

AFFIRM; and Opinion Filed February 11, 2016.



**In The
Court of Appeals
Fifth District of Texas at Dallas**

No. 05-14-00883-CV

**DFW ADVISORS LTD. CO., Appellant
V.
JACQUELINE ERVIN, Appellee**

**On Appeal from the 162nd Judicial District Court
Dallas County, Texas
Trial Court Cause No. 11-14414**

MEMORANDUM OPINION

Before Justices Lang, Brown, and O'Neill¹
Opinion by Justice Brown

Appellant DFW Advisors Ltd. Co. sued its former bookkeeper, appellee Jacqueline Ervin, alleging she misappropriated the company's funds. After a trial before the court, the court rendered judgment that DFW take nothing on its claims. In four issues, DFW contends that (1) the trial court erred in allowing Ervin to present a defense that was not disclosed during discovery; (2) one of the court's findings was against the great weight of the evidence; (3) the court abused its discretion in finding Ervin did not breach her fiduciary duties; and (4) the court abused its discretion in denying DFW's motion for continuance. For reasons that follow, we affirm the trial court's judgment.

¹ The Hon. Michael J. O'Neill, Justice, Assigned

BACKGROUND

DFW, a real estate management company, filed suit against Ervin in November 2011. In its original petition, DFW alleged that from 2005 to 2009, Ervin, while employed as its bookkeeper, misappropriated almost \$400,000 from the company. DFW alleged she did this in several ways, using either company checks or electronic payroll payments. The company asserted a claim for theft, alleging Ervin unlawfully appropriated its funds by taking them without effective consent. It also asserted claims for fiduciary duties, fraud, conversion, breach of contract, and unjust enrichment. Ervin answered with a general denial.

After three continuances, the case was tried to the court in April 2014. James Falvo, president and owner of DFW, testified that DFW hired Ervin as a bookkeeper in 1997. She initially reported to Chuck Golf, but after he left the company in 2005, Ervin began reporting to Falvo. Falvo testified that Ervin drafted DFW checks to pay fictitious invoices and fraudulently endorsed the checks and deposited them into her personal bank account. She also wrote checks payable to her credit card companies from DFW's bank account and fraudulently signed Falvo's name on the checks. The Quickbooks entries for these transactions showed that the payees were DFW vendors instead. Falvo also indicated that Ervin had overstated contract labor charges and electronically diverted the extra amount from DFW's payroll account to Ervin's personal account. According to Falvo, between 2005 and 2009, Ervin diverted about \$377,000 of DFW's money into her accounts. Falvo acknowledged that DFW received monthly bank statements that included images of the company's checks, but stated he never really looked at the statements. Falvo reviewed the signature section on 37 checks and testified that he did not sign them. Numerous financial documents and records were admitted into evidence, including copies of DFW's checks, Ervin's credit card statements, and the credit card company's payment records for Ervin's account. The trial court did not allow DFW to introduce business records related to

an account Ervin had with Chase Bank because DFW did not comply with the deadline for filing the records. *See* TEX. R. EVID. 902(10)(A).

Ervin's attorney cross-examined Falvo on the second day of the trial. Counsel asked Falvo how long his affair with Ervin had been going on. Falvo denied having an affair with Ervin.

Two other witnesses testified for DFW. Rita Rodriguez Utt, an attorney who did work for DFW, identified various DFW checks made out to and purportedly endorsed by her. Utt testified that she did not endorse the checks and or receive funds from those checks. Donald Southerland, a forensic accountant and certified fraud examiner, analyzed the financial documents in this case. In his opinion, Ervin misappropriated approximately \$325,000 from DFW while she was the company's bookkeeper.²

The next day, Ervin testified on her own behalf. She stated that after Golf, the man who hired her, retired in the summer of 2004, Falvo told her that if she wanted to keep her job she had to do sexual favors. Falvo proposed that he would pay her money if she did these favors for him. He told Ervin to "charge everything" to her credit cards and he would pay the bills. Ervin testified that she let Falvo know when she had a statement and he told her what account to cut a check from and which vendors to use. She brought him the checks and he signed them. Falvo told her to endorse the back of the checks and send them in to pay her bills. Ervin testified that when Falvo was in the office, he signed every check. But when he was out of the office, he instructed her to sign his name on checks. She testified she never signed a check without Falvo's consent. She also described how money was diverted from funds allocated for contract labor to pay her. Ervin ended her arrangement with Falvo in 2009 and was eventually "relieved from [her] employment duties at DFW."

² Southerland testified that if he deleted the amounts related to the Chase accounts, the amount misappropriated was \$230,000.

Ervin further testified that Falvo gave her DFW's monthly bank statements to reconcile. Each month, she put together a report that included a summary of the company's income and the checks that went out. Ervin attached the bank statements, which included check images, to her reports, and presented them to Falvo. Ervin testified that all of the funds she received were with Falvo's consent and that she never took any funds without permission. She identified two checks that were signed by Falvo and two checks on which she signed his name. Ervin testified that the difference between the two signatures was that she spelled out "James" and Falvo did not.

Following Ervin's testimony, Falvo testified again as a rebuttal witness. He denied that any sexual relations occurred between him and Ervin. He also denied that he consented to Ervin's signing of company checks.

The trial court ruled in favor of Ervin, rendering judgment that DFW take nothing on its claims. At DFW's request, the court issued findings of fact and conclusions of law. Among other things, the trial court found that Falvo and Ervin began an affair in 2005 and that Falvo began giving Ervin additional compensation. The court found that Falvo, to conceal the additional compensation from his wife, transferred funds to Ervin via a scheme using negotiable instruments to pay fictitious contract employees. This appeal followed.

ERVIN'S DEFENSE

In its first issue, DFW contends the trial court permitted trial by ambush when it allowed Ervin to present evidence of consent based on an affair between her and Falvo. DFW maintains it did not learn of this defensive theory until the second day of trial when Ervin cross-examined Falvo about an affair. DFW asserts that because Ervin did not disclose the alleged sexual relationship in response to a request for disclosure under rule of civil procedure 194.2(c), the trial court was required to exclude the evidence. *See* TEX. R. CIV. P. 193.6(a), 194.2(c). The request for disclosure was the only form of discovery done in this case.

When Ervin first testified about her arrangement with Falvo to provide sexual favors, DFW's counsel objected on grounds that those facts were not mentioned in Ervin's responses to the request for disclosure. The trial court asked to see the disclosure responses, and the record reflects that DFW's counsel produced them. Ervin's counsel indicated that in Ervin's response, she denied DFW's allegations and stated that she did not take the funds with the intent to deprive DFW of its funds without its consent.³ Ervin argued the evidence presented was in line with the response to the request for disclosure. DFW's counsel countered that the disclosure did not specifically mention sexual conduct and that DFW was surprised by that line of questioning. The court overruled DFW's objection.⁴

Under rule 194.2(c), a party may request disclosure of the legal theories and, in general, the factual bases of the responding party's claims or defenses. TEX. R. CIV. P. 194.2(c). The responding party need not marshal all evidence that may be offered at trial. *Id.* This rule is intended to require disclosure of a party's basic assertions, not necessarily all aspects of the party's claims or defenses. *See id.* cmt. 2 (for example, in case of car accident allegedly caused by defendant's speeding, defendant would be required to disclose his denial of speeding allegation). A party who fails to make, amend, or supplement a discovery response in a timely manner may not use the undisclosed information unless the trial court finds good cause for the failure or finds the failure will not unfairly surprise or prejudice the opposing party. *Id.* 193.6. A trial court's discovery ruling should not be disturbed on appeal absent an abuse of discretion. *Grocers Supply, Inc. v. Cabello*, 390 S.W.3d 707, 726 (Tex. App.—Dallas 2012, no pet.).

³ Counsel's statement is the only evidence in our record of Ervin's discovery responses. Her actual written responses are not part of the appellate record, although Ervin attached them to her appellee's brief. *See* TEX. R. CIV. P. 191.4(c)(3) (providing an exception to the rule that discovery responses must not be filed for those materials necessary for a proceeding in appellate court).

⁴ DFW also argued in the trial court and in its appellate brief that Ervin should not have been allowed to present evidence of consent because consent was an affirmative defense and Ervin had not pleaded any affirmative defenses. At oral argument, counsel for DFW abandoned the contention that consent was an affirmative defense in this case.

Here, all of DFW's claims arose out of Ervin's alleged theft of its funds. DFW alleged and had the burden to prove Ervin misappropriated its funds without effective consent. Ervin's response disclosed that she did not take the funds without DFW's consent. We conclude this response sufficiently disclosed Ervin's basic defense, which was that she had consent to take the money. Rule 194.2 only requires disclosure of a party's basic assertions and did not require Ervin to disclose the details of how consent was given. The trial court did not abuse its discretion in allowing evidence that Falvo consented to Ervin's taking of DFW's funds in exchange for a sexual relationship. We overrule DFW's first issue.

FINDING OF FACT REGARDING CHECKS

In its second issue, DFW contends the evidence is factually insufficient to support one of the trial court's findings of fact. Specifically, DFW complains of the court's finding that: "Despite testimony from Falvo that he did not endorse most of the Checks used to pay Ervin's credit card, the evidence supported [Ervin's] position that most of the Checks were signed or executed by Falvo." DFW contends this finding is against the great weight and preponderance of the evidence.

In an appeal from a bench trial, the trial court's findings of fact have the same weight as a jury verdict. *Thornton v. Dobbs*, 355 S.W.3d 312, 315 (Tex. App.—Dallas 2011, no pet.). An appellant who attacks the factual sufficiency of the evidence on an issue for which it had the burden of proof at trial must demonstrate that the adverse finding is contrary to the great weight and preponderance of the evidence. *Dow Chemical Co. v. Francis*, 46 S.W.3d 237, 242 (Tex. 2001). We must consider and weigh all the evidence and set aside the fact finding only if it is so against the great weight and preponderance of the evidence that it is clearly wrong and unjust. *Id.* In a bench trial, the court is the sole judge of the credibility of the witnesses. *Thornton*, 355 S.W.3d at 315.

In arguing that the evidence is factually insufficient to prove Falvo signed most of the checks in question, DFW cites only Falvo's testimony that Ervin signed most of the checks. It ignores Ervin's testimony that Falvo signed checks when he was in the office and she signed them only when he was out. The trial court was able to review and compare the signatures on the checks in question. Further, the outcome of this case turned on which one of the two main witnesses was more credible. We defer to the trial court's determination of this issue. We conclude the evidence is factually sufficient to support the court's finding that Falvo signed most of the checks. In addition, we note the court also found that the checks not signed by Falvo were signed by Ervin with Falvo's consent. DFW has not challenged this finding. Thus, in light of the finding that Ervin had consent to sign Falvo's name on the checks, even if the evidence was factually insufficient to support the court's finding that Falvo signed most of the checks, this finding is immaterial. *See Cooke Cty. Tax Appraisal Dist. v. Teel*, 129 S.W.3d 724, 731 (Tex. App.—Fort Worth 2004, no pet.) (erroneous finding on immaterial fact is harmless and not grounds for reversal). We overrule DFW's third issue.

BREACH OF FIDUCIARY DUTIES

In its third issue, DFW asserts the trial court abused its discretion in not finding that Ervin breached her fiduciary duties to DFW. DFW maintains Ervin breached fiduciary duties in several ways, including presenting false invoices, writing checks to vendors that were credited to her, and forging company checks.

One of the trial court's conclusions of law was that Ervin did not breach any fiduciary duty to DFW or its owner. The elements of a breach of fiduciary claim are: a fiduciary relationship existed between the plaintiff and defendant, the defendant breached her fiduciary duty to the plaintiff, and the breach resulted in injury to the plaintiff or benefit to the defendant. *Mims-Brown v. Brown*, 428 S.W.3d 366, 374 (Tex. App.—Dallas 2014, no pet.). The question

of whether Ervin breached a fiduciary duty was a mixed question of law and fact. We defer to the trial court's factual determinations so long as they are properly supported by the record while reviewing its legal determinations de novo. *Remington Arms Co. v. Luna*, 966 S.W.2d 641, 643 (Tex. App.—San Antonio 1998, pet. denied).

In arguing that Ervin breached fiduciary duties, DFW again relies solely on Falvo's testimony and overlooks Ervin's testimony that all funds she received were with Falvo's consent. Ervin indicated that Falvo, DFW's president and owner, initiated and authorized an arrangement whereby company funds were used to reward her for sexual favors. Although Falvo denied such an arrangement existed, we defer to the trial court's resolution of this fact issue. The court believed Ervin's version of the events and disbelieved Falvo's. As such, its legal conclusion that Ervin did not breach fiduciary duties is correct. We overrule DFW's third issue.

DENIAL OF MOTION FOR CONTINUANCE

In its fourth issue, DFW contends the trial court abused its discretion in denying its April 2014 motion for continuance, filed six days before trial. In the motion, DFW set out several grounds for needing a continuance, including that it could not locate witness Utt and that it needed additional time to review the Chase Bank records, which it had recently received. The record reflects that the court had granted three previous continuances, one upon the parties' agreed motion in January 2013, another upon an agreed motion in June 2013, and the third at DFW's request in November 2013. In its November 2013 motion, as grounds for continuance, DFW named the need for additional time to obtain financial documents and to meet with witnesses. At the start of trial, DFW's counsel sought a ruling on the motion to continue the case. The court denied the motion, citing the age of the case and the fact that the court had previously granted a continuance to permit time for gathering documents and preparing witnesses for trial.

This Court will not disturb a trial court's denial of a motion for continuance unless the trial court has committed a clear abuse of discretion. *BMC Software Belgium, N.V. v. Marchand*, 83 S.W.3d 789, 800 (Tex. 2002). A trial court abuses its discretion when it reaches a decision so arbitrary and unreasonable as to amount to a clear and prejudicial error of law. *Id.*

DFW contends the court abused its discretion because DFW did not have time to review the documents that Chase Bank produced and because it was unable to locate witness Utt in time to confer and review documents with her before trial. DFW asserts the trial court had no discretion to reject the uncontroverted facts in its sworn motion for continuance. The cases it cites for this proposition, however, involved challenges to the denial of a party's first motion for continuance, not its fourth. *See Verkin v. Sw. Ctr. One, Ltd.*, 784 S.W.2d 92, 94 (Tex. App.—Houston [1st Dist.] 1989, writ denied); *Garza v. Serrato*, 699 S.W.2d 275, 280–81 (Tex. App.—San Antonio 1985, writ ref'd n.r.e.). This case had been pending almost two and a half years before it went to trial. Three previous continuances had been granted, allowing counsel ample time to obtain and review financial records and locate and prepare witnesses. On this record, we cannot conclude the trial court abused its discretion in denying the motion for continuance. We overrule DFW's fourth issue.

We affirm the trial court's judgment.

/Ada Brown/

ADA BROWN
JUSTICE

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**Court of Appeals
Fifth District of Texas at Dallas**

JUDGMENT

DFW ADVISORS LTD. CO., Appellant

No. 05-14-00883-CV V.

JACQUELINE ERVIN, Appellee

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Trial Court Cause No. 11-14414.

Opinion delivered by Justice Brown, Justices
Lang and O'Neill participating.

In accordance with this Court's opinion of this date, the judgment of the trial court is **AFFIRMED**.

It is **ORDERED** that appellee JACQUELINE ERVIN recover her costs of this appeal from appellant DFW ADVISORS LTD. CO.

Judgment entered this 11th day of February, 2016.