NO. 12-16-00192-CV

IN THE COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT

TYLER, TEXAS

CANDACE RENAE EWING, APPELLANT	***§***	***APPEAL FROM THE***
V.	***§***	***COUNTY COURT AT LAW NO. 1***
CREATIVE CARE, INC., APPELLEE	***§***	***HENDERSON COUNTY, TEXAS***

MEMORANDUM OPINION

Candace Renae Ewing appeals from the trial court's judgment against her and in favor of Creative Care, Inc. In three issues, Ewing contends that the evidence is legally insufficient to support the trial court's judgment and the trial court erred in considering hearsay evidence. We affirm.

BACKGROUND

Ewing sought rehabilitation care services from Creative Care. Prior to receiving the services, Ewing signed contracts agreeing to pay Creative Care for the services if her insurance company did not and assigning Creative Care her rights to her insurance proceeds for the services. Ewing's insurance company sent checks payable to her for the services rendered by Creative Care. Ewing neither paid Creative Care nor forwarded the proceeds received from her insurance company to Creative Care for the services rendered.

Creative Care sued Ewing alleging that she defaulted in paying a debt. Creative Care sought $27,436.07 plus interest as provided for in the agreement and reasonable attorney's fees. Ewing filed a general denial. The matter proceeded to a bench trial. While Ewing was represented by counsel at trial, Ewing did not herself participate or appear at trial.

The trial court found for Creative Care and awarded $21,506.67 plus interest and costs of court. The trial court denied Creative Care's request for attorney's fees. The parties did not request, and the trial court did not prepare, findings of fact and conclusions of law. This appeal followed.

SUFFICIENCY OF THE EVIDENCE

In her first and second issues, Ewing challenges the legal sufficiency of the evidence to support the trial court's judgment. In her first issue, Ewing contends that there was no evidence to support a finding of performance by Creative Care of a contract with Ewing. In her second issue, Ewing asserts that there was no evidence to support a finding of breach of contract by Ewing.

Standard of Review and Applicable Law

In an appeal of a judgment rendered after a bench trial, the trial court's findings of fact have the same weight as a jury's verdict, and we review the legal sufficiency of the evidence used to support them just as we would review a jury's findings. *See* ***In re Doe***, 19 S.W.3d 249, 253 (Tex. 2000). The trial court acts as fact finder in a bench trial and is the sole judge of the credibility of witnesses. *See* ***Murff v. Murff***, 615 S.W.2d 696, 700 (Tex. 1981).

In conducting a legal sufficiency review of the evidence, we must consider all of the evidence in the light most favorable to the verdict and indulge every reasonable inference that would support it. ***City of Keller v. Wilson***, 168 S.W.3d 802, 822 (Tex. 2005). In determining whether legally sufficient evidence supports the finding under review, we must consider evidence favorable to the finding, if a reasonable fact finder could consider it, and disregard evidence contrary to the finding, unless a reasonable fact finder could not disregard it. ***Id.*** at 827; ***Brown v. Brown***, 236 S.W.3d 343, 348 (Tex. App.—Houston [1st Dist.] 2007, no pet.). If the evidence at trial would enable reasonable and fair-minded people to differ in their conclusions, the fact finder must be allowed to do so. ***City of Keller***, 168 S.W.3d at 822; *see also* ***King Ranch, Inc. v. Chapman***, 118 S.W.3d 742, 751 (Tex. 2003). When a party attacks the legal sufficiency of an adverse finding on which it did not have the burden of proof, it must demonstrate that there is no evidence to support the adverse finding. ***Croucher v. Croucher***, 660 S.W.2d 55, 58 (Tex. 1983); ***Bellino v. Comm'n for Lawyer Discipline***, 124 S.W.3d 380, 385 (Tex. App.—Dallas 2003, pet. denied). We will sustain a legal sufficiency or "no evidence"

challenge if the record shows one of the following: (1) a complete absence of evidence of a vital fact, (2) rules of law or evidence bar the court from giving weight to the only evidence offered to prove a vital fact, (3) the evidence offered to prove a vital fact is no more than a scintilla, or (4) the evidence establishes conclusively the opposite of the vital fact. ***City of Keller***, 168 S.W.3d at 810.

More than a scintilla of evidence exists when the evidence rises to a level that would enable reasonable and fair minded jurors to differ in their conclusions. ***Wal–Mart Stores, Inc. v. Spates***, 186 S.W.3d 566, 568 (Tex. 2006) (per curiam); ***Forbes Inc. v. Granada Biosciences, Inc.***, 124 S.W.3d 167, 172 (Tex. 2003). Any ultimate fact may be proved by circumstantial evidence. ***Russell v. Russell***, 865 S.W.2d 929, 933 (Tex. 1993). A fact is established by circumstantial evidence when the fact may be fairly and reasonably inferred from other facts proved in the case. ***Id.*** Evidence that is so slight as to make any inference a guess is in legal effect no evidence. ***Ford Motor Co. v. Ridgway***, 135 S.W.3d 598, 601 (Tex. 2004). Moreover, under the equal inference rule, a factfinder may not reasonably infer an ultimate fact from meager circumstantial evidence which could give rise to any number of inferences, none more probable than another. *See* ***Hancock v. Variyam***, 400 S.W.3d 59, 70–71 (Tex. 2013).

The elements of a breach of contract claim are (1) the existence of a valid contract, (2) performance or tendered performance, (3) breach of the contract, and (4) damage as a result of the breach. *See* ***Critchfield v. Smith***, 151 S.W.3d 225, 233 (Tex. App.—Tyler 2004, pet. denied). A breach of contract occurs when a party to the contract fails or refuses to do something that it has promised to do. ***B & W Supply, Inc. v. Beckman***, 305 S.W.3d 10, 16 (Tex. App.—Houston [1st Dist.] 2009, pet. denied).

Analysis

Ewing contends that Creative Care presented legally insufficient evidence to support the trial court's judgment. She asserts that Creative Care presented no evidence of (1) services, supplies, or accommodations it furnished to Ewing, (2) the reasonable value of those services, or (3) breach by Ewing. Ewing further argues that she is entitled to a take nothing judgment as to Creative Care's claims against her. We disagree.

The Admissions Agreement between Ewing and Creative Care contained a financial agreement. As part of that agreement, Creative Care agreed to bill Ewing's insurance company directly for any services rendered. Ewing, in return, agreed to pay for the services in the event

her insurance company failed to do so. Ewing also assigned her rights to the insurance proceeds to Creative Care.

Robert Alleman, Creative Care's billing coordinator, testified that Creative Care utilizes a third party, Medical Billing Connection, to submit bills to insurance companies. According to Alleman, Creative Care provided MBC's representative, Nancy Roberson, with the information regarding the services rendered for Ewing. Roberson then created a bill from that information, which was submitted to the insurance company for payment. Alleman further testified that based on his review of the file, Ewing owes Creative Care $27,463.07 for the services rendered.

Additionally, Alleman testified that the insurance proceeds that were billed by Creative Care were paid directly to Ewing. An email between Alleman and Roberson supports this assertion and shows that Ewing's insurance company did not forward payment to Creative Care.[1] Instead, the insurance company sent checks payable to Ewing totaling $21,506.67.[2] Ewing did not pay Creative Care with the money sent to her by her insurance company.

Based on the foregoing, Creative Care presented more than a scintilla of evidence of a valid contract between Ewing and Creative Care, performance by Creative Care, breach of the contract by Ewing, and damage to Creative Care as a result of Ewing's breach. As a result, Creative Care presented legally sufficient evidence of breach of contract. *See* ***City of Keller***, 168 S.W.3d at 822.

Ewing also argues that the breach of assignment of insurance benefits was the only issue presented at trial. However, Ewing acknowledges that Creative Care's petition asserts that an agreement was executed by Ewing and Creative Care, Creative Care fully complied with the agreement, and Ewing failed to pay Creative Care $27,436.07. Ewing nevertheless argues that, "[Creative Care's] counsel limited the issue for trial to insurance proceeds paid to [Ewing] which [Creative Care] asserted should have been paid to it." In his opening statement, Creative Care's counsel stated, "The amount of money being sought was actually insurance proceeds that were paid to Candace Ewing that we believe should have been paid to Creative Care."

Ewing cites no authority for her argument that the opening statement so limited Creative Care's avenues of recovery in this case. Regardless, Alleman specifically testified that the

[1] This email, Exhibit 2, was objected to as hearsay, which is the basis of Ewing's third issue.

[2] The trial court awarded damages in the amount of $21,506.67, which is the amount of the checks sent to Ewing by her insurance company. Neither party has challenged the sufficiency of the evidence supporting the amount of the damages awarded.

insurance proceeds that should have been paid to Creative Care were instead paid to Ewing. Therefore, even if we were to limit Creative Care's claims against Ewing, a question we do not decide in this case, Creative Care presented at least a scintilla of evidence to satisfy such a burden. *See* ***Spates***, 186 S.W.3d at 568**.**

Finally, Ewing argues that there was no evidence that she was the Candace Ewing who contracted with Creative Care. Ewing was not present at the trial. However, she was represented by counsel who appeared at trial. Ewing's counsel offered into evidence Creative Care's responses to requests for disclosure. The trial court admitted those responses into evidence without limitation. In those responses, Creative Care indicated that (1) it believes the parties are named correctly, (2) Ewing sought out Creative Care for professional services, (3) the parties entered into a written contract, and (4) Ewing failed to honor the contract. Ewing's counsel also offered into evidence print outs from the internet showing there are numerous individuals named Candace Ewing, and the trial court likewise admitted those documents into evidence.

As part of Ewing's answer, Ewing provided the last three numbers of her driver's license. At trial, the trial court took judicial notice of the documents filed in the case, which would have included Ewing's answer. The trial court also saw a copy of Ewing's driver's license that was part of Creative Care's file. The trial court did not admit the copy of Ewing's driver's license as an exhibit in the case, but neither did the trial court sustain an objection to the admission of Ewing's driver's license into evidence. The trial court simply stated, "And this was just a copy of the driver's license, so I pulled that out of there." Finally, Ewing did not specifically allege that she was not a party to the contract in her answer, but she did file a general denial. Indulging all reasonable inferences in favor of the trial court's judgment, we conclude that the trial court could have found that Ewing was the "Candace Ewing" who was a party to the contract with Creative Care. *See* ***City of Keller***, 168 S.W.3d at 822.

Based on the evidence in the record, a rational factfinder could have concluded that Ewing contracted with Creative Care, Creative Care performed under the contract, Ewing failed to perform her obligations under the contract, and Creative Care was damaged by Ewing's breach. *See* ***id.*** Viewing all of the evidence in the light most favorable to the trial court's judgment, we find the evidence legally sufficient to support it. *See* ***id.*** We overrule Ewing's first and second issues.

ADMISSION OF EVIDENCE

In her third issue, Ewing argues that the trial court abused its discretion by admitting Creative Care's Exhibit 2, which was an email from Robertson to Creative Care detailing the insurance money received by Ewing and not forwarded to Creative Care.

Standard of Review and Applicable Law

We review a trial court's decision to admit or exclude evidence under an abuse of discretion standard. ***Interstate Northborough P'ship v. State***, 66 S.W.3d 213, 220 (Tex. 2001). A trial court abuses its discretion if it acts in an arbitrary or unreasonable manner without reference to any guiding rules or principles. ***Downer v. Aquamarine Operators, Inc.***, 701 S.W.2d 238, 241–42 (Tex. 1985).

We must uphold a trial court's evidentiary ruling if there is any legitimate basis in the record to support it. ***Owens–Corning Fiberglas Corp. v. Malone***, 972 S.W.2d 35, 43 (Tex. 1998). We will not reverse a trial court for an erroneous evidentiary ruling unless the error probably caused the rendition of an improper judgment. *See* TEX. R. APP. P. 44.1; ***Interstate Northborough P'ship***, 66 S.W.3d at 220. A successful challenge to evidentiary rulings usually requires the complaining party to show that the judgment turns on the particular evidence excluded or admitted. ***Tex. Dep't of Transp. v. Able***, 35 S.W.3d 608, 617 (Tex. 2000).

Error in admitting evidence is generally harmless if the objecting party later permits the same or similar evidence to be introduced without objection or the contested evidence is merely cumulative of properly admitted evidence and is not controlling on a material issue dispositive of the case. ***Bay Area Healthcare Group, Ltd. v. McShane***, 239 S.W.3d 231, 234 (Tex. 2007); ***Interstate Northborough P'ship***, 66 S.W.3d at 220; ***Richardson v. Green***, 677 S.W.2d 497, 501 (Tex. 1984).

Analysis

Creative Care offered an email from Roberson to Creative Care into evidence through Alleman (Exhibit 2). Ewing conducted a voir dire examination of Alleman. From Ewing's examination, Alleman confirmed that Roberson's email contains information received from Ewing's insurance company. Ewing objected to the email from Roberson as double hearsay because it contains information from the insurance company to Roberson and then from Roberson to Creative Care. Ewing also argued that the document does not satisfy the business record exception requirements because it is not information known by someone at Creative Care.

The trial court overruled Ewing's objection. Roberson's email indicated that Ewing's insurance company did not send her the entire amount charged by Creative Care, but instead sent her checks totaling $21,506.67.

However, Alleman testified that Ewing contracted with Creative Care and received services from Creative Care pursuant to that contract. He further testified that those services were billed to Ewing's insurance company via a third party billing agent, the insurance company sent the checks to Ewing instead of to Creative Care, and Ewing failed to either pay or forward the checks to Creative Care. Ewing did not lodge a hearsay objection to any of this testimony. Therefore, assuming without deciding that Exhibit 2 was not properly admitted, any such error was harmless because it was cumulative of Alleman's testimony. *See* ***McShane***, 239 S.W.3d at 234; *see also* ***Interstate Northborough P'ship***, 66 S.W.3d at 220; ***Richardson***, 677 S.W.2d at 501. Accordingly, we overrule Ewing's third issue.

DISPOSITION

Having overruled Ewing's first, second, and third issues, we ***affirm*** the judgment of the trial court.

BRIAN HOYLE
Justice

Opinion delivered June 14, 2017.
Panel consisted of Worthen, C.J., Hoyle, J., and Neeley, J.

(PUBLISH)

COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT OF TEXAS

JUDGMENT

JUNE 14, 2017

NO. 12-16-00192-CV

CANDACE RENAE EWING,
Appellant
V.
CREATIVE CARE, INC.,
Appellee

Appeal from the County Court at Law No. 1
of Henderson County, Texas (Tr.Ct.No. 08077-CCL-15)

THIS CAUSE came to be heard on the appellate record and briefs filed herein, and the same being considered, it is the opinion of this court that there was no error in the judgment.

It is therefore ORDERED, ADJUDGED and DECREED that the judgment of the court below **be in all things affirmed**, and that all costs of this appeal are hereby adjudged against the Appellant, **CANDACE RENAE EWING,** for which execution may issue, and that this decision be certified to the court below for observance.

Brian Hoyle, Justice.
Panel consisted of Worthen, C.J., Hoyle, J., and Neeley, J.