AFFIRM in Part, REVERSE in Part, and RENDER; Opinion Filed April 12, 2017.

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-16-00206-CV

ODELA GROUP, LLC AND KEVIN LEE JONES, Appellants
V.
DOUBLE-R WALNUT MANAGEMENT, L.L.C., Appellee

On Appeal from the 44th Judicial District Court
Dallas County, Texas
Trial Court Cause No. DC-14-03546

MEMORANDUM OPINION

Before Justices Evans, Stoddart, and Boatright
Opinion by Justice Boatright

This is a restricted appeal. Appellants Odela Group, LLC ("Odela") and Kevin Lee Jones seek reversal of the trial court's judgment in favor of appellee Double-R Walnut Management, L.L.C. ("DWM"), asserting there was error on the face of the record. For the reasons stated below, we conclude that DWM's pleadings are sufficient and that there is no error on the face of the record regarding notice of trial. With the exception of DWM's claim under the Texas Theft Liability Act ("TTLA"), we also conclude that there is legally and factually sufficient evidence to support the trial court's judgment. Accordingly, we reverse the trial court's judgment as to DWM's TTLA claim and render judgment that DWM take nothing on that claim. In all other respects, we affirm the trial court's judgment.

BACKGROUND

By written contract dated February 8, 2012, DWM agreed to pay Odela to repair and restore a building in Dallas that had been damaged by fire. Jones signed the contract on Odela's behalf. DWM paid Odela an installment of $150,000, and Odela began work on the job. After Odela began installing a new roof on the building, DWM paid a second installment of $200,000. The new roof leaked. Odela failed to fix the problem and walked off the job in July 2012.

After attempts to resolve the dispute failed, DWM filed suit against Odela and Jones, alleging claims for breach of contract, conversion, fraud, violations of the Deceptive Trade Practices-Consumer Protection Act ("DTPA"), and theft of property. Odela and Jones appeared and answered, but failed to respond to DWM's requests for admission despite the trial court's order compelling them to do so. On DWM's subsequent motion for sanctions, the trial court deemed the requests admitted.

DWM filed a traditional motion for summary judgment on all of its claims, relying on the deemed admissions and the affidavit of Bruce Renouard, the owner of DWM. The trial court granted partial summary judgment on DWM's claims for "breach of contract, conversion, fraud, theft of property and violation of DTPA as to liability only."

The case then proceeded to trial before the court on the issue of DWM's damages. Neither Odela nor Jones appeared at the hearing. Renouard testified to DWM's damages, and the trial court admitted supporting exhibits into evidence. DWM also offered evidence of its reasonable and necessary attorney's fees. The trial court rendered judgment for DWM, awarding actual damages on DWM's "breach of contract, conversion, fraud, theft of property and violation of DTPA claims" of $275,000 "for payment made for work never performed"; $66,632.05 "for repairs to the work performed by the Defendants"; $164,700 in lost rents for the property, and treble damages under the DTPA of $1,518,996.15. The judgment also awarded DWM attorney's

fees, interest, and costs. Neither Odela nor Jones filed any post-judgment motions or requests for findings of fact and conclusions of law. On February 25, 2016, they filed this restricted appeal.

RESTRICTED APPEAL

A party who does not participate in person or through counsel in a hearing that results in a judgment may be eligible for a restricted appeal. *Pike-Grant v. Grant*, 447 S.W.3d 884, 886 (Tex. 2014); TEX. R. APP. P. 30. To sustain a proper restricted appeal, Odela and Jones must prove: (1) they filed notice of the restricted appeal within six months after the judgment was signed; (2) they were parties to the underlying lawsuit; (3) they did not participate in the hearing that resulted in the judgment complained of, and did not timely file any post-judgment motions or requests for findings of fact and conclusions of law; and (4) error is apparent on the face of the record. *Alexander v. Lynda's Boutique*, 134 S.W.3d 845, 848 (Tex. 2004). Only the fourth element is at issue in this appeal.

The face of the record includes all papers on file in the appeal, including the clerk's record and any reporter's record. *See Ulusal v. Lentz Eng'g, L.C.*, 491 S.W.3d 910, 914 (Tex. App.—Houston [1st Dist.] 2016, no pet.). In a restricted appeal, we afford the appellant the same scope of review as an ordinary appeal, that is, review of the entire case, with the restriction that the error must appear on the face of the record. *Norman Commc'ns v. Tex. Eastman Co.*, 955 S.W.2d 269, 270 (Tex. 1997) (per curiam).[1] A review of the entire case includes review of legal and factual insufficiency claims. *Id.*

[1] *Norman* addressed a writ of error under former rule of appellate procedure 45. *Norman*, 955 S.W.2d at 270. In a footnote, however, the court noted that "[o]n September 1, 1997, Rule 45 was repealed and replaced by Rule 30." *Id.* at 270 n.1. In its comment to the 1997 change, the court stated, "This is former Rule 45. The appeal by writ of error procedure is repealed. A procedure for an appeal filed within 6 months—called a restricted appeal—is substituted." Misc. Docket No. 97-9134 (Tex. Aug. 15, 1997), *reprinted in* 948–49 S.W.2d [Tex. Cases] C–CI.

ISSUES AND STANDARDS OF REVIEW

In eight issues, Odela and Jones challenge the sufficiency of DWM's pleadings and the legal and factual sufficiency of the evidence to support the trial court's judgment against each of them. They also contend they did not receive notice of the trial court's final hearing on damages.

The trial court granted a traditional summary judgment on liability. A party moving for a traditional summary judgment must show no material fact issue exists and it is entitled to judgment as a matter of law. TEX. R. CIV. P. 166a(c). We review a challenge to a traditional summary judgment de novo. *Provident Life & Accident Ins. Co. v. Knott*, 128 S.W.3d 211, 215 (Tex. 2003). We must determine whether the movant met its burden to establish that no genuine issue of material fact exists and that the movant is entitled to judgment as a matter of law. TEX. R. CIV. P. 166a(c); *Sw. Elec. Power Co. v. Grant*, 73 S.W.3d 211, 215 (Tex. 2002); *City of Houston v. Clear Creek Basin Auth.*, 589 S.W.2d 671, 678 (Tex. 1979). We affirm the trial court's judgment on liability if any theory presented to the court and preserved for review is meritorious. *Joe v. Two Thirty Nine Joint Venture*, 145 S.W.3d 150, 156–57 (Tex. 2004).

The trial court also rendered judgment for DWM after a bench trial on damages. "In a nonjury trial, where no findings of fact or conclusions of law are filed or requested, it is implied that the trial court made all the necessary findings to support its judgment." *Roberson v. Robinson*, 768 S.W.2d 280, 281 (Tex. 1989) (per curiam). These implied findings may be challenged for legal and factual sufficiency where, as here, a reporter's record is included in the record on appeal. *Id.* We review implied findings by the same standards we use in reviewing the sufficiency of the evidence to support a jury's answers or a trial court's fact findings. *Id.* In conducting a legal sufficiency review, we must determine whether the evidence would enable the factfinder to reach the determination under review. *City of Keller v. Wilson*, 168 S.W.3d 802, 827 (Tex. 2005). We will not disturb a finding for factual insufficiency unless the evidence in

support of the finding is so against the great weight and preponderance of the evidence that it is clearly wrong and manifestly unjust. *Dow Chem. Co. v. Francis,* 46 S.W.3d 237, 242 (Tex. 2001). In the absence of findings of fact and conclusions of law, the judgment of the trial court must be affirmed if it can be upheld on any available legal theory that finds support in the evidence. *Rosemond v. Al-Lahiq*, 331 S.W.3d 764, 766 (Tex. 2011) (per curiam). We review the trial court's ruling on questions of law de novo. *See, e.g., Ferry v. Sackett,* 204 S.W.3d 911, 912 (Tex. App.—Dallas 2006, no pet.).

NOTICE OF FINAL HEARING

In their seventh issue, Odela and Jones complain that they did not receive notice of the trial court's final hearing on damages.[2] In a post-answer default case, "well-settled law forbids entering a default judgment against a defendant that has received no notice of the hearing on a motion for default judgment." *KSNG Architects, Inc. v. Beasley*, 109 S.W.3d 894, 899 (Tex. App.—Dallas 2003, no pet.).

When a party claims in a restricted appeal that required notice was not given or a required hearing was never held, the error must appear on the face of the record. *Gold v. Gold*, 145 S.W.3d 212, 213 (Tex. 2004) (per curiam). We have concluded there was error on the face of the record arising from lack of notice where the record affirmatively showed notice was sent to counsel at an incorrect address and was returned undeliverable, *Smith v. Shipp*, No. 05-09-01204-CV, 2010 WL 2653733, at *1 (Tex. App.—Dallas Jul. 6, 2010, no pet.) (mem. op); where notice was served on counsel more than three months after the court ordered that counsel to withdraw, *Shih v. Mei*, No. 05-14-00900-CV, 2005 WL 225271, at *2 (Tex. App.—Dallas Feb. 1, 2005, no pet.) (mem. op.); and where service of notice of a motion for summary

[2] In their reply brief, Odela and Jones also complain that they did not receive notice of the summary judgment hearing. Because this complaint was not raised in their initial appellants' brief, the issue is not properly before us. *See Dallas Cty. v. Gonzales*, 183 S.W.3d 94, 104 (Tex. App.—Dallas 2006, pet. denied) (reply brief may not be used to raise new issues).

judgment was given only eleven days before the hearing, *Shaw v. Radionic Indus., Inc.*, No. 05-07-01333-CV, 2008 WL 4793499, at *2 (Tex. App.—Dallas Nov. 5, 2008, no pet.) (mem. op.).

But silence in the record regarding notice is not error on the face of the record. In *Gold*, the court explained that it "recently reaffirmed that the absence in the record of any proof that notice of intent to dismiss was sent to a party is 'just that—an absence of proof of error.'" *Gold*, 145 S.W.3d at 213 (quoting *Alexander*, 134 S.W.3d at 849). "Accordingly, it is not error apparent on the face of the record, and could not support a restricted appeal." *Id.*

Here, the record is silent regarding whether notice of the final hearing date was sent to Odela and Jones. The docket sheet in the clerk's record reflects an order granting partial summary judgment on July 17, 2015, a nonjury trial setting on August 24, 2015, and a final hearing on August 28, 2015. Nothing appears regarding notice of these settings. At the August 28 hearing, the reporter's record reflects that the trial court and DWM's counsel discussed the absence of counsel for Odela and Jones.[3] But there is nothing in either the clerk's record or the reporter's record to indicate whether or not Odela and Jones received notice of the hearing date.

Where, as here, extrinsic evidence would be necessary to establish that a hearing was held without notice to Odela and Jones, "the appropriate remedy is by motion for new trial or by bill of review filed in the trial court so that the trial court has the opportunity to consider and weigh factual evidence." *Ginn v. Forrester*, 282 S.W.3d 430, 432 (Tex. 2009) (per curiam). In *Ginn*, the court explained, "the absence of proof in the record that notice was provided does not establish error on the face of the record." *Id.* at 433. "[W]e have clearly said that silence is not enough." *Id.*

[3] The trial court, on the record, called and left a voice message for the counsel of record for Odela and Jones. The record also reflects that the bailiff called the case in the hallway.

Because the record is silent regarding notice to Jones and Odela of the August 28, 2015 hearing, Jones and Odela have not established error on the face of the record. We decide Jones's and Odela's seventh issue against them.

SUFFICIENCY OF PLEADINGS

In their first and second issues, Jones and Odela contend DWM's operative petition does not support the judgment against them. A trial court may not grant relief to a party in the absence of pleadings to support the relief. *Stoner v. Thompson*, 578 S.W.2d 679, 682–83 (Tex. 1979). A pleading must give fair notice of the plaintiff's claims. TEX. R. CIV. P. 45(b). The purpose of the fair notice requirement is to provide the opposing party with sufficient information to enable him to prepare a defense. *Horizon/CMS Healthcare Corp. v. Auld*, 34 S.W.3d 887, 897 (Tex. 2000). When a party fails to specially except to a pleading, "courts should construe the pleadings liberally in favor of the pleader." *Id.*

Appellants' complaint is limited to

- the fraud claim against Odela;
- the breach of contract claim against Jones;
- the DTPA claim against Jones; and
- the TTLA claim against Jones. [4]

We discuss each of the challenged pleadings in turn.

Fraud

Odela argues that DWM pleaded the fraud claim only against Jones, because DWM alleged that only Jones made false representations to DWM. Generally, a corporate officer's acts on the corporation's behalf are deemed to be acts of the corporation. *Walker v. Anderson*, 232

[4] Odela and Jones do not challenge DWM's pleading of (1) the fraud claim against Jones; (2) the breach of contract claim against Odela; (3) the TTLA claim against Odela; or (4) the conversion claim against each appellant.

S.W.3d 899, 918 (Tex. App.—Dallas 2007, no pet.). In addition, DWM's pleading alleges that Jones made misrepresentations about the work Odela had performed and the accounting he prepared on Odela's behalf. Therefore, DWM's pleading gave fair notice that DWM sought to recover from both Jones and Odela for Jones's misrepresentations on Odela's behalf.

Breach of contract

Jones asserts that only Odela was a party to the contract, and complains that DWM did not plead any theories for piercing the corporate veil as a basis for Jones's individual liability. DWM's pleadings, however, allege that Jones committed fraud through use of the corporation:

> Due to Jones assertions and promise of a refund payment, Plaintiff did delay legal action, first to attempt to contact and verify names and amounts paid to subcontractors, and second to await payment of the refund; **and during such delay Defendant Jones, as sole member of Odela Group, LLC, did strip the entity of all assets, closed all accounts, and ceased doing business as Odela Group, LLC, thus making a judgment on a breach of contract claim against Odela one that cannot be collected.**

(Emphasis added). Although DWM did not use the terms "alter ego," "corporate veil," or similar language, it can be reasonably inferred that it sought to recover its damages from Jones individually because of Jones's fraudulent stripping of the entity. *See Schlueter v. Carey*, 112 S.W.3d 164, 168 (Tex. App.—Fort Worth 2003, pet. denied) (pleading gave fair and adequate notice of alter ego and sham to perpetrate fraud where plaintiff alleged individual did not operate corporation as separate legal entity and used corporation to shield himself from liability).

Construing the pleading liberally in DWM's favor as we must, we conclude DWM's petition gave Odela and Jones fair notice that DWM sought to hold Jones liable for Odela's breaches because Jones used Odela for fraudulent purposes.

DTPA[5]

Jones asserts that DWM "did not specify Odela or Jones" in its DTPA claim, but "based on a plain reading of the amended petition, it may only be reasonably inferred" that DWM pleaded its DTPA claim against only Odela. We disagree. "Count 4–DTPA" of DWM's petition includes the allegation, in paragraph 56, that "Defendants are an individual and a corporation that can be sued under the DTPA." Although some of the other allegations in Count 4 refer to "defendant" in the singular, paragraph 56 makes clear that the claim is alleged against both defendants. In addition, Count 4 incorporates the factual allegations set forth in the previous sections of the petition, which include complaints of wrongful conduct on the part of both defendants. Because Jones did not specially except to this pleading, we construe it liberally in DWM's favor. *Horizon/CMS Healthcare Corp.*, 34 S.W.3d at 897. We conclude DWM's pleading of its DTPA claim against Jones was sufficient.

TTLA[6]

Jones again asserts that DWM pleaded its TTLA claim only against Odela and failed to plead any theory for piercing the corporate veil to impose liability on him individually, but "[i]t is a longstanding rule in Texas that a corporate agent is personally liable for his own fraudulent or tortious acts, even when acting within the course and scope of his employment." *Cimarron Hydrocarbons Corp. v. Carpenter*, 143 S.W.3d 560, 564 (Tex. App.—Dallas 2004, pet. denied). It is not necessary to pierce the corporate veil in order to impose personal liability on a corporate officer as long as it is shown that the officer knowingly participated in the wrongdoing. *Walker*, 232 S.W.3d at 918. Although DWM's claim under the TTLA is pleaded against "Defendant" in the singular, the cause of action incorporates all of the preceding paragraphs of the petition by

[5] TEX. BUS. & COM. CODE ANN. §§ 17.41–17.63 (West 2011 & Supp. 2016).

[6] TEX. CIV. PRAC. & REM. CODE ANN. §§ 134.001–134.005 (West 2011 & Supp. 2016).

reference, including those alleging wrongful conduct on the part of both defendants. Further, neither Odela nor Jones specially excepted to this pleading. We therefore construe it liberally in DWM's favor. *Horizon/CMS Healthcare Corp.*, 34 S.W.3d at 897. We conclude DWM's pleading of its TTLA claim was sufficient.

Conclusion

DWM's fraud claim against Odela, and its breach of contract, DTPA, and TTLA claims against Jones were sufficiently pleaded to give Jones and Odela fair notice of those claims. We decide Odela's and Jones's first and second issues against them.[7]

LIABILITY AND DAMAGES

In their third, fourth, and eighth issues, Odela and Jones challenge the sufficiency of the evidence to support the trial court's summary judgment on liability and final judgment awarding damages to DWM. The trial court's summary and final judgments both specify that they are rendered on DWM's claims for "breach of contract, conversion,[8] fraud, theft of property and violation of DTPA." We address these issues under the applicable standards of review.

In support of its motion for summary judgment, DWM relied on the deemed admissions and on Renouard's affidavit. DWM also submitted evidence of its attorney's fees by the affidavit of its attorney. Deemed admissions may be employed as proof, and where the admissions fully support each element of a cause of action, they will fully support a judgment on the cause of action. *Oliphant Fin., LLC v. Galaviz*, 299 S.W.3d 829, 838 (Tex. App.—Dallas 2009, no pet.); *see also* TEX. R. CIV. P. 198.2(c) (if response to request for admissions not timely served, request is considered admitted without necessity of court order).

[7] In their fifth and sixth issues, Jones and Odela assert that the trial court erred by rendering the final judgment. They rely on the pleading deficiencies we have discussed to support their argument that the trial court improperly rendered judgment on DWM's fraud claim against Odela and on all of DWM's claims against Jones. Because we have rejected these arguments, we also decide these issues against Odela and Jones.

[8] Because we conclude in our discussion below that the evidence was sufficient to support the judgment against appellants on DWM's causes of action for breach of contract, fraud, and DTPA violations, we need not address DWM's cause of action for conversion. As we have explained, we may affirm the trial court's judgment if any of the theories presented and preserved are meritorious. *Joe*, 145 S.W.3d at 157.

Breach of contract

Odela contends there was no evidence that any damages were caused by Odela's breach. Assuming that evidence of causation of some damages was required to establish DWM's right to summary judgment as to Odela's liability on DWM's breach of contract claim, we disagree with Odela's contention.[9] Although not evidence, DWM's petition details specific amounts of damages it suffered as a result of Odela's breaches of the contract, as well as Odela's refusal to pay those amounts when DWM demanded them. In Requests for Admission 26 and 27, Odela admitted that DWM made a written demand for the sums sought in the petition, and that Odela refused to pay. Odela further admitted that it executed a written contract with DWM and that it did not substantially or timely perform its contractual obligations. Odela also admitted that the work was not completed as agreed upon, and the defects in the work were not corrected. Renouard's affidavit also addresses causation, stating that DWM has suffered harm including "additional monies spent to finish and correct the work the Defendants were to perform." The summary judgment record, therefore, contained uncontroverted evidence that Odela's breach of contract caused damages to DWM. No fact issue existed to preclude summary judgment.

Jones contends that because he was not a party to the contract between Odela and DWM, he is not liable for breach of the contract. However, in the deemed admissions, Jones[10] admitted that (1) he executed a written contract with DWM; (2) DWM performed all of its contractual obligations; (3) he did not timely or substantially perform his contractual obligations; and (4) he refused to pay the damages demanded by DWM. These admissions were conclusively

[9] DWM moved for and obtained summary judgment only on liability for each of its pleaded theories. To the extent Odela challenges the summary judgment on liability because DWM did not establish causation for each item of damages, such relief was not granted in the trial court's summary judgment but instead was determined at final trial. As we discuss below, Renouard testified at trial regarding the damages incurred by DWM as a result of Odela's breach. Our discussion here addresses whether, in the summary judgment record, there was a genuine issue of material fact that Odela's breaches of contract caused any damages to DWM.

[10] The admissions refer to "defendants" in the plural and thus include both Jones and Odela.

established as true, and Jones may not contradict them. *Oliphant Fin., LLC*, 299 S.W.3d at 838. The admissions support the trial court's summary judgment based on them. *Id.*

We conclude DWM established its right to summary judgment as a matter of law on its claims for breach of contract against both Jones and Odela.

Fraud

Odela argues there is no evidence that it made any representations to DWM. Jones denies he made any misrepresentations in his individual capacity. We disagree with both propositions. A corporate officer's acts on the corporation's behalf are deemed to be acts of the corporation, and "[t]he law is well-settled that a corporate agent can be held individually liable for fraudulent statements or knowing misrepresentations even when they are made in the capacity of a representative of the corporation." *Kingston v. Helm*, 82 S.W.3d 755, 759 (Tex. App.—Corpus Christi 2002, pet. denied). The summary judgment record contained uncontroverted evidence, in both the deemed admissions and Renouard's affidavit, of material misrepresentations made by Jones and Odela on which DWM relied to its detriment. We conclude the trial court did not err by granting summary judgment for DWM on its fraud claims against Jones and Odela.

DTPA

Odela and Jones argue that summary judgment was not proper on DWM's DTPA claims, because DWM did not provide evidence of a breach of warranty that was a producing cause of damages. Jones also argues "DWM provided no competent summary judgment evidence that Jones can be sued under the DTPA." Each of these matters, however, was addressed in the summary judgment record in the deemed admissions. Defendants admitted they made a workmanship warranty; the work was not completed as agreed upon; they failed to correct the defects in response to DWM's complaints; they are not exempt from suit under the DTPA; and

they failed to tender damages as demanded by DWM. These admissions were conclusively established as true, and they support the trial court's summary judgment based on them. *Oliphant Fin., LLC*, 299 S.W.3d at 838. We conclude the trial court did not err by granting summary judgment against Jones and Odela for violation of the DTPA.

Jones and Odela also argue that "[t]he transaction made the basis of DWM's DTPA claim was an exempt transaction, as it involved more than $500,000 and was not for a 'consumer residence,'" citing section 17.49(g) of the Texas Business & Commerce Code.[11] But they do not attempt to explain why the transaction was exempt. Their allegation might have been based on some of the dollar amounts alleged in DWM's petition, or by adding together various dollar amounts of services rendered, or by some other method. They do not cite anything in the record about this. DWM's motion for summary judgment requested, and the trial court awarded, recovery based on a dollar amount of consideration below the 17.49(g) limit. Jones and Odela do not explain why those dollar amounts were incorrect. In a restricted appeal, error must be apparent on the face of the record, *Alexander*, 134 S.W.3d at 848, but the error that might form the basis of appellants' complaint regarding section 17.49(g) is not.

Nor do Jones and Odela explain how any error could have been preserved for our review. Perhaps some dollar amount in DWM's petition is a judicial admission that the transaction violated the 17.49(g) cap, and perhaps—*somehow*—that admission became part of the summary judgment record. Or maybe there was no judicial admission on this issue at all, because the dollar amounts in DWM's petition were simply assertions of fact rather than intentional acts of waiver. Jones and Odela say nothing about these and other crucial issues. They do not cite any relevant legal authorities to support their position or explain how those authorities apply.

[11] Section 17.49(g) provides, "[n]othing in this subchapter shall apply to a cause of action arising from a transaction, a project, or a set of transactions relating to the same project, involving total consideration by the consumer of more than $500,000, other than a cause of action involving a consumer's residence." TEX. BUS. & COM. CODE ANN. § 17.49(g) (West Supp. 2016).

"Appellate courts must construe the Texas Rules of Appellate Procedure reasonably, yet liberally, so that the right to appeal is not lost by imposing requirements not absolutely necessary to effect the purpose of a rule," *Dunmore v. Chicago Title Ins. Co.*, 400 S.W.3d 635, 643–44 (Tex. App.—Dallas 2013, no pet.), and so that they "reach the merits of an appeal whenever possible." *Dugan v. Compass Bank*, 129 S.W.3d 579, 581 (Tex. App.—Dallas 2003, no pet.). Nonetheless, "[t]he appellate court has no duty to brief issues for an appellant." *Gonzalez v. VATR Constr. LLC*, 418 S.W.3d 777, 783 (Tex. App.—Dallas 2013, no pet.). As we explained in *Gonzalez*, "an appellant must provide such a discussion of the facts and the authorities relied upon as may be requisite to maintain the point at issue." *Id.* at 784. "Appellate courts must construe briefing requirements reasonably and liberally, but a party asserting error on appeal still must put forth some specific argument and analysis showing that the record and the law support his contention." *Id.*

Rule 38.1(i) of Texas Rules of Appellate Procedure requires that a brief "contain a clear and concise argument for the contentions made, with appropriate citations to authorities and to the record." TEX. R. APP. P. 38.1(i). Because appellants fail to provide a clear and concise argument with appropriate citations to authorities and to the record regarding the application of section 17.49(g), and because no error is apparent on the face of the record, this portion of appellants' fourth issue presents nothing for us to decide and is overruled. *Id.*; *Gonzalez*, 218 S.W.3d at 784; *Alexander*, 134 S.W.3d at 848.

TTLA

Odela and Jones contend that there was no summary judgment evidence of their intent to appropriate DWM's property. We agree. The TTLA provides, "[a] person who commits theft is liable for the damages resulting from the theft." TEX. CIV. PRAC. & REM. CODE ANN. § 134.003(2) (West 2011). The act defines "theft" as "unlawfully appropriating property or

unlawfully obtaining services as described by Section 31.03, 31.04, 31.06, 31.07, 31.11, 31.12, 31.13, or 31.14, Penal Code." *Id.* § 134.002(2) (West Supp. 2016). Each of the penal code sections made the basis for liability under the TTLA requires intent. *See, e.g.,* TEX. PEN. CODE ANN. § 31.03(a) (West Supp. 2016) ("A person commits an offense if he unlawfully appropriates property with intent to deprive the owner of property."). The time at which the intent must be established is at the time of appropriation of the property. *See McCullough v. Scarbrough, Medlin & Assocs., Inc.*, 435 S.W.3d 871, 906 (Tex. App.—Dallas 2014, pet. denied) ("The relevant 'intent to deprive' [under the TTLA] is the person's intent at the time of the taking.").

In both civil and criminal law, absent a direct admission, intent is usually inferred from circumstantial evidence. *See, e.g., Guevara v. State*, 152 S.W.3d 45, 50 (Tex. Crim. App. 2004) ("Intent may also be inferred from circumstantial evidence such as acts, words, and the conduct of the appellant."). On the other hand, even a factfinder at trial may not violate the equal inference rule by drawing an inference of an ultimate fact such as intent where the same "meager circumstantial evidence" gives rise to other equally probable inferences. *See Hancock v. Variyam*, 400 S.W.3d 59, 70–71 (Tex. 2013) (equal, alternative inferences to letter damaging reputation). When reviewing a summary judgment, we are obligated to draw all inferences and resolve any doubts in the nonmovant's favor. *Cantey Hanger, LLP v. Byrd*, 467 S.W.3d 477, 481 (Tex. 2015).

DWM pleaded that it paid $350,000 to "Defendants," which "Defendant" unlawfully appropriated by keeping the money "for work they never performed," in violation of the TTLA. DWM relies on the deemed admissions and Renouard's affidavit to support summary judgment on this claim. Requests 26, 27 and 37, and paragraph 7 of Renouard's affidavit appear to offer the only possibly relevant summary judgment evidence:

> REQUEST 26: Plaintiff made a written demand for the sum sought in Plaintiff's original petition more than 30 days before Plaintiff filed suit.

> REQUEST 27: Defendant refused to pay Plaintiff the sum sought in the written demand referred to in Request for Admission 26.
>
> REQUEST 37: Defendants did not tender to Plaintiff, within 30 days of receiving the presuit notice, the claimed amount of Plaintiff's economic damages, mental-anguish damages, and expenses, including attorney fees, reasonably incurred in asserting the claim.
>
> [Renouard's affidavit] 7. The monies used to pay the Defendants was the personal property of the Plaintiff.

To establish DWM's TTLA claim from this evidence, we must infer, in DWM's favor, that: (1) Odela and Jones appropriated DWM's property; and (2) at the time of the taking, Jones and Odela intended to deprive DWM of its property. *See McCullough*, 435 S.W.3d at 906 (TTLA claim requires proof of intent at time of taking). Our obligation here, however, is to draw all reasonable inferences and resolve any doubts in Odela's and Jones's favor. *Cantey Hanger, LLP*, 467 S.W.3d at 481. An equal inference from this summary judgment evidence is that Jones and Odela had no intent to unlawfully deprive DWM of its property, but instead intended to retain only an amount fairly compensating them for the work they performed. Given these equal inferences, summary judgment for DWM on its TTLA claim was not proper.

Usually when we reverse a judgment on a theory of recovery and a party prevailed on other theories of recovery, we would remand for the prevailing party to re-elect the recovery of its choice. *Boyce Iron Works, Inc. v. Sw. Bell Tel. Co.*, 747 S.W.2d 785, 787 (Tex. 1988) ("When the jury returns favorable findings on two or more alternative theories, the prevailing party need not formally waive the alternative findings. That party may seek recovery under an alternative theory if the judgment is reversed on appeal."). That is because trial courts should require the prevailing party to elect its greatest or preferred recovery when it obtains recovery on multiple theories pertaining to the same facts constituting double recovery. *See Weeks Marine, Inc. v. Salinas*, 225 S.W.3d 311, 322 (Tex. App.—San Antonio 2007, pet. dism'd). But here the trial court did not require DWM to elect its remedy, the trial court did not award a double

recovery, and Odela and Jones did not complain on appeal about the judgment awarding a single award on each of DWM's causes of action. Where there is no purpose to remand for a re-election of remedy, we render judgment that DWM take nothing on its TTLA claim, but affirm the judgment as modified.

Damages

We next consider the sufficiency of the evidence admitted at trial to support the damages awarded to DWM in the judgment. The trial court awarded DWM:

- $275,000 for payment made for work never performed;
- $66,632.05 for repairs to the work performed by the Defendants;
- $164,700 in lost rents for the property;
- treble damages under the DTPA in the amount of three times the actual damages, in the amount of $1,518,996.15;
- reasonable and necessary attorney's fees in the amount of $12,636.90 for prosecution of the case through judgment, and additional amounts for bill of review and appeals; and
- interest and costs.

Evidence of each of these amounts was admitted at the hearing on DWM's damages. Renouard testified; DWM offered exhibits supporting the amounts claimed; and DWM's attorney offered evidence of the reasonable and necessary attorney's fees incurred by DWM. The exhibits included:

- the parties' contract, showing the parties' agreement that "[t]he work is to be completed in a substantial workmanlike manner";
- Odela's invoices to DWM and the supporting bank documentation showing that draws of $150,000 and $250,000 had been wired to Odela under the parties' contract;
- a written "proposal" by Renouard to Odela, prepared in an attempt to resolve the parties' dispute, showing that DWM had paid Odela $350,000, but Odela had performed work worth only $70,101, so that the "amount due" as a refund was $279,899;

- Odela's counteroffer of a refund of $163,184.78, showing DWM's payment of $350,000, but valuing the work performed by Odela at $186,815.22;
- the lease agreement and amendments reflecting the monthly rent for the property during the relevant time period;
- a spreadsheet showing amounts paid by DWM to repair the work performed by Odela; and
- an affidavit from DWM's attorney testifying to the reasonableness and necessity of fees DWM incurred, attaching a spreadsheet showing the dates, descriptions of work performed, time spent, and fees incurred in prosecuting the case.

Renouard identified each of these exhibits and answered numerous questions from counsel and the trial court about the amounts reflected. He explained that his proposal to Odela regarding the value of the work Odela had performed on the site was based on estimates Renouard requested and received from roofing and painting experts. Renouard explained that he proposed to pay Odela a total of $56,081 for labor, materials, and paint for the roof, as well as equipment rental and labor for cleanup, plus management overhead of 25 percent. He testified that Jones made the counteroffer valuing Odela's work at $186,815.22. Renouard further explained that he investigated Jones's backup for this work and found that "effectively none of the people were real, and they were all made up. No one had worked in Dallas County or in any of the other surrounding counties. The list was entirely made up."

Renouard testified to the terms of the lease agreement between DWM and the tenants of the building. He explained that the building was "non-leasable" after the fire, but also explained that DWM was seeking lost rent only from the period after Odela was to have completed its work under the contract through the time DWM completed its repair of Odela's work. And using the spreadsheet admitted into evidence, Renouard explained the amounts DWM had spent "to repair what Odela did" as the result of Odela's "shoddy labor," totaling at least $66,000.

DWM offered evidence to support each of the amounts awarded as actual damages in the trial court's judgment. Odela and Jones are liable for these damages as a result of their breaches

of contract, fraud, and violations of the DTPA. *See SAVA gumarska in kemijska industria d.d. v. Advanced Polymer Sciences, Inc.*, 128 S.W.3d 304, 317 n. 6 (Tex. App.—Dallas 2009, no pet.) (discussing measure and purpose of damages for breach of contract); *Formosa Plastics Corp. USA v. Presidio Eng'g & Contractors, Inc.*, 960 S.W.2d 41, 49 (Tex. 1998) (discussing measures of damages for common law fraud); *Henry S. Miller Co. v. Bynum*, 836 S.W.2d 160, 162–63 (Tex. 1992) (discussing measures of damages under DTPA). Under the applicable measures, there is sufficient evidence to support the judgment's award of $275,000.00 for payment made for work never performed, $66,632.05 for repairs to the work that was performed, and $164,700.00 for lost rent under an existing lease. In addition, the trial court could award DWM treble damages under the DTPA. TEX. BUS. & COM. CODE ANN. § 17.50(b)(1). Jones and Odela's argument that the evidence is insufficient to support the trial court's treble damage award is based solely on their contention that there was "insufficient evidence as to each element of actual damages awarded by the trial court." Because we have concluded that the evidence supports the actual damages awarded, we reject Jones's and Odela's challenge to the treble damage award.

DWM may recover its attorney's fees against both Odela and Jones under the DTPA. *See* TEX. BUS. & COM. CODE ANN. § 17.50(d) (under DTPA, prevailing consumer may recover court costs and reasonable and necessary attorney's fees). DWM may also recover its attorney's fees from Odela and Jones under section 38.001(8) of the Texas Civil Practice and Remedies Code based on its claim for breach of contract. We decide Odela's and Jones's eighth issue against them.

CONCLUSION

We conclude that DWM's pleadings were sufficient to give both Jones and Odela fair notice of DWM's claims for breach of contract, fraud, DTPA violations, and theft of property.

We further conclude that DWM proffered sufficient evidence to support the trial court's judgment on DWM's claims for breach of contract, fraud, and violation of the DTPA, but not on its claim under the TTLA. Accordingly, we reverse the trial court's judgment as to DWM's TTLA claim and render judgment that DWM take nothing on that claim. In all other respects, we affirm the trial court's judgment.

/Jason E. Boatright/
JASON E. BOATRIGHT
JUSTICE

160206F.P05

Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

ODELA GROUP, LLC AND KEVIN LEE JONES, Appellants

No. 05-16-00206-CV V.

DOUBLE-R WALNUT MANAGEMENT, L.L.C., Appellee

On Appeal from the 44th Judicial District Court, Dallas County, Texas
Trial Court Cause No. DC-14-03546.
Opinion delivered by Justice Boatright; Justices Evans and Stoddart, participating.

In accordance with this Court's opinion of this date, the judgment of the trial court is **AFFIRMED** in part and **REVERSED** in part. We **REVERSE** that portion of the trial court's judgment in favor of appellee Double-R Walnut Management, L.L.C. on its theft of property claim, and **RENDER** judgment that appellee take nothing on that claim. In all other respects, the trial court's judgment is **AFFIRMED**.

It is **ORDERED** that appellee Double-R Walnut Management, L.L.C. recover its costs of this appeal from appellants Odela Group, LLC and Kevin Lee Jones.

Judgment entered this 12th day of April, 2017.