In the
Court of Appeals
Second Appellate District of Texas
at Fort Worth

No. 02-21-00398-CV

BRADLEY PARSONS SPALDING AND WENDY YATES, Appellants

V.

ANA JEAN PARSONS BENNETT A/K/A ANNA JEANE PARSONS BENNETT, TRUSTEE, Appellee

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On Appeal from the 355th District Court
Hood County, Texas
Trial Court No. C2021003

Before Kerr, Womack, and Wallach, JJ.
Memorandum Opinion by Justice Wallach

MEMORANDUM OPINION

This is an appeal from a judgment in a nonjury trial. Regarding the sole issue on appeal, the trial court entered judgment for Appellee Anna Jean Parsons Bennett, as trustee, for reasonable expenses incurred on behalf of the Parsons-Heitsch Living Trust (Trust), in the amount of $86,149.21, including attorney's fees, to be reimbursed from funds previously deposited in the registry of the court. The registry funds represented proceeds from the agreed sale of Trust properties during the pendency of the case. By the parties' Rule 11 agreements, the registry funds could be dispersed only by agreement or court order. Appellants Bradley Parsons Spalding and Wendy Yates, two beneficiaries of the Trust, appeal this judgment for expenses contending, inter alia, that there is legally insufficient evidence or, alternatively, factually insufficient evidence, to support the judgment. We hold that there is legally and factually insufficient evidence to support the judgment for reasonable expenses. We will reverse the judgment of the trial court in that regard and remand the case to the trial court for a new trial on the reasonableness of expenses sought to be recovered by Appellee from the Trust's funds in the registry of the court.

I. Background

Appellee became successor trustee of the Trust after her mother, Betty Jo Heitsch (Settlor), died in April 2020. The Trust beneficiaries are (i) Appellee and (ii) Appellants, Settlor's only grandchildren. On January 6, 2021 Appellants filed this action in the 355th District Court of Hood County to remove Appellee as trustee.

Appellants alleged that Appellee had mismanaged the Trust and failed to carry out her duties as trustee in a legally acceptable fashion. Removal was sought under Texas Trust Code Sections 113.051, 113.082, and 112.054(a). *See generally* Tex. Prop. Code Ann. § 111.002. Appellants sought recovery of attorney's fees under Texas Civil Practice & Remedies Code Chapter 38 for enforcing their rights under the Trust. Appellee's responsive pleading through trial was her Original Answer, consisting of only a general denial.

During the pendency of the lawsuit, there were controversies involving temporary restraining orders and temporary injunctions as well as proceedings in the county court regarding probating Settlor's will. During that time, the parties agreed on and conducted the sale of the Trust's assets. Both sides acknowledge that the sale proceeds were to be deposited into the registry of the court pursuant to Rule 11 agreements and to be distributed only by agreement or court order.

On September 9, 2021, the trial court conducted a hearing on "pending motions." The pertinent aspects of the hearing can be outlined as follows:

- Appellants' claim for attorney's fees was precluded because of failure to disclose expert information.
- Appellee had not made a claim for recovery of attorney's fees against Appellants. Her claim was against the Trust's funds in the court's registry

to reimburse her for attorney's fees and other expenses she had incurred as trustee, pursuant to the terms of the Trust and as allowed by law.

- The Trust's assets had been sold and the proceeds paid into the registry of the court by agreement, except one sum which was being held in Appellee's attorney's Trust account, with disbursement of the funds to be made only by agreement or court order. Appellants' attorney acknowledged that Appellee should be reimbursed for "many" of her expenses, although there was disagreement as to the amounts and over the reimbursement of attorney's fees.
- Appellants asked for a continuance of the "final hearing" to make discovery disclosures on Appellants' claims and so "that this Court can entertain and enter an equitable and appropriate judgment as to how the proceeds are to be distributed."
- Appellee agreed to the continuance to prepare for requesting distribution of the registry funds.
- The court maintained its ruling on excluding Appellants' evidence of attorney's fees but granted the continuance to allow time for discovery and pretrial disclosures related to distribution of the registry funds, and it announced that at the next hearing, "**we are going to be determining how this money in the Registry of the Court and in your trust**

account from the sale of this property is distributed. All right? Whatever is relevant to that determination is what we're going to be determining . . . ." [Emphasis added.]

On October 25–26, 2021, the parties filed briefs with the court regarding their positions on Appellee's right to recovery of attorney's fees. On October 27–28, 2021, the court conducted the "final hearing." Again, we outline the pertinent parts of the hearing:

- The parties understood the scope of the hearing was "to determine the appropriate way to distribute the funds that are in the Registry of the Court."
- The court heard testimony regarding the conduct of Appellee in her role as trustee, which Appellants contended the court should have considered in deciding how to equitably and justly distribute the funds.
- Appellants objected to Appellee presenting expert testimony of her attorney's fees sought to be recovered from the registry funds because proof of reasonableness of attorney's fees requires expert testimony and Appellee did not timely designate an expert on that subject, which objection the court sustained.

- Appellee's counsel was allowed to testify, over objection, to the contractually agreed hourly rates for him and his firm, their total hours expended, and their total fee of $71,882.40.

- Defendant's Exhibit 14 (DX 14) was Appellee's affidavit of Trust expenses for which she was seeking reimbursement from the registry funds. It was first offered on October 27. This colloquy followed:

> [Appellants' counsel]: . . . I don't think it's a business record, appropriate business record, but I have no objection to it being offered as the—as the Defendant's request for expenses.
>
> THE COURT: All right. **So there is no objection to 14 being admitted then and considered. Correct?**
>
> [Appellants' counsel]: **That's correct, Your Honor.**
>
> THE COURT: All right. **Fourteen is admitted.**
>
> [Appellants' counsel]: And—and, Your Honor, if I might say, we are not agreeing that it is a document that is truthful. We are acknowledging that it is Ms. Bennett's claim.
>
> THE COURT: Understood. Thank you. **It's admitted.**
>
> [Emphasis added.]

- The following day, Appellants' counsel attempted to revisit his objection to DX 14, noting again that it is not a business record and that

> [i]t refers to an Exhibit A, and it states that she is speaking to the expenses itemized in Exhibit A. And it states that it contains records that are the exact duplicates of the original records in Exhibit A, but it nowhere, nowhere says anything about Exhibits B, C, D, E, F, G, H, I, J, K, L or—or L. And there is no backup whatsoever to the one exhibit that she does swear to, and that is not— that is not a business record.

The court noted that DX 14 had already been admitted and made no further ruling.

- DX 14 purported to be a business records affidavit. In it, Appellee also attested to having hired her counsel for legal representation of the estate, that such was necessary to defend the claims against the estate in the case, and that she had done so in good faith. She also stated that she had incurred the attached expenses out of her own personal funds and was seeking reimbursement from the Trust.
- Attached to DX 14 as Exhibit A was a list of expenses totaling $86,149.21. It listed "Attorney's Fees $51,004.74" along with many other expenses listed by payee, amount, and a cryptic description of the service or product. Attached to DX 14 as exhibits B–L were various checks to or invoices from third parties. The affidavit portion did not provide any details for the services or why the charges were reasonable or necessary for the Trust to incur. Paragraph 5 of the affidavit did generally track the requirements of Rule of Evidence 902(10) for a business record affidavit regarding the attached records except that it stated that Exhibit A contained records that were exact duplicates of original business records. Exhibit A, the list of expenses, contained no records. The records were Exhibits B–L, which were not referenced in DX 14. The affidavit also

> gave no explanation as to how the Trust, in its record-keeping functions, incorporated the documents from outside parties into its record-keeping processes or how the Trust relied on the records from those outside sources.

After the conclusion of the nonjury trial, the court entered judgment regarding the recovery of Appellee's expenses as follows: "It is further ORDERED that the Trustee has incurred reasonable expenses in the sum of $86,149.21, and the same shall be reimbursed from the funds in the Registry, pursuant to the terms of the Trust." This appeal ensued.

II. Legal Standards

Appellants contend that the judgment for recovery of attorney's fees and other expenses by Appellee should be reversed because there was no pleading to support such a judgment. Generally, each litigant must pay its own attorney's fees. *MBM Fin. Corp. v. Woodlands Operating Co.*, 292 S.W.3d 660, 663 (Tex. 2009); *Acosta v. Tri State Mortg. Co.*, 322 S.W.3d 794, 803 (Tex. App.—El Paso 2010, no pet.). Otherwise, the recovery of attorney's fees from an adverse party is only permitted upon proving that such recovery is authorized by statute, by a contract between the litigants, or under equity. *Akin, Gump, Strauss, Hauer & Feld, L.L.P. v. Nat'l Dev. & Rsch. Corp.*, 299 S.W.3d 106, 119–20 (Tex. 2009); *Knebel v. Cap. Nat'l Bank*, 518 S.W.2d 795, 799 (Tex. 1974); *Acosta*, 322 S.W.3d at 803. A plaintiff must plead and prove attorney's fees or waive them. *Acosta*, 322 S.W.3d at 803; *State Farm Fire & Cas. Co. v. Leasing Enters.*, 716

S.W.2d 553, 555 (Tex. App.—Houston [14th Dist.] 1986, writ ref'd n.r.e.). Unless recovery of attorney's fees sought as expenses for a trust is pleaded as such, there is not fair notice to constitute a pleading for such a recovery. *Jernigan v. Jernigan*, 677 S.W.2d 137, 140 (Tex. App.—Dallas 1984, no writ).

However, claims for relief which are not pleaded, including attorney's fees, may be tried by consent. *Estopar Holdings, Inc. v. Advanced Metallurgical Tech., Inc.*, 876 S.W.2d 205, 210 (Tex. App.—Fort Worth 1994, no writ); *see also Tatum v. Wells Fargo Home Mortg., Inc.*, No. 01-13-00855-CV, 2014 WL 7474074, at *9, *10 (Tex. App.—Houston [1st Dist.] Dec. 30, 2014, no pet.) (mem. op.) (holding, where attorney's fees issue was developed under circumstances indicating all parties understood the issue was in the case, issue was tried by consent); *Carswell v. Cloud*, No. 03-03-00117-CV, 2003 WL 22348842, at *2–3 (Tex. App.—Austin Oct. 16, 2003, pet. denied) (mem. op.) (holding attorney's fees tried by consent where trial court made it clear it was considering whether to assess former wife's attorney's fees and former husband suggested that fees issue be reserved for trial and requested wife's attorney provide proof of fees).

Appellants are also challenging the legal and factual sufficiency of the evidence to support the judgment for Appellee for reasonable expenses, a substantial portion of which was for attorney's fees incurred defending Appellee in the case. In an appeal from a bench trial, findings of fact have the same weight as a jury's verdict. *Scott Pelley P.C. v. Wynne*, No. 05-15-01560-CV, 2017 WL 3699823 *8 (Tex. App.—Dallas

Aug. 28, 2017, pet. denied) (mem. op.); *City of Holliday v. Wood*, 914 S.W.2d 175, 177 (Tex. App.—Fort Worth 1995, no pet.). The trial court's findings of fact are reviewable for legal and factual sufficiency by the same standards that are applied in reviewing the evidence supporting a jury's verdict. *BMC Software Belg. N.V. v. Marchand*, 83 S.W.3d 789, 794 (Tex. 2002); *City of Holliday*, 914 S.W.2d at 177. We do not substitute our judgment for that of the factfinder, even if we would have reached a different conclusion when reviewing the evidence. *SAVA Gumarska in Kemijska Industria D.D. v. Advanced Polymer Scis., Inc.*, 128 S.W.3d 304, 313 (Tex. App.—Dallas 2004, no pet.).

A legal sufficiency challenge to the evidence supporting an adverse finding of fact on an issue for which the appellant did not have the burden of proof requires the appellant to show that no evidence supports the adverse finding. *Graham Cent. Station, Inc. v. Peña*, 442 S.W.3d 261, 263 (Tex. 2014); *City of Amarillo v. Nurek*, 639 S.W.3d 760, 765 (Tex. App.—Amarillo 2021, pet. filed). In determining whether there is legally sufficient evidence to support the finding under review, we must consider evidence favorable to the finding if a reasonable factfinder could and disregard evidence contrary to the finding unless a reasonable factfinder could not. *Cent. Ready Mix Concrete Co. v. Islas*, 228 S.W.3d 649, 651 (Tex. 2007); *City of Keller v. Wilson*, 168 S.W.3d 802, 807, 827 (Tex. 2005); *Henson v. Reddin*, 358 S.W.3d 428, 434 (Tex. App.—Fort Worth 2012, no pet.).

When reviewing an assertion that the evidence is factually insufficient to support a finding, we set aside the finding only if, after considering and weighing all of the evidence in the record pertinent to that finding, we determine that the credible evidence supporting the finding is so weak, or so contrary to the overwhelming weight of all the evidence, that the answer should be set aside and a new trial ordered. *Pool v. Ford Motor Co.*, 715 S.W.2d 629, 635 (Tex. 1986) (op. on reh'g); *Garza v. Alviar*, 395 S.W.2d 821, 823 (Tex. 1965); *Henson*, 358 S.W.3d at 434.

Caught up in the legal and factual sufficiency issues in this case is a dispute about the objections to certain hearsay evidence. To preserve a complaint for our review, a party must have presented to the trial court a timely request, objection, or motion that states the specific grounds for the desired ruling, if the grounds are not apparent from the context of the request, objection, or motion. Tex. R. App. P. 33.1(a). If a party fails to do this, error is not preserved, and the complaint is waived. *See Bushell v. Dean*, 803 S.W.2d 711, 712 (Tex. 1991) (op. on reh'g); *In re A.M.*, No. 2-02-437-CV, 2004 WL 314942, at *1–2 (Tex. App.—Fort Worth Feb. 19, 2004, no pet.) (mem. op.). Further, an additional objection, made after the trial court has ruled on an initial objection and admitted the evidence, is untimely and does not preserve error. *In re A.M.*, 2004 WL 314942, at *1–2.

A trial court's ruling in admitting or excluding evidence is reviewed under an abuse of discretion standard, and an appellate court must uphold the trial court's evidentiary ruling if there is any legitimate basis in the record for the ruling. *In re*

C.J.H., 79 S.W.3d 698, 705 (Tex. App.—Fort Worth 2002, no pet.). However, conclusory evidence, even admitted without objection, is "no evidence" and cannot support a judgment. *City of San Antonio v. Pollock*, 284 S.W.3d 809, 816 (Tex. 2009); *Gibson v. Planned Parenthood Gulf Coast*, No. 14-18-00498-CV, 2019 WL 3432147, at *5 (Tex. App.—Houston [14th Dist.] July 30, 2019, pet. denied) (mem. op.).

III. Analysis

A. Judgment Must Conform to the Pleadings

There is no question that Appellee did not have a pleading seeking recovery of her expenses from the Trust funds in the registry of the court. Her only pleading was her general denial in her Original Answer. So, was the issue tried by consent? We hold that it was.

We must first frame the issue in question. Appellants argue that the issue was whether Appellee was entitled to a recovery of attorney's fees. Since Appellee did not have a pleading for such, and since Appellants objected to a lack of pleading throughout trial, Appellants contend that the issue of whether Appellee could recover attorney's fees was not tried by consent and the judgment should be reversed for lack of pleadings to support it.

The issue determined by the trial court was whether Appellee, as trustee, had incurred reasonable expenses on behalf of the Trust for which she could be reimbursed from the Trust funds in the court's registry. The question then becomes: did the parties try by consent whether Appellee, as trustee, had incurred reasonable

expenses on behalf of the Trust for which she could be reimbursed from the Trust's funds in the court's registry? Phrased in that manner, the answer is yes, it was tried by consent.

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); *see also City of The Colony v. N. Tex. Mun. Water Dist.*, 272 S.W.3d 699, 744 (Tex. App.—Fort Worth 2008, pet. dism'd). The proceedings in this case clearly show that this issue was "tried." When an issue is not properly pleaded but is brought before the trial court by the active assistance of both parties, it will be considered to have been properly raised to the trial court, including through briefs. *Bowles v. Reed*, 913 S.W.2d 652, 660 (Tex. App.—Waco 1995, writ denied); *see also Duncan Land & Expl., Inc. v. Littlepage*, 984 S.W.2d 318, 327–28 (Tex. App.—Fort Worth 1998, pet. denied). At a minimum, in this case Appellee's claim for reimbursement of Trust-related expenses was raised in Appellee's trial brief on the issue and was contested in Appellants' responsive brief.

Probably the most analogous case is *Tatum v. Wells Fargo Home Mortgage, Inc.*, 2014 WL 7474074, at *9, *10. Tatum sued Wells Fargo to stop a forcible entry and detainer action; to set aside a foreclosure sale; and to seek declaratory relief, a temporary restraining order, and a temporary injunction. *Id.* at *2. Wells Fargo answered and filed a counterclaim for sanctions for filing a frivolous lawsuit. *Id.*

Tatum amended his pleadings to ask for (1) temporary injunctive relief, (2) a declaratory judgment regarding an alleged oral modification and associated attorney's fees, (3) breach of the alleged oral contractual modification, (4) statutory and common-law fraud, and (5) wrongful foreclosure. *Id.* Wells Fargo moved for summary judgment on both traditional and no-evidence grounds, seeking dismissal of all Tatum's claims and an award of attorney's fees as the prevailing party on the note. *Id.* Tatum responded that Wells Fargo, even though it had sought attorney's fees on a frivolous lawsuit counterclaim, had not sought attorney's fees for which it could recover under its summary judgment motion. *Id.* at *9. Tatum filed a controverting affidavit contesting the reasonableness of Wells Fargo's claimed fees. *Id.* The parties then executed a Rule 11 agreement allowing for late supplementation of Wells Fargo's summary judgment regarding attorney's fees. *Id.* Wells Fargo supplemented its motion and attached an affidavit supporting its supplement. *Id.* at *10.

At the summary judgment hearing, Tatum asked the court to approve the Rule 11 agreement and to allow the supplementation as agreed, which the court did. Tatum disputed Wells Fargo's entitlement to attorney's fees because it had not filed a counterclaim for the fees and because the fees were not reasonable or properly segregated. *Id.* Because the issue of Wells Fargo's attorney's fees claim was developed under circumstances that indicated Tatum and Wells Fargo understood the issue was before the court for resolution, the court of appeals held that the attorney's fees issue was tried by consent. *Id.*

Similarly, in this case, Appellee had no pleading asking the court to reimburse her for her Trust-related expenses from the Trust funds in the registry of the court. While the parties disagree regarding whether Appellee would have needed permission of the court to incur and be reimbursed for reasonable expenses in the absence of the funds being deposited in the court's registry, we need not decide that question to resolve this dispute. The parties agreed to the sale of Trust properties and, importantly, they agreed that the proceeds of those sales would be deposited into the court's registry and could not be disbursed except by agreement or by court order. By doing so, they knew that, absent an agreement, court intervention would be needed. It was not a question of if, only when.

The issue was raised at the pending motions hearing. Both parties requested a continuance to prepare for trial of the issue. The trial court made it abundantly clear that the issue would be tried at the next "final" hearing. Both parties briefed the issue for the court before the "final" hearing. The issue was vigorously tried and the trial court entered judgment regarding it.

Based on the authorities cited above, we conclude that the issue, as it was framed by the trial court in the judgment, and as we have framed it here, was tried by consent. We hold that the judgment conforms to the pleadings and we overrule Appellants' issue that the trial court's judgment should be reversed for nonconformance with the pleadings.

B. Preservation of Error on Hearsay Objection to DX 14

Appellants challenge the trial court's judgment awarding reasonable expenses, in part because they claim DX 14 was improperly admitted in evidence over Appellants' objections. DX 14 was an affidavit by Appellee. As noted above, it addressed not only the predicate issues for the business records exception to the hearsay rule but also various operative facts relevant to the issue of expenses, including an attached summary of expenses as well as purported supporting documents. Appellants first objected to DX 14 because it was not a proper business record and because it was not truthful. However, Appellants' counsel also stated he had no objection to DX 14 and that it could be considered by the court.

Appellants' arguments are not preserved for review. First, by Appellants stating that they had no objection and the exhibit could be considered, they failed to preserve this issue for review. *Weatherbee v. GMAC Mortg., LLC*, No. 01-11-00546-CV, 2012 WL 1454494, at *4 (Tex. App.—Houston [1st Dist.] Apr. 26, 2012, pet. dism'd w.o.j.) (mem. op.); *Tex. Dep't of Transp. v. Pate*, 170 S.W.3d 840, 850 (Tex. App.—Texarkana 2005, pet. denied) ("When a party affirmatively asserts during trial that he or she has 'no objection' to the admission of the complained-of evidence, any error in the admission of the evidence is waived . . . ."). Further, the trial court did not rule on the objections which Appellants' counsel initially stated. Failure to obtain a ruling on an objection waives any complaint in the admission of the evidence. Tex. R. App. P.

33.1(a)(1); *Nat'l Carriers, Inc. v. Ray*, No. 04-01-00413-CV, 2003 WL 1964064, at *2 (Tex. App.—San Antonio Apr. 30, 2003, no pet.) (mem. op.).

Appellants objected again to DX 14 on the day following its admission into evidence. However, that objection was untimely and failed to preserve any error for review. *In re A.M.*, 2004 WL 314942, at *1–2 (party must object at time evidence is offered to preserve complaint on appeal.). Like the previous day, the court did not rule on the new objection so, again, any error was waived.

We overrule Appellants' issue as it relates to the trial court's judgment being improper because of the admission of DX 14.

C. Legal and Factual Sufficiency of the Evidence of Reasonableness of Expenses

A trial court "unquestionably ha[s] *quasi in rem* jurisdiction to determine who owns funds tendered into [its] registry." *Madeksho v. Abraham, Watkins, Nichols & Friend*, 112 S.W.3d 679, 686 (Tex. App.—Houston [14th Dist.] 2003, pet. denied) (en banc, plurality op. on reh'g) (citing *Bryant v. United Shortline Inc. Assurance Servs., N.A.*, 972 S.W.2d 26, 29 (Tex. 1998)). "[M]oney cannot be paid out of the registry of a court except on written evidence of the order of the judge of the court in which the funds have been deposited, authorizing the disbursement of the funds." *Eikenburg v. Webb*, 880 S.W.2d 781, 782 (Tex. App.—Houston [1st Dist.] 1993, orig. proceeding). Funds on deposit in the registry of a trial court are always subject to the control and order of the trial court, and the court enjoys great latitude in dealing with them. *Burns*

v. Bishop, 48 S.W.3d 459, 467 (Tex. App.—Houston [14th Dist.] 2001, no pet.). Appellate courts review a trial court's order disbursing funds from the trial court's registry for an abuse of discretion. *Troutman v. Interstate Promotional Printing Co.*, 717 S.W.2d 428, 430 (Tex. App.—San Antonio 1986, writ ref'd n.r.e.). An abuse of discretion occurs when the trial court acts in an arbitrary and unreasonable manner or without regard to guiding rules and principles. *In re Nationwide Ins. Co. of Am.*, 494 S.W.3d 708, 712 (Tex. 2016) (orig. proceeding). It is an abuse of discretion for the trial court to rule without supporting evidence. *Bocquet v. Herring*, 972 S.W.2d 19, 21 (Tex. 1998). When making this determination, appellate courts must view the evidence in the light most favorable to the trial court's ruling and indulge every presumption in its favor. *Aquaduct, L.L.C. v. McElhenie*, 116 S.W.3d 438, 444 (Tex. App.—Houston [14th Dist.] 2003, no pet.).

Funds tendered into the court's registry are subject to the trial court's control and the court has the equitable power to make such orders as it deems necessary to protect those funds. *In re Victory Energy Corp.*, 431 S.W.3d 728, 730 (Tex. App.—El Paso 2014, orig. proceeding); *Northshore Bank v. Com. Credit Corp.*, 668 S.W.2d 787, 790 (Tex. App.—Houston [14th Dist.] 1984, writ ref'd n.r.e.). Funds paid into the registry of the court which are subject to payment of attorney's fees require proof to the court of the reasonableness of the fees. *Pitman v. Sanditen*, 611 S.W.2d 663, 668 (Tex. App.—San Antonio 1980), *aff'd in part, rev'd in part on other grounds*, 626 S.W.2d 496 (Tex. 1981); *Grand Lodge Colored Knights of Pythias of Tex. v. Watson*, 145 S.W.2d 601,

603 (Tex. App.—Waco 1940, no writ). Further, trustees seeking to recover their expenses from trust funds in the registry of the court must establish the reasonableness of their expenses. *Harris Cnty. v. Wilkinson*, 540 S.W.2d 541, 543 (Tex. App.—Houston [14th Dist.] 1976, no pet.) (holding that county which had managed trust fund of plaintiffs in court's registry after conclusion of interpleader action had burden of proof to establish reasonableness of its charges for managing the funds to recover them upon final distribution).

In *Rohrmoos Venture v. UTSW DVA Healthcare, LLP*, the Texas Supreme Court made clear that recovery of attorney's fees, regardless of the legal theory being asserted to recover them, requires proof of reasonableness and necessity of the services, despite the use of the terms "reasonable," "necessary," "reasonable and necessary," or other similar phrases in the applicable contract or statutory language. 578 S.W.3d 469, 488–89 (Tex. 2019). "When a claimant wishes to obtain attorney's fees from the opposing party, the claimant must prove that the requested fees are both reasonable and necessary." *Id.* at 489. Although this case does not involve "fee shifting" directly from one party to another as described in *Rohrmoos*, the net effect of granting Appellee her expenses will be to reduce the amount of money to be distributed to the Appellants as Trust beneficiaries. Thus, we hold that the requirements of *Rohrmoos* are applicable.

In *Rohrmoos*, the court further observed that both reasonableness and necessity are fact issues to be decided by the trier of fact. *Id.* Proof of the reasonableness and

necessity of attorney's fees requires expert testimony. *Jones v. Patterson*, No. 11-17-00112-CV, 2019 WL 2051301, at *9 (Tex. App.—Eastland May 9, 2019, no pet.) (mem. op.); *Woodhaven Partners, Ltd. v. Shamoun & Norman, L.L.P.*, 422 S.W.3d 821, 830 (Tex. App.—Dallas 2014, no pet.); *see Rohrmoos Venture*, 578 S.W.3d at 490 ("Historically, claimants have proven reasonableness and necessity of attorney's fees through an expert's testimony—often the very attorney seeking the award—who provided a basic opinion as to the requested attorney's fees.").

The *Rohrmoos* court held that the lodestar method of calculating attorney's fees would be the accepted method of establishing the reasonableness and necessity of the fees. 578 S.W.3d at 497–98. The Court summarized the lodestar process as follows:

> We reaffirm today that the fact finder's starting point for calculating an attorney's fee award is determining the reasonable hours worked multiplied by a reasonable hourly rate, and the fee claimant bears the burden of providing sufficient evidence on both counts. *See El Apple*, 370 S.W.3d at 760. Sufficient evidence includes, at a minimum, evidence of (1) particular services performed, (2) who performed those services, (3) approximately when the services were performed, (4) the reasonable amount of time required to perform the services, and (5) the reasonable hourly rate for each person performing such services. *See id.* at 762–63. This base lodestar figure should approximate the reasonable value of legal services provided in prosecuting or defending the prevailing party's claim through the litigation process. *Cf. Blanchard v. Bergeron*, 489 U.S. 87, 93, 109 S. Ct. 939 . . . (explaining that a fee-shifting statute "contemplates reasonable compensation . . . for the time and effort expended by the attorney for the prevailing [party], no more and no less"). And the lodestar calculation should produce an objective figure that approximates the fee that the attorney would have received had he or she properly billed a paying client by the hour in a similar case. *See Perdue*, 559 U.S. at 551, 130 S. Ct. 1662 (noting that "the lodestar method produces an award that roughly approximates the fee that the prevailing attorney would have received if he or she had been representing a paying

> client who was billed by the hour in a comparable case" (emphasis in original)). This readily administrable and objectively reasonable calculation is the standard for calculating the reasonableness and necessity of attorney's fees in a fee-shifting situation. *See id.* at 551–52, 130 S. Ct. 1662 (recognizing that the lodestar method is administrable and objective, cabins discretion of trial court judges, permits meaningful judicial review, and produces reasonably predictable results).

Id. at 498.

What evidence of reasonable and necessary attorney's fees exists in this case? Due to a failure to timely disclose expert testimony under the rules of procedure, the trial court precluded Appellee from offering her attorney's testimony on the reasonableness of his services. The court did allow him to testify as to the total number of hours worked by members of his firm and their hourly rates set by the contract between the attorney and Appellee, as noted above. That calculation resulted in a total fee of $71,882.40. The only other fee evidence is found in DX 14, which reflects attorney's fees of $51,004.74. We therefore have some evidence of the lodestar calculation, a contract for attorney's services and fees, the total amount of the time expended, and the total amount of fees incurred. We have no evidence of the details of the work performed, by whom, why, or when. Thus, we have no evidence of the reasonableness or necessity of the work performed.

We hold that the evidence in this case is legally and factually insufficient under the lodestar method to support the court's finding and award of "reasonable" expenses in the form of attorney's fees. *Lopez v. Bailon*, No. 07-14-00442-CV, 2016 WL 4158034, at *5 (Tex. App.—Amarillo Aug. 4, 2016, no pet.) (mem. op.) (holding

evidence of attorney's fees was legally and factually insufficient where the only evidence offered was that the attorney "spent 33 hours in different court hearings, drafting pleadings, research, mediation, client consultation" at a rate of $275 per hour, requiring that the case be reversed and remanded for a re-trial on attorney's fees); *see Spence v. Hadley*, No. 11-19-00389-CV, 2021 WL 4998863, at *7, *8 (Tex. App.—Eastland Oct. 28, 2021, no pet.) (mem. op.) (holding evidence was legally and factually insufficient where the only information provided regarding attorney's fees was in two sentences: "Attorney's fees billed and estimated through arguments on Summary Motion to Remove Invalid Lien pursuant to Texas Property Code § 53.156. Attorney's fees are billed at a rate of $200 per hour."); *see also Bishara v. Tex. Health Harris Methodist Hosp. Fort Worth Inc.*, No. 02-20-00316-CV, 2021 WL 3085748, at *6 (Tex. App.—Fort Worth July 22, 2021, no pet.) (mem. op.).

We also hold that the evidence of other expenses is legally and factually insufficient. DX 14 lists a variety of expenses but with little explanation of their relevancy to the Trust or the goods or services they represent. While there is some testimony regarding these items, there is an insufficient basis in the record for the trial court to have made a determination of the reasonableness of the expenses. Appellee had the burden of proof to show the reasonableness of the expenses she was seeking to recover from the Trust's funds. *Harris Cnty.*, 540 S.W.2d at 543.

We sustain Appellants' issue on the basis that there was legally and factually insufficient evidence of the reasonableness of the expenses for which Appellee sought

reimbursement from the Trust funds in the registry of the court. Such being the case, we reverse the judgment of the trial court on this issue and remand the case to the trial court for another trial on the amount of reasonable expenses which should be awarded to Appellee from the funds in the registry of the court. *Spence*, 2021 WL 4998863, at *8; *Bishara*, 2021 WL 3085748, at *6; *Lopez*, 2016 WL 4158034, at *5; *Baja Energy, Inc. v. Ball*, 669 S.W.2d 836, 840 (Tex. App.—Eastland 1984, no writ) (holding that where a party is entitled to recover litigation expenses, including attorney's fees, at equity but the reasonableness and necessity of those expenses was not proved, the case should be remanded for a new trial on those issues).

IV. Conclusion

Having sustained Appellants' issue that the trial court erred in awarding expenses to Appellee from the court's registry funds, we reverse that portion of the trial court's judgment and remand the case for a new trial on that issue.

/s/ Mike Wallach

Mike Wallach
Justice

Delivered: June 16, 2022