Affirmed and Opinion Filed November 14, 2016

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-15-01470-CV

MARK S. GOLDMAN AND CAROLINE GOLDMAN, Appellants
V.
JEFFREY R. OLMSTEAD AND SUMMER S. OLMSTEAD, Appellees

On Appeal from the 298th Judicial District Court
Dallas County, Texas
Trial Court Cause No. DC-10-01144

MEMORANDUM OPINION

Before Justices Bridges, Lang-Miers, and Whitehill
Opinion by Justice Whitehill

Appellees Jeffrey and Summer Olmstead sued appellants Mark and Caroline Goldman for breaching a contract to buy the Olmsteads' house. The Goldmans counterclaimed against the Olmsteads. The Olmsteads won a judgment against the Goldmans, but we reversed the judgment and remanded the case. After remand, the Goldmans amended their pleadings and again pled counterclaims against the Olmsteads, which the trial court dismissed for lack of jurisdiction as exceeding the court's authority under our mandate. The Goldmans appeal the dismissal.

Because our mandate remanded the case for further proceedings consistent with our opinion, the present question is whether our opinion contemplated a remand for the Goldmans to pursue their attorneys' fees claims against the Olmsteads. We determine that we did not so provide. Accordingly, although we conclude that there was no jurisdictional defect, we agree

with the trial court that the Goldmans' counterclaims exceeded our mandate's scope. Therefore, the error was harmless, dismissal was proper, and we affirm.

I. BACKGROUND

In 2009, the Goldmans contracted to buy the Olmsteads' house.

The Olmsteads later sued the Goldmans for breaching that contract.

The Goldmans answered and counterclaimed, alleging that the Olmsteads breached the contract by refusing to release the earnest money. The Goldmans sought their attorneys' fees under civil practice and remedies code Chapters 37 and 38 (but not under their contract's fee shifting clause). The Goldmans also impleaded their agent and their agent's broker as third-party defendants.

The case was tried without a jury. The trial court rendered judgment for the Olmsteads, awarding them damages and attorneys' fees against the Goldmans. The judgment awarded the Goldmans no relief on their counterclaims. The judgment also ordered the Goldmans to take nothing on their third-party claims, and it awarded attorneys' fees to the third-party defendants.

The Goldmans appealed. They did not assert in their appellants' brief an issue complaining about the trial court's failure to award them a judgment against the Olmsteads for the Goldmans' attorneys' fees. Nor did they ask us to remand the case to determine such an issue.

We reversed in part and affirmed in part, rendering judgment that the Olmsteads take nothing on their claims against the Goldmans and remanding "the issue of the trial court's award of attorney's fees to the Olmsteads." *Goldman v. Olmstead*, 414 S.W.3d 346, 352 (Tex. App.—Dallas 2013, pet. denied) (*Goldman I*). We also reversed the award of attorneys' fees to the third-party defendants and remanded for further proceedings as to that issue. *Id*.

On remand, the Goldmans filed a fourth amended counterclaim asserting counterclaims for contract breach, recovery of the earnest money, and attorneys' fees. They based their attorneys' fees counterclaims on Chapter 38 and, for the first time, "the provisions of the contract between the parties."

The Olmsteads filed a plea to the jurisdiction asserting that this Court's judgment deprived the trial court of jurisdiction to hear the Goldmans' counterclaims. The trial court granted the plea and dismissed the Goldmans' counterclaims with prejudice. A few months later, the trial court ordered the Goldmans' earnest money, which had been tendered into the court's registry, to be disbursed to the Goldmans.[1] The order also ordered the Goldmans and the Olmsteads to take nothing "on their remaining claims against each other."

The trial court later rendered a final judgment disposing of the remaining issues between the Goldmans and the third-party defendants. The Goldmans timely appealed.

II. ISSUES

The Goldmans' appeal concerns only their attorneys' fees counterclaims against the Olmsteads. They assert two issues:

(1) "Whether the trial court erred in granting Plaintiffs' Plea to the Jurisdiction," and

(2) "Whether the trial court erred in ordering that the [Goldmans] take nothing on their claims against the Olmsteads without considering whether they are now the prevailing part[ies] entitled to a recovery of attorneys' fees."

The Goldmans' argument is essentially that (i) the *Goldman I* mandate vested the trial court with jurisdiction to consider the Goldmans' attorneys' fees counterclaims; (ii) the trial court thus erred in granting the Olmsteads' jurisdictional plea; and (iii) they were thus on remand entitled to pursue their attorneys' fees claim against the Olmsteads.

[1] This part of the order recites that it is "pursuant to the Agreement of the Plaintiffs and the Defendants."

III. ANALYSIS

A. Standard of Review

"We review de novo the trial court's ruling on a plea to the jurisdiction." *Williams v. Dallas Area Rapid Transit*, No. 05-14-01303-CV, 2016 WL 374833, at *1 (Tex. App.—Dallas Feb. 1, 2016, no pet.) (mem. op.).

B. Did the trial court commit harmful error by granting the Olmsteads' plea to the jurisdiction?

The basic question presented is whether the trial court correctly ruled that this Court's mandate in *Goldman I* barred it from adjudicating the Goldmans' attorneys' fees counterclaims. For the reasons discussed below, we conclude that (i) although the trial court erred by concluding that it lacked jurisdiction, (ii) the error was harmless because those counterclaims were beyond this Court's mandate and were thus barred as a matter of law.

1. Applicable Law

A mandate is an appellate court's formal command requiring the lower court to comply with the appellate court's judgment. *Cessna Aircraft Co. v. Aircraft Network, LLC*, 345 S.W.3d 139, 144 (Tex. App.—Dallas 2011, no pet.).

When an appellate court reverses a lower court's judgment and remands the case to the trial court, the trial court is authorized to take all actions necessary to give full effect to the appellate court's judgment and mandate. *Phillips v. Bramlett*, 407 S.W.3d 229, 234 (Tex. 2013). The trial court has no authority to take any action inconsistent with or beyond what is necessary to give full effect to the appellate court's judgment and mandate. *Id.*

"When an appellate court remands a case with specific instructions, the trial court is limited to complying with the instructions and cannot re-litigate issues controverted at the former trial." *Cessna Aircraft Co.*, 345 S.W.3d at 144. Moreover, the appellate court's judgment "is final not only in reference to the matters actually litigated, but as to all other matters that the

parties might have litigated and had decided in the cause." *Martin v. Credit Prot. Ass'n, Inc.*, 824 S.W.2d 254, 257 (Tex. App.—Dallas 1992, writ dism'd w.o.j.).

"The scope of the mandate is determined with reference to both the appellate court's opinion and the mandate itself." *Cessna Aircraft Co.*, 345 S.W.3d at 144.

2. Application of the Law to the Facts

a. Did the trial court have jurisdiction over the Goldmans' fourth amended counterclaims?

The Goldmans contend that the trial court erred by ruling that it lacked jurisdiction to consider their counterclaims. They argue that the trial court had jurisdiction to conduct the proceedings necessary to effectuate this Court's mandate, including jurisdiction to (i) decide whether the Goldmans' fourth amended counterclaims were within the scope of the remanded matters and (ii) proceed accordingly. We agree.

In *Phillips*, the supreme court clarified that the limits a mandate imposes on the trial court's authority are not jurisdictional. *See* 407 S.W.3d at 234 ("While we agree that our mandate and judgment limited the trial court's authority on remand, such limits are not 'jurisdictional' in the true sense of that word."). When a trial court exceeds the authority conferred on it by a mandate, the resulting judgment is erroneous but not beyond the trial court's jurisdiction. *See id*. ("[T]o the extent the trial court's judgment exceeds the requirements of our judgment and mandate, we will reverse the judgment for error rather than vacate it for lack of jurisdiction.").

Accordingly, the trial court had jurisdiction to conduct all necessary proceedings and render the judgment necessary to effectuate our mandate. *See id*. If the Goldmans' fourth amended counterclaims exceeded our mandate's scope, it would have been error for the trial court to grant relief on them. But under *Phillips*, the trial court had jurisdiction over the counterclaims. The trial court thus erred by concluding otherwise.

b. Was the trial court's error in sustaining the Olmsteads' plea to the jurisdiction harmless?

We must not reverse unless the trial court's error probably caused the rendition of an improper judgment or probably prevented the appellant from properly presenting the case on appeal. TEX. R. APP. P. 44.1(a). Even a dispositive ruling, such as a summary judgment, can be harmless error if other grounds raised in the case show that the dismissed claim is precluded as a matter of law. *See, e.g.*, *G&H Towing Co. v. Magee*, 347 S.W.3d 293, 297–98 (Tex. 2011) (per curiam). That is the case here. As shown below, this Court's mandate in *Goldman I* precluded the Goldmans' fourth amended counterclaims for contractual attorneys' fees. Thus, the grounds raised in the Olmsteads' plea to the jurisdiction, although not jurisdictional, defeat those claims as a matter of law.

We first ascertain the scope of the trial court's original judgment. The trial court conducted a nonjury trial that encompassed the Goldmans' counterclaims, including requests for attorneys' fees, against the Olmsteads. The court's judgment acknowledged both sides' claims, and it rendered judgment for the Olmsteads. Although the judgment did not expressly order the Goldmans to take nothing on their counterclaims, it recited, "All relief not granted herein is expressly denied as to all parties." Thus, the judgment was in effect a take nothing judgment as to the Goldmans' counterclaims. *Cf. Reynolds v. Nagely*, 262 S.W.3d 521, 526 (Tex. App.—Dallas 2008, pet. denied) (judgment rendered after conventional trial on the merits is presumed to be final and to dispose of all parties and issues in the lawsuit).

On appeal, we reversed the judgment as to all the affirmative relief it awarded to the Olmsteads (damages and attorneys' fees) and the third-party defendants (attorneys' fees). *Goldman I*, 414 S.W.3d at 369. We rendered judgment that the Olmsteads take nothing on their contract breach claims, and our opinion said that we were remanding "the issue of attorney's fees to the trial court." *Id.* We affirmed the judgment in all other respects. *Id.*

Our mandate recited as follows:

> We **REVERSE** that portion of the trial court's judgment awarding damages to appellees Jeffrey Olmstead and Summer Olmstead and **RENDER** judgment that appellees Jeffrey Olmstead and Summer Olmstead take nothing on their claims against Mark Goldman and Caroline Goldman. We **REVERSE** that portion of the trial court's judgment awarding attorney's fees to appellees Jeffrey Olmstead, Summer Olmstead, [and the third-party defendants].
>
> In all other respects, the trial court's judgment is **AFFIRMED**.
>
> We **REMAND** this cause to the trial court for further proceedings consistent with this opinion. It is **ORDERED** that each party bear its own costs of this appeal.

The mandate is clear. We reversed the trial court's judgment only to the extent it awarded affirmative relief to the Olmsteads and the third-party defendants. We affirmed it in all other respects, which means we affirmed the judgment's denial of relief to the Goldmans on their counterclaims. Our judgment was conclusive not only of the counterclaims the Goldmans had previously brought, but also of all other matters they might have brought. *See Martin*, 824 S.W.2d at 257. The Goldmans could have raised their contractual fee shifting theory before the trial court's first judgment, but they did not; thus, our affirmance of the judgment as to the Goldmans' claims foreclosed them from later raising that theory.[2]

Arguing that we consider both the opinion and the mandate in determining the mandate's scope, *see Cessna Aircraft Co.*, 345 S.W.3d at 144, the Goldmans rely heavily on the *Goldman I* opinion's final paragraph. There we said:

> We reverse the trial court's award of damages to the Olmsteads and render judgment that the Olmsteads take nothing on their breach of contract claims against the Goldmans. We reverse the award of attorney's fees to the Olmsteads and to [the third-party defendants] and *remand the issue of attorney's fees to the trial court*. In all other respects, we affirm the trial court's judgment.

[2] The Goldmans' reply brief asserts that they did request contract based attorneys' fees before the first appeal and alternatively that the matter was tried by consent. The assertion comes too late. *See Sanchez v. Martin*, 378 S.W.3d 581, 590 (Tex. App.—Dallas 2012, no pet.) ("[W]e cannot consider matters raised for the first time in a reply brief."). Moreover, even if the Goldmans are right, it would make no difference in the outcome. The partial affirmance in our *Goldman I* judgment is conclusive of all the Goldmans' claims that were actually adjudicated as well as those that could have been adjudicated. *See Martin*, 824 S.W.2d at 257.

414 S.W.3d at 369 (emphasis added). The Goldmans argue that the emphasized language shows an intent to authorize the trial court to revisit the Goldmans' fee claims as well. We are not persuaded.

The trial court's judgment awarded the Goldmans no relief on any of their claims, and our opinion does not hold that denying relief to the Goldmans was error. Rather, the only parts of the judgment that we reversed were the awards of relief to the Olmsteads and the third-party defendants. Further, the very sentence that the Goldmans rely on reverses the judgment only as to the fee awards *against* the Goldmans. In context, the "issue of attorney's fees" that we remanded to the trial court was limited to the Olmsteads' and the third-party defendants' entitlement to fees. As discussed above, the partial affirmance resolved the Goldmans' claims for affirmative relief and all other claims they might have litigated in the case.

The opinion's introduction further shows that the Goldmans' fee counterclaims were not within the remand's scope. Specifically, there we wrote that we were remanding the issues of the trial court's award of attorney's fees to the Olmsteads and to the third-party defendants:

> We reverse the trial court's judgment in favor of the Olmsteads, render judgment that the Olmsteads take nothing on their claims against the Goldmans, and remand the issue of the trial court's award of attorneys' fees to the Olmsteads. We reverse and remand the issue of the trial court's award of attorneys' fees to [the third-party defendants]. In all other respects, we affirm the trial court's judgment.

414 S.W.3d at 352.

The Goldmans nonetheless argue that the *Cessna Aircraft* opinion supports their position. We disagree. In that case, Aircraft Network won a judgment against Cessna for damages on multiple liability theories and for attorneys' fees. 345 S.W.3d at 142–43. Cessna appealed, and we reversed in part, reformed the judgment as to damages, and reversed and remanded the attorneys' fee award for further proceedings. *Id*. at 143. On remand, the trial court conducted a jury trial on fees and rendered a new fee judgment against Cessna. *Id*. Cessna appealed again,

arguing that the trial court erred by failing to vacate its original judgment and by failing to render a new comprehensive final judgment on all the issues in the case. *Id*. We rejected Cessna's argument, holding that our mandate did not give the trial court authority to address any issues other than attorneys' fees and costs—which is precisely what the trial court did. *Id*. at 145–46.

Here, by contrast, our mandate did not reopen the case as to the Goldmans' counterclaims, nor did we direct the trial court to address the Goldmans' counterclaims for attorneys' fees. *Cessna Aircraft* is not on point.

In sum, the Goldmans' attorneys' fees counterclaims were, as a matter of law, beyond the trial court's authority under our mandate. Accordingly, the trial court's error in concluding that it lacked jurisdiction was harmless because its judgment dismissing the Goldmans' fourth amended counterclaims was nevertheless correct.

IV. DISPOSITION

For the foregoing reasons, we affirm the trial court's judgment.

/Bill Whitehill/
BILL WHITEHILL
JUSTICE

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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

MARK S. GOLDMAN AND CAROLINE GOLDMAN, Appellants

No. 05-15-01470-CV V.

JEFFREY R. OLMSTEAD AND SUMMER S. OLMSTEAD, Appellees

On Appeal from the 298th Judicial District Court, Dallas County, Texas
Trial Court Cause No. DC-10-01144.
Opinion delivered by Justice Whitehill.
Justices Bridges and Lang-Miers participating.

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

It is **ORDERED** that appellees Jeffrey R. Olmstead and Summer S. Olmstead recover their costs of this appeal from appellants Mark S. Goldman and Caroline Goldman.

Judgment entered November 14, 2016.