TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-04-00440-CV

Appellant, David Hoelscher, Individually, d/b/a Landscape Design//Cross-Appellants, Joseph Ray Kilman, III and Cindy A. Kilman

v.

Appellees, Joseph Ray Kilman, III and Cindy A. Kilman//Cross-Appellee, David Hoelscher, Individually, d/b/a Landscape Design

FROM THE COUNTY COURT AT LAW OF TOM GREEN COUNTY
NO. 02C121-L, HONORABLE JUDGE BEN NOLEN PRESIDING

M E M O R A N D U M O P I N I O N

In 2001, Joseph Ray Kilman, III, and his wife Cindy Kilman hired Landscape Design, whose sole owner was appellant David Hoelscher (collectively "Hoelscher"), to design and build a circulating waterfall and pond system in their backyard in San Angelo. The Kilmans were not satisfied with the work done by Hoelscher but paid $8,788.75 for the work in several installments. In an effort to satisfy the Kilmans, Hoelscher did additional work on the project. Hoelscher alleges that the Kilmans agreed to pay $2,500 for the additional work, and he filed suit against them when payment was never received.

The Kilmans counterclaimed for breach of contract, negligent misrepresentation, common-law fraud, and violations of the Deceptive Trade Practices Act. *See* Tex. Bus. & Com.

Code Ann. §§ 17.01-.853 (West 2002 & Supp. 2005) (Deceptive Trade Practices Act). Trial was held before the county court, and the court entered judgment in favor of the Kilmans, finding that Holescher had "wholly failed and/or refused to complete the project as agreed" and characterizing this failure as a breach of contract.[1] The court awarded the Kilmans $8,788.75 in damages and $5,000.00 in attorney's fees.

Hoelscher presents two issues for review, arguing that the trial court's determinations of damages and attorney's fees were based on insufficient evidence. The Kilmans cross-appeal, contending that the damages and attorney's fees awarded were inadequate based on the evidence and that the trial court abused its discretion by not awarding appellate attorney's fees and pre-judgment interest.[2] We will modify the trial court's judgment and affirm as modified.

SUMMARY OF THE EVIDENCE

Before addressing the claims of the parties, we will provide a summary of the evidence. Hoelscher testified that the Kilmans agreed to pay him $8,500 in return for the construction of a waterfall and two ponds connected by a stream in their backyard. After receiving complaints from the Kilmans, Hoelscher inspected the aquastructure and found that a sprinkler head underneath one pond had not been capped and that there was another small leak elsewhere. Hoelscher testified that he repaired the leaks and that he believed there were no more leaks.

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[1] Hoelscher attacks the verdict by noting that "[t]here is nothing in appellees' pleadings to request a rescission of the contract and return of their purchase money." However, the trial court did not order a rescission of the contract. In its finding of fact, the court states that Holescher failed to perform the contract as agreed, characterizing this as a "breach of contract."

[2] Hoelscher has failed to respond to the Kilman's cross-appeal.

However, the Kilmans continued to complain that the system leaked. Hoelscher blamed the continued loss of water on the small size of the lower pond, which he recommended enlarging. Hoelscher testified that the Kilmans orally agreed to pay him an extra $2,500 to enlarge the lower pond and to plant more plants around the structure.

Monte Carter, an employee of Landscape Design, stated in a deposition introduced at trial that he knew that the lower pond was too small and had told Hoelscher about this problem. Carter stated that the entire system lost water too quickly but said that there were no leaks in it and blamed the loss of water on the small size of the ponds.

The Kilmans testified that they noticed that the system leaked almost immediately. Mrs. Kilman testified that after she complained to Hoelscher, he advised her to use a water hose to refill the system. She stated that, after refilling the ponds, the ponds would empty again within a few hours and that the ponds had to be refilled three or four times a day. Mrs. Kilman further testified that, even after Hoelscher made alterations to the system, the system had to be refilled repeatedly. After Hoelscher identified the cause of the leak as the lower pond being too small, Mrs. Kilman agreed to allow Hoelscher to enlarge the lower pond but stated that she never agreed to pay any extra money to "fix their mistake."

As part of his attempt to repair the aquastructure, Hoelscher installed a flow valve control that would automatically add more water to the system when the level became too low. However, Mrs. Kilman testified that the flow valve never shut off because the pond constantly needed more water. Mr. Kilman testified that their water bill rose from $9-10 a month to $40-50 a

month after the pond was built, that the area behind the pond was wet, and that there was unusually tall grass growing behind the pond.

The Kilmans presented Ross Albert as an expert on the construction, maintenance, and repair of aquascape structures. He had examined the Kilmans' pond and waterfall system at least three times. In his testimony, Albert identified several problems with the system installed by Hoeslcher: the proper filtration system had not been installed; there was not any "lip," or extra vertical wall, on the edge of the streams to keep the water contained; the ponds were not deep enough; the pump was not strong enough; and the pipes were not big enough. Albert further testified that the entire hillside was soggy because of the leaks in the system and that enlarging the lower pond did not solve any of the problems with the system.

To repair the system, Albert recommended tearing out all of the rocks and the liner of the stream, raising the edges of the streams, deepening the ponds, and reinstalling a sufficiently large liner. He estimated that the cost of this would be $18,000, which included $6,000 for tearing out the old system. On cross-examination, Albert estimated that it would cost between $5,000 and $6,000 just to "band-aid" the project.

DISCUSSION

On appeal, Hoelscher contends that (1) the evidence was insufficient to support the award of damages, and (2) the evidence was insufficient to support the award of attorney's fees. On cross-appeal, the Kilmans contend (1) the damages awarded are inadequate based on the evidence, (2) the amount of attorney's fees awarded are inadequate based on the evidence, (3) the trial court abused its discretion by not awarding appellate attorney's fees, and (4) the trial court abused its

discretion by not awarding pre-judgment interest. For clarity we will combine the first issues as presented by both parties and examine them together, do the same with the second issues, and then discuss appellate attorney's fees and pre-judgment interest.

Damages Award

Hoelscher argues that the trial court's determination of damages was not supported by sufficient evidence. Hoelscher further argues that the damages testified to by the Killmans' expert were merely estimates and were, therefore, not definite. Conversely, the Kilmans argue that the amount of damages was inadequate based on the evidence presented.[3] The Kilmans argue that the trial court should have awarded the full cost of replacing the fountain—more than $18,000.

When reviewing a verdict to determine the factual sufficiency of the evidence, we must consider and weigh all the evidence and should set aside the judgment only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. *Cain v. Bain,* 709 S.W.2d 175, 176 (Tex. 1986); *Stable Energy, L.P. v. Kachina Oil & Gas, Inc.*, 52 S.W.3d 327, 331 (Tex. App.—Austin 2001, no pet.). A damage award cannot be overruled simply because the fact-finder's reasoning is unclear. *Duggan v. Marshall*, 7 S.W.3d 888, 893 (Tex. App.—Houston [1st

[3] In his brief, Hoelscher does not clearly state whether he is contending the evidence is legally or factually insufficient. However, the cases he cites in support of his argument employ a factual sufficiency review. Thus, we will construe his argument as a factual sufficiency challenge. *See Garza v. Alviar*, 395 S.W.2d 821, 823 (Tex. 1965); *R.S. v. B.J.J.*, 883 S.W.2d 711, 713 (Tex. App.—Dallas 1994, no writ) ("The general rule is that unless the context shows that the words were used in a different sense, references to the insufficiency of the evidence are usually construed to mean factual insufficiency.").

Dist.] 1999, no pet.). As long as the damages awarded are within the range of evidence presented at trial, there is sufficient evidence for us to affirm the finder of fact's conclusion. *See id.*

The original contract price was $8,500, and Hoelscher tried to recover an extra $2,500 for the additional work he did on the structure. At trial, Albert estimated it would cost close to $18,000 to build a new system. This figure included the cost of removing the old system ($5,000 to $6,000) and the cost of building a new system ($10,000 to $12,000). Albert also testified that "band-aiding" the existing structure, which would alleviate the leaks by increasing the height of the stream's banks while narrowing the stream by one foot would cost $5,000 to $6,000.

The expert's testimony about the costs of repairing this defective system provided a reasonable basis for determining the damages suffered by the Kilmans because of Hoelscher's breach of contract. The award of $8,788.75 is within the range of the evidence presented at trial. After reviewing the evidence, we cannot conclude that the amount of damages awarded is so contrary to the overwhelming weight of the evidence as to be clearly wrong or unjust. We therefore overrule both Hoelscher's and the Kilmans' first issues on appeal.

Attorney's Fees

In his second issue, Hoelscher argues that the trial court's award of attorney's fees of $5,000 was based on insufficient evidence and an improper interpretation of the law. Conversely, the Kilmans contend that, considering the evidence presented at trial, the award of attorney's fees was inadequate.

Generally, we review a trial court's decision to grant or deny attorney's fees under an abuse of discretion standard, and we review the amount awarded as attorney's fees under a legal

sufficiency standard. *See Allison v. Fire Ins. Exch.*, 98 S.W.3d 227, 262 (Tex. App.—Austin 2002, pet. granted, judgm't vacated w.r.m. by agr.). However, some statutes remove the discretion from the trial court. *Cf. Bocquet v. Herring*, 972 S.W.2d 19, 20 (Tex. 1998). In *Bocquet*, the supreme court distinguished between statutes that vest a trial court with the discretion to award attorney's fees and statutes that require the court to award attorney's fees. *See id.*; *compare* Tex. Civ. Prac. & Rem. Code Ann. § 37.009 (West 1997) (court may award reasonable and necessary attorney's fees), *with* Tex. Civ. Prac. & Rem. Code Ann. § 38.001 (West 1997) (person may recover attorney's fees). Statutes stating that a court "may" award attorney's fees give courts the discretion to award attorney's fees, but statutes stating that a party "may recover," "shall be awarded," or "is entitled to" attorney's fees are not discretionary. *Bocquet*, 972 S.W.2d at 20.

Section 38.001(8) allows for the recovery of reasonable attorney's fees for a breach of contract claim. Tex. Civ. Prac. & Rem. Code Ann. § 38.001(8) (West 1997). It provides as follows:

> A person *may recover* reasonable attorney's fees from an individual or corporation, in addition to the amount of a valid claim and costs, if the claim is for:
>
> . . .
>
> (8) an oral or written contract.

Id. (emphasis added). Because the statute specifies that a party "may recover" attorney's fees, the statute is not discretionary.

However, before a court can award attorney's fees, the party must prove that they are reasonable and necessary. *Manon v. Tejas Toyota, Inc.*, 162 S.W.3d 743, 751 (Tex. App.—Houston

[14th Dist.] 2005, no pet.). The supreme court has identified eight factors that a fact-finder may consider when determining an award of attorney's fees: (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill required to perform the legal service properly; (2) the likelihood that the acceptance of the particular employment will preclude other employment by the lawyer; (3) the fee customarily charged in the locality for similar legal services; (4) the amount involved and the results obtained; (5) the time limitations imposed by the client or the circumstances; (6) the nature and length of the professional relationship with the client; (7) the experience, reputation and ability of the lawyer or lawyers performing the services; and (8) whether the fee is fixed or contingent on results obtained or uncertainty of collection before the legal services have been rendered. *Arthur Andersen & Co. v. Perry Equip. Co.*, 945 S.W.2d 812, 818 (Tex. 1997).

Evidence of attorney's fees that is clear, direct, and uncontroverted is taken as true as a matter of law, especially where the opposing party had the means and opportunity of disproving the evidence but did not. *Ragsdale v. Progressive Voters League*, 801 S.W.2d 880, 882 (Tex. 1990). In such instances, appellate courts will reverse a denial or minimization of attorney's fees and render judgment for attorney's fees in the amount proved. *See id.* (reversing $ 150 award attorney's fees award and rendering $ 22,500 judgment for attorney's fees). Testimony by an interested witness may establish the amount of attorney's fees as a matter of law only if: (1) the testimony could be readily contradicted if untrue; (2) it is clear, direct, and positive; and (3) there are no circumstances tending to discredit or impeach it. *Id.* Nevertheless, it is not true in every case that uncontradicted testimony mandates an award of the amount claimed. *Id.*

At trial, the Kilmans' attorney testified that he had been practicing law for approximately 15 years and that in preparation for this case he had spent 62 hours on necessary tasks such as conferencing with the Kilmans, preparing pleadings, writing discovery requests and responses, taking depositions, and attending pretrial hearings and the trial itself. He testified that his normal hourly fee is $140, that the total legal expenses were $8,680, and that these fees were reasonable and necessary. *See id*.

Hoelscher did not offer any evidence to refute the Kilmans' attorney's testimony. In addition, Hoelscher did not cross-examine the Kilmans' attorney regarding the attorney's fees requested. The evidence that $8,680 was a reasonable attorney's fee was clear, direct, positive, and could have been readily controverted if the amount was not reasonable. *See Ragsdale*, 801 S.W.2d at 882. Therefore, the Kilmans established as a matter of law the amount of attorney's fees. *See id.* Given the uncontested evidence regarding attorney's fees, the trial court's decision to award $5,000 in attorney's fees is arbitrary and without reference to any guiding rules or principles and is, therefore, an abuse of discretion. Accordingly, we overrule Hoelscher's second issue on appeal and sustain the Kilmans' second issue. We therefore modify the trial court's judgment in accordance with the uncontested evidence to award the Kilmans $8,680 in attorney's fees.

Appellate Attorney's Fees

In their third issue, the Kilmans argue that the trial court abused its discretion by not awarding appellate attorney's fees. At trial, the Kilmans' attorney testified that the following appellate attorney's fees were reasonable: (1) $3,000 for an appeal to the court of appeals, (2) $2,500 for responding to a petition to the supreme court, and (3) $2,500 for an appeal to the supreme court

in the event petition was granted. This testimony was not controverted. However, the trial court did not award any appellate attorney's fees. Further, appellate attorney's fees were not specifically mentioned in the final judgment nor in the findings of fact and conclusions of law prepared by the court at the request of Hoelscher.

For the same reasons specified in the proceeding section, we hold that the trial court abused its discretion in not awarding appellate attorney's fees. *See Ragsdale*, 801 S.W.2d at 882 (court abused its discretion by awarding $150 in attorney's fees attorney's fees under election code section 253.131(d), which states that candidates are "entitled to" attorney's fees, when evidence of $22,500 in appellate attorney's fees was uncontroverted); *Lee v. Perez*, 120 S.W.3d 463, 469-70 (Tex. App.—Houston [14th Dist.] 2003, no pet.) (trial court did not have discretion to award no attorney's fees in light of uncontested evidence regarding appellate attorney's fees). Accordingly, we sustain the Kilmans' issue and modify the trial court's judgment in accordance with the uncontested evidence to add $3,000 for attorney's fees in this appeal, $2,500 in the event a petition to the supreme court is filed, and $2,500 in the event a petition to the supreme court is granted.

Pre-Judgment Interest

In their final point of error, the Kilmans contend that the trial court erred by not awarding pre-judgment interest on their damages. The Kilmans' answer and counterclaim requested pre-judgment interest and postjudgment interest, but the trial court only awarded postjudgment interest.

Pre-judgment interest is compensation allowed by law for the lost use of the money due as damages during the time between the accrual of the claim and the judgment date. *Johnson*

& Higgins, Inc. v. Kenneco Energy, 962 S.W.2d 507, 528 (Tex. 1998). "There are two legal sources for an award of pre-judgment interest: (1) general principles of equity and (2) an enabling statute." *Id*. If no statute requires pre-judgment interest to be awarded, a court has the discretion to award pre-judgment interest if it determines an award is appropriate based on the facts of the case. *Cf. City of Port Isabel v. Shiba*, 976 S.W.2d 856, 860 (Tex. App.—Corpus Christi 1998, pet. denied) (where no statute controls, decision to award prejudgment interest left to discretion of trial court); *Larcon Petroleum, Inc. v. Autotronic Sys.,* 576 S.W.2d 873, 879 (Tex. Civ. App.—Houston [14th Dist.] 1979, no writ) (trial court may, but not is not required to, award pre-judgment interest under authority of statute or under equitable theory).[4] There is no statute requiring a trial court to award prejudgment interest under the facts of this case. Accordingly, we review the trial court's decision regarding prejudgment interest for an abuse of discretion. *Protective Life ins. Co. v. Russell,* 119 S.W.3d 274, 288 (Tex. App.—Tyler 2003, pet. denied); *J.C. Penney Life Ins. Co. v. Heinrich*, 32 S.W.3d 280, 289 (Tex. App.—San Antonio 2000, pet. denied).[5] A trial court abuses its discretion

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[4] *See also Thornton v. D.F.W. Christian Television Inc.*, 925 S.W.2d 17, 26 (Tex. App.—Dallas 1995), *rev'd on other grounds*, 933 S.W.2d 488 (Tex. 1996) (within discretion of trial court to determine if prejudgment interest should be awarded); *Spangler v. Jones*, 861 S.W.2d 392, 398-99 (Tex. App.—Dallas 1993, writ denied) (same). *But see Birmingham Fire Ins. Co. v. American Nat'l Fire Ins. Co.*, 947 S.W.2d 592, 606-07 (Tex. App.—Texarkana 1997, writ denied) (court concluded that, because damages had accrued by the time of judgment, trial court did not have discretion not to award prejudgment interest); *Graco Robotics, Inc. v. Oaklawn Bank*, 914 S.W.2d 633, 646 (Tex. App.—Texarkana 1995, writ dism'd) (trial court has no discretion about decision to award prejudgment interest or the rate of the interest in breach of contract claim); *Smith v. Herco, Inc.*, 900 S.W.2d 852, 861-62 (Tex. App.—Corpus Christi 1995, writ denied) (court stated that plaintiff entitled to recover prejudgment interest as a matter of law on damages that have accrued by time of judgment).

[5] The Kilmans have not cited us to any case, and we have found none, which have held that it is an abuse of discretion for a trial court to deny pre-judgment interest on damages for breach of contract.

when it reaches a decision so arbitrary and unreasonable as to amount to a clear and prejudicial error of law. *Joe v. Two Thirty Nine Joint Venture*, 145 S.W.3d 150, 161 (Tex. 2004).

Having reviewed the record, we cannot conclude the trial court's decision was so arbitrary or unreasonable to amount to a clear error of law. *Cf. Pickens v. Alsup*, 568 S.W.2d 742, 744 (Tex. Civ. App.—Austin 1978, writ ref'd n.r.e.) (denial of prejudgment interest proper when genuine dispute regarding ultimate liability, which was contested in good faith by parties, and amount of damages could not be ascertained until final judgment). Therefore, we conclude the trial court did not abuse its discretion by denying pre-judgment interest, and we overrule the Kilmans' fourth issue on appeal.

CONCLUSION

We have overruled all of the issues brought by Hoelscher. We modify the trial court's judgment regarding attorney's fees and appellate attorney's fees and, as modified, affirm the judgment of the trial court.

David Puryear, Justice

Before Chief Justice Law, Justices B.A. Smith and Puryear

Modified and, as Modified, Affirmed

Filed: February 16, 2006