Opinion issued April 7, 2011

In The

Court of Appeals

For The

First District of Texas

NO. 01-09-00094-CV

BENCOR, INC., Appellant

V.

THE VARIABLE ANNUITY LIFE INSURANCE COMPANY, Appellee

On Appeal from the 270th District Court
Harris County, Texas
Trial Court Case No. 2008-20349

MEMORANDUM OPINION

Appellant Bencor, Inc. appeals the trial court's order granting summary judgment in favor of appellee The Variable Annuity Life Insurance Company. In three issues, Bencor argues that the trial court erred in: (1) granting VALIC's

traditional motion for summary judgment; (2) denying Bencor's cross-motion for partial summary judgment; and (3) awarding attorney's fees and costs to VALIC. We affirm.

I. Background

Bencor was formed in 1990 for the purpose of developing and marketing various employee benefit plans for governmental employers and their employees. Among the retirement investment benefit plans developed by Bencor were the "3121 Plan" and the "Special Pay Plan." VALIC specializes in developing and marketing retirement products and services to employees of governmental entities, educational groups, and other organizations. The two companies entered into a marketing agreement, whereby Bencor agreed to design and market the 3121 Plans and Special Pay Plans, and VALIC agreed to provide investment vehicles for the retirement plans and the expertise of its national sales force. In consideration of Bencor's performance of its obligations under the marketing agreement, VALIC agreed to pay Bencor compensation in the form of various commissions and bonuses as set out in the agreement.

Bencor and VALIC eventually renegotiated the marketing agreement to change the rates of compensation. Under the agreement's first amendment, VALIC remained obligated to pay certain specified commissions and bonuses. The amended agreement further provided that, with the exception of the amended

terms, "[a]ll terms and conditions of the [original] Agreement shall remain valid and binding in accordance with its terms. . . . [N]o other enlargement or diminution of rights or responsibilities under the Agreement [was] either intended or recognized [by the parties]."

The parties operated under the revised marketing agreement for twenty-two months. In November 2004, VALIC informed Bencor that it would cease paying current and future commissions and bonuses in light of a perceived miscalculation and overpayment of commissions and bonuses, which it believed had occurred over the life of the agreement. Bencor ultimately initiated arbitration proceedings to resolve the dispute, seeking damages for amounts earned, a declaration of its rights under the agreement, and other relief. It argued in its pre-hearing brief that it was entitled to damages for past-due and future commissions, and during the February 2006 arbitration, it presented evidence of future damages under the marketing agreement through November 2007.

The arbitration panel issued an order and award, as well as findings of fact and conclusions of law. The panel concluded that the amended marketing agreement did not eliminate VALIC's obligation to pay the disputed commissions and bonuses, and that VALIC breached the marketing agreement when it refused to pay commissions and bonuses on existing and new cases. The panel further concluded that Bencor did not breach the amended marketing agreement and that it

was entitled to compete with VALIC after payments under the marketing agreement ceased. The panel denied all of VALIC's claims and counterclaims and ordered it to pay over $8 million in damages and over $1 million in costs and attorney's fees. The award stated that it fully resolved all claims, counterclaims and disputes of fact advanced by the parties, and that all claims not expressly granted were denied.

Bencor moved to confirm the arbitration award in the federal district court proceeding, and the court issued a final judgment confirming the arbitration award and dismissing all the parties' claims and counterclaims. VALIC paid Bencor all of the damages awarded by the arbitration panel. Subsequently, VALIC has not paid and refuses to pay post-termination commissions to which Bencor contends it remains entitled to receive under the terms of the agreement. It is VALIC's refusal to pay post-termination commissions for existing 3121 Cases and Special Pay Plan Cases that is the basis of this lawsuit.

Bencor sued VALIC for breach of contract, declaratory judgment, and an accounting. VALIC filed a motion for summary judgment asserting that res judicata barred Bencor's claims because they had previously been litigated before the arbitration panel. The trial court granted VALIC's motion for summary judgment, denied Bencor's motion for partial summary judgment, and dismissed all of Bencor's claims with prejudice. The trial court later vacated and re-entered

summary judgment against Bencor, reserving the issue of attorney's fees for trial. The issue of attorney's fees was tried to a jury, which awarded VALIC $200,122.50 in fees plus conditional appellate fees.

On appeal, Bencor argues that the trial court erred in granting VALIC's motion for summary judgment and in denying its motion for partial summary judgment. Bencor also argues that VALIC was not entitled to fees under the Declaratory Judgments Act because the trial court's ruling on its motion for summary judgment mooted Bencor's declaratory judgment claim, that the fees assessed were unjust and inequitable, that the evidence was insufficient to support the jury's award of attorney's fees, and that the trial court erred in refusing to instruct the jury on VALIC's duty to segregate fees.

II. Res judicata

VALIC argues that this lawsuit involves a claim for future damages that Bencor has already pleaded and proved before the arbitration panel. It argues that Bencor "is suing the same defendant under the same section of the same contract [and] asserting the same breach and the same future damages," which could have been and were litigated, and for which Bencor has already received an award for damages. Bencor contends that the arbitration panel did not have jurisdiction over the claims involved in this lawsuit because they were unripe at the time of arbitration. Bencor also argues that the principles of res judicata are inapplicable

because the claims asserted before the arbitration panel were different from the claims asserted in this lawsuit, i.e., the claims involve different breaches of different compensation provisions in the marketing agreement.

We review a trial court's summary-judgment decision de novo. *Valence Operating Co. v. Dorsett*, 164 S.W.3d 656, 661 (Tex. 2005). To prevail on summary judgment, the movant has the burden of proving that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. *Nixon v. Mr. Prop. Mgmt. Co.*, 690 S.W.2d 546, 548–49 (Tex. 1985); *see* TEX. R. CIV. P. 166a(c). In deciding whether there is a disputed issue of material fact precluding summary judgment, we take as true evidence favorable to the non-movant, indulging every reasonable inference and resolving any doubts in its favor. *Provident Life & Accident Ins. Co. v. Knott*, 128 S.W.3d 211, 215 (Tex. 2003). A defendant is entitled to summary judgment based on an affirmative defense if it proves all the essential elements of the defense as a matter of law. *See, e.g.*, *Cathey v. Booth*, 900 S.W.2d 339, 341 (Tex. 1995).

Res judicata, or claim preclusion, must be pleaded and proved as an affirmative defense. TEX. R. CIV. P. 94; *see Barr v. Resolution Trust Corp.*, 837 S.W.2d 627, 628 (Tex. 1992). Res judicata prevents the re-litigation of a claim or cause of action that has been finally adjudicated in a prior lawsuit. *Barr*, 837 S.W.2d at 628; *Houtex Ready Mix Concrete & Materials v. Eagle Const. & Envtl.*

Servs., L.P., 226 S.W.3d 514, 518 (Tex. App.—Houston [1st Dist.] 2006, no pet.). For res judicata to apply, the defendant must show that: (1) there is a prior final judgment on the merits by a court of competent jurisdiction; (2) the parties in the second action are the same or in privity with those in the first action; and (3) the second action is based on claims that were or could have been raised in the first action. *Igal v. Brightstar Info. Tech. Group, Inc.*, 250 S.W.3d 78, 86 (Tex. 2008). Res judicata does not operate as a bar to litigation when the second claim could not have been raised in the previous litigation. *See Ingersoll-Rand Co. v. Valero Energy Corp.*, 997 S.W.2d 203, 209 (Tex. 1999); *Tricon Tool & Supply, Inc. v. Thumann*, 226 S.W.3d 494, 511 (Tex. App.—Houston [1st Dist.] 2006, pet. denied). As such, it will not bar recovery in a subsequent lawsuit if the claims were unripe at the time of the prior judgment. *See Citizens Ins. Co. v. Daccach*, 217 S.W.3d 430, 457 (Tex. 2007). A subsequent lawsuit will, however, be barred if it arises out of the same subject matter of a previous suit and which through the exercise of diligence, could have been litigated. *See, e.g., Hallco Texas, Inc. v. McMullen County*, 221 S.W.3d 50, 60 (Tex. 2006); *Barr*, 837 S.W.2d at 628.

In determining whether a claim "could have been litigated," we follow a transactional approach, which requires consideration of several factors to decide whether the facts constitute a single transaction, including "'their relatedness in time, space, origin, or motivation, and whether, taken together, they form a

convenient unit for trial purposes.'" *Getty Oil Co. v. Ins. Co. of N. America*, 845 S.W.2d 764, 789 (Tex. 1992) (quoting RESTATEMENT (SECOND) OF JUDGMENTS § 24 cmt. b (1980)); *Hallco Tex., Inc. v. McMullen Cnty.*, 221 S.W.3d 50, 58 (Tex. App.—Houston [1st Dist.] 2007, no pet.).

Accordingly, whether res judicata applies in this case partly depends upon what the parties argued (or could have argued) and what the arbitration panel decided (or could have decided) during the arbitration process. Thus the scope of res judicata is not limited to matters actually litigated. *Barr*, 837 S.W.2d at 630 (citing *Texas Water Rights Comm. v. Crow Iron Works*, 582 S.W.2d 768, 771–72 (Tex. 1979)). We must analyze "the factual matters that make up the gist of the complaint, without regard to the form of action" and, applying the transactional approach, ascertain whether the facts constitute a single transaction. *Id.*; *see also Getty Oil*, 845 S.W.2d at 764.

The dispute arose when VALIC refused to pay commissions and bonuses due to Bencor under their amended marketing agreement. Bencor demanded arbitration to resolve the disagreement. Because the commissions and bonuses paid by VALIC were its only source of income, Bencor began marketing its retirement accounts through another company in order to mitigate its damages. This action prompted VALIC to sue Bencor in state court for a temporary restraining order and preliminary injunction to restrain Bencor from competing

with VALIC pending the arbitration proceeding. Bencor removed the dispute to the federal court and argued that VALIC's initial breach justified its actions and made the non-compete agreement unenforceable.

In its third amended demand for arbitration, Bencor described the nature of the dispute as follows:

> Breach of Contract and Declaratory Judgments Actions for: (i) failure of Respondent to pay monies due and owing to Claimant for amounts earned by Claimant for Marketing Bonuses, Asset-Based Commissions, Commissions on Deposit Flow for Retirement Benefit Plans and un-reimbursed expenses pursuant to the terms of the Contract documents[;] (ii) failure of Respondent to provide a competitive investment product as required by the Contract documents[;] (iii) failure of Respondent to pay its field agents as required by the Contract documents; (iv) declaration as to the rights of the Parties; and (v) declaration as to the existence of ambiguity and/or mutual mistake in the language of the contract.

Bencor's pre-hearing brief stated that the resolution of the parties' dispute turned on the arbitration panel's interpretation of the first amendment to the marketing agreement. Assuming that its interpretation prevailed, Bencor argued that it was entitled to damages for unpaid past commissions and for future commissions to which it would have been entitled had it not terminated the agreement with VALIC. Bencor also sought a declaration of its rights under the marketing agreement as amended.

In the course of discovery, Bencor produced a report by its expert, dated December 9, 2005, estimating the total amount of damages due to Bencor. This

damages model was expressly based on the expert's assumption that Bencor was entitled to commissions on plans acquired by both Bencor and VALIC through the effective termination date of the marketing agreement, which he assumed was November 23, 2007. The expert testified that he "was charged with calculating what would have happened had Bencor and [VALIC] maintained their relationship" from November 2004 through November 2007. In doing so, he calculated the past commissions VALIC already owed to Bencor—from November 2004 when VALIC refused to pay Bencor any commissions or bonuses through the date of arbitration—as well as the future commissions VALIC would have been obligated to pay had it not breached the agreement—through the date of arbitration and into the future until November 23, 2007. For this period, he estimated that "the present value of [Bencor's] economic losses total[ed] $14,294,516, consisting of $8,940,908 of past losses and $5,353,608 of future losses." VALIC offered the testimony of its own expert. Based on her independent calculations, she concluded that Bencor's past and future losses calculated through November 2007 and reduced to present value were approximately $6.6 million to $7.2 million.

Ultimately the arbitration panel concluded that VALIC breached the marketing agreement. It ordered VALIC to pay Bencor $8,045,425 in damages, as well as Bencor's attorney's fees and costs. The award was "in full resolution [of]

all claims, counterclaims and disputes of fact advanced by the parties" during arbitration. All claims not expressly granted were denied. The panel did not specifically address Bencor's claim for declaratory relief, and Bencor did not object to the panel's failure to address this claim, nor did it request clarification as to its future rights under the marketing agreement.

The present controversy centers on Bencor's assertion that it is entitled to additional damages under the marketing agreement for separate breaches of the contract. Bencor asserts that it is entitled to post-termination commissions pursuant to section 4(d) of the marketing agreement, which provides that: "[U]pon and following the termination of [the] Agreement, [VALIC] will pay Bencor . . . compensation . . . for [3121 Plan and Special Pay Plan] Cases in existence at the time of termination . . . ." In support of its position, Bencor argues that its claim for post-termination damages was not ripe at the time of arbitration and that the claims in the present suit do not arise out of the same common nucleus of operative facts. VALIC argues that the post-arbitration claims now advanced by Bencor were ripe and were actually litigated during the arbitration because Bencor sought future damages and a declaration of its continuing rights under the marketing agreement.

Bencor correctly states that "[a] case is not ripe when its resolution depends on contingent or hypothetical facts, or upon events that have not yet come to pass."

Patterson v. Planned Parenthood of Houston & S.E. Tex., Inc., 971 S.W.2d 439, 443 (Tex. 1998). But in this case, all of Bencor's claims were ripe at the time of arbitration. "Under the ripeness doctrine, we consider whether, *at the time a lawsuit is filed*, the facts are sufficiently developed 'so that an injury has occurred or is likely to occur, rather than being contingent or remote.'" *Waco Indep. Sch. Dist. v. Gibson*, 22 S.W.3d 849, 851-52 (Tex. 2000) (quoting *Patterson*, 971 S.W.2d at 442). Applying these general principles, a declaratory judgment action may encompass the future rights of parties pursuant to a contract when the "ripening seeds" of a controversy are present. *See, e.g.*, *Harris County Mun. Util. Dist. No. 156 v. United Somerset Corp.*, 274 S.W.3d 133, 140 (Tex. App.—Houston [1st Dist.] 2008, no pet.); *cf. BHP Petroleum Co. Inc. v. Millard*, 800 S.W.2d 838, 842 (Tex. 1990) (permitting declaratory judgment counterclaim to proceed for purpose of declaring future rights under contract); *Indian Beach Prop. Owners' Ass'n v. Linden*, 222 S.W.3d 682, 702 (Tex. App.—Houston [1st Dist.] 2007, no pet.) (same). Moreover, the Uniform Declaratory Judgments Act specifically authorizes declaratory relief construing a contract before there has been a breach. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 37.004(b) (West 2008).

At the time of arbitration, VALIC had refused to pay Bencor commissions and bonuses under the amended marketing agreement and both parties had terminated the agreement. The arbitration panel was called upon to interpret the

agreement as amended, to determine which party had breached the agreement, and to assess damages in accordance with its terms. Both parties presented evidence of future damages through November 2007, and Bencor requested a declaration of its rights under the agreement. Although Bencor did not specifically seek a determination of its right to receive post-termination commissions during the arbitration, it did generally plead a request for a declaration of its rights under the agreement. It also requested future damages in its pre-hearing brief and presented evidence of future damages to the panel. The relief requested could have included within its scope a declaration of Bencor's right to receive post-termination compensation. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 37.004(b). The panel's award did not include such declaratory relief, and it stated that claims not expressly granted were denied, yet Bencor failed to object to or request a clarification.

Bencor argues that its arbitration demand demonstrates that it only sought damages for amounts owed by VALIC prior to the date of arbitration. That is not at all clear from the one-page Third Demand for Arbitration, which characterized the claim as one for both breach of contract and declaratory judgment arising from VALIC's failure to pay monies due and owing to Bencor. Among other things, the demand sought relief in terms of both "amounts earned" and a declaration as to the rights of the parties. Even more tellingly as to what both parties understood to be in controversy, the evidence of damages proffered by both parties' experts during

arbitration included calculations of payments to which Bencor would have been entitled under the agreement through November 2007. The panel's award of over $8 million in damages is slightly more than the amount of past and future damages calculated by VALIC's expert, yet less than the total amount of past damages calculated by Bencor's expert. The award gave no indication that it was only for past damages, and Bencor failed to seek clarification from the panel as to that matter.

Based on its narrow interpretation of the arbitration demand, Bencor contends that the February 2006 expert testimony presented to the arbitration panel regarding future damages through November 2007 has no relevance to the preclusive effect of the arbitration award. To the contrary, that evidence is highly relevant to our transactional analysis. Bencor's arbitration demand included a request for declaratory relief, and its pre-hearing brief argued that it was entitled to future damages. Although Bencor did not expressly identify in its arbitration demand the post-termination damages it now seeks, the relief requested in the demand and pre-hearing brief was broad enough to encompass a request for all future damages. The expert testimony concerning future damages through November 2007 made clear that Bencor could have sought and actually did seek such relief in the prior proceeding, thereby demonstrating that the claim for future damages could have been previously litigated. *See Barr*, 837 S.W.2d at 628.

Bencor also contends that its right to receive post-termination commissions was not ripe because it was uncertain whether VALIC would renew its commitment to follow the terms of the marketing agreement if the panel determined that VALIC had breached the agreement. But this argument belies Bencor's ripeness point. Bencor sought a determination of its rights and remedies under the contract because the parties' future relationship was uncertain. At the time of arbitration, neither Bencor nor VALIC knew how the arbitration panel would rule on the question of whether either party had an obligation to the other. Bencor requested, and the arbitration panel could have awarded, a declaration of the continuing rights of the parties under the agreement, including Bencor's right to receive post-termination compensation. When the arbitration panel did not include such a declaration in the order and award, Bencor did not seek to modify or clarify it. Bencor cannot now argue that its claim for post-termination commissions was unripe or that its damages stemming from VALIC's breach of section 4(d) were incalculable.

Because Texas follows the transactional approach for evaluating the application of res judicata, this suit is barred if it arises out of the same common nucleus of operative facts and, through the exercise of reasonable diligence, could have been litigated in the first suit. *See Hallco Tex.*, 221 S.W.3d at 58; *Getty Oil*, 845 S.W.2d at 789. Bencor's claim before the arbitration panel involved the

interpretation of the compensation provisions in section 4 of the amended marketing agreement. In this suit, it also seeks damages and a declaration of its rights under section 4(d). Both claims involved interpretation of the same contract, and both claims involved the determination of Bencor's rights under the agreement. Bencor argues that each refusal by VALIC to pay post-termination damages following the arbitration panel's decision "constitutes a distinct and separate actionable breach with its own nucleus of operative facts." It also contends that VALIC could not have been in breach of its post-arbitration contractual obligations until it failed to pay the required post-termination commissions in February 2006. These arguments are inconsistent with Bencor's request for future damages in its pre-hearing brief and with the evidence of future damages presented to the arbitration panel. It is also inconsistent with Bencor's assertion that the marketing agreement terminated on May 19, 2005—the day Bencor notified VALIC that it was terminating the agreement because of VALIC's failure to pay past due commissions and bonuses—and with Bencor's request for a declaration of its rights under the agreement.

Because the arbitration panel's decision had implications with respect to Bencor's right to receive past-due commissions and bonuses, as well its continuing rights under the agreement, including future compensation, the issue of Bencor's right to receive post-termination damages under section 4(d) of the marketing

agreement was ripe. *See Gibson*, 22 S.W.3d at 851–52; *United Somerset Corp.*, 274 S.W.3d at 140. Bencor's claims before the arbitration panel were related in time, space, origin, and motivation to its present claim for post-termination damages, and would have formed a convenient unit for trial purposes. *See Barr*, 837 S.W.2d at 631; *Getty Oil*, 845 S.W.2d at 799. Accordingly, the arbitration panel's order and award precludes Bencor's claims in this case. *See Samedan Oil Corp. v. Louis Dreyfus Natural Gas Corp.*, 52 S.W.3d 788, 794 (Tex. App.—Eastland 2001, pet. denied). Bencor's first issue is overruled.

In its second issue, Bencor argues that the trial court erred in denying its motion for partial summary judgment on the issue of liability. Because we hold that the trial court properly granted summary judgment in favor of VALIC on res judicata grounds, we do not reach this issue.

III. Attorney's fees

In its third issue, Bencor argues that this court should reverse the award of attorney's fees for three reasons: (1) VALIC was not entitled to fees under the Declaratory Judgments Act because the ruling on its motion for summary judgment mooted Bencor's declaratory judgment claim; (2) the fees assessed were unjust and inequitable; (3) the evidence was insufficient to support the jury's award of attorney's fees; and (4) the trial court erred in denying Bencor's jury instruction on VALIC's duty to segregate fees.

a. Mootness

The availability of attorney's fees under a particular statute is a question of law, which we review de novo. *See Holland v. Wal-Mart Stores, Inc.*, 1 S.W.3d 91, 94 (Tex. 1999). The Declaratory Judgments Act provides that the trial court may award costs and reasonable attorney's fees when doing so is equitable and just. TEX. CIV. PRAC. & REM. CODE ANN § 37.009 (West 2006). After prevailing on its motion for summary judgment, VALIC sought and was awarded attorney's fees. Bencor argues that VALIC is not entitled to attorney's fees under the Act because its declaratory judgment claim was mooted when the trial court granted summary judgment on res judicata grounds.

"A case becomes moot if a controversy ceases to exist or the parties lack a legally cognizable interest in the outcome." *Bd. of Adjustment of San Antonio v. Wende*, 92 S.W.3d 424, 427 (Tex. 2002). VALIC's summary-judgment motion asserted that all of Bencor's claims were barred by the doctrine of res judicata and argued that Bencor was not entitled to a declaration of its rights because that claim had previously been litigated. Although the trial court granted summary judgment in favor of VALIC with respect to all of Bencor's claims, that disposition did not moot the question of VALIC's entitlement to fees as a prevailing party to Bencor's declaratory judgment claim. *See* TEX. CIV. PRAC. & REM. CODE ANN § 37.009; *see also Camarena v. Tex. Emp't Comm'n*, 754 S.W.2d 149, 151 (Tex. 1988).

Accordingly, we conclude that Bencor's declaratory judgment claim was not moot and that VALIC could seek fees pursuant to the Declaratory Judgments Act. *See* TEX. CIV. PRAC. & REM. CODE ANN § 37.009; *Arthur M. Deck & Assocs. v. Crispin*, 888 S.W.2d 56, 62 (Tex. App.—Houston [1st Dist.] 1994, writ denied).

b. Equity

Bencor next argues the fees assessed were unjust and inequitable. More specifically, it contends that VALIC would have incurred fees preparing the summary-judgment motion even if Bencor had not pleaded a declaratory judgment claim and that it is inequitable to provide a "windfall" to VALIC for doing "no more work than filing and presenting a motion for summary judgment solely on the ground of res judicata."

"[T]he Declaratory Judgments Act entrusts attorney fee awards to the trial court's sound discretion, subject to the requirements that any fees awarded be reasonable and necessary, which are matters of fact, and to the additional requirements that fees be equitable and just, which are matters of law." *Bocquet v. Herring*, 972 S.W.2d 19, 21 (Tex. 1998). We review the trial court's determination that such fees were equitable and just for an abuse of discretion. *Id.* at 21. A trial court abuses its discretion when it rules without regard for any guiding rules or principles. *Owens-Corning Fiberglas Corp. v. Malone*, 972 S.W.2d 35, 43 (Tex. 1998).

Relying on *MBM Financial Corp. v. The Woodlands Operating Co*., 292 S.W.3d 660 (Tex. 2009), Bencor argues that VALIC cannot use the Declaratory Judgments Act as a vehicle to obtain otherwise unrecoverable fees for defense of a breach of contract claim. While defense of a breach of contract claim alone could not support a claim for attorney's fees, it does not follow that VALIC could not recover attorney's fees under the Act when it raised the defense of res judicata as to both the breach of contract claim and the claim for declaratory relief. *See Tony Gullo Motors I, L.P. v. Chapa*, 212 S.W.3d 299, 313 (Tex. 2006). "To the extent such services would have been incurred on a recoverable claim alone, they are not disallowed [as a matter of law] simply because they do double service." *Id.* Bencor itself asserted the request for declaratory relief. It was necessary for VALIC to defend that claim, for which the law permits the prevailing party to recover attorney's fees. We conclude that the trial court did not err in determining that an award of fees was just and equitable.

c. Sufficiency of evidence

Bencor also challenges the sufficiency of the evidence to support the jury's award of attorney's fees. We will not overturn the jury's verdict unless Bencor demonstrates that the verdict is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. *Cain v. Bain*, 709 S.W.2d 175, 176 (Tex. 1986). The jury is the sole judge of the credibility of the witnesses and the

weight given to be given to their testimony. *Martitme Overseas Corp. v. Ellis*, 971 S.W.2d 402, 407 (Tex. 1998).

During the trial on the issue of attorney's fees, VALIC presented evidence that its legal strategy was to seek dismissal of Bencor's claims on res judicata grounds. VALIC's attorney testified that because of the economic risk of losing at summary judgment, it was reasonable and necessary for VALIC to pay approximately $300,000 in attorney's fees. The attorney also testified that the fees were reasonable and necessary, based on his knowledge of like cases. In light of this testimony, we conclude that there was sufficient evidence to support the jury's award of attorney's fees. *See Arthur Andersen & Co. v. Perry Equip. Corp.*, 945 S.W.2d 812, 818 (Tex. 1997) (listing factors to be considering in determining reasonableness of attorney's fees).

d. Segregation of fees

Bencor contends that the trial court erred in refusing to instruct the jury on VALIC's duty to segregate attorney's fees. The question of the need to segregate fees is a question of law, which we review de novo. *Tony Gullo Motors*, 212 S.W.3d at 313. Parties claiming attorney's fees must "segregate fees between claims for which they are recoverable and claims for which they are not." *Id.* at 311 (citing *Stewart Title Guar. Co. v. Sterling*, 822 S.W.2d 1, 10 (Tex. 1991)). "[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.* Although a claim is not disallowed because it does "double service," a claimant must segregate fees if any attorney's fees relate solely to a claim for which fees are unrecoverable. *Id.* at 313.

In this case, Bencor asserted a breach of contract claim, for which fees are not recoverable, and a declaratory judgment claim, for which fees are recoverable. *See* TEX. CIV. PRAC. & REM. CODE ANN § 37.009. VALIC moved for summary judgment on all of Bencor's claims, arguing that "[t]he claims . . . [were] barred in their entirety by the doctrine of res judicata." All of VALIC's summary-judgment arguments were premised on proof of the res judicata defense, which applied to both claims. VALIC's summary-judgment motion argued that any difference between Bencor's contract claim and declaratory judgment claim is "immaterial" because res judicata bars both claims.

At the trial on attorney's fees, VALIC's attorney testified that Bencor's claims "were two sides of the same coin. They [the claims] were . . . inextricably intertwined . . . ." He also testified that it was impossible to segregate the fees:

> [Counsel]: Would it be possible for you to separate the fees that [VALIC's attorney] incurred while representing VALIC in this suit? The fees that [were] spent on defending the breach of contract to separate those from the fees . . . spent defending the suit for declaratory judgment?
>
> [Witness]: That's not possible. Let me explain why. For instance, on the motion for summary judgment on the merits of the

> contract claim, if we win on that, we defeat the declaratory judgment action as well. So, in other words, defeating one, you defeat the other. So, everything we did in connection with every aspect of this case related to the declaratory judgment action.

Other evidence introduced at trial, including VALIC's billing statements, further demonstrates that VALIC's attorneys drafted a summary-judgment motion that responded to both of Bencor's claims. When, as here, the services necessary to defend a claim for which fees are available also advances an argument against a claim for which fees are not recoverable, "then the exception to the general fee segregation rule applies, and the amount of time or money that was reasonable to expend in performing the service need not be segregated among the claims advanced." *In re Lesikar*, 285 S.W.3d 577, 585 (Tex. App.—Houston [14th Dist.] 2009, orig. proceeding).

Because the evidence showed it was not necessary, or even possible, for VALIC to segregate its attorney's fees, we hold that the trial court did not err in refusing to instruct the jury. *See Tony Gullo Motors*, 212 S.W.3d at 313. We overrule Bencor's third issue.

Conclusion

We affirm the judgment of the trial court.

Michael Massengale
Justice

Panel consists of Justices Keyes, Sharp, and Massengale.