

Affirmed and Memorandum Opinion filed August 12, 2010.



In The

Fourteenth Court of Appeals

NO. 14-09-00471-CV

**GARY LYNN BECK, INDIVIDUALLY AND D/B/A GB INTERNATIONAL,
Appellant**

V.

WEST HOUSTON AIRPORT CORPORATION, Appellee

**On Appeal from the County Civil Court at Law No. 4
Harris County, Texas
Trial Court Cause No. 857364**

MEMORANDUM OPINION

In this appeal, the owner of an airport hangar challenges a judgment against him for breach of an easement agreement. In its cross-appeal, the owner of the private roads encumbered by the easement challenges both the finding that it waived enforcement of a deed restriction and the award of attorney's fees to the hangar owner. We conclude that the hangar owner failed to preserve the complaint he presents on appeal; that the evidence is legally and factually sufficient to support the jury's finding that enforcement of the deed

restriction was waived; and that the trial court did not abuse its discretion in awarding the hangar owner a portion of the attorney's fees he requested under the Uniform Declaratory Judgments Act. We therefore affirm the trial court's judgment.

I. FACTUAL AND PROCEDURAL BACKGROUND

Appellant Gary Lynn Beck purchased an aircraft hanger located at West Houston Airport from a seller who used the hangar as a workshop for building "muscle cars." The hangar was accessible only over roads owned by West Houston Airport Corporation ("WHAC"). Beck was permitted to use the roads pursuant to an easement agreement. Under the terms of the agreement, Beck was required to pay certain fees for taxes and maintenance of the easement property, and WHAC was granted discretion to increase the fees by ten percent each year. The hangar facility was burdened by an aviation-use deed restriction, requiring the owner to use the hangar for aircraft storage.

After the purchase, Beck began using the hangar as a factory. He refused to pay the assessed fees because he considered them excessive. WHAC sued Beck for the unpaid fees; it also asked for a declaration that Beck's deed was void because he failed to comply with the aviation-use deed restriction. WHAC moved for partial traditional summary judgment as to Beck's liability for breach of the easement agreement. The motion was supported by a transcript of Beck's deposition in which he admitted that he owed an unspecified portion of the fees, but declined to pay anything because, as he stated, the total fees billed were "far in excess of what I'm willing to pay . . . [w]ithout a judge ordering me to pay whatever he says I owe." More than six months after WHAC moved for partial summary judgment, Beck paid a portion of the outstanding fees and interest, then responded to the motion by asserting that he had paid the fees to the extent that they were reasonable. He additionally argued that WHAC had "failed to establish a reasonable relationship between the claimed fees and actual maintenance expenses." The trial court granted the motion as to liability without ruling on damages.

Shortly before trial, WHAC abandoned its request for declaratory judgment that Beck's deed is void. With the exception of the question of each party's attorney's fees, the remaining issues were tried to a jury, and both parties affirmatively stated that there were no objections to the jury charge. As relevant to this appeal, the jury found that Beck failed to comply with the aviation-use deed restriction, but that such failure was excused because WHAC waived compliance.

The parties prepared a judgment containing a recitation of the jury's findings and the partial summary judgment. They submitted the proposed judgment to the trial court, leaving blanks for the trial court's findings regarding attorney's fees, but filled in the amount of maintenance fees owed under the easement agreement. After a hearing on attorney's fees, the trial court signed the judgment awarding WHAC \$6,975.65 for fees due under the easement agreement, attorney's fees for prosecuting the claim through trial, pre- and post-judgment interest, and contingent attorney's fees in the event that Beck brought unsuccessful appeals. The trial court also awarded Beck \$1,500.00 for the attorney's fees it incurred in defending against WHAC's declaratory-judgment claim. Beck's motion for new trial was overruled by operation of law, and this appeal ensued.

II. ISSUES PRESENTED

In a single issue, Beck contends the trial court erred in granting partial summary judgment in WHAC's favor as to its breach-of-contract claim regarding Beck's failure to pay the assessed maintenance fees. In its cross-appeal, WHAC argues that the evidence is legally and factually insufficient to support the jury's finding that WHAC waived the aviation-use deed restriction. In a second issue, WHAC challenges the trial court's award of attorney's fees to Beck under the Declaratory Judgments Act.

III. ANALYSIS

A. Beck's Challenge to the Summary Judgment on Contract Liability

Beck contends that the trial court erred “when it granted summary judgment upholding the Airport’s claim for unpaid easement fees,” and he asks that we reverse and remand that portion of the judgment as well as the judgment for attorney’s fees pertaining to the contract claim. In a traditional motion for summary judgment, the movant has the burden of showing that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. TEX. R. CIV. P. 166a(c); *Am. Tobacco Co. v. Grinnell*, 951 S.W.2d 420, 425 (Tex. 1997). We review summary judgments de novo. *Ferguson v. Bldg. Materials Corp. of Am.*, 295 S.W.3d 642, 644 (Tex. 2009) (per curiam). To the extent that reasonable people could do so, we take as true all summary-judgment evidence favorable to the nonmovant and disregard unfavorable evidence, indulging every reasonable inference and resolving any doubts in the nonmovant’s favor. *City of Keller v. Wilson*, 168 S.W.3d 802, 821, 823, 827 (Tex. 2005).

Beck represents that he “has not sought to avoid paying maintenance fees for use of the [airport easements],” but “challenges the *additional* fees charged to him, over and above what most other property owners are charged.” His brief therefore is devoted exclusively to arguing that the fees WHAC assessed against Beck were excessive.

But these arguments miss the mark. A trial court is authorized to grant summary judgment on liability alone even if there is a genuine issue of material fact as to the amount of damages. TEX. R. CIV. P. 166a(a). The trial court did so here, leaving the issue of damages and attorney’s fees for future resolution. The partial summary judgment concerned only liability for breach of contract, and Beck does not argue that he did not breach the easement agreement. To the contrary, Beck admits that under the terms of the agreement, he was required to pay maintenance fees, and it is undisputed that until WHAC

filed suit and moved for summary judgment, Beck refused to pay, absent a court order, even that portion of the maintenance fees that he admittedly owed. His appellate arguments instead are directed to the amount of damages awarded for the breach rather than liability.

Although he argues on appeal that the maintenance fees WHAC charged were excessive, he did not present such an issue for determination by the trial court or the jury. He therefore failed to preserve this argument for appeal. *See* TEX. R. APP. P. 33.1(a). Having failed to litigate this issue in the court below, he is not entitled to remand to litigate it now. We therefore overrule Beck's sole issue on appeal and affirm the portion of the trial court's judgment requiring Beck to pay maintenance fees, pre- and post-judgment interest, and attorney's fees.

B. WHAC's Challenge to the Jury's Finding of Waiver

WHAC contends that the evidence is legally and factually insufficient to support the jury's finding that it waived compliance with the aviation-use deed restriction. To determine whether the evidence is legally sufficient to support a finding, we review the entire record, crediting favorable evidence if reasonable jurors could and disregarding contrary evidence unless reasonable jurors could not. *See City of Keller*, 168 S.W.3d at 827. If the evidence would enable reasonable and fair-minded people to differ in their conclusions, then it is legally sufficient to support the finding. *See id.* In reviewing the factual sufficiency of the evidence, we consider all the evidence and set the finding aside only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. *Cain v. Bain*, 709 S.W.2d 175, 176 (Tex. 1986) (per curiam). Whether reviewing the evidence for legal or factual sufficiency, we assume that jurors decided questions of credibility or conflicting evidence in favor of the finding if they reasonably could do so. *See City of Keller*, 168 S.W.3d at 819, 820. We do not substitute our

judgment for that of the trier-of-fact if the evidence falls within this zone of reasonable disagreement. *Id.* at 822.

Here, the jury was instructed that Beck’s failure to comply with the aviation-use deed restriction was excused if WHAC waived compliance. In the charge, “waiver” was defined as “the intentional surrender of a known right or intentional conduct inconsistent with claiming the right.” WHAC first challenges the jury’s waiver finding on the ground that the easement agreement contained a non-waiver clause. But a non-waiver clause can be waived; thus, its presence or absence is not dispositive. *See, e.g., Enserch Corp. v. Rebich*, 925 S.W.2d 75, 82 (Tex. App.—Tyler 1996, writ dismissed); *Straus v. Kirby Court Corp.*, 909 S.W.2d 105, 108 (Tex. App.—Houston [14th Dist.] 1995, writ denied); *Zwick v. Lodewijk Corp.*, 847 S.W.2d 316, 318 (Tex. App.—Texarkana 1993, writ denied). Not only did WHAC fail to enforce the deed restriction against the hangar’s prior owner, but it advertised the hangars for commercial and residential use and continued to do so through the date of trial. We conclude that the evidence was legally and factually sufficient for a reasonable jury to find that WHAC’s intentional conduct was inconsistent with its exercise of the right to enforce an aviation-use restriction.

WHAC does not dispute that the evidence is legally and factually sufficient to support the jury’s findings when measured against the questions and instructions the jury actually received. Instead, WHAC asks this court to measure the sufficiency of the waiver evidence by a standard different from that used at trial. Specifically, WHAC now argues for the first time that deed restrictions are not waived unless “pervasive violations of the deed restrictions destroyed the fundamental nature of the neighborhood.” But WHAC did not request such a finding or instruction in the trial court; to the contrary, it affirmatively stated that it had no objection to the more liberal definition of “waiver” submitted to the jury.¹ Because “[i]t is the court’s charge, not some other unidentified law, that measures

¹ WHAC contends that it had no duty to object because the definition of waiver submitted to the

the sufficiency of the evidence when the opposing party fails to object to the charge,” *Osterberg v. Peca*, 12 S.W.3d 31, 55 (Tex. 2000), we overrule WHAC’s first issue. See *Tanglewood Homes Ass’n, Inc. v. Henke*, 728 S.W.2d 39, 45–46 (Tex. App.—Houston [1st Dist.] 1987, writ ref’d n.r.e.) (evaluating the evidence of waiver based on the instructions given in the charge).

C. WHAC’s Challenge to the Attorney’s Fees Award

WHAC next contends that the trial court erred in awarding Beck attorney’s fees pursuant to the Declaratory Judgments Act “because no declaratory judgment claim was ever adjudicated.” A trial court awards attorney’s fees under the Declaratory Judgments Act based on the equities of the situation, and we review such an award for a clear abuse of discretion. *Lesikar v. Moon*, 237 S.W.3d 361, 375 (Tex. App.—Houston [14th Dist.] 2007, pet. denied). Here, the parties stipulated that Beck incurred reasonable attorney’s fees of \$6,000.00 preparing to defend against WHAC’s claim for a declaration that his deed was void. WHAC further agreed that it did not drop the claim “until we had the docket call for the trial” and stated that the declaratory-judgment claim “was in the broadest sense part of the overall scheme of the case.” Consequently, the bulk of Beck’s trial exhibits pertained to this claim and the trial court awarded only

jury was substantially correct, but the majority of the cases it cites in support of this position do not involve a jury charge at all. See, e.g., *Jim Rutherford Invs., Inc. v. Terramar Beach Cmty. Ass’n*, 25 S.W.3d 845 (Tex. App.—Houston [14th Dist.] 2000, pet. denied) (summary judgment); *Finkelstein v. Southampton Civic Club*, 675 S.W.2d 271 (Tex. App.—Houston [1st Dist.] 1984, writ ref’d n.r.e.) (summary judgment); *Stephenson v. Perlitz*, 537 S.W.2d 287 (Tex. Civ. App.—Beaumont 1976, writ ref’d n.r.e.) (bench trial); *Gonzalez v. City of Houston*, No. 01-00-01195-CV, 2002 WL 221586 (Tex. App.—Houston [1st Dist.] Feb. 14, 2002, no pet.) (not designated for publication) (summary judgment). WHAC also cites *Simon v. Henrichson*, in which the appellants complained of the trial court’s submission of a waiver issue to the jury and court’s definition of waiver as the “intentional relinquishment of a known right or such conduct as warrants an inference of the relinquishment of such right.” 394 S.W.2d 249, 257 (Tex. Civ. App.—Corpus Christi 1965, writ ref’d n.r.e.). The *Simon* court did not state whether the appellants objected to this definition at trial or submitted an alternative definition, and the basis of their challenge on appeal is not clear. Although the appellate court held that the definition submitted by the trial court “is substantially correct and presents no harm,” *id.*, a harm analysis was needed only if the charge was defective.

\$1,500.00—one-quarter of the fees that WHAC stipulated were reasonable—for Beck’s work in defending against the claim.

WHAC cites *Hardt v. Reliance Standard Life Insurance Co.*, 130 S. Ct. 2149 (2010), in support of its position that Beck is not entitled to attorney’s fees. In that case interpreting an award of attorney’s fees under § 1132(g)(1) of ERISA, the Court held that

a fees claimant must show “some degree of success on the merits” before a court may award attorney’s fees under § 1132(g)(1). A claimant does not satisfy that requirement by achieving “trivial success on the merits” or a “purely procedural victor[y],” but does satisfy it if the court can fairly call the outcome of the litigation some success on the merits without conducting a “lengthy inquir[y] into the question whether a particular party’s success was ‘substantial’ or occurred on a ‘central issue.’”

Id. at 2158 (citations omitted).

Analogizing the declaratory-judgments statute under which Beck sought attorney’s fees to the ERISA statute at issue in *Hardt*,² WHAC urges us to vacate the award of attorney’s fees on the ground that Beck cannot show “some degree of success on the merits” because WHAC abandoned the claim when the case was called for trial. We decline to do so.

A plaintiff’s nonsuit of a claim for declaratory judgment does not affect a defendant’s pending claim for attorney’s fees under the statute. TEX. R. CIV. P. 162; *Town of Flower Mound v. Upper Trinity Reg’l. Water Dist.*, 178 S.W.3d 841, 844 (Tex. App.—Fort Worth 2005, no pet.). A trial court does not abuse its discretion in awarding attorney’s fees incurred in defending against a claim for declaratory judgment that the

² Compare 29 U.S.C.A. § 1132(g)(1) (West 2009) (“the court in its discretion may allow a reasonable attorney’s fee and costs of the action to either party” in a suit for relief under ERISA) with TEX. CIV. PRAC. & REM. CODE ANN. § 37.009 (Vernon 2008) (“In any proceeding under [the Declaratory Judgments Act], the court may award costs and reasonable and necessary attorney’s fees as are equitable and just.”).

plaintiff chooses to dismiss before trial. *Noe v. McLendon*, No. 2-06-062-CV, 2007 WL 2067844, at *3 (Tex. App.—Fort Worth July 19, 2007, no pet.) (mem. op.). In light of this precedent, we hold that Beck is able to show “some degree of success on the merits” in that he has not had a judgment entered against him declaring his deed void.

Under these circumstances, we are unable to conclude that the trial court abused its discretion by awarding Beck a fraction of the attorney’s fees that WHAC caused him to incur. We therefore overrule WHAC’s second cross-issue and affirm the trial court’s judgment.

IV. CONCLUSION

Both parties seek reversal of the judgment on their substantive claims based on arguments that were waived in the trial court. In addition, WHAC contends but has failed to show that the trial court abused its discretion in awarding Beck part of the attorney’s fees he incurred as a result of WHAC’s request for declaratory judgment. We therefore overrule each of the issues presented affirm the trial court’s judgment.

/s/ Adele Hedges
Chief Justice

Panel consists of Chief Justice Hedges and Justices Brown and Sullivan.