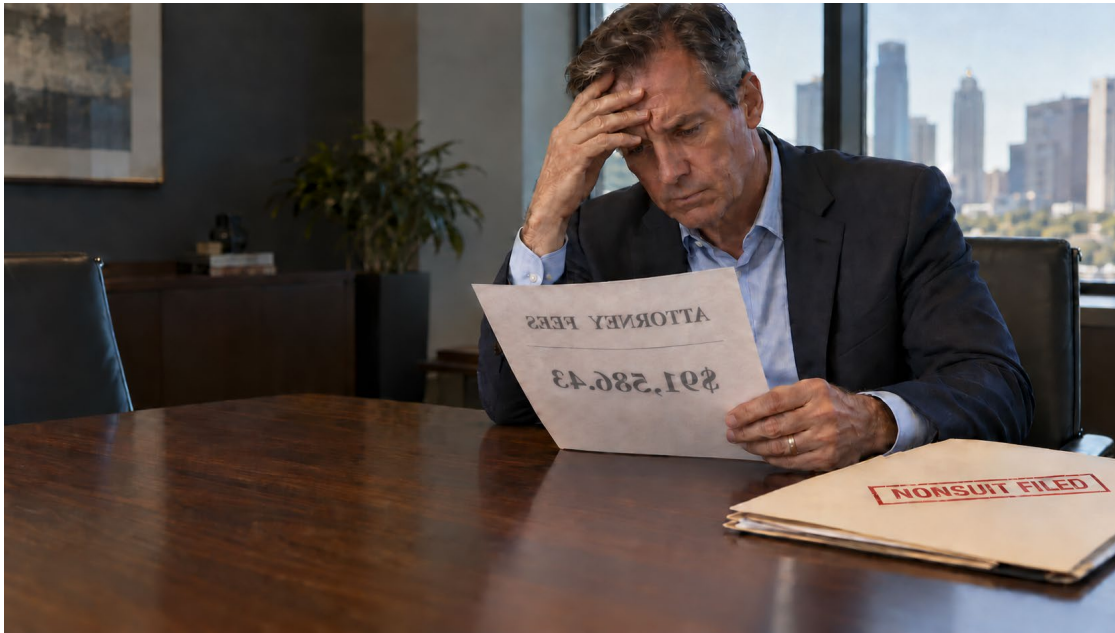


TEXAS APPELLATE UPDATE

The Expensive Nonsuit: *G6 Hospitality* Shows How Discovery Trouble Can Create Prevailing-Party Fees

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Fee shifting can happen much earlier in a case than one might anticipate. A plaintiff may assume that a nonsuit will avoid an attorney’s fee award, but *G6 Hospitality* shows the cost of making the wrong assumption. In *G6 Hospitality*, the parties were still litigating discovery disputes over document production and a corporate representative deposition. No dispositive motion was pending, trial was not approaching, and the case did not involve a Rule 91a motion. Even so, the trial court determined that G6 nonsuited to avoid an unfavorable ruling and treated Bucavi as the prevailing party entitled to attorney’s fees under the parties’ contractual fee-shifting provision.

In *G6 Hospitality, LLC v. Bucavi, LLC*, No. 04-25-00342-CV (Tex. App.—San Antonio Sept. 23, 2026, no pet. h.) (mem. op.), Bucavi complained about G6’s document production and sought the deposition of a corporate representative. G6 moved for protection three days before the rescheduled deposition. Bucavi responded with a motion to compel, and the court scheduled an emergency hearing for February 5. G6 nonsuited on February 4, and Bucavi sought attorney’s fees as the prevailing party.

The court applied *Epps v. Fowler*, 351 S.W.3d 862, 870–71 (Tex. 2011). A defendant ordinarily does not become the prevailing party when a plaintiff nonsuits without prejudice. But a defendant may become the prevailing party when a contract authorizes prevailing-party fees and the trial court determines that the plaintiff nonsuited to avoid an unfavorable ruling on the merits. The determination is “largely based on inferences drawn from the course of events in the lawsuit.” *Id.* at 870.

The hardest obstacle for G6 to overcome on appeal was the standard of review. Whether G6 nonsuited to avoid an unfavorable ruling was a question of fact for the trial court. That may be surprising because disputed fact issues ordinarily belong to a jury. In this setting, however, the trial court makes the determination from the existing record and affidavits. The court of appeals then reviews that determination only for abuse of discretion. To obtain reversal, G6 had to show that the evidence supported only one permissible decision and that the trial court reached a different one.

G6 had a plausible explanation for the nonsuit. New ownership had taken control, employees and lawyers were in transition, and its general counsel decided that continued litigation would cost more than it was worth. No potentially dispositive motion was pending. But G6 had not identified a corporate representative, did not adequately explain why it could not do so, and nonsuited the day before the discovery hearing. It also identified no newly discovered fact, change in law, or other event that had altered the merits of its claims. The appellate court therefore held that the trial court could infer that G6 nonsuited to avoid an unfavorable result rather than merely to control expenses.

Once the court resolved prevailing party status, the opinion supplied several additional lessons about proving fees. Bucavi sought fees for the testifying attorney, three other attorneys, two paralegals, and a legal assistant. Its records identified their work, hours, and rates, but did not establish the qualifications of the attorneys who did not testify. The evidence also failed to establish the nonlawyers' qualifications to perform substantive legal work, attorney supervision, and the reasonableness of their rates. See *Rohrmoos Venture v. UTSW DVA Healthcare, LLP*, 578 S.W.3d 469, 498 (Tex. 2019). See also *El Apple I, Ltd. v. Olivas*, 370 S.W.3d 757, 763–64 (Tex. 2012).

These are matters attorneys may take for granted. The lawyers handling the case know who performed the work, what experience each person has, and who supervised the staff. The court does not. Because Bucavi failed to put that information into evidence, the court reversed the \$85,272 fee award and remanded for a new trial on the amount.

The conditional appellate fees survived. Counsel identified the anticipated work, estimated 37.5 hours for each appellate stage, and applied his \$400 hourly rate. That supported \$15,000 for an unsuccessful appeal and another \$15,000 for an unsuccessful Texas Supreme Court proceeding. See *Yowell v. Granite Operating Co.*, 620 S.W.3d 335, 354–55 (Tex. 2020).

Finally, the court corrected the post-judgment interest language governing those conditional awards, advising the court to state the conditional awards as follows:

Bucavi is awarded post-judgment interest at the rate of 7.5% per year, compounded annually, on the attorney's fees related to an appeal to an intermediate court of appeals, running from the date of the opinion and judgment; and if G6 appeals to the Texas Supreme Court and does not prevail, Bucavi is awarded post-judgment interest at the rate of 7.5% per year, compounded annually, on the attorney's fees related to an appeal to the Texas Supreme Court, running from the date of that Court's judgment.

The court's proposed language provides practitioners with a useful guide for drafting judgments that properly address when post-judgment interest begins accruing on conditional appellate attorney's fee awards.

Overall, the takeaway of *G6 Hospitality* is not that plaintiffs should fear nonsuiting weak cases. Instead, the point at which a nonsuit can safely end the dispute may arrive earlier than many lawyers expect. Once the record begins to support an inference that the plaintiff is leaving to avoid an unfavorable ruling, the exit may no longer be free. Indeed, if the warning signs of an unfavorable ruling garner the Court's attention, the supposed off-ramp may already be closed.

About the author

David W. Reynolds focuses his practice on complex fiduciary litigation involving trusts, estates, and other probate matters, representing trustees, executors, beneficiaries, and interested parties throughout Texas and nationwide. His experience extends to fiduciary disputes in the business context, including conflicts among owners of closely held entities, business separations, and related commercial litigation.