Opinion issued October 6, 2020

In The

Court of Appeals

For The

First District of Texas

NO. 01-18-01091-CV

JETALL COMPANIES, INC., Appellant

V.

CAREEN M. PLUMMER, Appellee

On Appeal from the 281st District Court
Harris County, Texas
Trial Court Case No. 2016-00143

MEMORANDUM OPINION

Appellant, Jetall Companies, Inc. appeals the trial court's judgment awarding appellee, Careen M. Plummer, $2,285.34 in actual damages and $61,662.50 in attorney's fees in her breach of contract suit. In five issues, Jetall argues: (1) the trial court erred in failing to disregard immaterial findings; (2) Plummer was not entitled

to additional compensation in lieu of vacation or sick time; (3) the trial court erred in awarding attorney's fees; (4) the trial court erred by refusing to submit a jury question on excessive demand; and (5) this court should order a remittitur of the attorney's fees amount.

We affirm.

Background

In January of 2014, Plummer was hired by Jetall as a property manager. The parties entered into an employment agreement dated January 22, 2014, and Plummer started working at Jetall shortly thereafter. In total, she worked for one year and one pay period before resigning from Jetall effective February 17, 2015.

Per the employment agreement, Plummer earned an annual compensation of $84,500. This employment agreement provided that her "total annual compensation" consisted of:

- $1,000 signing bonus;
- $1,000 6-month bonus;
- $60,500 base compensation (to be divided into 24 equal payments, each paid on the 1stand 15th of each month);
- $2400 annual cell phone allowance ($200/month);
- $3600 annual allowance for gas/mileage ($300/month); and
- $10,000 additional compensation after one year.

The employment agreement also provided: "[Y]ou will be entitled to health insurance benefits starting after 90 days after the date of your employment or Jetall in its discretion provide you $500 per month payment for you to obtain your health

insurance of your choice." In addition, Plummer was also entitled to "5 paid sick days per year and 1-week paid vacation after one full year of service."

Following her resignation, Plummer sent an email to Ali Choudhri, president of Jetall, demanding payment for various amounts she asserted she was owed under the employment agreement. Specifically, Plummer requested that Jetall pay her $6,363.93 in unpaid wages, including $2,660.54 in unpaid child support, $100 in cell phone allowance, $150 for mileage reimbursement, $1,278.77 in unused sick time, $1,534.62 in unused vacation time, and $640 in reimbursements for out of pocket expenses. When she did not receive any payment or response from Jetall, Plummer filed the instant suit against Jetall, asserting claims for breach of the employment agreement.[1]

At trial, Plummer sought to recover approximately $13,000 in damages related to unpaid total annual compensation, base compensation, cell phone expenses, unused sick and vacation time, out of pocket expenses, and expenses related to child support payments. With respect to unpaid total annual compensation, Plummer testified that the component parts of the total annual compensation detailed in the employment agreement only totaled $78,500, leaving $6000 unaccounted for in the employment agreement. Brad Parker, the current chief financial officer of

[1] Plummer also asserted claims against Choudhri, but he was later dismissed from the suit.

Jetall, contended that the $6,000 difference was provided through the health insurance benefits. Plummer disagreed, testifying that health insurance was considered a separate "benefit" under the employment agreement and, therefore, should not be considered part of the total annual compensation.

With respect to base compensation, Plummer testified that under the employment agreement, she was entitled to $60,500, which was to be paid out in 24 equal payments of $2,520.83 on the 1st and 15th of each month. However, Plummer testified that she only received $2,500 each pay period and introduced her paycheck stubs in support of her testimony. Therefore, she testified she was seeking to recover $520.75, which reflected the $20.83 shortage over 25 pay periods.

With respect to vacation and sick time, the parties disputed whether the employment agreement entitled Plummer to payment for unused vacation or sick time. Plummer testified that she was told by Choudhri during her employment negotiations that her vacation and sick days accrued and that she would be compensated for any of these days she did not use. In contrast, Parker, who was hired after Plummer, testified that Jetall had a "use it or lose it policy" with respect to sick or vacation days.

Ultimately, the jury found that Jetall breached the employment agreement by failing to pay Plummer for base compensation and unused sick and vacation time, and awarded Plummer a total of $2,285.34 in actual damages ($520.75 in base

compensation and $1,764.59 in unused sick and vacation time), as well as $61,662.50 in attorney's fees related to representation through trial. Jetall filed a motion to modify the judgment, motion for judgment notwithstanding the verdict ("JNOV"), and motion for new trial, which was denied by the trial court. This appeal followed.

Immaterial Jury Findings

In its first issue, Jetall argues the jury's finding—that it had paid Plummer the total annual compensation due—rendered the separate component questions, including those related to base compensation and unused sick or vacation time, immaterial. Therefore, Jetall argues that the trial court erred by denying its motion to modify the judgment, motion for JNOV, and motion for new trial.

A. Standard of Review and Applicable Law

A trial court may disregard a jury's findings and render a JNOV only when a directed verdict would have been proper, and it may disregard any jury finding on a question that has no support in the evidence. TEX. R. CIV. P. 301; *B & W Supply, Inc. v. Beckman*, 305 S.W.3d 10, 15 (Tex. App.—Houston [1st Dist.] 2009, pet. denied); *see also Tiller v. McLure*, 121 S.W.3d 709, 713 (Tex. 2003) ("A trial court may grant a judgment notwithstanding the verdict if there is no evidence to support one or more of the jury findings on issues necessary to liability."). A jury question is immaterial for the purpose of determining whether the trial court may disregard a jury finding

"when it should not have been submitted, or when it was properly submitted but has been rendered immaterial by other findings." *Spencer v. Eagle Star Ins. Co. of Am.*, 876 S.W.2d 154, 157 (Tex. 1994).

A trial court properly enters a directed verdict (1) when the evidence conclusively establishes the right of the movant to judgment or negates the right of the opponent or (2) when the evidence is insufficient to raise a material fact issue. *See Sohani v. Sunesara*, 546 S.W.3d 393, 406 (Tex. App.—Houston [1st Dist.] 2018, no pet.); *Prudential Ins. Co. of Am. v. Fin. Review Servs., Inc.*, 29 S.W.3d 74, 77 (Tex. 2000) (holding that court may direct verdict "if no evidence of probative force raises a fact issue on the material questions in the suit"). The trial court should grant a JNOV "when the evidence is conclusive and one party is entitled to recover as a matter of law or when a legal principle precludes recovery." *B & W Supply*, 305 S.W.3d at 15.

In reviewing the rendition of JNOV, we must determine whether there is any evidence upon which the jury could have made the finding at issue. *See Tiller*, 121 S.W.3d at 713; *see also B & W Supply*, 305 S.W.3d at 15 (appellate court reviews JNOV under no-evidence standard); *CDB Software, Inc. v. Kroll*, 992 S.W.2d 31, 35 (Tex. App.—Houston [1st Dist.] 1998, pet. denied) ("We review the denial of CDB's motion [for JNOV] under the legal sufficiency standard."). We must view the evidence in the light most favorable to the verdict, crediting favorable evidence if

reasonable jurors could do so and disregarding contrary evidence unless reasonable jurors could not. *City of Keller v. Wilson*, 168 S.W.3d 802, 827 (Tex. 2005); *see Tiller*, 121 S.W.3d at 713 (in reviewing "no evidence" point, court views evidence in light that tends to support finding of disputed fact and disregards all evidence and inferences to contrary).

When reviewing the denial of a motion for JNOV, if there is more than a scintilla of evidence to support the jury's findings, the trial court properly denied the motion for JNOV. *Mancorp, Inc. v. Culpepper*, 802 S.W.2d 226, 228 (Tex. 1990); *Wang v. Gonzalez*, No. 01-11-00434-CV, 2013 WL 174576, at *6 (Tex. App.—Houston [1st Dist.] Jan. 17, 2013, no pet.) (mem. op.). We will affirm the jury's verdict if there is any evidence of probative value to support it. *Wang*, 2013 WL 174576, at *6.

B. Analysis

The trial court submitted one question to the jury regarding Jetall's liability, with a number of subparts. Question 1 asked the jury:

> Did Jetall Companies, Inc. fail to comply with the Employment Agreement by failing to pay Careen Plummer the following items?
>
> Answer 'Yes' or 'No' for each of the following:
>
> 1. Total Annual Compensation
>
> 2. Base Compensation
>
> 3. Cell Phone/Mileage for February 2015

4. Unused Vacation or Sick Time

5. Out of Pocket Expenses

6. Child Support deducted but not paid by AG

As is relevant to Jetall's first issue, the jury answered "No" to subpart 1 (Total Annual Compensation), but "Yes" to subpart 2 (Base Compensation) and subpart 4 (Unused Vacation or Sick Time).

Jetall argues that under the employment agreement, Plummer was only entitled to total annual compensation of $84,500, which encompassed the separately listed components of base compensation and unused vacation or sick time. Therefore, Jetall argues the jury's "Yes" answers regarding base compensation and vacation or sick time were immaterial and should have been disregarded because the jury found that it paid Plummer the total annual compensation. We disagree.

First, we note that the crux of Jetall's argument is that the jury's answer concerning total annual compensation rendered its later answers related to whether Jetall owed any money for the "separate components included in total annual compensation" immaterial. Jetall attempts to apply this argument to both base compensation and unused sick or vacation time. However, Jetall points to no evidence in the record that the unused sick or vacation time was to be included in the calculation for total annual compensation. To the contrary, the portion of the employment agreement breaking down the total annual compensation calculation cited by Jetall shows that this calculation *does not* include vacation or sick time:

> Your Total Annual Compensation is $84,500.00 (Eight-Four Thousand and Five Hundred Dollars) (subject to applicable tax withholding) . . . . This is broken down as follows: an upfront signing bonus/engagement/consideration payment of $1,000.00, another $1,000.00 bonus/engagement/consideration payment at 6 month milestone, $60,500 base compensation (to be divided into 24 equal payments, each paid on the 1st and 15th of each and every month), a Blackberry/iPhone/Smart phone and iPad/mobile computer with data and voice with an allowance of $200 per/month ($2,400 annually), $300 per/month for mileage/gas/travel ($3,600) and $10,000.00 additional compensation (to be paid in a lump sum on each anniversary (12 months from hire date) of your employment provided you then remained employed with Jetall). . . . As a Jetall employee, you will be entitled to health insurance benefits starting after 90 days after the date of your employment or Jetall may in its discretion provide you $500 per month payment for you to obtain your health insurance of your choice.

Therefore, we reject Jetall's argument that the jury's finding on total annual compensation rendered its finding on unused vacation or sick time immaterial.

Second, we also conclude that the jury's finding that Jetall owed Plummer $520.85 in unpaid base compensation was not rendered immaterial by its finding that Jetall did not fail to pay Plummer total annual compensation because it is possible for the jury's answers to these subparts to be read consistently with each other. *See Wang*, 2013 WL 174576, at *8 (rejecting argument that jury findings were immaterial because it was possible for jury's answers to be read consistently with each other).

The distinction between the damages Plummer was seeking for total annual compensation and base compensation was presented to the jury. For example,

Plummer testified that under the employment agreement, Jetall agreed to pay her $84,500 in total annual compensation, which was broken down into certain subparts, including a signing bonus, six-month bonus, base compensation, cell phone and mileage allowance, and additional annual compensation. However, she testified that adding each of the dollar amounts together for those subparts only equaled $78,500, leaving $6,000 unaccounted for. She testified that she was owed the $6,000 difference. In contrast, Brad Parker, who testified on behalf of Jetall, contended that the $6,000 difference was provided through the health insurance benefits.

With respect to base compensation, Plummer testified that under the employment agreement, she was entitled to $60,500, which was to be paid out in 24 equal payments of $2,520.83 on the 1st and 15th of each month. However, Plummer testified that she only received $2,500 each pay period (for a discrepancy of $20.83 each pay period) and introduced her paycheck stubs in support of her testimony. Therefore, she testified she was seeking to recover $520.75, which reflected the $20.83 shortage over 25 pay periods.

The jury, therefore, could have interpreted subpart 1 related to total annual compensation as asking whether Jetall failed to pay Plummer the $6,000 difference and concluded, based on Parker's testimony, that Jetall did not fail to do so. At the same time, the jury could have also determined, based on Plummer's testimony, that Jetall underpaid Plummer $20.83 in base compensation each pay period.

Thus, the jury's determination regarding total annual compensation does not render immaterial its findings that Jetall breached the employment agreement by failing to pay base compensation and unused sick or vacation time. The jury could have found, and apparently did so, that whether Jetall owed Plummer the $6,000 difference in total annual compensation, $520.75 in base compensation, or $1,764.59 in unused vacation or sick time were not dependent on one another.

We overrule Jetall's first issue.

Compensation In Lieu of Vacation or Sick Time

In its second issue, Jetall argues that the employment agreement did not entitle Plummer to compensation in lieu of taking a vacation or sick day and, therefore, the trial court erred by denying its motion to modify the judgment, motion for JNOV, and motion for new trial. We construe this argument as a challenge to the legal and factual sufficiency of the evidence to support the jury's finding on this issue.

A. Standard of Review

In a legal sufficiency review, we consider the evidence in a light most favorable to the jury's findings, crediting favorable evidence if reasonable jurors could, and disregarding contrary evidence unless reasonable jurors could not. *City of Keller*, 168 S.W.3d at 827; *Republic Petroleum, LLC v. Dynamic Offshore Res. NS LLC*, 474 S.W.3d 424, 433 (Tex. App.—Houston [1st Dist.] 2015, pet. denied). A party that challenges the legal sufficiency of a finding on which it did not have the

burden of proof must show that no evidence supports the jury's finding. *Exxon Corp. v. Emerald Oil & Gas Co.*, 348 S.W.3d 194, 215 (Tex. 2011); *Republic Petroleum*, 474 S.W.3d at 433. We defer to the jury's determination of the credibility of the witnesses and the weight to accord their testimony. *City of Keller*, 168 S.W.3d at 819; *Republic Petroleum*, 474 S.W.3d at 433.

In a factual sufficiency review, we consider all the evidence in the record in a neutral light and set aside the jury's verdict only if it 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); *Republic Petroleum*, 474 S.W.3d at 433. Jurors are entitled to resolve inconsistencies in witness testimony, whether those inconsistencies result from the contradictory accounts of multiple witnesses or from internal contradictions in the testimony of a single witness. *McGalliard v. Kuhlmann*, 722 S.W.2d 694, 697 (Tex. 1986); *Republic Petroleum*, 474 S.W.3d at 433.

B. Analysis

Jetall contends that there was legally and factually insufficient evidence to support the jury's finding that Plummer was entitled to $1,764.59 in unused vacation or sick time because the employment agreement did not entitle Plummer to additional compensation in lieu of taking a vacation or sick day. Instead, Jetall argues the employment agreement only allowed for Plummer to be paid while taking a

vacation or sick day. The applicable provision of the employment agreement provided that Plummer was entitled to "5 paid sick days per year and 1-week paid vacation after one full year of service."

Whether an employee is entitled to payment in lieu of taking vacation or sick time is determined by the terms of the contract: "'Any vested interest or right acquired concerning vacation pay must be determined from the terms of the contract of employment, either expressed or implied.'" *Brown v. Sabre, Inc.*, 173 S.W.3d 581, 587 (Tex. App.—Fort Worth 2005, no pet.) (quoting *Interstate Hosts, Inc. v. Thompson*, 435 S.W.2d 957, 958 (Tex. App.—Dallas 1968, no writ.)).

Jetall cites two cases in support of its argument that the employment agreement does not allow for additional compensation in lieu of sick or vacation days. *See Marine Inspection Servs., Inc. v. Alexander*, 553 S.W.2d 185 (Tex. App.—Houston [1st Dist.] 1977, no writ); *Chester v. Jones*, 386 S.W.2d 544 (Tex. App.—Tyler 1965, writ dism'd). We find these cases distinguishable.

In *Marine Inspection Services*, an employee sued his former employer to recover two weeks salary in lieu of vacation time which he claimed was owed to him upon his termination, which the jury awarded. 553 S.W.2d at 186. At trial, the employee testified that he had an oral agreement with the employer and that it was his understanding that he was to be paid two weeks' vacation after he was employed there for six months and that he had received a bulletin stating that he would receive

"two weeks['] vacation *per year* after 6 months tenure." *Id.* at 187 (emphasis added). A representative for the employer testified at trial that when he had hired the employee, he informed the employee that he would be given two weeks of vacation a year after he had been with the company for six months. *Id.*

On appeal, the employer argued there was no evidence of an agreement that the employee would receive vacation pay in lieu of taking a vacation. *Id.* at 188. The employer conceded that the employee could have taken two weeks of vacation after he had been with the company for six months, however, the employer argued that by tendering his resignation, the employee notified the company that he would not remain with the company for a full year, thereby not entitling him to a full two weeks of vacation. *Id.*

This Court agreed, concluding that there was "no evidence the company ever agreed that [the employee] would be entitled to a paid salary in lieu of vacation time." *Id.* "The [employee's] testimony to the effect that he was 'to be paid two weeks['] vacation,' considered in the light of his other testimony and evidence in this case, reflects only an understanding on his part that he was entitled to a two weeks paid vacation after he had been with the company for a period of six months." *Id.* This court emphasized that the employee had only worked for the company for eight and a half months at the time he notified his employer of his intent to terminate and concluded that, "[a]t that time[,] his right to a full two weeks['] vacation had not

accrued, notwithstanding the fact that he might have been permitted to take the two weeks[’] vacation had he elected to do so.” *Id.*

Unlike *Marine*, the employment agreement here is a written contract, not an oral contract. And the employment agreement here expressly provided that Plummer was entitled to “5 *paid* sick days per year and 1-week *paid* vacation after one full year of service.” (Emphasis added). Plummer also testified that Choudhri, president of Jetall, told her that her vacation and sick days accrued, and that she would be paid or compensated for those days if she did not use them.

Furthermore, part of this Court’s rational in *Marine Inspection Services* was based on the fact that the employee had not worked for the company for the full year, so at the time of his termination, “his right to a full two weeks[’] vacation had not accrued.” *Id.* at 188–89 (citing *Interstate Hosts*, 435 S.W.2d at 957–58 (holding employee was not entitled to payment in lieu of vacation because, although employer’s policies allowed for two weeks’ vacation per year after two full years of service, *at time employee was terminated she had not completed third full year of employment* and “[t]here [was] nothing in the contract, either express or implied, which would give [employee] a vested interest or right into a pro rata share of the vacation accrued during the third year”)). Here, Jetall has made no similar argument that Plummer’s entitlement to five days of paid vacation had somehow not accrued because she had not been employed long enough. In fact, it is undisputed that

Plummer worked for Jetall for one year plus one pay period. Thus, her entitlement to five days of paid vacation after one full year of service had accrued. Therefore, we conclude that *Marine Investment Services* is distinguishable from the case at bar.

Chester v. Jones, also cited by Jetall in support of this argument, is likewise distinguishable. In *Chester*, the employment agreement provided that the employee was entitled to "an annual vacation of two (2) weeks duration upon completion of one year's service to The Chester Clinic." 386 S.W.2d at 548. The court held that, "[i]n the absence of express contractual authorization, the [employee] is not entitled to a cash payment in lieu of unused vacation time[.]" *Id.* at 549. In contrast, here, the written contract expressly provides that Plummer would be entitled to "*paid* vacation" and "*paid* sick days," not just "annual vacation of two (2) weeks" as the contract in *Chester* provided.

Because the employment agreement expressly provided that Plummer was entitled to "*paid* vacation" and "*paid* sick days," and because there is evidence that Plummer was told this meant she would be compensated for unused vacation or sick time, we hold there was legally and factually sufficient evidence to support the jury's finding that Plummer was entitled to $1,764.59 in unused vacation or sick time. *See Hamby Co. v. Palmer*, 631 S.W.2d 589, 591 (Tex. App.—Amarillo 1982, no writ) (holding that sufficient evidence supported jury's verdict awarding damages as payment for vacation time earned but not used because there was evidence that

employee was told by company personnel manager that "after a year of employment we would be paid for a week's vacation," and that statement became term of employment contract); *cf. Beigel v. Stimac*, No. 05-89-01042-CV, 1991 WL 117042, at *5–6 (Tex. App.—Dallas June 28, 1991, no writ) (holding evidence was sufficient to support trial court's finding that employee was entitled to receive pay for accumulated but unused vacation time because letter agreement between parties included benefit of "[t]wo weeks['] vacation per year," ordinary meaning of vacation is "a period of exemption from work granted to an employee for rest and relaxation, and "[a]n employee generally receives salary during the time he is on vacation").

We overrule Jetall's second issue.

Presentment

In its third issue, Jetall argues that the trial court erred in awarding attorney's fees when there was no evidence of presentment of Plummer's claim for unpaid base compensation. Jetall argues that Plummer presented a claim for $6,363.93, which included child support deductions, cell phone allowance, mileage and expense reimbursement, and unused sick or vacation time, but did not include any claim for unpaid base compensation. Therefore, Jetall argues, it was never given an opportunity to pay Plummer's claim for $520.75 in unpaid base compensation to avoid paying attorney's fees.

A. Standard of Review and Applicable Law

Under Section 38.002 of the Texas Civil Practice and Remedies Code, to recover attorney's fees on a breach of contract claim: (1) the claimant must be represented by an attorney; (2) the claimant must present the claim to the opposing party; and (3) payment for the just amount owed must not have been tendered before the expiration of 30 days after the claim is presented. TEX. CIV. PRAC. & REM. CODE § 38.002. "The purpose of presentment is to allow the opposing party a reasonable opportunity to pay a claim without incurring an obligation for attorney's fees." *Brainard v. Trinity Universal Ins. Co.*, 216 S.W.3d 809, 818 (Tex. 2006). "The claimant bears the burden to plead and prove presentment of the claim." *Gibson v. Cuellar*, 440 S.W.3d 150, 157 (Tex. App.—Houston [14th Dist.] 2013, no pet.). The term "presentment" means "simply a demand or request for payment or performance[.]" *Id.*

All that is necessary is that the party seeking attorney's fees show that it made an assertion of a debt or claim and a request for compliance to the opposing party, and that the opposing party refused to pay the claim. *Busch v. Hudson & Keyse, LLC*, 312 S.W.3d 294, 300 (Tex. App.—Houston [14th Dist.] 2010, no pet.). "No particular form of presentment is required." *Jones v. Kelley*, 614 S.W.2d 95, 100 (Tex. 1981). A claimant is not required to make a demand of the exact amount it is entitled to recover. *West Beach Marina, Ltd. v. Erdeljac*, 94 S.W.3d 248, 269 (Tex.

App.—Austin 2002, no pet.); *Panizo v. Young Men's Christian Ass'n of Greater Hous. Area*, 938 S.W.2d 163, 169 (Tex. App.—Houston [1st Dist.] 1996, no writ) (citing *Adams v. Petrade Int'l, Inc.*, 754 S.W.2d 696, 720 (Tex. App.—Houston [1st Dist.] 1988, writ denied)). However, neither the filing of suit, nor the allegation of a demand in the pleadings can, alone, constitute presentment of a claim or a demand that a claim be paid. *Helping Hands Home Care, Inc. v. Home Health of Tarrant Cty., Inc.*, 393 S.W.3d 492, 516 (Tex. App.—Dallas 2013, pet. denied).

"Where, as here, the issue of the amount of attorney's fees is found by the jury without a request for a jury finding on the issue of presentment, Rule 279 of the Texas Rules of Civil Procedure operates so presentment is deemed found." *Genender v. USA Store Fixtures, LLC*, 451 S.W.3d 916, 925 (Tex. App.—Houston [14th Dist.] 2014, no pet.); *see also* TEX. R. CIV. P. 279 ("When a ground of recovery or defense consists of more than one element . . . and one or more of such elements are omitted from the charge, without request or objection, and there is factually sufficient evidence to support a finding thereon . . . such omitted element or elements shall be deemed found by the court in such manner as to support the judgment."). We construe Jetall's argument on appeal—that there was no evidence of presentment of Plummer's unpaid base compensation claim—as one challenging the sufficiency of the evidence to support the deemed finding.

B. Analysis

Jetall argues that Plummer never demanded payment for unpaid base compensation before suit and, therefore, there is no evidence of presentment and the trial court erred in awarding attorney's fees. We disagree.

The evidence demonstrates that Plummer made multiple written and oral demands for payment for amounts she contended were due under the employment agreement. Plummer testified at trial that she maintained contact with Choudhri after she left Jetall and every time she spoke with him, she followed up on the outstanding amounts she felt she was owed under the employment agreement. Plummer also introduced into evidence an email, dated July 22, 2015, that she sent to Choudhri detailing the outstanding amounts and demanding payment for various items, including reimbursement for child support payments, cell phone allowance, mileage, unpaid sick and vacation time, and out of pocket expenses.

Jetall focuses on the fact that Plummer never demanded payment for the $520.74 in unpaid base compensation that she sought and recovered at trial in her July 22, 2015 email, but in doing so, Jetall concedes that Plummer did in fact demand payment for various other items arising out of her employment at Jetall. Despite Jetall's assertion to the contrary, there is no requirement that a claimant present a demand for the exact amount it is entitled to recover. *See West Beach Marina*, 94 S.W.3d at 269; *Panizo*, 938 S.W.2d at 169. We conclude that by presenting multiple

oral and written demands for payment relating to her employment agreement with Jetall following the termination of her employment, Plummer sufficiently notified Jetall that she was demanding payment allegedly due to her under the employment agreement, and offered Jetall sufficient opportunity to settle the claim without incurring attorney's fees. *See West Beach Marina, Ltd.*, 94 S.W.3d at 269 (holding plaintiffs adequately presented claim for $275,000 due under settlement agreement, even though they never asked for that exact amount, because plaintiffs sent letter demanding performance of settlement agreement, demanded payment (which exceeded $275,000) at court-ordered mediation, and sent additional settlement offer to defendants, which included demand for payment of $367,468.70). Therefore, we hold there was sufficient evidence of presentment.

We overrule Jetall's third issue.

Excessive Demand

In its fourth issue, Jetall argues that the trial court erred by refusing to submit a jury question on excessive demand. In particular, Jetall contends that Plummer's demand for $6,363.93 was excessive because Jetall did not owe any of the amounts demanded. And Jetall claims that by demanding that Jetall pay obligations it did not owe, Plummer acted in bad faith.

A. Standard of Review and Applicable Law

A properly requested jury question must be submitted if the question is on a controlling issue that is raised by the pleadings and supported by some evidence. TEX. R. CIV. P. 278; *Union Pac. R.R. Co. v. Williams*, 85 S.W.3d 162, 166 (Tex. 2002). A trial court may refuse to submit a jury question only if no evidence exists to warrant its submission, i.e., less than a scintilla. *See Elbaor v. Smith*, 845 S.W.2d 240, 243 (Tex. 1992). To rise above a scintilla, the evidence offered to prove a vital fact must do "more than create a mere surmise or suspicion of its existence." *Kindred v. Con/Chem, Inc.*, 650 S.W.2d 61, 63 (Tex. 1983).

The standard of review for an allegation of jury charge error is an abuse of discretion. *Tex. Dep't of Human Servs. v. E.B.*, 802 S.W.2d 647, 649 (Tex. 1990). A trial court abuses its discretion by acting arbitrarily, unreasonably, or without consideration of guiding principles. *Walker v. Gutierrez*, 111 S.W.3d 56, 62 (Tex. 2003).

Excessive demand is an affirmative defense to a claim for attorney's fees. *Kurtz v. Kurtz*, 158 S.W.3d 12, 21 (Tex. App.—Houston [14th Dist.] 2004, pet. denied). Generally, "[a] creditor who makes an excessive demand upon a debtor is not entitled to attorney's fees for subsequent litigation required to recover the debt." *Findlay v. Cave*, 611 S.W.2d 57, 58 (Tex. 1981). A demand is not excessive simply because it is greater than the amount a jury later determines is actually due. *Panizo*,

938 S.W.2d at 169. Rather, the dispositive question in determining whether a demand is excessive is whether the claimant acted unreasonably or in bad faith. *See Standard Constructors, Inc. v. Chevron Chem. Co.*, 101 S.W.3d 619, 627–28 (Tex. App.—Houston [1st Dist.] 2003, pet. denied).

B. Analysis

As noted above, the evidence introduced at trial established that Plummer made multiple written and oral demands to Jetall for payment, including a written demand for $6,363.93, which included amounts for child support, cell phone allowance, mileage reimbursement, sick and vacation time, and expense reimbursement. Plummer also presented evidence of actual damages of approximately $13,000,[2] and the jury awarded Plummer actual damages in the amount of $2,285.34, which included $520.75 for unpaid base compensation and $1,764.59 for unused vacation or sick time. We hold that the amounts Plummer demanded prior to filing suit were not so much greater than the amount she was eventually awarded by the jury as to be considered "excessive" or to indicate that the demand was made in bad faith. *See Triton 88, L.P. v. Star Elec., L.L.C.*, 411

[2] Plummer testified she was seeking to recover $6,000 in total annual compensation, $520.75 in base compensation, $350 in reimbursements for cell phone expenses, $3,024.98 for unused sick and vacation time, $640 in reimbursements for out of pocket expenses, $576.58 in unpaid child support, and $1,487.50 in costs associated with hiring a certified public accountant to investigate the child support issues. Thus, the total amount of damages sought by Plummer was $12,599.81.

S.W.3d 42, 65 (Tex. App.—Houston [1st Dist.] 2013, no pet.) (holding amounts demanded by plaintiff prior to suit, totaling $384,978.93, were not so much greater than the $314,358.13 it was eventually awarded as to be "excessive" or to indicate that the demand was made in bad faith); *Panizo*, 938 S.W.2d at 169 (rejecting argument that plaintiff's $125,000 demand was excessive because, even though jury awarded plaintiff damages of only $1,000, demand was for same amount as defendant's prior settlement of related claim and plaintiff presented evidence of damages in range of $300,000).

We overrule Jetall's fourth issue.

Remittitur

In its fifth issue, Jetall argues the $61,662.50 attorney's fee award to pursue a claim of $520.75 was excessive and, therefore, this court should order a remittitur. We construe Jetall's issue as raising a factual-sufficiency challenge. *See C.M. Asfahl Agency v. Tensor, Inc.*, 135 S.W.3d 768, 801–02 (Tex. App.—Houston [1st Dist.] 2004, no pet.) (citing *Maritime Overseas Corp. v. Ellis*, 971 S.W.2d 402, 406–07 (Tex. 1998)).

A. Standard of Review and Applicable Law

An attorney's fee award may be challenged for the sufficiency of the evidence to support the award. *Id.* (citing *Stewart Title Guar. Co. v. Sterling*, 822 S.W.2d 1, 12 (Tex. 1991)). When considering a factual sufficiency challenge to a jury's verdict,

we must consider and weigh all the evidence, not just that evidence which supports the verdict. *Maritime Overseas*, 971 S.W.2d at 406–07. We may set aside the verdict "only if it is so contrary to the overwhelming weight of the evidence that the verdict is clearly wrong and unjust." *Id.* As we are not a factfinder, we may not pass upon the witnesses' credibility or substitute our judgment for that of the jury, even if the evidence would clearly support a different result. *Id.*

Factfinders should consider the following factors when determining the reasonableness of a fee: (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 & Co. v. Perry Equip. Corp.*, 945 S.W.2d 812, 818 (Tex. 1997). Attorney's fees must bear some reasonable relationship to the amount in controversy. *Bank of Tex. v. VR Elec., Inc.*, 276 S.W.3d 671, 684 (Tex. App.—Houston [1st Dist.] 2008, pet. denied). But the amount of

damages awarded is only one factor in determining the reasonableness of a fee award. *Id.* at 684–85.

B. Analysis

Here, on the subject of attorney's fees, Plummer presented the expert testimony of Sanford Dow, one of her attorneys and a partner at the law firm of Dow, Golub, Remels & Gilbreath, PLLC with over 25 years of experience in handling breach of contract and employment matters. Dow testified that he oversaw the representation, but that the majority of the work done on Plummer's case was performed by associates Stephanie Hamm, Moira Chapman, and Crystal Dang. Dow described the work that was done by these associates, which included drafting the petition, engaging in written discovery, conducting depositions, and preparing for trial. Dow also testified that these associates engaged in extensive motion practice, including filing and obtaining an order on a motion to compel, due to the defendant's failure to cooperate in the discovery process. Dow further testified that the associates filed additional motions after two of Jetall's representatives failed to appear at scheduled depositions. He testified that motions such as these increase costs and legal fees.

As to fees charged, Dow testified that his firm represented Plummer on a time-and-charge basis, meaning Plummer was billed for each hour of work performed, as well as for costs and out of pocket expenses incurred by the firm. Dow testified that

although he oversaw the work performed on this case, he did not charge Plummer any fees associated with his time. Dow testified that Hamm billed 71.65 hours at an hourly rate of $250 per hour; Dang billed 57.2 hours at an hourly rate of $250 per hour; and Chapman billed 122 hours at an hourly rate of $275 per hour, for a total of $65,762.50. The parties later stipulated that this amount should be reduced by $4,000, for a total of $61,662.50, to separate fees related to dismissed causes of action and defendants.[3] Dow explained that the associates' billing rates were reasonable considering their experience and consistent with similar rates charged in Harris County. He further testified that these fees were necessary to prepare Plummer's case for trial, especially considering the difficulties encountered during the discovery process. Accordingly, he opined that $61,662.50 was a reasonable and necessary fee for pursuing Plummer's claims in this case. Jetall did not offer evidence or testimony from a competing expert that the fees charged or time spent was unreasonable or unnecessary. The jury awarded the full $61,662.50 in attorney's fees.[4]

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[3] Jetall stipulated that the amount requested of the jury should be reduced by $4,000 but reserved its right to challenge the reasonableness and necessity of the attorney's fees incurred.

[4] The jury also awarded attorney's fees related to an appeal. Here, Jetall only challenges the excessiveness of the attorney's fees awarded for costs related to trial.

Jetall's only complaint in challenging the award as excessive is that it does not bear a reasonable relationship to the damages award. But the amount of damages awarded is but one factor to consider when assessing the reasonableness of an attorney's fees award, and a disproportionate relationship between the amount of damages and attorney's fees awarded does not alone render the attorney's fee award excessive. *See, e.g.*, *Nguyen v. Bui*, No. 01-14-00239-CV, 2015 WL 1825658, at *3–4 (Tex. App.—Houston [1st Dist.] Apr. 21, 2015, no pet.) (mem. op.) (upholding attorney's fee award of almost six times amount of actual damages after considering entire record, including testimony from plaintiff's counsel that case was made more difficult than necessary because defendant refused to produce documents requested in discovery, resulting in motions to compel and additional discovery requests); *Young v. Sanchez*, No. 04-10-00845-CV, 2011 WL 4828021, at *5–6 (Tex. App.—San Antonio Oct. 12, 2011, no pet.) (mem. op.) (holding attorney's fee award that was approximately ten times actual damages awarded was not excessive in light of prolonged nature of litigation and fact that counter-defendants' conduct and objections led to delay); *Padgett's Used Cars & Leasing, Inc. v. Preston*, No. 04-04-00579-CV, 2005 WL 2290249, at *5 (Tex. App.—San Antonio Sept. 21, 2005, no pet.) (mem. op.) (holding attorney's fee award that was approximately six times actual damages awarded was not excessive considering entire record).

Although Jetall contends that the amount of attorney's fees awarded is excessive, it presented no evidence that a rate of $250 or $275 per hour for a Harris County attorney is unreasonable or that the amount of time dedicated to the case was unreasonable or unnecessary. Given the amount of time invested in the case by Plummer's attorneys, Dow's testimony that the rates charged were reasonable rates for attorneys with the associates' experience, and that preparing for the case was made more difficult than usual because Jetall refused to produce documents requested through discovery and multiple witnesses failed to appear at scheduled depositions, we hold that the attorney's fees awarded are not excessive or unreasonable and we decline to order a remittitur. *See VR Elec.*, 276 S.W.3d at 685 (holding attorney's fees award was not excessive in light of evidence in record and because defendant failed to present any evidence that rate charged or amount of time dedicated to case was unreasonable); *see also Nguyen*, 2015 WL 1825658, at *4; *Young*, 2011 WL 4828021, at *5–6; *Padgett's Used Cars*, 2005 WL 2290249, at *5.

We overrule Jetall's fifth issue.

Conclusion

We affirm the trial court's judgment.

Sherry Radack
Chief Justice

Panel consists of Chief Justice Radack and Justices Goodman and Hightower.