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Supreme Court of Texas.
Emzy T. BARKER, III and Ava Barker d/b/a Brushy Creek Brahman Center and Brushy
Creek Custom Sires, Petitioners,
v.
Walter W. ECKMAN, Individually and as Nominee and Trustee, Eckman, Inc., and
Larry Eckman, Respondents.
No. 04-0194.

November 17, 2005

Appearances:
J. Brett Busby, Mayer, Brown, Rowe, & Maw LLP, Houston, TX, for petitioners.
Robert L. Ketchand, Boyer & Ketchand, P.C., Houston, TX, for respondents.

Before:

Wallace B. Jefferson, Don R. Willett, Harriet O'Neill, David M. Medina, Paul w. Green, Nathan L. Hecht, Dale Wainwright, Phil Johnson, Scott A. Brister, Justices.

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JUSTICE: Thank you. Be seated, please.
SPEAKER: The Court is ready to hear arguments in 04-0194, Barker and Others v. Eckman and Others. May it please the Court, Mr. Brett Busby will present argument of the petitioners. Petitioners have reserved five minute for rebuttal.

ORAL ARGUMENT OF J. BRETT BUSBY ON BEHALF OF THE PETITIONER

MR. BUSBY: Mr. Chief Justice and may it please the Court. In this case, the Court of Appeals reversed the trial court's ruling on limitations reducing Eckman's damages from $111,000 to $16,000 as a matter of law because most of his claims for breach of contract were time barred.
But it conducted no review whatsoever of how this 86 percent drop in the results obtained affected the jury's award of $244,000 in attorney's fees. The Court's failure to analyze that question requires reversal here.
We submit there are two possible tools that the court could use to

analyze the impact of the substantial claims and damages on/ a fee award, either a harm analysis or a factual sufficiency review. With respect to harm, the Court of Appeals could've examined the scope of the harm from the limitations error it had just reversed, asking whether that error probably caused the rendition of an improper judgment on fees as well as damages. In this case, it did. By substantially altering Eckman's damages, the limitations error also infected one of the important factors the jury was instructed to consider in setting the attorney's fees, the amount involved, and the results obtained.

Recognizing this link between this amount of damages and the fee calculation, both State and federal Courts upheld that the proper remedy when damage is changed substantially on appeal includes a remand for a new trial on fees. Yet the Court of Appeals didn't address the Barkers' request for a new trial on fees at all. Second, the Court of Appeals could have used the factors in the charge to conduct a meaningful factual sufficiency review of whether $244,000 is still a reasonable attorney's fee given the changed result obtained.

A detailed review of the evidence in light of these factors is essential because as this Court has said, the factor's the only meaningful way to determine if fees are in fact reasonable and not excessive and is --

JUSTICE: Excuse me, let me ask --

MR. BUSBY: Yes sir.

JUSTICE: During the testimony -- the expert testimony of attorney's fees, was there any attempt to limit or discussion about whether some of the cause of action may have been time barred and some not whether the [inaudible] was there a discussion about that?

MR. BUSBY: The only questions that were asked were whether $244,000 would be a reasonable fee because the damages were possibly half of that. There was testimony that the 2 to 1 ratio would be reasonable. There was no question asked nor was there an answer given that the 15 to 1 ratio would be reasonable. We submitted that --

JUSTICE: So it's reasonable for the lawyer to get twice as much as the client and not 15 times as much?

MR: BUSBY: Well, in this case, we believe -- in this case, there's no evidence that it would be in this particular record. And we don't believe --

JUSTICE: Now, all the other factors except the results obtained would stay the same?

MR. BUSBY: Well, there was really only a testimony on the lodestar and results obtained in this case. The lodestar being the amount of hours spent times the reasonable hourly rate, which is the first two factors and on the results obtained. There [inaudible] testimony either way on the other of the seven factors. So, really, you only have testimony on the lodestar and the results obtained. And the question is: If the results obtained changed dramatically what happens? Is it just, you know, as the Court of Appeals said, there is sufficient evidence on the ratio -- there is sufficient evidence on the lodestar to support that or do you have to take into account that the jury was also instructed to consider the results obtained and if they could have come to a different conclusion other than awarding the full amount of the lodestar.

JUSTICE: Let me ask you a question that kinda follow up on Justice Green's. Is it possible in a Castelle or Harris County way to or a defendant who is resisting attorney's fees and thinks that there are some liability findings for which there is no evidence to segregate in

the Court's charge the question on fees. How much fees go to this breach of contract issue for which we think there is no evidence, how much on this one to preserve that error for the Court of Appeals to make a determination?

MR. BUSBY: Well, we think not. The Court of Appeals said that what we should have done is subject it to -- awarded attorney's fees globally and that and that we should have segregated -- asked the Court to segregate Eckman's fees for various services. I'm not sure what they mean by "services." But we would say that no, its not required and it's not really feasible to have a charge that would say if the Court -- if the trial court is wrong in its legal ruling on limitations and the results obtained are only $16,000 not $111,000 sort of counterfactually, if you disagreed basically with the legal ruling that the trial court's made, what would the results -- what would you find the reasonable attorney's fees would be? And then you would have similar sort of hypothetical questions during -- presumably during the attorney's fees exchanged on the expert testimony where you would say, you would say, you know is this -- if the results obtained are this, what's the reasonable fee and that sort of thing. I would submit that that actually unduly emphasizes the result obtained. If you have several questions saying, you know -- if you ask the expert if this is the results obtained, what's the reasonable fee? And if you have a question on the charge that says, if this is the results obtained what's the reasonable fee? If this is the results, what's the reasonable fee?

So we don't think including hypothetical questions like that in the charge, in the testimony would be helpful. In fact, it would be confusing to the jury. And we would submit that it's contrary to the policy of trying simplify the charge.

In addition, there are several cases there cited in our brief and in the amicus brief that say when the damage is changed substantially on appeal, that that is harmful to the calculation of attorney's fees. And therefore, the proper remedy is to remand for a new trial. In none of those case did the Court say, you don't get a remand because you didn't ask and if you didn't ask the Court to -- you didn't ask the Court if the charge [inaudible] had breakdown, what the reasonable fees would have been had the results obtained been different. And so, --

JUSTICE: Of course, that's gonna be a lot of retrials. I mean, what percentage in DTPA and contract cases does the trial judge or an appellate court cut back the actual damages? That is 30 percent of the time, maybe more?

MR. BUSBY: Well, I actually don't know how how often that happens but then --

JUSTICE: There'd be hundreds of cases.

MR. BUSBY: Well, one reason it's important to have a substantial change standard for the harm is that it allows you to say if the change is not very great. In this circumstance, we gonna say that it doesn't cost much so it gives you flexibility

JUSTICE: But in all the ones where it is substantial, more than just a pittance. If it's changed or reduced by the trial judge or on appeal, we're gonna have to have to call in another jury, have another jury trial. Ladies and gentlemen, we're here for you to decide attorney's fees on a case tried five years ago --

MR. BUSBY: Well, I think a lot of times these things

JUSTICE: Call all lawyers back, run up some more fees and another time to say, well, you know the fees back then were this ...

MR. BUSBY: I, certainly --

JUSTICE: I wanna know -- they're gonna wanna know why we're doing this five years later.

MR. BUSBY: Sure, I understand the concern. I think a lot of times people agree to try these things with the judge to see if you're not gonna be calling in another jury. And I really don't think that there are a lot of cases where you're gonna have such a substantial change that you're gonna have to send it back. But it seems to me that we did what we were required to do to preserve the argument. On the factual sufficiency issue, we made an objection in our new trial motion which is how you preserve the factual sufficiency review.

The reasonable amount of attorney's fees on the limitations issue we made it -- we raised it repeatedly in our answer and our summary judgment motion in [inaudible] and that's how you preserve a challenge to limitations. And so, it doesn't seem to me that you have to preserve -- you have to also preserve the remedy from the error you've just preserved. And to the extent that the complaint is that the change occurred on appeal, we complained about that timely because the complaint that the fees have to revised when the damage award is reduced substantially on appeal arose from the Court of Appeals judgment reducing that damage and the Bunton case from this court recently said that it's proper to preserve that for the first time on appeal.

JUSTICE O'NEILL: But you're not planning or are you that there has to be proportionality. I mean, the Attorney's Fee Statute has reasonable attorney's fees so you can't have cases with small damages but high attorney's fees.

MR. BUSBY: Certainly.

JUSTICE O'NEILL: [inaudible] how recalcitrant the defendant might be in the case.

MR. BUSBY: Certainly, I mean, one virtue of the proportionality rule that the amicus has proposed is at least it ties us to something that the jury found, where in this case the jury found a ratio of about 2.2 to one of damages to attorney's fees. And so at least we know what the jury call the proper ratio was and so at least if you start with that, you're tying it to something the jury did but we certainly agree that can be adjusted --

JUSTICE O'NEILL: But if we treat ...

MR. BUSBY: -- based on the other testimony.

JUSTICE O'NEILL: If we treat this like regular damages instead of punitive damages because punitives are a little bit of a different animal. They are to punish and deter. And this is just to compensate. It seems like what would do then is remand to the Court of Appeals to do a factual sufficiency review just as they would with any other damage award. And they could look at the testimony in the trial court. Apparently, there is some evidence in this case that that it was a difficult case, accountingwise, and there's allegations and some testimony about having the ball a little bit and [inaudible] results the documents that the Court of Appeals can review that and find that the evidence is factually sufficient.

MR. BUSBY: Well, it seems difficult for the Court of Appeals to conduct a factual sufficiency review based on evidence that the jury didn't hear because the jury didn't know that the actual -- that the results obtained were only $16,000, not $111,000. And so the Court of Appeals would really be saying what's the maximum amount the jury could have awarded had they known the results obtained that we know now. So it's a little more like finding rather than unfinding a fact I would submit. But, you know, if this Court thinks that it's more proper to

send it back to the Court of Appeals for them to conduct that review rather than sending it back to the trial court -- for the trier of fact to reset the fees in the first instance based on the correct results obtained, you know, we would certainly acquiesce to that. But we do think that the way that the Court of Appeals conducted its factual sufficiency review is wrong because it didn't look at all -- at what the results obtained were. It said the result obtained are $111,000, not $16,000 as we've just presumed, as we've just held that they actually are.

JUSTICE O'NEILL: Well, I mean, a sort of [inaudible] switch on the jury because the jury is told to consider the results obtained that it's rendering verdict on and it would be reasonable, so you prefer measuring what the jury did by a different standard in hindsight.

MR. BUSBY: Well, I disagree, your Honor. I think there was nothing wrong with the particular charge in this case. If the court -- if the district court had agreed with us on the limitations issue, the jury would have only been given the claims that would support the $16,000 in damages. And there's -- if they kept it out the barred claims, the jury would have only considered the timely claims in setting the damages.

And I just don't see how it's practical to granulate the charge out and say, for example, if there'd been an issue on a discovery rule on this case, and the jury had to make a finding on the discovery rule in order to decide whether it was timely and they found that that there was a discovery issue and that all of these claims were timely, you wouldn't then say in the attorney's fees question, well, assuming that you answered your discovery rule question the other way, what would the damages be? It seems that you shouldn't have to granulate a charge against the possibility of reversal on the legal issue or on a factual issue like that where it's not just saying, you know, we want a -- like in the Castelle scenario, you're saying we want a separate answer for each one of these so we can review it. Here, you're actually saying assume it's contrary to what you've been told so --

JUSTICE O'NEILL: Was there a little bit of tension in the charge in any of the factors because one of them is the amount of money involved and the results obtained. Another one is whether the fee is fixed or is contingent on results obtained. This was not contingent on results obtained. It was a lodestar.

MR. BUSBY: That's right, it was. And I think that's probably why they break it out like that and you say that you need to consider the results obtained in addition to whether it's based on contingence. And the U.S. Supreme Court had said that that's in fact the most important factor is the results obtained. And that even if you have a complaint that, you know, that the charge -- that even if you have testimony that the lodestar is completely reasonable, in other words, that there's no segregation issue and that every hour that went into the lodestar calculation is on a valid claim or it's intertwined with the valid claim and if every hour is on a claim that they actually succeeded on, you can still argue that that total amount is not reasonable given the results obtained. And in fact, federal courts reduced those awards routinely. They usually remand to the district court to do it rather than doing it on appeal. But they say you don't even have to look at the other factors that the Court has discretion alone based on the results obtained to reduce it.

And just to point to the Court to those statements in federal cases that follow the new trial standard, those are at page four of our reply, as well as, the Coal Chemical Case that we submitted in page 10 of the amicus brief.

JUSTICE: What? Why is it we try attorney's fees to the jury, and feds do it to the judge?

MR. BUSBY: There's a rule in federal court that allows them to do it to the judge. In Texas, it's been held that it's a fact question. And therefore, since all fact questions go to jury, that's how it's ended up there. But federal court has changed that --

JUSTICE: [inaudible] cause. And cause could be a fact question that judges of Texas always decide those?

MR. BUSBY: I agree. It's, you know, that would be one way to simplify the issue but the current law is that they to [inaudible]

JUSTICE: [inaudible]

MR. BUSBY: Yes, sir.

Now on the issue of the new trial on fees, we submit that one of the areas this Court should look at is Rule 61.2 in order to figure out what the proper harm analysis should be and that rule asks whether only part of the matter in controversy is affected by an error and whether the other parts are separable without unfairness to the parties. In this case, we would say that the limitations error did not only infect the damages as part of the controversy and that fees are not separable without unfairness to the parties because you have the link between the two through the results obtained factor.

I would like to reserve the balance of my time.

JUSTICE: Thank you.

SPEAKER: The Court is ready to hear arguments from the respondent.

SPEAKER: May it please the Court. Mr.Robert Ketchand will present argument for the respondents.

ORAL ARGUMENT OF ROBERT L. KETCHAND FOR THE RESPONDENT

MR. KETCHAND: I'd like to first begin by addressing the fee issue even though we do not consider this [inaudible] limitations questions. I do want to reserve some time for that so I can talk about that. In this case, it is -- I do not believe and I can see no reason that the issue that they're talking about being a personal appeal could not have been addressed at the trial court level. The facts on this case were that the parties had agreed to reserve to [inaudible] the question of statute of limitations to be done in a legal briefing subsequent to the trial. And so that question was clearly on the table and that that was going to be an issue was clearly known and at no time -- but we went forward and presented to the jury the questions of attorney's fees. And there would be nothing, it would seem to me, that would have prevented some discussions, some issues, some conditional request for findings if that was what the --

JUSTICE: What would that have said?

MR. KETCHAND: Pardon me.

JUSTICE: What would that have said?

MR. KETCHAND: I would think that you could have asked the, you know, the jury, in the event that the --

JUSTICE: In the event that you, the jurors are wrong, and the trial judges also are wrong, what would you do if some court someday said something else, how many attorneys -- I mean, how in the world would they answer that?

MR. KETCHAND: Well, the -- it will -- I'm not sure you revised it [inaudible]

JUSTICE: That's an effect to what your answer.

MR. KETCHAND: Well, I think so but --

JUSTICE BRISTER: When you asked the jury what the damages are and then you ask him, what if the damages were something else, what would a reasonable attorney's fee be? They're gonna say, well, something else like what?

MR. KETCHAND: Well, I think that that is the, you know, the obligation of the defendant in this case to propose something if they want a finding on that particular issue. I mean, in this case, there were conditional findings, a good question -- there was a finding in the event that there is a petition for review to the Supreme Court, what would it be? In the event that there is an appeal to the Supreme Court, what would it be? And there's testimony about that. And the jury found that which were all subsequent events that they didn't know whether that would, you know, happen or not. And so, it would seem to me that, that it's entirely possible to frame a question like that in these particular circumstances where there is a legal issue in the case that's known --

JUSTICE: That begs a question, as Judge Brister said, what would that question be? The questions that are asked, what would be the fees be on appeal. Those are standard questions and those numbers are easily ascertainable to the expert testimony. When you have to segregate the fees in a case like this, I mean, what is the question? How do you ask that question without coming to the jury that there is a chance that one side is gonna lose and if they lose, what would you do? It's difficult.

MR. KETCHAND: It is, perhaps, difficult but if you know that you're going to raise the question subsequently that the limitations will bar this claim above a certain amount, I don't see any reason that says that in the event that damages are found to be at a subsequent [inaudible], what's a reasonable attorney's fee [inaudible]?

JUSTICE O'NEILL: Can you think of any reason why we shouldn't follow the federal courts in this area. It seems like the federal courts remand back to the courts of -- well, they remand for a determination of remittitur and why shouldn't we follow that same approach?

MR. KETCHAND: Well, the one thing that there is a Federal Rules of Civil Procedure that the whole presumption is that attorney's fees would be heard after the trial by the Court pursuant to a separate procedure unless it's, you know, part of the damages element in the case which then gives it the question about that when you have to deal with it. But I would say that routinely, it's a court function. Whereas in Texas routinely, it's not a court function. Furthermore, in this particular case --

JUSTICE O'NEILL: But it's still based on evidence? I mean, the judge, he's gonna judge the evidence. I mean, that's the difference, I understand, but still an evidentiary inquiry.

MR. KETCHAND: Well, if the belief was that this issue is so critical that we ought to do that, then, to me, that is a legislative or perhaps a rule-making kind of function. I mean, it is -- I don't believe that it's appropriate for this Court in this particular setting. I mean, one thing factual --

JUSTICE: [inaudible] advocate bad faith, breach of contract claims, and insurance cases without a rule and without a statute.

MR. KETCHAND: The issue here of -- I'm not saying that it can't be done. I am saying, however, that an issue such as -- which is being alleged against this proportionality of how you calculate it, those are

highly rule- making functions and rule 42 to reflective class actions and you know, there's a procedural aspect to it, it would seem to me, since these are legislative statutes on attorney's fees that the Court is going to, you know, mandate some rule having to do with proportionality, that that is a legislative function.

JUSTICE: I get your argument would work both ways if there were -- if the plaintiff proved as a matter of law damages that the trial court didn't find, the Court of Appeals said you did find that and that proof increases damages by $10 million. Even in that instance, there wouldn't be a reassessment of the fees awarded, is that right?

MR. KETCHAND: I don't believe so.

JUSTICE: Even though that's one of the factors in lodestar [inaudible]

MR. KETCHAND: That's exactly right. I mean, just consider what is going on at this particular Court, the Supreme Court. I mean, I received that the trial court level five years ago, and I testified at it, $12,500 for appeal. In the meantime, that was not known to the jury, Mr. Barker dead, Mrs. Barker is in bankruptcy, the business is in bankruptcy, and the only reason we're here now is the federal bankruptcy court had said we should let this case proceed under a belief mistake to get a judgment to liquidate the claim so that we can go back and, you know, make a claim --

JUSTICE: Well, but that's -- that's the problem with a trial jury awarding appellate fees. Your predicting the future and that's always gonna be --

MR. KETCHAND: And that's -- I guess kinda my point is that what would be sauce for the goose is sauce for the gander. I mean, if I had to --

JUSTICE: But --

MR. KETCHAND: If I had correctly testified, if I had known what's gonna happen, I would have asked for a whole lot more appellate fees to tell you the truth. And I certainly didn't guess that the tenth largest law firm in the United States would be poor in briefs --

JUSTICE: But part of the case --

MR. KETCHAND: [inaudible] the case was [inaudible] income.

JUSTICE: Part of it if I can get a word in edgewise.

MR. KETCHAND: Pardon me, your Honor.

JUSTICE: Part of the problem, part of what the Courts of Appeals are to do is to not have these McDonald's coffee cup verdicts where somebody gets millions of dollars for something that the public's gonna be outraged about and throw all of us out of a job and, you know, send all of us to arbitration, and close down the civil justice system. We got a case here now, where, you said, the jury said $120,000 in damages and $240,000 for the attorney. And then the Court of Appeal said, no $15,000 for the client and still $240,000 for the attorney. That looks a little excessive. That's look like we're running this deal for you rather than your client, doesn't it?

MR. KETCHAND: Well -

JUSTICE: When your client's gonna get $15,000. You're gonna get a quarter of a million. And then how much of your client's $15,000 is gonna come out for expenses, too?

MR. KETCHAND: The -- This is the case in which those are actual fees incurred. In fact, less than the actual fees -

JUSTICE: I don't doubt that but the question is, is that -- shouldn't somebody in the court system go, this is not a good way to run a railroad --

MR. KETCHAND: Well --

JUSTICE: -- where the attorneys get everything, and the clients get a thank you letter from the attorney, thanks for keeping me busy for the last year and a half.

MR. KETCHAND: Well, except that in here, the standard is factual sufficiency. It isn't automatic. If the Court -- and the Court in this case, examined the records, said they've examined the records, said they applied the factual sufficiency standard, they didn't write an opinion detailing results nor were they required to under existing law, and had they determined that it was the complications you're talking about, there is a remedy. I mean, if it, you know, if in examining the whole record, the evidence is insufficient, and under the great white preponderance standards it would be manifestly unjust, so there is a protection in thaere against that runaway way-out verdict. I mean, what --

JUSTICE: So how many times on a $15,000 verdict -- how does the -- how big does your fee have to be before its outrageous? A million? A billion?

MR. KETCHAND: I guess --

JUSTICE: I mean, this is a -

MR. KETCHAND: I guess we could agree on a billion but it's --

JUSTICE: -- a $15,000 case.

MR. KETCHAND: I guess we could agree -- well, except that, I mean, you know this gets to the heart of real philosophy as you know. And the -- we have to have a system where somebody calls the balls and the strikes. And, you know, a free market system has to work with some and there is -- at times, the transaction costs are high. In this particular instance, I would say, the transaction costs are high because of the defendants, in this particular case. I mean, I've tried and settled a lot of county cases a lot cheaper than this, but we couldn't do it, still can't do it. I mean, here we are to Supreme Court on a case that's worth very low. And when you factor everything into it and yet what do we do, do we give up?

JUSTICE O'NEILL: Well, you could have envisioned a scenario where a defendant sort of engages in Rambo tactics and runs attorney's fees up and then complains on appeal that somehow it's disproportionate.

MR. KETCHAND: Well, that's -- and I think that's the scenario we have here. I mean, we tried to summarize it. But we had a failure to produce documents, you know, producing the multiple documents of the same thing, producing, we think, fraudulently produced documents, long depositions. And it started out the first demand, which is in the record. It's attached to one of your briefs, exhibit 30. I mean, the attorney's fees requested for $200,000 to settle this case. And they didn't you know, accept it and so here we are, you know, years later. So, it -- I mean, it -- there are just simply times that it is reasonable to give a person who is doing nothing more than vindicating his business rights, I mean, nobody said Dr. Eckman wouldn't cheat. I mean, none in this whole record -- nobody has disagreed with the fact that he was denied what his contract said he was gonna get. And it cost him money and so, he used the court system to vindicate --

JUSTICE O'NEILL: Well, I guess that can work both ways. Both parties can use the court system. So why shouldn't we send it back down to the Court of Appeals for a factual sufficiency review of the attorney's fee award and let the Court of Appeals decide if there should be a remittitur or not in light of, as you say, if there is abuse, then the Court of Appeals would not remit.

MR. KETCHAND: Well, except, there was a fact -- I mean the Court of Appeal said, we have done a factual sufficiency -

JUSTICE O'NEILL: Well, the -

MR. KETCHAND: So, the issue would be -

JUSTICE O'NEILL: But they did the factual sufficiency review looking at the hundred and something thousand dollars as opposed to $16,000. If we send it back down and said, review the sufficiency of the evidence in light of the $16,000 award, why couldn't we let them review that? Why --

MR. KETCHAND: Well, because that gets to the very heart of what we're talking about. This Court would have picked out one issue, the relationship, the damages, and attorney's fees and said, we say that is the key thing. And presumably, the Court will have to give some guidance as to what that may be. You picked that out of all the circumstances of this case, why should the Court of Appeals not look at the whole case. I mean, I -- frankly, if -- I mean, if I had to do it again, I would ask for more attorney's fees, I mean just for being here. I mean -- and having to face, you know, these excellent lawyers [inaudible] summoning in a case [inaudible] I mean --

JUSTICE: Well, this case is maybe unusual and in that respect there are many cases of high-dollar amounts in controversy where this issue is recurring, where there is a dramatic reduction of the damages on appeal and there seems to be a disproportionality between damages and the fees that were originally found by the jury. So we're not just -- we're not simply looking at this case. We're looking at -- is there something in our system that needs to be corrected so that, for example, Courts of Appeals can conduct this sort of review that you're -- that you've suggested. Has the defendant overbilled this case? Have they engaged in sanctionable conduct, etc., etc. which might make the fee justifiable here.

MR. KETCHAND: Well, I think the Court is then adopting a rule that every case will have a trial -- a second trial within the trial before we can get it over with --

JUSTICE: [inaudible] just a factual --

MR. KETCHAND: The main --

JUSTICE: Excuse me. It's just a factual sufficiency review by the Court of Appeals that takes into account that there had been a series of reductions on appeal. And therefore, we're gonna take another look at the attorney's fees and may have hold it or may suggest that it be remitted.

MR. KETCHAND: That's my -- that would be, I believe the policy thing is wrong. Why just that factor? Because there could be all kind of reasons why this has happened. And to simply say, that one factor, the relationship of damages to attorney's fees, we're gonna consider that and -- in the first place, the Court of Appeals has already considered that issue. They said they have. I mean, they wrote their opinion that we've done a factual sufficiency review. And I think -- and this Court is not entitled to review that. You'd have to say we're gonna go back and make you do more on this one issue and what is there about that one issue that calls out for that? And in fact, I think it's very dangerous because if --

JUSTICE O'NEILL: By the same token, though, I mean, I hear you but they've already done that. They've looked at that one element. They just used arguably the wrong measure. So, they were just gonna ask them to do what they did before just with a different measuring. A $16,000 instead of $111,000.

MR. KETCHAND: You know, the Court knew what had happened. I mean, they -- I mean, I don't know how you know what they did was the wrong measure. I mean, if they say it was a factual sufficiency review. We've

looked at the whole record. There was no objection to this evidence. There was no issue on this evidence. There was no nothin' on this evidence. And taken as a whole, this has satisfied the standard already is that if it's unjust as a measure against the entirety of the record they can reverse sometimes do, as you've seen the cases cited. I mean, there's not that they're without a remedy. This Court is being invited to, and would be going beyond that to impose yet another layer of inquiry that I have a hard time seeing any policy, you know, supports that.

JUSTICE: Justice O'Neill raised an issue by punitive damages and perhaps our guidelines for that, and how is it any different? I mean, the United States Supreme Court has outlined guidelines in the Gore v. BMW case and Cooper v. Leatherman cases that pertains to punitive damages. Why couldn't those outline -- that similar situation we've done here for this type of situation that you have as pertains to attorney's fees.

MR. KETCHAND: I presume anything, you know, can happen in the Supreme Court but I mean, the question is whether it should. In punitive damages, what the Court said in [inaudible] is inherently an unguided process [inaudible] here, it's a function of evidence, and expert testimony and, you know, what the jury has heard -- they're not at large to the degree that they would be in a punitive damages case. I think there is a clear policy distinction. And I would urge that there'd be a strong interest in achieving finality. I mean, if you leave open the question of attorney's fees which is a part of the judgment in an inordinate number of cases it would seem to me whether you'll ever have a final judgment, it's just [inaudible] on and on and on. It's already been five years in this case.

JUSTICE: On to your limitations questions.

MR. KETCHAND: Thank you, your Honor.

JUSTICE: Are you arguing for a discovery rule on breach of contract cases? Looks like it.

MR. KETCHAND: Your Honor, the old lemon law and the cases that we've cited are to the effect that in a bailment situation, the statute of limitations improves when there is a demand at the end of the bailment --

JUSTICE: But you say those are conversion taxes -

MR. KETCHAND: Pardon me.

JUSTICE: You said those are brought as conversion taxes.

MR. KETCHAND: It may well be in a factual sense, that is the case. But there are other cases that have said that where there're contractual issues associated with the bailment, the same rule applies. That's what the law that we were relying on but focusing on when my client made a demand to terminate the bailment and get this material back, everything was within a four-year --

JUSTICE: Cheating had already been done.

MR. KETCHAND: The cheating had already been done.

JUSTICE: Bull semens sold, no accounting to you.

MR. KETCHAND: Exactly.

JUSTICE: It had it been done years before.

MR. KETCHAND: Right. There's been a long term so --

JUSTICE: In effect, your contract case is that discovery rule applies to breach of contract. It's not when the contract is breached. It's when you discover that the contract is breached.

MR. KETCHAND: It's not the discovery of rule as it applies to the contracts. I believe the rule in a bailment case is that statute of limitations begins to run when you make a demand for the return of your

product and the bailment is over. We have cases that say that. Or you could, if, in fact, you had notice, I mean, then it could be the notice issue which I believe it was the defendant's burden to raise that issue in a panel case. I mean, that is the question -- the overwhelming case law, although I'd be the first to admit that this one of the old doctrines have been lying around that, you know, that's --

JUSTICE: Hadn't been written on in a --

MR. KETCHAND: -- hadn't been written on in a long time but the overwhelming number of cases including one, specifically, which is not reported in [inaudible] out of the First Court of Appeals just [inaudible] that even if the issue is contractual, if that rises out of a bailment, if it's a contractual incident to the bailment, it accrues once the bailment terminates. And there's good policy for that. I mean, a bailment is somebody else [inaudible] your property. They're controlling it. They deal with it. You don't know about it. And so when you terminate the bailment, and they've, in fact, cheated you then limitations begins to accrue. By that standard which I believe is a legal standard, everything we sought is within the statute of limitations. The Court of Appeals on that issue just simply, nothing, to tell you the truth. I mean, they were utterly silent and that question had been fully briefed all the way through. So --

JUSTICE: Thank you, Counsel.

REBUTTAL ARGUMENT OF J. BRETT BUSBY FOR THE PETITIONER

MR. BUSBY: I'd like to respond to the one issue about how we know that the Court of Appeals applied the wrong number for the results obtained. And they do say in their opinion, we, therefore, review the factual sufficiency of the attorney's fees awarded by the jury in light of the jury's award of $111,000. So, that's how we know that they did not apply the correct, legally correct results obtained. Now, my fear about a remand to the Court of Appeals, in this case, is that they're gonna make the same argument that they've made to you here which is that the error is harmless, the change in the results obtained is harmless because there's enough evidence on the lodestar to support $244,000. Well, what that does is that it exalts the lodestar as the only factor and completely ignores the results obtained. So, you can't give no weight to the results obtained --

JUSTICE O'NEILL: But they considered the result obtained. They may have considered the wrong result obtained but they did consider that element and that it is one of the elements that the jury was instructed to consider.

MR. BUSBY: Absolutely. And so I think you can't just say that this -- that there's factually sufficient evidence to support this. I would urge this Court to give guidance to the Court of Appeals on how to conduct this sort of review if you're gonna send it back because it's different than a factual sufficiency review where the single element of damages -- because here you got a multifactor --

JUSTICE: [inaudible] tell us -- you would say that we must tell them that they have to remit some portion because of the ratio?

MR. BUSBY: No, your Honor. I just asked you to ask them to give serious consideration to the results obtained as well as the amount involved. I mean one way to do it is as amicus suggests is to say that's the ratio that the jury said so you need to give serious

consideration to that. This Court has said the same thing in the punitive damages context in your Southwestern Investment v. Neeley case.

JUSTICE: So you would agree that there could be cases in which they take this situation that goes back to the Court of Appeals if that's we were deciding and the Court could uphold that attorney's fee award by the jury --

MR. BUSBY: We wouldn't --

JUSTICE: -- even with the reduction.

MR. BUSBY: We would say not on this evidence because the only evidence that's in the record is that two times -- 2.2 times the damages is a reasonable attorney's fee.

JUSTICE O'NEILL: But, again, I mean, I think you acknowledged at the beginning that you're not urging a proportionality rule because we're guided by reasonableness. And what the Court would need to look at in terms of reasonableness is not so much a ratio as it is or the fees are justified in light of legal issues involved and the discovery issues that presented and the peculiarities of the particular case.

MR. BUSBY: And also the results obtained which just has to -- but all I'm saying is that it has given some weight. The U.S. Supreme Court says it's the most important factor. And so you cannot just say, well, there was a lot of discovery in this case and we have to spend a lot time on things and, you know, it -- there was a lot time on discovery so an 86 percent change in the results obtained is not reviewable. That would be our position. Now --

JUSTICE GREEN: [inaudible]

MR. BUSBY: -- in terms of the punitive damages, I'm sorry, Justice Green.

JUSTICE GREEN: [inaudible] before you leave, I wanna talk about the bailment questions.

MR. BUSBY: Yes.

JUSTICE: [inaudible] somebody has a -- puts a car in storage, long-term storage, a bailment agreement, say, two, three years or whatever and to get the car back -- come back, make a demand and get the car back. And it turns out that there's been some damage done to the paint, chemical leak or something like that. Cause of action accrues win?

MR. BUSBY: Well, I think, it depends on what you sued for. But if you sue for -- for example, negligence in that case, because they didn't store the car properly, that cause of action --

JUSTICE: That's gone because say two years before.

MR. BUSBY: Well, I mean I think you can say that they --

JUSTICE: [inaudible]

MR. BUSBY: -- didn't return the car and that you could also sue for breach of contract and say they didn't return the car in the same condition as when you gave it to them and they promised to take care of it and that sort of things so the breach actually occurs when they give it back to you in a faulty condition. In this particular case, when they demanded the return of their bull semen, we gave it back to them. There was no breach at that point. We gave them back more than they thought they should have gotten. The breach occurred when what they say is that we should have sold it years earlier and gotten money and remitted to them then --

JUSTICE: So their argument is they never breached the bailment agreement.

MR. BUSBY: No, we -- the jury found that we breached the bailment agreement. And we're not here challenging that. But the breach occurred

at the time that this transaction was supposed to take place. Because unlike the car example, this was an agreement where they said, here's our product. Sell it. Not, here's our product, store it, and give it back to us in the same condition as which you found it.

JUSTICE: Any further questions?

Thank you, Counsel. The cause is submitted and the Court will take another brief recess.

SPEAKER: Let's all rise.