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THE JOURNAL OF APPELLATE PRACTICE AND PROCESS

PRACTICE NOTE

THE STATUTE, THE CONSTITUTION, THE CASELAW, AND THE APPELLATE LAWYER AS SLEUTH

Leslie Hyman*

The Texas Commission on Human Rights Act,¹ like the federal employment statutes on which it was modeled, provides for an award of “attorneys’ fees as part of costs” for a successful plaintiff. In Texas, while entitlement to attorneys’ fees is a question for the court, the amount of reasonable and necessary attorneys’ fees is typically a question of fact for a jury to decide. The dramatic question addressed in this practice note is whether the Texas legislature’s adoption of the phrase “as part of costs” from the federal statute reflects an intention to adopt the federal procedure for determining attorneys’ fees as well.

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1. Because Texas is a right-to-work state, few employees have employment contracts; their relationships with their employers are governed instead by the Act, which is part of the Texas Labor Code. See *generally* Tex. Lab. Code §§ 21.001–21.556 (2015), available at <http://www.statutes.legis.state.tx.us/>.

ACT I, WHEREIN THE APPELLATE LAWYER IS PRESENTED
WITH THE PROBLEM

It was a dark and stormy night. . . . Well actually, it's a sunny afternoon, and trial counsel for Bill Miller Bar-B-Q Restaurants has asked for a meeting with appellate counsel. He has gone to trial in state court on an employment-related claim under the Act, which states that one of its purposes is to "provide for the execution of the policies of Title VII of the Civil Rights Act of 1964 . . . [and] the Americans with Disabilities Act."² It prohibits employment-related discrimination on the basis of "race, color, disability, religion, sex, national origin, or age" as well as retaliation against persons complaining about discrimination.³ For purposes of our story, the key provision states that "a court may allow the prevailing party . . . a reasonable attorney's fee as part of the costs."⁴

In the meeting with appellate counsel, Miller's trial counsel explains that the jury found in favor of the plaintiff and awarded \$30,000 in actual damages. The jury had not been presented with evidence about attorneys' fees and the court's charge to the jury did not contain a question about the amount of attorneys' fees reasonably and necessarily incurred by the plaintiff. Post-verdict, and nearly two months after the jury had been excused, plaintiff's counsel filed a motion to enter judgment, proposing a judgment containing an award of attorneys' fees. Over the objection of Miller's trial counsel, the trial court conducted a non-jury, evidentiary hearing on the amount of reasonable and necessary attorneys' fees and awarded the plaintiff \$60,975 in attorneys' fees. Miller's trial counsel filed a motion for new trial that again objected to the court's determining the amount of fees, which the court denied. But Miller's trial counsel remained convinced that under Texas law, a jury should determine the amount of a fee award.

2. Tex. Lab. Code § 21.001(1), (3) (2015), *available at* <http://www.statutes.legis.state.tx.us/>.

3. Tex. Lab. Code §§ 21.051, 21.055 (2015), *available at* <http://www.statutes.legis.state.tx.us/>.

4. Tex. Lab. Code § 21.259(a) (2015), *available at* <http://www.statutes.legis.state.tx.us/>.

Miller's appellate lawyer has experience with federal litigation, so upon being presented with this scenario, and after reviewing section 21.259 of the Texas Labor Code, she suspects that the phrase "attorneys' fees as part of the costs" probably comes straight from the comparable federal employment law—Title VII of the Civil Rights Act of 1964. A quick bit of research confirms this suspicion. Title VII provides that "the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee . . . as part of the costs."⁵

The appellate lawyer knows that a federal law upon which a Texas law is based is persuasive, but not controlling, on the interpretation of a comparable statute adopted by the state.⁶ What the appellate lawyer does not know is why Texas juries generally determine the amount of attorneys' fees to award and whether the Act's borrowed language changes the general practice.

ACT II, WHEREIN THE APPELLATE LAWYER BEGINS TO INVESTIGATE

Upon taking the case, the first thing the appellate lawyer does (after filing the notice of appeal), is research the current law on section 21.259 and jury trials. It's not good. The only two Texas intermediate appellate courts to consider whether a losing party is entitled to a jury trial on the reasonable amount of fees to be awarded under section 21.259 have come out the wrong way.

The first reported decision was *Borg-Warner Protective Services Corporation v. Flores*, a sexual-assault-by-co-worker case from the Corpus Christi Court of Appeals.⁷ The jury found against the attacker and the employer, and awarded actual and punitive damages.⁸ The court then awarded \$340,000 in attorneys' fees, which represented a fifty percent enhancement

5. 42 U.S.C. § 2000e-5(k) (2015), available at <http://uscode.house.gov>.

6. See, e.g., *Tex. Comptroller of Pub. Accounts v. Attorney Gen. of Tex.*, 354 S.W.3d 336, 342 (Tex. 2010) (noting that "federal precedent is persuasive, particularly where the statutory provisions mirror one another").

7. 955 S.W.2d 861, 864–65 (Tex. App.—Corpus Christi 1997, pet. denied) (summarizing facts).

8. *Id.* at 865.

of the actual hourly fees incurred.⁹ The employer appealed, arguing that the attorneys' fees were improperly awarded by the judge.¹⁰

The court of appeals disagreed. In a single paragraph, the court focused on "as part of costs," and held that because the "general rule" in Texas is that determination of costs is for the court, section 21.259 of the Act vests in the trial court the power to determine the amount of reasonable and necessary attorneys' fees.¹¹

The other intermediate Texas appellate court to consider the issue was the El Paso Court of Appeals, in *Union Pacific Railroad Company v. Loa*, a discrimination action involving harassment on the basis of national origin.¹² The trial court submitted the question of reasonable attorneys' fees to the jury over the defendant's objection, and the jury awarded fees of \$460,000.¹³ The defendant appealed, contending that the amount of attorneys' fees was for the court to decide.¹⁴ The El Paso court agreed and, citing *Borg-Warner* and *Gorges*, held without further analysis that "[t]he trial court is the proper authority to determine . . . attorneys' fees authorized as costs under [the Act]."¹⁵ It reversed the jury's award and remanded so that the trial court could award reasonable attorneys' fees itself.¹⁶

Neither court addressed the basis of the right to jury trial in Texas or the source of the Act's language about attorneys' fees. And neither addressed whether, by borrowing the federal

9. *Id.*

10. *Id.*

11. *Id.* at 870 (citing *Am. Commercial Colleges, Inc. v. Davis*, 821 S.W.2d 450, 454 (Tex. App.—Eastland 1991, writ denied)). By the time of our appellate lawyer's research, *Borg-Warner* had been followed three times by the Corpus Christi Court of Appeals without any additional analysis. See *Coastal Mart, Inc. v. Hernandez*, 76 S.W.3d 691 (Tex. App.—Corpus Christi 2002, no pet.); *City of Alamo v. Espinosa*, No. 13-99-704-CV, 2001 WL 1003309 (Tex. App.—Corpus Christi Aug. 31, 2001, no pet.); *Gorges Foodservice Inc. v. Huerta*, 964 S.W.2d 656 (Tex. App.—Corpus Christi 1997, pet. denied).

12. 153 S.W.3d 162, 167 (Tex. App.—El Paso 2004, rule 53.7(f) motion granted) (summarizing facts).

13. *Id.* at 164, 173–74.

14. *Id.* at 174.

15. *Id.*

16. *Id.* In a later case, the El Paso Court of Appeals affirmed a trial court's determination of attorneys' fees without discussion of whether the issue should have gone to the jury. *West Telemarketing Corporation Outbound v. McClure*, 225 S.W.3d 658, 675 (Tex. App.—El Paso 2006, pet. granted, judgment vacated w.r.m.).

reference to attorneys' fees, the Texas legislature intended to change—or even had the power to change—Texas practice.

ACT III, WHEREIN THE APPELLATE LAWYER DIGS FURTHER
INTO THE CASELAW

The appellate lawyer knew that in federal court attorneys' fees are generally awarded by the court under Rule 54 of the Federal Rules of Civil Procedure, which specifies that “unless the substantive law requires those fees to be proved at trial as an element of damages,” a claim for attorneys' fees is to be made by motion to the court, typically “no later than 14 days after the entry of judgment.”¹⁷ The appellate lawyer also knew that if the opposing party objects, the court must allow a response; may hear evidence;¹⁸ may hold oral argument or decide the matter on briefs;¹⁹ and may also bifurcate the issue and decide liability for fees separately from the amount of fees.²⁰

But the appellate lawyer also knew that in Texas state courts, the reasonableness of an attorneys' fees award was generally for the jury to decide.²¹ What she did not know was why this was the case, and whether there was a reason why the procedure would be different in state court than it was in federal court. There was, she could see, more research to be done.

It was in this research phase that the appellate lawyer learned something fascinating. She knew that the federal right to a jury trial in civil cases is found in the Seventh Amendment, which provides that

[i]n Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise

17. Fed. R. Civ. P. 54(d)(2)(A), (B) (Westlaw 2015).

18. Fed. R. Civ. P. 43(c) (incorporated by Fed. R. Civ. P. 54(d)(2)(C)) (Westlaw 2015).

19. Fed. R. Civ. P. 78 (incorporated by Fed. R. Civ. P. 54(d)(2)(C)) (Westlaw 2015).

20. Fed. R. Civ. P. 54(d)(2)(C) (Westlaw 2015). When it has made its decision, the court is required to make findings of fact and conclusions of law either on the record in open court or in writing. *Id.* (referencing Fed. R. Civ. P. 52(a)).

21. *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 367 (Tex. 2000) (indicating that “[i]n general, the reasonableness of statutory attorney’s fees is a jury question”).

re-examined in any Court of the United States, than according to the rules of the common law.²²

But the State of Texas's respect for the role of the jury is so great that the Texas Constitution addresses the trial by jury twice. Its Bill of Rights proclaims that "[t]he right of trial by jury shall remain inviolate. The Legislature shall pass such laws as may be needed to regulate the same, and to maintain its purity and efficiency."²³ And section 10 of Article V of the Texas Constitution, which governs the courts, provides that

[i]n the trial of all causes in the District Courts, the plaintiff or defendant shall, upon application made in open court, have the right of trial by jury; but no jury shall be empaneled in any civil case unless demanded by a party to the case, and a jury fee be paid by the party demanding a jury, for such sum, and with such exceptions as may be prescribed by the Legislature.²⁴

Do Texas's two constitutional provisions mean more than the United States' one provision? Yes, the appellate lawyer discovered, in fact they do.

The term "suits at common law" in the United States Constitution has been construed to refer to common-law causes of action and "actions brought to enforce statutory rights that are analogous to common-law causes of action ordinarily decided in English law courts in the late 18th century, as opposed to those customarily heard by courts of equity or admiralty."²⁵ It turns out that attorneys' fees have been considered "part of costs" for a very long time: "At common law, attorney's fees were regarded as an element of 'costs' awarded to the prevailing party."²⁶ And "[s]ince there is no common law right to recover attorneys fees, the Seventh Amendment does not guarantee a

22. U.S. CONST. amend. VII.

23. TEX. CONST. art. I, § 15.

24. TEX. CONST. art. V, §10.

25. *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 42 (1989); *see also* *Curtis v. Loether*, 415 U.S. 189, 193 (1974) (holding that "common law" meant "not merely suits, which the common law recognized among its old and settled proceedings, but suits in which legal rights were to be ascertained and determined, in contradistinction to those where equitable rights alone were recognized, and equitable remedies were administered") (internal quotation marks omitted).

26. *Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 200 (1988); *see also* *Ray Haluch Gravel Co. v. Cent. Pension Fund*, ___ U.S. ___, 134 S. Ct. 773 (2014).

trial by jury to determine the amount of reasonable attorneys fees.”²⁷

This is why in federal court, the amount of attorneys’ fees is tried to a jury when, and only when, the attorneys’ fees are an element of damages for a claim “ordinarily decided in English law courts in the late 18th century,”²⁸ and why Rule 54 provides that it does not apply when the substantive law requires the fees to be proved at trial as an element of damages.²⁹

The right to a jury trial contained in the Texas Constitution, on the other hand, is not limited to any particular type of claim or type of relief, and guarantees trial by jury on all contested issues of fact, regardless of the form of action.³⁰ Article I, Section 15 of the Bill of Rights to the Texas Constitution, which was carried over from the 1836 constitution of the Republic of Texas,³¹ is similar to the provision in the United States Constitution, with the exception that the key time period is the mid-1800s, rather than the late 1700s. The Texas Constitution’s provision “preserved the right to a trial by jury in a suit for the collection of civil penalties . . . [and] continues the right to a jury

27. *Resolution Trust Corp. v. Marshall*, 939 F.2d 274, 279 (5th Cir. 1991).

28. *Granfinanciera*, 492 U.S. at 42; *see also* *Taurus IP, LLC v. DaimlerChrysler Corp.*, 726 F.3d 1306, 1342 (Fed. Cir. 2013) (holding in connection with a claim for attorneys’ fees under section 38.001 of the Texas Civil Practice and Remedies Code that while in federal court, “a party has a Seventh Amendment right to a jury trial on *damages* in a breach of contract case, a party is not entitled to a jury trial on *attorney fees* assessed after trial”) (emphasis in original); *McGuire v. Russell Miller, Inc.*, 1 F.3d 1306, 1314 (2d Cir. 1993) (holding that the “determination of the amount of attorneys’ fees owed presents equitable issues of accounting which do not engage a Seventh Amendment right to a jury trial”).

29. So far, the United States Supreme Court appears to have limited the right to a jury trial on the amount of attorneys’ fees to the context of a dispute about a contingent-fee contract. *See Simler v. Conner*, 372 U.S. 221, 223 (1963) (“The questions involved are traditional common-law issues which can be and should have been submitted to a jury under appropriate instructions as petitioner requested.”).

30. *See San Jacinto Oil Co. v. Culberson*, 101 S.W. 197, 198 (1907) (declaring that “[t]he question whether or not the proceeding was legal or equitable is wholly immaterial,” and finding that “[t]he combined effect of section 8 and 10 of article 5 of the Constitution is to give the right in ‘all causes,’ and ‘without regard to any distinction between law and equity,’ upon demand and payment of the prescribed fee”); *DiGiuseppe v. Lawler*, 269 S.W.3d 588, 596 (Tex. 2005) (noting that “[w]hen contested fact issues must be resolved before a court can determine the expediency, necessity, or propriety of equitable relief, a party is entitled to have a jury resolve the disputed fact issues”).

31. *Tex. Ass’n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 459–60 (Tex. 1993) (Doggett, J., concurring and dissenting) (describing the source of the provision).

in all actions where that right existed at the time the [Texas] Constitution was adopted.”³² Standing alone, this provision too would be limited to situations in which there was a historical right to trial by jury. But this was apparently not considered enough protection by early Texans, and so when Texas’s new constitution for statehood was enacted, the right to trial by jury was broadened to include a right to trial by jury in “all causes in equity” and “all causes arising out of a contract” so long as the amount in controversy exceeded ten dollars.³³ In 1869, the protection was expanded again to include the right to trial by jury in “all cases of law or equity, when the matter in controversy shall be valued at or exceed one hundred dollars.”³⁴ The current version of the provision was adopted in 1876, and protects the right to trial by jury for factual disputes in “trial of all causes in the District Courts,” whether or not the case could have been heard at common law in the 1800s.³⁵ This, the appellate lawyer could see, must be why the factual question of the amount of attorneys’ fees is typically presented to the jury.

But the appellate lawyer then wondered whether the answer might be different in the case of the Texas Labor Code because its attorneys’ fees provision was connected with a statutory claim. The answer was no. The Texas Supreme Court has “expressly rejected” the argument that there is no right to a jury for statutory claims that did not exist at the time the Texas Constitution was adopted.³⁶ Instead, the court has referred to the “sound constitutional principle that litigants are entitled to a jury trial on all disputed factual matters,” even those involved in new

32. *State v. Credit Bureau of Laredo, Inc.*, 530 S.W.2d 288, 291 (Tex. 1975).

33. *Id.* at 292; *Tex. Ass’n of Bus.*, 852 S.W.2d at 460 (Doggett, J., concurring and dissenting); TEX. CONST. of 1845 art. IV, § 10, available at <http://tarlton.law.utexas.edu/constitutions/texas1845/a4>.

34. *Tex. Ass’n of Bus.*, 852 S.W.2d at 460 (Doggett, J., concurring and dissenting); TEX. CONST. of 1869, art. V, § VII, available at <http://tarlton.law.utexas.edu/constitutions/texas1869/a5>.

35. *Credit Bureau of Laredo*, 530 S.W.2d at 291; see also *Tex. Ass’n of Bus.*, 852 S.W.2d at 460 (Doggett, J., concurring and dissenting) (“While under our national Constitution and those of almost all of our sister states trial by jury is available only for those actions that could have been brought at common law, the Texas Constitution since 1845 has also preserved that right in cases that historically would have been brought in equity.”).

36. *State v. Landry*, 793 S.W.2d 281, 283 (Tex. 1990) (citing *Credit Bureau of Laredo*, 530 S.W.2d at 292).

causes of action.³⁷ The Texas Supreme Court has also repeatedly affirmed that the amount of attorneys' fees to be awarded, even in cases involving statutory remedies enacted after the adoption of the Texas Constitution, is an issue for the jury to decide because the question is "subject to the requirements that any fees awarded be reasonable and necessary, which are matters of fact."³⁸

So, under Texas law, the right to trial by jury of all disputed facts means that while the decision of whether to award attorneys' fees is a question of law for the judge, the amount of reasonable and necessary attorneys' fees is a question for the jury.³⁹ Even when the cause of action giving rise to the right to attorneys' fees is statutory, and even when the statute expressly states that the court is to make the award of fees, the determination of the amount of reasonable and necessary attorneys' fees is a question of fact for the jury.⁴⁰

37. *Id.*

38. *Bocquet v. Herring*, 972 S.W.2d 19, 21 (Tex. 1998) (Declaratory Judgment Act, enacted in 1985); *see also City of Garland*, 22 S.W.3d at 367 (Texas Public Information Act, Tex. Gov't Code § 552.323, enacted in 1993, for which a jury determines reasonable attorneys' fees); *Stewart Title Guar. Co. v. Aiello*, 941 S.W.2d 68, 73 (Tex. 1997) (breach of contract, presumably under Texas Civil Practice and Remedies Code § 38.001, enacted in 1985, for which a jury determines reasonable attorneys' fees); *Great Am. Reserve Ins. Co. v. Britton*, 406 S.W.2d 901, 907 (Tex. 1966) (Texas Insurance Code Art. 3.62, codified at Texas Insurance Code § 542.060, enacted in 1951, for which a jury determines reasonable attorneys' fees); *Discover Prop. & Cas. Ins. Co. v. Tate*, 298 S.W.3d 249, 253 (Tex. App.—San Antonio 2009, pet. denied) (workers' compensation claim under Texas Labor Code § 408.221, enacted in 1993, for which a jury determines reasonable attorneys' fees).

39. *Holland v. Wal-Mart Stores, Inc.*, 1 S.W.3d 91, 94 (Tex. 1999); *City of Garland*, 22 S.W. 3d at 367.

40. *See, e.g., City of Garland*, 22 S.W.3d 351, 367 (Texas Public Information Act, Tex. Gov't Code § 552.323); *Bocquet*, 972 S.W.2d at 20–21 (Tex. 1998) (Declaratory Judgments Act, Tex. Civ. Prac. & Rem. Code § 37.009); *Great Am. Reserve*, 406 S.W.2d at 907 (Tex. 1966) (Texas Insurance Code); *see also Discover Prop. & Cas.*, 298 S.W.3d at 253 (summarizing the Texas Supreme Court precedent affirming this principle, and pointing out that "when the Texas Supreme Court has dealt with the issue of a 'reasonable and necessary' amount of attorney's fees recoverable under a statute, it has consistently held that it is a question of fact for a jury to resolve").

ACT IV, WHEREIN THE APPELLATE LAWYER ATTEMPTS
TO CONVINCE THE APPELLATE COURT TO DIVERGE
FROM THE ONLY DECISIONS ON POINT

Now the appellate attorney knows why the Texas Legislature's decision to borrow language from a federal statute cannot deprive a Texas litigant of the right to a jury trial on a fact issue. But can the appellate lawyer convince the local court of appeals of this conclusion? Especially when the only two courts of appeals to address the question have gone the other way? And the Texas Supreme Court has not expressly spoken? The appellate lawyer approached the quest in four steps.

First, the appellate lawyer explained in the briefing that the courts reaching the contrary holdings had apparently not been presented with, and in any event had not discussed, the breadth of the Texas right to trial by jury or the difference between the right to trial by jury in Texas courts and the right to trial by jury in federal court.

Second, the appellate lawyer distinguished the plaintiff's cases. The plaintiff had argued that the phrase "as part of the costs" renders the Texas Labor Code—of which the Act is a part—different from other Texas statutes authorizing the recovery of attorneys' fees and that, exclusively under the Texas Labor Code, the trial court determines the amount of reasonable and necessary attorneys' fees because they are awarded "as costs." The plaintiff relied upon *Quantum Chemical Corp. v. Toennies*,⁴¹ for the proposition that the Texas Labor Code was modeled after federal law, and argued that the state procedure for determining attorneys' fees should be similar to the procedure used in federal court. But in fact, the Texas Supreme Court had said in *Quantum Chemical* only that certain provisions in the Texas Labor Code are "substantively identical" to their federal analogues.⁴² It said nothing in *Quantum Chemical* about whether Texas courts should enforce the Texas Labor Code using the same procedure used in federal courts. In fact, such a holding would have been surprising. Texas procedural rules control even when Texas courts apply the

41. 47 S.W.3d 473 (Tex. 2001).

42. *Id.* at 475.

actual substantive law of another jurisdiction,⁴³ let alone when a Texas court is applying a Texas law modeled on the law of another jurisdiction.

Settling on what she believed to be a persuasive comparison, the appellate lawyer thus highlighted in her brief a series of cases in which the Texas Supreme Court considered whether certain determinations were to be made by judge or jury in cases involving the Federal Employers' Liability Act. In these cases, the Texas Supreme Court repeatedly held that while federal law governs the substantive rights of the parties, state law dictates whether issues are decided by the court or the finder of fact when FELA claims are tried in Texas courts.⁴⁴ This is because "rules relating to the form, *necessity*, and effect of jury issues are procedural rather than substantive" so long as they do not interfere with the rights and defenses provided by federal law.⁴⁵

The plaintiff had also relied on *El Apple I, Ltd v. Olivas*,⁴⁶ a case decided under the Act in which the trial court had determined the amount of attorneys' fees. On appeal, the Texas Supreme Court considered the proper evidence and calculation methodology for reaching an amount of reasonable attorneys' fees. There was nothing in the opinion addressing whether a trial court may make such a determination over a party's objection. Nevertheless, the plaintiff relied on the case because it discussed proper application of the lodestar method for calculating reasonable and necessary attorneys' fees and stated that "the award of attorney's fees generally rests in the sound discretion of the trial court."⁴⁷ But the appellate attorney located a different case analyzing a jury-determined attorneys' fee award proven through use of the lodestar method, thus demonstrating that the *El Apple* court's approval of the lodestar method was not the

43. *Moonlight Invs. Ltd. v. John*, 192 S.W.3d 890, 894 (Tex. App.—Eastland 2006, pet. denied) ("Texas law governs matters of remedy and procedure in Texas courts even when another jurisdiction's substantive law applies.").

44. *See, e.g., Mitchell v. Mo.-Kan.-Tex. R.R. Co.*, 786 S.W.2d 659, 661–62 (Tex. 1990), *overruled on other grounds*, *Union Pac. R.R. Co. v. Williams*, 85 S.W.3d 162 (Tex. 2002).

45. *Mitchell*, 786 S.W.2d at 662 (emphasis in original; quoting *Dutton v. So. Pac. Transp.*, 576 S.W.2d 782, 784 (Tex. 1978)).

46. 370 S.W.3d 757 (Tex. 2012).

47. *Id.* at 761.

equivalent of holding that the amount of attorneys' fees is for the court to decide.⁴⁸

The appellate attorney also located other Texas Supreme Court cases discussing the "sound discretion of the trial court" to award attorneys' fees in which the court also addressed the right to trial by jury and explained that the amount of fees is for the jury to decide. The trial court's fee award, which is committed to its discretion, is "subject to the requirements that any fees awarded be reasonable and necessary," and those requirements, the court concluded again and again, "are matters of fact."⁴⁹ Thus, the "sound discretion" language in *El Apple* was not inconsistent with the position advanced by Miller: that although an award of attorneys' fees may be within a trial court's discretion, the reasonableness of those attorneys' fees is a fact question for the jury.

Third, the appellate lawyer explained that there was nothing magic about the Texas Labor Code. In *Transcontinental Insurance Company v. Crump*,⁵⁰ the Texas Supreme Court had already considered whether a trial court or a jury is to determine reasonable attorneys' fees under a different section of the Texas Labor Code. That statute provides a list of factors for a "court" to consider in determining a "reasonable and necessary" attorneys' fee under the Texas Workmen's Compensation Act. The court concluded that the statute did not deprive the insurance company of the right to a jury's determination of reasonable and necessary fees. Absent an explicit statement that only a trial court is to determine fees, a fee-shifting statute is subject to the general rule that "the reasonableness of statutory attorneys' fees is a jury question."⁵¹

Finally, at oral argument, the appellate lawyer herself raised the contrary cases from Corpus Christi and El Paso, which she had already addressed in the briefs. And she raised *El Apple* (but also mentioned *Montano* and *Crump*, the favorable

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

49. *Bocquet*, 972 S.W.2d at 21 (Tex. 1998); see also *City of Garland*, 22 S.W.3d at 367 (referring to the difference between awarding attorneys' fees and determining reasonable attorneys' fees.).

50. 330 S.W.3d 211 (Tex. 2010) (considering who determines fees awarded under section 408.221 of the Texas Labor Code).

51. *Id.* at 230–31 (quoting *City of Garland*, 22 S.W.3d at 367).

case that she had noted in the brief). The encouraging nods from the appellate justices seemed to indicate that confronting the “bad law” directly, rather than waiting for a question or rebuttal time, demonstrated the strength of the appellate lawyer’s conviction that the trial court had erred.

ACT V, WHEREIN THE SAN ANTONIO COURT OF APPEALS. . . .
NO, SORRY: YOU HAVE TO KEEP READING

Addressing for the first time the right to jury trial on the amount of attorneys’ fees under the Act, the San Antonio Court of Appeals departed from the holdings of its sister courts. The court recognized that the Texas Constitution’s two provisions addressing the right to trial by jury do not have identical meanings. Quoting *Credit Bureau of Laredo*, the court acknowledged that “the present Judiciary Article protecting the right to a jury was added by the Constitution of 1845 because the Bill of Rights Article contained in the Constitution of the Republic did not extend to causes in equity.”⁵² Obviously, then, because “the Legislature cannot deprive any party of his right to trial by jury in any cause,’ . . . statutes must be interpreted to avoid that effect.”⁵³ And because the only exceptions to the right to a jury trial arise where “the courts have held that a particular adversary proceeding does not qualify as a cause,” and because the plaintiff’s lawsuit was a “cause,” the court concluded that Miller was “constitutionally entitled to a jury trial on all contested issues of fact.”⁵⁴

The court then asked the key question:

whether the Texas Legislature’s failure to expressly distinguish between attorney’s fees and costs in section 21.259(a) must be construed as allowing the trial court to determine the reasonableness of the amount of attorney’s fees to award because section 21.259(a) awards the attorney’s fees as costs.⁵⁵

52. Bill Miller Bar-B-Q Enterprises, Ltd. v. Gonzales, No. 04-13-00704-CV, 2014 WL 5463951, at *2 (Tex. App.—San Antonio Oct. 29, 2014, no pet.) (quoting *Credit Bureau of Laredo*, 530 S.W.2d at 292).

53. *Id.* at *3 (quoting *San Jacinto Oil Co. v. Culberson*, 101 S.W. 197, 199 (Tex.1907)).

54. *Id.*

55. *Id.* at *4.

It concluded that the answer is no, holding that litigants in cases brought under section 21.259(a) of the Act are, like other litigants in the Texas state courts, entitled to have the fact question of the reasonableness of attorneys' fees determined by a jury.⁵⁶



56. *Id.* at *4–*5.