Opinion issued July 31, 2008

In The
Court of Appeals
For The
First District of Texas

NO. 01-05-00832-CV

MARVIN HARRY DACE, JR., Appellant

V.

TOMMY DACE, INDEPENDENT EXECUTOR OF THE ESTATE OF MARVIN DACE, SR., DECEASED
Appellee

On Appeal from Probate and County Court at Law Number One
Brazoria County, Texas
Trial Court Cause No. 26,222

MEMORANDUM OPINION

This is a dispute between two brothers, Marvin Harry Dace, Jr., ("Harry") and

Tommy Dace ("Tommy"), over the estate of their deceased father, Marvin Harry Dace, Sr. Following a jury trial, the trial court rendered judgment in favor of Tommy, in his capacity as independent executor of his father's estate. On appeal, Harry raises seven issues with numerous sub-points. We address the following dispositive issues raised by Harry: (1) whether the evidence was legally sufficient to support the award of damages against Harry for breach of a written agreement; (2) whether the trial court erred by rendering judgment "declaring null and void the March 28, 2001 deed to [Harry] from his parents"; (3) whether prejudgment interest and attorney's fees were properly awarded against Harry; (4) whether the trial court properly rendered judgment ordering that a will signed by Marvin in October 2001 was not Marvin's last will and testament; (5) whether the trial court erred "in signing the final judgment confirming the jury verdict because the jury verdict resulted from aggravated perjury and undue prejudice"; and (6) whether the trial court erred "in signing the final judgment because the trial court lacked jurisdiction over the estate of Ernestine Dace.

We affirm in part and reverse and render in part.

Background

Marvin Dace, Sr. ("Marvin") began an air conditioning manufacturing business ("the business") in 1953. He and his wife, Ernestine Dace ("Ernestine"), had three

sons: Tommy, Harry, and Dick.[1] Harry began working in his father's business when he was a child and continued working for the business into adulthood.

In 1989, Ernestine and Marvin deeded a one-acre piece of real property to Harry on West Clover Lane, where a new shop building for the business was constructed. Ernestine and Marvin also signed a will in 1989. Pursuant to the will, after the deaths of Ernestine and Marvin, all property in the estate passed to Tommy. The will expressly disinherited Harry and Dick.

In 1992, Ernestine and Marvin deeded another piece of property to Harry on West Clover Lane, where the old shop building for the business was located. Also in 1992, Ernestine and Marvin retired from the day-to-day operations of the business, and Harry began running the business.

In March 2001, Ernestine and Marvin deeded their homestead, also located on West Clover Lane, to Harry via a "gift deed." On October 10, 2001, Ernestine and Marvin sued Harry. They alleged that Harry had not paid them 50 per cent of the net proceeds from the business's operation, as he had orally agreed. More precisely, Ernestine and Marvin alleged that Harry had agreed to pay them such proceeds in exchange for renting the equipment and the property used to run the business. Ernestine and Marvin also challenged the validity of the 2001 deed transferring their

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[1] Dick was not a party in the trial court.

homestead to Harry.

Seven days after the suit was filed, Harry presented a new will to Marvin, who resided in a nursing home. Marvin signed the new will on October 17, 2001. Pursuant to the will, Marvin left his entire estate to Harry. Although she was still living, the new will made no mention of Ernestine. Nor did the will expressly mention Tommy or Dick.

Ernestine died on January 16, 2002, and Marvin passed away on November 20, 2002. After Marvin's death, Tommy, as independent executor of Marvin's estate, maintained the lawsuit against Harry. Tommy added a new claim challenging the validity of the October 2001 will. At Tommy's request, the trial court permitted the following trial amendment: that Harry breached a written contract, rather than an oral one as pled, with Ernestine and Marvin for the purchase of the business.

After a two-week trial, the jury made the following findings:

- The October 17, 2001 will was not Marvin's last will and testament.
- Ernestine and Marvin entered into a written agreement for the sale of the business known as "Dace Manufacturing" to Harry.
- Harry intended to bind himself to an agreement with Ernestine and Marvin that included the following term: "The parties agreed to a 50/50 split of the net profits from the business to be paid on a yearly basis, with the 50% net profit to Marvin H. Dace, Sr. and Ernestine Dace."
- Harry breached that agreement.

- As a result of the breach, Ernestine and Marvin suffered $246,058.50 in damages.

- Relating to the breach of contract, Tommy, as independent executor, was entitled to $34,000 in attorney's fees.

- Harry used neither fraud nor misrepresentations to obtain the execution of the 2001 real estate deed.

- Harry used duress and undue influence to obtain the execution of the 2001 real estate deed.

- Neither Ernestine nor Marvin ever ratified the conveyance of the "2001 property."

The trial court signed a judgment on the findings, ordering as follows:

- "[T]he Last Will and Testament of Marvin H. Dace, Sr. dated October 19, 1989, is [Marvin's] Last Will and Testament."

- "[T]he deed dated March 28, 2001 signed by [Marvin and Ernestine] as Grantors . . . is null, void and invalid and of no force and effect, and is hereby cancelled."

- "[T]he deed dated March 28, 2001, signed by [Marvin and Ernestine] and as more particularly described in exhibit "A" attached hereto and incorporated for all purposes is quieted in the Estate of Marvin Dace, Sr., Deceased, and further that said estate is the true and lawful owner of said tract."

- "Tommy Dace, Independent Executor of the Estate of Marvin H. Dace, Sr., Deceased, shall have and recover from Marvin Harry Dace, Jr., the sum of Two Hundred Forty Eight Thousand Fifty Eight and 50/100's Dollars ($248,058.50) as damages herein, together with prejudgment interest of $55,008.65. . . .

- "Tommy Dace, Independent Executor of the Estate of Marvin H. Dace, Sr., Deceased, shall have and recover from Marvin Harry Dace, Jr., attorneys fees in the sum of Thirty-Four Thousand and no/100's Dollars ($34,000.00) for services rendered through trial of this case."

- "[T]he award of attorney's fees is part of the judgment hereof rendered and that the judgment herein rendered shall bear interest at the rate of Six Percent (6%) from the date of judgment until fully paid."

- All costs of court were awarded against Harry.

Presenting seven issues, with numerous sub-points, Harry appeals the trial court's judgment.

Legal Sufficiency

In his first issue, Harry challenges the trial court's award of $248,058.50 in damages for breach of contract. Among his challenges, Harry attacks the legal sufficiency of the evidence to support the jury's findings that he entered into a written contract with his parents for the sale of the business and that, as part of the agreement, Harry agreed "to a 50/50 split of the net profits from the business to be paid on a yearly basis" to his parents.[2]

In deciding a legal-sufficiency challenge, we determine whether there is evidence that would enable reasonable and fair-minded people to reach the verdict

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[2] Alternatively, the jury could have found that Harry and his parents entered into an oral contract for the sale of the business. The jury chose to find that the sale contract was a written contract, not an oral one.

under review. *City of Keller v. Wilson*, 168 S.W.3d 802, 827 (Tex. 2005). To make this determination, we (1) credit all favorable evidence that reasonable jurors could believe; (2) disregard all contrary evidence, except that which they could not ignore; (3) view the evidence in the light most favorable to the verdict; and (4) indulge every reasonable inference that would support the verdict. *Id.* at 822, 827. But, we may not disregard evidence that allows only one inference. *Id.* at 822.

Here, the jury was instructed, "To prove an action for breach of contract, Plaintiff must establish an offer, acceptance, mutual assent and mutuality of obligations supporting the agreement." *See Roman v. Roman*, 193 S.W.3d 40, 50 (Tex. App.—Houston [1st Dist.] 2006, pet. denied) (identifying elements of breach of contract claim). To challenge the jury's finding of a written contract for the sale of the business, Harry asserts that no evidence was presented to show that his parent's offered to sell him the business or that he accepted such offer. And he contends that legally insufficient evidence was presented to show a *written* contract.

No written contract between Harry and his parents was offered at trial. Instead, to establish the existence of a written contract, Tommy testified that, in 1993, Marvin showed him a handwritten contract drafted by Marvin and signed by Harry. Tommy testified that, under the terms of the written contract, Harry agreed to pay his parents 50 percent of the business's net profits. Tommy also testified that the written

agreement was a lease agreement between Harry and his parents. Tommy did not testify that he saw a written agreement regarding the sale of the business to Harry. While some evidence was presented at trial indicating that Harry had purchased the business from his parents, rather than leasing it, no evidence was presented that Harry had entered into a *written* contract with his parents for the *purchase* of the business. To the contrary, Tommy testified that the written contract he saw was a rental agreement between Harry and his parents.

Applying the appropriate standard, we hold that legally insufficient evidence supports the jury's finding that Harry entered into a written agreement with his parents to purchase the business. Thus, we further hold that Tommy, as independent executor of Marvin's estate, should take nothing by his breach of contract claim against Harry.

We sustain Harry's first issue.

Attorney's Fees and Prejudgment Interest

In his third and fourth issues, Harry contends that the trial court erred by awarding Tommy prejudgment interest and attorney's fees. We agree.

Both the award of attorney's fees and prejudgment interest were predicated on the breach of contract award, which we have determined to be supported by legally insufficient evidence. Because he did not prevail on the breach of contract claim, and

is therefore not entitled to an award of actual damages under that claim, Tommy is not entitled to recover attorney's fees and prejudgment interest. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 38.001(8) (Vernon 2008) (permitting recovery of reasonable attorney's fees for breach of contract); *see also First Am. Title v. Willard*, 949 S.W.2d 342, 352 (Tex. App.—Tyler 1997, writ denied) ("Upon reversal of a claimant's judgment, all dependent causes of action are simultaneously defeated.").

We sustain Harry's third and fourth issues.

2001 Deed

In his second issue, Harry contends that the trial court erred "in declaring null and void the March 28, 2001 deed to [Harry] from his parents."

As mentioned, the jury found that Harry obtained the execution of the 2001 deed from his parents through the use of undue influence. To support his second issue, Harry contends that no evidence was presented to support the undue influence finding.

Here, the jury was instructed that undue influence

> means that there was such domination and control exercised over the mind of the person entering into the agreement, under the facts and circumstances then existing, as to overcome his free will. In effect the will of the party exerting undue influence was substituted for that of the party entering into the agreement, preventing him from exercising his own discretion and causing him to do what he would not have done but for such domination and control.

The jury was further instructed,

> The elements of undue influence require that the person alleging such undue influence must prove:
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> a. the existence and exertion of an influence;
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> b the effective operation of such influence so as to subvert or overpower the mind of the maker of the document at the time of execution of the document;
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> c. the execution of the document which the maker thereof would not have executed but for such influence.[3]

See Rothermel v. Duncan, 369 S.W.2d 917, 922 (Tex. 1963) (setting forth elements of undue influence).

Undue influence involves an extended course of dealings and circumstances, which may be proven by direct or circumstantial evidence. *See Watson v. Dingler*, 831 S.W.2d 834, 837 (Tex. App.—Houston [14th Dist.] 1992, writ denied). For this reason, it is proper to consider evidence of all relevant matters that occurred within a reasonable time before or after execution of the deed that tend to prove the

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[3] We note that Harry specifically attacks the undue influence finding by asserting that there is no evidence that Harry obtained the 2001 deed by fraud or deceit. Harry points out that the jury answered "no" when asked whether Harry obtained the execution of the deed by fraud. Despite Harry's contention, no finding of fraud or deceit was necessary under the charge given for the jury to make a finding of undue influence. We review the sufficiency of the evidence based on the charge as given. *See Osterberg v. Peca*, 12 S.W.3d 31, 55 (Tex. 2000). Thus, a lack of a fraud finding has no bearing on the sufficiency of the evidence in this case.

existence of undue influence at the time of execution. *See id.* All material facts may be considered, including: the circumstances attending execution of the instrument; the relationship between the maker and the beneficiaries; the motive, character, and conduct of those benefitted by the instrument; the words and acts of all attending parties; the physical and mental condition of the maker at the time of the execution of the instrument; the maker's age, weakness, infirmity, and dependency on or subjection to the control of the beneficiary; and the improvidence of the transaction by reason of unjust, unreasonable, or unnatural disposition. *Id*.

In this case, the evidence showed that, at the time that the deed was executed in March 2001, both Ernestine and Marvin were elderly and in ill health. Ernestine suffered from cancer and was taking morphine. Marvin resided in a nursing home. He had suffered a stroke leaving him paralyzed on his right side with little use of his left arm. Tommy testified that Marvin could not feed or dress himself and could not have held a pen to sign a document. Other than responding "yes" or "no," Marvin was unable to speak or hold a conversation. Tommy also indicated that Marvin had no "mental understanding of a document such as a deed."

The evidence showed that Ernestine and Marvin were dependent on Harry to supplement their income with funds from the business, including paying for Marvin's nursing home care. Tommy testified that, in 2001, Harry began cutting back on the

funds he gave his parents.

The record further shows that, in 2000, Tommy searched the real property records and discovered that his parents had deeded property to Harry in 1989 and in 1992. Tommy testified that Ernestine told him that she and Marvin had never deeded these properties to Harry. According to Tommy, when he confronted Harry in March 2000 about the 1992 deed, the first thing that Harry mentioned was that Marvin and Ernestine were ill at the time of the 1992 conveyance. Tommy confirmed that Marvin and Ernestine were in ill health in 1992. Tommy also testified that Harry then boasted that Tommy ought to be glad that Harry had not taken the "home place" because Marvin and Ernestine "would have signed anything I put in front of them." One year after Harry made this statement, Marvin and Ernestine did sign a "gift deed" conveying their homestead to Harry.

Tommy further testified that Ernestine denied that she and Marvin had deeded their home to Harry. Letters written by Ernestine to Harry in 2001 indicate that she had not intended to give him her home and informed Harry that he would not receive anything more from her. Not only does correspondence in the record indicate that Ernestine did not want Harry to receive any portion of her estate, Marvin's and Ernestine's 1989 will expressly disinherited Harry. The record reflects that, in October 2001, Harry changed the locks on Marvin and Ernestine's home and refused

to allow Ernestine access to retrieve any of her personal items.

Evidence was also presented depicting Harry as abrasive and domineering. Testimony was admitted that, at times, he was verbally abusive to his parents. The record further reflects that, over the years, Harry had a volatile relationship with his parents.

At trial, Harry introduced a videotape from November 2001. The video shows Harry taking Ernestine to the offices of Dace Manufacturing. Ernestine appears tired and not to be feeling well. Harry questions Ernestine regarding whether she wants to sue him, and she says she does not. The video shows Ernestine signing an affidavit, prepared by Harry, in which Ernestine states that she does not want to sue Harry. The video then shows Ernestine calling her attorney from Harry's office with Harry at her side. Once she reaches her attorney's office on the telephone, Harry instructs his mother what to say regarding dismissing the suit against him.

The record further reflects that Ernestine later regretted initiating the dismissal of the suit and continued the prosecution of the suit against Harry.

Applying the appropriate standard of review, we hold that legally sufficient evidence was presented to support the jury's finding of undue influence, which supports the portion of the trial court's judgment voiding and cancelling the 2001

conveyance.[4]

We overrule Harry's second issue.

Marvin's 2001 Will

In his fifth issue, Harry contends that the trial court erred when it rendered judgment that the October 17, 2001 will signed by Marvin was not his last will and testament.

In the charge, the jury was instructed that it should answer "no" to the question asking whether the October 17, 2001 will was Marvin's last will and testament if it found that Marvin did not have testamentary capacity at the time. In this regard, the jury was instructed,

> Testamentary capacity means sufficient mental ability, at the time of will execution, to understand the business in which the testator is engaged, the effect of his act in making the will, and the nature and extent of his property; the testator must also know his next of kin and the natural objects of his bounty, and have sufficient memory to assimilate the elements of the business to be transacted, to hold those elements long enough to perceive their relation to each other, and to form a reasonable judgment as to them.

See Lowery v. Saunders, 666 S.W.2d 226, 232 (Tex. App.—San Antonio 1984, writ ref'd n.r.e.) (providing similar definition).

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[4] Because the undue influence finding supports the trial court's judgment voiding and cancelling the 2001 conveyance, we need not address Harry's challenges to the jury's duress finding.

In support of this issue, Harry asserts that the 2001 will was "self-proving" and thus valid. However, as the proponent of the 2001 will, Harry had the burden to prove that his father had testamentary capacity on October 17, 2001 when he executed the new will. *See Croucher v. Croucher*, 660 S.W.2d 55, 57 (Tex. 1983). The fact that a will is self-proving does not relieve the will's proponent of the burden to establish testamentary capacity of the testator. *Id.*

Harry contends that "[t]here is no probative evidence that Marvin was incompetent at the time he signed the will." As mentioned, it was Harry's burden, as proponent of the 2001 will, to show that Marvin had testamentary capacity. Because Harry had the burden at trial to show that Marvin had testamentary capacity, we reject Harry's contention that "no evidence" supports the jury's finding regarding the 2001 will; Tommy was not obliged to prove that Marvin did not have testamentary capacity. *See Yap v. ANR Freight Sys*., 789 S.W.2d 424, 425 (Tex. App.—Houston [1st Dist.] 1990, no writ).

When a party challenges the legal sufficiency of the evidence on an issue on which he had the burden of proof at trial, he must demonstrate on appeal that the evidence conclusively establishes all vital facts in support of the issue as a matter of law. *Dow Chem. Co. v. Francis*, 46 S.W.3d 237, 241 (Tex. 2001); *Sterner v. Marathon Oil Co.*, 767 S.W.2d 686, 690 (Tex. 1989). In determining whether legally

sufficient evidence supports the finding under review, we must consider evidence favorable to the finding if a reasonable fact finder could consider it, and disregard evidence contrary to the finding unless a reasonable fact finder could not disregard it. *Keller*, 168 S.W.3d at 827.

Here, after considering the evidence supporting the finding in the context of the record as a whole, we conclude that Harry has not demonstrated on appeal that the evidence conclusively establishes that Marvin had testamentary capacity as a matter of law. Although Harry points to testimony arguably supporting a finding that Marvin had testamentary capacity, other witnesses, including Tommy, Marvin's granddaughter, a court-appointed investigator, and Marvin's court-appointed guardian, provided testimony weighing against such a finding. Given the record, the jury was entitled to believe the witnesses' testimony weighing against an implied finding of testamentary capacity and to disbelieve the testimony cited by Harry. We defer to the jury's determination in this case regarding the credibility of the witnesses, the weight to be given the testimony, and the resolution of the evidentiary conflicts. *See id.* at 819, 822.

We hold that the evidence was legally sufficient to support the determination that the October 17, 2001 will signed by Marvin was not his last will and testament.

We overrule Harry's fifth issue.

Undue Prejudice and Perjury

In his sixth issue, Harry contends that the trial court erred by "signing the final judgment confirming the jury verdict because the jury verdict resulted from aggravated perjury and undue prejudice" which "inflamed" the jury. Harry raises several arguments to support this issue.

Providing little supporting argument and citing no legal authority, Harry first briefly alludes to the trial court's ruling allowing Tommy to testify that, in 1989, Harry discharged a firearm at his parents' home following an argument between Harry and his parents. The testimony revealed that the argument was precipitated by Harry's burning down of a vacant house on his parents' property without their permission. Harry points out that, at trial, he objected that the prejudicial effect outweighed the probative value of the testimony. *See* TEX. R. EVID. 403. When a party objects under Rule 403, a trial court must conduct a balancing test, weighing the danger of prejudice against the probative value of the evidence. *Waldrep v. Tex. Employers Ins. Ass'n*, 21 S.W.3d 692, 703 (Tex. App.—Austin 2000, pet. denied). To obtain a reversal because of admitted evidence, the appellant must demonstrate that the whole case turns on the particular evidence admitted. *City of Brownsville v. Alvarado*, 897 S.W.2d 750, 753–54 (Tex. 1995). Harry has not demonstrated that the entire case turned on the disputed testimony.

Moreover, the disputed testimony was relevant to show how Harry interacted with and responded to his parents. Any risk of unfair prejudice must be measured against the relevancy of the evidence. *See Campbell v. State*, 118 S.W.3d 788, 795 (Tex. App.—Houston [14th Dist.] 2003, pet. denied). Given the claims in this case, it was important for the jury to be given historical information regarding Harry's relationship with his parents. We cannot say that the trial court abused its discretion by admitting Tommy's testimony regarding Harry's use of the firearm and the events surrounding the incident.

Harry also cites Tommy's testimony regarding a letter written by Harry to Tommy's employer. When asked on direct examination whether Harry sent a letter to his employer asking Tommy to be fired, Tommy responded that the letter was sent to the owner of the company for which he worked. Harry contends that Tommy's testimony in this regard constituted "perjury" that prejudiced the jury against him. However, as pointed out by Harry, the letter, which was admitted into evidence, did not request that Tommy's employer fire him. Thus, any potential prejudice that may have been caused by Tommy's testimony was ameliorated by the introduction of the letter.

Finally, Harry complains that the closing argument of Tommy's counsel was prejudicial and misrepresented the evidence. Harry made no objection to any of the

argument cited; thus, his complaint is waived.[5] *See* TEX. R. APP. P. 33.1; *Barras v. Monsanto Co*., 831 S.W.2d 859, 865 (Tex. App.—Houston [14th Dist.] 1992, writ denied) (holding that complaint of error in closing argument waived by failure to object).

We overrule Harry's sixth issue.

Jurisdiction

In his seventh issue, Harry contends, "The trial court erred in signing the final judgment because it lacked jurisdiction over the estate of Ernestine Dace." Despite Harry's assertion that Tommy made claims on behalf of Ernestine's estate, the record reflects otherwise. Tommy only asserted claims against Harry on behalf of Marvin's estate, and the trial court made no award to Ernestine's estate in its judgment. Although the jury was asked to make fact findings that involved Ernestine, these were simply factual determinations and did not result in any award to Ernestine's estate.

Moreover, as pointed out by Tommy, the record reflects that, after her death, everything in Ernestine's estate passed to Marvin and became part of his estate.

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[5] In his reply brief, Harry asserts for the first time that he was not required to object to the complained-of closing argument because the argument was "incurable" jury argument. Because this contention was not raised in Harry's opening brief, we do not consider it. *See Yazdchi v. Bank One, Tex., N.A.*, 177 S.W.3d 399, 404 n. 18 (Tex. App.—Houston [1st Dist.] 2005, pet. denied) (declining to consider substantive arguments raised by appellants for first time in reply brief).

Thus, any potential claims that Ernestine had against Harry also passed to Marvin.

We overrule Harry's seventh issue.

Conclusion

We reverse the portions of the judgment awarding $248,058.50 in damages, $55,008.65 in prejudgment interest, and $34,000 in attorney's fees against Harry and render judgment that Tommy, as independent executor of Marvin's estate, takes nothing by the breach of contract claim. We affirm the remaining portions of the judgment.

Laura Carter Higley
Justice

Panel consists of Justices Taft, Hanks, and Higley.