



NUMBER 13-14-00711-CV

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI - EDINBURG

DOUG GENGENBACH,

Appellant,

v.

**JESUS RODRIGUEZ AND
WILLACY COUNTY COOP,**

Appellees.

**On appeal from the 389th District Court
of Hidalgo County, Texas.**

MEMORANDUM OPINION

**Before Chief Justice Valdez and Justices Rodriguez and Garza
Memorandum Opinion by Chief Justice Valdez**

A jury found that appellant Doug Gengenbach committed fraud against appellee Jesus Rodriguez in connection with a farming transaction. By five issues, which we have reordered, Gengenbach contends: (1) the trial court erred in refusing to charge the jury on his claim against Rodriguez for breach of fiduciary duty; (2) the jury's damage award is factually insufficient; (3) the trial court erred by submitting a broad-form damage question that allegedly contained an improper damage element; (4) the economic loss

rule bars the jury's punitive damage award; and (5) the jury's damage award should be reduced to account for certain offsets and credits in favor of Gengenbach. We affirm.

I. Background

La Sal Del Rey, or "the King's Salt," is a 530-acre salt lake north of McAllen along Highway 186. La Sal Del Rey, and the 5,400-acre tract of land that surrounds it, is a national wildlife refuge owned and managed by the United States Fish and Wildlife Service (USFWS).

Since 1970, Rodriguez has been farming the land surrounding La Sal Del Rey, growing various fruits and vegetables. Beginning around the mid-2000s, Rodriguez acquired his own lease from the USFWS to farm 800 acres of land within the refuge. Through a cooperative farming agreement with the USFWS, Rodriguez paid impressively low rent compared to other farmers outside the refuge. Rodriguez paid \$3,500 for 800 acres.¹ However, Rodriguez's lease with the USFWS was not without restriction. One relevant restriction provided that:

[This lease] is not transferable, and no privileges herein mentioned may be sublet or made available to any person or interest not mentioned in this agreement. No interest hereunder may accrue through lien or be transferred to a third party without the approval of the Regional Director of the [USFWS] and the agreement shall not be used for speculative purposes.

During the time that Rodriguez rented with the USFWS, he always managed to pay rent and other expenses related to his farming operation, sometimes through the help of financing. Rodriguez was also a member of the Willacy County Co-op, a farm supply store and wholesale crop marketer. One benefit of Rodriguez's membership was that he received a fifty-cent discount per gallon on diesel fuel.

¹ The record is not clear concerning whether Rodriguez paid \$3,500 for 800 acres per year or per month.

Gengenbach, a self-described former millionaire, farmed land in Nebraska for many years. In 2010, Gengenbach, having been recently divorced, decided to start a new life in the Rio Grande Valley after he met a woman, Viola Bazan. Gengenbach relocated to Texas to "look[] for farm land" and found 375 acres in Rio Hondo, Texas for \$36,000. Gengenbach entered into a lease agreement. Soon thereafter, Gengenbach discovered that rent would be much cheaper by renting with the USFWS in La Sal Del Rey. At trial, Gengenbach acknowledged that Rodriguez's rent was "extremely reasonable" and that "any farmer would want to farm on those terms." Gengenbach also admitted that he was aware of the restriction contained in Rodriguez's lease prohibiting Rodriguez from subletting or conveying an interest under the lease to a third party without prior approval by the USFWS.

Against this backdrop, the jury heard evidence regarding how Gengenbach acquired and now owns Rodriguez's lease with the USFWS. During the summer of 2010, Gengenbach befriended Rodriguez with the help of Bazan, who served as Gengenbach's Spanish translator. After establishing Rodriguez's trust, Gengenbach offered to pay Rodriguez \$400 per acre to plant seed on 600 acres of Rodriguez's land. Seeing this as a great opportunity, Rodriguez accepted Gengenbach's offer. According to Rodriguez, Gengenbach refused to put their agreement in writing. Soon thereafter, Gengenbach contacted Rodriguez requesting that their oral agreement be modified to cover only 400 acres at \$400 per acre; again, Rodriguez agreed. Using his own equipment, Rodriguez ploughed 400 acres of his land in preparation for the start of the 2010–2011 farming season. However, after Rodriguez had already spent time and money ploughing 400 acres, Gengenbach informed Rodriguez that the provider of the seed allegedly could only supply seed for 125 acres, leaving 275 acres of Rodriguez's land ploughed but without

seed. Already in a difficult financial position, Rodriguez agreed to reduce the acres to 125. Thereafter, Rodriguez spent time and money planting seed on 125 acres with the expectation that Gengenbach would pay him \$400 per acre, totaling \$50,000. However, Gengenbach never paid Rodriguez \$50,000; instead, Gengenbach paid Rodriguez \$15,312, a meager weekly salary to keep the farming operation afloat, and rent on the land.²

At the end of the farming season, Rodriguez harvested and delivered the crop for sale at the Willacy County Co-op. However, the day after Rodriguez delivered the crops to the Willacy County Co-op, Gengenbach had already hired an attorney in preparation to sue Rodriguez for breach of contract, among other claims. According to Gengenbach, Rodriguez granted him a seventy-five percent interest in all crops grown on Rodriguez's land for the 2010–2011 crop year in exchange for Gengenbach's financial support, including payment of rent. Thereafter, Gengenbach sought, and the trial court granted, a temporary injunction enjoining Rodriguez from receiving any proceeds from Willacy County Co-op pending resolution of Gengenbach's lawsuit. Once the crops were sold, Willacy County Co-op deposited the proceeds of the sale in the registry of the court—less fees and expenses charged by Willacy County Co-op for storing the crop.

With the crop proceeds tied up in the lawsuit, Rodriguez entered the 2011–2012 crop year in a difficult financial situation. To make matters worse, Gengenbach informed the USFWS that Rodriguez allegedly gave him a seventy-five percent interest in all crops grown under Rodriguez's lease, which implicated the lease's restriction prohibiting Rodriguez from conveying an interest to a third party without prior approval by the

² Gengenbach also made payments to Rodriguez for other expenses related to the farming operation, including fuel. At the same time, Rodriguez recalled that he bought diesel fuel from the Willacy County Co-op at the discounted rate for Gengenbach's separate property in Rio Hondo.

USFWS. Thereafter, the USFWS revoked Rodriguez's lease, providing Gengenbach and Bazan an opportunity to successfully acquire it at an auction on favorable terms.

After acquiring Rodriguez's lease, Gengenbach continued to maintain his lawsuit against Rodriguez for his alleged share of seventy-five percent of the proceeds. In response to Gengenbach's lawsuit, Rodriguez countersued alleging fraud, among other claims. According to Rodriguez's counter-petition, Gengenbach never intended to pay \$400 per acre on any land; instead, Gengenbach intentionally underpaid Rodriguez on a piecemeal basis to make it appear as though Rodriguez had conveyed to Gengenbach an interest in crops grown under Rodriguez's lease, with the ultimate goal of instigating a revocation of Rodriguez's lease.

On the eve of trial, Gengenbach filed an amended petition in which he asserted that Rodriguez breached his fiduciary duty as a farming partner when he harvested and delivered the crop to the Willacy County Co-op.

After hearing all the evidence, the jury found that Gengenbach committed fraud. Specifically, the jury found that Rodriguez and Gengenbach had a verbal agreement to share profits and losses for crops grown on Rodriguez's land and that Gengenbach defrauded Rodriguez. The jury further found, in relevant part, that Gengenbach's fraud cost Rodriguez: (1) \$15,617.60 in fees and expenses charged by Willacy County Co-op; and (2) \$24,688 in unpaid farming services rendered on 400 acres of land. The jury also awarded punitive damages to Rodriguez in the amount of \$140,618.49. The trial court entered judgment on the jury's verdict. This appeal followed.

II. Fiduciary Duty Claim

By his first issue, Gengenbach contends that the trial court erred in refusing his request to charge the jury regarding breach of fiduciary duty. Gengenbach argues that

the jury should have been asked to consider whether he and Rodriguez were partners in a joint farming venture and, if so, whether Rodriguez breached a fiduciary duty owed to Gengenbach.

A. Standard of Review

We review the trial court's decision to submit a jury question under an abuse of discretion standard. *Park N. Serv. Ctr., L.P. v. Applied Circuit Tech., Inc.*, 338 S.W.3d 719, 721 (Tex. App.—Dallas 2011, no pet.). A trial court abuses its discretion if “it acts in an arbitrary or unreasonable manner or if it acts without reference to any guiding rules and principles.” *Id.*

The trial court is required to submit to the jury a properly requested question that is “raised by the pleadings and evidence and is necessary to enable the jury to render a verdict.” *Id.* (citing TEX. R. CIV. P. 278). When a trial court refuses to submit a question on an issue raised by the pleadings and evidence, “the [issue] on appeal is whether the request was reasonably necessary to enable the jury to render a proper verdict.” See *Shupe v. Lingafelter*, 192 S.W.3d 577, 579 (Tex. 2006). Error in the omission of a requested jury question calls for a new trial only if the omission probably caused the rendition of an improper judgment. See *id.* (citing TEX. R. APP. P. 44.1(a)).

B. Applicable Law

The elements of a claim for breach of fiduciary duty are: (1) a fiduciary relationship exists between the plaintiff and defendant; (2) the defendant breached his fiduciary duty to the plaintiff; and (3) the defendant's breach resulted in injury to the plaintiff or a benefit to the defendant. See *Jones v. Blume*, 196 S.W.3d 440, 447 (Tex. App.—Dallas 2006, pet. denied). The relationship between partners in a general partnership is fiduciary in

nature.³ See *Brazosport Bank of Tex. v. Oak Park Townhouses*, 889 S.W.2d 676, 683 (Tex. App.—Houston [14th Dist.] 1994, writ denied) (citing *Thigpen v. Locke*, 363 S.W.2d 247, 253 (Tex. 1962)).

C. Analysis

Gengenbach contends that the trial court erred in failing to submit a question to the jury regarding breach of fiduciary duty. Gengenbach argues that there is some evidence in the trial record indicating that he and Rodriguez verbally agreed to be farming partners and that Rodriguez breached this agreement by, among other things, selling the crop to Willacy County Co-op without Gengenbach's consent or approval. However, even were we to find that the trial court erred in failing to charge the jury regarding breach of fiduciary duty, we may not reverse the trial court's judgment unless the error is harmful—i.e., unless the error probably caused the rendition of an improper judgment. See *Park N. Serv. Ctr., L.P.*, 338 S.W.3d at 721. "Error in the omission of a [jury question] is harmless 'when the findings of the jury in answer to other issues are sufficient to support the judgment.'" *Shupe*, 192 S.W.3d at 579 (citing *Boatland of Houston, Inc. v. Bailey*, 609 S.W.2d 743, 750 (Tex. 1980)).

Here, question two of the jury charge asked: "Did [Rodriguez] fail to comply with the verbal agreement [to share profits and losses]?" The jury answered "no" to this

³ Factors indicating that persons have created a partnership include the persons':

1. receipt or right to receive a share of profits of the business;
2. expression of an intent to be partners in the business;
3. participation or right to participate in control of the business;
4. agreement to share or sharing:
 - A. losses of the business; or
 - B. liability for claims by third parties against the business; and
5. agreement to contribute or contributing money or property to the business.

TEX. BUS. ORGS. CODE ANN. § 152.052(a)(1)–(5) (West, Westlaw through 2015 R.S.).

question. Based on Gengenbach's theory of recovery, the jury's negative answer to this question rejected the "breach" element of Gengenbach's claim for breach of fiduciary duty. See *Jones*, 196 S.W.3d at 447. As such, even if the question had been submitted, it would not have altered the jury's verdict. See *Shupe*, 192 S.W.3d at 579–80 (holding that the trial court's refusal to submit a question regarding negligent entrustment was harmless where the jury answered "no" to the question on negligence generally; by answering the negligence question in the negative, the jury provided the answer to negligent entrustment). Therefore, we hold that the trial court's error, if any, in omitting a jury question regarding breach of fiduciary duty was harmless. See TEX. R. APP. P. 44.1(a). We overrule Gengenbach's first issue.

III. Factual Sufficiency

By his fourth issue, Gengenbach contends that the jury's damage award with respect to the following categories is factually insufficient: (1) fees and expenses charged by Willacy County Co-op in the amount of \$15,617.60; (2) unpaid farming services rendered on 400 acres of Rodriguez's land in the amount of \$24,688; and (3) punitive damages in the amount of \$140,618.49.

We examine the entire record, considering both the evidence in favor of, and contrary to, the challenged findings in our factual sufficiency review. *Maritime Overseas Corp. v. Ellis*, 971 S.W.2d 402, 406–07 (Tex. 1998). In reviewing a factual-sufficiency challenge to a finding on an issue on which the appellant did not have the burden of proof, we will set aside the verdict "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). The fact-finder is the sole judge of the witnesses' credibility and may choose to believe one witness over another. *Golden Eagle Archery, Inc. v. Jackson*, 116 S.W.3d

757, 761 (Tex. 2003). We may not substitute our own judgment for that of the jury, even if we would reach a different answer based on the evidence. *GTE Mobilnet of S. Tex. Ltd. P'ship v. Pascouet*, 61 S.W.3d 599, 616 (Tex. App.—Houston [14th Dist.] 2001, pet. denied) (citing *Maritime Overseas Corp.*, 971 S.W.2d at 407).

Here, Gengenbach has not explained how the jury's damage award with respect to the challenged categories is so contrary to the evidence as to make it clearly wrong and unjust. See *Golden Eagle Archery, Inc.*, 116 S.W.3d at 761 (explaining that in order for a reviewing court to properly apply our factual sufficiency review, when reversing on the basis of factual insufficiency, the court must in its opinion, "state in what regard the contrary evidence greatly outweighs the evidence in support of the verdict"); *Maritime Overseas Corp.*, 971 S.W.2d at 407 ("[W]hen reversing a trial court's judgment for factual insufficiency, the court of appeals must detail all the evidence relevant to the issue and clearly state why the jury's finding is factually insufficient or so against the great weight and preponderance of the evidence that it is manifestly unjust[, and] [t]he court of appeals must explain how the contrary evidence greatly outweighs the evidence supporting the verdict." (internal citations omitted)). Moreover, to support his factual insufficiency claim, Gengenbach relies on evidence in the record that favors his position. For example, Gengenbach relies on evidence in the form of an accounting sheet that he prepared for trial and on his own testimony concerning the allocation of certain payments made to Rodriguez. However, Gengenbach fails to address the evidence that could have supported the jury's verdict and fails to account for the jury's role as the finder of fact.

Examining the entire record, including the evidence in favor of and contrary to the jury's damage award, we cannot conclude that the weight of the evidence is so contrary to the verdict as to make it clearly wrong and unjust. See *Dow Chem. Co.*, 46 S.W.3d at

242; *Maritime Overseas Corp.*, 971 S.W.2d at 406–07; *Cain*, 709 S.W.2d at 176. Therefore, we hold that the evidence is factually sufficient to support the jury’s damage award. We overrule Gengenbach’s fourth issue.

IV. Punitive Damages

By his second and third issues, Gengenbach challenges the jury’s award of punitive damages in the amount of \$140,618.49. We address each issue separately below.

A. *Harris County v. Smith*

As we understand his second issue, Gengenbach argues that the trial court erred under *Harris County v. Smith*, by commingling a broad-form damage question with an improper damage element. 96 S.W.3d 230 (Tex. 2002). According to Gengenbach, the allegedly improper damage element is found in question twelve and specifically concerns the jury’s award of \$15,617.60 to Rodriguez for fees and expenses charged by Willacy County Co-op. Gengenbach asserts that this damage award lacks evidentiary support and therefore should not have been submitted to the jury. As we understand his argument, Gengenbach claims that this allegedly improper damage element tainted the jury’s award of punitive damages. Relying on *Smith*, Gengenbach contends that “the error now prevents [him] from properly presenting his claims before this Court, as it requires speculation to determine what factor the improper [damage element] played in the jury’s overall award.” To properly address Gengenbach’s second issue, we turn to the facts and holding of *Smith*.

In *Smith*, a personal injury case, the trial court submitted a broad-form damage question. The question asked the jury to assign a single dollar amount to compensate the plaintiff for the injuries by considering the following damage elements: (1) the

plaintiff's physical pain and mental anguish; (2) the plaintiff's loss of earning capacity; (3) the plaintiff's physical impairment; and (4) medical care. *Id.* at 231. This type of jury question is called a broad-form question because the jury essentially fills in one blank with a dollar amount after considering several damage elements. *Id.* At the charge conference, the defendant objected to the broad-form question and requested that each damage element be submitted separately; in other words, the defendant asked the trial court to include in the jury charge four separate blanks for each of the damage elements listed above. *Id.* at 231–32. The trial court denied the defendant's request and instead submitted the broad form damage question. *Id.* The jury awarded the plaintiff \$90,000. *Id.*

On appeal, the Texas Supreme Court reversed the damage award and remanded the case for a new trial. *Id.* at 236. The Supreme Court observed that the trial court has a duty to submit only those questions that the pleadings and evidence support. *Id.* The Supreme Court agreed with the court of appeals that no evidence supported the damage element concerning loss of earning capacity, and therefore, the trial court erred in submitting it to the jury. *Id.* at 232. After finding error, the Supreme Court concluded that the error was harmful. *Id.* at 236. Specifically, the Supreme Court found the error to be harmful because the mixture of valid and invalid elements of damages in a single broad-form damage question "prevented the appellate court from determining 'whether the jury based its verdict on an improperly submitted invalid' element of damage." *Id.* at 234 (quoting *Crown Life Ins. Co. v. Casteel*, 22 S.W.3d 378, 388 (Tex. 2000) and citing TEX. R. APP. P. 61.1(b)). Accordingly, the Supreme Court remanded the case for a new trial. *Id.* at 236.

Smith is distinguishable. First, in *Smith*, the trial court submitted an improper damage element—i.e., loss of earning capacity. Here, for the reasons set forth in Part III of this opinion, Gengenbach has not shown that the damage element for fees and expenses charged by Willacy County Co-op lacks evidentiary support or was otherwise improperly submitted. See *id.* at 233. Because Gengenbach has not shown the challenged damage element to be improper, there was no error under *Smith*. Second, *Smith* is further distinguishable even if we were to assume that the challenged damage element was improperly submitted; unlike the trial court in *Smith*, the trial court in this case never submitted a broad-form damage question. See *id.* at 232. Instead, the trial court charged the jury to assign a specific dollar amount to specifically identified damage elements, including: (1) Willacy County Co-op fees and expenses; (2) farming services rendered; and (3) tractor expenses. Therefore, even assuming that a damage element was erroneously submitted, the error would be deemed harmless under *Smith* because it would not prevent this Court from determining whether the jury based its verdict on an improper damage element. See *id.* at 234. And Gengenbach provides no analysis as to why this case presents a *Smith* problem when no broad-form damage question was submitted to the jury. We overrule Gengenbach’s second issue.

B. Economic Loss Rule

By his third issue, Gengenbach seeks to invalidate the jury’s punitive damage award under the economic loss rule. The economic loss rule provides that when the plaintiff’s loss is only the economic loss of the subject matter of a contract, the claim sounds in contract alone. See *Sw. Bell Tel. Co. v. DeLanney*, 809 S.W.2d 493, 494 (Tex. 1991). Punitive damages are not recoverable on a claim of breach of contract. *Id.* Gengenbach contends that Rodriguez’s fraud claim sounds in contract alone, and

therefore, punitive damages were not recoverable. However, the economic loss rule does not bar fraud claims. See *Haase v. Glazner*, 62 S.W.3d 795, 799 (Tex. 2001); *Formosa Plastics Corp. USA v. Presidio Eng'rs & Contractors, Inc.*, 960 S.W.2d 41, 46 (Tex. 1998); see also *Peterson Grp., Inc. v. PLTQ Lotus Grp, L.P.*, 417 S.W.3d 46, 62 (Tex. App.—Houston [1st Dist.] 2013, pet. denied). Because the economic loss rule did not bar Rodriguez's fraud claim, punitive damages were recoverable in this case. We overrule Gengenbach's third issue.

V. Offset

By his fifth issue, Gengenbach contends that the jury's damage award fails to account for certain offsets allegedly paid to Rodriguez over the course of the parties' dealings. However, Gengenbach never pleaded offset. "The right of offset is an affirmative defense. The burden of pleading offset and of proving facts necessary to support it are on the party making the assertion." *Brown v. Am. Transfer & Storage Co.*, 601 S.W.2d 931, 936 (Tex. 1980); see TEX. R. CIV. P. 94. We conclude that Gengenbach waived his fifth issue by failing to properly plead offset. See *Brown*, 601 S.W.2d at 936.

VI. Conclusion

We affirm the trial court's judgment.

/s/ Rogelio Valdez
ROGELIO VALDEZ
Chief Justice

Delivered and filed the
17th day of November, 2016.