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THE RECOVERY OF ATTORNEY FEES IN TEXAS

LARRY GLENN HYDEN

With the ever increasing cost of practicing law, today's lawyer is compelled to exercise the most exacting methods available to insure the receipt of an adequate fee. In several instances the legislature has allowed lawyers a statutory vehicle for incorporating attorney fees into the judgment of the court.¹ In recent years considerable change and development of the law in the area of statutory grants of attorney fees has taken place. Confusion has resulted from an abundance of misinterpreted cases and overruled authority, some of which is understandably due to the several major developments in this area. The object of this comment is to point out some of the major pitfalls, and hopefully, to serve as a guide to the successful inclusion of attorney fees in a judgment.

The rule that "attorney's fees are not recoverable either in an action in tort or a suit upon a contract unless provided by statute or by contract between the parties,"² has been continuously affirmed by our courts.³ Although directed at different types of suits, the *nature* of the statutes awarding the recovery of the fees is essentially the same.⁴

¹ E.g., TEX. REV. CIV. STAT. ANN. art. 2226 (Supp. 1972); TEX. INS. CODE ANN. arts. 3.62 & 3.62-1 (1963); TEX. PROB. CODE ANN. § 243 (1956).

² *New Amsterdam Cas. Co. v. Texas Indem., Inc.*, 414 S.W.2d 914, 915 (Tex. Sup. 1967).

³ E.g., *Mundy v. Knutson Constr. Co.*, 156 Tex. 211, 294 S.W.2d 371 (1956); *Johnson v. Universal Life & Acc. Ins. Co.*, 127 Tex. 435, 94 S.W.2d 1145 (1936). *Contra*, *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 391, 90 S. Ct. 616, 625, 24 L. Ed. 2d 593, 606 (1970):

While the general American rule is that attorneys' fees are not ordinarily recoverable as costs, both the courts and Congress have developed exceptions to this rule for situations in which overriding considerations indicate the need for such a recovery. A primary judge-created exception has been to award expenses where a plaintiff has successfully maintained a suit, usually on behalf of a class, that benefits a group of others in the same manner as himself To allow the others to obtain full benefit from the plaintiff's efforts without contributing equally to the litigation expense would be to enrich the others unjustly at the plaintiff's expense.

Powell v. Narried, 463 S.W.2d 43, 46 (Tex. Civ. App.—El Paso 1971, no writ):

However, where the natural and proximate consequence of a wrongful act has been to involve a plaintiff in litigation with others, there may, as a general rule, be a recovery in damages of the reasonable expenses incurred in such prior litigation, against the author of such act, including the compensation for attorney's fees; but such expenses must be the natural and proximate consequences of the injury complained of and must have been incurred necessarily and in good faith, and the amount thereof must be reasonable.

See Annot., 45 A.L.R.2d 1183 (1956); *Knebel v. Capital Nat'l Bank*, 469 S.W.2d 458, 461 (Tex. Civ. App.—Austin 1971, writ ref'd n.r.e.):

One exception to this rule is in those cases construing wills or trust instruments. However, even in the will or trust construction cases attorney's fees are not recoverable where the real controversy concerns . . . which of the claimants is entitled to receive the assets of the estate.

The exceptions to the general rule are beyond the purview of this comment, which will be confined to the recovery of attorney fees where allowed by statute.

⁴ *See, e.g.*, TEX. REV. CIV. STAT. ANN. art. 2226 (Supp. 1972); TEX. INS. CODE ANN. arts. 3.62 & 3.62-1 (1963); TEX. PROB. CODE ANN. § 243 (1956).

"[S]tatutory provisions for the recovery of attorney's fees are in derogation of the common law, are penal in nature and must be strictly construed."⁵

Another common trait of statutes awarding attorney fees is the *amount* of the fee to be recovered. In determining the amount, the statutes use the phrase, "reasonable attorney fees."⁶ The precise meaning of this seemingly simple phrase, reasonable attorney fees, has been the subject of much judicial inquiry.⁷ Must one prove reasonableness,⁸ and, if so, how does one prove reasonableness⁹ are also issues which have been the source of much litigation.

Understanding the requirement of pleading and proving attorney fees, and the evidence requirements to determine the reasonableness of those fees pleaded is essential to their recovery.

REQUIREMENT OF PLEADING

In a suit seeking the recovery of reasonable attorney fees, *which is a question of fact*,¹⁰ this amount must be afforded the same treatment given to any other cause of action. The amount of the fees, which is a

⁵ *New Amsterdam Cas. Co. v. Texas Indem., Inc.*, 414 S.W.2d 914, 915 (Tex. Sup. 1967); *McFarland v. Franklin Life Ins. Co.*, 416 S.W.2d 378, 379 (Tex. Sup. 1967).

⁶ *E.g.*, TEX. REV. CIV. STAT. ANN. art. 2226 (Supp. 1972): "[H]e may, if represented by an attorney, also recover in addition to his claim and costs, a reasonable amount as attorney's fees." (Emphasis added.) TEX. INS. CODE ANN. art. 3.62 (1963): "[S]uch company shall be liable to pay the holder of such policy, in addition to the amount of the loss, twelve (12%) per cent damages on the amount of such loss together with reasonable attorney fees for the prosecution and collection of such loss." (Emphasis added.) TEX. INS. CODE ANN. art. 3.62-1 (1963): "[S]uch insurer shall be liable to pay the holder of such policy, in addition to the amount of the loss, twelve percent (12%) damages on the amount of such loss, together with reasonable attorney fees for the prosecution and collection of such loss." (Emphasis added.) TEX. PROB. CODE ANN. § 243 (1956): "[W]hether successful or not he shall be allowed out of the estate his necessary expenses and disbursements including reasonable attorney's fees, in such proceedings." (Emphasis added.)

⁷ *See, e.g.*, *International Security Life Ins. Co. v. Finck*, 475 S.W.2d 363, 371 (Tex. Civ. App.—Amarillo 1971, writ granted). "That evidence [regarding attorney fees] consists in the facts before the jury in relation to the services rendered, as well as the estimates of the value given by the attorneys who testified, and is not required to show some precise preconceived mathematical ratio to the actual recovery." (Emphasis added.)

⁸ *See, e.g.*, *Great Am. Reserve Ins. Co. v. Britton*, 406 S.W.2d 901, 907 (Tex. Sup. 1966). *Contra*, *American Income Life Ins. Co. v. Davis*, 334 S.W.2d 486 (Tex. Civ. App.—Amarillo 1960, no writ); *Franklin Life Ins. Co. v. Woodyard*, 206 S.W.2d 93 (Tex. Civ. App.—Galveston 1947, no writ); *American Nat'l Ins. Co. v. Points*, 131 S.W.2d 983 (Tex. Civ. App.—Dallas 1939, writ dismissed judgment cor.).

⁹ *See, e.g.*, *Braswell v. Braswell*, 476 S.W.2d 444, 446 (Tex. Civ. App.—Waco 1972, writ dismissed).

[I]n deciding the reasonable value of legal services, the fact-finder may properly consider, among other factors, the time and labor involved; the nature and complexities of the case; the amount of money or the value of the property or interest involved, and the extent of the responsibilities assumed by the attorney; whether other employment is lost by the attorney because of the undertaking; the benefits resulting to the client from the services . . . whether the employment is casual or for an established or constant client.

¹⁰ *Johnson v. Universal Life & Acc. Ins. Co.*, 127 Tex. 435, 437, 94 S.W.2d 1145, 1146 (1936). Whether TEX. REV. CIV. STAT. ANN. art. 2226 (Supp. 1972) changes this will be discussed later in this comment.

part of the general recovery sought, must be pleaded to entitle a recovery,¹¹ whereupon it enters into and becomes a separate part of the amount sued for.¹² The recovery of attorney fees is not to be confused with the award of "costs." The term "costs" is generally understood to mean the fees or compensation, *which are fixed by law*, collectible by the officers of the court, witnesses and other like items, and does not ordinarily include attorney fees.¹³ The basic distinction is that attorney fees are not ordinarily recoverable unless by virtue of contract or statute.¹⁴ When speaking of the recovery of reasonable attorney fees, "[a] necessary issue in controversy here, is the question *whether plaintiff is entitled to attorney's fee* under the statute, and *if so, in what amount*; these are questions in dispute between the parties, properly raised by the pleadings."¹⁵

The only instances in which reasonable attorney fees are allowed without pleading a *specific amount*,¹⁶ are cases where a defendant does not specially except to the defective pleadings.¹⁷ Under Rule 90,¹⁸ the defendant's failure to specially except waives the deficiencies in the pleadings.¹⁹

Even though a failure to plead a specific fee may not preclude recovery of the fee, better practice would dictate the specific pleading. The plaintiff should exercise every opportunity afforded him to amend his pleadings to conform to the judgment²⁰ because, on appeal, the specific amount pleaded will ordinarily constitute a ceiling on the amount that can properly be awarded.²¹

Once a plaintiff has properly pleaded a specific amount entitled to

¹¹ Johnson v. Universal Life & Acc. Ins. Co., 127 Tex. 435, 437, 94 S.W.2d 1145, 1146 (1936).

¹² *Id.* at 437, 94 S.W.2d at 1146.

¹³ *Id.* at 437, 94 S.W.2d at 1146.

¹⁴ *Id.* at 437, 94 S.W.2d at 1146.

¹⁵ *Id.* at 437, 94 S.W.2d at 1146 (emphasis added).

¹⁶ *E.g.*, Liberty Universal Ins. Co. v. Bodiford, 426 S.W.2d 583 (Tex. Civ. App.—Houston [1st Dist.] 1968, no writ); Washington Nat'l Ins. Co. v. Kohlenbrener, 329 S.W.2d 956 (Tex. Civ. App.—San Antonio 1959, writ ref'd n.r.e.); Rio Grande Nat'l Life Ins. Co. v. Schmidt, 292 S.W.2d 864 (Tex. Civ. App.—Dallas 1956, no writ); *cf.* Liberty Sign Co. v. Newsom, 426 S.W.2d 210, 215 (Tex. Sup. 1968).

¹⁷ Liberty Universal Ins. Co. v. Bodiford, 426 S.W.2d 583, 586 (Tex. Civ. App.—Houston [1st Dist.] 1968, no writ): "It being the duty of the party levying exceptions to obtain action on them by the court, and we finding no action taken by the court, they were waived." Washington Nat'l Ins. Co. v. Kohlenbrener, 329 S.W.2d 956, 959 (Tex. Civ. App.—San Antonio 1959, writ ref'd n.r.e.); "The appellant did not except to the pleadings, and therefore waived such defect." Rio Grande Nat'l Life Ins. Co. v. Schmidt, 292 S.W.2d 864, 869 (Tex. Civ. App.—Dallas 1956, no writ): "There was no special exception to the allegation as too general, and testimony was adduced concerning a reasonable fee."

¹⁸ TEX. R. CIV. P. 90.

¹⁹ *Id.* "Every defect, omission or fault in a pleading either of form or of substance, which is not specifically pointed out by motion or exception in writing . . . shall be deemed to have been waived by the party seeking reversal on such account . . ."

²⁰ *See* TEX. R. CIV. P. 66 & 67.

²¹ Liberty Sign Co. v. Newsom, 426 S.W.2d 210, 215 (Tex. Sup. 1968).

him as reasonable attorney fees, he is faced with the proof requirements, that is, whether the amount pleaded is reasonable. The requirements for the proof of reasonable attorney fees have not been readily ascertainable from the case law.

REQUIREMENTS OF PROOF

Must There Be Proof as to the Reasonableness of Attorney Fees?

Originally, the trial court could determine reasonableness without any evidence of the nature or value of attorney's services.²² In 1887, the Texas Supreme Court gave trial courts this discretion in *Johnston v. Blanks*²³ with the following language:

But it is insisted that the court had no power to make the allowance without hearing evidence as to the nature and value of the services rendered. But this we think a mistake. *It would certainly be competent for the court to demand evidence if it saw proper*, and in some cases this might be necessary; *but it is to be presumed that the court is sufficiently acquainted with the value of professional services* in preparing a garnishee's answer which is presented to it without hearing testimony.²⁴

The law announced in *Johnston* prevailed until 1936.²⁵

The supreme court, on a certified question, announced a new position in *Johnson v. Universal Life & Accident Insurance Co.*²⁶ concerning the proof of reasonableness.

The reasonableness of attorney's fees . . . is a question of fact to be determined and *must be supported by competent evidence* and may be submitted to a jury.²⁷

Although the court in the *Johnson* case had clearly decided that the reasonableness of attorney fees must be supported by competent evidence,²⁸ this precedent was not adhered to by some of the courts of

²² *Johnston v. Blanks*, 68 Tex. 495, 497, 4 S.W. 557, 558 (1887).

²³ 68 Tex. 495, 497, 4 S.W. 557, 558 (1887).

²⁴ *Id.* at 497, 4 S.W. at 558 (emphasis added).

²⁵ *Smith v. Texas Co.*, 53 S.W.2d 774, 779 (Tex. Comm'n App. 1932, holding approved): "It is true it has been held that a trial judge may determine an issue of fact as to what constitutes a reasonable attorney fee for services rendered in a trial before him, from his own knowledge of the nature and value of the services for which compensation is claimed." *Texas Employers' Ins. Ass'n. v. Storey*, 7 S.W.2d 913, 915 (Tex. Civ. App.—Waco 1928), *aff'd*, 17 S.W.2d 458 (Tex. Comm'n App. 1929, holding approved): "It was the privilege of the court to hear evidence of what would be a reasonable fee for the guardian *ad litem* for his services in representing the minor, but it was not incumbent upon him to do so. . . . This was a matter within the sound discretion of the trial court, not reviewable by this court, unless it clearly appears that there has been an abuse of this discretion"

²⁶ 127 Tex. 435, 94 S.W.2d 1145 (1936).

²⁷ *Id.* at 437, 94 S.W.2d at 1146 (emphasis added).

²⁸ *Id.* at 437, 94 S.W.2d at 1146.

civil appeals. A growing number of courts of civil appeals seemed to be ignoring the *Johnson* decision.²⁹ The language in *Ferrous Products Co. v. Gulf States Trading Co.*³⁰ illustrates the extent of this trend.

In this case trial was to the Court without a jury, so he had to determine the facts. It was not necessary to have opinion evidence as to a reasonable attorney's fee. The judge had all essential facts before him as to the work done, the time spent and the nature of the controversy. *The Trial Court could take judicial notice of what would be a reasonable attorney's fee.*³¹

This trend of decisions by the courts of civil appeals resulted in an emphatic reaffirmance of the *Johnson* decision by the Texas Supreme Court in *Great American Reserve Insurance Co. v. Britton*.³²

The plaintiff offered no proof of any kind of the reasonableness of the attorney fees sought and recovered. We have held that "[t]he reasonableness of attorney's fees . . . is a question of fact to be determined and *must be supported by competent evidence* and may be submitted to a jury."³³

The supreme court in *Britton* expressly disapproved several of the prior courts of civil appeals' decisions, as being contrary to its own decision in *Johnson*.³⁴

There are holdings in some Court of Civil Appeals' opinions that the reasonableness of attorney fees is not a jury question but is a matter entrusted to the trial judge's discretion; and further,

²⁹ See *Combined Am. Ins. Co. v. Jordan*, 403 S.W.2d 811 (Tex. Civ. App.—Amarillo 1966, writ ref'd n.r.e.); *Hilliard v. Home Builders Supply Co.*, 399 S.W.2d 198 (Tex. Civ. App.—Fort Worth 1966, writ ref'd n.r.e.); *Akins v. Coffee*, 376 S.W.2d 953 (Tex. Civ. App.—Dallas 1964, writ dismissed); *American Income Life Ins. Co. v. Davis*, 334 S.W.2d 486 (Tex. Civ. App.—Amarillo 1960, no writ); *Ferrous Prods. Co. v. Gulf States Trading Co.*, 323 S.W.2d 292 (Tex. Civ. App.—Houston 1959), *aff'd*, 332 S.W.2d 310 (Tex. Sup. 1960); *Franklin Life Ins. Co. v. Woodyard*, 206 S.W.2d 93 (Tex. Civ. App.—Galveston 1947, no writ); *May v. Donalson*, 141 S.W.2d 702 (Tex. Civ. App.—San Antonio 1940, no writ); *American Nat'l Ins. Co. v. Points*, 131 S.W.2d 983 (Tex. Civ. App.—Dallas 1939, writ dismissed jdgmt cor.).

Some of the courts of civil appeals began differentiating between trial before a jury and trial to the court without a jury. See, e.g., *May v. Donalson*, 141 S.W.2d 702, 704 (Tex. Civ. App.—San Antonio 1940, no writ).

It has been held that in a trial before the court, the judge can fix the attorney's fees, even though there is no testimony from which to determine the value of the attorneys' services But, in a trial to a jury there must be evidence of what services the attorney had rendered, and of the reasonable value of such services, and the jury, but not the judge, should, from this evidence, fix the amount of the fees.

³⁰ 323 S.W.2d 292 (Tex. Civ. App.—Houston 1959), *aff'd*, 332 S.W.2d 310 (Tex. Sup. 1960).

³¹ *Id.* at 297 (emphasis added).

³² 406 S.W.2d 901 (Tex. Sup. 1966).

³³ *Id.* at 907 (emphasis added).

³⁴ *Id.* at 907. The court voiced its disapproval of *American Income Life Ins. Co. v. Davis*, 334 S.W.2d 486 (Tex. Civ. App.—Amarillo 1960, no writ); *Franklin Life Ins. Co. v. Woodyard*, 206 S.W.2d 93 (Tex. Civ. App.—Galveston 1947, no writ); *American Nat'l Ins. Co. v. Points*, 131 S.W.2d 983 (Tex. Civ. App.—Dallas 1939, writ dismissed jdgmt cor.).

that the trial judge may adjudicate reasonableness on judicial knowledge and without the benefit of evidence. . . . *Those holdings are in conflict with our own in Johnson . . . and are 'dis-approved.'*³⁵

Today, in view of the *Britton* decision, it is clear that *the reasonableness of attorney fees must be supported by competent evidence.*³⁶

Evidence of Reasonableness

A number of factors may be properly considered by the trier of the facts in determining the reasonableness of attorney fees. Generally, evidence to be considered consists of facts "in relation to the services rendered, as well as the estimates of their value made by attorneys who testified."³⁷ Specifically, some factors properly considered by the factfinder are:

[T]he time and labor involved; the nature and complexities of the case; the amount of money or the value of the property or interest involved, and the extent of the responsibilities assumed by the attorney; whether other employment is lost by the attorney because of the undertaking; the benefits resulting to the client from the services; the contingency or certainty of compensation; and whether the employment is casual or for an established or constant client.³⁸

³⁵ Great Am. Reserve Ins. Co. v. Britton, 406 S.W.2d 901, 907 (Tex. Sup. 1966) (emphasis added).

³⁶ *Id.* at 907. See generally Bagby Land & Cattle Co. v. California Livestock Comm'n Co., 439 F.2d 315, 318 (5th Cir. 1971). "[A]lthough the procedure in Texas courts would apparently require proof of reasonable attorney's fees, federal courts are not bound by this procedure in diversity actions. It was entirely permissible for the district court to fix attorney's fees on the basis of its own experience and without the aid of testimony of witnesses."

This comment will discuss the effects of amended TEX. REV. CIV. STAT. ANN. art. 2226 (Supp. 1971). "The amount prescribed in the current State Bar Minimum Fee Schedule shall be prima facie evidence of reasonable attorney's fees. The Court, in non-jury cases, may take judicial knowledge of such schedule and of the contents of the case file in determining the amount of attorney's fees *without the necessity of hearing further evidence.*" (Emphasis added.) This amendment, in effect, overrules the *Britton* decision with respect to attorney fees under article 2226.

³⁷ E.g., Gulf Paving Co. v. Lofstedt, 144 Tex. 17, 28, 188 S.W.2d 155, 160 (1945); International Security Life Ins. Co. v. Finck, 475 S.W.2d 363, 371 (Tex. Civ. App.—Amarillo 1971, writ granted); Magids v. Dorman, 430 S.W.2d 910, 912 (Tex. Civ. App.—Houston [14th Dist.] 1968, writ ref'd n.r.e.).

³⁸ Braswell v. Braswell, 476 S.W.2d 444, 446 (Tex. Civ. App.—Waco 1972, writ dismissed). E.g., Republic Bankers Life Ins. Co. v. Morrison, Docket No. 8106, Tex. Civ. App.—Texarkana, October 24, 1972 (not yet reported): "We hold that a reasonable attorney's fee in such cases [under article 3.61] would be at least the amount prescribed in the current suggested State Bar Minimum Fee Schedule for the preparation and trial of a civil case." American Exch. Life Ins. Co. v. Willis, 433 S.W.2d 945, 950 (Tex. Civ. App.—Tyler 1968, no writ); Hilliard v. Home Builders Supply Co., 399 S.W.2d 198, 202 (Tex. Civ. App.—Forth Worth 1966, writ ref'd n.r.e.). See generally Wiznia v. Wilcox, 438 S.W.2d 874, 879 (Tex. Civ. App.—Corpus Christi 1969, writ ref'd n.r.e.): "In the absence of testimony connecting the opinion evidence of the expert witness with the accuracy of the facts he made the basis of such opinion, the evidence of said expert as to his opinion of a reasonable fee was based on hearsay, incompetent evidence"

The above enumerated considerations are in keeping with those laid down by the Texas Bar Association.³⁹

Although there must be some proof of reasonableness, which may be accomplished by any of the means previously discussed, *the attorney "is not required to show some precise preconceived mathematical ratio to the actual recovery."*⁴⁰ The amount of recovery should not detract from the reasonableness of attorney fees because there are many cases where the actual amount of recovery has "little or nothing to do with the amount of professional skill, time, and trouble required . . ."⁴¹ However, *no recovery* in the suit will preclude the award of attorney fees.⁴²

Even though it is persuasive in the trial, opinion evidence or testimony as to the reasonableness of the fees, though uncontradicted, "is not binding and conclusive on the trial court."⁴³ On appeal, reasonableness will be determined by the appellate court from the entire record in the case, thus viewing the matter in the light of the testimony, the record, the amount in controversy and using its "own common knowledge and experience as lawyers and judges."⁴⁴

*Proof of Reasonableness Under Article 2226*⁴⁵

The most significant portion of article 2226 is its amendment, effective in 1971 pertaining to the determination of the reasonableness of attorney fees:

³⁹ Tex. Bar Ass'n, Rules and Canons of Ethics, art. XII, § 8 (DR 2-106) (B) (1972).

A fee is clearly excessive when, after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee. Factors to be considered as guides in determining the reasonableness of a fee include the following: (1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal services properly.

(2) The likelihood, if apparent to the client, 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.

(8) Whether the fee is fixed or contingent.

⁴⁰ International Security Life Ins. Co. v. Finck, 475 S.W.2d 363 (Tex. Civ. App.—Amarillo 1971, writ granted) (emphasis added). See Magids v. Dorman, 430 S.W.2d 910, 912 (Tex. Civ. App.—Houston [14th Dist.] 1968, writ ref'd n.r.e.).

⁴¹ Magids v. Dorman, 430 S.W.2d 910, 912 (Tex. Civ. App.—Houston [14th Dist.] 1968, writ ref'd n.r.e.).

⁴² *Id.* at 912.

⁴³ International Security Life Ins. Co. v. Kamp, 462 S.W.2d 63, 67 (Tex. Civ. App.—Beaumont 1970, writ dismissed); accord, e.g., Gulf Paving Co. v. Lofstedt, 144 Tex. 17, 28, 188 S.W.2d 155, 161 (1945); Harlow v. Southern Farm Bureau Cas. Ins. Co., 439 S.W.2d 365, 369 (Tex. Civ. App.—Austin 1969, writ ref'd n.r.e.).

⁴⁴ Capitol Life Ins. Co. v. Rutherford, 468 S.W.2d 535, 537 (Tex. Civ. App.—Houston [1st Dist.] 1971, no writ); accord, e.g., Southland Life Ins. Co. v. Norton, 5 S.W.2d 767 (Tex. Comm'n App. 1928, holding approved); Union Nat'l Life Ins. Co. v. Reese, 476 S.W.2d 928, 930 (Tex. Civ. App.—Houston [14th Dist.] 1972, writ ref'd n.r.e.).

⁴⁵ TEX. REV. CIV. STAT. ANN. art. 2226 (Supp. 1972).

The amount prescribed in the current *State Bar Minimum Fee schedule shall be prima facie evidence of reasonable attorney's fees. The court, in non-jury cases, may take judicial knowledge of such schedule and of the contents of the case file in determining the amount of attorney's fees without the necessity of hearing further evidence.*⁴⁶

Article 2226 awards attorney fees in suits for "services rendered, labor done, material furnished, over charges on freight or express, lost or damaged freight or express, or stock killed or injured or suits founded upon a sworn account or accounts"⁴⁷ However, in order to recover the fees under article 2226, the plaintiff must make a demand for his claim and if, after the expiration of 30 days, the claim has not been satisfied, the plaintiff must obtain a judgment for any amount of the claim.⁴⁸ At the time of this writing, three cases have construed the amendment to article 2226. To a lawyer trying to recover attorney fees these three cases present a dilemma. The holdings in these cases, *Duncan v. Butterowe*,⁴⁹ *McDonald v. Newlywed's, Inc.*,⁵⁰ and *Superior Stationers Corp. v. Berol Corp.*,⁵¹ are, at best, conflicting. Under almost identical circumstances, the *Duncan* case disallowed the fees;⁵² the *McDonald* case allowed the fees;⁵³ and the *Superior Stationers* case allowed a portion of the fees with a suggestion of remittitur for the remaining portion.⁵⁴

All three cases involved suits on sworn accounts, with summary judgments rendered for the plaintiffs. Each judgment included an award of attorney fees under article 2226. Also, each defendants' answer failed under Rule 185.⁵⁵

⁴⁶ *Id.* (emphasis added).

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ 474 S.W.2d 619 (Tex. Civ. App.—Houston [14th Dist.] 1971, no writ).

⁵⁰ 483 S.W.2d 334 (Tex. Civ. App.—Texarkana 1972, writ filed).

⁵¹ 483 S.W.2d 857 (Tex. Civ. App.—Houston [1st Dist.] 1972, no writ).

⁵² *Duncan v. Butterowe*, 474 S.W.2d 619, 621 (Tex. Civ. App.—Houston [14th Dist.] 1971, no writ).

⁵³ *McDonald v. Newlywed's, Inc.*, 483 S.W.2d 334, 338 (Tex. Civ. App.—Texarkana 1972, writ filed).

⁵⁴ *Superior Stationers Corp. v. Berol Corp.*, 483 S.W.2d 857, 861 (Tex. Civ. App.—Houston [1st Dist.] 1972, no writ).

⁵⁵ TEX. R. CIV. P. 185:

When any action or defense is founded upon an open account or other claim for goods, wares and merchandise . . . or is for personal services rendered, or labor done or labor or materials furnished on which a systematic record has been kept, and is supported by the affidavit of the party . . . taken before some officer authorized to administer oaths, to the effect that such claim is, within the knowledge of affiant, just and true . . . the same shall be taken as *prima facie* evidence thereof, unless the party resisting such claim shall . . . file a written denial, under oath, stating that each and every item is not just or true, or that some specified item or items are not just and true When the opposite party fails to file such affidavit, he shall not be permitted to deny the claim, or any item therein, as the case may be. (Emphasis added.)

Superior Stationers Corp. v. Berol Corp., 483 S.W.2d 857, 861 (Tex. Civ. App.—Houston

The Duncan case: The court affirmed the judgment as to the sworn account, severed the award of attorney fees, and reversed and remanded.⁵⁶ The trial court had awarded \$1491.55 on the sworn account plus \$500 attorney fees. In disallowing the fees *Duncan* reiterated the general rule that "a summary judgment should be granted only if the summary judgment record establishes a right thereto as a matter of law."⁵⁷ The court recognized the State Bar Minimum Fee Schedule, which constituted *prima facie* evidence of reasonable attorney fees,⁵⁸ as being evidence which would suffice as proof of the facts in issue until its effect is overcome by other evidence.⁵⁹ The court held that the appellee did not establish his right to a \$500 attorney fee as a matter of law because "[t]he appellee neither showed it to be so nor did the appellant have any effective means of proving his position in this summary judgment case."⁶⁰

Under Rule 185, the defendant's failure to file a sworn denial specifically stating the unjustness of the account was taken as *prima facie* evidence of the justness of the plaintiff's account, whereby the defendant was precluded from denying the claim.⁶¹ Yet, on the other hand, the court reversed the award of attorney fees because the *prima facie* evidence constituted by the minimum fee schedule *did not establish the plaintiff's right thereto as a matter of law.*⁶² The court reasoned that, since this was a summary judgment proceeding, the defendant had no effective means of proving his position.⁶³ *Duncan* seems to be holding that the *prima facie* evidence established under a Rule 185 failure *will* support a summary judgment, but the *prima facie* evidence established under 2226 *will not* support a summary judgment.

The McDonald case: The court affirmed the judgment as to both the

[1st Dist.] 1972, no writ). The defendant's denial was improperly verified. *McDonald v. Newlywed's, Inc.*, 483 S.W.2d 334, 335 (Tex. Civ. App.—Texarkana 1972, writ filed). The defendant's denial was unsworn and did not set out in specific terms the unjustness of the account. *Duncan v. Butterowe*, 474 S.W.2d 619, 620 (Tex. Civ. App.—Houston [14th Dist.] 1971, no writ). The defendant's denial did not set out the unjustness of the account in specific terms.

⁵⁶ *Duncan v. Butterowe*, 474 S.W.2d 619, 621 (Tex. Civ. App.—Houston [14th Dist.] 1971, no writ).

⁵⁷ *Id.* at 621; *accord*, *Harrington v. Young Men's Christian Ass'n*, 452 S.W.2d 423, 424 (Tex. Sup. 1970).

⁵⁸ TEX. REV. CIV. STAT. ANN. art. 2226 (Supp. 1972).

⁵⁹ *Duncan v. Butterowe*, 474 S.W.2d 619, 621 (Tex. Civ. App.—Houston [14th Dist.] 1971, no writ).

⁶⁰ *Id.* at 621.

⁶¹ TEX. R. CIV. P. 185; *accord*, *Duncan v. Butterowe*, 474 S.W.2d 619, 620 (Tex. Civ. App.—Houston [14th Dist.] 1971, no writ).

⁶² *Duncan v. Butterowe*, 474 S.W.2d 619, 621 (Tex. Civ. App.—Houston [14th Dist.] 1971, no writ). *But see* *Superior Stationers v. Berol Corp.*, 483 S.W.2d 857, 859 (Tex. Civ. App.—Houston [1st Dist.] 1972, no writ) where that court draws an analogy between the *prima facie* evidence in Rule 185 and the *prima facie* evidence in article 2226. (Emphasis added.)

⁶³ *Duncan v. Butterowe*, 474 S.W.2d 619, 621 (Tex. Civ. App.—Houston [14th Dist.] 1971, no writ).

*sworn account and the award of attorney fees.*⁶⁴ The trial court awarded \$248 on the sworn account plus \$60 attorney fees. *McDonald* recognized the *prima facie* evidence of attorney fees, established by the minimum fee schedule⁶⁵ as rebuttable, but stated that the defendant failed to rebut.⁶⁶ Thus, the defendant's failure to file a sworn denial conforming to Rule 185⁶⁷ entitled the plaintiff to a summary judgment on the \$60 attorney fees; (the amount was within the rate prescribed by the minimum fee schedule).⁶⁸

In overruling the motion for rehearing, the Texarkana Court of Civil Appeals found it necessary to reconcile its decision in *McDonald* with the *Duncan* case.⁶⁹ The *McDonald* court harmonized the two cases with the following reasoning:

The State Bar Minimum Fee Schedule suggests that, in the collection of commercial account, a minimum fee of 33 1/3 per cent of the amount collected is reasonable "with or without the filing of a suit and irrespective of whether there is a trial." In the *Duncan* case, [the plaintiff] sued for \$1,491.65, plus an additional sum of \$500.00 as attorney fees. It is obvious that the \$500.00 awarded by the trial court was in excess of 33 1/3 per cent of \$1,491.65, and therefore could not be *prima facie* evidence of a reasonable attorney's fee prescribed by the current State Bar Minimum Fee Schedule. Since the \$500.00 fee exceeded the State Bar Minimum Fee Schedule, it became a fact issue as to whether or not such amount was reasonable, to be determined on remand of the case

In the case before this Court, the amount sued for was \$248.00, plus interest, attorney's fees of \$60.00, and all costs. The attorney's fee of \$60.00 falls within the suggested minimum fee of 33 1/3 per cent and would therefore be *prima facie* evidence that such fee was reasonable⁷⁰

The fees sought in *Duncan* exceeded the State Bar Minimum Fee Schedule by \$2.82.⁷¹ If the *McDonald* interpretation of the *Duncan*

⁶⁴ *McDonald v. Newlywed's, Inc.*, 483 S.W.2d 334, 338 (Tex. Civ. App.—Texarkana 1972, writ filed).

⁶⁵ TEX. REV. CIV. STAT. ANN. art. 2226 (Supp. 1972).

⁶⁶ *McDonald v. Newlywed's, Inc.*, 483 S.W.2d 334, 339 (Tex. Civ. App.—Texarkana 1972, writ filed). *But see* TEX. R. CIV. P. 166-A(f); *Gulf, C. & S.F. Ry. v. McBride*, 159 Tex. 442, 454, 322 S.W.2d 492, 500 (1958).

⁶⁷ *See* TEX. R. CIV. P. 185.

⁶⁸ *McDonald v. Newlywed's, Inc.*, 483 S.W.2d 334, 337 (Tex. Civ. App.—Texarkana 1972, writ filed); *accord*, State Bar Minimum Fee Schedule 12 (1968). "With or without the filing of a suit and irrespective of whether there is a trial . . . Minimum 33 1/3%" There was a judgment for \$248 and attorneys fees award of \$60 in *McDonald*.

⁶⁹ *McDonald v. Newlywed's, Inc.*, 483 S.W.2d 334, 338 (Tex. Civ. App.—Texarkana 1972, writ filed).

⁷⁰ *Id.* at 338.

⁷¹ *See Duncan v. Butterowe*, 474 S.W.2d 619 (Tex. Civ. App.—Houston [14th Dist.] 1971, no writ); State Bar Minimum Fee Schedule 12 (1968).

case is correct, the sole reason for remanding the fees in *Duncan* was the \$2.82 excess. *If so, why did the court in Duncan fail to suggest a remittitur⁷² of \$2.82, instead of remanding the attorney fees back to the trial court for such a trivial sum?*

The more reasonable interpretation of the *Duncan* case appears to be that the court would not have allowed the fees in *any* amount because the *prima facie* evidence established by the minimum fee schedule did not establish the plaintiff's right to the fee as a matter of law, thereby precluding the summary judgment on that issue. Since it was a summary judgment case, the result that really seemed to disturb the court in *Duncan* was that the defendant did not have any effective means of rebutting the fee.⁷³ The *Duncan* case made no mention of the specific amount involved in the minimum fee schedule or its relation to the fees sought.

*The Superior Stationers case: The court affirmed the judgment of the trial court conditioned upon the plaintiff's remitting a portion of the attorney fees.*⁷⁴ The trial court awarded \$2,863.49 on the sworn account and \$900 attorney fees. In affirming a portion of the fees, the court in *Superior Stationers* recognized the *prima facie* evidence established by the minimum fee schedule as sufficing for summary judgment proof, in the absence of opposing evidentiary data.⁷⁵ The *prima facie* evidence provision in article 2226 was likened to the *prima facie* evidence provision in Rule 185.⁷⁶ In reversing a portion of the fees, the court pointed out the distinction made by the minimum fee schedule between the percentages to be charged for contingent fees as opposed to non-contingent fees, where a lower percentage is suggested.⁷⁷ Since the record did not show whether the fee was to be on a contingent or non-contingent basis, the court held that the plaintiff was only entitled to 20 per cent of the amount involved, suggesting a remittitur of the remainder.⁷⁸ Article 2226 allows the trial judge, in non-jury cases, to

⁷² See TEX. R. CIV. P. 440. Remittiturs will be discussed at length later in this comment.

⁷³ See *Duncan v. Butterowe*, 474 S.W.2d 619, 621 (Tex. Civ. App.—Houston [14th Dist.] 1971, no writ).

⁷⁴ *Superior Stationers Corp. v. Berol Corp.*, 483 S.W.2d 857, 861 (Tex. Civ. App.—Houston [1st Dist.] 1972, no writ).

⁷⁵ *Id.* at 859; see TEX. R. CIV. P. 166-A(f).

⁷⁶ *Superior Stationers Corp. v. Berol Corp.*, 483 S.W.2d 857, 860 (Tex. Civ. App.—Houston [1st Dist.] 1972, no writ).

⁷⁷ *Id.* at 860; accord, State Bar Minimum Fee Schedule 12 (1968).

Contingent Fee based on the amount collected or realized:

With or without the filing of a suit and irrespective of whether there is a trial. . . .

Minimum 33 $\frac{1}{3}$ %

If an appeal is perfected from the judgment of the trial court Minimum 40%

Non-contingent Fee based on the amount involved:

With or without the filing of a suit and irrespective of whether there is a trial

Minimum 16 $\frac{2}{3}$ %

If an appeal is perfected from the judgment of the trial court Minimum 20%

⁷⁸ *Superior Stationers Corp. v. Berol Corp.*, 483 S.W.2d 857, 860 (Tex. Civ. App.—Houston [1st Dist.] 1972, no writ).

take judicial knowledge of the minimum fee schedule, *as well as the contents of the case file*. Must the record show whether the fee was contingent or non-contingent?

If the *prima facie* evidence established by a defendant's failure under Rule 185 will support a summary judgment, it seems only logical that the *prima facie* evidence established under article 2226 should also support a summary judgment. Both *McDonald* and *Superior Stationers* so held, although contrary to *Duncan*.

The court in *McDonald* neither deemed it necessary for the record to show whether the fee was contingent or non-contingent, nor to even discuss the distinction drawn in the minimum fee schedule, contrary to *Superior Stationers*. Since article 2226 allows the trial judge to take judicial knowledge of the contents of the case file, it seems that a factual determination made by him from the case file, as to whether or not the fee was contingent, would have no need to appear in the record.

Obviously, the questions raised by, and the discrepancies between, *Duncan*, *McDonald*, and *Superior Stationers* will have to be resolved. Aside from summary judgments, the amendment to article 2226 leaves a number of other issues for judicial interpretation. The first sentence of the amendment, pertaining to the *prima facie* evidence established by the minimum fee schedule, would seem to be directed to both jury and non-jury cases. In non-jury cases, the amendment allows the trial judge the broad discretion of taking judicial knowledge of the fee schedule and the contents of the case file without the necessity of hearing any further evidence. How much will this affect the proof requirements formulated in *Britton*?⁷⁹

FEES FOR APPELLATE STEPS

*Cooksey v. Jordan*⁸⁰ in 1912 closed the doors to recovery of attorney fees at the trial level for any subsequent, contingent appellate steps.⁸¹ The trial court in *Cooksey* awarded \$150 attorney fees, and in the event of an appeal, an additional \$100 attorney fees.⁸² The supreme

⁷⁹ *Great Am. Reserve Ins. Co. v. Britton*, 406 S.W.2d 901, 907 (Tex. Sup. 1966).

[T]he reasonableness of attorney's fees . . . is a question of fact to be determined and must be supported by competent evidence

There are holdings in some Court of Civil Appeals' opinions that the reasonableness of attorney fees is not a jury question but is a matter entrusted to the trial judge's discretion; and further, that the trial judge may adjudicate reasonableness on judicial knowledge and without the benefit of evidence Those holdings are in conflict with our own . . . and are disapproved.

For a discussion of judicial knowledge, as distinguished from judicial notice, see Annot., 113 A.L.R. 258 (1937).

⁸⁰ 104 Tex. 618, 143 S.W. 141 (1912).

⁸¹ *Id.*

⁸² *Id.* "The judgment of the trial court recites that same is 'alternative, final and not conditional,' and further that 'the clerk of this court is directed on the request of the said Huggins to issue execution on this judgment for One Hundred and Fifty (\$150.00)

court upheld the \$150 award for the fees saying "[h]ere there is in effect a judgment unconditional, and in no manner contingent, for \$150"⁸³ However, as to the additional \$100 to be awarded in the event of an appeal, the court reversed, holding that "[t]his provision of the judgment was and is unauthorized in the manner attempted to be rendered."⁸⁴

The *Cooksey* opinion, by implication, revealed the possibility of a method to recover fees for appellate steps which would not render the judgment invalid as conditional.⁸⁵ A method devised to circumvent *Cooksey* was to award a fee large enough to protect the prevailing party in the event of an appeal.⁸⁶ The form of these judgments⁸⁷ "differs from that of the *Cooksey* case in that a total award is first fixed and then a proviso is added which reduces the award by remittitur in the absence of appellate steps."⁸⁸ The distinction between these two modes of awarding fees for appellate steps is in form only, since the substantive result is the same in either instance. In the past decade, several courts of civil appeals have approved this method of circumventing the *Cooksey* holding.⁸⁹ In 1971, with its decision in *International Security Life Insurance Co. v. Spray*,⁹⁰ the supreme court expressly overruled *Cooksey*, thereby abating the procedural obstacles *Cooksey* posed to the recovery of fees for appellate services.⁹¹ In dis-

Dollars, interest and costs, if appeal is perfected on this judgment within the manner and time prescribed by law then said writ of execution shall be for the sum of \$250.00, interest and costs."

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.* Although this language obviously implies that there might be ways of awarding fees for appellate steps, the court did not delve into the manner of how this might be accomplished.

⁸⁶ See *International Security Life Ins. Co. v. Spray*, 468 S.W.2d 347, 348 (Tex. Sup. 1971).

⁸⁷ An example of this type of trial court judgment reads as follows:

It is further ORDERED, ADJUDGED AND DECREED by the court that the plaintiff herein have and recover judgment of and from the defendant in the sum of \$1750.00 as attorney's fees, and it is the further judgment of the court that if defendant herein does not appeal this cause, the said judgment should be credited with \$1,000.00 as attorney's fees, leaving recovery for attorney's fees herein the sum of \$750.00. It is the further judgment of the court that if the defendant appeals this cause to the Court of Civil Appeals and said cause is not carried by appeal or writ of error to the Supreme Court of Texas, that its judgment be credited with the sum of \$500.00 on attorney's fees, leaving recovery for attorney's fees herein in the sum of \$1250.00.

International Security Life Ins. Co. v. Spray, 468 S.W.2d 347, 348 (Tex. Sup. 1971).

⁸⁸ *Id.* at 349.

⁸⁹ See, e.g., *International Security Life Ins. Co. v. Chesshir*, 468 S.W.2d 190 (Tex. Civ. App.—Eastland 1971, writ ref'd n.r.e.); *Security Life Ins. Co. v. Executive Car Leasing Co.*, 433 S.W.2d 915 (Tex. Civ. App.—Texarkana 1968, writ ref'd n.r.e.); *Central States Life Ins. Co. v. Byrnes*, 375 S.W.2d 330 (Tex. Civ. App.—Austin 1964, writ ref'd n.r.e.); *American Bankers Ins. Co. v. McDonald*, 369 S.W.2d 688 (Tex. Civ. App.—Austin 1963, writ dism'd w.o.j.).

⁹⁰ 468 S.W.2d 347 (Tex. Sup. 1971).

⁹¹ *Id.* at 350, overruling *Cooksey v. Jordan*, 104 Tex. 618, 143 S.W. 141 (1912).

cussing the two methods of awarding fees for appellate services, the court held:

[T]he trial judge may choose to allow an attorney fee large enough to protect the prevailing party in the event of an appeal. But it is the better practice to allocate the fee only if the additional work is actually done.⁹²

Certainty of the judgment is the goal to be achieved by the trial judge, not the form.⁹³ Although a final judgment must be characterized with definiteness and certainty, "this certainty is not dissipated simply because the district clerk has to compute costs to add to the amount of the judgment or to deduct a remittitur that is ordered."⁹⁴ A trial court judgment awarding fees for appellate services will not be held invalid for lacking definiteness "[s]o long as the judgment of the court makes the figure which the clerk is to place in the writ of execution determinable by ministerial act"⁹⁵

Attorneys should also look to *Spray* for support in requiring trial courts to award fees for subsequent appellate steps.⁹⁶

The purpose of the statute [awarding attorney fees] would be defeated if only the fees incurred in the trial court were recoverable No such distinction or limitation may be found When it imposes liability . . . for "reasonable attorney fees for the prosecution and collection of such loss," it includes all fees incurred for that purpose.⁹⁷

If *Spray* is interpreted as requiring the award of appellate fees, it should become common practice to seek the award of fees for appellate services. However, in doing so, it must be noted that, in Texas, "the award of any attorney fee must be by an original factual determination in the trial court, and the court of civil appeals, in exercising its appellate jurisdiction, may not initiate the award."⁹⁸

An example of a frustrated attempt to recover fees for appellate services is *Carter v. Leiter*,⁹⁹ one of the first post-*Spray* decisions. At the trial level, appellee had failed to request additional attorney fees in the event of an appeal.¹⁰⁰ Thus, the trial court awarded none.¹⁰¹ On appeal,

⁹² *Id.* at 349.

⁹³ *Id.* at 350.

⁹⁴ *Id.* at 350.

⁹⁵ *Id.* at 350.

⁹⁶ *Id.* at 349; Republic Bankers Life Ins. Co. v. Morrison, Docket No. 8106, Tex. Civ. App.—Texarkana, October 24, 1972 (not yet reported): "Counsel for appellees would have been entitled to an additional fee for representing his client in this appeal if he had so requested it in the trial court."

⁹⁷ International Security Life Ins. Co. v. Spray, 468 S.W.2d 347, 349 (Tex. Sup. 1971).

⁹⁸ International Security Life Ins. Co. v. Finck, 475 S.W.2d 363, 373 (Tex. Civ. App.—Amarillo 1971, writ granted).

⁹⁹ 476 S.W.2d 461 (Tex. Civ. App.—Dallas 1972, writ ref'd n.r.e.).

¹⁰⁰ See TEX. R. CIV. P. 301.

¹⁰¹ Carter v. Leiter, 476 S.W.2d 461, 463 (Tex. Civ. App.—Dallas 1972, writ ref'd n.r.e.).

appellee did not assign error¹⁰² to the disallowance of appellate fees because of a Rule 90 waiver.¹⁰³ He merely "requested" a remand for the purpose of allowing fees for the appeal.¹⁰⁴ There is "no authority requiring or permitting"¹⁰⁵ the courts of civil appeals to grant such a "request."¹⁰⁶ Courts of civil appeals are limited to the determination of questions which affect the correctness of judgments rendered by the courts below.¹⁰⁷ A court of civil appeals is not empowered "to determine a material issue of fact and render judgment thereon when such issue has not been passed upon by the trial court."¹⁰⁸ Therefore, fees for appellate services should be included in the pleadings at the trial level.¹⁰⁹ On appeal, a trial court denial of fees for appellate services should be assigned as error.¹¹⁰

USE OF REMITTITURS

The procedural rules pertaining to remittiturs¹¹¹ can be valuable tools in attorney fee litigation. At the trial level a remittitur may stave off a new trial.¹¹² At the appellate level a remittitur may convert a reversal to an affirmance.¹¹³ In any event, when the issue is the excessiveness of a verdict, the attorney might want to consider the advantages of a remittitur, depending obviously upon the amount to be remitted and the strength of the defendant's case. It must be stressed that the sole occasion for the use of a remittitur arises when the only ground for

¹⁰² See TEX. R. CIV. P. 374.

¹⁰³ TEX. R. CIV. P. 90.

¹⁰⁴ Carter v. Leiter, 476 S.W.2d 461, 463 (Tex. Civ. App.—Dallas 1972, writ ref'd).

¹⁰⁵ *Id.* at 463.

¹⁰⁶ *Id.* at 463.

¹⁰⁷ *Id.* at 463.

¹⁰⁸ Smith v. Texas Co., 53 S.W.2d 774, 779 (Tex. Comm'n App. 1932, holding approved).

¹⁰⁹ See TEX. R. CIV. P. 301.

¹¹⁰ See TEX. R. CIV. P. 374.

¹¹¹ See TEX. R. CIV. P. 315 (mechanics at trial level); TEX. R. CIV. P. 319 (effect upon trial judgment); TEX. R. CIV. P. 328 (suggestion of remittitur by trial court); TEX. R. CIV. P. 439 (remittitur to court of civil appeals before judgment); TEX. R. CIV. P. 440 (remittitur to court of civil appeals after judgment); TEX. R. CIV. P. 441 (refusal to remit not to be alluded to in subsequent trial).

¹¹² TEX. R. CIV. P. 328. "New trials may be granted when the damages are manifestly too small or too large, provided that whenever the court shall direct a remittitur in any action, and the same is made, and the party for whose benefit it is made shall appeal"

¹¹³ TEX. R. CIV. P. 440:

In civil cases appealed to a Court of Civil Appeals, if such court is of the opinion that the verdict and judgment of the trial court is excessive and that said cause should be reversed for that reason only, then said appellate court shall indicate to such party, or his attorney, within what time he may file a remittitur of such excess. If such remittitur is so filed, then the court shall reform and affirm such judgment in accordance therewith; if not filed as indicated then the judgment shall be reversed.

For examples of the use of remittiturs at the appellate stage see Brooks v. Brooks, 480 S.W.2d 463, 466-67 (Tex. Civ. App.—Eastland 1972, no writ) and Capitol Life Ins. Co. v. Rutherford, 468 S.W.2d 535, 537 (Tex. Civ. App.—Houston [1st Dist.] 1971, no writ).

reversal is excessiveness of the judgment according to the evidence bearing upon the amount.¹¹⁴

At the Trial Level

If a motion for new trial is based upon the ground that the verdict for the attorney fees is excessive, the trial judge may conditionally overrule the defendant's motion contingent upon the plaintiff remitting the amount deemed excessive.¹¹⁵ As to the determination of the amount of the excess, "there is no rule prescribing the manner by which the court determines the amount of remittitur."¹¹⁶ If the plaintiff decides to remit, which will depend upon the amount to be remitted and the strengths of the defendant's case, the defendant's motion for a new trial will be overruled. In the event the defendant appeals the judgment, the plaintiff will "not be barred from contending in the appellate court that said remittitur should not have been required either in whole or in part"¹¹⁷ If, on appeal, the trial court's order of remittitur is found to be erroneous, the court of civil appeals "should restore the remittitur or such part thereof as the court of civil appeals deems necessary to prevent the order from being manifestly unjust and render such judgment as the trial court should have rendered."¹¹⁸

At the Appellate Level

Remittiturs do not have as much to offer, tactically speaking, at the trial level as at the appellate level. Once a case has been appealed to the court of civil appeals, the attorney has two alternatives: (1) He may remit what might be considered the excessive amount before the judgment of the court of civil appeals is rendered;¹¹⁹ or (2) he may

¹¹⁴ *Dallas Ry. & Terminal Co. v. Farnsworth*, 148 Tex. 584, 592, 227 S.W.2d 1017, 1022 (1950); see TEX. R. CIV. P. 440. ". . . if such court is of the opinion that the verdict and judgment of the trial court is excessive and that said cause should be reversed for that reason only"

Some early cases allowed remittiturs only when the verdict had been influenced by a jury's passion or prejudice. See *Staine, Remittitur in Texas*, 29 TEXAS L. REV. 347 (1951). However, the Texas Supreme Court has denounced this obstacle. *Dallas Ry. & Terminal Co. v. Farnsworth*, 148 Tex. 584, 592, 227 S.W.2d 1017, 1022 (1950). "[T]here need not be extraneous proof of passion or prejudice or any other proof showing that the jury was 'improperly motivated.'" *Flanigan v. Carswell*, 159 Tex. 598, 607, 324 S.W.2d 835, 841 (1959).

¹¹⁵ *Flanigan v. Carswell*, 159 Tex. 598, 604, 324 S.W.2d 835, 839 (1959); see TEX. R. CIV. P. 328.

¹¹⁶ *Adams v. Houston Lighting & Power Co.*, 158 Tex. 551, 558, 314 S.W.2d 826, 830 (1958).

¹¹⁷ TEX. R. CIV. P. 328.

¹¹⁸ *Flanigan v. Carswell*, 159 Tex. 598, 606, 324 S.W.2d 835, 841 (1959); see TEX. R. CIV. P. 328.

¹¹⁹ TEX. R. CIV. P. 439:

If . . . such judgment shall be removed to the Court of Civil Appeals, it shall be lawful for the party . . . to make such remittitur in the Court of Civil Appeals in the same manner as such release is required to be made in the district or county .

await the judgment of the court of civil appeals, which will affirm, conditionally reverse with the suggestion of remittitur,¹²⁰ or reverse without the suggestion of remittitur. A reversal solely because a judgment is excessive, without a suggestion of remittitur, can nevertheless lead to a remittitur.¹²¹

Courts of civil appeals are governed by the same standards as trial courts in the determination of whether a judgment is excessive.¹²² Although there are no precise rules prescribing the manner by which a court determines the amount of remittitur,¹²³ the supreme court has set guidelines in this area.

All the Court of Civil Appeals can do, and all that is required of it to do . . . is to exercise its sound judicial judgment and discretion in the ascertainment of what amount would be reasonable compensation . . . and treat the balance as excess. The court must first determine what amount would be reasonable before it can determine what amount would be unreasonable Having determined that the verdict is excessive, or unreasonable, it is necessarily implied that the court has decided upon an amount that would be reasonable compensation . . . in which event it should authorize a remittitur of the excess above the amount which would be reasonable compensation . . . in accordance with its sound judgment.¹²⁴

Rule 440¹²⁵ has been held by the supreme court to impose "a mandatory duty upon the court of civil appeals."¹²⁶ It follows that when a court of civil appeals reverses an award of attorney fees solely because they are unreasonable, or excessive, *the court is obligated to permit a remittitur of the excess* and affirm, as reformed.¹²⁷ This aspect of remit-

court. Upon such release being filed in said court, after revising said judgment, said Court of Civil Appeals shall proceed to give such judgment as the court below ought to have given if the release had been filed therein.

¹²⁰ TEX. R. CIV. P. 440.

¹²¹ See TEX. R. CIV. P. 440; *Dye v. Western Fire & Indem. Co.*, 426 S.W.2d 209 (Tex. Sup. 1968); *Carter v. Texarkana Bus Co.*, 156 Tex. 285, 295 S.W.2d 653 (1956).

¹²² E.g., *Flanigan v. Carswell*, 159 Tex. 598, 606, 324 S.W.2d 835, 840 (1959); *World Oil Co. v. Hicks*, 129 Tex. 297, 301, 103 S.W.2d 962, 964 (1937).

¹²³ *Adams v. Houston Lighting & Power Co.*, 158 Tex. 551, 558, 314 S.W.2d 826, 830 (1958).

¹²⁴ *Wilson v. Freeman*, 108 Tex. 121, 125, 185 S.W. 993, 994 (1916); the same language was quoted with approval in *Flanigan v. Carswell*, 159 Tex. 598, 606, 324 S.W.2d 835, 840 (1959).

¹²⁵ TEX. R. CIV. P. 440.

¹²⁶ *Carter v. Texarkana Bus Co.*, 156 Tex. 285, 286, 295 S.W.2d 653, 653 (1956).

¹²⁷ See *Dye v. Western Fire & Indem. Co.*, 426 S.W.2d 209 (Tex. Sup. 1968); *Flanigan v. Carswell*, 159 Tex. 598, 606, 324 S.W.2d 835, 841 (1959); *Adams v. Houston Lighting & Power Co.*, 158 Tex. 551, 558, 314 S.W.2d 826, 830 (1958); *Carter v. Texarkana Bus Co.*, 156 Tex. 285, 295 S.W.2d 653 (1956); *Dallas Ry. & Terminal Co. v. Farnsworth*, 148 Tex. 584, 592, 227 S.W.2d 1017, 1022 (1950).

It is important to keep in mind the distinction between "no evidence" cases and "insufficient evidence" cases. When speaking of remittiturs we must be dealing with "insuffi-

titurs should become increasingly valuable in attorney fee litigation dealing with amended article 2226. Cases will arise where a trial court has awarded a fee in excess of the minimum fee schedule.¹²⁸ In the event the appellate court finds the fee to be unreasonable,¹²⁹ a remittitur based upon the *prima facie* evidence of the minimum fee schedule may be uniformly and efficiently applied.

CONCLUSION

Further judicial interpretation is foreseen before article 2226 settles into a readily workable statute. The intent of the amendment seems to be aimed at minimizing the proof requirements for reasonableness. Yet, *Duncan*, *McDonald*, and *Superior Stationers* exemplify the gamut of possible interpretations of the proof requirements under this statute. The *Duncan* and *Superior Stationers* interpretations impede the amendment's intent to establish a constant base for reasonableness; the amount prescribed by the minimum fee schedule. Before the amendment, there was no amount prescribed as reasonable and each case had to establish reasonableness starting from zero. The amendment merely establishes the amount prescribed by the minimum fee schedule as the starting point for the proof of reasonableness. This intent to remove some of the unnecessary requirements for proving reasonableness would be breached by courts' imposition of new requirements based upon a restrictive interpretation. Hopefully, the Texas Supreme Court will interpret the amendment in a manner which will not defeat the intent to relax the proof requirements of reasonableness.

cient evidence" cases. In "no evidence" cases excessiveness is not the issue, which precludes a remittitur.

¹²⁸ TEX. REV. CIV. STAT. ANN. art. 2226 (Supp. 1972).

¹²⁹ In cases where the judge has taken judicial knowledge of the minimum fee schedule and the case file there should be no question as to these being "insufficient evidence" cases, instead of "no evidence" cases.