Affirmed as Modified in Part, Reversed and Remanded in Part, and Majority and Dissenting Opinions filed January 20, 2011.

In The

Fourteenth Court of Appeals

NO. 14-08-00983-CV

THOMAS J. HENNEN, Appellant/Cross-Appellee

V.

JERRY MCGINTY AND VILLAS BY DESIGN, INC., Appellees/Cross-Appellants

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On Appeal from the 157th District Court
Harris County, Texas
Trial Court Cause No. 2005-41193

DISSENTING OPINION

A homeowner recovered $651,230.72 as the reasonable and necessary cost to repair his house to remedy the homebuilder's failure to comply with its contract. To affirm the trial court's judgment, we must conclude the record contains legally sufficient evidence that this amount was a reasonable and necessary cost to repair the house. Because the evidence is legally insufficient on this point, this court should reverse rather than affirm the judgment for this damage award.

Background

In February 2001, appellant/cross-appellee Thomas J. Hennen bought a vacant lot facing Galveston Bay in Seabrook, Texas. In May 2001, Hennen and appellee/cross-appellant Villas By Design, Inc. (hereinafter, "Villas") entered into a contract for Villas to build a house on that lot. Hennen moved into the house in November 2002 and experienced various problems, including numerous water leaks or areas of water intrusion in the house. Though Villas tried to address these problems and stop water from entering the house, Hennen continued to have problems and informed Villas of this situation. In an email sent on June 19, 2003, Hennen asked Villas to return the keys to Hennen's house and told Villas that on June 23, 2003, he would begin pursuing all available legal recourse against Villas.

After June 2003, Villas did not have access to the house and Hennen did not give Villas permission to undertake any further repairs. In July 2003, Hennen discovered extensive and noticeable mold damage to the vertical walls going up to the ceiling in an upstairs bathroom. During that same month, Hennen retained a lawyer to represent him in pursuing his claims against Villas. In August 2003, an inspection company, PE Services, inspected Hennen's house and conducted mold testing. PE Services determined significant fungal contamination permeated the house. Following Hennen's receipt of PE Services's report in October 2003, water damage and mold was identified in the exterior walls, interior walls, ceilings, flooring, areas around several plumbing fixtures, and inside the heating, ventilation, and air conditioning systems. Hennen learned that water penetration in the house was so widespread that repairing the damage would require replacement of the entire roof, all of the home's stucco, and every window in the house.

Hennen retained the services of Richard Guerra-Prats, a Corpus Christi contractor. In its October 2003 report, PE Services documented repairs that needed to be made on the house and recommended mold remediation. According to Guerra-Prats, PE Services

prepared a mold-remediation protocol. Based on this protocol, in 2003, Guerra-Prats estimated the cost to remediate the mold using this protocol and to then build back the parts of the house altered by the remediation. This 2003 estimate was not introduced into evidence at trial and was not the basis of Hennen's request for damages at trial. Though Hennen met with attorneys and had various inspections and tests performed on the house, Hennen did not file suit until June 22, 2005, two years after he denied Villas access to the house.

Between June 2003 and May 2008, when this case went to trial, no work was performed to prevent or mitigate water intrusion into the house. Consultant Mike Krismer provided Hennen with a mold-remediation protocol for the house in July 2006. Based on this protocol, in January 2007, Guerra-Prats provided Hennen with a detailed estimate as to how much it would cost, in January 2007, to remediate the mold using this protocol and to then build back the parts of the house altered by the remediation. The total cost Guerra-Prats estimated was $651,230.72.[1] This January 2007 estimate and Guerrra-Prats's trial testimony are the only evidence Hennen offered at trial to meet his burden of proving the amount of the reasonable and necessary cost to repair his house. The jury found that this amount was $651,230.72, the amount of Guerra-Prats's estimate, and the trial court rendered judgment awarding Hennen this amount of damages.

Standard of Review

In their second cross-issue on appeal, Villas and appellee/cross-appellant Jerry McGinty (hereinafter collectively, "Villas Parties") assert, among other things, that the evidence is legally insufficient to support the jury's finding that $651,230.72 was the reasonable and necessary cost to repair Hennen's house. When reviewing the legal

[1] In part of its opinion, the majority indicates that this estimate was performed in 2003. *See ante* at pp. 3–4. However, this estimate was made in January 2007, more than four years after the water intrusion began at the house.

sufficiency of the evidence, we consider the evidence in the light most favorable to the challenged finding and indulge every reasonable inference that would support it. *City of Keller v. Wilson*, 168 S.W.3d 802, 823 (Tex. 2005). We must credit favorable evidence if a reasonable fact finder could and disregard contrary evidence unless a reasonable fact finder could not. *See id.* at 827. We must determine whether the evidence at trial would enable reasonable and fair-minded people to find the facts at issue. *See id.* The fact finder is the only judge of witness credibility and the weight to give to testimony. *See id.* at 819.

Need for Evidence Beyond Proof of What One Contractor Would Charge

Texas has a strong public policy in favor of preserving freedom of contract. *See Fairfield Ins. Co v. Stephens Martin Paving, LP*, 246 S.W.3d 653, 664 (Tex. 2008). Unless their contract is contrary to an applicable law or public policy, parties in Texas enjoy a broad freedom of contract. *See In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124, 129 (Tex. 2004). This means that contractors generally have the right to charge unreasonably high prices for their goods and services, and parties have the freedom to choose to pay unreasonably high prices for goods and services. *See id*. In light of this freedom of contract, evidence of the amounts charged or paid is not legally sufficient evidence that these charges are reasonable or necessary; instead, separate evidence must be offered that raises a fact issue regarding the reasonableness and necessity of the charges or costs in question. *See Mustang Pipeline Co. v. Driver Pipeline Co.*, 134 S.W.3d 195, 200–01 (Tex. 2004); *Dallas Ry. & Terminal Co. v. Gossett*, 294 S.W.2d 377, 382–83 (Tex. 1956); *O & B Farms, Inc. v. Black*, 300 S.W.3d 418, 422–23 (Tex. App.—Houston [14th Dist.] 2009, pet. denied); *Dumler v. Quality Work By Davidson*, No. 14-06-00536-CV, 2008 WL 89961, at *4 (Tex. App.—Houston [14th Dist.] Jan. 10, 2008, no pet.) (mem. op.); *Jackson v. Gutierrez*, 77 S.W.3d 898, 904 (Tex. App.—Houston [14th Dist.] 2002, no pet.); *Allright, Inc. v. Lowe*, 500 S.W.2d 190, 191–92 (Tex. Civ. App.—Houston [14th

Dist.] 1973, no writ); *Ebby Halliday Real Estate, Inc. v. Murnan*, 916 S.W.2d 585, 589 (Tex. App.—Fort Worth 1996, writ denied).

Sufficiency of Evidence Regarding Necessity of the Repairs

Regarding necessity, Hennen points to Krismer's expert testimony. Though Krismer did testify regarding various construction defects in the house, Krismer did not testify as to the amount of any alleged repair costs or damages. Nor did Krismer testify that his remediation plan was reasonable or necessary. At trial, there was no direct evidence that it would cost $651,230.72 to make the necessary repairs to the house. Nor was there evidence that Villas's breaches of contract in constructing the house resulted in damages that would cost $651,230.72 to repair. Instead, Hennen relied upon Guerrra-Prats's testimony that it would cost this amount in January 2007 to remediate the mold using Krismer's protocol and to then build back the parts of the house altered by the remediation. After four years of water intrusion into the house with no effort to prevent or mitigate this intrusion, Guerra-Prats estimated how much he would charge to remediate the mold and restore the house after remediation. Even considering the evidence in the light most favorable to the jury's finding and indulging every reasonable inference that would support it, the trial evidence would not enable reasonable and fair-minded people to find that $651,230.72 was the cost of necessary repairs.

Sufficiency of Evidence that $651,230.72 was a Reasonable Cost for the Repairs

Regarding reasonableness, Krismer did not testify as to what it would cost to implement his mold-remediation protocol. For this evidence, Hennen points to Guerra-Prats's testimony. In addition to testifying about his qualifications and experience, Guerra-Prats testified as follows:

- Guerra-Prats is a general contractor from Corpus Christi, Texas.

- In January 2007, based on Krismer's mold-remediation protocol, Guerra-Prats provided Hennen with an estimate of the costs of implementing the protocol (hereinafter, "Remediation Work") and of building back the parts of the house altered by the remediation (hereinafter, "Build Back Work").

- Guerra-Prats provided Hennen with bids to repair Hennen's house as of January 2007. In Guerra-Prats's bid for the Remediation Work, the cost to Hennen is $246,992.96. In Guerra-Prats's bid for the Build Back Work, the cost to Hennen is $404,238.76. The total of these two bids or cost estimates is $651,230.72.

- Guerra-Prats provided Hennen with detailed information reflecting the items of parts and labor that form the basis for these bids or cost estimates.

- The prices reflected in Guerra-Prats's costs estimates were generated by a software program that used Houston prices. Some of the costs came from subcontractors or historical data or jobs that Guerra-Prats had done.

- "Not every price is right, so we have to cross-reference and double check all our pricing."

- Between January 2007 and May 2008 (the time of trial), the costs for this type of work increased across the board by ten to fifteen percent.

- In coming up with the numbers for the bid for the Build Back Work, Guerra-Prats did not get competitive bids from contractors in Seabrook, Texas.

Neither Guerra-Prats nor any other witness (1) provided the jury with an opinion regarding the reasonable cost of the necessary repairs to Hennen's house or (2) testified that the pricing in the two bids or cost estimates provided by Guerra-Prats was reasonable. Guerra-Prats's testimony that some of these prices were generated by computer software based on Houston prices does not address whether these prices were reasonable. Guerra-Prats's testimony that he cross-references and double-checks all of his prices is a vague statement that does not specify any substantive standard that Guerra-Prats uses to set his prices.

There was no direct evidence at trial that a reasonable cost to repair the house was $651,230.72. Under binding precedent, Guerra-Prats's testimony that he would charge Hennen a total of $651,230.72 for the Remediation Work and the Build Back Work is legally insufficient to support a finding that this amount is a reasonable cost to repair Hennen's house.[2] *See Mustang Pipeline Co.*, 134 S.W.3d at 200–201; *Dallas Ry. & Terminal Co.*, 294 S.W.2d at 382–83; *O & B Farms, Inc.*, 300 S.W.3d at 422–23; *Dumler*, 2008 WL 89961, at *4; *Allright, Inc.*, 500 S.W.2d at 191–92. If Guerra-Prats had opined that the amount in question was a reasonable and necessary cost to repair the house, this testimony would have been sufficient to raise a fact issue. *See Lowe*, 500 S.W.2d at 192. Though a fact issue can be raised even if no witness uses the word "reasonable," in the case under review, this can only occur if, considering the evidence in the light most favorable to the jury's finding and indulging every reasonable inference that would support it, the record contains evidence that would enable reasonable and fair-minded people to find $651,230.72 was a reasonable and necessary cost to repair Hennen's house. *See City of Keller*, 168 S.W.3d at 827. Neither Hennen nor the majority point to any such evidence, and a review of the record fails to reveal any.

The only case the majority cites regarding this issue is *Hernandez v. Lautensack*. *See* 201 S.W.3d 771, 777 (Tex. App.—Fort Worth 2006, pet. denied). Presuming for the sake of argument that this court should follow this opinion from a sister court of appeals, the *Hernandez* case is not on point. In *Hernandez*, an expert witness testified as to how much he would charge to replace the plaintiff's roof, but no witness opined that this amount was reasonable. *See id*. Nonetheless, the *Hernandez* court found legally sufficient evidence that this amount was reasonable based on evidence that this amount

[2] Even if the record contained evidence that Krismer's mold-remediation protocol was necessary, this evidence would not raise a fact issue as to whether Guerra-Prats's bids or cost estimates were reasonable. *See Dallas Ry. & Terminal Co.*, 294 S.W.2d at 382–83 (holding that proof certain services are necessary does not raise a fact issue as to the reasonable cost of these services).

was less than what the defendant himself would charge to replace the roof and proportionately less than what a third-party contractor would charge to replace part of the roof. *See id*. In the case under review, only Guerra-Prats testified concerning the amount it would cost Hennen to have the repair work done; therefore, the *Hernandez* case is not on point. *See id*.

Hennen has not paid any part of the $651,230.72, and Guerra-Prats's testimony was offered as a basis for a damage award in Hennen's favor. In this context, the requirement of independent evidence of the reasonableness of these charges is even more important to prevent excessive damage awards based on unreasonably high price quotes. Nonetheless, the majority effectively concludes that Guerra-Prats's testimony that he would charge $651,230.72 for the Remediation Work and Build Back Work is legally sufficient evidence that this amount is reasonable. This analysis conflicts with binding precedent that requires additional evidence to raise a fact issue regarding reasonableness. *See Mustang Pipeline Co.*, 134 S.W.3d at 200–201; *Dallas Ry. & Terminal Co.*, 294 S.W.2d at 382–83; *O & B Farms, Inc.*, 300 S.W.3d at 422–23; *Dumler*, 2008 WL 89961, at *4; *Allright, Inc.*, 500 S.W.2d at 191–92. This court should hold that the evidence is legally insufficient to establish that $651,230.72 was a reasonable and necessary cost to repair the house.

Conclusion

For this court to affirm the trial court's judgment awarding Hennen $651,230.72 in damages, the trial record must contain legally sufficient evidence that this amount was a reasonable and necessary cost to repair Hennen's house. Under this court's binding precedent, if there were legally sufficient evidence that the Remediation Work and Build Back Work were necessary to repair the house and if Guerra-Prats had provided the jury with an opinion that the stated amount was a reasonable charge for this work, then the evidence would be legally sufficient. But Guerra-Prats did not provide such an opinion, and under the applicable standard of review the trial evidence would not enable reasonable

and fair-minded people to find that $651,230.72 was a reasonable and necessary cost to repair Hennen's house. Because the evidence is legally insufficient to support this jury finding, Hennen may not recover damages based on repair costs, which were the only damages awarded in the trial court's judgment. Accordingly, this court should sustain the Villas Parties' second cross-issue and reverse the trial court's judgment awarding damages based on repair costs. Because the court instead affirms this part of the trial court's judgment, I respectfully dissent.

/s/ Kem Thompson Frost
Justice

Panel consists of Justices Anderson, Frost, and Seymore. (Anderson, J., majority).