

negligent and liable for fraud. Further, the jury apportioned liability as follows: Dufurrenas – 60% (30% each); Minshalls – 30% (10% each); and Hartman Equine – 10%.

2. Plaintiffs' proposed judgment requests relief for which they did not pray in their petition, was not awarded by the jury pursuant to this Court's instructions, and which is not available under law.

3. Defendant expressly reserves each and every argument articulated in its motion for judgment as a matter of law and all appellate rights. Defendant files this objection to Plaintiffs' proposed final judgment in an abundance of caution.

II. Objections

A. Defendant is only liable for the damages recoverable for a finding of negligence.

4. Plaintiffs' proposed final judgment asks the that the Court enter judgment against Defendant Hartman Equine for negligence, but then awards Plaintiffs for damages not recoverable for a negligence finding. In Question 14, the jury was asked to award certain compensatory damages should there be a finding of a violation of the Texas Deceptive Trade Practices Act, negligence, negligence misrepresentation, fraud, joint enterprise, civil conspiracy, and/or aiding and abetting. The jury found Ed and Shona Dufurrena liable for fraud and all parties liable for negligence, and so proceeded to answer the compensatory damages questions.

5. The Court provided instructions to the jury that provided specific factors for the jury to consider when awarding damages for each specific cause of action. *See* Exhibit 1, Final Instructions to the Jury, attached hereto. Pursuant to the Court's instructions, the only recoverable damage for negligence was the difference in the market value of Otto. *Id.* at page 23. In answer to question 14, the jury awarded \$30,000 as the difference in the market value of Otto. All other compensatory damages awarded were for the jury's finding of fraud against Ed and Shona

Dufurrena and are not recoverable from Hartman Equine because the jury did not find fraud against it.

6. Section 33.013 of the Texas Civil Practice and Remedies Code determines Defendant Hartman Equine's maximum liability, which multiplies the Defendant's percentage of liability by the verdict amount. The only recoverable damage for negligence is the difference in value of Otto, i.e. \$30,000. Indeed the jury was instructed, without objection, that damages would be limited in that fashion. Hartman Equine was only found liable for negligence, and its responsibility was limited to 10%. Thus, Hartman Equine's maximum liability is \$3,000. Plaintiffs' proposed judgment seeking compensation for all compensatory damages is not consistent with the Court's instruction for a finding of negligence, what the jury found as damages for negligence, and should not be allowed. Defendant, therefore, objects to any proposed judgment in excess of the maximum liability calculation discussed above.

B. Plaintiffs are not entitled to a recovery of attorney's fees.

7. Plaintiffs' proposed judgment also seeks an award of attorney's fees, which is not recoverable as a matter of law. Plaintiffs prevailed only on a negligence claim and did not plead to recovery attorney's fees under a negligence cause of action theory. Further, Chapter 38 of the Texas Civil Practices and Remedies Code only authorizes a recovery of attorney's fees from an individual or a corporation; Defendant Hartman Equine is neither. Finally, even if this court authorizes an award of attorney's fees, the attorney's fees must be segregated from the claims that Plaintiffs did not prevail.

i. Plaintiffs' proposed order seeks relief not prayed for in live complaint.

8. "State law applies in determining whether attorney's fees should be awarded in state-law cases." *CK DFW Partners Ltd. v. City Kitchens, Inc.*, 541 F. Supp. 2d 839, 840 (N.D. Tex. 2008); *Bumper Man, Inc. v. Smit*, No. 3:15-CV-02434-BF, 2017 WL 78508, at *1 (N.D. Tex. Jan. 5, 2017). If a

party seeks a recovery of attorney's fees, it must properly plead its right to recover the same. See *United Indus. V. Simon-Hartley, Ltd.*, 91 F.3d 762, 766, n.7 (5th Cir. 1996); Mark D. White & L. Hayes Fuller, III, "Attorney Fees Update," 66 *The Advoc. (Texas)* 144, 169 (2014). If a party pleads a specific ground for recovery of attorney's fees, the party is limited to that ground and cannot recover on another, unpleaded ground. *Heritage Gulf Coast Props. V. Sandalwood Apts., Inc.*, 2013 WL 5323983 (Tex. App. – Houston [14th Dist.] Sept. 24, 2013, no pet. h.).

9. Plaintiffs did not seek a recovery of attorney's fees under a negligence cause of action in this lawsuit. And it did not seek recovery of attorney's fees arising out of injury or death to stock. Plaintiffs' live complaint limits the requested attorney's fee relief as follows:

e. Plaintiffs' attorneys' fees, pursuant to Texas Civil Practice & Remedies Code § 38.001(8), Texas Business and Commerce Code § 17.50(d), and/or other provisions of the law;

Despite the limitation of Texas law regarding specificity and despite Plaintiffs' very specific pleading, Plaintiffs' proposed final judgment asks the Court to award attorney's fees for recovery under a negligence theory by way of Texas Civil Practice & Remedies Code § 38.001(6) for killed or injured stock. Plaintiffs never plead or sought recovery of attorney's fees under that provision of the statute. There was no factual allegation supporting recovery under that theory. Nor did the jury make any findings that the horse in question was injured. Indeed, Plaintiffs' only allegation of injury was that they themselves were injured as a result of the breeding – not that the horse was injured. Moreover, Plaintiffs have never shown from a legal or factual perspective that a horse suffering a genetic injury – one that occurred at or around the time of fertilization – can amount to an injury justifying a recovery of fees under the provision of the Texas Civil Practice & Remedies Code (that Plaintiffs never pleaded).

10. The only pleaded theories for recovery of attorney's fees were Section 38.001(8) of Texas Civil Practice & Remedies Code, which authorizes an award of attorney's fees with respect to an oral or written contract, and Section 17.50(d) of the Texas Business and Commerce Code, which allows a recovery of attorney's fees for a plaintiff prevailing in a DTPA claim. Plaintiffs had no success on either theory. On the former claim, the Court granted summary judgment; on the latter, the jury ruled in favor of Defendant Hartman Equine. Plaintiffs cannot recovery attorney's fees on their pleaded, but unsuccessful legal theories. Plaintiffs also cannot recovery attorney's fees on an unpleaded theory for which they secured no jury findings and for which they have not shown legal entitlement. Plaintiffs cannot attempt to backdoor an attorney's fee award through their proposed final judgment that attempts something that they never attempted to accomplish throughout the case.

ii. Defendant is not an individual or a corporation and cannot be held liable for attorney's fees under Chapter 38 of the Texas Civil Practices & Remedies Code

10. Regardless of Plaintiffs' pleadings, Plaintiffs cannot recovery attorneys' fees under Chapter 38 of the Texas Civil Practices & Remedies Code because Defendant Hartman Equine is not an individual or a corporation – it is a professional association. The language of Section 38.001 limits liability for attorney's fees to individuals and corporations, which is often overlooked, resulting in courts inappropriately awarding fees against partnerships, limited liability companies, and limited partnerships. Mark D. White & L. Hayes Fuller, III, Attorney Fees Update, 66 The Advoc. (Texas) 144, 169 (2014). However, a federal district court has determine that the Texas Supreme Court, if presented with the issue, would hold that Section 38.001 is unambiguous, and would limit the recovery only as against individuals and corporations. *Id.*, citing *Baylor Healthcare Sys. V. Nat'l Elevator Indus. Health Benefit Plan*, 2008 WL 2245834 (N.D. Tex. June 2, 2008). Thus, because Hartman

Equine is a professional association and not an individual or corporation, Plaintiffs cannot recover attorney's fees under Chapter 38 even if properly pled.

iii. If Plaintiffs can show a proper recovery of attorney's fees, then those fees should be segregated from the claims in which Plaintiffs were not successful

11. Although Defendant objects to Plaintiffs recovering any attorney's fees, should this Court award attorney's fees, the amount of the fees should be segregated. Plaintiffs should only be allowed to recover attorney's fees for the claim in which they were successful, which in this case, is negligence.

12. If attorney's fees are authorized for some, but not all, of a party's claims, that party generally has the duty to segregate the recoverable from the non-recoverable attorney's fees. See *Tony Gullo Motors, I, L.P. v. Chapa*, 212 S.W.3d 299, 313-14 (Tex. 2006); *A & L Eng'g & Consulting, Inc. v. Shiloh Apollo Plaza, Inc.*, 315 S.W.3d 928, 931 (Tex. App.-Dallas 2010, no pet.). A failure to segregate attorney's fees in a case containing multiple causes of action, only some of which entitle the recovery of attorney's fees, can result in the recovery of zero attorney's fees. *Green Int'l, Inc. v. Solis*, 951 S.W.2d 384, 389 (Tex. 1997).

13. During trial, Plaintiffs spent significant time presenting evidence of fraud and misrepresentation, which was also the main focus of their discovery. Specifically, according to the affidavit of Nathan Pearman regarding Plaintiffs' attorney's fees, Plaintiffs seek recovery of specific tasks such as: (1) preparing and filing Original Complaint, First Amended Complaint, Second Amended Complaint, and Third Amended Complaint; (2) preparing and attending depositions; (3) preparing and responding numerous discovery requests; (4) responding to motions for summary judgment; (5) and attending a seven day jury trial. The significant portion of all of these tasks revolved around preparation, discovery, and argument about fraud and misrepresentations allegedly made by Defendant – claims on which Plaintiffs did not prevail. Of the eight claims Plaintiffs

alleged, they only prevailed on one and it was one that was little focus of their case. Moreover, Plaintiff's success also should be judged against what they sought – well in excess of \$1 million – compared to their recovery \$3,000 (under Defendant's calculation of the judgment). Even under their inflated version of the recoverable damage amount, their "success" was so miniscule that it should be deemed a failure. Additionally, Plaintiffs collectively were more responsible for their damages than Defendant was, again showing that they were not really successful in pursuing their claims. Defendant objects to unreasonably large attorney's fees award because it is not justified by what transpired. Plaintiffs should also be required to segregate the attorney's fees, should any be allowed for recovery under the law, to the amount reasonably related to the prosecution of Plaintiffs' negligence claim.

C. Conclusion

14. Plaintiffs' Proposed Final Judgment is inconsistent with this Court's instructions to the jury and is incorrect as a matter of law. Plaintiffs should only be allowed to recover 10% (i.e. \$3,000) of the recoverable damages for negligence only, which is limited to the difference in value of Otto (\$30,000). Further, Plaintiffs should not be allowed to recover attorney's fees. Plaintiffs failed to properly plead a recovery of attorney's fees for a negligence cause of action. Defendant is not within the class of defendants against whom a fee award can be entered. Plaintiffs did not succeed and did not segregate their claimed fees. Therefore, Defendant respectfully requests that this Court sustain Defendant's objections to the Entry of Plaintiffs' Proposed Final Judgment and enter a judgment consistent with Defendant's objections. Defendant reserves all appellate rights to challenge any judgment entered in this case.

WHEREFORE, PREMISES CONSIDERED, Defendant respectfully requests that this Court sustain Defendant's objections to Plaintiffs' Proposed Final Judgment. Praying further,

Defendant prays for such other and further relief, either at law or in equity, to which Defendant may be justly entitled.

Respectfully submitted,

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CERTIFICATE OF CONFERENCE

I do hereby certify that on March 29, 2017, Caleena D. Svatek called Plaintiffs' counsel and they are opposed to these objections.

/s/ Caleena D. Svatek

Caleena D. Svatek

CERTIFICATE OF SERVICE

I do hereby certify that on March 31, 2017, a true and correct copy of the above and foregoing document has been forwarded to all counsel of record via electronic filing.

/s/ William H. Chamblee

William H. Chamblee