

IN THE SUPREME COURT OF TEXAS

No. 16-0651

DUDLEY CONSTRUCTION, LTD., RICHARD MARK DUDLEY, AND
HARTFORD FIRE INSURANCE COMPANY, PETITIONERS

v.

ACT PIPE AND SUPPLY, INC., RESPONDENT

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE SIXTH DISTRICT OF TEXAS

Argued December 5, 2017

JUSTICE BROWN delivered the opinion of the Court.

JUSTICE BLACKLOCK did not participate in the decision.

This case presents two questions. The first is procedural: Did ACT Pipe and Supply, Inc., in defending a favorable judgment notwithstanding the jury’s verdict, successfully raise a “cross-point” in the court of appeals that preserved an alternative argument proscribing the jury’s original verdict? We say yes—ACT did not formally label its argument a “cross-point,” but the substance of that argument, if accepted, would nonetheless vitiate the jury’s original verdict. The second presents an issue of statutory interpretation: Are attorney’s fees recoverable for a claim brought under the Texas Construction Trust Fund Act? Our answer is no—neither the Act nor Civil Practice and Remedies Code section 38.001 specifically provides for attorney’s fees, so they are

unavailable. Accordingly, we affirm the court of appeals' judgment in part, reverse in part, and remand to the trial court for further proceedings.

I

This appeal stems from a billing dispute between a general contractor and a pipe supplier. Dudley Construction, Ltd., the general contractor, enlisted ACT Pipe and Supply, Inc., as a supplier for two municipal water- and sewer-improvement projects: the Reclaimed Water Project in College Station and the Tabor Project in Bryan. This dispute primarily concerns the Tabor Project.

To assist Dudley in bidding for the Tabor Project, ACT's operations manager, Mark Stroud, quoted prices for the "slip-joint" pipe Dudley anticipated using for the project at \$95 per unit of 36-inch and \$74.53 per unit of 30-inch pipe. Dudley won the contract, and Stroud ordered the slip-joint pipe from ACT's manufacturer to lock in the quoted prices and ensure timely delivery.

After Stroud placed the order, however, the city rejected the proposed use of slip-joint pipe, insisting the project required "restrained-joint" pipe. Stroud provided Dudley a second proposal, quoting the city's preferred pipe at a more-expensive price of \$109.71 per unit of 36-inch and \$82 per unit of 30-inch pipe. The city approved Dudley's revised proposal, but ACT never modified the original slip-joint purchase order with the pipe manufacturer. Consequently, Dudley received slip-joint rather than restrained-joint pipe at the job site.

Dudley's project manager, Michael Ham, informed Stroud that Dudley had received the wrong pipe. Stroud advised Ham that restrained-joint pipe was available at a higher cost, but Ham insisted ACT supply the restrained-joint pipe at the same price ACT quoted for the slip-joint pipe.

Dudley's owner, Richard Dudley, began working with ACT's regional manager, Curt Murray, to resolve the dispute. After reviewing the project plans, Murray told Dudley he believed that slip-joint pipe met the project's specifications and was allowed under the contract, the city's objections notwithstanding. Dudley subsequently took the position with the city that the Tabor Project contract did not specify which pipe must be used and that slip-joint pipe was adequate. The city relented, agreeing to Dudley's use of slip-joint pipe so long as it was reinforced by external restraints. Dudley agreed. Accordingly, Dudley installed the errantly ordered slip-joint pipe it had already received along with \$17,500 worth of external restraints ACT supplied at no cost.

Dudley and ACT could not, however, agree on how much Dudley owed for the pipe. Dudley signed a purchase order on September 14, 2011, for the slip-joint pipe that was ultimately used at the originally quoted price of \$95 and \$74.53 per 36- and 30-inch unit, respectively. But after the project's completion, ACT billed Dudley for restrained-joint pipe at the second proposal's higher cost. Murray testified at trial that the parties verbally agreed to use the higher-quoted prices to offset cost reductions for pipe used in the Reclaimed Water Project. Dudley denied any such agreement, but nonetheless submitted ACT's invoices for both projects to the cities, which paid Dudley for the full amounts ACT sought. Dudley deposited these payments in its account, but citing the ongoing dispute, paid ACT nothing for either project.

ACT sued Dudley on a sworn account for \$143,714.19, the total it claims Dudley owes it for the Tabor and Reclaimed Water projects. Because Dudley did not pay ACT after the cities paid Dudley the amounts due on ACT's invoices, ACT also alleged misapplication of trust funds under the Texas Construction Trust Fund Act. As to ACT's sworn-account claims, the jury found that the prices ACT charged were "in accordance with the agreement" for the Reclaimed Water Project

and awarded ACT \$14,214.20. For the Tabor Project, however, the jury answered that the prices ACT charged were not “in accordance with the agreement,” but nonetheless awarded ACT \$110,629.70 for “reasonable compensation.” The jury also found ACT perfected a bond-payment claim and awarded the same damages as ACT’s sworn-account claims. Finally, the jury found that Dudley misapplied trust funds under the trust-fund act but awarded no corresponding damages to compensate ACT for either project.

ACT moved for judgment notwithstanding the verdict. It urged the trial court to change the jury’s answer to the sworn-account liability question for the Tabor Project. ACT argued the \$110,629.70 damages award necessitated a finding that ACT had indeed charged Dudley “in accordance with the agreement.” ACT also encouraged the trial court to disregard the jury’s finding that it was not entitled to damages in light of the jury’s finding that Dudley misapplied trust funds. ACT asked the trial court to instead substitute the \$110,629.70 in damages the jury found for its sworn-account and bond-payment claims.

The trial court granted ACT’s motion and issued a final judgment. In its judgment, the court set aside the jury’s liability finding on ACT’s sworn-account claim for the Tabor Project, instead concluding it was “conclusively proven” that the prices charged by ACT were in accordance with the parties’ agreement. The trial court further found that ACT’s damages were uncontroverted and conclusively proven, and substituted the jury’s \$110,629.50 award for the Tabor Project and \$14,214.20 for the Reclaimed Water Project under the sworn-account and bond-payment claims in place of the jury’s zero-damages findings for trust-fund act damages. The judgment awarded ACT \$131,823.99 in attorney’s fees.

Dudley appealed on several grounds. Relevant to the case here, Dudley argued the trial court erred in rendering judgment notwithstanding the verdict on ACT's sworn-account claim because sufficient evidence supports the jury's finding that the price ACT charged for the Tabor Project was not in accordance with the parties' agreement. Dudley also argued the evidence supports the jury's zero-damages finding on ACT's trust-fund act claim or, alternatively, that the trial court erred in awarding damages based on the amount the jury awarded for ACT's sworn-account and bond-payment claims. Finally, Dudley argues the trial court improperly awarded attorney's fees.

The court of appeals affirmed in part and reversed in part. 531 S.W.3d 744, 748 (Tex. App.—Texarkana 2016). On the claims relevant to this appeal, it agreed with Dudley that sufficient evidence supported the jury's finding that the prices ACT charged Dudley for the Tabor Project were not in accord with the parties' agreement. *Id.* at 754–55. Accordingly, the court of appeals reversed the trial court's judgment on that issue and rendered judgment that ACT take nothing on its sworn-account claim for the Tabor Project. *Id.* at 754. But it rejected Dudley's argument that the evidence supports the jury's zero-damages finding for ACT's trust-fund act claim. *Id.* at 755 (noting Dudley cited no authority to support its argument that “there was no loss of the construction funds” as Dudley held the funds because of “a dispute between the parties due to ACT's overcharges as found by the jury”).

The court of appeals concluded, however, that the trial court did not substitute “conclusively proven” trust-fund act damages in place of the jury's zero-damages finding when it inserted the jury's \$110,629.70 damages awards for the Tabor Project under ACT's sworn-account and bond-payment claims. *Id.* at 756. “From the documentation presented at trial,” the court of

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