In The
Court of Appeals
Seventh District of Texas at Amarillo

No. 07-20-00020-CV

ANDREW LECODY, APPELLANT

V.

BARBARA KRIS ANDERSON, CHARLES BABER,
DAVID KESSINGER, AND STEVE BLANCHARD, APPELLEES

On Appeal from the 16th District Court
Denton County, Texas
Trial Court No. 19-4117-16; Honorable Sherry Shipman, Presiding

March 30, 2021

MEMORANDUM OPINION

Before QUINN, C.J., and PIRTLE and DOSS, JJ.

Appellant, Andrew Lecody, appeals from the trial court's order dismissing his suit against Appellees, Barbara Kris Anderson, Charles Baber, David Kessinger, and Steve Blanchard (hereafter referred to as board members or individually, as required).[1] By a

[1] Originally appealed to the Second Court of Appeals, sitting in Fort Worth, this appeal was transferred to this court by the Texas Supreme Court pursuant to its docket equalization efforts. TEX. GOV'T CODE ANN. § 73.001 (West 2013). Should a conflict exist between precedent of the Second Court of Appeals and this court on any relevant issue, this appeal will be decided in accordance with the precedent of the transferor court. TEX. R. APP. P. 41.3.

global issue, Lecody contends the trial court erred in granting the board members' motion to dismiss filed pursuant to Rule 91a of the Texas Rules of Civil Procedure in his defamation suit against them.[2] We affirm the order of the trial court.

BACKGROUND

Dallas Makerspace is a non-profit corporation where all types of artists can gather and collaborate. Lecody founded the corporation in 2010, and he helped write the bylaws. He was also a board member and once served as president of the organization. In October 2018, the corporation's tax attorney sent an email regarding financial irregularities to the board. In response to the email, a board member, who is not a party to the underlying suit, started an email chain regarding past-due receipts and unaccounted expenses. Lecody, as a member of the finance committee, became concerned about possible misuse of funds and made a private request to the treasurer to inspect the books.

Lecody investigated the financial irregularities for several weeks. As part of his investigation, he posted the email from the tax attorney to a forum accessible to others. In early March 2019, he again questioned suspicious financial transactions. When the board members learned of Lecody's conduct, they perceived it as a violation of the corporation's rules and voted to ban him and others for two weeks. The board members had been informed by the tax attorney that the contents of the October email were no longer privileged because Lecody had made the content available to others.

[2] Rule 91a of the Texas Rules of Civil Procedure provides that a party "may move to dismiss a cause of action on the grounds that it has no basis in law or fact." TEX. R. CIV. P. 91a.1.

Although Lecody was on site during the meeting in which the board members voted to ban him, he alleged that he only became aware of the decision when the board members approached him on the premises and "loudly declared in front of friends and other members that he had been banned from the organization and that he must leave immediately because he had violated 'attorney/client' privilege and broken the law" by making the email from the tax attorney available to others.

On March 18, 2019, Lecody appeared at a board meeting to challenge his ban. The meeting was live-streamed on YouTube. Lecody read a prepared statement. The board members expressed concern over certain redactions he had made to the tax attorney's email. Remaining convinced that the ban was justified because Lecody had invalidated the attorney/client privilege by forwarding the redacted email to non-privileged parties, the board members banned him for nine months.

Blanchard posted a written comment on the corporation's message board as follows:

> [t]he disciplinary action against . . . Lecody [was] based on the breach of attorney/client privilege. [Lecody] also had the issue of his actions being detrimental to the corporation. There was a Board action specifying he stay away from the election and he choose [sic] not to. *Think of this as a parole violation*.

(Emphasis added). Lecody interpreted Blanchard's comments as an implication that his conduct was criminal in nature. The statements that Lecody interpreted as defamatory prompted him to file suit against the board members on May 6, 2019, alleging they had made verbal and written defamatory statements and also alleged a claim for intentional infliction of emotional distress.

During the time frame of the events that resulted in the underlying suit, Lecody's wife was being treated for cancer. As a show of support for his wife, Lecody had colored his hair blue and green to match her hair color. Within days of Lecody's filing suit, Anderson posted the following statement on Facebook:

> [i]f one skittle head and his sycophants think he can scare us into submission, they don't know us. We are not afraid, and we will hold him accountable for every *illegal and unethical thing he has done*.

(Emphasis added).

By his original petition, Lecody alleged "statutory" slander *per se*, statutory and common law libel, intentional infliction of emotional distress, and tortious interference with prospective contractual relations.[3] The alleged causes of action were presented in very brief and general paragraphs. The board members responded with special exceptions attacking deficiencies in Lecody's pleadings and they also filed a general denial. They then filed a Rule 91a motion to dismiss pursuant to the Texas Rules of Civil Procedure.

Lecody did not respond to the motion to dismiss; instead, he amended his petition to include more facts and details of the alleged slander *per se* and statutory and common law libel.[4] Regarding the allegation of intentional infliction of emotional distress, Lecody alleged that Anderson intentionally inflicted emotional distress by referring to him as a "skittle head" because of his hair color which was to show support for his wife. He also asserted that the board members who alleged he harmed the corporation by causing others to quit inflicted severe emotional distress.

---

[3] In his amended petition, Lecody omitted the word "statutory" preceding "slander *per se*" as there is no such statutory cause of action in the Texas Civil Practice and Remedies Code.

[4] Lecody eliminated the allegation of tortious interference with prospective contractual relations.

Within days of Lecody amending his petition, the board members amended their Rule 91a motion to dismiss asserting that Lecody's amended petition, even with new facts included, nevertheless failed to state a claim on which relief could be granted. The trial court held a brief hearing on the board members' motion.

At the hearing, the board members sought dismissal of the case arguing that Lecody's amended pleading did not provide fair notice of his causes of action. They argued that violating an attorney/client privilege was not an illegal act nor was an accusation of such a violation tantamount to being accused of criminal conduct. Regarding the claim of intentional infliction of emotional distress, the board members argued that referring to Lecody as a "skittle head" did not rise to the level of extreme and outrageous conduct required to support such a tort claim.

Lecody clarified that his claims were for slander *per se* and libel *per se*—textual defamation—the defamatory meaning arises from the words of the statement itself without the need for extrinsic evidence.[5] He conceded that a violation of the attorney/client privilege was not a criminal act but argued that under a "non-lawyerly educated reasonable person standard," such an accusation might be perceived as being a crime. He also argued that the board members' actions damaged his personal and business reputation and imputed his honesty. On the claim of intentional infliction of emotional distress, Lecody asserted that Anderson's Facebook post referring to him as a "skittle head" made a mockery of the support he showed for his wife while she was being treated for cancer.

[5] *Dallas Morning News*, *Inc. v. Tatum*, 554 S.W.3d 614, 625 (Tex. 2018).

The trial court took the motion and arguments under advisement. Just a little more than a week after the hearing, the trial court signed its order dismissing Lecody's suit with prejudice.

STANDARD OF REVIEW

A court of appeals reviews a ruling under Rule 91a "*de novo* because the availability of a remedy under the facts alleged is a question of law and the rule's factual plausibility standard is akin to a legal-sufficiency review." *City of Dallas v. Sanchez*, 494 S.W.3d 722, 724 (Tex. 2016). Rule 91a provides a procedure for dismissal of a case that has no basis in law or no basis in fact. TEX. R. CIV. P. 91a.

"A cause of action has no basis in *law* if the allegations, taken as true, together with reasonable inferences drawn from them, do not entitle the claimant to the relief sought." *Id.* "A cause of action has no basis in *fact* if no reasonable person could believe the facts pleaded." *Id.* (Emphasis added.). Except as required by Rule 91a.7 (award of costs and attorney's fees), the court "may not consider evidence in ruling on the motion and must decide the motion based solely on the pleading of the cause of action . . . ." TEX. R. CIV. P. 91a.6.

Furthermore, the trial court construes the pleadings liberally in favor of the plaintiff, looks to the plaintiff's intent, and accepts the plaintiff's factual allegations as true and, if necessary, draws reasonable inferences from the factual allegations to determine if the cause of action has a basis in law or fact. *In re Farmers Tex. Cnty. Mut. Ins. Co.*, 604 S.W.3d 421, 425-26 (Tex. App.—San Antonio 2019, orig. proceeding). Dismissal of a cause of action under Rule 91a is a harsh remedy with fee-shifting consequences; thus, an appellate court should strictly construe the rule's requirements. *Bedford Internet Off.*

Space, *LLC v. Tex. Ins. Grp.*, *Inc.*, 537 S.W.3d 717, 720-21 (Tex. App.—Fort Worth 2017, pet. dism'd).

Generally, the trial court may not consider evidence in ruling on the motion and must decide the motion based solely on the pleading of the cause of action, together with any pleading exhibits permitted by Rule 59 of the Texas Rules of Civil Procedure.[6] *See* TEX. R. CIV. P. 91a.6. *See also AC Interests*, *L.P. v. Tex. Comm'n on Envtl. Quality*, 543 S.W.3d 703, 706 (Tex. 2018); *ConocoPhillips Co. v. Koopmann*, 547 S.W.3d 858, 880 (Tex. 2018); *Sanchez*, 494 S.W.3d at 724. Recently, however, the Supreme Court ruled that in deciding a Rule 91a motion, a court may also consider a defendant's pleadings if doing so is necessary to make the legal determination of whether an affirmative defense is properly before the court. *Bethel v. Quilling*, 595 S.W.3d 651, 656 (Tex. 2020).

In deciding whether the trial court properly granted a motion to dismiss under Rule 91a, a reviewing court applies the fair-notice pleading standard in determining whether the allegations in the petition were sufficient to allege a cause of action. *Thomas v. 462 Thomas Family Props.*, *LP*, 559 S.W.3d 634, 639-40 (Tex. App.—Dallas 2018, pet. denied). Under that standard, a court considers whether the opposing party "can ascertain from the pleading the nature and basic issues of the controversy and what testimony will be relevant." *Horizon/CMS Healthcare Corp. v. Auld*, 34 S.W.3d 887, 896 (Tex. 2000). Stated differently, the fair-notice standard measures whether the pleading has provided the opposing party sufficient information to enable that party to prepare a defense or a response. *See First United Pentecostal Church of Beaumont v. Parker*, 514

[6] Rule 59 permits notes, accounts, bonds, mortgages, records, and all other written instruments that may be part of the claim sued on to be part of the pleadings. TEX. R. CIV. P. 59.

S.W.3d 214, 224-25 (Tex. 2017) (citing *Kopplow Dev.*, *Inc. v. City of San Antonio*, 399 S.W.3d 532, 536 (Tex. 2013); *Roark v. Allen*, 633 S.W.2d 804, 810 (Tex. 1982)).

APPLICABLE LAW—DEFAMATION

Defamation is a tortious statement that encompasses both libel and slander. *Randall's Food Mkts.*, *Inc. v. Johnson*, 891 S.W.2d 640, 646 (Tex. 1995). Slander is a defamatory statement expressed verbally. *Id.* Libel is a defamatory statement expressed in written or other graphic form. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 73.001 (West 2017). *See also Dallas Morning News*, *Inc.*, 554 S.W.3d at 623-24. Actionable defamation requires (1) publication of a false statement of fact to a third party, (2) that was defamatory concerning the plaintiff, (3) with the requisite degree of fault, and (4) that proximately caused damages. *Anderson v. Durant*, 550 S.W.3d 605, 617-18 (Tex. 2018).

In a defamation case, the threshold question is whether the words used "are reasonably capable of a defamatory meaning." *Musser v. Smith Protective Servs.*, *Inc.*, 723 S.W.2d 653, 655 (Tex. 1987). In answering this question, the "inquiry is objective, not subjective." *New Times*, *Inc. v. Isaacks*, 146 S.W.3d 144, 157 (Tex. 2004). Here, none of the complained-of allegations amount to slander *per se* or libel *per se.* To the extent Lecody contends the Facebook post stating, "we will hold [skittle head] accountable for every *illegal . . . thing he has done*" is evidence of a *per se* act of defamation, we disagree. First, the statement does not specifically identify Lecody as the actor, and secondly, the statement does not accuse him of any specific illegal act. As such, we do not believe such an allegation is sufficient to withstand a Rule 91a motion to dismiss.

Actionable defamation *per se* requires a statement that falls into any of four categories: (1) imputes the commission of a crime; (2) imputes contraction of a loathsome disease; (3) causes injury to a person's office, business, profession, or calling; or (4) imputes sexual misconduct. *Villasenor v. Villasenor*, 911 S.W.2d 411, 418 (Tex. App.—San Antonio 1995, no writ). Here, the allegations in question simply do not amount to defamation *per se.*

Libel is defamation expressed in written or other graphic form that tends to blacken the memory of the dead or that tends to injure a living person's reputation and thereby expose the person to public hatred, contempt or ridicule, or financial injury or to impeach any person's honesty, integrity, virtue, or reputation, or to publish the natural defects of anyone and thereby expose the person to public hatred, ridicule, or financial injury. TEX. CIV. PRAC. & REM. CODE ANN. § 73.001; *In re Hinterlong*, 109 S.W.3d 611, 627 (Tex. App.—Fort Worth 2003, orig. proceeding) (noting that section 73.001 of the Civil Practice and Remedies Code codified common law libel). A false statement that charges a person with the commission of a crime is libelous *per se*. *Leyendecker & Assocs.*, *Inc. v. Wechter*, 683 S.W.2d 369, 374 (Tex. 1984).

ANALYSIS

By his sole issue, Lecody contends the trial court erred in granting the board members' Rule 91a motion to dismiss. We disagree. Relying on *Mitre v. Brooks Fashion Stores*, *Inc.*, 840 S.W.2d 612, 618 (Tex. App.—Corpus Christi 1992), *overruled on other grounds*, *Cain v. Hearst Corp.*, 878 S.W.2d 577, 578-79 (Tex. 1994), Lecody contends his amended petition gave fair notice to the board members of his defamation claims when they made certain statements, both verbal and written, implying he had "broken the

law" and committed acts which were both "illegal and unethical." Lecody further contended that those statements *damaged his reputation*. (Emphasis added).[7]

In support of their motion to dismiss, the board members argue that Lecody's causes of action have no basis in law but do not contest whether they have any basis in fact. That is, they contend that the specific allegations, taken as true, together with reasonable inferences drawn from them, do not entitle Lecody to any relief. TEX. R. CIV. P. 91a. They also assert that the statements Lecody complains of as being defamatory are in fact truthful—an affirmative defense to defamation. *See Randall's Food Mkts.*, 891 S.W.2d at 646 (noting that truth is an affirmative defense in suits brought by private individuals).

Both sides in this appeal cite this court to *In re RNDC Tex.*, *LLC*, No. 05-18-00555-CV, 2018 Tex. App. LEXIS 4186 (Tex. App.—Dallas June 11, 2018, orig. proceeding). Lecody correctly points out that *In re RNDC Tex.*, *LLC* requires a liberal construction of a plaintiff's pleading looking to the pleader's intent and accepting as true the factual allegations in the pleading to determine if the cause of action has a basis in law or fact. *Id.* at *2. A motion seeking dismissal for having no basis in fact should be denied when a plaintiff's pleading provides sufficient facts to give fair notice of a claim. *Id.* at *3. But when, as here, a motion seeks dismissal based on claims having no basis in law only, the fair-notice pleading standard has no application. *Wooley v. Schaffer*, 447 S.W.3d 71, 83 (Tex. App.—Houston [14th Dist.] 2014, pet. denied). A motion to dismiss is properly

[7] Accusing someone of a specific crime is an example of defamation *per se*. *In re Lipsky*, 460 S.W.3d 579, 596 (Tex. 2015).

granted when there is a legal bar to a claim regardless of whether the facts pleaded give fair notice. *In re RNDC Tex., LLC*, 2018 Tex. App. LEXIS 4186, at *3.

The board members maintain that Lecody's defamation claims fail as a matter of law. Their position is that verbal statements they made in announcing in front of others that Lecody was banned from the corporation for violating the attorney/client privilege did not accuse him of committing a crime and did not defame him.

Lecody acknowledges that violating attorney/client privilege is not a crime. At the hearing, however, he argued that to a "non-lawyerly educated person," the statement could be interpreted as criminal conduct; however, he does not specify what crime a reasonable person would have thought him to have been accused of. The statements in question did not falsely accuse him of any crime, especially one for which he could have been punished by imprisonment. *See Christy v. Stauffer Publ'ns*, *Inc.*, 437 S.W.2d 814, 815 (Tex. 1969).

Lecody next posits that his defamation allegation "goes to the damage [it] caused to his reputation." We again disagree with his analysis for two reasons. First, whether a statement is defamatory depends on a reasonable person's perception. *Turner v. KTRK Television*, *Inc.*, 38 S.W.3d 103, 115 (Tex. 2000). Whether a statement is defamatory is construed in light of the surrounding circumstances based on how a person of ordinary intelligence would perceive it. *Id*. (citing *Isaacks*, 146 S.W.3d at 154). Lecody's argument referring to a "non-lawyerly educated person's" perception is not the standard for determining if he was accused of a crime when the board members accused him of allegedly "violating" the attorney/client privilege. Furthermore, Lecody did not plead any facts based on what he believes a reasonable person's perception would have been

regarding the alleged defamatory statements. Second, the board members note that in his amended pleading, Lecody did not seek damages for injury to his reputation for being accused of violating the attorney/client privilege and now raises the argument for the first time on appeal. This, the board members contend, is an untimely argument resulting in forfeiture of the claim. Again, we agree.

In his amended pleading, Lecody sought "general and special damages in the form of lost profits/lost sales/lost revenues/lost wages/lost income, and out-of-pocket expenses . . . ." He did not request any damages for harm to his reputation. By failing to request damages for any harm to his reputation, Lecody has waived that argument on appeal. *See Pirtle v. Gregory*, 629 S.W.2d 919, 920 (Tex. 1982) (holding that except for fundamental error, appellate consideration of errors for which there was no trial predicate is not authorized).

Even if his claim for damages had been preserved, we find the statements he complains of on appeal were not defamatory *per se*. He also identifies several statements made by the board members during the meeting that was live-streamed on YouTube. The statements include comments that: Lecody (1) made a false statement, (2) forwarded "misinformation" when he shared the tax attorney's email with others, (3) breached his fiduciary duty by redacting portions of the email, and (4) caused "people to quit because they were tired of the bullshit going around."

To be defamatory, those statements would have had to have caused injury to Lecody in his profession as statements that "ascribe[d] . . . conduct, characteristics or a condition that would adversely affect his fitness for the proper conduct of his lawful business, trade or profession, or of his public or private office, whether honorary or for

profit." *Hancock v. Variyam*, 400 S.W.3d 59, 66 (Tex. 2013). Lecody's amended petition did not include such allegations. Statements that are only disparaging of a general character are not actionable *per se*. *Id.* Accordingly, we conclude the statements complained of are not defamatory *per se*.

APPLICABLE LAW—INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

Intentional infliction of emotional distress requires (1) conduct that was intentional or reckless; (2) was extreme and outrageous; (3) caused the claimant emotional distress; and (4) the emotional distress was severe. *Kroger Tex. Ltd. P'ship v. Suberu*, 216 S.W.3d 788, 796 (Tex. 2006). The second element is satisfied only if the conduct is "'so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.'" *Twyman v. Twyman*, 855 S.W.2d 619, 621 (Tex. 1993) (quoting RESTATEMENT (SECOND) OF TORTS § 46 cmt. d (1965)). Conduct that is merely insensitive or rude is not extreme and outrageous nor are "mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities." *GTE Southwest.*, *Inc. v. Bruce*, 998 S.W.2d 605, 612 (Tex. 1999). Meritorious claims for intentional infliction of emotional distress are relatively rare precisely because most human conduct, even that which causes injury to others, cannot be fairly characterized as extreme and outrageous. *Creditwatch, Inc. v. Jackson*, 157 S.W.3d 814, 816-17 (Tex. 2005).

ANALYSIS

By his sole issue, Lecody also maintains the trial court erred in dismissing his suit and specifically, his claim for intentional infliction of emotional distress. As to this issue, we also disagree. Lecody alleged that Anderson caused him severe emotional distress when she posted a comment on Facebook referring to him as a "skittle head" for having

colored his hair blue and green as a show of support for his wife during her cancer treatments.[8] He also alleged that the board members' accusation that he harmed the corporation because his conduct caused people to quit triggered severe emotional distress for him.

Emotional distress is "all highly unpleasant mental reactions such as embarrassment, fright, horror, grief, shame, humiliation, and worry." *GTE Southwest, Inc.*, 998 S.W.2d at 618. "Severe emotional distress is distress that is so severe that no reasonable person could be expected to endure it." *Id.* A plaintiff alleging intentional infliction of emotional distress must prove severe emotional distress—more than worry, anxiety, vexation, embarrassment, or anger. *Soda v. Caney*, No. 05-10-00628-CV, 2012 Tex. App. LEXIS 4433, at *9 (Tex. App.—Dallas June 5, 2012, pet. denied) (mem. op.). Severe emotional distress includes being unable to function in one's normal life or seeking treatment from a medical professional. *Id.* at *10.

While perhaps rude and insensitive, the conduct complained of by Lecody can be considered neither extreme nor outrageous. Also, Lecody's amended petition does not include sufficient facts to support an allegation that he suffered severe emotional distress. Recalling that the board members challenged Lecody's claims as having no basis in law only, the fair-notice pleading standard has no application on his claim for intentional infliction of emotional distress. Without alleging that the board members engaged in "extreme and outrageous" conduct or that he suffered "severe" emotional distress, his claim for intentional infliction of emotional distress is legally barred.

[8] It is not necessary that an allegedly defamatory statement name the plaintiff. *Mitre*, 840 S.W.2d at 618. A statement can be defamatory if those who know and are acquainted with the plaintiff understand that the defamatory publication referred to him.

Applying a *de novo* standard of review, we conclude the trial court did not err in granting the board members' motion to dismiss Lecody's suit with prejudice. Lecody's sole issue is overruled.

MOTION TO AWARD ATTORNEY'S FEES

Pending before this court is the board members' motion requesting this court to award appellate attorney's fees if Lecody does not prevail on his issue. Alternatively, they request that the case be remanded to the trial court for consideration of appellate fees. Lecody objects to the motion asserting the board members waived the issue. For the following reasons, we agree with Lecody.

Rule 91a.7 of the Texas Rules of Civil Procedure provides "the court may award the prevailing party on the motion all costs and reasonable and necessary attorney fees incurred . . . . Any award of costs or fees must be based on evidence." TEX. R. CIV. P. 91a.7. Statutes and rules providing that a party "may recover," "shall be awarded," or "is entitled to," attorney's fees are not discretionary. *Bocquet v. Herring*, 972 S.W.2d 19, 20 (Tex. 1998). As the board members note, an award of attorney's fees to the prevailing party under Rule 91a.7 is mandatory. Appellate attorney's fees are also mandatory when proof of reasonable prospective fees is presented. *Ventling v. Johnson*, 466 S.W.3d 143, 154 (Tex. 2015) (citing *Gill Sav. Ass'n v. Chair King, Inc.*, 797 S.W.2d 31, 32 (Tex. 1990) (remanding to determine appellate attorney's fees when there was some evidence to support an award) (emphasis added)).

By *Defendants*' *Amended Rule 91a Motion to Dismiss*, the board members requested attorney's fees and offered to submit evidence of those fees at the appropriate time. During the hearing on the motion, the board members simply urged the court that

it "must award . . . their reasonable and necessary attorneys' fees." The trial court's order granting the motion to dismiss recites that "Defendants shall submit evidence by affidavit of their costs and reasonable and necessary attorneys' fees . . . within seven calendar days . . . ."

In a timely manner, the board members submitted their counsel's affidavit in support of $17,657.00 in attorney's fees for services in defending against Lecody's claims in the trial court. Attached to counsel's affidavit was an exhibit itemizing the services rendered. In its *Order and Final Judgment*, the trial court awarded $12,105.25 in reasonable and necessary attorney's fees to the board members as the prevailing parties. They did not, however, request nor provide evidence in the trial court of contingent appellate attorney's fees and none was included in the final judgment.

Instead, after perfecting this appeal and after the trial court's plenary power had expired, the board members filed *Appellees*' *Motion to Award Attorneys*' *Fees* in this court requesting an additional sum of $28,025.00 incurred subsequent to the trial court's order dismissing Lecody's suit. They also seek an additional $7,000.00 for oral argument, which occurred on November 4, 2020. Finally, they request $15,000.00 in contingent attorney's fees if Lecody files a petition for review in the Texas Supreme Court and $25,000 if the Court grants the petition. The motion is supported by counsel's affidavit in which he provides his hourly rate and avers that more than eighty-seven hours were spent on tasks related to this appeal.

A party seeking an award of attorney's fees bears the burden of providing sufficient evidence of the reasonable hours worked multiplied by the reasonable rate. *Rohrmoos Venture v. UTSW DVA Healthcare*, *L.L.P.*, 578 S.W.3d 469, 498 (Tex. 2019). That proof

must be offered in the trial court to provide the fact finder with an opportunity to calculate an award of reasonable and necessary attorney's fees. *Id.* The board members' request for conditional appellate fees in this court comes too late. Without a request for conditional appellate fees combined with sufficient evidence of those fees being presented in the trial court, they have waived any award of appellate fees. *See* TEX. R. APP. P. 33.1(a). *See also Twelve Oaks Tower I v. Premier Allergy*, 938 S.W.2d 102, 117 (Tex. App.—Houston [14th Dist.] 1996, no writ) (finding waiver of request for contingent attorney's fees where party failed to preserve issue in the trial court). *See, e.g.*, *Statler v. Challis*, No. 02-18-00374-CV, 2020 Tex. App. LEXIS 8519, at *49 (Tex. App.—Fort Worth Oct. 29, 2020, no pet. filed) (mem. op.) (finding evidence to support an award of conditional appellate attorney's fees legally insufficient). The motion for appellate fees pending in this court is denied.

CONCLUSION

Having overruled Lecody's issue, the trial court's order dismissing the underlying suit is affirmed.

Appellees' Motion to Award Attorneys' Fees is denied.

Patrick A. Pirtle
Justice