NO. 02-19-00394-CV

IN THE COURT OF APPEALS
SECOND JUDICIAL DISTRICT
FORT WORTH, TEXAS

VICTOR MIGNOGNA, *Appellant/Cross-Appellee*
v.
FUNIMATIONS PRODUCTIONS LLC, JAMIE MARCHI, MONICA RIAL and RONALD TOYE, *Appellees/ Cross-Appellants*

Appeal from the 141st District Court of Tarrant County
Honorable John P. Chupp, Judge Presiding

VICTOR MIGNOGNA'S RESPONSE TO APPELLEES' MONICA RIAL AND RONALD TOYE'S OPENING BRIEF

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ISSUES PRESENTED

The trial court did not abuse its discretion in awarding Rial and Toye attorney's fees and costs in the amount of $100,000.

Rial and Toye did not face a "more complicated fact pattern" than the other Appellees/Defendants.

Rial and Toye's own attorney's fee billing records controvert their assertion that $282,953.80 was a reasonable and necessary fee in this matter.

The testimony of Marchi's attorney expert controverted Rial and Toye's assertion that $282,953.80 was a reasonable and necessary fee to defend in this matter.

STATEMENT OF FACTS

Vic Mignogna ("Vic") filed claims against Monica Rial ("Rial"), Ron Toye ("Toye"; both "Rial and Toye"), Jamie Marchi ("Marchi"), and Funimation, LLC ("Funimation") for defamation, tortious interference with existing business relationships, tortious interference with prospective business relationships, and civil conspiracy along with vicarious liability against Funimation.[1] Each of Vic's causes

[1] 3rd Supp. CR pp 4-30.

of action were based on a series of tweets, collectively accusing Vic of sexual harassment, assault and misconduct, and upon communications between Rial and Toye and third parties. Rial, Toye, Marchi, and Funimation each filed motions to dismiss pursuant to the Texas Citizens Participation Act ("TCPA")[2] asking the trial court to dismiss each of Vic's causes of action (collectively the "TCPA Motions").[3,4,5] Following a hearing on October 4, 2019, the trial court granted each of the TCPA Motions and dismissed Vic's causes of action on November 25, 2019.[6]

Following the October 4, 2019 hearing, the trial court held a subsequent hearing on November 21, 2019 to consider the issues related to sanctions and reasonable and necessary attorney's fees pursuant to the TCPA.[7] Rial and Toye, represented by the same counsel, sought an attorney's fee award of $282,953.80.[8]

At the November 21, 2019 hearing, Rial and Toye, Marchi, and Funimation each offered heavily redacted billing statements into evidence and testified in support of their requested attorney's fee awards and sanctions.[9] Counsel for Vic directed the trial court to various deficiencies in Rial and Toye's attorney billing

[2] Texas Civil Practice & Remedies Code, chapter 27 ("TCPA motions").
[3] CR Vol. 2, pp. 398-926 (Rial and Toye's TCPA motion).
[4] CR Vol. 2, pp. 927-1032 (Marchi's TCPA motion).
[5] CR. Vol. 1, pp. 34-201 (Funimation's TCPA motion).
[6] 1st Supp. CR, pp. 4-9.
[7] 1st Supp. CR, pp. 4-9.
[8] 4 RR 25:13-18 and 33:5-23.
[9] RR Vol. 4, pp. 1-192.

statements[10], including Rial and Toye's attempt to recover attorney's fees for block billing,[11, 12, 13, 14] billing for unnecessary tasks such as discussions with a NY bankruptcy attorney,[15, 16] several hours of discussions regarding alleged death threats to Rial and Toye from unknown individuals,[17] unreasonably large time spent on discreet tasks such as billing over fifty (50) hours to prepare for a single deposition,[18, 19] duplicative and excessive attorney work,[20, 21, 22, 23, 24] and for billing time spent on opposition research not related to resolving a case under the TCPA.[25, 26] Additionally, Vic's counsel informed the trial court Rial and Toye's attorneys' fees rates were excessive.[27]

Each of these billing problems is exacerbated by the fact that Rial and Toye's attorney's fees expert, Sean Lemoine ("Lemoine"), testified he was an expert on the

[10] 2nd.Supp. CR, pp. 504-519.
[11] 2nd Supp. CR, p. 508.
[12] RR Vol. 4, p. 46:7-22.
[13] RR Vol. 4, p. 47:8-15.
[14] RR Vol. 4, p. 48:14-19.
[15] 2nd Supp. CR, p. 509.
[16] RR Vol. 4, p. 45:5-9, 15-22.
[17] 2nd Supp. CR, p. 509.
[18] 2nd Supp. CR, pp.510-11.
[19] RR Vol. 4, p. 41:6-14.
[20] 2nd Supp. CR, pp. 511-12.
[21] RR. Vol. 4, p. 48:1-7.
[22] RR. Vol. 4, pp. 49:4-50:11.
[23] RR Vol. 4, pp. 51:13-52:12.
[24] RR Vol. 4, p. 61:3-25.
[25] 2nd Supp. CR pp. 509-10.
[26] RR Vol. 4, pp. 52:16-53:8, 57:2-23.
[27] 2nd Supp. CR p. 513.

subject matter of the TCPA, had litigated through a TCPA Motion to Dismiss hearing 12-15 times, and presented CLE to other Texas lawyers about the TCPA.[28] The egregiousness of Rial and Toye's overbilling was not lost on the trial court as the Honorable Judge Chupp accepted Lemoine's expertise as fact but expressly questioned the unreasonableness of Rial and Toye's fee request during the November hearing.[29] Specifically, The Honorable Judge Chupp questioned Lemoine regarding the excessive billing, specifically related to Lemoine's billing for items that an expert should know.[30] The Honorable Judge Chupp stated Lemoine was "billing too much" for achieving the same results for his clients on the exact same causes of action as Marchi's attorney who had no experience with TCPA cases.[31]

Additionally, Marchi's expert witness on attorney's fees testified that a reasonable and necessary fee for this action was $48,137.50.[32] Vic's claims against Rial and Toye were identical to the claims filed against Marchi[33] Specifically, Vic's claims against Rial, Toye and Marchi were based on tweets accusing Vic of sexual harassment, assault and misconduct.[34] Concurrently with Rial and Toye, Marchi

[28] RR Vol. 4, pp. 11:17-12:12, 5:8-9.
[29] RR Vol. 4, p. 45:20-22.
[30] RR Vol. 4, p.45:13-17, 20-22.
[31] RR Vol. 4, p. 173:9-10.
[32] RR Vol. 4, p. 160:9-161:5.
[33] 3rd Supp. CR, pp. 40-43.
[34] 3rd Supp. CR, pp. 33-39.

pursued dismissal of Vic's claims under the TCPA.[35] Despite defending the exact same claims and achieving the exact same results as Rial and Toye, Marchi's expert attorney fee witness testified that a reasonable and necessary award for attorney's fees in this matter was forty-eight thousand one hundred thirty seven dollars and fifty cents ($48,137.50).[36] This is less than a quarter of the attorney's fees allegedly incurred by Rial and Toye($282,953.80).[37] Marchi's attorney spent significantly less time on discreet tasks, such as preparing for hearings and depositions, and was able to obtain the same results.[38] Additionally, Marchi's counsel did not bill for "opposition research" and watching YouTube videos, tasks that were included in Rial and Toye's billing statements.[39]

The trial court considered all of the expert testimony, objections to evidence, responses, argument of counsel and the relevant pleadings on file during the November hearing, and properly reduced Rial and Toye's attorney fee from the requested two hundred eighty two thousand nine hundred fifty three dollars and eighty cents ($282,953.80) to a total of one hundred thousand dollars ($100,000), an amount that was double what the court awarded either Funimation or Marchi.[40]

[35] CR Vol. 2, pp. 927-1032.
[36] RR Vol. 4, p. 160:9-161:5.
[37] 4 RR 25:13-18 and 33:5-23.
[38] RR Vol. 5, Def Atty Fees Exhibit 7C.
[39] RR Vol. 5, Def Atty Fees Exhibit 7C.
[40] Supp. CR Vol. 1, pp. 4-10.

SUMMARY OF ARGUMENT

The trial court acted within its sound discretion in reducing Rial and Toye's attorney's fees award. The trial court properly considered all of the evidence before it, including expert testimony, objections to evidence, responses, argument of counsel and relevant pleadings on file in determining a reasonable and necessary amount of attorney's fees.

ARGUMENT

A. The trial court properly awarded Rial and Toye attorney's fees in the amount of $100,000.

The sole issue on Rial and Toye's appeal is whether the trial court committed reversible error when it found that the reasonable and necessary attorney fee award was one hundred thousand dollars ($100,000). The trial court acted within its sound discretion in awarding Rial and Toye a sum of $100,000 as reasonable and necessary attorney's fees.[41]

When a claimant wishes to obtain attorney's fees from the opposing party, the claimant must prove that the requested fees are both reasonable and necessary.[42] Both elements are questions of fact to be determined by the fact finder and act as limits on the amount of fees that a prevailing party can shift to the non-prevailing party.[43] The Texas Supreme Court identified non-exclusive factors to guide the fact finder in determining the reasonableness and necessity of attorney's fees.[44] Those factors are:

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

[41] *McGibney v. Rauhauser*, 549 S.W.3d 816, 821-27 (Tex. App.—Fort Worth 2018, pet. denied).
[42] *Arthur Andersen & Co. v. Perry Equip. Corp*., 945 S.W.2d 812, 818 (Tex. 1997).
[43] *Id*.
[44] *Id*.

(2) the likelihood ... 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.[45]

Evidence of the *Arthur Anderson* factors is necessary for the fact finder to have a meaningful way to determine if the fees sought are in fact reasonable and necessary.[46] The determination of what constitutes a reasonable attorney's fee involves two steps.[47] First, the trial court must determine the reasonable hours spent by counsel in the case and a reasonable hourly rate for such work.[48] The trial court then multiplies the number of such hours by the applicable rate, the product of which

[45] *Id.*
[46] *McGibney*, 549 S.W.3d 816 at 821-27.
[47] *Rohrmoos Venture v. UTSW DVA Healthcare, LLP*, 578 S.W.3d 469, 491-505 (Tex. 2019).
[48] *Id.*

is the base fee or lodestar.[49] The court may then adjust the base lodestar up or down if relevant factors indicate an adjustment is necessary to reach a reasonable fee in the case.[50] However, time estimates based on generalities are not sufficient to support a fee-shifting award.[51]

The fee claimant bears the burden of providing sufficient evidence on both hours worked and reasonable rate.[52] 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.[53]

Counsel for the prevailing party should make a good-faith effort to exclude from a fee request hours that are excessive, redundant, or otherwise unnecessary, just as a lawyer in private practice ethically is obligated to exclude such hours from his fee submission.[54] Additionally, charges for duplicative, excessive, or inadequately documented work should be excluded.[55] Hours not properly billed to

[49] *Id*.
[50] *Id*.
[51] *Id*.
[52] *Id*.
[53] *Id*.
[54] *Id*, citing *Hensley v. Eckerhart*, 461 U.S. 424, 434 (1983).
[55] *Id*, quoting *El Apple I, Ltd. v. Olivas*, 370 S.W.3d 757, 761 (Tex. 2012).

one's client are not properly billed to one's adversary.[56]

After multiplying a reasonable hourly rate by a reasonable amount of time expended, the trial court may reduce (or enhance) the sum based on other relevant considerations not considered in the first-step base calculation.[57]

At the November hearing, Rial and Toye submitted heavily redacted billing records and provided testimony regarding their fee request.[58] Rial and Toye sought an award of $282,953.80 and their attorney fee expert, Lemoine, proffered testified that he believed the requested amount was reasonable and necessary.[59] The billing records offered in support of this egregious fee failed to support their fee request and, in fact, included multiple examples of impermissible billing practices and time spent on unrelated matters.[60]

Rial and Toye's billing records contain multiple entries that are patently unnecessary, facially unreasonable, and required the trial court to reduce their requested fees.[61] Specifically, the billing statements contained block billing,[62] included entries for unnecessary tasks such as discussions with a NY bankruptcy

[56] *Id*, quoting *Hensley*, 461 U.S..
[57] *Id*.
[58] RR Vol. 5, Exhibit 7A.
[59] 4 RR 25:13-18 and 33:5-23.
[60] RR Vol. 5, Exhibit 7A, *supra*.
[61] RR Vol. 5, Exhibit 7A, *supra*.
[62] RR Vol. 4, pp. 46:7-22, 47:8-15, and 48:14-19.

attorney,[63] several hours of discussions regarding alleged death threats to Rial and Toye from unknown individuals,[64] unreasonably large time spent on discreet tasks such as billing over fifty (50) hours to prepare for a single deposition (that spent most of its time on issues not related to the TCPA),[65] duplicative and excessive attorney work,[66, 67] and billing time spent on opposition research not related to resolving a case under the TCPA.[68]

Specifically, as to the issue of block billing, Lemoine testified that the use of block billing precluded the trial court from accurately distinguishing the amount of time spent between tasks unrelated to defending this action and time spent defending this action.[69] Additionally, the billing records included multiple instances of duplicative, excessive, and unnecessary attorney work.[70, 71] Specifically, Rial and Toye attempted to recover 21.5 hours of entries that involve emailing and/or conferencing, often with counsel for the co-Defendants.[72] It is important to note that *each* of the Defendants sought fees for conferencing amongst one another.[73] To

[63] RR Vol. 4, p. 45:5-9, 15-22.
[64] 2nd Supp. CR, p. 509.
[65] RR Vol. 4, p 41:6-14.
[66] 2nd Supp. CR, pp. 511-512.
[67] RR Vol. 4, pp. 48L17, 49:4-50:11, 51:13-52.12, 61:3-25.
[68] RR Vol. 4, 52:14-53:8, 57:2-23.
[69] RR Vol. 4, pp. 46, Lines 13-22 and 47, Lines 10-14.
[70] 2nd Supp. CR, pp. 511-512.
[71] RR Vol. 4, pp. 48L17, 49:4-50:11, 51:13-52.12, 61:3-25.
[72] RR Vol. 5, Exhibit 7A.
[73] RR Vol. 5, Exhibits 7A, 7B, 7C.

the extent that each of the three separate legal teams needlessly duplicated tasks, their respective fees are subject to reduction.[74]

Contrary to Rial and Toye's assertion that Vic did not rebut their attorney fee request,[75] Vic properly brought these various deficiencies and improper entries to the trial court's attention both by written motion and objection,[76] and by cross examination at the November hearing.[77]

Additionally, the trial court properly considered the attorney's fee records of Rial and Toye's co-Defendants/Appellees, including the testimony and attorney's fee records of Marchi's expert attorney's fees witness, Samuel Johnson ("Johnson").[78] The trial court accepted Johnson as an expert on attorneys fees.[79] Contrary to Rial and Toye's assertion that ($282,953.80) was a reasonable and necessary attorney fee amount in this matter, Johnson testified that a reasonable and necessary attorney fee amount to defend Vic's allegations in this matter was only $48,137.50.[80]

The Honorable Judge Chupp expressly noted the similarities in duties,

[74] *El Apple I, Ltd., 370 S.W.3d at 762.*
[75] Rial and Toye brief, p. 61.
[76] 2nd.Supp. CR, pp. 504-519.
[77] RR Vol. 4, pp. 38:16-62:5.
[78] RR Vol. 4, p. 160:9-161:5.
[79] RR. Vol. 4, pp. 150-163.
[80] RR Vol. 4, p. 160:9-161:5.

challenges, and results obtained by Marchi, on the one hand, and Rial and Toye, on the other.[81] In fact, the trial court went so far as to expressly question Lemoine as to why Johnson, who was not a TCPA expert, was able to defend the same lawsuit, perform virtually the same tasks, and ultimately achieve the same result as Lemoine at less than a quarter of the cost.[82]

Furthermore, Rial and Toye made no objection to Johnson's expert witness testimony nor did they object to the attorney's fee records admitted as evidence by Marchi. It is also of critical importance to note that the trial court did not limit Johnson's testimony or attorney's fee records to any particular purpose or party.[83] Rial and Toye failed to object to Marchi's attorney's fee evidence and thus waived any argument that either Johnson's expert testimony or Marchi's offered and admitted attorney fee evidence was not relevant to reasonableness and necessity of their own fees.

After considering all of the evidence before it, including invoices, various expert witness testimony, objections, argument of counsel, and the applicable law, the trial court properly reduced Rial and Toye's fee request.

B. Rial and Toye failed to show how facing an allegedly "more complicated fact pattern" justifies their exponentially higher attorney's fee.

[81] RR Vol. 4, p. 149.
[82] RR Vol. 4, p. 149.

Rial and Toye describe this case as a "textbook 'Strategic Lawsuit Against Public Participation'" case.[84] Rial and Toye's attorney, Lemoine, described himself as a TCPA expert with extensive experience prosecuting TCPA claims through final hearing.[85]

Despite framing this as a textbook TCPA case and retaining an expert on TCPA cases, Rial and Toye amazingly try to argue that their fact pattern was so complicated when compared to their co-Defendants, that their attorney's fees request of over four (4) times that of Marchi's request is justified.[86] Despite Rial and Toye's assertion to the contrary, their case was no more complicated than that of either Marchi or Funimation. In fact, Vic asserted more causes of action against Funimation than he did against Rial and Toye.[87] Moreover, Vic asserted the same causes of action against Marchi as he did against Rial and Toye and the fact patters underlying the causes of action for the parties was similar as well.[88]

Specifically, Vic accused Marchi, Rial, and Toye of making public statements accusing Vic of sexual harassment, assault and misconduct which resulted in Vic

[84] Rial and Toye Opening and Response Brief (p. xii).
[85] RR. Vol. 4, pp. 10-37.
[86] Rial and Toye Opening and Response Brief, p. 58.
[87] 3rd Supp. CR pp 4-30.
[88] 3rd Supp. CR pp 4-30.

losing contracts with studios and conventions.[89] Despite being sued under the exact same causes of action as Marchi and the exact same fact patters as Marchi, Rial and Toye attempt to argue that their case involved a "more complicated fact pattern" which justifies their exorbitant attorney's fee request. The fact is, that despite their assertions to the contrary, Rial and Toye's case was no more complicated than that of Marchi or Funimation and thus, does not justify an attorney fee reward of over four (4) times the amount awarded to Marchi and/or Funimation.

Rial and Toye also allege that they did more work on the case, however it should not be lost on this Court that Rial and Toye's attorney's fee award was double that of Marchi and/or Funimation.[90] Amazingly, Rial and Toye suggest that the fact that they secured sixteen (16) additional affidavits and attended two (2) extra depositions was worth an additional $182,953.80 in attorney fees. At bottom, the trial court was correct when it stated that Johnson was able to defend the "exact same case and get the same result for $48,000."

C. Rial and Toye's Attorney's Fee Evidence Does Not Mandate an Award of the Amount Claimed.

Rial and Toye argue that their attorney's fee evidence establishes their right

[89] 3rd Supp. CR pp 4-30.
[90] RR Vol. 4, Exhibits 7A, 7B, & 7C.

to recover $282,953.80 as a matter of law.[91] In addition, Rial and Toye incorrectly argue that Vic offered no evidence to rebut their expert testimony claiming an attorney's fee award of $282,953.80.[92]

This Court's recent opinion in *McGibney* specifically requires the trial court to reduce fees where the offered billing statements fails to establish fees as reasonable and necessary, even in the absence of controverting testimony.[93] In *McGibney*, this Court reversed a trial court's order awarding the full amount of attorney's fees sought by a prevailing TCPA movant.[94] There, the appellant objected at trial to the prevailing TCPA movant's billing records on the grounds that they demonstrated an overarching practice of heavily-redacted entries, entries with dubious relevance to the lawsuit, charges that "went well beyond the depth of research and preparation ordinarily expended in the early stages of a lawsuit," and charges that were "obviously not for the benefit of the client but for the attorney himself."[95] This Court noted that the billing entries were so heavily redacted as to be meaningless and prevented a meaningful review and included bills for "oppo research" into opposing counsel's attorney and social media "attacks."[96] This Court

[91] Rial and Toye brief, p. 56.
[92] Rial and Toye brief, p. 56.
[93] *McGibney*, 549 S.W.3d at 821-27.
[94] *Id*.
[95] *Id*.
[96] *Id*.

also found that the attorney performed research prematurely that was unnecessary for a case that did not move beyond the TCPA dismissal stage.[97] The attorney fees sought in *McGibney* amassed to $66,955.50, representing 144.30 hours.[98]

The appellee in *McGibney* specifically argued that the trial court was required to award all fees sought based on the fact that the appellant did not file a controverting affidavit, the exact argument presented by Rial and Toye in this case.[99] This Court found "while an unchallenged 18.001 affidavit provides legally sufficient evidence at trial to support a finding that the amount charged was reasonable, the affidavit does not constitute conclusive proof.[100] In applying this rule specifically to an attorney's fees award under TCPA, this court stated, "This rule does not change in the context of [TCPA] hearings."[101] The trial court, as factfinder, must determine whether the amount sought is "not excessive or extreme, but rather moderate or fair."[102] The trial court is required to do more than simply act as a rubber stamp and cannot accept carte blanche the amount appearing on a bill.[103]

Applying the ruling in *McGibney* to the facts in this case, the trial court would

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[97] *Id*.
[98] *Id*.
[99] *Id*.; Rial and Toye brief, pp. 56-57.
[100] *Id*, citing *Hong v. Bennett*, 209 S.W.3d 795, 800 (Tex. App.—Fort Worth 2006, no pet.)
[101] *Id*.
[102] *Id*.
[103] *Id*, citing *Sullivan v. Abraham*, 488 S.W.3d 294, 299 (Tex. 2016).

have committed reversible error by awarding Rial and Toye the entirety of their fees sought. Vic objected and directed the court's attention to the deficiencies in Rial and Toye's billing records.[104]

First, the testimony offered by Rial and Toye to support their attorney's fee award was testimony from their attorney and his accompanying billing statements.[105] It is the general rule that the testimony of an interested witness, such as a party to the suit, though not contradicted, does no more than raise a fact issue to be determined by the jury.[106] But there is an exception to this rule, which is where the testimony of an interested witness is not contradicted by any other witness, or attendant circumstances, and the same is clear, direct and positive, and free from contradiction, inaccuracies, and circumstances tending to cast suspicion thereon, it is taken as true, as a matter of law.[107]

The Texas Supreme Court, in *Ragsdale*, while awarding attorney's fees in that case as a matter of law, specifically stated:

> "While the present case fits the exception to the general rule, **we do not mean to imply that in every case when uncontradicted testimony is offered it mandates an award of the amount claimed.** For example, even though the evidence might be uncontradicted, if it is unreasonable, incredible, or its belief is questionable, then such evidence would only

[104] 2nd.Supp. CR, pp. 504-519; RR Vol. 4, pp. 38:16-62:5.
[105] *Ragsdale v. Progressive Voters League*, 801 S.W.2d 880, 882 (Tex. 1990).
[106] *Id*..
[107] *Id*.

> raise a fact issue to be determined by the trier of fact. In order for the court to award an amount of attorneys' fees as a matter of law, the evidence from an interested witness must not be contradicted by any other witness or attendant circumstances and the same must be clear, direct and positive, and free from contradiction, inaccuracies and circumstances tending to case suspicion thereon."[108]

Rial and Toye's attorney's fees testimony did not permit the trial court to award that amount as a matter of law. First, the time entries are, at best, questionable in their belief, and at worst facially unreasonable. For example, Rial and Toye attempt to justify spending over fifty (50) hours for deposition preparation (for a deposition that spent most of the time on evidence unrelated to the TCPA).[109] Although preparing for a total of three depositions may take time, Rial testified that the only preparation she and Toye did with their attorney for their respective depositions was speaking with an attorney on the phone briefly.[110] If counsel only prepped for the Rial and Toye depositions for a total of two (2) hours, then that means counsel expects this court to agree that over forty-eight (48) hours of alleged preparation for just one deposition, is a reasonable amount of time.

Rial and Toye's billing statements demonstrate a complete disregard to billing judgment.[111] Billing judgment requires documentation of the hours charged and of

[108] *Id*.
[109] RR Vol. 4, p 41:6-14.
[110] CR Vol. 4, pp. 1727:13-1728:5.
[111] *See Hensley*, 461 U.S. at 437.

the hours written off as unproductive, excessive, or redundant.[112] The proper remedy for omitting evidence of billing judgment does not include denial of fees, but, rather, a reduction of the award.[113]

Rial and Toye's billing records include time entries that are excessive, duplicative, or inadequately documented, which were properly reduced by the trial court. As in *McGibney*, this Court is presented with attorney fee evidence that is rife with time entries that either lack sufficient information to permit the trial court to conduct its necessary review or affirmatively demonstrate the fees sought to be unreasonable and/or unnecessary.[114, 115]

Additionally, Rial and Toye are not entitled to fees that did not advance their prosecution of the case.[116] In *Estate of Stokes*, the Fort Worth Court of Appeals considered a Defendant physician's award of attorney's fees, which were reduced from over $100,000 to $44,335 following a three day bench trial, in light of the fact that the physician pursued discovery on the merits of his case rather than diligently pursuing dismissal pursuant to the Texas Medical Liability Act.[117] More specifically,

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[112] *Saizan v. Delta Concrete Products Co., Inc.*, 448 F.3d 795, 798 (5th Cir. 2006).
[113] *Id*.
[114] RR Vol. 5, Exhibit 7A, *supra*.
[115] *McGibney*, 549 S.W.3d at 821-27.
[116] *Estate of Stokes*, 2019 WL 4048863 at 1 (Tex. App.—Fort Worth Aug. 28, 2019, no pet. h.)(citing *Rohrmoos Venture v. UTSW DVA Healthcare, LLP*, 578 S.W.3d 469 (Tex. 2019)).
[117] *Id.*

Estate of Stokes, confirms the rule that unnecessary attorney's fees—those which do not further the party's case—are not reasonable or necessary and thus should not be included as part of the lodestar calculation.[118]

Rial and Toye are mistaken in their argument that the trial court cannot reduce their fees under the lodestar analysis, absent a controverting expert.[119] Contrary to the facts in *Ragsdale*, Vic clearly brought the trial court's attention to the deficiencies in Rial and Toye's billing records via his Response and Objections to Rial and Toye's Brief in Support of Sanctions and Attorney's Fees[120] and via his cross-examination of Lemoine.[121]

Rial and Toye, defending their attorney's decision to include "block billing," argue the *Barrow* case is inapplicable.[122] In *Barrow*, the Northern District of Texas examined attorney fee billing statements and held that, in some circumstances of block billing, the information provided may be insufficient to enable the trial court to determine if the time and rate were reasonable and necessary.[123] Here, Rial and

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[118] *Id.*
[119] See *Ragsdale*; See also *Ihnfeldt v. Reagan*, 02-14-00220-CV, 2016 WL 7010922, at *16 (Tex. App.—Fort Worth Dec. 1, 2016, pet. denied)("Although the Ihnfeldts complained the fees were unnecessary, they produced no evidence calling into doubt any of them and made no effort on cross-examination to question any portion of the fees.").
[120] 2nd.Supp. CR, pp. 504-519.
[121] RR Vol. 4, pp. 38:16-62:5.
[122] Rial and Toye Brief p. 60-61.
[123] *Barrow v. Greenville Indep. Sch. Dist*., 3:00-CV-0913-D, 2005 WL 6789456 (N.D. Tex. Dec. 20, 2005), aff'd, 06-10123, 2007 WL 3085028 (5th Cir. Oct. 23, 2007).

Toye's block billing practice is replete throughout their billing statements and their own expert testified that, due to block billing, there were instances where the trial court could not properly distinguish between time spent furthering the case and time spent that was not in furtherance of the case.[124] Accordingly, the trial court had no choice but to reduce a portion of the award due to the improper block billing entries.[125]

D. Marchi's Attorney Fee Expert Controverted Rial and Toye's Assertion That $282,953.80 Was A Reasonable and Necessary Fee To Defend This Matter.

Additionally, the trial court properly considered the attorney's fee records of Rial and Toye's co-Defendants/Appellees, specifically the testimony and attorney's fee records of Marchi's expert attorney's fees witness, Johnson. The trial court accepted Johnson as an expert on attorney's fees without limitation or objection.[126] Additionally, the trial court admitted Marchi's attorney fee billing statements without limitation or objection.[127] Contrary to Rial and Toye's assertion that ($282,953.80) was a reasonable and necessary attorney fee amount in this matter, Johnson testified that a reasonable and necessary attorney fee amount to defend Vic's allegations in this matter was only $48,137.50.[128]

[124] RR Vol. 4 p. 45 line 5 through p 47 line 15.
[125] *Id*.
[126] RR Vol. 4, p. 160:9-161:5.
[127] RR Vol. 5, Exhibit 7C.
[128] RR Vol. 4, p. 160:9-161:5.

The Honorable Judge Chupp expressly noted the similarities in duties, challenges, and results obtained by Marchi, on the one hand, and Rial and Toye, on the other.[129] In fact, the trial court went so far as to expressly question Lemoine as to why Johnson, who was not a TCPA expert, was able to defend the same lawsuit, perform virtually the same tasks, and ultimately achieve the same result as Lemoine at less than a quarter of the cost.[130]

It is of critical importance to note that the trial court did not limit Johnson's testimony or attorney's fee records to any particular purpose or party. Rial and Toye failed to object to Marchi's attorney's fee evidence and thus waived any argument that either Johnson's expert testimony or Marchi's offered and admitted attorney fee evidence was not relevant to reasonableness and necessity of their own fees.

CONCLUSION AND PRAYER

WHEREFORE, Cross-appellee Victor Mignogna respectfully pray, subject to his appeal of the trial court's order granting Rial and Toye's TCPA motion, that this Court will overrule Cross-appellants Rial and Toye's point of error and affirm the trial court's judgment with respect to its determination as to the reasonableness and necessity of Rial and Toye's attorney fees evidence.

[129] 4 RR 189: 4-20.
[130] *Id.*

Respectfully submitted,
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By: */s/ Ty Beard*

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Certificate of Compliance

This document complies with the form requirements of Texas Rule of Appellate Procedure 9.4 and contains 5,501 words (except for those items excluded by Rule 9.4(h)(1)).

Dated: June 19, 2020 *_/s/ Ty Beard_*

Attorney Certifying

Certificate of Service

The undersigned certifies that, on this day, a copy of the foregoing and the Appendix attached hereto was served in accordance with Texas Rules of Appellate Procedure 6.3 and 9.5, electronically via efile.txcourts.gov to:

(a) Appellee Funimation Productions, LLC, by and through counsel of record, John Volney and Christian Orozco of LYNN PINKER COX & HURST, LLP;

(b) Appellee Jamie Marchi, by and through counsel of record Samuel Johnson of JOHNSON & SPARKS, PLLC; and

(c) Appellees Monica Rial and Ronald Toye, by and through counsel of record Sean Lemoine of WICK PHILLIPS GOULD & MARTIN, LLP, Casey Erick of COWLES & THOMPSON, P.C., and Andrea Perez of CARRINGTON, COLEMAN, SLOMAN & BLUMENTHAL, LLP.

Dated: June 19, 2020

/s/ *Ty Beard*

Attorney Certifying