

REVERSE in Part, AFFIRM in Part, and REMAND; Opinion Filed October 27, 2016.



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

No. 05-15-00835-CV

**VIKING HEALTHCARE, LLC, Appellant
V.
ZEIG ELECTRIC, INC., Appellee**

**On Appeal from the 397th Judicial District Court
Grayson County, Texas
Trial Court Cause No. CV-10-0868**

MEMORANDUM OPINION

**Before Justices Fillmore, Brown, and O'Neill¹
Opinion by Justice Fillmore**

This case involves a dispute between a general contractor and the subcontractor it hired to perform electrical work in connection with the construction of a hospital. The general contractor, appellant Viking Healthcare, LLC (Viking Healthcare), appeals a final judgment following a jury trial awarding damages to the subcontractor, appellee Zeig Electric, Inc. (Zeig). In five issues, Viking Healthcare asserts there is no evidence JPAC, LLC (JPAC) was a party to the contract at issue in the litigation, thus rendering the jury's finding that "JPAC, Viking Healthcare" breached the contract fatally flawed; attacks damages awarded to Zeig; contends Zeig's breach of the contract barred its right to recover from Viking Healthcare; and argues Viking Healthcare was not liable for attorney's fees and penalty interest under the Prompt

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

Payment to Contractors and Subcontractors Act. We reverse the trial court's judgment as to Viking Healthcare. We affirm the trial court's judgment in all other respects. We remand the case to the trial court for further proceedings.

Background

SDB Partners, LLC (SDB), owned real property in Sherman, Grayson County, Texas, on which the Carrus Specialty Hospital was constructed (the Project). Viking Healthcare, general contractor for construction of the Project, contracted with JPAC to serve as the project manager. In September 2009, Viking Healthcare entered into a "Standard Form of Agreement Between Contractor and Subcontractor" (the Contract) with subcontractor Zeig requiring that Zeig install electrical service and systems for the Project, including provision of necessary labor and material.² JPAC executed the Contract as project manager "on behalf of" Viking Healthcare.

Zeig was terminated as a subcontractor on the Project in May 2010. Zeig filed a mechanic's lien affidavit in the property records of Grayson County against the real property on which the Project was constructed, and a lawsuit against Viking Healthcare and SDB.³ During the pendency of the lawsuit, Zeig also sued JPAC.⁴ In Zeig's live pleading,⁵ Zeig asserted claims against Viking Healthcare and JPAC for breach of contract, fraud, fraud by nondisclosure, statutory damages under chapter 28 of the civil practice and remedies code entitled "Prompt

² The Contract was signed in November 2009, however the terms of the Contract indicate it was made effective as of September 28, 2009.

³ SDB was named as SDB Investment Group, LLC, but SDB Partners, LLC answered. The record contains no pleading filed by SDB Investment Group, LLC.

⁴ Other entities and individuals—Sterling Engineering & Design Group, Ltd.; Sanpat Management, LLC; Peter Juul; and Sandeep N. Patel—were also sued by Zeig in this lawsuit. Those entities and individuals were not parties to the lawsuit at the time of trial. In our discussion of Zeig's allegations, we will refer only to allegations against the parties at the time of trial.

⁵ The record reflects Zeig's Fourth Amended Petition, filed July 15, 2013, was its live pleading at the time of trial. There are references in pleadings contained in the Clerk's Record and in the Reporter's Record to a Fifth Amended Petition. However, that pleading is not contained in the Clerk's Record and is not referenced on the trial court's docket sheet contained in the Clerk's Record. At submission of this appeal, Zeig confirmed that its Fourth Amended Petition was the last petition that was both filed and served before trial and that its Fourth Amended Petition was its live pleading.

Payment to Contractors and Subcontractors,”⁶ and suit on a sworn account. Zeig asserted a claim for quantum meruit against Viking Healthcare, JPAC, and SDB. It also asserted a claim for tortious interference with contract against JPAC, and a claim for foreclosure of a lien against SDB. Zeig sought damages jointly and severally from Viking Healthcare, JPAC, and SDB, attorney’s fees under section 38.001 of the civil practice and remedies code⁷ and under section 28.005 of the property code,⁸ and foreclosure of the lien filed against SDB’s real property on which the Project was constructed. Zeig also claimed consequential damages as a result of loss of business; loss of income stream; loss of the Zeig Capital Management, Ltd. building; loss of the ability to qualify for bonds, lines of credit, and business loans; and any tax liability. Viking Healthcare, JPAC, and SDB pleaded entitlement to offset for payments and credits. The trial court granted summary judgment against Zeig on its claims of fraud, fraud by non-disclosure, tortious interference with contract, and for consequential damages.

According to Zeig’s live pleading, Zeig entered into the Contract, which Zeig refers to as the “Zeig-JPAC-Viking Healthcare Subcontract,” with JPAC and Viking Healthcare. Zeig pleaded it was entitled to damages as a result of JPAC’s and Viking Healthcare’s “failure and refusal . . . to make payments to Zeig” under the Contract. The case was tried before a jury. The sole theory of liability submitted to the jury was breach of contract by Viking Healthcare and JPAC. In pertinent part, the jury charge provided and the jury found as follows:

QUESTION NO. 1

a. Did any of those listed below fail to comply with the Agreement?

Answer “Yes” or “No”

⁶ See TEX. PROP. CODE ANN. §§ 28.001–.010 (West. 2014).

⁷ See TEX. CIV. PRAC. & REM. CODE ANN. § 38.001 (West 2015).

⁸ See TEX. PROP. CODE ANN. § 28.005(b) (in action brought under this chapter, court may award costs and reasonable attorney’s fees as it determines equitable and just).

JPAC, Viking Healthcare yes
Zeig Electric yes

“Agreement” is the AIA standard form of agreement between contractor and subcontractor admitted in evidence as Plaintiff’s Exhibit 1 and also as Defendants’ Exhibit 1.

....

If you answered “Yes” to both of those listed in Question No. 1(a), then answer Question No. 1(b). Otherwise, do not answer Question 1(b).

b. Who failed to comply with the [A]greement first?

Answer “**JPAC/Viking Healthcare**”, or “Zeig Electric”:

Answer: **JPAC/Viking Healthcare**

If you answered “Yes” to **JPAC and Viking Healthcare** in Question No. 1(a), then answer Question No. 1(c). Otherwise, do not answer Question No. 1(c).

c. Was the failure **by JPAC and Viking Healthcare** to comply with the Agreement as found by you in Question 1(a) excused?

Answer “Yes” or “no.” no

Failure to comply by **JPAC/Viking Healthcare** is excused if compliance is waived by Zeig Electric. Wavier is an intentional surrender of a known right or intentional conduct inconsistent with claiming the right.

Failure to comply by **JPAC, LLC or Viking Healthcare, LLC** is excused if Zeig Electric, Inc. ratified the terms and conditions of the Carrus Specialty Hospital Project.

....

If you answered “Yes” to **JPAC/Viking Healthcare** in Question No. 1(a) and “No” to 1(c), then answer the following question. Otherwise, do not answer the following question.

QUESTION NO. 2

What sum of money, if any, if paid now in cash, would fairly and reasonably compensate Zeig Electric for its damages, if any, that resulted from the failure to comply by **JPAC/Viking Healthcare** you found in answer to Question No. 1(a)?

....

Consider the following elements of damages, if any, and none other.

a. The difference between the amount **JPAC/Viking Healthcare** agreed to pay Zeig Electric and the amount paid.

Answer separately in dollars and cents for damages, if any:

Answer: \$201,580.00

b. The additional cost to Zeig for extension of time, delays and other causes in accordance with the plans and specifications, and Zeig Electric's bid attached to the Agreement.

Answer separately in dollars and cents for damages, if any:

Answer: \$380,289.44

....

If you answered with an amount in Question No. 2(a), then answer question No. 3. Otherwise, do not answer Question No. 3.

QUESTION NO. 3

On what date do you find the amounts in 2(a) became due to Zeig?

May 2010

If you answered with an amount in Question No. 2(a), then answer question No. 4. Otherwise, do not answer Question No. 4.

QUESTION NO. 4

For the amounts found in 2(a), if any, do you find that the work or materials were provided after December 31, 2009?

Yes X

No _____

If you answered with an amount in Question No. 2(a), then answer question No. 5. Otherwise, do not answer Question No. 5.

QUESTION NO. 5

Did **JPAC/Viking Healthcare** have a good faith basis to withhold the amount found in your answer to Question No. 2(a)?

Yes
No X

.....

If you determined a sum of money was due Zeig in Question No. 2(a) or 2(b), then answer Question No. 6. Otherwise, do not answer Question No. 6.

QUESTION NO. 6

What sum of money, if any, should be offset or credited from any amounts of money awarded to Zeig?

.....

Answer in dollars and cents for damages, if any.

ANSWER: \$27,600.00

If you answered “Yes” to **JPAC and Viking Healthcare** in Question No. 1(a), then answer Question No. 7. Otherwise, do not answer Question No. 7.

QUESTION NO. 7

What is a reasonable fee for the necessary services of Zeig Electric’s attorneys, stated in dollars and cents?

Answer with an amount for each of the following:

a. For representation in the trial court.

Answer: \$600,000.

b. For representation through appeal to the Court of Appeals.

Answer: \$150,000.

c. For representation at the petition for review stage in the Supreme Court of Texas:

Answer: \$50,000.

d. For representation through oral argument and the completion of proceedings in the Supreme Court of Texas:

Answer: \$50,000.

(Emphasis added.)

Zeig moved for entry of judgment holding Viking Healthcare and JPAC jointly and severally liable for the damages awarded by the jury. Viking Healthcare and JPAC filed a motion for judgment notwithstanding the verdict (J.N.O.V.) and, thereafter, an amended motion for J.N.O.V. and alternative motion to disregard jury findings. In their amended motion for J.N.O.V., Viking Healthcare and JPAC asserted there is no evidence of a contract between JPAC and Zeig, noting Viking Healthcare and JPAC are separate corporate entities.

In Zeig's response to Viking Healthcare and JPAC's amended motion for J.N.O.V., it asserted evidence established Zeig contracted with both JPAC and Viking Healthcare and that the Contract "unequivocally establishes the contractual relationship between (a) Zeig, (b) JPAC and (c) Viking Healthcare." Without citing to specific evidence of a principal and agent relationship, Zeig asserted there is more than a scintilla of evidence that, as project manager, JPAC's actions were actions of Viking Healthcare.

At the April 6, 2015 hearing on Zeig's motion for entry of judgment, the trial court orally pronounced its denial of Viking Healthcare and JPAC's motions for J.N.O.V. On that same date, the trial court signed a final judgment in favor of Zeig providing:

- Zeig recover from Viking Healthcare actual damages in amount of \$173,980.00, which represents \$201,580.00 found by the jury due Zeig, less \$27,600.00 found by the jury to be due Viking Healthcare as an offset;
- Zeig recover from Viking Healthcare interest pursuant to section 28.004 of the property code, at the rate of one and one-half percent per month on the principal amount of \$173,980.00 from May 31, 2010, through April 3, 2015, in the amount of \$239,230.95, with a daily rate after April 3, 2015, of \$222.46 per day until the date of entry of judgment;
- Zeig recover from Viking Healthcare "further" actual damages in the amount of \$380,289.44;

- Zeig recover from Viking Healthcare prejudgment interest on the “further” actual damages amount of \$380,289.44 at the rate of five percent per annum from May 31, 2010, through April 3, 2015, in the amount of \$92,102.98, with a daily rate after April 3, 2015, of \$52.94 per day until the date of entry of judgment;
- Zeig recover from Viking Healthcare reasonable and necessary attorney fees in the amount of \$600,000.00 for the prosecution of this case through judgment, and Viking Healthcare and SDB are jointly and severally liable for \$50,000.00 of the \$600,000.00 attorney fee amount;
- Zeig recover from Viking Healthcare and SDB, jointly and severally, court costs in the amount of \$14,610.87;
- Zeig recover from Viking Healthcare post-judgment interest at the rate of five percent compounded annually;
- If either Viking Healthcare or SDB appeal the judgment to an intermediate court of appeals and the judgment is affirmed, Zeig will additionally recover a maximum amount of \$150,000 from the unsuccessful defendant or defendants, representing all anticipated reasonable and necessary attorney’s fees that Zeig will incur for all proceedings in the intermediate court of appeals;
- If either Viking Healthcare or SDB unsuccessfully seeks review in the Texas Supreme Court, Zeig shall additionally recover a maximum of \$50,000 from the unsuccessful defendant or defendants, representing all anticipated reasonable and necessary attorney’s fees that Zeig would be expected to incur in responding to a petition for review from Viking Healthcare or SDB, and in the event proceedings in the Texas Supreme Court proceed beyond briefing at the petition stage but the trial court’s judgment is still affirmed, Zeig shall additionally recover a maximum of \$50,000.00 from the unsuccessful defendant or defendants, representing all anticipated reasonable and necessary attorney’s fees Zeig is expected to incur for remaining proceedings in the Texas Supreme Court.

In the final judgment, the trial court further ordered the foreclosure of Zeig’s mechanic’s lien in the amount of \$173,980.00 and issued an order of sale directing the Grayson County Sheriff’s Office to sell the real property and distribute the proceeds of such sale to Zeig until the lien in the amount of \$173,980.00 is satisfied.

After entry of the final judgment, Viking Healthcare and JPAC filed a supplemental motion for J.N.O.V., motion for new trial, and motion for remittitur. In supplementation of arguments contained in their amended motion for J.N.O.V., they argued it is impossible to determine from submission of the jury question 1(a) regarding breach of contract whether the

jury found the Contract was breached by Viking Healthcare alone, JPAC alone, or JPAC and Viking Healthcare. Following a hearing on Viking Healthcare and JPAC's supplemental motion for J.N.O.V., the trial court signed an order denying Viking Healthcare and JPAC's supplemental motion for J.N.O.V., motion for new trial, and motion for remittitur. Viking Healthcare filed this appeal.

No Evidence of Contract Between JPAC and Zeig

In Viking Healthcare's first issue, it asserts the jury's answer to question 1(a) that "JPAC, Viking Healthcare" breached a contract with Zeig was "fatally flawed" because there was no evidence that JPAC could have breached a contract "to which it indisputably was not a party," and if, as the trial court determined, the jury's findings could be read to refer to Viking Healthcare alone, the jury questions were ambiguous and contained multiple legally invalid theories.

Standard of Review

"[A] trial court should disregard a jury finding if the evidence is legally insufficient to support it, or if a directed verdict would have been proper because a legal principle precludes recovery." *Fazio v. Cypress/GR Houston I, L.P.*, 403 S.W.3d 390, 394 (Tex. App.—Houston [1st Dist.] 2013, pet. denied) (en banc). "Whether a jury finding is supported by the evidence is resolved under the same standard of review applied to challenges to the legal sufficiency of the evidence." *Palla v. Bio-One, Inc.*, 424 S.W.3d 722, 725 (Tex. App.—Dallas 2014, no pet.). Accordingly, we consider only evidence and inferences supporting the finding and disregard all contrary evidence and inferences. *Burroughs Wellcome Co. v. Crye*, 907 S.W.2d 497, 499 (Tex. 1995); *Bio-One, Inc.*, 424 S.W.3d at 725. In so doing, we must credit favorable evidence if reasonable jurors could, and disregard contrary evidence unless reasonable jurors could not. *See City of Keller v. Wilson*, 168 S.W.3d 802, 827 (Tex. 2005); *Bio-One, Inc.*, 424 S.W.3d at 725. A

legal sufficiency challenge must be sustained when the record discloses a complete absence of evidence of a vital fact or the evidence establishes conclusively the opposite of a vital fact. *Uniroyal Goodrich Tire Co. v. Martinez*, 977 S.W.2d 328, 334 (Tex. 1998).

Discussion

The elements of a breach of contract claim are (1) the existence of a valid contract; (2) performance or tendered performance by the plaintiff; (3) breach of the contract by the defendant; and (4) damages to the plaintiff resulting from that breach. *Nat'l Health Res. Corp. v. TBF Fin., LLC*, 429 S.W.3d 125, 131 (Tex. App.—Dallas 2014, no pet.). Zeig sued Viking Healthcare and JPAC for breach of the Contract. A party who asserts an affirmative claim for relief has the burden of persuading the factfinder as to each element of its cause of action. *See Vance v. My Apartment Steak House of San Antonio, Inc.*, 677 S.W.2d 480, 482 (Tex. 1984). That includes, for a breach of contract claim, the element of a valid contract between the plaintiff and the defendant. *See Barnett v. Coppell N. Tex. Court, Ltd.*, 123 S.W.3d 804, 815 (Tex. App.—Dallas 2003, pet. denied); *see also C & A Invs., Inc. v. Bonnet Res. Corp.*, 959 S.W.2d 258, 262 (Tex. App.—Dallas 1997, writ denied) (appellant cannot maintain breach of contract action against entity not a party to the contract).⁹

In answer to question 1(a), the jury found “JPAC, Viking Healthcare” breached the Contract. The issue on appeal is whether the evidence supports that finding; it is of no consequence that Viking Healthcare submitted the jury question. *See Exxon Corp. v. Breezevale, Ltd.*, 82 S.W.3d 429, 439 (Tex. 2002). In their amended motion for J.N.O.V., Viking Healthcare and JPAC asserted there is no evidence of a contract between JPAC and Zeig, noting Viking Healthcare and JPAC are separate corporate entities. *See TEX. R. CIV. P. 279* (“A claim that the

⁹ *See E.F. Johnson Co. v. Infinity Global Tech.*, No. 05-14-01209-CV, 2016 WL 4254496, at *6 (Tex. App.—Dallas Aug. 11, 2016, no pet. h.) (mem. op.) (“Of course, as a general rule, only a party to a contract can be responsible for breach of that contract.”).

evidence was legally or factually insufficient to warrant the submission of any question may be made for the first time after verdict, regardless of whether the submission of such question was requested by the complainant.”); *see also Grocers Supply, Inc. v. Cabello*, 390 S.W.3d 707, 725 (Tex. App.—Dallas 2012, no pet.) (to preserve legal sufficiency challenge for appeal after jury trial, party must have done one or more of the following: (1) moved for instructed verdict; (2) moved for J.N.O.V.; (3) objected to submission of jury question; (4) moved to disregard jury finding; or (5) moved for new trial). We agree there is no evidence JPAC was a party to the contract between general contractor Viking Healthcare and subcontractor Zeig. While an officer of JPAC signed the Contract “on behalf of” Viking Healthcare, JPAC was not made a party to the Contract, and there is legally insufficient evidence to support the jury’s answer to question 1(a) finding that “JPAC, Viking Healthcare” failed to comply with the Contract.¹⁰ Accordingly, we resolve Viking Healthcare’s first issue in its favor and reverse the trial court’s judgment against it.

Remand for New Trial

We are unable to conclude that the final judgment in this case comports with the jury’s verdict. Despite the fact that one cannot ascertain from the jury’s answers to question 1(a) whether it found the Contract was breached by Viking Healthcare alone, JPAC alone, or JPAC and Viking Healthcare, the final judgment contains no award against JPAC and only an award against Viking Healthcare. *See Calce v. Dorado Expl.*, 309 S.W.3d 719, 735–36 (Tex. App.—Dallas 2010, no pet.) (appellants challenged legal sufficiency of adverse finding on breach of contract issue on which they did not have burden of proof; it is court’s charge that measures the

¹⁰ Zeig argues on appeal that the evidence establishes JPAC was Viking Healthcare’s agent, and the jury’s answer to question 1(a) is consistent with a trial court judgment assessing liability against only Viking Healthcare as the principal. However, Zeig did not plead JPAC’s acts were those of the agent of Viking Healthcare as a principal. Rather, Zeig pleaded JPAC breached the “Zeig-JPAC-Viking Subcontract” to which it was purportedly a party. *See Wright Group Architects-Planners, P.L.L.C. v. Pierce*, 343 S.W.3d 196, 200 (Tex. App.—Dallas 2011, no pet.) (the law does not presume agency); *Miles v. Plumbing Servs. of Houston, Inc.*, 668 S.W.2d 509, 511 (Tex. App.—Houston [14th Dist.] 1984, writ ref’d n.r.e.) (agency cannot be presumed to exist).

sufficiency of the evidence when the opposing party fails to object to the charge; appellate court reviews sufficiency of the evidence in light of the charge submitted).¹¹

Although not technically the same problem presented in *Crown Life Insurance Co. v. Casteel*, 22 S.W.3d 378, 388–89 (Tex. 2000) (when a single broad-form liability question erroneously commingles valid and invalid liability theories and appellant’s objection is timely and specific, error is harmful when it cannot be determined whether the improperly submitted theories formed the sole basis for the jury’s finding), the problem presented here is akin to a *Casteel* problem. In this case jury question 1(a) submitted the liability for breach of contract by two separate corporate entities in a single broad-form liability question. As the question was submitted, it was not possible for the jury to render separate liability verdicts for the separate corporate entities, and it is not possible to ascertain whether JPAC only—an entity for which there is legally insufficient evidence of liability for breach of contract—was found liable for breach of contract by the jury, Viking Healthcare only—an entity which was a party to the Contract from which Zeig sought breach of contract damages—was found liable for breach of contract by the jury, or both entities were found liable for breach of contract by the jury. The remedy for the harmful error in *Casteel* was a remand to the trial court for a new trial. *See id.* at 390 (because error in the charge was harmful and was properly objected to, case was reversed and remanded to trial court for new trial).

Having prevailed on a no-evidence issue, Viking Healthcare would ordinarily be entitled to the rendition of judgment in its favor. *See Vista Chevrolet, Inc. v. Lewis*, 709 S.W.2d 176, 176 (Tex. 1986) (per curiam). However, the supreme court has held that appellate courts have broad

¹¹ The impossibility of determining the entity or entities to which the jury referred in answering question 1(a) that “JPAC, Viking Healthcare” breached the Contract is graphically demonstrated by the remainder of the jury charge. In a single answer to question 1(a), the jury found “JPAC, Viking Healthcare” breached the Contract. Yet, in subsequent questions, conditioned upon the jury having found “JPAC, Viking Healthcare” breached the Contract, and subsequent instructions, Viking Healthcare and JPAC are referred to as “JPAC and Viking Healthcare,” “JPAC/Viking Healthcare,” and “JPAC, LLC or Viking Healthcare, LLC.”

discretion to remand for new trial in the interest of justice. *See* TEX. R. APP. P. 43.3(b) (when reversing a trial court’s judgment, the court must render the judgment that the trial court should have rendered except when the interests of justice require a remand for another trial); *Scott v. Liebman*, 404 S.W.2d 288, 294 (Tex. 1996), *abrogated in part on other grounds by Parker v. Highland Park, Inc.*, 565 S.W.2d 512, 517 (Tex. 1978); *Innovate Tech. Solutions, L.P. v. Youngsoft, Inc.*, 418 S.W.3d 148, 153 (Tex. App.—Dallas 2013, no pet.) (citing *Knapp v. Wilson N. Jones Mem’l Hosp.*, 281 S.W.3d 163, 176 (Tex. App.—Dallas 2009, no pet.)); *see also Bayway Servs., Inc. v. Ameri-Build Constr., L.C.*, 106 S.W.3d 156, 161 (Tex. App.—Houston [1st Dist.] 2003, no pet.) (remanding case after sustaining a legal sufficiency challenge).¹² Viking Healthcare has not disputed it was a party to the Contract on which Zeig sued for damages. Because we are unable to ascertain whether the jury found Viking Healthcare breached that contract, we conclude it would be inappropriate to render a take-nothing judgment against Viking Healthcare, particularly where Viking Healthcare has not asserted on appeal that there is legally insufficient evidence it breached the Contract.

For the reasons stated above and in the interest of justice, we remand the cause against Viking Healthcare to the trial court for a new trial.

Viking Healthcare’s Issues Two Through Five

In Viking Healthcare’s issues two through five, it asserts: the award of \$173,989.00 for amounts Viking Healthcare “agreed” to pay Zeig must be reversed¹³; the award of \$380,289.44 in “delay” or “impact” damages must be reversed; Zeig’s right to demand performance from Viking Healthcare was barred by its own earlier failures to comply with the Contract; and Viking

¹² We note that on appeal Viking Healthcare prays for a judgment that Zeig take nothing against it and, in the alternative, prays this Court “reverse and remand for a new trial.”

¹³ While Viking Healthcare’s appellate brief suggests this award is in the amount of \$174,989.00, the final judgment actually awards the amount of \$173,980.00.

Healthcare was not liable for payment of penalty interest and attorney's fees under the Prompt Payment to Contractors and Subcontractors Act. Having resolved Viking Healthcare's first issue in its favor by concluding the final judgment against it must be reversed and remanded to the trial court for a new trial, Viking Healthcare's first issue is dispositive and we need not address its remaining issues. *See* TEX. R. APP. P. 47.1.

Judgment Against SDB

In the final judgment, the trial court ordered the foreclosure of Zeig's mechanic lien against SDB's real property in the amount of \$173,980.00, as well as awarding Zeig \$14,610.87 in court costs and \$50,000.00 in attorney's fees for which SDB was jointly and severally liable.¹⁴ SDB has not appealed the final judgment. Accordingly, we affirm the trial court's judgment in part as to SDB. *See* TEX. R. APP. P. 44.1(b) (if error affects part but not all of matter in controversy and that part is separable without unfairness to the parties, appellate court should reverse and order new trial only as to the part affected by the error).

Conclusion

We reverse the trial court's judgment against Viking Healthcare. We affirm the trial court's judgment in all other respects. We remand the cause against Viking Healthcare to the trial court for a new trial.

/Robert M. Fillmore/
ROBERT M. FILLMORE
JUSTICE

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¹⁴ The record contains a "Notice of Release of Judgment Lien as to SDB Partners, L.L.C." filed in the trial court on July 16, 2015, with an attached "Release of Liens as to SDB Partners, L.L.C." as filed in the property records of Grayson County, Texas, which provides Zeig "recovered a judgment against SDB Partners, L.L.C. for the sum of \$238,590.87" that "has been paid in full by SDB Partners, L.L.C." The \$238,590.87 award represents the sum of the mechanic's lien in the amount of \$173,980.00, and SDB's joint and several liability for court costs of \$14,610.87 and for \$50,000.00 of attorney's fees.



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

JUDGMENT

VIKING HEALTHCARE, LLC, Appellant

No. 05-15-00835-CV V.

ZEIG ELECTRIC, INC., Appellee

On Appeal from the 397th Judicial District
Court, Grayson County, Texas,

Trial Court Cause No. CV-10-0868.

Opinion delivered by Justice Fillmore,

Justices Brown and O'Neill participating.

In accordance with this Court's opinion of this date, the judgment of the trial court against Viking Healthcare, LLC is **REVERSED** and **REMANDED** to the trial court for a new trial. The judgment is **AFFIRMED** in all other respects.

It is **ORDERED** that appellant Viking Healthcare, LLC recover its costs of this appeal from Zeig Electric, Inc.

The obligations of appellant Viking Healthcare, LLC, as principal, and North American Specialty Insurance Company, as surety, on appellant's supersedeas bond are **RELEASED**.

Judgment entered this 27th day of October, 2016.