Reversed and Rendered and Memorandum Opinion filed August 22, 2017.

In The

Fourteenth Court of Appeals

NO. 14-15-01035-CV

BH CONTRACTORS, LLC, Appellant

V.

HELIX ENERGY SOLUTIONS GROUP, INC. AND HELIX SUBSEA CONSTRUCTION, INC., Appellees

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On Appeal from the 281st District Court
Harris County, Texas
Trial Court Cause No. 2012-44604

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

BH Contractors, LLC (BH) challenges the trial court's judgment ordering reformation of a Master Service Contract (the Contract) and awarding damages and attorney's fees to Helix Energy Solutions Group, Inc. and Helix Subsea Construction, Inc. (Helix). We agree with BH that there is no evidence of an essential element of contract reformation: the existence of an agreement reached by

the parties before the Contract was drafted. Thus, without reaching BH's remaining issues and arguments, we reverse and render judgment that Helix take nothing on its claim.

Background

I. The Contract

Helix performs marine operations such as commercial diving, construction, and pipeline work. BH was formed in 2007. Helix and BH entered into the Contract, executed September 21, 2007, under which BH agreed to supply labor to Helix as a subcontractor. The Contract was a form document drafted by Helix and was not specifically negotiated between the parties.

The parties assumed or believed that the Contract included a "knock-for-knock" indemnity provision. Under such a provision, each party is responsible for claims arising from the illness, injury, or death of its own employees, and must protect, defend, indemnify, and hold the other party harmless from such claims, regardless of fault. While this description applies to Helix's indemnification obligations under the Contract, Section IX.B. of the Contract required BH to indemnify Helix "for injury to or illness or death of SUBCONTRACTOR, , [sic][1] its parent, subsidiary, affiliated and related companies" related to work performed under the Contract.

II. The Ledbetter Claim and Trial Court Proceedings

Pursuant to the Contract, BH assigned Deryel Ledbetter to work as a welder on the M/V Intrepid, a Helix vessel, where he slipped and fell, injuring his left hand. Although BH's workers' compensation carrier or marine employer's liability carrier paid benefits to Ledbetter as BH's employee, Ledbetter brought suit against Helix seeking recovery of damages for his injuries, alleging he was employed by Helix.

[1] The Contract includes this additional space and comma.

Helix tendered its defense to BH, but BH's carriers denied Helix coverage. Ultimately, Helix settled the lawsuit with Ledbetter.[2]

On October 11, 2012, Helix filed a third-party petition against BH, alleging breach of contract and seeking recovery of all costs associated with Helix's defense of the Ledbetter lawsuit. Helix alleged BH was Ledbetter's employer at the time of his injury and that under the Contract, BH was required to indemnify Helix for any amounts paid to Ledbetter and for Helix's legal expenses. On September 24, 2013, Helix amended its petition, additionally seeking reformation of the Contract "to conform to the terms of the original and actual agreement between the parties." Helix alleged the intent of the parties when entering into the Contract was that BH would also indemnify Helix for claims asserted by any employee of BH, including claims such as Ledbetter's. Helix contended a scrivener's error resulted in language being omitted from the indemnity agreement that would have carried out the parties' intent.

Following a bench trial, the trial court rendered judgment reforming the Contract so that its indemnification provision now requires BH to indemnify Helix "for injury to or illness or death of SUBCONTRACTOR, *its employees*, its parent, subsidiary, affiliated and related companies" related to work performed under the Contract, and further ordered BH to reimburse Helix for the costs and fees incurred in defending and settling Ledbetter's claims. At BH's request, the trial court signed findings of fact and conclusions of law. This appeal followed.[3]

Analysis

In three issues, BH argues that (a) the trial court erred in reforming the

[2] BH attended the mediation of Ledbetter's claims against Helix, and did not object to their $300,000 settlement.

[3] Helix filed a notice of cross-appeal. Helix subsequently informed the court it would not be filing a brief in its cross-appeal, and it was dismissed by order of the court.

contract without a finding or evidence of an agreement before the contract was drafted; (b) Texas law does not allow reformation of a form contract; and (c) Helix's reformation claim accrued when the Contract was signed in 2007, and thus, the reformation claim is barred by the four-year statute of limitations.

I. Standard of Review

Where, as here, a case is tried without a jury and the trial court issues findings of fact and conclusions of law, the reviewing court is bound by any unchallenged factual finding unless the evidence is legally insufficient to support it. *See Saulsberry v. Ross*, 485 S.W.3d 35, 41 (Tex. App.—Houston [14th Dist.] 2015, pet. denied) (citing *Tenaska Energy, Inc. v. Ponderosa Pine Energy, LLC*, 437 S.W.3d 518, 523 (Tex. 2014)). If at least one of the elements of a ground of recovery or defense has been included in the findings, any omitted unrequested elements that are supported by the evidence are supplied by a presumption in support of the judgment. Tex. R. Civ. P. 299.

When a complete reporter's record is filed, a litigant may challenge a trial court's express and implied findings on legal and factual sufficiency grounds. *See Shields Ltd. P'ship v. Bradberry*, No. 15-0803, 2017 WL 2023602, at *6 (Tex. May 12, 2017). We review the findings for legal sufficiency under the same standard we apply to jury verdicts. *See Green v. Alford*, 274 S.W.3d 5, 23 (Tex. App.—Houston [14th Dist.] 2008, pet. denied) (op. on reh'g en banc) (citing *Ortiz v. Jones*, 917 S.W.2d 770, 772 (Tex. 1996) (per curiam)). When analyzing the legal sufficiency of the evidence, we review the record in the light most favorable to the challenged finding, crediting favorable evidence if a reasonable factfinder could and disregarding contrary evidence unless a reasonable factfinder could not. *See City of Keller v. Wilson*, 168 S.W.3d 802, 827 (Tex. 2005). Evidence is legally sufficient if it "rises to a level that would enable reasonable and fair-minded people to differ in

their conclusions." *Ford Motor Co. v. Ridgway*, 135 S.W.3d 598, 601 (Tex. 2004) (quoting *Merrell Dow Pharm., Inc. v. Havner*, 953 S.W.2d 706, 711 (Tex. 1997)). We will conclude that the evidence is legally insufficient to support the finding only if (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 Wilson*, 168 S.W.3d at 810.

We review a trial court's conclusions of law drawn from the facts *de novo* to determine their correctness. *See BMC Software Belg., N.V. v. Marchand*, 83 S.W.3d 789, 794 (Tex. 2002).

II. Helix's Contract-Reformation Claim

The parties agree that the Contract is governed by general federal maritime law, and that if general federal maritime law is inapplicable, then Texas law governs. The parties further agree that Helix's reformation claim is governed by Texas law because there is no federal maritime law governing the issue of reformation of a maritime contract.

Under Texas law, a court may reform a contract to correct a mutual mistake in preparing a written instrument. *See Cherokee Water Co. v. Forderhause*, 741 S.W.2d 377, 379 (Tex. 1987). "[R]eformation requires two elements: (1) an original agreement; and (2) a mutual mistake, made after the original agreement, in reducing the original agreement to writing." *Id*. It is not enough to show that a party "assumed or believed" that the contract contained particular terms. *See Champlin Oil & Ref. Co. v. Chastain*, 403 S.W.2d 376, 382 (Tex. 1965). And, "it is not enough to show that both parties were mistaken about some feature of their bargain." *Nat'l Resort Cmtys., Inc. v. Cain*, 526 S.W.2d 510, 513 (Tex. 1975). Rather, the parties must

have had a "definite and explicit" agreement, *see Champlin Oil & Ref.*, 403 S.W.2d at 382, and the agreement must have been reached before the contract was drafted. *See Cherokee Water*, 741 S.W.2d at 379.

In its first issue, BH contends that there is no finding or evidence that, before the Contract was drafted, the parties agreed that BH would indemnify Helix for personal-injury claims against Helix by BH's employees. Helix responds that BH has waived any complaint about omitted findings because BH did not request additional or amended findings. *See* Tex. R. Civ. P. 298.

BH's complaint, however, is not that the trial court simply omitted a finding that BH and Helix had a prior indemnification agreement; BH's complaint is that (a) the trial court did not find that the parties had such a prior agreement, and the evidence would not support such a finding; and (b) the trial court made a contrary finding, which is supported by the record. Specifically, BH points out that the trial court stated in Finding of Fact 13, "Helix drafted the [Contract]. The [Contract] was a form document that Helix used with other contractors and *was not specifically negotiated between the parties*."[4] An express finding that the parties did not negotiate the Contract is inconsistent with an implied finding that the Contract memorializes their prior agreement. *See Champlin Oil & Ref.*, 403 S.W.2d at 382.

Although Helix asserts in its statement of the case that the parties "agreed to a deal including knock-for-knock indemnity" and "*[a]fter* making the deal, a scrivener erred in reducing the original indemnity agreement to writing,"[5] no evidence supports this. To the contrary, the uncontroverted evidence establishes that the Contract is a form contract drafted by Helix years earlier—and thus, before BH

[4] Emphasis added.

[5] Emphasis added.

existed. Carol Sturdevant, who signed the Contract on Helix's behalf, testified that she was a contract administrator at Helix from 1998 to 2008, and she stated of the Contract, "this basic form was in place" before she began working for the company. Sturdevant's supervisor, account executive Sharon Adams, stated, "[T]his was just sort of a generic contract that we used for everyone," adding, "[I]t's changed very little over the last 20 years." Regarding Paragraph IX.B., which requires a subcontractor to indemnify Helix "for injury to or illness or death of SUBCONTRACTOR, , its parent, subsidiary, affiliated and related companies," Adams said, "there was no great proofreading on this. And I can only assume something was deleted that was between those two commas." However, the deletion could not have occurred in reducing any agreement with BH to writing, because Sturdevant testified that the indemnity provision in Helix's Contract with BH had not been modified from Helix's form. Indeed, Jason Shropshire, Helix's director of contracts and risk, admitted that the Contract was a form contract used company-wide, and that as a result of this lawsuit, Helix changed the language of the indemnity provision and "sent out endorsements or amendments to all active vendors to modify those contracts." Shropshire further conceded that he "do[es] not know how long the contract defect existed on that standard form," and that "it could have been there for several years."

There is no evidence that, before the form contract was reduced to writing, BH agreed to indemnify Helix for claims made against it by BH's employees. It is true, as Helix points out, that the trial court stated in Finding of Fact 17, "Mr. Bertrand testified that [BH] agreed that it would be liable for claims brought by [BH]'s personnel and Helix would be liable for claims brought by Helix's personnel."[6] But, Bertrand was questioned about his understanding, at and after the

[6] This finding could mean nothing more than that BH agreed it would be liable for claims

time he signed the Contract, of what the Contract meant. He was not asked if BH and Helix reached such an agreement before Helix drafted the Contract. The trial court additionally found that the Contract "reflects poor draftsmanship as intended words were omitted" from the indemnity provision. But, if words were omitted from this section of Helix's form, they were omitted when Helix drafted it. Because there is no evidence that BH and Helix had an agreement before Helix drafted the form, only Helix could have intended its "basic," "generic," form contract to include particular words.

The Texas Supreme Court's decision in *Cherokee Water* illustrates why the trial court's findings, and the evidence on which those findings are based, are insufficient to support reformation of the Contract. In that case, Cherokee was interested in buying certain properties and hired Clyde Hall to draft a form deed conveying property to himself, as Cherokee's trustee, but reserving the grantors' rights to the land's minerals. *See Cherokee Water*, 741 S.W.2d at 378. Hall drafted the form deed in January 1947, but rather than reserving the grantors' mineral rights, he included a provision giving Cherokee a right of first refusal to purchase the minerals.[7] *See id*. After the grantors executed an oil and gas lease to a third party, Cherokee sued for specific performance, and the grantors counterclaimed to reform the deed. *See id*. at 379. The trial court rendered judgment reforming the deed based on the jury's findings that, (a) "before the signing of the Deed in question, Grantors and Grantee had made an agreement that the first option clause of such Deed would

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brought against BH by its employees; it is undisputed that BH satisfied that obligation regarding Ledbetter's claims by maintaining insurance that paid him benefits as a result of his injury. For the purpose of this discussion, however, we will assume that the trial court was referring to claims brought against Helix by BH's employees.

[7] The deed at issue was executed on August 19, 1947. *See Forderhause v. Cherokee Water Co.*, 623 S.W.2d 435, 437 (Tex. Civ. App.—Texarkana 1981), *writ granted* (Feb. 3, 1982), *rev'd*, 641 S.W.2d 522 (Tex. 1982).

not include [mineral rights]"; and (b) the option clause's failure to exclude mineral rights "was the result of a mutual mistake as to the legal effect of the language" of the option clause. *Id.*

The Texas Supreme Court held that the jury's finding that the parties agreed, before signing the deed, to exclude mineral rights from the option clause was inadequate to prove a reformation claim because the question "fail[ed] to ask whether this agreement was made prior to *the deed being reduced to writing*." *Id.* (emphasis added). As the court explained, "The fact that an agreement was reached 'before the *signing* of the Deed' is of no consequence in a reformation cause of action." *Id.* at 379–80 (emphasis added). The Texas Supreme Court held that "this vital omission [of an agreement made before the deed was reduced to writing] does indeed preclude a court from reforming the deed in question."[8] *Id.* at 380.

Here, as in *Cherokee Water*, the document that is sought to be reformed is a form document drafted by one of the parties. And, as in *Cherokee Water*, the form predates the parties' agreement. Thus, as in *Cherokee Water*, "the facts of this case preclude reformation . . . as a matter of law." *See id.* at 380.

Helix does not attempt to distinguish the facts of this case from those of *Cherokee Water*, but instead argues that knock-for-knock indemnity provisions are standard in the offshore oil-and-gas business. Helix cites no authority that a claimant is entitled to contract reformation based on evidence that (a) a particular contract provision is standard in an industry; and (b) before reaching any agreement with the other signatory to the contract for which reformation is sought, the contract's author

[8] Regarding the second element of reformation, the court held that the jury's finding that the deed's failure to exclude mineral leases was the result of a mutual mistake, "falls short of the mark" because reformation requires "that the 'mutual mistake' occurred *in reducing the parties' prior agreement to writing*." *Cherokee Water*, 741 S.W.2d at 380 (emphasis added).

made a unilateral mistake when drafting the standard provision.

We sustain BH's first issue.

Conclusion

There is no evidence that, before Helix drafted its form contract, BH and Helix had a definite and explicit agreement that BH would indemnify Helix for claims against Helix by BH employees. Helix therefore failed to meet its burden to prove an essential element of a reformation claim. We accordingly hold that the trial court erred as a matter of law in (a) rendering judgment reforming the Contract to add language requiring BH to indemnify and hold Helix harmless with regard to claims against Helix arising from the illness, injury, or death of BH employees; and (b) holding BH liable to Helix under the reformed indemnification provision. Thus, without reaching BH's remaining issues and arguments, we reverse the trial court's judgment, and we render a take-nothing judgment in BH's favor.

/s/ Martha Hill Jamison
Justice

Panel consists of Justices Christopher, Jamison, and Donovan.