Error Preservation Concerning Attorney's Fees Claims: Treat These Claims as the Significant Causes of Action They Are. By Steven K. Hayes. Copyright 2016.

Commercial Litigation regularly includes a claim for attorney's fees. The value of such a claim often approximates, or exceeds, the damage award. Despite the frequency and magnitude of these claims, a recent two-year study I did revealed that complaints related to fees were in the top four categories of error preservation decisions decided by the courts of appeals—and in 80% of the error preservation decisions related to attorney's fees, courts of appeals held that error was not preserved because the complaints were not raised in the trial court *at all*. Pp. 10, 21, Hayes, Steven K., *What Have You Got to Lose?: Perhaps Your Appeal, If You Don't Use Error Preservation to Sell Your Case at Trial*, State Bar of Texas Annual Meeting CLE, June 17, 2016. With so much potentially at stake, what explains the frequency with which error is waived concerning complaints about attorney's fees?

> **Claims for attorney's fees have required elements, and are potentially subject to certain affirmative defenses. The nature of complaints about such claims which were waived indicates that we do not appreciate the existence of those elements and defenses.**

To answer why parties fail to preserve error as to attorney's fee claims, first consider the element-driven nature of many claims for fees. For example, "[t]o recover reasonable attorney's fees [under Chapter 38] for a claim based on an oral or written contract, (1) the claimant must be represented by counsel, (2) the claimant must present the claim to the opposing party, and (3) payment for the just amount owed must not have been tendered before the expiration of the thirtieth day after the claim is presented." *Whitmire v. Nat'l Cutting Horse Ass'n*, No. 02-11-00170-CV, 2012 Tex. App. LEXIS 8518, *48 (Tex. App.—Fort Worth Oct. 11, 2012, no pet.), citing Tex. Civ. Prac. & Rem. Code Ann. Secs. 38.001(8), .002. The party seeking fees must plead and prove the foregoing; neither filing suit, nor alleging a demand in the pleadings alone can constitute

presentment. *Id.* But to put the plaintiff to its proof on those pleaded issues, the opposing party must specifically deny the same. *Id.*, citing Tex. R. Civ. Pro. 54. Alternatively, a claim that a plaintiff's demand is excessive (and thus ineffective to serve as a demand) is an affirmative defense the defendant must plead, prove, and obtain findings on, to avoid waiving the defense. *Hameed Agencies (pvt) Ltd. v. J.C. Penney Purchasing Corp.*, No. 11-05-00140-CV, 2007 WL 431339, 2007 Tex. App. LEXIS 942, *20-21 (Tex. App.—Eastland Feb. 8, 2007, pet. denied), citing Tex. R. Civ. P. 94.

Next, consider the following objections about claims for attorney's fees; as to each of these, the complaining party failed to preserve its objection in the trial court:

(1) a party's failure to present the claim for fees as required by the statute. *Cannon v. Castillo*, No. 11-12-00256-CV, 2014 WL 3882190, 2014 Tex. App. LEXIS 8656, *7-8 (Tex. App.–Eastland Aug. 7, 2014, no pet.);

(2) a party's inability to recover fees under TCPRC 38.001 against a partnership. *Enzo Invs., LP v. White*, 468 S.W.3d 635, 651 (Tex. App.–Houston [14th Dist.] 2015, pet. denied);

(3) a failure to segregate fees between claims on which fees are recoverable and those on which they are not. *Garcia v. Baumgarten*, No. 02-14-00267-CV, 2015 WL 4603866, 2015 Tex. App. LEXIS 7878, *19-20 (Tex. App.–Austin July 30, 2015, no pet.);

(4) a complaint that the party did not incur fees, or that fees were excessive. *Tom Bennett & James B. Bonham Corp. v. Grant*, 460 S.W.3d 220, 257 (Tex. App.–Austin 2015, pet. filed); *Davis v. Chaparro*, 431 S.W.3d 717, 727 (Tex. App.- El Paso 2014, pet. denied); and

(5) the method for calculating fees. *Dias v. Dias*, No. 13-12-00685-CV, 2014 Tex. App. LEXIS 12676, 30-31 (Tex. App.–Corpus Christi Nov. 25, 2014, pet. denied).

Notice that only one of the foregoing complaints really focused on what we classically think of as the reasonableness and necessity of fees—the remainder focus, for the most part, on the elements of, nuances concerning, and procedures governing a claim for fees. In other words, there are elements of a claim for attorney's fees which the party seeking those fees must plead and prove—but only if the party opposing those fees forces them to shoulder that burden.

Speaking of procedures related to a claim for fees: if your opponent files an affidavit as to the reasonableness and necessity of fees, immediately consult TCPR Sec. 18.001; failing to timely file the requisite controverting affidavit establishes the reasonableness and necessity of the fees, and failing to object to any procedural deficiencies in your opponent's conduct will waive those complaints. *Jamshed v. McLane Express Inc.*, 449 S.W.3d 871, 884 (Tex. App.–El Paso 2014, no pet).

To avoid waiving error as to fees: treat a claim for fees as a standalone claim, with its own elements, proof, and procedure.

I think the relatively large number of error preservation decisions involving attorney's fees, the high percentage of holdings that error was not preserved about those complaints, and the nature of unpreserved complaints about fees show that many folks fail to recognize that a claim for fees is a separate cause of action, with its own (often statutorily-dictated) elements. Failing to work up a fee claim just as we would any other cause of action can easily result in waiver of error—with a concomitant and significant adverse impact on the judgment.

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