Affirmed and Memorandum Opinion filed April 28, 2016.

In The

Fourteenth Court of Appeals

NO. 14-15-00034-CV

BRIDGET D. ELLIOTT AS TRUSTEE OF BC TRUST, Appellant

V.

CROSSWATER YACHT CLUB, L.P., CROSSWATER YACHT CLUB MANAGEMENT, LLC, HURST JOINT VENTURE, L.P., AND HURST HARBOR GP, LLC, Appellees

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On Appeal from the 126th District Court
Travis County, Texas
Trial Court Cause No. D-1-GN-09-000550

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

This case involves a dispute over the scope of easements across property that appellees purchased and developed as a marina on Lake Travis. Appellees sued in 2009 seeking injunctive and declaratory relief regarding the scope. The adjoining property owner/easement holder and other related parties countersued asserting, among other claims, trespass. After more than five years of litigation and on the eve of trial, the defendants/counter-plaintiffs unilaterally stipulated to the scope of the

easements and nonsuited all causes of action and affirmative defenses other than a claim for attorney's fees under the Uniform Declaratory Judgments Act ("UDJA") and a defense of unclean hands (which the trial court submitted to the jury as an affirmative claim for malicious prosecution).[1] The jury found a reasonable fee for the necessary services of appellees' attorneys and for the necessary services of the defendants/counter-plaintiffs' attorneys. The jury also found against the defendants/counter-plaintiffs on their malicious prosecution claim. The trial court signed a declaratory judgment on the scope of the easements, awarded appellees their attorney's fees in the amount the jury found to be reasonable and necessary, and denied attorney's fees to the defendants/counter-plaintiffs.

Appellant Bridget D. Elliott as Trustee of BC Trust — one of the defendants/counter-plaintiffs below — challenges the trial court's judgment on four grounds: (1) the trial court lacked subject matter jurisdiction because the pre-trial stipulations mooted appellees' claims for declaratory relief; (2) the trial court erroneously failed to submit unresolved fact questions to the jury on appellees' claim for declaratory relief; (3) the trial court erroneously excluded a rebuttal witness; and (4) the attorney's fees awarded to appellees were not reasonable and necessary. We affirm.

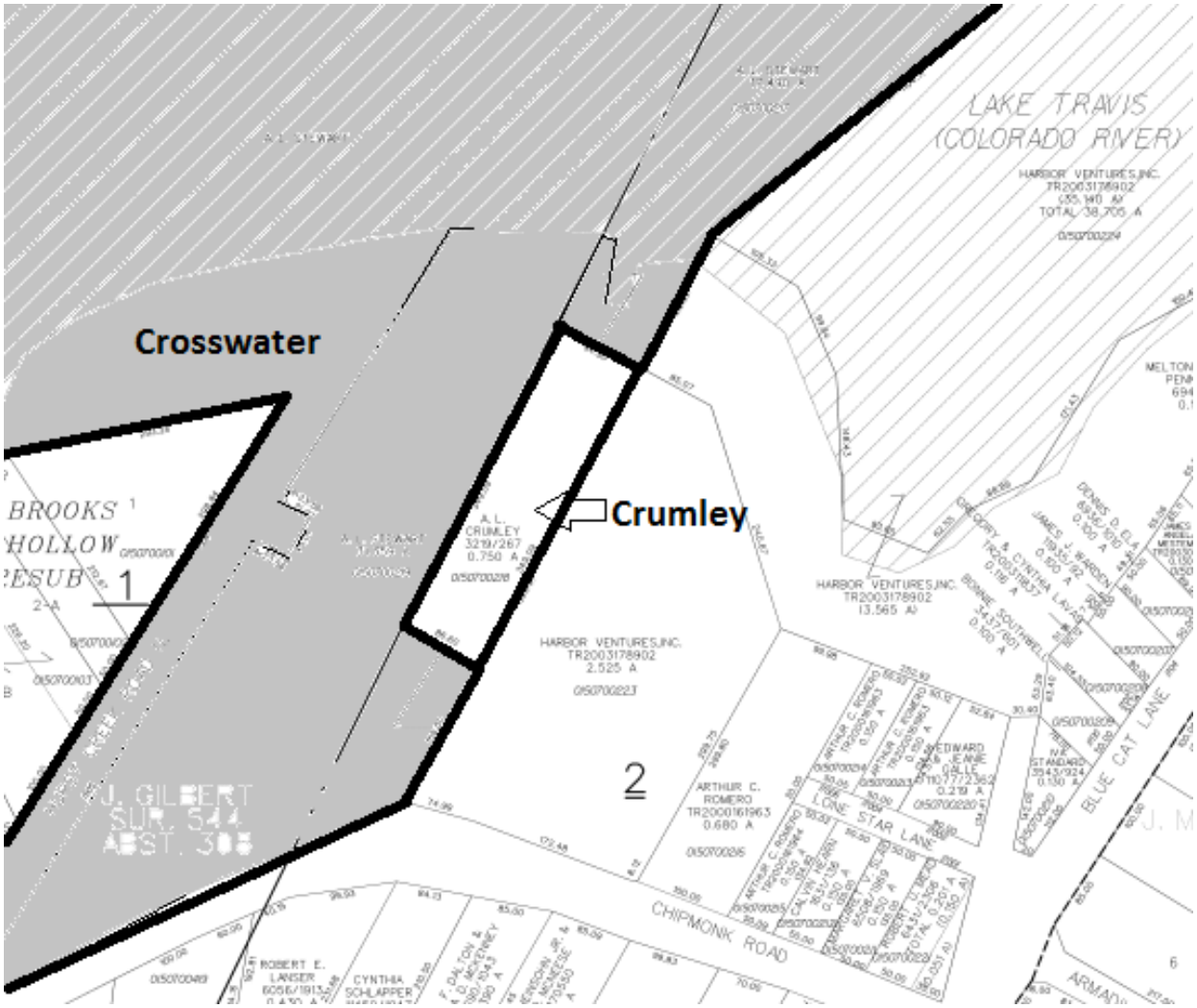
BACKGROUND

Crosswater purchased property on Lake Travis in 2007 for development as a marina.[2] The Crosswater property surrounds on three sides a residential property

[1] In this opinion we need not and do not address the propriety of the trial court's action in submitting the defense of unclean hands to the jury as an affirmative claim for malicious prosecution.

[2] Crosswater Yacht Club, L.P. originally acquired the property. Crosswater Yacht Club Management, LLC is the general partner of Crosswater Yacht Club, L.P. As Crosswater was preparing to begin construction of its marina in 2012, it was approached by the owners of Hurst Harbor Marina — another marina on Lake Travis — about forming a joint venture to own both

previously owned by Florence Marie Crumley. The Crumley property is bordered on the fourth side by another property and lacks direct access to either the road or Lake Travis:



Crumley and her husband acquired the Crumley property in 1966. The deed conveying the property to the Crumleys granted them "all easements and privileges" set out in an April 25, 1947 deed conveying the same tract to Herman and Lois Peavy (the "Peavy Deed"). The Peavy Deed granted two ingress/egress easements across

marinas. Hurst Joint Venture, L.P. was formed and acquired title to the property in 2012. Crosswater Yacht Club, L.P. is a member of Hurst Joint Venture, L.P. Hurst Harbor GP, LLC is the general partner of Hurst Joint Venture, L.P. For simplicity, we refer to the Hurst and Crosswater appellees collectively as "Crosswater."

what later became the Crosswater property: one easement granted the right to construct a roadway from the tract to Chipmunk Road, and the other easement granted the right to construct a walkway or a roadway from the tract to a point 670 feet above mean sea level behind the tract.

Disputes arose between Crosswater and Diane Crumley Dee (Florence Crumley's daughter), who was living on the Crumley property. Dee used the easements for purposes that Crosswater claimed exceeded the easement rights. The parties could not resolve their disputes, and Crosswater sued Dee in early 2009, seeking an injunction and a declaratory judgment regarding the scope of the two easements contained in the Peavy Deed.

Dee answered and filed a plea in abatement contending that Florence Crumley, as the owner of the property, was a necessary party to the suit; accordingly, Crosswater joined Crumley as a defendant. Dee and Crumley eventually asserted at least 22 counterclaims against Crosswater. The trial court granted summary judgment against Dee and Crumley on a number of their claims in 2010.[3]

Crumley died in September 2011. In late 2013, Crosswater applied for administration of Crumley's estate so a representative could be appointed and joined in the suit. Dina Crumley White (Crumley's daughter and Dee's sister) was appointed dependent administrator of Crumley's estate and was joined as a party to the suit.

[3] The dismissed claims included one asserting an implied negative reciprocal easement. The Peavy Deed included a restrictive covenant prohibiting use of the conveyed tract — the Crumley property — for a commercial enterprise. In contrast, the deed conveying the Crosswater property contained no such restriction. Dee sought a declaration that the Crosswater property was, by application of the implied reciprocal negative easement doctrine, burdened by a restrictive covenant prohibiting commercial uses such as Crosswater's intended marina. The trial court granted summary judgment against Dee on that claim, the claim was severed and appealed, and the Third Court of Appeals affirmed the trial court's judgment. *See Dee v. Crosswater Yacht Club, LP*, No. 03-10-00796-CV, 2012 WL 1810213, at *7 (Tex. App.—Austin May 18, 2012, no pet.) (mem. op.).

Around the same time, Bridget D. Elliott — Crumley's granddaughter and appellant here — produced two deeds conveying the Crumley property from Crumley to the BC Trust.[4] One was signed by Crumley and dated May 1, 2008, but was not recorded. The other, dated May 5, 2011, was recorded but not signed by Crumley. Due to uncertainty about whether the property belonged to the trust or passed by intestate distribution to Crumley's heirs, Crosswater joined Elliott as a party to the suit in her capacity as trustee of the BC Trust.[5]

The case was set for trial on October 6, 2014. Shortly before trial, Dee, White, and Elliott (collectively the "Crumley defendants") each unilaterally signed stipulations that the easement rights conveyed in the Peavy Deed were limited to ingress and egress to the Crumley property. These stipulations were essentially in agreement with Crosswater's position throughout the suit and were contrary to previous positions taken by the Crumley defendants.

Crosswater and the Crumley defendants also entered an agreed nonsuit and stipulation on issues to be tried. Crosswater nonsuited its request for injunctive relief but maintained its request for declaratory relief. At the time of trial, Crosswater was requesting declarations regarding the scope of the easements and that the trial court's earlier grant of summary judgment against Crumley and Dee on the implied negative reciprocal easement claim also bound Elliott. The Crumley defendants nonsuited all causes of action and affirmative defenses other than their unclean-hands defense. Both sides maintained their requests for attorney's fees under the UDJA.

[4] The Declaration of Trust for the BC Trust named Elliott and Crumley as co-trustees, and provided that Elliott would serve as successor trustee if Crumley became unable to serve.

[5] Crosswater also filed a petition for declaratory judgment in probate court to determine ownership of the property.

The trial court submitted the unclean-hands defense to the jury as an affirmative claim for malicious prosecution.[6] The jury answered "no" to a question asking whether Crosswater's filing and pursuit of claims constituted malicious prosecution. The jury found Crosswater's reasonable and necessary attorney's fees incurred in proving the scope of the Peavy Deed easements to be $356,500 for work in the trial court, $25,000 for a prospective appeal to the court of appeals, and $30,000 for any appeal to the Supreme Court of Texas. The jury found the Crumley defendants' reasonable and necessary attorney's fees to be $30,000.

The trial court signed a declaratory judgment on the scope of the easements. The trial court also signed a declaratory judgment that Elliott, as successor trustee of the BC Trust, was bound by the trial court's earlier final judgment against Crumley and Dee on their implied negative reciprocal easement claim. Exercising its discretion to award attorney's fees,[7] the trial court awarded Crosswater its attorney's fees in the full amount found by the jury and denied the Crumley defendants' requests for attorney's fees.

The Crumley defendants timely appealed the judgment. Since then, Dee and White have dismissed their appeals, leaving Elliott in her capacity as trustee of the BC Trust as the only remaining appellant. We address Elliott's four appellate issues below.[8]

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[6] Dee claimed that a Crosswater employee had trespassed on the Crumley property in 2008. During the pendency of the police investigation, Crosswater sued Dee in February 2009. Dee asserted the defense of unclean hands contending that Crosswater filed the action for injunctive and declaratory relief to avoid criminal liability for its trespassing employee. The trial court submitted Dee's unclean-hands defense to the jury as an affirmative claim on behalf of Dee, White, and Elliott for malicious prosecution.

[7] *See* Tex. Civ. Prac. & Rem. Code Ann. § 37.009 (Vernon 2015) ("the court may award costs and reasonable and necessary attorney's fees as are equitable and just" under the UDJA).

[8] This appeal was transferred to the Fourteenth Court of Appeals from the Third Court of Appeals. In cases transferred by the Supreme Court of Texas from one court of appeals to another,

ANALYSIS

I. Jurisdiction

In her first issue, Elliott contends the trial court lacked subject matter jurisdiction because the Crumley defendants' pre-trial stipulations mooted Crosswater's claims for declaratory judgment.

"A declaratory judgment is appropriate only if a justiciable controversy exists as to the rights and status of the parties and the controversy will be resolved by the declaration sought." *Bonham State Bank v. Beadle*, 907 S.W.2d 465, 467 (Tex. 1995). Elliott contends that "[b]y October 1, 2014, all of Crosswater's claims had been resolved. Crosswater nonsuited its request for injunctive relief and Crumley had stipulated as to the ownership of the Crumley Tract and the scope of the easements." Accordingly, Elliott argues that Crosswater's claim for declaratory relief was moot and the trial court lacked jurisdiction to enter a declaratory judgment or award attorney's fees under the UDJA. We disagree for two reasons.

First, the Crumley defendants' attempted unilateral stipulations[9] on the eve of trial did not deprive the trial court of subject matter jurisdiction to make a legal determination on Crosswater's claims for declaratory relief and attorney's fees. *See Am. Title Co. v. Smith*, 445 S.W.2d 807, 809 (Tex. Civ. App.—Houston [1st Dist.] 1969, no writ) ("The parties to an action may not control the power of the trial court to apply the applicable rules of law to the facts in rendering his judgment by

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the transferee court must decide the case in accordance with the precedent of the transferor court under the principles of stare decisis if the transferee court's decision would have been inconsistent with the precedent of the transferor court. *See* Tex. R. App. P. 41.3.

[9] The stipulations were "unopposed" by Crosswater, but were not agreed to or signed by Crosswater. *See Fidelity & Cas. Co. of N.Y. v. McCollum*, 656 S.W.2d 527, 528 (Tex. App.—Dallas 1983, writ ref'd n.r.e.) ("The requirements of an enforceable stipulation are found in Rule 11 of the Texas Rules of Civil Procedure, which provides: 'No agreement between attorneys or parties touching any suit pending will be enforced unless it be in writing, signed and filed with the papers as part of the record, or unless it be made in open court and entered of record.'").

stipulations or admissions concerning the rules of law deemed to be applicable."); *see also Phillips v. Wertz*, 546 S.W.2d 902, 909 (Tex. Civ. App.—Dallas 1977, writ ref'd n.r.e.) ("Neither does the attempted unilateral 'stipulation' by defendants' counsel that defendants would not violate the court's order constitute proof that defendants would discontinue their attempts to use the land for a driveway.").

Second, the Crumley defendants' unilateral stipulations did not match exactly the declaratory relief requested by Crosswater and did not address all of Crosswater's requested relief. For example, Crosswater requested a declaration "that the Peavy Deed does not authorize construction of any other driveway or roadway on the South Easement Land beyond the existing driveway;" the Crumley defendants stipulated "that the Peavy Deed does not authorize construction of any other driveway or roadway on the South Easement Land beyond the existing roadway *except for maintenance of the easement, including pavement of the roadway, tree and landscape maintenance and other safety items such as lighting, reflectors and other necessary items for safety of travel across the easement.*" Similarly, Crosswater requested a declaration that "the 670' Easement does not include the entire width of the east and west boundaries of the Crumley Tract;" the Crumley defendants stipulated that "the Peavy Deed provides for the construction of a walk-way and a roadway from the 'Crumley Tract' to the 670 foot contour line . . . between the prolongations of the East and West boundary lines of the 'Crumley Tract' *not to exceed in total 60 feet for both the walk-way and roadway although the 60 feet does not have to be contiguous to the walk-way and roadway.*" Perhaps most importantly, the stipulations did not address one of Crosswater's requested declarations at all: that the trial court deem Elliott bound by the trial court's prior final judgment rejecting the implied negative reciprocal easement claim. Accordingly, we conclude that the Crumley defendants'

unilateral pre-trial stipulations did not render Crosswater's requested relief moot or deprive the trial court of subject matter jurisdiction.[10]

Because we conclude that the stipulations did not render Crosswater's requested declaratory relief moot, we also conclude that Crosswater's claim for attorney's fees under the UDJA properly was before the court. *See Bilby v. Eaton*, 11-07-00032-CV, 2008 WL 1749096, at *2-3 (Tex. App.—Eastland Apr. 17, 2008, no pet.) (mem. op.) (trial court did not abuse its discretion by awarding attorney's fees in declaratory judgment action in part "[b]ecause the stipulation was not reached until just before the start of trial, [and] because that stipulation excepted the ownership of the line and meter and, thus, did not resolve all of the declaratory judgment claim . . . ."). However, even if the requested declaratory relief had been rendered moot, the claim for attorney's fees nevertheless would have remained for resolution. *See Allstate Ins. Co. v. Hallman*, 159 S.W.3d 640, 642-43 (Tex. 2005) (attorney's fees claim prevented appeal from becoming moot in a declaratory judgment case); *ENGlobal U.S., Inc. v. Jefferson Refinery, L.L.C.*, No. 09-14-00210-CV, 2015 WL 8476545, at *2 (Tex. App.—Beaumont Dec. 10, 2015, no pet.) (mem. op.) ("In declaratory judgment actions, it is well-settled law that a cognizable claim remains before the court if a claim for attorney's fees is pending when the trial court renders a final judgment. . . . While ENGlobal argues its release of the lien left nothing for the trial court to resolve, the record shows that a cognizable claim for attorney's fees remained following ENGlobal's release of its lien."); *Hansen v. JP Morgan Chase Bank, N.A.*, 346 S.W.3d 769, 774-75 (Tex. App.—Dallas 2011, no

[10] Contrary to their position at trial and on appeal that Crosswater's declaratory judgment claim was moot, the Crumley defendants agreed with Crosswater shortly before trial in an "Agreed Nonsuit and Stipulation on Issues to be Tried" filed with the trial court that "the only issues remaining in the case to be addressed at trial are [Crosswater's] claims for declaratory judgment and request for attorney's fees . . . and [the Crumley] Defendants' unclean hands defense and request for attorney's fees . . . ."

pet.) ("[A] case under the Declaratory Judgments Act remains a live controversy, even if all requests for substantive declaratory relief become moot during the action's pendency, as long as a claim for attorneys' fees under the Act remains pending. . . . Thus, Chase's and Cramer's claims for attorneys' fees under the Declaratory Judgments Act kept this case from becoming moot even though the Hansens dropped their objection to the sale of the house and the house was actually sold.").

Accordingly, we conclude that the Crumley defendants' stipulations did not deprive the trial court of jurisdiction to render a declaratory judgment or to award attorney's fees under the UDJA. Elliott's first issue is overruled.

II. Unresolved Fact Questions

Elliott contends in her second issue that, "[i]f in fact there were a pending claim for declaratory relief, the trial court erred by not submitting any unresolved fact questions to the jury." Elliott does not identify any unsubmitted fact issues. Elliott does not contend that the Peavy Deed was ambiguous, nor do we conclude that it is ambiguous; accordingly, the trial court correctly construed the Peavy Deed as a matter of law. *See DeWitt Cty. Elec. Coop., Inc. v. Parks*, 1 S.W.3d 96, 100 (Tex. 1999) (noting that "[t]he rules of contract construction and interpretation apply to easement agreements," and that "[w]hen a court concludes that contract language can be given a certain or definite meaning, then the language is not ambiguous, and the court is obligated to interpret the contract as a matter of law"); *Luckel v. White*, 819 S.W.2d 459, 461 (Tex. 1991) ("The construction of an unambiguous deed is a question of law for the court.").

Elliott's second issue is overruled.

III. Exclusion of Rebuttal Witness Testimony

Elliott contends in her third issue that the trial court erred by excluding a rebuttal witness to counter "unanticipated testimony regarding commercial uses of the subject property to support its request for attorney's fees." The allegedly unanticipated testimony was elicited by the Crumley defendants' attorney when questioning Crosswater's attorney. Crosswater's attorney testified that Crosswater could use portions of the Crosswater property that were subject to the Peavy Deed easements for commercial purposes so long as the commercial use did not interfere with the Crumley defendants' easement rights.[11]

Based on this testimony, the Crumley defendants sought to call former Justice of the Peace Rex Baker as a rebuttal expert witness on the meaning of the Peavy Deed.[12]

During voir dire, Baker stated that the sole purpose of his testimony would be to offer an opinion regarding whether the Peavy Deed's prohibition against

[11] This testimony comports with the Third Court of Appeals's decision in the severed action: "The evidence that 16 of the landlocked tracts were conveyed with easements over land lying between them and the 670′ contour line of Lake Travis does not serve to create a fact issue with regard to a scheme of noncommercial development for the tracts across which the easements are granted." *Dee*, 2012 WL 1810213, at *5.

[12] Baker was not identified as a witness before trial. A party may not call a witness whom it should have identified during discovery unless the party can establish either good cause for failing to timely identify the witness or that the failure will not unfairly surprise or prejudice the opposing party. *See* Tex. R. Civ. P. 193.6(a), (b); *Brunelle v. TXVT Ltd. P'ship*, 198 S.W.3d 476, 477 (Tex. App.—Dallas 2006, no pet.). A trial court's decision to exclude an unidentified witness's testimony is reviewed for an abuse of discretion. *See Brunelle*, 198 S.W.3d at 477; *see also Ambassador Dev. Corp. v. Valdez*, 791 S.W.2d 612, 625 (Tex. App.—Fort Worth 1990, no writ) ("A trial court can either allow or refuse to allow a previously unidentified expert to testify on rebuttal, and the court's decision is only reversible if it is an abuse of discretion."). Because we determine *infra* that the trial court properly excluded Baker's testimony on other grounds, we need not decide whether the trial court abused its discretion by excluding the testimony either on the grounds of unfair surprise or prejudice or lack of good cause.

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commercial enterprises on the "said land herein conveyed" applied not only to the land that was conveyed, but also to portions of the Crosswater land subject to the Peavy Deed easements. Baker conceded that the Peavy Deed's language is not ambiguous. Baker further stated that in forming his opinion he was "relying solely on the language in the deed." After the voir dire examination, the trial court excluded Baker's testimony.

As we have noted above, "[t]he construction of an unambiguous deed is a question of law for the court." *Luckel*, 819 S.W.2d at 461. "An expert witness may not testify regarding an opinion on a pure question of law." *Upjohn Co. v. Rylander*, 38 S.W.3d 600, 611 (Tex. 2000); *see also Greenberg Traurig of N.Y., P.C. v. Moody*, 161 S.W.3d 56, 94 (Tex. App.—Houston [14th Dist.] 2004, no pet.) (same). "Thus, an expert is not allowed to testify directly to his understanding of the law, but may only apply legal terms to his understanding of the factual matters in issue." *Greenberg Traurig*, 161 S.W.3d at 94.

Assuming without deciding that the Peavy Deed's commercial prohibition was an issue relevant to the case and proper for rebuttal, the trial court nevertheless correctly excluded Baker's testimony. Baker testified that he intended to offer an opinion regarding only the legal effect of easement language in the Peavy Deed. Baker agreed that the language in the deed was unambiguous and acknowledged that the opinions he would offer were based solely on the language of the deed. Baker's proposed testimony involved only his legal interpretation of the Peavy Deed — a pure question of law for the trial court — and the trial court properly excluded it. *See Upjohn*, 38 S.W.3d at 611; *Luckel*, 819 S.W.2d at 461; *Greenberg Traurig*, 161 S.W.3d at 95 ("The trial court erred in allowing Professor Long and former Justice Wallace to testify on questions of law.").

Elliott's third issue is overruled.

IV. Attorney's Fees

Elliott contends in her fourth issue that the jury erred in awarding attorney's fees to Crosswater.[13] Elliott contends that Crosswater's attorney's fees were unreasonable because "the amount was too high in light of the results obtained." In support of that contention, Elliott argues:

> Crosswater's only claim was attorney's fees. All other issues were resolved by stipulation. Crosswater's attorneys did not have to use any of their "experience, reputation or ability" to obtain a verdict regarding any other issue. In fact, Crosswater's own counsel admitted that they wasted time and money, with absolutely no result:
>
> Q. And if Diane Dee had provided the stipulation that we got just a month ago back in 2009, would your fees be nearly what they are?
>
> A. No, they would have been a small fraction of that, and we wouldn't be here today.
>
> . . . It strains credulity that Crosswater is entitled to $365,500.00 as attorney's fees for a case they never argued. Such fees are not reasonable and necessary.

We agree that Crosswater's attorney's fees may have been reduced had the Crumley defendants stipulated to certain issues regarding the Peavy Deed five years earlier. But Elliott's claim that the attorney's fees could have been avoided does not mean that the fees were unreasonable or unnecessary — especially considering that the stipulation's timing was entirely in the Crumley defendants' control.

As we have concluded above, Crosswater's claims for declaratory relief were not mooted by the Crumley defendants' unilateral stipulations on the eve of trial. The jury heard evidence that Crosswater incurred $365,500 in attorney's fees that were solely attributable to Crosswater's declaratory judgment claims. Viewing the

[13] Although an award of fees under the UDJA is within the trial court's discretion, whether those fees are reasonable and necessary are questions of fact for the jury's determination. *See Bocquet v. Herring*, 972 S.W.2d 19, 21 (Tex. 1998).

evidence in the light most favorable to the verdict, we conclude that the evidence is legally sufficient to support the jury's finding that $365,500 is a reasonable fee for the necessary services of Crosswater's attorneys for trial preparation and trial.[14] *See Carlile v. RLS Legal Sols., Inc.*, 138 S.W.3d 403, 409 (Tex. App.—Houston [14th Dist.] 2004, no pet.) (standard of review of an award of attorney's fees is sufficiency of the evidence).

Elliott's fourth issue is overruled.

CONCLUSION

Having overruled all of Elliott's issues, we affirm the judgment of the trial court.

/s/ William J. Boyce
Justice

Panel consists of Chief Justice Frost and Justices Boyce and Wise.

[14] Elliot does not assert that the evidence is factually insufficient to support any jury finding regarding attorney's fees.