AFFIRM; and Opinion Filed April 18, 2017.

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-16-00268-CV

RADIANT FINANCIAL, INC., Appellant
V.
FAYE BAGBY, BAGBY INVESTMENTS, LP, AND AMERICAN FINANCIAL & RETIREMENT SERVICES, LLC, Appellees

On Appeal from the 191st Judicial District Court
Dallas County, Texas
Trial Court Cause No. DC-13-06046-J

MEMORANDUM OPINION

Before Justices Bridges, Evans, and Schenck
Opinion by Justice Schenck

Radiant Financial, Inc. ("Radiant") appeals from a judgment in favor of appellees Faye Bagby ("Ms. Bagby"), Bagby Investments, LP ("Bagby Investments"), and American Financial & Retirement Services, LLC ("AFRS") (collectively, "appellees"), which the trial court entered notwithstanding the verdict. Radiant contends the trial court erred because the evidence was legally sufficient to support a judgment, including injunctive relief, on the jury's findings of breach of contract, tortious interference with contract, violation of the Texas Theft Liability Act,[1] misappropriation of trade secrets, and conspiracy. Appellees respond the evidence was legally insufficient to support the jury's findings and argue by cross-points of appeal (1) that the

[1] Radiant brought suit under a prior version of the Texas Theft Liability Act, which included in its definition of "theft" section 31.05 of the Texas Penal Code. TEX. CIV. PRAC. & REM. CODE ANN. § 134.002(2) (West 2012); TEX. PENAL CODE ANN. § 31.05 (West 2016) (criminalizing theft of trade secrets).

evidence was factually insufficient to support the jury's findings and (2) that even assuming Radiant is entitled to some damages, the award should be no more than the percentage the jury found appellees responsible less the settlement credit. We affirm the trial court's judgment. Because all issues are settled in law, we issue this memorandum opinion. TEX. R. APP. P. 47.4.

FACTUAL BACKGROUND

Radiant is in the business of structuring and selling fractional interests in life settlements, an investment product derived from life-insurance policies. To aid in its business, Radiant created several documents including its Life Settlement Interests Purchase and Sale Agreement ("PSA"), a form an investor is required to execute. Once Radiant accepts the proposed investment, the investor deposits funds into an escrow account and may elect during the ensuing twelve-month period to invest in a life-insurance policy or policies from Radiant's inventory as they become available.

To market its life-settlement products to potential investors, Radiant contracts with independent financial professionals as its sales representatives. The sales representatives then offer the product to investors and assist the investors with making the investment decision, completing investment documents, and finishing their investments with Radiant. The sales representatives are paid a commission after the completion of each transaction they facilitate. The sales representatives are not barred from doing business with other investment providers, but under the governing Radiant Sales Representative Agreement ("SRA"), they agree they will only reveal Radiant's confidential information and trade secrets to people who need to see it "for the purpose of discussing, evaluating or effect" an investment transaction with Radiant. Sales representatives agree to "take all necessary and appropriate precautions to avoid [its] unauthorized disclosure."

Ms. Bagby had been involved in the life-settlement business for many years before 2011 when she became a sales representative for Radiant and executed an SRA as owner of Bagby Investments. In February 2013, Ms. Bagby reached out to Mosaic Management Group, Inc. ("Mosaic") to purchase fractional interests in life policies. At that time, Mosaic was not in the business of selling fractional interests in life-insurance policies, but its representatives had been contemplating setting up a Texas corporation in order to do so. Jon Lippard, Mosaic's general counsel, asked Ms. Bagby to send him redacted documents from a sample closed transaction to see how the transactions were structured, to understand what forms were necessary to comply with applicable laws, and to determine whether there were requirements unique to Texas. Ms. Bagby responded by sending Mosaic a package of Radiant's documents.

In April 2013, fifty-nine investors who had been introduced to Radiant by Ms. Bagby, had executed PSAs with Radiant, and placed funds in escrow were interested in placing their funds in a particular policy offered by Radiant and valued at $8 million. But on the day of the planned closing, the seller backed out of the deal. Ms. Bagby approached Radiant about letting the investors out of their PSAs early, which Radiant agreed to do. Ms. Bagby informed Radiant she was considering pursuing investments for these investors from other sources, at which point Radiant sent an email to Ms. Bagby reminding her of her confidentiality obligations. Ms. Bagby forwarded to Mosaic the forms the fifty-nine investors had completed for Radiant. On April 25, 2013, Mosaic launched Paladin, a Texas life-settlement company. Nineteen of the fifty-nine investors Radiant released from their PSAs chose to invest in Paladin.

In May 2013, Radiant learned of Paladin and that it was using documents that looked much like its own. Radiant suspected Ms. Bagby had provided Paladin with Radiant's documents, so it terminated her SRA and demanded that she return "all written and tangible Radiant Financial Proprietary Information" pursuant to the SRA.

PROCEDURAL BACKGROUND

Radiant filed suit against Ms. Bagby, Bagby Investments, AFRS, Mosaic, and Paladin, asserting, among other claims, breach of contract, violation of the Texas Theft Liability Act, misappropriation of trade secrets, and conspiracy.[2] Ms. Bagby brought counterclaims against Radiant for breach of contract and attorney's fees, fraud by nondisclosure, and negligent misrepresentation. Mosaic and Paladin entered into a settlement agreement with Radiant before trial. Before trial, Ms. Bagby nonsuited her claim for breach of contract and attorney's fees.

After the close of the evidence but before submitting the case to the jury, the trial court directed a verdict dismissing Radiant's claim for breach of fiduciary duty and dismissing Ms. Bagby's counterclaims for fraud by nondisclosure and negligent misrepresentation. The trial court submitted the remaining claims to the jury who found appellees had misappropriated Radiant's trade secrets and engaged in a conspiracy, found Ms. Bagby and Bagby Investments breached their contract with Radiant, and awarded $152,916 in damages to Radiant. The jury further found appellees were likely to use or disclose Radiant's trade secrets or confidential information in the future without permission. Finally, the jury unanimously found Ms. Bagby and Bagby Investments acted with malice. After a second charge was submitted to the jury, the jury awarded Radiant $600,000 in attorney's fees for trial, plus appellate fees, and—based on its malice finding—awarded $150,000 in exemplary damages against Ms. Bagby.

Radiant moved for judgment on the jury's verdict and a permanent injunction based on the jury's finding that appellees were likely to misuse Radiant's trade secrets or confidential information in the future. Appellees moved for judgment notwithstanding the verdict, which the trial court granted. The trial court entered a take-nothing judgment against Radiant in appellees' favor.

[2] Radiant alleged Ms. Bagby acted at all times in her capacity as an individual or as an owner of Bagby Investments or AFRS.

On appeal, Radiant argues legally sufficient evidence supports the jury's findings in accordance with the verdict and seeks a judgment awarding Radiant damages, exemplary damages, and attorney's fees. Radiant also contends it is entitled to a permanent injunction based on the jury's finding that Ms. Bagby and Bagby Investments violated the SRA. Appellees counter that the evidence is not legally sufficient to support the jury's findings and raise cross-issues arguing alternatively that the evidence was factually insufficient to support the jury's findings and that even assuming Radiant is entitled to damages, the award should be no more than the percentage the jury found appellees responsible less the settlement credit.

DISCUSSION

I. Jury's Finding of Lost-Profits Damages

The only basis Radiant presented for damages is that of lost profits. In each of the questions presented to the jury regarding what sum of money would fairly and reasonably compensate Radiant for its damages, the jury was asked to "[c]onsider the profit that Radiant Financial lost" as a result of Ms. Bagby's and Bagby Investments's failure to comply with the SRA and appellees' misappropriation of Radiant's trade secrets.[3]

Radiant argues there was legally sufficient evidence to support the amount of lost-profits damages the jury awarded. According to Radiant, its expert Scott Barnes reasonably used the most recent five policies that Ms. Bagby's clients had selected to calculate the profits Radiant would have earned had the nineteen investors chosen to remain with Radiant rather than invest in Paladin. Radiant contends the record contains significant additional evidence to support Mr. Barnes's decision to use the last five policies in which Ms. Bagby's clients had invested. Radiant also argues that the record contains sufficient evidence to support Mr. Barnes's

[3] The jury was also asked to determine an amount of exemplary damages based on its finding that Ms. Bagby and Bagby Investments acted with malice. We will address exemplary damages *infra* in Section II.

assumptions that Radiant would have had sufficient policies available and the nineteen investors would have closed with Radiant but for appellees' wrongful conduct.

Appellees counter that Radiant failed to prove an amount of lost profits with reasonable certainty. Appellees find fault not with Radiant's expert's methodology, but with his reliance on unverified assumptions. Appellees contend Radiant's expert's testimony was premised on speculation and Radiant's assertions. Alternatively, appellees argue the evidence is factually insufficient to establish the amount of damages and a new trial on damages is appropriate.

A. Standards of Review

We review challenges to a trial court's ruling on a motion for judgment notwithstanding the verdict under the same legal-sufficiency test applied to appellate no-evidence challenges. *City of Keller v. Wilson*, 168 S.W.3d 802, 822–23, 827 (Tex. 2005). The test for legal sufficiency must always be whether the evidence at trial would enable reasonable and fair-minded people to reach the verdict under review. *Id.* at 827. We view the evidence in the light most favorable to the verdict, crediting favorable evidence if reasonable jurors could, and disregarding contrary evidence unless reasonable jurors could not. *Id.* at 807. Evidence is legally insufficient when (a) evidence of a vital fact is completely absent; (b) the court is barred by rules of law or of evidence from giving weight to the only evidence offered to prove a vital fact; (c) the evidence offered to prove a vital fact is no more than a mere scintilla; or (d) the evidence establishes conclusively the opposite of the vital fact. *Id.* at 810.

When reviewing an assertion that the evidence is factually insufficient to support a finding, we set aside the finding only if, after considering and weighing all of the evidence in the record pertinent to that finding, we determine that the credible evidence supporting the finding is so weak, or so contrary to the overwhelming weight of all the evidence, that the answer should

be set aside and a new trial ordered. *Crosstex N. Tex. Pipeline, L.P. v. Gardiner*, 505 S.W.3d 580, 615 (Tex. 2016).

B. Applicable Law of Lost Profits

Lost profits can be recovered as consequential damages only when the amount is proved with reasonable certainty. *Phillips v. Carlton Energy Grp., LLC*, 475 S.W.3d 265, 278 (Tex. 2015). Proof need not be exact, but neither can it be speculative. *Id.* The reasonable-certainty requirement is intended to be flexible enough to accommodate the myriad circumstances in which claims for lost profits arise. *Id.* But profits that are largely speculative, as from an activity dependent on uncertain or changing market conditions, cannot be recovered. *See id.* What constitutes reasonably certain evidence of lost profits is a fact-intensive determination. *Id.* at 279. In the cases where recoveries of lost profits were upheld, the claim of lost profits was not hypothetical or hopeful, but substantial in the circumstances. *Id.*

At a minimum, opinions or estimates of lost profits must be based on objective facts, figures, or data from which the amount of lost profits can be ascertained. *Id.* Though the breach or tort may be clear, profits not susceptible of being established by proof to the degree of certainty that the law demands cannot be recovered as damages. *Id.* If no evidence is presented to prove lost profits with reasonable certainty, the trial court must render a take-nothing judgment as to lost-profits damages. *Barton v. Resort Dev. Latin Am., Inc.*, 413 S.W.3d 232, 236 (Tex. App.—Dallas 2013, pet. denied).

C. Evidence of Lost Profits

Radiant presented the majority of its evidence of lost profits through its expert Mr. Barnes. Mr. Barnes focused on the nineteen investors Ms. Bagby placed with Paladin after requesting Radiant release them from their PSAs to determine the amount of profit Radiant would have made if the nineteen investors had invested with Radiant instead of Paladin. Mr.

Barnes used a yardstick approach, which involves a comparison of similar transactions to create a benchmark, or "yardstick," against which to measure a hypothetical transaction's profitability. As his yardstick, Mr. Barnes used the last five policies in which Ms. Bagby's clients had invested before Radiant terminated her SRA. Mr. Barnes testified he used these five policies after discussion with Radiant management because they were "more indicative of the economics" Radiant's management thought would have existed shortly after the ending of Ms. Bagby's relationship with Radiant. He also relied on Radiant management to select policies that met Ms. Bagby's criteria for her investors, which he understood to be policies with shorter terms and lower risk. Mr. Barnes then calculated the average profit margin for the five policies and then multiplied it by the total amount of funds the nineteen investors withdrew from Radiant. He then reduced that amount by additional variable costs and taxes to arrive at $152,900.

Mr. Barnes testified his analysis was based on the following assumptions. First, all nineteen investors that placed funds in policies with Paladin would have placed their funds in policies with Radiant if they had maintained their funds in escrow with Radiant. Mr. Barnes based this first assumption on his review of the historical transactions over the time period immediately before the nineteen investors withdrew their money from Radiant and on "[his] understanding that Radiant management had always been able to place policies with the investors." Second, Mr. Barnes assumed that Radiant would have had policies available during the relevant period that would meet Ms. Bagby's clients' criteria. Mr. Barnes based this second assumption on his discussion with Radiant management that they had the capability to meet the investors' demands. He also performed research on the market during 2012 and 2013 and determined that firms like Radiant required capital in order to "pull in" policies demanded by investors. His understanding was that if the investors Radiant released from their PSAs had instead maintained their investment funds with Radiant, then Radiant would have had sufficient

capital to attract policies for those investors to invest in. In addition to Mr. Barnes's testimony, Radiant's Vice President and Chief Compliance Officer Andrew Nall testified Radiant was able to secure policies to satisfy what its sales representatives were looking for. He also stated that after Radiant released the investors from their PSAs, Radiant had "plenty of other policies available."

Appellees point to the following evidence to argue Radiant failed to establish its amount of damages with reasonable certainty. Mr. Nall testified that at any given time, Radiant had as many as five to seven policies but also as few as none. Radiant's evidence of what policies were available in May, July, and August of 2013 showed it only had three, two, and one policy available, respectively. Mr. Nall also admitted that he knew that around February or March of 2013 Ms. Bagby was looking at competitors for other policies for her investors and that she wanted "more of a particular type of policy" than Radiant had at the time. Mr. Nall testified that in April 2013, after the acquisition of the $8 million policy failed to close, he met with Ms. Bagby to discuss whether Radiant would purchase additional policies that would meet her purchase parameters because with the loss of the $8 million policy, Radiant did not have appropriate policies.

The record contains conflicting testimony as to Ms. Bagby's criteria for policies, which appellees argue was not met by Radiant's inventory in early 2013, an argument Radiant disputes. Mr. Nall testified Ms. Bagby informed him she preferred to place investors in policies with life expectancies of less than five years, although she had placed investors with policies with life expectancies that were longer than five years, and he admitted that over time she had more of an interest in policies "that had a little bit shorter of the [life expectancies]." Peter Lott, who recruited sales representatives for Radiant, testified Ms. Bagby preferred policies with life expectancies ranging from single digits to less than 30 months. In support of appellees'

argument that Ms. Bagby and her investors preferred shorter life expectancies is the fact that the record contains agreements between Paladin and the nineteen investors who chose to invest in policies with Paladin with life expectancies ranging from 28 to 30 months. Further, the record reflects the policies Radiant had available in May, July, and August of 2013 had life expectancies ranging from 2.8 to 6.4 years, all of which were offered to and rejected by Ms. Bagby's investors.

Taken together and viewed in the light most favorable to the jury's verdict, the evidence does not show with any reasonable certainty that the nineteen investors who invested in policies with Paladin would have invested in any policies offered by Radiant but for the complained-of conduct of appellees. Radiant admits the five policies Mr. Barnes used in his estimate were not available at the time Radiant released the fifty-nine investors. Radiant argues that it had sufficient policies available, but none of the investors chose to invest in those policies, even though Radiant presented those policies to the investors. Further, even assuming Radiant had been able to acquire policies the nineteen investors would have been interested in, the only evidence on which Radiant's expert based his assumption that the nineteen investors would have closed with Radiant was his review of historical transactions in the time period *immediately before* the fifty-nine investors withdrew their funds and "[his] understanding that Radiant management had always been able to place policies with the investors." Thus, to conclude the nineteen investors would have invested with Radiant instead of Paladin, we would be required to stack assumption upon assumption, which we will not do. *See Barton*, 413 S.W.3d at 238. We conclude the trial court properly refused to award Radiant damages under the circumstances in this case.[4]

[4] Indeed, for each of the causes of action Radiant asserted, it must have proven it suffered harm resulting from the wrongful conduct in order to recover. *See Twister B.V. v. Newton Research Partners, LP*, 364 S.W.3d 428, 437 (Tex. App.—Dallas 2012, no pet.) (misappropriation of trade secrets); *Worldwide Asset Purchasing, L.L.C. v. Rent-A-Center E., Inc.*, 290 S.W.3d 554, 561 (Tex. App.—Dallas 2009, no pet.) (breach-

II. Exemplary Damages

Radiant argues the record contains sufficient evidence that appellees acted with malice, such that Radiant is entitled to exemplary damages. But a party may not recover exemplary damages unless the plaintiff establishes actual damages, which Radiant failed to do. *Burbage v. Burbage*, 447 S.W.3d 249, 263 (Tex. 2014).

III. Attorney's Fees

Radiant argues it is entitled to attorney's fees under the SRA and the Texas Theft Liability Act. As noted above, Radiant's claims failed because there was insufficient evidence of damages. Accordingly, Radiant cannot recover attorney's fees for breach of the SRA or for its claim under the Texas Theft Liability Act. *See MBM Fin. Corp. v. Woodlands Operating Co., L.P.*, 292 S.W.3d 660, 666 (Tex. 2009); *Glattly v. Air Starter Components, Inc.*, 332 S.W.3d 620, 641 (Tex. App.—Houston [1st Dist.] 2010, pet. denied).

IV. Permanent Injunction

In its final issue, Radiant argues it is entitled to a permanent injunction because of the jury's finding that appellees "will use or disclose" Radiant's trade secrets or confidential information in the future and because the SRA provides for injunctive relief.

To be entitled to a permanent injunction, a plaintiff must plead and prove (1) a wrongful act; (2) imminent harm; (3) irreparable injury; and (4) no adequate remedy at law. *Leibovitz v. Sequoia Real Estate Holdings, L.P.*, 465 S.W.3d 331, 350 (Tex. App.—Dallas 2015, no pet.). We review a trial court's grant or refusal of a permanent injunction to determine whether it clearly abused its discretion. *Id.* Under an abuse of discretion standard, the legal and factual

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of-contract claim); *Belz v. Belz*, 667 S.W.2d 240, 242–43 (Tex. App.—Dallas 1984, writ ref'd n.r.e.) (civil conspiracy). We note that although one of Radiant's remaining claims when the case went to the jury was tortious interference with a contract, Radiant admits that claim was not submitted to the jury and, in any event, required proof of actual damages. *See Searcy v. Parex Res., Inc.*, 496 S.W.3d 58, 91 (Tex. 2016) (tortious interference with a contract).

Because we conclude the trial court properly awarded appellees a take-nothing judgment against Radiant, we need not address appellees' cross-issues regarding damages. TEX. R. APP. P. 47.1.

sufficiency of the evidence are not independent grounds for reversal, but the sufficiency of the evidence is a relevant factor in determining whether the trial court had sufficient evidence to exercise its discretion. *Id.* at 350–51.

If there is more than a scintilla of evidence to support the finding, the evidence is legally sufficient. *Id.* at 351. But when the evidence offered to prove a vital fact is so weak as to do no more than create a mere surmise or suspicion of its existence, the evidence is no more than a scintilla and, in legal effect, is no evidence. *Id.* If the evidence furnishes a reasonable basis for differing conclusions by reasonable minds as to the existence of a vital fact, then there is legally sufficient evidence—more than a scintilla—to support the fact. *Id.* When reviewing the factual sufficiency of the evidence, we examine all the evidence and set aside a finding only if it is so contrary to the evidence as to be clearly wrong and unjust. *Id.* In conducting our review of both the legal and factual sufficiency of the evidence, we are mindful that the fact finder was the sole judge of the credibility of the witnesses and the weight to be given their testimony. *Id.* We may not substitute our judgment for the fact finder's, even if we would reach a different answer on the evidence. *Id.*

Even assuming without deciding the record contains evidence establishing a wrongful act and no adequate remedy at law, the only evidence of imminent harm or irreparable injury Radiant points us to in its brief is the following provision of the SRA.

> The Sales Representative hereby further covenants and agrees that any violation by the Sales Representative . . . of this Agreement shall cause immediate and irreparable injury to Radiant Financial for which there is no adequate remedy at law . . . .

We now review the record to determine whether the trial court had sufficient evidence to exercise its discretion. *See Leibovitz*, 465 S.W.3d at 350–51. When questioned at trial as to why Radiant requested an injunction, Mr. Nall responded that Radiant's documents "are very important to Radiant Financial" and that it was "important for Radiant Financial to stop any

further distribution or duplication or use of the documents." He stated the documents contained the information necessary to set up a life-settlement company, and that if that information was shared, Radiant would lose its competitive advantage.

Mr. Nall testified to at least four aspects of Radiant's business structure that were "unique" and that a competitor might glean from its documents. However, the record contains evidence establishing that either those aspects of Radiant's business structure were not unique or that they were not included in its documents. For example, Mr. Nall testified he knew of no other company than Radiant that made the escrow agent the sole owner under the policies it made available to its investors. But on cross-examination, one of Radiant's experts, Eddy Espinosa, stated that at least two of Radiant's competitors utilized an escrow agent as a policy holder. Mr. Nall also testified that although everyone in Radiant's industry uses life-expectancy estimates, Radiant took the extra step to obtain two estimates. Review of Radiant's documents reveals they either refer to one life expectancy estimate or provide for the possibility of more than one, instead of indicating more than one life expectancy estimate would be obtained for each policy. Additionally, Mr. Nall testified Radiant's practice of conducting its business solely within the state of Texas was unique and advantageous because structuring intrastate transactions of investment products allows Radiant to focus its compliance efforts on just Texas's laws, and not both state and federal laws. But Mr. Lippard testified when Mosaic contemplated forming Paladin they had already decided they wanted to do business solely in Texas because Mosaic's principals wanted to avoid subjecting Paladin to federal registration requirements. Mr. Nall also testified Radiant's ability to accept investment through qualified funds distinguished it from its competitors, but he admitted some of Radiant's competitors did accept qualified funds.

Finally, Radiant retained Mr. Espinosa to assess its products and its disclosures for purposes of determining whether they were distinguishable from Radiant's competitors and

whether that distinction, if any, provides a competitive market advantage to Radiant. Appellees retained their own expert, Michael Quilling, who testified he reviewed Radiant's documents and found nothing in them that would have provided an advantage to Radiant's competitors. Instead, Mr. Quilling testified the content of the documents was "not anything that's not well-known or easily determinable." He further elaborated that even the completed forms would not provide Radiant with a competitive advantage because the information would be unique to each policy.

On this record, we conclude the trial court did not abuse its discretion in denying Radiant's request for a permanent injunction. We resolve this final issue against Radiant.

CONCLUSION

We affirm the trial court's judgment.

/David J. Schenck/
DAVID J. SCHENCK
JUSTICE

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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

RADIANT FINANCIAL, INC., Appellant

No. 05-16-00268-CV V.

FAYE BAGBY, INDIVIDUALLY, AND BAGBY INVESTMENTS, LP, A LIMITED PARTNERSHIP, AMERICAN FINANCIAL & RETIREMENT SERVICES, LLC, A LIMITED LIABILITY COMPANY, Appellees

On Appeal from the 191st Judicial District Court, Dallas County, Texas
Trial Court Cause No. DC-13-06046-J.
Opinion delivered by Justice Schenck, Justices Bridges and Evans participating.

In accordance with this Court's opinion of this date, the judgment of the trial court is **AFFIRMED**.

It is **ORDERED** that appellees FAYE BAGBY, INDIVIDUALLY, AND BAGBY INVESTMENTS, LP, A LIMITED PARTNERSHIP, AMERICAN FINANCIAL & RETIREMENT SERVICES, LLC, A LIMITED LIABILITY COMPANY recover their costs of this appeal from appellant RADIANT FINANCIAL, INC.

Judgment entered this 18th day of April, 2017.