Affirmed in Part, Reversed and Remanded in Part, and Memorandum Opinion filed March 30, 2017.

In The

Fourteenth Court of Appeals

NO. 14-15-00845-CV

RICHARD SAAD, JR., Appellant

V.

VRISELDA VALDEZ, KENNETH VALDEZ, AND MOBILITY HEADQUARTERS, INC., Appellees

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On Appeal from 234th District Court
Harris County, Texas
Trial Court Cause No. 2011-17650

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

Richard Saad, Jr. purchased the business assets of Mobility Headquarters, Inc. but made only one payment on the promissory note he signed in connection with the asset purchase. Saad sued Vriselda and Kenneth Valdez and Mobility Headquarters, claiming the Valdezes misrepresented to him that no licensing was required to operate a business as an independent mobility motor vehicle dealer; he

also sued for breach of a non-compete agreement. Mobility Headquarters counter-sued Saad for breach of the promissory note. The trial court ruled in favor of Mobility Headquarters on its claim and ruled against Saad on his claims.

Saad challenges the trial court's summary ruling on his claims for fraud, fraudulent concealment, and negligent misrepresentation. Because there is no evidence that the Valdezes' alleged misrepresentation was material with regard to his fraud and fraudulent inducement claims, and because Saad waived his complaint regarding his negligent misrepresentation claim, we affirm the trial court's judgment with respect to Saad's claims.

Saad also challenges the trial court's ruling on the claim for breach of promissory note. We affirm the trial court's ruling because the promissory note was neither illegal nor void; there is no evidence Kenneth breached the non-compete agreement so as to excuse Saad's performance; there is evidence that Mobility Headquarters introduced the original promissory note at the bench trial; and there is sufficient evidence to support the trial court's award on the promissory note.

Finally, Saad challenges the trial court's (1) admission of testimony about Mobility Headquarters's billing records that were not produced in response to Saad's discovery request; and (2) award for trial and appellate attorney's fees on sufficiency grounds. We affirm the trial court's judgment with respect to the appellate attorney's fees award because the trial court acted within its discretion in determining that Saad was not unfairly surprised by the admission of any billing records evidence, and because there was sufficient evidence to support the trial court's award of appellate attorney's fees. However, because the evidence is insufficient to support the trial court's award for trial attorney's fees, we reverse the trial attorney's fees award and remand this case for a redetermination of trial

attorney's fees consistent with this court's opinion.

FACTUAL AND PROCEDURAL BACKGROUND

I. The Underlying Transaction

Mobility Headquarters, Inc. sold mobility equipment and retrofitted vehicles for disabled drivers. Vriselda Valdez was the company's president; Kenneth Valdez was an agent and employee.

Saad purchased the business assets of Mobility Headquarters on January 14, 2011; Saad did not purchase the corporation. The "Bill Of Sale" provides that Saad purchased "the following described personal property" from Mobility Headquarters: "Business, Business Name, Furniture, Fixtures, Equipment, Leasehold Improvements, Customer List, Business Telephone and Facsimile Number(s), Lease Rights, Contract Rights, Goodwill and Inventory of the business known as MOBILITY HEADQUARTERS." Saad paid $176,626.31 in cash and executed a $330,000 promissory note.

The Valdezes provided a "Business Disclosure Statement" in anticipation of selling these business assets. Vriselda first signed this document in 2008 and then initialed it on January 13, 2011. The document contains a section entitled "Required Licenses, Permits, And/Or Certificates" and asks that all required licenses, permits, and certificates be listed. Vriselda listed various certificates Mobility Headquarters had but left the space for required licenses and permits blank. The Valdezes also provided Saad with a document entitled "Tier 2 Business Brokers;" this document was signed by Kenneth on January 10, 2010. The document's section for "Licenses & Permits Required To Operate The Business" listed "Sales Tax, Texas Registered Creditors Permit, CCR." Under a section entitled "List any other licenses required," the notation "N/A" was written.

The Valdezes and Mobility Headquarters executed covenants not to compete with Saad in Texas for five years. The covenants prohibited the Valdezes and Mobility Headquarters from engaging in business "generally described as the manufacture of wheelchair accessible vans and durable medical equipment business together with any and all related services and products." The parties also executed a security agreement and a bill of sale.

After the asset purchase, Saad began operating a new entity called Mobility Headquarters of Texas, L.L.C. He made one payment under the promissory note on February 14, 2011. Vriselda demanded that Saad pay the outstanding balance on the promissory note on March 16, 2011, after Saad failed to make the March payment as required. Saad made no further payments.

II. The Parties Sue

Saad sued the Valdezes and Mobility Headquarters on March 22, 2011, and amended his petition several times during the course of litigation. Saad's live pleading alleged claims for fraud, fraud in the inducement, negligent misrepresentation, and breach of the non-compete covenants. He alleged that the Valdezes negligently or fraudulently made misrepresentations "orally" and "in writing" on a document entitled "Business Disclosure Statement." The Valdezes allegedly misrepresented that no "special licensing to operate his new Company" was required even though Saad needed licenses to "operate the fabrication portion of the business." He also alleged that the Valdezes "were continuing to engage in the sale of mobility vehicles in violation of the 'Covenant Not to Compete.'" The Valdezes and Mobility Headquarters filed an answer. In addition to their answer, the Valdezes and Mobility Headquarters filed counterclaims for breach of contract, quantum meruit, conversion, and fraud. Saad alleged the following affirmative defenses in response to the counterclaims: fraudulent inducement, negligent

inducement, "illegal and/or criminal activities," anticipatory repudiation, lack of consideration, negligence, contributory negligence, fraud, doctrine of laches, and illegality.

III. Summary Judgments

On July 7, 2014, the Valdezes and Mobility Headquarters filed a traditional summary judgment motion on Saad's claims for fraud and fraudulent inducement; they combined the traditional motion with a no-evidence summary judgment motion on Saad's claims for fraud, fraudulent inducement, negligent misrepresentation, and breach of contract.[1]

With regard to their traditional summary judgment motion, the Valdezes and Mobility Headquarters argued that they are entitled to judgment as a matter of law on Saad's fraud and fraudulent inducement claims because "the representations which [Saad] alleges were made to him by the Defendants are statements of legal opinion and not fact."

Mobility Headquarters moved for partial traditional summary judgment on its counterclaim for breach of the promissory note because Saad "judicially admit[ted] in his pleadings that he discontinued making payments" on the promissory note. Mobility Headquarters asked the trial court to grant partial summary judgment "on the issue of [Saad's] liability under the promissory note made the basis of its breach of contract claim, and set a writ of inquiry hearing on the damages and attorney's fees which [it] is entitled to recover against [Saad] as the result of his breach."

[1] The parties filed numerous pleadings, briefs, summary judgment motions, partial summary judgment motions, and written responses in the trial court. We will only discuss the motions, responses, and pleadings relevant to the appeal before us.

Saad filed a response to the Valdezes' and Mobility Headquarters's traditional and no-evidence summary judgment motion and to Mobility Headquarters's partial traditional summary judgment motion on July 21, 2014. Saad contended that the Valdezes falsely represented to him that no license was required to legally operate as a mobility motor vehicle dealer in Texas, which was evidenced by their completed "Business Disclosure Statement" and their failed attempts to obtain a General Distinguishing Number dealer license ("GDN").[2] Saad argued regarding his negligent misrepresentation claim that the Valdezes made false representations in their "Business Disclosure Statement" and "Tier 2 Business Brokers Document" that there were no "licenses or certifications necessary to legally operate the business as a mobility vehicle dealer."

Saad further argued the Valdezes and Mobility Headquarters breached the non-compete covenants because Kenneth admitted buying a vehicle in Austin, Texas approximately 30 days after the parties signed the covenant not to compete. And Saad argued that Mobility Headquarters is not entitled to partial summary judgment on its counterclaim for breach of the promissory note because he was

[2] Section 503.021 of the Texas Transportation Code, entitled "Dealer General Distinguishing Number," provides: "A person may not engage in business as a dealer, directly or indirectly, including by consignment, without a dealer general distinguishing number in one of the categories described by Section 503.029(a)(6) [including an independent mobility motor vehicle dealer] for each location from which the person conducts business as a dealer." *See* Tex. Transp. Code Ann. § 503.021 (Vernon 2013), § 503.029(a)(6)(G) (Vernon Supp. 2016) ("An applicant for an original or renewal dealer general distinguishing number must submit . . . a written application on a form that . . . specifies whether the applicant proposes to be a[n] . . . independent mobility motor vehicle dealer."); Tex. Occ. Code Ann. § 2301.002(17-b) (Vernon Supp. 2016) ("'Independent mobility motor vehicle dealer' means a nonfranchised dealer who: (A) holds a general distinguishing number issued by the board under Chapter 503, Transportation Code; (B) holds a converter's license issued under this chapter; (C) is engaged in the business of buying, selling, or exchanging mobility motor vehicles and servicing or repairing the devices installed on mobility motor vehicles at an established and permanent place of business in this state; and (D) is certified by the manufacturer of each mobility device that the dealer installs, if the manufacturer offers that certification.").

"lured . . . into the transaction by fraudulent means," excusing any obligation he had to perform under the note.

Together with his response, Saad also filed a traditional summary judgment motion on his claims. He argued that "Defendants were in the business of dealing motor vehicles for people with handicaps and other disabilities. As such, they were required by the State of Texas to obtain one or more licenses to legally operate their business. Specifically, Defendants were required to have a GDN license, which they failed to obtain after several attempts." He also argued that, "as evidenced in the Tier 2 Business Brokers Document(s), there is no question that Defendants represented themselves as a mobility dealer to Saad."

Saad argued that he is entitled to summary judgment on his claims for fraud, fraud in the inducement, and negligent misrepresentation because he proved as a matter of law that "Defendants were required to obtain a GDN license to operate their business. Defendants intentionally made several false misrepresentations to Saad regarding their status as a mobility dealer in the State of Texas" to "entice him into signing the agreement." With regard to his breach of contract claim, Saad argued he was entitled to summary judgment because "Defendants have not denied breaching the Covenant Not to Compete" and Vriselda testified in her deposition that "she bought and sold vehicles in the State of Texas within the period restricted by the covenant."

The Valdezes and Mobility Headquarters filed a "Defendants' Response to Plaintiff's Motion for Summary Judgment; and Reply to Plaintiff's Response to Defendants' and Counter-Plaintiff's Motion for Summary Judgment" on July 25, 2014. Saad filed a "Sur-Reply to Defendants' Motion for Summary Judgment, Counter-Defendant's Response to Counter-Plaintiffs' Motion for Partial Summary

Judgment and Plaintiff's Traditional Motion for Summary Judgment" on July 28, 2014.

The trial court signed an order denying Saad's motion for traditional summary judgment on January 21, 2015. On the same day, the trial court signed an order granting the Valdezes' and Mobility Headquarters's traditional and no-evidence summary judgment motion; it also signed an order granting Mobility Headquarters's partial traditional summary judgment "as to the issue of [Saad's] liability on the promissory note made the basis of this suit" and stating that a "hearing on damages and attorney's fees shall be scheduled." The trial court subsequently denied Saad's motion for reconsideration of its summary judgment orders.

IV. Bench Trial

A bench trial was held on April 14, 2015. At trial, the court recalled that it had signed interlocutory summary judgments "on many claims in this case" and questioned the parties regarding what remained to be litigated at the bench trial. Mobility Headquarters's counsel stated that (1) the only remaining claims were Mobility Headquarters's claim for breach of the promissory note and attorney's fees; (2) the Valdezes "are no longer in the suit;" and (3) the Valdezes and Mobility Headquarters nonsuited all other claims. Although the trial court recalled that it had "enter[ed] summary judgment that the promissory note was breached," the parties nonetheless agreed that "breach, damages, and attorney's fees" remained as issues for the bench trial.

Mobility Headquarters presented evidence to support its argument that Saad breached the promissory note and that it incurred damages and attorney's fees. Saad presented evidence in support of his argument that any breach of the promissory note was excused because the Valdezes (1) misrepresented to Saad that

no licenses were required to operate the business; and (2) breached the covenant not to compete. Mobility Headquarters's counsel, Hugh Plummer, Jr., testified regarding the reasonableness, necessity, and amount of attorney's fees.

The trial court signed a final judgment on June 2, 2015, incorporating the previously signed interlocutory summary judgment orders and ordering that (1) Saad take nothing against the Valdezes and Mobility Headquarters; (2) Mobility Headquarters recover from Saad "the amount of $712,740.42 (representing principal and interest on the note of $550,041.42, and $162,699.00, in reasonable and necessary attorney's fees in the trial of this cause) plus interest" of 18 percent annually; and (3) Saad pay appellate attorney's fees "in the event [Saad] unsuccessfully appeals this judgment."

Saad filed a motion for new trial on August 6, 2015, which was overruled by operation of law. *See* Tex. R. Civ. P. 329b(c). Saad filed a timely notice of appeal on October 1, 2015.

STANDARDS OF REVIEW

Saad's appeal challenges the trial court's grant of no-evidence and traditional summary judgment in favor of the Valdezes and Mobility Headquarters on his claims for fraud, fraudulent concealment, and negligent misrepresentation. He argues that the Valdezes misrepresented to him that no licensing was required to operate his business when in fact a GDN dealer license was required.

Saad challenges the trial court's ruling in favor of Mobility Headquarters's breach of promissory note claim, arguing that (1) the note was illegal and void against public policy; (2) his performance under the promissory note was excused by Kenneth Valdez's breach of the non-compete agreement; (3) there is no evidence that Mobility Headquarters presented the original promissory note or a

certified copy of the note at the bench trial; and (4) there is legally and factually insufficient evidence to support a $550,041.42 award on the promissory note.

Saad also challenges the trial court's admission of testimony about Mobility Headquarters's billing records during the bench trial that were not produced in response to Saad's discovery request. He argues that "good cause and a lack of surprise or prejudice were not shown to allow this evidence" as required by Texas Rule of Civil Procedure 193.6. Finally, Saad attacks the trial court's award for trial and appellate attorney's fees, arguing that the award is not supported by legally and factually sufficient evidence.

I. Traditional and No-Evidence Summary Judgment

We review the trial court's grant of summary judgment *de novo*. *Valence Operating Co. v. Dorsett*, 164 S.W.3d 656, 661 (Tex. 2005). In reviewing either a no-evidence or traditional summary judgment motion, we must take as true all evidence favorable to the nonmovant and draw every reasonable inference and resolve all doubts in favor of the nonmovant. *M.D. Anderson Hosp. & Tumor Inst. v. Willrich*, 28 S.W.3d 22, 23-24 (Tex. 2000) (per curiam); *Mendoza v. Fiesta Mart, Inc.*, 276 S.W.3d 653, 655 (Tex. App.—Houston [14th Dist.] 2008, pet. denied).

A no-evidence motion for summary judgment is essentially a motion for a pretrial directed verdict. *Timpte Indus., Inc. v. Gish*, 286 S.W.3d 306, 310 (Tex. 2009); *see* Tex. R. Civ. P. 166a(i). After an adequate time for discovery, a party without the burden of proof may, without presenting evidence, seek summary judgment on the ground that there is no evidence to support one or more essential elements of the nonmovant's claim or defense. Tex. R. Civ. P. 166a(i). The nonmovant is required to present evidence raising a genuine issue of material fact

supporting each element contested in the motion. *Id*.; *Timpte Indus.*, 286 S.W.3d at 310.

The party moving for a traditional summary judgment must show that no material fact issue exists and that it is entitled to summary judgment as a matter of law. Tex. R. Civ. P. 166a(c); *Willrich*, 28 S.W.3d at 23. To be entitled to traditional summary judgment, a defendant must conclusively negate at least one essential element of each of the plaintiff's causes of action or conclusively establish each element of an affirmative defense. *Am. Tobacco Co. v. Grinnell*, 951 S.W.2d 420, 425 (Tex. 1997). Evidence is conclusive only if reasonable people could not differ in their conclusions. *City of Keller v. Wilson*, 168 S.W.3d 802, 816 (Tex. 2005). Once the defendant produces sufficient evidence to establish the right to summary judgment, the burden shifts to the plaintiff to come forward with competent controverting evidence raising a genuine issue of material fact. *Centeq Realty, Inc. v. Siegler*, 899 S.W.2d 195, 197 (Tex. 1995).

II. Legal and Factual Sufficiency

When, as here, no findings of fact or conclusions of law are filed or properly requested in a bench trial, it is implied that the trial court made all necessary findings to support its judgment. *Holt Atherton Indus., Inc. v. Heine*, 835 S.W.2d 80, 83 (Tex. 1992); *see Neal v. Neal*, No. 14-10-01081-CV, 2011 WL 4554376, at *2 (Tex. App.—Houston [14th Dist.] Oct. 4, 2011, no pet.) (mem. op.); *Hicks v. Hicks*, 348 S.W.3d 281, 284 (Tex. App.—Houston [14th Dist.] 2011, no pet.). We must affirm the trial court's judgment on any legal theory that finds support in the evidence. *Neal*, 2011 WL 4554376, at *2; *Hicks*, 348 S.W.3d at 284. A party's failure to request findings of fact or conclusions of law does not waive his right to challenge the legal and factual sufficiency of the evidence on appeal. *Neal*, 2011 WL 4554376, at *2. When, as here, a record is brought forward on appeal, the trial

court's implied findings may be challenged for legal and factual sufficiency. *Willmore v. Quigley*, No. 14-12-00060-CV, 2013 WL 2296187, at *3 (Tex. App.—Houston [14th Dist.] May 23, 2013, no pet.) (mem. op.); *see Heine*, 835 S.W.2d at 84. The same sufficiency standard of review applies to findings by a trial court as to findings by a jury. *See Ortiz v. Jones*, 917 S.W.2d 770, 772 (Tex. 1996) (per curiam); *Catalina v. Blasdel*, 881 S.W.2d 295, 297 (Tex. 1994).

When reviewing the legal sufficiency of the evidence, we review the evidence in the light most favorable to the fact findings and assume that the court resolved all conflicts in accordance with its judgment. *See City of Keller*, 168 S.W.3d at 820. We credit evidence favorable to the findings if reasonable factfinders could do so, and we disregard contrary evidence unless reasonable factfinders could not do so. *See id*. at 827. Evidence is legally insufficient if: (1) there is a complete absence of evidence of a vital fact; (2) the court is barred by rules of law or evidence from giving weight to the only evidence offered to prove a vital fact; (3) the evidence offered to prove a vital fact is no more than a mere scintilla; or (4) the evidence establishes conclusively the opposite of the vital fact. *Id*. at 810. The ultimate test is whether the evidence at trial would enable reasonable and fair-minded people to reach the finding under review. *Id*. at 827.

For factual sufficiency review, we must consider and weigh all the evidence, and should set aside the judgment only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. *Willmore*, 2013 WL 2296187, at *3; *see Golden Eagle Archery, Inc. v. Jackson*, 116 S.W.3d 757, 761 (Tex. 2003). Under both standards of review, the trial court as the factfinder is the sole judge of the credibility of the witnesses and the weight to be given their testimony, and we will not disturb the court's resolution of evidentiary conflicts that turn on credibility determinations or the weight of the evidence. *Murray v.*

Grayum, No. 03-10-00165-CV, 2011 WL 2533796, at *2 (Tex. App.—Austin June 24, 2011, pet. denied) (mem. op.); *see City of Keller*, 168 S.W.3d at 819.

III. Admission of Evidence

We review a trial court's decision to admit or exclude evidence for abuse of discretion. *In re J.P.B.*, 180 S.W.3d 570, 575 (Tex. 2005). A trial court abuses its discretion in admitting or excluding evidence if it acts without reference to any guiding rules and principles, or if the act complained of is arbitrary and unreasonable. *Carpenter v. Cimarron Hydrocarbons Corp.*, 98 S.W.3d 682, 687 (Tex. 2002); *Van Heerden v. Van Heerden*, 321 S.W.3d 869, 875 (Tex. App.—Houston [14th Dist.] 2010, no pet.). We must uphold a trial court's evidentiary ruling if there is any legitimate basis in the record to support it. *Owens–Corning Fiberglas Corp. v. Malone*, 972 S.W.2d 35, 43 (Tex. 1998). We will not reverse a trial court for an erroneous evidentiary ruling unless the error probably caused the rendition of an improper judgment. *Interstate Northborough P'ship v. State*, 66 S.W.3d 213, 220 (Tex. 2001); *see* Tex. R. App. P. 44.1. A successful challenge to evidentiary rulings usually requires the complaining party to show that the judgment turns on the particular evidence excluded or admitted. *Tex. Dep't of Transp. v. Able*, 35 S.W.3d 608, 617 (Tex. 2000).

ANALYSIS

We pause at this juncture to discuss more fully the appropriate scope of review. This discussion is prompted by Saad's practice of citing evidence largely without regard to whether the evidence properly can be considered on appeal or whether it pertains to the specific trial court decision being challenged. For example, Saad cites to evidence adduced during the subsequent bench trial to support arguments challenging the trial court's prior grant of no-evidence and traditional summary judgment in favor of the Valdezes and Mobility Headquarters.

Saad also cites to evidence that was not attached to and presented with the particular summary judgment motions and responses being challenged.

We consider only evidence that was before the trial court at the time it ruled on the particular summary judgment motions being challenged. *See Nguyen v. Citibank N.A.*, 403 S.W.3d 927, 932 (Tex. App.—Houston [14th Dist.] 2013, pet. denied) (court of appeals did not consider evidence that was not attached to summary judgment response); *Blankinship v. Brown*, 399 S.W.3d 303, 309 (Tex. App.—Dallas 2013, pet. denied) (court of appeals considered only evidence that was before the trial court at the time it ruled on summary judgment motion, stating "this evidence was not before the trial court at the time it considered summary judgment. Accordingly, we may not consider the trial testimony in our summary judgment analysis"); *Neely v. Comm'n for Lawyer Discipline*, 302 S.W.3d 331, 347 n.16 (Tex. App.—Houston [14th Dist.] 2009, pet. denied) (court of appeals cited Rule 166a(d) and explained that it cannot consider summary judgment evidence that was not before the trial court); *McMahan v. Greenwood*, 108 S.W.3d 467, 482 (Tex. App.—Houston [14th Dist.] 2003, pet. denied) (court of appeals did not consider evidence attached to a motion for new trial that was not before the trial court when it granted summary judgment).

The record here is somewhat muddled because evidence arguably pertaining to some of the claims decided by summary judgment also was referenced during the bench trial. However, summary judgment was granted and never "ungranted." Thus, we do not consider additional evidence adduced at the bench trial in our review and analysis of Saad's issues challenging the trial court's grant of summary judgment. We consider evidence presented at the bench trial only in addressing Saad's appellate arguments challenging the trial court's judgment with regard to the specific issues litigated and decided at the bench trial.

We now turn to the seven issues Saad raises in his appellate briefing. We first address Saad's first and second issues by which he challenges the trial court's grant of summary judgment in favor of the Valdezes and Mobility Headquarters on his claims for fraud, fraudulent inducement, and negligent representation. We then address Saad's third through seventh issues by which he attacks the trial court's judgment following a bench trial awarding damages to Mobility Headquarters on its claim for breach of the promissory note and attorney's fees.

I. Summary Judgment

Saad argues in his first issue that Mobility Headquarters operated as an independent mobility vehicle dealer and thus needed a GDN dealer license to operate legally in Texas. *See* Tex. Transp. Code Ann. § 503.021 (Vernon 2013); Tex. Transp. Code Ann. § 503.029(a)(6) (Vernon Supp. 2016). According to Saad, "[t]he resolution of the GDN issue is important in analyzing the Trial Court's errors in granting Appellees' summary judgment motions." Alternatively, Saad argues that a fact issue exists with regard to the necessity of a GDN license. Saad argues in his second issue that the trial court erroneously granted summary judgment in favor of the Valdezes and Mobility Headquarters because he "submitted uncontested proof of each one of the elements of his causes of action for fraud and fraudulent inducement" and "presented uncontroverted evidence establishing each element of negligent misrepresentation."

A. Fraud and Fraudulent Inducement

Saad contends that he conclusively established fraud and fraudulent inducement with "uncontested proof" that (1) Mobility Headquarters operated as an independent mobility motor vehicle dealer which necessitated a GDN dealer license to operate legally in Texas; (2) the Valdezes "knew of the GDN requirement based on their previous unsuccessful attempts to obtain one, and,

despite this knowledge, the Valdezes represented to Saad both orally and in writing [on their Business Disclosure Statement or the Tier 2 Business Brokers Document] that no licenses (such as a GDN) were necessary;" and (3) "Saad relied on these representations to his detriment."[3]

Before we address Saad's contentions, we note the difference between the purchase of a corporation and the purchase of its assets. "The purchaser of stock in a corporation does not purchase any portion of the corporation's assets, nor is a sale of all the stock of a corporation a sale of the physical properties of the corporation." *See Tenneco Inc. v. Enter. Prods. Co.*, 925 S.W.2d 640, 645 (Tex. 1996). As we discuss further below, this distinction is germane to the fraud and materiality analysis because this transaction was structured as a sale of assets rather than a sale of the corporation itself.

The elements of common law fraud are: "(1) that a material representation was made; (2) the representation was false; (3) when the representation was made, the speaker knew it was false or made it recklessly without any knowledge of the truth and as a positive assertion; (4) the speaker made the representation with the intent that the other party should act upon it; (5) the party acted in reliance on the representation; and (6) the party thereby suffered injury." *Italian Cowboy Partners, Ltd. v. Prudential Ins. Co. of Am.*, 341 S.W.3d 323, 337 (Tex. 2011).

Fraudulent inducement is "a particular species of fraud that arises only in the context of a contract and requires the existence of a contract as part of its proof." *Haase v. Glazner*, 62 S.W.3d 795, 798 (Tex. 2001); *see also Nat'l Prop. Holdings,*

[3] Saad cites only to the bench trial transcript to support his contention. We do not consider additional evidence adduced at the bench trial in our review and analysis of Saad's issues challenging the trial court's grant of summary judgment; we are confined to the evidence that was before the trial court at the time it ruled on the respective summary judgment motions. *See supra* at 13-14.

L.P. v. Westergren, 453 S.W.3d 419, 423 (Tex. 2015) (per curiam). Otherwise, a fraudulent inducement claim requires proof of the same elements as a fraud claim. *See Westergren*, 453 S.W.3d at 423; *Haase*, 62 S.W.3d at 798-99.

With regard to the element of materiality, "[m]aterial means a reasonable person would attach importance to and would be induced to act on the information in determining his choice of actions in the transaction in question." *Italian Cowboy Partners, Ltd.*, 341 S.W.3d at 337; *Reservoir Sys., Inc. v. TGS-NOPEC Geophysical Co.*, 335 S.W.3d 297, 305 (Tex. App.—Houston [14th Dist.] 2010, pet. denied). In the context of fraudulent inducement, a representation is material if it induces a party to enter a contract. *Reservoir Sys., Inc.*, 335 S.W.3d at 305. "Even if a misrepresentation is not a party's sole inducement for entering into the contract, it may still be material so long as the party relied on it." *Id*.

Saad contends that he "conclusively established each element of fraud and fraudulent inducement with competent proof." Beginning with the element of materiality, Saad's argument on appeal consists of the following:

> A representation is "material" if it is important to the party to whom it is made in making a decision regarding the particular transaction or a reasonable person would attach importance to it and would be induced to act on the information in determining his/her choice of actions in the transaction in question. *Smith v. KNC Optical, Inc.*, 296 S.W.3d 807, 812 (Tex. App.—Dallas 2009, no pet.); *Burleson State Bank v. Plunkett*, 27 S.W.3d 605, 613 (Tex. App.—Waco 2000, pet. denied). In other words, a "representation is material if it induces a party to enter a contract." *Reservoir Sys., Inc., v. TGS-NOPEC Geophysical Co., L.P.*, 335 S.W.3d 297, 305 (Tex. App.—Houston [14th Dist.] 2010, pet. [denied]).
>
> Requisite licensing is uncontestably important in the sale of a business. In this case, licensing was the determining factor in the transaction. Despite the importance of licensing, and on the heels of the Valdezes withdrawing MHI's application to obtain a GDN, Appellees admit telling Saad that no licenses were required to operate

> MHI and the Disclosure Statements do not reflect any licensing requirements for MHI. Consequently, the statements by the Valdezes to Saad are material representations conclusively establishing the first element.
>
> Additionally, "even if a misrepresentation is not a party's sole inducement for entering into the contract, it may still be material so long as the party relied on it." *Reservoir Sys.*, 335 S.W.3d at 305. Saad relied on the Valdezes[']misrepresentations concerning the GDN need to legally operate MHI.

Saad's statements quoted above do not comply with Texas Rule of Appellate Procedure 38.1(i), requiring that an appellant's "brief must contain a clear and concise argument for the contentions made with appropriate citations to authorities and to the record." *See* Tex. R. App. P. 38.1(i). Saad fails to cite to any evidence that was before the trial court on summary judgment in support of his contention that he conclusively established the element of materiality for his fraud and fraudulent inducement claims. Saad's complaint is waived. *See id*.

Further, the record contains no evidence raising a fact issue that any alleged written representation[4] by the Valdezes made on the Business Disclosure Statement or the Tier 2 Business Brokers Document, even if false or contrary to Texas law, was a material representation. Saad proffered an affidavit stating as follows:

> My name is Richard Saad, Jr. I am over 18 years of age, of sound mind, and capable of making this affidavit. The facts stated in this affidavit are within my personal knowledge and are true and correct.
>
> I would not have purchased Mobility Headquarters, Inc. had Defendants disclosed the licensing, governmental contracts and related regulations applicable to the business.

[4] Contrary to Saad's contention, there is no evidence that "the Valdezes represented to Saad . . . orally . . . that no licenses (such as a GDN) were necessary." At most, any representation was made in writing on either the Business Disclosure Statement or the Tier 2 Business Brokers Document.

> I had no personal knowledge of the licensing, governmental contracts and related regulations applicable to the business as represented.

This affidavit is no evidence that any representation by the Valdezes regarding licensing requirements was material because it constitutes no evidence that Saad was induced to enter into the contract to purchase the assets of Mobility Headquarters. Instead, the affidavit states that Saad would not have purchased Mobility Headquarters, Inc. had licensing requirements been disclosed. There is a difference between the purchase of a corporation and the purchase of a corporation's assets. *See Tenneco Inc.*, 925 S.W.2d at 645. Saad did not purchase Mobility Headquarters, Inc.; he purchased its assets.

This affidavit is no evidence that Saad was induced to purchase the assets of Mobility Headquarters. Accordingly, there is no evidence in the record before us raising a fact issue as to the materiality of any alleged representation the Valdezes made with respect to the necessity of a GDN or other license.

We overrule Saad's second issue regarding his contention that the trial court erroneously granted summary judgment in favor of the Valdezes and Mobility Headquarters on his fraud and fraudulent inducement claims because the "evidence Saad submitted is sufficient to conclusively establish each element of fraud and fraudulent inducement or at least to create an issue of fact."

B. Negligent Misrepresentation

We now turn to Saad's argument that the trial court erred by granting no-evidence summary judgment in favor of the Valdezes and Mobility Headquarters on his negligent misrepresentation claim because he "presented uncontroverted evidence establishing each element of negligent misrepresentation."

"The elements of a claim for negligent misrepresentation are as follows: (1)

the representation is made by a defendant in the course of his business, or in a transaction in which it has a pecuniary interest; (2) the defendant supplies false information for the guidance of others in their business; (3) the defendant did not exercise reasonable care or competence in obtaining or communicating the information; and (4) the plaintiff suffers pecuniary loss by justifiably relying on the representation." *Roof Sys., Inc. v. Johns Manville Corp.*, 130 S.W.3d 430, 438 (Tex. App.—Houston [14th Dist.] 2004, no pet.); *see Fed. Land Bank Ass'n v. Sloane*, 825 S.W.2d 439, 442 (Tex. 1991).

On appeal, Saad's argument consists of the following statements:

> Saad produced more than sufficient evidence demonstrating the Valdezes made false representations concerning licensing that Saad justifiably relied upon. Saad also presented uncontroverted evidence establishing each element of negligent misrepresentation. The Valdezes admit to telling Saad no licenses were required to operate [Mobility Headquarters] despite the Texas requirements that businesses such as [Mobility Headquarters] must have a GDN. These representations were made despite the fact that [Mobility Headquarters] had attempted to and could never obtain a GDN. Saad relied on these statements in purchasing the company. Appellees had a pecuniary interest in this transaction, and the false information supplied was intended for the guidance of Saad. None of the evidence Saad submitted was ever controverted by Appellees. As a matter of law, summary judgment should have been granted to Saad on this issue.

Saad's argument does not comply with Texas Rule of Appellate Procedure 38.1(i), which requires that an appellant's brief must contain a clear and concise argument for the contentions made with appropriate citations to the record. *See* Tex. R. App. P. 38.1(i). Saad fails to cite to any evidence that was before the trial court on summary judgment in support of these contentions on appeal. Saad's complaint is waived. *See id*. We overrule Saad's second issue regarding his contention that the trial court erroneously granted no-evidence summary judgment in favor of the

Valdezes and Mobility Headquarters on his negligent misrepresentation claim.

Accordingly, we overrule Saad's second issue. And in light of our disposition of Saad's second issue, we need not address his first issue.

II. Bench Trial

We now turn to Saad's third through seventh issues by which he attacks the trial court's judgment following the bench trial on Mobility Headquarters's breach of promissory note claim and attorney's fees request.

A. Illegality

Saad argues in his third issue that the trial court erred by signing a judgment against him on the promissory note. He says the sales agreement and promissory note are illegal, unenforceable, and "void against public policy because [Mobility Headquarters] did not have the required GDN." Saad argues that the promissory note is an unenforceable and void contract because "[a] contract to do an act that cannot be performed without violation of the law" is void and Mobility Headquarters did not have the GDN dealer license as required by law. *See* Tex. Transp. Code Ann. § 503.021 (Vernon 2013), § 503.029(a)(6) (Vernon Supp. 2016).

Saad's argument is without merit. Saad entered into a contract to purchase the assets of Mobility Headquarters. Whether Mobility Headquarters had a GDN dealer license at the time it operated its business does not affect the legality of the sale of its assets. Nothing about the sale of Mobility Headquarters's assets to Saad is illegal or violates a law. Saad provides no authority for his argument that the promissory note is illegal, unenforceable, and void against public policy; nor does Saad explain how a contract for an asset sale is illegal or void and also renders the accompanying promissory note illegal and void even if the company did not have a

required license when it operated its business.

Saad also states that "[i]ndividuals cannot indirectly profit from a business they are directly prohibited from engaging in unless properly licensed by statute." For support, he cites *Denson v. Dallas County Credit Union*, 262 S.W.3d 846, 854-56 (Tex. App.—Dallas 2008, no pet.). Saad provides no argument or explanation for his isolated statement, and we fail to see how the statement has any relevance in this case. Saad acknowledges buying Mobility Headquarters's assets; nothing about the transaction between Saad and Mobility Headquarters to purchase assets involves "individuals indirectly profit[ing] from a business."

Denson is not applicable in this case. There, Denson and his car dealership, which was not licensed to sell cars in Dallas County, entered into an agreement with Dallas County Credit Union through its agent Chapman. *Id*. at 848. Under the agreement, Denson and his dealership located cars for Credit Union's customers, Credit Union financed the loans, and the profits from the car sales were split. *Id*. Denson and his dealership sued Chapman and Credit Union for breach of contract and other torts claiming that on many loans Chapman told Denson the cars sold for a lower amount when the Credit Union actually financed a higher amount, resulting in Denson and his dealership making less profit. *Id*. at 849. Denson conceded he and his dealership "had no legal ability to transact business as an automobile dealer from any location in Dallas County, yet they knowingly and willingly engaged Chapman as their sales agent for the express purpose of selling vehicles at the Credit Union in Dallas County." *Id*. at 853. The court stated that "the transaction of selling the cars was illegal because on the day of the transactions, [Denson and his dealership] did not have the statutory required license. Thus, we conclude [their] breach of contract claim is barred by the illegality defense." *Id*. at 855.

In contrast to the facts in *Denson*, Saad and Mobility Headquarters were not engaged in any business together for which a GDN or any other license was required. Instead, they entered into an asset sale agreement. They had no other common business purpose or dealings.

Within his third issue, Saad also contends that, because he has conclusively proved his claims for fraud and fraudulent inducement in his second issue and "raised" fraud and fraudulent inducement as affirmative defenses to Mobility Headquarters's claims, this court should reverse the trial court's judgment "enforcing the promissory note."

We have ruled against Saad on his fraud and fraudulent inducement claims as presented in his second issue. We have held that there is no evidence in the record to raise a fact issue on the element of materiality. Further, Saad's second issue challenged the trial court's grant of summary judgment in favor of the Valdezes and Mobility Headquarters on his fraud and fraudulent inducement claims; Saad's second issue did not challenge the trial court's ruling with regard to fraud and fraudulent inducement tried as an affirmative defense to Mobility Headquarters's breach of promissory note claim. We thus reject Saad's argument as being without merit.

Accordingly, we overrule Saad's third issue.

B. Non-Compete Agreement

Saad contends in his fourth issue that the "trial court erred in enforcing the promissory note" because he conclusively established that Kenneth Valdez breached the non-compete agreement, and Kenneth Valdez admitted this breach. Saad contends that "[t]his breach excused Saad's performance under the promissory note, and Saad was within his rights to stop payment."

The parties' non-compete agreement provides in relevant part as follows:

> NOW, THEREFORE, for full and adequate consideration paid by Buyer to Seller, the sufficiency of which is acknowledged by Seller, Seller hereby covenants and agrees with Buyer as follows:
>
> 1. Definitions. For the purposes of this Covenant, the following definitions shall apply:
>
> Prohibited Territory means the geographical area known as Texas.
>
> Competing Business means any person, concern or entity which is engaged in and, to the extent it is engaged in a business the same as or substantially similar to the business conducted by Seller as of the date of closing of the transactions set forth in the aforesaid Agreements, further generally described as the manufacture of wheelchair accessible vans and durable medical equipment business together with any and all related services and products.
>
> . . .
>
> Covenant Period means the period beginning on the date hereof and ending on the fifth anniversary of the date hereof.
>
> . . .
>
> 2. Agreement Not To Compete. During the Covenant Period, Seller will not, either directly or indirectly, (a) for itself or (b) as an officer, director, shareholder, owner, partner, joint venturer, employee, promoter, consultant, manager, independent contractor, agent, or in any similar capacity, participate or assist in a business which is similar to and competes with the Business or is a Competing Business, within the Prohibited Territory.

Saad incorrectly asserts that Kenneth Valdez admitted breaching the non-compete agreement. Saad cites no evidence to support his assertion, and we have not found any evidence in the record to support it. Saad also incorrectly contends that he "conclusively established that K[enneth] Valdez was continuing to buy, sell, and retrofit vehicles in direct violation of [the] non[-]compete agreement" because this contention is not supported by the record before us.

Saad cites to the following excerpts of his trial testimony to support his

assertion that he conclusively proved that Kenneth Valdez breached the non-compete agreement:

> [TRIAL COUNSEL:] Mr. Saad, could you explain to the Court one of the primary reasons you made no payments on the promissory note after the first one?
>
> [SAAD:] We were getting phone calls into the office of the Valdezes still conducting business. That made me do investigative work and figure out what's right and what's wrong. And then I figured out that they were still conducting business. I had a conversation with —
>
> * * *
>
> [SAAD:] Kenneth Valdez
>
> * * *
>
> [SAAD:] I met with Kenneth Valdez to explain that there are several business issues, and I needed help to be able to conduct businesses. And he looked at me and said: Not a chance.
>
> [TRIAL COUNSEL:] During the approximate 30-to 60-day time period after you acquired the assets of Mobility Headquarters, Inc., did you discover whether Mr. Valdez was buying and selling vehicles?
>
> [SAAD:] I did.
>
> [TRIAL COUNSEL:] And in your mind was this a violation of the two covenants not to compete?
>
> [SAAD:] Absolutely.

Saad also cites to the following excerpts of Kenneth Valdez's deposition testimony introduced at the bench trial:

> [TRIAL COUNSEL:] Let me pass you what I've marked as Exhibit 4. Let me see if I can get a page count. Hold on. I think it's approximately 34 documents, and I just want you to identify what Exhibit 4 is for me, please.
>
> [KENNETH VALDEZ:] Okay.
>
> [TRIAL COUNSEL:] Okay. Can you tell me in general terms what is Exhibit 4?

[KENNETH VALDEZ:] It just reads "Vehicles purchased and sold."

[TRIAL COUNSEL:] Let's see if we could be a little more specific. What do the first two pages of Exhibit 4 entail?

[KENNETH VALDEZ:] The first two? It's a list of vehicles that were purchased and sold, and it continues up to the second page.

[TRIAL COUNSEL:] What are the time periods of the earliest purchase or sale?

[KENNETH VALDEZ:] Let me see. Looking at the document, I see the earliest one would be 6-10-2011.

[TRIAL COUNSEL:] Well —

[KENNETH VALDEZ:] Actually, no. It's 6 — right underneath, it's — it's — because the way it's all typed, it reads — Let me see. Okay. 2-14-2011.

[TRIAL COUNSEL:] So that's February 14, 2011. Can I see Exhibit 4, please?

[KENNETH VALDEZ:] Okay.

* * *

[TRIAL COUNSEL:] What I'm trying to understand is the first two pages of Exhibit 4 are vehicles purchased and sold starting in February, 2011, to November, 2011. Then it appears to me that all these documents that follow those two pages are documents between the years 2008 and 2010. Some of them may be even older. Am I mistaken, or am I correct?

[KENNETH VALDEZ:] I'd have to look at the documents and review them just to be sure.

[TRIAL COUNSEL:] Let me show you. This is a bill of sale in July, 2008.

[KENNETH VALDEZ:] Okay.

[TRIAL COUNSEL:] So, in other words, what I'm asking you in an ineloquent fashion is isn't it true that the first two pages of Exhibit 4 have nothing to do with the remainder of the documents?

[KENNETH VALDEZ:] I'd have to go through each individual one to be sure.

[TRIAL COUNSEL:] I think . . . I think that's correct. The — The

ones below are from the time that — before December 31st of 2010, and the top ones are after January 1st, 2011.

[KENNETH VALDEZ:] So yes.

* * *

[TRIAL COUNSEL:] So am I correct that you bought a Chevrolet on February 14, 2011, in Austin, Texas?

[KENNETH VALDEZ:] Yes.

[TRIAL COUNSEL:] Okay. And am I correct that on February 23, 2011, you bought a van in South Carolina?

[KENNETH VALDEZ:] Yes, that is correct.

[TRIAL COUNSEL:] And then just one more. In or on May 23, 2011, you acquired it looks like a vehicle at an auction in Houston, is that correct, a van?

[KENNETH VALDEZ:] Yes.

[TRIAL COUNSEL:] Is it a van or a bus?

[KENNETH VALDEZ:] It's a bus.

[TRIAL COUNSEL:] Ford bus.

[KENNETH VALDEZ:] Yes.

[TRIAL COUNSEL:] Okay.

Contrary to Saad's assertion, none of this evidence conclusively establishes that Kenneth Valdez breached the non-compete agreement. Saad's testimony that he discovered Kenneth Valdez "was buying and selling vehicles" can prove nothing more than that Kenneth Valdez bought and sold vehicles. It is not evidence that he breached the non-compete agreement because it does not show that he "engaged in a business . . . generally described as the manufacture of wheelchair accessible vans and durable medical equipment business together with any and all related services and products" as required by the non-compete agreement. Nor is Saad's testimony evidence that Kenneth Valdez "was continuing to buy, sell, and retrofit vehicles in direct violation of [the] non[-]compete agreement" as Saad asserts because there is no mention of Valdez buying and retrofitting vehicles or selling

retrofitted vehicles.

Saad's belief that the activity of buying and selling cars constituted a breach of the non-compete agreement is evidence of nothing more than Saad's belief; it is not conclusive proof that Kenneth Valdez indeed breached the non-compete agreement. Further, Kenneth Valdez's testimony that he bought two vehicles in Texas and one vehicle in South Carolina is evidence only of the fact that he bought vehicles in or outside the State of Texas. It does not establish that he bought and retrofitted vehicles, or sold retrofitted vehicles in Texas — the prohibited territory under the non-compete agreement; nor does it show that he engaged in a business "generally described as the manufacture of wheelchair accessible vans" in Texas in violation of the non-compete agreement.

The record also contains the following deposition testimony of Kenneth Valdez, which contradicts Saad's assertion that he conclusively proved a breach of the non-compete agreement:

> [TRIAL COUNSEL:] What is your understanding regarding the prohibited territory [of the non-compete agreement]?
>
> [KENNETH VALDEZ:] Texas.
>
> [TRIAL COUNSEL:] And what is the covenant period as reflected in this document?
>
> [KENNETH VALDEZ:] I believe it's five years.
>
> [TRIAL COUNSEL:] And please explain to me how buying a vehicle 39 — no, excuse me, 30 days after signing this document in Austin is not a violation of this document.
>
> [KENNETH VALDEZ:] I don't believe it is.
>
> [TRIAL COUNSEL:] I didn't ask if you believed it was. I asked you is it.
>
> [KENNETH VALDEZ:] No.
>
> [TRIAL COUNSEL:] And explain to the ladies and gentlemen of the jury why your buying a vehicle in Texas 30 days after you signed a

covenant not to compete for five years is not a violation.

[KENNETH VALDEZ:] Well, my father-in-law had a heart condition and he passed away later that year. And he became to a point where we were not able to take him. He had congestive heart failure, and we needed a vehicle to transport him. And we utilized that vehicle to transport him. And I did not buy it and resell it to anyone in Texas.

[TRIAL COUNSEL:] Are you telling the ladies and gentlemen of the jury that you didn't buy this vehicle in Texas?

[KENNETH VALDEZ:] Well, I bought it in Texas, but I did not resell it in Texas.

* * *

[TRIAL COUNSEL:] Do you see anything wrong with that?

* * *

[TRIAL COUNSEL:] On a personal level, do you see anything wrong with what you did?

[KENNETH VALDEZ:] No, I do not.

* * *

[TRIAL COUNSEL:] When you traveled to South Carolina in February, 2011, isn't it true that you wanted to put the van in your father's name?

[KENNETH VALDEZ:] Yes, it is.

[TRIAL COUNSEL:] Why?

[KENNETH VALDEZ:] Because he's had hip replacements. He has titanium hips. And he just needs that vehicle every now and then to get out because he's disabled.

* * *

[TRIAL COUNSEL:] So if this matter is to proceed before a judge or a jury, are you going to take the position that you, Kenneth Valdez, have not violated the covenant not to compete which is attached to your deposition as Exhibit 9?

[KENNETH VALDEZ:] I agree that I did not violate that.

Based on the record before us, we conclude that Saad has not conclusively established that Kenneth Valdez breached the non-compete agreement. We thus

overrule Saad's issue with regard to his complaint that the "trial court erred in enforcing the promissory note" because he conclusively established a breach of the non-compete agreement and that this breach excused his performance under the promissory note.

Saad for the first time in his reply brief argues that the trial court erroneously granted summary judgment in favor of the Valdezes and Mobility Headquarters because Saad's and Kenneth Valdez's bench trial testimony raised at least a fact issue that Kenneth Valdez breached the non-compete agreement. Saad relies almost exclusively on evidence presented at the bench trial to support his argument that the trial court erroneously granted summary judgment.

As we already have explained, we consider evidence only that was before the trial court at the time it ruled on a summary judgment motion. *See Nguyen*, 403 S.W.3d at 932; *Blankinship*, 399 S.W.3d at 309; *Neely*, 302 S.W.3d at 347 n.16; *McMahan*, 108 S.W.3d at 482. Thus, we do not consider additional evidence adduced at a bench trial in reviewing an issue challenging the trial court's grant of summary judgment; we are confined to the evidence that was before the trial court at the time it made its summary judgment ruling.

Aside from bench trial evidence, Saad cites no other evidence that was before the trial court that would raise a fact issue on whether Kenneth Valdez breached the non-compete agreement. Therefore, Saad's summary judgment attack is without merit.

Accordingly, we overrule Saad's fourth issue.

C. Admission of Evidence

Saad argues in his fifth issue that the trial court abused its discretion by allowing attorney Hugh Plummer, Jr. to testify about billing records as part of the

proof of Mobility Headquarters's attorney's fees claim because the billing records were not produced in response to Saad's discovery request. Saad argues that Texas Rule of Evidence 1002 requires that the original of a document be produced and used as evidence to prove the contents of that document and, because Mobility Headquarters did not produce the billing records, any testimony regarding the billing records cannot be presented at trial pursuant to Texas Rule of Civil Procedure 193.6. According to Saad, the trial court abused its discretion by allowing Plummer to testify about billing records that were not produced in response to Saad's discovery request because "[g]ood cause and lack of surprise or prejudice were not shown to allow this evidence" as required by Rule 193.6.

Rule 193.6 prohibits a party from offering evidence not timely disclosed in a discovery response unless the trial court finds that: (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. *In re Kings Ridge Homeowners Ass'n, Inc.*, 303 S.W.3d 773, 783 (Tex. App.—Fort Worth 2009, orig. proceeding); *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) (per curiam). This rule promotes responsible assessment of settlement and prevents trial by ambush. *In re Kings Ridge*, 303 S.W.3d at 783; *see also Alvarado v. Farah Mfg. Co.*, 830 S.W.2d 911, 913-14 (Tex. 1992) (op. on reh'g) (applying predecessor Rule 215(5)); *Tijerina v. Wysong*, No. 14-15-00188-CV, 2017 WL 506779, at *6 (Tex. App.—Houston [14th Dist.] Feb. 7, 2017, no pet. h.) (mem. op.) ("The purpose of Rule 193.6 is to prevent 'trial by ambush.'").

The party seeking to offer the evidence at issue has the burden to establish good cause or lack of unfair surprise or prejudice. Tex. R. Civ. P. 193.6(b). The

trial court has discretion to determine whether the offering party has met its burden. *Tex. Mun. League Intergovernmental Risk Pool v. Burns*, 209 S.W.3d 806, 817 (Tex. App.—Fort Worth 2006, no pet.). But a finding of good cause or lack of unfair surprise or prejudice to the adverse party must be supported by the record. Tex. R. Civ. P. 193.6(b).

Here, Saad argues that the trial court abused its discretion in admitting Plummer's testimony because Saad "was unfairly prejudiced and surprised by the admission of this evidence." Saad does not explain how he was surprised or prejudiced other than the above-quoted statement in his brief. In any event, the record supports a conclusion that Saad was not unfairly surprised "by the admission of this evidence."

The trial court heard arguments from Saad and Mobility Headquarters before proceeding with the bench trial. Saad argued that the admission of billing records is impermissible under Rule 193.6 because Mobility Headquarters failed to produce these records in 2011 when Saad requested them and Mobility Headquarters cannot show that Saad "wouldn't be unfairly surprised by them, because we've never seen them, and we would need them to cross-examine." Saad also claimed that Plummer cannot "try[] to prove up the bills" that were never produced by testifying about them. Saad claimed that, in response to his discovery request, Mobility Headquarters's former trial counsel Mark Aschermann stated in 2011 that "relevant time and billing records will be provided" but then never produced them.

Plummer responded that, when he became Mobility Headquarters's trial counsel, he supplemented most of the requested documents, designated himself as an expert witness in 2014, and responded to Saad's discovery request regarding billing records by stating that, "if opposing counsel would like to see set time

sheets, those would be made available or especially a copy" would be made available to Saad. Plummer also told the trial court: "I made the representation to opposing counsel [that] any billing and attorney's records . . . we would make those copies available to them" "for inspection and copying," but Saad never asked to view any billing records as offered nor did he file a motion to compel production of the records. Plummer also offered to "recess" to exchange billing records "if the Court finds that's necessary."

The trial court then questioned Saad as follows:

> [THE COURT:] How have you guys been unfairly surprised by not getting these documents? Did you ever send a letter or an e-mail or anything saying: We don't have these yet?
>
> [SAAD'S TRIAL COUNSEL:] We have not. I would have to say that we have not. And I don't have anything to counter and say what he's saying isn't true, Your Honor.
>
> [THE COURT:] I'm going to allow the testimony today.

Based on this record, we conclude that the trial court acted within its discretion by determining that Saad was not unfairly surprised by the admission of any evidence relating to billing records pursuant to Rule 193.6.[5]

Accordingly, we overrule Saad's fifth issue.

D. Promissory Note

Saad contends in his seventh issue that the trial court erred by "[a]llowing [Mobility Headquarters] to recover on a promissory note when there is no evidence that the note presented was an original or a certified copy or that [Mobility Headquarters] was the owner and holder of the note." Saad also contends that the

[5] As we will discuss in more detail in section E below, the record shows that Plummer did not testify regarding any particular billing records to support Mobility Headquarters's attorney's fees request.

evidence is legally and factually insufficient to support the trial court's award of $550,041.42 in principal and interest on the promissory note because "[t]here was no evidence or insufficient evidence of the amount of principal and interest owing on the date of the alleged default and the interest accruing from the date of default."

We reject Saad's contention that "there is no evidence that the note presented was an original or a certified copy or that [Mobility Headquarters] was the owner and holder of the note." Mobility Headquarters introduced without objection at trial the original promissory note that Mobility Headquarters and Saad signed on January 14, 2011:

> [TRIAL COUNSEL:] Did you have an occasion as president of Mobility Headquarters, Inc. to enter into an agreement with Mr. Richard Saad?
>
> [VRISELDA VALDEZ:] Yes.
>
> [TRIAL COUNSEL:] And what was the agreement that you entered into?
>
> [VRISELDA VALDEZ:] Promissory note.
>
> * * *
>
> [TRIAL COUNSEL:] Okay. The assets that you were selling pursuant to — let me just reference this briefly. You mentioned the promissory note which is CP, Exhibit CP 1, correct?
>
> [VRISELDA VALDEZ:] Yes.
>
> [TRIAL COUNSEL:] I'm also going to reference out of the next Exhibit is CP 2, which is the security agreement; is that correct?
>
> [VRISELDA VALDEZ:] Yes.
>
> [TRIAL COUNSEL:] And then CP 5, which is the closing escrow statement.
>
> [VRISELDA VALDEZ:] Yes.
>
> [TRIAL COUNSEL:] Okay. That's the amount of the sale of the assets; is that correct?

[VRISELDA VALDEZ:] Yes.

[TRIAL COUNSEL:] Okay. And then CP 6 which would be the — what is CP 6?

[VRISELDA VALDEZ:] The Bill of Sale and Assignment.

[TRIAL COUNSEL:] Okay. So that's the actual — those are the actual documents that transfer the assets from Mobility Headquarters, Inc. to Mr. Richard Saad.

[VRISELDA VALDEZ:] Correct.

[TRIAL COUNSEL:] And you executed those documents on behalf of Mobility Headquarters, Inc.

[VRISELDA VALDEZ:] Correct.

[TRIAL COUNSEL:] And did you witness Mr. Saad execute those documents?

[VRISELDA VALDEZ:] Yes.

[TRIAL COUNSEL:] Okay. The item that we're here over is Exhibit No. 1, the promissory note, correct?

[VRISELDA VALDEZ:] Yes.

This record defeats Saad's contention that there is no evidence that the promissory note presented at trial was the original note.

Next, we address Saad's assertion that the trial court's award of $550,041.42 in principal and interest on the promissory note in favor of Mobility Headquarters is not supported by legally and factually sufficient evidence because there is no evidence or insufficient evidence showing the amount due on the note "and the interest accruing from the date of default."

The evidence presented at trial shows that the January 14, 2011 promissory note was in the amount of $330,000. The promissory note provides that Saad "promises to pay to the order of Mobility Headquarters . . . $330,000.00 . . . and to pay interest thereon from the date hereof until maturity at the rate of 5% per annum . . . ." Vriselda Valdez testified that Saad made one $14,817.58 payment on the

note on February 14, 2011, leaving a remaining principal balance of $315,182.42. Saad admitted at trial that he made only one payment.

Saad defaulted on the note when he did not make a required payment on March 14, 2011. Mobility Headquarters sent a letter to Saad on March 16, 2011, demanding payment of the note and stating that it would file suit seeking payment of the note with accrued interest. The promissory note provides that, "[i]n the event of default in the making of any payment herein provided, . . . or in the event the entirety of said promissory note evidenced hereby is declared due, this promissory note shall bear interest at the maximum lawful rate which may be contracted for, charged, taken, received or reserved by Payee in accordance with the laws of the state of Texas . . . ."

Although the note does not specify a specific numerical interest rate upon default, it provides that interest will be charged "at the maximum lawful rate." *See All Seasons Window & Door Mfg., Inc. v. Red Dot Corp.*, 181 S.W.3d 490, 497 (Tex. App.—Texarkana 2005, no pet.). Under the optional rate ceilings, the highest amount authorized by Texas law is at least 18 percent. *Id*. at 498; *see* Tex. Fin. Code Ann. § 303.009 (Vernon 2016) (stating that, "[i]f the rate computed for the weekly, monthly, quarterly, or annualized ceiling is less than 18 percent a year, the ceiling is 18 percent a year.").[6] This 18 percent rate ceiling is applicable to written contracts through Finance Code section 303.002. *Threlkeld v. Urech*, 329 S.W.3d 84, 89 (Tex. App.—Dallas 2010, pet. denied); *see* Tex. Fin. Code Ann. § 303.002 (Vernon 2016) (parties to a written agreement may agree to an interest

[6] Finance Code section 303.009 sets out interest ceiling rates; under Finance Code section 303.012, a court may take judicial notice of interpretations issued by the consumer credit commissioner or information published in the Texas Register under section 303.011. *See* Tex. Fin. Code Ann. § 303.009, § 303.012 (Vernon 2016); *see also Rahmani v. Banet*, No. 02-14-00240-CV, 2015 WL 2169765, at *2 n.4 (Tex. App.—Fort Worth May 7, 2015, pet. denied) (mem. op. on reh'g).

rate that does not exceed the weekly ceiling). Thus, Texas law authorizes a maximum lawful rate of 18 percent per annum to be applied to a written contract. *See All Seasons Window & Door Mfg., Inc.*, 181 S.W.3d at 497-98 (The court concluded that the language "maximum rate permitted by law" was sufficient to support application of the 18 percent ceiling rate under Finance Code section 303.009.); *Hernandez v. Hernandez*, No. 13-12-00212-CV, 2012 WL 3525656, at *4, (Tex. App.—Corpus Christi Aug. 16, 2012, no pet.) (mem. op.) ("Here, the note provided for a post-maturity rate at 'the highest rate allowed by applicable state and federal law.' Under section 303.009(a) of the Texas Finance Code, the highest allowed rate is 18% per annum, which is the rate set by the trial court."); *cf. Threlkeld*, 329 S.W.3d at 89.

Mobility Headquarters asked the trial court to award a sum on the promissory note's principal amount due at an 18 percent interest rate from March 16, 2011, to May 4, 2015. Applying an interest rate of 18 percent to the principal of $315,182.42 due on the promissory note from March 16, 2011, to May 4, 2015, equates to a rounded interest amount of $234,859. Adding the principal amount due on the note ($315,182.42) and the rounded interest amount ($234,859) equals $550,041.42, which is the damages amount the trial court awarded Mobility Headquarters in its final judgment.

Based on the record before us, we conclude that the trial court's award of $550,041.42 in principal and interest on the promissory note in favor of Mobility Headquarters is supported by legally and factually sufficient evidence.

Accordingly, we overrule Saad's seventh issue with respect to his argument that there is (1) no evidence that the promissory note presented at trial was not the original note; and (2) legally and factually insufficient evidence to support the trial court's award of $550,041.42 in principal and interest on the promissory note in

favor of Mobility Headquarters.[7]

E. Attorney's Fees

Saad argues in his sixth issue that there is legally and factually insufficient evidence to support the award of trial attorney's fees.

Saad claims that, although Mobility Headquarters "chose to use the [l]odestar method for proving its attorney's fees by offering evidence of the hours of work multiplied by the hourly rate of the person who performed the work," its attorney Plummer did not introduce sufficient evidence under the lodestar method. According to Saad, Plummer (1) did not testify what services were performed, how much time was "expended on specific tasks," and who performed the tasks at what hourly rate; (2) "testified that he did not keep contemporaneous time records of all the time spent working on this matter;" (3) did not "review any time records from the other attorneys who allegedly worked on this matter for" Mobility Headquarters but instead "reviewed the Trial Court's docket sheet and estimated the total time without providing any notes or breakdown of the specific tasks involved;" and (4) testified without referring to billing records so that his "testimony was simply general statements about reasonableness and the tasks involved" and constituted insufficient evidence of "the time and labor required" to perform the legal services.

Saad also contends that "time and billing records are necessary to properly segregate" recoverable from unrecoverable fees. Saad further contends that, because "Appellees have also been represented by multiple attorneys and different firms at different times," the trial court cannot determine "if any of the claimed

[7] Saad argues in his seventh issue that "[t]he evidence is also insufficient to support an award of attorney's fees for trial or for appeal." We address this argument in our analysis of Saad's other complaints regarding the trial court's attorney's fees award in section E of the opinion.

work done was duplicative or if the time spent on a particular task was unreasonable" without "detailed time records itemizing the specific tasks of the work done."

Further, Saad contends in his seventh issue that the "evidence is also insufficient to support an award of attorney's fees for trial or for appeal." He states that (1) Plummer "testified only as to the generalities of the work rather than the specific tasks involved in this matter" and such testimony "was insufficient to support a judgment" for trial attorney's fees; and (2) "[a]dditionally, the evidence is insufficient as to the award for attorney's fees on appeal because it is simply conclusory or, more specifically, a guess at what these fees may be," and "[c]onclusory opinions from experts are also insufficient to support a judgment."

A prevailing party in a suit on written contract is entitled to attorney's fees. *See* Tex. Civ. Prac. & Rem. Code Ann. § 38.001(8) (Vernon 2015). "The award of attorney's fees generally rests in the sound discretion of the trial court." *El Apple I, Ltd. v. Olivas*, 370 S.W.3d 757, 761 (Tex. 2012).

1. Trial Attorney's Fees

We first address Saad's argument that there is insufficient evidence to support the award of trial attorney's fees because Mobility Headquarters "chose to use the [l]odestar method for proving its attorney's fees" but its attorney Plummer failed to "introduce sufficient evidence to allow the court to apply it."

"The Supreme Court of Texas has held that the *El Apple I* requirements apply to an attorney's fees request under section 38.001 . . . if the evidence supporting the request 'use[s] the lodestar method by relating the hours worked for each of the . . . attorneys multiplied by their hourly rates for a total fee.'" *Auz v. Cisneros*, 477 S.W.3d 355, 359-60 (Tex. App.—Houston [14th Dist.] 2015, pet.

denied) (quoting *Long v. Griffin*, 442 S.W.3d 253, 255 (Tex. 2014) (per curiam)). Here, the parties agree that Mobility Headquarters chose to use the lodestar method to establish the amount of reasonable and necessary attorney's fees attributable to the successful prosecution of its breach of promissory note claim against Saad.

"Under the lodestar method, the determination of what constitutes a reasonable attorney's fee involves two steps." *El Apple I, Ltd.*, 370 S.W.3d at 760. First, the trial court determines the reasonable hours spent by counsel in the case and a reasonable hourly rate for such work. *Id*. Then, the court multiplies the number of such hours by the applicable rate, the product of which is the base fee or lodestar. *Id*. The court also may adjust the base lodestar up or down (apply a multiplier), if relevant factors indicate an adjustment is necessary to reach a reasonable fee in the case. *Id*.

A party applying for an award of attorney's fees under the lodestar method bears the burden of documenting the hours expended on the litigation and the value of those hours. *Id*. at 761. The lodestar method aims to provide a relatively objective measure of attorney's fees, but it has been criticized for providing a financial incentive for counsel to expend excessive time in unjustified work and for creating a disincentive to early settlement. *Id*. at 762. "To avoid these pitfalls, a trial court should obtain sufficient information to make a meaningful evaluation of the application for attorney's fees." *Id*. "Charges for duplicative, excessive, or inadequately documented work should be excluded." *Id*.

"The starting point for determining a lodestar fee award is the number of hours 'reasonably expended on the litigation.'" *Id*. at 762. Attorney's fees evidence should include the basic facts underlying the lodestar, including: (1) the nature of the work, (2) who performed the services and their rate, (3) approximately when the services were performed, and (4) the number of hours

worked. *Id*. at 763. "An attorney could, of course, testify to these details, but in all but the simplest cases, the attorney would probably have to refer to some type of record or documentation to provide this information." *Id*.

To establish Mobility Headquarters's attorney's fees under the lodestar method, Plummer testified as follows:

- "I am a [sic] licensed to practice here in the State of Texas, and have been doing so in Harris County for 12 years. . . . And have been primarily practicing in civil litigation and commercial civil litigation such as the lawsuit before this Honorable Court."
- "I have reviewed the file and reviewed one — one of the things I reviewed, Your Honor, was this Honorable Court's docket referencing all the work that has been compiled over the various years of litigation. I can testify to my hours that I've put into this case under the Plummer Law Firm, PC."[8]
- "I have reviewed and can testify as to the hours that Plummer & Farmer[9] have put in and the amounts they charge, as well as the hours of Vethan and Aschermann based on my review of the Court's file."

[8] Plummer (Hugh Jones Plummer, Jr.) is an attorney with The Plummer Law Firm, P.C.; Plummer is the third attorney to represent Mobility Headquarters. Lee King of the Vethan Law Firm, PC seems to have been the first attorney to represent Mobility Headquarters in this case; he also represented the Valdezes. Mark Aschermann was the second attorney to represent Mobility Headquarters; he also represented the Valdezes.

[9] Plummer & Farmer is the law firm that represented the Valdezes in this case for a period of time. Hugh Jones "Peter" Plummer, Sr. is an attorney with Plummer & Farmer who represented the Valdezes; he was also present at the bench trial. He is the father of Plummer, Jr. Michael Farmer is also an attorney with Plummer & Farmer who represented the Valdezes in this case. Apparently, Plummer & Farmer "helped represent" Mobility Headquarters.

- "To my knowledge the Plummer Law Firm has put in 311 hours, 311.5. My hourly rate is $325 an hour."
- "We made an agreement with Ms. Valdez [on behalf of Mobility Headquarters] . . . and after the expenses began to mount, that we would take a portion of [the] claim on a — on a quasi[-]contingent basis, kind of a hybrid-type fee arrangement."
- "To date [Vriselda Valdez on behalf Mobility Headquarters] has paid my firm $35,000. The outstanding balance [Mobility Headquarters] owes my law firm is $35,000 less the amount of hours we've accumulated thus far which is . . . 311 hours which totals $101,250. So . . . [Mobility Headquarters] paid 35,000 of that $101,000."
- "Today the time that I — I set aside to spend preparing and trying this case was three hours, which is approximately $975."
- "I reviewed the work done by Aschermann and the time spent therein, and it appears that he charged approximately $225 an hour. The estimate given by Ms. Valdez [of $69,500] on how much she's paid thus far seemed accurate, based on my experience as an attorney in Harris County, and the documents I reviewed that he prepared and filed in the motions that he attended."
- "I reviewed the file of the previous law firm, Vethan Law Firm. And it looks like they — they put about 21 hours into the case at $275 an hour."
- "I've been able to correspond with Plummer & Farmer who represented the Valdezes and helped represent the corporation. Plummer & Farmer segregated their fees out, and did not include the

fees that they charged for the individual work they did on the Valdezes. And it's been disclosed to me that they've spent approximately 65 hours on this case at $325 an hour. The amount that they — the billing . . . [for] . . . Mobility Headquarters, Inc. was around $21,280.50."

- "So the total hours that I've reviewed in the case thus far are 554.4 hours. The total amount being sought based on the various firms and the fees sought is $162,699. That includes the three hours for today."
- "Based on my experience with the complexity of these matters and based on handling this case personally, I believe that the amount being sought is reasonable. The attorney's fees are necessary. And they comport with the fair amount of fees charged in Harris County, Texas."
- "It's my experience based on reviewing the file that this case had significant complexity going into the case as the Court pointed out earlier, including licensing issues, as well as issues related to injunctive relief. And the various affirmative defenses and cross and counterclaims being made by the parties. Therefore, we submit to this Honorable Court that for trial we're seeking the amount of $162,699."

Saad cross-examined Plummer at length. During cross-examination, Plummer testified as follows:

- The trial attorney's fees request in the amount of $162,699 includes charges by Plummer, Aschermann, King, Plummer, Sr., and Farmer of the Plummer & Farmer law firm.
- He reviewed "a summary of the work [Plummer & Farmer] had done"

but he could not recall if any of the fees included work performed by legal assistants or non-lawyers.

- Although he and Plummer & Farmer would work on the "same issue as it related to the Valdez's and the corporation," "only one lawyer bills per — per client," and Plummer "asked that [Plummer & Farmer] segregate [billing for the Valdezes' claims and defenses] when they gave the summary of their hours to me, and they did so."
- He did not have "summaries from the other firms" or attorneys who have represented Mobility Headquarters in the past in this case.
- The summary from Plummer & Farmer provided that Plummer, Sr. "spent approximately three and a half hours on this matter for Mobility Headquarters" and that "Farmer had spent 61.9 hours."
- "Most of the work that Mike Farmer did had to do with the summary judgment work and the charges, both the various charges that were compiled for . . . for this, but that's what he was retained to do. He's more of the appellate-type lawyer. So he helped with the legal research and preparing the motions and assisting with the licensing issues and things of that nature."
- "[T]here's no sheet that has specific tasks that list what all [Farmer] did."
- He kept contemporaneous time records in the beginning until he entered into a contingency fee agreement with Mobility Headquarters some time in 2012 or early 2013.
- He looked at the trial court's docket and estimated his fees but did not keep time records.

- "I'm looking at the work done and the time associated . . . So, for example, if — if I looked at a motion for summary judgment, in my opinion, that motion should only take you an hour and a half to draft, for example. But it took me five hours, I would do the estimate based on the work. Essentially, I'm looking at the Court's docket. And the way I estimated my fees, I didn't keep time on those. It was: How much is a reasonable amount of time in Harris County for some one to do a motion for reconsideration of summary judgment, for example, so that's the basis of it. . . . Calculated on an hourly basis, but it's an estimate of time based on the work done."

- Regarding segregation of fees for work performed on claims other than Mobility Headquarters's breach of promissory note claim and for which attorney's fees are unrecoverable, "[u]nder the note most of the claims are so commingled that with regard to the fraud, with regard to the breach of contract and the defenses therewith, that most of the claims for both of those run concurrently. So with regard to segregating the fees with regard to the claims, they have not been — there's been times when, I guess looking at it this way, they've been so close together that there was no need to segregate those fees."

From this testimony, it is impossible to evaluate the extent to which the work of any of the five attorneys who represented Mobility Headquarters was reasonable and necessary to the prosecution of Mobility Headquarters's breach of promissory note claim against Saad.

Plummer provided generalized testimony and the total number of hours he, Aschermann, King, Plummer, Sr., and Farmer worked in this case. He did not provide "evidence 'of the services performed, who performed them . . ., when they

were performed, and how much time they required.'" *See Long v. Griffin*, 442 S.W.3d 253, 255 (Tex. 2014) (quoting *El Apple I, Ltd.*, 370 S.W.3d at 764). Plummer failed to testify about specific tasks performed by the five different attorneys or the time spent on specific tasks; he also failed to provide a general description of the tasks and work.

Plummer presented no time records or other documentary evidence at trial to substantiate Mobility Headquarters's attorney's fees request in the amount of $162,699. There is no evidence that would assure the factfinder that no work was duplicative in this case as among the five attorneys who apparently represented Mobility Headquarters. And there is no evidence that fees were segregated by any of the attorneys for work performed to advance Mobility Headquarters's claim for breach of promissory note for which attorney's fees are recoverable from fees for work performed solely in connection with claims for which no such award is available.[10]

Based on the record before us, Mobility Headquarters failed to submit evidence providing sufficient details of the work performed by the attorneys in this

[10] "If any attorney's fees relate solely to a claim for which such fees are unrecoverable, the party seeking an award of attorney's fees must segregate recoverable from unrecoverable fees. *Enzo Invs., LP v. White*, 468 S.W.3d 635, 652-53 (Tex. App.—Houston [14th Dist.] 2015, pet. denied); *see Tony Gullo Motors I, L.P. v. Chapa*, 212 S.W.3d 299, 313 (Tex. 2006). A party can recover attorney's fees relating to a breach of contract claim. *See Chapa*, 212 S.W.3d at 304. A party cannot recover attorney's fees relating to a fraud or fraudulent inducement claim. *See id*. A party cannot recover attorney's fees relating to a claim for negligent misrepresentation. *See Metro. Life Ins. Co. v. Haney*, 987 S.W.2d 236, 243 (Tex. App.—Houston [14th Dist.] 1999, pet. denied) (op. on reh'g). "Attorney's fees are generally not available for conversion claims." *Wiese v. Pro Am Servs., Inc.*, 317 S.W.3d 857, 861 (Tex. App.—Houston [14th Dist.] 2010, no pet.). Thus, Mobility Headquarters was required to segregate any fees that related to work performed to advance its claim for breach of promissory note for which attorney's fees are recoverable from fees for work performed in connection with (1) Saad's claims for fraud, fraudulent inducement, and negligent misrepresentation, and (2) Mobility Headquarters's claims for conversion and fraud (nonsuited some time before the bench trial) for which no such award is available.

case so that the trial court could meaningfully review the attorney's fees request. *See Long*, 442 S.W.3d at 255-56; *City of Laredo v. Montano*, 414 S.W.3d 731, 735-36 (Tex. 2013); *El Apple I, Ltd.*, 370 S.W.3d at 763-64; *Auz*, 477 S.W.3d at 361-62; *Enzo Invs., LP v. White*, 468 S.W.3d 635, 652-53 (Tex. App.—Houston [14th Dist.] 2015, pet. denied). We note that, as in *El Apple I* and *Long*, contemporaneous billing records or documentation may not exist for most of the work performed, but "the attorneys may reconstruct their work to provide the trial court with sufficient information to allow the court to perform a meaningful review of the fee application." *See Long*, 442 S.W.3d at 256; *El Apple I Ltd.*, 370 S.W.3d at 764.

We conclude that no legally sufficient evidence supports the amount of trial attorney's fees the trial court awarded under the lodestar method because no evidence indicates the time expended on specific tasks for which attorney's fees may be recovered. *See Long*, 442 S.W.3d at 256; *El Apple I Ltd.*, 370 S.W.3d at 765. The appropriate appellate remedy is to reverse the trial court's judgment as to the amount of trial attorney's fees the court awarded Mobility Headquarters and remand for a redetermination of trial attorney's fees consistent with this court's opinion. *See Long*, 442 S.W.3d at 256; *Montano*, 414 S.W.3d at 737; *El Apple I, Ltd.*, 370 S.W.3d at 765.

Accordingly, we sustain Saad's sixth issue. We also sustain Saad's seventh issue with regard to his sufficiency challenge of the trial attorney's fees award.

2. Appellate Attorney's Fees

We now turn to Saad's contention in his seventh issue that "the evidence is insufficient as to the award for attorney's fees on appeal because it is simply conclusory or, more specifically, a guess at what these fees may be," and "[c]onclusory opinions from experts are also insufficient to support a judgment."

At the bench trial, Plummer testified that based on his experience an appeal to the court of appeals "will cost approximately $20,000 in reasonable and necessary attorney's fees" and "the cost is about the same to go to the Supreme Court of Texas, which will be another $20,000." During cross-examination, Plummer further testified as follows:

> [SAAD'S TRIAL COUNSEL:] You testified about your appellate fees to the next level, to the Appellate Court. How many appeals have you handled in your career?
>
> [PLUMMER:] I've actually only handled one appeal to the Fifth Circuit of the United States. I have not handled an appeal to the Fourteenth or the First. But I have, when I was a young lawyer, I clerked for the First Court of Appeals. But based on — on my experience in handling trial matters, that seems to be a customary amount in the 12 years I've been doing this on commercial, commercial disputes such as this one.
>
> [SAAD'S TRIAL COUNSEL:] What do you base your view that that's customary?
>
> [PLUMMER:] Well, my experience with the Fifth Circuit, which while marketably more expensive than the First and Fourteenth, the amount of time it takes to prepare those briefs, and based on my experience doing that work and — and based on my joint venture with Plummer & Farmer, I collaborated and discussed with Mike Farmer what a reasonable fee in Harris County he would charge if he were to handle this appeal. And that's the way he — he confirmed my belief it was around $20,000.
>
> [SAAD'S TRIAL COUNSEL:] Do you and Mr. Farmer bill at the same rate?
>
> [PLUMMER:] We do.
>
> [SAAD'S TRIAL COUNSEL:] I take it that since you've never gone to the Fourteenth or First Court of Appeals or any Court of Appeals in Texas from here, you've never handled matters through to the Texas Supreme Court.
>
> [PLUMMER:] I have not handled a matter to the Texas Supreme Court.

> [SAAD'S TRIAL COUNSEL:] So, again, your basis again to get to the $20,000 that you said it would cost to go to the Texas Supreme Court would be based upon Mr. Farmer.
>
> [PLUMMER:] And my experience of doing an appeal with a Texas case out of the Fifth Circuit.

Contrary to Saad's assertion, Plummer's testimony is not conclusory or "a guess at what [appellate] fees may be." Plummer testified that, although he has handled only one appeal in the Fifth Circuit, based on his experience in the past 12 years, $20,000 is "a customary amount" to award in attorney's fees for an appeal to the court of appeals and the Texas Supreme Court respectively. Plummer also testified that he based his opinion that $20,000 is a reasonable appellate fee in Harris County on his joint venture and collaboration with Mike Farmer who handles appeals and is an "appellate-type lawyer."

Saad does not attack Plummer's qualification or lack of experience to opine regarding what constitutes a reasonable appellate attorney's fee; nor does he challenge Plummer's reliance on his consultation with Farmer or his reliance on Farmer's experience. Saad only claims that Plummer's testimony is conclusory or a guess, but, based on the record before us, we disagree with Saad's contention. We also note that Saad did not present any evidence contradicting Plummer's testimony that $20,000 is a reasonable appellate fee. We conclude that there is sufficient evidence to support the trial court's award of appellate attorney's fees.

Accordingly, we overrule Saad's seventh issue.

CONCLUSION

We reverse the trial court's judgment awarding Mobility Headquarters trial attorney's fees in the amount of $162,699 and remand this case for a redetermination of trial attorney's fees consistent with this court's opinion. We affirm the trial court's judgment in all other respects.

/s/ William J. Boyce
Justice

Panel consists of Justices Boyce, Christopher and Jamison.