Will *El Apple* Today Keep Attorneys' Fees Away?

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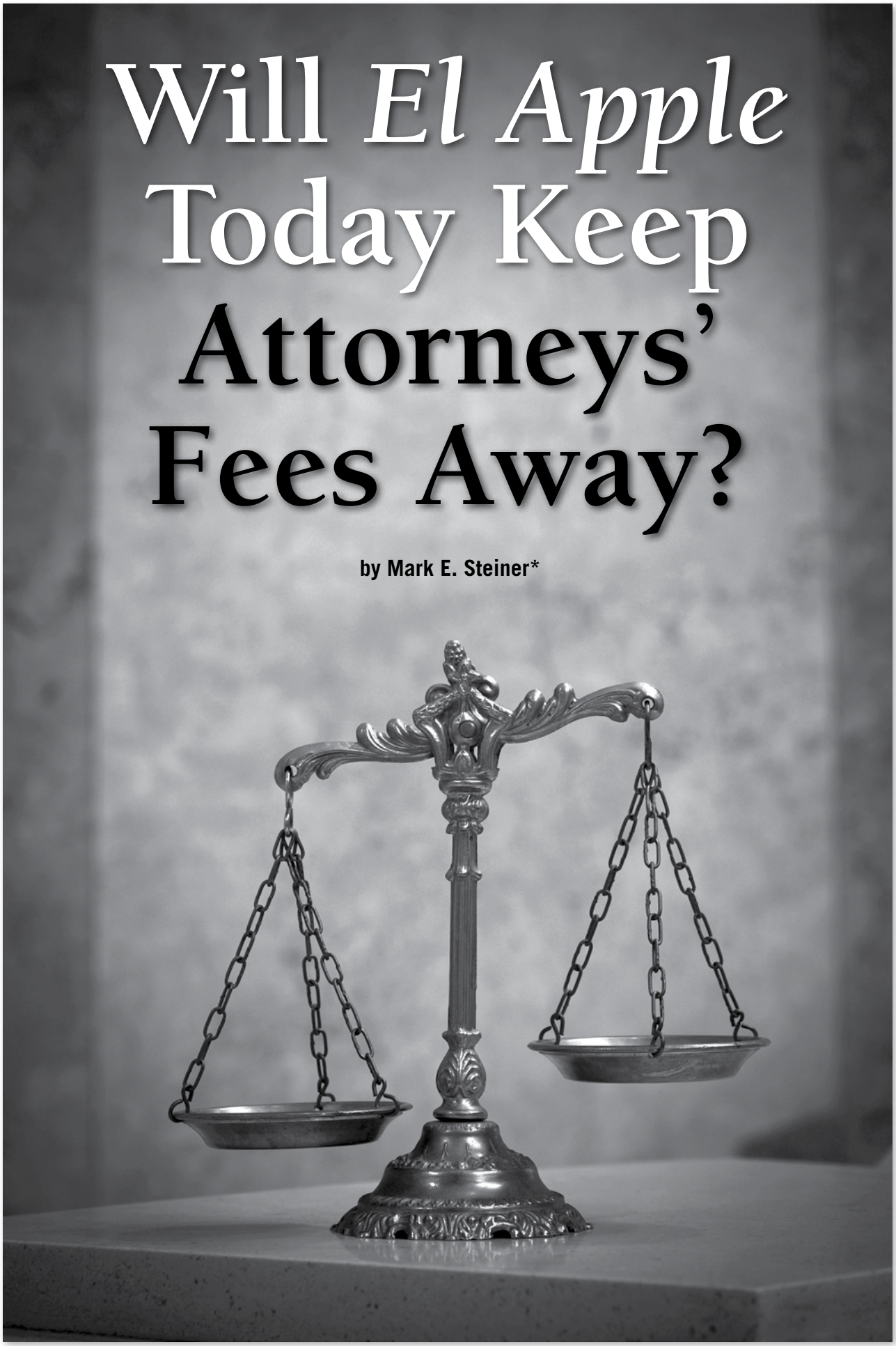

I. Introduction

Beginning in 1997 with its decision in *Arthur Andersen v. Perry Equip. Corp.*,[1] the Texas Supreme Court has issued several opinions that have changed how parties prove their entitlement to attorneys' fees. In 2006, the court reviewed the necessity of segregating attorneys' fees in *Tony Gullo Motors I, L.P. v. Chapa*.[2] More recently, the court issued *El Apple I, Ltd. v. Olivas* (2012) and two subsequent *per curiam* opinions (2013 and 2014) that address whether contemporaneous time records are required in "lodestar" cases (although what's a "lodestar" case is far from clear).[3] It's not a coincidence that all these decisions are designed to limit the recovery of attorneys' fees. These attorneys' fee opinions should be considered part of the court's larger agenda of consistently issuing pro-defense, anti-plaintiff opinions.[4]

This article reviews the recent caselaw on recovery of attorneys' fees in Texas, with a particular emphasis on the post-*El Apple* landscape.

II. *Arthur Andersen* and Contingent Fees

The Texas Supreme Court began tightening proof requirements for recovery of attorneys' fees in *Arthur Andersen v. Perry Equip. Corp*.[5] The plaintiff sued under the DTPA, which, of course, mandates the recovery of reasonable and necessary attorneys' fees for prevailing plaintiffs. Although the supreme court never mentioned what evidence in support of attorneys' fees was provided at trial, apparently the plaintiff had followed the then-common practice of merely entering the contingent fee into evidence. The jury charge asked the jury to calculate attorneys' fees in dollar and cents, as a percentage of plaintiff's recovery, and as a combination of dollars and cents and percentage of recovery. (The supreme court also never mentioned what the jury awarded for attorneys' fees.)[6]

The court first rejected the practice of the plaintiff asking the jury to award a percentage of the recovery, holding that the jury must be asked to award fees in a specific dollar amount. Second, the court held that proof of a contingent fee contract alone was insufficient. The court reasoned:

> [W]e do not believe that the DTPA authorizes the shifting of the plaintiff's entire contingent fee to the defendant without consideration of the factors required by the Rules of Professional Conduct. A contingent fee may indeed be a reasonable fee from the standpoint of the parties to the contract. But, we cannot agree that the mere fact that a party and a lawyer have agreed to a contingent fee means that the fee arrangement is in and of itself reasonable for purposes of shifting that fee to the defendant.[7]

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A plaintiff seeking recovery of reasonable attorneys' fees had to provide some evidence of reasonableness. The court stated, "a fact-finder should consider" the factors listed in the Disciplinary Rules:

> (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;
> (6) 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.[8]

The court stated that "the plaintiff cannot simply ask the jury to award a percentage of the recovery as a fee because 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."[9] The court also concluded that "a party's contingent fee agreement *should* be considered by the factfinder." The court again used "should" instead of "must" just as it had done with the consideration of the factors from the Disciplinary Rules ("a fact-finder *should* consider"). The court's use of "should" instead of "must" provides considerably less guidance for bench and bar.

Thus, DTPA plaintiffs were left with this rule:

> [T]o recover attorney's fees under the DTPA, the plaintiff must prove that the amount of fees was both reasonably incurred and necessary to the prosecution of the case at bar, and must ask the jury to award the fees in a specific dollar amount, not as a percentage of the judgment.[10]

The aftermath of *Arthur Andersen* was hardly apocalyptic. Attorneys adjusted, and routinely presented testimony on the factors establishing a "reasonable fee."[11] There don't seem to be a lot of reversals because of the plaintiff's failure to establish the *Arthur Andersen* factors.

There have been a couple of Court of Appeals opinions, however, that are worth noting. In *Robertson County v. Wymola*, the plaintiff realized that an attorney fee recovery based upon hours would yield more than a recovery based upon the contingent fee. Consequently, the plaintiff didn't enter its contingent fee agreement into evidence and instead presenting testimony on reasonable fees and hours. The defendant argued that the plaintiff had to enter its fee agreement into evidence to recover attorneys' fees. The plaintiff countered that evidence of the nature of the attorney-client fee arrangement was irrelevant because the testimony was about the regular hourly rate without making any adjustment for the risk involved in a contingent fee case. The trial court refused to order the admission of the contingent fee contract into evidence. The court of appeals held that the trial court didn't abuse its discretion by excluding the fee agreement because the supreme court in *Arthur Andersen* only said that evidence of a contingent fee arrangement was "admissible" and "should" be considered by the fact finder– the supreme court didn't mandate that such evidence must be admitted or considered.[12]

The *Arthur Andersen* court held that a plaintiff couldn't just enter its fee agreement into evidence and ask for a percentage of recovery. But could a plaintiff enter its fee agreement into evidence, offer testimony on the factors from the Disciplinary Rules, and then ask for a percentage of the recovery as per its fee agreement? In *VingCard A.S. v. Merrimac Hosp. Sys., Inc.*, the defendant on appeal argued that plaintiff's counsel ran afoul of *Arthur Andersen* by asking the jury to calculate attorney's fees only

as a percentage of the judgment, rather than any specific amount. Plaintiff's counsel had outlined the rule 1.04 factors and had provided information regarding each factor. He had testified that his 30% contingency fee was less than the contingency fee charged in similar cases. He had explained to the jury how to calculate fees based on the amount of damages they awarded, e.g. if the jury awarded $10 million in damages, his fee should be $3 million based on the 30% contingency fee. The court of appeals held that was not reversible error.[13]

III. *Tony Gullo Motors* and Segregating Recoverable and Unrecoverable Fees

Suppose a consumer's attorney brings a lawsuit and alleges both common-law fraud and DTPA violations. At time of trial, the attorney has put in 100 hours on the case. How many hours of the attorney's time are recoverable? That depends. The problem is that the fraud claim doesn't give rise to attorneys' fees while the DTPA claim does. The problem is avoided if all the time spent on the fraud cause of action doubles as time spent on the DTPA claim. The argument would be that the claims are so interrelated that the work on the two claims can't be separated.

The Texas Supreme Court rejected this resolution of the proof problem in *Tony Gullo Motors I, L.P. v. Chapa* in 2006.[14] The court began by stating the long-standing rule that recovery of attorneys' fees isn't allowed unless authorized by statute or contract. Consequently, plaintiffs had always been required to segregate fees between claims for which they are recoverable and claims for which they are not. The court then lamented that its earlier decision in *Stewart Title Guaranty Co. v. Sterling* had created an exception that had swallowed the rule. The *Sterling* exception to the duty to segregate arose when attorneys' fees were sought in connection with "claims arising out of the same transaction and are so interrelated that their prosecution or defense entails proof or denial of essentially the same facts."[15] The court in *Tony Gullo* disapproved this language from *Sterling* because, in practice, every claim had become "inextricably intertwined" and interrelated.[16] The court explained:

> It is certainly true that [plaintiff's] fraud, contract, and DTPA claims were all "dependent upon the same set of facts or circumstances," but that does not mean they all required the same research, discovery, proof, or legal expertise…. To the extent *Sterling* suggested that a common set of underlying facts necessarily made all claims arising therefrom "inseparable" and all legal fees recoverable, it went too far.[17]

But the court also conceded "many if not most legal fees in such cases cannot and need not be precisely allocated to one claim or the other." It noted:

> Many of the services involved in preparing a contract or DTPA claim for trial must still be incurred if tort claims are appended to it; adding the latter claims does not render the former services unrecoverable. Requests for standard disclosures, proof of background facts, depositions of the primary actors, discovery motions and hearings, voir dire of the jury, and a host of other services may be necessary whether a claim is filed alone or with others.[18]

The court concluded, "To the extent such services would have been incurred on a recoverable claim alone, they are not disallowed simply because they do double service."[19]

After *Tony Gullo*, plaintiffs were left with this rule for segregating attorney fee awards: If any attorney's fees relate solely to a claim for which such fees are unrecoverable, a claimant must segregate recoverable from unrecoverable fees. Intertwined facts do not make tort fees recoverable; it is only when discrete legal services advance both a recoverable and unrecoverable claim that they are so intertwined that they need not be segregated.[20]

Unlike the *Arthur Andersen* factors, the mandate from *Tony Gullo* on segregation has proved harder for plaintiffs and their attorneys to follow.[21] In one recent case where the failure to segregate at trial led to a reverse and remand on appeal, the trial court had "repeatedly admonished" the party about segregation. Agreeing with appellant that the failure to segregate was erroneous, the court of appeals stated, with seeming regret, that the remedy was a reverse and remand, not a reverse and render, "however willful and ill-considered the refusal to segregate was."[22]

In *Prudential Ins. Co. v. Durante*, the plaintiff sued for breach of contract, violation of the Prompt Payment Statute, common-law and statutory bad faith, negligence, and Texas Insurance Code violations.[23] At trial, the plaintiff made no attempt to segregate fees and was awarded $200,000 in attorneys' fees. The attorney for plaintiff testified as follows:

> The only other point I wish to make is that I have not attempted to segregate fees in this case, because there are essentially to some degree three lawsuits that were being litigated. However, the facts of one and the facts of all are the same. It is my opinion that it's not really possible to tease out any particular part of any claim or cause of action, because the facts of the three cases are so interrelated that it was all going to be generated whether or not there was a claim against Mr. Schmid directly or it was just against Prudential.[24]

The problem with this testimony is that it seems to be based upon an approach to segregation that was explicitly rejected in *Tony Gullo*.

The outright refusal to segregate fees is a near-guarantee of reversal. Moreover, the courts of appeals haven't been asking for much; they are typically satisfied with an approximation, an opinion, from the attorney about the percentage of work that went into the recoverable claim.[25] Thus, the El Paso Court of Appeals in *Durante* lamented, "Pierce made no effort to estimate a possible segregation of fees in his testimony. While the standard does not mandate the maintenance of separate time records when drafting the different claims, an opinion would be sufficient as to the percentages of segregation as to the claims."[26] The court then ordered a reversal and remand because of the failure to segregate.

Durante wasn't the only recent case where the plaintiff refused to segregate fees at trial and the court of appeals reversed the award of attorneys' fees. In *Jackson Walker, LLP v. Kinsel*, the plaintiffs pursued "claims for which fees could and could not be awarded"; however, their attorneys didn't segregate fees, maintaining the claims were "inextricably intertwined."[27] One lawyer testified that "whatever cause of action the plaintiffs have in this case, the facts basically relate to each of the causes of action. There's not a whole lot of difference between them as far as the facts go. It's the different aspects of the law that apply to the facts that are different, but the facts and basically everything is intertwined and you can't separate those things as between the causes of action."[28] Again, this looks like the approach toward "intertwined facts" that the supreme court rejected in *Tony Gullo*.

In rejecting this "intertwined" argument, the court provided an excellent summary of the current law on segregating attorneys' fees.

> As for the matter of segregation of recoverable from unrecoverable fees, that normally is required. An exception exits, however. It arises when discrete legal services advance both recoverable and unrecoverable claims that are so intertwined that the fees need not be segregated.

> The burden to illustrate that the exception applies lies with the fee claimant. And, it is not satisfied by simply suggesting that the causes of action for which fees are and are not recoverable required proof of the same set of facts and circumstances. In other words, intertwined facts alone do not make unrecoverable fees recoverable.[29]

The court concluded that the record "failed to establish that discrete legal services provided by those representing the Kinsels advanced both claims for which fees were recoverable and claims for which they were not. Segregation was necessary and the failure to do so obligates us to remand the issue of segregation for new trial."[30]

IV. *El Apple* and Sufficiency of Proof of Attorneys' Fees

A. *El Apple I, Ltd. v. Olivas*

The most significant recent development from the Texas Supreme Court concerning the recovery of attorneys' fees has been *El Apple* and the two cases that followed it.[31] Moreover, there also have been a considerable number of court of appeals opinions sorting out the impact of *El Apple*.

El Apple involved the calculation of an attorney's fees award in an employment discrimination and retaliation lawsuit brought under the Texas Commission on Human Rights Act. The plaintiff recovered $104,700 on her retaliation claim, and the court awarded $464,000 in attorney's fees for the trial of the case. The attorney's fee award included a 2.0 multiplier. On appeal, the defendant challenged both the sufficiency of the evidence for the award of attorney's fees and the enhancement of the award.

The most significant recent development from the Texas Supreme Court concerning the recovery of attorneys' fees has been *El Apple* and the two cases that followed it.

Texas courts have used the lodestar method for calculating fee awards under the TCHRA because the state law mirrors federal law and federal courts use the lodestar method for Title VII claims. Justice Medina described the lodestar method as follows:

> Under the lodestar method, the determination of what constitutes a reasonable attorney's fee involves two steps. First, the court must determine the reasonable hours spent by counsel in the case and a reasonable hourly rate for such work. The court then multiplies the number of such hours by the applicable rate, the product of which is the base fee or lodestar. The court may then adjust the base lodestar up or down (apply a multiplier), if relevant factors indicate an adjustment is necessary to reach a reasonable fee in the case.[32]

The court also noted how attorney's fees under Texas class action law also mandated the use of the two-step lodestar method.[33]

The sticking point in *El Apple* wasn't the hourly rate but the amount of hours expended. The court noted that the starting point for determining a lodestar fee award is the number of hours "reasonably expended on the litigation." The party applying for the award has the burden of proof. Proof of reasonable hours should include the basic facts underlying the lodestar, which are: "(1) the nature of the work, (2) who performed the services and their rate, (3) approximately when the services were performed, and (4) the number of hours worked."[34]

The question that *El Apple* was somewhat evasive in answering was whether contemporaneous time records are required to prove the hours reasonably expended on the litigation. The court began by noting that a party has "the burden of documenting the hours expended on the litigation and the value of those hours." It noted the defendant's argument that documenting the hours meant providing "contemporaneous time sheets, which evidence the performance of specific tasks, such that the trial court can make a reasoned determination of how much time was reasonably spent pursuing the litigation."[35]

The court recognized that previous Texas courts had not routinely required billing records or other documentary evidence to substantiate a claim for attorney's fees. The court then meekly offered that this "requirement has merit in contested cases under the lodestar approach." It next accepted the proposition that contemporaneous time records were probably a good idea; however, it didn't mandate their use. To establish the basic facts underlying the lodestar amount, the court said, "An attorney could, of course, testify to these details, but in all but the simplest cases, the attorney would *probably* have to refer to some type of record or documentation to provide this information."[36] The court concluded,

> Thus, when there is an expectation that the lodestar method will be used to calculate fees, attorneys *should* document their time much as they would for their own clients, that is, contemporaneous billing records or other documentation recorded reasonably close to the time when the work is performed.[37]

The affidavits provided by the attorneys at the hearing on the fee application fell short of the proof that is necessary to show the hours were "reasonably expended." Neither attorney indicated how their time was devoted to any particular task or category of tasks. Neither attorney presented time records or other documentary evidence. The attorneys gave time estimates based upon the amount of discovery in the case, the number of pleadings filed, the number of witnesses questioned, and the length of the trial. The court determined that "none of the specificity needed for the trial court to make a meaningful lodestar determination" had been provided. The trial court could not discern from the evidence how many hours each of the tasks required and whether that time was reasonable.[38]

B. *Long v. Griffin* and *City of Laredo v. Montano*

The court in *El Apple* defined the lodestar method as a two-step method that involved first arriving at a base fee or lodestar amount and then adjusting that amount up or down. The court specified two situations where such a method was to be used: TCHRA claims and class-action lawsuits. Since 2012, the Texas Supreme Court (and some courts of appeals) have used the term "lodestar" in a much looser manner. The supreme court issued per curiam opinions in 2013 and 2014 that addressed *El Apple* and both opinions are inconsistent with *El Apple* on when the lodestar method applies.[39]

Both *Long v. Griffin* and *City of Laredo v. Montano* appear to apply the term "lodestar" to any situation that involves recovering attorneys' fees on the basis of "reasonable hours times reasonable rate." There is no sense that lodestar is a two-step process, which is how the court had described it in *El Apple*. The court may have realized that the United States Supreme Court in *Perdue v. Kenny A. Ex rel. Winn* had signaled the end of enhancement.[40] The *Perdue* court took a very limited view of when a multiplier would be appropriate in a lodestar case. The Texas Supreme

Court may have concluded that there's no point in referring to a two-step method when there isn't going to be second step. Both cases also stated that the attorneys "chose" the lodestar method by the manner in which they attempted to prove the amount of attorneys' fees.

In *City of Laredo v. Montano*, the court first noted that the "fee-shifting statute in this case, however, does not require that attorney's fees be determined under a lodestar method, as in *El Apple*." That statement seemingly follows the narrow definition of lodestar from *El Apple*, and would limit its application to TCHRA claims and class-action lawsuits. But that sentence was immediately followed by this one: "The property owner nevertheless chose to prove up attorney's fees using this method and so our observations in *El Apple* have similar application here." The court did not explain how the plaintiff chose the lodestar method. Certainly, there is nothing to indicate that the plaintiff asked for a multiplier. It appears that testifying about hours and hourly rates triggered a "lodestar" designation, which, in turn, triggered the proof requirements for a lodestar fee suggested in *El Apple*. But, the court says, that doesn't necessarily mean "that a lodestar fee can only be established through time records or billing statements" as an attorney could testify to the details of his or her work. Then again, the court notes that *El Apple* already warned that "in all but the simplest cases, the attorney would probably have to refer to some type of record or documentation to provide this information."[41] The court then recalled that *El Apple* "encouraged attorneys using the lodestar method to shift their fee to their opponent to keep contemporaneous records of their time." All in all, this opinion is remarkably passive-aggressive. The court also appears very unwilling to say what it is exactly requiring in these cases. It's safe to say that contemporaneous time records are sorta, kinda required.[42]

The court the reviewed the proof offered in the trial court. The court held that one of the attorney's testimony on his hours was "simply devoid of substance." At trial, the attorney had estimated that he spent, on average, six hours a week for the 226 weeks he worked on the case. The court expressed "puzzlement" as the record provided "no clue" about how this figure was calculated; counsel didn't make any records of his time or prepare any invoices or bills for his clients. The court summarized the trial testimony:

> In short, Gonzalez offered nothing to document his time in the case other than the "thousands and thousands and thousands of pages" generated during his representation of the Montanos and his belief that he had reasonably spent 1,356 hours preparing and trying the case. We rejected similar proof in *El Apple*.
>
> Gonzalez's testimony that he spent "a lot of time getting ready for the lawsuit," conducted "a lot of legal research," visited the premises "many, many, many, many times," and spent "countless" hours on motions and depositions is not evidence of a reasonable attorney's fee under lodestar. . . . In *El Apple*, we said that a lodestar calculation requires certain basic proof, including itemizing specific tasks, the time required for those tasks, and the rate charged by the person performing the work. Here, Gonzalez conceded that had he been billing his client he would have itemized his work and provided this information. A similar effort should be made when an adversary is asked to pay instead of the client.[43]

The court found that the other attorney's testimony involved "contemporaneous events and discrete tasks–the trial and associated preparation for each succeeding day" and was sufficient.[44]

The Texas Supreme Court again addressed the ramifications of *El Apple* in 2014. In *Long v. Griffin*, the plaintiffs sought attorneys' fees under Chapter 38 of the Texas Civil Practice and Remedies Code and under the Texas Declaratory Judgment Act. The plaintiffs ultimately didn't prevail on the breach of agreement claim and Chapter 38 was inapplicable. Under the original reasoning of *El Apple*, the declaratory judgment claim by itself wouldn't have been considered a lodestar claim. But, following *Montano*, the court once again found that the plaintiffs "elects to prove attorney's fees via the lodestar method" by "relating the hours worked for each of the two attorneys multiplied by their hourly rates for a total fee."[45]

The court reviewed the affidavit that supported the award of attorney's fees and found it wanting.

> The affidavit supporting the request for attorney's fees only offers generalities. It indicates that one attorney spent 300 hours on the case, another expended 344.50 hours, and the attorneys' respective hourly rates. The affidavit posits that the case involved extensive discovery, several pretrial hearings, multiple summary judgment motions, and a four and one-half day trial, and that litigating the matter required understanding a related suit that settled after ten years of litigation. But no evidence accompanied the affidavit to inform the trial court the time spent on specific tasks.[46]

The attorney's affidavit only offered generalities about the number of hours expended on the case. It lacked any evidence of the time spent on specific tasks. Because no legally sufficient evidence supported the award of attorney fees, the award was reversed.[47]

The court also addressed the real evidentiary problem lurking in many of these cases: time records don't exist because when the case was tried they weren't yet required. The underlying bench trial in *Long* was held nine years before *El Apple* was decided. Contemporaneous time records won't exist because the attorneys failed to see into the future. Without a time machine, contemporaneous time records will seldom exist for cases tried before *El Apple*. The supreme court, as it did in *El Apple*, recognized this problem and cut the attorneys some slack on remand:

> We note that here, as in *El Apple*, contemporaneous evidence may not exist. But the attorneys may reconstruct their work to provide the trial court with sufficient information to allow the court to perform a meaningful review of the fee application.[48]

One big question has been left unanswered in *Long*: what is the impact of Chapter 38 of the Civil Practice and Remedies Code? Section 38.004 says, "The court may take judicial notice of the usual and customary attorney's fees and of the contents of the case file without receiving further evidence in: (1) a proceeding before the court; or (2) a jury case in which the amount of attorney's fees is submitted to the court by agreement." Section 38.003 says, "It is presumed that the usual and customary attorney's fees for a claim of the type described in Section 38.001 are reasonable. The presumption may be rebutted." Because the plaintiffs lost on their assignment claim, Chapter 38 did not apply. But the supreme court's approach to the lodestar method is inconsistent with the language of Chapter 38. To apply *El Apple*'s approach to proof requirements to Chapter 38 cases would abrogate the statutory language.

C. *El Apple* in the Courts of Appeals

1. Applicability of *El Apple*

The courts of appeals have not been consistent in applying *El Apple*. They are split on whether *El Apple* applies to non-lodestar cases. Several courts of appeals have held that *El Apple*

doesn't apply to non-lodestar cases.[49] Other courts have held that *El Apple* does apply to, say, breach of contract cases.[50] Both the Dallas Court of Appeals[51] and the Fourteenth Court of Appeals[52] have issued contradictory panel opinions. One Fourteenth Court of Appeals panel explained that *Long* and *Montano* required a different approach and held that *El Apple* applies when a party chooses to use the lodestar method. Thus, that panel found a plaintiff, "chose to use the lodestar method when seeking attorney's fees for services performed through the end of trial" by "offering evidence of the hours of work multiplied by the hourly rate of the person who performed the work."[53]

Most courts of appeals initially were reluctant to apply *El Apple* to breach of contract claims. The Dallas Court of Appeals typified the approach taken by most of these courts. In *Metroplex Mailing Services, LLC v. RR Donnelley & Sons Co.*, a breach of contract case, the court first noted, "nowhere in *El Apple* did the court conclude that all attorney's fees recoveries in Texas would thereafter be governed by the lodestar approach and we do not draw that conclusion here." It also noted that under the traditional method of awarding fees, documentary evidence is not a prerequisite and "an attorney's testimony about his experience, the total amount of fees, and the reasonableness of the fees charged is sufficient to support an award."[54]

In 2015, the Dallas Court of Appeals reaffirmed its position that *El Apple* does not mean that "all attorney's fees recoveries in Texas are governed by the lodestar method" in *Rohrmoos Venture v. UTSW DVA Healthcare, LLP*.[55] The court noted that many of its sister courts also have held that *El Apple* doesn't apply to non-lodestar cases.[56] Acknowledging the language from *Long v. Griffin* about a party "choosing" the lodestar method, the court noted that the appellant didn't assert, and the record didn't show, that the appellee "chose to prove up attorney's fees using this method."[57]

The Fort Worth Court of Appeals also has refused to extend *El Apple*. It recently noted that "under the traditional method of awarding fees, documentary evidence is not a prerequisite. It has consistently been held that an attorney's testimony about his experience, the total amount of fees, and the reasonableness of the fees charged is sufficient to support an award."[58] The court further noted that it previously had declined to extend *El Apple* to require time records in all cases in which an attorney uses the attorney's hourly rate to calculate the fee. "In ordinary hourly-fee breach of contract cases, '[t]ime sheets or other detailed hour calculations are not required if the testimony regarding the hours of work required is not speculative."[59] Similarly, the San Antonio Court of Appeals held that *El Apple* doesn't apply to "a garden-variety breach of contract claim in which the prevailing party sought to recover damages as well as attorney's fees under section 38.001 of the Texas Civil Practice and Remedies Code."[60]

In 2013, the Fourteenth Court of Appeals initially held that *El Apple* didn't apply to a breach of contract case: "Because the lodestar method is not the method used for calculating the appropriate attorney's fees in a breach-of-contract case, [*El Apple*] is not instructive to our analysis."[61]

Since the supreme court issued *City of Laredo v. Montano* in 2013 and *Long v. Griffin* in 2014, the Fourteenth Court of Appeals has handed down a couple of opinions that extended *El Apple* to breach-of-contract cases.

In *Enzo Investments, LP v. White*, the court determined that the plaintiff "chose to use the lodestar method to establish the amount of reasonable and necessary attorney's fees attributable to the successful prosecution of his breach-of-contract claim"; consequently, the plaintiff "was required to provide evidence of the time expended on specific tasks."[62] The court held that one attorney's affidavit was insufficient because it only gave total hours and listed tasks performed for the client. The court stated that from the information provided in the affidavit, it was impossible to evaluate the extent to which the attorney's work was reasonable and necessary to the prosecution of the plaintiff's breach-of-contract claim.

The court's other opinion extending *El Apple* to Chapter 38 claims is far more interesting. While the court in *Auz v. Cisneros* extended *El Apple*, it also recognized that the supreme court in *Long v. Griffin* had "effectively abrogated a number of Texas precedents regarding the application of Chapter 38."[63] The court provided a good summary of Chapter 38 jurisprudence before it was bulldozed by *Long v. Griffin*:

> Under section 38.004 of the Civil Practice and Remedies Code, in a proceeding before the court, the trial court "may take judicial notice of the usual and customary attorney's fees and of the contents of the case file without receiving further evidence." Tex. Civ. Prac. & Rem. Code Ann. § 38.004. Under section 38.003 of the Civil Practice and Remedies Code, "[i]t is presumed that the usual and customary attorney's fees for a claim of the type described in Section 38.001 are reasonable," and that "[t]he presumption may be rebutted." *Id.* § 38.003. In reaching its holding, the *Long* court did not explain how application of the *El Apple I* requirements to attorney's fees requests under Chapter 38 would be consistent with these statutory provisions. *See Long*, 442 S.W.3d at 254-56. Under prior precedent from the Supreme Court of Texas and this court, appellate courts could affirm Chapter 38 attorney's fees awards by presuming that the trial court took judicial notice under section 38.004, even if the party seeking fees did not request judicial notice and even if the trial court did not state that it was taking judicial notice. *See Gill Sav. Ass'n v. Chair King*, 797 S.W.2d 31, 32 (Tex. 1990); *Ross v. 3D Tower Ltd.*, 824 S.W.2d 270, 273 (Tex. App.–Houston [14th Dist.] 1992, writ denied). *See also* Scott A. Brister, *Proof of Attorney's Fees in Texas*, 24 St. Mary's L. J. 313, 333–34 (1993) (observing that Chapter 38 allows a trial court to award reasonable fees without any offer of evidence regarding attorney's fees in a proceeding before the court).[64]

The court apparently recognized the mess the supreme court has created; however, it pointed out that it's not its responsibility to clean up such a mess: "It is not our role as an intermediate court of appeals to abrogate or modify precedent from the Supreme Court of Texas; instead, we must apply the *Long* precedent to this case."[65]

2. Sufficiency of Evidence

Attorney fee awards continue to be reviewed for sufficiency of proof of attorneys' fees. The supreme court in *El Apple* criticized the attorneys' lack of detail on how much time was spent on "particular tasks or categories of tasks."[66] Global testimony or affidavits about the work performed is highly susceptible to attack on appeal.[67] Attorneys need to allocate specific hours to specific tasks.

Although the supreme court allowed in *El Apple* that documentation such as time records may not be required in "the simplest cases."[68] Allocating the hours between the various tasks performed may be required in all cases. Justice Boyce in a concurring opinion in *Auz v. Cisneros* concluded, "Allocation always is required under these decisions when the lodestar method is invoked, even in 'the simplest cases' involving a modest number of hours." That case involved a "modest expenditure of 30 attorney hours." Justice Boyce believed that there was "some flexibility" in requiring documentation under *El Apple*, but there was no such

flexibility for allocating which of these 30 hours were spent on which task. He, therefore, joined the majority's determination that the fee award must be reversed "because the supporting affidavit offers a global recitation of categories of tasks performed and the total number of hours expended." Justice Boyce conceded that the reversal "seems like an unduly formalistic result in a simple case involving a simple commercial dispute requiring a modest expenditure of 30 attorney hours to obtain a favorable judgment. By no measure is the requested fee disproportionate to the result."[69]

The First Court of Appeals reversed a fee award of $250,000 where the attorney's one-page affidavit in support of the award "recites her hourly fee, states that Academy has incurred fees in the amount of $185,930 through the date of the affidavit's execution, and avers that the reasonable value of fees that Academy would continue to incur is $50,000 through entry of judgment; $50,000 through appeal to this court; and $100,000 through appeal to the Texas Supreme Court."[70]

The First Court of Appeals also reversed a $145,000 award of attorneys fees in *Boyaki v. John M. O'Quinn & Associates, PLLC*.[71] The court found the affidavits supporting attorneys' fees were deficient because they offered generalities. The first affidavit stated:

> [S]ince September 15, 2009, I have attended several hearings, prepared a Motion for Temporary Injunction, prepared for the hearing. I have reviewed various drafts of letters and email correspondence to opposing counsel. I have communicated to my client, The O'Quinn Law Firm, the status of implementation of the settlement agreement, reviewed Texas cases on the enforcement of Rule 11 settlement agreements, reviewed Plaintiffs' First Amended Original Petition, reviewed Plaintiffs' Motion for Summary Judgment to Enforce Rule Settlement with supporting affidavits. I have also had a number of additional conferences with representatives of my client and co-counsel. Accordingly, since September 15, 2009, I have spent at least 98 hours in rendering the above-described necessary legal services ... in enforcement of the mediated Rule 11 Settlement Agreement.

The second affidavit said:

> [S]ince July 22, 2011, I have prepared various drafts of letters and email correspondence to and for Charles Musslewhite, my co-counsel, I have communicated to my client, The O'Quinn Law Firm the status of implementation of the settlement agreement, researched and reviewed Texas cases on the enforcement of Rule 11 settlement agreements, drafted and edited Plaintiffs' First Amended Original Petition, drafted and edited Plaintiffs' Motion for Summary Judgment to Enforce Rule 11 Settlement, with supporting affidavits, and prepared a proposed Final Summary Judgment. I have also had a number of additional conferences with representatives of my client and co-counsel. Accordingly, since July 22, 2011, I have spent at least 215 hours in rendering the above-described necessary legal services.

The court concluded that the evidence in support was legally insufficient and reversed and remanded.[72]

In another attorney's fees case from the First Court of Appeals, the court affirmed the award, finding none of the problems with generalities it had found in *Johnson* and *Boyaki*.[73] The Texas Attorney General had sued under section 431.047(d) of the Health & Safety Code, and the State was awarded nearly $130,000 in reasonable and necessary fees and costs. On appeal, the defendants presented the now-standard argument that there was no evidence to support the judgment's award of attorney's fees and expenses because the evidence on attorney's fees was too general to apply the lodestar method in a meaningful manner. The First Court of Appeals found that the State's evidence was detailed enough to pass scrutiny:

> The attorney's fees evidence in this case is much more detailed than that provided in *El Apple*, *Long*, or *Boyaki*. The State presented expert testimony regarding its attorney's fees, including the reasonableness and necessity of the work done on the case, the hours spent, the experience and qualifications of the timekeepers for the State, and the prevailing hourly rates of each. The State also submitted an affidavit, a summary of the hours worked and prevailing rates, and a computer-generated summary of the time records of all of the State's timekeepers who worked on the case. The computer generated time summary, entitled "Summary of Services Provided," identifies the case by name, each timekeeper by name and title, a description of each activity, and the hours devoted to that activity by each timekeeper. The activities are divided into categories such as "attend/appear at hearing," "drafting/revising pleadings," and "reviewing/researching law."[74]

The court also rejected the defendants' argument that the evidence was insufficient because it does not say which hearings were attended, which pleadings were revised, and what law was researched. The court noted that "nothing in *El Apple*, *Long*, or *Boyaki* requires such detail." It is enough to indicate how long each person spent working on particular categories of tasks.

3. Discovery

Can plaintiffs who seek attorneys' fees discover the amounts of the defendants' attorneys' fees? That question was answered "yes" by the Corpus Christi Court of Appeals. In a multidistrict litigation pretrial proceeding, the insureds–who would be entitled to statutory attorney fees if they prevail–hired an expert who testified that the fees of the opposing party are a factor and an indicator of a reasonable fee. The insureds subsequently moved to serve additional discovery requests on the insurers regarding the amount of attorney fees the insureds had accrued in the underlying cases. The special master for discovery recommended that the trial court grant leave to serve the additional discovery and the trial court did so. The insurers sought mandamus relief. The court of appeals held that the opposing party's legal fees "may be relevant to prove factors one and three from

the *Arthur Andersen* factors–that is, the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly, and the fee customarily charged in the locality for similar legal services." The court also pointed out that Justice Hecht considered evidence of the other party's attorneys' fees as an "indicator" of a reasonable fee in his concurring opinion in *El Apple*.[75]

4. Preservation of Error

Whether a party has to preserve error on an attack on the reasonableness of attorneys' fees will depend upon the procedural posture of the case. Several appeals have involved an award of attorneys' fees that accompanied a motion for summary judgment.[76] Courts of appeals have held that an appellant may complain for the first time on appeal about the legal sufficiency of the evidence for the attorneys fee award.[77]

A jury trial will necessitate preserving error on the sufficiency of evidence for the fee award. The Dallas Court of Appeals detailed the problems with one appellant's argument on appeal:

> In reviewing a jury finding, we review the evidence in light of the charge actually given. Here, the jury was given no definitions with respect to reasonable attorney's fees. In particular, the jury was not instructed it was required to make a lodestar calculation by first specifically determining the reasonable hours spent by counsel and the reasonable hourly rate. Additionally, Davenport Meadows' specific complaints focus largely on the lack of specificity with respect to Hopkins' testimony with respect to segregation. But it fails to discuss the contractual provision that authorized the award of attorney's fees and fails to provide any argument or authority that Hopkins was required to segregate any fees in the first instance. Moreover, the jury charge did not require the jury to segregate fees.[78]

The possibility that the court of appeals may order a take-nothing judgment on attorneys' fees means that there may not be a second bite at *El Apple*.

A party must preserve error in the trial court to complain about a failure to segregate fees.[79]

5. Appellate Remedy

A successful attack on the recovery of attorneys' fees almost always results in a reverse and remand and not reverse and render. In segregation of fees cases, a remand is ordered because there is some evidence of attorneys' fees. The Texas Supreme Court in *Tony Gullo Motors* held that the proper remedy would be a remand because the unsegregated fees for the entire case are some evidence of what the segregated amount should be.[80] This rule has been dutifully followed by the courts of appeals.[81]

The Austin Court of Appeals reluctantly ordered a remand where the trial court had denied attorneys' fees because the party willfully failed to segregate attorneys' fees despite many requests and opportunities to do so, among other reasons. The court of appeals noted that the party failed to segregate even after the trial court repeatedly admonished it that the foregoing circumstances were likely impediments to a full fee award.[82] The court of appeals sustained the attack on attorneys' fees and noted that the case would be remanded:

> However willful and ill-considered the refusal to segregate was, the remedy for such failure is not an award of zero attorney's fees, because evidence of unsegregated attorney's fees for the entire case is some evidence of what the segregated amount should be. . . . Accordingly, the supreme court has held that the appropriate remedy for failure or refusal to segregate attorney's fees is remand for segregation.[83]

However, the Corpus Christi Court of Appeals has upheld a no-evidence challenge and then rendered a take-nothing judgment on attorneys' fees. This was a forcible entry and detainer lawsuit. The landlord's attorney provided the following testimony:

> I am an attorney licensed by the Supreme Court in the State of Texas to practice in all of Texas, Judge. I've been working as an attorney for the past approximately 10 years. Now I did represent Mr. Ramos from the time that he– the appeal [sic] was filed up until today which is the conclusion. My hourly rate was $225 an hour and in my expert opinion all of the work that was done was necessary to bring forth the suit and the number of hours set forth that I put into the case were a reasonable and necessary fee that I'm charging is $15,000.

The court cited *El Apple* (without explaining why) and the *Arthur Andersen* factors. The court then summarized the attorney's testimony as constituting "brief testimony [that] touched on his experience as a lawyer in Texas, a general statement about how long he has worked on this specific case, and his hourly rate." It then noted that the lawyer's testimony did not explain– (1) the time and labor required in this case, (2) what specific work and services were accomplished, (3) what skill was required to properly perform legal services in this case, (4) what were the fees customarily charged in Hidalgo County for similar legal services, or (5) other factors that would explain the reasonableness of his fee.

The court held that the trial court abused its discretion in awarding attorneys' fees and rendered a take-nothing on attorneys' fees.[84]

The court's action seems unusual. For one thing, the affidavit does appear to be "some" evidence about attorneys' fees. Moreover, the supreme court has ordered remands in the three cases where it recently has found the evidence on attorneys' fees to be legally insufficient. But the Corpus Christi Court of Appeals remedy was not unprecedented. The opinion does cite a case where a $1000 award of attorneys' fees was vacated on appeal. There the plaintiff apparently didn't even request attorneys' fees, provided no proof at trial, and failed to respond to the defendant's argument on appeal.[85] Another opinion cited in the case resulted in the court of appeals vacating the award of attorneys' fees. Again, it appears in that case that no evidence on attorneys' fees was presented in the literal sense and not merely the legal sense of insufficient evidence.[86] Here, there was inadequate testimony, which the court of appeals found was "no evidence."

Consumer lawyers may recall appellate courts in DTPA cases ordering remands where the proof of attorney's fees has been found to be legally insufficient. In a case where the only evidence in the record supporting the award of attorney's fees was an exhibit totaling the fees charged, the Austin Court of Appeals reversed the award of attorney's fees but *remanded* that issue for a new trial. The court explained:

> Although ordinarily the failure to produce any evidence of an element of proof requires that we reverse and render judgment that a plaintiff take nothing, attorney's fees

> for a prevailing consumer under the DTPA have been treated differently. *Leggett v. Brinson*, 817 S.W.2d 154, 157 (Tex. App.–El Paso 1991, no writ). In such a case, the proper remedy is to remand to the trial court for presentation of evidence and a determination of whether the requested fees are reasonable and necessary.[87]

In another DTPA case where no proof of attorneys' fees was adduced (the trial court improperly took judicial notice), the court of appeals explained that a remand was necessary because the DTPA mandated attorney's fees. The court noted, "Normally, when we find that there is no evidence to support a finding, the remedy is to reverse and render on the point. However, the award of attorneys' fees under the DTPA presents a unique situation. This is so because an award of attorneys' fees is mandated."[88]

The possibility that the court of appeals may order a take-nothing judgment on attorneys' fees means that there may not be a second bite at *El Apple*. Attorneys should strive to get it right the first time.

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1 Arthur Andersen & Co. v. Perry Equip. Corp., 945 S.W.2d 812 (Tex. 1997).

2 Tony Gullo Motors I, L.P. v. Chapa, 212 S.W. 3d 299 (Tex. 2006).

3 Long v. Griffin, 442 S.W. 3d 253 (Tex. 2014)(per curiam); City of Laredo v. Montano, 414 S.W. 3d 731 (Tex. 2013)(per curiam); El Apple I, Ltd. v. Olivas, 370 S.W. 3d 757 (Tex. 2012).

4 David A. Anderson, *Judicial Tort Reform in Texas*, 26 Rev. Litig. 1, 7 (2007); R. Jack Ayres, Jr., *Judicial Nullification of the Right to Trial by Jury by "Evolving" Standards of Appellate Review*, 60 Baylor L. Rev. 337 (2008); Phillip Hardberger, *Juries Under Siege*, 30 St. Mary's L.J. 1, 141-42 (1998).

5 Arthur Andersen v. Perry Equip. Corp, 945 S.W. 2d 812 (Tex. 1997).

6 *Id*. at 817, n. 4.

7 *Id.* at 818.

8 *Id.*

9 *Id.* at 819.

10 *Id.*

11 *See, e.g.,* McDonald v. Fox, No. 13-11-00479-CV (Tex. App.–Corpus Christi, Nov. 15, 2012, no pet.)(mem. op.); Alsheikh v. Arabian Nat'l Shipping Corp., No. 01-08-00007-CV (Tex. App.–Houston [1st Dist.] April 2, 2009, no pet.)(mem. op.); EMC Mortg. Corp. v. Davis, 167 S.W.3d 406 (Tex. App.–Austin 2005, pet. denied).

12 Robertson County v. Wymola, 17 S.W.3d 334 (Tex. App.–Austin 2000, pet. denied).

13 VingCard A.S. v. Merrimac Hosp. Sys., Inc., 59 S.W.3d 847 (Tex. App.–Fort Worth 2001, pet. denied).

14 Tony Gullo Motors I, L.P. v. Chapa, 212 S.W.3d 299 (Tex. 2006).

15 Stewart Title Guar. Co. v. Sterling, 822 S.W. 2d 1, 11 (Tex. 1991).

16 Tony Gullo Motors I, L.P. v. Chapa, 212 S.W.3d 299 (Tex. 2006).

17 *Id*. at 313.

18 *Id.*

19 *Id.*

20 *Id*. at 313-314.

21 *See, e.g.*, Fix it Today, LLC v. Santander Consumer USA, Inc., No. 02-14-00191-CV (Tex. App.–Fort Worth May 7, 2015, no pet. h.)(mem. op.); Jackson Walker, LLP v. Kinsel, No. 07-13-00130-CV (Tex. App.–Amarillo April 10, 2015, pet. filed)(mem. op.); Prudential Ins. Co. v. Durante, 443 S.W. 3d 499 (Tex. App.–El Paso 2014, pet. denied); Farmers Group Ins., Inc. v. Poteet, 434 S.W.2d 316 (Tex. App.–Fort Worth 2014, pet. denied); Central Austin Apartments, LLC v. UP Austin Holdings, LP, No. 03-13-00080-CV (Tex. App.–Austin Dec. 8, 2014, no pet.) (mem. op.); Border States Elec. Supply v. Coast to Coast Electric, *LLC*, No. 13-13-00118-CV (Tex. App.–Corpus Christi May 29, 2014, pet. denied)(mem. op.); Contemporary Contractors, Inc. v. Centerpoint Apt. Ltd. P/S, No. 05-13-00614-CV (Tex. App.–Dallas July 3, 2014, no pet.) (mem. op.).

22 Central Austin Apartments, LLC v. UP Austin Holdings, LP, No. 03-13-00080-CV (Tex. App.–Austin Dec. 8, 2014, no pet.)(mem. op.).

23 Prudential Ins. Co. v. Durante, 443 S.W. 3d 499 (Tex. App.–El Paso 2014, pet. denied).

24 *Id.* at 514.

25 *See, e.g.,* Corral-Lerma v. Border Demolition & Environmental Inc., 467 S.W. 3d 109, 126 (Tex. App.-El Paso 2015) (pet. denied). (attorney "opined" that twenty percent of time was spent on non-recoverable claim); Sentinel Integrity Solutions, Inc. v. Mistras Group, Inc., 414 S.W.3d 911, 923 (Tex. App.–Houston [1st Dist.] 2013, pet. denied)(attorney "opined" that "'at least' ninety percent" of work was necessary for defending claim). *But see* Enzo Investments, LP v. White, 468 S.W.3d 635 (Tex. App.–Houston [14th Dist.] 2015, pet. denied).

26 Prudential Ins. Co. v. Durante, 443 S.W. 3d at 514.

27 Jackson Walker, LLP v. Kinsel, No. 07-13-00130-CV (Tex. App.–Amarillo April 10, 2015, pet. filed)(mem. op.).

28 *Id.*

29 *Id.* (citations omitted).

30 *Id.*

31 El Apple I, Ltd. v. Olivas, 370 S.W. 3d 757 (Tex. 2012); City of Laredo v. Montano, 414 S.W. 3d 731 (Tex. 2013)(per curiam); Long v. Griffin, 442 SW 3d 253 (Tex. 2014)(per curiam).

32 El Apple I, Ltd. v. Olivas, 370 S.W. 3d at 760.

33 Texas Civil Practice and Remedies Code § 26.003(a) provides for attorney fees in class action lawsuits:

> If an award of attorney's fees is available under applicable substantive law, the rules adopted under this chapter must provide that the trial court shall use the Lodestar method to calculate the amount of attorney's fees to be awarded class counsel. The rules may give the trial court discretion to increase or decrease the fee award calculated by using the Lodestar method by no more than four times based on specified factors.

34 El Apple I, Ltd. v. Olivas, 370 S.W. 3d at 763.

35 *Id*. at 761.

36 *Id.* at 763 (emphasis added).

37 *Id*.

38 *Id*.

39 City of Laredo v. Montano, 414 S.W. 3d 731 (Tex. 2013)(per curiam); Long v. Griffin, 442 S.W. 3d 253 (Tex. 2014)(per curiam).

40 Perdue v. Kenny A. Ex rel. Winn, 130 S. Ct. 1662 (2010).

41 *Id*. Montano, 414 S.W. 3d at 736.

42 414 S.W. 3d 731.

43 *Id.* at 736-737 (citations omitted).

44 *Id.*

45 Long v. Griffin, 442 SW 3d at 255.

46 *Id.*

47 *Id.*

48 *Id.* at 256.

49 Hussami v. Clear Sky MRI & Diagnostic Center, No. 02-14-0014 June 25, 2015, no pet. h.)(mem. op. settled and judgment withdrawn); In re Marriage of Pyrtle, 433 S.W. 3d 152 (Tex. App.–Dallas 2014, pet. denied); Ferrant v. Graham Assoc., Inc., No. 02-12-00190-CV (Tex. App.–Fort Worth May 8, 2014, no pet.)(mem. op.); Myers v. Southwest Bank, No. 02-14-00122-CV (Tex. App.–Fort Worth Dec. 11, 2014, pet. denied)(mem. op.); Paez v. Trent Smith Custom Homes, No. 04-13-00394-CV (Tex. App.–San Antonio March 19, 2014, no pet.)(mem. op.); Metroplex Mailing Servs., LLC v. RR Donnelley & Sons Co., 410 S.W.3d 889, 900 (Tex. App.–Dallas 2013, no pet.).

50 *See, e.g.*, Avery v. LPP Mortg., Ltd., No. 01-14-01007-CV (Tex. App.–Houston [1st Dist.] Oct. 29, 2015, no pet. h.)(mem. op.).
51 *Compare* Blackstone Med., Inc. v. Phoenix Surgicals, LLC, 470 S.W. 3d 636, 659 (Tex. App.—Dallas 2015, no pet.) *with* Metroplex Mailing Services, LLC v. RR Donnelley & Sons Co., 410 S.W.3d 889, 900 (Tex. App.–Dallas 2013, no pet.).
52 *Compare* Concert Health Plan, Inc. v. Houston Nw Partners, Ltd., No. 14-12-00457-CV (Tex. App.–Houston [14th Dist.] May 30, 2013, no pet.)(mem. op.) *with* Enzo Investment, LP v. White, 468 S.W.3d 635 (Tex. App—Houston [14th Dist.} 2015, pet. denied).
53 United Nat'l Ins. Co. v. Amj Investments, LLC, 447 S.W.3d 1, 16 (Tex. App.–Houston [14th Dist.] 2014, pet. dism'd).
54 Metroplex Mailing Services, LLC v. RR Donnelley & Sons Co., 410 S.W.3d 889, 900 (Tex. App.–Dallas 2013, no pet.). *See also* Qui Phuoc Ho v. Macarthur Ranch, LLC, No. 05-14-00741-CV (Tex. App.–Dallas Aug. 28, 2015, pet. filed)(mem. op.); In the Interest of J.R. III, No. 05-14-00338-CV (Tex. App.–Dallas Aug. 5, 2015, no pet.)(mem. op.).
55 Rohrmoos Venture v. UTSW DVA Healthcare, LLP, No. 05-14-00774-CV (Tex. App.–Dallas Oct. 5, 2015, no pet. h.)(mem. op.)(citing Metroplex Mailing Servs. LLC v. Donnelly & Sons Co., 410 S.W.3d 889, 900 (Tex. App.–Dallas 2013, no pet.); Powell v. Penhollow, Inc., No. 05-13-01653-CV (Tex. App.–Dallas June 1, 2015, no pet. h.)).
56 *Id.*(citing Ferrant v. Graham Assocs., Inc., No. 02-12-00190-CV (Tex. App.–Fort Worth May 8, 2014, no pet.) (mem. op.); Concert Health Plan, Inc. v. Houston Nw Partners, Ltd., No. 14-12-00457-CV (Tex. App.–Houston [14th Dist.] May 30, 2013, no pet.) (mem. op.); Circle Ridge Prod. Inc. v. Kittrell Family Minerals, LLC, No. 06-13-00009-CV (Tex. App.–Texarkana July 17, 2013, pet. denied) (mem. op.)). One of the cases cited in support, *Concert Health Plan, Inc. v. Houston NW Partners, Ltd.*, hasn't been followed by subsequent panels of the Fourteenth Court of Appeals. *See* Auz v. Cisneros, No. 14-13-00989-CV (Tex. App.– Houston [14th Dist.] Aug. 27, 2015, no pet. h.); United Nat'l Ins. Co. v. Amj Investments, LLC, 447 S.W.3d 1, 16 (Tex. App.–Houston [14th Dist.] 2014, pet. dism'd).
57 *Id.*
58 Myers v. Southwest Bank, No. 02-14-00122-CV (Tex. App.–Fort Worth Dec. 11, 2014, pet. denied)(mem. op.).
59 *Id.* (quoting Ferrant v. Graham Assocs., Inc., No. 02-12-00190-CV (Tex. App.–Fort Worth May 8, 2014, no pet.)(mem. op.)(on reh'g)).
60 Paez v. Trent Smith Custom Homes, No. 04-13-00394-CV (Tex. App.–San Antonio, March 19, 2014)(mem. op.).
61 Concert Health Plan, Inc. v. Houston Nw Partners, Ltd., No. 14-12-00457-CV (Tex. App.– Houston [14th Dist.] May 30, 2013, no pet.) (mem. op.).
62 Enzo Investments, LP v. White, 468 S.W.3d 635 (Tex. App.–Houston [14th Dist.] 2015, pet. denied).
63 Auz v. Cisneros, No. 14-13-00989-CV (Tex. App.– Houston [14th Dist.] Aug. 27, 2015, no pet. h.).
64 *Id.*
65 *Id.*
66 El Apple I, Ltd. v. Olivas, 370 S.W. 3d at 763.
67 *See, e.g.,* Avery v. LPP Mortg., Ltd., No. 01-14-01007-CV (Tex. App.–Houston [1st Dist.] Oct. 29, 2015, no pet. h.)(mem. op.).
68 El Apple I, Ltd. v. Olivas, 370 S.W. 3d at 763.
69 Auz v. Cisneros, No. 14-13-00989-CV (Tex. App.– Houston [14th Dist.] Aug. 27, 2015, no pet.)(concurring op.)
70 Johnson v. Texas Serenity Academy, Inc., No. 01-14-00438-CV (Tex. App.–Houston [1st Dist.] March 12, 2015, pet. filed)(mem. op.).
71 Boyaki v. John M. O'Quinn & Assocs., PLLC, No. 01-12-00984-CV (Tex. App.–Houston [1st Dist.], Sept. 30, 2014, pet. denied)(mem. op.).
72 *Id.*
73 Medical Discount Pharmacy, L.P. v. State, No. 01-13-00963-CV (Tex. App.–Houston [1st Dist.] July 7, 2015, no pet. h.)(mem. op.).
74 *Id.*
75 In re National Lloyds Ins. Co., No. 13-15-00219-CV (Tex. App.–Corpus Christi July 14, 2015, orig. proceeding)(mem. op.).
76 On appealing summary judgments that involve attorneys fees, see Judge David Hittner & Lynne Liberato, *Summary Judgments in Texas: State and Federal Practice*, 52 Hous. L. Rev. 773, 897-892 (2015).
77 Auz v. Cisneros, No. 14-13-00989-CV (Tex. App.– Houston [14th Dist.] Aug. 27, 2015, no pet.); Enzo Investments, LP v. White, 468 S.W.3d 635 (Tex. App.–Houston [14th Dist.] 2015, pet. denied); Schwartzott v. Maravilla Owners Ass'n, Inc., 390 S.W.3d 15, 21, n. 3 (Tex. App.– Houston [14th Dist.] 2012, pet. denied). *See also* City of Houston v. Clear Creek Basin Authority, 589 S.W.2d 671(Tex. 1979) (non-movant may argue on appeal that the grounds in motion for summary judgment are insufficient as a matter of law to support summary judgment without filing an answer or response to the motion).
78 Davenport Meadows, LP v. Dobrushkin, No. 05-12-01471-CV (Tex. App.–Dallas July 30, 2014, pet. denied)(mem. op.).
79 Green Int'l, Inc. v. Solis, 951 S.W.2d 384, 389 (Tex.1997); Dernick Resources, Inc. v. Wilstein, 471 S.W. 3d 468 ((Tex. App.–Houston [1st Dist.] June 30, 2015, pet. pending).
80 Tony Gullo Motors I, L.P. v. Chapa, 212 S.W. 3d at 314.
81 Farmers Group Ins., Inc. v. Poteet, 434 S.W.3d 316, 333 (Tex. App.–Fort Worth 2014, pet. denied).
82 Central Austin Apts. v. UP Austin Holdings, LP, No. 03-13-00080-CV (Tex. App.–Austin, Dec. 8, 2014 no pet.)(mem. op.)(judgmt vacated by agr.).
83 *Id.*
84 Serrano v. Ramos, No. 13-13-00476-CV (Tex. App.–Corpus Christi June 18, 2015, no pet. h.)(mem. op.).
85 Bruce v. Federal Nat'l Mortg. Ass'n, 352 S.W.3d 891 (Tex. App.–Dallas 2011, pet. denied).
86 Charette v. Fitzgerald, 213 S.W.3d 505 (Tex. App.–Houston [14th Dist.] Dec. 21, 2006, no pet.).
87 Murray v. Grayum, No. 03-10-00165-CV (Tex. App.–Austin June 24, 2011, pet. denied)(mem. op.).
88 Scott v. Spalding, No. 11-07-00264-CV (Tex. App.–Eastland Jan. 30, 2009, no pet.)(mem. op.).