

Recent Developments Regarding Attorney's Fees

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Ethics Warm-Up Hypothetical

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- A) As long as it is in writing and client has the sophistication to consent

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- **C) It is unethical and an affront to the justice system**

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- C) It is unethical and an affront to the justice system
- **D) Both B & C are correct.**

El Apple I, Ltd. v. Olivas, 2012 WL 2361722 (Tex. June 22, 2012): The Awards

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- Back Pay: \$ 1,700
- Past Compensatory Damages: \$75,000
- Future Compensatory Damages: \$28,000

- Attorneys' Fees: **\$232,000**
 - ✦ 700 hours @ \$300/hour
 - ✦ 190 hours @ \$250/hour

- Then Attorneys' Fees Doubled: **\$464,000**

El Apple I, Ltd. v. Olivas, 2012 WL 2361722 (Tex. June 22, 2012): The Supreme Court's Holding

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- The attorneys instead based their time estimates on generalities such as the amount of discovery in the case, the number of pleadings filed, the number of witnesses questioned, and the length of the trial. While all this is relevant, it provides none of the specificity needed for the trial court to make a meaningful lodestar determination. The court could not discern from the evidence how many hours each of the tasks required and whether that time was reasonable. Without at least some indication of the time spent on various parts of the case, a court has little basis upon which to conduct a meaningful review of the fee award
- *Id. at *5*

El Apple & Its Wiggle Room: Laredo v. Montano

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- “Contrary to the City's argument, *El Apple* does not hold that a lodestar fee can only be established through time records or billing statements. We said instead that an attorney could testify to the details of his work, but that “in all but the simplest cases, the attorney would probably have to refer to some type of record or documentation to provide this information.” . . . The fee-shifting statute in this case, however, does not require that attorney's fees be determined under a lodestar method, as in *El Apple*..
- *City of Laredo v. Montano*, 414 S.W.3d at 731 (Tex. 2013)

El Apple & Its Wiggle Room: Circle Ridge

- While the Texas Supreme Court recognized the lodestar method as the required method for claims under Section 21.259(a) of the Texas Commission on Human Rights Act and in class-action lawsuits, the opinion does not require the lodestar method in other types of lawsuits. The Dallas Court of Appeals has held that “there is no rigid requirement” of hourly time records and has affirmed attorney's fees awards without hourly time records. *See Brockie v. Webb*, 244 S.W.3d 905, 909 (Tex.App.-Dallas 2008, pet. denied). We agree with the Dallas Court of Appeals that time records are not an indispensable element in the calculation of reasonable attorney's fees.
- *Circle Ridge Prod., Inc. v. Kittrell Family Minerals, LLC*, 2013 WL 3781367 (Tex. App.—Texarkana 2013, pet. denied)

Long v. Griffin, 442 S.W.3d 253, 255 (Tex. 2014)

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The affidavit supporting the request for attorney's fees only offers generalities. It indicates that one attorney spent 300 hours on the case, another expended 344.50 hours, and the attorneys' respective hourly rates. The affidavit posits that the case involved extensive discovery, several pretrial hearings, multiple summary judgment motions, and a four and one-half day trial, and that litigating the matter required understanding a related suit that settled after ten years of litigation. But no evidence accompanied the affidavit to inform the trial court the time spent on specific tasks.

One more variation: *In the Interest of A.K.S.*

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- Vallejo conceded in her motion for new trial “the evidence is legally and factually insufficient to support [the trial court's order] based on the fact that there is no record of the agreements between counsel and of the evidence presented to the [trial court] in chambers.” Because the conference in chambers was conducted without a court reporter, there is no record for our review.

In the Interest of A.K.S., No. 05-14-00233-CV, 2015 WL 1182867, at *2 (Tex. App. Mar. 16, 2015)

Unpreserved or Invited Error? No

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- Smith complains there is legally insufficient evidence to support the trial court's award of attorney's fees. He does not complain on appeal about the in-chambers, off-the-record procedure. Even if we assume Smith agreed to the in-chambers, off-the-record conversation with the judge about attorney's fees, that does not stop him from challenging whether any evidence supports the attorney's fee award.

In the Interest of A.K.S., No. 05-14-00233-CV, 2015 WL 1182867, at *2 (Tex. App. Mar. 16, 2015)

Smith v. Patrick W.Y. Tam Trust,
296 S.W.3d 545, 547 (Tex. 2009)

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- Generally, the testimony of an interested witness, such as a party to the suit, though not contradicted, does no more than raise a fact issue to be determined by the jury.
- But we recognized that there was an exception to this rule, which is that where the testimony of an interested witness is not contradicted by any other witness, or attendant circumstances, and the same is clear, direct and positive, and free from contradiction, inaccuracies, and circumstances tending to cast suspicion thereon, it is taken as true, as a matter of law.

The Exception Did Not Apply Against The Smiths

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- **Because the fee is unreasonable in light of the amount involved and the results obtained, the evidence did no more than raise a fact issue to be decided by the jury.**

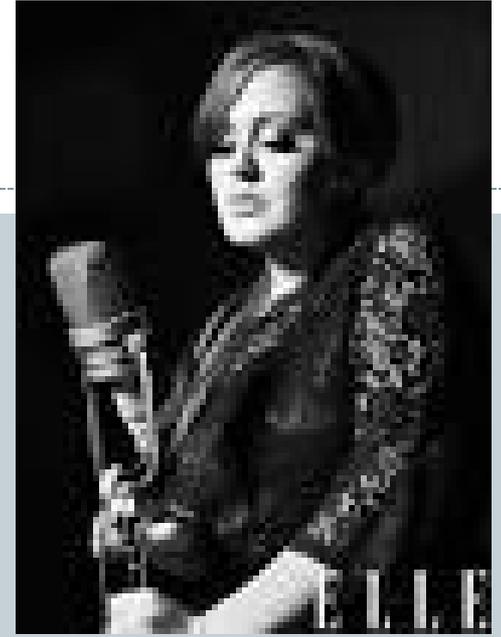
The Ruling in *Smith v. Tam Trust*

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- Although [the jury] could have rationally concluded that, in light of the amount involved and the results obtained, a reasonable fee award was less than the full amount sought, no evidence supported the jury's refusal to award *any* attorney's fees (as the court of appeals correctly noted). *The trial court could have directed the jury to reform its verdict, but the court was not free to set a reasonable fee on its own.*

Set Fire to The Rain

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But there's a side to you
That I never knew, never knew.
All the things you'd say
They were never true, never true,
And the games you play You would always win, always win.

But I set fire to the rain,
Watched it pour as I touched your face,
Well, it burned while I cried
'Cause I heard it screaming out your name, your name!



MBM Financial v. Woodlands Op. Co: Are
Nominal Damages Enough to Permit An Award of Fees



- ...this Court has never said whether nominal damages are enough. But as the Woodlands can recover neither actual nor nominal damages, that question is not before us. Accordingly, the Woodlands fee award cannot be affirmed based on Chapter 38.

- *292 S.W.3d 660, 666 (Tex. 2009)*

MBM Financial v. Woodlands, 292 S.W.3d
660, 666 (Tex. 2009)

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- While we normally remand for a new trial when there is some evidence to support an amount of actual damages, in this case there was no evidence about the amount of damages at all. And “where the record shows as a matter of law that the plaintiff is entitled only to nominal damages, the appellate court will not reverse merely to enable him to recover such damages.”

To suspend enforcement of a money judgment pending appeal, a judgment debtor must post security equaling the sum of **compensatory damages** awarded in the judgment, **interest** for the estimated duration of the appeal, **and costs** awarded in the judgment. We are asked to decide whether that amount includes attorney's fees incurred in the prosecution or defense of the claim. . . We conclude that it does not

Cases Involving the Word “Incurred”

- *Garcia v. Gomez*, 319 S.W.3d 638 (Tex. 2010): Texas Medical Liability Act/Expert Report Case: Fees must be incurred
- *Aviles v. Aguirre*, 292 s.w.3d 648 (Tex. 2009): Texas Medical Liability Act/Expert Report Case: Fees do not have to be incurred by the defendant/party (Ins. Company)
- *Jackson v. SOAH*, 351 S.W.3d 290 (Tex. 2011): Texas Public Info. Act: Lawyer representing himself did not “incur fees,” so as to be able to recover

“Incurred” vs. Multiplier: *J.C. Penney v. Ozenne*, 453 S.W.3d 509, 518 (Tex. App.—Dallas 2014)

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- **Tex. Bus. Orgs. Code §21.561**: The court may order. . . [a] corporation to pay the expenses the plaintiff incurred in the proceeding if the court finds the proceeding has resulted in a substantial benefit to the domestic or foreign corporation.”
- **Settlement Agreement**: The Court may award fees “for the results achieved in the Action and the risks of undertaking the...Action on a contingent basis”
- “Ozenne's lawyers presented some evidence that the value of the settlement was \$15.5 million per year for four years. Thus, the trial court could have determined that the total value of the Anti–Acceleration Term was \$62 million. The trial court's award of \$3.1 million was five percent of the \$62 million.”
- Court upholds award even though it was “5.5 times higher than lodestar” according to J.C. Penney.

Cases Under “New” (2003) Rules Governing Settlement: §42.004 & TRCP 167

- *Amedisys Inc. v. Kingwood Home Health Care*, 437 S.W.3d 507 (Tex. 2014): Supreme Court discusses procedural, timing and “acceptance” rules.
- *May v. Ticor Title Ins.*, 422 S.W.3d 93 (Tex. App.—Houston [14th Dist] 2014 (offset-award of defendant’s attorney’s fees upheld because final award less than 80% of offer).
- *In re CompleteRX, Ltd.*, 366 S.W.3d 318 (Tex. App.—Tyler 2012) (District court cannot extend time to reply to offer of settlement under Rule 167)

Cases Under “New” (2003) Rules Governing Settlement: §42.004 & TRCP 167

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- *Orix Capital v. La Villita*, 329 S.W.3d 30 (Tex. App.—San Antonio 2010, *pet. den’d*): **Recovery Denied**: Timing and procedural requirements not met & judgment not less than 80% of settlement
- *Duff v. Spearman*, 322 S.W.3d 869 (Tex. App.—Beaumont 2010, *pet. den’d*): **Recovery Permitted**: Judgment was “significantly less favorable” & so remanded for plaintiff’s judgment to be offset.
- *Grocers Supply v. Cabello*, 390 S.W.3d 451 (Tex. App.—Dallas 2012, no *pet*): **Recovery Denied**: Comparison of aggregate settlement offer must be to aggregate judgment for purposes of 80% comparison rule).

Chapter 38: Who May Fees Be Awarded Against?

- ***Hoffman v. L&M Arts***, 2015 WL 1000838 (N.D. Tex. 3/6/15): Attorney’s fees under Chap. 38 may not be awarded against L.L.C. (not an “individual or corporation” under §38.001): Judge Fitzwater.
- ***Fleming & Assoc. v. Barton***, 2014 WL 783772 (Tex. App.—Houston [14th Dist] 2014: Attorney's fees may not be awarded against a partnership (not an “individual or corporation”).