

Reverse and Render and Opinion Filed December 19, 2024



In The  
Court of Appeals  
Fifth District of Texas at Dallas

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No. 05-22-01341-CV

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SCOTT KEMP FAUSETT, Appellant  
V.  
KERRY JON WARREN, Appellee

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On Appeal from the 255th Judicial District Court  
Dallas County, Texas  
Trial Court Cause No. DF-20-00632

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**MEMORANDUM OPINION**

Before Justices Molberg, Nowell, and Kennedy  
Opinion by Justice Molberg

In this divorce-related contract dispute, appellant Scott Kemp Fausett appeals the trial court’s judgment that awarded appellee Kerry Jon Warren liquidated damages and attorneys’ fees on his counterclaim for breach of contract, ordered that “Fausett take nothing on the claims,” and excused Warren from the obligation to make any payments to Fausett. Because we conclude there is no evidence to support the awards, we reverse the portion of the judgment awarding Warren \$600,000 in liquidated damages and \$61,194 in attorneys’ fees on his breach of contract counterclaim and render judgment that Warren take nothing on that claim.

## I. BACKGROUND

The parties were divorced by an agreed final decree of divorce signed May 15, 2020. The decree ordered the parties to do all things necessary to effectuate the agreement and approved and incorporated by reference the parties' agreement incident to divorce (AID) which had been signed as part of a mediated settlement agreement (MSA) the parties reached on February 12, 2020.

Among other effects, the AID confirmed certain assets as the separate property of each party, including confirming as Warren's sole and separate property two condominiums in Puerto Vallarta, Jalisco, Mexico (Puerto Vallarta condos). Specifically, the AID provided, in pertinent part:

### Property Confirmed as the Separate Property of KERRY J. WARREN

KERRY J. WARREN shall be confirmed in his ownership of the following entities, together with any subsidiaries and affiliates to same, as his sole and separate property, and SCOTT KEMP FAUSETT stipulates and agrees that such entities are the sole and separate property of KERRY J. WARREN, free of any claim of SCOTT KEMP FAUSETT, together with any and all liabilities; obligations; local, state, and federal taxes of the entities listed below; and any lawsuits naming the entities listed below as a party:

1. The real property situated at Francisca Rodriguez 174, Puerto Vallarta, Jalisco, Mexico, Pier 57, Penthouse number 707 and Penthouse number 708, more specifically known as:  
[legal description]

including but not limited to any escrow funds, pre-paid insurance, utility deposits, keys, house plans, warranties and service contracts, mineral rights (if any) and title and closing documents.

The AID also awarded to Fausett as his sole and separate property a sum of \$550,000 payable to him by Warren for those Puerto Vallarta condos, as follows:<sup>1</sup>

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<sup>1</sup> The AID identified Warren as the Petitioner and Fausett as the Respondent.

Assets to SCOTT KEMP FAUSETT

Respondent, SCOTT KEMP FAUSETT, is to receive as his sole and separate property and shall own, possess, and enjoy that property, and KERRY J. WARREN partitions, quitclaims, assigns, and conveys to SCOTT KEMP FAUSETT the following property:

. . . .

8. The sum of \$550,000.00 payable by Petitioner to Respondent as follows:
  - a. One hundred fifty-thousand dollars and no cents (\$150,000.00) on February 12, 2020, the date the Mediated Settlement was signed by check;
  - b. Two hundred seventy-five thousand dollars and no cents (\$275,000.00) on the date of entry of an Agreed Final Decree of Divorce by check; and
  - c. One-hundred and twenty-five thousand dollars and no cents (\$125,000.00) paid to The Webb Family Law Firm to be held in Trust to ensure that Respondent signs the deeds for his interest in the Puerto Vallarta condos (hereafter "the Condos") awarded to Petitioner herein. If no formal written request to sign the deeds is made by Petitioner to Respondent within 12 months of the date of divorce, Petitioner shall instruct The Webb Family Law Firm to issue a check to Respondent in the amount of one-half of the \$125,000.00. If no formal written request is made by Petitioner to Respondent to sign the deeds from month 12 to month 24 after the date of divorce, Petitioner shall instruct the Webb Family Law Firm to issue a check to Respondent in the amount of the other half of the \$125,000.00. However, at any time during this 24 month period after the date of divorce, if Respondent signs the required deeds in the manner necessary to transfer Respondent's interest in the Condos to Petitioner, Petitioner shall instruct The Webb Family Law Firm to release the entire balance of these funds held in the Webb Family Law Trust account and the funds shall be immediately released to Respondent.

Scott Fausett hereby agrees that when he receives written notice that the deeds regarding the Condos are ready to be signed, Scott Fausett shall have ninety (90) days from the date of the notice to arrange to go to Puerto Vallarta, Mexico, and sign the deeds on the date and location specified in the written notice. Kerry Warren agrees to and shall pay for Scott Fausett's reasonable airfare and expenses to travel to Puerto Vallarta to sign the deeds in an amount not to exceed one thousand three-hundred dollars (\$1,300.00).

Scott Fausett agrees that if he fails to sign the deeds to the Condos necessary to transfer his interest in the Condos to Kerry Warren, Kerry Warren shall be awarded a judgment against Scott Fausett for liquidated damages in the amount of six hundred thousand dollars and no cents (\$600,000.00) for which let execution issue. This judgment shall only be awarded if Scott Fausett has not signed the deeds to the Condos pursuant to the provisions herein within 24 months from the date of divorce.

The above AID provisions, and Fausett’s later refusal to sign certain documents provided him by Warren’s lawyers, are at the heart of the current dispute.

Also pertinent is a general cooperation provision in the AID, which states:

SCOTT KEMP FAUSETT and KERRY J. WARREN agree to sign any and all additional documents necessary to effectuate the transfer of any asset, liability or interest in any entity or stock(s) to the other party. The Court finds that the transfer of the executed Special Warranty Deed regarding the real property situated at 6462 Bordeaux Avenue, Dallas, Texas has been completed.

In January 2021, Warren sued Fausett, requesting “an order directing [Fausett] to comply with the Decree of Divorce and AID relating to execution of documents previously sent to him on October 8, 2020” regarding the Puerto Vallarta condos. According to the record before us, the trial court heard that matter on May 5, 2021, but no record was made of that hearing, and no order was issued.

On June 15, 2021, Fausett filed, and later amended, a “Petition for Enforcement of Agreement Incident to Divorce and Agreed Final Decree of Divorce” (Fausett’s petition), prompting Warren to file, and later amend, his “Original Counterclaim for Breach of Contract” (Warren’s counterclaim).

Beginning September 12, 2022, Warren’s counterclaim was tried to a jury in a two-day trial. Before trial began, the parties’ counsel presented multiple agreed orders to the trial court for signature. Among those proposed orders was an agreed order granting a prior motion to bifurcate filed by Fausett. That agreed order was signed by both parties’ counsel and the trial court and ordered that separate trials be conducted on Fausett’s petition and Warren’s counterclaim, with Warren’s jury trial set for September 12, 2022, and to “be held prior to” Fausett’s bench trial. The

agreed order also stated Fausett's petition would be set on the trial court's bench trial docket "for a date and time to be provided by the [c]ourt."

The jury trial on Warren's counterclaim then proceeded. Five witnesses testified, and eleven exhibits were admitted into evidence. The trial court submitted a total of six questions to the twelve-member jury, ten of whom answered as follows:

QUESTION NO. 1

Are the Agreement Incident to Divorce and the Agreed Final Decree of Divorce a valid contract?

Yes ~~X~~ (10) No \_\_\_\_\_

QUESTION NO. 2

Has Kerry Jon Warren complied with his obligations as reflected in the Agreement Incident to Divorce and/or the Agreed Final Decree of Divorce related to the Puerto Vallarta condos?

Yes ~~X~~ (10) No \_\_\_\_\_

QUESTION NO. 3

Has Scott Kemp Fausett complied with his obligations as reflected in the Agreement Incident to Divorce and/or the Agreed Final Decree of Divorce related to the Puerto Vallarta condos?

Yes ~~X~~ No ~~X~~ (10)

QUESTION NO. 4

If you answered "No" to Question No. 3, has Kerry Jon Warren incurred damages as a result of Scott Kemp Fausett's breach of contract?

Yes ~~X~~ (10) No \_\_\_\_\_

QUESTION NO. 5

If you answered "yes" to Question No. 4, is Kerry Jon Warren entitled to the \$600,000.00 judgment set forth in the Agreement Incident to Divorce for his damages incurred as a result of Scott Kemp Fausett's breach of contract?

\$ 600,000 <sup>00</sup>/<sub>100</sub>

QUESTION NO. 8

What is a reasonable fee for the necessary services of Kerry Jon Warren's attorney in this lawsuit?

Answer in dollars and cents for representation in the trial court.

Answer: \$ 61,194


On October 7, 2022, about three weeks after the jury returned its verdict on Warren's counterclaim, the trial court entered the judgment at issue in this appeal. The judgment awarded Warren \$600,000 in liquidated damages and \$61,194 in attorneys' fees on his breach of contract counterclaim against Fausett, ordered that "Fausett take nothing on the claims," and excused Warren from the obligation to make any payments to Fausett.<sup>2</sup>

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<sup>2</sup> The judgment is titled, "Final Judgment on [Warren's] Breach of Contract Claim[.]" The only matter tried to the jury was Warren's counterclaim, not Fausett's own claim, as reflected both in the agreed order granting Fausett's motion to bifurcate and by each parties' objections to certain matters at trial.

Given the bifurcation, and the fact that the judgment's title specifically refers to Warren's counterclaim, it is difficult to understand why the judgment includes language stating that Fausett "take nothing on the claims" and excuses Warren from making payments to Fausett. As to the "take nothing" language, that portion of the judgment states:

~~ORDERED~~ ***The Court finds based on the jury's verdict,***  
~~IT IS ORDERED that~~ Scott Kemp Fausett take nothing on the claims, ~~contained in his~~  
~~First Amended Petition for Enforcement of Agreement Incident to Divorce and Agreed Final~~  
~~Decree of Divorce.~~



The trial court's strikethroughs suggest the trial court's "take nothing" language was not referring to Fausett's own petition, a matter that was to be set on the trial court's bench trial docket "for a date and time to be provided by the [c]ourt" according to the agreed order granting Fausett's motion to bifurcate that was signed on the first day of trial. There is no indication in the record before us that any such setting was made or that Fausett's petition was ever heard. However, there is no question that the judgment is, in fact, final, as it contains language clearly and unequivocally disposing of all parties and all claims. *See In re C.K.M.*, No. 05-23-00983-CV, 2024 WL 448854, at \*2 (Tex. App.—Dallas Feb. 6, 2024, pet. filed) (stating, "An order that expressly disposes of the entire case is not interlocutory merely because the record does not show a legal basis for the disposition" and "[w]hen the language of the order is clear and unequivocal, it must be given effect despite any other indication that it was not intended to be final.") (citing *Lehmann v. Har-Con Corp.*, 39 S.W.3d 191, 206 (Tex. 2001)). Here, the judgment concludes by stating "all relief requested in this case and not expressly granted is denied" and "[t]his is a final judgment" which "finally disposes of all claims and all parties and is subject to immediate appellate review."

Less than thirty days later, Fausett filed a motion for new trial and a “Motion to Disregard the Jury Verdict or, In the Alternative, for Judgment Notwithstanding the Verdict.” The trial court denied both motions on December 1, 2022, and Fausett timely appealed.

## II. ANALYSIS

### A. Breach of Contract, Generally

To prove his counterclaim for breach of contract, Warren had to establish (1) the existence of a valid contract, (2) Warren performed or tendered performance, (3) Fausett breached the contract, and (4) Warren was damaged as a result of that breach. *See Brown v. Ogbolu*, 331 S.W.3d 530, 535 (Tex. App.—Dallas 2011, no pet.); *Hackberry Creek Country Club, Inc. v. Hackberry Creek Home Owners Ass’n*, 205 S.W.3d 46, 55 (Tex. App.—Dallas 2006, pet. denied).

The normal measure of damages in a breach of contract case is the benefit-of-the-bargain measure, which seeks to restore the injured party to the economic position it would have been in had the contract been performed. *Brown*, 331 S.W.3d at 535. A liquidated damages clause is a contractual device that parties use to determine their rights and liabilities in the event of a dispute and is generally as enforceable as any other contractual provision. *Bonsmara Nat. Beef Co., LLC v. Hart of Texas Cattle Feeders, LLC*, 603 S.W.3d 385, 397 n.23 (Tex. 2020).

## **B. Issues on Appeal**

On appeal, Fausett asks us to reverse the judgment and render judgment in his favor, including by awarding him the \$125,000 in trust funds under section 8.c. of the AID, or alternatively, to reverse and remand to the trial court for a new trial.

Fausett raises three issues,<sup>3</sup> stating:

1. The AID’s liquidated damages provision applies only if Scott failed to sign “deeds” tendered by Kerry. The trial evidence proved—as a matter of law—that Kerry never tendered any “deed.” Does the lack of legally or factually sufficient evidence that Scott breached the only provision authorizing liquidated damages render the award of such damages improper?
2. The jury charge conditioned the award of liquidated damages to Kerry on a predicate finding that he incurred actual damages. But Kerry never proved actual damages. Under the charge, does Kerry’s failure to prove actual damages preclude the award of liquidated damages?
3. Is the liquidated damages provision facially invalid as an unenforceable penalty because it assesses the same amount of damages for different breaches?

## **C. Evidentiary Sufficiency Regarding Awards to Warren**

We begin with Fausett’s first issue, in which he challenges the legal and factual sufficiency of the evidence to support the award of \$600,000 in liquidated damages to Warren and also challenges Warren’s entitlement to attorneys’ fees.

### **1. Legal Sufficiency Review Standards**

When a party challenges the legal sufficiency of the evidence to support an adverse finding on which it did not have the burden of proof, the party must

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<sup>3</sup> Initially, he raised four issues, but later conceded the fourth. We therefore need not address it.



demonstrate that no evidence supports the finding. *Graham Cent. Station, Inc. v. Peña*, 442 S.W.3d 261, 263 (Tex. 2014) (per curiam); *Oncor Elec. Delivery Co. LLC v. Quintanilla*, No. 05-19-01331-CV, 2022 WL 9809712, at \*3 (Tex. App.—Dallas Oct. 17, 2022, pet. denied) (mem. op.).

To determine whether legally sufficient evidence exists to support the finding, we “must view the evidence in the light favorable to the verdict, crediting favorable evidence if reasonable jurors could, and disregarding contrary evidence unless reasonable jurors could not.” *City of Keller v. Wilson*, 168 S.W.3d 802, 807, 827 (Tex. 2005).

“Evidence is legally insufficient to support a jury finding when (1) the record discloses a complete absence of evidence of a vital fact; (2) the court is barred by rules of law or of evidence from giving weight to the only evidence offered to prove a vital fact; (3) the evidence offered to prove a vital fact is no more than a mere scintilla; or (4) the evidence establishes conclusively the opposite of a vital fact.” *Crosstex N. Tex. Pipeline, L.P. v. Gardiner*, 505 S.W.3d 580, 613 (Tex. 2016); see *Marathon Corp. v. Pitzner*, 106 S.W.3d 724, 727 (Tex. 2003) (per curiam).

The “final test for legal sufficiency” is “whether the evidence at trial would enable reasonable and fair-minded people to reach the verdict under review.” *City of Keller*, 168 S.W.3d at 827; see *Office of Att’y Gen. v. Rodriguez*, 605 S.W.3d 183, 192 (Tex. 2020).

## **2. Factual Sufficiency Review Standards**

When a party challenges the factual sufficiency of the evidence on an adverse finding on which it did not have the burden of proof, the party must demonstrate there is insufficient evidence to support the finding. *Hoss v. Alardin*, 338 S.W.3d 635, 651 (Tex. App.—Dallas 2011, no pet.). When determining the factual sufficiency of the evidence to support a jury verdict, we “must consider and weigh all the evidence and should set aside the verdict only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust.” *Cain v. Bain*, 709 S.W.2d 175, 176 (Tex. 1986) (per curiam) (citations omitted); *Harris Cty. v. Coats*, 607 S.W.3d 359, 380–81 (Tex. App.—Houston [14th Dist.] 2020, no pet.). Evidence is insufficient for factual sufficiency purposes if, after reviewing all the evidence in the record, we determine the evidence supporting the jury finding is so weak or the finding is so against the overwhelming weight of the evidence that the finding is clearly wrong and unjust. *Hoss*, 338 S.W.3d at 651.

Ordinarily, a court of appeals will not address the factual sufficiency of the evidence if it determines the evidence is legally insufficient. *Windrum v. Kareh*, 581 S.W.3d 761, 781 (Tex. 2019) (generally citing, in part, *In re King’s Estate*, 244 S.W.2d 660, 661 (Tex. 1951)) (per curiam) (other citations omitted).

## **3. Application and Conclusion on First Issue**

Under the AID, “a judgment against [Fausett] for liquidated damages in the amount of [\$600,000] . . . . shall only be awarded if [Fausett] has not signed the

deeds to the [Puerto Vallarta condos] pursuant to the provisions [in the AID] within 24 months from the date of divorce.”

Based on the record before us, and viewing the evidence in the light favorable to the verdict, crediting favorable evidence if reasonable jurors could, and disregarding contrary evidence unless reasonable jurors could not, *see City of Keller*, 168 S.W.3d at 807, 827, we conclude there is no evidence Fausett failed to comply with this provision, as the documents Fausett was provided, as reflected in the admitted exhibits marked as Warren-8 and SF4 through SF7, are not “deeds,” as a matter of law, as they do not convey an interest in land.<sup>4</sup>

Instead, these exhibits authorize a set of instructions to a particular Mexican bank identified as “Trustee” in the documents. Each exhibit states that Fausett

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<sup>4</sup> *See Deed*, BLACK’S LAW DICTIONARY (12th ed. 2024), (defining “deed,” in part, as “A written instrument by which land is conveyed.”); *see also Perthuis v. Baylor Miraca Genetics Lab’ys, LLC*, 645 S.W.3d 228, 236 (Tex. 2022) (“[P]arties may freely define an ordinary word to have an unusual meaning; when they do, they rebut the presumption of ordinary usage. Without any textually expressed bespoke meaning, however, courts will adopt the ordinary usage as a matter of law.”). As one of our sister courts has stated,

To be a legally effective conveyance, there are four “essential characteristics of a deed,” the second of which is critical here:

- (1) a grantor and grantee can be ascertained from the instrument as a whole;
- (2) there are operative words of grant showing the grantor's intention to convey to the grantee title to a real property interest;
- (3) the property is sufficiently described; and
- (4) the instrument is signed and acknowledged by the grantor.

*Cohen v. Tour Partners, Ltd.*, No. 01-15-00705-CV, 2017 WL 1528776, at \*6 (Tex. App.—Houston [1st Dist.] Apr. 27, 2017, no pet.) (mem. op.) (citing *Gordon v. W. Hous. Trees, Ltd.*, 352 S.W.3d 32, 43 (Tex. App.—Houston [1st Dist.] 2011, no pet.).

“would like to give the following instructions to [the bank], so that they may be executed by this Trustee” and then state, in pertinent part:

**IRREVOCABLE INSTRUCTIONS:**

**FIRST.** I instruct this Trustee to appear at the signing of the Public Instrument that contains, among other acts, THE CONTRACT OF PARTIAL ASSIGNMENT OF 50% OF THE RIGHTS AND OBLIGATIONS OF THE TRUST OF THE REFERRED TRUST AGREEMENT, in which the following parties will appear: ASSIGNOR : SCOTT KEMP FAUSETT; ASSIGNEE: Mr. KERRY JON WARREN, who will acquire ownership of all the rights and obligations of the Trustee derived from the aforementioned Trust; TRUSTEE: BANCO MONEX, SOCIEDAD ANÓNIMA, INSTITUCIÓN DE BANCA MÚLTIPLE, MONEX GRUPO FINANCIERO; acts to be carried out regarding the property of Trust number F / 6893.

**SECOND.** This institution will give instructions or will appear before the Attorney CARLOS CASTRO SEGUNDO; Notary Public Number five of the city of Puerto Vallarta, State of Jalisco, to execute the public instrument that contains the aforementioned acts.

Thus, rather than conveying an interest in land, the documents simply authorize and instruct a Trustee to take certain future acts. Under these circumstances, we hold, as a matter of law, there is no evidence to support the award of \$600,000 in liquidated damages to Warren, and as a result, we sustain Fausett’s first issue to the extent that we reverse the portion of the judgment awarding Warren \$600,000 in liquidated damages and \$61,194 in attorneys’ fees<sup>5</sup> on his breach of

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<sup>5</sup> Warren sought attorneys’ fees under Texas Civil Practice and Remedies Code § 38.001, which states, “A person may recover reasonable attorneys’ fees from an individual . . . in addition to the amount of a valid claim and costs, if the claim is for” “an oral or written contract.” TEX. CIV. PRAC. & REM. CODE § 38.001(b)(8). To recover attorneys’ fees under Section 38.001, a party must (1) prevail on a cause of action for which attorneys’ fees are recoverable, and (2) recover damages. *Green Int’l, Inc. v. Solis*, 951 S.W.2d 384, 390 (Tex. 1997). Because we have concluded no evidence supports Warren’s liquidated damages award, and because Warren failed to recover any other damages on his claim, he may not recover

contract counterclaim against Fausett and render judgment that Warren take nothing on that claim. As a result, we need not consider Fausett’s arguments regarding factual insufficiency or his other two issues.<sup>6</sup>

**D. Fausett’s Request for \$125,000 in Trust Funds**

This holding does not prompt us, however, to award Fausett \$125,000 in trust funds under section 8.c. of the AID, as he requests. Because the trial was bifurcated and addressed only Warren’s counterclaim, no issues regarding Fausett’s own claim against Warren were submitted to the jury. Nevertheless, the trial court’s judgment ordered that Fausett “take nothing on the claims” and excused Warren from making any payments to Fausett, and Fausett did not complain about those rulings below, nor has he made any such complaints in our Court. We thus do not address those rulings here, both because Fausett was required to preserve any such complaint for appellate review, *see* TEX. R. APP. P. 33.1 (preservation of appellate complaints), and because we “may not reverse a trial court judgment on a ground not raised.” *Pike v. Tex. EMC Mgmt., LLC*, 610 S.W.3d 763, 782 (Tex. 2020). Moreover, even if we could address Fausett’s affirmative claim for relief, we note that Fausett’s latest

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attorney’s fees. *See Mustang Pipeline Co. v. Driver Pipeline Co.*, 134 S.W.3d 195, 201 (Tex. 2004) (reversing attorneys’ fees award to a party when court held that the party did not have a valid claim).

<sup>6</sup> *See Windrum*, 581 S.W.3d at 781 (“Ordinarily, a court of appeals will not address the factual sufficiency of the evidence if it determines the evidence is legally insufficient.”); *see also* TEX. R. APP. P. 47.1 (“The court of appeals must hand down a written opinion that is as brief as practicable but that addresses every issue raised and necessary to final disposition of the appeal.”).

pleading appears to only request half of the amount he currently requests, according to the record before us.

### **III. CONCLUSION**

We reverse the portion of the judgment awarding Warren \$600,000 in liquidated damages and \$61,194 in attorneys' fees on his breach of contract counterclaim against Fausett and render judgment that Warren take nothing on that claim.

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/Ken Molberg/  
\_\_\_\_\_  
KEN MOLBERG  
JUSTICE



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

**JUDGMENT**

SCOTT KEMP FAUSETT,  
Appellant

No. 05-22-01341-CV      V.

KERRY JON WARREN, Appellee

On Appeal from the 255th Judicial  
District Court, Dallas County, Texas  
Trial Court Cause No. DF-20-00632.  
Opinion delivered by Justice  
Molberg. Justices Nowell and  
Kennedy participating.

In accordance with this Court's opinion of this date, we **REVERSE** the portion of the judgment awarding Warren \$600,000 in liquidated damages and \$61,194 in attorneys' fees on his breach of contract counterclaim against Fausett and **RENDER** judgment that Warren take nothing on that claim.

It is **ORDERED** that appellant SCOTT KEMP FAUSETT recover his costs of this appeal from appellee KERRY JON WARREN.

Judgment entered this 19<sup>th</sup> day of December, 2024.