IN THE
TENTH COURT OF APPEALS

No. 10-11-00009-CV

DOUG HOMEYER,

Appellant

v.

JASON FARMER,

Appellee

From the County Court at Law No. 1
McLennan County, Texas
Trial Court No. 20051281CV1

MEMORANDUM OPINION

This dispute pertains to an alleged breach of an oral agreement between appellant, Doug Homeyer, and appellee, Jason Farmer. After a bench trial, the trial court concluded that Homeyer had breached his oral agreement with Farmer and subsequently awarded Farmer $14,263.14 in actual damages, $3,877 in attorney's fees, post-judgment interest, and costs of court. By seven issues, Homeyer challenges the trial court's judgment, arguing that: (1) the judgment does not conform to the pleadings; (2) there is not legally and factually sufficient evidence to support the trial

court's findings of a valid partnership or agreement, breach of the alleged oral agreement, and damages resulting from the breach of the purported contract; (3) the damages awarded are excessive; and (4) Farmer is not entitled to an award of attorney's fees. We suggest a remittitur of actual damages, but in all other respects, we affirm.

I. BACKGROUND

The purported oral agreement in this case involved the purchase and eventual sale of "stocker" cattle.[1] Farmer alleged that, in 2004, the parties agreed for him to purchase 120 heifers that would be sold in May 2005. Farmer understood the agreement to require him to purchase the heifers while Homeyer would "do the plowing, the planting, pay for the seed, the fertilize[r]—just the pasture part was his end of the deal" on land that Homeyer leased. Essentially, "[t]he financing of the cattle was [Farmer's] end of the deal."

On September 14, 2004, Farmer purchased 120 heifers from the Amarillo Livestock Commission for $42,746.30. After the purchase, Farmer asserts that he took the cattle to his property for processing, which included ear tagging, worming, and the administration of antibiotics. The cattle remained in pens on Farmer's property for approximately thirty days. Farmer explained that it was necessary for the cattle to remain on his property for thirty days because they needed to be re-vaccinated approximately ten to fourteen days after they were first processed.

[1] Farmer described his "stocking" operation to involve purchasing young, light calves, feeding them through the fall and winter, and selling them to processors in the spring. Farmer acknowledged that the "stocker business" is a "short-term play" and does not take more than a year to operate. In fact, "you start planting [oats] in September and in May your grass runs out and it's over. You usually stock the cattle in November—from September to November, December, whenever your grass comes along."

Farmer testified that while he was processing and caring for the cattle during that thirty-day period, Homeyer was supposed to be preparing the leased land so that the cattle could be transferred. Farmer alleged that Homeyer did not plant oats or fertilize the land like he agreed he would do. As a result, Farmer had to do it himself. When the cattle were eventually transferred to the leased land, they "never got to where [Farmer] planted and fertilized." Instead, according to Farmer, Homeyer instructed that the cattle be released on "a coastal patch [of the leased land] that had a big tank [o]n it . . . ."

Approximately "ten days or two weeks" later, Farmer received a telephone call from Homeyer. Farmer recalled that Homeyer said, "We [sic] got to move the cattle. There's too many dead cattle over there." Farmer noted that, while the cattle were on the leased land, it was Homeyer's responsibility to tend to the cattle. Homeyer told Farmer to get the cattle "off his place."[2] Farmer subsequently picked up the cattle. He noticed that many of the cattle were very sick and that ten to fifteen of the cattle had already died because "they hadn't been tended to." Homeyer and Farmer later got into an argument when Farmer accused Homeyer of not "doing his part taking care of the cattle." When he arrived back at his property with the cattle, Farmer began to "mass[-]treat" the remaining cattle with antibiotics and medicated feed in an attempt to "keep them alive." Ultimately, many more cattle died, leaving only seventy-one cattle remaining from the original 120 head that were purchased. Farmer stated that the

[2] Later, Farmer clarified that the land owner, Jim Skinner, told Homeyer that the cattle must be removed from the leased land.

death loss for the herd was 40%, which was significantly higher than a normal 2%-5% death loss.

After "mass[-]treating" the remaining seventy-one cattle, Farmer kept them on his property and fed them tilled oats. Farmer later explained to Homeyer that he would "take half the cattle and put them in one pen and half the cattle and put them in another pen and you [Homeyer] can pick whichever pen you want." Homeyer would then pay Farmer for the cattle and for "what [Farmer] got in them" and could take his half of the cattle. At this point, Farmer desired to terminate the agreement. Homeyer declined to take the cattle and, other than an offer of $2,900 for the planting and fertilizing that Farmer did on the leased land, Homeyer refused to pay Farmer. Farmer refused to accept Homeyer's payment of $2,900. Subsequently, Farmer sold the remaining 71 head of heifers to Joe Richards of Diamond Cattle Feeders in Hereford, Texas, for $36,206.45—amounting to a loss of $6,539.85 from the original purchase price.

On September 8, 2005, Farmer filed suit against Homeyer, asserting a claim for breach of an oral contract. Thereafter, Homeyer filed an answer denying the allegations contained in Farmer's original petition. After several delays, this case was ultimately tried before the trial court on September 17, 2010. At trial, Farmer indicated that the entire project netted a loss of $28,550.54. He argued that Homeyer, his partner, was responsible for half of the loss or, in other words, $14,275.27. In addition to his damages, Farmer requested reimbursement for $3,382.50 in attorney's fees and court costs.

Homeyer also testified at trial. He noted that Farmer did not comply with the agreement because he did not purchase 400-pound heifers like Homeyer wanted. Homeyer planned to keep the heifers "for mama cows." He asserted that Farmer failed to pay him for $6,000 in bulldozer work he had done, which apparently involved work outside the scope of the purported oral agreement. He also contended that Farmer did not account for his baling and shredding of hay and of the leased land and his purchase of forty lick tubs, including twelve which allegedly were placed on Farmer's property. Homeyer appeared to agree that he and Farmer were partners and that the partnership ended when Farmer came to pick up the sick cattle from the leased land. Homeyer explained that the $2,900 check he offered Farmer accounted for the balance owed once deductions were made for amounts allegedly owed to each other. Homeyer denied giving Farmer permission to keep the cattle on his property, treat the cattle with medications, or sell the cattle. With regard to the damages alleged by Farmer, Homeyer admitted that he did not have any evidence to refute the receipts and documentation provided by Farmer.

At the conclusion of the trial, the trial court ruled in favor of Farmer and awarded him $14,263.14 in actual damages, $3,877 in attorney's fees, court costs, and post-judgment interest. Shortly thereafter, Homeyer filed a motion for new trial, which, after a hearing, was denied by the trial court. At the urging of Homeyer, the trial court issued the following findings of fact and conclusions of law:

1. That Plaintiff and Defendant entered into a valid contract.
2. That Defendant breached said contract.

3. That as a result of Defendant's breach of said contract, Plaintiff was damaged.

4. That the damages suffered by Plaintiff were $14,263.14 in actual damages, and $3[,]877.00 in reasonable and necessary attorney's fees, for a total sum of $18,140.14.

This appeal followed.

II. STANDARD OF REVIEW

A trial court's findings of fact in a bench trial "have the same force and dignity as the jury's verdict upon questions." *Anderson v. City of Seven Points*, 806 S.W.2d 791, 794 (Tex. 1991). Further, "[w]hen the trial court acts as a fact[-]finder, its findings are reviewed under legal and factual sufficiency standards." *In re Doe*, 19 S.W.3d 249, 253 (Tex. 2000).

In reviewing for legal sufficiency of the evidence, we consider the evidence in the light most favorable to the trial court's finding. *See AutoZone, Inc. v. Reyes*, 272 S.W.3d 588, 592 (Tex. 2008). The test for legal sufficiency "must always be whether the evidence at trial would enable [a] reasonable and fair-minded [fact-finder] to reach the [conclusion] under review." *City of Keller v. Wilson*, 168 S.W.3d 802, 827 (Tex. 2005). We must credit favorable evidence if a reasonable fact-finder could, and disregard contrary evidence unless a reasonable fact-finder could not. *Id.* The fact-finder is the sole judge of the credibility of the witnesses and the weight to be assigned to their testimony. *Id.* at 819.

We review the trial court's conclusions of law de novo. *See BMC Software Belg., N.V. v. Marchand*, 83 S.W.3d 789, 794 (Tex. 2002). Conclusions of law are upheld if the

judgment can be sustained on any legal theory the evidence supports. *See Stable Energy, L.P. v. Newberry*, 999 S.W.2d 538, 547 (Tex. App.—Austin 1999, pet. denied); *see also Fulgham v. Fischer*, No. 05-10-00097-CV, 2011 Tex. App. LEXIS 5865, at *6 (Tex. App.—Dallas July 29, 2011, no pet.). Incorrect conclusions of law do not require reversal if the controlling findings of fact support the judgment under a correct legal theory. *See Westech Eng'g, Inc. v. Clearwater Constructors, Inc.*, 835 S.W.2d 190, 196 (Tex. App.—Austin 1992, no writ); *see also Fulgham*, 2011 Tex. App. LEXIS 5865, at *6. Moreover, conclusions of law may not be reversed unless they are erroneous as a matter of law. *Westech Eng'g, Inc.*, 835 S.W.2d at 196.

In a factual sufficiency review, we must consider and weigh all of the evidence in a neutral light. *Golden Eagle Archery, Inc. v. Jackson*, 116 S.W.3d 757, 761 (Tex. 2003). The evidence is factually insufficient only if we conclude "that the verdict is so against the great weight and preponderance of the evidence as to be manifestly unjust, regardless of whether the record contains some evidence of probative force in support of the verdict." *Id.* Fact findings are not conclusive when, as in this case, a complete reporter's record appears in the record if the contrary is established as a matter of law or if there is no evidence to support the finding. *Material P'ships, Inc. v. Ventura*, 102 S.W.3d 252, 257 (Tex. App.—Houston [14th Dist.] 2003, pet denied).

III. A PARTNERSHIP AND THE ORAL AGREEMENT

In his second, third, and fourth issues, Homeyer asserts that the record does not contain legally and factually sufficient evidence of a valid partnership agreement or other contract, breach of such an agreement, and damages. Specifically, Homeyer

alleges that the evidence does not clearly establish the terms of any agreement; that Farmer's testimony does not establish a partnership; and that there is no evidence of a breach of any agreement or damages.

A. Applicable Law

The elements for a valid and binding contract are: (1) an offer; (2) acceptance in strict compliance with the terms of the offer; (3) a meeting of the minds; (4) each party's consent to the terms; and (5) execution and delivery of the contract with the intent that it be mutual and binding. *Hubbard v. Shankle*, 138 S.W.3d 474, 481 (Tex. App.—Fort Worth 2004, pet. denied); *Labor Ready Cent. L.P. v. Gonzalez*, 64 S.W.3d 519, 522 (Tex. App.—Corpus Christi 2001, no pet.). Consideration is also a fundamental element of every valid contract. *Turner-Bass Assocs. of Tyler v. Williamson*, 932 S.W.2d 219, 222 (Tex. App.—Tyler 1996, no writ). The elements of written and oral contracts are the same and must be present for a contract to be binding. *Critchfield v. Smith*, 151 S.W.3d 225, 233 (Tex. App.—Tyler 2004, pet. denied); *Bank of El Paso v. T.O. Stanley Boot Co.*, 809 S.W.2d 279, 284 (Tex. App.—El Paso 1991), *aff'd in part, rev'd in part on other grounds*, 847 S.W.2d 218 (Tex. 1992). Where an essential term is open for future negotiation, there is no binding contract. *Beal Bank, S.S.B. v. Schleider*, 124 S.W.3d 640, 653 (Tex. App.—Houston [14th Dist.] 2003, pet. denied); *Gerdes v. Mustang Exporation Co.*, 666 S.W.2d 640, 644 (Tex. App.—Corpus Christi 1984, no writ). In determining the existence of an oral contract, the court looks to the communications between the parties and to the acts and circumstances surrounding those communications. *Prime Prods., Inc. v. S.S.I. Plastics, Inc.*, 97 S.W.3d 631, 636 (Tex. App.—Houston [1st Dist.] 2002, pet. denied)

(citing *Copeland v. Alsobrook*, 3 S.W.3d 598, 605 (Tex. App.—San Antonio 1999, pet. denied)). The terms must be expressed with sufficient certainty so that there will be no doubt as to what the parties intended. *Copeland*, 3 S.W.3d at 605.

In a breach of contract suit, the plaintiff must establish: (1) a valid contract with the defendant; (2) the plaintiff performed or tendered performance; (3) the defendant breached the contract; and (4) the plaintiff suffered damages as a result of the breach. *Critchfield*, 151 S.W.3d at 233; *see Runge v. Raytheon E-Sys., Inc.*, 57 S.W.3d 562, 565 (Tex. App.—Waco 2001, no pet.).

B. Discussion

1. Existence of an Oral Contract

Here, Farmer testified that, under the contract, it was his responsibility to secure financing and to purchase the cattle. Farmer also testified that Homeyer's obligations under the contract were to prepare the leased land so that the cattle could graze and to tend to the cattle until they were sold to processors in the spring. Homeyer did not dispute at trial the existence of an agreement between the parties. Instead, Homeyer noted that Farmer did not comply with their agreement; namely, Farmer did not purchase heifers of the appropriate weight. Nevertheless, on appeal, Homeyer argues that "Farmer never presented any evidence of an offer, acceptance, and meeting of the minds regarding an alleged contract." However, Homeyer admits that "[t]here is no doubt that Farmer and Homeyer each engaged in certain activities with an interest in raising cattle," and Homeyer acknowledged that he "provided valuable goods and services to prepare the leased pasture for the grazing of heifers."

As noted above, whether an oral contract existed is premised on the communications between the parties and the acts and circumstances surrounding those communications. *See Copeland*, 3 S.W.3d at 605. Essentially, the resolution of this dispute centered on the weight to be afforded the testimony of both Farmer and Homeyer, as they were privy to the purported contract in this case. By concluding that a contract existed, the trial court clearly believed Farmer's testimony that the parties had a meeting of the minds such that Farmer would take care of procuring the cattle and Homeyer would tend to the cattle until they were to be sold in the spring. And it was within the province of the trial court to resolve such disputes in the testimony. *See City of Keller*, 168 S.W.3d at 819. Moreover, we find it curious that Homeyer argues that no contract or agreement existed between the parties, yet he testified and argues on appeal that he "provided valuable goods and services to prepare the leased pasture for the grazing of heifers." If there was no contract or agreement between the parties, then why did Homeyer engage in such acts? Our review of the record, including the acts and circumstances surrounding the parties' communications, supports a finding that Farmer offered to purchase cattle for the "stocker" operation and that Homeyer accepted the offer by agreeing to provide pasture land and services associated with tending to the cattle until they were to be sold in the spring. *See Copeland*, 3 S.W.3d at 605.

Based on the evidence adduced at trial and viewing the evidence in the light most favorable to the judgment, we conclude that a reasonable fact-finder could conclude that a contract and/or agreement existed between Farmer and Homeyer for

the raising of the cattle; as such, we find that there is legally sufficient evidence to support the trial court's conclusion. *See Reyes*, 272 S.W.3d at 592; *see also City of Keller*, 168 S.W.3d at 827. We further conclude that the evidence supporting the trial court's finding of a contract is not against the great weight and preponderance of the evidence as to be manifestly unjust; thus, the trial court's conclusion is supported by factually sufficient evidence. *See Jackson*, 116 S.W.3d at 761.

2. Breach of the Contract

Given that we have concluded that an oral contract existed between Farmer and Homeyer, we must now determine whether that contract was breached and, if so, whether Farmer sustained damages. With regard to Homeyer's purported obligations under the contract, Farmer testified that, in addition to procuring the leased land upon which the cattle could graze, Homeyer was responsible for tending to the cattle while they were on the property. Though Homeyer did procure pasture land for the cattle, Farmer noticed that, after he purchased the 120 head of cattle, Homeyer had not prepared the leased land so that the cattle could graze. As a result, Farmer planted oats and fertilized the pasture. And, even though Farmer planted oats and fertilized the pasture, Homeyer directed Farmer to drop off the cattle near the coastal patch of the leased property, which was not close to the area where Farmer planted and fertilized. Approximately ten days later, Homeyer called Farmer and informed him that several cattle had died and that the cattle needed to be removed from the leased land. Farmer insisted that the cattle died and needed to be removed from the property because Homeyer failed to tend to the cattle as he was obligated to do under their contract. At

trial, Homeyer did not deny that he failed to tend to the cattle properly. Instead, Homeyer testified that, once he discovered that several cattle had died and that many were sick, he offered medicine to treat the remaining cattle.

Again, the resolution of this issue centers on the weight afforded to the testimony of Farmer and Homeyer. *See City of Keller*, 168 S.W.3d at 819. In concluding that a breach of the oral contract occurred, the trial court assigned more weight to Farmer's testimony that Homeyer failed to properly tend to the cattle, as it was authorized to do. *See id.*; *see also XCO Prod. Co. v. Jamison*, 194 S.W.3d 622, 632 (Tex. App.—Houston [14th Dist.] 2006, pet. denied) ("A breach of contract occurs when a party fails or refuses to do something he has promised to do."). The trial court's conclusion is supported by Homeyer's failure to clearly deny that he breached the agreement. The focus of Homeyer's testimony appeared to center on damages—whether Farmer's damage claim properly accounted for work Homeyer did and whether Farmer properly mitigated the damages he sustained. Viewing the evidence in the light most favorable to the trial court's finding, we conclude that a reasonable fact-finder could determine that Homeyer breached the oral agreement he had with Farmer. *See Reyes*, 272 S.W.3d at 592; *see also City of Keller*, 168 S.W.3d at 827. Moreover, viewing the evidence in a neutral light, we cannot say that the evidence supporting the trial court's breach finding is against the great weight and preponderance of the evidence as to be manifestly unjust. *See Jackson*, 116 S.W.3d at 761. Accordingly, we hold that there is legally and factually sufficient evidence to support the trial court's breach finding. *See Reyes*, 272 S.W.3d at 592; *City of Keller*, 168 S.W.3d at 827; *see also Jackson*, 116 S.W.3d at 761.

3. Whether Farmer Sustained Damages as a Result of the Breach

Farmer testified that he sustained damages in the amount of $28,550.54 as a result of Homeyer's failure to tend to the cattle while they were on the leased land. Farmer explained that these damages were comprised of the following: (1) the loss on the purchase and sale of the remaining cattle; (2) the cost of medicine for the cattle; (3) the cost of fertilizer and oats for the leased land; (4) the cost of feed for the cattle while they were on Farmer's property; and (5) freight. The record contains numerous receipts, which purportedly account for the damages sustained. In addition, Farmer alleged that he and Homeyer were partners; thus, Farmer asserted that Homeyer was responsible for half of the damages or $14,275.27. Homeyer did not challenge whether Farmer sustained damages; instead, the focus of his testimony centered on whether Farmer's alleged damages were excessive, an issue which we address later. Viewing the evidence in the light most favorable to the trial court's finding, we conclude that a reasonable fact-finder could determine that Farmer sustained some damages as a result of Homeyer's breach of the oral contract. *See Reyes*, 272 S.W.3d at 592; *see also City of Keller*, 168 S.W.3d at 827. Furthermore, viewing the evidence in a neutral light, we cannot say that the evidence supporting the trial court's finding that Farmer sustained some damages is against the weight and preponderance of the evidence as to be manifestly unjust. *See Jackson*, 116 S.W.3d at 761. Accordingly, we hold that there is legally and factually sufficient evidence to support the trial court's finding that Farmer sustained some damages as a result of Homeyer's breach. *See Reyes*, 272 S.W.3d at 592; *City of Keller*, 168 S.W.3d at 827; *see also Jackson*, 116 S.W.3d at 761.

In sum, because we have concluded that there is legally and factually sufficient evidence to support the trial court's findings that a contract existed; that Homeyer breached the contract; and that Farmer sustained some damages as a result of the breach, we affirm the trial court's conclusion that Farmer established his breach of contract cause of action. *See Critchfield*, 151 S.W.3d at 233; *see also Runge*, 57 S.W.3d at 565. As a result, we overrule Homeyer's second, third, and fourth issues.

IV. THE PURPORTED EXCESSIVENESS OF THE DAMAGES AWARD & FARMER'S PLEADINGS

In his fifth issue, Homeyer argues that the trial court's damages award is excessive because the evidence only supports an award of, at most, $3,305.13 or one-half of the cost to plant ($3,875) and fertilize ($2,735.26) the leased land, as described by Farmer. Furthermore, in his first issue, Homeyer asserts that the trial court's judgment does not comport with Farmer's pleadings. Specifically, Homeyer contends that Farmer's pleadings only requested damages for the cost of fertilizer and "half of the death loss" rather than all expenses incurred in the purported "partnership." Farmer counters that the parties entered into a partnership; that all expenses incurred in the operation should have been split equally by the parties; and that the issue of partnership was tried by consent.

A. Partnership

Ordinarily, when the trial court does not make written findings of fact, we imply all fact findings that are supported by the evidence in favor of the trial court's ruling. *See Retamco Operating, Inc. v. Republic Drilling Co.*, 278 S.W.3d 333, 337 (Tex. 2009).

However, in this case, the trial court made written findings of fact and conclusions of law, and in them, the trial court did not specifically find that the parties were engaged in a partnership. Moreover, Farmer did not specifically plead that the parties agreed to engage in a partnership.[3] In any event, Farmer testified that Homeyer was responsible for half of the $28,550.54 in losses sustained by the operation or, in other words, $14,275.27. Despite this testimony, the trial court awarded Farmer $14,263.14 in actual damages, which is a deviation of a little more than $12 from the amount about which Farmer testified.

B. Proper Amount of Damages

In his original petition, Farmer alleged that:

> The parties entered into an agreement to raise stocker cattle. Plaintiff purchased oat seeds and planted 200 acres for cattle feed. The parties were to split the costs for fertilizer. Defendant's share of these costs is $6[,]637.00, which he has refused to pay Plaintiff.
>
> On September 9, 2004, they purchased 121 [sic] head of cattle, weighing between 170 to 220 pounds. The cattle were placed on the planted 200 acres. Defendant informed Plaintiff that he will pay for half of the death loss but later refused.

At trial, Farmer asserted that Homeyer was responsible for paying half of the $28,550.54 in losses incurred, which, as Farmer described, included the loss on the purchase and sale of the cattle, processing medication, medication for the sick cows, fertilizer, feed, oat seeds, and freight. However, Farmer's damages calculations—that Homeyer is

[3] On appeal, Farmer contends that the issue of partnership was tried by consent. We recognize that Farmer and Klint Moran, a relative and employee of Farmer, both alluded to the existence of a partnership between Farmer and Homeyer. However, we once again note that Farmer did not plead that the parties agreed to engage in a partnership, and more importantly, the trial court did not find that the parties were engaged in a partnership.

responsible for half of all losses sustained with this project—are premised upon a finding that the parties had entered into a partnership.

Because the trial court did not conclude that the parties were engaged in a partnership, and based on the pleadings, it would appear as if Farmer is entitled only to damages on his breach of contract claim that he pleaded and proved—damages associated with purchase and planting of oat seeds and fertilizer but not for medication, feed, freight, or any loss sustained on the purchase and sale of the cattle.[4] Had the trial court specifically concluded that the parties had, in fact, agreed to engage in a partnership, then, if proven, Farmer would likely be entitled to the damages approximating the amount he testified to—$14,275.27. But, because the trial court did not make a partnership finding, we conclude that the $14,263.14 actual-damage award exceeds the amount of damages requested in Farmer's original petition and, therefore, is improper. Based on the foregoing, we sustain Homeyer's first issue and part of his fifth issue.

If we determine that part of a damages award lacks sufficient evidentiary support, our proper course is to suggest a remittitur of that part of the damages. *See Larson v. Cactus Util Co.*, 730 S.W.2d 640, 641 (Tex. 1987); *see also Hannon, Inc. v. Scott*, No. 02-10-00012-CV, 2011 Tex. App. LEXIS 3624, at *30 (Tex. App.—Fort Worth May 12, 2011, pet. filed) (mem. op.). The party prevailing in the trial court should be given the option of accepting the remittitur or having the cause remanded. *See Larson*, 730 S.W.3d

[4] After reviewing Farmer's testimony, it appears that the "death loss" pleaded in his original petition refers to the loss calculated when the cattle were sold when compared to the price at which they were purchased. Farmer did not offer testimony as to the market value of each calf that died while under Homeyer's care on the leased land.

at 641. Our review of the record yields a finding that Farmer is entitled to reimbursement for the purchase and planting of oat seeds and fertilizer. Farmer testified that his invoices show that he paid $3,875 for the planting of the oat seeds and $2,735.26 for the fertilizer used to prepare the leased land. Based on this evidence, we suggest a remittitur in the amount of $7,652.88, the difference between the actual-damage award and the proven reimbursement claim of $6,610.26. *See* TEX. R. APP. P. 46.3.

V. HOMEYER'S IMPEACHMENT WITNESSES

In his sixth issue, Homeyer contends that the trial court erred in refusing to allow him to call any impeachment witness to testify at trial. Specifically, Homeyer argues that, although he did not disclose John Truitt, his impeachment witness, as a person with knowledge of relevant facts in his response to a request for disclosure, the rules did not require such a disclosure because the necessity of Truitt's testimony could not reasonably be anticipated before trial. When Homeyer sought to call Truitt as a rebuttal witness, Homeyer's counsel informed the trial court that Truitt would testify that, when the cattle were removed from the leased land, "no cattle had died and were in good health" and that some cattle "were dying immediately upon being put on the [leased land]." Nevertheless, the trial court excluded Truitt from testifying.

We apply an abuse of discretion standard to the question of whether a trial court erred in an evidentiary ruling. *Owens-Corning Fiberglas Corp. v Malone*, 972 S.W.2d 35, 43 (Tex. 1998). The admission or exclusion of evidence is a matter within the trial court's discretion. *City of Brownsville v. Alvarado*, 897 S.W.2d 750, 753 (Tex. 1995). A trial

court abuses its discretion when it rules without regard to any guiding rules or principles. *Malone*, 972 S.W.2d at 43. We must uphold the trial court's ruling if there is any legitimate basis for its ruling. *Id.*

Texas Rule of Civil Procedure 193.6(a) provides that:

> A party who fails to make, amend, or supplement a discovery response in a timely manner may not introduce in evidence the material or information that was not timely disclosed, or offer the testimony of a witness (other than a named party) who was not timely identified, unless the court finds that:
>
> (1) there was good cause for the failure to timely make, amend, or supplement the discovery response; or
>
> (2) the failure to timely make, amend, or supplement the discovery response will not unfairly surprise or unfairly prejudice the other parties.

TEX. R. CIV. P. 193.6(a). The purpose behind this rule is to prevent trial by ambush. *See Aetna Cas. & Sur. Co. v. Specia*, 849 S.W.2d 805, 807 (Tex. 1993); *see also Harris County v. Inter Nos, Ltd.*, 199 S.W.3d 363, 368 (Tex. App.—Houston [1st Dist.] 2006, no pet.). Absent a showing of good cause, lack of unfair surprise, or lack of unfair prejudice, rule 193.6 mandates exclusion of the undisclosed material or information. *See* TEX. R. CIV. P. 193.6(a); *see also Elliott v. Elliott*, 21 S.W.3d 913, 921 n.7 (Tex. App.—Fort Worth 2000, pet. denied); *Nw. Nat. County Mut. Ins. Co. v. Rodriguez*, 18 S.W.3d 718, 722 n.1 (Tex. App.—San Antonio 2000, pet. denied). The party seeking to introduce the evidence has the burden of establishing good cause or lack of unfair surprise or prejudice. TEX. R. CIV. P. 193.6(b); *see Norfolk S. Ry. Co. v. Bailey*, 92 S.W.3d 577, 581 (Tex. App.—Austin 2002, no pet.).

Despite this, Homeyer directs us to Texas Rule of Civil Procedure 192.3(d), which provides that: "A party may obtain discovery of the name, address, and telephone number of any person who is expected to be called to testify at trial. This paragraph does not apply to rebuttal or impeaching witnesses the necessity of whose testimony cannot reasonably be anticipated before trial." TEX. R. CIV. P. 192.3(d). However, if the rebuttal witness's testimony reasonably could have been anticipated, then the witness is not exempt from the scope of the written discovery rules. *See Moore v. Mem'l Hermann Hosp. Sys.*, 140 S.W.3d 870, 875 (Tex. App.—Houston [14th Dist.] 2004, no pet.).

In refusing to allow Truitt to testify and after both parties had briefed the matter, the trial court noted the following:

> All right. The Court would note that this matter was filed September the 8th, 2005, by the plaintiff; that this matter proceeded along with Mr. Chris Harris being the defendant's attorney; that his withdrawal was permitted September 5th of 2010.
>
> On June 25th, 2010, a letter from the plaintiff's attorney, notifying the defendant of the August 19th, 2010 final hearing was sent to Mr. Homeyer. On July 28, 2010, Ms. Simer [Homeyer's trial counsel] made her appearance letter, had the opportunity to review the file, know the condition of the file and know about the Rules of Discovery and had the opportunity to make any reply that she wished from that standpoint forward. So that's the ruling of the Court and will stand as that.

In the trial court, Homeyer did not establish good cause for failing to disclose Truitt as a witness, nor did he establish that Farmer would not be prejudiced. In arguing that Truitt should be allowed to testify and should be exempted from rule 193.6(a), Homeyer relied on the fact that "Farmer was never deposed, so we had no idea

if he would be untruthful on the stand." We find this assertion to be dubious, especially considering Farmer's original petition specifically alleged that:

> On September 9, 2004, they [Farmer and Homeyer] purchased 121 [sic] head of cattle, weighing between 170 to 220 pounds. The cattle were placed on the planted 200 acres. Defendant informed Plaintiff that he will pay for half of the death loss but later refused.
>
> Defendant refused to complete his end of the contract in regard to the cattle and his acts and omissions constitute breach of contract.

These allegations put the death of the cattle and the losses sustained as a result of the deaths squarely at issue. Furthermore, Farmer alleged that Homeyer was responsible for the deaths of many of the heifers because he failed to comply with the contract. Based on this, we conclude that Homeyer reasonably should have anticipated the need to call Truitt as a witness to dispute Farmer's testimony regarding the circumstances surrounding the deaths of many of the heifers that were pastured on the leased land. *See* TEX. R. CIV. P. 192.3(d); *see also Moore*, 140 S.W.3d at 875; *Orkin Exterminating Co., Inc. v. Williamson*, 785 S.W.2d 905, 910-11 (Tex. App.—Austin 1990, writ denied). Because Homeyer reasonably should have anticipated the need for Truitt's testimony and because Homeyer did not establish good cause or lack of prejudice in his failure to disclose Truitt as a testifying witness, we cannot say that the trial court abused its discretion in excluding Truitt's testimony. *See* TEX. R. CIV. P. 192.3(d), 193.6(a); *see also Malone*, 972 S.W.2d at 43; *Moore*, 140 S.W.3d at 875; *Williamson*, 785 S.W.2d at 910-11. Accordingly, we overrule Homeyer's sixth issue.

VI. ATTORNEY'S FEES

In his seventh issue, Homeyer asserts that the attorney's fees award should not stand solely because "the judgment awarding damages for breach of contract should be reversed . . . ." Because we have affirmed the trial court's judgment with respect to Farmer's breach of contract claim and because section 38.001 of the civil practice and remedies code authorizes the recovery of reasonable attorney's fees premised on a claim for "an oral or written contract," we affirm the trial court's attorney's fees award.[5] *See* TEX. CIV. PRAC. & REM. CODE ANN. § 38.001(8) (West 2008). As such, Homeyer's seventh issue is overruled.

VII. CONCLUSION

In accordance with rule of appellate procedure 46.3, we suggest a remittitur of $7,652.88. *See* TEX. R. APP. P. 46.3; *see also Hannon*, 2011 Tex. App. LEXIS 3624, at *31 (citing *Mahon v. Caldwell, Haddad, Skaggs, Inc.*, 783 S.W.2d 769, 772 (Tex. Civ. App.—Fort Worth 1990, no writ)). If Farmer files in this Court within fifteen days of this memorandum opinion, a remittitur of $7,652.88 in actual damages, then our subsequent judgment will modify the trial court's judgment in accordance with the remittitur and, as modified, affirm that judgment. *See Mahon*, 783 S.W.2d at 772; *see also Hannon*, 2011 Tex. App. LEXIS 3624, at *31. If the suggested remittitur is not filed, we shall reverse the trial court's judgment and remand this entire cause to the trial court for a new trial. *See Guevara v. Ferrer*, 247 S.W.3d 662, 670 (Tex. 2007); *Downing v. Burns*, No. 14-09-00718-

[5] On appeal, Homeyer does not argue the necessity or reasonableness of Farmer's request for attorney's fees.

CV, 348 S.W.3d 415, 2011 Tex. App. LEXIS 5752, at *28 (Tex. App.—Houston [14th Dist.] July 28, 2011, no pet.) (noting that a separate trial on unliquidated damages cannot be ordered when liability is contested) (citing TEX. R. APP. P. 44.1(b)). In all other respects, we affirm the trial court's judgment.

AL SCOGGINS
Justice

Before Chief Justice Gray,
Justice Davis, and
Justice Scoggins
Affirmed, in part, and modified, in part, conditioned on remittitur
Opinion delivered and filed November 23, 2011
[CV06]