

# UPDATE ON TEXAS ATTORNEY'S FEES

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For Houston Bar Association  
Litigation Section Luncheon  
April 24, 2014  
Houston, Texas

by

**Judge Mike Engelhart**

151<sup>st</sup> Civil District Court  
Harris County, Texas

# *El Apple I, Ltd. v. Olivas*, 370 S.W.3d 757 (Tex. 2012) (1/2)

- Discrimination case brought by Applebee's employee, Myrian Olivas, in El Paso.
- Alleged sex discrimination and retaliation under the TCHRA. Tex Lab. Code 21.001 - .55. She was successful only on her retaliation claim, not the sex discrimination claim and recovered past and future damages.
- She sought attorney's fees under §21.259(a) via affidavit. That section mirrors federal discrimination law and because federal courts use the lodestar method to calculate fees, Texas courts do too.
- Lodestar = two step process. (1) Reasonable hourly fee and, (2) reasonable number of hours. Then multiplied together and this is the base fee or lodestar. Then the court may adjust the lodestar up or down depending on relevant factors (the multiplier).

# *El Apple I, Ltd. v. Olivas*, 370 S.W.3d 757 (Tex. 2012) (2/2)

- The Court recites the standard non-exclusive factors. [TEX. DISCIPLINARY R. PROF'L CONDUCT 1.04\(b\)](#); see also [Arthur Andersen & Co. v. Perry Equip. Corp.](#), 945 S.W.2d 812, 818 (Tex.1997) (quoting the eight-factor test for determining attorney's fees). Our class action rule further provides that any adjustment to the base lodestar “must be in the range of 25% to 400% of the lodestar figure.” [TEX.R. CIV. P. 42\(i\)\(1\)](#).
- NEW: While Texas courts have not required contemporaneous billing records for an award of attorney's fees, use of the lodestar method and its considerations merit that requirement. So, in all but the simplest cases, attorneys should document their time with billing records and other documentation, and show the # of hours worked on each task performed, nature of the work, who performed it, their hourly rate, when they were performed.
- Reversed and remanded and let the attorneys re-create their time sheets – not rendered.
- Federal procedural law may be considered in determining a multiplier. Federal procedural law does not allow the contingent nature of the fee arrangement to be used as the basis of a multiplier. But, premature to comment on the multiplier in this case because the base lodestar amount was not yet known.

## *City of Laredo v. Montano*, 414 S.W.3d 731, 735 (Tex. 2013)

- The attorney fee statute in this eminent domain case (Tex. Prop. Code 21.019(c)) did not require lodestar determination of attorney's fees.
- Attorney used lodestar anyway, so the Supreme Court evaluated the fees under that analysis. Stated that it was not absolutely necessary to prove fees with contemporaneous time and billing records, but attorneys probably have to refer to them in all but the simplest cases.
- There were multiple attorneys representing Plaintiffs. As to one attorney, the Court held that his testimony was completely devoid of substance - complete generalities.
- The other attorney was hired only for the trial. She agreed to work for \$200 per hour and testified she came early for trial and stayed late. The award for her fees was upheld without any contemporaneous fee records because everyone could observe the work she was doing, and there was no practical way to create contemporaneous fee records. Moreover, she was not cross-examined. Good arrow for your quiver.

*Metroplex Mailing Services, LLC v. RR Donnelley & Sons Co.*, 410 S.W.3d 889  
(Tex.App.-Dallas 2013)

- Not all cases require *El Apple* application of the lodestar calculation.
- The Defendants argued that fees that the plaintiff's lawyer testified to that were not based on written invoices were legally insufficient. Dallas COA concludes that not all cases post *El Apple* require application of the lodestar nor the proof required thereunder. Cites Houston and Texarkana cases for proposition that not all cases are governed by lodestar post *El Apple*.
- Court found evidence factually & legally sufficient.
- D argued that new trial necessary on fees because of failure to segregate. COA held that charge did not ask about segregation and D did not object to the charge. A failure to specifically object to the charge's failure to segregate attorney's fees among the claims asserted waives any complaint on appeal regarding the failure to segregate.
- Attorney's fees can be awarded for interlocutory or mandamus appellate work if it is a necessary part of the initial relief and allowed the trial process to go forward.

*Concert Health Plan, Inc. v. Houston Northwest Partners, Ltd.*,  
2013 WL 2382960 (Tex.App.-Houston [14 Dist.] May 30, 2013)

- Appellant Concert asserts that the evidence is legally and factually insufficient to support the trial court's award of attorney's fees.
- Concert relies on [El Apple](#), as legal authority, although it notes that the “legal and factual situation is different” in *El Apple*. *El Apple* is an employment discrimination and retaliation case pursuant to the Texas Commission on Human Rights Act in which the Supreme Court of Texas utilized the lodestar method for calculating the appropriate attorney's fees.
- Houston 14<sup>th</sup> COA holds that 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.

## *Ferrant v. Graham Associates, Inc.*, 2013 WL 5433964 (Tex.App.-Fort Worth Sep 26, 2013)

- “While the Texas Supreme Court recognized the lodestar method as the required method for claims under Section 21.259(a) of the Texas Commission on Human Rights Act and in class-action lawsuits, the [ *El Apple* ] opinion does not require the lodestar method in other types of lawsuits.” [Circle Ridge Prod., Inc., 2013 WL 3781367, at \\*7](#). We likewise do not read *El Apple* to mean that evidence of attorney's fees is legally insufficient in an hourly-fee breach of contract case unless there are contemporaneous time records admitted into evidence. See *id.*; [Concert Health Plan, Inc., 2013 WL 2382960, at \\*9 n. 17](#).
- The Court distinguishes its opinion in [Toshiba Mach. Co., Am. v. SPM Flow Control, Inc., 180 S.W.3d 761, 782–84](#) (Tex.App.-Fort Worth 2005, pet. granted, remanded): To support his argument that the lodestar method discussed in *El Apple* applies in all breach of contract cases, that case is distinguishable. SPM had a blended contingent-fee agreement with its attorneys in that case, and we noted that “Texas courts consistently allow the use of a multiplier based upon the contingent nature of a fee under Texas statutes allowing recovery of attorney's fees.” [Id. at 783](#). This is not a contingent-fee case, nor is it a class action or suit under the TCHRA.
- GAI's trial counsel testified that he had spent more than sixty hours on this case, that he had charged GAI \$300 per hour, and that he believed \$18,000 in attorney's fees was reasonable and necessary. He also answered questions about the specific amounts of time he spent on various tasks in the case. The trial court did not award \$18,000 in attorney's fees, instead reducing the amount to \$15,000. The evidence is legally sufficient evidence to support the attorney's fees award.

*Paez v. Trent Smith Custom Homes, LLC*, 2014 WL 1089751  
(Tex.App.-San Antonio Mar 19, 2014)

- The case before this court is not a suit under the TCHRA or any other statute that contains a fee-shifting provision that employs the lodestar method. See, e.g., [City of Laredo v. Montano, 414 S.W.3d 731](#), (applying lodestar method in case involving fee-shifting provision in Texas Property Code). Rather, this case involves 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](#). [Section 38.001\(8\)](#) permits recovery of reasonable attorney's fees for claims based on a contract. [TEX. CIV. PRAC. & REM.CODE ANN. § 38.001\(8\)](#) (West 2008). Accordingly, we hold the lodestar method used by the supreme court in *El Apple I* does not apply here.



## *D & M Marine, Inc. v. Turner*, 409 S.W.3d 693 (Tex.App.-Houston [1st Dist.] Jul 11, 2013)

- Case that was not a TCHRA nor class action. Houston First COA used the *El Apple* analysis and concluded that the evidence was factually insufficient. The testimony and records were very vague and consisted of a list of broad topics and total numbers of hours.
- For the fees incurred up through the trial, the exhibit identified the fees as follows: Initial Meetings, Case Review 32.5, Pleadings 48.3, Depositions 36.4, Written Discovery 54.4, R/R of Documents produced by parties 40, Hearings 18.5, Inspections of Turner Home 9.5, Mediation 18.6, Miscellaneous 18, Trial 296.
- Evidence does not identify who performed each of the tasks. It does not identify when the services were performed. While the evidence does establish the amount of time worked, it does not do it with enough particularity to determine whether the amount of time involved was an appropriate amount.
- The Turners correctly explain that Lemon testified that his determination of hours worked was based on a review of the docket sheet and other documents in the file to determine the approximate amount of time worked. Assuming that this is a sufficient method of determining time worked under *El Apple* Lemon did not testify about the details of that review. We know only that it was done. We hold the evidence in support of attorneys' fees is not sufficiently specific to support the jury's award of fees.
- Reversed and remanded for new trial on attorney's fees.

*Mustapha v. HSBC Bank, USA,*  
2013 WL 2338198 (S.D.Tex. May 28, 2013)

- The Court agrees that this contractual provision allows Defendants' to recover their reasonable attorney's fees and expenses from the Mustaphas.

Texas courts accept the lodestar method as a means of calculating reasonable attorney's fees. See [El Apple](#). The Texas Supreme Court has outlined a two-step process for calculating the lodestar value. Courts first determine the reasonable hours spent by counsel on the case and a reasonable hourly rate—the number of hours is then multiplied by the hourly rate to arrive at the lodestar, or base fee. *Id.* Once the lodestar value is calculated, the court may then adjust the amount up or down if relevant factors indicate an adjustment is necessary to reach a reasonable fee in the case. *Id.*

## *Williams-Pyro, Inc. v. Barbour*, 408 S.W.3d 467, 483 (Tex.App.-El Paso Mar 20, 2013)

- Multiplier case. This was a TCHRA case and the court awarded \$154k in attorney's fees. The court concluded it did not have authority to apply a multiplier to the award, but that a 1.5x multiplier would be appropriate if the COA felt it could do so.
- In calculating attorney's fees under lodestar, the party applying for the award bears “the burden of documenting the hours expended on the litigation and the value of those hours.” See [El Apple](#).
- To justify adjusting the lodestar figure, the court must rely on factors such as the complexity of the case, the skill of the attorney, whether the fee is contingent, and the novelty of the issues raised. The problem here is that the findings of fact indicate that the trial court relied on each one of these factors in determining the lodestar. Appellee does not point to any additional evidence indicating exceptional circumstances existed which would warrant utilization of a multiplier. Likewise, the court does not find any indication that Appellee’s counsel ever identified which factors supported the use of a multiplier, separate and distinct from those used to calculate the base lodestar.
- The trial court specifically and repeatedly referred to the fees awarded as “reasonable and necessary.” Under Texas law, that is all the trial court is authorized to award. Finding no error, we overrule.

*Sentinel Integrity Solutions, Inc. v. Mistras Group, Inc.*,  
414 S.W.3d 911 (Tex.App.-Houston [1 Dist.] Oct 22, 2013)

- Party applying for the attorney's fee award bears the burden of proof. Amount of attorney's fees is a question of fact for the jury. On appeal the D complained that the charge did not contain language of "actually incurred" as to the attorney's fees. However, that was waived because the D did not object to the actual question in the charge: "What is a reasonable fee for the necessary services of Jody Olson's attorneys in this case in defending the claim that Jody Olson breached the non-competition agreement in this case, stated in dollars and cents?"
- "[I]t is the court's charge, not some other unidentified law, that measures the sufficiency of the evidence when the opposing party fails to object to the charge."

# *Preston Exploration Co., LP v. GSP, LLC,* 2013 WL 3229678 (S.D.Tex. Jun 25, 2013)

- Breach of contract case. This is as an excellent discussion of all of the elements and *Arthur Andersen* factors. Appellate fees need to be proven in the same way - the number of hours, the nature of each task and the time it is expected to take, who will be performing the work, etc. The federal district court applied the lodestar method and analysis to determine the reasonableness of the fee based upon *Arthur Andersen* or *Johnson* factors.
- [E]vidence of each of the Andersen factors is not required to support an award of attorney's fees." "The court can also look at the entire record, the evidence presented on reasonableness, the amount in controversy, the common knowledge of the participants as lawyers and judges, and the relative success of the parties."
- Once the court has determined the lodestar, it may accept the lodestar or adjust it up or down. "The lodestar method aims to provide a relatively objective measure of attorney's fees," and, to ensure this, trial courts "should obtain sufficient information to make a meaningful evaluation of the application for attorney's fees." [\*El Apple\*](#).

## *Fleming & Associates, LLP v. Barton*, 2014 WL 783772 (Tex. App.--Houston [14th] February 27, 2014, no pet h.)

- Recovery of fees against someone other than an individual or corporation.
- Plaintiff/Appellee Dan Barton sought attorney's fees from Fleming's LLP for breach of contract.
- Neither the terms "individual" nor "corporation" are defined in the Code Construction Act or in Chapter 38 of the TCPRC. When a statute contains undefined terms, the ordinary meanings of these terms should be applied. Here, there is no dispute that F & A is neither an individual nor a corporation: it is an LLP. Further, the Barton Group has not cited and our research has not revealed a definition of "individual" or "corporation" that includes any type of partnership.
- The predecessor statute, [article 2226 of the Texas Revised Civil Statutes](#), provided that "any person, corporation, partnership, or other legal entity" could recover fees from a "person or corporation." When the Legislature re-codified [article 2226](#) into Chapter 38 of the Texas Civil Practice and Remedies Code, it intended no substantive change. *Id.* Indeed, the revisor's note indicates that the term "person" was changed to "individual" primarily to avoid application of the Code Construction Act's definition of "person," which could potentially subject governmental entities to liability. *Id.* at 73–74. "But general statements by the Legislature that 'no substantive change in the law is intended' must be considered with the clear, specific language used" in [section 38.001](#). "[W]hen, as here, specific provisions of a 'nonsubstantive' codification and the code as a whole are direct, unambiguous, and cannot be reconciled with prior law, the codification rather than the prior, repealed statute must be given effect."
- Thus, under the plain language of [section 38.001\(8\)](#), a person may not recover attorney's fees against a partnership. *Cf.* [Ganz v. Lyons P'ship, L.P., 173 F.R.D. 173, 176 \(N.D.Tex.1997\)](#) (holding that TCPRC [section 38.001\(8\)](#) authorizing recovery of attorney's fees against "individual or corporation" does not provide for award of attorney's fees against limited partnership). Without any other authority for the award, COA concludes that the trial court erred in making such an award.

*In re Nalle Family Limited Partnership*,  
406 S.W.3d 168, 169-76 (Tex. 2013)

- Must you supersede your attorney's fees for trial or appeal?
- Attorney's fees for prosecution or defense of the suit are not compensatory damages or costs within the meaning of TCPRC 52.006. You do not need to supersede them.
- As part of House Bill 4 in 2003, the Legislature enacted [Civil Practice and Remedies Code section 52.006](#). Before then, appeal bonds were regulated solely by the Texas Rules of Appellate Procedure, which required a party to post security covering the entire judgment, regardless of amount, plus costs and interest for the estimated duration of the appeal. If the judgment was not fully superseded, the creditor could execute on the judgment.
- However, if attorneys fees are your actual damages, as in a malpractice suit, those must be superseded as compensatory damages. *Haubold v. Medical Carbon Research Institute, LLC*, 2014 WL 1018008 (Tex.App.-Austin Mar 14, 2014).

# *American Intern. Industries, Inc. v. Scott*, 355 S.W.3d 155 (Tex. App.--Houston [1st Dist.] 2011, no pet.)

- Segregation of claims between those for which attorney's fees are recoverable and those for which they are not. In [\*Tony Gullo Motors I, L.P. v. Chapa\*](#), the Texas Supreme Court held that parties claiming attorney's fees must "segregate fees between claims for which they are recoverable and claims for which they are not...".
- "Intertwined facts" do not make fees for unrecoverable claims recoverable. [Id.at 313–14](#). "[I]t is only when discrete legal services advance both a recoverable and unrecoverable claim that they are so intertwined that they need not be segregated." [Id](#). Thus, "[i]f any attorney's fees relate solely to a claim for which such fees are unrecoverable, the claimant must segregate recoverable from unrecoverable fees."
- There may, of course, be some disputes about fees that a trial or appellate court should decide as a matter of law. For example, to prevail on a contract claim a party must overcome any and all affirmative defenses (such as limitations, *res judicata*, or prior material breach), and the opposing party who raises them should not be allowed to suggest to the jury that overcoming those defenses was unnecessary. But when at least some of the attorney's fees are attributable only to claims for which fees are not recoverable, segregation of fees ought to be required.
- Attorneys are not required to keep separate time records when drafting parts of a petition or completing other tasks that relate to claims for which attorney's fees are unrecoverable. An attorney may testify, for example, "that a given percentage of the drafting time would have been necessary even if the claim for which attorney's fees are nonrecoverable had not been asserted." The party seeking to recover attorney's fees bears the burden of demonstrating that segregation is not required.
- Here, the defendant alleged that its several affirmative defenses, including collateral estoppel, *res judicata*, waiver, lack of due diligence, and unclean hands were intertwined with its affirmative relief declaratory action claim. Further, the Defendant subsequently filed a motion for summary judgment as to *res judicata*, among other defenses. The defendant sought attorney's fees under the UDJA.
  - The defendant argues that the actions it took in defending itself against the plaintiff's request for a judgment declaring that defendant released its claims in a prior suit by executing the settlement agreement were inextricably intertwined with its defense against the rest of the plaintiff's claims in the instant case for breach of contract, indemnity, money had and received, and removal of a cloud on its title to real property because all of plaintiff's claims were premised on the underlying argument of release and because all of those claims are addressed by defendant's *res judicata* defense.
- All of the legal services outlined in the affidavit would have been necessary even if the declaratory judgment claim had been the only claim asserted by plaintiff. All of defendant's pleadings and motions were necessary to address the settlement agreement's provisions, which was properly the subject of plaintiff's UDJA claim. No attorney's fees claimed that related solely to a claim for which such fees were unrecoverable—all of the attorney's drafting time would have been necessary even if the claim for which attorney's fees are nonrecoverable had not been asserted—so no segregation of fees was necessary.