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Supreme Court of Texas.  
MBM Financial Corporation N/K/A MBM Financial Interests, L.P. and  
Marimon  
Business Systems, Inc., Petitioners and Cross-Respondents,  
v.  
The Woodlands Operating Company, L.P., Respondent and Cross-Petitioner.  
No. 08-0390.

March 12, 2009.

Appearances:  
Jennifer B. Hogan, Hogan & Hogan, LLP, Houston, TX, for the  
petitioners.  
Karen D. Smith, Drucker, Rutledge & Smith, LLP, The Woodlands, TX,  
for the respondent.

Before:

Chief Justice Wallace B. Jefferson, Justice Don R. Willett,  
Justice David M. Medina, Justice Paul W. Green, Justice Nathan Hecht,  
Justice Dale Wainwright, Justice Phil Johnson, and Justice Scott A.  
Brister.

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CHIEF JUSTICE WALLACE B. JEFFERSON: Be seated, please. Justice  
O'Neill is not sitting in this case and the Court is ready to hear now  
08-0390-MB Financial v. The Woodlands Operating Company.

MARSHALL: May it please the Court, Ms. Hogan will present argument  
for the Petitioner. The Petitioner has reserved five minutes for  
rebuttal.

ORAL ARGUMENT OF JENNIFER B. HOGAN ON BEHALF OF THE PETITIONER

ATTORNEY JENNIFER B. HOGAN: May it please the Court, this case  
presents the Court with the opportunity to consider when claims for  
declaratory judgment can be added to traditional claims for breach of  
contract and tort in order to recover attorney's fees. We would ask  
that the Court announce three rules today and that it apply those rules  
to bar TWOC's recovery of attorney's fees in this case. The first rule  
would state that declaratory relief is unavailable, absent an ongoing  
and continuing relationship between the parties. Second, declaratory  
relief is unavailable to settle disputes that are already pending  
before the Court. And, lastly, declaratory relief is unavailable to  
declare a party's nonliability for past conduct. Each of these rules is

grounded in this Court's prior writings and holdings and each of these rules, standing alone, would bar TWOC's claims for attorney's fees in this case. The first rule.

JUSTICE SCOTT A. BRISTER: I'm troubled. My biggest problem is, hypothetically, if you had a company that was trying to do a merger or a buyout or a public offering or something and they've got somebody who's made \$160 billion claim against them. They just said, we're going to sue for \$160 billion for something that happened last week. So our limitations period is four years. Is there no way for the company to get that off its books by filing a declaratory judgment?

ATTORNEY JENNIFER B. HOGAN: I would say probably not unless we're going to create a rule that allows anyone to come into Court and claim that it wants basically a declaration of nonliability and I don't know why it has to be limited to contracts and not also encompass torts. But if we're going to say that we're not going to recognize the traditional right of a plaintiff, a potential plaintiff, to choose whether, if ever, to file a lawsuit and, if so, when and where to file that lawsuit, then I think that there have to be parameters that are built around the declaratory judgment fact and I think that's what this Court has said.

JUSTICE SCOTT A. BRISTER: And, of course, in a lot of those cases, it's because it looked like the defendant was trying to pick a forum other than the one the plaintiff had picked. But if you take that out of the equation, we don't have venue shopping going on with this declaration of nonliability, that does open companies up to extortion doesn't it? If I know your company's about to go into a merger and I say, I've got, write you a little letter. I've got a \$160 billion claim against you, but I haven't decided when, if ever, I'll file it, but it's, I've got four years to do so. It's plenty of time, but I will go away for \$1 million.

ATTORNEY JENNIFER B. HOGAN: Well that claim obviously, I mean, assuming there's a four-year statute of limitations, it's got to be a breach of contract. Then you have to be looking backwards in time and I think that companies that are involved in mergers that are involving a \$160 billion claim are probably competent to judge the risk of that lawsuit and companies have to do it all the time.

JUSTICE SCOTT A. BRISTER: But the people that are buying them don't want to buy into a company like that.

ATTORNEY JENNIFER B. HOGAN: Well, Your Honor, I think companies do that all the time. I mean there are always risks that are outstanding any time that you have sort of a corporate merger. You always have to do that sort of due diligence and that risk analysis to determine what the risks are and I don't think we want to say, well, what we're going to encourage here is that every company that's involved in a merger or a takeover, run to the courthouse and sue every potential plaintiff out there for a declaration.

JUSTICE SCOTT A. BRISTER: Back to your case. Your client was not telling them anything. They were saying when does this run, when did this start and when does it end and your client was saying we're not going to tell you. We'll just sue you for it later. I mean, that's- what do you do?

ATTORNEY JENNIFER B. HOGAN: Well that's not quite. That's not quite.

JUSTICE SCOTT A. BRISTER: Assume that's the case. Assume a jury could find that based on these facts. Shouldn't you be able to do something about that? What? Your answer is no declaratory judgment, you're just out of luck and we'll just string you along.

ATTORNEY JENNIFER B. HOGAN: I don't think it's stringing along. I mean, I think if you look at what happened in this case, TWOC terminated the contract. TWOC demanded that Marimon and MBM accept the return of the equipment. Within 30 days, TWOC had returned the equipment. Marimon had taken the equipment and TWOC had stopped making any kind of payments under the lease.

JUSTICE SCOTT A. BRISTER: But your client had said we think the lease is still going and we're going to sue you.

ATTORNEY JENNIFER B. HOGAN: Our client didn't say we think the lease is still going. By that point in time, the only claim that our client ever brought after it had been sued was a claim for breach of contract saying that you didn't terminate the contract correctly, but this was never a suit to say this is ongoing. It couldn't be. All of the equipment was back in MBM and Marimon's hands. This was a suit for breach.

JUSTICE SCOTT A. BRISTER: If your client was right and it was actually this backdated date, damages were ongoing.

ATTORNEY JENNIFER B. HOGAN: No. Damages were liquidated damages under the terms of the contract, that which what was pleaded.

JUSTICE SCOTT A. BRISTER: Well, but I mean if you'd had to, if they were going to have to pay for the full year lease, maybe the would have come, well, give us the equipment back then if we got to pay for it for another year.

ATTORNEY JENNIFER B. HOGAN: Well then again, Your Honor, we're just at the point where we're going to say that what we're going to allow the Declaratory Judgment Act to do is to be able to step in and it's going to be able to declare nonliability. It doesn't matter that the conduct is all over and done. There then is no delineation.

JUSTICE DAVID M. MEDINA: Let's say the Court does decide to do that. Can nominal damages of \$1,000 support a 200 times that amount to judgment and attorney's fees?

ATTORNEY JENNIFER B. HOGAN: No, Your Honor, I don't think it should. I mean, I think that there are two questions here. If, if they can recover attorney's fees under the Declaratory Judgment Act, then we don't have the requirements of Chapter 38 and I do think that that's a very serious question, is when can you just, what are the parameters between 37 and 38? But assuming that Chapter 38 applies, then no, Your Honor, I think the answer is that a nominal damages of \$1,000 should not support the recovery of attorney's fees under Chapter 38. It shouldn't recover the award, support an award of any attorney's fees under Chapter 38.

JUSTICE NATHAN HECHT: Can you sue for nominal damages for breach of contract?

ATTORNEY JENNIFER B. HOGAN: Your Honor, I would say that the rule should be that you cannot recover nominal damages for .

JUSTICE NATHAN HECHT: Why?

ATTORNEY JENNIFER B. HOGAN: Because contracts are, protect- a breach of contract lawsuit protects economic interests. It is not about punishment. It is not about vindication. Doesn't matter why a party breaches a contract. It can even be malicious. We don't allow punitive damages.

JUSTICE NATHAN L. HECHT: The last party said they were, plaintiff was in it for vindication.

ATTORNEY JENNIFER B. HOGAN: I think that perhaps you can be in it for vindication, but Chapter 38 is going to say what you can't do for vindication is be able to transfer all of your attorney's fees over to the other side and I think that that is a very significant difference

here.

CHIEF JUSTICE WALLACE B. JEFFERSON: What are nominal damages? Is \$1,000 nominal? Whatever...

ATTORNEY JENNIFER B. HOGAN: Yeah, I mean, who knows? I suppose, Your Honor, that it changes over time. I mean, most often nominal damages are \$1. In the Lowe case, it was alleged that \$100 was nominal damages. Here, \$1,000 is alleged to be nominal damages. Perhaps it's just inflation. Maybe we'll see a retreat the other direction now. But nominal damages are, I mean traditionally we think of nominal damages are there where the particular cause of action is inherent, it is inherent in that cause of action that you would not be able to plead or prove actual damages. Defamation is probably the most obvious type of case in which you see awards of nominal damages and there it is vindication of a right. You might not be able to prove just by the nature of the case that someone calling you a liar has actually cause actual damages and so we allow nominal damages.

JUSTICE DAVID M. MEDINA: If the Court says for whatever reason, nominal damages are fine in this type of scenario, what type of guidelines should we have for a judge, a trial court judge, in determining what's reasonable and necessary on the [inaudible] issue. In the U.S. Supreme Court in Copper v. Letterman set out some guidelines on punitive damages and what type of guidelines should we have here if the Court goes in that direction?

ATTORNEY JENNIFER B. HOGAN: Well I think again there's two things. I would say this is not a nominal damages case. This is a case where they pleaded actual damages and they just didn't prove them. In this case in that sense is identical to Lowe. So.

JUSTICE DAVID M. MEDINA: So this is maybe a trial, this is tried to the bench, right?

ATTORNEY JENNIFER B. HOGAN: That's correct.

JUSTICE DAVID M. MEDINA: Maybe the trial court was aware that something had to be awarded so it awarded \$1,000 so that attorney's fees could be recovered.

ATTORNEY JENNIFER B. HOGAN: Maybe that's so, Your Honor. That should not be how it works though, correct? I mean, we, we, that that should not be in the hands of a trial judge just to say I want to give \$195,000 worth of attorney's fees so I'm going to make up some number here and call it nominal damages and thereby make it available, make it possible to recover all of those attorney's fees. Attorney's fees are not supposed to be a punishment. They are not damages. Again, it's not about vindication. I would say that if we're going to allow a nominal damages claim at all, then this Court has repeatedly said that what counts most is the amount of a recovery and that you really ought to be looking at that and that's one of our points is that the Court of Appeals, when it remanded, wouldn't even address that claim when it said \$1,000 and we're going to send it back. Actually they said \$1,000 won't get you there, but this one declaration is enough to send the case back and they didn't address anything about what was, what relief that one declaration purported to provide-how that was...

JUSTICE NATHAN L. HECHT: Which one of the five was it?

ATTORNEY JENNIFER B. HOGAN: The second which was, no, excuse me, it was the first. The first declaration, which reads "TWOC has complied with its contractual obligations to provide notice of its intent not to renew the Officer Care Program Agreement and Maintenance Agreement." That was the one declaration that the Court of Appeals said was not completely subsumed within the rest of their breach of contract and fraud claims. We disagree with that. Obviously that's an element of

their breach of contract claim, but be that as it may, when the Court of Appeals said that one declaration is sufficient, the Court would not go on and address our, did not go on and address our complaint that you shouldn't be able to recover approximately \$200,000 worth of attorney's fees for prosecuting a claim for that particular relief and I think that it's very important that the Court should, in fact, address that because to send the case back on attorney's fees and say, well, most of the time since you have a factual claim that's intertwined, they didn't use the word "intertwined." They did quote this Court from Chapa, but once the claims are related, then most of the time you can recover all of your attorney's fees. And to send that back on what amounts to an affirmance of a \$1,000 nominal damages fee, but won't support attorney's fees and one declaration without informing the Trial Court of the need to actually come to a reasonable resolution of attorney's fees, I would say is improper and I do believe that you're right, Justice Medina, that the Court has to look at factors and apply those factors to get to some reasonable amount of attorney's fees that should be available.

JUSTICE DAVID M. MEDINA: Clear something up for me here. You said that you want the Court to develop three rules here. Your second one, I think, was that declaratory judgment can't be used to settle pending litigation.

ATTORNEY JENNIFER B. HOGAN: That's right. Disputes that are already pending before the Court. Yes, Your Honor.

JUSTICE DAVID M. MEDINA: I thought the relationship had been resolved. I mean, the issue by continuing contract had been resolved. That's wrong?

ATTORNEY JENNIFER B. HOGAN: Well, what this rule is intended to convey is that we don't allow declaratory judgment claims that simply mimic and add nothing to existing claims for traditional relief like breach of contract and tort claims.

JUSTICE DAVID M. MEDINA: It seems like this was a vehicle used to solely recover attorney's fees and I'm sure that aside we'll address that.

ATTORNEY JENNIFER B. HOGAN: That is clearly what this was for, Your Honor. I mean what happened in this case was they obtained a judgment from the Trial Court on their fraud and their breach of contract claim and, after MBM and Marimon filed post judgment motions, TWOC came back to the Trial Court and said, oh, out of an abundance of caution, we want you now to put declarations into the judgment and what TWOC told the Trial Court was, the declaratory relief requested by plaintiffs in this amended judgment was implicitly addressed in the original final judgment. They didn't need declaratory relief in this case. They understood that they gained nothing from declaratory relief in this case. They added it only after MBM and Marimon came back in and said you can't get attorney's fees under Chapter 37 when you have no declarations and they ran back into court and said, okay, we'll I'm going to get a declaration, but it did nothing but track the issues and the elements of their breach of contract and fraud claims. There was nothing additional that they received under that and that should not provide a basis for the recovery of attorney's fees. If it can, then we have no distinction and no viability to Chapter 38 or, frankly, to the common law rule that you can't recover attorney's fees for fraud. If we get to just always ask for declarations of every constituent element of a claim, then there will always be a right to attorney's fees. I don't think there's anything in the legislative history or in the behavior of the legislature in the last 50 years since the passage of the

Declaratory Judgments Act that would suggest that the legislature believes that it has, in fact, abrogated the American Rule or that it doesn't want to have any meaning to any of its individual fee statutes. We would ask that the judgment of the Court of Appeals be reversed. Thank you.

CHIEF JUSTICE WALLACE B. JEFFERSON: Thank you, Counsel. The Court is now ready to hear argument from the Cross-Petitioner Respondent.

MARSHALL: May it please the Court, Ms. Smith will present argument for the Respondents.

ORAL ARGUMENT OF KAREN D. SMITH ON BEHALF OF THE RESPONDENT

ATTORNEY KAREN D. SMITH: May it please the Court, by way of cross-appeal, we likewise believe that there are really three issues to be presented before this Court today and those three issues are that TWOC was entitled to a recovery of relief under Chapter 37 of the Civil Practice and Remedies Code, that it was entitled to relief under Chapter 38 of the Civil Practice and Remedies Code and that it was entitled to relief under its claim for fraud arising from a breach of contract action. Contrary to what Appellant would argue, we do not believe that these are mutually exclusive rights of recovery. In fact, Justice O'Neill commented in the last oral argument that that's disfavored under the statutes and, quite frankly, if these statutes were intended to be mutually exclusive of each other, that would have been written into those. They have very clear, distinct and separate purposes, all of which were served by the facts and the evidence presented before the Court here.

JUSTICE NATHAN L. HECHT: What did you seek by way of declaration that you didn't win by finding of no breach?

ATTORNEY KAREN D. SMITH: The very important issue, which was the one declaration that the Court of Appeals upheld, which was the determination as to whether or not we had timely, non-renewed the contracts.

JUSTICE NATHAN L. HECHT: Well, if you hadn't, then you would be in reach, right?

ATTORNEY KAREN D. SMITH: We would, it would be, we would not be in breach because we would be in a position to continue to perform had we not.

JUSTICE NATHAN L. HECHT: And you hadn't.

ATTORNEY KAREN D. SMITH: We had not at the time.

JUSTICE NATHAN L. HECHT: And so you'd be in breach.

ATTORNEY KAREN D. SMITH: We would be in breach, yes.

JUSTICE NATHAN L. HECHT: So, what I'm wondering is, so if they sued you for breach, they'd win. But they didn't. They non-suited that claim and so I'm wondering what you got by a declaration that you didn't get by the abandonment of the breach claim.

ATTORNEY KAREN D. SMITH: What I got was a determination with respect to the risk and uncertainties that we were facing as to whether or not that contract was a continuing contract because there's very few facts on that.

JUSTICE NATHAN L. HECHT: That's what concerned me because I don't know where that rule stops. I have a car accident, you know, and I'm worried that the other fellow's going to sue me because I ran into the back of him when I wasn't looking. So, but I don't want him to sue me first. I want to sue first. So I sue him and say, I want a declaration that I didn't, I wasn't negligent and didn't injure you, but I don't

think you, would the law permit that to happen?

ATTORNEY KAREN D. SMITH: Not necessarily. I think in a case.

JUSTICE NATHAN L. HECHT: What do you mean necessarily? I mean, would it ever permit it to happen?

ATTORNEY KAREN D. SMITH: I think it's going to be very fact driven. What are the facts that determine whether or not there's a fact.

CHIEF JUSTICE WALLACE B. JEFFERSON: How about under those facts? Let's start there.

ATTORNEY KAREN D. SMITH: There doesn't appear to be any real threat or risk or uncertainty there. There's not.

CHIEF JUSTICE WALLACE B. JEFFERSON: But there is.

JUSTICE NATHAN L. HECHT: So he tells everybody up and down the street, I'm going to sue him.

ATTORNEY KAREN D. SMITH: Then I think so.

JUSTICE NATHAN L. HECHT: Then I should go ahead and file a declaratory judgment?

ATTORNEY KAREN D. SMITH: I think so. Then, I think you have an actual risk or uncertainty that you're facing as to whether or not someone is going to bring an action against you because they're saying performance.

JUSTICE NATHAN L. HECHT: And if I win, I could get attorney's fees.

ATTORNEY KAREN D. SMITH: I think that's the intention of the declaratory judgment action and that's correct.

JUSTICE NATHAN L. HECHT: Even if he sued me for negligence and I won, I couldn't get attorney's fees.

ATTORNEY KAREN D. SMITH: That's correct, that's correct.

JUSTICE NATHAN L. HECHT: Does that make sense to you?

ATTORNEY KAREN D. SMITH: Well I think that the declaratory judgment action is clearly an instance where perhaps the American Rule has, in fact, been abrogated or an exception created because.

JUSTICE NATHAN L. HECHT: The concern is not that. The concern is that you could always ask for a declaration of the opposite of what you're being sued for, breach of contract.

ATTORNEY KAREN D. SMITH: But that wasn't the case here.

JUSTICE NATHAN L. HECHT: Civil rights, tort, antitrust, it wouldn't matter. The plaintiff claims all these things. The defendant says we have a claim too for declaratory judgment that everything he says is wrong and then you can get attorney's fees.

ATTORNEY KAREN D. SMITH: And I guess the concern is this mindset of the race to the courthouse. Has a declaratory judgment action created this race to the courthouse? You're going to sue me so in order to allow for a recovery of my attorney's fees, I'm going to sue you first.

JUSTICE NATHAN L. HECHT: Well, that was another thing that concerned me about your position because surely it doesn't matter who gets there first.

ATTORNEY KAREN D. SMITH: No.

JUSTICE NATHAN L. HECHT: I mean, surely, if the plaintiff wins and he sues me for negligence, if I've got a declaratory judgment claim, surely I don't lose it because he got there first. Surely, I still get to bring my declaratory judgment claim. No, I wasn't negligent and recover attorney's fees.

ATTORNEY KAREN D. SMITH: Right, you can still do that. You can still do that, but I think it.

JUSTICE NATHAN L. HECHT: Looks like there'd be a lot of that.

ATTORNEY KAREN D. SMITH: Well, there could very well be and I think there is some concern as to whether or not the purpose behind the declaratory judgment action is actually being pursued in its use by the trial lawyers today, but I think in the fact circumstances under this case, it was very clear that this was a case that warranted a declaratory judgment action because there was a clear justiciable controversy.

JUSTICE SCOTT A. BRISTER: Is Ms. Hogan right that we've said plenty of times you can't file a declaratory judgment mirror image counterclaim?

ATTORNEY KAREN D. SMITH: You have in a counterclaim, but that's the distinction there is if you sue me for negligence and then I turn around and file a declaratory judgment action that is simply a mirror image of that, that is not a proper use of the declaratory judgment action.

JUSTICE SCOTT A. BRISTER: So all I have to do is file it first?

ATTORNEY KAREN D. SMITH: You have to file it first and I think you can file first only if you meet the very specific.

JUSTICE SCOTT A. BRISTER: Can you think of any of our mirror-image cases suggesting that that was the, that was what we were thinking. You just needed. You were just a little late. You should have just filed it earlier.

ATTORNEY KAREN D. SMITH: Well I think it's more than who gets there first. I think who gets there first with sufficient facts to establish that a justiciable controversy exists. Are we going to be at risk if we don't go to the court now and get a determination of our rights because your point was very well made. Had we thought we were at risk for a continuation of these contracts, which was the position that Marimon took throughout this entire case right up to the time it was submitted to the Court, then we might have considered keeping the equipment because we were going to have to pay for it anyway.

JUSTICE SCOTT A. BRISTER: So give me your strongest argument for why we couldn't possibly wait and see whether they were going to sue us. We had to get this resolved right now.

ATTORNEY KAREN D. SMITH: Because we needed to know what to do with respect to those 19 contracts. Do we continue to perform or do we put ourselves at risk for \$160,000 damage claim because someone's going to determine that.

JUSTICE NATHAN L. HECHT: You made that decision. You gave them the machinery and you walked away.

ATTORNEY KAREN D. SMITH: We walked away with the, knowing that we had the opportunity to go before a Court and get that risk decided for us under the Declaratory Judgment Act because.

JUSTICE NATHAN L. HECHT: But you weren't going to get to decide to take the equipment back two years later. The equipment's gone.

ATTORNEY KAREN D. SMITH: It was at the point in time that this was ultimately decided, that's correct. That option for us. So it was a risk that we would have to assume. Do we continue to keep it and pay for that and sue for their breach for not taking it back and requiring us to continue or do we, instead, go under the Declaratory Judgment Act?

JUSTICE DAVID M. MEDINA: So the money in controversy was \$160,000?

ATTORNEY KAREN D. SMITH: That's correct.

JUSTICE DAVID M. MEDINA: And you were awarded \$1,000?

ATTORNEY KAREN D. SMITH: Under the breach.

JUSTICE DAVID M. MEDINA: Whether it's nominal or not.

ATTORNEY KAREN D. SMITH: That's correct.



JUSTICE DAVID M. MEDINA: The Trial Judge decided to award \$1,000. How does that support \$195,000 judgment of attorney's fees? Help me out here. Why is that?

ATTORNEY KAREN D. SMITH: I think if you look at the record. First of all, it's \$145,000 for trial. The additional fees are for the appellate costs, which are obviously conditioned upon appealing a trial. If you look at the record in this case, which is what the Court is often asked to do in looking at its discretion and deciding what's reasonable and necessary, \$145,000 in this case was more than warranted. It was a very, very difficult case. We had counsel in and out of the case throughout the time that I was trial counsel on it. We had very difficult discovery processes. We had difficult witnesses, who would deny requests for admissions and then in deposition finally admit them when forced to do so.

JUSTICE DAVID M. MEDINA: What was the total amount of attorney's fees?

ATTORNEY KAREN D. SMITH: The total amount with appellate fees would be the \$195,000. There were two trial counsel on my side.

JUSTICE DAVID M. MEDINA: It didn't seem then the judge used any discretion. Just look at the number. This is it. I'll give you \$1,000 and all your attorney's fees. What guidelines did the judge have?

ATTORNEY KAREN D. SMITH: I think part of the reason for that is the reasonableness of attorney's fees were not disputed at the trial court level. In fact, trial counsel for Marimon conceded on the record and it's a part of the record before this Court that the fees were reasonable and the number of hours were reasonable. We submitted attorney's fees to the Trial Court through very lengthy affidavits supported by the billing records. Those were never refuted or objected to. So based upon the record before it and no objection, I think the Court was quite appropriate in using its discretion to award that amount of attorney's fees. There was no refuting those amounts.

JUSTICE SCOTT A. BRISTER: Let me ask you about \$1,000 nominal damages. I see in your brief there's one 20-year-old no writ case from Corpus Christi saying breach of contract entitles to you at least nominal damages. Is that the only case you could find in Texas history that says you can get nominal damages for breach of contract?

ATTORNEY KAREN D. SMITH: The other case that we cited, I think, in the, whether at the Court of Appeals, it may have been in our application, the response to application for a petition for review was also the Trevino v. Southwestern Bell case.

JUSTICE SCOTT A. BRISTER: Was that a breach of contract case?

ATTORNEY KAREN D. SMITH: It was a trespass and invasion case.

JUSTICE SCOTT A. BRISTER: My question just specifically, Ms. Hogan argues that contracts are economic instruments and that there's no such thing as nominal damages in a breach of contract case. Is there any one other than this 1989 no writ case from Corpus Christi?

ATTORNEY KAREN D. SMITH: The Southwestern Bell v. Franco case speaks to that and I would disagree that nominal damages are awarded only in instances of monetary damages because you may recall in that case there were two plaintiffs, one of which who was seeking reinstatement under a labor code. The other was seeking equitable relief. In that instance, the Court found that Mr., I think it was Mendez was one of the two, was awarded equitable relief and that was something of value as damages are defined to allow for a recovery of attorney's fees in that case. So it doesn't have to be just economic in nature and that case is the Supreme Court case of 1998 where this Court made that distinction between those two instances. I know in the

Appellate's briefing, they rely on the Gulf States case, I think, out of this Court to attempt to say that this Court has made a determination that a finding of zero or nominal damages does not allow recovery of attorney's fees. I think the placement.

JUSTICE SCOTT A. BRISTER: Distinguish that because it's the DTPA.

ATTORNEY KAREN D. SMITH: Not only that, Your Honor, but the other thing I would do, with all due respect, I know Justice Jefferson, you authored that opinion and Justice Hecht joined in it, but I think there's a problem with the Gulf State case.

CHIEF JUSTICE WALLACE B. JEFFERSON: What?

ATTORNEY KAREN D. SMITH: With greatest respect I say that and I've read it several times because I was sure that couldn't be the case, but here's where I think the problem is and we talked about the Farrar v. Hobby case was discussed in the early opinion and here's where I think the problem arises there. If you look in the Gulf States case and it's at page 567 of that opinion, it makes reference to the Southwestern Bell - Franco case and in reference to it, it includes a parenthetical that the plaintiff who receives nominal or zero damages is not entitled to attorney's fees, giving the impression that that was the holding in the Franco case. In fact, that's what the appellants rely upon in their brief for that position. That, in fact, is not what Franco says. If you look at the Franco case, what happened there was the petitioner in an effort to avoid attorney's fees, relied upon the Farrar vs. Hobby case, which stood for that proposition where you had the \$1 of nominal damages, failure to establish proximate cause was the end result there so no recovery of attorney's fees and so I think that was transposed from the Franco case into the US, the Gulf State.

CHIEF JUSTICE WALLACE B. JEFFERSON: Weren't there two? That was the employment case.

ATTORNEY KAREN D. SMITH: That was the Labor Code case, two plaintiffs.

CHIEF JUSTICE WALLACE B. JEFFERSON: There were two plaintiffs and one got reinstatement of the job, as I recall, and the other got nothing, not reinstatement and no damages.

ATTORNEY KAREN D. SMITH: Equitable relief is what he got and the one who was entitled to equitable relief.

CHIEF JUSTICE WALLACE B. JEFFERSON: I thought one got equitable relief and the other one did not, but I could be.

ATTORNEY KAREN D. SMITH: Yeah, one got equitable relief and was allowed a recovery of attorney's fees because that was something of value. The one who sought reinstatement was denied reinstatement so he was afforded no relief and because he didn't get reinstatement, he was not entitled to an award of attorney's fees.

CHIEF JUSTICE WALLACE B. JEFFERSON: Right. That's what I'm saying, but there was a good finding for that second person, but they got no reinstatement and no attorney's fees, which seems to distinguish your argument here.

ATTORNEY KAREN D. SMITH: Well I think the difference there is I think that the flipside of that. I think our circumstances are more closely aligned with the plaintiff who was awarded equitable relief and, therefore, entitled to attorney's fees because in that case, it was something of value recovered so attorney's fees awarded. We have that in this instance. The \$1,000 whether nominal or otherwise are justified based upon what should be characterized as nominal damages is something of value recovered by TWOC, therefore allowing for recovery of attorney's fees.

JUSTICE SCOTT A. BRISTER: So this relates back to the previous

case as well. Do we want people suing for breach of contracts if they haven't suffered any damages? Why would we want to encourage that?

ATTORNEY KAREN D. SMITH: Well and the distinction, I think, between the Katie Holmes case and this case is whether there are zero damages or nominal damages and I think that's a pretty important distinction here because in our case, there was testimony and pleadings to show that while we had suffered actual damages, they were going to be difficult to quantify and calculate, which is were you get to nominal damages.

JUSTICE SCOTT A. BRISTER: I will get to that in just a second, but why would we want to encourage suits for breach of contract where you had. We want, we don't want, we want to discourage them if you didn't have any damages. We don't want to encourage them if you just had a tiny amount that you can't even prove.

ATTORNEY KAREN D. SMITH: Well because a party who has been wronged is entitled to be set right from that wrong.

JUSTICE SCOTT A. BRISTER: But it begins to look as somebody asked in the last case, it begins to look like we're doing this whole breach of contract suit for the attorneys.

ATTORNEY KAREN D. SMITH: It would appear so.

JUSTICE SCOTT A. BRISTER: That's the only people that get any money out of it.

ATTORNEY KAREN D. SMITH: Sure. My client didn't benefit from this. \$1,000 didn't do anything for them. It certainly didn't benefit them to incur the \$145,000 plus in attorney's fees to do this. They would have preferred to award that.

JUSTICE SCOTT A. BRISTER: Back on the question of whether this, why was this hard to prove if the employees say, I mean, what's hard about getting the, you know, we had 20 employees that had to spend two hours each and at their regular salary rates, that's \$600 or \$6,000 or whatever it is. What's hard about that?

ATTORNEY KAREN D. SMITH: It was difficult, I think, based upon the character of the employees involved and our general counsel Karen West spoke to that and testified to the efforts to try and quantify that. You had individuals who were salaried employees, some of who were employed in-house. Some who were outside, third-party vendors who were under contract who were providing services. Where it wasn't very clear, easy to distinguish between the hours put into just the work I'm doing and trying to get these folks to accept the return of these equipment or the work that I'm doing because I'm at your office looking at other IT issues. Did the clerk?

JUSTICE SCOTT A. BRISTER: So you just have them pick a number. I mean, that's, people do that all the time. It's all. I mean, it's not any harder than picking future profits, which is impossible.

ATTORNEY KAREN D. SMITH: The problem I would have, the problem I would have then if I just picked a number because you know how it happens when you're in there in trial and you're trying to establish your damages, are you establishing those damages to a reasonable degree of mathematical certainty and if I just pick a number, the challenge, I would get at trial then is well those are just numbers that you're picking. There's no mathematical certainty. There's no reasonable foundation upon which they're based.

JUSTICE SCOTT A. BRISTER: You have to prove it's mathematical certainty to the jury. I mean, you just put the witnesses on and they say, you know, I'd estimate my time was spent. I spent 10 hours and 10 hours of the 2000 hours I put in a year works out to this amount of money.

ATTORNEY KAREN D. SMITH: Well, and that's a good point made and I know there were some arguments made at the trial court level whether we could have or should have done more, but the only testimony before the Court was that the effort was made to quantify by our witness and that because of the nature of the parties involved that it was not quantifiable so the route to go and had it been quantified, it might have been more than \$1,000. We might have been in a better position.

JUSTICE SCOTT A. BRISTER: Why did the trial judge pick \$1,000?

ATTORNEY KAREN D. SMITH: There was testimony to that effect. It wasn't a number that was just pulled out of the air. There was testimony to the effect that we believe it was at least \$1,000. The question comes back why does a trial judge pick \$1, pick \$100? I think perhaps setting guidelines for what you rely upon in determining what is a nominal damages would be a good idea for our Trial Court judges because there's not a lot of guidelines out there for them. He could have probably just as easily said, no, I think the reasonable value of those costs, those times are \$100.

JUSTICE DAVID M. MEDINA: Why weren't the attorney's fees segregated?

ATTORNEY KAREN D. SMITH: The attorney's fees were not segregated because all three of the causes of action upon which we sought relief allow for recovery of attorney's fees. Chapa simply requires that you segregate fees when you have recoverable and non-recoverable causes of action. Each of the three claims upon which we sought relief, each independent of each other allowed for recovery of attorney's fees, so segregation was not necessary.

JUSTICE DAVID M. MEDINA: So if this Court decides that those fees aren't recoverable under the Declaratory Judgment Act, what is the Court do to then?

ATTORNEY KAREN D. SMITH: That's really the statute of the case right now because the Court of Appeals decided that we were not entitled to recovery of attorney's fees under breach of contract or under the fraud arising for breach of contract. It is now set for remand back to the Trial Court for a segregation of those attorney's fees and then it will be incumbent upon me as the trial lawyer then to segregate as the guidelines have been set out by Chapa. The thing that I would add while we're talking about Chapa is I would disagree with the Appellant's position that Chapa somehow abrogates the exception that allows for recovery of attorney's fees for fraud arising for breach of contract. I don't think that's what Chapa has done. If this Court intended to abrogate what it did in US, in the Gill Savings case, I think it would have said so in Chapa. There's no indication of that. So I believe that that Gill Savings case is still a viable claim, which allows for recovery of attorney's fees when you have a fraud claim arising from a breach of contract claim.

JUSTICE NATHAN L. HECHT: What does that even mean?

ATTORNEY KAREN D. SMITH: Well that's a good question because I looked at that in looking at the Appellant's argument, what is "arising from" as distinguished from "intertwined with" because appellants argue that the arguments about intertwined abrogate then the Gill Savings. I don't think it does. I think what "arising from" means is you have a cause of action for beach of contract with conduct that supports the breach of contract claim and conduct arising from that that also shows fraud, which is what we have in this case. We had an individual who went back and unilaterally altered documents after they were signed, submitting a date that benefitted it with respect to the termination of these contracts.

JUSTICE NATHAN L. HECHT: How is that fraud?

ATTORNEY KAREN D. SMITH: It's fraud because what he failed to do was tell us that that was his practice to do that.

JUSTICE SCOTT A. BRISTER: But you all had returned the stuff already. You all didn't rely on it.

ATTORNEY KAREN D. SMITH: No it wasn't fraudulent inducement okay? We weren't induced into enter into the contract because of it, that's correct, but we relied upon the fact that he, when he met with us and we were going to enter into those contracts that the termination date was going to be an agreed-upon term and that the termination date was going to be the date that we accepted that equipment and put it into service and that would be the date put into those contracts. It was only after we actually filed the lawsuit and engaged in discovery that we learned through his own employees that it was, in fact, his business practice.

JUSTICE SCOTT A. BRISTER: I agree it's bad conduct, but all fraud is bad conduct.

ATTORNEY KAREN D. SMITH: Sure.

JUSTICE SCOTT A. BRISTER: That doesn't mean you can get attorney's fees for it.

ATTORNEY KAREN D. SMITH: I think you're right, but I think this Court has said in the Gill Savings case, if you have a viable breach of contract case, which we have here, and a fraud action that arises from those same facts and circumstances, then you have a fraud arising from a breach of contract that allows for recovery of attorney's fees and that's a tort where that exception has been made. I see my time is up. May I conclude?

CHIEF JUSTICE WALLACE B. JEFFERSON: Are there? Yes, you may conclude.

ATTORNEY KAREN D. SMITH: I would just like to point out to the Court that I believe that the Trial Court had the evidence before it necessary to enter an award both under the Chapter 37 of the Civil Practices and Remedies Code, Chapter 38 of the Civil Practice and Remedies Code and that the findings and conclusions of law submitted supported the judgment entered.

CHIEF JUSTICE WALLACE B. JEFFERSON: Thank you, Counsel.

JUSTICE SCOTT A. BRISTER: Ms. Hogan, I know you've got a lot of things to respond to, but just quickly most of our mirror-image cases saying you can't, say you can't bring a mirror-image counterclaim declaratory judgment as a vehicle for attorney's fees. Does that mean you couldn't bring the declaratory judgment action without the attorney's fees? In other words, if they really were curious to know are you guys going to sue us or not, couldn't they bring a declaratory judgment action under those cases and say we wanted a declaration, but we're not asking for our attorney's fees?

REBUTTAL ARGUMENT OF JENNIFER B. HOGAN ON BEHALF OF PETITIONER

ATTORNEY JENNIFER B. HOGAN: I think that the reason that these cases come to a head is because of the attorney's fees claims. I certainly think that's true. I'm not sure that it's worth.

JUSTICE SCOTT A. BRISTER: And most of the cases do say you can't do it as a vehicle for attorney's fees.

ATTORNEY JENNIFER B. HOGAN: That's right and I think that again that, to me, is the important part of the question. But I think I would say that based on what this Court's holdings have been, I mean, going

back 40 years when the Court said from an affirmative standpoint that you can't duplicate your claims, that was not in the context that Texas Liquor Control Board case as I recall is not in the context of a counterclaim. So I actually think it has something to say about your ability even in the first instance to bring a declaratory judgment claim, but, again, I think that the real issue becomes using the Declaratory Judgment Act as a vehicle to recover attorney's fees that you can't get any other way and then I think it's very important to look and see whether it is past conduct, whether it duplicates everything else that's already in the case and, Justice Hecht, you were inquiring about that declaration. In the declaration that TWOC performed its contract, that is clearly an element of TWOC's own affirmative breach claim. If TWOC had not given timely notice of termination, then it would not have performed its contract obligations and it could not have prevailed on its breach claim. So it's not so much that it was even responsive to ours, that's my other side of the argument, right? It is responsive to our breach claim, but it is also an affirmative element that virtually every contract case in Texas recognizes as an element of a breach claim is that the plaintiff has to prove its own compliance in the first instance. I would say, I want to make the point that TWOC had argued that we conceded reasonableness of the attorney's fees. MBM and Marimon have always taken the position that TWOC was not entitled to recover any attorney's fees for its fraud claims and that those claims had to be segregated and taken out of the equation. We've always made the argument that it couldn't recover for these so-called declaratory judgment claims and that that had to come out of the equation and then alternatively and additionally, we made the claim that they were not entitled to recover on their breach of contract claims. So I think to say that we somehow conceded the reasonableness and the amount of all of these fees in the Trial Court is incorrect. I would want to point out that the recovery of \$1,000 as nominal damages, what the Court of Appeals held in this case is directly contrary to what this Court wrote in Lowe. What the Court of Appeals holds is that when a plaintiff "has sustained an actual loss, but failed to prove the amount of that loss", the plaintiff can recover nominal damages. What this Court wrote in Lowe was nominal damages are not available when the plaintiff "admittedly suffered actual damages, but did not prove the amount the jury awarded." You cannot line this case and Lowe up side by side. They, what happened in this case is that they sought actual damages. The evidence is is that they could have estimated. Their own witnesses said they could have estimated the amount of time and they just chose not to do it. This is a case where they didn't prove actual damages and they should not be entitled to recover nominal damages, particularly to pave the way to attorney's fees. Allowing a suit, allowing this suit does not just reward the attorneys. Allowing this suit and the recovery of attorney's fees turns attorney's fees into a weapon and into a punishment. It's not that Mr. Marimon had to pay his own lawyers in order to go forward in this and it certainly isn't at the end of the day that TWOC paid its own lawyers and so the lawyers all went home happy. Mr. Marimon is having to pay TWOC's lawyers in a case that was never about anything except at best vindication and \$1,000 worth of nominal damages. That should not be the way that this system operates and we would ask that the Court of Appeals judgment be reversed and that judgment be rendered that TWOC take nothing on its claims for nominal damages or for attorney's fees.

CHIEF JUSTICE WALLACE B. JEFFERSON: Any questions? Thank you, Counsel. That cause is submitted and that concludes argument for this

Westlaw.

morning. The Marshall will now adjourn the Court.

MARSHALL: All rise.

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