



COURT OF APPEALS
EIGHTH DISTRICT OF TEXAS
EL PASO, TEXAS

THEODIS and MARIA BRUCE,	§	
VIRGINIA and SERGIO CORDOVA,	§	
VICTOR CORRAL, JOSE DOMINGUEZ,	§	No. 08-20-00135-CV
MAGDALENA JUAREZ, BERNARDA	§	
LOPEZ, ELISA NEGRETE, MARIA	§	Appeal from the 171st
REYES, LUIS VELAZQUEZ, JOSE	§	
VALDEZ, ANTONIO and MARIA	§	Judicial District Court
SALGADO, and IRIS JORDAN,	§	
	§	of El Paso County, Texas
Appellants,	§	
	§	(TC# 2016DCV3160)
v.	§	
OSCAR RENDA CONTRACTING,	§	
	§	
Appellee.	§	

OPINION

Appellants are multiple El Paso homeowners (the Homeowners) who successfully sued Appellee Oscar Renda Contracting (Renda Contracting) for damages to their homes resulting from a construction project performed by Renda Contracting in their neighborhood. The Homeowners assert the trial court erred when it impliedly denied their motion for judgment which attached a

proposed judgment conforming with the jury’s award of exemplary damages.¹ Because the trial court did not have authority to disregard the jury’s verdict without a motion requesting such relief, and because the record does not support a finding that the jury failed to unanimously agree on the issue of exemplary damages, we conclude the trial court erred in so ruling. We therefore reverse the trial court’s decision to disregard the exemplary damages awarded and remand to the trial court with instructions to enter a judgment in harmony with the jury’s verdict to include an award of exemplary damages in the amount set forth by the jury’s verdict.

I. BACKGROUND

A. The Homeowners’ lawsuit

Renda Contracting performed a storm water project for the City of El Paso that included excavating trenches in the Homeowners’ neighborhood. In this lawsuit, the Homeowners alleged that Renda Contracting’s activities damaged their homes due to the “vibrations caused by their excavators.” They brought claims for negligence, gross negligence, fraud, trespass to real property, negligent misrepresentation, private nuisance, and damage to real property.

At trial, the Homeowners testified about damages occurring to their homes during the construction project, and multiple Homeowners testified that they, or their family members, reported their concerns to Renda Contracting’s employees, but their complaints were ignored. Additionally, both parties presented expert witness testimony on whether Renda Contracting’s activities caused the damages claimed by the Homeowners.

¹ Renda Contracting filed an untimely notice of appeal, which this Court previously dismissed for want of jurisdiction. *See Bruce v. Oscar Renda Contracting*, No. 08-20-00135-CV, 2020 WL 6255409, at *2 (Tex. App.—El Paso Oct. 23, 2020, no pet.) (mem. op.). Accordingly, the remainder of the jury’s verdict is not at issue.

B. The jury questions

At the close of evidence, the jury was given instructions then asked a series of questions on the several theories of liability asserted by the Homeowners. Among the list of 11 instructions given for answering questions, instruction number 11 stated:

Unless otherwise instructed, the answers to the questions must be based on the decision of at least 10 of the 12 jurors. The same 10 to 12 jurors must agree on every answer: Do not agree to be bound by a vote of anything less than 10 jurors, even if it would be a majority.

In Question 1, the jury was asked: “Did the negligence, if any, of *Oscar Renda Contracting* proximately cause the injury in question?” The jury answered “Yes” to this question. In Question 2, the jury affirmatively answered that Renda Contracting trespassed on each of the Homeowners’ properties, but in Question 3, the jury found that none of the trespasses were intentional. In Question 4, the jury found that Renda Contracting intentionally created a private nuisance for each of the Homeowners. In Question 5 the jury also found that Renda Contracting negligently created that nuisance. Question 6 then asked the jury to find damages for each of the Homeowners. The jury filled in varying amounts for each of the Homeowners, ranging from \$11,805.14 to \$23,309.20, for a total of \$237,086.75 in actual damages.

Relevant to this appeal and the issue of exemplary damages, the jury was asked two additional questions. First, Question 7 asked the jury, “Do you find by clear and convincing evidence that the harm to *Plaintiffs* resulted from gross negligence?” The conditioning instruction for Question 7 required unanimity in answering the question as follows:

Answer Question 7 only if you unanimously answered “Yes” to Question 1 regarding *Oscar Renda Contracting*. Otherwise, do not answer Question 7.

To answer “Yes” to Question 7, your answer must be unanimous. You may answer “No” to Question 7 only upon a vote of ten or more jurors. Otherwise, you must not answer the following question.”

The jury answered question 7, “Yes.” Second, Question 8 asked: “What sum of money, if any, should be assessed against *Oscar Renda Contracting* and awarded to *Plaintiffs* as exemplary damages for the conduct found in response to Question 1?” After being told to only answer Question 8, if it answered “Yes” to Question 7, the jury assessed exemplary damages at \$75,000 “for each [plaintiff],” for a total of \$825,000 in exemplary damages. No other questions were asked in the jury charge.

C. The verdict certificate

As part of the jury charge, the trial court provided the jury with instructions on how to sign the verdict certificate. The certificate instructions read as follows:

1. You may answer the questions on a vote of 10 jurors. The same 10 jurors must agree on every answer in the charge. This means you may not have one group of 10 jurors agree on one answer and a different group of 10 jurors agree on another answer.
2. If 10 jurors agree on every answer, those 10 jurors sign the verdict.

If 11 jurors agree on every answer, those 11 jurors sign the verdict.

If all 12 of you agree on every answer, you are unanimous and only the presiding juror signs the verdict.
3. All jurors should deliberate on every question. You may end up with all 12 of you agreeing on some answers, while only 10 or 11 of you agree on other answers. But when you sign the verdict, only those 10 who agree on every answer will sign the verdict.

The jury certificate in this instance provided four options as follows: one line could be checked if the verdict was unanimous, meaning “All 12 of us have agreed to each and every answer.” Another line was to be checked if the verdict was not unanimous but “Eleven of us have agreed to each and every answer[.]” A third line—and the one checked here—states: “Our verdict is not unanimous. Ten of us have agreed to each and every answer and have signed the certificate below.” Additionally, ten of the jurors signed the form. A fourth option read: “As to Questions 10,

11, 12, and 13, our verdict is unanimous.” The jury did not check the fourth option as this charge did not include any question numbered 10, 11, 12, or 13.

When the jury returned its verdict, the trial court read aloud the entire signed verdict, including the jury’s answers to all eight questions, as well as the certificate stating the verdict was not unanimous. Then, at the request of the Homeowners’ attorney, the trial court polled the jurors, asking if the verdict just read was their “individual verdict” to which ten jurors answered “Yes” and two said, “No.” The jury was then discharged without objection from either party.

D. Renda Contracting’s objection to the proposed judgment

The Homeowners later moved for entry of judgment on the verdict, attaching a proposed judgment that included awards for both actual damages and exemplary damages in the amounts set forth in the jury’s verdict. Renda Contracting filed a response to the motion which included objections raised against the proposed judgment. Primarily, it argued that the judgment could not properly include an award of exemplary damages because, it contended, the “verdict was not unanimous” as required for such award. The Homeowners responded to the objection, asserting that although the certificate reflected that 10 jurors had agreed to each and every answer and signed the certificate, the verdict itself also included answers to Questions 1, 7 and 8, which were conditioned on unanimity as instructed in Question 7. The trial court entered a final judgment which disregarded the jury’s award of exemplary damages. This appeal followed.

II. ISSUES ON APPEAL

In two issues on appeal, the Homeowners contend the trial court’s refusal to conform the judgment to the jury’s verdict necessarily led to the rendition of an improper judgment. Specifically, they argue: (1) Renda Contracting waived error, if any, by not objecting at the charge conference on the basis that jury questions on exemplary damages lacked unanimity instructions; and (2) even if this Court looks past such waiver, Renda Contracting failed to prove the jury did

not answer the exemplary damages unanimously. Renda Contracting counters that the trial court properly omitted the exemplary damages award, contending the verdict certificate established a lack of unanimity on those findings. Furthermore, in what we construe to be a cross-point, Renda Contracting asserts that we should uphold the trial court's omission of the award as there was insufficient evidence to support the jury's finding of gross negligence.

We address these arguments in turn.

III. THE JURY UNANIMITY REQUIREMENT

A. Standard of Review

We review a trial court's entry of judgment on a jury verdict as a question of law. *Arbor Windsor Ct., Ltd. v. Weekley Homes, LP*, 463 S.W.3d 131, 136 (Tex. App.—Houston [14th Dist.] 2015, pet. denied) (noting that determining the legal effect of the jury's answers is a question of law). More specifically, we treat a trial court's legal conclusion that a jury's verdict was not unanimous as a question of law, which we review de novo, and we will uphold the judgment if it can be sustained on any legal theory supported by the evidence. *See Trish Deatley v. Rodriguez*, 246 S.W.3d 848, 850 (Tex. App.—Dallas 2008, no pet.). “[Q]uestions of law are always subject to *de novo* review.” *In re Humphreys*, 880 S.W.2d 402, 404 (Tex. 1994).

B. Applicable Law

Although a verdict in district court may generally be based on a vote of as few as 10 jurors, to support an award of exemplary damages the jury must unanimously agree on the following three key issues: (1) the plaintiff's underlying theory of liability; (2) any additional conduct committed by the defendant, such as malice or gross negligence, that would support an exemplary damages award; and (3) the amount of the exemplary damages awarded.² *See* TEX. R. CIV. P. 226a;

² Regarding the number of jurors, a jury in district court is composed of 12 persons. *See* TEX. CONST. art 5, § 13; TEX. GOV'T CODE ANN. §62.201; TEX. R. CIV. P. 292(a). In contrast, a jury in a constitutional county court, a county

Cowboys Concert Hall-Arlington, Inc. v. Jones, No. 02-12-00518-CV, 2014 WL 1713472, at *12 (Tex. App.—Fort Worth May 1, 2014, pet. denied) (mem. op.) (recognizing the three unanimity requirements for an award of exemplary damages as set forth in Rule 226a); *see also* TEX. CIV. PRAC. & REM. CODE ANN. § 41.003(d) (“Exemplary damages may be awarded only if the jury was unanimous in regard to finding liability for and the amount of exemplary damages.”); TEX. R. CIV. P. 292(b) (a verdict may be rendered awarding exemplary damages only if the jury was unanimous in finding liability for and the amount of exemplary damages).

The Texas Supreme Court has promulgated a standard jury charge set forth in rule 226a, to be given with such modifications as the circumstances of the particular case may require, including cases in which exemplary damages will be submitted to the jury. *See* TEX. R. CIV. P. 226a; *Cullum v. White*, 399 S.W.3d 173, 188 (Tex. App.—San Antonio 2011, pet. denied) (recognizing that rule 226a sets forth the instruction regarding unanimous verdicts approved by order of the Texas Supreme Court); *see also* TEX. CIV. PRAC. & REM. CODE ANN. § 41.003(d) (requiring the trial court to instruct the jury in all cases in which the issue of exemplary damages is submitted to the jury that “in order for you to find exemplary damages, your answer to the question regarding the amount of such damages must be unanimous”). The standard charge includes instructions informing the jury it must unanimously agree the defendant is liable to the plaintiffs and that gross negligence or malice exists, in order to award dollar amounts for exemplary damages.

Rule 226a further provides that a trial court must give the jury a general verdict certificate form allowing it to certify that its verdict was unanimous, or alternatively, that 10 or 11 of the jurors “have agreed to each and every answer and have signed the certificate below.”

court at law, or in the justice courts is composed of six persons except as otherwise provided by the constitution or other law. *See* TEX. CONST. art 5, § 17; TEX. GOV’T CODE ANN. §§ 25.0007(b), 62.301; TEX. R. CIV. P. 504.2(f).

TEX. R. CIV. P. 226a. In addition, in cases in which there are “some questions [that] require unanimous answers,” rule 226a requires the trial court to give the jury an “additional certificate” to be signed by the presiding judge, as modified for the requirements of the trial court level:

I certify that the jury was unanimous in answering the following questions. All 12 [6] of us agreed to each of the answers. The presiding juror has signed the certificate for all 12 [6] of us.[Judge to list questions that require a unanimous answer, including the predicate liability question.]

TEX. R. CIV. P. 226a.

Thus, rule 226a clearly contemplates a situation in which a jury may not agree on each and every question asked in a jury charge, but where it may nevertheless unanimously agree on certain findings as needed to award exemplary damages. *See generally Mem'l Hermann Health Sys. v. Gomez*, 584 S.W.3d 590, 622 (Tex. App.—Houston [1st Dist.] 2019, pet. granted) (upholding award of exemplary damages where jury’s certificate form indicated that its verdict was not entirely unanimous as to each and every answer, but where it stated in its special certificate that its exemplary damages findings were unanimous).

C. Analysis

Assigning error to the trial court’s implied denial of their motion for judgment, the Homeowners argue in this appeal that the trial court rendered an improper judgment by disregarding the jury’s finding on exemplary damages. *See* TEX. R. CIV. P. 301. We consider the Homeowners’ first and second issues together to determine whether the trial court erred in impliedly denying the Homeowners’ motion for judgment.

To start, the Homeowners rightly point out in their first argument that Renda Contracting did not object to questions pertaining to exemplary damages before the charge was read to the jury, and therefore waived any challenge it might bring to the jury charge on that basis. *See* TEX. R. CIV. P. 272 (all objections to a jury charge not presented to the trial court prior to reading

the charge to the jury “shall be considered as waived.”); TEX. R. CIV. P. 278 (“Failure to submit a definition or instruction shall not be deemed a ground for reversal of the judgment unless a substantially correct definition or instruction has been requested in writing and tendered by the party complaining of the judgment.”); *Murphy v. American Rice, Inc.*, No. 01-03-01357-CV, 2007 WL 766016, at *21 (Tex. App.—Houston [1st Dist.] Mar. 9, 2007, no pet.) (mem. op.) (defendant waived its challenge to the trial court’s failure to instruct the jury on the need for unanimity with respect to its award of exemplary damages where the defendant failed to timely object to the omission of the instruction); *Fitzerman v. Classic Americana, LLC*, No. 05-15-00528-CV, 2016 WL 1450165, at *10 (Tex. App.—Dallas Apr. 13, 2016, no pet.) (mem. op.) (defendant waived any error created by the omission of unanimity instructions in the jury charge by failing to timely object to the charge on that basis).

Here, the trial court informed the jury that before it could award exemplary damages, it was required to unanimously agree that Renda Contracting was liable for the harm caused to the Homeowners, and that such harm further resulted from Renda Contracting’s gross negligence (Questions 1 and 7). The bottom of Question 7 gave further instructions about proceeding to Question 8. The instruction stated, “If you have answered ‘Yes’ to Question 7, then answer Question 8. Otherwise, do not answer Question 8.” The instruction included on Question 8, however, did not otherwise inform the jury that it was similarly required to unanimously agree on the *amount* of the exemplary damages to be awarded, and instead Question 8 only instructed the jury to fill in the amount of exemplary damages, if any, it believed should be awarded in dollars and cents. As to the answer to Question 8, the jury filled in the blank provided with the following: Answer: “\$75,000 for each [plaintiff] total of \$825,000.”

This waiver argument appears to be a moot point, however, as Renda Contracting did not raise any challenge to the jury charge in its post-verdict objection included in its response to the Homeowners' proposed judgment. Nor does Renda Contracting argue in this Court that a charge error supports the trial court's disregard of exemplary damages from the final judgment. To the contrary, in its brief, Renda Contracting acknowledges that any error in the jury charge with regard to Question 8 was "harmless," and it otherwise appears satisfied that the trial court properly instructed the jury of the need for unanimity in awarding exemplary damages. Thus, we are not persuaded by the Homeowners' initial argument on waiver of jury charge error.³

For three other reasons, we conclude the trial court erred when it disregarded the jury's verdict awarding exemplary damages: (1) only the Homeowners made a request for the court to sign a proposed judgment, and their motion preserved error for review, (2) Renda Contracting's complaint about the jury verdict—which it first raised in its response to the Homeowners' motion for judgment—should have been brought at a time before the jury was discharged by the court, and (3) even if Renda Contracting's response is otherwise construed as a motion to disregard the jury's findings on exemplary damages, it nonetheless failed to conclusively establish that the jury awarded exemplary damages without having reached unanimity on the required questions.

1. No motion was filed requesting a judgment disregarding the jury's verdict on exemplary damages

In relevant part, Rule 301 of the Texas Rules of Civil Procedure provides: "The judgment of the court shall conform to the pleadings, the nature of the case proved and the verdict[.]" TEX. R. CIV. P. 301. Continuing, this rule includes an exception: "Provided, that upon motion and

³ The dissent states we understate several errors that exist with the jury charge. However, any possible issues with the jury charge are not before this Court. *See* TEX. R. CIV. P. 272 (stating all objections to a jury charge not presented to the trial court prior to reading the charge to the jury "shall be considered as waived"). Furthermore, appellate courts are to presume the jury followed the jury instructions. *Columbia Rio Grande Healthcare, L.P. v. Hawley*, 284 S.W.3d 851, 862 (Tex. 2009) ("The jury is presumed to have followed the court's instructions.").

reasonable notice the court may render judgment non obstante veredicto if a directed verdict would have been proper, and provided further that the court may, upon like motion and notice, disregard any jury finding on a question that has no support in the evidence.” *Id.* Thus, a motion for JNOV preserves the “no evidence” and “as a matter of law” points for appeal. Relevant to this appeal by the Homeowners, a motion for judgment preserves error in the event the trial court modifies or rejects the proposed judgment. *Emerson v. Tunnell*, 793 S.W.2d 947, 947-48 (Tex. 1990).

The trial court cannot disregard a material jury finding on its own initiative—it can do so only on a written motion. TEX. R. CIV. P. 301; *Law Offices of Windle Turley, P.C. v. French*, 140 S.W.3d 407, 414 (Tex. App.—Fort Worth 2004, no pet.); *see also Lamb v. Franklin*, 976 S.W.2d 339, 343 (Tex. App.—Amarillo 1998, no pet.) (“Because the record does not reflect that a motion for judgment non obstante veredicto was filed, or that a hearing on such motion was had, we conclude that the trial court erred in granting such relief.”). In other words, where a trial court renders a modified judgment or judgment non obstante veredicto, it must act pursuant to a motion, and provide notice and a hearing. *Lamb*, 976 S.W.2d at 343. However, “upon motion and reasonable notice the court may render judgment non obstante veredicto if a directed verdict would have been proper, and provided further that the court may, upon like motion and notice, disregard any jury finding on a question that has no support in the evidence.” *Id.* (quoting TEX. R. CIV. P. 301).

Following the jury’s verdict, the Homeowners filed a motion to enter judgment and attached a proposed judgment. In response, Renda Contracting filed a response and objections to the proposed judgment asserting the jury’s verdict on exemplary damages was not unanimous. No attachment or exhibit was included with the response nor was a request made to the trial court to sign a counter judgment that disregarded jury findings. Renda Contracting simply requested that

the trial court sustain its objections. In reply, the Homeowners procedurally objected to the response, asserting it was untimely given that Renda Contracting waited until the hearing before filing it. The Homeowners additionally argued they were not given sufficient notice and a hearing on Renda Contracting's objection. Addressing Renda Contracting's objections in substance, the Homeowners also urged that the jury's findings and award of exemplary damages were in fact unanimous and, if a conflict existed with the jury's certification, that Renda Contracting waived such conflict by not raising that point before the court discharged the jury from the case. Ultimately, the trial court entered a final judgment, which, in substance, disregarded the jury's findings on exemplary damages. In their brief, the Homeowners assert "the trial court's refusal to conform the judgment to the verdict necessarily led to the rendition of an improper judgment," citing to rule 301.

Here, a basis for reversal of the trial court's implied ruling is that Renda Contracting did not file any motion requesting the trial court to disregard the jury's findings on exemplary damages, but only objected to the Homeowners' proposed judgment. *See* TEX. R. CIV. P. 301; *see also French*, 140 S.W.3d at 414 ("If the record does not reflect the motion, notice, and hearing, 'a judgment disregarding the verdict or specific findings under Rule 301 will be reversed.'" (quoting *Franklin*, 976 S.W.2d at 343)). Both parties treated the jury's verdict as if it had been returned without conflict. Although Renda Contracting raised a conflict issue after the jury's discharge, it did so only in a response to the Homeowners' motion. Without a proper motion from Renda Contracting, however, the trial court lacked authority to disregard jury findings on exemplary damages. *See* TEX. R. CIV. P. 301; *French*, 140 S.W.3d at 414; *Franklin*, 976 S.W.2d at 343.

2. Renda Contracting's argument was previously waived

Even if we construe Renda Contracting's response and objection as an objection to the jury's verdict, the argument should have been brought prior to the jury being discharged from the

case. Rule 295 provides that when a jury's verdict is incomplete, nonresponsive, or the jury's answers are in conflict, the trial court shall in writing instruct the jury in open court of the nature of the incompleteness, unresponsiveness, or conflict, provide the jury such additional instructions as may be proper, and retire the jury for further deliberations. *See* TEX. R. CIV. P. 295. ““What the jury intended by findings that potentially conflict is best determined by the jury itself,” and that is the solution rule 295 requires.” *USAA Texas Lloyds Co. v. Menchaca*, 545 S.W.3d 479, 518 (Tex. 2018) (quoting *Springs Window Fashions Div., Inc. v. Blind Maker, Inc.*, 184 S.W.3d 840, 867 (Tex. App.—Austin 2006, pet. granted)).

Renda Contracting argued the award of exemplary damages was improper because the jury did not return a unanimous verdict. It based this argument on an assertion that only 10 of the 12 jurors signed the verdict certificate; and, in that form, the certificate conflicted with answers given to questions instructing the jury not to answer certain questions unless there was unanimity among all jurors. We disagree.

Rule 226a provides that in a case in which exemplary damages are at issue, a trial court must give a jury both a general verdict certificate indicating whether its verdict was unanimous as to each and every question asked, as well as an “additional certificate,” indicating whether it nevertheless unanimously agreed in answering the questions asked in support of an exemplary damages award. TEX. R. CIV. P. 226a. Here, due to an apparent error in numbering the questions, the trial court did not provide the jury with any such additional certificate and did not give the jurors the option of certifying that its answers to the liability, gross negligence, and exemplary damages questions were unanimous. Thus, no certification question asked the jury to certify that unanimity was reached on all matters requiring unanimity.

Nevertheless, Renda Constructing was required to lodge an objection pursuant to rule 295 of the Texas Rules of Civil Procedure before the jury was discharged. If a timely objection had been made, the trial court could have provided the jury with an amended verdict form, thereby giving the jurors the option to certify that they had (or had not) unanimously agreed on the issue of exemplary damages. *See Fleet v. Fleet*, 711 S.W.2d 1, 3 (Tex. 1986) (stating when faced with a verdict which left material issues supported by some evidence unanswered, the trial court must instruct the jury to deliberate further on the issues); *Bryan v. Papalia*, 542 S.W.3d 676, 692-93 (Tex. App.—Houston [14th Dist.] 2017, rev. granted, judgment vacated w.r.m.) (approving trial court’s decision to send jury back for further deliberations to clarify and amend its verdict certificate where the certificate indicated that the jury did not answer questions regarding the defendant’s liability unanimously, but its answers to the questions set forth in the jury charge established they did).

Because Renda Contracting failed to raise an objection at the proper time, we conclude that the trial court had no authority to entertain the objection when it did, even if we construe the response to the motion for judgment as a motion for judgment notwithstanding the verdict. *See Menchaca*, 545 S.W.3d at 515–16 (recognizing that a party must object in the trial court to incomplete or unresponsive jury verdicts, as well as to conflicting jury answers, before the jury is discharged, or the challenge is waived).

The dissent cites to *Redwine v. Peckinpaugh*, 535 S.W.3d 44 (Tex. App.—Tyler 2017, no pet.), as persuasive authority. Yet we conclude the facts are distinguishable. There, the court held that, defendant’s objection to exemplary damages in a post judgment motion preserved error, when the jury had expressly set forth in the charge that the verdict was not unanimous and only agreed upon by eleven jurors. *Id.* at 47-48. In *Redwine*, the underlying claim was for defamation where

the jury was presented with seven different statements and needed to answer (1) whether the statements were made by the defendant, (2) whether the statements were false, and (3) whether the defendant knew or should have known, in the exercise of ordinary care, that the statements were false and had the potential to be defamatory. *Id.* at 48. The jury answered in the affirmative to each question for all seven statements. *Id.* In addition to other damages awarded, the jury awarded exemplary damages. *Id.* The defendant argued the exemplary award was not proper because the jury was not unanimous. *Id.* at 51. The Tyler Court of Appeals concluded the record showed the jury verdict was not unanimous because, although the jury answered the exemplary damages question containing the proper predicates on unanimity, the jury had certified otherwise that the verdict was not unanimous. *Id.* at 52. Polling of the jury also confirmed the absence of unanimity. *Id.*

As contrasted from this case, the key distinction in the *Redwine* case is that the jury had only been tasked with deciding a single cause of action, namely, a claim of defamation. *Id.* at 48. There was no other way to reconcile the jury's certification that it had not reached a unanimous decision, other than to interpret the certification by its plain words. In this case, the jury was asked to answer liability questions regarding a mix of several causes of action to include a claim of gross negligence that itself required jury unanimity. Because the jury was instructed to only answer the gross negligence question, and the exemplary damages award question if unanimity was reached, we must presume it did so by following the instructions. *Hawley*, 284 S.W.3d at 862 (“The jury is presumed to have followed the court’s instructions.”).

We conclude that the jury's certification at issue here does not have the same conclusive effect as it did in *Redwine*, given that this jury was permitted to answer several questions by a 10 to 2 vote, unless otherwise instructed to only answer upon reaching unanimity.

3. Even if Renda Contracting's response is construed as a motion to disregard the jury's verdict, said motion failed to establish the jury verdict was not unanimous as to questions requiring unanimity

Lastly, when looking at the jury's verdict as a whole, as we must, Renda Contracting failed to conclusively prove the verdict was not unanimous. While the verdict certificate indicated that only 10 out of the 12 jurors "agreed to each and every answer and have signed the certificate below," the certificate failed to further ask whether all 12 jurors unanimously agreed on answers that required unanimity such as the question on gross negligence and the award of exemplary damages. In fact, the jury was asked at least five questions pertaining to the other causes of action upon which the jury did not need unanimity to reach a proper verdict. In addition to the questions regarding Renda Contracting's liability and gross negligence, the jury was asked (1) whether it had trespassed on the property of each plaintiff; (2) whether the trespass was intentional with respect to each plaintiff; (3) whether its actions constituted a private nuisance, and if so, whether its actions were intentional or negligent with respect to each plaintiff; and (4) the amount of actual damages to which each plaintiff was entitled. The jurors could have not reached unanimity on any number of these issues, while still unanimously agreeing on the key issues of liability and gross negligence in support of an exemplary damages award.

Nevertheless, the jury charge expressly instructed the jury that it was required to unanimously agree on Questions 1 (whether Renda Contracting's negligence proximately caused the injury) and 7 (whether the harm resulted from gross negligence) before it could award exemplary damages. Additionally, Question 7 instructed the jury to only answer the question if they unanimously answered "Yes" to Question 1. The jury was also instructed to only answer "Yes" to Question 7 if the answer was unanimous. Because the jury did in fact award such damages, we must presume that it correctly followed these instructions and thereby based its exemplary damages award on a unanimous vote, despite its lack of unanimity on other questions

contained in the charge. *See generally Hawley*, 284 S.W.3d at 862 (noting that unless the record demonstrates otherwise, appellate courts must presume the jury followed instructions given in the jury charge (citing *Golden Eagle Archery, Inc. v. Jackson*, 116 S.W.3d 757, 771 (Tex. 2003))). Because the jury was never given the opportunity to clarify whether it unanimously agreed on the issue of exemplary damages, we must reconcile any ostensible conflict between its verdict certificate and its answers to the questions in the jury charge in a manner that supports its award of exemplary damages. *See Menchaca*, 545 S.W.3d at 509 (recognizing that a court must “reconcile apparent conflicts in the jury’s findings” in a way that harmonizes them, if reasonably possible); *Metro Allied Ins. Agency, Inc. v. Lin*, 304 S.W.3d 830, 837 (Tex. 2009) (courts must “indulge all reasonable inferences in favor of the jury’s verdict”). Viewing the jury’s verdict as a whole presents evidence of unanimity.

Finally, Renda Contracting relies on a case for the proposition that the trial court properly omitted the exemplary damages award. *See, e.g., Miller v. Argumaniz*, 479 S.W.3d 306, 315 n.9 (Tex. App.—El Paso 2015, pet. denied). However, in that case, the jury acknowledged that it did not unanimously agree on the issue of the defendant’s liability. *Id.* (recognizing in dicta that an award of exemplary damages could not stand where the plaintiff expressly conceded that the jury did not unanimously agree on the issue of the defendant’s liability). Given that acknowledgment, the court found an exemplary damages award was clearly improper. *Id.* In the present case, however, no such acknowledgment appears in this record.

It is true that the Homeowners were responsible for obtaining all the needed findings to support the award they sought. *See United Scaffolding, Inc. v. Levine*, 537 S.W.3d 463, 481 (Tex. 2017) (stating the plaintiff bears the burden to obtain affirmative answers to jury questions as to the necessary elements of the plaintiff’s cause of action). In this case, the Homeowners did just

that. The jury's verdict as a whole demonstrates the jury made all requisite findings, including a unanimous affirmative finding on liability, gross negligence, and exemplary damages. We conclude that Renda Contracting failed to conclusively prove the lack of unanimity.

For all these reasons, we conclude the trial court erred in disregarding the jury's findings. We sustain the Homeowners' first and second issue.

IV. RENDA CONTRACTING'S CROSS-POINT

When a judgment disregarding a jury's verdict is entered, an appellee may bring a cross-point in its brief on "any ground which would have vitiated the verdict or would have prevented an affirmance of the judgment had one been rendered by the trial court in harmony with the verdict, including although not limited to the ground that one or more of the jury's findings have insufficient support in the evidence or are against the overwhelming preponderance of the evidence as a matter of fact . . . [.]” See TEX. R. CIV. P. 324(c); see also *Dudley Constr., Ltd. v. Act Pipe & Supply, Inc.*, 545 S.W.3d 532, 538-39 (Tex. 2018); *Miller v. Bock Laundry Mach. Co.*, 568 S.W.2d 648, 652 (Tex. 1977). Here, Renda Contracting argues that even if we were to conclude that the jury's verdict was unanimous on the issue of exemplary damages, we should nevertheless affirm the trial court's judgment on the alternative ground that there was insufficient evidence to support the jury's finding of gross negligence.⁴ An appellee's argument will be treated as a cross-point even if it is not formally labeled as such, as long as the appellee makes "a substantive argument that would, if accepted, vitiate the jury's original verdict or prevent an affirmance of the judgment had one been rendered in harmony with the jury's verdict, it has presented a cross-point sufficient

⁴ We note here that Renda Contracting initially criticizes the Homeowners for not addressing this issue in their brief. However, as the Homeowners point out, Renda Contracting did not raise this issue in the court below when objecting to the Homeowners' proposed judgment. Instead, its response only raised an issue questioning the unanimity of the jury's verdict on exemplary damages. Accordingly, the Homeowners were under no obligation to brief any issues regarding the sufficiency of the evidence to sustain their point of error.

to avoid waiver.” *Dudley Constr.*, 545 S.W.3d at 538. Considering its cross-point, we do not find that Renda Contracting has made a meritorious argument on this point.

A. Standard of review and applicable law

In a legal-sufficiency review, “we determine whether more than a scintilla of evidence supports the jury’s finding by considering evidence favorable to the finding if a reasonable fact-finder could and disregarding evidence contrary to the finding unless a reasonable fact-finder could not.” *Horizon Health Corp. v. Acadia Healthcare Co.*, 520 S.W.3d 848, 859 (Tex. 2017). In a factual sufficiency challenge, an appellate court must “consider and weigh all of the evidence in the case and to set aside the verdict and remand the cause for a new trial, if it thus concludes that the verdict is so against the great weight and preponderance of the evidence as to be manifestly unjust—this, regardless of whether the record contains some evidence of probative force in support of the verdict.” *Jackson*, 116 S.W.3d at 761 (quoting *In re King’s Estate*, 244 S.W.2d 660, 661 (Tex. 1951)).

Renda Contracting points out that gross negligence consists of two components: “(1) viewed objectively from the actor’s standpoint, the act or omission complained of must involve an extreme degree of risk, considering the probability and magnitude of the potential harm to others; and (2) the actor must have actual, subjective awareness of the risk involved, but nevertheless proceed in conscious indifference to the rights, safety, or welfare of others.” *Lee Lewis Const., Inc. v. Harrison*, 70 S.W.3d 778, 785 (Tex. 2001).

B. Analysis

Renda Contracting contends that the Homeowners did not present any evidence to establish either element of their claim for gross negligence, and that to the contrary, the undisputed evidence in the record conclusively establishes that it did not engage in any acts of gross negligence. Renda Contracting finds it significant that the construction project was overseen by a third party, that the

third party issued daily inspection reports that did not disclose any “issues” with its performance, and that it successfully fulfilled all of its contractual obligations in the performance of its portion of the project. While the jury could have relied on this evidence to support a finding that Renda Contracting exercised *some* degree of care in performing its duties, Renda Contracting cites no authority for the proposition that it conclusively establishes the opposite, i.e., the absence of gross negligence. *See generally Harrison*, 70 S.W.3d at 785 (although evidence of simple negligence is not enough to prove the elements of gross negligence, “some evidence of care does not defeat a gross-negligence finding”); *Forester v. El Paso Elec. Co.*, 329 S.W.3d 832, 837-38 (Tex. App.—El Paso 2010, no pet.) (same). As the Homeowners’ expert witness agreed, the fact that a project was completed on time and on budget does not “necessarily mean” people’s homes were not damaged during the process.

In addition, the fact that the third party tasked with overseeing Renda Contracting’s work may not have been aware that Renda Contracting’s activities posed a risk of damage to the Homeowners—or simply chose to overlook this problem in its daily reports—this does not mean that Renda Contracting itself was not aware of that risk. In fact, the record contains ample evidence from which a jury could have reasonably inferred that Renda Contracting was both objectively and subjectively aware of the risks of its activities.

With regard to the objective component, the Homeowners presented expert witness testimony that Renda Contracting used a method known as “pile driving” to perform its portion of the construction project, in which the construction employees used the bucket of a large excavator to hammer steel plates into position in an area being excavated. The Homeowners’ experts testified that pile driving, while saving time compared to other alternative excavation methods, was known in the industry to be “very destructive.” The expert stated it causes “excess vibrations,” which in

turn can cause a “lot of vibrational damage.” Further, in this instance, the pile driving did in fact cause “major damage” to the Homeowners’ residences. Although Renda Contracting denied engaging in pile-driving—an issue that the jury was entitled to resolve in the Homeowners’ favor—its own safety director testified that if used, this method would “absolutely” cause damage to the surrounding area, as it is known to cause vibrations. *See generally City of Keller v. Wilson*, 168 S.W.3d 802, 820 (Tex. 2005) (providing it is the province of the jury to resolve conflicts in the evidence, and in determining whether the evidence supports a jury’s verdict, and we must assume that the jurors resolved all conflicts in accordance with that verdict). He further testified that Renda Contracting’s own policies therefore prohibited it from using pile driving without having a professional engineer assess the effects that using this method would have in the area, which it did not do in this instance.

This evidence is sufficient to support a finding that Renda Contracting was aware of the risks involved in its activities from an objective standpoint. Additionally, although Renda Contracting denied having subjective knowledge that its activities posed any risk of damage to the Homeowners, multiple Homeowners testified that either they, or their family members, reported the ongoing damage that Renda Contracting’s activities were causing to their homes to Renda Contracting’s on-site foreman, its superintendent, and other employees during the course of the construction project, but that their reports were ignored.

In its cross-point, Renda Contracting neither addresses nor explains why this evidence was not sufficient to allow the jury to reasonably infer that it was both objectively and subjectively aware of the extreme risk of harm its activities posed to the Homeowners, but that it nevertheless proceeded with its activities in conscience indifference to their rights, welfare, and safety. Accordingly, viewed in the light most favorable to the jury’s findings, we conclude that the

evidence presented at trial was both factually and legally sufficient to allow a jury to reasonably conclude that Renda Contracting's activities rose to the level of gross negligence. *See Harrison*, 70 S.W.3d at 785 (evidence of gross negligence is legally sufficient if, considered as a whole in the light most favorable to the prevailing party, it rises to a level that would enable reasonable and fair-minded people to differ in their conclusions).

We overrule Renda Contracting's cross-point.

V. CONCLUSION

We conclude that the trial court erred in disregarding the jury's award of exemplary damages, and further conclude there is no merit to Renda Contracting's cross-point. Accordingly, we reverse the trial court's judgment and remand to the trial court for further proceedings with instructions for the court to enter a judgment consistent with this opinion. All pending motions are denied as moot.

GINA M. PALAFOX, Justice

August 25, 2022

Before Rodriguez, C.J., Palafox, and Alley, JJ.
Alley, J., dissenting