COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH

NO. 02-15-00166-CV

HARLAN J. FRIEND — APPELLANT

V.

TRACEY M. FRIEND — APPELLEE

FROM THE 367TH DISTRICT COURT OF DENTON COUNTY
TRIAL COURT NO. 2013-71553-431

MEMORANDUM OPINION[1]

In eight issues, Appellant Harlan J. Friend appeals from the trial court's final judgment. We affirm in part and reverse and render in part.

[1]*See* Tex. R. App. P. 47.4.

I. Background

In March 2005, Harlan and Appellee Tracey M. Friend obtained a home equity line of credit (the line of credit) from Bank of America for the purpose of purchasing a restaurant. The line of credit was secured by their residence.

Harlan and Tracey were divorced on November 7, 2008. The agreed final divorce decree awarded the residence to Tracey as her sole and separate property and ordered her to pay the mortgage on the residence. The decree also stated that the balance on the line of credit was $204,000 and ordered Harlan to pay the line of credit,[2] along with "[a]ny and all debts, charges, liabilities, and other obligations incurred solely by [him] from and after May 23, 2008 unless express provision is made in this decree to the contrary." The decree ordered Tracey to pay $634 to Harlan by the twenty-seventh day of each month, and Harlan was required to apply these payments to the line of credit.

The decree also ordered Harlan and Tracey to sell a second home located Englewood, Florida, at a mutually agreeable price. Tracey was responsible for paying for all maintenance and repairs necessary to keep the Florida home in its present condition. Once the Florida home was sold, Tracey's obligation to make the $634 monthly payments to Harlan would terminate. The proceeds from the sale were to be applied first to the line of credit to pay it in full and then to Tracey to reimburse her for the maintenance and repair costs. If any funds remained,

[2]The decree refers to the line of credit as the "2nd line of Credit."

Tracey was to deposit them into college fund accounts for Tracey and Harlan's two children.

In 2009 and 2010, Harlan took draws totaling approximately $52,000 against the line of credit without Tracey's knowledge or consent. Harlan paid $19,000 of those funds to the attorney general's office to satisfy his back child support obligations. Additionally, in March 2009, Harlan started applying only a portion of Tracey's $634 monthly payments to the line of credit. Tracey stopped making the monthly payments to Harlan in June 2013.

In September 2013, Harlan filed a petition for enforcement alleging that Tracey had violated the terms of the decree by failing to make her $634 monthly payments to him from June 2013 through August 2013 and that he believed the violations would continue. Harlan sought a judgment for the amounts due, plus interest, attorney's fees, and costs. The trial court signed a default judgment against Tracey in early November 2013, awarding Harlan judgment against Tracey for $3,170 in unpaid monthly payments from June 2013 through October 2013, plus $1,350 in attorney's fees. Tracey filed a motion to set aside the default judgment and a motion for new trial, both of which the trial court denied.

In late November 2013, Tracey filed suit against Harlan, alleging that Harlan's postdivorce draws on the line of credit combined with his "anemic payments" allowed the balance on the line of credit to grow, putting her at risk of losing her residence through foreclosure and reducing her equity in the residence, which prevented her from refinancing the mortgage. She asserted

claims for breach of contract, tortious interference with prospective business relationships, conversion, intentional infliction of emotional distress, fraud, fraudulent inducement, unjust enrichment, and money had and received. She also sought an injunction to prevent Harlan from continuing to draw on the line of credit, as well as actual damages, exemplary damages, and attorney's fees under section 38.001 of the civil practices and remedies code. *See* Tex. Civ. Prac. & Rem. Code Ann. § 38.001 (West 2015). Harlan filed another petition for enforcement, alleging that Tracey had violated the terms of the decree by failing to make her $634 monthly payments to him from November 2013 through July 2014 and that he believed the violations would continue. Harlan sought a judgment for the amounts due, plus interest, attorney's fees, and costs.

The case was tried to the bench on January 16, 2015, and on May 6, 2015, the trial court signed a final judgment in Tracey's favor.[3] The trial court permanently enjoined Harlan from taking additional draws on the line of credit, found that Harlan was solely responsible for repayment of the line of credit for all amounts in excess of $177,360.40, rescinded Tracey's obligation to make her $634 monthly payments to Harlan, and ordered that she could make those payments directly to Bank of America.[4] The trial court awarded Tracey $25,000 in exemplary damages and $26,135.43 in attorney's fees. The trial court also

[3]The case was tried by the trial court that rendered the divorce decree.

[4]At the time of trial, the Florida home had not been sold.

ordered that the monthly payments that Tracey failed to make to Harlan[5] be offset by $7,500 in attorney's fees awarded to Tracey in a prior proceeding and ordered Tracey to pay the $3,912 difference directly to Bank of America.

The trial court filed findings of fact and conclusions of law in which it concluded, among other things, that the decree was an enforceable contract and that Harlan breached it. Harlan has appealed.

II. Election of Remedies

Here, Tracey essentially alleged only one injury—the increase in the balance due on the line of credit secured by her separate property caused by Harlan's postdivorce draws on the line of credit and his failure to apply Tracey's monthly payments to the line of credit. If a plaintiff pleads multiple theories of recovery for a single injury and does not elect her remedies before the trial court proceeds to judgment, the trial court should render the judgment offering the greatest recovery. *Birchfield v. Texarkana Mem'l Hosp.*, 747 S.W.2d 361, 367 (Tex. 1987). If the trial court does not do so, the appellate court must use the findings awarding the greatest theory of recovery and render judgment accordingly. *Citizens Nat'l Bank v. Allen Rae Invs., Inc.*, 142 S.W.3d 459, 475 (Tex. App.—Fort Worth 2004, no pet.) (op. on reh'g).

The trial court awarded damages in the form of a credit against the balance on the line of credit, $26,135.43 in attorney's fees, and $25,000 in

[5]At trial, the parties stipulated that Tracey had failed to make eighteen monthly payments to Harlan.

exemplary damages. Exemplary damages are not recoverable for breach of contract. *Jim Walter Homes, Inc. v. Reed*, 711 S.W.2d 617, 618 (Tex. 1986). Attorney's fees are not recoverable for tortious interference with prospective business relationships, conversion, intentional infliction of emotional distress, fraud, fraudulent inducement, unjust enrichment, and money had and received. *See* Tex. Civ. Prac. & Rem. Code Ann. § 38.001. Attorney's fees may, however, be awarded for breach of contract. *See id.* Thus, Tracey's breach of contract claim affords the greatest recovery. We will therefore first address Harlan's issues challenging the sufficiency of the evidence to support Tracey's recovery for breach of contract.

III. Standards of Review

A trial court's findings of fact have the same force and dignity as a jury's answers to jury questions and are reviewable for legal and factual sufficiency of the evidence to support them by the same standards. *Catalina v. Blasdel*, 881 S.W.2d 295, 297 (Tex. 1994); *Anderson v. City of Seven Points*, 806 S.W.2d 791, 794 (Tex. 1991); *see also MBM Fin. Corp. v. Woodlands Operating Co.*, 292 S.W.3d 660, 663 n.3 (Tex. 2009). When the appellate record contains a reporter's record, findings of fact on disputed issues are not conclusive and may be challenged for the sufficiency of the evidence. *Sixth RMA Partners, L.P. v. Sibley*, 111 S.W.3d 46, 52 (Tex. 2003); *Allison v. Conglomerate Gas II, L.P.*, No. 02-13-00205-CV, 2015 WL 5106448, at *6 (Tex. App.—Fort Worth Aug. 31, 2015, no pet.) (mem. op.). We defer to unchallenged findings of fact that are

supported by some evidence. *Tenaska Energy, Inc. v. Ponderosa Pine Energy, LLC*, 437 S.W.3d 518, 523 (Tex. 2014).

We may sustain a legal sufficiency challenge only when (1) the record discloses a complete absence of evidence of a vital fact, (2) the court is barred by rules of law or of evidence from giving weight to the only evidence offered to prove a vital fact, (3) the evidence offered to prove a vital fact is no more than a mere scintilla, or (4) the evidence establishes conclusively the opposite of a vital fact. *Ford Motor Co. v. Castillo*, 444 S.W.3d 616, 620 (Tex. 2014); *Uniroyal Goodrich Tire Co. v. Martinez*, 977 S.W.2d 328, 334 (Tex. 1998), *cert. denied*, 526 U.S. 1040 (1999). In determining whether there is legally sufficient evidence to support the finding under review, we must consider evidence favorable to the finding if a reasonable factfinder could and disregard evidence contrary to the finding unless a reasonable factfinder could not. *Cent. Ready Mix Concrete Co. v. Islas*, 228 S.W.3d 649, 651 (Tex. 2007); *City of Keller v. Wilson*, 168 S.W.3d 802, 807, 827 (Tex. 2005).

When reviewing an assertion that the evidence is factually insufficient to support a finding, we set aside the finding only if, after considering and weighing all of the evidence in the record pertinent to that finding, we determine that the credible evidence supporting the finding is so weak, or so contrary to the overwhelming weight of all the evidence, that the finding should be set aside and a new trial ordered. *Pool v. Ford Motor Co.*, 715 S.W.2d 629, 635 (Tex. 1986)

(op. on reh'g); *Cain v. Bain*, 709 S.W.2d 175, 176 (Tex. 1986); *Garza v. Alviar*, 395 S.W.2d 821, 823 (Tex. 1965).

We review the trial court's legal conclusions de novo. *BMC Software Belg., N.V. v. Marchand*, 83 S.W.3d 789, 794 (Tex. 2002). We may review conclusions of law to determine their correctness based upon the facts, but we will not reverse because of an erroneous conclusion if the trial court rendered the proper judgment. *City of Austin v. Whittington*, 384 S.W.3d 766, 779 n.10 (Tex. 2012) (citing *BMC Software*, 83 S.W.3d at 794); *H.E.B., L.L.C. v. Ardinger*, 369 S.W.3d 496, 513 (Tex. App.—Fort Worth 2012, no pet.). That is, because a trial court's conclusions of law are not binding on us, we will not reverse a trial court's judgment based on an incorrect conclusion of law when the controlling findings of fact support the judgment on a correct legal theory. *Wise Elec. Coop., Inc. v. Am. Hat Co.*, 476 S.W.3d 671, 679 (Tex. App.—Fort Worth 2015, no pet.).

IV. Breach of the Decree

In his first issue, Harlan argues that the trial court erred by concluding that he breached the decree by drawing against the line of credit after the divorce. We agree that the decree does not expressly prohibit Harlan from making additional draws on the line of credit. But even if the trial court erred by concluding that Harlan breached the decree by drawing against the line of credit, the trial court also concluded—and Harlan concedes—that he breached the

decree by failing to apply Tracey's $634 monthly payments to the line of credit. Thus, we overrule Harlan's first issue as moot.

V. Damages

In his seventh issue, Harlan argues that the trial court erred by holding that he was independently and solely responsible for the repayment of the line of credit for all amounts in excess of $177,360.40 because that amount is speculative in that the evidence is legally and factually insufficient to establish that amount and the record is silent on the balance of the line of credit.

Harlan first complains that the trial court did not make any findings of fact explaining how it arrived at $177,360.40. The trial court filed findings of fact and conclusions of law, but the trial court did not make any findings or conclusions regarding its calculations. Harlan did not timely file a request for additional or amended findings of fact and conclusions of law. *See* Tex. R. Civ. P. 298 (requiring a request for additional or amended findings and conclusions to be filed within ten days of the original findings and conclusions). He filed a motion for extension of time to request additional or amended findings, but the trial court denied the motion, and he does not complain about this ruling on appeal. By failing to timely request additional findings and conclusions, Harlan waived the right to complain on appeal about the trial court's failure to make additional findings. *See Heritage Res., Inc. v. Hill*, 104 S.W.3d 612, 620 (Tex. App.—El Paso 2003, no pet.); *see also Villalpando v. Villalpando*, 480 S.W.3d 801, 810 (Tex. App.—Houston [14th Dist.] 2015, no pet.) ("The failure to request amended

or additional findings or conclusions waives the right to complain on appeal about the trial court's failure to make the omitted findings or conclusions.").

Harlan next complains that $177,360.40 is speculative because there is no evidence to support this amount. In resolving the sufficiency of the evidence to support damages, the trial court's damage award will be upheld if it is within the range of the testimony regarding the amount of damages incurred. *Seabourne v. Seabourne*, 493 S.W.3d 222, 230 (Tex. App.—Texarkana 2016, no pet.) (citing *Garza de Escabedo v. Haygood*, 283 S.W.3d 3, 6 (Tex. App.—Tyler 2009), *aff'd sub nom*. *Haygood v. De Escabedo*, 356 S.W.3d 390 (Tex. 2011); *Cont'l Dredging, Inc. v. De-Kaizered, Inc.*, 120 S.W.3d 380, 392 (Tex. App.—Texarkana 2003, pet. denied)).

Tracey responds that the trial court arrived at this amount by crediting the $26,639.60 Harlan paid on the line of credit from March 2009 (the first month Harlan did not apply the entirety of Tracey's monthly payments to the line of credit) through January 2014 against the amount owed on the line of credit at the time of the divorce, which was $204,000. Tracey relies on a "HELOC Schedule" prepared by Harlan and admitted into evidence at the trial that shows every payment he made on the line of credit from April 1, 2008, through January 3, 2014, to support her calculations.[6]

[6]The "HELOC Statement" reflects that Harlan paid $33,857.53 on the line of credit from the time of the parties divorce on November 7, 2008, through January 4, 2014.

Harlan asserts that the trial court should have awarded Tracey damages in the amount of $13,045, which he contends is the total amount of the portions of the $634 monthly payments that he did not apply to the line of credit. Harlan also relies on the "HELOC Schedule" to support his calculations.

The goal in measuring damages for a breach of contract is to provide just compensation for any loss or damage actually sustained as a result of the breach. *Tex. Ear Nose & Throat Consultants, PLLC v. Jones*, 470 S.W.3d 67, 79 (Tex. App.—Houston [14th Dist.] 2015, no pet.) (citing *Mays v. Pierce*, 203 S.W.3d 564, 577 (Tex. App.—Houston [14th Dist.] 2006, pet. denied)). The normal measure of damages in a breach of contract case is the benefit of the bargain, which seeks to restore the injured party to the economic position it would have been in had the contract been performed. *Id.* (same). To recover for a breach of contract, a plaintiff must establish that she sustained damages as a result of the breach. *Id.* (citing *S. Elec. Servs., Inc. v. City of Houston*, 355 S.W.3d 319, 324 (Tex. App.—Houston [1st Dist.] 2011, pet. denied) (op. on reh'g)).

Here, the trial court found—and Harlan does not dispute—that Tracey was damaged by his failure to apply the monthly payments to the line of credit. Had Harlan performed under the agreed decree, he would have applied each of Tracey's $634 monthly payments to the balance owed on the line of credit,

which, according to the agreed decree, was $204,000 at the time of the divorce.[7] From the time the divorce decree was signed in November 2008 until the final judgment was signed in early May 2015, Tracey should have made seventy-eight monthly payments to Harlan, for a total of $49,452, which would have reduced the balance on the line of credit to $154,548.[8] Tracey, however, failed to make each of those, and the parties stipulated at trial that she had failed to make eighteen monthly payments, which totaled $11,412.[9] Thus, if Harlan had applied to the line of credit the payments that Tracey actually made to him, the balance on the line of credit would have been reduced by $38,040 to $165,960.[10]

The trial court's credit of $26,639.60 to the line of credit is based on the payments listed on the "HELOC Schedule," and this amount is within the range of

[7]Tracey and Harlan signed the decree as "APPROVED AND CONSENTED TO AS TO BOTH FORM AND SUBSTANCE."

[8]We do not include interest in our calculations because there is no evidence in the record regarding the interest rate on the line of credit or the amount of interest that has accrued since the date of the parties' divorce. Moreover, neither Harlan nor Tracey includes interest in their calculations.

[9]At trial, Harlan agreed on the record that the trial court could offset $7,500 in attorney's fees awarded to Tracey in a prior proceeding against the $11,412 in unpaid monthly payments. The trial court did so and ordered Tracey to pay the $3,912 difference directly to Bank of America. Harlan does not complain about this part of the trial court's judgment.

[10]Tracey does not bring a cross-point contending Harlan should bear sole responsibility for repayment of the line of credit for all amounts exceeding $165,960.

evidence presented at trial.[11] Because there is more than a scintilla of evidence to support the amount awarded by the trial court, and because we cannot say the great weight and preponderance of the evidence indicates this award was improper as to Harlan, we overrule Harlan's seventh issue.

VI. Impermissible Modification of the Decree

In his sixth issue, Harlan argues that the trial court erred by modifying the decree to require him to pay all amounts on the line of credit in excess of $177,360.40 because the trial court had no power to modify the property division in the decree. *See generally* Tex. Fam. Code Ann. §§ 9.006, 9.007 (West 2006 & Supp. 2016).

Generally, the court that rendered the decree of divorce retains the power to clarify and enforce the decree's property division. *Id.* §§ 9.002, 9.008 (West 2006 & Supp. 2016). Specifically, "the court may render further orders to enforce the division of property made or approved in the decree . . . to assist in the implementation of or to clarify the prior order." *Id.* § 9.006(a). The trial court "may specify more precisely the manner of effecting the property division previously made or approved if the substantive division of property is not altered or changed." *Id.* § 9.006(b). However, the trial court "may not amend, modify,

[11]As explained above, Tracey asserts that Harlan paid $26,639.60 on the line of credit from March 2009 through January 2014. According to our calculations based on the amounts listed on the "HELOC Schedule," Harlan paid $26,627.13 on the line of credit during that period. The difference, $12.47, is de minimus.

alter, or change the division of property made or approved in the decree of divorce." *Id.* § 9.007(a). "An order to enforce the division is limited to an order to assist in the implementation of or to clarify the prior order and may not alter or change the substantive division of property." *Id.* An order under section 9.007 that amends, modifies, alters, or changes the actual substantive division of property made or approved in a final decree of divorce is "beyond the power of the divorce court and is unenforceable." *Id.* § 9.007(b); *see DeGroot v. DeGroot*, 260 S.W.3d 658, 663 (Tex. App.—Dallas 2008, no pet.) ("[S]ection 9.007 of the Texas Family Code is jurisdictional and orders violating its restrictions are void.").

Harlan contends that the trial court violated section 9.007(a) by changing "the divorce decree's requirement that [he] pay the [line of credit] in the amount of $204,000 to the requirement that he pay all amounts on the [line of credit] 'in excess of $177,360.40.'" The decree stated that Harlan, "shall pay, as a part of the division of the estate of the parties, and shall indemnify and hold [Tracey] and her property harmless from any failure to so discharge" the line of credit, which, according to the agreed decree, had a balance of $204,000 at the time the decree was signed in November 2008. Harlan was also responsible for "[a]ny and all debts, charges, liabilities, and other obligations incurred solely by [him] from and after May 23, 2008 unless express provision [was] made in th[e] decree to the contrary." And Harlan was required to apply Tracey's $634 monthly payments to the line of credit.

As explained above, had Harlan adhered to the decree by applying Tracey's payments to the line of credit, the $204,000 balance on the line of credit would have been reduced accordingly. Harlan was responsible for any debts incurred by him after May 23, 2008, which would include the additional draws on the line of credit after the divorce. Thus, the trial court's judgment making Harlan solely responsible for repayment of the line of credit for all amounts in excess of $177,360.40 does not alter or change the substantive division of property and therefore does not violate section 9.007(a). We overrule Harlan's sixth issue.

VII. Presentment

In his eighth issue, Harlan argues that the trial court erred by awarding Tracey $26,135.43 in attorney's fees, expenses, and costs because she failed to present her claim as required by section 38.002(2) of the civil practice and remedies code. *See* Tex. Civ. Prac. & Rem. Code Ann. § 38.002(2) (West 2015) (requiring that "the claimant must present the claim to the opposing party or to a duly authorized agent of the opposing party" to recover attorney's fees under chapter 38). Tracey responds that Harlan waived this compliant because she pled that all conditions precedent to recovery had been met and Harlan failed to specifically deny presentment.

The claimant bears the burden to plead and prove presentment. *Ellis v. Waldrop*, 656 S.W.2d 902, 905 (Tex. 1983) (op. on reh'g); *Jones v. Kelley*, 614 S.W.2d 95, 100 (Tex. 1981). However, a claimant is excused from proving presentment if she pleads that all conditions precedent to recovery have been

met and the opposing party fails to specifically deny presentment. *See* Tex. R. Civ. P. 54 (stating that a party is required to prove only those conditions precedent that have specifically been denied by the opposing party); *Shin-Con Dev. Corp. v. I.P. Invs., Ltd.*, 270 S.W.3d 759, 768–69 (Tex. App.—Dallas 2008, pet. denied) (holding that appellants waived argument that appellee failed to present its contract claim to them as required by chapter 38 because they failed to specifically deny presentment had occurred); *Belew v. Rector*, 202 S.W.3d 849, 857 (Tex. App.—Eastland 2006, no pet.) (concluding that defendant's failure to affirmatively deny that all conditions precedent had been met relieved plaintiff from producing specific evidence of presentment); *Knupp v. Miller*, 858 S.W.2d 945, 955 (Tex. App.—Beaumont 1993, writ denied) (holding that defendant's failure to deny that all conditions precedent had been met justified the trial court's award of attorney's fees).

Presentment must be raised at the trial court to be preserved on appeal. *See* Tex. R. App. P. 33.1(a); *Salem v. Asi*, No. 02-10-00295-CV, 2011 WL 2119640, at *5 n.4 (Tex. App.—Fort Worth May 26, 2011, no pet.) (mem. op.) (holding failure to raise section 38.002 presentment in the trial court waived issue on appeal); *Coleman v. Coleman*, No. 01-09-00615-CV, 2010 WL 5187612, at *2 (Tex. App.—Houston [1st Dist.] Dec. 23, 2010, no pet.) (mem. op.) (same); *Dumler v. Quality Work by Davidson*, No. 14-06-00536-CV, 2008 WL 89961, at *6 (Tex. App.—Houston [14th Dist.] Jan. 10, 2008, no pet.) (mem. op.) (same).

Harlan failed to raise presentment in the trial court and therefore failed to preserve error on this issue. Accordingly, we overrule his eighth issue.

VIII. Exemplary Damages

Harlan's second, third, fourth, and fifth issues challenge the trial court's judgment awarding $25,000 in exemplary damages to Tracey.

In his second issue, Harlan argues that a "breach of contract cannot support recovery of exemplary damages." *Jim Walter Homes*, 711 S.W.2d at 618 (citing *Bellefonte Underwriters Ins. Co. v. Brown*, 704 S.W.2d 742, 745 (Tex. 1986); *Amoco Prod. Co. v. Alexander*, 622 S.W.2d 563, 571 (Tex. 1981)). We agree that exemplary damages are not recoverable for breach of contract. *See, e.g.*, *id.*; *Amoco Prod. Co.*, 622 S.W.2d at 571. Therefore, we sustain Harlan's second issue.

In his fifth issue, Harlan complains that Tracey cannot recover punitive damages because the trial court did not award her any actual damages. *See Nabours v. Longview Sav. & Loan Ass'n*, 700 S.W.2d 901, 904 (Tex. 1985) ("Punitive damages must be contingent on a finding of actual damage since actual damage is a necessary element of the underlying tort upon which the punitive damages are to be based."); *see also* Tex. Civ. Prac. & Rem. Code Ann. § 41.004(a) (West 2015) ("[E]xemplary damages may be awarded only if damages other than nominal damages are awarded.").

As we explained above, Tracey's breach of contract claim affords her the greatest recovery. Because the trial court did not award any other actual

damages that could be tied to an underlying tort upon which an award of exemplary damages could be based, we sustain Harlan's fifth issue. Because this issue is dispositive on the exemplary damages issue, we do not address Harlan's third and fourth issues. *See* Tex. R. App. P. 47.1.

IX. Conclusion

Having sustained Harlan's second and fifth issues, we reverse that portion of the trial court's judgment awarding $25,000 in exemplary damages to Tracey and render judgment that she takes nothing with respect to exemplary damages. Having overruled Harlan's first, sixth, seventh, and eighth issues, we affirm the remainder of the trial court's judgment.

/s/ Anne Gardner
ANNE GARDNER
JUSTICE

PANEL: DAUPHINOT, GARDNER, and SUDDERTH, JJ.

SUDDERTH, J., concurs without opinion.

DELIVERED: December 15, 2016