MARIE PFISTNER DELAHOUSSAYE, Appellant
v.
LISA DELAHOUSSAYE KANA, Appellee
No. 01-07-00579-CV
Court of Appeals of Texas, First District
November 13, 2008

On Appeal from the 334th Judicial District Chambers County, Texas Trial Court Cause No. 20174

Panel consists of Justices Taft, Keyes, and Alcala.

MEMORANDUM OPINION

Elsa Alcala Justice.

Appellant, Marie Pfistner Delahoussaye, appeals from a judgment in favor of appellee, Lisa Delahoussaye Kana. Delahoussaye filed suit against Kana seeking return of real property, actual damages, exemplary damages, and attorney's fees. After a jury trial, the trial court rendered a take-nothing judgment in favor of Kana, in accordance with the jury's verdict. In six issues, Delahoussaye asserts that (1) the trial court erred "in denying [her] motion for declaratory judgment for recission of the deed"; (2) the trial court erred by denying her motion for judgment notwithstanding the verdict because the evidence is legally insufficient to support the verdict; (3) the trial court erred by denying her motion for new trial because the evidence to certain jury questions is legally and factually insufficient to support the verdict; (4) the jury erred by failing to answer certain questions because it erroneously answered the predicate questions; (5) the trial court erred by denying her motion for sanctions; and (6) Texas Rule of Civil Procedure 327b and Texas Rule of Evidence 606 are unconstitutional because they "deprive a party of the right to seek information concerning possible jury misconduct during deliberation." We conclude the evidence is legally and factually sufficient to support the jury's verdict, the trial court did not abuse its discretion by denying the requested sanctions, and Delahoussaye waived her constitutional challenges to rule 327b and rule 606. We affirm.

Background

Delahoussaye inherited two tracts of land on Point Barrow Road, in Baytown, Texas from her parents. One tract is a 10.92 acre tract located on Trinity Bay. The other, smaller tract was located across Point Barrow Road from the bay.

In 2001, Delahoussaye was diagnosed with cancer and began treatment. During this time her relationship with Kana, Delahoussaye's daughter, was good. They spoke regularly, and Kana was present during Delahoussaye's surgery and took her to two of her chemotherapy treatments. In 2002, Delahoussaye was informed she had a mass in her right breast, and her doctor recommended removing it. However, she wanted to wait.

In April 2002, Kana's husband began a job in the Clear Lake area. Because Kana and her family lived in Conroe, her husband had an hour-long commute and often got up before his daughters were awake, returning after they had gone to sleep. Kana asked Delahoussaye for two acres on the smaller tract across Point Barrow Road on which she could build a house for her family. Delahoussaye responded she "would be more than happy to give [Kana] two acres across the road."

A few days later, Delahoussaye told Kana that instead of giving her the tract of land across Point Barrow Road, she would give Kana the land on the bay property because she knew Kana would take care of it and never sell it. Delahoussaye also told Kana she would give her the entire 10.92 acres of the bay property, explaining that it "would be real easy because [Delahoussaye] already had a survey of the whole thing and she wouldn't have to have it re-surveyed."

In May, Delahoussaye met with an attorney to have him prepare a deed for Kana. Delahoussaye provided the legal description of the property conveyed, which was attached as an exhibit to the deed and included all 10.92 acres of the bay property. The deed recited the consideration for the property as the "love and affection which I have and hold for my daughter." Kana was not involved in preparing the deed or meeting with the attorney and did not know of the deed until Delahoussaye called to tell her the deed had been prepared.

After the deed was filed, Delahoussaye went to her attorney's office for the deed. Her attorney informed her the deed had been mistakenly filed in Harris County and must be filed in Chambers County. Delahoussaye said she would take care of it. Delahoussaye, Kana, and Kana's daughters drove to Chambers County, filed the deed, and had lunch. Kana paid for the filing fee. When the original deed was returned from Chambers County, Delahoussaye took it to Kana, telling her she should get a safety deposit box and keep the deed in it.

Kana and her family moved into the existing house on the bay property in late May or early June, after the children were out of school for the summer. Delahoussaye would visit frequently, and Kana and her daughters would visit Delahoussaye in Pasadena approximately once every other week. Kana and her husband began making plans to build a new home on the bay property. Delahoussaye went with Kana and her daughters to see a builder's model home. Kana and her husband began making improvements, including putting in a large septic system. Delahoussaye paid approximately half of the price of the septic system.

In August, shortly before school started, Delahoussaye called Kana and told her that she wanted to put a trailer on the bay property. Kana questioned her mother about the trailer. Delahoussaye admitted she did not want to put a trailer on the property, but it was her other daughter, Kana's half-sister, who wanted the trailer. Kana responded that she would not allow a trailer on the property because it was not what Delahoussaye really wanted. Several hours later, Delahoussaye called Kana again and said she was going to have a lawyer prepare the papers necessary to convey the bay property back to Delahoussaye and she wanted Kana to sign the papers the next day. Kana replied that she would not give the bay property back. Delahoussaye demanded the return of some personal property, and Kana gave her the items. Delahoussaye and Kana did not speak after that. In September, Kana received a letter from Delahoussaye's attorney

demanding the bay property. Kana received one or two more similar letters. Finally, in December 2002, Kana was served with this lawsuit.

In contrast, Delahoussaye testified that when she told Kana she would be happy to give her two acres on which to build a home, it was with the understanding that Kana would take care of Delahoussaye for the rest of her life. According to Delahoussaye, the conveyance of the entire 10.92 acres of the bay property was a mistake and should have been only two acres. In May 2002, before the deed was filed in Chambers County, Delahoussaye filed a protest with the Chambers County Appraisal District. The protest included an affidavit explaining that she had transferred the land to Kana in return for the agreement that Kana and her family would care for her because she had cancer. Delahoussaye states that she paid for numerous improvements on the bay property and the existing house in anticipation of moving onto the property.

Delahoussaye explained she wanted the trailer to be placed on the property because the existing house was too small and had only one bathroom. Delahoussaye stated Kana and her husband were always having parties and she needed a place where she could rest. When she mentioned placing a trailer on the property, Kana told her "Don't come down here no more." Kana sent letters to Delahoussaye informing her that if she came on the property it would be considered trespassing and informing her of the possible criminal penalties. Delahoussaye asked Kana to return the property and filed this suit when Kana refused.

Declaratory Judgment and Recission of the Deed

In her first issue, Delahoussaye contends the trial court erred by denying her "Motion for a Declaratory Judgment under the Texas Civil Practice and Remedies Code, Chapter 37, Declaratory Judgments, for the recission of the deed made the subject of this lawsuit because it was obtained by fraud and breach of contract by [Kana] and alternatively, a mistake." Delahoussaye asserts (1) "there is sufficient evidence to show that [Kana] breached the contract"; (2) Delahoussaye was entitled to recission or reformation because Kana insisted the bay property was a gift from Delahoussaye, but the burden of proof was on Kana to prove a gift; and (3) alternatively, the evidence showed that Delahoussaye only intended for two acres to be a gift, not the entire tract.

Kana responds that fraud, breach of contract, and mistake are "inherently based on fact questions. The jury held in favor of [Kana] on . . . breach of contract and fraud. [Delahoussaye] failed to submit a question to the jury on mistake, and, therefore, waived that potential ground." Kana also asserts "the deed itself clearly indicate[s] that it is a gift deed and the description of the property conveyed is equally clear."

Delahoussaye requested declaratory relief in her petition. After the jury's verdict, she filed a "Motion for Judgment Non Obstante Veredicto and for Declaratory Judgment." The only ground she raised to support her motion for declaratory judgment was that Kana had the burden to prove the existence of a gift and that she failed to establish that Delahoussaye intended to make a gift of the bay property to Kana. However, the issue of whether the transfer of the property was a gift was not submitted to the jury.

The elements required to establish the existence of a gift are: (1) intent to make a gift; (2) delivery of the property; and (3) acceptance of the property. *Panhandle Baptist Found., Inc., v. Clodfelter*, 54 S.W.3d 66, 72 (Tex. App.—Amarillo 2001, no pet.) (citing *Roberts v. Roberts*, 999 S.W.2d 424, 432 (Tex. App.—El Paso 1999, no pet.)). "In determining whether a gift was intended by the execution of a deed, we must look to the facts and circumstances surrounding its execution in addition to the recitation in the deed itself." *Id.*, 54 S.W.3d at 72 (citing *Haile v. Holtzclaw*, 414 S.W.2d 916, 927 (Tex. 1967)) .

"A party objecting to a charge must point out distinctly the objectionable matter and the grounds of the objection. Any complaint as to a question, definition, or instruction, on account of any defect, omission, or fault in pleading, is waived unless specifically included in the objections." Tex.R.Civ.P. 274. "Failure to submit a question shall not be deemed a ground for reversal of the judgment, unless its submission, in substantially correct wording, has been requested in writing and tendered by the party complaining of the judgment; provided, however, that objection to such failure shall suffice in such respect if the question is one relied upon by the opposing party." Tex.R.Civ.P. 278.

The issue of whether a gift was intended is a question of fact, which the jury would need to decide. *See Panhandle Baptist*, 54 S.W.3d at 72 (citing *Haile*, 414 S.W.2d at 927). Here, when the trial court asked the parties about the proposed charge, Delahoussaye stated, "No objection from the plaintiff, your honor." Thus, any complaint Delahoussaye has regarding the failure to submit or obtain an answer concerning her intent to make a gift to Kana was waived by failing to object or otherwise notify the trial court of the complaint. *See* Tex.R.Civ.P. 274, 278.

We overrule Delahoussaye's first issue.

Evidentiary Issues

In her second and third issues, Delahoussaye challenges the legal and factual sufficiency of the evidence to support the jury's verdict. In her fourth issue, Delahoussaye contends that the jury erred by not answering certain questions, because it erroneously answered the predicate questions.

A. Standard of Review

When a party attacks the legal sufficiency of an adverse finding on an issue on which it has the burden of proof, it must show the evidence establishes, as a matter of law, all vital facts in support of the desired finding. *Dow Chem. Co. v. Francis*, 46 S.W.3d 237, 241 (Tex. 2001). In a legal sufficiency review, we consider the evidence in the light most favorable to the verdict and indulge every reasonable inference that would support it. *City of Keller v. Wilson*, 168 S.W.3d 802, 822 (Tex. 2005). The ultimate question is whether the evidence, crediting favorable evidence if reasonable jurors could and disregarding contrary evidence unless reasonable jurors could not, would permit reasonable and fair-minded people to reach the verdict under review. *Id.* at 827.

In determining the factual sufficiency of the evidence to support a jury's finding, courts of appeals are to weigh all the evidence, both for and against the finding. *Dow Chem. Co.*, 46 S.W.3d at 242. In reviewing a factual sufficiency challenge to a finding where the burden of proof is on the complaining party, that party must show that "the adverse finding is against the great weight and preponderance of the evidence." *Id.* In conducting our review, we may not substitute our judgment for that of the jury, which is the sole judge of the credibility of witnesses and the weight to be given to their testimony. *Golden Eagle Archery, Inc. v. Jackson*, 116 S.W.3d 757, 761 (Tex. 2003).

B. Judgment Notwithstanding the Verdict

In her second issue, Delahoussaye asserts the trial court erred by denying her motion for judgment notwithstanding the verdict because the evidence is legally insufficient to support the jury's answers to questions 1, 7, 8, 10, and 14.

1. Question 1

Question 1 asked the jury,

Did Marie Delahoussaye and Lisa Marie Delahoussaye Kana agree that in return for two acres of land located in Chambers County, Lisa Marie Delahoussaye Kana, would care for Marie Delahoussaye on the remaining portion of the Subject Property for the remainder of Marie Delahoussaye's life?

The jury answered "no" to this question. Although Delahoussaye testified that such an agreement existed, Kana denied it. In addition, the only consideration recited in the deed of the bay property to Kana was Delahoussaye's "love and affection" for Kana. Considering the evidence of Kana's testimony and the recital in the deed in the light most favorable to the verdict, Delahoussaye did not establish as a matter of law that Kana promised to take care of her in exchange for the bay property. We conclude the evidence is legally sufficient to support the answer to Question 1.

2. Question 7

Question 5 asked, "Did a relationship of trust and confidence exist between [Delahoussaye] and [Kana]?," to which the jury responded "no." In response to Question 6, the jury also found that Kana did not comply with a fiduciary duty to Delahoussaye. The jury was asked, in Question 7,

What sum of money, if any, if paid now in cash, would fairly and reasonably compensate Marie Delahoussaye for her damages, if any, that resulted from Lisa Marie Delahoussaye Kana's breach of fiduciary duty?

(a) Loss of use of the Subject Property sustained in the past.

(b) Loss of use of the Subject Property sustained in the future.

The jury answered "0" for both past and future loss-of-use damages.

Delahoussaye contends the evidence shows the bay property was worth approximately $800,000 and, in reliance on Kana's promise to take care of her, she had also made expenditures to improve the property. However, the jury was not asked the value or worth of the property or informed that the value was the proper measure of damages; nor did the jury receive any question or instruction concerning Delahoussaye's out of pocket expenses. Instead, the jury was asked to find "Loss of use of the Subject Property" as the measure of damages. Delahoussaye does not identify any evidence to establish any damages for loss of use as a matter of law. Accordingly, we conclude the evidence is legally sufficient to support the answer to Question 7.

3. Question 8

Question 8 asks, "Did Marie Delahoussaye substantially rely to her detriment on Lisa Marie Delahoussaye Kana's promise, if any, and was this reliance foreseeable by Lisa Marie Delahoussaye Kana?" The jury answered "no."

Delahoussaye contends, "Evidence that [Delahoussaye] relied to her detriment on [Kana]'s promise to care for her is shown by her transfer of the land worth over $800,000, thousands of dollars for improvements to the bay place, attorney's fees, depositions and court costs." We must view Kana's testimony and the absence of a promise mentioned as consideration in the deed in the light most favorable to the verdict. Therefore, Delahoussaye did not establish her detrimental reliance as a matter of law. We conclude the evidence is legally sufficient to support the answer to Question 8.

In her argument, Delahoussaye also states that questions 5, 6, 7, and 8 are in conflict. "To preserve error that the jury's findings are inconsistent, the complaining party must raise an objection in the trial court before the jury is discharged." *Kennedy Ship & Repair, L.P. v. Pham*, 210 S.W.3d 11, 24 (Tex. App.—Houston [14th Dist.] 2006, no pet.). Delahoussaye failed to raise the issue of an inconsistency or conflict in the jury's verdict prior to the jury's discharge, and thus has not preserved this issue for appeal. *See id.*

4. Question 10

The jury was also asked,

Did Lisa Marie Delahoussaye Kana commit fraud against Marie Delahoussaye?

Fraud occurs when—
(a) a party makes a material misrepresentation;
(b) the misrepresentation is made with knowledge of its falsity or made recklessly without any knowledge of the truth and as a positive assertion;
(c) the misrepresentation is made with the intention that it should be acted on by the other party; and
(d) the other party relies on the misrepresentation and thereby suffers injury.

"Misrepresentation" means:

(a) a false statement of fact; or
(b) a promise of future performance made with an intent, at the time the promise was made, not to perform as promised.

The jury responded "no."

As noted above, in our discussion of Questions 1 and 8, the record contains conflicting evidence concerning whether Kana made a promise to Delahoussaye. Viewing the evidence in the light most favorable to the verdict, we conclude the evidence is legally sufficient to support the answer to Question 10.

5. Question 14

Question 14 asked the jury,

Did Lisa Marie Delahoussaye Kana commit intentional infliction of emotional distress against Marie Delahoussaye ?

The elements of intentional infliction of emotional distress are as follows:

(a) the defendant acted intentionally or recklessly;
(b) the conduct was extreme and outrageous;
(c) the plaintiff suffered emotional distress as a result of the defendant's acts; and
(d) the plaintiff's distress was severe.

Extreme and outrageous conduct is conduct "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."

Severe emotional distress includes highly unpleasant mental reactions, such as extreme grief, shame, humiliation, embarrassment, anger, disappointment, or worry.

The jury answered "no."

Delahoussaye contends that the evidence "clearly showed" Kana's actions were intended to cause her "a great deal of emotional distress." Delahoussaye asserts that Kana erased Delahoussaye's name from concrete that had been poured years before, refused to allow Delahoussaye to visit her granddaughters, refused to answer telephone calls, barred Delahoussaye from the bay property, and threatened Delahoussaye with fines and imprisonment. Delahoussaye does not expressly state that these acts were "extreme and outrageous" or "atrocious and utterly intolerable."

Kana does not dispute that the acts occurred. She does, however, offer some explanation. Kana stated that she only put up "no trespassing" signs after she started having "incidents" on the property. Someone stole the chain to the front gate, someone put putty or glue in the keyhole of the lock on the front gate, and someone threw a rock through Kana's truck window. Kana

testified that neighbors told her that Delahoussaye had been seen driving on the bay property. After all these incidents, and receiving several letters threatening to sue her over the return of the bay property, Kana sent a letter to Delahoussaye at the end of November, stating,

Be advised that you, Marie Delahoussaye, are absolutely forbidden to enter and/or remain upon [the bay property] at any time. . . . .
Be advised that should you enter and/or remain upon the property described above after receiving this notice, a charge of Criminal Trespass (PC 30.05) will be filed against you. You may be arrested and put in jail to be held to face a Class B Misdemeanor offense of Criminal Trespass, which carries a maximum possible penalty of a $2,000 fine, up to 180 days in jail, and/or both.

The acts described by Delahoussaye were within Kana's legal rights. "There is no liability for intentional infliction of emotional distress where an actor does no more than insist on his legal rights." *Torres v. GSC Enterprises, Inc.*, 242 S.W.3d 553, 563 (Tex. App.—El Paso 2007, no pet.) (citing *Lang v. City of Nacogdoches*, 942 S.W.2d 752, 760 (Tex. App.—Tyler 1997, writ denied)); *see also McClendon v. Ingersoll-Rand Co.*, 757 S.W.2d 816, 820 (Tex. App.—Houston [14th Dist.] 1988), *aff'd*, 807 S.W.2d 577 (Tex. 1991). Because the evidence shows that Kana only performed acts that were within her legal rights and because Kana offered a reasonable explanation for some of the acts, we conclude the jury's answer to Question 14 is supported by legally sufficient evidence.

6. Conclusion

We overrule Delahoussaye's second issue.

C. Motion for New Trial

In her third issue, Delahoussaye contends the trial court erred by denying her motion for new trial because the evidence is legally and factually insufficient to support the jury's answer to Questions 1, 7, 8, 10, and 14. Having already discussed the legal sufficiency of the evidence, in the discussion of Delahoussaye's second issue, we need only address the factual sufficiency of the evidence.

1. Question 1

As discussed above, Delahoussaye testified that she did not intend the entire 10.92 acres of the bay property as a gift. Rather, Delahoussaye only intended to make a gift of two to Kana in exchange for Kana's promise to care for Delahoussaye for the rest of her life. However, Kana testified that no such promise was made. The deed transferring the property describes all 10.92 acres and states the consideration is Delahoussaye's "love and affection" for Kana. Delahoussaye's attorney testified that she gave him the description of the property and that he understood that she wanted a gift deed to be prepared. The jury was also presented evidence that Delahoussaye made gifts of real property in the past to her other children.

Viewing this conflicting evidence in a neutral light, and deferring to the jury for determinations of credibility and the weight to be given to testimony, we cannot conclude that the jury's answer to Question 1 is against the great weight and preponderance of the evidence. *See Golden Eagle Archery, Inc.*, 116 S.W.3d at 761.

2. Question 7

As discussed above, the sole measure of damages the jury was asked to consider was loss of use of the property. Delahoussaye did not present any evidence of her damages from loss of use. Thus, the jury's answer was not against the great weight and preponderance of the evidence.

3. Question 8

We must view conflicting evidence in a neutral light and defer to the jury on questions of credibility. Because the jury received conflicting evidence and was free to assess which evidence was more credible, we conclude that its answer to Question 8 is not against the great weigh and preponderance of the evidence. *See id.* at 761.

4. Question 10

We overrule Delahoussaye's challenge to this question because we must view conflicting evidence in a neutral light and defer to the jury on questions of credibility. *See id.*

5. Question 14

As noted above in the discussion of legal sufficiency, Kana's insisting on her rights is not enough to impose liability for "extreme and outrageous" conduct. Because the jury could have reasonably concluded that Kana simply exercised her legal rights, we conclude that the jury's answer is not against the great weight and preponderance of the evidence. *See Dow Chem. Co.*, 46 S.W.3d at 242.

6. Conclusion

We overrule Delahoussaye's third issue.

D. Jury's Failure to Answer All Questions

In her fourth issue, Delahoussaye contends that the jury erred by not answering certain questions, because it erroneously answered the predicate questions. Specifically, Delahoussaye's fourth issue states,

THE JURY'S FAILURE TO ANSWER QUESTIONS 2, 3, 4, 9, 11, 12, 13 WAS ERROR BECAUSE [DELAHOUSSAYE] HAD PRODUCED SUFFICIENT EVIDENCE TO SUPPORT ANSWERS TO ALL THE QUESTIONS.
AS A RESULT OF ANSWERING NO TO QUESTION NO. 1, THE JURY DID NOT ANSWER QUESTIONS, 2, 3, 4[.]

AS A RESULT OF ANSWERING NO TO QUESTION NO. 7 AND 8, THE JURY DID NOT ANSWER QUESTION NO. 9[.]
AS A RESULT OF ANSWERING NO TO QUESTION NO. 10, THE JURY DID NOT ANSWER QUESTIONS 11, 12, 13[.]
AS A RESULT OF ANSWERING NO TO QUESTION NO. 14, THE JURY DID NOT ANSWER QUESTIONS 11, 12, 13[.]
[DELAHOUSSAYE] ADOPTS AND INCORPORATES THE OFFER OF PROOF AND AUTHORITIES CITED IN ISSUES I, II, III.

Thus, this issue is another challenge to the sufficiency of the evidence. Having already determined legally and factually sufficient evidence supports the jury's verdict concerning Questions 1, 7, 8, 10, and 14 in our discussion of her second and third issues, we overrule Delahoussaye's fourth issue.

Motion for Sanctions

In her fifth issue, Delahoussaye asserts the trial court erred by denying her motion for sanctions for Kana's abuse of process.

A. Standard of Review

We review the imposition of sanctions for an abuse of discretion. *Low v. Henry*, 221 S.W.3d 609, 614 (Tex. 2007) (citing *Am. Flood Research, Inc. v. Jones*, 192 S.W.3d 581, 583 (Tex. 2006); *Cire v. Cummings*, 134 S.W.3d 835, 838 (Tex. 2004)). A reviewing court may reverse the trial court's ruling only if the trial court acted without reference to any guiding rules and principles, such that its ruling was arbitrary or unreasonable. *Id.* (citing *Cire*, 134 S.W.3d at 838–39). Generally, courts presume that pleadings and other papers are filed in good faith. *Id.* (citing *GTE Commc'ns Sys. Corp. v. Tanner*, 856 S.W.2d 725, 730 (Tex. 1993)). The party seeking sanctions bears the burden of overcoming this presumption of good faith. *Id.*

Chapter 10 of the Texas Civil Practice and Remedies Code and rule 13 of the Texas Rules of Civil Procedure allow a trial court to sanction an attorney or a party for filing motions or pleadings that lack a reasonable basis in fact or law. The signatory of a pleading or motion certifies that each claim, each allegation, and each denial is based on the signatory's best knowledge, information, and belief, formed after reasonable inquiry. Tex. Civ. Prac. & Rem. Code Ann. § 10.001 (Vernon 2002). Section 10.001 requires that each claim and each allegation be individually evaluated for support. *Id.* Rule 13 states that the signatory of a pleading certifies that, to the best of the signatory's knowledge, information, and belief formed after reasonable inquiry, the instrument signed is "not groundless and brought in bad faith or groundless and brought for the purposes of harassment." Tex.R.Civ.P. 13.

B. Counterclaims

Delahoussaye contends that Kana's counterclaims for fraud and breach of contract were sanctionable because the extensive discovery conducted in this case "disproved" Kana's claims for damages. Specifically, Delahoussaye contends that Kana made a profit of approximately

$50,000 on the sale of her home in Conroe. Kana responds that Delahoussaye's requested sanctions were waived because Delahoussaye did not file a motion or submit the matter for hearing.

1. Waiver

To preserve a complaint for appellate review, a party must present to the trial court a timely request, motion, or objection, state the specific grounds therefor, and obtain a ruling. Tex.R.App.P. 33.1; *see Holland v. Wal-Mart Stores, Inc.*, 1 S.W.3d 91, 94 (Tex. 1999); *In re C.O.S.*, 988 S.W.2d 760, 764 (Tex. 1999); *Gen. Chem. Corp. v. De La Lastra*, 852 S.W.2d 916, 920–21 (Tex. 1993). Here, Delahoussaye's request for sanctions was initially filed as part of her answer to Kana's counterclaims. In her motion for new trial, she attached the answer and request for sanctions as an exhibit. Delahoussaye also briefed her grounds for requesting sanctions concerning Kana's counterclaims in her motion for new trial. The trial court overruled the motion for new trial. We conclude Delahoussaye's request for sanctions was presented to the trial court and the trial court overruled it. Therefore, the issues raised in the motion for new trial were not waived for failure to hold a hearing or obtain a ruling.

2. Merits of Sanctions Request

The sale of Kana's home in Conroe was not an issue in this case. Delahoussaye does not assert that Kana was seeking damages from the sale of that house. A review of Kana's pleadings indicate that she based her counterclaims upon Delahoussaye's conduct in connection with the transfer of the bay property. Thus, the profit or loss from the sale of the house in Conroe is irrelevant to the determination of whether the trial court abused its discretion in denying sanctions.

Although Delahoussaye asserts that the evidence disproves many of the items that Kana and her husband claimed were paid for improvements to the property, she does not assert that all these items were disproved. For example, Kana's husband testified that he and Kana paid $2,800 for the septic system, with Delahoussaye paying $3,000, and that he and Kana also paid taxes on the bay property since 2002. Delahoussaye does not address these items in her motion for sanctions or appellate brief. Because Kana presented some evidence of damages to support her counterclaims, we cannot conclude that the trial court abused its discretion by acting without reference to guiding rules or principles when it denied Delahoussaye's request for sanctions based on those counterclaims. *See Low*, 221 S.W.3d at 614.

C. Experts

Delahoussaye also contends that the trial court erred by failing to sanction Kana and her attorney for designating experts "done for the sole purpose of creating rabbit trails and causing additional expense to [Delahoussaye]." Specifically, Delahoussaye identifies two experts, Dr. Stockwell and Mr. Cotton. Delahoussaye did not assert the designation of these experts as sanctionable conduct in her request for sanctions, although she did brief them in her motion for new trial. Although Delahoussaye did not entirely waive her request for sanctions for failure to have a hearing or obtain a ruling as asserted by Kana, we conclude that Delahoussaye waived

any complaint concerning the designation of experts for failure to timely raise the issue before the trial court. *See Trahan v. Lone Star Title Co. of El Paso, Inc.*, 247 S.W.3d 269, 282–83 (Tex. App.—El Paso 2007, no pet.) (citing *Remington Arms Co., Inc. v. Caldwell*, 850 S.W.2d 167, 170 (Tex. 1993)) (holding failure to obtain pretrial ruling on discovery disputes that exist before commencement of trial waives any claim for sanctions based on that conduct).

D. Conclusion

We overrule Delahoussaye's fifth issue.

Constitutional Challenge

In her sixth issue, Delahoussaye asserts Texas Rule of Civil Procedure 327b and Texas Rule of Evidence 606 are unconstitutional because "they deprive a person of their [sic] constitutional rights of due process and equal protection by not permitting the questioning [of] a juror about effects of anything on any juror's mind, emotions or mental processes, including possible jury misconduct if it occurred during deliberations." [1] Delahoussaye raises this complaint for the first time on appeal. Accordingly, Delahoussaye waived this point by not presenting it to the trial court. Tex.R.App.P. 33.1; *Dreyer v. Greene*, 871 S.W.2d 697, 698 (Tex. 1993) (holding due process and equal protection challenges to statute "must have been asserted in the trial court in order to be raised on appeal"); *In the Interest of K.C.M.*, 4 S.W.3d 392, 394 (Tex. App.—Houston [1st Dist.], 1999, pet denied) (holding constitutional challenge to "vague and ambiguous" statute waived when raised for first time on appeal), *disapproved of on other grounds by In re C.H.*, 89 S.W.3d 17, 26 (Tex. 2002).

We overrule Delahoussaye's sixth issue.

Conclusion

We affirm the judgment of the trial court.

Notes:

[1] Rule 327b provides,

A juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict concerning his mental processes in connection therewith, except that a juror may testify whether any outside influence was improperly brought to bear upon any juror. Nor may his affidavit or evidence of any statement by him concerning a matter about which he would be precluded from testifying be received for these purposes.

Tex. R. Civ. P. 327b.

Rule 606 states,

Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the jury's deliberations, or to the effect of anything on any juror's mind or emotions or mental processes, as influencing any juror's assent to or dissent from the verdict or indictment. Nor may a juror's affidavit or any statement by a juror concerning any matter about which the juror would be precluded from testifying be admitted in evidence for any of these purposes. However, a juror may testify: (1) whether any outside influence was improperly brought to bear upon any juror; or (2) to rebut a claim that the juror was not qualified to serve.

Tex. R. Evid. 606(b).
