Affirmed and Memorandum Opinion filed February 3, 2011.

In The

Fourteenth Court of Appeals

NO. 14-09-00961-CV

LAURO ARELLANO, Appellant

V.

DON MCGILL TOYOTA OF KATY, INC., Appellee

On Appeal from the County Civil Court at Law No. 2
Harris County, Texas
Trial Court Cause No. 913,178

MEMORANDUM OPINION

An automobile owner appeals the trial court's judgment in favor of an automobile dealership that prevailed in its suit to recover repair costs. In three issues, the automobile owner challenges the sufficiency of the evidence supporting the trial court's judgment, claiming (1) there was no legally binding automobile repair contract between the parties, (2) the record contains no evidence of actual damages, and (3) no evidence supports the award of attorney's fees. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Appellant Lauro Arellano's vehicle was damaged in an automobile collision. Arellano brought the vehicle to appellee Don McGill Toyota of Katy (hereinafter the "Dealership"), an automobile dealership and automotive repair shop, seeking an estimate for automotive repairs to the vehicle. An initial estimate to repair the vehicle amounted to $3,248.66.

The parties entered into an agreement under which Arellano was to purchase a new vehicle from the Dealership and trade in the damaged vehicle. Together, the parties inspected the damaged vehicle, which had been taken apart in the repair shop, to determine a trade-in value. According to the parties' agreement, Arellano received a trade-in allowance of $19,000 on the vehicle. The written agreement expressly states, "Purchaser shall be responsible for any loss in value in the event that any representation or warranty is untrue or in the event that the trade vehicle has any loss in value from the bid or appraisal."

A document relating to the repair of the vehicle and bearing Arellano's signature was admitted at trial. Ultimately, the total cost to repair Arellano's vehicle amounted to $6,754.54. The Dealership received $3,505.88 from an insurance carrier for repairs to the vehicle, leaving a remaining balance of $3,248.66 for the repairs. The Dealership claimed to have repaired the vehicle and demanded payment from Arellano, but Arellano failed to pay the Dealership the remaining balance.

The Dealership brought suit against Arellano in the justice court seeking to recover the cost to repair the trade-in vehicle. The Dealership asserted breach of contract, conversion, and fraud, and sought $3,248.66 in damages and reasonable attorney's fees and costs. The justice court entered judgment in favor of the Dealership.

Arellano filed a de novo appeal to the county court. Following a bench trial, the trial court entered a final judgment, awarding the Dealership $3,248.66 in actual damages

and $10,250.00 for attorney's fees and costs. The trial court subsequently entered findings of fact and conclusions of law. Arellano now appeals the trial court's judgment.

ISSUES AND ANALYSIS[1]

In conducting a legal-sufficiency review, we consider the evidence in the light most favorable to the challenged finding and indulge every reasonable inference that would support it. *City of Keller v. Wilson*, 168 S.W.3d 802, 823 (Tex. 2005). We must credit favorable evidence if a reasonable factfinder could and disregard contrary evidence unless a reasonable factfinder could not. *See id.* at 827. We must determine whether the evidence at trial would enable reasonable and fair-minded people to find the facts at issue. *See id.* The factfinder is the only judge of witness credibility and the weight to give to testimony. *See id.* at 819.

When reviewing a challenge to the factual sufficiency of the evidence, we examine the entire record, considering both the evidence in favor of, and contrary to, the challenged finding. *Cain v. Bain*, 709 S.W.2d 175, 176 (Tex. 1986). After considering and weighing all the evidence, we set aside the fact finding only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. *Pool v. Ford Motor Co.*, 715 S.W.2d 629, 635 (Tex. 1986). The trier of fact is the sole judge of the credibility of the witnesses and the weight to be given to their testimony. *GTE Mobilnet of S. Tex. v. Pascouet*, 61 S.W.3d 599, 615–16 (Tex. App.—Houston [14th Dist.] 2001, pet. denied). We may not substitute our own judgment for that of the trier of fact, even if we would reach a different answer on the evidence. *Maritime Overseas Corp. v. Ellis*, 971 S.W.2d 402, 407 (Tex. 1998). The amount of evidence necessary to affirm a

[1] In his appellate brief Arellano has provided no citation to legal authority for any of the three issues presented. To present an issue for appellate review, "the brief must contain a clear and concise argument for the contentions made, with appropriate citations to authorities and to the record." TEX. R. APP. P. 38.1(i). Although appellant has not cited any cases or legal authority in support of his arguments for any of the issues, in the interest of justice, we consider Arellano's three appellate issues, in which he challenges the sufficiency of the evidence to support the trial court's judgment.

judgment is far less than that necessary to reverse a judgment. *Pascouet*, 61 S.W.3d at 616.

In his first two issues, Arellano asserts that the evidence is legally insufficient to support the trial court's judgment because, he claims, there was no agreement to repair the vehicle and no evidence of actual damages.

Although Arellano asserts that he sought only an estimate for the repairs, the Dealership produced a document bearing Arellano's signature authorizing repairs to the damaged vehicle. The document contains the following language:

> You are hereby authorized to make the above specified repair. I understand that payment in full will be due upon release of the vehicle, including additional supplemental damages charges, . . . I authorize any and all supplements payable directly to you.

The Dealership's general manager testified that Arellano brought the damaged vehicle in for repair. According to the manager, when the men inspected the vehicle together to determine a trade-in value, repairs already were underway and Arellano did not object to the repairs being made.

At trial, Arellano claimed that when he traded in the damaged vehicle, he understood that the $19,000 he received as a trade-in allowance was in exchange for the damaged vehicle "as is." But, the purchase agreement reflecting the parties' trade-in agreement provides that Arellano, as the purchaser, "shall be responsible for any loss in value in the event that . . . the trade vehicle has any loss in value from the bid or appraisal." In its ruling, the trial court noted that Arellano's testimony was unreliable and that Arellano contradicted himself at times. The trial court, as factfinder, may determine the weight of the evidence and judge the credibility of witnesses. *See City of Keller*, 168 S.W.3d at 819. The evidence is sufficient to establish a repair contract. *See Jones v. Star Houston, Inc.*, 45 S.W.3d 350, 354 (Tex. App.—Houston [1st Dist.] 2001, no pet.). Arellano's first issue is overruled.

Moreover, the record reflects that the Dealership introduced evidence of the remaining balance for repairs to the vehicle ($3,248.66), which Arellano did not pay. The Dealership's general manager testified that the Dealership sustained out-of-pocket costs to repair the vehicle in the amount of $3,248.66. Although the repair agreement indicates that Arellano authorized insurance payments to be sent to the Dealership, the record reflects that Arellano cashed a check from his insurance carrier in the amount of $3,248.66, which is the same amount that the trial court awarded the Dealership. To the extent Arellano argues on appeal that the Dealership did not prove its damages because the Dealership sold the repaired vehicle for more than it paid Arellano at the time of the trade-in, this fact does not dispense with Arellano's obligation to pay for the repairs under the repair agreement. The evidence is sufficient to support the trial court's award of $3,248.66. Arellano's second issue is overruled.

In Arellano's third issue, he claims that the evidence is legally and factually insufficient to support the award of attorney's fees. According to Arellano, although the trial court did not award $25,000 in attorney's fees the Dealership had requested, the trial court still erred in making an award of $10,250 because this amount is unreasonably excessive and not supported by the evidence.

Attorney's fees are statutorily authorized for breach-of-contract actions; the Dealership prevailed on its claims and was awarded damages. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 38.001(8) (West 2010); *Gill Sav. Ass'n v. Chair King, Inc.*, 797 S.W.2d 31, 31 (Tex. 1990). The trial court has discretion to set the amount of attorney's fees, provided that the award is supported by credible evidence. *See Hassell Constr. Co., Inc. v. Stature Commercial Co.*, 162 S.W.3d 664, 668 (Tex. App.—Houston [14th Dist.] 2005, no writ). Under section 38.004 of the Texas Civil Practice and Remedies Code, entitled "Judicial Notice," in a bench trial, the trial court, without receiving evidence, can take judicial notice of the usual and customary attorney's fees and the contents of the case file. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 38.004 (West 2010).

Arellano asserts that the award is not supported by adequate proof given that trial counsel for the Dealership failed to state the number of hours spent on the case. Trial counsel for the Dealership testified as an expert as to the reasonableness and necessity of the attorney's fees, explaining the work involved in litigating the issues before the justice court and the trial court. The attorney's standard billing rate was $205 per hour. The trial court admitted into evidence the firm's invoices showing the amounts that were charged and billed to the Dealership. The record reflects that the Dealership's trial counsel did not provide a tally of hours, but he suggested that the amount of $25,000 could be divided by the billable rate of $205 to determine the number of hours spent working on the case. There is no requirement that evidence of hours and an hourly rate be introduced to support a finding that attorney's fees are necessary and reasonable. *See Brockie v. Webb*, 244 S.W.3d 905, 909 (Tex. App.—Dallas 2008, pet. denied). The proceedings, together with the trial court's taking of judicial notice of the usual and customary fees, constitute some evidence to support the award of attorney's fees. *See Gill Sav. Ass'n*, 797 S.W.2d at 32 (concluding evidence was factually sufficient to support award of attorney's fees); *Brockie*, 244 S.W.3d at 909 (concluding evidence was legally and factually sufficient to support award of attorney's fees).

Arellano also asserts that the attorney's fees award was unreasonably excessive. Factors for the trial court to consider when determining the reasonableness of attorney's fees include:

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 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.

See Arthur Anderson & Co. v. Perry Equip. Corp., 945 S.W.2d 812, 818 (Tex. 1997). Section 38.003 establishes a presumption that the "usual and customary attorney's fees for a claim of the type described in section 38.001 are reasonable." TEX. CIV. PRAC. & REM. CODE ANN. § 38.003 (West 2010).

According to the Dealership's expert, the case presented a number of challenges, and he cited difficulty getting responses and documents from opposing counsel and in procuring dates and hearings. The expert testified that the Dealership attempted to follow the less-costly path by filing first in the justice court to resolve its claims; but the Dealership was forced to defend its claims when Arellano appealed to the trial court. The record reflects that the parties went to trial twice: once before the justice court and again at the bench trial currently under review. The attorney for the Dealership noted that the parties participated in mediation and engaged in discovery disputes, as well as numerous attempts to schedule depositions and mediation. According to the testimony at trial, the case presented the firm with a novel and difficult issue, resulting in the firm having to give up other engagements.

The trial court ruled that the an attorney's fees award in the amount of $25,000 would be excessive, given that the request was more than five times the amount of damages awarded. The trial court noted that without actual hours appearing on the firm's invoices, it was difficult to determine whether the service and charges were reasonable. According to the trial court, fifty hours would be more reasonable, given the time spent between the two trials in the justice court and the trial court. Noting for the record that the bench trial already had lasted six hours, the trial court estimated that between the two trials, the parties likely spent twelve to fifteen hours in trial or preparing for trial, three to four hours for the three hearings set before the trial court, three to four hours to attend the

motions docket, one hour or more on the hearing for the motion to compel, and unspecified time on legal research. The trial court ruled that "50 hours probably gets your Motion to Compel prepared, before you do it, your telephone calls, your scheduling, and your trying to get mediations, any research you had to do on the various causes or [sic] actions, the preparation of the petitions, the review of the citation, the motion for substituted service, if there was one." Given the amount of time invested in this case, we cannot say that the attorney's fees awarded are excessive or unreasonable. *See USAA County Mut. Ins. Co. v. Cook*, 241 S.W.3d 93, 103 (Tex. App.—Houston [1st Dist.] 2007, no pet.) (determining evidence to be sufficient in supporting reasonable award of attorney's fees for $23,310 at $150 hour for a $2,000 claim).

Arellano also objects to the award of attorney's fees because the fees were not segregated so that unreasonable or "unrecoverable tasks" would not be included. To preserve a complaint for appellate review, a party must present a timely request, motion, or objection, state with specificity the grounds for the ruling requested, and obtain a ruling from the trial court. *See* TEX. R. APP. P. 33.1(a). A party that fails to object to an award of attorney's fees based on testimony of unsegregated fees fails to preserve the issue for appeal. *See Green Int'l v. Solis*, 951 S.W.2d 384, 389 (Tex. 1997); *Bencon Mgmt. & Gen. Contracting, Inc v. Boyer*, 178 S.W.3d 198, 208 (Tex. App.—Houston [14th Dist.] 2005, no pet.). Arellano did not object, either at trial or in a post-trial motion, to the attorney's fees based on a failure to segregate. Nor did Arellano undertake to cross-examine the expert for the Dealership regarding segregation of attorney's fees. Therefore, Arellano has waived this issue for appellate review. *See* TEX. R. APP. P. 33.1(a).

Based on the record and the applicable standards of review, we conclude the evidence is both legally and factually sufficient to support the trial court's finding that $10,250 is a reasonable attorney's fee through the trial court level for this collection action resulting in the recovery of a principal amount of $3,248.66. *See Gill Sav. Ass'n*,

797 S.W.2d at 32; *Brockie*, 244 S.W.3d at 909 (determining evidence was legally and factually sufficient to support award of attorney's fees even if hours spent on the case was not introduced into evidence). Accordingly, we overrule Arellano's third issue.

The trial court's judgment is affirmed.

/s/ Kem Thompson Frost
Justice

Panel consists of Chief Justice Hedges and Justices Frost and Christopher.