COURT OF APPEALS
EIGHTH DISTRICT OF TEXAS
EL PASO, TEXAS

HORACIO HERNANDEZ D/B/A/ TOP RANK TRANSPORT,	§	No. 08-20-00131-CV
Appellant,	§	Appeal from the
v.	§	210th Judicial District Court
EDGAR DURAN D/B/A DURAN'S BODY SHOP,	§	of El Paso County, Texas
Appellee.	§	(TC# 2018-DCV-4430)

O P I N I O N

Appellant Horacio Hernandez d/b/a Top Rank Transport asserts that the trial court abused its discretion in not awarding treble damages under the Deceptive Trade Practices-Consumer Protection Act (DTPA), and in awarding less in attorney's fees than Appellant requested at trial. Because we find that the trial court did not abuse its discretion, we affirm.

Factual and Procedural Background

This appeal arises from a dispute over insurance proceeds covering the cost of repairs of Appellant's damaged semi-truck. Appellant took three vehicles he owned—an F-150 pickup truck, a Mercedes, and a Freightliner semi-truck—to Appellee's body shop for repairs and improvements. Appellant's insurance company issued a check for $5,441.35 ("the Check") for repairs to the semi-truck, which Appellee cashed. No insurance proceeds were issued for work

on the two secondary vehicles. The parties dispute much of what transpired during their business relationship, including the order in which Appellee was to work on the vehicles and whether the Check could be used for custom improvements for Appellant's secondary vehicles. Appellee completed work on the secondary vehicles before starting repairs to the semi-truck. Because the Check was issued only to cover repairs to the semi-truck, Appellee refused to apply the Check proceeds to the cost of work on the secondary vehicles, and demanded payment from Appellant. Appellant at first refused to pay cash for that work. To compel Appellant to pay for that work, Appellee refused to release the vehicles or complete the repairs to the semi-truck—even though he had the Check proceeds to pay for it.

When Appellant relented and paid for the repairs to the secondary vehicles, Appellee allowed him to remove the vehicles from his shop. However, in addition to removing the secondary vehicles, Appellant also repossessed the semi-truck even though the repairs were not complete. Appellee testified that although he had the Check proceeds and was willing and able to finish the repairs on the semi-truck, Appellant refused to return the vehicle and thus prevented him from doing so.

Appellant sued Appellee for (1) money had and received, (2) unjust enrichment, (3) conversion, (4) appropriation by theft, (5) fraud by misrepresentation and/or inducement, (6) fraud by nondisclosure, (7) negligence and/or gross negligence, (8) breach of fiduciary duty, and (9) deceptive trade practices.

After a bench trial on Feb. 26, 2020, the trial court granted judgment for Appellant in the amount of five thousand four hundred forty-one dollars and thirty-five cents ($5,441.35) in economic damages, one thousand dollars ($1,000.00) in attorneys' fees, and four hundred thirty-two dollars and fifty-four cents ($432.54) in costs. The trial court did not award additional

("treble") damages under the DTPA. Neither party requested, and the trial court did not prepare, findings of fact and conclusions of law. Appellant now challenges the trial court's failure to award additional damages and the full amount of requested attorneys' fees.

Issue One—Additional Damages Under the DTPA

Appellant first contends that the trial court was required to award treble damages under the DTPA, because uncontroverted evidence established that Appellee knowingly cashed the Check without completing the repairs to the semi-truck. We disagree. The DTPA provides that the trial court may award a consumer prevailing under the Act additional damages of "not more than three times the amount of economic damages" if it finds that the conduct of the defendant was committed knowingly or intentionally. TEX.BUS.&COM.CODE ANN. § 17.50(b)(1). "Knowingly" means "actual awareness, at the time of the act or practice complained of, of the falsity, deception, or unfairness of the act or practice giving rise to the consumer's claim[.]" TEX.BUS.&COM.CODE ANN. § 17.45(9).[1] Courts have interpreted "actual awareness" to mean "that a person knows that what he is doing is false, deceptive, or unfair." *McLeod v. Gyr*, 439 S.W.3d 639, 652 (Tex.App.—Dallas 2014, pet. denied) (quoting *St. Paul Surplus Lines Ins. Co. v. Dal–Worth Tank Co.*, 974 S.W.2d 51, 53–54 (Tex. 1998))(cleaned up). This finding is not required to award economic damages—only additional damages under 17.50(b)(1). TEX.BUS.&COM.CODE ANN. § 17.50(b)(1).

Standard of Review

[1] Although Appellant used the word "intentionally" in his brief, which in this context means "actual awareness of the falsity, deception, or unfairness of the act or practice, or the condition, defect, or failure . . . coupled with the specific intent that the consumer act in detrimental reliance on the falsity or deception[.]" Appellant failed to raise a point of error sufficient to generate our consideration of the issue. *Id.* § 17.45(13).

To determine the standard of review, we look to the text of the statute. *See e.g.*, *Bocquet v. Herring*, 972 S.W.2d 19, 20 (Tex. 1998). Here, Section 17.50(b)(1) provides that if the trier of fact finds that the defendant's conduct was committed knowingly, then "the trier of fact *may* award not more than three times the amount of economic damages[.]" TEX.BUS.&COM.CODE ANN. § 17.50(b)(1)(emphasis added). "May" is permissive language that vests discretion in the fact finder. *See Bocquet*, 972 S.W.2d at 20 (finding that the language "the court may" affords discretion to the trial court while language that "a party 'may recover'" is mandatory); *see also Henry S. Miller Co. v. Hamilton*, 813 S.W.2d 631, 634 (Tex.App.—Houston [1st Dist.] 1991, no writ)(concluding, under a previous version of Section 17.50(b)(1), that an award of additional damages is "within the discretion of the trier of fact"). A trial court abuses its discretion when it acts arbitrarily or unreasonably—without reference to guiding principles. *Protect Env't Services, Inc. v. Norco Corp.*, 403 S.W.3d 532, 543 (Tex.App.—El Paso 2013, pet. denied).

Discussion

In a bench trial, the trial court is the sole fact finder and judge of the witnesses' credibility and the weight to be given their testimony. *See e.g.*, *Zenner v. Lone Star Striping & Paving L.L.C.*, 371 S.W.3d 311, 314 (Tex.App.—Houston [1st Dist.] 2012, pet. denied). When, as here, the trial court has not entered any findings of fact, we will imply the findings necessary to support the judgment to the extent that they are supported by the record.[2] *Getosa, Inc. v. City of El Paso*, 642 S.W.3d 941, 950 (Tex.App.—El Paso 2022, pet. denied).

[2] Of the nine claims Appellant pursued at trial against Appellee, only the DTPA claim provided a basis for the award of attorney's fees. TEX.BUS.&COM.CODE ANN. § 17.50(d). The judgment does not state under which claims Appellant prevailed. However, Appellant was awarded both money damages and attorney's fees. Because the trial court awarded some attorney's fees, we conclude that Appellant prevailed, at least in part, on his DTPA claim.

Appellant points to, and we find, no authority requiring a trial court to award additional damages to a prevailing consumer who was awarded economic damages under the Act. And we cannot on this record find that the trial court abused its discretion in not awarding additional damages.

First, contrary to Appellant's assertions, the parties' trial testimony was not uncontroverted. The parties' trial testimony was conflicting in many ways. Of relevance here, Appellee testified that he intended to and was willing to complete the repairs of the semi-truck as requested, and it was Appellant who prevented him from doing so. Appellant said the opposite. The trial court could reasonably have determined that either party was credible. The record supports either finding and thus this Court will not disturb the trial court's decision in that regard. *See e.g.*, *Zenner*, 371 S.W.3d at 314.

We are free to imply a finding on the issue of Appellee's knowledge to support the trial court's judgment. *Getosa Inc.*, 642 S.W.3d at 950. However, in this case, it matters not whether the trial court determined from the evidence that Appellee acted with the requisite knowledge to justify additional damages or not. The decision to award additional damages or not falls within the discretion of the trial court either way.

We may imply that the trial court failed to find that Appellee acted with the requisite knowledge to justify additional damages under the DTPA, in which case Appellant would not be entitled to recover additional damages at all. *See* TEX.BUS.&COM.CODE ANN. § 17.50(b)(1); *Getosa Inc.*, 642 S.W.3d at 950. Or, we may imply that the trial court found that Appellee acted with the requisite knowledge, in which case it could have *but was not required to* assess additional damages. *Id.* And finally, even had the trial court found the requisite knowledge and elected to award additional damages under the DTPA, it was within the discretion of the trial court to

determine the amount of such additional damages, so long as the amount did not exceed three times the economic damages. TEX.BUS.&COM.CODE ANN. § 17.50(b)(1). Therefore, under any implied finding on Appellee's knowledge, the trial court did not abuse its discretion in awarding only the economic damages. Appellant's first issue is overruled.

Issue Two—Attorney's Fees
Standard of Review

In his second issue, Appellant challenges the amount of attorney's fees awarded by the trial court. Appellant requested $7,494.99 in legal fees. The trial court awarded $1,000.00. We review an award of attorney's fees under an abuse-of-discretion standard. *Protect Env't Services, Inc.*, 403 S.W.3d at 542–43. A court abuses its discretion when it acts in an arbitrary and unreasonable manner. *Id.* at 543. When awarding fees, the trial judge can draw on their common knowledge and experience when considering the testimony, the record, and the amount in controversy. *Id.* As stated above, when the trial court has not entered any findings of fact, we will imply the findings necessary to support the judgment to the extent that they are supported by the record. *Getosa Inc.*, 642 S.W.3d at 950.

Discussion

The DTPA provides that "[e]ach consumer who prevails shall be awarded court costs and reasonable and necessary attorneys' fees." TEX.BUS.&COM.CODE ANN. § 17.50(d). The party seeking fees has the burden to show that the requested fees are both reasonable and necessary. *Robles v. Nichols*, 610 S.W.3d 528, 537 (Tex.App.—El Paso 2020, pet. denied). Whether fees are reasonable and necessary is a question of fact to be determined by the fact finder. *Rohrmoos Venture v. UTSW DVA Healthcare, LLP*, 578 S.W.3d 469, 489 (Tex. 2019). The trial court may consider the entire record and relative success of the parties when determining reasonable and

necessary fees. *Wilkerson v. Atascosa Wildlife Supply*, 307 S.W.3d 357, 359 (Tex.App.—San Antonio 2009, pet. denied). The trial court may consider, among other things, the time, labor, and skill required, the difficulty of the questions involved, the amount in controversy, the customary fees in the area for similar services, the results obtained, and the reputation and ability of the lawyer performing the services. *See Arthur Andersen & Co. v. Perry Equip. Corp.*, 945 S.W.2d 812, 818 (Tex. 1997).

Appellant produced an uncontroverted affidavit by his attorney regarding the amount of attorney's fees which included contemporaneous billing records, information on his experience and background, and his opinion on customary fees for similar litigation. In the absence of rebuttal evidence, Appellant contends that it was an abuse of discretion for the trial court to award anything less than the full amount requested. When the testimony of an interested witness "is not contradicted by any other witnesses, or attendant circumstances, and the same is clear, direct, and positive, and free from contradiction, inaccuracies, and circumstances tending to cast suspicion thereon," the trial court may take the testimony as true as a matter of law. *Elias v. Mr. Yamaha, Inc.*, 33 S.W.3d 54, 62–63 (Tex.App.—El Paso 2000, no pet.). Our Court has noted that this is "especially true" when the opposing party had the opportunity to contest, cross examine, or otherwise offer opposing evidence but failed to do so. *Id.* at 63.

Appellant urges us to adopt this reasoning here because the evidence of attorney's fees was uncontradicted by Appellee at trial. However, a failure to offer contradicting evidence is not dispositive. *Id.* In fact, the absence of conflicting evidence is only a factor to be considered by the court and does not mandate an award of the requested amount simply because testimony is uncontradicted. *Id.* Instead, the trial court as the fact finder may make credibility determinations when there are circumstances or evidence that the uncontradicted evidence is somehow

unreasonable or lacks credibility. *Id.* In such a case, any evidence that the requested fees are unreasonable, incredible, or questionable will "only raise a fact issue to be determined by the trier of fact." *Id.* (citing *Ragsdale v. Progressive Voters League*, 801 S.W.2d 880, 882 (Tex. 1990)).

We find that the facts here present such a case. During the final hearing, the trial court noted duplicate entries for "billing for travel time and then also billing under the expenses for mileage" within Appellant's invoices and attorney's fees evidence. The trial court further commented that there were "several items" that it did not "believe [were] reasonable." The trial court's review of the evidence shows that there was some question as to both the reasonableness and the credibility of the requested attorney's fees. We may infer that the trial court found that Appellant's attorneys' fees evidence was not "free from contradiction, inaccuracies, and circumstances tending to cast suspicion thereon." *Elias*, 33 S.W.3d at 62–63. Because these determinations are within the sole purview of the trial court, and we find that the evidence is not uncontroverted, we will not disturb the trial court's finding.

Here, because no findings of facts or conclusions of law were filed or requested, the court's judgment implies all necessary findings to support it. *Getosa, Inc.*, 642 S.W.3d at 950. Therefore, the judgment in this case implies that, after reviewing the evidence, the trial court found that a $1,000 award was both reasonable and necessary. Accordingly, Appellant has not shown that the trial court abused its discretion. Appellant's second issue is overruled.

CONCLUSION

We overrule Appellant's first and second issues, and the judgment of the trial court is affirmed.

October 31, 2022 ROY FERGUSON, Judge

Before Rodriguez, C.J., Alley, J., and Ferguson, Judge

Ferguson, Judge (Sitting by Assignment)