AFFIRMED IN PART AND REVERSED AND RENDERED IN PART and Opinion Filed August 17, 2020

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-19-00813-CV

EDWARD KELLY, EDWARD KELLY D/B/A KELLY PLUMBING & LEAK DETECTION AND BRITTANY KELLY, Appellants
V.
SANJAI R. ISAAC, M.D., REBECCA ISAAC, MERIDIAN REVOCABLE TRUST, BARBARA HEIDEN, SHELLEY OLIVER AND BLAKE MYERS, Appellees

On Appeal from the County Court at Law No. 7
Collin County, Texas
Trial Court Cause No. 007-01284-2017

MEMORANDUM OPINION

Before Justices Whitehill, Osborne, and Carlyle
Opinion by Justice Whitehill

Appellees Sanjai R. Isaac, M.D., Rebecca Isaac, and Meridian Revocable Trust (Homeowners) own a house at which appellant Edward Kelly did some work on the gas lines. The Homeowners refused to pay Kelly's bill, he put a lien on their house, and the Homeowners sued Kelly and his wife, also an appellant. The Kellys

counterclaimed. The litigation was resolved piecemeal by several interlocutory orders, and on appeal the Kellys attack the following:

- two orders removing or invalidating the Kellys' lien on the house and assessing related attorney's fees against the Kellys;
- an order assessing attorney's fees against the Kellys relating to their Texas Theft Liability Act counterclaims, which they nonsuited shortly before a summary judgment motion attacking them was to be submitted for determination; and
- a no-evidence summary judgment order denying the Kellys' contract breach and quantum meruit counterclaims.

The Kellys raise six issues on appeal attacking these orders. We decide the pivotal issues as follows:

- The trial court lacked subject matter jurisdiction to entertain the Homeowners' claims attacking the Kellys' lien or to award them related attorney's fees because the Government Code deprives the statutory county court of jurisdiction over suits to adjudicate the enforceability of a lien on land.
- The trial court did not err in awarding the Homeowners their attorney's fees regarding the Kellys' civil theft counterclaims, because (i) the Homeowners were prevailing parties and (ii) their fees evidence and segregation efforts were sufficient.
- The trial court did not err by granting a no-evidence summary judgment against the Kellys on their contract breach and quantum meruit counterclaims because they produced no evidence (i) of a contract binding against the Homeowners or (ii) that the Homeowners had reasonable notice that the Kellys expected the Homeowners to pay them for services and materials.

Accordingly, we affirm in part and reverse and render in part.

I. BACKGROUND

A. Factual Allegations

The Homeowners' live petition alleged these facts:

The Homeowners hired a contractor to perform repairs on their homestead property in Plano. The contractor hired Kelly Plumbing to perform services on the house, and Edward Kelly himself performed that work in February 2017. Kelly damaged the property, causing the Homeowners to hire someone else to repair their home and personal property.

Kelly sent the Homeowners invoices for several thousand dollars and filed or attempted to file a mechanic's and materialmen's lien on their property. Additionally, Brittany Kelly defamed the Homeowners on the internet.

B. Procedural History

The Homeowners sued the Kellys. Their live pleading asserted six counts:

1. declaratory relief and lien removal under Texas Civil Practice and Remedies Code § 12.002;
2. declaratory relief and lien removal under Texas Property Code § 53.160;
3. breach of express warranty and DTPA violations;
4. breach of implied warranty and DTPA violations;
5. defamation; and
6. assault by threat.

The Kellys filed a pro se answer alleging that Edward Kelly had sued the Homeowners in justice court for nonpayment of his bill.

The Homeowners filed a motion to remove the lien pursuant to the Property Code. After a hearing, the trial judge signed an order removing the lien and awarding the Homeowners $4,550 in costs and attorney's fees.

The Kellys obtained counsel and counterclaimed against the Homeowners. In their live counterpetition they counterclaimed for:

1. contract breach;
2. quantum meruit;
3. Texas Theft Liability Act (TTLA) violations;
4. suit on sworn account; and
5. negligent misrepresentation.

The Homeowners attacked all of the Kellys' counterclaims by a no-evidence summary judgment motion. The Kellys nonsuited their TTLA counterclaims, and the trial court eventually granted summary judgment for the Homeowners as to all other counterclaims.

The Kellys filed a plea to the jurisdiction arguing that Government Code § 26.043 deprived the trial court of jurisdiction over the Homeowners' lien removal claims. They asked the court to vacate its lien removal order and dismiss those claims. The Homeowners responded, and the trial court denied the plea.

Then the Homeowners filed a summary judgment motion seeking a declaration that the lien was invalid and subject to removal under Property Code

Chapter 53, plus attorney's fees. They simultaneously filed a separate motion for attorney's fees claiming that they were prevailing parties under the TTLA.

The Kellys responded to the Homeowners' motions.

After a hearing, the trial judge granted both of the Homeowners' motions, awarding the Homeowners $40,000 in attorney's fees for the lien invalidation and $12,000 for defending the TTLA counterclaims.

All other claims were nonsuited, resulting in a final judgment.[1] The Kellys filed a new trial motion, which the trial court denied. The Kellys then timely appealed.

II. ISSUES PRESENTED

The Kellys present six issues.

Issue one challenges the trial court's denial of their jurisdictional plea.

Issue two challenges the partial summary judgment invalidating the lien.

Issues three, four, and five challenge the attorney's fee awards.

Issue six challenges the summary judgment denying the Kellys' contract and quantum meruit counterclaims.

[1] The nonsuited claims include those by and against Barbara Heiden (a plaintiff in intervention), Shelly Oliver (another plaintiff in intervention), and Blake Myers (who was sued by the Kellys). Although the Kellys' brief lists those parties as appellees, no one seeks any appellate relief regarding them.

III. ANALYSIS

A. Issue One: Did the trial court have jurisdiction to remove the lien from the Homeowners' home?

No, because the Government Code deprives statutory county courts of jurisdiction to adjudicate claims to determine a lien's enforceability.

1. Standard of Review

We review an order denying a jurisdictional plea de novo. *See Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226 (Tex. 2004) (subject matter jurisdiction is a question of law).

The Kellys' plea was a pleadings-based challenge. Thus, we construe the pleadings liberally in the Homeowners' favor and look to the Homeowners' intent. *See id*. If the Homeowners' pleading affirmatively negated jurisdiction, the trial court should have sustained the Kellys' plea. *See id*. at 227.

Additionally, this issue turns on statutory construction, which is also a legal issue we review de novo. *City of Rockwall v. Hughes*, 246 S.W.3d 621, 625 (Tex. 2008).

2. Statutory County Court Jurisdiction

Texas courts' jurisdiction derives solely from the Texas Constitution and state statutes. *In re Allcat Claims Serv., L.P.*, 356 S.W.3d 455, 459–60 (Tex. 2011) (orig. proceeding). The constitution vests the judicial power in several courts, including district courts and county courts. TEX. CONST. art. V, § 1. The constitution also

authorizes the legislature to "establish such other courts as it may deem necessary and prescribe the jurisdiction and organization thereof." *Id*.

The constitution establishes a county court in each county. *Id*. art. V, § 15. These are commonly referred to as "constitutional county courts." *In re Marriage of Skarda*, 345 S.W.3d 665, 668–69 (Tex. App.—Amarillo 2011, no pet.). But in the Government Code, these courts are called simply "county courts." TEX. GOV'T CODE § 21.009(1).

Additionally, the legislature has used its article V, § 1 powers to create a variety of other "county courts." *See id*. § 21.009(2) (mentioning county courts at law, county criminal courts, and others). In the Government Code, all of these courts (excluding certain statutory probate courts) are called "statutory county courts." *Id*.

The trial court in this case, County Court at Law No. 7 of Collin County, is a statutory county court. *See id*. § 25.0451(a)(7).

As a general rule, statutory county courts have "jurisdiction over all causes and proceedings, civil and criminal, original and appellate, prescribed by law for [constitutional] county courts." *See id*. § 25.0003(a). However, the legislature has removed certain civil matters from constitutional county courts' jurisdiction. *See id*. § 26.043.

The § 26.043 jurisdictional exclusions also apply to statutory county courts unless another statute gives broader jurisdiction to a particular statutory county court. *See Thielemann v. Kethan*, 371 S.W.3d 286, 291–94 (Tex. App.—Houston

[1st Dist.] 2012, pet. denied) (thoroughly examining statutes and case law); *cf. Contemporary Contractors, Inc. v. Centerpoint Apt. Ltd. P/S*, No. 05-13-00614-CV, 2014 WL 3051321, at *4 (Tex. App.—Dallas July 3, 2014, no pet.) (mem. op.) ("If a specific statutory provision confers jurisdiction [on a statutory county court], the specific provision controls over the general limitation of section 26.043."); *Chambers v. Pruitt*, 241 S.W.3d 679, 684 (Tex. App.—Dallas 2007, no pet.) (implying that § 26.043 applied to Kaufman County's county court at law).

There is no statutory grant of broader jurisdiction to Collin County's county courts at law, so the § 26.043 jurisdictional exclusions apply in this case.

3. Does § 26.043(2) apply to the Homeowners' lien related claims?

Yes, because § 26.043(2), properly construed, deprives county courts of jurisdiction over suits adjudicating the enforceability of liens.

This is a question of statutory interpretation. We construe a statute according to its plain meaning unless such a construction yields absurd results. *Erdner v. Highland Park Emergency Ctr., LLC*, 580 S.W.3d 269, 274 (Tex. App.—Dallas 2019, pet. denied).

The statute provides, "A county court does not have jurisdiction in . . . a suit for the enforcement of a lien on land . . . ." GOV'T CODE § 26.043(2).

The Kellys argue that we should look broadly to the claims' gist to determine whether they fall into a § 26.043 exclusion. Here, although the Homeowners sued to remove a lien and have it declared unenforceable, the Kellys defended the lien's

enforceability by denying the Homeowners' claims. Because the lien's enforceability is thus at issue, the Kellys argue, the Homeowners' claims are within the § 26.043(2) exclusion. They also argue that it would be "clearly inequitable" to allow the inconsistent result that land owners may bring lien removal claims in either district court or county court but lien holders may sue to enforce or validate a lien only in district court.

The Homeowners argue that the statute doesn't apply because they sued to *remove* a lien on land, not to *enforce* such a lien. They urge that applying § 26.043(2) to lien removal claims would impermissibly add words to the statute. *See Lippincott v. Whisenhunt*, 462 S.W.3d 507, 508 (Tex. 2015) (per curiam) ("A court may not judicially amend a statute by adding words that are not contained in the language of the statute.").

We adopt the Kellys' interpretation because the Homeowners' interpretation leads to an absurd result.

To begin, § 26.043 shows a legislative intent that county courts should not decide questions closely related to land ownership. *See* GOV'T CODE § 26.043(2) (liens on land); *id*. § 26.043(8) (recovery of land); *see also id*. § 26.043(7) (depriving county courts of jurisdiction in eminent domain cases).

Next, the Homeowners propose no reason, and we can conceive of none, that the legislature would require suits to enforce a lien on land to be brought in district court but permit suits to invalidate such liens to be brought in either district or county

court. Such a rule leads to the absurd result that the Homeowners could sue the Kellys in county court to invalidate their lien but the Kellys could not counterclaim to foreclose on the very same lien. The two claims are two sides of the same coin; accordingly, we conclude that § 26.043(2) applies to the Homeowners' claims seeking to invalidate the Kellys' lien.

Further supporting our conclusion, we note that Civil Practice and Remedies Code Chapter 12, on which the Homeowners based one of their two lien counts, has a special provision entitled "Venue" that says, "An action under this chapter may be brought in any *district court* in the county in which the recorded document is recorded or in which the real property is located." TEX. CIV. PRAC. & REM. CODE § 12.004 (emphasis added). Although venue and jurisdiction concern two different concepts (where a dispute will be tried versus which courts have the power to try the case), this statute further indicates a legislative preference that suits determining lien enforceability, and not just suits to enforce liens, be brought in district court.[2]

For these reasons, we hold that § 26.043(2) encompasses the Homeowners' claims to invalidate the Kellys' lien. Accordingly, the trial court lacked jurisdiction to adjudicate those claims and erred by failing to grant the Kellys' jurisdictional plea.

[2] We also note that appellate courts interpreting § 26.043(8) and its predecessors, depriving county courts of jurisdiction over suits for the recovery of land, have read that provision broadly to encompass other disputes necessarily involving land title. *See, e.g.*, *Doggett v. Nitschke*, 498 S.W.2d 339 (Tex. 1973); *Coughran v. Nunez*, 127 S.W.2d 885 (Tex. [Comm'n Op.] 1939); *Merit Mgmt. Partners I, L.P. v. Noelke*, 266 S.W.3d 637 (Tex. App.—Austin 2008, no pet.).

Moreover, because the trial court lacked jurisdiction to adjudicate the Homeowners' lien related claims, it also lacked jurisdiction to award attorney's fees to the Homeowners regarding those claims. *See Tex. Dep't of Pub. Safety v. Salazar*, No. 03-11-00478-CV, 2013 WL 5878905, at *12 & n.9 (Tex. App.—Austin Oct. 31, 2013, pet. denied) (mem. op.).

4. Conclusion

We sustain the Kellys' first issue, reverse the trial court's rulings on the Homeowners' lien claims and related attorney's fee claims, and dismiss those claims for lack of jurisdiction. This makes it unnecessary for us to address issue two, in which the Kellys claim that the trial court erred procedurally by granting a summary judgment invalidating the lien after having already removed the lien by a previous order. We also need not address issue three, in which the Kellys challenge the attorney's fees award in that summary judgment for evidentiary insufficiency and lack of segregation.

B. Issues Four and Five: Did the trial court err by awarding the Homeowners $12,000 in attorney's fees for defending the Kellys' TTLA counterclaims?

No. We may infer that the trial court determined that the Kellys nonsuited their TTLA counterclaims to avoid an unfavorable ruling on the merits. And the Homeowners' fee evidence was both sufficient and adequately segregated.

1. Additional Background Facts

After the Kellys nonsuited their TTLA counterclaims and the trial court granted summary judgment against them on their other counterclaims, the Homeowners filed a summary judgment motion on their fraudulent lien claim and a motion for attorney's fees on the TTLA counterclaims. Each motion had the same affidavit by attorney Byron Henry attached, stating that (i) the Homeowners' reasonable and necessary attorney's fees for the whole case were $80,000, (ii) of that amount, 15% or $12,000 should be allocated to defending the TTLA counterclaims, and (iii) 50% or $40,000 should be allocated to prosecuting the Homeowners' lien claims. Redacted billing records were attached to each affidavit. The affidavit did not address appellate attorney's fees.

It appears that the Homeowners' motions were set for submission without a hearing. The Kellys responded to the motions more than seven days before the submission date.

The trial judge held a hearing several days after the submission date. The reporter's record of that hearing indicates that the trial judge had decided to grant the Homeowners' motions and then had his court coordinator contact the Kellys' lawyers to ask if they agreed to the Homeowners' attorney's fees. They did not agree. The judge thought that the Kellys' lawyers asked the court coordinator for the hearing, but they denied it and in fact objected to the judge's taking additional attorney's fee evidence without the notice period provided in the summary judgment

rule. The judge overruled the objections and allowed Henry to testify about the Homeowners' attorney's fees. His testimony addressed appellate attorney's fees.

The day after the hearing, the trial judge signed separate orders granting the Homeowners' two motions. One order awarded the Homeowners $12,000 in trial level fees for defending against the TTLA counterclaims, plus additional conditional appellate fees.

2. Issue Four: Did the trial court err by awarding attorney's fees without making an express finding that the Kellys nonsuited their TTLA counterclaims to avoid an unfavorable ruling on the merits?

No, because it is proper to imply the finding necessary to support the trial court's order awarding fees—that the Kellys nonsuited their TTLA counterclaims to avoid an unfavorable ruling on the counterclaims' merits.

The TTLA creates a civil cause of action for damages resulting from certain theft acts defined by the Penal Code. TEX. CIV. PRAC. & REM. CODE §§ 134.002–.003. A person who prevails in a TTLA suit is entitled to recover reasonable and necessary attorney's fees. *Id*. § 134.005(b). And a TTLA defendant is a prevailing party if the claimant voluntarily nonsuits the claim and the trial court determines on the defendant's motion that the nonsuit was taken to avoid an unfavorable ruling on the merits. *BBP Sub I LP v. Di Tucci*, No. 05-12-01523-CV, 2014 WL 3743669, at *4 (Tex. App.—Dallas July 29, 2014, no pet.) (mem. op.) (citing *Epps v. Fowler*, 351 S.W.3d 862, 869–70 (Tex. 2011)).

Here, the Kellys sued the Homeowners under the TTLA. The Homeowners' answer requested attorney's fees under the statute. The Homeowners also moved for a no-evidence summary judgment on the Kellys' TTLA counterclaims, among others. The Kellys nonsuited their TTLA counterclaims about two weeks before the summary judgment motion's submission date. The trial judge signed an order granting this nonsuit. The Homeowners then moved for an award of TTLA attorney's fees, claiming to be "prevailing parties." After the Kellys responded to this fee motion, the trial judge signed an order finding that the Homeowners were prevailing parties for TTLA purposes and awarding the Homeowners $12,000 in attorney's fees, plus additional contingent appellate fees.

The Kellys' sole argument under issue four is that the fee award is erroneous because (i) the Homeowners didn't specifically request a finding that the Kellys nonsuited their counterclaims to avoid an unfavorable ruling and (ii) the trial court didn't make an express finding to that effect.

The Kellys' first premise is unpersuasive. The Homeowners' motion for fees discussed the law pertaining to nonsuits and statutes allowing prevailing parties to recover their fees. The motion recognized that the fee-seeking party must show that the claimant nonsuited to avoid an unfavorable merits ruling and argued that the Kellys had done just that. Thus, the Homeowners told the trial court what they had to show in order to recover their TTLA fees.

So, the issue devolves to whether the fee award is fatally defective because the order doesn't recite that the Kellys nonsuited to avoid an unfavorable ruling on the merits (even though it does recite that the Homeowners were prevailing parties on the TTLA counterclaims).[3] This is a legal question we review de novo. *See Great Am. Lloyds Ins. Co. v. Vines-Herrin Custom Homes, L.L.C.*, 596 S.W.3d 370, 374 (Tex. App.—Dallas 2020, pet. filed) ("The availability of attorney's fees under a particular statute is a question of law for the court that we review de novo.").

Although the Kellys cite three cases that purportedly require an express finding, they don't. *See Epps*, 351 S.W.3d at 871; *Moore v. Amarillo-Panhandle Humane Soc'y, Inc.*, 541 S.W.3d 403, 405–06 (Tex. App.—Amarillo 2018, pet. denied); *Bacon Tomsons, Ltd. v. Chrisjo Energy, Inc.*, No. 01-15-00305-CV, 2016 WL 4217254, at *11–14 (Tex. App.—Houston [1st Dist.] Aug. 9, 2016, no pet.) (mem. op.).

The Homeowners rely on the general rule that we imply all fact findings necessary to support a judgment and supported by the evidence. *See, e.g.*, *BMC Software Belg., N.V. v. Marchand*, 83 S.W.3d 789, 795 (Tex. 2002) (special appearance); *Tex. Gen. Indem. Co. v. Speakman*, 736 S.W.2d 874, 884 (Tex. App.—Dallas 1987, no writ) (attorney's fee award after bench trial). They also cite a case from a sister court of appeals that inferred the necessary finding. *See Lusk v. Osorio*,

[3] We assume without deciding that the Kellys did not need to object to the order awarding the fees or otherwise preserve this alleged error. *But cf.* TEX. R. APP. P. 33.1.

No. 14-17-01011-CV, 2019 WL 3943195, at *7 (Tex. App.—Houston [14th Dist.] Aug. 20, 2019, no pet.) (mem. op.).

We agree with the Homeowners. Here, the Homeowners' motion for fees advised the trial court that they were prevailing parties if the Kellys nonsuited their TTLA counterclaims to avoid an unfavorable merits ruling. The trial court expressly found that the Homeowners were prevailing parties for TTLA purposes. Therefore, we imply a finding that the Kellys nonsuited their TTLA counterclaims to avoid an unfavorable ruling on the merits. *See id*.

We overrule the Kellys' fourth issue.

3. Issue Five: Did the trial court err by awarding the fees without sufficient evidence that they were reasonable and necessary or without sufficient segregation?

No. The attorney's fees evidence was sufficient, and the Homeowners adequately segregated their TTLA attorney's fees from their other fees.

The reasonableness and necessity of attorney's fees are fact questions. *Rohrmoos Venture v. UTSW DVA Healthcare, LLP*, 578 S.W.3d 469, 489 (Tex. 2019). Thus, the legal and factual sufficiency of the evidence standards apply. *See KBIDC Invs., LLC v. Zuru Toys Inc.*, No. 05-19-00159-CV, 2020 WL 3481658, at *20–21 (Tex. App.—Dallas June 26, 2020, no pet. h.) (mem. op.).

The extent to which fees can or cannot be segregated among claims is a mixed question of law and fact. *Tony Gullo Motors I, L.P. v. Chapa*, 212 S.W.3d 299, 313 (Tex. 2006).

a. The Kellys have not shown that the evidence was insufficient.

The Kellys argue that the evidence was insufficient to support the finding that the Homeowners reasonably and necessarily incurred $12,000 in attorney's fees to defend the TTLA counterclaims. Specifically, they argue that the record shows that the Homeowners' attorneys spent only minimal time on the TTLA counterclaims. For example, they argue that the Homeowners' pleadings regarding the TTLA counterclaims amounted to one sentence in their answer requesting their attorney's fees and two paragraphs in their no-evidence summary judgment motion. They also argue that the billing records show that the Homeowners' lawyers billed only 5.9 hours to the no-evidence summary judgment motion.

Conversely, the Homeowners argue that their evidence met the *Rohrmoos* test. Under that test, "a claimant seeking an award of attorney's fees must prove the attorney's reasonable hours worked and reasonable rate by presenting sufficient evidence to support the fee award sought." *Rohrmoos*, 578 S.W.3d at 501–02. Sufficient evidence to support an award of attorney's fees includes, at a minimum, evidence of the following facts: (i) the particular services performed, (ii) who performed them, (iii) approximately when the services were performed, (iv) the reasonable amount of time required to perform them, and (v) the reasonable hourly rate for each person performing the services. *Id*. at 502. Although contemporaneous billing records are not required, they are strongly encouraged. *Id*.

We reject the Kellys' argument. The Homeowners' evidence, in their lawyer's affidavit, live testimony, and billing records, addressed the five *Rohrmoos* topics. Henry testified at the fees hearing that he and the Homeowners' other lawyers worked on discovery and motions practice regarding all claims in the case, including the TTLA counterclaims.[4] They also prepared for trial twice, although the case was never actually tried. Henry also testified that the Kellys seldom agreed to anything in the course of the case, which "increased the costs somewhat." He intentionally forwent certain steps, such as deposing Kelly, to keep costs down. And he said that the Kellys themselves had spent over $90,000 in attorney's fees in the case.

Moreover, the Kellys' narrow focus on the time spent specifically on TTLA pleadings is not the proper approach to assessing the reasonableness and necessity of the Homeowners' attorney's fees. *See KBIDC Invs., LLC*, 2020 WL 3481658, at *22 (fees recoverable even though only one billing entry mentioned the TTLA). The trial court could reasonably conclude that defending the TTLA counterclaims involved more than drafting pleadings and a summary judgment motion. Defending those counterclaims, and ethically filing a no-evidence summary judgment motion

[4] Although the Kellys' opening appellate brief argues that Henry's live testimony was inadmissible to support the fee award relating to the Homeowners' lien related claims, it does not make that argument as to his live testimony regarding the Homeowners' TTLA fees. Their reply brief asserts that Henry's live testimony was inadmissible for TTLA fee purposes, but we don't consider matters raised for the first time in a reply brief. *See Sanchez v. Martin*, 378 S.W.3d 581, 590 (Tex. App.—Dallas 2012, no pet.).

attacking them, reasonably required some factual investigation and participation in discovery processes. *See* TEX. R. CIV. P. 166a(i) cmt. (no-evidence motions are subject to sanctions for frivolous filings under the usual rules). Thus, the trial court permissibly awarded more fees than just those represented by preparation of TTLA pleadings and a summary judgment motion.

The Kellys also argue that the trial court's award of contingent appellate attorney's fees relating to the TTLA counterclaims was erroneous because the Kellys nonsuited those counterclaims, making it unnecessary for the Homeowners to spend any appellate fees concerning those claims.

But, as the Homeowners argue, there was a basis for awarding contingent attorney's fees relating to the nonsuited TTLA counterclaims—the need to defend the award of TTLA attorney's fees on appeal. *See KBIDC Invs.*, 2020 WL 3481658, at *19–20 (under TTLA, prevailing party may recover attorney's fees incurred to recover attorney's fees). Accordingly, we reject the Kellys' complaint about the contingent appellate fees award.

We overrule the Kellys' sufficiency arguments.

b. The Kellys have not shown that the Homeowners inadequately segregated their fees.

The Kellys' other argument is that the Homeowners' evidence did not adequately segregate their TTLA fees from their other, unrecoverable attorney's fees incurred in this case. We disagree.

The Texas Supreme Court has said that segregation evidence need not be extensive to be sufficient:

> Here, Chapa's attorneys did not have to keep separate time records when they drafted the fraud, contract, or DTPA paragraphs of her petition; an opinion would have sufficed stating that, for example, 95 percent of their drafting time would have been necessary even if there had been no fraud claim.

Tony Gullo Motors, 212 S.W.3d at 314. Thus, "it is sufficient to submit to the fact-finder testimony from a party's attorney concerning the percentage of hours that related solely to a claim for which fees are not recoverable." *RM Crowe Prop. Servs. Co., L.P. v. Strategic Energy, L.L.C.*, 348 S.W.3d 444, 453 (Tex. App.—Dallas 2011, no pet.).

Here, Henry's affidavit said, "[I]t is my opinion that 15% of the attorney's fees in the amount of $12,000 should be allocated to defending against the civil theft claim[.]" We have already described above his live testimony about the services he and the Homeowners' other lawyers provided in the case. Henry also explained that he reviewed all the bills and segregated the tasks performed in reaching his conclusion that $12,000 of the Homeowners' total fees was a reasonable fee for defending the TTLA counterclaims.

We conclude that the Homeowners adequately segregated their TTLA attorney's fees.

4. Conclusion

We overrule the Kellys' fourth and fifth issues.

C. Issue Six: Did the trial court err by granting summary judgment against the Kellys on their contract and quantum meruit counterclaims?

No. The Kellys produced no evidence of a valid contract binding the Homeowners or that the Homeowners had reasonable notice that the Kellys expected the Homeowners to pay for the Kellys' services and materials.

1. Standard of Review

We review a summary judgment de novo. *Trial v. Dragon*, 593 S.W.3d 313, 316 (Tex. 2019).

We review a no-evidence summary judgment under the same legal sufficiency standard as a directed verdict. We consider the evidence in the light most favorable to the nonmovant, crediting evidence a reasonable jury could credit and disregarding contrary evidence and inferences unless a reasonable jury could not. The nonmovant bears the burden of producing summary judgment evidence sufficient to raise a genuine issue of material fact as to each challenged element. *Merriman v. XTO Energy, Inc.*, 407 S.W.3d 244, 248 (Tex. 2013).

2. Contract Breach Counterclaim

The Homeowners' summary judgment motion attacked every element of the Kellys' contract breach counterclaims, but the Kellys' appellate focus is whether they raised a genuine fact issue as to the existence of a contract with the Homeowners.

a. Applicable Law

The elements of contract breach are (i) a valid contract, (ii) performance or tendered performance by the plaintiff, (iii) breach by the defendant, and (iv) damages sustained by the plaintiff as a result of that breach. *Dixie Carpet Installations, Inc. v. Residences at Riverdale, LP*, 599 S.W.3d 618, 625 (Tex. App.—Dallas 2020, no pet.).

A binding contract forms when all the following are present: (i) an offer, (ii) an acceptance in strict compliance with the offer's terms, (iii) a meeting of the minds, (iv) each party's consent to the terms, and (v) execution and delivery of the contract with the intent that it be mutual and binding. *Id*.

This case involves questions of agency and whether Blake Myers, a landscaper working at the Homeowners' house, had actual or apparent authority to enter a contract for the Homeowners. Agency is a consensual relationship by which one party acts on behalf of another, subject to the other's control. *Suzlon Energy Ltd. v. Trinity Structural Towers, Inc.*, 436 S.W.3d 835, 841 (Tex. App.—Dallas 2014, no pet.). Texas law does not presume agency, so the party alleging agency bears the burden of proving it. *Sanders v. Total Heat & Air, Inc.*, 248 S.W.3d 907, 913 (Tex. App.—Dallas 2008, no pet.). An alleged agent cannot bind another to a contract absent either actual or apparent authority. *Id*.

Actual authority is authority that the principal (i) intentionally confers upon the agent, (ii) intentionally allows the agent to believe he has, or (iii) by want of

ordinary care allows the agent to believe himself to possess. *Id*. Actual authority is created through the principal's words or conduct communicated to the agent. *CNOOC Se. Asia Ltd. v. Paladin Res. (SUNDA) Ltd.*, 222 S.W.3d 889, 899 (Tex. App.—Dallas 2007, pet. denied).

Apparent authority is based on estoppel arising from the principal's conduct communicated to a third party. *Sanders*, 248 S.W.3d at 913. It arises if (i) the principal knowingly permits the purported agent to hold himself out as having authority or (ii) the principal's conduct shows such a lack of ordinary care as to clothe the purported agent with indicia of authority, leading a reasonably prudent person to believe the agent has authority to bind the principal. *Id*. Only the principal's conduct is relevant to determining whether apparent authority exists; "representations by the alleged agent or speculations of a third party are not evidence of apparent authority." *Id*. at 916; *see also Gaines v. Kelly*, 235 S.W.3d 179, 183–84 (Tex. 2007) ("Declarations of the alleged agent, without more, are incompetent to establish either the existence of the alleged agency or the scope of the alleged agent's authority.").

b. The Evidence

The Kellys rely on Edward Kelly's affidavit and Sanjai Isaac's deposition testimony to raise genuine fact issues on Myers's actual and apparent authority.

Kelly's affidavit says that he and his wife Brittany Kelly operate a sole proprietorship called Kelly Plumbing and Leak Detection. On or about February 9,

2018, Kelly "was referred to" the Homeowners' residence to repair a faulty gas line. Although Kelly's affidavit doesn't say who referred him to that job, Isaac testified in his deposition that a roofing contractor named John Wright hired Kelly to repair a gas line that the roofer had punctured while installing a roof.[5] Isaac further testified that he was working when Kelly was at the house and that he never saw, talked to, or communicated with Kelly until after this litigation began.

Kelly's affidavit says he was met at the premises by Blake Myers, who allowed Kelly to enter the property, instructed him about the gas problem, and held himself out as "Isaac's assistant." Isaac testified in deposition that Myers was hired to redo the landscaping at the house. According to Kelly, "[b]ased on [Myers's] statements, conduct and directions and the absence of Mr. Isaac and Meridian Trust's statements or conduct to the contrary, [Myers] had full authority on behalf of Mr. Isaac and Meridian Trust, to consent and instruct me regarding the multiple gas leak repairs." In his deposition, Isaac testified that Myers had the authority to let Kelly into the property to fix the gas line. Isaac also agreed that Myers was his "representative there because [he] couldn't be there."

Kelly's affidavit continues that he lacked a part needed to repair the gas leaks so he left and returned the next morning to finish the job. He repaired the leak in the

[5] The Kellys' live pleading also alleged that Kelly was contacted by someone named "Victoria Slazar," "a representative of Jon Wright Industries, on behalf of a roofing company to fix a gas leak." Moreover, the Kellys' appellate reply brief concedes that "JWI contacted Kelly Plumbing and asked them to fix a broken gas line at Appellee[s'] home."

attic, but pressure tests indicated that there was at least one more leak somewhere else. Myers authorized Kelly to fix the additional leaks and "held himself out to have express, implied, or apparent authority to make decisions on behalf of Mr. and Mrs. Isaac and Meridian Trust, in regard to contracting for additional work."

Kelly's affidavit also says, "Mr. Isaac and Meridian Trust were aware of the gas problems due to multiple telephone conversations with [Myers]. It was clear from [Myers's] statements and Mr. Isaac's silence that [Myers] was Mr. Isaac's authorized assistant, who dealt with all the contractors." Isaac testified that Myers told him that Kelly had dismantled the gas line in the patio and the drawers under the kitchen stove top. Then Isaac testified:

> And so at that point I began questioning is, this man qualified to do what he has been hired to do? I, of course, was working.
>
> And I said, you know, reasonable, maybe it is a little bit more complex than at first glance. We'll let him continue working.

Isaac testified that eventually Myers told him that the house was becoming disheveled as a result of Kelly's work and there was a broken water pipe in a washroom where Kelly had been. Isaac then told Myers to have Kelly leave.

Kelly's affidavit says that he found the second leak in a hallway closet, finished the work, and sent bills to the Homeowners but they never paid. He attached two invoices to his affidavit. The first was addressed to Jon Wright Industries and sought payment of $989 for repairing an attic gas line hit by a nail strike. The second

was addressed to "Meridian Revocable Trust – 'Sanjai Isaac'" and sought payment of $2,262 for installing gas valves and for locating and repairing "2nd leak."

c. Applying the Law to the Evidence

(1) There is no evidence of actual authority.

As to actual authority, we conclude there is no evidence that Isaac said or did anything that communicated to Myers that he had actual authority to enter a contract with the Kellys on the Homeowners' behalf.

There is evidence that Myers was hired to do landscape work on the house. When a roofer damaged a gas line while Isaac was at work, Isaac authorized Myers to allow Kelly into the property to do the repairs.[6] There's no evidence that Isaac authorized Myers to contract with Kelly as to this initial repair. Indeed, Kelly's affidavit doesn't say who called him out for the job initially, and the evidence on that point (such as Kelly's own invoice) suggests that a roofing company hired Kelly to repair damage the roofing company had caused.

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[6] In Isaac's deposition, the following exchange occurred:

Q: And did you ask Mr. Kelly [sic] in reasonable caution to monitor and be sure that he didn't muck the place up or steal or do anything like that? Did he have authority to watch him and supervise him?

A: Blake Myers?

Q: Yes.

A: Yes.

Given the question's compound nature and confusing pronoun use, Isaac's "Yes" answer is vague and doesn't raise a reasonable inference that he gave Myers actual authority to contract for new work on Isaac's behalf.

According to Kelly's affidavit, after the initial repair he determined that there was another gas leak somewhere on the property, and Myers told him to fix the second leak. The question is whether Isaac had previously said anything to Myers that would have led Myers to believe at that time that he had authority to hire Kelly on the Homeowners' behalf for the additional work. We see no evidence that he did. According to Isaac's testimony, Kelly had already dismantled the patio gas line and the kitchen drawers when Myers told Isaac by telephone that "something [was] not right" with Kelly's work. Isaac further testified, "And I said, you know, reasonable, maybe it is a little bit more complex than at first glance. We'll let him continue working." On this same subject, Isaac testified, "[Myers] told me, no, he's doing additional work. And I found that puzzling, but I decided that, you know, he must know what he's doing. He's a qualified, competent individual and left it at that." This evidence indicates that Kelly started the additional work before Isaac found out about it. More importantly, it does not support a reasonable inference that Isaac authorized Myers to hire Kelly for the additional work at the Homeowners' expense.

Although Kelly's affidavit asserts that Myers held himself out to have authority to make contracting decisions for the Homeowners, this is no evidence of actual authority because actual authority must be established by the alleged principal's communications to the alleged agent. *See CNOOC*, 222 S.W.3d at 899. The evidence pertaining to Isaac's communications with Myers shows that Isaac authorized Myers to let Kelly into the house to do the work, supervise him while he

was there, and tell him to leave. Although Isaac agreed that Myers was his "representative," no evidence suggests that this status went beyond the foregoing list of activities. We see no evidence suggesting that Isaac ever communicated to Myers that he could hire Kelly on the Homeowners' behalf.

(2) There is no evidence of apparent authority.

As to apparent authority, we conclude that there is no evidence that Isaac said or did anything that communicated to Kelly that Myers had authority to enter a contract with the Kellys as the Homeowners' agent.

Isaac testified without contradiction that he never communicated with Kelly until after this litigation began. Kelly's affidavit supports reasonable inferences that Kelly reasonably could have believed that (i) Isaac told Myers to let Kelly into the house to do the work and (ii) Myers was keeping Isaac informed about the work by telephone. But Kelly's affidavit testimony that Myers "held himself out" to have authority, and other similar testimony, is no evidence of apparent authority, because only Isaac's conduct is relevant to the apparent authority issue. *See Sanders*, 248 S.W.3d at 913.

Again, there is no evidence that Isaac said or did anything after Kelly repaired the attic gas leak and before Kelly started the additional work that would have suggested to Kelly that Myers had authority to hire Kelly on the Homeowners' behalf for that additional work. Isaac testified that Myers told him about the additional work after it was already underway. Kelly's affidavit contains no specific

averments about Isaac's conduct to show apparent authority. It says only, "Mr. Isaac and Meridian Trust were aware of the gas problems due to multiple telephone conversations with [Myers]. It was clear from [Myers's] statements and Mr. Isaac's silence that [Myers] was Mr. Isaac's authorized assistant, who dealt with all the contractors." Although Isaac's testimony permits an inference that he told Myers to allow Kelly to continue working, at least for a while, there is no evidence that Isaac himself communicated this to Kelly—much less that he somehow manifested to Kelly that the Homeowners had authorized Myers to hire him.

We conclude there is no evidence that Isaac said or did anything to justify a belief that Myers had authority to contract on the Homeowners' behalf, and thus no evidence of apparent authority.

d. Conclusion

For the foregoing reasons, we conclude that there is no evidence that Myers had actual or apparent authority to contract with the Kellys on the Homeowners' behalf. The Kellys do not argue or cite any evidence that they formed a valid contract through offer and acceptance directly with any of the Homeowners. Accordingly, there is no evidence that the Kellys had a valid contract with the Homeowners, and the trial court correctly granted summary judgment for the Homeowners on the Kellys' contract breach counterclaims.

3. Quantum Meruit Counterclaims

The Homeowners' summary judgment motion attacked every element of the Kellys' quantum meruit counterclaims.

The elements of quantum meruit are (i) valuable services were rendered or materials furnished, (ii) for the person sought to be charged, (iii) the services and materials were accepted by the person sought to be charged, and were used and enjoyed by him, and (iv) the person sought to be charged was reasonably notified that the claimant who performed the services or furnished the materials was expecting to be paid by the person sought to be charged. *Hill v. Shamoun & Norman, LLP*, 544 S.W.3d 724, 736 (Tex. 2018).

The Kellys' briefing of this argument is arguably inadequate, consisting of a single short paragraph that merely refers back to their contract breach discussion. The paragraph contains no record references and a single legal authority (a case that recites quantum meruit's elements). This does not satisfy their obligations under the appellate briefing rules. *See* TEX. R. APP. P. 38.1(i) (argument must include appropriate citations to authorities and the record); *Bolling v. Farmers Branch Indep. Sch. Dist.*, 315 S.W.3d 893, 896 (Tex. App.—Dallas 2010, no pet.) (without record references and legal authority, a brief fails).

In any event, we reject the argument on the merits. The quantum meruit counterclaims fall on at least the last element because there is no evidence that the

Homeowners were reasonably notified that the Kellys expected the Homeowners to pay them for extra work beyond what the contractor hired Kelly to do.

As noted above, there is no evidence that Myers was the Homeowners' agent for contracting purposes, so notice to Myers is not notice to the Homeowners. *Cf. Casey v. Gibson Prods. Co.*, 216 S.W.2d 266, 269 (Tex. App.—Dallas 1948, writ dism'd) (notice to agent within his authority is generally deemed notice to the principal). The Kellys cite no evidence that Myers or anyone else told Isaac that the Kellys were expecting the Homeowners to pay for the services.

Regarding the initial attic gas line repair, we see no evidence that the Homeowners were on notice that the Kellys expected the Homeowners to pay for that repair; indeed, the evidence suggests that the roofing company called Kelly out for the job and the Kellys initially (and unsuccessfully) billed the roofing company for that repair.

As for the additional work Kelly performed after detecting a second gas leak, his affidavit contains no facts showing or implying that Isaac or the other Homeowners were informed that the Kellys expected the Homeowners to pay for the additional work.[7] Nor do the Isaac deposition excerpts discussed above raise a

[7] Kelly's affidavit says that he told Myers how much the valves would cost and that Myers consented to the additional work, but the trial court struck this evidence on the Homeowners' objection, and the Kellys do not appeal that ruling. And, as stated above, there is no evidence that Myers was the Homeowners' agent or passed this information on to the Homeowners before Kelly did the work.

reasonable inference that he was notified before Kelly did the work that the Kellys expected the Homeowners to pay for the services.

Accordingly, we conclude that the Kellys have not shown that the trial court erred by granting summary judgment against them on their quantum meruit counterclaims.

4. Conclusion

We overrule issue six.

IV. DISPOSITION

We reverse (i) the trial court's order granting the Homeowners' motion to remove lien and (ii) the trial court's amended order granting the Homeowners' motion for summary judgment regarding the lien's invalidity, including the attorney's fees awards in both orders. We render judgment dismissing counts one and two of the Homeowners' first amended petition for lack of subject matter jurisdiction in the trial court. We affirm the remainder of the trial court's judgment.

/Bill Whitehill/
BILL WHITEHILL
JUSTICE

Carlyle, J., dissenting and concurring

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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

EDWARD KELLY, EDWARD KELLY D/B/A KELLY PLUMBING & LEAK DETECTION AND BRITTANY KELLY, Appellants

No. 05-19-00813-CV V.

SANJAI R. ISAAC, M.D., REBECCA ISAAC, MERIDIAN REVOCABLE TRUST, BARBARA HEIDEN, SHELLEY OLIVER AND BLAKE MYERS, Appellees

On Appeal from the County Court at Law No. 7, Collin County, Texas
Trial Court Cause No. 007-01284-2017.
Opinion delivered by Justice Whitehill. Justices Osborne and Carlyle participating.

In accordance with this Court's opinion of this date, the judgment of the trial court is **AFFIRMED IN PART** and **REVERSED AND RENDERED IN PART**.

We **REVERSE** the trial court's August 4, 2017 Order Granting Plaintiffs' Verified Motion to Remove Mechanic's & Materialmen's Lien Against Residential Homestead Property and the trial court's April 12, 2019 Amended Order Granting Plaintiffs' Motion for Summary Judgment, and we **RENDER** judgment dismissing for lack of jurisdiction Count One and Count Two of Plaintiffs' First Amended Petition, Request for Declaratory Relief, and Application for Temporary Restraining Order, Temporary Injunction, and Permanent Injunctive Relief.

We **AFFIRM** the trial court's judgment in all other respects.

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

Judgment entered August 17, 2020.