Affirmed as Modified and Memorandum Opinion filed June 18, 2020.

In The

Fourteenth Court of Appeals

NO. 14-18-00216-CV

JOE ALFRED IZEN, JR., Appellant

V.

BRIAN LAINE AND KIMBERLY LAINE, Appellees

On Appeal from the 55th District Court
Harris County, Texas
Trial Court Cause No. 2013-28211

MEMORANDUM OPINION

Appellant Joe Alfred Izen, Jr. appeals from a final judgment ordering him to disgorge the legal fees appellees Brian and Kimberly Laine paid him pursuant to an unconscionable attorney employment agreement. As explained below, we affirm the trial court's modified amended final judgment.

BACKGROUND

Izen is an attorney who offices in Houston. Brian Laine worked as a Jones

Act seaman for Big Inch Marine Systems, Inc. and Stolt Offshore, Inc. (collectively Big Inch). Kimberley Laine is his wife. Mr. Laine was seriously injured while working on the job in a Louisiana marine fabrication yard. It is undisputed that Mr. Laine liked working for his employer Big Inch and they did everything needed to take care of him after his injury. Mr. Laine and Big Inch negotiated a settlement of his Jones Act claims.

The proposed settlement included two lump sum payments. The first was $60,000, the second was $75,000 for Mr. Laine's future medical needs. The two lump sum payments were payable once Mr. Laine signed the formal settlement agreement. The negotiated settlement agreement also included an annuity. The annuity guaranteed Mr. Laine a monthly payment of about $1,100 for a minimum of thirty years. The annuity also included a two percent annual cost of living adjustment.[1] Big Inch reserved the right to subrogation of any amounts Mr. Laine recovered against third parties also found to be responsible for his injuries. Big Inch's attorney drafted the proposed settlement agreement and sent it to Mr. Laine. Big Inch recommended that Mr. Laine consult with an attorney regarding the proposed settlement document.

Izen entered the story at this point when Mr. Laine contacted him by email in the middle of July 2002. Mr. Laine contacted Izen regarding (1) Izen reviewing the draft settlement agreement to make certain it said what Mr. Laine understood it should say, and (2) pursuing any claims Mr. Laine might have against third-party entities possibly responsible for his injuries. According to Mr. Laine, he did not contact Izen regarding a lawsuit against his employer Big Inch. Izen has not disputed that a written proposed settlement agreement between Big Inch and Mr.

[1] The first annuity payment was made on September 24, 2002 in the amount of $1,065.11.

Laine had been prepared before Mr. Laine contacted Izen. Mr. Laine faxed the proposed settlement agreement to Izen on July 23, 2002. Izen reviewed the document, made pencil margin notes on certain pages, and faxed the annotated pages back to Mr. Laine on August 2. Nothing changed in the final settlement agreement as a result of Izen's notations.

Izen and Mr. Laine met in person on August 9. Mr. Laine signed an attorney employment agreement with Izen during this meeting.[2] The attorney employment agreement provided that the Laines retained Izen to "sue for and recover all damages and compensation to which [the Laines] may be entitled as well as to compromise and settle all claims arising out of the causes of action against Triple C Fabricators, Inc. and any other responsible parties. . . ." The fee agreement also provided that Izen would represent "Client, Brian Laine, in his Workmen's Compensation claim against his employer, Big Inch Marine, Inc." Izen did not offer Mr. Laine a flat fee option or an hourly rate option in his fee agreement. Izen instead offered Mr. Laine only a thirty-five percent contingent-fee payment option. Izen told Mr. Laine that he was to be paid thirty-five percent of all settlement payments included in the proposed settlement agreement with Big Inch. This included two lump sum payments, as well as a monthly annuity payment for at least thirty years. Izen explained that the payments were to be used to finance the contingent-fee litigation in Louisiana against the third-party defendants such as Triple C Fabricators.

Izen and Mr. Laine attended the settlement meeting with Big Inch the same day that the attorney employment agreement was signed. At the meeting, Mr. Laine signed the Big Inch settlement agreement, which was unchanged from the original proposed settlement agreement. Izen signed the settlement agreement as

[2] Mr. Laine's wife signed the agreement at some point during that day.

Mr. Laine's attorney. It is undisputed that Big Inch made the two lump sum payments called for by the settlement agreement and also set-up the annuity with Hartford Insurance. It is also undisputed that Hartford subsequently made all monthly annuity payments to Mr. Laine. Mr. Laine testified that he made the initial thirty-five percent payment on each lump sum and timely made most of the monthly annuity payments as well. While Mr. Laine missed some monthly payments, he would eventually catch up by making larger payments. During the trial, Izen estimated that the Laines paid him between $70,000 and $90,000. Izen also agreed that he would eventually be paid a total of $228,730.80 out of the Laines' Big Inch Settlement proceeds.

The fee agreement authorized Izen, who was not licensed to practice law in Louisiana, to associate other counsel at his cost to pursue the third-party litigation. Izen asked Big Inch's attorney, Ralph Kraft, if he could recommend a Louisiana attorney who could pursue the third-party claims in Louisiana. Kraft recommended Conrad S. P. Williams. Williams met with Mr. Laine and agreed to represent Mr. Laine in his claims against the third-party defendants. Williams would be compensated out of Izen's contingent fee recovery, if any. Williams and Izen agreed they would split Izen's thirty-five percent of any recovery sixty percent for Williams and forty percent for Izen.

It is undisputed that Izen drafted a proposed pro-se petition against third-party entities Mr. Laine believed were responsible for his injuries to be filed in Louisiana within Louisiana's one-year statute of limitations for personal injury claims. Izen explained that the filing of the pro se petition would give him time to find a Louisiana attorney to handle the Laines' lawsuit. The pro se petition was timely filed. According to Mr. Laine and Williams, the drafting and filing of the pro se petition was the extent of Izen's involvement in the third-party defendant

litigation. Izen disputed that during his trial testimony. According to Izen, he helped with some discovery responses and stood by ready to take over the litigation if that became necessary. Ultimately, the lawsuit was voluntarily dismissed by Mr. Laine with no recovery, so there was no contingent fee owed on his claims against the third-party defendants.

Once the third-party litigation was dismissed, Mr. Laine terminated Izen's services saying he was no longer needed. Mr. Laine also stopped making the monthly annuity payments to Izen because there was no longer third-party litigation to be financed. This was done in a letter sent in August 2007. Mr. Laine did not, however, ask for repayment of the amounts he had already paid Izen. Izen sent a letter back to Mr. Laine on March 27, 2008 telling Mr. Laine that his representation ended when Mr. Laine received the annuity contract in October 2002.

Izen sued the Laines in county court on March 26, 2010. For reasons not disclosed in the record, the case was later transferred to district court. Izen alleged several causes of action including a request for a declaratory judgment that he owned a thirty-five percent interest in the Hartford annuity and in each annuity payment. Izen also alleged causes of action for breach of contract, conversion, unjust enrichment, quantum meruit, breach of fiduciary duty, and he sought a turnover order and injunctive relief. The Laines answered the lawsuit and eventually asserted numerous affirmative defenses to Izen's claims, including an assertion that Izen's attorney employment agreement was unconscionable. The Laines eventually filed a counterclaim against Izen on November 4, 2011, alleging that Izen took advantage of the Laines, collected money he was not due, and they sought to recover all money, totaling $70,126.13, they had paid to Izen.

The case eventually went to trial in front of a jury. At the close of Izen's

case, the trial court granted the Laines' motion for directed verdict on all of Izen's claims based on a determination that the attorney fee agreement was unconscionable. The trial court also granted Izen's directed verdict providing that Izen's "motion for directed verdict on all of [the Laines'] claims is also granted, except as set out below. At the latest, all of [the Laines'] causes of action accrued on August 9, 2007, when Izen was terminated as counsel. [The Laines'] claims were not filed within the four year period of limitations." The trial court's directed verdict order continued that the Laines might "be entitled to disgorgement of the fees Izen has received because the Attorney Employment Agreement is against public policy under these facts." The trial court ordered briefing on that issue.

A month later, the trial court signed an order based on *Burrow v. Arce*, 997 S.W.2d 229 (Tex. 1999), directing Izen to "disgorge all fees collected from [the Laines] in the matters at issue in this case." The trial court then instructed the Laines to file a proposed final judgment setting out the specific amount of fees received by Izen as the judgment amount. The trial court also ordered the Laines to calculate the amount of prejudgment and post-judgment interest. The trial court then signed a final judgment ordering Izen to disgorge $70,126.13 and to pay prejudgment interest of $48,337.56 that began accumulating on August 9, 2002. Izen objected to the trial court's prejudgment interest calculation in the final judgment. The trial court slightly decreased the amount of prejudgment interest in a subsequent "final order" amending the final judgment. This appeal followed.

ANALYSIS

I. The trial court did not err when it concluded Izen's attorney employment agreement was unconscionable as to the Big Inch Settlement and ordered fee disgorgement on that basis.

Izen's first, second, third, fourth, fifth, and sixth issues challenge the trial

court's ruling that his attorney employment agreement with the Laines was unconscionable, and the directed verdict granted on all of his claims against the Laines based on that determination.

A. The trial court could conclude Izen's attorney employment agreement was unconscionable as to the Big Inch Settlement based on the Laines' affirmative defense of unconscionability.

Izen argues in his first issue that the trial court erred when it granted the Laines' motion for directed verdict on all of his claims because the Laines filed their breach of fiduciary duty, fraud, and fee forfeiture counterclaims more than four years after those claims accrued. Izen cites the Texas Supreme Court's *Cosgrove v. Cade* opinion in support of this argument. 468 S.W.3d 32, 35 (Tex. 2010). In *Cosgrove*, the Supreme Court stated that fee forfeiture claims have a statute of limitations of four years. *Id.* Izen asserts that the Laines' claims accrued no later than August 9, 2007 and as a result, their counterclaim, filed November 4, 2011, was filed too late and the trial court could not order fee forfeiture.

The trial court agreed with Izen on the limitations issue because it granted his motion for directed verdict on all of the Laines' causes of action.[3] But, as the trial court recognized, and Izen overlooks, the Laines timely pled the affirmative defense of unconscionability to Izen's causes of action seeking full payment of the amounts he claimed he was owed under the attorney employment agreement and they moved for directed verdict on Izen's claims based on that defense.

As stated in *Burrow v. Arce*, the trial court was authorized to declare Izen's attorney employment agreement unconscionable based on the assertion of that defense. 997 S.W.2d 229, 243-45 (Tex. 1999) (recognizing remedy of fee

[3] Therefore, we need not reach Izen's contention that the trial court abused its discretion when it did not grant his motion for directed verdict on the Laines' causes of action.

forfeiture applies when an attorney sues for payment of compensation); *Webb v. Crawley*, 590 S.W.3d 570, 579 (Tex. App.—Beaumont 2019, no pet.) ("Because attorneys are prohibited by the Disciplinary Rules from charging or collecting an unconscionable fee, an attorney's remedy against a client is subject to the prohibition against charging or collecting an unconscionable fee.") (internal quotation marks omitted). Therefore, the fact that the Laines' causes of action for affirmative relief may have been barred by limitations, a question we need not reach, did not prohibit the trial court from deciding Izen's attorney employment agreement was unconscionable with respect to the Big Inch Settlement. As the Texas Supreme Court recognized in *Burrow*, "an attorney's compensation is for loyalty as well as services, and his failure to provide either *impairs his right to compensation*." *Id.* at 240 (emphasis added). We overrule Izen's first issue.[4]

B. Izen's attorney employment agreement was unconscionable as a matter of law as to the Big Inch Settlement.

Izen argues in his second and third issues that the trial court erred when it concluded his attorney employment agreement was unconscionable. Izen contends in his fourth issue that the trial court should have granted his motion for directed verdict on his unjust enrichment cause of action. In his fifth issue Izen asserts that the trial court erred when it granted a directed verdict on his causes of action based on the trial court's unconscionability determination. Finally, in his sixth issue Izen contends that the trial court violated his right to a jury trial when it granted the Laines' motion for directed verdict. We address these issues together.

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[4] To the extent Izen argues in his first issue that the trial court's action in granting a directed verdict in favor of the Laines violated his federal constitutional right to equal protection and the Texas Constitution's open court's provision, he has not cited any authority holding that the trial court's action directing a verdict against him based on an affirmative defense violates those constitutional provisions. We therefore conclude that he has not met his burden to show reversible error by the trial court. *See Budd v. Gay*, 846 S.W.2d 521, 524 (Tex. App.—Houston [14th Dist.] 1993, no writ) (citing *Christiansen v. Prezelski*, 782 S.W.2d 842, 843 (Tex. 1990)).

1. Standard of review and applicable law

A directed verdict is warranted when the evidence is such that no other verdict can be rendered and the moving party is entitled, as a matter of law, to judgment. *Tanglewood Homes Ass'n v. Feldman*, 436 S.W.3d 48, 66 (Tex. App.—Houston [14th Dist.] 2014, pet. denied). When reviewing a directed verdict, an appellate court views the evidence in the light most favorable to the party against whom the verdict was rendered. *Szczepanik v. First S. Trust Co.*, 883 S.W.2d 648, 649 (Tex. 1994) (per curiam). When reviewing a directed verdict on a legal issue, we consider all the evidence presented at trial, viewing it in the losing party's favor "as much as the record allows." *S.V. v. R.V.*, 933 S.W.2d 1, 8 (Tex. 1996). We may consider any reason why the directed verdict should have been granted, even if not stated in the party's motion. *Industrial III, Inc. v. Burns*, No. 14-13-00386-CV, 2014 WL 4202495, at *8 (Tex. App.—Houston [14th Dist.] Aug. 26, 2014, pet. denied) (mem. op.).

The attorney-client relationship gives rise to a fiduciary relationship as a matter of law. *Meyer v. Cathey*, 167 S.W.3d 327, 330–31 (Tex. 2005) (per curiam). When 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 marks omitted). In Texas, attorneys are held to the highest standards of ethical conduct in their dealings with their clients. *Id.* As a result, attorneys must conduct their business with their clients with inveterate honesty and loyalty and they must always keep the client's best interest in mind. *Id.* at 561. Therefore, a lawyer has a duty to inform the client of all material facts and this duty requires that a lawyer's fee agreement be clear. *Bennett v. Commission for Lawyer Discipline*, 489 S.W.3d 58, 70 (Tex.

App.—Houston [14th Dist.] 2016, no pet.).

Contingent fee agreements are generally acceptable in Texas. *Walton*, 206 S.W.3d at 561. Their primary purpose is to provide an opportunity to plaintiffs who cannot afford an attorney to obtain legal services by compensating the attorney from the proceeds of any recovery. *Id.* A contingent fee agreement offers the attorney the potential to earn a larger fee than might have been earned under an hourly billing agreement because it compensates the attorney for the risk that no fee at all will be recovered if the client's case is lost. *Id.* This risk-sharing feature of contingent fee agreements creates an incentive for lawyers to work diligently and obtain the best results possible for the client. *Id.*

Contingent fee agreements are subject to the prohibition against an attorney charging or collecting an unconscionable fee. *Id.* (citing Tex. Disciplinary Prof'l Conduct R. 1.04(a), *reprinted in* Tex. Gov't Code Ann. tit. 2, subtit. G, app. A (Tex. State Bar R. art. X, § 9)). As the Supreme Court noted in *Walton*, while "the Disciplinary Rules do not define standards of civil liability for attorneys, they are persuasive authority outside the context of disciplinary proceedings, and we have applied Rule 1.04 as a rule of decision in disputes concerning attorney's fees." *Id.* at 561, n.6.

Under the Disciplinary Rules, a fee is unconscionable if a competent lawyer could not form a reasonable belief that the fee is reasonable. *Id.* at 561, n.7. (citing Tex. Disciplinary Prof'l Conduct R. 1.04(a)). The factors to be considered when determining whether a fee is reasonable include, but are not limited to, the following:

> (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill required to perform the legal service properly;

(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

(3) the fee customarily charged in the locality for similar legal services;

(4) the amount involved and the results obtained;

(5) the time limitations imposed by the client or by the circumstances;

(6) the nature and length of the professional relationship with the client;

(7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and

(8) whether the fee is fixed or contingent on results obtained or uncertainty of collection before the legal services have been rendered.

Id. (quoting Tex. Disciplinary Prof'l Conduct R. 1.04(b)).

If the question is whether a particular-fee amount or contingency percentage charged by the attorney is unconscionable under all relevant circumstances of the representation, then it is an issue for the factfinder to resolve. *Id.* at 561. But, if the question is whether a fee agreement between an attorney and a client is contrary to public policy and unconscionable at the time it was formed, then it is a question of law. *Id.* at 562. We are presented with the latter situation here.

2. The trial court did not err when it determined the Big Inch Settlement part of the attorney fee agreement was unconscionable.

Izen argues that the trial court erred when it determined that the attorney fee agreement was unconscionable. Izen makes several arguments in support of his contention that the trial court erred including (1) the truism that a thirty-five percent contingency fee is not automatically an unconscionable fee in all cases; (2) the litigation was filed in Louisiana against the third parties Mr. Laine believed

were responsible for his injuries and significant work was done in that litigation; (3) the Laines approved the referral agreement with Williams; (4) the time he spent reviewing the proposed settlement documents and attending the settlement conference with Big Inch; and (5) the Laines had not demonstrated good cause for terminating his legal services.

In making these arguments, Izen ignores the fact that the Laines retained him to handle two distinct jobs. The first involved review of the proposed Big Inch settlement agreement that had already been negotiated and accepted by Mr. Laine and then attending the settlement conference where the settlement agreement would be signed. This was a very discrete and finite representation that presented no risk and little or no expense. The second distinct job required Izen to pursue through litigation the Louisiana third parties Mr. Laine believed were responsible for his injuries. This second job did include the risk that there would be no recovery to both Izen and the Laines; indeed, there ultimately was no recovery in that litigation as it was voluntarily dismissed with the approval of the Laines. In his arguments against the trial court's unconscionability determination, Izen combines the two jobs and insists that his thirty-five percent contingent fee on the Big Inch Settlement was not unconscionable because the Big Inch Settlement was used to finance the litigation against the Louisiana third parties.

We reject Izen's attempt to combine the two separate jobs he was hired to perform because of the unique situation presented in this case. While it might be acceptable for an attorney to combine the pursuit of different target entities under a single fee agreement and divide the cost of that combined litigation among all of the recoveries obtained either through settlement or trial when none of the target entities have already settled, a question we need not decide, we conclude it is not acceptable when one of the target entities has already reached a settlement before

the attorney even begins his representation. *See Walton*, 206 S.W.3d at 561 (stating that attorneys must conduct their business with their clients with inveterate honesty and loyalty and must always keep the client's best interest in mind); *Goffney v. Rabson*, 56 S.W.3d 186, 193 (Tex. App.—Houston [14th Dist.] 2001, pet. denied) (stating that one of most common breaches of fiduciary duty by attorneys involves placing attorney's interest above the client's interest). Therefore, we conclude that the propriety of the thirty-five percent contingent fee collected by Izen must be viewed only as it relates to the Big Inch Settlement. Because there was no risk involved in the Big Inch Settlement and little work to be done by Izen on that settlement, we further conclude that it was unconscionable and a violation of public policy for Izen to collect a thirty-five percent contingent fee on the Big Inch Settlement payments disguised as the payment of the expenses incurred in separate litigation against the Louisiana third-party defendants. *See Walton*, 206 S.W.3d at 561 (stating one reason contingent fee agreements are acceptable is because they provide plaintiffs who cannot afford an attorney the opportunity to obtain legal services by allowing the attorney to earn a larger fee than might have been otherwise earned because it compensates the attorney for the risk that no fee at all will be recovered if the client's case is lost); *Burrow*, 997 S.W.2d at 246 (stating that trial court must determine whether attorney's conduct was a clear and serious breach of duty to his client and whether any of the attorney's compensation should be forfeited and if so, what amount).

The language of the attorney employment agreement supports this conclusion. Section VI of the agreement, titled "Deduction of Expenses," provides

> 6.01 All reasonable expenses incurred by the attorney in the handling of this representation, if paid by the attorney, shall be billed to the file as accrued and shall be reimbursed to the attorney before or after final settlement. If for some reason any expenses remain unpaid at the time of the settlement or judgment, those outstanding expenses shall be

> paid by the client out of the settlement or judgment monies. Clients shall bear no other responsibility for payment of the costs advanced by the attorney(s).

This provision is the only one addressing the payment of expenses in the attorney employment agreement. It would not be clear to a reasonable client reading this provision that the client would be fronting litigation expenses. *Bennett*, 489 S.W.3d at 71; *see Walton*, 206 S.W.3d at 565 ("For these reasons, the failure of the lawyer to give at the outset a clear and accurate explanation of how a fee was to be calculated weighs in favor of a conclusion that the fee may be unconscionable.") (internal quotation marks omitted). Instead, it would appear the provision imposes the burden of fronting litigation costs, as well as the risk that reimbursement of any costs paid would only occur in the event there was a recovery, on Izen.

Izen's March 27, 2008 letter to the Laines also supports our conclusion that the fee was unconscionable with respect to the Big Inch Settlement. In that letter, Izen notified the Laines that his representation ended when they received the Hartford annuity contract in October 2002. Therefore, any fees collected under the guise of financing the litigation against the Louisiana third-party defendants were collected under false pretenses in violation of an attorney's duty of honesty and loyalty to his clients. *See Walton*, 206 S.W.3d at 561 (stating that "a lawyer must conduct his or her business with inveterate honesty and loyalty, always keeping the client's best interest in mind").

We also reject Izen's argument that he was entitled to the full thirty-five percent contingent fee on the Big Inch Settlement payments because, in his view, he was terminated without cause by the Laines. Even if we assume that he is correct when he asserts that he was terminated without cause by the Laines, Izen still cannot overcome the fact that his representation of the Laines must be seen as

two distinct jobs, the Big Inch Settlement and the Louisiana third-party litigation. We have already determined that the thirty-five percent contingent fee for just the Big Inch Settlement was unconscionable, a fact Izen recognized in his opening brief.[5] With respect to the Louisiana third-party litigation, Izen was not entitled to be paid any fees even if he was terminated without cause because there was no recovery. *See Walton*, 206 S.W.3d at 561 (stating that an attorney terminated without cause may seek compensation in quantum meruit or in a suit to enforce the contract by collecting the fee from any damages client subsequently recovers).

We therefore hold that the trial court did not err when it determined as a matter of law that Izen's attorney employment agreement was unconscionable with respect to the Big Inch Settlement, at the time it was formed, and subsequently ordered Izen to disgorge the entire amount of fees he had received pursuant to the attorney employment agreement. *See Walton*, 206 S.W.3d at 562, 566 ("Hoover's termination fee provision penalized Walton for changing counsel, granted Hoover an impermissible proprietary interest in Walton's claims, shifted the risks of the representation almost entirely to Walton's detriment, and subverted several policies underlying the use of contingent fees. We hold that this provision is unconscionable as a matter of law, and therefore, unenforceable."); *Dardas v. Fleming, Hovenkamp & Grayson, P.C.*, 194 S.W.3d 603, 613 (Tex. App.—

[5] Izen wrote: "While the value of the legal services performed for the Laines' benefit prior to the [Big Inch Settlement Agreement] could be viewed as small in light of the $443,439.60 [Big Inch Settlement Agreement], the value of Izen and Williams' legal services performed after the [Big Inch Settlement Agreement] was not." Izen then continued: "While a reasonable attorney might opine, or Judge might find that Izen's collection of a 35% contingent fee interest in the Hartford annuity payments received by Laines was an excessive fee based solely on the value of Izen's services prior to the [Big Inch Settlement Agreement], no reasonable factfinder could find the 35% contingent fee excessive or unreasonable if the value of Izen and Williams' $174,000.00 post-settlement legal services which benefited the Laines was taken into account."

Houston [14th Dist.] 2006, pet. denied) (stating that a court may deem the Texas Disciplinary Rules of Professional Conduct to be an expression of public policy so that a contract violating them is unenforceable as against public policy). We overrule Izen's second and third issues.

3. The trial court did not err when it granted the Laines' motion for directed verdict on Izen's causes of action and denied his motion based on quasi-estoppel.

Izen argues in his fourth issue that the trial court erred when it denied his motion for directed verdict on his unjust enrichment cause of action based on quasi-estoppel. Izen asserts in his fifth issue that the trial court erred when it granted a directed verdict on his causes of action against the Laines. We address these issues together. Each of Izen's causes of action depend on the enforceability of the attorney employment agreement. Having already affirmed the trial court's determination that the attorney employment agreement was unconscionable and unenforceable with respect to the Big Inch Settlement, we conclude that the trial court did not err when it granted a directed verdict on Izen's causes of action dependent on that agreement, including his suit for a declaratory judgment, breach of contract, conversion, unjust enrichment, breach of fiduciary duty, his request for a turnover order, and his request for injunctive relief.

Turning to Izen's quantum meruit cause of action, we conclude that the trial court did not err when it granted the directed verdict on that claim as well. The only recovery the Laines received was from the Big Inch Settlement. We have already affirmed the trial court's determination that the attorney employment agreement for that representation was unconscionable because the settlement had already been negotiated prior to Izen's involvement. Izen is not entitled to any fee on the Louisiana third-party litigation because there was no recovery. *See Walton*,

206 S.W.3d at 561 (stating that an attorney terminated without cause may seek compensation in quantum meruit or in a suit to enforce the contract by collecting the fee from any damages client subsequently recovers).

The same principle defeats Izen's quasi-estoppel argument in his fourth issue. Izen asserts that the trial court should have granted his motion for directed verdict on his claim for the full contingent fee on the amount of the Big Inch Settlement because he fully performed on that part of the attorney employment agreement. According to Izen, the Laines accepted the benefits of that settlement and cannot later deprive him of his full payment.

"Quasi-estoppel precludes a party from asserting, to another's disadvantage, a right inconsistent with a position previously taken." *Lopez v. Munoz, Hockema & Reed, L.L.P.*, 22 S.W.3d 857, 864 (Tex. 2000). Izen argues that by continuing to accept annuity payments under the settlement, the Laines were estopped from not fully paying him under the attorney fee agreement. We have already determined that the attorney employment agreement with respect to the Big Inch Settlement is unconscionable and unenforceable, therefore Izen cannot rely on quasi-estoppel to collect an unconscionable fee. We have also decided that he was not entitled to a fee for the unsuccessful Louisiana third-party litigation. The fact the Laines may have been unaware of the law surrounding an attorney's fiduciary responsibilities and acceptable contingent fee contracts and made many payments to Izen does not change this analysis. *See Walton*, 206 S.W.3d at 561 (stating attorneys must conduct their business with their clients with inveterate honesty and loyalty and must always keep the client's best interest in mind); *Joe v. Two Thirty Nine Joint Venture*, 145 S.W.3d 150, 160 (Tex. 2004) (stating that an attorney owes a client a duty to inform the client of matters material to the representation); *Goffney*, 56 S.W.3d at 193 (stating that one of most common breaches of fiduciary duty by

attorneys involves placing attorney's interest above the client's interests). We overrule Izen's fourth and fifth issues.

4. The trial court did not violate Izen's right to a jury trial when it granted the Laines' motion for directed verdict.

In his sixth issue, Izen argues that the trial court violated his right to a jury trial when it granted the Laine's motion for directed verdict on his claims because he asserts there were disputed fact issues that had to be resolved by the jury. We disagree.

The jury's function is to determine questions of fact. *Fort Worth & D.C. Ry. Co. v. Yantis*, 185 S.W. 969, 972 (Tex. Civ. App.—Fort Worth 1916, writ ref.). When the facts are undisputed, only a legal question remains. *City of Dallas v. Frank*, 69 S.W.2d 830, 830 (Tex. App.—Dallas 1934, no writ). Questions of law are decided by the court. Therefore, when the facts are undisputed, the trial court may decide whether a party is entitled to judgment. *Szczepanik*, 883 S.W.2d at 649. Under those circumstances, a party's constitutional right to a trial by jury is not violated. *See Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322, 336 (1979) (noting that procedural devices such as summary judgment and directed verdict do not threaten the federal constitution's right to jury trial in civil cases); *Rosenthal v. Boyd*, No. 03–11–00037–CV, 2013 WL 1876513, at *4 (Tex. App.—Austin May 1, 2013, no pet.) (mem. op.) (in civil cases the right to a jury trial applies only where there are issues of fact to be resolved).

We have already determined that the trial court did not err when it granted a directed verdict based on its determination that the attorney employment agreement was unconscionable as a matter of law with respect to the Big Inch Settlement. Therefore, the trial court did not violate Izen's right to jury trial by granting the Laines' motion for directed verdict on that issue. *See*

Hosiery Co., Inc., 439 U.S. at 336; *Rosenthal*, 2013 WL 1876513, at *4.

Izen also argues there was a fact issue on the amount of money the Laines had paid him pursuant to the attorney employment agreement and thus the amount of the fee disgorgement. Once again, we disagree that the amount of the fee disgorgement presents a question of fact to be resolved by a jury. *See Burrow*, 997 S.W.3d at 245–46 ("In a forfeiture case the value of the legal services rendered does not, as we have explained, dictate either the availability of the remedy or amount of the forfeiture. Both decisions are inherently equitable and must thus be made by the court."). Additionally, even if the issue was not one to be resolved by the trial court, we conclude there was not a disputed fact issue on the amount of fees paid by the Laines. The Laines asserted that they paid Izen $70,126.13 and supported that figure with evidence submitted during the trial. They also submitted additional evidence to the trial court subsequent to the directed verdict. In addition, Izen did not dispute the Laines' number during his trial testimony. In fact, Izen testified that he estimated that he had received between $70,000 and $90,000 from the Laines. Because there were no disputed facts to be determined by the jury, the trial court did not violate Izen's right to a jury trial. We overrule his sixth issue.

II. Izen has not established that he is entitled to a new trial based on items allegedly missing from the reporter's record.

Izen argues in his seventh issue that his ability to present his arguments on appeal has been adversely affected by two items missing from the reporter's record. According to Izen, the missing items are the transcript of the hearing on his first motion for new trial and the transcript of the trial court's "directed verdict ruling." Izen continues that the trial court "received evidence and considered arguments at those hearings concerning the amount of attorney's fees the Laines

paid Izen and the calculations of prejudgment interest on those fees." Izen, citing Rule 34.6, argues that he is entitled to a new trial because he has been cheated "out of the benefit of a full designated court reporter's record." *See* Tex. R. App. P. 34.6(f) (providing that if an appellant can establish that a significant exhibit or portion of a court reporter's notes and records have been lost or destroyed and the parties cannot agree to a replacement, the appellant is entitled to a new trial). Izen offers no further explanation on how these two items are necessary to the resolution of the appeal. Izen also makes no assertion that the parties attempted to reach agreement on replacements for the allegedly missing items, but failed.

We turn first to Izen's contention that the trial court's "directed verdict ruling" is not included in the reporter's record. We disagree. The fourth volume of the reporter's record contains the Laines' oral motion for directed verdict on Izen's causes of action and the trial court's granting of that motion. In granting the Laines' motion, the trial court stated "[t]he fee is completely thoroughly absolutely unconscionable and I'm going to render - - I'm going to direct the verdict and render judgment for the defense." The trial court then informed the parties that he would issue a written order granting the Laines' motion. That order appears in the clerk's record. Because the trial court's "directed verdict ruling" appears in the record, this contention cannot support Izen's request for a new trial based on Rule 34.6(f).

Next, Izen asserts he is entitled to a new trial because the transcript from the hearing on his first motion for new trial is missing from the reporter's record. According to Izen, the trial court received evidence and considered the parties' arguments concerning the amount of attorney's fees the Laines paid Izen and the proper calculation of prejudgment interest. We agree with Izen that a transcript of the hearing on Izen's first motion for new trial does not appear in the appellate

record. Assuming the oral hearing occurred, even if Izen requested that the court reporter record the hearing, that does not mean the record was taken, or that it was subsequently lost or destroyed. *Haase v. Abraham, Watkins, Nichols, Sorrels, Agosto & Friend, L.L.P.*, 499 S.W.3d 169, 179–80 (Tex. App.—Houston [14th Dist.] 2016, pet. denied). In addition, if the court reporter fails to record a hearing, to preserve error, a party must object to that failure. *Id.* There is nothing in the appellate record indicating that Izen objected in the trial court to the court reporter's failure to record the hearing. We therefore conclude Izen did not preserve error on this issue.

Even if he did preserve error, Izen has not shown that he is unable to adequately present his arguments on appeal. The record establishes that the trial court granted Izen's first motion for new trial in part on the "proper amount of fees to be disgorged, and proper calculation of interest." The trial court then notified the parties that it would accept additional briefing and evidence on those questions by submission. The parties responded to the trial court's request for additional evidence and briefing, which appears in the appellate record and is available for our review. Because the trial court granted Izen a partial new trial on the question of the amount of fees to be disgorged and the amount of prejudgment interest and allowed the parties to submit additional evidence and briefing on that question before it changed the amount of prejudgment interest based on that briefing and evidence, we conclude Izen has not demonstrated how the missing transcription of the first motion for new trial hearing, assuming it was transcribed, is necessary to the resolution of the appeal as required by Rule 34.6(f)(3). *See* Tex. R. App. P. 34.6(f)(3); *Magana v. Citibank, N.A.*, 454 S.W.3d 667, 679 (Tex. App.—Houston [14th Dist.] 2014, pet. denied) (abrogated on other grounds by *Kinsel v. Lindsey*, 526 S.W.3d 411, 422, n.4 (Tex. 2017) ("We conclude appellants have not

established that the discussions, if any, regarding how to respond to the two jury questions are necessary to the resolution of this appeal as required by Rule 34.6(f)(3)."); *Town of Flower Mound v. Teague*, 111 S.W.3d 742, 766 (Tex. App.—Fort Worth 2003, pet. denied) ("The Town does not explain how the alleged uncorrected errors are necessary to resolution of the appeal; thus, the Town has not met its burden under Rule 34.6."). We overrule Izen's seventh issue.

III. The trial court held a hearing on Izen's second motion for new trial.

Izen argues in his eighth issue that the trial court erred and denied his right to due process when it denied him a hearing on his second motion for new trial. The record however, establishes that the trial court did conduct a hearing, albeit brief, on Izen's motion. To the extent Izen argues the hearing was inadequate, he has not cited any authority supporting this contention. None of the cases Izen cites address motions for new trial. Two of Izen's cases address motions to reinstate following dismissal for want of prosecution. *See Kelly v. Cunningham*, 848 S.W.3d 370, 371 (Tex. App.—Houston [1st Dist.] 1993, no pet.) ("The Texas Supreme Court has made it clear that when a party requests an oral hearing on a timely filed, properly verified, motion to reinstate, it is an abuse of discretion for the trial court to refuse to hold an oral hearing."); *Cabrera v. Cedarapids, Inc.*, 834 S.W.2d 615, 618 (Tex. App.—Houston [14th Dist.] 1992, writ denied) (observing that Rule 165a(1) provides for a hearing on a motion to reinstate following dismissal for want of prosecution if requested by movant). The third case, *Giese v. NCNB Texas Forney Banking Center*, addresses whether a trial court must conduct an oral hearing on a motion for summary judgment. 881 S.W.2d 776, 783 (Tex. App.—Dallas 1994, no pet.). Even then, the court of appeals rejected the appellant's argument that an oral hearing is mandatory, stating that the decision is instead within the discretion of the trial court. *Id.* We overrule Izen's eighth issue.

IV. The trial court committed no error when it refused to make findings of fact and conclusions of law.

In his ninth issue Izen asserts that the trial court erred when it refused to make findings of fact and conclusions of law. Indeed, the trial court signed an order denying Izen's request. To the extent Izen asserts the trial court was required to make findings of fact and conclusions of law after the trial court granted the directed verdict, we disagree. Findings of fact and conclusions of law are not appropriate following a directed verdict. *Haase v. Sorrels, Waggett, and Patton, Tidwell, Schroeder & Culbertson, LLP*, No. 14-20-00001-CV, 2020 WL 1060838, at *1 (Tex. App.—Houston [14th Dist.] March 5, 2020, no pet.) (mem. op.).

We turn next to the trial court's post-directed verdict decisions. When properly requested, the trial court has a mandatory duty to file findings of fact and conclusions of law. *Nicholas v. Environmental Systems (Int'l) Ltd.*, 499 S.W.3d 888, 894 (Tex. App.—Houston [14th Dist.] 2016, pet. denied) (citing *Cherne Indus., Inc. v. Magallanes*, 763 S.W.2d 768, 770 (Tex. 1989)). The primary purpose for findings of fact is to assist the losing party in narrowing his issues on appeal by ascertaining the true basis for the trial court's decision. *Id.* A trial court's refusal to make findings of fact does not require reversal if the record before the appellate court affirmatively shows that the complaining party suffered no harm. *Id.* Error is harmful if it prevents an appellant from properly presenting a case to the appellate court. *Id.* (citing Tex. R. App. P. 44.1(a)(2) and *Tenery v. Tenery*, 932 S.W.2d 29, 30 (Tex. 1996) (per curiam)). Generally, the controlling issue is whether the circumstances of the case would require the appellant to guess at the reasons for the trial court's decision. *Id.*

Izen makes no attempt on appeal to demonstrate how he was harmed by the trial court's failure to make findings of fact and conclusions of law. Even if he

had, we conclude that the trial court's failure to file findings of fact was harmless in this case. Izen asserts that the trial court "tried fact issues concerning unconscionability, excessive fees, the amount of attorney's fees which the Laines allegedly paid Izen, and the proper calculation of prejudgment interest on those fees to itself." The first two items listed by Izen were resolved by the trial court's directed verdict. We conclude that Izen's ability to present his issues challenging the trial court's decisions on the latter two items has not been impacted by the trial court's failure to make findings of fact and conclusions of law. *Elliott v. Kraft Foods N. Am., Inc.*, 118 S.W.3d 50, 54–55 (Tex. App.—Houston [14th Dist.] 2003, no pet.) (rejecting appellant's harm argument because she was able to "properly present the issues on appeal"). We overrule Izen's ninth issue.

V. Izen has not established that he was harmed when the trial court refused to admit the complete Williams deposition transcript into evidence.

Conrad Williams was the Louisiana attorney retained by the Laines to pursue Mr. Laine's third-party litigation. Izen called Williams to testify during the trial and Izen had the opportunity to examine him without limitation by the trial court as to time and subject matter. Once Williams had completed his live testimony, Izen offered the complete transcript from Williams' deposition, totaling 141 pages, into evidence as an exhibit. The Laines objected, the trial court sustained the objection, and excluded the deposition. Izen's tenth issue challenges the trial court's refusal to admit Williams' deposition transcript into evidence as an exhibit.

The decision to admit or exclude evidence lies within the sound discretion of the trial court. *Bay Area Healthcare Grp., Ltd. v. McShane*, 239 S.W.3d 231, 234 (Tex. 2007). A trial court exceeds its discretion if it acts in an arbitrary or unreasonable manner or without reference to guiding rules or principles. *Barnhart*

v. Morales, 459 S.W.3d 733, 742 (Tex. App.—Houston [14th Dist.] 2015, no pet.). When reviewing matters committed to the trial court's discretion, a reviewing court may not substitute its own judgment for that of the trial court. *Id.* Thus, the question is not whether this Court would have admitted the evidence. Rather, an appellate court will uphold the trial court's evidentiary ruling if there is any legitimate basis for the ruling, even if that ground was not raised in the trial court. *Id*. Therefore, we examine all bases for the trial court's decision that are suggested by the record or urged by the parties. *Id.*

A party seeking to reverse a judgment based on evidentiary error must prove that the error probably resulted in rendition of an improper judgment. *Neely v. Comm'n for Lawyer Discipline*, 302 S.W.3d 331, 339 (Tex. App.—Houston [14th Dist.] 2009, pet. denied). To determine whether evidentiary error probably resulted in the rendition of an improper judgment, an appellate court reviews the entire record. *Barnhart*, 459 S.W.3d at 742 (citing *Interstate Northborough P'ship v. State*, 66 S.W.3d 213, 220 (Tex. 2001)).

Even if we assume that the trial court erred when it excluded the Williams deposition transcript as an exhibit, a question we need not decide, Izen must still show that he was harmed by the exclusion. Tex. R. App. P. 44.1(a); *G & H Towing Co. v. Magee*, 347 S.W.3d 293, 297 (Tex. 2011) (stating that harmless error rule applies to all errors). We conclude that the error, if any, was harmless because Williams testified live during the trial and Izen had the opportunity to examine him. *See Schreiber v. State Farm Lloyds*, 474 S.W.3d 308, 317–18 (Tex. App.—Houston [14th Dist.] 2015, pet. denied) (concluding that trial court's erroneous exclusion of evidence was harmless because trier of fact heard similar

evidence throughout the trial).[6]

VI. Izen waived his eleventh issue.

Izen conclusorily argues in his eleventh issue that the trial court should have granted his motion seeking sanctions against the Laines because they filed causes of action barred by limitations. Statute of limitations is an affirmative defense that must be pled by a defendant or it is waived. Tex. R. Civ. P. 94; *Zorrilla v. Aypco Constr. II, LLC*, 469 S.W.3d 143, 155 (Tex. 2015). Izen has not cited any legal authority holding that a person who files a claim that might be barred by limitations if that defense is pled, subjects a party automatically to sanctions. Therefore, Izen was required to explain why the fact the Laines may have done so here should subject them to sanctions.

While Izen mentions Chapter 10 of the Civil Practice and Remedies Code and Rule 13 of the Texas Rules of Civil Procedure, he offers no explanation or citation to legal authority explaining the standard a trial court must apply when deciding a party's motion for sanctions based on a party filing claims that were possibly barred by limitations, an analysis of how the trial court violated that

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[6] To the extent Izen argues that he was harmed because there were numerous references to the excluded Exhibit 75, Williams' deposition transcript, in unidentified locations, the result is the same. First, Izen has not identified where these references occurred or to which issue they were directed. Second, to the extent the Williams deposition transcript might have been attached to the parties' post-directed verdict filings, those filings are included in the appellate record and therefore would be available for this court to review when called upon to do so. Finally, to the extent Izen suggests that it is this court's burden to identify appellate issues and the evidence, such as the Williams deposition transcript or some portion thereof, supporting or not supporting those issues, we reject that invitation. *See King v. Wells Fargo Bank, N.A.*, 205 S.W.3d 731, 734–35 (Tex. App.—Dallas 2006, no pet.) (stating it is well-established that it is not the duty of appellate court to make an independent search of voluminous appellate record for evidence to support appellant's contentions); *Gleason v. Isbell*, No. 14-03-00166-CV, 2004 WL 1205784, at *4 (Tex. App.—Houston [14th Dist.] June 3, 2004, pet. denied) (holding appellate court has no duty to conduct independent search of voluminous record to determine whether a summary judgment should be reversed).

standard, and the standard of review an appellate court must apply to an issue of this type on appeal. The Rules of Appellate Procedure require that a brief contain a clear and concise argument for the contentions made, with appropriate citations to legal authority and the record. Tex. R. App. P. 38.1(i). We conclude Izen has not met this requirement and has waived his eleventh issue due to inadequate briefing and overrule it. *See Collins v. Walker*, 341 S.W.3d 570, 575 (Tex. App.—Houston [14th Dist.] 2011, no pet.) (stating that Rule 38.1(i) requirements are "not satisfied by merely uttering brief, conclusory statements unsupported by legal citations").

VII. The trial court abused its discretion when it awarded prejudgment interest that began accruing on August 9, 2002.

The trial court determined that the accrual date for the calculation of prejudgment interest was August 9, 2002, the day the Laines made their first payment to Izen. Izen argues in his twelfth issue that the trial court abused its discretion when it calculated the amount of prejudgment interest included in the final judgment using this accrual date. To the extent Izen argues the trial court used the wrong accrual date, we agree.

Texas law provides two sources for an award of prejudgment interest: (1) general principles of equity; and (2) an enabling statute. *Hand & Wrist Center of Houston, P.A. v. Republic Services, Inc.*, 401 S.W.3d 712, 717 (Tex. App.—Houston [14th Dist.] 2013, no pet.) (citing *Johnson & Higgins of Tex., Inc. v. Kenneco Energy, Inc.*, 962 S.W.2d 507, 528 (Tex. 1998)). Because the claims in this case do not fall within any enabling statute, an award of prejudgment interest is governed by equitable principles. *Lee v. Lee*, 47 S.W.3d 767, 799–800 (Tex. App.—Houston [14th Dist.] 2001, pet. denied). When an award of prejudgment interest is governed by equitable principles, the decision to award prejudgment

interest is within the trial court's discretion. *Hand & Wrist Center of Houston, P.A.*, 401 S.W.3d at 717. We therefore review the trial court's award of prejudgment interest for abuse of discretion. *Id.* (citing *Marsh v. Marsh*, 949 S.W.2d 734, 744 (Tex. App.—Houston [14th Dist.] 1997, no writ)). A trial court abuses its discretion when it fails to analyze or apply the law correctly. *Iliff v. Iliff*, 339 S.W.3d 74, 78 (Tex. 2011). There are only two dates on which prejudgment interest may begin to accrue: the earlier of (1) 180 days after the date a defendant receives notice of a claim, or (2) the date suit is filed. *Holliday v. Weaver*, No. 05-15-00490-CV, 2016 WL 3660261, at *3 (Tex. App.—Dallas July 7, 2016, no pet.) (mem. op.).

Here it is undisputed that the Laines did not send Izen a notice of their claim. Therefore, we look to the date the Laines filed their counterclaim. Their counterclaim was filed November 4, 2011, not August 9, 2002. Accordingly, we conclude that the trial court abused its discretion when it calculated the amount of prejudgment interest using August 9, 2002 as the accrual date. *Id.* We therefore sustain Izen's twelfth issue to the extent he argues that the trial court abused its discretion when it calculated the amount of prejudgment interest based on an incorrect accrual date.

Izen also argues that the trial court abused its discretion because it included prejudgment interest for delays in the trial date that Izen asserts were requested by the Laines. "The award of prejudgment interest during periods of delay is generally left to the discretion of the trial court." *Helena Chem. Co. v. Wilkins*, 18 S.W.3d 744, 760 (Tex. App.—San Antonio 2000), *aff'd* 47 S.W.3d 486 (Tex. 2001). Here the record establishes that both sides requested delays in the trial date. Based on this, we conclude that the trial court could have reasonably decided that it would disregard any delays in the trial date when it calculated the amount of

prejudgment interest. *Id.*

The trial court abused its discretion when it determined that the Laines were entitled to recover an award of prejudgment interest totaling $47,794.46. The Laines are entitled to an award of prejudgment interest from November 4, 2011 until the date of the trial court's final order, December 21, 2017, which totals $21,493.66. We therefore modify the trial court's award of prejudgment interest to that amount. *See Hand & Wrist Center of Houston, P.A.*, 401 S.W.3d at 724 (modifying amount of prejudgment interest and affirming as modified).

CONCLUSION

Having sustained Izen's twelfth issue in part, we modify the part of the trial court's amended final judgment awarding the Laines prejudgment interest in the amount of $47,794.46 so that it now awards prejudgment interest in the amount of $21,493.66. We affirm the amended final judgment as modified. Tex. R. App. P. 43.2.

/s/ Jerry Zimmerer
Justice

Panel consists of Justices Jewell, Bourliot, and Zimmerer.