Affirmed in Part; Reversed and Remanded in Part; and Memorandum Opinion filed September 13, 2011.

In The

Fourteenth Court of Appeals

NO. 14-10-00606-CV

J. A. "JAY" ASAFI, INDIVIDUALLY AND AS INDEPENDENT ADMINISTRATOR OF THE ESTATE OF ALOSIA SMITH RAUSCHER, DECEASED, AND TODD REAGAN SMITH, Appellants

V.

MARTIN J. RAUSCHER, Appellee

On Appeal from the Probate Court No. 2
Harris County, Texas
Trial Court Cause No. 381,121

M E M O R A N D U M O P I N I O N

J. A. "Jay" Asafi, as independent administrator of the estate of Alosia Smith Rauscher, deceased, and Alosia's surviving son, Todd Reagan Smith, sued Alosia's surviving husband, Martin J. Rauscher, in probate court following the successful probate of Alosia's will. Martin filed a counterclaim against Alosia's estate, Todd, and Asafi, individually and as independent administrator, regarding ownership of certain property. We affirm in part, reverse in part, and remand to the trial court.

BACKGROUND

Martin and Alosia married in 1992. Todd is Alosia's son from a previous marriage. Alosia suffered a severe stroke in May 2008. Todd and Asafi visited Alosia in the hospital on June 2, 2008, at which time Alosia signed (1) a medical power of attorney in favor of Todd; and (2) a durable power of attorney designating Asafi as her agent and attorney-in-fact. Asafi, acting as "attorney-in-fact for Alosia Smith Rauscher," signed a document purporting to grant, convey, and assign to Todd "all right, title, and interest" in "any accounts, including checking accounts, investment accounts, and retirement accounts, as well as any safety deposit boxes associated therewith" on June 3, 2008.[1] Alosia died on June 12, 2008.

Todd filed an application to probate Alosia's will, which was granted on July 11, 2008.[2] Asafi was appointed independent administrator of Alosia's estate. Todd filed an original petition against Martin under the same cause number in which he asserted claims for unjust enrichment, tortious interference with inheritance rights, and conversion. Todd alleged in his petition that he is entitled to Alosia's assets by virtue of the purported assignment or Alosia's will, and that Martin had "improperly claim[ed]" an interest in these assets.[3] Asafi, acting as independent administrator of Alosia's estate, also filed an original petition against Martin alleging that Martin had "taken control of certain accounts that are presumed to be Estate property until the issues of ownership between [Todd] and [Martin] are resolved."

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[1] Todd and Asafi attended law school together; Todd works as a paralegal for Asafi. Todd graduated from law school but is not eligible to take the Texas Bar Examination. Todd has represented himself as a *pro se* litigant before the trial court and on appeal.

[2] Alosia executed a will in 2005 naming Todd as the sole beneficiary of her estate.

[3] Todd alleges in his First Supplemental Petition that Martin has "willfully and maliciously interfered with [Todd's] right to receive Alosia's interest in the accounts, as well as other property, without just cause or excuse" and become "unjustly enriched by obtaining property, through wrongful acts, that rightly belongs to [the estate and Todd]." At the hearing on Martin's motion for summary judgment on Todd's affirmative claims, Todd did not challenge the trial court's characterization of these statements as claims for unjust enrichment, tortious interference with inheritance rights, and conversion.

Martin filed a counterclaim for declaratory relief against Alosia's estate, Todd, and Asafi, individually and as administrator of Alosia's estate. Martin alleged in support of his counterclaim that he is the owner of certain stock, bank, and brokerage accounts as a transfer-on-death designee, beneficiary, or joint tenant with rights of survivorship pursuant to various non-testamentary transfer agreements.[4] Martin also sought attorney's fees in connection with his request for declaratory relief.

Asafi submitted an inventory of "all [of Alosia's] separate and community property" for the probate court's approval. The inventory included tangible property and numerous stock, bank, and brokerage accounts held by Alosia and Martin.

Martin filed seven motions for partial summary judgment regarding his asserted ownership of certain property identified in the inventory:

1. Alosia and Martin's FivePoint, Vanguard, Cohen & Steers, Merger Fund, and Woodforest joint accounts, for which Martin claims a right of survivorship;

2. Martin's separately owned Vanguard individual retirement accounts, which he argues are traceable to his separate property;

3. Alosia's separately owned Chevron stock and Vanguard non-retirement and individual retirement accounts, for which Martin claims ownership as a transfer-on-death designee or beneficiary; and

4. Martin's community property interest in cash dividends paid on Alosia's separately owned Chevron stock during her marriage to Martin.

[4] Martin also sought (1) a declaratory judgment that the purported power of attorney executed by Alosia "was the result of undue influence and [Alosia] was not of sound mind when the durable power of attorney was executed" and that "any action taken by Asafi pursuant to the power of attorney is void;" (2) rescission of the purported assignment; and (3) damages for intentional infliction of emotional distress. The trial court did not rule on the validity of the durable power of attorney or the purported assignment. The record reflects that at least one of these additional claims was non-suited by Martin. The trial court's post-trial final judgment states: "This is a final judgment finally disposing of all parties and all claims and causes of actions between all parties, and this judgment is appealable. All other relief not expressly granted in this Final Judgment is denied." Martin does not challenge on appeal the trial court's denial of relief for his additional claims.

Martin also filed a traditional and no-evidence motion for partial summary judgment on Todd's affirmative claims of tortious interference with inheritance rights, conversion, and unjust enrichment. The trial court granted all eight partial summary judgments in favor of Martin.

Martin then filed a motion for attorney's fees based on the declaratory relief granted by the trial court and a motion for sanctions against appellants. Martin argued, among other things, that appellants should be sanctioned pursuant to Texas Rules of Civil Procedure 13 and 215 and Chapter 10 of the Texas Civil Practice and Remedies Code because "[t]hroughout this litigation [Todd] and Asafi acted in concert to harass [Martin] by filing identical lawsuits [in multiple courts], engaging in harassing, duplicative and unnecessary discovery and asserting claims that had no basis in law or fact. . . . Each of [Asafi and Todd's] claims were frivolous, groundless and asserted to intimidate and harass [Martin]." Martin submitted evidence of the attorney's fees he incurred (1) due to the sanctionable conduct detailed in his motion; (2) preparing the motion for sanctions; and (3) prosecuting and obtaining the requested declaratory relief. The trial court granted the request for sanctions and scheduled a bench trial on attorney's fees based on the declaratory relief and appellants' sanctionable conduct. The trial court denied appellants' jury requests on the issue of reasonable and necessary attorney's fees Martin incurred in seeking declaratory relief.

In an eight-page order detailing findings to support its conclusion that good cause existed to sanction appellants, the trial court invoked its authority under Texas Rules of Civil Procedure 13 and 215 and Chapter 10 of the Texas Civil Practice and Remedies Code. The trial court ordered that appellants are jointly and severally liable to Martin for (1) $25,250 in "reasonable and necessary attorney's fees incurred by [Martin] as the result of [Todd] and Asafi's sanctionable conduct;" (2) $2,500 in "reasonable and necessary attorney's fees incurred in bringing this Motion for Sanctions;" (3) $10,000 in "additional attorney's fees if [Todd] or Asafi unsuccessfully appeal[] this award of sanctions to the Court of Appeals;" and (4) $3,500 in "attorney's fees if [Todd] or Asafi

unsuccessfully file[] a petition for review of this award of sanctions in the Texas Supreme Court."

The trial court signed a final judgment on March 12, 2010, in which it ordered that Todd and Asafi, as independent administrator of Alosia's estate, are jointly and severally liable to Martin for (1) $54,250 in "reasonable and necessary attorney's fees as are equitable and just [that were] incurred by [Martin] in pursuit of [declaratory relief];" (2) $25,000 "in the event the judgment is appealed to the Court of Appeals and the Court of Appeals upholds the judgment;" and (3) $10,000 "in the event that the judgment is appealed to the Supreme Court of Texas, and the judgment is affirmed." The final judgment also approves the inventory, subject to the prior rulings and orders of the trial court; incorporates the partial summary judgments and the sanctions order; awards $82,000 in post-judgment interest to Martin; and adjudges "all costs of court spent or incurred in this cause" against appellants. Appellants requested findings of fact and conclusions of law; the trial court signed nine pages of findings of fact and conclusions of law concerning the partial summary judgments, attorney's fees, and sanctionable conduct.

Appellants argue on appeal that the trial court erred in (1) "granting summary judgment;" (2) "awarding attorney's fees;" (3) "awarding sanctions;" and (4) "not making additional findings of fact and conclusions of law."

I. Partial Summary Judgments on Non-Testamentary Transfers

In their first issue, appellants argue that the trial court erred in "granting summary judgment" as to Martin's ownership of the property in dispute because (1) Asafi, acting as "attorney-in-fact for Alosia," assigned "all right, title, and interest" in Alosia's accounts to Todd; (2) the purported assignment revoked Martin's rights of survivorship; and (3) the trial court erred in overruling appellants' objections to evidence Martin proffered to prove his ownership of the account assets. Appellants also argue that the trial court erred in granting partial summary judgment on Martin's (1) claimed community interest in cash dividends paid on Alosia's separately owned Chevron stock;

and (2) ownership of Martin's separately owned Vanguard accounts based on his ability to trace the account assets to his separate property. Finally, appellants argue that the trial court erred in granting partial summary judgment on Todd's affirmative claims against Martin because "it is clear" that Martin's transfer of funds from the accounts "gives rise to a cause of action" for tortious interference, conversion, and unjust enrichment.

An appellate court applies *de novo* review to a grant of summary judgment, using the same standard that the trial court used in the first instance. *Duerr v. Brown*, 262 S.W.3d 63, 68 (Tex. App.—Houston [14th Dist.] 2008, no pet.) (citing *Valence Operating Co. v. Dorsett*, 164 S.W.3d 656, 661 (Tex. 2005)). A party may move for a traditional summary judgment after the adverse party has appeared or answered, and for a no-evidence summary judgment after an adequate time for discovery has passed. *Id*. (citing Tex. R. Civ. P. 166a(a), (i), and *McMahan v. Greenwood*, 108 S.W.3d 467, 498 (Tex. App.—Houston [14th Dist.] 2003, pet. denied)).

A traditional summary judgment under Rule 166a(c) may be granted if the motion and evidence show there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Id*. (citing Tex. R. Civ. P. 166a(c), and *Nixon v. Mr. Prop. Mgmt. Co.*, 690 S.W.2d 546, 548 (Tex. 1985)). The non-movant has no burden to respond to a summary judgment motion unless the movant conclusively establishes its cause of action or defense. *M.D. Anderson Hosp. & Tumor Inst. v. Willrich*, 28 S.W.3d 22, 23 (Tex. 2000). Once the movant produces sufficient evidence conclusively establishing his right to summary judgment, the burden of proof shifts to the non-movant to present evidence sufficient to raise a fact issue. *Walker v. Harris*, 924 S.W.2d 375, 377 (Tex. 1996). In reviewing a traditional summary judgment, we examine the entire record in the light most favorable to the non-movant, indulging every reasonable inference and resolving any doubts against the motion. *Yancy v. United Surgical Partners Int'l, Inc.*, 236 S.W.3d 778, 782 (Tex. 2007).

A no-evidence motion for summary judgment under Rule 166a(i) must be granted if (1) the moving party asserts that there is no evidence of one or more specified elements

of a claim or defense on which the adverse party would have the burden of proof at trial; and (2) the respondent produces no summary judgment evidence raising a genuine issue of material fact on those elements. *Duerr*, 262 S.W.3d at 69 (citing Tex. R. Civ. P. 166a(i)). In reviewing a no-evidence motion for summary judgment, we view all of the summary judgment evidence in the light most favorable to the non-movant, "crediting evidence favorable to that party if reasonable jurors could, and disregarding contrary evidence unless reasonable jurors could not." *Id*. (quoting *Mack Trucks, Inc. v. Tamez*, 206 S.W.3d 572, 582 (Tex. 2006)). The non-moving party is not obligated to marshal its proof, but it is required to present evidence that raises a genuine fact issue on the challenged element. *Id*. (citing *Sw. Elec. Power Co. v. Grant*, 73 S.W.3d 211, 215 (Tex. 2002)).

A. Purported Assignment

Appellants first argue that Asafi, acting as "attorney-in-fact for Alosia," assigned to Todd "all right, title, and interest" in Alosia's accounts. Accordingly, appellants contend that the trial court improperly granted each partial summary judgment in favor of Martin because Todd "became the owner of Alosia's interest in the accounts" on the date of the assignment. In making this argument, appellants do not distinguish among the various types of accounts and non-testamentary transfer agreements at issue in the relevant partial summary judgments granted by the trial court. Appellants cite to general rules regarding assignments and *inter vivos* gifts; appellants do not explain how these general rules apply to non-testamentary transfer agreements, and they do not explain how the purported assignment is effective as against (1) the specific agreements between Alosia and Martin to hold property in joint accounts as joint tenants with rights of survivorship; or (2) the transfer-on-death and beneficiary designations relevant to the other non-testamentary transfers. We overrule appellant's issue with respect to this argument. *See* Tex. R. App. P. 38.1(i).

Appellants argue that the purported assignment "revoked any account agreements between Alosia and [Martin]," citing authority relevant only to the joint accounts with

survivorship agreements. With respect to these account agreements, appellants correctly state that "[o]nce [a] survivorship agreement [is] in place, the only means of revoking it [is] pursuant to [Section 455 of the Texas Probate Code], i.e., through a subsequent written agreement or a disposition of the assets covered by the agreement." *See Holmes v. Beatty*, 290 S.W.3d 852, 861–62 (Tex. 2009); *see also* Tex. Prob. Code Ann. § 455 (Vernon 2003) (revocation of agreement to create survivorship rights in community property). Appellants contend that the purported assignment disposed of all of Alosia's assets and revoked all survivorship agreements because Martin "was provided with written notice that any purported right he had to Alosia's interest in accounts was revoked."

An agreement between spouses creating survivorship rights in community property "'may be revoked in accordance with the terms of the agreement.'" *Holmes*, 290 S.W.3d at 861 (quoting Tex. Prob. Code Ann. § 455). Written notice signed by one spouse and delivered to the other spouse may effectively revoke a survivorship agreement "'[i]f the agreement does not provide a method for revocation.'" *Id.* (quoting Tex. Prob. Code Ann. § 455). Appellants failed to (1) mention this limitation to the trial court or on appeal, or (2) argue that the relevant agreements do not provide a method for revocation.[5] Even assuming that the purported assignment is valid, appellants' unsupported conclusion that "[it] is crystal clear that the assignment of Alosia's interest to [Todd] disposed of Alosia's interest in the accounts" does not warrant reversal because appellants have not argued or established the absence of provisions in the relevant agreements setting forth a method of revocation. We overrule appellants' issue based on this argument.

[5] Martin's summary judgment evidence included the relevant account agreements and affidavits regarding the execution of those agreements and their effectiveness on the date of Alosia's death. Aside from making various unsupported evidentiary challenges discussed below, appellants do not argue on appeal, as they did to the trial court, that Martin failed to meet his initial burden to prove "to the satisfaction of the court" that the survivorship agreements at issue were not revoked. *See* Tex. Prob. Code Ann. § 456 (Vernon 2003) (proof required to support application to adjudicate survivorship agreement between spouses).

B. Proof of Ownership

Appellants make a number of challenges on appeal to the summary judgment evidence proffered to show Martin's ownership of the account assets.

First, appellants argue that Martin "used documents" that were "illegible" and included "agreements with pages missing, unreliable evidence, and extrinsic evidence." The record contains a total of eight summary judgment motions and hundreds of pages of exhibits, but appellants do not cite to the offending exhibits or explain these assertions. Appellants cite to general authority regarding Martin's burden to show survivorship rights, the use of extrinsic evidence and parol evidence, and the best evidence rule without explaining how these cases are applicable to each of the non-testamentary transfer agreements at issue. We have no duty to search a voluminous record without more specific guidance from appellants to determine whether an assertion of reversible error is valid. *See Casteel–Diebolt v. Diebolt*, 912 S.W.2d 302, 305 (Tex. App.—Houston [14th Dist.] 1995, no writ). Appellants have presented nothing for review, and we overrule appellants' issue based on this argument. *See* Tex. R. App. P. 38.1(i).

Appellants next argue:

> One need go no further than the affidavit of [Martin], attached to Exhibit 1 of his motion to determine that he is not entitled to summary judgment and, in fact, as a matter of law is not entitled to the Chevron stock. [Martin] states plainly and clearly that '[i]n the fall of 2000 Alosia told [him] she wanted to make [him] the transfer on death beneficiary on book-entry shares she held in Texaco.' [Martin] further states that the Texaco shares were later converted to Chevron shares. It is uncontroverted that at the time of her death, Alosia owned Chevron shares, not Texaco shares. Accordingly, as a matter of law, he is not entitled to Chevron shares Alosia owned at the time of her death, because he admits Alosia wanted him to be the transfer on death beneficiary of any Texaco shares she owned, which she did not own at the time of her death.[6]

[6] Appellants state: "The evidence is uncontroverted that . . . specific forms . . . needed to be completed to designate a person as a transfer on death beneficiary. . . . The evidence is uncontroverted that Alosia never completed any of the required forms to make [Martin] the transfer on death beneficiary of her Chevron stock." Martin's summary judgment evidence includes a completed form in which Alosia

Appellants do not challenge Martin's assertion that "[i]n October 2001, Texaco merged with Chevron and all Texaco shares in the transfer on death registration were converted into . . . Chevron shares." Appellants do not cite any authority for their conclusion that a transfer on death registration must be resubmitted after such a conversion. We overrule appellants' issue based on this argument. *See* Tex. R. App. P. 38.1(i).

Appellants next argue:

> The trial Court overruled Appellants' objections . . . under Rule 1002, Texas Rules of Evidence, the Best Evidence Rule, and Texas Probate Code § 456(a) as well as for non-relevant extrinsic evidence, conclusory evidence, hearsay, and violations of Rule 601(b), T.R.E., to [Martin's] summary judgment evidence. The law is crystal clear that Appellants' objections should have been sustained, because the evidence was inadmissible. *Mercer v. Daoran Corp.*, 676 S.W.2d 580, 584 (Tex. 1984); *Parker v. JP Morgan Chase Bank*, 95 S.W.3d 428, 431 (Tex. App.—Houston [1st Dist.] 2002, no pet.); *Gary E. Patterson & Assocs., P.C. v. Holub*, 264 S.W.3d 180, 197 (Tex. App.—Houston [1st Dist.] 2008, pet. denied); Texas Probate Code § 456(a).[7]

Appellants provide no additional explanation or argument in support of this statement. The cases cited by appellant are inapplicable. *See Mercer*, 676 S.W.2d at 583–84 (an unexecuted "copy" of an executed agreement, along with testimony that original agreement was executed, did not satisfy best evidence rule because absence of executed agreement was not explained and "copy" was not a purported reconstruction of the executed agreement); *Parker*, 95 S.W.3d 431–32 (payee on death account was never created because decedent failed to sign the agreement); *Holub*, 264 S.W.3d at 197 (general explanation of limitations on use of parol evidence). Texas Probate Code

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registers her account as "Alosia S. Rauscher TOD Martin J. Rauscher" before the merger; appellants do not challenge this pre-merger designation. The forms identified by appellants are required when the shareowner wishes to transfer stock to a new account or shareowner. Again, appellants do not cite any authority for the conclusion that it was necessary for Alosia to submit these transfer forms to reaffirm her existing transfer-on-death designation after the merger.

[7] Appellants recite this argument verbatim five times throughout their brief to challenge evidence supporting each of the five motions for partial summary judgment motions on Martin's ownership of the Chevron stock, the "Vanguard Accounts," the Cohen & Steers, CGM, and Merger Fund accounts, the Woodforest account, and the Fivepoint accounts.

section 456(a) does not relate to the admissibility of evidence. *See* Tex. Prob. Code Ann. § 456(a) (Vernon 2003) (requirements for application to adjudicate agreement between spouses creating a right of survivorship in community property). Appellants have presented nothing for review and we overrule appellants' issue based on this argument. *See* Tex. R. App. P. 38.1(i).

C. Community Interest in Cash Dividends

Appellants argue that Martin has no interest in half of the cash dividends paid from Alosia's separately owned Chevron stock during her marriage to Martin because "[a]n increase in the value of separate-property stock remains separate property."

Martin argued in his summary judgment motion that Alosia's separately owned Chevron stock generated cash dividends during her marriage to Martin in the amount of $25,352.88. Martin contends that he is entitled to half of these cash dividends, which were reinvested to purchase additional Chevron stock, because such income is community property. Appellants argue that the reinvested dividends were "stock dividends" and that they remained Alosia's separate property because "[a] stock dividend normally is separate if the stock ownership out of which it springs is separate." *See Wohlenberg v. Wohlenberg*, 485 S.W.2d 342, 347 (Tex. Civ. App.—El Paso 1972, no writ).

"Interest and dividends paid on investments, whether the investments are separate property or not, are income under Texas law and are generally community property." *Fischer-Stoker v. Stoker*, 174 S.W.3d 272, 279 (Tex. App.—Houston [1st Dist.] 2005, pet. denied) (citing *Alsenz v. Alsenz*, 101 S.W.3d 648, 653 (Tex. App.—Houston [1st Dist.] 2003, pet. denied)). We reject appellants' attempt to characterize the cash dividends as "stock dividends" that remained Alosia's separate property because they were reinvested to purchase additional stock. *See Legrand-Brock v. Brock*, 246 S.W.3d 318, 322 n.4 (Tex. App.—Beaumont 2008, pet. denied) (citing *Tirado v. Tirado*, 357 S.W.2d 468, 473 (Tex. Civ. App.—Texarkana 1962, writ dism'd) (distinguishing between cash dividends, which are treated like income, and stock dividends, which are

treated as a mutation of property and take the character of the stock from which they originated when they do not increase the value of the total stocks owned); *see also Duncan v. U.S.*, 247 F.2d 845, 855 (5th Cir. 1957) ("Dividends are, of course, community, but a stock dividend normally is that in name only. It is a mere rearrangement of the formal corporate bookkeeping structure with no increase in equity ownership."). We overrule appellants' issue as it relates to this argument.[8]

D. Martin's Individual Retirement Accounts

Appellants argue that partial summary judgment should not have been granted on Martin's separately owned Vanguard individual retirement accounts because the affidavit of expert Paula A. Miller, which Martin proffered in support of his argument that the account assets are traceable to his separate property, should have been considered "unreliable" by the trial court.

Appellants' reliability challenge is based on their assertion that Miller's tracing opinion relied upon incomplete account information; appellants argue that account information is "missing" because the evidence reviewed by Miller does not contain statements for every month during Alosia's marriage to Martin.[9] Martin responds by pointing out that Miller's affidavit specifically states: "It should be noted there are not always balances on a monthly basis because certain of the financial institutions did not issue monthly statements on the accounts or when there was no activity in the account. If there was activity in an account[,] a statement was issued. Some of the financial institutions issued statements monthly, quarterly, bi-annual, and on an annual basis. This fact does not affect the accuracy of tracing and characterization." Appellants do not

[8] Appellants also make the same unsupported evidentiary challenges that were overruled in Part I.B. For the same reasons stated above, we overrule appellants' issue as it relates to these challenges.

[9] Appellants also argue that "[t]his Court in *Osorno v. Osorno*, 76 S.W.3d 509 (Tex. App.—Houston [14th Dist.] 2002, no pet.) required that deposit slips or bank records be produced when tracing bank accounts as separate property." This Court stated in *Osorno* that conclusory testimony as to the separate nature of presumptively community assets, without deposit slips, bank records, or other evidence to trace the assets to separate property, cannot overcome the community property presumption. *Osorno*, 76 S.W.3d at 512. *Osorno* is inapplicable because Martin's summary judgment motion was based on "other evidence" tracing the account assets to his separate property.

argue that the "missing" account information would reveal unaccounted-for transactions or other inconsistencies with Miller's tracing opinion. We overrule appellants' issue as it relates to this argument.

E. Todd's Affirmative Claims against Martin

Appellants argue that the trial court erred in granting partial summary judgment on Todd's affirmative claims against Martin because "it is clear that by [Martin] taking over Alosia's interest in accounts that [Todd] is entitled to," Martin's actions "give[] rise to a cause of action" for tortious interference, conversion, and unjust enrichment. Appellants' argument is based on their conclusion that the first seven partial summary judgments were improperly granted because Martin does not own the account assets and property. Because we overrule appellants' issues challenging the other partial summary judgments, we also overrule appellants' challenge to the trial court's partial summary judgment on Todd's affirmative claims against Martin.

Having rejected all of appellants' arguments in support of reversing the trial court's partial summary judgments, we overrule appellants' first issue.

II. Attorney's Fees for Declaratory Relief

Appellants argue in their second issue that the trial court erred in awarding attorney's fees Martin incurred in seeking declaratory relief. Appellants alternatively argue that if Martin is entitled to attorney's fees, the trial court improperly denied appellants' timely jury request.

Appellants first contend that Texas Probate Code sections 456 through 458 exclusively govern Martin's claims, and that Martin cannot seek attorney's fees under the Declaratory Judgments Act because it is "crystal clear" that sections 456–58 do not allow the recovery of attorney's fees. *See* Tex. Prob. Code Ann. §§ 456–58 (Vernon 2003). Appellants also argue that "the record is crystal clear that [Martin's] relief is based on his filing a counterclaim" that "presents no new controversies, but is engineered solely to pave an avenue for the award of attorney's fees."

Appellants failed to specially except to Martin's pleadings or make these arguments at any point to the trial court in their (1) written response to Martin's request for attorney's fees; (2) arguments to the trial court at the hearing on the amount of attorney's fees; or (3) post-trial motions. Accordingly, appellants have waived these arguments on appeal. *See* Tex. R. Civ. P. 90 (waiver of defects in pleading); Tex. R. App. P. 33.1 (preservation of error for complaint on appeal); *Gulf Ins. Co. v. Vantage Props., Inc.*, 858 S.W.2d 52, 55 (Tex. App.—Houston [14th Dist.] 1993, writ denied) ("Even were we to assume that the claim for declaratory judgment did not involve matters not already before the court . . . we still are not able to sustain appellant's point of error because appellant failed to properly except to the claim or otherwise raise the issue until [on appeal].").

Appellants also argue that if Martin is entitled to attorney's fees, then appellants are entitled to a jury trial to determine the amount of attorney's fees. We agree that a party is entitled to a jury trial on the issue of the amount of reasonable and necessary attorney's fees incurred in pursuit of declaratory relief. *See* Tex. Civ. Prac. & Rem. Code § 37.009 (Vernon 2008) ("In any proceeding under [the Declaratory Judgments Act], the court may award costs and reasonable attorney's fees as are equitable and just."); *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 367–68 (Tex. 2000) (plurality opinion) (citing *Bocquet v. Herring*, 972 S.W.2d 19, 21 (Tex. 1998)) (majority holding that party was entitled to jury trial on issue of reasonable and necessary attorney's fees under the Texas Public Information Act, in part, because "similarly-worded provision in the Declaratory Judgments Act . . . requires the trial court to determine whether to award attorney's fees and allows the jury to determine the amount of reasonable attorney's fees;" concluding that the court of appeals did not err in remanding the attorney's fees issue for a jury determination); *Ogu v. C.I.A. Servs. Inc.*, No. 01-07-00933, 2009 WL 41462, at *3–5 (Tex. App.—Houston [1st Dist.] Jan. 8, 2009, no pet.) (appellants were entitled to but denied a jury trial on the issue of the amount of attorney's fees; reversing and remanding issue because appellants "disputed the veracity" of testimony supporting

amount of fees requested and continued to insist on their right to a jury to hear evidence).

Martin does not dispute that appellants timely requested a jury trial and paid the fee. The trial court stated that appellants' request was denied because "there are cases all over the place. I'm choosing to follow the extreme authority that in a dec action the attorney's fees are subject to the sound discretion of the Court. I'm not going to submit it to the jury."[10] We conclude on this record that the appellants erroneously were deprived of their right to a jury trial on the issue of the amount of reasonable and necessary attorney's fees Martin incurred seeking declaratory relief. *See City of Garland*, 22 S.W.3d at 367–68; *Ogu*, 2009 WL 41462, at *3–5. To this extent, we sustain appellants' second issue and remand this case for a jury trial on that issue.

III. Sanctions Award

Appellants argue in their third issue that the trial court abused its discretion in awarding sanctions because (1) the trial court "refused to specify the Rule associated with each violation and refused to . . . state the specific factual basis of each sanction; and (2) the various allegations of sanctionable conduct against Asafi and Todd are "against the evidence . . . and amount[] to no evidence" or do not constitute sanctionable conduct.[11]

We review a trial court's imposition of sanctions for an abuse of discretion. *Am. Flood Research, Inc. v. Jones*, 192 S.W.3d 581, 583 (Tex. 2006) (citing *Cire v.*

[10] Martin's only response to appellants' argument is that appellants are not entitled to relief because they failed on appeal to challenge the amount of attorney's fees awarded or the sufficiency of the evidence supporting the award or explain how they were harmed by the failure to have the issue of the amount of fees submitted to a jury. The denial of a party's constitutional right to trial by jury constitutes reversible error. *See McDaniel v. Yarbrough*, 898 S.W.2d 251, 253 (Tex. 1995); *see also Wittie v. Skees*, 786 S.W.2d 464, 465 (Tex. App.—Houston [14th Dist.] 1990, writ denied) (timely and appropriate jury demand entitles party to absolute right to a jury trial). A denied jury request is harmless error only if the record shows that no material issues of fact exist and an instructed verdict would have been justified. *Halsell v. Dehoyos*, 810 S.W.2d 371, 372 (Tex. 1991). We reject Martin's argument because the record reflects that appellants challenged the reasonableness and necessity of Martin's claimed attorney's fees throughout the trial and repeatedly insisted on their right to have a jury hear the evidence.

[11] Appellants also argue briefly that Martin "waived any sanctions" because he "wait[ed] to move for sanctions at trial based on alleged pretrial conduct." The record reveals that Martin filed a pre-trial motion for sanctions regarding pre-trial conduct; he did not "wait[] to move for sanctions." We overrule appellants' issue as it relates to this argument.

Cummings, 134 S.W.3d 835, 838 (Tex. 2004)) (discovery sanctions under Texas Rule of Civil Procedure 215); *Barkhausen v. Craycom, Inc.*, 178 S.W.3d 413, 419–22 (Tex. App.—Houston [1st Dist.] 2005, pet. denied) (sanctions under Texas Rule of Civil Procedure 13 and Texas Civil Practice and Remedies Code Chapter 10). The ruling will be reversed only if the trial court acted "without reference to any guiding rules and principles," such that its ruling was arbitrary or unreasonable. *Am. Flood Research*, 192 S.W.3d at 583 (citing *Cire*, 134 S.W.3d at 839).

With respect to appellants' first argument, the trial court's eight-page sanctions order states that "there is good cause to sanction Asafi and [Todd] because their actions in this matter violated Rules 13 and 215 of the Texas Rules of Civil Procedure and Chapter 10 of the Texas Civil Practice and Remedies Code. Specifically[,] the Court finds that throughout the litigation Asafi and [Todd] repeatedly acted in concert in filing groundless pleadings and in bad faith; knowingly filed the same claims in two separate courts; asserted frivolous claims that had no basis in law or fact; engaged in duplicative and unnecessary discovery and took actions designed to delay the proceedings and harass [Martin] and thereby did cause unnecessary delay and caused [Martin] to incur unnecessary attorney[']s fees."

This statement is followed by eighteen paragraphs detailing the particular conduct supporting the trial court's conclusion, as well as the trial court's findings regarding the amount of attorney's fees that were incurred by Martin "as a result of Asafi and [Todd's] improper and sanctionable conduct . . . . If Asafi and [Todd] had acted in good faith and not engaged in the above conduct, [Martin] would not have had to incur the majority of legal fees he incurred." Appellants do not challenge on appeal the propriety or proportionality of the amount awarded.

We conclude that the trial court's order sufficiently identifies the rules associated with the relevant violations and satisfies the particularity requirements applicable to sanctions under Chapter 10 and Rule 13. *See* Tex. Civ. Prac. & Rem. Code Ann. § 10.005 (Vernon 2002) ("A court shall describe in an order imposing a sanction under this

chapter the conduct the court has determined violated Section 10.001 . . . ."); Tex. R. Civ. P. 13 (good cause for sanctioning party for filing a groundless pleading brought in bad faith or harassment must be stated in the sanctions order with particularity); *Barkhausen*, 178 S.W.3d at 420–22 (trial court abused its discretion in awarding sanctions because it failed to "particularize the conduct it found warranted sanctions" under Rule 13 and Chapter 10 and the evidence did not otherwise support sanctions).[12]

Appellants failed to sufficiently brief their remaining arguments regarding the trial court's factual findings and legal conclusions supporting the sanctions against appellants. In support of each challenge to the sufficiency of the evidence, appellants cite to the same range of over four hundred transcript pages taken at the hearing on Martin's motion for sanctions and trial on the amount of attorney's fees. In support of each statement that certain conduct is not sanctionable as a matter of law, appellants cite irrelevant authority and fail to provide any accompanying analysis. We overrule appellants' issue as it relates to these arguments. *See* Tex. R. App. P. 38.1; *Casteel–Diebolt,* 912 S.W.2d at 304–05 (issue waived on appeal because appellant failed to provide relevant legal authority or make accurate references to the record).

Having rejected all of appellants' arguments in support of overturning the trial court's sanctions award, we overrule appellants' third issue.

IV. Additional Findings of Fact and Conclusions of Law

Appellants argue in their fourth issue that the trial court erred in denying appellants' request for additional findings of fact and conclusions of law because "the Orders granting [Martin] relief involved factually complicated situations in which there are two or more possible grounds for recovery or defense existed [sic], which has placed an undue burden upon Appellants in challenging the relief granted Mr. Rauscher in this

[12] Appellants also argue that we should reverse the sanctions order because the trial court "refused to state lesser sanctions considered." A trial court must consider the imposition of lesser sanctions, such as the imposition of attorney's fees, for discovery abuse under Ruler 215 before imposing severe sanctions, such as striking a party's pleadings. *See Cire*, 134 S.W.3d at 839–40. Appellants have not explained on appeal why such a rule applies in this case.

appeal." *See Limbaugh v. Limbaugh*, 71 S.W.3d 1, 7 (Tex. App.—Waco 2002, no pet.) ("In factually complicated situations in which there are two or more possible grounds for recovery or defense, an undue burden would be placed upon an appellant [if the trial court fails to file more detailed conclusions of law].") (internal quotation omitted).

We cannot agree with appellant that the trial court's findings of fact and conclusions of law, which fill nine pages, force appellants "to try to guess the reason or reasons the trial judge ruled against [them]." *See id.* The trial court incorporated (1) each of its eight partial summary judgment rulings; (2) detailed findings and conclusions regarding the sanctionable conduct at issue in its previous sanctions order; and (3) findings and conclusions regarding attorney's fees. We conclude on this record that the trial court explained in sufficient detail the reasons for its rulings, and we overrule appellants' fourth issue.

CONCLUSION

We sustain appellants' issue regarding their entitlement to a jury trial on the issue of the amount of reasonable and necessary attorney's fees incurred by Martin in seeking declaratory relief. We overrule all appellants' other issues on appeal. We remand this case for a jury trial on the issue of the amount of reasonable and necessary attorney's fees incurred by Martin in seeking declaratory relief, and affirm the trial court's judgment in all other respects.

/s/ William J. Boyce
Justice

Panel consists of Chief Justice Hedges and Justices Seymore and Boyce.