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Superseding Attorney's Fees and Pre-Judgment Interest after House Bill 4.

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ESSAY

SUPERSEDING ATTORNEY'S FEES AND PRE-JUDGMENT INTEREST AFTER HOUSE BILL 4

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I. Introduction	657
II. House Bill 4	658
A. The Changes of House Bill 4.....	658
B. The House Bill 4 Dilemma	659
III. Economic Damages	661
A. Attorney's Fees As Economic Damages	661
B. Pre-Judgment Interest As Economic Damages....	663
IV. Attorney's Fees As Costs.....	664
V. Attorney's Fees Under Rules of Statutory Construction	665
VI. Conclusion.....	667

I. INTRODUCTION

Supersedeas is a rule of procedure allowing a judgment debtor to suspend enforcement of a judgment “by posting security set by the trial court” during the pendency of an appeal.¹ The purpose of supersedeas, is to “protect[] the [prevailing] party [following trial and entry of judgment] from the risk of a later uncollectible judg-

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1. *In re Crow - Billingsley Air Park, Ltd.*, 98 S.W.3d 178, 179 (Tex. 2003).

ment and [to] compensate[]'” the prevailing party “for delay in the entry of final judgment.”²

Changing the rules relating to the superseding of judgments was all part of the “monumental . . . changes [to] the face of civil litigation in the State of Texas”³ brought about by House Bill 4 (HB 4).⁴ Several commentators have discussed why these changes were made:

1. [T]he whole idea behind the legislative changes affecting supersedeas bonds is to ensure that the judgment debtor in a case doesn't lose the right to appeal simply because it would cost too much to bond the judgment.⁵
2. Most jurisdictions require that more than 100% of the judgment award (to cover the interest that will accrue during the appeal) be posted before the losing party can take an appeal. But “[i]n an era of large damage awards, in which punitive damages often are many times higher than compensatory damages, the traditional requirement that bonds cover the total damages award may no longer be realistic or defensible.”⁶

II. HOUSE BILL 4

A. *The Changes of House Bill 4*

Before HB 4 became effective, September 1, 2003, the amount of a supersedeas bond, deposit, or other security when the judgment on appeal was for the recovery of money was the amount of “the judgment, interest for the estimated duration of the appeal, and costs. . . .”⁷ Exemplary damages,⁸ attorney's fees,⁹ and pre-judg-

2. *Hebert v. Exxon Corp.*, 953 F.2d 936, 938 (5th Cir. 1992) (quoting *NLRB v. Westphal*, 859 F.2d 818, 859 (9th Cir. 1988)); *see also* *Carter Real Estate & Dev., Inc. v. Builder's Serv. Co.*, 718 S.W.2d 828, 830 (Tex. App.—Austin 1986, no writ) (noting that the “purpose of a supersedeas bond is to secure the appellee and abate the remedies he would otherwise have for realizing on his judgment”).

3. Scott Rothenberg, *2003 Legislative Update: House Bill 4: A User Friendly Guide*, 66 TEX. B.J. 702, 702 (2003).

4. TEX. CIV. PRAC. & REM. CODE ANN. §§ 52.006, 41.001 (Vernon Supp. 2003).

5. Mary Alice Robbins, *H.B. 4 Rules on Supersedeas Bonds, MDL Take Effect*, TEX. LAW., Sept. 1, 2003, at 1.

6. Catherine M. Sharkey, *Punitive Damages: Should Juries Decide?*, 82 TEX. L. REV. 381, 406 (2003) (quoting Timothy S. Bishop & Jeffrey W. Sarles, *Supersedeas Bonds: A Crushing Burden*, NAT'L L.J., Nov. 13, 1995, at C25).

7. TEX. R. APP. P. 24.2(a)(1).

8. *See* *Texaco Inc. v. Pennzoil Co.*, 784 F.2d 1133, 1136 (2d Cir. 1986), *rev'd*, 481 U.S. 1 (1987) (including a \$3 billion punitive award); *Kajima Int'l, Inc. v. Formosa Plastics Corp.*,

ment interest¹⁰ were part of the judgment and, therefore, included in determining the amount of the supersedeas bond.

Chapter 52 of the Texas Civil Practices and Remedies Code was amended by HB 4 and changed (i) “the amount of the judgment” to “the amount of compensatory damages awarded in the judgment,” and (ii) “costs” to “costs awarded in the judgment.”¹¹ The terms “compensatory damages” were defined in HB 4’s amendment to Chapter 41 of the Texas Civil Practices and Remedies Code on damages¹² and made applicable to Chapter 52.¹³

B. *The House Bill 4 Dilemma*

It is the change in defining what is to be superseded, from “the amount of the judgment” to “compensatory damages awarded in the judgment,” that raises the question whether an award of attorney’s fees and/or pre-judgment interest has been eliminated from supersedeas requirements.¹⁴

15 S.W.3d 289, 290 (Tex. App.—Corpus Christi 2000, pet. denied) (including \$1.5 million in exemplary damages); *In re Cantu*, 961 S.W.2d 482, 484 (Tex. App.—Corpus Christi 1997, no pet.) (including \$800,000 in punitive damages).

9. *See Am. Realty Trust, Inc. v. Matisse Partners, L.L.C.*, No. Civ.A. 300CV1801G, 2003 WL 23175440, at *1 (N.D. Tex. Dec. 15, 2003) (including \$1.1 million in attorney’s fees); *Kajima Int’l, Inc.*, 15 S.W.3d at 290 (including \$4.6 million in attorney’s fees); *Culbertson v. Brodsky*, 775 S.W.2d 451, 452, 455 (Tex. App.—Fort Worth 1989, orig. proceeding [leave denied], writ dism’d w.o.j.) (including attorney’s fees for \$140,000); *Fortune v. McElhenney*, 645 S.W.2d 934, 935 (Tex. App.—Austin 1983, no pet.) (including attorney’s fees for \$75,078).

10. *See Texaco Inc.*, 784 F.2d at 1137 (including a \$625 million prejudgment interest award that was superseded). In *Texaco Inc.*, the court noted that the entire amount to be superseded needed to be in excess of twelve billion, as the interest was accruing at a rate of \$3 million a day. *Id.* at 1138; *see also Benavidez v. Isles Constr. Co.*, 726 S.W.2d 23, 25 (Tex. 1987) (recognizing the general rule that parties “are required to plead for pre-judgment interest sought at common law as an element of damages, whereas statutory or contractual interest may be predicated on a prayer for general relief”); *Robert L. Crill, Inc. v. Bond*, 76 S.W.3d 411, 415 (Tex. App.—Dallas 2001, pet. denied) (awarding \$61,040 in pre-judgment interest); *Nat’l Convenience Stores, Inc. v. Martinez*, 763 S.W.2d 960, 960 (Tex. App.—Houston [1st Dist.] 1989, no writ) (finding the bond defective for not including post-judgment interest; it covered only the amount of the judgment and the pre-judgment interest); *Irrigation Constr. Co. v. Motheral Contractors, Inc.*, 599 S.W.2d 336, 344 (Tex. App.—Corpus Christi 1980, no writ) (noting that pre-judgment interest should be in the final judgment).

11. TEX. CIV. PRAC. & REM. CODE ANN. § 52.006(a) (Vernon Supp. 2003).

12. *Id.* § 41.001(8).

13. *Id.* § 41.002(a).

14. Scott Rothenberg, *2003 Legislative Update: House Bill 4: A User Friendly Guide*, 66 TEX. B.J. 702, 705 (2003).

HB 4 made it clear that exemplary damages were no longer included in determining the amount of a supersedeas bond, deposit, or security by specifically excluding exemplary damages in defining compensatory damages.¹⁵

However, HB 4 defined compensatory damages as “economic and non-economic damages.”¹⁶ Non-economic damages are traditional tort damages producing harm to the body or mind¹⁷ and would clearly not include attorney’s fees or pre-judgment interest. Therefore, any statutory change analysis must focus on whether attorney’s fees and pre-judgment interest would be included as economic damages, which are defined as: “[D]amages intended to compensate a claimant for actual or pecuniary loss”¹⁸ The concept of loss indicates something of value that has been taken away and for which the law will afford a remedy by way of compensation. Since the terms economic loss and pecuniary loss conceptually describe damages generally recoverable at common law,¹⁹ the argument arises that attorney’s fees are not compensa-

15. TEX. CIV. PRAC. & REM. CODE ANN. § 41.001(8) (Vernon Supp. 2003).

16. *Id.*

17. *Id.* § 41.001(12). “‘Non-economic damages’ means damages awarded for the purpose of compensating a claimant for physical pain and suffering, mental or emotional pain or anguish, loss of consortium, disfigurement, physical impairment, loss of companionship and society, inconvenience, loss of enjoyment of life, injury to reputation, and all other non-pecuniary losses of any kind other than exemplary damages.” *Id.*

18. *Id.* § 41.001(4).

19. *Geters v. Eagle Ins. Co.*, 834 S.W.2d 49, 50 (Tex. 1992) (defining damages with Webster’s New Ninth Collegiate Dictionary as “compensation in money imposed by law for loss or injury”); *Nobility Homes of Tex., Inc. v. Shivers*, 557 S.W.2d 77, 78 n.1 (Tex. 1977) (measuring direct economic loss as a common law measure of damages determined by the costs of replacement and repair); *Seelbach v. Clubb*, 7 S.W.3d 749, 759 (Tex. App.—Texarkana 1999, pet. denied) (asserting that a party must prove actual pecuniary loss to recover actual damages); *Odom v. Meraz*, 810 S.W.2d 241, 244 (Tex. App.—El Paso 1991), writ denied, 835 S.W.2d 626 (Tex. 1992) (per curiam) (identifying “[t]he object of awarding a plaintiff recovery is to compensate for the actual loss sustained . . .” and that actual damages “has been construed to mean common law damages”); *City of Dallas v. Cox*, 793 S.W.2d 701, 733 (Tex. App.—Dallas 1990, no writ) (noting that “[a]n award of damages is defined as the sum of money the law awards as pecuniary compensation . . .”); *Waldon v. Williams*, 760 S.W.2d 833, 834 (Tex. App.—Austin 1988, no writ) (stating that “[a] fundamental purpose of all rules of damages, other than punitive damages, is to indemnify an injured party for the pecuniary loss suffered . . .”). The court in *Nobility Homes* identifies the distinction between direct and consequential economic loss:

Direct economic loss may be said to encompass damage based on insufficient product value; thus, direct economic loss may be “out of pocket”—the difference in value between what is given and received—or “loss of bargain”—the difference between the value of what is received and its value as represented. Direct economic loss also may

tion for loss but expenses incurred in pursuing recovery of that which has been lost, are not traditionally recoverable at common law, and therefore are not “economic or pecuniary loss[es]” for purposes of determining supersedeas.²⁰

III. ECONOMIC DAMAGES

A. Attorney's Fees As Economic Damages

There is little guidance in the legislative history of HB 4 as to what was meant by “actual economic or pecuniary loss.” The only reference to economic damages in the legislative history of HB 4 appears in the House Bill Analysis where the following statement was made:

be measured by costs of replacement and repair. Consequential economic loss includes all indirect loss, such as loss of profits resulting from inability to make use of the defective product.

Nobility Homes, 557 S.W.2d at 78 (citing Note, *Economic Loss in Products Liability Jurisprudence*, 66 COLUM. L. REV. 917, 918 (1966)); see also *Burmarsal Co. v. Lake*, 272 S.W. 582, 584 (Tex. Civ. App.—El Paso 1925, writ dism'd w.o.j.) (stating that “[c]ompensatory damages are always to be commensurate with the actual loss”). Other cases state that the “measure of damages is the pecuniary loss.” *Kneip v. Unitedbank-Victoria*, 734 S.W. 2d 130, 134 (Tex. App.—Corpus Christi 1987, no writ); *Wright v. Carpenter*, 579 S.W.2d 575, 578 (Tex. Civ. App.—Corpus Christi 1979, writ ref'd n.r.e.).

20. See *Arcambel v. Wiseman*, 3 U.S. 306, 306 (1796) (promulgating the American rule that attorney's fees were not recoverable at common law); *Sanchez v. Rowe*, 870 F.2d 291, 293 (5th Cir. 1989) (recognizing the two hundred year old American rule that “the prevailing litigant ordinarily may not collect attorney's fees from the loser”); *Holliday v. Todd Shipyards Corp.*, 654 F.2d 415, 421 (5th Cir. 1981) (referring to the *Arcambel v. Wiseman*, 3 U.S. 306, 306 (1796) pronouncement of the American rule, although not agreeing with it, but following it until Congress changes it); *New Amsterdam Cas. Co. v. Texas Indus., Inc.*, 414 S.W.2d 914, 915 (Tex. 1967) (indicating “the rule that statutory provisions for the recovery of attorney's fees are in derogation of the common law”); *Thompson v. H. Rouw Co.*, 237 S.W.2d 662, 665 (Tex. Civ. App.—San Antonio 1951, writ ref'd n.r.e.) (stating that “[a]ttorney's fees are not recoverable under the common law”).

[A]s a general rule, the cost and expenses of litigation, other than the usual court costs, are not recoverable in an action for damages. Unless provided for by statute, or by contract between the parties, the attorneys' fees incurred by a party to litigation are not recoverable against his adversary, either in an action in tort or a suit upon a contract, except by way of punitive damages upon allegations of fraud, imposition, or malicious conduct.

Mathis v. Wherry, 45 S.W.2d 700, 702 (Tex. Civ. App.—Beaumont 1932, no writ) (citations omitted). Cf. J. David Tate, Comment, *The American Law Institute's Study on Enterprise Liability for Personal Injury: How Does Texas Tort Law Compare?*, 45 BAYLOR L. REV. 103, 146 (1993) (discussing Texas's prohibitions on attorney's fee recovery unless statutorily or contractually provided).

[Civil Practices and Remedies Code], chapter 41 governs exemplary damages, often called punitive damages. Exemplary damages over and above compensatory damages are awarded as a penalty or to punish a wrongdoer for excessively bad conduct, whereas compensatory damages are intended only to compensate the injured party for the injury sustained. Economic damages are damages for pecuniary loss, such as medical expenses or lost wages.²¹

The authorities have distinguished attorney's fees from "economic" or "pecuniary loss." One appellate court has held, "[W]e do not believe that attorney's fees are properly assignable to the category of pecuniary losses."²² Another court has held attorney's fees are not economic damages, but are in the nature of costs.²³

In *McCarthy v. Padre Beach Homes, Inc.*,²⁴ a memorandum opinion, the losing party at trial argued that the other party should not have been allowed to offer evidence of attorney's fees because it failed to disclose in its response to a Request for Disclosure the amount of attorney's fees it sought when it responded to the method of calculating economic damages.²⁵ In rejecting this argument, the court held,

THE PROBLEM WITH THIS ARGUMENT IS THAT ATTORNEY FEES ARE NOT ECONOMIC DAMAGES. Damages are defined as compensation in money imposed by law for loss or injury. *Geters v. Eagle Ins. Co.*, 834 S.W.2d 49, 50 (Tex. 1992). Recovery of attorney fees, on the other hand, is permitted by statute, rules of procedure, a contract between the parties, or equity.²⁶

Additionally, in *Williams v. Compressor Engineering Corp.*,²⁷ the court held, "[A]ttorney's fees are in the nature of costs, not damages."²⁸

21. HOUSE COMM. ON CIVIL PRACTICES, BILL ANALYSIS, Tex. H.B. 4, 78th Leg., R.S. (2003).

22. *Kneip v. Unitedbank-Victoria*, 734 S.W.2d 130, 135 (Tex. App.—Corpus Christi 1987, no writ).

23. *Alma Group, L.L.C. v. Palmer*, 143 S.W.3d 840, 846 (Tex. App.—Corpus Christi 2004, pet. denied).

24. No. 13-01-846-CV, 2003 WL 22025858 (Tex. App.—Corpus Christi 2003, no pet.) (mem. op.).

25. *McCarthy v. Padre Beach Homes, Inc.*, No. 13-01-846-CV, 2003 WL 22025858, at *4 (Tex. App.—Corpus Christi 2003, no pet.) (mem. op.).

26. *Id.* (emphasis added).

27. 704 S.W.2d 469, 474 (Tex. App.—Houston [14th Dist.] 1986, writ ref'd. n.r.e.).

28. *Williams v. Compressor Eng'g Corp.*, 704 S.W. 2d 469, 474 (Tex. App.—Houston [14th Dist.] 1986, writ ref'd. n.r.e.).

HB 4 defined compensatory damages, in part, as economic damages,²⁹ and economic damages as “actual economic or pecuniary loss.”³⁰ The authorities cited hold attorney’s fees are not economic damages or in the category of pecuniary loss.³¹ Therefore, if attorney’s fees are neither economic damages nor pecuniary loss, they cannot be economic damages as now defined. If attorney’s fees are not economic damages, they cannot be compensatory damages as now defined. If they are not compensatory damages, attorney’s fees are therefore not properly included in determining supersedeas.

B. *Pre-Judgment Interest As Economic Damages*

Pre-judgment interest as damages is “compensation allowed by law as additional damages for lost use of the money due as damages during the lapse of time between the accrual of the claim and the date of judgment.”³² “Pre-judgment interest falls within the common-law meaning of ‘damages.’”³³

Based on the foregoing, the argument could be made that pre-judgment interest is common law damages compensating loss and, therefore should be included within the definition of economic damages (“actual economic or pecuniary loss”). Thus, prejudgment interest should be properly taken into consideration when determining the amount of supersedeas in an appeal from a money judgment.³⁴

29. TEX. CIV. PRAC. & REM. CODE ANN. § 41.001(8) (Vernon Supp. 2003).

30. *Id.* § 41.001(4).

31. *Alma Group, L.L.C. v. Palmer*, 143 S.W.3d 840, 840 (Tex. App.—Corpus Christi 2004, pet. denied) (stating that “attorney fees are in the nature of costs, not damages”); *McCarthy*, No. 13-01-846-CV, 2003 WL 22025858, at *4; *Kneip v. Unitedbank – Victoria*, 734 S.W.2d 130, 135 (Tex. App.—Corpus Christi 1987, no writ); *Williams*, 704 S.W.2d at 474.

32. *Cavnar v. Quality Control Parking, Inc.*, 696 S.W.2d 549, 552 (Tex. 1985); *see also* *Chilton Ins. Co. v. Pate & Pate Enters., Inc.*, 930 S.W.2d 877, 897 (Tex. App.—San Antonio 1996, writ denied) (determining the right of prejudgment interest recovery for a specified amount and time prior to judgment).

33. *Horizon/CMS Healthcare Corp. v. Auld*, 34 S.W.3d 887, 898 (Tex. 2000) (citing *Cavnar v. Quality Control Parking, Inc.*, 696 S.W.2d 549, 552-54 (Tex. 1985)).

34. The authors recognize that most pre-judgment interest is now statutorily awarded; however, this argument is in light of common law pre-judgment interest.

IV. ATTORNEY'S FEES AS COSTS

Costs awarded in the judgment are included in determining the amount of supersedeas.³⁵ That raises the question, of whether attorney's fees are "costs." The authorities seem to indicate they are not.³⁶

Costs usually refer to legally required fees and charges paid to a court or its officers, and the statute or court rules establish the amount.³⁷ Generally, expenses incurred in prosecuting or defending lawsuits are not recoverable as "costs" unless permitted by a statute or equitable principal.³⁸

In *Arthur's Garage, Inc. v. Racal-Chubb Security Systems, Inc.*,³⁹ the court drew a distinction between attorney's fees and ordinary expenses of litigation or court costs.⁴⁰

Since costs are "fees and charges required by law to be paid to the courts or some of their officers"⁴¹ and because the authorities distinguish costs from attorney's fees,⁴² the argument would be that attorney's fees are not costs awarded in the judgment and therefore, are not a proper consideration in determining the amount of supersedeas in an appeal from a money judgment.

35. TEX. CIV. PRAC. & REM. CODE ANN. § 52.006(a)(1) (Vernon Supp. 2003); TEX. R. APP. P. 24.2(a)(1).

36. See *Shaikh v. Aerovias de Mexico*, 127 S.W.3d 76, 82 (Tex. App.—Houston [1st Dist.] 2003, no pet.) (finding that expenses paid in defending a lawsuit are not collectable as costs); *Arthur's Garage, Inc. v. Racal-Chubb Sec. Sys., Inc.*, 997 S.W.2d 803, 816 (Tex. App.—Dallas 1999, no pet.) (allowing a party to recover attorney's fees only when a statute or contract permits); *Ex parte Williams*, 866 S.W.2d 751, 753 (Tex. App.—Houston [1st Dist.] 1993, no writ) (asserting that costs normally include items such as filing or service fees).

37. *Ex parte Williams*, 866 S.W.2d at 753.

38. *Shaikh*, 127 S.W.3d at 82.

39. 997 S.W.2d 803 (Tex. App.—Dallas 1999, no pet.).

40. See *Arthur's Garage, Inc. v. Racal-Chubb Sec. Sys., Inc.* 997 S.W.2d 803, 816-17 (Tex. App.—Dallas 1999, no pet.) (asserting that attorney's fees are recoverable if allowed by contract or statute, but usages of equity or statutory provisions are required to recover ordinary expenses of litigation).

41. *Ex parte Williams*, 866 S.W.2d 751, 753 (Tex. App.—Houston [1st Dist.] 1993, no writ).

42. See *Arthur's Garage, Inc.*, 997 S.W.2d at 816-17 (distinguishing the requirements to recover attorney's fees from court costs).

V. ATTORNEY'S FEES UNDER RULES OF STATUTORY CONSTRUCTION

The legislature's failure to specifically include or exclude attorney's fees in its definition of compensatory damages or costs awarded in the judgment may raise an argument under rules of statutory construction that attorney's fees are to be included because they are relief accorded under prior law which has not been specifically changed. There are a number of rules of statutory construction which must be taken into consideration in making such an argument.

"The cardinal rule of statutory construction is to ascertain the legislature's intent and to give effect to that intent."⁴³ When determining legislative intent, a court will "look to the language of the statute, its legislative history, and the objective sought."⁴⁴ Within the analysis, courts also look to the consequences that follow from the construction. "When construing a statute, a court may look at the object sought to be obtained, the legislative history, the consequences of a particular construction, as well as other laws on the same subject."⁴⁵ Statutory construction is a question of law.⁴⁶

43. *Korndorffer v. Baker*, 976 S.W.2d 696, 700 (Tex. App.—Houston [1st Dist.] 1997, pet. dismissed w.o.j.); see also *Cortez v. Progressive County Mut. Ins. Co.*, 61 S.W.3d 68, 72 (Tex. App.—Austin 2001, pet. dismissed by agreement, vacated) (noting that "a fundamental rule of statutory construction is that a court should first ascertain the legislature's intent"); *Cent. Counties Ctr. for Mental Health & Mental Retardation Servs. v. Rodriguez*, 45 S.W.3d 707, 710 (Tex. App.—Austin 2001), *rev'd on other grounds*, 106 S.W.3d 702 (2003), *withdrawn* (noting that "[t]he goal of statutory construction is to give effect to the intent of the legislature"); *Boudreaux v. State*, 24 S.W.3d 503, 507 (Tex. App.—Texarkana 2000, no pet.) (agreeing that "[t]he primary goal of statutory construction is to ascertain the intent of the Legislature and to effect that intent").

44. *Levesque v. Wilkens*, 57 S.W.3d 499, 504 (Tex. App.—Houston [14th Dist.] 2001, no pet.); see also *Renaissance Park v. Davila*, 27 S.W.3d 252, 256 (Tex. App.—Austin 2000, no pet.) (recognizing that "resolution of an issue of statutory construction must begin with an analysis of the statute"); *Korndorffer*, 976 S.W.2d at 700 (stating that in construing a statute, the court will "consider the entire act, its nature and object, and the consequences that would follow from each construction").

45. *Boudreaux*, 24 S.W.3d at 507; see also *Neal v. SMC Corp.*, 99 S.W.3d 813, 815 (Tex. App.—Dallas 2003, no pet.) (stressing that when courts interpret individual statutes "[they] consider the entire act, its nature and object, and the consequences that would follow from each construction"); *Tex. Dep't of Mental Health & Mental Retardation v. Newbasis Cent., L.P.*, 58 S.W.3d 278, 282 (Tex. App.—Fort Worth 2001, pet. dismissed by agreement) (affirming the consideration of the act, its nature, and resulting consequences); *Aledo Indep. Sch. Dist. v. Reese*, 987 S.W.2d 953, 957 (Tex. App.—Fort Worth 1999, pet. denied) (noting that "[l]egislative intent, for purposes of statutory construction, must be determined from the entire act, not from isolated portions thereof").

“The ultimate goal of all statutory interpretation and construction is to determine legislative intent.”⁴⁷ A court must determine legislative intent from a statute’s language by reading it as a whole.⁴⁸ “The existence or non-existence of legislative intent may be inferred from the fact that a certain provision is missing from a statute.”⁴⁹ “A limitation may not be read into a statute by implication, unless it is apparent that the limitation was intended by the legislature but left unexpressed.”⁵⁰

A statute is presumed to have been enacted by the legislature with complete knowledge of the existing law and with reference to it. . . . A legislative enactment covering a subject dealt with by an older law, but not repealing that law, should be harmonized whenever possible with its predecessor in such a manner as to give effect to both.⁵¹

Harmonizing the legislative intent with older law includes the common law and decisions of the courts.⁵²

There is no doubt that the legislative intent in changing the rules on supersedeas in HB 4 was to exclude exemplary damages. It is also clear that the legislature intended to put in place certain limitations on the amount of the security⁵³ to accomplish the legislative purpose of “prevent[ing] a situation where the bond amount alone makes the appeal impossible.”⁵⁴

An argument could be made that the uncertainty of whether attorney’s fees are compensatory damages or costs awarded creates

46. *Johnson v. City of Fort Worth*, 774 S.W.2d 653, 656 (Tex. 1989) (per curiam); *Neal*, 99 S.W.3d at 815; *Levesque*, 57 S.W.3d at 504; *Renaissance Park*, 27 S.W.3d at 256; *Korndorffer*, 976 S.W.2d at 699.

47. *Jones v. Houston Gen. Ins. Co.*, 736 S.W.2d 860, 863 (Tex. App.—Waco 1987, writ denied) (citing *Crimmins v. Lowry*, 691 S.W.2d 582, 584 (Tex. 1985)).

48. *See Estate of Padilla v. Charter Oaks Fire Ins. Co.*, 843 S.W.2d 196, 198 (Tex. App.—Dallas 1992, writ denied) (emphasizing that a court will harmonize the provisions of a statute in order to avoid conflict between a statute and other provisions).

49. *Jones*, 736 S.W.2d at 863; *see also Freels v. Walker*, 120 Tex. 291, 26 S.W.2d 627, 630 (1930) (stating that “[w]here a law is enacted as a part of an existing system covering a given subject-matter, it will be presumed the Legislature intended that the same should operate in harmony therewith”).

50. *Jones*, 736 S.W.2d at 863.

51. *Acker v. Tex. Water Comm’n*, 790 S.W.2d 299, 301 (Tex. 1990) (citations omitted).

52. *McBride v. Clayton*, 140 Tex. 71, 166 S.W.2d 125, 128 (1942).

53. TEX. CIV. PRAC. & REM. CODE ANN. § 52.006(b), (c) (Vernon Supp. 2004); TEX. R. APP. P. 24.2(b).

54. Patrice Pujol & Marty Thompson, *Texas Legislature Hammers Out Massive Tort Reform Bill*, 41 HOUS. LAW. 10, 16 (July/August 2003).

an ambiguity to be resolved by applicable rules of statutory construction. If there is an ambiguity, then one would argue under rules of construction:

1. A statute will be construed so that it harmonizes with other existing law, unless the statute clearly contains a contrary intention;⁵⁵
2. That this rule includes harmony with decisions of the courts;⁵⁶
3. That the decisions of the courts have consistently held attorney's fees are included in the amount to be superseded;⁵⁷
4. That the legislative purpose would be served if attorney's fees were to be included in superseding a judgment because the limitations placed on the amount of the bond will protect any defendant from an excessive bond even if attorney's fees are included;⁵⁸ and
5. The underlying purpose of the bond is to protect judgment creditors on appeal,⁵⁹ which will be served by affording full relief from the judgment awarded.

VI. CONCLUSION

The uncertainty of what the legislature meant by "actual economic or pecuniary loss," as those terms have been used in the context of damages recoverable at common law, opens the door to arguing an exclusion of attorney's fees as a factor in determining the amount of supersedeas. However, including attorney's fees would be consistent with the purpose of supersedeas and consistent with prior law and, at the same time, would not be repugnant to what appears to be the clear legislative purpose of removing exem-

55. See *Acker*, 790 S.W.2d at 301 (noting that statutes should be harmonized with existing law and there is a presumption that the legislature has full knowledge of all prior laws).

56. See *McBride*, 166 S.W.2d at 128 (stating that the rules should be harmonized with existing law, common law, the constitution, and other court decisions).

57. See *Am. Realty Trust, Inc. v. Matisse Partners, L.L.C.*, No. Civ.A. 300CV1801G, 2003 WL 23175440, at *1 (N.D. Tex. Dec. 15, 2003) (including \$1.1 million in attorney's fees); *Kajima Int'l, Inc. v. Formosa Plastics Corp.*, 15 S.W.3d 289, 290 (Tex. App.—Corpus Christi 2000, pet. denied) (including \$4.6 million in attorney's fees); *Culbertson v. Brodsky*, 775 S.W.2d 451, 451-52 (Tex. App.—Fort Worth 1989, orig. proceeding [leave denied], writ dismissed w.o.j.) (including attorney's fees in the amount of \$140,000); *Fortune v. McElhenney*, 645 S.W.2d 934, 935 (Tex. App.—Austin 1983, no writ) (including attorney's fees).

58. TEX. CIV. PRAC. & REM. CODE ANN. § 52.006(b), (c) (Vernon Supp. 2003); TEX. R. APP. P. § 24.2(b); *Patrice Pujol & Marty Thompson, Texas Legislature Hammers Out Massive Tort Reform Bill*, 41 Hous. Law. 10, 16 (July/August 2003).

59. See *Hebert v. Exxon Corp.*, 953 F.2d 936, 938 (5th Cir. 1992) (stating the purpose of the supersedeas bond is to serve as a surety for the judgment).

plary damages from supersedeas, adding limits, and creating restraints and discretion in setting the amount of supersedeas in those instances where justice requires.