IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 92-4908

UNION TEXAS PETROLEUM CORPORATION,

Plaintiff-Appellant,

versus

S & R OILFIELD SERVICES, INC.,

Defendant-Appellee.

Appeal from the United States District Court for
the Western District of Louisiana
(CV 88 3325)

September 8, 1993

Before REAVLEY, DUHÉ and BARKSDALE, Circuit Judges.

REAVLEY, Circuit Judge:[*]

Union Texas Petroleum Corporation ("UTP") brought suit against S&R Oilfield Services, Inc. ("S&R") and others, on claims arising out of S&R's sandblast and paint work on three of UTP's offshore platforms. After a bench trial, the district court awarded UTP a recovery for certain invoices which had been paid

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[*]Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

twice, but denied all other claims. UTP appeals the district court's denial of a recovery on other the claims. We affirm.

I. BACKGROUND

In 1985 four of UTP's offshore platforms in the Gulf of Mexico were in need of sandblasting and painting. The parties refer to these four platforms as Vermilion 171, Vermilion 103, Vermilion 104 and South Timbalier 148. UTP sent out bid packages to potential contractors which contained specifications for the paint work. The bid packages were essentially requests for bids. Originally the bid package specifications called for the platforms to receive a "white metal" blast and a three-coat paint system, and called for the contractor to provide labor and materials. After receiving several bids, UTP hired S&R to paint the three Vermilion platforms referenced above, and non-party Rex Painting, Inc. was hired to paint the South Timbalier platform.

Evidence was presented that UTP changed the original specifications to provide that UTP would supply the paint and sand for the jobs, and that a two-coat "Carboline" paint system would be used rather than the more expensive three-coat system. S&R completed its work on Vermilion 103 and 104, but was pulled off the job on Vermilion 171 after completing only 50 to 70 percent of the work on that platform. S&R used a two-coat paint system, and did not use a white metal blast originally specified in the bid packages. By 1987, the paint jobs on the platforms had not held up, and Vermilion 171 had to be completely repainted, this time using a white metal blast and a three-coat

paint system. Vermilion 103, Vermilion 104 and South Timbalier 148 also had to be repainted.

UTP claimed that S&R and its vice-president Stephen Bienvenu corrupted UTP area production superintendent Charles Mason by providing him with gifts and bribes, and that Mason in turn allowed S&R to provide inferior services and to overcharge UTP for its work. UTP brought suit against S&R, Bienvenu and Mason, asserting numerous claims including breach of fiduciary duty on the part of Mason, unfair trade practices, and breach of contract. The district court found that UTP had made double payments on certain invoices, and entered judgment in favor of UTP for the amount that had been paid twice. The other claims for relief were denied.

II. DISCUSSION

A. Liability for Inducing Breach of Fiduciary Duty

UTP contends that the district court found as fact that S&R and Bienvenu paid Mason bribes, and that the court therefore erred as a matter of law in not awarding damages on its claim for inducing a breach of fiduciary duty. Under this claim UTP argues that it is entitled to (1) all of the indirect or consequential damages suffered as a result of Mason's breach of trust, (2) an amount at least equal to the value of the gifts and bribes Mason received, and (3) attorney's fees. While Mason died before trial and the claims against him were dropped, UTP contends that S&R

and Bienvenu are liable under applicable law for inducing Mason's breach of trust.[1]

In its opinion the district court stated:

> This Court is convinced however, that S&R and Stephen Bienvenu unduly tried to gain the influence of Union Texas employee Charles Mason, through gifts and trips, among other things. This Court finds such tactics reprehensible. However, as stated earlier, Charles Mason did not make the major decisions for Union Texas, and such tactics do not, of themselves, support a finding of breach of contract.

UTP argues that this finding entitles it to a recovery based on the evidence and applicable law, and that the district court erred earlier in its opinion in concluding that the only live issue for trial was whether S&R breached its contract with UTP. The issue of liability for breach of fiduciary duty was revisited when the court heard post-judgment motions. The court again declined to award damages on this claim, based on the credibility of the witnesses who testified regarding the attempts to bribe Mason. The trial judge stated that "I did not find them credible. In fact, I found them incredible, some of their

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[1] We have some question as to whether UTP ever properly asserted a claim for *inducing* a breach of fiduciary duty against S&R and Bienvenu. UTP's complaint asserts no separate count against S&R and Bienvenu for inducing Mason's breach of fiduciary duty, and the first count of the complaint, for "breach of fiduciary obligations," is asserted only against Mason. However, the prayer of the complaint generically prays for judgment on all counts against defendants "jointly, severally and *in solido*." In addition, at the beginning of the trial, the parties, including Mason (through his attorney) agreed that the claims against Mason and his counterclaim would be dropped, and that S&R and Bienvenu "will waive any defense they may have with respect that might arise out of the possibility of solidarity liability in connection with any judgment that may be obtained." We assume without deciding that the claim was properly asserted in the district court.

comments and stories." The court further explained its denial of relief on the breach of fiduciary duty and unfair practices claims:

> I further didn't feel that although I think they did try to influence Mr. Mason, there was no connexity between the influence of Mason and the alleged poor job that the plaintiff says was in fact and indeed a poor job. Y'all didn't bear the burden. . . . I didn't see a connexity between the influence or the attempted influence of Mr. Bienvenu and the defendant to any poor job that was done in this particular case. . . . I think what I said was there was an attempt to influence, but they were influencing the wrong person or attempting to influence the wrong person, because he wasn't calling the shots and they had other people there calling shots and making decisions. And there was no testimony . . . that those individuals had been influenced in any way, shape or form.

Under Louisiana law, employees in general, and we think in particular those such as Mr. Mason who oversee and approve invoices, have a duty of loyalty to their employer.

> The employee is duty bound not to act in antagonism or opposition to the interest of the employer. Every one . . . who is under contract or other legal obligation to represent or act for another in any particular business or line of business or for any valuable purpose, must be loyal and faithful to the interest of such other in respect to such business or purpose. . . . [He] is not entitled to avail himself of any advantage that his position may give him to profit beyond the agreed compensation for his service. . . . He will be required to account to his employer for any gift, gratuity, or benefit received by him . . . though it does not appear that the principal has suffered any actual loss by fraud or otherwise.

Texana Oil & Refining Co. v. Belchic, 90 So. 522, 527 (La. 1922). Under *Texana*, "whatever the agent servant/fiduciary wrongfully acquires during the fiduciary relationship must be disgorged completely, once and for all." *McDonald v. O'Meara*, 473 F.2d 799, 805 (5th Cir.), *cert. denied*, 412 U.S. 906 (1973).

Louisiana law further provides that "[h]e who conspires with another person to commit an intentional or willful act is answerable, in solido, with that person, for the damage caused by such act." LA. CIV. CODE ANN. art. 2324(A) (West Supp. 1993). This court has held that an earlier version of this statute applied where a defendant contractor had made secret payments to the plaintiff's full-time employee in order to influence the amount of contract work received from the employer.[2] We affirmed the district court's ruling that the contractor thereby became the employee's "partner in his breach of trust," and was answerable *in solido* with the employee for the damage caused by the breach of trust. *American Cyanamid Co. v. Electrical Indus., Inc.*, 630 F. 2d 1123, 1127 (5th Cir. 1980).

UTP urges on appeal that the evidence established that S&R and Bienvenu corrupted Mason with their bribes and gifts, and that this effort allowed S&R to perform substandard work and overcharge UTP for its work. We believe that the questions of whether S&R and Bienvenu induced Mason to breach his duty to his employer, whether UTP suffered any actual damages as a result of any such breach of trust, and whether S&R failed to perform its services in a good and workmanlike manner, were questions of fact

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[2] The earlier version of Article 2324 provided that "[h]e who causes another person to do an unlawful act, or assists or encourages in the commission of it, is answerable, *in solido*, with that person, for the damage caused by such act." LA. CIV. CODE ANN. art. 2324 (West 1979). The parties do not address whether this version of the statute or its 1987 amended version applies to this case, nor do we, since our decision does not turn on this question.

for the district court to determine. *See, e.g., Marathon Pipe Line Co. v. M/V Sea Level II*, 806 F.2d 585, 589 (5th Cir. 1986) (clearly erroneous standard of review applied to finding that alleged breach of warranty of workmanlike performance did not cause plaintiff's injury). As such, our review is limited to determining whether these district court findings are clearly erroneous. FED. R. CIV. P. 52(a). We can only reverse such a finding if, upon a review of the entire record, we are left with the definite and firm conviction that a mistake has been committed. *Graham v. Milky Way Barge, Inc.*, 824 F.2d 376, 388 (5th Cir. 1987). Furthermore, in a case such as this, where there are conflicts in the evidence requiring that credibility determinations be made, we will defer to the trier of fact. *Wohlhman v. Paul Revere Life Ins. Co.*, 980 F.2d 283, 285 (5th Cir. 1992).

At the outset, the court's finding of fact regarding the attempt to gain undue influence with Mason does not itself compel a reversal, nor is there an irreconcilable conflict between this finding and the district court's later comments (quoted above) at the hearing on post-judgment motions. As we read the district court opinion and the later comments from the bench, the court found that S&R and Bienvenu *attempted* unduly to influence Mason, but concluded that UTP had failed to carry its burden of proving that this attempt *caused* any actual injury to UTP, in the form of poor workmanship on the jobs, excessive charges, or otherwise.

Applying the clearly erroneous standard, we find that there was sufficient evidence in the record as a whole to support the latter finding. For example, there was evidence presented from which the district court reasonably could have concluded that: (1) while Mason may have influenced the decision to send the bid packages to S&R, he never even saw the bids that were returned, and did not influence the decision to award the contract to S&R over other bidders; (2) personnel at UTP (other than Mason) made the decisions to change the specifications from a three-coat system to a two-coat system, to have UTP supply the paint and sand, and to pay S&R on a time and materials basis rather than on a fixed bid or turn-key basis which S&R had offered; (3) Bienvenu had advised against using a two-coat Carboline paint system, since he had seen it fail at other sites in the Gulf of Mexico; (4) UTP hired its own inspector to oversee the jobs and to determine, among other things, the level of sandblasting to be done prior to paint application, and to the extent that the inspector's work schedule or instruments were inadequate, UTP was to blame; (5) the inspector was generally satisfied with S&R's work, and when he was not satisfied, S&R was cooperative in doing the work again; (6) the paint job on South Timbalier 148, which was not performed by S&R but which also used a two-coat Carboline paint system, also failed and repainting was required in 1987, as was the case with the platforms painted by S&R;[3] (7) Mason did

[3] The district court found that the failure of the paint job on South Timbalier 148 was a particularly important fact in S&R's favor.

not have sole authority to approve invoices, and instead invoices also had to be approved by his superiors; (8) the overpayments to S&R (which UTP recovered at trial) were not the fault of Mason or S&R, but were the result of errors by UTP's accounting department; (9) at least part of the problem with the performance of the paint job could have been due to the inferior quality of the paint itself or an improper mixing of paints, rather than S&R's application, and UTP supplied the paint; (10) weather problems were a factor in the length of the job exceeding S&R's estimate, as were a lack of dry sand and oil contamination caused by UTP; (11) the cost of these projects were not out of line with the costs of similar projects at the time; and (12) S&R's total invoices were less than UTP's own internal "AFE's" or authorizations for expenditure, and were less than the cost of repainting the platforms in 1987 (although the AFE's and the paint jobs in 1987 admittedly involved the more expensive white metal blast and three-coat paint system).

UTP argues that even if the gifts to Mason did not cause any actual damages to UTP, it is at the very least entitled to recover the value of those gifts. It points to language in *Texana*, *supra*, which requires the employee to account to his employer for such gifts "though it does not appear that the principal has suffered any actual loss by fraud or otherwise." 90 So. at 527. It also argues that the court's finding that Bienvenu and S&R unduly tried to influence Mason with such gifts mandates such a recovery. Our reading of the district court's

opinion and later comments at the hearing on post-judgment motions is that he found an attempt on the part of Bienvenu and S&R unduly to influence Mason, but based on the credibility of the witnesses, he declined to award damages equal to the value of the gifts, due to lack of evidence as to the identity and value of the gifts. In commenting on this issue, the court stated that he did not find the witnesses who testified about the gifts credible, "[a]nd if I didn't state it in the reasons, I'll state it now. I did not find them credible. In fact, I found them incredible, some of their comments and stories."

Again, we cannot say that the court's findings here are clearly erroneous. The alleged gifts to Mason from Bienvenu included a trip to Acapulco, the services of an alleged prostitute, one thousand dollars in spending money, and a Rolex watch. As for the spending money and the Rolex watch, both Bienvenu and Mason (by deposition) flatly denied that such gifts were ever made. Regarding the trip to Acapulco, no one denied that the trip took place, but there was no testimony as to the cost of the flight and hotel rooms, and Mason testified that he paid for a substantial part of the trip. As for the alleged prostitute, there was evidence that she was given spending money and $300 a night for the three-day trip to Acapulco. However, Mason, Bienvenu and the woman in question all denied that Mason used the services of the woman. As the district court correctly observed, "what they paid her and the value of her services may not have been the same," since *Texana* only requires the employee

to account for the "gift, gratuity, or benefit *received by him* . . . ." 90 So. at 527 (emphasis added).

B. Unfair Trade Practices

UTP complains of the court's failure to award a recovery under the Louisiana Unfair Trade Practices Act ("UTPA" or "Act"). The Act prohibits "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce . . . ." LA. REV. STAT. ANN. § 51:1405(A) (West 1987). Louisiana case law has interpreted the Act broadly to cover practices which offend public policy and are immoral, unethical, oppressive, unscrupulous or substantially injurious. *Belle Pass Terminal, Inc. v. Jolin, Inc.*, 618 So.2d 1076, 1081 (La. App. 1993); *Bryant v. Sears Consumer Fin. Corp.*, 617 So.2d 1191, 1196 (La. App. 1993).

UTP maintains that, inasmuch as the district court found the attempts to influence Mason "reprehensible," the conduct falls within the proscriptions of the UTPA. We find no error in denying a recovery under this claim. The district court denied relief because the plaintiff had not carried its burden of establishing "an ascertainable loss of money" and a connection between the alleged unfair practices and the alleged poor performance by S&R. Causation is an element for recovery under the Act. A private action may be maintained by a person "who suffers any ascertainable loss of money . . . *as a result of* the use or employment by another person of an unfair or deceptive method, act or practice . . . ." LA. REV. STAT. ANN. § 51:1409(A)

(West 1987) (emphasis added). *See also Roustabouts, Inc. v. Hamer*, 447 So.2d 543, 549-50 (La. App. 1984) (dismissing claim under Act for failure to connect any harm to claimant with alleged unfair practices); *Gerasta v. Hibernia Nat. Bank*, 411 F. Supp. 176, 193 (E.D. La. 1976) ("Even if we were to hold, which we do not, that the practices complained of were unfair, the evidence does not support a finding that any actual damages were sustained as a result of the alleged unfair practices employed."), *rev'd in part on other grounds*, 575 F.2d 580 (5th Cir. 1978).

Based on the evidence described above, we cannot say that the district court clearly erred in concluding that UTP had failed to establish that the alleged unfair practices of defendants caused it injury.

C. Breach of Contract

On appeal, UTP complains that the district court erred in denying its contract claim because S&R did not perform its work in a good workmanlike manner. UTP is correct that Louisiana law requires a repair contractor to perform his work in a good workmanlike manner. *Dixie Trucks, Inc., v. Davis*, 530 So.2d 107, 109 (La. App. 1988). Again, however, based on the record as a whole, some of which is summarized above, and deferring to the district court on credibility determinations, we cannot find that the court was clearly erroneous in finding no breach of contract.

D. Attorney's Fees

Finally, UTP complains that the district court erred in denying an award of attorney's fees. It cites authority that prevailing plaintiffs can recover attorney's fees under the UTPA and in cases of a fraudulent or bad faith breach of contract.[4] Since, for the reasons explained above, the district court did not err in denying UTP's claims under the UTPA and for breach of contract, it did not err in denying attorney's fees.

AFFIRMED.

[4] Again, we have some question whether all the claims for attorney's fees asserted on appeal were pleaded in the complaint. While the complaint requests attorney's fees under its UTPA count, it does not request attorney's fees in its counts for breach of fiduciary obligations, fraud, and breach of contract. We assume without deciding that the request for attorney's fees for fraudulent or bad faith breach of contract made on appeal was properly asserted in the district court.