In The
Court of Appeals
Seventh District of Texas at Amarillo

No. 07-19-00223-CV

SUPERTRACK ARLINGTON, INC. AND ISMAIL M. ABUKHDAIR, APPELLANTS

V.

PROTON PRC, LTD., APPELLEE

On Appeal from the 67th District Court
Tarrant County, Texas
Trial Court No. 067-290182-17, Honorable Donald J. Cosby, Presiding

March 4, 2021

MEMORANDUM OPINION

Before QUINN, C.J., and PIRTLE and PARKER, JJ.

Appellants Supertrack Arlington, Inc. and Ismail Abukhdair (collectively referred to as Supertrack) appeal from an adverse money judgment arising from Supertrack's purchase of motor vehicle fuel and related goods and services from appellee Proton PRC, Ltd. Through their "sole" issue, they contend that the "trial court erred in granting judgment because Proton failed to establish damages." We affirm.[1]

[1] Because this appeal was transferred from the Second Court of Appeals, we are obligated to apply its precedent when available in the event of a conflict between the precedents of that court and this Court. *See* TEX. R. APP. P. 41.3.

Background

Proton is a wholesale gasoline distributor. Its principal, Ray Khalil, appeared at trial as Proton's only witness. According to testimony and documentary evidence, in 2010, Proton and Supertrack executed an exclusive fuel supply contract under which Proton agreed to sell, and Supertrack agreed to purchase, motor vehicle fuel for Supertrack's Arlington, Texas convenience store. According to the testimony of Khalil, Proton rebranded the convenience store from Valero to Shell Oil Company. Abukhdair guaranteed Supertrack's obligations under the agreement.

Khalil testified that credit card transactions were handled through Shell's credit card system. Specifically, customer credit card purchases were credited by Shell to Proton and by Proton to Supertrack. Apparently, Shell required a pump credit card reader upgrade. According to Khalil, Proton installed upgraded credit card readers on Supertrack's fuel pumps at a cost to Supertrack of $22,000. Khalil further testified Proton sent Supertrack invoices for the pump upgrade, and, in response, Abukhdair said he was "going to pay you, do not worry[.]" Khalil testified that Supertrack did not pay for the upgrade, though.

Proton last delivered fuel to Supertrack during the summer of 2015. In 2017, Proton filed suit against Supertrack and Abukhdair (a guarantor) alleging Supertrack failed to pay for all of the fuel delivered and for the upgraded credit card readers. Abukhdair was sued as guarantor of the amounts due.

Following a bench trial, the court rendered judgment jointly and severally against Supertrack and Abukhdair for $84,575.47, as damages for unpaid fuel costs (that is,

$62,575.47) and the upgraded credit card readers (that is, $22,000). Findings of fact and conclusions of law were requested and filed.

Legal Sufficiency of the amount of Damages

Supertrack began its argument, through its "sole" issue, that there was no evidence to support the amount of actual damages awarded Proton. We overrule the issue.

Though Supertrack couches its argument as an attack on the sufficiency of the evidence underlying the trial court's award of damages, it peppered the contention with complaints about erroneous evidentiary rulings and refusing to offset purported credits. Interlacing the sole issue about the sufficiency of the evidence with those tangential matters rendered the "sole" issue multifarious. *See Hamilton v. Williams*, 298 S.W.3d 334, 338 n.3 (Tex. App.—Fort Worth 2009 pet. denied) (stating that an issue is multifarious when it generally attacks the trial court's order with numerous arguments); *In re S.K.A.*, 236 S.W.3d 875, 894 (Tex. App.—Texarkana 2007, pet. denied) (stating that an issue addressing more than one specific ground of error is multifarious); *Hollifield v. Hollifield*, 925 S.W.2d 153, 155 (Tex. App.—Austin 1996, no writ) (stating that an issue is multifarious when it embraces more than one specific ground of error, or if it attacks several distinct and separate rulings of the court). Being multifarious, we have the discretion to disregard the entire issue. *See Hollifield*, 925 S.W.2d at 155; *accord Restrepo v. Alliance Riggers & Constructors, Ltd.,* 538 S.W.3d 724, 733 (Tex. App—El Paso 2017, no pet.) (so stating); *Rich v. Olah*, 274 S.W.3d 878, 885 (Tex. App.—Dallas 2008, no pet.). Or, we may consider it if we can discern, with reasonable certainty, the error about which the appellant complains. *See Restrepo*, 538 S.W.3d at 733–34. We reasonably discern errors about which Supertrack complained in its "sole" issue as the

sufficiency of the evidence, the "trustworthiness" of exhibits which it deemed were hearsay, and the complaint about offset and consider them. *See id.* (noting that appellants challenged the sufficiency of the evidence to support a jury's verdict but interjected sub-issues which included erroneous evidentiary rulings and concluding that the sub-issues will be disregarded while the sufficiency and service complaints will be considered).

Relevant to appellants' sufficiency issue, the trial court made the following findings:

> 6. Supertrack has failed to pay Proton for delivered motor fuel. Supertrack owes, pursuant to the terms of the Contract, the sum of $62,575.47 for delivered, yet unpaid, motor fuel that Supertrack had received.
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> 8. Proton installed a credit card reader used by Supertrack customers to purchase motor fuel with a credit card instead of having to pay for the purchased motor fuel with cash. Per the Contract terms Supertrack agreed to reimburse Proton for the cost of such equipment and for its installation onto motor fuel pumps. The total cost owing by Supertrack to Proton for the credit card reader and its installation is $22,000.
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> 27. The amount of $84,575.87 represents the sum of monies owed by Supertrack to Proton to which Abukhdair guaranteed payment.
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> 28. Proton is entitled to a judgment against Supertrack and Abukhdair in the amount of $84,575.87 for Supertrack's breach of contract and Abukhdair' s breach of the Guaranty agreement. Such judgment shall be joint and severable as to Supertrack and Abukhdair.

We begin with the damages related to the fuel charges. Proton endeavored to prove them through its exhibit 3 (a fuel transaction ledger) and testimony of Khalil. The latter testified that exhibit 3 evinced an outstanding balance of $62,575.47 and such was the amount due from Supertrack. That testimony supports the trial court's finding, *viz* the fuel damages due from Supertrack.

Yet, Supertrack argued here that exhibit 3 was inadmissible and non-probative. This was allegedly so because the exhibit was 1) hearsay outside the scope of Texas Rule of Evidence 803(6) and 2) not a summary admissible under Texas Rule of Evidence 1006. As for the Rule 1006 contention, it was not urged at trial but rather in a motion to reconsider. Because an objection to evidence must be urged at the earliest opportunity and Supertrack waited until the trial ended before mentioning Rule 1006, the complaint was not preserved. *Laven v. THBN, LLC*, No. 14-13-00440-CV, 2014 Tex. App. LEXIS 13281, at *9–10 (Tex. App.—Houston [14th Dist.] Dec. 11, 2014, no pet.) (mem. op.) (stating that the requirement to object timely encompasses not only the objection itself but also all grounds allegedly supporting it, both the objection and grounds must be timely asserted, and asserting the objection and grounds for the first time in a motion for new trial does not satisfy the contemporaneous objection rule if the complaint could have been urged earlier).

As for the hearsay complaint, Supertrack urged below that exhibit 3 was purportedly inadmissible because it was 1) "an altered instrument"; 2) "lack[ed] foundation"; 3) was "never even an internal document that was created by plaintiff"; 4) "never sent to defendants"; 5) "was not – this document they're trying to present today having been altered was not made at or near the time the relevant act or event is not a business record as defined by Rule 803, Texas Rules of Evidence"; and 6) "is untrustworthy" because it is "nothing more than an incomplete summary of other records with the invoices that are not before the Court." The ground for reversal urged on appeal, however, solely implicated the trustworthiness component of Rule 803. So, we do not consider the others mentioned at trial.

Proton attempted to establish that exhibit 3 fell within the hearsay business record exception found under Texas Rule of Evidence 803(6). Among the rule's five elements, one pertains to trustworthiness. It specifies that the record in question may be admitted if "the opponent fails to demonstrate that the source of information or the method of preparation indicate a lack of trustworthiness." TEX. R. EVID. 803(6)(E).

Proton's representative (Khalil) testified that the exhibit was a record 1) kept in the ordinary course of business; 2) reflecting "all of the transactions, payments, and charges between" it and Supertrack for gasoline bought by Supertrack; 3) kept in the "care, custody, and control" of Proton; 4) recording events and information "at or near the time of " their occurrence; and 5) recorded "by someone who ha[d] personal knowledge of what they're recording." Furthermore, the record itself was a "general ledger" consisting of 277 pages. The ledger was produced through computer software known as "Petro Data," which software tracked purchases of and payments for fuel by Proton customers like Supertrack. One could reasonably describe it as creating a document that depicts a running balance of debt due from a customer, like Supertrack. And, upon being asked during voir dire whether the exhibit was altered, Khalil admitted that it had been. He also conceded, during voir dire, that the document was dated 2017 even though the business relationship between Supertrack and Proton ended in 2015. These discrepancies allegedly rendered the exhibit untrustworthy. Yet, Khalil explained that the alteration was made to remove a charge that was not payable by Supertrack. Furthermore, the 2017 date on the 277-page document reflected the date on which it was printed-out; its content though reflected only transactions and payment made during the business relationship. Those were the only two grounds developed by Supertrack during voir dire and prior to

the trial court ruling on its objection.[2] Given Khalil's explanation of them, we cannot say that the trial court's decision to reject the objection that exhibit 3 was untrustworthy for purposes of Rule 803(6)(E) was an abuse of discretion.

As for the $22,000 attributable to "upgrading" (as it was characterized at trial) the credit card readers apparently mandated by Shell, Khalil testified that 1) he invoiced Supertrack $22,000 for same, 2) it agreed to pay the expense, 3) the sum went unpaid, and 4) if Proton did "not install it, [Supertrack] would not be able to have [a] credit card system." Furthermore, the parts were "sold" and "shipped" to Proton because it was able to secure a "better deal" for its customers. Their customers buying them directly would cost them between $3,000 or $4,000 more. Additionally, exhibit 11 consisted of an invoice of the parts needed to perform the upgrade. As depicted on it, they cost Proton $21,420.52 and were shipped to it on "7/14/11." To that we add evidence about the labor charge assessed by Proton for the upgrade being an additional $600, though normally "it cost a lot more than that." Indeed, the usual sum charged by other installers approximated $2,500 to $3,000 more. So, while Proton simply charged Supertrack $22,000 for the parts and labor, its "real cost would have been somewhere around 24 grand." Combined, this information is more than a scintilla of evidence supporting both

[2] Effort was made by Supertrack during voir dire to develop other indicia purportedly illustrating why the ledger was untrustworthy. But that effort went unfulfilled. The trial court effectively halted it because it believed the effort exceeded the realm of voir dire. And, upon so halting voir dire, it overruled the hearsay objection. Supertrack did not complain on appeal of the trial court denying it further opportunity to develop additional grounds underlying its objection. So, we do not consider whether that was error. *See Pat Baker Co. v. Wilson,* 971 S.W.2d 447, 450 (Tex. 1998) (per curiam) (stating that "[i]t is axiomatic that an appellate court cannot reverse a trial court's judgment absent properly assigned error"). Moreover, the remainder of the grounds now urged by Supertrack as illustrative of untrustworthiness were developed after the trial court's ruling and during cross-examination. Thus, they were not uttered contemporaneously with its objection and also are beyond consideration by us. *See Laven*, 2014 Tex. App. LEXIS 13281, at *9–10. And, when they were eventually developed at trial, Supertrack had the opportunity to renew its objection to the exhibit and mention them as basis for excluding the exhibit. But did not do so.

1) a reasonable inference that the $22,000 sought from Supertrack was reasonable and necessary and 2) the trial court's award of that $22,000 as damages.[3]

Supertrack, however, objected to exhibit 11 as inadmissible hearsay because it did not fall within the ambit of Rule 803(6). Khalil testified that the exhibit was 1) a record kept in the ordinary course of your business; 2) a record over which he, as president of Proton PRC, Ltd., had "care, custody, and control"; 3) a record containing information "recorded at or near the time of the occurrence of the events recorded therein"; and 4) information "recorded by someone of personal knowledge of what's recorded therein." *See Goins v. Discover Bank*, No. 02-20-00128-CV, 2021 Tex. App. LEXIS 1391, at *8 (Tex. App.—Fort Worth Feb. 25, 2021, no pet. h.) (mem. op.) (stating that "[u]nder the business-records exception to the hearsay rule, the proponent of records must show (1) the records were made and kept in the course of a regularly conducted business activity, (2) it was the regular practice of the business activity to make the records, (3) the records were made at or near the time of the event that they record, and (4) the records were made by a person with knowledge who was acting in the regular course of business"). Nonetheless, it purportedly was inadmissible because Khalil allegedly did not know who entered the information. Such is not necessary, though. *See Star Elec., Inc. v. Northpark Office Tower,* LP, No. 01-17-00364-CV, 2020 Tex. App. LEXIS 5216, at *42 (Tex. App.—Houston [1st Dist.] July 14, 2020, no pet.) (mem. op. on reh'g) (stating that Rule 803(6)

[3] Supertrack argued that Proton had the burden to prove the damages sought were reasonable and necessary and cited *701 Katy Bldg., LP v. John Wheat Gibson, LP*, No. 05-16-00193-CV, 2017 Tex. App. LEXIS 8192 (Tex. App.–Dallas Aug. 24, 2017, pet. denied) (mem. op.), to support the contention. *Katy* involved a construction case and effort to collect expenses. Assuming it to be applicable to a non-construction case like that here, *see First Cash, LTD. v. JQ-Parkdale, LLC*, 538 S.W.3d 189, 204 (Tex. App.—Corpus Christi 2018, no pet.) (holding the rule inapplicable since "Legacy Landlords breached a lease contract, not a construction contract, and the jury awarded damages to permit First Cash to build out a pawn shop, not remedial damages to complete or repair a defectively constructed pawn shop"), the evidence presented by Proton was enough to satisfy the burden.

did not require that the witness laying the predicate be the creator of the document, an employee of the same company as the creator, or have personal knowledge of the information recorded in the document, but the witness need only have knowledge of how the records were prepared). And, Khalil having testified to the elements described in *Goins* and the exhibit being an invoiced billed to Proton and for which it seeks reimbursement from Supertrack, we cannot say that the trial court abused its discretion in overruling the objection.[4]

In short, some evidence supports the amounts found by the trial court as damage for unpaid fuel and the credit card reader upgrade. Thus, we overrule Supertrack's "sole" issue and its multifarious components.[5]

The judgment is affirmed.

Per Curiam

[4] Other grounds of attack asserted on appeal were not mentioned by Supertrack contemporaneously with its objection. Thus, as discussed in an earlier footnote, they were not preserved for review.

[5] We do not ignore that aspect of the "sole issue" relating to Supertrack purportedly not being given an offset. Offset is an affirmative defense. *Brown v. Am. Transfer & Storage Co*., 601 S.W.2d 931, 936 (Tex. 1980). The party relying on an affirmative defense has the burden to request findings of fact on the issue to avoid waiver. *Stanley Works v. Wichita Falls Indep. Sch. Dist*., 366 S.W.3d 816, 824 (Tex. App.—El Paso 2012, pet. denied); *Cotten v. Weatherford Bancshares, Inc,*, 187 S.W.3d 687 (Tex. App.—Fort Worth 2006, pet. denied), *disapproved of on other grounds by Ritchie v. Rupe*, 443 S.W.3d 856 (Tex. 2013). Although appellants affirmatively alleged offset in their answer, they did not request or obtain any findings of fact on the defense. Accordingly, the complaint that the trial court failed to offset the amount of damages awarded Proton was waived. *See Rogue Invs., LLC v. Tex. Tarts, Inc*., No. 14-15-01089-CV, 2018 Tex. App. LEXIS 5368, at *10–11 (Tex. App.—Houston [14th Dist.] July 17, 2018, no pet.) (mem. op.) (finding the trial court made no findings concerning the defendant's affirmative defense of offset and the defendant did not request additional findings on this ground; accordingly, the defendant waived its claim for offset on appeal). Appellants' second issue is overruled.