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## **RECORD REFERENCES**

In the interest of simplicity, the Davises will refer to the record from the trial court in the same manner and by the same abbreviations as those used in the Petition for Review.

Additionally, the Davises have included an appendix to this response to include documents not contained in the Petitioner's appendix. These will be referred to as "Davis Appendix Tab \_\_\_".

## **I. STATEMENT OF THE CASE**

EMC Mortgage appeals a jury verdict against it and in favor of the Davises. The lawsuit was brought by the Davises to enforce their home purchase loan after EMC attempted to unilaterally alter the terms of that agreement. At trial, the jury found that the loan provided for a balloon payment of \$140,296.42 due and payable on June 1, 2004; that EMC had breached the agreement; and that, as a result, the Davises had been damaged in the amount of \$182,954.74. The jury also awarded attorney's fees to the Davises in the amount of \$91,400.00 through trial, and additional fees through various steps in the appellate process. Judgment was rendered based on that verdict. EMC appealed, seeking to reverse the judgment, but the Third Court of Appeals affirmed. EMC now appeals to this Court requesting that the appellate court's decision be reversed.

## **II. STATEMENT OF JURISDICTION**

The Davises disagree with EMC's statement of jurisdiction to the extent it claims jurisdiction pursuant to Texas Government Code, §§ 22.001(a)(2) and (a)(6).

The Court of Appeals' decision does not conflict with controlling precedents from this Court and can be squared with this Court's decisions in *Enterprise Leasing Co. v. Barrios*, 156 S.W.3d 547 (Tex. 2004)(per curiam) and *Universal Health Services, Inc. v. Renaissance Women's Group, P.A.*, 121 S.W.3d 742 (Tex. 2003) as discussed below.

Additionally, and contrary to the assertion of EMC, the question of when errors in extrinsic documents can be used to alter unambiguous terms in a negotiable instrument is not raised, because as set forth in detail below, the note in question is ambiguous.

### **III. REPLY TO ISSUES PRESENTED**

1. The Court of Appeals did not err in agreeing with the trial court that the document entitled “note” was ambiguous because the document states that it contains provisions for a balloon payment but then does not supply those terms.

2. The lower courts did not err in allowing the jury to refer to all of the documents executed as part of the Davises’ home purchase to supply necessary terms to the agreement, because the document entitled “note” was ambiguous.

3. The trial court did not err in rendering judgment on the attorney’s fees verdict nor did the court of appeals err in affirming such award, because the award is supported by evidence that complies with this Court’s decision in *Arthur Andersen & Co. v. Perry Equipment Corp.*, 945 S.W.2d 812 (Tex. 1997).

#### **IV. STATEMENT OF FACTS**

In 1989, Fred and Sherry Davis bought their home at 4651 Rock Cliff Road, Austin, Texas 78746 (“the house”) from ICA Mortgage Corporation. (1 RR 22:16-17; 26:7-12). The Davises applied for a loan that would be amortized over thirty years, but which would require fifteen years of monthly payments with a balloon payment due at the end of those fifteen years. (1 RR 26:19-27:19; 28:6-29:1; 204:6-205:1; PX 1 & 2).

Prior to the closing of the loan, Mr. Davis was told by a representative of the lender, Imperial Savings, that he would be borrowing \$390,500.00, that the interest rate was to be 10%, that the monthly payment would be \$3,426.92, and that the balloon payment due in fifteen years would be \$140,296.42.<sup>1</sup> (1 RR 37:11-21; 44:9-12; 81:11-82:16; 2 RR 111:3-9). The Davises relied on these figures in deciding to enter into the loan agreement. (1 RR 37:22-38:4; 46:23-47:14; 98:17-20).

The Davises and ICA entered into an earnest money contract for the purchase of the house. (PX 1; Davis Appendix Tab 1). ICA’s counterproposal, incorporated and made a part of the earnest money contract, specifically references financing on the basis of a thirty year amortization and a balloon payment at the end of fifteen years. (PX 1; Davis Appendix Tab 1). The residential loan application filled out by the Davises also stated a 360 month amortization and a 15 year term. (PX 2; Davis Appendix Tab 2). Additionally, Imperial Savings’ instructions to the closing agent for the purchase of the house stated that a balloon payment notice was required for the closing of the loan. (PX 3; Davis Appendix Tab 3)

As part of the purchase transaction, the Davises signed many documents, including the following: (1) Note (1 RR 42:15-20; PX 4); (2) Deed of Trust (1 RR 50:16-18; 185:6-9 PX 5);

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<sup>1</sup> ICA Mortgage and Imperial Savings were closely-related companies. (1 RR 217-224).

(3) Balloon Payment Disclosure (1 RR 42:23-43:10; PX 6); (4) Regulation Z Disclosure (1 RR 47:15-49:7; PX 7); and (5) Bilateral Writing Requirement form (1 RR 51:4-6; PX 8).

All of the documents referenced in the foregoing paragraph were signed at the same time as part of the same transaction. (1 RR 40:21-41:3; 45:23-46:10; 46:18-22; 47:23-25; 50:22-24; 185:6-9). Each of the aforementioned documents reference loan number 006-580534. (PX 4, 5, 6, 7, 8).

The document entitled “note” states at the top in all capital letters, “THE TERMS OF THIS NOTE CONTAIN PROVISIONS FOR A BALLOON PAYMENT AT MATURITY.” (PX 4; 1 RR 41:9-14). However, no terms of the balloon payment obligation are described in this document. (1 RR 41:17-20; PX 4). Instead, the specific payment obligations under the transaction are spelled out in incorporated documents. Both the balloon payment disclosure and the Regulation Z disclosure state that the loan provides for 179 payments of \$3,426.92 and one final payment of \$140,296.42 due on June 1, 2004. (PX 6 & 7; 1 RR 43:11-16; 48:1-7).

Of all the documents signed at closing, only the Regulation Z Disclosure stated the total amount of payments to be made by the Plaintiffs. (PX 7; 1 RR 48:8-11). The Regulation Z Disclosure states as to Mr. and Mrs. Davis that, “The amount you will have paid after you have made all payments as scheduled” is “\$753,715.10.” (*Id.*). When the sum of 179 payments of \$3,426.92 is added to a final payment of \$140,296.42, the total is \$753,715.10. (1 RR 48:17-24).

Beginning in 1989, the Davises lived in the house, made it their home, and timely made all payments of \$3,426.92 per month. (1 RR 56:3-6). At various points between 1989 and 2002, the indebtedness was transferred from Imperial Savings Association to several other financial institutions. (1 RR 56:16-24). Ultimately, the note was obtained by EMC Mortgage Corporation. (*Id.*).

None of the owners of the loan prior to EMC attempted to alter the terms of the agreement. In fact, one of the owners, Bank of America, confirmed in writing that the amount of the final balloon payment due on June 1, 2004, was \$140,296.42 as set forth in the documentation executed at the beginning of the loan obligation. (1 RR 58:17-60:11; PX 11; Davis Appendix Tab 4). Little did the Davises know, however, that the next owner of the loan, EMC, would attempt to unilaterally alter the agreement and devastate their longstanding plans for financial security.

The first and only holder of the loan to take a position contrary to the initial loan documents was EMC. (1 RR 62:1-63:12; PX 12 & 14). Once EMC obtained the loan, it took a different position as to the amount of the balloon payment and attempted to unilaterally change the terms of the agreement, as evidenced by its monthly statements sent to the Davises and by the information on its website. (*Id.*). EMC took the position that it would not allow the Davises to pay off the note by continuing to make payments until June 2004 and then paying the \$140,296.42 balloon payment at that time. (1 RR 201:7-21; 213:2-11). Instead, EMC insisted that it would require \$337,828.85 to pay off the loan. (1 RR 201:22-25; 212:7-10; PX 17). This position is identical to the position EMC continued to take in this litigation, that in June 2004, the Davises would not owe \$140,296.42 to pay off the loan, but instead would owe \$318,899.09. (1 RR 63:8-12).

The Davises advised EMC of this discrepancy, but EMC insisted that the balloon payment as of June 1, 2004 would be \$318,899.09, instead of the agreed upon \$140,296.42. (PX 14; 1 RR 62:7-63:3). EMC made it clear to the Davises that it would not accept \$140,296.42 in

satisfaction of the note in June 2004, but would require \$318,899.09 at that time.<sup>2</sup> (RR 63:13-20; 65:15-66:14; 201:7-25).

The Davises attempted to resolve this matter with EMC but could not. (1 RR 67:8-13). Based on EMC's insistence that it would be owed \$318,899.09 on June 1, 2004, the Davises chose to refinance the remaining debt due and owing as of October 4, 2002, at a reduced interest rate with another lender. (1 RR 67:14-68:7; PX 17). The payoff amount insisted upon by EMC on October 4, 2002, was \$337,828.85. (1 RR 68:4-7; PX 17). Anticipating a breach of the contract by EMC, the Davises went forward with refinancing in October 2002 to decrease the amount of interest they would be paying for the remaining term of the agreement. (1 RR 67:8-22).

At trial, the Davises presented a veteran certified public accountant, Tom Glass, as an expert witness to testify to their damages. Mr. Glass testified that the difference between what the Davises paid Defendant in October 2002 and what they should have paid based on the agreement was \$128,536.88. (1 RR 125:15-21; 128:1-7; PX 22). This amount is calculated by reducing the \$337,828.85 pay-off by \$457.15 refunded for an overpayment, leaving \$337,371.70. (1RR 126:22-127:11; PX 22). Then, the amount is further reduced by the twenty additional payments of \$3,426.92 which the Davises would have made through May 2004, for a total of \$68,538.40, and by the agreed-upon balloon payment of \$140,296.42, leaving a difference of \$128,536.88. (1 RR 128:1-7; PX 22). The Davises were additionally damaged in the amount of \$54,417.86 in unearned interest that they paid to EMC after EMC refused to accept payment as originally agreed. (1 RR 128:15-129:16; PX 22). Mr. Glass concluded that the total amount of damages to the Davises because of EMC's breach was \$182,954.74. (1 RR 132:5-11; PX 22).

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<sup>2</sup> The difference between the \$337,828.85 actually paid by the Davises to satisfy EMC's demand and the \$318,899.09 figure quoted on this page is fact that the Davises decided to mitigate their damages and pay off the loan several months early.

During the litigation, both parties filed motions for summary judgment asserting conflicting interpretations of the agreement. Judge Margaret Cooper's order of May 30, 2003, mostly denied both the Davises' and EMC's motions for summary judgment in large part, but found that the agreement was ambiguous. (EMC Appendix Tab H). Judge Cooper stated in a letter to counsel explaining her ruling that she found the note internally inconsistent.

Because EMC would not stand by the terms of the original agreement, the Davises were forced to bring this lawsuit and eventually hired the undersigned counsel. (1 RR 69:22-70:12; PX 20). The Davises engaged their attorneys on a one-third contingent fee basis. (*Id.*; 1 RR 159:9-19) At trial, Jon Smith, counsel for the Davises, testified to the eight factors from State Bar Rule 1.04 as applied to this case. (1 RR 156:17-164:15). Based on the amount in controversy and the other factors set forth in the State Bar Rules on attorney's fees, Mr. Smith testified that a reasonable attorney's fee in this case would be between \$25,399.99 and approximately \$90,000.00. (1 RR 158:18-23; 164:16-165:12; 166:22-167:8; 168:6-11; 175:17-20).

Upon properly-submitted jury questions, not objected to by EMC, the jury returned a verdict in favor of the Davises. (EMC Appendix Tab B). Specifically, the jury found that the loan did provide for a balloon payment of \$140,296.42 due and payable on June 1, 2004; that EMC had breached the agreement; and that, as a result, the Davises had been damaged in the amount of \$182,954.74. (*Id.*). The jury also awarded attorney's fees to the Davises in the amount of \$91,400.00 through trial, and additional fees through various steps in the appellate process. (*Id.*). The jury did not answer the question submitted by EMC concerning EMC's requested attorney's fees. (*Id.*).

Judge Margaret Cooper rendered judgment on the verdict. (EMC Appendix Tab A). EMC appealed, and the trial court's judgment was upheld by the court of appeals. (EMC

Appendix Tab C). EMC now petitions the Supreme Court seeking reversal of both the trial court's judgment and the decision of court of appeals.

## **V. SUMMARY OF THE ARGUMENT**

The trial court correctly allowed the jury to consider all documents that formed the agreement between the parties because the document entitled "note" is ambiguous. This document states that it contains a "balloon payment" provision, but then does not contain one. The document's ambiguity opens the door to consideration of other facts outside the document in order to determine its meaning. Therefore, it was proper for the trial court to allow the jury to consider all the documents related to the transaction in order to determine the document's meaning.

The attorney's fee award should not be set aside, because there is ample proof in the record to support the amount awarded by the jury.

## **VI. ARGUMENT**

### **A. The Note is Ambiguous.**

The evidence in this case establishes that every person and entity associated with the Davises' loan for the purchase of their house – except for EMC – believed and intended that the loan would be for a fifteen-year term with a balloon payment. The documentation, including the document, entitled "note" supports that intent and construction.

In construing a written contract, the primary concern of the court is to ascertain the true intent of the parties as expressed in the instrument. *Davidson v. Webster*, 128 S.W.3d 223, 229 (Tex. 2003); *National Union Fire Ins. Co. v. CBI Indus., Inc.*, 907 S.W.2d 517, 520 (Tex. 1995).

If the language of a contract is subject to two or more reasonable interpretations, it is ambiguous. *Id.* Phrased another way, a contract is ambiguous if its meaning is uncertain or susceptible to more than one reasonable interpretation. *Coker v. Coker*, 650 S.W.2d 391, 393 (Tex. 1983). Importantly, the two or more competing interpretations do not have to be equally reasonable in order for there to be an ambiguity, they must just be reasonable.

As the court of appeals so succinctly stated, “Because the note states that there is a balloon-payment obligation but does not specify the terms and the payment terms in the note do not include a balloon payment, the note is ambiguous about whether a balloon payment is required. An agreement cannot both require a balloon-payment requirement and require equal monthly payments of principal and interest.” *EMC Mortgage Corp. v. Davis*, 167 S.W.3d 406, 414 (Tex. App.—Austin 2005, pet. filed).

The document in this case entitled “note” is, at a minimum, reasonably susceptible to the meaning understood by the Davises, and agreed with by the jury and by the court of appeals – that it included a balloon payment. Perhaps the best way to illustrate the reasonableness of this interpretation is to consider how this case might appear under different circumstances. EMC takes the position that the note unambiguously calls for thirty years of monthly payments in the amount of \$3,426.92, because that position is to its economic benefit. The amount of the balloon payment as set forth in the balloon payment disclosure and Regulation Z disclosure are less than what EMC claims it is entitled to under a mathematically correct amortization of this loan.

Consider though whether the note would be considered ambiguous if the shoe were on the other foot. What if, due to differing circumstances, it was the Davises claiming that there was no way to construe the note as if there was a balloon payment provision? What if, for example, interest rates were now at 20% as opposed to current rates substantially below the 10%

called for in the note, and the balloon payment disclosure called for a balloon payment of \$400,000.00 instead of approximately \$140,000.00? Could the Davises then argue with a straight face that no reasonable person could construe the note as having a balloon payment component to it? The answer is, “No.”

While EMC makes multiple technical arguments about what provisions are typically contained in a loan agreement in order to argue that by way of implication the document is unambiguous, it boggles the mind to imagine that any reasonable person could read the words, “THE TERMS OF THIS NOTE CONTAIN PROVISIONS FOR A BALLOON PAYMENT AT MATURITY” and not think that perhaps the note contains a balloon payment provision. Because one reasonable interpretation of the document entitled note is that it includes a balloon payment provision, the agreement is ambiguous.

Petitioner attempts to compare the instant case to the facts in *Enterprise Leasing Co. v. Barrios*, 156 S.W.3d 547 (Tex. 2004). The *Barrios* holding, though, should be limited to its facts, which differ in significant relevant respects to those in this case.

In *Barrios*, this Court construed a rental car agreement that contained the following language:

**DAMAGE TO RENTED CAR:** Renter is responsible for and agrees to pay to Owner the retail value of replacing and/or repairing all losses and damages to the rented car including “loss of use” during the period it is unavailable for rental use as measured by reasonable rental value of renting a replacement car, regardless of fault or negligence of the Renter or any person, and regardless if damages are a result of an act of God.

156 S.W.3d at 548.

Barrios, the renter of the vehicle, failed to return it after it was stolen. He argued that the rental agreement did not require him to pay to replace the vehicle if it was stolen through no fault

of his own, because the above-referenced provision was entitled “DAMAGE TO RENTED CAR.” The Court of Appeals agreed and held that the rental agreement was ambiguous. This, despite the specific operative terms set out above that stated that the renter was responsible for “all losses . . . regardless of fault or negligence.”

This Court reversed, holding that the agreement unambiguously required Barrios to reimburse Enterprise if the car was stolen and not returned, regardless of fault. *Barrios*, 156 S.W.3d at 549. In so holding, this Court stated that the court of appeals put undue weight on the title of the provision and ignored contrary substantive language. *Id.* The facts of the instant case are different and dictate a different result.

While the language in *Barrios* held by the court of appeals to create an ambiguity was merely a title, the language at issue in this case makes an affirmative statement regarding the rights and obligations of the parties. The words “damage to rented car” merely formed the heading of a section of the contract in *Barrios*, which contained specific contractual language. The language in the Davises’ contract is an actual declarative sentence: “THE TERMS OF THIS NOTE CONTAIN PROVISIONS FOR A BALLOON PAYMENT AT MATURITY.” When construed with the rest of the document, the language creates an ambiguity as to whether or not there is a balloon payment.

Additionally, while in the instant case there is ample evidence in the surrounding circumstances of the Davises’ purchase of the house that supports the existence of a balloon payment agreement. In contrast, no similar evidence was mentioned in *Barrios*. As noted below in connection with the discussion of *Cook Composites, Inc. v. Westlake Styrene Corp.*, 15 S.W.3d 124 (Tex. App.—Houston [14th Dist.] 2000, pet. dism’d), inquiry into such circumstances is justified.

EMC also seeks to compare this case to the facts in *Universal Health Services, Inc. v. Renaissance Womens Group, P.A.*, 121 S.W.3d 742 (Tex. 2003), in which this Court held that an introductory sentence describing the nature of a project in a letter agreement did not create an ambiguity. The facts in *Renaissance* are distinguishable.

In *Renaissance* a group of doctors agreed with a corporation to undertake a project that would include the construction of a medical facility that would contain a hospital on the first floor and physician offices on the second. *Renaissance*, 121 S.W.3d at 744. After two years of operating the hospital at a substantial loss, the corporation announced it would close the hospital. *Renaissance*, 121 S.W.3d at 745. The physicians sued the corporation, arguing that it had contractually committed to keep the hospital open throughout the fifteen-year term of the lease. *Id.*

The language relied on by the doctors in *Renaissance* was an introductory sentence in a letter agreement that stated that the project “is to be composed of a woman’s hospital to be located on the first floor of the Project, and medical offices and clinic leased to [the physicians] to be located on the second floor of the Project.” *Renaissance*, 121 S.W.3d at 746. A great deal of specific, substantive language followed, none of which included a covenant or obligation on the part of the corporation to keep the hospital open for fifteen years. *Id.* The *Renaissance* language is distinguishable from the balloon payment statement in the instant case. Whereas the language referenced above from *Renaissance* fails to state any agreement or obligation, the balloon payment language in the instant case affirmatively states the parties’ agreement that there is a balloon payment provision in the note.

This case is also distinguishable from this Court’s decision in *Jim Walters Homes, Inc. v. Schuenemann*, 668 S.W.2d 324 (Tex. 1984), cited by Petitioner. In *Jim Walters Homes* this

Court refused to favor a description of contemplated terms in one document over actual contractual terms in an unambiguous document. Conversely, in the instant case an ambiguity exists within the document containing the terms EMC seeks to enforce.

This case is more similar to the facts underlying the Court's decision in *Davidson v. Webster*, 128 S.W.3d 223 (Tex. 2003), where this Court found ambiguous an employment agreement that appeared to require arbitration of all issues between the employer and its employees, but which stated, "The Company reserves the right to unilaterally abolish or modify any personnel policy without prior notice." 128 S.W.3d at 229. The Court found that the agreement could not be given a certain or definite meaning because it did not supply a term – namely, the definition of "personnel policy." *Id.* Based on that holding, this Court found the agreement ambiguous and remanded the case to the trial court for determination by the fact finder of the true intent of the parties. *Id.* at 230-31. Similarly, the note in the instant case does not supply terms defining the referenced balloon payment obligation. As a result, the trial court was correct to allow the jury to consider all of the transaction documents to determine the true intent of the parties.

In construing a contract, a court also considers how a reasonable person would have used and understood the language, by pondering the circumstances surrounding the contract's negotiation, and by considering the purposes which the parties intended to accomplish by entering into the contract. *Cook Composites, Inc. v. Westlake Styrene Corp.* 15 S.W.3d at 132. A court is free to examine prior negotiations and all other relevant incidents bearing on the intent of the parties; however, the parties may not contradict or vary the terms of the agreement by oral statements of their intentions. *Id.* (citing *Sun Oil Co. v. Madeley*, 626 S.W.2d 726, 734 (Tex. 1982)).

In this case, the negotiations prior to the transaction indicate both in writing and orally that the Davises and Imperial Savings intended to enter into a loan that included a balloon payment after fifteen years. As shown above, the earnest money contract, loan application, and lender's instructions at closing all provided a thirty-year amortization with a fifteen year term. (PX 1, 2, and 3; Davis Appendix Tabs 1, 2 and 3). Additionally, Fred Davis testified that a representative of Imperial Savings supplied him with the specific terms of repayment as set forth in the balloon payment disclosure before the transaction was closed and that, if they were not as represented, he and his wife would not have entered into the transaction. (1 RR 37:11-38:22). Based on these circumstances surrounding the transaction, one can reasonably conclude that the notice at the top of the note that there would be a balloon payment provision in the note means just that.

**B. Because the Note is Ambiguous it was Proper to Allow the Jury to Consider All Evidence Surrounding the Transaction.**

Once the trial court determines that a contract is ambiguous, as it did in this case, the court may admit extraneous evidence to determine the true meaning of the instrument. *National Union Fire Ins. Co. v. CBI Indus., Inc.*, 907 S.W.2d 517, 520 (Tex. 1994). If one reasonable interpretation of the agreement at issue in this case is that the note did contain provisions for a balloon payment, then the trial court was justified in allowing the jury to consider all of the evidence in order to decide between the two interpretations advanced by the parties.

This includes documents such as the balloon payment disclosure, the Regulation Z disclosure and the Bank of America letter. (EMC Appendix Tabs F and G and Davis Appendix Tab 4). EMC's argument that allowing the factfinder to view and consider these documents misapprehends their purpose is overstated. It is only because the note is ambiguous to begin

with that these documents become relevant. The *Mulligan*<sup>3</sup> case cited by EMC, while interesting because of its discussion of Truth in Lending disclosures, is inapplicable because the note in question was unambiguous.

Also overstated is EMC's claim that affirming the decision in this case will place the lending industry, and indeed all business, in peril. EMC argues that if this Court follows long-held principles of law regarding ambiguity and the consequent consideration of parol evidence it will open a door for every disgruntled party to wiggle out of contracts if they can just find a minor ambiguity. This is simply not true. The law of contract construction and ambiguity have remained virtually unchanged in this state for many years, with the lending industry no worse for wear. The scarcity of published law on this topic speaks to the exaggerated nature of Petitioner's argument.

Because it is reasonable to interpret the note in question as containing a balloon payment provision, and because, therefore, it was proper to let the jury consider all of the documents that comprised the agreement of the parties, the judgment of the trial court and decision of the court of appeals should be affirmed.

**C. The Attorney's Fees Awarded by the Jury are Supported by the Evidence.**

EMC next complains that the attorney's fees award in this case was excessive. Despite alluding to this Court's opinion in *Arthur Andersen & Co. v. Perry Equipment Corp.*, 945 S.W.2d 812 (Tex. 1997), EMC's point on attorney's fees boils down to the circular argument that "the award was excessive because it was too much." Application of the correct legal standard leads to a different conclusion.

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<sup>3</sup> *Mulligan v. Resolution Trust Corp.*, 903 F.Supp. 121, 124 (D.D.C. 1995)

This Court has outlined the factors to be considered in determining the reasonableness of attorney's fees. *Arthur Andersen*, 945 S.W.2d at 818 (Tex. 1997). Counsel for the Davises testified to the application of each of the well-known eight factors as follows:

- (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill required to perform the legal service properly (1 RR 157:3-158:1; 165:13-166:13; PX 24);
- (2) the likelihood . . . that the acceptance of the particular employment will preclude other employment by the lawyer (1 RR 159:11-160:6);
- (3) the fee customarily charged in the locality for similar legal services (1 RR 158:2-17; 160:7-24);
- (4) the amount involved and the results obtained (1 RR 160:25-161:15);
- (5) the time limitations imposed by the client or by the circumstances (1 RR 161:16-162:13);
- (6) the nature and length of the professional relationship with the client (1 RR 162:14-163:3);
- (7) the experience, reputation and ability of the lawyer or lawyers performing the services (1 RR 154:10-155:8; 163:4-19; PX 23); and
- (8) whether the fee is fixed or contingent on results obtained or uncertainty of collection before the legal services have been rendered (PX 20; 1 RR 155:9-156:3; 163:20-165:12; 168:6-21; 169:20-171:23; 175:4-20).

Tex. Disciplinary R. Prof'l Conduct 1.04(b), *reprinted in* Tex. Gov't Code Ann., tit. 2, subtit. G app. A (Vernon 1998).

Counsel for the Davises testified that a range of fees between approximately \$25,000.00 and \$90,000.00 would be reasonable based on the foregoing factors and the facts of this case. (1 RR 166:14-167:8). Counsel for the Davises testified that the Davises would only be made whole by an award at the upper end of the spectrum. *Id.* EMC did not object to this evidence nor did it put on any controverting evidence.

The evidence presented by the Davises met this Court's requirements in *Arthur Andersen* that the plaintiff prove the amount of fees was both reasonably incurred and necessary to the prosecution, and that the jury must award a specific dollar amount, not a percentage. 945 S.W.2d at 819.

Because the Davises satisfied the requirements set forth by this Court by providing testimony on the reasonableness and necessity of their attorney's fees, and because the jury awarded fees in a specific dollar amount, the trial court's judgment awarding attorney's fees should be affirmed.

#### **VII. PRAYER**

Based on the foregoing evidence, authorities, and arguments, the trial court did not err in any respect in the trial of this case. This Court should affirm the judgment of the trial court.

Respectfully submitted,

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512/477-4470 *fax*

**CERTIFICATE OF SERVICE**

I hereby certify that the above and foregoing instrument was served this the 21<sup>st</sup> day of November 2005, as follows:

*Via Hand-Delivery*

Marcy Hogan Greer  
Fulbright & Jaworski, L.L.P.  
600 Congress Avenue, Suite 2400  
Austin, Texas 78701

*Via Regular Mail*

Michael A. Swartzendruber  
Fulbright & Jaworski, L.L.P.  
2200 Ross Avenue, Suite 2800  
Dallas, Texas 75201-2784

**Attorneys for Appellant EMC Mortgage Corporation**

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Jon Michael Smith

## **INDEX TO APPENDIX**

1. Contract
2. Loan Application
3. Lender's Instructions
4. Bank of America Letter (3/28/01)