

In The
Court of Appeals
Ninth District of Texas at Beaumont

NO. 09-09-00397-CV

WYTHE II CORPORATION, Appellant

V.

JOHN D. STONE, Appellee

**On Appeal from the 58th District Court
Jefferson County, Texas
Trial Cause No. B-179,073-A**

OPINION ON MOTION FOR REHEARING

In a motion for rehearing, Stone contends that this Court addressed factual sufficiency in issue five-A as unpreserved and unassigned error. This contention is not correct. The Court sustained the no evidence issue presented.

Wythe challenged the legal sufficiency of the evidence supporting the jury's award of attorney fees. In particular, Wythe urged that Stone "never introduced contemporaneous billing records or any testimony regarding reasonable hourly fee rates." As explained in the opinion, this Court remanded the case for a determination of a reasonable fee based on an

hourly rate. The Court's opinion addressed the issue that was preserved, raised, and briefed: that is, the legal sufficiency of the evidence supporting the award of attorney fees. This Court held that the evidence offered by Stone did not provide sufficient justification for shifting the amount of the contingent fee to Wythe. The evidence presented was legally insufficient to support a fee in the amount awarded by the jury. *See City of Keller v. Wilson*, 168 S.W.3d 802, 822 (Tex. 2005).

It is correct that “[g]enerally we render judgment when a no evidence issue is sustained following a trial on the merits.” *Guevara v. Ferrer*, 247 S.W.3d 662, 670 (Tex. 2007). That possibility has been considered by the Court. But there are limited exceptions. It is not always appropriate for an appellate court to render judgment when a no evidence issue is sustained following a trial. *See id.* When there is no legally sufficient evidence to support the amount awarded by the jury, and there is no legitimate question that some amount of attorney fees are owed under a correct measure, remand to the trial court may be appropriate to determine a reasonable fee. *See, generally, Formosa Plastics Corp. USA v. Presidio Eng'rs and Contractors, Inc.*, 960 S.W.2d 41, 51 (Tex. 1998) (remanding where there is “no legally sufficient evidence to support the entire amount of damages, but there is some evidence of the correct measure of damages”); *see also Guevara*, 247 S.W.3d at 670 (“However, when there is evidence to support some damages it is not appropriate to render judgment.”). Also, the possibility of a suggestion of remittitur has been considered by this Court, but the record in this case does not permit that action. *See id.* Although Stone had the

burden of offering evidence but failed to present legally sufficient evidence, the Court concluded that a remand to the trial court for the determination of a reasonable fee would be the appropriate judgment under the circumstances. We see no reason to grant the motion for rehearing to reconsider the decision.

Although Stone raises other issues in his motion for rehearing, and Wythe also filed a motion for rehearing and a reply to Stone's motion, none of the other issues raised by the parties require clarification of the Court's opinion or a rehearing by the Court. The motions for rehearing are overruled.

DAVID GAULTNEY
Justice

Opinion Delivered May 5, 2011

Before McKeithen, C.J., Gaultney and Kreger, JJ.