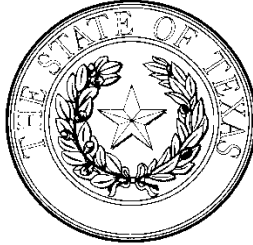


Opinion issued November 10, 2011.



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

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NO. 01-10-00044-CV

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**LUCKY ASEMOTA AKA AND BSPA LUCKY PIZARRO ASEMOTA,  
LUCKY P. PIZARRO, LUCKY ASEMOTA AND L.P. ASEMOTA IND.  
AND D/B/A LUCKY PIZARRO FOOTWEAR, Appellant**

**V.**

**E & R GENERATION FOOTWEAR CORP., Appellee**

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**On Appeal from the County Court at Law No. 1  
Harris County, Texas  
Trial Court Case No. 925715**

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**MEMORANDUM OPINION**

This is an appeal from a suit on a sworn account for outstanding invoices for ladies' shoes. After a bench trial, the trial court found that E&R Generation Footwear Corp. was entitled to recover the amounts due and owing, plus attorney's

fees, from Lucky Asemota. Asemota appeals the judgment against him, contending that the trial court erred in: (1) failing to provide a court reporter during the trial; (2) overruling his motion for new trial; and (3) awarding attorney's fees to E&R Generation. We conclude that Asemota did not preserve his objection to the trial court's lack of a court reporter for appeal. We further conclude that, in the absence of a record of the trial proceedings, Asemota has failed to show that the trial court erred in denying his motion for new trial or in awarding attorney's fees. Accordingly, we affirm.

### **BACKGROUND**

In September 2010, E&R Generation sued Asemota on a sworn account to recover unpaid invoices from a series of shoe shipments. TEX. R. CIV. P. 185. Asemota answered by an unverified general denial. Asemota also counterclaimed against E&R Generation for storage costs. *Id.* In January 2010, the trial court entered judgment in favor of E&R Generation for \$89,396.10, plus \$29,790.00 in attorney's fees. Asemota timely filed a motion for new trial. In his motion for new trial, Asemota contended that he was unable to obtain competent counsel to properly defend his case. The motion was overruled by operation of law. TEX. R. CIV. P. 329b.

The appellate record does not contain a reporter's record from the bench trial. A letter from the Official Court Reporter confirms that there is no record of any portion of the trial.

## **DISCUSSION**

### *Failure to employ a court reporter*

Asemota first asserts that the trial court erred, because it did not employ a court reporter during the trial as the law requires. Specifically, Asemota observes that Texas Government Code section 52.046 requires the court to appoint a court reporter to record the proceedings. TEX. GOV'T CODE ANN. § 52.046(a) (West 2005).

A court reporter must transcribe court proceedings. TEX. GOV'T CODE ANN. § 52.046(a). However, the parties may waive their right to a record. TEX. R. APP. P. 13(a). In the absence of an express waiver, the failure to transcribe trial proceedings is error. *In re Estate of Arrendell*, 213 S.W.3d 496, 502 (Tex. App.—Texarkana 2006, no pet.) (court reporter's failure to record proceedings constitutes error in the absence of an express waiver by parties); *Reyes v. Credit Based Asset Serv. & Securitization*, 190 S.W.3d 736, 740 (Tex. App.—San Antonio 2005, no pet.) (court reporter's failure to transcribe the proceedings in accordance with TEX. R. APP. P. 33.1(a) is error). Nonetheless, to preserve this issue for appeal, the complaining party must object to the court reporter's failure to

record the proceedings. TEX. R. APP. P. 33.1(a); *Reyes*, 190 S.W.3d at 740 (“[I]n order to preserve the error for appeal, a party has the burden of objecting to the court reporter’s failure to record the proceedings”); *see Nicholson v. Fifth Third Bank*, 226 S.W.3d 581, 582 (Tex. App.—Houston [1st Dist.] 2007, no pet.) (presuming sufficient evidence supporting judgment where defendant failed to request court reporter record county court bench trial).

Asemota contends that the trial court erred because his bench trial was not recorded, but raises this issue for the first time on appeal. He did not, for example, complain about the lack of a court reporter in his motion for new trial. In a similar case, this Court affirmed a trial court’s judgment—after a bench trial on the merits—because the party seeking reversal had not complained about the lack of a reporter in the trial court. *Nicholson*, 226 S.W.3d at 583. Because Asemota did not object to the absence of a court reporter either by motion or written objection in the trial court, we hold that he has failed to properly preserve the error. *See Reyes*, 190 S.W.3d at 740 (error not preserved without objection in the trial court); *In re Estate of Arrendell*, 213 S.W.3d at 502 (same).

### *Motion for New Trial*

Asemota next asserts that the trial court abused its discretion when it overruled his motion for new trial. We review a trial court's denial of a motion for a new trial for abuse of discretion. *See In re R.R.*, 209 S.W.3d 112, 114 (Tex. 2006); *Imkie v. Methodist Hosp.*, 326 S.W.3d 339, 344 (Tex. App.—Houston [1st Dist.] 2010, no pet.). The trial court abuses its discretion if it acts without reference to any guiding principles or acts arbitrarily or unreasonably. *Downer v. Aquamarine Operators, Inc.*, 701 S.W.2d 238, 241–42 (Tex. 1985). Under the abuse-of-discretion standard, we view the evidence in the light most favorable to the trial court's actions. *Holley v. Holley*, 864 S.W.2d 703, 706 (Tex. App.—Houston [1st Dist.] 1993, writ denied).

When no reporter's record exists and the trial court has made no findings of fact, we presume that sufficient evidence supports the trial court's judgment. *See Simon v. York Crane & Rigging Co.*, 739 S.W.2d 793, 795 (Tex. 1987) (holding that absent record, reviewing court must presume that evidence before trial court was adequate to support decision); *Nicholson*, 226 S.W.3d at 583 (assuming sufficient evidence supporting judgment in absence of reporter's record). Without a reporter's record, Asemota has not shown that the trial court abused its discretion in overruling the motion by operation of law. Moreover, with rare exception, a defendant is not entitled to court-appointed counsel in a civil case. *Gibson v.*

*Tolbert*, 102 S.W.3d 710, 712 (Tex. 2003). Accordingly, we hold that the trial court did not abuse its discretion in overruling Asemota's motion for new trial.

#### *Attorney's Fees*

We review an award of attorney's fees for abuse of discretion. *Comm'rs Court of Titus Cnty. v. Agan*, 940 S.W.2d 77, 81 (Tex. 1997). A decision to award attorney's fees is an issue of fact. *See Gonzalez v. Nielson*, 770 S.W.2d 99, 102 (Tex. App.—Corpus Christi 1989, writ denied); *Magids v. Dorman*, 430 S.W.2d 910, 912 (Tex. Civ. App.—Houston [14th Dist.] 1968, writ ref. n.r.e.). “Where an appellant has not produced a record before this Court showing the evidence considered by the trial court in making the award, we cannot say that the trial court erred in the amount awarded.” *Houston Lighting & Power Co. v. Russo Props., Inc.*, 710 S.W.2d 711, 716 (Tex. App.—Houston [1st Dist.] 1986, no writ). Accordingly, we hold that the trial court did not abuse its discretion in awarding attorney's fees.

## **Conclusion**

Asemota objects to the absence of a court reporter for the first time on appeal. We conclude that, because Asemota did not challenge the lack of a reporter in the trial court, he has waived such a challenge on appeal. Without a record, we cannot find that the trial court abused its discretion in overruling Asemota's motion for new trial or in awarding attorney's fees. We therefore affirm the judgment of the trial court.

Jane Bland  
Justice

Panel consists of Chief Justice Radack and Justices Bland and Huddle.