AFFIRMED and Opinion Filed January 9, 2020

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-18-00337-CV

GREAT AMERICAN LLOYDS INSURANCE COMPANY AND MID-CONTINENT CASUALTY COMPANY, Appellants/Cross-Appellees
V.
VINES-HERRIN CUSTOM HOMES, L.L.C., HERRIN CUSTOM HOMES, INC., AND EMIL G. CERULLO, Appellees/Cross-Appellants

On Appeal from the 44th Judicial District Court
Dallas County, Texas
Trial Court Cause No. DC-03-6903

OPINION

Before Justices Myers, Osborne, and Nowell
Opinion by Justice Osborne

On remand from this Court, the trial court rendered its second amended final judgment in favor of appellees Vines-Herrin Custom Homes, L.L.C., Herrin Custom Homes, Inc., and Emil G. Cerullo (together, "Vines-Herrin"). In three issues, appellants Great American Lloyds Insurance Company and Mid-Continent Casualty Company (together, "the Insurers") contend the trial court erred by rendering judgment for Vines-Herrin because Vines-Herrin did not meet its burden to establish the amount of damages owed by each insurer. Vines-Herrin asserts one issue in a cross-appeal, arguing the trial court erred by refusing to award additional attorney's fees. For the reasons we discuss, we affirm the trial court's judgment.

BACKGROUND

This is the third appeal of an insurance coverage dispute. Detailed facts may be found in our previous opinions,[1] and we recite here only the background necessary to resolve this appeal:

- Vines-Herrin, a builder, purchased commercial general liability (CGL) insurance coverage from the Insurers for the relevant policy years.

- Cerullo sued Vines-Herrin for construction defects in his home.

- The Insurers refused to defend Vines-Herrin in Cerullo's suit.

- Vines-Herrin sued the Insurers for a declaratory judgment that they owed duties to defend and indemnify in Cerullo's suit.

- Cerullo's claim against Vines-Herrin was arbitrated and resulted in an award of $2,487,507.77 to Cerullo. Although they had notice, the Insurers did not participate in the arbitration.

- Cerullo and Vines-Herrin agreed that Cerullo would not confirm the arbitrator's award in exchange for an assignment of Vines-Herrin's claims against the Insurers.

- After a bench trial on the coverage issues, the trial court first ruled in Vines-Herrin's favor, but then relied on an intervening Texas Supreme Court decision in rendering judgment that Vines-Herrin take nothing. Vines-Herrin appealed to this Court.

- In *Vines-Herrin I*, we reversed the trial court's judgment, concluding that both Great American and Mid-Continent owed Vines-Herrin a duty to defend, and Great American's duty to indemnify was triggered. *Vines-Herrin I*, 357 S.W.3d at 173. We remanded the case to the trial court for further proceedings.

- The trial court rendered judgment for Vines-Herrin in the amount of the arbitrator's award against both of the Insurers, jointly and severally.

- In *Vines-Herrin II*, we concluded that both Insurers owed Vines-Herrin a duty to indemnify. *Vines-Herrin II*, 2016 WL 4486656, at *5–7. We also concluded, however, that the trial court erred by ruling that each insurer was liable for the entire arbitration award. We again remanded the case for further proceedings.

- The trial court rendered a second amended final judgment allocating the $2,487,507.77 award on a pro rata basis based on the number of days each insurer's policy was implicated for the damages incurred. The trial court's calculation resulted in a damage

[1] *Vines-Herrin Custom Homes, LLC v. Great Am. Lloyds Ins. Co.*, 357 S.W.3d 166 (Tex. App.—Dallas 2011, pet. denied) ("*Vines-Herrin I*"), and *Great Am. Lloyds Ins. Co. v. Vines-Herrin Custom Homes, L.L.C.*, No. 05-15-00230-CV, 2016 WL 4486656 (Tex. App.—Dallas Aug. 25, 2016, pet. denied) (mem. op.) ("*Vines-Herrin II*").

award against Great American for $872,057.32, and a damage award against Mid-Continent for $1,615,450.45.

- The trial court denied Vines-Herrin's request for an award of attorney's fees incurred in the *Vines-Herrin II* appeal.

In three issues, the Insurers contend (1) the trial court erred by determining the amount of indemnification required by each insurer based on the insurer's time on the risk; (2) the evidence is insufficient to support the amount of damages awarded against each insurer; and (3) the trial court erred by awarding attorney's fees, and the evidence is insufficient to support the award. In its cross-appeal, Vines-Herrin contends the trial court erred by refusing to award additional attorney's fees incurred in the *Vines-Herrin II* appeal.

DISCUSSION

1. Standards of review

In an appeal from a bench trial, the trial court's findings of fact are reviewable for legal and factual sufficiency of the evidence by the same standards that are applied in reviewing the evidence supporting a jury's answer. *Sheetz v. Slaughter*, 503 S.W.3d 495, 502 (Tex. App.—Dallas 2016, no pet.). When neither party has requested findings of fact and conclusions of law following a nonjury trial, all fact findings necessary to support the trial court's judgment are implied. *Sixth RMA Partners, L.P. v. Sibley*, 111 S.W.3d 46, 52 (Tex. 2003). When the appellate record includes the reporter's and clerk's records, as in this case, implied findings of fact may be challenged for legal sufficiency. *Id.*

When an appellant challenges the legal sufficiency of an adverse finding on which he did not have the burden of proof at trial, he must demonstrate there is no evidence to support the adverse finding. *Sheetz*, 503 S.W.3d at 502. When reviewing the record, we determine whether any evidence supports the challenged finding. *Id.* If more than a scintilla of evidence exists to support the finding, the legal sufficiency challenge fails. *Id.*; *see also King Ranch, Inc. v. Chapman*,

118 S.W.3d 742, 751 (Tex. 2003) (more than a scintilla of evidence exists when evidence "rises to a level that would enable reasonable and fair-minded people to differ in their conclusions" [internal quotation omitted]).

When an appellant challenges the factual sufficiency of the evidence on an issue, we consider all the evidence supporting and contradicting the finding. *Sheetz*, 503 S.W.3d at 502. We set aside the finding for factual insufficiency only if the finding is so contrary to the evidence as to be clearly wrong and manifestly unjust. *Id.* In a bench trial, the trial court, as factfinder, is the sole judge of the credibility of the witnesses. *Id.* As long as the evidence falls "within the zone of reasonable disagreement," we will not substitute our judgment for that of the fact-finder. *Id.* (quoting *City of Keller v. Wilson*, 168 S.W.3d 802, 822 (Tex. 2005)).

We review de novo a trial court's conclusions of law. *See BMC Software Belg., N.V. v. Marchand*, 83 S.W.3d 789, 794 (Tex. 2002). We are not bound by the trial court's legal conclusions, but the conclusions of law will be upheld on appeal if the judgment can be sustained on any legal theory supported by the evidence. *Sheetz*, 503 S.W.3d at 502. Incorrect conclusions of law will not require reversal if the controlling findings of fact will support a correct legal theory. *Id.* Moreover, conclusions of law may not be reversed unless they are erroneous as a matter of law. *Id.*

The availability of attorney's fees under a particular statute is a question of law for the court that we review de novo. *Brinson Benefits, Inc. v. Hooper*, 501 S.W.3d 637, 641 (Tex. App.—Dallas 2016, no pet.). If we determine that a party was entitled to an award of attorney's fees, we then review the trial court's award for an abuse of discretion. *Id.*

The "law of the case" doctrine mandates that the ruling of an appellate court on a question of law raised on appeal will be regarded as the law of the case in all subsequent proceedings unless

clearly erroneous. *Caplinger v. Allstate Ins. Co.*, 140 S.W.3d 927, 929 (Tex. App.—Dallas 2004, pet. denied) (citing *Briscoe v. Goodmark Corp.*, 102 S.W.3d 714, 716 (Tex. 2003)).

2. The allocation and amounts awarded

In their first two issues, the Insurers challenge the trial court's method of allocation and the amounts allocated. We begin with the proposition that an insurer who has wrongfully refused to defend its insured is barred from collaterally attacking a judgment or settlement between the insured and the plaintiff. *Great Am. Ins. Co. v. Hamel*, 525 S.W.3d 655, 662–63 (Tex. 2017) (citing *Evanston Ins. Co. v. ATOFINA Petrochemicals, Inc.*, 256 S.W.3d 660, 670–74 (Tex. 2008)). As the court noted in *Evanston*, "had the insurer accepted the defense, it would have had, of course, the opportunity to conduct the defense in the manner most likely to have defeated the plaintiffs' claim or at least to have reduced the amount of damages." *Evanston*, 256 S.W.3d at 672 (internal citation and quotations omitted). The Insurers were given several opportunities to participate in the defense of Cerullo's claims against their insured, but chose not to do so, in violation of the policies they issued to Vines-Herrin. Consequently, they may not challenge the total amount of the arbitration award. *See Hamel*, 525 S.W.3d at 662–63.

Second, we reject the notion that the Insurers may pay nothing at all if their insured does not establish a specific amount of damages attributable to each policy period. In *Vines-Herrin II*, we expressly rejected the Insurers' argument that "even if the evidence shows they should have indemnified Vines-Herrin in some amount, Vines-Herrin's failure to present evidence showing what that amount was is fatal to its recovery." *Vines-Herrin II*, 2016 WL 4486656, at *6. We decided instead that the Insurers "were not required to indemnify Vines-Herrin for property damages caused by occurrences and damages, *both of which* occurred outside their respective policy periods." *Id.* at *7 (emphasis added). Consequently, Great American was not required to indemnify Vines-Herrin for damages that occurred during Mid-Continent's two policy periods,

and Mid-Continent was not required to indemnify Vines-Herrin for damages that occurred during Great American's single policy period. *Id.* But conversely, each Insurer is required to indemnify Vines Herrin "for property damages caused by occurrences and damages, both of which" *did* occur during that Insurer's policy period. *Cf. id.* Vines-Herrin offered proof that it suffered damages from occurrences in each of the three policy periods. Great American issued a policy for one of these policy periods, and Mid-Continent issued policies for the remaining two. Each must indemnify Vines-Herrin accordingly.

Cerullo and Vines-Herrin presented evidence to the arbitrator and to the trial court of the repairs made necessary by the three occurrences. Cerullo's evidence submitted to the arbitrator included a binder of inspection reports, repair estimates, and photographs to support his claims regarding the problems at his home. The arbitrator heard testimony from Cerullo and from Vines-Herrin's principals. In the trial court, Cerullo testified about the problems, and the binder of inspection reports, estimates, and photographs was admitted into evidence at trial. Cerullo and the arbitrator testified at trial about the evidence presented and the defenses raised at the arbitration. The arbitrator testified:

> Q. The damage numbers that were presented to you were the—both the amounts Mr. Cerullo had already spent in repairs and additional amounts that would be needed to repair the house, correct?
>
> A. Correct.

In *Vines-Herrin II*, we explained that "[t]he Insurers presented no evidence that the damages did *not* occur within either Mid-Continent's or Great American's policy periods." *Id.* at *6. We added, "In that regard, we note that it appears to have been the Insurers' strategy not to present any evidence that the property damages did not occur during their respective policy periods. Had they done so, they would have provided evidence that the damages occurred during

the other's policy periods." *Id.* at *6 n.3. Consequently, the only evidence before the arbitrator and the trial court showed that property damage occurred during each respective policy period.

The trial court applied a "time on the risk" allocation between Great American and Mid-Continent to determine the amount of indemnification required from each insurer. In its judgment, the trial court allocated the total arbitration award on a pro rata basis, based on the number of days each policy was implicated. We agree with the Insurers that no case cited by Vines-Herrin applying a time on the risk allocation presents exactly the same circumstances as those here. It does not follow, however, that the principle's underlying rationale may not apply. The Supreme Court of New Hampshire discussed "pro rata allocation" of loss among multiple insurers in *EnergyNorth Natural Gas, Inc. v. Certain Underwriters at Lloyd's*, 156 N.H. 333, 934 A.2d 517 (2007),[2] a case involving long-term environmental pollution damages. The court contrasted pro rata allocation with applying joint and several liability among insurers, describing pro rata allocation as follows:

> The other approach to allocating liability among multiple insurers is to apply proportional, or pro rata, liability. Under this approach, all the triggered insurers will be allocated a certain portion of the loss. The difference between joint and several allocation and pro rata allocation is that pro rata allocation allows the policy holder to recover only a portion of each triggered policy. The pro rata approach emphasizes that part of a long-tail injury will occur outside any particular policy period. Rather than requiring any one policy to cover the entire long-tail loss, pro rata allocation instead attempts to produce equity over time.

156 N.H. at 339–40, 934 A.2d at 522–23 (internal quotation marks and citations omitted). The Supreme Court of South Carolina applied a time on the risk framework to allocate damages among insurers in a case involving water penetration and progressive damage to a series of condominium projects. *Crossmann Communities of N. Carolina, Inc. v. Harleysville Mut. Ins. Co.*, 395 S.C. 40, 717 S.E.2d 589 (2011). The court explained:

> In cases where it is impossible to know the exact measure of damages attributable to the injury that triggered each policy, courts have looked to the total loss incurred

[2] The parties do not cite any Texas state court decisions discussing a "time on the risk" damages allocation in their briefing. Both parties cite and discuss *EnergyNorth Natural Gas*, *Crossmann Communities*, and numerous other cases from a variety of federal and state jurisdictions.

> as a result of all of the property damage and then devised a formula to divide that loss in a manner that reasonably approximates the loss attributable to each policy period. The basic formula consists of a numerator representing the number of years an insurer provided coverage and a denominator representing the total number of years during which the damage progressed. This fraction is multiplied by the total amount the policyholder has become liable to pay as damages for the entire progressive injury. In this way, each triggered insurer is responsible for a share of the total loss that is proportionate to its time on the risk.
>
> This formula is not a perfect estimate of the loss attributable to each insurer's time on the risk. Rather, it is a *default rule* that assumes the damage occurred in equal portions during each year that it progressed. If proof is available showing that the damage progressed in some different way, then the allocation of losses would need to conform to that proof. However, absent such proof, assuming an even progression is a logical default.

395 S.C. at 64–65, 717 S.E.2d at 602 (footnotes omitted).

In this case, the arbitrator rendered a final decision that Cerullo incurred $2,487,507.77 in actual damages from Vines-Herrin's negligent construction of his home. At the arbitration and at the subsequent trial, Cerullo and Vines-Herrin established that these damages resulted from "separate occurrences, each of which caused damages in a single policy period." *Vines-Herrin II*, 2016 WL 4486656, at *7. In its findings of fact and conclusions of law accompanying the November 26, 2014 judgment, the trial court found that in May 2000, Cerullo "noticed substantial flooding in his courtyard after a rainstorm"; "around Thanksgiving Day of 2000," Cerullo "noticed that the windows around the pool area were beginning to bow"; and in "early 2002," Cerullo "noticed that his ceilings and roof were starting to sag, indicating deficiencies in the structural soundness of the Residence." Cerullo offered evidence at the arbitration relating to all of these problems and the cost to repair them. But because the Insurers wrongfully refused to defend Vines-Herrin or participate in the arbitration, they lost their opportunities to require that Cerullo and Vines-Herrin allocate an exact amount of damages to the relevant policy period or to request that the arbitrator do so. At the arbitration, Cerullo's burden was to prove and obtain damages for all of the problems at his home, regardless of the date of occurrence, and Vines-Herrin's burden was

to prove that its negligence was not the cause of any of the problems in question. Neither was required to meet the extra burden of proving exactly how much of the damage occurred on any particular day. Neither was required to establish any sort of allocation among the absent insurers, and the arbitrator was not asked to make one. Consequently, this case presents a problem similar to that of the time on the risk cases, that is, how to apportion an established total amount of damages among the insurers whose policies were in effect during the time a portion of the loss was suffered by the insured.

Under these circumstances, we conclude there was legally and factually sufficient evidence to support the trial court's allocation of damages in its February 21, 2018 judgment. Cerullo and Vines-Herrin offered evidence that damages occurred during each policy period and evidence of the total awarded by the arbitrator to compensate Cerullo for those damages. The trial court allocated the total loss on a pro-rata basis, allocating $872,057.32 of indemnification against Great American for its single policy period and $1,615,450.45 of indemnification against Mid-Continent for its two policy periods, based on the number of days each policy was implicated. "In this way, each triggered insurer is responsible for a share of the total loss that is proportionate to its time on the risk." *Crossmann Communities*, 395 S.C. at 65, 717 S.E.2d at 602. We decide the Insurers' first and second issues against them.

3. The award of attorney's fees

In their third issue, the Insurers challenge the trial court's award of $604,743.02 in attorney's fees and $14,186.76 in costs to Vines-Herrin. The award in the 2018 judgment appealed here is in the same amounts originally made in the trial court's judgment of November 26, 2014 that was reversed in *Vines-Herrin II*.[3] The Insurers argue (1) because Vines-Herrin failed to prove

[3] In the February 21, 2018 judgment, the trial court took judicial notice of the November 26, 2014 final judgment, the November 24, 2014 findings of fact and conclusions of law, and this Court's mandate in *Vines-Herrin II*.

the proper amount of indemnification, it cannot recover attorney's fees, and (2) even if recovery of attorney's fees is proper, the evidence is legally insufficient to support the trial court's award. We have already concluded that the evidence is sufficient to support the trial court's award of damages. Consequently, we decide the Insurers' first complaint about the attorney's fee award against them.

We next consider the legal sufficiency of the evidence to support the trial court's award of attorney's fees. The Insurers argue that the 2014 affidavit of Geoffrey S. Harper is an insufficient basis for the trial court's award. The Insurers rely on this Court's opinion in *ViewPoint Bank v. Allied Property & Casualty Insurance Co.*, 439 S.W.3d 626, 636–38 (Tex. App.—Dallas 2014, pet. denied), and, in a supplemental letter brief, the supreme court's recent opinion in *Rohrmoos Venture v. UTSW DVA Healthcare, LLP*, 578 S.W.3d 469 (Tex. 2019). In *Rohrmoos Venture*, the court held that "[w]hen a fee claimant seeks to recover attorney's fees from an opposing party, it must put on evidence of reasonable hours worked multiplied by a reasonable hourly rate, yielding a base figure that can be adjusted by considerations not already accounted for in either the hours worked or the rate." *Rohrmoos Venture*, 578 S.W.3d at 475. In *ViewPoint Bank*, we concluded "the summary judgment evidence fails to establish as a matter of law the amount of reasonable and necessary attorney's fees ViewPoint is entitled to recover" where the attorney's affidavit was "not clear about the method used to determine the amount of attorney's fees." *ViewPoint Bank*, 439 S.W.3d at 638.

The trial court's award of fees was made under Chapter 38 of the civil practice and remedies code. Under Chapter 38, the trial court "may take judicial notice of the usual and customary attorney's fees and of the contents of the case file without receiving further evidence" in a proceeding before the court. TEX. CIV. PRAC. & REM. CODE § 38.004. Further, "[i]t is presumed that the usual and customary attorney's fees for a claim of the type described in Section 38.001 are

reasonable." *Id.* § 38.003. "The presumption may be rebutted." *Id.* As the court noted in *Rohrmoos Venture*:

> We note that section 38.004 of the Civil Practice and Remedies Code authorizes a court, in certain proceedings involving fee-shifting under section 38.001, to take judicial notice of usual and customary attorney's fees. In such instances, there is a rebuttable presumption that the usual and customary fees are reasonable.

Rohrmoos Venture, 578 S.W.3d at 490 n.9 (quotation of statutory language omitted). In *Rohrmoos Venture*, fees were shifted under a contract provision, so Chapter 38 did not apply. *See id.* at 484–85. And although chapter 38 did apply in *ViewPoint Bank*, an appeal of an order granting summary judgment, the opinion does not reflect that the parties raised any arguments about sections 38.003 or 38.004. *See ViewPoint Bank*, 439 S.W.3d at 629, 636–38.

In this case, in contrast, the trial court's 2014 award of attorney's fees was made after our remand in *Vines-Herrin I*, when the trial court had already conducted a bench trial and had presided over the case for eight years.[4] The Insurers correctly point out that Harper's 2014 affidavit does not state the number of hours worked, and explains only that Harper's firm charged "its usual and customary rates." But at that time, in addition to Harper's 2014 affidavit, the record included at least two prior attorney's fees affidavits submitted in the course of the proceedings. Most important, the trial court had conducted a bench trial, rendered judgment, considered further arguments and briefing by the parties, rendered a second judgment, had that judgment reversed on appeal, and was required to render a third judgment on remand. *See Vines-Herrin I*, 357 S.W.3d at 169; *Vines-Herrin II*, 2016 WL 4486656, at *7.[5] Under these circumstances, Chapter 38's judicial notice and presumption provisions applied so that the trial court was not required to "receiv[e] further evidence." TEX. CIV. PRAC. & REM. CODE § 38.004. Given this record, we

[4] The case was filed in 2003, but a new presiding judge was elected in 2006.

[5] The Insurers challenged the award of attorney's fees in *Vines-Herrin II*, but given our disposition of the appeal, we did not consider the issue. *See Vines-Herrin II*, 2016 WL 4486656, at *1, 7 (given the disposition of the allocation issue, the Court considered only "the Insurers' remaining points that would entitle them to a rendition of judgment").

conclude that legally sufficient evidence supports the trial court's award of attorney's fees. *See Sheetz*, 503 S.W.3d at 502. We decide the Insurers' third issue against them.

4. Vines-Herrin's cross-appeal

On remand after *Vines-Herrin II*, Vines-Herrin sought an additional $396,122.03 in attorney's fees and additional expenses of $427.50 incurred from November 13, 2014 to January 16, 2018.[6] They offered the affidavit of David B. Conrad, dated January 18, 2018, in support. Considering this Court's mandate in *Vines-Herrin II* to be limited to allocation of the arbitrator's award, the trial court denied Vines-Herrin's request, but stated, "[f]rom my perspective, the amount that you have presented with regard to reasonable and necessary attorney's fees is not controverted." *See* TEX. CIV. PRAC. & REM. CODE § 38.003 (presumption that usual and customary fees are reasonable may be rebutted). In a single issue in its cross-appeal, Vines-Herrin contends the trial court erred by refusing to award the additional fees.

The Insurers respond that:

- The additional award is outside the scope of the *Vines-Herrin II* mandate;
- Vines-Herrin did not request or preserve "any entitlement to an award of attorney's fees in connection with the appeal of the [November 26, 2014] Amended Final Judgment or otherwise" and did not offer proof of attorney's fees for appeal of the 2014 judgment. Postjudgment attorney's fees may not be determined after appeal on remand to the trial court; and
- Any error was harmless because Vines-Herrin did not show it was entitled to any additional attorney's fees. Conrad's affidavit is insufficient because it contains only conclusory statements that the requested fees were reasonable and necessary.

Even if our mandate encompassed the trial court's consideration of additional attorney's fees and Conrad's affidavit was sufficient, we conclude that Vines-Herrin's request and proof for this portion of its attorney's fees came too late. Vines-Herrin submitted the affidavit of Geoffrey

[6] As we have explained, the fee award in the trial court's February 21, 2018 judgment is unchanged from the fee award in the November 26, 2014 judgment challenged in *Vines-Herrin II*, and consequently did not include fees incurred since.

S. Harper to the trial court after the remand of *Vines-Herrin I*. In that November 2014 affidavit, Harper testified to the total fees incurred in prosecuting Vines-Herrin's claim for breach of contract.[7] The trial court's 2014 findings of fact and judgment included amounts for attorney's fees and costs, but did not specify that any of the award was made prospectively for an appeal of the 2014 judgment. Instead, Vines-Herrin sought its fees for defending the 2014 judgment on appeal after it had incurred them. It submitted Conrad's 2018 affidavit after remand of *Vines-Herrin II* to support its appellate fees incurred between 2014 and 2018.

"Where the remand does not order a new trial or a redetermination of attorney's fees previously awarded, the general rule is that the trial court must rely on the evidence provided in the initial trial of the case to determine the amount of attorney's fees to award." *Interstate 35/Chisam Road, L.P. v. Moayedi*, No. 05-16-00196-CV, 2017 WL 1046768, at *4 (Tex. App.—Dallas Mar. 20, 2017, no pet.) (mem. op.) (appeal after remand). In *Moayedi*, the plaintiff/appellant sued on a guaranty. *Id.* at *1. In its motion for summary judgment, the plaintiff offered proof of attorney's fees in the amounts of $28,533.75 for trial and $10,000 for appeal. *Id.* at *2. Both parties moved for summary judgment, and the trial court rendered judgment for the defendant. In an initial appeal, we reversed the trial court's summary judgment, concluding that the defendant had waived his right to offset his liability on the guaranty. *See id.* at *1. We rendered judgment for the plaintiff in the amount of the guaranty and remanded the case to the trial court for determination of interest and costs as provided in the guaranty agreement. *Id.* Our judgment was affirmed by the Texas Supreme Court. *Id.* On remand, the plaintiff submitted the affidavit of its attorney to prove up additional amounts of attorney's fees it incurred through the date of the trial court's summary judgment and the appeals to this Court and the Texas Supreme Court, including $40,574.03

[7] Harper also submitted an affidavit in 2008 that specifically included prospective fees for an appeal in *Vines-Herrin I*. The trial court's 2008 findings of fact and conclusions of law originally included findings of Vines-Herrin's prospective appellate fees. But when the trial court rendered the new take-nothing judgment in 2008, it amended its findings and conclusions so that Vines-Herrin did not recover damages or attorney's fees.

incurred through the date of the original summary judgment, $13,587.56 incurred prosecuting the appeal to this Court, and $21,762.48 incurred defending this Court's judgment in the Texas Supreme Court. *Id.* The trial court refused to award the additional amounts, and the plaintiff again appealed to this Court. *See id.* at *4.

In the second appeal, we held that the trial court did not err by failing to award the full amount of requested attorney's fees. *Id.* Citing the general rule quoted above, we explained that "[t]his limit on fee evidence applies to prohibit evidence on remand of 'actual' appellate fees incurred as well as fees for work performed after the mandate issued." *Id.* Consequently, we affirmed the trial court's ruling that the plaintiff's recoverable attorney's fees were limited to the amount it proved up as part of the original summary judgment proceedings. *Id.*

In *Vines-Herrin II*, we did not reach the Insurers' issue challenging the trial court's award of attorney's fees to Vines-Herrin. *See Vines-Herrin II*, 2016 WL 4486656, at *7 (pretermitting issues that would not entitle the Insurers to rendition of judgment). Nor did we order a new trial on all issues; we concluded, for example, that Great American's duty to indemnify was law of the case and that Mid-Continent's duty to indemnify was also triggered. *See id.* at *5. Our remand did "not order a new trial or a redetermination of attorney's fees previously awarded." *See Moayedi*, 2017 WL 1046768, at *4. Consequently, the "general rule" applies that "the trial court must rely on the evidence provided in the initial trial of the case to determine the amount of attorney's fees to award." *Id.* That evidence did not include the fees incurred for appeal of the trial court's judgment in *Vines-Herrin II*. We decide Vines-Herrin's cross-issue against it.

CONCLUSION

We affirm the trial court's judgment.

/Leslie Osborne/
LESLIE OSBORNE
JUSTICE

180337F.P05

Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

GREAT AMERICAN LLOYDS INSURANCE COMPANY AND MID-CONTINENT CASUALTY COMPANY, Appellants/Cross-Appellees

No. 05-18-00337-CV V.

VINES-HERRIN CUSTOM HOMES, L.L.C., HERRIN CUSTOM HOMES, INC., AND EMIL G. CERULLO, Appellees/Cross-Appellants

On Appeal from the 44th Judicial District Court, Dallas County, Texas
Trial Court Cause No. DC-03-6903.
Opinion delivered by Justice Osborne;
Justices Myers and Nowell, participating.

In accordance with this Court's opinion of this date, the judgment of the trial court is **AFFIRMED**.

It is **ORDERED** that appellees Vines-Herrin Custom Homes, L.L.C., Herrin Custom Homes, Inc., and Emil G. Cerullo recover their costs of this appeal from appellants Great American Lloyds Insurance Company and Mid-Continent Casualty Company.

Judgment entered January 9, 2020