THIS OPINION HAS BEEN RELEASED FOR PUBLICATION BY ORDER OF THE COURT OF CIVIL APPEALS

IN THE COURT OF CIVIL APPEALS OF THE STATE OF OKLAHOMA

DIVISION IV

CARL FLEIG,

Plaintiff/Appellant,

vs.

LANDMARK CONSTRUCTION GROUP, INC.,

Defendant/Appellee.

Case No. 119,432

APPEAL FROM THE DISTRICT COURT OF OKLAHOMA COUNTY, OKLAHOMA

HONORABLE ROBERT TRENT PIPES, TRIAL JUDGE

AFFIRMED

E. W. Keller
Harry Dalton
KELLER, KELLER & DALTON
Oklahoma City, Oklahoma

For Plaintiff/Appellant

Philip A. Schovanec
FELLERS SNIDER, P.C.
Oklahoma City, Oklahoma

For Defendant/Appellee

OPINION BY GREGORY C. BLACKWELL, PRESIDING JUDGE:

¶1 Carl Fleig appeals an attorney fee award of $51,331 against him in a case involving an alleged breach of a roofing warranty. On appeal, Fleig argues that (1) the fee awarded is impermissible because it so exceeded the amount in controversy as to be inherently unreasonable, and (2) the trial court abused its discretion in allowing too many hours for certain specific tasks. We affirm the

trial court's award as to the first contention and find that Fleig waived appellate review as to the second.

BACKGROUND

¶2 This matter began in July 2010, when two homeowners entered into a contract with Landmark to replace a hail-damaged roof on their home. At this time, the homeowners were negotiating to sell the house to Fleig. The roofing contract provided a five-year, non-transferrable warranty to the homeowners. Fleig was not a named party to the roofing contract and paid no part of the consideration. On September 1, 2010, Landmark made a "roofing certification" that the new roof used "class 4 impact resistant lifetime shingles" and that, in the opinion of Landmark's vice president, the roof had a "remaining life of 25+ years." The certification was evidently made for mortgage purposes.[1] Fleig did not see this certification until it was faxed to the closing company on September 7, 2010.

¶3 After moving into the house in September 2010, Fleig experienced some problems with leaking gutters, which Landmark repaired. In April 2011, Fleig began to experience roof leaks. Landmark refused to address the leak on the grounds that the five-year warranty given to the prior homeowners did not transfer to Fleig. Fleig eventually hired another contractor to repair the roof. This contractor billed Fleig approximately $2,600. Fleig also alleged damages of

[1] The certificate is sometimes required by mortgage companies as a condition of lending. *See* Tr. (1/12/2017), pg. 87. It can also help obtain insurance coverage or a lower insurance rate because it confirms the particular resistance of the shingles to impact damage and their expected life under normal circumstances.

$1,400 required to remediate interior water damage. Fleig sued Landmark, claiming that the "roofing certification" acted either as a warranty, or an assurance which he relied on in purchasing the house. Fleig later argued theories of implied warranty, contractual warranty, and fraud. After Fleig had put on his evidence in a bench trial, Landmark made a motion for directed verdict, which the district court granted. Landmark then filed what would become the first of several fee applications, seeking $7,500 in fees.

¶4 Fleig appealed the grant of a directed verdict in Supreme Court Case No. 111,677. A split panel of Division II of the Court of Civil Appeals affirmed, but the Supreme Court vacated the majority's opinion on certiorari. The Court adopted the dissent—which held that the directed verdict was inappropriate because Fleig has established a *prima facie* case for several theories of recovery—as the controlling opinion of the Court.

¶5 The matter thus returned to the trial court where the bench trial was continued to allow Landmark to present its defense. Fleig put on no new evidence. Nevertheless, the trial court found Landmark liable on four different theories, which were: (1) the written contractual clause stating that the warranty was non-transferrable was unenforceable because the prior homeowners were not "made aware" of it; (2) Landmark additionally breached a common-law warranty of good workmanship; (3) the roofing contract between the prior homeowners and Landmark was a contract for goods, and hence a UCC warranty of fitness for purpose was effective; and (4) an express warranty was created between Landmark and Fleig when Landmark faxed the roofing certification to

Fleig to forward to his mortgage provider. The court denied damages for harm done to the interior by water. The court awarded Fleig $2,725 as damages.[2]

¶6 Landmark appealed in Supreme Court Case No. 115,949. Division II of the Court of Civil Appeals reversed all four of the district court's decisions and remanded with instructions to enter judgment in favor of Landmark. Fleig sought certiorari for a second time, which the Supreme Court denied.

¶7 Landmark then filed its fee application seeking $65,666 in fees. Fleig objected, arguing that this amount bore no reasonable relationship to the approximately $2,725 in damages Landmark had avoided, or the $3,922 in controversy. After an argument-only hearing, the trial court awarded Landmark $51,331 in fees. Fleig appeals.

STANDARD OF REVIEW

¶8 We review the amount of an award of attorney's fees for an abuse of discretion. *Strack v. Continental Resources, Inc.*, 2021 OK 21, ¶ 10, 507 P.3d 609, 614. Such review includes examination of both fact and law issues. *Id.* There is abuse when a court "bases its ruling on an erroneous legal conclusion or there is no rational basis in the evidence for the decision." *Id.*

[2] Fleig filed a fee application seeking approximately $30,000 in fees, arguing that this amount was reasonable because of the complex, novel, and difficult issues involved.

ANALYSIS

ESTOPPEL

¶9 Fleig argues that the fee here was unreasonable.[3] Landmark counters that Fleig must be at least partially estopped from presenting this argument by his prior position regarding his own fees. Following the second trial, when he was temporarily the prevailing party, Fleig requested some $30,000 in fees, accompanied by an argument that such an award was clearly justified by the particular circumstances of the case, despite his recovery amounting to only $2,725. Now that the positions are reversed, Fleig argues that a reasonable fee, even after substantial additional proceedings, is no more than $3,000. Landmark argues that he must be estopped from arguing that any fee less than $30,000 is now unreasonable by his prior argument that $30,000 in fees *was* reasonable.

¶10 Judicial estoppel is an equitable doctrine designed to bar a party who has knowingly and deliberately assumed a particular position from later assuming an inconsistent position to the prejudice of the adverse party. *Messler v. Simmons Gun Specialties, Inc.*, 1984 OK 35, ¶ 18, 687 P.2d 121, 128. It applies to prevent advancement of inconsistent positions only vis-à-vis matters of fact. *Parker v. Elam*, 1992 OK 32, ¶ 7, 829 P.2d 677, 680. Judicial estoppel must be applied with restraint and only in the narrowest of circumstances so as to avoid

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[3] It is important to note here precisely *what* is considered precedent in fee cases. Fleig cites, as precedential, cases where a reduction in fees by the trial court was upheld on appeal. This argument misunderstands the standard of review applied in these cases. Pursuant to an abuse-of-discretion standard, an affirmation merely finds that a decision was *within the discretion of the court*. An affirmation of a trial court's reduction of fees under an abuse-of-discretion standard does not create precedent that a similar reduction is *required*—or even advisable—in another case.

impinging on the truth-seeking function of the court. *Barringer v. Baptist Healthcare of Oklahoma*, 2001 OK 29, ¶ 14, 22 P.3d 695, 699.

¶11 Here, we find Fleig's changed position on the reasonableness of fees typifies human nature and the demands of advocacy, rather than constituting a statement of fact or position upon which Landmark relied to its prejudice. We further find no record that Landmark has detrimentally changed its position here or been prejudiced by any reliance on Fleig's statements as to a reasonable fee. Thus, Fleig is not estopped to plead opposite theories as to the reasonableness of the fee versus the award, even though his view of what is reasonable appears to change substantially based on which party is seeking the fee.

THE CONSTITUTION AND PREVAILING PARTY FEES

¶12 Statutory law is clear that an attorney fee award is subject to the rule that it must be generally reasonable, and case law indicates more specifically that one factor to consider is whether the award bears some reasonable relationship to the amount in controversy. "While the amount recovered is one factor to consider, a reasonable attorney's fee should be determined on remand in accordance with an appropriate balancing of the guidelines delineated in [*Burk*]." *State ex rel. Harris v. Three Hundred & Twenty-Five Thousand & Eighty Dollars*, 2021 OK 16, ¶ 24, 485 P.3d 242, 248 (*citing State ex rel. Burk v. City of Oklahoma City*, 1979 OK 115, ¶ 3, 598 P.2d 659, 660) (footnotes omitted). The Supreme Court has, however, consistently declined to identify or apply any ratio between the amount recovered and the amount of fees requested to determine what is reasonable because each case is based on highly individual circumstances. *See*

Finnell v. Jebco Seismic, 2003 OK 35, ¶ 19, 67 P.3d 339, 347 ("While we are committed to the rule that a fee for legal services must bear some reasonable relationship to the judgment, we have never identified a percentage above which a fee's relationship to the damage award must be deemed unreasonable per se.").

¶13 To counter, Fleig first argues that the fee here goes beyond statutory and common-law rules and veers into the realm of unconstitutionality when compared to the amount in controversy. Fleig cites *Moses v. Hoebel*, 1982 OK 26, 646 P.2d 601, for the principle that "litigation costs are subject to limitation in Okla. Const., Art 2 § 6."[4] *Brief-in-chief*, pg. 3. Neither *Moses* nor our constitution makes such a broad statement regarding "litigation costs," however. *Moses* held that preventing a plaintiff from refiling his case on the grounds that he had not yet paid a sanction imposed for his prior vexatious dismissal constituted an unconstitutional bar to court access. *Id.* ¶ 1, 602. We do not find the rule of *Moses* applicable here.

¶14 Fleig also cites *Beard v. Richards*, 1991 OK 117, 820 P.2d 812. *Beard* makes no relevant statement regarding the general constitutionality of litigation costs either, holding that sanctions for bad faith litigation should be "strictly applied" by the courts to avoid chilling novel arguments for the extension or modification of existing law, or claims based on dubious, but disputed, facts. *Id.*

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[4] Okla. Const., Art 2 § 6 states that "The courts of justice of the State shall be open to every person, and speedy and certain remedy afforded for every wrong and for every injury to person, property, or reputation; and right and justice shall be administered without sale, denial, delay, or prejudice."

¶ 12-14, 816. Neither case indicates a constitutional limitation on prevailing-party fees based on the amount recovered.

¶15 Finally, Fleig argues that the fee here constitutes a barrier to access to the courts because the prospect of such fees will reduce filings by plaintiffs with limited resources. He argues that the possibility of a prevailing-party fee substantially greater than the amount in controversy is against public policy and the constitutional goal of open courts. While it is clear that the possibility of prevailing party fees may cause a plaintiff *or* a defendant of limited means to avoid litigation of any claim where the outcome is not reasonably certain to be favorable, the desire to preserve access underlies the public policy represented by the American Rule and is one reason why cases are not statutorily fee-bearing unless specifically made so. *Eagle Bluff, L.L.C. v. Taylor*, 2010 OK 47, ¶ 16, 237 P.3d 173, 179. The execution of this public policy is properly left to the legislature, however, and the legislature has chosen to make warranty claims fee bearing. 12 O.S. § 939. What Fleig appears to argue is that the Oklahoma Constitution imposes some maximum ratio of fees against the amount recovered. We find no authority for this position and reject it.

SPECIFIC CASE LAW AND THE FEE HERE

¶16 Fleig also relies on *Continental Natural Gas, Inc. v. Midcoast Natural Gas, Inc.*, 1996 OK CIV APP 157, 935 P.2d 1185, in an effort to show that the fee here, even if not unconstitutional, is still inherently unreasonable. In that case, the trial court awarded Continental approximately $35,000 in attorney's fees after a $15,000 recovery. *Id.* ¶ 7, 1187. Fleig argues that, in *Continental*, the Court of

Civil Appeals found a $35,000 fee inherently unreasonable in contrast to a $15,000 recovery. The *Continental* decision is, however, more nuanced than Fleig suggests, and is of limited relevance here.[5] Further, even if we accept Fleig's view that *Continental* reduced the fee based only on the amount recovered versus the fee, *Spencer v. Oklahoma Gas & Elec. Co.*, 2007 OK 76, 171 P.3d 890, subsequently held that *all Burk* factors must be considered in determining if a fee was reasonable. *Id.* ¶ 15, 896.[6] The Court in *Spencer* was clear: an award based on nothing more than "the comparison of the fee to the amount recovered" is improperly decided. *Id.*

¶17 What cases such as *Continental* primarily illustrate is that the amount approved or disapproved of in any specific case is of little assistance in determining a reasonable fee in a different case.[7] The hours of work reasonably and necessarily required by the position and strategy of the parties, the

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[5] Although *Continental* did state that "the trial court's award in our opinion bears no reasonable relationship to the amount in controversy," the court did not make its reduction *solely* because $35,000 in fees was inherently unreasonable for recovering $15,000. Rather, the court also found the $19,000 in fees the trial court had granted to Continental on account of litigation delays was a cost that should have been borne by the parties equally because the delay was attributable to both parties. *Continental*, ¶ 11, 1188.

[6] The factors set out in *Burk v. Oklahoma City* are: time and labor required; novelty and difficulty of the questions; skill requisite to perform the legal service; preclusion of other employment; customary fee; whether the fee is fixed or contingent; time limitations; amount involved and results obtained; experience, reputation and ability of the attorneys involved; risk of recovery; nature and length of relationship with the client; and awards in similar causes. *State ex rel. Harris v. Three Hundred & Twenty-Five Thousand & Eighty Dollars*, 2021 OK 16, ¶ 22, 485 P.3d 242, 247–48.

[7] By example, *Continental* found that $15,000 in fees was reasonable for recovering $15,000—a ratio of 1:1. At the other extreme, *Coastal Strategies Income Fund-C v. Mewbourne Oil Company*, No. 110,063, (COCA Div. IV Oct. 16, 2013) (unpublished), *cert. denied* (Okla. Sup. Ct. Mar. 4, 2014), found a $75,000 fee incurred defending against liability for a stolen $5,000 royalty check—a ratio of 15:1—to be within the discretion of the court. *See* note 8, *infra*. The ratio between the fee and the recovery, while a factor to consider, is clearly not controlling.

procedural and legal complexity of the issues, and any fees incurred due to undue delay or frivolous positions appear to have a more substantial effect on both the fee claimed and its reasonableness. The *Burk* analysis properly focuses on these factors.

¶18 Here, the issues were both complex and novel. Fleig evidently argued that a written clause stating that a warranty is non-transferrable is invalid unless the original warrantee knows of it or is "made aware of it." He argued that a contract to replace a roof qualifies as a sale of goods under the UCC and invokes common law warranties of merchantability and suitability for purpose. Most significantly, he argued that the "roofing certificate" routinely provided to mortgagees identifying "25-year shingles," constituted a warranty by the installer that the roof would not leak for a certain amount of time. Such was the novelty of these questions that this case took some ten years to reach this final stage, and involved over 700 pages of record, a split trial, and is now on its third appeal in this Court.

¶19 There is nothing inherently unreasonable about a party requiring approximately 175 hours to litigate such a case. Significantly, we also see no reason why the actual time necessary to oppose the complex theories Fleig presented should vary substantially based on the original amount in controversy. We do not agree that, under the umbrella of "reasonable fees," a defendant should simply confess novel claims for small amounts, or that a plaintiff should avoid bringing such claims because, in both cases, it may cost substantially more in fees to try the issue than the possible recovery. Rather, the

principle of a "reasonable fee" is based more on a multi-factor analysis of whether the work billed was reasonably necessary for the issues presented in a particular case, and whether the amount of time taken was reasonable for the difficulty of the issues raised.

¶20 Additionally, the issues here were not only legally complex, but commercially significant well beyond the immediate question of a $2,725 roof repair.[8] If Fleig's warranty theories were correct, Landmark would likely be subject to substantial future warranty costs and liabilities. Fleig sought to establish that the roofing certificate provided for the purpose of mortgage lending or insurance constituted a twenty-five-year roof warranty by Landmark. If Fleig had been successful, Landmark would likely find that it had unwittingly bestowed an unknown number of twenty-five-year roof warranties upon its customers' assignees.[9]

¶21 Despite these realities, Fleig argues that Landmark was required to defend in a manner—and at a cost—appropriate for a case in which only $3,922 was at stake. Based on the foregoing analysis and considerations, we are not persuaded.

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[8] For an example of a case where the legal principle, not the specific amount in controversy, was commercially significant, see *Coastal Strategies Income Fund-C v. Mewbourne Oil Company, supra,* note 7. In that case, Mewbourne sought statutory attorney fees and costs of approximately $200,000 for establishing that it was not required to replace a $5,000 royalty check that had been stolen from Coastal's office and cashed. It was clear that the parties were litigating the commercially significant question of whether an operator must bear the loss for *any* royalty check intercepted and cashed after the operator mailed it. Failure to defend a seemingly small claim could lead to disastrous results for a defendant, depending on the number of potential plaintiffs with similar claims. *Burk* accounts for such circumstances by considering both the "amount involved and the results obtained." *Burk*, 1979 OK 115, ¶ 8, 661.

[9] Landmark's representative testified at trial that he remembered signing "dozens" of such certifications.

A "LACK OF NOVEL ISSUES"

¶22 Fleig next argues that, even if this case did initially present novel issues that would justify a larger fee, all such novel issues were settled by the first appeal, and hence, any fees incurred since then should be much reduced. This argument is not consistent with the appellate court's findings in either prior opinion, however.

¶23 A review of those opinions shows no "settling" of the novel issues.[10] Indeed, it is difficult to conceive how any question other than a pure question of law could be "settled" against Landmark on an appeal from a directed verdict before it had the opportunity to present any defense below. The majority of findings in the first appeal clearly do not settle any issue of law or fact in the case.

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[10] In the second appeal, No. 115,949, the court summarized the existing law of the case created by the first appeal as follows:

> 1. According to Fleig's evidence, the roof was in need of repair.
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> 2. Fleig's evidence showed that [the prior homeowners] contracted with Landmark to install a new roof after [the homeowners'] old roof failed an inspection.
>
> 3. That Roofing Contract between Landmark and [the prior owners] contained a five-year warranty.
>
> 4. At least part of the damage for which Fleig sued was covered by the five-year warranty.
>
> 5. Fleig's evidence was sufficient to establish that he was a third-party beneficiary to the Roofing Contract between Landmark and [the prior owners], and therefore able to enforce the five-year warranty.
>
> 6. Fleig's evidence supported the argument that Landmark was estopped to deny that it had contracted with Fleig or his mortgage company to provide a Roofing Certification.
>
> 7. The Certification states that the roof had a twenty-five year life.

Fleig v. Landmark Construction Group Inc., No 115,949, slip op. at 6-7 (COCA Div. II Dec. 20, 2019) (unpublished), *cert. denied* (Okla. Sup. Ct. May 26, 2020).

¶24 One finding does state that Fleig's evidence was "sufficient to establish that he was a third-party beneficiary to the Roofing Contract between Landmark and [the prior owners] and able to enforce the five-year warranty." Fleig appears to interpret this as establishing, as the law of the case, that he *was* a third-party beneficiary as a matter of law. This statement must be properly read in the context of the opinion at that time, however—an appeal of a directed verdict made at the close of Fleig's evidence. Hence, it can only be interpreted as stating that Fleig had established a *prima facie* case that he *could be* a third-party beneficiary—that is, he was not, as a matter of law, *not* a third-party beneficiary.[11] None of these findings settled the novel issues pressed by Fleig.

THE HOURLY RATE AND HOURS BILLED

¶25 Fleig's brief also contains a section titled "Hours and Rate Are Excessive." The section does not contain any argument regarding the hourly rate, however, and, according to the order appealed, there was "no dispute that the hourly rate of Defense counsel was reasonable." Fleig does, though, raise several questions about alleged overbilling.

¶26 However, under the unique record presented in this case, we find Fleig has waived any appellate argument as to specific claims of overbilling. According to the order appealed, in addition to agreeing that the hourly rate was reasonable, "[t]he parties further stated that they were not requesting a detailed analysis and

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[11] The first appeal was from a directed verdict before Landmark put on any evidence. It is clear that COCA did not find that Fleig was a third-party beneficiary as a matter of fact or law because it remanded to allow Landmark an opportunity to present contrary evidence on this issue.

order but rather just wanted a 'number.'" Fleig has not contested this statement. Further, Fleig failed to provide any transcript of the hearing on fees, apparently did not present any evidence at that hearing (expert or otherwise), and has not (insofar as we can tell from this record) argued that the attorney time sheets and records offered in support of Landmark's motions were inadequate to permit the district court's review pursuant to *Burk*. While normally our abuse of discretion standard includes "appellate examination of both fact and law issues," *Christian v. Gray*, 2003 OK 10, 65 P.3d 591, ¶ 43, 608, here, where the appellant invites an evidentiary record void of the factual findings he claims are necessary on the appeal, the appellant has not preserved an appellate challenge to the factual basis of the trial court's decision. See *McCorkle v. Great Atlantic Ins. Co.*, 1981 OK 128, ¶ 16, 637 P.2d 583, 586 ("[S]ince appellant neither preserved error in objecting to the amount of attorney fees *nor presented evidence in contradiction of the amount*, but merely objected to the award of attorney fees, we hold that the amount of attorney fees is not subject to our review because any objection, which would have preserved this issue for appeal, was waived." (emphasis supplied)).[12] As such, we find Fleig's claims as to overbilling were waived for purposes of this appeal.

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[12] The dissent reads *Burk* and its progeny as barring the parties from agreeing to allow the trial court—after hearing the evidence, weighing the appropriate factors, and performing the necessary calculations to produce a reasonable fee—from entering an order that does not include a detailed calculation showing exactly how the court arrived at that fee. Put simply, the trial court must always "show its work." In the usual case, we would agree. Here however, as noted above, the parties stipulated to a simple order—they "just wanted a number." We view such a stipulation as waiving the parties' right to the mathematical evidence the dissent demands. While the trial court must still allow only a reasonable fee, and the trial court's duties outlined in *Burk* cannot be waived, the parties

CONCLUSION

¶27 The question of whether a fee is reasonable in comparison to the amount recovered can be fairly clear in simple litigation. When more complex theories are raised, and a case takes more than one trip to the appellate courts, it is inevitable that litigation costs will rise, while the potential recovery remains static. Here, the amount of time required to litigate the various theories Fleig raised would have been substantially the same whether he had sought $3,000 or $300,000. Parties will sometimes stand on principle, continue litigation because the fees incurred have already become substantial, or continue to litigate because the future consequences of establishing a new rule or theory of liability are significant to their business.

¶28 The *Burk* analysis places weight on several factors in cases such as this, and no one factor is predominant. Although deference to the trier of fact does not relieve appellate courts from their duty to review fact findings, a judgment of the trial court cannot be disturbed merely because we would have reached a different decision or where the appellant fails to direct us to a specific instance of error. On this record, we find that Fleig has failed to show either that the fee award was inherently excessive or that his appellate argument as to individual allegations of overbilling was not waived.

¶29 **AFFIRMED.**

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cannot invite a court to produce a simple order and then seek reversal because the trial court's order was insufficiently detailed. See *Samedan Oil Corp. v. Corporation Commission*, 1988 OK 56, ¶ 7, 755 P.2d 664 ("Parties to an action on appeal are not permitted to secure a reversal of a judgment upon error which they have invited, acquiesced or tacitly conceded in, or to assume an inconsistent position from that taken in the trial court.").

FISCHER, J., concurs, and WISEMAN, J. (sitting by designation), concurs in part and dissents in part.

WISEMAN, P.J., concurring in part and dissenting in part:

¶1 I concur in the Majority's analysis of the issues of estoppel, constitutionality, specific case law on unreasonable fees vis-à-vis the amount in controversy, and the novelty of the questions presented. My objection is to the final section on "The Hourly Rate and Hours Billed" and is simple: the trial court failed to follow clear Oklahoma Supreme Court precedent in setting this fee and its decision must be sent back for compliance.

¶2 Fleig agrees that the attorney fees of $31,025 Landmark requested through the end of the second trial and the entry of judgment were reasonable and appropriate, both as to hourly rate and time expended. The task for the trial court was to ascertain the reasonable and necessary counsel fees to which Landmark was entitled for the work performed after the second trial to the case's conclusion.

¶3 The trial court, however, did not follow the longstanding, well-established procedure extant since 1979 when *State ex rel. Burk v. City of Oklahoma City*, 1979 OK 115, 598 P.2d 659, was decided. *Burk* remains our guiding principle on this frequently thorny issue and its tenets are quite clear and direct:

> A particular word of caution to the trial judges of Oklahoma is here warranted. When a question on appeal presents the issue of reasonableness of attorney's fees awarded by the court, abuse of discretion by the trial judge is the standard of review. Therefore, the trial court should set forth with specificity the facts, and computation to support his award. While the compensatory fee is not all that

> difficult a problem on review if the trial court has made findings into the record regarding hours spent and reasonable hourly rates, the value placed on additional factors will be different in each case.

Id. ¶ 22. The Court held that, after *Burk*, attorneys in fee applications were required to submit detailed time records showing the work performed and to present evidence as to the reasonable value for the services performed, *i.e.*, the reasonable hourly rate within the local legal community. As the Court aptly reasoned, "This will enable trial courts to remove the fixing of attorney fees, not only in this type of action, but in every case, from the realm of speculation and guesswork into the area of simple mathematical computation. The trial court may then, with certainty, determine the compensatory fees." *Id.* ¶ 20.

¶4 The trial court here did not follow these guidelines. The court did not tell us what hourly fee or fees it rejected or accepted and applied and did not determine the number of hours for which fees were being awarded, and there is certainly no computation using these two factors to reach a lodestar amount. In the absence of the court's calculations, we are left to speculation and guesswork to determine what the trial court accepted and rejected and how the fee was calculated.

¶5 As the Supreme Court held in *Spencer v. Oklahoma Gas & Electric*, 2007 OK 76, ¶ 15, 171 P.3d 890, in reversing a non-compliant attorney fee award:

> No baseline was arrived at from either Spencer's detailed time records or the draft records offered by the electric company. The awarded fee did not result from the multiplication of an hourly rate, based on evidence presented, times the hours expended. Simply, the trial court awarded the fee based on a determination that the cause was never worth more

> than $5,000.00 and that it would not support an award of more than $2,500.00 in attorney fees. The award does not comport with the guidelines of Burk v. Oklahoma City, 1979 OK 115, 598 P.2d 659.

The *Spencer* Court reminds us that attorney fee awards are reviewed for abuse of discretion which occurs "when a decision is based on an erroneous conclusion of law **or where there is no rational basis in evidence for the ruling.**" *Id.* ¶ 13.

¶6 It is not a matter, as the Majority here urges, of the trial court "weighing the appropriate factors, and performing the necessary calculations to produce a reasonable fee." Nor is it a matter of the order being "insufficiently detailed." There is in fact no detail as to how the court reached its award, making it impossible to determine if the figure given represents too much or too little when the procedure mandated in *Burk* has not been complied with. This is not, in my view, a "demand" for "mathematical evidence," but recognition of a simple failure to follow long-established procedure implemented to avoid the all-too-common issue we repeatedly see in counsel fee appeals. The Court in *Spencer* concluded, "On this record, we are constrained to hold that the award set was without a basis in reason or evidence and an abuse of discretion occurred. The failure to follow the directives of Burk v. Oklahoma City, 1979 OK 115, 598 P.2d 659 in setting the attorney fees and to make an award consistent with the evidence presented constitutes an abuse of discretion requiring reversal." *Id.* ¶ 28.

¶7 The same is no less true here, even if the parties advised the court to abjure its duty and simply give them "a number." The record is more than sufficient to

show that the directives of *Burk v. Oklahoma City* were not followed, no computation was made, and no rational basis in the evidence exists that we can determine for the court's ultimate figure. We should follow the Supreme Court's 40-year precedent and reverse for compliance with *Burk*. I respectfully concur in part and dissent in part.

May 1, 2023