

**Affirmed in Part; Reversed and Rendered in Part; and Opinion filed July 26, 2001.**



**In The**

**Fourteenth Court of Appeals**

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**NO. 14-00-00213-CV**

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**JACK NOLAN, Appellant**

**V.**

**LYNN J. KLEMENT, Appellee**

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**On Appeal from the County Court-at-Law No. 1  
Brazoria County, Texas  
Trial Court Cause No. 23,804M**

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**OPINION**

This is an appeal from the trial court's judgment for appellee, Lynn Klement, on a suit alleging breach of a fee-splitting agreement by appellant, Jack Nolan. In two issues for review, Nolan challenges the trial court's judgment awarding Klement damages and attorney's fees. We will affirm in part and reverse and render in part.

**Background**

On December 22, 1995, Robin Morpew sustained injuries in a work-related accident. Morpew retained attorney Lynn Klement on a contingency fee basis, seeking to appeal denial

of worker's compensation benefits and pursue a third-party negligence claim arising from his injury. Klement was successful in securing worker's compensation income and medical benefits; however, Morpew decided to terminate the attorney-client relationship and retained attorney Jack Nolan to continue prosecuting the third-party claim. Klement released Morpew's file to Nolan. The two attorneys signed a referral agreement wherein Klement was to be reimbursed for expenses and receive 30 percent of attorney's fees from any recovery in the third party action.

Ultimately, Nolan settled the third party suit for \$50,000. Pursuant to the referral agreement signed by Nolan, Klement demanded his referral fee. When Nolan refused to honor the referral agreement, Klement brought this action for breach of the referral agreement and failure to honor his lien pursuant to the original fee agreement signed by Morpew. Originally, Klement sued Nolan and Morpew; however, Klement non-suited Morpew before jury deliberations. The jury found for Klement on the lien holder theory, awarding Klement \$5,488 as his share of the settlement and \$2,000 in attorney's fees. It is from this award of damages that Nolan now appeals.

### **Attorney's Fees For Breach of Contract**

In his first issue for review, Nolan contends that the trial court erred by awarding Klement's attorney's fees. Specifically, Nolan argues that the trial court should not have rendered judgment for Klement's attorney's fees because the jury awarded zero damages on Klement's breach-of-contract claim. We agree.

Pursuant to the Texas Civil Practices and Remedies Code, a person may recover reasonable attorney's fees from an individual or corporation based on breach of an oral or written contract. TEX. CIV. PRAC. & REM. CODE ANN. § 38.001(8) (Vernon 1997). Notwithstanding the fact that the legislature used the term "may," in section 38.01, the Texas Supreme Court has declared that the grant of attorney's fees under this section is not discretionary. *Bocquet v. Herring*, 972 S.W.2d 19, 20 (Tex. 1998). To obtain an award of attorney's fees under this section, however, a party must fulfill two requirements: (1) prevail

on a cause of action for which attorney's fees are recoverable, and (2) recover damages. *Green Intern. Inc. v. Solis*, 951 S.W.2d 384, 389 (Tex. 1997); *Kenneth Leventhal & Co. v. Reeves*, 978 S.W.2d 253, 257 (Tex. App.—Houston [14th Dist.] 1998, no pet.).

In its charge to the jury, the trial court submitted three questions concerning Klement's breach of contract action. Relevant to appellant's first issue are the jury's answers to numbers one and three. Question one asked whether Nolan failed to comply with the letter-agreement pertaining to attorney's fees. The jury answered "yes". Question three asked what sum of money would fairly compensate Klement for Nolan's failure to comply with the agreement. The jury answered "zero". Based on the jury's answer to question three, i.e., no damage recovery for Nolan's breach, the court's award of \$2,000 in attorney's fees was improper. Accordingly, we sustain appellant's first issue.

#### **Attorney's Fee Pursuant To Lien**

In his second issue, appellant argues that the court erred by rendering judgment based on the jury's answers to question numbers six and seven in the charge. Specifically, appellant contends that these two questions were improperly submitted to the jury because: 1) there is no legal duty to honor Klement's attorney-fee lien; 2) the State Bar rules prevent Nolan from paying, and Klement from receiving, any proceeds from Morpew's settlement.

To preserve error in the jury charge, a party must make the trial court aware of his complaint, timely and plainly, and obtain a ruling. *State Dept. of Highways & Public Transp. v. Payne*, 838 S.W.2d 235, 241 (Tex. 1992). A party objecting to a charge must distinctly point out the matter to which he objects and the grounds of his objection. TEX. R. CIV. P. 274; *Castleberry v. Branscum*, 721 S.W.2d 270, 276 (Tex. 1986); *Lone Star Ford v. Hill*, 879 S.W.2d 116, 121 (Tex. App.—Houston [14<sup>th</sup> Dist.] 1994, no writ). The purpose of Rule 274 is to afford trial courts opportunity to correct errors in the charge. *Castleberry*, 721 S.W.2d at 276. An objecting party must clearly designate error and explain the grounds for complaint. An objection not meeting both requirements is properly overruled and does not preserve error on appeal. *Id.*

After both sides rested, the trial court selected the jury charge proffered by Klement. Questions six and seven of this charge are relevant to appellant's second issue. Question six was stated as follows: "[d]id Jack Nolan have notice of the attorney's lien possessed by Lynn J. Klement on the settlement proceeds received by Robin Morphey at the time [Nolan] distributed such proceeds?" Question seven followed: "What sum of money, if any, was due to Klement from the personal injury settlement proceeds recovered for Morphey. During the jury charge conference, counsel for Nolan made the following objections to question six: "[a]nd as to question number six, the same thing. It's not a controlling issue. It's not properly predicated. It's not properly conditioned. It's undisputed fact in the case, and we hereby object on all of these grounds."<sup>1</sup> Nolan did not object to question seven.<sup>2</sup>

Based on the non-specific nature of Nolan's objection to jury question six, we find that her second issue has not been preserved for review. Nolan's objections did not apprise the trial court of either argument contained in his second issue. Pursuant to Rule 274 we are precluded from finding that Nolan's boilerplate objections preserved the arguments raised in his second issue. The purpose of Rule 274 is to afford trial courts opportunity to correct jury charge errors. *See also* TEX. R. APP. P. 33.1. Nolan's failure to object to jury question seven

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<sup>1</sup> Counsel's objection to question five was stated as follows: "the question submitted [] is completely improper. It is not even an issue disputed in the facts of this case. It's not a controlling issue. It's not properly predicated. It's not properly conditioned. And we hereby object on these grounds." Any clarifying effect this objection may have had on question number six, however, is irrelevant because Rule 274 does not permit an objection to one part of the charge "to be adopted and applied to any other part of the charge by reference only." TEX. R. CIV. P. 274; *Spencer v. Eagle Star Ins. Co. of Am.*, 876 S.W.2d 154, 159 (Tex. 1994) (Doggett, J., concurring and dissenting) ("Rule 274 does not permit the use of . . . cross-references in objections.").

<sup>2</sup> On the day prior to oral submission, counsel for Nolan filed an affidavit with this Court arguing that the court reporter failed to record the objection she made to question seven during the charge conference. Appellant's affidavit, however, is unaccompanied by a motion to supplement or cure inaccuracies in the reporter's record. Also, appellant did not cite proper authority authorizing such a request. Therefore, the affidavit has no relevance to our review of Nolan's second issue. In addition, appellant filed a post-submission motion to supplement the trial record seeking to include her tendered jury charge which had been rejected by the trial court. We have denied appellant's request because of the unwarranted delay this would cause in disposition of the appeal. *See Crown Life Ins. Co. v. Estate of Gonzales*, 820 S.W.2d 121, 122 (Tex. 1991) (opining that leave to supplement post-submission is often denied, especially where it would result in unreasonable delay of the appeal).

likewise results in waiver of any complaint regarding its propriety. *Id.* Accordingly, we overrule Nolan's second issue for review.

In conclusion, we affirm that portion of the trial court's judgment awarding damages pursuant to the answer to jury question seven.<sup>3</sup> Regarding that portion of the court's judgment awarding attorney's fees, we reverse and render judgment that Klement take nothing.

/s/ Charles W. Seymore  
Justice

Judgment rendered and Opinion filed July 26, 2001.

Panel consists of Justices Anderson, Hudson, and Seymore.

Do Not Publish — TEX. R. APP. P. 47.3(b).

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<sup>3</sup> In reaching our decision today, we note an apparent conflict between the jury's answers to questions numbered two and seven. However, error was not preserved for review because there was no objection to question number seven.