Affirmed as Reformed in Part; Reversed and Rendered in Part; Reversed and Remanded in Part and Memorandum Opinion filed March 31, 2016.

In The

Fourteenth Court of Appeals

NO. 14-14-00635-CV

GUARDIAN TRANSFER & STORAGE INC. AND STUART STAUFFACHER, Appellants/Cross-Appellees

V.

ERIC BEHRNDT, INDIVIDUALLY AND D/B/A EZ MANAGEMENT GP, LLC, AND EZ MANAGEMENT GP, LLC, Appellees, AND BEHR CONSTRUCTION, INC., Appellee/Cross-Appellant

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On Appeal from 164th District Court
Harris County, Texas
Trial Court Cause No. 2011-22262

M E M O R A N D U M O P I N I O N

This case arises from a dispute regarding an unpaid moving and storage fee. Appellants Guardian Transfer & Storage Inc. and Stuart Stauffacher (collectively, "Guardian") challenge a final judgment entered in Guardian's favor and against Behr Construction, Inc. The final judgment awards damages and attorney's fees to

Guardian based on a finding that Behr Construction breached its contract with Guardian.

Guardian contends the final judgment is erroneous because the trial court (1) failed to include an award for lost profits and lost market value based on the jury's fraud finding; (2) failed to award Guardian "damages due to fraud and recognize the election by [Guardian] to recover [its] damages from fraud in lieu of damages from breach of contract;" (3) disregarded the jury's damage award for conspiracy; (4) disregarded the jury's award of actual damages based on Behr Construction's conduct in the "filing of this suit in bad faith and for purposes of harassment;" (5) disregarded the jury's verdict assessing exemplary damages against Behr Construction based on the "filing of this suit in bad faith and for purposes of harassment;" and (6) disregarded the jury's finding that Behr Construction was Behrndt's alter ego.

Behr Construction challenges the trial court's judgment on cross-appeal contending that Guardian cannot recover lost profits in connection with the contract breach. Behr Construction also contends there is legally or factually insufficient evidence to support the attorney's fees award.

We affirm the trial court's judgment as reformed in part, reverse and render in part, and reverse and remand in part.

BACKGROUND

Eric Behrndt is the owner and president of Behr Construction, Inc. He also owns EZ Management, a check-cashing business that no longer is in operation.

Behrndt provided financing to Truong Duong, who owned a company called Micro Machine Manufacturing; this company sells machining services and parts used in oilfield production. Behrndt's financing allowed Micro Machine to buy

supplies for its business; in turn, Behrndt and Duong equally split the profits Micro Machines made on the resulting sales. Over time, Duong acquired equipment for Micro Machine with an estimated value of five to six million dollars.

Gulf Coast Bank and Trust Company obtained a $161,488.05 judgment against Duong individually and d/b/a Micro Machine on May 14, 2010. After a writ of execution was issued on this judgment, a Harris County constable seized most of Micro Machine's equipment and supplies on October 27 and 28, 2010. The constable hired Guardian Transfer & Storage Inc., which is owned by Stuart Stauffacher, to pack the seized property and move it to Guardian's warehouse for storage so it could be sold later at a constable's personal property sale. The constable sale was noticed for November 15, 2010, at 10 a.m. at Guardian's warehouse.

Behrndt and Duong agreed that Behrndt would bid on the seized property at the constable sale and provide it to Duong to satisfy several outstanding purchase orders and continue Micro Machine's operations. Behrndt, Duong, and others came to the constable sale on November 15, 2010. Before bidding began, an inventory of the seized property to be auctioned off was read and Guardian's moving and storage services fee of $49,161.18 was announced to everyone present at the sale. Behrndt was the sole bidder at the sale; he bid and bought the property on behalf of Behr Construction for $427.64.

Behrndt paid the constable $427.64 for the property; he did not pay Guardian the moving and storage fee after the constable sale. Behrndt knew that the moving and storage fee had to be paid to Guardian in addition to the constable sale bid amount in order to take possession of the auctioned property. Behrndt told Stauffacher that he needed to lease a warehouse for the property and would return to Guardian to pay the moving and storage fee. Based on Behrndt's promise to pay

the fee, Stauffacher agreed to release some of the property to Behrndt.

Behrndt returned to Guardian the next day and Guardian released six loads of property, including finished parts and several electronic machines, to Behrndt and his employee Robert Stroka. Behrndt told Stauffacher he would lease a warehouse for the property and bring a check for the moving and storage fee. Behrndt never brought the promised check.

Stauffacher called Behrndt several times after the sale but Behrndt neither responded nor paid the moving and storage fee. In the meantime, Behrndt gave some of the released material, parts, and equipment to Duong to finish outstanding purchase orders and deliver the finished parts to customers for payment.

A dispute about the payment of the fee ensued between Guardian and Behrndt. In January 2011, Behrndt sent Guardian a letter offering to pay Guardian $25,000 for "storage and/or transport" of the seized property Behrndt bought at the November 2010 constable sale. In February 2011, Guardian sent a letter to Behrndt and Behr Construction demanding payment of the moving and storage fee and informing them that Guardian would sell the property that was still in its warehouse at a warehouse lien sale in satisfaction of the unpaid fee amount. In response, Behrndt sent a letter to Guardian offering to pay $24,161.18 "in exchange for all of the equipment and materials purchased at the execution sale on November 15, 2010."

After advertising in *The Greensheet*, Guardian conducted a sale on March 24, 2011, to recover sums due on the warehouse lien it had on the seized property. Guardian was the sole buyer at the warehouse lien sale, and the sale price for the property was "moving and storage costs" in the amount of $49,161.18.

Behrndt sued Guardian on April 12, 2011,[1] alleging claims for breach of fiduciary duty, tortious interference with contractual relations, fraud by misrepresentation and nondisclosure, and conversion. Guardian filed its original counterclaim on May 26, 2011, alleging claims for breach of contract, fraud, misrepresentation, libel, and slander. Guardian also pleaded for "its damages, for exemplary damages, and for the fees of Counsel and costs of court incurred in defending against the frivolous and groundless claims by BEHRNDT and the slander by BEHRNDT." Guardian alleged that Behrndt's suit is "frivolous and groundless, is in violation of Rule 13, Texas Rules of Civil Procedure, and Tex. Civ. Prac. & Rem. Code Ann. § 10.001, Et Seq, and is the basis for sanctions for frivolous and/or groundless litigation."

EZ Management and Behr Construction subsequently filed a petition in intervention; the date is not apparent from the record. EZ Management and Behr Construction alleged claims against Guardian for breach of fiduciary duty, tortious interference with contract, tortious interference with prospective business relations, fraudulent inducement, conversion, fraud by nondisclosure, negligent misrepresentation, negligence, violation of the Texas Deceptive Trade Practices Act, violation of the Texas Theft Liability Act, breach of resulting and constructive trusts, violation of statute for enforcement of warehouse lien, unjust enrichment, and breach of contract.

Guardian and Behrndt filed several amended petitions. Guardian's live pleading at trial included (1) claims against Behrndt, Behr Construction, and EZ Management for breach of contract, fraud, misrepresentation, libel, slander, conspiracy, and violation of the Texas Theft Liability Act; (2) an allegation that EZ

[1] On March 7, 2012, Behrndt filed a first amended original petition which stated: "Plaintiff is ERIC BEHRNDT who brings this action on behalf of himself individually and d/b/a EZ MANAGEMENT GP, LLC., who is a proper party in interest in this lawsuit."

Management and Behr Construction are Behrndt's "alter ego entities;" and (3) a request for "all" damages, exemplary damages, attorney's fees, and sanctions for filing a frivolous and groundless suit in violation of Texas Rule of Civil Procedure 13 and Texas Civil Practice and Remedies Code section 10.001 et seq.

Behrndt's live pleading included claims against Guardian for breach of fiduciary duty, tortious interference with contract and prospective business relations, fraud by nondisclosure, negligent misrepresentation, fraudulent inducement, conversion, negligence, violation of the Texas Deceptive Trade Practices Act, violation of the Texas Theft Liability Act, breach of resulting and constructive trusts, violation of statute for enforcement of warehouse lien, unjust enrichment, and breach of contract.

A two-week jury trial was held from February 24, 2014, until March 6, 2014. The charge submitted 49 questions to the jury. The jury found against Behrndt, Behr Construction, and EZ Management on all of their claims against Guardian. The jury also made the following findings and awards.

- Behr Construction committed fraud against Guardian.
- Behr Construction breached its contract with Guardian to pay $49,161.18 for moving and storage services causing damages consisting of $612,700 in past lost profits, $563,600 in future lost profits, and $1.2 million in "loss in fair market value of the equipment and materials purchased in the Constable Sale."
- Behr Construction and EZ Management were alter egos of Behrndt, and Behrndt was personally responsible for the conduct of these entities.
- Behrndt and Behr Construction were "part of a conspiracy that damaged Guardian;" the jury awarded $2.75 million in damages based on the

conspiracy finding.

- Behrndt and Behr Construction sued Guardian in bad faith and for purposes of harassment; the jury awarded actual damages of $300,000 to Guardian and $200,000 to Stauffacher. The jury also awarded $3 million in exemplary damages to be paid by Behrndt and Behr Construction.
- The jury awarded Guardian $235,000 in trial attorney's fees and $40,000 in appellate attorney's fees.

Guardian and Behr Construction filed motions to enter judgment based on the jury's verdict. The trial court signed a final judgment on June 20, 2014, ordering that Guardian recover from Behr Construction and Behrndt (1) $612,700 for past lost profits and $563,600 for future lost profits; (2) $235,000 in trial attorney's fees and $40,000 in appellate attorney's fees; and (3) jointly and severally the "total amount" of $1,364,303.40 "through trial."

Behrndt and Behr Construction filed a motion for new trial on grounds that (1) the lost profits award was excessive and unsupported by evidence; and (2) the attorney's fees award did not satisfy *El Apple I, Ltd. v. Olivas*, 370 S.W.3d 757 (Tex. 2012). Behrndt and Behr Construction also filed a motion for judgment notwithstanding the verdict based on (1) legally insufficient evidence of fraud; (2) legally insufficient evidence of past and future lost profits damages; (3) no pleading to support a recovery of lost profits; and (4) legally insufficient evidence to support the award of attorney's fees under *El Apple*.

Guardian filed a motion to modify, correct, or reform the trial court's judgment, arguing that the judgment erroneously fails to (1) "recognize and reference the express jury findings of fraud . . . and fails to follow the jury's verdict and award" Guardian "lost profits and lost market value damages incurred from

fraud;" (2) award Guardian "damages incurred from conspiracy by" Behrndt and Behr Construction; (3) award Guardian damages incurred from Behrndt's and Behr Construction's filing of the present suit in bad faith and for purposes of harassment; (4) award Guardian exemplary damages the jury assessed against Behrndt and Behr Construction for filing the present suit in bad faith and for purposes of harassment; and (5) include the jury's finding that Behr Construction and EZ Management are Behrndt's alter egos making Behrndt "individually responsible for liabilities or damages assessed against those entities."

The trial court signed an amended final judgment on July 18, 2014, expressly finding that there is no evidentiary support for the jury's finding in Question 42 that Behrndt is responsible for the conduct of Behr Construction or EZ Management, and in Question 43 that Behrndt and Behr Construction were "part of a conspiracy that damaged Guardian." The amended final judgment orders (1) Behr Construction to pay Guardian $612,700 for past lost profits damages and $563,600 for future lost profits damages; (2) Behr Construction to pay Guardian $235,000 in trial attorney's fees and $40,000 in appellate attorney's fees; and (3) Behr Construction, Behrndt, and EZ Management to take nothing on their claims against Guardian and Stauffacher.

Guardian filed a timely appeal. Behr Construction filed a timely cross-appeal.

ANALYSIS

We begin our analysis by addressing Guardian's six appellate issues. We then turn to the two issues Behr Construction raises in its cross-appeal.

I. Guardian's Appeal

A. Fraud

Guardian argues in its first issue that the trial court erred by refusing to modify, reform, or correct the final judgment to include the jury's "verdict findings of fraud and award the lost profits and lost market value damages found by the jury that were caused by the fraud" of Behr Construction. Guardian argues in its second issue that the trial court erred by refusing to modify, reform, or correct the final judgment to "award [Guardian] damages due to fraud and recognize the election by [Guardian] to recover [its] damages from fraud in lieu of damages from breach of contract."

We reject Guardian's first two issues because no fraud judgment can be rendered in Guardian's favor. No jury question on Guardian's fraud damages was submitted to the jury.

A "fraud claim requires 'a material misrepresentation, which was false, and which was either known to be false when made or was asserted without knowledge of its truth, which was intended to be acted upon, which was relied upon, and which caused injury.'" *Zorrilla v. Aypco Constr. II, LLC*, 469 S.W.3d 143, 153 (Tex. 2015) (quoting *Formosa Plastics Corp. USA v. Presidio Eng'rs & Contractors, Inc.*, 960 S.W.2d 41, 47 (Tex. 1998)). Thus, a successful fraud claim requires a fraud damages finding. Without submitting a question to the jury with regard to fraud damages, a party cannot recover any damages for fraud and therefore cannot recover on its fraud claim.

In this case, the parties did not submit a fraud damages question as to Guardian. Question No. 8 asked the jury whether Guardian or Behr Construction "commit[ted] fraud against the other party?" The jury answered: "Behr

Construction, Inc." Question No. 9 provided as follows:

Question 9

What sum of money, if any, if paid now in cash, would fairly and reasonably compensate the other party for its damages, if any, that were proximately caused by such fraud that you found in Question 8?

"Proximate cause" means that cause which, in a natural and continuous sequence, produces an event, and without which cause such event would not have occurred. In order to be a proximate cause, the act or omission complained of must be such that a person using the degree of care required of him would have foreseen that the event, or some similar event, might reasonably result therefrom. There may be more than one proximate cause of an event.

Consider the following elements of damages, if any, and none other.

EZ Management GP, LLC's lost profits sustained in the past.

EZ Management GP, LLC's lost profits that, in reasonable probability, will be sustained in the future.

Behr Construction Inc.'s loss in the fair market value of the equipment and materials purchased at the Constable Sale on November 15, 2010.

Lost profits that were a natural, probable, and foreseeable consequence of Guardian Transfer & Storage, Inc.'s failure to comply.

In answering questions about damages, answer each question separately. Do not increase or reduce the amount in one answer because of your answer to any other question about damages.

Do not speculate about what any party's ultimate recovery may or may not be. Any recovery will be determined by the court when it applies the law to your answers at the time of judgment. Do not add any amount for interest on damages, if any.

Answer separately in dollars and cents for damages, if any.

a. Lost profits sustained in the past.

   Answer: $612,700.00

b. Lost profits that, in reasonable probability, will be sustained in the future.

   Answer: $563,600.00

c. Loss in the fair market value of the equipment and materials purchased at the Constable Sale on November 15, 2010.

Answer: $1.2 million

Question No. 9 did not ask the jury to find Guardian's damages for fraud. Instead, Question 9 asked the jury to address (1) lost profits that EZ Management sustained in the past or will sustain in the future; and (2) damages for Behr Construction's "loss in the fair market value of the equipment and materials purchased."

No party objected to this question and instruction. Absent an objection to the jury charge, the parties are bound by the statements contained in the charge and submitted to the jury. *See Funes v. Villatoro*, 352 S.W.3d 200, 208 (Tex. App.—Houston [14th Dist.] 2011, pet. denied). Thus, Guardian and Behr Construction are now bound by the unobjected-to portions of the jury charge. *See id*. at 209. Because the jury charge did not submit a question regarding fraud damages sustained by Guardian, there are no fraud damages to be awarded to Guardian.

Accordingly, we overrule Guardian's first and second issues.

B. Conspiracy

In its third issue, Guardian contends that the trial court erred by "disregarding the jury verdict and by failing to enter judgment for [Guardian] for . . . damages incurred from conspiracy by [Behrndt and Behr Construction], in accordance with the verdict of the jury."

There is no independent liability for civil conspiracy; it is not a freestanding tort cause of action. *See Four Bros. Boat Works, Inc. v. Tesoro Petroleum Cos., Inc.*, 217 S.W.3d 653, 668 (Tex. App.—Houston [14th Dist.] 2006, pet. denied). "Therefore, because a defendant's liability depends upon its participation in some underlying tort for which the plaintiff seeks to hold the defendant liable, conspiracy is considered a derivative tort." *Id*. (citing *Tilton v. Marshall*, 925

S.W.2d 672, 681 (Tex.1996)). An actionable conspiracy must consist of acts which would have been actionable against the conspirators individually. *Id.* "[T]o prevail on a civil conspiracy claim, the plaintiff must show the defendant was liable for some underlying tort." *Id.*

Guardian did not object when the conspiracy question was submitted to the jury without conditioning it on any other tort finding. The only other tort questions submitted to the jury were questions relating to negligent misrepresentation, conversion, libel and slander, and fraud. The jury found against Guardian on its claims for negligent misrepresentation, conversion, and libel and slander. Guardian does not challenge these jury findings on appeal. Although the jury found in favor of Guardian on its fraud claim, Guardian cannot prevail on its fraud claim for reasons we already stated in our analysis of Guardian's first and second issues. There is no other underlying tort in this case for which Behr Construction or Behrndt were held liable via the conspiracy finding. Therefore, Guardian cannot prevail on a civil conspiracy claim. *See id.* The trial court did not err in disregarding the jury's conspiracy finding and refusing to award Guardian damages for conspiracy.

Accordingly, we overrule Guardian's third issue.

C. Frivolous Lawsuit

1. Actual Damages

Guardian argues in its fourth issue that the trial court erroneously failed to award Guardian "actual damages incurred from Plaintiffs[']filing of this suit in bad faith and for purposes of harassment, as found by the jury." Guardian argues that Behrndt and Behr Construction "neither made nor filed any objections to the evidence or pleadings of [Guardian] on actual damages incurred from the

harassment from this suit before submission of the charge to the jury." Guardian therefore contends that Behrndt and Behr Construction have waived any argument that actual damages may not be awarded for the filing of a lawsuit in bad faith or for purposes of harassment.

In its live pleading, Guardian stated that the suit filed by Behrndt, EZ Management, and Behr Construction is "frivolous and groundless, is in violation of Rule 13, Texas Rules of Civil Procedure, and Tex. Civ. Prac. & Rem. Code Ann. § 10.001, Et Seq, and is the basis for sanctions for frivolous and/or groundless litigation."

Texas Rule of Civil Procedure 13 provides in pertinent part that the "signatures of attorneys or parties constitute a certificate by them that they have read the pleading, motion, or other paper; that to the best of their knowledge, information, and belief formed after reasonable inquiry the instrument is not groundless and brought in bad faith or groundless and brought for the purpose of harassment." Tex. R. Civ. P. 13. "If a pleading, motion or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, after notice and hearing, shall impose an appropriate sanction available under Rule 215.1 upon the person who signed it, a represented party, or both." *Id*.

Section 10.001 of the Texas Civil Practice and Remedies Code provides that a person signing a motion or pleading certifies that "to the signatory's best knowledge, information, and belief, formed after reasonable inquiry": (1) the motion or pleading is not presented for an improper purpose, (2) each legal contention is warranted, (3) each factual contention is likely to have evidentiary support, and (4) each denial of a factual contention is warranted. Tex. Civ. Prac. & Rem. Code Ann. § 10.001 (Vernon 2002). If there has been a violation of section 10.001, then "[a] party may make a motion for sanctions" or the "court on its own

initiative" may issue a show cause order. *Id*. § 10.002 (Vernon 2002). "A court that determines that a person has signed a pleading or motion in violation of Section 10.001 may impose a sanction on the person, a party represented by the person, or both." *Id*. § 10.004(a) (Vernon 2002). If the court determines that section 10.001 has been violated and that a sanction should be imposed, then the "court shall describe in an order imposing a sanction under this chapter the conduct the court has determined violated Section 10.001 and explain the basis for the sanction imposed." *Id*. § 10.005 (Vernon 2002).

Guardian never asked the trial court to (1) hold a hearing; (2) determine that the lawsuit was frivolous and filed in bad faith or for the mere purpose of harassment; or (3) award sanctions against Behrndt, Behr Construction, or EZ Management as provided for in Rule 13 and Chapter 10. Instead, Guardian submitted Question No. 46 to the jury asking, "Did Plaintiffs file this claim in this lawsuit in bad faith or merely for purposes of harassment . . . ." The jury answered "Yes" and awarded $500,000 in actual damages.

The jury's answers to Questions 46 (lawsuit filed in bad faith or for purposes of harassment) and 47 ($500,000 in actual damages for bad faith filing of suit) cannot form the basis for a judgment because Rule 13 does not establish an independent cause of action for damages; rather, it provides a basis for a trial court to impose sanctions "upon motion or upon its own initiative." *Guidry v. Envtl. Procedures, Inc.*, 388 S.W.3d 845, 860 (Tex. App.—Houston [14th Dist.] 2012, pet. denied); *Haase v. Pearl River Polymers, Inc.*, No. 14-11-00024-CV, 2012 WL 4166826, at *2 n.4 (Tex. App.—Houston [14th Dist.] Aug. 9, 2012, pet. denied) (mem. op.); *see* Tex. R. Civ. P. 13. Similarly, Chapter 10 does not create an independent cause of action for damages for filing a frivolous lawsuit; it allows the trial court to impose sanctions upon a motion or upon its own initiative. *See*

Michels v. Zeifman, No. 03-08-00287-CV, 2009 WL 349167, at *4 (Tex. App.—Austin Feb. 12, 2009, pet. denied) (mem. op.); *Mantri v. Bergman*, 153 S.W.3d 715, 717-18 (Tex. App.—Dallas 2005, pet. denied); *see also* Tex. Civ. Prac. & Rem. Code Ann. § 10.002.

The record does not show that Guardian filed a motion asking the trial court to impose sanctions for Behrndt's, Behr Construction's, or EZ Management's conduct under Rule 13 or Chapter 10. Guardian acknowledges in its brief that "[t]here were no motions for sanctions made in trial." The jury findings in response to Questions 46-49 do not provide a permissible vehicle for imposing sanctions. The trial court did not err by refusing to award actual damages to Guardian based on the jury's answers to Questions 46 and 47.

Guardian identifies no authority under which the asserted actions of Behrndt and Behr Construction in filing a lawsuit in bad faith or for purposes of harassment can be the basis for a statutory or common-law cause of action. Guardian asserts: "The general rule regarding the liability of persons advising or procuring the institution of proceedings against another, whether civil or criminal, is that any person who causes the institution of a prosecution is liable for damages for malicious prosecution to the party injured, to the same extent as if the instigator had brought the proceedings." To the extent Guardian attempts to argue that the jury awarded damages for malicious prosecution, we reject such an argument. No question was submitted to the jury regarding a claim for malicious prosecution. Furthermore, Guardian cannot recover for malicious prosecution as a matter of law in this case.

"To prevail in a suit alleging malicious prosecution of a civil claim, the plaintiff must establish: (1) the institution or continuation of civil proceedings against the plaintiff; (2) by or at the insistence of the defendant; (3) malice in the

commencement of the proceeding; (4) lack of probable cause for the proceeding; (5) termination of the proceeding in plaintiff's favor; and (6) special damages." *Tex. Beef Cattle Co. v. Green*, 921 S.W.2d 203, 207 (Tex. 1996). "By definition, Texas claims for malicious prosecution arise only after the underlying case reaches a final judgment and all appeals are exhausted." *Graber v. Fuqua*, 279 S.W.3d 608, 617 (Tex. 2009). Here, there is no underlying case that has terminated in Guardian's favor. Therefore, Guardian cannot prevail on a claim for malicious prosecution.

Accordingly, we overrule Guardian's fourth issue.

2. Exemplary Damages

Guardian contends in its fifth issue that the trial court erred by failing to award it "the exemplary damages found by the [j]ury . . . to be assessed against Plaintiffs for their filing of this suit in bad faith and for purposes of harassment." Guardian claims that "Texas law provides for exemplary damages for tortious actions and conduct, including damages for frivolous suits and/or claims." Guardian further claims that the "jury expressly found Plaintiffs filed this suit for purposes of harassment...a *frivolous* suit and a tort" and "[d]amages for this conduct meets the criteria, definitions and specifications for damages provided under Sect. 41.001 (7), Texas Civil Practice and Remedies Code."

According to Guardian, Rule 13 and Chapter 10 do not "exclusively control[] the awards of exemplary damages for frivolous, harassing lawsuits" and "do not provide a remedy where, as in this case, the trial jury makes the express finding that the filing of the lawsuit was for purposes of harassment and finds exemplary damages are in order." Instead, Guardian contends that Civil Practice and Remedies Code section 41.001(7) "governs and expressly sets out the criteria and requirements for exemplary damages" for a frivolous suit present here.

Contrary to Guardian's assertion, nothing in Civil Practice and Remedies Code section 41.001(7) states that a party may recover exemplary damages for defending a frivolous lawsuit. *See* Tex. Civ. Prac. & Rem. Code Ann. § 41.001(7) (Vernon Supp. 2015). Section 41.001(7) provides the following definition for malice: "'Malice' means a specific intent by the defendant to cause substantial injury or harm to the claimant." Section 41.002 states that "[t]his chapter applies to any action in which a claimant seeks damages relating to a cause of action." *Id.* § 41.002 (Vernon 2015). Section 41.003 states that "exemplary damages may be awarded only if the claimant proves by clear and convincing evidence that the harm with respect to which the claimant seeks recovery of exemplary damages results from: (1) fraud; (2) malice; or (3) gross negligence." *Id.* § 41.003(a) (Vernon 2015).

Guardian also states in its brief: "Malice, required by the referenced code, may be inferred from the circumstances of the case, if they are such as to satisfy the minds of the jurors that the party was actuated by wrongful motives in the institution and continuance of the prosecution of the suit. . . . Under Texas law filing such a suit is an intentional tort. . . . The institution of a civil suit maliciously and without probable cause also constitutes malicious prosecution."

To the extent Guardian attempts to argue that the tort of malicious prosecution constitutes a proper basis for the exemplary damages award in this case because it satisfies the malice requirement listed in section 41.003(a), we reject such an argument. As we have stated in our discussion of Guardian's fourth issue, Guardian cannot establish a claim for malicious prosecution in this case as a matter of law. Therefore, the tort of malicious prosecution cannot form the basis for an exemplary damages award. In light of Guardian's arguments and authorities presented, we conclude that the trial court did not err by failing to award Guardian

exemplary damages in accordance with the jury's verdict.

Accordingly, we overrule Guardian's fifth issue.

D. Alter Ego

In its sixth issue, Guardian contends that an alter ego relationship existed between Behr Construction and Behrndt. According to Guardian, this relationship means that the trial court erroneously disregarded the jury's answers to Questions Nos. 42 and 43 and rendered judgment that Guardian take nothing against Behrndt individually.

With regard to Question No. 42, Guardian argues that the trial court should not have disregarded the jury's "Yes" answer because there was "substantial evidence" that Behrndt "individually controlled and operated" Behr Construction and "all of the entities in this cause, he operated them solely for his own individual benefit, and individually instigated and perpetuated this frivolous suit, individually took advantage of every opportunity to benefit himself personally, eliminated his fellow business shareholders/partners, kept all of the properties Guardian allowed him to take after the auction, without payment, on the fraudulent representation that he would return and pay the charges and obtain the balance of the auction properties."

A trial court may disregard a jury finding when it is unsupported by evidence or immaterial. *Spencer v. Eagle Star Ins. Co. of Am.*, 876 S.W.2d 154, 157 (Tex. 1994); *Graves v. Tomlinson*, 329 S.W.3d 128, 147 (Tex. App.—Houston [14th Dist.] 2010, pet. denied). A question is immaterial when it should not have been submitted or calls for a finding beyond the province of the jury, such as a question of law. *Graves*, 329 S.W.3d at 147.

In reviewing the legal sufficiency of the evidence to support a finding

governed by a preponderance of the evidence standard, the court must consider evidence in the light most favorable to the verdict; it must credit favorable evidence if reasonable jurors could do so and disregard contrary evidence unless reasonable jurors could not do so. *Id*. at 140-41 (citing *Del Lago Partners, Inc. v. Smith*, 307 S.W.3d 762, 770 (Tex. 2010)). "The final test for legal sufficiency must always be whether the evidence at trial would enable reasonable and fair-minded people to reach the verdict under review." *City of Keller v. Wilson*, 168 S.W.3d 802, 827 (Tex. 2005).

Question No. 42 states as follows:

> **QUESTION 42**
>
> Is Eric Behrndt responsible for the conduct of Behr Construction, Inc. or EZ Management GP, LLC?
>
> **Instruction:**
>
> He is responsible if you find that Behr Construction, Inc. or EZ Management GP, LLC were organized and operated as a [sic] mere tools or business conduits of BEHRNDT; or if there was such unity between Behr Construction, Inc., or EZ Management GP, LLC and Eric Beh[r]ndt that the separateness of Behr Construction, Inc. or EZ Management GP, LLC had ceased and holding only Behr Construction, Inc. or EZ Management GP, LLC responsible would result in injustice; and/or if caused Behr Construction, Inc. or EZ Management GP, LLC to be used for the purpose of perpetuating and did perpetuate an actual fraud on Guardian Transfer & Storage, Inc[.] primarily for the direct personal benefit of Eric Behrndt[].
>
> In deciding whether there was such unity between Eric Behrndt, and/or Behr Construction, Inc. and/or EZ Management GP, LLC. that the separateness of Behr Construction, Inc. and/or EZ Management GP, LLC had ceased, you are to consider the total dealings of Behr Construction, Inc. and/or EZ Management GP, LLC and Behr Construction, Inc. including:
>
> 1. the degree to which Behr Construction, Inc. and/or EZ Management GP, LLC's property had been kept separate from that of Eric Behrndt;

2. the amount of financial interest, ownership, and control Eric Behrndt maintained over Behr Construction, Inc. and/or EZ Management GP, LLC; and

3. whether Behr Construction, Inc. and/or EZ Management GP, LLC had been used for personal purposes of Eric Behrndt.

Answer "Yes" or "No" as to each:

Behr Construction, Inc. Yes

EZ Management GP, LLC Yes

Based on the record before us, we conclude that the trial court did not err by disregarding the jury's answer to Question No. 42 and rendering judgment that Guardian take nothing against Behrndt individually because there is no evidence to support the jury's "Yes" answer to Question No. 42.

The record before us contains no evidence regarding whether (1) Behr Construction was "organized and operated as a mere tool[] or business conduit[] of Behrndt;" (2) "there was such unity between Behr Construction . . . and Beh[r]ndt that the separateness of Behr Construction . . . had ceased and holding only Behr Construction . . . responsible would result in injustice;" or (3) Behr Construction was used to defraud Guardian "for the direct personal benefit of" Behrndt. There was also no evidence regarding (1) the "degree to which Behr Construction[']s . . . property had been kept separate from that of Eric Behrndt;" (2) the "amount of financial interest, ownership, and control Eric Behrndt maintained over Behr Construction;" or (3) whether Behr Construction had been "used for personal purposes of Eric Behrndt."

Additionally, Behrndt's connection to Behr Construction and Behr Construction in general was hardly mentioned during the two-week jury trial. Behrndt testified that he is the owner of Behr Construction. The Constable Property Sale Information Sheet states, "Purchaser's Name: Eric Behrndt" and

"Name or Company on Deed: Behr Construction." And the Texas Franchise Tax Public Information Report states that Behrndt is the President of Behr Construction, and that Nicki Viars is an officer of Behr Construction.

In light of the record before us, we conclude that there is no evidence to support the jury's answer to Question No. 42.

Guardian also assails the trial court's determination to disregard the jury's "Yes" answer to Question No. 43, which asked: "Were any Plaintiffs part of a conspiracy that damaged Guardian Transfer & Storage, Inc.?" We already have addressed Guardian's third issue and determined that the trial court did not err in disregarding the jury's conspiracy finding. Insofar as Guardian suggests that a finding of conspiracy is tantamount to an alter ego finding, we disagree. Alter ego and civil conspiracy are different concepts.

The concept of civil conspiracy is sometimes used to establish joint and several liability among multiple defendants, some of whom may not have committed a tort by their own conduct. *See, e.g.*, *Energy Maint. Servs. Grp. I, LLC v. Sandt*, 401 S.W.3d 204, 220 (Tex. App.—Houston [14th Dist.] 2012, pet. denied). If a plaintiff proves a civil conspiracy, then each conspirator is responsible for all acts done by any of the conspirators in furtherance of the conspiracy. *Id*. A finding of civil conspiracy imposes joint and several liability on all conspirators for actual damages resulting from acts in furtherance of the conspiracy. *Id*. Conversely, under the alter ego theory, courts disregard the corporate entity when there exists such unity between corporation and individual that the corporation ceases to be separate and when holding only the corporation liable would promote injustice. *Mancorp, Inc. v. Culpepper*, 802 S.W.2d 226, 228 (Tex. 1990).

Accordingly, we overrule Guardian's sixth issue.

II. Behr Construction's Cross-Appeal

A. Lost Profits

In its first cross-issue, Behr Construction contends that the amended final judgment erroneously awarded Guardian damages for lost profits because (1) Guardian did not plead for lost profits; and (2) there is "no evidence, or insufficient evidence, that any lost profits were caused by [Behr Construction]'s failure to pay Guardian the $49,161.18" moving and storage fee.

When an appellant attacks the legal sufficiency of an adverse finding on an issue on which it did not have the burden of proof, it must demonstrate that no evidence supports the finding. *Barton v. Resort Dev. Latin Am., Inc.*, 413 S.W.3d 232, 235 (Tex. App.—Dallas 2013, pet. denied). There is "no evidence" when (a) there is a complete absence of evidence of a vital fact; (b) the court is barred by rules of law or 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 conclusively establishes the opposite of the vital fact. *See City of Keller*, 168 S.W.3d at 810. "The final test for legal sufficiency must always be whether the evidence at trial would enable reasonable and fair-minded people to reach the verdict under review." *Id*. at 827.

In reviewing factual sufficiency, we must consider and weigh all the evidence. *Golden Eagle Archery, Inc. v. Jackson*, 116 S.W.3d 757, 761 (Tex. 2003). We can set aside a verdict only if the evidence is so weak or if the finding is so against the great weight and preponderance of the evidence that it is clearly wrong and manifestly unjust. *Id*.

The general rule regarding damages in a breach-of-contract case is that the "complaining party is entitled to recover the amount necessary to put him in as

good a position as if the contract had been performed." *Bowen v. Robinson*, 227 S.W.3d 86, 96 (Tex. App.—Houston [1st Dist.] 2006, pet. denied) (citation omitted). "Put another way, in a breach-of-contract case, the normal measure of damages is just compensation for the loss or damage actually sustained, commonly referred to as the benefit of the bargain." *Id.* "The benefit-of-the-bargain measure of damages may include reasonably certain lost profits." *Id*.

Lost profits are damages for the loss of net income to a business, reflecting income from the lost business activity, less expenses that would have been attributable to that activity. *Barton*, 413 S.W.3d. at 235-36; *Bowen*, 227 S.W.3d at 96; *see Miga v. Jensen*, 96 S.W.3d 207, 213 (Tex. 2002). Lost profits may be recovered for money that would have been made if the bargain had been performed as promised. *Formosa Plastics Corp. USA v. Presidio Eng'rs & Contractors, Inc.*, 960 S.W.2d 41, 50 (Tex. 1996); *Bowen*, 227 S.W.3d at 96.

The calculation of lost profit damages must be based on net profits, not on gross revenue or gross profits. *Barton*, 413 S.W.3d. at 236; *see Holt Atherton Indus., Inc. v. Heine*, 835 S.W.2d 80, 83 n.1 (Tex. 1992). Although recovery for lost profits does not require that the loss be susceptible to an exact calculation, a party seeking to recover lost profits must prove the loss through competent evidence with reasonable certainty. *ERI Consulting Eng'rs, Inc. v. Swinnea*, 318 S.W.3d 867, 876 (Tex. 2010). What constitutes reasonably certain evidence of lost profits is a fact-intensive determination. *Id*. At a minimum, opinions or estimates of lost profits must be based on objective facts, figures, or data from which the amount of lost profits can be ascertained. *Id*.

Plaintiffs cannot recover profits that are largely speculative, such as activities dependent on uncertain or changing market conditions, chancy business opportunities, promotion of untested products, entry into unknown or unviable

markets, or on the success of new and unproven enterprises. *Ramco Oil & Gas Ltd. v. Anglo-Dutch (Tenge) L.L.C.*, 207 S.W.3d 801, 808 (Tex. App.—Houston [14th Dist.] 2006, pet. denied). If the business is shown to have been established and profitable when the contract was breached, such pre-existing profit, together with other facts and circumstances, may indicate with reasonable certainty the amount of profits lost. *Id.*

If no evidence is presented to prove lost profits with reasonable certainty, then the trial court should render a take-nothing judgment as to lost profits damages. *Barton*, 413 S.W.3d. at 236 (citing *Tex. Instruments, Inc. v. Teletron Energy Mgmt., Inc.*, 877 S.W.2d 276, 281 (Tex. 1994)).

Here, the jury found that Behr Construction agreed to pay Guardian $49,161.18 as a moving and storage fee in consideration for the release of equipment and materials to Behr Construction after the constable sale, and that Behr Construction failed to comply with this agreement. The jury also found that Guardian incurred $612,700 in past lost profits, and that Guardian will incur $563,600 in future lost profits because of Behr Construction's failure to comply with the agreement. The trial court's amended final judgment contains awards in conformity with the jury's verdict on past and future lost profits.

Based on our review of the record before us, we conclude there is no evidence that Guardian sustained lost profits as a result of Behr Construction's failure to pay $49,161.18 as a moving and storage fee to Guardian.

Guardian's owner, Stuart Stauffacher, testified that Guardian was "ask[ing] this jury" to grant "relief in this case." He stated, "I'm asking for the costs associated with this case, the materials that were released to him [Behrndt] that he never paid for back, plus all my expenses and -- associated with this case, release the restraining order prohibiting me from functioning -- reimbursed for that, plus

legal expenses." With regard to the "values of the properties that were voluntarily delivered to Mr. Behrndt's organization" after the constable sale, Stauffacher testified that Guardian "intend[s] to introduce evidence to show [the jury] what the value of all those assets were" including "actual purchase orders of . . . parts that went to" various companies.

Stauffacher testified that Guardian also sought damages for monthly rent payments of $14,200 Guardian had to pay to its landlord for 17 months. Stauffacher further testified that Guardian was "asking this jury" to award damages for the "cost of repairing/upgrading all of those machines" Guardian still has in its warehouse or has sent out for repairs. Stauffacher testified that the cost of repair for each of the three machines Guardian has sent out for repairs so far would be between $8,000 and $10,000; and Guardian has another four machines in its warehouse that need repairs.

On cross-examination, Stauffacher agreed that "Guardian's whole business model was getting property that was seized to enforce a judgment, holding the property in [its] warehouse, and then the constables conduct a constable sale at [its] warehouse so that then the property is taken off -- out of [its] warehouse."

Guardian called Duong as a witness to establish the value of the property that Guardian had released to Behr Construction after the auction. Guardian showed Duong numerous photos depicting the equipment, including machines and tools, as well as materials Behr Construction had received from Guardian after the constable sale. Based on these photos, Duong recognized numerous finished production parts as parts Micro Machine had produced, matched these parts to different purchase orders, and assessed the parts' value. For example, Duong recognized many parts he produced for a "PO Number 5" that were worth $1.65 million with a production cost of $375,000. Most of the parts Duong recognized

on the photos were valued between $2,000 and $10,000 per piece and were made of "exotic material."

Duong also identified several machines, including welding machines, Guardian had released to Behr Construction that Duong valued at about $80,000. Duong estimated the value of his tools at $250,000. Duong identified several unfinished parts that Behr Construction had obtained from Guardian; Behrndt returned them to Duong so Duong could finish them, deliver them, and get paid by the companies that had ordered the parts. Duong answered "Yes" in response to Guardian's question: "Can you provide a list of all of this equipment that you contend was picked up by Mr. Behrndt and the values of that to determine just how much money Mr. Behrndt has received to the damage of Guardian because he had never paid for any of it?" Guardian's Exhibit No. 3 appears to be the list of equipment, materials, and parts and their corresponding values as identified by Duong. The record also contains copies of numerous purchase orders Duong referred to during his testimony.

Besides testimony concerning the value of the property Guardian released to Behr Construction, the sums needed to repair machines Guardian still stored, and the amount of rent Guardian continued to pay on its warehouse after the constable sale, Guardian presented no other evidence regarding any alleged damages at trial. This testimony is not evidence of any amount of "money that would have been made [by Guardian] if the bargain had been performed as promised" by Behr Construction. *See Formosa Plastics Corp.*, 960 S.W.2d at 50; *Bowen*, 227 S.W.3d at 96. Because nothing in the record before us establishes that Guardian suffered any lost profits, the trial court erred by not entering a take-nothing judgment against Guardian with regard to lost profits damages. Accordingly, we sustain Behr Construction's first cross-issue.

Behr Construction does not challenge the jury's finding that it breached the agreement to pay Guardian the $49,161.18 moving and storage fee as consideration for the release of equipment and materials to Behr Construction after the constable sale. Behr Construction stated at oral argument that it is not asking this court to hold that "they [Guardian] don't get anything." Behr Construction stated at oral argument that it was "prepared to pay" $49,161.18 but when it drafted the trial court's final judgment it inadvertently left out the $49,161.18 amount. Behr Construction explained that it did not intend to omit this amount from the final judgment and that this was an "inadvertent error." In light of Behr Construction's concessions at argument, judgment in favor of Guardian is warranted in the amount of $49,161.18.

B. Attorney's Fees

In its second cross-issue, Behr Construction argues that the "judgment awarding attorneys' fees to Guardian should be reversed since there is no evidence, or insufficient evidence, to support the award." In that regard, Behr Construction argues that the testimony of Guardian's attorney is incompetent evidence to support the fee award because "[n]owhere in his testimony does [Guardian's attorney] testify that he based his opinion on contemporaneous records," and Texas law requires evidence of contemporaneous time records as stated in *El Apple I, Ltd. v. Olivares*, 370 S.W.3d 757 (Tex. 2012).

Contrary to Behr Construction's assertion, *El Apple* does not completely foreclose the possibility of an attorney's fee award absent evidence of contemporaneous time records. *See id*. at 763; *see also City of Laredo v. Montano*, 414 S.W.3d 731, 736 (Tex. 2013) ("*El Apple* does not hold that a lodestar fee can only be established through time records or billing statements. We said instead that an attorney could testify to the details of his work, but that . . . 'the attorney

would probably have to refer to some type of record or documentation to provide this information.'"); *River Oaks L-M. Inc. v. Vinton-Duarte*, 469 S.W.3d 213, 233 (Tex. App.—Houston [14th Dist.] 2015, no pet.) (affidavit in support of attorney's fees claim which stated that actual time records had not been kept but that attorney conducted a "forensic review" of the firm's files satisfied *El Apple* requirements). Accordingly, we reject Behr Construction's argument that the attorney's fees award in this case is not supported by evidence because Guardian's attorney did not testify that "he based his opinion on contemporaneous records."

Behr Construction also argues that there is no evidence to support the fee award because Guardian's attorney did not (1) "provide any information as to the methodology used to arrive at the claimed fees;" (2) "allocate between recoverable and non-recoverable claims;" and (3) "distinguish between fees incurred defending a case and those incurred prosecuting any successful claims."

Behr Construction's second and third contentions regarding the lack of segregation of attorney's fees have not been preserved for our review because Behr Construction failed to make these arguments in the trial court. *See* Tex. R. App. P. 33.1; *Green Int'l, Inc. v. Solis*, 951 S.W.2d 384, 389 (Tex. 1997); *Daftary v. Prestonwood Mkt. Square, Ltd.*, 399 S.W.3d 708, 712 (Tex. App.—Dallas 2013, pet. denied). To the extent Behr Construction's first argument regarding the "methodology used to arrive at the claimed fees" is also a complaint about a lack of segregation of attorney's fees, it is equally not preserved for our review because it was not raised in the trial court. To the extent Behr Construction's "methodology" argument attacks a lack of contemporaneous time records, we have already rejected the argument as meritless.

Finally, to the extent Behr Construction's argument challenges Guardian's attorney's fees testimony as being conclusory, we reject such an argument because

the testimony was not conclusory. Guardian's attorney testified that (1) he has practiced law for 40 years; (2) he charges $250 per hour for his services "which is probably a hundred dollars less than most of my contemporaries;" (3) he worked on this case from the beginning; (4) he spent about one hundred hours on this case excluding trial and "the legal time is not even close to what I've actually spent;" (5) he prepared for trial and then spent two weeks in trial "which is approximately $25,000 worth of additional time in this -- in this case that I have actually spent. And that really doesn't include a lot of the miscellaneous time that I don't -- I don't charge;" (6) the attorney's fees are approximately $210,000 "until December, and . . . I did not include any of the miscellaneous billing that I did in January. As we now know, we're -- we're through with February;" (7) he had to spend many more hours "than is reasonable in a case of this type because the plaintiff in this case has brought so many what I consider frivolous charges" and it has not been a simple case; and (8) the fees charged are reasonable and necessary.

Accordingly, we overrule Behr Construction's second cross-issue with regard to these arguments

However, when an amount of damages is meaningfully reduced on appeal, the issue of attorney's fees should ordinarily be retried unless we are "reasonably certain that the jury was not significantly influenced" by the erroneous damage award. *See Young v. Qualls*, 223 S.W.3d 312, 314-15 (Tex. 2007); *Barker v. Eckman*, 213 S.W.3d 306, 314 (Tex. 2006); *Colvin v. Tex. Dow Emps. Credit Union*, No. 01-11-00342-CV, 2012 WL 5544950, at *11 (Tex. App.—Houston [1st Dist.] Nov. 15, 2012, no pet.) (mem. op.). Here, we cannot be reasonably certain that the erroneous damages award had no significant influence on the jury's fee award. *See Young*, 223 S.W.3d at 315; *Barker*, 213 S.W.3d at 314.

Therefore, the case must be remanded to the trial court for a new trial on attorney's fees. *See Young*, 223 S.W.3d at 315; *Barker*, 213 S.W.3d at 314.

CONCLUSION

We reverse the trial court's judgment with regard to the award of lost profits and render judgment that Guardian take-nothing with regard to lost profits. We reverse the trial court's judgment with respect to the award of attorney's fees and remand this case to the trial court for a new trial on the amount of Guardian's reasonable and necessary attorney's fees. We reform the judgment to award Guardian $49,161.18 in breach-of-contract damages, and affirm the remainder of the judgment as reformed.

/s/ William J. Boyce
Justice

Panel consists of Justices Boyce, Busby and Brown.