



NUMBER 13-19-00157-CV

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI – EDINBURG

ANTHONY RUSSELL SNOWDEN,

Appellant,

v.

ARTESIA WELLS RANCH 1994, LTD.,

Appellee.

**On appeal from the 218th District Court
of La Salle County, Texas.**

MEMORANDUM OPINION

**Before Chief Justice Contreras and Justices Longoria and Hinojosa
Memorandum Opinion by Justice Longoria**

Appellee Artesia Wells Ranch 1994, Ltd. (Artesia Wells) filed a third-party petition against appellant Anthony Snowden. The trial court awarded Artesia Wells actual damages, exemplary damages, and attorney's fees. By one issue on appeal, Snowden argues that the trial court erred by awarding attorney's fees. We affirm.

I. BACKGROUND¹

In 2013, Patricia Snowden filed suit for declaratory relief against Harry Affleck Jr. and Artesia Wells. In her suit, Patricia contested the status of a road on her property as a public county road and sought to prevent Affleck and Artesia Wells from using said road to access Cascabel Ranch, which is owned by Artesia Wells. In 2017, while this litigation was ongoing, Patricia's nephew, appellant Anthony Snowden, began dumping dead animal carcasses at the entrance gate of the Artesia Wells property. Artesia Wells filed a third-party claim against Anthony for nuisance. This nuisance claim was severed from the underlying suit concerning the road. A bench trial on the nuisance claim was held on February 14, 2019.

La Salle County Game Warden Ryan Johnson testified that he responded to a call from a Border Patrol Agent regarding possible poaching in late 2017. Johnson saw a large number of animal carcasses on Snowden's road next to Affleck's gate. Johnson testified that he contacted Anthony by phone and that Anthony admitted to instructing "his hunters to dump their carcasses at that location." According to Johnson, Anthony further admitted that he would continue to dump carcasses there because "he did not like Mr. Affleck and wanted to annoy him as best he could." Affleck testified that Anthony had been continuously dumping carcasses at that location since late 2017 up until the beginning of trial in February of 2019. When Anthony testified, he admitted to dumping the carcasses but he denied that he did so specifically to annoy Affleck. He also testified that he had

¹ This case is before this Court on transfer from the Fourth Court of Appeals in San Antonio pursuant to a docket-equalization order issued by the Supreme Court of Texas. See TEX. GOV'T CODE ANN. § 73.001. Because this is a transfer case, we apply the precedent of the San Antonio Court of Appeals to the extent it differs from our own. See TEX. R. APP. P. 41.3.

stopped dumping carcasses at that site and had no intention of dumping there in the future.

In its pleadings, Artesia Wells requested equitable attorney's fees. In response, Anthony filed a general denial. Through cross-examination of Artesia Well's attorney, Anthony challenged the amount of attorney's fees being requested. In closing argument, Anthony simply asked the trial court to "not award attorney's fees." However, Anthony never explained why he believed attorney's fees were unrecoverable. The trial court awarded \$5,000 in actual damages, \$1,000 in exemplary damages, and \$18,000 in attorney's fees. This appeal ensued.

II. WAIVER

In his sole issue, Anthony argues that the trial court erred by granting attorney's fees because attorney's fees were not recoverable in this case. However, we first address Artesia Well's argument that Anthony waived this issue for appeal.

A. Standard of Review and Applicable Law

"Parties are restricted on appeal to the theory on which the case was tried." *Wells Fargo Bank, N.A. v. Murphy*, 458 S.W.3d 912, 916 (Tex. 2015). If no objection was made to the trial court that matches the complaint on appeal, then the issue has not been preserved for appellate review. See TEX. R. APP. P. 33.1; *Isaacs v. Bishop*, 249 S.W.3d 100, 113 n.13 (Tex. App.—Texarkana 2008, pet. denied) ("Complaints and argument on appeal must correspond with the complaint made at the trial court level."). However, in a civil nonjury trial, a complaint regarding the legal sufficiency may be made for the first time on appeal. See TEX. R. APP. P. 33.1(d).

B. Analysis

On appeal, Anthony argues that the trial court erred by granting attorney's fees because attorney's fees are not recoverable in nuisance cases. See TEX. CIV. PRAC. & REM. CODE ANN. § 38.001 (listing what types of claims allow for the recovery of attorney's fees). However, Anthony never challenged the recoverability of attorney's fees during trial or filed any post-verdict motions otherwise objecting to the attorney's fees. Thus, nothing has been preserved for our review. *Isaacs*, 249 S.W.3d at 113 n.13.

Anthony argues that challenging the lack of statutory authority for attorney's fees is a type of claim that cannot be waived and he cites *Holland v. Wal-Mart Stores, Inc.*, 1 S.W.3d 91, 94 (Tex. 1999) to support that proposition. However, *Holland* has at least one key distinguishing feature: as noted by the Texas Supreme Court, "[b]y asserting nonrecoverability [of attorney's fees] in its motion for j.n.o.v., Wal-Mart gave the trial court ample opportunity to rule on the availability of attorney's fees before an erroneous judgment was rendered." *Id.* The court further noted that Wal-Mart "raise[d] a timely and specific objection in the trial court that attorney's fees are not recoverable." *Id.* at 95. Thus, *Holland* did not conclude that this type of claim can be raised for the first time on appeal; rather, the court concluded that raising the issue in a motion for j.n.o.v. sufficiently preserved the issue for appellate review. See *id.*

Unlike *Holland*, Anthony did not timely present to the trial court his challenge to the recoverability of attorney's fees in this case. Anthony did not file a motion for j.n.o.v. to challenge the recoverability of attorney's fees. And he cites no authority to show that this type of claim can be raised for the first time on appeal. Furthermore, Texas caselaw consistently holds that almost every type of claim can be waived. See, e.g., *In re Baby Boy R.*, 191 S.W.3d 916, 921 (Tex. App.—Dallas 2006, pet. denied) (observing that even

constitutional claims can be waived if not properly preserved); *Jess v. Libson*, 742 S.W.2d 90, 92 (Tex. App.—Austin 1987, no writ) (refusing to address appellee’s cross-issue concerning the recoverability of attorney’s fees because “the record contains no specific objection to the submission of the issue of attorney’s fees” and thus appellees failed to preserve the issue for review). Therefore, we overrule Anthony’s sole issue.

III. CONCLUSION

We affirm the judgment of the trial court.

NORA L. LONGORIA
Justice

Delivered and filed the
21st day of May, 2020.