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WHAT TO MAKE OF PROVING AND CHALLENGING NONECONOMIC DAMAGE RECOVERIES AFTER *GREGORY V. CHOHAN*

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WHAT TO MAKE OF PROVING AND CHALLENGING NONECONOMIC DAMAGE RECOVERIES AFTER *GREGORY V. CHOHAN*

I. INTRODUCTION.

Virtually every personal injury and wrongful death case involves elements of noneconomic damages (physical pain, mental anguish, physical impairment, disfigurement, loss of consortium, etc.). While pecuniary damages (such as medical expenses, lost wages, loss of earning capacity, loss of services, funeral expenses, loss of inheritance, etc.) may constitute a portion of the recovery sought by the plaintiff, there is no doubt that noneconomic damages account for significant losses and recovery by plaintiffs in personal injury and wrongful death cases.

Although there have been slight developments over the past 30 years regarding recovery of mental anguish damages, the law in Texas has remained fairly consistent regarding the right to recover such damages in personal injury and wrongful death cases. Nevertheless, appellate review of mental anguish damages has come into sharper focus as such review has become more strict over time.

A recent plurality opinion by the Texas Supreme Court in *Gregory v. Chohan*, 670 S.W.3d 546 (Tex. 2023), has caused many courts and practitioners to wonder where appellate scrutiny of mental anguish damages currently stands and where it will ultimately land. Is the standard the same as it has been, and, if so, does *Gregory* signal the Texas Supreme Court's intent to ultimately create an entirely new standard?

II. *GREGORY V. CHOHAN.*

Only six of the nine justices on the Texas Supreme Court participated in the *Gregory* decision. Justices Lehrmann, Young and Huddle did not participate. Justice Blacklock wrote the plurality opinion joined by Chief Justice Hecht and Justice Busby. Justice Devine authored a concurring opinion joined by Justice Boyd, concurring in the judgment only. Justice Bland also authored a concurring opinion, concurring in the judgment and the opinion in part.

A. Background facts.

Sarah Gregory was driving an eighteen-wheeler on a highway near Amarillo when her tractor trailer jackknifed across lanes of traffic, resulting in a pileup that caused four deaths. *Id.* at 550, 551-52. One of the people killed in the collision was a truck driver with a wife and three children. *Id.* at 550. In the subsequent lawsuit against Gregory and her employer, the jury determined damages to be approximately $16.8 million. *Id.* at 550, 552-53. Included in that amount were noneconomic damages of past and future mental anguish and loss of companionship to six surviving family members that accounted for approximately $15 million. *Id.* at 550, 552-53. Of relevance to this case, in closing argument, one of the plaintiffs' counsel referenced a $71 million F-18 fighter jet and a $186 million Mark Rothko painting, and suggested that the jury consider two cents for each of the three decedents (i.e., six cents) for every one of the 650 million miles the defendant's trucks drove during the year of the collision, which amounted to $39,000,000. *Id.* at 557-58.

B. Issues presented.

In the supreme court, the Petitioner alleged there was no evidence to support the noneconomic damages finding but at the same time challenged the standard for reviewing a jury's noneconomic damages finding. *Id.* at 550, 553. Separately, the Petitioner challenged the trial court's denial of the submission of a responsible third party for consideration by the jury. *Id*. Numerous amici weighed in to encourage the Court to adopt various standards of review or at least clarify the current standards.

C. The Judgment.

The Court's Judgment, based on the majority vote of six Justices, reversed the judgment of the court of appeals and remanded the case to the trial court for a new trial on all remaining issues between the remaining parties. The Justices concurring in the judgment of reversal did so on the ground that the improper jury argument (discussed below) tainted the jury's verdict and on the responsible third-party issue.

D. Non-binding plurality opinion.

Given the unique nature of this decision in which three justices were recused and with fractured opinions in which three justices were in the plurality and three justices concurred, when analyzing this case, it is important to understand which portions of the decision are binding and which are not. Ultimately, only the judgment and a few nuggets were joined by a majority and can be considered binding authority.

"[T]he concurrence of five [justices] shall be necessary to a decision of a case." *See* TEX. CONST. Art. V, section 2A. Texas Supreme Court plurality opinions, in which less than five justices agree, are not binding on the Texas Supreme Court, the courts of appeals, or the trial courts. *In re State Farm Mut. Auto. Ins. Co.*, 629 S.W.3d 866, 872 n.1, 873 (Tex. 2021); *State v. Volkswagen*, 669 S.W.3d 399 (Tex. 2003); *Cincinnati Life Ins. Co. v. Cates*, 927 S.W.2d 623, 626 (Tex. 1996); *University of Tex. Med. Branch v. York*, 871 S.W.2d 175, 176-77 (Tex. 1994) (when "the principles of law have not been agreed upon by a majority of the sitting court, the plurality opinion is not authority for

determination of other cases, either in this Court or lower courts."); *Texas Dept. of Mental Health & Mental Retardation v. Petty*, 848 S.W.2d 680, 689 (Tex. 1992) (Cornyn, J. dissenting) ("And because today's opinion is only that of a plurality, none of these issues are settled. No court, no advocate, and no litigant can justly claim the plurality opinion as precedent for any other case.").

The substance of the various sections of the plurality opinion will be discussed in more detail below. But for those keeping score, Justice Bland joined in all but Parts II.C.2 (concerning ways to support the amount of noneconomic damages with evidence) and II.D (concerning the review of the amount of noneconomic damages found by the jury) of the plurality opinion. Justices Devine and Boyd did not agree with the plurality's analysis of the proposed standard for reviewing mental anguish damages but agreed with the plurality's conclusion that improper jury argument could have influenced the damages award, and they joined in the judgment remanding for a new trial due to the trial court's erroneous exclusion of a responsible third party. Where five or more justices agreed on particular statements of law, such statements are noted below as binding precedent.

E. The plurality's discussion of standards for the recovery of mental anguish damages.

With regard to cases in which mental or emotional injuries are sought in the absence of accompanying physical injury, citing cases from the 1800s, the plurality makes the statement that, historically, "[n]oneconomic damages are the exception, not the norm, in tort law." *Id.* at 553.[1] However, the plurality then acknowledged that, for 124 years, since 1900, even in the absence of a physical injury, in certain circumstances, the law supports the recovery of mental anguish damages "when mental anguish produces some physical manifestation." *Id.* at 553. The plurality further acknowledged that current law has abandoned the "antiquated and inequitable" limitations of the past and currently allows for the recovery of damages beyond pecuniary losses, such as mental anguish and loss of companionship, in wrongful death cases even in the absence of a physical manifestation. *Id.* at 554 (citing *Moore v. Lillebo*, 722 S.W.2d 683, 685-86 (Tex. 1986)).

Citing *Parkway Co. v. Woodruff* and other *non-personal injury cases*, the plurality stated that "[f]or personal injury cases . . . we have . . . held that 'evidence of the nature, duration, and severity of [] mental anguish' is required to establish the existence of mental anguish damages." *Id.* at 554 (citing *Parkway Co. v. Woodruff*, 901 S.W.2d 434, 444 (Tex. 1995) (property damage case); *Serv. Corp. Int'l v. Guerra*, 348 S.W.3d 221, 231 (Tex. 2011) (abuse of corpse case); *Saenz v. Fidelity & Guaranty Ins. Underwriters*, 925 S.W.2d 607 (Tex. 1996) (suit for wrongful inducement to settle worker's compensation claim);[2] *Hancock v. Variyam*, 400 S.W.3d 59 (Tex. 2013) (defamation case)). The plurality reiterated that, based on prior precedent, legally sufficient evidence of the nature, duration, and severity of mental anguish is required to support both the existence and amount of compensable loss. *Gregory*, 670 S.W.3d at 557.

1. The plurality recognizes the inherent lack of precision for noneconomic damages.

Initially, the plurality noted that "[a]ssigning a dollar value to non-financial, emotional injuries such as mental anguish or loss of companionship will never be matter of mathematical precision." *Gregory*, 670 S.W.3d at. 550. Appellate courts may not merely determine whether a verdict is so excessive or unreasonable as to shock the judicial conscience. *Id*. at 550-51. Instead, a court should review the evidence of both the existence of compensable mental anguish and evidence to justify the amount of damages found by the jury. *Id.* at 551. *Gregory* was the first time the Texas Supreme Court attempted to apply these principles to a wrongful death claim. *Id.*

While the plurality noted that the jury has discretion in finding damages, "that discretion is limited." *Id*. "'Juries cannot simply pick a number and put in in the blank.'" *Id.* (citing *Bentley*, 94 S.W.3d at 606). The plurality further noted that the plaintiff in a wrongful death case "should be required to demonstrate a rational connection, grounded in the evidence, between the injuries suffered and the dollar amounts

[1] Without acknowledging the plurality's historical references to case law from the 1800s, Justice Huddle recently noted that "[f]our members of this Court have described noneconomic damages as 'the exception, not the norm, in tort law.'" *Noe v. Velasco*, 690 S.W.3d 1, 10 (Tex. 2024) (quoting the plurality opinion in *Gregory*, 670 S.W.3d at 553). Given the development of the law since the 1800s, not only are noneconomic damages such as physical pain, mental anguish, physical impairment, and disfigurement routinely recovered under tort law, but are also ubiquitous in personal injury and wrongful death cases. *See, e.g. City of Tyler v. Likes*, 962 S.W.2d 489, 495 (Tex. 1997) ("Texas has authorized recovery of mental anguish damages in virtually all personal injury actions.").

[2] Although the plurality characterized *Saenz* as a "personal injury case," *Gregory*, 670 S.W.3d at 555, the Texas Supreme Court in *Saenz* set forth the actual nature of the case, stating "Corina Saenz sued her employer's workers' compensation carrier and its adjuster for wrongfully inducing her to settle her claim and recovered actual damages for future medical costs and mental anguish, and punitive damages." *Saenz v. Fidelity & Guaranty Ins. Underwriters*, 925 S.W.2d 607, 608 (Tex. 1996).

awarded." *Id*. The plurality stated that "[w]hile precision is not required—and surely cannot be achieved when placing a dollar value on the emotional toll of losing a loved one—some rational basis for the size of the judgment is a minimal requirement on which the law must insist." *Id*. The plurality acknowledged that "noneconomic harm transcends quantification entirely." *Id.* at 556. "Nevertheless, existing Texas law authorizes such recoveries, and our justice system must proceed in this realm, as in all others, on the basis of evidence and reason." *Id.* at 556-67.

According to the plurality, the analysis is the same regardless whether the injury results in death: "Nor do we see any valid basis on which to carve out special rules for appellate review of noneconomic damages in wrongful death cases, as opposed to non-death injury cases or defamation cases." *Id*. at 555.

2. Unsubstantiated anchoring.

The plurality acknowledged that, in this case, there was sufficient and ample evidence demonstrating the existence of compensable mental anguish and loss of companionship. *Id*. at 551. But the plurality suggested there was nothing in the record or in the plaintiff's arguments to demonstrate a rational connection between the injuries suffered and the amount awarded. *Id*. The jury arguments regarding the proper amount of damages included references to the price of fighter jets, the value of artwork, and the number of miles driven by the defendant's trucks. *Id*. The plurality characterized these references as "unsubstantiated anchors," which the plurality described as "a tactic whereby attorneys suggest damage amounts by reference to objects or values with no rational connection to the facts of the case." *Id.* at 557. The plurality expressed concern that such arguments did the opposite of rationally connecting the evidence to the amount of damages, but instead encouraged the jury to base its compensatory damage findings on improper considerations that had no connection to rationally compensating the plaintiff. *Id.* at 551.

3. The plurality's proposed standards.

With regard to mental anguish and loss of companionship damages, the plurality recognized that "[w]hile precision is not required—and surely cannot be achieved when placing a dollar value on the emotional toll of losing a loved one—some rational basis for the size of the judgment is a minimal requirement on which the law must insist." *Id.* at 551. The plurality quoted *Bentley*, stating "[n]ot only must there be evidence of the existence of compensable mental anguish, there must also be some evidence to justify the amount awarded . . . There must be evidence that the amount found is fair and reasonable compensation, just as there must be evidence to support any other jury finding." *Id.* at 555 (quoting *Bentley*, 94 S.W.3d at 606 (quoting *Saenz*, 925, S.W.2d at 614)).

The plurality acknowledged that evidence of nature, duration and severity demonstrating the existence of mental anguish damages "will naturally also be relevant to the *amount* awarded." *Id.* at 560. The plurality also suggested that evidence of likely financial consequences of severe emotional disruption in the plaintiff's life or evidence that some amount of money would enable the plaintiff to better deal with grief or restore his emotional health my serve as direct evidence supporting the quantification of an amount of damages. *Id*. Nevertheless, the plurality did not "offer these as examples to suggest that in all cases there must be direct evidence of a quantifiable amount of damages. . . . [T]he requirement that some evidence support the amount of damages for emotional injury is not a requirement of precise quantification or a requirement that a particular type of evidence must always be proffered." *Id*.

The plurality stated that "[t]he required rational basis for the award may come from evidence suggesting a quantifiable amount of damages, such as testimony about the potential financial consequences of severe emotional trauma. Or the rational basis may be revealed by lawyer argument rationally connecting the amount sought—or on appeal, the amount awarded—to the evidence." *Id.* at 561. So a post-hoc rational basis appears permissible, as long as it is tied to some evidence in the record.

The plurality also did not "foreclose the possibility that comparison to other cases may play some role in a plaintiff's efforts to establish that a given amount of noneconomic damages is reasonable and just compensation rationally grounded in the evidence." *Id.* at 561 n.12. Yet, the plurality said "[w]e will not endeavor here to define the permissible uses of verdict comparisons." *Id.* at 561 n.12.

Without providing any concrete standards for demonstrating the rational basis between the evidence and the amount awarded, the plurality simply said "[w]e will not speculate here about all the permissible ways in which parties may demonstrate that a rational connection between the evidence and the amount awarded exists or is lacking." *Id.* at 561. The most instruction the plurality provided was:

> [C]ourts and jurors alike should be told *why* a given amount of damages, or a range of amounts, would be reasonable and just compensation. Mathematical precision is by no means required, but it is not enough for the plaintiff or his attorneys merely to assert, without rational explanation, that a given amount or a given range is reasonable and just. . . . There must be a *reason given* for why the belief is valid, a *reason given*, for why the

> amount sought or obtained is reasonable and just. And it must be a rational reason grounded in the evidence.

Id. at 561. The plurality stated that "we do not place any limits . . . on the reasons by which a plaintiff might justify the amount he seeks or the amount he has been awarded." *Id.* at 562. The plurality reasoned only that "a rational reason, grounded in the evidence, must be given by the plaintiff, whose burden it is to prove the damages." *Id.* at 562.

4. The plurality's conclusion.

In summary, the plurality stated "to survive a legal-sufficiency challenge to an award of noneconomic damages, a wrongful death plaintiff should bear the burden of demonstrating both (1) the existence of compensable mental anguish or loss of companionship and (2) a rational connection, grounded in the evidence, between the injuries suffered and the amount awarded." *Id.* at 562.

Although the plurality concluded that there was sufficient evidence of compensable mental anguish and loss of companionship, the extensive testimony that supported the existence of such damages was "no evidence, standing on its own, of the *amount* of damages incurred on account of that suffering." *Id.* at 563. The plurality stated that "the only arguments provided to justify the amount of damages were impermissible appeals to irrelevant considerations, such as fighter jets and [the defendant's] total miles driven." *Id.* at 563.

The plurality conceded that there was sufficient evidence to satisfy *Parkway's* requirement regarding nature, duration and severity, yet the evidence did not "satisfy *Saenz's* requirement that 'there must also be some evidence to justify the amount awarded.'" *Id.* at 563-64. The plurality concluded that "[b]ecause no rational connection has been proffered between the amount awarded and the evidence of the 'nature, duration, and severity' of the noneconomic damages suffered by [the plaintiffs]—and no such connection is apparent from the record—we must conclude that no evidence supports the amount awarded. The award of noneconomic damages must therefore be reversed." *Id.* at 564. The plurality ultimately remanded the case for a new trial in light of its holding that the exclusion of a responsible third party from consideration by the jury was improper. *Id.* at 565.

In light of remanding the entire case for a new trial on the responsible third party issue (which will require a new trial on both liability and damages), some might question why the plurality ventured into the sufficiency of evidence of noneconomic damages at all (the Court's "no evidence" ruling on the amount of noneconomic damages also resulted in a remand since there was "sufficient evidence" of the existence of *some* damages. *Id*. at 564-65).

F. Concurring Opinions.

1. Justice Devine's concurrence joined by Justice Boyd.

Justice Devine authored a concurring opinion in which Justice Boyd joined. Justice Devine initially noted that:

> The value of life is inherently unquantifiable. Grief, loss, loneliness, longing, pain, and suffering simply have no market value. The injury—the *anguish*—caused by the untimely loss of a loved one defies calculation, quantification, and measurement, but is no less real, no less enduring, and—under Texas law—no less compensable.

Id. at 568. Recognizing, as the plurality did, that the evidence in the case validates the existence of such an injury, Justice Devine questioned "who decides the value of a man's worth to his family?" *Id.* at 568.

Reflecting on the importance of community standards as found by a jury, Justice Devine noted that "[w]e have long entrusted such abstract concepts to the community through its duly empaneled jury representatives . . . and . . . have upheld they jury's determination with just as much respect when the outcome was a zero damages award as when it was a much more significant one." *Id.* at 569. Even acknowledging that some damage awards may occasionally exceed the bounds of reasonable expectation, Justice Devine stated that "we ought to have faith in the jury system." *Id.* at 569. Critical of the plurality's analysis, Justice Devine noted "an intrinsic quandary . . .: What constitutes 'meaningful review' when there is no objectively correct answer? How can anyone measure the unmeasurable?" *Id.* at 569.

Critical of the plurality's proposed standard, Justice Devine stated "while the plurality makes an earnest effort to supply guidance and guardrails, the opinion overreaches and yet still comes up short. In the quest to eliminate the uncertainty of elastic standards that have long balanced jury discretion with judicial oversight, the plurality offers an impossible one." *Id.* at 570. The "plurality conspicuously refuses to say . . . what evidence would *ever* suffice. The best the plurality can offer the bench, the bar, and these litigants is: we'll know it if we see it. But we will never see it." *Id.* at 570.

Justice Devine continued, noting that "[p]ain and anguish are not '*difficult* to monetize' due to the 'impossibility of any *exact* evaluation'; they are *easy* to monetize, but *impossible* to objectively quantify. By ignoring this basic truth, the plurality set up a Sisyphean pursuit that would burden litigants and the legal system

with costly do-over trials." *Id.* at 570. Regarding quantification of noneconomic damages, Justice Devine stated "[t]he reality is that, although pain and anguish are compensable as a matter of law, no one can ever know what one unit [of pain or anguish] is 'worth' in the monetary sense because pain and anguish is wholly nonpecuniary and has no market value." *Id.* at 571.

Justice Devine was critical of the plurality's suggestion that a claimant's financial costs of treating or dealing with pain and anguish might provide some basis for deciding an appropriate amount of compensation noting that "those costs represent economic losses. And although the amount of economic losses could theoretically provide some 'substantiated' anchoring, it certainly will not do so in all cases." *Id.* at 571. "[T]he plurality simply refuses to 'speculate' about the permissible forms of evidence or argument that could support a particular amount in a given case." *Id.* at 571. "At the same time, [the plurality] would require claimants and their counsel to find that evidentiary needle in the haystack. *But there is no needle there*. By definition, nonpecuniary losses inherently have no pecuniary measure." *Id.* at 571.

With deference to the jury system, Justice Devine stated that "I would not, as the plurality does, offer a solution that effectively neutralizes the jury's role by requiring them to rely on evidence a claimant simply cannot present." *Id.* at 574. Justice Devine noted that the plurality opinion "ventures far afield from what is necessary to decide this case and, more problematically, advocates a new evidentiary standard that is not only foreign to our jurisprudence but also incapable of being satisfied." *Id.* at 569.

Justices Devine and Boyd concurred in the judgment remanding for a new trial, but did not join the plurality's opinion. *Id.* at 569. Justices Devine and Boyd only agreed that improper jury argument could have influenced the damages award, and they joined in the judgment remanding for a new trial because the jury charge erroneously excluded a responsible third party. *Id.* at 575.

2. Justice Bland's concurrence.

In her concurring opinion, Justice Bland stated that:

> To resolve the challenge to the mental anguish damages in this case, we neither need to adopt the plurality's standard for determining whether the evidence demonstrates a rational connection to the amount awarded for every case, nor reject such a standard as Justice Devine advocates. We instead should leave further development of the law to a case in which the jury is properly informed about what to consider and, importantly, not told to apply measurements wholly outside the mental anguish evidence presented.

Id. at 576.

Without expressly adopting the "unsubstantiated anchoring" phraseology, Justice Bland was critical of trial counsel's argument to the jury "to employ mental anguish measurements based on standards that depart from the evidence" rendering the verdict legally infirm and which "destroyed any rational connection the verdict has to the mental anguish evidence presented." *Id.* at 577 (citing the references to the number of miles driven by the defendant and the cost of fighter jets and artwork).

Ultimately, Justice Bland concurred in reversing the case determining the jury's mental anguish verdict "was infected by repeated requests to use improper measures to assess mental anguish damages, warranting a new trial." *Id.* at 577.

G. Binding portions of the *Gregory* opinion.

1. Nature, duration, severity.

A majority of the court acknowledged that juries should consider the nature, duration, and severity of a claimant's pain and anguish in wrongful death cases. *Id.* at 554, 560, 571, 572-73, 577; *see also In re Richardson Motorsports, Ltd.*, 690 S.W.3d 42, 50 n.1 (Tex. 2024) (bystander claim; citing *Gregory*). This analysis applies to both the existence of compensable harm and the amount of damages.

2. Unsubstantiated anchoring.

The plurality, supported by a majority of the Court, introduced a new legal term into Texas jurisprudence—"unsubstantiated anchoring." *Gregory*, 670 S.W.3d at 557. The court defined unsubstantiated anchoring as "a tactic whereby attorneys suggest damage amounts by reference to objects or values with no rational connection to the facts of the case." *Id.* at 557. The court pointed to specific examples in *Gregory* in which a plaintiff's counsel, in closing argument, referenced a $71 million F-18 fighter jet, a $186 million Mark Rothko painting, and two cents worth (for each of the three decedents) for every one of the 650 million miles the defendant's trucks drove during the year of the collision. *Id.* at 557-58. The court used these as examples of unsubstantiated anchoring, which are improper means of establishing the required connection between an emotional injury and an amount of damages. *Id.* at 558, 569; *see also Alonzo v. John*, 689 S.W.3d 911, 915 n.1 (Tex. 2024).

Notably, the two cents per mile argument resulted in $39,000,000—very close to the $38,800,000 in total awarded by the jury—and all the justices appeared to deem harmful error caused by this improper argument. As noted above, Justice Bland in her concurrence

suggested that the clear improper jury argument was enough to warrant a remand, and that the Court should wait for future cases to more fully develop standards for reviewing sufficiency of the evidence of noneconomic damages.

3. A responsible third party was improperly excluded.

Irrespective of the analysis of noneconomic damages in this case, a majority of the court held that the trial court had erred by excluding a responsible third party from the jury charge—necessitating a reversal and remand for a new trial. *Gregory*, 670 S.W.3d at 551, 575.

H. Other interesting things to note in the plurality opinion.

1. Charging improper jury argument to a co-party.

The unsubstantiated anchoring arguments the court concluded to be improper were made by a co-party's counsel. *Id.* at 558-59. Counsel for Chohan (the plaintiff on appeal) did not make the unsubstantiated anchoring arguments. *Id.* at 558-59. Nevertheless, the plurality attributed the unsubstantiated anchoring arguments to all parties, whether made by their counsel or not. *Id.* at 558-59.

2. Preserving Error Regarding Closing Argument.

Except for incurable arguments, traditionally, if a party makes improper closing arguments, the other party is required to timely object to the improper argument in order to preserve the issue for appeal. *Living Centers of Tex., Inc. v. Penalver*, 256 S.W.3d 678, 680–81 (Tex. 2008). However, the plurality in *Chohan* stated "[c]ourts have an obligation to prevent improper jury argument and 'will not be required to wait for objections to be made when the rules as to arguments are violated.'" *Id.* at 559 (citing Tex. R. Civ. P. 269(g)). "The trial court should have done so in response to the unsubstantiated anchors suggested by counsel." *Id.* at 559.

3. Ratio of economic and noneconomic damages.

The plurality rejected "any requirement that the ratio between economic and noneconomic damages must be considered." *Id.* at 559. Nevertheless, the plurality suggested that:

> There are certainly circumstances in which some types of economic damages might correlate with noneconomic damages. For example, the family of a decedent who suffers for an extended time in the hospital before passing away might suffer more mental anguish due to the strain of dealing with medical bills and insurance hassles while coping with the death of a loved one.
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> * * *
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> But the possibility that economic and noneconomic damages may correlate or inform one another in certain situations does not mean that they are necessarily connected in all cases or that the ratio between the two is always a useful tool. Like other unsubstantiated anchors, unexamined use of the ratio between economic and noneconomic damages—without case-specific reasons why such analysis is suitable-cannot provide the required rational connection between the injuries suffered and amount awarded.

Id. at 560.

4. Burden shifting to plaintiff/appellee.

The plurality stated that "[a]s with any evidentiary-sufficiency requirement, parties defending an award of damages cannot just assert that the amount justifies itself. Instead, when the record lacks evidence directly supporting the amount found, parties and reviewing courts must explore whether there is any other rational explanation of *how* the evidence supports the finding." *Id.* at 560-61. The plurality then stated that "[i]t is the plaintiff's responsibility, as the party with the burden of proof, to articulate the 'reasonable inference' connecting the size of the verdict and the evidence." *Id.* at 562 n.13.

In his concurrence, Justice Devine noted that the plurality opinion suggests that "rather than requiring the *appealing party* to demonstrate the *absence* of a rational basis for the jury's damages award, the *prevailing party* would (or should) bear the burden on appeal to justify the jury's award." *Id.* at 569 n.2. Justice Devine noted that this would be "an unprecedented change in the law." *Id.* at 569 n.2.

5. Despite being asked to do so, the Court did not address the standard of review for excessiveness.

The Petitioner in *Gregory* as well as most of the amici focused their briefing on asking the Court to articulate standards by which intermediate appellate courts should evaluate *excessiveness* of noneconomic damages, which is a factual insufficiency construct.[3] Of course, the Texas Supreme Court has no jurisdiction over questions of factual sufficiency, but it can direct how lower courts are to evaluate factual sufficiency, including excessiveness. Despite being asked to address

[3] *See* Petitioner's Brief on the Merits at SearchMedia.aspx (txcourts.gov).

it, the *Chohan* opinions provide no guidance on excessiveness or factual insufficiency standards.

I. In light of the plurality's nonbinding analysis, what is the current binding authority regarding the recovery of mental anguish damages?

In addition to the portions of the *Gregory* opinion noted above that received the vote of 5 or more justices, the following bullet points set forth the lead Texas Supreme Court cases related to the recovery of mental anguish damages.

- ***Parkway Co. v. Woodruff*, 901 S.W.2d 434, 444 (Tex. 1995)** (property damage case) – "An award of mental anguish damages will survive a legal sufficiency challenge when the plaintiffs have introduced direct evidence of the nature, duration, and severity of their mental anguish, thus establishing a substantial disruption in the plaintiff's daily routine."
- ***Parkway*, 901 S.W.2d at 445** – "Anger, frustration, or vexation" demonstrate the existence of "mere emotions," which do not rise to the level of compensable mental anguish.
- ***Saenz v. Fidelity & Guaranty Ins. Underwriters*, 925 S.W.2d 607, 614 (Tex. 1996)** (suit for wrongful inducement to settle worker's compensation claim) (quoting *Parkway*, 901 S.W.2d at 444). – "[D]irect evidence of nature, duration, or severity of [plaintiff's] anguish, thus establishing a substantial disruption in the plaintiffs' daily routine' or other evidence of 'a high degree of mental pain and distress' that is 'more than mere worry, anxiety, vexation, embarrassment, or anger."
- ***City of Tyler v. Likes*, 962 S.W.2d 489, 496 (Tex. 1997)** (property damage case) - Mental anguish recoverable if there is (1) intent or malice, (2) serious bodily injury, (3) a special relationship between two parties; (4) injuries of such a shocking and disturbing nature that mental anguish is a highly foreseeable result; (5) wrongful death; (6) actions by bystanders for a close family member's serious injury.
- ***Bentley v. Bunton*, 94 S.W.3d 561, 606 (Tex. 2002)** (defamation case) – "There must be evidence that the amount found is fair and reasonable compensation, just as there must be evidence to support any other jury finding."
- ***Serv. Corp. Int'l v. Guerra*, 348 S.W.3d 221, 231 (Tex. 2011)** (abuse of corpse case) – "Even when an occurrence is of the type for which mental anguish damages are recoverable, [direct] evidence of the nature, duration, and severity of the mental anguish is required."
- ***Hancock v. Variyam*, 400 S.W.3d 59, 68 (Tex. 2013)** (defamation case) – "There must be both evidence of the existence of compensable mental anguish and evidence to justify the amount awarded."

III. CONCLUSION.

While the plurality opinion in *Gregory v. Chohan* is not binding and leaves many questions unanswered, until a majority of the Texas Supreme Court speaks with one voice on these issues, much of Texas law remains the same with regard to the recovery of mental anguish damages. Nevertheless, litigants who do not take the discussions in *Gregory* into consideration when trying their cases proceed at their own peril of their case being the one that is used to clarify the issues raised in *Gregory*.