FIRST DIVISION
PHIPPS, C. J.,
ELLINGTON, P. J., and BRANCH, J.

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March 26, 2014

NOT TO BE OFFICIALLY REPORTED

In the Court of Appeals of Georgia

A13A1664. COASTAL RETAIL MANAGEMENT, LLC d/b/a FUEL AMERICA TRUCK AND TRAVEL CENTERS, INC. v. K. C. PETROLEUM, INC. et al.

BRANCH, Judge.

Shortly after plaintiff Coastal Retail Management, LLC ("Coastal") began operating a fuel station and convenience store in Screven County in May 2009, the fuel storage tanks on the property were found to have leaked substantial amounts of fuel into the ground. In August 2010, Coastal sued K.C. Petroleum, Inc. ("KCP"), which had installed the tanks in 2004, for negligence, fraud, punitive damages, and attorney fees, and Petroleum Services Group, LLC ("PSG"), which Coastal had hired to monitor the tanks in June 2009, for negligence. After a jury began hearing evidence, the parties agreed to dismiss the jury and to proceed before the judge alone. At the conclusion of the bench trial, the court found that PSG was not liable, but that KCP

was liable for negligence and, after apportionment, for compensatory damages in the amount of $425,170.50. On appeal, Coastal's principal arguments are that the trial court erred when it denied Coastal's request for findings of fact and conclusions of law and that the evidence did not support the judgment. We find no error and affirm.

"The court is the trier of fact in a bench trial, and its findings will be upheld on appeal if there is any evidence to support them. The plain legal error standard of review applies where the appellate court determines that the issue was of law, not fact." (Citations and punctuation omitted.) *McRae, Stegall, Peek, Harman, Smith & Manning v. Ga. Farm Bureau Mut. Ins. Co.*, 316 Ga. App. 526 (729 SE2d 649) (2012).

So viewed, the record shows that in 2004, the owners of the Screven County property, David and Linda Gay, contracted with KCP to install five used underground storage tanks at the fuel station the Gays were developing there. The tanks passed air-pressure leak tests both at KCP's facility and at the installation site, the last of which was observed by a Screven County inspector. Although the tanks were buried and backfilled by November 24, 2004, David Gay did not cover them with a concrete pad until August 2005, and the couple's financial difficulties delayed the opening of the station until May 2009. At one point in 2007, for example, Gay rehired KCP to run

a fuel leak test of the tanks, which was required before the station could open, but then refused to order the fuel needed to run the tests.

After the Gays agreed to lease the property to Coastal in February 2009, they again contacted KCP to test the tanks in preparation for the station's opening. In light of the Gays' difficulties, KCP asked for and obtained a payment agreement whereby the Gays would pay KCP at the end of each day for the work performed. Although KCP returned to the site on May 5, 2009, Gay's checks bounced for insufficient funds, and the company stopped work once again on May 16. On May 12, KCP employee Loy Sanders completed a Flammable Liquid Installation Certificate ("FLIC") and filed it with the state fire marshal's office, which issued a self-service permit the same day. The completed FLIC contained numerous false statements, including that a leak test had been completed when it had not been. Sanders did not keep or forward any copies of the FLIC to any of the parties to the lease.

At the time KCP left the work site on May 16, 2009, Coastal was aware that the tanks' monitors were not fully operational, that final leak tests had not been performed, and that a required Form 7530 certifying installation and registering the tanks with the Georgia Environmental Protection Division (EPD) had not been

submitted.[1] On May 20, Coastal retained PSG to activate connections between the electronic cash register system and the fuel pumps. PSG's technician requested the charts necessary to verify the operation of the tank monitors, but Coastal never supplied them. Despite these problems, the station opened for business on May 21, 2009, with Coastal eventually obtaining delivery of approximately 99,000 gallons of gasoline from its supplier, Sommers Oil, between May and August 2009. In mid-June, Coastal told the PSG technician that the fuel levels in the tanks was fluctuating both up and down, whereas the tanks were actually losing fuel steadily. At the end of June, Sommers Oil advised Coastal of a negative variance between fuel amounts delivered and amounts sold; in early July, Sommers refused to supply any additional fuel until Coastal's tanks were properly registered and an EPD certificate obtained.

As the next stage of Coastal's acquisition of the property, David Gay had scheduled the closing of the sale of the station to Coastal's principals on July 21. Gay forged Loy Sanders's signature on an "oath of installation" on Form 7530 before submitting it to the EPD on July 8, perhaps because without the registration certificate

[1] See OCGA § 12-13-13 (e) (2) ("it shall be a violation of this Code section for any person to place or cause to placed regulated substances in an underground storage tank for which the tank owner or operator has failed to provide [an] annual tank notification" to the EPD); Ga. Comp. R & Regs. 391-3-15-.05 (4) (b), (4) (e).

dependent on the submission of the form, the Gays' sworn statements at closing that they had complied with all applicable environmental regulations would be false. The EPD issued a registration certificate on July 16, and the sale of the property from the Gays to Coastal closed as scheduled on July 21. Inventory controls performed between June 15 and August 18, 2009, when the station was closed, showed average losses in at least two of the tanks exceeding 100 gallons of fuel per day. Later analysis suggested that the tanks might have been damaged by trucks driving over them during the nine-month period between their 2004 burial and the 2005 installation of concrete pads on top of them. Remediation of the site was estimated at trial to cost between $300,000 and $1.4 million.

Before trial, PSG filed a notice of non-party fault[2] as to six persons and entities, including David Gay, Loy Sanders, Sommers Oil, and an engineer who allegedly failed to advise Coastal to apply for reimbursement from the Georgia Underground Storage Tank (GUST) Trust Fund. On the second day of a jury trial, the parties agreed that the case would proceed as a bench trial with Coastal renouncing any recovery against either KCP or PSG, or their agents or employees, in excess of the companies'

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[2] See OCGA § 51-12-33 (d) (1) ("Negligence or fault of a nonparty shall be considered" if a defendant gives notice not later than 120 days prior to trial that a nonparty was "wholly or partially at fault").

insurance coverages. On the last day of trial, Coastal pointed out that the verdict form submitted before the parties' agreement to a bench trial had limited the named nonparties at fault to David Gay and Sommers Oil.

On September 10, 2012, the trial court filed its judgment by means of the verdict form previously agreed to. The trial court found that KCP had been negligent and that this negligence was the cause of 35% of Coastal's damages of $1,000,000 for remediation of the site and 50% of Coastal's damages of $150,341 for removal and replacement of the fuel tanks. The trial court also found that Coastal itself was contributorily negligent as to 10% of its remediation damages; that David Gay's negligence had caused 50% of Coastal's removal and replacement damages and 40% of its remediation damages; and that Sommers Oil's negligence had caused the remaining 15% of Coastal's remediation damages. The trial court awarded no damages for either lost profits or diminished real estate value. Based on its finding that KCP had not been guilty of fraud, the court also found that Coastal was not entitled to punitive damages or attorney fees.

On the following day, September 11, 2012, Coastal moved for a statement of findings of fact and conclusions of law under OCGA § 9-11-52. The trial court denied the motion, noting that the issues in the case were "straightforward" ones as to

"whether or not negligence and/or fraud caused [Coastal] harm" and that its judgment had "contained all necessary findings for potential appellate review." On the same day, the trial court entered what it entitled "final judgment" in favor of Coastal in the amount of $425,170.50, noting again that its previous judgment had been "submitted and agreed [to] by the parties to be used by this Court as the form for rendering its verdict" such that it remained "the judgment of this Court." This appeal followed.

1. Coastal first argues that the trial court erred when it denied Coastal's motion for specific findings of fact and conclusions of law. We disagree.

OCGA § 9-11-52 provides in relevant part:

> (a) In ruling on interlocutory injunctions and in all nonjury trials in courts of record, the court *shall upon request of any party made prior to such ruling,* find the facts specially and shall state separately its conclusions of law. If an opinion or memorandum of decision is filed, it will be sufficient if the findings and conclusions appear therein. . . .
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> (c) Upon motion made not later than 20 days *after* entry of judgment, the court *may* make or amend its findings or make additional findings and may amend the judgment accordingly. If the motion is made with a motion for new trial, both motions shall be made within 20 days after entry of judgment.

(Emphasis supplied.) Thus "[u]nder OCGA § 9-11-52 (a), the trial court is *required* to make findings if a party requests such action *prior* to the entry of judgment; under § 9-11-52 (c), the trial court may or may not make findings if the initial request to do so is made after the entry of judgment." (Emphasis supplied.) *Payson v. Payson*, 274 Ga. 231, 236 (2) (552 SE2d 839) (2001); see also *Kim v. First One Group*, 305 Ga. App. 861, 862 (700 SE2d 729) (2010) ("A trial court is under an obligation to make findings of fact and conclusions of law . . . *only if* a party so requests before the court enters its judgment") (emphasis supplied). Finally, OCGA § 9-11-54 (a) specifies that the term "judgment" includes "any order from which an appeal lies," and the question "[w]hether an order is final and appealable is "judged by [that order's] function and substance, rather than any 'magic language.'" (Punctuation omitted.) *Rhymes v. E. Atlanta Church of God*, 284 Ga. 145, 146 (663 SE2d 670) (2008), quoting *Hughey v. Gwinnett County*, 278 Ga. 740, 741 (1) (609 SE2d 324) (2004).

Here, the trial court issued a judgment in a "verdict" form submitted by the parties. But "there is no verdict in a bench trial," *Meacham v. Franklin- Heard County Water Auth.*, 302 Ga. App. 69, 74 (1) (690 SE2d 186) (2009) (citation omitted), and we conclude from both the so-called "verdict" and the "final judgment" issued shortly afterward that the former was a "judgment" under OCGA § 9-11-54 (a), which

became effective when it was signed by the judge and filed with the clerk on September 10, 2012. See *Payson*, 274 Ga. at 235-236 (2) (a trial court's "oral pronouncement . . . has no legal force or effect as a judgment until reduced to writing, signed by the trial court, and filed with the clerk of court") (citations omitted). It follows that Coastal's September 11, 2012, request for findings of fact and conclusions of law under OCGA § 9-11-52 (a) was untimely as a matter of law. *Kim*, 305 Ga. App. at 862-863 (trial court did not err in failing to make findings of fact and conclusions of law when appellant moved for these after judgment was entered); compare *Payson*, 274 Ga. at 236 (merely oral pronouncement of a trial court's ruling was not a ruling or an appealable judgment, such that a party's request for findings of fact and conclusions of law was timely under OCGA § 9-11-52 (a)).

Moreover, and as the trial court noted, its judgment, which disposed of and apportioned a single plaintiff's negligence claims as to two defendants and its fraud claim as to one, was not especially complex, used the form submitted by the parties themselves, and left no issues undecided for appeal. It follows that the trial court did not abuse its discretion under OCGA § 9-11-52 (c) when it denied Coastal's request for findings of fact and conclusions of law. *Greene County v. North Shore Resort at Lake Oconee*, 238 Ga. App. 236, 241 (2) (517 SE2d 553) (1999) (trial court did not

abuse its discretion in failing to make findings of fact and conclusions of law under OCGA § 9-11-52 (c) when "the issues and the record were both uncomplicated"); compare *Gold Kist v. Wilson*, 220 Ga. App. 426, 428 (1) (469 SE2d 504) (1996) (trial court abused its discretion in failing to make findings pursuant to OCGA § 9-11-52 (c) when parties submitted proposed findings in case of a high "magnitude and complexity" involving "many plaintiffs and claims").

2. In four claimed errors, Coastal asserts that the evidence did not support the trial court's judgment. We disagree.

As a preliminary matter, Coastal never moved at trial for either a directed verdict or judgment as a matter of law on any of its claims. As a result, no question of law is presented concerning them, and we examine the record to determine only whether the evidence presented at trial supported the court's judgment. See *Aldworth Co. v. England*, 281 Ga. 197, 200-201 (2) (637 SE2d 198) (2006) (a party's failure to move for directed verdict bars that party from contending on appeal that it is entitled to judgment as a matter of law, but does not bar appellate review under an "any evidence" standard).

(a) Coastal argues that because its evidence as to Loy Sanders's fraudulent execution of the Flammable Liquid Installation Certificate was undisputed, the trial

court should have granted Coastal judgment as a matter of law on its fraud claim against KCP and awarded Coastal punitive damages and attorney fees.

"The five elements of fraud and deceit are: (1) false representation made by defendant; (2) scienter; (3) intention to induce plaintiff to act or refrain from acting in reliance by plaintiff; (4) justifiable reliance by plaintiff; and (5) damage to plaintiff." *Jegadeesh v. Ryan*, 293 Ga. App. 341, 343-344 (2) (667 SE2d 105) (2008). Here, some evidence at trial showed that Sanders did not intend to deceive anyone when he erroneously filled out the FLIC. Some evidence also showed that Coastal was not aware of the certificate and thus could not have relied on it to its detriment when it operated the station and purchased the property. Because there was some evidence to negate the scienter and reliance elements of Coastal's fraud claim, the trial court's judgment in favor of KCP on that claim was authorized. See id. at 344-345 (2) (trial court did not err in directing verdict for defendant on plaintiffs' fraud claim where there was no evidence that plaintiff relied on an alleged misrepresentation). Likewise, because "[n]egligence, even gross negligence, is inadequate to support a punitive damage award," *Howard v. Alamo Corp*, 216 Ga. App. 525-526 (455 SE2d 308) (1995) and because the trial court did not find bad faith on the part of KCP, there was no error in its refusal to award Coastal either punitive damages or attorney fees. Id.

at 525-526; *MARTA v. Mitchell*, 289 Ga. App. 1, 4 (659 SE2d 605) (2007) (where plaintiff had persuaded a jury that defendants had been negligent but had not pointed to any evidence that the defendants had acted in bad faith, no attorney fee award under OCGA § 13-6-11 was authorized).

(b) Coastal also argues that the trial court erred when it found that PSG had not been negligent. There was evidence at trial, however, that Coastal called the PSG technician to the site for the limited purpose of connecting the cash register system to the station's other equipment, incorrectly informed the technician that the fuel variances were showing both gains and losses, and failed to supply the technician with the station's tank charts. Thus the trial court had some evidence to support the conclusions that PSG was not negligent in failing to discover the tank leakages, or that PSG's negligence, if any, was not the proximate cause of Coastal's damages. See *Delson v. Ga. DOT*, 295 Ga. App. 84, 85-87 (1) (671 SE2d 190) (2008) (affirming jury's verdict for defendant when some evidence suggested that a non-party's acts of negligence were the sole proximate cause of the collision at issue).

(c) Although Coastal asserts that the trial court's award of zero damages for diminished property value and lost profits and only $1 million in remediation damages was erroneous, Coastal's own expert testified that once remediation of the property's

biodegradable fuel leaks was complete, the property's "stigma" would be removed, and another expert estimated the cost of remediation at only $300,000. See *Ga. Northeastern R. R. v. Lusk*, 277 Ga. 245, 247 (1) (587 SE2d 643) (2003) (reversing verdict awarding damages for both remediation of real property and its diminution in value as "improper double recovery"). Likewise, and although lost profits may be recovered if a business has "a proven 'track record' of profitability," (Punctuation and footnote omitted.) *Johnson County School Dist. v. Greater Savannah Lawn Care*, 278 Ga. App. 110, 113 (629 SE2d 271) (2006), Coastal did not make a profit in the four-month period between the station's opening and closing, and there was some evidence that the accounting records on which its lost profits claim was based were incomplete. The trial court's award was thus within the range of the evidence.

(d) Coastal also asserts that the trial court erred in its apportionment of damages. On the contrary, the evidence outlined above also provided the trial court with a rational basis for apportioning fault in the way it did between KCP, Coastal itself, and the non-parties David Gay and Sommers Oil, and by imposing damages on KCP alone in accordance with that apportionment. See OCGA § 51-12-33 (b), (c) (the trier of fact "shall[,] after a reduction of damages [by the percentage of plaintiff's fault], apportion its award of damages among the persons who are liable according to

the percentage fault of each person," and "shall consider the fault of all persons or entities who contributed to the alleged injury or damages, regardless of whether the person or entity was, or could have been, named as a party to the suit"); *Woods v. Allied Van Lines*, 316 Ga. App. 548, 549-550 (730 SE2d 35) (2012) (nonparty's fault, though "collateral to the main issue of the defendants' negligence and liability," was "essential to the adjudication of the cause" under OCGA § 51-12-33; "whether or not [the nonparty's] actions were the proximate cause of or contributed to the accident necessarily determined appellees' negligence and the extent of their liability") (citation and punctuation omitted).

3. Coastal also argues that the trial court abused its discretion when it denied Coastal's motion in limine to exclude evidence of the GUST Fund, which was relevant to PSG's attribution of fault to the engineer who allegedly failed to apprise Coastal of its right to seek reimbursement from the Fund.

"Where [a] trial court alone tries the case, the presumption is that the judgment was rendered only upon competent and legal evidence before him, and even if illegal evidence was admitted, it does not require a new trial." (Citations omitted.) *CFUS Properties v. Thornton*, 246 Ga. App. 75, 79 (3) (539 SE2d 571) (2000). By the time this case was submitted to the trial court for decision, Coastal itself had noted that the

engineer had been removed from the list of potential non-parties at fault, an absence reflected in the agreed-to verdict form used to deliver the trial court's judgment. "In order to have reversible error, there must be harm as well as error[,] and the lack of harm makes this enumeration of error without merit." (Citation and punctuation omitted.) *Moxley v. Moxley*, 281 Ga. 326, 328 (4) (638 SE2d 284) (2006).

Judgment affirmed. Phipps, C. J., and Ellington, P. J., concur.