RECENT CASES ON THE RECOVERY OF ATTORNEY’S FEES

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CHAPTER 15
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BASED UPON IAN FLEMING CHARACTER (PLEASE KEEP THIS CONFIDENTIAL AS MR. CRAIG DOES NOT YET KNOW THAT HIS CURRENT FIVE FILM CONTRACT WILL NOT BE RENEWED)
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RECENT CASES INVOLVING RECOVERY OF ATTORNEYS’ FEES

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RECENT CASES INVOLVING CHAPTER 38 OF TEXAS CIVIL PRACTICES AND REMEDIES CODE

Smith v. Patrick W.Y. Tam Trust, 296 S.W.3d 545 (Tex. 2009)

This case is based on a dispute between Tam Trust, the owner of a shopping center, and the Smiths, guarantors of Plano Pets in a lease agreement between the Trust and Plano Pets. After Plano Pets stopped making payments for a leased space a jury awarded the Trust $65,000 of the requested $215,391.50 in damages, but no attorney’s fees. The trial court rendered judgment notwithstanding the verdict on attorney’s fees, awarding $7,500 for fees incurred and up to $15,000 for success in appeals. The court of appeals vacated the $7,500 attorney’s fee award and rendered judgment for $47,438.75, the full amount the Trust’s attorney testified at trial would be a reasonable fee. The appeals court reasoned that the trial judge abused his discretion in awarding the lesser amount because the Trust presented competent and uncontroverted evidence of the amount of, and its right to, attorney’s fees under chapter 38.

Before the Supreme Court landlord Tam Trust argued that the testimony they provided as to appropriate attorney’s fees was undisputed and that by failing to request a jury instruction on factors affecting attorney’s fees the Smiths waived their right to later contest the fee award. The Texas Supreme Court reversed the judgment as to attorney’s fees and remanded to determine reasonable fees under Chapter 38. The court found no evidence to support the jury’s refusal to award any attorney’s fees, but the fact that the amount was undisputed did not mean that the fee was reasonable. The Court found that the amount requested by the Trust in attorney’s fees “was unreasonable in light of the amount involved and the results obtained, and in the absence of evidence that such fees were warranted due circumstances unique to this case.” Smith, 296 S.W.3d at 548.

Midland Western Building v. First Service Air Conditioning Contractors, Inc., 300 S.W.3d 738 (Tex. 2009)

An air conditioning contractor brought an action on a sworn account against a building owner alleging failure to pay for air conditioning services. The jury awarded First Service $14,645.10, over two-thirds of the requested amount of money damages, yet awarded no attorney’s fees despite uncontradicted testimony by an expert witness attorney as to reasonable fees. On appeal, the Court of Appeals awarded First Service the entire amount of attorney’s fees requested at trial, $24,000.

The Supreme Court, relying on its recent holding in Smith v. Patrick W.Y. Tam Trust, 296 S.W.3d 545, held that the Court of Appeals could not hold as a matter of law that First Service was entitled to attorney’s fees when its award was not supported by uncontradicted testimony. This was especially so since the expert witness admitted on cross-examination that some of the fees sought involved claims against parties other than defendant.

However, neither was there sufficient evidence to support the jury’s finding of no attorney’s fees in the absence of evidence affirmatively showing that no attorney’s services were needed at all or that any services provided were of no value. Therefore the case was remanded for a new trial on attorney’s fees.

Medical City Dallas, Ltd. v. Carlisle Corp., 251 S.W.3d 55 (Tex. 2008)

The Texas Supreme Court held that the prevailing building-owner in this breach of warranty case was entitled to attorney’s fees under Chapter 38. When Medical City experienced repeated leaks in its roof, which was under a 20-year warranty, it sued for damages, attorney’s fees and costs. After a jury verdict, the court awarded Medical City damages and $121,277.04 in attorney’s fees.

On appeal, the Dallas court rendered a take nothing judgment on the attorney’s fees issue, asserting that a breach of warranty claim does not entitle a party to attorney’s fees under Chapter 38. See Carlisle Corp. v. Medical City Dallas, Ltd., 196 S.W.3d 855 (Tex. App. – Dallas 2006).

The Supreme Court reinstated the trial court’s award of attorney’s fees, concluding that breach of an express warranty is a “claim based on an oral or written contract” under §38.001(8). Tracing the history and purpose of attorney’s fees awards in Texas, the court noted that the Uniform Commercial Code (UCC), which governs express warranty claims, is silent on the issue of attorney’s fees. The court found it appropriate to look to the statute in a sale of goods case in the absence of a provision in the UCC addressing recovery
of fees. The court ruled that Chapter 38, allowing recovery of attorney’s fees for a claim based on an oral or written contract, applied to this breach of warranty case, particularly because the damages were economic.


An insured prevailed on his claim against an automobile insurer for breaching a towing agreement in an insurance contract. The jury awarded the insured $100 in damages, and $0 in attorney fees. On appeal the Houston court found that the insured had prevailed on his breach of contract claim as required for fees award under chapter 38, that the award of $0 was reasonable, and affirmed the trial court’s decision. The Insurer put on evidence that it would have paid the relevant bill if the insured had turned it in, and that the insured had never submitted the bill. The court decided that the jury could reasonably had concluded that $0 was a reasonable amount of attorney’s fees in a lawsuit in which the sole legitimate claim would have been paid if the insured had just turned in an insurance claim.


Holder of a promissory note brought action against the maker of the note and guarantors, seeking to recover on promissory note and guaranty agreement, while maker and guarantors brought counterclaim for usury. The trial court granted holder’s motion for summary judgment and awarded attorney’s fees to holder. On maker and guarantor’s appeal, maker and guarantor argued that holder was not entitled to attorney’s fees incurred in relation to their counterclaim for usury and that holder had failed to properly segregate fees.

The Court of Appeals held that since the promissory note contained a contractual provision for collection costs, including a reasonable amount for attorney’s fees, holder was entitled to a mandatory recovery under Chapter 38.

At the same time, however, holder was required to segregate fees in this case. Despite holder’s claim that it had to defeat the usury claim in order to prevail on its contract claim, the Court noted that holder did not successfully defend against the counterclaim per se, but instead took corrective action in order to avoid liability for usury. In such a case, their attorney’s efforts in correcting the alleged usury violation cannot be characterized as successfully defending against a counterclaim. Thus, holder was required to segregate its fees and the case was remanded for a determination of a reasonable fee award that excluded any fees incurred in correcting the alleged usury violation.

**AMX Enterprises, L.L.P. v. Master Realty Corp.,** 283 S.W.3d 506 (Tex. App.—Fort Worth, 2009, no pet.)

A realty company hired contractor to remediate flood damage at one of their hotels. Contractor brought breach of contract, Prompt Payment to Contractors Act, and constitutional lien, suit against the realty company. The trial court entered judgment on a jury verdict for contractor, but denied their request for attorney’s fees.

The Court of Appeals held that the trial court abused its discretion in failing to award attorney’s fees because, under §38.001 an award of reasonable attorney’s fees is mandatory if there is proof of the reasonableness of the fees. Since contractor had provided several affidavits from both in-house and local counsel, and the realty company had the opportunity but failed to oppose the evidence, the trial court was obligated to award reasonable attorney’s fees. The case was thus remanded for a new trial on attorney’s fees.

The court also addressed the question of whether market value or cost-plus value was the appropriate means of calculating fees for in-house counsel. Citing the relative lack of precedent on this question in Texas law, the court looked to numerous other jurisdictions, resolving that the better method is to use market value.

**Besteman v. Pitcock, 272 S.W.3d 777 (Tex. App.—Texarkana 2008, no pet.)**

Lessees brought claims for specific performance, declaratory judgment, and breach of contract against lessors, relating to plaintiffs’ option under a pasture lease to purchase the land at end of two-year lease. The trial court entered judgment for plaintiffs, ordering specific performance, and awarding attorney’s fees to plaintiffs.

In reversing the trial court as to specific performance, the Court of Appeals likewise held that “Considering that the outcome of this case is changed, it will fall to the trial court to make a determination of the award of attorney’s fees awarded between and among the parties.”  **Besteman, 272 S.W.3d at 793.**  The Court also reiterated that while an award of attorney’s fees is wholly within the discretion of the trial court under §37.009, an award is mandatory under §38.002 if the prevailing party presents evidence of the reasonableness of the fees, although the precise amount of the award remains in the court’s discretion.
Brent v. Field, 275 S.W.3d 611 (Tex. App. –Amarillo 2008, no pet.)

Former partner in family partnership filed breach of contract and declaratory judgment action, arising out of a dispute over amounts allegedly due to former partner under contract pursuant to which former partner sold to partner her interest in the partnership. After a bench trial, the trial court granted partial summary judgment to partner that offset sums sought by former partner, awarded almost $60,000 to former partner, awarded a certain amount to company that trucked cattle and had claim against the partnership, and awarded the balance to partner.

On former partner’s appeal, the Court of Appeals held that although former partner’s claim was extensively offset by the trial court, she nevertheless was entitled to attorney’s fees as a matter of law under Chapter 38, since she both had recovered money damages that were sustained on appeal and she presented detailed evidence as to the reasonableness and necessity of fees. The Court emphasized that under §38.001, an award of reasonable attorney’s fees is mandatory if there is proof of the reasonableness of the fees.

Moreover, fees are mandatory under that section “even though the damages a party recovers are completely offset by the claim of the opposing party…it need not obtain a net recovery.” Brent, 275 S.W.3d at 622. Since former partner not only obtained damages, but in fact did obtain a net recovery, the trial court was clearly required to award attorney’s fees. The case was remanded for a hearing on the issue of the proper amount of attorney’s fees to be awarded to former partner.


This Supreme Court case involves an action to compel arbitration. The arbitration agreement contained a provision allowing any prevailing party to recover attorney’s fees. The plaintiff argued that such a provision was unconscionable, and contrasted it with Chapter 38 which allows only a prevailing plaintiff to recover fees.

The Texas Supreme Court disagreed, noting that allowing both parties to recover fees actually makes a commercial arbitration agreement less one-sided, not more so.


In this dispute over a bill for truck repair, the Austin court concluded that the trial court was within its discretion in awarding $5,000 more in appellate fees to the prevailing party than the parties’ agreement stipulated.

First Air Express hired 271 Truck Repair to replace an engine in one truck with an engine from another truck. The parties disputed whether the scope of the work included getting the truck with the replacement engine to run, and a lien action ensued. The truck was restored to running condition, but both trucks remained in 271’s possession. Eventually, the running truck was destroyed in a fire and 271 sold the second truck. First Air asserted claims for breach of contract, usury and conversion, and 271 counterclaimed. After a bench trial, the trial court entered judgment in favor of the truck owners on the contract and usury claims, awarding damages and attorney’s fees of $10,206.25 for trial work and $10,000 in case of appeals.

On appeal, the repair company complained that the trial court erred in awarding twice as much in appellate fees as was stipulated by the parties. The company also argued that the trial court erred in awarding appellate fees that were not conditioned on an unsuccessful appeal by the defendant.

Because Chapter 38 gives the trial court discretion to award a reasonable fee, the Austin court concluded that the $10,000 appellate fee award was within the trial court’s discretion. However, the court agreed that appellate fee awards must be conditioned on a successful appeal, and modified the trial court’s judgment to reflect that condition.


After counterclaiming for breach of contract, the defendant in this dispute between a company and a subcontractor was awarded $10,000 in damages and $5,000 in attorney’s fees. The Fort Worth court reversed the award of attorney’s fees because the defendant failed to present the claim to the opposing party as required under Chapter 38. The Fort Worth court also remanded the case for consideration of attorney’s fees after it concluded that the trial court should have entered a declaratory judgment in favor of the plaintiff on another claim.

This case is based on a dispute between contractors and subcontractors on a project with the U.S. Army to develop a power generation system in Iraq. At trial, the court awarded Graybar $100,000 in damages on a counterclaim.

Graybar argued on appeal that the court was also required to award him attorney’s fees under Chapter 38. The Houston court agreed and remanded, noting that a trial court “does not have the discretion to deny fees altogether if they are proper under section 38.001.” Graybar Elec. Co., 252 S.W.3d at 549.

The court also reduced a damage award to another party in the case, and remanded for reconsideration of attorney’s fees due to this change in award.

Imperial Lofts, Ltd. v. Imperial Woodworks, Inc., 245 S.W.3d 1 (Tex. App. - Waco 2007, pet. denied)

In this negligence and breach of contract action, the trial court found that the reasonable attorney’s fees were $140,000, but awarded none. The Waco court affirmed, asserting that, although the parties’ lease agreement entitled the prevailing party to attorney’s fees, this party was not a prevailing party because insurance payments and settlement credits it received exceeded the jury’s damage award.

RECENT CASES INVOLVING CHAPTER 37 OF TEXAS CIVIL PRACTICES AND REMEDIES CODE & DECLARATORY JUDGMENTS


An attorney sought a writ of mandamus directing the State Office of Administrative Hearings to provide certain decisions and orders in license suspension cases related to delinquent child support. He sought attorney’s fees under section 552.323 of the Texas Public Information Act (TPIA) and section 37.009 of the Declaratory Judgment Act (DJA), distinguishing his case from those of other pro se litigants because he was a licensed attorney.

The Texas Supreme court found that the attorney did not “incur” attorney’s fees as required under TPIA because he “did not at any time become liable for attorney’s fees.” Jackson, 351 S.W.3d at 300. Therefore he could not recover fees under the TPIA and to award fees under the DJA would frustrate the limits established by the TPIA.

In re Allcat Claims Serv., L.P., 356 S.W.3d 455 (Tex. 2011)

A limited partnership, Allcat, brought a petition for mandamus against the state comptroller, alleging that the comptroller was required to refund taxes collected from the limited partnership. For tax years 2008 and 2009 Allcat paid franchise tax under protest, and then filed two suits seeking a refund: an original proceeding in the Texas Supreme Court and a suit in the 201st District Court of Travis County. The court found that Article VIII, Section 24 of the Texas Constitution granted it jurisdiction to hear the claim.

The partnership also sought to recover attorney’s fees pursuant to the DJA. However, the Texas Supreme Court found that the Legislature did not intend to incorporate the DJA into Article VIII, Section 24 of the Texas Constitution merely because section 24 of the Act authorizes declaratory relief. Therefore the court did not have jurisdiction over the claim for attorney’s fees.

MBM Financial Corp. v. Woodlands Operating Co., 292 S.W.3d 660 (Tex. 2009)

An equipment lessee brought suit against lessor for declaratory relief, breach of contract and fraud in connection with lease and maintenance agreements. Following a bench trial, the district court awarded lessee $1,000 in damages (described as “actual damages in the form of nominal damages”) and $145,091.59 in attorney’s fees. On petition for discretionary review from the appellate court’s partial reversal and remand, the Supreme Court held that since the damages award itself must be set aside due to insufficient evidence, the attorney’s fee award must also be set aside in its entirety.

The Court wrote that $1,000 is too great a sum to be considered nominal damages, and that nominal damages are not available when the harm is entirely economic and subject to proof, as the damages were in this case. The Court acknowledged, but refused to rule upon, the question of whether nominal damages are sufficient to recover fees under Chapter 38 of the Civil Practices and Remedies Code.

The Court also rejected arguments from lessee that attorney’s fees could be awarded based on fraud arising from breach of contract, bad faith & vexatious conduct, and declaratory judgment. Dismissing the first two arguments, the Court held as to declaratory judgment that lessee’s stated bases for such relief were merely duplicative of other aspects of the contract claim in the underlying suit, and that under the Declaratory Judgments Act a party “cannot use the Act as a vehicle to obtain otherwise impermissible
attorney’s fees.” *MBM Financial Corp.*, 292 S.W.3d at 669.


Existing user of aquifer sought declaration that Edwards Aquifer Authority’s rule setting deadline for filing permit application was invalid and, in the alternative, that existing user had substantially complied with the filing requirements. The district court ruled in favor of existing user on both counts and awarded attorney’s fees, and the Austin Court of Appeals affirmed.

On review, the Supreme Court reversed on the substantive issues, which necessarily changed the analysis as to attorney’s fees under Chapter 37. Thus, the Court held that “Now that Chemical Lime is no longer the prevailing party, the trial court should have the opportunity to reconsider its award.” *In re Allcat Claims Serv., L.P.*, 356 S.W.3d at 405. The Court declined to express an opinion on whether Chapter 37 permits an award of attorney’s fees only to a prevailing party since the Authority did not raise the issue on appeal. However, since the Authority was the prevailing party on appeal, it was automatically entitled to attorney’s fees in the amount stipulated by the parties at trial, under 36.066(g) of the Water Code.

**Aurora Petroleum, Inc. v. Newton, 287 S.W.3d 373 (Tex. App. – Amarillo 2009, no pet.)**

A proposed lessor of an oil and gas lease filed suit on behalf of non-executive mineral right holders against executive mineral rights holders seeking a declaration that the executive mineral right holders owed the non-executive holders a duty to lease property. The trial court entered a take nothing judgment in favor of defendants and ordered plaintiffs to pay attorney’s fees. On appeal, plaintiffs argued that Chapter 37 does not apply to take nothing judgments and thus the trial court should not have relied on its provisions in awarding attorney’s fees to defendant.

In upholding the entirety of the trial court’s judgment, the Court of Appeals quoted §37.003(b), which states that “The declaration may be either affirmative or negative in form and effect.” *Aurora Petroleum*, 287 S.W.3d at 377. Therefore, the trial court’s finding that the executive mineral rights holders did not owe a duty to the non-executive holders amounted to a denial of the declaratory relief requested and used sound discretion in making the fee award under Chapter 37.

**AG Acceptance Corporation v. Veigel, 564 F.3d 695 (5th Cir. 2009)**

Foreclosing creditors filed suit to quiet title to farm land previously owned by debtors in this diversity suit. After a bench trial, the district court entered declaratory judgment for plaintiffs and awarded them attorney’s fees. In reversing the trial court’s award of attorney’s fees to the prevailing creditors, the Fifth Circuit held that although the case was tried under Federal Declaratory Judgment Act, which authorizes attorney’s fee awards where controlling state substantive law allows it, circuit precedent dictated that the Texas Declaratory Judgment Act (TDJA) could not be relied upon for an award in a diversity case since it is not substantive law. For this proposition, the Court cited *Utica Lloyd’s of Texas v. Mitchell*, 138 F.3d 208, 210 (5th Cir. 1998).

However, the debtors did not raise this argument in the district court, instead briefing the issue under the impression that the relevant TDJA standard applied. As such, the Fifth Circuit was required to find heightened circumstances to justify consideration of the issue on appeal. Here, they did in fact find such circumstances to be present because the availability of attorney’s fees under a statute is a pure question of law, the district court’s award “was patently erroneous in light of controlling precedent,” and their failure to reach the issue would result in significant actual harm to the debtors in the amount of $206,544.52. *AG Acceptance Corp.*, 564 F.3d at 701.


The Waco court remanded this property dispute case a second time on the issue of attorney’s fees.

McCalla sued Ski River for specific performance on a contract that gave McCalla an option to purchase land that Ski River controlled via a 99-year lease. Ski River counterclaimed, seeking tort relief and a declaration that the purchase option contract was void.

McCalla prevailed at trial, obtaining damages for tortious interference, an award of attorney’s fees and declaratory judgments that his option exercise was proper and that the 99-year lease was void and unenforceable.

In the first appeal, the Waco court reversed the judgment with respect to the purchase option contract, declaring it void. Asserting that the award of attorney’s fees related to that declaratory judgment would no longer be “equitable and just,” the court reversed the attorney’s fees award to McCalla. The court also reformed the judgment with respect to the 99-year lease, then remanded to determine whether to award fees to Ski River on that issue. On remand, the trial
court awarded $100,000 in trial court fees and $30,000 in appellate fees to Ski River.

In this appeal, McCalla challenged the award of fees to Ski River, alleging that Ski River impropriously used the Declaratory Judgment Act (DJA) as a vehicle for recovering fees and also failed to segregate fees related to the declaratory judgment action from fees related to non-recoverable claims. McCalla also challenged the fees as unreasonable, inequitable and unjust.

The Waco Court first addressed the issue of the scope of the first remand, which instructed the trial court “to determine whether to award ‘equitable and just’ attorney’s fees. . . under the Declaratory Judgment Act.”

The court found sufficient evidence of the reasonableness of the trial fee but reformed the appellate fees. The evidence on reasonableness of the trial fee included the attorney’s affidavit and the transcript of his testimony at the jury trial in which he stated his $200 per hour rate and asserted that he “stopped counting” hours he worked on the case at 500. The court found this was enough to justify a $100,000 award for trial fees but sustained the objection to the $30,000 appellate fees because there was no evidence in the record regarding appellate fees.

Regarding Ski River’s use of Chapter 37 (“DJA”), McCalla’s challenges on appeal were that Ski River’s declaratory judgment counterclaim did not allege a cause of action independent of its other claims, that Ski River was inappropriately using a declaratory action as a defense to other issues in the case, and that Ski River had no standing to seek declaratory action on a contract to which it was not a party.

The Waco court found that Ski River was appropriately employing the DJA because McCalla’s suit sought enforcement of what McCalla considered to be a valid contract, whereas Ski River’s declaratory action sought to challenge the validity of the contract. The court found these to be independent claims.

With regard to the issue of standing, the court found that, because Ski River’s rights under its 99-year lease were affected by enforcement of the purchase option contract, Ski River had standing to seek declaratory relief even though it was not a party to the purchase option contract.

The Waco court remanded the case on the issue of fee segregation. Although Ski River claimed that its tort and declaratory judgment claims were inextricably intertwined so as not to require segregation of fees, the court declared that these claims were necessarily distinct from each other. Because Ski River had not explained what percentage of time was devoted to the tort claims as opposed to the other claims, the court remanded “for the limited purpose of conducting an evidentiary hearing to determine the amount of recoverable attorney’s fees.”


In this school finance case, a large group of Texas school districts sued the state seeking a declaration that the school finance system was an unconstitutional state property tax and that the system itself failed to provide for a “general diffusion of knowledge,” as required by the state constitution. Two additional school districts joined on related issues.

The trial court found in favor of the districts on most counts and, in a separate action, awarded attorney’s fees to the districts under the DJA. The state appealed directly to the Texas Supreme Court, which issued a revised ruling and remanded on the issue of attorney’s fees. On remand, the district court reinstated its $2,657,606 award to the original plaintiffs and awarded reduced amounts of $1,256,395.20 and $263,912.50 to the two intervening plaintiffs.

On appeal, the state challenged the attorney’s fees, arguing that the districts were using the DJA as a vehicle to obtain fees when the issue was a constitutional matter; that the award was inequitable and unjust; that the award should not have been made because the state, not the districts, prevailed on most claims; or, alternatively, that the fee award should be reduced by the amount of attorney’s fees the state earned on the claims on which it prevailed.

The Austin court affirmed the attorney’s fees award, finding that the state waived the issue of misapplication of the DJA by not raising it on appeal to the Supreme Court. Examining the record, the court held that the award was equitable and just because of the case’s complexity and the contribution that the litigation made to problem-solving on education issues at the state level.

Noting that the trial court has wide discretion in awarding fees, the Austin court asserted that the DJA does not require a party to show that it substantially prevailed in the case as a whole in order to be eligible for attorney’s fees. Finally, on the argument that the district should reduce fees by the extent to which the state prevailed, the court acknowledged that a trial court can consider relative success in awarding fees,
but found no evidence that the trial court ignored the relative success of the parties in this case.

**RECENT CASES INVOLVING ATTORNEY’S FEE AWARDS UNDER OTHER STATUTES**

*Epps v. Fowler, 351 S.W.3d 862 (Tex. 2011)*

The contract between purchasers and vendors included a provision that the prevailing party in any legal proceeding related to the contract be entitled to recover reasonable attorney’s fees, but did not define “prevailing party.” In a suit by the purchasers against the vendors the vendors sought attorney’s fees as sanctions under Chapter 10 of the Civil Practice and Remedies Code on the grounds that the purchasers claims were legally and factually groundless, and under the provision of their contract entitling the prevailing party to fees. One day after the vendors moved for partial summary judgment and the purchasers substituted counsel, the purchaser’s new attorney filed a notice of nonsuit without prejudice. The parties proceeded to trial on the issue of the vendors’ attorney’s fees. Rather than dismissing the purchasers’ claims, the trial court rendered judgment that they take nothing and ordered the purchasers pay the vendors’ attorney’s fees of $22,950. On appeal the portion of the judgment ordering payment of attorney’s fees was reversed. The appeals court reasoned that a favorable decision on the merits of a case is necessary to confer prevailing party status on a litigant.

The Texas Supreme Court found that a defendant is a prevailing party with respect to contractual language entitling a prevailing party to attorney fees when a plaintiff nonsuits a case with prejudice and when a plaintiff nonsuits without prejudice if the trial court determines, on the defendant’s motion, that the nonsuit was taken to avoid an unfavorable ruling on the merits. The Court attempted to ascertain the parties’ true intent as to the definition of “prevailing party” as expressed in the contract. Finding that the contract left the term undefined, the majority turned to its *KB Home* decision that a party prevails if a court awards monetary or equitable value and discussed the arguments of various federal courts that had addressed the question. The majority found it reasonable to presume that the parties “did not intend to encourage continued litigation of weak claims,” and would therefore not want to deter the plaintiff from taking nonsuits by imposing fees on all nonsuiting plaintiffs. *Epps*, 351 S.W.3d at 869. They also decided it was logical to conclude that the parties “intended to award attorney’s fees to compensate the defendant when the plaintiff knowingly pursues a baseless action.” *Id.* Therefore the court adopted the prevailing party test laid out in the 5th circuit court’s *Dean v. Riser*, 240 F.3d 505 decision and instructed courts to find a defendant had prevailed only when the defendant can establish that the plaintiff dismissed in order to escape an unfavorable judgment on the merits. The Court remanded for determination of whether the purchasers dismissed in order to avoid an unfavorable judgment.

The dissent felt that the majority focused on policy rather than on the intent of the parties and would have awarded the vendor reasonable attorney’s fees. They would not have looked to federal cases for guidance because those cases dealt with legislative policy not with the intentions of private parties and nothing suggests that the parties involved had federal case law in mind in reaching an agreement that attorney fees should go to a prevailing party. The dissent found that, because “when a plaintiff decides to abandon his lawsuit, the defendant . . . thinks he won,” the vendors were the “prevailing party” referenced in their contract. *Id.* at 873

*Texas Dept. of Criminal Justice v. McBride, 317 S.W.3d 731 (Tex. 2010)*

An inmate sued the Texas Department of criminal Justice. The Department denied the inmate’s allegations, asserted sovereign immunity, and requested attorney’s fees. The trial court granted the department’s plea and dismissed, but the appeals court reversed, holding that the claim for attorney’s fees was a claim for affirmative relief that waives sovereign immunity.

The Texas Supreme Court held that the Department did not waive sovereign immunity by requesting attorney’s fees. The request for attorney’s fees was purely defensive in nature, unconnected to any claim for monetary relief.


KB Home, a national homebuilder, and Intercontinental, a real estate developer, entered into a contract which included a provision providing for reasonable attorney’s fees to be paid by the losing party to the prevailing party in any action enforcing the terms of the contract. “Prevailing party” was not defined in the contract. At trial, the jury found that Intercontinental had breached the written contract but KB had incurred no damages, and awarded $0 for damages and $66,000 in attorney’s fees. Both parties moved for judgment, claiming attorney’s fees as the prevailing party. The trial court found that KB Homes had prevailed and awarded fees, and the appeals court affirmed.

The Supreme Court held that because KB Home had sued for money damages, yet obtained nothing at
trial except a jury finding that Intercontinental had violated the contract, KB Home was not properly a “prevailing party” under the terms of the contract. The majority at page found that because “KB Home’s sole goal at trial was actual damages, it [could not] declare victory without recovering any.” \textit{Intercontinental Group,} 295 S.W.3d at 660. The court did not address the question of whether Intercontinental was the prevailing party due to remitting no damages because the question was not properly presented.

The dissent argued that the majority’s focus on federal and state law did not properly consider the parties’ intent. They found that liability rather than damages is the appropriate indicator of which party has prevailed in litigation, and would have affirmed.

\textit{Aviles v. Aguirre,} 292 s.w.3d 648 (Tex. 2009)

More than 20 plaintiffs jointly sued a physician, but never filed an expert report, as required by former article 4590i in order to avoid dismissal and fee awards for fees incurred by the defendant. The trial court dismissed but denied the physician attorney’s fees because the fees had been incurred by the defendant’s insurer rather than the defendant himself.

The Texas Supreme court found that the physician had incurred the fees since he was personally liable for both defense costs and any potential judgment.

\textit{Fitzgerald v. Schroeder Ventures II, LLC,} 345 S.W.3d 624 (Tex. App.—San Antonio 2011, no pet.)

The purchasers of land sued the vendors and the vendor’s broker after closing. The vendor and brokers filed a counterclaim for costs and attorney fees as provided for in the parties’ earnest money contract. A jury found in favor of the vendors and brokers on all liability questions. The trial judge rendered a take-nothing judgment in accordance with the jury’s liability findings but denied recovery for costs and attorneys fees.

On the vendors’ and broker’s appeal for costs and attorney fees the San Antonio court found that the vendors and brokers were the prevailing parties in the lawsuit and were therefore entitled to recover costs and attorney fees. The court decided that \textit{Intercontinental v. KB Home,} 295 S.W.3d 650 did not preclude an award of attorney’s fees in this case, as that decision illustrated what a plaintiff must do to be a prevailing party, not what a defendant must do. In that case the claim that a take-nothing defendant is a prevailing party had been waived, and the court did not consider it.


An employee restaurant manager brought a sex discrimination and retaliation claims against her employer. At trial, the jury determined that the employee had not been the target of sex discrimination, but that she had been the target of illegal retaliatory conduct following her filing of sex discrimination charges resulting in an award of compensatory damages and back pay. The trial court also awarded the employee $464,000 in attorney’s fees and added conditional attorney’s fee awards for post-judgment and appellate proceedings. The employer raised four issues on appeal, including a challenge to the trial court’s award of attorney fees. The employer challenged the fees on several grounds, including insufficient evidence as to the number of hours employee’s attorney’s expended, insufficient evidence as to the reasonable hourly rate of employee’s counsel, improper enhancement of the initial lodestar calculation, and the speculative nature of the conditional post-judgment and appellate proceedings award. The Court of Appeals affirmed the trial court’s use of a two-times “multiplier” to enhance the lodestar amount of fees. Basing its analysis in Labor Code §21.259(a) and the detailed affidavits of employee’s counsel, the Court of Appeals held in favor of employee on each of the preceding arguments, finding that the lodestar calculation and its enhancement were appropriate under Texas law and that the Texas Supreme Court had already sanctioned the use of conditional appellate fee awards. Finally, the Court addressed employer contention, embedded in their arguments on appeal as to attorney’s fees, that employee’s counsel had not appropriately segregated fees between recoverable and unrecoverable claims under \textit{Chapa.} Without the benefit of findings of fact and conclusions of law, the Court held that it could infer that the trial court had determined that the legal services were so intertwined as not to require segregation. Accordingly, the Court of Appeals upheld the entirety of the trial court’s award of attorney’s fees.


Former employee of a sports-trading card company filed suit against the company and its founder, asserting claims including breach of contract as well as sexual harassment under the Texas Commission on Human Rights Act (CHRA) that employee later nonsued. The jury returned a verdict for employee on the breach of contract claim, but the trial court entered a take nothing judgment for
employee, and denied defendants’ motion for attorney’s fees on the nonsued CHRA claim.

On defendant’s appeal and employee’s cross-appeal, the Court of Appeals held that defendant failed to demonstrate an abuse of discretion on the part of the trial judge with respect to his denial of attorney’s fees. Analogizing from their own recent decision under another statute that also grants the trial court discretion to award attorney’s fees to a prevailing party, the Court here found that the basis for the trial court’s denial of fees was unclear. Accordingly, since the trial court’s resolution of various factors affecting a fee award was unclear, “the defendants have not carried their burden of showing an abuse of discretion.”  

*Smith v. Deneve*, 285 S.W.3d 904 (Tex. App.—Dallas 2009, no pet.)

An alleged husband, Smith, brought action for divorce against an alleged wife, Deneve, who denied that they were married. The district court granted summary judgment in favor of the alleged wife and granted her an award of attorneys’ fees.

The alleged husband appealed the award of attorneys’ fees, arguing that Deneve specifically pleaded for recovery under Texas Rule of Civil Procedure 13 but did not prove the elements of that rule and that she could not rely on section 6.708 of the family code, which applies to any suit in which they were married. The district court granted summary judgment in favor of the alleged husband and denied her an award of attorneys’ fees.

An alleged husband appealed the award of attorneys’ fees, arguing that Deneve specifically pleaded for recovery under Texas Rule of Civil Procedure 13 but did not prove the elements of that rule and that she could not rely on section 6.708 of the family code to support the award because the trial court ruled that no informal marriage existed. The Dallas appeals court found that Deneve’s pleadings for attorneys’ fees were sufficiently general to distinguish the case from *Kreighbaum v. Lester*, No. 05-06-01333-CV, 2007 WL 1829729, (Tex. App.—Dallas June 27, 2007, no pet.) (mem. op.), and to permit her to argue any available legal basis to support the award of attorneys’ fees. The court also found that section 6.708 of the family code, which applies to any suit in which the plaintiff prays for dissolution of a marriage, applied because Smith sought the dissolution of a marriage, even though the trial court ultimately ruled that no marriage actually existed. Section 6.708 amounts to a statutory exception to the *Mattox v. Buentello*, 800 S.W.2d 320, 328 (Tex. App.—Corpus Christi 1990, no writ) rule that the existence of a marriage relationship is a condition precedent to an allowance of alimony, counsel fees, and suit money.


Employee brought motion to confirm arbitrator’s award of $1 plus attorney’s fees of $24,500 on her assault and battery claim against employer and supervisor. Employee brought motion to modify the award of attorney’s fees. On appeal, defendant argued that employee was not entitled to attorney’s fees because the governing Arbitration Clause limits the parties to the recovery to which they would be entitled under substantive law.

Although the Labor Code allows a court to award attorney’s fees to the prevailing party on claims brought under Chapter 21, employee only prevailed on her common-law assault claim, not her discrimination or retaliation claims. Since common-law assault claims do not entitle a prevailing party to attorney’s fees, the fee award to employee could not be granted on this basis. However, employee was able to successfully argue that the award was appropriate under certain provisions of the Texas General Arbitration Act, and the fee award was ultimately upheld.


This case addressed the issue of attorney’s fees where two statutes with conflicting provisions were relevant to fee recovery.

C. Green Scaping (CGS) was a subcontractor on a project for the City of Fort Worth. It sued Westfield, the holder of the payment bond secured by the project’s contractor, after it submitted claims for work performed and received no payment. Westfield asserted that CGS had not performed in a timely manner and owed liquidated damages as a result. The trial court awarded payment to CGS, offset by the amount CGS owed in liquidated damages. The court also found that CGS was not entitled to attorney’s fees.

On appeal, CGS argued that, as the prevailing party, it was entitled to attorney’s fees under Chapter 38. The Fort Worth court concluded that, where there are competing statutes in the context of a payment bond claim, the statute governing enforcement of a payment bond claim controls. The relevant statute, §2253 of the Texas Government Code, allows, but does not require, a trial court to award attorney’s fees “that are equitable.” The Fort Worth court concluded that a trial court could have found that it would not be equitable in this case because much of the legal work was related to a CGS claim for payment that the company submitted knowing that it was invalid.


In this Deceptive Trade Practices Act (DTPA) case, the Osbornes sued their homebuilder for mold and other construction-related flaws. Although the trial court found that the Osbornes had suffered damages, the Austin court concluded that the Osbornes...
MECHANICS” OF PROVING UP FEES

Recent Cases Involving Recovery Of Attorneys’ Fees


The district court entered partial summary judgment in favor of a lawyer, Stone, on a breach of contract claim, and, after a jury trial, entered judgment on the verdict awarding attorney fees that Stone had incurred in pursuing the breach of contract claim. The trial court ordered the former client, Wythe, to pay sanctions and attorney fees that Stone incurred in pursuing sanctions, and Wythe appealed.

One of Wythe’s issues on appeal was the contention that the trial court erred in awarding attorney’s fees for the breach of contract since funds were deposited into the registry of the court through an interpleader, and attorney’s fees cannot be recovered by a claimant in an interpleader proceeding. The court found that Wythe failed to distinguish interpleader from the causes of action between the parties. Stone’s claim for attorney fees incurred in pursuing the breach of contract claim is based on Section 38.001 of the Texas civil Practice and Remedies Code, not Rule 43 (“Interpleader”).

Wythe also contended that evidence of a contingent-fee agreement, taken alone, is not sufficient evidence that an attorney fee was reasonable. The contract between Stone and Stone’s attorney provided for a contingent fee, and the court found that the fee was excessive under the circumstances. Quoting Arthur Andersen, 945 SW2d 812, the court reversed the judgment in part and remanded for a determination of a reasonable fee based on an hourly rate, not determined as a percentage of damages.

GARCIA V. GOMEZ, 319 S.W.3d 638 (Tex. 2010)

In this Texas Medical Liability Act case the trial court dismissed a health care liability claim with prejudice but denied the defendant physician attorney’s fees, and the appeals court affirmed the denial. In affirming the trial court’s judgment, the court of appeals concluded that the testimony of defendant’s counsel, the sole evidence presented to establish reasonable fees were incurred, was conclusory and

were not a ‘prevailing party’ under the statute and, therefore, were not entitled to attorney’s fees.

The homeowner initially sued the builder and several subcontractors involved in constructing the home. Before the trial, the Osbornes settled for approximately $1.1 million with all the defendants except the builder. At trial, the jury found that the owners had sustained $835,158.78 in damages for which the builder was 48 percent responsible. Because the Osbornes had already received more than this amount in settlement, the court entered judgment that the homeowners should take nothing in damages. The court concluded that the Osbornes were not entitled to attorney’s fees because they did not receive a net recovery from the builder and did not segregate their fees among the claims and parties.

On appeal, the Austin court affirmed the denial of attorney’s fees after examining what it means to be a prevailing party, and thus eligible for attorney’s fees, under the DTPA. Citing Texas Supreme Court precedent, the Austin court explained that “prevailing” generally means to prevail on a claim, not to obtain a net recovery. However, the Austin court asserted that this general rule did not apply in this case because Osborne already received payment for the same claims in excess of the damages found by the trial court.


The Houston court denied attorney’s fees to a prevailing plaintiff in this case, despite Texas Insurance Code provisions entitling him to fees. Rosenblatt, the insured, sued Freedom Life for bad faith and for violation of the Insurance Code due to failure to affirm or deny coverage within a reasonable time. The jury rejected Rosenblatt’s bad faith claim, but awarded him damages totaling $30,000 on the Insurance Code claim. The trial court awarded no attorney’s fees.

On appeal, Rosenblatt argued that the trial court was compelled to disregard the jury’s zero award of fees and to render judgment for statutorily authorized fees. He requested that the Houston court render $500,000 in attorney’s fees as a matter of law.

The Houston court agreed that, under the relevant statute, Rosenblatt was entitled to attorney’s fees. However, it denied the fee award because of inconsistencies in the evidence regarding the reasonableness of the requested $500,000 fee. At trial, Rosenblatt’s attorney testified that $500,000 was a reasonable fee, but also testified that she had a 40 percent contingency arrangement which would have yielded a fee less than $500,000. The attorney also testified that her fee was based on estimated, not actual, time spent on the case. Further, over the five years during which the case was pending, the claims had changed, with only two finally considered at trial.

Based on these findings, court found that Rosenblatt was not entitled to $500,000 as a matter of law. Because remand was not requested, the court denied the fee altogether.
failed to establish that the physician actually incurred attorney’s fees, an essential statutory element. The testimony consisted of the attorney’s opinion of what a reasonable total sum would be for a case of the sort, but included no indication that fees were actually incurred. The Texas Supreme Court remanded for further proceedings, finding some evidence that a reasonable fee was incurred.

The majority noted that an attorney’s testimony about the reasonableness of his or her own fees is not like that of other expert witnesses and is not objectionable as merely conclusory because the opposing party’s attorney effectively questions the reasonableness of the fee. The majority also found that the record reflected that legal services were performed on the doctor’s behalf. Citing Aviles v. Aguirre, 292 S.W. 3d 648, 649 (Tex. 2009), the Court found that fees were incurred when a health-care-liability defendant becomes personally liable for defense costs and any potential judgment. However, the attorney’s testimony, although not contradicted, was not conclusive evidence that the fee was both reasonable and incurred. The Court found that section 74.351(b) of the Texas Medical Liability Act requires a fee be both reasonable and incurred, and that “the fee to be awarded is the lesser of a reasonable fee or the fee actually incurred.” Garcia, 319 S.W.3d at 642.

The dissent (Chief Justice Jefferson joined by Justice Johnson) noted that nowhere in the testimony did the attorney state an amount of fees actually charged, and would not have given the physician a second chance to prove the amount of fees incurred. The fees were not supported by evidence, as there was no mention in the testimony of the amount of time spent on the case or the attorney’s hourly rate.

In a separate dissent, Justin Johnson discussed the eight factors laid out in Arthur Andersen, 945 SW2d 812, finding that the testimony touched on only two of the factors. He found that the testimony was not not probative evidence because it did not contain the underlying factual basis on which it rested.”

Transcontinental Ins. Co. v. Crump, 330 S.W.3d 211 (Tex. 2010)

After an insurance company appealed the decision of a hearing officer in a workers’ compensation death benefits case, the trial court awarded fees and determined the amount of the fee. The appeals court affirmed.

The Texas Supreme Court found that an insurance carrier is entitled to have a jury determine the disputed amount of reasonable and necessary attorney’s fees for which it is liable under Texas Labor Code § 408.221(e) and remanded. The Court found that the statute is ambiguous as whether a judge or jury decides the amount of fees but note that previous examinations of fee shifting provision generally decide that the reasonableness of statutory attorney’s fees is a jury question.

Varner v. Cardenas, 218 S.W. 3d 68 (Tex. 2007)

This Texas Supreme Court case clarified that Texas procedure does not allow post-judgment attorney’s fees, for which proof is not presented at the initial trial, to be determined after appeal by remand.

A property seller, Varner, brought an action to recover on a promissory note when the purchaser did not make payments as arranged. The purchaser, Cardenas, counterclaimed for breach of contract and warranty, asserting that the land purchased was smaller than Varner had represented. The trial court altered the land price to reflect the smaller acreage and awarded Varner the remaining amount due as well as $40,400 in attorney’s fees.

On appeal, the Amarillo court remanded the issue of attorney’s fees because the Varners had not segregated those fees they incurred in their suit on the note from those fees incurred in pursuing claims against the title insurer. The Varners also had not segregated fees incurred in defending against the counterclaims related to the smaller acreage. See Cardenas v. Varner, 182 S.W.3d 380 (Tex. App. – Amarillo 2005).

The Texas Supreme Court agreed that the fees related to the title insurance claim should be segregated from the other claims. However, the court concluded that counterclaims did not have to be segregated because the Varners had to overcome the counterclaim’s allegation of a shortfall in acreage in order to succeed on collecting the full amount of the note.

Varner also asked to submit evidence of fees for post-judgment work to the trial court on remand, even though he had submitted no such evidence at the original trial. The supreme court prohibited post-judgment fees to be determined after appeal on remand, declining “the invitation to allow two trials on attorney’s fees when one will do.” Varner, 218 S.W.3d at 70.


A trial court held in favor of Temeasha Scott in her suit against the appellants for breach of contract and violation of the Deceptive Trade Practices Act. During trial the parties stipulated as to a $10,000 figure for their attorneys fees incurred during trial, with an additional $7,500 if there was an appeal.
Among other contentions, the appellants argued that the trial court erred in awarding attorney’s fees to Scott because the jury did not award any fees and she was not legally entitled to attorney’s fees. They contended that although their stipulation covered the amount of attorney’s fees, they did not stipulate to the reasonableness and necessity of such fees or Scotts right to recover them. The appeals court found that evidence was legally sufficient to support the jury’s finding that the appellant breached its written contract with Scott and violated the DTPA. Therefore Scott was the prevailing party and was entitled to an award of reasonable attorney’s fees. The court also found that the stipulation contemplated the amount of attorney’s fees to be recovered; the issue was not in dispute and, therefore, was not required to be submitted to the jury. The stipulation necessarily covered the reasonableness and necessity of the fees, and the trial court did not abuse its discretion in awarding $10,000 in attorney’s fees.


This action arose out of a Surety Agreement between a plaintiff insurance company and defendant contractors Hisaw & Associates General Contractors, Inc. (HAGC) and the Hisaws. The Surety had required HAGC and the Hisaw to enter into an indemnity agreement whereby they would be jointly and severally liable for losses, fees, costs, and expenses that the Surety suffered due to the enforcement of one of its performance and payment bonds. An amendment to the indemnity agreement limited the Hisaws’ liability to the amount of any funds or assets of HAGC received by the Hisaws as a result of distributions, payments, dividends, bonuses, redemption of stock, loans, or sale of assets that caused or occurred while the values of HAGC was below $3,000,000.

HAGC failed to fully perform on several of its construction contracts and multiple owners enforced their bonds against the Surety, leading to net losses for the Surety of $16,278,896. At trial the Court found HAGC liable under the indemnity agreement for $15,034,831.12. However, the amendment greatly limited the Hisaw’s liability, and the court found them liable only for the total amount of salary payments that went to the Hisaws. The parties stipulated this was $45,000. The Surety moved for attorneys’ fees, contending that as the prevailing party on its breach of contract claims, it is entitled to an award of attorneys’ fees pursuant to Section 30.001(8).

The defendants admitted that an award of fees against HAGC was proper, but contended that an award of fees against the Hisaws would be unreasonable given that the Surety obtained less than one-third of one percent of the initial amount sought against them. The court found that the fact that a plaintiff only recovers a very small portion of the amount it sought does not preclude the plaintiff as a matter of law from recovering some or all of its attorneys’ fees. Rather, a court must consider the degree of success in the context of the particular facts in determining what portion, if any, of the requested fees should be awarded. The court found that the particular circumstances of the case did not warrant full fee recovery and that the Hisaws’ liability for the Surety’s attorneys’ fees should be halved.

The defendants also maintained that the attorneys’ fees needed to be segregated because they are attributable to separate defendants and separate causes of action. The court found that the Surety’s claim against HAGC and the Hisaws shared the same fundamental basis, and in order to recover from the Hisaws, the Surety had to prove its claims against HAGC. Therefore fees did not have to be segregated.

**Austin ISD v. Manbeck, 338 S.W.3d 147 (Tex. App.—Austin 2011, pet. filed)**

Austin ISD sought review of a decision of the Texas Department of Insurance Division of Workers’ Compensation on the extent of a claimant’s injuries. The Claimant counterclaimed for attorneys’ fees. Following the school district’s non-suit of its appeal, the district court granted the claimant’s attorney’s fees. AISD appealed, arguing that the award of attorney’s fees that were incurred after it non-suit its judicial-review claim was in error because the Labor Code section 408.221(c) does not authorize claimants to recover attorney’s fees incurred solely to recover the attorney’s fees otherwise authorized under that provision and that the claimant failed to present legally or factually sufficient evidence to support the jury’s findings that he incurred $36,000 in reasonable trial-level attorneys’ fees prior to AISD’s non-suit.

The Austin Court of Appeals held that the workers’ compensation statute authorized claimants to recover attorneys’ fees incurred in prevailing on the issues on which the carrier sought judicial review, but not fees incurred in pursuit of those fees. The court looked at the plain language of the statute in light of the “American Rule” whereby parties to litigation bear their own attorneys’ fees unless specifically authorized by statute or contract, the court. The court decided the legislature precluded the award of attorneys’ fees incurred in pursuit of fees otherwise authorized by language limiting the entitlement to fees incurred in connection with the “issues” “appealed” by the carrier on which the claimant prevailed.
The Austin court also found that the evidence was sufficient to support the award of attorneys’ fees. The claimant relied on testimony and documentary evidence concerning services provided by two of his three attorneys to establish the amount of attorneys’ fees he incurred in the district court prior to AISD’s non-suit. AISD challenged the jury’s attorney’s fee award based on evidence that one lawyer’s billing by quarter-hours could have resulted in rounding up by large amounts, and that the lawyer’s rate was twice as high as the rate he had charged the client for services in the administrative proceedings. AISD also charged that a second lawyer billed for unnecessary travel and for tasks that were more appropriate for a paralegal or secretary. Noting that the Texas Supreme Court has repeatedly emphasized that the reasonableness of statutory attorney’s fees is generally a jury question, the court found sufficient evidence to support the award.


Truck drivers sued farm for breach of contract, fraud, and conspiracy to commit fraud, alleging they were underpaid compensation for hauling non-agricultural loads for farm’s customers and requesting exemplary damages and attorney’s fees. At trial, the jury found that the farm had breached its contracts with the drivers and awarded damages based on the tenure and fuel surcharge of each driver’s load. The jury also awarded $3,350 in attorney’s fees to drivers.

On appeal, the Court of Appeals held that the evidence was insufficient to support the award of attorney’s fees by the jury. Citing the Arthur Andersen, 945 SW2d 812 (Tex. 1997) factors, the Court explained that the counsel for drivers had only provided bare testimony as to fees, including the name of the law school he attended, the number of years he had practiced, and the number of hours spent on the case. Counsel never testified to which attorneys he was referring for those hours, nor did he ever state that their fees were reasonable. Finally, counsel did not request a specific amount of fees, only testifying that his clients had agreed to pay him a percentage of the recovery. Accordingly, the Court vacated the jury award of fees and rendered a take nothing judgment on the issue of attorney’s fees.

Jarvis v. Rocanville Corp., 298 S.W.3d 305 (Tex. App.—Dallas 2009, pet. denied)

In the latest of a series of lawsuits between the parties involved, the minority interest owners of two oil wells brought action against the majority interest owners, Rocanville, alleging breach of prior lawsuit settlement agreements, the result of which was a trespass claim for equipment encroachment on the minority owners’ land. Both parties moved for summary judgment on all claims and counterclaims, but the trial court only granted summary judgment in favor of Rocanville on plaintiff’s claim for declaratory relief, denying all other motions. After a bench trial, the trial court held in favor of Rocanville on all claims and awarded them $75,000 in attorney’s fees. Plaintiffs raised five issues on appeal, including the question of whether the trial erred in awarding attorney’s fees to Rocanville.

In finding in favor of Rocanville, the Court of Appeals rejected arguments from Jarvis that Rocanville did not present sufficient evidence as to attorney’s fees at trial, did not offer requested documentation of attorney’s fees during discovery, and did not adequately segregate fees. The Court held, first, that “A trial court is not required to receive evidence on each of the factors that determine the reasonableness of attorney’s fees, nor is documentary evidence a prerequisite to an award of attorney’s fees. Jarvis, 298 S.W.3d 318. The trial court can also look at the entire record, the amount in controversy, and the relative success of the parties in making an award, as it did in this case.

The Court further held that the fee award was appropriate under either §38.001 since the case partly turned on a breach of contract claim, or under §37.009 since the case also turned on a declaratory judgment request. Finally, the Court dismissed Jarvis’ complaints as to segregation, holding that Rocanville’s attorneys presented sufficient testimony on the intertwined nature of most of the claims and that, regardless, Jarvis did not present any controverting testimony or other evidence on the inadequacy of the segregation of fees. Jarvis’ other arguments, including that the fee documentation was excessively redacted, were not properly preserved for appeal and thus not considered.


The trial court in this case awarded $68,000 in attorney’s fees as sanctions to the plaintiff for the defendant’s discovery abuse after the defendant withheld critical information, produced documents in a manner calculated to conceal information, and filed two no-evidence motions for summary judgment knowing that the production of documents and witnesses was deficient.

On appeal, the defendant argued that the evidence at trial did not show that the fees were reasonable, necessary or sufficiently tied to the sanctionable discovery issue. The evidence at trial consisted of an
affidavit by plaintiff’s counsel stating that the plaintiff had “incurred fees and expenses totaling $68,000, which are associated with [defendant’s] discovery abuse.” Scott Bader, Inc., 248 S.W.3d at 816.

The Houston court found no abuse of discretion, noting that proof of reasonableness and necessity is not required when fees are awarded as sanctions. It also found evidence in the record tying the plaintiff’s attorney time to the sanctionable conduct: because of the discovery abuse, at least eight depositions were taken without a key document that would have been relevant to those depositions. The evidence further showed that the plaintiff’s counsel prepared two motions to compel discovery and provided services related to the sanctions request.

**Johnson v. Oliver, 250 S.W.3d 182 (Tex. App. - Dallas 2008, no pet.)**

In this dispute between the leaders of two churches over property ownership and use of a bus, the trial court awarded defendant Oliver damages, prejudgment interest, costs and $24,611 in attorneys’ fees.

The Dallas court found insufficient evidence to support the award rendered, but found enough to support a $23,166 award, so it reduced the fee amount by the $1,445 difference. The evidence included Johnson’s testimony that he had hired an attorney and agreed to pay a reasonable fee. The attorney submitted an affidavit the work done and a declaring that the client had agreed to a $200 per hour rate, a customary charge for the type of work and level of attorney expertise. The attorney also testified that his fee was $23,166.

The trial court struck through the final judgment’s draft language “$23,166, and legal assistant fees in the amount of $1,445” and substituted “$24,611,” reflecting the total. The Dallas court found no evidence for the $1,445 and reduced the award accordingly.


Although the property owner in this eminent domain action recovered nothing because the action was dismissed, the Dallas court affirmed the trial court’s award of $201,213 in attorney’s fees to his lawyer.

Brazos Electric initiated eminent domain proceedings in order to condemn property owned by Weber. The trial court appointed special commissioners, who assessed the value of the property at approximately $1 million more than Brazos had offered. After the assessment, Brazos voluntarily dismissed its eminent domain action, and the trial court awarded attorney’s fees to the property owner, pursuant to the Texas Property Code, which provides for reasonable and necessary attorney’s fees to the owner when a condemnation proceeding is dismissed.

On appeal, the Dallas court found sufficient evidence of the reasonableness of the fee. Three witnesses testified on the issue of attorney’s fees, including the client, the attorney and an expert in fees related to condemnation proceedings. The client testified that the fee arrangement was for 20 percent of the $1 million difference between the best offer made and the special commissioner’s award. The client also testified that no provision in his fee contract addressed what the fee would be if there was a dismissal. The expert witness had 26 years of experience with eminent domain cases and testified that the standard contingency was between 1/3 and 40 percent and that the $200,000 request was probably less than reasonable. The owner’s lawyer testified that he had represented the client for approximately 30 years and that he generally charges a 30 percent contingent rate.

In affirming the award, the Dallas court noted that the owner had offered evidence of the traditional factors used to determine reasonableness of rates, that he had offered a specific amount, not just a percentage, and that he had offered evidence beyond just the fee contract.


In this case based on a dispute between a condominium owner and the condominium association, the owner sued the association for alleged violations of the organization’s regulations when it moved her parking space. The final judgment denied her claims but also denied the association attorney’s fees.

On appeal, the association argued that it was entitled to fees under the Uniform Condominium Act. The Houston court affirmed the trial court’s decision, noting that, even where a statute mandates an award of attorney’s fees, the prevailing party is still required to prove fees are reasonable. At trial, the association called no witnesses and offered no documents relating to attorney’s fees. The only evidence it put forward was its cross-examination of the homeowner’s attorney, asking whether the lawyer thought it would cost about as much to defend the case as it was costing them to pursue it.


In this family trust dispute, the trial court awarded $400,000 in attorney’s fees pursuant to the DJA and the Texas Property Code. The Houston court remanded
on the issues of both reasonableness and fee segregation.

Although the award was consistent with the contingent fee arrangement in the case, there was not enough other consistent testimony addressing the reasonableness of the fee. Only one of the three attorneys had any time records, and none were produced at trial. The attorney who testified knew nothing about the rates of the other attorneys working on the case. Only rough estimates of the total time spent on the case were available. One witness testified that the rate proposed was high for the area. Further, there was no evidence of fee segregation despite the multiple claims in the case and no evidence that would demonstrate that segregation was unnecessary.


The Corpus Christi court remanded on the issue of the reasonableness of an attorney fee award in this case in which Southwestern Bell sued to recover a debt for advertising services. The trial court granted summary judgment in favor of Southwestern Bell and awarded $91,589 in attorney’s fees.

The evidence regarding the fee included Southwestern Bell’s attorney’s affidavit stating that he performed “several hours of work” and that he expected “. . . an additional several hours” of his time to be devoted to post-judgment work. The affidavit also listed the services he provided, declared the attorney’s familiarity with local fees and asserted that “the sum of 1/3 of the amount owed or $91,589.09 would be a reasonable fee . . . .” Mercier, Inc., 214 S.W.3d at 777. Although this latter statement implied that there was a contingency fee agreement, Southwestern Bell provided no evidence of a written fee agreement.

The court found that the absence of proof of a written agreement was enough to conclude that the fee evidence was “controverted and questionable.” The court also found insufficient additional evidence on the factors critical to evaluating the reasonableness of fees.


The Mitchells brought action against Fort Davis Bank after the bank sought to foreclose on a lien. The trial court granted summary judgment to the bank and awarded $5,000 in attorney’s fees pursuant to the DJA.

On appeal, Mitchell claimed that he had created a fact question regarding the reasonableness of the fees because a letter from Mitchell’s attorney declared “. . . in my professional opinion, the attorney’s fees and costs sought by Fort Davis State Bank of $8,087.51 and $1,800 are neither reasonable nor necessary. . . .” Mitchell, 243 S.W.3d at 127.

The El Paso court affirmed the trial court’s fee award, which was less than the amount requested, finding that Mitchell had failed to show the fees were unreasonable or unnecessary.

RECENT CASES INVOLVING FEE SEGREGATION AFTER TONY GULLO MOTORS I, L.P. V. CHAPA, 212 S.W.3D 299 (TEX. 2006)


This appeal arose from a probate proceeding in which a jury found that Belton Kleberg Johnson executed certain wills and trusts as a result of undue influence. Is a suit by the Johnson’s children and grandchildren against Johnson’s widow for tortuous interference in their inheritance right and contesting the validity of the wills, the trial court denied probate of certain wills on the ground of undue influence, invalidated certain trust documents, and admitted another will to probate. On appeal a San Antonio court held that evidence was sufficient to support the attorneys’ fee award of $6,301,292 and that the award for both the will contest and the trust contest was not impermissible double recovery.

The appellants contended that the trial court erred in allowing the jury to consider fees for legal services provided to plaintiffs who are ineligible to recover attorneys’ fees under section 243 of the Texas Probate Code and section 114.064 of the Texas Trust Code because they did not personally pay or incur the fees. The appeals court rejected that argument because evidence established that trusts created for the benefit of the plaintiffs paid or advanced payment for fees.

The appellants also contended that the evidence was legally insufficient to support the attorney’s fee award. The court discussed testimony on the complexity of the case, the number of attorney involved, the amount of documents produced, the lawyers’ hourly rates, finding sufficient evidence to support the jury’s award. With regard to segregation, the court considered testimony that 95% of the total fees were incurred in relation to the will and trust contest claims, including testimony that work required on claims relating to the dissolution of a family business was ties to the undue influence claim because the dissolution was evidence of the undue influence.

The appellants also argued that there had been a double recovery of attorneys’ fees because half the fee was awarded for the will contest and half for the trust
Contest. The court found that this argument was without merit.


In this contract dispute Transcontinental appealed the trial court’s award of $95,000 in attorney’s fees to McGuire, Craddock and McGuire, Craddock appealed a reduction of its awarded fee due to non-segregation. The Austin court reversed that portion of the judgment awarding McGuire, Craddock $95,000 and remanded to determine the proper amount of fees.

Transcontinental contended that the trial court erred in awarding attorney’s fees because McGuire, Craddock failed to offer proof of presentment. However, McGuire, Craddock averred in its petition that all conditions precedent to recovery had occurred or had been performed and the record showed that McGuire, Craddock had presented its contract claim to Transcontinental and Transcontinental had refused to pay.

McGuire, Craddock contended that the trial court erred in reducing its fee award due to non-segregation because it was not required to segregate the fees it incurred in pursuing its breach of contract claim from the fees it incurred in overcoming Transcontinental’s counterclaims. The Dallas court found that in order to recover on the contract for the legal fees it claimed were owed by Transcontinental McGuire, Craddock had to overcome each of the defenses and affirmative claims asserted by Transcontinental. Therefore McGuire, Craddock was not required to segregate the attorney’s fees it incurred in prosecuting its breach of contract claim form the fees incurred in defeating Transcontinental’s counterclaims.


A long-standing property dispute was resolved at trial in favor of the loan servicer for an adjustable rate note on real property owned by appellant, who appeared pro se at trial and on appeal. Despite affirming all other aspects of the trial court’s final judgment, the Court of Appeals reversed and remanded on the sole issue of attorney’s fees, which had been awarded to the loan servicer on summary judgment. Appellant argued that appellee was not entitled to attorney’s fees under §38.001 because they had not recovered actual damages in their breach of contract counterclaim, a prerequisite to a fee recovery under that section. However, the Court rejected appellant’s contention that appellee was not entitled to attorney’s fees under §37.009 because their seeking of a declaratory judgment duplicated relief already sought in the breach of contract counterclaim.

Finally, on the issue of segregation, the Court cited Tony Gullo Motor I, L.P. v. Chapa, 212 S.W.3d 299 for the holding that appellee had not met its burden of demonstrating that segregation was not required because it was unclear from the evidence presented whether any of the fees sought related to claims for which fees are unrecoverable. At the same time, the Court held that appellee had not therefore forfeited their right to recover fees, the evidence presented was some indication of what the segregated amount should be, and the case should be remanded for further proceedings on the issue of attorney’s fees.


A dispute between two neighboring business over the size and location of an access easement resulted in a trial award to the plaintiff, Edom Wash ‘N Dry. Appellant Shed raised several issues on appeal, including arguments that the trial court erred in awarding attorney’s fees to Edom due to legally or factually insufficient evidence, the subsequent reduction of exemplary damages on appeal, and Edom’s failure to segregate fees at trial.

Reaching only the issue of segregation, the Court of Appeals held that it was unclear from the evidence presented by Edom at trial whether certain credits given to Edom by its attorneys related to fees for recoverable claims. Furthermore, the Court held that since Edom had been awarded the full amount of their requested attorney’s fees by the jury, fees in excess of the credits given were incurred for non-declaratory claims, and Edom failed to offer a basis or authority for recovery of attorney’s fees for those claims, the case must be remanded for further proceedings on the issue of attorney’s fees so that Edom could properly present evidence on segregation of recoverable from unrecoverable fees.


Purchaser brought breach of contract, fraud, and tortious interference action against vendor of an office building, vendor’s property manager, and a real estate
broker (along with its affiliates) who was to be the second purchaser after its purchase closed. The trial court granted summary judgment for defendants and awarded vendor and second purchaser attorney’s fees.

On purchaser’s appeal, the Court of Appeals held that second purchaser was required to segregate its attorney’s fees between claims purchaser brought against it and claims purchaser brought against its affiliates. As in most appeals involving segregation, appellee attempted to argue that the underlying facts of the claims were so intertwined as not to require segregation of fees.

However, citing Tony Gullo, 212 S.W.3d 299, the Court of Appeals agreed with appellant that appellee was required to segregate fees in this case because appellee had incurred a portion of its fees defending its affiliates on unrecoverable claims and spent a portion of its time defending itself against unrecoverable claims. Revealingly, the Court here noted that “In making this determination, we do not look at the legal work as a whole but parse the work into component tasks, such as examining a pleading paragraph by paragraph to determine which ones relate to recoverable claims.”

Thus, in awarding 99.4% of the requested fees to this appellee, the trial court had failed to recognize that Chapa requires segregation when fees involve both recoverable and unrecoverable claims, regardless of whether the underlying facts of those claims are “interrelated and inextricably intertwined.” Since the total amount of fees expended was some evidence of the proper fee award, appellee’s failure to segregate merely required remand to enable proper proof of fees.

Gallagher Headquarters Ranch Dev., Ltd. v. City of San Antonio, 269 S.W.3d 628 (Tex. App.--San Antonio 2008, pet. granted, judgment vacated w.r.m.)

City resident brought action asserting various injunctive and declaratory judgment claims, challenging city’s grant of easements to city public service agency for construction of power lines across land that city had acquired as an approved venue project. The trial court entered summary judgment for the city on all of resident’s claims and awarded attorney’s fees to the city.

Despite affirming the trial court on all portions of the summary judgment, the Court of Appeals reversed and remanded on the issue of attorney’s fees. Resident appellants argued on appeal that the city was required to segregate fees at trial because not all the claims asserted by residents authorized the recovery of attorney’s fees. The city argued on appeal that it was not required to segregate since all but one of resident’s claims were pled as claims for declaratory relief on which fees are recoverable and resident’s claim, a request for injunctive relief, was intertwined with its substantive claims.

Rejecting these arguments, the Court cited Tony Gullo, 212 S.W.3d 299 for the proposition that “the determining factor as to whether fees must be segregated is the type of legal services rendered with respect to the particular claims, not simply the manner of pleading or the type of claim pled.” The Court further found that the city was not correct in asserting that almost all claims pled by resident were for declaratory relief, citing amended pleadings that referenced among other claims constitutional violations, statutory violations, fraud and breach of contract.

Finally, the Court held that the City had not met its burden of establishing that fees need not be segregated because its request for fees was supported only by imprecise affidavits, and no testimony or other evidence was presented at the hearing on attorney’s fees. Specifically, the Court cited the affidavits for their lack of a statement that the legal services provided were intertwined and inseparable between claims. The Court thus concluded that the trial court erred in awarding full attorney’s fees for the total hours spent on the case and remanded for a new hearing on the issue of attorney’s fees.


The Texas Supreme Court remanded the issue of attorney’s fees in this dispute between the daughter of a deceased account holder and A.G. Edwards.

The daughter initially sued the firm for conversion, negligence, fraud, breach of contract and other claims, alleging that it failed to open an account with right of survivorship as agreed. The trial court entered judgment on a jury verdict for the daughter, awarding $225,000 in attorney’s fees for trial and $48,000 in unconditional appellate attorney’s fees.

On appeal (and prior to the Supreme Court’s decision in Tony Gullo, 212 S.W.3d 299), the El Paso court affirmed the judgment and held that segregation of fees in this case was not required because all the claims arose from the same transaction and were inextricably intertwined. The El Paso court did reform the appellate fee award to make it conditional on an unsuccessful appeal by A.G. Edwards. See A.G. Edwards & Sons, Inc. v. Beyer, 170 S.W.3d 684 (Tex. App. – El Paso 2005).

The Texas Supreme Court remanded the case for a new trial on attorney’s fees, holding that the daughter was required to segregate fees between her breach of contract and tort causes of action. Quoting Tony Gullo, 212 S.W.3d 299, the Supreme Court asserted that “if
any attorney’s fees related solely to a claim for which fees are unrecoverable, a claimant must segregate recoverable from unrecoverable fees.” *Gallagher Headquarters*, 269 S.W.3d at 710.

**Navigant Consulting, Inc. v. Wilkinson*, 508 F.3d 277 (5th Cir. 2007)

In this Fifth Circuit case, an employer, Navigant, brought seven causes of action, including breach of fiduciary duty, misappropriation of trade secrets and breach of contract, against several former employees. The district court entered judgment against the employees and awarded attorney’s fees of $574,149.60 to Navigant. The Fifth Circuit remanded.

At trial, Navigant argued that it was not required to segregate fees because the issues were “inextricably intertwined.” Examining the facts and proof in the case, the district court found that some, but not all, claims were intertwined. It also concluded that fee segregation was impossible in this case. Based on these determinations, the district court awarded Navigant 60 percent of its requested fee.

Although the Fifth Circuit found no error in the district court’s awarding of a proportion of the requested fee, it remanded on the issue of segregation. Clarifying *Tony Gullo*, the Fifth Circuit asserted that it is not the intertwining of facts that make it unnecessary to segregate fees. Rather, “. . . the question under *Chapa* is whether discrete legal services advance both a recoverable and unrecoverable claim.” *Navigant Consulting, Inc.*, 508 F.3d at 298.

Although the record showed that the district court gave some consideration to whether work performed by Navigant’s attorney was related to the breach of contract claim, the Fifth Circuit remanded for full consideration of the extent to which Navigant’s legal services advanced both the breach of contract claim and the claims for which fees were unrecoverable.


Dollar Rent a Car alleged that 7979 Airport Garage, the owner of a garage leased by Dollar, breached its contract as well as the implied warranty of suitability by failing to make structural repairs to the garage.

The garage owner purchased the property knowing that repairs would be needed. Six months after the purchase, Dollar notified 7979 that it expected the repairs to be made. Evidence indicated that 7979 knew it was responsible for the repairs and was, in fact, moving to make them. In the meantime, Dollar sued. Six months after the lawsuit was filed, 7979 made the repairs, and then counterclaimed for fraud and breach of contract.

After a jury trial, the trial court found in Dollar’s favor and awarded damages, prejudgment interest, and $340,000 in trial-related attorney’s fees, plus conditional appellate attorney’s fees of up to $90,000.

On appeal, 7979 attacked the award of attorney’s fees because they were not segregated to distinguish the fees incurred in connection with the breach of contract claim from those related to the breach of warranty of suitability and to the counterclaims.

The 14th District court remanded for consideration of attorney’s fees, finding that Dollar was required to segregate the breach of warranty of suitability claim. The court concluded that Dollar was not required to segregated fees for the breach of contract and counterclaims, however. Both the contract claim and the counterclaims depended on many of the same facts and involved the same evidence, including responsibility under the lease, the need for repairs, notice of the repairs and the date and cost of the repairs. In addition, in order to prevail on its contract claim for which fees were recoverable, Dollar had to defeat the fraud and breach of contract counterclaims.

To defeat the counterclaims, Dollar had to show, in part, that the repairs were needed; that 7979 had notice of the need for them; that the repairs were 7979’s responsibility; and that 7979 failed to make them in a timely manner. These same facts were needed to prove the contract claim.

In remanding for segregation of fees related to the breach of warranty, the court acknowledged that little work on the case was related to this issue, as demonstrated by less than a dozen relevant sentences in the jury charge or the petition. The court implied that, if Dollar had come forward with a stated percentage of time related to the breach of warranty claim, that would have sufficed to meet the segregation requirement. Since Dollar simply asserted that the fees were inextricably intertwined, remand was necessary. Quoting *Tony Gullo*, 212 S.W.3d 299, the court asserted that “unrecoverable fees [are not] rendered recoverable merely because they are nominal.” *7979 Airport Garage*, 245 S.W.3d at 510.


The San Antonio court did not remand in this fee segregation case where a party remitted part of its awarded fee at trial.

Lender AGF sued property owner Allen, seeking foreclosure on a property. When AGF discovered that the property had already been sold, it altered its claim to seek a constructive trust on the proceeds from the sale. Allen countered with claims including violations
of the DTPA, negligence, gross negligence, and breach of contract.

The trial court issued partial summary judgment on some of the counterclaims, and the breach of contract and negligence claims were tried to a jury. Allen prevailed on the claims and the jury found that his reasonable attorney's fees were $150,000. Evidence at trial regarding the fee included the testimony of Allen's attorney on the number of hours worked on the case over six years. Allen's attorney also testified that the fees were not segregable between the negligence and breach of contract claims. In his testimony, the attorney asserted that the issues were intertwined because "the same amount of time would have been spent on the case" "if the case had been . . . only breach of contract" and all of the time requested related to the contract claim. Allen, 251 S.W.3d at 691. The trial court suggested a remittur and Allen remitted $100,000 of the $150,000 fee award.

Allen challenged the remittur on appeal, and the San Antonio court declined to reinstate the remitted $100,000, concluding that the evidence was insufficient to support the full $150,000 award. The court noted that, although Allen asserted that the claims were intertwined, the evidence at trial suggested otherwise. Although his original petition listed only two claims, by the time the case made it to trial he had added eight claims, all of which were separately pled in detail. The evidence he introduced at trial to support his fees included services for pursuing claims not tried, claims for which fees were not recoverable and summary judgment proceedings. As a result, the court found that Allen was required to segregate fees and declined to reinstate the $100,000 jury award.


The Dallas court declared that legal services for several claims were intertwined as a matter of law in this case, allowing a former husband to keep $119,598.74 in attorney's fees awarded by the trial court.

The case involved a dispute over the interpretation of a divorce decree which granted the former wife, Broesche, half of oil and gas interests held by Jacobson and operated by Texas Independent Exploration, Inc. (TIE). Because of post-decree litigation between Broesche and Jacobson as well as a dispute regarding Broesche's failure to pay taxes, TIE began holding her oil and gas revenues in suspense.

When both Jacobson and Broesche began demanding payment of the suspended funds, TIE filed an interpleader action. Broesche then filed breach of contract, fraud and conversion counterclaims to the interpleader action. TIE succeeded in obtaining summary judgment and was later awarded $119,598.74 in attorney's fees.

On appeal, Broesche challenged the award of attorney's fees, contending that, because fees are not generally available for a conversion claim, TIE was only entitled to fees for the services related to its interpleader action, not the services related to defending the counterclaims.

Citing **Tony Gullo, 212 S.W.3d 299** for the proposition that, if discrete legal services advance both recoverable and unrecoverable claims, then they need not be segregated, the Dallas court concluded that TIE's interpleader and defense of the conversion claim were inextricably intertwined so as not to require segregation. The court found that defeating the conversion claim was necessary to prevail on the interpleader action. To prove the interpleader case, TIE had to show that it had a reasonable doubt about which party had the valid claim to the funds. Broesche's conversion claim included a charge that TIE colluded with Jacobson to deny Broesche her revenue. Defeating this collusion allegation was necessary to show that TIE had doubts about who had the valid claim to the revenue.


In this case involving a commercial tenant and landlord, the jury awarded the tenant, Nguyen, $73,900 in attorney's fees for trial preparation and $6,000 in fees for post-trial work. In rendering judgment, the trial court recited that Nguyen "as the prevailing party, is entitled to recover attorney's fees under the Declaratory Judgment Act and section 24.006 of the Texas Property Code."

On appeal, the landlord argued that attorney's fees could not be recovered because there were no damages awarded; the declaratory judgment claim was duplicative and served only as a means to obtain an award of attorney's fees; and fees were not segregated as required.

The First District court overruled the challenge regarding damages, asserting that it was not necessary to be the prevailing party in order to obtain attorney's fees under the DJA. Because of the sequence in which the claims were asserted in this case, the court further found that Nguyen did not allege declaratory relief solely to obtain attorney's fees for which she was not otherwise authorized.

The appeals court remanded the case on the issue of segregation of fees. Nguyen had not segregated fees according to all the claims made in the case, but had argued that her claims were so intertwined that segregation was unnecessary. In doing so, she relied primarily on the testimony of the counsel to her former...
partner. In remanding on this issue, the court noted that this testimony concerned the former partner’s attorney’s fees, not Nguyen’s, and also did not cover all of the relevant claims in the case.

**Lamajak, Inc. v. Frazin, 230 S.W.3d 786 (Tex. App. - Dallas 2007, no pet.)**

This case is based on a dispute between gift store chain owner Lamajak and collectible toy owner Frazin about profits from the sale of Beanie Babies. Frazin alleged that Lamajak’s owner, Cohen, orally committed to give Frazin all of the store’s 1998 profits in excess of $6 million from the sale of Beanie Babies. When Cohen did not make good on the promise, Frazin sued Cohen and Lamajak for breach of contract, promissory estoppel and *quantum meruit*, among other claims.

At the trial, the jury returned a verdict favoring Frazin on his breach of contract and *quantum meruit* claims, awarding $4 million in damages and $1.6 million in attorney’s fees.

Lamajak challenged the fee award on appeal, asserting that fees could only be awarded if the contract claim was upheld on appeal; that there was insufficient evidence of the reasonableness of the fee; and that the evidence did not segregate fees as required.

The Dallas court affirmed the trial court’s award, asserting that recovery of attorney’s fees is allowed on a *quantum meruit* claim. The court further concluded that there was sufficient evidence at trial on the reasonableness of the fee, including the testimony of Frazin’s attorney regarding his experience, his fee arrangement, the work done, the legal issues involved, and the usual and customary fees in the area.

The court also found that further segregation was not required in this case. The language in the jury charge asked for a determination of a reasonable fee for the services “in this cause” and Lamajak did not object to this wording. Noting that the trial court makes the legal determination of whether fees must be segregated, the Dallas court asserted that, in this case, the jury charge indicated that the trial court determined that segregation was not required.


The Fort Worth court remanded for a hearing and judgment on attorney’s fees in this multi-claim dispute between a commercial tenant’s assignee and a landlord’s assignee.

At trial, the jury determined that a reasonable fee for the prevailing tenant’s assignee, Potter, was $212,753.50 for trial-related services and $45,000 for appellate work. Despite this determination, the trial court entered judgment granting $75,000 in fees for trial preparation and $32,500 for potential appellate work. NP Anderson appealed the award of attorney’s fees, and the Fort Worth court remanded on the issue of fee segregation.

Potter originally sued NP Anderson for specific performance, a declaratory judgment, breach of contract and tortious interference with a contract. The only claims that survived summary judgment and made it to the jury were the breach of contract and declaratory judgment issues. At trial, the jury considered separate questions on the two causes of action but only one question on attorney’s fees. When NP Anderson moved for a directed verdict because the fees were not segregated, the trial court stated that “the fees [for all of Potter’s claims] are inextricably intertwined” and held that “as a matter of law they are not segregable.” *NP Anderson, 230 S.W.3d at 467.*

There was no evidence from Potter’s counsel regarding the reasonableness or necessity of the fees or any discussion that the facts and fees were inextricably linked.

The Fort Worth court acknowledged that a trial court has discretion in awarding fees under the DJA and is free to award less than a jury determines to be reasonable. However, in remanding, the court concluded that the trial court did not have discretion to award unsegregated fees where there was no evidence regarding segregation and where, as in this case, it was possible for the plaintiff to prevail on some, but not all, claims.

**Petras v. Criswell, 248 S.W.3d 471 (Tex. App. - Dallas 2007, no pet.)**

In this multi-claim case between a building owner and a prospective buyer, the trial court awarded attorney’s fees of $45,915 to the owner after he nonsuited the claim remaining after summary judgment rulings that partially favored both parties. The prospective purchaser appealed on the grounds that the owner failed to segregate fees for breach of contract and other claims and counterclaims in the case.

The Dallas court affirmed the award of attorney’s fees, finding the record to contain adequate evidence of fee segregation. The owner’s attorney testified at trial that all of the purchaser’s claims were based on the same common facts and were inseparable from the contract claims and that all of the counterclaims were kept in separate billing files.

The Eastland court ruled on the issue of unsegregated fees without remand in this case in which the plaintiffs were judgment creditors of Harrington. The plaintiffs purchased property of Hennington’s that was sold to satisfy the judgment against him. After the sale, Hennington’s former wife asserted partial ownership in the property, clouding its title, and Hennington continued to claim that he owned the property. The plaintiffs alleged a tort claim and sought damages. The trial court found in favor of the plaintiffs on the issue of clarifying the title and awarded zero damages and $2,500 in attorney’s fees.

On appeal, the plaintiffs challenged the low attorney’s fees in light of the $13,425 fee that was requested. The Eastland court concluded that most of the plaintiff’s case was related to his tort claims, not to his claims recoverable under Chapter 37. As a result, the court found no error in the fee award.

**RECENT CASES INVOLVING THE EFFECT OF A POST-JURY REDUCTION OF DAMAGES AFTER BARKER V. ECKMAN, 213 S.W.3d 306 (TEX. 2006)**

**Young v. Qualls**, 223 S.W.3d 312 (Tex. 2007)

Qualls sued Young for breach of their partnership agreement to develop some property together. The trial court awarded Qualls $142,550 in damages and $46,331.86 in attorney’s fees. On appeal, the damage award was reduced from $142,550 to $54,751.50, with Qualls agreeing to remit the difference. See Young v. Qualls, 2005 WL 2254999 (Tex. App. – Amarillo 2005).

The Texas Supreme Court remanded the case for a new trial on damages because, under **Barker**, unless an appellate court is “reasonably certain that the jury was not significantly influenced by the erroneous amount of damages it considered,” the issue of fees should be retried when the damages are reduced on appeal. Young, 223 S.W.3d at 314. The court found this reasoning to apply in this case, even though the award was not by a jury but by the court.

Qualls argued that a new trial was unwarranted in this case because the parties had stipulated that the trial court could set fees based on the affidavits of counsel and these affidavits supported the court’s award. In remanding for a new trial, the Supreme Court acknowledged that the stipulation could be sufficient evidence to support the awarded fees, but found that, in light of the significant reduction in award based on errors in computing damages, a new trial on fees was warranted.

**Rowan Companies, Inc. v. Wilmington Trust Co.,** 305 S.W.3d 698 (Tex. App.–Houston. [14th Dist.] 2009, pet. granted, judgm’t vacated w.r.m.)

The charterer of an offshore drilling rig brought suit against the rig’s owners after the rig was destroyed in a hurricane, seeking a declaration regarding the disposition of proceeds from hull insurance policy. The owners counterclaimed for breach of contract, declaratory judgment and attorney’s fees. The district court granted the owners summary judgment and the charterer appealed. On appeal, the charterer attempted to use **Barker** as authority for reversing and remanding the attorney’s fee award. 213 S.W.3d 306, 312-15 (Tex. 2006).

The Court of Appeals, however, noted that **Barker** stands for the proposition that an appellate court cannot conduct a proper factual sufficiency review when the jury’s award of attorney’s fees is tied to an inflated damage finding. In contrast, the parties in this case stipulated to the proper amount of the owner’s attorney’s fees. Therefore, although the trial court’s award of attorney’s fees took place in the context of an erroneous finding on the amount of damages, the award was the result of the parties’ stipulation and was not significantly influenced by the damages finding. The full award of attorney’s fees was affirmed.


Solar Soccer Club and Prince of Peace Lutheran Church entered into a lease agreement providing that Solar would build and maintain soccer fields on Prince of Peace’s property in exchange for the use of the fields. Prince of Peace sued Solar for breach of contract and to terminate the lease. Solar counterclaimed for recovery of damages in **quantum meruit** for the work done on the soccer field.

At trial, the jury awarded the church $56,000 in damages, $130,000 for trial attorney’s fees, and up to $35,000 in appellate fees. In considering Solar’s **quantum meruit** claim, the jury found that Solar performed $342,566.33 in compensable work. The trial judge then offset the damages awarded to each party and entered judgment allowing the soccer club to recover $154,934.33 from the church.

On appeal, Solar challenged the award of attorney’s fees to the church, asserting that the church failed to make presentment of the claim, failed to segregate fees, and failed to present enough evidence of the reasonableness of the fees.

The Dallas court disagreed with all of these issues but remanded the case based on **Young v. Qualls**, 223 S.W.3d at 314. The court asserted that presentment of
fees is not required if fees are sought under a lease; that segregation of fees was unnecessary in this case because the only claim was breach of contract; and that the record held sufficient evidence on reasonableness of fees.

Despite denying Solar’s challenges to attorney’s fees on these issues, the court remanded the case for consideration of attorney’s fees based on the “supreme court’s recent pronouncements [in Young v. Qualls] on the necessity of remand to determine attorney’s fees when the jury considered an erroneous amount of damages in making its attorney’s fees finding.”


In this complex dispute brought by a crankshaft forging company against an aircraft engine manufacturer, the jury found for the plaintiff and awarded attorney’s fees in excess of $4 million dollars, with a conditional award of up to $550,000 depending on appeals.

On appeal, the 14th District court reduced a portion of the estimated $90 million award. Because of this reduction in damages, the court asserted that it was not "reasonably certain that the jury was not significantly influenced by the erroneous amount of damages it considered." Barker v. Eckman, 213 S.W.3d 306, 313-14 (Tex.2006). As a result, it reversed the award of attorney’s fees and remanded the case solely for consideration of the costs and reasonable, necessary, equitable, and just attorney’s fees, if any, to award to either party.

**MISCELLANEOUS CASES**


Following heavy storms that damaged Erwin Cruz’s house, Protech, a restoration company, performed various services to restore Cruz’s property, under verbal contract with Chubb, Cruz’s insurer, that Chubb would pay for these services. Protech brought a breach of contract action against homeowner Cruz and Chubb. Cruz counterclaimed for violations of the Deceptive Trade Practice-Consumer Protection Act alleging Protech’s work authorizations omitted language mandated by the Property Code. The Texas Supreme Court found that Cruz’s DTPA claim failed because he sustained no damages and he did not rely on the deceptive act. The court also affirmed the jury finding that Chubb’s promise to pay fell within the “main purpose” exception to the general rule that promises to pay the debt of another must be in writing, because there was evidence that Chubb’s main purpose in agreeing to accept primary liability was to buy time to decide how to proceed with Cruz’s claim. Therefore the court reversed the appeals court’s judgment that the insurer’s promise to pay was unenforceable.

Protech charged that the trial court erred by submitting questions on attorney’s fees that did not ask about reasonable and necessary fees incurred for preparation and trial, although they asked about appellate attorney’s fees. Protech argued that it preserved the error by submitting a proposed charge and objecting to a different purported error in one question on attorney’s fees. The Court found that the proposed charge Protech filed four days before trial began, coupled with its objection that a question on calculating fees should include an instruction that the jury consider whether services rendered were related to the prosecution or the defense, did not preserve the complain that the jury charge lacking questions on fees for preparation and trial. On page 13 the Court stated that “we cannot expect [trial court] to comb through the parties’ pretrial filing to ensure that the resulting document comports precisely with their requests.” Protech could only complain on appeal if it made the trial court aware, timely and plainly, of the purported problem and obtained a ruling.


A former client, Anglo-Dutch, brought action seeking a declaration that it did not owe an attorney, S wonke, contingency fees. Anglo-Dutch had asked S wonke, a lawyer of counsel with the firm Greenberg Peden, P.C. to represent it as a plaintiff, proposing a 20% contingent fee arrangement. Although Greenberg Peden declined the business, S wonke’s arrangement with Greenberg Peden allowed him to undertake the representation individually, and he decided to do so. Anglo-Dutch contracted with the firm McConn & Williams to represent it for a 20% contingent fee, of which S wonke would receive a pro rata share based on hours worked. A year into litigation Greenberg Peden dissolved, and S wonke moved to McConn & Williams. As the litigation continued Anglo-Dutch decided to retain additional counsel and hired John M. Quinn & Associates. A new contract reduced McConn & Williams 20% contingent fee to 16 and 2/3%, with O’Quinn to receive 20%.

After the case settled for $51 million, Van Dyke informed S wonke that he’d consulted lawyers and determined that Anglo-Dutch’s contract was with Greenberg Peden and not with S wonke individually. Accordingly, Van Dyke refused to include the hours billed after S wonke left Greenberg Peden in the
contingency ratio, reducing Swonke’s compensation by over one million. Swonke told Anglo-Dutch that he expected to be paid under the Fee Agreement not only for the 277 hours he worked while at Greenberg Peden, but also for 1,022 hours he worked while at McConn & Williams. Anglo-Dutch sued for a declaration that the Fee Agreement was with Greenberg Peden, not Swonke personally, as well as for breach of fiduciary duty. Swonke counterclaimed for breach of contract and alleged that he had been defrauded. A jury found that the Fee Agreement was with Swonke, that he had complied with his fiduciary duties and that his damages were $1 million. The appeals court affirmed.

The Texas Supreme Court held that that the agreement was between the Anglo-Dutch and Greenberg Peden, rather than with Swonke individually. The court discussed the importance of clarity in fee agreements, lawyers’ fiduciary duties to clients during contracting, and the superior ability of lawyers to detect and repair omissions in contracts. Therefore, on page 453 the court found that those consideration, “impose a responsibility of clarity on the lawyer that should preclude a determination that an agreement is ambiguous in most instances.” The majority found that, on its face, the Fee Agreement was plainly with Greenberg Peden. Evidence that the agreement was with the firm included a letter memorializing the agreement Swonke sent to Anglo-Dutch on Greenberg Peden letterhead, that the Greenberg Peden invoiced Anglo-Dutch for expenses, a letter sent by Anglo-Dutch’s president, Van Dyke to Swonke referencing an agreement between Anglo-Dutch and Greenberg Peden, and the fact that when Greenberg Peden dissolved Swonke treated all of Anglo-Dutch’s files as having belonged to Greenberg Peden. The majority found that the evidence that the agreement was with the firm was not contradicted by Swonke’s use of singular personal pronouns in communications with Anglo-Dutch and, given that the agreement was unambiguous, there was no need to investigate extrinsic evidence of the parties’ intent. The court remanded to trial for further proceedings.

Justice Wainwright concurred with the majority’s decision to remand, but agreed with the dissents reasoning. He discussed the engagement letter, in which Swonke referenced expenses that he would “personally incur,” fees that “I would be entitled to receive” and stated that the agreement was for “me” to assist you. He also cited testimony at trial concerning Van Dyke’s knowledge that Greenberg Peden was not his law firm. Wainwright would have remanded with instructions that the jury be guided by the lawyer’s fiduciary duties in interpreting the ambiguous engagement letter.

Justice Lehmann, joined by Justice Medina and Justice Green dissented, finding that the agreement was open to multiple interpretations and that the trial court properly submitted its construction to the jury. Lehmann argued that evidence of an agreement with the firm had to be viewed in light of evidence that the client understood that the firm had refused to represent him in the case due to large unpaid legal bills, Swonke’s testimony that his secretary mistakenly used firm stationery, and the fact that the agreement referred solely to the individual lawyer and contemplated a fee structure where only that lawyer’s time would be compensated. She argued that the majority effectively decided that any potential ambiguities in contracts should be resolved against the attorney, and would that the court should have considered the circumstances in which the contract was made and the client’s sophistication and experience.

In re Babcock & Wilcox Co., 526 F.3d 824 (5th Cir. 2008) (per curiam)

In this bankruptcy case, the 5th Circuit approved the halving of attorney’s fees for time spent traveling. The court observed that “there is not a consensus regarding the billing of travel time” in bankruptcy proceedings, and determined that a reduced award was allowable in this case because the firm never specified that it would bill at full rate for travel, it did not demonstrate that comparably skilled practitioners charged a full hourly rate for travel, and the statute allowed for an award of compensation less than what was requested. In re Babcock & Wilcox Co., 526 F.3d at 828.


Because of its own reporting errors during a two-year period, Humana overpaid the Texas Health Insurance Risk Pool by over $1 million. When Humana sought a refund for the overpayment, the risk pool refused to reimburse the insurer. Humana sued for declaratory relief, an order requiring repayment, and attorney’s fees. The trial court granted the state’s plea to the jurisdiction and awarded attorney’s fees to both Humana and the state.

On appeal, the Corpus Christi court reversed the trial court’s award of fees to Humana, finding it “inequitable and unjust” to require the state entities, who were immune from suit, to pay the insurer’s fees. The court concluded that Humana’s action was for damages, not declaratory relief, so no fees were available. Even if Humana had been requesting declaratory relief, the court asserted, it would have
been ineligible because it was not the prevailing party in the case.


This case is based on a suit in which an attorney withdrew from representation, then sued his client for payment under a written fee agreement that contained mandatory arbitration provisions. The arbitrator found in favor of the attorney, a trial court affirmed the arbitrator’s decision, and the client and his mother, who had promised to guarantee fees “up to $10,000,” appealed.

The guarantor argued that she was only obligated to pay fees up to $10,000, not the $43,000 she was eventually billed. The client challenged the fee award and also the fee agreement, which allowed for recovery of fees “for all time spent” in withdrawing from the representation.

The San Antonio court found no error in the fees, but declared the provision awarding fees for “all time spent” in withdrawing unconscionable, and remanded. The attorney had warned the client that he would be forced to withdraw unless the client could agree to pay more for additional services. Any threat by the attorney was only based on the fact that the lawyer was providing additional services and expected payment.

The court declared that the provision awarding the attorney fees for “all time spent” in withdrawing was unconscionable because it paid for time other than legal services, none of which was devoted to representing the client.

The court also concluded that the attorney was entitled to fees for participating in the arbitration pursuant to Chapter 38. Because the court also reduced the damages by a significant amount, 40 percent, the court remanded for a new trial on attorney’s fees associated with the arbitration and appeal.


Wagner, who owned a town home adjacent to defendant Edlund, sued for breach of a restrictive covenant and negligence after water damaged his property. The jury found that Edlund had breached the restrictive covenant and was liable for damages and attorney’s fees, but awarded no fees. After the trial court sent the question back to the jury, the jury answered that reasonable fees were $500 for trial and up to $300 for appeals. The court entered final judgment awarding $500 for trial fees and up to $12,000 for appeals.

On appeal, Wagner asked the court to render judgment for attorney’s fees in the amounts requested: $25,000 for trial services and $30,000 for appeals. The Dallas court found that no evidence supported the jury’s finding, but it did not conclude that the evidence established the requested fees as a matter of law. As a result, the court remanded for a new trial on the issue of attorney’s fees.

Wagner’s attorney testified at trial that his usual rate was $225 per hour and that he would spend “a little bit under 110 hours” on the case through the end of trial. He also testified that his request for appellate fees at the Court of Appeals and Supreme Court levels were reasonable. *Lee*, No. 04-07-00096-CV, 2008 WL 2037309 at 876. There was no contradictory testimony, but Edlund did cross examine Wagner’s counsel on the issue of segregation of fees.

The Dallas court found no evidence to support the jury’s findings regarding attorney’s fees. However, because of Wagner’s attorney’s testimony that his fees had not been segregated according to claims the negligence and breach claims, the court concluded that there was some evidence to support an award of less than the requested amount. As a result, the court could not rule as a matter of law that the fees requested should be granted.

In issuing its remand, the Dallas court also ruled that the trial court erred in rendering a higher fee than the jury. In the case where a jury award is contrary to the evidence, the trial court’s only option was a new trial.


This appeal is based on a landlord-tenant dispute in which the landlord prevailed and attorney’s fees and prejudgment interest on the fees were awarded pursuant to provisions in the lease.

On appeal, the tenant challenged the trial court’s award of pre-judgment interest on the attorney’s fees. The Eastland court affirmed the prejudgment interest because the landlord filed an affidavit demonstrating that the $23,000 in attorney’s fees was paid in full prior to the trial.