NUMBER 13-15-00431-CV

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI – EDINBURG

THUNDER ROSE ENTERPRISES, INC.
AND MICHAEL J. PALMER, **Appellants,**

v.

BILLY R. KIRK AND KIRK OILFIELD
EQUIPMENT SALES, INC., **Appellees.**

On appeal from the 24th District Court
of Goliad County, Texas.

MEMORANDUM OPINION

Before Justices Rodriguez, Contreras, and Longoria
Memorandum Opinion by Justice Contreras

This case involves Michael Palmer's invention of a pressure-equalizing gate valve for use in the oil and gas industry. The principal question is whether a partnership agreement was reached to produce and market the valve. A Goliad County jury found that such an agreement did exist and that it was breached by appellants Palmer and

Thunder Rose Enterprises, Inc. (Thunder Rose). The trial court rendered judgment ordering the parties to specifically perform their agreement and awarding attorney's fees and court costs to appellees Billy R. Kirk and Kirk Oilfield Equipment Sales, Inc. (collectively, Kirk).

On appeal, appellants argue by eleven issues that (1) the evidence was insufficient to support the judgment, (2) the award of specific performance was error, (3) the jury charge contained error, (4) it was error to exclude certain evidence, and (5) the award of attorney's fees and costs was improper. We affirm as modified in part and reverse and remand in part.

I. Factual Background

After developing his valve invention for over twenty years, Palmer completed a prototype made out of wood and plastic in 2007. He applied for a patent and assigned the patent rights to Thunder Rose, a company owned by his two daughters.[1] Preparing to market the valve, Thunder Rose filed trademark applications for "Bullhead," "Bullhead Control Systems," and "Box Carrier."

In 2008, Palmer contacted Billy Kirk, whom he had known and done business with since the 1970s, in an effort to obtain financing to test and market the valve. In November 2008, Palmer met with Kirk at Kirk's office to show him the prototype. Kirk and his associate Dickie McGee, who together owned a company called Thrubore Valves LLC (Thrubore), had discussions about forming an entity, to be called Excalibur Control Systems (Excalibur), which would own the license to produce and market the valve.

[1] Palmer, who is of an advanced age, established Thunder Rose so that his daughters could benefit from his invention. Palmer is an officer and director, but not owner, of Thunder Rose.

In April 2009, Palmer, McGee, and Kirk met with Paul Wang, the operator of a Chinese manufacturer called Centermart. At the meeting, McGee, Kirk, and Wang each signed a non-disclosure agreement (NDA) stating in part that nothing in the NDA created a partnership. According to Kirk, he and Palmer agreed at the April 2009 meeting that Thrubore would pay Centermart to build a fully-functional prototype of the valve made of steel. In May, Kirk set up a Wells Fargo bank account in the name of Excalibur with Palmer, Kirk, and McGee listed as signatories. Thrubore began advancing funds through Excalibur for development of the prototype valve, including funds paid to Palmer's lawyer for patent work. Appellants note, however, that Thrubore accounted for those payments on its books as notes receivable rather than as equity or investments.

Also in 2009, Kirk and McGee prepared a draft agreement for Excalibur stating that the parties did not intend to form a partnership or joint venture. Under the draft agreement, McGee and Kirk would each contribute $100,000 in capital and Palmer would assign the valve patent rights to Excalibur. The agreement was never executed.

Appellants, on the other hand, proposed that Excalibur would be jointly owned by Thunder Rose and Thrubore. In exchange, Thrubore would contribute $5 million into Excalibur. Thrubore did not have $5 million in cash, so it suggested that it would sell the valves packaged with other used oilfield equipment it already owned. Additionally, Kirk and McGee approached Wells Fargo about obtaining a $2 million loan in order to provide the financing contemplated by Thunder Rose. Wells Fargo declined to approve the loan.

Meanwhile, in February 2010, Centermart's prototype valve was delivered to Kirk's office. Kirk and his employee Victor Barron took the prototype to RAM International, a machine shop in Corpus Christi. RAM International pressure-tested the valve and found that it tested well, but Palmer did not approve of certain changes to the design which he claimed made the valve less safe.

Later in 2010, a dispute arose between Kirk and McGee. Kirk filed suit against McGee seeking to dissolve Thrubore and terminate their business relationship. A settlement agreement was reached in June 2012 under which Kirk received $1.3 million in cash and over $100,000 in Thrubore's inventory. According to appellants, Kirk had substantial outstanding debts to the IRS and sought to raise cash as soon as possible by pushing the valve to market, without regard to concerns expressed by Palmer that the design was inadequately developed.

After Kirk severed ties with McGee, he hired Barron, who had a relationship with Douson, another Chinese manufacturing concern. Barron, Palmer, and Kirk met with a Douson representative in April 2010, and Kirk ordered a prototype valve from Douson in May. In August, Palmer went with one of his daughters to Douson's facility in China to oversee testing of the first prototype. When the first prototype was delivered, Palmer began to make modifications to the valve for safety and operational reasons, which Palmer testified was standard procedure.

In September 2010, Kirk's attorney, Lee Lewis, prepared a document with a diagram outlining the broad contours of a license agreement between Thunder Rose and Kirk. Under the diagram, Kirk would provide financing in the form of $1 million in equity and $3 million in a credit line. The parties dispute as to whether they agreed that the diagram would represent the business relationship between Thunder Rose and Kirk regarding the licensing of the valve.

Subsequently, Kirk ordered ten additional valves from Douson. According to appellants, Kirk did not notify Palmer of the order, and Palmer had not yet completed modifications to the prototype which were necessary to make the valve safe to use. Appellants later alleged that Kirk undertook a number of other actions that misrepresented the valve's state of development and jeopardized their intellectual property rights, including attempting to sell the valves without conducting proper field testing.

In June 2011, Kirk's attorney sent a draft agreement to Palmer's attorney to establish a Delaware limited liability corporation called Bullhead Control Systems, LLC (Bullhead) which would own the patent, trademark, and distribution rights on the valve. Under this draft agreement, Kirk would be responsible for a $750,000 capital contribution, and Thunder Rose would contribute 100% in the rights in the patent. The draft Bullhead agreement was never executed.

II. Procedural Background

The instant dispute began in earnest on September 7, 2011, when Palmer proposed granting Kirk a non-exclusive license to develop and market the valve. On September 12, 2011, Palmer's attorney sent cease and desist letters demanding that Kirk immediately cease all marketing, sales, and distribution activities in connection with the valve, including using the trademark "Bullhead."

Kirk filed suit on September 26, 2011 alleging that he and Palmer had formed a partnership in 2008 to develop, construct, market, and sell the valve. Kirk alleged that Palmer breached his duty of loyalty to Kirk, causing damages, by "prevent[ing Kirk] from realizing and enjoying profits from business opportunities presented to the partnership" and by "negotiat[ing] and enter[ing] into a competing agreement with a third party in an effort to deprive [Kirk] of available business opportunities."[2]

[2] In May of 2012, appellants removed the case to the United States District Court for the Southern District of Texas. *See* 28 U.S.C.A. § 1446 (West, Westlaw through P.L. 114-327). Two years later, the

Kirk's live petition, dated June 12, 2014, added Thunder Rose as a defendant and added allegations that both appellants breached the partnership agreement and misappropriated trademarks.[3] Kirk requested a declaratory judgment stating that a partnership exists, that the cease and desist letters are null and void, that Kirk is the rightful licensee and assignee of the patent and trademark rights to the valve, and that Kirk is entitled to 50% of all past and future profits from the valve. Kirk further requested actual damages, exemplary damages, and specific performance of the alleged partnership agreement. Appellants answered the suit and filed a counterclaim seeking, among other things, a declaration that they owned the valve trademarks. Appellants denied that there was an oral partnership agreement but argued in the alternative that, if there was a partnership, Kirk breached his fiduciary duties owed to the partnership. Both sides sought attorney's fees.

Following trial, the trial court found as a matter of law that there was no written agreement between the parties other than the April 2009 NDA. However, the jury found that appellants entered into an oral partnership agreement with Kirk. The jury specifically found that the agreement contained the following terms: (1) Kirk was to supply financing and funding for the development and production of the valve; (2) the parties were to "split profits from the sale and marketing of the valve" 50/50, with Kirk recouping his expenses from his 50% share; (3) the parties were to "share losses and liability to third parties from the valve" 50/50; and (4) appellants were to assign Kirk an exclusive worldwide right or

---

federal court remanded the case back to state district court upon finding *sua sponte* that it lacked subject matter jurisdiction.

[3] The live petition asserted "alternative causes of action" under theories of promissory estoppel, unjust enrichment, breach of fiduciary duty, misappropriation of corporate opportunity, fraud and fraud in the inducement, and conversion.

license to sell and market the valve. The jury found that appellants breached each of those terms.[4] The jury additionally found that appellants own the three trademarks at issue; that Kirk is ready, willing, and able to perform under the partnership agreement; that Kirk substantially performed under the partnership agreement before the cease and desist letters were sent; and that Kirk did not breach any fiduciary duties owed to appellants.[5]

On June 12, 2015, the trial court rendered judgment on the verdict, declaring that a partnership exists with terms as found by the jury and that the cease and desist letters are null and void. The judgment ordered the parties to specifically perform under the partnership agreement; in particular, it ordered appellants to assign to Kirk an exclusive worldwide license to sell and market the valve, and to pay Kirk fifty percent of any past profits from the valve. The judgment stated that appellants are owners of the trademarks at issue. Finally, the judgment awarded Kirk $272,552.11 in reasonable and necessary trial attorney's fees, as well as $25,000 "for post-judgment enforcement which the Court finds is reasonable and probably necessary"; $50,000 in the event of an unsuccessful appeal to this Court; $25,000 in the event of an unsuccessful petition for review to the Texas Supreme Court; and court costs. Appellants filed a motion for new trial as well as a motion to disregard certain jury findings and to modify, correct, or reform the judgment.

---

[4] The jury also found that, under the partnership agreement, the parties would share equal rights to participate in control of the business. The jury charge did not ask whether appellants breached this provision, however.

[5] Because the jury found that a partnership agreement existed, it was instructed not to answer questions concerning the April 2009 NDA or concerning Kirk's "alternate claims" of promissory estoppel, fraud, and unjust enrichment.

Both motions were denied by operation of law. *See* TEX. R. CIV. P. 329b(c). This appeal followed.[6]

III. DISCUSSION

A. Partnership Agreement

We first address appellants' arguments regarding the jury's findings that an oral partnership agreement existed and that appellants breached that agreement. Appellants contend there was legally and factually insufficient evidence to support those findings, and they also contend that an oral partnership agreement is precluded by the statute of frauds.

1. Standard of Review

In determining whether evidence is legally sufficient to support a jury finding, the ultimate test is whether the evidence would enable reasonable and fair-minded people to make the finding. *City of Keller v. Wilson*, 168 S.W.3d 802, 827 (Tex. 2005). Evidence will be legally insufficient to support the finding if the record reveals: (1) the complete absence of evidence of a vital fact; (2) that the court is barred by the rules of law or evidence from giving weight to the only evidence offered to prove a vital fact; (3) that the evidence offered to prove a vital fact is no more than a scintilla; or (4) that the evidence establishes conclusively the opposite of a vital fact. *Id.* at 810. In a legal sufficiency review, we view the evidence in the light most favorable to the finding, and we assume that jurors credited testimony favorable to the verdict and disbelieved testimony contrary to it. *Id.* at 819. We defer to the jury's determination as to the credibility of the witnesses

[6] On December 11, 2015, we abated the appeal upon being notified that Palmer had filed for bankruptcy in the United States Bankruptcy Court for the Eastern District of Texas. *See* TEX. R. APP. P. 8.2. The bankruptcy proceeding was dismissed and we reinstated the appeal in April of 2016.

and the weight to give their testimony, and we indulge every reasonable inference in support of the finding. *Id.* at 819, 822.

In reviewing a factual sufficiency challenge to a jury finding on issues which the appellant did not have the burden to prove, as here, we will set aside the verdict only if the evidence that supports the finding is so weak as to make the verdict clearly wrong and manifestly unjust. *Cain v. Bain*, 709 S.W.2d 175, 176 (Tex. 1986) (per curiam); *Ins. Network of Tex. v. Kloesel*, 266 S.W.3d 456, 469–70 (Tex. App.—Corpus Christi 2008, pet. denied). In a factual sufficiency review, we consider and weigh all the evidence, but as in a legal sufficiency review, we defer to the jury as the sole judge of the witnesses' credibility. *Dow Chem. Co. v. Francis*, 46 S.W.3d 237, 242 (Tex. 2001); *see Golden Eagle Archery, Inc. v. Jackson*, 116 S.W.3d 757, 761 (Tex. 2003).

Under both legal and factual sufficiency standards, the jury may choose to believe one witness over another, and a reviewing court may not impose its own opinion to the contrary. *City of Keller*, 168 S.W.3d at 819; *Golden Eagle Archery*, 116 S.W.3d at 761.

2. Existence of Agreement

By part of their first issue, appellants contend that the evidence was legally and factually insufficient to support a finding that they entered into an oral partnership agreement with Kirk.

A "partnership" is "an association of two or more persons to carry on a business for profit as owners," regardless of whether the persons "intend to create a partnership" and regardless of what the association is called. TEX. BUS. ORGS. CODE ANN. § 152.051(b) (West, Westlaw through 2015 R.S.); *see Ingram v. Deere*, 288 S.W.3d 886, 898 (Tex. 2009) ("The terms used by the parties in referring to the arrangement do not control[.]"). In determining whether a partnership has been created, we consider whether the persons involved: (1) received or had the right to receive a share of the business's profits; (2) expressed an intent to be partners in the business; (3) participated or had the right to participate in control of the business; (4) agreed to share or shared the business's losses or liability for claims by third parties against the business; and (5) agreed to contribute or contributed money or property to the business. TEX. BUS. ORGS. CODE ANN. § 152.052(a) (West, Westlaw through 2015 R.S.). The absence of any evidence of these factors will preclude the recognition of a partnership, and even conclusive evidence of only one factor normally will be insufficient to establish the existence of a partnership. *Ingram*, 288 S.W.3d at 898; *see* TEX. BUS. ORGS. CODE ANN. § 152.052(b) (providing that the right to receive a share of profits or revenues will not, by itself, indicate that a person is a partner in a business, nor will the co-ownership of property). On the other hand, conclusive evidence of all the factors will establish the existence of the partnership as a matter of law. *Ingram*, 288 S.W.3d at 898. Whether a partnership exists must be determined by an examination of the totality of the circumstances. *Id.* at 903–04.

At trial, Kirk testified as follows with respect to their November 2008 meeting:

> A. Palmer brought the model into my office, laid it on the desk and started explaining to me how it worked. I must have looked at it for maybe an hour, checking it out. I put my hands on it, pulled the box carrier out. We looked at the little equalizer gates. I said, well, the specs are correct, and if it will fit inside of a valve it will work. So we talked a little more about it. And then we was talking about a partnership. Palmer wanted me to be his partner. He said he didn't want anybody else to be his partner. He wanted me to be his partner. So we discussed what it would take to make our partnership work.
>
> Q. And what were those terms?
>
> A. My obligation was to finance the whole operation, including, including his crane needed fixing; offices needed fixing; computers need to be put in. This was just preliminary. We were just discussing what would happen, you know, and how it would work. We visited for about three hours. . . . That's where me and Palmer had a meeting

> of the mind was in my office and we talked about the whole thing. We agreed on the agreement, shook hands. Palmer took his prototype and went to San Antonio to visit his sick uncle.
>
> Q. Tell me about the terms of the agreement. . . . What terms did you have a meeting of the minds over?
>
> A. My obligation was to finance the building of the valve, the manufacture, the marketing, production and sale of the valve. Palmer's obligation was to put up 100 percent exclusive rights worldwide perpetual to me for exclusive rights to manufacture, market and sell and distribute the valve.
>
> Q. Did you come to any other agreements that day for the partnership, terms of the partnership? Did you discuss profits and losses, for example?
>
> A. Oh, yes, yes, we did. We decided that I was the only one to manufacture the valve. He was the technician. He was the inventor and when we got our business going the profits was 50-50. The losses were 50-50.
>
> Q. What about the, did you discuss with him and come to an agreement on the control, the right to control the business?
>
> A. It was between me and him. We both controlled it together. That was our decision.
>
> Q. Was it your idea to make it 50-50?
>
> A. No. I offered him 51 percent and me 49 because he was the inventor and I trusted Palmer to do what we agreed to. I had no reason not to trust him throughout the years.
>
> Q. So you had suggested 51-49?
>
> A. I suggested to him 51 and 49 and he turned around and said, well, if we're going to be partners, how would you feel about 50-50? I said, well, that's better for me. If that's what you want to do that's what we'll do—50-50.

Lewis, Kirk's attorney, also testified that Kirk and Palmer had reached an oral agreement as to a partnership. Lewis stated:

> [Palmer and Kirk] called each other partners. They held each other out as partners. They each had equal control of the business. They were both contributing money and they were both agreeing that whatever losses the

> company would sustain would be shared equally so in my view, they said they were partners and everything they did agreed with that conclusion.

Kirk argues that this testimony addresses the five factors set forth in the business organizations code and is alone sufficient to allow the jury to conclude that a partnership agreement was reached.

We agree. According to Kirk's testimony, he and Palmer both expressed an intent to establish a business in which they would share equally in both the profits and losses. *See* TEX. BUS. ORGS. CODE ANN. § 152.052(a)(1), (2), (4). Kirk testified that he and Palmer agreed to share control of the business, and there was evidence that they did, in fact, share in such control. In a June 2011 email asking representatives of Douson to disregard a statement made by one of Kirk's employees, Palmer stated that "[d]esign changes can only be authorized by Billy Kirk or Michael J. Palmer." This constitutes some evidence from which the jury could have concluded that Palmer and Kirk each participated or had the right to participate in control of the business. *See id.* § 152.052(a)(3). Finally, it is undisputed that, from 2008 to 2011, both Kirk and Palmer spent thousands of dollars of their own money in efforts to develop and market the valve. *See id*. § 152.052(a)(5). In particular, evidence was adduced at trial indicating that Kirk spent over $400,000 of his own funds in connection with developing the valve, including payments made to Thunder Rose's patent counsel, payments made to Palmer directly, and payments made to Douson for the manufacturing of prototypes.

Additionally, there was ample evidence that Palmer publicly held Kirk out to be his partner with respect to the development and marketing of the valve. For example, in a May 2011 email to Kirk's employee regarding a brochure for potential valve purchasers, Palmer referred to himself as "Billy's favorite partner." Palmer also referred to Kirk as his "partner" in his June 2011 email to representatives of Douson. "[M]erely referring to another person as 'partner' in a situation where the recipient of the message would not expect the declarant to make a statement of legal significance is not enough" to establish a partnership. *Ingram*, 288 S.W.3d at 900. But here, there was evidence showing Palmer referred to Kirk as his partner in communications with people involved with the valve project. Taken together with Kirk's and Lewis's testimony, this evidence is probative as to whether the parties expressed an intent to form a partnership. *See id*. § 152.052(a)(2).

Appellants note that there were no profits actually generated from any sales of the valve, and they argue that there was no "mechanism" to distribute profits such as a line of credit or bank account. They further argue that, although the parties generally kept written records of all other transactions and entities, there were no accounting records, tax records, jointly titled property, or other financial documents indicating that a partnership existed to develop and market the valve. But there was evidence that Kirk set up a bank account in the name of Excalibur with Palmer, McGee, and Kirk listed as signatories. In any event, even if there was evidence supporting an inference that no partnership exists, we must assume that the jury disbelieved that evidence. *See City of Keller*, 168 S.W.3d at 819.

Appellants emphasize that, despite several rounds of negotiation, the parties were never able to reach an agreement as to a patent license. But the fact that the parties never executed a written agreement as to a license does not preclude a finding that they separately agreed orally to be partners. Appellants also note that the June 2011 draft Bullhead agreement provided that no partnership was being formed, and the April 2009

NDA stated that the NDA did not establish a partnership.[7] Again, to the extent this evidence supports a finding that no partnership was intended, the jury was entitled to reject it. *See id.* The jury could have instead believed Kirk's theory that the negotiations to create Bullhead, and to grant intellectual property licenses to that entity, constituted an effort to convert the existing partnership into a corporate form.

Considering the totality of the circumstances in light of the five factors set forth in the business organizations code, we conclude that the evidence could enable reasonable and fair-minded people to find that a partnership agreement existed, and that this evidence was not so weak as to make the verdict clearly wrong or unjust. *See City of Keller*, 168 S.W.3d at 827; *Cain*, 709 S.W.2d at 176. We overrule this part of appellants' first issue.

3. Statute of Frauds

By their fourth issue, appellants argue that the statute of frauds precludes the existence of an oral partnership agreement. Appellants pleaded the statute of frauds generally as an affirmative defense in their live answer, *see* TEX. R. CIV. P. 94, and they raised the issue in their motion for new trial. Appellants also contend, by their fifth issue, that once the trial court determined as a matter of law that the April 2009 NDA was the only written agreement entered into by the parties, it should have granted a directed verdict in their favor on the basis of the statute of frauds.[8]

---

[7] Appellants argue that the NDA stated that "[Kirk] had no partnership interest relating to the valve" and that "the parties had no intent to form a partnership." That is incorrect; the NDA merely stated that nothing *in that agreement* should be construed as creating a partnership.

[8] The clerk's record provided to this Court does not contain a written motion for directed verdict. However, following trial, appellants' counsel orally re-urged a directed verdict motion purportedly filed in September 2014, and counsel explained that the motion was based at least in part on the statute of frauds applicable to agreements which are not to be performed within one year. *See* TEX. BUS. & COM. CODE ANN. § 26.01(b)(6) (West, Westlaw through 2015 R.S.). Accordingly, the directed verdict issue has been preserved for our review, but only to the extent it addresses this specific statute. *See* TEX. R. APP. P.

Under the statute of frauds, certain agreements must be in writing and signed by the person to be charged if they are to be enforceable. *See, e.g.*, TEX. BUS. & COM. CODE ANN. § 26.01 (West, Westlaw through 2015 R.S.). The party pleading the statute of frauds bears the initial burden of establishing its applicability. *Dynegy, Inc. v. Yates*, 422 S.W.3d 638, 641 (Tex. 2013). Once that party meets its initial burden, the burden shifts to the opposing party to establish an exception taking the oral contract out of the statute of frauds. *Id*. The question of whether the statute of frauds applies is a question of law subject to de novo review, *id.*, but the question of whether an exception to the statute of frauds applies is generally a question of fact. *Turner v. NJN Cotton Co.*, 485 S.W.3d 513, 520 (Tex. App.—Eastland 2015, pet. denied); *Adams v. H & H Meat Prods., Inc.*, 41 S.W.3d 762, 775 (Tex. App.—Corpus Christi 2001, no pet.). The parties hereto dispute both whether the statute of frauds applies and whether an exception applies.[9]

On appeal, appellants assert that various statutory provisions operate to bar an oral partnership agreement here. First, appellants note that, according to federal and state statutes, assignments of patents and trademarks must generally be made in writing. *See* 15 U.S.C.A. § 1060(a)(3) (West, Westlaw through P.L. 114-327) ("Assignments [of trademarks] shall be by instruments in writing duly executed."); 35 U.S.C.A. § 261 (West, Westlaw through P.L. 114-327) ("Applications for patent, patents, or any interest therein, shall be assignable in law by an instrument in writing."); TEX. BUS. & COM. CODE ANN.

33.1(a)(1); TEX. R. CIV. P. 268 ("A motion for directed verdict shall state the specific grounds therefor."); *Dillard v. Broyles*, 633 S.W.2d 636, 645 (Tex. App.—Corpus Christi 1982, writ ref'd n.r.e.) (noting that Rule 268 "does not require a formal written motion for instructed verdict" and that "[t]he requirement of specificity may be met with an oral motion").

[9] Kirk argued specifically that, even if the statute of frauds applies, the oral partnership agreement is enforceable because he partially performed the agreement. *See Thomas v. Miller*, 500 S.W.3d 601, 609 (Tex. App.—Texarkana 2016, no pet.) (noting that partial performance is an exception to the statute of frauds); *Choi v. McKenzie*, 975 S.W.2d 740, 743 n.2 (Tex. App.—Corpus Christi 1998, pet. denied) (same).

§ 16.061 (West, Westlaw through 2015 R.S.) ("An assignment [of a trademark] must be made by a properly executed written instrument . . . ."). We disagree that these statutes apply here. The agreement at issue here is not an assignment of a patent or trademark but is rather an agreement to enter into a partnership—i.e., an association to carry on a business for profit as owners. *See* TEX. BUS. ORGS. CODE ANN. § 152.051(b). Although the agreement contemplated that Palmer would convey to the partnership a worldwide license to manufacture, market and sell the valve, patent licenses are not subject to the statute of frauds. *See Waymark Corp. v. Porta Sys. Corp.*, 334 F.3d 1358, 1364 (Fed. Cir. 2003) ("Only assignments need be in writing under 35 U.S.C. § 261. Licenses may be oral.").

Appellants further cite a statute providing that "[a] promise to make a contribution or otherwise pay cash or transfer property to a limited liability company" is enforceable only if it is in writing and signed by the person making the promise. TEX. BUS. ORGS. CODE ANN. § 101.151 (West, Westlaw through 2015 R.S.). This statute is not applicable here because the partnership agreement neither contained nor contemplated a promise to make a contribution to a limited liability company.

Finally, appellants contend that the agreement is subject to the statute of frauds applicable to agreements "which [are] not to be performed within one year from the date of making the agreement." TEX. BUS. & COM. CODE ANN. § 26.01(b)(6) (West, Westlaw through 2015 R.S.). This statute bars only oral contracts that cannot be completed within one year. *Niday v. Niday*, 643 S.W.2d 919, 920 (Tex. 1982); *Gerstacker v. Blum Consulting Eng'rs, Inc.*, 884 S.W.2d 845, 849 (Tex. App.—Dallas 1994, writ denied). A contract that could *possibly* be performed within a year, however improbable performance within one year may be, does not fall within the statute of frauds. *Beverick v. Koch Power,* *Inc.*, 186 S.W.3d 145, 149 (Tex. App.—Houston [1st Dist.] 2005, pet. denied) (citing *Hall v. Hall*, 308 S.W.2d 12, 15 (Tex. 1957)). The fact that the entire performance within one year is not required, or expected, will not bring an agreement within the statute. *Id.*

Appellants assert that the purported agreement was "to develop, market, and sell the . . . valve worldwide during the patent's duration" and therefore "could not be completed in one year." *See* 35 U.S.C.A. § 154(a)(2) (West, Westlaw through P.L. 114-327) (providing generally that a patent term ends "20 years from the date on which the application for the patent was filed"). However, they do not direct us to any evidence in the record, and we find none, indicating that the partnership, or the patent license as contemplated in the agreement, would last for the entire term of the patent. Instead, the record establishes that each element of the agreement—including the assignment of the patent by appellants and the provision of funding by Kirk—could possibly be accomplished within one year.

We conclude that appellants did not meet their burden to show that the statute of frauds applies to the partnership agreement at issue. *See Dynegy, Inc.*, 422 S.W.3d at 641. We therefore need not address whether any exceptions to the statute of frauds, such as partial performance, are applicable. The trial court did not err in denying appellants' motions for directed verdict or new trial on this basis. We overrule appellants' fourth and fifth issues.

4. Breach

By the second part of their first issue, appellants contend that the evidence was legally and factually insufficient to support the jury's finding that appellants breached the oral partnership agreement.[10]

The jury answered six separate questions, labeled 1D to 1I in the jury charge, as to appellants' breach of the partnership agreement. Specifically, the jury found that appellants failed to comply with the following terms: "that [Kirk] would supply the development, financing, and funding for the production of the valve" (question 1D); that the parties were to "split the profits from the sale of valves 50-50" with Kirk recouping his expenses from his 50% share (question 1E); that the parties "would split the losses and liability to third parties from the valve 50-50" (question 1F); and that appellants would assign Kirk "an exclusive worldwide right or license to sell and market the valve" (question 1G). The jury also found that appellants breached the agreement by issuing the cease and desist letters in September 2011 (question 1H) and by "prevent[ing] third parties from doing business with the partnership" (question 1I).[11]

First, appellants contend that question 1D is "nonsensical" because appellants could not possibly fail to comply with a term that imposes a duty only on Kirk. Appellants also contend that the answer to question 1E is not supported by legally sufficient evidence because it was undisputed that the putative partnership generated no profits during the

---

[10] Kirk argues that appellants waived this issue by failing to cite legal authority in the section of their brief pertaining to sufficiency of the evidence supporting the breach findings. *See* TEX. R. APP. P. 38.1(i). We decline to find waiver because appellants cite authority setting forth the applicable standard of review and refer extensively to the record.

[11] We note that no damages were awarded for breach of contract. However, the judgment's award of specific performance was arguably permissible only upon a finding of breach. *See Marx v. FDP, LP*, 474 S.W.3d 368, 374 (Tex. App.—San Antonio 2015, pet. denied). Accordingly, we address the issue.

time period at issue. We agree. We further find that the jury's answer to question 1F was not supported by legally sufficient evidence because there was no indication that appellants or Kirk incurred any "losses or liability to third parties" in connection with the duties specified in the partnership agreement.

However, the remaining breach findings were supported by sufficient evidence. Lewis testified that Newman, Palmer's attorney, sent him an email on September 7, 2011, proposing to grant Kirk a non-exclusive license to market and sell the valve. Moreover, evidence showed that Palmer sent an email to Douson's representative on September 9, 2011, stating that Kirk is not his partner and directing Douson not to ship or sell any valve prototypes to Kirk. This evidence could allow a reasonable juror to conclude that appellants had breached the oral partnership agreement.

We sustain this part of appellants' first issue as to jury charge questions 1D, 1E, and 1F, but overrule it as to the remaining breach questions.

B. Breach of Fiduciary Duty

By their third issue, appellants contend that the evidence was legally and factually insufficient to support the jury's finding that Kirk did not breach any fiduciary duty. When a party challenges the sufficiency of the evidence supporting an adverse finding on an issue on which it has the burden of proof, that party must demonstrate on appeal that the evidence establishes, as a matter of law, all vital facts in support of the issue. *Dow Chem. Co.*, 46 S.W.3d at 241 (citing *Sterner v. Marathon Oil Co.*, 767 S.W.2d 686, 690 (Tex. 1989)). In reviewing such a challenge, we first examine the record for evidence that supports the finding, while ignoring all evidence to the contrary. *Id*. If there is no evidence to support the finding, we then examine the entire record to determine if the contrary proposition is established as a matter of law. *Id*. The issue should be sustained only if the contrary proposition is conclusively established. *Id*. (citing *Croucher v. Croucher*, 660 S.W.2d 55, 58 (Tex. 1983)). We view the evidence in the light most favorable to the finding, crediting favorable evidence if a reasonable fact finder could and disregarding contrary evidence unless a reasonable fact finder could not. *City of Keller*, 168 S.W.3d at 822, 827.

The relationship between partners is fiduciary in character and "imposes upon all the participants the obligation of loyalty to the joint concern and of the utmost good faith, fairness, and honesty in their dealings with each other with respect to matters pertaining to the enterprise." *Bohatch v. Butler & Binion*, 977 S.W.2d 543, 545 (Tex. 1998) (citing *Fitz–Gerald v. Hull*, 150 Tex. 39, 237 S.W.2d 256, 264 (1951)). Here, question 11 of the jury charge asked whether Kirk failed to comply with fiduciary duties he owed to appellants. The question included the following instruction:

> To prove that [Kirk] failed to comply with [his] fiduciary duties to [appellants], [appellants] must show:
>
> 1. The transaction in question was[[12]] fair and equitable to [appellants]; or
>
> 2. [Kirk] did not make reasonable use of the confidence that [appellants] placed in [him]; or

---

[12] As in original. The instruction was apparently based on Texas Pattern Jury Charge 104.2, which places the burden on the beneficiary of a transaction between fiduciaries to prove compliance with the beneficiary's duties by showing, among other things, that the transaction in question was fair and equitable to the other party. *See Lundy v. Masson*, 260 S.W.3d 482, 503 (Tex. App.—Houston [14th Dist.] 2008, pet. denied); *Balusik v. Kollatschny*, No. 01-99-01342-CV, 2002 WL 1822360, at *3 n.5 (Tex. App.—Houston [1st Dist.] Aug. 2, 2002, no pet.) (op. on reh'g). The instruction given here, however, placed the burden on appellants to show that Kirk failed to comply with his duties. Accordingly, this instruction likely should have read that appellants needed to show that the "transaction in question" was *not* fair and equitable to appellants. We note further that the charge does not state which specific transaction or transactions were "in question" with respect to this claim. Nevertheless, no party objected to question 11, and we therefore must evaluate the sufficiency of the evidence in light of the language actually submitted, not the hypothetically correct language. *See Osterberg v. Peca*, 12 S.W.3d 31, 55 (Tex. 2000) ("[I]t is the court's charge, not some other unidentified law, that measures the sufficiency of the evidence when the opposing party fails to object to the charge.").

3. [Kirk] failed to act in the utmost good faith and exercised [sic] the most scrupulous honesty toward [appellants]; or

4. [Kirk] placed [his] own interests before [appellants], used the advantage of [his] position to gain a benefit for [himself] at the expense of [appellants], or placed [himself] in a position where [his] self-interest might conflict with [his] obligations as a fiduciary; or

5. [Kirk] failed to fully and fairly disclose all important information to [appellants] concerning the transaction.

The jury answered "No."

Appellants set forth myriad ways in which they believe Kirk violated his fiduciary duties, including: (1) disregarding the cease and desist letters sent in September 2011; (2) field testing valves without modifications requested by Palmer and without proper insurance in place; (3) issuing brochures improperly suggesting that the valves, which were still to be tested, met American Petroleum Institute (API) standards; (4) attempting to sell untested, unmodified valves; (5) misrepresenting to Douson that Kirk was an owner of the valve design; (6) opening a bank account for Excalibur "in which [Kirk] was the only person that signed the signature card"; (7) providing information about the valve to third parties without requiring an NDA; and (8) "actively marketing the valve before appropriate testing and completion of design modifications" and without appellants' approval. Appellants assert that Kirk's "self-created financial problems" caused him to disregard his fiduciary obligations to the partnership. Kirk disputes each of the allegations. In particular, he points to evidence showing that there was no field testing done, that he believed he could use API trademarks in the valve brochures because the manufacturer was API-certified, and that Kirk and Palmer were named as authorized signers on the Excalibur bank account that Kirk set up.

Although they extensively cite the trial record, appellants offer no references to legal authority indicating that the specific actions purportedly taken by Kirk, even if they were conclusively established by the evidence, constitute breaches of his fiduciary duty. They also do not explain which of the duties listed in the jury charge were breached by any of the alleged actions. In any event, the evidence conflicted with regard to these actions and the jury was entitled to believe the contrary evidence. *See City of Keller*, 168 S.W.3d at 819; *Golden Eagle Archery*, 116 S.W.3d at 761. We therefore determine that the evidence did not conclusively establish that Kirk breached his fiduciary duties in any of the manners specified in the jury charge. Appellants' third issue is overruled.

C. Jury Charge Error

Appellants' sixth issue alleges that it was error for the trial court to include the following definition of "license" in the jury charge: "Permission to use the patented invention, which may be granted by a patent owner in exchange for a fee called a royalty or other consideration. A license may be granted in writing or orally. And it may be express or implied." Appellants argue that oral licenses arise "in the context of an estoppel affirmative defense to a patent infringement case" and "will not support an affirmative claim for a license when the statute of frauds applies." But appellants did not object to this definition at trial; therefore, the issue is waived. *See* TEX. R. APP. P. 33.1(a)(1); TEX. R. CIV. P. 272, 274. In any event, as we have already held, the statute of frauds does not apply to the partnership agreement in general, or to patent licenses specifically. *See Waymark Corp.*, 334 F.3d at 1364. The trial court did not abuse its discretion by including this definition in the charge. *See Shupe v. Lingafelter*, 192 S.W.3d 577, 579 (Tex. 2006) (noting that alleged charge error is reviewed for abuse of discretion). Appellants' sixth issue is overruled.

D. Specific Performance

By their second issue, appellants contend that the evidence was legally and factually insufficient to support the jury's finding that Kirk was "ready, willing, and able to perform [his] obligations under the partnership agreement" or its finding that Kirk substantially performed under the agreement.[13] By their seventh issue, appellants argue that the trial court "improperly charged the jury with 'substantial performance' as grounds for specific performance" because Kirk "neither plead[ed] substantial performance nor proved the elements for substantial performance."

Specific performance is an equitable remedy for breach of contract that may be awarded at the discretion of the trial court. *Marx v. FDP, LP*, 474 S.W.3d 368, 374 (Tex. App.—San Antonio 2015, pet. denied). An essential element in obtaining specific performance is that "the party seeking such relief must plead and prove he was ready, willing, and able to timely perform his obligations under the contract." *DiGiuseppe v. Lawler*, 269 S.W.3d 588, 593 (Tex. 2008). Moreover, to be entitled to specific performance, a party generally must show his own substantial compliance with the contract. *Glass v. Anderson*, 596 S.W.2d 507, 513 (Tex. 1980); *see DiGiuseppe*, 269 S.W.3d at 594 ("[T]o be entitled to specific performance, the plaintiff must show that it has substantially performed its part of the contract, and that it is able to continue performing its part of the agreement."). But when the defendant refuses to perform or repudiates a contract, the plaintiff may be excused from actually tendering his or her performance to the repudiating party. *DiGiuseppe*, 269 S.W.3d at 594.

[13] Appellants further argue by their eighth issue that specific performance is not available as a remedy "when the alleged partner willfully departs from the alleged agreement's terms" and "omits an essential point of the alleged agreement." They do not support this issue with any references to authority; accordingly, it is waived. *See* TEX. R. APP. P. 38.1(i).

Appellants argue that the partnership agreement called for Kirk to provide financing in the form of $1 million in equity and a $3 million line of credit, but that Kirk did not obtain that financing and could not do so because of a prior felony conviction. Appellants contend that Lewis, Kirk's attorney, admitted that the partnership agreement took the form of the diagram he created in September 2010, which called for Kirk to provide financing in this amount. But according to Kirk, Lewis's diagram was not intended to represent the partnership arrangement, but rather was intended to demonstrate the parties' plan to convert the then-existing partnership into a limited liability company. The jury was entitled to believe Kirk's theory.

We conclude that the evidence was sufficient to support the jury's findings. Although Kirk was not able to obtain a personal loan to secure the funding, Palmer testified that Kirk informed him that he knew of investors that were "interested in getting in on the license." Moreover, there was no evidence that Kirk ever refused to provide financing for the project or that he was unable to do so. Instead, evidence supported a finding that Kirk substantially performed the agreement by spending thousands of dollars of his own funds in furtherance of the partnership. Again, to the extent there was conflicting evidence, the jury was entitled to believe the evidence favorable to Kirk. *See City of Keller*, 168 S.W.3d at 819; *Golden Eagle Archery*, 116 S.W.3d at 761. Appellants' second issue is overruled.

Additionally, the inclusion of the "substantial performance" question in the jury charge was not erroneous. As noted, a plaintiff seeking specific performance need only show that it has substantially performed under the contract, not that it has fully performed. *See DiGiuseppe*, 269 S.W.3d at 594; *Glass*, 596 S.W.2d at 513. Accordingly, the question was legally correct. Further, the submission of this question was supported by evidence, as set forth above, and it was supported by Kirk's live pleading, which alleged that "[s]ince the date of the agreement, the Plaintiffs have fully performed or tendered performance, of their obligations." *See Weitzul Const., Inc. v. Outdoor Environs*, 849 S.W.2d 359, 363 (Tex. App.—Dallas 1993, writ denied) ("[A] pleading of full performance will support the submission of a substantial performance issue."); *Del Monte Corp. v. Martin*, 574 S.W.2d 597, 599 (Tex. Civ. App.—San Antonio 1978, no writ) (same). Appellants' seventh issue is overruled.

E. Evidentiary Ruling

By their ninth issue, appellants assert that the trial court erred by excluding evidence that Kirk could not obtain a loan from Wells Fargo because of a prior felony conviction.

In their briefs, appellants do not direct us to any point in the record where the trial court ruled on any objection or excluded any evidence. Further, although appellants correctly set forth the standard for reversible error on appeal, *see* TEX. R. APP. P. 44.1(a)(1), they do not identify any rule of evidence under which this evidence may have been excluded, nor do they provide any argument pertaining to any specific rule of evidence. We find that this issue is waived. *See* TEX. R. APP. P. 38.1(i).

Even if we were to consider the issue, we would find it lacks merit. The record before this Court includes a bill of exceptions containing deposition testimony by Kirk in which he states in part that, when he and McGee went to Wells Fargo to ask for a $2 million loan, they were told that the bank's policy required criminal background checks for loans of $1 million or more. Kirk stated that the bank "found a theft charge on me that was 48 years old" and "because of that, they turned me down on the loan." He denied ever having a similar experience with any other bank. The bill of exceptions also includes deposition testimony by McGee in which he states that Wells Fargo would loan McGee the money, but not Kirk because "he had a record."

Prior to trial, Kirk's counsel referred to a "problem" that he had "with the defense wanting to introduce evidence of a 50-year-old criminal conviction of Billy Kirk." The trial court noted that it had already granted a motion in limine as to that evidence, but no motion in limine or ruling thereon appears in the record. Following trial, appellants' counsel asked to make a bill of exceptions consisting of testimony "dealing with the reason for the denial of the loan from Wells Fargo for $2 million." Counsel stated: "It's my understanding that the Court did not allow that to come in because of Rule 403, the prejudice to outweigh the testimony."

Assuming that counsel's understanding was correct and that trial court sustained a Rule 403 objection to the testimony at issue, we would find no abuse of discretion. *See Brookshire Bros., Ltd. v. Aldridge*, 438 S.W.3d 9, 27 (Tex. 2014) (noting that evidentiary rulings are reviewed for abuse of discretion). Under Texas Rule of Evidence 403, relevant evidence may be excluded "if its probative value is substantially outweighed by a danger of," among other things, "unfair prejudice." TEX. R. EVID. 403. Here, evidence of Kirk's theft conviction was probative as to why he was unable to obtain a loan from Wells Fargo, and it was arguably probative as to whether Kirk had the ability to personally obtain more than $1 million in financing for the partnership. But the evidence established that Kirk was able to contribute over $400,000 to the project despite his record, and unlike the proposed written agreements, the oral partnership agreement did not require Kirk to provide a specific amount of funding. Further, Kirk testified that he had not had that experience with other banks. In any event, though Kirk's compliance with his fiduciary duties to the partnership was an issue before the jury, his compliance with the terms of the partnership agreement was not. Considering the slight probative value of this evidence and the significant prejudice that may have resulted from its admission, we would find that the trial court did not abuse its discretion in excluding the evidence.

Appellants' ninth issue is overruled.

F. Attorney's Fees and Court Costs

Appellants' final two issues challenge the trial court's award of attorney's fees and costs to Kirk. Kirk's live petition requested attorney's fees under chapters 37 and 38 of the civil practice and remedies code. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 37.009 (West, Westlaw through 2015 R.S.) (permitting award of attorney's fees in declaratory judgment actions); *id*. § 38.001(8) (West, Westlaw through 2015 R.S.) (permitting award of attorney's fees on a claim for "an oral or written contract"). Following trial, the parties agreed to submit the issue of attorney's fees to the trial court for its consideration. Kirk submitted an affidavit by his lead counsel, Rex Easley, stating that Kirk had incurred $211,020 in reasonable fees for Easley's services, $34,437.50 in reasonable fees for services by patent counsel John Etter, and $26,094.61 in expenses. The affidavit also requested $25,000 in fees for "post-judgment enforcement"[14] and $75,000 in conditional appellate attorney's fees. Appellants filed written responses to Kirk's submission contending, in part, that Kirk failed to segregate recoverable from non-recoverable fees. The final judgment, citing sections 37.009 and 38.001, awarded the fees precisely as requested in Easley's affidavit.

---

[14] The affidavit stated:

> If [appellants]·do not satisfy the relief ordered in the Judgment and [Kirk is] forced to bring additional litigation in order to enforce the Judgment, specific performance and injunctive relief, including collection efforts for attorney's fees, then fees and costs are estimated to be and this Court should award $25,000.00. Based on a reasonable probability, it is more likely than not, that such post-verdict legal work will need to be performed.

1. Uniform Declaratory Judgments Act

By their eleventh issue, appellants argue that Kirk cannot recover fees under chapter 37, the Uniform Declaratory Judgments Act (UDJA), because Kirk did not prevail on his request for declaratory relief. We disagree. The judgment declared that appellants are the rightful owners of the trademarks at issue, but it also declared that a partnership existed and that the cease and desist letters were null and void, which were also declarations requested by Kirk in his live petition. In any event, the only requirements for the award of fees under the UDJA are that the fees must be reasonable and necessary and their award must be equitable and just. TEX. CIV. PRAC. & REM. CODE ANN. § 37.009. "One need not even be the prevailing party or seek affirmative relief to be awarded attorney's fees under the [UDJA], as long as the award of fees is equitable and just." *Hong Kong Dev., Inc. v. Nguyen*, 229 S.W.3d 415, 451–53 (Tex. App.—Houston [1st Dist.] 2007, no pet.); *Save Our Springs Alliance, Inc. v. Lazy Nine Mun. Util. Dist. ex rel. Bd. of Dirs*., 198 S.W.3d 300, 318 (Tex. App.—Texarkana 2006, pet. denied) ("Either party may obtain attorney's fees [under the UDJA] regardless of which party is affirmatively seeking relief."); *Del Valle Indep. Sch. Dist. v. Lopez*, 863 S.W.2d 507, 512–13 (Tex. App.—Austin 1993, writ denied) ("[A]n award [of attorney's fees] under the [UDJA] is not limited to the prevailing party."); *see also Barshop v. Medina Cnty. Underground Water Conservation Dist.*, 925 S.W.2d 618, 637 (Tex. 1996) (rejecting argument that party had to "substantially prevail" in order to recover attorney's fees under UDJA). We overrule appellants' eleventh issue.

2. Chapter 38

By their tenth issue, appellants contend in part that the award of attorney's fees under chapter 38 was erroneous because there was no finding of money damages.[15] We agree. To recover attorney's fees under section 38.001, a party must (1) prevail on a cause of action for which attorney's fees are recoverable, and (2) recover damages. *Green Int'l, Inc. v. Solis*, 951 S.W.2d 384, 390 (Tex. 1997); *State Farm Life Ins. Co. v. Beaston*, 907 S.W.2d 430, 437 (Tex. 1995). Here, Kirk prevailed on his claim relating to breach of the partnership agreement, but the jury made no findings as to damages, and the judgment does not award damages. Kirk cites *Nguyen*, 229 S.W.3d at 451–53, for the proposition that a finding of damages was not required for the recovery of attorney's fees under chapter 38. However, the trial court in *Nguyen* cited the UDJA as the only basis for awarding fees, and the appellant's issue was overruled for that reason. *See id*. The *Nguyen* court did not address whether an award of specific performance—as opposed to money damages—may support an award of attorney's fees in a contract action under chapter 38. Kirk directs us to no other authority, and we find none, establishing that a contract claimant may recover fees under chapter 38 when the judgment awards only specific performance and not damages. Accordingly, we conclude that Kirk was not entitled to recover attorney's fees under chapter 38. *See Green Int'l*, 951 S.W.2d at 390; *Beaston*, 907 S.W.2d at 437.

3. Segregation of Fees

Appellants additionally argue by their tenth issue that the fee award was improper because Kirk did not segregate recoverable from non-recoverable fees. *See Tony Gullo*

---

[15] Appellants preserved this issue by raising it in their written response to Kirk's submission on attorney's fees.

Motors I, L.P. v. Chapa, 212 S.W.3d 299, 313 (Tex. 2006) ("[I]f any attorney's fees relate solely to a claim for which such fees are unrecoverable, a claimant must segregate recoverable from unrecoverable fees."). Again, we agree. Kirk's live petition asserted the following primary and alternative causes of action: (1) breach of the partnership agreement; (2) misappropriation of trademark and patent; (3) promissory estoppel; (4) unjust enrichment; (5) breach of fiduciary duty and misappropriation of corporate opportunity; (6) fraud and fraud in the inducement; (7) conversion; and (8) declaratory judgment. Of these causes of action, the recovery of attorney's fees is authorized by statute only for breach of the partnership agreement, promissory estoppel, and declaratory judgment. *See* TEX. CIV. PRAC. & REM. CODE ANN. §§ 37.009, 38.001(8); *Corpus Christi Day Cruise, LLC v. Christus Spohn Health Sys. Corp.*, 398 S.W.3d 303, 315 (Tex. App.—Corpus Christi 2012, pet. denied) (holding that attorney's fees are available under section 38.001(8) for a plaintiff prevailing on a promissory estoppel theory). And we have already concluded that the recovery of attorney's fees is not proper for the particular contract claims asserted in this case because the jury did not award damages. *See Green Int'l*, 951 S.W.2d at 390; *Beaston*, 907 S.W.2d at 437. Therefore, only fees attributable to the declaratory judgment action are recoverable in this case.

A party is not required to segregate fees when recoverable and non-recoverable claims "are so intertwined that they need not be segregated." *Tony Gullo Motors*, 212 S.W.3d at 313. But "[i]t is only when legal services advance both recoverable and unrecoverable claims that the services are so intertwined that the associated fees need not be segregated." *A.G. Edwards & Sons, Inc. v. Beyer*, 235 S.W.3d 704, 710 (Tex. 2007). Here, Kirk alleged in a reply to appellants' response to his attorney's fees submission that "[o]ver 95% of all drafting time would have been necessary even if there had been no alternative causes of action asserted." However, Easley did not state in his affidavit that the fees requested were attributable to any particular cause of action, nor did he state that any particular services advanced both recoverable and unrecoverable claims. *See id.* Accordingly, the award of attorney's fees and costs to Kirk was erroneous. We sustain appellants' tenth issue.

IV. CONCLUSION

Because there was legally insufficient evidence to support the jury's findings in response to charge questions 1D, 1E, and 1F, we modify the trial court's judgment to delete those findings. We further reverse the trial court's award of attorney's fees and costs and remand for a new trial as to that issue consistent with this opinion. *See Tony Gullo Motors*, 212 S.W.3d at 314 (noting that "an unsegregated damages award requires a remand"). The remainder of the judgment is affirmed as modified.

DORI CONTRERAS
Justice

Delivered and filed the
20th day of April, 2017.