TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-13-00854-CV

Appellant, Barton Creek Senior Living Center, Inc. d/b/a Querencia at Barton Creek// Cross-Appellant, Ann O. Howland, Individually and as personal representative of the estate of William C. Howland

v.

Appellee, Ann O. Howland, Individually and as personal representative of the estate of William C. Howland// Cross-Appellee, Barton Creek Senior Living Center, Inc. d/b/a Querencia at Barton Creek

FROM THE DISTRICT COURT OF TRAVIS COUNTY, 201ST JUDICIAL DISTRICT NO. D-1-GN-12-001426, HONORABLE ORLINDA NARANJO, JUDGE PRESIDING

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

Barton Creek Senior Living Center, Inc. d/b/a Querencia at Barton Creek, appeals from the judgment favoring Ann O. Howland, individually and as personal representative of the estate of William C. Howland. The jury found that Querencia breached its contract with Howland, awarding her $145,490 in economic damages and $165,780 for attorney's fees accrued through trial, plus other amounts not in dispute here. Querencia contends on appeal that the evidence is insufficient to support the damages award, that the attorney's fees award is erroneous because Howland did not segregate time spent on the claim on which she succeeded from time spent on those on which she did not, and that the record lacks evidence of the reasonableness of the fees awarded.[1]

[1] Howland filed her own notice of appeal, but in her brief waived her right to pursue issues by cross-appeal.

We will affirm the award of damages, reverse the attorney's fees award, and remand for further proceedings.

BACKGROUND

Ann and William Howland entered a Life Care Agreement with Querencia while in their 80s. In exchange for a deposit plus monthly fees, Querencia agreed to provide the Howlands a continuum of care from independent living through assisted living, skilled nursing care, and memory care. The Howlands entered Querencia in independent living, but Mrs. Howland spent some time in skilled nursing, and both eventually moved to assisted living.

The jury heard about a series of interactions between the Howlands' adult children and Querencia staff in which each side said that the other acted inappropriately. After a telephone conference on May 13, 2011, Querencia staff told Mrs. Howland that they would no longer communicate with her children regarding the Howlands' care. Querencia staff and Mrs. Howland testified that she offered to be the sole contact with Querencia regarding her and her husband's care. By letter dated May 21, 2011, however, Mrs. Howland requested that Querencia resume open communications with her family or anyone else that she designated. By letter dated May 27, 2011, Querencia notified the Howlands that requiring communication with their children was unworkable because of the discord with the children. Querencia terminated the Life Care Agreement with the Howlands and ordered them to vacate the premises within thirty days.

On June 16, 2011, the Howlands moved to The Summit, an assisted living facility with a different pricing and service structure. Mr. Howland died almost nine months later, and Mrs. Howland then sued Querencia for breach of contract, violation of the deceptive trade

practices act, and violations of the health and safety code. The trial court granted Querencia's motion for summary judgment on several claims, but denied Querencia's motion seeking to dispose of Howland's claims for breach of contract based on termination for impermissible reasons and without sufficient notice.

The case was tried before a jury who found that Querencia "fail[ed] to comply with Ann O. Howland and William Howland Jr.'s Life Care Agreement" and that its failure to comply was not excused by the Howlands' previous failure to comply with a material obligation of the agreement. The jury awarded Howland damages for the difference between the value the Howlands would have paid to Querencia under the Life Care Agreement and the value the Howlands agreed to pay The Summit. These included the cost of the residence prior to trial ($56,700), of services prior to trial ($7,800), and of services in the future ($18,000). The jury also awarded the amount remaining from the Howlands' deposit with Querencia ($62,990) as well as attorney's fees for preparation and trial ($165,780), for appeal to this Court ($10,000), and for a petition for review if granted by the Supreme Court of Texas ($7,500).

DISCUSSION

Querencia complains that the evidence is legally and factually insufficient to support the damages and attorney's fees awarded. It contends that the failure to provide sixty days' notice did not cause the damages awarded and that the move did not increase the expenses for which Howland was awarded damages. It urges that the attorney's fees award is not supported because Howland's attorneys did not segregate their fees charged between claims on which she prevailed from those on which she did not prevail, did not have the detailed billing records admitted,

and did not testify to particular factors used in determining the reasonableness of an attorney's fees award.

The evidence is sufficient to support the damages awarded.

On appeal, Querencia does not challenge the finding that it failed to comply with the Life Care Agreement, but contends that the evidence is legally and factually insufficient to support the damages awarded to Howland. Specifically, Querencia argues that the damages cannot be tied to the pre-termination notice being 30 days instead of 60 days. It also contends that Howland does not deserve damages for assistive services used after termination that they were already using before termination. Finally, Querencia contends that it properly withheld ten percent of the Howlands' deposit pursuant to their contract.

To prevail on a legal-sufficiency challenge, an appellant must show that no more than a scintilla of evidence supports a finding on which the opponent had the burden of proof. *See Waste Mgmt. of Tex., Inc. v. Texas Disposal Sys. Landfill, Inc.*, 434 S.W.3d 142, 156-57 (Tex. 2014); *City of Keller v. Wilson*, 168 S.W.3d 802, 826 (Tex. 2005). The judgment must stand if the evidence as a whole enables reasonable and fair-minded people to reach different conclusions. *Merrell Dow Pharms., Inc. v. Havner*, 953 S.W.2d 706, 711 (Tex. 1997). We consider the evidence in the light most favorable to the judgment, crediting evidence that a reasonable factfinder could have considered favorable and disregarding unfavorable evidence unless a reasonable fact finder could not. *City of Keller*, 168 S.W.3d at 826.

When assessing a factual-sufficiency challenge, we consider all of the evidence and set aside the verdict only if the evidence that supports the finding on which the plaintiff had the

burden of proof is so weak as to make the verdict clearly wrong and manifestly unjust. *Cain v. Bain*, 709 S.W.2d 175, 176 (Tex. 1986). We defer to the jury's implicit determinations of credibility and weight to be given to the evidence. *See Golden Eagle Archery, Inc. v. Jackson*, 116 S.W.3d 757, 761 (Tex. 2003).

Querencia's claim that its provision of only 30 days' notice of termination did not damage the Howlands ignores that Howland pled and provided proof on theories of breach and damage other than short notice on which the verdict and judgment might be based. An appellant must attack all independent bases or grounds that fully support a complained-of ruling or judgment. *Oliphant Fin. LLC v. Angiano*, 295 S.W.3d 422, 423 (Tex. App.—Dallas 2009, no pet.). If an independent ground fully supports the complained-of ruling or judgment, but the appellant assigns no error to that independent ground, we must accept the validity of that unchallenged independent ground, and thus any error in the grounds challenged on appeal is harmless because the unchallenged independent ground fully supports the complained-of ruling or judgment. *Id.* at 424. When partially granting Querencia's motion for summary judgment, the trial court expressly carved out two paragraphs in Howland's live petition from the judgment granted Querencia:

> 52. In accordance with Section 7.2 of the Lifecare Agreement, Defendant may only terminate the Lifecare Agreement subsequent to occupancy by the resident(s) with cause and for specific enumerated reasons. Defendant's eviction of Plaintiffs did not fall within any of the enumerated contractual categories which would entitle Defendant to terminate the Lifecare Agreement. Defendant's actions therefore constitute a breach of the Lifecare Agreement.
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> 53. In accordance with Section 7.2 of the Lifecare Agreement, in the event Defendant sought to terminate the Lifecare Agreement, it was required to provide "sixty (60) days' prior written notice of termination" and to provide an opportunity to meet with representatives from Defendant and an opportunity to cure the conduct alleged to warrant the termination. Defendant failed to provide sufficient notice or

> opportunity to cure any breach of the Lifecare Agreement. Moreover, Defendant wholly failed to provide any form of separate written notice to W. Howland of their intention to evict W. Howland and terminate its Assisted Living Residency Agreement with him.

Paragraph 52 alleges breach for Querencia's failure to terminate for the reasons provided under the agreement and does not mention the notice period.[2] Paragraph 53 alleges insufficient termination notice, but it also alleges that Querencia failed to comply with the appeal and opportunity-to-cure provisions and other necessary termination procedures. Querencia raised evidence and argued that the termination was permissible based on the Howlands' conduct, but the jury rejected that argument.

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[2] In addition to termination for medical reasons—not alleged here—paragraph 7.2 allows Querencia to terminate the Life Care agreement for these reasons:

(i) A material misrepresentation or omission by you in the Confidential Data Profile, Confidential Medical Profile, or related materials, which, if such information had been accurately provided, would have been material to the decision whether or not to accept the Resident for residency;

(ii) If you fail to comply with the policies and procedures of Querencia or create a situation detrimental to the health, safety or quiet enjoyment of the community by other Residents or the staff;

(iii) If you fail to pay the Monthly Service Fee or other amounts due us when due unless other mutually satisfactory arrangements have been made, provided however, it is our policy that this Agreement shall not be terminated solely because of your financial inability to pay the fees to the extent that:

> (1) your inability to pay is not the result of your willful action; and
> (2) in the judgment of [Querencia], the ability of Querencia to operate on a sound financial basis will not be impaired,

(iv) Material breach by you of the terms and conditions of this Agreement; and,

(v) The Residence is no longer fit for occupancy and Querencia elects not to restore the Residence to habitable condition.

These unchallenged grounds and the relevant evidence admitted at trial support the finding of breach and serve as a basis for an award of damages independent of the inadequate notice.

Querencia contends that the evidence is insufficient to support Howland's recovery for increased expenses incurred after they left Querencia because the record shows that the Howlands would have moved even if Querencia had not terminated their contract and would have incurred such expenses regardless of a breach by Querencia, citing *Mead v. Johnson Group, Inc.*, 615 S.W.2d 685, 687 (Tex. 1981). Querencia argues that the fact that the Howlands' son put down a deposit at The Summit in May and the Howlands moved to The Summit in June—less than a month after their termination notice—shows that they were not damaged by any shortfall in the termination notice period. But, again, Querencia's argument depends on the inaccurate premise that the breach finding rests solely on the inadequate notice of termination.

Querencia also contends that the damages awarded are not supported by the evidence. Remedies for a breach of contract protect the non-breaching party's expectation interest (being in as good a position as performance of the contract would have provided), reliance interest (being in as good a position had the contract never existed), and restitution interest (restoring any benefit conferred on the other party). Restatement (Second) of Contracts § 344 (1981). Expectation damages include losses that are the necessary and usual result of the defendant's wrongful act. *See Arthur Andersen & Co. v. Perry Equip. Corp.*, 945 S.W.2d 812, 816 (Tex. 1997); *Bechtel Corp. v. CITGO Prods. Pipeline Co.*, 271 S.W.3d 898, 927 (Tex. App.—Austin 2008, no pet.). Howland testified that she preferred to stay at Querencia but that the termination of the Life Care Agreement made that impossible, so the jury could have awarded damages for expenses the Howlands incurred because of Querencia's failure to comply with the provisions enumerating the permissible causes

for termination. *See Arthur Andersen*, 945 S.W.2d at 816. Although the Howlands employed private care providers while at Querencia, there is evidence that the Howlands' move to The Summit increased their monthly expenses because the monthly rent was higher at The Summit, it provided fewer services than Querencia, and services at The Summit were more expensive. Querencia argued, based on its expert's testimony, that potential investment return on the refunded deposit would allow Howland to profit from her eviction. Querencia's expert also told the jury that she did not consider increased costs for services and amenities not included at The Summit and that her opinions assumed that the Howlands would have achieved a seven-percent return by placing the returned deposit funds in a conservative investment portfolio. The jury was free to consider evidence of increased costs and reject projections of returns on investment. Howland claimed over a million dollars in damages, Querencia countered that Howland profited from the breach, and the jury awarded Howland $82,500 plus the unrefunded deposit. The evidence in the record supports the jury's exercise of its role as factfinder regarding the damages award.

The evidence also supports the jury's award of $62,990 representing the portion of the Howlands' deposit that Querencia did not refund. Querencia asserts that it was entitled to retain ten percent of the Howlands' deposit under the terms of the Life Care Agreement. But the jury found that Querencia breached that agreement, and restitution is a permissible measure of damages for breach of contract.[3] *Quigley v. Bennett*, 227 S.W.3d 51, 56 (Tex. 2007); *see also* Restatement (Second) of Contracts § 344 (1981). The jury was empowered to and did decide that

[3] Querencia did not argue that Howland was required to elect between remedies of restitution of the deposit and compensation for the denied benefit-of-the-bargain represented by the increased cost of rent and services.

Querencia must compensate for its breach by returning the final ten percent of the Howlands' deposit.

We conclude that legally and factually sufficient evidence supports the damages awarded to Howland.

Insufficient evidence supports the attorney's fees award.

Querencia contends that the evidence does not support the award of $165,780 to Howland for attorney's fees because she did not provide sufficiently detailed evidence of the fees and because she did not segregate attorney's fees accrued pursuing the issues on which she prevailed from fees accrued pursuing issues on which the court granted judgment to Querencia.

Querencia asserts that the evidence is insufficient because Howland's evidence was limited to her attorney's general testimony about the hours she and other attorneys worked and their hourly rates. *See El Apple I, Ltd. v. Olivas*, 370 S.W.3d 757, 760-61 (Tex. 2012). In *El Apple*, the Texas Supreme Court held that parties using the lodestar method[4] must introduce detailed billing records to support their attorney's fees claims. *Id*. at 762-64; *see also Metroplex Mailing Servs., LLC v. RR Donnelley & Sons Co.*, 410 S.W.3d 889, 900 (Tex. App.—Dallas 2013, no pet.) (noting supreme court did not require all cases to use lodestar method). The court has since found *El Apple* and the lodestar method applicable in a breach-of-contract case. *Long v. Griffin*, 442 S.W.3d 253,

[4] The lodestar method of calculating a reasonable and necessary attorney's fee is a two-step process. *El Apple I, Ltd. v. Olivas*, 370 S.W.3d 757, 760 (Tex. 2012). First, the court determines the reasonable hours spent by counsel in the case and a reasonable hourly rate for such work, then multiplies the number of such hours by the applicable rate, the product of which is the base fee or lodestar. *Id.* The court may then adjust the base lodestar up or down if relevant factors indicate an adjustment is necessary to reach a reasonable fee in the case. *Id.* Howland's testimony followed this model.

255 (Tex. 2014). The court explained why the Griffins' proof of attorney's fees was insufficient as follows:

> The affidavit supporting the Griffins' request for attorney's fees used the lodestar method by relating the hours worked for each of the two attorneys multiplied by their hourly rates for a total fee. We explained in *El Apple I, Ltd. v. Olivas* that generalities about tasks performed provide insufficient information for the fact finder to meaningfully review whether the tasks and hours were reasonable and necessary under the lodestar method. 370 S.W.3d 757, 763 (Tex. 2012).
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> Here, as in *El Apple* and *Montano*, the affidavit supporting the request for attorney's fees only offers generalities. It indicates that one attorney spent 300 hours on the case, another expended 344.50 hours, and the attorneys' respective hourly rates. The affidavit posits that the case involved extensive discovery, several pretrial hearings, multiple summary judgment motions, and a four and one-half day trial, and that litigating the matter required understanding a related suit that settled after ten years of litigation. But no evidence accompanied the affidavit to inform the trial court the time spent on specific tasks. *See El Apple*, 370 S.W.3d at 763. The affidavit does claim that 30% of the aggregate time was expended on the assignment claim (part of which the Griffins prevailed on) and that the assignment issue was inextricably intertwined with matters that consumed 95% of the two attorneys' time on the matter. But without any evidence of the time spent on specific tasks, the trial court had insufficient information to meaningfully review the fee request. [*City of Laredo v. Montano*, 414 S.W.3d 731, 736-37 (Tex. 2013)]; *El Apple*, 370 S.W.3d at 764.

Long, 442 S.W.3d at 255-56. The trial court sustained Querencia's objection that Howland's billing records were inadmissible because the bills did not segregate entries relating to claims on which she did not prevail from entries relating to claims on which she did prevail and because the bills were not sufficiently detailed to permit the jury to make those distinctions.

The proof process in this case was similar to that found insufficient in *Long*, except that the trial court in this case excluded Howland's attempted documentation of her attorney's time. Howland's attorney testified to the hours expended by various attorneys, the rates charged, and

the necessity and reasonableness of the work and the rates. Howland did not obtain admission of detailed information by which the trier of fact could assess the reasonableness and necessity of the work and the rates. We reverse the award of attorney's fees for services rendered through the trial of this case.[5] Because we do so, we need not address Querencia's other challenges to the attorney's fees award.

Because Howland prevailed on a claim for which attorney's fees are available and produced some evidence that reasonable and necessary attorney's fees accrued, we do not render a take-nothing judgment on attorney's fees and will remand for further proceedings on attorney's fees. *See El Apple*, 370 S.W.3d at 764.

CONCLUSION

We reverse the award of attorney's fees for services rendered through trial and remand for further proceedings concerning those attorney's fees. We otherwise affirm the judgment.

Jeff Rose, Chief Justice

Before Chief Justice Rose, Justices Pemberton and Bourland

Affirmed in part; Reversed and Remanded in part

Filed: April 28, 2016

[5] Querencia does not challenge, and we do not address or disturb, the conditional awards of attorney's fees for appeal and a petition for review that is granted by the Texas Supreme Court.