Affirmed and Opinion Filed January 9, 2018

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-16-00999-CV

DANIEL S. BARNETT AND ABOVO CORPORATION, Appellants
V.
RICHARD B. SCHIRO, Appellee

On Appeal from the 95th Judicial District Court
Dallas County, Texas
Trial Court Cause No. DC-13-08747

MEMORANDUM OPINION

Before Justices Lang-Miers, Fillmore, and Stoddart
Opinion by Justice Fillmore

Kirtland Realty Group, LP (KRG) sued Daniel S. Barnett and Entrust Administration, Inc., the custodian of Barnett's individual retirement account (the IRA), seeking to recover on a personal guaranty executed by Barnett. Richard B. Schiro, an attorney, represented Barnett and the IRA in that lawsuit. After the litigation was concluded, Schiro sued Barnett and Abovo Corporation, a company formerly owned by Barnett (collectively appellants), alleging Barnett had failed to pay all of Schiro's legal fees. Appellants asserted counterclaims for legal malpractice, conversion, and breach of contract. Prior to trial, the trial court granted Schiro's no evidence motion for summary judgment on appellants' legal malpractice and conversion counterclaims. The jury found appellants breached the contract with Schiro, and awarded Schiro $183,673 for the unpaid fees, $131,786.11 for reasonable and necessary attorneys' fees incurred

by Schiro in suing appellants, and contingent attorneys' fees should appellants unsuccessfully appeal the judgment.

In five issues, appellants contend the trial court erred by granting Schiro's no evidence motion for summary judgment on the professional negligence counterclaim; Schiro's expert witness on attorneys' fees relied on an incorrect measure of damages; and the evidence is neither legally nor factually sufficient to support the jury's award of $131,786.11 for attorneys' fees incurred by Schiro in this litigation, $20,000 as the reasonable amount of attorneys' fees Schiro would incur if appellants unsuccessfully appealed the judgment to this Court, and $10,000 as the reasonable amount of attorneys' fees Schiro would incur if appellants unsuccessfully filed a petition for review with the Texas Supreme Court. We affirm the trial court's judgment.

Background

Barnett was one of the owners of Mortgage Solutions Partners (MSP), a company that purchased promissory notes and related first lien mortgages or deeds of trust securing real property. On November 14, 2003, MSP borrowed $232,200.47 from KRG and pledged, as security for the loan, certain promissory notes and related first lien rights that it owned. MSP subsequently was renamed Mortgage Assistance Corporation (MAC), and MAC became obligated to re-pay the loan to KRG. KRG requested that Barnett personally guarantee the loan to MAC, and on April 14, 2005, Barnett signed a personal guaranty requiring him to pay KRG if MAC failed to do so. On October 10, 2006, KRG agreed to extend the term of the loan, and Barnett signed a second personal guaranty, in which he agreed to pay KRG if MAC failed to do so.

On May 7, 2008, MAC and KRG signed a memorandum of understanding pursuant to which MAC executed an assignment of five designated properties to KRG. MAC was required to notify KRG if MAC sold any of the designated properties in order to allow MAC and KRG to

agree "upon the substitution of like collateral." If MAC defaulted on the loan, KRG was entitled to file and record the assignment of each of the properties. The properties designated in the memorandum of understanding had an agreed cumulative value of $253,500.

Barnett was the sole owner of Abovo, which owned a number of investment properties. On July 1, 2010, KRG loaned Abovo $371,306.13. Barnett signed a personal guaranty promising to re-pay the loan if Abovo failed to do so. The Abovo note provided that Abovo would be in default on the loan if Barnett failed "to perform or observe any covenant or agreement contained in . . . any . . . Loan Document." The Abovo note defined "Loan Documents" to include the "Guaranty Agreements," which were "each Guaranty Agreement executed by Dan Barnett in favor of Lender . . . including without limitation, the Abovo Guaranty."

MAC merged with Mortgage Assistance Center Corporation (MACC) and, in July 2008, MACC defaulted on the loan from KRG. KRG sued MAC and MACC, and asserted claims for breach of contract, fraud, constructive fraud, and negligent misrepresentation. Neither MAC nor MACC filed an answer, and on January 11, 2010, KRG obtained a default judgment against both entities in the amount of $867,114.96, consisting of $286,638.32 for actual damages, $7,200.00 for attorneys' fees, and $573,276.64 for additional damages due to MAC's and MACC's fraudulent conduct.

MAC and MACC failed to satisfy the judgment, and KRG sought to recover the entire amount of the judgment from Barnett. After Barnett failed to pay, KRG sued Barnett and the IRA on January 7, 2011, asserting claims for breach of the personal guaranty, unjust enrichment, fraud, and negligent misrepresentation against Barnett, and alleging both Barnett and the IRA had engaged in the fraudulent transfer of property. KRG also filed a "Notice of Interest" and a "Notice of Lis Pendens" in the deed records, asserting it had an interest in certain properties

owned by Barnett and the IRA. Barnett hired Schiro to represent him the litigation, and Schiro subsequently began representing the IRA as well. Barnett and the IRA agreed to pay $375 an hour for Schiro's services, and $255 an hour for the services of Schiro's associate attorney.

As the litigation progressed, KRG took the position, based on the cross-collateralization language in the Abovo note, that Barnett's default on his personal guaranty of the loan to MAC constituted a default by Abovo on its loan from KRG. KRG claimed that Abovo's property was therefore available to satisfy both Abovo's and MAC's debts to KRG. Abovo hired Schiro to respond to KRG's claims.

Although Barnett initially paid the invoices for legal services submitted to him by Schiro, Barnett and the IRA quickly failed to pay the full amount of the monthly bills. In early 2012, Barnett informed Schiro that he did not have sufficient cash to pay Schiro's bills. Schiro indicated he would be willing to accept title to some "investment houses" to satisfy the legal bills.

On June 8, 2012, Schiro and the IRA agreed the IRA would transfer the ownership of two houses to Schiro "in payment of existing and future amounts" owed to Schiro by the IRA for legal services and expenses incurred in the litigation with KRG. Schiro and the IRA agreed the combined equity value of the two houses was $102,922.61. The IRA transferred title of the two houses to Schiro.

Also on June 8, 2012, Schiro and appellants agreed appellants would transfer the ownership of a house on Randy Road to Schiro "to address payment of amounts presently due and owing to Schiro for his services, and to provide for payment of future fees likely to be owed" by appellants to Schiro. Schiro and appellants agreed the net value of the Randy Road house was $40,444.10, and that amount would be credited to the legal fees and expenses due as of June 8, 2012. If between June 8, 2012, and either the final resolution of litigation with KRG or the

termination of the attorney-client relationship, the unpaid balance owed to Schiro exceeded or was expected to exceed the value of the Randy Road house, appellants agreed to "either grant, transfer, and convey to Schiro" additional properties or "promptly remit the unpaid balance to him in funds." Appellants also agreed that if, upon resolution of the lawsuit and any related litigation or upon termination of the attorney-client relationship with Schiro, the balance owed to Schiro exceeded the value of the Randy Road house, they would "promptly remit the balance to Schiro in funds or by transfer of additional parcels, as they elect[.]" Schiro agreed that if the balance owed was less than the value of the Randy Road House, he would "promptly remit" to appellants "the difference between the final balance of fees" owed by appellants and the value of the Randy Road house.

KRG's claims against Barnett and the IRA were tried to the bench over a three day period. The two main issues at trial were whether the assignment of the five properties to KRG by MAC pursuant to the memorandum of understanding was intended to be payment of the MAC loan or additional collateral (the payment issue), and whether KRG was liable under chapter 12 of the civil practice and remedies code for filing false liens on Barnett's and the IRA's property. The payment issue was significant because KRG received net proceeds of approximately $69,000 from the sale of the five properties assigned by MAC. KRG argued it was required to credit Barnett with only the $69,000 in net proceeds, while Barnett argued he was entitled to a credit of the full value of the properties at the time they were assigned to KRG.

At the end of trial, the Honorable Craig Smith indicated neither party was going to like his rulings. The parties requested that Judge Smith delay issuing a ruling while they attempted to mediate the case. The case settled at mediation, with Barnett agreeing to pay KRG $100,000, and KRG agreeing to release Barnett from his personal guaranty of the Abovo loan, and to reduce the interest rate on the Abovo loan, extend the Abovo loan for a period of three years, and

subordinate its debt to a new first lienholder if Barnett was able to obtain refinancing on the properties owned by Abovo. The parties also agreed to cooperate in attempting to sell "the MACC shell."

After the case was resolved, Schiro sent Barnett an invoice stating the outstanding balance due for legal services was $183,673. Although Schiro and Barnett discussed the transfer of additional properties to Schiro to satisfy the outstanding balance, Barnett failed to either transfer additional properties or pay the outstanding balance. Schiro sued appellants for breach of contract.[1]

Appellants filed counterclaims for legal malpractice, conversion, and breach of contract. Schiro filed a first amended no evidence motion for summary judgment on all three counterclaims. The trial court granted Schiro's no evidence motion for summary judgment on the legal malpractice and conversion counterclaims. Schiro's breach of contract claim proceeded to trial.[2] The jury found appellants breached their contract with Schiro, and awarded Schiro $183,673 in damages, $131,786.11 for attorneys' fees incurred in the litigation, and contingent attorneys' fees if appellants unsuccessfully appealed the judgment to this Court or to the Texas Supreme Court. The trial court entered judgment on the jury's verdict.

Motion for No Evidence Summary Judgment

In their first issue, appellants assert the trial court erred by granting Schiro's first amended no evidence motion for summary judgment on Barnett's legal malpractice counterclaim

[1] Schiro also asserted claims based on a sworn account, an open account, quantum meruit, fraud, and fraudulent inducement, but none of these causes of action were submitted to the jury.

[2] Appellants' breach of contract counterclaim was not submitted to the jury.

because he produced legally sufficient evidence to support each challenged element of the counterclaim.[3]

Standard of Review

After an adequate time for discovery, the party without the burden of proof may, without presenting evidence, move for summary judgment on the ground there is no evidence to support an essential element of the nonmovant's claim or defense. TEX. R. CIV. P. 166a(i). The motion must specifically state the elements of the claim or defense for which there is no evidence. *Id.*; *Timpte Indus., Inc. v. Gish*, 286 S.W.3d 306, 310 (Tex. 2009). The trial court must grant the motion unless the nonmovant produces evidence that raises a genuine issue of material fact. *See* TEX. R. CIV. P. 166a(i) & cmt.—1997; *Hamilton v. Wilson*, 249 S.W.3d 425, 426 (Tex. 2008) (per curiam).

We review the rendition of a no evidence motion for summary judgment de novo. *Starwood Mgmt., LLC v. Swaim*, 530 S.W.3d 673, 678 (Tex. 2017) (per curiam). In conducting our review, we apply the same legal sufficiency standards used to review a directed verdict. *Gish*, 286 S.W.3d at 310. We consider the evidence in the light most favorable to the nonmovant, indulging every reasonable inference and resolving any doubts against the motion. *Smith v. O'Donnell*, 288 S.W.3d 417, 424 (Tex. 2009); *Gish*, 286 S.W.3d at 310. We credit evidence favorable to the nonmovant if a reasonable factfinder could, and disregard contrary evidence and inferences unless a reasonable factfinder could not. *Merriman v. XTO Energy, Inc.*, 407 S.W.3d 244, 248 (Tex. 2013). If the nonmovant brings forward more than a scintilla of probative evidence that raises a genuine issue of material fact on each of the challenged elements, then a no evidence summary judgment is not proper. *Smith*, 288 S.W.3d at 424.

[3] Abovo has not appealed the trial court's grant of Schiro's no evidence motion for summary judgment on its counterclaim for legal malpractice.

Relevant Facts

To prove a legal malpractice claim, the former client must establish (1) the existence of a duty of care owed to the client, (2) the duty was breached, and (3) the breach proximately caused damages to the client. *Swaim*, 530 S.W.3d at 678. Schiro moved for summary judgment on grounds there was no evidence he breached a duty to Barnett, the alleged breach was a proximate cause of any harm to Barnett, or that Barnett suffered damages as a result of the alleged breach.

In his amended response to the no evidence motion for summary judgment, Barnett relied on the affidavit of his trial counsel, Robert Clark, to support the claim for legal malpractice. Clark opined that Schiro "breached his duty of standard of care to Barnett by failing to set out the contested property values in a timely manner." Clark based this opinion on a motion for continuance in the litigation with KRG in which Schiro complained KRG's attorneys had not cooperated in scheduling the depositions of Barnett's expert witnesses who had appraised the values of the five properties assigned to KRG by MAC.[4] In the motion, Schiro argued:

> The motive for these tactics is clear. These appraisals show the value of the five houses deeded to Kirtland on June 30 and July 8, 2008. If, as Barnett asserts, the transfer of these houses to Kirtland was payment, and these appraisal values are the total amount of that payment, then Kirtland's claim against Barnett is reduced to $9,200.47 (plus interest).

Clark opined the appraisals were required to be filed on June 15, 2012, were not submitted until forty-six days after they were due, and because they "were not filed timely, Barnett was forced to have to enter into a disadvantaged [sic] settlement with Kirtland for $100,000[.]" In Clark's opinion, the damages incurred by Barnett due to Schiro's alleged negligence "were the approximately $80,000 legal bill from Schiro after the date of the omission and the $90,000 difference in the damages due to the omission."

[4] Clark also stated his opinion was based on Schiro's "statement to Barnett." Clark does not provide any information about the statement he is referring to, and we will not speculate about the substance of that statement.

Analysis

Because it is dispositive to our analysis of this issue, we address only whether Clark's affidavit was sufficient to raise a material issue of fact that any negligent conduct by Schiro was a proximate cause of damages to Barnett. *See* TEX. R. APP. P. 47.1.

"[I]f the breach of a duty of care does not cause harm, no valid claim for legal-malpractice exists." *Rogers v. Zanetti*, 518 S.W.3d 394, 400 (Tex. 2017). Causation is not presumed in a legal malpractice case. *Alexander v. Turtur & Assocs., Inc.*, 146 S.W.3d 113, 119 (Tex. 2004). Rather, the former client has the burden to prove proximate cause, which includes proof of cause in fact. *Swaim*, 530 S.W.3d at 678; *Rogers*, 518 S.W.3d at 402. "The evidence of cause in fact is tested, in part, by means of the but-for test: would the harm alleged have occurred absent the attorney's alleged breach." *Swain*, 530 S.W.3d at 678–79 (citing *Rogers*, 518 S.W.3d at 402). The factfinder "must have some basis for understanding the causal link between the attorney's negligence and the client's harm." *Alexander*, 146 S.W.3d at 119.

When a claim for legal malpractice arises from prior litigation, the former client must prove he would have obtained a more favorable result in the underlying litigation had the attorney conformed to the proper standard of care. *Rogers*, 518 S.W.3d at 401. When, as in this case, the claimed injury depends on the merits of the underlying action, the former client is required to re-create the underlying case in order to resolve what should have happened. *Id*. This "suit-within-a-suit" is the "accepted and traditional means of resolving the issues involved in the underlying proceeding in a legal malpractice action." *Id.*

If the former client claims the alleged misconduct or omission by the attorney caused a less favorable settlement than would have been obtained absent the misconduct or omission, the former client must show the attorney "mishandled the defense and that a judgment for [the underlying plaintiff] in excess of the case's true value would have resulted from [the attorney's]

malpractice." *Rogers*, 518 S.W.3d at 404 (quoting *Keck, Mahin & Cate v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, 20 S.W.3d 692, 703 (Tex. 2000) (footnote omitted)). The "true value" of the case is "the recovery [the underlying plaintiff] would have obtained following a trial in which [the underlying defendant] had a reasonably competent, malpractice free defense." *Id*. (quoting *Keck, Mahin & Cate*, 20 S.W.3d at 703 n.5). The former client's damages are "the difference between the result obtained for the client and the result that would have been obtained with competent counsel," *id.* (quoting *Elizondo v. Krist*, 415 S.W.3d 259, 263 (Tex. 2013)), and depend on proof that the true value of the claim was less than the settlement amount, but the attorney's malpractice inflated its value. *See Keck, Mahin & Cate*, 20 S.W.3d at 703.

Generally, expert testimony is required to rebut a defendant's motion for summary judgment challenging the causation element of a legal malpractice claim. *Swaim*, 530 S.W.3d at 679. The expert affidavit must be probative and raise a material fact issue. *Id.* A conclusory affidavit is not probative. *Id*. Rather, to defeat summary judgment, the affidavit must explain "how and why the negligence caused the injury." *Id.* (quoting *Jelinek v. Casas*, 328 S.W.3d 526, 536 (Tex. 2010)). "To that end, an expert's opinion must set out a 'demonstrable and reasoned basis on which to evaluate [the] opinion.'" *Id.* (quoting *Elizondo*, 415 S.W.3d at 265).

Clark, as appellants' expert,[5] opined Schiro was negligent by failing to timely file the appraisals, and this negligence caused Barnett to (1) incur approximately $80,000 in legal fees

[5] In the trial court, Schiro objected that Clark, as Barnett's trial counsel, could not appear as both an advocate and an expert witness in the case, *see* TEX. R. DISCIPLINARY P. 3.08(a), *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G, app. A (West 2013), but failed to obtain a ruling on the objection. On appeal, Schiro argues that, regardless of his failure to obtain a ruling in the trial court, the expert testimony of a party's own counsel in the lawsuit on an ultimate issue in the case is not competent evidence to defeat summary judgment. *See Aghili v. Banks*, 63 S.W.3d 812, 818 (Tex. App.—Houston [14th Dist.] 2001, pet. denied) (concluding trial court abused its discretion by allowing lawyer for defendant to testify about relevant facts by affidavit in response to summary judgment motion because "a lawyer who represents clients as an advocate before a court should be incompetent to provide evidence in the matter unless one of the exceptions to Rule [of Disciplinary Procedure] 3.08 applies"); *see also Mauze v. Curry*, 861 S.W.2d 869, 870 (Tex. 1993) (per curiam) (trial court abused its discretion by failing to disqualify plaintiff's attorney who testified as expert witness in an affidavit to defeat defendant's motion for summary judgment in legal malpractice case when testimony did not fall within any of the exceptions in rule 3.08(a)); *Reliance Capital, Inc. v. G.R. Hmaidan, Inc.*, No. 14-05-00061-CV, 2006 WL 1389539, at *4 (Tex. App.—Houston [14th Dist.] May 18, 2006, no pet.) (mem. op.). While we are troubled that Clark, as trial counsel, attempted to also act as an expert witness on an ultimate issue in this case, we need not address this argument because, after reviewing the affidavit, we conclude it failed to raise a material issue of fact on whether any negligence by Schiro was the proximate cause of any damages to Barnett.

after the date of the omission, and (2) settle the case for $100,000, when he should have paid only $9,200.47 plus accrued interest.

As to the legal fees portion of the alleged damages, Clark's affidavit contains no analysis of why Barnett was damaged in the amount of all legal fees billed by Schiro after the date of the alleged omission. He does not explain why the litigation would have ceased when the appraisals were filed, and offers no opinion as to the amount of fees that would have been incurred if the litigation had proceeded with the appraisals in evidence. Accordingly, Clark's opinion that Barnett would have incurred no additional legal fees if Schiro had timely filed the appraisals is conclusory, and insufficient to defeat summary judgment. *See Elizondo*, 415 S.W.3d at 264 ("Further, 'a claim will not stand or fall on the mere *ipse dixit* of a credentialed witness.'" (quoting *Burrow v. Arce*, 997 S.W.2d 229, 235 (Tex. 1999)).

We next consider Clark's opinion that Schiro's alleged negligence caused Barnett to enter into an unfavorable settlement. This opinion is based on Clark's conclusion the "true value" of KRG's claims against Barnett was $9,200.47 plus accrued interest. The basis of this opinion regarding the "true value" of the case appears to be a conclusion by Clark that, if the appraisals had been admitted into evidence, Barnett would have prevailed on the payment issue. The only "fact" set out in Clark's affidavit as a basis for this conclusion is the above-referenced statement in the motion for continuance filed by Schiro. That statement, however, was conditioned on the fact that the appraisals were necessary to establish the value of KRG's claim only if Judge Smith ruled in Barnett's favor on the payment issue. In short, Schiro represented in the motion for continuance that the appraisals mattered if Judge Smith determined the assigned properties were payment on the loan. Clark's affidavit contained no analysis of the law or the facts relating to whether the assignment of the properties by MAC constituted payment on the loan or why, in his

opinion, Barnett would have prevailed on the payment issue at trial.[6] *See Rogers*, 518 S.W.3d at 408 ("[E]vidence of causation must show that the result in the hypothetical case would, more likely than not, be different than the result in the actually litigated case because of the additional evidence."); *Alexander*, 146 S.W.3d at 119 (concluding expert testimony was necessary to explain legal significance of omitted evidence to bankruptcy judge's decision in underlying litigation). Rather, without analysis, Clark simply assumes Barnett would have prevailed on the payment issue.

To defeat summary judgment, Clark's affidavit was required to sufficiently link his conclusions to the facts and explain why the alleged negligence caused the injury. *Swaim*, 530 S.W.3d at 679 ("To demonstrate 'why,' the affidavit must explain the link between the facts the expert relied upon and the opinion reached."); *Alexander*, 146 S.W.3d at 119 ("Moreover, the trier of fact must have some basis for understanding the causal link between the attorney's negligence and the client's harm."). However, Clark provided no facts or analysis to support his opinion that, if the appraisals had been admitted into evidence, Judge Smith would have resolved the payment issue in Barnett's favor, and the underlying litigation would have concluded with Barnett owing, or KRG settling for, only $9,200.47 plus accrued interest. *See e.g.*, *Elizondo*, 415 S.W.3d at 264 ("Conversely, in this case, an attorney-expert, however well qualified, cannot defeat summary judgment if there are fatal gaps in his analysis that leave the court to take his word that the settlement was inadequate."); *see also Rogers*, 518 S.W.3d at 411 (concluding summary judgment was proper because there was no evidence the opposing party in the underlying litigation would have settled the case for $450,000). Therefore a "fatal analytical gap" in Clark's affidavit divides his recitation of the facts from his opinion of the "true value" of

[6] We recognize this analysis is complicated by the fact Judge Smith did not determine whether the assignment of the properties by MAC to KRG constituted payment on the loan or additional collateral. However, Clark provided no explanation, and we can discern none, as to how the appraisals, even if admitted, required Judge Smith to rule the assignment of the properties constituted payment on the loan.

case, and we "are simply left to take his word" that the settlement was excessive. *See Elizondo*, 415 S.W.3d at 265.

We conclude Clark failed to set out a "demonstrable and reasoned basis" to support his opinion that Schiro's alleged negligence caused Barnett damages. Accordingly, his opinion was conclusory and insufficient to defeat summary judgment. *See Swaim*, 530 S.W.3d at 680 (An expert's opinion is conclusory *ipse dixit* if "there is 'simply too great an analytical gap between the data and the opinion proffered.'" (quoting *Gammill v. Jack Williams Chevrolet, Inc.*, 972 S.W.2d 713, 726 (Tex. 1998)); *Elizondo*, 415 S.W.3d at 264, 265. Because Barnett failed to offer summary judgment evidence that Schiro's alleged negligence caused Barnett to suffer any damages, the trial court did not err by granting Schiro's no evidence motion for summary judgment on Barnett's counterclaim for legal malpractice. We resolve appellants' first issue against them.

Measure of Damages

In their third issue, appellants contend Schiro's expert witness regarding the reasonableness of Schiro's fees in the litigation between KRG and Barnett used the incorrect measure of damages. Appellants specifically argue they had an agreement with Schiro to transfer houses on Ross Avenue and Belmont Drive in full payment of all fees owed to Schiro, this agreement constituted a novation of the original hourly fee agreement, and the correct measure of damages was the equity value of the two properties at the time of the agreement.

Novation is an affirmative defense to a claim for breach of contract. *Fulcrum Cent. v. AutoTester, Inc.*, 102 S.W.3d 274, 277 (Tex. App.—Dallas 2003, no pet.). A defendant relying on an affirmative defense has the burden to plead, prove, and obtain findings to sustain the defense. *Woods v. William M. Mercer, Inc.*, 769 S.W.2d 515, 517 (Tex. 1988); *Baska v. McGuire*, No. 01-16-00337-CV, 2017 WL 4545913, at *5 (Tex. App.—Houston [1st Dist.] Oct.

12, 2017, no pet.) (mem. op). "Generally, an affirmative defense must be pled in a responsive pleading or it is waived." *McCafferty v. McCafferty*, No. 05-16-00587-CV, 2017 WL 3124470, at *9 (Tex. App.—Dallas July 24, 2017, no pet.) (mem. op.); *see also* TEX. R. CIV. P. 94; *see also MAN Engines & Components, Inc. v. Shows*, 434 S.W.3d 132, 136 (Tex. 2014) ("Rule 94 makes clear that affirmative defenses must be properly raised in pretrial pleadings[.]"); *Broyhill Furniture Indus., Inc. v. Murphy*, No. 05-11-01545-CV, 2013 WL 4478172, at *5 (Tex. App.—Dallas Aug. 20, 2013, no pet.) (mem. op.). Because appellants did not plead the defense of novation in the trial court, any complaint regarding the affirmative defense has been waived. We resolve appellants' third issue against them.

Sufficiency of the Evidence

In their second issue, appellants contend the evidence is neither legally nor factually sufficient to support the jury's award of $131,786.11 for attorneys' fees incurred by Schiro in this litigation. In their fourth and fifth issues, appellants assert the evidence is neither legally nor factually sufficient to support the jury's determination that $20,000 was the reasonable amount of attorneys' fees Schiro would incur in an unsuccessful appeal by appellants to this Court, and $10,000 was the reasonable amount of attorneys' fees Schiro would incur if appellants unsuccessfully filed a petition for review with the Texas Supreme Court.

Preservation of Error

To preserve a challenge to the legal sufficiency of the evidence to support a jury's finding, the party must raise the specific complaint in the trial court either by: (1) a motion for directed verdict, (2) a motion for judgment notwithstanding the verdict (JNOV), (3) an objection to the submission of the jury question, (4) a motion to disregard the jury's finding on a vital fact issue, or (5) a motion for new trial. *Cecil v. Smith*, 804 S.W.2d 509, 510–11 (Tex. 1991); *Maya Walnut, LLC v. Lopez-Rodriguez*, No. 05-16-00750-CV, 2017 WL 1684679, at *4 (Tex. App.—

Dallas May 3, 2017, no pet.) (mem. op.). To preserve a factual sufficiency challenge, the party must present the specific complaint to the trial court in a motion for new trial. TEX. R. CIV. P. 324(b)(2), (3); *Cecil*, 804 S.W.2d at 510; *Maya Walnut, LLC*, 2017 SL 1684679, at *4.

Appellants filed a combined motion for judgment and motion for JNOV, asserting "[t]here was no legally sufficient evidence supporting the amount of $134,000.00 as awarded attorney fees to [Schiro] in the jury verdict." Appellants did not complain in the combined motion that the evidence was legally insufficient to support the amount of contingent attorneys' fees awarded to Schiro in the event appellants unsuccessfully appealed the judgment to this Court or unsuccessfully filed a petition for review with the Texas Supreme Court. Accordingly, appellants waived any complaint the evidence is legally insufficient to support the award of the contingent appellate attorneys' fees.

Further, appellants did not file a motion for new trial complaining about the factual sufficiency of the evidence to support any of the attorneys' fees awarded by the jury. Appellants, therefore, waived any complaint the evidence was factually insufficient to support the jury's award of $131,786.11 for attorneys' fees incurred by Schiro through trial and for contingent attorneys' fees on appeal.

Appellants preserved only a complaint the evidence is legally insufficient to support the jury's award of $131,786.11 for attorneys' fees incurred by Schiro through trial. Accordingly, we resolve appellants' (1) fourth and fifth issues complaining about the jury's award of contingent appellate attorneys' fees, and (2) second issue, to the extent it complains about the factual sufficiency of the evidence to support the jury's award of $131,786.11 for attorneys' fees incurred by Schiro through trial, against them.

Standard of Review

When a party attacks the legal sufficiency of the evidence to support an adverse finding on which it did not have the burden of proof at trial, it must demonstrate there is no evidence to support the adverse finding. *Exxon Corp. v. Emerald Oil & Gas Co., L.C.*, 348 S.W.3d 194, 215 (Tex. 2011); *Croucher v. Croucher*, 660 S.W.2d 55, 58 (Tex. 1983). In determining whether the evidence is legally sufficient to support a finding, we consider the evidence in the light most favorable to the judgment and indulge every reasonable inference that would support it. *City of Keller v. Wilson*, 168 S.W.3d 802, 822 (Tex. 2005). We must credit favorable evidence if a reasonable factfinder could and disregard contrary evidence unless a reasonable factfinder could not. *Id.* at 807, 827. "The final test for legal sufficiency must always be whether the evidence at trial would enable reasonable and fair-minded people to reach the verdict under review." *Id.* at 827.

A complaint the evidence is legally insufficient will be sustained when: (a) there is a complete absence of evidence of a vital fact; (b) the court is barred by rules of law or of evidence from giving weight to the only evidence offered to prove a vital fact; (c) the evidence offered to prove a vital fact is no more than a mere scintilla; or (d) the evidence establishes conclusively the opposite of the vital fact. *See id.* at 810; *King Ranch, Inc. v. Chapman*, 118 S.W.3d 742, 751 (Tex. 2003). "Anything more than a scintilla of evidence is legally sufficient to support the finding." *Formosa Plastics Corp. U.SA. v. Presidio Eng'rs & Contractors, Inc.*, 960 S.W.2d 41, 48 (Tex. 1998). There is more than a scintilla of evidence "when the evidence as a whole rises to a level enabling reasonable and fair-minded people to have different conclusions." *Waste Mgmt. of Tex., Inc. v. Tex. Disposal Sys. Landfill, Inc.*, 434 S.W.3d 142, 156 (Tex. 2014). "However, if the evidence is so weak that it only creates a mere surmise of suspicion of its existence, it is regarded as no evidence." *Id.* The factfinder is the sole judge of the credibility of the witnesses

and the weight to be given their testimony. *City of Keller*, 168 S.W.3d at 819. We may not substitute our judgment for that of the factfinder merely because we might reach a different result. *Id.* at 819, 822.

Analysis

Appellants contend the evidence was legally insufficient to support the jury's award of $131,786.11 for the attorneys' fees incurred by Schiro through trial because the evidence submitted in support of the award was conclusory, and Schiro's counsel, Daniel Tostrud, failed to adequately segregate fees for work performed on claims for which fees were recoverable from work performed on claims for which fees were not recoverable.

Relying on *El Apple I, Ltd. v. Olivas*, 370 S.W.3d 757, 764 (Tex. 2012) and its progeny, appellants argue Tostrud's testimony was conclusory and could not support the jury's award because there was no "evidence of the services performed, who performed them and at what hourly rate, when they were performed, and how much time the work required." Appellants assert Tostrud was required to either submit his billing records or give detailed testimony about the hours expended on each task and the attorney who performed the work. We disagree.

In *El Apple*, the Texas Supreme Court addressed the evidence necessary to support an award of attorneys' fees under the Texas Commission on Human Rights Act using the federal lodestar method. *Id.* at 760 ("Because federal courts use the lodestar method in awarding attorney's fees in the Title VII cases, Texas courts have likewise used lodestar in awarding fees under Section 21.259(a) of the TCHRA."). The court noted that, under the federal lodestar method, a claimant must produce evidence of the nature of the work, who performed the legal services and their billing rate, when the services were performed, and the amount of time spent on various aspects of the case. *Id*. at 763. However, it distinguished the lodestar approach from a traditional award of attorneys' fees noting that "[w]hile Texas courts have not routinely

required billing records or other documentary evidence to substantiate a claim for attorney's fees, the requirement has merit in contested cases under the lodestar approach." *Id.* at 762.

We have previously concluded *El Apple* does not stand for the proposition that all attorneys' fees recoveries in Texas are governed by the lodestar approach. *See Metroplex Mailing Servs., LLC v. RR Donnelley & Sons Co.*, 410 S.W.3d 889, 900 (Tex. App.—Dallas 2013, no pet.). Further, the Texas Supreme Court has clarified that, even under the lodestar approach, *El Apple* does not mandate that time records or billing statements are the exclusive means of proving a party's attorneys' fees. *See City of Laredo v. Montano*, 414 S.W.3d 731, 735–37 (Tex. 2013) (per curiam). Finally, the Texas Supreme Court recently affirmed an award of attorneys' fees under the Uniform Declaratory Judgment Act (UDJA), even though the attorneys' billing records were not admitted into evidence, *see Kinsel v. Lindsey*, 526 S.W.3d 411, 427 (Tex. 2017), indicating the lodestar method does not apply to all claims for attorneys' fees based on hourly billing.[7]

As to this case, the record does not show the lodestar method was required or that Schiro "chose to prove up attorney's fees using this method[.]" *See City of Laredo*, 414 S.W.3d at 736; *see also Long v. Griffin*, 442 S.W.3d 253, 253 (Tex. 2014) (per curiam) (referring to the party "choosing" the lodestar method of proving attorneys' fees). As a non-lodestar case, Schiro's failure to offer billing records or other documentation concerning Tostrud's attorneys' fees,

[7] In *Kinsel*, the defendants appealed the jury's award of $800,000 for attorneys' fees to the Amarillo Court of Appeals, contending the plaintiffs failed to produce written fee agreements, the evidence was insufficient to support the award, and the plaintiffs failed to segregate fees recoverable under the UDJA from those that were not. *Jackson Walker, LLP v. Kinsel*, 518 S.W.3d 1, 25 (Tex. App.—Amarillo 2015), *aff'd by Kinsel v. Lindsey*, 526 S.W.3d 411 (Tex. 2017). In evaluating the sufficiency of the evidence, the court of appeals looked to the supreme court's decision in *Garcia v. Gomez*, 319 S.W.3d 638, 641 (Tex. 2010), in which an attorney testified as to his experience and opined that particular sums for trial and appeal were reasonable and necessary fees. *Id*. at 26. Applying *Garcia*, the Amarillo Court of Appeals noted the evidence at trial on the plaintiffs' attorneys' fees consisted of testimony from legal counsel (1) about their respective experience, (2) generally describing the work performed by each, (3) alluding to the hours expended in preparing, (4) alluding to fees of either $920,000 or $950,000 being reasonable through trial of the cause, (5) mentioning their respective hourly rates, (6) describing in broad terms the factors considered in concluding the fees were reasonable, and (7) opining that they lost the opportunity to work on other matters. *Id.* at 27. The court of appeals concluded that, "[t]hough lacking in specifics too, the foregoing equated, at the very least, the quantum of evidence found sufficient by the Supreme Court in *Garcia*." *Id.*; *see also Garcia*, 319 S.W.3d at 641–42. On appeal to the supreme court, the plaintiffs again argued there was insufficient evidence to support the amount of the awarded fees. Without substantive analysis, the supreme court agreed with the court of appeals that the evidence was sufficient to support the award. *Kinsel*, 526 S.WS.3d at 427.

standing alone, does not render the evidence legally insufficient to support the attorney fees award. *See Kinsel*, 526 S.W.3d at 427; *Halsey v. Halter*, 486 S.W.3d 184, 188 (Tex. App.—Dallas 2016, no pet.); *see also J&K Tile Co. v. Aramsco Inc.*, No. 05-15-01065-CV, 2016 WL 6835717, at *2 (Tex. App.—Dallas Nov. 3, 2016, no pet.) (mem. op.) ("This Court has declined to require the lodestar approach for all attorney fee recoveries since *El Apple*."). Rather, in a non-lodestar case, "'an attorney's testimony about his experience, the total amount of fees, and the reasonableness of the fees charged is sufficient to support an award.'" *J&K Tile Co.*, 2016 WL 6835717, at *3 (quoting *Classic Superoof LLC v. Bean*, No. 05-12-00941-CV, 2014 WL 5141660, at *9 (Tex. App.—Dallas Oct. 14, 2014, pet. denied) (mem. op.)); *see also Kinsel*, 526 S.W.3d at 427; *Garcia v. Gomez*, 319 S.W.3d 638, 641 (Tex. 2010) (attorney's brief testimony about experience, total amount of fees, and that total amount of fees was reasonable and necessary is "some evidence" of reasonableness of attorney's fees).

Tostrud testified regarding his background and experience practicing law in Dallas for twenty-seven years, and his familiarity with reasonable and necessary fees charged in cases similar to this one. He also testified about the complexity of the case, and the amount of evidence that had to be reviewed in preparation for trial. Tostrud testified about his hourly billing rate and the hourly billing rate of another attorney who also worked on the case. Tostrud also stated he had submitted a detailed invoice of the work done on the case to Schiro each month during the representation.

Relying on a summary prepared from his billing statements, Tostrud testified about the total number of hours spent on the case, his estimate of the time he and his associate attorney would spend during the trial, and the total amount of fees and expenses, $131,786.11, sought by Schiro. Tostrud testified he considered the time records in the case in light of the factors set out

in *Arthur Anderson*,[8] and in his opinion, the requested fees were reasonable and necessary. Although he had copies of Tostrud's billing statements, appellants' counsel did not request a copy of the summary Tostrud was using during his testimony, and did not cross-examine Tostrud on any of the fees charged to Schiro. On this record, we conclude Tostrud's testimony is legally sufficient to support the jury's award of attorneys' fees through trial. *See Kinsel*, 526 S.W.3d at 427, *Garcia*, 319 S.W.3d at 641; *J&K Tile Co.*, 2016 WL 6835717, at *3.

We finally turn to appellants' complaint Tostrud failed to adequately segregate non-recoverable fees from recoverable fees. A claimant seeking attorneys' fees bears the burden of segregating fees between claims for which they are recoverable and claims for which they are not. *Tony Gullo Motors I, L.P. v. Chapa*, 212 S.W.3d 299, 311 (Tex. 2006); *see also Kinsel*, 526 S.W.3d at 427. "[T]o meet a party's burden to segregate its attorneys' fees, it is sufficient to submit to the fact-finder testimony from a party's attorney concerning the percentage of hours that related solely to a claim for which fees are not recoverable." *Berryman's S. Fork, Inc. v. J. Baxter Brinkmann Int'l, Corp.*, 418 S.W.3d 172, 202 (Tex. App.—Dallas 2013, pet. denied) (quoting *RM Crowe Prop. Servs. Co., L.P. v. Strategic Energy, L.L.C.*, 348 S.W.3d 444, 453 (Tex. App.—Dallas 2011, no pet.)); *see also Tony Gullo Motors I, L.P.*, 212 S.W.3d at 314 ("[A]n opinion would have sufficed stating that, for example, 95 percent of their drafting time would have been necessary even if there had been no fraud claim.").

Tostrud testified a portion of the work on the case was defending the conversion and legal malpractice counterclaims asserted by appellants, and attorneys' fees were not recoverable for defending against these two claims. In Tostrud's opinion, approximately thirty percent of the

[8] *See Arthur Anderson & Co. v Perry Equip. Corp.*, 945 S.W.2d 812, 818 (Tex. 1997). The factors set out in *Arthur Anderson* for determining the reasonableness of a fee include: (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill required to perform the legal service properly; (2) the likelihood that the acceptance of the particular employment will preclude other employment by the lawyer; (3) the fee customarily charged in the locality for similar legal services; (4) the amount involved and the results obtained; (5) the time limitations imposed by the client or the circumstances; (6) the nature and length of the professional relationship with the client; (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and (8) whether the fee is fixed or contingent on results obtained or uncertainty of collection before the legal services have been rendered. *Id*.

time spent on the case through the trial court's grant of summary judgment was to defend those two counterclaims, and Schiro was not seeking to recover attorneys' fees for that work. Tostrud testified that, after the trial court granted summary judgment on the legal malpractice and conversion counterclaims, all work performed on the case was in prosecution of Schiro's breach of contract claim, or in defense of appellants' breach of contract counterclaim, and the fees charged for that work was recoverable. Appellants did not object to this evidence or provide controverting evidence regarding segregation of attorneys' fees. On this record, we conclude Schiro met his burden as to segregation of recoverable attorneys' fees from non-recoverable attorneys' fees.

We resolve appellants' second issue, to the extent it challenges the legal sufficiency of the evidence to support the jury's award of $131,786.11 for reasonable and necessary attorneys' fees incurred by Schiro through trial, against them.

We affirm the trial court's judgment.

/Robert M. Fillmore/
ROBERT M. FILLMORE
JUSTICE

160999F.P05

Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

DANIEL S. BARNETT AND ABOVO CORPORATION, Appellants

No. 05-16-00999-CV V.

RICHARD B. SCHIRO, Appellee

On Appeal from the 95th Judicial District Court, Dallas County, Texas,
Trial Court Cause No. DC-13-08747.
Opinion delivered by Justice Fillmore, Justices Lang-Miers and Stoddart participating.

In accordance with this Court's opinion of this date, the judgment of the trial court is **AFFIRMED**.

It is **ORDERED** that appellee Richard B. Schiro recover his costs of this appeal from appellants Daniel S. Barnett and Abovo Corporation.

Judgment entered January 9, 2018.