

PHOTODISTRICT NEWS

VOLUME X ISSUE X

AUGUST, 1990

DALLAS PHOTOG WINS DAMAGES IN HOLE-PUNCHING CASE

by Lisa Levy

In a recent court case in Texas, Dallas photographer Jeff Baker was awarded \$15,000 for damage done to 34 chromes he had taken of the rock band Timbuk 3.

Baker was hired to take the publicity shots by I.R.S., Inc., a record company based in Universal City, California, in early 1988. Since it was a rush job, the record company asked him to send the transparencies directly to the band in Austin. When Baker got the chromes back five months later, he discovered holes had been punched in 34 of the 37 images.

Baker immediately called I.R.S., and sent them a letter of grievance, which reiterated the key points on the standard ASMP invoice form that referred to usage rights, clients liability for lost or damaged work and the reimbursement of \$1,500 for each transparency lost or damaged.

In September Baker received a letter from Paul Farberman, I.R.S.'s vice president of business affairs. While Farberman admitted that the "damage to the transparencies is indeed unfortunate," he also stated that "I.R.S. cannot accept the responsibility for this damage" and went on to say that no employee of I.R.S. had damaged the chromes. "How they got the holes unfortunately has never been determined," says Farberman. Everyone from the band, to the band's management, to I.R.S. employees deny doing it.

Realizing that any sort of reimbursement was unlikely without legal aid, Baker contacted Richard Weisgrau, ASMP's national executive director, to obtain names of attorneys. "Both of the Dallas attorneys I contacted didn't want to touch the case," Baker says, "so I called Houston attorney Dana LeJune, and he jumped on it."

"I took the case because I like to represent photographers in general," explains LeJune. "I thought that Jeff would make a good client and that he had a strong case." The liquidated damages provision in Baker's paperwork basically stated that, if the client pays an invoice, then the client has agreed to the terms and conditions stated on the invoice, including a \$1,500 liability for each lost or damaged transparency.

As a first step in pursuing the matter, LeJune sent a letter to I.R.S. president Jay Boberg in October, 1988, requesting a settlement of \$51,000 (34 chromes at \$1,500 each) to be paid in 30 days to avoid a lawsuit. Payment wasn't made, and LeJune filed suit against I.R.S.

I.R.S. offered a \$2,000 settlement, but Baker did not accept. The case came to trial in Texas State District Court in Dallas in February, 1990.

The three charges brought against I.R.S. were: 1) breach of liquidated damages contractual provision; 2) negligence; and 3) conversion (to willfully exercise control over the personal property of another without owner's consent).

The arguments presented by both LeJune and I.R.S.'s attorney Will Pryor in the four-day trial reveal the subjective nature of the valuation of a photograph and therefore the difficulty of enforcing the liquidated damages clause.

To convince the jury that I.R.S. was guilty of negligence and conversion, LeJune had only to present the evidence—the chromes in question. They had been delivered to I.R.S. undamaged (Timbuk 3's manager had sworn that they were undamaged when he delivered them) and returned to Baker with holes in them.

Another important point was that although LeJune was unable to prove that I.R.S. or its employees had punched the holes, "I.R.S. was unable to show that the holes were punched when they were not in their possession," says LeJune.

But proving the liquidated damages clause enforceable was more complex.

As the valuation of a photograph is abstract at best, the following factors are taken into consideration: technical excellence, the selective eye of the photographer, the established prestige and earning level of the photographer, the uniqueness of the subject matter, established sales and the frequency of acceptance by users.

LeJune was able to convince the jury that Baker was an established photographer with an impressive client and earnings history. But proving each chrome was worth \$1,500 was difficult.

In a trial such as this, which has no precedent in the state of Texas, only facts relating to the current case can be presented. Two expert witnesses, photographers Gary McCoy and Doug Handel, testified on Baker's behalf but they were not permitted to present information on their past experiences with damaged or lost slides as precedent material to the jury. Thus it was difficult to show the actual sales potential of the chromes.

Another problem was the placement of the holes on the chromes: Each of the 34 chromes is a portrait of the two band members of Timbuk 3 and most of the holes were punched in the bottom left corner of the transparency.

LeJune argued that the liquidated damages clause states that each transparency is valued at \$1,500, a fair and reasonable forecast of foreseeable damages at the time of the agreement, and that, as LeJune says, "the agreement doesn't say, 'if you partially damage them' it's any different." In other words, a hole is a hole is a hole.

I.R.S.'s attorney, however, pressed the point that the images "were damaged, but were not rendered commercially useless, as the holes were punched on the border of large chromes." Pryor's main argument was that, if cropped, the images could, theoretically, be used commercially. "I was able to produce proof that they could be used" says Pryor, referring to the reproduction of an image from the 1988 shoot in a Playboy magazine article on Timbuk 3.

"The heart of the issue is that the ordinary lay person can't comprehend why a photograph is intrinsically valuable," says Baker, "and you're trying to convince not only the jury, but the judge of that."

LeJune succeeded in convincing the jury that Baker and I.R.S. had entered into an agreement (which stipulates \$1,500 per transparency value, etc.) but they were only awarded \$15,000 plus

\$5,000 in attorney fees, not the \$51,000 that was sought.

This most likely reflected Pryor's defense that although Baker had indeed suffered damages, it was unlikely that he would ever earn \$51,000 in resales or other future uses of the chromes. Pryor argued that "in this case the amount is disproportionate to Baker's actual or foreseeable damages," and should therefore be considered an unfair penalty.

Another problem was that the images were not perceived as unique—a factor that has played a significant role in past cases in which the full \$1,500 per transparency were awarded. The more difficult it would be to recreate the images, the easier it is for the plaintiff's attorney to convince a court that the chromes are valuable property.

Following Baker's February trial, his attorney filed a judgment requesting that Judge Frank Andrews change the award to the full \$51,000. Judge Andrews agreed, and modified the judgment to \$51,000 plus attorney fees and interest, in April, 1990. But the thrill of this coup didn't last long, as I.R.S. filed a motion for a hearing to either modify the judgment or grant a new trial. The hearing took place June 8, in Dallas.

At that hearing, Pryor claimed that the liquidated damages clause was not enforceable because the amount was disproportionate to actual damages, as he had before, and that the jury's decision of \$15,000 was fair. He also stressed that "the liquidated damages clause can't be enforced in every situation across the board."

Judge Andrews overruled the motion for a new trial, and also dropped the award back down to \$15,000 plus pre-judgment interest. He also decided that Baker wasn't entitled to attorney fees, based on I.R.S.'s defense that proper evidence hadn't been introduced to merit such an award.

"This case shows to what extent a photographer needs to be informed about contract law and the wording of the laws," Baker says. "The fight becomes about the wording of the law."

Since laws vary from state to state "it becomes the Photographer's responsibility to find out what the laws are in his/her state, and which ones are enforceable in their state," Baker explains. "It's our business to educate our clients about what the terms and conditions really mean, and not just assume that they understand...and it takes a watchdog organization like ASMP fighting tooth and nail to help us get even half of what we deserve."

At the time this story went to press, Baker was waiting to hear from ASMP about whether or not they would back an appeal.

PHOTODISTRICT NEWS

VOLUME XI ISSUE VIII

JULY, 1991

BAKER V. IRS RECORDS: DAMAGE CLAUSE UPHELD IN APPEAL VICTORY

by Jeff Wignall

Photographer Jeff Baker of Dallas has emerged the victor in the latest round of his lawsuit against the International Record Syndicate (IRS) over damaged chromes (Case No. 05-90-00914-CV).

The April 15 ruling by Chief Justice C.T. Enoch increased Baker's damage award from \$15,000 to \$51,000, and set a precedent in Texas on the value of a photographer's work. Baker was also awarded about \$5,000 in attorney's fees plus interest, bringing the total award to about \$60,000.

The decision, entered in the Court of Appeals, Fifth District of Texas at Dallas, overturns an earlier judgment in Texas State District Court ("Dallas Photog Wins Damages In Hole-Punching Case," August, 1990).

Unlike the first judge, the appeals court recognized the validity of the liquidated damages clause in Baker's delivery invoice. The clause stated that the value of the 34 chromes of the rock band Timbuk 3 that he delivered to the record company were worth \$1,500 each.

"In view of the inherent difficulty in determining the value of a piece of art," wrote Judge Enoch, "the broad range of values and long-term earning power of photographs, and the unknown potential for fame of the subject, \$1,500 is not an unreasonable estimate of Baker's actual damages."

"I feel vindicated," says Baker of the decision. "The system works if you hammer at it long enough. It's important that people stand up for themselves."

Baker's attorney, Dana LeJune of Houston, calls the win a rarity since less than 5 percent of all appeals result in reversals. He attributes the victory to his presentation of evidence that a photo which sold in 1986 was still producing income for Baker in 1990.

LeJune stresses that Judge Enoch's decision only applies to Texas, where it is the sole appellate judgment addressing the standard liquidated damages clause found in most photographer's invoices. In other states, however, LeJune believes that if judges feel "it's a novel point of law they never encountered before, they'll listen to this decision."

Court Opinion

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812 S.W.2d 53, Baker v. International Record Syndicate, Inc., Tex.App.-Dallas (1991)

*53 15 UCC Rep.Serv.2d 875

Jeff BAKER d/b/a Jeff Baker Photography, Appellant,

INTERNATIONAL RECORD SYNDICATE, INC., Appellee.

No. 05-90-00914-CV. Court of Appeals of Texas, Dallas.

June 4, 1991.

Photographer brought breach of contract action against customer to recover for damage to negatives. The 116th Judicial District Court, Dallas County, Frank Andrews, J., determined that liquidated damages provision was unenforceable and awarded damages based on jury findings. Photographer appealed. The Court of Appeals, Enoch, C.J., held that: (1) liquidated damages clause of contract satisfied requirements that harm caused by breach be difficult of estimation, that amount of liquidated damages be reasonable forecast of just compensation, and that liquidated damages not be disproportionate to actual damages, and (2) there was competent evidence supporting award of attorney fees.

Reversed and rendered.

1. DAMAGES k76 115 ---- 115IV Liquidated Damages and Penalties 115k75 Construction of Stipulations 115k76 In general.

Tex.App.-Dallas 1991. "Liquidated damages" are meant to be the measure of recovery in the event of nonperformance or breach of contract.

See publication Words and Phrases for other judicial constructions and definitions.

2. DAMAGES k83 115 ---- 115IV Liquidated Damages and Penalties 115k83 Questions for jury.

Tex.App.-Dallas 1991. Determination of whether contractual clause is enforceable as a liquidated damages provision or void as a penalty is a question of law.

3. DAMAGES k79(1) 115 ---- 115IV Liquidated Damages and Penalties 115k75 Construction of Stipulations 115k79 Certainty as to Amount of Actual Damage 115k79 (1) In general.

[See headnote text below]

3. DAMAGES k80(1) 115 ---- 115IV Liquidated Damages and Penalties 115k75 Construction

of Stipulations 115k80 Proportion of Sum Stipulated to Actual Debt or Damage 115k80(1) In general.

Tex.App.-Dallas 1991. Liquidated damages will be enforced when court finds that the harm caused by breach is incapable or difficult of estimation and that the amount of liquidated damages is a reasonable forecast of just compensation, and if liquidated damages are not disproportionate to actual damages; if liquidated damages are disproportionate, they can be declared a penalty and recovery limited to actual damages proven. V.T.C.A., Bus. & C. Sec. 2.718(a).

4. DAMAGES k163(3) 115 ---- 115IX Evidence 115k163 Presumptions and Burden of Proof 115k163(3) Liquidated damages and penalties.

[See headnote text below]

4. DAMAGES k184 115 ---- 115IX Evidence 115k183 Weight and Sufficiency 115k184 In general.

Tex.App.-Dallas 1991. Party asserting that liquidated damages clause is, in fact, a penalty provision as burden of proof, and evidence related to difficulty of estimation and reasonable forecast must be viewed at the time the contract was executed.

5. DAMAGES k79(1) 115 ---- 115IV Liquidated Damages and Penalties 115k75 Construction of Stipulations 115k79 Certainty as to Amount of Actual Damage 115k79(1) In general.

Tex.App.-Dallas 1991. Contract clause providing liquidated damages to photographer of \$1,500 per negative for loss of or damage to negatives of photographs taken of musical group satisfied requirements for valid liquidated damages clause that harm caused by breach be incapable or difficult of estimation, in view of evidence of widely varying income from photographs, and that amount of liquidated damages was a reasonable forecast of just compensation, in view of long-term earning power of photographs and unknown potential for fame of the subject.

6. DAMAGES k184 115 ---- 115IX Evidence 115k183 Weight and Sufficiency 115k18 In general.

Tex.App.-Dallas 1991. Evidence showing the value of several of photographer's other projects was not evidence of value of damaged negatives in question, for purposes of showing that contractual liquidated damages provision with respect to loss of or damage to negatives was disproportionate to actual damages.

7. DAMAGES k80(1) 115 ---- 115IV Liquidated Damages and Penalties 115k75 Construction of Stipulations 115k80 Proportion of Sum Stipulated to Actual Debt or Damage 115k80(1) In general.

Tex.App.-Dallas 1991. Even assuming that jury's finding of \$15,000 in actual damages for damage to 34 photographic negatives was accurate assessment, that sum was not so disproportionate to the \$51,000 liquidated damages figure as to abrogate the parties' agreement.

8. JUDGMENT k199(1) 228 ---- 228VI On Trial of Issues 228VI(A) Rendition, Form, and Requisites in General 228k199 Notwithstanding Verdict 228k199(1) In general.

Tex.App.-Dallas 1991. For trial court to disregard jury's findings and enter judgment notwithstanding verdict, it must determine that there was no evidence on which jury could have made its findings, reviewing the evidence in the light most favorable to the jury finding and considering only the evidence and inferences that support the finding, and where there is more than a scintilla of competent evidence to support the finding, judgment notwithstanding the verdict cannot be sustained.

9. COSTS k194.32 102 ---- 102VIII Attorney Fees 102k194.24 Particular Actions or Proceedings 102k194.32 Contracts.

Tex.App.-Dallas 1991. Competent evidence supported \$5,000 award of attorney fees to photographer in breach of contract action against customer for damage to negatives. V.T.C.A., Civil Practice & Remedies Code Sec. 38.001.

*54 Dana Andrew Lejune, Houston, for appellant.

Will Pryor, Dallas, for appellee.

Before ENOCH, C.J., and CHADICK (FN1) and CARVER (FN2), JJ.

OPINION ON MOTION FOR REHEARING

ENOCH, Chief Justice.

The opinion of this court issued April 15, 1991 is withdrawn. This is the opinion of the court. Jeff Baker, d/b/a Jeff Baker Photography (Baker), appeals a judgment rendered in his favor in a breach of contract case. The trial court determined that a liquidated damages provision was unenforceable and awarded damages to Baker based on jury findings. We reverse the trial court's judgment and render judgment for Baker.

International Record Syndicate (IRS) hired Baker to take photographs of the musical group Timbuk-3. Baker mailed thirty-seven "chromes" (negatives) to IRS via the business agent of Timbuk-3. When the chromes were returned to Baker, holes had been punched in thirty-four of them. Baker sued for the damages to these chromes. The trial court submitted the issues of actual damages and attorney's fees to the jury. The jury found \$15,000 in actual damages and \$5000 for attorney's fees. The trial court rendered judgment awarding \$51,000 in actual damages and \$5000 for attorney's fees. The damage award was pursuant to a liquidated damages clause, which set damages at \$1500 per chrome. The trial court later modified the judgment, awarded Baker the \$15,000 actual damages found by the jury, and eliminated the attorney's fee award.

LIQUIDATED DAMAGES

[1][2] The provision printed on Baker's invoice states: "[r]eimbursement for loss *55 or damage shall be determined by a photograph's reasonable value which shall be no less than \$1500 per transparency." A liquidated damages clause is meant to be the measure of recovery in the event of nonperformance or breach of a contract. *Stewart v. Basey*, 150 Tex. 666, 245 S.W.2d 484, 486 (1952). The determination of whether a contractual clause is enforceable as a liquidated damages provision or void as a penalty is a question of law.

Mayfield v. Hicks, 575 S.W.2d 571, 576 (Tex.Civ.App.--Dallas 1978, writ ref'd n.r.e.).

The Uniform Commercial Code provides:

Damages for breach by either party may be liquidated in the agreement but only at an amount which is reasonable in light of the anticipated or actual harm caused by the breach, the difficulties of proof of loss, and the inconvenience or non-feasibility of otherwise obtaining an adequate remedy. A term fixing unreasonably large liquidated damages is void as a penalty.

TEX.BUS. & COM.CODE ANN. Sec. 2.718(a) (Tex.UCC) (Vernon 1968).

[3][4] Under Texas law, a liquidated damages provision will be enforced when the court finds (1) the harm caused by the breach is incapable or difficult of estimation, and (2) the amount of liquidated damages is a reasonable forecast of just compensation. *Advance Tank & Constr. Co. v. City of DeSoto*, 737 F.Supp. 383, 384 (N.D.Tex.1990); *Rio Grande Valley Sugar Growers, Inc. v. Campesi*, 592 S.W.2d 340, 342 n. 2 (Tex.1979). This might be termed the "anticipated harm" test. The party asserting that a liquidated damages clause is, in fact, a penalty provision has the burden of proof. *Commercial Union Ins. Co. v. La Villa School Dist.*, 779 S.W.2d 102, 106 (Tex.App.--Corpus Christi 1989, no writ). Evidence related to the difficulty of estimation and the reasonable forecast must be viewed as of the time the contract was executed. *Mayfield*, 575 S.W.2d at 576.

[5] Baker testified that he had been paid as much as \$14,000 for a photo session, which resulted in twenty-four photographs and that several of these photographs had also been resold. Baker further testified that he had received as little as \$125 for a single photograph. Baker also testified he once sold a photograph for \$500. Subsequently, he sold reproductions of the same photograph three additional times at various prices; the total income from this one photo was \$1500. This particular photo was taken in 1986 and was still producing income in 1990. Baker demonstrated, therefore, that an accurate determination of the damages from the loss of a single photograph is virtually impossible.

Timbuk-3's potential for fame was an important factor in the valuation of the chromes. At the time of the photo session, Timbuk-3's potential was unknown. In view of the inherent difficulty in determining the value of a piece of art, the broad range of values and long-term earning power of photographs, and the unknown potential for fame of the subject, \$1500 is not an unreasonable estimate of Baker's actual damages.

Additionally, liquidated damages must not be disproportionate to actual damages. If the liquidated damages are shown to be disproportionate to the actual damages, then the liquidated damages can be declared a penalty and recovery limited to actual damages proven. *Commercial Union Ins. Co.*, 779 S.W.2d at 107. This might be called the "actual harm" test. The burden of proving this defense is upon the party seeking to invalidate the clause. *Id.* The party asserting this defense is required to prove the amount of the other party's actual damages, if any, to show that the actual loss was not an approximation of the stipulated sum. *Id.* at 106-07; *Johnson Eng'rs, Inc. v. Tri-Water Supply Corp.*, 582 S.W.2d 555, 557 (Tex.Civ.App.--Texarkana 1979, no writ).

[6] While evidence was presented that showed the value of several of Baker's other projects, this was not evidence of the value of the photographs in question. The evidence clearly shows that photographs are unique items with many factors bearing on their actual value. Each of the thirty-four chromes may have had a different value. Proof of this loss is difficult; where damages are real but difficult to prove, injustice will be done the injured party if the court substitutes the requirements of judicial proof for the parties' own informed agreement as to what is a reasonable measure of damages. The evidence offered to prove Baker's actual damages lacks probative

force. IRS failed to establish Baker's actual damages as to these particular photographs.

[7] Even assuming that the jury's findings as to damages are an accurate assessment, we do not agree that that sum is so disproportionate to the stipulated sum so as to abrogate the parties' agreement. Consequently, we conclude that the facts and circumstances of this case require that we reach a decision contrary to the one made by the trial court. We sustain Baker's first point of error and hold that the liquidated damages clause is enforceable.

ATTORNEY'S FEES

[8][9] In his original petition, Baker pleaded a breach of contract and sought attorney's fees pursuant to section 38.001 of the Civil Practice and Remedies Code. At trial, Baker's attorney took the stand and testified that a one-third or 40% contingency fee was reasonable. All testimony on reasonableness and necessity of attorney's fees was un rebutted. The jury awarded Baker \$5000 in attorney's fees. The trial court then rendered judgment setting aside the award of attorney's fees. For a trial court to disregard a jury's findings and enter a judgment notwithstanding the verdict, it must determine that there is no evidence upon which the jury could have made its findings. *Dowling v. NADW Mktg., Inc.*, 631 S.W.2d 726, 728 (Tex.1982); *Collision Center Paint & Body, Inc. v. Campbell*, 773 S.W.2d 354, 356 (Tex.App.--Dallas 1989, no writ).

We review the evidence in the light most favorable to the jury finding, considering only the evidence and inferences that support the finding and rejecting the evidence and inferences contrary to the finding. *Navarette v. Temple Indep. School Dist.*, 706 S.W.2d 308, 309 (Tex.1986); *Collision Center*, 773 S.W.2d at 357. Where there is more than a scintilla of competent evidence to support the jury's finding, then the judgment notwithstanding the verdict should be reversed. *Collision Center*, 773 S.W.2d at 356-57. We sustain Baker's second point of error.

We reverse the judgment of the trial court. We render judgment for Baker in the amount of \$51,000 for actual damages and \$5000 for attorney's fees. TEX.R.APP.P. 80(b)(3).

FN1. The Honorable T.C. Chadick, Justice, Retired, Supreme Court of Texas, sitting by assignment.

FN2. The Honorable Spencer Carver, Justice, Retired, Court of Appeals, Fifth District of Texas at Dallas, sitting by assignment.

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812 S.W.2d 53,

**Baker v. International Record Syndicate, Inc.,
Tex.App.-Dallas (1991)**

*53 15 UCC Rep.Serv.2d 875

Jeff BAKER d/b/a Jeff Baker Photography, Appellant,

**INTERNATIONAL RECORD SYNDICATE, INC.,
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[3][4] Under Texas law, a liquidated damages provision will be enforced when the court finds (1) the harm caused by the breach is incapable or difficult of estimation, and (2) the amount of liquidated damages is a reasonable forecast of just compensation. *Advance Tank & Constr. Co. v. City of DeSoto*, 737 F.Supp. 383, 384 (N.D.Tex.1990); *Rio Grande Valley Sugar Growers, Inc. v. Campesi*, 592 S.W.2d 340, 342 n. 2 (Tex.1979). This might be termed the "anticipated harm" test. The party asserting that a liquidated damages clause is, in fact, a penalty provision has the burden of proof. *Commercial Union Ins. Co. v. La Villa School Dist.*, 779 S.W.2d 102, 106 (Tex.App.--Corpus Christi 1989, no writ). Evidence related to the difficulty of estimation and the reasonable forecast must be viewed as of the time the contract was executed. *Mayfield*, 575 S.W.2d at 576.

[5] Baker testified that he had been paid as much as \$14,000 for a photo session, which resulted in twenty-four photographs and that several of these photographs had also been resold. Baker further testified that he had received as little as \$125 for a single photograph. Baker also testified he once sold a photograph for \$500. Subsequently, he sold reproductions of the same photograph three additional times at various prices; the total income from this one photo was \$1500. This particular photo was taken in 1986 and was still producing income in 1990. Baker demonstrated, therefore, that an accurate determination of the damages from the loss of a single photograph is virtually impossible.

Timbuk-3's potential for fame was an important factor in the valuation of the chromes. At the time of the photo session, Timbuk-3's potential was unknown. In view of the inherent difficulty in determining the value of a piece of art, the broad range of values and long-term earning power of photographs, and the unknown potential for fame of the subject, \$1500 is not an unreasonable estimate of Baker's actual damages.

Additionally, liquidated damages must not be disproportionate to actual damages. If the liquidated damages are shown to be disproportionate to the actual damages, then the liquidated damages can be declared a penalty and recovery limited to actual damages proven. *Commercial Union Ins. Co.*, 779 S.W.2d at 107. This might be called the "actual harm" test. The burden of proving this defense is upon the party seeking to invalidate the clause. *Id.* The party asserting this defense is required to prove the amount of the other party's actual damages, if any, to show that the actual loss was not an approximation of the stipulated sum. *Id.* at 106-07; *Johnson Eng'rs, Inc. v. Tri-Water Supply Corp.*, 582 S.W.2d 555, 557 (Tex.Civ.App.--Texarkana 1979, no writ).

[6] While evidence was presented that showed the value of several of Baker's other projects, this was not evidence of the value of the photographs in question. The evidence clearly shows that photographs are unique items with many factors bearing on their actual value. Each of the thirty-four chromes may have had a different value. Proof of this loss is difficult; where damages are real but difficult to prove, injustice will be done the injured party if the court substitutes the

requirements of judicial proof for the parties' own informed agreement as to what is a reasonable measure of damages. The evidence offered to prove Baker's actual damages lacks probative force. IRS failed to establish Baker's actual damages as to these particular photographs.

[7] Even assuming that the jury's findings as to damages are an accurate assessment, we do not agree that that sum is so disproportionate to the stipulated sum so as to abrogate the parties' agreement. Consequently, we conclude that the facts and circumstances of this case require that we reach a decision contrary to the one made by the trial court. We sustain Baker's first point of error and hold that the liquidated damages clause is enforceable.

ATTORNEY'S FEES

[8][9] In his original petition, Baker pleaded a breach of contract and sought attorney's fees pursuant to section 38.001 of the Civil Practice and Remedies Code. At trial, Baker's attorney took the stand and testified that a one-third or 40% contingency fee was reasonable. All testimony on reasonableness and necessity of attorney's fees was un rebutted. The jury awarded Baker \$5000 in attorney's fees. The trial court then rendered judgment setting aside the award of attorney's fees. For a trial court to disregard a jury's findings and enter a judgment notwithstanding the verdict, it must determine that there is no evidence upon which the jury could have made its findings. *Dowling v. NADW Mktg., Inc.*, 631 S.W.2d 726, 728 (Tex.1982); *Collision Center Paint & Body, Inc. v. Campbell*, 773 S.W.2d 354, 356 (Tex.App.--Dallas 1989, no writ).

We review the evidence in the light most favorable to the jury finding, considering only the evidence and inferences that support the finding and rejecting the evidence and inferences contrary to the finding. *Navarette v. Temple Indep. School Dist.*, 706 S.W.2d 308, 309 (Tex.1986); *Collision Center*, 773 S.W.2d at 357. Where there is more than a scintilla of competent evidence to support the jury's finding, then the judgment notwithstanding the verdict should be reversed. *Collision Center*, 773 S.W.2d at 356-57. We sustain Baker's second point of error.

We reverse the judgment of the trial court. We render judgment for Baker in the amount of \$51,000 for actual damages and \$5000 for attorney's fees. TEX.R.APP.P. 80(b)(3).

FN1. The Honorable T.C. Chadick, Justice, Retired, Supreme Court of Texas, sitting by assignment.

FN2. The Honorable Spencer Carver, Justice, Retired, Court of Appeals, Fifth District of Texas at Dallas, sitting by assignment.