REVERSE in part; AFFIRMED and Opinion Filed July 20, 2020

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-18-00868-CV

BRIGETTA D'OLIVIO, Appellant
V.
GREG AND LAURA FOX, Appellees

On Appeal from the 191st Judicial District Court
Dallas County, Texas
Trial Court Cause No. DC-16-05606

MEMORANDUM OPINION

Before Justices Schenck, Osborne, and Reichek
Opinion by Justice Reichek

Brigetta D'Olivio appeals the trial court's judgment following a bench trial in this construction contract case. Asserting twelve issues, D'Olivio generally challenges the legal and factual sufficiency of the evidence supporting the verdict and the trial court's award of damages on multiple theories of recovery. We conclude Greg and Laura Fox were not entitled to recover both exemplary damages for statutory and common law fraud and treble damages under the Texas Deceptive Trade Practices Act. Accordingly, we reverse the portion of the trial court's

judgment awarding exemplary damages for statutory and common law fraud. We affirm the judgment in all other respects.

Factual Background[1]

In 2014, Greg and Laura Fox made a bulk sale of Bitcoins that resulted in an income to them of over $800,000. The Foxes used the money to, among other things, pay off student loans and purchase a car. They wanted to use up to $400,000 of the remaining funds to purchase a home. At the time, Laura worked at Starbucks and, through this job, met D'Olivio, a homebuilder. According to Greg, D'Olivio told them that, for the amount they wanted to spend, they could get "a better house with more things" if they built a house rather than purchased one.

D'Olivio met with the Foxes and, following the meeting, the Foxes sent D'Olivio an email entitled "Laura + Greg Fox Needs / Wants / Locations." In the email, the Foxes stated their maximum budget for the land and house combined was $405,000. They listed their first and second choice of lots, both in Sunnyvale, Texas,

[1] In her brief on appeal, D'Olivio relies almost entirely on pleadings and documents not admitted into evidence at trial to support her statement of facts and arguments for reversal. Because this evidence was not admitted at trial, it cannot inform our sufficiency analysis. *See City of Keller v. Wilson*, 168 S.W.3d 802, 822 (Tex. 2005); *Davenport v. Hall*, No. 04-14-00581-CV, 2019 WL 1547617, at *5 (Tex. App.—San Antonio April 10, 2019, no pet.); *DeLeon v. Lacey*, No. 03-13-00292-CV, 2015 WL 4449436, at *4 (Tex. App.—Austin July 15, 2015, no pet.); *Miller v. State*, No. 14-02-00884-CV, 2003 WL 22707135, at *1 (Tex. App.—Houston [14th Dist.] Nov. 18, 2003, no pet.). Accordingly, our recitation of the facts is based solely on the evidence presented at trial. In addition, D'Olivio argues extensively in her reply brief that many pieces of evidence submitted by the Foxes at trial were fabricated or falsified. However, virtually all of the evidence about which D'Olivio complains was admitted without objection and she presents no issues in her brief on appeal challenging the trial court's admission of this evidence.

and included a list of things the house "must have" and a list of things that were "optional, but highly preferred." The "must have" list included things such as 3000-4000 square feet of living space, many large windows, a two-car attached garage, a pier foundation in bedrock, heated tile in all rooms, granite counter tops in the kitchen and baths, a bar area, lighted built-in wall displays, a built in 200+ gallon fish tank, a laboratory room with an optional secret entrance, a finished attic, and a primary bathroom with a large tub and shower with separate temperature controls for two shower heads. The "optional, but highly preferred" list included things such as an attached porte cochere, a balcony with a spiral staircase outside, a safe room, an elevator, and an indoor pool.

On March 9, 2014, the Foxes and D'Olivio signed a "General Contract for Services" setting forth a Guaranteed Price Maximum ("GPM") of $405,000 for the construction of a house including purchase of the land. Greg testified they chose to do a GPM contract rather than a cost-plus contract because they wanted surety regarding the costs. The general contract required an initial payment of $18,500, which the Foxes made. The contract also set out several events of default which included (1) the failure to make a required payment when due, (2) the insolvency or bankruptcy of either party, and (3) the subjection of any of either party's property to any levy, seizure, or general assignment for the benefit of creditors. The contract stated it was the entire agreement and there were no other promises or conditions, either oral or written, concerning the subject matter. The contract further contained

a nonwaiver provision stating that "the failure of either party to enforce any provision of this Contract shall not be construed as a waiver or limitation of that party's right to subsequently enforce and compel strict compliance with every provision of this Contract." The parties to the contract were listed as Greg and Laura Fox and Paquette Holdings. D'Olivio testified that Paquette Holdings was the name under which she personally conducted her homebuilding business.

Two months later, the Foxes signed two amendments to the contract. The first amendment stated that the $405,000 GPM was for only 3000 square feet under roof and the GPM excluded "upgrades, change orders, change in square footage, spending outside and above allowances, and any other spending from final cost projections." Greg stated they understood an increase in the GPM was possible if they made changes or modifications, but they felt they would be able to manage this by exchanging increased costs in some areas with reductions in others. The amendment set forth a list of services and items to be bundled into the total projected construction cost. Approximately half of these items were identified as "allowances."

The second amendment to the contract stated the following:

> Paquette Holding agrees to supply Laura and Greg Fox, upon completion of bids received and prior payment by Laura and Greg Fox for the Construction Document Package, a new Guaranteed Price maximum which includes allowance(s).

> Said allowance(s) will be included in the budget set forth for the Guaranteed Price Maximum and Laura and Greg Fox agree that such allowances will also have a price maximum.
>
> Paquette Holding agrees that the allowances as listed in [the first amendment] will be a detailed list of what such allowances are and what budget is allocated to each such allowance(s).
>
> Laura and Greg Fox agree to stay within the budget allowance unless a written request [is made as stipulated], including that a change order must be received by Paquette Holding with both parties signatures attached prior to . . . any modifications from including but not limited to the allowances contained within the GPM.
>
> Laura and Greg Fox agree that any such modifications from the budget allowance contained within the GPM will be the financial responsibility of Laura and Greg Fox solely.

Once the preliminary design for the house was completed, D'Olivio emailed the Foxes an invoice. The email stated the design plans for the house showed a total of 4841 square feet – 3306 square feet of indoor living space and 1535 square feet of covered outdoor space. D'Olivio advised the Foxes that "the budget secured in your contract is for 3000 sq" and the increased square footage would cause an increase in the budget.

The Foxes responded to D'Olivio stating they were "under the impression that some of these additional items could be covered under the 405K total price if we scaled back on other areas finishing up the house." They further stated "we do not have much room to move on this price, so we need to get an idea how much each extra part will cost individually to determine if it is necessary, and this could substantially impact our preliminary plans."

After some discussion, the Foxes and D'Olivio signed a third amendment to the general contract. The third amendment set out a new GPM amount, special requests to be included in that amount, and a list of allowances to be paid for with a specified portion of the GPM. The new GPM amount was $456,943.02 for construction of 4779 square feet under roof. Although the land was originally supposed to be included in the contract price, Greg testified they ended up paying for the lot separately. Of the GPM amount, $44,050 was allocated for specifically listed allowances which were appliances, plumbing fixtures, cabinets, counter tops, bathroom counters, electrical fixtures, carpeting, tile, hardware, and the fish tank. Although the total amount for the allowances was set out in the amendment, the contract did not set forth the specific amounts budgeted for each allowance item as required by the second amendment. The special requests listed in the third amendment included two HVAC units, a mechanical gate, and reinforced foundation supports for the fish tank. Attached to the third amendment was an exhibit that listed all the items contained within the construction budget including the allowance items. The exhibit did not contain specific amounts for any of the items. Payment for the house was to be made in three installments or "phases" of $152,314.34 with an initial deposit of $50,000 that would be deducted from the first payment. The Foxes paid the initial deposit on July 8, 2014.

During the month of July, the Foxes and D'Olivio conducted several conference calls with the electrician and the architect to discuss modifications to the

design plans. The discussions were memorialized in memoranda drafted by D'Olivio. The memoranda stated that

> [a]n increase above and beyond the GPM (Guaranteed Price Maximum) can take place for any and all modifications from signed Initial Bid Set and the increased costs for any and all modifications to the signed Initial Bid Set are accepted by Laura & Greg Fox as their financial responsibility if any increase is required. Paquette Holding agrees to notify Greg & Laura Fox upon confirmed knowledge of any such increase in costs.

In an email dated July 15, 2014, D'Olivio told the Foxes she would let them know the increase in the GPM within forty-eight hours of receiving their final decisions on the modifications. Once that was done, she would send them "a work detail schedule and a pay schedule as outlined in the contract." According to Greg, D'Olivio never notified them of any increase to the GPM and, on August 8, they received a "work and payment schedule" invoice that billed them only for the remainder due on the first installment.

On November 12, the Foxes sent D'Olivio an email regarding specifics for certain windows and doors. At the beginning of the email, the Foxes stated they "still don't have prices, which could potentially change some things." Ten days later Greg sent D'Olivio a text message regarding tile for the bedroom and kitchen. Greg told D'Olivio "you said you were going to get us a list of our budgets for all of these things, could you please send it over as soon as you can." Greg testified he and Laura were trying to make sure they stayed within the $44,050 allowance amount.

D'Olivio responded that she would definitely get their budget and allowance amounts to them the following day. Greg stated they never received the information.

On December 1, the Foxes emailed D'Olivio again about house items. At the beginning of the email, they stated "We need to know our budgets, this is starting to get really important!!" Greg stated they had been trying to "keep an eye on" the cost but "there's so many things that we just don't have a clue on" and they were relying on D'Olivio to make sure they stayed within their budget. At this point, according to Greg, D'Olivio had given them no indication of what the prices for things were or that there would be an increase in the GPM.

The Foxes continued to make decisions on house items and building features. On December 6, they emailed D'Olivio stating they "really need[ed] to see the price for potential HVAC upgrades." Greg testified that seeing the cost was important so they could determine whether they wanted to go through with any changes.

On January 6, 2015, Greg messaged D'Olivio asking for her progress on "getting the final budget/allowance breakdowns/new GPM[.]" D'Olivio responded she would send them the "new GPM" that evening for the HVAC, the "electric increase," the foundation, the windows and doors, and the lumber. D'Olivio also informed them she would be getting the building permit the next day so they could finally begin building. Greg replied to D'Olivio that, as far as he was aware, there were "no other changes that would affect our GPM other than what we have in this phase, is that correct?" He further stated they wanted "to make sure that this will be

the final change to the GPM unless we make any last minute changes." D'Olivio responded that the other changes that would affect the GPM would be "cabinet modifications and miscellaneous modifications which are minor."

Two weeks later, when they had still not received any information regarding their costs, the Foxes messaged D'Olivio again stating it was "really important" that she provide them with their final GPM and budgets. On February 18, D'Olivio sent the Foxes an email with the "final count for the modifications for the electric." The email stated the total modified cost of the electrical work would be $32,200, which she said she could reduce to $26,900 if they allowed her to "sub out the PVC installation." The Foxes responded with a list of changes to the electrical work, including removal of multiple outlets and lights that they hoped would reduce the increased cost.

In April, D'Olivio sent the Foxes the second "work and payment schedule" invoice. In addition to the second installment payment, D'Olivio also billed the Foxes $120,426.75 for asserted modification costs. Greg stated they were shocked because the only increased cost they had been made aware of was the additional $26,900 for the electrical work. Greg admitted he was aware that changes to things such as the HVAC system could cause an increase in costs, but they had not signed any change orders as required by the second amendment and they had not been informed before getting the second invoice that any of the changes they had discussed would cause an increase in the GPM. The invoice contained only a total

amount owed with no breakdown of what the individual charges were. D'Olivio also did not provide the Foxes with receipts to show what money had been paid out by her in connection with the house.

The Foxes met with D'Olivio and demanded to know why the cost was so high. D'Olivio responded that she would see what she could do to lower the cost. Shortly thereafter, D'Olivio sent the Foxes an amended invoice reducing the modification costs to $84,241.25 which, along with the second installment payment, made the total due $228,939.87. The Foxes paid this amount in full a few days later making the total amount they had paid for the house so far $398,174.48.

It was at about this time that the Foxes' income taxes became due including the taxes owed on their Bitcoin sale. Their plan had been to obtain a mortgage on the finished house to pay off the taxes. But Greg testified the only work that had been done on the house in the year since they signed the initial contract was the foundation and some of the framing. Although they were upset about the modification charges, they felt their best plan was to move forward with D'Olivio and get the house done as quickly as possible. Because they had only planned to spend an amount close to the originally stated GPM, they asked D'Olivio if she would allow them to split the final installment payment so that they would pay $100,000 at the time D'Olivio sent the final invoice and the remaining $52,314.34 after the house was completed and they obtained a mortgage. Greg testified D'Olivio agreed to let them split the final payment.

Shortly after paying the second invoice, Greg messaged D'Olivio stating they still had not been told "the full finances for the house or how much you have allotted for the cabinets in the kitchen." He then asked, "What price do we need to stay under in order to make sure the GPM does not go up, or that there won't be any added modification costs." In response D'Olivio stated "I don't modify unless I bring it to your attention which I have not done." She also told the Foxes to "hang in there" and they would work out the allowance budget to get them what they had discussed.

During May, the Foxes repeatedly questioned D'Olivio about whether certain changes would create modifications that exceeded their budget. At the end of May, D'Olivio messaged Greg that she was "very hopeful" the cabinet bid would be "within the remainder of your allowance budget." In a phone call the same day D'Olivio told Greg she was going to "hold [him] to that budget" and "maneuver things" if she had to in order to get him what he needed. Greg understood this to mean that all the allowance items had been within their budget.

By check dated September 18, 2015, the Foxes paid D'Olivio the $100,000 they agreed to pay as part of the final installment. Although D'Olivio had not yet given the Foxes a final invoice, Greg testified they were anxious to get the house completed so they could get the cash-out mortgage and pay their tax bill. Greg stated the money was to "make sure she can continue moving this house forward." This payment made the total amount paid by the Foxes for the house so far $498,174.48.

Three days later the Foxes were sent a "Notice of intent to seize ("levy") your state tax refund or other property" by the IRS. The notice stated the Foxes' property could be subject to seizure if they did not pay their unpaid taxes which, along with penalties and interest, amounted to $184,203.92. Greg testified he was working with the IRS and keeping them updated on their progress. He stated the people at the IRS were sympathetic, but only "to a point." Ultimately, none of the Foxes' property was levied upon or seized.

Greg began doing some of the low voltage electrical work on the house himself. D'Olivio expressed concern about her potential liability if Greg got injured and asked him to sign a hold-harmless agreement. The agreement D'Olivio brought the Foxes was entitled "4th Amendment to General Contract for Services" and, in addition to a hold-harmless provision, the amendment also had a paragraph concerning the allowances. The allowance paragraph contained a reference to research the Foxes had done into their costs and, after discussion with D'Olivio, the Foxes attached an exhibit to the amendment which was a list of allowance costs they had sent her in July. The paragraph with the added reference to the exhibit, stated as follows:

> . . . LGF [Laura and Greg Fox] acknowledge and agree that any and all spending above the allowance amount is of their own doing and is dictated by choice and desires of LGF. LGF agrees as set forth in signed GCS that the allowance budget is known and that LGF are fully aware of the pricing for any and all such costs related allowance items and as such are solely responsible for out of budget spending. LGF agree that Paquette Holding did inform LGF of budget costs and

> modification/change order increases that would directly affect the set budget amount and that the budget amount for allowances and any increase would be the sole financial responsibility of LGF. LGF agree that in fact they did research their costs and recognize their out of budget spending. Exhibit C. See attached document of House Items. LGF also agree to reimburse in full to Paquette Holding and in accordance to GCS any and all allowance items bought by Paquette Holding on request of LGF and that the cost incurred by Paquette Holding for such requests must be paid back to Paquette Holding.

Exhibit C listed thirty-two allowance items, mostly appliances, plumbing fixtures, and the fish tank. Of those thirty-two items, the exhibit showed the Foxes had already paid in full for nineteen of the items and for half of the fish tank. The total amount paid by the Foxes according to the exhibit was $17,897 which was to be credited towards their allowance budget. Eight of the allowance items had been paid for by D'Olivio, totaling $6,720. Of the remaining four items, three of them, including the refrigerator, washer, and dryer had no costs associated with them because the Foxes decided to move the ones they already owned into the new house. The only allowance item on the list without a cost associated with it was the bathtub in the primary bathroom. In total, the list outlined payments of $24,617 out of the allowance budget of $44,050. Greg testified that their understanding of the references to "budget costs and modification/change order increases" in the fourth amendment pertained only to the increases they had already paid for in the second installment payment. He stated they had not been made aware of any increased costs associated with the house since that time.

With the house still not completed, the Foxes began exploring the possibility of obtaining a construction loan to pay off the remaining amount owed to D'Olivio and their taxes. D'Olivio assisted the Foxes with this process and, on October 14, she spoke with the Foxes by phone stating she had talked to a lender and obtained preliminary approval for them to obtain a construction loan to finish building the house, and then a cash-out mortgage to pay their tax bill. When Greg asked how much the house was going to cost in total, D'Olivio responded that, with respect to their last payment, she had "bought a tremendous amount of allowance stuff that didn't need to or should have . . . just waited, so that's all included, so you're over 210. You're over 210. You've paid 100, so you owe – went over 110,000." When the Foxes expressed surprise, D'Olivio stated "yeah, well, you modified the cost." Greg responded that they had asked her to let them know every time a modification caused an increase in the cost and how much it was. D'Olivio said they had "discussed it all" and the bulk of it was from "all the appliances" and "stuff that doesn't come off the builder's costs." She further said "You sent me that list, you have the prices listed on it, you are aware of those costs." Greg testified the only list they had sent D'Olivio was Exhibit C to the fourth amendment. D'Olivio continued, "So we discussed this numerous times. And the fact of the matter is, the items are there and the work has been done, and it's all documented and it's all broke down for you." D'Olivio stressed how important it was to get the house built so they could pay the IRS. Greg responded, "Can you get that information to us very quickly,

please, because I have to do the numbers, and I have to see the items." Greg testified he never received the information about the allowance costs despite repeated requests.

In late October, the Foxes and D'Olivio met and D'Olivio gave them a third installment invoice. This invoice listed the amount owed for the third installment together with modification costs to be $310,712.22. The invoice also billed the Foxes for $64,708.93 in taxes for a total amount of $375,421.15. Deducted from that amount was the Foxes' previous payment of $100,000, the allowance amount of $44,050, and a "discount" of $30,000 which Greg testified was based on a recent offer they made to sell D'Olivio their current house at cost. This made the total amount due $201,371.15. The invoice had no receipts attached and no breakdown of the costs other than a list of prices for things identified only as "purchased items." The invoice also stated "No Further Construction will take place until Paid in Full." The Foxes told her the amount was crazy and questioned the taxes. Greg testified D'Olivio told them there was no way she could remove the taxes from the bill and it would be illegal to do so.

Greg testified he and Laura felt they had no choice but to pay the increased amount and finish building the house with D'Olivio. They reached out to friends and family to help them get the extra money by cosigning for their loan. On November 3, Greg emailed D'Olivio that he was trying to explain to his mother how they were so far above the guaranteed price. He asked D'Olivio to "please list what

specific items increased the original guaranteed price and in what amounts." D'Olivio responded in a text message stating,

> Greg I look at the email look at your second invoice increase and modifications from the very beginning that's why you're actually [sic] comes from including the tax it's very self-explanatory I'm not going back and forth on this you have all the documentation from me to answer your own question
>
> you're forgetting the main point the main point is securing the home. Your continued delay will lead to a loss of at [sic] home by the IRS a lien due to failure to pay the invoice and the amount owed
>
> please get the mortgage cosigned there's not much else I can do to help you the longer you wait the higher your risk

Frustrated and concerned, the Foxes decided to hire a lawyer.

Discussions between the Foxes and D'Olivio continued over the next several months. On January 6, 2016, the IRS filed a Notice of Federal Tax Lien in the amount of $179,120.08 on the Foxes' property. When things could not be resolved with D'Olivio, the Foxes attempted to move forward on the house with another contractor. No work had been done on the house since October and they were concerned that the passage of time would cause damage to the portions of the house that had been completed. The permit and house plans were in D'Olivio's name, however, and she refused to release them. Additionally, D'Olivio refused to release the fixtures and other items in storage on the property that the Foxes had paid for.

In May 2016, D'Olivio drafted a new final invoice for the Foxes. This invoice did not include a charge for taxes, but added storage costs and a return of "discounts/credits" in the amount of $47,115 "due to Fox's Breach of Contract &

Bad Faith." The total amount stated as due upon receipt was $255,708.71. D'Olivio sent the Foxes an email on May 4 stating her team was prepared to complete the house and if she did not hear from them, she would "take the necessary steps to ensure that the money you now owe Paquette Holdings is paid in full."

The Foxes filed this suit on May 10, 2016, asserting claims for breach of contract, fraud, violation of the Texas Theft Liability Act, conversion, violation of the Texas Trust Fund Act, and violations of the Texas Deceptive Trade Practices Act. Shortly after the suit was filed, D'Olivio filed an affidavit claiming a lien on the house in the amount of $206,000. Because they could not get a loan on the house with the lien in place, Greg testified they worked out a different payment plan with the IRS to pay them $3,000 per month.

Over a year later, and in accordance with an order compelling answers to interrogatories, D'Olivio's attorney submitted a chart of payments purportedly made by D'Olivio out of the Paquette Holding bank account in connection with the construction. Attached to the document was a verification affidavit signed by D'Olivio. The chart showed 149 payments including two cash payments to D'Olivio totaling $125,051.47 for 20% overhead and profit, and four cash payments to John Paquette of $20,000 each. The first two payments to Paquette were undated and the last two were dated February 21, 2015 and April 21, 2015. Greg compared the chart to Paquette Holdings' bank account records and found multiple items that did not match up. Greg testified that if you removed the cash payments to D'Olivio and

Paquette and the items that appeared to be duplicate payments or had no support in the bank records, the documentation showed D'Olivio had spent only $230,952 on construction of their house. Greg further testified the bank records showed D'Olivio used the Paquette Holdings account to pay for her rent, her daughter's rent, and personal purchases from places like Target and Walmart. He stated approximately $6,000 in money from the account was spent at Starbucks.

At trial, the Foxes presented the expert testimony of Lynn Motheral, an area homebuilder who also worked as an expert in construction cases. Motheral testified the Foxes' house was still in the framing stage and was only 40% to 45% complete. Even using the amounts stated by D'Olivio in her deposition regarding what she had paid for things in place such as the plumbing and electrical work, and despite the fact that the Foxes had already paid her over $490,000, the total cost for what had been built so far was only $270,322.22. Adding in a reasonable overhead and profit charge of 15%, which Motheral testified was industry standard rather than the 20% charged by D'Olivio, the total value of the house in place was $310,870.55. Motherall further testified the cost to complete the house, taking into account the cost to fix the deterioration caused by the house sitting untouched for an extended period, was $240,244.94. Adding in a 15% overhead and profit charge, the total price of completion was $276,281.68. Motheral stated the record showed $179,492.64 in upgrade charges. He further stated nothing attached to the house would be taxed.

Motherall stated it was not normal for a builder to front load collection of money from the client and then pay it out later for the work done. Standard practice was to collect money from the client after the work had been completed to cover the costs incurred. Motherall further stated it would be highly unusual to pay out large amounts for construction in cash because such payments would be "a red flag" and were harder to track for purposes of complying with the trust fund act. According to Motherall, money paid for the project must come out of a construction account specifically earmarked for the project and other jobs cannot be paid for out of the same account.

In dealing with clients, Motherall stated that, whenever he ran into a cost overrun, he would stop and go over the increase with the client before proceeding. He did not expect his clients to know what things would cost ahead of time. He also stated that he could only perfect a lien on construction work that had been completed, not on work that had yet to be done.

D'Olivio agreed with Motheral at trial that the value of the home at the time of trial was around $270,000, but said she was entitled to 20% overhead and profit bringing the total cost of the partially completed house to around $320,000. Although there was no mention of overhead and profit in her contract with the Foxes, D'Olivio testified they had discussed it verbally. D'Olivio disagreed with Motheral regarding how much of the house had been completed stating in her view, the house was at least 70% complete. She further stated that, although the house had yet to

have any drywall or insulation installed, the delay in the work was caused by Greg taking an extended period of time on the low-voltage electrical work.

D'Olivio stated all the money paid to her by the Foxes was accounted for by the bills for construction. She disputed the accuracy of the payment chart submitted by her previous attorney in response to the trial court's order compelling discovery, and said he had used her signature on the verification page without her permission. In particular, she disputed the four cash payments of $20,000 to John Paquette, who she says worked as her supervising general contractor. D'Olivio testified she had paid him only $60,000 and, although she paid him in cash, she did so in $5,000 to $8,000 increments rather than in $20,000 lump sum payments as indicated on the chart. With respect to the payments she made out of the account for things like her children's rent, she stated "I had one account, I testified to that, and I didn't say I had any different. The money out of each invoice of 20 percent is my money. I can spend it any way I want, and I will always take care of my family, always with my money, which I am entitled to."

D'Olivio also stated that, despite the fact taxes were listed as a charge to the Foxes on the invoice she gave them in October 2015, the Foxes "didn't owe [her] $64,000 in taxes." D'Olivio testified she never actually charged the Foxes for taxes and she created the October invoice solely "for the lending company." She "believed at the time [it] would get them through their financial problems enough to get a

construction loan." D'Olivio stated the real final invoice was the one she gave them in May 2016, seven months after she stopped working on the house.

D'Olivio conceded she did not have written change orders for the majority of the modifications and upgrades. But she said all the changes were discussed verbally and the Foxes were aware of the costs. D'Olivio stated the GPM was for approximately $95 per square foot without any modifications or upgrades. She further stated it was "unheard of" to build a house for $95 per square foot in the neighborhood where the Foxes were building their house. According to D'Olivio, she stopped work on the Foxes house because they had run out of money and breached their contract.

After hearing the evidence, the trial court ruled in favor of the Foxes on their claims for breach of contract, fraud, violations of the DTPA, and violation of the Texas Trust Fund Act with intent to defraud. The court awarded actual damages in the amount of $282,506.40, treble damages of $150,000 under the DTPA, and $50,000 in exemplary damages. The court further ordered that the Foxes had paid for the architectural and engineering plans, as well as the building permit, and those things were released to them so they could complete construction. The Foxes were awarded possession of all the items from the storage unit on their property that they had paid for and the cabinets that were being stored offsite. The court declared the lien D'Olivio had placed on the property invalid and unenforceable. Finally, the Foxes were awarded $58,407 in attorney's fees through trial, $20,000 in the event

of a successful appeal to this Court, and another $20,000 in the event of a successful appeal to the Texas Supreme Court.[2] D'Olivio brought this appeal.

ANALYSIS

I. Breach of Contract

In her first six issues, D'Olivio generally challenges the legal and factual sufficiency of the evidence supporting the trial court's findings that she breached her contract with the Foxes and the Foxes did not commit a prior material breach. In reviewing a legal sufficiency challenge to the evidence, we credit evidence that supports the verdict if a reasonable factfinder could have done so and disregard contrary evidence unless a reasonable factfinder could not have done so. *Akin, Gump, Strauss, Hauer & Feld, L.L.P. v. Nat'l Dev. & Research Corp.*, 299 S.W.3d 106, 115 (Tex.2009); *City of Keller v. Wilson,* 168 S.W.3d 802, 827 (Tex.2005). We consider all the evidence in the light most favorable to the prevailing party and indulge every reasonable inference in that party's favor. *St. Joseph Hosp. v. Wolff*, 94 S.W.3d 513, 520–21 (Tex. 2003). The evidence is legally sufficient if "more than a scintilla of evidence exists." *Browning–Ferris, Inc. v. Reyna*, 865 S.W.2d 925, 928 (Tex. 1993). More than a scintilla of evidence exists if the evidence furnishes

[2] The trial court signed a final judgment nunc pro tunc on April 18, 2019 to correct the date the on which the original final judgment was signed. The original final judgment stated it was signed on May 2, 2017 when it was actually signed on May 2, 2018. The judgment nunc pro tunc made no changes to the final judgment other than correcting the date. A trial court may correct clerical errors by judgment nunc pro tunc. *See Escobar v. Escobar*, 711 S.W.2d 230, 231 (Tex. 1986).

some reasonable basis for differing conclusions by reasonable minds about a vital fact's existence. *Litton Loan Servicing, L.P. v. Manning*, 366 S.W.3d 837, 840 (Tex. App.—Dallas 2012, pet. denied). The final 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. *Del Lago Partners, Inc. v. Smith*, 307 S.W.3d 762, 770 (Tex. 2010).

To evaluate a factual sufficiency challenge, we consider and weigh all the evidence. *Dow Chem. Co. v. Francis*, 46 S.W.3d 237, 242 (Tex. 2001) (per curiam). We can set aside a verdict only if the evidence is so weak or the finding is so against the great weight and preponderance of the evidence that it is clearly wrong and unjust. *Id*. We must not substitute our judgment for that of the factfinder and should remain cognizant that the factfinder is the sole judge of witness credibility. *Golden Eagle Archery, Inc. v. Jackson*, 116 S.W.3d 757, 761 (Tex. 2003).

In its findings of fact and conclusions of law, the trial court found D'Olivio breached her contact with the Foxes by (1) failing to provide a budget for allowances or breakdown of upgrades to support increases in the GPM, (2) making modifications and changing allowance amounts without written change orders, (3) charging for work that had not been done, (4) charging for taxes that were not owed, (5) using construction funds for something other than the Foxes' house, and (6) abandoning construction when the Foxes were in compliance with the contract and did not owe her any money. D'Olivio contends any findings that she violated the

contract by charging for unapproved upgrades and modifications are contrary to the unambiguous language of the fourth amendment to the general contract signed by the Foxes. D'Olivio reads the amendment to approve all out-of-budget spending both before and after the amendment was signed.

The language relied upon by D'Olivio is contained in the portion of the fourth amendment addressing allowances. In that portion, the Foxes acknowledged they were "fully aware of the pricing for any and all such costs related to allowance items and as such are solely responsible for out of budget spending." The Foxes further acknowledged that "they did research their costs and recognize their out of budget spending." Specifically referenced in the amendment, however, was a list of all the allowance costs of which the Foxes were aware, the total of which fell well within the allowance budget of $44,050.

The amendment further stated "that Paquette Holding did inform LGF of budget costs and modification/change order increases that would directly affect the set budget amount and that the budget amount for allowances and any increase would be the sole financial responsibility of LGF." The amendment, by its terms, applied only to budget increases the Foxes were made aware of before signing the amendment. Greg testified the only increase to the GPM D'Olivio informed them about prior to their signing the amendment was the increase reflected in the second invoice, which they agreed to pay. D'Olivio produced no evidence at trial to show otherwise. Nothing in the fourth amendment removed the contractual requirement

that D'Olivio inform the Foxes of the costs associated with each allowance item and obtain a signed change order from the Foxes before going forward with any modifications that would affect the GPM. Pursuant to the nonwaiver provision in the original contract, the Foxes' willingness to pay for previous modifications made without written change orders did not waive their right to require change orders for future modifications.[3] Accordingly, D'Olivio's reliance on the fourth amendment as a blanket approval by the Foxes of future out-of-budget charges without their authorization is misplaced.

D'Olivio also challenges the trial court's conclusion that the Foxes did not commit a prior material breach of the contract excusing her failure to perform. D'Olivo contends there were three occurrences of default under the terms of the general contract: the Foxes failed to make a required payment when due, they became insolvent, and their property was subjected to levy by the IRS.

Although it is undisputed the Foxes never paid the third invoice, D'Olivio testified at trial that the invoice she submitted in October 2015 was never intended as a request for payment from the Foxes and was created solely for the purposes of helping them obtain a construction loan. D'Olivio testified she gave them the "real" invoice in May 2016, seven months after she stopped working on the house. Even

[3] D'Olivio makes no argument that the Foxes intentionally engaged in conduct inconsistent with claiming the right to enforce the nonwaiver provision. *See Shields Ltd. P'ship v. Bradberry*, 526 S.W.3d 471, 485 (Tex. 2017).

in the May invoice, D'Olivio charged the Foxes for unauthorized upgrades and modifications. D'Olivio cannot rely on the Foxes' refusal to pay an improper invoice that, by her own testimony, was not submitted for payment until long after she refused to continue work under the contract, as a prior material breach.

The only evidence in the trial record that D'Olivio points to as showing the Foxes were insolvent is their tax debt and their request to split the final installment payment with only $100,000 being paid in cash up front. According to D'Olivio, when the Foxes gave them the final $100,000 check, they informed her they "had no more money."

The term "insolvency" was not defined in the contract. Generally, insolvency means an inability to pay debts as they mature. *See Parkway/Lamar Partners, L.P. v. Tom Thumb Stores, Inc.*, 877 S.W.2d 848, 850 (Tex. App.—Fort Worth 1994, writ denied). The trial court found that the Foxes "paid $498,174 in cash for the construction of the home" and "they had loan options if additional money was needed for construction." Indeed, the evidence showed the Foxes had obtained preliminary approval for a construction loan at the time D'Olivio stopped work. At that time, the Foxes owed no money to D'Olivio. The Foxes' unwillingness or inability to complete construction in the future with cash does not establish insolvency. Greg disputed ever telling D'Olivio they had "no more money" and the trial court was free to disbelieve D'Olivio's testimony. *See Brauss v. Triple M Holding GmbH*, 411 S.W.3d 614, 621 (Tex. App.—Dallas 2013, pet. denied).

With respect to the tax debt, the evidence showed, and the trial court found, that the Foxes chose to pay cash for construction of the house and to borrow against the equity in the house to pay their taxes. The evidence further supported the trial court's finding that the Foxes were paying their tax obligation under an agreement with the IRS. Once it became impossible for the Foxes to obtain a cash-out mortgage due to D'Olivio's actions, the Foxes arranged to pay off their tax bill in $3,000 monthly installments. The mere existence of a debt does not establish insolvency. There is no evidence in the trial record to show the Foxes were unable to pay their tax bill, only that D'Olivio frustrated and ultimately thwarted their original plan of how to do so. The Foxes submitted evidence that they had resources, including friends and family who were willing to help them if needed. *Cf. Hillwood Inv. Props. III, Ltd. v. Radical Mavericks Mgmt., LLC*, No. 05-11-01470-CV, 2014 WL 4294968, at *3 (Tex. App.—Dallas Aug. 21, 2014, no pet.). Accordingly, the evidence supports the trial court's conclusion that the Foxes were not insolvent.

Finally, there is no evidence in the trial record to show the Foxes defaulted under the contract due to a levy on their property. Although the IRS sent them a notice of intent to levy, the evidence showed no levy ever occurred. Although the IRS eventually filed a lien on the property, the contract does not include liens as an event of default. Even if a lien could be considered a defaulting event, the evidence shows the lien was not filed until well after D'Olivio ceased work under the contract. Accordingly it could not have constituted a prior breach.

In her tenth issue, D'Olivio contends the evidence is insufficient to support the trial court's award of $282,506.40 in actual damages. D'Olivio simply states, without discussion or argument, that "there is nothing in the record to support the trial court's calculations." It is undisputed that the Foxes paid D'Olivio $498,174. Their expert testified at trial that the value of the work in place was only $310,870.55. The difference between what was paid and what was received was $187,303.45. In addition, the evidence showed the work in place included $179,444.20 worth of unauthorized upgrades. The Foxes stated they were not seeking reimbursement for the $84,241.25 in upgrades they agreed to pay for in their second installment payment. The difference between $179,444.20 and $84,241.25 is $95,202.95. The trial court's damage award was calculated as the difference between what the Foxes received and what they paid together with the cost of the unauthorized upgrades they did not agree to pay for ($187,303.45 + $95,202.95 = $282,506.40).

Based on the foregoing, we conclude the evidence is legally and factually sufficient to support the trial court's judgment against D'Olivio for breach of contract and its award of actual damages. We resolve D'Olivio's first six issues and her tenth issue against her.

II. DTPA

In her eighth issue, D'Olivio challenges the sufficiency of the evidence supporting the trial court's verdict in favor of the Foxes on their DTPA claim.

D'Olivio argues the Foxes' claims sounded only in contract and, therefore, awarding additional damages under the DTPA was error. Although the failure to comply with a contract alone does not violate the DTPA, an initial misrepresentation inducing a party to enter into a contract the person making the representation had no intention of performing is a violation of the DTPA. *See* TEX. BUS. & COM. CODE ANN. § 17.46(b)(24) (defining deceptive acts to include "failing to disclose information concerning goods or services which was known at the time of the transaction if such failure to disclose such information was intended to induce the consumer into a transaction into which the consumer would not have entered had the information been disclosed"); *Tony Gullo Motors I , L.P. v. Chapa*, 212 S.W.3d 299, 305 (Tex. 2006).

"Proving that a party had no intention of performing at the time a contract was made is not easy, as intent to defraud is not usually susceptible to direct proof." *Id*. While a breach of contract by itself is not evidence that a party did not intend to perform, breach combined with "slight circumstantial evidence of fraud" will support a verdict of fraudulent intent. *Id*. A party's intent at the time the representation is made may be inferred from the party's subsequent acts. *Aquaplex, Inc. v. Rancho La Valencia, Inc.*, 297 S.W.3d 768, 775 (Tex. 2009). Intent is a fact question "uniquely within the realm of the trier of fact" because it so depends on the credibility of the witnesses and the weight to be given their testimony. *Spoljaric v. Percival Tours, Inc.*, 708 S.W.2d 432, 434 (Tex. 1986).

In this case, the evidence presented at trial showed that, before the original construction contract was signed, the Foxes informed D'Olivio they had a maximum budget of $405,000. They also told her they were looking at two lots in Sunnyvale and the house had to be 3,000 to 4,000 square feet. D'Olivio knew the Foxes wanted the house to have numerous high-end features such as heated tile floors, granite counter tops, a bar area, a built-in fish tank, and a "laboratory room." She also knew they were hoping to have features such as a safe room, elevator, and indoor pool. Knowing all this, D'Olivio contracted with the Foxes to build them a house for a guaranteed price maximum of $405,000.

Once the Foxes had purchased the land and had design plans drafted, D'Olivio quickly renegotiated the GPM up to $456,943. At that price, the Foxes were paying approximately $95 per square foot. D'Olivio conceded at trial that it was "unheard of" to build a house that cheaply in the neighborhood where the Foxes were building.

D'Olivio repeatedly reassured the Foxes she would help them stay within their budget and that she would not make modifications without informing them if the change would result in an increase of the GPM and obtaining their approval. Despite this, D'Olivio charged the Foxes for numerous unauthorized upgrades and modifications that raised the cost of the house to well in excess of the GPM. A substantial amount of the money the Foxes paid to D'Olivio could not be accounted for. This evidence is more than "slight circumstantial evidence of fraud" and is

sufficient to show D'Olivio induced the Foxes to enter into a GPM contract she never intended fulfill.

The trial court found the same actual damages as a result of the DTPA violation as for D'Olivio's breach of contract. The Foxes were entitled to elect the theory of recovery that provided them with the largest damage award. Because recovery under the DTPA allowed the Foxes to recover treble damages in addition to actual damages and attorney's fees, the trial court's judgment properly awarded the Foxes those amounts. *See Chapa*, 212 S.W.3d at 304. We resolve D'Olivio's eighth issue against her.

III. Fraud and Texas Trust Fund Act

In her seventh and ninth issues, D'Olivio challenges the sufficiency of the evidence supporting the trial court's determination that she committed fraud and violated the Texas Trust Fund Act with intent to defraud. In her eleventh issue, she challenges the trial court's award of exemplary damages based on its findings of fraudulent conduct.

As with the DTPA claim, the trial court concluded the Foxes incurred the same actual damages as a result of D'Olivio's fraudulent conduct as from her breach of contract. As discussed above, the Foxes were entitled to recover based on the theory of liability that provided them with the greatest relief. *Id*. They could not, however, recover based on more than one theory when all the theories resulted in the same injury. *Id*.

The trial court awarded the Foxes $150,000 in treble damages pursuant to the DTPA. *See* TEX. BUS. & COM. CODE ANN. § 17.50(b)(1) (for acts committed intentionally, a consumer may recover up to three times the amount of economic damages). The award of exemplary damages based on D'Olivio's fraudulent conduct was only $50,000. Because the Foxes cannot recover under more than one theory, and they are entitled to the largest recovery possible, we reverse the trial court's award of $50,000 in exemplary damages. We resolve D'Olivio's eleventh issue in her favor. This determination renders it unnecessary for us to address D'Olivio's seventh and ninth issues.

IV. Declaratory Relief, Injunctive Relief, and Attorney's Fees

In her final issue, D'Olivio contends the evidence is legally insufficient to support the trial court's awards of declaratory relief, injunctive relief, and attorney's fees. D'Olivio provides no argument or citation to authority to support these contentions. Bare assertions of error, without argument or authority, present nothing for review on appeal. *See Sullivan v. Bickel & Brewer*, 943 S.W.2d 477, 486 (Tex. App.—Dallas 1995, writ denied); *Hogan v. Aspire Fin., Inc.*, No. 05-19-00385-CV, 2020 WL 3054509, at *2 (Tex. App.—Dallas June 8, 2020, no pet. h.) (mem. op.); *see also Fredonia State Bank v. Gen. Am. Life Ins. Co.*, 881 S.W.2d 279, 284 (Tex. 1994) (appellate court has discretion to waive point of error due to inadequate briefing). Because D'Olivio has failed to provide any argument or authority to show

error, we conclude she has waived our review of the matter asserted in this issue. We resolve her twelfth issue against her.

V. Conclusion

Based on the foregoing, we reverse the trial court's judgment to the extent it awards the Foxes $50,000 in exemplary damages. In all other respects, the judgment is affirmed.

/Amanda L. Reichek/
AMANDA L. REICHEK
JUSTICE

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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

BRIGETTA D'OLIVIO, Appellant	On Appeal from the 191st Judicial District Court, Dallas County, Texas
No. 05-18-00868-CV V.	Trial Court Cause No. DC-16-05606. Opinion delivered by Justice
GREG FOX AND LAURA FOX, Appellees	Reichek. Justices Schenck and Osborne participating.

In accordance with this Court's opinion of this date, the judgment of the trial court is **AFFIRMED** in part and **REVERSED** in part. We **REVERSE** that portion of the trial court's judgment awarding Greg Fox and Laura Fox $50,000 in exemplary damages. In all other respects, the trial court's judgment is **AFFIRMED**.

It is **ORDERED** that appellees GREG FOX and LAURA FOX recover their costs of this appeal from appellant BRIGETTA D'OLIVIO.

Judgment entered July 20, 2020