

In The
Court of Appeals
Ninth District of Texas at Beaumont

NO. 09-14-00316-CV

CHEVRON PHILLIPS CHEMICAL COMPANY LP, Appellant

V.

KINGWOOD CROSSROADS, L.P., Appellee

**On Appeal from the 410th District Court
Montgomery County, Texas
Trial Cause No. 14-04-04123-CV**

MEMORANDUM OPINION

In this appeal, Appellant Chevron Phillips Chemical Company LP (“CP Chem”) contests the trial court’s order and judgment on remand concerning the award of Kingwood Crossroads, L.P.’s (“KCR’s”) attorneys’ fees. We hold that the trial court erred by failing to segregate KCR’s attorneys’ fees incurred in advancing affirmative contract claims from those fees incurred defending CP Chem’s breach-of-contract counterclaim. We reverse and remand for KCR to

segregate these fees and for the trial court to determine the amount of fees necessary for defense of CP Chem's contract claim.

I. Factual and Procedural Background

This is the second appeal in a lawsuit, which KCR filed against CP Chem over a failed real estate transaction, concerning CP Chem's liability for KCR's attorneys' fees. On the initial appeal, the Fourteenth Court of Appeals made several modifications to the trial court's judgment and remanded solely for KCR to segregate the fees its attorneys incurred in successfully defending against CP Chem's contract counterclaim or to demonstrate that segregation was not required, and for the trial court to determine the amount of fees necessary for the defense of CP Chem's contract counterclaim. *Chevron Phillips Chem. Co. v. Kingwood Crossroads, L.P.*, 346 S.W.3d 37, 70 (Tex. App.—Houston [14th Dist.] 2011, pet. denied) (hereinafter referred to as "*Chevron I*"). On remand, the trial court held that all of KCR's attorneys' fees incurred in advancing its affirmative breach-of-contract claims against CP Chem also advanced its defense of CP Chem's breach-of-contract counterclaim; and therefore, the court did not segregate the fees between KCR's affirmative contract claim (upon which it was not a prevailing party) and KCR's successful defense of CP Chem's contract counterclaim (for which the Fourteenth Court of Appeals held KCR was entitled to recover). CP

Chem presents a seven-issue canopy over a multitude of sub-issues, which we summarize and address as follows: (1) whether KCR was a “prevailing party” under Texas law; (2) whether the trial court properly segregated the amount of attorneys’ fees before making its award; (3) whether a jury trial was necessary on remand; (4) the beginning date when post-judgment interest begins to accrue on the attorneys’ fee award; (5) the amount of appellate fees to which KCR is entitled; (6) whether CP Chem is entitled to settlement credits for the amount of attorneys’ fees KCR was paid in pre-trial settlements with other defendants; and (7) whether CP Chem should be allowed to offset KCR’s outstanding judgment liability to CP Chem against any award of attorneys’ fees found necessary to defend the breach-of-contract counterclaim.

The original proceedings involved multiple parties and claims. *See Chevron I*, 346 S.W.3d at 42–47. However, as the scope of this appeal is limited to issues concerning the attorneys’ fees that the trial court awarded to KCR on remand, we include only those facts and procedural aspects of the case necessary to address the complaints in this appeal.

A. Trial Proceedings

The underlying litigation began when KCR asserted causes of action against:

- (i) CP Chem for breach of contract, tortious interference, fraud, negligent

misrepresentation, and conspiracy; (ii) Exxon Land Development Inc. (“ELDI”), for tortious interference and conspiracy; (iii) First American Title Insurance Company (“First American”) for breach of contract, violation of the Texas Deceptive Trade Practices Act, tortious interference, and negligent misrepresentation; and (iv) Kingwood Place West Community Association, Inc. (“the Association”) for declaratory judgment.

CP Chem filed a counterclaim against KCR for breach of contract, seeking \$155,000.00 in damages, for making a fraudulent claim against real property and asserting other claims for declaratory judgment. CP Chem’s counterclaim was based upon the same contract as KCR’s contract claims against CP Chem. ELDI also filed a counterclaim requesting a declaratory judgment. *Chevron I*, 346 S.W.3d at 47. Before trial, KCR settled with First American and the Association, and “[a] jury trial was conducted on the remaining claims.” *Id.*

Prior to trial, the parties stipulated that the jury would be responsible for determining the amount of attorneys’ fees, but the trial court would determine whether and how to segregate attorneys’ fees. During the trial, the court instructed the parties to present evidence segregating their attorneys’ fees, so that it would not have to retry the case over that issue. KCR submitted evidence of its attorneys’

fees in the form of trial testimony of KCR's counsel, Paul Mitchell; portions of a trial deposition transcript of Mitchell; and KCR's redacted billing records.

At the conclusion of the trial, the jury found that CP Chem failed to comply with the contract but that CP Chem's failure to comply was excused by impracticability. Additionally, CP Chem was found liable for negligent misrepresentation and fraud. The jury also found that KCR's reasonable and necessary fees for preparation and trial were \$3,000,000.00.

Pursuant to the parties' stipulation, the trial court addressed fee segregation in a separate hearing. KCR identified three categories of fees that it conceded "should probably be segregated": (i) \$32,430.00 in fees associated with the settlement with First American; (ii) \$8,675.00 in fees connected to the settlement with the Association; and (iii) \$16,560.00 relating to a discovery dispute with First American (totaling \$57,665.00). The trial court reduced the jury's \$3,000,000.00 finding of reasonable attorneys' fees by these amounts (\$57,665.00) to \$2,942,335.00, and rendered judgment partially in favor of KCR, stating in part that:

[KCR] is entitled to \$2,942,335.00 in reasonable attorneys' fees from CP Chem as a prevailing party in its contract action. If on appeal it is determined that [KCR] should have segregated these attorneys' fees, [KCR's] recovery for attorneys' fees for its contract action shall be reduced by 5% to \$2,795,218.25.

The trial court's judgment also stated that KCR was entitled to recover against CP Chem for fraud damages, and ordered the parties to specifically perform under the contract. The judgment, however, stated that KCR was to take nothing from CP Chem in damages on its claim for breach of contract. The judgment further provided that CP Chem, as "a prevailing party in the contract action, and as a just and equitable award under" its declaratory judgment cause of action, was to recover \$1,200,000.00 in attorneys' fees from KCR but awarded CP Chem no damages on its counterclaim.

Additionally, the trial court's final judgment provided that should any party appeal, attorneys' fees on appeal shall be awarded to the party prevailing on appeal; specifically, that if KCR were the prevailing party on appeal, it would be entitled to \$150,000.00 in the Court of Appeals and another \$150,000.00 if it prevailed in the Texas Supreme Court, with CP Chem responsible for sixty-five percent of any such payment to KCR, and ELDI responsible for the remaining thirty-five percent.

B. The Fourteenth Court of Appeals' Decision

CP Chem, ELDI, and KCR appealed, and the case was transferred to the Fourteenth Court of Appeals pursuant to an equalization order issued by the Texas

Supreme Court. *Chevron I*, 346 S.W.3d at 42, n.1. Relevant to our decision, CP Chem challenged (1) the specific-performance order; (2) the award of fraud damages to KCR; and (3) the award of attorneys’ fees to KCR. *Id.* at 50. The Fourteenth Court of Appeals sustained CP Chem’s first two challenges and sustained in part, and overruled in part, CP Chem’s third issue.¹ *Id.* at 65–67, 70. The Fourteenth Court of Appeals consequently reversed and rendered judgment (1) denying KCR’s request for an order requiring specific performance of the contract; (2) that KCR take nothing on its fraud claim against CP Chem; (3) that KCR take nothing on its request for attorneys’ fees against CP Chem for KCR’s prosecution of its declaratory-judgment action; and (4) “that [KCR] take nothing on its request for attorneys’ fees against CP Chem for [KCR’s] prosecution of its breach-of-contract claim; but [the Fourteenth Court of Appeals] remand[ed] for determination of the amount of attorneys’ fees [KCR] [was] entitled to recover for its defense of CP Chem’s breach-of-contract claim.” *Id.* at 78.

Notably, in arriving at its decision concerning KCR’s recovery of attorneys’ fees incurred in its defense of CP Chem’s breach-of-contract counterclaim, the Fourteenth Court of Appeals first determined that section 38.001(8) of the Civil Practice and Remedies Code did not authorize KCR to recover attorneys’ fees

¹ We have renumbered and condensed CP Chem’s issues in *Chevron I* for the sake of clarity and brevity.

because KCR was not a prevailing party on a valid contract claim for damages. *Id.* at 69–70.² Yet, that court held that because KCR successfully defended CP Chem’s breach-of-contract counterclaim, KCR was entitled to recover attorneys’ fees based on the language of the contract in question.³ *Id.* at 70 (holding that the contract at issue entitled a “prevailing party” to recover attorneys’ concomitant with either a successful prosecution or a successful defense of a claim). “Therefore, we may uphold the trial court’s determination that [KCR] is entitled to *some fees* because it successfully defended CP Chem’s breach-of-contract counterclaim.” *Id.* (emphasis added).

The Fourteenth Court of Appeals further held that remand was necessary “because the trial court did not specifically award fees for [KCR’s] successful defense of CP Chem’s contract claim, [and therefore] issued no finding on whether segregation of *those* fees is required.” *Id.* (emphasis added). The Fourteenth Court

² The Fourteenth Court of Appeals stated: “CP Chem prevailed entirely on [KCR’s] breach-of-contract action by obtaining a favorable jury finding on impracticability.” *Chevron Phillips Chem. Co. v. Kingwood Crossroads, L.P.*, 346 S.W.3d 37, 62 (Tex. App.—Houston [14th Dist.] 2011, pet denied) (hereinafter referred to as “*Chevron I*”). The Fourteenth Court of Appeals further “conclude[d] the trial court acted beyond its discretion by ordering specific performance.” *Id.* at 65.

³ The contract provided in relevant part: “If [KCR or CP Chem] is a prevailing party in any legal proceeding brought under or with relation to this contract or this transaction, such party is entitled to recover from the non-prevailing parties all costs of such proceeding and reasonable attorney’s fees. This Paragraph . . . survives termination of this contract.” *Chevron I*, 346 S.W.3d at 69.

of Appeals determined that it could “not merely affirm the entire attorney-fee award based on [KCR’s] successful defense of [the contract] claim,” and instead “remand[ed] for [KCR] to segregate these fees or demonstrate segregation is not required and for the trial court to determine the amount of fees recoverable for defense of CP Chem’s contract claim.” *Id.*

In its cross-appeal, KCR challenged (1) one of the trial court’s declarations concerning the property in question; (2) the jury’s impracticability finding excusing CP Chem from performing under the contract; and (3) the award of attorneys’ fees to CP Chem. *Id.* at 50. The Fourteenth Court of Appeals held that KCR’s first challenge was rendered moot by reversal of the specific-performance order, and overruled its remaining two challenges. *Id.* at 50, 61, 72. Notably, the Fourteenth Court of Appeals did not address whether CP Chem must segregate its attorneys’ fees because:

[KCR did] not argue on appeal that CP Chem was required to segregate its fees . . . [but r]ather, [KCR] argue[d] that the award [was] erroneous on both grounds (contract and declaratory-judgment actions). Accordingly, [the Fourteenth Court of Appeals] [upheld] the entire award because CP Chem successfully defended the contract action.

Id. at 72.

C. On Remand to the Trial Court

On remand, the trial court first ordered the parties to mediate all outstanding issues, inviting them to “engage in appropriate discovery,” and setting an oral hearing for final resolution. After mediation failed, KCR filed a motion for final judgment for attorneys’ fees based on the evidence in the pre-remand record. CP Chem, however, filed a jury demand, paid its jury fees, and opposed KCR’s motion as premature on the theory that the Fourteenth Court of Appeals’ remand order required a “new trial.” KCR opposed CP Chem’s request for a new trial as well as its more specific request for a jury trial, claiming that the parties had previously stipulated that the court would determine segregation issues, and the parties had already developed a full evidentiary record.

The trial court did not conduct a new trial on remand, noting that it was “obvious to [him] . . . that the [Fourteenth] Court sent this back to [him] to decide.” The court did, however, hold a hearing. KCR (the party bearing the burden of proof) offered no new evidence. CP Chem’s counsel, whom the trial court accepted as an expert on the issue of attorneys’ fees, testified that a reasonable fee for KCR’s defense of CP Chem’s contract counterclaim would be no more than \$75,000.00, based on the limited information that KCR had offered on the issue of fees. The trial court issued its final judgment on April 11, 2014, and also filed

findings of fact and conclusions of law on October 6, 2014, and amended findings and conclusions on October 27, 2014.

The trial court's final judgment ordered CP Chem to pay KCR its attorneys' fees incurred in KCR's defense of CP Chem's contract counterclaim in the amount of \$2,648,101.50, plus 7.25% post-judgment interest from January 11, 2008, compounded annually (which amounted to \$3,769,097.06 as of April 9, 2014, the date the court signed the judgment, and which is continuing to accrue interest); \$97,500.00 (or sixty-five percent of the original appellate attorneys' fee award)⁴ for defending against CP Chem's contract claim before the Fourteenth Court of Appeals, plus post-judgment interest at the rate of 7.25% per annum, compounded annually, from May 26, 2011, the date of the mandate of the Fourteenth Court of Appeals, excluding the time periods during which KCR requested extensions on appeal to the Texas Supreme Court (which totaled \$114,144.67 as of April 9, 2014, and is continuing to accrue interest); \$97,500.00 (or sixty-five percent of the original appellate attorneys' fee award) for defending against CP Chem's contract

⁴ *See supra*, Section I.A. (the trial court's final judgment provided that should any party appeal, attorneys' fees on appeal shall be awarded to the party prevailing on appeal; specifically, that if KCR were the prevailing party, it would be entitled to \$150,000.00 in the Court of Appeals and another \$150,000.00 if it prevailed in the Texas Supreme Court, with CP Chem responsible for sixty-five percent of any such payment to KCR, and ELDI responsible for the remaining thirty-five percent.)

claim before the Texas Supreme Court, plus post-judgment interest at the rate of 7.25% per annum, compounded annually, from February 15, 2013, the date of the Texas Supreme Court's Denial of Petition for Review (which totaled \$105,669.58 as of April 9, 2014, and continues to accrue interest).

The trial court's amended findings reiterated that the jury found KCR incurred \$3,000,000.00 in reasonable attorneys' fees in preparation of and for trial; that \$57,665.00 of KCR's attorneys' fees related solely to KCR's settlements with First American and the Association and to KCR's discovery dispute with First American; and that this amount was properly segregated from KCR's recovery of attorneys' fees. The court also determined that ten percent of the remaining \$2,942,335.00 fee award related solely to unrecoverable claims (tort and declaratory judgment claims). The court held ninety percent of the remaining \$2,942,335.00 fee award represented services by KCR's attorneys that advanced and were necessary to KCR's defense of CP Chem's contract counterclaim.

The court held: "all of the legal services performed by KCR's counsel in advancement of KCR's affirmative breach of contract claim against CP Chem also advanced KCR's defense of CP Chem's breach of contract claim against KCR." Therefore, the court concluded that "no segregation of KCR's attorneys' fees is required between KCR's affirmative breach of contract claim against [CP Chem]

(upon which it was not a prevailing party), and KCR's successful defense of [CP Chem's] breach of contract claim against KCR."

II. Prevailing Party Determination of the Fourteenth Court of Appeals Stands as the Law of the Case

CP Chem argues that "KCR is not entitled to recover its defense fees because it was not the prevailing party on the main issue in the case."

Under the law of the case doctrine, an initial opinion from a court of appeals is ordinarily binding if there is a subsequent appeal in the same case. *Briscoe v. Goodmark Corp.*, 102 S.W.3d 714, 716 (Tex. 2003); *Cessna Aircraft Co. v. Aircraft Network, LLC*, 345 S.W.3d 139, 150 (Tex. App.—Dallas 2011, no pet.) ("A court's prior decision is deemed the law of the case unless it was clearly erroneous."). "By narrowing the issues in successive appeals, the law-of-the-case doctrine further seeks to promote efficiency and uniformity in the decision-making process." *Paradigm Oil, Inc. v. Retamco Operating, Inc.*, 372 S.W.3d 177, 182 (Tex. 2012).

Under Texas law, attorneys' fees are recoverable when permitted by statute or contract. *Tony Gullo Motors I, L.P. v. Chapa*, 212 S.W.3d 299, 310 (Tex. 2006). The Fourteenth Court of Appeals interpreted the contract provision in question to allow a party to recover attorneys' fees for the successful defense of a claim. *Chevron I*, 346 S.W.3d at 70 (observing that the "contractual provision entitling a

‘prevailing party’ to recover attorneys’ fees does not distinguish between successful prosecution and defense of a claim”).⁵ That decision became the law of the case for future proceedings at the trial and intermediate level courts, including this Court.⁶ *See Johnson v. Scott*, 113 S.W.3d 366, 375 (Tex. App.—Beaumont 2003, pet. denied) (applying *Briscoe* and refusing to reconsider issue previously decided).

We overrule CP Chem’s second issue.

⁵ Here, the contract provided: “If [KCR or CP Chem] is a prevailing party in any legal proceeding brought under or with relation to this contract or this transaction, such party is entitled to recover from the non-prevailing parties all costs of such proceeding and reasonable attorney’s fees. This Paragraph . . . survives termination of this contract.” *Chevron I*, 346 S.W.3d at 69.

⁶ We are aware that the Fourteenth Court of Appeals’ interpretation of the contractual attorney fee provision may not be the law of the case in the Texas Supreme Court, as the Texas Supreme Court denied petition for review of the Fourteenth Court of Appeals’ opinion. *Paradigm Oil, Inc. v. Retamco Operating, Inc.*, 372 S.W.3d 177, 182–83 (Tex. 2012); *see also Epps v. Fowler*, 351 S.W.3d 862, 870 (Tex. 2011) (holding “a defendant may be a prevailing party when a plaintiff nonsuits without prejudice if the trial court determines, on the defendant’s motion, that the nonsuit was taken to avoid an unfavorable ruling on the merits”); *Intercontinental Grp. P’ship v. KB Home Lone Star L.P.*, 295 S.W.3d 650, 652 (Tex. 2009) (holding that “a plaintiff must prove compensable injury and secure an enforceable judgment in the form of damages or equitable relief” to be considered a prevailing party such that attorney’s fees can be awarded).

III. The Multimillion Dollar Question: How to Segregate Attorneys' Fees

The Fourteenth Court of Appeals remanded solely for determination of whether segregation of KCR's attorneys' fees was required, and if so, for determination of the amount of attorneys' fees KCR necessarily incurred for its defense of CP Chem's breach-of-contract claim. *Chevron I*, 346 S.W.3d at 70, 78.

CP Chem argues that the trial court should have ordered KCR to segregate its attorneys' fees incurred in asserting contract-based causes of action against CP Chem from the fees incurred in defending against CP Chem's contract counterclaim. KCR continues steadfast in its stance that all of the fees related to issues concerning the contract are "intertwined" and excepted from the segregation requirement.

A. Relevant Legal Standards

The need to segregate attorneys' fees is a question of law, which we review *de novo*. See *Chapa*, 212 S.W.3d at 312.

That standard, of course, gives no deference to the factual determinations of the trial judge or the jury. But the fees necessary to prove particular claims often turn on such facts—how hard something was to discover and prove, how strongly it supported particular inferences or conclusions, how much difference it might make to the verdict, and a host of other details that include judgment and credibility questions about who had to do what and what it was worth. Given all these details, it may often be impossible to state as a matter

of law the extent to which certain claims can or cannot be segregated; the issue is more a mixed question of law and fact for the jury.

Id. at 312–13. A claimant seeking attorneys’ fees bears the burden of “segregat[ing] fees between claims for which they are recoverable and claims for which they are not.” *Id.* at 311.

“An exception exists only when the fees are based on claims arising out of the same transaction that are so intertwined and inseparable as to make segregation impossible.” *Kinsel v. Lindsey*, No. 15-0403, 2017 WL 2324392, at *12 (Tex. May 26, 2017); *Chapa*, 212 S.W.3d at 313–14 (“[I]t is only when discrete legal services advance both a recoverable and unrecoverable claim that they are so intertwined that they need not be segregated.”). Intertwined facts alone do not make fees for unrecoverable claims recoverable. *Chapa*, 212 S.W.3d at 313–14. The party seeking to recover attorneys’ fees bears the burden of demonstrating segregation is not required. *CA Partners v. Spears*, 274 S.W.3d 51, 82 (Tex. App.—Houston [14th Dist.] 2008, pet. denied).

In making a determination on proper segregation of attorneys’ fees, we do not look at the legal work “as a whole, but parse the work into component tasks,” such as examining a pleading paragraph by paragraph to determine which ones relate to recoverable claims. *7979 Airport Garage, L.L.C. v. Dollar Rent A Car*

Sys., 245 S.W.3d 488, 509 (Tex. App.—Houston [14th Dist.] 2007, pet. denied). A “discrete legal service” includes “[r]equests for standard disclosures, proof of background facts, depositions of the primary actors, discovery motions and hearings, *voir dire* of the jury, and a host of other services [that] may be necessary whether a claim is filed alone or with others.” *Chapa*, 212 S.W.3d at 313. Of course, some services may advance more than one claim. *Id.* “To the extent such services would have been incurred on a recoverable claim alone, they are not disallowed simply because they do double service.” *Id.*

B. Evidence Regarding Need to Segregate or Not to Segregate

On remand, the trial court concluded that it need not segregate KCR’s fees incurred defending against CP Chem’s contract counterclaim from KCR’s fees incurred in asserting affirmative contract claims against CP Chem:

[A]ll of the legal services performed by KCR’s counsel in advancement of KCR’s affirmative breach of contract claim against [CP Chem] also advanced KCR’s defense of [CP Chem’s] breach of contract claim against KCR. The Court therefore concludes that, under the standard set forth by the Texas Supreme Court in *Gullo v. Chapa*, 212 S.W.3d 299 (Tex. 2006), no segregation of KCR’s attorneys’ fees is required between KCR’s affirmative breach of contract claim against [CP Chem] (upon which it was not a prevailing party), and KCR’s successful defense of [CP Chem’s] breach of contract claim against KCR.

We review this determination *de novo*. See *Chapa*, 212 S.W.3d at 312–13.

We do not doubt that KCR's attorneys' work in asserting affirmative causes of action under the contract in dispute would also assist its defense of CP Chem's counterclaim based on the same contract. However, we do question the extent to which such services would have been incurred on the recoverable claim alone. In other words, we question the trial court's apparent "double duty" standard of segregation, which would allow a party to recover all its attorneys' fees incurred in asserting unsuccessful claims, just so long as it successfully defended a related counterclaim. Such a standard ignores the requirement that before recovering fees incurred in pursuing an unsuccessful claim, the claimant must show that the fees "would have been incurred on a recoverable claim alone." *Chapa*, 212 S.W.3d at 311. This additional requirement serves to prevent recovery of fees that were not necessary to achieving success on a recoverable claim.

The trial court's amended findings state broadly that:

under the circumstances of this case, the legal services performed by KCR's counsel in advancement of KCR's affirmative breach of contract claim against [CP Chem] were . . . necessary to advance KCR's successful defense of [CP Chem's] breach of contract claim against KCR, which arose from the same contract, [and] would have been performed by KCR's counsel in advancement of KCR's successful defense of [CP Chem's] breach of contract claim alone.

CP Chem attacks the legal sufficiency of these findings. At the trial level, KCR bore the burden of showing segregation was not required. *See CA Partners*, 274

S.W.3d at 82. Therefore, we review the record to determine whether the evidence is legally sufficient to support these findings. *See City of Keller v. Wilson*, 168 S.W.3d 802, 827 (Tex. 2005).

“[When] an appellant attacks the legal sufficiency of an adverse finding on an issue on which it did not have the burden of proof, the appellant must demonstrate on appeal that there is no evidence to support the adverse finding.” *Univ. Gen. Hosp., L.P. v. Prexus Health Consultants, LLC*, 403 S.W.3d 547, 550 (Tex. App.—Houston [14th Dist.] 2013, no pet.). When evaluating legal sufficiency, we review the evidence in the light most favorable to the appealed finding and indulge every reasonable inference that supports the finding. *Id.* at 550–51. We will find the evidence legally sufficient if it “would enable reasonable and fair-minded people to reach the verdict under review.” *Wilson*, 168 S.W.3d at 827. We will credit favorable evidence if a reasonable trier of fact could and disregard contrary evidence unless a reasonable trier of fact could not. *Id.* at 807, 827. We will sustain a legal sufficiency challenge (no evidence challenge) only if the record shows: (1) the 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 scintilla; or (4) the evidence conclusively establishes the opposite of the vital fact. *Id.* at 810.

We do not intend to suggest that KCR bore an “impossible timekeeping burden.” No greater evidentiary precision is required for attorneys’ fees than is required for other issues. *Chapa*, 212 S.W.3d at 314 (noting that attorneys need not keep separate time records for recoverable and unrecoverable work, rather “an opinion would . . . suffice[] stating that, for example, 95 percent of their drafting time would have been necessary even if there had been no fraud claim.”). KCR has averred throughout the totality of this litigation that segregation is not required, and it offered no evidence that it would have incurred the entirety of its fees related to contract issues had KCR not initially made affirmative contract claims and had instead only defended against CP Chem’s contract counterclaim.

The trial court relied on evidence adduced at the original proceeding to make its determination that segregation between KCR’s attorneys’ fees incurred in asserting its contract claims need not be segregated from its fees incurred in defending against CP Chem’s contract counterclaim. At the original trial, KCR offered evidence of its attorneys’ fees in the form of trial testimony of one of its attorneys, Paul Mitchell; redacted billing statements; and deposition testimony of Mitchell, which included a written breakdown of those fees into fifty categories.

KCR advises that “[d]uring the trial, [KCR] filled the record with evidence, including expert testimony from its counsel as to the function and necessity of each dollar billed and a breakdown of its invoices into 50 component tasks.” KCR’s expert on attorneys’ fees, Mitchell, testified to the necessity of the total amount of fees KCR’s attorneys claimed; the necessity of appellate fees to the court of appeal and Texas Supreme Court; and the necessity of the costs KCR incurred in this litigation. CP Chem’s attorney, Scott Marrs, testified as to the necessity of the fees charged by the firms that were representing KCR. However, the expert testimony never addressed whether component tasks or discrete legal services taken to affirmatively assert contract claims against CP Chem were necessary to its defense of CP Chem’s contract counterclaim. Rather, to the extent that Mitchell did address fees related to contract claims with CP Chem, he testified that \$700,000.00 to \$750,000.00 of KCR’s total attorneys’ fees were attributable to the breach of contract. Moreover, while some of KCR’s fifty component tasks do identify the party and/or claims they furthered (*e.g.*, “Discovery dispute with KPWCA re minutes”), others do not (*e.g.*, “Jury Charge”), providing no evidence from which a reasonable fact finder could determine those fees necessary to successfully defend against CP Chem’s contract counterclaim. Additionally, on remand, CP Chem offered expert testimony of its counsel that the reasonable and necessary amount of

KCR's defense fees would be no more than \$75,000 or no more than ten percent of the work on the contract claims.

Based on the record, we conclude that no reasonable fact finder could have found that KCR would have incurred the full amount of attorneys' fees which the trial court awarded on remand on its recoverable claim alone. *See Chapa*, 212 S.W.3d at 311. As an example, KCR filed eleven versions of its petition in the trial court, which included five theories of breach of contract claims for which it sought affirmative claims for damages against CP Chem, set forth in about 100 paragraphs. As noted by the Texas Supreme Court, some evidence of segregation is required concerning even the drafting of a petition that includes both causes of action for which fees are recoverable and those for which fees are not. *See Chapa*, 212 S.W.3d at 313. Therefore, KCR was required to present evidence of the segregation of its fees. *See Hoss v. Alardin*, 338 S.W.3d 635, 652–53 (Tex. App.—Dallas 2011, no pet.) (holding that the unsegregated amount of attorneys' fees provided an inadequate evidentiary basis for the amount of reasonable and necessary attorneys' fees incurred in the prosecution of breach-of-contract claims). We sustain CP Chem's second issue to the extent it claims there is no evidence in the record to support the trial court's award of attorneys' fees.

C. Reversal and Remand of the Attorney Fee Award is the Proper Remedy

“Typically, if segregation is required and the claimant does not provide testimony from counsel on the proper segregation of the fee, the cause is remanded for a factual determination of the portion of the attorneys’ work that is attributable to the recoverable claim.” *McMahon v. Zimmerman*, 433 S.W.3d 680, 691 (Tex. App.—Houston [1st Dist.] 2014, no pet.); *see also, e.g., Chapa*, 212 S.W.3d at 314 (“Unsegregated attorney’s fees for the entire case are some evidence of what the segregated amount should be. . . . [A]n unsegregated damages award requires a remand.”); *CA Partners*, 274 S.W.3d at 84 (remanding for determination of attorneys’ fees based on holding that segregation was required).

The Fourteenth Court of Appeals remanded this case with instructions for KCR “to segregate these fees or demonstrate segregation is not required.” *Chevron I*, 346 S.W.3d at 70. This is not a case where a reviewing court ordered a party seeking attorneys’ fees to segregate and that party obstinately refused to provide the court with evidence necessary to determine the amount of recoverable fees. *See, e.g., Air Routing Int’l Corp. (Canada) v. Britannia Airways, Ltd.*, 150 S.W.3d 682, 689 (Tex. App.—Houston [14th Dist.] 2004, no pet.) (holding that when a trial court concludes that segregation is required and that, without segregation, the court does not have sufficient information to determine the amount of reasonable

and necessary fees, yet the party seeking fees refuses to segregate, the trial court may be forced to deny recovery of fees). Rather, the trial court ruled that KCR need not segregate its fees relating to KCR's affirmative breach-of-contract claim against CP Chem. Because we are the first court to hold that KCR's attorneys' fees are capable of and subject to segregation as a matter of law, KCR is entitled to the opportunity to put on evidence segregating its fees in a manner that will allow the trial court to determine the reasonable attorneys' fees KCR incurred had KCR been defending CP Chem's counterclaim alone. Remand is therefore proper. *See Chapa*, 212 S.W.3d at 314. We overrule CP Chem's first issue to the extent that it advocates for this Court to render a take-nothing verdict, and we sustain CP Chem's sixth issue.

IV. Jury Trial on Remand

CP Chem argues in its second issue that on remand, it was entitled to a jury trial on the issue of segregation. The parties stipulated on the record, during the original trial, that the jury would decide the reasonable and necessary amount of attorneys' fees, and the trial court would decide the issue of segregation. The parties' agreement did not limit its application to the first trial and was never invalidated.

“A stipulation is an agreement, admission, or concession made in a judicial

proceeding by the parties or their attorneys respecting some matter incident thereto.” *Shepherd v. Ledford*, 962 S.W.2d 28, 33 (Tex. 1998) (quoting *Ortega-Carter v. Am. Int’l Adjustment*, 834 S.W.2d 439, 441–42 (Tex. App.—Dallas 1992, writ denied)). Courts favor stipulations as a way of expediting litigation, and generally, they will uphold stipulations unless good cause is shown for rejecting them. *Gulf Const. Co., v. Self*, 676 S.W.2d 624, 630 (Tex. App.—Corpus Christi 1984, writ ref’d n.r.e.). Whenever possible, courts should give effect to voluntary agreements freely made by the parties. *Johnson v. Swain*, 787 S.W.2d 36, 38 (Tex. 1989).

The parties’ stipulation that the trial court would decide the issue of segregation constitutes an “agreement between attorneys” that was “made in open court and entered of record,” and therefore “will be enforced.” See Tex. R. Civ. P. 11. We overrule CP Chem’s second issue.

V. Interest

CP Chem complains that the trial court erred by awarding post-judgment interest from the date of the original judgment. The assessment of post-judgment interest is a matter of statutory interpretation, subject to *de novo* review. *Long v. Castle Tex. Prod. L.P.*, 426 S.W.3d 73, 78 (Tex. 2014).

Our determination that the record lacks sufficient evidence to support the determination of KCR's recoverable attorneys' fees and our order for remand renders CP Chem's fourth issue moot because the trial court will be required to reopen the record on remand. We note that any post-judgment interest on the trial court's re-determined attorney fee award should accrue from the date of the new final judgment. *See id.* at 80 (“[W]hen an appeal . . . results in a retrial or a remand for further proceedings where new evidence is required, postjudgment interest will accrue from the trial court’s subsequent judgment.”).

VI. Appellate Fees

CP Chem also challenges the trial court's order that CP Chem pay \$195,000.00 in appellate attorneys' fees for the first appeal in *Chevron I*, under the authority of its original judgment, which provided any prevailing party on appeal an award of attorneys' fees.⁷

The segregation requirement applies to appellate attorneys' fees as well as trial fees. *See Smith v. Smith*, 757 S.W.2d 422, 426 (Tex. App.—Dallas 1988, writ denied). “[A] party should not be penalized for taking a successful appeal.” *Schlueter v. Schlueter*, 975 S.W.2d 584, 590 (Tex. 1998). Accordingly, “[a]n appellee may not recover attorney’s fees for work performed on any issue of the

⁷ *See supra*, section I.A.

appeal where the appellant was successful.” *Jacks v. G.A. Bobo*, No. 12-10-00163-CV, 2011 WL 2638751, at *5 (Tex. App.—Tyler June 30, 2011, no pet.) (mem. op.). Rather, he may only recover “fees for work performed on any issue of the appeal where the appellant was unsuccessful.” *Id.*

In its appeal to the Fourteenth Court of Appeals, CP Chem complained of three main issues. *Chevron I*, 346 S.W.3d at 50. The Fourteenth Court of Appeals completely sustained CP Chem’s first two issues, and partially sustained CP Chem’s third issue—the award of attorneys’ fees to KCR, which was reversed and remanded. In its cross-appeal to the Fourteenth Court of Appeals, KCR made three challenges, all of which the Fourteenth Court of Appeals either found moot or overruled. *Id.* at 50, 61, 72.

Because KCR only partially prevailed on one of the many issues appealed in *Chevron I*, we partially sustain CP Chem’s fifth issue, reverse the trial court’s decision to grant KCR the full amount of the appellate fees award, and remand to the trial court to determine the appropriate portion of the appellate fees award that KCR should recover.

VII. Settlement Credit

CP Chem argues that because KCR did not allocate the amounts it received in settlement from First American (\$850,000.00) and the Association

(\$100,000.00) between attorneys' fees and other grounds of recovery, CP Chem is entitled to a credit equaling the entire settlement amount. *See Mobil Oil Corp. v. Ellender*, 968 S.W.2d 917, 928 (Tex. 1997) (holding that a nonsettling party is entitled to credit equaling the entire settlement amount when settlement agreement does not allocate between actual and punitive damages); *Matter of Tex. Gen. Petroleum Corp.*, 52 F.3d 1330, 1340 (5th Cir. 1995) (holding that a settling party has burden to show that settlement does not involve a double recovery by offering proof of written settlement, "which should specifically stipulate the allocation of damages to each cause of action"). KCR responds that this issue is outside the scope of the Fourteenth Court of Appeals' remand order; that CP Chem did not preserve the issue for appeal, because it did not obtain a ruling on settlement credits from the trial court on remand; and that the settlement credits relate to fraud claims, unrelated to KCR's recovery of attorneys' fees for successfully defending CP Chem's contract counterclaim.

When an appellate court remands a case to determine a limited issue, the trial court is restricted to a determination of that particular issue. *Hudson v. Wakefield*, 711 S.W.2d 628, 630 (Tex. 1986). "Thus, in a subsequent appeal, instructions given to a trial court in the former appeal will be adhered to and enforced." *Id.* When interpreting an appellate court's mandate, the trial court

“should look not only to the mandate itself, but also to the opinion of the [appellate] court.” *Id.*

In its original 2008 judgment, the trial court applied \$350,000.00 of the \$950,000.00 settlement credits towards KCR’s award of additional out-of-pocket damages under its fraud claim against ELDI (or if KCR alternatively elected to recover under its claim of negligent misrepresentation against CP Chem, ELDI, and the Association, the trial court would have applied the \$350,000.00 credit to that award). The trial court did not allocate any settlement credits toward KCR’s award of attorneys’ fees from CP Chem.

The Fourteenth Court of Appeals reversed the trial court’s decision to award attorneys’ fees to KCR and reversed the trial court’s determination that segregation was not required. The Fourteenth Court of Appeals remanded: “for [KCR] to segregate these fees or demonstrate segregation is not required and for the trial court to determine the amount of fees recoverable for defense of CP Chem’s contract claim.” *Chevron I*, 346 S.W.3d at 70. The Fourteenth Court of Appeals did not instruct the trial court to consider whether CP Chem was entitled to any settlement credits on the segregated amount of attorneys’ fees. *Id.* at 70, 78. We agree with KCR that this issue was beyond the scope of the remand order. We overrule CP Chem’s sixth issue.

VIII. Offset

CP Chem argues that it is entitled to offset the amount that KCR still owes CP Chem for its attorneys' fees under the original (2008) final judgment, which the Fourteenth Court of Appeals upheld. *Chevron I*, 346 S.W.3d at 72. Generally, mutual judgments are subject to offset. *Bonham State Bank v. Beadle*, 907 S.W.2d 465, 470 (Tex. 1995). On remand, we instruct the trial court to determine any outstanding amount that KCR owes CP Chem for attorneys' fees under the original final judgment and offset that amount against any award of attorneys' fees CP Chem is found to owe KCR. To the extent CP Chem seeks to offset any amount it is found to owe KCR for KCR's attorneys' fees incurred in successfully defending against CP Chem's counterclaim against the amount KCR owes CP Chem pursuant to the original final judgment, we sustain CP Chem's seventh issue.

IX. Summary

We hold that KCR did not meet its burden of showing that it need not segregate its fees relating to KCR's affirmative breach-of-contract claim against CP Chem. We reverse the trial court's determination of the amount of attorneys' fees recoverable by KCR in Cause No. 05-03-02662-CV in the 410th Judicial District Court of Montgomery County, Texas, styled *Kingwood Crossroads, L.P. v. First American Title Ins. Co., et al.*, vacate its judgment, and remand to the trial

court for determination of the amount of attorneys' fees KCR incurred that was necessary for defense of CP Chem's breach-of-contract counterclaim, consistent with this opinion.

REVERSED AND REMANDED.

CHARLES KREGER
Justice

Submitted on June 11, 2015
Opinion Delivered September 21, 2017

Before Kreger, Horton, and Johnson, JJ.