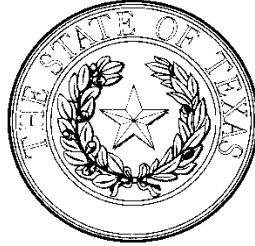


Opinion issued August 19, 2010



In The
Court of Appeals
For The
First District of Texas

NO. 01-08-00639-CV

**CSFB 1998-PI BUFFALO SPEEDWAY OFFICE LTD., PARTNERSHIP,
LNR PARTNERS, INC., AND MRIO, INC., D/B/A MOODY RAMBIN
OFFICE SERVICES F/K/A MOODY RAMBIN INTEREST, INC.,
Appellants**

V.

AMTECH ELEVATOR SERVICES COMPANY, Appellee

**On Appeal from the 270th District Court
Harris County, Texas
Trial Court Case No. 2006-39331**

CONCURRING OPINION

I join the opinion of the court, and write separately only to offer an additional observation about CSFB's request for attorney's fees, which was rejected by the trial court.

CSFB moved for entry of final judgment and requested that the trial court make an additional award of "all attorney's fees in the amount of at least \$67,000." In support of that request CSFB submitted an affidavit that recited the history of the dispute up to the trial court's summary judgment order, and providing the following additional facts and expert opinion:

Rather than reimbursing [CSFB] and assuming their defense, [Amtech] appealed this Court's decision, which caused [CSFB] to incur substantially more fees than they had previously incurred up to the date the Court heard the summary judgment. Additionally, [CSFB was] forced to continue defending themselves from the Plaintiff's claims during the pendency of the appeal. Ultimately, the First Court of Appeals affirmed this Court's decision that [Amtech] breached its contractual obligations to defend and indemnify [CSFB].

Despite attempts between [CSFB] and [Amtech] to resolve the debt owed by [Amtech] to [CSFB], [Amtech] refuses to honor its contractual obligations and reimburse [CSFB] for all attorney's fees incurred defending the claims asserted by Plaintiff and prosecuting [CSFB's] breach of contract claims against [Amtech]. Further, [Amtech] has failed and continues to fail to indemnify [CSFB] for the sum of \$46,599.00 paid to settle Plaintiff's claim and mitigate the damages incurred by [CSFB] as a result of [Amtech's] breach of its contract.

In connection with the representation of [CSFB] in this case, the necessary and reasonable attorneys' fees and expenses incurred to date are approximately \$67,000.00. To preserve their privileges,

[CSFB] will submit fee bills for an *in camera* inspection to substantiate the amount of attorney's fees incurred in this litigation rather than attaching them to this Motion for Entry of Final Judgment. [CSFB], however, incorporate[s] the referenced fee bills in its Motion for Entry of Final Judgment as if set forth fully therein. . . .

Such attorneys' fees and expenses are reasonable and necessary in connection with the proper representation of [CSFB] in these matters based upon the factors set out in Disciplinary Rule 1.04 of the State Bar Rules, including (1) the time and labor required; (2) the novelty and difficulty of the questions involved, and the skill required to perform the legal service properly; (3) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer; (4) the fee customarily charged in the locality; (5) the amount involved and the results obtained; (6) the time limitations imposed by the client or the circumstances; (7) the nature and length of the professional relationship with the client; (8) the experience, reputation, and ability of the lawyer or lawyers performing the services; and (9) whether the fee is fixed or contingent or results obtained or uncertainty of collection before the legal services have been rendered.

Amtech objected to the affidavit. Amtech complained that it could not readily controvert the affidavit when it had not been provided with itemized billing invoices, though those documents were relied upon by the expert and submitted to the trial court for review *in camera*. The trial court sustained this objection. It did not abuse its discretion in doing so.*

* “[T]he award of any attorney fee is a fact issue which must be passed upon by the trial court.” *Int’l Sec. Life Ins. Co. v. Spray*, 468 S.W.2d 347, 349 (Tex. 1971); *see also Great Am. Reserve Ins. Co. v. Britton*, 406 S.W.2d 901, 907 (Tex. 1966). “The pattern for proving attorney’s fees at trial usually follows that used for expert testimony in general: (1) present the expert’s qualifications, and then (2) elicit the expert’s opinion, and (3) her support for the opinion.” Scott A. Brister, *Proof of Attorney’s Fees in Texas*,

Whatever reasons may have motivated CSFB to offer its billing records to the trial court in camera, it has provided this court no authority approving a process of supporting a fees request with records that have been withheld from the opposing party. CSFB appears to have offensively used its billing records such that it waived any possible claim of privilege over those records. *See Republic Ins. Co. v. Davis*, 856 S.W.2d 158, 163 (Tex. 1993). But in any case, the documents that have been provided to, reviewed by, or prepared by or for an expert in anticipation of the expert's testimony are discoverable. TEX. R. CIV. P. 192.3(e) (authorizing discovery, among other things, of "the facts known by the expert that relate to or form the basis of the expert's mental impressions and opinions"); TEX. R. CIV. P. 194.2(f) (authorizing requests for disclosure of such documents for testifying experts). Amtech was entitled to request and receive discovery of such documents to enable it to controvert the opinion offered as to the reasonableness of CSFB's fees request. For that reason the trial court's ruling sustaining Amtech's objection to the affidavit was no abuse of discretion.

The Supreme Court has emphasized the importance that a party opposing a fees request have "the means and opportunity of disproving the testimony or evidence" before fees will be granted as matter of law. *Ragsdale v. Progressive*

24 ST. MARY'S L.J. 313, 325 (1993). The support for the attorney's fees opinion proffered by CSFB was lacking, and that was the basis of Amtech's objection.

Voters League, 801 S.W.2d 880, 882 (Tex. 1990). On remand, Amtech should be given the opportunity to review those materials relied upon by CSFB to support its request for fees.

Michael Massengale
Justice

Panel consists of Justices Keyes, Sharp, and Massengale.

Justice Massengale, concurring.