

Opinion issued January 19, 2017



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

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NO. 01-16-00423-CV

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**JOE LOUIS CARDENAS A/K/A JOSE LUIS CARDENAS A/K/A  
JOSE L. CARDENAS D/B/A J&S BODY SHOP, Appellant**

**V.**

**BETTY JEAN WILSON AND JEFFERY OLIVER WILSON, Appellees**

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**On Appeal from the 215th District Court  
Harris County, Texas  
Trial Court Case No. 2013-25987**

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**MEMORANDUM OPINION**

In this appeal, we consider the sufficiency of the evidence to support the jury's findings in connection with Joe Cardenas's request for trial and appellate attorney's

fees. We hold that the trial court erred in denying Cardenas's motion for new trial and in entering judgment on the jury's zero findings for attorney's fees incurred in the trial court and for fees conditioned on a successful appeal in the Supreme Court of Texas. We reverse and remand.

## **BACKGROUND**

After his pickup truck was involved in an accident, Jeffery Wilson brought the damaged truck to Cardenas's shop for repair.<sup>1</sup> After Cardenas repaired the truck, the parties disagreed over the extent of the repair work that Cardenas was to perform. When Wilson refused to pay for any of the repair work, Cardenas refused to return the truck. Wilson and his mother, Betty Wilson, then sued Cardenas under the Texas Deceptive Trade Practices Act and for breach of contract and conversion. Cardenas counterclaimed for breach of contract and sought attorney's fees under section 38.001 of the Texas Civil Practice and Remedies Code.

The parties presented their claims in a seven-day jury trial. The jury rejected the Wilsons's DTPA, contract, and conversion claims and found in favor of Cardenas on his breach-of-contract counterclaim, awarding him \$4,310.

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<sup>1</sup> This case first came before this Court in Cardenas's challenge to the trial court's order removing a mechanic's lien that Cardenas had filed on Wilson's truck and releasing the truck to the Wilsons. *Cardenas v. Wilson*, 428 S.W.3d 130 (Tex. App.—Houston [1st Dist.] 2014, no pet.).

In the testimony on Cardenas's attorney's fees, Cardenas confirmed that he had paid attorney Rich Robins a \$5,000 retainer to represent Cardenas in his dispute with the Wilsons. Robins told the jury that he would explain how the fees sought were reasonable and necessary by applying the *Arthur Andersen* factors in his testimony and identified the factors for the jury. He described his credentials, experience, ability, and reputation in the community. Robins explained that Cardenas retained him with the understanding that he would bill \$200 per hour. Robins told the jury that he "burned through" the retainer, which accounted for 25 hours of work at his billing rate, but because of the nature of the case and the amount in dispute, he refused to accept further funds from Cardenas and stopped billing. He noted that the hourly rate he charged Cardenas was below market, and was the same as that of the first-year attorney who was assisting the Wilsons' lead attorney with the case.

Robins further testified that he spent "at least several hundred hours" on the case since he earned the retainer, but that he was not seeking compensation for the uncompensated time in representing Cardenas through trial. He explained, though, that he was seeking \$5,000 in fees for 25 hours of work he anticipated on post-trial briefing; conditional appellate fees of \$5,000 for appeal to a Texas intermediate appeals court; \$5,000 for a petition for review to the Supreme Court of Texas; \$3,000

for briefing on the merits to the Supreme Court; and \$200 for oral argument and completion of proceedings before the Supreme Court.

The attorney's-fee question was predicated on a finding that the Wilsons were liable, and it included the *Arthur Andersen* factors for determining the reasonableness and necessity of the fee award. The jury found that Cardenas was entitled to the following fees:

For representation in the trial court:	0
For post-trial motions:	0
For representation through appeal to the court of appeals:	\$5,000
For representation at the petition for review stage in the Supreme Court of Texas:	0
For representation at the merits briefing stage at the Supreme Court of Texas:	0
For representation through oral argument and the completion of proceedings in the Supreme Court of Texas:	0

Cardenas moved for new trial on the jury's zero findings on attorney's fees for his representation in the trial court and in the Supreme Court. The trial court denied Cardenas's motion and entered judgment on the verdict.

## ATTORNEY'S FEES

### A. Standard of Review

We review the trial court's denial of a motion for new trial for an abuse of discretion. *See Dolgencorp of Tex., Inc. v. Lerma*, 288 S.W.3d 922, 926 (Tex. 2009); *In re R.R.*, 209 S.W.3d 112, 114 (Tex. 2006). In other words, the court's ruling on the motion will not be disturbed on appeal absent a showing of an abuse of discretion. *Strackbein v. Prewitt*, 671 S.W.2d 37, 38 (Tex. 1984). A trial court abuses its discretion when it makes a decision without reference to any guiding rules or principles. *Mullins v. Martinez R.O.W., LLC*, 498 S.W.3d 700, 705 (Tex. App.—Houston [1st Dist.] 2016, no pet.) (citing *Garcia v. Martinez*, 988 S.W.2d 219, 222 (Tex. 1999)).

### B. Law Applicable to Attorney's Fees

Under Texas law, attorney's fees are not recoverable unless specifically provided for by contract or statute. *MBM Fin. Corp. v. Woodlands Operating Co.*, 292 S.W.3d 660, 669 (Tex. 2009). Cardenas's claim relies on section 38.001(8) of the Texas Civil Practice and Remedies Code, which provides that "[a] person may recover reasonable attorney's fees . . . in addition to the amount of a valid claim and costs, if the claim is for . . . an oral or written contract." TEX. CIV. PRAC. & REM. CODE ANN. § 38.001(8) (West 2015).

“Under section 38.001, the trial court has no discretion to deny attorney’s fees when presented with evidence of the same.” *Ventling v. Johnson*, 466 S.W.3d 143, 154 (Tex. 2015) (citing *Bocquet v. Herring*, 972 S.W.2d 19, 20 (Tex. 1998)). This rule applies to both trial and appellate fees. *Id.* (citing *Gill Sav. Ass’n v. Chair King, Inc.*, 797 S.W.2d 31, 32 (Tex. 1990) (per curiam)).

The fees awarded, however, must be reasonable. The Texas Supreme Court has articulated the following factors for courts to consider when determining whether attorney’s fees are reasonable: (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill required to perform the legal services properly; (2) the likelihood that the acceptance of the particular employment will preclude other employment by the lawyer; (3) the fee customarily charged in the locality for similar legal services; (4) the amount involved and the results obtained; (5) the time limitations imposed by the client or by the circumstances; (6) the nature and length of the professional relationship with the client; (7) the experience, reputation, and ability of the lawyer or lawyers performing the service; and (8) whether the fee is fixed or contingent on results obtained or uncertainty of collection before the legal services have been rendered. *Arthur Andersen & Co. v. Perry Equip. Corp.*, 945 S.W.2d 812, 818 (Tex. 1997) (citing TEX. DISCIPLINARY RULES PROF’L CONDUCT R. 1.04, *reprinted in* TEX. GOV’T CODE ANN., tit. 2, subtit. G, app. A (TEX. STATE BAR R. art. X, § 9)). A court is not required to receive

evidence on all of the factors. *Rapid Settlements Ltd. v. Settlement Funding, LLC*, 358 S.W.3d 777, 786 (Tex. App.—Houston [14th Dist.] 2012, no pet.); *Burnside Air Conditioning & Heating, Inc. v. T.S. Young Corp.*, 113 S.W.3d 889, 897–98 (Tex. App.—Dallas 2003, no pet.).

The expert testimony of an interested witness, standing alone, can be sufficient to support the reasonableness and necessity of a fee award. *See Whitmire v. Greenridge Place Apts.*, 333 S.W.3d 255, 264 (Tex. App.—Houston [1st Dist.] 2010, pet. dismiss'd); *Burnside Air Conditioning & Heating*, 113 S.W.3d at 898; *Hugh Wood Ford, Inc. v. Galloway*, 830 S.W.2d 296, 298 (Tex. App.—Houston [14th Dist.] 1992, writ denied).

### **C. Analysis**

With respect to Cardenas's request for attorney's fees incurred through trial, Robins testified that he had spent "far more than 25 hours" in "the past week and a half" preparing for and trying the case. He told the jury about documents that he prepared in advance of trial and other matters in the case that totaled in excess of 25 hours. The jury also observed Robins's performance during the trial, which, standing alone, exceeded 25 hours of representation.

The Wilsons contend that Cardenas waived fees at the trial-court level, pointing to Robins's statements to the jury that "I am seeking nothing at all for the past two years' worth of work" and "I stopped billing because I had determined this

is the kind of case that needed to be handled that way.” Waiver is the intentional relinquishment of a known right or intentional conduct inconsistent with claiming that right. *Jernigan v. Langley*, 111 S.W.3d 153, 156 (Tex. 2003); *Buffington v. DeLeon*, 177 S.W.3d 205, 212 (Tex. App.—Houston [1st Dist.] 2005, no pet.). In determining if a waiver has in fact occurred, the court must examine the acts, words or conduct of the parties and it must be unequivocally manifested that the party intends to no longer assert its right. *Buffington*, 177 S.W.3d at 212 (citing *Robinson v. Robinson*, 961 S.W.2d 292, 299 (Tex. App.—Houston [1st Dist.] 1997, no writ)).

Robins’s statements concern his intent to forgo additional fees from Cardenas in connection with the trial-court proceedings; they do not waive Cardenas’s request that he be compensated for the \$5,000 retainer he had remitted to Robins in payment for legal services. Robins specifically pointed out that Cardenas was entitled to compensation for the \$5,000 retainer. Accordingly, we hold that a claim for recovery of this portion of the trial court fees was not waived at trial.

Cardenas’s counsel also presented uncontroverted evidence of the attorney’s fees that, he anticipated, Cardenas would incur in post-trial proceedings, and of the conditional appellate attorney’s fees both for an appeal to this Court and for further proceedings in the Supreme Court. A party may seek appellate attorney’s fees whether the successful outcome on appeal stems from prosecuting an appeal or defending a judgment on appeal. *Ventling*, 466 S.W.3d at 154. Because the evidence



was insufficient to support an award of zero dollars for fees incurred in post-trial proceedings in the trial court and a conditional award of zero dollars for fees in connection with Cardenas's representation before the Supreme Court of Texas, we hold that the trial court's award of nothing for appellate fees is against the great weight and preponderance of the evidence. Because fact issues remain about the proper amount of attorney's fees to award for these matters, remand to the trial court for findings on the amount of the award is appropriate. *See Smith v. Patrick W.Y. Tam Tr.*, 296 S.W.3d 545, 548–49 (Tex. 2009).

### **CONCLUSION**

We reverse the portion of the trial court's judgment awarding zero compensation for attorney's fees incurred for Cardenas's representation in the trial court through trial; for post-trial proceedings; and for representation in the appellate courts. We remand these attorney's fees issues for new trial. The remainder of the judgment is affirmed. All pending motions are dismissed as moot.

Jane Bland  
Justice

Panel consists of Chief Justice Radack and Justices Jennings and Bland.