AFFIRM IN PART; REVERSE AND RENDER IN PART; and Opinion Filed August 10, 2020

In the
Court of Appeals
Fifth District of Texas at Dallas

No. 05-19-00777-CV

IN THE INTEREST OF M.G.G., J.O.G., AND E.A.G., CHILDREN

On Appeal from the 417th Judicial District Court
Collin County, Texas
Trial Court Cause No. 417-53207-2010

MEMORANDUM OPINION

Before Justices Whitehill, Osborne, and Carlyle
Opinion by Justice Carlyle

John Gustafson appeals the trial court's judgment awarding Elizabeth Gatewood damages and attorney's fees following a bench trial. We affirm in part and reverse and render in part in this memorandum opinion. *See* TEX. R. APP. P. 47.4.

Background

When Mr. Gustafson and Ms. Gatewood divorced in 2011, Mr. Gustafson held stock shares through his employer's performance-based incentive plan (the "Plan"). The divorce decree awarded Ms. Gatewood a portion of those shares, which the decree called the "Assigned Shares." Because the Plan did not allow Mr. Gustafson

to transfer the shares directly to Ms. Gatewood, the decree required him to hold the shares for her benefit as a constructive trustee.

The section of the decree dealing with the Assigned Shares states that "Capitalized terms . . . . shall have the same meaning ascribed to them in" the Plan. That section also contains two paragraphs central to the dispute in this case. The first paragraph states that "[d]uring all time periods when [Mr. Gustafson's] Account holds any Assigned Shares," he must forward to Ms. Gatewood "One Hundred Percent (100%) of any Distribution attributable to the Assigned Shares, including dividends on such Assigned Shares." The paragraph obligates Mr. Gustafson to give Ms. Gatewood "an IRS Form 1099-DIV" each year "reflecting the gross amount of Distributions forwarded" to Ms. Gatewood. It also provides that Mr. Gustafson and Ms. Gatewood "shall each be solely responsible to pay any federal income or other tax levied on the Distributions ultimately received on their respective Shares, and neither shall have any responsibility for payment of such taxes with respect to the other's Share Distributions."

The second paragraph requires Mr. Gustafson to notify Ms. Gatewood in writing within thirty days of "his actual date of termination of employment or other event" terminating his participation in the Plan. The paragraph acknowledges the parties' agreement that "the distribution of Shares or cash to [Mr. Gustafson] upon termination of employment or death, or otherwise, will be governed in all respects by the terms of [the Plan]." It also states that if Mr. Gustafson receives "(i) all Shares

in kind, net of sales to satisfy tax liabilities and charges, or (ii) cash representing sale of all Shares, net of sales to satisfy tax liabilities and charges," he must give Ms. Gatewood her share.

After parenting disputes arose between the parties, Mr. Gustafson and Ms. Gatewood each filed a petition seeking to modify the decree's provisions governing conservatorship, possession, and access. In January 2015, Mr. Gustafson's therapist testified at a hearing in the case. Ms. Gatewood's counsel deposed the therapist in advance of the hearing and subpoenaed her records, which the therapist provided.

Later that year, Mr. Gustafson agreed to leave his employer. Although he reached a "final agreement" about his termination in August 2015, he stayed on the payroll until October 2016. There is no record evidence that Mr. Gustafson ever provided written notice to Ms. Gatewood within thirty days of "his actual date of termination," for purposes of the decree's second paragraph. Nevertheless, he and Ms. Gatewood discussed liquidating the Assigned Shares toward the end of 2015.

Ms. Gatewood wanted to sell the Assigned Shares in two transactions, one in 2015 and one in 2016, and she wanted Mr. Gustafson to give her 100% of the gross proceeds. Mr. Gustafson told Ms. Gatewood he was willing to come out of pocket to reimburse her for any money his employer withheld in taxes, but only if she sold all of her shares in 2015, and only if she agreed to amend the divorce decree to reflect that payment as alimony. The parties did not reach an agreement on that issue, and Ms. Gatewood instructed Mr. Gustafson to sell half her shares in December 2015.

Mr. Gustafson sold the shares for a gross of $109,399.31, his employer withheld $45,893.01 for taxes, and he withheld an additional $1,586.29 for taxes before remitting the balance of $61,920.01 to Ms. Gatewood.

Ms. Gatewood objected to the withholding, contending the decree required Mr. Gustafson to pay her 100% of the gross proceeds from the sale, leaving her solely responsible to pay any taxes. She instructed Mr. Gustafson to sell the remaining half of her shares in March 2016 without withholding any money for taxes. Mr. Gustafson sold these shares for a gross of $146,103.00, but he withheld $63,408.70 for taxes and remitted to Ms. Gatewood the balance of $82,694.30. In total, Mr. Gustafson and his employer withheld $110,888, which they undisputedly paid to the IRS to satisfy the tax liability from the transactions.

Ms. Gatewood amended her modification petition to assert a claim for breach of fiduciary duty based on Mr. Gustafson's failure to remit 100% of the gross sale proceeds. Mr. Gustafson then filed a motion seeking an order requiring Ms. Gatewood to return his therapy records and enjoining her from disclosing their contents.

At a pretrial hearing, Ms. Gatewood's counsel explained her theory of how she was harmed by the tax withholding:

> [U]ltimately, the parties agreed and you signed off on an order that said he was to pay a hundred percent of those distributions to her and that she was to pay tax at her rate. And he's essentially forced her to pay taxes at his rate, which was to her detriment because of the disparity of their tax brackets.

Before ruling on the parties' pretrial motions at the hearing, the trial court learned the parties did not complete court-ordered mediation. Rather than beginning the trial, the court ordered the parties to complete the mediation, which resulted in a mediated settlement agreement resolving a portion of the modification issues.

The court conducted a bench trial on the parties' remaining modification issues, as well as Ms. Gatewood's claim for breach of fiduciary duty. Mr. Gustafson testified his 2015 income was $2.2 million. He said his total tax rate for the transactions was 43.4%, and he and his employer paid the withheld amounts to the IRS to satisfy the tax liability for the transactions. He did not think the stock sales were governed by the decree's first paragraph, which required him to give Ms. Gatewood 100% "of any Distribution attributable to the Assigned Shares," because he understood that paragraph to apply only to dividends. Instead, he believed the transactions were governed by the second paragraph, which he contended required him to give her cash representing the sale of her shares, net of any taxes.

Mr. Gustafson called an accountant to offer expert testimony supporting his interpretation of the decree. The accountant testified the stock sale could not be reported on a 1099-DIV, as would be required if the transactions fell under the first paragraph, and Mr. Gustafson could not give Ms. Gatewood a 1099-DIV for anything other than dividends. Ms. Gatewood's counsel asked the expert to review a document purporting to contain the Plan's definition of "Distribution." The expert

reviewed the definition and acknowledged it did not mention the word "dividend," but the expert did not read the full definition into evidence.

Ms. Gatewood testified she believed Mr. Gustafson owed her 100% of the proceeds from the stock sale. She did not dispute Mr. Gustafson's testimony that he paid the withheld amounts to the IRS to satisfy the tax liability on the transactions. She presented no evidence to establish her taxable income in 2015 or 2016. Rather, she testified only that she and her husband did not "make anywhere near $2.2 million" in 2015. As to her tax rate, she had the following exchange with her counsel:

> Q. Are you at least hopeful that if you get your money, the tax rate won't be anywhere near what the tax rate that Mr. Gustafson paid taxes on?
>
> A. Yes. I don't believe it to be at all.

Attorneys for both parties testified and introduced evidence to support their requests for attorney's fees. At closing, Mr. Gustafson's counsel argued that, even if the decree required Mr. Gustafson to remit 100% of the proceeds under the first paragraph, Ms. Gatewood provided no evidence of a proper measure of damages. Her actual damages, if any, were the difference between what she would have owed in taxes if she received 100% of the proceeds and what Mr. Gustafson actually paid the IRS to satisfy the tax liability.

Ms. Gatewood's counsel responded that the decree required Mr. Gustafson to pay Ms. Gatewood 100% of the proceeds and, once he did that, she would just claim that money as income and pay whatever taxes the IRS required. She argued Mr.

Gustafson intentionally breached his obligation to pay 100% of the proceeds once he realized he could not write off the full amount of the stock sales against his own tax liability. She asked the court to award her actual damages of $110,888 and up to twice that amount in exemplary damages.

The trial court took the matter under advisement before issuing a Memorandum Order both denying the parties' pending modification requests and concluding Mr. Gustafson breached his fiduciary duty by withholding taxes from the transactions. The court stated it would award actual damages for the breach, invited the parties to submit competing proposals as to the amount of Ms. Gatewood's damages, and declined to award exemplary damages. In addition, the court stated it would "award Attorney's fees for the breach."

Ms. Gatewood filed a motion for clarification and reconsideration in which she pointed out the court could not award attorney's fees on her claim for breach of fiduciary duty. She asked the court to clarify its memorandum and reconsider its decision to deny exemplary damages.

The trial court held a hearing on the motion in which the parties addressed damages, attorney's fees, and Mr. Gustafson's unresolved request for the return of his therapy records. Mr. Gustafson and Ms. Gatewood repeated their damages arguments at the hearing, and the trial court declined to change its rulings on that issue.

With respect to attorney's fees, Mr. Gustafson conceded that "obviously, as the Court knows, it's up to the Court's discretion about awarding fees in a modification," but he argued Ms. Gatewood should not receive her fees. The trial court determined Ms. Gatewood was the prevailing party in the modification proceeding because Mr. Gustafson had more modification requests denied. After reviewing evidence of Ms. Gatewood's attorney's fees presented at the trial, the court stated it would award $50,000 of the $53,278.84 Ms. Gatewood requested in the modification proceeding.

As to Mr. Gustafson's therapy records, Ms. Gatewood's counsel expressed concern that if he turned those records over to Mr. Gustafson, he would be unable to obtain them again if they became relevant in future proceedings concerning the parties' children. The court agreed with Mr. Gustafson that Ms. Gatewood and her counsel should be enjoined from disclosing the contents of the records. But instead of requiring that Ms. Gatewood's counsel give the records to Mr. Gustafson, the court proposed taking possession of the records and holding them under seal. Mr. Gustafson did not object to the court's proposal.

The trial court issued its final judgment in April 2019. As relevant to the issues here, the trial court: (1) awarded Ms. Gatewood $110,888 in actual damages for breach of fiduciary duty; (2) awarded $50,000 for Ms. Gatewood's attorney's fees "in the modification"; (3) required that Mr. Gustafson's therapy records be turned over to the court to remain under seal as long as the court retained jurisdiction over

the parties' youngest child or until further order from the court; and (4) enjoined Ms. Gatewood or anyone "acting in concert with her" from disclosing the contents of the records. Mr. Gustafson filed a motion for new trial, and it was denied by operation of law. He also requested findings of fact and conclusions of law, which the trial court issued.

On appeal, Mr. Gustafson contends: (1) the evidence is legally and factually insufficient to support the trial court's finding that Mr. Gustafson breached a fiduciary duty that caused Ms. Gatewood damages; (2) the trial court erred by relying on extrinsic and unauthenticated evidence of the Plan's definition of "Distribution"; and (3) the trial court abused its discretion by retaining his therapy records.

The evidence is legally insufficient to support the trial court's finding that Ms. Gatewood suffered actual damages

Mr. Gustafson first contends the evidence is legally and factually insufficient to support the trial court's judgment on Ms. Gatewood's claim for breach of fiduciary duty. We review a trial court's factual findings under the same sufficiency standards we apply to jury verdicts. *Guillory v. Dietrich*, 598 S.W.3d 284, 293 (Tex. 2020). When an appellant challenges both the legal and factual sufficiency of the evidence, we should first examine legal sufficiency. *Glover v. Tex. Gen. Indem. Co.*, 619 S.W.2d 400, 401 (Tex. 1981). If we conclude the evidence is legally insufficient, we need not consider factual sufficiency. *See id.*

Evidence that would "enable reasonable and fair-minded people to reach the finding under review" is legally sufficient. *Guillory*, 598 S.W.3d at 293. But when "evidence is so weak that it does no more than create a surmise or suspicion of the matter to be proved, the evidence is no more than a scintilla and, in legal effect, is no evidence." *Id.* When reviewing legal sufficiency, "we view the evidence in the light most favorable to the finding and indulge every reasonable inference that would support it," crediting all favorable evidence a reasonable person could credit and disregarding all contrary evidence a reasonable person could disregard. *Id.*

To prove her claim, Ms. Gatewood had to establish "(1) the existence of a fiduciary duty, (2) breach of the duty, (3) causation, and (4) damages." *First United Pentecostal Church of Beaumont v. Parker*, 514 S.W.3d 214, 220 (Tex. 2017). Mr. Gustafson acknowledges he owed Ms. Gatewood a fiduciary duty as the constructive trustee of the Assigned Shares. He contends, however, he did not breach that duty by withholding and paying the required taxes on the transactions and, even if he did, there is no evidence Ms. Gatewood suffered actual damages as a result. We agree the evidence is legally insufficient to support a finding that Ms. Gatewood suffered actual damages.

Ms. Gatewood does not dispute that Mr. Gustafson and his employer paid the withheld amounts to the IRS to cover the taxes from the transactions. Nor does she dispute that, if Mr. Gustafson instead paid her 100% of the gross proceeds, she would have to pay those taxes. The only theory of harm Ms. Gatewood advanced in the trial

court is that, by withholding and paying taxes based on his own tax rate instead of hers, Mr. Gustafson forced her to pay taxes at a higher rate. The proper measure of damages for that harm, however, is the difference between the taxes she would have paid at her purportedly lower tax rate and the amount Mr. Gustafson paid the IRS. To prove Mr. Gustafson harmed her in that manner, Ms. Gatewood had to prove there was a disparity between their tax rates.

Ms. Gatewood refused to turn over her tax records during discovery and chose not to present evidence establishing her tax rate at the trial. The only record evidence directly touching upon Ms. Gatewood's tax rate is her affirmative response to a hypothetical question asking whether she was "at least hopeful" her tax rate would be lower if she received the money Mr. Gustafson paid the IRS. That conclusory response, premised on Ms. Gatewood's hope or belief, is insufficient to show Ms. Gatewood's tax rate would have been lower. *See McAllen Hosps., L.P. v. Lopez*, 576 S.W.3d 389, 394 (Tex. 2019) ("[I]t is well settled that the naked and unsupported opinion or conclusion of a witness does not constitute evidence of probative force and will not support a jury finding . . . ."); *Lake v. Cravens*, 488 S.W.3d 867, 906 (Tex. App.—Fort Worth 2016, no pet.) (plaintiff's conclusory testimony about damages is insufficient to support an award).

Likewise, the trial court could not reasonably infer Ms. Gatewood's tax rate would have been lower based on her vague assertion that she and her husband did not make "anywhere near $2.2 million" in 2015. There is no evidence establishing

the correlation between her income and the applicable tax rate on the transactions. Moreover, there is no evidence from which one could conclude Ms. Gatewood's income would fall below the threshold for the highest tax bracket regardless of whether that income was "anywhere near" Mr. Gustafson's.

"Damages must be ascertainable in some manner other than by mere speculation or conjecture, and by reference to some fairly definite standard, established experience, or direct inference from known facts." *Tate v. Goins, Underkofler, Crawford & Langdon*, 24 S.W.3d 627, 635 (Tex. App.—Dallas 2000, pet. denied). Although "uncertainty as to the *amount* of damages is not fatal to recovery, lack of evidence or uncertainty as to the *fact* of damages is." *Id.*

There is no evidence from which the trial court could conclude without speculating that Ms. Gatewood suffered actual damages as a result of the manner in which Mr. Gustafson withheld and paid taxes on the stock sales. There may have been a measure of damages recoverable for the alleged breach, but Ms. Gatewood chose not to present any evidence to support it at trial. Because we conclude the evidence is legally insufficient to support the damages element of Ms. Gatewood's claim for breach of fiduciary duty, we need not address Mr. Gustafson's remaining challenges to that claim.

The trial court did not abuse its discretion by awarding attorney's fees

In a footnote in his opening brief, Mr. Gustafson says that because Ms. Gatewood was not entitled to the $110,888 in actual damages, the trial court's

"award of $50,000 in attorney fees must also be reversed." He cites the recent supreme court case, *Rohrmoos Venture v. UTSW DVA Healthcare, LLP*, 578 S.W.3d 469, 484 (Tex. 2019), and six pages from the clerk's record. The page cited in *Rohrmoos Venture* includes a general discussion of attorney's fees and part of the discussion on fees awarded to prevailing parties when the parties' contract governs fee awards. The pages from the clerk's record show where the trial court specifically articulated it awarded Ms. Gatewood attorney's fees in the modification proceeding. Mr. Gustafson failed to cite us to his motion for new trial, where the only complaint he made regarding fees was a *Rohrmoos Venture*-based argument as to the sufficiency of proof to support the amount.

Mr. Gustafson provides no explanation why the portions of the clerk's record he cites demonstrate that the evidence insufficiently supported the fee award under *Rohrmoos Venture*. Those citations are to the court's order on the modification and the court's findings of fact and conclusions of law. Mr. Gustafson provides no citation or analysis to the portions of the reporter's record where Ms. Gatewood's counsel articulated the basis for the attorney's fees.

Mr. Gustafson's trial counsel never cross-examined Ms. Gatewood's trial counsel regarding the fee amounts, hourly rates, or segregation of fees. And, Mr. Gustafson's trial counsel declined an invitation to further cross-examine Ms. Gatewood's counsel at a later hearing, though Mr. Gustafson's counsel made arguments to the court questioning which paralegal did what work. In response, the

court excised $3,278.84 from Ms. Gatewood's request for attorney's fees to remove the chance the court was awarding Ms. Gatewood fees for duplicate paralegal work.

The evidence was sufficiently detailed to support the segregated fee award for the modification. Ms. Gatewood's counsel provided testimony and introduced billing records, both without objection. They detailed the lawyers' and paralegals' experience, hourly rates, bases for the hourly rates, work on the case, when work was done, and explanations sufficient to address the relevant factors for supporting fees. *See Rohrmoos Venture*, 578 S.W.3d at 498–505. The trial court did not abuse its discretion.[1]

[1] We note that there is no prevailing-party requirement for a fee award under the family code. *See* TEX. FAM. CODE § 106.002(a); *In re K.M.B.*, No. 05-19-00591-CV, 2020 WL 4047966, at *7 (Tex. App.—Dallas July 20, 2020, no pet. h.) (mem. op.); *Coburn v. Moreland*, 433 S.W.3d 809, 838, 840 (Tex. App.—Austin 2014, no pet.).

We reject Mr. Gustafson's argument, raised for the first time in a post-submission brief addressed to an oral argument question, that the trial court could not award fees under the family code without first making a finding that Mr. Gustafson's modification requests were frivolous or harassing. That argument refers to section 156.005, which aims to deter frivolous modification proceedings by requiring that a trial court assess attorney's fees as costs if it finds a suit for modification is filed frivolously or for purposes of harassment. *See* TEX. FAM. CODE § 156.005.

Section 106.002, in contrast, is general and gives courts broad discretion to award attorney's fees in suits affecting parent–child relationships, including modification proceedings, without regard to whether the petition was filed in good faith. *See* TEX. FAM. CODE § 106.002(a). Fees under section 106.002 are no longer treated as costs, however, after a legislative amendment to that section. *See Coburn*, 433 S.W.3d at 838, 840. The Austin court in *Coburn* found no issue locating authority for a trial court to award attorney's fees in a modification pursuant to section 106.002, and neither do we. *See id.* at 838–40; *In re K.M.B.*, 2020 WL 4047966, at *7. Section 156.005 covers a small area of attorney-fee awards, and does not preclude applying section 106.002's broad grant of discretion to trial courts to award attorney's fees.

The trial court did not abuse its discretion by retaining Mr. Gustafson's records under seal

Finally, Mr. Gustafson argues the trial court abused its discretion by retaining his therapy records. In his motion seeking return of those records, Mr. Gustafson asserted that his therapist improperly released the records to Ms. Gatewood's counsel, and he "objects to [Ms. Gatewood] having the records." He asked the trial court both to order the records returned and to enjoin Ms. Gatewood from disclosing their contents. Ms. Gatewood, in turn, expressed concern about preserving the evidence for future proceedings.

The trial court granted Mr. Gustafson's injunction request and addressed the only objection Mr. Gustafson raised in his motion—that he did not want Ms. Gatewood to have a copy of the records—by ordering those records be turned over to the court and kept under seal. Mr. Gustafson did not object to that resolution on any ground in the trial court, much less the specific grounds he now asserts on appeal. Accordingly, Mr. Gustafson has not preserved these objections for our review. *See* TEX. R. APP. P. 33.1(a)(1)(A).

To the extent Mr. Gustafson complains the trial court failed to issue findings of fact and conclusions of law specific to its ruling on his therapy records, he waived that issue by failing to request additional findings. *See* TEX. R. CIV. P. 298; *Tabasso v. BearCom Grp., Inc.*, 407 S.W.3d 822, 829 (Tex. App.—Dallas 2013, no pet.).

Further, Mr. Gustafson has not demonstrated he will suffer any harm as a result of the trial court's decision. There is no merit to Mr. Gustafson's assertion that "the trial court even forbade [him] from possessing ***his own*** Medical Records until it approved such a transfer." Br. of Appellant at 51. The trial court's order does not forbid Mr. Gustafson from obtaining a copy of the records; it merely orders that the specific copy turned over by Ms. Gatewood will not be returned to Mr. Gustafson without a further order from the court. The trial court did not abuse its discretion by retaining Mr. Gustafson's therapy records under seal.

* * *

Because the evidence is legally insufficient to support a finding of actual damages, we reverse the trial court's judgment to the extent it awards Ms. Gatewood actual damages for breach of fiduciary duty, and we render judgment that Ms. Gatewood take nothing on that claim. We affirm the trial court's judgment in all other respects.

/Cory L. Carlyle/
CORY L. CARLYLE
JUSTICE

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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

IN THE INTEREST OF M.G.G., J.O.G. AND E.A.G., CHILDREN,	On Appeal from the 417th Judicial District Court, Collin County, Texas Trial Court Cause No. 417-53207-2010.
No. 05-19-00777-CV	Opinion delivered by Justice Carlyle. Justices Whitehill and Osborne participating.

In accordance with this Court's opinion of this date, the judgment of the trial court is **AFFIRMED** in part and **REVERSED AND RENDERED** in part.

We **REVERSE** that portion of the trial court's judgment awarding Elizabeth Gatewood actual damages for breach of fiduciary duty and **RENDER** judgment that she take nothing on that claim.

In all other respects, the trial court's judgment is **AFFIRMED**.

It is **ORDERED** that each party bear its own costs of this appeal.

Judgment entered this 10th day of August 2020.