IN THE SUPREME COURT OF TEXAS

NO. 07-0815

INTERCONTINENTAL GROUP PARTNERSHIP, PETITIONER,

v.

KB HOME LONE STAR L.P., RESPONDENT

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE THIRTEENTH DISTRICT OF TEXAS

Argued March 12, 2009

JUSTICE WILLETT delivered the opinion of the Court, in which CHIEF JUSTICE JEFFERSON, JUSTICE HECHT, JUSTICE GREEN, and JUSTICE JOHNSON joined.

JUSTICE BRISTER filed a dissenting opinion, in which JUSTICE O'NEILL, JUSTICE WAINWRIGHT and JUSTICE MEDINA joined.

This breach-of-contract case poses a straightforward question: What does "prevailing party" mean? We have construed this phrase in a discretionary fee-award statute[1] but not in a mandatory fee-award contract. Specifically, when a contract mandates attorney's fees to a "prevailing party," a term undefined in the contract, has a party "prevailed" if the jury finds the other side violated the contract but awards no money damages? We agree with the United States Supreme Court, which holds that to prevail, a claimant must obtain actual and meaningful relief, something that materially

[1] *Green Int'l, Inc. v. Solis*, 951 S.W.2d 384, 390 (Tex. 1997).

alters the parties' legal relationship.[2] That is, a plaintiff must prove compensable injury and secure an enforceable judgment in the form of damages or equitable relief. The plaintiff here secured neither. We thus reach the same conclusion as in another breach-of-contract case decided today: "a client must gain something before attorney's fees can be awarded."[3] We reverse the court of appeals' judgment and render a take-nothing judgment.

I. Background

KB Home Lone Star L.P. (KB Home), a national homebuilder, contracted with Intercontinental Group Partnership (Intercontinental), a real estate developer, to develop lots in a McAllen subdivision known as Santa Clara and sell them to KB Home. The contract provided:

> Attorney's fees. If either party named herein brings an action to enforce the terms of this Contract or to declare rights hereunder, the prevailing party in any such action, on trial or appeal, shall be entitled to his reasonable attorney's fees to be paid by losing party as fixed by the court.

"Prevailing party" was not defined.

Intercontinental began selling Santa Clara lots to other buyers, and KB Home sued for breach of contract (among other theories) and sought specific performance, damages, injunctive relief, and attorney's fees.[4] KB Home did not seek a declaratory judgment under the contract. At trial, KB Home sought only one type of actual damages: lost profits due to Intercontinental's alleged breach.

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[2] *Farrar v. Hobby*, 506 U.S. 103, 111-12 (1992).

[3] *MBM Fin. Corp. v. Woodlands Operating Co.*, ___ S.W.3d ___, ___ (Tex. 2009) (construing the attorney's-fees provision in section 38.001 of the Texas Civil Practice & Remedies Code, which specifies that attorney's fees must be "in addition to the amount of a valid claim and costs").

[4] Intercontinental had sold a majority of the Santa Clara lots to other developers, so KB Home dropped its specific performance and injunctive relief claims before trial and sought only lost profits.

Intercontinental counterclaimed, asserting that KB Home failed to honor an oral agreement to buy Santa Clara at a below-market price in exchange for an exclusive partner arrangement for future property acquisitions.

The jury found that Intercontinental breached the written contract but answered "0" on damages, though it did award KB Home $66,000 in attorney's fees.[5] The jury rejected Intercontinental's oral-agreement claim and consequently did not answer the conditional question about Intercontinental's attorney's fees related to that claim. Both parties moved for judgment, claiming attorney's fees as the "prevailing party." The trial court sided with KB Home and signed a judgment in its favor for $66,000, concluding that KB Home "should recover its damages against [Intercontinental] as found by the jury . . . ." The court of appeals affirmed.[6]

II. Is KB Home the Prevailing Party?

Under the American Rule, litigants' attorney's fees are recoverable only if authorized by statute or by a contract between the parties.[7]

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[5] Specifically, the jury was asked: "Did Intercontinental Group Partnership fail to comply with the Santa Clara Lot Contract?" and separately "What sum of money, if any, if paid now in cash, would fairly and reasonably compensate KB Home Lone Star, L.P. for its damages, if any, that resulted from such failure to comply with the Santa Clara Lot Contract?"

[6] ___ S.W.3d ___, ___.

[7] *MBM Fin. Corp. v. Woodlands Operating Co.*, __ S.W.3d __, __ ("Texas has long followed the 'American Rule' prohibiting fee awards unless specifically provided by contract or statute." (citing *Tony Gullo Motors I, L.P. v. Chapa*, 212 S.W.3d 299, 310-11 (Tex. 2006) ("Absent a contract or statute, trial courts do not have inherent authority to require a losing party to pay the prevailing party's fees.")).

A. Applicability of Chapter 38 to KB Home's Breach Claim

We first address the applicability of the discretionary attorney's-fees provision in Chapter 38 of the Civil Practice and Remedies Code.[8] As seen here, the statutory and contract provisions are similar in general but dissimilar in particular:

THE CONTRACT	CHAPTER 38
If either party named herein brings an action to enforce the terms of this Contract or to declare rights hereunder, the prevailing party . . . shall be entitled to his reasonable attorney's fees to be paid by losing party as fixed by the court.	A person may recover reasonable attorney's fees from an individual or corporation, in addition to the amount of a valid claim and costs, if the claim is for . . . an oral or written contract.

We held in *Green International, Inc. v. Solis* that before a party is entitled to fees under section 38.001, that "party must (1) prevail on a cause of action for which attorney's fees are recoverable, and (2) recover damages."[9] If *Green* and Chapter 38 applied to this case, KB Home could not recover attorney's fees since it did not recover any damages. But *Green*, while instructive, is not controlling, nor is Chapter 38.

Parties are free to contract for a fee-recovery standard either looser or stricter than Chapter 38's, and they have done so here. As KB Home points out, Chapter 38 permits recovery of attorney's fees "in addition to the amount of a valid claim," while nothing in the contract expressly requires that a party receive any "amount" of damages. The triggering event under the contract is that a party

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[8] TEX. CIV. PRAC. & REM. CODE § 38.001.

[9] 951 S.W.2d 384, 390 (Tex. 1997).

prevail in an action "to enforce the terms of this Contract or to declare rights hereunder . . . ." True enough, but the question remains: what does "prevailing party" mean under the contract?

B. Attorney's Fees Under the Contract

The contract leaves "prevailing party" undefined, so we presume the parties intended the term's ordinary meaning.[10] We have found the United States Supreme Court's analysis helpful in this area.[11] In *Hewitt v. Helms*, the Court was faced with the question of whether a plaintiff who obtained a favorable judicial pronouncement in the course of litigation, yet suffered a final judgment against him, could be a prevailing party.[12] Helms had sued several prison officials alleging a violation of his constitutional rights.[13] The district court granted summary judgment against him on the merits of his claim, but the court of appeals reversed, holding that he had a valid constitutional claim.[14] On remand, the district court still rendered summary judgment against him, finding that the defendants were shielded by qualified immunity.[15] Helms then sought his attorney's fees, claiming that the court of appeals' decision made him the prevailing party.[16] The Supreme Court disagreed, saying "[r]espect for ordinary language requires that a plaintiff receive at least some relief on the

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[10] *See Valence Operating Co. v. Dorsett*, 164 S.W.3d 656, 662 (Tex. 2005).

[11] *See, e.g.*, *Dallas v. Wiland*, 216 S.W.3d 344, 358 n.61 (Tex. 2007); *Sw. Bell Mobile Sys., Inc. v. Franco*, 971 S.W.2d 52, 55-56 (Tex. 1998); *Grounds v. Tolar Indep. Sch. Dist.*, 856 S.W.2d 417, 423 (Tex. 1993).

[12] 482 U.S. 755, 757 (1987).

[13] *Id*.

[14] *Id*. at 757-58.

[15] *Id*. at 758.

[16] *Id*. at 759.

merits of his claim before he can be said to prevail."[17] And since Helms did not obtain a damages award, injunctive or declaratory relief, or a consent decree or settlement in his favor, he was not a prevailing party.[18] Five years later in *Farrar v. Hobby*, a federal civil-rights case, the Court elaborated:

> [T]o qualify as a prevailing party, a . . . plaintiff must obtain at least some relief on the merits of his claim. The plaintiff must obtain an enforceable judgment against the defendant from whom fees are sought, or comparable relief through a consent decree or settlement. Whatever relief the plaintiff secures must directly benefit him at the time of the judgment or settlement. Otherwise the judgment or settlement cannot be said to "affect the behavior of the defendant toward the plaintiff." Only under these circumstances can civil rights litigation effect "the material alteration of the legal relationship of the parties" and thereby transform the plaintiff into a prevailing party. In short, a plaintiff "prevails" when actual relief on the merits of his claim materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff.[19]

The Court concluded that the plaintiff "prevailed" in *Farrar* because he was awarded one dollar in damages: "A judgment for damages in any amount, whether compensatory or nominal, modifies the defendant's behavior for the plaintiff's benefit by forcing the defendant to pay an amount of money he otherwise would not pay."[20] *Farrar* did not speak to whether a plaintiff awarded zero damages can claim prevailing-party status, but under the *Farrar* Court's analysis, a plaintiff who receives no judgment for damages or other relief has not prevailed.

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[17] *Id*. at 760.

[18] *Id*.

[19] 506 U.S. 103, 111-12 (1992) (reviewing attorney's fees awarded pursuant to 42 U.S.C. § 1988) (citations omitted).

[20] *Id*. at 113-14 (noting that "the prevailing party inquiry does not turn on the magnitude of the relief obtained").

The trial-court judgment in today's case recited the jury's finding that "[t]he sum of zero dollars would fairly and reasonably compensate KB" for its damages, if any, resulting from Intercontinental's breach, and that "[t]he sum of sixty-six thousand dollars and zero cents" constituted a reasonable fee for the necessary services of KB Home's attorneys. The judgment continued, however:

> It appearing to the Court that, based upon the verdict of the jury, KB Home Lone Star should recover its *damages* against the International Group Partnership as found by the jury, and the Court so finds.
>
> IT IS ACCORDINGLY ORDERED, ADJUDGED AND DECREED that KB Home Lone Star have and recover from the International Group Partnership judgment for the sum of sixty-six thousand dollars and zero cents ($66,000.00).[21]

The court erred in making that award. The jury answered "0" on damages, and KB Home sought no other type of relief, so the trial court should have rendered a take-nothing judgment against KB Home on its contract claim.[22]

It seems beyond serious dispute that KB Home achieved no genuine success on its contract claim. Whether 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. It recovered no damages; it secured no declaratory or injunctive relief; it obtained no consent decree or settlement in its favor; it received nothing of value

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[21] (Emphasis added).

[22] *Cf. State Farm Life Ins. Co. v. Beaston*, 907 S.W.2d 430, 437-38 (Tex. 1995) (rendering take-nothing judgment against party who recovered no damages on claim alleging violation of Insurance Code article 21.21, even assuming *arguendo* the party prevailed on the article 21.21 claim).

of any kind, certainly none of the relief sought in its petition.[23] No misconduct was punished or deterred, no lessons taught. KB Home sought over $1 million in damages, but instead left the courthouse empty-handed: "That is not the stuff of which legal victories are made."[24] Nor do we perceive any manner in which the outcome materially altered the legal relationship between KB Home and Intercontinental.[25] Before the lawsuit, Intercontinental was selling lots that were promised to KB Home. After the lawsuit, Intercontinental had sold the promised lots and was not required to pay a single dollar in damages or do anything else it otherwise would not have done.

As judgment should have been rendered in Intercontinental's favor, it is untenable to say that KB Home prevailed and should recover attorney's fees. A stand-alone finding on breach confers no

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[23] *See Helms*, 482 U.S. at 760.

[24] *Id*.

[25] *See Farrar*, 506 U.S. at 111-12.

benefit whatsoever.[26] A zero on damages necessarily zeroes out "prevailing party" status for KB Home.[27]

C. Declaration of Rights?

KB Home argues that it should nonetheless recover attorney's fees because it sued to "declare rights" under the contract and prevailed by obtaining a jury verdict that Intercontinental breached the contract. We disagree. In *Southwestern Bell Mobile Systems v. Franco* we noted that "[i]t is the

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[26] *See id*. at 111 (to be a prevailing party, "[w]hatever relief the plaintiff secures must directly benefit him . . . ."). It is difficult to conclude a breach-of-contract plaintiff has prevailed when the jury says the plaintiff was wholly uninjured and denies all requested relief. As the dissent recognizes, money damages are essential in contract claims seeking money damages (though not for contract claims seeking something else). ___ S.W.3d ___, ___. Every single court of appeals has likewise held that one of the required elements in a breach-of-contract suit seeking money damages is that the plaintiff was in fact damaged by the breach. *Wright v. Christian & Smith*, 950 S.W.2d 411, 412 (Tex. App.—Houston [1st Dist.] 1997, no pet.); *Fieldtech Avionics & Instruments, Inc. v. Component Control.com, Inc.*, 262 S.W.3d 813, 825 (Tex. App.—Fort Worth 2008, no pet.); *Roundville Partners, L.L.C. v. Jones*, 118 S.W.3d 73, 82 (Tex. App.—Austin 2003, pet. denied); *Killeen v. Lighthouse Elec. Contractors, L.P.*, 248 S.W.3d 343, 349 (Tex. App.—San Antonio 2007, pet. denied); *Reynolds v. Nagley*, 262 S.W.3d 521, 527 (Tex. App.—Dallas 2008, pet. denied); *West v. Brenntag Sw., Inc.*, 168 S.W.3d 327, 337 (Tex. App.—Texarkana 2005, pet. denied); *Domingo v. Mitchell*, 257 S.W.3d 34, 39 (Tex. App.—Amarillo 2008, pet. denied); *Hovorka v. Cmty. Health Sys., Inc.*, 262 S.W.3d 503, 508-09 (Tex. App.—El Paso 2008, no pet.); *Sullivan v. Smith*, 110 S.W.3d 545, 546 (Tex. App.—Beaumont 2003, no pet.); *Bank of Am., N.A. v. Hubler*, 211 S.W.3d 859, 864 (Tex. App.—Waco 2006, pet. granted, judgm't vacated w.r.m.); *United Plaza-Midland, L.L.C. v. First Serv. Air Conditioning Contractors, Inc.*, No. 11-05-00382-CV, 2007 WL 4536525, at *7 (Tex. App.—Eastland Dec. 20, 2007, pet. denied) (mem. op.); *Lake v. Premier Transp.*, 246 S.W.3d 167, 173 (Tex. App.—Tyler 2008, no pet.); *Pegasus Energy Group v. Cheyenne Petroleum*, 3 S.W.3d 112, 127 (Tex. App.—Corpus Christi 1999, pet. denied); *West v. Triple B Servs., L.L.P.*, 264 S.W.3d 440, 446 (Tex. App.—Houston [14th Dist.] 2008, no pet.).

[27] We said in a 1998 decision discussing *Farrar* that two plaintiffs who proved retaliatory discharge under Texas law "prevailed" even though the jury awarded no money damages. *Sw. Bell Mobile Sys. v. Franco*, 971 S.W.2d 52, 56 (Tex. 1998) (per curiam). Unlike today's case, however, one of the plaintiffs in *Franco* received equitable relief: reinstatement. As to that plaintiff, *Franco* correctly decided that he was a prevailing party. However, like KB Home in this case, the other *Franco* plaintiff received no relief whatsoever. As we noted in *Franco*, under the United States Supreme Court's reasoning in *Farrar,* "'the only reasonable fee'" when a plaintiff fails to prove damages is usually "'no fee at all.'" *Id*. at 55-56 (quoting *Farrar*, 506 U.S. at 115). Also, our 1998 *Franco* decision predated the United States Supreme Court's 2001 decision in *Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health & Human Services*, 532 U.S. 598, 603 (2001), which refined its earlier analysis and basically held: "no money judgment, no fees." Accordingly, we disagree with *Franco* that a plaintiff who recovers no money and receives no equitable relief can be a prevailing party. Instead, a plaintiff must receive affirmative judicial relief to be considered a prevailing party.

judgment, not the verdict, that we must consider in determining whether attorney's fees are proper."[28] The United States Supreme Court has likewise reasoned that the *judgment* is critical to the prevailing-party determination.[29] In this case, the trial court should have rendered a take-nothing judgment on KB Home's contract claim. Neither law nor logic favors a rule that bestows "prevailing party" status upon a plaintiff who requests $1 million for actual injury but pockets nothing except a jury finding of non-injurious breach; to prevail in a suit that seeks only actual damages — compensation for provable economic harm — there must be a showing that the plaintiff was actually harmed, not merely wronged.

If KB Home had brought its breach-of-contract case and obtained favorable answers on the same "failure to comply" questions, but the jury also found that an affirmative defense barred KB Home's claim, a take-nothing judgment in favor of Intercontinental would have been rendered. There would be no dispute that KB Home had not prevailed, despite jury findings that Intercontinental breached. No rational distinction exists between that scenario and the one before us. In both, the end result is a take-nothing judgment with no meaningful judicial relief for KB Home. Its only "relief" in either case is the gratification that comes with persuading a jury that Intercontinental behaved badly. But vindication is not always victory. However satisfying as a matter of principle, "purely technical or *de minimis*" success affords no actual relief on the merits

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[28] 971 S.W.2d at 56.

[29] *Buckhannon*, 532 U.S. at 603-04.

that would materially alter KB Home's relationship with Intercontinental.[30] Accordingly, KB Home, while perhaps a "nominal winner"[31] in convincing the jury that it was "wronged,"[32] cannot be deemed a "prevailing party" in any non-Pyrrhic sense.[33]

III. Is Intercontinental the Prevailing Party?

If KB Home "lost" by receiving no damages does that mean Intercontinental "won" by remitting no damages? We cannot reach this question if it is not properly presented, and it is not. On the record before us,[34] it is undisputed that Intercontinental neither preserved the issue nor presented any evidence (either before, during, or after trial) regarding its attorney's fees for

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[30] *See Tex. State Teachers Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 792 ("Where the plaintiff's success on a legal claim can be characterized as purely technical or *de minimis*, a district court would be justified in concluding that" attorney's fees should be denied.).

[31] ABRAHAM LINCOLN, NOTES FOR LAW LECTURE (July 1, 1850), *reprinted in* 2 COLLECTED WORKS OF ABRAHAM LINCOLN 142 (John G. Nicolay & John Hay eds. 1894) ("Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser — in fees, expenses, and waste of time.").

[32] *But see Zapata Hermanos Sucesores, S.A. v. Hearthside Baking Co.*, 313 F.3d 385, 389 (7th Cir. 2002) (Posner, J.) ("[A] breach of contract is not considered wrongful activity in the sense that a tort or a crime is wrongful. When we delve for reasons, we encounter Holmes's argument that practically speaking the duty created by a contract is just to perform or pay damages . . . .") (citing OLIVER WENDELL HOLMES, JR., THE COMMON LAW 300-02 (1881) and Oliver W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 462 (1897)).

[33] *See Goland v. Cent. Intelligence Agency*, 607 F.2d 339, 356 (D.C. Cir. 1978) (declining to define "substantially prevail" in the Freedom of Information Act but doubting "that plaintiffs could be said to have 'substantially prevailed' if they, like Pyrrhus, have won a battle but lost the war."). *See also Farrar v. Hobby*, 506 U.S. 103, 117, 119 (1992) (O'Connor, J., concurring) (noting that a plaintiff who achieves a purely technical victory, something Justice O'Connor labels "[c]himerical accomplishments," has in reality "failed to achieve victory at all, or has obtained only a pyrrhic victory for which the reasonable fee is zero.").

[34] In this Court, both the clerk's and reporter's records are partial.

defending KB Home's breach-of-contract claim.[35] This failure, along with others discussed below, waives any right to recovery.[36]

Intercontinental contends that the phrase "fixed by the court" in the contract means the trial judge, not the jury, decides the proper measure of attorney's fees after trial ends, thus "there was no need for Defendant to have submitted a question on attorneys fees." Reading "fixed by the court" to mean "fixed by the judge" is a straightforward construction.[37] But a contract's overriding purpose is to capture the parties' intent, meaning we must construe it in light of how the parties meant to construe it. In this case, the parties' trial conduct is itself instructive.

In this case, KB Home submitted the attorney's-fees issue, like other fact issues, to the jury, not to the court, and the record contains no indication that Intercontinental objected.[38] Intercontinental's lone pleading requesting attorney's fees is its original counterclaim, where it

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[35] As its briefing makes clear, the only evidence Intercontinental introduced on attorney's fees, and the only jury question it submitted on attorney's fees, concerned "its *separate counterclaim* for breach of an *oral* agreement by Plaintiff" (emphasis in original), not its defense of KB Home's breach-of-contract claim. Intercontinental concedes that since it lost on that affirmative claim, "the jury rightfully denied Defendant's request for attorneys fees on that claim, and Defendant does not complain about that finding."

[36] *See Bocquet v. Herring*, 972 S.W.2d 19, 21 (Tex. 1998) (noting that reasonableness and necessity of fees are "question[s] of fact for the jury's determination'") (quoting *Trevino v. Am. Nat'l Ins. Co.*, 168 S.W.2d 656, 660 (Tex. 1943)).

[37] Somewhat analogous to this contract provision is the attorney's-fees provision in the Texas Declaratory Judgment Act (DJA): "[T]he court may award costs and reasonable and necessary attorney's fees as are equitable and just." TEX. CIV. PRAC. & REM. CODE § 37.009. One court of appeals has recently noted that, "[o]n the face of this provision, it would appear that the trial court, not the jury, determines the amount of attorneys' fees . . . ." *Ogu v. C.I.A. Servs. Inc.*, No. 01-07-00933-CV, 2009 WL 41462, at *3 (Tex. App.—Houston [1st Dist.] Jan. 8, 2009, no pet.) (mem. op.). But, the court continued, "the amount of the attorneys' fees is a question of fact for the jury to decide." *Id*. (citing *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 367 (Tex. 2000)). We express no view on the matter.

[38] In Texas courts, the reasonableness of attorney's fees is normally "a fact issue for the jury." Scott A. Brister, *Proof of Attorney's Fees in Texas*, 24 ST. MARY'S L.J. 313, 349 (1993) ("Texas law treats attorney's fees as a fact issue for the jury rather than as a collateral matter usually determined by the court after the trial has been concluded and the loser determined."). Obviously, parties can contract otherwise if they wish.

asserts Chapter 38, not the written contract, as a basis for recovering fees related to its oral-contract counterclaim. The one time that Intercontinental mentioned fees spent defending KB Home's written-contract claim came during a post-trial hearing for entry of judgment when Intercontinental argued, "If they're not the prevailing party, then we successfully defended. And . . . we're entitled to attorney's fees. And I'm prepared to present evidence today to that effect." The trial court did not respond, and Intercontinental neither pressed the issue nor made any offer of proof. The record contains no mention of a jury-charge conference or any pretrial conference, much less one indicating that the manner of setting attorney's fees was in question. Intercontinental never argued the contract was ambiguous. Moreover, there is no indication that Intercontinental asked the trial court to take judicial notice of trial testimony concerning its attorney's fees,[39] or that Intercontinental offered any fees-related testimony in the post-trial hearing.

Both KB Home as plaintiff on its written-contract claim and Intercontinental as counter-plaintiff on its oral-contract claim submitted an attorney's fees question on their affirmative claims, apparently because they understood that the jury would hear evidence and decide what fee award, if any, was proper. Thus, the parties, given how they and the trial court actually tried the case, interpreted "fixed by the court" to mean that fees in this case would be determined by a court proceeding (for example, a court judgment effectuating the jury's verdict). This reading is not unreasonable. The contract does not reserve fees specifically to the trial judge, but to the court, and both parties submitted all fact questions to the jury. In short, any reading of "fixed by the court"

[39] TEX. CIV. PRAC. & REM. CODE § 38.004 ("The court may take judicial notice of the usual and customary attorney's fees and of the contents of the case file without receiving further evidence in: (1) a proceeding before the court; or (2) a jury case in which the amount of attorney's fees is submitted to the court by agreement.").

must be informed by the record and by how the parties chose to present fees to the jury on their respective claims.

In any case, even assuming the written contract reserved attorney's fees exclusively to the judge and not the jury, Intercontinental has certainly waived that argument and its rights to recover fees under the contract. Intercontinental did not plead for attorney's fees under the contract, and never sought to amend its pleadings to do so.[40] Nor, apparently, did Intercontinental ever object, either before the case went to the jury or post-trial, that KB Home's jury question on attorney's fees was immaterial because the contract left that issue to the judge. As noted above, Intercontinental first raised its "fixed by the court" argument during a post-trial hearing for entry of judgment, after the case (including Intercontinental's jury request for fees on the oral contract) had been fully tried to the jury. Nothing indicates that Intercontinental made the trial court aware of its position before the jury charge was submitted or raised *any* issue about the contract's meaning as to attorney's fees. Nor did Intercontinental offer any evidence when it made its oral, post-trial request that the trial court award it fees under the contract.

Given that both parties tried questions of breach and attorney's fees to the jury, Intercontinental cannot be excused for failing to submit a jury question on attorney's fees incurred in defending KB Home's lawsuit on the written contract, or otherwise preserving the issue for appellate review.[41] The issue of whether a breaching-but-nonpaying defendant can be a "prevailing

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[40] TEX. R. CIV. P. 301 (providing that the court's judgment shall conform to the pleadings).

[41] TEX. R. CIV. P. 279 ("Upon appeal all independent grounds of recovery or of defense not conclusively established under the evidence and no element of which is submitted or requested are waived."); *cf. Wilz v. Fluornoy*, 228 S.W.3d 674, 676-77 (Tex. 2007) (per curiam); *Hunt Constr. Co. v. Cavazos*, 689 S.W.2d 211, 212 (Tex. 1985) (per

party" under an attorney's-fees provision like this is interesting legally, but not before us procedurally.[42]

IV. Response to the Dissent

The dissent accuses the Court of ignoring the contract's language in order to reach an easy-to-apply answer. Nothing could be further from the truth. Since the contract leaves "prevailing party" undefined, we must do our best to effectuate the parties' intent. We believe the most sensible interpretation is that a plaintiff prevails by receiving tangible relief on the merits.

Despite what the dissent contends, the Court is not saying a plaintiff must recover a money judgment in every breach-of-contract action. Quite the opposite. The dissent cites a variety of situations where we agree the plaintiff would "prevail": when the plaintiff obtains rescission of the contract, specific performance, an injunction, or a declaratory judgment. Today's decision is not grounded on the fact that KB Home received no money damages, but rather on the fact that KB Home received nothing at all.[43]

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curiam).

[42] Some might argue that not every lawsuit produces a winner (even cases that go to verdict); the parties could battle to what amounts to a draw, pay their own fees and expenses, and go home. Here, a jury finds there was breach but not injurious breach; the wronged plaintiff gets nothing and the wrongdoing defendant gives nothing. If "receiving no damages" means the plaintiff did not prevail, does "remitting no damages" necessarily mean the breaching defendant prevailed? When defining litigation success, some might argue that while relief is required for plaintiffs to prevail, a finding of "no breach" is required for defendants — that is, a desired finding on breach is insufficient for plaintiffs but indispensable for defendants.

[43] Citing cases from 1917 and earlier, the dissent also argues that KB is the prevailing party because it is entitled to nominal damages. ___ S.W.3d ___, ___. Nothing in the record shows that KB Home requested nominal damages in the trial court or that it appealed any non-award of nominal damages, so that scenario is simply not before us today. More to the point, as the Court makes clear in another case decided today, the modern Texas rule is that "nominal damages are not available when the harm is entirely economic and subject to proof (as opposed to non-economic harm to civil or property rights)." *MBM Fin. Corp. v. Woodlands Operating Co.*, ___ S.W.3d ___, ___ (Tex. 2009). KB Home asked the jury to award damages to remedy an "entirely economic" harm that was "subject to proof": lost profits.

The reason we focus on money damages is because KB Home focused on money damages. Had KB Home pursued nominal damages, rescission, specific performance, injunctive relief, or declaratory relief, that would be another case.[44] But since KB Home's sole goal at trial was actual damages, it cannot declare victory without recovering any, a point the dissent seems to concede: "Money damages may be indispensable in contract claims *seeking money damages*. . . ."[45] This is exactly such a claim.

The jury's verdict delivered KB Home a stand-alone finding on breach, but a breach-of-contract plaintiff who seeks nothing beyond economic damages cannot receive a judgment based on breach alone.[46] In *CU Lloyd's of Texas v. Feldman*, the court of appeals granted the plaintiff a partial summary judgment on liability and rendered judgment for him.[47] We reversed, holding:

> When the relief sought is a declaratory judgment, an appellate court may properly render judgment on liability alone. In this case, however, Feldman sought no declaratory relief and no evidence of damages was submitted or considered. . . . Thus, the court of appeals erred in rendering judgment for Feldman.[48]

Feldman was a summary-judgment case (where the plaintiff submitted no evidence of damages), and today's case arises in a jury-verdict context (where the plaintiff submitted evidence of damages that the jury rejected), but the common thread is plain: Absent tangible relief, either monetary or

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[44] To this end, the dissent is mistaken in saying we are requiring parties to wait until they are damaged in order to seek a declaration of their respective rights.

[45] ___ S.W.3d ___ at ___.

[46] *See CU Lloyd's of Tex. v. Feldman*, 977 S.W.2d 568, 568 (Tex. 1998) (per curiam).

[47] *Id*. at 569.

[48] *Id*. (internal citations omitted).

equitable, a judgment on liability alone is improper. Where a party seeks only damages, as here, damages are a precondition to "prevailing."

It is unconvincing to construe KB Home's suit as one seeking declaratory relief. The DJA, like the contract, covers an action "to declare rights,"[49] and as explained above, authorizes an award of attorney's fees. A declaratory judgment, by its nature, is forward looking; it is designed to resolve a controversy and prevent future damages.[50] It affects a party's behavior or alters the parties' legal relationship on a going-forward basis. Here, however, KB Home's suit was decidedly focused on the past, seeking backward-looking money damages for prior breaches of contract. The dissent is right that "[a]n action to 'declare rights' is not an action for money damages,"[51] but this case was never the former and always the latter. KB Home could have brought a declaratory-judgment action and "prevailed" (and thus recovered attorney's fees) had the trial court rendered judgment on liability.[52] It chose not to, opting instead to seek actual damages from the jury. The attorney's-fees provision does not require a monetary recovery in every case, but KB Home made it necessary in this case by demanding only monetary, not declaratory, relief.

The dissent contends the judgment declares the parties' rights, but the part of the judgment the dissent quotes from merely incorporates the jury verdict. KB Home's petition sought jury

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[49] TEX. CIV. PRAC. & REM. CODE § 37.003.

[50] *See Bonham State Bank v. Beadle*, 907 S.W.2d 465, 467 (Tex. 1995) ("A declaratory judgment is appropriate only if a justiciable controversy exists as to the rights and status of the parties and the controversy will be resolved by the declaration sought.").

[51] ___ S.W.3d ___, ___.

[52] *CU Lloyd's of Tex. v. Feldman*, 977 S.W.2d 568, 569 (Tex. 1998) ("When the relief sought is a declaratory judgment, an appellate court may properly render judgment on liability alone.").

findings on breach, damages and attorney's fees. Taken at face value, the lawsuit asks the jury to "enforce the terms of this Contract"; it does not ask the court to declare rights. Intercontinental's attorney noted as much at a post-trial hearing, stating that "an action to enforce a contractual provision" is "exactly what we're dealing with here." There are cases where parties who disagree over a contract's meaning have asked the courts to declare their respective rights,[53] but these cases are typically brought as declaratory-judgment actions. One exception is *Feldman*, which strengthens our decision today as illustrated in *Feldman*'s opening paragraph:

> In this insurance case, we consider whether a court of appeals may properly render judgment on a party's liability for breach of contract without evidence of damages and when no declaratory judgment has been sought. We conclude that it cannot . . . .[54]

Finally, the dissent resurrects an old version of Black's Law Dictionary to define "prevailing party" as the one who prevails on the "main issue" of the case. The dissent then states there was "no doubt the main issue was defendant Intercontinental's counterclaim," and because the jury found for KB Home on that counterclaim, KB Home must be the prevailing party. But this analysis does precisely what the dissent accuses the Court of doing: It disregards the language of the contract.

The attorney's-fees provision makes clear that the prevailing party is judged by "an action to enforce the terms of *this Contract* or to declare rights *hereunder*."[55] The problem with the

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[53] *See* TEX. CIV. PRAC. & REM. CODE § 37.004; *Allstate Ins. Co. v. Hallman*, 159 S.W.3d 640, 641 (Tex. 2005); *Brooks v. Northglen Ass'n*, 141 S.W.3d 158, 161 (Tex. 2004); *CU Lloyd's of Tex. v. Feldman*, 977 S.W.2d 568, 569 (Tex. 1998) (per curiam); *Firemen's Ins. Co. of Newark, N.J. v. Burch*, 442 S.W.2d 331, 332 (Tex. 1968); *Hoover v. Gen. Crude Oil Co.*, 147 Tex. 89, 90, 212 S.W.2d 140, 141 (1948).

[54] 977 S.W.2d at 568.

[55] (Emphasis added).

dissent's analysis is that Intercontinental's counterclaim was not rooted in the parties' written contract, but rather in an alleged separate oral agreement. Under the dissent's "main issue" test, the interpretation of "prevailing party" in "this Contract" is controlled by the fate of a claim brought under a separate oral contract.

Displacing the parties' agreed-to language with the dissent's "main issue" analysis would yield an anomalous result: Plaintiff sues for $1 million-plus, winds up empty-handed, but nonetheless "prevails." That cannot be right. Focusing on what KB Home walked away with post-trial – no relief whatsoever – we cannot say it emerged the prevailing party.

V. Conclusion

Whether seeking attorney's fees under Chapter 38 (which impliedly requires a claimant to first recover damages)[56] or under this contract (where the jury denied the claimant's sole basis for recovery), the bottom line is the same: As there was no award to the client, there can be no attorney's fee award either.[57] KB Home obtained nothing of value from its breach-of-contract lawsuit — certainly no judgment acknowledging compensable injury — and thus cannot recover its attorney's fees under the contract: "to recover those fees, the [claimant] had to recover damages for breach of contract."[58] On these uncommon facts, we adopt a "no harm, no fee" rule, meaning a stand-alone finding of breach unaccompanied by any tangible recovery (either monetary or equitable relief) cannot bestow "prevailing party" status. As for Intercontinental, it waived any claim for attorney's

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[56] *MBM Financial Corp. v. Woodlands Operating Co.*, ___ S.W.3d ___ (Tex. 2009).

[57] *See id*. at ___ ("a client must gain something before attorney's fees can be awarded.").

[58] *Id*. at ___.

fees defending KB Home's breach-of-contract claim by not submitting the issue to the factfinder. Accordingly, we reverse the court of appeals' judgment and render judgment that KB Home take nothing.

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Don R. Willett
Justice

OPINION DELIVERED: August 28, 2009