In The
Court of Appeals
Seventh District of Texas at Amarillo

No. 07-20-00315-CV

CITY OF AMARILLO, TEXAS; JARED MILLER, IN HIS OFFICIAL CAPACITY AS CITY MANAGER; GINGER NELSON, IN HER OFFICIAL CAPACITY AS MAYOR; ELAINE HAYS, IN HER OFFICIAL CAPACITY AS COUNCILMEMBER PLACE 1; FREDA POWELL, IN HER OFFICIAL CAPACITY AS COUNCILMEMBER PLACE 2; EDDY SAUER, IN HIS OFFICIAL CAPACITY AS COUNCILMEMBER PLACE 3; HOWARD SMITH, IN HIS OFFICIAL CAPACITY AS COUNCILMEMBER PLACE 4; DAVID HURT, IN HIS OFFICIAL CAPACITY AS THE CHAIRMAN OF THE CIVIL SERVICE COMMISSION; SALLY JENNINGS, IN HER OFFICIAL CAPACITY AS VICE-CHAIRMAN OF THE CIVIL SERVICE COMMISSION; AND LAWRENCE WALKER, IN HIS OFFICIAL CAPACITY AS MEMBER OF THE CIVIL SERVICE COMMISSION, APPELLANTS AND CROSS-APPELLEES

V.

NATHAN SLOAN NUREK AND MICHAEL BRANDON STENNETT, APPELLEES AND CROSS-APPELLANTS

On Appeal from the County Court at Law Number 2
Potter County, Texas
Trial Court No. V-105821-00-2, Honorable Matthew H. Hand, Presiding

November 18, 2021

OPINION

Before QUINN, CJ. and PARKER and DOSS, JJ.

Nathan Sloan Nurek[1] and Michael Brandon Stennett sued the City of Amarillo, the city manager, the mayor, the members of city council, and the members of the civil service commission (collectively, "the City") seeking a declaration that employment positions within the Amarillo Fire Marshal's Office (hereinafter, "FMO") should be classified as civil service positions subject to the Civil Service Act and injunctive relief making FMO positions classified as civil service and affording appellants the ranks they would have been entitled to had the FMO positions been classified. Stennett, who is a firefighter employed by the Amarillo Fire Department, claims that he was improperly bypassed for a promotion to a position within the FMO. Following a bench trial, the trial court entered a final order declaring that positions within the Amarillo FMO are civil service positions subject to the requirements of Texas Local Government Code chapter 143 but denied Stennett relief after finding that the Amarillo Professional Firefighters Association (hereinafter, "association") is a real party in interest and that, as such, Stennett's recovery is barred by laches, limitations, and estoppel. Both Stennett and the City appealed. We affirm in part and reverse in part and remand for further proceedings.

Factual and Procedural Background

The City of Amarillo is a home-rule city under Texas law. In 1944, the voters of Amarillo adopted the Fire Fighters and Police Officers Civil Service Act found in chapter 143 of the Texas Local Government Code for the Amarillo Fire Department. The Civil Service Act requires governing bodies to classify all "fire fighters" as civil service employees and to hire and promote all firefighters based on objective measures, including

[1] Nurek did not file an appeal in this case.

competitive examinations. *See* TEX. LOCAL GOV'T CODE ANN. § 143.021. "Fire fighter" positions that are required to be classified are positions within the fire department that are filled in substantial compliance with the Civil Service Act, require substantial knowledge of firefighting, and have been certified by the Texas Commission on Fire Protection. *Id*. § 143.003(4).

The Amarillo FMO is not classified as covered by the Civil Service Act. As such, employees within the FMO are civilians who are not afforded civil service protections. The FMO performs fire prevention duties such as checking building plans, inspecting businesses, and investigating suspicious fires. FMO employees are certified by the Texas Commission on Fire Protection.

In November of 2015, Stennett held the top position on the promotional eligibility list for the rank of captain. At that time, there were two vacancies in the FMO rank of Investigator/Inspector II, to which Stennett contends is the equivalent to the position of captain. Stennett did not apply for these positions and does not currently possess the qualifications necessary to perform these jobs. Stennett was not promoted to fill either vacancy or given notice of bypass. As a result, Stennett filed suit for declaration that the FMO positions should be classified as civil service positions and for injunctive relief ordering the City to pass an ordinance making FMO positions civil service and requiring the City to promote Stennett to the rank of captain, with a seniority date of January of 2016.

The City filed a plea to the jurisdiction, which was denied by the trial court. The City filed an interlocutory appeal. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(a)(8)

(authorizing interlocutory appeal from denial of plea to the jurisdiction filed by a governmental unit). On review, this Court reversed the trial court's denial of the City's plea to the jurisdiction as it relates to Nurek's and Stennett's claims seeking retrospective monetary relief and remanded the remaining claims to the trial court for further proceedings. *City of Amarillo v. Nurek*, 546 S.W.3d 428, 438 (Tex. App.—Amarillo 2018, no pet.).[2]

Upon remand, the case was tried to the bench. The trial court entered a final order in which it determined that FMO positions fall within the Civil Service Act's definition of "fire fighter" positions that are required to be classified, but that Stennett's requests for injunction are barred by the application of the doctrines of laches, estoppel, and limitations. Subsequently, the trial court issued findings of fact and conclusions of law. By these findings and conclusions, the trial court made clear that the basis upon which Stennett's claims are barred by laches, estoppel, and limitations is that the trial court determined that the association is the real party in interest and that it failed to act in an adequate time to be entitled to relief. The City appealed the trial court's ruling that FMO positions are "fire fighter" positions and should be classified in accordance with the Civil Service Act. Stennett appealed the trial court's ruling denying his request for relief.

By its appeal, the City presents seven issues. Its first two issues challenge the trial court's findings that support its conclusion that FMO positions are "fire fighter" positions under section 143.003(4) of the Texas Local Government Code. The City's third

[2] The trial court made a conclusion of law that this Court "held that the Amarillo City Council enjoys sovereign immunity from suit, so this Court need not make any finding(s) regarding the Council or its members." Our 2018 opinion does not address the issue of whether the Amarillo City Council enjoyed sovereign immunity.

issue contends that the trial court erred in concluding that section 143.003 is clear and unambiguous regarding who is covered by the Civil Service Act, which led the court to erroneously conclude that FMO positions are "fire fighter" positions that must be classified. By its fourth through seventh issues, the City contends that the trial court erred by failing to award it reasonable and necessary attorney's fees.

By his appeal, Stennett presents eleven issues. By his first issue, Stennett contends that the trial court erred when it imputed the actions of the association to Stennett based on its conclusion that the association is the real party in interest in this case. Stennett's issues two through nine challenge the trial court's fact findings underlying its conclusion that Stennett's recovery and requested relief are barred by the application of laches, estoppel, and limitations. Stennett's tenth issue challenges the trial court's finding that the non-classification of FMO positions was motivated by the City's good faith. Finally, Stennett's eleventh issue contends that the trial court erred in not granting Stennett attorney's fees.

Standard of Review

In an appeal from a bench trial, findings of fact have the same weight as a jury's verdict. *Scott Pelley P.C. v. Wynne*, No. 05-15-01560-CV, 2017 Tex. App. LEXIS 8228, at *23 (Tex. App.—Dallas Aug. 28, 2017, pet. denied) (mem. op.) (citing *Speer v. Presbyterian Children's Home & Serv. Agency*, 847 S.W.2d 227, 233 n.4 (Tex. 1993)). The trial court's findings of fact are reviewable for legal and factual sufficiency by the same standards that are applied in reviewing the evidence supporting a jury's verdict. *Id*. (citing *BMC Software Belg. N.V. v. Marchand*, 83 S.W.3d 789, 794 (Tex. 2002)). We do

not substitute our judgment for that of the factfinder, even if we would have reached a different conclusion when reviewing the evidence. *Sava Gumarska in Kemijska Industria D.D. v. Advanced Polymer Scis., Inc.*, 128 S.W.3d 304, 313 (Tex. App.—Dallas 2004, no pet.). A trial court's findings of fact are binding on the appellate court unless challenged on appeal. *Scott Pelley P.C.*, 2017 Tex. App. LEXIS 8228, at *23.

When a party attacks the legal sufficiency of an adverse finding of fact on which it had the burden of proof, it must demonstrate on appeal that the evidence establishes, as a matter of law, all vital facts in support of the issue. *Dow Chem. Co. v. Francis*, 46 S.W.3d 237, 241 (Tex. 2001) (per curiam). However, a legal sufficiency challenge to the evidence supporting an adverse finding of fact on an issue for which the appellant did not have the burden of proof requires the appellant to show that no evidence supports the adverse finding. *Graham Cent. Station, Inc. v. Peña*, 442 S.W.3d 261, 263 (Tex. 2014) (per curiam). When reviewing the record, we view the evidence in the light most favorable to the finding, considering only the evidence and inferences that support the finding and disregarding all evidence and inferences to the contrary. *Catalina v. Blasdel*, 881 S.W.2d 295, 297 (Tex. 1994). If more than a scintilla of evidence exists to support the finding of fact, the legal sufficiency challenge will not prevail. *Graham Cent. Station, Inc.*, 442 S.W.3d at 263.

In reviewing a factual sufficiency challenge, we examine all the evidence and set aside the finding only if the evidence is so weak or the finding so against the great weight and preponderance of the evidence that it is clearly wrong and unjust. *Zieben v. Platt*, 786 S.W.2d 797, 799 (Tex. App.—Houston [14th Dist.] 1990, no writ); *see also Cain v. Bain*, 709 S.W.2d 175, 176 (Tex. 1986) (per curiam).

We review the trial court's conclusions of law de novo. *BMC Software Belg., N.V.*, 83 S.W.3d at 794. An appellant may not challenge the trial court's conclusions of law for factual insufficiency, but it may challenge the legal conclusions drawn from the facts to determine their correctness. *Id*. If the reviewing court determines a conclusion of law is erroneous but the trial court rendered the proper judgment, the erroneous conclusion of law does not require reversal. *Id*. An appellant may not challenge the trial court's conclusions of law for legal insufficiency. *Scott Pelley P.C.*, 2017 Tex. App. LEXIS 8228, at *24-25.

FMO as Civil Service Positions

By its first two issues, the City challenges the evidence upon which the trial court concluded that FMO positions are “fire fighter” positions under Section 143.003 of the Texas Local Government Code.

Determining what falls within the statutory definition of “fire fighter” is a question of statutory construction and, as such, is a question of law, which we review de novo. *In re Heavy Equip. Appraisal Litig.*, MDL No. 12-0185, 2013 Tex. LEXIS 1079, at *5 (Tex. [Panel Op.] Feb. 14, 2013) (citing *State v. Shumake*, 199 S.W.3d 279, 284 (Tex. 2006), and *Harper Park Two, LP v. City of Austin*, 359 S.W.3d 247, 254-55 (Tex. App.—Austin 2011, pet. denied)). When construing a statute, we begin with its language. *Shumake*, 199 S.W.3d at 284. Our primary objective is to determine the legislature’s intent which, when possible, we discern from the plain meaning of the words chosen. *Id*. When the statute is clear and unambiguous, we apply the common meaning of the words used without resort to rules of construction or extrinsic aids. *Id*. In construing the statute, we

may consider other matters in ascertaining legislative intent, including the objective of the law, its history, and the consequences of a particular construction. *Id*. However, once we construe the statute, we assess the trial court's application of the statute to the facts for abuse of discretion. *Bruington Eng'g, Ltd. v. Pedernal Energy, L.L.C.*, 456 S.W.3d 181, 186 (Tex. App.—San Antonio 2014), *rev'd on other grounds*, 536 S.W.3d 487 (Tex. 2017).

Both parties agree that the determination of whether a particular position is a "fire fighter" position depends on whether the position meets the definition identified in Texas Local Government Code section 143.003(4). That definition provides:

> "Fire fighter" means a member of a fire department who was appointed in substantial compliance with this chapter or who is entitled to civil service status under Section 143.005 or 143.084. The term:
>
> (A) applies only to an employee of a fire department whose position requires substantial knowledge of fire fighting and who has met the requirements for certification by the Texas Commission on Fire Protection under Chapter 419, Government Code, including an employee who performs:
>
> (i) fire suppression;
> (ii) fire prevention;
> (iii) fire training;
> (iv) fire safety education;
> (v) fire maintenance;
> (vi) fire communications;
> (vii) fire medical emergency technology;
> (viii) fire photography;
> (ix) fire administration; or
> (x) fire arson investigation; and
>
> (B) does not apply to a secretary, clerk, budget analyst, custodial engineer, or other administrative employee.

TEX. LOCAL GOV'T CODE ANN. § 143.003(4). The trial court concluded that positions within the FMO are "fire fighter" positions.

Under the statute, a "fire fighter" that must be covered by the Civil Service Act must (1) be a member of the fire department or entitled to civil service status under other statutory authority, (2) whose position requires substantial knowledge of firefighting, and (3) who has been certified by the Texas Commission on Fire Protection. While there was conflicting evidence, the trial court heard evidence that the FMO was moved within the Amarillo Fire Department in 1989, the FMO is part of the Fire Department for budgeting purposes, and the FMO is listed as part of the Fire Department within the City's Organizational Structure. Thus, the trial court did not abuse its discretion in determining that FMO employees are members of the Fire Department. The trial court found that "FMO positions require substantial knowledge of fire fighting . . . ." While the City presents an issue challenging this finding, its argument is that FMO positions are not required to have substantial knowledge of fire *suppression*. The City points to Texas Government Code section 419.032 to establish that the legislature intended "fire fighting" to mean "fire suppression." Initially, we note that section 419.032 discusses "fire protection personnel" rather than "fire fighting." Further, the express language of section 419.032 distinguishes "fire protection personnel" from "fire suppression." See TEX. GOV'T CODE ANN. § 419.032(c) ("Fire protection personnel must complete a commission-approved training course in fire suppression before being assigned full-time to fire suppression duties."). Clearly, fire suppression is a subset contained within the class of fire protection personnel. Consequently, we do not conclude that the trial court erred in determining that FMO positions require substantial knowledge of firefighting. The parties to the instant dispute do not contest that FMO employees must be certified by the Texas Commission on Fire Protection. Consequently, we determine that the trial court did not err in concluding that

FMO positions are firefighter positions subject to civil service classification under section 143.003.

We overrule the City's first two issues.

Ambiguity of Section 143.003

By its third issue, the City contends that the trial court "erred as a matter of law when it concluded that [section] 143.003 'is clear and unambiguous in its expression of who is covered by the CSA,' thus leading the court to an erroneous conclusion[.]" As addressed above, we find section 143.003(4) to clearly and unambiguously identify the requirements for a position to be classified as a firefighter position that is covered by the CSA. Interestingly, in its brief, the City agrees when it states that, "Here, there is nothing ambiguous in the language of [section] 143.003(4), nor does the context require the conversion to affect the manifest intention of the [l]egislature. Rather, the language in [section] 143.003(4) is clear and unambiguous in its expression of who is covered by the [CSA]." We overrule the City's third issue.

City's Attorney's Fees

By its fourth through seventh issues, the City challenges the trial court's denial of the City's request for an award of attorney's fees. The City's challenge is focused entirely on the trial court's denial of its attorney's fees as a sanction for failure to timely provide records justifying the fees. However, the record in this case does not establish why the trial court denied the City its attorney's fees. The City did not present evidence to establish that its attorney's fees were reasonable and necessary. Likewise, the City did

not request a finding of fact regarding whether its attorney's fees were reasonable and necessary. "When a claimant wishes to obtain attorney's fees from the opposing party, the claimant must prove that the requested fees are both reasonable and necessary." *Rohrmoos Venture v. UTSW DVA Healthcare, LLP*, 578 S.W.3d 469, 489 (Tex. 2019). Because the City did not establish its right to an award of attorney's fees through trial, we affirm the trial court's denial of these fees.

Association as Real Party in Interest

By the first issue of his cross-appeal, Stennett contends that the trial court erred when it imputed the actions of the association to Stennett based on its conclusion that the association is a real party in interest in this case. The City contends that the trial court correctly concluded that the association was the real party in interest and, therefore, it properly imputed the actions (or inactions) of the association to Stennett.

The trial court made a finding that the association is "a real party in interest. Therefore, the affirmative defenses asserted by the [City] of laches, estoppel[,] and statutes of limitations are applicable to [Stennett's] claims. Further, [Stennett's] claims are barred due to the failure of the [association] to act in a timely fashion in 2005, when Chapter 143 was amended."

Initially, we note that the association was not a party to Nurek's and Stennett's petition and that the City did not assert counterclaims against the association or in any way add it as a party to the instant lawsuit. In fact, the City actively argued that the association lacked standing to participate in the case. Stennett agreed that the association lacked standing and never sought to include it as a party in this case

whatsoever. Consequently, we do not see any basis for the trial court to determine that the association's inaction established the defenses of laches, estoppel, or limitations that would bar any claims brought by Stennett.

The City cites *Ex parte Foster*, 188 S.W.2d 382 (Tex. 1945), as justifying the trial court's determination that the association was the real party in interest and its inaction could preclude Stennett from recovering for his claims. In *Foster*, the trial court issued a permanent injunction enjoining the raising of a drop inlet above the agreed height of four and a half feet. *Id*. at 383. Foster, who was not a party to the suit resulting in the injunction, raised a portion of the drop inlet that was located on his land to a height of seven feet. *Id*. As a result, the trial court held Foster in contempt. *Id*. Foster filed a petition for writ of habeas corpus arguing that he was not a party to the suit resulting in the injunction and, as such, is not bound by the injunction. *Id*. Noting that Foster had personally participated in the suit leading to the injunction and had even agreed to the injunction's entry, the court held that Foster "by virtue of his knowledge of and interest in the subject matter of the litigation [leading to the injunction] and his participation in the proceedings therein, is bound by the judgment entered therein." *Id*. at 384. Of particular import, the court identified that this concept of a party being held to be a party-in-interest to another suit in which that party did not directly participate "is derived from the common law doctrine that a decree of injunction not only binds the parties defendant but also those identified with them in interest, in 'privity' with them, represented by them, or subject to their control." *Id*. at 384-85 (quoting *Regal Knitwear Co. v. Nat'l Labor Rel. Bd.*, 324 U.S. 9, 14, 65 S. Ct. 481, 89 L. Ed. 437 (1945)). We interpret *Foster* to establish that a party

that participated in a lawsuit, even if not a nominal party, will be held to the outcome of the case as it relates to the specific subject matter of that case.

However, in the present case, the trial court went well beyond what *Foster* authorizes. Rather than holding the association to the decision reached by the trial court in Stennett's case,[3] the trial court held the association's inaction from 2005 and 2015 against Stennett in reaching its decision in Stennett's case. We conclude that *Foster* does not authorize imputing the association's inaction against Stennett under the circumstances of the present case.

We sustain Stennett's first issue.

Defenses of Laches, Estoppel, and Limitations

Stennett's issues two through nine challenge the trial court's fact findings underlying its decision that Stennett's recovery and requested relief are barred by the application of laches, estoppel, and limitations. However, the trial court's findings of fact reveal that its decision regarding the defenses of laches, estoppel, and limitations depend on its decision that the association is a real party in interest to this suit. Since we have decided that Stennett may not be held responsible for the association's prior inaction, we will review the City's only argument relating specifically to Stennett.

The only argument the City makes regarding the defenses of laches, estoppel, and limitations related specifically to Stennett is the following:

[3] The City makes much of the association's testimonial concession that it has an interest in Stennett's case. Because of its interest and participation in Stennett's suit, under *Foster*, the association would likely be held bound by any decision rendered by the trial court.

> From the time Stennett became eligible to compete for a promotion to the Captain's rank in the Fire Suppression Department (red trucks), he waited approximately 16 years before he first asserted he was entitled to consideration for a promotion into a higher level FMO position, for which he was not qualified.

However, nothing in the record supports the City's claim that Stennett waited approximately sixteen years before challenging his ability to promote to the FMO. The evidence, rather, establishes that Stennett became eligible to promote to captain in April of 2015. Stennett filed his petition on September 22, 2016. In its appellate filings, the City does not contend that this one-year-and-five-month delay bars Stennett's claim.[4]

Because the City's defenses of laches, estoppel, and limitations generally depend on the determination that the association was a real party in interest, which we rejected above, we sustain Stennett's second through ninth issues.

Good Faith Defense

By his tenth issue, Stennett contends that the trial court erred in finding that the City's use of non-classified employees to staff the FMO was motivated by good faith because such a finding was not supported by legally or factually sufficient evidence.

When a governmental unit makes positions that were previously classified as subject to the Civil Service Act available to non-classified employees,[5] the governmental unit must prove that the change was made in good faith. *Int'l Ass'n of Firefighters Local*

[4] In its conclusions, the trial court identified that a four-year statute of limitations applied to Stennett's claims.

[5] We will refer to this process of making classified positions available to the general public as "civilianizing."

624 v. City of San Antonio, 822 S.W.2d 122, 127 (Tex. App.—San Antonio 1991, writ denied) (citing *City of San Antonio v. Wallace*, 338 S.W.2d 153, 155-56 (Tex. 1960)). The governmental unit establishes its good faith by demonstrating that civilianization would be more satisfactory to the public in general—that it will result in something more than monetary savings and that the duties of the classified personnel were not merely transferred to others. *Id*. at 128.

Initially, we must determine whether this good faith defense applies to the current dispute. Most cases applying the defense address the situation where a position that was classified as a civil service position is civilianized and made available to non-classified employees. However, the Texas Supreme Court seems to indicate that situations, such as the present case, where a non-classified position is challenged as one that should be classified is subject to judicial review to determine whether the decision not to classify the position was made in good faith. *See id*. at 129 (discussing *Lee v. City of Houston*, 807 S.W.2d 290, 294 (Tex. 1991)). Consequently, we conclude that the defense applies to challenges to a governmental unit's failure to classify a position as a civil service position.[6]

Because good faith is a defense, the City bears the burden of proof. *Id*. at 127; *Wallace*, 338 S.W.2d at 156, 158. The trial court made findings that the City proved that using non-classified employees in FMO positions was motivated by good faith, was more satisfactory to the public, and was based on more than monetary savings. Stennett challenges each of these findings. A review of the evidence relevant to this defense

[6] We note that the City argues that the good faith defense does not apply because it "has not civilianized any positions that previously were classified . . . ." While we disagree with this assessment, we note that the City seems to argue that a defense that the trial court found in its favor does not apply to the current dispute.

reveals that the City justified its use of civilians in the FMO on the basis that none of the classified civil service personnel were qualified to fill those positions at the time of trial. However, the standard requires that the City provide a good-faith reason to justify the use of non-classified personnel over civil servants, rather than assessing the qualifications of particular individuals to serve in those positions. The City presented no evidence as to how non-classified employees would be more satisfactory to the public or would provide any benefit beyond being more cost-effective. *But see Int'l Ass'n of Firefighters Local 624*, 822 S.W.2d at 128 (discussing evidence that firefighters provide substantial benefits over civilians in performing inspector, dispatch, and emergency medical services positions). Further, the evidence establishes that there are civil servants within the Amarillo Fire Department who have the certifications required to perform the tasks of the FMO. Also, evidence was presented that it is standard practice, upon hiring someone to fill an FMO position, to provide training before having the person perform the requisite tasks of the job. After reviewing the evidence, we find that the trial court's findings of fact regarding the City's good faith defense are supported by legally insufficient evidence. As such, we sustain Stennett's tenth issue.

Stennett's Claims for Relief

Having affirmed the trial court's declaration that FMO positions are firefighter positions subject to civil service classification under section 143.003 and reversing the trial court's determinations that the defenses of laches, estoppel, limitations, and good faith preclude Stennett's recovery, we must determine to what relief Stennett is entitled.

Stennett's live pleading seeks declarations that the City has failed to classify FMO positions as civil service positions. A declaration to this effect is already a part of the trial court's final order and we affirm this declaration.

Stennett also requests that an injunction be issued requiring that the City[7] pass an ordinance establishing civil service classifications for "fire fighter" positions in the FMO. The trial court denied Stennett relief on the basis that the association was a real party in interest and, therefore, his request for relief was "barred by the application of laches, limitation, and estoppel." No other basis for denying Stennett's request for injunctive relief is identified in the order or in the trial court's findings of fact and conclusions of law. Because we have rejected the trial court's imputation of the association's inaction onto Stennett, we necessarily reverse the trial court's denial of Stennett's relief on the basis of defenses that only apply if the association's inaction is imputed to Stennett. But, because it seems that the trial court has not considered Stennett's entitlement to injunctive relief on the merits of the claims he has asserted individually, we find it appropriate to remand this issue to the trial court for further consideration.

Stennett also requests that the trial court issue an injunction requiring the City to promote him to the rank of captain, with a seniority date of January of 2016. Like above,

[7] The trial court granted summary judgment in favor of defendants David Hurt, Sally Jennings, Lawrence Walker, and Jared Miller by order dated July 24, 2019. Stennett has not raised an issue regarding this summary judgment, so any request for injunctive relief against these individuals is not before us. Therefore, Stennett's request for an injunction requiring the classification of FMO positions is asserted against Ginger Nelson, Elaine Hayes, Freda Powell, Eddy Sauer, and Howard Smith.

Additionally, we note that Stennett pled an *ultra vires* act claiming that the City's failure to classify the FMO positions as subject to the Civil Service Act was illegal conduct. However, Stennett did not challenge the trial court's denial of this claim by appeal. Therefore, we conclude that this claim is not properly before us.

it appears that the trial court denied Stennett this relief on the basis that it was imputing the association's inaction onto Stennett. We have rejected this theory and, therefore, conclude that it is not an appropriate basis upon which to deny Stennett the relief he seeks. However, we further note that the trial court found that the "FMO rank of Investigator/Inspector II position is similar to but not identical to the classified rank of Captain." Because of the equivocal nature of this finding, we cannot determine whether Stennett is entitled to be promoted to the rank of captain based on his being illegally bypassed for an Investigator/Inspector II vacancy in January of 2016. Thus, we conclude that this issue must be remanded to the trial court to resolve the factual issue of whether Stennett is entitled to be promoted to the rank of captain.

Finally, Stennett pled for an award of attorney's fees. In a declaratory judgment action, the trial court has discretion to award reasonable and necessary attorney's fees as are equitable and just. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 37.009. In the present case, the trial court awarded attorney's fees only in favor of the City. Because we reverse the trial court's judgment, we remand the issue of Stennett's attorney's fees to give the trial court an opportunity to reconsider its decision. *Lubbock Pro. Firefighters v. City of Lubbock*, 742 S.W.2d 413, 418 (Tex. App.—Amarillo 1987, writ ref'd n.r.e.).

Conclusion

After concluding that the trial court did not err in deciding that FMO positions should be classified as civil service positions but reversing the trial court's denial of Stennett's requests for relief, we affirm the trial court's declaration that positions within the FMO should be classified within the Civil Service Act, reverse the remaining portions of the trial

court's order, and remand the case to the trial court to consider remaining issues in light of our opinion.

Judy C. Parker
Justice