ORAL ARGUMENT REQUESTED

NO. 02-19-00394-CV

IN THE COURT OF APPEALS
FOR THE SECOND APPELLATE DISTRICT OF TEXAS AT FORT WORTH

VICTOR MIGNOGNA
Appellant/Cross-Appellee

v.

FUNIMATION PRODUCTIONS, LLC, JAMIE MARCHI, MONICA RIAL, AND RONALD TOYE
Appellees/Cross-Appellants

FROM 141ST DISTRICT COURT
TARRANT COUNTY, TEXAS
CAUSE NO. 141-307474-19

CROSS-APPELLANTS' MONICA RIAL AND RONALD TOYE'S REPLY BRIEF

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SUMMARY OF REPLY

The trial court acted arbitrarily and abused its discretion in awarding Rial and Toye an amount of attorneys' fees ($100,000.00) lower than the amount proven by competent evidence ($282,953.80). Evidence of attorneys' fees that is clear, direct, and uncontroverted is taken as true ***as a matter of law***, especially where the opposing party had the means and opportunity of disproving the evidence but failed to do so. In such instances, appellate courts will "reverse a denial or minimization of attorney's fees and render judgment . . . in the amount proved." *Hoelscher v. Kilman*, No. 03-04-00440-CV, 2006 WL 358238, at *4 (Tex. App.—Austin Feb. 16, 2006, no pet.) (citing *Ragsdale v. Progressive Voters League*, 801 S.W.2d 880, 882 (Tex. 1990), which reversed a $150.00 attorneys' fees award and rendered a $22,500.00 award).

In this case, Rial and Toye proved their entitlement to the full amount of fees by submitting both affidavits and expert testimony. They performed the appropriate lodestar analysis, considered the *Arthur Andersen* factors, and then applied *Rohrmoos* billing discretion reductions. Rial and Toye also provided their full, unredacted billing records for in camera inspection, as well as a summary chart to show the calculations and reductions. There was ample evidence to allow the Court and Mignogna to disprove Rial and Toye's calculations or perform their own. They chose not to. Mignogna did not provide any controverting evidence as to reasonable hourly rates, reasonable and necessary expenditures of time, and did not provide the

trial court with a competing lodestar analysis—despite having three weeks to prepare and present such a challenge. Neither the trial court nor Mignogna offered any analysis at all to support a lower award; therefore, the trial court abused its discretion in failing to award the full amount requested and proven by Rial and Toye.

Texas statutes and case law are clear: "[t]o challenge the reasonableness of the amount charged after a proper . . . affidavit has been filed, the opponent ***must*** file and serve a controverting affidavit" or offer contradictory expert testimony. *McGibney v. Rauhauser*, 549 S.W.3d 816, 826 (Tex. App.—Fort Worth 2018, pet. denied) (emphasis added). Although Mignogna had many opportunities to challenge Rial and Toye's fees through proper evidence, he failed to do so. Even during Mignogna's cross-examination of Rial and Toye's fees expert, he never introduced any evidence or undermined the testimony that the hourly rate, time spent, and lodestar analysis were reasonable and necessary.

Now, for the first time on appeal, Mignogna realizes that an expert on fees is ***required***, so his Response tries to argue that this Court should adopt Appellee Jamie Marchi's fees expert, Sam Johnson, as *Mignogna's expert*. Specifically, he argues that because Johnson testified that $48,137.50 was reasonable and necessary for Marchi, that amount was reasonable and necessary for both Rial and Toye. Response, p. 12. This argument is facially absurd. Mignogna never disclosed, proffered, or adopted Johnson as an expert below, and Johnson specifically testified

that he never reviewed Rial and Toye's bills and could not offer an opinion on their fees. Johnson did, however, testify that Rial and Toye's fees were understandably higher because Rial and Toye's counsel had twice the number of clients, faced more factual allegations, and conducted significantly more discovery. 4 RR 172:14-20. In other words, Johnson's testimony actually supports Rial and Toye's position that they are entitled to a higher fee award.

Based on the record, the trial court could have reached only one decision and failed to do so. Accordingly, Rial and Toye respectfully request that this Court reverse and render an award of $282,953.80 in trial fees and $55,000 in appellate fees.

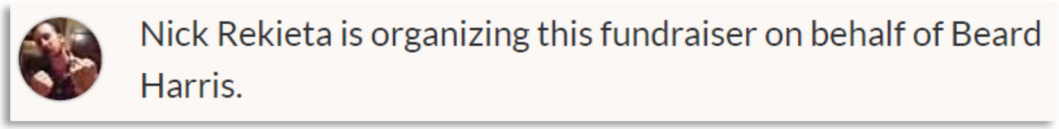
BRIEF FACTUAL REPLY

A. Mignogna's litigation tactics forced Rial and Toye to respond to excessive pleadings and discovery abuses during the litigation, demonstrating that not all defendants faced the same claims and allegations.

Rial and Toye will not recount for the Court the entire frustrating history of Mignogna's gamesmanship and dilatory tactics aimed specifically at Rial and Toye. A simple review of the six-volume clerk's record and four-volume supplemental clerk's record reveals the contentious and costly nature of the underlying case below—driven by Mignogna and his online fundraising campaign against Rial and Toye. The record is replete with Mignogna's combative and wasteful litigation tactics, which included extensive depositions, filing numerous correspondence with the trial court, reneging on agreements made with Rial and Toye's counsel, and late-

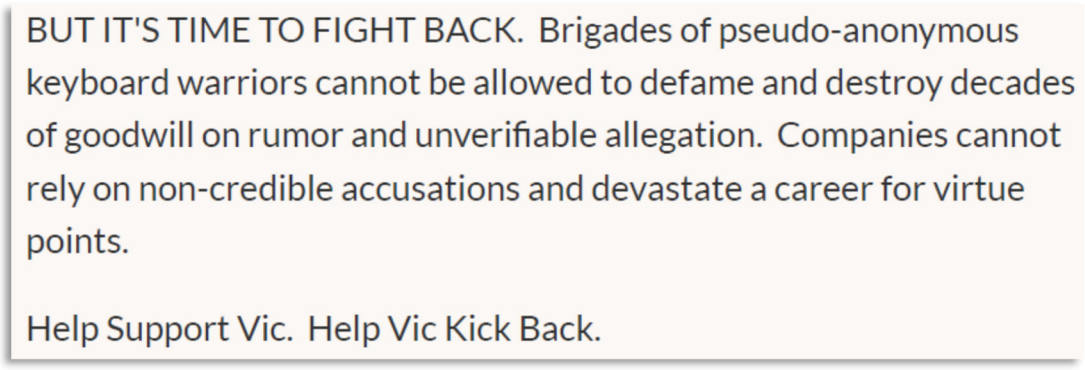
filed improper pleadings that led to necessary motion practice. *See, e.g.*, 2 CR 772-92; 5 CR 2467-95; 6 CR 2931, 3000, 3003; 4 Supp. CR 322.

Mignogna's counsel took full advantage of the GoFundMe campaign that raised funds for his lawsuit to drive up the costs and fees in this case ("GFM War Chest"). 2 Supp. CR 267-69; 2 CR 434-35 (Mignogna Depo. at 32:23-34:13, 36:9-20). In fact, the GFM War Chest was raised on behalf of Mignogna's trial counsel, Beard Harris:



2 Supp. CR 267.

The GFM War Chest raised $257,170 as of October 16, 2019. *See* 2 Supp. CR 268, 269; *see also* 4 RR 43:6-8 (identifying $261,700 on November 21, 2019—the date of the fee hearing). The goal was clear—outspend the defendants and retaliate against them:



2 Supp. CR 269.

Mignogna's entire strategy was to unleash a torrent of internet abuse coupled with litigation to retaliate against Appellees. 2 CR 622-623. Mignogna deliberately set out to file a frivolous, harassing lawsuit to silence Appellees' speech and then raised money to pay for abusive litigation tactics that caused reasonable and necessary expenditures from Defendants. Mignogna's strategy here succeeded—the scorched-earth tactics forced Rial and Toye to incur the time and expense reflected in their billing invoices.

B. The trial court granted the Anti-SLAPP Motion but awarded reduced fees without identifying a basis for doing so.

After granting Appellees' Anti-SLAPP Motions, the trial court ordered them to submit evidence of their attorneys' fees, costs, expenses, and sanctions within 30 days of entry of the Dismissal Order. 6 CR 3228. Rial and Toye filed their motion for fees and sanctions on November 4, 2019, attaching nearly 300 pages of evidence in support, including three affidavits and dozens of billing invoices. 2 Supp. CR 129-409. Mignogna submitted a brief in opposition, but did not offer any countervailing evidence of his own. 2 Supp. CR 504-519.

On November 21, 2019, the trial court conducted an evidentiary hearing during which Rial and Toye's counsel testified as to reasonable and necessary attorneys' fees (including offsets) totaling $282,953.80. *See* 4 RR 25:13-18; *see also* 5 RR 112-13 (Ex. 7A). As part of that testimony, Rial and Toye introduced a spreadsheet summarizing their billing entries and identifying the amount of time and

fees reduced so that Mignogna and the trial court could examine the precise calculation at a granular level. *See* 5 RR 112-13 (Ex. 7A).

Despite having seventeen (17) days to prepare, Mignogna failed to offer any expert testimony, did not provide any alternative reasonable hourly rate or amount of time that would go into an alternative lodestar analysis, or reduce his cross-examination into a competing spreadsheet for the trial court's review. *See* 2 CR 534-47 and 4 RR 4-5 (showing that Mignogna did not call any witnesses or present any evidence to contradict Rial and Toye's fee calculation at the hearing); *see also Rosas v. Bursey*, 724 S.W.2d 402, 411 (Tex. App.—Fort Worth 1986, no writ) (stating that although witness "was cross-examined by appellants' attorney, appellants offered no evidence that the attorneys' fees were unreasonable. After reviewing the record, we hold that the award of attorneys' fees was not unreasonable.")

The trial court entered its Final Judgment on November 25, 2019, awarding attorneys' fees and sanctions to Rial and Toye. 1 Supp. CR 5-7. However, the trial court arbitrarily awarded the same amount of fees ($50,000.00) to each of Rial, Toye, Marchi, and Funimation without accounting for the differences in time and labor expended or identifying the evidence on which its opinion was based. 1 Supp. CR 5-7. The trial court also did not respond to Rial and Toye's Request for Findings of Fact and Conclusions of Law on the fee issue (4 Supp. CR 408-09), or their Notice of Past Due Findings and Conclusions (4 Supp. CR 418-19).

The fees requested and proven by Rial and Toye—and which should be rendered by this Court—are broken down as follows:

Attorneys' fees incurred by Wick Phillips and various co-counsel through October (after applying $30,686.45 in reductions)	$271,923.80
Estimated fees incurred through the November 21 hearing on attorneys' fees and sanctions	$11,250.00
Conditional Appellate Fees for Briefing to the Court of Appeals	$55,000.00
Total	**$337,963.04** • **$282,953.80 at trial** • **$55,000.00 in appellate fees**

4 RR 25:13-18 and 5 RR 112-113 (Ex. 7A).

ARGUMENT AND AUTHORITIES

Appellate courts apply an abuse of discretion standard when reviewing a trial court's award of attorneys' fees under the TCPA. *Sullivan v. Abraham*, 488 S.W.3d 294, 299 (Tex. 2016). A trial court does not abuse its discretion merely because the appellate court would have ruled differently. *See E.I. du Pont de Nemours & Co., Inc. v. Robinson*, 923 S.W.2d 549, 558 (Tex. 1995); *see also Low v. Henry*, 221 S.W.3d 609, 620 (Tex. 2007). Rather, "the appropriate inquiry is whether the [trial] court acted ***without reference to any guiding rules or principles***, that is, whether the court's act was arbitrary or unreasonable." *McGibney*, 549 S.W.3d at 820 (citing *Low*, 221 S.W.3d at 614; *Cire v. Cummings*, 134 S.W.3d 835, 838–39 (Tex. 2004)) (emphasis added).

The trial court in this case abused its discretion by failing to award fees consistent with the uncontroverted evidence presented and arbitrarily awarding each moving party the same $50,000 in fees without accounting for the obvious differences in allegations, defenses, and work performed by each underlying defendant. Accordingly, rendering judgment for the full amount of $282,953.80 in trial fees plus $55,000 in appellate fees is appropriate. *Hoelscher*, 2006 WL 358238, at *4; *Propel Fin. Services, LLC for Propel Funding Nat'l 1, LLC v. Perez*, No. 01-17-00682-CV, 2018 WL 3580935, at *5-6 (Tex. App.—Houston [1st Dist.] July 26, 2018, no pet.).

A. Rial and Toye's evidence of attorneys' fees was supported by uncontroverted expert testimony that was clear, direct, and free from contradiction, which entitles them to their full fee award of $282,953.80.

Texas law is clear that uncontroverted testimony establishes reasonable and necessary attorneys' fees "as matter of law, ***thus authorizing rendition by the appellate court***, . . . if the following conditions exist: (1) the testimony could readily be contradicted if untrue; (2) the testimony is clear, direct, and positive; and (3) there are no circumstances that tend to discredit or impeach the testimony." *See Rosenblatt v. Freedom Life Ins. Co. of Am.*, 240 S.W.3d 315 (Tex. App.—Houston [1st Dist.] 2007, no pet.) (emphasis added); *see also Spivey v. Goodwin*, No. 10-16-00178-CV, 2017 WL 2507841, at *5 (Tex. App.—Waco June 7, 2017, no pet.) (mem. op.) (noting that none of the attorneys' fees evidence (invoices plus attorney testimony)

was contradicted or controverted, and that the trial court abused its discretion in failing to award such fees, ultimately reforming the judgment to add the fees).

"[W]here 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***." *Ragsdale*, 801 S.W.2d at 882 (holding uncontroverted testimony of attorneys' fees conclusively established right to recover fees as a matter of law and trial court abused its discretion by awarding only $150 in fees) (emphasis added); *Hoelscher*, 2006 WL 358238, at *4.

In such instances, appellate courts must reverse a trial court's denial or even minimization of fees and "***render judgment*** for attorney's fees in the amount proved." *Hoelscher*, 2006 WL 358238, at *4 (emphasis added); *AMX Enterprises, L.L.P. v. Master Realty Corp.*, 283 S.W.3d 506, 519–20 (Tex. App.—Fort Worth 2009, no pet.).

Those conditions are met here. The only evidence before the trial court on Rial and Toye's fees were the affidavits and testimony of J. Sean Lemoine ("Lemoine"), Casey Erick ("Erick"), and Andrea Perez ("Perez"), which established as a matter of law Rial and Toye's entitlement to $282,953.80 in fees. 4 RR 10-65; 5 RR 96-113.

i. Rial and Toye's attorneys' fees evidence followed the requirements outlined by **Arthur Andersen** *and* **Rohrmoos.**

With regard to the factors set out in *Arthur Andersen* and *Rohrmoos*, Lemoine's, Erick's, and Perez's affidavits, time records, and testimony recited the time and labor required to represent Rial and Toye, the fee customarily charged in Tarrant County for similar legal services, the amounts involved, their experience and ability, and the reasonableness and necessity of the fees charged. 2 Supp. CR 277-407 (affidavits of Lemoine, Erick, and Perez, including their billing invoices); 5 RR 112-113 (Chart of fees incurred - Ex. 7A); 4 RR 14:11-25 (discussing *Rohrmoos* factors), 4 RR 15:20-16:25 (discussing reasonable rates in Tarrant County); 4 RR 17:2-18 (discussing lodestar); *see Arthur Andersen & Co. v. Perry Equip. Corp*., 945 S.W.2d 812, 818 (Tex. 1997);[1] *Rohrmoos Venture v. UTSW DVA Healthcare, LLP*, 578 S.W.3d 469, 491 (Tex. 2019).

The affidavits and testimony also established the lodestar calculation. Lemoine testified specifically that, "once I determine this is the reasonable hourly

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[1] Factors that factfinder should consider when determining reasonableness of fee include: (1) time and labor required, novelty and difficulty of questions involved, and skill required to perform legal service properly; (2) likelihood that acceptance of particular employment will preclude other employment by lawyer; (3) fee customarily charged in locality for similar legal services; (4) amount involved and results obtained; (5) time limitations imposed by client or by circumstances; (6) nature and length of professional relationship with client; (7) experience, reputation, and ability of lawyer or lawyers performing services; and (8) whether fee is fixed or contingent on results obtained or uncertainty of collection before legal services have been rendered. Tex. Disciplinary Rules Prof'l Conduct R. 1.04, *reprinted in* Tex. Gov't Code, tit. 2, subtit. G, app. A (State Bar R. art. X, § 9).

rate, we'll take my rate, 515 an hour, and then how many hours should I have spent on a particular case or a particular activity, and then you multiply that out, and you do that for each timekeeper." 4 RR 17:7-13. Completing the lodestar analysis creates a presumption that the fee amount is reasonable. *Rohrmoos*, 578 S.W.3d at 501 (stating that, "the base lodestar figure is ***presumed to represent reasonable and necessary attorney's fees***, but other considerations may justify an enhancement or reduction to the base lodestar . . . .") (emphasis added). Mignogna offered nothing to rebut that presumption.

After establishing a lodestar calculation, Lemoine went a step further and testified that, "under *Rohrmoos* you have to take an extra step, and the extra step is called billing discretion or billing judgment. Prior to *Rohrmoos*, that was not a requirement." 4 RR 17:14-18. Lemoine then applied those reductions here. After walking the trial court through the analysis of factors to consider and performing a lodestar calculation, Lemoine testified that he "looked at the billing records, and based on the billing records, I did certain deductions to satisfy the billing discretion analysis[.]" 4 RR 19:22-25 and 4 RR 20:9-13 (testifying that, "I did that calculation on an Excel spreadsheet, tracked it, identified it by timekeeper. And so if you look at that Exhibit B to my affidavit, you can see the exact reductions that I made to meet the *Rohrmoos* billing discretion analysis."). 2 Supp. CR 322-323 (Ex. B to Declaration of J. Sean Lemoine); 5 RR 112-113 (showing $30,686.45 in reductions in Ex. 7A).

Based on the properly admitted exhibits to Lemoine's expert testimony, including the affidavits of Lemoine, Erick, and Perez, the reasonable and necessary fees incurred and proven by Rial and Toye amounted to $282,953.80. *See* 4 RR 25:16-18; *see also* 5 RR 96-113. In contrast, Mignogna called no witnesses of his own, submitted no affidavits, and limited his cross-examination of Lemoine to six (6) time entries, which totaled only $8,935.50. *Compare* 4 RR 44:6-45:11; 4 RR 47:23-48:19; 4 RR 50:12-51:12; 4 RR 54:5-56:2; 4 RR 58:22-59:9 (cross examination) *with* 2 Supp. CR 286-320 (billing invoices).[2]

ii. Block billing is permitted in Texas state courts and Rial and Toye's billing statements allowed a meaningful review.

Mignogna's Response asserts that "block billing" is not allowed under Texas law and, in support, cites *Rohrmoos* and *Barrow v. Greenville Indep. Sch. Dist.*, No. 3:00-CV-0913-D, 2005 WL 6789456 (N.D. Tex. Dec. 20, 2005), aff'd, No. 06-10123, 2007 WL 3085028 (5th Cir. Oct. 23, 2007). Response, pp. 21-22.

Not only does *Rohrmoos* not reference "block billing" at all, but the Houston Court of Appeals expressly rejected the assertion that Texas law prohibits block billing. *See State Farm Lloyds v. Hanson*, 500 S.W.3d 84, 100 (Tex. App.—Houston

[2] Mignogna's counsel did argue on cross-examination that spending "60 hours" preparing for Mignogna's 6-hour deposition was unreasonable. However, he offered no evidence or testimony to undermine Lemoine's testimony that the time spent preparing for depositions was reasonable and necessary, "especially when you get a shot at a plaintiff in a defamation case and he goes first. That's a kill shot opportunity." 4 RR 41:6-19.

[14th Dist.] 2016, pet. denied) ("State Farm argues that *El Apple* requires assigning a particular number of minutes to each individual task. We cannot agree that such level of detail is required to be able to meaningfully review a fee award."); *see also John Moore Services, Inc. v. Better Bus. Bureau of Metro. Hous. Inc.*, No. 01-14-00906-CV, 2016 WL 3162206, at *7 (Tex. App.—Houston [1st Dist.] June 2, 2016, no pet.) (concluding that "block-billing technique" is permissible where the entries "describe the work that was done, specify the date the work was done, provide the total amount of time spent accomplishing the tasks, and identify the person who did the work."). Rial and Toye's bills met that criteria and were sufficient to permit the trial court and Mignogna to perform a meaningful review.

Mignogna's Response next argues that, "Rial and Toye submitted heavily redacted billing records and provided testimony regarding their fee request." Response, p. 10. He goes on to suggest that the bills "were so heavily redacted as to be meaningless and prevented a meaningful review." Response, p. 19. Again, Mignogna mischaracterizes the appellate record. Not only were the bills not unreasonably redacted, but Rial and Toye's counsel ***specifically tendered the unredacted billing entries*** for in camera inspection, which cures that issue. 4 RR 173:22-174:6.

iii. Rial and Toye applied appropriate reductions to account for duplicative entries, inefficiencies, or block billing.

Mignogna argues that, "[c]ounsel 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." Response, p. 9. ***That is exactly what Rial and Toye did in this case***. They not only submitted affidavits and billing records (and tendered unredacted invoices to the trial court at the hearing), but they also introduced a chart identifying the reductions they applied. 5 RR 112-113 (chart); 2 Supp. CR 277-407 (affidavits of Lemoine, Erick, and Perez, including their billing invoices); 2 Supp. CR 324-325 (Ex. B. to Lemoine Affidavit). Rial and Toye's expert also testified about the reasonableness and necessity of the fees incurred. 4 RR 25:16-18; 5 RR 96-113.

A review of the chart introduced at the November 21 hearing shows the incoherence of Mignogna's argument by specifically identifying the reductions applied by Rial and Toye:

March-April 2019	24% reduction
May-July 2019	9% reduction
June 2019	9% reduction
July 2019	6% reduction
August 2019	9% reduction
September 2019	13% reduction
October 2019	18% reduction

5 RR 112-113. Rial and Toye reduced their bills by $30,686.45—demonstrating significant billing discretion and appropriate offsets in this case.

Instead of performing any analysis or calculation of fees, the trial court arbitrarily awarded a flat $50,000 to each defendant untied to any guiding principle or legal analysis. The trial court offered no indication that its reduction of fees was based on block billing, redacted billing statements, specific line items, or any other rationale. 2 Supp. CR 548-552. Accordingly, Rial and Toye's evidence was uncontroverted and permits this Court to render an award of fees as a matter of law.

iv. Rial and Toye's fees were incurred as a direct result of Mignogna's conduct during the litigation.

Despite having no evidence to suggest that Rial and Toye's fees were excessive, unreasonable, or unnecessary, Mignogna now contends in his Response that Rial and Toye's fees were "exponentially higher" than the other Defendants' fees. Response, p. 13. However, those fees were incurred as a direct result of Mignogna's abusive conduct directed at Rial and Toye. *Flint & Associates v. Intercontinental Pipe & Steel, Inc.*, 739 S.W.2d 622, 626 (Tex. App.—Dallas 1987, writ denied). In *Flint*, the attorneys' fees awarded were nearly seven times actual damages recovered, but the court held the award was not excessive because the opposing party transformed the case from a simple sworn account claim to a four-week DTPA trial. *Id*. Courts must take into consideration entire nature of case and the conduct of the Parties. *Id*.

In this case, Mignogna and his counsel employed a scorched-earth tactic by serving dozens of discovery requests (3 Supp. CR 24-30), taking depositions of both Rial (2 CR 772-792) and Toye (2 CR 800-828), withdrawing notices and filing last-minute pleadings, missing deadlines and filing for leave, seeking continuances and delays of hearings, and unleashing a barrage of online abuse to influence the lawsuit. *See* 2 Supp. CR 267-69; 4 Supp. CR 85-86; 5 CR 2467-95; 6 CR 2931; 3000-13; *see also* 3 RR 14:15-15:17, 41:11-14. Accordingly, Rial and Toye's fees were reasonable and necessary under the circumstances.

B. Mignogna's failure to introduce contravening evidence is fatal to his opposition to overturning Rial and Toye's fee award.

i. Mignogna failed to offer any affidavit or witness testimony to contradict Rial and Toye's attorneys' fees evidence.

Mignogna's Response contends that, "[c]ontrary to Rial and Toye's assertion that [Mignogna] did not rebut their attorney fee request, [Mignogna] properly brought these various deficiencies and improper entries to the trial court's attention both by written motion and objection, and by cross examination at the November hearing." Response, p. 12. The appellate record proves otherwise.

First of all, Mignogna's "written motion and objection" in the trial court could have, but failed to, attach a controverting affidavit opining on the *Arthur Andersen* and *Rohrmoos* factors or offering a countervailing lodestar analysis. 2 Supp. CR 504-519; *Interest of D.Z.*, 583 S.W.3d 284, 296 (Tex. App.—Houston [14th Dist.] 2019,

no pet.) (failure to testify or offer affidavit or billing record into evidence is legally insufficient to uphold fee award); *Day v. Fed'n of State Med. Boards of the U.S., Inc.,* 579 S.W.3d 810, 827–28 (Tex. App.—San Antonio 2019, pet. denied). ***Mignogna offered no expert, no affidavit, and no witness testimony to oppose Rial and Toye's fees***, which is fatal to his position. 2 Supp. CR 504-519; 4 RR 38-66.

In contrast, Rial and Toye's evidence—billing records, charts, affidavits, and testimony—was all provided to Mignogna and his counsel. 2 Supp. CR 129-409. Mignogna had ample time to prepare an expert, introduce evidence, and perform an independent lodestar analysis to contradict Rial and Toye's fee calculations. They chose not to. 2 Supp. CR 504-519; 4 RR 38-66.

Rial and Toye's evidence was uncontroverted, and their affidavits and testimony were clear, direct, positive, and free from inconsistency. *See Ragsdale*, 801 S.W.2d at 882. Mignogna had the opportunity and means to try to disprove or at least controvert Rial and Toye's expert testimony, but he failed to do so. *See id*. Thus, Rial and Toye proved their entitlement to $282,953.80 ***as a matter of law***.

ii. Mignogna's cross-examination of Rial and Toye's expert did not undermine the lodestar analysis or justify an adjustment of fees.

Mignogna's counsel never offered an affidavit or expert testimony to suggest that the hourly rates charged to Rial and Toye were unreasonable, that the total hours spent were unreasonable, or that the lodestar analysis admitted into evidence was unreliable. Instead, Mignogna's counsel pointed out on cross examination that

certain line items in Rial and Toye's billing entries seemed duplicative. However, that is not a substitute for ***evidence,*** nor does it overcome Rial and Toye's already-applied reductions. 4 RR 60:19-21. Notably, there is also no evidence in the record that the trial court relied on the cross-examination for its decision.

Throughout his Response, Mignogna attempts to undermine Rial and Toye's fee award by pointing to single line items he dislikes, but wholly fails to reference the $30,686.45 written off by their counsel. 4 RR 112-113. Mignogna argues, for example, that Rial and Toye sought recovery for "time spent on unrelated matters." Response, p. 10. However, that is in reference to a ***single instance*** on one bill that referred to a conference with a New York bankruptcy attorney. *See* 2 Supp. CR 509, ¶ 14; *see also* 4 RR 25:19-23. The entire total for that line item amounted to $220, and Rial and Toye's counsel specifically ***excluded it*** from the billing calculation. 4 RR 25:19-23. Mignogna also complains, without any support, that Rial and Toye impermissibly "attempted to recover 21.5 hours of entries that involve emailing and/or conferencing, often with counsel for the co-Defendants." Response, p. 11. However, he offers no case law and no record cite suggesting that conferring with co-counsel is improper, inefficient, or otherwise unrecoverable.

Mignogna's counsel cross-examined Lemoine, but ultimately criticized only six billing entries amounting to $8,935.50 in fees,[3] which does not exceed the $30,685.00 in reductions that Lemoine had already excluded from consideration. *See Lee v. Holoubek*, No. 06-15-00041-CV, 2016 WL 2609294, at *8 (Tex. App.—Texarkana May 6, 2016, no pet.) (upholding fee testimony because although attorney cross-examined witness, "he did not question the reasonableness of the fees, ***nor did he put on controverting evidence*** on the issue of attorney fees.") (emphasis added).

Even if this Court subtracted each of those time entries *in addition to* the $30,685.00 reductions applied by Lemoine, the evidence still results in reversing the trial court and rendering an award of $274,018.30 in reasonable and necessary fees.[4]

iii. Mignogna's Response cites case law that actually supports Rial and Toye's entitlement to the full fee award.

Rial and Toye followed the road map laid out in *McGibney v. Rauser*, and deliberately avoided the pitfalls highlighted by *Rohrmoos*. Moreover, Mignogna was aware of and cited to *McGibney* and *Estate of Stokes* prior to the evidentiary hearing, which expressly require expert testimony on fees. 2 Supp. CR 507, 513, ¶¶ 8, 23; *McGibney*, 549 S.W.3d at 826; *Estate of Stokes*, No. 02-18-00234-CV, 2019 WL

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[3] 4 RR 44:6-45:11; 4 RR 47:23-48:19; 4 RR 50:12-51:12; 4 RR 54:5-56:2; and 4 RR 58:22-59:9.

[4] On this point, the appellate court could suggest remittitur to reduce the amount of fees by the $8,935.50 that were addressed on cross examination, resulting in a reduced fee award to $274,018.30. *Landry's, Inc. v. Animal Legal Def. Fund*, 566 S.W.3d 41, 50 (Tex. App.—Houston [14th Dist.] 2018, pet. denied), reh'g denied (Dec. 31, 2018).

4048863, at *1 (Tex. App.—Fort Worth Aug. 28, 2019, no pet.). Despite knowing about those cases, Mignogna still failed to offer expert testimony or evidence.

Against this backdrop, Mignogna's Response argues, incredibly, that, "[t]his Court's recent opinion in *McGibney* specifically requires the trial court to reduce fees where the offered billing statements fail to establish fees as reasonable and necessary, even in the absence of controverting testimony." Response, p. 19 (citing *McGibney*, 549 S.W.3d at 826). This argument is a mischaracterization of the case's holding and Texas law.

In reality, *McGibney* supports awarding Rial and Toye their entire request for fees by holding that where the proponent seeking fees submits an affidavit, "***the opponent must file and serve a controverting affidavit in compliance with 18.001***." *McGibney*, 549 S.W.3d at 826 (citing Tex. Civ. Prac. & Rem. Code Ann. § 18.001(e)–(f)). If the opponent's (*i.e.*, Mignogna) controverting affidavit is properly prepared and served, that forces the party with the burden of proof (*i.e.*, Rial and Toye) to prove reasonableness through expert testimony. *Id*. (citing *Hong v. Bennett*, 209 S.W.3d 795, 801 (Tex. App.—Fort Worth 2006, no pet.)).

In other words, expert testimony is not always necessary if the opposing party files a controverting affidavit. However, ***Mignogna did neither while Rial and Toye did both***. Rial and Toye submitted affidavits and evidence on November 4, 2019, and followed that up with expert testimony at the November 21 hearing. 2 Supp. CR

129-409; 4 RR 10-66. Mignogna ignored the teachings of *McGibney* and *Estate of Stokes* by failing to bring an expert.

C. Mignogna cannot now try to use Marchi's expert as his own.

Clearly, Mignogna knows that his case collapses without expert affidavits and testimony. He first cites several cases where courts rendered an award of attorneys' fees because the opposing party failed to supply expert testimony or affidavits. He then shifts to a novel strategy (for the first time on appeal) trying to adopt the testimony of Sam Johnson who served as co-defendant Marchi's trial counsel and fees expert. Response, p. 22-23. This argument is as illogical as it is unpersuasive.

i. Johnson was never disclosed or proffered as an expert on Rial and Toye's fees.

"[T]he identity of expert witnesses must be disclosed no less than 30 days before trial." *Lohie Inv. Co. v. C.G.P., Inc. No. 10*, 751 S.W.2d 313, 315 (Tex. App.—Houston [1st Dist.] 1988, writ dism'd w.o.j.) (citing *E.F. Hutton & Co. v. Youngblood*, 741 S.W.2d 363, 364 (Tex. 1987)). "Failure to comply will result in ***automatic exclusion of testimony*** unless the proffering party demonstrates good cause for its admission." *Id*. (citing Tex. R. Civ. P. 215(5)) (emphasis added). Mignogna never showed good cause because he never raised this argument or strategy in the trial court. *See Interest of D.Z.*, 583 S.W.3d at 296.

In *Youngblood*, the Texas Supreme Court disallowed the recovery of attorneys' fees, finding it error to have allowed the appellee's attorney to testify

where the appellee failed to supply the attorney's name as an expert witness. *Lohie Inv. Co.*, 751 S.W.2d at 315 (citing *Youngblood*, 741 S.W.2d at 364). Therefore, because the appellee in that case never disclosed the name of the expert, the trial court erred in allowing him to testify about fees for litigating this case. *Id*.

In this case, Mignogna never even attempted to use Johnson as an expert in the trial court, nor would that make any sense. Mignogna's Response now argues that, "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." Response, p. 16. Mignogna never proffered Johnson as an expert, so there would have been no reason to object. It is only now, for the first time on appeal, that Mignogna suggests Johnson's testimony about Marchi's fees should preclude recovery of Rial and Toye's fees. Response, p. 12 (stating that, "[t]he trial court accepted Johnson as an expert on attorneys' fees. 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 [Mignogna's] allegations in this matter was only $48,137.50.").[5]

[5] Mignogna's argument is also unpersuasive because it wholly ignores Funimation's expert who testified that $168,941.00 was a reasonable and necessary fee for defending the claims made against Funimation. 4 RR 113:12-16.

In reality, however, Johnson was offered as an expert on Marchi's fees only. 4 RR 151:22-23 (stating he represented *Marchi* only), 152:9-11 (stating that his declaration was made with respect to *Marchi's* motion for fees and sanctions). He was never prepared to opine on Rial and Toye's fees, which is why he did not testify that Rial and Toye's fees were *unreasonable*; rather, he testified that Marchi's fees were *reasonable*. There is a significant difference. In fact, Johnson specifically testified that he did not even review Rial and Toye's billing statements. 4 RR 172:1-2 ("I haven't reviewed their bills, Judge").

ii. Even if Johnson had been designated as an appropriate expert, he was only offered to testify on his particular client's fees.

Johnson was never proffered as an expert in anything but Marchi's fees, but even so, Johnson explained why Rial and Toye's fees were reasonably and necessarily higher than Marchi's fees. Johnson himself acknowledged at the November 21 hearing that Rial and Toye's fees were higher because they "had twice as many clients as I did, and, you know, from Ms. Marchi, if we're going to assume for argument's sake that they had any actual claim pleaded against her, it was only maybe as to one tweet, which actually wasn't a part of their pleadings." 4 RR 172:15-20. Johnson also testified that, "I had a lot fewer – a lot less record to deal with" than Rial and Toye. 4 RR 173:5-6.

When asked about the work he performed on Marchi's TCPA motion to dismiss, he further explained that his testimony and work was limited to that done

for his particular client. 4 RR 165:9-14 ("Q. Do you feel like you spent a sufficient amount of time, based on your understanding of the TCPA, to properly research and draft that motion in its entirety? A. Based on the claims and record ***relating to my particular client***, yes, I do.") (emphasis added).

iii. Texas courts expressly hold that it's improper to compare fees incurred by different Parties.

Even if Mignogna tried to use one of the other Appellees' experts for his own in the trial court, it is improper to compare cases and fees because the circumstances of each particular defendant may be vastly different—as they were in this case. Fee evidence needs to be tailored to the specific parties because different parties may freely choose to spend more or less time or money than would be "reasonable" in comparison to other parties. *In re Nat'l Lloyds Ins. Co.*, 532 S.W.3d 794, 808 (Tex. 2017), reh'g denied (Dec. 8, 2017). In other words, the work needed to successfully represent Rial and Toye is not the same as the work needed to successfully represent Marchi, Funimation, or even Mignogna.

Mignogna actually did try to use his own fees for comparison, arguing below (with no lodestar analysis) that the time Rial and Toye's counsel spent preparing for Mignogna's deposition was unreasonable because "attorneys for [Mignogna] did not spend fifty (50) hours preparing for the two (2) separate depositions taken by [Mignogna's] attorneys." 2 Supp. CR 511, ¶ 18. However, "comparisons between the hourly rates and fee expenditures of opposing parties are inapt, as differing

motivations of the [parties] impact the time and labor spent, hourly rate charged, and skill required[.]" *In re Nat'l Lloyds Ins. Co.*, 532 S.W.3d at 808. Also, "the tasks and roles of counsel on opposite sides of a case vary fundamentally, so even in the same case, the legal services rendered to [different] parties are not fairly characterized as 'similar[.]'" *Id*; *MCI Telecommunications Corp. v. Crowley*, 899 S.W.2d 399, 403-04 (Tex. App.—Fort Worth 1995, no writ).

D. Rial and Toye faced a more complex fact pattern than Marchi or Funimation.

Rial and Toye's Opening Brief provided this Court with an in-depth look at the significant differences between the work performed and fees incurred by the various defendants in the underlying litigation, in anticipation that Mignogna would argue they were identical. *See* Appellees/Cross-Appellants' Opening Brief and Response, pp. 58-59. Mignogna's Response, however, made no attempt to address those distinctions or explain how two defendants that had to sit for depositions, answer discovery, and face dozens of additional factual allegations would incur the same amount as a defendant sitting quietly on the sidelines. *See, e.g.*, 3 Supp. CR 40, ¶ 35 (First Amended Petition alleging that Toye has tweeted more than 117 times about Mignogna); *see also* 4 RR 172:14-20 (as to Marchi, "it was only maybe as to one tweet, which actually wasn't a part of their pleadings.").

The Response contends that, "[t]he 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." Response, pp. 12-13. The problem, however, is that the evidence demonstrates the distinct inaccuracy of the trial court's observation. In fact, the trial court made a conclusory statement that the cases were similar, but never actually identified *how* they were purportedly similar—because they were not similar. The trial court wrongly suggested, without identifying any facts or evidence, that "[Marchi's attorney] was able to [defend] the exact same case and get the same result for $48,000." 4 RR 189:4-20.

A factfinder "must decide the question of attorney's fees specifically in light of the work performed ***in the very case for which the fee is sought***." *Arthur Andersen*, 945 S.W.2d at 819 (emphasis added). When granting equal fees to each defendant, the court below ignored each defendant's unique case presented. The duties between the Parties were not similar, the challenges were significantly different, and the focus of Mignogna's case was skewed against Rial and Toye. More importantly, though, the evidence supporting Rial and Toye's fees went uncontested. Accordingly, the trial court's arbitrary award of the same amount of fees for all Parties is reversible error and this Court should render an appropriate award.

CONCLUSION AND PRAYER

WHEREFORE, Appellees Monica Rial and Ronald Toye respectfully pray for the reasons stated herein that this Court (1) affirm the trial court's decision to grant their Anti-SLAPP Motion and dismiss all Claims asserted against them; and

(2) reverse and render judgment that Appellees be awarded $282,953.80 in attorneys' fees for defense of this matter at the trial court level, plus an additional $55,000.00 in conditional appellate fees for briefing to this Court on appeal.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Texas Rules of Appellate Procedure 9.4, I hereby certify that, absent the caption, identity of parties and counsel, statement regarding oral argument, table of contents, index of authorities, statement of the case, statement of issues presented, statement of jurisdiction, statement of procedural history, signature, proof of service, certification, certificate of compliance, and appendices, the computer program used to prepare this document prior to its conversion to portable document format calculate the number of words in the foregoing brief as 6,359.

/s/ Rusty J. O'Kane
Rusty J. O'Kane

CERTIFICATE OF SERVICE

I hereby certify that on July 9, 2020, a true and correct copy of the foregoing document was served on counsel of record for all parties through the Court's e-filing system.

/s/ Rusty J. O'Kane
Rusty J. O'Kane