In The

Court of Appeals

Ninth District of Texas at Beaumont

NO. 09-15-00014-CV

MEADWESTVACO CORPORATION, Appellant

V.

WAY SERVICE, LTD., Appellee

On Appeal from the 58th District Court
Jefferson County, Texas
Trial Cause No. A-190,889

MEMORANDUM OPINION

Way Service, Ltd. ("Way") and MeadWestvaco Corporation ("MWV"), a paper mill company, entered into an agreement in which MWV agreed to pay Way a monthly fee in exchange for Way's maintenance, repair, and replacement of HVAC equipment covered by the contract. Way agreed to repair equipment not covered by the contract at either a fixed or proposed rate. When MWV subsequently became dissatisfied with Way's services, it stopped paying Way. On January 14, 2011, MWV terminated the contract with Way as of January 31. Way

completed MWV's requested list of repairs and, on January 31, Way left the mill with no outstanding issues.

After MWV began complaining of additional problems, Way sued MWV for suit on a sworn account, breach of contract, and quantum meruit. MWV counterclaimed for breach of contract and other claims. The jury found that MWV breached the contract and that Way performed compensable work for MWV, did not breach the contract, and did not breach any warranty. The jury awarded Way damages for both breach of contract and quantum meruit. In four appellate issues, MWV contends that: (1) it did not breach the contract; (2) Way did breach the contract; (3) Way is not entitled to attorney's fees; and (4) the trial court committed jury charge error. We affirm the trial court's judgment in part and reverse and render in part.

Way's Breach of Contract Claim

In issue one, MWV raises several arguments challenging the jury's breach of contract findings. In its petition, Way alleged that (1) MWV breached the contract by failing to make payments pursuant to the contract; and (2) MWV owed $8,609.85 as a termination payment under the contract's termination clause. After finding that MWV breached the contract, the jury awarded $254,196.48 for three unpaid invoices and $8,609.88 as a termination payment.

We interpret a contract from a utilitarian standpoint, taking into consideration the specific business activity sought to be served. *FPL Energy, LLC v. TXU Portfolio Mgmt. Co., L.P.*, 426 S.W.3d 59, 63 (Tex. 2014). "We consider the entire writing to harmonize and effectuate all provisions such that none are rendered meaningless." *Id*. Moreover, under legal sufficiency review, we consider whether the evidence "would enable reasonable and fair-minded people to reach the verdict under review." *City of Keller v. Wilson*, 168 S.W.3d 802, 827 (Tex. 2005). We view the evidence in the light most favorable to the verdict, credit favorable evidence if a reasonable factfinder could, and disregard contrary evidence unless a reasonable factfinder could not. *Del Lago Partners v. Smith*, 307 S.W.3d 762, 770 (Tex. 2010). Under factual sufficiency review, we consider and weigh all the evidence, and will 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. *Dow Chem. Co. v. Francis*, 46 S.W.3d 237, 242 (Tex. 2001).

The contract required MWV to pay undisputed portions of properly documented invoices within sixty days of receipt of the invoice or performance of services described, whichever was later. If MWV disputed an invoice, it had to provide written notice of the reasons for withholding payment and pay any

undisputed portion of the invoice. MWV could terminate the contract at any time by providing Way with ten days of written notice. Way was entitled to a termination payment as follows:

> (a) for [s]ervices performed on a firm, fixed price basis, [Way] shall be entitled to (i) an amount, taking into account any progress payments previously paid, that equitably compensates [Way] for the value of conforming [s]ervices received by MWV through the effective date of termination and (ii) the reasonable costs incurred by [Way] to terminate any executory subcontracts and to demobilize; provided, however, in no event shall the sum of the progress payments previously received and the termination payment exceed the firm, fixed price amount payable hereunder[.]

The termination payment did not include compensation for "unabsorbed overheads or lost profits." Upon termination, Way warranted that all HVAC equipment would be in "operational and maintainable working condition[]" and if an inspection revealed otherwise, Way would be responsible for incurring "reasonable costs associated with bringing equipment up to Program standard."

On appeal, MWV takes the position that its failure to pay the invoices does not constitute a breach because any obligation to pay the invoices was discharged once MWV terminated the contract. MWV maintains that, upon termination, Way was entitled to nothing more than a termination payment. We do not read the contract's termination clause as eliminating MWV's obligation to pay for services

performed before termination. The termination clause specifically provides as follows:

> MWV shall have no further obligation to [Way] respecting terminated Services *not yet performed*. Except for the termination payment as provided herein, MWV's obligation to compensate [Way] for the Services shall be deemed to have been discharged upon termination. No termination . . . shall affect (a) any rights MWV may have with respect to any *Services performed prior to the effective date of termination*, (b) any pending Dispute . . . , or (c) any rights MWV may have with respect to any breach by [Way] . . . . (emphasis added).

Read in context, the portion of the termination clause addressing the discharge of this duty refers to services that have been contracted for but not yet performed. *See FPL Energy, LLC*, 426 S.W.3d at 63. Thus, MWV was not relieved of the responsibility for paying outstanding invoices for services performed before termination. Accordingly, Way could assert breach of contract for the three unpaid invoices.

Additionally, MWV argues that the evidence fails to support the jury's findings that MWV breached the contract and that MWV owed $254,196.48 for three unpaid invoices and $8,609.88 as a termination payment. John Riekart, Way's general manager, testified that MWV never paid invoices for November 2010, December 2010, or January 2011 in the amount of $84,732.16 each. He testified that Way performed the work identified in the invoices, and that MWV accepted and benefitted from the work. Malcolm Hanzel, MWV's contract

coordinator, admitted that MWV failed to pay the invoices. Despite being contractually obligated to provide Way with written notice of any dispute regarding the invoices, the record does not indicate that MWV did so before terminating the contract. Viewing the evidence in the light most favorable to the verdict, the jury could reasonably conclude that MWV breached the contract by failing to pay the undisputed invoices and that Way was entitled to $254,196.48, an amount that represented the three unpaid invoices. *See Smith*, 307 S.W.3d at 770; *see also Wilson*, 168 S.W.3d at 827. Such a finding is not so against the great weight and preponderance of the evidence that it is clearly wrong and unjust. *See Francis*, 46 S.W.3d at 242.

Riekert testified that when Way received the termination letter, it ceased ordering materials and canceled subcontractors and vendors. When asked if Way incurred demobilization costs of $8,609.85, he testified that the amount "sounds correct" and "I think around $8600 is the number." Our review of the record does not reveal which costs comprise this amount, whether previous progress payments were considered, or whether unabsorbed overheads and lost profits were excluded. Nor does Way point to such evidence in the record. Without such information, a reasonable jury could not conclude that Way was entitled to $8,609.85 as a termination payment. *See Smith*, 307 S.W.3d at 770; *see also Wilson*, 168 S.W.3d

at 827. Because the evidence is legally insufficient to support the jury's termination payment award, we need not address MWV's contention that Way was not entitled to a termination payment for non-conforming services. *See* Tex. R. App. P. 47.1.

Next, MWV contends that it was entitled to retain payments as a setoff. The contract provided that if Way breached the contract

> MWV shall have the right to retain out of any payments due or to become due to [Way] an amount sufficient to protect MWV completely from all corresponding present or future claims, losses, damages and expenses provided that MWV provides notice to [Way] setting forth MWV's reasons for such retainage. . . . Further, MWV shall have the right to set-off any costs, damages, expenses or other monies, the payment for which [Way] is responsible, against any amounts that MWV owes [Way] hereunder.

All notices were required to be in writing.

At trial, MWV attempted to admit a May 23, 2011, letter into evidence, which stated "for settlement purposes only[.]" MWV argues that this letter served as notice to Way of MWV's right to a setoff and that the trial court abused its discretion by excluding the letter from evidence. Evidence attempting to prove or disprove the validity or amount of a disputed claim, such as a settlement offer, is not admissible. *See* Tex. R. Evid. 408(a). "Whether the evidence is being impermissibly offered as evidence of liability or for some other valid reason is a

matter within the trial court's discretion." *Vinson Minerals, Ltd. v. XTO Energy, Inc.*, 335 S.W.3d 344, 352 (Tex. App.—Fort Worth 2010, pet. denied).

The record indicates that MWV's letter was sent in response to Way's demand letter. In the letter, MWV discussed the points on which the parties agreed and disagreed, asserted that Way is not owed for the final invoices and that MWV has a right to withhold payment as a setoff, and stated that if "Way refuses payment, MWV will have no choice but to demand payment and then sue." The letter further states:

> It is critical that if Way wishes to undertake any of the repairs remaining on the list, that it identify those projects by Wednesday, May 25 and commit to a date for completion that is reasonable and satisfactory to MWV business needs. Any projects not voluntarily undertaken by Way will be assigned out to JCI or another contractor for timely completion.
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> . . .
>
> We agree that Texas law provides for recovery of attorney fees in certain cases providing there is a claim for which recovery is awarded and that claim was presented for payment and no payment was made. We think that between the photos of the work (or lack thereof) in the wake of Way's exit from the facility, that Way is not entitled to payment and that MWV appropriately withheld or set off payments under the Agreement. Of course, the statute applies equally to MWV's claim for damages pursuant to Section 18 of the Agreement. Since that work has not yet been completed, however, we will wait to make formal demand until the actual cost of repairs and other damages is known.

The letter advised that dispute resolution must be completed before filing litigation and MWV designated a senior executive to facilitate that process. When

exercising its discretion, the trial court could reasonably conclude that the letter amounted to an inadmissible settlement communication. *See id*. at 352-53.

Even without the letter, the jury heard Hanzel testify that, after termination, MWV sent Way written notice of its intent to withhold money. *See McInnes v. Yamaha Motor Corp., U.S.A.*, 673 S.W.2d 185, 190 (Tex. 1984) ("The exclusion of cumulative evidence is not reversible error."). The jury also heard Riekert and Hassel Morgan, Way's former general manager, testify that Way never received written notice from MWV advising Way of its intent to either dispute the invoices or retain any payments. Alan Watters, MWV's maintenance engineering manager, admitted that no intent to withhold payment was issued before termination. As sole judges of the witnesses' credibility, the jurors were entitled to choose which testimony to believe. *See Wilson*, 168 S.W.3d at 819. In doing so, the jury could reasonably conclude that MWV was not entitled to an offset because it failed to provide Way with written notice pursuant to the contract.

MWV further argues that Way is not entitled to damages for quantum meruit because the work at issue was covered by the parties' agreement. "Quantum meruit is an equitable remedy which does not arise out of a contract, but is independent of it." *Vortt Expl. Co. v. Chevron U.S.A., Inc.*, 787 S.W.2d 942, 944 (Tex. 1990).

"Generally, a party may recover under quantum meruit only when there is no express contract covering the services or materials furnished." *Id.*

The jury's award of quantum meruit damages was based on two unpaid invoices that involved work performed on equipment not covered by the contract. In addition to addressing covered equipment, the contract also required Way to perform "additional, non-contract related, work on equipment as requested by MWV at labor rate[.]" Accordingly, the contract governed not only those services and materials rendered within the scope of the contract, but also those provided outside the contract's scope. Because the contract covered both types of materials and services, Way was not entitled to recover for quantum meruit. *See Vortt*, 787 S.W.2d at 944; *see also H2O Sols., Ltd. v. PM Realty Grp., LP*, 438 S.W.3d 606, 624 (Tex. App.—Houston [1st Dist.] 2014, pet. denied). We sustain issue one in part.

MWV's Breach of Contract Claim

In issue two, MWV challenges the legal and factual sufficiency of the evidence to support the jury's findings that Way did not breach the contract. First, MWV contends that Way failed to keep the "HVAC equipment in good working order and like-new condition" and provide quarterly preventative maintenance. Under the contract, Way agreed to provide preventative maintenance, *i.e.*, "[j]ob

labor, travel labor and travel and living expenses required to clean, align, calibrate, tighten, adjust, lubricate and paint equipment." The contract required preventative maintenance to be done bi-weekly for critical equipment identified by MWV and other maintenance no less than quarterly. The contract's warranty provision also provided:

> [Way] warrants that it has experience and expertise in performing services of the type required herein and that the Services performed hereunder shall (a) be performed in strict accordance with all conditions and requirements set forth in this Agreement, (b) be performed in strict accordance with all applicable laws and regulations, (c) be performed in a diligent and workmanlike manner by qualified and skilled personnel appropriately supervised, trained and licensed and (d) reflect the highest level of care, skill, knowledge and judgment required or reasonably expected of providers of comparable services. If MWV discovers that any Services performed by [Way] fail to conform to the above warranties, then [Way] shall, at MWV's option and at no cost to MWV, promptly correct or re-perform such non-conforming Services so that they conform to the above warranties. . . .

The contract provided that after completion of preventative maintenance, equipment would be in like-new condition or there would be a plan in place to return the unit to such condition.

Upon termination, Way warranted that the HVAC equipment would be in an operational and maintainable condition. If an inspection revealed otherwise, Way was responsible for reasonable costs associated with bringing equipment up to the program standard. Under this standard, all work was to be performed in a high-

quality manner, materials and craftsmanship were subject to MWV's inspection and approval, and non-compliant items were to be repaired or replaced at Way's expense. Way was also required to provide full unit replacement at the end of a unit's useful life and to keep equipment operating properly and efficiently. Way's failure or inability to remedy any non-conforming services authorized MWV to remedy those services and required Way to reimburse MWV.

Morgan testified that Way received almost daily calls from the mill. Bob Boyd, Way's service manager, testified that approximately forty percent of calls that Way received were related to problems with the way the plant was operating. Morgan, Riekert, and Boyd testified to problems with the water being supplied by the mill, and they explained that the poor water quality taxed the equipment. Boyd testified that the water temperature was sometimes too hot, the water pressure was sometimes too high, and the water contained damaging sediment. One reason for the water issue was MWV's decision to idle certain equipment in the mill. According to Riekert, some of the equipment filters did not last for their typical lifespan.

Way advised MWV of the need for cooling towers because the hot water was damaging the equipment. In May 2010, the parties met to discuss the issues and MWV told Riekert that "things are going in the right direction." MWV

acknowledged that water temperatures were a problem and affected the equipment's performance and lifespan. In June 2010, Way warned MWV that pieces of equipment were "being used in a way that is detrimental to their life expectancy." Riekert testified that MWV agreed to some of Way's recommendations for improving the water situation, such as installing a few cooling towers. The record indicates that the mill struggled with water-cooled condenser issues before Way's arrival. The mill also had chiller problems after Way's departure from the mill.

Riekert testified that Way performed preventative maintenance quarterly, but maintained critical pieces of equipment more frequently. He explained that Way's tasking system generated a monthly list of items that needed preventative maintenance. Riekert and Boyd testified that technicians also performed preventative maintenance when responding to trouble calls. Morgan testified that Way performed preventative maintenance in accordance with the contract and that, during his employment with Way, he saw weekly documents showing that maintenance was done. He testified that to ensure enough maintenance was being performed, he made sure that tasking was being generated monthly in a proactive effort to reduce service calls and create more reliability. In December 2010, Morgan told MWV that he had hired additional technicians, was working to

determine what the crew needed to perform services timely and efficiently, and was working to resolve chiller issues.

Way admitted numerous service tickets into evidence, which reflected the maintenance performed on MWV's equipment. Eugene Hellman, an engineer with Rimkus Consulting, testified that, based on the evidence he reviewed, Way conducted quarterly maintenance on the equipment there were claims against. He opined that the lack of trouble calls when Way left in January suggested that (1) Way made a definite effort to conduct preventative maintenance, particularly since the mill contains over six hundred pieces of equipment; and (2) the equipment was operational. He concluded that Way met the terms of the contract.

According to Watters, the mill suffered numerous equipment failures, equipment was not repaired in a timely manner, and MWV spent a lot of money on rental equipment while waiting for Way to get things done. He opined that the mill's reliability problems suggested that Way was not doing a good job of preventative maintenance. Jeff Siau, a former MWV employee, attributed the mill's problems to a lack of maintenance, and he did not feel that Way provided the service it had promised. Hanzel also did not believe that Way provided quarterly and biweekly maintenance.

Hanzel and Watters testified that Way's vice-president, David Cooper, told them that Way was not doing preventative maintenance sufficiently. Hanzel and Watters testified that nothing changed after the conversation with Cooper. Watters testified that Way's "sole purpose . . . was to live and breathe HVAC a hundred percent of the time; and they were the experts on understanding what shape our equipment was in[,]" but that Way failed to fulfill that purpose. Rickey Midkiff, an on-site supervisor and manager for MWV's new contractor Johnson Controls Inc. ("J.C.I."), testified that there would be fewer service calls if better preventative maintenance were being done.

Siau testified that, after Way was terminated and J.C.I. took over, MWV discovered that some equipment had not been maintained. Hanzel testified that numerous pieces of equipment were not maintainable or operational and thus, not in like-new condition. He testified to being shocked by the condition of the equipment, some of which was missing. Midkiff testified that the equipment was in poor condition, some components were missing, numerous pieces of equipment were not operational or maintainable, and some parts had been installed backward.

Chevy Spoonemore, Way's HVAC service technician, testified that he worked for J.C.I. when it took over the mill. Spoonemore testified that none of the equipment in a paper mill is like-new and that the mill was operating when J.C.I.

came on the job. He was not surprised to see equipment showing signs of wear and tear because of the mill's corrosive environment, but he was unaware of any equipment that was nonoperational. Midkiff admitted that, besides equipment that had a missing component, other pieces of equipment were operating and maintainable. He further admitted that not all of the equipment was immediately inspected or repaired; thus, he could not say when the equipment failed. Boyd testified that equipment does not remain like-new for very long in a mill environment but that the equipment was operational and maintainable when he left the mill on January 31. He testified that MWV's representatives expressed satisfaction after a walk-through of the mill on January 31.

In February 2011, MWV contacted Way to complain of additional problems but told Way there was no need to send anyone to the mill, and in May 2011, MWV provided Way with another list of needed repairs. Morgan testified that he went to the mill for an inspection but discovered that "[c]ompressors, old units, anything that had been repaired or replaced, there wasn't a shred of evidence of any of the existing equipment that was there when we were servicing it." Morgan testified that "[t]here was just new equipment or repaired equipment; and all the evidence and all the parts and materials and everything were all disposed of,

thrown in a dumpster[.]" Midkiff admitted to disposing of equipment that J.C.I. deemed to be no longer useful.)

Hanzel testified that MWV had to pay J.C.I. a significant sum of money to repair or replace equipment. Boyd testified that without the old equipment, he could not determine what caused the failures and whether MWV had made repairs as a result of Way's services. Hellman testified that he was unable to find a justification for the replacement of entire units or for the amount that MWV spent repairing certain equipment. Hellman testified that photographs of equipment that were taken thirty to sixty days after Way left the mill could not help determine whether the equipment was working when Way left.

Tommy King, MWV's HVAC manager, testified he now received fewer complaints and that the mill no longer uses as many rentals as it used under Way. Watters testified that the mill uses the same water process under J.C.I. and he and King, both testified that the mill does not have water problems. Midkiff testified that J.C.I. had taken steps to reduce the mill's issues, but that the mill still had problems with certain equipment even after Way left. Spoonemore, however, testified that, during his time at the mill, there were equipment failures because of the water and that the water condition did not change.

The jury heard evidence that the equipment was operating on January 31, that the lack of trouble calls indicates that the equipment was maintained and operational, that the equipment was operational when J.C.I. took over, and that equipment in a harsh mill environment does not remain like-new for very long. Additionally, the record contains evidence suggesting that the removal of equipment and timing of inspections prevented an accurate determination as to when the equipment failed and whether the equipment failed as a result of Way's services. The jury was also entitled to believe Way's testimony and documentary evidence establishing that preventative maintenance was properly performed. *See Wilson*, 168 S.W.3d at 819. Under these circumstances, the jury could reasonably conclude that Way provided preventative maintenance in accordance with the contract, that the equipment was in like-new condition when maintenance was complete, and that Way left the equipment in operational and maintainable condition at the time of termination.

MWV also argues that Way failed to "provide the promised state-of-the-art computer system." The contract required Way to "utilize a proprietary, computer managed maintenance system (CMMS) for accounting, deploying, and analyzing all service activities." Morgan testified that Way's tasking system is essentially the same as a CMMS. He explained that the tasking system "identifies every piece of

equipment, what it does, what types of services it needs, what skill level it needs, and what frequency it needs." Boyd testified that historical data could be printed from the tasking system.

Hanzel testified that one of Way's representatives told him that MWV would be able to view equipment history through the CMMS. Watters testified that he was told that a CMMS system would allow computer access to information regarding MWV's liabilities, but that no system was ever put in place. Hanzel testified that although he gave Way a link to a CMMS that he had previously used, he never had access to a CMMS and Way never utilized a CMMS. Watters admitted that the contract did not specify anything about MWV being able to access the CMMS. Watters testified that tasking is only a small component of the CMMS.

Given the evidence presented at trial, the jury could reasonably conclude that Way complied with the contract through the use of its tasking system. The contract did not require Way to give MWV access to the CMMS system that Way was to utilize. Moreover, the record contains evidence suggesting that the tasking system not only generates a report as to what maintenance needs to be done, but also allows the gathering of historical data. The jury was entitled to believe Way's representation that the tasking system satisfied the contract's CMMS provision.

Finally, MWV contends that Way failed to "provide adequate personnel at the mill to service the equipment[.]" According to the contract, "[a]ll personnel furnished shall require the approval of MWV's representative based on their training, experience, qualifications, certification and ability to perform the required service and maintenance for all [e]quipment in an efficient manner." The contract also provided that, "Failure to provide such personnel in the required numbers shall be considered sufficient reason to terminate the agreement[,]" and "Time is of the essence with respect to the performance of any [s]ervices." The failure to perform services in strict compliance with the contract's scheduling provision shall be considered a material breach.

Siau and King testified that they regularly received complaints during Way's contract. According to the record, MWV complained to Way regarding filter issues, equipment not being serviced, air conditioning issues, equipment reliability, dissatisfaction with Way's services, use of rentals, and lack of manpower. Siau testified that Way did not provide quality service. Hanzel testified that he received repeated calls about work not getting done. He testified that work was not completed in a reasonable time, that skilled technicians were not always at the mill to timely repair equipment, and work was not performed in a high quality manner. Watters did not feel that Way was making much effort to repair equipment such

that rentals would no longer be required. Siau testified that he complained to Way regarding reliability, repeat failures, and equipment that had not been repaired.

Siau testified that Way did not have the appropriate number of technicians assigned to the mill, and he did not believe that some of the assigned technicians had the necessary expertise. Nor were technicians assigned to certain areas on a daily basis. Hanzel testified that the mill had several different site supervisors throughout Way's contract and that the mill never had a set group of technicians present. He explained that the mill suffered because skilled technicians were transferred to other job sites. He believed the technicians worked hard but did not have the right skill set. King did not believe that Way had the right technicians on site. Hanzel admitted the contract did not require a set number of technicians.

Riekert testified that the contract contained no personnel requirements. He explained that Way sent out the number of technicians needed based on demand and issues at the mill. Boyd testified that the number of technicians varied on a daily basis but that six to ten technicians were present at the mill at any given time. He explained that the number depended on the workload, as is typical in the industry. He believed the technicians had the skills necessary to handle the mill's needs. Morgan testified that he hired additional technicians to improve staffing at the mill and that technicians were moved around on occasion. Hanzel admitted that

there were at least five technicians that he was willing to allow to work on the equipment and that he recommended that J.C.I. hire three of Way's technicians.

The jury heard competing views as to whether Way's technicians were skilled enough to meet the mill's needs. Accordingly, the jury bore the burden of deciding which view to believe and, in doing so, was entitled to reject MWV's claim that Way's technicians were unskilled and that Way failed to provide a sufficient number of skilled technicians. This is particularly true given the absence of a contractual requirement regarding the number of technicians and a set group of technicians. Viewing the evidence in the light most favorable to the jury's verdict, we conclude that the evidence is legally sufficient to support the jury's findings that Way did not breach the contract with MWV. *See Smith*, 307 S.W.3d at 770; *see also Wilson*, 168 S.W.3d at 827. Nor are the jury's findings so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. *See Francis*, 46 S.W.3d at 242. We overrule issue two.

Attorney's Fees

In issue three, MWV contends that Way failed to establish its entitlement to attorney's fees. In its findings of fact and conclusions of law, the trial court found that Way's attorney's fees could be segregated between recoverable and unrecoverable claims, the hourly rate charged by Way's attorneys was reasonable,

the recoverable portion of fees was eighty percent, and Way was entitled to fees of $328,336.77 plus appellate costs. We review a trial court's attorney's fees award for an abuse of discretion. *Ridge Oil Co. v. Guinn Invs., Inc.*, 148 S.W.3d 143, 163 (Tex. 2004).

MWV first argues that the trial court improperly allowed Way to amend its pleadings after the jury was discharged, so as to include a claim for fees under Chapter 38 of the Texas Civil Practice and Remedies Code. In its first amended petition, Way pleaded for attorney's fees as follows:

> Way Service presented its claim to MWV. MWV did not tender payment of the just amount due before the expiration of the thirtieth day after the claim was presented.
>
> Way Service has retained the undersigned lawyers to prosecute this suit and has agreed to pay a reasonable fee for the legal services performed.
>
> Way Service is entitled to recover a reasonable attorney's fee for all legal services performed in the trial court and for any and all appeals.

The jury reached its verdict on August 21, 2014. The trial court subsequently granted Way's motion for leave to supplement its first amended petition to reiterate its claim for attorney's fees, specifically citing Chapter 38.

Amended pleadings "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. Way pleaded facts which, if true, entitled Way to recover attorney's fees; thus, Way was not required to specifically plead Chapter 38 to recover under the statute. *See Mitchell v. Laflamme*, 60 S.W.3d 123, 130 (Tex. App.—Houston [14th Dist.] 2000, no pet.); *see also Town Ctr. Mall, L.P. v. Dyer*, No. 02-14-00268-CV, 2015 WL 5770583, at*7 (Tex. App.—Fort Worth Oct. 1, 2015, no pet.) (mem. op.). The amendment did not assert a new claim for recovery, and we cannot say that the amendment caused surprise or prejudice to MWV. *See State Bar of Tex. v. Kilpatrick*, 874 S.W.2d 656, 658 (Tex. 1994) ("A court may not refuse a trial amendment 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."). Having found that Way presented legally and factually sufficient evidence supporting its breach of contract claim, we also reject MWV's contention that Way was not entitled to attorney's fees under Chapter 38.

MWV also contends that the termination payment is MWV's sole obligation, which does not include attorney's fees, and that the contract prevails over Chapter 38. Parties may provide for attorney's fees by contract and, in doing so, "may agree to terms for the recovery of fees that are either more or less liberal than the terms presented in Chapter 38." *Big Wheel Dev., Inc. v. Orange Cty. Bldg.*

Materials, Inc., No. 09-07-381 CV, 2008 WL 2521926, at *1 (Tex. App.—Beaumont June 26, 2008, no pet.) (mem. op.). Absent a contractual clause that specifically excludes a party's "'claim to an award of attorney's fees' under Chapter 38, 'no valid waiver can occur because the party giving up the right does not know what he or she is relinquishing.'" *Bank of Am., N.A. v. Hubler*, 211 S.W.3d 859, 865 (Tex. App.—Waco 2006, pet. granted, judgm't vacated w.r.m.) (quoting *Tex. Nat'l Bank v. Sandia Mortg. Corp.*, 872 F.2d 692, 701 (5th Cir. 1989)). The contract contains no specific waiver of Way's right to attorney's fees under Chapter 38. Thus, the contract does not preclude Way from seeking attorney's fees under Chapter 38. *See id*.

MWV also challenges Way's right to recover attorney's fees for defending against MWV's counterclaim. "[A]ttorney's fees are recoverable only if necessary to recover on a contract or statutory claim allowing them[.]" *Varner v. Cardenas*, 218 S.W.3d 68, 69 (Tex. 2007). The Texas Supreme Court has held that a party may recover attorney's fees when a successful defense to a counterclaim is necessary to prevail at trial. *Id*.; *see Anglo-Dutch Petroleum Int'l, Inc. v. Case Funding Network, LP*, 441 S.W.3d 612, 634 (Tex. App.—Houston [1st Dist.] 2014, pet. denied) ("Attorneys' fees incurred to defeat a counterclaim that must be overcome to recover fully on a contract need not be segregated."); *see also In re*

Estate of Snow, No. 12-11-00055-CV, 2012 WL 3793273, at *13 (Tex. App.—Tyler Aug. 30, 2012, no pet.) (mem. op.) ("[W]hen a defendant asserts a counterclaim that the plaintiff must overcome in order to fully recover on its contract claim, the attorney's fees necessary to defeat the counterclaim are likewise recoverable."). Because Way could not have prevailed at trial without successfully defending against MWV's counterclaim, it was entitled to obtain attorney's fees for defending against MWV's counterclaim. *See Varner*, 218 S.W.3d at 69; *see also Anglo-Dutch Petroleum Int'l, Inc.*, 441 S.W.3d at 634; *Snow*, 2012 WL 3793273, at *13; *Yeh v. David J. MacDougall, D.O., P.A.*, No. 01-06-00509-CV, 2008 WL 183712, at *5 (Tex. App.—Houston [1st Dist.] Jan. 17, 2008, no. pet.) (mem. op.).

MWV further contends that Way cannot recover attorney's fees for its quantum meruit claim or its claim for damages related to the two invoices for which the jury awarded nothing. According to MWV, Way was required to segregate its attorney's fees. "To recover attorney's fees under section 38.001, a party must prevail on the underlying claim and recover damages." *Ventling v. Johnson*, 466 S.W.3d 143, 154 (Tex. 2015). As previously discussed, Way was not entitled to recover on its quantum meruit claim. Additionally, Way sought the following in damages for breach of contract: (1) three unpaid invoices for

equipment covered by the contract; (2) two unpaid invoices for equipment not covered by the contract; and (3) a termination payment. Way did not recover on its claim for breach of contract regarding the two invoices for uncovered equipment. Thus, Way cannot recover attorney's fees for pursuing claims for which it did not prevail. *See id*.

When attorney's fees relate solely to a claim for which fees are not recoverable, the claimant must segregate the recoverable fees from the unrecoverable fees. *A.G. Edwards & Sons, Inc. v. Beyer*, 235 S.W.3d 704, 710 (Tex. 2007). "It is only when legal services advance both recoverable and unrecoverable claims that the services are so intertwined that the associated fees need not be segregated." *Id*. Way's unrecoverable claims are so intertwined with its recoverable claim for breach of contract that their prosecution entailed essentially the same work and proof. *See Varnado v. R & D Marble, Inc.*, No. 09-12-00114-CV, 2013 WL 5874095, at *5 (Tex. App.—Beaumont Oct. 31, 2013, no pet.) (mem. op.) (Segregation was not required when recoverable claim for "sworn account/breach of contract" and unrecoverable claim for quantum meruit and unjust enrichment were intertwined.). Nor was Way required to segregate fees incurred in defeating MWV's counterclaim. *See Anglo-Dutch Petroleum Int'l, Inc.*,

441 S.W.3d at 634. Because segregation was not required, we overrule issue three. *See Beyer*, 235 S.W.3d at 710; *see also Varnado*, 2013 WL 5874095, at *5.

Jury Charge

In issue four, MWV challenges the trial court's failure to submit instructions regarding setoff and condition precedent. A trial court must submit instructions and definitions that enable the jury to reach a verdict and which are raised by the written pleadings and evidence. Tex. R. Civ. P. 277, 278. We review alleged charge error for abuse of discretion. *Tex. Dep't of Human Servs. v. E.B.*, 802 S.W.2d 647, 649 (Tex. 1990) (op. on reh'g). We will not reverse unless the error "probably caused the rendition of an improper judgment[.]" Tex. R. App. P. 44.1(a)(1); *Shupe v. Lingafelter*, 192 S.W.3d 577, 579 (Tex. 2006). Whether an alleged charge error is reversible depends on the parties' pleadings, the evidence presented at trial, and the entire charge. *Island Recreational Dev. Corp. v. Rep. of Tex. Sav. Ass'n*, 710 S.W.2d 551, 555 (Tex. 1986).

MWV sought submission of questions to the jury regarding whether MWV was entitled to setoff any amounts that the jury found that MWV owed to Way and, if so, to which amounts it was entitled. MWV further sought submission of a jury question asking whether MWV's failure to pay was excused by Way's failure to perform a condition precedent. Specifically, MWV relied on the contract's

provisions regarding whether MWV (1) could terminate the contract if Way failed to consistently meet defined specifications; and (2) was entitled to retain payments for Way's breach of contract. The trial court refused to submit MWV's proposed questions to the jury.

Assuming, without deciding, that the trial court abused its discretion by refusing the proposed jury questions, we conclude that any error did not cause the rendition of an improper judgment. As previously discussed, the jury heard testimony that MWV did not provide the required written notice regarding offset. Additionally, MWV was only entitled to an offset for amounts for which Way was responsible. We have also concluded that the evidence is sufficient to support the jury's conclusion that Way did not breach the contract. "Error in the omission of an issue is harmless 'when the findings of the jury in answer to other issues are sufficient to support the judgment.'" *Shupe*, 192 S.W.3d at 579 (quoting *Boatland of Houston, Inc. v. Bailey*, 609 S.W.2d 743, 750 (Tex. 1980)). Because any error in the failure to submit MWV's requested jury instructions is harmless, we overrule issue four.

Having sustained issue one in part, we reverse the jury's award of $8,609.88 as a termination payment and $72,071.13 in damages for quantum meruit. We

render judgment to reflect an award of $254,196.48. *See* Tex. R. App. P. 43.2(c), 43.3. We affirm the trial court's judgment in all other respects.

AFFIRMED IN PART; REVERSED AND RENDERED IN PART.

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STEVE McKEITHEN
Chief Justice

Submitted on November 5, 2015
Opinion Delivered February 4, 2016

Before McKeithen, C.J., Kreger and Johnson, JJ.