

**Opinion issued March 17, 2011**



**In The  
Court of Appeals  
For The  
First District of Texas**

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**NO. 01-09-01025-CV**

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**CAROLINE OGU AND OAKEY UGBOAJA, Appellants**

**V.**

**C.I.A. SERVICES INC. AND BRIDLEWOOD ESTATES PROPERTY  
OWNERS' ASSOCIATION, Appellees**

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**On Appeal from the County Court at Law No. 4  
Harris County, Texas  
Trial Court Case No. 795884-101**

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**MEMORANDUM OPINION**

Caroline Ogu and Oakey Ugboaja appeal the trial court's judgment awarding C.I.A. Services Inc. and Bridlewood Estates Property Owners' Association attorney's fees. After a prior appeal to this Court, we remanded for Ogu and

Ugboaja to have a jury trial on the amount of attorney's fees, the last remaining issue in this case. After a jury trial, the trial court rendered judgment for attorney's fees through trial in the amount of \$32,005.00 and conditional attorney's fees in the event of an unsuccessful appeal by Ogu and Ugboaja. Ogu and Ugboaja assert that the trial court erred in numerous ways in the conduct of the trial. We have reviewed the briefs of the parties and the full record, and we conclude that the trial court did not err. We therefore affirm.

### **Background**

This Court's prior opinion sets forth more fully the factual background of this case. However, a brief restatement is appropriate here. Ogu and Ugboaja own real property in the Bridlewood Estates subdivision of Harris County. *Ogu v. C.I.A. Servs. Inc.*, No. 01-07-00933-CV, 2009 WL 41462, at \*1 (Tex. App.—Houston [1st Dist.] Jan. 8, 2009, no pet.). C.I.A. and Bridlewood paid a lawn service to mow Ogu and Ugboaja's property, contending that their failure to mow violated the declarations governing Bridlewood. *Id.* Ogu and Ugboaja sued for "unlawful billings and trespassing." *Id.* C.I.A. and Bridlewood filed a counterclaim, asking for declaratory judgment concerning Ogu and Ugboaja's responsibilities under the declarations. *Id.* C.I.A. and Bridlewood also sought attorney's fees. *Id.* After rendering a take-nothing summary judgment on Ogu and

Ugboaja's claims, the trial court severed those claims into a separate cause number and the judgment became final. *Id.* That judgment was not appealed. *Id.*

At the trial on C.I.A and Bridlewood's counterclaims, the trial court granted a directed verdict on the counterclaims and, despite a timely jury request from Ogu and Ugboaja, held a bench trial on the amount of reasonable and necessary attorney's fees. *Id.* at \*2. After the trial court rendered judgment, Ogu and Ugboaja appealed and this Court reversed the trial court, holding Ogu and Ugboaja were entitled to a jury trial on the issue of attorney's fees. *Id.* at \*4. Specifically, we stated, "Under these facts, we hold that [Ogu and Ugboaja] were entitled to a jury trial on the issue of the amount of attorney's fees, the denial of this right constitutes reversible error, and this case must be remanded for a jury trial as requested on this issue." *Id.* at \*5.

On remand, the trial court impaneled a six-person jury. C.I.A. and Bridlewood's attorney conducted voir dire, gave opening statements, testified concerning attorney's fees, and made closing argument to the jury. Ogu and Ugboaja had not designated an attorney to act as an expert witness. The trial court, however, did permit them to testify, although the trial court did, generally, restrict their testimony to issues involving attorney's fees, sustaining objections when Ogu or Ugboaja attempted to interject matters concerning their claims that had been resolved by summary judgment. The jury answered several questions concerning

the amount of reasonable and necessary fees, answering in the amounts testified to by C.I.A. and Bridlewood's attorney. The trial court rendered judgment on the jury's verdict.

### **Scope of the Trial**

Ogu and Ugboaja make several arguments concerning the scope of the trial. For example, they assert, "The totality of the entire case was not addressed as directed by the court of [a]ppeals judgment. Only the Appellees were favored and their evidence heard on Attorney's fees." They also assert that the trial court should have held a "retrial of the whole case." By these and similar statements, we understand Ogu and Ugboaja to be asserting that they did not have an opportunity to present evidence of their claims. However, as noted above and in this Court's prior opinion in this case, after the trial court granted summary judgment on their claims, those claims were severed into a separate lawsuit and the summary judgment became final. That judgment was not appealed. Absent a timely-filed notice of appeal, this court lacks jurisdiction over a cause. *See Verburgt v. Dorner*, 959 S.W.2d 615, 617 (Tex. 1997). To the extent Ogu and Ugboaja argue that this Court's prior opinion remanded the cause for a trial of issues other than attorney's fees, they are mistaken; this Court had no jurisdiction to address their claims because they did not appeal the judgment on those claims.

In the prior appeal in this case, the only issue we discussed in our opinion was the jury trial on attorney's fees. We remanded this cause for a jury trial on only one issue: the amount of the attorney's fees. Therefore, any evidence concerning Ogu and Ugboaja's claims for trespass, or any other claims, was irrelevant. *See* TEX. R. EVID. 401 (stating relevant evidence has tendency to make existence of fact that is of consequence to determination of action more probable or less probable). The trial court, therefore, properly excluded any evidence that did not pertain to the issue of attorney's fees. *See* TEX. R. EVID. 402 ("Evidence which is not relevant is inadmissible.").

Ogu and Ugboaja also assert that the trial court erroneously refused to admit this Court's prior judgment. They contend that the judgment is the "bas[i]s of the [r]etrial" and the refusal to admit the judgment "subjects the verdict of the jury to mistrial for lack of sufficient evidence to support the bases for retrial."

Even if a trial court commits error in excluding evidence, we will not reverse on appeal unless, among other requirements, the excluded evidence was not cumulative of other evidence. *See Tex. Dep't of Transp. v. Able*, 35 S.W.3d 608, 617 (Tex. 2000). CIA and Bridlewood's attorney, in testifying to the work done on this case through the years, described the prior appeal and this Court's judgment. He explained that in order to protect the judgment in favor of his clients, he had to review Ogu and Ugboaja's appellate brief and research the law and the record to

write a brief in response. He also generally described this Court’s prior judgment, telling the jury that this Court’s ruling was that “one issue needed to be determined by a jury of our peers. That would be the amount of attorney’s fees.” He further clarified by stating, “Therefore, that is the issue that is being presented to you is what amount of attorney’s fees is suitable to award my client, not whether they’re getting attorney’s fees.” This accurately states the substance of this Court’s prior judgment.<sup>1</sup> Thus, the jury heard the substance of this Court’s prior judgment. Because the jury had already heard the substance of the judgment, Ogu and Ugboaja’s testimony concerning the judgment—or introducing the judgment into evidence—would have been cumulative of other evidence presented. Accordingly, we hold that the error, if any, in the trial court excluding the judgment is not reversible error. *See Tex. Dep’t of Transp.*, 35 S.W.3d at 617.

Additionally, to the extent Ogu and Ugboaja complain that they were not allowed to testify concerning the reasonableness or necessity of attorney’s fees, we note that they did not designate an expert on the issue of attorney’s fees and neither

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<sup>1</sup> In contrast, Ogu testified that this Court’s judgment “found an error in judgment in [the prior trial] that they found that on my rights was denied for not setting up a jury. The Appeal Court decided on that. They vacated the judgment of the attorney fee that was awarded by the Judge, that’s every proceeding should go back to Court Four. What I understand that I’m doing here today is for the jury summon to hear my case, not attorney fees.” As we state above, this is an inaccurate description of this Court’s prior decision and judgment. The sole issue to be tried was the amount of attorney’s fees. After Ogu stated this to the jury, the trial court sustained an objection to this testimony and instructed the jury to disregard it.

of them are attorneys. Generally, the amount of attorney's fees sought in a case must be proved by expert testimony. *Twin City Fire Ins. Co. v. Vega-Garcia*, 223 S.W.3d 762, 770 (Tex. App.—Dallas 2007, pet. denied). Because they did not designate themselves or qualify as experts on the issues concerning attorney's fees, the trial court properly restricted their testimony concerning the reasonableness and necessity of attorney's fees. *See id.*; *see also Cantu v. Moore*, 90 S.W.3d 821, 826 (Tex. App.—San Antonio 2002, pet. denied) (holding non-attorney's testimony concerning fees was no evidence on fee issue because "[e]xpert testimony is required to support an award of attorneys' fees").

We overrule the issues concerning limiting the trial to attorney's fees, including excluding this Court's prior judgment.

In a related argument, Ogu and Ugboaja contend that the trial court did not allow them to testify or "to present any kin[d] of 'statement' or argument to the jury." The record does not support this contention. They were allowed to make opening statements, cross-examine C.I.A and Bridlewood's attorney, take the stand and testify, and make closing arguments to the jury.

We overrule the issues concerning Ogu and Ugboaja not being allowed to address the jury or testify.

## Composition of the Jury

In their brief, Ogu and Ugboaja assert that the jury “was not fairly and legally constituted.” They explain that the jury pool had three black people and one Hispanic person among the potential jurors but their six-person jury consisted of five white people and one Hispanic.

Race-based exclusions of jurors violate the equal protection rights of the excluded jurors and the litigants. *See Goode v. Shoukfeh*, 943 S.W.2d 441, 445 (Tex. 1997). But to preserve a complaint about the racial composition of the jury, a party must timely object. *See In re C.O.S.*, 988 S.W.2d 760, 766 (Tex. 1999); *see also In re K.M.B.*, 91 S.W.3d 18, 27 (Tex. App.—Fort Worth 2002, no pet.) (stating that, to preserve challenge to racial composition of jury, party must object before jury is sworn). The record does not show that Ogu and Ugboaja objected to the composition of the jury. Therefore, any complaint is waived. *See In re C.O.S.*, 988 S.W.2d at 766; *In re K.M.B.*, 91 S.W.3d at 27.

We overrule the issue concerning the makeup of the jury.<sup>2</sup>

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<sup>2</sup> Ogu and Ugboaja also contend, “The selection of the pool of the Jury in this case was very poor. The educational background of the Jury is questionable, no one of the jury have more than high school diploma. The complexity of this Case and the rhetoric of Attorney fees equally jeopardized the comprehension of the jury.” Ogu and Ugboaja have not cited any authority that they were entitled to a jury of any particular “educational background.” Without any citation to authority to support this argument, we conclude that Ogu and Ugboaja waived this argument. *See Abdelnour v. Mid Nat’l Holdings, Inc.*, 190 S.W.3d 237, 241 (Tex. App.—



## **Issues Concerning Attorney's Fees**

Ogu and Ugboaja make a number of arguments concerning attorney's fees. Although their brief does not contain a statement of issues or points of error, we discern four arguments concerning the attorney's fees: C.I.A and Bridlewood were not entitled to fees because (A) they were not the prevailing party and did not present their claim prior to suit; (B) they failed to present evidence regarding segregation of fees; (C) their attorney acted as both counsel and expert witness; and (D) the evidence is legally insufficient to support the jury's verdict concerning the amount of fees.

### **A. "Prevailing party" and "presentment"**

Ogu and Ugboaja assert that C.I.A. and Bridlewood may not recover attorney's fees because they are not the prevailing party and they never presented their claim. Ogu and Ugboaja cite sections 38.001(8) and 38.002 of the Texas Civil Practice and Remedies Code to support this argument.

Section 38.001(8) provides a party may recover attorney's fees if a claim is for "an oral or written contract." TEX. CIV. PRAC. & REM. CODE ANN. § 38.001(8) (West 2008). Section 38.002(2) provides that a party "must present the claim to the opposing party" to recover attorney's fees under chapter 38. *Id.* § 38.002(2). However, as noted in the previous appeal, C.I.A. and Bridlewood's claim for

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Houston [1st Dist.] 2006, no pet.) ("Issues on appeal are waived if an appellant fails to support his contention by citations to appropriate authority . . .").

attorney's fees is not a suit on a contract; their claim was brought under the Texas Uniform Declaratory Judgments Act, chapter 37 of the Texas Civil Practice and Remedies Code. TEX. CIV. PRAC. & REM. CODE ANN. §§ 37.001–.011 (West 2008). “Declaratory judgment actions do not fall under chapter 38.” *Gorman v. Gorman*, 966 S.W.2d 858, 866 (Tex. App.—Houston [1 Dist.] 1998, pet. denied). Under chapter 37, “the court may award costs and reasonable and necessary attorney's fees as are equitable and just.” TEX. CIV. PRAC. & REM. CODE ANN. § 37.009. The trial court is not required to award attorney's fees to the prevailing party and may award fees to either party. *See Moosavideen v. Garrett*, 300 S.W.3d 791, 802 (Tex. App.—Houston [1st Dist.] 2008, pet. denied). The Declaratory Judgments Act does not require presentment of a claim as a condition for the recovery of attorney's fees. Because C.I.A. and Bridlewood's claim was for declaratory judgment and not breach of contract, they were not required to prevail or to present the claim. Furthermore, as noted above, the only issue in this trial was the amount of reasonable and necessary fees, not whether C.I.A. and Bridlewood were entitled to the fees under chapter 37.

We overrule the issue concerning sections 38.001 and 38.002 of the Texas Civil Practice and Remedies Code.

## B. Segregation

Ogu and Ugboaja assert that attorney's fees are not recoverable in this case "because the cost was not segregated from recoverable and unrecoverable Attorneys['] fees in all the cases." When a party presents multiple claims, some of which support recovery of attorney's fees and some of which do not, the party must segregate the attorney's fees attributable to claims for which fees are recoverable. *Tony Gullo Motors I, L.P. v. Chapa*, 212 S.W.3d 299, 311–12 (Tex. 2006). "Settled law, however, holds that a party waives any error arising from possibly awarding nonrecoverable fees when the complaining party does not object to failure to segregate between legal services for which fees are properly recoverable and those for which no recovery of fees is authorized." *Haden v. David J. Sacks, P.C.*, No. 01-01-00200-CV, 2009 WL 1270372, at \*9 (Tex. App.—Houston [1st Dist.] May 7, 2009, pet. denied). The record does not show that Ogu and Ugboaja objected to the lack of segregation or otherwise brought the issue to the trial court's attention. This issue is not preserved for appeal.<sup>3</sup> *See id.*

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<sup>3</sup> Ogu and Ugboaja also assert that "Texas procedure does not allow post judgment attorney fees . . ." To the extent they are complaining of the award of attorney's fees relating to the appeal, Texas law allows an award of appellate attorney's fees, provided that the award is contingent upon the appellant's unsuccessful appeal. *Houston Livestock Show & Rodeo, Inc. v. Hamrick*, 125 S.W.3d 555, 586 (Tex. App.—Austin 2003, no pet.).

**C. Attorney as a witness**

Ogu and Ugboaja also contend, “The defense [counsel] on this case . . . became his own expert witness a[t] the same time the defense attorney. This is a double standard and legally is not sustainable.”

Rule 3.08 of the Texas Disciplinary Rules of Professional Conduct provides,

A lawyer shall not . . . continue employment as an advocate before a tribunal in a . . . pending adjudicatory proceeding if the lawyer knows or believes that the lawyer is or may be a witness necessary to establish an essential fact on behalf of the lawyer’s client, unless:

. . .

(3) the testimony relates to the nature and value of legal services rendered in the case[.]

TEX. DISCIPLINARY R. PROF’L CONDUCT 3.08(a), *reprinted in* TEX. GOV’T CODE, tit. 2, subtit. G, app. A (West 2005). Under the applicable rules, C.I.A. and Bridlewood’s attorney was allowed both to act as counsel and testify concerning attorney’s fees. *See id.*

We overrule the issue concerning C.I.A. and Bridlewood’s attorney being allowed to serve as an attorney’s fees expert.

**D. Sufficiency of the evidence**

Ogu and Ugboaja contend that the evidence is legally insufficient to support the jury’s verdict concerning the amount of reasonable and necessary attorney’s fees in this case. Legal sufficiency complaints can be preserved in a motion for

directed verdict, motion to disregard the jury's answer, a motion for judgment notwithstanding the verdict, a motion for new trial, or objections to the jury charge. *T.O. Stanley Boot Co. v. Bank of El Paso*, 847 S.W.2d 218, 220–21 (Tex. 1992). Ogu and Ugboaja did not move for a directed verdict, to disregard a jury answer, for judgment notwithstanding the verdict, or for new trial. Nor did they object to the jury charge. This issue is not preserved for appeal. *See id.*

### **Limitations**

In their brief, Ogu and Ugboaja assert that “[t]he statu[te] of limitations on this case has passed. The original case was filed [sic] on August 28, 2002 . . . , this is a case of enforcement of deed restriction and . . . the limitation is four years (4 years). We the appellants [ask] the Honorable APPEAL COURT for limitation review.” Statutes of limitations govern how long a claimant has to bring a suit after a legal injury, not how long a case may remain pending after filing. *See, e.g., TEX. CIV. PRAC. & REM. CODE ANN. § 16.051* (West 2008) (“Every action for which there is no express limitations period . . . *must be brought* not later than four years after the day the cause of action accrues.”) (emphasis added). Although this case has a long history, the statute of limitations has no application to the length of time a case has been pending.<sup>4</sup>

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<sup>4</sup> Additionally, the statute of limitations is an affirmative defense that must be pleaded and tried in the trial court or it is waived; it may not be raised for the first time after trial. *See Hollingsworth v. Hollingsworth*, 274 S.W.3d 811, 814–15

We overrule the issues concerning the statute of limitations.

**Conclusion**

We affirm the judgment of the trial court.

Harvey Brown  
Justice

Panel consists of Justices Jennings, Higley, and Brown.

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(Tex. App.—Dallas 2008, no pet.) (limitations defense waived when first raised in motion for new trial). Here, the record does not show that Ogu and Ugboaja pleaded or otherwise raised limitations in the trial court.