RECOVERING ATTORNEY’S FEES AS DAMAGES

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CHAPTER 20
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RECOVERING ATTORNEY’S FEES AS DAMAGES

I. INTRODUCTION.

The American Rule has long prohibited the recovery of attorney’s fees absent a statutory or contractual provision to the contrary. This paper explores the extent to which the American Rule prevents recovery even when the relevant attorney’s fees are sought as actual damages.

II. THE AMERICAN RULE.

One of the United States Supreme Court’s first judicial acts—in its first decade of existence and prior even to the Court’s seminal opinion in *Marbury v. Madison*—was to establish the American Rule regarding the recovery of attorney’s fees. *Arcambel v. Wiseman*, 3 U.S. 306, 306 (1796); see also *Alyeska Pipeline Serv. Co. v. Wilderness Soc’y*, 421 U.S. 240, 248–49 (1975) (discussing *Arcambel* and holding only Congress could authorize and exception to the American Rule).

In the 1796 case of *Arcambel v. Wiseman*, the Court reversed an award of attorney’s fees as damages and held that fees were not recoverable absent an explicit statutory provision to the contrary. *Alyeska*, 421 U.S. at 248–49. This holding—that the prevailing party may not recover attorneys’ fees as costs or otherwise”—is known as the American Rule. *Alyeska*, 421 U.S. at 245; *Akin, Gump, Strauss, Hauer & Feld, L.L.P. v. Nat’l Dev. & Research Corp.*, 299 S.W.3d 106, 120 (Tex. 2009) (discussing the American Rule) [hereinafter, *Akin Gump*]. The Rule was intended as a direct repudiation of the law controlling in England—the “English Rule”—which awards attorney’s fees to the prevailing party. *Alyeska*, 421 U.S. at 247.


III. THE RULE REGARDING FEES AS DAMAGES.

Despite the engrained nature of the American Rule, it has been inconsistently applied when attorney’s fees are sought as actual damages rather than incident to the recovery of other damages.

A. Distinction: Incidental Fees v. Fees as Damages.


In *Nalle*, the law firm of Porter, Rogers, Dahlman, & Gordon sued Nalle Plastics for breach of contract based on unpaid legal fees, and the trial court awarded $130,000 in damages and $150,000 in attorney’s fees. *Id.* at 169. Nalle deposited approximately $130,000 with the trial court to suspend the judgment pending appeal. *Id.* The trial court held that Nalle was required to deposit a supersedeas bond that accounted for the $150,000 award of attorney’s fees as well. *Id.* Nalle deposited the money and sought relief in the court of appeals. *Id.* After the court of appeals denied its motion to review the bond, Nalle sought a writ of mandamus from the Texas Supreme Court. *Id.* The Texas Supreme Court thus reviewed the nature of attorney’s fees and the history of the supersedeas statute. *Id.* at 169–70.

Prior to 2005, the Texas Rules of Appellate Procedure governed supersedeas bonds. *Id.* at 169–70. The Rules required the debtor to supersede the entire judgment plus costs and interest for the duration of the appeal. *Id.* However, the *Nalle* court noted that the Legislature enacted Texas Civil Practice and Remedies Code section 52.006 in 2005 to ease the burden on the judgment debtor. *Id.* at 170. Texas Rule of Appellate Procedure 24 was then amended to match the new supersedeas statute. *Id.* at 170.

These new rules limit the required bond to compensatory damages plus costs, among other debtor-friendly modifications. *TEX. R. APP. P.* 24.2 (also capping the supersedeas based on the debtor’s net worth, and providing courts with the flexibility to further
reduce the bond amount if necessary). Now, under Texas Rule of Appellate Procedure 24 and Texas Civil Practice and Remedies Code section 52.006, the amount of a supersedeas bond is generally equal to “the sum of (1) the amount of compensatory damages awarded in the judgment; (2) interest for the estimated duration of the appeal; and (3) costs awarded in the judgment.” TEX. CIV. PRAC. & REM. CODE § 52.006(a); TEX. R. APP. P. 24.2.

Nalle argued that attorney’s fees were not “compensatory damages,” and thus, the supersedeas amount did not include the award of attorney fees for prosecuting the suit. Nalle, 406 S.W.3d at 169–70. The Court confronted the question head on. The Court acknowledged that attorney’s fees “may be compensatory in that they help make a claimant whole.” Id. at 173–75. Yet, “[n]ot every amount, even if compensatory, can be considered damages.” Id. at 173–74. The statutes and case law of the state have long distinguished attorney’s fees from damages, and, the American Rule does not permit the recovery of attorney’s fees absent a contract or statute to the contrary. Id. at 173. Thus, the Court held attorney’s fees were not “compensatory damages” within the definition of the supersedeas statute. Id. at 174.

Nonetheless, the Texas Supreme Court went out of its way to explicitly “reject the idea that attorney’s fees can never be considered compensatory damages.” Id. at 174. Even in Nalle, the $130,000 in previously incurred attorney’s fees sought as damages for the breach of contract claim were compensatory. Id. at 174–75. The Texas Supreme Court then summarized the distinction between incidental fees and fees as damages: “[w]hile attorney’s fees incurred in prosecuting this claim are not compensatory damages . . . [i]f the underlying suit concerns a claim for attorney’s fees as an element of damages, as with Porter’s claim for unpaid fees here, then those fees may properly be included in a judge or jury’s compensatory damages award.” Id. at 175 (emphasis added).

The Court’s analysis in Nalle not only clarifies the distinction between incidental attorney’s fees and those sought as damages, but also demonstrates one of the many ramifications of this distinction. Attorney’s fees already incurred and sought as actual damages resulting from the defendant’s actions are compensatory and must be superseded, while those being incurred in the present case incident to the recovery of other damages need not be superseded. See, e.g., Haubold, 2014 WL 1018008, at *6.

But are both types of attorney’s fees—whether incidental or compensatory—subject to the American Rule?

B. Application of the American Rule to Fees as Damages.

Historically, the American Rule has been applied to both incidental attorney’s fees and fees sought as actual damages. The Texas Supreme Court held as early as 1892 that the recovery of attorney’s fees—including those sought as damages in a subsequent suit—would violate the policy of the state and discourage litigation. Neese v. Radford, 19 S.W. 141, 142 (Tex. 1892).

In Neese v. Radford, Neese sued Radford for executing a levy on his partnership property while the judgment giving rise to such levy was suspended pending appeal. Id. at 141. Neese claimed that the wrongful levy injured his business and credibility and forced him to hire attorneys to obtain an injunction staying the sale of the property. Id. The trial court entered judgment for Radford, and Neese appealed. Id. The Texas Supreme Court affirmed, stating:

We are not a ware [sic] of any case in which attorney’s fees or costs incurred in another suit have been recovered as actual damages. The right to recover his attorney’s fees by the defendant in every case in which the plaintiff fails in his suit would seem to be as much a matter of right. The costs usually follow the result of the litigation, and, further than that, it seems to be the policy of the law not to discourage a resort to the courts by parties who believe they have a cause of action, or who, having a good one, fail from some cause to successfully maintain it by charging them with the expenses incurred in the litigation by their adversaries.

Id. at 142; see also Galveston, H. & S.A. Ry. Co. v. Ware, 11 S.W. 918, 920 (Tex. 1889) (“Counsel fees in the original suit are not allowed as compensatory damages in suits for wrongfully suing out writs of attachment and sequestration, and we see no reason why a different rule should apply when an injunction has been wrongfully obtained.”); Carpenter v. First Nat. Bank, 114 S.W. 904, 906 (Tex. Civ. App. 1908, no writ) (“It is well settled that attorney’s fees incurred in defending an injunction suit are not recoverable as damages upon the dissolution of the injunction, either by cross-action in the injunction suit, or by suit subsequently brought upon injunction bond.”).

Similarly, in Sherrick v. Wyland, the Texas Court of Civil Appeals reversed a judgment awarding attorney’s fees as damages. Sherrick v. Wyland, 37 S.W. 345, 345 (Tex. Civ. App. 1896, no writ). There, Wyland sued Sherrick for fraud and deception after attorney’s fees are distinct from such expenses. Nalle, 406 S.W.3d at 175–76.
Sherrick sold Wyland property in Houston that was subject to a vendor’s lien. *Id.* The trial court entered judgment for Wyland and awarded damages for fees Wyland paid to an attorney to secure a release of the lien. *Id.* The Texas Court of Civil Appeals reversed, noting that “[i]t has often been ruled, in this state and elsewhere, that fees of counsel, incurred in prosecuting a suit for or defending against a wrong, are not ordinarily recoverable as actual damages, because they are not considered proximate results of such wrong.” *Id.; see also Choate v. Murphy, 125 S.W.2d 413, 415 (Tex. Civ. App.—Beaumont 1939, no writ)* (reviewing stock dippage case, reversing attorney’s fees awarded for prior recovery of cattle unlawfully taken, and holding that “[c]osts and expenses of litigation, other than ordinary court costs, are not recoverable in an action for damages”).

Thus, historically, the American Rule has been broadly applied to prohibit recovery of attorney’s fees whether such fees are sought as actual damages, “as costs, or otherwise.” *Alyeska, 421 U.S.* at 245.

IV. ANOMALIES.

Despite the historical precedent on the issue, courts of appeals have issued opinions permitting the recovery of attorney’s fees as damages.

For example, in *Jackson v. Julian*, the Dallas Court of Appeals refused to apply the American Rule to attorney’s fees sought as damages. 694 S.W.2d 434, 437 (Tex. App.—Dallas 1985, no writ). There, Lynda Jackson sued Dr. Julian for negligence, fraud, and battery based on Dr. Julian’s unauthorized removal of her right ovary during a procedure to remove other organs. *Id.* at 435–36. Jackson also alleged that Dr. Julian lied to her, telling her that the right ovary had been removed without her knowledge by a previous doctor. *Id.* Among the damages sought, Jackson prayed for recovery of attorney’s fees she paid to investigate Dr. Julian’s misstatements and identify the doctor who had removed her right ovary. *Id.* at 437. The trial court rendered partial summary judgment for Dr. Julian before dismissing the remaining causes of action for failure to state a claim and failure to allege recoverable damages. *Id.* at 436–37.

The Dallas Court of Appeals however, held that the attorney’s fees constituted recoverable damages:

> Although attorney’s fees are not ordinarily considered as an element of damages, the patient is entitled to recover in tort those damages that proximately resulted from the alleged fraud. Since the patient seeks to recover the expense incurred in hiring an attorney to investigate the other doctor, as distinguished from the cost of prosecuting her action against Dr. Julian, we hold that such investigative expense may be found to be proximately resulting from the doctor’s alleged misrepresentations.

*Id.* at 437 (internal citations omitted). The Dallas Court later reiterated this reasoning in *Guffey v. Clark* to permit the recovery of previously-paid attorney’s fees as damages caused by the breach of a settlement agreement. *Guffey v. Clark*, No. 05-93-00849-CV, 1997 WL 142750, at *4 (Tex. App.—Dallas Mar. 31, 1997, writ denied) (not designated for publication). Guffey, in turn, influenced the Waco Court of Appeals, thus spreading the rejection of the American Rule to another judicial district. *Ganske v. WRS Group, Inc.*, No. 10-06-00050-CV, 2007 WL 1147357, at *3 (Tex. App.—Waco Apr. 18, 2007, no pet.) (mem. op.) (citing and relying upon *Guffey*).

In *Ganske v. WRS Group, Inc.*, the Waco Court of Appeals refused to apply the American Rule to attorney’s fees claimed as damages. *Id.* at *2–3. There, the Ganskes engaged in nine years of litigation with WRS Group, Ltd. regarding a settlement agreement. *Id.* at *1. In the agreement, WRS bought the Ganske’s minority interest in WRS and released all claims against the former shareholders. *Id.* at *1. WRS then threatened to ignore the settlement and pursue litigation against the Ganskes regardless. *Id.*

The Ganskes sued for declaratory judgment in state court. *Id.* While the suit was pending, WRS filed an action against the Ganskes in federal court. *Id.* The federal claim was dismissed because of the settlement agreement, and the Ganskes added a breach to contract claim to their state court action seeking to recover the attorney’s fees incurred in the federal suit. *Id.* The trial court granted summary judgment for WRS, and the Ganskes appealed. *Id.* at *2.

The Waco Court of Appeals acknowledged the American Rule, recognizing that “attorney’s fees from prior litigation are not generally recoverable” and can only be awarded “when a statute or agreement so provides.” *Id.* However, sentences later, the court shifted its reasoning and noted that the Ganskes sought their previously-paid attorney’s fees as damages and that “[t]here could be no more foreseeable consequence of a breach of the settlement agreement than the cost of litigation that it was specifically designed to avoid.” *Id.* at *3. Thus, despite the American Rule, the court stated “[t]here is nothing sacrosanct about attorney’s fees per se that forbids their award as damages.” *Id.* at *3 (quoting *Nationwide Mutual Ins. Co. v. Holmes, 842 S.W.2d* 335, 342 (Tex. App.—San Antonio 1992, pet. denied) (awarding prior attorney's fees as actual damages in a DTPA claim)). The Waco Court reversed the trial court’s judgment and remanded for further proceedings. *Id.* at *6.
Jackson, Guffey, and Ganske represent anomalies in Texas case law, and directly contradict the Texas Supreme Court’s then-controlling precedent. See Neese, 19 S.W. at 142; supra Section 0. These cases have not been widely cited, applied, or extended. See, e.g., infra Section 0 and cases cited therein (recognizing the need for an exception to the American Rule to permit the recovery of attorney’s fees resulting from the defendant’s conduct as damages). In fact, the Dallas Court of Appeals later flip-flopped on the statements made in Jackson and Guffey by acknowledging the applicability of the American Rule to attorney’s fees claimed as damages. City of Garland v. Booth, 895 S.W.2d 766, 771 (Tex. App.—Dallas 1995, writ denied) (“In Texas, attorneys’ fees expended in prior litigation with third parties are not recoverable as damages: attorneys’ fees are only recoverable when provided for by statute or by agreement between the parties.”); Petersen v. Dean Witter Reynolds, Inc., 805 S.W.2d 541, 549 (Tex. App.—Dallas 1991, no writ) (“Counsel’s fees incurred in prosecuting a suit for or defending against a wrong are not ordinarily recoverable as actual damages. Thus, inequitable as it may be, the law does not provide for the recovery of litigation expense in this case.” (internal citations omitted)).

Ironically, Jackson, Guffey, and Ganske are potentially in line with a broad interpretation of the cases decided by the Texas Supreme Court in Akin Gump and Nalle. See infra Section V.B.1; see also In re Marriage of Pyrtle, 433 S.W.3d 152, 169 (Tex. App.—Dallas 2014, pet. denied) (citing Ganske in support of broad interpretation of Akin Gump and Nalle). Until the Akin Gump and Nalle opinions are clarified however, the American Rule still largely governs the recovery of previously-paid attorney’s fees sought as damages. Thus, the “tort of another” exception remains the primary method for recovering attorney’s fees as damages.

V. EQUITABLE EXCEPTION TO THE AMERICAN RULE: “TORT OF ANOTHER” DOCTRINE.

Although Texas courts have historically applied the American Rule to attorney’s fees sought as damages, recovery has been permitted in some judicial districts under the equitable “tort of another” exception. Specifically, courts have recognized two equitable exceptions: the common-fund doctrine, and the “tort of another” exception. Martinez v. Martinez, No. 04-06-00671-CV, 2007 WL 2187105, at *2 (Tex. App.—San Antonio Aug. 1, 2007, no pet.) (mem. op.) (“To recover attorney’s fees under equity, a plaintiff must establish her claim of attorney’s fees is based on one of the following equitable grounds: (1) the common-fund doctrine . . . or (2) attorney’s fees as actual damages”); Nationwide Mut. Ins. Co. v. Holmes, 842 S.W.2d 335, 341 (Tex. App.—San Antonio 1992, writ denied) (referencing the common fund and “tort of another” doctrines as the two equitable exceptions to the American Rule). The common fund doctrine permits the recovery of attorney’s fees as a credit against the damages awarded where a defendant bears the costs of litigation to protect or preserve a common fund. Bashara v. Baptist Mem’l Hosp. Sys., 685 S.W.2d 307, 310 (Tex. 1985) (stating “where one litigant has borne the burden and expense of the litigation that has inured to the benefit of others as well as to himself, those who have shared in the benefits should contribute to the expense”); Knebel v. Capital Nat. Bank in Austin, 518 S.W.2d 795, 799 (Tex. 1974). While such fees can be recovered as damages in a subsequent lawsuit, they are traditionally awarded in the lawsuit in which they are incurred, and are provided only as “a charge against the fund.” City of Dallas v. Arnett, 762 S.W.2d 942, 954 (Tex. App.—Dallas 1988, writ denied) (also discussing the history of the doctrine and noting that in the originating opinion—Trustees v. Greenough, 105 U.S. 527 (1881)—the United States Supreme Court held that “a prevailing plaintiff who had created a common fund could recover his reasonable costs of the litigation, including attorney fees.”); see also Tex. Farmers Ins. Co. v. Seals, 948 S.W.2d 532 (Tex. App.—Fort Worth 1997, no writ) (declaratory judgment action holding that insured who was injured in automobile accident and pursued claim against the driver at fault’s insurance companies was not required to forfeit all of the recovery to his own insurance company as reimbursement for their subrogation interest, but was entitled to credit for the insurance company’s proportional amount of attorney’s fees based on “common fund” doctrine). A third exception permitting the recovery of attorney’s fees when the opposing party acts “in bad faith, vexatiously, wantonly, or for oppressive reasons” was rejected by the Texas Supreme Court. Tana Oil & Gas Corp. v. McCall, 104 S.W.3d 80, 83 (Tex. 2003) (attorney’s fees based on “bad faith” should be pursued as sanctions under Tex. R. Civ. P. 13 and Tex. Civ. Prac. & Rem. Code chapter 10); G.R.A.V.I.T.Y. Enters., Inc. v. Reece Supply Co., 177 S.W.3d 537, 547 (Tex. App.—Dallas 2005, no pet.) (noting that there were initially two exceptions to the American Rule permitting the recovery of fees as damages, but that the Texas Supreme Court rejected the “bad faith” exception in McCall); Qwest Commc’ns Intern., Inc. v. AT & T Corp., 114 S.W.3d 15, 33 (Tex. App.—Austin 2003), rev’d., 167 S.W.3d 324 (Tex. 2005) (recognizing two exceptions to the American Rule permitting recovery of fees as damages: the “tort of another” exception, and the “bad faith” exception). Thus, the “tort of another” exception is the primary basis for securing attorney’s fees as damages absent a statute or contractual provision.
“tort of another” doctrine is set forth in Restatement of Torts Section 914:

A person who through the tort of another has been required to act in the protection of his interests by bringing or defending an action against a third person is entitled to recover compensation for the reasonably necessary loss of time, attorney fees and other expenditures thereby suffered or incurred.

RESTATEMENT (FIRST) OF TORTS § 914 (Am. Law Inst. 1939); RESTATEMENT (SECOND) OF TORTS § 914(b) (Am. Law Inst. 1979). Some Texas courts have given effect to this exception by requiring evidence of two elements: “(1) the plaintiff must have incurred the attorney’s fees in a prior action and (2) the action must have involved a third party.” Dixon Fin. Servs., Ltd. v. Chang, 325 S.W.3d 668, 678 (Tex. App.—Houston [1st Dist.] 2010, pet. denied).

Texas courts of appeals have been split regarding the availability of the “tort of another” exception for the last half-century. See Brannan Paving GP, LLC v. Pavement Markings, Inc., 446 S.W.3d 14, 28 n.5 (Tex. App.—Corpus Christi 2013, pet. denied). The Texas Supreme Court acknowledged the “tort of another” exception for the last half-century.

Although the Texas Supreme Court has discussed the “tort of another” doctrine, it has declined to directly adopt the exception. See infra, Section V.A.

A. The Texas Supreme Court Discussed, but Did Not Adopt, the “Tort of Another” Exception.

The Texas Supreme Court acknowledged the “tort of another” doctrine in Turner v. Turner. 385 S.W.2d 230 (Tex. 1964), overruled on other grounds by Bounds v. Caudle, 560 S.W.2d 925, 927 (Tex. 1977). There, Genevieve Turner sued Mozelle and Pat Corley for alienating the affections of Genevieve’s husband, Harry Turner. Id. at 232. Specifically, Genevieve alleged that Mozelle Corley’s actions toward Harry Turner caused the disruption of Genevieve’s home and led to her divorce from Harry. Id. Both the Turners and the Corleys divorced while the alienation of affections suit was pending, and Mozelle then married Harry Turner. Id. Pat cross-claimed seeking to recover his attorney’s fees in the suit from his ex-wife Mozelle, pointing out that Mozelle’s tortious behavior forced Pat to hire counsel and defend himself against Genevieve’s accusations. Id.

The trial court awarded Pat $30,000 in reasonable attorney’s fees. Id. Mozelle challenged the award on appeal, arguing that Pat could not seek indemnification because spouses could not sue one another, and Mozelle was married to Pat at the time the lawsuit was filed. Id. at 232–33. Pat however responded by referencing Restatement Section 914. Id. at 234.

The Texas Supreme Court acknowledged the “tort of another” exception to the American Rule, stating that “where a plaintiff has been involved in litigation with a third party as a result of the tortious act of another, plaintiff may recover in a separate suit for his reasonable and necessary expenses of the prior litigation” if “certain requisites” are met. Id. at 234. However, the Court noted that the comments to the Restatement explicitly recognized that “this subject does not deal with rights dependent upon special relationships, such as husband and wife.” Id. Moreover, even if the Restatement were applicable to suits between spouses, Pat did not meet the necessary requisites because he was pursuing attorney’s fees in a cross-claim rather than in a separate suit, and sought to recover from the defendant to the present litigation. Id. at 234 (noting that, among the required requisites, “the first . . . is that the present plaintiff . . . must have incurred attorney’s fees in the prosecution or the defense of a prior action,” and “[a]nother, the litigation must have involved a third party and not against the defendant . . . in the present action”). Consequently, the portion of the judgment awarding Pat attorney’s fees was reversed. Id.

Although Turner did not explicitly adopt the “tort of another” exception, the Court’s discussion has caused many intermediate courts to interpret the opinion as an affirmation that a party may recover previously-paid attorney’s fees as actual damages in a separate suit against a third party. See, e.g., Dixon Fin. Servs, 325 S.W.3d at 678 (citing Turner for “tort of another” doctrine); Lesikar v. Rappeport, 33 S.W.3d 282, 306 n.1 major changes in the laws defining the marital relationship since the Turner decision.” Bounds v. Caudle, 560 S.W.2d 925, 927 (Tex. 1977).
(Tex. App.—Texarkana 2000, pet. denied) (citing Turner for “tort of another” doctrine, but also recognizing that “[s]everal courts of appeals have held that the recovery of attorneys’ fees is allowed only when provided for by statute or contract, even where such fees were incurred in other litigation and are sought as actual damages.”). The Texas Supreme Court however, interprets its precedent as leaving the question open. Akin Gump, 299 S.W.3d at 119 (“[W]e need not and do not address whether the exception set out in section 914(2) of the Second Restatement should be adopted as Texas law.”). Intentional or not, the ambiguity in Turner has led to a half-century split among the courts of appeals regarding the “tort of another” exception.5

B. Seven Courts of Appeals Apply the “Tort of Another” Exception.


In Standard Fire, Joy Lenderman Stephenson sued Standard Fire Insurance Company for the company’s bad faith refusal to pay benefits under the Texas Workers’ Compensation Act upon the work-related death of her husband. Id. at 83. A jury returned a verdict in favor of Stephenson, awarding her attorney’s fees for prosecution of the underlying worker’s compensation claim, among other damages. Id. at 90. Standard Fire moved for a JNOV, but the trial court entered judgment on the verdict. Id. On appeal, Standard Fire challenged the verdict, relying on the American Rule that attorney’s fees cannot be recovered in Texas without a statutory or contractual provision. Id.

The Beaumont Court of Appeals acknowledged that its own precedent took conflicting positions, initially applying the American Rule to damages stemming from prior litigation, while subsequently holding that “such fees may be recoverable where the natural and proximate results and consequences of prior wrongful acts have been to involve a plaintiff in litigation with and against third parties and other parties.” Id. The court then held that there was “no reason why Standard Fire should not be responsible for the damages incurred by Mrs. Stephenson as a result of its wrongful act merely because the damage was unnecessarily-incurred attorney’s fees,” describing this as “the better rule.” Id. at 90.

The San Antonio Court of Appeals applied the same rule in the context of a claim for transactional legal malpractice in Estate of Arlitt. 995 S.W.2d at 721. There, Margie Arlitt sued a collection of attorneys and law firms for negligently advising her deceased husband regarding estate planning and negligently drafting his will and codicil. Id. at 716. Arlitt claimed that the attorneys’ negligence led to a six-year will contest suit by one of her children, and she sought to recover the attorney’s fees from the prior suit as damages. Id. The attorneys moved for summary judgment, which the trial court granted upon a finding that—in accordance with the American Rule—Arlitt could not recover attorney’s fees without a statutory basis. Id. at 721. The San Antonio Court of Appeals reversed. Id. Citing the “tort of another” doctrine in Restatement (Second) of Torts section 914, the court held that “contractual or statutory authorization is not necessary to recover attorneys’ fees and costs as damages.” Id.

As these cases indicate, seven of the courts of appeals have applied the “tort of another” exception to permit recovery of previously-paid attorney’s fees in a wide variety of contexts. Dixon Fin. Servs., 325 S.W.3d at 678 (acknowledging availability of “tort of another” exception in context of breach of contract claim); Massey, 35 S.W.3d at 701–02 (holding bank could recover attorney’s fees for defending false grievances and complaints in subsequent action against the individuals who filed such grievances); Lesikar, 33

5 The Corpus Christi Court of Appeals has not addressed the issue. Brannan Paving, 446 S.W.3d at 27 n.5. Similarly, although the Waco Court of Appeals’ opinion in Buck v. Johnson is often cited as a rejection of the doctrine, the court addressed the recovery of attorney’s fees by third-party defendants rather than in a prior action. Compare Buck v. Johnson, 495 S.W.2d 291, 297 (Tex. Civ. App.—Waco 1973, writ ref’d n.r.e.) (addressing the trial court’s erroneous award of attorney’s fees to third-party cross-defendants), with City of Garland, 895 S.W.2d at 771 (citing Buck in support of the rule that “attorneys’ fees expended in prior litigation with third parties are not recoverable as damages”), and Peterson, 805 S.W.2d at 549 (same). Thus, the Waco Court of Appeals has not explicitly rejected the “tort of another” doctrine.
S.W.3d at 306 (attorney’s fees recovered for challenging unlawful assignment before Railroad Commission in subsequent suit against individuals at fault for unlawful assignment); Estate of Arlitt, 995 S.W.2d at 721 (permitting recovery of previously-paid attorney’s fees caused by attorneys’ negligent advice and drafting of will); Standard Fire, 963 S.W.2d at 90 (attorney’s fees paid in worker’s compensation case can be recovered in subsequent case against insurer for bad faith refusal to pay benefits); Baja Energy, 669 S.W.2d at 839 (applying “tort of another” exception to permit recovery of attorney’s fees from well operator by company that plugged the well at issue when contractor was forced to defend a lawsuit based on wrongful plugging of the well). Generally, the courts reason that “[t]here is nothing sacrosanct about attorney’s fees per se that forbids their award as damages.” Nationwide Mut. Ins., 842 S.W.2d at 342. Thus, a case falling within the jurisdiction of the Houston (First), Austin, San Antonio, Texarkana, Amarillo, Beaumont, or Eastland Courts of Appeals may recover previously-paid attorney’s fees for litigation caused by the defendant, where the elements of the exception are met.

C. Five Courts of Appeals Have Not Adopted the “Tort of Another” Exception.

Meanwhile, the Fort Worth, Dallas, El Paso, Tyler, and Houston (Fourteenth) Courts of Appeals have rejected the “tort of another” exception and instead held that, “[i]n Texas, attorneys’ fees expended in prior litigation with third parties are not recoverable as damages; attorneys’ fees are only recoverable when provided for by contract or by agreement between the parties.” Peterson v. Dean Witter Reynolds, Inc., 805 S.W.2d 541, 549 (Tex. App.—Dallas 1991, no writ) (affirming trial court’s refusal to award damages for attorney’s fees incurred while litigating claims with plumbing companies which purchased the defective pipes). Id. at 616. Among its damages, Esco sought recovery of attorney’s fees incurred while litigating claims with plumbing companies which purchased the defective pipes. Id. The trial court denied recovery of these expenses. Id. at 619. Esco appealed, asserting the “tort of another” doctrine. Id.

The El Paso Court of Appeals rejected the doctrine, noting that it had not been adopted in Texas. Id. In fact, the Texas Supreme Court ruled on the issue in 1932, denying recovery of fees incurred in third party litigation and holding:

It is settled law in this state that, unless provided for by statute or by contract between the parties, 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. Counsel fees incurred in prosecuting a suit for or defending against a wrong are not ordinarily recoverable as actual damages. This is in harmony with the general rule in most of the states.

Id. (quoting Wm. Cameron & Co., 55 S.W.2d at 1035). Noting that this “rule has continued to be followed in this State,” the El Paso Court of Appeals affirmed the

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6 The Dallas Court of Appeals now claims that it has not weighed in on the “tort of another” exception. Pyrtle, 433 S.W.3d at 170 n.2. However, the court has issued multiple opinions rejecting the substance of the doctrine. City of Garland, 895 S.W.2d at 771 (“In Texas, attorneys’ fees expended in prior litigation with third parties are not recoverable as damages: attorneys’ fees are only recoverable when provided for by statute or by agreement between the parties.”); Petersen v. Dean Witter Reynolds, Inc. was a clear rejection of the doctrine. 805 S.W.2d 541, 549 (Tex. App.—Dallas 1991, no writ).

7 El Paso has issued conflicting opinions on the “tort of another” issue. Compare Cupples Coiled Pipe, Inc. v. Esco Supply Co., 591 S.W.2d 615, 619 (Tex. Civ. App.—El Paso 1979, writ ref’d n.r.e.) (holding “the Court considered the question of a right to attorney fees as a result of litigation by third parties . . . [and] denied recovery”), with Powell, 463 S.W.2d at 46 (holding that “where the natural and proximate consequence of a wrongful act has been to involve a plaintiff in litigation with others, there may, as a general rule, be a recovery in damages of the reasonable expenses incurred in such prior litigation, against the author of such act, including the compensation for attorney’s fees”). However, the El Paso Court’s opinion in Cupples came after its opinion in Powell and explicitly rejected the exception. Cupples Coiled Pipe, 591 S.W.2d at 619 (noting that Esco relied on a case from a foreign jurisdiction which directly quoted Restatement Section 914).
The five courts of appeals rejecting the “tort of another” doctrine have not limited their rejection of the doctrine to a particular class or category of cases. See, e.g., Edom Corner, 2016 WL 1254017, at *3 (holding that Edom could not recover previously-paid attorney’s fees caused by defendant’s breach of contract); Toka Gen. Contractors, 2014 WL 1390448, at *7 (applying the law prevailing in the Fort Worth Court of Appeals in case transferred by the Supreme Court to affirm trial court’s entry of JNOV denying recovery of attorney’s fees incurred to pursue insurance claims in case against insurance agent); Tex. Elec. Util. Const., 2010 WL 2638066, at *2–3 (denying recovery of attorney’s fees where company’s unauthorized use of equipment caused employee to injure himself and sue equipment owner); Naschke, 187 S.W.3d at 655 (refusing to apply “tort of another” doctrine, and holding that “[b]ecause we are bound to follow the existing laws of the State, we are not at liberty to adopt a theory of recovery that has not been enacted by the Legislature or adopted by the Texas Supreme Court.”); Petersen, 805 S.W.2d at 549 (affirming trial court’s refusal to award damages for attorney’s fees incurred to defend lawsuit stemming from defendant’s failure to deliver warehouse receipt); Dalton Steamship Corp., 354 S.W.2d at 624 (reversing award of attorney’s fees and reaffirming the American Rule where fees were part of a debt owed by a third party and made unrecoverable by defendant’s actions). Thus, attorney’s fees have generally not been permitted as actual damages in these five judicial districts, even where the previously-paid fees were incurred because of the defendant’s actions.

VI. RETHINKING THE GENERAL RULE?

Despite the longstanding American Rule and equitable exception discussed above, the Texas Supreme Court’s recent case law indicates that the legal landscape could be changing. The Texas Supreme Court’s opinions in Akin Gump (2009) and Nalle (2013) could be read to undermine the American Rule’s application to attorney’s fees as damages, and they may pave the way for recovery of previously-paid fees in separate lawsuits. On the other hand, some courts construe Nalle and Akin Gump narrowly, applying the holdings to malpractice claims and claims for unpaid legal fees.

A. Akin Gump and Nalle.

In Akin Gump, the Texas Supreme Court shifted the framework regarding the recovery of attorney’s fees by declaring that the American Rule is entirely inapplicable to litigation seeking previously-paid fees as damages. Compare Akin Gump, 299 S.W.3d at 121 (“The situation before us does not involve the American Rule . . . [because] NDR does not seek to recover attorney’s fees for prosecuting its [present] malpractice suit against Akin Gump”), with Turner, 385 S.W.2d at 234 (evaluating claim for attorney’s fees as damages and referencing section 914 of the Restatement regarding fees incurred in prior actions as an exception to the American Rule); see also Noell v. City of Carrollton, 431 S.W.3d 682, 716 (Tex. App.—Dallas 2014, pet. denied) (opining Akin Gump was intended to correct the “misapplication of the American Rule to bar the recovery of attorney’s fees as actual damages that were incurred in other matters”).

In Akin Gump, the law firm of Akin, Gump, Strauss, Hauer & Feld represented the National Development and Research Corporation (“NDR”) and Robert Tang, NDR’s President, in a declaratory judgment action brought by Panda Global regarding a Letter Agreement between the parties. Akin Gump, 299 S.W.3d at 110. Although a jury returned findings favorable to NDR, the trial court entered judgment against the company. Id. NDR then sued Akin Gump for malpractice, arguing that Akin Gump’s failure to request specific jury findings caused the adverse judgment. Id. A jury returned a verdict against Akin Gump, awarding damages not only for the money NDR lost under its Letter Agreement with Panda Global, but also for the attorney’s fees NDR paid Akin Gump for representation in the Panda Global case. Id.

On appeal, the Texas Supreme Court examined whether NDR could recover its previously-paid attorney’s fees as damages. Id. at 119. NDR urged the court to adopt and apply the “tort of another” exception to permit recovery of NDR’s previously-paid attorney’s fees as damages. Id. at 119. The Court however, found that the “tort of another” doctrine was irrelevant, as the American Rule—to which the “tort of another” doctrine serves as an exception—was inapplicable. Id. at 120–21. The Court criticized the intermediate court of appeals for applying the American Rule too broadly, and emphasized that NDR was seeking damages that simply happened to be previously-paid attorney’s fees—not attorney’s fees to prosecute the malpractice case at hand. Id. The Court held “the general rule as to recovery of attorney’s fees from an adverse party in litigation does not bar a malpractice plaintiff from claiming damages in the malpractice case for fees it paid its attorneys in the underlying suit.” Id. at 119–21. The Texas Supreme Court, however, did not explicitly state that the American Rule should never be applied to any claim seeking previously-paid attorney’s fees as damages.

The Court reaffirmed Akin Gump four years later, applying similar reasoning in Nalle, discussed above. Nalle, 406 S.W.3d 168; see supra, Section 0. In Nalle, the Court considered, as a matter of first impression, whether attorney’s fees must be superseded as an
element of “compensatory damages.” *Id.* at 170–71. Although the Court concluded that “attorney’s fees incurred in the prosecution or defense of a claim are not compensatory damages,” it cautioned that such rule was not absolute. *Id.* at 174–75. Rather, citing *Akin Gump*, the Court recognized that attorney’s fees can be considered compensatory damages when they are an element of damages in the underlying claim. *Id.* at 174–75.

### B. Application of *Akin Gump and Nalle*.

It is unclear if the Texas Supreme Court intended its decisions in *Akin Gump and Nalle* to be interpreted broadly, or even to extend outside the context of malpractice and claims for unpaid fees. The Court used broad language in portions of *Akin Gump*, explaining that the American Rule does not apply when the plaintiff “seeks damages measured by the economic harm it suffered” from the tortious malpractice alleged, and there is no “reason not to consider the . . . attorney’s fees as damages in the malpractice suit.” *Akin Gump*, 299 S.W.3d at 121. If such logic were extended to permit wide-scale recovery of attorney’s fees caused by tortious conduct, the rule would not only encompass the “tort of another” doctrine, but eradicate the need for it entirely. Several courts of appeals have already interpreted *Akin Gump and Nalle* to do just that. At least one other court, however, has limited *Akin Gump* to attorney malpractice cases and claims for unpaid legal bills.

#### 1. Broad interpretation.

In *Noell v. City of Carrollton*, a group of homeowners filed suit against the City of Carrollton’s regulation of a private airport located in the homeowners’ residential community. 431 S.W.3d at 690. The City annexed the airport and passed an ordinance regarding its operation before announcing that the airport was in violation of the new ordinance and was required to close until all violations had been cured. *Id.*

The homeowners sought declaratory and injunctive relief regarding the constitutionality and interpretation of the relevant ordinance. *Id.* The homeowners also prayed for actual damages from the company with record ownership of the airport, the company’s owner Henry Billingsley, and the residential community’s zoning committee for violation of contractual and fiduciary duties due to the closure of the landing strip. *Id.* The case went to trial on the homeowners’ contractual and fiduciary duty claims, and a jury returned a verdict in favor of the homeowners. *Id.* at 715. The jury awarded damages, including the attorney’s fees incurred by the homeowners in proceedings with the City and in abating violations of the ordinance. *Id.* at 715.

On appeal, the Dallas Court of Appeals analyzed whether the award of attorney’s fees as damages was permitted. *Id.* The court noted that its own precedent applied the American Rule to prohibit the recovery of previously-paid attorney’s fees as damages in a subsequent suit. *Id.* at 715–16. However, these decisions occurred prior to *Akin Gump*. *Id.* The court interpreted *Akin Gump* to hold that the American Rule “did not apply in cases where the plaintiff was seeking fees incurred in a previous case that were . . . proven under ordinary causation standards.” *Id.* The court held the rule was not expressly or logically limited to cases involving attorney malpractice and “was not based on the nature of the claim at issue, but on this Court’s misapplication of the American Rule to bar the recovery of attorney’s fees as actual damages that were incurred in other matters.” *Id.* at 716. Consequently, under *Akin Gump*, a plaintiff could recover attorney’s fees incurred in a prior proceeding proximately caused by the defendant’s tortious conduct. *Id.* Thus—interpreting *Akin Gump* as an overruling of the Dallas Court’s precedent and application of the American Rule—the court held that the homeowners’ previously incurred attorney’s fees were recoverable as damages. *Id.* The Dallas Court further solidified this position in December 2016.

In *CBIF v. TGI Friday’s*, the Dallas Court of Appeals affirmed an award of attorney’s fees as compensatory damages. *CBIF Ltd. P’ship v. TGI Friday’s Inc.*, No. 05-15-00157-CV, 2016 WL 7163849, at *14 (Tex. App.—Dallas Dec. 5, 2016, no. pet. h.) (mem. op.). There, Friday’s and CBIF participated in a joint venture to open restaurant establishments in DFW Airport. *Id.* at *2*. Friday’s later filed suit against CBIF for breach of fiduciary duty based on CBIF’s obstruction of the venture’s attempts to renovate and renew its leases for the airport facilities. *Id.* at *5*. The jury returned a verdict for Friday’s, awarding damages including the transactional attorney’s fees Friday’s paid to coordinate the renovation of the Terminal A facility. *Id.* at *14*. CBIF challenged this on appeal, arguing that attorney’s fees paid in prior litigation were not recoverable as damages. *Id.* The Dallas Court of Appeals, however, referenced the “tort of another” exception and held that the award of attorney’s fees as damages was “entirely consistent with the supreme court’s recognition that attorney’s fees unrelated to the ongoing litigation can be recovered as compensatory damages.” *Id.* Thus, the judgment was affirmed as to the previously-paid attorney’s fees. *Id.*

Perhaps the clearest opinion interpreting *Akin Gump and Nalle* came from the Northern District of Texas in its interpretation and summarization of Texas law. In *Vianet Group PLC v. Tap Acquisition, Inc.*, Tap sued Vianet in Dallas County state court, despite a forum selection clause binding the parties to litigate
In contrast to the Dallas Court in Noell v. City of Carrollton, the Tyler Court of Appeals continued to follow the rule that “[a]ttorney’s fees are ordinarily not recoverable as actual damages in and of themselves.” Id. at *2. The court acknowledged both Turner and Akin Gump, but emphasized that neither opinion adopted the “tort of another” exception. Id. at *3. Thus, the Tyler Court of Appeals held that previously-paid attorney’s fees are not recoverable unless and until the Supreme Court explicitly adopts an exception to the rule. Id.; see also Noell, 431 S.W.3d at 716 n.18 (noting “we disagree with the Tyler Court to the extent it relied on the American Rule alone as operating to bar the recovery of attorneys’ fees as damages that were incurred in prior litigation”).

The Tyler Court went even further in Edom Corner, LLC v. It’s the Berry’s LLC. 2016 WL 1254017, at *2. There, It’s the Berry (“ITB”) leased a commercial space from Edom Corner. Id. at *1. The lease led to numerous disputes between the parties, ultimately resulting in two forcible detainer actions, two garnishment actions, two mandamus proceedings, and an injunction. Id. at *1. Finally, ITB filed a breach of contract suit, claiming that Edom Corner was obligated to pay ITB’s reasonable attorney’s fees under the terms of the lease. Id. The trial court granted ITB’s motion for summary judgment and awarded more than $135,000 in attorney’s fees for the prior actions, as well as another $40,000 for prosecution of the current litigation. Id.

On appeal, the Tyler Court of Appeals reversed. Id. at *2. The court reiterated that attorney’s fees are generally not recoverable as actual damages. Id. at *3. Regarding Nalle and Akin Gump, the court distinguished the cases based on their underlying claims of malpractice (Akin Gump) and unpaid legal bills (Nalle). Id. These litigation-related actions represented only a narrow class of claims in which attorney’s fees were recoverable as real damages. Id. The court held:

The circumstances in this case are not within the narrow class of cases authorizing an award of attorney’s fees as actual damages, such as a suit by a law firm to collect unpaid legal bills against its client under their contract. Such a suit, the unpaid fees under the contract are the actual damages suffered by the law firm. Instead, the fees ITB incurred in the prior suits are incident to prosecuting or defending them. To the extent that the trial court awarded those fees under the terms of the lease, Texas law does not authorize a lawsuit like this one maintained solely for the attorney’s fees.

Id. at *3. This interpretation of Nalle and Akin Gump by the Tyler Court of Appeals is in sharp contrast to that of the Dallas Court. Thus, rather than resolving the split
among the courts of appeals regarding the “tort of another” exception, *Akin Gump* and *Nalle* are creating a second split between the intermediate courts.

**C. Prediction.**

In the author’s opinion, it is unlikely that the Texas Supreme Court intended its *Akin Gump* opinion to permit the recovery of previously-paid attorney’s fees as damages in subsequent suits. First, the Court acknowledged that the “tort of another” doctrine was an exception to the American Rule. *Akin Gump*, 299 S.W.3d at 119 (“Because the general [i.e., American] rule does not apply to NDR’s claim, we need not and do not address whether the exception set out in section 914(2) of the Second Restatement should be adopted as Texas law.”). Yet, by definition, the “tort of another” doctrine applies only in suits for previously-paid attorney’s fees pursued as damages in separate litigation. *Restatement (Second) of Torts* § 914(2) (1979) (permitting recovery of the fees “suffered or incurred in the earlier action . . . against a third party”). If *Akin Gump* is read in accordance with the Dallas Court of Appeals’ broad interpretation to eliminate the American Rule when attorney’s fees are sought as damages, the “tort of another” exception would be rendered meaningless.

Furthermore, the reasoning set forth in *Akin Gump* and emphasized in *Noell* could be used to abolish the American Rule altogether. The Texas Supreme Court has explicitly recognized and commented that attorney’s fees are often compensatory in that they are made necessary by the defendant’s conduct, and that a fee award may work to make the plaintiff whole. *Nalle*, 406 S.W.3d at 173 (“While attorney’s fees for the prosecution or defense of a claim may be compensatory in that they help make a claimant whole, they are not, and have never been, damages. Not every amount, even if compensatory, can be considered damages.”). These comments could be applied to allow any successful plaintiff to assert a claim for attorney’s fees as economic damages—whether in the same or a subsequent cause of action. Yet, the American Rule was instituted despite the compensatory nature of attorney’s fees. *Nalle*, 406 S.W.3d at 174–75; *Neese*, 19 S.W. at 141–42. Again, this Rule has controlled not only in Texas, but in the United States at large for more than two centuries. *Alyeska*, 421 U.S. at 271; *Akin Gump*, 299 S.W.3d at 120; *Tony Gullo Motors*, 212 S.W.3d at 310. The Dallas Court’s broad interpretation of *Akin Gump* is thus unlikely to be adopted by the Texas Supreme Court, in the author’s opinion. Rather, the *Akin Gump* decision will probably be confined to a narrow class of litigation-related claims in the malpractice context.

**VII. PROVING UP DAMAGES.**

Where attorney’s fees are available as damages however, the amount must be supported by sufficient evidence. Generally speaking, the evidentiary requirements for establishing the amount of attorney’s fees sought as damages follow the traditional rules applicable to incidental attorney’s fees. *Dixon Fin. Servs.*, 325 S.W.3d at 678 (“To obtain attorney’s fees as actual damages, the plaintiff must also show that the claimed attorney’s fees were reasonable and necessary.”); *Lesikar*, 33 S.W.3d at 306; *Powell*, 463 S.W.2d at 46 (attorney’s fees as damages “must have been incurred necessarily and in good faith, and the amount thereof must be reasonable”). Thus, fees are only recoverable if they are established to be reasonable and necessary. *Lesikar*, 33 S.W.3d at 306–08. Typically, “the issue of reasonableness and necessity of attorneys’ fees requires expert testimony; an attorney testifies as to reasonableness, and the testifying attorney must be designated as an expert before he testifies.” *Lesikar*, 33 S.W.3d at 308.

For example, in *Lesikar v. Rappeport*, H.G. Lewis left his two daughters—Jenny Rappeport and Harriet Lesikar—undivided half-interests in his estate, including in his working interest in an oil and gas lease. 33 S.W.3d at 290. Jenny later learned that Harriet coordinated to have a portion of the interest assigned to Harriet’s husband, Lyn, in exchange for Harriet’s dismissal of overpayment claims rightfully asserted by Lewis’ estate. *Id.* at 291. Jenny filed suit against Harriet and Lyn, recovering $12,000 in compensatory damages for the attorney’s fees she paid to contest the wrongful assignment before the Railroad Commission. *Id.* at 306.

The Texarkana Court of Appeals noted that the award was permitted under the “tort of another” exception to the American Rule, as “the claimant was required to prosecute or defend litigation as a consequence of the wrongful act of the defendant.” *Id.* However, the court questioned the evidence Jenny offered in support of the damage award. *Id.* at 306–07. Jenny provided no witnesses or expert testimony on the reasonableness or necessity of her attorney’s fees, but offered only her invoices as evidence of the relevant amounts. *Id.* at 307. The Texarkana Court noted that Texas courts have yet to “expressly set[t] out a standard for determining reasonableness in cases where attorneys’ fees are sought as damages.” *Id.* at 307. However, the court held that there was no reason “why we should not apply in this case the established rules of law pertaining to the reasonableness of attorneys’ fees . . . simply because the attorneys’ fees here have been awarded as actual damages.” *Id.* For incidental attorney’s fees, “the issue of reasonableness and necessity of attorneys’ fees requires expert testimony.” *Id.* Without such testimony, the evidence was
insufficient to support Jenny’s award of attorney’s fees as damages. Id.

The Texarkana Court’s application of the traditional evidentiary rules regarding the “reasonableness” and “necessity” of attorney’s fees has been adopted and applied by other courts as well. See, e.g., Dixon Fin. Servs., 325 S.W.3d at 678 (reversing award of attorney’s fees as damages because claim fees were documented in an affidavit that did not segregate fees, nor to show that they were reasonable and necessary); Baja Energy, 669 S.W.2d at 840 (remanding for determination of reasonableness of attorney’s fees awarded as damages); Powell, 463 S.W.2d at 46 (attorney’s fees as damages “must have been incurred necessarily and in good faith, and the amount thereof must be reasonable”). But see Pyrtle, 433 S.W.3d at 170 n.2 (holding “courts applying that equitable [tort of another] exception have concluded ‘[t]o obtain attorney’s fees as actual damages, the plaintiff must also show that the claimed attorney’s fees were reasonable and necessary,’” but there is “no authority” to support the position that a plaintiff must establish reasonableness and necessity to recover fees as damages). When proving up attorney’s fees as damages then, the claimant should establish the reasonableness and necessity of such fees via expert testimony, in accordance with the traditional evidentiary rules for proving up attorney’s fees.

VIII. CONCLUSION.

The current legal landscape regarding the recovery of attorney’s fees as compensatory damages is ambiguous and evolving. Although the longstanding American Rule continues to govern, courts of appeals are split regarding the application of the Rule and the equitable “tort of another” doctrine to the recovery of previously-paid legal fees. The Texas Supreme Court has not weighed in on the issue, apart from making sweeping statements about recovery in litigation-related causes of action in attorney-client lawsuits that may or may not extend to the broader legal context. Only time will tell if the Court will adopt the “tort of another” exception, endorse the widespread application of Akin Gump and Nalle to permit recovery of all previously-paid legal fees, or reverse course and return to a hardline enforcement of the American Rule. For now, however, both the Texas Supreme Court and the intermediate courts of appeals have indicated an increasing openness to claims seeking previously-paid fees as compensatory damages.