Reversed in Part, Remanded in Part, and Opinion filed April 29, 2025.

In the

Fourteenth Court of Appeals

NO. 14-24-00376-CV

ALLSTATE FIRE AND CASUALTY COMPANY, Appellant

V.

MARIA NGUYEN, Appellee

On Appeal from the 157th District Court
Harris County, Texas
Trial Court Cause No. 2021-61438

O P I N I O N

This is an appeal from a summary judgment in a declaratory-judgment action. Insurer Allstate Fire and Casualty Company made medical payments to its insured Maria Nguyen after she was injured in a motor-vehicle accident. To recover the amounts paid to Nguyen, Allstate pursued its subrogation claim against the other driver's liability insurer while Nguyen brought a personal-injury suit against the other driver. Nguyen settled the case against the other driver, then sought a declaration that, under the common-fund doctrine, Allstate's claim for

reimbursement of its medical payments should be offset by a portion of Nguyen's legal fees and expenses. The trial court granted summary judgment in Nguyen's favor. On appeal, we agree that Allstate presented evidence sufficient to raise a genuine issue of material fact. We accordingly reverse the judgment against Allstate and remand Nguyen's claim against Allstate for further proceedings.

I. BACKGROUND

On January 26, 2020, plaintiff Maria Nguyen was injured in an auto accident allegedly caused by defendant Laida Juarez. The vehicle Nguyen occupied was insured by Allstate Fire and Casualty Co., who paid Nguyen $5,000 under the policy's "Medical Payment" coverage. Allstate notified Nguyen and Juarez's insurer, Farmers Insurance, of Allstate's claim for reimbursement for that payment.

Nguyen sued Juarez to recover for her personal injuries; those claims have been settled. But while those claims were still pending, Nguyen added Allstate as a defendant and sought declaratory relief to equitably offset a portion of Nguyen's attorney's fees and litigation expenses in suing Juarez against Allstate's claim for reimbursement of its Medical Payment to Nguyen. As a basis for this offset, Nguyen relied on the common-fund doctrine.

Nguyen filed a traditional motion for summary judgment against Allstate, supported by the affidavit of her attorney, Scott Lannie. In its response, Allstate described the contents of documents showing Allstate's efforts to pursue its subrogation claim independently from Nguyen and her attorney. As support for the descriptions, Allstate cited Pamela Collum's "first" declaration, which authenticated and attached the described documents as exhibits.

Nguyen stated in her reply that summary-judgment evidence requires affidavits setting out facts, whereas Collum's declaration merely authenticated

documents. In response, Allstate filed a surreply, to which it attached Collum's "second" declaration. The two declarations differ only in that the second declaration includes the same descriptions of documents that appear in the body of Allstate's summary-judgment response.

The trial court sustained Nguyen's multiple objections to Collum's second declaration, struck that declaration, and granted Nguyen's motion for summary judgment. The trial court rendered declaratory relief, offsetting Allstate's $5,000 claim by $2,000 for Nguyen's attorney's fees in pursuing her claim against Juarez and $130.04 for Nguyen's case expenses. Pursuant to the Uniform Declaratory Judgments Act (UDJA), the trial court additionally awarded Nguyen $2,700 for attorney's fees she incurred in pursuing declaratory relief.[1] The trial court conditionally awarded Nguyen further attorney's fees in the event that Allstate unsuccessfully appealed the judgment.

At Nguyen's request, the trial court dismissed her claims against Juarez with prejudice, and the interlocutory judgment against Allstate merged into the final judgment. Allstate moved unsuccessfully for a new trial, then brought this appeal.

II. ISSUES PRESENTED

Allstate presents four issues for review. In its first issue, Allstate asserts that there is insufficient evidence to support Nguyen's traditional motion for summary judgment because Nguyen improperly relied upon her own attorney's affidavit, which is incompetent summary-judgment evidence. Allstate argues in its second issue that it produced evidence sufficient to raise a genuine issue of material fact as to whether the common-fund doctrine applies to Allstate's subrogation claim. In its third issue, Allstate challenges the trial court's ruling sustaining Nguyen's objections

[1] *See* TEX. CIV. PRAC. & REM. CODE § 37.009.

to Collum's second declaration attached to Allstate's summary-judgment surreply. Finally, Allstate contends in its fourth issue that because the summary judgment against it must be reversed, the award to Nguyen of attorney's fees under the UDJA also must be reversed.

III. STANDARD OF REVIEW

A movant is entitled to summary judgment on a claim for which it has the burden of proof if it conclusively establishes each element of the claim. *See* TEX. R. CIV. P. 166a(a), (c). To prevail on a traditional motion for summary judgment, the movant must show that there is no genuine issue of material fact on the issues expressly set out in the motion or in any response and that the movant is entitled to judgment as a matter of law. TEX. R. CIV. P. 166a(c). If the movant carries this initial burden, the burden shifts to the nonmovant to raise a genuine issue of material fact precluding summary judgment. *Lujan v. Navistar, Inc.*, 555 S.W.3d 79, 84 (Tex. 2018) (citing *Centeq Realty, Inc. v. Siegler*, 899 S.W.2d 195, 197 (Tex. 1995)).

We review the trial court's ruling on the summary-judgment motion de novo. *See Boerjan v. Rodriguez*, 436 S.W.3d 307, 310 (Tex. 2014) (per curiam). On review, we construe the evidence in the light most favorable to the non-movant, crediting evidence favorable to the nonmovant if a reasonable juror could and disregarding contrary evidence unless a reasonable juror could not. *Mann Frankfort Stein & Lipp Advisors, Inc. v. Fielding*, 289 S.W.3d 844, 848 (Tex. 2009).

IV. THE ATTORNEY'S AFFIDAVIT

To preserve a complaint for appellate review, the record must show that the complainant raised the issue in the trial court by a timely request, objection, or motion and obtained an express or implicit ruling from the trial court or objected to the trial court's refusal to rule. *See* TEX. R. APP. P. 33.1(a). In an exception to this

general rule, one can complain on appeal about an affidavit's purely substantive defects, even if the complaint was not raised in the trial court. *See Seim v. Allstate Tex. Lloyds*, 551 S.W.3d 161, 166 (Tex. 2018) (per curiam).

Nguyen's summary-judgment evidence included the affidavit of her attorney Scott Lannie. *See* TEX. R. CIV. P. 166a(c) ("A summary judgment may be based on uncontroverted testimonial evidence of an interested witness . . . if the evidence is clear, positive and direct, otherwise credible and free from contradictions and inconsistencies, and could have been readily controverted."). Citing Texas Disciplinary Rule of Professional Conduct 3.08, Allstate argues that the affidavit is incompetent summary-judgment evidence because an attorney "should not be a witness to essential facts in a case in which he is representing a client."

The Texas Disciplinary Rules of Professional Conduct are not rules of evidence; rather, they "define proper conduct for purposes of professional discipline." TEX. DISCIPLINARY R. PROF'L CONDUCT preamble ¶ 10, *reprinted in* TEX. GOV'T CODE, tit. 2, subtit. G, app. A (TEX. STATE BAR R. art. X, § 9). Subsection (a) of Rule 3.08 provides that "[a] lawyer shall not accept or continue employment as an advocate before a tribunal in a contemplated or pending adjudicatory proceeding if the lawyer knows or believes that the lawyer is or may be a witness necessary to establish an essential fact on behalf of the lawyer's client" unless one of five exceptions applies. In particular, a party's attorney may offer testimony necessary to establish an essential fact if the testimony "relates to an uncontested issue" or "relates to the nature and value of legal services rendered in the case." *Id.* 3.08(a)(1), (a)(3).

Although Allstate did not object to the affidavit in the trial court, Allstate contends that this is a complaint that the affidavit is substantively defective, and thus, the complaint can be raised for the first time on appeal. Allstate cites no authority

that an affidavit signed by a party's counsel, allegedly in violation of Rule 3.08, is substantively defective such that the complaint can be raised for the first time on appeal. *But see Anderson Producing Inc. v. Koch Oil Co.*, 929 S.W.2d 416, 423 (Tex. 1996) (party waived complaint of the alleged violation of Rule 3.08 by failing to object in the trial court). Moreover, we cannot clearly identify Allstate's complaint. Lannie attested to the nature and value of legal services he rendered in this case, and Allstate does not dispute such testimony falls within an exception to Rule 3.08. In its reply brief, Allstate adds that Lannie "mentioned that Allstate did nothing to contribute to any of these case expenses." But Rule 3.08 does not apply to statements related to an uncontested issue, and Allstate does not contend that it paid any of Lannie's fees or expenses, and does not explain why this statement would constitute a substantive defect.

We overrule Allstate's first issue.

V. THE COMMON-FUND DOCTRINE

The common-fund doctrine is an equitable rule under which a trial court has discretion "to allow reasonable attorney's fees to a litigant who, at his own expense, has maintained a suit which creates a fund benefitting other parties as well as himself." *Lancer Corp. v. Murillo*, 909 S.W.2d 122, 126 (Tex. App.—San Antonio 1995, no writ). "The equitable objective is that of distributing the burden of such expenses among those who share in an accomplished benefit." *Knebel v. Capital Nat'l Bank in Austin*, 518 S.W.2d 795, 799–800 (Tex. 1974). If a non-litigant owes its recovery to the legal services performed for the plaintiff, then it is only right that the non-litigant pay its share of the fees and expenses incurred in obtaining it; thus, the determinative question is whether the legal services benefitted the non-litigant.

In the context of an insurer's subrogation or reimbursement claim, the question of whether to apply the doctrine depends upon whether the insurer assisted

in pursuing subrogation from the tortfeasor (or the tortfeasor's insurer), regardless of whether the insurer acted in concert with, or independently from, the injured plaintiff. *See Lancer*, 909 S.W.2d at 128–29 (collecting cases). At one extreme, if liability is contested and the insurer took no action either to assist the plaintiff's efforts to recover the subrogated amount or to resolve the insurer's subrogation claim directly with a third party, then the common-fund doctrine applies. *See Tex. Farmers Ins. Co. v. Seals*, 948 S.W.2d 532, 534 (Tex. App.—Fort Worth 1997, no writ). At the other extreme, if liability and the amount of the subrogation claim are uncontested, then the insurer does not benefit from the plaintiff's effort, because the insurer already has the right to recover the full amount it claims. Because the plaintiff's efforts do not benefit the insurer, the doctrine is inapplicable. *See Valle v. State Farm Mut. Auto. Ins. Co*., 5 S.W.3d 745, 746–47 (Tex. App.—San Antonio 1999, pet. denied).

Nguyen argues that this case is like *Seals* because Allstate did not contribute to the attorney's fees and legal expenses that Nguyen incurred in her suit against Juarez. It appears to be Nguyen's position that if the insured sues the tortfeasor, then the common-fund doctrine applies unless the insurer assists in the prosecution of the insured's suit. But, that is incorrect. The doctrine's applicability is not determined by whether the insurer assists in pursuing the *insured's* claims; it is determined by whether the insurer assists in pursuing the *insurer's* claim, and the insurer can do so independently of the insured's suit against the tortfeasor.

Because an insurer can independently pursue its subrogation claim outside of the insured's personal-injury suit, the insurer in *Allstate Ins. Co. v. Edminster* was able to raise a genuine issue of material fact sufficient to defeat summary judgment as to whether the common-fund doctrine applied by producing evidence that the insurer (a) demanded reimbursement directly from the tortfeasor's insurer,

(b) informed the tortfeasor's insurer that it was pursuing its subrogation claim independently of the plaintiff's claim, (c) asked the tortfeasor's insurer to issue a separate check in the amount of the subrogation claim and to name the subrogated insurer as the sole payee, (d) notified the insured's counsel not to take any action to collect the subrogation claim, and (e) supported its subrogation claim by submitting the insured's medical bills to the tortfeasor's insurer. 224 S.W.3d 456, 458 (Tex. App.—Dallas 2007, no pet.).

In its summary-judgment response and on appeal, Allstate correctly pointed out that this case is legally indistinguishable from *Edminster*.

Nguyen's accident occurred on January 26, 2020, and as Allstate stated in its summary-judgment response, Allstate began taking independent steps on February 14, 2020, to pursue its own claim at its own expense. On that date, Allstate sent Juarez's insurer a letter that is a nearly verbatim copy of the letter sent by the insurer in *Edminster*. *See id.* Just as in *Edminster*, the letter formally notified the tortfeasor's insurer of Allstate's subrogation claim and demanded payment directly from the tortfeasor's insurer. Just as in *Edminster*, Allstate informed the tortfeasor's insurer that it was pursuing its own subrogation claim independently from the insured. And just as in *Edminster*, Allstate asked the tortfeasor's insurer to issue a separate check in the amount of the subrogation claim and to name Allstate as the sole payee. Allstate further stated,

> Allstate Fire and Casualty Insurance Company has not authorized, hired, or retained its insured's attorney and expressly disavows any authority, apparent or otherwise, for its insured's attorney to negotiate for any amount owed Allstate Fire and Casualty Insurance Company on its Medical Payment subrogation claim. By copy of this letter, our insured and his or her attorney are being notified of our position in this matter.

Five days after this letter, Allstate wrote the tortfeasor's insurer again. In its letter of February 19, 2020, Allstate presented its subrogation claim and wrote that the documentation of its claim was attached—as did the insurer in *Edminster*. *See id.* And again, Allstate wrote, "We request that you contact us regarding the final reimbursement amount before settling any bodily injury claim with our insured as we intend to take the necessary steps to preserve our subrogation claim."

Allstate also wrote directly to Nguyen's attorney and advised him, "we will negotiate directly with the responsible party and/or their insurance carrier for the recovery of any benefit payments we make on behalf of your client."

Allstate took all of these steps not merely before Nguyen's suit against Juarez was settled, but before the case was even filed.

Moreover, Allstate did not merely repeat the same actions taken in *Edminster*; it took additional steps. The summary-judgment evidence shows that Allstate and Farmers Insurance communicated about the subrogation claim by email and telephone. And shortly after Nguyen filed this lawsuit, Allstate submitted its subrogation claim against Farmer's Insurance to "Arbitration Forums," which appears to be a forum for alternative dispute resolution. Before the date set for the hearing in Arbitration Forums, Nguyen settled her claims against Juarez.

Nguyen attempts to distinguish *Edminster* solely on the ground that, in this case, Nguyen and Juarez reached a settlement after suit was filed, whereas the *Edminster* court does not state whether or not there was a pending suit between the injured insured and the tortfeasor at the time of settlement. Nguyen does not explain why this would make a difference, and she cites no authority that it does. Certainly the *Edminster* court did not treat the presence of absence of a pending lawsuit between the insured and the tortfeasor as a material fact. And in any event, the pendency of the insurer's subrogation claim in an alternative dispute-resolution

forum is no less a material fact than the pendency of the injured insured's personal-injury claim in court.

Reviewing the evidence in the light most favorable to Allstate and drawing all reasonable inferences in its favor, it cannot be said that Nguyen conclusively established that Allstate did not "assist" in recovering on its subrogation claim by pursuing payment directly from the tortfeasor's insurer. At a minimum, the same evidence that was sufficient to defeat summary judgment in *Edminster* was presented by Allstate as part of its response to Nguyen's motion, and it is sufficient to defeat summary judgment here.

We sustain Allstate's second issue. Because Allstate's summary-judgment response and its attached evidence were sufficient to defeat summary judgment, we do not reach Allstate's third issue, in which Allstate challenges the trial court's ruling sustaining Nguyen's objections to evidence attached to Allstate's surreply.

VI. ATTORNEY'S FEES UNDER THE UDJA

In its fourth issue, Allstate argues that because the summary judgment against it must be reversed, the trial court's award of attorney's fees under the Uniform Declaratory Judgments Act also must be reversed. We agree.

The UDJA permits an award of "reasonable and necessary" costs and attorney fees "as are equitable and just." TEX. CIV. PRAC. & REM. CODE § 37.009. But when the trial court made the award, Nguyen was the prevailing party; now she is not. "Where the extent to which a party prevailed has changed on appeal, our practice has been to remand the issue of attorney fees to the trial court for reconsideration of what is equitable and just." *Farmers Grp., Inc. v. Geter*, 620 S.W.3d 702, 712 (Tex. 2021) (quoting *Morath v. Tex. Taxpayer & Student Fairness Coalition*, 490 S.W.3d 826, 885 (Tex. 2016)). It will not be possible to determine whether it is equitable

and just to award attorney's fees in any amount to either party until Nguyen's claim against Allstate under the common-fund doctrine is decided.

We sustain Allstate's fourth issue.

VII. CONCLUSION

Because Allstate's summary-judgment response and its attached evidence were sufficient to defeat summary judgment, we reverse the judgment against Allstate and we remand Nguyen's claims against Allstate to the trial court for further proceedings.[2]

/s/ Tracy Christopher
Chief Justice

Panel consists of Chief Justice Christopher and Justices Jewell and McLaughlin.

[2] If an error affects only part of the matter in controversy, we can limit the scope of remand to the part affected by the error if that part is separable without unfairness to the parties. TEX. R. APP. P. 44.1(b). Nguyen's claims against Allstate are readily separable from Nguyen's claims against Juarez, which were dismissed with prejudice pursuant to a settlement agreement. We accordingly exclude Nguyen's claims against Juarez from the scope of remand.