

No. 08-0390

In the Supreme Court of Texas

MBM FINANCIAL CORPORATION
N/K/A MBM FINANCIAL INTERESTS, L.P.
AND MARIMON BUSINESS SYSTEMS, INC.,
Petitioners,

v.

THE WOODLANDS OPERATING COMPANY, L.P.,
Respondent.

On Petition for Review from the Ninth Court of Appeals

09-07-00060-CV

**REPLY BRIEF ON THE MERITS OF PETITIONERS,
MBM FINANCIAL CORPORATION
N/K/A MBM FINANCIAL INTERESTS, L.P.
AND MARIMON BUSINESS SYSTEMS, INC.**

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ARGUMENT IN REPLY

I. In the Absence of Articulated Boundaries, the Declaratory Judgments Act Will Eviscerate the American Rule Regarding the Recovery of Attorney's Fees.

As it has throughout this litigation, TWOC ignores the distinctions between the various attorney's fee statutes enacted by the Legislature. TWOC posits that "Congress, like Texas, has enacted numerous statutes which allow for the recovery of attorney's fees by the prevailing party." Br. of Respondent at 21. And, according to TWOC, Chapters 37 and 38 of the Texas Civil Practices and Remedies Code are both "statutes which allow a prevailing party a recovery of its attorney's fees." *Id.*

TWOC's suggestion that Chapters 37 and 38 offer interchangeable routes to the recovery of attorney's fees by a "prevailing party" should be addressed and rejected by this Court. Chapter 38 does not authorize an award of attorney's fees to one who is merely a prevailing party. *Green Int'l, Inc. v. Solis*, 951 S.W.2d 384, 390 (Tex. 1997). "To recover attorney's fees under Section 38.001, a party must (1) prevail on a cause of action for which attorney's fees are recoverable, and (2) recover damages." *Id.*; accord *State Farm Life Ins. Co. v. Beaton*, 907 S.W.2d 430, 437 (Tex. 1995). Additionally, "under section 38.002, three prerequisites to recovery under section 38.001 exist: representation by an attorney, presentment of the claim, and lack of timely tender." *Great Am. Ins. Co. v. North Austin MUD*, 908 S.W.2d 415, 427 n.10 (Tex. 1995). And, of course, no statute authorizes the recovery of attorney's fees in a common law fraud case. *Tony Gullo Motors I, L.P. v. Chapa*, 212 S.W.3d 299, 304 (Tex. 2006). "For fraud, [a plaintiff can] recover economic damages, mental anguish, and exemplary damages, but not attorney's fees." *Id.*

In any event, if this Court were to employ a “prevailing party” analysis, TWOC still should lose on its claim for attorney’s fees. A plaintiff “who seeks compensatory damages but receives no more than nominal damages” is not a “prevailing party” and is not entitled to recover attorney’s fees. *Southwestern Bell Mobile Sys., Inc. v. Franco*, 971 S.W.2d 52, 55-56 (Tex. 1998). If Chapters 37 and 38 of the Civil Practices and Remedies Code interchangeably permitted the recovery of attorney’s fees by prevailing parties, TWOC would not qualify. But Chapters 37 and 38 are not interchangeable.

A plaintiff should not be able to avoid the requirements imposed by Chapter 38 simply by joining its contract or tort claims with claims for declaratory relief. If a plaintiff can recover attorney’s fees in a fraud (or other tort) case by requesting declarations on the elements of a fraud (or other tort) claim or its defenses, then every tort claim (or defense) will permit the recovery of attorney’s fees, and Texas will no longer adhere to the American Rule. Likewise, if a plaintiff can recover attorney’s fees in a contract case by requesting declarations on the elements of a contract claim or its defenses, then Chapter 38 will be rendered meaningless and loser-pays will be the rule in every contract case. To avoid these expansive and unintended results, this Court should accept review and clarify the limited nature of an attorney’s fees recovery under the Declaratory Judgments Act.

II. This Court Should Define the Relationship Between Chapter 37 and Other Fee Recovery Statutes, Including Chapter 38.

The Legislature has carefully delineated the circumstances in which attorney's fees should be recoverable in contract cases. *See* TEX. CIV. PRAC. & REM. CODE § 38.001 *et seq.* (Vernon 2008). And, as discussed, this Court has consistently recognized and enforced the Legislature's requirements. A plaintiff who sues for breach of contract and fraud, and who fails to comply with Chapter 38, cannot simply add a declaratory judgment claim under Chapter 37 to sidestep its failure and recover exorbitant attorney's fees. But that is what TWOC has done, and that is the rule the Beaumont Court of Appeals has sanctioned. Chapters 37 and 38 serve different purposes and apply in disparate circumstances. This Court should define the boundaries between Chapters 37 and 38 for the benefit of the state's jurisprudence.

III. TWOC's Redundant Declarations About Terminated Relationships Do Not Support an Award of Attorneys' Fees Under Chapter 37.

A. TWOC's declaratory judgment action duplicated its contract and fraud actions.

TWOC asserts that "Declarations 1, 3, 4, and 5, do not duplicate relief sought through TWOC's breach of contract claims." Br. of Respondent at 24. But TWOC offers no analysis or explanation to support these bald assertions.

MBM and Marimon have already explained that TWOC was required to prove its own "performance or tendered performance" as an element of TWOC's breach of contract claim. *See* Br. of Petitioners at 22-24 and n.2. TWOC does not dispute the identified elements of a contract claim, nor does TWOC dispute its obligation to prove

that it performed its contractual obligations as an element of its contract claim. TWOC simply asserts that its first declaration—stating that “TWOC has complied with its contractual obligations . . .”—does not duplicate its contract claim. TWOC’s assertion is legally unsupportable, and it should be rejected.

Recognizing the weakness of its argument with respect to Declaration No. 1, TWOC shifts to declarations 3, 4, and 5, asserting that these declarations “expressly focus on the termination dates provided by MBM, while the breach of contract claims make no mention of terminations dates.” Br. of Respondent at 25. The court of appeals rejected TWOC’s argument about declarations 3, 4, and 5, and for good reasons. Declarations 3, 4, and 5 are entirely duplicative of TWOC’s fraud claims. *See* Br. of MBM and Marimon as Cross-Respondents at 26-28.

Declarations 3, 4, and 5 declared that TWOC had justifiably relied on MBM’s termination dates, that TWOC had relied to its detriment on MBM’s termination dates, and that TWOC suffered damages. CR 753-55. To recover for common-law fraud, a plaintiff must prove: “(1) that a material representation was made; (2) that it was false; (3) that the speaker knew it was false when made or that the speaker made it recklessly without any knowledge of the truth and as a positive assertion; (4) that he made it with the intention that it be acted upon by the other party; (5) that the party acted in reliance on it; and (6) damage.” *T. O. Stanley Boot Co. v. Bank of El Paso*, 847 S.W.2d 218, 222 (Tex. 1992). Here, TWOC’s third, fourth, and fifth declarations directly overlap with elements four, five and six from *T.O. Stanley Boot*.

Declarations 3 and 4 also anticipate MBM’s contractual defense to TWOC’s claim—that TWOC had not properly provided notice of its intent to nonrenew the parties’ office equipment contracts. *See* CR 756-57. To recover on its breach of contract claim, TWOC had to prove it had performed its contractual obligation and had not materially breached. *See Mustang Pipeline Co. v. Driver Pipeline Co.*, 134 S.W.3d 195, 196 (Tex. 2004); *see also* Br. of Petitioners at 22-24. To counter the anticipated argument of MBM and Marimon, TWOC pleaded that it had justifiably and detrimentally relied on termination dates supplied by MBM. *See* CR 709 (Finding of Fact 39: “MBM is estopped from or has waived any claim that TWOC failed to provide timely notice of its intent not to renew the Agreements because TWOC justifiably relied upon the termination dates provided by MBM.”).

TWOC’s declaratory judgment claims added nothing to its claims for breach of contract and fraud. TWOC’s declaratory judgment action did not ask for anything that was not already bound up and decided—at least implicitly—in TWOC’s breach of contract and fraud actions. Therefore, attorney’s fees under the Declaratory Judgments Act are improper.

B. TWOC’s relationship with MBM was terminated—its declaratory judgment was meaningless.

TWOC repeatedly asserts that declaratory relief was necessary “even after the acceptance of the return of the equipment” by MBM and Marimon. Br. of Cross-Petitioner at 18. According to TWOC, this necessity arose because of “the continued demand for substantial sums of money by MBM” and because “MBM was continuing to

maintain the position that the agreement between it and TWOC had not yet terminated.” *Id.* at 18, 22; *see also id.* at 28-30. Despite TWOC’s assertions, there was no continuing contractual relationship between the parties, only a terminated relationship spawning competing claims for breach of contract.

1. The fact that TWOC was insecure about its decision to terminate the equipment contracts does not make them any less terminated.

TWOC is simply wrong to assert that MBM (or Marimon) insisted that the lease and maintenance contracts were continuing. Given that TWOC had returned, and MBM had accepted, the leased equipment, it is hard to understand how anyone could argue that the lease and maintenance contracts continued into the future. MBM and Marimon certainly did not make that claim. *See* PX 23 (MBM’s 1st Amended Pet., cited by TWOC as proof of MBM’s demands). MBM sued TWOC for breach of contract. *Id.* Specifically, MBM alleged that TWOC “breached *by terminating* the contract in violation of the contractual provisions.” *Id.* (emphasis added). At no point after accepting TWOC’s return of the equipment on February 17, 2005 did MBM or Marimon claim a continuing contractual relationship with TWOC going forward in time.

After February 17, 2005, there was no dispute concerning whether the contracts had been terminated. *Id.* The dispute between TWOC and MBM concerned whether TWOC’s termination complied with, or was in breach of, the contracts. MBM alleged that TWOC “breached by terminating the contract in violation of the contractual provisions,” and MBM sought liquidated damages for TWOC’s breach in accordance with each contract’s remedies provision. *Id.* For its part, TWOC alleged that it had

complied with its contractual obligations to provide notice of its intent not to renew, and TWOC alleged that MBM had breached by failing to designate a carrier and location for return of the equipment. CR 13-20.

Proof that MBM or Marimon could or did assert a breach claim against TWOC lends no support to TWOC's assertion that there was a continuing contract between the parties. Competing breach claims do not revive a terminated relationship. TWOC had "two mutually exclusive courses of action." *Chilton Ins. Co. v. Pate & Pate Enters., Inc.*, 930 S.W.2d 877, 887-88 (Tex. App.—San Antonio 1996, writ denied). TWOC elected termination, rather than ongoing and continued performance. *See* PX 17, 19. There is no evidence whatsoever to the contrary.

Having terminated the lease agreements and having ended the parties' contractual relationship, TWOC needed no declarations to guide its future performance. And TWOC did not request any declarations regarding future performance. TWOC's specific requests for declaratory relief reflect TWOC's desire for vindication of its past acts; every one of TWOC's requested declarations was couched in the past tense, with no present or future effect on any existing, on-going relationship.

TWOC's requests for past-tense declarations as to liability (or non-liability) for past conduct are not a proper use of the Declaratory Judgments Act. A declaratory judgment action is not meant to address "the adverse consequences of actions already undertaken." *Dawdy v. Direct General Ins. Co.*, 586 S.E.2d 228, 231 (Ga. 2003). The protection of a declaratory judgment "is from uncertainty with respect to future conduct" *Id.*; *accord BHP Petroleum Co. v. Millard*, 800 S.W.2d 838, 841 (Tex. 1990)

(distinguishing between an action “seeking a true declaration controlling an ongoing and continuing relationship” and “a one time occurrence that is fully covered by [the plaintiff]’s original suit.”). TWOC was not insecure as to its future conduct in an ongoing relationship. TWOC had no right to declaratory relief and no right to attorney’s fees under Chapter 38.

2. TWOC did not seek declaratory relief regarding any other “continuing” agreement.

For the first time, TWOC also now contends that its declaratory judgment action was necessary because of “additional Office Care Agreements between the parties” that had not terminated at the time suit was filed.¹ Br. of Cross-Respondents at 30. TWOC’s newly-minted justification for pursuing its declaratory relief claims is belied by TWOC’s pleading, its judgment, and its briefing.

TWOC never asserted any claim for relief concerning any “continuing” Office Care Agreement. TWOC sued MBM and Marimon over “certain written agreements” that TWOC specifically identified as those “[a]ttached to Plaintiff’s Original Petition as Exhibit A-1 through A-20.” CR 14, 215. TWOC then pleaded that each of these identified Agreements “expired on February 16, 2005.” CR 15, 216.

Thereafter, in seeking declaratory relief, TWOC pleaded that “TWOC has provided timely and proper notice of its nonrenewal of the Office Care Program Agreements and Maintenance Agreement.” CR 17-18, 228. Having stated its past-tense nonrenewal of the contracts, TWOC then requested a series of five past-tense

¹ TWOC never offered this justification in the court of appeals. *See* Br. of Appellee at 22-28.

declarations. *Id.* TWOC did not seek any declaration relating to its own, or to MBM's, future performance of any agreement, and it did not obtain any such declaration. *See* CR 756-57.

TWOC acknowledges in this Court that it did not bring any claims related to continuing contracts. In its Statement of Facts, TWOC states that "TWOC entered into twenty-two written agreements with MBM for the lease and maintenance of multiple copier machines." Br. of Respondent at 1. But in a footnote following that statement, TWOC candidly admits that "[o]nly nineteen (19) of the Office Care Program Agreements were at issue in the underlying dispute." *Id.* at 1 n.1. Each of those nineteen agreements terminated, according to TWOC, on February 16, 2005. CR 15, 216. Try as it might, TWOC cannot demonstrate any continuing contractual relationship that was made the subject of its declaratory relief claims. TWOC's Declaratory Judgments Act claim should not support an award of attorney's fees.

C. TWOC's defensive declaration of non-liability cannot support an award of fees.

After repeatedly insisting that it needed declaratory relief because MBM had demanded substantial sums of over \$160,000, TWOC does an abrupt about-face and asserts that its request for a declaration stating TWOC had complied with its contractual obligations was not defensive. *See* Br. of Cross-Respondents at 34-36. TWOC's incredible assertion is belied by its own briefing.

What purpose did TWOC's declaration serve? There are only two possible answers, and neither supports TWOC's recovery of attorney's fees. Either TWOC

needed to establish its past contractual compliance as an element of its affirmative breach of contract claim, or TWOC needed to establish its past contractual compliance in order to defeat a potential claim or defense asserted by MBM. Either TWOC's claim was duplicative, or it was defensive. Either way, it was an improper use of the Declaratory Judgments Act, and either way it should not support TWOC's recovery of attorney's fees.

IV. The Court of Appeals Erroneously Awarded TWOC Nominal Damages, Directly Contravening Supreme Court Precedent that Forbids Such an Award.

TWOC dismisses this Court's holdings in *Gulf States Utilities Co. v. Low*, 79 S.W.3d 561 (Tex. 2002), as "limited to DTPA cases." Br. of Respondent at 37. But the distinction the Court drew between actual and nominal damages was not, and should not be, limited to DTPA cases. *Gulf States*, 79 S.W.3d at 567. The Court should enforce its holding in *Gulf States* and reverse TWOC's recovery of "nominal" damages.

TWOC does not claim that MBM's breach of contract (or fraud) "produced no actual loss." *Id.* To the contrary, TWOC admits that MBM's breach of contract (and fraud) produced an actual loss—"e.g., the cost of employees' time and employee and general contractor expenses." Br. of Respondent at 37. TWOC tries to distance itself from this admission by asserting that it *also* proved "nominal" damages. *Id.* But TWOC's argument is nonsensical, and squarely at odds with this Court's holding in *Gulf States Utilities v. Low*.

When a plaintiff admits that it has suffered an actual loss, it has, by definition, ruled out the possibility of a nominal damages recovery. Nominal damages are available when there is "an invasion that produced no actual loss." *Gulf States*, 79 S.W.3d at 567.

Nominal damages are not available when the plaintiff “has suffered an actual loss” but fails to “offer any evidence to meet his burden to prove [that actual loss].” *Id.* TWOC suffered an actual loss but failed to prove the amount of that loss. Under this Court’s holding in *Gulf States*, TWOC cannot recover actual or nominal damages as a matter of law.

Seeking to avoid this result, TWOC asserts that “at least some injury was done but the proof failed to show the amount due to the nature of the case.” Br. of Respondent at 38. The “nature of the case” had nothing to do with TWOC’s failure to prove its damages. TWOC simply elected not to offer any evidence of the amount of its loss. TWOC cannot credibly contend that it *could not* offer evidence of the cost of its employee time and employee and contractor expenses. TWOC’s Chief Financial Officer assumed that TWOC “would have to give you [MBM and Marimon] the number” TWOC claimed as damages. He never expressed any doubt as to his ability to provide the number; he testified only that “it has not been calculated.” RR 2:196-97.

TWOC failed to prove its actual damages, and TWOC is not entitled to recover nominal damages. The court of appeals’ contrary holding should be reversed.

V. Alternatively, the Court of Appeals Wrongly Refused to Consider the Results Obtained by TWOC in Reviewing the Award of Attorney’s Fees.

According to TWOC, this Court need not bother with any consideration of the reasonableness of TWOC’s attorneys’ fees in light of the results obtained by TWOC. TWOC’s Response at 39. According to TWOC, this question is “premature.” *Id.* Such a dodge tactic makes sense—that way TWOC avoids having to justify \$195,000 in fees

incurred in the prosecution of a meaningless declaratory judgment or in pursuit of \$1,000 in nominal damages. \$195,000:0 or even 195:1 are take-your-breath-away ratios, and TWOC cannot begin to justify these figures under a “results obtained” analysis.²

TWOC’s “premature” argument misses the point entirely. The reasonableness of TWOC’s fees in light of the “results obtained” cannot be avoided by remanding for segregation under *Tony Gullo Motors I, L.P. v. Chapa*. Separate and apart from the requirement that attorney’s fees must be segregated between recoverable and non-recoverable claims, attorneys’ fees must also be “reasonable.” *Arthur Andersen & Co. v. Perry Equip. Corp.*, 945 S.W.2d 812, 818 (Tex. 1997). And “[t]he most critical factor in determining a fee award’s reasonableness is the degree of success obtained, since a fee based on the hours expended on the litigation as a whole may be excessive if a plaintiff achieves only partial or limited success.” *Farrar v. Hobby*, 506 U.S. 103, 114 (1992).

² A multiple of 195 to 1 bears no reasonable relationship to the results obtained by TWOC. See *Jack Roach Ford v. De Urdanavia*, 659 S.W.2d 725, 730 (Tex. App.—Houston [14th Dist.] 1983, no writ) (“We find that in light of the evidence, the nature of the case, the amount in controversy, and our own experience as judges and lawyers, the jury’s award of \$28,500.00 for attorneys’ fees in connection with the trial and preparation of the case [with a judgment of \$500] was excessive.”); *Wuagneaux Builders, Inc. v. Candlewood Builders, Inc.*, 651 S.W.2d 919, 923 (Tex. App.—Forth Worth 1983, no writ) (“[W]e find that the finding of the jury as to each category of attorneys’ fees, enumerated above, was excessive, and that the total amount of attorneys’ fee of \$15,500.00 on a sworn account involving a claim of \$5,635.00 was considerably excessive.”); *Argonaut Ins. Co. v. ABC Steel Prods. Co.*, 582 S.W.2d 883, 889 (Tex. Civ. App.—Texarkana 1979, writ ref’d n.r.e.) (holding that \$16,000 in attorneys’ fees was excessive in case where amount in controversy was only \$13,093.75); *Republic Nat’l Life Ins. Co. v. Heyward*, 568 S.W.2d 879, 887 (Tex. Civ. App.—Eastland 1978, writ ref’d n.r.e.) (disallowing an attorneys’ fee award of \$65,000; “[t]he amount in controversy in the instant case is \$12,000 plus penalty and interest . . . We must conclude . . . that if plaintiff’s attorneys worked between 750 and 1,000 hours on this \$12,000 lawsuit, then they overproduced and defendant should not be held liable for such overproduction”). See also SCOTT BRISTER, *Proof of Attorneys’ Fees in Texas*, 24 ST. MARY’S L.J. 313, 330 (1993) (“[T]he courts will reduce an excessive fee award by remittitur. One of the most frequent grounds for doing so is an award of fees that is substantially higher than the verdict.”).

TWOC is not entitled to recover any attorney's fees at all. And it should certainly never be allowed \$195,000 in fees fighting for a meaningless declaration or "nominal" damages. This Court's decision in *Arthur Anderson* requires that the court of appeals—and the trial court—ensure that any award of attorney's fees bears a reasonable relationship to the pyrrhic results obtained by TWOC.

PRAYER


The petitioners ask this Court to grant their petition for review, reverse the judgment of the court of appeals in part, and render judgment that the respondent take nothing on its claims for attorney's fees. The petitioners also ask the Court to render judgment that the respondent take nothing on its claim for nominal or actual damages. The petitioners also ask for all other relief to which they may be entitled.

Respectfully submitted,

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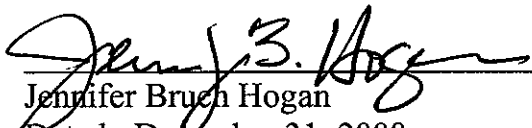
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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing instrument was served in accordance with Rule 9.5 of the Texas Rules of Appellate Procedure.


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Dated: December 31, 2008

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