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Epps v. Fowler

Supreme Court of Texas

February 3, 2011, Argued; August 26, 2011, Opinion Delivered

NO. 10-0283

Reporter

351 S.W.3d 862 *; 2011 Tex. LEXIS 610 **: 54 Tex. Sup. J. 1759

CHRISTOPHER N. EPPS AND LAURA L. EPPS,
PETITIONERS, v. BRUCE FOWLER, JR. AND
STEPHANIE L. FOWLER, RESPONDENTS

Subsequent History: Released for Publication October 7, 2011.

Prior History: [**1] ON PETITION FOR REVIEW FROM THE COURT OF APPEALS FOR THE THIRD DISTRICT OF TEXAS.

[*Fowler v. Epps*, 352 S.W.3d 1, 2010 Tex. App. LEXIS 1027 \(Tex. App. Austin, Feb. 10, 2010\)](#)

Core Terms

nonsuit, prevailing party, attorney's fees, prevail, unfavorable, trial court, legal relationship, award of attorney's fees, court of appeals, order to avoid, civil rights, res judicata, wins, jury finding, discourage, lawsuit, affirmative relief, pending claim, no damage, contractual, dictionary, discovery, abandon, riser

Case Summary

Procedural Posture

Petitioner home sellers sought review of an order from the Court of Appeals for the Third District of Texas, which reversed an award of attorney fees in their favor in an action by respondent purchasers for violations of the Texas Deceptive Trade Practices Act, fraud, and negligent misrepresentation.

Overview

The purchasers sued the sellers after discovering cracks in the home's sheetrock. The sellers sought their attorney fees as sanctions under Tex. Civ. Prac. & Rem. Code Ann. ch. 10 on the ground that the purchasers' claims were groundless. Alternatively, they sought

attorney fees under the earnest money contract, which provided that the prevailing party was entitled to recover attorney fees. The purchasers filed a notice of nonsuit without prejudice. The trial court ordered that the purchasers pay the sellers' attorney fees. The court of appeals reversed the judgment. On review, the court held that the court of appeals did not err in reversing the award of attorney fees under the contract, as the trial court awarded fees based solely on the purchasers' nonsuit without prejudice. No determination had been made as to whether the purchasers nonsuited in order to avoid an unfavorable ruling. Accordingly, it was necessary to remand the case for a determination on that issue. The court appeals erred in dismissing the purchasers' claims without allowing them an opportunity for a hearing on their ch. 10 claims; such a decision ran afoul of *Tex. R. Civ. P. 162*.

Outcome

The court vacated the judgment of the court of appeals and remanded the purchasers' contractual attorney fees claim to the trial court. The court remanded the purchasers' claim for attorney fees under ch. 10.

LexisNexis® Headnotes

Civil Procedure > ... > Attorney Fees &
Expenses > Basis of Recovery > English Rule

Civil Procedure > ... > Pretrial
Judgments > Nonsuits > Voluntary Nonsuits

HN1 Basis of Recovery, English Rule

When a plaintiff nonsuits a claim without prejudice, the defendant is not a prevailing party for the purpose of an award of attorney fees unless the court determines, on the defendant's motion, that the plaintiff took the nonsuit

in order to avoid an unfavorable judgment.

Civil Procedure > ... > Attorney Fees &
Expenses > Basis of Recovery > English Rule

Civil Procedure > ... > Pretrial
Judgments > Nonsuits > Voluntary Nonsuits

Civil Procedure > Judgments > Preclusion of
Judgments > Res Judicata

HN2 Basis of Recovery, English Rule

Because a nonsuit with prejudice immediately alters the legal relationship between the parties by its res judicata effect, a defendant prevails for the purpose of an award of attorney fees when the plaintiff nonsuits with prejudice.

Civil Procedure > ... > Attorney Fees &
Expenses > Basis of Recovery > American Rule

HN3 Basis of Recovery, American Rule

Texas adheres to the American Rule with respect to attorney fees. Under that rule, litigants may recover attorney fees only if specifically provided for by statute or contract.

Contracts Law > Contract Interpretation > Intent

HN4 Contract Interpretation, Intent

A court's primary concern when it construes a written contract is to ascertain the parties' true intent as expressed in the contract. The court may look to the entire agreement in an effort to give each part meaning.

Contracts Law > Contract Interpretation > Intent

HN5 Contract Interpretation, Intent

When a contract leaves a term undefined, a court presumes that the parties intended its plain, generally accepted meaning. Accordingly, the court gives the term its ordinary meaning. Often, courts consult dictionaries to discern the natural meaning of a common-usage term not defined by contract, statute, or regulation.

Civil Procedure > ... > Attorney Fees &
Expenses > Basis of Recovery > English Rule

Contracts Law > Breach > Breach of Contract
Actions > General Overview

HN6 Basis of Recovery, English Rule

A plaintiff who obtains a jury finding that a defendant has breached its contract but is awarded no damages is not a prevailing party for the purpose of an award of attorney fees. Whether a party prevails turns on whether the party prevails upon the court to award it something, either monetary or equitable.

Civil Procedure > ... > Attorney Fees &
Expenses > Basis of Recovery > English Rule

Civil Procedure > Dismissal > Involuntary
Dismissals > General Overview

Civil Procedure > ... > Pretrial
Judgments > Nonsuits > Voluntary Nonsuits

HN7 Basis of Recovery, English Rule

Federal courts recognize that a defendant may be a prevailing party for the purpose of an award of attorney fees when a plaintiff nonsuits in two situations: when a suit is dismissed with prejudice, and when a nonsuit is taken to avoid an unfavorable merits decision.

Civil Procedure > ... > Pretrial
Judgments > Nonsuits > Involuntary Nonsuits

Civil Procedure > Judgments > Preclusion of
Judgments > Res Judicata

HN8 Nonsuits, Involuntary Nonsuits

In Texas, plaintiffs may nonsuit at any time before introducing all of their evidence other than rebuttal evidence. *Tex. R. Civ. P. 162*. No court order is required. A nonsuit terminates a case from the moment the motion is filed. At the same time, a nonsuit does not affect any pending claim for affirmative relief or motion for attorney fees or sanctions. *Tex. R. Civ. P. 162*. When a case is nonsuited without prejudice, res judicata

does not bar relitigation of the same claims.

Civil Procedure > ... > Attorney Fees &
Expenses > Basis of Recovery > English Rule

HN9 Basis of Recovery, English Rule

A plaintiff who secures favorable jury findings but is awarded no damages is not a prevailing party for the purpose of an award of attorney fees because the plaintiff receives no relief that materially alters the parties' legal relationship; the plaintiff's victory is simply illusory.

Civil Procedure > ... > Attorney Fees &
Expenses > Basis of Recovery > English Rule

Civil Procedure > ... > Pretrial
Judgments > Nonsuits > Voluntary Nonsuits

Civil Procedure > Judgments > Preclusion of
Judgments > Res Judicata

HN10 Basis of Recovery, English Rule

A defendant who is the beneficiary of a nonsuit with prejudice is a prevailing party for the purpose of an award of attorney fees. A dismissal or nonsuit with prejudice is tantamount to a judgment on the merits. The res judicata effect of a nonsuit with prejudice works a permanent, inalterable change in the parties' legal relationship to the defendant's benefit: the defendant can never again be sued by the plaintiff or its privies for claims arising out of the same subject matter. As such, a defendant is a prevailing party when a plaintiff nonsuits a case with prejudice. In contrast, a nonsuit without prejudice works no such change in the parties' legal relationship; typically, the plaintiff remains free to refile the same claims seeking the same relief.

Civil Procedure > ... > Attorney Fees &
Expenses > Basis of Recovery > English Rule

Civil Procedure > ... > Pretrial
Judgments > Nonsuits > Voluntary Nonsuits

HN11 Basis of Recovery, English Rule

A defendant may be a prevailing party when a plaintiff

nonsuits without prejudice if the trial court determines, on the defendant's motion, that the nonsuit was taken to avoid an unfavorable ruling on the merits. In applying the test, courts should rely as far as possible on the existing record and affidavits, and resort to live testimony only in rare instances. A number of factors may support an inference that a plaintiff has nonsuited in order to avoid an unfavorable ruling. Evidence that a suit was not without merit when filed may indicate that the defendant has not prevailed and is therefore not entitled to attorney fees.

Civil Procedure > Appeals > Notice of Appeal

HN12 Appeals, Notice of Appeal

Tex. R. App. P. 25.1(c) only requires a party who seeks to alter a trial court's judgment to file a notice of appeal.

Civil Procedure > ... > Pretrial
Judgments > Nonsuits > General Overview

HN13 Pretrial Judgments, Nonsuits

Under *Tex. R. Civ. P. 162*, a nonsuit shall not prejudice the right of an adverse party to be heard on a pending claim for affirmative relief.

Counsel: For Christopher N. Epps, Petitioner: Mr. Noel West Short, Mr. Travis Dale Weitzel, WEST SHORT & ASSOCIATES, P.C., Georgetown TX.

For Bruce Fowler, Jr., Respondent: Mr. Frank B. Lyon, Attorney at Law, Austin TX.

Judges: JUSTICE LEHRMANN delivered the opinion of the Court, in which CHIEF JUSTICE JEFFERSON, JUSTICE WAINWRIGHT, JUSTICE GREEN, JUSTICE WILLETT, and JUSTICE GUZMAN joined. JUSTICE HECHT filed a dissenting opinion, in which JUSTICE MEDINA, and JUSTICE JOHNSON joined. Debra H. Lehrmann, Justice.

Opinion by: Debra H. Lehrmann

Opinion

[*864] Two years ago, we held that a plaintiff who obtained favorable jury findings but no damages was

not entitled to attorney's fees under contractual language entitling a prevailing party to such fees. [*Intercont'l Group P'ship v. KB Home Lone Star L.P.*, 295 S.W.3d 650, 652 \(Tex. 2009\)](#). Today, we consider whether a defendant is a prevailing party entitled to attorney's fees when the plaintiff nonsuits a claim without prejudice. We hold that such [HN1](#) a defendant is not a prevailing party unless the court determines, on the defendant's motion, that the plaintiff took the nonsuit in order to avoid an unfavorable [**2](#) judgment. We also hold that, [HN2](#) because a nonsuit with prejudice immediately alters the legal relationship between the parties by its res judicata effect, a defendant prevails when the plaintiff nonsuits with prejudice. Because the trial court has not had the opportunity to determine whether the plaintiff nonsuited in order to avoid an unfavorable judgment, we reverse the court of appeals' judgment and remand the defendant's claim for attorney's fees under the contract to the trial court. Finally, we hold that the court of appeals erred by not remanding the case to allow the trial court to dispose of the Eppses' pending claim for sanctions under [chapter 10 of the Civil Practice and Remedies Code](#), and accordingly remand for the trial court to dispose of that alternative claim if it determines that fees are not available under the contract.

I. Background

In 2004, Bruce and Stephanie Fowler purchased a house in Georgetown, Texas, from Laura and Christopher Epps. Two years later, the Fowlers allegedly discovered cracks in the house's sheetrock and evidence of past repairs. They concluded that the foundation was failing, and sued the Eppses for violations of the Deceptive Trade Practices Act, [**3](#) fraud, and negligent misrepresentation. The Fowlers claimed [*865](#) that the Eppses were aware of problems with the house's foundation and failed to disclose them at the time of the sale. The Eppses denied having knowledge of any defects in the foundation. They sought their attorney's fees as sanctions under Chapter 10 of the Civil Practice and Remedies Code on the ground that the Fowlers' claims were legally and factually groundless. Alternatively, they sought attorney's fees under section 17 of the earnest money contract signed by the parties, which provides that "[t]he prevailing party in any legal proceeding related to the contract is entitled to recover reasonable attorney's fees and all costs of such proceeding incurred

by the prevailing party."¹ The contract does not define the term "prevailing party."

According to the Eppses, the Fowlers failed to respond to discovery, including the Eppses' requests for admissions, and cancelled or postponed a number of depositions.² The Eppses moved for partial summary judgment, and the Fowlers responded with an expert report attached. The same day they filed their summary [**4](#) judgment response, the Fowlers filed a motion to substitute counsel, which was granted. The next day, the Fowlers' newly retained counsel filed a notice of nonsuit without prejudice. The parties proceeded to trial on the Eppses' contractual attorney's fees issue. At the trial, the Eppses expressly reserved their claim for fees as sanctions under Chapter 10.

Rather than dismissing the Fowlers' claims, the trial court rendered judgment that they take nothing and ordered that the Fowlers pay the Eppses' attorney's fees of \$22,950. The judgment provided that "[a]ny relief not granted herein is expressly denied." The Fowlers appealed. The court of appeals modified the judgment to reflect that the Fowlers' claims were dismissed without prejudice. [__S.W.3d __, __](#). It also reversed the portion of the judgment ordering that the Fowlers pay attorney's fees, reasoning that a favorable decision on the merits of a case is necessary to confer prevailing party status on a litigant. [__S.W.3d at __](#). We granted [**5](#) the Eppses' petition for review to decide whether a defendant is a prevailing party when the plaintiff voluntarily nonsuits without prejudice. [54 Tex. Sup. Ct. J. 428 \(Jan. 11, 2011\)](#).

II. Prevailing Party

[HN3](#) Texas adheres to the American Rule with respect to attorney's fees. [KB Home, 295 S.W.3d at 653](#). Under that rule, litigants may recover attorney's fees only if specifically provided for by statute or contract. *Id.* (citing [MBM Fin. Corp. v. Woodlands Operating Co.](#), [292 S.W.3d 660, 669 \(Tex. 2009\)](#)). Thus, we must determine if the contract between the Fowlers and the Eppses authorized the trial court's award of fees in this case to

¹ The contract is a widely used standard Texas Real Estate Commission form contract.

² There is evidence that several depositions of Bruce Fowler had to be rescheduled because he was working outside of the country. The requests for admission are not in the record before us.

the Eppses because they "prevailed."

HN4 Our primary concern when we construe a written contract is to ascertain the parties' true intent as expressed in the contract. *Valence Operating Co. v. Dorsett*, 164 S.W.3d 656, 662 (Tex. 2005) (citing *J.M. Davidson, Inc. v. Webster*, 128 S.W.3d 223, 229 (Tex. 2003); *Gulf Ins. Co. v. Burns Motors, Inc.*, 22 S.W.3d 417, 423 (Tex. 2000); *Coker v. Coker*, 650 S.W.2d 391, 393 (Tex. 1983)). We may look to the entire agreement in an effort to give each [*866] part meaning. *Coker*, 650 S.W.2d at 393. In this instance, the agreement does not expressly [*6] define the term prevailing party, and no other portion of the agreement sheds light on the term's meaning. **HN5** When a contract leaves a term undefined, we presume that the parties intended its plain, generally accepted meaning. *Valence Operating Co.*, 164 S.W.3d at 662; *KB Home*, 295 S.W.3d at 653. Accordingly, we give the term its ordinary meaning. Often, we consult dictionaries to discern the natural meaning of a common-usage term not defined by contract, statute, or regulation. See *Reyes v. City of Laredo*, 335 S.W.3d 605, 607 (Tex. 2010); *Albertson's, Inc. v. Sinclair*, 984 S.W.2d 958, 960 (Tex. 1999); *Guardian Life Ins. Co. of Am. v. Scott*, 405 S.W.2d 64, 65 (Tex. 1966). But in this case, as in our controlling *KB Home* decision, we are interpreting a legal-usage term within a form contract, a term that many courts (including us less than two years ago) have explicated by examining how prevailing party is used statutorily.³

In *KB Home*, we held that **HN6** a plaintiff who obtained a jury finding that the defendant had breached its contract but was awarded no damages was not a prevailing party. 295 S.W.3d at 655. We reasoned

[w]hether a party prevails turns on whether the party prevails upon the court to award it something, either monetary or equitable. *KB Home* got nothing except a jury finding that Intercontinental violated the contract. . . . Nor do we perceive any manner in which the outcome materially altered the legal relationship between *KB Home* and

Intercontinental.

Id.

A. Federal tests

As we did in *KB Home*⁴ we find federal cases focusing on the meaning of prevailing party instructive.⁵ In *Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health and Human Resources*, 532 U.S. 598, 121 S. Ct. 1835, 149 L. Ed. 2d 855 (2001), the Supreme Court considered whether a plaintiff who received neither a favorable judgment nor a consent degree, but whose lawsuit nevertheless caused the defendant [*8] to voluntarily [*867] change its conduct, was a prevailing party. The Court rejected the notion that a plaintiff whose lawsuit had served as the catalyst for a change in the defendant's conduct should be considered a prevailing party entitled to attorney's fees under the Fair Housing Act Amendments, 42 U.S.C. § 3613(c)(2), and the Americans with Disabilities Act, 42 U.S.C. § 12205, overruling several Circuit Court decisions. *Id.* at 601-02 (citing *Stanton v. S. Berkshire Reg'l Sch. Dist.*, 197 F.3d 574, 577, n.2 (1st Cir. 1999); *Marbley v. Bane*, 57 F.3d 224, 234 (2d Cir. 1995); *Baumgartner v. Harrisburg Housing Auth.*, 21 F.3d 541, 546-50 (3d Cir. 1994); *Payne v. Bd. of Educ.*, 88 F.3d

⁴The dissent faults us for looking to federal cases to determine the parties' intent, but we applied a nearly identical analytical framework in *KB Home*, an opinion the dissent's author joined. And the dissent in *KB Home* raised almost the same objections as the dissent in this case. In following *KB Home*'s analysis, we simply treat all parties to a lawsuit the same, whether they are plaintiffs or defendants, as we are obligated to do.

⁵The Eppses take issue with the court of appeals' reliance on cases interpreting the term prevailing party as used in statutes. We agree that it might be improper to look to cases focusing on whether courts should exercise their discretion to award fees to a prevailing party, because those cases turn on legislative policy choices. See, e.g., *Christiansburg Garment Co. v. Equal Employment Opportunity Comm'n*, 434 U.S. 412, 420-21, 98 S. Ct. 694, 54 L. Ed. 2d 648 (1978) [*10] (holding that defendant may be entitled to recover attorney's fees as prevailing party when a plaintiff voluntarily withdraws complaint if it establishes that the suit was groundless, because Congress "wanted to protect defendants from burdensome litigation having no legal or factual basis"). We see no error, however, in looking to cases considering the plain meaning of the term prevailing party. We note that the Eppses themselves rely on statutory cases.

³In fact, the petitioner in *KB Home* argued that the case presented an issue that was likely to recur and thus be important to the state's jurisprudence because of the term's use in numerous contracts, including a differently numbered version of the Standard One To Four [*7] Family Residential Contract (Resale) Texas Real Estate Commission form that the parties entered into in this case. See Petitioner's Brief on the Merits at 5 n.12, *Intercont'l Group P'ship v. KB Home Lone Star L.P.*, 295 S.W.3d 650 (Tex. 2009) (No. 07-0815).

[392, 397 \(6th Cir. 1996\)](#); [Zinn v. Shalala, 35 F.3d 273, 276 \(7th Cir. 1994\)](#); [Little Rock Sch. Dist. v. Pulaski Cnty. Sch. Dist., # 1, 17 F.3d 260, 263 n.2 \(8th Cir. 1994\)](#); [Kilgour v. Pasadena, 53 F.3d 1007, 1010 \(9th Cir. 1995\)](#); [Beard v. Teska, 31 F.3d 942, 951-52 \(10th Cir. 1994\)](#); [Morris v. West Palm Beach, 194 F.3d 1203, 1207 \(11th Cir. 1999\)](#)). In reaching that conclusion, the Court noted that "enforceable judgments on the merits and court-ordered consent decrees create the 'material alteration of the legal relationship' [**9] of the parties' necessary" to confer prevailing party status on the plaintiff. [Id. at 604](#) (quoting [Tex. State Teachers Ass'n v. Garland Indep. Sch. Dist., 489 U.S. 782, 792-93, 109 S. Ct. 1486, 103 L. Ed. 2d 866 \(1989\)](#)). A voluntary change in the defendant's conduct, by contrast, lacked the requisite "judicial imprimatur" to confer prevailing party status on the plaintiff. [Id. at 605](#).

While *Buckhannon* involved a plaintiff who claimed to have prevailed because of the defendant's voluntary action, at least two Circuit Courts have applied its reasoning to defendants seeking attorney's fees as a result of plaintiffs' voluntary actions. In *Claiborne v. Wisdom*, the Seventh Circuit considered whether a defendant was a prevailing party after the plaintiff voluntarily moved to dismiss her claim. [414 F.3d 715 \(7th Cir. 2005\)](#). Exercising the discretion afforded it by [Rule 41\(a\)\(2\) of the Federal Rules of Civil Procedure](#),⁶ the district court dismissed the claim with prejudice. [Id. at 717](#). The Seventh Circuit affirmed. [Id. at 719](#). The order "effect[ed] a material alteration of [the plaintiff's] legal relationship with the other [**11] parties, because it terminate[d] any claims [the plaintiff] may have had . . . arising out of this set of operative facts"; because the claims were dismissed with prejudice, they would be barred by res judicata or claim preclusion. *Id.*

Similarly, the Federal Circuit has held that a defendant was a prevailing party after the plaintiff filed a "Declaration and Covenant Not to Sue" on the eve of trial. [Highway Equip. Co. v. FECO, Ltd., 469 F.3d 1027, 1035-36 \(Fed. Cir. 2006\)](#). In response to the declaration, the district court dismissed the plaintiff's claims with

prejudice. *Id.* The Federal Circuit concluded that the defendant could be considered a prevailing party. *Id.* The dismissal [**12] with prejudice, which extinguished the plaintiff's ability to sue again on its claims, had "the necessary judicial imprimatur to constitute a judicially sanctioned change in the legal relationship of the parties." [Id. at 1035](#).

[*868] In a case predating *Buckhannon*, cited by both parties, the Fifth Circuit considered whether a defendant was a prevailing party after the plaintiff voluntarily nonsuited his case with prejudice. [Dean v. Riser, 240 F.3d 505 \(5th Cir. 2001\)](#). The court held that a defendant is not a prevailing party under [section 1988](#) of the Civil Rights Act unless the defendant can establish that the plaintiff dismissed in order to escape an unfavorable judgment on the merits. [Id. at 511](#). The Fifth Circuit rejected the idea that the mere fact of dismissal, even with prejudice, was sufficient to confer prevailing party status on a defendant. [Id. at 512](#). The court observed that the decision to nonsuit may well reflect a legitimate litigation strategy that

reveals nothing about the merits of a plaintiff's case [and thus] does not warrant a conclusion that a defendant in such a case has prevailed. . . .

. . . [A] plaintiff whose claim appeared meritorious at the onset may encounter various [**13] changes in his litigation posture during the unpredictable course of litigation. "Decisive facts may not emerge until discovery or trial. The law may change or clarify in the midst of litigation."

[Id. at 510](#) (quoting [Christiansburg, 434 U.S. at 423](#)). Thus, the [HN7](#) federal courts have recognized that a defendant may be a prevailing party when the plaintiff nonsuits in two situations: when a suit is dismissed with prejudice, and when the nonsuit is taken to avoid an unfavorable merits decision.

B. Texas nonsuit law

[HN8](#) In Texas, plaintiffs may nonsuit at any time before introducing all of their evidence other than rebuttal evidence. *TEX. R. CIV. P. 162*. No court order is required. *Id.*; [Travelers Ins. Co. v. Joachim, 315 S.W.3d 860, 862 \(Tex. 2010\)](#). A nonsuit terminates a case "from 'the moment the motion is filed.'" [Joachim, 315 S.W.3d at 862](#) (quoting [Univ. of Tex. Med. Branch at Galveston v. Estate of Blackmon ex rel. Shultz, 195 S.W.3d 98, 100 \(Tex. 2006\)](#) (per curiam)). At the same time, a nonsuit does not affect any pending claim for affirmative relief or

⁶ [Rule 41](#) permits plaintiffs to dismiss their claims without a court order before the opposing party serves either an answer or a motion for summary judgment, or with the stipulation of all parties. *Fed. R. Civ. P. 41(a)(1)(A)(i), (ii)*. A dismissal under [Rule 41\(a\)\(1\)](#) is generally without prejudice. *Id. 41(a)(1)(B)*. If it is too late to dismiss under [Rule 41\(a\)\(1\)](#), a plaintiff may still elect to move to dismiss, but may do so only by court order "on terms that the court considers proper." *Fed. R. Civ. P. 41(a)(2)*.

motion for attorney's fees or sanctions. [*Id.* at 863](#); *TEX. R.CIV. P.* 162. When a case is nonsuited without prejudice, res judicata does not **[**14]** bar relitigation of the same claims. [*Klein v. Dooley*, 949 S.W.2d 307, 307 \(Tex. 1997\)](#).⁷

C. When does a nonsuit alter the parties' legal relationship?

In *KB Home*, we held that [*HN9*](#) a plaintiff who secured favorable jury findings but was awarded no damages was not a prevailing party because the plaintiff received no relief that materially altered the parties' legal relationship; the plaintiff's victory was simply illusory. [*KB Home*, 295 S.W.3d at 652](#). By comparison, we have no doubt that [*HN10*](#) a defendant who is the beneficiary of a nonsuit with prejudice would be a prevailing party. As the Fifth Circuit has observed, a dismissal or nonsuit with prejudice is "tantamount to a judgment on the merits." [*Riser*, 240 F.3d at 509](#). The res judicata effect of a nonsuit with prejudice works a permanent, inalterable change in the parties' legal relationship **[*869]** **[**15]** to the defendant's benefit: the defendant can never again be sued by the plaintiff or its privies for claims arising out of the same subject matter. [*Joachim*, 315 S.W.3d at 862](#) (citing [*Gracia v. RC Cola-7-Up Bottling Co.*, 667 S.W.2d 517, 519 \(Tex. 1984\)](#)). As such, we hold that a defendant is a prevailing party when a plaintiff nonsuits a case with prejudice.

In contrast, a nonsuit without prejudice works no such change in the parties' legal relationship; typically, the plaintiff remains free to re-file the same claims seeking the same relief. [*Klein*, 949 S.W.2d at 307](#).⁸ Like the

plaintiff in *KB Home*, the Eppses did not prevail upon the court to award them anything, either monetary or equitable. Moreover, we doubt that the parties to this agreement intended that there could be more than one prevailing party. But construing the agreement to apply to a plaintiff who nonsuits without prejudice could potentially result in just that, as the Eppses' counsel acknowledged in oral argument: after the defendant is awarded attorney fees in an initial action, the plaintiff could simply re-file the exact same claims, litigate them to a favorable judgment, and thus also become a prevailing party. Further, **[**16]** for us to determine that a defendant prevails within the meaning of the parties' agreement any time a plaintiff nonsuits without prejudice would require us to conclude that they sought to discourage all nonsuits.⁹ As the Fifth Circuit noted, imposing attorney's fees on plaintiffs who take nonsuits regardless of the reason for or effect of the nonsuit "would penalize the plaintiff for doing precisely what should be done" and actually encourage plaintiffs to pursue claims that should be abandoned. [*Riser*, 240 F.3d at 510](#). In construing the parties' agreement, it is reasonable to presume that they did not intend to encourage continued litigation of weak claims. But if, as the dissent suggests, any nonsuit will result in an award of attorney fees to the defendant, then a plaintiff may have the incentive to roll the dice and hope for a favorable judgment rather than accept an inevitable judgment for attorney's fees.

At the same time, it is logical to conclude that the parties intended to award attorney's fees to compensate the defendant when the plaintiff knowingly pursues a baseless action. It makes sense to conclude that the parties would have sought to "discourage the litigation of frivolous, **[**18]** unreasonable, or groundless claims" when a "calculating plaintiff . . . voluntarily withdraws his complaint 'to escape a disfavorable judicial determination on the merits.'" [*Id.*](#) (quoting [*Marquart v. Lodge 837, Int'l Ass'n of Machinists and Aerospace*](#)

⁷ A plaintiff may not, however, take a nonsuit to avoid an unfavorable venue ruling. [*In re Team Rocket, L.P.*, 256 S.W.3d 257, 258 \(Tex. 2008\)](#). Further, when a claimant nonsuits after an unfavorable partial summary judgment, the nonsuit is with prejudice as to the claims disposed of by the judgment. [*Hyundai Motor Co. v. Alvarado*, 892 S.W.2d 853, 854 \(Tex. 1995\)](#).

⁸ In this case, the Eppses contend that limitations would have barred any claims the Fowlers may have filed in a new lawsuit. Without considering the merits of that contention, we agree with the court of appeals that the mere possibility that limitations would bar future suits **[**17]** does not effect a change in the parties' relationship that confers prevailing party status on a defendant. Limitations is an affirmative defense that must be pleaded and proven. See [*KPMG Peat Marwick v. Harrison Cnty. Housing Fin. Corp.*, 988 S.W.2d 746, 748 \(Tex.](#)

[*1999*](#)) (citing [*Velsicol Chem. Corp. v. Winograd*, 956 S.W.2d 529, 530 \(Tex. 1997\)](#)). Further, limitations may, in some circumstances, be subject to exceptions like fraudulent concealment and the discovery rule. [*BP Am. Prod. Co. v. Marshall*, 342 S.W.3d 59, \(Tex. 2011\)](#). Until a defendant has secured a favorable ruling on a res judicata defense, there has been no material change in the parties' legal relationship

⁹ The Eppses maintain that section 17's purpose was to discourage the filing of frivolous claims. The agreement's language is not so narrow, however. If that were the provision's sole purpose, then it would award fees to a "prevailing defendant."

Workers, 26 F.3d 842, 852 (8th Cir. [*870] 1994)). That construction is consistent with the disfavor our cases have displayed toward nonsuits that are filed to circumvent unfavorable legal restrictions or rulings. See, e.g., *In re Team Rocket, L.P.*, 256 S.W.3d 257, 260 (Tex. 2008); *In re Bennett*, 960 S.W.2d 35, 36 (Tex. 1997); *Hyundai Motor Co. v. Alvarado*, 892 S.W.2d 853, 854 (Tex. 1995). Accordingly, in accord with *Riser*, we hold that **HN11** a defendant may be a prevailing party when a plaintiff nonsuits without prejudice if the trial court determines, on the defendant's motion, that the nonsuit was taken to avoid an unfavorable ruling on the merits.

The definition the Epps propose—that a defendant prevails any time the plaintiff nonsuits—at first blush appears to promise simplicity of application. But the mere availability of fees, in itself, will almost inevitably expand the issues that must be resolved in a lawsuit. The amount and reasonableness **[**19]** of the fees will likely be the subject of continuing litigation, no matter how prevailing party is defined. And, while a bright-line definition under which a defendant *never* prevails when a nonsuit is without prejudice would reduce the triable issues, it would enhance the possibility that plaintiffs who pursue frivolous claims suffer no consequences and fail to reward defendants whose efforts cause their opponents to yield the playing field. Our review of federal district court decisions within the Fifth Circuit suggests that *Riser*'s prevailing party test has not spawned a large amount of satellite litigation. In the decade since *Riser* was decided, only a bare handful of cases have focused on whether a defendant is a prevailing party under that case. See, e.g., *Barnes v. Sanchez*, NO. 3:07-CV-01184-M, 2011 U.S. Dist. LEXIS 50944, 2011 WL 1831602, at *2 (N.D. Tex. May 10, 2011); *Hilborn v. Klein Indep. Sch. Dist.*, NO. H-09-840, 2010 U.S. Dist. LEXIS 36011, 2010 WL 1463472, at *2 (S.D. Tex. Apr. 12, 2010); *Fox v. Vice*, NO. 2:06-CV-135, 2008 U.S. Dist. LEXIS 72624, 2008 WL 4386880, at *3 (W.D. La. Sept. 22, 2008), *aff'd*, 594 F.3d 423 (5th Cir. 2010), *vacated on other grounds*, 131 S. Ct. 2205, 180 L. Ed. 2d 45 (2011); *Butler v. MBNA Tech., Inc.*, NO. 3:02-CV-1715-H, 2004 U.S. Dist. LEXIS 3069, 2004 WL 389101, at *5 (N.D. Tex. Mar. 1, 2004). **[**20]** Moreover, the cases suggest that the determination has been made largely based upon inferences drawn from the course of events in the lawsuit; the federal courts have tended to place great weight upon the fact that a plaintiff's nonsuit has followed closely on the heels of a defendant's potentially dispositive motion. For example, in *Fox*, the court determined that the defendants were prevailing parties

in light of the fact that the plaintiff nonsuited only after the defendants moved to dismiss after the plaintiff conceded that she had no federal claim. *2008 U.S. Dist. LEXIS 72624, 2008 WL 4386880, at *3*. And in *MBNA Technology*, the court noted that the plaintiff nonsuited only after the defendants moved for summary judgment, and that the timing of the dismissal suggested that the plaintiff's dismissal was not motivated by her failure to uncover evidence supporting her claims in discovery, but instead, was attributable to her desire to avoid an unfavorable judgment. *2004 U.S. Dist. LEXIS 3069, 2004 WL 389101, at *5*; see also *Barnes*, 2011 U.S. Dist. LEXIS 50944, 2011 WL 1831602, at *2 (finding that the defendant was a prevailing party when the plaintiff moved to dismiss only after trial had commenced and the defendant had moved for dismissal); *Hilborn*, 2010 U.S. Dist. LEXIS 36011, 2010 WL 1463472, at *3 **[**21]** (finding that defendants were prevailing parties when the plaintiff sought dismissal only after the defendants presented uncontested affidavits establishing that the plaintiff had no viable First Amendment claim).

In applying the test, courts should rely as far as possible on the existing record and affidavits, and resort to live testimony only in rare instances. See *Riser*, 240 F.3d at 511. A number of factors **[*871]** may support an inference that a plaintiff has nonsuited in order to avoid an unfavorable ruling. For example, as in *MBNA Technology*, if a plaintiff nonsuits only after a motion for summary judgment is filed, it may suggest that the plaintiff elected to do so in order to escape summary judgment. See *MBNA Tech., Inc.*, 2004 U.S. Dist. LEXIS 3069, 2004 WL 389101. Further, a plaintiff's unexcused failure to respond to requests for admissions or other discovery that could support entry of an adverse judgment may also indicate that a nonsuit was taken to foreclose that possibility. Similarly, a failure to timely identify experts or other critical witnesses could suggest that a nonsuit is neither tactical nor voluntary. And the existence of other procedural obstacles, such as the plaintiff's inability to join necessary **[**22]** parties, may also signal that the defendant has prevailed over the plaintiff. On the other hand, as we have noted, it is reasonable to presume that the parties did not intend to encourage continued litigation when discovery reveals previously unknown flaws in the plaintiff's claims. Accordingly, evidence that the suit was not without merit when filed may indicate that the defendant has not prevailed and is therefore not entitled to attorney's fees.

In this case, the record reflects that the trial court based its decision solely on the fact that the plaintiff nonsuited

without prejudice. While the court of appeals' judgment reversing the trial court's award of fees is consistent with our holding today, no determination has been made whether the Fowlers nonsuited in order to avoid an unfavorable ruling.¹⁰ Accordingly, we remand the case to the trial court to apply the standard we announce.

III. Remand for Consideration of Chapter 10 Remedy

The Eppses argue that, even if the court of appeals was correct in reversing the trial court's award of attorney's fees under section 17 of the earnest money contract, its judgment was erroneous. They maintain that the court of appeals erred by rendering judgment dismissing the Fowlers' claims with prejudice rather than remanding to allow the trial court to consider the Eppses' reserved claim for attorney's fees under chapter 10 of the Civil Practice and Remedies Code. The Fowlers contend that the Eppses waived that issue by failing to appeal the portion of the trial court's judgment denying all relief not expressly granted. We agree with the Eppses. The trial court's judgment recited that "[a]ny relief not granted herein is expressly denied." The Fowlers argue that the Eppses were required to appeal that portion of the judgment in order to be entitled to a remand. That argument fails for two reasons.

First, [HN12](#) Rule 25.1(c) of the Rules of Appellate Procedure only requires a party who seeks to alter the trial court's judgment to file a notice of appeal. **[**24]** In this case, the judgment that the Eppses sought under chapter 10—\$22,950 in attorney's fees—is the same as the judgment that was awarded under section 17 of the earnest money contract. Thus, the Eppses were not required to file a notice of appeal challenging the trial court's denial of fees under chapter 10. Understandably, the Eppses' focus in the brief they filed in the court of appeals was on the fees the trial court awarded under the contract. But they **[*872]** advised the court of their affirmative claim under chapter 10, and one of the issues the brief presented was whether "a trial court abuse[s] its discretion in awarding attorney fees after a plaintiff's nonsuit where [the] defendant . . . had an independent counterclaim for affirmative relief on file at

the time of the nonsuit." The court of appeals was sufficiently apprised of the Eppses' contention that they would be entitled to a remand if the court reversed the contractual attorney's fees. *See generally* [Consol. Eng'g Co. v. S. Steel Co.](#), 699 S.W.2d 188 (Tex. 1985).

Moreover, the court of appeals' disposition is inconsistent with *Rule 162 of the Rules of Civil Procedure*. [HN13](#) Under that rule, a nonsuit "shall not prejudice the right **[**25]** of an adverse party to be heard on a pending claim for affirmative relief." The court of appeals' rendition of judgment dismissing the Fowlers' claims without prejudice without allowing the Eppses the opportunity for a hearing on their chapter 10 claims ran afoul of *Rule 162*.

IV. Conclusion

The court of appeals did not err in reversing the trial court's award of attorney's fees under section 17 of the earnest money contract, as the lower court awarded fees based solely on the Howards' nonsuit without prejudice. Because the trial court has had no opportunity to determine whether the Fowlers dismissed to avoid an unfavorable judgment, we vacate the court of appeals' judgment and remand the Eppses' contractual attorney's claim to the trial court. We also remand the Eppses' claim for fees under chapter 10 of the Civil Practice and Remedies Code.

Debra H. Lehrmann

Justice

OPINION DELIVERED: August 26, 2011

Dissent by: Nathan L. Hecht

Dissent

The Fowlers and the Eppses signed a contract agreeing that if either sued the other, the "prevailing party" would be entitled to recover reasonable attorney fees. The Fowlers sued the Eppses, but after the Eppses had incurred \$22,950 in attorney fees defending the suit, the Fowlers **[**26]** suddenly nonsuited. Did the Eppses prevail?

Because the parties were undisputedly free to agree on what would happen in this situation, the answer depends entirely on what they meant when they signed the contract. "In construing a written contract, the

¹⁰ Of course, parties may elect to define prevailing party any way they choose, see [Healthcare Cable Sys., Inc. v. Good Shepherd Gen. Hosp., Inc.](#), 180 S.W.3d 787, 791 (Tex. App.—Tyler 2005, no pet.); [Alexander v. Cooper](#), 843 S.W.2d 644, 647 (Tex. App.—Corpus Christi 1992, no writ), and could conceivably **[**23]** say that a defendant prevails any time a plaintiff nonsuits, with or without prejudice.

primary concern of the court is to ascertain the true intentions of the parties as expressed in the instrument."¹ But the Court is not primarily concerned with, or even especially interested in, ascertaining the Fowlers' and the Eppses' intentions from the text of their contract. The Court's primary concern is whether recovery of attorney fees from a plaintiff who nonsuits is good policy, and it presumes the Fowlers and the Eppses must have shared its view of the subject.

The Court begins, as it should, with the presumption that the Fowlers and the Eppses intended to give the word "prevailing" its ordinary meaning but then turns to federal case law for that meaning. The Court finds one case: the Fifth Circuit's 2001 decision in *Dean v. Riser*.² There, the issue was whether a defendant sued in a civil rights action was a prevailing party within the meaning of [42 U.S.C. § 1988\(b\)](#) [****27**] when the plaintiff's claim was nonsuited [***873**] with prejudice.³ The determinative consideration was "the general policies and competing interests that prompted Congress to enact [Title VII of the Civil Rights Act of 1964] authorizing district courts to award attorney's fees to prevailing parties in civil rights litigation."⁴ The court finally concluded:

The policy considerations surrounding the law of attorney's fees for prevailing civil rights litigants demand a flexible rule. It should empower trial courts to balance the concerns for encouraging vigorous enforcement of civil rights against discouraging frivolous litigation within the specific and unique context of each individual case. Accordingly, we hold that a defendant is not a prevailing party within the meaning of [§ 1988](#) when a civil rights plaintiff voluntarily dismisses his claim, unless the defendant can demonstrate that the plaintiff withdrew to avoid a disfavorable judgment on the merits.⁵

For two reasons, the federal cases the Court cites do not give guidance. First, the cases cited all deal with

legislative policy reflected in public statutes, not with private [****28**] parties' intentions in ordering their personal affairs by contract. The Court notes this problem, observing that "it might be improper to look to cases" construing statutes based on legislative policy choices for guidance in determining what private parties intended in a contract,⁶ but then does it anyway. *Riser* could not be clearer in explaining that the availability of attorney fees there depended on policy considerations in the Civil Rights Act. There are no legislative policy choices involved in deciding what "prevailing party" means in a private agreement, even a standard form agreement like the one in this case. Second, nothing suggests that private parties like the Fowlers and the Eppses would have federal case law in mind in reaching an agreement that attorney fees should go to a prevailing party.

The place to look for the ordinary meaning of words is not federal case law but a dictionary.⁷ According to *Webster's Third New International Dictionary*, to prevail means "to gain victory by virtue of strength or superiority : win mastery : TRIUMPH".⁸ Now surely it is beyond argument that, policy considerations aside, when a plaintiff decides to abandon his lawsuit, [****29**] the defendant, thereby relieved of the further worry and expense of defending himself, thinks he won. Common experience teaches that the challenger who forfeits, loses, and his opponent wins. Imagine the conversation between the Eppses and their lawyer: "Good news! The Fowlers dropped their suit." "Wow! So we won!" "No, you didn't win. The Fowlers just gave up." "But we said all along the case had no merit, and now they've effectively conceded it. We didn't win?" "Well, you have to understand that a federal case construing the Civil Rights Act has held that"

[***874**] The Court's problem with the Eppses' common-sense, dictionary understanding of "prevailing" is that it

⁶ *Ante* at __ n.3.

¹ [J.M. Davidson, Inc. v. Webster](#), 128 S.W.3d 223, 229 (Tex. 2003).

² [240 F.3d 505 \(5th Cir. 2001\)](#).

³ [Id. at 506](#).

⁴ [Id. at 507](#).

⁵ [Id. at 511](#).

⁷ The Court accuses me of hypocrisy, or at least a faulty memory, pointing out that I joined the majority in [Intercont'l Grp. P'ship v. KB Home Lone Star L.P.](#), 295 S.W.3d 650 (Tex. 2009), which considered case law in determining when a plaintiff is a prevailing party. But we held in *KB Home* that a plaintiff who sues for damages and recovers nothing does not prevail. The case law the Court cited only supported the dictionary meaning of "prevailing".

⁸ WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1961).

"appears to promise simplicity **[**30]** of application."⁹ The Court's notion of what it means to prevail has the virtue of complexity. The defendant prevails if the plaintiff takes a nonsuit with prejudice (because further suit would be barred by res judicata, an affirmative defense¹⁰), but not if the nonsuit is without prejudice, even if further action would be barred as if the nonsuit were with prejudice (by limitations, for example, another affirmative defense¹¹), except when the nonsuit is taken to avoid an unfavorable judgment. It is impossible to think that parties like the Fowlers and the Epps would ever have all this in mind when agreeing that a prevailing party should recover attorney fees.

The internal inconsistencies in this new test cannot be reconciled. One is between nonsuits of weak claims that should not be discouraged and nonsuits of claims to avoid unfavorable judgments that should be discouraged. The Court reasons that awarding attorney fees against a plaintiff who nonsuits a "weak claim[]" that "should be abandoned" would "penalize the plaintiff for doing precisely what should be done".¹² "At the same time," the **[**31]** Court concludes that attorney fees should be awarded against a plaintiff who "nonsuit[s] in order to avoid an unfavorable judgment."¹³ What is the difference between a weak claim that should be abandoned, which can be nonsuited with impunity, and a claim that is likely to result in an unfavorable judgment, which cannot? Says the Court: "the determination has been made largely based upon inferences drawn from the course of events in the lawsuit."¹⁴ In other words: there is none. Then why differentiate between them? The pieces of this puzzled ruling have no unifying principle but are supported instead by a somewhat cynical pragmatism: the defendant who is nonsuited without prejudice cannot recover attorney fees unless he is willing to continue litigating to prove that the plaintiff would have lost anyway. And so a contractual provision unquestionably intended to discourage unnecessary litigation is

construed either to foment it or do nothing at all.

Another inconsistency is in the Court's differentiation between post-nonsuit litigation that is barred by res judicata and post-nonsuit litigation that is barred by limitations. The Court concludes **[**32]** that attorney fees may be awarded against the nonsuiting plaintiff in the former instance but not the latter. Why? Because, the Court explains, "the mere possibility that limitations would bar future suits does not effect a change in the parties' relationship that confers prevailing party status on a defendant."¹⁵ But the bar of res judicata is also a "mere possibility" in the sense that both it and limitations are affirmative defenses that are waived if not raised. If either is successfully raised, the effect is the same: suit is barred. Yet the Court goes out of its way to treat them differently. As hard as it is to understand why the Court would differentiate between the two defenses, it is impossible to think the Fowlers and the Epps did.

[*875] The Court doubts that the Fowlers and the Epps intended for a defendant to be awarded attorney fees after a nonsuit without prejudice because the result could be two different prevailing parties if the plaintiff refiles the same suit and wins. But the difficulty the Court sees in this example is not avoided by sparing the nonsuiting plaintiff from an attorney fee award. In the Court's view, if the plaintiff nonsuits without **[**33]** prejudice a claim that is then barred by limitations, the defendant has not prevailed. But if the plaintiff refiles the same action, the defense is raised, and the defendant wins, has he prevailed? Of course. The Court does not avoid the difficulty it raises.

In reality, the difficulty the Court sees should not have been any problem at all for the Fowlers and the Epps, had they thought about it before signing their contract. It is neither illogical nor unreasonable for parties to agree that a plaintiff who abandons litigation should make everyone whole, even if he tries again and wins. The law may afford a mulligan, but the parties can decide it should not be free. And if a prevailing attorney is to recover attorney fees, it makes perfect sense to award them to a defendant both when he is nonsuited, and again later when a second suit is dismissed based on res judicata or limitations.

Finally, the Court worries that to enforce a fee-shifting provision like the one in this case will result in satellite litigation over attorney fees. Usually, determining the amount of a party's reasonable attorney fees does not

⁹ *Ante* at __.

¹⁰ [*Tony Gullo Motors I, L.P. v. Chapa*, 212 S.W.3d 299, 314 \(Tex. 2006\)](#).

¹¹ *Id.*

¹² *Ante* at __.

¹³ *Ante* at __.

¹⁴ *Ante* at __.

¹⁵ *Ante* at __ n.6.

require much litigation. But the important point, here and throughout, is **[**34]** that any cause for concern belongs to the parties in reaching agreement, not to the Court in setting policy.

In the end, the Court forces parties who desire a broader fee-shifting agreement than it thinks is good policy to use clearer words than "prevailing party". "Just party" would only encourage more judicial subjectivism. I don't think "escaping party" would do it, because the nonsuiting plaintiff may be escaping the defendant's becoming a prevailing party. "Fortunate party" might work, though it's very general. Viewed from another angle, the provision might award fees to the "oppressed party", though it, too, is very general and also injects a moral tone. But if "prevailing" is not clear enough, probably no one word is. To be safe, parties will have to spell out their intentions in more detail. An agreement to shift attorney fees will require more attorney fees to draft. But it will be worth it.

"A court must be careful not to substitute its own view of what should have been intended for what was intended."¹⁶ In accordance with the parties' agreement, I would award the Epps reasonable attorney fees. Accordingly, I respectfully dissent.

Nathan L. Hecht

Justice

Opinion delivered: August 26, 2011

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¹⁶ [*Lane Bank Equip. Co. v. Smith S. Equip., Inc.*, 10 S.W.3d 308, 321 \(Tex. 2000\)](#) **[**35]** (Hecht, J., concurring) (emphasis in original).