Opinion issued August 29, 2013

In The

Court of Appeals

For The

First District of Texas

NO. 01-11-00746-CV

HOUSTOUN, WOODARD, EASON, GENTLE, TOMFORDE AND ANDERSON, INC., D/B/A INSURANCE ALLIANCE, Appellants

V.

ESCALANTE'S COMIDA FINA, INC., Appellee

On Appeal from the 215th District Court
Harris County, Texas
Trial Court Case No. 2009-52295

MEMORANDUM OPINION

Escalante's Comida Fina, Inc. sued its former insurance agent, Houstoun, Woodard, Eason, Gentle, Tomforde and Anderson, Inc., d/b/a Insurance Alliance ("Insurance Alliance" or "Alliance") alleging violations of the Deceptive Trade

Practices Act[1] (DTPA) and the Texas Insurance Code by making misrepresentations and failing to disclose information concerning its policy and the coverage afforded thereunder. The jury returned a verdict in favor of Escalante's and the trial court signed a final judgment awarding $56,835 in actual damages, $75,780 additional damages for Insurance Alliance's "knowing" violation of the DTPA and the Insurance Code, attorney's fees, costs, and pre- and post-judgment interest.

Insurance Alliance raises the following ten points of error:

1) The trial court erred in submitting jury questions 3A, 3B, 4A, and 5B regarding DTPA, Insurance Code violations, and breach of contract because there was legally insufficient evidence of causation to support the jury submissions;

2) The trial court erred in submitting jury questions 3A and 4A regarding DTPA violations and Insurance Code violations because there was legally insufficient evidence that Insurance Alliance made any misrepresentation of fact;

3) The trial court erred in submitting jury question 3B regarding failure to disclose because there was legally insufficient evidence for the submission and because there was a disclosure as a matter of law;

4) The trial court erred in refusing to include instructions for jury questions 3A, 3B, 4A, and 7B, which stated longstanding Texas law with respect to an insurance agent's duties;

5) The trial court erred in submitting a breach of contract question to the jury because there was legally insufficient evidence that the parties entered into a valid and binding agreement or that Insurance Alliance breached any alleged agreement to procure coverage that compared "apples to apples" to the prior coverage;

[1] TEX. BUS. & COM. CODE ANN. §§ 17.001–.926 (West 2011 & Supp. 2012).

6) The trial court erred in submitting a breach of contract question because a cause of action based on the alleged failure to perform a professional service is a tort rather than a breach of contract;

7) The trial court erred in entering final judgment because the only evidence was that the off premises power failure to Escalante's restaurants resulted from direct physical loss or damage to the overhead power lines, excluding coverage for Escalante's "Ike claim" for business interruption and the jury's finding was against that great weight of the evidence;

8) The trial court erred in entering final judgment because there was legally and factually insufficient evidence to support the damage award because Escalante's did not put on evidence of what the Allied policy would have paid had it been identical to the prior policy;

9) The trial court erred in submitting a question on knowing conduct because there was legally and factually insufficient evidence that Insurance Alliance knowingly provided a policy that was not comparable to the prior policy; and

10) The trial court erred in allowing expert testimony regarding attorney's fees despite Escalante's failure to properly designate an expert and to provide documents relied upon by the expert to Insurance Alliance.

We reverse and render judgment in Insurance Alliance's favor.

Background

Between 2003 and 2008, Escalante's owned and operated four restaurants in the Houston area. Between 2003 and 2006 the property and casualty insurance policy on the restaurants was through Ohio Casualty Group,[2] which provided coverage, with certain exceptions, in the event of loss of business income caused

[2] The policy had been acquired for Escalante's by Escalante's' insurance agent, Mace Meeks.

by an off-premises power or utilities outage. After Hurricane Rita hit Houston in 2005, Escalante's claimed against the policy and Ohio Casualty paid.

Section III, n. of the Ohio Casualty Policy states in pertinent part:

> The following items are added to the Additonal Coverages section of Part A coverage of the Property Coverage form:
>
> n. Off Premises Power Failure
>
> We will pay up to $25,000 for loss of Business Income and Extra Expenses caused by the failure of power or other utility service supplied to the described premises if the failure occurs away from the described premises.
>
> The failure of power or other utility service must result from direct phyicial loss or damage by the Covered Cause of Loss.
>
> We will only pay for the loss you sustain after the first 24 hours following the direct physical loss to the off premises property. Off Premises Power Failure under this Additional Coverage does not apply to failure of power or other utility service resulting from direct physical loss or damage by any Covered Cause of Loss to overhead transmission lines.

Patrick Torres, Escalante's' President, testified that during this same time period, Insurance Alliance's principal, Kirk Gentle, was seeking to add Escalante's as a client. Toward this end, Escalante's provided Alliance a copy of its then-current Ohio Casualty policy and agreed to purchase the Alliance coverage if it matched the Ohio Casualty coverage but cost less. Alliance told Escalante's that it had such a policy. Torres testified that he specifically reminded Alliance about the Escalante's experience with Hurricane Rita and emphasized that the coverage had to be the same as Ohio Casualty's. In fact, when Torres asked if the Alliance

coverage matched the Ohio Casualty policy "apples to apples," he was assured it was the same.

In reliance upon Alliance's assurances, Torres testified that Escalante's declined to renew with Ohio Casualty and purchased an Allied Property & Casualty Insurance Company policy issued in 2006. Escalante's made no claims on the Allied policy during the first year and renewed the policy for 2007-2008.

In September 2008, Hurricane Ike caused a temporary loss of electrical power at all four restaurants—from which business interruption Escalante's lost revenue. Apart from minor damage suffered at one location, none of the other restaurant locations suffered physical damage, but all locations experienced food spoilage and business interruption losses. Escalante's complains that it never recovered for these losses under the Allied Policy because losses caused by an off-premises power failure were expressly excluded.

Exclusion (e) to Section B of the Allied Policy states:

> We will not pay for loss or damage caused directly or indirectly by any of the following. Such loss or damage is excluded regardless of any other causes or event that contributes concurrently or in any sequence to the loss.
>
> . . .
>
> e. Off-Premise Services
>
> The failure of power or other utility service supplied to the described premises, however caused, if the failure occurs away from the described premises.

> But if a failure of power or other utility service results in a Covered Cause of Loss, we will pay for the loss or damage caused by that Covered Cause of Loss.

After discussions with its prior insurance agent, Meeks, Escalante's terminated its relationship with Insurance Alliance and once again retained Meeks as its insurance agent. Escalante's alleges that had the Allied coverage been identical to its prior Ohio Casualty policy, its business interruption losses would have been covered. Escalante's sued Alliance for its failure to obtain insurance that matched the prior coverage "apples to apples."

The jury found that: (1) the off-premises power failure did not result from direct physical loss or damage to overhead transmission lines; Insurance Alliance (2) failed to render professional service of advice, judgment, opinion or similar professional skill; (3A) engaged in false, misleading or deceptive acts or practices upon which Escalante's relied to its detriment and which were a producing cause of damages; (3B) failed to disclose information about goods or services that was known at the time of the transaction with the intention to induce Escalante's into a transaction it otherwise would not have entered into if the information had been disclosed; (3C) engaged in the conduct knowingly; (4A) engaged in an unfair or deceptive act that caused damages to Escalante's; (5A) Escalante's and Insurance Alliance agreed that Insurance Alliance would obtain insurance coverage for Escalante's comparable to the insurance coverage provided under the Ohio

Casualty policy; (5B) Insurance Alliance failed to comply with the agreement; (6A) the reasonable damages to compensate Escalante's were $18,945 for each of Escalante's four locations; (6B) $75,780 additional damages for knowing conduct should be awarded to Escalante's and; (7) Escalante's was also negligent and 25% responsible for its own damages.

Policy Interpretation

Insurance contracts are subject to the same rules of construction as ordinary contracts. *Archon Invs., Inc. v. Great Am. Lloyds Ins. Co.*, 174 S.W.3d 334, 338 (Tex. App.—Houston [1st Dist.] 2005, pet. denied) (citing *Trinity Universal Ins. Co. v. Cowan*, 945 S.W.2d 819, 823 (Tex. 1997)). When a policy permits only one reasonable interpretation, we construe it as a matter of law and enforce it as written. *Id.* (citing *Upshaw v. Trinity Cos.*, 842 S.W.2d 631, 633 (Tex. 1992)). When construing an insurance policy, "[w]e must strive to effectuate the policy as the written expression of the parties' intent." *Id.* (citing *State Farm Life Ins. Co. v. Beaston*, 907 S.W.2d 430, 433 (Tex. 1995)). To discern this intent of the parties, the court considers the entire writing in order to harmonize and give effect to all the policy's provisions so none are rendered meaningless, no single provision taken alone will be given controlling effect, and all the provisions are considered with reference to the whole instrument. *See In re Serv. Corp. Int'l*, 355 S.W.3d 655, 661 (Tex. 2011). If the term to be construed is unambiguous and susceptible

of only one construction, we must give the words in the policy their plain meaning. *Archon*, 174 S.W.3d at 338 (citing *Devoe v. Great Am. Ins.*, 50 S.W.3d 567, 571 (Tex. App.—Austin 2001, no pet.)).

The "Off Premises Power Failure" section of the Ohio Casualty policy unambiguously sets out coverage up to $25,000 in lost Business Income and Extra Expenses incurred as a result of an off-premises power failure after the first twenty-four hours, unless the failure results from "direct physical loss or damage by any Covered Cause of Loss to overhead transmission lines." Giving these unambiguous terms their ordinary and plain meaning, we conclude that except for failure caused by direct physical loss or damage to overhead transmission lines, the Ohio Casualty policy covers Escalante's Business Income losses caused by an off-premises power failure.

Sufficiency of Evidence Regarding Cause of Off-Premises Power Outage

In its seventh point of error, Alliance contends that establishment of causation under Escalante's' DTPA, Insurance Code, and breach of contract claims requires sufficient evidence that Escalante's business interruption losses from Hurricane Ike—not covered by the Allied Policy—would have been covered by the prior Ohio Casualty policy. Alliance maintains that the Ohio Casualty policy's express exclusion for off-premises power failures resulting from direct physical loss or damage to overhead transmission lines requires proof establishing the

inapplicability of the exclusion, that the only evidence as to the cause of Escalante's power outage during Ike established that the power outage resulted from just such a direct physical loss or damage to the overhead transmission lines, and that the jury's contrary finding was against the great weight of the evidence. We construe this argument as a challenge to both the legal and factual sufficiency of the evidence in support of the jury's finding that the off-premises power failure to Escalante's restaurants did *not* result from the excluded cause.

a. Standard of Review

A party who attacks the legal sufficiency of an adverse finding on an issue on which that party has the burden of proof must demonstrate on appeal that the evidence establishes, as a matter of law, all vital facts in support of the issue. *Dow Chem. Co. v. Francis*, 46 S.W.3d 237, 241 (Tex. 2001). When an appellant attacks the legal sufficiency of an adverse finding on an issue for which it did not have the burden of proof, it must demonstrate that there is no evidence to support the adverse finding. *See Croucher v. Croucher*, 660 S.W.2d 55, 58 (Tex. 1983).

Our review of legal sufficiency credits favorable evidence if a reasonable juror could do so and disregards contrary evidence unless a reasonable juror could not. *City of Keller v. Wilson*, 168 S.W.3d 802, 827 (Tex. 2005). We consider the evidence in the light most favorable to the finding under review and indulge every reasonable inference that would support it. *Id.* at 822. We sustain a no-evidence

contention only if: (1) the record reveals 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 conclusively establishes the opposite of the vital fact. *Id.* at 810.

Our review of a challenge to the factual sufficiency of the evidence must consider and weigh all evidence and set aside the judgment only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. *Arias v. Brookstone, L.P.*, 265 S.W.3d 459, 468 (Tex. App.—Houston [1st Dist.] 2007, pet. denied) (citing *Cain v. Bain*, 709 S.W.2d 175, 176 (Tex. 1986)). Likewise, when a party challenges the factual sufficiency of the evidence supporting an adverse finding on which the opposing party had the burden of proof, we should set aside the finding only if the evidence supporting it is so weak as to be clearly wrong and manifestly unjust. *Pitts & Collard, L .L.P. v. Schechter*, 369 S.W.3d 301, 312 (Tex. App.—Houston [1st Dist.] 2011, no pet.) (citing *Cain*, 709 S.W.2d at 176)).

Whether reviewing the evidence for legal or for factual sufficiency, we are mindful that the jury is the sole judge of a witnesses' credibility, and may choose to believe one witness over another; a reviewing court may not impose its own opinion to the contrary. *City of Keller*, 168 S.W.3d at 819. Of course, "[t]he jury's

decisions regarding credibility must be reasonable." *Id.* at 820. "Jurors cannot ignore undisputed testimony that is clear, positive, direct, otherwise credible, free from contradictions and inconsistencies, and could have been readily controverted." *Id.* Whenever reasonable jurors could decide what testimony to discard, a reviewing court must assume they did so in favor of their verdict, and disregard it in the course of legal sufficiency review. *Id.*; *see also Uniroyal Goodrich Tire Co. v. Martinez*, 977 S.W.2d 328, 338 (Tex. 1998) ("[T]he judgments and inferences of experts or skilled witnesses, even when uncontroverted, are not conclusive on the jury or trier of fact, unless the subject is one for experts or skilled witnesses alone, where the jury or court cannot properly be assumed to have or be able to form correct opinions of their own based upon evidence as a whole and aided by their own experience and knowledge of the subject of inquiry.")

b. Discussion and Analysis

The parties agree that to establish causation for its DTPA, Insurance Code, and breach of contract claims, Escalante's had the burden to show that its business interruption losses from Hurricane Ike—not covered by its Allied Policy—would have been covered by its Ohio Casualty policy. *See Metro Allied Ins. Agency, Inc. v. Lin*, 304 S.W.3d 830, 835–36 (Tex. 2009) (per curium) (stating that in order to prove causation in failure-to-procure-coverage case, plaintiff must show that

coverage for his claims could have been obtained, because "the injury would have been the same regardless"). The parties disagree, however, about which side had the burden as to the applicability of the Ohio Casualty coverage. Nevertheless, it is unnecessary for the Court to reach that issue because the evidence at trial conclusively established the applicability of the policy exclusion (i.e., that the off-premises power failure was caused by damage to overhead transmission lines) and no evidence was admitted in support of the jury's contrary finding. *See Dow Chem. Co.*, 46 S.W.3d at 241 (party attacking legal sufficiency of adverse finding on issue on which that party has burden of proof must demonstrate that the evidence establishes, as matter of law, all vital facts in support of issue); *Croucher*, 660 S.W.2d at 58 (party attacking legal sufficiency of adverse finding on issue for which it did not have burden of proof must demonstrate that there is no evidence to support adverse finding).

Asked whether the off-premises power outage the restaurants experienced resulted from "direct physical loss or damage to overheard transmission lines," the jury answered "no" as to all four restaurants. The only evidence admitted as to the source of the off-premises power outage came from the deposition testimony of CenterPoint Energy's corporate representative, Scott Humble, and the CenterPoint business records upon which he relied. Humble, who had been employed by CenterPoint and/or its predecessor company for nearly thirty years, was a senior

service consultant who dealt with the circuits and the way power was distributed throughout the CenterPoint system on a daily basis. Based upon his expertise and familiarly with CenterPoint's power distribution system, he was designated by CenterPoint to testify regarding the cause of the off-premises power outage experienced by the restaurants during Hurricane Ike.

Escalante's argues that Humble's opinion testimony that the power outage was due to damage to the overhead power and transmission lines conflicted with other material portions of his testimony, and was unsupported by the business records upon which he relied.[3] According to Escalante's, it was the jury's province to reconcile the conflicts and inconsistencies between Humble's "opinion" testimony as to the cause of the power outage, the remainder of his testimony, and CenterPoint's records. *See City of Keller*, 168 S.W.3d at 819.

Contrary to Escalante's' characterization, however, Humble's testimony, was neither internally inconsistent nor contradictory. From the beginning of his testimony, he established that there were three possible reasons for the power disruption Escalante's experienced during Hurricane Ike: (1) a problem with or damage to the substation that services a given property, (2) damage to the

[3] Escalante's contends that Humble's testimony was not based upon his first-hand knowledge. The record does not demonstrate that Escalante's objected to Humble's testimony on this or any other basis. *See* TEX. R. APP. P. 33.1 (stating that to preserve argument for appellate review, party must present it to trial court by timely request, motion, or objection, state specific grounds therefore, and obtain ruling).

underground portion of the distribution line between the substation and property, or (3) damage to the above-ground portion of the distribution line between the substation and property. After reviewing CenterPoint's records and documentation regarding the power loss, Humble specifically excluded the first two possibilities—i.e., damage to or problems associated with the substation and damage to the underground distribution system—as causes for the power loss. Using deductive reasoning, Humble opined that the power loss could have been caused only by damage to the above-ground portion of the distribution line between the substation and the property.

Humble noted that in some instances, the records referenced numerous problems or damage to the above-ground portion of the distribution circuit, and he could not be sure *which particular instance* was responsible for the power outage Escalante's experienced. Likewise, Humble did not know the *exact location* where the problem in the overhead transmission lines occurred, but his testimony was, nevertheless, clear and unequivocal—the off-premises power failure was caused by damage to the overhead transmission lines. In particular, Humble testified:

> Q. With regard to all four locations that we've talked about, the Escalante's restaurant, to wrap up, based on all the information that's available to you and your 28 years with the company working with distribution—power distribution, is there any reasonable explanation for the power going off at any of those four restaurants other than some damage or combination of damage in the overhead portion of the distribution system?

. . .

A. I cannot pinpoint any locations (sic) that happened, occurred on any of these locations. It appears that Hurricane Ike knocked out electricity to all four locations.

Q. (By Mr. Oldenettel) By damaging what?

A. By damaging the overhead power lines.

Q. Is that speculation?

A. No.

Although it could have sought to admit its own expert testimony on this point, Escalante's introduced no evidence at trial to contradict Humble's testimony. As such, the only evidence before the jury was Humble's testimony based upon his specialized knowledge of power distribution systems, and in particular, CenterPoint's system in the Houston area. Under these circumstances, the jury was not free to disbelieve such unambiguous and uncontradicted testimony from a skilled witness. *City of Keller*, 168 S.W.3d at 820 ("Jurors cannot ignore undisputed testimony that is clear, positive, direct, otherwise credible, free from contradictions and inconsistencies, and could have been readily controverted."); *Uniroyal Goodrich Tire*, 977 S.W.2d at 328 (stating uncontradicted opinions of experts and skilled witnesses are conclusive and binding upon fact-finder if subject of testimony is one for experts or skilled witnesses alone).

We conclude that the evidence establishes as a matter of law that the power failure was due to damage to the overhead transmission lines, *Dow Chem. Co.*, 46

S.W.3d at 241, and that there is no evidence to support the jury's adverse finding. *Croucher*, 660 S.W.2d at 58. We hold, therefore, that there was legally insufficient evidence supporting the jury's finding that the off-premises power failure to Escalante's restaurants did *not* result from direct physical loss or damage to overhead transmission lines.

We sustain Insurance Alliance's seventh point of error on legal sufficiency grounds.[4]

Conclusion

We reverse the judgment of the trial court and render judgment in favor of Insurance Alliance.

Jim Sharp
Justice

Panel consists of Justices Keyes, Sharp, and Huddle.

[4] Because of our disposition of this issue, we need not address any of Insurance Alliance's remaining issues.