
COURTROOM NEWS from HarrisMartin's COLUMNS-Mold

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Homeowners Fare Poorly in Rehearing by Texas Court of Appeals

AUSTIN, Texas — A Texas appellate court has affirmed a trial court's denial of attorneys' fees for homeowners who successfully sued a developer over mold damage, but has also allowed their insurer to assert subrogation rights and claim \$1 million in settlement proceeds. *Osborne, et ux. v. Jauregui Inc.*, No. 03-04-00813 (Texas Ct. App., 3rd Dist.).

The 3rd District Court of Appeals' April 17 en banc opinion replaces the Aug. 29 opinion in which a panel of the court had allowed unspecified attorney fees and remanded the subrogation issue for further consideration by the trial court.

Phillip and Deborah Osborne purchased a home from architect and builder Jauregui Inc. in 1997, paying more than \$1 million, according to the court summary.

Shortly after moving in, the Osbornes say they discovered mold they blamed on construction defects. They submitted claims to State Farm Lloyds, which paid the couple \$1,874,687.

The Osbornes also sued Jauregui and the builder's subcontractors. They settled with the subcontractors for \$1,260,500 and went to trial on claims against the builder. The jury found for the Osbornes, and set damages at \$835,158.78.

The trial court applied the settlement against those damages and awarded nothing to the Osbornes. The trial court also denied the Osborne's claim for attorneys' fees and denied State Farm's bid for subrogation rights against the Osborne's settlement with the subcontractors.

Osborne and State Farm each appealed to the 3rd District Court of Appeals.

In its en banc opinion, the 3rd District said the "one-satisfaction" rule, which prevents a "windfall" by limiting plaintiffs to one recovery for a single injury, applies to the Osbornes' claim for damages and attorneys' fees.

The Osbornes argued that they prevailed on their Deceptive Trade Practices Act, and were not obligated to segregate fees for that cause of action from those for other causes of action. In all, the couple sought \$1,132,035.29 for trial expenses, and \$50,000 for appellate fees.

The 3rd District acknowledged that the Texas Supreme Court has allowed a party who prevails on its DTPA claim to pursue fees even if that claim is "entirely offset by a claim of an opposing party" (*McKinley v. Drozd*, 685 S.W.2d 7,9 [Tex. 1985]).

“However,” the court explained, “as discussed by our sister court in *Hamra v. Gulden* [898 S.W.2d 16, 19 (Texas App. — Dallas 1995, writ dismissed w.o.j.)], the rule that a net recovery is not necessary for a plaintiff to be considered a prevailing party ‘does not apply in a case in which a consumer has already received payment of an amount equal to or greater than the damages found by the fact finder in the trial of the consumer’s case against the non-settling defendant.’”

The court added, again quoting *Hamra*, “‘It is one thing to allow a party an attorney’s fees award on a successful claim notwithstanding an opposing party’s success on an offsetting claim. However, it is another to allow attorney’s fees on a claim that, although successful, was paid in full before trial.’”

The court said the subcontractors paid \$1,260,500 “to settle the same claims on which the Osbornes proceed to trial against Jauregui.”

“The claims for which Jauregui was found liable were the same as those brought against and settled pre-trial by the other defendants well in excess of the jury’s award; therefore, the Osbornes are not entitled to attorney’s fees from Jauregui.”

The 3rd District also ruled that State Farm Lloyds was entitled to bring a subrogation claim, saying that despite their claim that State Farm had not paid for all damage to personal items, the Osbornes “had been made whole by State Farm’s insurance payments” before filing suit against the contractors.

“To refuse subrogation in this case would result in the Osbornes receiving a windfall well beyond the \$835,000 in damages they suffered and State Farm being left without remedy to recover any of the nearly \$2,000,000 it paid to the Osbornes for their claims related to the defective home,” the 3rd District said.

The court also cited policy language allowing for subrogation, and said “if a contract provides for subrogation regardless of whether the insured is first made whole, ‘[t]he contract’s specific language controls ... and the equitable defense of the ‘made whole’ doctrine must give way’” *Fortis Benefits v. Cantu*, 234 S.W.3d 642, 651 [Tex. 2007]).

Chief Justice Kenneth Law and Justices Bob Pemberton and Alan Waldrop concurred in Justice David Puryear’s majority opinion. Justice Henson dissented, joined by Justice Jan P. Patterson.

The Osbornes were represented by Toni Hunter and Richard E. Gray III of Gray & Becker in Austin, Texas.

State Farm was represented by Claude E. Ducloux of Austin, Texas, N. Scott Carpenter and Craig M. Schumacher.

David M. Ward of Austin, Texas, was counsel for Jauregui Inc.

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