Affirmed and Majority and Dissenting Opinions filed August 24, 2023.

In The

Fourteenth Court of Appeals

NO. 14-22-00190-CV

RED BLUFF, LLC, Appellant

V.

NICOLE TARPLEY, Appellee

On Appeal from the 55th District Court
Harris County, Texas
Trial Court Cause No. 2016-50146

OPINION

Appellant Red Bluff, LLC appeals a final judgment in favor of appellee Nicole Tarpley on her claims for negligence and premises liability. In what we construe as two appellate issues, Red Bluff argues that: (1) the trial court erred in denying its Rule 306a motion to reset postjudgment deadlines and (2) the trial court should have considered and granted its motions for judgment notwithstanding the verdict and new trial because there was legally- and factually-insufficient evidence to support the jury's (a) finding on negligence and premises liability, (b) award for future

medical expenses, and (c) award for past and future physical impairment. We affirm.

I. BACKGROUND

Red Bluff operates a nursing and rehabilitation facility in Pasadena, Texas. Tarpley worked for Red Bluff as a certified nursing assistant ("CNA") beginning in April 2016. Tarpley had worked as a CNA for five years at the time she began her employment with Red Bluff.

In May 2016, one of the bariatric patients—weighing over 300 pounds—asked Tarpley to take him to the library. Tarpley attempted to help the patient from his bed to the wheelchair on her own. According to Tarpley, as she was helping the patient to the wheelchair, the wheelchair brakes spontaneously unlocked and the patient began falling. Tarpley placed her right leg under the patient to break his fall, but injured herself in the process.

In July 2016, Tarpley filed suit against Red Bluff for premises liability and negligence.[1] Tarpley asserted that Red Bluff was negligent in training and warning Tarpley against attempting to transfer the bariatric patient without assistance. Tarpley's premises liability claim was based on the condition of the wheelchair.

The case was tried to a jury, and the jury returned a verdict in favor of Tarpley, awarding: (1) $360,000 in past medical expenses; (2) $500,000 in future medical expenses; (3) $750,000 in past physical pain and suffering; (4) $2,000,000 in future pain and suffering; (5) $250,000 in past mental anguish; (6) $500,000 in future mental anguish; (6) $750,000 in past physical impairment; and (7) $2,000,000 in future physical impairment. Red Bluff filed a proposed final judgment, which the trial court signed on February 4, 2022.

On March 14, 2022, Red Bluff filed a sworn motion to reset postjudgment

[1] Red Bluff is a worker's compensation nonsubscriber.

deadlines under Tex. R. Civ. P. 306a, arguing that it had not received proper notice of the judgment. On April 11, 2022, Red Bluff filed a motion for judgment notwithstanding the verdict to disregard the jury findings and a motion for new trial.

In July 2022, the trial court denied Red Bluff's motion to reset the postjudgment timelines. In its order, the trial court found that even though Red Bluff did not receive notice by first class mail, Red Bluff's counsel acquired actual knowledge of the signing of the judgment when he received an e-mail from the trial court on February 8.

II. JURISDICTION

We first consider our subject-matter jurisdiction over this case. A timely-filed notice of appeal is a jurisdictional requirement. *In re United Servs. Auto. Ass'n*, 307 S.W.3d 299, 307 (Tex. 2010).

This court granted Red Bluff's motion to extend time to file its notice of appeal concluding:

> The record reflects the judgment was signed February 4, 2022. The notice of appeal was due March 7, 2022. *See* Tex. R. App. P. 26.1. Appellant filed its notice of appeal on March 14, 2022, a date within the 15-day grace period provided by Rule 26.3 for filing a motion for extension of time. *See Verburgt v. Dorner*, 959 S.W.2d 615, 617–18 (1997) (construing the predecessor to Rule 26).

Even though Red Bluff's notice of appeal was filed outside of the thirty-day period provided in Rule 26.1, the notice of appeal fell within the 15-day grace period and properly invoked the jurisdiction of this court. *See* Tex. R. App. P. 26.1; *see also Verburgt*, 959 S.W.2d at 617 (motion to extend time is implied if notice of appeal is filed within fifteen-day period in which appellant may move for such extension, but once that period has passed, "a party can no longer invoke the appellate court's jurisdiction"). Therefore, this court has jurisdiction over Red Bluff's appeal

independent of the trial court's ruling on Red Bluff's Rule 306a motion.

III. ANALYSIS

A. Red Bluff's Rule 306a motion

In issue 1, Red Bluff argues that the trial court erred by not granting its Rule 306a motion to establish the date on which Red Bluff or its attorney first received either notice of the judgment or acquired actual knowledge of the signing of the judgment. Tex. R. Civ. P. 306a(5). Although we have already concluded this court has jurisdiction, we consider issue 1 to determine whether Red Bluff's sufficiency challenges were preserved for our review.

1. Standard of review and applicable law

A trial court retains jurisdiction over a case for 30 days after it signs a final judgment or order. Tex. R. Civ. P. 329b(d). After the 30 days expire, the trial court loses its plenary power, and lacks jurisdiction to act. *See Unifund CCR Partners v. Villa*, 299 S.W.3d 92, 96 (Tex. 2009).

However, Rule 306a provides that, if, within 20 days but no later than 90 days after a judgment is signed, a party adversely affected by the judgment has neither received the clerk's notice nor acquired actual knowledge of the judgment, then the timeline for filing certain postjudgment motions, such as motions for new trials, begins on the date that the party received the clerk's notice or acquired actual knowledge of the judgment. Tex. R. Civ. P. 306a(4). The rule clarifies that the extension of postjudgment filings requires the party to establish lack of actual knowledge:

> [i]n order to establish the application of paragraph (4) of this rule, the party adversely affected is required to prove in the trial court, on sworn motion and notice, the date on which the party or his attorney first either received a notice of the judgment or acquired actual knowledge of the

> signing and that this date was more than twenty days after the judgment was signed.

Tex. R. Civ. Pro. 306a(5). This court reviews a trial court's Rule 306a findings under the legal and factual sufficiency standards of review. *See LDF Constr., Inc. v. Tex. Friends of Chabad Lubavitch, Inc.*, 459 S.W.3d 720, 724 (Tex. App.—Houston [14th Dist.] 2015, no pet.).

When reviewing the legal sufficiency of the evidence, we consider the evidence in the light most favorable to the challenged finding and indulge every reasonable inference that would support it. *City of Keller v. Wilson*, 168 S.W.3d 802, 821–22, 827 (Tex. 2005); *see also Graham Cent. Station, Inc. v. Peña*, 442 S.W.3d 261, 263 (Tex. 2014) (per curiam). The evidence is legally sufficient if it would enable a reasonable and fair-minded person to reach the verdict under review. *City of Keller*, 168 S.W.3d at 827. "If the evidence at trial would enable reasonable and fair-minded people to differ in their conclusions, then jurors must be allowed to do so." *Id.* at 822. "A reviewing court cannot substitute its judgment for that of the trier-of-fact, so long as the evidence falls within this zone of reasonable disagreement." *Id.*

When an appealing party attacks the factual sufficiency of an adverse finding on an issue on which the party did not have the burden of proof, they must demonstrate the finding is so contrary to the overwhelming weight of the evidence as to be clearly wrong and manifestly unjust. *Price Pfister, Inc. v. Moore & Kimmey, Inc.*, 48 S.W.3d 341, 347 (Tex. App.—Houston [14th Dist.] 2001, pet. denied). In a factual-sufficiency challenge, all the evidence in the record, both for and against the finding, is reviewed. *Id.*

2. Application

Because Red Bluff's motion for judgment notwithstanding the verdict and motion for new trial were both filed more than 30 days after the judgment was signed, the trial court did not have plenary power to consider them unless Rule 306a applied to extend postjudgment deadlines. Tex. R. Civ. P. 306a(5).

Red Bluff's sworn motion establishes a prima facie case that it lacked timely notice. In its sworn motion to establish the date it received actual knowledge of the judgment, Red Bluff asserted that March 14—when Tarpley's counsel reached out to Red Bluff concerning the judgment—was the date that Red Bluff obtained actual knowledge that the judgment was signed. According to Red Bluff, it was entitled to receive notice of the judgment being signed by first-class mail, but it had never received the first-class notice. Thus, Red Bluff's sworn motion invoked the trial court's otherwise-expired jurisdiction for the limited purpose of holding an evidentiary hearing to determine the date on which Red Bluff or its counsel first received notice or acquired knowledge of the judgment. *In re Lynd Co.*, 195 S.W.3d 682, 685 (Tex. 2006).

At the trial-court hearing, Brett Stecklein—Red Bluff's lead counsel—testified initially that he did not learn of the judgment being signed until March 14, but he later admitted that he received e-mail notice of the judgment being signed on February 8. He claimed that he did not recall reviewing the e-mail. He also conceded that it was his office that had filed the proposed judgment with the trial court.

Red Bluff argues on appeal, as it did below, that under the then-applicable version of Rule 306a(3), e-mail notice was insufficient to give it notice of the signed judgment; rather, it was entitled to receive first-class-mail notice of the judgment. However, under both the prior and current versions of the rule, the party seeking to

reset postjudgment timelines must ultimately prove that it did not receive actual knowledge of the judgment until at least 20 days after it was signed. *See* Tex. R. Civ. P. 306a(3), (4).

Red Bluff's counsel acknowledged that it actually received the e-mail on February 8. Even though Red Bluff's counsel does not recall opening the e-mail, Rule 306a does not requires knowledge of the contents of the appealable order itself. *See* Tex. R. Civ. P. 306a(4), (5). We also note that several courts of appeal have concluded, in circumstances similar to the present case, that a party received actual notice when the party received an e-mail containing notice of the appealable order from the trial court clerk within 20 days of when the appealable order was signed, regardless of whether the party had actual knowledge of the e-mail's contents. *See Rendon v. Swanson*, No. 11-19-00260-CV, 2021 WL 3672622, at *3 (Tex. App.—Eastland Aug. 19, 2021, no pet.) (mem. op.); *Park v. Aboudail*, No. 02-20-00260-CV, 2021 WL 1421442, at *6 (Tex. App.—Fort Worth Apr. 15, 2021, no pet. h.) (mem. op.); *Arlitt v. Ebeling*, No. 03-18-00646-CV, 2018 WL 6496714, at *4 (Tex. App.—Austin Dec. 11, 2018, no pet.) (mem. op.).

We conclude that the trial court's finding that Red Bluff obtained actual knowledge of the judgment being signed on February 8 is supported by legally- and factually-sufficient evidence. Accordingly, the trial court did not err in denying Red Bluff's Rule 306amotion. We overrule issue 1.

B. Remaining issue

Without an extension of postjudgment timelines, Red Bluff's motion for judgment notwithstanding the verdict and motion for new trial were both untimely because they were filed more than 30 days after the judgment was signed and the trial court lacked plenary power to consider them. Tex. R. Civ. P. 329b(d). The

remainder of Red Bluff's issues were legal- and factual-sufficiency challenges including the award of damages. However, factual sufficiency challenges must be preserved by filing a motion for new trial. Tex. R. Civ. P. 324(b)(2). Legal sufficiency challenges may be raised for the first time on appeal, but only following a nonjury trial in a civil suit. Tex. R. App. P. 33.1(d).

> After a jury trial, a legal-sufficiency challenge may be preserved in the trial court in one of the following ways: (1) a motion for instructed verdict, (2) a motion for judgment notwithstanding the verdict, (3) an objection to the submission of the issue to the jury, (4) a motion to disregard the jury's answer to a vital fact issue, or (5) a motion for new trial.

Interest of D.T., 625 S.W.3d 62, 75 (Tex. 2021).

Red Bluff's untimely motions are ineffective to preserve its legal- and factual-sufficiency challenges and its challenges to the jury's award of damages.[2] *See* Tex. R. Civ. P. 324(b)(2), (3), (4) (stating that filing motion for new trial is prerequisite to making the following complaints on appeal: "(2) A complaint of factual insufficiency of the evidence to support a jury finding; (3) A complaint that a jury finding is against the overwhelming weight of the evidence; (4) A complaint of inadequacy or excessiveness of the damages found by the jury . . . ."); Tex. R. App. P. 33.1(d) (stating that legal- and factual-sufficiency challenges may be raised for the first time on appeal, but only in civil nonjury cases); *see also Moritz v. Preiss*, 121 S.W.3d 715, 721 (Tex. 2003) (concluding untimely motion or amended motion

[2] We note that appellant raised the following objection to the charge during the charge conference: "There's not sufficient evidence to establish that there was a defect with the premises." However, we do not need to analyze whether this was sufficient to preserve error because appellant did not challenge the sufficiency of the evidence regarding negligence, and that ground alone independently supports the judgment. *See Guar. Cnty. Mut. Ins. Co. v. Reyna*, 709 S.W.2d 647, 648 (Tex. 1986) (there is no reversible error if trial court's judgment can be supported by any legal theory before it).

for new trial preserves nothing for appellate review). Accordingly, we overrule Red Bluff's issue 2.

IV. CONCLUSION

We affirm the judgment of the trial court as challenged on appeal.

/s/ Charles A. Spain
Justice

Panel consists of Chief Justice Christopher and Justices Jewell and Spain. (Jewell, J., dissenting).