Affirmed and Memorandum Opinion filed October 14, 2010.

In The

Fourteenth Court of Appeals

NO. 14-09-00273-CV

DUNCAN M. HARRISON, JR., D/B/A PAVECO ASPHALT PAVING, Appellant

V.

J.W. NELSON TRANSPORTS, INC., D/B/A GROENDYKE, Appellee

On Appeal from the 189th District Court
Harris County, Texas
Trial Court Cause No. 2006-71954

MEMORANDUM OPINION

Appellee J.W. Nelson Transports, Inc., d/b/a Groendyke ("Groendyke") filed suit against appellant Duncan M. Harrison, Jr. ("Harrison" or "Harrison, Jr."), alleging causes of action for negligence, negligent misrepresentation, and breach of warranty. The trial court awarded Groendyke damages and stipulated attorney's fees. Harrison now challenges the judgment, arguing that the evidence is legally insufficient to support any of Groendyke's claims. Harrison also argues that the trial court erred in entering a final judgment *nunc pro tunc*. We affirm.

BACKGROUND

Harrison is the owner of Paveco Asphalt Paving, a company that specializes in asphalt installation, repair, and resurfacing. Harrison observed Groendyke's trucking facility while repairing an asphalt parking lot at a nearby terminal in Lake Charles, Louisiana. Groendyke's parking lot was a composite of dirt, shell, and limestone, and Harrison offered to apply asphalt to its surface. According to Brad Nelson, Groendyke's terminal manager, the parking lot was already in a good, functional condition. Groendyke accepted the offer, however, because drivers often complained of tracking dirt into their trucks. By the terms of their contract, Harrison agreed to prepare the base and apply the asphalt for $99,500. The contract expressly provided an unconditional one-year warranty.

Harrison completed the parking lot in January 2005. Just over four months later, Groendyke paid an additional $20,000 for Harrison to apply a protective sealant to the asphalt. At the time of contract, Harrison represented that by shielding the asphalt from moisture and sun damage, the sealant would extend the life of the asphalt anywhere between ten and fifteen years. Without the sealant, the asphalt was expected to last twenty to thirty years.

Within two weeks of the date the sealant was applied, the asphalt began to show signs of deterioration, including cracks and deep rutting. In some areas, the asphalt completely broke apart. Harrison visually inspected the asphalt after receiving notice of the problems, but he did not offer to fix any of the damage. In his opinion, the deterioration was caused by a failure of the base.

Groendyke hired civil engineer Walt Jessen to determine whether the parking lot could be repaired. Because of the widespread damage, Jessen recommended that Groendyke remove the asphalt entirely and replace it with a concrete parking lot. Groendyke agreed to Jessen's plan in 2007.

Groendyke sued Harrison and his father, Duncan M. Harrison, Sr., both d/b/a Paveco Asphalt Paving. Groendyke subsequently dismissed Harrison's father from the suit.

At trial, Nelson testified that his employees resumed parking their trucks at the terminal immediately after Harrison laid the asphalt. Even though some trucks carried loads in excess of forty tons, Nelson testified that the asphalt sustained no visible damage until one or two weeks after the sealant's application. During the concrete installation project, Nelson discovered that the base underlying the asphalt was completely saturated with moisture. He testified that it was "no longer usable," and that its replacement cost was approximately $68,000.

Jessen testified that sealant should never be applied four months after asphalt has been laid. In his experience, sealants are strictly maintenance devices, used, for example, when cracks start to develop. At only four months, he stated, properly-applied asphalt should not show any signs of aging or distress. When questioned whether the sealant would trap subsurface moisture beneath the asphalt, Jessen answered that it "should create a waterproof barrier."

Harrison testified that he would not have recommended application of the asphalt if he had seen any preexisting problems with the base. He also testified that he had not observed any deterioration in the asphalt prior to the application of the sealant. Harrison defended his decision to apply the sealant four months after laying the asphalt, stating that his practice has always been to wait at least ninety days and that he has never experienced any similar problems in the past. He conceded, however, that (1) he had not previously applied this brand of sealant in Louisiana; (2) he experienced subsurface moisture problems while repairing the asphalt at the adjacent terminal in Lake Charles; (3) he failed to investigate the soil conditions at the Groendyke terminal; and (4) he did not ask the sealant's manufacturer about its application in areas, such as Lake Charles, that are below

sea level. Harrison also testified that it "makes sense" the sealant could trap moisture beneath the surface and that he was "pretty close to agreeing" the asphalt would not have deteriorated but for the sealant's application.

The jury found Harrison liable for negligence, negligent misrepresentation, and breach of warranty, and on December 30, 2008, the trial court awarded Groendyke $167,517.24 for damages and $40,708 for attorney's fees. The judgment incorrectly named Harrison's father as the defendant. On May 8, 2009, the trial court entered a final judgment *nunc pro tunc*, correcting the earlier order. Harrison now appeals the legal sufficiency of the evidence and the validity of the final judgment *nunc pro tunc*.

ANALYSIS

A. Legal Sufficiency

In his first three issues, Harrison challenges the sufficiency of the evidence for each of the jury's findings of liability. We initially address the finding of breach of warranty, for which Harrison contends there is no evidence of causation. In a legal sufficiency challenge, we consider whether the evidence at trial would enable a reasonable and fair-minded jury to reach the verdict under review. *City of Keller v. Wilson*, 168 S.W.3d 802, 827 (Tex. 2005). We "must credit favorable evidence if reasonable jurors could, and disregard contrary evidence unless reasonable jurors could not." *Id.* We will only reverse the judgment if (a) there is a complete absence of a vital fact, (b) the court is barred by rules of law or of evidence from giving weight to the only evidence offered to prove a vital fact, (c) the evidence offered to prove a vital fact is no more than a mere scintilla, or (d) the evidence establishes conclusively the opposite of the vital fact. *Id.* at 810 (citing Robert W. Calvert, *"No Evidence" & "Insufficient Evidence" Points of Error*, 38 TEX. L. REV. 361, 362–63 (1960)). The record contains more than a mere scintilla of evidence—and thus the evidence is legally sufficient—if reasonable minds could form differing conclusions about

a vital fact's existence. *Lee Lewis Constr., Inc. v. Harrison*, 70 S.W.3d 778, 782–83 (Tex. 2001). Conversely, the record is insufficient when the evidence offered to prove a vital fact is so weak as to do no more than create a mere surmise or suspicion of its existence. *Ford Motor Co. v. Ridgway*, 135 S.W.3d 598, 601 (Tex. 2004).

The trial court charged the jury to find Harrison liable if his failure to comply with a warranty was a producing cause of Groendyke's damages. "Producing cause" was defined as "an efficient, exciting, or contributing cause that, in a natural sequence, produced the damages, if any." *But see Ford Motor Co. v. Ledesma*, 242 S.W.3d 32, 46 (Tex. 2007) (abrogating a decision based on a charge containing such language and explaining that this definition is incomplete). Harrison did not object to the charge at trial and does not challenge it on appeal. We therefore measure the sufficiency of the evidence using the charge actually given. *Osterberg v. Peca*, 12 S.W.3d 31, 55 (Tex. 2000).

Viewing the evidence in the light most favorable to the verdict, we conclude that there was more than a scintilla of evidence to show that Harrison's breach of an express warranty was a producing cause of Groendyke's damages. The jury heard ample testimony that the sealant caused the base of the parking lot to fail, thereby precipitating the deterioration of the asphalt. Jessen testified that the sealant "should create a waterproof barrier," and Harrison testified it "makes sense" that the sealant could trap moisture beneath the asphalt, even though its primary purpose was to prevent water from penetrating from above. Nelson testified that he first noticed signs of deterioration in the asphalt within a week or two after the sealant was applied. He also stated that much of the base had to be replaced during the concrete installation because its high moisture content rendered it "no longer usable." Even Harrison testified he was "pretty close to agreeing" that the asphalt would not have deteriorated if the sealant had not been applied.

In addition to a warranty for the sealant, Harrison also warranted the asphalt installation for one year. The asphalt failed within one year. While Harrison argues that he

was only giving a warranty on the asphalt itself—and not the base—the job included preparing the site, grading the lot for proper drainage, installing base as needed in low areas, compacting the base with a five-ton roller, and applying emulsion tack coat to the base. The handwritten warranty was at the bottom of the contract (including all of the work to the base) and contains the term "1 year warranty." There is nothing in the contract that would limit the warranty to the asphalt itself. Harrison admits the base failed causing the asphalt to fail, a breach of the one-year warranty.

Because Harrison's breach of warranty fully supports Groendyke's recovery of both damages and attorney's fees, we need not address Harrison's challenges regarding the negligence and negligent misrepresentation theories of liability. *See* TEX. R. APP. P. 47.1; *Checker Bag Co. v. Washington*, 27 S.W.3d 625, 634 (Tex. App.—Waco 2000, pet. denied) ("In cases where the judgment rests on multiple theories of recovery, an appellate court need not address all causes of action if any one theory is valid."); *see also* TEX. CIV. PRAC. & REM. CODE § 38.001 (Vernon 2008) (permitting recovery of reasonable attorney's fees on claims of an oral or written contract); *Med. City Dallas, Ltd. v. Carlisle Corp.*, 251 S.W.3d 55, 63 (Tex. 2008) (breach of express warranty included within section 38.001). We therefore overrule Harrison's first, second, and third issues.

B. *Nunc Pro Tunc*

In his fourth issue, Harrison argues that the trial court could not enter the final judgment *nunc pro tunc* because the error in the original judgment was judicial, rather than clerical. A clerical error involves a mistake or omission in the entry of a judgment. *LaGoye v. Victoria Wood Condo. Ass'n*, 112 S.W.3d 777, 783 (Tex. App.—Houston [14th Dist.] 2003, no pet.); *e.g.*, *Nolan v. Bettis*, 562 S.W.2d 520, 522–23 (Tex. Civ. App.—Austin 1978, no writ) (concerning a misprint in the date of judgment). The trial court may correct clerical errors at any time by a judgment *nunc pro tunc*, even after it has lost its plenary power over the judgment. TEX. R. CIV. P. 316; *see also* TEX. R. CIV. P. 329b(e) (trial court

may vacate, modify, correct, or reform a judgment no later than thirty days after a motion for new trial has been overruled). A judicial error, by contrast, occurs in the judgment's rendition. *Escobar v. Escobar*, 711 S.W.2d 230, 231 (Tex. 1986); *e.g.*, *Finlay v. Jones*, 435 S.W.2d 136, 137–39 (Tex. 1968) (concerning recital that defendant had been duly served with citation). "[R]endition is the judicial act by which the court settles and declares the decision of the law upon the matters at issue. Its entry is the ministerial act by which an enduring evidence of the judicial act is afforded." *Coleman v. Zapp*, 151 S.W. 1040, 1041 (Tex. 1912). If the error is judicial, rather than clerical, the error may only be corrected by appeal, writ of error, or bill of review. *See Comet Aluminum Co. v. Dibrell*, 450 S.W.2d 56, 58 (Tex. 1970). Whether an error in the judgment is clerical or judicial is a question of law; accordingly, our review is de novo. *LaGoye*, 112 S.W.3d at 783.

In this case, the trial court entered a final judgment against Harrison, Sr., a party who had been dismissed before the case ever proceeded to trial. More than four months later, after its plenary power expired, the trial court entered a final judgment *nunc pro tunc*, correcting the earlier order to reflect a judgment against Harrison, Jr. alone. The misidentification of the defendant in this case occurred as an inaccurate recording during the entry of the judgment. Because the misprint is a typographical mistake not resulting from judicial reasoning or determination, it is a clerical error subject to a judgment *nunc pro tunc*. *See Andrews v. Koch*, 702 S.W.2d 584, 585 (Tex. 1986) (per curiam). Any holding to the contrary would depart from years of settled law. *See*, *e.g.*, *Gooch v. Morris*, No. 10-05-00069-CV, 2006 WL 348706, at *1 (Tex. App.—Waco Feb. 15, 2006, no pet.) (mem. op.) (correcting misprint of "Jeffrey Gooch" to "Jeffery Gooch"); *Carlyle Real Estate Ltd. P'ship-X v. Leibman*, 782 S.W.2d 230, 231–33 (Tex. App.—Houston [1st Dist.] 1989, no writ) (correcting omission of single letter from a party name); *Whicker v. Taylor*, 422 S.W.2d 609, 610 (Tex. Civ. App.—Waco 1967, no writ) (correcting inversion of party initials); *Kendall v. Johnson*, 212 S.W.2d 232, 236–37 (Tex. Civ. App.—San Antonio 1948, no writ) (correcting omission of suffix from a party name).

Harrison nonetheless contends the error in this case is judicial because Groendyke drafted the final judgment and, under the authority of *In re Fuselier*, "a drafting error by a party's attorney does not constitute 'clerical error.'" 56 S.W.3d 265, 268 (Tex. App.—Houston [1st Dist.] 2001, no pet.). But *Fuselier* is readily distinguishable. The error in *Fuselier* occurred during rendition when the trial court signed an order drafted by counsel dismissing a claim "with prejudice." *Id.* at 266. Despite having no personal recollection of the case, the trial court subsequently entered an order *nunc pro tunc* modifying the earlier order to read "without prejudice." *Id.* at 267. The court of appeals ruled the order *nunc pro tunc* void because, under those circumstances, the errors of counsel became part of the court's judgment as *rendered*. *Id.* at 268. *Fuselier* involved an error arising neither from the entry of a judgment nor from the misidentification of a party. Therefore, it has no application to the facts of this case.

Because the correction of a party's name was a clerical error, the judgment *nunc pro tunc* is valid. We overrule Harrison's fourth issue.

CONCLUSION

Having overruled the issues presented, we affirm the trial court's judgment.

/s/ Tracy Christopher
Justice

Panel consists of Justices Seymore, Boyce, and Christopher.