Reverse and Render, in part; Remittitur Suggested; and Opinion Filed November 27, 2018.

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-17-01051-CV

DALLAS AREA RAPID TRANSIT AND NANCY K. JOHNSON, Appellants
V.
AMALGAMATED TRANSIT UNION LOCAL NO. 1338, Appellee

On Appeal from the 95th Judicial District Court
Dallas County, Texas
Trial Court Cause No. DC-13-05156

MEMORANDUM OPINION

Before Justices Lang, Fillmore, and Schenck
Opinion by Justice Fillmore

Included in the Dallas Area Rapid Transit's (DART's)[1] hourly employment manual are grievance and appeal procedures that, under certain circumstances, provide a mechanism for hourly employees of DART to pursue complaints regarding DART's operations and disciplinary actions. The first three steps of the grievance and appeal process currently consist of a hearing conducted by employees of DART at different levels of management. Following the Step 3 hearing, some, but not all, complaints may be appealed to the "Trial Board," which is a neutral hearing officer.

[1] DART is a regional public transportation authority. *Dallas Area Rapid Transit v. Amalgamated Transit Union Local No. 1338*, 273 S.W.3d 659, 661 (Tex. 2008).

The Amalgamated Transit Union Local No. 1338 (ATU 1338) represents hourly employees of DART. In 2000, ATU 1338 sued DART and Nancy K. Johnson, the Secretary of the Trial Board, alleging they were improperly refusing to forward appeals to the Trial Board. To resolve the litigation, Kenneth Day, the President of ATU 1338, Gary Thomas, the President/Executive Director of DART, and Johnson, the Secretary of the Trial Board, signed a settlement agreement that required the implementation of new procedures pertaining to appeals to the Trial Board.

ATU 1338 subsequently filed this suit, alleging DART and Johnson breached the settlement agreement by failing to forward to the Trial Board an appeal of a grievance filed by ATU 1338 and Richard Katz and by failing to comply with the agreed-upon procedures. ATU 1338 also sought declaratory and injunctive relief. After the trial court instructed the jury that DART and Johnson had breached the settlement agreement, the jury awarded ATU 1338 $2,520,000 for damages to its reputation in the past and $20,000 for out-of-pocket costs it incurred due to the breach. It also found ATU 1338 had incurred reasonable and necessary attorneys' fees of $280,325. The trial court granted ATU 1338's request for injunctive and declaratory relief and rendered judgment in favor of ATU 1338 for the damages and attorneys' fees found by the jury.

In three issues, DART and Johnson argue the trial court erred by awarding ATU 1338 damages for past injury to its reputation, excluding certain evidence, and awarding attorneys' fees under the Texas Uniform Declaratory Judgment Act, TEX. CIV. PRAC. & REM. CODE ANN. §§ 37.001–.011 (UDJA). We conclude (1) the evidence is legally insufficient to support the damages awarded to ATU 1338 for past injury to its reputation, (2) a portion of the attorneys' fees awarded as out-of-pocket damages are not recoverable on the breach of contract claim, and (3) the trial court did not err by awarding ATU 1338 attorneys' fees on its claims under the UDJA. We, therefore, reverse the trial court's award of damages for past injury to ATU 1338's reputation, render judgment ATU 1338 take nothing on its claim for injury to its reputation in the past, and

affirm the remainder of the trial court's judgment, conditioned on ATU 1338's agreement to remit all out-of-pocket damages other than $16,156.01.

Background

Since at least November 22, 1988, DART has had in place procedures pursuant to which employees can file grievances and appeal disciplinary actions.[2] The procedures applicable at the time of the events at issue here involved three "step" hearings before DART employees at different levels of management. With certain exceptions, an employee who completes the "final grievance and appeal procedure step applicable" may appeal to the Trial Board by submitting a written request to the Secretary of the Trial Board (the Secretary). As relevant in this case, the Trial Board may not consider appeals of "general grievances," which are grievances regarding the establishment of, or failure to establish, specified wages, hours or conditions of work, or of the discharge of an employee during the employee's probationary period.

Johnson became the Secretary in June of 1999. In 2000, ATU 1338 sued DART and Johnson, alleging they were failing to forward to the Trial Board grievances that were within its jurisdiction. The litigation was settled by Johnson, as Secretary, DART, and ATU 1338 agreeing to new procedures for processing appeals to the Trial Board. The parties agreed that, with the exception of "corrective actions" that were not used in the issuance of a suspension without pay, demotion, or discharge, the Secretary was required to accept and process all appeals to the Trial Board other than those that the Secretary determined, in good faith, were either general grievances or, for any other reason, were "improper and/or outside the jurisdiction of the Trial Board." The Secretary was required to return a "questioned grievance" to the employee, who could then choose to submit the issue of whether the Trial Board had jurisdiction over the questioned grievance to an

[2] In this opinion, we address only those portions of the grievance and appeal procedures necessary to resolve DART and Johnson's complaints.

arbitrator. The parties agreed the decision of the arbitrator regarding whether the Trial Board had jurisdiction over the grievance would be "final and binding."

Katz was hired by DART as a Train Operator Student on August 2, 2010. After completing training and obtaining the required certifications, Katz was hired as a Full Time Rail Operator on September 17, 2010. As a new hire, Katz was on probation for a period of six months. On December 10, 2010, Katz "tripped on a red signal" while operating a train. After an investigation, Arturo Torres, the Manager of Central Rail Operations, issued Katz a written warning for a safety violation and placed Katz under a "corrective action period" until February 16, 2011. During the corrective action period, Katz was provided additional training.

On December 27, 2011, Katz, who was a member of ATU 1338, filed a grievance seeking to have the written warning removed from his file. Torres conducted the Step 1 hearing on Katz's grievance. During the hearing, William Fellows, a member of ATU 1338 who accompanied Katz, argued DART was partially at fault for the red signal violation due to the design of the system. Torres determined DART had followed established rules and procedures in issuing the written warning and denied Katz's grievance and request for resolution. Although Katz sought a Step 2 hearing before an assistant vice president and a Step 3 hearing before a vice president, those requests were denied on the ground he did not have grievance rights because he was still in his probationary period.

On February 17, 2011, Torres informed Katz that he had completed the corrective action period for the red signal violation. On February 23, 2011, Torres notified Katz that he was being discharged for unsatisfactory performance during his probationary period. The only specific conduct cited by Torres was that Katz incurred the red signal violation, failed to "take accountability" for his actions, and blamed DART for the violation. Torres stated he found that Katz's "overall performance" during the probationary period was "unsatisfactory."

Katz and ATU 1338 filed a grievance on March 3, 2011 (the March 3rd grievance), complaining DART had terminated Katz in retaliation for his use of the grievance or appeal procedures. Although the March 3rd grievance specifically stated it was not an appeal of a disciplinary action, it sought Katz's reinstatement. In each of the three steps of the grievance process, the March 3rd grievance was denied on the ground that Katz was on probation at the time of his discharge and could not appeal the termination. Katz and ATU 1338 filed an appeal to the Trial Board. After considering DART's procedures on grievances and probationary employees and the Step 3 denial of the grievance on the ground that probationary employees were not entitled to the "Appeal process," Johnson determined the grievance was questionable and returned it to ATU 1338 on March 28, 2011.

On April 27, 2011, Katz and ATU 1338 requested an arbitrator determine whether the Trial Board had jurisdiction over the March 3rd grievance. Dr. William L. McKee was appointed as the arbitrator to consider the issue. McKee found that probationary hourly employees were eligible to use the grievance and appeal process, but had no right to appeal following discharge and could not appeal a disciplinary action, which includes reprimand, suspension, demotion, and discharge. McKee also found the March 3rd grievance was not a general grievance and the Trial Board had jurisdiction to consider whether DART refused to comply with the timelines set out in the grievance and appeal procedures or retaliated against Katz for attempting to utilize the grievance and appeal procedure.[3]

After McKee's decision, Johnson processed the March 3rd grievance to the Trial Board, and Dr. Otis H. King was selected as the hearing officer. DART filed a motion to dismiss the appeal, arguing the March 3rd grievance "ultimately appeals a disciplinary action" and should be

[3] McKee determined the Trial Board did not have jurisdiction to consider whether Katz's discharge was procedurally defective.

dismissed because probationary employees were precluded from appealing disciplinary matters. King granted the motion and dismissed the appeal.

ATU 1338 filed this suit, alleging DART and Johnson breached the parties' settlement agreement by returning the March 3rd grievance as questionable without a good faith basis for doing so and by not accepting as final McKee's determination that the Trial Board had jurisdiction to hear portions of the grievance. At the close of evidence, the trial court granted ATU 1338's motion for directed verdict and instructed the jury that DART and Johnson had breached the settlement agreement by failing to submit the March 3rd grievance to the Trial Board for a determination on the merits and by refusing to accept as final and binding McKee's decision that the Trial Board had jurisdiction to hear some of the complaints presented in the grievance. The jury found ATU 1338's damages from the breach were $2,520,000 for past injury to its reputation and $20,000 in out-of-pocket costs, and that ATU 1338 had incurred reasonable and necessary attorneys' of $280,325.

The trial court rendered judgment on the jury's verdict, holding DART and Johnson jointly and severally liable for the damages and attorneys' fees found by the jury. The trial court granted ATU 1338's request for declaratory and injunctive relief and declared King's decision with respect to the March 3rd grievance was "void and of no effect" and was "set aside and held for naught." The trial court also ordered DART and Johnson to advance the March 3rd grievance to the Trial Board for a "determination on the merits without further procedural or jurisdictional impediments," in accordance with DART's procedures and the parties' settlement agreement. Finally, the trial court permanently enjoined DART and Johnson from "failing to accept as final and binding any future determination of a Questioned Grievance Arbitrator on the issue of jurisdiction of the Trial Board."

Damages to ATU 1338's Reputation

In their first issue, DART and Johnson argue the trial court erred by awarding ATU 1338 damages for injury to its reputation in the past because (1) DART did not waive governmental immunity for ATU 1338's breach of contract claim or for a tort claim, (2) Johnson was acting in the course and scope of her employment and is entitled to official immunity, (3) ATU 1338 cannot recover tort damages on a breach of contract claim, (4) section 271.153 of the local government code bars the recovery of damages based on injury to reputation on a breach of contract claim, (5) ATU 1338 did not plead for damages for past injury to its reputation and the claim was not tried by consent, and (6) the evidence was legally insufficient to support the awarded damages.

Governmental Immunity

Because it challenges both the trial court's and this Court's jurisdiction to consider this matter, we first address DART's argument that it did not waive immunity from (1) ATU 1338's breach of contract claim or (2) a tort claim for damages to ATU 1338's reputation.

Absent a statutory waiver, DART has governmental immunity from suit. *Dallas Area Rapid Transit v. Amalgamated Transit Union Local No. 1338*, 273 S.W.3d 659, 661 (Tex. 2008). Governmental immunity defeats a trial court's subject matter jurisdiction. *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 224 (Tex. 2004). Whether a trial court has subject matter jurisdiction is a question of law subject to de novo review. *Id.* at 226.

DART contends it has not waived governmental immunity as to ATU 1338's breach of contract claim because it did not file a claim for affirmative relief in this case. *See City of Dallas v. Albert*, 354 S.W.3d 368, 373–74 (Tex. 2011); *Reata v. Constr. Corp. v. City of Dallas*, 197 S.W.3d 371, 375–76 (Tex. 2006). ATU 1338 responds that this Court addressed this issue in *Dallas Area Rapid Transit v. Amalgamated Transit Union Local No. 1338*, No. 05-14-00208-CV, 2014 WL 6661880 (Tex. App.—Dallas Nov. 25, 2014, pet. denied) (mem. op.) (*ATU I*), and the

law of the case doctrine bars DART from again challenging whether it has immunity from the breach of contract claim.

After ATU 1338 filed this suit, DART filed a plea to the jurisdiction arguing it had governmental immunity from suit. The trial court denied the plea to the jurisdiction, and DART brought an interlocutory appeal from that order. *See id.* at *1. In *ATU I*, DART argued ATU 1338 had not alleged a breach of the settlement agreement that would waive governmental immunity. *Id.* at *2. Relying on *Livecchi v. City of Grand Prairie*, 109 S.W.3d 920, 922 (Tex. App.—Dallas 2003, pet. dism'd), we stated:

> If a governmental entity agrees to settle a lawsuit in which it has waived governmental immunity, it cannot claim immunity from suit for breach of the settlement agreement. Accordingly, to avoid dismissal based on a plea to the jurisdiction in a breach of contract suit against a governmental entity, the plaintiff must allege facts that present a breach of a settlement agreement and must show the settlement was for a lawsuit in which the governmental entity waived immunity.

ATU I, 2014 WL 6661880, at *3 (internal citations omitted).[4] After concluding ATU 1338 had presented facts alleging a breach of the parties' settlement agreement, we turned to the second prong of the test—whether ATU 1338 had shown the settlement agreement was for a lawsuit in which DART had waived immunity. *Id.* We concluded:

> ATU 1338 argued that DART waived governmental immunity in the 2000 lawsuit because DART asserted counterclaims seeking affirmative relief against ATU 1338. DART did not respond to this argument in its plea to the jurisdiction or now on appeal except to argue that ATU 1338's allegations of breach in this case do not relate to the [settlement agreement]. But we have already addressed DART's argument and rejected it.
>
> DART does not argue that it did not waive governmental immunity in the 2000 lawsuit. And the record shows that DART filed counterclaims in the 2000 lawsuit seeking affirmative relief against ATU 1338, thereby giving the trial court jurisdiction over its claims in that lawsuit. Consequently, we conclude that ATU 1338 satisfied its burden to show that the [settlement agreement] settled a lawsuit in which DART waived governmental immunity.

[4] When a governmental unit agrees to settle a lawsuit from which it is not immune, it cannot claim immunity from suit for breach of the agreement. *See Tex. A&M Univ.-Kingsville v. Lawson*, 87 S.W.3d 518, 518, 522–23 (Tex. 2002) (plurality op.); *Triple BB, LLC v. Vill. of Briarcliff*, No. 03-17-00149-CV, 2018 WL 3863252, at *4 (Tex. App.—Austin Aug. 15, 2018, no pet. h.).

Id at *3–4 (internal citations omitted).

The law of the case doctrine is defined as "that principle under which questions of law decided on appeal to a court of last resort will govern the case throughout its subsequent stages." *Loram Maint. of Way, Inc. v. Ianni*, 210 S.W.3d 593, 596 (Tex. 2006). Under the doctrine, a court of appeals will ordinarily be bound by its initial decision if there is a subsequent appeal in the case. *Gotham Ins. Co. v. Warren E&P, Inc.*, 455 S.W.3d 558, 562 n.8 (Tex. 2014). "By narrowing the issues in the successive stages of the litigation, the law of the case doctrine is intended to achieve uniformity of decision as well as judicial economy and efficiency." *Briscoe v. Goodmark Corp.*, 102 S.W.3d 714, 716 (Tex. 2003) (quoting *Hudson v. Wakefield*, 711 S.W.2d 628, 630 (Tex. 1986)).

The application of the doctrine lies within the discretion of the court, depending on the circumstances of the case. *Id.*; *see also Gotham Ins. Co.*, 455 S.W.3d at 562 n.8. We, therefore, have the authority to revisit our jurisdictional decision. *Briscoe*, 102 S.W.3d at 717; *Entergy Corp. v. Jenkins*, 469 S.W.3d 330, 337 (Tex. App.—Houston [1st Dist.] 2015, pet. denied). In exercising that discretion, this Court has declined to apply the law of the case doctrine when the facts pertaining to the jurisdictional challenge were more developed after the trial of the case than they were at the time of the prior opinion on the denial of a plea to the jurisdiction, *see Univ. of Tex. Sw. Med. Ctr. v. Munoz*, No. 05-14-01152-CV, 2016 WL 1179407, at *3–4, 7 (Tex. App.—Dallas Mar. 22, 2016, pet. denied) (mem. op.), but has applied the doctrine to preclude a second jurisdictional challenge when there was no change in the issues or facts or in controlling law since the original opinion, *see City of Dallas v. Jones*, 331 S.W.3d 781, 785 (Tex. App.—Dallas 2010, pet. dism'd).

DART does not argue the issues or facts presented in this appeal have changed since our decision in *ATU I*, and the record of the trial proceedings does not reflect any significant

development of jurisdictional facts. DART also does not point to an intervening change in controlling law. Accordingly, we conclude the law of the case doctrine applies and decline to revisit DART's arguments that it has governmental immunity from ATU 1338's breach of contract claim.

DART also complains that ATU 1338's reputational injury sounds in tort, and it did not waive immunity for a tort claim. ATU 1338, however, asserted a claim that DART and Johnson breached the settlement agreement, not a tort claim. *See Jim Walter Homes, Inc. v. Reed*, 711 S.W.2d 617, 618 (Tex. 1986) (concluding whether cause of action is based in contract or tort is based on substance of cause of action); *Jacaman v. Nationstar Mortg., LLC*, No. 04-17-00048-CV, 2018 WL 842975, at *6 (Tex. App.—San Antonio Feb. 14, 2018, no pet.) (mem. op.). Whether the damages sought by ATU 1338 are recoverable on a breach of contract claim does not change the substance of the claim.

Based on our opinion in *ATU I* and applying the law of the case doctrine, we conclude DART waived governmental immunity from ATU 1338's breach of contract claim.

Official Immunity

DART and Johnson also contend Johnson was entitled to official immunity because, as Secretary, she acted only in her capacity as an employee of DART. ATU 1338 responds that Johnson is liable in her individual capacity because she was a signatory to the settlement agreement and had specific contractual obligations under the agreement.

Official immunity is an affirmative defense that protects governmental employees from personal liability. *Univ. of Houston v. Clark*, 38 S.W.3d 578, 580 (Tex. 2000); *see also Meyers v. JDC/Firethorne, Ltd.*, 548 S.W.3d 477, 482 n.5 (Tex. 2018). Governmental employees are entitled to official immunity from a suit arising from the performance of their discretionary duties within

the scope of their authority, provided that the employee acts in good faith. *Clark*, 38 S.W.3d at 580.

The trial court granted ATU 1338's motion for directed verdict and instructed the jury that, as a matter of law, Johnson breached the settlement agreement by failing to submit the March 3rd grievance to the Trial Board and by refusing to accept as final and binding McKee's decision that the Trial Board had jurisdiction to consider portions of the grievance. Based on the language of the settlement agreement, Johnson could have breached the agreement only if she did not act in good faith in processing the March 3rd grievance. Accordingly, the trial court's determination that Johnson breached the settlement agreement was necessarily premised on a finding that she did not act in good faith in performing her duties as Secretary.

In this appeal, DART and Johnson have not complained that the trial court erred by granting ATU 1338's motion for directed verdict on the ground that there was more than a scintilla of evidence that Johnson acted in good faith in the performance of her duties relating to the March 3rd grievance. *See Coastal Transp. Co., Inc. v. Crown Cent. Petroleum Corp.*, 136 S.W.3d 227, 233–34 (Tex. 2004) (stating trial court's grant of motion for directed verdict must be reversed and remanded for jury determination if there was more than a scintilla of evidence on claim).[5] Accordingly, because Johnson did not act in good faith in processing the March 3rd grievance, she was not entitled to official immunity. *See Clark*, 38 S.W.3d at 580.

Legal Sufficiency of the Evidence

DART and Johnson next argue the evidence is legally insufficient to support the jury's award of damages based on injury to ATU 1338's reputation in the past. A party challenging the legal sufficiency of the evidence supporting an adverse finding on an issue on which it did not

[5] DART and Johnson's only challenge to the trial court's granting of ATU 1338's motion for directed verdict is contained in their second issue, in which they argue the improper exclusion of certain evidence by the trial court led to an improper directed verdict.

have the burden of proof at trial must demonstrate on appeal that no evidence supports the finding. *Exxon Corp. v. Emerald Oil & Gas Co., L.C.*, 348 S.W.3d 194, 215 (Tex. 2011). We sustain a challenge to the legal sufficiency of the evidence if: (1) the record discloses a complete absence of evidence of a vital fact; (2) the court is barred by rules of law or evidence from giving weight to the only evidence offered to prove a vital fact; (3) the evidence offered to prove a vital fact is no more than a mere scintilla; or (4) the evidence establishes conclusively the opposite of a vital fact. *Ford Motor Co. v. Castillo*, 444 S.W.3d 616, 620 (Tex. 2014) (per curiam).

In evaluating the legal sufficiency of the evidence to support a finding, we determine whether the evidence at trial would enable reasonable and fair-minded people to reach the verdict under review. *City of Keller v. Wilson*, 168 S.W.3d 802, 827 (Tex. 2005). We credit evidence favorable to the finding if reasonable jurors could, while disregarding evidence contrary to the finding unless reasonable jurors could not. *Cent. Ready Mix Concrete Co., Inc. v. Islas*, 228 S.W.3d 649, 651 (Tex. 2007); *City of Keller*, 168 S.W.3d at 807. We must consider the evidence "in the light most favorable to the verdict, and indulge every reasonable inference that would support it." *City of Keller*, 168 S.W.3d at 822. Anything more than a scintilla of evidence is legally sufficient to support the finding. *Haggar Clothing Co. v. Hernandez*, 164 S.W.3d 386, 388 (Tex. 2005) (per curiam). "However, if the evidence is so weak that it only creates a mere surmise or suspicion" that a fact exists, it is regarded as no evidence. *Waste Mgmt. of Tex., Inc. v. Tex. Disposal Sys. Landfill, Inc.*, 434 S.W.3d 142, 156 (Tex. 2014).

At trial, ATU 1338 contended DART's and Johnson's breach of the settlement agreement injured ATU 1338's reputation in the past and, in all reasonable probability, would injure its reputation in the future. Both parties requested a jury question on the amount of "reputational damages" suffered by ATU 1338 and, for purposes of our analysis, we will assume, without

deciding, that such damages are recoverable on a breach of contract claim.[6] The jury awarded no damages for any injury to ATU 1338's reputation in the future, but awarded $2,520,000 for injuries to ATU 1338's reputation in the past.

To recover damages for breach of contract, a plaintiff must show that it suffered a pecuniary loss as a result of the breach. *AZZ Inc. v. Morgan*, 462 S.W.3d 284, 289 (Tex. App.—Fort Worth 2015, no pet.). The evidence must show the damages were the natural, probable, and foreseeable consequence of the defendant's conduct. *Mead v. Johnson Grp., Inc.*, 615 S.W.2d 685, 687 (Tex. 1981); *AZZ Inc.*, 462 S.W.3d at 289. Damages that are too remote, contingent, speculative, or conjectural are not recoverable. *City of Dallas v. Vills. of Forest Hills, L.P., Phase I*, 931 S.W.2d 601, 605 (Tex. App.—Dallas 1996, no writ); *TLC Hosp., LLC v. Pillar Income Asset Mgmt., Inc.*, No. 12-16-00211-CV, 2018 WL 1324715, at *14 (Tex. App.—Tyler Mar. 15, 2018, pet. denied); *see also Horizon Health Corp. v. Acadia Healthcare Co., Inc.*, 520 S.W.3d 848, 860 (Tex. 2017) ("When the evidence supporting a claim for lost profits damages is largely speculative or a mere hope for success, lost profits have not been established with reasonable certainty."). Therefore, the absence of a causal connection between the alleged breach and the damages sought will preclude recovery. *AZZ Inc.*, 462 S.W.3d at 289.

ATU 1338 argues its reputation was damaged in the past by DART and Johnson preventing grievances from being heard by the Trial Board. In support of this damages theory, ATU 1338 offered evidence of the number of DART employees who belonged to ATU 1338 between 2010 and 2016, and the amount of dues paid by each member. ATU 1338 calculated the injury to its reputation in the past based on the testimony of Kenneth Day, the President of ATU 1338, that,

[6] DART and Johnson challenged the legal sufficiency of the evidence to support the damages awarded by the jury in a motion for judgment notwithstanding the verdict and, therefore, did not forfeit their right to challenge the legal sufficiency of the evidence supporting the jury's award of damages for injury to ATU 1338's reputation in the past by requesting the jury question. *See Musallam v. Ali*, No. 17-0762, 2018 WL 5304678, at *3 (Tex. Oct. 26, 2018).

while sixty percent of DART hourly employees were members of ATU 1338 from 2010 through 2016, eighty percent of DART hourly employees would have been members if ATU 1338 had demonstrated an ability to have grievances considered by the Trial Board.[7] Day provided no factual support for his opinion that an additional twenty percent of DART's employees would have joined ATU 1338 if it had been more successful in obtaining hearings before the Trial Board, did not identify any DART employees who would have joined ATU 1338 if it had more success in obtaining hearings before the Trial Board, and made no attempt to trace any damages specifically to DART's or Johnson's actions relating to the March 3rd grievance. Because Day's opinion was not supported by any facts, the damages awarded by the jury were based entirely on conjecture and speculation, and the evidence is legally insufficient to support the damages awarded by the jury for past injury to ATU 1338's reputation. *See e.g., Holt Atherton Indus., Inc. v. Heine*, 835 S.W.2d 80, 85 (Tex. 1992) (concluding business owner's testimony was insufficient to establish lost profits where he "was not able to specify which contracts they lost, how many they lost, how much profit they would have had from the contracts, or who would have awarded them contracts"); *see also Horizon Health Corp.*, 520 S.W.3d at 861 (concluding expert testimony was insufficient to support damages for lost profits because witness simply assumed that plaintiff would have won contract); *Axcess Int'l, Inc. v. Baker Botts, L.L.P.*, No. 05-14-01151-CV, 2016 WL 1162208, at *4 (Tex. App.—Dallas Mar. 24, 2016, pet. denied) (mem. op.) ("Expert testimony that is conclusory, speculative, or based on assumed facts contrary to the evidence is legally insufficient to prove the facts testified to.").

[7] To support its claims that it was damaged by DART's or Johnson's breach of the settlement agreement, ATU 1338 also relied on (1) Johnson's response of "I don't know" to ATU 1338's counsel's question of whether she could "think of any good reason" why a DART employee would pay dues to a union that could not process a grievance to the Trial Board and her agreement to counsel's question that it could be expected that "if a Union can't do things for members, it can't get members to pay dues," and (2) the testimony of Albert Dirla, Jr., ATU 1338's recording secretary, about the difficulties in convincing employees who were still in their probationary period to join ATU 1338. However, neither Johnson nor Dirla provided any evidence to support the amount of damages awarded by the jury.

We resolve DART and Johnson's first issue in their favor and render judgment that ATU 1338 take nothing on its claims for injury to its reputation in the past. *See Akin, Gump, Strauss, Hauer & Feld, L.L.P. v. Nat'l Dev. & Res. Corp.*, 299 S.W.3d 106, 124 (Tex. 2009).[8]

Exclusion of Evidence

In their second issue, DART and Johnson argue the trial court erred by excluding King's decision from evidence because (1) there was no basis for declaring King's decision void; (2) ATU did not have standing to challenge King's decision; (3) King's decision was relevant, properly authenticated, and controlling on a material issue in the case; and (4) the exclusion of the decision prevented DART and Johnson from proving their defensive theory.

We review a trial court's evidentiary rulings for abuse of discretion. *Sw. Energy Prod. Co. v. Berry-Helfand*, 491 S.W.3d 699, 727 (Tex. 2016). A trial court does not abuse its discretion unless it acts without reference to guiding rules or principles or acts arbitrarily or unreasonably. *Cire v. Cummings*, 134 S.W.3d 835, 838–38 (Tex. 2004). We may not reverse a judgment based on the erroneous exclusion of evidence unless we determine the exclusion probably resulted in an improper judgment. TEX. R. APP. P. 44.1(a)(1); *Morale v. State*, 557 S.W.3d 569, 576 (Tex. 2018) (per curiam).

Both DART and ATU 1338 questioned Johnson about the appeal of the March 3rd grievance to the Trial Board, her return of the grievance as questionable, McKee's decision that the Trial Board had jurisdiction over a portion of the grievance, and the motion to dismiss the grievance that DART filed with King. At the close of Johnson's testimony, the trial court stated outside the presence of the jury that it wanted to put into the record the following portion of our opinion in *ATU I*:

[8] Because we have concluded the evidence is legally insufficient to support the damages awarded by the jury, we need not address DART and Johnson's arguments that ATU 1338 cannot recover tort damages on a breach of contract claim, section 271.151(2) of the local government code bars the recovery of damages based on injury to reputation on a breach of contract claim, and that ATU 1338 did not plead for damages for past injury to its reputation and the claim was not tried by consent. *See* TEX. R. APP. P. 47.1.

> [W]e reject, as did the trial court, DART's argument that the [settlement agreement] did not limit the Trial Board's authority to dismiss ATU 1338's grievance for lack of jurisdiction. Under DART's construction, the [settlement agreement's] provision for having a neutral arbitrator decide the issue of the Trial Board's jurisdiction is rendered meaningless if the Trial Board may nevertheless dismiss a grievance for lack of jurisdiction.

ATU I, 2014 WL 6661880, at *3. The trial court asked counsel "why isn't this the law of the case?" DART and Johnson's counsel responded that King had broad authority when reviewing the motion to dismiss to determine the available remedy. After further discussion, counsel explained the "appropriate remedy" could "come through a motion to dismiss." The trial court responded that the opinion in *ATU I* "is dead clear on the very issue we've been trying for a day and a half. That opinion says your view of this matter doesn't wash." DART and Johnson's counsel responded, "[w]e'd like the jury to hear it."

At the close of evidence, DART and Johnson made an offer of proof regarding Johnson's testimony about the King decision. Johnson identified McKee's award, DART's motion to dismiss filed with King, ATU 1338's response to the motion to dismiss, and King's decision. According to Johnson, she forwarded DART's motion to dismiss and ATU 1338's response to King and he issued a written decision. Johnson testified that she had been unable, during her testimony before the jury, to indicate that King made a final decision and gave an award on the March 3rd grievance.

DART and Johnson argued King's decision should be admitted into evidence:

> [U]nder the rule of optional completeness, so that the jury can get the full story and DART could be allowed to tell its full story. Otherwise, it gives a false impression that there's two motions to dismiss, but then they don't know where to go from there.
>
> And also Ms. Johnson has not been able to tell everything that she did, which again gives a false impression of some mis-action on her part, and, therefore, we're asking that we be allowed to – to submit that testimony before the jury.[9]

[9] Texas Rule of Evidence 107 provides:

> If a party introduces part of an act, declaration, conversation, writing, or recorded statement, an adverse party may inquire into any other part on the same subject. An adverse party may also introduce any other act, declaration, conversation, writing,

DART and Johnson's defensive theory at trial was that King had authority to determine whether the Trial Board had jurisdiction because he had the power to fashion a remedy for the grievance. Further, on appeal, DART and Johnson argue King's decision was relevant and vital to their defense that they:

> [C]omplied with the settlement agreement and that Katz received the opportunity to present his grievance first to Arbitrator McKee whose decision was final and binding and then to Arbitrator King by written submission whose decision was also final and binding.

However, in *ATU I*, we rejected DART and Johnson's defensive theory, concluding that, once a questioned grievance arbitrator determined the Trial Board had jurisdiction to hear a grievance, the Trial Board could not dismiss that grievance for lack of jurisdiction. *See ATU I*, 2014 WL 6661880, at *3.

DART does not argue the issues, facts, or controlling law have changed since our decision in *ATU I*. *See Jones*, 331 S.W.3d at 785. Based on the circumstances in this case, we exercise our discretion to apply the law of the case doctrine and decline to revisit the issue of whether King had jurisdiction to dismiss the March 3rd grievance. *See Briscoe*, 102 S.W.3d at 716; *J.O. Lockridge Gen. Contractors, Inc. v. Morgan*, 848 S.W.2d 248, 250 (Tex. App.—Dallas 1993, writ denied) ("A reviewing court does not again pass upon any matter either presented to or directly passed upon or which was in effect disposed of on a former appeal to that court."). Because DART and Johnson offered the King decision to support a defensive theory that we concluded in *ATU I* was not viable, they have failed to show the judgment was impacted by the exclusion of the King decision.[10] We resolve DART and Johnson's second issue against them.

> or recorded statement that is necessary to explain or allow the trier of fact to fully understand the part offered by the opponent. "Writing or recorded statement" includes a deposition.

TEX. R. EVID. 107.

[10] DART and Johnson also argue in their second issue that (1) ATU 1338 did not have standing to request the King decision be declared void because Katz filed the grievance before the Trial Board and (2) the request to have King's decision declared void was an impermissible collateral

ATU's Out-of-Pocket Expenses

As part of their third issue, DART and Johnson complain the trial court erred by awarding out-of–pocket expenses consisting of attorneys' fees incurred by ATU 1338 relating to the March 3rd grievance prior to the filing of this lawsuit and to grievances other than the March 3rd grievance. ATU 1338 claimed it was entitled to recover as as-of-pocket damages the attorneys' fees it incurred outside this litigation due to DART's and Johnson's breach of the settlement agreement.

Generally, we review a trial court's award of attorneys' fees under an abuse of discretion standard. *See Ridge Oil Co., Inc. v. Guinn Invs., Inc.*, 148 S.W.3d 143, 163 (Tex. 2004). Here, however, the issue is whether Texas law recognizes a basis for the recovery of attorneys' fees, which is a question of law that we review de novo. *See Heckman v. Williamson Cty.*, 369 S.W.3d 137, 150 (Tex. 2012) (appellate courts review questions of law de novo); *Holland v. Wal-Mart Stores, Inc.*, 1 S.W.3d 91, 94 (Tex. 1999) (per curiam) (availability of attorneys' fees under particular statute is question of law).

"Courts have long distinguished attorney's fees from damages." *See In re Nalle Plastics Family Ltd P'ship*, 406 S.W.3d 168, 172 (Tex. 2013) (orig. proceeding); *see also Landmark Dividend LLC v. Hickory Pass L.P.*, No. 03-16-00002-CV, 2017 WL 5560082, at *2 (Tex. App.—Austin Nov. 17, 2017, no pet.) (mem. op.). Attorneys' fees are ordinarily not recoverable as damages, even if compensatory. *In re Xerox Corp.*, 555 S.W.3d 518, 529 (Tex. 2018) (orig. proceeding). However, attorneys' fees may be recovered as actual damages in limited circumstances, such as for the recovery of unpaid legal bills arising from a client's contract with his lawyer, or in a legal malpractice case for the attorneys' fees incurred by the plaintiff in the

attack on the decision. However, both Katz and ATU 1338 filed the grievance that was presented to the Trial Board. Further DART and Johnson's collateral attack argument is based on the premise that King had jurisdiction to dismiss the grievance because he had authority to fashion a remedy, the same defensive theory we rejected in *ATU I*.

underlying suit due to the attorneys' negligence. *See In re Nalle Plastics Family Ltd. P'ship*, 406 S.W.3d at 174–75 (unpaid legal bills); *Akin, Gump, Strauss, Hauer & Feld, L.L.P.*, 299 S.W.3d at 111 (legal malpractice cases). As relevant here, attorneys' fees incurred in enforcing a settlement agreement may be recoverable if the fees are a natural, probable, and foreseeable consequence of a breach of the agreement. *Ganske v. WRS Grp., Inc.*, No. 10-06-00050-CV, 2007 WL 1147357, at *3 (Tex. App.—Waco Apr. 18, 2007, no pet.) (mem. op.).[11]

ATU 1338 sought to recover as out-of-pocket damages the attorneys' fees it incurred in appealing the March 3rd grievance after it was returned as questionable, as well as in appealing other grievances that were returned as questionable after the March 3rd grievance. The trial court determined DART and Johnson breached the settlement agreement by their conduct relating to the March 3rd agreement.[12] Because DART and Johnson breached the settlement agreement, it was foreseeable that ATU 1338 would incur attorneys' fees by seeking to enforce the settlement agreement. Accordingly, the attorneys' fees related to the March 3rd grievance that were incurred by ATU 1338 in seeking to enforce the settlement agreement are properly recoverable as damages. *See In re Marriage of Pyrtle*, 433 S.W.3d 152, 169 (Tex. App.—Dallas 2014, pet. denied) (concluding attorneys' fees claimed as element of damages were recoverable); *Haubold v. Med. Carbon Research Inst., LLC*, No. 03-11-00115-CV, 2014 WL 1018008, at *8 (Tex. App.—Austin Mar. 14, 2014, no pet.) (mem. op.) (concluding "full import" of supreme court's holding in *Nalle* was that, while attorneys' fees incurred in prosecuting claim in case were not compensatory damages, "the fees comprising the breach-of-contract damages are").

[11] *See also Guffey v. Clark*, No. 05-93-00849-CV, 1997 WL 142750, at *3 (Tex. App.—Dallas Mar. 31, 1997, writ denied) (op. on reh'g) (not designated for publication) (concluding that, if attorneys' fees were "natural, probable, and foreseeable consequence" of breach of contract, fees could properly be recovered as damages).

[12] Our opinion in no way suggests the Secretary's decision to return a grievance as questionable is a per se breach of the settlement agreement for which ATU 1338 could seek to recover subsequent attorneys' fees as damages.

However, the attorneys' fees incurred by ATU 1338 to pursue two other grievances filed after the March 3rd grievance were not a foreseeable consequence of DART's and Johnson's breach of the settlement agreement in relation to the March 3rd grievance. *See Stuart v. Bayless*, 964 S.W.2d 920, 921-22 (Tex. 1998) (per curiam) (concluding attorney's loss of contingency fees in unrelated cases was not foreseeable consequence of breach of contract by client). Therefore, the attorneys' fees incurred by ATU 1338 relating to other grievances do not fall within the narrow class of cases in which attorneys' fees may be recovered as actual damages. *See In re Nalle Plastics Ltd. P'ship*, 406 S.W.3d at 173 (concluding, for purposes of establishing amount of supersedeas bond that "[w]hile attorney's fees for the prosecution or defense of a claim may be compensatory in that they help make a claimant whole, they are not, and have never been, damages"); *Edom Corner, LLC v. It's the Berry's, LLC*, No. 12-14-00365-CV, 2016 WL 1254017, at *2–3 (Tex. App.—Tyler Mar. 31, 2016, pet. denied) (mem. op.) (concluding fees incurred in prior suits were incident to prosecuting or defending them and could not be recovered as actual damages).

ATU 1338 submitted evidence that, prior to instituting this litigation, it incurred attorneys' fees relating to the March 3rd grievance beginning on February 28, 2011, and ending on May 1, 2013. However, Johnson did not return the March 3rd grievance as questionable until March 28, 2011, and ATU 1338 may recover attorneys' fees as compensable damages only if the fees were incurred as a result of DART's and Johnsons' breach of the settlement agreement. ATU 1338 submitted evidence that its attorneys spent 75.2 hours between April 27, 2011, and March 1, 2013, on presenting the grievance to McKee and participating in the Trial Board proceedings before King. ATU 1338's attorneys billed $212 an hour for seventy-three of those hours and designated the remaining 2.2 hours as "no charge." Accordingly, ATU 1338 proved out-of-pocket damages of $16,156.01, consisting of $15,476 in out-of-pocket costs for the attorneys' fees it incurred

following DART's and Johnson's breach of the settlement agreement and $680.01 that it paid as its portion of McKee's fee.

We resolve DART and Johnson's third issue in their favor to the extent it challenges the award of attorneys' fees incurred by ATU 1338 to pursue grievances other than the March 3rd grievance and conclude the jury's award of $20,000 to ATU 1338 for out-of-pocket damages is not supported by the evidence. However, there is evidence to support an award of out-of-pocket damages to ATU 1338. If, as we conclude here, part of a damages award lacks sufficient evidentiary support, the proper course is to suggest a remittitur of that part of the verdict. *Larson v. Cactus Util. Co.*, 730 S.W.2d 640, 641 (Tex. 1987); *see also* TEX. R. APP. P. 46.3 (court of appeals may suggest a remittitur). Consequently, we suggest a remittitur of $3,843.99 of the out-of-pocket damages awarded by the jury. As the prevailing party at trial, ATU 1338 must be given the option of accepting the remittitur or having the case remanded for a new trial. TEX. R. APP. P. 46.3; *Larson*, 730 S.W.2d at 641; *McLeod v. Gyr*, 439 S.W.3d 639, 650 (Tex. App.—Dallas 2014, pet. denied). If the suggested remittitur of $3,843.99 is timely filed, we will modify and affirm the judgment in accordance with the remittitur. TEX. R. APP. P. 46.3; *McLeod*, 439 S.W.3d at 650. However, if the remittitur is not timely filed, we will reverse the judgment and remand for a new trial the issues of whether DART and Johnson breached the settlement agreement, the out-of-pocket damages incurred by ATU 1338 due to any breach, and whether ATU 1338 is entitled to declaratory and injunctive relief. TEX. R. APP. P. 46.3; *McLeod*, 439 S.W.3d at 650.

Attorneys' Fees Pursuant to UDJA

In the remainder of their third issue, DART and Johnson challenge the trial court's award to ATU 1338 of attorneys' fees incurred in this litigation.[13] DART and Johnson specifically argue

[13] Under section 38.001 of the civil practice and remedies code, a party may recover reasonably attorneys' fees from an individual or a corporation if the party prevails on a cause of action for which fees are recoverable and recovers damages. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 38.001; *Mustang Pipeline Co., Inc. v. Driver Pipeline Co., Inc.*, 134 S.W.3d 195, 201 (Tex. 2004) (per curiam). Although ATU 1338

that neither the settlement agreement nor section 271.159 of the local government code authorize the recovery of attorneys' fees by ATU 1338 and the UDJA may not be used to recover attorneys' fees that are otherwise not recoverable.

In its first amended petition, ATU 1338 asserted a claim for breach of contract and sought declaratory relief under the UDJA. ATU 1338 requested the trial court declare that (1) DART and Johnson are bound by the settlement agreement, (2) under the settlement agreement, McKee's decision that the Trial Board had jurisdiction to hear portions of the March 3rd grievance was final and binding on DART, (3) the March 3rd grievance was reinstated to the Trial Board, (4) DART's motion to dismiss filed in the Trial Board proceedings was a breach of the settlement agreement and was null and void, (5) any further motion to dismiss filed by DART in this matter that addresses the issue resolved would be a further breach of the settlement agreement and would be null and void, (6) under the settlement agreement, any future determination by a questioned grievance arbitrator regarding the jurisdiction of the Trial Board is final and binding on DART and Johnson, (7) any future motion to dismiss that attacks the final and binding determination of the questioned grievance arbitrator would be a breach of the settlement agreement and would be null and void, and (8) King's decision was outside his authority and jurisdiction and is null and void. The trial court declared that King's decision was void, ordered DART and Johnson to advance the March 3rd grievance to the Trial Board for a determination on the merits without further procedural or jurisdictional impediments, and permanently enjoined DART and Johnson from failing to accept as binding a determination of a questioned grievance arbitrator on the issue of the Trial Board's jurisdiction, and awarded ATU 1338 reasonable and necessary attorneys' fees of $280,325.

pleaded it was entitled to attorneys' under sections 38.001 of the civil practice and remedies code, it conceded at trial and on appeal that it was not entitled to recover attorneys' fees under that section. Accordingly, we need not address DART and Johnson's argument that ATU 1338 was not entitled to recover attorneys' fee under section 38.001.

"As a general rule, litigants in Texas are responsible for their own attorney's fees and expenses in litigation." *Ashford Partners, Ltd. v. ECO Res., Inc.*, 401 S.W.3d 35, 41 (Tex. 2012). Attorneys' fees are recoverable only when provided for by statute or the parties' contract. *Tony Gullo Motors I, L.P. v. Chapa*, 212 S.W.3d 299, 310 (Tex. 2006). The UDJA provides that a trial court "may award costs and reasonable and necessary attorney's fees as are equitable and just." TEX. CIV. PRAC. & REM. CODE ANN. § 37.009; *see also Wells Fargo Bank, N.A. v. Murphy*, 458 S.W.3d 912, 919 (Tex. 2015). The UDJA "entrusts attorney fee awards to the trial court's sound discretion, subject to the requirements that any fees awarded be reasonable and necessary, which are matters of fact, and to the additional requirements that the fees be equitable and just, which are matters of law." *Bocquet v. Herring*, 972 S.W.2d 19, 21 (Tex. 1998). We review a trial court's decision to award attorneys' fees under the UDJA for abuse of discretion. *Ridge Oil Co.*, 148 S.W.3d at 163.

ATU 1338 requested the trial court construe the parties' settlement agreement and determine whether, following a decision by a questioned grievance arbitrator on the jurisdiction of the Trial Board, the Trial Board had the authority to dismiss the grievance for lack of jurisdiction. The UDJA's purpose is "to settle and to afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations." TEX. CIV. PRAC. & REM. CODE ANN. § 37.002(b). However, a "declaratory judgment is appropriate only if a justiciable controversy exists as to the rights and status of the parties and the controversy will be resolved by the declaration sought." *Bonham State Bank v. Beadle*, 907 S.W.2d 465, 467 (Tex. 1995). The UDJA does not grant courts the authority to render advisory opinions, *see Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 444 (Tex. 1993); *Hope Hill Invs., Inc. v. Richardson Indep. Sch. Dist.*, No. 05-16-01519-CV, 2018 WL 2676551, at *2 (Tex. App.—Dallas June 5, 2018, no pet.) (mem. op.), and does not permit courts to grant declaratory relief when the real issue is determining whether a party

breached an agreement, *Severs v Mira Vista Homeowners Ass'n, Inc.*, No. 02-16-00157-CV, 2018 WL 4231437, at *8 (Tex. App.—Fort Worth Sept. 6, 2018, no pet. h.); *see also Tex. Parks & Wildlife Dept. v. Sawyer Trust*, 354 S.W.3d 384, 388 (Tex. 2011) ("And a litigant's couching its requested relief in terms of declaratory relief does not alter the underlying nature of the suit."). Further, the UDJA does not enlarge a trial court's jurisdiction, *Tex. Dept. of Transp. v. Sefzik*, 355 S.W.3d 618, 621–22 (Tex. 2011) (per curiam), and governmental immunity bars an otherwise-proper UDJA claim if it would have the effect of establishing an entitlement to relief against the government for which the legislature has not waived immunity, *Sawyer Trust*, 354 S.W.3d at 388.

Simply repleading a claim as one for a declaratory judgment cannot serve as a basis for an award of attorneys' fees. *Etan Indus., Inc. v. Lehmann*, 359 S.W.3d 620, 624 (Tex. 2011) (per curiam). Rather, when a claim for declaratory relief is merely "tacked onto" statutory or common-law claims that do not permit fees, attorneys' fees are disallowed. *Id.* The declaratory judgment claim must do more "than merely duplicate the issues litigated" via contract or tort claims. *Id.*[14]

Several of ATU 1338's requests for declaratory relief duplicated the relief sought under the breach of contract claim. However, the only declaratory relief granted by the trial court was to declare King's decision void and that the March 3rd grievance should be advanced to the Trial Board for a determination on the merits. The declaration King's decision was void was not relief that was available pursuant to ATU 1338's breach of contract claim. *See e.g., Mungia v. Via Metro. Transit*, 441 S.W.3d 542, 548 (Tex. App.—San Antonio 2014, pet. denied) (noting declaratory judgment action collaterally attacking void judgment is independent cause of action).

[14] A "declaratory judgment action may not be used to collaterally attack, modify, or interpret a prior judgment." *Depumpo v. Thrasher*, No. 05-14-00967-CV, 2016 WL 147294, at *5 (Tex. App.—Dallas Jan. 13, 2016, no pet.) (mem. op.). However, the UDJA may be used to bring a collateral challenge to have a judgment "declared void and set aside." *Luttrell v. El Paso Cnty.*, 555 S.W.3d 812, 828 (Tex. App.—El Paso 2018, no pet.); *Mungia v. Via Metro. Transit*, 441 S.W.3d 542, 547–48 (Tex. App.—San Antonio 2014, pet. denied) (concluding void default judgment may be collaterally attacked through declaratory judgment action seeking to declare judgment void and have it set aside). ATU 1338 contended King did not have jurisdiction to dismiss the March 3rd grievance and sought a declaration setting aside King's decision as void. Because DART and Johnson have not argued that ATU 1338 was precluded from recovering attorneys' fees because the requested declaration was an impermissible use of the UDJA, we will not consider that question in this appeal. *See Wells Fargo Banks, N.A.*, 458 S.W.3d at 916.

Accordingly, the trial court was authorized to render judgment awarding ATU 1338 its attorneys' fees under the UDJA. *See Wells Fargo Bank, N.A.*, 458 S.W.3d at 916 ("Because the Murphys pleaded for declaratory relief and Wells Fargo pleaded for the recovery of its attorney's fees for either prosecuting or defending claims for declaratory relief, the trial court was authorized to enter a judgment awarding Wells Fargo its attorney's fees under the UDJA.").[15]

We resolve the remainder of DART and Johnson's third issue against them.[16]

Conclusion

We resolve DART and Johnson's first issue in their favor and render judgment that ATU 1338 recover nothing for past injury to reputation. We resolve DART and Johnson's third issue in their favor to the extent of suggesting a remittitur of $3,843.99 of the out-of-pocket damages awarded by the trial court. We resolve the remainder of DART and Johnson's third issue against them.

In accordance with rule of appellate procedure 46.3, if ATU 1338 files with this Court within fifteen (15) days from the date of this opinion a remittitur of $3,843.99 of out-of-pocket damages, we will modify the trial court's judgment to reflect ATU 1338 shall recover nothing for past injury to its reputation and to award ATU 1338 $16,156.01 in out-of-pocket damages as well as the attorneys' fees of $280,325 awarded by the trial court, and affirm the trial court's judgment as modified. If the suggested remittitur is not timely filed, we will reverse the trial court's

[15] DART and Johnson waived any complaint that ATU 1338 failed to segregate its fees between the request for declaratory relief and the breach of contract claim by not objecting to the failure to segregate. *See Green Int'l, Inc. v. Solis*, 951 S.W.2d 384, 389 (Tex. 1997); *Rhodes v. Kelly*, No. 05-16-00888-CV, 2017 WL 2774452, at *13 (Tex. App.—Dallas June 27, 2017, pet. denied) (mem. op.).

[16] DART and Johnson also contend ATU 1338 was not entitled to recover attorneys' fees under section 271.159 of the local government code. Section 271.159, which was in effect when the settlement agreement was signed, was repealed effective June, 19, 2009. *See* Act of May 31, 2009, 81st Leg., R.S., ch. 1266, § 16, 2009 Tex. Gen. Laws 4006, 4008. It provided that attorneys' fees incurred by a local governmental entity or any other party in the adjudication of a claim against a local governmental entity could not be recovered unless the local governmental entity had entered into a written agreement that expressly authorized the prevailing party in the adjudication to recover its reasonable and necessary attorneys' fees. Act of May 25, 2005, 79th Leg., R.S., ch 604, § 1, 2005 Tex. Gen. Laws 1548, 1549 (repealed 2009). Because we have determined ATU 1338 could properly recover attorneys' fees under the UDJA, we need not consider whether it could recover fees pursuant to section 271.159. *See* TEX. R. APP. P. 47.1.

judgment and remand the cause for further proceedings consistent with this opinion. *See* TEX. R. APP. P. 46.3.

/Robert M. Fillmore/
ROBERT M. FILLMORE
JUSTICE

171051F.P05

Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

DALLAS AREA RAPID TRANSIT AND NANCY K. JOHNSON, Appellants

No. 05-17-01051-CV V.

AMALGAMATED TRANSIT UNION LOCAL NO. 1338, Appellee

On Appeal from the 95th Judicial District Court, Dallas County, Texas,
Trial Court Cause No. DC-13-05156.
Opinion delivered by Justice Fillmore,
Justices Lang and Schenck participating.

In accordance with this Court's opinion of this date, we **REVERSE** the judgment of the trial court to the extent it awards appellee Amalgamated Transit Union Local No. 1338 $2,520,000 for past injury to reputation and **RENDER** judgment that appellee Amalgamated Transit Union Local No. 1338 take nothing on its breach of contract claim against appellants Dallas Area Rapid Transit and Nancy K. Johnson for past injury to reputation.

We suggest a remitter in the amount of $3,843.99 on the out-of-pocket costs awarded to appellee Amalgamated Transit Union Local No. 1338 on its breach of contract claim. In accordance with Texas Rule of Appellate Procedure 46.3, if appellee Amalgamated Transit Union Local No. 1338 files with this Court within fifteen (15) days from the date of this opinion a remittitur in the amount of $3,843.99, we will modify the trial court's judgment to award appellee Amalgamated Transit Union Local No. 1338 $16,156.01, along with pre- and post-judgment interest, for out-of-pocket expenses on its breach of contract claim and affirm as modified. If the suggested remittitur is not filed timely, we will reverse the trial court's judgment and remand for further proceedings.

It is **ORDERED** that each party bear its own costs of this appeal.

Judgment entered this 27th day of November, 2018.