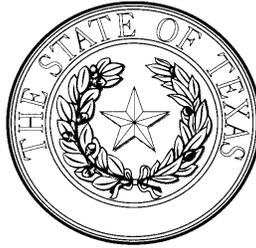


Opinion issued April 26, 2022



In The  
**Court of Appeals**  
For The  
**First District of Texas**

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NO. 01-20-00059-CV

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**DAVID HYMAN AND RENEE MATTURRO, Appellants**

**V.**

**K.D. RESOURCES, LLC, Appellee**

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**On Appeal from the 129th District Court  
Harris County, Texas  
Trial Court Case No. 2012-32430**

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**MEMORANDUM OPINION**

David Hyman and Renee Matturro, heirs of Miles Hyman, appeal the district court's judgment in favor of KD Resources, LLC ("KD"). The heirs allege that the trial court erred in finding no breach of contract between Miles Hyman and KD. We affirm.

## **Background**

This is an employment dispute arising from the termination of Miles Hyman in June 2008 by KD. In 2012, Hyman sued KD alleging that it was in breach of contract for failing to pay severance according to his employment contract. Hyman alleged that the contract entitled him to a \$200,000 annual salary and \$1 million in damages based on his termination. KD answered that there was no employment contract between Hyman and KD, and to the extent a signed employment contract existed, the individual who signed it did not have actual or apparent authority to do so for the company. Alternatively, KD alleged that Hyman was fired for cause, which precluded severance under the agreement.

While the lawsuit was pending, Hyman died. His heirs (hereinafter the “Hyman Parties”) pursued his breach of contract claim.<sup>1</sup> The parties proceeded to a bench trial in October 2019.

### **A. Stipulated Facts**

The parties stipulated to the following facts: KD was a startup business formed in Houston to produce oil from wells in south Texas. Barry Kostiner originally owned two-thirds of the business and Jim Dorman Sr. and Jim Dorman Jr. owned the remaining one-third. Hyman was aware of the ownership division. Between the Dormans, Dorman Sr. owned 28% of the company and Dorman Jr.

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<sup>1</sup> KD does not dispute that the Hyman Parties have standing to pursue the claim.

owned 5%. Robert Kinsey, Vice President in Charge of Operations, ran the company. While Hyman alleges that he had an employment contract with KD, no other KD employees had employment contracts with the company.

In December 2007, Kinsey hired Hyman to be one of KD's first employees. At the time, Hyman lived in Toronto, Canada and was in his mid-50s. He had no oil and gas experience. Hyman moved to Houston and lived and worked from Kinsey's house until Hyman rented an apartment and KD rented office space. While he was employee with KD, Hyman's salary was \$55,000.

In December 2007, Hyman, who attended law school in Canada, helped Kinsey attempt to negotiate an employment contract with another entity. Hyman kept a draft of the contract that was later produced in this case. A month after Hyman helped with the employment contract, Kinsey admitted to Hyman that he had embezzled from his previous employer. Hyman also learned that Kinsey was embezzling from KD. Hyman worked with Kinsey to attempt to block a background check on Kinsey that would have revealed that Kinsey did not hold an engineering degree he purported to hold. Hyman did not reveal his knowledge about Kinsey until after he was terminated from KD.

In June 2008, Hyman was fired by KD. In November 2008, Kinsey was fired from KD for embezzlement. KD was purchased by new owners. By 2009, neither Kostiner nor the Dormans had any ownership interests in KD.

In November 2011, Hyman recorded a telephone conversation with Dorman Jr. in which he claimed he had an employment contract with KD that entitled him to severance pay. Hyman told Dorman Jr. that he did not have a copy of the contract. He told Dorman Jr. that he was going to send a blank copy for Dorman Jr. to sign. Hyman alleged that his employment contract was based on an employment contract that he had previously drafted for Kinsey, and Hyman sent an unsigned version for Dorman Jr. to sign.

Hyman filed suit in June 2012. Two months later, he spoke with Dorman Jr. again. Dorman Jr. told Hyman that he did not remember signing the employment contract and that he did not remember Kostiner telling him to sign it either. Dorman Jr. told Hyman that when Dorman Jr. worked for the company, he did not have the authority to sign it.

## **B. Trial Testimony**

The parties dispute whether Hyman was entitled to severance upon termination from KD. Specifically, they dispute whether a valid employment contract existed between Hyman and the company. They also dispute whether the basis for Hyman's termination precluded him from severance under the alleged agreement.

## **1. Testimony regarding the existence of an agreement**

In his deposition in 2013, Hyman testified that he had an employment agreement with KD that specified that he received \$200,000 annually. He testified that he was entitled to severance after he was terminated by KD in June 2008. Since his termination, he had remained unemployed.

Hyman recalled that he signed the contract around January 2008. He gave it to Dorman Jr., but Dorman Jr. did not sign it then. Hyman testified that Dorman Jr. told him that he needed Kostiner's approval to sign it. Hyman testified that Kostiner told him several times that he had instructed Dorman Jr. to sign the contract and give it back to Hyman. Kostiner told Hyman that securities regulations involving another entity prohibited him from signing the agreement. In November 2011, Hyman called Dorman, Jr. and told him that he had an employment contract with KD that KD had not honored. Hyman said he had no original and no copies of the agreement, so he told Dorman Jr. that he would send a blank version for Dorman Jr. to sign. Hyman testified that after the call, he sent the unsigned agreement to Dorman Jr., but Dorman Jr. never signed or returned it. At some point after learning that Dorman Jr. would not sign the blank agreement, Hyman found a copy of the fully executed agreement on an old computer at his apartment in Toronto. He testified that he was not sure if he still had the old computer.

In February 2012, Hyman emailed Dorman Jr. a copy of the fully executed agreement and asked him to sign an affidavit saying that Kostiner, the majority owner of the company, told Dorman Jr. to sign it in 2008. When Dorman Jr. refused, Hyman suggested that Dorman Jr. “find a way where you can—you can write something and backdate it before the gag order.”

Hyman filed suit in June 2012 seeking nearly five years of severance pay under the alleged employment agreement, at \$200,000 per year, plus other alleged damages. He did not attach a copy of the agreement to the lawsuit. In May 2013, KD received the document for the first time in advance of Hyman’s deposition.

Dorman Jr. testified that during the time he had an ownership interest in KD, Hyman asked him to sign an employment contract that Hyman created. Dorman Jr. testified that he told Hyman at the time that he lacked authority to sign it for KD. Dorman Jr. owned five percent of the company. He did not recall ever signing the agreement. Dorman Jr. testified that he would have needed Kostiner’s approval to sign it. Dorman Jr. did not remember Kostiner telling him to sign the agreement or giving any sort of approval to do so.

Kostiner testified in his deposition that he could not recall ever telling Dorman Jr. to sign the employment agreement between KD and Hyman. He testified that he would not have done so because, “[t]hat makes no sense. The company had no financial resources to do something like that. . . . The company

was not solvent. Those types of numbers were greater compensation than the CEO, the president, and any affiliates. It doesn't make any sense. It's not possible.”

## **2. Testimony regarding Hyman's Termination**

Brody testified that in June 2008, he was working with Hyman when Hyman pulled out a large knife and began running its blade up and down his own arm. Brody had not previously seen Hyman do that, and he felt that Hyman was trying to threaten or intimidate him. Brody told Kinsey about the incident later that evening. Kinsey told Brody that it was the last straw, and, the next day, Hyman was terminated. According to Brody, Hyman's job performance was poor, even before the knife incident.

Hyman testified that he performed his job satisfactorily. According to Hyman, he regularly carried a knife. He often scratched his skin with a knife because of a skin condition. He claimed that when he pulled out the knife around Brody, he was scratching his arms because airborne pollen in Houston aggravated his skin condition.

## **C. Judgment**

In October 2019, the trial court signed a final judgment in favor of KD Resources. Hyman filed a timely request for findings of fact and conclusions of law and a timely notice of appeal. We abated the appeal for entry of findings of fact and conclusions of law. The trial court entered them in June 2021.

Among other things, the trial court found that Hyman's breach of contract claim failed because as a matter of fact and law no employment agreement ever existed between Hyman and KD. Alternatively, even if an employment agreement signed by Dorman Jr. existed, the court found that Dorman Jr. did not have authority to bind the company when he signed it. The trial court also found that Hyman's breach of contract claim fails because Hyman was terminated for cause, as defined in the alleged employment agreement. Therefore, no severance was due. The trial court found that Hyman was not a credible witness.

### **Sufficiency of the Evidence**

On appeal, the Hyman Parties challenge the legal and factual sufficiency to support the trial court's holding that KD did not breach a contract with Hyman.

#### **A. Standard of Review**

In an appeal from a bench trial, the trial court's findings of fact have the same weight as a jury verdict. *Catalina v. Blasdel*, 881 S.W.2d 295, 297 (Tex. 1994); *Nguyen v. Yovan*, 317 S.W.3d 261, 269–70 (Tex. App.—Houston [1st Dist.] 2009, pet. denied). When the appellate record contains a reporter's record, findings of fact on disputed issues are not conclusive and may be challenged for the sufficiency of the evidence. *Sixth RMA Partners, L.P. v. Sibley*, 111 S.W.3d 46, 52 (Tex. 2003). We review the trial court's findings of fact under the same standard

used to determine whether sufficient evidence exists to support a jury finding. *See Catalina*, 881 S.W.2d at 297; *Nguyen*, 317 S.W.3d at 269–70.

In a factual sufficiency review, we consider and weigh all the evidence. *See Cain v. Bain*, 709 S.W.2d 175, 176 (Tex. 1986); *Arias v. Brookstone, L.P.*, 265 S.W.3d 459, 468 (Tex. App.—Houston [1st Dist.] 2007, pet. denied). When a party challenges an adverse finding on an issue on which it had the burden of proof at trial, the party must show on appeal that the adverse finding is against the great weight and preponderance of the evidence. *Dow Chem. Co. v. Francis*, 46 S.W.3d 237, 241 (Tex. 2001).

When considering whether the evidence is legally sufficient to support a challenged finding, we must consider the evidence that favors the finding if a reasonable fact finder could do so, and disregard contrary evidence unless a reasonable fact finder could not. *See City of Keller v. Wilson*, 168 S.W.3d 802, 827 (Tex. 2005). We view the evidence in the light most favorable to the trial court’s finding and indulge every reasonable inference to support it. *Id.* at 822. Because it acts as the fact finder in a bench trial, the trial court is the sole judge of the credibility of the witnesses and the weight to be given their testimony. *Golden Eagle Archery, Inc. v. Jackson*, 116 S.W.3d 757, 761 (Tex. 2003); *see also Wise v. Conklin*, No. 01-13-00840-CV, 2015 WL 1778612, at \*3 (Tex. App.—Houston [1st Dist.] Apr. 16, 2015, no pet.) (mem. op.) (“In a bench trial, the trial court is the

sole judge of the witnesses' credibility, and it may choose to believe one witness over another; a reviewing court may not impose its own opinion to the contrary.”). If the evidence at trial “would enable reasonable and fair-minded people to differ in their conclusions,” we will not substitute our judgment for that of the fact finder. *City of Keller*, 168 S.W.3d at 822.

When a party attacks the legal sufficiency of an adverse finding on an issue on which it had the burden of proof, the party must show on appeal that the evidence establishes, as a matter of law, all vital facts in support of the issue. *Dow Chem.*, 46 S.W.3d at 242. In reviewing a “matter of law” challenge, the reviewing court must first examine the record for evidence that supports the finding, while ignoring all evidence to the contrary. *Id.* If no evidence supports the finding, the reviewing court will then examine the entire record to determine whether the contrary proposition is established as a matter of law. *Id.* The issue should be sustained only if the contrary proposition is conclusively established. *Id.*

## **B. Analysis**

The evidence is legally and factually sufficient to support the trial court’s finding that KD did not breach a contract with Hyman. A successful breach of contract claim requires proof of the following elements: (1) the existence of a valid contract; (2) performance or tendered performance by the plaintiff; (3) breach of contract by the defendant; and (4) damages sustained resulting from the breach.

*B & W Supply, Inc. v. Beckman*, 305 S.W.3d 10, 16 (Tex. App.—Houston [1st Dist.] 2009, pet. denied).

There was legally and factually sufficient evidence to support that no contract existed. Hyman testified that he signed an employment contract around January 2008. He testified that he struggled to get Dorman Jr. to sign it, and he did not remember exactly when Dorman Jr. did so. Initially, Dorman Jr. told Hyman he could not sign it without Kostiner's approval. Hyman testified that he spoke with Kostiner who gave permission to Dorman Jr. to sign the contract. Hyman claimed that Kostiner could not sign the contract due to SEC restrictions.

Hyman testified that he reached out to Dorman Jr. three years after Hyman was terminated from KD. He asked Dorman Jr. if he had a copy of Hyman's employment contract. Dorman Jr. did not. Hyman then found a copy on an old computer. He testified that he did not have the computer at the time of his deposition.

Dorman Jr. testified that he could not recall signing an employment contract between KD and Hyman. He testified that he would have needed Kostiner's approval to enter into a contract to pay Hyman \$200,000 per year. Dorman Jr. testified that several years after Hyman was fired from KD, Hyman reached out to see if Dorman Jr. had a copy of an alleged employment contract between KD and Hyman. Dorman Jr. told him that he did not. Then Hyman attempted to get

Dorman Jr.'s signature on an affidavit stating that an employment contract had existed. Dorman Jr. did not sign it. Hyman told Dorman Jr. of his breach of contract claim against KD. Dorman Jr. told him that it did not sound recoverable.

Kostiner testified that he did not remember directing Dorman Jr. to sign the contract. According to Kostiner, the company did not have the financial resources to enter into a contract to pay Hyman the amount listed in the purported agreement because the company was not solvent. He testified that a salary of \$200,000 a year was more than the CEO, president, and any affiliates were compensated. While employed, Hyman was not paid \$200,000 annually. He was paid \$55,000 per year.

The trial court found that Hyman was not a credible witness. The trial court was entitled to credit Kostiner and Dorman Jr.'s testimony over Hyman's. *See Golden Eagle Archery*, 116 S.W.3d at 761 (trial court is free to judge the credibility of witnesses and the weight to be given their testimony). Kostiner and Dorman Jr. did not recall signing the purported employment agreement. Kostiner testified that doing so would have been unreasonable given the company's financial situation and the compensation given to top executives. Dorman Jr. testified that he heard from Hyman years after Hyman was terminated. When Dorman Jr. told Hyman that he did not have the agreement, Hyman found a copy on an old computer. Hyman asked Dorman Jr. to sign an affidavit stating that he had previously signed an employment agreement. Dorman Jr. refused.

Viewing the evidence in the light most favorable to the trial court's finding, the evidence is legally and factually sufficient to support the finding that there was no contract between KD and Hyman. The trial court did not err in holding that there was no breach of contract because the Hyman Parties failed to establish the existence of a valid contract between Hyman and KD.

We overrule the Hyman Parties's sole issue on appeal.

### **Conclusion**

We affirm the judgment of the trial court.

Peter Kelly  
Justice

Panel consists of Justices Kelly, Hightower, and Farris.