Reverse and Remand; Opinion Filed May 27, 2016.

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-14-01615-CV

TRANSITIONAL ENTITY LP, DURACARE LLC, AND CHARLES SYLVESTER, Appellants
V.
ELDER CARE LP, AND BEVERLY A. DAWSON, Appellees

On Appeal from the 44th Judicial District Court
Dallas County, Texas
Trial Court Cause No. 12-11642

MEMORANDUM OPINION

Before Justices Lang, Brown, and Whitehill
Opinion by Justice Lang

Appellees, Elder Care LP and Beverly Dawson, sued appellants, Transitional Entity LP, Duracare LLC, and Charles Sylvester for fraud and breach of contract.[1] In a bench trial, judgment was rendered that appellees recover $66,666.66 in actual damages from appellants.

Appellants raise four issues on appeal: (1) appellees' breach of contract claims under section 2 of the agreement are barred by the statute of limitations; (2) Sylvester did not breach section 8 of the agreement by failing to procure certain licenses for Elder Care; (3) the trial court erred in measuring damages based on the diminution in value of Elder Care; and (4) there is no evidence to support the trial court's damage award.

[1] The trial court did not address appellees' cause of action for fraud in rendering judgment for appellees and did not make findings of fact or conclusions of law as to the fraud claim. Appellees do not cross-appeal on their fraud claim and it is not before this Court.

We affirm the trial court's judgement in part, reverse the trial court's judgment in part, and remand for further proceedings consistent with this opinion.

I. FACTUAL AND PROCEDURAL CONTEXT

Charles Sylvester owned and managed Elder Care, LP from 2003 to 2008.[2] In 2008, Sylvester sold Elder Care, LP to Elder Helpers, LP, which was owned by Beverly Dawson. At the time of the sale, Sylvester was the only limited partner of Elder Care, LP and the owner of Duracare, LLC, which was the general partner of Elder Care, LP. After Sylvester sold Elder Care, LP, Sylvester changed the name of Elder Care, LP to "Transitional Entity." The Sale and Purchase Agreement ("purchase agreement"), dated April 10, 2008, pursuant to which Elder Helpers, LP purchased Elder Care, LP is the subject of this lawsuit.

Elder Helpers, LP purchased Elder Care, LP for $145,000. $100,000 was paid at the time the purchase agreement was signed. A promissory note was executed for the $45,000 balance of the purchase price which was payable to Sylvester over 84 months with interest accruing at a rate of four percent per annum. Additionally, Dawson signed a guaranty in her individual capacity promising to pay the debt of Elder Helpers, LP. Sylvester testified that approximately $46,000 of the purchase price represented the amount Elder Care paid for durable medical equipment and the furniture, fixtures, and equipment of the company. The remaining portion of the purchase price was for the home health care services business itself. After the parties executed the purchase agreement, Dawson changed the name of Elder Helpers, LP to "Elder Care."

Dawson testified that prior to the sale, she told Sylvester she did not have any experience in the health care industry. Sylvester said this was "fine," that Dawson "could run" the business exactly as Sylvester had, and she could expect a consistent profit of $5,000 to $6,000 per month.

[2] Sylvester originally bought Elder Care LP with a business partner named Dwight Sprinkle. Sylvester later acquired Sprinkle's interest in the business.

According to Dawson, Sylvester told her that "he ran" the business with only one full-time administrative assistant.

During the course of their negotiations, Sylvester described to Dawson that Elder Care obtained new business by locating customers who required home health care services and then arranging appropriately skilled caregivers to serve those customers. Elder Care relied almost exclusively on advertising in "yellow pages," brochures, and mail-outs to locate customers. One such single-page Elder Care advertisement displayed in large, bold-font typeface in the center of the page: "Durable Medical Equipment and Home Health Care Services." Other Elder Care advertisements described in some way that Elder Care provided "home health care services."

Dawson testified that it was important for Elder Care to generate new customers on a regular basis because existing customers "pass away or they become incapacitated," or they "have to go into a facility and no longer need service." According to Dawson, during the course of their negotiations, Sylvester told Dawson that she "needed to continue to advertise in the various mediums like he was because [Elder Care needed] this influx of clients."

Dawson stated Sylvester showed her what he said were government-issued licenses Elder Care owned prior to the sale, and those were the same licenses that Dawson would need "to run" the business. These licenses included those for durable medical equipment distribution, a Texas Sales and Use Tax Permit, a Personnel Employment license, and proof of approval for a Medicaid license. Dawson testified she "relied" on Sylvester's representations that these were the licenses Elder Care "needed."

According to Dawson, after she purchased Elder Care, she conducted the business as had Sylvester until 2010 when Elder Care was sued by Helen Kubacek for illegal advertising. The history of that suit was that in a letter dated February 12, 2010, Kubacek complained that she had been a home health care customer of Elder Care, but discovered Elder Care did not hold an

"HCSSA" license required by section 142.002 of the Texas Health & Safety Code.[3] Therefore, according to Kubacek, Elder Care was illegally advertising itself as a licensed provider of home health care services.

Dawson was surprised by this letter. So, she contacted Sylvester. Sylvester told her that she "had better go get a home health care license posthaste. And if [she] ever tried to sue him that he would file for bankruptcy and [Dawson] wouldn't get anything." That conversation was followed by Kubacek's suit filed on July 29, 2010, where Kubacek claimed Deceptive Trade Practices Act violations, fraud, breach of contract, and that Elder Care had illegally advertised itself as a licensed home health care provider. Kubacek's lawsuit was ultimately settled.

Dawson did not obtain a home health care license because in order to get the license, Elder Care would have been required to hire an administrator, an assistant administrator, a nurse, and an alternate nurse. According to Dawson, hiring such skilled personnel was not financially feasible because their salaries would have exceeded the company's revenue. Instead, right after Kubacek brought suit, Elder Care removed the words "home health care" from all Elder Care advertisements. Dawson testified that removing these words from all Elder Care advertisements caused a"los[s] [of] over 50 percent of [its] revenues" and that business "continued to go down each year."

On October 1, 2012, appellees filed the underlying suit, alleging appellants breached the purchase agreement by not supplying the licenses Dawson believed Elder Care "had" and needed

[3] That provision states, in pertinent part:

(a) Except as provided by section 142.003, a person, including a health care facility licensed under this code, may not engage in the business of providing home health, hospice, habilitation, or personal assistance services, or represent to the public that the person is a provider of home health, hospice, habilitation, or personal assistance services for pay without a home and community support services agency license authorizing the person to perform those services issued by the department for each place of business from which home health, hospice, habilitation, or personal assistance services are directed. A certified agency must have a license to provide certified home health services.

(b) A person who is not licensed to provide home health services under this chapter may not indicate or imply that the person is licensed to provide home health services by the use of the words "home health services" or in any other manner. TEX. HEALTH & SAFETY CODE ANN. § 142.002 (West. Supp. 1992).

to operate, and alleging appellants committed fraud by misrepresenting which licenses Elder Care "had" and needed to operate at the time of the purchase agreement. In addition, Dawson and Elder Care refused to make any further payments on the promissory note. On June 12, 2013, appellants filed a counterclaim against appellees for the $19,068.10 balance due on the promissory note.

After a bench trial, the trial court rendered judgment in favor of appellees, concluded appellants breached the purchase agreement, and awarded $66,666.66 in actual damages, $55,355.55 attorneys' fees, prejudgment interest of $6,621.00, and costs and expenses of $1,750.62. Appellants filed a Motion to Modify, Correct, or Reform the Judgment or, in the Alternative, for a New Trial, which the trial court denied. Notice of appeal was timely filed.

II. STANDARDS OF REVIEW

Whether a contract is ambiguous is a question of law for the court to decide by looking at the contract as a whole in light of the circumstances present when the contract was entered. *Coker v. Coker*, 650 S.W.2d 391, 393 (Tex. 1983). The interpretation of an unambiguous contract is a question of law, which this Court reviews de novo. *MCI Telecomms. Corp. v. Tex. Utils. Elec. Co.*, 995 S.W.3d 647, 650 (Tex. 1999). This Court reviews de novo whether a claim is barred by the statute of limitations. *See Hunt Oil Co. v. Live Oak Energy Inc.*, 313 S.W.3d 384, 387 (Tex. App.–Dallas 2009, pet. denied). Finally, this Court reviews de novo whether the trial court applied the proper measure of damages. *Elias v. Mr. Yamaha, Inc.*, 33 S.W.3d 54, 60 (Tex. App.–El Paso 2000, no pet.).

III. SECTION 2 CLAIMS AND THE STATUTE OF LIMITATIONS

Appellants' first issue asserts "The trial court erred in granting relief on appellees section 2 breach of contract claims, because such claims were barred by the statute of limitations."

A. Applicable Law

The statute of limitations is an affirmative defense. TEX. R. CIV. P. 94. As such, the defendant bears the initial burden of pleading, proving, and securing findings to sustain its plea of limitations. *Woods v. William M. Mercer, Inc.*, 769 S.W.2d 515, 517 (Tex. 1988). As a general rule, the statute of limitations for a breach of contract action is four years from the day the cause of action accrues. *Capstone Healthcare Equip. Servs., Inc. v. Quality Home Health Care, Inc.*, 295 S.W.3d 696, 699 (Tex. App.–Dallas 2009, pet. denied). A defendant relying on the affirmative defense of limitations has the burden to "conclusively prove when the cause of action accrued." *KPMG Peat Marwick v. Harrison Cty. Hous. Fin. Corp.*, 988 S.W.2d 746, 748 (Tex. 1999). A breach of contract claim "accrues" when the contract is breached. *Capstone Healthcare Equip. Servs., Inc.*, 295 S.W.3d at 699. A breach of contract occurs when a party fails or refuses to do something he has promised to do. *Id.*

B. Application of Law to the Facts

This suit was filed October 1, 2012. Appellants contended at trial that appellees' claims for breach of contract accrued before October 1, 2008 and therefore are time-barred by the four-year statute of limitations. The trial court made no findings as to the statute of limitations.[4]

Pertinent parts of section 2 of the purchase agreement are as follows:

> Sec. 2.01: Partnership is a limited partnership and is in good standing to do business in the state of Texas. Partnership has all requisite power and authority to own, operate and carry on its business as now being conducted;
>
> Sec. 2.14: Partnership is not in default or in violation of any law; regulation; court order; or order of any federal, state, municipal, foreign, or other government department, board, bureau, agency, or instrumentality wherever located, that would materially adversely affect its business or future prospects;

[4] A finding by the trial court is implied that the claims were not barred in light of the findings of breach and award of damages. *Pulley v. Milberger*, 198 S.W.3d 418, 427 (Tex. App.–Dallas 2006, pet. denied) ("It is presumed that all fact findings needed to support the judgment were made by the trial court. When the trial court's express findings of fact do not address all grounds for recovery or defenses, an appellate court implies findings of fact regarding the omitted grounds or defenses that are needed to support the judgment.").

> Sec. 2.17: The business operations of Partnership are and have been for the past five years in material compliance with all laws, treaties, rulings, directive, and similar regulations of all government authorities having jurisdiction over such business insofar as failure to comply could materially adversely affect Partnership's business and future prospects;
>
> Sec. 2.19: No representation, warranty, or covenant made to Purchaser in this Agreement nor any document, certificate, exhibit, or other information given or delivered to Purchaser pursuant to this Agreement contains or will contain any untrue statement of a material fact, or omits or will omit a material fact necessary to make the statements contained in this Agreement or the matters disclosed in the related documents, certificates, information, or exhibits not misleading.

Sections 2.01, 2.14, and 2.17 of the purchase agreement contain affirmative statements that Elder Care, at the time the purchase agreement was executed, had "all requisite power and authority to . . . operate and carry on its business," was "not in default or in violation of any law," and was and had been "for the past five years in material compliance with all laws[.]" However, the record reflects, and the parties do not dispute, that at the time the purchase agreement was executed, Elder Care did not hold the HCSSA license required to advertise and operate a home health care services business. Nevertheless, as found by the trial court, on April 10, 2008 when the purchase agreement was executed, Elder Care was operating and advertising itself as a provider of "home health care" services in violation of section 142.002 of the Texas Health & Safety Code. *See* TEX. HEALTH & SAFETY CODE ANN. § 142.002(a) (West Supp. 1992). The trial court found Elder Care's operation in violation of Texas law breached sections 2.01, 2.14, and 2.17.[5] Further, the trial court found Elder Care's operation as a home health care

[5] The trial court found section 2.01 was breached in paragraph 11 of its findings, stating "Transitional Entity and Sylvester breached this provision of the Agreement in that Transitional Entity did not have legal authority to carry on its business as it was then being conducted, because advertising for the provision of home health services was a substantial part of Transitional Entity's business, and Transitional Entity did not have the necessary license to advertise for the provision of home health services."

The trial court found section 2.14 was breached in paragraph 13 of its findings, stating "Transitional Entity and Sylvester breached this provision of the Agreement in that Transitional Entity was in violation of Texas law; Transitional Entity was advertising for the provision of home health services, and Transitional Entity did not have the necessary license to advertise for the provision of home health services."

The trial court found section 2.17 was breached in paragraph 14 of its findings, stating "Transitional Entity and Sylvester breached this provision of the Agreement in that, during the relevant period, Transitional Entity had been generating a substantial part of its business by advertising as a provider of home health services, which was a violation of applicable Texas laws."

service in violation of the law also breached section 2.19,[6] which states "No representation . . . in this agreement . . . will contain any untrue statement of a material fact."

Accordingly, we conclude that the claims arising under sections 2.01, 2.14, 2.17, and 2.19 which affirm that Elder Care was operating legally and that the purchase agreement contained "no untrue statement of material fact" accrued on April 10, 2008 when the parties executed the purchase agreement. That date was more than four years before this suit was filed on October 1, 2012. We conclude all of the above section 2 claims for breach of contract are barred by the statute of limitations. We decide appellants' first issue in their favor.

IV. LIABILITY UNDER SECTION 8.05

Appellants' second issue asserts that, "[a]s a matter of law, the trial court erred in finding that Sylvester breached section 8 of the agreement by not assisting Elder Care in obtaining additional licenses."

A. Applicable Law

The primary concern of a court in construing a written contract is to ascertain the true intent of the parties as expressed in the instrument. *Westchester Fire Ins. Co. v. Stewart & Stevenson Servs. Inc.*, 31 S.W.3d 654, 658 (Tex. App.–Houston [1st Dist.] 2000, pet. denied). Courts should examine and consider the entire writing in an effort to harmonize and give effect to *all* the provisions of the contract so that none will be rendered meaningless. *Coker v. Coker*, 650 S.W.2d 391, 393 (Tex. 1983) (emphasis in original) (internal citations omitted). Absent a finding of ambiguity, a court must interpret the meaning and intent of a contract from the four corners of the document without the aid of extrinsic evidence. *Westchester Fire Ins. Co.*, 31 S.W.3d at 658.

[6] The trial court found section 2.19 was breached in paragraph 15 of its findings of fact where it states this provision was breached by Transitional Entity and Sylvester "withholding the material facts . . . including material facts regarding licenses held and need by Transitional Entity[.]"

Terms in the contract will be given their ordinary meaning unless the contract shows "the words were meant in a technical or different sense." *Markel Ins. Co. v. Muzyka*, 293 S.W.3d 380, 385 (Tex. App.–Fort Worth 2009, no pet.). "If the terms in the contract can be given a definite or certain legal meaning, they are not ambiguous, and the court will construe the contract as a matter of law." *Id.* at 385–86. "In determining the ordinary and generally accepted meaning of an undefined term in an unambiguous [contract], Texas courts may consult dictionaries." *Markel Ins. Co. v. Muzyka*, 293 S.W.3d 380, 386–87 (Tex. App.–Fort Worth 2009, no pet.) (citing *Mescalero Energy, Inc. v. Underwriters Indem. Gen. Agency, Inc.*, 56 S.W.3d 313, 320 (Tex. App.–Houston [1st Dist.] 2001, pet. denied); *Fiess v. State Farm Lloyds*, 202 S.W.3d 744, 751 (Tex. 2006)).

B. Application of Law to the Facts

Section 8.05 of the purchase agreement provides, "Charles Sylvester agrees to become a Limited Partner in the Purchaser for a period, not to exceed six (6) months form [sic] the closing date, to ensure that required permits and licenses are applied for and obtained by Purchaser in Purchaser's name for the operation of the business."

As described above, the trial court found that Elder Care did not have the required HCSSA license to operate legally at the time the purchase agreement was executed. Also, the trial court found in paragraph 16 of its findings of fact that Sylvester "made no effort whatsoever to obtain the requisite license" and that was a breach.

Appellants have not contested these findings. Instead, appellants argue there was no breach of contract because Charles Sylvester had only one obligation under this provision; i.e., to become a limited partner in Elder Care for a period not to exceed six months from the date of closing. Specifically, they assert that Sylvester "simply agreed to assist Appellees in obtaining additional licenses if requested–which never happened–and in making sure the licenses that

Elder Care did possess prior to close . . . were transferred to Appellees." Appellees respond that the purchase agreement stated that appellants "had all licenses needed to legally operate [Elder Care]" and that Sylvester would "ensure" such licenses were "obtained by Purchaser in Purchaser's name for the operation of [Elder Care]." Also, appellees assert appellants' contention Sylvester would only "assist" is unsupported by any language in the agreement. Further, the agreement contains no requirement that appellees "request" Sylvester's assistance in order to initiate his obligations under section 8.05.

The purchase agreement states Sylvester will "*ensure* that required permits and licenses are applied for and obtained by Purchaser in Purchaser's name for the operation of the business." (emphasis added). The meaning of the word "ensure" is critical to the interpretation of section 8.05. Accordingly, we begin our analysis by determining the "plain meaning" of the word "ensure." *Markel Ins. Co.*, 293 S.W.3d at 385. According to Webster's dictionary, "ensure" is defined to mean, "to make (something) sure, certain, or safe." *Ensure*, MERRIAM-WEBSTER, *available at* http://www.merriam-webster.com/dictionary/ensure; *see also id.*

Applying this definition to section 8.05, we conclude the plain meaning of section 8.05 is that Sylvester was to "make sure" that "required permits and licenses [were] applied for and obtained by Purchaser in Purchaser's name for the operation of the business." It is undisputed that Elder Care did not hold an HCSSA license to operate legally as a provider of home health care services when the agreement was executed, nor was such an HCSSA license ever obtained. Further, section 8.05 does not provide Sylvester's obligation to "ensure," or "to make sure," is contingent on a "request" for Sylvester's "assistance." The word "request" simply does not appear in section 8.05. Accordingly, we conclude Sylvester did not perform his obligation pursuant to section 8.05. The trial court did not err in finding appellants breached section 8.05 of the purchase agreement. We decide appellants second issue against them.

V. MEASURE AND EVIDENCE OF DAMAGES

Appellants' third issue asserts "The trial court erred in awarding damages based on the decreased value of Elder Care, because diminution in value is not an appropriate measure of damages on a breach of contract claim related to the sale of a business."

A. Applicable Law

"A successful breach of contract claim requires proof of the following elements: (1) a valid contract; (2) performance or tendered performance by the plaintiff; (3) breach of the contract by the defendant; and (4) damages sustained by the plaintiff as a result of the breach." *Sharifi v. Steen Auto., LLC*, 370 S.W.3d 126, 140 (Tex. App.–Dallas 2012, no pet.). Damages must be measured by a legal standard, and that standard must be used to guide the fact finder in determining what sum would compensate the injured party. *Allied Vista, Inc. v. Holt*, 987 S.W.2d 138, 141 (Tex. App.–Houston [14th Dist.] 1999, no pet.).

When measuring damages in a contract action, "the general rule is that 'the complaining party is entitled to recover the amount necessary to put him in as good a position as if the contract had been performed.'" *Bowen v. Robinson*, 227 S.W.3d 86, 96 (Tex. App.–Houston [1st. Dist.] 2006, pet. denied) (quoting *Smith v. Kinslow*, 598 S.W.2d 910, 912 (Tex. Civ. App.–Dallas 1980, no writ)). "Benefit of the bargain" damages "serve to protect the promisee's 'expectation interest,' or his interest in having the benefit of his bargain by being put in as good a position as he would have been had the contract or promise been performed." *Bechtel Corp. v. CITGO Products Pipeline Co.*, 271 S.W.3d 898, 927 (Tex. App.–Austin 2008, no pet.).

The "benefit of the bargain" measure of contract damages can include lost profits. *See id.* (listing lost profits as one example of expectancy damages); *see also ERI Consulting Engineers, Inc. v. Swinnea*, 318 S.W.3d 867, 876 (Tex. 2010) (discussing whether the evidence of lost

profits was legally sufficient to support the damage calculation for breach of contract); *see also Holt Atherton Industries, Inc. v. Heine*, 835 S.W.2d 80, 84 (Tex. 1992) (same). The "benefit of the bargain" measure of damages "compensates for the profits that would have been made if the bargain had been performed as promised." *Formosa Plastics Corp. USA v. Presidio Engineers and Contractors, Inc.*, 960 S.W.2d 41, 55 (Tex. 1998) (measuring "benefit of the bargain" damages for fraud).

"Diminution in value" measures "damages for the destruction of a business by the tortious act of another." *Nelson v. Data Terminal Sys., Inc.*, 762 S.W.2d 744, 748 (Tex. App.–San Antonio 1988, writ denied). The San Antonio Court of Appeals has determined diminution in value of a business is not "an appropriate measure of damages" in a breach of contract action. *See id. See also, Abraxas Petroleum Corp. v. Hornburg*, 20 S.W.3d 741, 761 (Tex. App–El Paso 2000, no pet.) (citing *Nelson* with approval for the principle that "diminution in the value of a business is not the proper measure of damages in a breach of contract case.").

B. Application of Law to the Facts

At trial, in their closing argument, appellees argued they were entitled to damages based on a rescission theory. However, in their live petition, appellees assert numerous theories by which their damages could be measured, including "actual damages, losses or injuries sustained"; "the fair value of the company"; "loss of value or loss of use of the property"; and "lost profits." Appellants did not argue a measure at trial, and simply asserted they were not liable for breach of contract or fraud. The trial court awarded 66,666.66 dollars to appellees in actual compensatory damages. That finding and award of damages is contained in paragraph 21 of its findings of fact where it states:

> [T]he Home Health Care Business for which Plaintiffs paid $100,000 has decreased in value by over two-thirds, because it could not legally be operated as Defendants operated it, and compliance with the law had the effect of making the Home Health Care Business unprofitable. As a result, Elder Care did not receive

> the *benefit of the bargain* promised . . . The value of the Home Health Care Business received by Elder Care was at least $66,666.66 less than the value of what was promised. (emphasis added)

In its conclusions of law, the trial court determined Elder Care was "entitled to recover $66,666.66 in actual damages."

In a post-judgment motion, after the trial court rendered its findings of fact and conclusions of law, appellants argued that "the damages sought does not [sic] match the award." Appellants stated:

> While the Court did enter a damage model based on benefit of the bargain, it determined that number to be $66,666.66, ostensibly as the value of the business at the time of purchase on April 10, 2008. . . .
>
> The purpose of a proper benefit of the bargain calculation is to put the plaintiff in the same position as if the contract had been performed. The 2/3rds calculation is not based on evidence that at the time of purchase ElderCare's [sic] service component of the business was only worth approximately $33,000. Further undermining this damage model is the evidence that Plaintiffs obtained revenue for almost two years of $150,0000. At a minimum, Plaintiffs obtain a windfall in the form of getting to keep Elder Care's hard assets, a multi-year revenue stream ($150,000), reimbursement of $66,666.66, and avoid payment on the remaining amount owed under the noted and guaranty (approximately $20,000, based on Defendants' calculation).

On appeal, appellants argued, for the first time, that the trial court's application of a "diminution in value" measure of damages was error because "diminution in value" cannot be used to measure contract damages in an action involving the sale of a business.[7] During oral submission, appellants conceded that appellees' damages could be calculated pursuant to the "benefit of the bargain" measure if this Court found appellants liable for breach. When appellees were asked during argument what evidence, if any, existed in the record of their lost profits, appellees directed the Court to Dawson's testimony and Plaintiff's trial exhibit 20, which

[7] Although this argument does not comport with the argument made in the trial court, we address it nonetheless because it asserts the calculation of damages was erroneous. *Mestizo Enterprises, Inc. v. Safeco Ins. Co. of America*, No. 03-08-00677-CV, 2009 WL 3806137, at *2 n.4 (Tex. App.–Austin Nov. 13, 2009, no pet.) ("When appellants present a general point of error but do not brief specific grounds raised [below], appellate courts have discretion to choose whether to address grounds raised in the trial court[,] but not specifically argued on appeal.").

purports to contain profit and loss statements for Elder Care dating from December 2008 to December 2013.

On this record, we conclude the trial court's calculation does not conform to the "benefit of the bargain" measure of damages. Rather, based upon the findings of the trial court, damages were calculated based upon evidence offered by appellees that compared the amount Elder Care paid for the home health care services business with the actual value of the home health care services business at the time of the sale. That measure does not "compensate[] for the profits that would have been made if the bargain had been performed as promised." *Formosa Plastics Corp. USA*, 960 S.W.2d at 55. Instead, the trial court's calculation appears to compensate appellees for the loss in value of a business. *See Nelson*, 762 S.W.2d at 747–48. The trial court's calculation of damages is error.

Appellees have identified some evidence of their lost profits. Accordingly, we remand this case for a new trial in the interests of justice pursuant to Texas Rule of Appellate Procedure 43.3(b). *Cf. Crawford Chevrolet, Inc. v. Rowland*, 525 S.W.2d 242, 250 (Tex. App.–Amarillo 1975, writ ref'd n.r.e.). ("It is well recognized that where . . . the proper measure of damage was not applied, the interests of justice require a remand.").

Rule 44.1 of the Texas Rules of Appellate Procedure provides that even if the error determined on appeal affects only part of the trial court's judgment, we "may not order a separate trial solely on unliquidated damages if liability is contested." TEX. R. APP. P. 44.1(b); *see also Clear Lake Center L.P., v. Garden Ridge, L.P.*, 416 S.W.3d 527, 545 (Tex. App.–Houston [14th Dist.] 2013, no pet.). Accordingly, we must reverse the trial court's judgment in its entirety. *See Clear Lake Center L.P.*, 416 S.W.3d 527, 545 (reversing trial court as to both liability and damages and remanding for new trial, despite the court's conclusion that the trial

court did not err in granting summary judgment to lessee on the issue of liability on lessee's breach of commercial lease claim).

We decide appellants' third issue in their favor and remand for further proceedings. Because of the disposition of the third issue, we need not address appellants' fourth issue.

VI. CONCLUSION

The trial court's judgment is reversed and we remand this case for a new trial.

/Douglas S. Lang/
DOUGLAS S. LANG
JUSTICE

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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

TRANSITIONAL ENTITY LP, DURACARE LLC, AND CHARLES SYLVESTER, Appellants

No. 05-14-01615-CV V.

ELDER CARE LP, AND BEVERLY A. DAWSON, Appellees

On Appeal from the 44th Judicial District Court, Dallas County, Texas
Trial Court Cause No. 12-11642.
Opinion delivered by Justice Lang. Justices Brown and Whitehill participating.

In accordance with this Court's opinion of this date, the judgment of the trial court is **REVERSED** and this cause is **REMANDED** to the trial court for a new trial.

It is **ORDERED** that appellant TRANSITIONAL ENTITY LP, DURACARE LLC, AND CHARLES SYLVESTER recover their costs of this appeal from appellee ELDER CARE LP, AND BEVERLY A. DAWSON.

Judgment entered this 27th day of May, 2016.