Fourth Court of Appeals
San Antonio, Texas

MEMORANDUM OPINION

No. 04-16-00529-CV

Charles **BORKERT**, Penelope Sturm-Borkert, and Alamo Turf Farms, Inc.,
Appellants

v.

Wieslawa **TWOREK**,
Appellee

From the 57th Judicial District Court, Bexar County, Texas
Trial Court No. 2013-CI-13132
Honorable Antonia Arteaga, Judge Presiding

Opinion by: Patricia O. Alvarez, Justice

Sitting: Sandee Bryan Marion, Chief Justice
Karen Angelini, Justice
Patricia O. Alvarez, Justice

Delivered and Filed: February 14, 2018

REVERSED AND RENDERED IN PART, AFFIRMED IN PART

In this breach of contract suit, the jury found that Appellants Charles Borkert, Penelope Sturm-Borkert, and Alamo Turf Farms, Inc. (the Borkerts) breached the Agreement with Appellee Wieslawa Tworek. The jury awarded Tworek damages for breach of the Agreement, damages for promissory estoppel, and attorney's fees. The trial court rendered judgment on the verdict and the Borkerts appeal. Because there was no reversible error in the charge for breach of the Agreement, and the Borkerts' broken promises were within the scope of the Agreement, we reverse the trial court's award of damages for promissory estoppel and affirm the remainder of the judgment.

BACKGROUND

Charles and Penelope Borkert, who had experience operating a turf farm business, decided to start a new turf farm on land they owned in St. Hedwig, Texas. Penelope knew Wieslawa Tworek, and the Borkerts asked Tworek to loan them money to start the business.

Under the Agreement,[1] Tworek agreed to fund the new farm's start-up costs in exchange for liens on the St. Hedwig property and the corporation's equipment, a 2% participation in gross profits, and a 10% participation in net profits. But the parties dispute how much Tworek agreed to loan and under what circumstances.

After Tworek loaned the Borkerts about $30,000.00 for start-up costs, the Borkerts presented Tworek with a promissory note they prepared. The promissory note, signed by the Borkerts and dated May 5, 2011, specified a loan amount of $224,000.00 with an interest rate of 10%. Tworek did not sign the Note. The Note states that "[t]he funds will be drawn as needed . . . based [o]n the schedule attached," but no schedule was attached. The Note also describes installment payments from the Borkerts to Tworek that "will begin as soon as the turf farm begins producing turf." The Note further provides for Tworek to recover her costs and attorney's fees if she prevails in a collection action against the Borkerts.

To start the new farm, Tworek loaned the Borkerts a total of $160,000.00, and the Borkerts used some of those funds to install equipment at the St. Hedwig property and to prepare the land for turf farming. After Tworek refused to loan the Borkerts the additional $64,000.00 the Borkerts insist Tworek promised to loan them under the Note, the business failed.

[1] Under the jury charge definition, the "Agreement" includes the following documents: a Participation Agreement, dated April 20, 2011; a Promissory Note and an Amended Deed of Trust, each dated May 5, 2011; and a Security Agreement, dated June 29, 2011, but effective May 5, 2011.

Tworek sued the Borkerts for multiple causes including breach of the Agreement, promissory estoppel, fraud, and attorney's fees. The Borkerts counterclaimed against Tworek for multiple causes including breach of the Agreement, fraud, and attorney's fees.

While the lawsuit was pending, the Borkerts defaulted on the bank note for the St. Hedwig farm. The Borkerts and Tworek signed a one-page Supplemental Agreement that envisioned Tworek purchasing the bank note and combining the bank's first lien and Tworek's second lien into a single lien securing a ten-year note for $320,000.00 at 9% interest. Tworek purchased the bank's note, but the Borkerts refused to sign the $320,000.00 note, and the case went to trial.

At trial, Tworek testified and submitted evidence that she paid the Borkerts $160,000.00, the Note set an interest rate of 10%, and the amount of principal and interest owed on the Note was $227,270.53. Tworek argued that the Borkerts breached the Agreement for a number of reasons including that they failed to provide her with documentation on how the loan funds were being spent, they failed to make her a voting member of the corporation, and they misapplied some of the loaned funds. The Borkerts acknowledged that Tworek loaned them $160,000.00, but they argued that the turf farm failed because Tworek refused to loan them the remaining $64,000.00 they needed for start-up costs. They argued that the Note was for $224,000.00, Tworek loaned them only $160,000.00, and because she failed to loan them the remaining $64,000.00, the business failed.

The jury rejected the Borkerts claims and found that the Borkerts breached the Agreement and their promises to Tworek. The jury awarded Tworek $227,270.53 for breach of the Agreement, $50,000.00 for promissory estoppel (i.e., $25,000.00 against Charles Borkert and $25,000.00 against Penelope Sturm-Borkert), no damages for fraud, and $20,000.00 for attorney's fees. The trial court rendered judgment on the verdict. The Borkerts' motion for new trial was overruled by operation of law, and the Borkerts appeal. They raise six issues.

JURY CHARGE ON BREACH OF THE AGREEMENT

In their first issue, the Borkerts argue the trial court committed reversible error by failing to instruct the jury on the proper measure of damages. Tworek argues that even if the trial court erred by failing to include the Borkerts' requested instruction, the judgment should be affirmed because, in light of the entire record, there was no reversible error.

A. Standard of Review

"When a trial court refuses to submit a requested instruction on an issue raised by the pleadings and evidence, the question on appeal is whether the request was reasonably necessary to enable the jury to render a proper verdict." *Shupe v. Lingafelter*, 192 S.W.3d 577, 579 (Tex. 2006). "We review a trial court's decision to submit or refuse a particular instruction under an abuse of discretion standard of review." *Thota v. Young*, 366 S.W.3d 678, 687 (Tex. 2012) (quoting *In re V.L.K.*, 24 S.W.3d 338, 341 (Tex. 2000)). If the trial court should have submitted the requested instruction but did not, "[t]he omission of an instruction is reversible error only if the omission probably caused the rendition of an improper judgment." *Shupe*, 192 S.W.3d at 579 (citing TEX. R. APP. P. 41.1(a)); *accord Thota*, 366 S.W.3d at 687.

B. Applicable Law

In a breach of contract action, a plaintiff may recover damages for its expectation interest in the contract. "Damages must be measured by a legal standard, and that standard must be used to guide the fact finder in determining what sum would compensate the injured party." *Jackson v. Fontaine's Clinics, Inc.*, 499 S.W.2d 87, 90 (Tex. 1973); *TeleResource Corp. v. Accor N. Am., Inc.*, 427 S.W.3d 511, 523 (Tex. App.—Fort Worth 2014, pet. denied). "[T]he universal rule for measuring damages for the breach of a contract is just compensation for the loss or damage actually sustained." *Zachry Const. Corp. v. Port of Hous. Auth. of Harris Cty.*, 449 S.W.3d 98, 114 (Tex. 2014) (quoting *Stewart v. Basey*, 245 S.W.2d 484, 486 (Tex. 1952)).

C. Breach of the Agreement Claim

Tworek's first claim against the Borkerts was for breach of the Agreement. She sought to recover "damages as set forth in the Note and Agreement." In her amended petition, Tworek pled that she loaned the Borkerts $160,000.00 under the Note, the Borkerts had failed to pay her according to its terms, and interest was continuing to accrue on the unpaid balance. Tworek also pled that, after she applied the Borkerts' credits,[2] the remaining unpaid principal and interest owed to her was $225,502.60.

At trial, about four months after she filed her amended petition, Tworek testified to the same facts—and added that, because the interest had continued to accrue, the current amount of principal and interest owed was $227,270.53. In the court's charge, Question 5 asked the jury to determine damages, if any, for Tworek:

> What sum of money, if any, if paid now in cash, are CHARLES BORKERT, PENELOPE STURM-BORKERT, and ALAMO TURF FARMS, INC., obligated to pay WIESLAWA TWOREK under the "Agreement."

The Borkerts objected to the question; they submitted a handwritten instruction to be added to Question 5 that limited the measure of damages to "only the loss of princip[al] and interest." *See Jackson*, 499 S.W.2d at 90. The trial court overruled the objection and refused to include the requested instruction.

D. Borkerts' Arguments

The Borkerts argue that Question 5 was fatally defective because the jury was left "free to speculate regarding the appropriate elements of damages" and "to include or consider damages that were neither pleaded nor legally permissible." The Borkerts cite *Jackson v. Fontaine's Clinics, Inc.*, 499 S.W.2d 87, 89 (Tex. 1973), and *Arthur Andersen & Co. v. Perry Equipment*

[2] The credits were the proceeds from Tworek's sale of the Borkerts' assets on which Tworek foreclosed.

Corp., 945 S.W.2d 812, 814 (Tex. 1997), to support their arguments. We consider the applicability of each case.

1. Jackson v. Fontaine's Clinics, Inc.

In *Jackson*, the plaintiff sued the defendants for "wrongfully damag[ing] the business and reputation of [the plaintiff]," for making "false disparaging statements," and for stealing the plaintiff's trade secrets. *Jackson*, 499 S.W.2d at 89. The charge asked the jury to determine damages for "the loss of Monetary reward from [the plaintiff's] business activities." *Id.* *Jackson* stated that "[d]amages must be measured by a legal standard, and that standard must be used to guide the fact finder in determining what sum would compensate the injured party." *Id.* at 90. The court commented that the plaintiff's pleadings were not clear, surmised that the plaintiff was seeking damages for lost profits, but noted that "the jury was given no guideline for determining a loss of net profits." *Id.* The court held the "submission was fatally defective, because it simply failed to guide the jury to a finding on *any proper legal measure of damages*." *Id.* But *Jackson* is distinguishable.

Jackson's plaintiff pled multiple causes of action, none of which was breach of contract, and the measure of damages was "the loss of monetary reward," a nebulous phrase with no inherent legal definition. *See id.* at 89; *see also Island Recreational Dev. Corp. v. Republic of Tex. Sav. Ass'n*, 710 S.W.2d 551, 562 (Tex. 1986) (Gonzalez, J., dissenting) (commenting on *Jackson*'s reasoning and explaining that "[w]hen the jury's answer to a broad issue can include inapplicable types of damages or inapplicable grounds of recovery, the issue requires an appropriate accompanying instruction"); *cf. Crown Life Ins. Co. v. Casteel*, 22 S.W.3d 378, 389 (Tex. 2000) ("When a single broad-form liability question erroneously commingles valid and invalid liability theories and the appellant's objection is timely and specific, the error is harmful when it cannot be

determined whether the improperly submitted theories formed the sole basis for the jury's finding.").

In contrast, Tworek sought damages under Question 5 of the charge for the amount of money the Borkerts were "obligated to pay [her] under the 'Agreement.'" She had testified to the amount of unpaid principal and accrued interest on the Note as $227,270.53, and in her closing argument, she asked the jury to award her damages for "the note and the accrued interest on the note, $227,270.53." The jury awarded $227,270.53—the exact amount she asked for as unpaid principal and accumulated interest.

Given the differences in the facts between *Jackson* and this case, we conclude that *Jackson* is distinguishable to the degree that it may be read to require reversal without a harmful error analysis. *See Jackson*, 499 S.W.2d at 90; *see also* TEX. R. APP. P. 44.1(a) (harmful error analysis).

2. Arthur Andersen & Co. v. Perry Equipment Corp.

In *Arthur Andersen*, Perry Equipment Corporation (PECO) sued Arthur Anderson for losses PECO sustained when a company it bought—based on Arthur Anderson's audit—failed. *Arthur Andersen*, 945 S.W.2d at 814. PECO sued for multiple causes of action including "violations of the Deceptive Trade Practices Act, fraud, negligence, negligent misrepresentation" and other torts. *Id.*

As the court noted, "direct damages for misrepresentation are measured in two [different] ways." *Id.* at 817. The two measures are out-of-pocket damages and benefit-of-the-bargain damages, and "[b]oth measures . . . are determined at the time of sale." *Id.* The jury was "not asked to find direct damages at the time of sale." *Id.* Instead, it was "asked to consider the purchase price as part of the overall damages," but PECO failed to establish how much of its losses were legally attributable to Arthur Andersen. *Id.* The court concluded that "[b]ecause the charge failed

to instruct the jury on the proper measure of direct damages, the submission was reversible error." *Id.* *Arthur Andersen* is also distinguishable.

PECO's principal claim had two different measures of damages, PECO failed to establish the elements comprising those measures, and the charge failed to instruct the jury on which measure was proper. *See Arthur Andersen*, 945 S.W.2d at 814. Here, Tworek sought damages under Question 5 of the charge for the amount of money the Borkerts were "obligated to pay [her] under the 'Agreement.'" The pleadings, evidence, charge, and closing argument show that Question 5 pertained to a single cause of action with a single measure of damages: the amount owing on the Agreement. Unlike *Arthur Anderson*, the charge question here was not given in the context of multiple measures of damages and Tworek did not fail to establish the amount of principal and interest owed under the Agreement. *See id.* at 817.

Given the differences in the facts between *Arthur Andersen* and this case, we conclude that *Arthur Andersen* is also distinguishable to the degree that it may be read to require reversal without a harmful error analysis. *See id.*; *see also* TEX. R. APP. P. 44.1(a).

E. Harmful Error Analysis

Assuming arguendo that the trial court abused its discretion by failing to include a measure of damages instruction in Question 5, we must still determine whether the error "probably caused the rendition of an improper judgment." *See Shupe*, 192 S.W.3d at 579 (citing TEX. R. APP. P. 41.1(a)); *see also Thota*, 366 S.W.3d at 687.

For Tworek's breach of the Agreement claim, her pleadings and arguments sought damages under a single measure: the amount of the unpaid principal and interest owed under the Agreement. *See Stewart*, 245 S.W.2d at 486; *cf. Jackson*, 499 S.W.2d at 89 (reversing a judgment resting on multiple measures of damages with no evidence of certain essential elements of damages). Tworek pled, submitted evidence, and argued that she loaned the Borkerts $160,000.00, and the Borkerts

failed to timely pay her according to the terms of their promissory note. She testified that the unpaid principal and accumulated interest they owed her was $227,270.53.

The jury was asked to determine what damages the Borkerts were obligated to pay Tworek "under the 'Agreement,'" and the jury awarded the exact amount that Tworek testified was owed under the Note: $227,270.53. For the breach of the Agreement claim, there was a single measure of damages, the evidence supported the measure, and the jury awarded the exact amount owed. Given that the jury found the Borkerts breached the Agreement, even if the trial court had included an instruction limiting the measure of damages to the principal and interest owed under the Agreement, the award of damages for breach of the Agreement would have been the same.

Having considered the entire record, we conclude that, under the facts of this case, even if the trial court erred in failing to include an instruction limiting the measure of damages, the failure did not "cause[] the rendition of an improper judgment." *See* TEX. R. APP. P. 44.1(a)(1); *See Shupe*, 192 S.W.3d at 579 (citing TEX. R. APP. P. 41.1(a)); *see also Thota*, 366 S.W.3d at 687. We overrule Appellants' first issue.

JURY'S FINDING THAT TWOREK DID NOT BREACH AGREEMENT

In their second issue, the Borkerts argue that the jury's finding that Tworek did not breach the Agreement was against the great weight and preponderance of the evidence. They insist that the evidence conclusively established Tworek's breach by her failure to loan "the remaining $64,000" under the Note, her breach would necessarily affect the remainder of the judgment, and this court should reverse the judgment and order a new trial.

Tworek counters that she did not agree to loan the Borkerts money on demand, the Note is not enforceable against her because she did not sign it, she met her obligations under the Agreement, and the judgment should be affirmed.

A. Standard of Review

"When a party attacks the factual sufficiency of an adverse finding on an issue on which [the party] has the burden of proof, [the party] must demonstrate on appeal that the adverse finding is against the great weight and preponderance of the evidence." *Dow Chem. Co. v. Francis*, 46 S.W.3d 237, 242 (Tex. 2001). In our review, we "must consider and weigh all of the evidence, and [we] can set aside a verdict only if . . . the finding is so against the great weight and preponderance of the evidence that it is clearly wrong and unjust." *Dow Chem.*, 46 S.W.3d at 242; *accord Cain v. Bain*, 709 S.W.2d 175, 176 (Tex. 1986); *see* W. Wendell Hall et al., *Hall's Standards of Review in Texas*, 42 ST. MARY'S L.J. 1, 42 (2010).

B. Applicable Law

The essential elements of a breach of contract are "(1) a valid contract; (2) the plaintiff performed or tendered performance; (3) the defendant breached the contract; and (4) the plaintiff was damaged as a result of the breach." *McLaughlin, Inc. v. Northstar Drilling Techs., Inc.*, 138 S.W.3d 24, 27 (Tex. App.—San Antonio 2004, no pet.) (quoting *Richter v. Wagner Oil Co.*, 90 S.W.3d 890, 898 (Tex. App.—San Antonio 2002, no pet.)). "It is a fundamental principle of contract law that when one party to a contract commits a material breach of that contract, the other party is discharged or excused from further performance." *Bartush-Schnitzius Foods Co. v. Cimco Refrigeration, Inc.*, 518 S.W.3d 432, 436 (Tex. 2017) (quoting *Mustang Pipeline Co., Inc. v. Driver Pipeline Co., Inc.*, 134 S.W.3d 195, 196 (Tex. 2004) (per curiam)).

C. Analysis

The Borkerts contend that under the terms of the Promissory Note, Tworek was obligated to pay them $224,000.00. Because she admitted she only paid them $160,000.00, the Borkerts argue Tworek failed to comply with the Agreement. Question 1 of the charge asked the following:

> Did WIESLAWA TWOREK fail to comply with the "Agreement" to lend ALAMO TURF FARMS the sum of $224,000.00 under the terms of the "Agreement"?

The jury answered "No." The Borkerts insist the jury should have answered "Yes" and found that Tworek failed to comply with the Agreement.

But Tworek testified that she never signed the Promissory Note, she only agreed to fund the start-up costs—which Borkert told her would be about $150,000.00–160,000.00—and she never agreed to unconditionally pay $224,000.00. Charles Borkert testified that, as stated in the Deed of Trust, the Note proceeds were to be used for the turf farm operation, but there was undisputed evidence that the Borkerts diverted some of the Note funds to their personal accounts and spent Note funds on personal expenses rather than on developing the turf farm. There was also evidence that the Borkerts violated the Security Agreement by removing collateralized equipment from the property, and Charles Borkert testified that the removed equipment was "worth a lot." It is undisputed that the Borkerts never made any principal or interest payments to Tworek under the Agreement.

Having considered and weighed all the evidence, we conclude (1) there was evidence of material breach by the Borkerts and (2) the jury's finding on Question 1 is not against the great weight and preponderance of the evidence. *See Bartush-Schnitzius Foods Co.*, 518 S.W.3d at 436; *Dow Chem.*, 46 S.W.3d at 242; *McLaughlin, Inc.*, 138 S.W.3d at 27. We overrule the Borkerts' second issue.

EXCLUDED PHOTOGRAPHS

In their third issue, the Borkerts argue the trial court erred by excluding certain photographs of the turf farm property because the Borkerts' alleged failure to perform work on the turf farm was one of Tworek's bases for her breach of the Agreement claim. The Borkerts contend the trial

court's ruling "prevented the jurors from observing the work performed on the land for themselves, and likely resulted in the rendition of an improper judgment."

Tworek argues the trial court properly sustained her objections to the excluded photographs based on lack of proper predicate and the Borkerts' failure to produce the photographs during discovery, the Borkerts failed to make an offer of proof, and the photographs were merely cumulative and not dispositive on the question of the Borkerts' breach of the Agreement.

A. Standard of Review

"The admission and exclusion of evidence is committed to the trial court's sound discretion." *City of Brownsville v. Alvarado*, 897 S.W.2d 750, 753 (Tex. 1995); *accord Interstate Northborough P'ship v. State*, 66 S.W.3d 213, 220 (Tex. 2001). "To reverse a judgment based on a claimed error in . . . excluding evidence, a party must show that the error probably resulted in an improper judgment." *Interstate Northborough P'ship*, 66 S.W.3d at 220; *accord McCraw v. Maris*, 828 S.W.2d 756, 757 (Tex. 1992). Generally, even if the trial court erred by excluding the evidence, unless the appellant can show the excluded evidence was not cumulative and the judgment turned on the excluded evidence, we will not reverse the judgment. *See Interstate Northborough P'ship*, 66 S.W.3d at 220; *Tex. Dep't of Transp. v. Able*, 35 S.W.3d 608, 617 (Tex. 2000). To determine whether "the excluded evidence probably resulted in the rendition of an improper judgment, we review the entire record." *Interstate Northborough P'ship*, 66 S.W.3d at 220; *accord City of Brownsville*, 897 S.W.2d at 753.

B. Analysis

At trial, the Borkerts moved to admit Defendant's Exhibit 19. The Borkerts' counsel stated the exhibit contained a PowerPoint presentation and photographs that "show the process of the caring for, harvesting, and preparing for transport sod grass." Charles Borkert testified that he took some of the photographs in 2006, and others in 2011 and 2012. Tworek objected to admitting

the exhibits because of the lack of specificity for the "timeframe in which the pictures were taken," and the trial court sustained the objection.

On appeal, the Borkerts argue the photographs were necessary to show the work they had done to prepare the farm to grow turf grass, and the jury should have been able to see the photographs to understand the work the Borkerts had done. But Charles Borkert testified in some detail, including drawing a diagram for the jury to show the work that had been done. He described the installation of a water supply line, standpipes, the irrigation pump, and other details of the work done to prepare the property for turf farming.

Because the record contains detailed testimony and evidence describing the condition of the property and the work done to it, we conclude the excluded exhibit was merely cumulative, and the trial court did not abuse its discretion by excluding it. *See Interstate Northborough P'ship*, 66 S.W.3d at 220; *Able*, 35 S.W.3d at 617. However, assuming arguendo that the trial court abused its discretion by excluding the exhibit, the Borkerts would still have to show the error was harmful. *See* TEX. R. APP. P. 44.1(a); *Interstate Northborough P'ship*, 66 S.W.3d at 220; *Able*, 35 S.W.3d at 617. To find harmful error, we would have to determine that Tworek's breach of the Agreement claim against the Borkerts turned on the excluded exhibit. *See Interstate Northborough P'ship*, 66 S.W.3d at 220; *Able*, 35 S.W.3d at 617.

Tworek testified that the Borkerts committed multiple material breaches of the Agreement by, inter alia, diverting Note funds to personal accounts, paying personal expenses from Alamo Turf Farms, Inc.'s account, removing collateralized property from the turf farm without permission, failing to install Tworek as a director in the Alamo Turf Farms, Inc., and failing to provide expense receipts and Profit and Loss statements.

The jury was free to believe Tworek's testimony on the alleged material breaches that were independent of any work the Borkerts performed on the turf farm. If the jury believed Tworek,

the photographs of the condition of the turf farm in 2006, or during 2011 and 2012, would be either irrelevant or not controlling on the independent material breaches. *See Interstate Northborough P'ship*, 66 S.W.3d at 220; *City of Brownsville*, 897 S.W.2d at 753.

Having reviewed the entire record, we conclude the exclusion of the exhibit did not "probably cause[] the rendition of an improper judgment." *See* TEX. R. APP. P. 44.1(a); *Interstate Northborough P'ship*, 66 S.W.3d at 220; *City of Brownsville*, 897 S.W.2d at 753. We overrule the Borkerts' third issue.

PROMISSORY ESTOPPEL

In their fourth issue, the Borkerts complain that the trial court erred as a matter of law by awarding Tworek damages for her promissory estoppel claim. They argue, inter alia, Tworek's live pleading raised a promissory estoppel claim only in the alternative to breach of the Agreement, and Tworek's closing argument expressly stated her promissory estoppel claim was based on the same injury as her breach of the Agreement claim and she asked for exactly the same damages as her breach of the Agreement claim.

In her appellate brief, Tworek argues the promissory estoppel and breach of the Agreement claims involved different injuries, the Borkerts' broken promises outside the Agreement were tried by consent, and there is sufficient evidence to support the verdict and judgment for her promissory estoppel damage awards.

A. Standard of Review

"A trial court has no 'discretion' in determining what the law is or applying the law to the facts." *Walker v. Packer*, 827 S.W.2d 833, 840 (Tex. 1992). When a trial court decides a question of law, its decision is "subject to *de novo* review." *In re Humphreys*, 880 S.W.2d 402, 404 (Tex. 1994); *accord Marin Real Estate Partners, L.P. v. Vogt*, 373 S.W.3d 57, 75 (Tex. App.—San Antonio 2011, no pet.).

B. Applicable Law

"[T]he promissory-estoppel doctrine presumes no contract exists." *Rachal v. Reitz*, 403 S.W.3d 840, 848 (Tex. 2013) (alteration in original) (quoting *Subaru of Am., Inc. v. David McDavid Nissan, Inc.*, 84 S.W.3d 212, 226 (Tex. 2002)). Where a contract exists, "promissory estoppel will apply to a promise *outside* the contract," *Richter v. Wagner Oil Co.*, 90 S.W.3d 890, 899 (Tex. App.—San Antonio 2002, no pet.) (emphasis added), but "[p]romissory estoppel is not applicable to a promise *covered* by a valid contract between the parties," *BP Am. Prod. Co. v. Zaffirini*, 419 S.W.3d 485, 507 (Tex. App.—San Antonio 2013, pet. denied) (alteration in original) (emphasis added) (quoting *Richter*, 90 S.W.3d at 899).

C. Analysis

In her first amended original petition, Tworek asserted the following:

> 34. In reliance on the promises of Defendants, CHARLES BORKERT, PENELOPE STURM-BORKERT, and ALAMO TURF FARMS, INC., Plaintiff advanced Defendants pursuant to the Note, between February 16, 2011[,] and October 29, 2011, the sum of $160,000.00.

Raising a promissory estoppel claim, Tworek's amended petition stated as follows:

> 93. In the alternative, Plaintiff seeks to recover for the costs incurred by Plaintiff in detrimental reliance on the promises of the Defendants, CHARLES BORKERT, PENELOPE STURM-BORKERT, and ALAMO TURF FARMS, INC.

At trial, Tworek's live pleading contained a promissory estoppel claim *only* in the alternative; it did not allege that the Borkerts failed to execute a new note or raise a promissory estoppel claim based on a broken promise to execute a new note. Further, in her closing argument, when addressing the damages she sought for her promissory estoppel claim, Tworek's counsel repeated the charge's question pertaining to promissory estoppel (jury charge Question 7-A) and explained the damages Tworek sought:

> And we go [on to] question 7-A. Once again, what sum of money would reasonably compensate Mrs. Tworek. And that's the same, $227,270.53.

> We're asking just to be compensated for our note or the sum of money advanced, plus the interest.

On appeal, to defend her promissory estoppel award, Tworek makes a different argument. She now argues that the Borkerts' failed promise to sign a new note for $320,000.00 was an extra-contractual promissory estoppel claim that was tried by consent, and that the broken promises evidence supports her promissory estoppel awards. We disagree.

1. No Clear Intent to Try by Consent

First, the Borkerts' obligation to sign a new note was implicit in the Supplemental Agreement. The Supplemental Agreement states that "[o]nce the $320,000.00 loan has been created and executed[,] both parties agree to dismiss their causes of action and counterclaims to the lawsuit." Because the Borkerts' obligation to execute the new note was within the scope of the Supplemental Agreement's express terms, the Borkerts' promise to sign the new note was not an extra-contractual promise that would support a promissory estoppel claim. *See Zaffirini*, 419 S.W.3d at 507; *Richter*, 90 S.W.3d at 899.

Second, assuming arguendo that the Borkert's promise to sign the new note was an extra-contractual promise, the record does not show that the parties tried by consent the issue of a separate, non-alternative claim of promissory estoppel for the Borkerts' failure to sign the new note. Both sides submitted evidence regarding the Supplemental Agreement and the new note, but merely submitting evidence on an issue is not enough to try an unpled issue. *See Geis v. Colina Del Rio, LP*, 362 S.W.3d 100, 115–16 (Tex. App.—San Antonio 2011, pet. denied). We will not conclude that "an issue [was] tried by consent when the evidence relevant to the unpleaded issue is also relevant to a pleaded issue because admitting that evidence would not be calculated to elicit an objection and its admission ordinarily would not prove the parties 'clear intent' to try the unpleaded issue." *Hampden Corp. v. Remark, Inc.*, 331 S.W.3d 489, 496 (Tex. App.—Dallas

2010, pet. denied) (citing *Case Corp. v. Hi-Class Bus. Sys. of Am., Inc.*, 184 S.W.3d 760, 771 (Tex. App.—Dallas 2005, pet. denied)).

2. Evidence that Extra-Contractual Promise Not Tried by Consent

There are several indications that the parties did not understand they were trying by consent Tworek's promissory estoppel claim based on the Borkerts' failure to sign a new note.

First, Tworek did not seek to amend her pleadings before submission to the jury. *See* TEX. R. CIV. P. 67 (addressing amending pleadings to conform with issues tried by consent); *Mitchell v. LaFlamme*, 60 S.W.3d 123, 133 (Tex. App.—Houston [14th Dist.] 2000, no pet.) (citing *Bedgood v. Madalin*, 600 S.W.2d 773, 775–76 (Tex. 1980)) ("[E]ven if an issue is tried by consent, a party is obligated to amend its pleadings to support the issue prior to its submission to the jury.").

Second, Tworek did not ask for separate damages in her closing argument. When asking for damages on her promissory estoppel claim, Tworek did not ask for damages for the Borkerts' failure to execute a new note. Instead, she asked "just to be compensated for our note or the sum of money advanced, plus the interest," in the exact same amount as the breach of the Agreement claim.

Third, although Tworek submitted evidence of the Borkerts' breaches of some promises, that evidence was also applicable to Tworek's breach of the Agreement claim, and admission of that evidence is not evidence of the parties' intent to try a separate, independent, non-alternative promissory estoppel claim. *See Hampden Corp.*, 331 S.W.3d at 496; *see also Geis*, 362 S.W.3d at 115.

3. Promissory Estoppel Claim Barred

Having reviewed the record, we conclude a separate, independent promissory estoppel claim was not tried by consent, Tworek's promissory estoppel claim was—as she pled and as she argued—in the alternative to her breach of the Agreement claim but for the exact same damages.

Because a valid contract existed that covered the alleged broken promises, Tworek's promissory estoppel claim was barred as a matter of law. *See Zaffirini*, 419 S.W.3d at 507; *Richter*, 90 S.W.3d at 899. Thus, the trial court erred in awarding damages for promissory estoppel, and we sustain the Borkerts' fourth issue.

DOUBLE RECOVERY FOR SINGLE INJURY

In their fifth issue, the Borkerts complain that the jury's award of damages for promissory estoppel constituted a double recovery in violation of the one satisfaction rule. Tworek counters that the damages for promissory estoppel were separate from the breach of the Agreement damages and were supported by legally and factually sufficient evidence, and the Borkerts waived their one satisfaction rule defense. Because we have already determined that the trial court erred by awarding damages for promissory estoppel, the Borkerts' fifth issue is moot.

ATTORNEY'S FEES

In their sixth issue, the Borkerts challenge the trial court's award of attorney's fees. They argue that Tworek's only claim that can support an attorney's fees award is her breach of the Agreement claim, and because that claim must be reversed, we must also reverse the award of attorney's fees. Tworek responds that her breach of the Agreement award was sound, she recovered damages for her breach of the Agreement and her promissory estoppel claims, and she is entitled to recover attorney's fees under either claim.

A. Applicable Law, Standard of Review

By statute, a party may recover attorney's fees for a breach of contract claim where the party prevails on its claim and recovers damages on that claim. TEX. CIV. PRAC. & REM. CODE ANN. § 38.001 (West 2014); *MBM Fin. Corp. v. Woodlands Operating Co., L.P.*, 292 S.W.3d 660, 666 (Tex. 2009); *Tony Gullo Motors I, L.P. v. Chapa*, 212 S.W.3d 299, 304 (Tex. 2006). Interpreting a statute is a question of law for the court, and we review a trial court's decision de

novo. *See Holland v. Wal-Mart Stores, Inc.*, 1 S.W.3d 91, 94 (Tex. 1999) ("The availability of attorney's fees under a particular statute is a question of law for the court."); *Discover Prop. & Cas. Ins. Co. v. Tate*, 298 S.W.3d 249, 253 (Tex. App.—San Antonio 2009, pet. denied).

B. Analysis

The Borkerts do not contest the amount of the attorney's fees, the segregation of the fees between the claims, or the sufficiency of the evidence supporting the award. Instead, they essentially acknowledge that if Tworek's breach of the Agreement claim stands, the award of attorney's fees will also.

As we have already explained, the trial court erred in awarding damages for promissory estoppel, but there was no reversible error in the trial court's award of damages for breach of the Agreement. Because Tworek prevailed on her breach of the Agreement claim and was awarded damages, we conclude the trial court did not err in awarding attorney's fees to Tworek for her breach of the Agreement claim. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 38.001; *MBM Fin. Corp.*, 292 S.W.3d at 666. We overrule the Borkerts' sixth issue.

CONCLUSION

Having reviewed the record and applied the applicable standards of review, we conclude there was no reversible error in the jury charge for Tworek's breach of the Agreement claim, the jury's finding that Tworek did not breach the Agreement was not against the great weight and preponderance of the evidence, and the trial court did not abuse its discretion in excluding the evidence offered by the Borkerts.

However, we conclude the trial court erred in awarding damages for promissory estoppel. Therefore, we reverse the award of damages for promissory estoppel against Charles and Penelope

Borkert, and we render judgment that Wieslawa Tworek take nothing on her promissory estoppel claim. We affirm the remainder of the judgment.

Patricia O. Alvarez, Justice