NO. 12-16-00114-CV

IN THE COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT

TYLER, TEXAS

DONNA MORRIS, APPELLANT	*§*	***APPEAL FROM THE 241ST***
V.	*§*	***JUDICIAL DISTRICT COURT***
MIKE HUDSON, APPELLEE	*§*	***SMITH COUNTY, TEXAS***

MEMORANDUM OPINION

Donna Morris appeals from an order in a partition action, in which the trial court awarded equitable adjustments and attorney's fees in favor of Mike Hudson. She presents three issues on appeal. We reverse a portion of the judgment, modify, and affirm the judgment as modified.

BACKGROUND

Morris and Hudson each owned an undivided one-half interest in a piece of property in Smith County, Texas. In January 2006, Hudson filed suit to partition the property. In May, the trial court determined that the property could not be partitioned in kind and ordered the property be sold. The court further ordered that the partition proceeds be used to pay the closing expenses, realtor's fees, attorney's fees in the amount of $2,500, and reimbursement equities of $22,534.90. The remaining proceeds were to be divided evenly between Morris and Hudson.

In February 2015, Hudson received an offer for the property. After Morris failed to respond to his requests to sign the contract documents, Hudson asked the court to appoint a receiver to sign the documents for Morris. In May, the trial court granted Hudson's request and appointed a receiver. The sale was completed in July. In accordance with the court's 2006 partition order, the net proceeds were paid into the registry of the court for distribution.

On January 18, 2016, Hudson filed an application for distribution of funds and discharge of receiver. In his application, Hudson alleged that he spent $2,731.95 in 2012, 2013, and 2014 preparing the property for sale and an additional $8,735.38 maintaining and improving the property. Hudson sought reimbursement for these expenses, and $5,021.02 in attorney's fees. Following a hearing, the trial court granted Hudson's application, including his request for reimbursement and attorney's fees, and ordered Morris to pay Hudson's attorney's fees.[1] The trial court's order was signed and entered on March 15. On March 18, Morris filed an objection to Hudson's application. This appeal followed.

PRESERVATION OF ERROR

We first address Hudson's contention that Morris has waived her complaints by failing to present them to the trial court.

To preserve a complaint for appellate review, a party must present the complaint to the trial court by a timely request, objection, or motion that states the grounds for the ruling that the complaining party seeks, with sufficient specificity to make the trial court aware of the complaint. TEX. R. APP. P. 33.1. This rule ensures that the trial court has had the opportunity to rule on matters for which parties later seek appellate review. ***In re E. Tex. Med. Ctr. Athens,*** 154 S.W.3d 933, 936 (Tex. App.—Tyler 2005, orig. proceeding). Further, the trial court must have ruled on the request, objection, or motion, either expressly or implicitly, or refused to rule on the request, objection, or motion, and the complaining party objected to the refusal. TEX. R. APP. P. 33.1(a)(2). However, complaints about the sufficiency of the evidence in a bench trial may be brought for the first time on appeal. TEX. R. APP. P. 33.1(d).

Additionally, two judgments are rendered in a partition suit. ***Griffin v. Wolfe,*** 610 S.W.2d 466, 466 (Tex. 1980) (per curiam). The first judgment, sometimes referred to as an interlocutory decree, determines the interest of each of the joint owners and whether the property is susceptible to partition. TEX. R. CIV. P. 760, 761; *see also* ***Snow v. Donelson,*** 242 S.W.3d 570, 572 (Tex. App.—Waco 2007, no pet.); ***Carson v. Hagaman,*** 884 S.W.2d 194, 195 n.1 (Tex. App.—Eastland 1994, no writ). If the property cannot be partitioned, the court will order the property to be sold. TEX. R. CIV. P. 770. During this first phase, the court should appoint a receiver to sell the property, after which the proceeds of the sale are delivered to the registry of

[1] While the record indicates that a hearing occurred, no transcript was made of the hearing.

the court to be partitioned among the prior owners. ***Id***. In the second order, the trial court confirms the receiver's actions and distributes the funds. ***Ellis v. First City Nat'l Bank***, 864 S.W.2d 555, 557 (Tex. App.—Tyler 1993, no writ). Matters decided in the first order cannot be reviewed in an appeal from the second. ***Id***.

In her first issue, Morris urges that the trial court exceeded its authority when it granted equitable adjustments in the second partition order. However, Morris filed her objection to Hudson's application for distribution three days after the trial court signed and entered its March 15 order. Thus, she did not present the trial court with a timely request, objection, or motion. *See* TEX. R. APP. P. 33.1. Further, Morris's objection did not challenge the trial court's authority to grant equitable adjustments in the second partition order. As a result, the trial court did not have an opportunity to address Morris's argument, which she asserts for the first time on appeal, that it exceeded its authority by granting the equitable adjustments in its second partition order. *See* ***In re E. Tex. Med. Ctr. Athens***, 154 S.W.3d at 936. Accordingly, Morris failed to preserve her first issue for appellate review. *See* TEX. R. APP. P. 33.1.

In her second issue, Morris contends the evidence is factually insufficient to support the equitable adjustments awarded by the trial court. And in her third issue, Morris argues the evidence is legally insufficient to support the award of attorney's fees. Because challenges to the sufficiency of the evidence in nonjury cases may be brought for the first time on appeal, Morris has not waived these issues for appellate review. *See* TEX. R. APP. P. 33.1(d); ***EXCO Oper. Co. v. McGee***, 12-15-00087-CV, 2016 WL 4379484, at *1 (Tex. App.—Tyler Aug. 17, 2016, no pet.) (mem. op.); ***Watts v. Oliver***, 396 S.W.3d 124, 132 (Tex. App.—Houston [14th Dist.] 2013, no pet.) (construing issue raised for first time on appeal concerning opposing party's entitlement to attorney's fees as legal sufficiency challenge).

SUFFICIENCY OF THE EVIDENCE

In her second and third issues, Morris challenges the evidentiary sufficiency of the trial court's damages findings, i.e., the trial court's award of equitable adjustments to Hudson and the attorney's fees award.

Standard of Review

A trial court's determinations in a partition suit may be attacked for legal and factual sufficiency. ***Hagaman***, 884 S.W.2d at 198. When, as here, the court is not asked to enter

findings of fact and conclusions of law, we will assume that the trial court made all factual findings necessary to support its decree. ***Grimes v. Collie***, 733 S.W.2d 338, 341 (Tex. App.—El Paso 1987, no writ); ***Jimmie Luecke Children P'ship, Ltd. v. Pruncutz,*** No. 03–10–00840–CV, 2013 WL 4487541, at *3 (Tex. App.—Austin Aug. 16, 2013, no pet.) (mem. op.). A trial court's findings are reviewable for legal and factual sufficiency of the evidence by the same standards that are applied in reviewing evidence supporting a jury's findings. ***Catalina v. Blasdel***, 881 S.W.2d 295, 297 (Tex. 1994). The trial court acts as fact finder in a bench trial and is the sole judge of the credibility of witnesses. *See* ***Murff v. Murff***, 615 S.W.2d 696, 700 (Tex. 1981).

In conducting a legal sufficiency review, we 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; ***Brown v. Brown***, 236 S.W.3d 343, 348 (Tex. App.—Houston [1st Dist.] 2007, no pet.). If the evidence at trial would enable reasonable and fair-minded people to differ in their conclusions, the fact finder must be allowed to do so. ***City of Keller***, 168 S.W.3d at 822; *see also* ***King Ranch, Inc. v. Chapman***, 118 S.W.3d 742, 751 (Tex. 2003). When a party attacks the legal sufficiency of an adverse finding on which the party did not have the burden of proof, the party 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.

More than a scintilla of evidence exists when the evidence rises to a level that would enable reasonable and fair minded jurors to differ in their conclusions. ***Wal–Mart Stores, Inc. v. Spates***, 186 S.W.3d 566, 568 (Tex. 2006) (per curiam); ***Forbes Inc. v. Granada Biosciences, Inc.***, 124 S.W.3d 167, 172 (Tex. 2003). Any ultimate fact may be proved by circumstantial evidence. ***Russell v. Russell***, 865 S.W.2d 929, 933 (Tex. 1993). A fact is established by

circumstantial evidence when the fact may be fairly and reasonably inferred from other facts proved in the case. ***Id.*** Evidence that is so slight as to make any inference a guess is in legal effect no evidence. ***Ford Motor Co. v. Ridgway***, 135 S.W.3d 598, 601 (Tex. 2004). Moreover, under the equal inference rule, a factfinder may not reasonably infer an ultimate fact from meager circumstantial evidence which could give rise to any number of inferences, none more probable than another. *See* ***Hancock v. Variyam***, 400 S.W.3d 59, 70–71 (Tex. 2013).

When reviewing a factual sufficiency challenge, we examine the entire record, considering the evidence in favor of and contrary to the challenged finding, and set aside the verdict only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. ***Dow Chem. Co. v. Francis,*** 46 S.W.3d 237, 242 (Tex. 2001); ***Pool v. Ford Motor Co.,*** 715 S.W.2d 629, 635 (Tex. 1986). When the party without the burden of proof on a fact issue complains the evidence is factually insufficient, the complaining party must show the credible evidence supporting the finding is too weak or that the finding is against the great weight and preponderance of the credible evidence. ***Clayton v. Wisener,*** 190 S.W.3d 685, 692 (Tex. App.—Tyler 2005, pet. denied); *see* ***Garza v. Alviar,*** 395 S.W.2d 821, 823 (Tex. 1965).

Equitable Adjustments

In her second issue, Morris contends the evidence is factually insufficient to support the amount of equitable adjustments awarded by the trial court. Morris contends that the equitable adjustments did not account for Hudson's use of the property, and that she is entitled to an offset for the value of Hudson's use of the property.

A cotenant who occupies joint property, without complaint, from his cotenants is not required to account for the value of the use of the property. ***Roberts v. Roberts,*** 150 S.W.2d 236, 238 (Tex. 1941). However, an offset for the value of use may be allowed where an occupying tenant in common seeks equitable contribution from other cotenants for funds expended to benefit the common estate. ***Id.***; *see also* ***Scott v. Scruggs***, 836 S.W.2d 278, 281 (Tex. App.—Texarkana 1992, writ denied).

In his application for distribution, Hudson sought reimbursement for improvements made to the property. He argued that he spent $2,731.95 preparing the property for sale from 2012 through 2014. Hudson further claimed to have spent $8,735.38 maintaining and improving the property, which he alleged increased the property's sale price by $21,000. To support his claims, Hudson attached handwritten notes, bank statements, invoices, and receipts to his application for

distribution. Following a hearing, the trial court granted Hudson's request and awarded the equitable adjustments from the net proceeds from the property's sale.

On appeal, Morris argues that Hudson's alleged expenses resulted from the wear and tear of Hudson residing on the property for eleven years or relate to improvements he made to increase his personal enjoyment of the property during his residency. Thus, Morris maintains that Hudson should not be reimbursed for such expenses. Hudson responds that he lived on the property for six years and only sought reimbursement for the costs incurred when he was not living on the property. The length of time that Hudson resided on the property was a fact question for the trial court, as factfinder and sole judge of the witnesses' credibility, to determine. *See* ***Murff***, 615 S.W.2d at 700. Because findings of fact and conclusions of law were not requested, we assume the trial court found that Hudson resided on the property for six years instead of eleven. *See* ***Grimes***, 733 S.W.2d at 341.

The trial court's first partition order, which determined the property was to be partitioned by sale, was entered in May 2006. The record indicates that Hudson resided on the property from 2006 through 2011. The evidence attached to Hudson's application shows that, at a time when he no longer resided on the property, he incurred expenses in the amount of $11,467.33 for improvements made to the property from 2012 through 2015, when the property was sold. Hudson provided detailed receipts and handwritten notes describing these costs. The expenditures range from improving the condition of the property, such as fresh paint, garage door repairs, replacement of rotten support posts, yard work, and cosmetic improvements, to paying the utility bills and required homeowner's association dues. Hudson did not seek reimbursement for expenditures from 2006 through 2011, during which time he resided on the property and would have personally benefitted from the repairs.

Based on this evidence, the trial court could have reasonably concluded that Hudson (1) spent $11,467.33 of his own funds maintaining and improving the property prior to its sale, (2) only sought reimbursement for expenses incurred during the time he was not living on the property, and (3) was not an occupying tenant in common when the funds were spent for the benefit of the common estate. *See* ***Roberts,*** 150 S.W.2d at 238. In doing so, the trial court could reasonably conclude that no further offset was warranted. As a result, we conclude that the trial court's equitable adjustment award was not so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. *See* ***Francis***, 46 S.W.3d at 242. Because the

evidence is factually sufficient to support the trial court's award of equitable adjustments, we overrule Morris's second issue.

Attorney's Fees

In her third issue, Morris argues that the evidence is legally insufficient to support the trial court's award of attorney's fees. Specifically, Morris urges that an award of attorney's fees is not authorized in a partition suit and Hudson failed to establish the reasonableness of the attorney's fees.

The general rule in Texas is that each litigant must pay its own attorney's fees. ***MBM Fin. Corp. v. Woodlands Oper. Co.***, 292 S.W.3d 660, 663 (Tex. 2009). Recovery of attorney's fees from the adverse party is allowed only when permitted by statute, by a contract between the litigants, or under equity. ***Akin, Gump, Strauss, Hauer & Feld, L.L.P. v. Nat'l Dev. & Research Corp.***, 299 S.W.3d 106, 120 (Tex. 2009); ***Knebel v. Capital Nat'l Bank***, 518 S.W.2d 795, 799 (Tex. 1974). A party generally may not recover its attorney's feeds in a partition suit, as there is no statutory authorization for the award of attorney's fees in a partition suit. *See* ***Cecola v. Ruley***, 12 S.W.3d 848, 856 (Tex. App.—Texarkana 2000, no pet.); ***Green v. Doakes***, 593 S.W.2d 762, 765 (Tex. App.—Houston [1st Dist.] 1979, no writ); ***O'Neil v. O'Neil***, 77 S.W.2d 554, 557 (Tex. Civ. App.—Eastland 1934, writ dism'd by agr.). Nevertheless, Hudson argues that the court was authorized by its equitable powers to reimburse him for his attorney's fees. Specifically, he argues that his actions benefitted Morris and himself, therefore, the court was authorized under its equitable powers to award attorney's fees. Accordingly, we construe Hudson's argument as a contention that the award is allowed under the common-fund doctrine.

The common-fund doctrine is based on the equitable principle that those who receive the benefits of a lawsuit should bear their fair share of the expenses. ***Knebel***, 518 S.W.2d at 799. When a few succeed in securing a benefit for a group, the entire group should share the cost of securing the benefit. ***Bayliss v. Cernock***, 773 S.W.2d 384, 386 (Tex. App.—Houston [14th Dist.] 1989, writ denied). Under the common-fund doctrine, the court may award reasonable attorney's fees to a complainant who at his own expense has maintained a suit which creates a fund benefitting other parties, as well as himself. ***Knebel***, 518 S.W.2d at 799-801; ***City of Dallas v. Arnett***, 762 S.W.2d 942, 954 (Tex. App.—Dallas 1988, writ denied). The attorney's fees are allowed as a charge against the fund. ***Arnett***, 762 S.W.2d at 954.

Assuming, without deciding, that the common-fund doctrine applies in this case, the trial court could only charge the fees against the common fund. *See* ***id***. However, the trial court awarded Hudson's attorney's fees against Morris by deducting the fees from Morris's portion of the distribution. Under the common-fund doctrine, "[t]he equitable objective is that of distributing the burden of such expenses among those who share in an accomplished benefit." ***Knebel***, 518 S.W.2d at 799. The trial court was not authorized to award attorney's fees against Morris rather than the common fund. *See* ***id.***; *see also* ***Arnett***, 762 S.W.2d at 954. Thus, the attorney's fees award is improper. As a result, we sustain Morris's third issue, and modify the judgment to delete the award of attorney's fees. *See* TEX. R. APP. P. 43.2(b); ***Dallas Cty. v. Essenburg***, No. 05-95-01390-CV, 1999 WL 298314, at *2 (Tex. App.—Dallas May 13, 1999, pet. denied) (op., not designated for publication) (modifying judgment to delete award of attorney's fees when trial court charged fees against county instead of common fund).

CONCLUSION

We have overruled Morris's second issue. Having sustained Morris's third issue, we ***reverse*** the portion of the trial court's judgment awarding $5,021.02 in attorney's fees and ***modify*** the judgment to delete the award of attorney's fees in the amount of $5,021.02 and to reflect an award of $65,221.26 to Morris. We ***affirm*** the trial court's judgment in all other respects.

JAMES T. WORTHEN
Chief Justice

Opinion delivered June 21, 2017.
Panel consisted of Worthen, C.J., Hoyle, J., and Neeley, J.

(PUBLISH)

COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT OF TEXAS

JUDGMENT

JUNE 21, 2017

NO. 12-16-00114-CV

DONNA MORRIS,
Appellant
V.
MIKE HUDSON,
Appellee

Appeal from the 241st District Court
of Smith County, Texas (Tr.Ct.No. 06-155-C)

THIS CAUSE came on to be heard on the appellate record and the briefs filed herein; and the same being inspected, it is the opinion of the Court that part of the trial court's judgment below should be **reversed, modified and, as modified, affirmed**.

It is therefore ORDERED, ADJUDGED and DECREED that the portion of the trial court's judgment awarding $5,021.02 in attorney's fees to **RALPH ALLEN** be **reversed** and **modified** to delete the award of attorney's fees and to reflect an award of $65,221.26 to **DONNA MORRIS**; **and as modified**, the trial court's judgment in all other respects is **affirmed**; and that this decision be certified to the trial court below for observance.

James T. Worthen, Chief Justice.
Panel consisted of Worthen, C.J., Hoyle, J., and Neeley, J.