Opinion issued July 28, 2022

In The

Court of Appeals

For The

First District of Texas

NO. 01-20-00715-CV

THE STATE OF TEXAS, Appellant

V.

SIGNAD LTD., F/K/A SIGNAD, INC., Appellee

On Appeal from the County Court at Law
Austin County, Texas
Trial Court Case No. 18CV-5774

O P I N I O N

This appeal arises out of a condemnation suit filed by the State with respect to a highway billboard owned by SignAd Ltd. After the State dismissed its own suit, the trial court awarded attorney's fees and expenses to SignAd. On appeal, the State contends that SignAd is not entitled to an award of attorney's fees and expenses on

several independent grounds. Because we agree with the State in part, we reverse the trial court's judgment and render a judgment that SignAd take nothing.

BACKGROUND

The trial court filed findings of fact about this case's background and the parties' disputes. Neither side has challenged any of these findings. When, as here, the trial court files findings of fact and they are unchallenged on appeal, those factual findings are binding on us, provided they are supported by some evidence. *Tenaska Energy v. Ponderosa Pine Energy*, 437 S.W.3d 518, 526 (Tex. 2014); *see also McGalliard v. Kuhlmann*, 722 S.W.2d 694, 696 (Tex. 1986) (unchallenged findings of fact are entitled to same weight as jury verdict and therefore bind appellate court unless contrary is established as matter of law or no evidence supports finding).

Trial Court's Findings

SignAd owns a billboard that sits on land it leases from a third party adjacent to an IH-10 overpass bridge, which the State planned to expand. As part of this planned bridge expansion, in September 2017, the State sent a notice of taking to SignAd about the billboard. *See* TEX. PROP. CODE § 21.0113(a) (requiring entity that has eminent domain authority to make bona fide offer to buy property).

After receiving the State's notice, SignAd determined that the State's planned bridge expansion would bisect the billboard by two feet at most. Rather than accept the State's offer of around $106,000 in compensation for the taking, in March 2018,

SignAd applied for an amended permit to move the billboard out of the way of the State's planned bridge expansion.

In May 2018, the Texas Department of Transportation denied SignAd's application to move the billboard. SignAd appealed, but the Department affirmed the denial of SignAd's application in July 2018.

Nonetheless, around August 2018, SignAd moved the billboard so that it was no longer within the area of the State's planned bridge expansion. After SignAd had moved the billboard, it was located at least five feet outside of the area required by the State for its planned bridge expansion.

In October 2018, the State filed suit to condemn the billboard. *See id.* § 21.012 (authorizing entity with eminent domain authority to initiate condemnation suit if unable to agree with property owner as to damages).

Two months later, in December 2018, the appointed special commissioners held a hearing to decide what amount would adequately compensate SignAd for the taking of its billboard. *See id.* § 21.014(a) (providing for trial court to appoint special commissioners to assess amount of damages that property owner will suffer from condemnation); *id.* at § 21.015(a) (providing for prompt hearing before special commissioners). At the time of the hearing, the State was unaware that SignAd had moved its billboard. Or, at the very least, the transcript of the December hearing does

not show that the State's counsel, engineer, or appraiser knew that SignAd had moved its billboard.

The special commissioners decided the fair market value of the billboard was $118,000. SignAd objected to their decision. *See id.* § 21.018 (providing that party may object to findings made by special commissioners and requiring trial court to then try case like any other civil suit); *see also PR Invs. & Specialty Retailers v. State*, 251 S.W.3d 472, 476 (Tex. 2008) (hearings before special commissioners generally not recorded and condemnation suit is tried de novo by trial court when party objects to commissioners' findings).

In January 2019, SignAd applied for a temporary injunction to bar the State from removing the billboard before the State's suit was tried. The trial court heard the injunction application in mid-February 2019.

During the temporary injunction hearing, SignAd disclosed that it had moved its billboard. SignAd's surveyor testified that the billboard was at least five feet outside the State's proposed right of way. The State's counsel agreed that if the billboard was not within the proposed right of way, the State did not have the authority to condemn the billboard.

After the hearing, the trial court, with the State's agreement, enjoined the State from removing the billboard. The State also agreed to commission a survey to

confirm the billboard's new location. The State never took possession of or removed SignAd's billboard.

Trial was set for April 2020. Before then, in December 2019, the State dismissed its condemnation suit with prejudice. *See* PROP. § 21.0195(a)–(b) (authorizing Texas Department of Transportation, the state entity at issue here, to seek dismissal of condemnation suit with leave of court).

Trial Court's Award of Fees and Expenses

The trial court later held a bench trial to decide whether SignAd was entitled to attorney's fees and expenses due to the State's voluntary dismissal. *See id.* § 21.0195(c) (providing for award of expenses and fees upon dismissal). The trial court awarded SignAd $48,304.06 in expenses, which consisted of various expenses associated with SignAd's relocation of the billboard out of the State's proposed right of way, as well as $171,509.57 in reasonable and necessary attorney's fees.

DISCUSSION

The State appeals from the award of fees and expenses on multiple grounds. First, the State contends its sovereign immunity is waived solely to the extent stated in Section 21.0195(c) of the Property Code, which allows a *property owner* to recover fees and expenses after the voluntary dismissal of a condemnation suit. Because SignAd's billboard was not inside the State's planned bridge expansion area

when the State filed its condemnation suit, the State maintains that SignAd does not qualify as a *property owner* and cannot recover under Section 21.0195(c).

Moreover, even if SignAd does qualify as a *property owner* under the statute, the State contends that SignAd cannot recover its fees or expenses. With respect to SignAd's fees, the State maintains they are not reasonable or necessary because SignAd moved its billboard without informing the State that this had been done before the State filed its condemnation suit. Had SignAd informed the State that the billboard was no longer within the planned bridge expansion area, the State would not have filed suit to condemn the billboard. Thus, SignAd caused its own fees.

Similarly, the State contends that SignAd cannot recover expenses under the statute because SignAd incurred these expenses in moving the billboard. Because SignAd moved the billboard before the State filed its condemnation suit, the State maintains that the expenses were not caused by its suit and cannot be recovered.

I. Property Owner Status

A. Standard of review

The proper interpretation of a statute is a question of law, which we review de novo. *Broadway Nat'l Bank v. Yates Energy Corp.*, 631 S.W.3d 16, 23 (Tex. 2021). When we review a question of law de novo, we give the trial court's ruling no deference. *McFadin v. Broadway Coffehouse*, 539 S.W.3d 278, 282 (Tex. 2018).

B. Applicable law

In interpreting a statute, our goal is to give effect to the Legislature's intent, which we discern first and foremost from the statute's plain language. *Odyssey 2020 Academy v. Galveston Cent. Appraisal Dist.*, 624 S.W.3d 535, 540 (Tex. 2021). If the statute's words are undefined, we give them their ordinary meaning, unless a contrary meaning is apparent from the statute's language. *Tex. State Bd. of Examiners of Marriage & Fam. Therapists v. Tex. Med. Ass'n*, 511 S.W.3d 28, 34 (Tex. 2017). In determining the ordinary meaning of undefined words, we usually look first to their dictionary definitions and then turn to other sources of meaning, like their usage in other statutes, court decisions, and similar authorities, as necessary. *Id.* at 35. We must give effect to all the statute's words so none are rendered meaningless. *Odyssey 2020 Academy*, 624 S.W.3d at 540. But we also cannot add words to the statute that the Legislature omitted. *Broadway Nat'l Bank*, 631 S.W.3d at 24. Context matters; so, we consider the statute as a whole, rather than interpreting its provisions in isolation. *Id.* at 23. Unless a statute is ambiguous or its plain meaning yields an absurd result, we do not consider extrinsic evidence of meaning. *Sunstate Equip. Co. v. Hegar*, 601 S.W.3d 685, 690 (Tex. 2020).

C. Analysis

Both sides agree that if SignAd is to recover attorney's fees or expenses in this suit, it must do so under Section 21.0195(c) of the Property Code. It provides:

> If a court dismisses a condemnation proceeding on the motion of the department or as a result of the failure of the department to bring the proceeding properly, the court shall make an allowance to the property owner for the value of the department's use of the property while in possession of the property, any damage that the condemnation has caused to the property owner, and any expenses the property owner has incurred in connection with the condemnation, including reasonable and necessary fees for attorneys.

PROP. § 21.0195(c). Both sides also agree that solely expenses, including attorney's fees, are at issue in this appeal, as the trial court did not award any sums relating to the value of the State's use of the property or for damage caused by condemnation.

Chapter 21 of the Property Code does not define *property*, *owner*, or *property owner*. *See In re State*, 629 S.W.3d 462, 468 (Tex. App.—Austin 2020, orig. proceeding) (stating that Chapter 21, which governs eminent domain, does not define term "property owner"). We therefore look to how these terms are used in the context of Chapter 21 as a whole to ascertain their meaning. *See id.* at 468–69.

It is apparent from the Code's eminent domain provisions that *property* is confined to real property. *See, e.g.*, PROP. §§ 21.0111(a), 21.0112(a), 21.0113(a), 21.012(a) (referring to acquisition of "real property" through eminent domain); *see also In re State*, 629 S.W.3d at 468–69 (Chapter 21 concerns real property). Billboards may be fixtures and thus qualify as real property subject to the Code's eminent domain provisions. *See State v. Clear Channel Outdoor*, 463 S.W.3d 488, 495–96 (Tex. 2015) (stating legal standard for deciding whether billboard is fixture

and holding that billboard was fixture). Here, neither the State nor SignAd dispute that the billboard at issue is a fixture and thus property under Section 21.0195(c).

In addition, neither side disputes that this fixture—the billboard—belongs to SignAd. Ordinarily, this would be sufficient to make SignAd a property owner under the Code. *See State v. Clear Channel Outdoor*, 274 S.W.3d 162, 164–66 (Tex. App.—Houston [1st Dist.] 2008, no pet.) (billboard owner not compensated by State when it condemned land on which owner had erected billboard under lease was entitled to bring inverse condemnation action in its capacity as property owner); *see also Houston N. Shore Ry. Co. v. Tyrell*, 98 S.W.2d 786, 793 (Tex. [Comm'n Op.] 1936) ("owner," as term was used in prior version of condemnation statute, included any person with interest in property that would be affected by condemnation).

Nevertheless, the State argues that SignAd still does not qualify as a *property owner* for purposes of Section 21.0195(c) because SignAd's billboard—having already been moved by SignAd without the State's knowledge or permission beforehand—was not within the State's proposed right of way when the State filed its condemnation suit. In support of this position, the State relies on *State v. Hidalgo County Irrigation District No. 16*, No. 13-18-00214-CV, 2019 WL 2384154 (Tex. App.—Corpus Christi June 6, 2019, pet. denied) (mem. op.). According to the State, *Hidalgo County Irrigation* stands for the proposition that an entity that does not own property subject to condemnation cannot recover fees under Section 21.0195(c).

In *Hidalgo County Irrigation*, the State sued several landowners, including the irrigation district, to condemn 35 acres near a highway. *Id.* at *1. In the trial court, it eventually came to light that the district did not own any part of the condemned land. *Id.* The State apparently had believed otherwise based on a mistaken title commitment. *Id.* at *1–2. After learning of this mistake, the State filed an amended petition removing the district as a party, and the district then moved to recover its attorney's fees under the Property Code. *Id.* at *2. The trial court awarded the district attorney's fees, and the court of appeals reversed. *Id.* at *1, *4. The court of appeals held that the district's concession that it did not own the property at issue was dispositive because Section 21.0195(c) and a related provision only allow entities with an interest in the condemned property to recover fees. *Id.* at *4. Thus, the State retained its sovereign immunity as to the district's monetary claims. *Id.*

As a matter of statutory interpretation, the result in *Hidalgo County Irrigation* makes sense: a party who lacks an interest in the condemned property does not qualify as a property owner. *See Houston N. Shore Ry. Co.*, 98 S.W.2d at 793 (party who has interest in property that will be affected by condemnation qualifies as owner). Assuming *Hidalgo County Irrigation* was correctly decided, however, it materially differs from the case before us. There, the district lacked an ownership interest in the land the State sought to condemn in its lawsuit. Here, in contrast, SignAd unquestionably is the owner of the property the State sought to condemn.

That SignAd had moved the billboard out of the State's proposed right of way before the State filed suit does not negate SignAd's ownership of the property at issue.

Without acknowledging that it is doing so, the State asks us to interpret the words *property* or *owner* to apply solely when property actually lies within the State's proposed right of way at the time the State files suit. Under the State's interpretation of Section 21.0195(c), if the State is mistaken as to whether the property it seeks to condemn actually lies within the State's proposed right of way, the owner of the property at issue cannot qualify as a *property owner* for purposes of eminent domain. But Section 21.0195(c) does not contain language qualifying *property*, *owner*, or *property owner* in this fashion, and we cannot add qualifications to the statute that it lacks. *Broadway Nat'l Bank*, 631 S.W.3d at 24.

A court can recognize that a statute implicitly conveys a meaning that its explicit words do not express when extraordinary circumstances show the Legislature unmistakably intended this meaning. *See Fitzgerald v. Advanced Spine Fixation Sys.*, 996 S.W.2d 864, 867 (Tex. 1999) (judicial amendment of statute to provide something that statute does not explicitly state is inappropriate absent "extraordinary circumstances showing unmistakable legislative intent"). But the State has not identified extraordinary circumstances showing the Legislature unmistakably intended the interpretation the State advances, and we discern none.

On the contrary, our Supreme Court has recognized that the purpose of a similar expense-shifting provision in the Property Code—Section 21.019(b)—is to protect property owners from the burden of attorney's fees and expenses associated with abandoned condemnation lawsuits. *FKM P'Ship v. Bd. of Regents of Univ. of Houston Sys.*, 255 S.W.3d 619, 634 (Tex. 2008); *see also Brazos Cty. Water Control & Improvement Dist. No. 1 v. Salvaggio*, 698 S.W.2d 173, 176 (Tex. App.—Houston [1st Dist.] 1985, writ ref'd n.r.e.) (recognizing that Legislature enacted predecessor statute to make condemnors act more responsibly and fairly to property owners by awarding fees and expenses in some cases). The statutory provision before us—Section 21.0195(c)—shares the same purpose. *See State v. Brown*, 262 S.W.3d 365, 368 (Tex. 2008) (noting that Section 21.0195(c) does same thing as Section 21.019(b) in condemnation suits brought by Texas Department of Transportation). Thus, the State's interpretation, which would categorically disallow property owners from recovering attorney's fees and expenses when the State abandons a condemnation suit after discovering the suit is meritless because the property at issue is not within the State's proposed right of way, is at odds with Section 21.0195(c)'s purpose.

We therefore reject the State's contention that SignAd does not qualify as a *property owner* under Section 21.0195(c) of the Property Code. We turn next to the State's alternative contentions about SignAd's disentitlement to fees and expenses.

II. Reasonable and Necessary Attorney's Fees

A. Standard of review

Whether the trial court has the authority to award attorney's fees to a party under a given statute is a question of law, which we review de novo. *Holland v. Wal-Mart Stores*, 1 S.W.3d 91, 94 (Tex. 1999); *WWW.URBAN.INC. v. Drummond*, 508 S.W.3d 657, 665 n.3 (Tex. App.—Houston [1st Dist.] 2016, no pet.). But when the trial court has the statutory authority to award fees, we review its decision as to what amount of fees is reasonable and necessary under the circumstances for an abuse of discretion. *See Bocquet v. Herring*, 972 S.W.2d 19, 21 (Tex. 1998); *Keith v. Keith*, 221 S.W.3d 156, 169 (Tex. App.—Houston [1st Dist.] 2006, no pet.). Evidentiary insufficiency is not an independent ground of error but is relevant in assessing whether a trial court abused its discretion. *Kubbernus v. ECAL Partners*, 574 S.W.3d 444, 486 (Tex. App.—Houston [1st Dist.] 2018, pet. denied). A trial court abuses its discretion when its decision is contrary to the only permissible view of the admissible evidence. *Unifund CCR Partners v. Villa*, 299 S.W.3d 92, 97 (Tex. 2009) (per curiam). When reasonable people could not differ in their conclusions based on the evidence, the evidence is conclusive and is therefore susceptible to only one permissible view. *Aerotek, Inc. v. Boyd*, 624 S.W.3d 199, 204 (Tex. 2021).

B. Applicable law

Section 21.0195(c) states a trial court "shall" award "reasonable and necessary fees for attorneys" when the State dismisses a condemnation suit. PROP. § 21.0195(c). Thus, when a party incurs reasonable and necessary fees in a condemnation suit dismissed by the State, the trial court must award these fees if they are properly requested and proved. *Eller Media Co. v. State*, 51 S.W.3d 783, 786 (Tex. App.—Fort Worth 2001, no pet.) (applying Section 21.0195(c)); *State v. Gracia*, 56 S.W.3d 196, 202 & n.4 (Tex. App.—Fort Worth 2001, no pet.) (same).

In general, the reasonableness and necessity of attorney's fees are fact questions for the factfinder to resolve. *See Bocquet*, 972 S.W.2d at 21 (holding so as to Declaratory Judgments Act, which allows trial court to award reasonable and necessary attorney's fees). But there are legal principles that guide the award of fees that the trial court must observe when it does so. *See id.* (indicating that *Arthur Andersen* factors guide attorney's fee awards and stating that trial court abuses its discretion if it rules without reference to guiding legal principles). In addition, in some instances, fees may be unreasonable or unnecessary as a matter of law. *Univ. Gen. Hosp. v. Siemens Med. Sols. USA*, No. 01-14-00678-CV, 2017 WL 1881160, at *5 (Tex. App.—Houston [1st Dist.] May 9, 2017, no pet.) (mem. op.); *see also Tony Gullo Motors I v. Chapa*, 212 S.W.3d 299, 314 (Tex. 2006) (observing that there are some disputes about fees that courts should decide as matter of law).

A party seeking attorney's fees must prove the requested fees are both reasonable *and* necessary. *Rohrmoos Venture v. UTSW DVA Healthcare*, 578 S.W.3d 469, 489 (Tex. 2019). With respect to fees, we have held they are "necessary" when they are "essential or needed for some purpose." *Univ. Gen. Hosp.*, 2017 WL 1881160, at *6. Fees incurred in an unsuccessful suit are unnecessary as a matter of law because they are "neither essential nor needed for some purpose." *Id.*; *see, e.g.*, *Alpert v. Riley*, 274 S.W.3d 277, 295–96 (Tex. App.—Houston [1st Dist.] 2008, pet. denied) (fees associated with claims trustee was statutorily unauthorized to assert were unreasonable and unnecessary as matter of law); *cf. Tony Gullo Motors*, 212 S.W.3d at 314 (fees incurred defeating affirmative defenses are necessary as matter of law because claimant must do so to prevail).

C. Analysis

The trial court found that before the State filed its condemnation suit, SignAd applied to the Texas Department of Transportation for permission to move the billboard. The Department denied SignAd permission to do so in May 2018. SignAd then appealed, and the Department affirmed the denial in July 2018. When the Department affirmed the denial, the denial became final without the possibility of further review, including judicial review. *KEM Tex. v. Tex. Dep't of Transp.*, No. 03-08-00468-CV, 2009 WL 1811102, at *5 (Tex. App.—Austin June 26, 2009, no

pet.) (mem. op.) (Legislature did not create right to judicial review of final decision of Texas Department of Transportation denying outdoor advertising permits).

The trial court further found that, despite the Department's denial of SignAd's application to move its billboard, SignAd did so sometime around August 2018. Both sides agree that, permission or no, once SignAd moved the billboard outside of the State's planned right of way, the billboard was no longer subject to condemnation because it was then located outside the area required by the State to expand the bridge.

The trial court's findings are consistent with the evidence. At trial, Wesley Gilbreath, Jr., the president of SignAd, testified on behalf of the company. He acknowledged that the billboard in dispute is regulated by the Texas Department of Transportation, and that the Department denied SignAd's request to move the billboard out of the planned right of way. The Department's notice denying permission to do so and its letter affirming that denial were both introduced into evidence.

Gilbreath testified that SignAd then moved the billboard without the Department's permission, and that it took almost a month to do so. The billboard was out of the State's right of way by late August 2018.

Richard Rothfelder, SignAd's counsel, testified that SignAd moved the billboard to avoid condemnation after being denied permission to move it. He

admitted he knew SignAd was going to move the billboard outside of the State's right of way without a permit before SignAd moved it.[1]

The State filed the instant suit to condemn the billboard in October 2018. According to the State, it was unaware that SignAd had moved the billboard outside of its planned right of way. If the State had known of SignAd's action, the State asserts, it would have never filed its condemnation suit because there would have been no public need to condemn property that did not interfere with the planned bridge expansion. *See* PROP. § 21.012 (entity with eminent domain authority may file suit if it "wants to acquire real property for public use"); *City of Austin v. Whittington*, 384 S.W.3d 766, 772 (Tex. 2012) (Texas Constitution—Article I, Section 17—allows State to condemn property to be taken for public use). Without a public need to condemn the property, a condemnation suit would be meritless. *See Tex. Rice Land Partners v. Denbury Green Pipeline-Tex.*, 363 S.W.3d 192, 197–98 (Tex. 2012) (right to condemn property constitutionally limited to public use, and

[1] In its brief and at oral argument, SignAd noted that, in January 2018, it obtained a permit from the City of Sealy to move the billboard. The trial court included this fact among its findings, and the evidence supports this finding. But SignAd has not cited any authority for the proposition that this permit made it unnecessary to obtain the Department's regulatory approval to move the billboard. To the contrary, Gilbreath testified the billboard was subject to regulation by both the City and the Department. And the City's permit stated: "Granting of a permit does not presume to give authority to violate or cancel the provisions of any other state or local law regulating construction or the performance of construction." The record contains undisputed evidence that the Department was aware of the City's permit when the Department denied SignAd's application for regulatory approval to move the billboard out of the right of way.

ultimate question as to whether use is public is question of law for court to decide). Thus, the State maintains that none of SignAd's attorney's fees were reasonable or necessary as a matter of law because the State would not have filed suit in the first place if SignAd had simply disclosed that it had moved the billboard beforehand.

On the record before us, we agree with the State. Section 21.0195(c) provides for an award of reasonable and necessary attorney's fees when the trial court dismisses a condemnation suit on the Department's motion. PROP. § 21.0195(c). Under this provision, the Department necessarily must file a condemnation suit in the first place for a property owner to recover its attorney's fees. *See id.* Accordingly, when the evidence shows that a property owner could have either avoided a condemnation suit altogether or secured an early dismissal of the suit based on information solely within the property owner's possession that it declined to promptly disclose, any attorney's fees the property owner incurred in the suit are unreasonable and unnecessary as a matter of law. *See Nath v. Tex. Children's Hosp.*, 446 S.W.3d 355, 372 (Tex. 2014) (stating in context of sanctions for baseless pleadings that degree to which defendant causes its own attorney's fees is relevant and placing entire cost of suit on defendant may be proper if it is responsible for sustaining meritless suit for prolonged time); *Midland W. Bldg. v. First Serv. Air Conditioning Contractors*, 300 S.W.3d 738, 739 (Tex. 2009) (per curiam) (award of zero fees can be proper when evidence shows no attorney's services needed).

It is clear from the evidence that SignAd caused its own fees. The Department issued a notice of taking with respect to the disputed billboard. It is undisputed that when the Department did so, the billboard was located in the Department's planned right of way. SignAd eliminated the possibility that its billboard could be condemned by moving its billboard outside of the Department's planned right of way before the Department filed its condemnation suit. But SignAd did not disclose the fact that it had moved its billboard before the Department filed suit. Indeed, SignAd did not affirmatively disclose that it had moved its billboard until more than four months later, when it divulged it had done so during the temporary injunction hearing. SignAd's failure to promptly disclose this case-dispositive information beforehand was unreasonable under the circumstances as it made the entire suit unnecessary.

The trial court found, and it is undisputed, that the billboard at issue had been in the same place for decades before SignAd moved it to avoid condemnation. The State began the condemnation process by issuing a notice of taking to SignAd in September 2017. Given that SignAd later applied for permission to move its billboard and the Department had denied the application in May 2018 and affirmed the denial of the application in July 2018, the State had no reason to suspect the billboard did not remain within its planned right of way when it filed its condemnation suit in October 2018. At trial, Wendy Knox, the Commercial Signs Regulatory Program Director in the Department's Right of Way Division, testified

that it was not legal for SignAd to move its billboard after the Department denied SignAd permission to do so, and that she did not have any reason to believe SignAd would move the billboard under these circumstances. There is no evidence in the record suggesting the State anticipated SignAd would move the billboard after the denial of SignAd's application.

The trial court did not make an explicit finding as to when the State first learned that SignAd had moved its billboard. But two of the trial court's findings show that the trial court implicitly found the State did not know the billboard had been moved when it filed its condemnation suit in October 2018 or soon afterward.

In the trial court, SignAd argued, among other things, that the transcript of the December 2018 hearing before the special commissioners shows the State knew the billboard was no longer within its planned right of way by that time. But the trial court found that this hearing transcript does not show the State's counsel or its employees or agents who attended the hearing knew the billboard had been moved. The transcript, which was admitted into evidence during the bench trial on attorney's fees, supports the trial court's finding of fact.[2]

During the December 2018 hearing, Chris Rothfelder, who is one of SignAd's attorneys, represented that SignAd had made its own survey in October 2018

[2] Condemnation hearings before special commissioners ordinarily are not recorded. *PR Invs.*, 251 S.W.3d at 476. But this particular hearing was transcribed by a court reporter.

showing that its billboard would not interfere with the bridge expansion. However, the special commissioners declined to hear testimony about the survey because SignAd did not bring a witness to testify about it. Neither Rothfelder nor anyone else at the hearing divulged that SignAd had moved its billboard out of the State's planned right of way relating to the bridge expansion.

During the bench trial on attorney's fees, Chris Rothfelder testified that he informed the State's counsel at the December 2018 hearing before the special commissioners that SignAd had made a survey showing the billboard was outside of the State's planned right of way. But Rothfelder did not testify that he also told the State's counsel SignAd had moved the billboard at the hearing.

SignAd's lead counsel, Richard Rothfelder, acknowledged that neither he nor his client disclosed at the December 2018 special commissioners hearing that SignAd had already moved the billboard. When the State's counsel cross-examined Richard Rothfelder about this at trial, he asserted this information was "not relevant to this condemnation suit" because it "doesn't matter who or why or when or with or without a permit." According to Rothfelder, the only relevant point was that SignAd had given notice to the State of a lack of public necessity. In other words, Rothfelder testified the only relevant fact was that the billboard was not in the State's right of way, which SignAd's survey showed.

Thus, just as the trial court found, the transcript of the December 2018 hearing before the special commissioners does not show that the State's counsel, or its employees or agents who attended the hearing, knew SignAd had already moved the billboard. The record shows that SignAd's counsel did not disclose this fact during the December 2018 hearing. No evidence shows SignAd had done so beforehand.

In addition, the trial court found that SignAd stated during the February 2019 temporary injunction hearing that the billboard had been moved. While the trial court did not expressly state that this was the first time SignAd disclosed this fact, this is the only way its finding can be understood, given that the parties hotly contested when and how the State learned of the move at trial.

Once again, the evidence supports the trial court's finding. The transcript of the February 2019 temporary injunction hearing was admitted into evidence during the bench trial. During that hearing, Daniel J. Creel, who was then an executive vice president and real estate manager for SignAd, testified that SignAd moved the billboard out of the State's right of way. Creel agreed that the billboard was regulated by the Texas Department of Transportation, which had not issued SignAd a permit to move the billboard when SignAd did so. According to Creel, SignAd moved the billboard before the State filed its condemnation suit.

The record does not contain any evidence that SignAd disclosed it had moved the billboard prior to Creel's February 2019 temporary injunction hearing testimony.

There is evidence the State first discovered the billboard had been moved about two to three weeks before Creel's hearing testimony. Knox testified that Greg Polasek, a right-of-way supervisor with the Texas Department of Transportation, notified her that the billboard had been modified in late January 2019. Knox then directed another employee, Ross Sherrod, to inspect the billboard about a week after Polasek discovered the modification. Sherrod confirmed that the billboard had been modified by the removal of one its support poles and the reorientation of its sign face. Due to these modifications, the billboard was now farther away from the bridge. Knox testified, however, that she was not certain that SignAd itself had moved the billboard until it confirmed that it had done so during the subsequent February 2019 hearing. At that hearing, the State agreed to make a new survey to confirm the billboard was no longer within the State's planned right of way relating to the bridge expansion.

On this record, none of the attorney's fees incurred by SignAd were reasonable or necessary. Here, SignAd caused its own fees by failing to promptly disclose that, in response to the State's notice of taking and denial of permission to move the billboard out of the State's planned right of way, SignAd had nonetheless moved the billboard thereby defeating the possibility of condemnation for public use before the State filed its condemnation suit. *See Nath*, 446 S.W.3d at 372 (defendant may be required to bear its fees if it unnecessarily prolongs meritless suit). Had

SignAd promptly disclosed that it had moved its billboard, the State either would not have filed suit or, if the State had done so, SignAd could have moved to dismiss the suit and sought its attorney's fees. *See* PROP. § 21.019(c) (providing trial court "may make an allowance to the property owner for reasonable and necessary fees for attorneys, appraisers, and photographers and for the other expenses incurred by the property owner to the date of the hearing or judgment" if the trial court dismisses suit on property owner's motion or otherwise renders judgment denying condemnation). What SignAd could not reasonably do, however, was decline to disclose that it had moved the billboard, allow the State to file suit and prosecute the suit for a prolonged period of time, and then belatedly disclose the move and claim its fees were necessary.

The trial court held otherwise, awarding SignAd $171,509.57 in attorney's fees. But the trial court's own findings of fact, which are supported by the evidence, preclude this award because they show SignAd's fees were unreasonable and unnecessary as a matter of law. As these findings conclusively show that SignAd's attorney's fees were unreasonable and unnecessary, the trial court abused its discretion in awarding SignAd's fees. *See Unifund CCR Partners*, 299 S.W.3d at 97 (stating that trial court abuses its discretion when its decision is contrary to only permissible view of probative, properly admitted evidence).

On appeal, SignAd emphasizes that it notified the State that the billboard was not in the State's planned right of way before and shortly after the State filed suit. This information, SignAd argues, renders SignAd's failure to inform the State that SignAd had already moved the billboard irrelevant in evaluating the reasonableness and necessity of its attorney's fees. SignAd reasons that the notice it gave to the State should have sufficed to prevent the filing of suit or resulted in its early dismissal. Hence, SignAd maintains, it did not cause its own fees. We reject this position.

The trial court found that SignAd's counsel sent the State an e-mail, in which SignAd's counsel stated that the billboard was not in the planned right of way and that SignAd was in the process of obtaining a survey to verify this fact, about a month before the State sued to condemn the billboard. The trial court further found that, a few days after the State filed its condemnation suit, SignAd's counsel sent the State's counsel a survey confirming "that SignAd had eliminated the billboard's anticipated encroachment into the State's proposed right of way." The first of these findings is supported by the evidence. The second finding, however, is not supported by any evidence to the extent it could be read to suggest that SignAd told the State that SignAd had moved the billboard to eliminate the encroachment.

The evidence in question consists of a series of September–October 2018 e-mails between Chris Rothfelder, counsel for SignAd, and Samantha Diaz, counsel for the State, that were sent *after* SignAd had already moved its billboard but *before*

SignAd had disclosed this fact to the State or the trial court. Notably, Richard Rothfelder, SignAd's lead counsel, who testified at trial that he knew SignAd had already moved the billboard by this time, was carbon-copied on the e-mails from Chris Rothfelder to Samantha Diaz. Richard Rothfelder also testified that his "client was blind carbon copied."

In his first e-mail, sent before suit, Chris Rothfelder wrote: "The client indicates that the sign will not overhang the State's proposed acquisition area. SignAd is in the process of retaining a surveyor to confirm that the sign will not encroach into the acquisition area identified on the survey attached to the State's last offer letter." Rothfelder said he expected to receive more information from the surveyor within a week and would relay that information after receipt. Rothfelder concluded, "Assuming the surveyor confirms that the sign is not going to be within the proposed acquisition area, there should be no need for SignAd to be named as a party to any eminent domain litigation."

Samantha Diaz responded to Rothfelder's initial e-mail the same day. Her e-mail stated in its entirety: "Thanks for letting me know. As you'll recall from our communications back in April, the sign is within the right of way and will need to be moved. We have postponed this for quite some time and unfortunately cannot anymore. We will go ahead and proceed with condemnation."

Rothfelder replied to Diaz the next day, which was more than a month before the State filed suit. In its entirety, Rothfelder's e-mail read: "Understood. The client's surveyor has indicated that he'll have a survey completed by the end of the month. If the survey confirms that the sign is outside of the State's acquisition area, then SignAd intends to move to dismiss the case and seek reimbursement of its fees and expenses pursuant to Section 21.019 of the Property Code."

Finally, three days after the State filed suit, Rothfelder sent Diaz a follow-up e-mail, in which he wrote: "As I mentioned last month, the client has confirmed that the sign is outside of the State's acquisition area. Please see the attached survey." The survey was attached to Rothfelder's e-mail. Though at trial the State denied receiving this e-mail due to the file size of the attached survey, the trial court ultimately found that the State received the e-mail, and the State does not challenge the trial court's evidentiary ruling on appeal.

What these September–October 2018 e-mails show is a disagreement between SignAd and the State about whether the billboard was in the State's right of way. On their face, the e-mails indicate both sides had surveys that led them to believe they were correct about the billboard's location. SignAd offers no explanation as to why the State should have immediately accepted SignAd's later survey in lieu of its own. At this point, SignAd—and SignAd alone—knew that the two surveys contradicted each other because the facts had changed; namely, SignAd had moved its billboard

after the State made its survey and before SignAd commissioned its survey. Remarkably, however, Rothfelder did not disclose this information to Diaz.

At trial, Richard Rothfelder represented that Chris's e-mails were an effort "to communicate to the State's lawyer that the sign had been removed out of the right of way." When confronted with the fact that these e-mails did not disclose SignAd had moved the billboard, Richard answered, "It says what it says. I guess you can take a look at it and read it to the judge if you want." When the State's counsel followed up about these e-mails, Richard was initially evasive:

> Q. Mr. Rothfelder, did you or did you not tell TxDOT that SignAd had moved the sign affirmatively?
>
> A. No. Didn't say who did it, just that it had been done.
>
> Q. Well, can you show me where in that document it shows that it has been done by SignAd?
>
> A. The letter speaks for—or the e-mail speaks for itself. No, it doesn't mention SignAd having done it.

The fact of the matter is that the e-mails in question do not disclose that anyone, including SignAd, had since moved the billboard out of the right of way. Richard Rothfelder finally conceded as much, testifying that Chris did not "go that extra step" in his e-mails and state "in addition to the client indicating there's no encroachment," SignAd had "itself eliminated the encroachment."

If anything, Chris Rothfelder's e-mails underscore that SignAd knew it had case-dispositive information but chose not to disclose this information before the

State filed suit. As Chris indicated in one of his e-mails, if SignAd's billboard was outside of the State's planned right of way, then SignAd would be entitled to dismissal of any condemnation suit filed by the State. Similarly, when SignAd finally disclosed at the February 2019 temporary injunction hearing that it had previously moved the billboard, Richard Rothfelder stated SignAd was going to file a motion to dismiss because the billboard was no longer in the State's right of way. Yet, SignAd did not do so, which reinforces our conclusion that SignAd caused its own attorney's fees in this condemnation suit.

Instead, SignAd waited for the State to seek dismissal. And while SignAd waited, it litigated matters unrelated to the State's public necessity for condemnation, which were thus unnecessary to obtain dismissal. For example, as SignAd acknowledged at trial, SignAd deposed Knox about permitting issues as well as the appraiser who valued the billboard for the State over the State's objection. Knox's deposition lasted almost six hours. SignAd insisted on these depositions even after the State moved to dismiss its suit. Richard Rothfelder conceded at trial that his firm billed more than half of its fees after the State filed its motion to dismiss the condemnation suit.

SignAd defends its decision to continue litigating even after the State filed its motion to dismiss, arguing that the parties' dispute about SignAd's entitlement to recover expenses, including reasonable and necessary attorney's fees, under Section

21.0195(c) required these services. In particular, SignAd argues that it was necessary to litigate permit-related issues due to the State's assertion that SignAd was disentitled to recover its expenses and fees because it had moved the disputed billboard without regulatory permission and then failed to disclose that it had done so in bad faith. Consistent with its position below, SignAd argues on appeal that it was legally entitled to move its billboard under the pertinent regulations and the Texas Department of Transportation's contrary decision was therefore erroneous.

But the merits of the Department's decision to deny SignAd permission to move its billboard were not before the trial court and are not before us. Right or wrong, the Department made its decision, which is final. *KEM Tex.*, 2009 WL 1811102, at *5. SignAd acknowledged the finality of the Department's decision during the February 2019 temporary injunction hearing. SignAd again acknowledged the finality of the Department's decision in its appellate brief. We therefore have no occasion to evaluate the correctness of the permit decision.

That SignAd sought a permit to move its billboard, the Department denied the permit, SignAd moved the billboard anyway, and SignAd did not disclose it had moved the billboard before the State filed its condemnation suit are relevant to whether SignAd is entitled to attorney's fees under Section 21.0195(c). This sequence of events is relevant because it bears on whether SignAd could have avoided being sued in the first place or defeated such a suit soon after it was filed,

which, in turn, are material to the reasonableness and necessity of SignAd's fees. The relevance of these events, however, does not make the merits of the underlying permit decision germane to an assessment of reasonableness or necessity.

SignAd elaborates that business necessity in the face of the Department's ostensibly erroneous permit decision makes the fees it incurred in this condemnation suit both reasonable and necessary. Gilbreath, SignAd's president, testified that the billboard generates between $50,000 and $60,000 in revenue per year, which SignAd would permanently lose if the billboard was condemned, as the City of Sealy, where the billboard is located, prohibits the erection of new billboards. Assuming this is accurate, it is beside the point. On its own account, SignAd decided the revenue at stake made it worthwhile to risk the State's ire by moving the billboard after the State had denied the regulatory approval required to do so.[3] SignAd then failed to disclose that it had done so even though the State had informed SignAd that the State was going to file suit to condemn the billboard—a suit premised on the mistaken notion that the billboard remained in the same place it had been located for decades. We reject SignAd's premise that a billboard owner can preemptively defeat the

[3] After learning that SignAd had moved the billboard without the required regulatory approval, the Texas Department of Transportation cancelled SignAd's existing permit and demanded that SignAd remove the billboard. SignAd contested the cancellation before the State Office of Administrative Hearings. The State represents—and SignAd does not dispute—that an administrative law judge concluded the Department had properly cancelled the permit and the Texas Transportation Commission agreed and entered an order canceling the permit.

possibility of condemnation by moving its billboard out of the State's planned right of way after the State has denied the regulatory approval required to move the billboard, decline to disclose that it has moved the billboard knowing the State intends to file suit to condemn the billboard, and then claim the attorney's fees it incurs in the condemnation suit are reasonable and necessary.

III. Recoverability of Other Expenses

It is undisputed that all the other expenses SignAd seeks to recover relate to moving the billboard out of the State's planned right of way. These expenses consist of the costs incurred in actually moving the billboard, surveying to confirm that it was then outside the State's right of way, and expert testimony about the survey. SignAd incurred almost all these expenses before the State filed suit to condemn the billboard, and SignAd incurred all these expenses at or before the point in time when it first disclosed that it had moved the billboard to the State and the trial court.

Section 21.0195(c) requires a trial court to award a property owner "any expenses the property owner has incurred in connection with the condemnation, including reasonable and necessary fees for attorneys," when the trial court dismisses a condemnation suit on the Texas Department of Transportation's motion. PROP. § 21.0195(c). When the Legislature provides for an award of *expenses*, this term's ordinary meaning is confined to required or necessary expenses. *See* NEW OXFORD AMERICAN DICTIONARY 609 (3d ed. 2010) (defining "expense" as "the cost

required for something" or "a thing on which one is required to spend money"); *see also Rohrmoos*, 578 S.W.3d at 488–89 (holding that party seeking to recover attorney's fees from opponent must prove fees sought are both reasonable and necessary even when statute does not expressly include term "necessary" in its text). Like the similar expense-shifting provision contained in Section 21.019(b), the purpose of Section 21.0195(c) is to reimburse the property owner for the expenses the now-abandoned condemnation suit required or necessitated. *See State v. Tamminga*, 928 S.W.2d 737, 741 (Tex. App.—Waco 1996, no writ) (twin purposes of Section 21.019(b) are reimbursing property owners for their necessary and reasonable expenses when condemnation suit is voluntarily dismissed and discouraging commencement and later abandonment of condemnation proceedings); *see also State v. CPS Energy*, No. 04-18-00063-CV, 2018 WL 3440703, at *3–5 (Tex. App.—San Antonio July 18, 2018, pet. denied) (mem. op.) (interpreting Section 21.0195(c) in conformity with decisions applying Section 21.019(b)).

Hence, SignAd's claim for other expenses fails as a matter of law for the same reason as its claim for reasonable and necessary attorney's fees: the evidence conclusively proves that these expenses were not necessary because SignAd caused them by moving its billboard after seeking and being denied the regulatory approval to do so and declining to promptly disclose this fact to the State before it filed suit to condemn the billboard, which was no longer within the State's planned right of

way and therefore not subject to condemnation. Because SignAd could have avoided the condemnation suit altogether or defeated it soon after it was filed if SignAd had only disclosed that it had moved the billboard, SignAd cannot recover its expenses.

CONCLUSION

We reverse the trial court's judgment, and we render judgment that SignAd take nothing by way of its claims for attorney's fees and other expenses.

Gordon Goodman
Justice

Panel consists of Justices Kelly, Goodman, and Guerra.