

Attorney's Fees

State Bar of Texas Litigation Section
Lunch & Learn Webinar
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Presented by Robert H. Ford
Moderated by Andy Jones

Who we are.



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What's on Tap for Today?

- Brief overview of Texas Law governing the recovery of attorney's fees
- Rohrmoos Venture v. UTSW DVA Healthcare, LLP, 578 S.W.3d 469 (Tex. 2019)
- Jurisprudential development since Rohrmoos and tactical considerations to keep in mind



Overview of Texas law on attorney's fees

As you know, this, here, is “‘Murica.”



And, seeing how this is " 'Murica," and all . . .

- **Texas adheres to the "American Rule."**
  - "In Texas, as in the federal courts, each party generally must pay its own way in attorneys." Rohrmoos Venture, 578 S.W.3d at 484 (citing Perdue v. Kenny A. ex rel. Winn, 599 U.S. 542, 550 (2010)).

- **Absent a statute or contract authorizing the recovery of fees, each party pays her own way.**
  - "Our basic point of reference when considering the award of attorney's fees is the bedrock principle known as the American Rule: Each litigant pays his own attorney's fees, win or lose, unless a statute or contract provides otherwise." Baker Botts LLP v. ASARCO LLC, --U.S.--, 135 S.Ct. 2158, 2164 (2015) (quoting Hardt v. Reliance Standard Life Ins. Co., 560 U.S. 242, 252–53 (2010)).

So what does all this really mean in a nutshell?

Before a prevailing party may recover its attorney's fees from an opponent, "the prevailing party must prove that:

(1) recovery of attorney's fee is legally authorized [(e.g., by statute or contractual provision)]; and

(2) the requested attorney's fees are reasonable and necessary for the legal representation so that such an award will compensate the prevailing party generally for its losses resulting from the litigation process."

Rohrmoos Venture, 578 S.W.3d at 487

** The second is a question of fact to be decided by the fact finder.* Id. (citing In re Nat'l Lloyd's Ins. Co., 532 S.W.3d 794, 809 (Tex. 2017)).

Rationale behind the "reasonable and necessary" requirement

- Awarding a prevailing party attorney's fees pursuant to fee-shifting provisions "is to compensate the prevailing party generally for its reasonable losses resulting from the litigation process." Rohrmoos Venture, 578 S.W.3d 487.

- "[B]ecause such fee awards are ***compensatory in nature***, fee-shifting is ***not a mechanism for greatly improving an attorney's economic situation***," therefore "only fees reasonable and necessary for the legal representation will be shifted to the non-prevailing party, and not necessarily the amount contracted for between the prevailing party and its attorney." Id.

One more thing about the "necessary" prong

- Even though statutes authorizing the recovery of attorney's fees "loosely employ a reasonable and necessary standard, sometimes using both terms 'reasonable and necessary' and other times just 'reasonable,'" "[t]he distinction between such provisions immaterial." Id.

- So, in order to recover attorney's fees from an opponent, the prevailing party must prove that the requested fees are *both* reasonable *and* necessary—irrespective of whether the authorizing statute requires one but not the other. See id. at 489 (citing In re Nat'l Lloyds Ins. Co., 532 S.W.3d 794, 809 (Tex. 2017)).




Rohrmoos Venture v. UTSW DVA Healthcare, LLP,
578 S.W.3d 469 (Tex. 2019)

All this over a breach of lease . . .



Facts of Rohrmoos Venture

- In 1996, Defendant, Landlord Rohrmoos Ventures, leased out a commercial building in Dallas to UT Southwestern DVA Healthcare, LLP (UTSW), which UTSW intended to use as a dialysis clinic. Id. at 475.

- UTSW begins experiencing water penetration in the building's concrete foundation that only worsens over time despite remediation efforts. Id.

- UTSW terminates lease, deeming space unsuitable for intended commercial purpose, and moves out still owing Rohrmoos about $250K in unpaid rent.

- UTSW sues Rohrmoos Ventures for breach of contract and breach of the implied warranty of suitability.

- UTSW spent over $800K in attorney's fees, and Rohrmoos spent over $1.3 million. Id.

- As the Court observed, "[a]lthough UTSW initially sought money damages, it did not submit that claim to the jury. Accordingly, no money damages were awarded to UTSW." Id. at 476.

Let that sink in:

$800K and $1.4M in fees, respectively—all over $250,000 . . .





THE COURT: Okay. So, now, let's go [back] to the amount [of attorney's fees]..

[UTSW's COUNSEL]: Yes, Your Honor.

THE COURT: We all had those discussions both on the record and off the record of what this court's impression was of the attorney's fees and how this case was driven. I believe that defense counsel testified to how much in attorney's fees?

[UTSW's COUNSEL]: $ 1.3 million, Your Honor, for the landlord. And there were –

THE COURT: And how much was -- how much rent did you owe if you had lost?

[UTSW's COUNSEL]: The less than 300.

THE COURT: $ 300,000. And the attorney's fees for defendant, once again, were how much?

[UTSW's COUNSEL]: The landlord's were $ 1.3 million.

THE COURT: And how much did -- were you yours?

[UTSW's COUNSEL]: Ours were over $ 800,000.

THE COURT: On a breach of lease case?

[UTSW's COUNSEL]: Yes, Your Honor.

THE COURT: And if you moved out and you move out too early, before the term of the lease was up, how much would you have owed had you lost, one more time?

[UTSW's COUNSEL]: Less than $ 300,000.[]

THE COURT: Think about it. Thank you. All right. You can continue.

Id. at 505 n.15.

So how did the fees rack up so quickly?

Which is exactly why, Your Honor, that what I testified to was that the reasonable and necessary fees in this case should have been in the 3 to $400,000. But primarily because of the Defendant's conduct, hiring twelve experts –

....

[The Defendants] spent $ 1.3 million [in attorney's fees]. Of course, I'm -- you know, he notices up 37 depositions including, you know, 15 third-party depositions, I have to attend. He hires twelve experts. You know, I have to depose them and know what they're going to say. And all of that evidence came in about all the things that the landlord did that caused the Plaintiff to incur significantly more fees than what should have been reasonable and necessary. But if you recall, I did say that we did have to do those. They were reasonable. They were necessary. The amount charged was reasonable. The time spent doing those tasks was reasonable. It just -- the actions they took.

Id. at 505 n.16 (highlight added)

Plaintiff Tenant UTSW Prevails at Trial

- Jury finds that both parties breached the lease but that Landlord Rohrmoos committed the first material breach by breaching the implied warranty of suitability. Id. at 476.

- Jury awards UTSW all $1.3M in fees UTSW claims to have incurred, and trial court enters judgment for the full amount pursuant to the Lease's fee-shifting provision. Id. at 477.

- Dallas Court of Appeals affirms. Id. at 478.

The Texas Supreme Court reverses the fee award in a unanimous opinion.

- On appeal, Rohrmoos Venture challenged UTSW's attorney's fee evidence as legally insufficient to support the fee awards

- Rohrmoos argued that the lodestar method applied to the case and that UTSW needed to submit "detailed proof, likely in the form of billing records, so the jury could have conducted a meaningful review to determine the reasonableness of the fees." Id. at 486.

- UTSW countered that it did all that it was required to do under the Texas Supreme Court's prior decisions (most notably, Arthur Andersen), by having its trial lawyer testify to the amount of fees, the reasonableness of those fees, and his own qualifications. Id.

SCOTX's Response:
This ain't your daddy's fee application . . .



- "Historically, claimants have proven reasonableness and necessity of attorney's fees through an expert's testimony—often the very attorney seeking the award—who provided a basic opinion as to the requested attorney's fees." Id. at 490.

- But, "[i]n recent years," some Texas courts had created confusion in the case law by describing the lodestar method and the Arthur Andersen "method" (sometimes referred to in the case law as the "traditional method") as two separate methods for proving up attorney's fees. Id.

- However, "the loadstar method developed as a 'short hand [sic] version' of the Arthur Andersen factors and was never intended to be a separate test or method." Id

The Standard for Proving Up Attorney's Fees: CliffsNotes™ Version

"[T]he lodestar method as [the Court] presented it in El Apple applies for determining the reasonableness and necessity of attorney's fees in a fee shifting situation," and further summarized the standard as follows:

> Under the lodestar method, the determination of what constitutes a reasonable attorney's fee involves two steps. [1] First, the [fact finder] must determine the reasonable hours spent by counsel in the case and a reasonable hourly rate for such work. The [fact finder] then multiplies the number of such hours by the applicable rate, the product of which is the base fee or lodestar. [2] The [fact finder] may then adjust the base lodestar up or down (apply a multiplier), if relevant factors indicate an adjustment is necessary to reach a reasonable fee in the case.

Id. at 501 (quoting El Apple, 370 S.W.3d at 760).

Step One of the Lodestar Method: Calculate base, "lodestar" figure

Reasonable Hours Worked x Reasonable Hourly Rate = Presumptively Reasonable Fee.

- Fee claimant bears the burden of proving up both the reasonableness of the number of hours worked and the reasonableness of the hourly rate. Id. at 498.

- Critically, "[s]ufficient evidence includes, at a minimum, evidence of (1) particular services performed, (2) who performed those services, (3) approximately when the services were performed, (4) the reasonable amount of time required to perform the services, and (5) the reasonable hourly rate for each person performing such services." Id. at 498 (citing El Apple, 370 S.W.3d at 762–63)

Step Two of the Lodestar Method: Adjust presumptively reasonable lodestar upward downward as *Arthur Andersen* factors dictate

(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill required to perform the legal service properly;

(2) the likelihood … that the acceptance of the particular employment will preclude other employment by the lawyer;

(3) the fee customarily charged in the locality for similar legal services;

(4) [(a)] the amount involved and [(b)] the results obtained;

(5) the time limitations imposed by the client or by the circumstances;

(6) the nature and length of the professional relationship with the client;

(7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and

(8) whether the fee is fixed or contingent on results obtained or uncertainty of collection before the legal services have been rendered.

945 S.W.2d at 818 (quoting TEX. DISCIPLINARY R. PROF'L CONDUCT 1.04, *reprinted in* TEX. GOV'T CODE, tit. 2, subtit. G, app. A (TEX STATE BAR R. art. X, § 9)).

Key Caveats re: the Step Two Adjustment

- Base lodestar figure is presumptively reasonable, and that presumption of reasonableness is "strong." Id. at 502.

- Base lodestar calculation usually includes at least Arthur Andersen Consideration Nos. 1, 3, 4(a), 7 and 8 (highlighted in previous slide), so these considerations may not be used to enhance or reduce the base calculation to the extent they are already reflected in base lodestar. Id. at 500.

- Because of "strong" presumption, fee-claimant seeking enhancement "must produce specific evidence showing that a higher fee is necessary to achieve a reasonable award." Id. at 501.

- Same goes for fee opponent seeking reduction. Id.

You’re a fool if you don’t introduce contemporaneous billing records into evidence.





Don’t take my word for it.
Take theirs.

Straight from the SCOTX in Rohrmoos Venture:

Contemporaneous billing records are not required to prove that the requested fees are reasonable and necessary. See El Apple, 370 S.W.3d at 763; see also Monsanto, 414 S.W.3d at 736 (explaining that "El Apple does not hold that a lodestar fee can only be established through time records or billing statements."). Nevertheless, billing records are *strongly* encouraged to prove the reasonableness and necessity of requested fees when those elements are contested. In El Apple, we acknowledged the value of contemporaneous records for lodestar calculations:

> An attorney could, of course, testify to these details, but in all but the simplest cases, the attorney would probably have to refer to some type of record or documentation to provide this information. Thus, when there is an expectation that the lodestar method will be used to calculate fees, attorneys should document their time much as they would for their own clients, that is, contemporaneous billing records or other documentation recorded reasonably close to the time when the work is performed.

- Id. at 502 (emphasis in original) (quoting El Apple, 370 S.W.3d at 763).

Yowell v. Granite Operating Co.,
620 S.W.3d 335 (Tex. 2020)

- The Texas Supreme Court addressed, for the first time, "how this lodestar analysis may affect the evidence needed to support a contingent award of fees that hat not yet been incurred" Id. at 355.

- In that case, which involved an award of contingent appellate fees, the Texas Supreme Court reaffirmed its statement in Rohrmoos Venture that "the lodestar analysis applies to situations 'in which an objection calculation of reasonable hours worked . . . can be employed." Id. (quoting Rohrmoos Venture, 578 S.W.3d at 498).

Yowell, *ct'd*

- However, the Court went on to observe that "[t]hat is not the situation with respect to contingent appellate fees, which have not yet been incurred and thus must be projected on expert opinion testimony." Id. As the Court explained,

> At that point when fees are awarded by the trial court, an appeal is still hypothetical. There is no certainty regarding who will represent the appellee in the appellate courts, what counsel's hourly rate(s) will be, or what services will be necessary to ensure appropriate representation in light of the issues the appellant chooses to raise.

- "Of course," the Court cautioned, "this uncertainty does not excuse a party seeking to recover contingent appellate fees from the need to provide opinion testimony about the services it reasonably believes will be necessary to defend the appeal and a reasonable hourly rate for those services." Id.

Kanyezi Africa Safara, Inc. v. Sells.
No. 01-20-00179-CV, 2022 WL 548992 at *15
(Tex. App.—Houston [1st Dist.] Feb. 24, 2022, no pet h.) (mem. op.)

- Reversed entire fee award of $27,682.61 and remanded for redetermination of attorney's fees, the First Court of Appeals finds insufficient evidence of $7,680 in alleged fees for 51.2 hours of "unbilled work" *and further* reversed co-counsel's larger fee award because it was based, in part, on an offset against the other lawyer's $27K award.
- With respect to the unbilled work, counsel testified that the 51.2 hours included "three extensive and lengthy responses to motions for summary judgment, defending the depositions of all three Appellees with two of the depositions approaching the six[-]hour limit, attending an oral hearing on a motion for continuance, and attending mediation."
- "While he testified that he spent a total of 51.2 hours on the listed tasks, Baird presented no testimony or documentary evidence itemizing or otherwise allocating the amount of time he spent on a particular task. . . . We conclude that, without any evidence of the time spent on specific tasks, the trial court had insufficient information to meaningfully review the fees requested for [counsel's] unbilled work. The trial court could not have determined whether the time spent on each task was reasonable, the charges were inadequately documented, or whether the tasks performed were duplicative or unnecessary. We hold that the evidence was not legally sufficient . . .

Gonzalez v. Pounds,
No. 07-21-00088-CV, 2022 WL 348403
(Tex. App.—Amarillo Feb. 4, 2022, no pet h.) (mem. op.)

Don't forget those affidavits proving up necessity, reasonableness, and the Arthur Anderson Factors

- Facts: At conclusion of bench trial on post-divorce enforcement matters, trial court did not hold hearing on attorneys' fees and instead requested written submission of requests for fees a week later. Included in the record were invoices setting for the rate charged, the time spent, and a brief description of the tasks performed.

- Holding: Reversed and remanded. "[T]his information is not a substitute for testimony explaining the reasonableness and necessity of those fees." Therefore, evidence of fee award was factually insufficient.

THB Constr., LLC v. Holt Tex., Ltd.
No. 05-20-00020-CV, 2022 WL 123105 (Tex. App.—Dallas Jan. 13, 2022, judgm't set aside)
Beware of the redactions.

- Facts: Counsel introduced contemporaneous invoices for work performed over a three-year period, but "the records [we]re so heavily redacted that it [wa]s impossible to determine what tasks were performed, how long the tasks took to perform, and who performed the tasks. Indeed, the invoices at issue are so heavily redacted, the only visible information remaining is the month and year of the invoice, attorneys who rendered legal services in that month, total hours charged, rate, and miscellaneous charges."

- Holding: Fee award reversed and case remanded due to legally-insufficient evidence of the award.

Starry Skies Ranch, L.P. v. Chappell Hill Constr. Co.,

No. 1-22-00760-CV, 2024 WL 4628408 (Tex. App. – Houston [1st Dist.] Oct. 31, 2024, no pet.)

Redactions done right—when "supplemented" by trial lawyer's testimony.

- Facts: Complex construction dispute arising out of a contract to build a large home in Washington County (20,000 sq. foot residence, 3,000 sq. ft. detached garage, and 5,500 sq. ft. deck). Chappell Hill Construction ("CHC") sued Starry Skies Ranch for nonpayment of costs and retainage. Jury found breach and awarded CHC $353,022.47, $838,688.61 in trial attorney's fees, and $50,000 in conditional appellate attorney's fees. At trial, CHC offered the testimony of its attorney's fees expert, one of the lawyers who tried the case, who testified as to the reasonableness of the rate and the reasonableness and necessity of the hours billed. He introduced 252 pages of invoices that were "extensively redacted."

Starry Skies Ranch, L.P. v. Chappell Hill Constr. Co.,

No. 1-22-00760-CV, 2024 WL 4628408 (Tex. App. – Houston [1st Dist.] Oct. 31, 2024, no pet.)

Redactions done right—when "supplemented" by trial lawyer's testimony.

- Holding: "While many of the invoices are extensively redacted, the invoices, coupled with [trial lawyer's] testimony regarding the legal services his firm and the junior attorneys provided to CHC, provided sufficient information to allow the jury meaningfully to assess the reasonableness and necessity of the legal services provided to CHC." Id. at *24 (quoting Tite Water Energy, LLC v. Wild Willy's Welding, LLC, No. 01-22-00158-CV, 2023 WL 5615816 at *11 (Tex. App.—Houston [1st Dist.] Aug. 31, 2023, pet. denied) (mem. op.).

- "Unlike in Rohrmoos, CHC introduced 252 pages of billing records into evidence. While heavily redacted, the invoices nevertheless supplemented [the trial lawyer's] testimony and provided the type of detailed information found lacking in Rohrmoos." Id.

DeBoer v. Attebury Grain, LLC
--S.W.3d--, 2024 WL 269619 (Tex. App. – Eastland Jan. 25, 2024)

- Facts: Appellant argued that there was insufficient evidence to support the trial court's award of $31,964.75 in attorney's fees to appellee. At trial, lead trial counsel testified that his partner, who was originally assigned case and worked up the file, experienced medical issues, requiring the lead trial counsel to "t[ake] control of the file." Lead trial counsel testified that both his and his partner's hourly rate as $300, which was reasonable given their skill and experience. He further testified that "it took a substantial amount of time and effort" to work on the case pretrial, including "failed arbitration, drafting petitions, addressing the motion to transfer venue, drafting discovery, filing motions and responses, and deposition. ***However***, he did not testify as to 'approximately when [these] services were performed.'" He also gave no estimate of the reasonable amount of time to perform all of the services he described, nor did he reveal how these hours were allocated to the various tsks mentioned. All he did was give a figure of approximately 124 hours worked at $300/hour for a grand total of $37,090.75.
- Holding: **Fee award REVERSED for insufficient evidence. Trial court abused its discretion in awarding the fee.** "Here, there is evidence of the particular services performed, who performed those services, and the reasonably hour rate for each person performing such services. But there is no evidence of approximately when the services were performed or the reasonable amount of time required to perform the services."

Attorney's Fee Trivia – Lightning Round

Do I still need to go through the same prove-up of attorney's fees when moving for default judgment?



Default Jugm't, ct'd

YES!! Prove-up of attorney's fees required, even on default!

- "When a trial court grants an award of attorney's fees in a default judgment without any evidence in the record to support the award, the proper action is to remand the issue of attorney's fees to the trial court for a new hearing on the fees." Lynch v. Lynch, 540 S.W.3d 107, 134 (Tex. App.—Houston [1st Dist.] 2017, pet. denied) (citing In re C.L.W., 485 S.W.3d 537, 542 (Tex. App.—San Antonio 2015, no pet.)).

Does the same standard apply for fees awarded as sanctions?



Fees as sanctions, ct'd

<u>YES</u>!! Prove-up of attorney's fees required, even on when fees are awarded as sanctions!

Nath v. Tex. Children's Hosp., 576 S.W.3d 707 (Tex. 2019) (per curiam)

Rohrmoos applies when fees are awarded as sanctions, too

- Two months after deciding Rohrmoos Venture, the Texas Supreme Court decided Nath v. Tex. Children's Hosp., 576 S.W.3d 707, 710 (Tex. 2019) (per curiam).

- In that case, the Court held that "the standard for fee-shifting awards in Rohrmoos Venture likewise applies to fee-shifting sanctions." Id.

- **Rationale:** Without Rohrmoos Venture standard requiring some evidence of reasonableness of the fee, a trial court "cannot determine that the sanction is 'no more severe than necessary' to fairly compensate the prevailing party." Id. at 709.

- So that means:
  - Chapter 10 of CPRC;
  - Texas Citizens' Participation Act ("Anti-SLAPP")

In cases where I have fee-eligible and fee-ineligible claims alike, do I have to segregate the fees before I can recover them?



Segregation of fees, ct'd.

- **Generally, YES!! Only exception** is if the discrete legal services for which fees are sought are "inextricably intertwined."

  - Under Texas law, fee-claimants "must segregate recoverable fees from unrecoverable fees" where "any attorney's fees relate solely to a claim for which such fees are unrecoverable." Tony Gullo Motors I, L.P. v. Chapa, 212 S.W.3d 299, 313 (Tex. 2006).

  - "Unrecoverable fees are not rendered recoverable 'merely because they are nominal.' If *any* of the component tasks relate solely to a cause of action for which legal fees are not recoverable, the claimant must segregate the fees." Sustainable Tex. Oyster Res. Mgmt., L.L.C. v. Hannah Reef, Inc., 623 S.W.3d 851, 873 (Tex. App.—Houston [1st Dist.] 2020, pet. denied) (citing 7979 Airport Garage, L.L.C. v. Dollar Rent A Car Sys., Inc., 245 S.W.3d 488, 509 (Tex. App.—Houston [14th Dist.] 2007, pet. denied) (op. on reh'g)).

  - "Whether it is necessary to segregate attorney's fees is a question of law, but the extent to which certain claims can or cannot be segregated is a mixed question of law and fact." Starry Skies Ranch, L.P. v. Chappell Hill Constr. Co., No. 01-22-00760-CV, 2024 WL 4628408 at *23 (Tex. App.—Houston [1st Dist.] Oct. 31, 2024, pet. denied) (mem. op.) (citing Tony Gullo Motors, 212 S.W.3d at 312-13)

If the other side does not contest the attorney's fee request, must the trial court grant the fee request as unopposed?



Unopposed fee request, ct'd.

- **NO!!** Even if the attorney's fees request is not contested, the trial court is not obligated to award the requested amount, but the award must bear a reasonable relationship to the fees in controversy. *Iola Barker v. Hurst*, 632 S.W.3d 175, 193 (Tex. App.—Houston [1st Dist.] 2021, no pet.). Thus, when determining an appropriate fee award, the trial court is entitled to examine the entire record and to view the matter in light of the amount in controversy, the nature of the case, and his or her personal experience as a lawyer or judge. *Mignogna*[*v. Funimation Prods., LLC*, No. 02-19-00394-CV], 2022 WL 3486234, at *17 [(Tex. App.—Fort Worth Aug. 18, 2022, pet. denied) (mem. op.)] (citing *Iola Barker*, 632 S.W.3d at 193–94).

  Tex. Health Harris Methodist Hosp. Fort Worth v. Featherly, No. 02-24-00572-CV, 2025 WL 3723946, at *12 (Tex. App.—Fort Worth Dec. 23, 2025, no pet. h.)

If I have a standard 33% or 40% contingent-fee arrangement, may I rely on the agreed contingency stake as a reasonable lodestar?



Contingent fee, ct'd.

- **NO!!! The fee applicant (and the Court) still must perform the lodestar analysis and compute the lodestar under an hourly paradigm.**
  - A "contingent fee may indeed be a reasonable fee from the standpoint of the parties to the contract," but it is not "in and of itself reasonable for purposes of shifting that fee to the defendant." Arthur Andersen, 945 S.W.2d at 818-19.
  - "Although, . . . The trial court appeared to award fees in this case strictly on a contingency basis, we note that the Texas Supreme Curt has proclaimed that the base lodestar method of calculating fees is presumed to reflect the reasonable and necessary attorney's fees that can be shifted to the non-prevailing party when supported by sufficient evidence." Parvizian Fine Oriental Rugs, Inc. v. Eclectic Design, LP, No. 14-22-00264, 2023 WL 7034055, at *10 n.4 (Tex. App.—Houston [14th Dist.] Oct. 26, 2023, no pet.) (mem. op.) (reversing the fee award because it "was based on a percentage of the overall damages awarded" as opposed to the lodestar method).

If the appellate court determines there is insufficient evidence of the attorney's fee amounts awarded, court of appeals vacates the award, and fee applicant recovers no fees?



Rendition vs. Remand for insufficient evidence of attorney's fee amount, ct'd.

- **YES, NO, MAYBE??**
- "Because attorney's fees were authorized but the evidence was insufficient under *Rohrmoos* to support the amounts awarded, the proper remedy is to reverse the awards and remand the case for a new hearing on fees." *Porter v. Porter*, No. 04-20-00229-CV, 2021 WL 2117923, at *5 (Tex. App.—San Antonio May 26, 2021, no pet.) (mem. op.)

Shumate v. Wildlife Partners, LLC, No. 04-24-00500-CV, 2025 WL 3295339, at *17 (Tex. App.—San Antonio Nov. 26, 2025, no pet. h.)

- But see Vo v. Nguyen, No. 01-23-00559-CV, 2025 WL 1184229 at *3 (Tex. App. [1st Dist.] —Apr. 24, 2025) (mem. op.) (no pet.) (vacating fee award due to insufficient evidence (lack of contemporaneous bills) and leaving remainder of judgment in place).

Justice David Gunn's Concurrence in Vo.

When a record does not contain enough evidence to uphold a factual finding, the decision whether to render or remand takes place according to well-known rules. The answer often depends on the difference between legal and factual insufficiency. Regardless, the main driver in choosing the disposition is the state of the record.

But suppose the dispute involves an award of attorney's fees, and there is some evidence of those fees but not enough detail. Should the render-vs-remand decision depend on whether the statute authorizing fees uses mandatory language? Some courts say yes. They create the following dichotomy:

1. *"Shall"*—If the statute makes the fees mandatory, the appellate court will remand to give the fee claimant another at-bat.

2. *"May"*—If the statute makes the fees discretionary, the appellate court will render and send the fee claimant back to the dugout with nothing.

Justice David Gunn's Concurrence in Vo, ct'd.

Our sister court took this position in *In re K.A.M.S.*, 583 S.W.3d 335, 350 (Tex. App.—Houston [14th Dist.] 2019, no pet.), and it has adhered to that view. It makes sense for the two appellate courts in Houston to minimize conflicts, and given that a few other courts have agreed, I will go along, but with real doubts. The mandatory/discretionary test just seems unsound.

Instead, the key must lie in the kind of insufficiency. Cases of inadequate detail occupy their own category, making them qualitatively different from cases of a true vacuum of proof.

A case of inadequate detail closely resembles a case of failure to segregate. When we sustain a sufficiency attack on a damage award that combines recoverable and unrecoverable components, we typically remand for segregation rather than killing the claim. The same holds true of fee awards that need more detail.

Vo v. Nguyen, No. 01-23-00559-CV, 2025 WL 1184229, at *5 (Tex. App.—Houston [1st Dist.] Apr. 24, 2025, no pet.) (Gunn, J., concurring).

Thank you.



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