Cause No. 04-0194

IN THE SUPREME COURT OF TEXAS

EMZY T. BARKER, III and AVA BARKER D/B/A
BRUSHY CREEK BRAHMAN CENTER AND
BRUSHY CREEK CUSTOM SIRES,

Petitioners,

v.

WALTER W. ECKMAN, INDIVIDUALLY AND AS
NOMINEE AND TRUSTEE, ECKMAN, INC., AND LARRY ECKMAN,

Respondents.

On appeal from the First Court of Appeals, Houston

AMICUS CURIAE BRIEF OF TEXANS FOR LAWSUIT REFORM

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April 26, 2005

IDENTITY OF AMICUS CURIAE

This brief is tendered on behalf of Texans for Lawsuit Reform, which will pay counsel for preparing the brief. Texans for Lawsuit Reform is an unincorporated association of volunteers that advocates sound public policy on litigation issues.

IDENTITY OF PARTIES AND COUNSEL

The list of parties and counsel provided in the Petition for Review is supplemented in accordance with Rule 55.3(a) of the Texas Rules of Appellate Procedure as follows:

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STATEMENT OF JURISDICTION

This Court has jurisdiction under section 22.001(a)(3) of the Texas Government Code because the case involves the construction of a statute necessary for the decision of the case, specifically: how are "reasonable" fee-shifting awards to be determined under section 38.001 of the Texas Civil Practice and Remedies Code? TEX. CIV. PRAC. & REM. CODE § 38.001

This Court has jurisdiction under section 22.001(a)(6) of the Texas Government Code because in this case the court of appeals committed an error of law important to the jurisprudence of this State. It allowed a fee-shifting award of nearly one-quarter of a million dollars to stand unchanged despite an 86% reduction in the actual damages awarded to the Plaintiffs. This eviscerates the "crucial factor" in determining the reasonableness of a fee-shifting award, the "results obtained."

This Court has jurisdiction under section 22.001(a)(2) of the Texas Government Code because the courts of appeals, including the court of appeals in this case, have differed with this Court and with each other on the standards and procedures in jury factual sufficiency review of reasonable fee-shifting awards.

ISSUE PRESENTED

This case presents an important fee shifting law issue: what standards and procedures should a court of appeals apply in a factual sufficiency review of the reasonableness of a fee-shifting award when the crucial factor of "results obtained" has been changed on appeal?

TO THE HONORABLE SUPREME COURT OF TEXAS:

Texans for Lawsuit Reform ("TLR") exists to advocate sound public policy on civil litigation issues. The law on attorneys' fees is important to the litigation system. This case presents an important legal issue – how to ensure that statutory fee-shifting awards are, as the Legislature requires, "reasonable" in amount. TLR urges this Court to grant the defendants' petition and rule on that issue.

STATEMENT OF THE CASE

Plaintiffs asserted breach of bailment contract claims based on hundreds of sales of bull semen over more than a decade. The jury found that defendants had breached the bailment agreement, found $111,983.58 in actual damages, and found $244,500 in reasonable attorney's fees pursuant to TEX. CIV. PRAC. & REM. CODE § 38.001(8). The trial court entered judgment on the jury verdict. On appeal the court of appeals held that most of the semen sales at issue were barred by limitations and accordingly reduced the jury's damage award to $16,180.14. *Barker v. Eckman*, 2004 WL 163462, *2 (Tex. App.—Houston [1st Dist.] Jan 22, 2004).

The court of appeals left the $244,500 fee-shifting award unchanged despite the 86% reduction in the results obtained by Plaintiffs. It expressly applied the factual sufficiency of the evidence standard, not to the reduced results obtained, but to the jury's original award of $111,983.58 in damages. *Id.* at 3. ("We, therefore, review the factual sufficiency of the attorney's fees awarded by the jury in light of the jury's award of $111,983.58 for the [Defendants'] failure to comply with the contract."). It did not

discuss in detail any record evidence under the other factors that this Court has held relevant to the reasonableness of a statutory fee-shifting award.

Defendants petitioned this Court for review of the reasonableness of the fee award, and Plaintiffs cross-petitioned on limitations. This Court requested full briefs on the merits for consideration of the petitions. As amicus curiae TLR urges this Court to grant Defendants' petition on the fee issue and assumes, without briefing, that limitations was correctly decided.

SUMMARY OF ARGUMENT

Along with the lodestar itself (hours worked times reasonable hourly rates), the "results obtained" are the most crucial of the factors this Court has held to determine a reasonable fee-shifting award. Standards and procedures used in Texas factual sufficiency of evidence review of a fee award must be calculated to enforce the factors this Court has held determine the reasonableness of a fee award.

In this case the jury concluded that $244,500 constituted a reasonable fee award based on the erroneous belief that the Plaintiffs were entitled to $111,983.58 in actual damages – the results obtained. When the court of appeals reduced actual damages by 86% to $16,180.14, it thereby changed the results obtained.

This Court clearly has jurisdiction to review whether the court of appeals properly carried out its factual sufficiency review of the fee award in light of that court's own reduction of the results obtained. This issue arose from the court of appeals' decision, and could not have been waived in the trial court. Proof of lodestar fees and segregation

of such files by claim are different issues from the effects of appellate reduction of results obtained, so any waiver of those issues is irrelevant to this Court's jurisdiction.

To enforce the "results obtained" factor, a Texas court of appeals must determine whether to suggest a proportionate or a more or less than proportionate remittitur of fees that were based on a higher, legally erroneous result. For this purpose, a court of appeals must presume that a proportionate remittitur is appropriate, and detail the record evidence (if any) under each of the other fee factors that warrants a more or less than proportionate remittitur. The party to whom the fees were awarded may elect to file the suggested remittitur amount or by declining to file, face remand for new trial of the issue of reasonable attorney's fees.

The questions presented here – substantive standards for fee-shifting awards under statutes, and standards and procedures in factual sufficiency reviews – are matters of law for this Court. The approach urged here is consistent with federal case law on reasonable fee-shifting awards and the "results obtained" factor. It is closely analogous to this Court's holdings on factual sufficiency review of exemplary damages when actual damages are reduced on appellate review.

ARGUMENT

I. This Court Has Jurisdiction Over the Single Important Fee Issue Presented – the Effects of a Significant Reduction in "Results Obtained"

A. This Court Has Jurisdiction to Determine Whether the Court of Appeals Applied the Correct Legal Standard.

Under American common law, each party bears its own attorney's fees. *See Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 95 S.Ct. 1612 (1975). The

shifting of attorney's fees to a party's adversary in a court proceeding, such as occurred in this case, is in derogation of the common law, and must be authorized by statute or be the result of an agreement between the parties. *Dallas Cent. Appraisal Dist. v. Seven Inv. Co.*, 835 S.W.2d 75, 77 (Tex. 1992). Statutes authorizing fee-shifting typically provide for a shift of "reasonable" attorney's fees, often with little or no additional guidance.[2]

While the question of whether a jury verdict is excessive is a factual sufficiency question over which this Court does not have jurisdiction, this Court does have jurisdiction to determine whether the court of appeals applied the correct legal standards. *Rose v. Doctors Hosp.*, 801 S.W.2d 841, 848 (Tex. 1990); *see also Bocquet v. Herring*, 972 S.W.2d 19, 20 (Tex. 1998).

The legal standards to be applied by a court of appeals in reviewing an award of attorney's fees pursuant to a statute permitting a shift of such fees to the opposing party are the statutory standards. Statutory construction raises questions of law which are reviewed *de novo*. *Subaru of Am., Inc. v. David McDavid Nissan, Inc.* 84 S.W.3d 212, 222 (Tex. 2002).

B. "Results Obtained" Is the Only Fee Issue Presented.

In *Arthur Andersen & Co. v. Perry Equip. Corp.*, 945 S.W.2d 812, 818 (Tex. 1997) and *Bocquet v. Herring*, 972 S.W.2d at 21, this Court ruled that the eight factors

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[2] TEX. CIV. PRAC. & REM. CODE § 38.001 (Vernon 1997) ("A person may recover reasonable attorney's fees...if the claim is for: ...(8) an oral or written contract."); TEX. BUS. & COM. CODE ANN. § 17.50(d) (Vernon 1987) ("reasonable and necessary" attorney's fees in a Deceptive Trade Practices action); TEX. INS. CODE ANN. art. 21.21 § 16(e) (Vernon Supp. 2002) ("attorney's fees reasonably incurred in asserting the claim" in an insurance case); TEX. CIV. PRAC. & REM. CODE ANN. § 37.009 ("reasonable and necessary attorney's fees as are equitable and just" in a declaratory judgment action).

set out in Tex. Disciplinary R. Prof. Conduct 1.04 should be considered by the fact finder in determining the reasonableness of an attorney fee award. Those factors include "the amount involved and the results obtained." *Perry Equipment*, 945 S.W.2d at 818.

Whether a fee award must be adjusted when the "results obtained" are significantly reduced on appeal is the single key issue presented in the case. Two other important fee shifting award issues, the calculation of the "lodestar" amount and the fee applicant's burden to segregate fees, are not presented.

As a general rule, a fee shifting award is based on the lodestar amount – the hours spent on the claim times a reasonable hourly rate for each attorney performing the work. Here, the Plaintiffs' fee witnesses apparently testified that the fees they requested were based on their hours worked and hourly rates. If there be any error in Plaintiffs' failure to present the records themselves, Defendants apparently did not preserve that error.

Also as a general rule, a plaintiff is not entitled to fees for attorney time spent on claims on which it has not been successful, or for which no fee shifting statute is available, and bears the burden of segregating fees that are compensable from those that are not. *Stewart Title Guar. Co. v. Sterling*, 822 S.W.2d 1, 11 (Tex. 1991); *Hensley v. Eckerhart*, 461 U.S. 424, 434-35, 103 S. Ct. 1933, 1940 (1983). If, however, the work performed on compensable and non-compensable claims is so interrelated that no segregation is possible, the fee applicant is entitled to include all hours worked in the lodestar amount, including hours spent on claims that are unsuccessful and for which a statutory basis for fee shifting does not exist. *Id.*

Here, Plaintiffs' fees were all based on a bailment contract theory, for which fee-shifting is available and on which Plaintiffs were successful at trial. On appeal, however, the court of appeals substantially reduced Plaintiffs' degree of success by ruling that the majority of Plaintiffs' claims were barred by limitations. While it is the fee applicant's burden to segregate fees between successful and unsuccessful claims, Defendants apparently failed to preserve any error on that point. 2004 WL 163462, *3. As a result, segregation of fees is not an issue in this case. *Green Int'l, Inc. v. Solis*, 951 S.W.2d 384, 389 (Tex. 1997) (if no one objects to fee applicant's failure to segregate fees on different claims, issue is waived).

C. This Court Plainly Has Jurisdiction to Determine Whether the Court of Appeals Properly Considered Results Obtained.

The court of appeals suggests (2004 WL 163462, *3) and the Plaintiffs argue (Cross-Petitioners' Response to Petitioners' Brief on the Merits pp. 30-31) that the Defendants cannot challenge the reasonableness of the fee award in light of the reduced "results obtained" because they did not preserve error on the segregation of fees between those spent on claims not barred by limitations and those so barred. This is wrong for two reasons.

First, the issue presented – whether an attorney's fee award must be revised when a damage award is substantially reduced on appeal - arose from the court of appeal's decision itself and thus may be raised for the first time in this Court. *Bunton v. Bentley*, 153 S.W.3d 50, 53 (Tex. 2004) ("A complaint that arises from the court of appeals'

judgment itself, however, may be raised either in a motion for rehearing in the court of appeals or in a petition for review in this Court.")

Second, Plaintiffs' argument confuses two distinct issues. Even after the issue of fee segregation is resolved, it must still be determined whether the resulting lodestar amount bears a reasonable relationship to the "results obtained" by the fee applicant. The United States Supreme Court made this point quite clearly in its seminal fee-shifting award decision, *Hensley v. Eckerhart*:

> [When] a plaintiff has achieved only partial or limited success, the product of hours reasonably expended on the litigation as a whole times a reasonable hourly rate may be an excessive amount. This will be true even where the plaintiff's claims were interrelated, non-frivolous, and raised in good faith.

461 U.S. at 436, 103 S. Ct. at 1941.

That segregation of fees and results obtained are two different issues is evident from an opinion written by Justice Hecht for the Dallas court of appeals, on which the Plaintiffs heavily rely in their briefing to this court. In *Flint & Assoc. v. Intercont'l Pipe & Steel, Inc,* 739 S.W.2d 622 (Tex. App.—Dallas 1987, writ denied), the court first determined that the plaintiff was entitled to compensation for attorney time spent both on its successful claim for breach of contract and for defending against a counterclaim under the Texas Deceptive Trade Practices Act because the two were so interrelated that the fees could not be segregated. *Id.* at 624-25. After the issue of segregation was resolved the court then took up the separate question of whether the resulting fee award bore a reasonable relationship to the result obtained by the plaintiff. *Id.* at 626.

This case squarely presents the issue of whether a court of appeals is required to adjust a fee-shifting award when the results obtained by the fee applicant are substantially reduced on appeal. Defendants did not and could not waive that issue. *Bunton v. Bentley*, 153 S.W.3d at 53. The entirely separate question of whether Plaintiffs carried their burden of segregating fees between successful and unsuccessful claims is not an issue and has no relevance to the "results obtained" question that is presented.

II. Federal Case Law Provides Guidance on the Effect of Reductions in Results Obtained

In construing Texas fee-shifting statutes and determining the legal standards and processes to be used by Texas courts of appeals in conducting factual sufficiency reviews of Texas fee-shifting awards, this Court can and should draw on the far greater body of federal court experience with federal fee-shifting statutes. Though not bound to adopt federal standards, Texas courts appropriately consider them.[1] Federal case law on determining the reasonableness of fee-shifting awards is particularly helpful because of the similarity of the statutory standards and issues.[2]

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[1] *See, e.g., Williams v. Lara*, 52 S.W.3d 171, 181 (Tex. 2001) (following federal law regarding taxpayer standing); *General Motors Corp. v. Bloyed*, 916 S.W.2d 949, 954 n.1 (Tex. 1996) (looking to federal law for guidance on issues relating to class actions); *Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 444 (Tex. 1993) (deferring to "the more extensive federal jurisprudential experience of the federal courts" on the subject of standing to sue).

[2] *See Guity v. C.C.I. Enterprise Co.*, 54 S.W.3d 526, 528 (Tex. App.—Houston [1st Dist] 2001, no. pet.) (pointing out substantial similarity between federal standard for determining reasonableness of fee-shifting award and factors set out by Texas Supreme Court in *Arthur Andersen &Co. v. Perry Equipment Corp.*, 945 S.W.2d at 818). Federal courts consider 12 factors which are based on the American Bar Association Code of Professional Responsibility, Disciplinary Rule 2-106: (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal service properly; (4) the preclusion of employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the "undesirability" of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases. *Hensley v. Eckerhart*, 461 U.S. at 430, n.3, 103 S. Ct. at 1937, n.3. The eight factors identified by the Court in *Arthur Andersen & Co., v. Perry Equip. Corp.* are

Federal courts hold that, in addition to the lodestar, "the most critical factor" in determining the reasonableness of a fee shifting award "is the degree of success obtained." That was the precise holding in *Hensley v. Eckerhart*:

> Congress has not authorized an award of fees whenever it was reasonable for a plaintiff to bring a lawsuit or whenever conscientious counsel tried the case with devotion and skill. Again, the most critical factor is the degree of success obtained . . .That the plaintiff is a "prevailing party" therefore may say little about whether the expenditure of counsel's time was reasonable in relation to the success achieved.

461 U.S. at 436, 103 S. Ct. at 1941. The Supreme Court concluded by holding that the extent of a plaintiffs' success is "a crucial factor" that the lower courts "should consider carefully in determining the amount of fees to be awarded." 461 U.S. at 438, n.14, 103 S. Ct. at 1942, n.14.

In *Farrar v. Hobby*, 506 U.S. 103, 113 S. Ct. 566 (1992) the Court reaffirmed and expanded the primary importance of results obtained in reviewing the reasonableness of a fee award, holding that a court may reduce a fee award based on that factor alone:

> "Where recovery of private damages is the purpose of . . . civil rights litigation, a district court, in fixing fees, is obligated to give primary consideration to the amount of damages awarded as compared to the amount sought." Such a comparison promotes the court's "central" responsibility to "make the assessment of what is a reasonable fee under the circumstances of the case." Having considered the amount and nature of damages awarded, the court may lawfully award low fees or no fees without reciting the 12 factors bearing on reasonableness or multiplying "the number of hours reasonably expended . . . by a reasonable hourly rate."

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similarly derived from Tex. Disciplinary R. Prof. Conduct 1.04: (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill required to perform the legal service properly; (2) the likelihood that the acceptance of the particular employment will preclude other employment by the lawyer; (3) the fee customarily charged in the locality for similar legal services; (4) the amount involved and the results obtained; (5) the time limitations imposed by the client or by the circumstances; the nature and length of the professional relationship with the client; (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and (8) whether the fee is fixed or contingent on results obtained or uncertainty of collection before the legal services have been rendered. 945 S.W.2d at 818.

Id. at 114-15, 113 S. Ct. at 575 (citations omitted).

When a damage award is substantially modified on appeal, federal courts, following the United States Supreme Court's directions, invariably remand the fee award for reconsideration in light of the changed degree of success of the fee applicant. *See, e.g., Hitt v. Connell*, 301 F.3d 240, 251 (5th Cir. 2002) (remanding fee award of $88,497.94 for reconsideration in light of reduction of plaintiff's damage recovery on appeal from $300,000.00 to $76,000.00); *Shea v. Galaxie Lumber & Constr. Co.*, 152 F.3d 729, 736 (7th Cir. 1998) (remanding lower court fee award of only 20% of lodestar in light of substantial increase of damage award on appeal); *Johnson v. Hardin County, Kentucky*, 908 F.2d 1280, 1288 (6th Cir. 1990) ("Since we have reversed in part the judgment for Johnson on the merits of the case, the award of attorney's fees must be reversed so that the District Court can consider what reduction, if any at all, is appropriate in light of Johnson's reduced success.")

In *Coffel v. Stryker*, 284 F.3d 625 (5th Cir. 2002), the Fifth Circuit reviewed an attorney's fee award under the same Texas statute at issue here, TEX. CIV. PRAC. & REM. CODE § 38.001(8). In that case, the plaintiff had sought over $500,000.00 in damages based on a claim for fraud and a claim for breach of contract, but had only been awarded a total of $8,000.00 in breach of contract damages after the trial court determined that his fraud claim was barred as a matter of law. *Id.* at 640-41. Because of the plaintiff's limited success the trial court had awarded less than 25% of the attorney's fees requested. *Id.* at 641. On appeal the Fifth Circuit reinstated plaintiff's fraud claim and awarded plaintiffs $500,000.00 in damages. *Id.* The court remanded the fee award with

instructions that the trial court reconsider it in light of the larger damage award and the interrelatedness of the plaintiff's contract claim and fraud claim. *Id.*

III. Texas Factual Sufficiency Review Case Law Supports Mandatory Detailed Review of Fee-Shifting Awards When Results Obtained Are Reduced

Texas courts of appeals review fee awards based on jury verdicts for factual sufficiency. When the "results obtained" are reduced as a matter of law on appeal, factual sufficiency review must involve detailed review of the record evidence (or lack thereof) bearing on each of the other relevant fee factors.

When the "results obtained" are reduced on appeal, it is clear that this factor did not "guide the determination" of the jury on the reasonableness of fees. *Bocquet,* 972 S.W.2d at 21. The results actually obtained by the Plaintiffs were not known to the jury. The jury was not asked about the unknown impact of all possible outcomes of future appellate review of the results obtained. Indeed, in *Perry Equipment* itself this Court ruled that it was error for a jury to be instructed to award attorney's fees based on a contingent fee arrangement without knowing the actual amount of the damage award: "because the jury is not informed what the total amount of the judgment will be, the jury can only speculate about whether a percentage of that unknown recovery will represent a reasonable and necessary fee in that particular case." 945 S.W.2d at 819.

The same reasoning applies here. Without knowing the amount of damages that would ultimately be awarded to Plaintiffs, the jury necessarily had insufficient evidence to determine a reasonable attorney fee award. The fee award entered on the jury-verdict

is therefore flawed as a matter of law *See* TEX. R. APP. P. 44.1(a)(1) (Reversible error is one that "probably caused the rendition of an improper judgment.").

The question then must be, how should courts of appeals conducting factual sufficiency reviews of the fee award take account of an appellate reduction in the "results obtained"?

In *Bunton v. Bentley,* 153 S.W.3d 50 (Tex. 2004) this Court addressed the closely analogous question of what to do about exemplary damages awarded on a jury verdict when compensatory damages are significantly reduced on appeal. This Court held that the court of appeals must automatically re-evaluate any corresponding award of exemplary damages. *Id.* at 54.

In so doing, the court of appeals must detail relevant evidence in its opinion, explaining why that evidence either supports or does not support the exemplary damage award in light of all relevant factors. *Transportation Ins. Co. v. Moriel,* 879 S.W.2d 10, 30 (Tex. 1994). The same should be true for an award of attorney's fees under a fee shifting statute. The holding in *Moriel* can and should be adapted as follows:

> While we do not alter this [factual sufficiency] level of appellate deference, we emphasize that courts of appeals must carefully scrutinize [fee shifting awards] to ensure that they are supported by the evidence. We have already held in *Pool* that courts of appeals, when reversing on insufficiency grounds, should detail the evidence in their opinions and explain why the jury's finding is factually insufficient or is so against the great weight and preponderance of the evidence as to be manifestly unjust. 715 S.W.2d at 635. Due to the [crucial importance of a jury's fee award bearing a reasonable relationship to the results obtained], we believe that a similar type of review is appropriate when a court of appeals is *affirming* such an award over a challenge that it is based on insufficient evidence or is against the great weight and preponderance of the evidence. This will ensure careful appellate review of the [fee] award, and allow this court to

> determine whether the court of appeals correctly applied the [*Perry Equipment*] factors. Thus, we hold that the court of appeals, when conducting a factual sufficiency review of a [fee-shifting award], must hereafter detail the relevant evidence in its opinion, explaining why that evidence either supports or does not support the [fee] award in light of the [*Perry Equipment*] factors.

879 S.W.2d at 30-31 (footnotes omitted, emphasis in original).

Every reason exists to apply the same standard to the review of a fee-shifting award as to an exemplary damages award. Like an award of attorney's fees, a jury award of exemplary damages is reviewed based on a factual sufficiency of the evidence standard. *Id.* Like an attorney's fees award, the reasonableness of an award of exemplary damages is determined by considering a number of factors including proportionability to actual damages. *Bunton v. Bentley*, 153 S.W.3d at 51; *Tatum v. Preston Carter Co.*, 702 S.W.2d 186, 187-88 (Tex. 1986). Similar policy considerations underscore the importance of insuring a reasonable relationship to the corresponding compensatory damage awards. Compare *General Motors Corp. v. Bloyed*, 916 S.W.2d at 960 (the lodestar amount, standing alone, can provide "a financial incentive for counsel to expend excessive time in unjustified work and creat[e] a disincentive to early settlement") with *Transportation Ins. Co. v. Moriel*, 879 S.W.2d at 17 (a jury's award of exemplary damages creates a potential windfall for the plaintiff).

Unlike the court of appeals in this case, other Texas courts of appeals have recognized that fee awards must be carefully re-examined once the damage award upon which they are based has been significantly reduced. *See, e.g., Allison v. Fire Ins. Exch.*, 98 S.W.3d 227, 262 (Tex. App.—Austin 2002, *pet. granted, judgm't vacated w.r.m. by*

agr.) (remanding fee award after reducing $25 million damage award to a little more than $4 million because "[w]e cannot say, . . . that the award of $8.9 million is still reasonable, given that we have significantly reduced the damages awarded by the jury.");[3] *Burns v. Miller, Hiersche, Martens & Hayward, P.C.*, 948 S.W.2d 317, 327-28 (Tex. App.—Dallas 1997, writ denied) (reversing and remanding attorney's fee award for reconsideration in light of significant reduction on appeal of property subject to turnover order upon which fee award was based); *Chilton Ins. Co., v. Pate & Pate Enters., Inc.*, 930 S.W.2d 877, 895-96 (Tex. App.—San Antonio 1996, writ denied) (reversing and remanding fee award in light of reduced success of fee applicant after appeal because, "most important in this case, attorney's fees must be reasonable and necessary, and bear some relationship to the amount recovered.")

IV. The "Amount Involved" May Differ from the "Results Obtained"

Before taking up the specific recommendation for how to deal with factual sufficiency review of a fee-shifting award when the results obtained are reduced on appeal, we must briefly address Plaintiffs' attempt to confound "amount involved" with "results obtained."

Both Texas and federal fee-shifting case law direct a fact-finder to consider the "amount involved and the results obtained." *Perry Equipment*, 945 S.W.2d at 818; *Hensley v. Eckerhart*, 461 U.S. at 430, n.3, 103 S. Ct. at 1937, n.3. Plaintiffs contend that

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[3] The decision in *Allison* well illustrates why a need exists for this Court to specify a procedure reviewing a fee award after a court of appeals has reduced a damages award. In that case the court of appeals found that there was "legally sufficient" evidence to support the jury's $8.9 million fee award, even though the court had reduced the damages award by over 80%. 98 S.W.3d at 263. The court of appeals nevertheless remanded to the trial court for re-determination of the fee award in light of the fee applicant's significantly reduced degree of success.

"the amount involved" can be substituted for the "results obtained," and equals the total amount of damages originally sought, which in this case was $113,892. Petitioners' Brief on the Merits, p. 3. Plaintiffs contend that because the amount involved in the case was $113,892, $244,500 in attorney's fees is not unreasonable. Cross-Petitioners' Response to Petitioners' Brief on the Merits pp. 20, 25, 27. Plaintiffs' arguments fail for two reasons.

First, the amount involved is not co-equal with, and may not be substituted for, results obtained in the determination of the reasonableness of an attorney's fee award. The United States Supreme Court made that point quite clearly in *Farrar v. Hobby*, 506 U.S. at 114, 113 S. Ct. at 575: In determining a reasonable fee-shifting award, a fact - finder is "obligated to give primary consideration to the amount of damages awarded as compared to the amount sought."

The point made by the Supreme Court is so obvious that its importance may be easy to underestimate. If Plaintiffs' argument were correct, a plaintiff could sue for $1,000,000, be awarded $1,000, or $100 or even $10, and still be entitled to recover a full lodestar amount of attorney's fees because the amount involved was $1,000,000. That is not the law. *See Southwestern Bell Mobile Sys., Inc. v. Franco*, 971 S.W.2d 52, 55-56 (Tex. 1998) (plaintiff who receives nominal or zero damages is not entitled to attorney's fees); *Hensley v. Eckerhart*, 461 U.S. at 440, 103 S. Ct. at 1943 ("where the plaintiff achieved only limited success, the district court should award only that amount of fees that is reasonable in relation to the results obtained.")

Second, the "amount involved" is not necessarily the damages sought. *Flint & Assoc. v. Intercont'l Pipe & Steel, Inc.*, on which Plaintiffs rely, demonstrates the point.

There the plaintiffs both sought and recovered $24,067.14 on a breach of contract claim, and also successfully defended against a counterclaim under the Texas Deceptive Trade Practices Act for $525,000. The defendant argued that the award of $162,000 in attorney's fees was excessive in relation to a damage award of only $24,067.14. 739 S.W.2d at 626. The court, in an opinion by Justice Hecht, rejected defendant's argument, pointing out that the plaintiff's success in the case was measured both by the damages recovered and by the much larger counterclaim that the plaintiff had successfully defended against. *Id.* Because the defendants had "picked the game and set the stakes" by filing a counterclaim seeking over 20 times as much as sought by the plaintiff, they could not later "complain of the size of the pot." *Id.*

Here, on the other hand, Plaintiffs picked the game and set the stakes. They filed suit seeking $113,892. At the end of the day (assuming the court of appeals correctly decided limitations) they were successful in recovering only a little over $16,000. Unlike the plaintiffs in *Flint*, the Plaintiffs here were not successful in any other aspect of the case that could serve to increase the amount involved to more than the damages awarded.

V. The Appropriate Texas Procedure Is Remittitur

The court of appeals invoked but did not properly apply the correct standard of review of a jury award of attorney's fees -- factual sufficiency of the evidence. *Snoke v. Republic Underwriters Ins. Co.*, 770 S.W.2d 777 (Tex. 1989). Any such review must also take into consideration the eight factors set out in *Perry Equipment Co.*, 945 S.W.2d at 818. The court of appeals in this case effectively refused to incorporate into its review one of the two most crucial *Perry Equipment* factors – the results obtained. Although it

reduced the damages awarded to Plaintiffs by 86%, it gave no effect to that fact in its review of the jury's fee award.

The procedure the court of appeals should have followed is expressly authorized under TEX. R. APP. P. 46. Its application to attorney's fees is well-established under Texas law.

If an appellate court finds that a jury's award of attorney's fees, compensatory damages or exemplary damages was based on factually insufficient evidence, the court may suggest a remittitur which must be conditioned on remand for a new trial should the fee applicant fail to timely file the remittitur. Rule 46.3 of the Texas Rules of Appellate Procedure expressly provides that a court of appeals may suggest a remittitur, and Rule 44.1(b) allows remand of an attorney fee award for new trial in the event a fee applicant refuses the remittitur. *See also Snoke v. Republic Underwriters Ins. Co.*, 770 S.W.2d at 777-78; Scott A. Brister, *Proof of Attorney's Fees in Texas*, 24 ST. MARY'S L.J. 313, 330 (1993) ("[T]he courts will reduce an excessive fee award by remittitur. One of the most frequent grounds for doing so is an award of fees that is substantially higher than the verdict."); William Powers, Jr. & Jack Ratliff, *Another Look at "No Evidence" and "Insufficient Evidence"* 69 TEX. L. REV. 515, 564 (1991) ("Courts of appeals also have the power to suggest a remittitur in lieu of a new trial, whether or not a trial court has done so. A court of appeals' action regarding remittiturs is reviewable by the supreme court, as in other factual sufficiency cases.").

Some courts have hesitated to order a remittitur of inherently imprecise damage awards, such as those for pain and suffering and mental anguish. Powers and Ratliff, 69

Tex. L. Rev. at 566-67; *Brookshire Bros., Inc. v. Wagnon*, 979 S.W.2d 343, 354 (Tex. App.--Tyler 1998, *pet. denied*) ("The process of awarding damages for amorphous, discretionary damages, such as mental anguish and pain and suffering, is inherently difficult because the injury constitutes a subjective, unliquidated, non-pecuniary loss." As a result "the jury is given a great deal of discretion in awarding an amount of damages it determines appropriate.").

As the Court recently indicated, however, the better position is that a court of appeals should suggest a remittitur even of mental anguish damages when supported by insufficient evidence. *Bunton v. Bentley*, 153 S.W. 3d at 52-53 (affirming in pertinent part court of appeals' suggestion of remittitur of all but $150,000 of $7,000,000 mental anguish award). Remittiturs are much less problematic for awards of attorney's fees because the determination of such awards is supposed to be governed by much more objective factors – especially hours and hourly rates. Indeed, the United States Supreme Court has held that a court may reduce an attorney's fee award based solely on the single factor at issue in this case without considering any other. *Farrar v. Hobby*, 506 U.S. at 115, 113 S. Ct. at 575. ("Having considered the amount and nature of damages awarded, the court may lawfully award low fees or no fees without reciting the 12 factors bearing on reasonableness.") This direction fits comfortably with this Court's standard for a lower court's suggestion of a remittitur:

> Lower courts should examine all the evidence in the record to determine whether sufficient evidence supports the damage award, remitting only if some portion is so factually insufficient or so against the great weight and preponderance of the evidence as to be manifestly unjust.

Pope v. Moore, 711 S.W.2d 622, 624 (Tex. 1986). When, as here, a jury awards attorney's fees based on a damage recovery that is later reduced by 86%, the fee award by definition is not supported by sufficient evidence and an appropriate remittitur should be required.

That was the precise holding in this Court's recent decision in *Bunton v. Bentley* with regard to a jury award of exemplary damages. There the court of appeals had suggested a remittitur of all but $150,000 of a $7,000,000 mental anguish damages award, but refused to re-evaluate the jury's $1,000,000 exemplary damage award. This Court affirmed the remittitur of the compensatory damage award but reversed and remanded the fee award to the court of appeals:

> Because the exemplary damages must bear a reasonable relation to the defendant's conduct and to the actual harm suffered, a claim that the exemplary damages are grossly disproportionate may therefore arise any time the compensatory damages are significantly adjusted. Ideally, the court of appeals should automatically reevaluate exemplary damages whenever compensatory damages are reduced.

153 S.W.3d at 54.

It is equally important for a fee shifting award to bear a reasonable relation to the damages award on which it is based. The holding in *Bunton v. Bentley* should be extended to attorney's fee-shifting awards.

VI. Presumption of Proportionate Remittitur for Results Reduced on Appeal

When compensatory damages are substantially reduced on appeal, as in this case, common sense suggests a *presumption* of a remittitur proportionately reducing the corresponding fee-shifting award. The appeal of this common sense notion is especially

strong in cases like this one, where there is apparently no evidence upon which to separate fees attributable to the remaining successful claims.

Texans for Lawsuit Reform urges a *presumptive, not automatic*, proportionate remittitur. In *Bunton v. Bentley* this Court held in the context of exemplary damages that an automatic reduction mathematically proportionate to a reduction in compensatory damages is inappropriate as a *per se* rule. 153 S.W.3d at 53, citing *Tatum v. Preston Carter Co.*, 702 S.W.2d 186, 188 (Tex. 1986). The Court's opinion, however, allowed proportionate reduction, based on consideration by the court of appeals of all relevant factors as they relate to the revised award of compensatory damages: "instead, each of the factors supporting the exemplary damages should be reevaluated in light of the actual harm suffered by the plaintiff." *Id.*

In the context of exemplary damages, judicial enforcement of some proportionality to actual damages is constitutionally essential in order to comply with "the Due Process Clause of the Fourteenth Amendment, which 'prohibits the imposition of grossly excessive or arbitrary punishments on a tortfeasor.'" *Bunton v. Bentley,* 153 S.W.3d at 53, quoting *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 416, 123 S. Ct. 1513, 1519-20 (2003). This is so despite the fact that the other factors that must be considered, *e.g.*. "the degree of reprehensibility of the defendant's misconduct," are inherently imprecise. *Id. See also Tatum v. Preston Carter Co.*, 702 S.W.2d at 188 (listing five factors that must be included in determining the reasonableness of an exemplary damages award). In contrast, for reasonable attorney's fees, the other most crucial factor is a highly objective and quantifiable factor, the lodestar amount. Thus the

presumption of a proportionate reduction is even more appropriate when an appellate court is reviewing a fee shifting award.

By direct analogy to exemplary damages, the court of appeals should conduct its factual sufficiency review of the record evidence with respect to each of the other *Perry Equipment* factors. It must detail each factor which warrants either a more than proportionate reduction in the fee award or a less than proportionate reduction. *See Bunton v. Bentley*, 153 S.W.3d at 53. In some cases, one or more of the other *Perry Equipment* factors will make a proportionate reduction of the fee award inappropriate. *Flint & Associates v. Intercont'l Pipe & Steel* again furnishes an example. There the damages actually awarded to the plaintiff did not adequately reflect the plaintiff's degree of success in light of the plaintiff's successful defense of a counterclaim involving over 20 times as much money as the plaintiff's actual recovery. 739 S.W.2d at 626.

In many cases, no damages are awarded, only declaratory and injunctive relief. Such cases plainly require a different analysis of reductions in "results obtained" and their effects on reasonable fees.

In other cases, both damages and meaningfully distinct declaratory and injunctive relief are awarded. In such cases, a reduction in the damages alone would not presumptively justify a proportionate reduction in the fees.

In this case only damages were awarded. Because those damages have been sharply reduced on appeal, the court of appeals must conduct an automatic factual sufficiency review of the evidence pertaining to all *Perry Equipment* factors and detail in its opinion all such evidence in light of the fee applicants' reduced degree of success.

Bunton v. Bentley, 153 S.W.3d at 54; *Transportation Ins. Co. v. Moriel*, 879 S.W.2d at 31. It may be that the record evidence contains nothing capable of overcoming the presumption that the fee award should be reduced in proportion to the reduction of the damages award. The court of appeals cited only to evidence that Plaintiffs' witness on attorney's fees had reviewed the billing summaries prepared by Plaintiffs' attorneys and pronounced the time spent on Plaintiffs' case to be reasonable. 2004 WL 163462, *3. There was apparently no testimony that plaintiffs' degree of success could be measured on any basis other than by damages awarded, nor evidence regarding any other *Perry Equipment* factor that could justify anything but a proportionate reduction of the fee award. If on remand from this Court the court of appeals finds no record evidence of other *Perry Equipment* factors that warrants a more or less than proportionate reduction in fees, it should suggest a proportional remittitur of 86%, conditioned on remand to the trial court for a new trial on attorney's fees.

PRAYER

For the foregoing reasons, Texans for Lawsuit Reform urges this Court to grant the Defendants' petition for review, reverse the court of appeals with respect to the statutory fee-shifting award, and remand to that court for a detailed factual sufficiency review of each of the *Perry Equipment* factors and determination of whether a remittitur of the fee award should be proportionate or more or less than proportionate to the reduction in the results obtained.

Respectfully submitted,

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CERTIFICATE OF SERVICE

On April 26, 2005, a true and correct copy of Amicus Curiae Brief of Texans for Lawsuit Reform was served by U.S. certified mail, return receipt requested, on all counsel of record as listed below in compliance with Rule 9.5(e) of the Texas Rules of Appellate Procedure:

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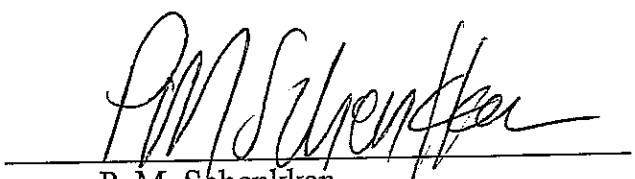

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