

Reversed and Dismissed in Part, Reversed and Rendered in Part, and Majority and Concurring and Dissenting Opinions filed January 28, 2016.



In The
Fourteenth Court of Appeals

NO. 14-14-00764-CV

**EDWARD J. SHERMAN AND EDWARD J. SHERMAN ENTERPRISES
INC. D/B/A FIND IT APARTMENT LOCATORS & CITI HOMES,
Appellants**

V.

**DATRIL BOSTON AND APARTMENT EXPRESS, LLC D/B/A MR. DAY
RENTS, Appellees**

**On Appeal from the County Civil Court at Law No. 4
Harris County, Texas
Trial Court Cause No. 1020809**

C O N C U R R I N G A N D D I S S E N T I N G O P I N I O N

I join Parts I and II of the majority opinion, but I respectfully dissent to Part
III.

After a three-day bench trial, the trial court rendered judgment in favor of a limited liability company on its conversion counterclaim. The plaintiff, a natural person represented by counsel, offered about half of the evidence admitted. There were no opening statements or closing arguments at trial. No one purported to submit documents to the trial court on behalf of the company during the trial, and no one presented arguments to the trial court in support of the company's claims. Though the company was not represented by an attorney at the time of trial, the trial court did not raise the issue during trial, nor did any party point out that the company needed to be represented by counsel or otherwise object to proceeding with trial under the circumstances.

Even though the evidence the plaintiff tendered may be sufficient to support the trial court's judgment in favor of the company, this court reverses and renders judgment that the company take nothing, concluding that the evidence is legally insufficient to support the trial court's judgment as to the conversion claim solely because the company was not represented by an attorney at trial.¹ Because no one raised this complaint in the trial court and because this complaint would not make the evidence legally insufficient, I respectfully dissent from this part of the majority opinion. Rather than resolve the fourth issue based upon the company's lack of legal representation at trial, this court should determine whether the evidence is

¹ Though all other parts of the majority opinion reflect that the majority concludes the evidence to support this conversion counterclaim is legally insufficient solely based upon the company's lack of legal representation at trial, footnote 6 suggests that perhaps the majority employs a different analysis—disregarding the evidence offered by the company's owner and then concluding that the rest of the trial evidence is legally insufficient under the applicable standard of review. *See ante* at 2, 10-12 & n.6. If the majority bases its disposition of the fourth issue on the latter analysis, it still relies on the company's lack of legal representation at trial for an essential part of its reasoning, an improper course when the complaint was not preserved in the trial court.

legally sufficient based on all of the trial evidence under the applicable standard of review.

Appellant Edward J. Sherman argues that the trial evidence is legally insufficient to support the trial court's judgment in favor of appellee Apartment Express, LLC d/b/a Mr. Day Rents (hereinafter "Mr. Day Rents") on its conversion claim against Sherman. Sherman contends the evidence is legally insufficient because the only evidence offered in support of this claim at trial was offered by appellee Datril Boston, who is not an attorney, on behalf of Mr. Day Rents, a limited liability company that must be represented by an attorney. In the alternative, Sherman asserts the trial evidence is legally insufficient to support findings in favor of Mr. Day Rents on its conversion claim, even considering the evidence offered by Boston.²

Mr. Day Rents is a corporate entity. The company can represent itself in justice court, but in all other Texas courts, Mr. Day Rents may appear only when represented by a licensed attorney.³ When corporate entities break this rule, how should courts respond?

One approach would be to conclude that allowing such conduct is fundamental, jurisdictional error, rendering the proceedings void without the necessity of any complaint in the trial court.⁴ Texas has not taken this approach.

² The majority concludes that the evidence is legally insufficient because Mr. Day Rents was not represented by an attorney at trial, and therefore the majority does not address this alternative argument. *See ante* at 10–12.

³ *See* Tex. Govt. Code Ann. § 27.031(d) (allowing corporate entities to appear in justice court even though not represented by an attorney) (West, Westlaw through 2015 R.S.); *Rabb Intern., Inc. v. SHL Thai Food Service, LLC*, 346 S.W.3d 208, 209 (Tex. App.—Houston [14th Dist.] 2011, no pet.).

⁴ *See, e.g., Bennie v. Triangle Ranch Co.*, 216 P. 718, 718–19 (Co. 1923) (holding that judgment in

Instead, Texas law holds that actions taken purportedly on behalf of a corporate entity by a non-attorney are not void or fundamental error, though they are defective.⁵ And, Texas courts hold that in some circumstances the trial court errs in not allowing the corporation a reasonable opportunity to remedy this defect by retaining an attorney to represent it in the litigation.⁶

It is against this backdrop, that this court must consider the impact of Sherman's failure to preserve error. Two important presumptions underlie the analysis. First, if a trial court errs by allowing a non-attorney to purportedly represent a corporate entity, the appellate court will ignore the actions of the non-attorney in determining the merits of the claims, though the non-attorney's actions may be effective for some purposes, such as to avoid a default judgment, perfect appeal, or extend the deadline to perfect appeal.⁷ Second, if a trial court errs in allowing a non-attorney to offer evidence at trial purportedly on behalf of a corporate entity, the effect of this error is that the appellate court should ignore all such evidence. Even if ignoring the evidence is the effect of the error, today's case presents the issue of whether the error must be preserved in the trial court. Though the majority effectively says "no," the better view under Texas jurisprudence is that error preservation is required.

favor of plaintiff corporation was void and corporation's pleading would be dismissed because corporation was not represented by an attorney in the proceeding, even though this issue was not raised in the trial court by either the trial court or any party).

⁵ See *Rabb Intern., Inc.*, 346 S.W.3d at 209–10.

⁶ See *KSNG Architects, Inc. v. Beasley*, 109 S.W.3d 894, 896–99 (Tex. App.—Dallas 2003, no pet.).

⁷ See *Rabb Intern., Inc.*, 346 S.W.3d at 209–10.

The Supreme Court of Texas has recognized the strong policy considerations supporting the preservation-of-error requirement.⁸ A timely and specific complaint alerts the trial court and the adversary to the alleged error, giving both a chance to correct the problem and thereby avoid the need to raise the issue on appeal.⁹ Requiring error preservation prevents unfairness, gives deference to the trial court, and encourages the proper administration of justice by having the parties and the trial court address the issues before they reach the court of appeals.¹⁰ In this way, the error-preservation rule enhances efficiency, prevents unnecessary expense, and safeguards judicial resources.¹¹ It also discourages the gamesmanship that sometimes accompanies the exceptions to the error-preservation requirement.¹² For these and other reasons, as a general rule, Texas appellate courts will not review non-jurisdictional complaints raised for the first time on appeal.¹³ Today, the majority creates an exception and reverses based on unpreserved error.

Failure to Preserve Error

There are strong policy reasons for preventing the unauthorized practice of law.¹⁴ One would expect that Texas trial courts would not allow a corporate entity to proceed to trial if the entity were not represented by an attorney.¹⁵ Nonetheless, if

⁸ See *Mansions in the Forest, L.P. v. Montgomery County*, 365 S.W.3d 314, 317 (Tex. 2012) (per curiam).

⁹ See *id.*

¹⁰ See *id.*

¹¹ See *id.*

¹² See *id.*

¹³ See *id.*

¹⁴ See *Rabb Intern., Inc.*, 346 S.W.3d at 209–11.

¹⁵ This statement would not apply to a case in a justice court. See Tex. Govt. Code Ann. § 27.031(d) (allowing corporate entities to appear in justice court even though not represented by an

a trial court does so, and if the effect of doing so is that none of the actions that the non-attorney takes will be effective as to the merits of the claims by and against the corporate entity, there is no reason the general preservation-of-error requirement should not apply.¹⁶

Because corporate self-representation is permitted in justice courts, owners of corporate entities, especially small-business owners, may be unaware that corporate entities must be represented by an attorney in all other courts.¹⁷ If a trial court proceeds to trial with a corporate entity unrepresented by counsel without mentioning to the corporate entity the need for an attorney, the opposing parties should not be permitted to “lie behind the log,” make no mention of this requirement, and then successfully argue for the first time on appeal that all actions on behalf of the corporate entity should be ignored.¹⁸

If the opposing parties timely object to the lack of counsel for the corporate entity, the entity generally will have an opportunity to obtain counsel. If the opposing parties object and the corporate entity states that it does not intend to retain counsel, then the trial court would err in proceeding to trial without an attorney for

attorney).

¹⁶ See *Mansions in the Forest, L.P.*, 365 S.W.3d at 316–18 (holding that no exception should be made to the normal preservation-of-error requirements for a complaint that a purported affiant was “no affidavit at all” because the signatory did not swear to the statements in the “affidavit”). If the actions that the non-attorney takes could be effective as to the merits of the claims by and against the corporate entity, then there would be even stronger reasons for the application of the preservation-of-error requirement.

¹⁷ See Tex. Govt. Code Ann. § 27.031(d); *Rabb Intern., Inc.*, 346 S.W.3d at 209–10.

¹⁸ See *Haggard v. Div. of Emp’t Sec.*, 238 S.W.3d 151, 155–56 (Mo. 2007) (holding that error in allowing entity to be represented by non-attorney was waived by failure to object); *Casework, Inc. v. Hardwood Assocs., Inc.*, 466 S.W.3d 622, 627–28 (Mo. Ct. App. 2015) (stating that allowing a non-lawyer to ostensibly act on behalf of corporate entity is not fundamental error but may be error if objected to in a timely manner).

the corporate entity. If the opposing parties raise no objection and the trial court says nothing, it would be a waste of time, money, and judicial resources (as well as an endorsement of unfair gamesmanship) to reverse the trial court's judgment on appeal based on this error, which is not fundamental and to which the opposing parties chose not to object in the trial court.¹⁹ Therefore, to complain on appeal that Mr. Day Rents is a limited liability company that was not represented by an attorney at the bench trial, Sherman must have preserved error in the trial court.²⁰ He did not.

Though Sherman may complain for the first time on appeal that the evidence is legally insufficient to support the trial court's judgment following a bench trial, a complaint that a corporate entity was not represented at trial by an attorney is not itself a legal-insufficiency complaint, even though, if meritorious, this complaint might mean that the evidence offered by the corporate entity at trial should be ignored in determining the merits of the case.²¹

The trial court did not inform Mr. Day Rents that it could not proceed to trial unless it retained an attorney. The trial court did not refuse to proceed with trial because Mr. Day Rents did not have counsel. Nor did the trial court dismiss Mr. Day Rents's claims for this reason. The trial court proceeded to trial, found in favor of Mr. Day Rents on its conversion claim against Sherman, and rendered judgment

¹⁹ See *Mansions in the Forest, L.P.*, 365 S.W.3d at 316–18; *Haggard*, 238 S.W.3d at 155–56; *Casework, Inc.*, 466 S.W.3d at 627–28.

²⁰ See Tex. R. App. P. 33.1(a); *Mansions in the Forest, L.P.*, 365 S.W.3d at 316–18; *Grace Interest, LLC v. Wallis State Bank*, 431 S.W.3d 110, 122 (Tex. App.—Houston [14th Dist.] 2013, pet. denied); *Haggard*, 238 S.W.3d at 155–56; *Casework, Inc.*, 466 S.W.3d at 627–28.

²¹ See Tex. R. App. P. 33.1(d). In the unlikely event that the failure to be represented by an attorney meant that the corporate entity automatically lost on the merits as to claims in the case, this error still would not be equivalent to the legal insufficiency of the evidence, and the reasons for requiring error preservation would be even stronger.

in Mr. Day Rents's favor on this claim. In this context, for this court to sustain Sherman's challenge to the judgment based on the failure of Mr. Day Rents to be represented by an attorney at trial, Sherman must have voiced this complaint in the trial court.²² Because Sherman failed to do so, this court should not reverse the trial court's judgment based on this error.²³

Improper Legal-Sufficiency Analysis

Even if Sherman had preserved error in the trial court or if error preservation were not required, Mr. Day Rents's lack of legal representation at trial does not mean that the trial evidence is legally insufficient to support the trial court's judgment on Mr. Day Rents's conversion claim. At most, Mr. Day Rents's lack of representation by an attorney would mean that this court would disregard the evidence offered by Mr. Day Rents at trial and the arguments and actions of its purported representative at trial. There were no opening statements or closing arguments, no documents allegedly filed on behalf of the company during trial, and no arguments presented to the trial court in support of Mr. Day Rents's claims. Boston offered evidence, cross-examined witnesses, and objected to evidence, but he did it all in his individual capacity. It does not appear that Boston did anything on behalf of Mr. Day Rents.

Even presuming that Boston, who is not an attorney, improperly sought to act on behalf of Mr. Day Rents, at most, it would entitle Sherman to have this court

²² See Tex. R. App. P. 33.1(a); *Mansions in the Forest, L.P.*, 365 S.W.3d at 316–18; *Grace Interest, LLC*, 431 S.W.3d at 122; *Haggard*, 238 S.W.3d at 155–56; *Casework, Inc.*, 466 S.W.3d at 627–28.

²³ See Tex. R. App. P. 33.1(a); *Mansions in the Forest, L.P.*, 365 S.W.3d at 316–18; *Grace Interest, LLC*, 431 S.W.3d at 122; *Haggard*, 238 S.W.3d at 155–56; *Casework, Inc.*, 466 S.W.3d at 627–28.

ignore the evidence offered by Boston for the purposes of determining whether the evidence is legally sufficient to support the trial court's judgment on Mr. Day Rents's conversion claim against Sherman.²⁴ Ignoring Boston's evidence does not mandate the conclusion that the evidence is legally insufficient.²⁵

Sherman offered testimonial and documentary evidence that makes up about half of the evidence admitted at trial. There is no rule requiring the trial court's judgment to be supported by evidence offered by a prevailing party in the trial court.²⁶ If, under the applicable standard of review, the evidence Sherman offered is legally sufficient to support the trial court's judgment on Mr. Day Rents's conversion claim, this court could and should conclude that the evidence is legally sufficient, without any reliance upon evidence offered by Boston or Mr. Day Rents.

In his first argument, Sherman asserts that the trial evidence is legally insufficient to support the trial court's judgment in Mr. Day Rents's favor on its conversion claim because the only evidence offered at trial in support of this claim was submitted by Boston, who is not an attorney. In this argument, Sherman does not assert that Mr. Day Rents's lack of legal representation means that in determining the legal sufficiency of the evidence, this court must ignore the trial evidence Sherman offered. Rather, Sherman's argument appears to be based on the incorrect premise that only evidence offered in support of a claim may be legally

²⁴ See *McClane v. New Caney Oaks Apartments*, 416 S.W.3d 115, 121 (Tex. App.—Beaumont 2013, no pet.) (ignoring testimony offered by non-attorney on behalf of corporate entity not represented by counsel for purposes of legal sufficiency analysis).

²⁵ See *City of Keller v. Wilson*, 168 S.W.3d 802, 827 (Tex. 2005) (stating that evidence supporting a verdict cannot be identified by which party offered it and that in determining the legal sufficiency of the evidence courts must eventually consider all of the trial evidence).

²⁶ See *id.*

sufficient to support recovery under that claim.²⁷ The premise is incorrect because evidence offered in opposition to a claim may nonetheless be legally sufficient to support recovery under that claim; thus, courts consider all trial evidence in determining the sufficiency of the evidence.²⁸ Sherman's first argument fails for this reason alone.

This court should address Sherman's second argument — that the trial evidence is legally insufficient to support findings in favor of Mr. Day Rents on its conversion claim, considering all the trial evidence. Instead, the majority concludes that because Boston improperly sought to act on behalf of Mr. Day Rents, this court must ignore the evidence Boston offered and, on this basis alone, deem the evidence legally insufficient to support findings in Mr. Day Rents's favor on the company's conversion claim.²⁹ Ignoring the evidence Boston offered does not make the evidence Sherman offered legally insufficient.³⁰

²⁷ *See id.*

²⁸ *See id.*

²⁹ *See id.* In footnote 6 of its opinion, the majority notes Sherman's assertion that the only evidence offered in support of Mr. Day Rents's conversion claim was submitted by Boston. This assertion by Sherman is not the same as an assertion that Boston offered the only evidence that might be legally sufficient to support the conversion claim. *See id.* The majority then states that Boston has not cited and the majority has not found any evidence presented by a licensed attorney that is sufficient to support a conversion judgment for Mr. Day Rents. *See ante* at 11, n.6. This statement suggests the majority may be disregarding the evidence Boston offered and then concluding that the rest of the trial evidence is legally insufficient under the applicable standard of review, an analysis that conflicts with the analysis articulated in the rest of the majority opinion. *See ante* at 2, 10-12 & n.6. If the majority bases its disposition of the fourth issue on the former analysis (suggested in footnote 6), the majority still relies on Mr. Day Rents's lack of legal representation at trial for an essential part of its analysis without any preservation of error in the trial court.

³⁰ *See City of Keller*, 168 S.W.3d at 827.

Sherman and the majority rely upon the Ninth Court of Appeals's opinion in *McClane v. New Caney Oaks Apartments*.³¹ But, *McClane* is not on point because in that case the only evidence offered at trial by any party was offered by a non-attorney purportedly on behalf of a corporate entity.³² The *McClane* court concluded that it should disregard this evidence and that, on the record before the court, the evidence was legally insufficient to support the trial court's judgment.³³ Because our record contains other evidence (not just evidence offered by a non-attorney) that may be sufficient to support the trial court's judgment on the conversion claim, Mr. Day Rents's lack of legal representation at trial does not mean that the trial evidence is legally insufficient to support the judgment.³⁴

Conclusion

Sherman did not have to preserve error in the trial court to argue on appeal that the trial evidence is legally insufficient to support the trial court's judgment against him on Mr. Day Rents's counterclaim. But, Sherman had to preserve error on his complaint that Mr. Day Rents was not represented by an attorney at trial. Because Sherman did not voice his lack-of-attorney-representation complaint in the trial court, this court should determine Sherman's legal-insufficiency complaint based upon all the evidence admitted at trial. In any event, even if error-preservation were not required on this point, Mr. Day Rents's lack of attorney representation at trial does not mean that the trial evidence is legally insufficient to support the judgment.

³¹ See *McClane*, 416 S.W.3d at 121.

³² See *id.* at 117.

³³ See *id.* at 121.

³⁴ See *City of Keller*, 168 S.W.3d at 827.

For these reasons, I respectfully dissent as to Part III of the majority opinion.

/s/ Kem Thompson Frost
 Chief Justice

Panel consists of Chief Justice Frost and Justices Jamison and Busby (Busby, J., majority).