

## Moyer v. Rosenzweig

Court of Appeals of Texas, Fourteenth District, Houston  
June 1, 1995, rendered ; June 1, 1995, Filed  
No. 14-94-00481-CV

**Reporter:** 1995 Tex. App. LEXIS 1229; 1995 WL 328089

KATHLEEN G. MOYER, Appellant v. L.B. ROSENZWEIG AND EDITH GARVEN, Appellees

**Notice:** [\*1] PURSUANT TO RULE 90(i) OF THE TEXAS RULES OF APPELLATE PROCEDURE, UNPUBLISHED OPINIONS SHALL NOT BE CITED AS AUTHORITY BY COUNSEL OR BY A COURT.

**Prior History:** On Appeal from the 333rd District Court, Harris County, Texas. Trial Court Cause No. 91-27268.

**Disposition:** Affirmed

### Core Terms

attorneys', attorney's fees, partial statement, trial court, conversion, jury's

### Case Summary

#### Procedural Posture

Appellant tenant sought review of a judgment from the 333rd District Court, Harris County (Texas), failing to award her attorney fees after being granted judgment against appellee landlords in a conversion action.

#### Overview

Appellant tenant challenged the judgment of the trial court denying her attorney fees. In one point of error, appellant challenged the sufficiency of the evidence to support the jury's finding of zero as to attorney fees and contended that the trial court abused its discretion in failing to award attorney fees as a matter of law. Appellee landlords contended that the court could not reach the question of attorney fees because appellant failed to comply with the procedure for filing a limited record on appeal. Appellant did not state, nor did the record reveal, whether she intended to limit the scope of her appeal to the issue of attorney fees or whether she intended only to bring forward a partial statement of facts. The court held that because appellant filed only a partial statement of facts, the court had no way of knowing whether appellant's trial attorney's testimony was the only evidence of attorney fees in the record. Therefore the court had to presume the omitted evidence supported the jury's finding of no

attorney fees and had to affirm the trial court's judgment upholding that jury finding.

#### Outcome

The court affirmed the trial court's judgment in favor of appellee landlords denying appellant tenant attorney fees. Because appellant filed only a partial statement of facts, the court had no way of knowing whether appellant's trial attorney's testimony was the only evidence of attorney fees in the record.

### LexisNexis® Headnotes

Civil Procedure > Remedies > Costs & Attorney Fees > General Overview

**H1** Texas law provides for attorneys' fees in a conversion action. [Tex. Prop. Code Ann. 93.002\(g\)](#) (1995).

Civil Procedure > Appeals > Record on Appeal

Civil Procedure > Appeals > Notice of Appeal

Governments > Courts > Court Personnel

**H2** To limit the scope of an appeal, the issue to be appealed must be definitely severable from the remainder of the judgment, and notice of limitation of appeal must be served on all parties. [Tex. R. App. P. 40\(a\)\(4\)](#).

**Judges:** Panel consists of Chief Justice Paul C. Murphy, and Justices Anderson, and Hudson.

**Opinion by:** PAUL C. MURPHY

### Opinion

#### OPINION

Appellant Kathleen Moyer appeals the judgment of the trial court denying her attorneys' fees. In one point of error, appellant challenges the sufficiency of the evidence to support the jury's finding of zero as to attorneys' fees, and contends that the trial court abused its discretion in failing to award attorneys' fees as a matter of law. We affirm.

In this conversion action, a jury found that appellees converted appellant's property and awarded appellant \$

5,500 in actual damages. After offsetting the undisputed amount appellant owed in delinquent rents, the trial court rendered judgment for appellant in the amount of \$ 800.

**HNI** Texas law provides for attorneys' fees in a conversion action. Tex. Prop. Code Ann. 93.002(g) (Vernon 1995). The jury, however, found the amount of reasonable attorneys' fees [\*2] authorized under Section 93.002(g) to be zero. Ruling that the evidence on attorneys' fees raised a fact question, the trial court upheld the jury's failure to find any attorneys' fees. Appellant subsequently filed a Motion for New Trial on the issue of attorneys' fees, which was overruled by operation of law.

Appellees contend that this Court cannot reach the question of attorneys' fees because appellant failed to comply with the procedure for filing a limited record on appeal. Appellant appeals only that part of the judgment denying her attorneys' fees. Appellant does not state, nor does the record reveal, whether she intended to limit the scope of her appeal to the issue of attorneys' fees or whether she intended only to bring forward a partial statement of facts.

**HN2** To limit the scope of an appeal, the issue to be appealed must be definitely severable from the remainder of the judgment, and notice of limitation of appeal must be served on all parties. Tex. R. App. P. 40(a)(4); Superior Packing v. Worldwide Leasing, 880 S.W.2d 67, 70 (Tex. App.--Houston [14th Dist.] 1994, writ denied). To limit the record on appeal, a party requesting a partial statement of facts must include [\*3] in the request to the court reporter a statement of the points of error upon which she will rely. Tex. R. App. P. 53(d); Matthews v. Land Tool Co., 868 S.W.2d 25, 26 (Tex. App.--Houston [14th Dist.] 1993, no writ). In addition, a party requesting a partial statement of facts should ask that the notice of a limited record be included in the appellate transcript, and should notify other

parties of the limitation of the record. Superior Packing, 880 S.W.2d at 70. If an appellant fails to comply with Rule 53(d) but files a partial statement of facts, this Court presumes that the omitted portions of the record are relevant to the disposition of the appeal. Christiansen v. Prezelski, 782 S.W.2d 842, 843 (Tex. 1990); Superior Packing, 880 S.W.2d at 70.

Appellant apparently intended to limit her appeal to the issue of attorneys' fees and filed an excerpt from the statement of facts consisting of the direct and cross examination of her trial attorney concerning his fees. Appellant, however, did not designate the issue of attorneys' fees as a point of error when she requested that the court reporter limit the statement of facts. Appellant maintains that she has brought on appeal the complete [\*4] record of the only evidence presented on the issue of attorneys' fees, and alleges that the testimony and documents of the underlying case are superfluous, and lend nothing to this appeal. Nevertheless, because appellant filed only a partial statement of facts, we have no way of knowing whether appellant's trial attorney's testimony is the only evidence of attorneys' fees in the record. Therefore we must presume the omitted evidence supports the jury's finding of no attorneys' fees and the trial court's judgment upholding that jury finding. Christiansen, 782 S.W.2d at 843; Superior Packing, 880 S.W.2d at 71. Appellant's point of error is overruled.

The judgment of the court below is affirmed.

/s/ Paul C. Murphy

Chief Justice

Judgment rendered and Opinion filed June 1, 1995.

Panel consists of Chief Justice Paul C. Murphy, and Justices Anderson, and Hudson.