Reverse and Remand in part; Affirm in part and Opinion Filed July 29, 2016

In The

Court of Appeals
Fifth District of Texas at Dallas

No. 05-15-00278-CV

JULIE E. SCHMADER, Appellant
V.
MATTHEW M. BUTSCHEK D/B/A ACCENT FINANCIAL SERVICES, Appellee

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On Appeal from the County Court at Law No. 2
Collin County, Texas
Trial Court Cause No. 002-01100-2012

MEMORANDUM OPINION

Before Justices Bridges, Lang, and O'Neill[1]
Opinion by Justice Bridges

Julie E. Schmader appeals the trial court's judgment in favor of Matthew M. Butschek d/b/a Accent Financial Services. In five issues, Schmader argues the trial court erred in awarding any relief on the basis of a covenant not to compete or the other provisions of a Confidentiality and Nonsolicitation Agreement, the trial court's judgment cannot be sustained on Butschek's Theft Liability Act claim or his conversion claim, Butschek's failure to segregate his evidence regarding attorney's fees precludes an award of any fees, and the evidence is factually insufficient to support the trial court's rejection of Schmader's defamation claim. We affirm the trial court's judgment in part and reverse and remand in part.

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

Butschek operates a financial services business which includes financial consulting and tax preparation services. Schmader began working for Butschek in May 2009, and she signed a confidentiality and nonsolicitation agreement in January 2010. The agreement provided Schmader would not enter into a business relationship for the preparation of tax returns with any of Butschek's clients or customers within two years of the termination of her independent contractor relationship with Butschek. On June 6, 2011, Schmader terminated her contract with Butschek.

On April 19, 2012, Butschek sued Schmader alleging Schmader had entered into a business relationship for the preparation of tax returns with six named clients of Butschek. Butschek alleged Schmader violated the confidentiality and nonsolicitation agreement, causing him pecuniary damages. On July 21, 2012, Butschek's daughter, working on emails to clients, discovered emails between Schmader and another Butschek employee, Jeannie Gregory. Butschek's daughter showed the emails to Butschek's wife, Catherine, who "read every single one" of the 160 pages of emails. The emails discussed some of Butschek's clients, and in one email Schmader wrote, "If you got a file you wish to scan and send over, that might help me alittle [sic]…hint hint! hahaha." Gregory replied that "[i]t hasn't been done yet but i will get what info there is in there over to you today." Schmader replied, "Thanks! And heck, maybe that file will need to disappear after tomarrow! [sic]." Catherine checked the physical files of the clients discussed in the emails and found "several years" of files missing for multiple clients. Catherine also checked the computer files of the same customers and discovered the files had been deleted. Catherine reported the incident to the police and sent the affected customers "breach notification letters." In subsequent responses to requests for admissions, Schmader admitted working with these same customers after she left her employment with Butschek.

By the time Butschek filed his second amended petition in September 2012, he added a claim that Schmader's conduct constituted theft, and she was liable under the Theft Liability Act (the Act) for Butschek's actual damages and an additional sum not to exceed $1000. Also pursuant to the Act, Butschek sought recovery of his reasonable attorney's fees and costs.

At trial, Gregory testified she recognized the emails between her and Schmader. Gregory testified she sent Schmader a client list and transferred client files to Schmader "when the client would request it." In transferring some of the files, Gregory relied on Schmader telling her that the client had requested the files. Gregory had conversations with Schmader in which Schmader expressed her desire to obtain a list of clients "that she knew would want to go to her." Gregory testified she and Schmader had "a lot of conversations about her wanting to solicit [Butschek's] clients."

Mark Phillips testified he employed Butschek to prepare personal and business tax returns for approximately ten years. Phillips turned over to Butschek the "information concerning [his] personal and [his] corporate finances" so that Butschek could prepare his 2011 tax returns. Gregory called Phillips to tell him his taxes were ready to be picked up but called again later that same day to say Butschek "had done the taxes incorrectly." Gregory asked Phillips if he knew that Schmader "was not working there anymore." Phillips told Gregory he did not know, and he was "confused." Phillips did not remember if he contacted Schmader or if she contacted him, but they spoke on the telephone, and Schmader told Phillips she had "been doing [his] taxes all along." Schmader asked Phillips if he would prefer to have Schmader do his taxes that year "since [Butschek] had done them incorrectly." Schmader said Butschek "was getting old and that he was getting senile and losing his competency on doing his tax returns." Phillips agreed that Schmader would prepare his 2011 tax returns. When they were ready, Schmader called and told Phillips he could pick them up. Phillips did not know how Schmader

got his working papers and all the information that allowed her to prepare his 2011 tax returns, but he suspected Gregory had "sent them over."

Buscheck testified he lost $10,000 in income from the clients and their businesses that Schmader took from him. In attempting to prove her damages resulting from Butschek's defamation of her, Schmader testified she lost $1200 from one client who went back to Butscheck after employing her and $1800 from another.

On December 11, 2014, the trial court entered judgment in favor of Butschek and awarded him $8000 in damages and $18,000 in attorney's fees, plus additional attorney's fees in the event Butschek prevailed on appeal. The judgment further ordered that Butschek take nothing on his causes of action for defamation, injunctive relief, misappropriation of trade secrets, tortious interference with existing contracts and exemplary damages. The judgment also ordered that Schmader take nothing by her defamation suit against Butschek. This appeal followed.

We first address Schmader's third issue in which she argues the trial court's judgment cannot be supported by Butschek's claims under the Act. Specifically, Schmader argues there is no evidence to show Schmader appropriated any of Butschek's property or to show "fair market value" of the property allegedly stolen by Schmader. In addition, Schmader argues the attorney's fee award cannot be upheld on the basis of Butschek's claim under the Act. In its findings of fact, the trial court found Schmader and Gregory, in a manner inconsistent with Butschek's rights, exercised control over Butschek's personal property, namely his customer files and customer lists, without his effective consent, and he suffered damages in the amount of $8000 as a result.

In an appeal from a bench trial, the trial court's findings of fact have the same weight as a jury verdict. *Fulgham v. Fischer*, 349 S.W.3d 153, 157 (Tex. App.—Dallas 2011, no pet.).

When the appellate record contains a reporter's record as it does in this case, findings of fact are not conclusive and are binding only if supported by the evidence. *Id.* We review a trial court's findings of fact under the same legal and factual sufficiency of the evidence standards used when determining if sufficient evidence exists to support an answer to a jury question. *Id.* (citing *Catalina v. Blasdel*, 881 S.W.2d 295, 297 (Tex. 1994)).

When an appellant challenges the legal sufficiency of an adverse finding on which he did not have the burden of proof at trial, he must demonstrate there is no evidence to support the adverse finding. *Id.* When reviewing the record, we determine whether any evidence supports the challenged finding. *Id.* If more than a scintilla of evidence exists to support the finding, the legal sufficiency challenge fails. *Id.*; *see also King Ranch, Inc. v. Chapman*, 118 S.W.3d 742, 751 (Tex. 2003) (more than scintilla of evidence exists when evidence "rises to a level that would enable reasonable and fair-minded people to differ in their conclusions").

We review de novo a trial court's conclusions of law. *See BMC Software Belg., N.V. v. Marchand*, 83 S.W.3d 789, 794 (Tex. 2002). We are not bound by the trial court's legal conclusions, but the conclusions of law will be upheld on appeal if the judgment can be sustained on any legal theory supported by the evidence. *Fulgham*, 349 S.W.3d at 157-58. Incorrect conclusions of law will not require reversal if the controlling findings of fact will support a correct legal theory. *Id.* Moreover, conclusions of law may not be reversed unless they are erroneous as a matter of law. *Id.*

Under the Act, a person who commits theft is liable for the damages resulting from the theft. TEX. CIV. PRAC. & REM. CODE ANN. § 134.003(a) (West 2011). "Theft" means unlawfully appropriating property or unlawfully obtaining services as described by certain enumerated

sections of the penal code.[2] *Id.* § 134.002(2). The Act provides for the recovery of "actual damages." *Id.* § 134.005(a)(1). "Actual damages" under the Act are those recoverable at common law. *Beaumont v. Basham*, 205 S.W.3d 608, 619 (Tex. App.—Waco 2006, pet denied). At common law, actual damages are either direct or consequential. *Houston Livestock Show & Rodeo, Inc. v. Hamrick*, 125 S.W.3d 555, 581 (Tex. App.—Austin 2003) (citing *Henry S. Miller Co. v. Bynum*, 836 S.W.2d 160, 163 (Tex. 1992) (Phillips, C.J., concurring)). Direct damages are the necessary and usual result of the defendant's wrongful act; they flow naturally and necessarily from the wrong. *Id.* Direct damages compensate the plaintiff for the loss that is conclusively presumed to have been foreseen by the defendant from its wrongful act. *Id.* Consequential damages result naturally, but not necessarily, from the defendant's wrongful acts. *Id.* Under the common law, consequential damages need not be the usual result of the wrong, but must be foreseeable and must be directly traceable to the wrongful act and result from it. *Id.*

Here, the record shows Schmader unlawfully appropriated Butschek's customer files and customer lists, both electronically and physically. The theft allowed Schmader to take some of Butschek's clients and deprive Butschek of the income he would otherwise have realized from the preparation of those clients' tax returns. Butschek testified he lost $10,000 as a result, and Schmader's own testimony established she lost $1200 from one client who went back to Butscheck after employing her and $1800 from another. Under these circumstances, we conclude the evidence was legally sufficient to support the trial court's finding that committed theft against Butschek in violation of the Act and Butschek was damaged in the amount of $8000 as a result. *See Fulgham*, 349 S.W.3d at 157-58; *see also King Ranch, Inc.*, 118 S.W.3d at 751. To the extent Schmader challenges the trial court's award of attorney's fees, we note the award

[2] At oral argument, Schmader's counsel withdrew the argument that Butschek's allegations are not included in the Act's definition of theft.

of fees to a prevailing party in an action under the Act is mandatory. *Bocquet v. Herring*, 972 S.W.2d 19, 20 (Tex. 1998). We overrule Schmader's third issue.

In her fourth issue, Schmader argues Butschek's failure to segregate his evidence regarding attorney's fees precludes an award of attorney's fees. In his argument at trial, Schmader's counsel argued Butschek did not segregate his claim for attorney's fees even though attorney's fees were not available "under the statute for a covenant not to compete." The record reflects Butschek's counsel did not segregate his attorney's fees.

Section 134.005(b) of the Act provides that "[e]ach person who prevails in a suit under this chapter shall be awarded court costs and reasonable and necessary attorney's fees." TEX. CIV. PRAC. & REM. CODE ANN. § 134.005(b) (West 2011). As we have said, the award of fees to a prevailing party in an action under the Act is mandatory. *Bocquet*, 972 S.W.2d at 20 ("Statutes providing that a party 'may recover,' 'shall be awarded,' or 'is entitled to' attorney fees are not discretionary."). However, a prevailing party entitled to attorney's fees is required to "segregate fees between claims for which they are recoverable and claims for which they are not." *Tony Gullo Motors I, L.P. v. Chapa*, 212 S.W.3d 299, 311 (Tex. 2006). Failure to segregate, though, does not result in the denial of any fee. *Arrow Marble, LLC v. Estate of Killion*, 441 S.W.3d 702, 709 (Tex. App.—Houston [1st Dist.] 2014, no pet.) Rather, testimony of the full, unsegregated amount of the fee is treated as "some evidence" of the segregated fee amount, and remand is appropriate to determine the segregated fee amount due. *Id.* Because the reasonableness of a fee award is a question of fact and Butschek presented some evidence of its fees, we remand for a new trial on attorney's fees. *See id.* We sustain Schmader's fourth issue.

In her fifth issue, Schmader argues the evidence is factually insufficient to support the trial court's rejection of her defamation claim. When an appellant challenges the factual sufficiency of the evidence to support a trial court's finding, we consider all the evidence

supporting and contradicting the finding. *Fulgham*, 349 S.W.3d at 157-58 (citing *Plas–Tex, Inc. v. U.S. Steel Corp.*, 772 S.W.2d 442, 445 (Tex. 1989)). We set aside the finding for factual insufficiency only if the finding is so contrary to the evidence as to be clearly wrong and manifestly unjust. *Id.* (citing *Cain v. Bain*, 709 S.W.2d 175, 176 (Tex. 1986) (per curiam)). In a bench trial, the trial court, as factfinder, is the sole judge of the credibility of the witnesses. *Id.* As long as the evidence falls "within the zone of reasonable disagreement," we will not substitute our judgment for that of the fact-finder. *Id.* (quoting *City of Keller v. Wilson*, 168 S.W.3d 802, 822 (Tex. 2005)).

Schmader's defamation claim was based on letters Butschek sent out accusing Schmader of stealing files from his office. We have concluded the evidence supports a finding that Schmader stole both electronic and physical files from Butscheck. Statements that are not verifiable as false cannot form the basis of a defamation claim. *Neely v. Wilson*, 418 S.W.3d 52, 62 (Tex. 2013). We conclude the evidence was factually sufficient to support the trial court's rejection of her defamation claim. *See Fulgham*, 349 S.W.3d at 157-58. We overrule Schmader's fifth issue. Because of our disposition of these issues, we need not address Schmader's remaining issues.

We reverse the trial court's award of attorney's fees and remand for new trial on the issue of attorney's fees. In all other respects, we affirm the trial court's judgment.

/David L. Bridges/
DAVID L. BRIDGES
JUSTICE

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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

JULIE E. SCHMADER, Appellant

No. 05-15-00278-CV   V.

MATTHEW M. BUTSCHEK D/B/A ACCENT FINANCIAL SERVICES, Appellee

On Appeal from the County Court at Law No. 2, Collin County, Texas
Trial Court Cause No. 002-01100-2012.
Opinion delivered by Justice Bridges. Justices Lang and O'Neill participating.

In accordance with this Court's opinion of this date, the judgment of the trial court is **AFFIRMED** in part and **REVERSED** in part. We **REVERSE** that portion of the trial court's judgment awarding Matthew M. Butschek d/b/a Accent Financial Services attorney's fees. In all other respects, the trial court's judgment is **AFFIRMED**. We **REMAND** this cause to the trial court for new trial on the issue of attorney's fees.

It is **ORDERED** that appellee MATTHEW M. BUTSCHEK D/B/A ACCENT FINANCIAL SERVICES recover his costs of this appeal from appellant JULIE E. SCHMADER.

Judgment entered July 29, 2016.