Fourth Court of Appeals
San Antonio, Texas

MEMORANDUM OPINION

No. 04-20-00028-CV

181 SOUTH HOMES INC. and Ricardo Canales,
Appellants

v.

Henry **GARIBAY**, Individually, and d/b/a Hengar Unlimited,
Appellees

From the 408th Judicial District Court, Bexar County, Texas
Trial Court No. 2017CI07741
Honorable Angelica Jimenez, Judge Presiding

Opinion by: Rebeca C. Martinez, Chief Justice

Sitting: Rebeca C. Martinez, Chief Justice
Irene Rios, Justice
Liza A. Rodriguez, Justice

Delivered and Filed: August 4, 2021

AFFIRMED

Appellants 181 South Homes Inc. and Ricardo Canales appeal the trial court's order awarding Henry Garibay, individually, and d/b/a Hengar Unlimited ("Garibay") damages, attorney's fees, and pre-judgment interest. Garibay brings one issue on cross-appeal, challenging the trial court's attorney's fees and interest rulings. We affirm the judgment of the trial court.

BACKGROUND

In 2013, Garibay was employed by 181 South Homes Inc. ("181 South"), a mobile home dealership, as a manager. Garibay's job responsibilities included mobile home sales, deliveries,

and set up of the homes after delivery. Joe Canales and his son, Ricardo Canales, owned 181 South. Joe was the president of 181 South and Ricardo managed the day-to-day operations of the business. In 2015, 181 South and Garibay orally agreed that Garibay would transition from a salaried employee of 181 South to an independent contractor. According to Joe, Garibay was to perform home installation and delivery services as an independent contractor to 181 South. Joe testified that the agreement covered two types of services transactions—primary service transactions ("primaries"), where 181 South would sell new or used homes to a customer and assist the customer with its delivery and set up, and secondary service transactions ("secondaries"), where customers who already owned a mobile home would hire 181 South to assist them with moving and setting up their new home at a new location. Joe testified that Garibay agreed to bill 181 South at cost for the primaries and invoice 181 South after installations. For secondaries, Joe testified that Garibay agreed to bill at cost plus half the amount of any profit. In this way, Garibay and 181 South would split the profits for secondaries. For secondaries, customers would pay Garibay directly.

For the primaries, Joe testified that he paid over sixty invoices to Garibay between July 2015 and September 2016, per the agreement. He also testified that Garibay submitted additional invoices for his independent contractor services that remained unpaid. Garibay testified that he asked Ricardo about these outstanding invoices, but Ricardo refused to pay. For the secondaries, Joe alleged Garibay billed clients directly and personally collected on these transactions. Joe alleged that Garibay's handling of the payments on the secondaries was inconsistent with their agreement because Garibay retained all of the money collected when he should have shared half of the profits with 181 South.

Testimony was also presented regarding a second incident involving Ricardo and Garibay. Garibay testified that Ricardo sold a mobile home privately owned by Garibay and then kept the

sale proceeds from the transaction without Garibay's consent. Garibay testified that he purchased the home for approximately $40,000, and 181 South and Ricardo later sold it for approximately $100,000. Garibay testified that he wanted damages in the amount of the profit from the sale, which amounted to $49,551.23. However, Garibay later testified that he would accept damages of $25,000, per an arrangement he and Ricardo entered into regarding this transaction.

In April 2017, Garibay sued 181 South, Joe, and Ricardo for breach of contract, unjust enrichment, quantum meruit, common law fraud and fraudulent inducement, violation of the Texas Theft Liability Act, conversion, negligent misrepresentation, breach of fiduciary duty, negligence, conspiracy/joint and several liability, and sought to pierce the corporate veil under a theory of alter ego.[1] Garibay also pleaded for attorney's fees. 181 South, Ricardo, and Joe filed a general denial and a counterclaim against Garibay, individually, and Hengar Unlimited, for multiple causes of action, including breach of contract, fraud, fraudulent inducement, violation of the Texas Theft Liability Act, conversion, negligence, negligent misrepresentation, and unjust enrichment.

The trial court conducted a bench trial over a five-day period in September 2019. After the close of Garibay's case-in-chief, 181 South, Joe, and Ricardo moved for a directed verdict on all of Garibay's causes of action. For the first time, 181 South and Ricardo argued that the oral agreement with Garibay concerning his transportation and delivery of mobile homes violated the statute of frauds and requested a trial amendment to add a statute of frauds defense. The trial court denied 181 South and Ricardo's motion for a trial amendment and denied their motion for directed verdict as to all claims except for Garibay's conspiracy claim. 181 South, Joe, and Ricardo then moved to dismiss allegations against Joe and Ricardo. The trial court granted the motion to dismiss allegations against Joe, but denied the motion as to Ricardo.

[1] Garibay also sued Falls City National Bank, but his claims against the bank are not at issue in this appeal.

After the close of evidence, the trial court took the case under advisement. The court subsequently entered a final judgment, which included the following: (1) Garibay recover $180,438 from 181 South; (2) Garibay recover $24,775.62 from Ricardo; (3) Garibay recover $10,000 in attorney's fees from 181 South; (4) Garibay be awarded $23,802.98 in pre-judgment interest from 181 South; and (5) Garibay be awarded $3,268.35 in pre-judgment interest from Ricardo. The judgment also disposed of all other claims. No party requested findings of fact and conclusions of law, and the trial court issued none. Ricardo and 181 South timely filed a notice of appeal, and Garibay timely filed a notice of cross-appeal.

TRIAL AMENDMENT

In their first issue, 181 South and Ricardo argue the trial court abused its discretion in denying their request for a trial amendment to plead the affirmative defense of the statute of frauds, arguing the issue was tried by consent and they were entitled to amend their pleadings to conform to the evidence. We disagree.

A. Applicable Law

When a party seeks a trial amendment to assert a new defense, the decision whether to allow the amendment rests within the sound discretion of the trial court. *State Bar of Tex. v. Kilpatrick*, 874 S.W.2d 656, 658 (Tex. 1994) (per curiam). "A trial court has discretion to grant a trial amendment when an unpleaded issue has been 'clearly tried' by consent." *Fischer v. Wells*, No. 04-06-00131-CV, 2007 WL 247673, at *1 (Tex. App.—San Antonio Jan. 31, 2007, no pet.) (mem. op.); *see* TEX. R. CIV. P. 67. "This rule is limited to those exceptional cases where it clearly appears from the record as a whole that the parties tried an unpled issue by consent." *Green Tree Servicing, LLC v. Sanders*, No. 04-13-00156-CV, 2014 WL 2443811, at *5 (Tex. App.—San Antonio May 28, 2014, no pet.) (mem. op.) (citation omitted). "It is not intended to establish a general rule of practice; it should be applied with care, and never in a doubtful situation." *Id.*

To decide whether an issue was tried by consent, we review the record "not for evidence of the issue, but rather for evidence of trial of the issue." *Case Corp. v. Hi-Class Bus. Sys. of Am., Inc.*, 184 S.W.3d 760, 771 (Tex. App.—Dallas 2005, pet. denied); *accord Sanders*, 2014 WL 2443811, at *5. "A party's unpleaded issue may be deemed tried by consent when evidence on the issue is developed under circumstances indicating both parties understood the issue was in the case, and the other party failed to make an appropriate complaint." *Case*, 184 S.W.3d at 771. However, "trial by consent is inapplicable when evidence relevant to an unpleaded matter is also relevant to a pleaded issue; in that case admission of the evidence would not be calculated to elicit an objection, and its admission ordinarily would not demonstrate a 'clear intent' on the part of all parties to try the unpleaded issue." *Id.* (citation omitted). An issue is "not tried merely by the hearing of testimony thereon." *Sage St. Assocs. v. Northdale Constr. Co.*, 863 S.W.2d 438, 446 (Tex. 1993) (citation and emphasis omitted).

B. Analysis

It is undisputed that 181 South and Ricardo's live pleading did not assert the statute of frauds as an affirmative defense at the time the bench trial began. *See* TEX. R. CIV. P. 94 (stating the statute of frauds is an affirmative defense). 181 South and Ricardo point to one portion of the record that they contend compels the conclusion that their statute of frauds affirmative defense was tried by consent. That reference consists of testimony elicited by 181 South and Ricardo's counsel during his cross-examination of Garibay. 181 South and Ricardo's counsel questioned Garibay about the absence of a written agreement for Garibay's mobile home and delivery services and Garibay stated that no written agreement existed:

> [Counsel]: All right. So the answer to my question when I asked if that was correct, you said yes. You had no written agreement that could be performed within one year with regard to the secondaries work made the subject of this lawsuit, correct?
>
> [Garibay]: That's correct. It was verbal.

After Garibay's case-in-chief, 181 South and Ricardo moved for a directed verdict on all of Garibay's causes of action, including breach of contract. They argued in their motion there was no valid contract under the statute of frauds because Garibay testified that the contract in dispute was an oral agreement not performable within one year. *See Baylor Univ. v. Sonnichsen*, 221 S.W.3d 632, 635 (Tex. 2007) (per curiam) ("[A] breach of contract claim based on an oral promise to enter a contract that is not performable in one year and is not in writing is barred by the statute of frauds."). In response, Garibay's counsel stated that the statute of frauds was never pled.

After reviewing the record, we hold that the affirmative defense of the statute of frauds was not tried by consent. First, the record does not indicate that both parties understood the statute of frauds was a defense to be tried. The only evidence 181 South and Ricardo rely on is Garibay's testimony that he would not be able to perform the verbal agreement within a year. While this testimony relates to the statute of frauds, this one exchange alone does not show the issue was "actually tried." *See Compass Bank v. MFP Fin. Servs., Inc.*, 152 S.W.3d 844, 856–57 (Tex. App.—Dallas 2005, pet. denied) (holding an issue regarding the election of remedies was not "actually tried," even though there was testimony presented at trial on the issue); *Montoya v. Gutierrez*, No. 04-19-00070-CV, 2019 WL 5580263, at *2 (Tex. App.—San Antonio Oct. 30, 2019, no pet.) (mem. op.) ("To determine whether an issue was tried by consent, an appellate court must examine the record for evidence of the *trial* of the issue, not just admission of evidence on the issue." (quoting *Cont'l Homes of Tex., L.P. v. City of San Antonio*, 275 S.W.3d 9, 16 (Tex. App.—San Antonio 2008, pet. denied))). Further, the evidence raising the issue of the statute of frauds is also relevant to the terms of the contract, which were disputed through the pleaded breach of contract claim. *See Fischer*, 2007 WL 247673, at *1 (holding trial court did not abuse its discretion in denying motion for a trial amendment to include statute of frauds defense because evidence raising the statute of frauds issue was also relevant to another pleaded claim).

Because the record does not indicate both parties understood the statute of frauds issue was to be tried and because the evidence raising the issue is also relevant to establishing the terms of the contract, the issue was not tried by consent, and the trial court did not abuse its discretion in denying 181 South and Ricardo's motion for a trial amendment. *See id.*[2] We overrule 181 South and Ricardo's first issue.

181 SOUTH AND RICARDO'S REMAINING CHALLENGES

In 181 South and Ricardo's second, third, and fourth issues, they argue the trial court erred in issuing judgment in favor of Garibay on his breach of contract and unjust enrichment claims. Garibay responds that 181 South and Ricardo fail to show the trial court's judgment is not supported by any legal theory raised by the evidence. We agree.

A. Applicable Law

In a trial to the court where no findings of fact or conclusions of law are filed, the trial court's judgment implies all findings of fact necessary to support it. *Pharo v. Chambers Cty.*, 922 S.W.2d 945, 948 (Tex. 1996); *see Martin v. Republic Land Tech., L.L.C.*, 63 S.W.3d 34, 35 (Tex. App.—San Antonio 2001, pet. denied). When a reporter's record is filed, however, these implied findings are not conclusive, and an appellant may challenge them by raising both legal and factual sufficiency of the evidence issues. *BMC Software Belg., N.V. v. Marchand*, 83 S.W.3d 789, 795 (Tex. 2002). The applicable standard of review is the same regardless of whether the implied

[2] 181 South and Ricardo rely on *Ingram v. Deere*, 288 S.W.3d 886 (Tex. 2009) for their contention that the parties tried the statute of frauds issue by consent, but the case is distinguishable. *Ingram* concerned whether a party preserved a no-evidence argument regarding the existence of a partnership when it failed to file a verified denial in response to a party's claim that they were partners. *Id.* at 892–93. The court held that the issue was tried by consent of the parties because both parties understood that the issue was contested. *Id.* at 893. The parties developed the issue at trial by presenting evidence to support or controvert the issue, and one of the parties submitted the issue in the jury charge. *Id.* Here, the issue is not preservation of error, but whether the trial court abused its discretion in denying a trial amendment on an unpleaded affirmative defense, and the record does not show that the parties developed the issue at trial in a manner that would suggest that 181 South, Joe, Ricardo, and Garibay all understood that the statute of frauds was a contested issue.

findings come from a bench or jury trial. *Roberson v. Robinson*, 768 S.W.2d 280, 281 (Tex. 1989) (per curiam). The judgment of the trial court should be affirmed if it can be upheld on any legal theory that finds support in the evidence. *Bishop v. Bishop*, 359 S.W.2d 869, 871 (Tex. 1962). It is the appellant's burden to show that the trial court's judgment was not supported by any legal theory raised by the evidence. *See McMaster v. Davidson*, No. 13-03-533-CV, 2005 WL 2000789, at *6 (Tex. App.—Corpus Christi Aug. 22, 2005, pet. denied) (mem. op.).

B. Analysis

Garibay pleaded the following causes of actions as a basis for his lawsuit: (1) breach of contract, (2) unjust enrichment, (3) quantum meruit, (4) common-law fraud and fraudulent inducement, (5) violation of the Texas Theft Liability Act, (6) conversion, (7) negligent misrepresentation, (8) breach of fiduciary duty, (9) negligence, and (10) conspiracy/joint and several liability. Garibay argued all of these claims at trial and introduced evidence in support of his claims. After the close of Garibay's case-in-chief, 181 South and Ricardo moved for a directed verdict on all of Garibay's causes of action, which the trial court denied as to all claims except for Garibay's conspiracy claim. Therefore, at the end of trial, Garibay had nine of his original ten claims alive.

The trial court's judgment does not explicitly demonstrate why the trial court awarded judgment in favor of Garibay, and the trial court did not render findings of fact or conclusions of law.[3] When a trial court does not render findings of fact or conclusions of law and the record does

[3] In their brief, 181 South and Ricardo note that the trial court "issued to counsel its Judge's Notes on December 3, 2019 finding in favor of Appellee as to its breach of contract claims against 181 S. Homes in the amount of $180,438.00 and $10,000.00 in attorney's fees and in favor of Appellee of unjust enrichment against Ricardo Canales in the amount of $24,775.62." However, we may not look to any comments that the judge may have made at the conclusion of a bench trial as being a substitute for findings of fact and conclusions of law. *See* TEX. R. CIV. P. 296 (providing procedure for party to request findings of fact and conclusions of law after judgment is signed); *see also Cherokee Water Co. v. Gregg Cty. Appraisal Dist.*, 801 S.W.2d 872, 878 (Tex. 1990) (holding that judge's comments in letter to parties were not findings of fact "as contemplated by rules 269-299 of the Texas Rules of Civil Procedure."); *Tex. Bd. of Chiropractic Exam'rs v. Tex. Med. Ass'n*, 375 S.W.3d 464, 482 n.24 (Tex. App.—Austin 2012, pet. denied)

not explicitly demonstrate why the trial court awarded judgment, an appellant has the burden to show that the trial court's judgment is not supported by any legal theory raised by the evidence. *See Point Lookout West, Inc. v. Whorton*, 742 S.W.2d 277, 278 (Tex. 1987) (per curiam) ("In the absence of any findings of fact and conclusions of law, it was Whorton's burden as appellant to show that the trial court's judgment was not supported by any legal theory raised by the evidence."); *see also Pharo*, 922 S.W.2d at 948 ("Because the trial court did not render findings of fact or conclusions of law, we must assume that it made all findings in support of its judgment . . . .").

Here, 181 South and Ricardo have not met their burden because they challenge only two of the nine claims pled. *See Residential Credit Sols., Inc. v. Padilla*, No. 13-15-00504-CV, 2018 WL 1959989, at *4 (Tex. App.—Corpus Christi 2018, no pet.) (mem. op.) (holding that appellants failed to meet their burden to show the trial court's judgment was not supported by any legal theory raised by the evidence because appellants only challenged a wrongful foreclosure claim, and not a fraud claim that appellant also pled, which could have served as a legal basis for the rescission of the foreclosure); *see also Salem v. Asi*, No. 02-10-00295-CV, 2011 WL 2119640, at *5 (Tex. App.—Fort Worth 2011, no pet.) (mem. op.) (presuming the trial court found in favor of appellee on his breach of contract claim because appellant did not challenge the sufficiency of the evidence as to appellee's breach of contract claim and no findings of fact or conclusions of law were filed); *cf. Kasper v. Meadowwood Ranch Estates, Inc. Prop. Owners Ass'n*, No. 05-07-00982-CV, 2008 WL 3579379, at *2 (Tex. App.—Dallas Aug. 15, 2008, no pet.) (mem. op.) ("If summary judgment was granted, whether properly or improperly, on a ground not challenged on appeal, the judgment

(noting that judge's letter to the parties explaining his reasoning did not impact appellate review); *Lares v. Muñiz*, No. 04-20-00047-CV, 2020 WL 2441423, at *1 (Tex. App.—San Antonio May 13, 2020, no pet.) (mem. op.) (stating judge's notes do not constitute a judgment, decision, or order).

must be affirmed."). Therefore, even if we credit 181 South and Ricardo's arguments as to breach of contract and unjust enrichment, they would not be entitled to reversal of the trial court's judgment because they have not shown that the seven unchallenged claims do not provide a legal basis for the judgment. *See Padilla*, 2018 WL 1959989, at *4; *cf. Point Look*, 742 S.W.2d at 279 (stating all facts are deemed to be found against appellant and in support of the portion of the judgment from which appellant appealed when there are no findings of fact and conclusions of law). Without this showing of reversible error, we must overrule 181 South and Ricardo's second, third, and fourth issues. *See* TEX. R. APP. P. 44.1(a).

ATTORNEY'S FEES

In his cross-appeal, Garibay asserts in a single issue that the trial court erred in failing to award him (1) contingent appellate attorney's fees against 181 South, (2) trial and appellate attorney's fees against Ricardo, and (3) post-judgment interest on the attorney's fees award.

A. Applicable Law

We review the trial court's award of attorney's fees for an abuse of discretion. *Bocquet v. Herring*, 972 S.W.2d 19, 21 (Tex. 1998); *Doncaster v. Hernaiz*, 161 S.W.3d 594, 606 (Tex. App.—San Antonio 2005, no pet.). A trial court has discretion to fix the amount of attorney's fees, but it does not have discretion to deny attorney's fees entirely if an award of fees is required under the terms of the parties' agreement or by statute. *See Fitzgerald v. Schroeder Ventures II, LLC*, 345 S.W.3d 624, 626–27 (Tex. App.—San Antonio 2011, no pet.) (stating attorney's fees were mandatory when the parties' agreement provided that "such party is entitled to recover from the non-prevailing parties all costs of such proceeding and reasonable attorney's fees"); *see also Bocquet*, 972 S.W.2d at 20 (holding Declaratory Judgment Act does not require an award of attorney's fees to the prevailing party; rather, the statute "affords the trial court a measure of discretion in deciding whether to award attorney's fees or not").

As a general rule, the party seeking to recover attorney's fees carries the burden of proof. *Stewart Title Guar. Co. v. Sterling*, 822 S.W.2d 1, 10 (Tex. 1991); *Doncaster*, 161 S.W.3d at 606. "Texas law [does] not [allow for] recovery of attorney's fees unless authorized by statute or contract." *Tony Gullo Motors I, L.P. v. Chapa*, 212 S.W.3d 299, 311 (Tex. 2006). A party can recover attorney's fees under the Civil Practice and Remedies Code if the claim is one listed in section 38.001, such as for breach of contract, and if the party (1) is represented by an attorney, (2) presented his or her claim to the opposing party or that party's duly authorized agent, and (3) the opposing party did not tender the just amount owed within thirty days. *See* TEX. CIV. PRAC. & REM. CODE ANN. §§ 38.001, .002, (allowing recovery of attorney's fees for an oral or written contract claim). If all of the statutory elements are established and there is proof of the reasonableness of the fees, an award of fees under section 38.001 is mandatory. *See AMX Enters., L.L.P. v. Master Realty Corp.*, 283 S.W.3d 506, 516 (Tex. App.—Fort Worth 2009, no pet.).

Section 134.005(b) of the Texas Theft Liability Act ("TTLA") provides that "[e]ach person who prevails in a suit under this chapter shall be awarded court costs and reasonable and necessary attorney's fees." TEX. CIV. PRAC. & REM. CODE ANN. § 134.005(b). The award of fees to a prevailing party in a TTLA action is mandatory. *Bocquet*, 972 S.W.2d at 20 ("Statutes providing that a party 'may recover,' 'shall be awarded,' or 'is entitled to' attorney's fees are not discretionary."). Generally, the party seeking to recover attorney's fees carries the burden of proof. *Sterling*, 822 S.W.2d at 10.

B. Analysis

In his live pleading, Garibay requests attorney's fees pursuant to sections 38.001 and 134.005(b) of the Texas Civil Practice and Remedies Code. *See* TEX. CIV. PRAC. & REM. CODE ANN. §§ 38.001 (allowing recovery of attorney's fees for breach of contract); 134.005(b) (allowing recovery of attorney's fees for theft cause of action). In the final judgment, the trial court awarded

Garibay $180,438 from 181 South Homes and $24,775.62 from Ricardo. The trial court awarded Garibay $10,000 in "attorney's fees for prosecuting this case to judgment" from 181 South. Finally, the trial court awarded Garibay $23,802.98 in pre-judgment interest from 181 South and $3,268.35 in pre-judgment interest from Ricardo. The trial court did not specify under which claims it awarded attorney's fees. We take each of Garibay's attorney's fees challenges in order.

i. Contingent Appellate Attorney's Fees Against 181 South

Garibay argues the trial court erred in failing to award him conditional appellate fees against 181 South. At trial, Garibay's counsel provided evidence on his request for attorney's fees and stated that "most of the work that [he] . . . spent on this case has been in prosecution of [his] breach of contract claims against 181 South." He mentioned his other tort causes of actions where attorney's fees were not recoverable and stated he was not seeking attorney's fees for those causes of action. However, he failed to mention how these fees were related to his TTLA claim, and he did not segregate time spent on the TTLA claim from time spent on other claims.

In his brief on appeal, Garibay acknowledges that "the record contains two alternative theories to support an award" of attorney's fees. One theory is under section 38.001; the other theory is under section 134.005(b), related to the TTLA. Garibay argues that an award of appellate attorney's fees is mandatory under both theories. Garibay is correct that an award of appellate attorney's fees is mandatory under section 38.001. *See Ventling v. Johnson*, 466 S.W.3d 143, 154 (Tex. 2015) (stating appellate fees are mandatory under section 38.001); *DaimlerChrysler Motors Co. v. Manuel*, 362 S.W.3d 160, 198–99 (Tex. App.—Fort Worth 2012, no pet.) (holding if an award of trial attorney's fees is mandatory under section 38.001, then an award of appellate attorney's fees is likewise mandatory). However, he fails to point to any authority establishing that appellate attorney's fees are also mandatory under section 134.005(b). We overrule Garibay's issue as to contingent appellate fees because Garibay did not segregate his fees by claim, because

the trial court did not specify its basis for awarding attorney's fees, and because Garibay has not shown that the failure to award appellate attorney's fees under section 134.005 would be an abuse of discretion. *See Kinsel v. Lindsey*, 526 S.W.3d 411, 427 (Tex. 2017) ("The party seeking recovery [of attorney's fees] bears the burden of proof to support the award.").

ii. Attorney's Fees Against Ricardo

Garibay also argues the trial court erred in failing to award trial and appellate attorney's fees against Ricardo. The trial court awarded Garibay damages in the amount of $24,775.62 from Ricardo but failed to award attorney's fees to Garibay from Ricardo.

Garibay pleaded numerous causes of action against Ricardo, some of which mandate the award of attorney's fees to the prevailing party, and some of which do not. *See, e.g.*, TEX. CIV. PRAC. & REM. CODE ANN. §§ 38.001 (mandating attorney's fees award to prevailing party in suits founded on an oral or written contract); 134.005(b) (mandating attorney's fees award to prevailing party in theft suit); *see also Amoco Prod. Co. v. Smith*, 946 S.W.2d 162, 165–66 (Tex. App.—El Paso 1997, no writ) (holding that trial court did not abuse its discretion by refusing to award attorney's fees in unjust enrichment claim because attorney's fees may only be appropriate under some circumstances). Although the trial court awarded Garibay damages against Ricardo, the final judgment does not state under which cause of action the award was made; therefore, the damages award could have been under any of the causes of action that were live. *See Pharo*, 922 S.W.2d at 948 ("Because the trial court did not render findings of fact or conclusions of law, we must assume that it made all findings in support of its judgment.").

At trial, Garibay's counsel recognized he was pursuing other claims and stated he "understand[s] that th[e]se are torts and therefore attorney's fees are not recoverable." On appeal, Garibay does not show that an award of attorney's fees was mandatory under all of his causes of action, but only focuses on his breach of contract and TTLA claims. *See* TEX. CIV. PRAC. & REM.

CODE ANN. §§ 38.001, 134.005(b); *see also McMaster*, 2005 WL 2000789, at *6 (stating it is appellant's burden to show that the trial court's judgment was not supported by any legal theory raised by the evidence); *Lindsey*, 526 S.W.3d at 427 (noting the party seeking recovery of attorney's fees carries the burden of proof to support the award).

Therefore, although the trial court awarded Garibay damages against Ricardo, it could have been for a claim or claims, for which attorney's fees were not recoverable. As such, Garibay has not shown that the trial court abused its discretion in failing to award him fees against Ricardo.

iii. Post-Judgment Interest on Appellate Attorney's Fees Award

Finally, Garibay argues he is entitled to an award of post-judgment interest on his award of conditional appellate attorney's fees against Ricardo and 181 South. Because we hold that the trial court did not abuse its discretion in failing to award Garibay conditional appellate attorney's fees against 181 South and Ricardo, we consequently do not reach the issue of whether Garibay is entitled to an award of post-judgment interest related to these denied fees. *See* TEX. R. APP. P. 47.1 (requiring appellate courts to address all issues raised and necessary to the appeal's disposition); *cf. Ventling*, 466 S.W.3d at 156 (holding claimant was entitled to post-judgment interest on their award of conditional appellate attorney's fees because "an award for conditional appellate attorney's fees accrues postjudgment interest from the date the award is made final by the appropriate appellate court's judgment (quoting TEX. FIN. CODE ANN. § 304.005(a))).

CONCLUSION

We overrule 181 South and Ricardo's issues on appeal, overrule Garibay's cross-issue, and affirm the trial court's judgment.

Rebeca C. Martinez, Chief Justice