

Opinion issued July 29, 2010



In The
Court of Appeals
For The
First District of Texas

NO. 01-09-00067-CV

PABLO TURULL AND RUTH TURULL, Appellants

V.

**WILLIAM E. FERGUSON, INDIVIDUALLY AND D/B/A TIMBEROOF
COMPANY, TIMBEROOF ROOF COMPANY, TIMBEROOF ROOF
COMPANY, INC., AND TIMBEROOF ROOFING COMPANY, INC.;
TIMBEROOF ROOFING CO., INC.; AND TRC SERVICES, INC.,
INDIVIDUALLY AND D/B/A THE ROOF CO. HOLDINGS, Appellees**

**On Appeal from the 129th District Court
Harris County, Texas
Trial Court Case No. 2003-22884**

MEMORANDUM OPINION

Appellants, Pablo Turull and Ruth Turull, appeal the trial court's rendition of a judgment that excluded the attorney's fees awarded to the Turulls by the jury. Appellants argue that the trial court erred by granting a judgment notwithstanding the verdict on the issue of their attorney's fees.

We reverse and render judgment.

Background

In April 2001, William E. Ferguson—individually and doing business as Timberoof Company, Timberoof Roof Company, Inc., and Timberoof Roofing Company, Inc.—and Timberoof Roofing Co., Inc.¹ (the “Timberoof Defendants”) provided an estimate to the Turulls to repair damage to the roof of their residence incurred during a hailstorm. The Timberoof Defendants performed work on the roof, and disputes arose between the parties about the work done and the money owed.

The Timberoof Defendants brought suit in a county court at law. The Turulls ultimately brought suit against the Timberoof Defendants in a district

¹ TRC Services, Inc., individually and d/b/a The Roof Co. Holdings, was also a party at trial and listed as an appellee in this matter. No verdict or judgment was obtained against this party, nor has any point of error been raised that would affect it. Accordingly, we do not consider it a proper party to this appeal. *Gupta v. E. Idaho Tumor Inst., Inc.*, 140 S.W.3d 747, 751 n.4 (Tex. App.—Houston [14th Dist.] 2004, pet. denied). Any facts concerning it at trial are not relevant to this appeal.

court seeking declaratory judgment and alleging defamation and slander of title, violations of the Deceptive Trade Practices Act, conspiracy to violate the Deceptive Trade Practices Act, breach of contract, breach of warranty, violation of Chapter 12 of the Texas Civil Practice and Remedies Code, fraud, fraud in the inducement, and violation of the Texas Fair Debt Collection Practices Act. The two lawsuits were eventually consolidated in the district court.

At trial, the attorneys for both sides each presented testimony of the work incurred and the rate at which each attorney billed. Counsel for the Turulls testified as to the entire amount of time she had worked on the case and her hourly rate. The total for her fees came to \$69,660. On cross-examination, counsel for the Timberoof Defendants asked counsel for the Turulls to segregate her attorney's fees according to each cause of action alleged. Counsel for the Turulls testified that five percent of the total time could be attributed to three of the causes of action and that the remaining time could not be segregated because the remaining causes of action arose "from the same facts and circumstances." It is not clear from the record which causes of action were part of the three that counsel for the Turulls testified could be segregated from the total amount of time worked.

Counsel for the Timberoof Defendants never objected to the Turulls' counsel's failure to segregate her fees for the majority of the causes of action.

The jury question relating to the attorney's fees to be awarded to the Turulls read, "What is a reasonable fee for the necessary services of the Turulls' attorney in this case, stated in dollars and cents?" No objection was raised as to the wording of this question.

The jury returned a verdict finding both the Turulls and the Timberoof Defendants liable for various claims. The jury awarded attorneys' fees to each side.

After the trial, but before the judgment was rendered, the parties submitted numerous filings. Only a few of those filings are a part of this record. The record shows that, on March 9, 2007, the trial court denied the Timberoof Defendants' request for remittitur of the attorney's fees awarded to the Turulls. Subsequently, on July 17, 2007, the trial court construed an objection to entry of judgment by the Timberoof Defendants as a motion to reconsider the court's ruling on the March 9 order. The court did reconsider the order and—relying on *Tony Gullo Motors I, L.P. v. Chapa*, 212 S.W.3d 299 (Tex. 2006)—determined that counsel for the Turulls should have segregated her attorney's fees by the causes of action to which the fees related. The court granted the Timberoof Defendants' "motion to disregard and/or for judgment notwithstanding the verdict as to the jury's answer" to the question on attorney's fees awarded to the Turulls and granted a new trial.

More filings followed. The majority of the filings are not part of the record. Ultimately, however, on October 23, 2008, the trial court rendered judgment, which excluded any award of attorney's fees to the Turulls. The Turulls filed this appeal, challenging the exclusion from the judgment of the attorney's fees that had been awarded by the jury.

The Record on Appeal

The Texas Rules of Appellate Procedure establishes a limited number of documents that must be included in the clerk's record. TEX. R. APP. P. 34.5(a). Anything more must be designated by the parties. TEX. R. APP. P. 34.5(b). Additionally, any party can seek supplementation of the clerk's record and, at least until the time the case is set for submission, the supplement will be accepted. TEX. R. APP. P. 34.5(b); *Worthy v. Collagen Corp.*, 967 S.W.2d 360, 366 (Tex. 1998) (holding that after submission, courts have more discretion in denying supplementation).

The parties never filed a designation of the record in this case. As a result, the original clerk's record consisted only of the items enumerated in Rule 34.5(a). Subsequently, no party filed a proper request for supplementation. Despite this, both sides include references in their briefs to documents that were apparently filed with the court but that were never designated for the appellate record. Briefs must

contain concise arguments with appropriate citations to the record. TEX. R. APP. P. 38.1(i); 38.2(a) (1).

Rather than seeking supplementation of the record, the Timberroof Defendants instead included copies of filings and court orders as a part of their appendix to their brief. Attachments of documents as exhibits or appendices to briefs do not constitute a formal inclusion in the record on appeal and cannot be considered. *Sowell v. The Kroger Co.*, 263 S.W.3d 36, 38 (Tex. App.—Houston [1st Dist.] 2006, no pet.).

This Court, on its own motion, ordered the district clerk to supplement three items not previously included in the record. TEX. R. APP. P. 34.5(c)(1). The first was the charge of the court and jury's verdict, an item required under Rule 34.5 but inadvertently missing from the record. TEX. R. APP. P. 34.5(a)(4). The other two were orders from the trial court that we discerned were relevant in an attempt to not prejudice the trial court by the underdeveloped record.

Accordingly, our review of the record is limited to the reporter's record, the clerk's record including the supplementation requested by this Court, and facts in the briefs that were not contradicted by the opposing parties. *See* TEX. R. APP. P. 38.1(g) (requiring courts to accept as true facts stated unless contradicted by another party); *W. Steel Co. v. Altenburg*, 206 S.W.3d 121, 124 (Tex. 2006)

(same). Anything outside this scope is not a part of the record and will not be considered.

Judgment Notwithstanding the Verdict on Attorney's Fees

In their sole point of error, the Turulls argue that the trial court erred by reducing the attorney's fees that were awarded by the jury in the verdict. Both parties identify the motion by the Timberoof Defendants to disregard the jury's award of attorney's fees as a motion for judgment notwithstanding the verdict. The trial court's order granting this request identifies the request as a "motion to disregard and/or for judgment notwithstanding the verdict." Accordingly, we review this point of error under the standard of review for judgments notwithstanding the verdict.

A. Standard of Review

A trial court can grant a motion for judgment notwithstanding the verdict only if a directed verdict would have been proper and can disregard a jury finding on a question only if it has no support in the evidence. TEX. R. CIV. P. 301. We review a judgment notwithstanding the verdict under a legal-sufficiency standard, viewing the evidence and inferences in the light most favorable to the jury's finding. *City of Keller v. Wilson*, 168 S.W.3d 802, 823 (Tex. 2005). We sustain the granting of a judgment notwithstanding the verdict based on "no evidence" when the record shows: (1) a complete lack of evidence of a vital fact; (2) the trial

court is barred by the 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 not more than a scintilla; or (4) the evidence establishes conclusively the opposite of a vital fact. *Id.* at 810; *see also Tiller v. McLure*, 121 S.W.3d 709, 713 (Tex. 2003) (holding trial court may grant judgment notwithstanding verdict if there is no evidence to support jury's finding on issue necessary to liability).

If more than a scintilla of evidence supports the jury's finding, "the jury's verdict and not the trial court's judgment must be upheld." *Wal-Mart Stores, Inc. v. Miller*, 102 S.W.3d 706, 709 (Tex. 2003). More than a scintilla of evidence exists when the evidence "rises to a level that would enable reasonable and fair-minded people to differ in their conclusions." *Ford Motor Co. v. Ridgway*, 135 S.W.3d 598, 601 (Tex. 2004) (quoting *Merrell Dow Pharms., Inc. v. Havner*, 953 S.W.2d 706, 711 (Tex. 1997)). Evidence that is "so weak as to do no more than create a mere surmise," however, is no more than a scintilla and, thus, no evidence. *Id.* (quoting *Kindred v. Con/Chem, Inc.*, 650 S.W.2d 61, 63 (Tex. 1983)).

If the trial court states its grounds for granting the judgment notwithstanding the verdict, we limit our review to the adequacy of that ground. *Voskamp v. Arnoldy*, 749 S.W.2d 113, 118 (Tex. App.—Houston [1st Dist.] 1987, writ denied). Appellees, however, may assert in a cross-point on appeal those grounds alleged in their motion for judgment notwithstanding the verdict, but not relied upon by the

trial judge in entering judgment. *Id.*; TEX. R. CIV. P. 324(c); TEX. R. APP. P. 38.2 (b).

In its order granting the Timberoof Defendants' motion for judgment notwithstanding the verdict, the trial court disregarded the jury's determination on the award of attorney's fees to the Turulls based on the Turulls' counsel's failure to segregate her fees according to the claims brought. Accordingly, we limit our review to this ground. The Timberoof Defendants assert by cross-point that the Turulls' counsel's proof of attorney's fees was legally insufficient because there was no evidence that the fees sought were reasonable or necessary.

B. Segregation of Fees

In its first order concerning the Timberoof Defendants' motion for judgment notwithstanding the verdict, the trial court determined that the Turulls' counsel's testimony established that the "causes of action for which recovery was sought were 'inextricably intertwined'" and that this testimony was some evidence of the fees recovered. The trial court based its ruling on the Texas Supreme Court's opinion in *Chapa*.

Subsequently, the trial court reconsidered this ruling and determined that the Turulls' counsel's testimony as well as the jury's award was based on the full amount of fees incurred in the case. The trial court determined that, because certain causes of action were not submitted to the jury and, accordingly, not

recoverable, the Turulls' counsel should have segregated the fees incurred solely for the non-recoverable claims. As a result, the trial court granted the Timberoof Defendants' motion to disregard and for judgment for notwithstanding the verdict on the issue of attorney's fees for the Turulls and ordered a new trial. This subsequent ruling was also based on *Chapa*.

In *Chapa*, the Texas Supreme Court modified its earlier ruling in *Sterling* and clarified that "a claimant must segregate recoverable from unrecoverable fees. . . . [I]t is only when discrete legal services advance both a recoverable and unrecoverable claim that they are so intertwined that they need not be segregated." *Id.* at 313–14 (modifying *Stewart Title Guar. Co. v. Sterling*, 822 S.W.2d 1 (Tex. 1991)).

Assuming without deciding that the Turulls' counsel was required to segregate her fees and failed to do so properly, the Timberoof Defendants never objected to this testimony. Additionally, the jury question relating to the attorney's fees to be awarded to the Turulls read, "What is a reasonable fee for the necessary services of the Turulls' attorney *in this case*, stated in dollars and cents?" (Emphasis added.) No objection was raised as to the wording of this question. If there is no objection "to the fact that the attorney's fees are not segregated as to specific claims, then the objection is waived." *Green Int'l, Inc. v. Solis*, 951 S.W.2d 384, 389 (Tex. 1997). "When segregation is proper, . . . the jury not only

determines the amount of attorney’s fees, but also determines the segregation issue.” *C.M. Asfahl Agency v. Tensor, Inc.*, 135 S.W.3d 768, 801 (Tex. App.—Houston [1st Dist.] 2004, no pet.). Failure to object to the charge that does not ask the jury to segregate attorney’s fees waives any error in the charge. *Id.* Because the Timberoof Defendants did not object to the Turulls’ counsel’s testimony regarding segregation of fees and because there was no objection to the wording of the charge that did not ask the jury to segregate attorney’s fees, any error regarding segregation has been waived.²

We sustain the Turulls’ sole point of error.

C. Reasonable and Necessary Fees

By cross-point, the Timberoof Defendants argue that the Turulls’ evidence of attorney’s fees is legally insufficient, alleging that the fees were not reasonably incurred or necessary to the prosecution of the case.³ Both parties agree that attorney’s fees for the Turulls were awarded according to the Deceptive Trade

² Because the Timberoof Defendants did not object to the Turulls’ counsel’s testimony regarding segregation or to the jury question on attorney’s fees, we do not need to determine whether failure to object to the testimony alone is sufficient to waive any errors.

³ The Timberoof Defendants also raise points alleging that the Turulls refused to proceed with a new trial on attorney’s fees. Because we have determined that a new trial should not have been granted, we do not need to address any issues relating to the parties’ involvement in the new trial.

Practices Act. *See* TEX. BUS. & COMM. CODE ANN. § 17.50(d) (Vernon Supp. 2009).

The Timberoof Defendants' motion for judgment notwithstanding the verdict and subsequent re-urging of the issue on attorney's fees was never designated as part of the record. Accordingly, there is no evidence in the record that the issue of whether the Turulls' attorney's fees were reasonable and necessary was presented to the trial court. Furthermore, neither party makes a representation in their briefs as to whether this issue was presented to the trial court.

A party can raise a cross-point only on those grounds alleged in its motion for judgment notwithstanding the verdict but not relied upon by the trial judge in rendering judgment. *Voskamp*, 749 S.W.2d at 118; TEX. R. CIV. P. 324(c); TEX. R. APP. P. 38.2(b). Because neither side represents in their briefs that this argument was presented to the trial court and there is nothing in the record to show that it was presented to the trial court, this issue is not properly before us. *See in re J.M.C.A.*, 31 S.W.3d 692, 699 (Tex. App.—Houston [1st Dist.] 2000, no pet.) (holding party asserting point of error bears burden of showing record supports contention raised).

Even if this issue were properly before us, the record contains legally-sufficient evidence to support a finding that the Turulls' attorney's fees were reasonable and necessary. The Turulls' counsel testified on each of the factors

enumerated in *Arthur Anderson* to establish the reasonableness of her fees.⁴ *See Arthur Andersen & Co. v. Perry Equip. Corp.*, 945 S.W.2d 812, 818 (Tex. 1997). The Timberoof Defendants did not object to, rebut, or cross-examine this portion of the Turulls' counsel's testimony. The Turulls' counsel also testified as to the necessity of her fees without objection, rebuttal, or cross-examination.

The Timberoof Defendants attempt to rely on evidence that either was never presented to the jury or is absent from the record altogether in an attempt to disprove that the Turulls' attorney's fees were reasonable and necessary. We do not consider information that was not presented to the jury in no-evidence points of error. *See Meyer v. Cathey*, 167 S.W.3d 327, 332 (Tex. 2005) (considering legal-sufficiency review based on evidence presented to jury).

We deny the Timberoof Defendants' cross-point.

⁴ These factors include: (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill required to perform the legal service properly; (2) the likelihood that the acceptance of the particular employment will preclude other employment by the lawyer; (3) the fee customarily charged in the locality for similar legal services; (4) the amount involved and the results obtained; (5) the time limitations imposed by the client or by the circumstances; (6) the nature and length of the professional relationship with the client; (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and (8) whether the fee is fixed or contingent on results obtained or uncertainty of collection before the legal services have been rendered. *Arthur Andersen v. Perry Equip. Corp.*, 945 S.W.2d 812, 818 (Tex. 1997) (quoting TEX. DISCIPLINARY R. PROF'L CONDUCT 1.04(b), *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G app. A (Vernon Supp. 2009) (TEX. STATE BAR R. art. X, § 9)).

Conclusion

The Turulls' counsel's testimony at trial was legally sufficient to support the jury's award of attorney's fees. Any requirement for the Turulls' counsel to segregate her fees was waived. Accordingly, we reverse the portion of the judgment ordering that the Turulls recover nothing from the Timberoof Defendants for attorney's fees and render judgment to include the attorney's fees awarded by the jury to the Turulls.

Laura Carter Higley
Justice

Panel consists of Justices Keyes, Hanks, and Higley.