Affirmed and Memorandum Opinion filed October 31, 2017.

In the

Fourteenth Court of Appeals

NO. 14-16-00299-CV

WOODY K. LESIKAR, AS EXECUTOR OF THE ESTATE OF WOODROW V. LESIKAR, AS TRUSTEE OF THE WOODROW V. LESIKAR FAMILY TRUST, AND AS TRUSTEE OF THE WOODY K. LESIKAR SPECIAL TRUST, Appellants

V.

CAROLYN ANN LESIKAR MOON, INDIVIDUALLY AND AS TRUSTEE OF THE CAROLYN ANN LESIKAR MOON SPECIAL TRUST, AND AMERICAN CONTRACTORS INDEMNITY COMPANY D/B/A TEXAS BONDING COMPANY, Appellees

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On Appeal from the 149th District Court
Brazoria County, Texas
Trial Court Cause No. 56710

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

This appeal presents yet another round in the decade-old probate battle

between two siblings—Woody K. Lesikar and Carolyn Ann Lesikar Moon.[1] In order to recover on a supersedeas bond securing a final judgment rendered September 13, 2005 (the "2005 Judgment"), Carolyn, individually and as trustee of the Carolyn Ann Lesikar Moon Special Trust (collectively, the "Moon Entities"), filed suit against American Contractors Indemnity Company d/b/a Texas Bonding Company ("Texas Bonding") and against her brother Woody, as executor of the estate of Woodrow V. Lesikar,[2] as trustee of the Woodrow V. Lesikar Family Trust, and as trustee of the Woody K. Lesikar Special Trust (collectively, the "Lesikar Entities").

The trial court rendered final judgment against the Lesikar Entities. The judgment incorporated the trial court's previous orders granting sanctions against the Lesikar Entities and granting summary judgment in favor of Texas Bonding and the Moon Entities. The Lesikar Entities bring three issues on appeal. The Lesikar Entities argue that the trial court abused its discretion by granting "death penalty" sanctions as requested by the Moon Entities. The Lesikar Entities also contend that the trial court erred by granting the Moon Entities' motion for summary judgment on breach of contract and by granting Texas Bonding's motion for partial summary judgment on attorney's fees. We affirm.

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[1] *See generally Lesikar v. Moon*, No. 01-12-00406-CV, 2014 WL 4374117 (Tex. App.—Houston [1st Dist.] Sept. 4, 2014, pet. denied) (mem. op. on reh'g); *Lesikar v. Moon*, No. 14–11–01016–CV, 2012 WL 3776365 (Tex. App.—Houston [14th Dist.] Aug. 30, 2012, pet. denied) (mem. op.); *Woody K. Lesikar Special Tr. v. Moon*, No. 14–10–00119–CV, 2011 WL 3447491 (Tex. App.—Houston [14th Dist.] Aug. 9, 2011, pet. denied) (mem. op.); *Lesikar v. Moon*, 237 S.W.3d 361 (Tex. App.—Houston [14th Dist.] 2007, pet. denied); *Moon v. Lesikar*, 230 S.W.3d 800 (Tex. App.—Houston [14th Dist.] 2007, pet. denied); *In re Lesikar*, No. 14–06–01041–CV, 2007 WL 1624965 (Tex. App.—Houston [14th Dist.] June 7, 2007, orig. proceeding) (per curiam mem. op.).

[2] Woodrow V. Lesikar passed away on January 28, 2001, leaving behind his widow Margie R. Lesikar and two children Woody and Carolyn.

I. BACKGROUND[3]

2005 Judgment. In 2003, the Moon Entities filed a petition in the 149th Judicial District Court of Brazoria County (cause number 25560) against the Lesikar Entities, seeking control of and distributions to Carolyn's special trust. On September 13, 2005, the trial court entered a final judgment specifying which assets were to be distributed to the respective special trusts and those that were to remain in the family trust. Among other items, Carolyn's special trust was awarded six properties in Lavaca County, an interest in an oil-and-gas lease in Lavaca County, and three properties in Brazoria County. The 2005 Judgment ordered that Woody deliver to Carolyn original and fully-executed and notarized transfer documents for the properties. One item that was to remain temporarily in the family trust was $250,000 in qualified terminable interest property (QTIP) trust funds. This $250,000 was to be divided equally between Woody's and Carolyn's special trusts upon their stepmother's death. The 2005 Judgment also awarded the Moon Entities $400,000 in attorney's fees, which after adjustment for equalization among the trusts, resulted in a net attorney's-fee award of $273,257.

Supersedeas bond. The Lesikar Entities appealed the 2005 Judgment and sought to supersede the judgment pending appeal. In their motion for the entry of an order fixing the amount and conditions of supersedeas bond, the Lesikar Entities invoked rule 24 of the Texas Rules of Appellate Procedure.[4] In the brief accompanying their motion, the Lesikar Entities cited rule 24.2(a)(2)(A):

(2) For Recovery of Property. When the judgment is for the recovery

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[3] In-depth discussion of additional background facts and proceedings in the related cases can be found in the prior opinions. *See* n.1.

[4] Rule 24 has four subparts: "Suspension of Enforcement"; "Amount of Bond, Deposit or Security"; "Continuing Trial Court Jurisdiction; Duties of Judgment Debtor"; and "Appellate Review." Tex. R. App. P. 24.

> of an interest in real or personal property, the trial court will determine the type of security that the judgment debtor must post. The amount of that security must be at least:
>
> > (A) the value of the property interest's rent or revenue, if the property interest is real . . . .

Tex. R. App. P. 24.2(a)(2)(A). Woody, as trustee of the family trust and his special trust, signed a court bond application containing an agreement to indemnify Texas Bonding. In November 2005, the trial court signed an order fixing the amount and conditions of the supersedeas bond, setting the amount at $345,000 and ordering that "none of the property specified in the [2005 Judgment] shall be disposed of or encumbered in any manner to obtain the amount needed to satisfy this supersedeas requirement." In January 2006, the Lesikar Entities filed a $345,000 supersedeas bond, with Texas Bonding as the surety. The record does not indicate that the Lesikar Entities sought appellate review on the bond.

Result of appeal of 2005 Judgment. In July 2007, this court issued its opinion, affirming the 2005 Judgment except as to Carolyn's attorney's fees. *Lesikar v. Moon*, 237 S.W.3d 361, 378–79 (Tex. App.—Houston [14th Dist.] 2007, pet. denied). We reversed and remanded only the amount of Carolyn's reasonable and necessary attorney's fees based on lack of segregation. *Id.*; *see Woody K. Lesikar Special Tr. v. Moon*, No. 14-10-00119-CV, 2011 WL 3447491, at *2 (Tex. App.—Houston [14th Dist.] Aug. 9, 2011, pet. denied) (mem. op.).

Supplemental bond. In September 2007, the trial court signed an order modifying the amount and conditions of supersedeas bond, increasing the amount by $125,000[5] and preventing the Lesikar Entities "from selling, encumbering, or

[5] Woody's and Carolyn's stepmother Margie died on February 18, 2006. Disagreement ensued over whether the Moon Entities could execute that portion of the 2005 Judgment requiring the distribution of $125,000 from the family trust to Carolyn's special trust. The Moon Entities filed a motion to modify the amount and conditions of the supersedeas bond and requested a

otherwise depleting [the Moon Entities'] portion of the trust assets for [the Lesikar Entities'] attorney's fees." In October 2007, the Lesikar Entities filed a supplemental supersedeas bond with a surety rider executed by Texas Bonding, increasing the total bond amount to $470,000. The record does not indicate that the Lesikar Entities sought appellate review on the supplemental bond. In December 2007, as trustee of the family trust, Woody executed a collateral security agreement with Texas Bonding to secure his obligations to the surety using a $345,000 letter of credit and a $125,000 letter of credit. This collateral security agreement also provided for indemnification.

Retrial of attorney's fees. After the Texas Supreme Court denied rehearing of its denial of the Lesikar Entities' petition for review, the mandate issued in the appeal of the 2005 Judgment, ordering that the attorney's fees from the 2005 Judgment be reversed, severed, and remanded, while the remainder of the 2005 Judgment be affirmed. The cause number for the severed action was 49786. The Lesikar Entities filed a motion to exonerate the bond, which the trial court denied. The record does not indicate that the Lesikar Entities sought appellate review as to this denial. At trial, the jury awarded $375,000 in reasonable and necessary attorney's fees to the Moon Entities, and the trial court rendered judgment. We affirmed this judgment. *Lesikar v. Moon*, No. 14-11-01016-CV, 2012 WL 3776365,

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distribution of part of the $125,000 based on financial difficulties. *In re Lesikar*, 2007 WL 1624965, at *1. At that time, the trial court did not amend the bond but instead ordered that $125,000 be deposited into the court's registry. *Id.* We found that this order exceeded the trial court's rule-24 supersedeas jurisdiction but, because the order did not fall within the list of reviewable orders under rule 24.4(a), we denied the Lesikar Entities' motion to vacate the order. *Id.* After the Moon Entities filed a motion for contempt, the Lesikar Entities sought a writ of prohibition. *Id.* at *2. The Lesikar Entities argued, and we agreed, that the trial court could not exercise contempt jurisdiction because that would interfere with our jurisdiction over the then-pending appeal of the superseded 2005 Judgment. *Id.* at *3. We also noted that the option to modify the bond remained open. *Id.*

at *5, 12 (Tex. App.—Houston [14th Dist.] Aug. 30, 2012, pet. denied) (mem. op.).

Turnover order. In cause number 25560, in January 2010, the Moon Entities filed an application for turnover relief. The trial court issued a turnover order, which in relevant part found that the Moon Entities should receive "$125,000 for ½ of the Margie Lesikar [additional trust] funds which were owed [under the September 2005 final judgment]." *Woody K. Lesikar Special Tr. v. Moon*, 2011 WL 3447491, at *3. This court affirmed the turnover order as to the $125,000. *Id.* at *7–8.

Proceedings in this case. In March 2010, the Moon Entities filed an original petition against Texas Bonding (cause number 56710) to recover on the supersedeas bond, alleging breach of contract and alternatively asking for declaratory judgment. The Moon Entities asserted that the bond was liable for the lost revenue (unpaid rents and insurance proceeds) suffered during the Lesikar Entities' appeal of the 2005 Judgment. The Moon Entities amended their petition to join the Lesikar Entities in order to bring the obligor/judgment debtor before the court. Among other defenses, the Lesikar Entities pleaded the affirmative defense of offset.[6] Texas Bonding filed cross-claims against the Lesikar Entities for indemnity.

The Moon Entities filed a motion for summary judgment. The trial court granted this motion in part, finding that "the obligation previously reduced to final judgment requiring $125,000 to be paid to [the Moon Entities] from the Margie Lesikar QTIP funds, should be paid out of the funds of the supersedeas bond."[7] The trial court further ordered that all other obligations of Texas Bonding as surety on

[6] The Lesikar Entities also brought counterclaims against the Moon Entities for declaratory relief and recovery of special damages for withholding of property in violation of the trust agreement, as well as cross-claims against Texas Bonding for wrongful payment and declaratory relief. None of these claims is at issue on appeal.

[7] Texas Bonding then provided Carolyn with a check for $125,000.

the bond in cause number 25560 remained in full force and effect.

The Lesikar Entities filed a motion for summary judgment on the release of the bond. The trial court denied this motion.

The Moon Entities filed a motion to deem certain of the Lesikar Entities' answers admitted and to compel them to respond to discovery. The trial court granted this motion. In pertinent part, the trial court ordered that the Lesikar Entities fully and completely respond to interrogatory number 1 and fully and completely respond to requests for production numbers 1 and 2.

Texas Bonding filed a first amended motion for partial summary judgment that its attorney's fees be paid prior to judgment.[8]

The Moon Entities filed a second amended traditional and no-evidence motion for summary judgment.[9] The Moon Entities argued that they established their

[8] Texas Bonding previously had filed a motion for partial summary judgment that its attorney's fees be paid from the bond prior to judgment. To its first amended partial summary-judgment motion, Texas Bonding attached: the bond application dated November 22, 2005; and the collateral security agreement dated December 13, 2007. To its reply to the Lesikar Entities' response to Texas Bonding's first amended motion, Texas Bonding attached an affidavit by attorney Darlene Payne Smith and an affidavit by attorney M. Joseph Rosas.

[9] The Moon Entities previously had filed an amended traditional and no-evidence motion for summary judgment, which the trial court denied in June 2012. To their second amended summary-judgment motion, the Moon Entities attached: the 2005 Judgment; a copy of *Lesikar v. Moon*, 237 S.W.3d 361; the September 2009 final judgment in the retrial on attorney's fees; the November 2005 order fixing the amount and conditions of the supersedeas bond; the September 2007 order modifying the amount and conditions of the supersedeas bond; the January 2006 supersedeas bond for $345,000; the October 2007 supplemental supersedeas bond for $470,000; the November 2008 transmittal letter whereby Woody turned over the deeds and control of the real property awarded to the Moon Entities in the 2005 Judgment; the January 2010 turnover order relating to the $125,000 QTIP trust funds; a copy of *Woody K. Lesikar Special Tr. v. Moon*, 2011 WL 3447491; various filings, orders, and the judgment from the suit that Woody, individually and as trustee of the family trust and his special trust, filed against the Moon Entities, and Texas Bonding (cause number 65920) in Harris County; a copy of *Lesikar v. Moon*, 2012 WL 3776365; the Moon Entities' first set of requests for admission, interrogatories, and requests for production of documents to the Lesikar Entities; the June 9, 2015, order granting the Moon Entities' motion to deem answers admitted and motion to compel, and the Lesikar Entities' responses to the Moon

contract claims on lost revenue. In relevant part, the Moon Entities further argued that they established: (1) res judicata and (2) collateral estoppel barred the Lesikar Entities' affirmative defense of offset, and (3) there was no evidence concerning any offset sought. The Moon Entities subsequently filed a motion for sanctions and/or second motion to compel, challenging the Lesikar Entities' failure to adequately respond to interrogatory number 1 and requests for production numbers 1 and 2.

The Lesikar Entities filed special exceptions, a motion for continuance, and their response to the Moon Entities' second amended summary-judgment motion.[10] The trial court signed an order denying the Lesikar Entities' special exceptions and motion for continuance.[11]

On January 4, 2016, the trial court signed three orders: (1) granting the Moon Entities' motion for sanctions, prohibiting the Lesikar Entities from introducing at trial any evidence or offering any testimony of claimed offsets to the amounts due to the Moon Entities; (2) granting the Moon Entities' second amended traditional and no-evidence motion for summary judgment; and (3) granting Texas Bonding's first amended motion for partial summary judgment that its attorney's fees be paid prior to judgment.

The trial court signed its final judgment on January 6, 2016. This final judgment awarded the Moon Entities from Texas Bonding and the Lesikar Entities all amounts and interest awarded in the 2005 Judgment, plus money damages of

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Entities' first set of requests for admissions, interrogatories, and requests for production; and a copy of *Lesikar v. Moon*, 2014 WL 4374117.

[10] To their response, the Lesikar Entities attached: excerpts from the supersedeas bond; the September 4, 2014, judgment of the First Court of Appeals in cause number 65920; Woody's affidavit dated September 2, 2011; tax invoices and receipts; utility and other invoices; and the September 4, 2014, memorandum opinion on rehearing of the First Court of Appeals in cause number 65920.

[11] The Lesikar Entities do not challenge this ruling on appeal.

$126,460.32 caused by the delay in transfer of the property awarded in the 2005 Judgment, pre-judgment interest of $34,725.46 on those damages, attorney's fees of $107,000.00, and post-judgment interest. The award against and paid by Texas Bonding was not to exceed the total bond amount of $470,000.00. In addition, the trial court found that:

- Texas Bonding incurred reasonable and necessary attorney's fees of $135,000.00;
- pursuant to the collateral security agreement, Texas Bonding held two letters of credit in the amounts of $345,000.00 and $125,000.00;
- the $345,000.00 letter of credit was cashed to pay the Moon Entities $125,000.00 and to reimburse $52,071.69 of Texas Bonding's attorney's fees and expenses, totaling $177,071.69; and
- $167,928.31 in cash remained along with the $125,000 letter of credit.

The trial court ordered that Texas Bonding shall be paid its remaining its attorney's fees and expenses of $82,928.31 from the Lesikar Entities and may be paid from the remaining collateral. The trial court awarded Texas Bonding judgment of and from the Lesikar Entities in the amount of $270,185.78, the total judgment in favor of the Moon Entities; ordered that Texas Bonding is entitled to recover its attorney's fees from the collateral; and awarded Texas Bonding judgment of and from the Lesikar Entities in the amount of $82,928.31 for attorney's fees, plus court costs and post-judgment interest. The trial court ordered that Texas Bonding shall pay $270,185.78 to the Moon Entities and $82,928.31 for Texas Bonding's attorney's fees from the collateral, which will deplete the remaining collateral of $292,928.31. The trial court ordered that Texas Bonding have judgment against the Lesikar Entities for the remaining $60,185.78 in attorney's fees not covered by the collateral. The trial court

also awarded the Moon Entities and Texas Bonding conditional attorney's fees in the event of the Lesikar Entities' unsuccessful appeal.

The Lesikar Entities filed a motion for new trial, which was overruled by operation of law. On appeal, the Lesikar Entities challenge the trial court's granting death-penalty sanctions against them and the trial court's granting of the Moon Entities' and Texas Bonding's respective summary-judgment motions.

II. ANALYSIS

A. Sanctions issue

In their first issue, the Lesikar Entities argue that the trial court abused its discretion in granting the Moon Entities' motion for "death-penalty" sanctions because the sanctions were not sufficiently related to the alleged discovery abuse and because less-harsh sanctions were available. *See TransAmerican Natural Gas Corp. v. Powell*, 811 S.W.2d 913, 917 (Tex. 1991) (setting out two-part test for review of whether sanctions are "just"). The Lesikar Entities assert that the sanctions prevented them from introducing evidence of offsets they were owed on the trial court's sizeable judgment against them and "ultimately led to the rendition of an incorrect judgment against" them.

The trial court previously had issued an order granting the Moon Entities' motion to deem certain of the Lesikar Entities' discovery answers admitted and to compel them to respond to certain discovery. In relevant part, the trial court ordered the Lesikar Entities to fully and completely respond to interrogatory number 1[12] and

[12] Interrogatory number 1 provided:

> Specify every legal and factual basis for your claim, if any, that amounts should be deducted from the value of the rent or revenue due from the properties awarded to Plaintiff for the period during the pendency of your appeal. In doing so, for each deduction you claim, identify every amount you claim should be deducted by providing the date of each payment, the amount of each payment, the payor on each

to requests for production numbers 1 and 2.[13] The Lesikar Entities provided supplemental responses to this discovery. Subsequently, the Moon Entities filed a motion for sanctions requesting that the Lesikar Entities be prohibited from introducing at trial in this case any evidence or offering any testimony of any claimed deductions to the amounts due the Moon Entities. In the alternative, the Moon Entities requested that the trial court again compel the Lesikar Entities to completely respond to interrogatory number 1 and requests for production numbers 1 and 2, this time with the warning that, should the Lesikar Entities again fail to comply, the trial court would order their pleadings be stricken and/or they be prohibited from introducing any evidence or testimony of claimed deductions. After a hearing, the trial court granted the Moon Entities' motion for sanctions, ordering that the Lesikar Entities be "prohibited from introducing at trial . . . any evidence or offering any testimony of claimed deductions to the a[m]ounts due" the Moon Entities.

Texas Rule of Civil Procedure 215.2 allows a trial court to sanction a party for failure to comply with a discovery order or request. *See* Tex. R. Civ. P. 215.2. One of the discovery sanctions a court may impose is refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting designated matters from being introduced into evidence. *Id.* 215.2(b)(4). Sanctions that have the effect of adjudicating a claim or precluding a decision on the merits of the case are referred to as "death penalty" sanctions. *GTE Commc'ns Sys. Corp. v.*

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payment, the payee on each payment, and a description of the purpose for each payment.

[13] Requests for production numbers 1 and 2 sought production of documents related to interrogatory number 1:

1. All cancelled checks or other evidence of payment for the amounts described in Interrogatory No. 1.

2. All invoices, statements, or other support relating to the amounts described in Interrogatory No. 1.

Tanner, 856 S.W.2d 725, 732 (Tex. 1993).

Ordinarily, we review the trial court's imposition of sanctions for an abuse of discretion. *Am. Flood Research, Inc. v. Jones*, 192 S.W.3d 581, 583 (Tex. 2006) (per curiam) (citing *Cire v. Cummings*, 134 S.W.3d 835, 838 (Tex. 2004)). We only reverse the ruling if the trial court acted "without reference to any guiding rules and principles," such that its ruling was arbitrary or unreasonable. *Id.* (citing *Cire*, 134 S.W.3d at 839). In response to this issue, the Moon Entities do not defend the trial court's exercise of discretion in ordering sanctions, but rather contend that even if there was error it is not reversible. We agree.

Under Texas Rule of Appellate Procedure 44.1, an error in the trial court should only be reversed if the error probably caused the rendition of an improper judgment or probably prevented the appellant from presenting the case to the court of appeals.[14] Tex. R. App. P. 44.1(a). The challenged sanctions related to the Lesikar Entities' presentation of evidence regarding their affirmative defense of offset. In their summary-judgment motion, the Moon Entities argued that the Lesikar Entities provided no evidence of their offset defense. Additionally, the Moon Entities raised res juducata and collateral estoppel as independent legal grounds for summary judgment on all of the Lesikar Entities' claims and affirmative defenses, including offset. The trial court granted summary judgment in favor of the Moon Entities without specifying the grounds on which it relied. Therefore, on appeal, to be entitled to reversal, the Lesikar Entities must show that each independent summary-judgment ground asserted against its offset defense did not provide a basis for affirming the trial court's summary judgment. *See Parkway Dental Assocs., P.A. v. Ho & Huang Props., L.P.*, 391 S.W.3d 596, 610 (Tex. App.—

[14] The Lesikar Entities do not argue that any sanctions error probably prevented them from presenting their case on appeal.

Houston [14th Dist.] 2012, no pet.).

On appeal, the Lesikar Entities challenge the summary judgment granted in favor of the Moon Entities on their contract claims on the basis that the bond previously had been discharged as a matter of law. The Lesikar Entities challenge the summary judgment in favor of Texas Bonding on its attorney's fees on that same basis and because Texas Bonding did not sufficiently prove its fees. If the evidentiary sanctions constituted error, then presumably the trial court could not properly render summary judgment against the Lesikar Entities based on "no evidence" of offset. However, the Lesikar Entities do not challenge any of the other independent summary-judgment grounds—namely, res judicata and collateral estoppel—upon which the trial court could have ruled against them on their offset defense. Consequently, any sanctions error in excluding offset evidence did not probably cause the rendition of an improper judgment under rule 44.1. *See Vaughn v. Ford Motor Co.*, 91 S.W.3d 387, 394 (Tex. App.—Eastland 2002, pet. denied) (citing rule 44.1 in holding that sanctions error in excluding expert witnesses was harmless where directed verdict was proper on grounds unrelated to exclusion).

We overrule the Lesikar Entities' first issue.

B. The trial court properly granted summary judgment against the Lesikar Entities.

We review a summary judgment de novo. *Mann Frankfort Stein & Lipp Advisors, Inc. v. Fielding*, 289 S.W.3d 844, 848 (Tex. 2009). We review the evidence presented in the light most favorable to the party against whom the summary judgment was rendered, crediting favorable evidence if reasonable jurors could, and disregarding contrary evidence unless reasonable jurors could not. *Id.* To prevail on a traditional motion for summary judgment, a movant must establish "there is no genuine issue as to any material fact and the moving party is entitled to

judgment as a matter of law." Tex. R. Civ. P. 166a(c).

1. The bond contract remained in effect.

In their summary-judgment motion, the Moon Entities argued that Texas Bonding and the Lesikar Entities were liable on the bond and sought to recover the property interest's rent or revenue lost during the appeal, before Woody transferred property ownership to Carolyn. *See* Tex. R. App. P. 24.1(d)(3) (surety on bond "is subject to liability for all damages and costs that may be awarded against the debtor—up to the amount of the bond, deposit, or security—if . . . the judgment is for the recovery of an interest in real or personal property, and the debtor does not pay the creditor the value of the property interest's rent or revenue during the pendency of the appeal"); *Whitmire v. Greenridge Place Apartments*, 333 S.W.3d 255, 260, 262 (Tex. App.—Houston [1st Dist.] 2010, pet. dism'd w.o.j.) ("The sureties on the bond are subject to liability for all damages and costs that may be awarded against the judgment debtor, up to the amount of the bond, if the debtor does not pay the value of the property's rent or revenue during the pendency of the appeal." (citing Tex. R. App. P. 24.1(d)(3))).

"To prevail on a breach of contract claim, a party must establish the following elements: (1) a valid contract existed between the plaintiff and the defendant; (2) the plaintiff tendered performance or was excused from doing so; (3) the defendant breached the terms of the contract; and (4) the plaintiff sustained damages as a result of the defendant's breach." *West v. Triple B Servs., LLP*, 264 S.W.3d 440, 446 (Tex. App.—Houston [14th Dist.] 2008, no pet.). The Lesikar Entities only attack "the threshold issue of the existence of a contract." The Lesikar Entities argue that due to the partial reversal and remand of the 2005 Judgment, they prosecuted their appeal "with effect" resulting in the legal discharge of all obligations on the bond. According to the Lesikar Entities, the trial court erred in granting summary judgment

in favor of the Moon Entities on their contract claims and the Moon Entities were not entitled to any attorney's fees under section 38.001 of the Texas Civil Practice and Remedies Code. *See* Tex. Civ. Prac. & Rem. Code Ann. § 38.001(8) (West 2015).[15]

The Lesikar Entities primarily rely on *Amwest Surety Insurance Co. v. Graham*, 949 S.W.2d 724 (Tex. App.—San Antonio 1997, writ denied). In *Amwest*, in the underlying appeal, the appeals court had reversed a final judgment (1992 Judgment) against Employers Casualty Co. and remanded the case. *Id.* at 726. On remand, the trial court signed an amended final judgment (1995 Judgment) against Employers and ordered Amwest (the surety) to apply the proceeds of the supersedeas bond to satisfy the 1995 Judgment. *Id.* On appeal, Amwest argued it should be released from its obligations under the bond as a matter of law as a result of the reversal of the 1992 Judgment. *Id.*

The appeals court explained that a supersedeas bond is a contract by which a surety obligates itself to pay a final judgment rendered against its principal under the conditions stated in the bond. *Id.* at 726 (citing *Trent v. Rhomberg*, 18 S.W. 510, 511–12 (Tex. 1886)). Accordingly, courts construe supersedeas bonds as any other contract, looking to the plain language in order to ascertain the intent of the parties. *Id.* (citing *Trent*, 18 S.W. at 512; *Harrison v. Barngrover*, 118 S.W.2d 415, 418 (Tex. Civ. App.—Beaumont 1938, writ ref'd)). The *Amwest* court construed the bond to determine Amwest's obligations:

> By conditioning the supersedeas bond as required by Rule 47, Amwest obligated itself to do two things: (1) to pay the 1992 Judgment if Employers did not prosecute the appeal "with effect" and (2) to pay any judgment that might be rendered against Employers by this court or the supreme court on appeal of the 1992 Judgment. *See Lloyds Cas.*

[15] The Lesikar Entities do not otherwise contest the Moon Entities' attorney's-fee award.

> *Insurer v. McGee*, 141 Tex. 384, 174 S.W.2d 314, 316 (1943). Since it is undisputed that Amwest did not breach its promise to pay a judgment rendered against Employers by this court or the supreme court, since none was rendered, we are concerned here only with whether Amwest is liable on the bond because Employers failed to prosecute the appeal "with effect."

Id. at 726–27. Ultimately, the *Amwest* court held that when the mandate issued reversing the 1992 Judgment, even though not based on the merits, Employers prosecuted its appeal "with effect," and Amwest was discharged from its obligations under the bond as a matter of law. *Id.* at 729.

Here, under the plain language of the supersedeas bond, the Lesikar Entities and Texas Bonding obligated themselves: "to pay [the Moon Entities] the sum of $345,000.00 conditioned that the said Appellants shall perfect and prosecute their appeal to effect *and* shall pay off and satisfy the judgment which may be rendered against appellants on said appeal" (emphasis added). Under the supplemental supersedeas bond, the Lesikar Entities and Texas Bonding acknowledged their "previous" "obligation to pay [the Moon Entities] the sum of $345,000, should the Judgment in the above cause become final on appeal." The supplement, along with the incorporated surety rider, increased the bond amount from $345,000 to $470,000. The Lesikar Entities and Texas Bonding were "bound to satisfy in full the final judgment if [the Lesikar Entities'] appeal should be dismissed or the judgment should be affirmed." The Lesikar Entities and Texas Bonding were "also bound to satisfy any modification of the final judgment ordered by the appellate court of last resort or, if the judgment should be affirmed only in part, to satisfy that part of the judgment affirmed, including costs and interest."

Amwest does not control. In *Amwest*, there was no dispute that "Amwest did not breach its promise to pay a judgment rendered against Employers by this court

or the supreme court, since none was rendered." *Id.* at 727. In other words, nothing remained of the 1992 Judgment. Setting aside whether the Lesikar Entities' obtaining a partial reversal and remand of the 2005 Judgment on the Moon Entities' attorney's-fee award may have constituted prosecuting their appeal at least in part "to effect," there is no dispute that the final mandate issued by this court in October 2008 affirmed the remainder of the 2005 Judgment. Perfecting and prosecuting an appeal "to effect" was not the sole obligation under the bond. Under the bond, the Lesikar Entities and Texas Bonding also were obligated to "pay off and satisfy the judgment which shall be rendered against appellants on said appeal." Under the supplement, the Lesikar Entities and Texas Bonding were obligated "if the judgment should be affirmed only in part, to satisfy that part of the judgment affirmed."

We conclude that the Lesikar Entities remained obligated on the bond to satisfy the affirmed portion of the 2005 Judgment. Additional authorities cited by the Lesikar Entities do not persuade us otherwise.[16] Therefore, the Moon Entities established the existence of the bond, and the trial court did not err in granting them summary judgment on their contract claims or by awarding them section-38.001

[16] *See, e.g.*, *Neeley v. Bankers Tr. Co. of Tex.*, 848 F.2d 658, 660 (5th Cir. 1988) ("[T]he bond language would support the enforcement of an appellate award, even if reduced from the original amount. But there was no appellate decree to enforce in this case."); *Howze v. Sur. Corp. of Am.*, 584 S.W.2d 263, 266–68 (Tex. 1979) (concluding that bond covered deceptive acts and misrepresentations and rendering judgment that surety was liable to pay for judgment against mobile-home dealer); *Blair v. Sanborn*, 18 S.W. 159, 159–60 (Tex. 1892) (surety was not liable to pay costs from bond under circumstances where plaintiff on remand failed to further prosecute claims where judgment against certain defendants had been reversed); *In re Castle Tex. Prod. Ltd. P'ship*, 157 S.W.3d 524, 528 (Tex. App.—Tyler 2005, orig. proceeding) (appeal prosecuted "with effect" where entire judgment against principal reversed); *Resolution Tr. Corp. v. Chair King, Inc.*, 827 S.W.2d 546, 551 (Tex. App.—Houston [14th Dist.] 1992, no writ) (plurality op.) (affirming trial court's granting of temporary injunction prohibiting receiver from withdrawing supersedeas cash deposit from court registry "even though the portion of the judgment relating to damages was reversed and remanded for new trial" where liability had been affirmed and appellant had become insolvent during appeal); *Flowers v. Flowers*, 589 S.W.2d 746, 748 (Tex. Civ. App.—Dallas 1979, no writ) (addressing "whether a contempt order, based on an order to modify, that has been entered prior to reversal of the order to modify, can be enforced after the order to modify is reversed").

attorney's fees.[17]

We overrule the Lesikar Entities' second issue.

2. Texas Bonding was entitled to and proved its attorney's-fee award.

Pursuant to the court bond application, Woody for the family trust and his special trust agreed to indemnify Texas Bonding:

> against all losses, liabilities, costs, damages, attorneys' fees and expenses the Surety may incur or has incurred due to the execution and issuance of the bond on, before, or after this date, including any modifications, renewals or extensions of the bond or the enforcement of the terms of this indemnity agreement.

This indemnity agreement was to be effective "until Surety is satisfactorily discharged from liability pursuant to the terms and conditions" in the application and in the bond. In addition, pursuant to the collateral security agreement, Woody for the family trust agreed to indemnify Texas Bonding "from any and all losses, costs, interests, expenses, and/or legal fees which Surety may incur or become liable for

[17] In a one-sentence footnote, the Lesikar Entities also argue that "[t]here is no evidence that the bond secured anything other than attorney's fees, the award of which this Court reversed and remanded in the first set of appeals of the Brazoria County litigation." To the extent that this argument was preserved, we disagree. When the Lesikar Entities requested the bond, they invoked rule 24, which requires that the bond cover the value of the real property interest's rent or revenue for judgments involving recovery of property. *See* Tex. R. App. P. 24.2(a)(2)(A) ("The amount of that security must be at least . . . the value of the property's rent or revenue, if the property interest is real."); *Whitmire*, 333 S.W.3d at 260 ("[I]n setting the amount of the supersedeas bond requirement when the judgment involves a real property interest, the trial court must consider the value of rent or revenue likely to accrue during the pendency of an appeal."); *see also In re Lesikar*, 2007 WL 1624965, at *3 ("Woody argues that the original supersedeas bond covers the entire [2005] judgment, including the QTIP funds."). At the hearing on the bond, although counsel for the Lesikar Entities disputed there was any rental value, he acknowledged that rule 24 provided for "reasonable rental value." The trial court stated that it would not entertain expert testimony at a supersedeas hearing to determine "rental value" but understood it needed to provide for "some value." Therefore, the trial court set the bond amount at $345,000—not only to cover the original attorney's-fee award plus interest, but also to specifically include "rental value" on the real-property award.

under the terms and provisions of all the agreements provided by Owner and/or Principal to Surety."

In their third issue, the Lesikar Entities challenge the attorney's fees awarded to Texas Bonding on summary judgment. The Lesikar Entities assert that they did not owe any indemnification to Texas Bonding because the bond was exonerated in 2007, releasing the Lesikar Entities from any contractual obligations under the bond. However, we already have concluded that the parties' obligations on the bond survived this court's 2007 decision to reverse and remand only the attorney's-fee portion of the 2005 Judgment. The Lesikar Entities do not otherwise challenge Texas Bonding's right to indemnification under the agreements. We conclude that Texas Bonding properly asserted its claims for attorney's fees pursuant to its indemnity agreements with Woody.[18]

The Lesikar Entities also argue that even if Texas Bonding was entitled to claim its attorney's fees, summary judgment was improper essentially because a fact issue remained as to the "amount and reasonableness" of Texas Bonding's fees. To begin, the Lesikar Entities contend that the summary-judgment record lacks evidence of Texas Bonding's attorney's fees because Texas Bonding did not file its attorney affidavits until the day before the summary-judgment hearing. Therefore, the Lesikar Entities assert that the affidavits were untimely under rule 166a(c). *See* Tex. R. Civ. P. 166a(c) ("Except on leave of court, with notice to opposing counsel, the motion and any supporting affidavits shall be filed and served at least twenty-

[18] In its summary-judgment motion, Texas Bonding alternatively argued that it was entitled to its reasonable and necessary attorney's fees under section 38.001 "following Woody's alleged default on the bond." Because the trial court did not specify the grounds upon which it relied in granting summary judgment, and Texas Bonding was entitled to seek its attorney's fees through the indemnification agreements, we need not reach the Lesikar Entities' argument that the trial court erred in awarding Texas Bonding its attorney's fees under section 38.001. *See* Tex. R. App. P. 47.1; *Carr v. Brasher*, 776 S.W.2d 567, 569 (Tex. 1989).

one days before the time specified for hearing. Except on leave of court, the adverse party, not later than seven days prior to the day of hearing may file and serve opposing affidavits or other written response.").

Summary-judgment evidence, whether supporting or opposing the motion, may be filed late, but leave of court is required. *See id.*; *Benchmark Bank v. Crowder*, 919 S.W.2d 657, 663 (Tex. 1996). We will treat late-filed evidence as part of the summary-judgment record as long as the trial court affirmatively indicated in the record that it accepted or considered the evidence. *Auten v. DJ Clark, Inc.*, 209 S.W.3d 695, 702–03 (Tex. App.—Houston [14th Dist.] 2006, no pet.) (citing *Stephens v. Dolcefino*, 126 S.W.3d 120, 133–34 (Tex. App.—Houston [1st Dist.] 2003, pet. denied)). Leave to late-file summary-judgment evidence may be reflected in a separate order, a recital in the summary judgment, or an oral ruling contained in the reporter's record. *See Pipkin v. Kroger Tex., L.P.*, 383 S.W.3d 655, 663 (Tex. App.—Houston [14th Dist.] 2012, pet. denied); *see also Wright v. Hernandez*, 469 S.W.3d 744, 755 (Tex. App.—El Paso 2015, no pet.) ("In determining what constitutes sufficient 'affirmative evidence' to indicate that a trial court granted leave to file late pleadings or evidence, other Texas courts have looked to the record as a whole . . . ." (citing *Pipkin*, 383 S.W.3d at 663)).

In her affidavit dated and filed December 14, 2015, counsel for Texas Bonding Darlene Payne Smith averred that Texas Bonding had incurred $104,096.17 in attorney's fees through the date of the filing of its supplement to its first amended summary-judgment motion. During the summary-judgment hearing the next day, without any objection by the Lesikar Entities, Smith presented argument concerning her "attorney fee affidavit." On January 4, 2015, during the hearing on "entry of judgments as well as resolution of any outstanding issues," with regard to its ruling on Texas Bonding's summary-judgment motion, the trial court expressly stated:

"There was an amount in your affidavit that I granted. That was the amount I granted." The trial court went on to state: "[P]ut the amount in there that I awarded pursuant to the affidavit as it was at the time it was proven up. . . . I'm granting you what was in the affidavit, the full amount in the affidavit. . . ." Again, the Lesikar Entities did not object. In its order granting Texas Bonding's first amended motion for partial summary judgment, the trial court found that Texas Bonding had incurred reasonable and necessary attorney's fees in the specific amount of "$104,096.17 as of December 14, 2015."

We conclude that the record contains "an affirmative indication" that the trial court permitted Texas Bonding leave to file, accepted, and considered Smith's attorney's-fee affidavit. *See, e.g.*, *Auten*, 209 S.W.3d at 702–03 (considering late-filed affidavit as part of summary-judgment record where trial court affirmatively indicated in its order denying motion for new trial that it considered affidavit attached to new-trial motion); *Stephens*, 126 S.W.3d at 133–34 (considering late-filed videotape as part of summary-judgment record where at hearing on motion for new trial court stated, "The court will include the evidence offered today in the summary judgment record. The court, even taking this evidence into the record, denies the Plaintiff's motion for new trial."); *Morris v. JTM Materials, Inc.*, 78 S.W.3d 28, 47 n.19 (Tex. App.—Fort Worth 2002, no pet.) (considering late-filed affidavits as part of summary-judgment record where trial court stated during hearing on motion for new trial that it would allow them into evidence in determining whether to reconsider its decision granting summary judgment). Moreover, the Lesikar Entities have not asserted that the trial court abused its discretion by deciding to consider Smith's affidavit. *See Pipkin*, 383 S.W.3d at 667 (summary-judgment evidentiary decisions reviewed for abuse of discretion). Therefore, we will consider Smith's affidavit as summary-judgment evidence. However, because the trial court

did not affirmatively indicate that it granted leave and considered the affidavit of M. Joseph Rosas, we do not consider it.

Next, the Lesikar Entities attack the "competence" of Smith's affidavit. "'[T]he affidavit of the attorney representing a claimant constitutes expert testimony that will support an award of attorney's fees in a summary judgment proceeding.'" *Vela v. Vela*, No. 14–12–00822–CV, 2013 WL 6700270, at *9 (Tex. App.—Houston [14th Dist.] Sept. 24, 2013, no pet.) (subs. mem. op.) (quoting *Haden v. David J. Sacks, P.C.*, 332 S.W.3d 503, 511–12 (Tex. App.—Houston [1st Dist.] 2009, pet. denied)). The Lesikar Entities argue that Smith's "affidavit did not *establish* any of the eight [*Arthur Andersen & Co. v. Perry Equipment Corp.*, 945 S.W.2d 812 (Tex. 1997)[19]] factors" and "simply list[ed] the factors." The Lesikar Entities neither list the specific *Andersen* factors nor provide any analysis in their brief regarding the factors. *See Trinh v. Lang Van Bui*, No. 14-11-00442-CV, 2012 WL 5378112, at *11 (Tex. App.—Houston [14th Dist.] Nov. 1, 2012, pet. denied) (mem. op.).

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[19] In *Arthur Andersen*, the Texas Supreme Court outlined the factors a factfinder should consider when determining the reasonableness of attorney's fees:

> (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill required to perform the legal service properly;
>
> (2) the likelihood . . . that the acceptance of the particular employment will preclude other employment by the lawyer;
>
> (3) the fee customarily charged in the locality for similar legal services;
>
> (4) the amount involved and the results obtained;
>
> (5) the time limitations imposed by the client or by the circumstances;
>
> (6) the nature and length of the professional relationship with the client;
>
> (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
>
> (8) whether the fee is fixed or contingent on results obtained or uncertainty of collection before the legal services have been rendered.

945 S.W.2d at 818.

Assuming without deciding that Texas Bonding had to establish the reasonableness of its fees,[20] our review of Smith's affidavit reveals that she adequately addressed the *Andersen* factors. *See id.* at *12; *see also River Oaks L-M. Inc. v. Vinton-Duarte*, 469 S.W.3d 213, 244 (Tex. App.—Houston [14th Dist.] 2015, no pet.) ("'[E]vidence of each of the [*Arthur*] *Andersen* factors is not required to support an award of attorney's fees.'" (quoting *Vela*, 2013 WL 6700270, at *8)). Smith described her background as a partner at Crain, Caton & James, P.C., with 28 years of experience as a licensed Texas attorney (factor 7). Smith averred that she was familiar with the reasonable and necessary fees customarily charged for similar cases; that she had personal knowledge of the services rendered by CC&J; and that the fees charged ($104,096.17 through the filing of the supplement to Texas Bonding's first amended summary-judgment motion) after allowing for all offsets, payments, and credits were reasonable and necessary (factor 4). Smith also emphasized the lengthy ten-year history of litigation pending since the posting of the bond (factors 1 and 6). In addition, Smith discussed the indemnity agreements in the bond application and the collateral security agreement as the clear source for Woody's obligation to pay all of Texas Bonding's incurred attorney's fees (factor 8). We cannot conclude that Smith's affidavit was incompetent.

Finally, the Lesikar Entities fault the trial court for awarding Texas Bonding "significantly more than [$104,096.17] for attorney fees." The Lesikar Entities are correct that the trial court awarded Texas Bonding $135,000 for its attorney's fees in the final judgment. However, the Lesikar Entities fail to acknowledge that Smith provided testimony of additional attorney's fees during the hearing "for entry of judgments." Smith discussed the *Andersen* factors and testified that $21,560 in

[20] At the summary-judgment hearing, Texas Bonding disputed that it was even required to show the reasonableness of its attorney's fees under the language of the indemnity agreements.

additional reasonable and necessary attorney's fees were incurred between December 14, 2015, and January 4, 2016, in preparation for the scheduled bench trial.[21]

We conclude Texas Bonding established that it was entitled to, and the amount of, its reasonable and necessary attorney's fees. We also conclude that the Lesikar Entities failed to raise a genuine issue of material fact. Therefore, the trial court did not err by granting summary judgment and awarding Texas Bonding its attorney's fees. We overrule the Lesikar Entities' third issue.

III. CONCLUSION

Having overruled each of the Lesikar Entities' issues, we affirm the trial court's judgment.

/s/ Marc W. Brown
Justice

Panel consists of Justices Boyce, Hill Jamison, and Brown.

[21] We do not consider the Lesikar Entities' belated attempts to challenge the substance of Smith's hearing testimony in their reply brief. *See Priddy v. Rawson*, 282 S.W.3d 588, 597 (Tex. App.—Houston [14th Dist.] 2009, pet. denied) ("The Texas Rules of Appellate Procedure do not allow an appellant to include in a reply brief a new issue not raised in the appellant's original brief.").