Reverse and Render; Opinion Filed March 16, 2018.

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-17-00398-CV

VANESSA SWAROVSKI, Appellant
V.
RANDY ENGER, INDIVIDUALLY AND D/B/A SIGNATURE MOTORCARS, Appellee

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On Appeal from the County Court at Law No. 1
Dallas County, Texas
Trial Court Cause No. CC-13-07017-A

MEMORANDUM OPINION

Before Chief Justice Wright, Justice Francis, and Justice Brown
Opinion by Justice Francis

In this statutory theft case, Vanessa Swarovski sued Randy Enger, individually and d/b/a Signature Motorcars, alleging he stole a 2007 Bentley she had purchased from him three months earlier. After this Court conditionally granted a writ of mandamus ordering the trial court to rule on Swarovski's requests for default judgment and entry of final judgment, the trial court rendered a take-nothing judgment in favor of Enger, the defaulting party. Swarovski appealed. After reviewing the record, we conclude the trial court erred by disregarding unanswered requests for admission and undisputed evidence that conclusively support liability and damages. Accordingly, we reverse the trial court's judgment and render judgment in Swarovski's favor.

Swarovski sued Enger in December 2013, alleging she gave Enger a $75,500 personal check in September 2013 as full payment of the purchase price of a 2007 Bentley. Enger accepted

the check as full payment and delivered the Bentley and its keys to her, but he did not transfer or deliver the title to the car to her. Swarovski alleged that on December 16, 2013, Enger gained access to her residential property, entered her garage, and stole the Bentley. Swarovski asserted causes of action for fraud and breach of contract and later added a claim under the Texas Theft Liability Act.

Enger answered the lawsuit, but over the course of the next three years of litigation, he did not respond to discovery, did not appear at a court-ordered mediation, and did not appear at multiple trial settings and default prove-up hearings. At one point, the trial court granted Swarovski a default judgment but later sua sponte granted a new trial.

The default prove-up that led to this appeal occurred after Enger failed to appear at the third trial setting on May 26, 2016. So, on that date, the trial court set a default prove-up hearing for September 2. Again, Enger did not appear at the hearing. Swarovski presented evidence of liability, damages, and attorney's fees related to her claim for violation of the Theft Liability Act. Numerous exhibits were admitted as evidence, including requests for admissions unanswered by Enger; the police report filed by Swarovski; the indictment charging Enger with felony theft of the Bentley; a screenshot of Signature Motorcars webpage listing the vehicle for sale at $89,988 after it was taken from Swarovski's garage; Swarovski's affidavit; her check, dated September 21, 2013, in the amount of $75,500 made payable to Enger; a bank statement showing the withdrawal of $75,500 from her checking account; documents showing Swarovski added the vehicle to her automobile insurance policy; deposition excerpts of Wendy Jones, Enger's employee at Signature Motorcars; records related to a complaint Swarovski filed with the Texas Department of Motor Vehicles about Signature Motorcars; and her attorney's affidavit on fees and the redacted billing records.

At the end of the hearing, the trial judge told counsel she wanted the unredacted billing records to review in camera and additional information regarding the *Andersen* factors.[1] The judge told counsel it was not necessary to have another hearing, said she had no problem with the "other elements," and said she would rule on his request after reviewing the billing statements. Counsel provided the unredacted billing statements for in camera review as well as a second affidavit on attorney's fees. When the trial court had not ruled by November, counsel wrote a letter requesting a ruling on his requests for default and entry of judgment and submitted another proposed judgment. One month later, counsel submitted another proposed final judgment. When there still was no ruling almost six months after the hearing, Swarovski filed a petition for writ of mandamus asking this Court to order the trial court to rule. This Court conditionally granted the writ and ordered the trial court to rule on Swarovski's requests for entry of default judgment and for entry of final judgment. *See In re Swarovksi*, No. 05-17-00192-CV, 2017 WL 1075642, at 2 (Tex. App.—Dallas March 22, 2017, orig. proceeding).

Fifteen days after our order issued, the trial court rendered a take-nothing judgment on Swarovski's claim. In the judgment, the court recited that Swarovski failed to meet her burden of proof under the Theft Liability Act. Five days later, the trial court made sixty-nine findings of fact and conclusions of law.[2] In her conclusions, she determined that Swarovski waived all causes of action except the theft claim and concluded she failed to establish her burden of proof

> 1) by failing to prove that she had greater right to possession of the property than did Defendant, the title owner; 2) failing to prove that defendant unlawfully appropriated, or stole *the plaintiff's* property; 3) failing to prove that *Defendant taking his own property* from her was an unlawful taking and made with intent

[1] *Arthur Andersen & Co. v. Perry Equip. Corp.*, 945 S.W.2d 812, 818 (Tex. 1997).

[2] The trial court provided citations to the "evidence" she relied on for some of her findings, which included the absent defendant's answer and excerpts from a deposition admitted in an earlier default prove-up hearing but not admitted at the hearing on which judgment was based. Although not necessary to the disposition of this appeal, we are compelled to comment on the trial court's decision to rely on pleadings and unintroduced evidence in an attempt to create fact issues that would support a finding of no liability. Pleadings are not evidence unless offered by a party and admitted as evidence by the trial court. *Ceramic Tile Int'l, Inc. v. Balusek*, 137 S.W.3d 722, 724–25 (Tex. App.—San Antonio 2004, no pet.). Additionally, "for testimony from a prior hearing or trial to be considered in a subsequent proceeding, the transcript of that testimony must be properly authenticated and entered into evidence." *B.L.M. v. J.H.M., III*, No. 03-14-00050-CV, 2014 WL 3562559, at *11 (Tex. App.—Austin July 17, 2014, pet. denied). In this case, neither was entered into evidence at the hearing.

> to deprive her of the property; and 4) Plaintiff sustained damages as a result of the theft. ([E]mphasis added.)

This appeal ensued.

In four issues, Swarovski challenges the trial court's take-nothing judgment rendered following a default prove-up hearing, arguing the trial court erred by disregarding the deemed admissions and undisputed evidence admitted at the hearing to support liability and damages, by considering evidence not before her at the hearing, and rendering a judgment that was erroneous as a matter of law. We agree.

We review the denial of a default judgment for abuse of discretion. *Gotch v. Gotch*, 416 S.W.3d 633, 637 (Tex. App.—Houston [14th Dist.] 2013, no pet.). "With respect to factual matters, a trial court abuses its discretion if, under the record, it reasonably could have reached only one decision and it failed to do so." *Id.* (quoting *Moroch v. Collins*, 174 S.W.3d 849, 864–65 (Tex. App.—Dallas 2005, pet. denied). A trial court's failure to correctly analyze or apply the law constitutes an abuse of discretion. *Id.*

Under the Theft Liability Act, a person who commits a theft is liable for the damages resulting from the theft. TEX. CIV. PRAC. & REM. CODE ANN. § 134.003 (West 2011). The Act defines "theft" as "unlawfully appropriating property or unlawfully obtaining services" as described by various sections of the penal code. *Id.* § 134.002(2) (West Supp. 2017). As relevant here, a person commits theft when he appropriates property without the owner's effective consent and with the intent to deprive the owner of property. TEX. PENAL CODE ANN. § 31.03(a), (b)(1) (West Supp. 2017). Owner is defined as a person who has title to the property, possession of the property, whether lawful or not, or a greater right to possession of the property than the actor. *Id.* § 1.07(35)(A) (West Supp. 2017).

When a defendant fails to answer a plaintiff's requests for admissions, the matters are deemed admitted. *Oliphant Fin., LLC v. Galaviz*, 299 S.W.3d 829, 838 (Tex. App.—Dallas 2009,

no pet.). Deemed admissions may be employed as proof, and once admissions are deemed admitted by operation of law, they will fully support a judgment. This is because unanswered requests for admissions are deemed admitted without the necessity of a court order and any matter thus admitted is conclusively established as being true. *Id.* (citing TEX. RS. CIV. P. 198.2(c); 198.3).

Here, Swarovski relied, in part, on the following deemed admissions to prove her case:

- Swarovski possessed and was the "rightful owner" of the Bentley and did not owe Enger any money related to the Bentley.
- He and Swarovski entered a valid and binding agreement for the purchase of the Bentley on or before September 21, 2013.
- He agreed to sell and convey the Bentley to Swarovski in exchange for payment of $75,500, purchased the vehicle with the intent of selling it to Swarovski, accepted a check dated September 21, 2013 for $75,500 as full payment from her, and deposited the check in his bank account.
- He had not received a gift of $75,500 from Swarovski.
- He sold the vehicle to Swarovski, delivered the keys to her, and represented she was the owner of the vehicle but never delivered title to her.
- Without Swarovski's consent, he both entered the grounds of her residence and removed the Bentley from her garage.
- Swarovski performed no overt action abandoning the Bentley but took action consistent with ownership by obtaining car insurance for it after receiving possession of it in 2013.
- Swarovski demanded Enger return the Bentley to her, but he did not.
- He profited from the sale of the Bentley to Swarovski.
- Swarovski was in possession of the Bentley to Enger's exclusion prior to the date he took it, and he intended to permanently dispossess Swarovski of the Bentley on that date.

The trial judge disregarded these deemed admissions, finding the requests contained "blacked out responsive answers" which she believed could be denials to the requested admissions. Specifically, she found:

> 43. Plaintiff's Exhibit A-2 is a set of requested admissions which appears to have blacked out responsive answers. Based on the requests made it appears that the redacted answers may be denials to the requested admissions. No reason is provided for the redaction of the responses. The court cannot ascertain the content of the responses and therefore cannot construe them in favor of the Plaintiff, nor against the Defendant.

In a footnote following the fact finding, the trial court went on to explain it had "never before been presented with unexplained and unapproved redacted discovery responses. The Court assumes that as with the redacted deposition testimony presented by Plaintiff, *infra*, that the responses must be favorable to the Defendant."

In the requests for admissions admitted as proof, requests for admission Nos. 16, 20–27, 37–39, 61–64, 66, 68–76, 80, and 82 are blacked out. It appears the trial court construed the "blacked out" spaces, however, as the responses to particular requests. But in her affidavit that attached the requests and authenticated them, counsel for Swarovski explained the redactions. Brandy N. Hoge testified she was personally involved in preparing Plaintiff's First Request for Admissions to Enger. Hoge testified Exhibit A-2 was a true and correct copy of the requests served on Enger, "redacted to exclude requests not cited in the Motion to which this Affidavit is attached." Hoge attested the requests were served on Enger by hand delivery through a process server on or around March 19, 2014. Hoge attested that as of the date of her affidavit, September 1, 2016, Swarovski had not received a response.[3]

Thus, the only evidence before the trial court established that Enger had not responded to the request for admissions, meaning that any "blacked out" space could not be a denial nor be construed as a response favorable to Enger. Rather, Hoge explained the redactions were done to exclude requests that Swarovski was not relying on in the motion. Given this evidence, the trial court's finding to the contrary has no support. Because the admissions were not withdrawn, they

[3] Hoge also attested that a second set of admissions was served on Enger by certified mail on March 25, 2014, but Swarovski had not received a response.

served as conclusive proof that Swarovski was the possessor and owner of the Bentley when Enger went onto her property and took the car without her consent with the intent to deprive her of the property. Accordingly, Swarovski conclusively established the theft of her vehicle by Enger.

Having established a theft, Swarovski was entitled to any resulting damages. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 134.005(a) (West 2011). In her affidavit, Swarovski testified her damages resulting from the theft were $94,949.70. She testified the fair market value of the Bentley on the day she purchased it was $91,200. She also testified she purchased new $800 rims, which were on the Bentley at the time Enger stole it, and paid $2,949.70 in insurance premiums to insure the vehicle since December 16, 2013.

Generally, a property owner is qualified to testify to the value of his property even if he is not an expert. *Reid Rd. Mun. Util. Dist. No. 2 v. Speedy Stop Food Stores, Ltd.,* 337 S.W.3d 846, 852–53 (Tex. 2011). This rule is based "on the presumption that an owner is familiar with his property and its value," and it "is an exception to the requirement that a witness must otherwise establish his qualifications to express an opinion on values." *Nat. Gas Pipeline Co. of Am. v. Justiss*, 397 S.W.3d 150, 157 (Tex. 2012). To testify on value, an owner may not simply echo the phrase "fair market value" and state a number to substantiate the owner's claim; the property owner must provide the factual basis on which the opinion rests. *Id*. at 159. This burden is not onerous, particularly in light of the resources available today. *Id.* But, the value must be substantiated; a naked assertion of "market value" is not enough. *Id*.

Because Swarovski's affidavit testimony regarding fair market value was nothing more than a "naked assertion" of market value, it was conclusory and incompetent evidence even absent objection. *See City of San Antonio v. Pollock*, 284 S.W.3d 809, 816 (Tex. 2009). But evidence of the price paid may be offered as proof of the property's fair market value. *Justiss*, 397 S.W.3d at 159. The undisputed evidence established that Swarovski paid Enger $75,500 for the Bentley on

September 21, 2013, only three months before Enger took the car. In deemed admissions, Enger admitted he accepted Swarovski's $75,500 check as full payment for the Bentley and deposited the check into his account. Thus, the undisputed evidence established that Swarovski's damages resulting from the theft totaled $79,249.70, which includes the cost of the rims and insurance payments.[4]

Finally, Swarovski also pleaded for attorney's fees. A person who prevails in a suit under the Theft Liability Act "shall be awarded court costs and reasonable and necessary attorney's fees." TEX. CIV. PRAC. & REM. CODE ANN. § 134.005(b) (West 2011). The award of attorney's fees to a prevailing party under this statute is mandatory. *Arrow Marble, LLC v. Estate of Killion*, 441 S.W.3d 702, 705 (Tex. App.—Houston [1st Dist.] 2014, no pet.); *see Bocquet v. Herring*, 972 S.W.2d 19, 20 (Tex. 1998) ("Statutes providing that a party 'may recover,' 'shall be awarded,' or 'is entitled to' attorney fees are not discretionary.").

Swarovski presented evidence that her reasonable and necessary attorney's fees were $187,445.10 through the affidavits of Jonathan J. Cunningham and C. Gregory Shamoun as well as the redacted billing fee statements.[5] Both attorneys testified the fees in this case were reasonable and necessary. Their opinions took into consideration the *Andersen* factors and were also based on their personal knowledge of the case, their review of the pleadings, motions, discovery, and other materials produced, their review of the billing records, and their education, training, and experience. Both also testified the fees charged were within the usual and customary rates normally charged by other attorneys for similar matters in Dallas County.

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[4] Swarovski also pleaded for statutory damages under the Act. The Act allows "the trier of fact" to award statutory damages "in a sum not to exceed $1,000," if the party recovers actual damages. TEX. CIV. PRAC. & REM. CODE ANN. § 134.005(a) (West 2011). This Court, however, is not the trier of fact. Because Swarovski makes clear she is seeking a rendition of judgment and because the evidence before us is not conclusive on this issue, we do not include a statutory penalty in our judgment.

[5] At the default prove-up hearing, the judge asked for unredacted billing statements and additional information regarding the attorneys who worked on the case. Less than two weeks later, counsel filed unredacted invoices for in camera review as well as an additional affidavit and case law regarding redacted billing statements. In her cover letter, counsel explained billing entries that were marked through related to services provided that had no relation to his case and were not included in the total amount of attorney's fees sought.

Shamoun's affidavit contained a spreadsheet reflecting the initials of each attorney and staff member, their positions, years of experience, hourly rate, and number of hours each worked on the case. From this, the trial court could have determined which attorney provided which work set out in the billing statements. Both attorneys detailed some of the work done in their affidavits and also explained why the fees for the theft case were inseparable from the other claims, but that where there were services solely related to a nonrecoverable claim, those services were segregated out. In addition, both attorneys attested that if appealed to this Court, "the reasonable and necessary attorney's fees for the work necessary to represent Plaintiff would be the sum of $30,000" and if appealed to the Texas Supreme Court, the amount reasonable and necessary would be $25,000.

When evidence of attorney's fees is not contradicted by any other witness, or attendant circumstances, and the evidence is clear, direct and positive, and free from contradictions, inaccuracies, and circumstances tending to cast suspicion thereon, it is taken as true, as a matter of law. *Ragsdale v. Progressive Voters League*, 801 S.W.2d 880, 882 (Tex. 1990) (per curiam). This is particularly true "when the opposing party has the means and opportunity of disproving the testimony or evidence and fails to do so." *Id.*; *see Brown v. Bank of Galveston, N.A.,* 963 S.W.2d 511, 515 (Tex. 1998), *abrogated on other grounds by Ford Motor Co. v. Ledesma*, 242 S.W.3d 32 (Tex. 2007). But, even if evidence is uncontradicted, if it is unreasonable, incredible, or its belief is questionable, then the evidence raises only a fact issue. *Ragsdale*, 801 S.W.2d at 882; *see Smith v. Patrick W.Y. Tam Trust*, 296 S.W.3d 545, 547–48 (Tex. 2009).

Here, evidence on attorney's fees was not contradicted and was free from inaccuracies and any circumstance that would tend to cast suspicion. Although Enger had many opportunities to challenge the allegations in this suit, he failed to appear at multiple trial settings and default prove-

up hearings. Moreover, the evidence is not unreasonable, incredible, or otherwise of questionable belief.

Having reviewed the record in this case, the trial court could have reached only one decision in this case and failed to do so.[6] We therefore render the judgment the trial court should have rendered.

We reverse the trial court's judgment and render judgment in Swarovski's favor for $79,249.70 in actual damages, $187,445.10 in attorney's fees through trial, $30,000 in attorney's fees for appeal to this Court, an additional $25,000 in attorney's fees if an appeal is taken to the Texas Supreme Court and Swarovski is the prevailing party, and costs of court.

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/Molly Francis/
MOLLY FRANCIS
JUSTICE

[6] Our result would be the same if we reviewed the judgment under a legal sufficiency standard. When a party challenges the legal sufficiency of the evidence supporting an adverse finding on an issue on which it had the burden of proof, it must show the evidence establishes all vital facts as a matter of law. *PopCap Games, Inc. v. MumboJumbo, LLC*, 350 S.W.3d 699, 710 (Tex. App.—Dallas 2011, pet. denied). We credit evidence favorable to the finding if a reasonable factfinder could and disregard any contrary evidence unless a reasonable factfinder could not. *City of Keller v. Wilson*, 168 S.W.3d 802, 827 (Tex. 2005). We sustain the issue only if the contrary proposition is established as a matter of law. Here, the contrary proposition—that Enger committed theft of the Bentley—was conclusively established. Additionally, the evidence conclusively established Swarovski's damages and attorney's fees.

Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

VANESSA SWAROVSKI, Appellant

No. 05-17-00398-CV V.

RANDY ENGER, INDIVIDUALLY AND D/B/A SIGNATURE MOTORCARS, Appellee

On Appeal from the County Court at Law No. 1, Dallas County, Texas
Trial Court Cause No. CC-13-07017-A.
Opinion delivered by Justice Francis; Chief Justice Wright and Justice Brown participating.

In accordance with this Court's opinion of this date, the judgment of the trial court is **REVERSED** and judgment is **RENDERED** that appellant Vanessa Swarovski recover from appellee Randy Enger, individually and d/b/a Signature Motorcars: (1) actual damages in the amount of $79,249.70 on her claim under the Texas Theft Liability Act; (2) attorney's fees through trial in the amount of $187,445.10; (3) attorney's fees for appeal to this Court in the amount of $30,000; (4) an additional $25,000 in attorney's fees if an appeal is taken to the Texas Supreme Court and Swarovski is the prevailing party; and (5) costs of court.

It is **ORDERED** that appellant Vanessa Swarovski recover her costs of this appeal from appellee Randy Enger, individually and d/b/a Signature Motorcars.

Judgment entered this 16th day of March, 2018.