**UNITED STATES COURT OF APPEALS**
**FIFTH CIRCUIT**

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No. 93-1381 and 93-1899

(Summary Calendar)

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PHILLIPS PETROLEUM COMPANY,

Plaintiff-Appellee,

versus

KATHY LOUCKS, ET AL.,

Defendants-Appellants.

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Appeal from the United States District Court
For the Northern District of Texas
(2:91-CV-218)

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(December 5, 1994)

Before SMITH, EMILIO M. GARZA, and PARKER, Circuit Judges.

PER CURIAM:[*]

Kathy Loucks, Randy Loucks, Pat Moffitt, Velma Moon, and the estate of Neal Moon (collectively "the homeowners") appeal the district court's partial summary judgment and damages judgment on Phillips Petroleum Company's ("Phillips") breach of contract and Texas Deceptive Trade Practices Act counterclaims. We AFFIRM in

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[*] Local Rule 47.5.1 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

part, REVERSE in part, and REMAND.

## I

Many years ago, Phillips built small houses near its refining and natural gas plants and leased the homes to its employees and their families at reduced rates. Some of the houses were located on land owned by Phillips, but most were on land leased by Phillips from other parties, primarily MM Cattle Company ("MM"). Phillips eventually sold the houses to the tenants, and Phillips and MM granted the purchasers long-term leases for the land on which the houses were located. Phillips and MM later terminated the land leases and requested that the homeowners move their houses. To help pay for the relocation of the houses, Phillips set up a moving assistance program. Phillips required the homeowners who participated in the program to sign contracts releasing Phillips (and MM if applicable) from any claims to damages arising from or related to the moves. Kathy Loucks, Randy Loucks and Patricia Moffitt are homeowners who signed such releases.[1] The Lounckses also agreed to move their house by December 31, 1986, and to reimburse Phillips for any costs it incurred if the Lounckses breached the agreement.

Despite having signed the agreements, Kathy Loucks and Patricia Moffitt, joined by the Moons, sued Phillips for damages related to the moves. The homeowners alleged numerous common law, constitutional, and state and federal statutory causes of action,

[1] Neal Moon and Velma Moon did not enter into a release agreement with Phillips.

including claims under the Texas Deceptive Trade Practices-Consumer Protection Act, Tex. Bus. & Com. Code Ann. §§ 17.41-17.63 (West 1987) ("DTPA"). In addition, the Loucks failed to move their house by the agreed-to deadline. Phillips counterclaimed for damages against the Loucks and Patricia Moffitt for breach of contract. Phillips also counterclaimed under the DTPA for damages against Kathy Loucks, Patricia Moffitt, and the Moons for filing a groundless and bad faith DTPA claim.

The district court severed Phillips' counterclaims and granted Phillips' motion for summary judgment on the homeowners' claims ("the primary action"). The court held that the releases barred Kathy Loucks' and Patricia Moffitt's claims as a matter of law. It also held that all of the Moons' claims, including the DTPA claims, were barred by the applicable statutes of limitations. We affirmed the court's judgment without opinion. *See Loucks v. Phillips Petroleum Co.*, 978 F.2d 708 (5th Cir. 1992) (table), *cert. denied*, ___ U.S. ___, 114 S. Ct. 212, 126 L. Ed. 2d 169 (1993).

The district court then proceeded to the counterclaims. The court partially granted Phillips' motion for summary judgment on its breach of contract and DTPA counterclaims, and it set the matter of damages for a hearing. In its summary judgment order, the district court held that the Loucks had breached their agreement to move their house by December 31, 1986. The court also held that Kathy Loucks and Patricia Moffitt breached the release agreements by filing the primary action. Finally, the court held that the homeowners' DTPA actions were groundless and brought in

bad faith because: (1) they were barred by either the applicable statute of limitations or the releases; (2) the homeowners conceded in the pretrial order that their claims could not survive summary judgment; and (3) the homeowners' litigation "tactics" established a clear pattern of abuse.

After a hearing on Phillips' attorneys' fees, the court awarded Phillips damages totalling $135,092.94 (plus $15,000 in case of an appeal), taxable court costs, and post-judgment interest. The homeowners now appeal, alleging nineteen points of error.[2]

**II**

**A**

The homeowners argue that the district court erroneously granted Phillips' motion for summary judgment on its breach of contract and DTPA counterclaims. We review a district court's grant of summary judgment *de novo*, applying the same standard as the district court. *McDaniel v. Anheuser Busch, Inc.*, 987 F.2d 298, 301 (5th Cir. 1993). We "review the facts drawing all inferences most favorable to the party opposing the motion." *Reid v. State Farm Mut. Auto. Ins. Co.*, 784 F.2d 577, 578 (5th Cir. 1986).

Summary judgment under Rule 56 involves a shifting burden. *John v. Louisiana*, 757 F.2d 698, 708 (5th Cir. 1985). The movant must first discharge "the initial burden of demonstrating that `the

[2] We address the merits of only some of these arguments. Many are either frivolous or irrelevant to the district court's judgment.

pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.'" *Id.* (quoting Fed. R. Civ. P. 56(c)).[3] The burden then shifts to the nonmovant "to designate specific facts that establish an issue for trial." *Meyers v. M/V Eugenio C*, 919 F.2d 1070, 1072 (5th Cir. 1990).[4] If, however, the moving party does not meet its initial burden, summary judgment must be denied. *See John*, 757 F.2d at 708. As the relevant facts in this case are undisputed, the homeowners' appeal turns on whether Phillips demonstrated its entitlement to judgment as a matter of law on its counterclaims.

**1**

The homeowners argue that the district court should not have granted summary judgment on Phillips' breach of contract counterclaim because their releases were invalid.[5] Under Texas

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[3] *See also Bias v. Advantage Int'l, Inc.*, 905 F.2d 1558, 1560-61 (D.C. Cir.) ("[T]he moving party must explain its reasons for concluding that the record does not reveal any genuine issue of material fact, and must make a showing supporting its claims insofar as those claims involve issues on which it will bear the burden at trial."), *cert. denied*, 498 U.S. 958, 111 S. Ct. 387, 112 L. Ed. 2d 397 (1990); *McKinney v. Dole*, 765 F.2d 1129, 1135 (D.C. Cir. 1985) ("[T]he moving party must present affirmative evidence of facts that, if true, would compel a judgment for that party.").

[4] We note that this case differs from the typical summary judgment case in that Phillips moved for summary judgment as a plaintiff on its counterclaims. When a *defendant* moves for summary judgment, it may satisfy its burden simply by pointing out the absence of evidence supporting the nonmoving party's case. *See Duplantis v. Shell Offshore, Inc.*, 948 F.2d 187, 190 (5th Cir. 1991).

[5] The Louckses also argue that a supervening legal impossibility excused their obligation to move their house by December 31, 1986. According to the Louckses, a preliminary injunction entered in a class certification proceeding prohibited Phillips from evicting members of the putative class from land leased from Phillips or MM. However, as the district court explained in its Order on Damages, nothing about the injunction made it impossible for the

law, "[a] cause of action for breach of contract is composed of two elements: one, the contract, and two, the breach thereof." *Balderama v. Western Casualty Life Ins. Co.*, 794 S.W.2d 84, 89 (Tex. App.))San Antonio 1990), *rev'd on other grounds*, 825 S.W.2d 432 (Tex. 1991). The homeowners do not argue that they did not breach the terms of their releases by suing Phillips. Rather, they assert numerous defenses to the contracts' enforceability.[6] However, because the effect of the releases was already litigated in the primary action, the homeowners must escape the bar of res judicata.

Whether a claim or defense is barred by res judicata is a question of law, which we review *de novo*. *Schmueser v. Burkburnett Bank*, 937 F.2d 1025, 1031 (5th Cir. 1991). The doctrine of res judicata, or claim preclusion, bars "either party from raising any claim or defense in [a] later action that was or *could have been* raised in support of or in opposition to the cause of action asserted in the prior action." *United States v. Shanbaum*, 10 F.3d 305, 310 (5th Cir. 1994). Claim preclusion depends on whether: (1) the parties in the later action are identical to or in privity with the parties in the prior action, (2) the judgment in the prior action was rendered by a court of competent jurisdiction, (3) the prior action reached a final judgment on the merits, and (4) both

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Louckses to perform their promise to move their house.

[6] The reasons asserted include unconscionability, fraud, and mutual mistake. The homeowners also argue that "Phillips is estopped from enforcing the releases because of its negligent misrepresentation, spoliation of court-protected documents, supervening legal impossibility, failure of consideration, and the rules of collateral estoppel and *stare decisis*."

suits involve the same claim or cause of action. *Id.* "To determine whether the same claim is involved in two actions, we apply the transactional test of the Restatement (Second) of Torts § 24." *Eubanks v. FDIC*, 977 F.2d 166, 171 (5th Cir. 1992). "Under this approach, the critical issue is whether the two actions were based on the `same nucleus of operative facts.'" *Id.* (quoting *In re Howe*, 913 F.2d 1138, 1144-45 (5th Cir. 1990)).

The homeowners do not argue that the elements of res judicata have not been satisfied. Instead, they assert numerous arguments why their defenses were not disposed of by the district court's order in the primary case))because the district court's order in the primary case held that the releases barred only the homeowners' affirmative claims and not subsequent defenses to the validity of the releases themselves; because the district court's summary judgment order necessarily reached only questions of law; because the homeowners now allege new grounds for attacking the validity of the releases, etc. All of these arguments are beside the point. The homeowners' ability to assert their claims in the primary action depended on their avoiding the effect of the releases. In their complaint, the homeowners sought a declaratory judgment that the releases were void. Any defenses regarding the validity of the releases "*could have been* raised" in the primary action and were thus barred in the counterclaim action. *Shanbaum*, 10 F.3d at 310. Consequently, the district court properly granted summary judgment against the Louckses and Patricia Moffitt on Phillips' breach of contract counterclaims.

We are compelled, however, to vacate the district court's judgment against the Moons for breach of contract. The Moons did not sign a release, Phillips did not counterclaim against them for breach of contract, and in its partial summary judgment order the court did not hold them liable for breach of contract. Nevertheless, in its Order on Damages and again in its Judgment the court held the Moons jointly and severally liable with the Louckses and Patricia Moffitt for $13,393.00 in damages for breach of contract. Consequently, we vacate the district court's judgment for breach of contract damages against the Moons.

**2**

The homeowners also argue that the district court erroneously granted Phillips' summary judgment motion on its DTPA counterclaim for attorneys' fees. Section 17.50(c) of the DTPA provides: "On a finding by the court that an action under this section was groundless and brought in bad faith, or brought for the purpose of harassment, the court shall award to the defendant reasonable and necessary attorneys' fees and court costs." Tex. Bus. & Com. Code Ann. § 17.50(c). As the party claiming attorneys' fees under § 17.50(c), Phillips bears the burden of proving that the claims were groundless and brought in bad faith. *See Fichtner v. Richardson*, 708 S.W.2d 497, 482 (Tex. App.))Dallas 1986, writ ref'd n.r.e.) (citing *Dairyland County Mut. Ins. Co. v. Childress*, 650 S.W.2d 770, 774 (Tex. 1983)); *see also Stewart Title Guar. Co. v. Sterling*, 822 S.W.2d 1, 10 (Tex. 1991) ("As a general rule, the party seeking to recover attorney's fees carries the burden of

proof.").

The standard for determining whether a DTPA claim is groundless "is whether the totality of the tendered evidence demonstrates an arguable basis in fact and law for the consumer's claim." *Splettstosser v. Myer*, 779 S.W.2d 806, 808 (Tex. 1989).[7] To prove "bad faith," Phillips "must have shown the claim was motivated by a malicious or discriminatory purpose." *Central Texas Hardware*, 810 S.W.2d at 237. Finally, in order for a court to find that a DTPA action was brought for "the purpose of harassment," harassment must have been the "*sole* purpose" of the suit. *Donwerth v. Preston II Chrysler-Dodge*, 775 S.W.2d 634, 638 (Tex. 1989). "[A]ny purpose for recovering money damages, however small, as a motivating factor, [will] defeat such a finding . . . ." *Id.*

Because the "court, not the factfinder, must determine the existence of groundlessness, bad faith and harassment under section 17.50(c)," *Donwerth*, 775 S.W.2d at 637, there is no question whether genuine issues of material fact precluded summary judgment.[8] Rather, we review the district court's summary judgment to determine whether Phillips met its initial burden under Rule

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[7] The Texas Supreme Court has also explained that "`[g]roundless' under the DTPA has the same meaning as `groundless' under Rule 13 of the Texas Rules of Civil Procedure: `[No] basis in law or fact and not warranted by good faith argument for the extension, modification, or reversal of existing law.'" *Donwerth v. Preston II Chrysler-Dodge*, 775 S.W.2d 634, 637 (Tex. 1989) (citing Tex. R. Civ. P. 13).

[8] Trial court determinations under § 17.50(c) are questions of law, *see Donwerth*, 775 S.W.2d at 637 n.3; *Selig v. BMW*, 832 S.W.2d 95, 103 (Tex. App.))Houston [14th Dist.] 1992, no writ), and summary judgment is appropriate when the issue before the court involves a purely legal question. *See Diversified Group, Inc. v. Van Tassel*, 806 F.2d 1275, 1277 (5th Cir. 1987) ("Under Fed. R. Civ. P. 56 summary judgment is appropriate where the facts are not in dispute and the issue before the court poses purely a legal question.").

56(c) to prove it is entitled to judgment as a matter of law. *See John*, 757 F.2d at 708.

Phillips did not argue below that the homeowners' claims lacked a legal or factual basis. In fact, Phillips did not apply the elements of the standards for groundless and bad faith or harassive actions to the homeowners' claims at all.[9] The only ground that Phillips asserted in support of its motion for summary judgment on its DTPA counterclaim was the homeowners' purported concession that their claims could not survive summary judgment. In support of this argument, Phillips quotes a sentence from the homeowners' pretrial order, which we reproduce in context:

> Finally, given a fair reading of Phillips' counterclaim, the only claim actually asserted against the Moons, is that they brought a groundless and bad faith DTPA claim. *Counterclaim defendants concede that the DTPA claim cannot survive a Motion for Summary Judgment*. However, because Phillips engaged in an unconscionable course of conduct toward the Moons, which is still going on the DTPA claim can hardly be called groundless or in bad faith. Indeed the only questionable issue as to the Moons is their status as consumers. In any event, Phillips cannot demonstrate bad faith.

Record on Appeal, vol. 1, at 142 (emphasis added).

This "concession" does not satisfy Phillips' burden of showing that it was entitled to judgment as a matter of law on its DTPA

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[9] Phillips' entire argument in support of its motion for summary judgment on its $100,000 DTPA counterclaim consisted of the following three sentences:

> The claims of [the homeowners] purportedly brought under the [DTPA] are groundless and brought [sic] in bad faith for purposes of harassment. In their own words from the Pretrial Order, "counterclaim defendants concede that the DTPA claim cannot survive a Motion for Summary Judgment." The determination as to whether a groundless and bad faith claim has been asserted is a question for the Court and not for the jury.

Record on Appeal, vol. 2, at 408-09 (citations omitted).

counterclaim. Even if we were to interpret the italicized language as a concession[10] that the homeowners'[11] DTPA claims were groundless, the quoted passage does not concede bad faith.[12] According to the plain language of § 17.50(c), Phillips must show that the homeowners' DTPA claims were "groundless *and* brought in bad faith." (emphasis added). Furthermore, Texas courts have held that "[t]he fact that a suit is groundless does not per se establish bad faith." *Chambless v. Barry Robinson Farm Supply, Inc.*, 667 S.W.2d 598, 604 (Tex.App.))Dallas 1984, writ ref'd n.r.e.) (reversing attorneys' fees award under § 17.50(c) where there was insufficient evidence that groundless claim was brought in bad faith).

Phillips offered no summary judgment evidence to show that the homeowners' DTPA claims "were motivated by a malicious or discriminatory purpose." *Central Texas Hardware*, 810 S.W.2d at 237. Similarly, Phillips did not offer any summary judgment evidence that the sole purpose of the homeowners' DTPA action was harassment and not to obtain money damages. *See Donwerth*, 775

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[10] In the context of an appeal from summary judgment, where we review the facts in the light most favorable to the nonmoving party, *Reid v. State Farm Mut. Auto. Ins. Co.*, 784 F.2d 577, 578 (5th Cir. 1986), we question whether the italicized language, when read in context, is anything but ambiguous. The homeowners appear simultaneously to concede and then contest whether their DTPA claims were groundless. Further, the pretrial order was prepared and filed one month after the district court had entered summary judgment against the homeowners on their DTPA claims against Phillips. It makes little sense to "concede" that "the DTPA claim cannot survive a Motion for Summary Judgment" after summary judgment has been granted.

[11] We note that the concession appears in the context of an argument regarding Phillips' counterclaim against the Moons. It is unclear whether the quoted passage concedes anything with respect to the remaining homeowners.

[12] In fact, the final sentence of the passage explicitly questions Phillips' ability to prove bad faith.

S.W.2d at 638. Consequently, even if we were to interpret the ambiguous language of the homeowners' pretrial order as a concession that their DTPA claims were groundless, Phillips failed to meet their burden of demonstrating an entitlement to judgment on their DTPA counterclaims as a matter of law, and the district court erroneously granted Phillips' motion for summary judgment.[13]

**B**

The homeowners also contend that the district court erred when it denied their motion for leave to amend their pleadings. "Although leave to amend pleadings `shall be freely given when

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[13] In its Order Partially Granting Plaintiff's Motion for Summary Judgment, the court explained additional grounds supporting summary judgment on Phillips' DTPA counterclaims. The court held that the Moons' DTPA claims were groundless because they were clearly barred by the applicable statute of limitations. We have found no authority for the proposition that simply because a claim is time-barred it is groundless and brought in bad faith. *See Cal Fed Mortgage Co. v. Street*, 824 S.W.2d 622, 627 (Tex. App.))Austin 1991, writ denied) (declining to hold as a matter of law that a time-barred suit was groundless and brought in bad faith). With respect to the Louckses and Patricia Moffitt, the district court held that their DTPA claims were groundless because "the Loucks and Moffitts were barred by their releases." We have similarly found no authority for the conclusion that claims that turn out to be barred by an allegedly invalid release are groundless. The district court did not hold that there was "no basis in law or fact" for the homeowners' attempt to avoid their releases or that their claims were "not warranted by good faith argument for the extension, modification, or reversal of existing law." *Donwerth*, 775 S.W.2d at 637.

The district court also held that the homeowners' suits were brought in bad faith based on its determination that "the tactics in this suit and the bring [sic] of the DTPA claim after the statute of limitations had clearly run are malicious and in bad faith." Again, we have found no authority under Texas law to support the proposition that a time-barred claim is necessarily motivated by a malicious or discriminatory purpose. Furthermore, even assuming that the litigation methods of a party's attorney constitute evidence that a DTPA claim was brought for a malicious or discriminatory purpose, the summary judgment record in this case contains no such evidence because the district court severed Phillips' counterclaims, thus creating a separate record. Phillips included no summary judgment evidence of the homeowners' "tactics" with its motion for summary judgment on its DTPA counterclaims.

We do not express an opinion on the merits of Phillips' DTPA counterclaims. Although we vacate in part the court's summary judgment, we note that the district court on remand may conduct a hearing on Phillips' DTPA counterclaims or decide the counterclaims on the record of this proceeding combined with the record of the homeowners' claims. Outside the summary judgment context, we have held that we review a court's award of attorneys' fees under § 17.50(c) for abuse of discretion. *See Fragumar Corp. v. Dunlap*, 925 F.2d 836, 840 (5th Cir. 1991).

justice so requires,' Fed. R. Civ. P. 15(a), leave to amend is not automatic. The decision to grant or deny a motion to amend is in the sound discretion of the trial court." *Avatar Exploration, Inc. v. Chevron*, 933 F.2d 314, 320 (5th Cir. 1991). We have explained that a district court may properly deny a motion to amend when the amendment would be futile. *Id.* at 321; *see also Jamieson v. Shaw*, 772 F.2d 1205, 1208 (5th Cir. 1985) ("Among the acceptable justifications for denying leave to amend are undue delay, bad faith . . . and the futility of the amendment."). In this case, the district court found that the homeowners' amendment would be futile because it simply sought to assert claims and defenses they had unsuccessfully attempted to assert in the primary action. In fact, each of the proposed defenses was either barred by the doctrine of res judicata, *see supra* Part II.A.1, or irrelevant to Phillips' breach of contract and DTPA counterclaims. Consequently, we hold that the district court did not abuse its discretion in denying the homeowners' motion.[14]

[14] The homeowners also argue that their proposed amendment could be liberally construed as adding permissive counterclaims to Phillips counterclaims (rather than simply adding defenses to Phillips counterclaims). As counterclaims, the homeowners argue, their amendments are permitted by Federal Rule of Civil Procedure 13(e), which provides: "A claim which either matured or was acquired by the pleader after serving a pleading may, with the permission of the court, be presented as a counterclaim by supplemental pleading." The homeowners argue that Rule 13(e) allows counterclaims that arose subsequent to the original answer to "escape the bar of res judicata." In support of this interpretation of the rule, they cite "835 F.2d 609 (5th Cir. 1988)," but the case appearing at that citation, *Evans v. Marsh*, has nothing to do with civil procedure, let alone Rule 13(e). We have found no reason why Rule 13(e) should alter the general standard for motions to amend an answer. Therefore, whether the homeowners characterize their proposed amendments as permissive counterclaims or defenses does not change our holding that the district court did not abuse its discretion in denying the homeowners leave to amend their pleadings.

**C**

The homeowners also contend that the district court erred when it determined the amount of attorneys' fees to award Phillips rather than submitting the question to a jury. The homeowners argue that under Texas law, "the reasonableness of attorneys' fees is a matter for the factfinder." The right to a jury trial, however, is a matter of federal law. *RTC v. Marshall*, 939 F.2d 274, 279 (5th Cir. 1991) (citing *Simler v. Conner*, 372 U.S. 221, 222, 83 S. Ct. 609, 610, 9 L. Ed. 2d 691 (1963)). "Since there is no common law right to recover attorneys fees, the Seventh Amendment does not guarantee a trial by jury to determine the amount of reasonable attorneys' fees." *Id.* Although a jury as a trier of fact may determine the amount of reasonable attorneys' fees, the homeowners did not have a constitutional or statutory right to have the issue decided by a jury.

**D**

The homeowners also challenge several of the district court's evidentiary rulings during the damages hearing. We review a district court's evidentiary rulings for abuse of discretion. *Johnson v. Ford Motor Co.*, 988 F.2d 573, 578 (5th Cir. 1993). An error in the exclusion of evidence should not be the basis for setting aside the judgment "unless refusal to take such action appears to the court inconsistent with substantial justice," Fed. R. Civ. P. 61; *EEOC v. Manville Sales Corp.*, 27 F.3d 1089, 1093 (5th Cir. 1994), and we will not overturn evidentiary rulings unless we find that "the substantial rights of the parties were

affected." *Manville Sales*, 27 F.3d at 1093. The party asserting the evidentiary error has the burden to prove that the error prejudiced a substantial right. *Smith v. Wal-Mart Stores*, 891 F.2d 1177, 1180 (5th Cir. 1990).

**1**

The homeowners contend that the district court abused its discretion when it sustained four of Phillips' hearsay objections during the testimony of the homeowners' witness Roy Broom. Broom is a former employee of Fish Engineering, a company that performed a variety of services for Phillips under a maintenance contract. The homeowners called Broom to testify regarding Phillips' alleged destruction of documents in 1986. The following question is typical of the form of the objected-to questions: "Did they [your co-workers at Fish Engineering] discuss with you what they were told by the Phillips lawyers in terms of what they should say on the witness stand?" All four objected-to questions called for testimony by Broom as to what his co-workers told him that they had been told by Phillips' lawyers.

The homeowners argue that the statements of Phillips' lawyers to Broom's co-workers are not hearsay because they are party admissions or instructions not offered for the truth of the matter asserted. However, even assuming that Phillips' lawyers' statements are not hearsay, the homeowners do not explain why the out of court statements by Broom's co-workers are not hearsay. Furthermore, the homeowners fail to show that the error, if any, prejudiced a substantial right. Consequently, the district court's

hearsay rulings were not an abuse of discretion.

**2**

The homeowners also contend that the district court abused its discretion when it sustained Phillips' relevancy objection to a hypothetical question that they posed to their expert witness, attorney Bill Cornett.[15] All relevant evidence is admissible unless "its probative value is substantially outweighed by the danger of unfair prejudice." Fed. R. Evid. 403. Evidence is relevant if it has a "tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Fed. R. Evid. 401.

The homeowners' hypothetical question called for an opinion on the ethical considerations regarding an attorney's destruction of court-protected documents. The sole purpose of the damages hearing, however, was to determine reasonable attorneys' fees. Phillips' alleged unethical conduct was of no consequence to this determination. Furthermore, the homeowners fail to show that the supposed error prejudiced a substantial right. Therefore, the district court did not abuse its discretion in sustaining Phillips' objection.

**3**

The homeowners also contend that the district court abused its discretion when it overruled their objection to Phillips'

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[15] The homeowners called Cornett to testify regarding the reasonableness of Phillips' attorneys' fees request.

attorneys' fees exhibit. The homeowners did not receive a complete copy of Phillips' exhibit on attorneys' fees until the day of the damages hearing and were given only the lunch hour to review the new material. The homeowners argue that the court's ruling prejudiced a substantial right because their expert was not able to examine the entire fee statement before the hearing. The homeowners fail to show, however, that the new material was in any way flawed such that they could have objected had they been allowed more time to review it. In the absence of evidence that the exhibit could have been challenged in any way such that its admission impaired a substantial right, we cannot say that the court abused its discretion. *See Manville Sales*, 27 F.3d at 1093.

**E**

The homeowners further complain that the district court erroneously awarded Phillips attorneys' fees without segregating the fees according to the claims and the individual homeowners as required under Texas law. In suits involving multiple claims and parties, a party seeking attorneys' fees generally must segregate the amount of fees incurred prosecuting or defending the suit according to each claim or party. *See Stewart Title Guar. Co. v. Sterling*, 822 S.W.2d 1, 10-11 (Tex. 1991).

Segregation of claims is not required, however, when the claims arise out of the same transaction and are "so interrelated that their `prosecution or defense entails proof or denial of essentially the same facts.'" *Stewart Title Guar.*, 822 S.W.2d at 11 (quoting *Flint Assocs. v. Intercontinental Pipe & Steel, Inc.*,

739 S.W.2d 622, 625 (Tex. App.))Dallas 1987, writ denied)). Segregation of parties is likewise not required when the suit brought by or against the multiple parties involves identical claims. *See, e.g., Green Tree Acceptance, Inc. v. Pierce*, 768 S.W.2d 416, 425 (Tex. App.))Tyler 1989, no writ).

Phillips argues, and we agree, that it properly segregated the contract fees from the DTPA fees when it proved its total fees and later filed a supplemental brief highlighting the contract fees. The district court's judgment clearly segregates Phillips' fees for each claim. With respect to Phillips' breach of contract claims, the Louckses' and Patricia Moffitt's releases were substantially similar, and the contract claims arose from the same transaction. Consequently, Phillips was not required to segregate its fees for each breach of contract action. *See Stewart Title Guar.*, 822 S.W.2d at 10-11. Likewise, because the homeowners' DTPA claims against Phillips were identical, Phillips was not required to segregate its DTPA attorneys' fees against each homeowner. *See, e.g., Green Tree*, 768 S.W.2d at 425.

**F**

Lastly, the homeowners complain that there is a discrepancy in the amount of damages stated in the court's judgment and order on damages. Although the homeowners do not explain what that discrepancy is, we notice that the district court's judgment does in fact assess an incorrect total amount of damages. In its damages order, the district court assessed $13,393.00 against the

Louckses, Patricia Moffitt, and the Moons for breach of contract[16] and $108,306.94 against Kathy Loucks, Patricia Moffitt, and the Moons for filing a bad faith DTPA action, making the total damages $121,699.94 plus $15,000 in case of appeal. However, in the judgment the district court assessed $13,393.00 for the contract counterclaim and $121,699.94 for the DTPA claim, making the total damages 135,092.94 plus $15,000 in case of appeal. The district court mistakenly entered the total damages amount from its damages order as the DTPA damages amount in the judgment, which effectively counted the contract damages twice. Because we reverse the district court's summary judgment on Phillips' DTPA counterclaims, this error in arithmetic may become irrelevant. We explain it here only to avoid confusion on remand.

## III

For the foregoing reasons, we **AFFIRM** in part, **VACATE** in part and **REMAND**.

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[16] As we explain in Part II.A.1, that portion of the district court's damages order assessing damages against the Moons for breach of contract was also error.