

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 Petition for Review from the
First Court of Appeals, Houston, Texas
No. 01-01-00079-CV

PETITIONERS' BRIEF ON THE MERITS

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STATEMENT OF THE CASE

- Nature of the Case:* Claims for breach of contract to store, sell, and ship semen produced by three Brahman bulls, collect the proceeds of the sales, and pay those proceeds to the bulls' owners in proportion to their ownership interests. CR 465, 468.
- Trial Court:* The Honorable Caroline E. Baker, 151st District Court, Harris County, Texas (jury trial).
- Trial Court's Disposition:* Judgment for plaintiffs. The plaintiffs obtained a (10-2) jury verdict finding \$111,983.58 in damages and \$244,500 in attorneys' fees. Tab A. Finding no limitations bar on the liability claims, the trial court rendered judgment on the verdict and awarded plaintiffs pre- and post-judgment interest and court costs. Tab B.
- Court of Appeals:* First District Court of Appeals, Houston. Chief Justice Radack, with Justices Nuchia and Hedges. *Barker v. Eckman*, 2004 WL 163462 (Tex. App. – Houston [1st Dist.] Jan. 22, 2004, pet. filed) (mem. op.). Tab C.
- Court of Appeals' Disposition:* Affirmed in part and reversed and rendered in part. Held that all breach of contract claims were barred by limitations except for a few claims totaling \$16,180.14 in damages. Upheld the entire \$244,500.00 award of attorneys' fees despite having taken away almost all of the recovery on which the attorneys' fees were based.

STATEMENT OF JURISDICTION

This Court has jurisdiction pursuant to sections 22.001(a)(2) and (6) of the Texas Government Code. The court of appeals' legal errors are important to the State's jurisprudence because they restrict the power of courts to police the size of attorneys' fee awards. In addition, the proper standard for reviewing attorneys' fees when liability is reversed in part and damages are substantially reduced is a question that has divided the

courts of appeals. This issue is likely to arise frequently in the future, and this petition offers the Court a good vehicle for clarifying the applicable standard of review. *See Golden Eagle Archery, Inc. v. Jackson*, 116 S.W.3d 757, 761 (Tex. 2003) (supreme court has “jurisdiction to determine whether court of appeals has applied the correct standard in conducting a factual sufficiency review”).

ISSUES PRESENTED

1. By what standards should an award of attorneys’ fees be measured in regard to the results obtained for the client?
2. Does the award of \$244,500 in attorneys’ fees bear a reasonable relationship to Eckman’s damages of \$16,180.14?
3. Is a new trial on attorneys’ fees required when the result on liability changes drastically on appeal?
4. When should attorneys’ fees be compared to the results obtained: when the jury renders its verdict and awards damages, when judgment is rendered, when the final result is determined on appeal, or upon remand to the trial court after the correct result (a reduction in damages) is determined on appeal?

TO THE HONORABLE SUPREME COURT OF TEXAS:

STATEMENT OF FACTS

Emzy and Ava Barker are ranchers from central Texas.¹ Together, this married couple owns and operates a business called Brushy Creek Custom Sires. CR 462. Through this business, the Barkers board Brahman bulls owned by other people, collect and store semen from the bulls, sell the semen at prices set by the owners, and collect the sales proceeds for distribution to the owners. 3 RR 185; 4 RR 53-54, 56-57.²

Dr. Walter Eckman is a practicing neurosurgeon who is also involved in his family's cattle raising business. 2 RR 167-68. In the early 1980s, Dr. Eckman and his family (collectively "Eckman") purchased partial interests in two Brahman bulls. Eckman and the other owners of these bulls chose the Barkers to handle semen collection and sales, and Eckman later sent a third bull to the Barkers as well.

The bulls and Brushy Creek

In February 1981, Eckman purchased a one-half ownership interest in a bull named JJ Poncrata 276 ("Bull 276"). Eckman and the other owner agreed that Brushy Creek would handle the collection, storage, sale, and shipment of semen for Bull 276. PX 3. For recordkeeping purposes, Eckman directed the Barkers to establish separate accounts for him and his co-owner, and to credit each account with one-half of the semen

¹ Mr. Barker died during the pendency of this petition, but Mrs. Barker remains a petitioner. Under TEX. R. APP. P. 7.1(a)(1), this Court should proceed to adjudicate the petition as if all parties were alive.

² Certain volumes of the reporter's record were not numbered sequentially by the court reporters. In this brief, the volume reporting proceedings for June 9, 2000, will be referred to as volume 4, the June 12 volume as volume 5, and the June 13 volume as volume 6.

collected from Bull 276. He also directed the Barkers to handle sales of Bull 276 semen by deducting from each account one-half of the semen ordered and distributing one-half of the sales proceeds to each party. PX 6.

In March 1982, Eckman purchased a one-third interest in the semen produced by another bull, RQ's Rexcrata 455 ("Bull 455"). Eckman and his co-owner chose Brushy Creek to collect Bull 455's semen and serve as collection agent for semen sales. PX 2. They agreed on recordkeeping and sales arrangements for Bull 455 that were similar to those for Bull 276, with Eckman receiving one-third of the semen collected from Bull 455 and providing one-third of the semen for each sale made by Brushy Creek. PX 9-11.

Finally, in November 1987, Eckman sent a bull named WWE Suville Poncrata 102 ("Bull 102") to Brushy Creek. 2 RR 191-92. This bull was wholly owned by Eckman. *Id.* at 182-83. As with other bulls sent to them, the Barkers began to collect and store semen from Bull 102, sell that semen, and collect the sales proceeds for distribution to Eckman. 3 RR 185.

Eckman fights with the bulls' other owners

Early in Eckman's business relationship with his co-owners and the Barkers, he began to experience problems participating in sales arranged by his co-owners. As early as 1983, Eckman was having "very significant difficulty" with the co-owner of Bull 455 regarding management of the semen accounts and collection of the sales proceeds. PX 15. Similarly, in June 1992, Eckman's attorney wrote a letter accusing the co-owner of Bull 276 of making improper sales of semen without providing notice and payment to Eckman. DX 64.

After the co-owner of Bull 455 declared bankruptcy in 1992, Eckman had even more reason to think that semen sales had been made solely from his co-owners' accounts at Brushy Creek. 2 RR 203. In July 1992, Eckman received notice from the FDIC that it was seizing 4,800 ampules of Bull 455 semen from his co-owner's account. Eckman could not understand why the FDIC was seizing so little, as he estimated there should be as many as 13,000 ampules in that account. DX 30. In June 1993, Eckman filed a proof of claim in the bankruptcy, alleging that he was owed \$225,000 in part because the co-owner had made sales of Bull 455 semen without allowing him to participate or accounting to him for his share of the profits. DX 31. Eckman settled this claim regarding Bull 455 through the bankruptcy system, 3 RR 76, and then went after the co-owner of Bull 276 and the Barkers.

Eckman sues the Barkers

On October 25, 1995, Eckman's attorney sent the Barkers a letter demanding payment of his share of proceeds from Bull 455 semen sales and a refund of storage charges for semen that should have been sold. PX 30. When they could not reach a settlement, Eckman filed this lawsuit. The defendants named in Eckman's original petition included the Barkers as well as the co-owner of Bull 276, who later settled with Eckman. The Barkers' answer raised the affirmative defense that Eckman's claims were barred by the statute of limitations, and they raised the limitations issue again in a motion for summary judgment. CR 37-38; Supp. CR 9-16.

Eckman sought \$113,892 in damages going back to 1981. See PX 46; DX 68b. He also sought \$244,500 in attorneys' fees. PX 47. These fees included the considerable

time that Eckman’s counsel devoted – both in discovery and at trial – to pursuing breach of contract claims against the Barkers that were barred by the statute of limitations. They also included time spent on claims against the Barkers that were dropped by amendment of the petition, as well as claims against other defendants (the co-owners of the bulls) who were dropped from the case. 3 RR 223-24.

The jury’s verdict and the trial court’s judgment

The Barkers moved for an instructed verdict at the close of the evidence, arguing that the four-year statute of limitations barred Eckman’s claims for breach of contract. 5 RR 4. Eckman opposed the motion on the ground that limitations did not begin to run until a demand was made, but he did “stipulat[e] that at least some of the breaches occurred more than four years before the tolling agreement.” 5 RR 4, 6.

After hearing these arguments, the court ruled that

the parties are going to provide briefing on that issue to the Court after the verdict. I’m going to submit the case to the jury, and then you will argue the questions of law to the Court afterwards.

5 RR 4-5. Eckman’s counsel stipulated that he was “comfortable with” this procedure, *id.* at 6, but the Barkers did not. The court then submitted a question to the jury regarding recovery of attorneys’ fees over the Barkers’ no-evidence objection. *Id.* at 7.

The jury found by a 10-2 vote that the Barkers had “fail[ed] to comply with the bailment agreement.” Tab A, at 4. It made a small deduction from Eckman’s requested damages due to a miscalculation of semen storage charges, awarding him \$111,983.58. It also awarded him attorneys’ fees of more than twice that amount: \$244,500. *Id.* at 5-6.

The Barkers raised their limitations argument again in a motion for judgment n.o.v. 4 CR 554-59. The court denied this motion without a hearing and entered judgment for Eckman on the verdict. Tab B. The Barkers then filed a motion for new trial arguing that the fee award was excessive and unsupported by factually sufficient evidence,³ but the motion was denied by operation of law.

The court of appeals drastically reduces the damages but affirms the fees

Based on the Barkers' arguments that most of the claims for breach of the bailment contract were barred by limitations, as well as Eckman's failure to contradict that assertion on appeal, the court of appeals rendered judgment that "all but \$16,180.14 in breach-of-contract damages are barred by the statute of limitations." Tab C, at *2. The court of appeals declined to reduce the award of attorneys' fees, however. Treating the issue as a global factual-sufficiency challenge, the court did not find "the trial court's judgment in . . . regard [to attorneys' fees] to be so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust." *Id.* at *3. The court did not consider the Barkers' arguments that the trial court's legal error regarding limitations required a new trial on fees or that the award was excessive in relation to the non-barred damages.

³ The new trial motion included a general objection to the factual sufficiency of the evidence supporting fees. CR 597 (jury's answers to fee question are "against the overwhelming weight of the evidence and the damages awarded by the jury . . . are excessive"). The Barkers also objected that the fee award was "excessive for a case involving damages which were approximately half the amount of attorney fees claimed for the trial . . ." CR 598.

SUMMARY OF THE ARGUMENT

Texas appellate courts are divided over how to review a prevailing party's award of attorneys' fees when liability is reversed in part and the party's damages are reduced substantially as a matter of law. Should courts merely review the sufficiency of the evidence to support fees "globally," as did the court below, or should they apply the *Arthur Andersen* factors and consider (among other things) whether there is sufficient evidence of a reasonable relationship between the fees and the amount ultimately recovered, as this Court and many others have held? Furthermore, is a new trial required on the issue of attorneys' fees when a key factor considered by the jury – "the amount of money involved in the case and the results obtained" – was corrupted by legal error? Because these questions are likely to arise frequently in the future, the Court should take this opportunity to provide needed guidance to the lower courts.

These questions are important to the State's jurisprudence because the lower court's "global" standard of review casts substantial doubt on the ability of courts to control runaway fee awards. This Court should make clear that courts do have the power to check unreasonably large awards of attorneys' fees in appropriate cases. This is such a case. The award of \$244,500 in attorneys' fees bears no reasonable relationship to the maximum amount of actual damages that Eckman could possibly recover, which the court of appeals reduced to \$16,180.14 as a matter of law. Nor does the record contain a factually sufficient explanation of why the nature and circumstances of this case support such a grossly disproportionate award. At a minimum, the Court should hold that meaningful review of the *Arthur Andersen* factors – including the relationship between

attorneys' fees and a party's recovery – is required and remand for the court of appeals to conduct that review.

The proper remedy, however, is not merely to remand this case to the court of appeals. Instead, this Court should remand to the trial court for a new trial on attorneys' fees because the legal error concerning liability and damages probably caused the rendition of an improper judgment regarding attorneys' fees. As the court of appeals recognized, the trial court erred in failing to conclude that the statute of limitations barred all but \$16,180.14 in breach-of-contract damages. This failure, in turn, wrongly inflated one of the key factors that the jury was instructed to consider in setting a fee award: "the amount of money involved in the case and the results obtained." Because it cannot be determined whether the jury based its fee award on claims and damages that were legally invalid, the error is harmful and a new trial on fees is required.

ARGUMENT

I. The Attorneys' Fee Award Should Be Reversed Because The Court Of Appeals Used An Incorrect Standard Of Review.

"The courts of appeals are authorized to determine whether damage awards are supported by insufficient evidence – that is, whether they are excessive or unreasonable." *Bentley v. Bunton*, 94 S.W.3d 561, 606 (Tex. 2002). "And the law requires appellate courts to conduct a meaningful review of [compensation awards]." *Saenz v. Fid. & Guar. Ins. Underwriters*, 925 S.W.2d 607, 614 (Tex. 1996). To decide whether a damage award should be remitted or a new trial granted, the courts of appeals employ a factual

sufficiency standard of review. *Larson v. Cactus Util. Co.*, 730 S.W.2d 640, 641 (Tex. 1987); *Pope v. Moore*, 711 S.W.2d 622, 623-24 (Tex. 1986) (per curiam).

Here, the court of appeals applied an improperly deferential standard of review and erroneously affirmed an excessive jury award of attorneys' fees. The jury awarded \$244,500 in fees,⁴ which is *fifteen times* Eckman's damages as corrected on appeal to remove time-barred claims. Yet the court of appeals never reviewed the fee award in light of the factors specified by this Court, including the changed results on Eckman's claims. Nor did the lower court meaningfully evaluate the record, which would have limited the fee award to *two times* Eckman's damages. These errors should be corrected.

A. The court of appeals failed to review the evidence regarding all the *Arthur Andersen* factors, including the “results obtained.”

This Court has jurisdiction to determine whether a court of appeals applied the correct standard when conducting a factual sufficiency review. *Pool v. Ford Motor Co.*, 715 S.W.2d 629, 634-35 (Tex. 1986). In this case, the court of appeals applied an incorrect standard of review that did not focus on all the evidence pertinent to an award of attorneys' fees.

The evidence that is pertinent to a factual sufficiency review varies depending upon the type of damage involved and the charge given to the jury. *See Golden Eagle Archery, Inc. v. Jackson*, 116 S.W.3d 757, 762 (Tex. 2003). Regarding attorneys' fees,

⁴ Tab A, at 6. According to Eckman, the “actual” award of attorneys' fees was only \$222,000 for preparation and trial; the additional \$22,500 in appellate fees “is separate and not related to the actual fees award.” PFR Resp. at 4 n.1. This argument makes no sense, particularly given that Eckman's own attorney used the “total fee” of \$244,500 when testifying that the fee was reasonable in relation to the damages. 3 RR 219.

the “[f]actors that a fact finder should consider when determining the reasonableness of a fee” are those listed in Disciplinary Rule 1.04.⁵ *Arthur Andersen & Co. v. Perry Equip. Corp.*, 945 S.W.2d 812, 818 (Tex. 1997). The jury charge in this case included those factors, which are:

- a. the time and labor involved, the novelty and difficulty of the questions involved, and the skill required to perform the legal services properly;
- b. the fee customarily charged in the locality for similar services;
- c. the amount of money involved in the case and the results obtained;
- d. the experience, reputation, and ability of the lawyers performing the services;
- e. whether the fee is fixed or is contingent upon results obtained;
- f. the time limitations imposed by the client or the circumstances; and
- g. the nature and length of the professional relationship with the client.⁶

In *Bocquet v. Herring*, this Court held that courts of appeals should “[d]etermine the factual sufficiency of the evidence . . . in light of the standards prescribed in Rule 1.04.” 972 S.W.2d 19, 21 (Tex. 1998). Thus, most courts of appeals use the *Arthur Andersen* factors to identify the evidence relevant to their factual sufficiency inquiry, reversing or suggesting a remittitur when the evidence does not support certain factors.

For example, courts often give serious consideration to the “results obtained” factor, which focuses on “the amount of damages awarded.” *Wayland v. City of Arlington*, 711 S.W.2d 232, 233 (Tex. 1986) (per curiam). As Justice Green has held,

⁵ TEX. DISCIPLINARY R. PROF’L CONDUCT 1.04(b), *reprinted in* TEX. GOV’T CODE ANN., tit. 2, subtit. G, app. A (Vernon 1998) (TEX. STATE BAR R. art. X, § 9).

⁶ Tab A, at 6-7.

“attorney’s fees must . . . bear some relationship to the amount recovered.” *Chilton Ins. Co. v. Pate & Pate Enters., Inc.*, 930 S.W.2d 877, 896 (Tex. App. – San Antonio 1996, writ denied).⁷ When the evidence is insufficient to demonstrate such a relationship, most Texas courts suggest a remittitur or remand for a new trial on the issue of fees.⁸ Justice Brister has observed that “[o]ne of the most frequent grounds for [remittitur] is an award of fees that is substantially higher than the verdict.” Scott A. Brister, *Proof of Attorney’s Fees in Texas*, 24 ST. MARY’S L.J. 313, 330 (1993).

In this case, however, the court of appeals did not evaluate the factual sufficiency of the evidence based on the results obtained or the other *Arthur Andersen* factors. Although the court quoted those factors as they appeared in the charge, Tab C, at *2, it did not consider each factor and the evidence relevant to it. Instead, the court looked for some testimony to support the award of fees “globally,” and it concluded that general testimony about the fee bills and their reasonableness was sufficient to support the award. *Id.* at *3. The court did not consider any evidence relating to factors such as the novelty and difficulty of the questions involved, the skill required to perform the legal services properly, or the results obtained.

⁷ See also, e.g., *Farrar v. Hobby*, 506 U.S. 103, 114 (1992) (“[T]he *most critical* factor in determining the reasonableness of a fee award is the degree of success obtained.”) (internal quotation marks omitted, emphasis added).

⁸ See, e.g., *Jack Roach Ford v. De Urdanavia*, 659 S.W.2d 725, 730 (Tex. App. – Houston [14th Dist.] 1983, no writ); *Wuagneaux Builders, Inc. v. Candlewood Builders, Inc.*, 651 S.W.2d 919, 923 (Tex. App. – Fort Worth 1983, no writ); *Allied Fin. Co. v. Garza*, 626 S.W.2d 120, 127 (Tex. App. – Corpus Christi 1981, writ ref’d n.r.e.); *Argonaut Ins. Co. v. ABC Steel Prods. Co.*, 582 S.W.2d 883, 889 (Tex. Civ. App. – Texarkana 1979, writ ref’d n.r.e.); *Republic Nat’l Life Ins. Co. v. Heyward*, 568 S.W.2d 879, 887-88 (Tex. Civ. App. – Eastland 1978, writ ref’d n.r.e.); *McFadden v. Bresler Malls, Inc.*, 548 S.W.2d 789 (Tex. Civ. App. – Austin 1977, no writ); *Capitol Life Ins. Co. v. Rutherford*, 468 S.W.2d 535, 537 (Tex. Civ. App. – Houston [1st Dist] 1971, no writ).

This approach is not unique to the court below. While other courts have not gone so far as to ignore *Arthur Andersen* in favor of a global standard of review, some have declined to consider certain of its factors,⁹ thereby nullifying them as meaningful standards for determining reasonable attorneys' fees.

This Court should reconcile these diverging lines of cases and hold that the court of appeals applied the wrong standard of review. It is not enough simply to stack up some evidence regarding hours billed and the reasonableness of the hourly rate and then proclaim the amount of evidence globally sufficient to support the fee award. Rather, *Bocquet* and *Saenz* require courts to determine factual sufficiency by conducting a meaningful review of the evidence regarding each of the *Arthur Andersen* factors. Here, no meaningful review happened.

The court of appeals' failure to use the *Arthur Andersen* factors to "measure[] the sufficiency of the evidence" is also erroneous because those factors appeared in the charge. *Osterberg v. Peca*, 12 S.W.3d 31, 55 (Tex. 2000). Thus, the court of appeals was required to "detail the relevant evidence" regarding each factor. *Pope*, 711 S.W.2d at 624; *see also Transp. Ins. Co. v. Moriel*, 879 S.W.2d 10, 30 (Tex. 1994) (holding, in analogous context of factual sufficiency review of punitive damages, that court of appeals must "detail the relevant evidence in its opinion, explaining why that evidence either supports or does not support the punitive damages award in light of the *Kraus* factors").

⁹ *See, e.g., Hagedorn v. Tisdale*, 73 S.W.3d 341, 353-54 (Tex. App. – Amarillo 2002, no pet.) (upholding award despite lack of evidence on several factors including hours spent by each attorney and customary local fees); *Columbia Rio Grande Reg'l Hosp. v. Stover*, 17 S.W.3d 387, 397 (Tex. App. – Corpus Christi 2000, no pet.) (affirming award while acknowledging lack of evidence to support some factors).

Its failure to do so directly contradicts this Court’s admonition that “without evidence of the factors identified in Disciplinary Rule 1.04, the jury has no meaningful way to determine if the fees were in fact reasonable and necessary.” *Arthur Andersen*, 945 S.W.2d at 818.

In sum, the court of appeals erred not simply by giving insufficient weight to certain factors (as Eckman contends), but by completely failing to review the sufficiency of the evidence regarding each factor – including, but not limited to, the results obtained.¹⁰ This Court should reverse. *Cf. Ellis County State Bank v. Kever*, 915 S.W.2d 478, 479 (Tex. 1995) (per curiam) (reversing and remanding “for the court of appeals to detail all the evidence and explain why that evidence either supports or does not support the punitive damages award” in light of the relevant factors).

B. At a minimum, the court of appeals considered the wrong “results obtained.”

Even if this Court concludes that the court of appeals did attempt to review the evidence regarding some *Arthur Andersen* factors, the lower court still erred by failing to consider the changed “results obtained” on appeal. Despite having just reduced Eckman’s damages to ***\$16,180.14*** as a matter of law, the court “review[ed] the factual sufficiency of the attorney’s fees . . . in light of the jury’s award of ***\$111,983.58***” in damages. Tab C, at *3 (emphasis added). This legal error in the court’s review requires

¹⁰ Eckman argues that the correct standard of review includes all of the *Arthur Andersen* factors, not solely whether there is a reasonable relationship between the fees and the results obtained. This argument is a red herring; the Barkers do not contend that the results obtained should be the sole factor in reviewing a fee award. Instead, results are one important part of the *Arthur Andersen* factors, all of which must be meaningfully considered as part of a factual sufficiency review of attorneys’ fees.

reversal. *See Pool*, 715 S.W.2d at 631, 633 (reversing and remanding where “court of appeals committed errors of law in their [factual sufficiency] review”).

1. When the results obtained change on appeal, Texas courts review fee awards in light of the new results.

Unlike the court below, other courts have held that when liability is reversed in part and damages are reduced substantially as a matter of law, the changed results should be taken into account in reviewing an award of attorneys’ fees.¹¹ In *Chilton*, for example, Justice Green’s opinion for the court held that the defendant’s DTPA claims failed as a matter of law. The court rendered judgment reducing the defendant’s damages; it also awarded damages to the plaintiff that the trial court had erroneously disregarded. The court then reviewed attorneys’ fees in light of the changed “amount recovered” and “success of the parties on their causes of action and damage theories,” holding that these changes required a remand to redetermine the fee awards. 930 S.W.2d at 896, 897.¹²

Similarly, in *Hunt County Tax Appraisal District v. Rubbermaid Inc.*, 719 S.W.2d 215 (Tex. App. – Dallas 1986, writ ref’d n.r.e.), the taxpayer won a refund for three tax years at trial. The court of appeals reversed and rendered judgment against the taxpayer for two of the years. As to fees, the court held that because the taxpayer “ha[d] not

¹¹ In addition to the cases discussed in text, see *Burns v. Miller, Hiersche, Martens & Hayward, P.C.*, 948 S.W.2d 317, 327 (Tex. App. – Dallas 1997, writ denied) (holding that when appellate court reversed certain parts of turnover order but affirmed others, “the turnover order is so significantly altered as to merit the trial court’s reconsideration of reasonable attorneys’ fees” under the *Arthur Andersen* factors).

¹² Eckman states that no fees were awarded at all in *Chilton*, but he is wrong. One party did not receive fees at trial, and the appellate court held that this was error. 930 S.W.2d at 895. A second party did receive fees at trial, however. After reducing the second party’s damages, the appellate court remanded for a new trial on that party’s fees in light of the reduction. *Id.* at 896-97.

prevailed on appeal for [the two] years,” it would remand for the trial court to determine a reasonable fee for the remaining year. *Id.* at 222-23.

Finally, the Austin Court of Appeals faced a case very similar to this one in *Parker v. Rolls*, 338 S.W.2d 523 (Tex. Civ. App. – Austin 1960, no writ). There, the plaintiff filed suit for breach of contract in November 1958, seeking to recover damages for several payments that the defendant failed to make between March and December 1954. The jury awarded the plaintiff his requested damages of \$1,212.50, as well as \$400 in attorneys’ fees. *Id.* at 525-26. On appeal, the court reduced the damage award to \$262.50, holding that the four-year statute of limitations barred recovery of all payments that the defendant should have made more than four years before suit was filed. *Id.* at 528-29. With respect to attorneys’ fees, the court considered this changed result and held that because the only amount of damages recoverable under the statute of limitations was \$262.50, an award of \$400 for attorneys’ fees was excessive. It suggested that the fee award be remitted by \$300, and ordered a remand for a new trial on fees if the plaintiff did not agree to the remittitur. *Id.* at 530.

The rule that changes in the results obtained on appeal should be considered in reviewing attorneys’ fee awards is not unique to fees; it also applies in the analogous context of reviewing exemplary damages. Like fees, exemplary damages are reviewed for factual sufficiency in light of a multi-factor test, and courts require that they bear a reasonable relationship to compensatory damages. *Moriel*, 879 S.W.2d at 30; *Alamo Nat’l Bank v. Kraus*, 616 S.W.2d 908, 910 (Tex. 1981). Less than two months ago, this Court emphasized that “court[s] of appeals should automatically reevaluate exemplary

damages whenever compensatory damages are reduced.” *Bunton v. Bentley*, 48 TEX. SUP. CT. J. 197, 199, 2004 WL 2913693, at *3 (Tex. Dec. 17, 2004) (per curiam); see *Tatum v. Preston Carter Co.*, 702 S.W.2d 186, 188 (Tex. 1986) (remanding for court of appeals to reevaluate exemplary damage award under *Kraus* factors given substantial reduction in actual damages).¹³ Likewise, the court of appeals here should have evaluated the fee award in light of the changed results on liability and damages.

Eckman contends that the cases above do not apply because they held that an entire cause of action or theory of liability was incorrect as a matter of law, while here the court merely reduced a damage award on the same issue of liability. PFR Resp. at 9-12. This purported distinction makes no sense. Here, the court of appeals reduced the damages precisely because most of Eckman’s causes of action for breach of contract were barred by limitations as a matter of law.¹⁴ Thus, this case is exactly like the ones discussed above. *E.g.*, *Hunt County*, 719 S.W.2d at 216, 222-23 (considering changed result when claims for two of three tax years barred by voluntary payment); *Parker*, 338 S.W.2d at 530 (considering changed result when most breaches barred by limitations). In

¹³ See also *Gunn Infiniti, Inc. v. O’Byrne*, 996 S.W.2d 854, 861 (Tex. 1999) (eliminating certain damages as a matter of law and holding that “[t]he court of appeals should determine the effect, if any, this reduction in actual damages has on the factual sufficiency of the evidence supporting the exemplary damages award”).

¹⁴ In their court of appeals briefing, the Barkers showed that most of Eckman’s claims for breach of contract were barred by the statute of limitations as a matter of law because the breaches occurred more than four years before the Barkers signed a tolling agreement. Only a few breaches causing at most \$16,180.14 in damages occurred less than four years before the tolling agreement, so the statute limited Eckman’s damages to that amount.

any event, as *Bunton* makes clear, it is proper to consider changed results “whenever compensatory damages are reduced.”

Eckman also argues that a change in results obtained should not lead to an arbitrary pro rata reduction of attorneys’ fees. This argument mischaracterizes the Barkers’ position. Requiring courts to take changed results into account when applying the *Arthur Andersen* factors is not the same as a pro rata approach. In the context of exemplary damages, for example, this Court has rejected a pro rata approach. *Tatum*, 702 S.W.2d at 188. Yet it has also held that courts *must* consider appellate changes in actual damages when applying the multi-factor sufficiency test. *Id.*; *Bunton*, 48 TEX. SUP. CT. J. at 199, 2004 WL 2913693, at *3. The same consideration is proper here.

For these reasons, the court of appeals erred by failing to consider the partial reversal of liability and substantial reduction in actual damages when reviewing the factual sufficiency of the evidence to support the fee award. At a minimum, this Court should reverse in part and remand for the court of appeals to reconsider the factual sufficiency of the evidence in light of all the *Arthur Andersen* factors, including the changed results obtained.

2. *The Barkers did not waive consideration of the changed “results obtained.”*

Although the opinion is less than clear, it seems that the court of appeals declined to consider the changed results on liability and damages when reviewing fees because the Barkers did not “ask[] the jury to segregate [Eckman’s] attorney’s fees for various

services.”¹⁵ Tab C, at *3. But segregation has no relevance here. Juries may be asked to segregate fees when they accept some of a plaintiff’s claims and reject others, when a statute does not authorize fees for all claims, or when the plaintiff’s fees include time spent pursuing non-parties to the judgment. Yet whether a *jury* would segregate fees under those circumstances is an entirely different question from the one at issue here: whether fees are reasonable in relation the plaintiff’s recovery after an *appellate court* reverses liability in part and reduces damages *as a matter of law*. See *Chilton*, 930 S.W.2d at 896 (treating segregation requirement as distinct from requirement of reasonable relationship between attorneys’ fees and amount recovered).

As this Court recently observed in *Bunton*, “[a] complaint that arises from the court of appeals’ judgment itself . . . may be raised either in a motion for rehearing in the court of appeals or in a petition for review in this Court.” 48 TEX. SUP. CT. J. at 199, 2004 WL 2913693, at *2. Applying this rule, the Court held that a defendant could challenge exemplary damages as excessive for the first time in its petition because the challenge was based on the court of appeals’ judgment reducing actual damages. *Id.*

Under *Bunton*, the Barkers properly preserved their argument that an appellate judgment changing the “results obtained” should be considered when reviewing a fee award for excessiveness. The Barkers challenged the factual sufficiency of the evidence supporting fees in their new trial motion (CR 597-98) and pressed this challenge in their

¹⁵ The court’s focus on “services” is misplaced. The Barkers do not contend that certain kinds of services were improper. Their position is that Eckman cannot recover attorneys’ fees of any kind for pursuing his legally invalid claims.

appellate briefs, which anticipated the argument that a reduction in damages based on limitations would alter the “results obtained” component of the fee determination.¹⁶ For example, the Barkers stated that there was no evidence the award was reasonable given that “the damages available on [Eckman’s] legally viable claims are less than one-fifteenth the amount of attorney’s fees.” Supp. Br. for Appellants at 4. Then, in their petition for review, the Barkers argued that the court of appeals erred by failing to consider its judgment reducing Eckman’s damages when evaluating the fee award. *E.g.*, PFR at 6. Because this error arose from the court of appeals’ judgment, the Barkers’ briefing was sufficient to preserve it.

Moreover, the Barkers repeatedly urged their objections to Eckman’s time-barred claims in the trial court.¹⁷ The error lay in submitting those invalid claims to the jury, not in a failure to segregate attorneys’ fees. If the trial court had sustained the Barkers’ objections, the jury would properly have considered only Eckman’s viable claims when weighing the fee factors, including “the amount of money involved . . . and the results obtained.” Tab A, at 6.

Contrary to Eckman’s argument, the record does not reflect that the Barkers consented to the trial court’s decision to submit all of Eckman’s claims to the jury and decide the issue of limitations after the verdict. 5 RR 4-6. Yet even if Eckman were correct about what happened at *trial*, *Bunton* holds that the Barkers properly preserved

¹⁶ See Appellants’ Br. at 26, 28; Supp. Br. for Appellants at 2-4, 7.

¹⁷ See, *e.g.*, CR 37-38 (answer); Supp. CR 9-16 (summary judgment motion); 5 RR 4 (directed verdict motion); CR 554-59 (j.n.o.v. motion).

their argument that an *appellate* change in the “results obtained” should be used in reviewing the fee award.¹⁸ Because the court of appeals failed to heed this argument and applied an incorrect standard that did not include the changed results obtained, this Court should reverse the judgment regarding attorneys’ fees.

C. Under the proper standard of review, the evidence is insufficient to support the fee award.

The Barkers recognize that it is this Court’s function to determine whether a court of appeals has applied the correct legal standard in conducting a factual sufficiency review, not to conduct a factual sufficiency review itself. One reason that the Court should take this opportunity to clarify the legal standard, however, is that the proper standard is critical to the outcome of this case. If the court of appeals had meaningfully reviewed the factual sufficiency of the evidence in light of the *Arthur Andersen* factors, including the changed results obtained, it would have found the evidence insufficient to support the attorneys’ fee award.

The award of \$244,500 in attorneys’ fees bears no reasonable relationship to the maximum result that Eckman could possibly obtain, which is \$16,180.14. Nor does the record contain a factually sufficient explanation of why the nature and circumstances of this case support such a grossly disproportionate award. On direct examination, Eckman’s counsel testified that he did not believe a total fee award of \$244,500 was

¹⁸ The case cited by Eckman does not hold that consent to the trial court’s decision would waive the right to seek adjustment of the fee award based on a later reduction in damages. In *Russell v. City of Bryan*, 919 S.W.2d 698, 708-09 (Tex. App. – Houston [14th Dist.] 1996, writ denied), the court merely held that a party could not recover attorneys’ fees when it failed to request submission of a fee question to the jury.

“unreasonable” when “the damages are approximately a half of that.” We quote the entire exchange:

Q All right. Now, Mr. Ketchand, do you believe that total fee is a reasonable fee in this case?

A Yes.

Q And does the fact that the attorneys fees are – that total attorney fee including the appeal portion, do you believe that that fee is unreasonable since the damages are approximately a half of that?

A No, I do not in the context of this case.

Q Would you explain why that is?

A It relates to earlier what I said. The complexity of the factual issues, the myriad number of detailed transactions that had to be reviewed, the difficulty obtaining those documents are the type of things that generate cost. And it's, it's unfortunate that those costs sometimes balloon up like that. But in this instance, that's what happened. And it was, it was the result of actual work expended doing productive work towards the advancement of this lawsuit. So I think under those circumstances, it's reasonable.

3 RR 218-19.

Eckman offered no evidence that a fee award of \$244,500 is reasonable when, as a matter of law, the maximum recovery available on his breach of contract claims is \$16,180.14. *See id.* According to Eckman's counsel, the nature and complexity of the case supported an attorneys' fee award that was *twice* the amount of Eckman's recovery on all of his asserted breach of contract claims. *Id.* But Eckman's counsel did not testify that the nature or complexity of the case supports an award of attorneys' fees that is more than *fifteen times* the maximum amount of Eckman's damages on his contract claims. *Cf. id.* Although Eckman says other courts have upheld fee awards that exceed the damages,

cf. PFR Resp. at 6-7, most of the cases he cites did not involve appellate damage reductions and none upheld awards anywhere near as large as fifteen times the damages.¹⁹

Even before this case was tried, Dr. Eckman's brother and two other lawyers had billed over 1,000 hours on claims against the Barkers and the co-owners of the bulls. 3 RR 200-02, 220-21. The record reveals that Eckman's counsel spent this time – and additional time during trial – pursuing claims going all the way back to 1981.²⁰ Yet most of these claims were barred by limitations as a matter of law. Eckman is not entitled to recover attorneys' fees for pursuing these legally invalid claims.²¹ Because Eckman's counsel devoted considerable time to his invalid claims, their testimony regarding the number of hours spent, the breadth of discovery, and the length of trial is not factually sufficient to support the jury's fee award in this case. This testimony is greatly

¹⁹ In fact, in one of the cases Eckman cites for the proposition that awards greater than the judgment can be reasonable, the court actually held that the fees claimed were too high in relation to the damages awarded given the nature of the case, the results obtained, and other factors. *Baxter v. Crown Petroleum Partners 90-A*, No. 3:97-CV-2371-P, 2000 WL 269747, at *9-10 (N.D. Tex. Mar. 10, 2000).

²⁰ *See, e.g.*, 3 RR 202 (Eckman's lawyer testifies that his time entries and fee calculations include all the time expended on all of Eckman's contract claims against the Barkers); 2 RR 214-15 (Eckman discusses how he went through the Barkers' records going back in time to the late 1970s and is asserting claims dating back to 1982); 3 RR 128-29 (Eckman testifies that his contract claims include claims that the Barkers breached the contract regarding Bull 276 twelve times before 1986 and breached the contract regarding Bull 455 seventeen times before 1986); PX 41-42 (Eckman's analysis of his breach claims dating back to 1981); PX 43A-E, 44A-B (reflecting Eckman's discovery of the Barkers' records going back to 1978); 4 RR 10 (Eckman's expert discusses his search of all the Barkers' records to find support for all of Eckman's claims going back to 1981).

²¹ *See* TEX. CIV. PRAC. & REM. CODE ANN. § 38.001(8) (Vernon 1997) (providing that a party “may recover reasonable attorney's fees . . . in addition to the amount of a *valid* claim and costs, if the claim is for . . . an oral or written contract”) (emphasis added); *Butler v. Arrow Mirror & Glass, Inc.*, 51 S.W.3d 787, 797 (Tex. App. – Houston [1st Dist.] 2001, no pet.) (recognizing that for attorneys' fees to be awarded the “claim presented by an attorney's fee claimant must be valid”).

outweighed by evidence of the large number of unmeritorious, invalid claims pursued by Eckman and evidence of Eckman's maximum recovery on his few legally valid claims.

In addition, Eckman failed to offer sufficient evidence regarding other *Arthur Andersen* factors. For example, there is no evidence that Eckman's claims were novel or that pursuing them required special legal skills. In fact, much of counsel's work on those claims appears to have involved matters of accounting. 3 RR 196-97, 201. Furthermore, counsel's trial preparation included routine administrative tasks such as "getting exhibits blown up . . . [and] copying exhibits." 3 RR 223.

For these reasons, an award of \$244,500 in attorneys' fees for pursuing claims worth a maximum of \$16,180.14 is "excessive [and] unreasonable." *Bentley*, 94 S.W.3d at 606. To guard against runaway fee awards and ensure that fees bear a reasonable relationship to the amount at issue and the results obtained for the client, this Court should at least send the case back to the court of appeals to review the evidence according to the standards required by the charge and by this Court's decision in *Arthur Andersen*.

II. The Trial Court's Limitations Error Requires A New Trial On Fees.

The fee award must also be reversed for a second, independent reason: the trial court's legal error regarding the statute of limitations probably caused the rendition of an improper judgment on attorneys' fees as well as damages. TEX. R. APP. P. 44.1. To remedy this error, the Court should remand for a new trial on the issue of attorneys' fees.

As discussed above, the jury was instructed to consider certain factors in setting a reasonable fee, including "the amount of money involved in the case and the results obtained." Tab A, at 6. The trial court's limitations error drastically altered this key

component of the jury's fee determination. Because the trial court refused to bar most of Eckman's claims, the jury heard evidence of claims going all the way back to 1981 and believed that the amount involved was \$111,983.58. Tab A, at 5-7. As a result, Eckman's counsel was able to testify that it would be reasonable for the jury to award \$244,500 in fees "since [Eckman's] damages are approximately a half of that." 3 RR 219.

The court of appeals correctly held, however, that most of Eckman's claims are barred by limitations as a matter of law. The maximum amount he can recover on his few remaining claims is \$16,180.14 – not \$111,983.58. Tab C, at *2. Yet the trial court's limitations error prevented the jury from learning this true amount. Because it must be presumed that the jury followed its instructions and considered the legally improper damage figure of \$111,983.58 in setting the fee award,²² this error probably caused the rendition of an improper judgment regarding attorneys' fees. Therefore, a new trial on attorneys' fees is required.

Several courts of appeals have held that when (as here) liability is reversed in part or damages are reduced substantially as a matter of law, the proper remedy regarding attorneys' fees is to grant a new trial – not simply to conduct a factual sufficiency review. *Chilton*, 930 S.W.2d at 896-97 (Green, J.) (reversing liability in part, rendering judgment reducing actual damages, and then remanding attorneys' fee award for retrial in light of

²² See *Daugherty v. So. Pac. Transp. Co.*, 772 S.W.2d 81, 83 (Tex. 1989); cf. *Preston Carter Co. v. Tatum*, 708 S.W.2d 23, 25 (Tex. App. – Dallas 1986, writ ref'd n.r.e.) (“[I]t is probable that in assessing exemplary damages . . . the jury considered. . . elements of damages now held to be improper.”).

the changed “amount recovered” and “success of the parties on their causes of action and damages theories”); *see Allison v. Fire Ins. Exch.*, 98 S.W.3d 227, 263 (Tex. App. – Austin 2002, pet. granted, judgm’t vacated w.r.m. by agr.) (holding that although sufficient evidence supported fee award, “[w]e cannot say . . . that the award . . . is still reasonable, given that we have significantly reduced the damages awarded by the jury. We remand the determination of attorneys’ fees to the district court for further proceedings . . .”).²³

This new trial remedy makes sense because the problem with the fee award in such cases is not merely a lack of factually sufficient evidence to support the full amount awarded. Instead, due to legal errors regarding liability or damages, the jury was prevented from considering the proper evidence when setting the fee award in the first place. It is not the role of an appellate court to engage in counterfactual speculation about what amount a jury would have awarded had it considered the proper evidence. Thus, a new trial is necessary.

This Court’s *Casteel* line of cases provides a useful analogy that illustrates why a new trial is required. Here, the jury determined the results obtained in the case by answering the first two charge questions regarding breach and damages. Tab A, at 4-5. Question 3 then incorporated these “results obtained” into the calculation of attorneys’

²³ *See also Burns v. Miller, Hiersche, Martens & Hayward, P.C.*, 948 S.W.2d 317, 327 (Tex. App. – Dallas 1997, writ denied) (“[B]ecause of our disposition of Burns’s first five points of error, the turnover order is so significantly altered as to merit the trial court’s reconsideration of reasonable attorneys’ fees.”); *Hunt County*, 719 S.W.2d at 223 (“[T]he trial court awarded one fee for the three tax years in dispute. This single award requires us to remand the attorney’s fee issue for new trial to determine a reasonable fee for the case involving only the 1984 tax year . . .”).

fees. *Id.* at 6. As discussed above, however, most of the breach claims and damages that the jury considered were barred by limitations as a matter of law. Because it cannot be determined whether the jury based its fee award on Eckman's invalid claims and damages, the limitations error is harmful and a new trial on attorneys' fees is required. *See Harris County v. Smith*, 96 S.W.3d 230, 233-34 (Tex. 2002); *Crown Life Ins. Co. v. Casteel*, 22 S.W.3d 378, 388-89 (Tex. 2000); *San Antonio Credit Union v. O'Connor*, 115 S.W.3d 82, 102 (Tex. App. – San Antonio 2003, pet. denied) (incorporating multiple liability theories into single questions on damages and malice required new trial where one theory failed as matter of law).

The Barkers presented these arguments to the court of appeals,²⁴ which erred by ignoring them. Eckman's only response is that a new trial is improper unless the jury considered a cause of action or theory of liability that was incorrect as a matter of law. PFR Resp. at 9-10. As already explained, however, that is exactly what happened here: most of the causes of action for breach of contract that Eckman presented to the jury were barred by limitations as a matter of law. Tab C, at *2; *see* p. 15 & n.14, *supra*.

For these reasons, the jury's award of attorneys' fees was corrupted by legal error. Therefore, this Court should reverse the judgments below in part and remand to the trial court for a new trial on attorneys' fees.²⁵

²⁴ *See, e.g.*, Appellants' Br. at 28-29; Appellants' Reply Br. at 24-25; Supp. Br. for Appellants at 7-8.

²⁵ When an error regarding attorneys' fees warrants a new trial, appellate courts have the power to sever and reverse the portion of the judgment awarding fees, remanding for a new trial on fees alone. *See, e.g.*, *Wayland v. City of Arlington*, 711 S.W.2d 232, 233-34 (Tex. 1986) (per curiam); *ASAI v. Vanco Insulation Abatement, Inc.*, 932 S.W.2d 118, 124 (Tex. App. – El Paso 1996, no writ); *Gen. Elec. Supply*

CONCLUSION AND PRAYER

Petitioners respectfully request that this Court grant their petition for review, reverse the court of appeals' judgment in part, and remand the case to the trial court or, at a minimum, to the court of appeals. Petitioners also request all other relief to which they may show themselves justly entitled.

Respectfully submitted,

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Co. v. Gulf Electroquip, Inc., 857 S.W.2d 591, 602 (Tex. App. – Houston [1st Dist.] 1993, writ denied). Eckman misunderstands the proposition for which the Barkers cite these cases. *Cf.* PFR Resp. at 9-10. The Barkers do not contend that they support a new trial on these facts, but merely that they authorize an appellate court to limit a new trial (when one is necessary) solely to the issue of attorneys' fees.

CERTIFICATE OF SERVICE

On February 7, 2005, a true and correct copy of Petitioner's Brief on the Merits 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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J. Brett Busby

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 Petition for Review from the
First Court of Appeals, Houston, Texas
No. 01-01-00079-CV

**PETITIONERS' BRIEF ON THE MERITS
APPENDIX**

- A. Jury Charge (CR 544-553)
- B. Final Judgment (CR 577-579)
- C. Court of Appeals' Opinion