Affirmed and Memorandum Opinion filed July 6, 2010.

In The

Fourteenth Court of Appeals

NO. 14-09-00601-CV

SOUTHWEST PIPE SERVICES, INC., Appellant

V.

KINDER MORGAN, INC., Appellee

On Appeal from the 280th District Court
Harris County, Texas
Trial Court Cause No. 2007-30117

MEMORANDUM OPINION

Appellant Southwest Pipe Services, Inc. challenges the trial court's judgment in favor of appellee Kinder Morgan, Inc. Kinder Morgan sued to recover damages arising from Kinder Morgan's sale of used pipe to Southwest Pipe. Southwest Pipe contends that the trial court erred by (1) not permitting expert John Buckert to testify, and by instructing the jury to answer "yes" to jury question number one; (2) excluding testimony regarding course of dealing; (3) allowing testimony from an undisclosed expert; and (4) awarding Kinder Morgan pre-judgment interest and costs. We affirm.

Background

Christopher Hokanson, a senior material management analyst for Kinder Morgan, sent invitations to potential customers for bids to purchase used pipe from Kinder Morgan. Joe Briers, who serves as president of Southwest Pipe, received an invitation and submitted a bid on January 10, 2007. Southwest Pipe's bid stated that it was "based upon good round straight pipe cut at or near the welds." Hokanson notified Southwest Pipe that it was the highest bidder and faxed Kinder Morgan's standard bill of sale contract to Southwest Pipe. The contract stated that Southwest Pipe agreed to purchase the pipe for $239,698.50. The contract also contained an "as is" clause located on the first page stating as follows:

> Descriptions of the Property are for the purpose of identification only. While Seller intends that the descriptions are accurate, **SELLER NEITHER REPRESENTS NOR WARRANTS** that the Property conforms to the descriptions. Seller hereby covenants that the Property is free and clear of liens and encumbrances, but **SELLER MAKES NO REPRESENTATIONS OR WARRANTIES, EXPRESS OR IMPLIED OF ANY KIND, INCLUDING WITHOUT LIMITATION AS TO THE CONDITION OF THE PROPERTY OR ITS FITNESS FOR ANY PURPOSE. PURCHASER REPRESENTS, WARRANTS AND ACKNOWLEDGES THAT IT HAS INSPECTED THE PROPERTY TO ITS SATISFACTION AND IS BUYING ON AN "AS IS – WHERE IS" BASIS WILL [sic] ALL FAULTS. GRANTEE FURTHER ACKNOWLEDGES THAT IT HAS NO RECOURSE AGAINST GRANTOR IN THE EVENT OF DISCOVERY OF ANY DEFECTS OF ANY KIND, LATENT OR PATENT.**

(emphasis in original). Briers signed the contract on January 30, 2007, and returned it to Hokanson.

On February 21, 2007, Briers contacted Hokanson and asserted that the pipe was "damaged." Briers also sent Hokanson an e-mail regarding "contingency pricing" for the "damaged" pipe. Southwest Pipe later sent Kinder Morgan a check for $53,333 as full payment for the pipe based on a unilateral reduction in the sales price to account for the

pipe's condition. Kinder Morgan rejected this proposed payment and sued Southwest Pipe on May 15, 2007, alleging causes of action for breach of contract, suit on sworn account, quantum merit, and promissory estoppel. Southwest Pipe filed its original answer and amended counterclaim alleging causes of action for breach of contract and breach of warranty on July 18, 2008.

The jury found that Southwest Pipe breached the contract, and that Southwest Pipe's breach caused damages of $200,000 to Kinder Morgan. The trial court signed its judgment in favor of Kinder Morgan on April 3, 2009, awarding Kinder Morgan $200,000 in damages, plus $70,000 in attorney's fees, and pre-judgment and post-judgment interest. The trial court also assessed costs against Southwest Pipe. Southwest Pipe appeals from the trial court's judgment.

Analysis

Southwest Pipe presents four issues on appeal. First, Southwest Pipe contends that the trial court erred in not permitting expert Buckert to testify and in instructing the jury to answer "yes" to jury question number one. Second, Southwest Pipe contends that the trial court erred in excluding the testimony of Burrell Thomas and Henry Schiro. Third, Southwest Pipe contends that the trial court erred in allowing testimony from an undisclosed expert. Lastly, Southwest Pipe contends that the trial court erred in awarding Kinder Morgan pre-judgment interest and costs. We address each issue in turn.

I. Buckert's Testimony and Jury Instruction

In its first issue, Southwest Pipe argues that the trial court erred by (1) not permitting expert Buckert to testify regarding course of dealing within the pipe industry, and (2) "instructing the jury to answer 'yes' to Jury Question No. 1, the breach of contract portion of the charge." Southwest Pipe predicates both arguments on the unenforceability of the contract's "as is" clause.

Courts will give effect to an "as is" clause unless the clause is set aside. *See Prudential Ins. Co. of Am. v. Jefferson Assocs., Ltd.*, 896 S.W.2d 156, 161 (Tex. 1995). An "as is" clause may be set aside if (1) the buyer was induced to enter into the contract containing "as is" language by the seller's fraudulent representation or concealment, or (2) the seller engaged in conduct that impaired, obstructed, or interfered with the buyer's inspection of the property being sold. *Id.* at 162. "Other aspects of a transaction" also may influence whether an "as is" clause is enforceable, including (1) the sophistication of the parties and whether they were represented by counsel, (2) whether the contract was an arm's length transaction, (3) the relative bargaining power of the parties and whether the contractual language was freely negotiated, and (4) whether that language was an important part of the parties' bargain, and not simply added in a "boilerplate" provision. *Id.*

Southwest Pipe argues that the "as is" clause is unenforceable based on (1) fraudulent inducement, and (2) "other aspects of the transaction." Southwest Pipe does not argue that Kinder Morgan "impaired, obstructed, or interfered with" its inspection of the pipe.

Southwest Pipe first argues that Kinder Morgan fraudulently induced it into signing the contract because Kinder Morgan concealed the pipe's condition. Southwest Pipe does not assert that Kinder Morgan made any fraudulent representations regarding the pipe's condition. Briers testified that "there was absolutely no representation by Kinder Morgan that they were going to sell [him] straight round pipe."

Southwest Pipe argues that Kinder Morgan concealed the pipe's condition because Kinder Morgan did not provide Southwest Pipe "with copies of the pictures of pipe taken prior to Plaintiff signing the contract on January 30, 2007." There is no evidence that Southwest Pipe requested photographs of the pipe before signing the contract, or that Kinder Morgan failed to produce photographs of the pipe in response to a request before Southwest Pipe signed the contract. In its responses to Kinder Morgan's requests for

admissions, Southwest Pipe admitted that it was not asserting a claim or defense of fraud in this suit. Southwest Pipe's responses were admitted into evidence at trial.

Southwest Pipe argues that this case is analogous to *Dunbar Medical Systems, Inc. v. Gammex Inc.*, 216 F.3d 441, 444-51 (5th Cir. 2000). Dunbar Medical Systems entered into a settlement agreement with Gammex in which Dunbar Medical Systems agreed to release its claims against Gammex in exchange for $70,000 and specified equipment. *Id.* at 446. During negotiations, Gammex represented to Dunbar Medical Systems that the equipment would be "either new and has never been used, or has previously been used as demonstration or loaner equipment." *Id.* at 445-46. The settlement agreement also included an express warranty stating that the equipment was "either new and has never been used, or has previously been used as demonstration or loaner equipment." *Id.* at 446. When Dunbar Medical Systems received the equipment, it discovered that the equipment was not of the specified quality. *Id.* at 446-47.

Dunbar Medical Systems sued Gammex asserting breach of contract and fraud claims. *Id.* Gammex argued that Dunbar Medical Systems' claims were barred by the contract's "as is" clause. *Id.* at 448. The court held that Dunbar Medical Systems' claims were not barred by the contract's "as is" clause because Gammex expressly misrepresented the condition of the equipment. *Id.* at 450.

Unlike the circumstances in *Dunbar Medical Systems*, there is no evidence here that Kinder Morgan made an express misrepresentation regarding the pipe's condition. The contract did not include an express warranty regarding the pipe's condition, and Briers testified that "there was absolutely no representation by Kinder Morgan that they were going to sell [him] straight round pipe." There is no evidence that Kinder Morgan fraudulently concealed the pipe's condition from Southwest Pipe. Therefore, Southwest Pipe cannot avoid the "as is" clause based on fraudulent inducement.

Southwest Pipe next argues that the "as is" clause is unenforceable based on the totality of the circumstances surrounding the contract because "there was no negotiation of

any terms, [Southwest Pipe] was not represented by counsel, and the parties were obviously not of equal bargaining power and sophistication." Southwest Pipe also argues that the "as is" clause is merely a "boilerplate" term.

The evidence at trial showed that Hokanson sent invitations to potential customers for bids to purchase used pipe located in Vance, Alabama. Southwest Pipe received an invitation and submitted a bid. Hokanson notified Southwest Pipe that it was the highest bidder and faxed Kinder Morgan's standard bill of sale contract, which included an "as is" clause. Briers signed the contract and returned it to Hokanson.

Briers testified that he was familiar with Kinder Morgan's standard bill of sale contract because he had done business with Kinder Morgan "for years." He agreed that he was buying the pipe "on an as is-where is basis." He testified that he was familiar with the practice of buying pipe "as is-where is," and that "if something in a contract [is] either bold or italicized, that means it's a very important term." Briers testified that Kinder Morgan made no representations regarding the pipe's condition. He further testified that he was not surprised that Kinder Morgan made no representations regarding the pipe's condition because "[t]hey would never do that." When asked if it was "impossible" for Kinder Morgan to make a representation regarding the pipe's condition, Briers agreed. Briers also testified that he had 18 years of experience in the pipe industry, and he was designated as an expert in the pipe industry by Southwest Pipe.

In light of this evidence, neither the absence of attorney participation nor the circumstances surrounding the underlying contract establish that the "as is" clause is unenforceable. Two experienced parties contracted at arm's length. Southwest Pipe was a sophisticated party; Briers testified that he has 18 years of experience in the pipe industry, and was designated as an expert in the pipe industry. There is no evidence that the contract was the product of coercion or was not freely negotiated. Briers testified that he was familiar with Kinder Morgan's standard bill of sale contract, understood all of the terms, and agreed to buy the pipe "as is." Further, the "as is" clause was located on the

first page, set off in capital letters and bold font. Therefore, Southwest Pipe cannot avoid the "as is" clause based on the totality of the circumstances surrounding the transaction. *See Prudential Ins. Co. of Am.*, 896 S.W.2d at 162.

Southwest Pipe bases its argument that the trial court erred in "instructing the jury to answer 'yes' to Jury Question No. 1, the breach of contract portion of the charge" solely on the unenforceability of the "as is" clause: "In the event the court had redacted the 'as is' clause portion of the contract, the jury could have been able to fairly decide which party breached the contract and award damages accordingly." Having found the "as is" clause to be enforceable, we reject this argument.

Southwest Pipe next argues that the trial court erred in excluding Buckert's testimony. Buckert was designated as an expert witness regarding course of dealing within the pipe industry. Specifically, Southwest Pipe argues that the trial court should have allowed Buckert to testify that (1) it is common in the pipe industry for contracts to contain "as is" clauses; (2) it is understood throughout the industry that pipe is sometimes damaged upon removal or while in the ground; and (3) it is usual and customary that these contracts are renegotiated due to this damage once the pipe has been removed and accepted by the buyer. Southwest Pipe argues that because "the 'as is' clause was clearly unenforceable . . . evidence of course [of] dealing should have been presented to the jury."

Evidentiary rulings are committed to the trial court's sound discretion. *Bay Area Healthcare Group, Ltd. v. McShane,* 239 S.W.3d 231, 234 (Tex. 2007) (per curiam). We review a trial court's decision to admit or to exclude evidence for an abuse of that discretion. *In re J.P.B.*, 180 S.W.3d 570, 575 (Tex. 2005) (per curiam). A trial court abuses its discretion when it acts without reference to any guiding rules or principles. *Garcia v. Martinez*, 988 S.W.2d 219, 222 (Tex. 1999) (per curiam). However, we review questions of law *de novo*. *Harris County Hosp. Dist. v. Tomball Reg'l Hosp.*, 283 S.W.3d 838, 842 (Tex. 2009). We must uphold the trial court's evidentiary ruling if there is any

legitimate basis for the ruling. *Owens-Corning Fiberglas Corp. v. Malone*, 972 S.W.2d 35, 43 (Tex. 1998).

Course of dealing evidence[1] is not considered when a contract is unambiguous. *See Frost Nat'l Bank v. L & F Distribs., Ltd.*, 165 S.W.3d 310, 313 n.3 (Tex. 2005) (per curiam); *James L. Gang & Assocs., Inc. v. Abbott Labs., Inc.*, 198 S.W.3d 434, 437 (Tex. App.—Dallas 2006, no pet.). A contract is ambiguous when it is susceptible to more than one reasonable interpretation. *Frost Nat'l Bank*, 165 S.W.3d at 312. If a contract is worded so that it can be given a certain or definite legal meaning, it is unambiguous. *Id.* The parties' mere disagreement about a contract's meaning does not render it ambiguous. *Hewlett-Packard Co. v. Benchmark Elecs., Inc.*, 142 S.W.3d 554, 561 (Tex. App.—Houston [14th Dist.] 2004, pet. denied).

We conclude that the contract is unambiguous because it is not subject to more than one reasonable interpretation. The contract states that Kinder Morgan agrees to sell the specified pipe to Southwest Pipe for $239,698.50. There is no language in the contract to indicate that the price was contingent on the pipe's condition, or that the price would be renegotiated based on the pipe's condition. The contract states that Kinder Morgan makes no representations regarding the pipe's condition, and that Southwest Pipe acknowledges that it has inspected the pipe and is buying the pipe "as is." The only reasonable interpretation of the contract is that the pipe is being sold "as is" for $239,698.50. Therefore, the trial court did not abuse its discretion in excluding Buckert's testimony regarding course of dealing. *See Frost Nat'l Bank*, 165 S.W.3d at 313 n.3; *James L. Gang & Assocs., Inc.*, 198 S.W.3d at 437.

[1] "Course of dealing" is defined as "a sequence of conduct concerning previous transactions between the parties to a particular transaction that is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct." Tex. Bus. & Com. Code Ann. § 1.303(b) (Vernon 2009). Evidence of course of dealing is admissible to "explain or supplement" a contract, but it may not be used to contradict an express term. *Id.* § 2A.202 (Vernon 2009). Express terms of a contract control over course of dealing. *Id.* § 1.303(e)(1).

We overrule Southwest Pipe's first issue.

II. Testimony of Thomas and Schiro

In its second issue, Southwest Pipe argues that the trial court erred in excluding the testimony of Thomas and Schiro regarding Kinder Morgan's course of dealing. Thomas and Schiro are Kinder Morgan employees who previously had entered into transactions for the sale of pipe with Southwest Pipe. Southwest Pipe argues that Thomas and Schiro should have been allowed to testify that (1) "in their usual course of business, they notify the buyer that the pipe is being sold 'as is'"; and (2) Schiro generally rejects a bid for "good, round straight pipe" and notifies the buyer that the bid has been disqualified due to the contingency.

Having already concluded that the contract is enforceable and unambiguous, we further conclude that the trial court did not abuse its discretion in excluding the testimony of Thomas and Schiro regarding course of dealing. *See Frost Nat'l Bank*, 165 S.W.3d at 313 n.3; *James L. Gang & Assocs., Inc.*, 198 S.W.3d at 437. We overrule Southwest Pipe's second issue.

III. Testimony of Alleged Undisclosed Expert Witness

In its third issue, Southwest Pipe argues that the trial court erred in allowing Hokanson to testify as to the value of the pipe in the underlying transaction because this testimony constituted expert witness testimony. Hokanson was disclosed as a fact witness; he was not disclosed as an expert witness.

Property owners can testify about the value of their property if they are familiar with it, even though they are not testifying as an expert. *See Porras v. Craig*, 675 S.W.2d 503, 504-05 (Tex. 1984); *Taiwan Shrimp Farm Vill. Assoc., Inc. v. U.S.A. Shrimp Farm Dev., Inc.*, 915 S.W.2d 61, 71 (Tex. App.—Corpus Christi 1996, writ denied). The testimony must show that the property owner is testifying as to market value and not intrinsic value. *Porras*, 675 S.W.2d at 505; *Taiwan Shrimp Farm Vill. Assoc., Inc.*, 915 S.W.2d at 71.

Therefore, Hokanson, as a senior material management analyst for Kinder Morgan, could establish the value of the pipe as a fact witness if his opinion was based on market value.[2]

At trial, Hokanson testified that as part of his job he receives a publication called "Pipe Exchange" on a regular basis via e-mail. He testified that Pipe Exchange contains "market quotations, tabulations, and other lists" regarding pricing of scrap metal. He testified that he uses Pipe Exchange to "gauge bids or analyze bids." Specifically, Hokanson testified that he uses the "Scrap Iron Consumer Buying Price – Chicago #1 Busheling" index reported in Pipe Exchange to analyze bids. Hokanson then testified as to the value of the pipe in the underlying transaction based on this index as reported in a Pipe Exchange issue he received on January 20, 2009. Hokanson testified that the "scrap price of iron" was $300 per ton on February 7, 2007, $305 per ton on February 8, 2007, and $780 per ton on June 5, 2008.

Hokanson's testimony shows his familiarity with the market value of the pipe, and that his opinion is not based on intrinsic value. Therefore, Hokanson's testimony regarding the value of the pipe was admissible even though he was not designated as an expert witness. *See Porras*, 675 S.W.2d at 505; *Taiwan Shrimp Farm Vill. Assoc., Inc.*, 915 S.W.2d at 71. The trial court did not abuse its discretion in allowing Hokanson to testify regarding the value of the pipe.

We overrule Southwest Pipe's third issue.

IV. Pre-Judgment Interest and Costs

Lastly, Southwest Pipe argues that the trial court erred in awarding Kinder Morgan pre-judgment interest and costs.

We review a trial court's award of pre-judgment interest and allocation of costs for an abuse of discretion. *See Madison v. Williamson*, 241 S.W.3d 145, 157 (Tex. App.—Houston [1st Dist.] 2007, pet. denied); *Marsh v. Marsh*, 949 S.W.2d 734, 744 (Tex.

[2] Southwest Pipe does not contend that the property owner rule is inapplicable to corporate owners. Therefore, we do not address that issue. *Cf. Speedy Stop Food Stores, Ltd. v. Reid Road Mun. Util. Dist. No. 2*, 282 S.W.3d 652 (Tex. App.—Houston [14th Dist.] 2009, pet. granted).

App.—Houston [14th Dist.]1997, no writ). A trial court abuses its discretion when it acts without reference to any guiding rules or principles. *Garcia*, 988 S.W.2d at 222.

A. Pre-Judgment Interest

Southwest Pipe first argues that the trial court erred in failing to offset its award of pre-judgment interest to Kinder Morgan because "a continuance was granted so that Kinder Morgan could comply with discovery."

Prejudgment interest is awarded to fully compensate the injured party, not to punish the defendant. *Johnson & Higgins of Tex., Inc. v. Kenneco Energy, Inc.*, 962 S.W.2d 507, 528 (Tex. 1998). It is considered compensation allowed by law as additional damages for lost use of the money due between the accrual of the claim and the date of judgment. *Id.*

The case was originally set for trial on October 6, 2008. The trial court reset the case for trial on March 16, 2009 after granting Southwest Pipe's motion to compel discovery and extending the discovery deadline. Southwest Pipe argues that Kinder Morgan should not have received pre-judgment interest during this five-month delay because the delay was "caused by its own malfeasance."

The decision to award prejudgment interest is left to the sound discretion of the trial court. *Citizens Nat'l Bank v. Allen Rae Invs., Inc.*, 142 S.W.3d 459, 487 (Tex. App.—Fort Worth 2004, no pet.). Based on the record before us, we cannot say the trial court abused its discretion in awarding Kinder Morgan pre-judgment interest. We overrule Southwest Pipe's third issue.

B. Court Costs

Southwest Pipe next contends that the trial court erred in adjudicating Kinder Morgan's court costs against it because Kinder Morgan failed to provide the trial court and Southwest Pipe with an accounting of its court costs before the trial court entered its final judgment.

Generally, "[t]he successful party to a suit shall recover of his adversary all costs incurred therein." Tex. R. Civ. P. 131. A "successful party" is a party who obtains a judgment from a competent court vindicating a civil claim of right.[3] *Madison*, 241 S.W.3d at 157. A successful party is not required to submit an accounting of its court costs to the trial court or opposing counsel before judgment may be entered adjudicating costs. *See* Tex. Civ. Prac. & Rem. Code Ann. § 31.007(a) (Vernon 2008); *Madison*, 241 S.W.3d at 158. Rather, the successful party is responsible for submitting a record of its court costs to the court clerk so that the clerk can perform its ministerial duty and tax costs in accordance with Texas Rule of Civil Procedure 622. *Madison*, 241 S.W.3d at 158.

Therefore, we cannot conclude that the trial court abused its discretion in awarding costs to Kinder Morgan even though Kinder Morgan did not submit an itemized accounting of its costs to the trial court or opposing counsel. *See id.* We overrule Southwest Pipe's fourth issue.

Conclusion

We affirm the trial court's judgment.

/s/ William J. Boyce
Justice

Panel consists of Chief Justice Hedges and Justices Yates and Boyce.

[3] Southwest Pipe does not contest Kinder Morgan's status as the "successful party" in this lawsuit.