SOAH DOCKET NO. 582-16-0967
TCEQ DOCKET NO. 2015-1268-UIC

APPLICATION BY URI, INC. FOR RENEWAL AND MAJOR AMENDMENT OF CLASS III INJECTION WELL AREA PERMIT NO. UR02827	§ § § § §	**BEFORE THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY**

APPLICANT URI, INC.'S EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S PROPOSAL FOR DECISION

TO THE HONORABLE COMMISSIONERS OF THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY:

Applicant URI, Inc. ("Applicant" or "URI") files this, its Exceptions to the Administrative Law Judge's ("ALJ") Proposal for Decision ("PFD") pursuant to applicable rules of the Texas Commission on Environmental Quality ("TCEQ" or the "Commission").

Discussion

URI hereby adopts and incorporates its prior arguments and analysis contained in its Responses and Objections to Kleberg County's and Nerio and Olga Martinez's Submission of Reimbursable Expenses (Attachment 1) ("Responses").

For the reasons stated in its Responses, URI requests that, to the extent discussed therein, the Commission not adopt all of the ALJ's recommendation. URI recommends that the Commission reduce the amount the ALJ recommends it reimburse Kleberg County in this proceeding by an amount equal to $9,382.48.

In summary, URI disagrees with the PFD that URI should reimburse Kleberg County any expenses related to a lawsuit filed by the County against the TCEQ. The fact that URI was not a party to that misguided lawsuit and that Kleberg County non-suited it only reinforces that its

claims for reimbursement are not justified. The justification for the recommendation in the PFD is conclusory and stretches the interpretation of 30 TAC 80.25(e)(2) beyond reason.

URI also disagrees that legal assistant time should be reimbursed for the reasons explained in its previously filed Responses.

URI agrees with the ALJ's analysis regarding the claims of Nerio and Olga Martinez and URI agrees to reimburse the remainder of their requested expenses.

Conclusion

For the reasons stated above, URI requests that the Commission adopt its amended draft Order (Attachment 2) requiring it to reimburse Kleberg County a total of $7,592.77 and Nerio and Olga Martinez a total of $967.38 for expenses each incurred in the TCEQ permitting process for permit amendment and renewal of UIC Permit No. UR02827.

Respectfully submitted,

LLOYD GOSSELINK
ROCHELLE & TOWNSEND, P.C.
816 Congress Ave., Suite 1900
Austin, Texas 78701
(512) 322-5800
(512) 472-0532 (Fax)

By: _____
DUNCAN C. NORTON
State Bar Number 15103950

ATTORNEY FOR URI, INC.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document has been served on the following counsel/parties of record by electronic mail, certified mail (return receipt requested), regular U.S. Mail, facsimile transmission and/or hand delivery on this the 12th day of October, 2016.

FOR THE APPLICANT
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URI, Inc.
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Kingsville, Texas 78363-2628
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Eleuterio Saenz
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Tel: (361) 592-4156

Duncan C. Norton

SOAH DOCKET NO. 582-16-0967
TCEQ DOCKET NO. 2015-1268-UIC

APPLICATION BY URI, INC. FOR RENEWAL AND MAJOR AMENDMENT OF CLASS III INJECTION WELL AREA PERMIT NO. UR02827	**§**	**BEFORE THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY**

APPLICANT URI, INC.'S EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S PROPOSAL FOR DECISION

Attachment 1

Applicant URI, Inc.'s Responses and Objections to Kleberg County's and Nerio and Olga Martinez's Submission of Reimbursable Expenses

SOAH DOCKET NO. 582-16-0967
TCEQ DOCKET NO. 2015-1268-UIC

APPLICATION BY URI, INC. FOR RENEWAL AND MAJOR AMENDMENT OF CLASS III INJECTION WELL AREA PERMIT No. UR02827	§ § § § §	BEFORE THE STATE OFFICE OF ADMINISTRATIVE HEARINGS

APPLICANT URI, INC.'S RESPONSES AND OBJECTIONS TO KLEBERG COUNTY'S AND NERIO AND OLGA MARTINEZ'S SUBMISSION OF REIMBURSABLE EXPENSES

TO THE HONORABLE ADMINISTRATIVE LAW JUDGE CASEY A. BELL:

Applicant URI, Inc. ("Applicant" or "URI") files this, its Responses and Objections to Kleberg County's Submission of Reimbursable Expenses and Nerio and Olga Martinez's Reimbursable Expenses, pursuant to the ALJ's Order No. 3, and other applicable rules of the Texas Commission on Environmental Quality ("TCEQ" or the "Commission").

In support thereof, URI submits the following:

I.
OBJECTIONS TO KLEBERG COUNTY'S REQUEST FOR REIMBURSEMENT OF EXPENSES

A. URI objects to all expenses claimed by Kleberg County related to Kleberg County's pursuit of a lawsuit against TCEQ on January 7, 2013 and non-suited by Kleberg County on February 6, 2013. Itemization and documentation of the reimbursable expenses incurred by Kleberg County are contained within the Affidavits of Brad Rockwell and Shari Straight attached to its Submission of Reimbursable Expenses. The reimbursable expenses contained in the attached Affidavit of Sheri Straight in Exhibit A[1] lists expenses of $352.00 total for entries apparently related to the pursuit of litigation against the TCEQ for a dispute over the

[1] See Attachment A to Applicant URI Inc.'s Responses and Objections.

manner of TCEQ's processing of the URI applications for renewal and amendment. Additionally, the 1/7/2013, the 2/6/2013, and the 3/7/2013 invoices contained in the Affidavit of Brad Rockwell in Exhibit A[2] include $1,014.98 in expenses which are related to that litigation also. None of these expenses fall within the ambit of "expenses incurred in the permitting process for the subject application" as required by 30 TAC §80.25(e)(2). A collateral lawsuit against the TCEQ in which URI was not even a party clearly does not qualify for reimbursement. For this reason, URI objects to the above identified expenses and requests that the ALJ deny their reimbursement.

B. Additionally and independently of the objection above, URI objects to the $8,367.50 in "legal assistant expenses" as referenced in paragraph 24 of the affidavit of Brad Rockwell.[3] The cost of paralegal work has been categorized an attorney's fees where "a legal assistant performed work that has traditionally been done by an attorney." *Clary Corp. v. Smith*, 949 S.W. 2d 452, 469 (Tex. App.—1997);[4] *Gill Savings Ass'n v. Int'l Supply Co., Inc.*, 759 S.W. 2d 697, 702 (Tex. App.—Dallas 1988).[5] The cost of work done by a paralegal is included within the definition of attorney's fees if the evidence establishes: "(1) the qualifications of the legal assistant to perform substantive legal work; (2) that the legal assistant performed substantive legal work under the direction and supervision of an attorney; (3) the nature of the legal work performed; (4) the legal assistant's hourly rate; and (5) the number of hours expended by the legal assistant. *All Seasons Window and Door Mfg., Inc.* v. *Red Dot Corp.*, 181 S.W. 3d 490, 504 (2005).[6]

---

[2] See Attachment B to Applicant URI Inc.'s Responses and Objections.
[3] Some of Kleberg County's requests for reimbursement likely are improper for reasons explained in both I.A and I.B.
[4] See Attachment C to Applicant URI Inc.'s Responses and Objections.
[5] See Attachment D to Applicant URI Inc.'s Responses and Objections.
[6] See Attachment E to Applicant URI Inc.'s Responses and Objections.

The invoices provided by opposing counsel include legal assistant fees for work that is likely considered work "that has traditionally been done by an attorney" and meets the requirements established in *All Seasons Window and Door Mfg.* Kleberg County has the burden to support its expense claim. It has failed to separate out the legal assistant fees that fall within the guidelines established in *All Seasons*. This failure to properly support its claim is grounds for denial of the entire $8,367.50 of legal expenses claimed by Kleberg County. Therefore, URI objects to all items labelled as "legal assistant" expenses on the grounds that it appears that many of these entries include legal work that should be placed in the same category as other attorney's fees, rather than expenses, and which URI is not required to pay pursuant to 30 TAC §80.25(e)(2).

II.
OBJECTION TO NERIO AND OLGA MARTINEZ'S REQUEST FOR REIMBURSEMENT OF EXPENSES

URI objects to the reimbursement of the Martinez's expenses in the amount of $446.19 for the purchase of a Fujitsu portable scanner.[7] The purchase of a scanner cannot be properly categorized as an expense. It can only be appropriately categorized as the purchase of office equipment, and therefore is a capital expenditure and not a reimbursable expense. For this reason, URI requests that the amount URI must reimburse the Martinez's be reduced by $446.19.

III.
OTHER PARTIES

No other parties submitted any reimbursement requests.

[7] See Attachment F to Applicant URI Inc.'s Responses and Objections.

IV.
PRAYER

For these reasons, URI requests that, to the extent discussed above, URI be released from the obligation to reimburse the parties in this proceeding. URI agrees to reimburse the parties the remainder of their requested expenses.

Respectfully submitted,

LLOYD GOSSELINK
ROCHELLE & TOWNSEND, P.C.
816 Congress Ave., Suite 1900
Austin, Texas 78701
(512) 322-5800
(512) 472-0532 (Fax)

By: _____
DUNCAN C. NORTON
State Bar Number 15103950

ATTORNEY FOR URI, INC.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document has been served on the following counsel/parties of record by electronic mail, certified mail (return receipt requested), regular U.S. Mail, facsimile transmission and/or hand delivery on this the 22nd day of July, 2016.

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Duncan C. Norton

Attachment A

SOAH DOCKET NO. 582-16-0967
TCEQ DOCKET NO. 2015-1268-UIC

APPLICATION OF URANIUM RESOURCES INC. FOR RENEWAL AND MAJOR AMENDMENT OF CLASS III INJECTION WELL AREA PERMIT NO. UR02827	§	**BEFORE THE STATE OFFICE OF ADMINISTRATIVE HEARINGS**

AFFIDAVIT OF SHARI STRAIGHT IN SUPPORT OF REIMBURSEMENT TO KLEBERG COUNTY OF EXPENSES INCURRED IN THE PERMITTING PROCESS FOR URI, INC.'S APPLICATION FOR RENEWAL TO AND MAJOR AMENDMENT OF PERMIT UR02827

STATE OF TEXAS §
§
COUNTY OF TRAVIS §

BEFORE ME, the undersigned Notary Public on this day, personally appeared Shari Straight, known to me to be the person whose name is subscribed hereto, and after being duly sworn on her oath stated the following:

1. "My name is Shari Straight. I am over eighteen (18) years of age and of sound mind, have never been convicted of a felony, and am otherwise competent to make this affidavit. I have personal knowledge of the facts stated in this affidavit, all of which are true and correct.

2. "I have been the Office Manager at Frederick, Perales, Allmon & Rockwell, P.C. ("FPAR"), for five (5) years. My duties include, but are not limited to bookkeeping, preparing, and sending monthly invoices to clients, and receiving payments and depositing checks from clients.

3. "I assemble or collect the information that goes on the invoice. I do not send out any final invoice to Kleberg County until the invoice has been reviewed and approved by Brad Rockwell. I am the custodian of the invoices at FPAR.

4. "I have reviewed the application and exhibit to the Brad Rockwell affidavit. True and correct copies of the invoices (with records of attorneys' fees and other non-reimbursable expenses redacted) sent to Kleberg County relating to the permit

Exhibit A

Kleberg Renewal Permit Expenses
Legal Assistant Time

Date	Num	Name	Memo	Item	Item Description	Sales Price	Amount
01/07/2013	6008	Kleberg Renewal Permit (264)	Emailed BR re. coordination & planning for Commissioners Court meeting.	KC 035		35.00	3.50
01/07/2013	6008	Kleberg Renewal Permit (264)	Assisted BR w/ preparation & research for original petition. Created shell document.	KC 035		35.00	35.00
01/07/2013	6008	Kleberg Renewal Permit (264)	Reviewed, edited, filed petition (1.5)	SDW 030		30.00	45.00
01/07/2013	6008	Kleberg Renewal Permit (264)	Ph. call to district court & process server re. issuance of citation for original petition.	KC 035		35.00	17.50
01/07/2013	6008	Kleberg Renewal Permit (264)	F/U ph. call w/ district clerk & process server re. status of issuance of citation.	KC 035		35.00	17.50
01/07/2013	6008	Kleberg Renewal Permit (264)	F/U ph. call w/ District Clerk re. citation for original petition. F/U e-mail with process server re. status of issuance of citation	KC 035		35.00	3.50
01/07/2013	6008	Kleberg Renewal Permit (264)	F/U w/ process server re. status of issuance of citations for original petition to defendants.	KC 035		35.00	7.00
01/07/2013	6008	Kleberg Renewal Permit (264)	Calculated deadlines for Defendants' answer and emailed DOF & BR.	KC 035		35.00	31.50
01/07/2013	6008	Kleberg Renewal Permit (264)	Responded to BR research inquiry re: URI corporate info (.4)	SDW 030		30.00	12.00
01/07/2013	6008	Kleberg Renewal Permit (264)	Discussed case with KEC (.1)	SDW 030		30.00	3.00
02/06/2013	6055	Kleberg Renewal Permit (264)	Drafted a notice for Non-suit for Kleberg Permit Renewal (2.3).	KOB 040		40.00	92.00
02/06/2013	6055	Kleberg Renewal Permit (264)	Calculate deadlines for filing comments on Major Amendment (.3). Emailed Judge Escobar updating him of case status. (.3)	KOB 030		30.00	18.00
02/06/2013	6055	Kleberg Renewal Permit (264)	Prepared and filed plaintiff's notice of nonsuit (0.5). Located and assembled exhibits to press release. (0.5). Reviewed docketing sheet at district court. (0.4).	KB 035		35.00	49.00
03/07/2013	6130	Kleberg Renewal Permit (264)	Called potential volunteers to help us monitor newspaper for administrative complete notice.	KOB 035		35.00	10.50
03/07/2013	6130	Kleberg Renewal Permit (264)	Coded and filed Original Answer from Attorney General's office	KOB 035		35.00	7.00
4/8/2013	6204	Kleberg Renewal Permit (264)	Spoke with Don Redmon about administrative complete status, notices and obtaining new application (.2). Drafted and sent PIR to TCEQ for mailing list changes to URI's permit renewal and major amendment application (.5). Emailed and discussed with BR deadline triggers for notices, request for contested case hearing and public comments. (.4)	KOB 035		35.00	38.50
4/8/2013	6204	Kleberg Renewal Permit (264)	Called Don Redmon, asked about administrative complete status.	KOB 035		35.00	3.50
4/8/2013	6204	Kleberg Renewal Permit (264)	Drafted a summary for BR outlining administrative process and deadlines (.7). Scanned and sent NORI to BR (.1).	KOB 035		35.00	28.00
4/8/2013	6204	Kleberg Renewal Permit (264)	Responded to KOB research inquiry re: Kleberg application (.1)	SDW 035		35.00	3.50
5/6/2013	6235	Kleberg Renewal Permit (264)	Called local newspapers in Kleberg County to discuss NORI publication in order to calculate deadline (.5). Called Don Redmon at TCEQ to ask about publication (.1). Reviewed rules for filing comments and hearing request after NORI is published (.2).	KOB 035		35.00	28.00
6/9/2013	6322	Kleberg Renewal Permit (264)	Spoke with BR about status of publication (.1). Called Chief clerks office to find out about publication hold up (.2). Called Elizabeth Cumberland re: mailing list (.1). Ran a central registry check on application status (.1).	KOB 035		35.00	17.50
6/9/2013	6322	Kleberg Renewal Permit (264)	Called local newspapers to check on status of published NORI	KOB 035		35.00	10.50
8/6/2013	6440	Kleberg Renewal Permit (264)	Called Kingsville Record regarding public notice for permit renewal and request for article (.2). Review rules for deadlines and email BR results (.4).	KOB 035		35.00	21.00
8/6/2013	6440	Kleberg Renewal Permit (264)	Revised PIA request (.2); discussed application with TCEQ, KOB (.2)	SDW 035		35.00	14.00
8/6/2013	6440	Kleberg Renewal Permit (264)	Prepare letter regarding PIR and send to appropriate staff members at TCEQ	KOB 035		35.00	10.50
8/6/2013	6440	Kleberg Renewal Permit (264)	Look up rules for providing notice in Spanish (.3). Research schools in surrounding area and call for information about ESL or bilingual programs offered (.3).	KOB 035		35.00	21.00

Attachment B

SOAH DOCKET NO. 582-16-0967
TCEQ DOCKET NO. 2015-1268-UIC

APPLICATION OF URANIUM RESOURCES INC. FOR RENEWAL AND MAJOR AMENDMENT OF CLASS III INJECTION WELL AREA PERMIT NO. UR02827	§	**BEFORE THE STATE OFFICE OF ADMINISTRATIVE HEARINGS**

AFFIDAVIT OF BRAD ROCKWELL IN SUPPORT OF REIMBURSEMENT TO KLEBERG COUNTY OF EXPENSES INCURRED IN THE PERMITTING PROCESS FOR URI, INC.'S APPLICATION FOR RENEWAL TO AND MAJOR AMENDMENT OF PERMIT UR02827

STATE OF TEXAS §
§
COUNTY OF TRAVIS §

BEFORE ME, the undersigned Notary Public on this day, personally appeared Brad Rockwell, known to me to be the person whose name is subscribed hereto, and after being duly sworn on his oath stated the following:

1. "My name is Brad Rockwell. I am over eighteen (18) years of age and of sound mind, have never been convicted of a felony, and am otherwise competent to make this affidavit. I am an attorney at Frederick, Perales, Allmon & Rockwell, P.C. ("FPAR"). I have personal knowledge of the facts stated in this affidavit, all of which are true and correct.

2. I am the lead attorney for our client, Kleberg County, in matters relating to URI's application for renewal and major amendment to UR02827. The following is a

Summary of the Permitting Process for URI's Application.

3. On or shortly after September 24, 2012, URI, Inc., submitted to TCEQ an application to renew its Kingsville Dome permit UR02827. Kleberg County attempted to contact TCEQ to point out that URI had missed the deadline for its renewal request and that TCEQ was without authority to extend this deadline.

4. In December of 2012, Kleberg County filed suit seeking a declaration that URI had missed the deadline for its renewal application and that TCEQ was without jurisdiction to consider it.

Exhibit A

Lowerre, Frederick, Perales, Allmon, & Rockwell

707 Rio Grande, Suite 200
Austin, TX 78701

Invoice

Date	Invoice #
1/7/2013	6008

Bill To

Kleberg County
c/o County Judge, Kleberg County
P.O. Box 752
Kingsville, TX 78364

Re: Renewal Permit

Hrs/Qty	Serviced	Fees/Expenses	Description	Rate	Amount
1	12/7/2012	Copies-Vendor	Secretary of State of Texas	1.00	1.00
1	12/17/2012	Filing Fee	Original Petition	281.19	281.19
1	1/1/2013	Online Search ...	Online Research - West	37.13	37.13
1	1/2/2013	Online Search ...	Online Research - LexisNexis	32.68	32.68
52	1/2/2013	Copies	Copying Costs	0.10	5.20
1	1/3/2013	Process Service	Process Service	75.00	75.00
1	1/3/2013	Process Service	Process Service	37.50	37.50
1	1/3/2013	Process Service	Process Service	70.00	70.00
1	1/3/2013	Process Service	Process Service	37.50	37.50
0.1	12/3/2012	KC 035	Emailed BR re. coordination & planning for Commissioners Court meeting.	35.00	3.50
0.4	12/7/2012	SDW 030	Responded to BR research inquiry re: URI corporate info (.4)	30.00	12.00
0.1	12/10/2012	SDW 030	Discussed case with KEC (.1)	30.00	3.00
1	12/14/2012	KC 035	Assisted BR w/ preparation & research for original petition. Created shell document.	35.00	35.00
1.5	12/17/2012	SDW 030	Reviewed, edited, filed petition (1.5)	30.00	45.00
0.5	12/17/2012	KC 035	Ph. call to district court & process server re. issuance of citation for original petition.	35.00	17.50
0.5	12/19/2012	KC 035	F/U ph. call w/ district clerk & process server re. status of issuance of citation.	35.00	17.50
0.1	12/20/2012	KC 035	F/U ph. call w/ District Clerk re. citation for original petition, F/U e-mail with process server re. status of issuance of citation.	35.00	3.50
0.2	12/21/2012	KC 035	F/U w/ process server re. status of issuance of citations for original petition to defendants.	35.00	7.00
0.9	12/28/2012	KC 035	Calculated deadlines for Defendants' answer and emailed DOF & BR.	35.00	31.50
			Total Expenses		752.70

[redacted]

Phone #	Fax #
512-469-6000	512-482-9346

Total

Lowerre, Frederick, Perales, Allmon, & Rockwell
707 Rio Grande, Suite 200
Austin, TX 78701

Invoice

Date	Invoice #
2/6/2013	6055

Bill To

Kleberg County
c/o County Judge, Kleberg County
P.O. Box 752
Kingsville, TX 78364

Re: Renewal Permit

Hrs/Qty	Serviced	Fees/Expenses	Description	Rate	Amount
1	12/17/2012	Filing Fee	Texas Online E-filing	23.77	23.77
1	1/17/2013	Filing Fee	Notice of Nonsuit	27.61	27.61
61	2/1/2013	Copies	Copying Costs	0.10	6.10
1	2/1/2013	Postage	Postage	19.20	19.20
2	1/9/2013	KOB 0	Reviewed Original Petition and case info sheet.	0.00	0.00
2.2	1/10/2013	KOB 0	Reviewed Amended Answer and Original Petition in preparation for H20 deadline and future case work (2.0). Participated in a phone call to Don Redmon regarding URI's renewal application (.2).	0.00	0.00
[redacted]					
2.3	1/16/2013	KOB 040	Drafted a notice for Non-suit for Kleberg Permit Renewal (2.3).	40.00	92.00
[redacted]					
1.4	1/17/2013	KB 035	Prepared and filed plaintiff's notice of nonsuit (0.5). Located and assembled exhibits to press release (0.5). Reviewed docketing sheet at district court (0.4).	35.00	49.00
0.6	1/18/2013	KOB 030	Calculate deadlines for filing comments on Major Amendment (.3). Emailed Judge Escobar updating him of case status (.3).	30.00	18.00
0.5	1/18/2013	KB 0	Conversation with KOB re: case facts and status (0.4). Phone conversation with KC re: new permit amendment (0.1).	0.00	0.00
			Total Expenses		300.68
[redacted]					

Phone #	Fax #
512-469-6000	512-482-9346

Total

Lowerre, Frederick, Perales, Allmon, & Rockwell
707 Rio Grande, Suite 200
Austin, TX 78701

Invoice

Date	Invoice #
3/7/2013	6130

Bill To

Kleberg County
c/o County Judge, Kleberg County
P.O. Box 752
Kingsville, TX 78364

Re: Renewal Permit

Hrs/Qty	Serviced	Fees/Expenses	Description	Rate	Amount
1	1/18/2013	Filing Fee	EFile EFM	5.62	5.62
1	1/25/2013	Shipping	FedEx - Rodriguez	31.88	31.88
1	3/1/2013	Copies	Copying Costs	0.10	0.10
[redacted]					
0.3	2/25/2013	KOB 035	Called potential volunteers to help us monitor newspaper for administrative complete notice.	35.00	10.50
0.2	2/26/2013	KOB 035	Coded and filed Original Answer from Attorney General's office.	35.00	7.00
			Total Expenses		79.60
[redacted]					

Phone #	Fax #
512-469-6000	512-482-9346

Total $199.60

Attachment C

949 S.W.2d 452
Court of Appeals of Texas,
Fort Worth.

CLARY CORPORATION, Appellant,

v.

Daniel F. SMITH and Michael A. Smith, Individually, and d/b/a Fairfield Distributors, Appellees.

No. 2-93-243-CV.

|

July 3, 1997.

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Rehearing Overruled Aug. 28, 1997.

Manufacturer of pallet products brought action against distributor and partners in distributor for balance on open account, and distributors counterclaimed against manufacturer, alleging defective trade practices, negligent misrepresentation and tortious interference with business relations. The County Court at Law No. 3, Tarrant County, Vincent G. Sprinkle, J., rendered net judgment for distributors in total sum of $264,270.61, and manufacturer appealed. The Court of Appeals, 886 S.W.2d 570, reversed and remanded. On application for writ of error, the Supreme Court, 917 S.W.2d 796,reversed and remanded. On remand, the Court of Appeals, Richards, J., held that: (1) attempt to amend claim to plead amounts within trial court's jurisdiction after dismissal for lack of jurisdiction did not relate back to date of original counterclaim, but rather constituted new lawsuit barred by statute of limitations; (2) plain language of saving statute precluded its application to claims refiled in same court after initial dismissal for failure to plead amounts in controversy within court's jurisdiction; (3) partner had standing to bring negligent misrepresentation and Deceptive Trade Practices-Consumer Protection Act (DTPA) claims in his individual capacity; (4) negligent misrepresentation claim sufficiently alleged misstatement of existing fact; (5) partner qualified as consumer for purposes of DTPA claims; (6) some evidence supported "benefit of the bargain" damages to partner under DTPA; and (7) partner was not entitled to damages under DTPA for mental anguish.

Affirmed in part and reversed in part.

Attorneys and Law Firms

*456 Cantey & Hanger, L.L.P., Sloan B. Blair, Kevin C. Norton, Fort Worth, for Appellant.

Shannon, Gracey, Ratliff & Miller, L.L.P., John J. Drake, Steven J. Graham, Fort Worth, for Appellees.

Before DAY, DAUPHINOT and RICHARDS, JJ.

OPINION ON REMAND

RICHARDS, Justice.

I. INTRODUCTION

In our original opinion in this case, we reversed the trial court's judgment and dismissed appellees' claims based on our holding that the trial court lacked subject matter jurisdiction over this case. *See Clary Corp. v. Smith,* 886 S.W.2d 570 (Tex.App.—Fort Worth 1994). The Texas Supreme Court reversed our decision regarding the trial court's jurisdiction and remanded the case to us for additional proceedings. *See Smith v. Clary Corp.,* 917 S.W.2d 796 (Tex.1996). In this opinion on remand, we consider appellant's remaining points of error and appellees' cross-point. We must decide the following issues:

- When a lawsuit is dismissed for want of jurisdiction and later refiled in the same court, is the new pleading an amendment that relates back to the date the original lawsuit was filed, or is it a new lawsuit for statute of limitations purposes? We hold that the new pleading is a new lawsuit.

- In these circumstances, does the saving provision in section 16.064 of the Texas Civil Practice and Remedies Code operate to toll the statute of limitations? We hold that section 16.064 does not apply.

- When a defendant has allegedly committed torts against a partnership, does an individual partner ever have standing to recover from the defendant in the partner's individual capacity? We hold that an individual partner has standing to sue if the defendant violated the individual's—as opposed to the partnership's—legal rights.

*457 - Can a distributorship, which is generally an intangible, constitute a good or service under the DTPA? We hold that it can, if the distributorship includes services that are clearly the objective of the transaction.

- Can an individual who does not personally lease or purchase goods or services be a consumer under the DTPA? We hold that the individual can be a consumer if the individual is the beneficiary of the goods or services.

We must also consider several challenges to the legal and factual sufficiency of the evidence. We hold that the evidence is sufficient to support all of the jury's findings pertinent to this appeal except the jury's award of mental anguish damages for DTPA violations.

In light of our holdings, we reverse the trial court's judgment as to appellees Michael A. Smith, individually, and d/b/a Fairfield Distributors, and render judgment that they take nothing because their claims are barred by limitations. We reverse that part of the trial court's judgment awarding appellee Daniel F. Smith, individually, mental anguish damages on his DTPA claim and render judgment that he is not entitled to mental anguish damages. We affirm the remainder of the trial court's judgment as to Daniel F. Smith, individually, and remand the cause to the trial court for recalculation of interest and entry of judgment in accordance with this opinion. [1]

II. BACKGROUND FACTS

Daniel and Michael worked with their father in a family-owned pallet business. A pallet is a platform made from slats of wood connected by 2 x 4s called "stringers." It is not uncommon for a stringer to become cracked from use. In the 1970s and early 1980s, the accepted method of pallet repair consisted of nailing part of a 2 x 4 under the damaged stringer, which strengthened the stringer but decreased the space between the top and bottom platforms of the pallet.

In the mid-to-late 1980s, the pallet business was in transition. The use of high rack storage systems, which enabled a company to store goods on pallets 30 to 40 feet above the ground, and pallet conveyor loading systems became more prevalent. As a result, the old method of pallet repair created a hazardous situation. Forklift operators would periodically strike the block of wood under the repaired stringer while attempting to remove a pallet from high rack storage, causing merchandise to fall to the ground. The potential liability associated with repaired pallets outweighed any savings associated with them.

In 1989, Clary entered the pallet repair business. Clary had developed a machine that compressed plates on each side of a damaged stringer, creating a "splint." The splint does not significantly decrease the space between the top and bottom

platforms of the pallet. Thus, businesses can use pallets repaired with the Clary system without exposing themselves to the risks associated with pallets repaired the old way. In addition, pallets repaired with the Clary system can be resold for the same price as pallets with no prior stringer damage, thereby creating a greater profit potential for companies who sell used pallets.

Being new to the pallet repair business, Clary decided to develop markets for its pallet products by using distributors with established contacts in the industry. At that time, Clary did not have a pre-established sales force marketing its products. Clary believed it would cost less to set up distributorships with pallet businesses who already had market contacts than to hire direct sales people.

In early 1989, Daniel read an advertisement for a Clary stringer repair system in a pallet trade magazine. Daniel contacted Clary and eventually spoke with Dwane Brown by telephone about the stringer repair system. Brown was Clary's national sales manager of pallet products. During the telephone conversation, Brown offered *458 Daniel a Clary distributorship. Daniel and his wife LaDonna then met with Brown to discuss the distributorship. Through Brown, Clary offered Daniel a 22–state east coast distributorship requiring a $50,000 initial outlay. In return, the distributorship was to receive factory leads on a monthly basis, local trade show support, six copies of Clary's sales video, a one percent annual advertising discount, annual prospect lists, engineering testing, a sales support package, a sales training program, 1,056 boxes of Clary pallet plates, and five pallet platers.

After meeting with Brown, Daniel and LaDonna borrowed $50,000 to invest in a partnership (Fairfield) that would market Clary products. Daniel also contacted Michael to discuss forming the partnership. Michael invested $30,000 in the partnership.

By early March 1989, Fairfield was formed and had contracted with Clary to be its east coast distributor. In September 1989, a dispute developed between Clary and Fairfield regarding whether Fairfield had or could retain the exclusive right to market Clary's products within the 22–state territory. This dispute continued until Clary notified Fairfield that Fairfield would no longer be allowed to market Clary's products.

On August 20, 1990, Clary sued appellees for money that Clary contended was due and owing for products Fairfield had purchased from Clary. Appellees counterclaimed, alleging violations of the Deceptive Trade Practices–Consumer Protection Act (DTPA), negligent misrepresentation, and tortious interference with business relationships. After a trial, the jury found that appellees owed Clary $14,155.57 for Clary products. The jury also found that appellees were entitled to recover from Clary on their counterclaims. Based on the jury's findings, the trial court rendered judgment for appellees in the total amount of $264,270.61 plus post-judgment interest. This appeal followed.

Clary raises fifteen points of error on appeal. In point of error one, Clary contends that appellees' claims at trial were all partnership assets and that Daniel and Michael have no individual claims against Clary. In point of error two, Clary contends that Fairfield's and Michael's claims are barred by the statute of limitations. In points of error three through thirteen, Clary challenges the legal and factual sufficiency of the evidence to support the jury's answers to various jury questions. In points of error fourteen and fifteen, Clary challenges the award of attorneys' fees to appellees.

In a single cross-point, appellees contend that the trial court erred in excluding legal assistant fees from the attorneys' fees award.

III. STATUTE OF LIMITATIONS

[1] We will first address Clary's second point of error: whether Fairfield's and Michael's claims are barred by limitations. Appellees' claims against Clary were required to have been brought within two years of their accrual. The claims accrued, at the latest, when appellees should with reasonable care or diligence have discovered their alleged injuries, or in the case of the DTPA, the alleged deceptive act or practice. *See* TEX. CIV. PRAC. & REM.CODE ANN. § 16.003 (Vernon 1986

& Supp.1997); TEX. BUS. & COM.CODE ANN. § 17.565 (Vernon 1987); *Moreno v. Sterling Drug, Inc.*, 787 S.W.2d 348, 351 (Tex.1990); *Texas Am. Corp. v. Woodbridge Joint Venture*, 809 S.W.2d 299, 302–03 (Tex.App.—Fort Worth 1991, writ denied).

Appellees pleaded the discovery rule and obtained a jury finding setting the date of discovery of their claims as April 27, 1990. They filed their first counterclaims on August 6, 1991, alleging unliquidated damages. In their first amended counterclaim, filed on April 24, 1992, each of the appellees alleged damages amounts in excess of the county court's $100,000 jurisdictional limits. [2] Specifically, Daniel, Michael, and Fairfield alleged $197,545.33, $194,545.33, and $314,390.50, respectively in past and future damages.

*459 Clary filed a plea to the court's jurisdiction and, on July 8, 1992, the trial court entered an order dismissing Fairfield's and Michael's claims for want of jurisdiction. The trial court also ordered Daniel to amend his counterclaim to plead an amount in controversy within the court's jurisdictional limits to avoid dismissal. Appellees' counsel approved the dismissal order in its entirety, although Clary's counsel only approved it as to form.

After entry of the July 8, 1992 order, Daniel filed second and third amended counterclaims. Then, on September 4, 1992, a fourth amended counterclaim was filed in which Fairfield and Michael were again named as parties to the suit and in which they reasserted their claims against Clary.

Clary contends that the fourth amended counterclaim was barred by limitations as to Fairfield and Michael (but not as to Daniel). We agree. In addressing this point of error, we must decide whether the fourth amended counterclaim was an amended pleading that "related back" to the original counterclaim to defeat Clary's statute of limitations defense, or whether the fourth amended counterclaim was a new lawsuit that was time-barred. We conclude it was the latter.

A. The fourth amended counterclaim was a new lawsuit as to Fairfield and Michael, and the relation-back doctrine does not apply.

[2] When a cause of action is dismissed and later refiled, limitations are calculated to run from the time the cause of action accrued until the date that the claim is refiled. *See Cunningham v. Fox*, 879 S.W.2d 210, 212 (Tex.App.—Houston [14th Dist.] 1994, writ denied); *Cronen v. City of Pasadena*, 835 S.W.2d 206, 210 (Tex.App.—Houston [1st Dist.] 1992, no writ), *overruled on other grounds, Lewis v. Blake*, 876 S.W.2d 314, 315 (Tex.1994); *Berry v. Humble Oil & Ref. Co.*, 205 S.W.2d 376, 386 (Tex.Civ.App.—Waco 1947, writ ref'd n.r.e.). This is because a dismissal is equivalent to a suit never having been filed; thus, the statute of limitations is not tolled for any new pleading filed. *See Cunningham*, 879 S.W.2d at 212.

[3] In this case, appellees' claims against Clary accrued on April 27, 1990, and limitations ran from that date. When Fairfield and Michael were dismissed from the case on July 8, 1992, it was as if they had never filed suit. The dismissal was based on their failure or refusal to plead an amount in controversy within the trial court's jurisdiction. Nearly two months later, on September 4, 1992, Fairfield and Michael joined Daniel in the fourth amended counterclaim and for the first time pleaded amounts in controversy that were within the trial court's jurisdiction. However, the "amendment" did not relate back to the date of the original counterclaim; instead, it was a new lawsuit because it was made post-dismissal. Moreover, because September 4, 1992 was more than two years after April 27, 1990, the new lawsuit was barred by limitations. *See id.* at 211–12 (party who was dismissed from suit for lack of standing and made a post-dismissal amendment to his complaint alleging proper grounds for standing actually filed a new lawsuit that was barred by limitations).

Nonetheless, appellees contend that Fairfield's and Michael's claims are saved from limitations on two grounds: the relation-back doctrine and the saving provision in section 16.064 of the Texas Civil Practice and Remedies Code.

|4| Under the relation-back doctrine, if an amended pleading asserts additional causes of action based upon the same transaction or occurrence that formed the basis of the claims made in the original pleading, then the amended pleading relates back to the original filing and is not subject to a limitations defense. *See* TEX. CIV. PRAC. & REM.CODE ANN. § 16.068 (Vernon 1986); *Ex parte Goad,* 690 S.W.2d 894, 896 (Tex.1985); *Lochinvar Corp. v. Meyers,* 930 S.W.2d 182, 188 (Tex.App.—Dallas 1996, no writ); *Duran v. Furr's Supermarkets., Inc.,* 921 S.W.2d 778, 791–92 (Tex.App.—El Paso 1996, writ denied).

The relation-back doctrine does not apply to this case because the fourth amended counterclaim was not an *amended* pleading as to Fairfield and Michael; it was a completely *new* pleading. After they had been completely dismissed from the case, Fairfield *460 and Michael reasserted their claims against Clary and alleged new amounts in controversy. The relation-back doctrine does not save claims that have been dismissed and are later refiled. *Compare Cunningham,* 879 S.W.2d at 212 (petition "amended" post-dismissal was a new lawsuit, not an amendment) *with Abbott v. Foy,* 662 S.W.2d 629, 631 (Tex.App.—Houston [14th Dist.] 1983, writ ref'd n.r.e.) (pleading amended before dismissal was an amendment to original pleading). *See also Hanmore Dev. Corp. v. JBK Enter.,* 776 S.W.2d 738, 740 (Tex.App.—Corpus Christi 1989, writ denied) (omission of party in amended pleading operates as voluntary dismissal of party from lawsuit; if dismissed party is brought back into lawsuit through amendment made after limitations has run, suit is barred as to that party); *Johnson v. Coca-Cola Co.,* 727 S.W.2d 756, 758 (Tex.App.—Dallas 1987, writ ref'd n.r.e.) (same).

Because Fairfield's and Michael's joinder in the fourth amended counterclaim was a "new" lawsuit as to them, the relation back doctrine did not toll the running of limitations concerning their claims.

B. Section 16.064 does not apply to save Fairfield's and Michael's claims.

The saving provision in section 16.064 is also inapplicable to this case. Section 16.064 provides:

> (a) The period between the date of filing an action in a trial court and the date of a second filing of the same action *in a different court* suspends the running of the applicable statute of limitations for the period if:
>
> (1) because of lack of jurisdiction in the trial court where the action was first filed, the action is dismissed or the judgment is set aside or annulled in a direct proceeding; and
>
> (2) not later than the 60th day after the date the dismissal or other disposition becomes final, the action commenced in a court of proper jurisdiction.

TEX. CIV. PRAC. & REM.CODE ANN. § 16.064(a) (Vernon 1986) (emphasis added).

We must decide whether section 16.064(a) applies to Fairfield and Michael's situation because there is no Texas case law directly on point. Construction of a statute is a question of law. *See Johnson v. City of Fort Worth,* 774 S.W.2d 653, 656 (Tex.1989). The primary rule of construction is that a court must look to the legislature's intent and construe the statute to effectuate that intent. *See Union Bankers Ins. Co. v. Shelton,* 889 S.W.2d 278, 280 (Tex.1994). Statutory construction begins with an analysis of the statute. *See Cail v. Service Motors, Inc.,* 660 S.W.2d 814, 815 (Tex.1983). If the statute is clear and unambiguous, we must seek the legislature's intent as found in the plain and ordinary meaning of the words and terms used. *See Moreno,* 787 S.W.2d at 352; *Connors v. Connors,* 796 S.W.2d 233, 237 (Tex.App.—Fort Worth 1990, writ denied); *see also* TEX. GOV'T CODE ANN. § 312.002(a) (Vernon 1988).

|5| By its terms, section 16.064 does not apply to this case. After dismissal, Fairfield and Michael refiled their claims in the *same* court, not a *different* one. The plain language of both section 16.064 ("second filing ... in a different court") and its predecessor ("commencement in the second court")[3] indicates that the legislature intended the saving statute to apply only to cases refiled in a different court after dismissal, not in the same court. The case law also supports this interpretation. *See, e.g., Vale v. Ryan,* 809 S.W.2d 324, 326–27 (Tex.App.—Austin 1991, no writ) (cause of action

properly refiled in state court after dismissal by federal court). *Compare* *461 *Allright, Inc. v. Guy,* 696 S.W.2d 603, 605 (Tex.App.—Houston [14th Dist.] 1985, no writ) [*Allright 2*] *with Allright, Inc. v. Guy,* 590 S.W.2d 734, 735 (Tex.Civ.App. Houston [14th Dist.] 1979, writ ref'd n.r.e.) [*Allright 1*] (after *Allright 1* court determined that county court did not have jurisdiction over amount in controversy, plaintiff properly refiled in district court). We are not aware of any case in which section 16.064 has been applied to toll limitations where a litigant amended his pleadings and refiled his case in the *same* court following dismissal.

[6] We believe our interpretation of section 16.064 is in keeping with the statute's remedial purpose. Although the saving statute is to be liberally construed, its reach is not limitless. Rather, the statute is to be given a liberal construction to effectuate "its manifest objective—relief from penalty of limitation bar to one who has *mistakenly* brought his action 'in the wrong court.' " *Burford v. Sun Oil Co.,* 186 S.W.2d 306, 310 (Tex.Civ.App.—Austin 1944, writ ref'd w.o.m.) (op. on reh'g) (emphasis added). There is no evidence of mistake here. Appellees have neither alleged nor presented evidence that they were unaware of the trial court's amount in controversy limits. After Clary filed its plea to the jurisdiction, Fairfield and Michael could have amended their counterclaim to reduce their damages demand, yet they chose not to. Instead, they approved without limitation an order dismissing Fairfield and Michael. Then, after a lapse of nearly two months and two amended counterclaims by Daniel, they refiled their counterclaim in the same court with a reduced demand that could have been reduced to avoid dismissal in the first place. Section 16.064 was not designed to remedy such tactical decisions. *See Hotvedt v. Schlumberger Ltd. (N.V.),* 942 F.2d 294, 297 (5th Cir.1991).

Indeed, if a party can amend its pleadings to come within a trial court's jurisdiction, reliance upon section 16.064 is unnecessary; the party can avoid dismissal altogether through proper repleading. Then, the party would not be in the wrong court and would not suffer the "penalty of limitation bar" that section 16.064 is designed to protect against. Because Fairfield and Michael did not refile their case in a different court after dismissal and because there is no evidence that they initially mistakenly filed their counterclaim in the trial court, they cannot rely on section 16.064(a) to save their claims from limitations. We sustain Clary's second point of error and hold that all of Fairfield's and Michael's claims are barred by limitations.

In light of our holding with regard to this point of error, we need not consider Clary's fifth, ninth, twelfth, or thirteenth points of error because they only challenge findings for Fairfield. We address all of Clary's remaining points only as they pertain to Daniel.

IV. DANIEL'S RIGHT TO PURSUE INDIVIDUAL CLAIMS

In its first point of error, Clary contends that all of appellees' claims at trial were partnership assets and that Daniel had no individual claims against Clary. The jury found for appellees on three theories: DTPA violations, negligent misrepresentations, and tortious interference with business relationships. However, the jury only awarded Daniel damages on his DTPA and negligent misrepresentation claims. Daniel did not request or receive any damages for tortious interference with business relationships. Thus, we will only consider whether Daniel, individually, could prosecute claims against Clary for negligent misrepresentation and DTPA violations.

A. Daniel had standing to sue.

[7] [8] Although it does not use the term "standing" in this point of error, Clary's contention is that Daniel had no standing to sue in his individual capacity. To maintain a lawsuit, a person must have standing to litigate the matters at issue. *See Hunt v. Bass,* 664 S.W.2d 323, 324 (Tex.1984). Standing consists of some personal interest peculiar to the person individually and not as a member of the general public. *Id.* Without the breach of a legal right belonging to the plaintiff, no cause of action can accrue to his benefit. *See Nobles v. Marcus,* 533 S.W.2d 923, 927 (Tex.1976); *Department of Hous. & Urban Dev. v. Nueces County Appraisal Dist.,* 875 S.W.2d 377, 379 (Tex.App.—Corpus Christi 1994, no writ); *462 *Bell v. Moores,* 832 S.W.2d 749, 752 (Tex.App.—Houston [14th Dist.] 1992, writ denied).

Without addressing the merits of Daniel's negligent misrepresentation and DTPA claims,[4] we hold that Daniel asserted that Clary breached his individual legal rights; thus, he had standing to sue Clary in his individual capacity.

The cases upon which Clary relies all stand for the proposition that an individual shareholder or partner cannot personally pursue claims that actually belong to a corporation or partnership. *See, e.g., Commonwealth of Mass. v. Davis,* 140 Tex. 398, 168 S.W.2d 216, 221 (1942) (shareholder could not sue for corporation's injury), *cert. denied,* 320 U.S. 210, 63 S.Ct. 1447, 87 L.Ed. 1848 (1943); *Kenneth H. Hughes Interests, Inc. v. Westrup,* 879 S.W.2d 229, 235 (Tex.App.—Houston [1st Dist.] 1994, writ denied) (shareholders could not recover personally for corporation's injury); *Seidman & Seidman v. Schwartz,* 665 S.W.2d 214, 218 (Tex.App.—San Antonio 1984, writ dism'd) (partnership, not individual partners, owned cause of action against one partner for breach of fiduciary duty); *Gaines v. Gaines,* 519 S.W.2d 694, 696 (Tex.Civ.App.—Houston [1st Dist.] 1975, writ ref'd n.r.e.) (partner did not own title to specific property belonging to partnership); *see also, e.g., Cates v. Int'l Tel. & Tel. Corp.,* 756 F.2d 1161, 1176–77 (5th Cir.1985) (individual partner could not sue insurance company for damages to partnership after insurance company allegedly breached agreement with partnership); *Martens v. Barrett,* 245 F.2d 844, 846–48 (5th Cir.1957) (corporate shareholders could not sue third party because suit belonged to corporation).

These cases are not controlling because whether Daniel had standing to pursue *Fairfield's* legal rights against Clary is irrelevant to the individual standing issue. Daniel could pursue individual claims against Clary if Clary breached *his* legal rights.

|9| Daniel contends that Clary breached his legal right to receive accurate information about the nature of Clary's distributorships and that the breach occurred before Fairfield was even formed. Daniel also contends that, but for the pre-partnership misrepresentations to him, he would not have acted and would not have incurred the damages he has personally incurred. Daniel pleaded that the alleged misrepresentations were made to him, individually. Because Daniel's individual negligent misrepresentation and DTPA claims are based on misrepresentations Clary allegedly made and actions he allegedly took before the partnership existed, we hold that Daniel can prosecute these claims against Clary in his individual capacity. *See Wingate v. Hajdik,* 795 S.W.2d 717, 719–20 (Tex.1990) (supreme court would have affirmed trial court's damages award for corporate shareholder on his personal causes of action for fraud in the inducement and breach of fiduciary duty if those damages had been segregated from damages for misappropriation of corporate assets); *Bankruptcy Estate of Rochester v. Campbell,* 910 S.W.2d 647, 652 (Tex.App.–Austin 1995, writ granted) (shareholder may have personal cause of action against wrongdoer to corporation if wrongdoer also violates duty directly owed to shareholder as individual); *Schoellkopf v. Pledger,* 739 S.W.2d 914, 918 (Tex.App.—Dallas 1987) (nature of wrong, whether directed against corporation only or individual personally, determines who may sue), *rev'd on other grounds,* 762 S.W.2d 145 (Tex.1988); *see also Kaspar v. Thorne,* 755 S.W.2d 151, 155 (Tex.App.—Dallas 1988, no writ) (corporate shareholder may sue individually for breach of fiduciary duty); *accord Davis,* 168 S.W.2d at 222.

Clary also cites Daniel's pleadings to show that his individual claims were actually Fairfield's claims. For instance, Clary contends that the only misrepresentations and damages Daniel claimed were to the distributorship, which belonged to Fairfield. This contention is actually an argument that Daniel's pleadings were insufficient to allow submission of his individual claims to the jury. With the exception of its complaints concerning Daniel's consumer status, Clary did not *463 make this argument to the trial court.[5] Thus, he has not preserved it for our review. *See* TEX.R. APP. P. 52(a). We overrule Clary's first point of error.

In points of error three and ten, Clary contends that the trial court erred in submitting Daniel's DTPA and negligent misrepresentation theories to the jury because these theories were not available to Daniel under the circumstances of this case.

B. Daniel pleaded negligent misrepresentation of an existing fact.

[10] To establish his negligent misrepresentation claim, Daniel had to prove: (1) Clary made a representation in the course of its business or in a transaction in which it had a pecuniary interest; (2) Clary supplied false information to guide Daniel in his business; (3) Clary did not exercise reasonable care or competence in obtaining or communicating the information; and (4) Daniel suffered pecuniary loss by justifiably relying on the representation. *See Federal Land Bank Ass'n of Tyler v. Sloane,* 825 S.W.2d 439, 442 (Tex.1991). The "false information" supplied must have been a misstatement of existing fact. *See Airborne Freight Corp. v. C.R. Lee Enter.,* 847 S.W.2d 289, 294 (Tex.App.—El Paso 1992, writ denied).

Daniel's negligent misrepresentation was centered around his assertion that Clary offered him a 22-state distributorship that was supposed to be exclusive but that, in fact, was not exclusive. In point of error ten, Clary contends, in part, that Daniel did not plead a negligent misrepresentation claim because he did not allege misrepresentation of an *existing fact;* rather he merely alleged that Clary promised future action—that he (or Fairfield) would receive an exclusive distributorship with Clary.

[11] We hold that Daniel's negligent misrepresentation theory was based on an alleged misstatement of existing fact. The parties agree that Clary, through Brown, informed Daniel that a distributorship was available. Daniel contended that Clary misrepresentated the nature of the distributorship to him by representing that the distributorship was exclusive when it actually was not. If made, the representation concerning the nature of the distributorship was a statement of existing fact, not a promise to do something in the future. Consequently, Daniel alleged negligent misrepresentation of an existing fact. We overrule this portion of Clary's tenth point of error.

C. Daniel's DTPA claim sounds in tort, not contract.

[12] Clary also contends that Daniel's DTPA claim is based on Clary's alleged nonperformance of its contract with Fairfield and therefore is only actionable as a breach of contract claim, not as a DTPA claim. *See Crawford v. Ace Sign, Inc.,* 917 S.W.2d 12, 12 (Tex.1996) (holding that nonperformance of contract is not actionable under DTPA). However, Daniel's DTPA claim is based on the same allegations as his negligent misrepresentation claim; thus, it is based on Clary's alleged misrepresentation of an existing fact, not on Clary's alleged nonperformance of a contract. As such, it sounds in tort, not contract.

"Tort obligations are in general obligations that are imposed by law—apart from and independent of promises made and therefore apart from the manifested intention of the parties—to avoid injury to others." *Southwestern Bell Tel. Co. v. DeLanney,* 809 S.W.2d 493, 494 (Tex.1991) (quoting W. PAGE KEETON, ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 92, at 655 (5th ed.1984)). If the defendant's conduct would give rise to liability independent of whether a contract existed between the parties, the plaintiff's claim sounds in tort. *See Southwestern Bell Tel. Co.,* 809 S.W.2d at 494.

The duty that Daniel alleged Clary breached was one imposed by law, not contract: to refrain from making misrepresentations about existing fact, i.e., about the nature of the distributorship. If Clary breached this duty, its breach would give rise to liability independent of whether a contract existed between Clary and Daniel. Consequently, Daniel can sue individually for any false, misleading, or deceptive act or practice enumerated ***464** in the DTPA that is related to the alleged misrepresentations. *See Weitzel v. Barnes,* 691 S.W.2d 598, 600 (Tex.1985) (oral misrepresentations can serve as basis for DTPA claim); *Hedley Feedlot, Inc. v. Weatherly Trust,* 855 S.W.2d 826, 838 (Tex.App.—Amarillo 1993, writ denied) (op. on reh'g) (same).

D. Daniel was a consumer under the DTPA.

Clary's main premise under point of error three is that Daniel was not a consumer within the meaning of the DTPA.

[13] [14] [15] The DTPA's definition of "consumer" includes an individual who "seeks or acquires by purchase or lease, any goods or services...." TEX. BUS. & COM.CODE ANN. § 17.45(4) (Vernon 1987). We are to liberally construe the DTPA and give it the most comprehensive application possible without doing damage to its terms. *See Kennedy v. Sale,* 689 S.W.2d 890, 892 (Tex.1985). To qualify as a consumer, Daniel had to prove both: (1) that he sought or acquired goods or services by purchase or lease; and (2) that the goods or services formed the basis of his complaint. *See Cameron v. Terrell & Garrett, Inc.,* 618 S.W.2d 535, 539 (Tex.1981). Whether a claimant has proved consumer status is a question of law for the trial court. *See Johnson v. Walker,* 824 S.W.2d 184, 187 (Tex.App.—Fort Worth 1991, writ denied).

1. The distributorship consisted of "goods or services" that formed the basis of Daniel's complaint.

Clary first contends that Daniel is not a consumer because the goods or services purchased or acquired from Clary do not form the basis of his complaint. Daniel asserts that the distributorship consisted of both goods and services and was therefore covered by the DTPA. Clary counters that the distributorship was neither a "good" nor a "service" under the DTPA and that any services accompanying the distributorship were merely incidental to the transaction.

[16] [17] The DTPA excludes those transactions that convey wholly intangible rights, such as money or accounts receivable, that are not associated with any collateral services. *See Riverside Nat'l Bank v. Lewis,* 603 S.W.2d 169, 174–75 (Tex.1980). Generally, a business is also an intangible, unless it encompasses goods or services purchased for use in the function of the business. In that event, if the plaintiff can show that the services purchased are clearly the objective of the transaction and not merely incidental to it, the transaction involves the transfer of "goods or services" for DTPA purposes. *See, e.g., Texas Cookie Co. v. Hendricks & Peralta, Inc.,* 747 S.W.2d 873, 876-77 (Tex.App.—Corpus Christi 1988, writ denied) (franchise agreement involved transfer of goods and services for DTPA purposes where collateral services included company training program, a confidential operating manual, and a "unique system" for marketing merchandise and tracking sales and inventory); *Wheeler v. Box,* 671 S.W.2d 75, 78 (Tex.App.—Dallas 1984, no writ) (business encompassed goods and services where it included operations manual, word processing programs, marketing materials, guidelines for necessary office supplies, equipment, office space, and up to ten days' on-site training and assistance).

In this case, the evidence shows that the distributorship encompassed both goods and services. The goods were Clary products. The services included factory leads within the distributorship's territory on a monthly basis, local trade show support, six copies of Clary's sales video, a one percent annual advertising discount, annual prospect lists, engineering testing, a sales support package, and a sales training program.

[18] Clary advertised its pallet repair products in industry trade magazines, and Daniel could have purchased those products without investing in a distributorship. Daniel's primary object in acquiring the distributorship was not to purchase Clary products but to obtain the services that accompanied the distributorship—especially Clary's provision of factory leads in the 22-state distributorship territory—with attendant marketing support and incentives. Thus, the services associated with the distributorship were the primary object of the transaction, and the distributorship involved the transfer of ***465** "goods or services" for DTPA purposes. *See Arthur Andersen & Co. v. Perry Equip. Corp.,* 945 S.W.2d 812, 815–16 (Tex.1997); *Texas Cookie Co.,* 747 S.W.2d at 877. Moreover, whether Clary provided the services --in particular, whether Clary provided all factory leads in the distributorship territory--formed the basis of Daniel's complaint.

Clary mistakenly contends that this case is controlled by *Fisher Controls Int'l v. Gibbons,* 911 S.W.2d 135, 139 (Tex.App. —Houston [1st Dist.] 1995, writ filed). In *Fisher,* the plaintiff merely contracted to be a "sales, engineering[,] and service representative" of Fisher products and receive sales commissions. *Id.* The right to sell a company's products is not a "good or service" under the DTPA. *Cf. Johnson,* 824 S.W.2d at 187 (insurance agent not a consumer where he merely

contracted for right to sell insurance agency's products). A Clary distributorship was more than the right to sell Clary products; it included many services central to the transaction, which we have listed above.

2. Daniel sought or acquired the distributorship.

Clary also asserts that Daniel is not a consumer because he did not seek or acquire the distributorship from Clary, because Clary and Fairfield were the only parties to the distributorship arrangement. This argument assumes, incorrectly, that there must be privity between the individual asserting consumer status and the party who allegedly engaged in false, misleading, or deceptive conduct.

|19| |20| Privity of contract with a defendant is not required for a plaintiff to be a consumer. *See Amstadt v. United States Brass Corp.*, 919 S.W.2d 644, 649 (Tex.1996). Instead, we focus on the plaintiff's relationship to the transaction. *See Arthur Andersen & Co.*, 945 S.W.2d at 814–15. The evidence shows that, in reliance upon Clary's alleged representations concerning the exclusive nature of its distributorship, Daniel sought to obtain the distributorship by borrowing $50,000 and investing it to form a partnership (Fairfield) that would sell Clary products. Thus, Daniel "sought" goods or services in the form of the distributorship. *See Lewis & Lambert Metal Contractors, Inc. v. Jackson,* 914 S.W.2d 584, 587 (Tex.App.—Dallas 1994) (plaintiff-employees "sought" goods or services when they complained to employer about ventilation system and employer contracted with defendant to check and repair system), *vacated upon settlement without regard to merits,* 938 S.W.2d 716 (Tex.1997).

The parties disagree about whether Daniel personally paid Clary $50,000 to purchase the distributorship, or whether Fairfield made that payment. However, the DTPA does not require the plaintiff himself to purchase or lease the goods or services to be a consumer, as long as the plaintiff's reliance on the defendant's misrepresentations concerning the goods or services caused the plaintiff's injuries. *See Arthur Andersen & Co.*, 945 S.W.2d at 814–15 (stock purchaser that required audit and relied on it in purchasing stock was consumer, even though it did not pay for audit, because stock purchaser sought to benefit from audit); *Kennedy,* 689 S.W.2d at 892 (employee complaining of misrepresentations concerning group insurance policy provisions was consumer, even though employer purchased policy, because he "acquired" policy benefits "by purchase" through employer); *Jackson,* 914 S.W.2d at 587–88 (employees complaining of misrepresentations made to employer concerning ventilation system were consumers even though they did not contract with company that repaired ventilation system). In this case, Daniel sought to benefit from Fairfield's purchase of the distributorship, just as the stock purchaser in *Arthur Andersen & Co.* sought to benefit from the audit and the hospital employees in *Jackson* sought to benefit from the hospital's contract to repair its ventilation system.

Clary's reliance on *Westrup,* 879 S.W.2d at 229 is misplaced. In that case, a corporation relied on a business developer's misrepresentations and entered into a lease agreement. As a result, the corporation suffered irreversible damages and went out of business. The corporation and its shareholders sued under the DTPA. The shareholders argued that they were consumers because they suffered the loss of their personal investments ***466** in the corporation as a result of the defendant's alleged DTPA violations. The appellate court disagreed and held that the alleged wrong was done solely to the corporation because only the corporation had entered into the lease agreement. Thus, the court reasoned that the corporation—and not the shareholders—was the sole consumer. *Id.* at 234–35.

As we noted in our disposition of Clary's first point of error, the *Westrup* court's holding actually goes to the issue of standing. The court in *Westrup* determined that corporate shareholders were not consumers because their legal rights were not violated. Conversely, we have held that Daniel had standing to sue Clary because he alleged that Clary violated *his* individual legal rights before Fairfield ever existed. Accordingly, *Westrup* does not apply to this case.

We hold that Daniel sought to acquire goods and services and is therefore a consumer for DTPA purposes. Point of error three is overruled.

Clary's fourth point of error challenges the legal and factual sufficiency of the evidence to support the jury's finding that Clary violated the DTPA. However, Clary does not brief this point except to argue that Daniel is not a consumer. In light of our holding that Daniel is a consumer, we need not consider this point of error.

V. LEGAL AND FACTUAL SUFFICIENCY CHALLENGES

In its sixth point of error, Clary contends the evidence is legally and factually insufficient to support the jury's answer to Question 7a.

A. The standard of review.

[21] [22] In determining a "no evidence" point, we are to consider only the evidence and inferences that tend to support the finding and disregard all evidence and inferences to the contrary. *See Catalina v. Blasdel,* 881 S.W.2d 295, 297 (Tex.1994); *In re King's Estate,* 150 Tex. 662, 244 S.W.2d 660, 661-62 (1951). If there is more than a scintilla of such evidence to support the finding, the claim is sufficient as a matter of law, and any challenges go merely to the weight to be accorded the evidence. *See Browning-Ferris, Inc. v. Reyna,* 865 S.W.2d 925, 928 (Tex.1993).

[23] [24] A "no evidence" point of error may only be sustained when the record discloses one of the following: (1) a complete absence of evidence of a vital fact; (2) the court is barred by rules of law or evidence from giving weight to the only evidence offered to prove a vital fact; (3) the evidence offered to prove a vital fact is no more than a mere scintilla of evidence; or (4) the evidence establishes conclusively the opposite of a vital fact. *See Juliette Fowler Homes, Inc. v. Welch Assocs.,* 793 S.W.2d 660, 666 n. 9 (Tex.1990); Robert W. Calvert, "No Evidence" and "Insufficient Evidence" Points of Error, 38 TEX. L. REV. 361, 362-63 (1960). There is some evidence when the proof supplies a reasonable basis on which reasonable minds may reach different conclusions about the existence of the vital fact. *See Orozco v. Sander,* 824 S.W.2d 555, 556 (Tex.1992).

[25] [26] An assertion that the evidence is "insufficient" to support a fact finding means that the evidence supporting the finding is so weak or the evidence to the contrary is so overwhelming that the answer should be set aside and a new trial ordered. *See Garza v. Alviar,* 395 S.W.2d 821, 823 (Tex.1965). We are required to consider all of the evidence in the case in making this determination and, if reversing, to detail that evidence in the opinion. *See Jaffe Aircraft Corp. v. Carr,* 867 S.W.2d 27, 29 (Tex.1993).

Clary does not brief its contention that the evidence is factually insufficient to support the jury's finding; thus, we will only consider Clary's no evidence argument. *See* TEX.R. APP. P. 74(f).

B. There is some evidence to support the jury's economic damages finding.

In response to Question 3, the jury found that Clary's DTPA violations were a producing cause of damages to Daniel. Clary does not challenge this finding, except to assert that Daniel was not a consumer. In response to Question 7a, the jury found Daniel's ***467** economic damages caused by Clary's DTPA violations were $15,000.

Clary contends that this finding should be disregarded because:

- Daniel is not a consumer and is not entitled to DTPA damages;
- the distributorship was owned by Fairfield, not Daniel; thus, Daniel has no individual claim for any loss of its value;
- there is no evidence to support the jury's finding.

Clary's first argument fails in light of our holding that Daniel is a consumer for DTPA purposes. Clary's second argument also fails in light of our holding that Daniel did not have to personally own the distributorship to recover DTPA damages. Moreover, Daniel did not recover for loss of the distributorship's value, but for damages he incurred as a result of Clary's alleged misrepresentations about the nature of the distributorship. As we discuss below, Daniel properly used the difference between the distributorship's actual and represented value as a measure of damages.

[27] [28] We now turn to Clary's third argument, that there is no evidence to support the jury's damages finding because Daniel did not put on any evidence of the distributorship's value at any time. Establishing the amount of damages is the jury's duty in a jury trial. *See Hedley Feedlot,* 855 S.W.2d at 839. The fact finder may award damages anywhere within the range of evidence presented at trial. *See City of Houston v. Harris County Outdoor Adver. Assoc.,* 879 S.W.2d 322, 334–35 (Tex.App.—Houston [14th Dist.] 1994, writ denied), *cert. denied,* 516 U.S. 822, 116 S.Ct. 85, 133 L.Ed.2d 42 (1995).

[29] In a DTPA case, a plaintiff may recover under either the "out of pocket" or the "benefit of the bargain" measure of damages, whichever gives the greater recovery. *See Leyendecker & Assoc. v. Wechter,* 683 S.W.2d 369, 373 (Tex.1984) (op. on reh'g); *Ebby Halliday Real Estate, Inc. v. Murnan,* 916 S.W.2d 585, 590 (Tex.App.—Fort Worth 1996, writ denied). In this case, Daniel sought to recover under the benefit of the bargain measure, which is the difference between value as represented and value actually received.[6] *See Leyendecker & Assoc.,* 683 S.W.2d at 373. Thus, we must consider whether there is any evidence that the distributorship "as it was" was worth less than the distributorship as represented.

[30] Daniel's position at trial was that Clary represented that the distributorship was exclusive within a 22–state territory; that Clary would forward all factory leads it received in the distributorship territory; and that Clary would not make any direct sales of its products within the distributorship territory. The record shows that Clary did make direct sales of its products within the distributorship territory. The record also shows that, in the last three quarters of 1989, Fairfield had a net profit loss of $39,401 because of Clary's direct sales within the distributorship territory. This is some evidence that the distributorship as represented by Clary (an exclusive distributorship) was worth more than the distributorship "as it was" (a nonexclusive distributorship). Thus, there is some evidence to support the jury's $15,000 damages finding for Daniel in response to Question 7a.

Clary contends that the net lost profits calculation is incomplete because it only includes shipping and does not take into account the ordinary costs of doing business, such as advertising and overhead costs. Daniel's expert witness explained, however, that Fairfield had already deducted these expenses from its actual gross profits. With the exception of additional shipping expenses, these costs would not have increased if Fairfield had been able to make the sales that Clary made directly. Accordingly, it was not necessary to factor these costs into the net profits calculation.

Because there is some evidence to support the jury's finding in response to Question 7a, we overrule Clary's sixth point of error.

***468 C. Daniel is not entitled to mental anguish damages.**

In its seventh point of error, Clary contends the evidence is legally and factually insufficient to support the jury's answer to Question 8. In response to Question 8, the jury awarded Daniel $10,000 for mental anguish damages caused by Clary's DTPA violations.

[31] [32] Mental anguish damages are not recoverable under the DTPA absent proof of a willful tort, gross negligence, unconscionable conduct, or a knowing DTPA violation. *See State Farm Life Ins. Co. v. Beaston,* 907 S.W.2d 430, 435 (Tex.1995); *Luna v. North Star Dodge Sales, Inc.,* 667 S.W.2d 115, 117 (Tex.1984); *Smith v. Levine,* 911 S.W.2d 427, 435 (Tex.App.—San Antonio 1995, writ denied). In this case, the jury found that Clary did not engage in any unconscionable conduct. Daniel did not allege a willful tort, and he did not seek or obtain a gross negligence finding with regard to his DTPA claim. While the jury found that Clary knowingly violated the DTPA, the jury concluded that only Fairfield was

damaged by the knowing conduct. This record does not support the jury's award of mental anguish damages to Daniel. We sustain Clary's seventh point of error.

In light of our holding regarding this point, we need not consider Clary's eighth point of error.

D. The evidence supports the jury's findings regarding negligent misrepresentation.

In points of error ten and eleven, Clary challenges the legal and factual sufficiency of the evidence to support the jury's findings that Clary made a negligent misrepresentation to Daniel, causing him $5,000 in damages.

Clary devotes its entire argument under point ten to the premise that Daniel did not have a negligent misrepresentation claim because he did not plead or prove that Clary made a misrepresentation concerning an existing fact. In our discussion in section IV(B), we held that Daniel's negligent misrepresentation theory was based on an alleged statement of existing fact: that Clary had an exclusive distributorship available, when it actually did not.

[33] Daniel testified that Clary represented to him that its distributorship benefits package included "all factory leads" in the distributorship territory; that Clary "would not sell direct in our territory ... [p]eriod"; that he was not aware for nearly a year that Clary was making direct sales in Fairfield's territory; and that, upon confrontation, Clary credited to Fairfield's account a direct sale that Clary had made within the distributorship territory. Brown testified that Clary "wasn't going to sell direct" when it initially set up the distributorship arrangements. But the record shows that Clary made direct sales of its products within the distributorship's territory beginning at least in March 1989. In addition, Paul Hurder, a Clary general manager, testified that Clary's by-laws prohibited it from giving anyone an exclusive distributorship. Considered as a whole, the record supports Daniel's theory that Clary misrepresented to him the exclusive nature of the distributorship. Thus, the evidence is sufficient to support the jury's negligent misrepresentation finding.

[34] The record also shows that Daniel borrowed $50,000, which was used to purchase enough Clary products to "start up" the distributorship. There is evidence that Daniel would have purchased at least some of Clary's products regardless of its representations concerning the distributorship. For instance, Daniel initiated contact with Clary after reading an advertisement for Clary products in a pallet trade magazine. Because Daniel's family was in the pallet repair business, he was "real interested" in Clary's stringer repair products, or "pallet platers." However, Clary's pallet platers cost approximately $7,000 each, and cartons of its pallet plates cost $26 or $31 each. Thus, the record shows that, if Daniel had not been offered a Clary distributorship, he might have made a much smaller out-of-pocket investment in Clary's products. This evidence is sufficient to support the jury's $5,000 damages award for negligent misrepresentation. We overrule point of error eleven and the remainder of point of error ten.

***469 E. The evidence supports the attorneys' fees award.**

In points of error fourteen and fifteen, Clary contends that the evidence is legally and factually insufficient to support the amount of attorneys' fees that the jury awarded. Each consumer who prevails in a DTPA action is entitled to recover court costs and reasonable and necessary attorneys' fees. *See* TEX. BUS. & COM.CODE ANN. § 17.50(d) (Vernon Supp.1997). Daniel's attorney, John Drake, testified that:

- he and his legal assistant were the two primary individuals who worked on Daniel's case;
- his hourly rate was $125 and was reasonable and necessary;
- three associates from Drake's firm worked on research projects related to the case;
- before filing Daniel's counterclaim, Drake spent approximately 35 hours investigating the case and making a demand to Clary under the DTPA;

· the total fees in the case, excluding paralegal time, were $70,260.

Drake's testimony was uncontroverted. On cross-examination, Clary only asked Drake whether he had segregated the time he spent working on Daniel's case before and after the counterclaim was filed. Drake responded "[n]ot totally" because of pre-suit time spent investigating Daniel's claim.

[35] Where, as here, trial counsel's testimony concerning attorneys' fees is clear, positive and direct, and uncontroverted, it is taken as true as a matter of law. This is especially true where the opposing party had the means and opportunity of disproving the testimony, if it were not true, and failed to do so. *See Ragsdale v. Progressive Voters League,* 801 S.W.2d 880, 882 (Tex.1990); *Van Waters & Rogers, Inc. v. Quality Freezers, Inc.,* 873 S.W.2d 460, 464 (Tex.App.—Beaumont 1994, writ denied). Because Clary neither questioned nor controverted Drake's testimony, even though it had the means and opportunity to do so, we may take the testimony as true. Points of error fourteen and fifteen are overruled.

F. The trial court properly excluded legal assistant fees from the attorneys' fees award.

In his sole cross-point, Daniel contends that the trial court improperly excluded legal assistant fees from the attorneys' fees award. The jury found that a reasonable attorneys' fee for the trial of this case was $84,160. This award included legal assistant fees. After the jury returned its verdict, Clary moved for judgment notwithstanding the verdict, asserting in part that there is no evidence to support the attorneys' fees award. The trial court granted Clary's motion "solely to the extent there is no evidence to support the jury's award of paralegal fees" and reduced the attorneys' fees award by $13,900.

[36] Compensation for a legal assistant's work may be separately assessed and included in the attorneys' fees award if a legal assistant performed work that has traditionally been done by an attorney. *See Moody v. EMC Servs.,* 828 S.W.2d 237, 248 (Tex.App.—Houston [14th Dist.] 1992, writ denied); *Gill Sav. Ass'n v. International Supply Co.,* 759 S.W.2d 697, 702 (Tex.App.—Dallas 1988, writ denied). However, the evidence must establish:

· that the legal assistant is qualified through education, training, or work experience to perform substantive legal work;

· that substantive legal work was performed under the direction and supervision of an attorney;

· the nature of the legal work that was performed;

· the hourly rate charged for the legal assistant; and

· the number of hours expended by the legal assistant.

See Moody, 828 S.W.2d at 248.

[37] In this case, Drake testified that his legal assistant, Linda Taylor, spent a "considerable amount of time in going through documents and in the document production" under Drake's direction. Drake did not explain how Taylor was qualified to participate in document production, or even that she was *470 qualified at all. Although Drake testified about the total amount of legal assistant fees, he did not state what Taylor's hourly rate was or give the number of hours she worked on the case. Drake did not submit any billing statements detailing Taylor's work expended or the time involved. We hold the evidence is legally insufficient to support the jury award for legal assistant fees. Daniel's cross-point is overruled.

VI. CONCLUSION

We reverse the trial court's judgment as to Fairfield and Michael and render judgment that they take nothing because their claims are barred by limitations. We reverse that part of the trial court's judgment awarding Daniel mental anguish damages on his DTPA claim and render judgment that he is not entitled to mental anguish damages. We affirm the

remainder of the trial court's judgment as it pertains to Daniel and remand the cause to the trial court for recalculation of interest and entry of judgment in accordance with this opinion.

All Citations

949 S.W.2d 452

Footnotes

1 In parts of this opinion, we refer to Daniel F. Smith and Michael A. Smith individually as "Daniel" and "Michael," and we refer to Fairfield Distributors as "Fairfield." At other times, we refer to these three parties collectively as "appellees." We refer to appellant Clary Corporation as "Clary."

2 A county court exercising civil jurisdiction has jurisdiction over "civil cases in which the matter in controversy exceeds $500 but does not exceed $100,000, excluding interest, statutory or punitive damages and penalties, and attorney's fees and costs, as alleged on the face of the petition[.]" TEX. GOV'T CODE ANN. § 25.0003(c)(1) (Vernon Supp.1997).

3 *See* Act of April 27, 1931, 42nd Leg., R.S., ch. 81, § 1, 1931 Tex. Gen. Laws 124, 124 (repealed 1985) (current version at TEX. CIV. PRAC. & REM.CODE ANN . § 16.064 (Vernon 1986)):

> When an action shall be dismissed in any way, or a judgment therein shall be set aside or annulled in a direct proceeding, because of a want of jurisdiction of the Trial Court in which such action shall have been filed, and within sixty (60) days after such dismissal or other disposition becomes final, such action shall be commenced in a Court of Proper Jurisdiction, the period between the date of first filing and that of commencement in the *second Court* shall not be counted as a part of the period of limitation....

Id. (emphasis added).

4 We address the merits of Daniel's negligent misrepresentation and DTPA claims in section IV(D), below.

5 We address Daniel's consumer status in section IV(D), below.

6 In Question 7, the trial court instructed the jury to:

> Consider the following elements of damages, if any, and none other:
>
> The difference, if any, in the value of the distributorship as it was and the value it would have had if it had been as it was represented.

Attachment D

759 S.W.2d 697
Court of Appeals of Texas,
Dallas.

GILL SAVINGS ASSOCIATION, Appellant,
v.
INTERNATIONAL SUPPLY COMPANY, INC., Appellee.

No. 05-87-01007-CV.
|
Aug. 11, 1988.
|
Rehearing Denied Sept. 2, 1988.

Supplier brought action against project owner and contractor seeking establishment and foreclosure of mechanic's and materialman's lien. The 116th District Court, Dallas County, Hugh Snodgrass, J., granted judgment in favor of supplier. Project owner appealed. The Court of Appeals, Thomas, J., held that: (1) fact that supplier's attorney sought lien affidavit did not invalidate lien for removables; (2) fact that lien affidavit stated an amount in excess of what was owed did not render lien invalid; (3) compensation for legal assistant's work may be separately assessed and included in award of attorney fees if legal assistant performs work that has traditionally been done by any attorney; and (4) evidence was insufficient to support supplier's claim for compensation for legal assistants' work.

Affirmed in part and cause of action for attorney fees severed and remanded.

Attorneys and Law Firms

*698 Paul T. Curl, San Antonio, for appellant.

Martin J. Lehman, David A. Miller, Dallas, for appellee.

Before WHITHAM, ROWE and THOMAS, JJ.

Opinion

THOMAS, Justice.

Appellee, International Supply Company, Inc., instituted this action seeking the establishment and foreclosure of its statutory mechanic's and materialman's lien against property owned by appellant, Gill Savings Association. After the trial court granted judgment in favor of International, Gill brought this appeal complaining generally in four points of error that the trial court erred: 1) in ruling the mechanic's and materialman's lien to be valid; 2) in holding that International had proved the amount of its claim; 3) in awarding attorney's fees *699 to International; and 4) in not awarding attorney's fees to Gill. For the reasons given below, we affirm the trial court's judgment except for the award of attorney's fees, which we reverse. We sever International's cause of action for attorney's fees and remand same to the trial court for determination of the reasonable amount of attorney's fees, if any, that International should recover from Gill.

FACTUAL BACKGROUND

Gentry Place, Ltd., a limited partnership, owned and constructed the Gentry Place Apartments. Gill held a first lien on the project as the construction lender. H & M, Ltd., the original contractor and a general partner of Gentry Place Ltd., entered into a contract with T.P. Mechanical, whereby T.P. Mechanical agreed to provide a complete plumbing system throughout the project which included the obligation to furnish and install all of the plumbing fixtures. T.P. Mechanical purchased the majority of the plumbing supplies, including such items as lavatories, water heaters, bar sinks and toilets, from International.

In order to perfect its lien to secure payment, International filed its mechanic's and materialmen's lien affidavit on June 21, 1985. Unable to collect the money which it was owed, International filed this suit on January 31, 1986, naming as defendants Gentry Place, Ltd., Martin K. Eby Construction, T.P. Mechanical, and Gill. [1] On or about October 7, 1986, Gill foreclosed its first lien on Gentry Place and purchased the apartments at the foreclosure sale.

VALIDITY OF THE LIEN

In the first point of error, Gill argues that the trial court erred in finding that International had a valid mechanic's and materialman's lien because the lien affidavit: (a) was signed by the attorney; (b) stated an amount far in excess of what was owed; and (c) included charges for items beyond the applicable notice and filing deadlines.

A. *International's attorney signed the lien affidavit without having personal knowledge of the matters stated in the affidavit.*

[1] In urging that the lien affidavit is void because it was signed by International's attorney, Gill argues that the holding in *Energy Fund of America, Inc. v. G.E.T. Service Co.*, 610 S.W.2d 833 (Tex.Civ.App.—Eastland 1980), *rev'd on other grounds sub nom. Ayco Development Corp. v. G.E.T. Service Co.*, 616 S.W.2d 184 (Tex.1981), is erroneous. [2] We disagree with Gill's arguments and hold that the mere fact that International's attorney signed the lien affidavit does not invalidate the lien for removables.

The Texas Property Code requires that the materialman's lien affidavit "must be signed by the person claiming the lien or by another person on the claimant's behalf...." TEX.PROP.CODE ANN. § 53.054(a) (Vernon 1984). Section 53.054 sets out the contents required to be in a lien affidavit but does not specifically state whether such affidavit must be made on the personal knowledge of the one who signs it. Corporations, such as International, can act only through persons, [3] and it is undisputed that International designated its attorney, Martin Lehman, as being duly authorized to represent it for purposes of signing the lien affidavit.

In International's lien affidavit, the affiant Lehman states that he is "duly qualified and authorized to make [the] affidavit," and that he is acting as the "authorized *700 representative" for International. The record demonstrates that Lehman's law firm had represented International for at least five years. John Vogt, the president of International, testified that Lehman prepared the lien affidavit at his [Vogt's] direction, that International authorized Lehman to sign the lien affidavit on its behalf, and that International had provided Lehman with various records prepared in the regular course of business prior to the time the affidavit was signed.

Because the property code contains no affirmative personal knowledge requirement, and because the record which reveals that Lehman had the means to, and could have become personally informed, as desired by Gill, we hold that the execution of the lien affidavit by International's attorney does not render it invalid. *See Energy Fund,* 610 S.W.2d 836-37; *Henry S.*

Miller Co., 573 S.W.2d at 555 (corporations can only act through persons); *Gex v. Texas Company,* 337 S.W.2d 820, 828 (Tex.Civ.App.--Amarillo 1960, writ ref'd n.r.e.) (the affiant-attorney swore in the affidavit that he was duly authorized to make the affidavit, had read the motion, knew its contents, and knew that the facts therein were true and correct).

B. *International's lien affidavit stated an amount far in excess of what it was owed.*
Section 53.054(a)(1) of the property code requires that the lien claimant file "a sworn statement of the claim, including the amount." Vogt testified that the $75,986.03 amount in International's lien affidavit, filed on June 21, 1985, failed to take into account a $15,678.00 credit received by International in early May, 1985, which credit was not applied to the account until sometime in August, 1985. An additional correction of approximately $3,000.00 was also made. Vogt admitted that the amount shown in the lien affidavit was incorrect; however, he testified at trial that the account had since been reconciled and that the sum due and owing amounted to $57,365.32 after all credits and corrections.

[2] Gill asserts that "[i]t is not unreasonable for the law to require that amount be correct, or at least much closer to correct than the amount stated in International's affidavit." Gill does not elaborate further on this complaint and neither party cited any authority beyond the statute itself. The statute, however, aids little in solving the issue of whether a lien affidavit that states more than the amount actually owed invalidates the lien. We hold that it does not.

Gill, as lender on the project, purchased and became the owner of Gentry Place through a foreclosure sale in October 1986, over one year after International filed its lien affidavit and over seven months after Gill made its appearance in this law suit. Further, Thomas Shockey, a vice-president of Gill, testified that when Gill bought Gentry Place, Gill knew International was claiming a lien. It is clear that Gill was in no way a third party stranger in its purchase of Gentry Place, and notwithstanding this fact, it is also clear that the discrepancy in amounts in no way harmed Gill, and Gill is actually in a better position than expected since the lien against Gentry Place is less than the amount that Gill believed it to be at the time it foreclosed on and bought the project.

We hold that under the facts of this case, International's lien affidavit was in substantial compliance with the property code statute when it filed its lien for an amount greater than the actual amount reconciled by the time of trial two years later. *See First National Bank in Graham v. Sledge,* 653 S.W.2d 283, 285 (Tex.1983) (a subcontractor's lien rights are totally dependent on compliance with the statutes authorizing the lien; however, substantial compliance is sufficient to perfect a lien); *see also and compare Mathews Construction Company, Inc. v. Jasper Housing Construction,* 528 S.W.2d 323, 329 (Tex.Civ.App.--Beaumont 1975, writ ref'd n.r.e.) (holding that a "general statement" of the total price in lump sum is in substantial compliance with mechanic's and materialmen's lien statutes).

*701 C. *International's lien affidavit included charges for items supplied to Gentry Place beyond the applicable notice and filing deadlines.*
Gill's third argument is that the affidavit is invalid because International failed to timely perfect its lien claim as required by Section 53.056(b) of the Texas Property Code. Since the lien affidavit contained charges for materials delivered to Gentry Place in February 1985, Gill complains that the notices to the owner (dated June 20, 1985) and general contractor (dated May 13, 1985) were not timely. *See* TEX.PROP.CODE ANN. § 53.056(b) (Vernon 1984). Gill further contends that International did not timely file its lien affidavit. *See* TEX.PROP.CODE ANN. § 53.052(c) (Vernon 1984).

[3] International, on the other hand, claims that under Texas Rule of Civil Procedure 54, it was not required to offer any proof that it gave 36-day and 90-day notices of its claim for materials furnished during February 1985. Both International's Original Petition and First Amended Petition plead that "all conditions precedent to Defendants' liability and the foreclosure of International's lien have been performed or have occurred."

International contends that its pleadings are in accordance with Rule 54, which provides as follows:

> In pleading the performance or occurrence of conditions precedent, it shall be sufficient to aver generally that all conditions precedent have been performed or have occurred. When such performances or occurrences have been so plead, the party so pleading the same shall be required to prove only such of them as are *specifically* denied by the opposite party.

(Emphasis added.) The record shows that Gill did not specifically deny that International failed to give a 36-day notice to the original contractor or a 90-day notice to the owner for the materials delivered in February, 1985. Thus, we agree with International that it was not required to offer independent proof of having given the notices.

|4| Rule 54 is applicable to notices required to be given in connection with mechanic's and materialmen's lien claims. *Sunbelt Constr. Corp. v. S & D Mechanical Contractors, Inc.*, 668 S.W.2d 415, 417-18 (Tex.App.—Corpus Christi 1983, writ ref'd n.r.e.); *Skinny's, Inc. v. Hicks Brothers Construction of Abilene, Inc.*, 602 S.W.2d 85, 90 (Tex.Civ.App.—Eastland 1980, no writ) (subcontractor required to prove only such conditions precedent as were specifically denied by owner, distinguishing and rejecting *Bunch Electric Co. v. Tex-Craft Builders, Inc.*, 480 S.W.2d 42, 46 (Tex.Civ.App.—Tyler 1972, no writ)); *Continental Contractors, Inc., v. Thorup*, 578 S.W.2d 864, 866-67 (Tex.Civ.App.—Houston [1st Dist.] 1979, no writ) (plaintiff not required to offer independent proof that he had given the required notice if plaintiff plead all relevant conditions precedent, also distinguishing and explaining *Bunch Electric* holding); *Yeager Electric & Plumbing Co. v. Ingleside Cove Lumber and Builders, Inc.*, 526 S.W.2d 738, 739-40 (Tex.Civ.App.—Corpus Christi 1975, no writ); *see also Investors, Inc. v. Hadley*, 738 S.W.2d 737, 741-42 (Tex.App.—Austin 1987, writ denied) (applying Rule 54 to the notice provisions of the Texas Deceptive Trade Practices Act, *citing, Skinny's Inc., Continental Contractors, Inc.*, and *Yeager Electric & Plumbing Company, Inc.*).

Since Gill failed to specifically deny that International failed to give a 36-day notice to the original contractor and a 90-day notice to the owner for materials delivered in February 1985, International was not required, pursuant to Rule 54, to offer independent proof of having given the required notices. Gill has thereby waived its right to complain of any such failure on appeal. *Sunbelt Construction*, 668 S.W.2d at 418.

|5| The mechanic's and materialmen's lien statutes are to be liberally construed for the purpose of protecting laborers and materialmen. *Industrial Indemnity Co. v. Zack Burkett Co.*, 677 S.W.2d 493, 495 (Tex.1984). Moreover, the Texas Supreme Court has held that substantial compliance with statutes authorizing a subcontractor's ***702** lien is sufficient to perfect a lien. *First National Bank v. Sledge*, 653 S.W.2d at 285 (Tex.1983). Having found no merit in any of the three reasons offered by Gill to invalidate the lien, we hold that International's affidavit was in substantial compliance with the statutory requirements, and it therefore secured a valid lien. The first point of error is overruled.

PROOF OF AMOUNT OF CLAIM

|6| Gill's second point of error complains that the trial court erred in finding that International proved the amount of its claim. The essence of Gill's point of error is that International failed to establish the value of the plumbing materials it sought to remove *as of the date of trial.* We hold that proof of the value of the plumbing materials as of the date of trial is not an essential element of International's claim.

International is required to prove at trial *the amount* of its claim. *See* TEX.PROP.CODE ANN. § 53.054(a)(1) and discussion under point of error number one, *supra.* The record reveals through the testimony and exhibits that International made its proof, with the trial court finding that the principal unpaid balance owed to International as of the date of the trial was $57,365.32. The value of the removables as of the date of trial is irrelevant because the only manner in which the lien can be foreclosed is through a judicial foreclosure sale. TEX.PROP.CODE ANN. § 53.154 (Vernon 1984) ("A mechanic's lien may be foreclosed only on judgment of a court of competent jurisdiction foreclosing

the lien and ordering the sale of the property subject to the lien."); *Exchange Savings v. Monocrete,* 629 S.W.2d 34, 38 (Tex.1982); *see Summerville v. King,* 98 Tex. 332, 339, 83 S.W. 680, 682 (Tex.1904).

Gill's reliance on this Court's case of *L & N Consultants, Inc. v. Sikes,* 648 S.W.2d 368 (Tex.App.—Dallas 1983, writ ref'd n.r.e.) is misplaced. In *Sikes,* this Court agreed with the contractor's contention that a mechanic's lien claimant is allowed to "recover the entire amount of his debt up to the total value of the removable improvements." *Sikes,* 648 S.W.2d at 370 71. That rule is correct (and was properly applied under the facts of that case), and it is not in conflict with the rule that the lien claimant's sole remedy is to have the removable items removed and sold through a judicial proceeding. *See* TEX.PROP.CODE ANN. § 53.154 (Vernon 1984). Accordingly, Gill's second point of error is overruled.

ATTORNEY'S FEES AWARDED TO INTERNATIONAL

[7] [8] Gill's third point of error is "the trial court erred in awarding attorney's fees to International." As a part of this assignment of error, Gill argues that (a) the award includes charges for legal assistant time, and (b) International failed to apportion its fees between its claims against T.P. Mechanical and Gill. For the reasons stated below, we overrule Gill's argument that, as a matter of law, a legal assistant's time is not includable as a part of an attorney's fees award. In this connection, we hold that compensation for a legal assistant's work may be separately assessed and included in the award of attorney's fees if a legal assistant performs work that has traditionally been done by any attorney. However, in order to recover such amounts, the evidence must establish: (1) that the legal assistant is qualified through education, training or work experience to perform substantive legal work; (2) that substantive legal work was performed under the direction and supervision of an attorney; (3) the nature of the legal work which was performed; (4) the hourly rate being charged for the legal assistant; and (5) the number of hours expended by the legal assistant. To the extent, however, that Gill argues that the evidence concerning the work performed by the legal assistants is legally insufficient to support the award, we sustain the point of error and reverse the trial court's judgment. Lastly, for the reasons stated below, we overrule the challenge concerning International's failure to apportion between Gill and T.P. Mechanical.

A. Legal Assistant's Time

We have not been cited to any Texas state court decisions, nor have we found a ***703** decision which has dealt with the question of whether the value of legal work performed by legal assistants may be recovered as an element of attorney's fees.

The ever-increasing use of legal assistants by attorneys is recognized by the Texas legal community. In order to better define what legal assistants are and the general perimeters within which their services may be used, the Board of Directors of the State Bar of Texas has approved the General Guidelines for the Utilization of the Services of Legal Assistants by Attorneys. The Guidelines contain the following preliminary statement:

> Providing legal services to the public at an affordable price without reduction in the quality of services finds ample support in the purpose clause of the State Bar Act as well as in the Code of Professional Responsibility. It is a goal toward which the Bar is committed, both in principle and in practice. The utilization by attorneys of the services of legal assistants is recognized as one means by which the Bar may attain this goal. With direction and supervision by an attorney, legal assistants can perform a wide variety of tasks which may neither constitute the unauthorized practice of law nor require the traditional exercise of an attorney's training, experience, knowledge or professional judgment.

While the day-to-day duties of a legal assistant will vary from law firm to law firm, it is recognized that the legal assistant will perform work that has traditionally been done by an attorney, and the Guidelines so provide:

> A legal assistant is a person not admitted to the practice of law in Texas but ultimately subject to the definition of "the practice of law" as set forth in the law of the State of Texas, who has, through education, training and experience, demonstrated knowledge of the legal system, legal principles and procedures, and who uses such knowledge in rendering paralegal assistance to an attorney in the representation of that attorney's clients. The attorney is responsible for the work of the legal assistant and the legal assistant remains, at all times, responsible to and under the supervision and direction of the attorney. The functions of a legal assistant are defined by the attorney responsible for the legal assistant's supervision and direction, and are limited only to the extent that they are limited by law.

We note further that General Guideline V states:

> An attorney may charge and bill a client for a legal assistant's time, but the attorney may not share legal fees with a legal assistant under his or her supervision and direction.

In this action, International's right to recover attorney's fees arises from section 53.156(a) of the Texas Property Code, which provides:

> If the lien provided under Section 53.021 is not paid before the 181st day the lien is fixed and secured under this Chapter, the claimant or owner of the lien is entitled to recover all reasonable costs of collection, including attorney's fees.

TEX.PROP.CODE ANN. § 53.156(a) (Vernon 1984). Thus, once International secured a lien under the Code, section 53.156 entitled it to recover the reasonable sums it had to expend in collecting upon the lien, including attorney's fees. Gill is correct in its assertion that the statute uses only the words "attorney's fees" and does not state "legal assistants' fees." For the reasons given below, though, we do not read the statute to preclude recovery for legal work properly performed by legal assistants.

In *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717–19 (5th Cir.1974), the court established a twelve point test for determining what factors are necessary to ascertain reasonable attorney's fees, where such fees are allowed by federal law. These factors are: (1) the time and labor required; (2) the novelty and difficulty of the question; (3) the skill requisite to perform the legal service properly; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; ***704** (8) the amount involved and the results obtained; (9) the experience, reputation and ability of the attorneys; (10) the "undesirability" of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases. We note that this is consistent with the factors set out in Disciplinary Rule 2–106(B) of the Texas Code of Professional Responsibility.

Inasmuch as one of the elements is the time and labor required, we must look to the reasonableness of the labor and time expended in a case. Properly employed and supervised legal assistants can decrease litigation expense and improve an attorney's efficiency. As pointed out by one of our sister states, justice would not be served by requiring attorneys to perform tasks more properly performed by legal assistants solely to permit that time to be compensable in the event that a request for attorney's fees is ultimately submitted to the court. *See Continental Townhouses East v. Brockbank*, 733 P.2d 1120, 1126–27 (Ariz.App.1986). Indeed, the Guidelines suggest the inclusion of legal assistant services. Further, the purpose and objective of our legal system is to provide the most equitable, efficient adjudication of litigation at the least expense practicable. *See* TEX.R.CIV.P. 1. Likewise, as is suggested by the Guidelines, legal assistant charges are an

appropriate component of attorney's fees since an attorney would have to have performed the services if a legal assistant had not been used.

While the courts differ in their treatment of the time spent by non-lawyers in structuring fee awards, we note that our holding that work performed by legal assistants is compensable under statutes authorizing attorney's fees awards is supported by various federal court decisions. In *Jones v. Armstrong Cork Co.*, 630 F.2d 324 (5th Cir.1980), a civil rights action under 42 U.S.C.A. § 2000e–5(k), the district court's order denied the plaintiff's attorney's request for compensation for the work hours of Ethel Smith. In affirming the trial court's conclusion that it had not been established that Smith was a "paralegal," the court noted:

> Had Ms. Smith been a paralegal, then to the extent that she performed work that has traditionally been done by an attorney, Ms. Turner [plaintiff's attorney] would have been entitled to have compensation for that work separately assessed and included in her award.

630 F.2d at 325 (citations omitted). *See also Richardson v. Byrd*, 709 F.2d 1016, 1023 (5th Cir.), *cert. denied*, 464 U.S. 1009, 104 S.Ct. 527, 78 L.Ed.2d 710 (1983) (award of attorneys' fees to paralegals who performed work traditionally performed by attorneys was not error under 42 U.S.C.A. § 2000e); *Alter Financial Corp. v. Citizens & Southern International Bank*, 817 F.2d 349, 350 (5th Cir.1987) (award of attorney's fees properly included an assessment for work done by paralegals and a law clerk under 28 U.S.C.A. § 1927); *Jacobs v. Mancuso*, 825 F.2d 559 (1st Cir.1987) (in calculation of attorney's fee award under 42 U.S.C.A. § 1983, the use of paralegals should be encouraged by separate compensation and should not be considered part of the overhead included in counsel's fee); *Garmong v. Montgomery County*, 668 F.Supp. 1000, 1011 (S.D.Tex.1987) (award of attorney's fees allowed under 42 U.S.C.A. § 1988 to paraprofessional whose work replaced an attorney's efforts); *Zacharias v. Shell Oil Co.*, 627 F.Supp. 31, 34 (E.D.N.Y.1984) (defendant's inclusion of fees for paralegals in its request for reasonable fees under the Petroleum Marketing Practices Act 15 U.S.C.A. § 2805(d)(3) was proper); *Selzer v. Berkowitz*, 477 F.Supp. 686, 690–91 (E.D.N.Y.1979) (award of attorney's fees included charges for paralegals and such was reasonable in civil rights suit under 42 U.S.C.A. § 1988); *Entin v. Barg*, 412 F.Supp. 508, 519 (E.D.Pa.1976) (value of paralegal time computed on their normal hourly billing rate in case under the Securities Exchange Act of 1934 was allowable as a part of the attorney's fees).

The state courts have been divided on this issue. We note, however, that a growing number of our sister states have allowed recovery of "legal assistant" time in attorney's fee awards. *See Continental* ***705** *Townhouses East v. Brockbank*, 733 P.2d at 1127; *Aries v. Palmer Johnson, Inc.*, 735 P.2d 1373, 1384 (Ariz.App.1987) (value of legal work performed by legal assistants could be recovered as element of attorney fees under statute allowing award of attorney fees). *See also Williamette Prod. Credit v. Borg–Warner Acc.*, 706 P.2d 577, 580 (Or.App.1985) (in an action to foreclose livestock fee lien, charges for legal assistant time was properly considered in determining attorney fees); *In Re Marriage of Thornton*, 412 N.E.2d 1336, 1349 (Ill.App.1980) (services of a paralegal can be considered in determining a reasonable fee in a divorce action).

Having determined that a legal assistant's time is properly includable in an attorney's fee award under certain conditions, we turn to Gill's alternative argument that International did not put on the necessary proof to substantiate the award. Specifically, it is contended that there is no evidence regarding: 1) the specific tasks which were performed by the legal assistants; 2) the identity of all of the persons performing the various tasks; and 3) the charge for the legal assistant's work. Although not characterized as such, we will treat this as an assertion that the evidence is legally insufficient to support the award for legal assistant's services.

[9] [10] [11] A "legally insufficient" point is a "no evidence" point presenting a question of law. In deciding that question, we must consider only the evidence and the inferences tending to support the finding and disregard all evidence and inferences to the contrary. If a "no evidence" point is sustained and the proper procedural steps have been taken, the finding under attack may be disregarded entirely and judgment rendered for the appellant unless the interest of justice requires another trial. *Garza v. Alviar*, 395 S.W.2d 821, 823 (Tex.1965). In reviewing "factually insufficient evidence"

points we consider all of the evidence, including any evidence contrary to the judgment. *Burnett v. Motyka,* 610 S.W.2d 735, 736 (Tex.1980). Applying these principles, we must determine if there is evidence of probative value to support the trial court's finding. It is fundamental that the finding must be upheld by this court if there is more than a scintilla of evidence in support thereof. *Stedman v. Georgetown Savings and Loan Association,* 595 S.W.2d 486, 488 (Tex.1979).

[12] Utilizing these principles, we examine the evidence presented by International in support of its request for attorney's fees. Copies of the monthly fee statements which were submitted to International by its counsel were admitted into evidence without objection. The following information is reflected on the statements: (1) the date the service was rendered; (2) a brief description of the work that was performed; (3) the time spent performing the particular task; (4) the initials of the person performing the work; and (5) the total amount due as a result of the services which were rendered. The testimony reflected that at least two of the sets of initials represent two of the attorneys who worked on the case and one of the sets of initials represents a "legal assistant." The testimony and exhibits however do not provide any help in determining: (1) the qualifications, if any, of the legal assistants; (2) whether the tasks performed by the legal assistants were of a substantive legal nature or were the performance of clerical duties; and (3) the hourly rate being charged for the legal assistant. Further, without the benefit of additional testimony identifying the different sets of initials, it is impossible to determine which class of professional is performing which task. Therefore, we hold that the evidence concerning the work performed by the legal assistants is legally insufficient to support the award. We sustain that portion of Gill's point of error complaining of the legal sufficiency of the evidence to support the attorney's fees award.

B. Failure to Apportion Fees Between Claims

[13] We find no error in International's failure to segregate the attorney's fees expended in its claim against T.P. Mechanical and its claim against Gill "since the claims arise out of the same transaction and are ***706** so interrelated that their prosecution or defense entails proof or denial of essentially the same facts." *See Flint & Associates v. Intercontinental Pipe & Steel, Inc.,* 739 S.W.2d 622 (Tex.App.—Dallas 1987, writ denied).

ATTORNEY'S FEES TO GILL

[14] In the final point of error, Gill complains that the trial court erred in not awarding it attorney's fees. Gill's right to recover attorney's fees arises from Section 53.156(b) which provides:

> If a claim for a lien provided under Section 53.021 *is not valid or enforceable* because of the failure to fix or secure the lien under this Chapter or for any other reason, the owner ... is entitled to recover from the claimant all reasonable costs of defending against the lien claim, including attorney's fees.

TEX.PROP.CODE ANN. § 53.156(b) (Vernon 1984) (emphasis added). In view of the determination that International's lien claim is valid and enforceable, Gill is not entitled to recover its attorney's fees or costs in defending this suit, and the fourth point of error is overruled.

DISPOSITION

We affirm the trial court's judgment except as to the award of attorney's fees. We reverse the judgment insofar as it awards attorney's fees to International. Having prevailed on its "no evidence" point as to attorney's fees, Gill would ordinarily be entitled to the rendition of judgment in its favor. *National Life and Accident Ins. Co. v. Blagg,* 438 S.W.2d 905, 909 (Tex.1969); *Garza,* 395 S.W.2d at 823. However, the rules of appellate procedure authorize this court to remand for further proceedings "when it is necessary to remand ... for further proceedings." TEX.R.APP.P. 81(c).

The precursor of rule 81 was rule 434 of the rules of civil procedure.[4] Under that rule, the supreme court has held that appellate courts have broad discretion to remand in the interest of justice. *Scott v. Liebman,* 404 S.W.2d 288, 294 (Tex.1966). As early as 1911, the supreme court laid down the rule to be followed in cases where a "no evidence" point has been sustained:

> [A]s long as there is a probability that a case has *for any reason* not been fully developed, this court will not render judgment on the insufficiency of the evidence. In other words, it must be apparent to the court that the case has been fully developed, and *that there is no probability* that any other evidence can be secured before it will render judgment. *Paris and G.N.R.R. v. Robinson,* 104 Tex. 482, 492, 140 S.W. 434, 439 (1911) (emphasis added); *see also Morrow v. Shotwell,* 477 S.W.2d 538, 541-42 (Tex.1972); *City of Lucas v. North Texas Municipal Water District,* 724 S.W.2d 811, 820 (Tex.App.—Dallas 1986, writ ref'd n.r.e.); *Zion Missionary Baptist Church v. Pearson,* 695 S.W.2d 609, 613 (Tex.App.—Dallas 1985, writ ref'd n.r.e.).

We can conceive of no case which better exemplifies the need to remand in the interest of justice than the case at bar. In this case of first impression, we have set out a rule for proving legal assistant's fees so that they are recoverable under a statute authorizing the award of attorney's fees. Because we have just enunciated this procedure, International had no reason to believe it was required to introduce the evidence we have now held necessary. Clearly, then, the case has not been fully developed as to attorney's fees.

Having found error in the judgment of the trial court on the issue of attorney's fees, we possess both the power and the obligation to remand because such recourse "will subserve better the ends of justice." *Zion Missionary Baptist Church,* 695 S.W.2d at 613, *quoting* *707 *Massachusetts Mutual Life Ins. Co. v. Steves,* 472 S.W.2d 332, 333 (Tex.Civ.App.—Fort Worth 1971, no writ). Accordingly, we sever International's cause of action for attorney's fees and remand same to the trial court for a determination of the reasonable amount of attorney's fees, if any, that International should recover from Gill.

All Citations

759 S.W.2d 697

Footnotes

1 International also obtained judgments against Gentry Place, Ltd., Martin K. Eby Construction (the general contractor), and T.P. Mechanical. Those judgments have not been appealed.

2 *Energy Fund* involved several parties and Energy Fund itself did not take part in further appeal of the case to the Texas Supreme Court. *Ayco,* 616 S.W.2d 185. Thus, the Texas Supreme Court did not consider the Eastland Court's ruling on the propriety of an attorney signing a lien affidavit containing statements of which he has no personal knowledge.

3 *See Henry S. Miller Co. v. Treo Enterprises,* 573 S.W.2d 553, 555 (Tex.Civ.App.—Texarkana 1978), *aff'd,* 585 S.W.2d 674 (Tex.1979) (suit to recover balance due on promissory note representing a broker's commission on the sale of real estate).

4 Rule 434 required remand "when it is necessary that some matter of fact be ascertained or the damage to be assessed or the matter to be decreed is uncertain." Rule 81(c) of the rules of appellate procedure simply states that remand is allowed "when it is necessary to remand ... for further proceedings." We consider the language of the two rules to be sufficiently similar that cases analyzing rule 434 also apply to our rule 81(c).

Attachment E

181 S.W.3d 490
Court of Appeals of Texas,
Texarkana.

ALL SEASONS WINDOW AND DOOR MANUFACTURING, INC., and William Kent Akins, Appellants,
v.
RED DOT CORPORATION, Appellee.

No. 06-04-00084-CV.
|
Submitted Oct. 5, 2005.
|
Decided Nov. 29, 2005.

Synopsis

Background: Window manufacturing company and its president brought action against construction contractor for usury, to quiet title, for breach of contract, and harassment. The 188th Judicial District Court, Gregg County, David S. Brabham, J., found president individually formed and breached contract with contractor and rendered judgment for contractor. Company and contractor filed cross-appeals.

Holdings: The Texarkana Court of Appeals, Jack Carter, J., held that:

[1] company did not have standing to pursue usury claim against contractor;

[2] company had standing to pursue claim for recovery from contractor;

[3] contractor was entitled to interest rate of 18% on deferred payments under the contract;

[4] interest began to accrue when construction of building was complete;

[5] contractor did not commit usury by demanding 18% interest rate on deferred payments; and

[6] modification of trial court's award of attorney fees was required.

Affirmed in part, reversed in part, and modified in part.

Attorneys and Law Firms

*494 John R. Mercy, Mercy & Carter & Tidwell, LLP, Texarkana, Frank M. Mason, Frank Mason, PC, Longview, for appellants.

D. Todd Smith, Fulbright & Jaworski LLP, Austin, Jeffrey W. Kemp, Fulbright & Jaworski LLP, Dallas, for appellee.

Before MORRISS, C.J., ROSS and CARTER, JJ.

OPINION

Opinion by Justice CARTER.

All Seasons Window and Door Manufacturing, Inc., and William Kent Akins appeal the final judgment of the trial court following a bench trial. Akins, the president of All Seasons, hired Red Dot Corporation to construct a metal building so All Seasons could expand its operations. A dispute arose due to Akins' belief that the construction was unnecessarily delayed and was slipshod. While the dispute only concerned approximately $5,000.00, Akins withheld the entire final payment. Following a bench trial, the trial court found that Akins breached the contract and that he owed Red Dot $143,800.44, plus interest for approximately three years, and $105,369.95 in attorney's fees. All Seasons and Akins appeal the judgment of the trial court, and Red Dot has filed a cross-appeal. We affirm in part, reverse in part, and modify in part.

All Seasons and Akins raise fifteen points of error on appeal. Red Dot responded with six reply points and raises two cross-points of error. We have consolidated the issues as follows: (1) Does All Seasons have standing to bring this appeal? (2) Did the trial court err in finding the contract interest rate was ten percent rather than eighteen percent? (3) Did the trial court err in concluding that interest should begin to accrue December 11, 2001? (4) Did the trial court err in refusing to find the contract usurious? (5) Did the trial court err in offsetting the judgment against Akins with All Seasons' $38.56 counterclaim? (6) Is the evidence sufficient to support the amount of the attorney's fees awarded?

While All Seasons lacks standing to bring a claim for usury, it does have standing to pursue its counterclaim for $38.56. The trial court erred in finding the contractual interest rate was ten percent. The contract authorized interest at the maximum rate allowed by law, and the law allows interest up to eighteen percent. Therefore, the contractual interest rate should have been eighteen percent. Although legally and factually sufficient evidence supports the trial court's finding that construction was completed October 24, 2001, the trial court erred in holding that interest should accrue from December 11, 2004. Interest should accrue from October 24, 2001, because the final payment was due on completion of erection. Red Dot did not commit usury. Last, there is sufficient evidence to support the attorney's ***495** fees award except for the award of paralegal fees and expenses.

I. Facts

This case concerns a dispute over the construction of an industrial metal building. Akins, the president of All Seasons, owned the property on which the building was constructed. All Seasons, which was in the window manufacturing business, leased the property from Akins. Due to an increase in business, All Seasons needed additional room for its manufacturing facility. Akins contracted with Red Dot to erect a metal building in order to expand the space being used by All Seasons. Red Dot was responsible for the construction of the metal building, while Akins retained responsibility for the remainder of the project, including concrete, electrical, plumbing, and finishing out the interior.

On March 5, 2001, Akins signed a contract with Red Dot. With the "change orders," the contract price totaled $400,771.00. The contract included provisions detailing each party's duties, a payment schedule, and provided for payment of reasonable attorney's fees in the event of a dispute. Construction was to begin August 14, 2001. Due to rain delays, construction actually began one week later. Red Dot failed to deliver sufficient anchor bolts to be incorporated into the concrete. All Seasons had to purchase the additional bolts, which forms the basis of the $38.56 counterclaim by All Seasons. During the construction, there were various problems, including column placement, loose bolts, delays in delivery of materials, understaffing by the erection subcontractor, and defects in the insulation.

Akins alleges the building should have been completed in August. Red Dot completed the erection of the building October 24, 2001. However, Red Dot returned to tighten bolts, fix insulation, incorporate an additional beam, and address other

issues at the request of Akins and/or All Seasons. On December 11, 2001, the final walk-through with a punch list was conducted and Akins agreed to accept the project, with the understanding that additional repairs were to be made. Some repairs were completed December 11. Red Dot agreed to make the additional repairs, but never has.

Pursuant to the contract, Akins paid ten percent of the contract price on signing the contract. Akins paid $218,300.00 on September 14, 2001, for the delivery of materials. On October 24, 2001, Red Dot sent Akins an invoice for final payment in the amount of $143,839.00. On December 12, 2001, Akins tendered a check for $138,873.49 marked "payment in full." In a letter accompanying the check, Akins informed Red Dot that the deductions were due to increased security costs caused by delays in construction, the cost of pouring new footers for twelve columns, and the cost of the anchor bolts. Red Dot refused to accept the check when Akins refused to remove the "payment in full" language. When the parties could not reach an agreement concerning the final invoice, Red Dot filed a mechanic's lien on the building and sought eighteen percent interest on the invoice.

Eventually, Akins sued Red Dot for usury, to quiet title, for breach of contract, and harassment. Following a bench trial, [1] the trial court found that Akins signed the contract in his individual capacity and had breached the contract. The trial court entered several detailed findings of fact. The trial court found Red Dot was justified in refusing to accept the check marked ***496** "payment in full" and that Red Dot had only received $256,932.00 of the $400,771.00 due under the contract. The trial court also found that the contract was ambiguous concerning whether Akins signed in his individual or personal capacity and determined that Akins signed in his personal capacity. The trial court held that the contract, which stated interest would be charged at the maximum rate allowed by law, authorized interest at the rate of ten percent. Although Red Dot had sought to collect eighteen percent interest, the trial court found that Red Dot had not committed usury. The trial court concluded that the transaction was not a loan or forbearance of money. The trial court rendered judgment that Red Dot recover from Akins $143,800.44 in actual damages, $33,921.14 in contract interest, attorney's fees, postjudgment interest, and costs. Akins appealed to this Court, and Red Dot has filed a cross-appeal.

II. All Seasons has Standing

As a preliminary matter, Red Dot argues All Seasons lacks standing. Since the trial court found All Seasons was not a party to the contract, Red Dot contends All Seasons does not have a cognizable interest in this appeal. Although All Seasons lacks standing to pursue its usury claims on appeal, All Seasons has standing to be a party to the appeal due to its claim for the cost of the anchor bolts.

[1] [2] [3] Standing is a constitutional prerequisite to maintaining a suit under Texas law. *Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 444 (Tex.1993). Standing, as a necessary component of a court's subject-matter jurisdiction, cannot be waived and can be raised for the first time on appeal. *Id.* Standing requires the claimant to demonstrate a particularized injury distinct from that suffered by the general public. *Bland Indep. Sch. Dist. v. Blue*, 34 S.W.3d 547, 555–56 (Tex.2000); *see Rodgers v. RAB Inv., Ltd.*, 816 S.W.2d 543, 546 (Tex.App.-Dallas 1991, no writ). The claimant must have an actual grievance, not one that is merely hypothetical or generalized. *Brown v. Todd*, 53 S.W.3d 297, 302 (Tex.2001). We review de novo the issue of standing. *Tex. Dep't of Transp. v. City of Sunset Valley*, 146 S.W.3d 637, 646 (Tex.2004).

[4] [5] [6] Red Dot argues All Seasons lacks standing to pursue its usury claim because All Seasons was not a party to the contract. All Seasons and Akins have consistently claimed All Seasons was not a party to the contract. Because All Seasons successfully persuaded the trial court it was not a party to the contract, Red Dot argues it lacks standing to appeal based on usury. Usury remedies are personal to the debtor and restricted to the parties to the transaction. *See Houston Sash & Door Co. v. Heaner*, 577 S.W.2d 217, 222 (Tex.1979); *W. Bank–Downtown v. Carline*, 757 S.W.2d 111, 115 (Tex.App.-Houston [1st Dist.] 1988, writ denied); *see also* TEX. FIN.CODE ANN. § 305.001 (Vernon Supp.2005). Only the obligor has standing to assert a usury claim. *Weisfeld v. Tex. Land Fin. Co.*, 162 S.W.3d 379, 381 (Tex.App.-

Dallas 2005, no pet.). Since the trial court found that All Seasons was not a party to the contract and that finding has not been challenged on appeal, All Seasons lacks standing to pursue usury claims against Red Dot.

[7] [8] However, All Seasons does have standing to pursue its counterclaim for $38.56. Red Dot argues All Seasons failed to plead any theory to justify recovery of the $38.56, which All Seasons paid for the missing anchor bolts. Although All Seasons pled breach of contract, the $38.56 cannot be recovered through breach of contract because the trial court found that All Seasons was not a party to the contract. ***497** Standing is a distinct concept from capacity to sue. *Roman Forest Pub. Util. Dist. No. 4 v. McCorkle,* 999 S.W.2d 931, 932 (Tex.App.-Beaumont 1999, pet. denied) (public utility district had standing despite lack of damages, ownership of land, etc.). Whether All Seasons failed to plead a cause of action is not relevant to whether All Seasons has standing. [2] The issue of standing is concerned with whether the claimant has a particularized injury distinct from that suffered by the general public. *Blue,* 34 S.W.3d at 555–56. All Seasons has a particularized injury distinct from that suffered by the general public and, therefore, the claim of $38.56 gives All Seasons standing to appeal.

Although All Seasons does not have standing to bring usury claims against Red Dot, All Seasons does have standing to be a party to the suit. We overrule Red Dot's counterpoint.

III. Red Dot Established the Contractual Interest Rate Is Eighteen Percent As a Matter of Law

Red Dot and Akins both challenge the trial court's finding concerning the amount of interest authorized by the contract. The trial court found that the interest under the contract, which provided for interest at the maximum rate allowed by law, was ten percent. In its cross-appeal, Red Dot claims the contract authorized interest at the rate of eighteen percent. Akins argues the interest rate under the contract should have been six percent. We review de novo the trial court's conclusion. *See In re Humphreys,* 880 S.W.2d 402, 403 (Tex.1994).

[9] [10] The contract provides that "[a]ll deferred payments shall bear interest from the time they are due until paid at the maximum rate permitted by the applicable law." All Seasons and Akins argue that the contract rate is six percent because the contract does not specify a rate of interest. Section 302.002 of the Texas Finance Code provides as follows: "If a creditor has not agreed with an obligor to charge the obligor any interest, the creditor may charge and receive from the obligor legal interest at the rate of six percent a year...." TEX. FIN.CODE ANN. § 302.002 (Vernon Supp.2005). When a contract does not specify a rate of interest, the statutory rate of six percent is read into the agreement and becomes the maximum rate allowed on the transaction. *Id.; Broady v. Johnson,* 763 S.W.2d 832, 834 (Tex.App.-Texarkana 1988, no writ). All Seasons and Akins cite *Tubelite v. Risica & Sons, Inc.,* 819 S.W.2d 801, 805 (Tex.1991), for the proposition that a rate greater than six percent is usurious when the parties do not specify a rate. *Tubelite* is distinguishable because in that case the contract entirely omitted any reference to interest. *Id.* Although an acknowledgment sent after the formation of the contract provided for interest and late charges, the contract formed made no reference to interest or late charges. *Id.*

[11] In this case, the contract provided for interest, although it did not specify a numerical amount. The contract provided that interest would be charged "at the maximum rate permitted by law." The Beaumont and Tyler Courts of Appeals have held the lack of a numerical rate of interest does not establish six percent as the correct interest rate. *See* ***498** *Whitehead Utils., Inc. v. Emery Fin. Corp.,* 697 S.W.2d 460, 461 (Tex.App.-Beaumont 1985, no writ) (holding that Article 5069–1.03, a precursor to Section 302.002, does not apply when the parties contracted for the "highest contract rate of interest Lessor may charge lessee under applicable law ...."); *cf. Bundrick v. First Nat'l Bank of Jacksonville,* 570 S.W.2d 12, 15 (Tex.Civ.App.-Tyler 1978, writ ref'd n.r.e.) (allowing collection of the maximum legal rate of interest for a contract that provided for "interest at the highest legal contract rate from the date of such default...."); *AU Pharm., Inc. v. Boston,* 986 S.W.2d 331, 334 (Tex.App.-Texarkana 1999, no pet.) (Section 302.002 does not apply when parties agreed to zero percent interest). When the parties have agreed to a standard for the rate of interest, which can be determined by reasonable calculations, Section 302.002 is inapplicable. *See Whitehead Utils., Inc,* 697 S.W.2d at 462. We agree with the Beaumont and Tyler Courts of Appeals that the default interest rate of Section 305.002 does not apply.

In the alternative, Akins argues ten percent interest is the maximum rate authorized by law. Red Dot claims that eighteen percent interest is authorized by two different statutes. First, Red Dot argues that Section 303.009(a) authorizes eighteen percent interest. Second, Red Dot contends that Section 28.004 of the Texas Property Code applies.

Traditionally, the Texas Finance Code capped at ten percent the interest rate for which an individual could contract. Section 302.001 provides that "[t]he maximum rate or amount of interest is 10 percent a year except as otherwise provided by law." TEX. FIN.CODE ANN. § 302.001(b) (Vernon Supp.2005). While the prior scheme still exists, the 1981 amendments to the Texas Finance Code superimposed an alternative rate ceiling on the prior scheme. 28 STEPHEN COCHRAN, TEXAS PRACTICE: CONSUMER RIGHTS AND REMEDIES § 11.4 (3d ed.2002). The optional rate ceilings provide a floating ceiling based on formulas determined by the twenty-six week United States Treasury Bills. [3] Unless a higher rate is allowed by another law, [4] the scheme includes a minimum ceiling, which applies if the floating ceiling is lower than the minimum ceiling, and a maximum ceiling, which applies if the floating ceiling is higher than the maximum ceiling. [5]

Under the optional rate ceilings, the highest amount authorized by Texas law was at least eighteen percent. "The parties to a written agreement may agree to an interest rate ... that does not exceed the applicable weekly ceiling." TEX. FIN.CODE ANN. § 303.002 (Vernon Supp.2005). Although Red Dot failed to prove the ceilings were eighteen percent, this Court could take judicial notice of the applicable ceilings. [6] However, there is no need to ***499** take judicial notice of the weekly rates because the minimum ceiling is eighteen percent and Red Dot never sought to charge interest greater than eighteen percent. The Texas Finance Code allows interest of at least eighteen percent.

In addition, the Texas Property Code authorizes eighteen percent interest. Section 28.004 of the Texas Property Code provides:

> (a) An unpaid amount required under this chapter begins to accrue interest on the day after the date on which the payment becomes due.
>
> (b) An unpaid amount bears interest at the rate of 1 1/2 percent each month.
>
> (c) Interest on an unpaid amount stops accruing under this section on the earlier of:
>
> (1) the date of delivery;
>
> (2) the date of mailing, if payment is mailed and delivery occurs within three days; or
>
> (3) the date a judgment is entered in an action brought under this chapter.

TEX. PROP.CODE ANN. § 28.004 (Vernon 2000). The payment must be made within thirty-five days of receipt of a written invoice unless there is a good-faith dispute. *Compare* TEX. PROP.CODE ANN. § 28.002(a) (Vernon 2000), *with* TEX. PROP.CODE ANN. § 28.003 (Vernon 2000).

The trial court erred in finding the interest rate under the contract was ten percent. Because the highest rate authorized by law was eighteen percent, the interest rate under the contract should have been eighteen percent.

IV. Interest Began To Accrue October 24, 2001

In its second cross-point of error, Red Dot argues the trial court erred in finding the interest began to accrue December 11, 2001. Red Dot alleges the erection was completed by October 24, 2001, but Akins argues the building was not completed until December 11, 2001. [7] The trial court found the construction of the buildings was completed by October 24, 2001, but

Red Dot "completed various punch-list items brought to its attention by Akins, to the satisfaction of Akins, by December 11, 2001." The trial court concluded interest should accrue from December 11, 2001. There is sufficient evidence to support the trial court's finding that construction was completed by October 24, 2001. However, the trial court erred in concluding interest should accrue from December 11, 2001.

|12| |13| Findings of fact entered in a case tried to the court are of the same force and dignity as a jury's answers to jury questions. *Anderson v. City of Seven Points,* 806 S.W.2d 791, 794 (Tex.1991). The trial court's findings of fact are reviewable for evidentiary sufficiency by the same standards that are applied in reviewing evidentiary sufficiency to support a jury's verdict. *Ortiz v. Jones,* 917 S.W.2d 770, 772 (Tex.1996).

|14| |15| |16| When deciding a legal sufficiency point concerning a fact issue, we must consider all the evidence in the record in the light most favorable to the party in whose favor the verdict has been rendered, and we must apply every reasonable inference that could be made from the evidence in that party's favor. *Merrell Dow Pharms., Inc. v. Havner,* 953 S.W.2d 706, 711 (Tex.1997). We disregard all evidence and inferences to the contrary. ***500** *Burroughs Wellcome Co. v. Crye,* 907 S.W.2d 497, 499 (Tex.1995). A no-evidence point 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 conclusively establishes the opposite of the vital fact. *Uniroyal Goodrich Tire Co. v. Martinez,* 977 S.W.2d 328, 334 (Tex.1998). More than a scintilla of evidence exists if the evidence furnishes some reasonable basis for differing conclusions by reasonable minds about the existence of a vital fact. *Rocor Int'l, Inc. v. Nat'l Union Fire Ins. Co.,* 77 S.W.3d 253, 262 (Tex.2002).

|17| |18| |19| |20| If we find some probative evidence, we will test the factual sufficiency of that evidence by examining the entire record to determine whether the finding is clearly wrong and unjust. When considering a factual sufficiency challenge to a jury's verdict, courts of appeals must consider and weigh all of the evidence, not just that evidence which supports the verdict. *Mar. Overseas Corp. v. Ellis,* 971 S.W.2d 402, 406-07 (Tex.1998). A court of appeals may set aside the verdict only if it is so contrary to the great weight and preponderance of the evidence that the verdict is clearly wrong and unjust. *Id.* at 407; *Cain v. Bain,* 709 S.W.2d 175, 176 (Tex.1986). The court of appeals is not a fact-finder. Accordingly, the court of appeals may not pass on the witnesses' credibility or substitute its judgment for that of the fact-finder, even if the evidence would clearly support a different result. *Ellis,* 971 S.W.2d at 407.

|21| This issue basically turns on when the final payment was due. Red Dot argues the final payment was due when the building was completed October 24, 2001. According to Red Dot, the contract required payment of the balance on "completion of erection." While the contract does provide that the final payment is due on "completion of erection," it does not define what completion of erection means. The contract provides: "Terms of Payment: Unless changed by the terms of a payment schedule above, materials are to be invoiced on date of shipment for contract value of each shipment. Erection charges are to be invoiced when erection is complete...." Earlier in the contract, the contract provides as follows: [8]

|22| |23| Courts should give terms their plain, ordinary, and generally accepted meaning, unless the contract indicates otherwise. *Heritage Res., Inc. v. NationsBank,* 939 S.W.2d 118, 121 (Tex.1996). Under the plain language of the contract, the final payment was due on completion of the erection. [9]

The evidence is sufficient to support the trial court's finding that construction was ***501** completed by October 24, 2001. Ronald Acree, a subcontractor for Red Dot, testified the building was complete October 24, 2001. This arises to more than a scintilla of evidence that erection was complete by October 24, 2001. While there is some evidence the building was not complete in all respects, the trial court's finding is not so contrary to the great weight and preponderance of the

evidence that it is clearly wrong or unjust. [10] The evidence is legally and factually sufficient that erection was completed by October 24, 2001.

[24] Because the trial court found construction was complete by October 24, 2001, it erred in holding interest should accrue from December 11, 2001. When interest should begin to accrue is an issue of law, which we review de novo. The contract provides that the final payment is due on completion of erection. [11] Since construction was complete October 24, 2001, interest should have begun to accrue October 24, 2001.

V. Red Dot Did Not Commit Usury

[25] In his first six points of error, Akins challenges the trial court's denial of his usury claims. Akins argues that usury was proven as a matter of law, or in the alternative, argues the evidence is factually insufficient to support the trial court's holding. According to Akins and All Seasons, usury was established as a matter of law or by the great weight and preponderance of the evidence if the contractual interest rate was six percent or even ten percent. As discussed above, Red Dot did not attempt to charge an illegal rate of interest. The trial court's finding is supported by legally and factually sufficient evidence.

[26] Akins alleges the trial court erred in denying his usury claims because any interest in excess of ten percent is usury in Texas. Section 305.001 of the Texas Finance Code imposes liability for contracting for, charging, or receiving interest greater than the amount authorized by law. Section 305.001 provides as follows:

> (a) A creditor who contracts for, charges, or receives interest that is greater than the amount authorized by this subtitle ... is liable to the obligor for an amount that is equal to the greater of:
>
> (1) three times the amount computed by subtracting the amount of interest allowed by law from the total *502 amount of interest contracted for, charged, or received; or
>
> (2) $2,000 or 20 percent of the amount of the principal, whichever is less.

TEX. FIN.CODE ANN. § 305.001(a). The solicitation of interest, through a demand letter, exceeding that allowed by law may constitute a "charge" for the purposes of Section 305.001. *Hoxie Implement Co. v. Baker,* 65 S.W.3d 140, 146 (Tex.App.-Amarillo 2001, pet. denied). However, as discussed above, eighteen percent interest was permissible under Texas law. Because the rate of interest Red Dot charged was legal, Red Dot did not commit usury.

[27] Alternatively, Akins argues Red Dot committed usury because it sought to charge interest from October 24, 2001, instead of December 11, 2001, and from August 14, 2001, to September 14, 2001. [12] The legality of the interest rate depends on when the payment was due. Interest charged at any rate for a period contracted by the parties to be free of interest is usurious. *PJM, Inc. v. Walter Clark Adver., Inc.,* 624 S.W.2d 282, 284–85 (Tex.App.-Dallas 1981, writ ref'd n.r.e.); *see Heaner,* 577 S.W.2d at 221. The contract provided: "Terms of Payment: Unless changed by the terms of a payment schedule above, materials are to be invoiced on date of shipment for contract value of each shipment. Erection charges are to be invoiced when erection is complete...." Earlier in the contract, the contract provided as follows: [13]

Therefore, the contract required the second payment to be made on delivery of the materials. As discussed above, the contract requires the final payment to be made on the completion of erection. Because the materials were delivered August 14, 2001, and there is sufficient evidence to support the trial court's finding that construction was completed October 24, 2001, Red Dot could charge interest during the periods alleged.

Legally and factually sufficient evidence supports the trial court's finding that Red Dot did not commit usury. The law authorizes interest to be charged at eighteen percent. Further, Red Dot did not commit usury when it attempted to

charge interest for the periods from October 24, 2001 through December 11, 2001, and for the tardiness of Akins' second payment, since Red Dot could, under the contract, legally charge interest during those periods under the contract.

VI. The Trial Court Erred by Deducting $38.56 from the Amount Owed by Akins

[28] The evidence established as a matter of law that All Seasons paid $38.56 for anchor bolts, which were the responsibility of Red Dot. Acree conceded in his testimony Red Dot owed All Seasons the $38.56; e-mails introduced into evidence established there was an error in the amount of anchor bolts that were sent to the jobsite, and All Seasons introduced into evidence the receipt for the anchor bolts. Because All Seasons and Akins are separate entities, the trial court erred in awarding the $38.56 to Akins.

***503 VII. The Attorney's Fees Are Supported by Sufficient Evidence**

[29] In their seventh through thirteenth points of error, Akins and All Seasons challenge the trial court's award of attorney's fees to Red Dot. In essence, Akins is complaining that the amount of the attorney's fees is excessive. We review the award of attorney's fees for legal and factual sufficiency of the evidence. *See Bocquet v. Herring,* 972 S.W.2d 19, 20 (Tex.1998); *Stewart Title Guar. Co. v. Sterling,* 822 S.W.2d 1, 12 (Tex.1991). [14]

[30] [31] Attorney's fees must be based on some statutory or contractual authority. *Holland v. Wal–Mart Stores, Inc.,* 1 S.W.3d 91, 95 (Tex.1999). A contract may provide that the prevailing or successful party in litigation arising out of the contract is entitled to recover attorney's fees from the other party. *See Robbins v. Capozzi,* 100 S.W.3d 18, 27 (Tex.App.-Tyler 2002, no pet.). In determining whether attorney's fees are reasonable, the trial court should consider the factors discussed in *Arthur Anderson & Co. v. Perry Equip. Corp.,* 945 S.W.2d 812, 818 (Tex.1997).

Red Dot employed two law firms at various stages of the litigation. Guy Harrison, Red Dot's expert on attorney's fees, testified that Cowles & Thompson billed Red Dot for $32,769.65 in attorney's fees and that Fulbright and Jaworski billed Red Dot for $87,669.95, for a total of $138,139.60. Harrison estimated the fees that had been incurred since the last billing at $17,700.00. Without the Cowles & Thompson fees, the attorney's fees came to $105,369.95.

The trial court stated in a letter to the parties that the "attorney's fees expended by plaintiff in connection with the Henderson County litigation to be unnecessary and unreasonable." [15] The trial court then awarded $105,369.95 for attorney's fees, the maximum fees for the remaining attorney's fees supported by the testimony of Harrison. The trial court stated that, although the fees were "high," they were not unreasonable and unnecessary.

[32] [33] First, Akins argues the trial court erred in awarding attorney's fees in excess of $250.00 per hour when the evidence only established that $250.00 per hour was a reasonable rate. In general, the reasonableness of attorney's fees is a question of fact. ***504** *City of Garland v. Dallas Morning News,* 22 S.W.3d 351, 367 (Tex.2000). Harrison testified that he thought $250.00 per hour was a "more appropriate" fee, but that $300.00 per hour could be reasonable in some circumstances. Harrison testified that, after adjusting rates exceeding $250.00 per hour to $250.00 per hour, Red Dot's attorney's fees came to $125,043.15. [16] Harrison's testimony that that amount was reasonable and that the case was not "overstaffed," is some evidence the attorney's fees are reasonable and necessary. Further, the great weight and preponderance of the evidence does not indicate the attorney's fees are unreasonable.

[34] [35] [36] Second, Akins argues the trial court erred in awarding recovery of paralegal fees and other expenses in the award of attorney's fees. An award of attorney's fees may include a legal assistant's time to the extent that the work performed "has traditionally been done by any attorney." *Clary Corp. v. Smith,* 949 S.W.2d 452, 469 (Tex.App.-Fort Worth 1997, writ denied); *Gill Sav. Ass'n v. Int'l Supply Co.,* 759 S.W.2d 697, 702 (Tex.App.-Dallas 1988, writ denied). To recover attorney's fees for work performed by legal assistants, "the evidence must establish: (1) the qualifications of the legal assistant to perform substantive legal work; (2) that the legal assistant performed substantive legal work under

the direction and supervision of an attorney; (3) the nature of the legal work performed; (4) the legal assistant's hourly rate; and (5) the number of hours expended by the legal assistant." *Multi-Moto Corp. v. ITT Commercial Fin. Corp.*, 806 S.W.2d 560, 570 (Tex.App.-Dallas 1990, writ denied); *see Gill Sav. Ass'n*, 759 S.W.2d at 704-05. Because there was no evidence concerning the legal assistants other than the hourly rate and number of hours expended, we modify the award of attorney's fees in the amount of $4,819.50 for work performed by legal assistants. Red Dot has failed to provide any authority for the award of expenses to this Court or the trial court. Attorney's fees must be based on some statutory or contractual authority. *Holland*, 1 S.W.3d at 95. Because Red Dot had the burden of proving its attorney's fees were reasonable and failed to prove it was entitled to the expenses, we modify the award for expenses by $2,377.95.

Third, Akins argues the attorney's fees are unreasonable because the actual amount in controversy was only $4,926.95. While the attorney's fees may be excessive if Akins had paid the amount not in dispute under the contract, Akins never tendered the amount not in dispute to Red Dot. The amount in controversy was actually $143,839.00. Therefore, we cannot conclude the amount in dispute indicates the attorney's fees are unreasonable.

All Seasons argues, because it prevailed on its counterclaim for $38.56, it is entitled to attorney's fees. All Seasons failed to segregate which portion of its attorney's fees concerned the counterclaim. Although there was no objection to the failure to segregate,[17] an award of $29,511.29 for attorney's fees for a $38.56 claim is clearly unreasonable. The trial court did not err in refusing to award attorney's fees for the $38.56 counterclaim.

[37] [38] Last, All Seasons and Akins argue the trial court erred in failing to condition the attorney's fees awarded for the appeal on the appeal being successful. ***505** An award for attorney's fees for an appeal should be conditioned on a successful appeal. *Westech Eng'g, Inc. v. Clearwater Constructors, Inc.*, 835 S.W.2d 190, 205 (Tex.App.-Austin 1992, no writ). We modify the judgment to reflect that Red Dot is only eligible to receive attorney's fees for its appeal if its appeal of the breach of contract issues is successful. *See J.C. Penney Life Ins. Co. v. Heinrich*, 32 S.W.3d 280, 290 (Tex.App.-San Antonio 2000, pet. denied).

The trial court awarded the maximum attorney's fees supported by the testimony. Therefore, the award must have included the fees for paralegals and expenses. Because there is no evidence Red Dot was entitled to the paralegal fees and expenses, we modify the award by $7,197.45. We modify the judgment to condition attorney's fees for appeal on the success of that appeal.

VIII. Conclusion

We affirm the judgment of the trial court in part, reverse in part, and modify in part. Although All Seasons lacks standing for its usury claims, All Seasons has standing based on its claim for the amount it spent on anchor bolts. The trial court erred in finding the interest rate under the contract was ten percent. We modify the judgment that the interest rate under the contract was eighteen percent. We affirm the trial court's finding that construction was complete October 24, 2001, but modify the ruling that interest should accrue from October 24, 2001. We affirm the trial court's determination that Red Dot did not commit usury. The trial court erred in awarding to Akins the $38.56 expended by All Seasons for anchor bolts. Because Red Dot failed to prove it was entitled to paralegal fees and expenses, we modify the award for attorney's fees by $7,197.45. We modify the judgment to condition attorney's fees for appeal on the success of that appeal.

We modify the judgment that Red Dot recover from Akins' damages in the amount of $143,839.00, interest at a rate of eighteen percent on $143,839.00 from October 24, 2001; $98,172.50 in attorney's fees for the trial of the case;[18] and $10,000.00 in attorney's fees for the successful appeal to this Court.[19] We reverse and render judgment that All Seasons recover $38.56 from Red Dot.

We affirm the trial court's judgment in all other respects.

All Citations

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Footnotes

1 Although Akins filed suit in this case, the parties were later realigned, resulting in Red Dot being the plaintiff with the burden of proof at trial.

2 There are theories of recovery, such as unjust enrichment, which would entitle All Seasons to recover its $38.56. Red Dot has failed to direct us to where in the record it presented this alleged defect to the trial court. *See Roark v. Allen,* 633 S.W.2d 804, 809–10 (Tex.1982). Further, this issue may have been tried by consent. *See* TEX.R. CIV. P. 67.

3 TEX. FIN.CODE ANN. § 303.003(a), (b) (Vernon Supp.2005). Depending on the type of contract, the Code provides four methods of computing the applicable floating rate ceiling based on whether the rate ceiling is calculated weekly, monthly, quarterly, or annually. *See* TEX. FIN.CODE ANN. §§ 303.003, 303.004, 303.006, 303.008 (Vernon Supp.2005).

4 *See* TEX. FIN.CODE ANN. § 303.001 (Vernon Supp.2005).

5 TEX. FIN.CODE ANN. § 303.009 (Vernon Supp.2005); *see In re Kemper,* 263 B.R. 773, 781 (Bankr.D.Tex.2001). The amount of the minimum and maximum ceilings depends on whether the loan is a consumer loan or business loan. For consumer loans, Section 303.009 provides for a minimum interest rate ceiling of eighteen percent and a maximum interest rate ceiling of twenty-four percent. TEX. FIN.CODE ANN. § 303.009. For loans concerning a "business, commercial, investment, or similar purpose," the maximum ceiling is twenty-eight percent. *Id.*

6 TEX. FIN.CODE ANN. § 303.012 (Vernon Supp.2005). Red Dot only introduced into the record the weekly ceiling for seven weeks of the approximately three-year period. During these weeks, the weekly ceiling was eighteen percent.

7 Akins maintains that some repairs have still not been completed.

8 The amounts due were later modified through "change orders."

Terms of payment:	$ 38,632.00	with order
	224,308.00	material delivery
	123,375.00	completion of erection
	$386,315.00	TOTAL

9 We note that Red Dot argues the payment was due October 24, 2001, because the invoice for the final payment was mailed on that date and marked "due upon receipt." While the statement on the invoice does not modify the contract, it is evidence of the intent of the parties for payment to be due on completion of erection. "The primary concern of a court in construing a written contract is to ascertain the true intent of the parties as expressed in the instrument." *Nat'l Union Fire Ins. Co. v. CBI Indus., Inc.,* 907 S.W.2d 517, 520 (Tex.1995). The invoice is evidence the parties intended for the final payment to be due on completion of erection and is consistent with the plain language of the contract.

10 We note that the trial court found that Red Dot "completed various punch-list items brought to its attention by Akins, to the satisfaction of Akins, by December 11, 2001." Acree testified he installed a jack beam in late November 2001, for which installation Red Dot was responsible. Acree testified they had forgotten to install the beam previously. Jack Harrington, the construction manager of Red Dot, testified that Red Dot returned to tighten bolts, fix insulation, incorporate an additional beam, and address other issues at the request of Akins and/or All Seasons. Akins testified that there were several items which had to be repaired and that repairs were performed December 11, 2001. Even though there is some evidence the building was not completed in all respects, the trial court's conclusion that construction was completed is not against the great weight and preponderance of the evidence.

11 Red Dot argues that occupancy of the building constituted acceptance. Red Dot argues that, because All Seasons occupied the building before October 24, 2001, the payment was due when the invoice was mailed. Acree testified that All Seasons had started to move into the new building in late September before the erection was complete. Akins testified he did not accept the building until the final punch list was completed December 11, 2001, and therefore the payment was not due until December 11, 2001. Acceptance of the building, though, is not relevant to when the payment was due under the contract.

12 Before trial, Red Dot had sought interest because Akins paid the second invoice September 14, 2001, thirty-one days after the materials were delivered. Red Dot dropped this claim before trial.

13 The amounts due were later modified through "change orders."

Terms of payment:	$ 38,632.00	with order
	224,308.00	material delivery

123,375.00	completion of erection
$386,315.00	TOTAL

14 As noted by Red Dot, some courts review attorney's fees under an abuse of discretion standard while others review based on the sufficiency of the evidence. *Compare Hagedorn v. Tisdale*, 73 S.W.3d 341, 353 (Tex.App.-Amarillo 2002, no pet.); *Sieber & Calicutt, Inc. v. La Gloria Oil & Gas Co.*, 66 S.W.3d 340, 350-51 (Tex.App.-Tyler 2001, pet. denied); *Long Trusts v. Atl. Richfield Co.*, 893 S.W.2d 686, 688 (Tex.App.-Texarkana 1995, no writ), *with Bocquet*, 972 S.W.2d at 20; *Merch. Ctr., Inc. v. WNS, Inc.*, 85 S.W.3d 389, 398 (Tex.App.-Texarkana 2002, no pet.). We will follow the precedent of the Texas Supreme Court and review attorney's fees based on the sufficiency of the evidence standards.

15 Red Dot originally filed suit in the Henderson County Court of Law while represented by Cowles & Thompson. Because the amount in controversy exceeded the jurisdiction of that court, the suit was nonsuited. Akins then filed a suit to quiet title (this suit) in Gregg County. Afterward, Red Dot filed another suit in the District Court in Henderson County. The contract provides that any action "shall be asserted and maintained in any court of competent subject matter jurisdiction located in Henderson County, Texas." There is no indication that a motion to transfer was filed, but the contract does provide some support for filing suit in Henderson County. It is unclear when Red Dot terminated its relationship with Cowles & Thompson, but Fulbright and Jaworski filed the original answer in this suit.

16 This amount includes fees for both Fulbright and Jaworski and Cowles & Thompson. Harrison did not testify as to the amount of Fulbright and Jaworski fees if the fees had been reduced to $250.00 per hour.

17 *See Sterling*, 822 S.W.2d at 10-11.

18 Red Dot's attorney's fees for trial modified by $7,197.45 is $98,172.50.

19 Because Red Dot was the prevailing party as to the breach of contract issues and the attorney's fees were awarded for its breach of contract claims, Red Dot is entitled to attorney's fees for the appeal to this Court.

Attachment F

SOAH DOCKET NO. 582-16-0967
TCEQ DOCKET NO. 2015-1268-UIC

APPLICATION OF URI, INC. FOR RENEWAL AND MAJOR AMENDMENT OF CLASS III INJECTION WELL AREA PERMIT NO. UR02826	§ § § § §	BEFORE THE STATE OFFICE OF ADMINISTRATIVE HEARINGS

NERIO AND OLGA MARTINEZ'S REIMBURSABLE EXPENSES PURSUANT TO 30 TAC 80.25(e)(2)

Protestants Nerio and Olga Martinez hereby submit their expenses incurred in the permitting process for the subject application. Invoices for the claimed expenses are attached.

1) Neely Water Well Service Invoice # 75188, preparation for sampling, labor to pull pump pipe and wire, flush well drilled by URI in 1989. - $427.00

2) George Rice Invoice dated June 16, 2016, preparation for groundwater sampling near the Kingsville Dome mine - $400.00

3) CDW Invoice # DDM9847, Fujitsu ScanSnap IX500, portable scanner to copy documents provided for review at URI site in response to discovery requests - $446.19

4) Enterprise Car rental to attend March 3, 2016 Preliminary Hearing - $140.38

TEXAS RIO GRANDE LEGAL AID
1111 North Main
San Antonio Texas 78212

By: _____
Enrique Valdivia
SBN 20429100

Attorneys for Protestants
Nerio and Olga Martinez

INVOICE DATE	INVOICE NUMBER		
05/24/16	DDM9847	Net 30 Da[illegible]	06/23/16
ORDER DATE	**SHIP VI**	**PURCHASE [illegible] R NUMBER**	**CUSTOMER NUMBER**
05/24/16	UPS Ground	10377	8241254

ITEM NUMBER	DESCRIPTION	QTY ORD	QTY SHIP	QTY B/O	UNIT PRICE	TOTAL
2926502	FUJITSU SCANSNAP IX500 25PPM 600DPI Manufacturer Part Number: PA03656-B005 Serial No: A0VBC54963	1	1	0	446.19	446.19

RECEIVED
JUN - 2 2016

PAID
JUN 29 2016

GO GREEN!

CDW is happy to announce that paperless billing is now available! If you would like to start receiving your invoices as an emailed PDF, please email CDW at paperlessbilling@cdw.com. Please include your Customer number or an invoice number in your email for faster processing.

REDUCE PROCESSING COSTS AND ELIMINATE THE HASSLE OF PAPER CHECKS!

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ACCOUNT MANAGER	SHIPPING ADDRESS:
SARA LAMACCHIA 312-547-2391 saralam@cdwg.com	TEXAS RIO GRANDE LEGAL AID, INC JOSEPH RESURRECCION 4920 N INTERSTATE 35 AUSTIN LOCATION AUSTIN TX 78751-2716
SALES ORDER NUMBER	
HCJW138	

SUBTOTAL	$446.19
SHIPPING	$0.00
SALES TAX	$0.00
AMOUNT DUE	$446.19

CDWG

Cage Code Number 1KH72
DUNS Number 02-815-7235

ISO 9001 and ISO 14001 Certified
CDW GOVERNMENT FEIN 36-4230110

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SOAH DOCKET NO. 582-16-0967
TCEQ DOCKET NO. 2015-1268-UIC

APPLICATION BY URI, INC. FOR RENEWAL AND MAJOR AMENDMENT OF CLASS III INJECTION WELL AREA PERMIT NO. UR02827	**§**	**BEFORE THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY**

APPLICANT URI, INC.'S EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S PROPOSAL FOR DECISION

Attachment 2

URI, Inc.'s Amended Draft Order

URI DRAFT ORDER

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

AN ORDER Withdrawing the Applications of
URI, Inc. to Renew and Amend UIC Permit No. UR02827
TCEQ Docket No. 2015-1268-UIC
SOAH Docket No. 582-16-0967

On _____, the Texas Commission on Environmental Quality (TCEQ or Commission) considered the request by URI, Inc. (URI) to withdraw without prejudice its applications for renewal and amendment of UIC Permit No. UR02827 (the Applications). Administrative Law Judge (ALJ) Casey A. Bell of the State Office of Administrative Hearings (SOAH) presented a Proposal for Decision (PFD) recommending that the Commission enter an order dismissing the Applications without prejudice upon payment by URI of expenses incurred in the permitting process by protesting parties Kleberg County and Nerio and Olga Martinez. After considering the PFD, the Commission adopts the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. In September 2012 and December 2012, respectively, URI filed with the Commission the Applications to renew and amend UIC Permit No. UR02827, which authorizes Class III underground injection wells for the *in situ* recovery of uranium and aquifer restoration at the Kingsville Dome Mine in Kleberg County, Texas.

2. On October 11, 2015, the Commission referred the Applications to the State Office of Administrative Hearings (SOAH) for a contested case hearing.

3. On March 3, 2016, SOAH Administrative Law Judge (ALJ) Casey A. Bell convened the preliminary hearing, assumed SOAH jurisdiction over this case, and named as protesting parties, among others, Kleberg County and Nerio and Olga Martinez.

4. On June 15, 2016, URI filed a request seeking withdrawal of the Applications without prejudice. The request was filed before a proposal for decision was issued.

5. The parties have not agreed in writing to a withdrawal of the Applications without prejudice.

6. Kleberg County and Nerio and Olga Martinez submitted affidavits and other documentation pertaining to expenses they contend were incurred in the permitting process for the subject applications.

7. Legal assistants employed by Frederick, Perales, Allmon & Rockwell, P.C. (FPAR), Kleberg County's counsel of record, performed work pertaining to the permitting process for the Applications. Kleberg County was billed and paid for this work.

8. Kleberg County claimed $8,367.50 in expenses for the work performed for it by the FPAR legal assistants pertaining to the permitting process for the Applications. This amount is not a reimbursable expense because the legal assistants' work was substantive legal work.

9. Kleberg County was charged and paid for legal services provided by FPAR in connection with a Travis Co. District Court lawsuit filed by Kleberg County against the Commission related to the Commission's processing of URI's application to renew UIC Permit No. UR02827. URI was not a party to this lawsuit.

10. Kleberg County claimed $1,014.98 in expenses in connection with the Travis County District Court lawsuit filed against the Commission. This amount is not a reimbursable expense because these expenses are not considered "expenses incurred in the permitting process for the subject application" as required by 30 TAC §80.25(e)(2).

11. After Kleberg County filed suit against the Commission, URI filed a major amendment application pertaining to UIC Permit No. UR02827. Kleberg County then nonsuited the lawsuit against the Commission.

12. The total amount of expenses that Kleberg County claims it has incurred in the permitting process for the Applications is $16,975.25.

13. The total reimbursable expenses incurred by Kleberg County in the permitting process for the Applications is $7,592.77.

14. The portable scanner purchased by Mr. and Mrs. Martinez and claimed as an expense they incurred in the permitting process for the Applications is office equipment that can be used for many purposes, and it was not used as part of the permitting process for the Applications.

15. The total amount of expenses that Mr. and Mrs. Martinez incurred in the permitting process for the Applications is $967.38.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction to consider the Applicant's application pursuant to Texas Water Code § 27.011.

2. SOAH has jurisdiction to conduct a hearing and to prepare a Proposal for Decision in this matter. Tex. Gov't Code § 2003.047.

3. In a contested case hearing at SOAH, an applicant may file a request to withdraw its application at any time before the proposal for decision in a contested case hearing is issued. 30 Tex. Admin. Code § 80.25(a).

4. If the applicant seeks to withdraw its application without prejudice, the parties to the contested case have been named, and the parties do not agree in writing to the withdrawal without prejudice, the ALJ must forward the application, the request, and a recommendation on the request to the Commission. 30 Tex. Admin. Code § 80.25(d).

5. An applicant is entitled to an order dismissing an application without prejudice if (a) the applicant reimburses the other parties all expenses, not including attorney's fees, incurred by the other parties in the permitting process for the subject application, or (b) the Commission authorizes the dismissal of the application without prejudice. 30 Tex. Admin. Code § 80.25(e)(2)-(3).

6. The expenses incurred by Kleberg County for the work performed by the FPAR legal assistants pertaining to the permitting process for the Applications are not reimbursable because the work performed was substantive legal work traditionally performed by an attorney and therefore considered to be within the definition of attorney fees pursuant to established Texas case law (See *Gill Savings Ass'n v. Int'l Supply Co., Inc., 759 S.W. 2d 697, 702 (Tex App.-Dallas 1988)* and *All Seasons Window And Door Mfg. Inc. v. Red Dot Corp., 181 S.W.3d 490, 504 (2005)*).

7. The expenses incurred by Kleberg County related to the lawsuit against the Commission regarding the Commission's jurisdiction over URI's application to renew UIC Permit No. UR02827 were not incurred in the permitting process for the Applications.

8. The cost of the portable scanner purchased by Mr. and Mrs. Martinez was not an expense incurred in the permitting process for the Applications.

9. URI is entitled to an order dismissing the Applications without prejudice upon, its payment to Kleberg County of the sum of $7,592.77 as reimbursement of expenses incurred by Kleberg County in the permitting process for the Applications and payment to Nerio and Olga Martinez of $967.38 as reimbursement of expenses incurred by Mr. and Mrs. Martinez in the permitting process for the Applications.

NOW, THEREFORE, BE IT ORDERED BY THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY THAT:

1. URI shall make payment to Kleberg County in the amount of $7,592.77 as reimbursement of expenses incurred by Kleberg County in the permitting process for the Applications.

2. URI shall make payment to Nerio and Olga Martinez in the amount of $967.38 as reimbursement of expenses incurred by Mr. and Mrs. Martinez in the permitting process for the Applications.

3. Upon URI's payment of the amounts in paragraphs 1 and 2 above to Kleberg County and Mr. and Mrs. Martinez, URI's applications to renew and amend UIC Permit No. UR02827 are dismissed without prejudice to refiling.

4. All other motions, requests for entry of specific Findings of Fact or Conclusions of Law, and any other requests for general or specific relief, if not expressly granted herein, are hereby denied.

5. The effective date of this Order is the date the Order is final, as provided by 30 Texas Administrative Code § 80.273 and Texas Government Code § 2001.144.

6. The Commission's Chief Clerk shall forward a copy of this Order to all Parties.

7. If any provision, sentence, clause, or phrase of this Order is for any reason held to be invalid, the invalidity of any provision shall not affect the validity of the remaining portions of this Order.

ISSUED: _____

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

_____
Bryan W. Shaw, Ph.D., Chairman
For the Commission