NUMBER 13-18-00554-CV

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI - EDINBURG

GARY BRANFMAN, Appellant,

v.

WARREN V. ALKEK, Appellee.

On appeal from the 24th District Court of Victoria County, Texas.

MEMORANDUM OPINION

Before Justices Benavides, Perkes, and Tijerina
Memorandum Opinion by Justice Benavides

By five issues, appellant Gary Branfman challenges the judgment in appellee Warren Alkek's favor arising out of this breach of contract case. Branfman argues that the judgment must be reversed on the following grounds: (1) the broad-form jury charge question on contract damages commingled proper and improper damage theories; (2) evidence of fraud is legally insufficient; (3) the trial court erred in allowing Alkek to recover

contract damages, attorney's fees for breach of contract, and punitive damages arising from fraud; (4) the judgment's award of appellate attorney's fees is not conditional and must be reformed; and (5) the trial court erred by awarding prejudgment interest on punitive damages.

Alkek concedes that there is no evidence to support a fraud judgment and that the judgment must be reformed to remove the punitive damages award and prejudgment interest associated with it. Alkek however asserts that Branfman waived any complaint regarding appellate attorney's fees. We affirm in part, reverse and render in part, and reform the judgment.

I. BACKGROUND

Branfman, a surgeon in Victoria, and Alkek, a businessman, had been friends for years. Their wives were friends, and their children were the same ages. When Branfman was going through a divorce in 2013, he called Alkek and asked to sleep on his sofa. Alkek told him he could sleep in his mother's house (the Powers Avenue house) which was vacant and shared a backyard with Alkek.[1] Alkek had previously leased the house, but it was not currently occupied. Branfman stayed there a couple of months and the two did not discuss rent.

After that time elapsed, Alkek proposed a lease of $1,800 per month to Branfman. Alkek was going to remodel his own house and had planned to stay in the Powers Avenue house while the work was being done. The two agreed to live together and Alkek would pay the utilities during that time; afterwards, Branfman would pay the utilities. They signed

[1] Alkek's mother had died a few years before.

a written lease in March 2013.

The Powers Avenue house was approximately 4,000 square feet with high ceilings, custom molding, and travertine floors. The shared backyard had a pool and was professionally landscaped. After Alkek moved back into his newly remodeled house, he began billing Branfman for utilities. Because the utilities were in Alkek's name, Branfman did not know the amount of his share until he was billed by Alkek. The billing was handled by their respective office staffs. Branfman was nearly always late paying rent and utilities, but Alkek did not always bill the utilities monthly. Sometimes Branfman would get a bill for several months' utilities at one time. Sometimes Alkek lost Branfman's checks and Branfman had to reissue them. The pattern of late payments did not appear to cause problems until June 2016.

In June 2016, Branfman's rent and utility payments were six months' late. On June 8, 2016, Alkek learned that Branfman was behind on his rent and utilities for the year. He sent a text to Branfman to meet him in the backyard. The two men met sometime between seven and nine that evening, and the meeting quickly turned into a shouting match. According to Alkek, Branfman started shouting and walked off stating, "I'm out of here." Branfman recalled things differently, that Alkek was yelling and told him to get out, even after Branfman told him he would get caught up right away. The two exchanged further text messages that night including one from Alkek demanding that Branfman get out "immediately."

According to Branfman, he wanted to stay in the house for the full five-year lease term. He liked living there and was comfortable. His girlfriend Tracy was at the house that

night but was not outside at the time of the argument. Branfman worked out that he would move at the end of the month. By the end of June 2016, Branfman paid all the rent due for 2016, including interest as specified in the lease. On July 16, 2016, he paid Alkek an amount of $1,312 for unspecified maintenance.

Over the next year, the two men each claimed the other harassed them or members of their family in various ways not relevant to the contract claims that remain.

Alkek sued Branfman on October 3, 2016 for breach of contract and other claims. Branfman answered and filed counterclaims. By the time of trial Alkek's claims were limited to the breach of lease and resulting damages, fraud, intentional infliction of emotional distress, attorney's fees, and punitive damages.

The lease here provided that the rent was $1,800 per month for two years over the five-year rental with a ten percent increase to $1,980 per month the beginning of the third year. In addition, the tenant paid utilities and a share of lawn maintenance which were defined by the lease as rent. The lease also had an addendum that if the tenant terminated the lease before the five-year term the tenant would pay a penalty of eight months' rent, $15,840. This was a negotiated term; Alkek originally wanted twelve months but Branham talked him down to eight months. According to Alkek, the penalty was to compensate him in part for the below market rate rent.

The jury found that Branfman breached the lease first and that Alkek sustained contract damages for: back rent and/or penalty of $15,840, repairs to the leased premises of $12,743, and air conditioning repairs of $2,300. The parties entered into a Rule 11 agreement on attorney's fees that the prevailing contract party would recover $100,000

through trial, and appellate fees as follows: $40,000 for representation in the court of appeals, $10,000 for petition for review to the Texas Supreme Court, $20,000 for merits briefing at the Texas Supreme Court, and $10,000 for oral argument through completion of proceedings. The jury also found that Branfman committed fraud and found Alkek sustained fraud damages for: back rent and/or penalty of $3,200, repairs to the leased premises of $2,600, and air conditioning repair of $460. The jury awarded $42,000 in exemplary damages as a result of fraud.

Before judgment was entered, Branfman objected on multiple grounds, but the trial court entered judgment after Alkek elected to recover on his contract damages, attorney's fees, and exemplary damages. This appeal followed.

II. JURY CHARGE

By his first issue, Branfman argues that Question 3's broad form submission included an erroneous damage submission that confused the jury and prevented proper presentation of his issue to this Court. *See Harris County. v. Smith*, 96 S.W.3d 230, 234–35 (Tex. 2002); TEX. R. APP. P. 44.1(a).

A. Standard of Review

A trial court shall submit questions, instructions, and definitions raised by the pleadings and evidence. TEX. R. CIV. P. 278; *European Crossroads' Shopping Ctr., Ltd. v. Criswell*, 910 S.W.2d 45, 53 (Tex. App.—Dallas 1995, writ denied). Rule 278 provides a substantive, non-discretionary directive to trial courts requiring them to submit controlling questions to the jury if the pleadings and any evidence support them. *Elbaor v. Smith*, 845 S.W.2d 240, 243 (Tex. 1992); *Schack v. Prop. Owners Ass'n of Sunset Bay*,

555 S.W.3d 339, 352 (Tex. App.—Corpus Christi–Edinburg 2018, pet. denied). "If an issue is properly pleaded and is supported by some evidence, a litigant is entitled to have controlling questions submitted to the jury." *Triplex Comm. v. Riley*, 900 S.W.2d 716, 718 (Tex. 1995); *Formosa Plastics Corp., USA v. Kajima Intern*., *Inc.*, 216 S.W.3d 436, 456 (Tex. App.—Corpus Christi–Edinburg 2006, pet. denied) (en banc).

We review the trial court's submission of instructions and jury questions for an abuse of discretion. *See H.E. Butt Grocery Co. v. Bilotto*, 985 S.W.2d 22, 23 (Tex. 1998); *Schack*, 555 S.W.3d at 355; *Green Tree Acceptance, Inc. v. Combs*, 745 S.W.2d 87, 89 (Tex. App.—San Antonio 1988, writ denied). A trial court abuses its discretion by acting arbitrarily, unreasonably, or without consideration of guiding principles. *Walker v. Gutierrez*, 111 S.W.3d 56, 62 (Tex. 2003).

If a trial court abuses its discretion when it submits an instruction to the jury, we do not reverse in the absence of harm. *See Lone Star Gas Co. v. Lemond*, 897 S.W.2d 755, 756 (Tex. 1995) (per curiam); *Schack*, 555 S.W.3d at 355. Harm occurs when the error in the charge probably caused the rendition of an improper judgment or prevented appellant from properly presenting the case to the court of appeals. TEX. R. APP. P. 44.1(a); *Harris County*, 96 S.W.3d at 234–35; *Wal–Mart Stores, Inc. v. Johnson*, 106 S.W.3d 718, 723 (Tex. 2003); *Schack*, 555 S.W.3d at 355.

B. Discussion

Alkek admitted at trial that by the time he filed suit, Branfman did not owe any back rent or utilities. The remaining contract damage issues were the amounts owed, if any, to repair damages Branfman allegedly caused and to restore the property to its previous

condition, air conditioner repair, and the eight-month early termination penalty. Alkek variously referred to the penalty as back rent and as a penalty.

Branfman argued that because Alkek evicted him, Branfman should not have to pay the eight-month penalty which applied only when the tenant terminated the lease early. He further argued that there were no damages to the property other than normal wear and tear. However, Branfman challenges only the portion of the damage question addressing back rent and/or penalty. The question for breach of contract damages read in part as follows:

> **Question 3**
>
> What sum of money, if any, if paid now in cash, would fairly and reasonably compensate Warren Alkek for his damages, if any, that resulted from such a failure to comply?
>
> Consider the following elements of damages, if any, and none other.
>
> Do not add any amount for interest on damages, if any.
>
> Answer separately in dollars and cents for damages, if any.
>
> 1. Back rent and/or penalty provision
>
> Answer: $15,480.00

The jury question for fraud damages was identical, but the answer was not. The jury answered $3,200 to Question 5(1). Although the fraud questions are immaterial because Alkek concedes that fraud is not supported by sufficient evidence, Branfman argues that the differing amounts awarded confirm the jury's confusion over the submission of the improper back rent with the proper penalty provision in the same question. He objected on that basis at the charge conference and in post-trial motions.

In *Harris County*, the defendant pointed out to the trial court that particular elements of damage [physical impairment and loss of earning capacity] had no support in the evidence and should not be included in the broad-form question." *Harris County*, 96 S.W.3d at 232. On appeal, the court held that the objection was correct and because there was no evidence to support the submission of those elements of damages, the defendant could not properly attack the remaining award. Thus, the case had to be remanded. *Id.* at 235–36.

Despite Branfman's argument regarding the differing fraud damages awarded for the same elements of damage, the contract damages are defined by the lease, and unlike in *Harris County*, this is a damage calculation that can be quantified by multiplying the eight-month term by the monthly rent of $1,980 to reach $15,480. *See id.* at 232. Under these circumstances, because the damages are calculable to a certainty, although the method of submission may have been error, it was harmless. *See* TEX. R. APP. P. 44.1.

We overrule Branfman's first issue.

III. APPELLATE ATTORNEY'S FEES

By his fourth issue, Branfman challenges the trial court's judgment on the grounds that appellate attorney's fees are not contingent on success. The parties entered into a Rule 11 Agreement as to the amounts of attorney's fees which consisted of a standard jury question on attorney's fees completed with agreed-upon amounts and titled Rule 11 at the top, signed by counsel and the trial judge. The agreement was also recited into the record by Branfman's counsel.[2] The judgment recited that Alkek, the prevailing party at

[2] The Rule 11 agreement was read into the record:

trial, would recover attorney's fees and did not make recovery of appellate fees contingent on success. The Rule 11 Agreement as written did not specify whether the appellate fees should be contingent on success, however, the manner in which it was read into the record suggested that the prevailing party in the trial court may recover fees in the appellate courts only if he continues to be the prevailing party.

"[A] trial court has no discretion to award appellate attorney's fees that are not conditioned on the party's failure to obtain relief." *In re Ford Motor Co*., 988 S.W.2d 714, 722 (Tex. 1998) (orig. proceeding). "[A] trial court may not penalize a party for taking a successful appeal by taxing him with attorney's fees if he takes such action." *Siegler v. Williams*, 658 S.W.2d 236, 241 (Tex. App.—Houston [1st Dist.] 1983, no writ). Therefore, the trial court must condition the award of attorney's fees to an appellee upon the appellant's unsuccessful appeal. *Id.* An unconditional award of appellate attorney's fees is improper. *Id.*; *Ortiz v. O.J. Beck & Sons, Inc.*, 611 S.W.2d 860 (Tex. App.—Corpus Christi–Edinburg 1980, no writ); *King Optical v. Automatic Data Processing*, 542 S.W.2d 213 (Tex. App.—Waco 1976, writ ref'd n.r.e.). "The proper remedy for an unconditional

---

> We have gotten an agreement between the parties to enter into a Rule 11 on reasonable and necessary attorney's fees for the prevailing party. And that would be $100,000 through trial and completion of proceedings at the trial court, $40,000 for appeal through the Court of Appeals, $10,000 for representation of the petition at the review stage of the Supreme Court, $20,000 for merits on the briefing stage to the Supreme Court, and $10,000 for representation through oral arguments at the Supreme Court. All of the parties and lawyers have signed. It's been marked as Court's Exhibit No. 4.
>
> THE COURT: And is that correct, Mr. Cilfone?
>
> MR. CILFONE: True.
>
> THE COURT: Do you have anything else to add to the record on Court's Exhibit No. 4?
>
> MR. CILFONE: My mind is running on the definition of "prevailing party," but I have nothing else to add.

award of appellate attorney's fees is to modify the judgment so that the award depends on the paying party's lack of success on appeal." *Sundance Minerals, L.P. v. Moore*, 354 S.W.3d 507, 515 (Tex. App.—Fort Worth 2011, pet. denied); *see Solomon v. Steitler,* 312 S.W.3d 46, 59–60 (Tex. App.—Texarkana 2010, no pet.) ("When the trial court errs by failing to condition the award of appellate attorney's fees, this error can be corrected by reforming the judgment without the necessity of sending the case back to the trial court."); *Hoefker v. Elgohary*, 248 S.W.3d 326, 332 (Tex. App.—Houston [1st Dist.] 2007, no pet.).

Alkek argues that Branfman waived objection by failing to object in the trial court and by failing to object to unconditional appellate attorney's fees in his post-trial motions. *See Tex. Dep't of Pub. Safety v. Burrows*, 976 S.W.2d 304, 307 (Tex. App.—Corpus Christi–Edinburg 1998, no pet.) (finding complaint regarding an award of attorney's fees waived where party did not raise issue in motion for rehearing or motion for new trial); *see also Kelly v. Brenham Floral Co*., No. 01-12-01000-CV, 2014 WL 4219448, at *4 (Tex. App.—Houston [1st Dist.] Aug. 26, 2014, no pet.) (mem. op.). However, those cases did not address unconditional appellate fee awards. He further argues that the award of appellate attorney's fees to the prevailing party is consistent with the Rule 11 Agreement. But the Rule 11 Agreement did not address unconditional appellate fees. Rather it was only when Alkek prepared the judgment that the trial court signed that the appellate attorney's fees became unconditional for Alkek and a penalty for appeal to Branfman.

Branfman argues that he did not waive objection because the award of appellate attorney's fees does not become final until after the judgment at each level of appeal. *See Sky View at Las Palmas, LLC v. Mendez*, 555 S.W.3d 101, 116 (Tex. 2018). "An award

of conditional appellate attorney's fees 'is essentially an award of fees that have not yet been incurred,' and the party awarded such fees 'is not entitled to recover [these fees] unless and until the appeal is resolved in that party's favor.'" *Id.* (quoting *Ventling v. Johnson*, 466 S.W.3d 143,156 (Tex. 2015)). We agree Branfman did not waive his objection.

Accordingly, we sustain Branfman's fourth issue.

IV. FRAUD

By his second issue, Branfman attacks the sufficiency of the evidence to support the jury's fraud finding. Alkek concedes this issue. Without the fraud finding, the jury's finding of punitive damages and its award must be reversed as well.

We sustain Branfman's second, third, and fifth issues.

V. CONCLUSION

We affirm the trial court's judgment in part, modify and affirm as modified, in part, and reverse and render in part.

GINA M. BENAVIDES,
Justice

Delivered and filed the
28th day of May, 2020.