Affirmed in Part, Reversed and Remanded in Part, and Memorandum Opinion filed February 7, 2017.

In The

Fourteenth Court of Appeals

NO. 14-15-00188-CV

RICARDO TIJERINA, Appellant

V.

ROBERT WYSONG AND HOUSTON INTERNATIONAL AIRCRAFT SUPPORT, INC., Appellees

---

On Appeal from the 189th District Court
Harris County, Texas
Trial Court Cause No. 2011-14628

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

Appellant Ricardo Tijerina leased premises from appellees Robert Wysong and Houston International Aircraft Support, Inc., for Tijerina to store used aircraft ground control equipment. After Tijerina stopped paying rent, appellees disposed of Tijerina's personal property. Tijerina sued, and he pursued claims at trial for

conversion, statutory theft under the Texas Theft Liability Act (TTLA), and violation of a Property Code statute applicable to commercial tenants.

The trial court granted appellees a directed verdict on Tijerina's conversion and TTLA claims and then granted appellees' motion to disregard several of the jury's answers to questions in the charge. The trial court signed a take-nothing judgment on Tijerina's claims and awarded appellees attorney's fees. *See* Tex. Civ. Prac. & Rem. Code § 134.005(b) (TTLA prevailing party entitled to attorney's fees).

In five issues, Tijerina contends that the trial court erred by (1) directing a verdict on the conversion and TTLA claims, (2) refusing to submit jury questions on the conversion, TTLA, and Property Code claims, (3) refusing to render a judgment for Tijerina on the Property Code claim, (4) awarding appellees attorney's fees under the TTLA because the trial court erred by directing a verdict on the TTLA claim, and (5) admitting testimony of appellees' counsel concerning attorney's fees for several reasons, and awarding those fees in the judgment because appellees failed to segregate fees.

We reverse the portion of the trial court's judgment awarding appellees' attorney's fees and remand for a new trial on fees because appellees did not segregate their fees or prove an exception to the rule.

We affirm the remainder of the judgment.

I. FAILURE TO CHALLENGE ALL BASES FOR THE JUDGMENT

Appellees contend that the judgment must be affirmed because the trial court granted appellees' motion to disregard the jury's finding of damages, and on appeal, Tijerina failed to challenge the trial court's granting of the motion on that basis. In his reply brief, Tijerina contends (1) appellees waived this argument by

inadequate briefing, (2) Tijerina raised the issue as a "subsidiary question of his third issue on appeal," and (3) there was some evidence to support the jury's finding, thus making the trial court's ruling erroneous.

First, we hold that appellees did not waive this argument by inadequate briefing. Then, after reviewing the record and relevant law, we hold that Tijerina did not challenge the trial court's disregarding the jury's answer to the damages question in his brief. And because the trial court's disregarding the damages finding is dispositive for each of Tijerina's claims, we overrule Tijerina's first three issues.

A. No Waiver by Inadequate Briefing

Tijerina claims that we must reject appellees' argument because appellees do not cite to legal authority. Tijerina cites four cases in which courts of appeals found briefing waiver as a result of an ***appellant's*** failure to comply with Rule 38.1 of the Texas Rules of Appellate Procedure.

Tijerina, as the appellant, has the burden to show grounds for reversal on appeal. *See Richardson-Eagle, Inc. v. William M. Mercer, Inc.*, 213 S.W.3d 469, 478 n.6 (Tex. App.—Houston [1st Dist.] 2006, pet. denied); *see also Grimm v. Grimm*, 864 S.W.2d 160, 163 (Tex. App.—Houston [14th Dist.] 1993, no writ) ("The burden of showing reversible error is on appellant as the complaining party."). Appellees, on the other hand, "need not raise cross-points or even file a brief to have this Court consider what was presented to the trial court." *Richardson-Eagle*, 213 S.W.3d at 478–79 & n.6 (reviewing propriety of summary judgment on DTPA claims even though the appellees failed to address the DTPA claims in their appellate brief); *see also Schied v. Merritt*, No. 01-05-00466-CV, 2016 WL 3751619, at *6 (Tex. App.—Houston [1st Dist.] July 12, 2016, no pet.) (mem. op.) (reasoning that an appellant does not prevail on appeal merely because

the appellee does not file a brief); *Commercial Credit & Control Data Corp. v. Wheeler*, 756 S.W.2d 769, 771 (Tex. App.—Corpus Christi 1988, writ denied) (reviewing merits of the appellant's appeal and affirming judgment even though the court of appeals struck the appellee's brief; "The burden rests on the appellant to present to us, through its brief, errors committed by the trial court").

Because appellees had no obligation even to raise the argument for this court to consider it, we decline to hold that appellees waived this argument due to inadequate briefing. *See Richardson-Eagle*, 213 S.W.3d at 478 n.6.

B. Procedural Background

At the conclusion of Tijerina's evidence, appellees moved for a directed verdict on the conversion and TTLA claims. One of the bases was that there was legally insufficient evidence of the fair market value of the property:

> Lastly, Judge, is the issue of market value and I guess we could ask that you grant directed verdict and find as a matter of law Mr. Tijerina has not adduced evidence legally or factually sufficient to support what the market value, fair market value, of his property was at the time and place of the taking of it by Mr. Wysong.

The trial court directed a verdict in appellees' favor on Tijerina's conversion and TTLA claims. While discussing the directed verdict, the trial court said, "I don't think [Tijerina] has established any basis for his, quote, 'estimates of market value.'"

The trial court submitted jury questions related to the Property Code claim, including Question 1 about whether Tijerina abandoned his personal property, Question 2 about whether Wysong delivered notice to Tijerina by certified mail,

Question 3 about whether Tijerina had actual notice that his property might be disposed of, and Question 4 about damages.[1]

Question 4 appears in relevant part:

> What sum of money, if any, if paid now in cash, would fairly and reasonably compensate Ricardo Tijerina for his damages, if any, resulting from the sale of the property in March 2009?
>
> Consider the following elements of damages, if any, and none other.
>
> a. The Fair Market value of the property sold.
>
> Fair market value is defined as the price property would bring when it is offered for sale by one who desires, but is not obligated to sell, and is bought by one who is under no necessity of buying it.

"Fair market value of the property" was the same measure of damages Tijerina sought on his conversion and TTLA claims, although the trial court declined to submit Tijerina's proposed jury questions on those claims. The jury answered Question 4 in the amount of $36,210.15.

Appellees filed a motion to disregard the jury's answers to several questions, including Question 4, and for the court to enter judgment based on the remaining jury questions and court rulings. Specifically, appellees asked the trial court to disregard the jury's answer to Question 4 because Tijerina "failed to introduce evidence sufficient to raise a material fact issue on the fair market value of the personal property," and "the record is devoid of any probative evidence of the

[1] *See* Tex. Prop. Code § 93.002(e) ("A landlord may remove and store any property of a tenant that remains on premises that are abandoned. In addition to the landlord's other rights, the landlord may dispose of the stored property if the tenant does not claim the property within 60 days after the date the property is stored. The landlord shall deliver by certified mail to the tenant at the tenant's last known address a notice stating that the landlord may dispose of the tenant's property if the tenant does not claim the property within 60 days after the date the property is stored."); *id.* § 93.002(g) (authorizing a tenant to recover damages if a landlord violates Section 93.002).

market value of the personal property." Tijerina filed a response and argued that he, as a property owner, was qualified to testify about the value of the property.

The trial court signed a final judgment in appellees' favor, by which the trial court granted appellees' motion and "for those reasons set out in Defendants' Motion, [the Court] disregards the Jury's answers to Questions 1 and 4."

C. Relevant Authorities

A trial court may disregard a jury's findings and grant a motion for judgment notwithstanding the verdict (JNOV) when there is no evidence upon which the jury could have made its findings. *Strauss v. Cont'l Airlines, Inc.*, 67 S.W.3d 428, 434 (Tex. App.—Houston [14th Dist.] 2002, no pet.). The standards for a JNOV are the same for a directed verdict. *See Rush v. Barrios*, 56 S.W.3d 88, 94 (Tex. App.—Houston [14th Dist.] 2001, pet. denied).

When a trial court does not specify the basis for a JNOV, an appellant has the burden of discrediting each independent ground asserted in the motion, and we must affirm if the appellant fails to challenge each of the possible grounds. *See Viajes Gerpa, S.A. v. Fazeli*, No. 14-15-00608-CV, 2016 WL 7478352, at *16 (Tex. App.—Houston [14th Dist.] Dec. 29, 2016, no pet. h.); *see also McKelvy v. Barber*, 381 S.W.2d 59, 62 (Tex. 1964) (noting that when the trial court states multiple grounds for instructed verdict should be granted, the appellant must establish that all possible grounds cannot support the instructed verdict, and if the appellant "has waived the right to question either of such grounds or if either is sound, the judgment of the trial court must be affirmed"); *cf. McCoy v. Rogers*, 240 S.W.3d 267, 272 (Tex. App.—Houston [1st Dist.] 2007, pet. denied) (in the context of summary judgment, "[w]e must affirm when a judgment may have been rendered, whether properly or improperly, on a ground not challenged on appeal").

D. Unchallenged Ground for JNOV and Instructed Verdict on Damages

Tijerina contends he raised the issue of the trial court's disregarding the answer to Question 4 as a "subsidiary question of his third issue on appeal." We disagree.

Tijerina's third issue is, "Did the district court below err when refused [sic] to render judgment for Appellant on his Texas Property Code § 93.002(e) and (f) claim?" Such an issue is broadly stated enough to permit argument concerning the trial court's disregarding of Question 4. *Cf. Malooly Bros., Inc. v. Napier*, 461 S.W.2d 119, 121 (Tex. 1970) (noting that a broad statement of an issue, i.e., asserting the trial court erred by granting summary judgment, would be sufficient "to allow argument as to all the possible grounds upon which summary judgment should have been denied").

But Tijerina makes no argument about the trial court's disregarding Question 4. Within his third issue, Tijerina addresses whether the property was abandoned and whether appellees failed to send written notice as required by the statute. His only reference to damages in relation to Question 4 is: "Jury question 4 asked what Appellant's damages were for the loss of his property."

We hold that Tijerina failed to address the trial court's disregarding Question 4 on the ground urged by appellees—legally insufficient evidence of fair market value. As such, we cannot reverse the JNOV on this basis. *See Viajes Gerpa*, 2016 WL 7478352, at *16; *see also McCoy*, 240 S.W.3d at 272 (assuming the issue statement was broad enough to encompass all grounds for the trial court's summary judgment, the failure to present each specific argument along with supporting authority precluded reversal of the judgment).

Furthermore, Tijerina does not challenge on appeal the trial court's directed verdict on the ground that there was legally insufficient evidence of the fair market value of the property. As such, we cannot reverse the directed verdict on this basis. *See McKelvy*, 381 S.W.2d at 62.

Because Tijerina has failed to challenge all grounds for the trial court's disregard of the jury's answer to Question 4 and the JNOV, the related liability issues are rendered immaterial and any error harmless. *See Viajes Gerpa*, 2016 WL 7478352, at *16. As noted above, Tijerina sought the same measure of damages for his conversion and TTLA claims. Thus, any error arising out of the trial court's granting the directed verdict or refusing jury questions on these claims is harmless. *See id.*

In his reply brief, Tijerina addresses the merits of the trial court's disregarding the jury's answer to Question 4. But this argument comes too late, and we do not consider it. *See Duke Realty Ltd. P'ship v. Harris Cty. Appraisal Dist.*, No. 14-15-00543-CV, 2016 WL 3574666, at *4 n.9 (Tex. App.—Houston [14th Dist.] June 30, 2016, no pet.) (mem. op.) ("It is well settled under Rule of Appellate Procedure 38.3 that an appellant cannot raise a new issue in a reply brief in response to a matter pointed out in the appellee's brief."); *Barrios v. State*, 27 S.W.3d 313, 322 (Tex. App.—Houston [1st Dist.] 2000, pet. ref'd) ("Pointing out the *absence* of an appellant's argument does not raise the argument or entitled appellant to assert that argument for the first time in his reply brief. If the rule were construed otherwise, an appellee could never point out matters not raised by an appellant for fear of reopening the door.").

Tijerina's first three issues are overruled.

II. ATTORNEY'S FEES

In his fourth issue, Tijerina contends that the trial court erred by awarding attorney's fees to appellees under the TTLA because the district court erred when it directed a verdict on the TTLA claim. As we have overruled Tijerina's challenge to the directed verdict on the TTLA claim, we also overrule his fourth issue.

In his fifth and final issue, Tijerina contends that the trial court abused its discretion by admitting the testimony of appellees' trial counsel, Phil Griffis, concerning appellees' attorney's fees and by awarding the fees in the judgment because (1) appellees did not timely designate Griffis as an expert witness and have failed to show good cause or lack of unfair surprise or prejudice, (2) some of Griffis's testimony about appellees' former attorney's fees was hearsay, and (3) appellees failed to segregate attorney's fees. We address each of these contentions in turn.

A. No Unfair Surprise or Prejudice

Under Rule 193.6 of the Texas Rules of Civil Procedure, the testimony of a witness who was not timely disclosed is inadmissible. *See* Tex. R. Civ. P. 193.6(a); *Fort Brown Villas III Condo. Ass'n, Inc. v. Gillenwater*, 285 S.W.3d 879, 881 (Tex. 2009). A trial court may admit such evidence, however, if the court finds "(1) there was good cause for the failure to timely make, amend, or supplement the discovery response; or (2) the failure to timely make, amend, or supplement the discovery response will not unfairly surprise or unfairly prejudice the other parties." Tex. R. Civ. P. 193.6(b).

"A party who fails to timely designate an expert has the burden of establishing good cause or a lack of unfair surprise or prejudice before the trial court may admit the evidence." *Gillenwater*, 285 S.W.3d at 881; *see* Tex. R. Civ.

P. 193.6(b)–(c). We review a trial court's ruling under Rule 193.6 for an abuse of discretion. *Sprague v. Sprague*, 363 S.W.3d 788, 798 (Tex. App.—Houston [14th Dist.] 2012, pet. denied) (citing *Gillenwater*, 285 S.W.3d at 881). A trial court abuses its discretion under Rule 193.6 if the court acts arbitrarily, unreasonably, or without reference to guiding rules or principles. *Hilburn v. Providian Holdings, Inc.*, No. 01-06-00961-CV, 2008 WL 4836840, at *6 (Tex. App.—Houston [1st Dist.] Nov. 6, 2008, no pet.) (mem. op.).

The parties do not dispute the following timeline of events, as shown by the record:

09/05/2012:	Appellees prayed for attorney's fees under the TTLA in their first amended answer.
10/31/2012:	Appellees designated their attorney, Kevin Bradshaw, as an expert witness.
01/17/2013:	Appellees amended their designation of experts to state that Bradshaw would testify about the reasonableness and necessity of attorney's fees.
03/09/2014:	The parties filed a joint motion for continuance because Bradshaw died.
03/18/2014:	The trial court signed a docket control order requiring expert designations by August 13, 2014, and setting trial for October 13, 2014.
05/03/2014:	Appellees designated Griffis as lead counsel.
09/10/2014:	Appellees supplemented their expert designations to include Griffis, explaining that he would testify about reasonable and necessary attorney's fees incurred by appellees.[2]

[2] The designation identified Griffis by name, address, and phone number and described his testimony as follows:

> Mr. Griffis will testify about those reasonable and necessary attorneys' fees incurred and to be incurred by Defendant in the above-styled and numbered case. In general, his opinion is that reasonable attorneys' fees incurred in defending this suit may be calculated by multiplying the hourly rate charged by counsel (Mr.

10/14/2014: Trial commenced.

Appellees concede that their September 10, 2014 designation of Griffis was untimely under the trial court's docket control order. But appellees contend that Tijerina could not have been unfairly surprised or prejudiced by the late disclosure. Based on the timeline above, Tijerina knew that (1) appellees sought attorney's fees more than two years before trial; (2) appellees had designated their prior counsel as an expert nearly two years before trial; (3) appellees' prior counsel died seven months before trial; (4) Griffis became appellees' new counsel more than five months before trial; and (5) appellees' supplemented their expert designation with Griffis as their attorney's fees expert more than a month before trial.

Under these circumstances, we hold that the trial court did not abuse its discretion by impliedly finding that Tijerina was not unfairly surprised or prejudiced by the late disclosure. *See Estate of Toarmina*, No. 05-15-00073-CV, 2016 WL 3267253, at *2 (Tex. App.—Dallas June 13, 2016, pet. denied) (mem. op.) (holding that when a party "sought attorney's fees at the onset of litigation and timely designated his former attorney as an expert on fees, the trial court did not abuse its discretion in determining that there was no unfair surprise in permitting his current attorney to testify about his fees"; former attorney withdrew and claimant hired new counsel three months before trial); *Rhey v. Redic*, 408 S.W.3d 440, 459 (Tex. App.—El Paso 2013, no pet.) (holding that the trial court did not abuse its discretion by finding a lack of unfair surprise or prejudice when the plaintiffs included a request for attorney's fees in their original petition five months before trial and disclosed their attorney's fees expert thirty-one days before

---

> Griffis' rate is $250 an hour) times the number of hours spent by counsel for Defendants in defending the case. The total amount of such fees will not be known until the time of trial. He will also testify that the fees incurred by prior counsel for Defendant, as reflected in their previously produced bills, were reasonable and necessary for the defense of this case.

trial); *Beard Family P'ship v. Commercial Indem. Ins. Co.*, 116 S.W.3d 839, 849–50 (Tex. App.—Austin 2003, no pet.) (holding that the trial court did not abuse its discretion by finding a lack of unfair surprise or prejudice when the party's pleadings contained a request for attorney's fees from the lawsuit's inception and the party disclosed the attorney's fees expert thirty days before trial).

Furthermore, Tijerina contends that the disclosure of Griffis did not comply with Rule 194.2(f) because "it failed to include Mr. Griffis' résumé and biography, nor did include [sic] the basis for his opinions, the documents he relied reviewed [sic] and relied upon for his opinions, including the billing records of Appellees' prior legal counsel." Of these complaints, the only one raised before the admission of Griffis's testimony was the failure to provide a resume. *See* Tex. R. Civ. P. 194.2(f)(4)(B) (requiring disclosure of expert's resume).[3] Thus, the other complaints are not preserved. *See* Tex. R. App. P. 33.1(a)(1) (requiring timely objections); *Petroleum Workers Union of the Repub. of Mex. v. Gomez*, 503 S.W.3d 9, 36 (Tex. App.—Houston [14th Dist.] 2016, no pet.) (holding that a Rule 193.6 complaint was not preserved when the complaining party did not object or request an instruction to disregard the testimony at the time the evidence was admitted because "an objection to the admission of evidence must be made when the evidence is offered, not well after it was introduced"; complaining party first lodged a complaint in a motion for mistrial six days after admission of the evidence).[4]

[3] The only other complaint mentioned in the trial court—in Tijerina's motion to disregard some of the jury's answers, filed about a month after trial—concerned the failure to produce "complete" billing records for the deceased attorney.

[4] Further, we note that the designation itself describes the basis for Griffis's opinion and states that he would rely upon the "previously produced bills" from Bradshaw. *See supra* note 2.

The purpose of Rule 193.6 is to prevent "trial by ambush." *Gomez*, 503 S.W.3d at 35. Griffis was opposing counsel and therefore known to Tijerina well in advance of the supplemental designation and trial, and the designation described the rationale for Griffis's opinion and included his contact information. Under these circumstances, we hold that the trial court did not abuse its discretion by finding that the failure to provide Griffis's resume did not unfairly surprise or prejudice Tijerina. *See In re S.R.*, No. 10-10-00063-CV, 2010 WL 4983484, at *1–2 (Tex. App.—Waco Dec. 8, 2010, pet. denied) (mem. op.) (holding that the trial court did not abuse its discretion by finding lack of unfair surprise or prejudice when a party did not provide a resume for its expert witness; the witness had been the other party's therapist and the designation provided the name, address, and phone number of the witness); *see also Leas v. Comm'n for Lawyer Discipline*, No. 13-10-00441-CV, 2012 WL 3223688, at *6 (Tex. App.—Corpus Christi Aug. 9, 2012, pet. dism'd w.o.j.) (mem. op.) (holding that the trial court did not abuse its discretion by finding lack of unfair surprise or prejudice when a party did not provide a resume for its expert witness; the witness testified that he did not keep an updated resume on file, and the designation otherwise provided the complaining party with sufficient notice of the substance of the expert's testimony).

B. Hearsay

At trial, Tijerina objected to Griffis's testimony concerning attorney's fees attributable to appellees' deceased former attorney because "[t]he prior lawyer fee statements are hearsay." The record does not reflect that the trial court ruled on Tijerina's hearsay objection or that Tijerina objected to the trial court's refusal to rule. Accordingly, no error is preserved. *See* Tex. R. App. P. 33.1(a)(2).[5]

[5] Later, Tijerina objected a second time, and the trial court overruled it. But the basis of the second objection was not hearsay: "Again, objection, Your Honor. How does he know what

Even if error was preserved, the trial court did not abuse its discretion by admitting the testimony. "[A]n expert can testify at trial in appropriate circumstances about hearsay evidence relied upon in forming an expert opinion if such evidence reasonably would be relied upon by experts in the field in forming opinions or inferences regarding the subject at issue." *Niche Oilfield Servs., LLC v. Carter*, 331 S.W.3d 563, 574 (Tex. App.—Houston [14th Dist.] 2011, no pet.); *see* Tex. R. Evid. 703. Here, Griffis reasonably relied upon invoices and billing statements from appellees' former attorney to form an opinion, and these documents would typically be relied on to determine the reasonableness of the fees charged. *See In re Marriage of Bivins*, 393 S.W.3d 893, 901 (Tex. App.—Waco 2012, pet. denied) (noting that an expert could rely upon invoices containing hearsay to form an opinion about whether the work invoiced was reasonable and necessary).

C. Segregating Attorney's Fees

The jury found that appellees' reasonable and necessary attorney's fees were $51,501 for trial and $6,000 for each of four appellate stages—through the court of appeals, filing a petition for review, briefing on the merits, and oral argument at the Texas Supreme Court. Tijerina contends that appellees failed to segregate their attorney's fees, so the trial court erred to award appellees attorney's fees in the judgment.[6]

Appellees do not contend that there is any evidence they segregated their fees. Instead, appellees respond that (1) Tijerina waived his right to complain about the lack of segregation because he did not object at trial, and (2) segregation was

---

they paid—what the fees are if he's only seen a few of the bills? Just so we're clear for the record he didn't properly review them, by his own testimony."

[6] The trial court awarded appellees slightly less fees than found by the jury—$51,005 for trial. The parties do not suggest the discrepancy affects the analysis of this issue.

impossible because the claims were inextricably intertwined. We reject both of appellees' arguments.

1. No Waiver

Without citing authority, appellees claim that Tijerina waived error by not objecting. During the charge conference, Tijerina objected to the submission of the question on appellees' attorney's fees in part because "there's no segregation of fees." The trial court overruled the objection and then said, "I understand that those issues need to be resolved and I'll deal with that on a post-trial basis depending on what the jury does for the answers." After the jury returned its verdict, but before judgment, Tijerina filed a motion to disregard the jury's answer to the attorney's fees question because appellees "offered no testimony on how the fees were segregated among the Defendants and whether or not the fees were segregated based on recoverable versus non-recoverable causes of action."

Tijerina preserved error under these circumstances. *See Young v. Neatherlin*, 102 S.W.3d 415, 420 (Tex. App.—Houston [14th Dist.] 2003, no pet.) ("[T]he Texas Supreme Court has held that error is preserved by an objection to the jury charge on the ground that the charge did not properly segregate attorney's fees." (citing *Stewart Title Guar. Co. v. Sterling*, 822 S.W.2d 1, 10 (Tex. 1991)); *Aetna Cas. & Sur. v. Wild*, 944 S.W.2d 37, 40 (Tex. App.—Amarillo 1997, writ denied) ("An objection to the failure of the trial court to allocate or segregate the fees in the jury charge is sufficient to preserve error."); *cf. Pitts & Collard, L.L.P. v. Schechter*, 369 S.W.3d 301, 322 (Tex. App.—Houston [1st Dist.] 2011, no pet.) (finding waiver because the appellant's objection to lack of segregation "was not raised before the trial court rendered judgment").

2. No Evidence of Intertwined Legal Services

Appellees do not dispute the legal conclusion that attorney's fees were only recoverable on a successful defense of the TTLA claim, and not for defending the conversion or Property Code claims. *See CA Partners v. Spears*, 274 S.W.3d 51, 81 (Tex. App.—Houston [14th Dist.] 2008, pet. denied) (noting that a determination as to "the need to segregate attorney's fees is a question of law" (citing *Tony Gullo Motors I, L.P. v. Chapa*, 212 S.W.3d 299, 312 (Tex. 2006)).[7] Appellees do not argue that there is any evidence that they segregated their attorney's fees. Instead, appellees rely on a "narrow exception" to the segregation requirement. *See State Farm Lloyds v. Hanson*, 500 S.W.3d 84, 102 (Tex. App.—Houston [14th Dist.] 2016, pet. filed). They contend that segregation was "impossible" because Tijerina's claims were "utterly, totally, and inextricably intertwined," and all of the claims "were based on a single act" of appellees' "removal and selling of the junk Appellant left on the land."

Appellees rely on the *Sterling* case to argue that a claimant need not segregate fees when services are rendered "in connection with claims arising out of the same transaction and are so interrelated that their prosecution or defense entails proof or denial of essentially the same facts." *Sterling*, 822 S.W.2d at 11 (quotation omitted). But the Texas Supreme Court modified *Sterling* in *Chapa*: "To the extent *Sterling* suggested that a common set of underlying facts necessarily made all claims arising therefrom 'inseparable' and all legal fees recoverable, it went too far." *Chapa*, 212 S.W.3d at 313.

[7] The parties agree that Tijerina had asserted a breach of contract claim but abandoned it at trial. Appellees do not contend they were entitled to attorney's fees for defending the contract claim.

Chapa states the rule: "Intertwined facts do not make tort fees recoverable; it is only when discrete legal services advance both a recoverable and unrecoverable claim that they are so intertwined that they need not be segregated." *Id.* at 313–14. In *Chapa*, for example, the party's claims were all dependent upon the same set of facts and circumstances, but this did not mean all the claims "required the same research, discovery, proof, or legal expertise." *Id.* at 313. If a discrete legal service does not advance a claim for which fees are recoverable, then the fee for that service must be segregated and disregarded even if it is nominal. *See id.* at 313–14. Under the *Chapa* test, "[t]he party seeking to recover attorney's fees has the burden of demonstrating that fee segregation is not required." *Messier v. Messier*, 458 S.W.3d 155, 169 (Tex. App.—Houston [14th Dist.] 2015, no pet.). The extent to which certain claims can or cannot be segregated is usually "a mixed question of law and fact for the jury." *Chapa*, 212 S.W.3d at 313.

Appellees did not present evidence that every legal service that advanced unrecoverable defenses also advanced the recoverable TTLA defense. And the record does not support their argument that segregation was "impossible." For example, appellees may have incurred fees relating to discrete research, discovery, proof, or legal expertise unique to defense of the Property Code claim, as opposed to the other claims. One of appellees' defenses to the Property Code claim was that Tijerina had actual notice of appellees' ability to dispose of the property, rather than notice sent by certified mail as outlined in the statute. Appellees persuaded the trial court to submit jury questions on this issue, urged it as a basis for judgment in the post-trial motion with analysis of allegedly analogous case law (despite a jury finding that appellees failed to send the notice required by the statute), and again raised the issue on appeal. Under these circumstances, there is at least a fact question as to whether these legal services advanced appellees' defense of the

TTLA claim. *See 7979 Airport Garage, L.L.C. v. Dollar Rent A Car Sys., Inc.*, 245 S.W.3d 488, 509–10 (Tex. App.—Houston [14th Dist.] 2007, pet. denied) (reversing award of attorney's fees when the plaintiff won on its recoverable contract claim and unrecoverable warranty claim; the petition contained a single paragraph regarding the warranty claim, and the jury charge included two questions pertaining solely to the warranty claim).

Because appellees presented no evidence on the issue of whether every legal service that advanced the contract, conversion, and Property Code defenses also advanced the TTLA defense, their argument against segregation fails. *See CA Partners*, 274 S.W.3d at 83 (reversing award of attorney's fees even though the attorney testified that all the claims were intertwined and no segregation was required, but the attorney "failed to articulate how the legal services that she performed advanced both recoverable and unrecoverable claims"); *cf. River Oaks L-M. Inc. v. Vinton-Duarte*, 469 S.W.3d 213, 234 (Tex. App.—Houston [14th Dist.] 2015, no pet.) (affirming award of attorney's fees when there was testimony that the attorney had to perform the same legal work for multiple claims and that he segregated nominal amounts of time).

Appellees' attorney's fees that are not attributable to defending the TTLA claim might be nominal, but they must be segregated nonetheless. *See Chapa*, 212 S.W.3d at 313–14. Because appellees did not segregate fees over Tijerina's objection, we must reverse the trial court's award of attorney's fees and remand for a new trial on fees. *See id.* at 315.

Tijerina's fifth issue is sustained in part.

III. CONCLUSION

We reverse the portion of the judgment awarding attorney's fees to appellees, sever that portion of the judgment, and remand the issue to the trial court for a new trial on the issue of appellees' attorney's fees. In all other respects, we affirm the trial court's judgment. *See 7979 Airport Garage*, 245 S.W.3d at 510.

/s/ Ken Wise
Justice

Panel consists of Justices Jamison, Wise, and Jewell.