APPENDIX

APPENDIX

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APPENDIX A

[SEAL]

COURT OF APPEALS
FIRST DISTRICT OF TEXAS

NO. 01-17-00149-CV

[Filed April 26, 2018]

LAURIE ANN MCRAY, INFINITY CAPITAL, LLC AND MCRAY MONEY MANAGEMENT, LLC, Appellants	)
V.	)
DOW GOLUB REMELS & BEVERLY, LLP, Appellee	)

Appeal from the 333rd District
Court of Harris County.
(Tr. Ct. No. 2015-47112).

JUDGMENT

This case is an appeal from the final judgment signed by the trial court on December 12, 2016. After submitting the case on the appellate record and the arguments properly raised by the parties, the Court holds that there was reversible error in the trial court's

judgment in the following respect: granting appellee Dow Golub Remels & Beverly, LLP's, motion for summary judgment. Accordingly, the Court **reverses** the trial court's judgment and **remands** the case to the trial court for further proceedings.

The Court **orders** that the appellee, Dow Golub Remels & Beverly, LLP, pay all appellate costs.

The Court **orders** that this decision be certified below for observance.

Judgment rendered April 26, 2018.

Panel consists of Chief Justice Radack and Justices Bland and Higley. Opinion delivered by Justice Bland.

APPENDIX B

[SEAL]

COURT OF APPEALS
FIRST DISTRICT OF TEXAS

NO. 01-17-00149-CV

[Filed October 19, 2018]

LAURIE ANN MCRAY, INFINITY CAPITAL, LLC AND MCRAY MONEY MANAGEMENT, LLC, Appellants	)
V.	)
DOW GOLUB REMELS & BEVERLY, LLP, Appellee	)

Appeal from the 333rd District
Court of Harris County.
(Tr. Ct. No. 2015-47112).

MANDATE

TO THE 333RD DISTRICT COURT OF HARRIS COUNTY, GREETINGS:

Before this Court, on the 26th day of April 2018, the case upon appeal to revise or to reverse your judgment

was determined. This Court made its order in these words:

> This case is an appeal from the final judgment signed by the trial court on December 12, 2016. After submitting the case on the appellate record and the arguments properly raised by the parties, the Court holds that there was reversible error in the trial court's judgment in the following respect: granting appellee Dow Golub Remels & Beverly, LLP's, motion for summary judgment. Accordingly, the Court **reverses** the trial court's judgment and **remands** the case to the trial court for further proceedings.
>
> The Court **orders** that the appellee, Dow Golub Remels & Beverly, LLP, pay all appellate costs.
>
> The Court **orders** that this decision be certified below for observance.
>
> Judgment rendered April 26, 2018.
>
> Panel consists of Chief Justice Radack and Justices Bland and Higley. Opinion delivered by Justice Bland.

WHEREFORE, WE COMMAND YOU to observe the order of our said Court in this behalf and in all things to have it duly recognized, obeyed, and executed.

/s/ Christopher A. Prine
CHRISTOPHER A. PRINE
CLERK OF THE COURT

October 19, 2018
Date

[SEAL]

APPENDIX C

Opinion issued April 26, 2018

[SEAL]

IN THE
COURT OF APPEALS
FOR THE
FIRST DISTRICT OF TEXAS

NO. 01-17-00149-CV

[Filed April 26, 2018]

LAURIE ANN MCRAY, INFINITY CAPITAL, LLC AND MCRAY MONEY MANAGEMENT, LLC, Appellants	)
V.	)
DOW GOLUB REMELS & BEVERLY, LLP, Appellee	)

On Appeal from the 333rd District Court
Harris County, Texas
Trial Court Case No. 2015-47112

O P I N I O N

This is a law firm's suit against its former clients for unpaid attorney's fees. The trial court granted

summary judgment to the law firm for the fees, plus the additional fees that the law firm incurred in collecting its contract damages. The clients appeal, contending that the law firm did not conclusively establish liability for the amount of fees owed, nor for the fees incurred in collecting the debt. The clients further contend that the trial court erred in striking one of their late-designated expert witnesses. Because the summary-judgment evidence does not conclusively establish the amounts owed, we reverse and remand.

BACKGROUND

Dow Golub Remels & Beverly, LLP, represented Laurie Ann McRay; Infinity Capital, LLC; and McRay Money Management, LLC (collectively, McRay) in two lawsuits. In the first, Dow Golub defended Infinity Capital against claims arising out of mold in a rental property and pursued a counterclaim against Infinity Capital's tenants, who allegedly had damaged the property. In the second, Dow Golub defended Laurie Ann McRay, McRay Money Management, and Infinity Capital against claims brought by investors in McRay's entities for breach of fiduciary duty, professional malpractice, and violations of the Texas Securities Act.

In engagement agreements for the two lawsuits, McRay agreed to pay Dow Golub fees for its professional services. McRay had the right to terminate the representation at any time by written notice, at which time she would owe the charges incurred to that point, plus post-termination fees associated with transfer of the files. The engagement agreements say: "It is difficult to predict exactly how much time will be required to complete our legal work. The Firm will

devote, however, the time which we deem necessary to carry out the representation."

The engagement agreements also entitle Dow Golub to seek the fees that it might incur in pursuing payment of its unpaid invoices: "[Dow Golub] is entitled to reasonable attorney's fees and costs if collection activities are necessary for the failure of [McRay] to pay any indebtedness to the Firm."

In February 2015, McRay terminated Dow Golub's representation. At the time, McRay did not pay amounts charged in certain of Dow Golub's invoices. Dow Golub later issued two invoices for additional legal work, in July 2015 and in August 2015, which McRay also did not pay. Dow Golub sued McRay and her entities to recover its unpaid fees, alleging causes of action for breach of contract and quantum meruit. McRay answered, denying the amount owed, and she asserted a counterclaim for professional negligence.

After the time for designating expert witnesses had passed, Dow Golub moved for a traditional summary judgment on its breach of contract claim for unpaid fees. It attached an affidavit from Sanford Dow, to which he attached the unpaid invoices, noting that they reflected the legal fees and expenses incurred by McRay.

McRay responded to the motion by stating that "the attorneys' fees for which Dow Golub seeks to be paid were excessive as are the fees for which they seek to be compensated to recover those fees." She noted that some entries in the invoices were heavily redacted, so

that "it is not possible to tell what legal services were performed."

McRay also moved in the trial court to allow a late designation of expert witnesses. With the motion, McRay proffered affidavits from two experts, John P. Venzke, on the reasonableness of the fees, and Eugene B. Wilshire, on the standard of care. Dow Golub moved to strike the late-designated experts. The trial court struck Wilshire, but it allowed Venzke.

Venzke is a practicing lawyer who has "handled and submitted invoices for legal services for thousands of files," and he has "audited invoices for legal services." He stated that he is "familiar with reasonable billing rates and time entries in Harris County, Texas." Venzke averred that he had reviewed the entire file, including "the billing records submitted by [Dow Golub]." He opined that "the fees sought are not reasonable and necessary for the services performed."

McRay nonsuited her professional-negligence counterclaim, but she filed an amended answer adding affirmative defenses of "credit and/or setoff" and "breach of fiduciary duty."

The trial court granted final summary judgment to Dow Golub. McRay moved to modify the judgment and for a new trial. The trial court denied the motions.

DISCUSSION

McRay challenges the legal sufficiency of the summary-judgment evidence supporting Dow Golub's contract damages. Noting that no one from Dow Golub proffered an affidavit that the amount of fees that it

charged in the two engagements was reasonable, she contends that Dow Golub has failed to conclusively establish that the amount it claims it is owed was reasonable and necessary and, in particular, that Dow Golub improperly seeks amounts for fees that it charged after McRay had terminated the representation. Thus, McRay argues, genuine issues of material fact exist as to the amount owed under the fee agreements. Dow Golub responds that it proffered copies of its unpaid invoices and that it did not have a burden to demonstrate that the fees it sought were reasonable to establish its contract damages.

I. Contract Damages

A. Standard of Review

We review summary judgments de novo. *Mann Frankfort Stein & Lipp Advisors, Inc. v. Fielding*, 289 S.W.3d 844, 848 (Tex. 2009). In doing so, we take as true all evidence favorable to the nonmovant, indulge every reasonable inference in the nonmovant's favor, and resolve any doubts in the nonmovant's favor. *Provident Life & Accident Ins. Co. v. Knott*, 128 S.W.3d 211, 215 (Tex. 2003). The movant must show that no genuine issue of material fact exists and that the movant is entitled to judgment as a matter of law. TEX. R. CIV. P. 166a(c); *Provident Life*, 128 S.W.3d at 215–16. If the movant seeks summary judgment finding liability and awarding damages on its cause of action, then it must prove all elements of the cause of action as a matter of law. *Ayele v. Jani-King of Houston, Inc.*, 516 S.W.3d 630, 634 (Tex. App.—Houston [1st Dist.] 2017, no pet.). Once the movant shows it is entitled to judgment as a matter of

law, the burden shifts to the nonmovant to present evidence raising a fact issue to defeat summary judgment. *Green v. Lowe's Home Ctrs., Inc.*, 199 S.W.3d 514, 518 (Tex. App.—Houston [1st Dist.] 2006, pet. denied).

B. Attorney's Fees as Contract Damages

An attorney may recover unpaid hourly fees for professional services rendered under the usual rules of contract law. *See, e.g.*, *Stuart v. Bayless*, 964 S.W.2d 920, 921–22 (Tex. 1998) (per curiam) (reversing contingency-fee award under usual rules of contract law for consequential damages and affirming non-contingency remainder of fee award); *John H Carney & Assocs. v. Ahmad*, No. 07-15-00252-CV, 2016 WL 368527, at *2 (Tex. App.—Amarillo Jan. 28, 2016, pet. denied) (mem. op.) ("A suit by an attorney against a client or former client for the recovery of attorney's fees under an hourly fee contract of representation is governed by the usual rules of contract law.").

Under the usual rules of contract law, a plaintiff must prove, as a matter of law: (1) the existence of a valid contract, (2) performance or tendered performance by the plaintiff, (3) breach by the defendant, and (4) the amount of damages sustained as a result of the breach. *N. & W. Ins. Co. v. Sentinel Inv. Grp., LLC*, 419 S.W.3d 534, 539 (Tex. App.—Houston [1st Dist.] 2013, no pet.). McRay does not challenge the existence of the two engagement agreements. She does not challenge Dow Golub's summary-judgment evidence that it performed services under those agreements and that some invoices remain unpaid. She does contend, however, that Dow Golub has failed to

establish the reasonableness of its fees as a matter of law.

The Texas Supreme Court has observed that "[w]hen interpreting and enforcing attorney-client fee agreements, it is not enough to simply say that a contract is a contract. There are ethical considerations overlaying the contractual relationship." *Hoover Slovacek LLP v. Walton*, 206 S.W.3d 557, 560 (Tex. 2006) (internal quotation omitted). The attorney's contract remedy is "subject to the prohibition against charging or collecting an unconscionable fee." *See id.* at 561 (citing TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.04(a), *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G, app. A (West 2013) (TEX. STATE BAR R. art. X, § 9)). The Supreme Court has "applied Rule 1.04 as a rule of decision in disputes concerning attorney's fees." *Hoover Slovacek*, 206 S.W.3d at 561 n.6 (collecting cases).

C. Analysis

In its summary-judgment affidavit proving up its fees, Dow Golub does not attest that the time that it billed, as reflected in its invoices, was reasonable for representing McRay and her entities in the two lawsuits. Rather, the supporting affidavit states that the invoices represent "legal fees and expenses incurred" by the McRay entities. Dow Golub did not adduce summary-judgment evidence showing that the time reflected in its billing records was reasonable for the rendition of legal services. In contesting the motion for summary judgment, Venzke testified that he was familiar with time entries and had audited legal bills.

He opined that the amount sought in the invoices was not reasonable for the services rendered.

Because Dow Golub did not offer any evidence that the hours it expended or the overall fees it charged in connection with the lawsuits were reasonable, and because McRay challenged the reasonableness of the amount owed with a contravening affidavit, we hold that Dow Golub has failed to conclusively establish the amount of attorney's fees that it is owed as contract damages. *See* TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.04(a), (b); *Hoover Slovacek*, 206 S.W.3d at 560–61 & n.6; *see also J. Bennett White, P.C. v. Reeder*, No. 12-17-00026-CV, 2018 WL 851367, at *5 (Tex. App.—Tyler, Feb. 14, 2018, no pet.) (mem. op.) (holding evidence legally and factually sufficient to support jury verdict awarding unpaid fees as contract damages where attorney testified that fees were reasonable); *Ashton Grove L.C. v. Jackson Walker L.L.P.*, 366 S.W.3d 790, 799 (Tex. App.—Dallas 2012, no pet.) (holding that law firm failed to conclusively prove amount owed under engagement agreement where it "made no attempt" to prove up reasonableness of fees).

Dow Golub responds that it need not establish the reasonableness of the amounts that it charged McRay because it charged the hourly rate set forth in the engagement agreements and provided invoices to establish the number of hours that its attorneys and legal assistants worked. We agree that the hourly rate was established by contract, but that is only half of the equation: the amounts charged in the invoices were derived by multiplying the agreed-upon rate by the

number of hours worked. The engagement agreements did not fix the overall time expended and total amount billed to McRay. Rather, those agreements specified that Dow Golub would expend time that, in its professional judgment, it "deem[ed] necessary to carry out the representation." Dow Golub's summary-judgment evidence does not attest to whether or how the time reflected on the invoices was deemed to be necessary.

Dow Golub relies on cases involving contingent-fee agreements. *See, e.g.*, *In re Polybutylene Plumbing Litig.*, 23 S.W.3d 428 (Tex. App.—Houston [1st Dist.] 2000, pet. dism'd). In the *Polybutylene Plumbing* case, our court upheld a contingency-fee contract because it contained the parties' entire agreement concerning payment in exchange for the services rendered. *Id.* at 436–42; *see also Lopez v. Muñoz, Hockema & Reed, L.L.P.*, 22 S.W.3d 857, 860–62 (Tex. 2000) (holding that contingency-fee agreement that increased percentage of recovery by 5% if case was appealed was not ambiguous).

The amount owed to an attorney in contingent-fee cases is fixed based on the contract and the ultimate recovery for the client. The same cannot be said for hourly-fee agreements, which fix the hourly rate, but leave the number of hours to bill to the attorney's professional judgment. An hourly fee is not dependent on the ultimate recovery for the client, and the amount owed for legal services can exceed the amount in controversy. *See Hoover Slovacek*, 206 S.W.3d at 563 & n.8 (noting that hourly-fee arrangements are not outcome dependent). But that does not mean that a

client cannot contest the reasonableness of the amount charged. In the cases that Dow Golub cites involving disputes over hourly-fee engagements, either evidence supported the reasonableness of the charges or the time expended, or reasonableness was admitted and otherwise unchallenged.

For example, in *McGuire, Craddock, Strother & Hale, P.C. v. Transcontinental Realty Investors, Inc.*, the Dallas Court of Appeals upheld fees as contract damages based on expert testimony as "to the reasonableness of McGuire, Craddock's attorney's fees." 251 S.W.3d 890, 898 (Tex. App.—Dallas 2008, pet. denied). Similarly, in *Kleas v. Clark, Thomas & Winters, P.C.*, No. 03-12-00755-CV, 2013 WL 4516120 (Tex. App.—Austin Aug. 21, 2013, pet. denied) (mem. op.), the law firm introduced the client's deemed admissions that the unpaid attorney's fees it sought were reasonable, and the client did not proffer attorney testimony to dispute the reasonableness of the fees charged. *See* 2013 WL 4516120, at *1.[1]

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[1] In the same case, the Austin Court of Appeals held that an affidavit setting forth that the law firm performed the work reflected in its invoices established the law firm's breach of contract damages for unpaid legal services. *Kleas v. Clark, Thomas & Winters, P.C.*, No. 03-12-00755-CV, 2013 WL 4516120, at *2 (Tex. App.—Austin Aug. 21, 2013, pet. denied) (mem. op.). In doing so, it distinguished the reasonableness analysis that the Dallas Court of Appeals used in *Ashton Grove*. The Austin Court noted, however, that the nonmovant brought forward no summary-judgment evidence contesting the reasonableness of the fees. In contrast, in this case, McRay challenged the reasonableness the fees awarded with an expert affidavit.

In contrast, McRay challenges the amount sought. McRay observes that Dow Golub sent invoices in July and August 2015, more than five months after she terminated the representation. These invoices bear the notation "Matter: The Maribel Allport Revocable Trust." Dow Golub's affiant averred that they are part of "a series of invoices from [Dow Golub] for work performed for [McRay] in the Allport Lawsuit (from September 21, 2012 through August 10, 2016)." Reading the summary-judgment record in a light favorable to McRay, as we must, the July and August 2015 invoices do not establish that they relate to the Firm's withdrawal from the representation and transfer of the files, as contemplated by the engagement agreement's allowance for post-termination fees.

Finally, we note that Dow Golub did not sue on a sworn account, which allows a party to establish a prima facie right of recovery for "any claim . . . for personal service rendered." *See* TEX. R. CIV. P. 185. Had Dow Golub pleaded its case as a sworn account, absent a verified denial and specific challenge to the amount owed, we agree that it would not be required to adduce proof of reasonableness of the fees beyond attaching detailed invoices as prima facie evidence of the debt. *See Ashton Grove*, 366 S.W.3d at 797; *see also Panditi v. Apostle*, 180 S.W.3d 924, 927 (Tex. App.—Dallas 2006, no pet.) (affirming summary judgment because law firm presented prima facie case on sworn account and thus "was not required to offer additional proof, as argued by [client], that the fees and expenses were reasonable and necessary, and assessed at the usual and customary rate").

We hold that, to recover on its claim for breach of its engagement agreements, it was Dow Golub's summary-judgment burden to attest that the hours that it billed to the two engagements, and thus the overall fees that it charged, were reasonable for the professional services that it rendered. *Hoover Slovacek*, 206 S.W.3d at 560–61 & n.6.[2] Accordingly, we conclude that the trial court erred in awarding Dow Golub $167,429.67 in attorney's fees as damages as a matter of law.

II. Remaining Issues

The engagement agreements allow Dow Golub to recover "reasonable attorney's fees and costs if collection activities are necessary for the failure of [McRay] to pay any indebtedness to the Firm." Because we have reversed the summary judgment, the award of attorney's fees and expenses incurred in prosecuting this suit must also be remanded for further determination. *See* TEX. CIV. PRAC. & REM. CODE § 38.001; *Green Int'l, Inc. v. Solis*, 951 S.W.2d 384, 390 (Tex. 1997) ("To recover attorney's fees under Section 38.001, a party must (1) prevail on a cause of action for which attorney's fees are recoverable, and (2) recover damages."). Our resolution of this issue makes it unnecessary to address McRay's remaining contention that the trial court erred in denying leave to allow an untimely designated expert witness.

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[2] In contrast to the averments in support of its contract damages, Dow Golub supported its claim for the attorney's fees that it incurred in prosecuting this lawsuit with an averment that the fees incurred were "reasonable and necessary to the proper resolution of this cause of action."

CONCLUSION

We reverse the summary judgment awarding damages for Dow Golub's claim for breach of contract and remand the case to the trial court for further proceedings.

Jane Bland
Justice

Panel consists of Chief Justice Radack and Justices Higley and Bland.

APPENDIX D

IN THE 333RD DISTRICT COURT
HARRIS COUNTY, TEXAS

2015-47112

[Filed October 16, 2020]

DOW GOLUB REMELS & GILBREATH, PLLC, AS ASSIGNEE OF DOW GOLUB REMELS & BEVERLY, LLP, Plaintiff,	)
v.	)
LAURIE ANN MCRAY, INFINITY CAPITAL, LLC, AND MCRAY MONEY MANAGEMENT, LLC, Defendant.	)

FINAL JUDGMENT

On September 25, 2019, the Court called this case to trial, non-jury. Plaintiff, Dow Golub Remels & Gilbreath, PLLC, as assignee of Dow Golub Remels & Beverly, LLP (Plaintiff), appeared through its attorney of record and announced ready for trial. Defendants, Laurie Ann McCray, Infinity Capital, LLC, and McRay Money Management, LLC (Defendants), appeared through their attorney and announced ready for trial.

After hearing all of the testimony, documentary evidence, and arguments of counsel, the Court renders judgment for Plaintiff and against Defendants. The Court therefore ORDERS, ADJUDGES, and DECREES that:

(1) Dow Golub Remels & Gilbreath, PLLC, shall have and recover from Infinity Capital, LLC, damages in the sum of $22,904.49, prejudgment interest on that amount at the annual rate of 5% from September 1, 2016, through the day preceding the signing of this judgment, and post-judgment interest on that amount at the rate of 5% compounded annually from the date of this judgment until it is paid;

(2) Dow Golub Remels & Gilbreath, PLLC, shall have and recover from Laurie Ann McRary, Infinity Capital, LLD, and McRay Money Management, LLC, jointly and severally, damages in the sum of $81,412.17, prejudgment interest on that amount at the annual rate of 5% from September 1, 2016, through the day preceding the signing of this judgment, and post-judgment interest on that amount at the rate of 5% compounded annually from the date of this judgment until it is paid;

(3) Dow Golub Remels & Gilbreath, PLLC, shall have and recover from Laurie Ann McCray, Infinity Capital, LLC, and McRay Money Management, LLC, jointly and severally, for reasonable and necessary attorneys' fees

incurred (or to be incurred) by Dow Golub Remels & Gilbreath, PLLC, in the following amounts: (A) $104,516.50 for representation through trial and completion of proceedings in this trial court; and, contingent upon success on appeal: (B) $25,000.00 for representation through judgment in the Court of Appeals; (C) $20,000.00 for representation at the petition-for-review stage in the Supreme Court of Texas; (D) $15,000 for representation for merits briefing in the Supreme Court of Texas; and (E) $10,000 for oral argument, if argument is granted, in the Supreme Court of Texas.

(4) Dow Golub Remels & Gilbreath, PLLC shall have and be entitled to all writs and processes that may be necessary for the enforcement, execution, and collection of this Final Judgment.

All court costs in this proceeding shall be and are hereby taxed against Infinity Capital, LLC, Laurie Ann McRay, and McRay Money Management, LLC, jointly and severally.

This is a final, appealable judgment, which disposes of all parties and all claims. Any relief not expressly granted in this judgment is denied.

Signed October 16, 2020.

/s/ Daryl L. Moore
HONORABLE DARYL L. MOORE,
333rd DISTRICT COURT

APPENDIX E

IN THE 333RD DISTRICT COURT
HARRIS COUNTY, TEXAS

2015-47112

[Filed November 9, 2020]

DOW GOLUB REMELS & GILBREATH, PLLC, AS ASSIGNEE OF DOW GOLUB REMELS & BEVERLY, LLP, Plaintiff,	)
v.	)
LAURIE ANN MCRAY, INFINITY CAPITAL, LLC, AND MCRAY MONEY MANAGEMENT, LLC, Defendant.	)

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Plaintiff, Dow Golub Remels & Gilbreath, PLLC, as assignee of Dow Golub Remels & Beverly, LLP (Dow Golub), brought this suit to collect unpaid fees charged to Defendants, Infinity Capital, LLC (Infinity), Lauri Ann McRay (McCray), and McRay Money Management, LLC (Money Management) in two matters: (1) 2012-29738 (*Munoz*); and (2) 2011-30904 (*Allport*).

On September 25, 2019, the Court called this case to trial, non-jury. Plaintiff, Dow Golub Remels & Gilbreath, PLLC, as assignee of Dow Golub Remels & Beverly, LLP (Plaintiff), appeared through its attorney of record and announced ready for trial. Defendants, Laurie Ann McCray, Infinity Capital, LLC, and McRay Money Management, LLC (Defendants), appeared through their attorney and announced ready for trial.

On October 16, 2020, after hearing all of the testimony, documentary evidence, and arguments of counsel, the Court rendered a judgment for Plaintiff and against Defendants. The Court now issues these findings of fact and conclusions of law.

Findings & Conclusions

1. This is a fee dispute between a law firm (Plaintiff) and Defendants, arising from two valid and enforceable fee agreements (the *Munoz* and *Allport* agreements).

2. Plaintiff performed legal services under the agreements, but Defendants failed and refused to pay for those services.

3. Defendants' failure to pay constitutes breaches of the agreements.

4. As a result of Defendants' breaches, Plaintiff suffered actual damages of $22,904.49 with regard to the *Munoz* agreement, and $81,412.17 with regard to the *Allport* agreement.

5. Plaintiff incurred $104,516.50 in reasonable and necessary attorney's fees prosecuting its claims

in this suit for representation through trial and completion of the proceedings in this Court, and – if this case is appealed -- will incur in reasonable and necessary attorney's fees: (A) $25,000.00 for representation through judgment in the Court of Appeals; (B) $20,000.00 for representation at the petition-for-review stage in the Texas Supreme Court; (C) $15,000.000 for representation for merits briefing in the Texas Supreme Court; and (D) $10,000.00 for oral argument in the Texas Supreme Court if the case is argued.

6. In reaching the actual-damage figures and fee awards, the Court has reviewed all of the billing records, has segregated recoverable from non-recoverable fees, has partially reduced the amounts sought for block billing, and has awarded only amounts that are both reasonable and necessary.

7. Defendant provided neither legally nor factually sufficient evidence of any breach of fiduciary duty.

8. Fee forfeiture is not warranted, factually or legally.

9. Defendant has provided neither legally nor factually sufficient evidence to support its claim for offset.

Signed November 6, 2020.

/s/ Daryl L. Moore
HONORABLE DARYL L. MOORE,
333rd DISTRICT COURT

APPENDIX F

Opinion issued December 29, 2022

[SEAL]

**IN THE
COURT OF APPEALS
FOR THE
FIRST DISTRICT OF TEXAS**

NO. 01-21-00032-CV

[Filed December 29, 2022]

LAURIE ANN MCRAY; INFINITY CAPITAL, LLC; MCRAY MONEY MANAGEMENT, LLC, Appellants	)
V.	)
DOW GOLUB REMELS & GILBREATH PLLC, Appellee	)

**On Appeal from the 333rd District Court
Harris County, Texas
Trial Court Case No. 2015-47112**

MEMORANDUM OPINION

This is a suit to recover unpaid attorney's fees. Appellants Laurie Ann McRay, Infinity Capital, LLC,

and McRay Money Management, LLC (collectively, McRay) appeal the trial court's final judgment rendered after a bench trial in favor of appellee Dow Golub Remels & Gilbreath PLLC (Dow Golub) on its breach of contract claim. McRay raises two issues on appeal. First, it contends that several of the trial court's pretrial rulings were erroneous and prevented it from developing its defenses and presenting the complete set of facts and legal issues to the trial court and therefore a remand is necessary for a new trial on liability and damages. Second, McRay contends that, if no new trial is granted, this Court should reverse the trial court's award of attorney's fees in the amount of $104,516.50 for the prosecution of Dow Golub's breach of contract claim and render judgment that Dow Golub take only $10,000 in attorney's fees or, alternatively, remand the issue of attorney's fees for reconsideration of the evidence presented at trial.

We affirm.

Background

A. Factual History

In 2012, McRay hired Dow Golub to represent it in two lawsuits: the *Munoz* suit and the *Allport* suit.[1] For

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[1] The *Munoz* suit is *Louis Munoz, Sr. and Yvette Munoz, Individually and as Next Friend of Miranda Munoz, Louis Munoz, Jr. and Juliana Munoz, Minor Children vs. Infinity Capital, LLC, Realty Associates Hub, LLC, Marie Barforough Individually and d/b/a Me'Cohen Enterprises, and George Barforough*; Cause No. 2012-29738; In the 151st Judicial District Court of Harris County, Texas. The *Allport* suit is *Melinda Gardner, Susan Jacobus, and Suzanne Carroll, as Co-Trustees of the Maribel*

each matter, the parties signed letters of engagement for legal services which set forth the terms of Dow Golub's engagement and related matters as well as the hourly rates of its attorneys and legal staff assigned to work on the cases.

In the *Munoz* matter, one of Laurie McRay's companies was sued by tenants of a single-family residence owned by the company for personal injury damages. In the *Allport* matter, Laurie McRay and her two companies were sued for alleged wrongful conduct that included securities violations, breach of fiduciary duty, and fraud. Following Dow Golub's engagement in the *Allport* matter, the parties attended a mediation that resulted in a settlement agreement and dismissal of the claims against Laurie McRay, individually, and her companies. The settlement agreement executed by the parties on January 14, 2013 required McRay to wind down the business of Infinity Capital, LLC, and sell all of its assets.

On April 1, 2013, Laurie McRay, as Managing Partner of Infinity Capital, LLC, conveyed a number of Infinity Capital, LLC's properties that were to be sold as part of the *Allport* settlement to a newly formed entity, Infinity Capital 2, LLC. Litigation ensued over the transferred assets during which Dow Golub continued to represent McRay despite the fact that McRay had ceased paying its legal bills months earlier.

Allport Revocable Trust vs. Laurie A. McRay, McRay Money Management, LLC, and Infinity Capital, LLC; Cause No. 2011-30904; In the 281st Judicial District Court of Harris County, Texas.

On February 13, 2015, McRay terminated Dow Golub's legal services in connection with the *Allport* case.

Alan F. Levin was appointed as the arbitrator in the *Allport* suit. On June 23, 2015, Levin entered an arbitration award finding that "the transfer of . . . nine (9) properties from Infinity Capital, LLC to Infinity Capital 2, LLC . . . w[as] fraudulent and [] therefore deemed null, void and of no legal force or effect . . . ." The arbitration award ordered McRay to pay Strasburger Price, who represented the *Allport* plaintiffs and was granted an equitable interest in and a lien on the properties, actual damages in the amount of $1,413,164.00, sanctions, and attorney's fees. The trial court entered a final judgment confirming the arbitration award on June 24, 2015.[2]

B. Procedural History

On August 12, 2015, Dow Golub sued McRay asserting claims for breach of contract and quantum meruit based on sums due and owing under the parties' contract and seeking attorney's fees pursuant to the contract and Texas Civil Practice and Remedies Code Section 38.001. On November 13, 2015, McRay answered asserting a general denial.

On November 25, 2015, McRay filed an original counterclaim and third-party petition joining Sanford Dow (Dow), a partner at Dow Golub, and asserting a professional negligence claim against Dow Golub and Dow individually. McRay alleged that Dow Golub and Dow committed negligence by (1) advising Laurie

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[2] Judge Sylvia Matthews signed the final judgment.

McRay to enter into an invalid, illegal, and unenforceable mediation agreement on behalf of Infinity Capital, LLC, (2) advising Laurie McRay to enter into a mediation agreement with terms requiring that all future disputes between the parties to the mediation be resolved by binding arbitration with mediator Alan F. Levin to act as arbitrator, and (3) failing to raise an objection to arbitration on the basis that the underlying agreement was invalid, illegal, or unenforceable. Dow Golub and Dow filed answers to the counterclaim, each asserting a general denial and various affirmative defenses. They later amended their answer asserting additional affirmative defenses.

On December 9, 2015, the trial court entered a docket control order in the case setting June 27, 2016, as the final deadline for expert designations and August 26, 2016, as the close of discovery. After the expert designation deadline had passed, Dow Golub moved for traditional summary judgment on its breach of contract claim for unpaid fees. McRay subsequently nonsuited its professional negligence counterclaim. On December 4, 2016, McRay amended its answer asserting affirmative defenses of "credit and/or setoff" and "breach of fiduciary duty."

On December 12, 2016, the trial court granted Dow Golub's motion for summary judgment on its breach of contract claim.[3] The final judgment awarded Golub its unpaid fees and the attorney's fees incurred in

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[3] Then presiding Judge Joseph J. Halbach, Jr. signed the judgment.

collecting its contract damages. McRay appealed raising two issues: (1) Dow Golub had failed to conclusively prove the reasonableness and necessity of its fees in the *Munoz* and *Allport* matters, and (2) the trial court erred by denying it leave to allow the designation of an expert witness after the deadline.[4]

This Court reversed the trial court's order granting summary judgment to Dow Golub concluding that the evidence did not conclusively establish the amounts owed, and it remanded the case to the trial court for further determination. *See McRay v. Dow Golub Remels & Beverly, LLP*, 554 S.W.3d 702, 708 (Tex. App.—Houston [1st Dist.] 2018, no pet.). This Court further concluded that, given its resolution of this issue, it was unnecessary to address McRay's remaining contention that the trial court erred in denying leave to allow the late designation of an expert witness. *See id.* This Court issued its mandate on October 19, 2018.

On the same day the mandate issued, Dow Golub filed a letter with the trial court requesting that the matter be set for a one-day bench trial "at the court's earliest convenience" and noting that the parties had engaged in sixteen months of litigation to date and that discovery had been closed since August 2016.

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[4] With its motion to allow late designation, McRay proffered affidavits from two experts: John P. Venzke, on the reasonableness of fees, and Eugene B. Wilshire, on the standard of care. Dow Golub moved to strike the late-designated experts. The trial court struck the designation of Wilshire, but it allowed the designation of Venzke.

On November 5, 2018, Bradley Kirklin, McRay's newly retained counsel, sent a letter to the trial court requesting that it issue a new docket control order allowing limited discovery to permit McRay to designate expert witnesses and depose Dow Golub's corporate representative, and that it set a trial date six months thereafter. McRay's counsel noted that, due in part to the serious health problems of his client's previous counsel, Anthony Bannwart, McRay "did not depose Dow Golub's corporate representative or timely designate experts to opine on whether the disputed fees were reasonable and necessary and/or whether the work allegedly performed by Dow Golub warranted such fees." McRay's counsel filed a brief in support of the motion to reopen discovery and for a new docket control order. The trial court denied McRay's motion.[5]

On February 25, 2019, Kirklin moved to withdraw as McRay's counsel due to McRay's failure to pay its attorney's fees. The trial court granted the motion. A new attorney, Gene Tausk, took over McRay's defense the same day.

On June 25, 2019, the trial court notified the parties that trial was set for July 30, 2019. Two weeks before trial, Tausk moved to withdraw because McRay's retainer had been exhausted and Tausk did not believe McRay intended to pay him for legal services rendered after exhaustion of the retainer. The trial court held a hearing on the motion to withdraw. After noting that allowing McRay's counsel to withdraw would require resetting the trial date, the trial court stated:

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[5] Then presiding Judge Daryl Moore signed the order.

> Okay. So this is what I'm going to do. I'm going to draft my order. I'm going to reset it for trial. I'll get a trial date . . . so the trial setting will be in the order granting the withdrawal. So, counsel, if you will agree to make sure that you send a copy to your clients so they have notice of the trial setting, and I'm going to reiterate that I will not entertain a motion to modify the docket control order or the motion for continuance.

The trial court advised the parties that trial would be held on September 25, 2019.

On September 16, 2019, Mitchell Katine filed a notice of appearance listing him and three other attorneys as McRay's counsel. That same day, Katine filed an emergency motion for continuance requesting additional time to review the case and prepare for trial. Based upon information from his client, Katine stated that the parties were engaged in good faith settlement discussions and needed additional time to attempt to finalize settlement terms. Dow Golub filed a response contesting the alleged grounds for the requested motion, noting that the case had been continued multiple times and stating that, as of the filing of the response, there were no good faith settlement discussions nor "need for additional time to try and finalize settlement terms."

The case proceeded to a bench trial on September 25, 2019—more than four years after suit was filed and three years after the close of discovery. Dow Golub's witnesses—Sanford Dow and Robert Debelak—testified about the reasonableness and

necessity of the attorney's fees incurred. Dow Golub sought $160,487.17 in unpaid fees, expenses, and interest based on its work in the *Munoz* and *Allport* matters and $197,412.65 in legal fees incurred to collect the unpaid debt. McRay called Laurie McRay and its attorney's fees expert, John Venzke, as witnesses. Venzke testified that the hourly rates of Dow Golub's attorneys were reasonable but that some of the fees charged were inadequately documented or unnecessary.

On October 16, 2020, the trial court entered a final judgment in favor of Dow Golub, awarding it $104,316.66 in damages on its breach of contract claim and $104,516.50 in legal fees. On November 6, 2020, the trial court entered the following findings of fact and conclusions of law:

- This is a fee dispute between a law firm (Plaintiff) and Defendants, arising from two valid and enforceable fee agreements (the *Munoz* and *Allport* agreements).
- Plaintiff performed legal services under the agreements, but Defendants failed and refused to pay for those services.
- Defendants' failure to pay constitutes breaches of the agreements.
- As a result of Defendants' breaches, Plaintiff suffered actual damages of $22,904.49 with regard to the *Munoz* agreement, and $81,412.17 with regard to the *Allport* agreement.

- Plaintiff incurred $104,516.50 in reasonable and necessary attorney's fees prosecuting its claims in this suit for representation through trial and completion of the proceedings in this Court[.][6]
- In reaching the actual-damage figures and fee awards, the Court has reviewed all [] the billing records, has segregated recoverable from non-recoverable fees, has partially reduced the amounts sought for block billing, and has awarded only amounts that are both reasonable and necessary.
- Defendant provided neither legally nor factually sufficient evidence of any breach of fiduciary duty.
- Fee forfeiture is not warranted, factually or legally.
- Defendant has provided neither legally nor factually sufficient evidence to support its claim for offset.

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[6] The trial court additionally found that, if the case was appealed, Dow Golub would incur in reasonable and necessary attorney's fees as follows: (a) $25,000.00 for representation through judgment in the Court of Appeals; (b) $20,000.00 for representation at the petition-for-review stage in the Texas Supreme Court; (c) $15,000.00 for representation for merits briefing in the Texas Supreme Court; and (d) $10,000.00 for oral argument in the Texas Supreme Court if the case is argued.

On November 16, 2020, McRay filed a motion for new trial contending that it discovered new evidence[7] after the trial that would have affected the outcome of the trial, and the trial court erred by finding no breach of fiduciary duty by Dow Golub in connection with McRay's asserted affirmative defense. Dow Golub responded that all the allegedly newly discovered evidence was irrelevant to the issues presented at trial as it related solely to the 2014 arbitration concerning McRay's fraudulent transfer of assets with which Dow Golub had no involvement. Following a hearing, the trial court denied McRay's motion for new trial, finding that (1) the evidence was not newly discovered and not so material that it would have produced a different result, (2) Laurie McRay's affidavit presented in support of the new trial motion was not credible, and (3) had the trial court considered the alleged newly discovered evidence during trial, it would have found Laurie McRay less credible than it did during her trial testimony. The trial court subsequently denied McRay's request for rehearing of its motion for new trial.[8]

This appeal followed.

Trial Court's Pretrial Rulings

In its first issue, McRay contends that a remand for a new trial is necessary on liability and damages because several of the trial court's post-remand pretrial

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[7] The alleged newly discovered evidence consisted of secretly recorded conversations and an attempt to surreptitiously record the 2014 arbitration.

[8] Judge Brittanye Morris was the presiding judge.

rulings were erroneous and prevented it from developing its defenses and presenting a complete set of facts and legal issues to the trial court. It complains specifically about the trial court's rulings denying its request for limited discovery, excluding an expert on fiduciary duty, and precluding Sanford Dow's deposition.

With regard to McRay's contention that the trial court erroneously excluded its fiduciary duty expert, Dow Golub responds that (1) McRay never designated a fiduciary duty expert and the trial court never entered an order denying McRay's purported expert, (2) McRay failed to preserve its argument for appellate review, and (3) its argument is without merit. With regard to McRay's contention that the trial court improperly denied its request for additional discovery and Dow's deposition, Dow Golub argues that those arguments are similarly waived, harmless, and without merit.

A. Standard of Review

The scope of discovery rests within the discretion of the trial court. *See Flores v. Fourth Ct. of Appeals*, 777 S.W.2d 38, 41 (Tex. 1989); *In re Morgan*, 507 S.W.3d 400, 403 (Tex. App.—Houston [1st Dist.] 2016, orig. proceeding). Trial courts have broad discretion in matters of discovery. *See Clanton v. Clark*, 639 S.W.2d 929, 931 (Tex. 1982) ("[T]he court is given wide discretion in managing its docket, and we will not interfere with the exercise of that discretion absent a showing of clear abuse."); *Macy v. Waste Mgmt., Inc.*, 294 S.W.3d 638, 651 (Tex. App.—Houston [1st Dist.] 2009, pet. denied). The same standard applies to a trial

court's ruling on requests to obtain additional discovery. *Wheeler v. Methodist Hosp.*, 95 S.W.3d 628, 643–44 (Tex. App.—Houston [1st Dist.] 2002, no pet.). A party who claims the trial court abused its discretion in a discovery matter labors under a heavy burden—it must establish that, under the circumstances of the case, "the facts and law permitted the trial court to make *but one decision*." *Shell Oil Co. v. Smith*, 814 S.W.2d 237, 241 (Tex. App.—Houston [14th Dist.] 1991, orig. proceeding) (emphasis in original). We also review for an abuse of discretion a trial court's exclusion of expert testimony based on a failure to designate during the discovery period. *Fort Brown Villas III Condo. Ass'n v. Gillenwater*, 285 S.W.3d 879, 881 (Tex. 2009).

B. Expert Witness Designation

McRay argues that the trial court abused its discretion in denying its request to designate its fiduciary duty expert witness, Eugene B. Wilshire, after the discovery deadline had passed. It argues that the issues underlying its breach of fiduciary duty affirmative defense "are not matters within a lay person's knowledge and, potentially, not within the knowledge of a trial judge, especially when the conduct in question [concerns] proper attorney-client conduct when reviewing commercial litigation-based settlement agreements, binding arbitration, the Texas Business Organization Code, and other issues related to the legal operation of corporate entities."

The trial court's docket control order set June 27, 2016 as the expert designation deadline in the case. After the deadline had passed, Dow Golub moved for traditional summary judgment on its breach of contract

claim for unpaid fees. McRay's only counterclaim at that time was for professional negligence which it later nonsuited. On December 4, 2016—nearly six months after expiration of the expert designation deadline—McRay amended its answer asserting breach of fiduciary duty as an affirmative defense.

Dow Golub argues that the record does not show that McRay attempted to designate Wilshire as an expert on fiduciary duty and the trial court did not deny it leave to do so. We agree. In its prior decision, this Court noted that McRay had moved the trial court to allow a late designation of expert witnesses, proffering affidavits from two experts: Venzke on the reasonableness of fees, and Wilshire on the standard of care. *See McRay*, 554 S.W.3d at 708. McRay's request to late designate Wilshire as an expert on the standard of care correlated to its only claim before the trial court, a professional negligence claim. McRay had not pleaded a breach of fiduciary duty claim. Thus, when the trial court denied McRay's request to designate Wilshire after the deadline, it was denying the designation of Wilshire as an expert on professional negligence and not an expert on fiduciary duties. Because McRay did not request that Wilshire be designated as a fiduciary duty expert, and the trial court therefore did not deny a request to designate him as such, that complaint was not preserved for our review. *See* TEX. R. APP. P. 33.1(a)(1), (2) (stating as prerequisite to presenting complaint for appellate review, record must show that complaint was made to trial court by timely request, objection, or motion and that trial court ruled on request, objection, or motion, or refused to rule).

Further, under Texas Rule of Civil Procedure 193.6, a party may not offer the testimony of a witness (other than the named party) who was not timely identified. TEX. R. CIV. P. 193.6(a); *Fort Brown Villas*, 285 S.W.3d at 881. A party who fails to timely designate an expert has the burden of establishing good cause or a lack of unfair surprise or prejudice before the trial court may allow the witness to testify. *See* TEX. R. CIV. P.193.6(b). "A trial court's exclusion of an expert who has not been properly designated can be overturned only upon a finding of abuse of discretion." *Mentis v. Barnard*, 870 S.W.2d 14, 16 (Tex. 1994) (citing *Morrow v. H.E.B., Inc.*, 714 S.W.2d 297, 298 (Tex. 1986)). Here, while McRay requested that the trial court certify a 374-page clerk's record and a 687-page supplemental clerk's record, it notably did not include its motion for leave to late designate Wilshire as an expert and/or any evidence associated with the motion. As a result, there is nothing in the record showing whether McRay satisfied its burden under Rule 193.6 to show that Wilshire's late designation was supported by good cause and a lack of prejudice. We therefore presume that the omitted documents support the trial court's order denying leave for McRay to late designate Wilshire. *Cf. Enter. Leasing Co. of Hous. v. Barrios*, 156 S.W.3d 547, 550 (Tex. 2004) (stating that where pertinent summary judgment evidence considered by trial court was not included in appellate record, appellate court must presume that omitted evidence supported trial court's judgment); *Small v. Garcia*, 01-20-00640-CV, 2022 WL 3092895, at *4 (Tex. App.—Houston [1st Dist.] Aug. 4, 2022, no pet.) (mem.

op.) (same).[9] The trial court did not abuse its discretion in excluding Wilshire as an expert.

C. Denial of Continuance and Limited Discovery

McRay argues that the trial court abused its discretion in denying McRay's requests for a continuance and that discovery be reopened. It argues that, under Texas Rule of Civil Procedure 190.5, the interest of justice required modification of the discovery plan.

1. McRay's First Request

In a letter dated November 5, 2018, McRay's counsel asked that (1) trial be set "on or after May 1, 2019," (2) McRay be given a chance to depose Dow Golub's corporate representative and designate expert witnesses, and (3) McRay be afforded time to fully brief the circumstances as to why it was unable to designate expert witnesses or depose the plaintiff before the close of discovery. The trial court subsequently notified the parties that trial was set on July 30, 2019, and McRay was permitted the opportunity to brief its request to reopen discovery. The trial court, however, later denied McRay's request to reopen discovery.

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[9] We also note that it is the appellant's burden to bring forth a sufficient record demonstrating error by the trial court. Without the motion and evidence, we cannot determine whether McRay met its burden and thus whether the trial court erred. *See Christiansen v. Prezelski*, 782 S.W.2d 842, 843 (Tex. 1990) (per curiam); *Matter of Marriage of Comstock*, 639 S.W.3d 118, 130 (Tex. App.—Houston [1st Dist.] 2021, no pet.); *Nicholson v. Fifth Third Bank*, 226 S.W.3d 581, 583 (Tex. App.—Houston [1st Dist.] 2007, no pet.).

We review a trial court's ruling denying a motion for continuance for an abuse of discretion. *BMC Software Belgium, N.V. v. Marchand,* 83 S.W.3d 789, 800 (Tex. 2002) (applying abuse of discretion standard to denial of motion for continuance requesting extension to complete discovery). A trial court abuses its discretion "when it reaches a decision so arbitrary and unreasonable as to amount to a clear and prejudicial error of law." *Id.*

McRay bore the burden to show that "the interest of justice require[d]" the trial court to allow it additional time to depose Dow Golub's corporate representative and designate experts. *See* TEX. R. CIV. P. 190.5. To satisfy the burden, McRay had to show that it used due diligence to obtain the discovery sought and specify the nature, materiality, or purpose of the evidence it claimed it was prevented from discovering. *See Lagou v. U.S. Bank Nat'l Ass'n*, No. 01-13-00311-CV, 2013 WL 6415490, at *3 (Tex. App.—Houston [1st Dist.] Dec. 5, 2013, no pet.) (mem. op.) ("'If a continuance is sought in order to pursue further discovery, the motion must describe the evidence sought, explain its materiality, and show the party requesting the continuance has used due diligence to obtain the evidence.'" (quoting *Wal-Mart Stores Tex., LP v. Crosby*, 295 S.W.3d 346, 356 (Tex. App.—Dallas 2009, pet. denied)); *Estate of Hernandez*, No. 04-14-00046-CV, 2014 WL 7439713, at *3 (Tex. App.—San Antonio Dec. 31, 2014, pet. denied) (mem. op.). In its brief in support of its motion to reopen discovery, McRay did not offer any explanation for its failure to depose Dow Golub's corporate representative, identify the testimony it would have obtained at a deposition, or explain its materiality. The

trial court did not abuse its discretion in denying McRay's request to reopen discovery.

2. McRay's Second Request

Nine days before the September 25, 2019 trial setting, McRay's new counsel filed an emergency motion for continuance requesting additional time to review the case and prepare for trial. The motion stated that the parties were engaged in good faith settlement discussions and needed additional time to try and finalize settlement terms. Dow Golub filed a response disputing the grounds for a continuance alleged in McRay's motion, noting that the case had been continued multiple times and that, as of the filing of the response, there were no good faith settlement discussions nor "need for additional time to try and finalize settlement terms." The trial court denied the emergency motion.

Other than McRay's assertion that the parties were engaged in settlement negotiations—which Dow Golub disputed—the sole basis for the requested continuance was to allow McRay's four-lawyer defense team additional time to review the case and prepare for a half-day bench trial. "[T]he denial of a motion for continuance based on lack of time to prepare for trial is not an abuse of discretion." *Perrotta v. Farmers Ins. Exch.*, 47 S.W.3d 569, 577 (Tex. App.—Houston [1st Dist.] 2001, no pet.); *see also Losoya v. Mission Hous. Auth.*, No. 13-15-00599-CV, 2016 WL 8607595, at *2 (Tex. App.—Corpus Christi–Edinburg Dec. 8, 2016, pet. denied) (mem. op.); *White v. Hansen*, No. 05-99-00657-CV, 2000 WL 1137285, *2 (Tex. App.—Dallas Aug. 11, 2000, no pet.); *Hatteberg v. Hatteberg*, 933 S.W.2d 522,

527 (Tex. App.—Houston [1st Dist.] 1994, no writ). The trial court did not abuse its discretion in denying McRay's requests for continuance and to reopen discovery.

We overrule McRay's first issue.

Attorney's Fees

In its second issue, McRay contends that, if no new trial is granted, this Court should reverse the trial court's award of attorney's fees in the amount of $104,516.50 for the prosecution of Dow Golub's breach of contract claim and render judgment that Dow Golub take only $10,000 in attorney's fees or, alternatively, remand the question for reconsideration of the evidence presented at trial.

A. Standard of Review and Applicable Law

Whether attorney's fees are available for a prevailing party is a question of law that we review de novo. *Holland v. Wal–Mart Stores, Inc.*, 1 S.W.3d 91, 94 (Tex. 1999). It is the burden of the party claiming fees to provide sufficient evidence of both the reasonable hours worked and the reasonable hourly rate. *Rohrmoos Venture v. UTSW DVA Healthcare, LLP*, 578 S.W.3d 469, 498 (Tex. 2019). "Sufficient evidence includes, at a minimum, evidence of (1) particular services performed, (2) who performed those services, (3) approximately when the services were performed, (4) the reasonable amount of time required to perform the services, and (5) the reasonable hourly rate for each person performing such services." *Id.*; *see also City of Laredo v. Montano*, 414 S.W.3d 731, 736 (Tex. 2013).

B. Analysis

McRay argues that Dow Golub was not entitled to recover $104,516.50 in prosecution-based attorney's fees because Dow Golub's insurer, not Dow Golub, was billed and paid for nearly all the attorney's fees and therefore Dow Golub did not "incur" the fees. It also argues that the evidence was insufficient to support the trial court's findings of reasonableness and necessity.

1. Fees "Incurred"

In support of its challenge to the attorney's fees award, McRay points to the trial court's finding that Dow Golub "incurred" $104,516.50 in prosecution-based fees. Noting that a fee is incurred when a party becomes liable for it, McRay argues that there is no evidence in the record that Dow Golub paid or became liable for the fees. Rather, it argues, the evidence shows that third-party firms took over once they were hired by Dow Golub's professional malpractice insurer, North American Risk Services, and that, other than a $10,000 deductible paid by Dow Golub, all remaining third-party law firm fees and costs were billed to and paid for by the insurer. McRay's argument is unavailing.

In *Aviles v. Aguirre*, the Texas Supreme Court held that a defendant incurred the legal fees expended on his defense despite the fact that the fees were actually paid by the defendant's insurer. 292 S.W.3d 648, 649 (Tex. 2009). Noting that the plaintiffs had sued only the defendant doctor, and not his insurer, the Court stated that the defendant was "personally liable in the first instance for both defense costs and any potential

judgment," and "[t]hat he had previously contracted with an insurer to pay some or all of both does not mean he incurred neither." *Id.* The Court stated that "[w]hen [the defendant's] insurer paid his attorney's fees on his behalf, the insurer was 'stand[ing] in the shoes of its insured.'" *Id.* (quoting *Sonat Expl. Co. v. Cudd Pressure Control, Inc.*, 271 S.W.3d 228, 236 (Tex. 2008)). Thus, under *Aviles*, whether Dow Golub paid its counsel's invoices directly or its insurer paid them does not alter the fact that Dow Golub incurred the fees. *See id.*

We further note that McRay's effort to reduce its own liability by the amount of Dow Golub's insurance benefits is barred by the collateral source rule which holds that a wrongdoer cannot offset its liability by insurance benefits independently procured by the injured party. *See Mid–Century Ins. Co. of Tex. v. Kidd*, 997 S.W.2d 265, 274 (Tex. 1999); *Brown v. Am. Transfer & Storage Co.*, 601 S.W.2d 931, 934 (Tex. 1980). It is undisputed that the parties' contract provided for Dow Golub's recovery of reasonable prosecution-based attorney's fees and costs.[10] Because McRay is liable to Dow Golub for its reasonable attorney's fees and costs expended on collecting McRay's unpaid debt, McRay cannot rely on Dow Golub's separate decision to "purchase[] insurance" as a basis to avoid that liability. *See Graco, Inc. v. CRC, Inc. of Tex.*, 47 S.W.3d 742, 744–46 (Tex. App.—Dallas

[10] The contract states, in relevant part, that "the Firm is entitled to reasonable attorney's fees and costs if collection activities are necessary for the failure of Client to pay any indebtedness to the Firm."

2001, pet. denied) (concluding that collateral source rule applied and therefore defendant incurred legal fees and expenses provided by its insurance company, and evidence supported trial court's finding that defendant had incurred $107,859.82 in legal fees and expenses in case). That Dow Golub's legal fees were paid by its insurer does not provide a basis to exclude those fees from Dow Golub's fee award.

2. Necessity of Fees

McRay contends that the evidence is insufficient to demonstrate that the prosecution-based attorney's fees the trial court awarded to Dow Golub were necessary. It argues that this Court should remand the case to the trial court for reconsideration of the evidence presented at trial in light of governing law.

The record shows that Dow Golub sought $197,412.56 in attorney's fees incurred in the collection of McRay's unpaid debt from the *Munoz* and *Allport* matters. At trial, it offered Exhibit 44 which consisted of the invoices reflecting the work performed by Sanford Dow and an associate, Stephanie Hamm—whose hourly rates were $425 and $250, respectively—from August 2015 until August 2016, following McRay's termination of Dow Golub's representation, to prosecute its lawsuit and collect McRay's unpaid debt. Dow testified that, applying the *Arthur Anderson* factors,[11] the hourly rates and the

[11] To determine the amount of attorney's fees to be awarded, Texas follows the lodestar method, which is a short-hand version of the factors set forth by the Texas Supreme Court in *Arthur Andersen & Co. v. Perry Equip. Corp.*, 945 S.W.2d 812, 818 (Tex. 1997). *See*

hours worked to prosecute the case against McRay were reasonable and necessary. Dow Golub also offered Exhibits 45 and 46 which consisted of the invoices from Edison, McDowell & Heatherington LLP, the third-party firm who took over prosecution of the suit, reflecting the work performed by its counsel from January 2016 to June 2019.

Venzke, McRay's fees expert, opined that $46,276.70 of the fees reflected in the invoices presented by Dow Golub were either duplicative or improperly documented due to redactions. Specifically, he testified that $15,137.50 in fees reflected in Exhibit 44 for work performed by Dow Golub after January 26, 2016, the date the third-party firm entered its first appearance in the case, should be excluded as well as $30,139.20 of the fees reflected in the third-party firm's invoices in Exhibits 45 and 46 due to redactions. Venzke also opined that Dow Golub should not recover any fees for work spent to obtain the summary judgment that was reversed on appeal, however, he did not quantify how much of a reduction he believed was warranted.

Rohrmoos Venture v. UTSW DVA Healthcare, LLP, 578 S.W.3d 469, 496 (Tex. 2019). The lodestar method requires the fact finder to determine reasonable attorney's fees by first determining the reasonable hours spent by counsel in the case and the reasonable hourly rate for counsel's work. *See El Apple I, Ltd. v. Olivas*, 370 S.W.3d 757, 760 (Tex. 2012). The fact finder then multiplies the number of hours counsel worked on the case by the applicable rate, the product of which is the base fee or lodestar. *Id*. It is the fee claimant's burden to provide sufficient evidence of both the reasonable hours worked and the reasonable hourly rate. *Rohrmoos Venture*, 578 S.W.3d at 498.

Based on Venzke's testimony, if the trial court excluded every one of the redacted and duplicative entries from Dow's Golub's evidence—totaling fees of $46,276.70—the evidence would still support an award of $151,135.86. However, as noted above, the trial court awarded only $104,516.50 to Dow Golub for prosecution-based fees, which is less than the amount supported by the unobjected-to evidence. Thus, the evidence upon which McRay relies cannot constitute grounds for reversal of the award.

McRay argues that the defenses of offset and the one-satisfaction rule also bar the trial court's award of $104,537.50 in prosecution-based attorney's fees. In a footnote, McRay asserts that the defense of offset allows defendants, like McRay, to an offset of the amount of damages claimed that were reimbursed or paid by defendants or other parties. It argues that because Dow Golub's insurer paid the fees (except for the $10,000 deductible), rather than Dow Golub, to permit Dow Golub to recover those fees would result in a double recovery and windfall. This argument is unavailing.

The final judgment shows that the trial court did not award the same fees to both Dow Golub and its insurer; rather, the prosecution-based fees were awarded only once, to Dow Golub. And, as Dow Golub points out, to exclude those fees would not prevent a double recovery but instead would preclude even a single recovery for the fees that Dow Golub incurred to collect McRay's unpaid debt. McRay's argument that the one-satisfaction rule bars the award of attorney's fees is also without merit because "the principle

forbidding more than one recovery for the same loss is not applicable" when one of the recoveries comes in the form of an insurance payment that falls "within the collateral source rule." *Brown*, 601 S.W.2d at 936 ("If payment is within the collateral source rule, the principle forbidding more than one recovery for the same loss is not applicable.").

We conclude that the evidence is sufficient to support the trial court's findings related to the reasonableness and necessity of Dow Golub's fees and its award of $104,516.50 in prosecution-based fees to Dow Golub. We overrule McRay's second issue.

Conclusion

We affirm the trial court's judgment.

Amparo Guerra
Justice

Panel consists of Justices Goodman, Hightower, and Guerra.

APPENDIX G

[SEAL]

COURT OF APPEALS
FIRST DISTRICT OF TEXAS

NO. 01-21-00032-CV

[Filed December 29, 2022]

LAURIE ANN MCRAY, INFINITY CAPITAL, LLC AND MCRAY MONEY MANAGEMENT, LLC, Appellants	)
V.	)
DOW GOLUB REMELS & GILBREATH PLLC, Appellee	)

Appeal from the 333rd District
Court of Harris County.
(Tr. Ct. No. 2015-47112).

JUDGMENT

This is an appeal from the judgment signed by the trial court on October 16, 2020. After submitting the case on the appellate record and the arguments properly raised by the parties, the Court holds that there is no reversible error in the trial court's

judgment. Accordingly, the Court **affirms** the trial court's judgment.

The Court **orders** that the appellants, Laurie Ann McRay, Infinity Capital, LLC, and McRay Money Management, LLC, pay all appellate costs.

The Court **orders** that this decision be certified below for observance.

Judgment rendered December 29, 2022.

Panel consists of Justices Goodman, Hightower, and Guerra. Opinion delivered by Justice Guerra.

APPENDIX H

[SEAL]

Court of Appeals
First District
301 Fannin Street
Houston, Texas 77002-2066

Tuesday, February 28, 2023

TERRY ADAMS
CHIEF JUSTICE

PETER KELLY
GORDON GOODMAN
SARAH BETH LANDAU
RICHARD HIGHTOWER
JULIE COUNTISS
VERONICA RIVAS-MOLLOY
AMPARO GUERRA
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RE: Court of Appeals Number: 01-21-00032-CV
Trial Court Case Number: 2015-47112

Style: Laurie Ann McRay; Infinity Capital, LLC; McRay Money Management, LLC v. Dow Golub Remels & Gilbreath PLLC

Please be advised the Court today DENIED Appellant's motion for rehearing in the above referenced cause.

Panel consist of Justice Goodman, Hightower, and Guerra.

Sincerely,

/s/ Deborah M. Young
Deborah M. Young, Clerk Pro Tempore

APPENDIX I

SUPREME COURT OF TEXAS

Case No. 23-0214
COA #: 01-21-00032-CV
TC#: 2015-47112

[Filed August 4, 2023]

MCRAY	)
	)
v.	)
	)
DOW GOLUB REMELS & GILBREATH PLLC	)
	)

Today the Supreme Court of Texas denied the petition for review in the above-referenced case. (Justice Bland not participating)

DEBORAH M. YOUNG (1ST COA)
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APPENDIX J

SUPREME COURT OF TEXAS

Case No. 23-0214
COA #: 01-21-00032-CV
TC#: 2015-47112

[Filed October 27, 2023]

MCRAY	)
	)
v.	)
	)
DOW GOLUB REMELS & GILBREATH PLLC	)
	)

Today the Supreme Court of Texas denied the motion for rehearing of the above-referenced petition for review.
(Justice Bland not participating)

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