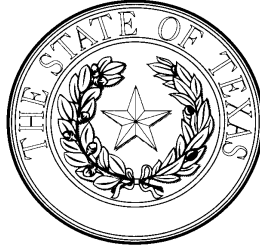


**Opinion issued August 4, 2020**



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

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**NO. 01-19-00247-CV**

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**DIMENSION HOMES, INC., Appellant  
V.  
LAWRENCE E. YOUNG AND JUDITH A. YOUNG, Appellees**

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**On Appeal from the 400th District Court  
Fort Bend County, Texas  
Trial Court Case No. 12-DCV-197202**

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**MEMORANDUM OPINION**

This is the second appeal in an ongoing dispute between a home builder, Dimension Homes, Inc., and homeowners, Lawrence E. Young and Judith A. Young. In five issues on this second appeal, Dimension argues that: (1) the trial court erred when it failed to award Dimension \$281,431.21 in attorney's fees through trial

because Dimension established the amount of reasonable and necessary attorney's fees as a matter of law; (2) the trial court erred when it failed to award Dimension \$45,000.00 in the event of a successful appeal by Dimension to this court, and \$65,000.00 in the event of an appeal to the Texas Supreme Court in which Dimension is successful, because Dimension established the amount of reasonable and necessary attorney's fees as a matter of law; (3) if the evidence does not conclusively establish Dimension's entitlement to fees in those amounts as a matter of law, the trial court's award is nonetheless against the great weight and preponderance of the evidence; (4) the trial court erred by allowing the Youngs' attorney to testify because his opinions were not disclosed during discovery and were not supported by any underlying data or analysis; and (5) the trial court erred by allowing the Youngs to cross-examine Dimension's attorney's fees expert and offer evidence on the issues of tender, the absence of a certificate of completion, and lien waivers.

We affirm the trial court's judgment.

### **Background**

In January 2007, the Youngs hired Dimension to build their new home. A dispute arose between the parties regarding certain extras and upgrades added by the Youngs after construction began and the total amount the Youngs owed to Dimension. In 2012, Dimension sued the Youngs for breach of contract, quantum

meruit, fraud, and negligent misrepresentation. The Youngs asserted counterclaims and affirmative defenses to Dimension's contract claim.

The case was tried to a jury over ten days in September and October 2013. As relevant here, Dimension argued at trial that the Youngs breached the contract by: (1) failing to pay \$266,920.22 for the extras and upgrades that were added to the contract after February 2008, and (2) failing to pay the \$103,317.71 retainage (five percent of the contract price of \$2,066,354.57). Dimension also argued that if the post-February 2008 items were not covered by the contract, then those costs were recoverable under quantum meruit. During its closing argument, Dimension asked the jury to find that the Youngs agreed to pay more than \$2,066,354.57, they failed to do so, the Youngs' failure to pay was not excused, and Dimension had incurred \$266,920.22 in damages as a result of the breach. Alternatively, Dimension asked the jury to award it \$266,920.22 on its quantum meruit claim, i.e., the value of the work Dimension performed for the Youngs in excess of the \$2,066,354.57 contract price.

The jury found against Dimension on its fraud and negligent misrepresentation claims, determined that the Youngs had not agreed to pay more than \$2,066,354.57 pursuant to the contract, and awarded Dimension \$146,000 on its quantum meruit claim. Based on the jury's findings, the trial court also entered judgment in favor of Dimension on its breach of contract claim and awarded it

\$103,317.71 (the total contract price of \$2,066,354.57 minus the amount of \$1,963,036.84 that the Youngs had already paid). The trial court also awarded Dimension \$260,417.70 in attorney’s fees, plus \$140,000 in contingent appellate fees. *Young v. Dimension Homes, Inc.*, No. 01-14-00331-CV, 2016 WL 4536407, at \*3 (Tex. App.—Houston [1st Dist.] Aug. 30, 2016, no pet.) (mem. op.). The Youngs appealed.

This court affirmed the breach of contract award and reversed the quantum meruit award. Because damages for quantum meruit may not be awarded where there is a contract, we held that Dimension could not recover attorney’s fees attributable to its quantum meruit claim. In addition, because Dimension had not segregated the fees attributable to its breach of contract claim from its quantum meruit claim, we remanded the issue of Dimension’s attorney’s fees on its breach of contract claim “for further consideration of the correct amount.” *Id.* at \*10.

On remand, the issue of Dimension’s attorney’s fees was tried to the bench. David Showalter, Dimension’s lead attorney in this case, testified regarding the amount of reasonable and necessary attorney’s fees related to the breach of contract claim. Showalter testified that he segregated the fees attributable to the breach of contract claim from Dimension’s quantum meruit and tort claims and then assessed the reasonableness of the fees by considering the factors set forth in *Arthur Andersen*

*& Co. v. Perry Equipment Corp.*, 945 S.W.2d 812, 818 (Tex. 1997) and Rule 1.04 of the Texas Disciplinary Rules of Professional Conduct.

Timesheets showing the specific work performed and the time spent on the task, as well as the identity and hourly rate of the timekeeper performing the work, were admitted into evidence, along with summary worksheets showing the segregation calculation. For purposes of his analysis, Showalter divided the legal work that was performed into four phases: the original trial on the merits, post-trial proceedings, the original appeal to this court, and the re-trial of attorney's fees. He then reviewed the time sheets, identified any tasks or work which related solely to the quantum meruit claim or the tort claims, and he deducted those fees from the total amount of fees incurred for each phase. He then estimated the percentage of the remaining fees which would have been necessary without the quantum meruit and tort claims.

According to Showalter, the amount of attorney's fees through the end of the trial on the merits was \$270,139.90 (855.17 hours). Showalter determined that 5% of that time was attributable to the tort claims (\$13,507.00) and 15% was attributable to the quantum meruit claim (\$40,520.99).<sup>1</sup> Attorney's fees for the post-trial proceedings phase was \$27,065.00 (80.90 hours). Showalter opined that he identified 3.8 hours (\$1,235.00) that were spent on the quantum meruit claim and

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<sup>1</sup> Showalter did not identify any time entries specific to these claims.

that 45% of the remaining 77.1 hours (\$11,623.50) was also attributable to that claim. None of the fees for that phase were attributable to the tort claims. After deducting the fees for the quantum meruit claim, Showalter opined that the amount of fees attributable to the breach of contract claim for this phase of the proceeding was \$14,206.50. Attorney's fees for appeal to this court were \$43,718.00 (133.96 hours). None of the fees for that phase were attributable to the tort claims. Showalter testified that he identified 9.95 hours (\$3,290.00) that were spent on the quantum meruit claim and that 45% of the remaining time was also attributable to that claim (\$16,171.20). After deducting the fees for the quantum meruit claim, Showalter opined that the amount of fees attributable to the breach of contract claim for this phase of the proceeding was \$24,256.80. Showalter and his firm spent 74.48 hours on remand for a total of \$26,856.00, all of which were attributable to the breach of contract claim. According to Showalter, the quantum meruit claim was not "a real focus of the litigation."

With respect to the reasonableness of these fees, Showalter identified the factors to be considered with respect to his issue as set forth in *Arthur Andersen* and Rule 1.04, and he applied those factors to this case. The records reflect that most of the work in this case was performed by attorney Jim Pennington, who billed between \$325 and \$375 an hour, and, to a lesser extent, Showalter, who billed between \$400 and \$500 an hour. Among other things, Showalter testified that the hourly rates

charged were reasonable in Fort Bend County, Texas, and in keeping with each lawyer's experience. According to Showalter, this was the first matter for which he and his law firm had been hired by Dimension and the rates charged were the same as for all new clients. Showalter also testified that the parties had engaged in extensive discovery that included the production of over 10,000 pages of documents and nearly a dozen depositions and had prepared for a lengthy trial that lasted 10 days. As a result, the lawyers who worked on this case were consistently busy, and their work in this matter precluded them from working on other matters. Showalter testified that his firm had taken the case on a contingency fee basis.

Showalter described the litigation as a "construction dispute matter" in which "there were a lot of moving parts," but he also acknowledged that the issues presented were more or less routine with respect to this type of litigation, such as, "Did you do the work, was it accepted, was it proper, you know, did it comply with the contract, what was the value." According to Showalter, the "issues related to whether, the full amount had been paid, interest and attorney's fees on those issues, the expenses that the contract provided were to be covered." He also testified that the Youngs had asserted several counterclaims and defenses to the breach of contract claim that had to be addressed.<sup>2</sup>

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<sup>2</sup> No jury issues were submitted on any of the counterclaims and there were no affirmative findings on these issues.

Showalter testified that the total contract price was a little over \$2 million and that Dimension was suing to recover \$266,920.22 of unpaid construction costs. The record reflects that Dimension was also seeking the \$103,317.71 retainage due under the contract that the Youngs had not paid. Thus, Dimension was seeking a minimum of \$370,237.93 under the contract. Showalter further testified that although Dimension ultimately did not recover all of the money it sought, it did recover almost \$200,000.00 by prevailing on its breach of contract claim (\$103,317.71 in contract damages plus approximately \$69,000.00 in contract interest and another \$20,000.00 in expenses recoverable under the contract).<sup>3</sup>

Showalter testified that, based upon his analysis and application of the *Arthur Andersen* factors, Dimension incurred \$281,431.21 in reasonable and necessary attorney's fees through the re-trial with respect to its breach of contract claim. Specifically, Showalter opined that Dimension incurred: (1) \$216,111.91 in attorney's fees for representation through the original trial; (2) \$14,206.50 in attorney's fees for representation in the post-trial proceedings; (3) \$24,256.80 in attorney's fees for representation in the appeal; and (4) \$26,856.00 in attorney's fees for re-trial of attorney's fees through judgment. Showalter also opined that the amount of reasonable and necessary contingent attorney's fees was: \$45,000.00 in

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<sup>3</sup> The Youngs contend that the amount recovered does not include the interest and expenses.



the event of an appeal to this court, \$10,000.00 for the petition review stage in the Texas Supreme Court, \$35,000.00 for the merits briefing stage in the Texas Supreme Court, and \$20,000.00 in the oral argument stage in the Texas Supreme Court.

Scott West, the Youngs' attorney, cross-examined Showalter at length regarding the reasonableness and necessity of the requested fees. Among other issues addressed in the more than sixty pages of testimony, Showalter was questioned about the method he used to segregate the fees for services related to the breach of contract claim from the fees for services related to the fraud, negligent misrepresentation, and quantum meruit claims, the reasonableness of his computations, whether a ten-day trial was still necessary after the other claims were excluded, and whether trial and appellate fees of approximately \$391,000 were reasonable given the amount recovered on the claim. Showalter also acknowledged that he had inadvertently included some duplicative charges in his analysis and that he had overestimated the amount of appellate fees during the original trial.

The trial court allowed West to offer expert rebuttal testimony on the issue of Dimension's attorney's fees. West testified that the only cause of action that Dimension prevailed on was its breach of contract claim for the \$103,317.73 retainage, and that the Youngs had offered to pay the \$103,317.73 before any attorneys became involved in the dispute. West opined that if Dimension's president, Jeff Dzuik, had accepted the offer of \$103,317.73 in 2008, which is the amount

Dimension was awarded in damages on its breach of contract claim, a reasonable amount of time for finalizing that deal would have been \$3,200—Dimension’s counsel’s current billing rate of \$375 multiplied by eight and a half hours. West testified that because there were no other causes of action pending at that time, there was no need to segregate fees. West further testified that this was a “simple breach of contract case,” and that if it had gone to trial, the trial would not have lasted more than two days and the entire matter could have been tried by one lawyer for \$20,000 in attorney’s fees.

The trial judge entered a final judgment awarding Dimension Homes \$65,104.42 in trial attorney’s fees, and \$21,859.00 in appellate attorney’s fees. Findings of fact and conclusions of law were requested but never entered by the trial court. This appeal followed.

### **Reasonable and Necessary Attorney’s Fees as a Matter of Law**

In its first and second issues, Dimension argues that the trial court erred by not awarding it \$281,431.21 in attorney’s fees through trial, and \$110,000.00 in conditional appellate attorney’s fees because Dimension established the amount of its reasonable and necessary attorney’s fees as a matter of law.

#### **A. Standard of Review and Applicable Law**

We review a trial court’s award of attorney’s fees for an abuse of discretion. *El Apple I, Ltd. v. Olivas*, 370 S.W.3d 757, 761 (Tex. 2012). A trial court abuses that

discretion if it acts arbitrarily, unreasonably, or without regard to guiding legal principles, or if its decision is not supported by legally or factually sufficient evidence. *See Bocquet v. Herring*, 972 S.W.2d 19, 21 (Tex. 1998); *see also Beaumont Bank, N.A. v. Buller*, 806 S.W.2d 223, 226 (Tex. 1991) (explaining that legal and factual sufficiency of evidence are relevant factors in determining whether trial court abused its discretion).

Non-exclusive factors to be considered in determining the amount of attorney's fees to be awarded include the following: (1) the time and labor required, novelty and difficulty of the questions presented, and the skill required; (2) the likelihood that acceptance of employment precluded other employment; (3) the fee customarily charged for similar services; (4) the amount involved and the results obtained; (5) the time limitations imposed by the client or the circumstances; (6) the nature and length of the professional relationship with the client; (7) the expertise, reputation, and ability of the lawyer performing the services; and (8) whether the fee is fixed or contingent. *Arthur Andersen*, 945 S.W.2d at 818. "Trial judges can [also] draw on their common knowledge and experience as lawyers and as judges in considering the testimony, the record, and the amount in controversy in determining attorney's fees." *McMahon v. Zimmerman*, 433 S.W.3d 680, 693 (Tex. App.—Houston [1st Dist.] 2014, no pet.) (quoting *Protect Env'tl. Servs. v. Norco Corp.*, 403 S.W.3d 532, 543 (Tex. App.—El Paso 2013, pet. denied)).

Ordinarily, the testimony of an interested witness, even when uncontradicted, merely raises an issue of fact, leaving the amount of the fees that should be awarded up to the factfinder, and a reviewing court may not substitute its judgment for the factfinder. *See Smith v. Patrick W.Y. Tam Tr.*, 296 S.W.3d 545, 547 (Tex. 2009) (citing *Ragsdale v. Progressive Voters League*, 801 S.W.2d 880, 882 (Tex. 1990)); *see also Bocquet*, 972 S.W.2d at 21 (noting that reasonableness and necessity of attorney’s fees are questions of fact for factfinder’s determination). If, however, the testimony of an interested witness “is not contradicted by any other witness, or attendant circumstances, and the same is clear, direct and positive, and free from contradiction, inaccuracies, and circumstances tending to cast suspicion thereon,” the testimony “is taken as true, as a matter of law.” *Ragsdale*, 801 S.W.2d at 882.

**B. Attorney’s Fees for Incurred through the Bench Trial**

Dimension argues that Showalter’s testimony with respect to the amount of reasonable and necessary attorney’s fees from the beginning of the case until the end of the bench trial was uncontroverted because the Youngs did not offer any admissible evidence on this issue. Contradictory evidence, however, is not required; the testimony of an interested witness can also be contradicted by attendant circumstances. *Id.*; *see also Russell v. Russell*, 478 S.W.3d 36, 50 (Tex. App.—Houston [14th Dist.] 2015, no pet.) (holding party did not prove reasonableness of fees as matter of law because, although opposing party did not present evidence, it

cross-examined requesting party's expert about reasonableness of fees requested); *Miller v. Miller*, No. 05-01-01844-CV, 2002 WL 31410965, at \*6 (Tex. App.—Dallas Oct. 28, 2002, pet. denied) (not designated for publication) (holding that party did not prove fees as matter of law because, although opposing party did not present evidence, it cross-examined requesting party).

During its closing arguments in the trial on the merits, Dimension argued that it was entitled to recover \$207,520.50 on its fraud claim and “between 250,000 and \$400,000” on its claim for negligent misrepresentation. Despite the fact that these claims accounted for most of the damages Dimension sought at trial (over \$600,000), Showalter opined on remand that the total amount of fees attributable to the fraud and negligent misrepresentation claims was \$13,507, which is only 5% of the \$270,139.90 in fees accrued through the end of the original ten-day jury trial. The disparity between the value of the tort claims, for which attorney's fees are not recoverable, and the minimal time allegedly spent on these claims is an attendant circumstance that tends to contradict Showalter's testimony that 80% of the fees that accrued through the end of the first trial were for its breach of contract, for which it sought a smaller recovery. *See Ragsdale*, 801 S.W.2d at 882. Showalter's testimony also raises a fact issue with respect to the reasonableness and necessity of the amount of attorney's fees because it indicates that there are some inaccuracies in the

attorney's fees calculations, namely the four duplicate time entries, and cast into doubt the accuracy of the supporting documentation. *See id.*

Attorney's fees should bear some reasonable relationship to the amount awarded, but "there is no rule that fees cannot be more than the actual damages awarded." *Metroplex Mailing Servs., LLC v. RR Donnelley & Sons Co.*, 410 S.W.3d 889, 900 (Tex. App.—Dallas 2013, no pet.), *abrogated on other grounds by Rohrmoos Venture v. UTSW DVA Healthcare, LLP*, 578 S.W.3d 469, 496 (Tex. 2019). Although the disparity between the amount of attorney's fees requested and the actual damages awarded is not dispositive on this issue, such factors can nevertheless amount to an attendant circumstance that casts suspicion on the testimony of an interested witness. *See Inwood N. Homeowners' Ass'n, Inc. v. Wilkes*, 813 S.W.2d 156, 158 (Tex. App.—Houston [14th Dist.] 1991, no writ) ("At the very least the amount in controversy in the present case, \$649.44, is an attendant circumstance tending to cast suspicion on the uncontradicted evidence regarding the [\$1,486.45] in attorney's fee."). Here, Dimension's counsel requested \$281,431.21 in trial attorney's fees, even though Dimension only recovered \$103,317.71 in contract damages (or approximately \$200,000, if we consider the amount of interest and expenses that Dimension was awarded pursuant to the contract).

Considering this evidence and attendant circumstances, we conclude that Dimension's trial attorney's fees evidence was not "clear, direct, and positive, as

well as free from contradiction” and did not establish the reasonableness of Dimension’s requested attorney’s fees as a matter of law. *See Smith*, 296 S.W.3d at 548; *see also Ragsdale*, 801 S.W.2d at 882. We overrule Dimension’s first issue.

### **C. Appellate Attorney’s Fees**

The record reflects that Showalter overestimated the amount of reasonable and necessary appellate attorney’s fees during the first trial. Specifically, Showalter opined that the amount of attorney’s fees for appeal to this Court from the trial court’s judgment was \$70,000. The actual amount of fees incurred on appeal, however, was closer to \$43,000. On remand, Showalter opined that an appeal to this Court from a judgment rendered after a two-day bench trial on the sole issue of attorney’s fees was \$45,000.

Showalter’s overestimation of appellate attorney’s fees in the first trial and the fact that he opined on remand that an appeal from a two-day bench trial on a single issue (\$45,000) was roughly the same as the amount incurred in a prior appeal from a ten-day jury trial on the merits and involving multiple causes of action and requests for attorney’s fees (\$43,000) are circumstances tending to cast suspicion on the reasonableness of the appellate fees requested. *See generally Ragsdale*, 801 S.W.2d at 882.

Therefore, we conclude that Dimension’s appellate attorney’s fees evidence was not “clear, direct, and positive, as well as free from contradiction” and did not

establish the reasonableness of Dimension’s requested attorney’s fees as a matter of law. *See Smith*, 296 S.W.3d at 548; *see also Ragsdale*, 801 S.W.2d at 882.

We overrule Dimension’s second issue.

### **Factual Sufficiency of Attorney’s Fee Awards**

In its third issue, Dimension argues that, even if Showalter’s testimony did not establish the reasonableness of the requested attorney’s fees as a matter of law, the trial court’s awards of \$65,104.42 in fees through the end of the bench trial and \$21,859.00 in conditional appellate fees must nevertheless be reversed because the awards are supported by factually insufficient evidence.

We review a trial court’s award of attorney’s fees for an abuse of discretion. *El Apple I, Ltd.*, 370 S.W.3d at 761; *Kubbernus v. ECAL Partners, Ltd.*, 574 S.W.3d 444, 486 (Tex. App.—Houston [1st Dist.] 2018, pet. denied). Evidentiary sufficiency issues are not independent grounds to reverse a trial court’s award of attorney’s fees but are relevant factors in assessing whether the trial court abused its discretion. *Beaumont Bank, N.A.*, 806 S.W.2d at 226; *Kubbernus*, 574 S.W.3d at 486.

As the party requesting fees, Dimension bears the burden of establishing that the fees are reasonable and necessary. *In re Nat’l Lloyds Ins. Co.*, 532 S.W.3d 794, 809 (Tex. 2017) (orig. proceeding); *see also Bocquet*, 972 S.W.2d at 21.<sup>4</sup> When a

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<sup>4</sup> A prevailing party on a breach of contract claim may recover reasonable attorney’s fees. *See* TEX. CIV. PRAC. & REM. CODE § 38.001(8). We previously held that “[b]ecause Dimension pleaded for attorney’s fees based on Chapter 38, prevailed



party attacks the factual sufficiency of an adverse finding on an issue on which he has the burden of proof, he must demonstrate on appeal that the adverse finding is against the great weight and preponderance of the evidence. *Dow Chem. Co. v. Francis*, 46 S.W.3d 237, 242 (Tex. 2001). When conducting a factual sufficiency challenge, we must consider and weigh all of the evidence; we will set aside a verdict only if the evidence is so weak or if the finding is so against the great weight and preponderance of the evidence that it is clearly wrong and unjust. *See Pool v. Ford Motor Co.*, 715 S.W.2d 629, 635 (Tex. 1986).

As previously discussed, the reasonableness of attorney’s fees is ordinarily left to the factfinder and we cannot substitute our judgment for the factfinder’s. *Smith*, 296 S.W.3d at 547. In a bench trial, the trial court, as factfinder, is the sole judge of the credibility of the witnesses. *Townsend v. Vasquez*, 569 S.W.3d 796, 808 (Tex. App.—Houston [1st Dist.] 2018, pet. denied). As long as the evidence falls “within the zone of reasonable disagreement,” we will not substitute our judgment for that of the factfinder. *See City of Keller v. Wilson*, 168 S.W.3d 802, 822 (Tex. 2005).

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on its breach of contract claim for the retainage, and recovered damages for that claim, Dimension is entitled to recover some amount of attorney’s fees under Chapter 38.” *Young v. Dimension Homes, Inc.*, No. 01-14-00331-CV, 2016 WL 4536407, at \*9 (Tex. App.—Houston [1st Dist.] Aug. 30, 2016, no pet.) (mem. op.) (citing *Intercontinental Grp. P’ship v. KB Home Lone Star L.P.*, 295 S.W.3d 650, 653 (Tex. 2009) and *Bocquet v. Herring*, 972 S.W.2d 19, 20 (Tex. 1998)).

As previously discussed, there is some evidence and attendant circumstances reflected in the record that either contradicts Showalter's testimony or casts doubt on the reasonableness of the requested fees at trial and on appeal. Specifically, Showalter acknowledged there were some duplicative charges in the billing records submitted on remand, and his estimates regarding the amount of fees attributable to the tort claims is also suspect given the disparity between the damages sought for such claims (over \$600,000) and the minimal amount of work Showalter attributed to these claims. The disparity between the amount recovered on the breach of contract claim and the amount of attorney's fees requested is also an attendant circumstance that contradicts Showalter's testimony. *See E & A Utils., Inc. v. Joe*, No. 14-08-00890-CV, 2010 WL 2901711, at \*4-5 (Tex. App.—Houston [14th Dist.] July 27, 2010, no pet.) (mem. op.) (holding evidence factually sufficient to support award of \$2,000 in attorney's fees because facts and circumstances weighed against awarding requested amount of \$11,400, including fact that amount requested was more than double amount of damage award).

Furthermore, Showalter described this breach of contract case as a "construction dispute matter" in which "there were a lot of moving parts," including affirmative defenses and counterclaims, but he also acknowledged that the issues presented were "more or less routine" with respect to this type of litigation, e.g.,

whether the work complied with the contract, the value of the work performed, the amount paid, and the scope of the work covered by the contract.

The trial judge could have reasonably concluded, based on her knowledge and experience as a lawyer and judge, that a contract dispute of this type involving routine issues such as the ones testified to by Showalter, would not have necessitated a ten-day trial, staffed by two highly experienced trial attorneys, each billing in excess of \$300 per hour. *See McMahon*, 433 S.W.3d at 693 (stating judges can draw on their “common knowledge and experience as lawyers and as judges” in considering amount of attorney’s fees).

Accordingly, we hold that the trial court’s award of \$65,104.42 in attorney’s fees for trial preparation is not so against the great weight of the evidence as to be clearly wrong and unjust.

We next consider whether the trial court’s award of \$21,859.00 in conditional appellate attorney’s fees is against the great weight and preponderance of the evidence. As previously discussed, Showalter testified that the amount of reasonable and necessary conditional appellate attorney’s fees was \$110,000 (\$45,000.00 in the event of an appeal to this court, \$10,000.00 for the petition review stage in the Texas Supreme Court, \$35,000.00 for the merits briefing stage in the Texas Supreme Court, and \$20,000.00 in the oral argument stage in the Texas Supreme Court). There are circumstances under which the trial court could have questioned the reasonableness

of these fees, namely, Showalter's significant overestimation of the amount of appellate attorney's fees for the first appeal to this court and his testimony that the amount of reasonable and necessary attorney's fees for an appeal of this straightforward bench trial on a single issue (\$45,000) is roughly the same amount as that actually accrued in a previous appeal of a lengthy, multi-claim jury trial on the merits (\$43,718.00). The trial judge could have reasonably concluded, based on her knowledge and experience as a lawyer and judge, that an appeal from a bench trial on attorney's fees should not require nearly as much work as the previous appeal from the trial on the merits. *See McMahon*, 433 S.W.3d at 693. We further note that the \$110,000 requested for all three appellate stages was almost equal to the amount of breach of contract damages.

Based on our review of the record, we cannot conclude that the trial court's award of \$110,000 in appellate attorney's fees was so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. *See Dow Chem. Co.*, 46 S.W.3d at 242; *Pool*, 715 S.W.2d at 635.

We overrule Dimension's third issue.

### **Evidentiary Challenges**

In its fourth and fifth issues, Dimension argues that the trial court erred by: (1) allowing West to testify regarding the amount of reasonable and necessary attorney's fees attributable to Dimension's breach of contract claim because West's

opinions were not disclosed during discovery and were not supported by any underlying data or analysis and (2) allowing West to cross-examine Showalter and offer evidence with respect to whether the Youngs offered to pay or tendered the retainage, the absence of an affidavit of completion, and lien waivers because those issues had been resolved against the Youngs in the prior trial on the merits.

We review whether a trial court erred in making an evidentiary ruling for an abuse of discretion. *Bay Area Healthcare Grp., Ltd. v. McShane*, 239 S.W.3d 231, 234 (Tex. 2007). We will not reverse an erroneous evidentiary ruling, however, unless the error probably caused the rendition of an improper judgment or prevented a proper presentation of the appeal. *See* TEX. R. APP. P. 44.1(a).

Even if the court abused its discretion by allowing West to testify about the amount of reasonable and necessary attorney's fees in this case or to cross-examine Showalter about whether the Youngs tendered or offered to pay the retainage<sup>5</sup> in the absence of an affidavit of completion and lien waivers, we cannot say that such errors probably caused the rendition of an improper judgment because, as previously discussed, the trial court had sufficient evidence on which to base its attorney's fees awards in the absence of the challenged evidence. *See Horizon/CMS Healthcare*

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<sup>5</sup> We note that evidence and testimony regarding these issues was already before the trial court. *See Young*, 2016 WL 4536407, at \*8 (discussing correspondence between Youngs and Dimension in 2008 and 2009 in which Youngs offered to pay \$103,317.71 retainage if Dimension provided Youngs with final-bills-paid affidavit and lien waivers).

*Corp. v. Auld*, 34 S.W.3d 887, 907 (Tex. 2000) (stating that even if trial court erred by admitting survey reports, error did not probably cause rendition of improper judgment, in part, because “[t]he jury had sufficient evidence on which to base its verdict even disregarding the survey reports.”).<sup>6</sup>

We overrule Dimension’s fourth and fifth issues.

### **Conclusion**

We affirm the trial court’s judgment.

Russell Lloyd  
Justice

Panel consists of Justices Keyes, Lloyd, and Hightower.

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<sup>6</sup> We did not rely upon the challenged evidence when considering Dimension’s third issue challenging the factual sufficiency of the evidence supporting the fee awards.