Opinion filed February 8, 2018

In The

Eleventh Court of Appeals

No. 11-16-00087-CV

KYLE CLEMENT ET AL., Appellants

V.

DAVID BLACKWOOD AND SHARON BLACKWOOD, Appellees

On Appeal from the 350th District Court
Taylor County, Texas
Trial Court Cause No. 09742-D

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

Kyle Clement, Valerie Ann Clement, Rimrock Land & Cattle Co., LLC, and Clement Cattle Co., LLC appeal a judgment entered in favor of David Blackwood and Sharon Blackwood. In four issues on appeal, Appellants make the complaint that the evidence is legally and factually insufficient to support the jury's findings of breach of fiduciary duty, fraud, statutory theft, alter ego, and damages. We affirm.

David Blackwood (a cardiologist) and his wife, Sharon, met Kyle Clement and his wife, Valerie, at church. The families became "friends." Kyle and Valerie were cattle ranchers.

David and Kyle talked about cattle and ranching. David testified that, in the early nineties, he "ran a cow-calf operation" on approximately 23,000 acres as a "hobby" and a "sideline business." Kyle told David that he had an "operation already going" and that, if the Blackwoods were ever interested in purchasing some cattle with the Clements, they could expect a 20% return on their investment.

The Blackwoods and Clements agreed to enter into a cow-calf venture. The Blackwoods would provide the capital; the Clements would provide the expertise and labor; and the parties would split the profits. The venture was to be operated through the Clements' existing limited liability company, Rimrock. However, the parties never reduced their agreement to writing.

Over the course of eight months, the Blackwoods contributed in excess of $650,000 to the Clements[1] and Rimrock. David understood that these funds were "to be used to purchase cattle" and run a "self-sustaining cow-calf operation." He also understood that, by contributing this amount, the Blackwoods would earn an approximate 50% ownership in Rimrock.

Rimrock did use some of these contributions to purchase cattle. However, Valerie, the person who wrote checks for Rimrock expenditures, left the purpose of many expenditures unidentified. Valerie did not keep a set of books for Rimrock; Rimrock's accountings were based solely off its bank statements. The Blackwoods' CPA, Bobbie Lee Wolfe, opined that it was "impossible to properly adequately [sic]

[1]Prior to investing in Rimrock, the Blackwoods gave the Clements $55,000 to purchase and care for cattle on their behalf.

identify what each expense was for," and there were thousands of dollars in "miscellaneous unidentified expenses" in Rimrock's records.

The unidentified expenses included "15 to 25 debit charges each month for anywhere from HEB to Buffalo Corner, to Love's Country Store, Kincaid's Hamburgers, and so forth." Although Wolfe acknowledged that purchases at HEB could have been for fuel, it was apparent that the Clements paid some of their personal expenses out of Rimrock's account. Wolfe noticed, for example, that the Clements had paid for the repair of their swimming pool and septic system from Rimrock's account.

In addition to her involvement with Rimrock, Valerie also managed a personal cattle herd under the name "Valerie Clement d/b/a Clement Cattle Company." Wolfe was unable to determine whether Valerie paid for any of the expenses associated with her personal herd; however, it appeared to Wolfe that Valerie paid all of the expenses for her personal herd from Rimrock's account. Valerie did not deny that the Clements used Rimrock money to feed the Clements' cattle. Additionally, bank records showed that Valerie paid for $8,400 worth of cattle for the Clements' herd with a Rimrock check. She acknowledged that the Blackwoods did not agree to pay for the care of the Clements' cattle.

Additionally, Valerie operated a partnership called "Angels of Sacred Heart." The Blackwoods wrote a check to Rimrock for $40,000 with the memo "for cattle and lease," which is what the Clements told the Blackwoods was the purpose for which the money would be used. Instead, the evidence shows that on the same day that Valerie deposited the $40,000 check, she withdrew $26,594.96 from Rimrock's account. She used that withdrawal to purchase a house to benefit Angels of Sacred Heart. Valerie intended to sell the house and donate the land to her church. She did not tell the Blackwoods "specifically" about this purchase, and she never provided

the Blackwoods with an accounting for the house. The Blackwoods did not learn that Rimrock funds were used to purchase the house until after they filed the present lawsuit. Eventually, Angels of Sacred Heart gift-deeded the house to the Blackwoods.

When asked at trial about Rimrock's miscellaneous expenditures, Valerie responded that she "[did]n't recall," that she "[did]n't know," or that "[i]t was Rimrock money." When asked if she could use Rimrock's money "however [she] wanted to," Valerie replied, "Yes."

Wolfe determined that Rimrock's purchases and sales of cattle were "normal" for the size of its operation but that its expenses were not. The expenses were representative of either a larger herd or excessive expenses. He offered his opinion that it was not possible for Rimrock to make a profit with that amount of expenses.

In addition to their investment in Rimrock, the Blackwoods loaned the Clements $240,000 to pay off a mortgage on their family ranch.

Kyle informed David that the Clements' ranch, which was owned by Clement Cattle Company, LLC (Clement Cattle LLC), was in immediate danger of foreclosure. David first suggested that Rimrock sell enough cattle from its herd to get the money the Clements needed, but Kyle responded that there was not enough time. David asked what Rimrock would be worth if it sold all its cattle and settled its liabilities. Kyle responded that they would "probably have somewhere around $900,000 to a million dollars" and that he could sell all the cattle in sixty to ninety days. Relying on this representation, David agreed to "bail [the Clements] out of [their] mortgage" and to be repaid from the liquidation of Rimrock's assets. Kyle "was agreeable" to this plan.

However, when the last of Rimrock's cattle was finally sold seven months later, the Clements produced a check to the Blackwoods for only $94,618. At that

time, Kyle also informed David that he could not pay him back for the $240,000 loan. When the business between the Blackwoods and the Clements ended, the Blackwoods had suffered a $747,505 loss on their investment and the loan that they had extended to the Clements to stop foreclosure of the Clements' ranch.

At the time that David agreed to loan Kyle $240,000, he did not request any security—David did not think he needed to secure the debt. When he learned that Kyle could not pay him back with the liquidation proceeds, he asked the Clements if they would agree to sign a promissory note and deed of trust. They agreed, and the Blackwoods' attorney prepared and sent the requisite documents to the Clements.

The Clements disagreed with the terms of the note and refused to sign it. Eventually, they cut off all communication with the Blackwoods regarding the note. Although the Clements "knew that it was a loan and . . . always intended to pay it back," at the time of trial, the Clements had not repaid "a penny."

The Blackwoods filed suit against Valerie, Kyle, Rimrock, and Clement Cattle LLC and alleged that the Clements had "misrepresent[ed] what they were doing with [the Blackwoods'] money" and had accounted for Rimrock's funds "in ways other than they were spent." In their final petition, the Blackwoods alleged seven causes of action: (1) breach of fiduciary duty, (2) conspiracy to breach fiduciary duty, (3) action for access to partnership books and records, (4) fraud, (5) conversion and misappropriation, (6) alter ego, and (7) statutory theft.

The trial was held before a jury, which determined that defendants Kyle, Valerie, Rimrock, and Clement Cattle LLC owed a fiduciary duty to the Blackwoods due to a "relationship of trust and confidence" and that each defendant breached this duty. The jury further determined that Valerie and Kyle committed fraud against the Blackwoods. It also determined that Kyle and Valerie were responsible for the conduct of both Rimrock and Clement Cattle LLC under the theory of alter ego.

Finally, it determined that Valerie, Kyle, Rimrock, and Clement Cattle LLC stole the Blackwoods' property. The jury assessed damages of $747,505, and the trial court entered judgment against the defendants accordingly.

When we consider a legal sufficiency challenge, we review all of the evidence in the light most favorable to the trial court's judgment and indulge every reasonable inference in its favor. *City of Keller v. Wilson*, 168 S.W.3d 802, 822 (Tex. 2005). We credit any favorable evidence if a reasonable factfinder could and disregard any contrary evidence unless a reasonable factfinder could not. *Id.* at 821–22, 827. We may sustain a legal sufficiency challenge only when (1) the record discloses a complete absence of evidence of a vital fact, (2) the trial court is barred by rules of law or of evidence 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 mere scintilla, or (4) the evidence establishes conclusively the opposite of a vital fact. *Id.* at 810.

When we review a factual sufficiency challenge, we consider all of the evidence and uphold the finding unless it is so against the overwhelming weight of the evidence as to be clearly wrong and unjust. *Cain v. Bain*, 709 S.W.2d 175, 176 (Tex. 1986). But factfinders "are the sole judges of the credibility of the witnesses and the weight to give their testimony. They may choose to believe one witness and disbelieve another." *City of Keller*, 168 S.W.3d at 819 (footnote omitted). If the evidence at trial would enable reasonable minds to differ in their conclusions, we do not substitute our judgment, so long as the evidence falls within the zone of reasonable disagreement. *Id.* at 822.

The trial court rendered judgment based on the jury's findings, which included a finding that both Valerie and Kyle either made a "material misrepresentation" or "fail[ed] to disclose a material fact" to the Blackwoods with the requisite scienter.

In their fifth issue, Appellants argue that the evidence is legally and factually insufficient to prove that the Clements committed fraud when they represented that the Blackwoods would receive a 20% return on their investment in Rimrock's cow-calf operation.

According to Appellants, the Clements merely made a promise about things that would happen in the future. Therefore, evidence that the Clements failed to perform as promised is not sufficient; there must also be evidence that, at the time they made this representation, they did not intend to perform as promised.

To recover on an action for fraud, a party must prove the following: (1) a material representation was made; (2) the representation was false; (3) when the representation was made, the speaker knew the representation was false or made it recklessly without knowledge of the truth as a positive assertion; (4) the representation was made with the intention that it should be acted upon by the party; (5) the party acted in reliance upon it; and (6) the party suffered injury as a result. *Formosa Plastics Corp. USA v. Presidio Eng'rs & Contractors, Inc.*, 960 S.W.2d 41, 47 (Tex. 1998). If the alleged fraudulent statement was a promise to take future action, there must also be proof that the promise was made with no intention of performing. *Aquaplex, Inc. v. Rancho La Valencia, Inc.*, 297 S.W.3d 768, 774 (Tex. 2009).

"A promise to do an act in the future is actionable fraud when made with the intention, design and purpose of deceiving, and with no intention of performing the act." *Spoljaric v. Percival Tours, Inc.*, 708 S.W.2d 432, 434 (Tex. 1986). "Proving that a party had no intention of performing at the time a contract was made is not easy, as intent to defraud is not usually susceptible to direct proof." *Tony Gullo Motors I, L.P. v. Chapa*, 212 S.W.3d 299, 305 (Tex. 2006). Therefore, intent at the time the statement was made may be inferred from a party's actions before and after

the fraudulent conduct. *Spoljaric*, 708 S.W.2d at 435. Although a mere failure to perform is no evidence of fraud, breach of a promise to perform, "combined with 'slight circumstantial evidence' of fraud," is sufficient evidence of fraudulent intent. *Tony Gullo Motors*, 212 S.W.3d at 305 (quoting *Spoljaric*, 708 S.W.2d at 435); *see Formosa Plastics*, 960 S.W.3d at 48.

When the Blackwoods made their first contribution to Rimrock, Rimrock had no more than "a couple thousand dollars" in its account, and it had drawn numerous overdrafts. Upon the Blackwoods' first contribution of $55,000 to purchase cattle, the Clements immediately used $26,000 to engage in a self-dealing transaction. Specifically, they purchased cattle for Rimrock from Valerie. Three months later, the Blackwoods made their seventh contribution in the amount of $40,000. The same day that Valerie deposited that $40,000 check from the Blackwoods "for cattle and lease," she withdrew $26,594.96 from Rimrock's account to purchase a house for Angels of Sacred Heart. The timing of these actions constitutes circumstantial evidence that the Clements did not intend to operate Rimrock as a profitable cow-calf operation, despite promising the Blackwoods that they would. *See, e.g.*, *Aquaplex*, 297 S.W.3d at 775.

Additionally, Rimrock's bank records contain evidence that the Clements used Rimrock monies to fund their personal expenses. For instance, the Clements wrote checks on the Rimrock account to satisfy a judgment against Kyle and to maintain their personal herds. Throughout the trial, Valerie testified that she could do "whatever [she] wanted" with Rimrock's money, and she justified some of the actions listed above by explaining that they were funded with "Rimrock money." This is further evidence that the Clements did not intend to use the money invested in Rimrock solely to operate Rimrock's cow-calf business.

Bobbie Wolfe, a CPA who testified as an expert witness, testified that, with Rimrock's "excessive expenses," it would not have been possible to ever yield a profit. He also offered his opinion that the "incredible amount" of documentation missing from Rimrock's accounting showed that Valerie was "trying to defraud the investors."

The evidence that we have outlined is sufficient to support a finding that the Clements intended to perpetrate a fraud on the Blackwoods at the time that they induced the Blackwoods to invest in Rimrock. Specifically, they did not intend to use the Blackwoods' money to operate a profitable cow-calf operation for Rimrock as promised.

There is also sufficient evidence to support a finding that the Clements secured the $240,000 loan from the Blackwoods through fraudulent misrepresentations. Before they agreed to provide the loan to pay off the Clements' ranch, David asked Kyle how much Rimrock would be worth if it liquidated all its assets and paid all its liabilities. Kyle responded with the estimate, "$900,000 to a million dollars." This estimate might have been supported by Valerie's valuation of Rimrock at $1.5 million before the Blackwoods' investment; however, Wolfe testified that this valuation was unsupported by Rimrock's records. Moreover, Rimrock's accounting at the time that Kyle requested the loan revealed that, although it did have approximately $1.15 million in assets, it also had total liabilities in the amount of $500,000. This presents more than a scintilla of evidence that, at the time Kyle presented this estimate, he acted at least with reckless disregard of the truth of his estimate.

Additionally, Kyle told David that he could sell all the cattle in sixty to ninety days. However, when the Blackwoods met with the Clements three months after providing the loan, the Clements had not begun to sell Rimrock's cattle. Instead,

they asked the Blackwoods if they "really wanted to sell off the cattle." This serves as some evidence that Kyle did not intend to sell the cattle in sixty to ninety days, as he represented to David.

David relied on both of these representations, which reflected the Clements' ability to repay the loan, when he agreed to make the loan. Because the Clements ultimately could not repay the loan, and have not since repaid any of the loan, the Blackwoods were injured. The evidence is sufficient to show that the Clements committed fraud when they induced the Blackwoods to provide the $240,000 loan.

In its charge, the trial court instructed the jury that fraud occurs when a party either makes a material misrepresentation or fails to disclose a material fact. Because we have found that there is sufficient evidence to support a finding that the Clements made fraudulent misrepresentations to the Blackwoods, we need not address whether the Clements committed fraud by omission. We overrule Appellants' fifth issue.

In their third issue, Appellants argue that the evidence is legally and factually insufficient to support a finding that Clement Cattle LLC[2] was an "alter-ego" of Valerie and Kyle.

Alter ego is a legal basis for disregarding corporate fiction when there is "a unity between the [entity] and the individual to the extent the [entity's] separateness has ceased." *Doyle v. Kontemporary Builders, Inc.*, 370 S.W.3d 448, 458 (Tex. App.—Dallas 2012, pet. denied). Traditionally, the goal for disregarding the corporate fiction is to hold individuals liable for the debts of the corporation. *See Castleberry v. Branscum*, 721 S.W.2d 270, 271 (Tex. 1986) ("The corporate form normally insulates shareholders, officers, and directors from liability for corporate obligations; but when these individuals abuse the corporate privilege, courts will

[2]Appellants do not challenge the jury's finding that Rimrock was an alter-ego of the Clements.

disregard the corporate fiction and hold them individually liable."). However, Texas also allows the alter-ego doctrine to be applied in reverse; a corporation's assets can be held accountable to satisfy the liabilities of individuals who treated the corporation as their alter-ego. *Wilson v. Davis*, 305 S.W.3d 57, 70–71 (Tex. App.—Houston [1st Dist.] 2009, no pet.); *Dillingham v. Dillingham*, 434 S.W.2d 459, 462 (Tex. Civ. App.—Fort Worth 1968, writ dism'd); *see Am. Petroleum Exch., Inc. v. Lord*, 399 S.W.2d 213, 216–17 (Tex. Civ. App.—Fort Worth 1966, writ ref'd n.r.e.).

"The ultimate goal in a reverse piercing case is unique; rather than merely disregarding the corporate fiction and holding the shareholders accountable, the court treats the individual and the corporation as 'one and the same.'" *Zahra Spiritual Trust v. United States*, 910 F.2d 240, 243–44 (5th Cir. 1990) (applying Texas law). To determine whether an individual is operating an entity only "as the shadow of his personality," the court considers the total dealings of the entity and the individual, including the amount of financial interest, ownership, and control the individual maintains over the corporation; the degree to which corporate formalities have been followed; and whether the individual's property has been kept separately or the corporation was used for personal purposes. *Seghers v. El Bizri*, 513 F. Supp. 2d 694, 703 (N.D. Tex. 2007) (applying Texas law); *Cappuccitti v. Gulf Indus. Prods., Inc.*, 222 S.W.3d 468, 481–82 (Tex. App.—Houston [1st Dist.] 2007, no pet.); *Am. Petroleum*, 399 S.W.2d at 217.

Finally, to pierce the corporate veil, there must be evidence that the Clements perpetrated an actual fraud, which directly and personally benefited them. TEX. BUS. ORGS. CODE ANN. § 21.223(b) (West 2012). As for Clement Cattle LLC, Appellants argue that the record has no evidence that the $240,000 loan was the product of actual fraud or that this fraud led to the Clements receiving a "direct personal

benefit," as required by the Texas Business Code. *Id.* As discussed above, we hold that the evidence supports a finding that $240,000 was the product of actual fraud.

For the reasons discussed herein, we also hold that there was sufficient evidence that this fraud resulted in a direct, personal benefit to the Clements. Veil-piercing is a fact-specific inquiry. *Castleberry*, 721 S.W.2d at 273. Appellants cite to cases involving LLCs to support their argument that only Clement Cattle LLC received a direct benefit when the Clements paid off its loan. Appellants contend that the fact that the Clements could continue living on the ranch was merely an "incidental benefit," akin to a shareholder receiving property or a corporation reducing its debt. Appellants cite *Solutioneers Consulting, Ltd. v. Gulf Greyhound Partners, Ltd.*, 237 S.W.3d 379, 388–89 (Tex. App.—Houston [14th Dist.] 2007, no pet.), and *Scott v. McKay*, No. 12-02-00195-CV, 2003 WL 21998629, at *2 (Tex. App.—Tyler Aug. 20, 2003, no pet.) (mem. op.), in support of this contention.

However, Appellants ignore a significant distinction from these cases, which is that Clement Cattle LLC's sole purpose was to own the Clements' family ranch. It was formed for "estate planning" purposes, not to operate a business. In sum, it existed exclusively to directly benefit the Clements. Because the Blackwoods satisfied Clement Cattle LLC's mortgage, it avoided foreclosure. The direct benefit to the Clements is that they continued to have a place to live. Clement Cattle LLC is an alter ego of the Clements, and it is also liable for the Clements' fraudulent actions. We overrule Appellants' third issue.

In their fourth issue, Appellants challenge the legal and factual sufficiency of the evidence to support the damages awarded. Citing *Harris County v. Smith*, Appellants assert that it is "error to subject to the jury a single, broad-form damages question, when the liability questions presented mix valid and invalid theories of recovery." *See Harris Cty. v. Smith*, 96 S.W.3d 230, 234 (Tex. 2002). Appellees

respond that Appellants failed to preserve this error for appeal because they did not specifically object to the damages question.

The trial court presented a single, broad-form damages question to the jury. During the charge conference, Appellants' counsel objected:

> As to Question 7, the damages question. For the reasons that we've stated and based on the failure -- the evidentiary failure to prove a sum certain of damages, we object to Question No. 7 as to damages.

Prior to this objection, Appellants' counsel had objected to submitting breach of fiduciary duty and theft as theories of recovery, arguing that there was no evidence to support those claims. Given this context, it is reasonable to conclude that these objections related to the inclusion of those theories in the damages charge. *See* TEX. R. APP. P. 33.1 (explaining that preservation for appeal requires a timely objection stating specific grounds, "unless the specific grounds were apparent from the context"). Therefore, Appellants sufficiently preserved error to invoke the harm analysis employed in *Harris County*. *See Shrock v. Sisco*, 229 S.W.3d 392, 395–96 (Tex. App.—Eastland 2007, no pet.).

Assuming, without deciding, that the damages question combined valid and invalid theories of recovery would implicate the harm analysis adopted by the supreme court in *Crown Life Insurance Co. v. Casteel*, 22 S.W.3d 378 (Tex. 2000). *Harris Cty.*, 96 S.W.3d 230, 232–34. The court ruled in *Casteel* that, when a single broad-form liability question comingles valid and invalid liability grounds and the appellant's objection is timely and specific, the error is harmful and a new trial is required when the appellate court cannot determine whether the jury based its verdict on an invalid theory. *Casteel*, 22 S.W.3d at 389. In *Harris County*, the court determined that the *Casteel* harmful error analysis applied to a damage question that mixed valid and invalid elements of damages in a single broad-form submission. 96 S.W.3d at 232–34.

Here, the trial court instructed the jury to award a sum of money that would "fairly and reasonably compensate [Appellees] for their damages, if any, that were proximately caused" by Appellants' conduct. It went on to admonish that the jury not "compensate twice for the same loss."

In Texas, there are two standards for measuring damages from fraud: the out-of-pocket measure and the benefit-of-the-bargain measure. *Leyendecker & Assocs., Inc. v. Wechter*, 683 S.W.2d 369, 373 (Tex. 1984). Out-of-pocket damages derive from a restitutionary theory; they measure "the difference between the value of that which was parted with and the value of that which was received." *Baylor Univ. v. Sonnichsen*, 221 S.W.3d 632, 636 (Tex. 2007); *Leyendecker*, 683 S.W.2d at 373 (quoting *George v. Hesse*, 93 S.W. 107 (Tex. 1906)). Benefit-of-the-bargain damages derive from an expectancy theory; they measure the difference between the value represented and the actual value received. *Baylor*, 221 S.W.3d at 636. Both measures are determined at the time of the relevant transaction. *Arthur Andersen & Co. v. Perry Equip. Corp.*, 945 S.W.2d 812, 817 (Tex. 1997).

Under *Casteel*, we must reverse the jury's award of damages only if we are not "reasonably certain that the jury was not significantly influenced by" the erroneous submission of invalid theories of recovery. *Romero v. KPH Consolidation, Inc.*, 166 S.W.3d 212, 227–28 (Tex. 2005) (quoting *Braun v. Flynt*, 731 F.2d 1205, 1206 (5th Cir. 1984)).

The Blackwoods "parted with" $894,362. This sum represented the amount that they contributed to Rimrock—in reliance on the Clements' fraudulent representation that they would operate it as a profitable cow-calf operation—and the amount that they loaned based on the Clements' fraudulent representation that they could pay it back promptly with proceeds from Rimrock's liquidation. The Clements returned only $94,618 to the Blackwoods on their investment in Rimrock,

and the Blackwoods were able to sell some cattle for $7,376 and sell the Angels of Sacred Heart house for $44,863. The Clements had not paid "a penny" on the $240,000 loan. Therefore, the Blackwoods "received" $146,857. The difference between the amount "parted with" and the amount "received" is $747,505, which is the amount the jury awarded.

Because the jury awarded an amount derived from the out-of-pocket formula expressed above, we are reasonably certain that the jury did not consider any invalid theory of recovery in determining damages. Accordingly, we overrule Appellants' fourth issue.

Having determined that there is sufficient evidence to affirm the trial court's judgment and the award of damages on the theories of fraud and alter ego, we need not address Appellant's first and second issues, which relate to the alternative theories of liability found by the jury. *See* TEX. R. APP. P. 47.1; *State v. Ninety Thousand Two Hundred Thirty-Five Dollars and No Cents in U.S. Currency ($90,235)*, 390 S.W.3d 289, 294 (Tex. 2013).

We affirm the judgment of the trial court.

JIM R. WRIGHT
SENIOR CHIEF JUSTICE

February 8, 2018

Panel consists of: Willson, J.,
Bailey, J., and Wright, S.C.J.[3]

[3]Jim R. Wright, Senior Chief Justice (Retired), Court of Appeals, 11th District of Texas at Eastland, sitting by assignment.