe's opinion testimony gave him an "aura of expertise and credibility before the jury to testify about [E & A's] work that he did not deserve." E & A contends the verdict was likely impacted by Joe's inadmissible opinion testimony because the jury awarded E & A less than the $6,000. E & A also argues that the trial court erred by admitting this testimony because Joe was not designated as a testifying expert. *See* Tex. R. Civ. P. 193.6(a).

We hold that the trial court did not err by admitting the challenged testimony because Joe did not offer an expert opinion. He merely testified he knew "what needed to be done" to connect the property to the City's sewer line because he had previously performed similar work. Joe never opined regarding the reasonable and necessary cost of materials and labor for the project. Although he testified that he would not have agreed to pay $6,000, he did not base this testimony on his experience in sewer construction.

Further, even if the trial court erred by allowing Joe to testify regarding his experience in sewer construction, we hold that such error was harmless. When an evidentiary ruling is erroneous, we will not reverse the court's judgment unless the ruling probably caused rendition of an improper judgment. Tex. R. App. P. 44.1(a); *Nissan Motor Co. v. Armstrong*, 145 S.W.3d 131, 144 (Tex. 2004). "A reviewing court must evaluate the whole case from voir dire to closing argument, considering the 'state of the evidence, the strength and weakness of the case, and the verdict.'" *Reliance Steel & Aluminum Co. v. Sevcik*, 267 S.W.3d 867, 871 (Tex. 2008) (*quoting Standard Fire Ins. Co. v. Reese*, 584 S.W.2d 835, 841 (Tex. 1979)). "[I]t is not necessary for the complaining party to prove that 'but for' the exclusion of evidence, a different judgment would necessarily have resulted." *McCraw v. Maris*, 828 S.W.2d 756, 758 (Tex. 1992).

The erroneous admission of evidence is likely harmless if the evidence was cumulative, or the rest of the evidence was so one-sided that the error likely made no difference in the judgment. *Reliance Steel*, 267 S.W.3d at 873. However, if erroneously-admitted evidence was crucial to a key issue, the error is likely harmful. *Id.*

The substance of Joe's testimony merely supported his assertion that he previously performed similar work, not that he is an expert regarding value of the construction services rendered. During jury argument, Joe's counsel mentioned Joe was familiar with the services rendered. However, it appears Joe's counsel ultimately argued—albeit improperly—that Joe agreed to $2,500 because another contractor made a similar bid (see issue four, *infra*). Additionally, E & A's counsel argued that Joe "is not a water sewer contractor. He doesn't have a license with [the City.] That's all wishful thinking." The jury was aware of the limited nature of Joe's sewer-construction experience; it is unlikely the jury considered Joe an expert regarding the value of E & A's services. Therefore, reviewing the record as a whole, we cannot conclude Joe's testimony regarding his work on a sewer line probably caused rendition of an improper judgment. We overrule E & A's third issue.

V. IMPROPER JURY ARGUMENT

In its fourth issue, E & A contends the trial court erred in allowing jury argument unsupported by the evidence.

Generally, to obtain reversal on the basis of improper jury argument, an appellant must prove (1) an error (2) that was not invited or provoked, (3) was preserved by an objection, and (4) was not curable by an instruction, a prompt withdrawal of the statement, or a reprimand by the judge. *Standard Fire Ins.*, 584 S.W.2d at 839. Prongs three and four are met when the trial court overrules a timely objection to improper argument. *See Lone Star Ford, Inc. v. Carter*, 848 S.W.2d 850, 854 (Tex. App.—Houston [14th Dist.] 1993, no writ). Appellant must also prove "that the argument by its nature, degree and extent constituted reversibly harmful error," and "that the probability that the improper argument caused harm is greater than the probability that the verdict

was grounded on the proper proceedings and evidence." *Standard Fire Ins.*, 584 S.W.2d at 839–40. The length of the argument, whether it was repeated or abandoned, and whether there was cumulative error are proper inquiries in this determination. *Id.* We must closely examine all of the evidence to determine the probable effect of the erroneous argument on a material finding. *Id.* at 840. Finally, we must evaluate the jury argument in light of the entire case, beginning with voir dire and ending with closing argument. *Id.*

During opening statement, Joe's counsel stated the jury would hear evidence that a different construction company offered to perform the project for $1,895. At trial, Joe's counsel asked Joe what price this second company bid, but the trial court sustained E & A's hearsay objection, and the testimony was excluded. During closing argument, the following exchange occurred:

> [Joe's counsel]: Mr. Joe testified that he's familiar with this type of work. He testified that he had somebody lined up to do the work for $1,895. - -
>
> [E & A's counsel]: Objection, you Honor. That never came into evidence.
>
> [Joe's counsel]: I think it did.
>
> [Trial Court]: I'm going to overrule that. It did.
>
> [Joe's counsel]: He had somebody out there to do the work for $1,895. He testified that . . . Mr. Land ran the guy off and said: I have a permit. He can't do the work. That's how he came up with $2,500. He would never have signed an agreement to pay Mr. Land $6000.

Because existence of the $1,895 bid was not admitted into evidence, the trial court erred in overruling E & A's objection. *See* Tex. R. Civ. P. 269(e). We next review the entire record to determine whether this error was so harmful that reversal is required.

The gist of the improper argument was that Joe would not have agreed to pay $6,000 for the project because another company had previously bid $1,895. The principal issue for the jury to decide was whether the contract was for $2,500 or $6,000. During opening statement, Joe's counsel expressed, "Our dispute with [Land] is that [Joe]

never agreed to pay him $6000 for a job that the evidence will show [Joe] had found somebody to do it for $1,895." At trial, Joe testified that he had an agreement with another contractor, but Land "ran the guy off." Additionally, the trial court exacerbated the improper jury argument by stating in front of the jury that evidence supported the argument. Nevertheless, we cannot conclude the probability that the improper argument caused harm is greater than the probability the verdict was grounded on proper proceedings and evidence.

Regarding E & A's breach-of-contract claim, the jury by implication believed Joe's testimony that the contract was for $2,500 because of its finding that Joe did not fail to comply with the contract. We do not believe the probability that the jury chose to believe Joe because of the improper argument is greater than the probability the jury chose to believe Joe based on the proper proceedings and evidence, *i.e.*, it is unlikely the jury found Joe's testimony that the contract was for $2,500 credible because he had a separate bid for $1,895.

Regarding E & A's quantum-meruit claim, the jury ultimately awarded $4,500, an amount significantly higher than $1,895 or $2,500. Further, as discussed in our factual-sufficiency analysis, the jury could have decided to award $4,500 because it found E & A failed to remove Joe's septic tank. Thus, we cannot conclude the probability that the jury awarded $4,500 because of the improper argument is greater than the probability the jury awarded this amount based on the proper proceedings and evidence. We overrule E & A's fourth issue.

VI. ALLEGED ERROR IN ALLOWING JOE TO PRESENT EVIDENCE

In its second issue, E & A argues the trial court erred by allowing Joe to testify and present evidence to dispute E & A's claims. Apparently, E & A is arguing that Joe should not have been allowed to present evidence because his amended answer was untimely. We overrule this argument based on our disposition of the first issue.

E & A also argues the trial court erred by allowing Joe to present evidence

because he was erroneously allowed to opine that he was familiar with the work performed by E & A and Joe's counsel gave improper jury argument regarding another contractor's bid of $1,895. According to E & A, viewed cumulatively, these errors caused the jury to conclude "there was no agreement with [E & A] for $6000, [Joe] was knowledgeable about E & A's sewer work, and that the reasonable value of [E & A's] labor, work and material was less than $6000." *See Weidner v. Sanchez*, 14 S.W.3d 353, 377–78 (Tex. App.—Houston [14th Dist.] 2000, no pet.) (explaining standard for cumulative error analysis). However, as previously discussed, Joe's testimony regarding his familiarity with the services E & A rendered and Joe's counsel's improper jury argument did not probably cause the rendition of an improper judgment, and we decline to hold differently simply because Joe complains of cumulative error. We overrule E & A's second issue.

VII. MOTION FOR NEW TRIAL

Finally, in its sixth issue, E & A contends the trial court erred by allowing its motion for new trial to be overruled by operation of law. Specifically, E & A argues the motion for new trial should have been granted because the trial court erred by granting Joe permission to file an untimely amended answer and offer evidence in support of his new defense. Because we have already determined that the trial court did not err by granting Joe permission to file the amended answer, we overrule E & A's sixth issue.

We affirm the judgment of the trial court.

/s/ Charles W. Seymore
Justice

Panel consists of Justices Yates, Seymore, and Brown.