Affirmed and Memorandum Opinion filed March 3, 2011.

In The

Fourteenth Court of Appeals

NO. 14-10-00018-CV

DONALD E. SPENCER, Appellant

V.

DON MCGILL OF KATY, LTD., Appellee

On Appeal from the County Civil Court at Law No. 2
Harris County, Texas
Trial Court Cause No. 877,919

MEMORANDUM OPINION

In this appeal from a bench trial, appellant Donald E. Spencer, *pro se*, raises twelve issues challenging the trial court's adverse judgment on his claims under the Deceptive Trade Practices and Consumer Protection Act ("DTPA"). In his first issue, Spencer contends that the trial court erred in not granting leave to amend his petition. In issues two through eleven, he challenges the sufficiency of the evidence supporting the trial court's findings of fact. Finally, in his twelfth issue, Spencer contends the trial court erred in awarding appellee Don McGill of Katy, Ltd. ("McGill"), its costs of court. For the reasons explained below, we affirm.

I

On August 1, 2006, Spencer brought his 1999 Toyota RAV4 to McGill around 7:00 a.m. At that time, the vehicle had been driven over 140,000 miles. Because his vehicle-inspection sticker had expired, Spencer requested a vehicle inspection as well as a 30,000-mile service. Spencer spoke with Sonny Spencer,[1] a service advisor with McGill, and signed a service ticket authorizing these two services on the vehicle. In addition to these services, Spencer authorized McGill to perform a brake job on the vehicle if needed because the brakes were "a little soft." According to Spencer, the brake job was authorized if needed for the vehicle to pass inspection.

Around 11:00 a.m., Sonny called Spencer and informed him that the vehicle needed a power-steering flush and fuel-injector cleaning, and he wanted to know if Spencer would authorize this additional work. According to Spencer, he asked Sonny if everything else was "okay" and Sonny answered, "Yes, everything is okay." Whether the vehicle had passed or failed the inspection was not specifically discussed. The total labor charges for the additional work authorized by phone were $177.64.

At about 3:15 p.m., according to Spencer, Sonny called Spencer to inform him that his vehicle failed the inspection and it needed tires.[2] At that point, Spencer became very upset and angry that additional work had been done to the vehicle before the inspection was performed. At about 5:00 p.m., Spencer called Sonny's supervisor and the service manager for McGill, Allen Simmer. Although Spencer disputed it, Simmer testified that he offered to put two new tires on Spencer's vehicle free of charge so that McGill could

[1] To avoid confusion, we will refer to Sonny Spencer, no relation to Donald Spencer, as "Sonny."

[2] Whether Sonny told Spencer that the vehicle would not pass an inspection without new tires, or that the vehicle was actually inspected and failed the inspection, was disputed at trial. Sonny did not testify because, according to McGill's counsel, he had suffered a stroke and subsequent brain aneurysm shortly after the incident and had no memory of it. There was no evidence that McGill had actually performed an inspection which the vehicle failed, and McGill stipulated at trial that no inspection was performed.

submit his vehicle for inspection. Spencer said he would call Simmer back with his answer.

Instead of calling Simmer back, Spencer picked up his vehicle and paid the invoice for McGill's services. Spencer signed the accounting copy of his service ticket on August 1, 2006, with this notation: "This payment is in protest of the service I received. DS." In response to Spencer's complaint, the cashier offered a free oil change certificate, which Spencer accepted.

The next day, August 2, Mike Mynatt, McGill's general manager, spoke with Spencer and offered to replace his two rear tires free of charge, or to refund all of the labor charges for the work Spencer claimed that he would not have authorized had he known his vehicle would not pass inspection. The labor for these services, the brake job, power-steering flush, and fuel-injector cleaning, totaled $376.35.[3] In response, Spencer told Mynatt that if McGill did not refund the majority of his bill, Spencer had a sister-in-law who was an attorney who would assist him in suing McGill. Spencer did not complain about McGill's failure to replace his windshield-wiper blades, which was part of the 30,000-mile service, during this conversation.

That same day, Spencer took his vehicle to Memorial Car Care Center for an inspection. Spencer's car failed this inspection due to, among other things, the condition of the rear tires and the windshield wipers.

By letter dated August 21, 2006, Spencer demanded that McGill pay him $1,542.90 for claimed violations of the DTPA. In this letter, Spencer stated that he had a

[3] McGill also introduced into evidence the accounting copy of the invoice for services Spencer received on August 1, 2006. Spencer testified that he had never seen this document until after he filed the lawsuit. Simmer testified that he wrote on the document the total for the labor charges for the three services that Spencer claimed he would not have authorized had he known his tires were too worn to pass inspection. The total Simmer wrote down was $376.35, the same amount that Mynatt testified he offered Spencer on August 2, 2006.

sister-in-law, who was an attorney, who said that there was "more money available." McGill did not respond to the demand letter.

Spencer then sued McGill, claiming that McGill violated the DTPA in several respects. Specifically, Spencer claimed that McGill violated Section 17.46(b)(24) of the DTPA by failing to disclose that his vehicle had failed the safety inspection when it induced Spencer to agree to additional work on the vehicle and by failing to perform a safety inspection as Spencer requested. Spencer also claimed that McGill violated Section 17.46(b)(22) of the DTPA by failing to replace his windshield wipers and by representing that McGill had performed the requested safety inspection when it had not done so. Spencer alleged that each of these actions also constituted unconscionable actions.

In July 2009, the case was tried to the court, which rendered judgment in favor of McGill. At Spencer's request, the trial court entered findings of fact and conclusions of law. The court's findings of fact were as follows:

> 1. Plaintiff Donald E. Spencer ("Spencer") purchased automobile maintenance and repair services on August 1, 2006[,] from Defendant Don McGill of Katy, Ltd. ("Don McGill Toyota").
>
> 2. Don McGill Toyota did not fail to disclose information that was known at the time of the transaction with the intent to induce Spencer into a transaction into which Spencer would not have entered had the information been disclosed.
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> 3. Don McGill Toyota did not falsely represent that it had performed services or replaced parts on Spencer's car.
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> 4. Spencer did not rely upon any representation by Don McGill Toyota to his detriment.
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> 5. No representation made by Don McGill Toyota was a producing cause of economic damages to Spencer.
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> 6. Don McGill Toyota did not take advantage of Spencer's lack of knowledge, ability, experience, or capacity to a grossly unfair degree.

7. Don McGill Toyota tendered and Spencer accepted a free oil change certificate in full satisfaction of the dispute over the service Spencer purchased from Don McGill Toyota on August 16, 2006.

8. Spencer did not incur any economic damages.

9. Spencer did not suffer any mental anguish.

10. Spencer could have avoided, by the exercise of reasonable care, $376.35 in claimed damages.

11. Spencer did not incur any attorney's fees in this case.

On October 21, 2009, the trial court signed an "Amended/Modified Final Take Nothing Judgment" against Spencer, which awarded McGill its costs of court, but gave Spencer a judgment credit for $20.00.

II

In his first issue, Spencer contends the trial court erred by not granting leave to amend his petition. Specifically, he contends that McGill's stipulation at trial that no certified safety inspector ever looked at Spencer's vehicle constituted additional violations of the DTPA that he should have been granted leave to assert. McGill points out, however, that Spencer did not seek leave to amend his pleadings until he filed his second motion for new trial on November 20, 2009, a month after the trial court signed the Amended/Modified Final Take Nothing Judgment on October 21, 2009. After the trial court renders judgment, it is too late to ask to amend the pleadings to add new parties or claims. *Mitchell v. LaFlamme*, 60 S.W.3d 123, 132 (Tex. App.—Houston [14th Dist.] 2000, no pet.). Therefore, the trial court did not err by refusing to grant Spencer leave to amend his petition. We overrule Spencer's first issue.

III

In his second through eleventh issues, Spencer challenges the sufficiency of the evidence supporting the trial court's findings of fact 2, 3, 4, 5, 6, 7, 8, 10, and 11.

Although Spencer asserts in the headings for each of these issues that he is challenging the factual sufficiency of the evidence, in his brief he also discusses the standard of review for legal sufficiency of the evidence, and "incorporates this standard of review on all issues in this brief." Therefore, we will review the legal and factual sufficiency of the evidence supporting the trial court's findings of fact as necessary.

A

Findings of fact in a bench trial have the same force and dignity as a jury's verdict upon questions and are reviewed for legal and factual sufficiency of the evidence by the same standards. *Ortiz v. Jones*, 917 S.W.2d 770, 772 (Tex. 1996). We review the trial court's legal conclusions de novo. *BMC Software Belguim, N.V. v. Marchand*, 83 S.W.3d 789, 794 (Tex. 2002).

When reviewing legal sufficiency we review the evidence in the light most favorable to the challenged finding and indulge every reasonable inference that would support it. *See City of Keller v. Wilson*, 168 S.W.3d 802, 822 (Tex. 2005). We credit favorable evidence if a reasonable fact finder could, and disregard contrary evidence unless a reasonable fact finder could not. *Id.* at 827. The evidence is legally sufficient if it would enable a reasonable and fair-minded person to reach the verdict under review. *Id.* A party attacking the legal sufficiency of an adverse finding on an issue on which he has the burden of proof must demonstrate that the evidence conclusively establishes all vital facts in support of the issue. *Dow Chem. Co. v. Francis*, 46 S.W.3d 237, 241 (Tex. 2001). The fact finder is the sole judge of witness credibility and the weight to give testimony. *See City of Keller*, 168 S.W.3d 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. *See Cain v. Bain*, 709 S.W.2d 175, 176 (Tex. 1986). When, as here, a party attacks factual sufficiency with respect to an adverse finding on which he had the

burden of proof, he must demonstrate on appeal that the finding is against the great weight and preponderance of the evidence. *Francis*, 46 S.W.3d at 242. 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). In our review, we may not substitute our own judgment for that of the trier of fact or pass upon the credibility of the witnesses. *See Mar. Overseas Corp. v. Ellis*, 971 S.W.2d 402, 407 (Tex. 1998); *GTE Mobilnet of S. Tex. v. Pascouet*, 61 S.W.3d 599, 615–16 (Tex. App.—Houston [14th Dist.] 2001, pet. denied). The amount of evidence necessary to affirm a judgment is far less than that necessary to reverse a judgment. *Pascouet*, 61 S.W.3d at 616.

A consumer may recover damages incurred as a result of another's false, misleading, or deceptive acts or practices that are a producing cause of economic damages or damages for mental anguish. *See* Tex. Bus. & Com Code § 17.50(a)(1). False, misleading, or deceptive acts or practices include failing to disclose information concerning goods or services that was known at the time of the transaction if the failure to disclose such information was intended to induce the consumer into a transaction and the consumer would not have entered into the transaction had the information been disclosed. *Id.* § 17.46(b)(24). False, misleading, or deceptive acts or practices also include representing that work or services have been performed on, or parts replaced in, goods when the work or services were not performed or the parts replaced. *Id.* § 17.46(b)(22).

A consumer also may recover actual damages for any unconscionable action or course of action that is a producing cause of economic damages or damages for mental anguish. Tex. Bus. & Com. Code § 17.50(a)(3); *see also Mays v. Pierce*, 203 S.W.3d 564, 571–72 (Tex. App.—Houston [14th Dist.] 2006, pet. denied) (explaining that claims of unconscionable action or course of action and claims of false, misleading, or deceptive acts or practices are distinct and either basis will support recovery). An "unconscionable

action or course of action" means "an act or practice which, to a consumer's detriment, takes advantage of the lack of knowledge, ability, experience, or capacity of the consumer to a grossly unfair degree." *Id.* § 17.45(5). To prove an unconscionable action, a consumer must show that the defendant's acts took advantage of his lack of knowledge and that the resulting unfairness was glaringly noticeable, flagrant, complete and unmitigated. *Bradford v. Vento*, 48 S.W.3d 749, 760 (Tex. 2001). The relevant inquiry examines the entire transaction but not the defendant's intent. *Chastain v. Koonce*, 700 S.W.2d 579, 583 (Tex. 1985).

B

1

In his second issue, Spencer contends the evidence is insufficient to support finding of fact 1, that he "purchased automobile maintenance and repair services on August 1, 2006" from McGill. Spencer complains that it is uncontroverted that he requested the safety inspection first, and he was deceived into authorizing additional work when McGill did not inform him of the status of the inspection when it called to request the additional work. He asserts that finding of fact 1 "is the beginning of the deception and damages" to him. But the finding on its face is not erroneous, because the evidence shows that Spencer did purchase maintenance and repair services for which he signed a service ticket and paid "under protest" for those services. The finding does not state or imply anything about the order in which Spencer requested services or which specific services Spencer requested. We therefore overrule Spencer's first issue.

2

In his third issue, Spencer contends the evidence is insufficient to support finding of fact 2, that McGill "did not fail to disclose information that was known at the time of the transaction with the intent to induce Spencer into a transaction into which Spencer would not have entered had the information been disclosed." Spencer contends that the

evidence is uncontroverted that McGill "failed to do the work requested . . . in the order that comports with honesty and efficiency." Specifically, he points to his testimony that he instructed McGill to do the safety inspection first and he authorized a brake job if necessary to pass the inspection, which he considered to be "job one." He also contends he would not have agreed to the additional work if he had known the car had not passed inspection, and he points to Department of Public Safety rules and regulations governing the state-mandated inspections to assert that McGill acted improperly concerning the inspection.

Spencer acknowledged that he authorized the most expensive service, the 30,000-mile maintenance, as well as the inspection, when he signed the service ticket. By signing the service ticket, Spencer agreed to the following statement: "I hereby authorize the repair work herein after set forth to be done along with the necessary material." Spencer also testified that he authorized McGill to perform a brake job on his vehicle, if needed, because he thought the brakes were "a little soft." Further, when Sonny called Spencer at 11:15 a.m. and asked whether he would authorize the additional services of the power-steering flush and fuel-injector cleaning, Spencer authorized these services, too. Spencer contends he was misled that the inspection had been performed when he asked whether everything else was "okay" and Sonny told him it was, but he admitted there was no specific discussion concerning the inspection and he merely assumed that it had been successfully completed. This evidence is legally sufficient to support the trial court's finding of fact.

Although Spencer contends he told Sonny to perform the inspection first, the trial court was not required to accept his version of the events. *See City of Keller*, 168 S.W.3d at 819; *Pascouet*, 61 S.W.3d at 615–16. We note that McGill sought to impeach Spencer's credibility based on his failure to disclose several lawsuits he had filed in Harris County and in federal court in Kansas. During his deposition, Spencer was asked how many lawsuits he had been a party to before his lawsuit against McGill. In response,

Spencer disclosed three prior lawsuits that he had filed against various companies. Although Spencer identified three lawsuits, he could remember almost nothing about the facts of those lawsuits, including one he was apparently appealing *pro se* at the time of his deposition. In addition, Spencer failed to disclose at least two other lawsuits, one filed against the City of Houston and the other against American Mining Company. Spencer also admitted that, contrary to his assertion in his DTPA demand letter, he did not have a sister-in-law who was an attorney.

There is also evidence that no inspection was done because McGill determined that the vehicle needed new tires to pass inspection. Simmer and Mynatt testified that they offered to replace Spencer's tires at no charge so the inspection could be performed, but Spencer refused this offer. Spencer also admitted he was not charged for an inspection. Further, a DPS employee who was called by Spencer, Jean Chapa, testified that she investigated McGill when Spencer filed a complaint with the agency, and she determined that McGill did nothing wrong and so did not issue a citation to McGill for its actions.[4] Chapa also testified that a dealership does nothing wrong if it does not charge for an inspection. Thus, the evidence on this issue is conflicting. We defer to the fact finder's resolution of disputed issues. *CA Partners v. Spears*, 274 S.W.3d 51, 75 (Tex. App.—Houston [14th Dist.] 2008, pet. denied). Therefore, we cannot say that the trial court's finding of fact 2 is so against the great weight and preponderance of the evidence as to be manifestly unjust.

We overrule Spencer's third issue.

3

In his fourth issue, Spencer contends the evidence is insufficient to support finding of fact 3, that McGill did not falsely represent that it had performed service or replaced

[4] Spencer also lodged one or more complaints about Chapa to her superior at DPS following her investigation.

parts on his vehicle. The thrust of this issue is that McGill invoiced Spencer for replacing windshield wipers, but did not replace them; consequently, when Spencer took the vehicle to another inspection station he had to buy wipers again to pass the inspection. Spencer points to his complaint in his DTPA demand letter that the wipers were not replaced, the trial court's $20 judgment credit to cover the wiper expense, and Simmer's admission that Spencer suffered money damages for wiper inserts he was charged for but did not receive.[5]

Although McGill does not dispute that the wipers or wiper inserts were not replaced, Spencer points to no evidence that that McGill made any false, misleading, or deceptive representations concerning wipers which would support a DTPA claim. Instead, the evidence shows that Spencer was not aware of any issue concerning the wipers until after he took the vehicle to another inspection station. Mynatt testified that Spencer never said anything in their phone conversation about wipers, and if Spencer had informed him of the problem they would have replaced the wipers or refunded his money. Spencer presented no evidence to the contrary.

Further, Spencer does not challenge the trial court's conclusion of law that his claim that McGill failed to replace his windshield wiper-blade inserts sounds only in contract, but this conclusion is supported by the evidence and the law. Mere breach of contract, without more, does not violate the DTPA. *Riddick v. Quail Harbor Condo. Ass'n*, 7 S.W.3d 663, 670 (Tex. App.—Houston [14th Dist.] 1999, no pet.). When a representation by a defendant causes no harm itself but instead the injury or damage was caused by the breach of contract, that injury is governed by contract law, not the DTPA. *See Crawford v. Ace Sign, Inc.*, 917 S.W.2d 12, 14–15 (Tex. 1996). Therefore, we conclude that sufficient evidence supports the trial court's finding of fact 3.

[5] Simmer also testified that he believed there was a "miscommunication" because Toyota wiper inserts will not fit in after-market wiper blades, and Spencer should have been informed of this fact, but he was not.

We overrule Spencer's fourth issue.

4

In his fifth issue, Spencer contends the evidence is insufficient to support finding of fact 4, that Spencer did not rely on any representation by McGill to his detriment. In this issue, Spencer asserts that the testimony is uncontroverted that he relied on McGill to work on his vehicle according to his instructions and he suffered damages. We have already discussed the evidence surrounding Spencer's assertion that the inspection was the primary job and McGill did not inform him it was not done when he approved the additional services. And there is no assertion that the work performed was unnecessary or incorrectly performed. The evidence is legally and factually sufficient to support the trial court's finding of fact 4.

We overrule Spencer's fifth issue.

5

In his sixth issue, Spencer contends the evidence is insufficient to support the trial court's finding of fact 5, that no representation made by McGill was a producing cause of economic damages to Spencer. Spencer points to the evidence that his vehicle failed a subsequent inspection for wiper blades, McGill represented that new wipers were installed as part of the 30,000-mile service, and the service was done at the wrong time because it wasn't due for another 4,000 miles. The evidence shows, however, that Spencer authorized the 30,000-mile service when he dropped off the car, before any inspection was performed, and Spencer presented no evidence McGill made a representation actionable under the DTPA regarding the wipers. *See Doe v. Boys Clubs of Greater Dallas, Inc*., 907 S.W.2d 472, 480–81 (Tex. 1995) (explaining that alleged misrepresentation that did not influence the plaintiff's behavior was not the producing cause of plaintiff's damages).

We overrule Spencer's sixth issue.

6

In his seventh issue, Spencer contends the evidence is insufficient to support finding of fact 6, in which the trial court found that McGill did not take advantage of Spencer's lack of knowledge, ability, experience, or capacity to a grossly unfair degree. In this issue, Spencer points to his testimony that his safety-inspection sticker was expired and the inspection should have been performed first. He also points to excerpts of a DPS manual to assert that McGill violated the manual's rules, and argues that "no reasonable person would not do a fail/pass safety inspection first." But, as we have already discussed, the evidence concerning Spencer's expectations was disputed, and a DPS investigator found that McGill did nothing wrong when it did not perform an inspection and did not charge Spencer for an inspection. This evidence is sufficient to support the trial court's finding.

7

In his eighth issue, Spencer contends the evidence is insufficient to support finding of fact 7, that McGill tendered and Spencer accepted a free oil-change certificate in full satisfaction of the dispute over the service Spencer purchased from McGill on August 1, 2006. Spencer asserts that he did not accept the free oil change in satisfaction of his complaints, and points to his phone call to Mynatt on August 2 to continue his complaining and his DTPA demand letter as support. We agree with Spencer.

McGill points to Spencer's testimony that when he picked up his vehicle on August 1, he complained to the cashier about the services he received and in response she offered him a free oil-change certificate, which he accepted. The accord and satisfaction defense rests upon a contract, express or implied, in which the parties agree to the discharge of an existing obligation by means of a lesser payment tendered and accepted. *Lopez v. Munoz, Hockema & Reed, L.L.P.*, 22 S.W.3d 857, 863 (Tex. 2000). For this

defense to prevail, however, there must be a dispute and an unmistakable communication to the creditor that tender of the reduced sum is upon the condition that acceptance will satisfy the underlying obligation. *Id.* "The parties must specifically and intentionally agree to the discharge of one of the parties' existing obligations." *Id.*

There is no evidence that Spencer and McGill "specifically and intentionally" agreed that a free oil-change certificate would satisfy Spencer's complaints. In fact, it is undisputed that the disagreement continued after Spencer received the certificate. Therefore, the evidence is insufficient to support this finding of fact. But the defense of accord and satisfaction is merely an alternative basis for a judgment in favor of McGill. We have already concluded that the evidence supports the trial court's findings of fact that McGill did not engage in false, misleading or deceptive acts or unconscionable actions, Spencer did not rely on any representations to his detriment, and no representations were a producing cause of damages to Spencer. Therefore, this finding of fact did not cause the rendition of an improper judgment and therefore does not require the judgment's reversal. Tex. R. App. P. 44.1(a).

We overrule Spencer's eighth issue.

8

In his ninth issue, Spencer contends that the evidence is insufficient to support the trial court's finding of fact 8, that Spencer did not incur any economic damages. As noted above, we have already concluded that the evidence supports the trial court's findings of fact that McGill did not engage in any false, misleading or deceptive acts or unconscionable actions, Spencer did not rely on any representations to his detriment, and no representations were a producing cause of damages to Spencer. Having concluded the evidence supports the trial court's determination that no DTPA violations occurred, we do not need to reach the issue of damages.

9

In his tenth issue, Spencer contends the evidence is insufficient to support finding of fact 10, in which the court found that Spencer could have avoided, by the exercise of reasonable care, $376.35 in claimed damages. Spencer points to his testimony that he asked for all labor charges to be returned to him on August 1, 2006, McGill did not respond to his DTPA-demand letter, and $376.35 was not brought up until discovery in the lawsuit.

A claimant under the DTPA owes a duty to mitigate his damages. *Gunn Infiniti, Inc. v. O'Byrne*, 996 S.W.2d 854, 858 (Tex. 1999). Contrary to Spencer's assertion that he had not heard the $376.35 offer until discovery, both Simmer and Mynatt testified that McGill offered Spencer this amount in response to his complaints regarding the work performed on his vehicle. This evidence is legally sufficient to support the trial court's finding. Further, although Spencer disputes this evidence, we cannot say that the trial court's finding of fact 10 on this disputed issue is so against the great weight and preponderance of the evidence as to be manifestly unjust.

We overrule Spencer's tenth issue.

10

In his eleventh issue, Spencer contends the evidence is insufficient to support finding of fact 11, that Spencer did not incur any attorney's fees in this case. Spencer contends that the DTPA mandates reasonable and necessary attorney's fees for a plaintiff who prevails. But we have determined that the evidence is sufficient to support the trial court's findings in favor of McGill; therefore, Spencer is not a prevailing party. And, to the extent Spencer is contending that the trial court abused its discretion by excluding Spencer's evidence of attorney's fees, the record reflects that Spencer failed to disclose any information regarding his claimed fees in discovery. Spencer designated his attorney at trial to testify regarding reasonable and necessary attorney's fees, but he failed to

disclose the information required by Texas Rule of Civil Procedure 194.2(f), specifically, his attorney's opinions and the basis for them and her resume. McGill moved to strike the attorney's fees claim on this basis, and Spencer's attorney admitted that Spencer did not respond to any discovery requests regarding Spencer's claim for attorney's fees. Because Spencer failed to make, amend, or supplement his response to include all the required information regarding his attorney's testimony, the trial court did not abuse its discretion by excluding the attorney's testimony under Rule 193.6(a). *See* Tex. R. Civ. P. 193.6(a); *Moore v. Mem'l Hermann Hosp. Sys., Inc.*, 140 S.W.3d 870, 875 (Tex. App.—Houston [1st Dist.] 2004, no pet.).

IV

In his twelfth issue, Spencer contends the trial court erred by awarding McGill its costs. Specifically, Spencer complains of the award to McGill of $764.54 in costs for McGill to depose Spencer. Under Texas Rule of Civil Procedure 131, "the successful party to a suit shall recover of his adversary all costs incurred therein, except where otherwise provided." Tex. R. Civ. P. 131. We review the award of costs to the prevailing party under an abuse-of-discretion standard. *See Furr's Supermarkets, Inc. v. Bethune*, 53 S.W.3d 375, 376 (Tex. 2001). Here, McGill was the prevailing party, and therefore the trial court did not abuse its discretion in awarding McGill its costs.

We overrule Spencer's twelfth issue.

* * *

We overrule Spencer's issues and affirm the trial court's judgment.

/s/ Jeffrey V. Brown
Justice

Panel consists of Justices Brown, Boyce, and Jamison.