

Recent Cases on The Recovery of Attorney's Fees

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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 un-contradicted 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 un-contradicted 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.

***Crounse v. State Farm Mut. Auto. Ins. Co.*, 336 S.W.3d 717 (Tex. App.—Houston [1st Dist.] 2010, pet. denied)**

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.

***Bair Chase Property Company, LLC v. S & K Development Company, Inc.*, 260 S.W.3d 133 (Tex. App. –Austin 2008, rehearing of petition for review denied, Mar 27, 2009)**

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

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