Affirm and Opinion Filed March 28, 2025

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-24-00431-CV

LARRY MCDONALD, Appellant
V.
FOUR RIVERS DEVELOPMENT, LLC D/B/A FOUR RIVERS POOLS, Appellee

On Appeal from the 471st Judicial District Court
Collin County, Texas
Trial Court Cause No. 471-05834-2021

MEMORANDUM OPINION

Before Justices Miskel, Garcia, and Lee
Opinion by Justice Lee

Appellant sued for breach of an Independent Contractor Agreement and a Promissory Note. Appellee countersued for breach of same. After a two-day bench trial, the trial court rendered a take-nothing judgment. We affirm.

BACKGROUND

On June 11, 2020, the parties entered into four written agreements to memorialize the purchase and sale of Metroplex Commercial Pools and its assets. Appellant Larry McDonald (McDonald), a sole proprietor, was the seller. Appellee Four Rivers Development, LLC's (Four Rivers) was the buyer. The documents were

signed on behalf of Four Rivers by the company's "manager," Justin Thurlkill (Thurlkill). The four documents executed by the parties were: (1) Asset Purchase and Sale Agreement (APA); (2) Promissory Note; (3) Bill of Sale and Assignment Agreement; and (4) Independent Contractor Agreement (ICA).

Under the APA, Four Rivers purchased Metroplex Commercial Pools and its assets[1] for $250,000.00, with $50,000.00 paid at closing and the remaining amount paid pursuant to the Promissory Note.

The APA contains a noncompete agreement, stating in pertinent part:

> **Section 8.01** For a period of five (5) years commencing on the Closing Date (the **'Restricted Period'),** [McDonald] shall not, directly or indirectly, (i) engage in or assist others in engaging in the Restricted Business in the Territory; (ii) have an interest in any person or entity that engages directly or indirectly in the Restricted Business in the Territory in any capacity, including as a partner, shareholder, member, employee, principal, agent, trustee or consultant; or (iii) cause, induce or encourage any material actual or prospective client, customer, supplier or licensor of the business known as Metroplex Commercial Pools (the 'Business') (including any existing or former client or customer of [McDonald] and any person or entity that becomes a client

[1] The Purchased Assets include, but are not limited to, the following:

- Phone numbers, emails, and gmail account related to 'Metroplex Commercial Pools' owned by Seller. The gmail account is associated with the following email: santalarrymc@gmail.com. The phone number is 469-323-4902.
- All customer accounts, including but not limited to all customer files and information, and goodwill attached thereto related to 'Metroplex Commercial Pools' owned by Seller.
- Exclusive rights to and ownership of the name 'Metroplex Commercial Pools.'
- All sales leads, and pending order/contracts related to 'Metroplex Commercial Pools' owned by Seller.

> or customer of the Business after the Closing), or any other person or entity who has a material business relationship with the Business or [McDonald], to terminate or modify any such actual or prospective relationship.
>
> **Section 8.02** During the Restricted Period, [McDonald] shall not, directly or indirectly, hire or solicit any person who is offered employment by Buyer pursuant to this Agreement or is or was employed in the Business during the Restricted Period, or encourage any such employee to leave such employment or hire any such employee who has left such employment, except pursuant to a general solicitation which is not directed specifically to any such employees. The term employee shall include independent contractors for the purpose of this provision.
> . . .
> **Section 8.05** 'Restricted Business' means the operation of the business of designing, installing or selling pools or any operation currently performed by [McDonald] related thereto.
>
> **Section 8.06** 'Territory' means within 100 miles of 1240 Vista Run, Prosper, TX 75078.
>
> **Section 8.07** Notwithstanding the provisions of this Article 8, [McDonald] may continue to design and sell pools for Oakcrest Homes.

Under the Promissory Note, Four Rivers agreed to pay a total of $200,000.00 to McDonald in two installments. The note conditions Four Rivers' obligation to pay the note: "The payments under this Note may be forfeited or cancelled as set forth in the [ICA] of even date."

The ICA provides in pertinent part:

> 1. Services. McDonald agrees to provide general consulting and sales services for and on behalf of FOUR RIVERS as directed by the managers of FOUR RIVERS from time to time. McDonald agrees to use McDonald's best efforts, talents and energy in the performance of

such duties. McDonald will faithfully perform and discharge all tasks and duties assigned to McDonald by FOUR RIVERS hereunder, will abide by all of the rules and procedures established by FOUR RIVERS from time to time, and will fully comply with all of the terms of this agreement.

...

3. Term. This Agreement will be for a term of three years, unless this Agreement is terminated pursuant to the provisions of Paragraph 5.

4. Compensation. FOUR RIVERS agrees to pay McDonald compensation in accordance with the Compensation Schedule attached hereto as Exhibit A…

5. Termination. This Agreement may be terminated at any time during the term of this Agreement, subject to the survival of certain provisions hereunder, as follows:

…

(d) following the approval of a majority of FOUR RIVERS's mangers [sic] and members, immediately on the giving of written notice by FOUR RIVERS to McDonald after the occurrence of any of the following events (upon which FOUR RIVERS shall not be required to pay McDonald the remaining amount due on the promissory note associated with the APA):

(i) McDonald violates the noncompete set forth in Article VIII of the APA hereinbelow;

…

(v) McDonald's breach of this Agreement.

Attached to the ICA is a compensation schedule:

1. In consideration of McDonald's services hereunder, FOUR RIVERS agrees to pay McDonald a 6% commission of the amount paid for each pool sold by McDonald for FOUR RIVERS and Metroplex. After 30 sales in one calendar year, FOUR RIVERS agrees to pay McDonald an extra 1% on each pool sold thereafter for that calendar year. Each payment is subject to FOUR RIVERS [sic] and dependent on the project having a profit margin of 25% of more.

McDonald brought suit against Four Rivers, alleging Four Rivers (1) breached the ICA by failing to pay commissions owed for pools sold by McDonald and (2)

breached the promissory note to pay for McDonald's pool business purchased by Four Rivers. McDonald plead "all conditions precedent necessary for Plaintiff to recover in this action have occurred, have been performed, or have been waived."

In response, Four Rivers asserted affirmative defenses of payment, prior material breach, failure of one or more conditions precedent, and failure of one or more conditions subsequent to McDonald's claims against Four Rivers. Four Rivers did not expressly or specifically identify the conditions precedent alleged to have failed. Four Rivers also countersued for breaches of the APA and the ICA.

The case was tried in December 2023. Testimony was heard from: (1) Justin Thurlkill; (2) Larry McDonald; and (3) Bryan McDonald. We have considered the entire record and outline the evidence necessary for disposition of McDonald's appellate issues, below.

Thurlkill testified McDonald would meet with customers, figure out what they wanted, and then prepare a bid for the cost of the entire project. Thurlkill would then design the pool, add in the profit margin, and prepare and send a contract to the customer. This calculation was subject to change based on various tile selections, colors, plaster-types, etc., and McDonald was expected to follow-up. Thurlkill testified two things were supposed to occur for McDonald to be paid: (1) he had to sell the pool and (2) the pool had to be, at least, profitable by 25%. However, there were instances where these conditions were not met and McDonald was paid a

commission to further the business relationship. Thurlkill maintained none of the jobs McDonald sold earned at least 25% profit but he had forgotten the provision was in the contract.

Thurlkill testified McDonald kept access to an e-mail address which was purchased by Four Rivers through the APA. The carve-out for McDonald to continue working on Oakcrest Homes was because Oakcrest was not in close proximity to Four Rivers and was to encompass: (1) meeting with the customer; (2) designing the pool; and (3) bidding and selling the pool for Oakcrest or the customer. McDonald was not to manage the building or installation of any pool, buy any equipment, or schedule subcontractors for Oakcrest. At one point, Thurlkill testified he drove by an Oakcrest active pool job site and saw McDonald sitting and speaking with a concrete subcontractor who worked for McDonald before he sold the business to Four Rivers. McDonald's pulling subcontractors off Four Rivers' jobs contributed to a backlog of constructing Four Rivers' pools in several instances.

Thurlkill did not recall receiving a single call on the phone number purchased from McDonald but testified McDonald had mentioned prior customers reached out to him for repairs. Thurlkill testified he sent McDonald text messages bringing concerns about McDonald's performance to his attention including:

> "I am really getting frustrated with your lack of follow-up…[y]ou have told me numerous times you were taking care of this and you haven't. You have also told me for two weeks that you are going to talk with the Carreons about the piers and haven't. I'm not sure what it's going to

> take you to follow up on things I've asked you to handle. I know you're no [sic] accustomed to having to answer to anyone, but that was the arrangement we made. I don't ask a lot from you, Larry, but when I do, I need you to please do it. If you can't, then maybe we need to revisit our arrangement. Let's make some time to sit down this week and decide how we're going to proceed in the future. The status quo is not acceptable."

McDonald testified he had not received any communication from Thurlkill that he was violating the non-compete and was surprised to see it mentioned in the subsequent letter from Thurlkill's lawyer.

Thurlkill contended McDonald "never seemed to actually sell me the business…he continued to operate the name Metroplex Commercial Pools…continued to do the work building and installing pools [and] did not give his best efforts to the success and growth of Four Rivers."

Thurlkill testified he went to a job site on April 21, 2021, and noticed "a multitude of problems" including a very large tree where the pool was to be and a fiber-optic line that ran across the decking and plumbing area. This led Thurlkill to dismiss McDonald from the site, telling him that he "couldn't work with him any longer." Thurlkill recorded the interaction on his phone. Some weeks before this incident, Thurlkill's lawyer prepared a letter terminating McDonald, but it was not sent until after the events of April 21. The letter stated Four Rivers was terminating the agreements among Four Rivers and McDonald pursuant to § 5(d) of the ICA, and that its obligations under the Promissory Note had been waived and cancelled.

In the written notice, Four Rivers lists multiple reasons for terminating the ICA, including McDonald's failures to use his best efforts to sell pools for Four Rivers, teach Thurlkill the pool business, follow up with customers, and exercise diligence in bidding jobs so Four Rivers would be profitable.

The letter also identifies various violations by McDonald of the non-compete provisions in the APA, including taking on side jobs in direct competition with Four Rivers, diverting subcontractors away from Four Rivers' jobs, building and managing pools for Oakcrest Homes, and continuing to use Metroplex Commercial Pools accounts to buy equipment for McDonald's side jobs. Bryan McDonald, McDonald's son, testified he worked for Four Rivers as a 1099 independent contractor preparing permits after his father sold the business. At some point after McDonald was terminated, Bryan left Four Rivers to work with McDonald.

McDonald testified he would buy various equipment from Pool Water Products who would issue a bill to McDonald Pool Consulting and ship the items to the customer's address with the name Metroplex Commercial Pools. McDonald believes he did not violate the non-compete because he continued to sell pools to Oakcrest, as allowed by the non-compete, and referred subcontractors to build those pools. McDonald believed the letter was an attempt to avoid paying him under the promissory note.

McDonald further admitted, in one instance, an individual, Raymond Reza, asked McDonald to help him with acquiring pool equipment. McDonald purchased $11,000.00 of pool operating components for Reza, including a sub panel power center, under the name of Metroplex Commercial Pools. McDonald did not build Reza's pool but referred Reza to someone outside of Four Rivers who could do the job without charging the retail price. McDonald further allowed Reza to buy equipment on McDonald's account with his suppliers. If a customer needed a service not covered by Four Rivers, McDonald would send the customer to one of his subcontractors.

Subsequently, Thurlkill testified he and McDonald had a conversation where McDonald admitted to building a pool outside of Four Rivers' agreements and failing to teach Thurlkill the pool business. The next day, Thurlkill sent McDonald a summary of their conversations in an e-mail that included calculations of commissions McDonald said he was owed. McDonald testified the e-mail sent by Thurlkill after he was terminated was an agreement that at least $29,047.50 in commissions were owed to him.

During cross-examination of Thurlkill, McDonald objected to "the line of testimony challenging the condition precedent of the 25 percent profit on each job, because we pled all conditions precedent in our petition" and Four Rivers did not plead which conditions were not met. Four Rivers responded that a specific denial

was not needed because the required 25% profit was an element of the contract. Further, Four Rivers asserted the issue had already been tried by consent and McDonald opened the door when he called Thurlkill on direct, Thurlkill testified to the provision, and McDonald mentioned the provision in his opening statement. McDonald's objection was overruled but he was granted a running objection on testimony regarding a job not meeting the profit margin.

At the conclusion of the bench trial, the trial court entered a take-nothing judgment against all parties on January 17, 2024. McDonald timely filed a motion for new trial which was overruled by operation of law. This appeal ensued.

ANALYSIS

McDonald raises three issues on appeal. The first two, legal insufficiency and factual insufficiency on the negative finding that Four Rivers did not breach the (1) promissory note and (2) the ICA, will be considered together. The third, whether the trial court erred in allowing testimony about the elements to commission payments, will be considered separately.

1. Legal and Factual Sufficiency of Evidence

When, as in this case, neither party requests findings of fact and conclusions of law following a bench trial, we will imply all findings necessary to support the trial court's judgment. *Shields Ltd. P'ship v. Bradberry*, 526 S.W.3d 471, 480 (Tex. 2017). If the record contains the reporter's record, implied findings may be

challenged on appeal for legal and factual sufficiency in the same manner as a challenge to jury findings or express findings of fact. *Id*.

In conducting a sufficiency review, we consider the evidence in the light most favorable to the challenged findings and indulge every reasonable inference that supports them. *City of Keller v. Wilson*, 168 S.W.3d 802, 821-22 (Tex. 2005). The evidence is legally sufficient if it would enable reasonable and fair-minded people to reach the decision under review. *Id*. at 827. Whether a reviewing court begins by considering all the evidence or only the evidence supporting the verdict, legal-sufficiency review in the proper light must credit favorable evidence if reasonable jurors could believe it, and disregard contrary evidence except that which reasonable jurors could not ignore. *Id*. Evidence is legally insufficient to support a finding when (1) the record bears no evidence of a vital fact; (2) the court is barred by rules of law or of evidence 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 mere scintilla; or (4) the evidence conclusively establishes the opposite of a vital fact. *Shields Ltd. P'ship*, 526 S.W.3d at 480.

In reviewing the factual sufficiency of the evidence, we examine the entire record, considering both the evidence in favor of and contrary to the challenged findings. *See Mar. Overseas Corp. v. Ellis*, 971 S.W.2d 402, 406-07 (Tex. 1998); *Cain v. Bain*, 709 S.W.2d 175, 176 (Tex. 1986). We may set aside the verdict for

factually insufficient evidence only if the verdict is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. *Ellis*, 971 S.W.2d at 407. The party asserting the evidence is factually insufficient must establish that the finding is against the great weight and preponderance of the evidence. *Dow Chem. Co. v. Francis*, 46 S.W.3d 237, 242 (Tex. 2001).

We construe McDonald's legal sufficiency argument to be that Four Rivers' breach of the ICA and the Promissory Note to have been established as a matter of law. We consider the factual insufficiency argument to be that the trial court's failure to find Four Rivers' breach was against the great weight and preponderance of the evidence. Neither argument is persuasive. There was some, in fact, significant evidence that (1) the promissory note was cancelled due to McDonald's violations of the ICA, excusing Four Rivers from the obligation to make further payments on the note; and, (2) there was no breach of the ICA by Four Rivers because evidence indicated no commissions were due on the mentioned jobs per the terms of the ICA. Evidence was presented that McDonald steered subcontractors away from Four Rivers[2], used an account controlled by Four Rivers to purchase equipment for non-

[2] Namely, Robert Golden and subcontractors for Oakcrest. McDonald further testified, "Q: If Four Rivers is building a pool for someone and that customer needs a fence, for example…would you send the customer directly to your subcontractor for fences? A: I don't remember. I don't recall. I might have." In regards to Reza, McDonald "referred people to him to subcontract it, like the electrician."

customers at cost[3], and failed to fulfill his contracted duties to pools built with Four Rivers. There were text messages produced which showed McDonald was aware of the offending actions that ultimately culminated in his termination. McDonald's failure to correct these deficiencies was an explicit breach of the ICA's provisions that McDonald "use [his] best efforts, talents and energy in the performance of such duties [and] will faithfully perform and discharge all tasks and duties assigned to [him]." The evidence further established that none of the jobs for Four Rivers bid by McDonald reached the 25% profit margin necessary for commissions to be due. With the weight of this evidence, McDonald clearly failed to establish Four Rivers' breach as a matter of law; and, we likewise conclude the negative findings of breach were not against the great weight and preponderance of the evidence.

We overrule issues one and two.

2. Admissibility of 25% Profit Margin Evidence

In his third issue, McDonald contends the trial court committed error in admitting evidence regarding the 25% profitability margin required for commissions to be owed on any of the pool jobs. Appellant contends the profitability margin was

[3] McDonald testified: (1) on or about December 11, 2020, McDonald bought "a whole set of equipment for Raymond Reza, $11,000.00 worth" under the account of Metroplex Commercial Pools; (2) "I let [Reza] buy equipment at my – at – on my account with suppliers;" and (2) "What I would do for them is I would help them get it fixed just at my cost;"

not in issue because appellee did not expressly deny the occurrence of a condition precedent, specifically the failure of any job to meet the profitability margin.

We review a trial court's admission or exclusion of evidence under an abuse of discretion standard. *See State v. Cent. Expressway Sign Assocs*., 302 S.W.3d 866, 870 (Tex. 2009); *In re J.P.B.*, 180 S.W.3d 570, 575 (Tex. 2005). The exclusion or admission of evidence is likely harmless if the evidence was cumulative, or the rest of the evidence was so one-sided that the error likely made no difference in the judgment. *Cent. Expressway Sign Assocs.*, 302 S.W.3d at 870 (citing *Reliance Steel & Aluminum Co. v. Sevcik*, 267 S.W.3d 867, 873 (Tex. 2008)). But if erroneously admitted or excluded evidence was crucial to a key issue, the error is likely harmful. *Id*.; see *Boulle v. Boulle*, 254 S.W.3d 701, 708 (Tex. App.-Dallas 2008, no pet.) ("A trial court's error in excluding evidence requires reversal if the evidence 'is both controlling on a material issue and not cumulative.'" (quoting *Mentis v. Barnard*, 870 S.W.2d 14, 16 (Tex. 1994)).

McDonald contends the court erred in allowing in evidence of a contractual provision which McDonald claims was not in issue. McDonald maintains any evidence that a condition of a 25% profit margin was not satisfied should have been

considered waived by Four Rivers since it did not expressly or specifically identify the conditions precedent alleged to have failed in its answer.[4]

"A condition precedent is an event that must happen or be performed before a right can accrue to enforce an obligation." *Centex Corp. v. Dalton,* 840 S.W.2d 952, 956 (Tex. 1992) (citations omitted); *see also* RESTATEMENT (SECOND) OF CONTRACTS § 224 ("A condition is an event, not certain to occur, which must occur, unless its non-occurrence is excused, before performance under a contract becomes due."); RESTATEMENT (SECOND) OF CONTRACTS § 225 (noting the effects of the non-occurrence of a condition).

A covenant, as distinguished from a condition precedent, is an agreement to act or refrain from acting in a certain way. *Solar Applications,* 327 S.W.3d at 108.

The compensation schedule accompanying the ICA is interlined and initialed by both parties. As interlined, it is not a model of clarity, though it clearly contemplates a 6% commission for the first thirty pool sales by McDonald in a calendar year, with a 7% commission for any pool sold after the first thirty. The schedule then contains the following language: "Each payment is subject to the

[4] TEX. R. CIV. P. 54: In pleading the performance or occurrence of conditions precedent, it shall be sufficient to aver generally that all conditions precedent have been performed or have occurred. When such performances or occurrences have been so plead, the party so pleading same shall be required to prove only such of them as are specifically denied by the opposite party.

FOUR RIVERS [sic] and dependent on the project having a profit margin of 25% or more."

We do not view the 25% profit margin requirement as a condition precedent that would require a specific denial. The provision – commissions calculated at 6% for any job sold by McDonald in which the overall profit on the job was 25% or more – was the measure of calculating commissions, i.e., a covenant or term of the contract. It was not "if this, then that," meaning it was not a condition precedent. *See Solar Applications Eng'g, Inc. v. T.A. Operating Corp.*, 327 S.W.3d 104, 108 (Tex. 2010) ("When no conditional language is used and another reasonable interpretation of the contract is possible, the terms will be construed as a covenant in order to prevent forfeiture." (citations omitted)).

The trial court certainly cannot be said to have abused its discretion by admitting evidence of the calculation of commissions in this manner.

Even assuming the 25% profit margin was a condition precedent, it appears the matter was tried by consent. An issue is tried by consent when one party's presentation of the evidence puts the other party on notice that it is seeking to recover under such a theory. *Boyles v. Kerr*, 855 S.W.2d 593, 601 (Tex. 1993). TEXAS R. CIV. P. 67 governs trial by consent. When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. *See La Marque Indep. Sch. Dist. v.*

Thompson, 580 S.W.2d 670, 673 (Tex. Civ. App.—Austin 1979, no writ) (as a general rule, failure to amend pleadings to conform to evidence does not affect result of trial on issues tried by consent).

McDonald notes he objected to any evidence of the 25% profitability margin and was granted a running objection to the subject. However, before the objection was made, McDonald himself introduced the 25% profit margin by mentioning it in his opening statement and asking Thurlkill about it on direct examination. He objected to testimony about the 25% margin only after the cross-examination of Thurlkill. McDonald himself made the issue relevant before later objecting to the admission of further evidence regarding the profitability margin.

Accordingly, even if the 25% profit margin requirement were to be interpreted as a condition precedent, the trial court did not abuse its discretion in admitting evidence on a subject that McDonald himself introduced.

Therefore, we overrule McDonald's third issue.

CONCLUSION

Having overruled all of McDonald's appellate issues, we affirm the trial court's judgment.

/Mike Lee/
MIKE LEE
JUSTICE

Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

LARRY MCDONALD, Appellant	On Appeal from the 471st Judicial District Court, Collin County, Texas
No. 05-24-00431-CV V.	Trial Court Cause No. 471-05834-2021.
FOUR RIVERS DEVELOPMENT, LLC D/B/A FOUR RIVERS POOLS, Appellee	Opinion delivered by Justice Lee. Justices Miskel and Garcia participating.

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

It is **ORDERED** that appellee FOUR RIVERS DEVELOPMENT, LLC D/B/A FOUR RIVERS POOLS recover its costs of this appeal from appellant LARRY MCDONALD.

Judgment entered this 28th day of March, 2025.