Affirmed and Memorandum Opinion filed October 31, 2017.

In The

Fourteenth Court of Appeals

NO. 14-16-00548-CV

ALAA HAMDAN, Appellant / Cross-Appellee

V.

ABDEL RAHIM HAMDAN, Appellee / Cross-Appellant

On Appeal from the 215th District Court
Harris County, Texas
Trial Court Cause No. 2011-15273

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

Abdel Hamdan and Alaa Hamdan are brothers, and they owned three companies together. Alaa abandoned one of the companies and took control of the other two, cutting off Abdel from profits and management of the latter two companies. Abdel sued Alaa for, among other things, breach of contract. Alaa countersued for, among other things, breach of fiduciary duty.

The parties agreed to a bifurcated trial, submitting the issue of attorney's fees to the court after a jury trial on liability and damages. A jury found in Abdel's favor on his contract claim and against Alaa on his fiduciary duty claim, and the jury awarded Abdel $266,400 in damages. Ultimately, the trial court ordered that Abdel take nothing on his request for attorney's fees, and the court signed a judgment consistent with the jury's verdict. Each brother appealed.

In Alaa's appeal, he contends that (1) the evidence is legally insufficient to support $115,500 of the damages, or some portion thereof, and (2) the evidence is factually insufficient to support the jury's finding that Abdel did not breach a fiduciary duty owed to Alaa. In Abdel's appeal, he contends that the trial court erred by denying his request for attorney's fees.

We affirm.

I. BACKGROUND[1]

Abdel and Alaa had been "50/50" business partners since 1999 when they became co-owners of two gas stations and accompanying convenience stores. Initially, the brothers leased out one of the stations and personally managed the day-to-day operations of the other one. In 2005, they also opened a small retail store in Beaumont doing business as "The Unit," where they sold clothing and other accessories. An employee, Rami Khdeir, managed the day-to-day operations of The Unit.

[1] We recite the background evidence in the light most favorable to the verdict, consistent with the standard described below, and we do not recite all of the disputed evidence concerning liability. Alaa does not challenge the jury's findings that Alaa breached an agreement that he and Abdel were "50/50 owners" of three companies, nor does Alaa challenge the jury's finding that Abdel suffered $150,900 in damages related to one of the companies.

By 2007, the brothers operated all of their businesses under one company (Dreamland Investment, Inc.). By early 2009, the brothers had begun selling excess merchandise from the businesses online through websites such as eBay and uBid. The brothers decided to lease out the second gas station and to expand the online sales business. They rented a warehouse in Pasadena to store merchandise for the online business; they rented an apartment together; and they hired several employees for the online business. Together, the brothers formed separate companies for The Unit (formally known as Teamwork USA Trading, LLC) and the online business (formally known as Liquidation Trade, LLC[2]). The gas station business remained with Dreamland.

Abdel testified that the online business had "started going down" in late 2009. By August 2009, Abdel suspected that the employees, whom Alaa had hired, were stealing merchandise from the warehouse and mislabeling or failing to mail items that customers had purchased through eBay. The online business started getting negative reviews on eBay. Alaa, however, suspected that Abdel was stealing money from the online business, and Alaa testified that tensions arose because Abdel was failing to submit financial records to their accountant.

Each brother testified that they had a meeting together in October 2009. Abdel testified that he informed Alaa about the problems with the online business, and Alaa was upset. Alaa testified that during the meeting, Abdel told Alaa that Abdel was taking the online business for himself and that Alaa could have The Unit and the gas station business. Abdel testified that the brothers never agreed to divide up the companies. Even after the October 2009 meeting, Abdel continued to deposit funds

[2] The record contains references to "Liquidation Trade, Inc.," but there is no indication that this was a separate company from the LLC.

from the online business to a bank account for which both brothers had access, and from which Alaa transferred money to his personal bank account.

But, Abdel stopped making deposits from the online business in March 2010 when the company was in serious financial trouble. After customers complained to eBay, eBay limited the selling account for the company concerning the number of items the business could sell and the amount of money it could receive. At this point, "the business [was] over" according to Abdel. Eventually, Abdel sold the remainder of the business's inventory for $3,500.

In January 2010, Alaa moved out of the apartment that the brothers had shared. In March 2010, Alaa wrote in an email to Abdel that Alaa was "leaving the company," but that he would "never leave my money, or rights for all the past year." On the same day, Alaa emailed the companies' accountant with a request to take Abdel "off" as an owner of The Unit and the gas station business. The accountant told Alaa that such a change would require signatures from both brothers. Alaa did not engage the accountant to make the change, and Alaa terminated the accountant later that year.

In February 2011, Alaa unilaterally filed certificates of amendment to remove Abdel from management and ownership of the three companies and to name himself as the sole member of The Unit and online business and sole director of the gas station business. A month later, Abdel sued Alaa. The parties proceeded to a jury trial nearly five years later. In addition to the evidence above, the jury heard that Alaa profited from the gas station business and expanded The Unit's operation to open a second store. The second store closed within nine months, but The Unit was still operating at the time of trial.

The jury found that Abdel and Alaa did not agree in October 2009 for (1) Abdel to forgo his ownership of the gas station business or The Unit, and (2) Alaa

to forgo his ownership of the online business. The jury found that Alaa failed to comply with the brothers' agreements to be "50/50" owners of each of the three companies. And, the jury awarded to Abdel damages for Alaa's breach amounting to $150,900 related to the gas station business and $115,500 related to The Unit. The jury found that Alaa breached his fiduciary duty owed to Abdel, and Abdel did not breach his fiduciary duty owed to Alaa.

We recite the evidence and procedural background related to the parties' specific issues in greater detail below.

I. LEGALLY SUFFICIENT EVIDENCE: ABDEL'S DAMAGES

In his first issue, Alaa contends that the evidence is legally insufficient to support the jury's award of $115,500 in damages related to Alaa's breach of contract concerning The Unit. Assuming the evidence is legally sufficient, Alaa further contends that the evidence supports at most an award of $60,000. Abdel responds that Alaa failed to preserve error, and in any event, the full damages award is supported by sufficient evidence.

A. Preservation of Error

Abdel contends that Alaa has not preserved error because the record does not contain Alaa's motion for judgment notwithstanding the verdict. *See Daniels v. Empty Eye, Inc.*, 368 S.W.3d 743, 748–49 (Tex. App.—Houston [14th Dist.] 2012, pet. denied) (noting that a legal sufficiency challenge may be preserved in a case tried to a jury by a motion for judgment notwithstanding the verdict). After Abdel made this argument on appeal, however, the record was supplemented with Alaa's motion. In the motion, Alaa challenged the sufficiency of the evidence for the damages challenged on appeal. Accordingly, Alaa has preserved error. *See id.* at 749.

B. Standard of Review and Legal Principles

When a party challenges the legal sufficiency of the evidence to support a finding, we review the record in the light most favorable to the finding, crediting favorable evidence if a reasonable fact-finder could and disregarding contrary evidence unless a reasonable fact-finder could not. *City of Keller v. Wilson*, 168 S.W.3d 802, 807 (Tex. 2005); *Daniels*, 368 S.W.3d at 748. We indulge every reasonable inference in support of the verdict. *City of Keller*, 168 S.W.3d at 822; *Siddiqui v. Fancy Bites, LLC*, 504 S.W.3d 349, 364 (Tex. App.—Houston [14th Dist.] 2016, pet. denied). The ultimate test for legal sufficiency is whether the evidence at trial would enable reasonable and fair-minded people to reach the verdict under review. *City of Keller*, 168 S.W.3d at 827.

We apply the sufficiency standard "mindful of Texas's long-settled deference to the fact-finder's discretion to fix appropriate and reasonable damage amounts." *Vast Constr., LLC v. CTC Contractors, LLC*, No. 14-16-00005-CV, 2017 WL 2882197, at *9 (Tex. App.—Houston [14th Dist.] July 6, 2017, no pet. h.). "A jury has broad discretion to award damages within the range of evidence presented at trial." *Id.*; *see also Gulf States Utils. Co. v. Low*, 79 S.W.3d 561, 566 (Tex. 2002). The jury must have an evidentiary basis for its findings. *Vast Constr.*, 2017 WL 2882197, at *9. But, when the evidence "supports a range of damages, an award within that range is an appropriate exercise of the jury's discretion, and we may not speculate on how the jury actually arrived at its award." *Id.*

"With respect to the recovery of lost profits as consequential damages, the law is well-settled: lost profits can be recovered only when the amount is proved with reasonable certainty." *Phillips v. Carlton Energy Group, LLC*, 475 S.W.3d 265, 278 (Tex. 2015). "It is impossible to announce with exact certainly any rule measuring the profits the loss for which recovery may be had." *Id.* at 279 (quoting *Sw. Battery*

Corp. v. Owen, 115 S.W.2d 1097, 1099 (Tex. 1938)). "What constitutes reasonably certain evidence of lost profits is a fact intensive determination." *Id.* (quoting *Holt Atherton Indus., Inc. v. Heine*, 835 S.W.2d 80, 84 (Tex. 1992)).

"Proof need not be exact, but neither can it be speculative." *Id.* at 278. Courts draw a distinction between uncertainty merely as to the amount of damages and uncertainty as to the fact of damages. *Id.* at 279–80 (citing *Sw. Battery*, 115 S.W.2d at 1099). Uncertainty as to the fact of damages is fatal to recovery, "but uncertainty as to the amount will not defeat recovery." *Id.* at 280 (quoting *Sw. Battery*, 115 S.W.2d at 1099). "A party who breaks his contract cannot escape liability because it is impossible to state or prove a perfect measure of damages." *Id.* (quoting *Sw. Battery*, 115 S.W.2d at 1099).

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.* at 279. Although supporting documentation may affect the weight of the evidence of lost profits, "it is not necessary to produce in court the documents supporting the opinions or estimates." *ERI Consulting Eng'rs, Inc. v. Swinnea*, 318 S.W.3d 867, 876 (Tex. 2010) (quoting *Holt Atherton*, 835 S.W.2d at 84).

A common thread running through the cases is that a claim for lost profits cannot be hypothetical or hopeful, but it must be substantial in the circumstances. *Phillips*, 475 S.W.3d at 279. Lost profits cannot be recovered if they are "largely speculative, as from an activity dependent on uncertain or changing market conditions, or on chancy business opportunities, or on promotion of untested products or entry into unknown or unviable markets, or on the success of a new and unproven enterprise." *Id.* (quoting *Tex. Instruments, Inc. v. Teletron Energy Mgmt., Inc.*, 877 S.W.2d 276, 279 (Tex. 1994)).

But, when "there is an established business, pre-existing profits may be used to evidence the amount of loss with reasonable certainty." *White v. Sw. Bell Tel. Co.*, 651 S.W.2d 260, 262 (Tex. 1983); *see also Phillips*, 475 S.W.3d at 279 (collecting cases where lost profit damages were upheld for "established" business); *Sw. Battery*, 115 S.W.2d at 1098–99 ("Where the business is shown to have been already established and making a profit at the time when the contract was breached or the tort committed, such pre-existing profit, together with other facts and circumstances, may indicate with reasonable certainty the amount of profits lost."). "Contrasting revenue from a time period immediately before the period at issue is an established method of proving revenue for a lost profit damages calculation." *ERI Consulting*, 318 S.W.3d at 877.

C. Evidence

Abdel testified that he was seeking damages for seven years' profits from The Unit. He testified about the pre-existing profits of The Unit for the time immediately before Alaa breached the brothers' agreement in 2009. His testimony was inconsistent:

> Q. Talk about 2009.
>
> A. Okay, 2009. How we do 2009 from the Unit is, we bring in Rami Khdeir $2,000 a month; cause he's the one that run the store and work there.
>
> Q. He was an employee?
>
> A. Yeah, he was an employee. He's a good guy working there, making some money for us and for himself and always. But the end of the month, the income would become 6– to $8,000.
>
> After paying everything and paying Rami 2,000 we generate between 2,000 each to 3,000 each every month from that store.
>
> . . . .

Q. And how much were you generating from the Unit after paying Mr. Khdeir his salary, per per month?

A. As an average—you have to understand, it goes up and down. The average was 6– to $800. We will end up 2,000 to $3,000 but it's not going to be exceeded more than 3,000 or less than 2,000 for each.

Q. Would it be fair to say the income from the Unit store on a yearly basis was between $24,000 and $30,000, based on your projection of—

A. Around.

Q. Excuse me, let me finish—based on your recollection of what was coming in, would that be a fair estimate?

A. As a fair 20– to 24–.

Q. 20– to 24,000 a year from the Unit?

A. Yes.

Q. Now, are you claiming any of that as part of your damages?

A. Yes, yes.

Q. You're claiming how much?

A. I believe I'm claiming 20,000 for each year or something like that. I'm not sure.

Q. What is your percentage of that 20,000?

A. It's going to be 50.

As noted above, there was evidence that The Unit had been open since 2005 and remained open at the time of trial. Alaa testified that he had attempted to expand the business by opening a second storefront. He testified that he invested $65,000 into The Unit's second storefront, which he closed down after nine months because he did not have time to manage it by himself. Alaa repeated his deposition testimony at trial that, at the time of the alleged division of the companies in October 2009, the gas station business and The Unit made "20– to $30,000 a year." He testified that he would be "lucky by the end of the year to get $30,000" from the two companies. He also testified that in 2010 he "lost" $10,000 on the gas station business because the

rental income of $86,400 was $10,000 less than the business's expenses. He testified that the gas station business had a loss of $21,947 in 2011 and $15,197 in 2012.

Abdel testified that he would have "no way" to dispute testimony from Khdeir or Alaa if they testified that The Unit was not making a profit at the time of trial. Khdeir testified that he still worked at The Unit at the time of trial but that the store was not making a profit. Alaa similarly testified that The Unit was "not doing well" at the time of trial.[3]

D. Analysis

As a long-time co-owner of a small, profitable company, Abdel was competent to testify about the pre-existing profits of The Unit. *See ERI Consulting*, 318 S.W.3d at 876. Other than Abdel's own testimony, Alaa directs us to no contradicting evidence—particularly, no conclusive evidence to determine that Abdel's pre-existing profits amount was incorrect. *See id.* at 876–77 & n.5.[4] Abdel's testimony demonstrated that he received profits from The Unit before Alaa's breach, and Abdel had not received profits for seven years. Contrasting Abdel's profits immediately before the breach compared to after the breach is an established method of proving lost profits. *See id.* at 877; *see also White*, 651 S.W.2d at 262 ("Where there is an established business, pre-existing profits may be used to evidence the amount of loss with reasonable certainty.").

The jury heard that Alaa attempted to expand the business with a $65,000 investment for a second storefront after the breach. And, the jury heard that The Unit

[3] He also testified repeatedly that a CPA would be "coming in and he will testify to that." No CPA testified about The Unit's status.

[4] Alaa contends that Abdel's testimony was not the "best evidence available," and that the "exact facts and figures were available through discovery." Alaa has not referred this court, nor the jury, to those facts and figures, which would have been within Alaa's control.

was still in business, with Khdeir as manager, at the time of trial. The jury could have disregarded Alaa's and Khdeir's testimony that The Unit was no longer profitable by the time of trial. *See, e.g.*, *City of Keller*, 168 S.W.3d at 819–20.[5]

Regarding the amount of damages, Abdel's testimony was inconsistent. Abdel testified, on the one hand, that The Unit made as little as $20,000 per year and that his share was half, which would total $70,000 in damages over seven years. On the other hand, he testified that each brother would take profits of up to $3,000 per month, which would total $252,000 for seven years. Alaa testified that The Unit and gas station business were making combined profits of up to $30,000 per year around the time of the October 2009 meeting, while the gas station business itself operated at a $10,000 loss in 2010. A reasonable inference from Alaa's testimony is that The Unit was making up to $40,000 in profit per year. *See City of Keller*, 168 S.W.3d at 821 (legal sufficiency review "must assume jurors made all inferences in favor of their verdict if reasonable minds could"). Abdel's fifty percent share of that amount for seven years would be $140,000.

Accordingly, the jury was presented with a range for determining the lost profits, and its finding of $115,500 was within that range. We will not disturb the jury's verdict when the jury's award is within the range of evidence, *see Vast Constr.*, 2017 WL 2882197, at *9, and the estimate is based on competent evidence to a reasonable certainty, *see ERI Consulting*, 318 S.W.3d at 876. Abdel was required to prove lost profits with reasonable certainty, not exact certainty. *See Phillips*, 475 S.W.3d at 279–80.

On appeal, Alaa relies primarily on *Tabrizi v. Daz-Rez Corp.*, 153 S.W.3d 63 (Tex. App.—San Antonio 2004, no pet.), as an analogous case reversing an award

[5] In any event, no one testified that The Unit failed to make a profit for the entire seven years of its operation after the breach.

of lost profit damages. In *Tabrizi*, a restaurant's manager had been paid a bonus equal to forty percent of the restaurant's "net profits." *Id.* at 65. The bonus ranged from $44,000 to $76,000 per year, *id.* at 65, and averaged $60,000 per year, *id.* at 68. When the company experienced cash flow problems, an accountant discovered that the restaurant had been calculating net profit incorrectly by not deducting certain expenses from net revenue. *Id.* at 65. Thereafter, the manager agreed to pay forty percent of the cost of an expansion for the restaurant in exchange for a promise of forty percent of future profits. *Id.* at 65–66. The manager resigned from the restaurant and sued for breach of contract. *Id.* at 66. The jury awarded $183,000 in lost profit damages. *Id.* at 67. At trial, the manager based his request for lost profit damages on his prior bonuses: "I would roughly say 1999 would be $35, $34,000, 1999, because I have received some of it before I resign. Year 2000, $60,000; 2001, $60,000. . . . That was my average bonus I used to make yearly at El Maracumbe." *Id.* at 68.

The San Antonio Court of Appeals summarily concluded that the evidence was legally insufficient because the lost profits estimate was not based on objective facts, figures, or data from which the damages could be ascertained. *See id.* However, an important distinction exists between the evidence in *Tabrizi* and the evidence in this case. In *Tabrizi*, it was undisputed that the manager's bonuses had been calculated based on an inflated calculation of the restaurant's profits. *See id.* at 65. The incorrect calculation led to the restaurant having "cash flow problems." *See id.* Thus, evidence of prior bonuses could not have been a reasonably certain estimate of lost profits for later years when profits would be based on a different calculation of "net profits." *See id.* at 68.

Here, no undisputed or conclusive evidence undermines Abdel's calculation of pre-existing profits so as to make an estimate of future profits not based on

objective facts, figures, or data. *See ERI Consulting*, 318 S.W.3d at 876–77 & n.5. Furthermore, the *Tabrizi* court did not cite to any authority concerning the method of calculating lost profits based on pre-existing profits from a time not too distant before the breach of contract. *See White*, 651 S.W.2d at 262; *Sw. Battery*, 115 S.W.2d at 1098–99; *see also ERI Consulting*, 318 S.W.3d at 877. To the extent *Tabrizi* failed to consider binding authority that evidence of pre-existing profits could suffice to show lost profits, we follow the Supreme Court of Texas. *See, e.g.*, *Tex. La Fiesta Auto Sales, LLC v. Belk*, 349 S.W.3d 872, 882 n.5 (Tex. App.—Houston [14th Dist.] 2011, no pet.) ("We are not obligated to follow the holdings of other courts of appeals.").

The evidence is legally sufficient to support the jury's award of $115,500 in lost profits related to The Unit. Alaa's first issue is overruled.

II. FACTUALLY SUFFICIENT EVIDENCE: BREACH OF FIDUCIARY DUTY

In his second issue, Alaa contends that the evidence is factually insufficient to support the jury's finding that Abdel did not breach his fiduciary duty owed to Alaa.

Alaa complains about the jury's "no" answer to the following question:

> Did Plaintiff Abdel Rahm Hamdan fail to comply with his fiduciary duty to Defendant Alaa Maher Hamdan?
>
> Because a relationship of trust and confidence existed between them, as business partners Plaintiff Abdel Rahim Hamdan owed Defendant Alaa Maher Hamdan a fiduciary duty. To prove he complied with his duty, Plaintiff Abdel Rahim Hamdan must show:
>
> 1. The transactions in question were fair and equitable to Defendant Alaa Maher Hamdan, and
> 2. Plaintiff Abdel Rahim Hamdan made reasonable use of the confidence that Defendant Alaa Rahim Hamdan placed in him, and

3. Plaintiff Abdel Rahim Hamdan acted in the utmost good faith and exercised the most scrupulous honesty toward Defendant Alaa Maher Hamdan, and
4. Plaintiff Abdel Rahim Hamdan placed the interests of Defendant Alaa Maher Hamdan before his own, did not use the advantage of his position to gain any benefit for himself in any position where his self-interest might conflict with his obligations as a fiduciary, and
5. Plaintiff Abdel Rahim Hamdan fully and fairly disclosed all important information to Defendant Alaa Maher Hamdan concerning the transactions.

Specifically, Alaa contends that the undisputed evidence shows that Abdel (1) created a new company on March 31, 2010 (Dreamland Deal, Inc.) with himself as the sole owner; (2) competed with the online business and sold the inventory belonging to the online business under the new company; and (3) kept the profits for himself without providing Alaa any compensation. Alaa contends that the undisputed evidence demonstrates a "statutorily defined breach of duty" under Section 152.205 of the Texas Business Organizations Code.

We measure the sufficiency of the evidence under the charge actually given since the parties had no objections to this question. *See Westview Drive Invs., LLC v. Landmark Am. Ins. Co.*, 522 S.W.3d 583, 602 (Tex. App.—Houston [14th Dist.] 2017, pet. filed) (citing *Osterberg v. Peca*, 12 S.W.3d 31, 55 (Tex. 2000)). For this reason, we decline Alaa's invitation to measure the sufficiency of the evidence under a charge that would have tracked the Texas Business Organizations Code. *See generally* Comm. on Pattern Jury Charges, State Bar of Tex., *Texas Pattern Jury Charges: Business* PJC 104.3–104.5 & cmts. (2016) (discussing differences between common law and statutory fiduciary duty instructions).

In a factual sufficiency review, we must consider and weigh all of the evidence to determine whether the evidence is insufficient. *See Pool v. Ford Motor Co.*, 715 S.W.2d 629, 635 (Tex. 1986). We will set aside the verdict and remand for a new

trial if we conclude that the verdict is so against the great weight and preponderance of the evidence as to be manifestly unjust. *Golden Eagle Archery, Inc. v. Jackson*, 116 S.W.3d 757, 761 (Tex. 2003) (citing *In re King's Estate*, 244 S.W.2d 660, 661 (Tex. 1951)). We will weigh the evidence supporting the verdict along with evidence contrary to the verdict. *See id.* at 761–62.

However, the jury remains the sole judge of the credibility of witnesses and the weight to be given their testimony. *Id.* at 761. We may not merely substitute our judgment for that of the jury, *id.*, even if we may disagree with the jury's conclusions. *See Howell Crude Oil Co. v. Donna Refinery Partners, Inc.*, 928 S.W.2d 100, 107 (Tex. App.—Houston [14th Dist.] 1996, writ denied).

Abdel testified that after eBay significantly limited the online business's opportunities for selling, Alaa abandoned the online business and the apartment that the brothers shared. Abdel testified that he created the new company in an attempt to get the selling restrictions on eBay lifted so that he could revive the online business. He was unsuccessful, and eBay "closed the whole account" after about two months. Abdel was unable to keep up with the monthly rent for the apartment and the warehouse. Abdel had to give up the apartment that the brothers shared, and he moved into the warehouse, where he lived for at least a month. Ultimately, Abdel testified that he sold the remaining inventory in the warehouse for $3,500. Abdel was not questioned about what he did with this $3,500 specifically, but he testified generally that he transferred the profits from the online business to a bank account that the brothers shared.

Alaa's testimony differed from his brother's in many respects. For example, he testified that he did not have access to the online business's bank account, and he testified that the inventory in the online business's warehouse was worth $100,000. But, the jury was free to resolve the fact issue based on credibility in Abdel's favor.

See id. Alaa cites to no undisputed evidence to support his contention on appeal that Abdel's new company competed with the online business, or that Abdel kept the profits from the online business without sharing it with Alaa.

Weighing all of the evidence, we hold that the verdict is not so against the great weight and preponderance of the evidence as to be manifestly unjust. Alaa's second issue is overruled.

III. ATTORNEY'S FEES

In his sole issue on appeal, Abdel contends that the trial court erred by denying his motion for attorney's fees. Specifically, Abdel contends that the trial court erred because "(i) Abdel pleaded that all conditions precedent had occurred and Alaa did not specifically deny presentment, excusing any requirement to prove presentment; (ii) Alaa waived his complaint by withholding it until after trial; and (iii) the record contains sufficient proof of presentment." Alaa treats Abdel's complaint as a challenge to the sufficiency of the evidence concerning the presentment requirement. Alaa contends that Abdel waived his right to rely on Rule 54 of the Texas Rules of Civil Procedure because Abdel tried the issue of presentment by consent. And, Alaa contends that Abdel failed to prove presentment and failed to segregate fees.

First, we review principles related to presentment as a requirement for attorney's fees under Section 38.001 of the Texas Civil Practice and Remedies Code. Then, we recite some of the procedural background. We hold that Abdel has not preserved his argument that Alaa waived his right to challenge Abdel's attorney's fees on the issue of presentment. And we hold that Abdel has not preserved his argument that Rule 54 requires reversal; alternatively, the parties tried by consent

the issue of presentment. Finally, we overrule Abdel's sufficiency challenge to the trial court's implied finding of fact that Abdel did not present his claim.[6]

A. Legal Principles for Presentment

To recover attorney's fees for a breach of contract claim under Section 38.001, "the claimant must present the claim to the opposing party or to a duly authorized agent of the opposing party." Tex. Civ. Prac & Rem. Code § 38.002(2). And, "payment for the just amount owed must not have been tendered before the expiration of the 30th day after the claim is presented." *Id.* § 38.002(3).

Presentment is a "demand or request for payment or performance, whether written or oral." *Gibson v. Cuellar*, 440 S.W.3d 150, 157 (Tex. App.—Houston [14th Dist.] 2013, no pet.). "The purpose of the presentment requirement is to allow the party against whom the claim is asserted an opportunity to pay it or tender performance within 30 days after they have notice of the claim without incurring an obligation for attorney's fees." *Id.* The statute must be "liberally construed to promote its underlying purposes." Tex. Civ. Prac & Rem. Code § 38.005. Thus, "[n]o particular form of presentment is required." *Gibson*, 440 S.W.3d at 157 (quoting *Jones v. Kelley*, 614 S.W.2d 95, 100 (Tex. 1981)); *see also Doctors Hosp. 1997, L.P. v. Sambuca Houston, L.P.*, 154 S.W.3d 634, 638 (Tex. App.—Houston

[6] Abdel notes that he filed a request for findings of fact and conclusions of law and a notice of past due findings and conclusions. *See* Tex. R. Civ. P. 296, 297. Yet, the trial court failed to file findings and conclusions. On appeal, Abdel does not request reversal on this basis or abatement for the trial court to issue findings and conclusions, nor does Abdel address the issue of harm. *See generally Zieba v. Martin*, 928 S.W.2d 782, 786 & n.2 (Tex. App.—Houston [14th Dist.] 1996, no writ); *Brooks v. Hous. Auth. of City of El Paso*, 926 S.W.2d 316, 319–21 (Tex. App.—El Paso 1996, no writ). Accordingly, we infer the adverse finding by the trial court that Abdel challenges on appeal—i.e., that Abdel did not present his claim. *See Graham Cent. Station, Inc. v. Pena*, 442 S.W.3d 261, 263 (Tex. 2014) (implying an adverse finding of fact after a bench trial, which the appellant properly challenged on sufficiency grounds, when the trial court's failure to file findings of fact and conclusions of law did not prevent the appealing party from properly presenting its case to the court of appeals).

[14th Dist.] 2004, pet. abated). "However, merely filing suit for a breach of contract, by itself, does not constitute presentment." *Genender v. USA Store Fixtures, LLC*, 451 S.W.3d 916, 924 (Tex. App.—Houston [14th Dist.] 2014, no pet.).

"The claimant bears the burden to plead and prove presentment of the claim." *Gibson*, 440 S.W.3d at 157 (citing *Ellis v. Waldrop*, 656 S.W.2d 902, 905 (Tex. 1983)). "Generally, presentment is an issue of fact." *Genender*, 451 S.W.3d at 924. Accordingly, this court and others have reviewed findings on presentment based on evidentiary sufficiency standards. *See, e.g.*, *Gibson*, 440 S.W.3d at 157–58; *Adams v. Petrade Int'l, Inc.*, 754 S.W.2d 696, 720 (Tex. App.—Houston [1st Dist.] 1988, writ denied).

B. Background

Abdel pleaded in his third amended petition that he was entitled to attorney's fees under Chapter 38 of the Texas Civil Practice and Remedies Code, and that he repeatedly presented his claim to Alaa. He also pleaded, "All conditions precedent to Plaintiffs' claim for relief have been performed or have occurred." In Alaa's answer, he did not specifically deny Abdel's presentment of the claim.

As Abdel acknowledges in his brief, the parties "agreed to try the issue of Abdel's attorneys' fees to the bench" rather than submit the issue to the jury. As such, the parties agreed to a bifurcated trial.[7] After the jury trial, Abdel filed a motion for attorney's fees. Abdel noted that the parties agreed "they would testify about legal fees to the Court directly." Abdel submitted an affidavit from his attorney concerning the amount of fees and related invoices.

[7] *See* Tex. R. Civ. P. 174; *see also Lyon v. Bldg. Galveston, Inc.*, No. 01-15-00664-CV, 2017 WL 4545831, at *1, *10 (Tex. App.—Houston [1st Dist.] Oct. 12, 2017, no pet. h.) (mem. op.) (noting that there was a bifurcated trial when the parties agreed to try the issue of attorney's fees to the bench after a jury verdict on liability and damages).

Alaa filed a response, arguing that Abdel's request for attorney's fees should be denied because "there was no evidence submitted to the court that the Plaintiff ever presented a claim to Defendant or his agent." Abdel filed a reply, arguing that there was uncontroverted evidence that Abdel presented his claim to Alaa before trial. Abdel attached an exhibit from the jury trial and an excerpt of Abdel's testimony from the jury trial.

In particular, Abdel pointed to Plaintiff's Exhibit 57, consisting of an online chat between the brothers a few months before Abdel filed suit. The exhibit includes the following exchange:

> Abdel: when you coming to houston
>
> Alaa: not sure
>
> Abdel: can you come tomorrow
>
> Alaa: what for
>
> Abdel: we need to talk about my half fel company
>
> Alaa: sure, give me my half of the profit for 2009 and 2010 of the warehouse business
>
> Abdel: you know its been close
>
> Alaa: no it is not

Abdel also cited his trial testimony as follows:

> Q: . . . Any follow up on this chat? Is there any discussion now about you getting your part of the income from these companies at that time? Was there any follow up?
>
> A: Like we did talk about many times, yeah
>
> Q: Okay?
>
> A: But no answer.

Finally, Abdel noted that he had pleaded presentment. Abdel did not argue that Alaa waived the ability to raise the issue of presentment or that Abdel was relieved of

proving presentment because of Alaa's failure to specifically deny the occurrence of presentment.

Alaa filed a sur-reply and argued that Abdel had the burden to prove presentment by a preponderance of the evidence. Alaa argued that Abdel's evidence did not prove presentment. And, Alaa argued that Abdel's pleading concerning presentment and conditions precedent did not provide evidence of presentment. Alaa also objected to Abdel's attorney's affidavit, and Alaa requested an oral hearing for the opportunity to cross-examine Abdel's attorney.

Abdel filed a sur-response, noting that in his reply, he "did not challenge the burden of proof, and moved directly to discuss the evidence presented at trial of presentment." Abdel recited the evidence he attached to his reply. He argued that Alaa had "waived" any objections to Abdel's attorney's affidavit by not raising objections in Alaa's initial response. Alaa filed a reply to Abdel's sur-response and again requested cross-examination on the issue of attorney's fees.

The trial court held a hearing, at which Abdel's attorney testified and was subjected to cross-examination about her fees. The trial court heard arguments about the presentment issue. Alaa's attorney again argued that Abdel had the burden of proving presentment by a preponderance of the evidence. Abdel did not argue that he was not required to prove presentment, that Alaa failed to plead the occurrence of conditions precedent, or that Alaa waived the presentment issue.

The trial court signed an order denying Abdel's motion for attorney's fees, and the court signed a final judgment ordering that Abdel take nothing on his motion for attorney's fees.

C. No Preservation Regarding Waiver by Alaa

Abdel contends on appeal that the trial court erred by denying him attorney's fees because "Alaa waived his complaint by withholding it until after trial." Abdel has not preserved error regarding this rationale for reversing the trial court's judgment because Abdel never urged the complaint in the trial court. *See* Tex. R. App. P. 33.1.

D. No Reversal Based on Rule 54

Abdel contends that he was "not required to prove presentment" and that this court should reverse the trial court's judgment and render a judgment for the full amount of fees requested (or alternatively, remand solely to determine the amount of fees) because of a deficiency in Alaa's pleading. Abdel contends that Alaa did not specifically deny the condition precedent of presentment as required by Rule 54 of the Texas Rules of Civil Procedure.

The rule provides:

> In pleading the performance or occurrence of conditions precedent, it shall be sufficient to aver generally that all conditions precedent have been performed or have occurred. When such performances or occurrences have been so plead, the party so pleading same shall be required to prove only such of them as are specifically denied by the opposite party.

Tex. R. Civ. P. 54. Absent a specific denial by the defendant, a plaintiff who pleads that all conditions precedent had been met is "relieved of the burden of proving that conditions precedent to recovery had been met." *Cmty. Bank & Trust, S.S.B. v. Fleck*, 107 S.W.3d 541, 542 (Tex. 2002).

This court has indicated that presentment is a condition precedent for an award of attorney's fees. *See Beauty Elite Grp., Inc. v. Palchick*, No. 14-07-00058-CV, 2008 WL 706601, at *5 (Tex. App.—Houston [14th Dist.] Mar. 18, 2008, no pet.)

(mem. op.); *Cook Composites, Inc. v. Westlake Styrene Corp.*, 15 S.W.3d 124, 138 & n.6 (Tex. App.—Houston [14th Dist.] 2000, no pet.). And, as noted in Abdel's brief, courts of appeals have affirmed trial courts' awards of attorney's fees when defendants failed to deny presentment after proper pleadings by plaintiffs under Rule 54. *See ExxonMobil Corp. v. Valence Operating Co.*, 174 S.W.3d 303, 319 (Tex. App.—Houston [1st Dist.] 2005, pet. denied); *White Budd Van Ness P'ship v. Major-Gladys Drive Joint Venture*, 798 S.W.2d 805, 816–17 (Tex. App.—Beaumont 1990), *writ dism'd*, 811 S.W.2d 541 (Tex. 1991).

Abdel cites no authority, however, in which a defendant's failure to specifically deny a condition precedent under Rule 54 has been raised for the first time on appeal as a ground for reversing the trial court's judgment. Ordinarily, a party who "fails to raise the lack of a pleading in the trial court before submission of the case cannot seek reversal on appeal based on the alleged pleading deficiency." *Tex. Ear Nose & Throat Consultants, PLLC v. Jones*, 470 S.W.3d 67, 87 (Tex. App.—Houston [14th Dist.] 2015, no pet.) (citing *Roark v. Stallworth Oil & Gas, Inc.*, 813 S.W.2d 492, 495 (Tex. 1991)); *see also* Tex. R. Civ. P. 90 ("Every defect, omission or fault in a pleading either of form or of substance, which is not specifically pointed out by exception in writing and brought to the attention of the judge in the trial court before the instruction or charge to the jury or, in a non-jury case, before the judgment is signed, shall be deemed to have been waived by the party seeking reversal on such account . . . ."). In *Jones*, this court noted the distinction between reliance on Rule 54 to attack the trial court's judgment and to support it. *See Jones*, 470 S.W.3d at 84 n.15, 95 n.31 (citing Tex. R. App. P. 33.1(a)) (noting that the appellants waived their Rule 54 argument by asserting it for the first time on appeal to challenge a jury's finding, but that waiver would not apply to their Rule 54 argument in response to the other party's cross-appeal). Thus, Abdel has not

preserved error for his complaint regarding Alaa's pleading deficiency. *See* Tex. R. App. P. 33.1; *Jones*, 470 S.W.3d at 84 n.15.

Moreover, the record supports Alaa's contention that the issue of presentment was tried by consent. Under Rule 67 of the Texas Rules of Civil Procedure, "When issues not raised by the pleading are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings." Tex. R. Civ. P. 67; *see also Roark*, 813 S.W.2d at 495 ("The party who allows an issue to be tried by consent and who fails to raise the lack of a pleading before submission of the case cannot later raise the pleading deficiency for the first time on appeal.").

An issue is tried by consent, and a defect in the pleadings waived, if the parties presented evidence on the issue and the issue was developed during trial without objection. *Ingram v. Deere*, 288 S.W.3d 886, 893 (Tex. 2009). "[W]e must examine the record not for evidence of the issue, but rather for evidence of *trial* of the issue." *Sage Street Assocs. v. Northdale Constr. Co.*, 863 S.W.2d 438, 446 (Tex. 1993) (alteration in original) (quoting *Wendell v. Cent. Power & Light Co.*, 677 S.W.2d 610, 618 (Tex. App.—Corpus Christi 1984, writ ref'd n.r.e.)). We will consider whether the parties consented to resolution of the issue by the fact-finder. *See id.*

After Alaa raised the presentment issue, Abdel responded by submitting evidence on the issue of presentment to the trial court. Alaa repeatedly argued to the trial court that Abdel had the burden of proof on the issue of presentment, and Abdel acknowledged that he "did not challenge the burden of proof." Abdel never pointed out the pleading deficiency or referred to Rule 54. At the bench trial, the trial court asked the parties to argue the issue of presentment and told the parties that the court would have a ruling on the issue. Under these circumstances, Abdel waived the pleading deficiency and tried the issue of presentment by consent. *Cf. Rosenthal v.*

Doherty & Doherty, L.L.P., No. 01-12-01017-CV, 2014 WL 953547, at *4 (Tex. App.—Houston [1st Dist.] Mar. 11, 2014, no pet.) (mem. op.) (holding that the trial court did not err by failing to render a judgment for the plaintiff when the defendant failed to deny a condition precedent under Rule 54; the condition precedent was tried by consent during the bench trial because the parties offered evidence and argument on the issue and the trial judge asked a question about the condition precedent); *Dallas Raceway, Inc. v. Pavecon, Ltd.*, No. 05-10-00712-CV, 2011 WL 1679869, at *7 (Tex. App.—Dallas May 5, 2011, pet. denied) (mem. op.) (holding that the defendants could challenge the sufficiency of the evidence to support the jury's adverse finding on a condition precedent question despite the defendants' failure to specifically deny the condition precedent under Rule 54; the condition precedent was tried by consent when the parties addressed the issue in their arguments and submitted the issue to the fact-finder in a jury question).

Finally, we note that in his reply brief on appeal, Abdel focuses on the evidence and arguments from the jury trial to contend that presentment was not tried by consent to the court. Abdel contends, "The attorneys' fee hearing was not a 'trial' on presentment and no new evidence was offered." Abdel contends that, although the parties briefed the issue and the trial court heard arguments about presentment, "the parties were limited to the testimony and evidence that was actually developed over a month earlier at [the jury] trial." Abdel contends that he had "no opportunity to prove in open court that he presented his claim in satisfaction of the statute" because "[t]he trial was over and the evidence was closed." Abdel cites no authority for these contentions.

Nothing in the record support's Abdel's contentions that the trial court prevented him from adducing evidence concerning presentment before or during the hearing in addition to the evidence that had already been admitted during the jury

trial. The record shows that Abdel attached an affidavit and invoices to his motion for attorney's fees (i.e., evidence that had not been admitted during the jury trial); Abdel attached evidence concerning presentment to his reply before the hearing; Abdel's attorney testified at the hearing and was subjected to cross-examination; the trial court sustained and overruled objections to testimony; the trial court admitted an exhibit proffered by Alaa; and Abdel did not dispute Alaa's attorney's suggestion that the parties were "still in trial" during the hearing. Thus, Abdel had the opportunity to present evidence of presentment in addition to the evidence attached to its post-verdict motion for attorney's fees and reply—the trial court never denied Abdel any such opportunity. *See Lyon v. Bldg. Galveston, Inc.*, No. 01-15-00664-CV, 2017 WL 4545831, at *8, *10 (Tex. App.—Houston [1st Dist.] Oct. 12, 2017, no pet. h.) (mem. op.) (noting that additional evidence of presentment could be submitted during a post-verdict hearing on attorney's fees after a jury trial when the parties agreed to submit the issue of attorney's fees to the trial court; holding that the trial court committed harmful error by denying leave for the plaintiff to amend its petition after the jury trial to allow the plaintiff to plead presentment).

Accordingly, Abdel waived any pleading deficiencies and tried by consent the issue of presentment.

E. Legally Sufficient Evidence to Support the Trial Court's Finding

Abdel contends that "the record contains sufficient proof of presentment." Alaa treats Abdel's complaint as a legal sufficiency challenge, and so do we. *See Gibson*, 440 S.W.3d at 157 (reviewing adverse finding on presentment for legally sufficient evidence); *see also Bocquet v. Herring*, 972 S.W.2d 19, 21 (Tex. 1998) (noting that a trial court abuses its discretion by awarding attorney's fees without sufficient supporting evidence).

Abdel had the burden to prove presentment. *See Gibson*, 440 S.W.3d at 157.[8] When a party attacks the legal sufficiency of an adverse finding on an issue for which he has the burden of proof, he must demonstrate on appeal that the evidence establishes, as a matter of law, all vital facts in support of the issue. *Dow Chem. Co. v. Francis*, 46 S.W.3d 237, 241 (Tex. 2001). "In reviewing a 'matter of law' challenge, the reviewing court must first examine the record for evidence that supports the finding, while ignoring all evidence to the contrary." *Id.* "If there is no evidence to support the finding, the reviewing court will then examine the entire record to determine if the contrary proposition is established as a matter of law." *Id.* "The point of error should be sustained only if the contrary proposition is conclusively established." *Id.*

Evidence is conclusive only if reasonable people could not differ in their conclusions. *City of Keller*, 168 S.W.3d at 816. Undisputed evidence is not necessarily conclusive. *See id.* at 814–16. But if undisputed evidence allows for only one logical inference, then the evidence can be viewed in only one light, and a reasonable fact-finder can reach only one conclusion from it. *Id.* at 814. The ultimate test for legal sufficiency is whether the evidence would enable reasonable and fair-minded people to reach the finding under review. *Id.* at 827.

Because a trial court acting as a fact-finder can view a witness's demeanor, it is has "great latitude in believing or disbelieving a witness's testimony, particularly when the witness is interested in the outcome." *In re Doe 4*, 19 S.W.3d 322, 325 (Tex. 2000). Acting as a fact-finder, therefore, the trial court may "reject the uncontroverted testimony of an interested witness unless it is readily controvertible,

[8] In his reply brief on appeal, Abdel refers to the "affirmative defense of failure of presentment," and Abdel faults Alaa for not pleading this "affirmative defense." Abdel cites no authority for this contention, and we do not treat the "failure of presentment" as an affirmative defense for which Alaa would have had the burden of proof at trial.

it is clear, positive, direct, and there are no circumstances tending to discredit or impeach it." *Id.*

Here, the evidence was undisputed. Alaa submitted no evidence on the issue of presentment. On appeal, Alaa directs us to no evidence that supports the trial court's implied finding that Abdel did not present his claim. Accordingly, we must determine whether Abdel conclusively established presentment. *See Dow Chem.*, 46 S.W.3d at 241; *see also Diaz v. Att'y Gen. of State of Tex.*, 827 S.W.2d 19, 23 (Tex. App.—Corpus Christi 1992, no writ) (overruling the appellant's challenge to the trial court's failure to award attorney's fees because the appellant did not prove presentment as a matter of law).

As mentioned above, the only evidence Abdel submitted on the issue was (1) an exhibit containing the log of an online chat between the brothers in January 2011 in which Abdel said "we need to talk about my half fel company" and (2) Abdel's testimony that there was "follow up" to the chat where the brothers "did talk about many times" the "discussion" about Abdel getting income from the companies. Abdel contends that Alaa's response in the chat indicates "beyond doubt" that Alaa understood Abdel to be making a request or demand.

Abdel cites no analogous case to suggest that a party's request to "talk" about an issue or have a "discussion" about the issue conclusively establishes presentment as a matter of law. This court has held that merely engaging in "discussions" about settling claims was *no* evidence of presentment, let alone conclusive evidence of presentment. *See Border Gateway, L.L.C. v. Gomez*, No. 14-10-01266-CV, 2011 WL 4361485, at *9 (Tex. App.—Houston [14th Dist.] Sept. 20, 2011, no pet.) (mem. op.) (reversing award of attorney's fees when the parties "made repeated efforts to negotiate the terms of settlement"; holding that "participation in settlement discussions is insufficient to show that a party presented a claim"). Evidence that the

parties merely discussed or talked about settling a dispute is insufficient to prove presentment because "it does not satisfy the purpose of the presentment requirement: to provide the defendant with 'the opportunity, by undertaking specific action, to avoid paying attorney's fees.'" *Genender*, 451 S.W.3d at 927 (quoting *Belew v. Rector*, 202 S.W.3d 849, 857 (Tex. App.—Eastland 2006, no pet.)).

We need not, and do not, hold in this case that Abdel's evidence is "no evidence" of presentment. But Abdel's evidence does not approach the quantum of evidence that courts have found to conclusively prove presentment as a matter of law. *See Jones v. Kelley*, 614 S.W.2d 95, 97, 100 & n.4 (Tex. 1981) (holding that presentment was established as a matter of law in a suit for specific performance to convey real estate when there was uncontroverted evidence of a letter sent to the defendants stating that the plaintiffs intended to go through with the sale, and there was a transcript of a telephone conversation in which the plaintiffs told the defendants that the defendants were trying to back out of the deal, that the plaintiffs would not in any way give up the piece of land, and that the defendants would be hearing from the plaintiffs' lawyer); *see also Giles v. Carter*, No. 10-15-00286-CV, 2016 WL 7177566, at *6 (Tex. App.—Waco Dec. 7, 2016, no pet.) (mem. op.) (letter from the plaintiff to the defendant); *Cintas Corp. v. Arrellano*, No. 13-12-00511-CV, 2014 WL 3926808, at *4 n.7 (Tex. App.—Corpus Christi Mar. 20, 2014, no pet.) (mem. op.) (undisputed evidence that the plaintiff's attorney sent a letter stating that the plaintiff would sue and seek attorney's fees for breach of contract if the defendant did not pay the claim); *Lopez v. Los Cielos Homeowners Ass'n, Inc.*, No. 11-11-00102-CV, 2013 WL 1636433, at *2 (Tex. App.—Eastland Apr. 11, 2013, no pet.) (mem. op.) (undisputed affidavit testimony that the defendant "was notified of this violation and failed to pay it"); *Recognition Commc'n, Inc. v. Am. Auto. Ass'n, Inc.*, 154 S.W.3d 878, 891 (Tex. App.—Dallas 2005, pet. denied) (letters

complaining that the plaintiff was not paid commissions); *Zemaco, Inc. v. Navarro*, 580 S.W.2d 616, 620–21 (Tex. Civ. App.—Tyler 1979, writ dism'd w.o.j.) (letter from the plaintiff's attorney to the defendant's attorney); *cf. France v. Am. Indem. Co.*, 648 S.W.2d 283, 285–86 (Tex. 1983) (reasoning that "[a]t the very least, a fact issue was raised here as to presentment" when there was uncontroverted evidence that medical bills were promptly forwarded to the defendant, the plaintiff contacted the defendant by telephone regarding payment of the bills, and the defendant rejected the demands in a letter); *Gensco, Inc. v. Transformaciones Metalurgicias Especiales, S.A.*, 666 S.W.2d 549, 552, 554 (Tex. App.—Houston [14th Dist.] 1984, writ dism'd) (affirming summary judgment based on invoices and the defendant's answers to requests for admissions).

Considering Abdel's evidence, we hold that reasonable fact-finders could differ in their conclusions. *See City of Keller*, 168 S.W.3d at 816. The trial court, acting as a fact-finder, could have disbelieved the testimony of an interested witness, particularly when the evidence was not clear, positive, and direct. *See In re Doe 4*, 19 S.W.3d at 325. We cannot conclude that the trial court acted unreasonably. *See City of Keller*, 168 S.W.3d at 827 (ultimate test is whether a reasonable and fair-minded person could reach the finding under review).

Abdel's exhibit containing the online chat, coupled with his testimony, does not conclusively establish presentment. Accordingly, the evidence is legally sufficient to support the trial court's implied finding.

IV. CONCLUSION

Having overruled all of the parties' issues, we affirm the trial court's judgment.

/s/ Ken Wise
Justice

Panel consists of Justices Christopher, Brown, and Wise.