

**SELECTED TOPICS IN APPEALING
ACTUAL AND PUNITIVE DAMAGES**

JEFF LEVINGER

OMAR KILANY

CARRINGTON, COLEMAN, SLOMAN & BLUMENTHAL, L.L.P.

200 Crescent Court, Suite 1500

Dallas, Texas 75201

214-855-3000

jlevinger@ccsb.com

State Bar of Texas

**17TH ANNUAL ADVANCED CIVIL APPELLATE
PRACTICE COURSE**

September 11-12, 2003

Austin, Texas

CHAPTER 19

JEFFREY S. LEVINGER
CARRINGTON, COLEMAN, SLOMAN & BLUMENTHAL, L.L.P.
200 Crescent Court, Suite 1500
Dallas, Texas 75201
Telephone: (214) 855-3036
Telecopier: (214) 758-3736
jlevinger@ccsb.com

EDUCATION

Dartmouth College (A.B., 1979). Magna cum laude; Phi Beta Kappa.
University of Virginia (J.D., 1982). Editorial Board, Virginia Law Review,
1980-1982; Order of the Coif.

JUDICIAL CLERKSHIP

Law Clerk to the Honorable Patrick E. Higginbotham, United States Court of Appeals for the Fifth Circuit,
1982-1983.

PROFESSIONAL ACTIVITIES AND HONORS

Partner, Carrington, Coleman, Sloman & Blumenthal, L.L.P., Dallas, Texas.
Member, American Law Institute.
Master, Wm. "Mac" Taylor American Inn of Court.
Fellow, Texas Bar Foundation and Dallas Bar Foundation.
Chairman, Civil Appellate Law Advisory Commission for the Texas Board of Legal Specialization.
Member, State Bar of Texas Committee on Pattern Jury Charges (Malpractice, Premises, Products).
Former Director, Dallas Bar Association Appellate Section.
Named by *D Magazine* as one of the "Best Lawyers in Dallas" in appellate law (May 2001 and May 2003).

BOARD CERTIFICATION

Board certified in Civil Appellate Law by the Texas Board of Legal Specialization (1989 - Present).

SELECTED PUBLICATIONS AND PRESENTATIONS

Duty's Not Dead in Texas, Tex. Lawyer (July 13, 1998).
Co-Author, *Fifth Circuit Trial Practice Guide* (1998).
Business Litigation panel discussion, presented at State Bar of Texas Advanced Civil Appellate Practice
Course (October 2002).
FRAP Amendments and TRAPs in the FRAPS, presented at the 13th Annual Conference on State and Federal
Appeals (June 2003).
Pondering Punitives: Issues Arising at Trial and on Appeal, presented at the State Bar of Texas Advanced
Personal Injury Law Court (June, July, August 2003)

TABLE OF CONTENTS

I. CHALLENGES TO ACTUAL DAMAGE AWARDS	1
A. Broad Form Submission – The Supreme Court Extends <i>Casteel</i> to Damage Questions	1
B. Actual Damages in Fraud Cases.....	2
1. <u>Direct Damages</u>	2
2. <u>Indirect Damages</u>	2
C. Recovery of Lost Profits	3
D. Reviewing Both Existence and Amount of Non-Economic Damages	3
E. A Comparative Approach to Reviewing the Factual Sufficiency of Non-Economic Damages.....	5
F. The Fifth Circuit’s Approach to Reviewing Non-Economic Damages	6
II. CHALLENGES TO PUNITIVE DAMAGE AWARDS	7
A. Limits on the Scope of Admissible Evidence – <i>State Farm v. Campbell</i>	7
B. Remittitur or Entry of Judgment of Excessive Punitive Damage Awards	9
C. Assessing Punitive Damages Against a Corporation.....	10
D. Review of Punitive Damage Awards After <i>Moriel</i>	12
E. Effect on Punitive Damage Awards When Actual Damages Are Remitted.....	13
F. Standard of Review for Fraud/Malice Predicate	14
G. Judicial Redistribution of Punitive Damage Awards.....	15
III. HB 4 AND THE NEW TEXAS DAMAGES CAPS	15
A. New Damages Caps in Medical Malpractice Litigation	15
B. Future Damages in Medical Malpractice Litigation.....	16
C. Proportionate Responsibility.....	16
D. Punitive Damages Generally	16
E. Supersedeas Bonds	16
F. Pre and Post-Judgment Interest.....	17

SELECTED TOPICS IN APPEALING ACTUAL AND PUNITIVE DAMAGES

Introduction

Like a bad car wreck, large awards of actual and punitive damages always seem to bring out the usual rubbernecks: critics, scholars, appellate lawyers, and litigants. But the wreck of a large actual or punitive damage award is seldom as bad as it looks. Through the combination of caps, constitutional challenges, and appellate review, courts are generally vigilant in ensuring that both actual and punitive damage awards are justified by the pleadings, proof, and charge, and are reasonable in amount. This paper will examine the variety of common law, statutory, and constitutional issues that frequently arise in obtaining or defeating, upholding or overturning actual and punitive damage awards.

I. CHALLENGES TO ACTUAL DAMAGE AWARDS

A. Broad Form Submission – The Supreme Court Extends *Casteel* to Damage Questions

In the oft-discussed and debated decision of *Crown Life Insurance Co. v. Casteel*, the Texas Supreme Court held that when a single broad form liability question commingles valid and invalid theories of liability (and the appellant lodges a timely and specific objection), the error is considered harmful and a new trial is required if the appellate court cannot determine whether the jury based its verdict on one of the invalid theories. 22 S.W.3d 378, 388 (Tex. 2000). In the wake of this decision, Texas courts debated whether the *Casteel* analysis should be confined to questions of liability or whether it also extended to challenges to broad form *damage* questions. See *Wal-Mart Stores, Inc. v. Redding*, 56 S.W.3d 141, 154-55 (Tex. App. – Houston [14th Dist.] 2001, pet. denied); *Mountain Bison Ranch, Inc. v. Easley Trailer Mfg., Inc.* 42 S.W.3d 149, 157 (Tex. App. – Amarillo 2000, no pet.). The outcome of the debate was important because, under standard broad form practice, it is quite common to submit a damages question that combines a series of damage elements (such as mental anguish, loss of companionship, loss of earning capacity, etc.) for the jury's consideration, and then asks the jury to award a single amount of damages that incorporates all of the elements submitted. See, e.g., STATE BAR OF TEXAS, TEXAS PATTERN JURY CHARGES 8.2, 110.2-.3 (2000).

In *Harris County v. Smith*, 96 S.W.3d 230 (Tex. 2002), the Supreme Court resolved the debate. In that case, Lynn and Erica Smith sued Harris County for injuries they suffered in a collision with a patrol car that was driven by a deputy sheriff. *Id.* at 231. With respect to Mr. Smith, the trial court submitted a broad

form damages question that instructed the jury to award a single damages amount, considering her (a) physical pain and mental anguish, (b) loss of earning capacity, (c) physical impairment, and (d) medical care. *Id.* Similarly, with respect to Mrs. Smith, the jury was instructed to consider her (a) physical pain and mental anguish, (b) physical impairment, and (c) medical care in awarding her a single damage amount. *Id.* at 231-32. Harris County objected to both of these submissions by first asking the trial court to submit each damage element separately; when the court denied this request, the County objected to the inclusion of Mr. Smith's loss of earning capacity and Mrs. Smith's physical impairment on the ground that no evidence supported these elements of damage. *Id.* at 232.

Although the court of appeals agreed that no evidence supported these damage elements, it rejected the County's argument that *Casteel* required a new trial. Instead, the court of appeals concluded that *Casteel* applied only to "key issues" such as liability, and did not extend to damages because a jury was less likely to include an invalid element of damage in its verdict than it was to rely on an invalid theory of liability. *Id.* at 233.

The Supreme Court reversed. As in *Casteel*, the *Harris County* Court similarly held that the trial court's error in combining supported and unsupported elements of damage was harmful because it prevented the appellate court "from determining 'whether the jury based its verdict on an improperly submitted invalid' element of damages." *Id.* at 234 (quoting *Casteel*, 22 S.W.3d at 388; TEX. R. APP. P. 61.1(b)).

In justifying this result, the Court considered and rejected a number of issues raised by Justice O'Neill's dissent. Most significantly, Justice O'Neill argued that the majority opinion would "undoubtedly resurrect the granulated and confusing charges that we long ago abandoned," and that it further "severely undermines the strong preference for broad form submission reflected in [TEX. R. CIV. P. 277's] mandate to the trial courts that they 'shall, whenever feasible, submit the cause upon broad form questions.'" *Harris County*, 96 S.W.3d at 239 (O'Neill, J., dissenting).

The majority responded, however, that its decision will not represent the end of broad-form practice. Focusing on the language in Rule 277 that broad-form should be used "whenever feasible," the Court explained that adherence to broad form practice did not require its blind use when "a specific objection raises substantial concern that a particular theory of liability will infect the proposed broad-form question with error." *Id.* at 236 (citing *Casteel*, 22 S.W.3d at 390). Similarly, simply requesting the jury to record its verdict as to each element of damage when there is doubt as to the legal sufficiency of the evidence would

permit the losing party to both “preserve error without complicating the charge or the jury’s deliberations” and more effectively present the case on appeal. *Id.* Indeed, the Court specifically noted that the Pattern Jury Charges “have long recommended that . . . ‘the use of a separate answer line for each element of damages might avoid the need for a new trial if the appellate court finds that one or more, but not all, of the elements lack legal or evidentiary support.’” *Id.* at 235 (quoting TEXAS PATTERN JURY CHARGES 8.2 cmt. (2000)) (emphasis added).

Both trial and appellate practitioners should be aware of several significant implications of *Casteel* and *Harris County*. With respect to preservation of error, the Court in *Harris County* was clear to explain that “[a] timely objection, plainly informing the court that a specific element of damages should not be included in a broad-form question because there is no evidence to support its submission . . . preserves the error for appellate review.” *Harris County*, 96 S.W.3d at 236. But as Justice O’Neill noted in her dissent, cautious counsel will have to also seriously consider requesting “granulated questions if . . . there is doubt as to the legal sufficiency of the evidence This reasoning would apply equally to any doubts about factual sufficiency, or if a plaintiff wishes to preserve a challenge to a potential zero damage award for a particular damage elements.” *Id.* at 239 (O’Neill, J., dissenting). Under *Harris County*, then, a practitioner who insists on a broad form damages question combining multiple elements in the face of a timely objection assumes the risk of losing an entire damages award if even only one element of that award is rejected on appeal.

Harris County also almost certainly signals a shift in the way damage awards are challenged and considered on appeal. Until this decision, the widely-held and long-standing rule in Texas was that “[t]he only way that an appellant [could] successfully attack on appeal a multi-element damages award [was] to address *all of the elements* and show that the evidence [was] insufficient to support *the entire damages award* considering all the elements.” *Price v. Short*, 931 S.W.2d 677, 688 (Tex. App. – Dallas 1996, no writ) (emphasis added); *see also Goodman v. Page*, 984 S.W.2d 299, 305-306 (Tex. App. – Fort Worth 1998, pet. denied); *Amelia’s Automotive, Inc. v. Rodriguez*, 921 S.W.2d 767, 771 (Tex. App. – San Antonio 1996, no writ); *K Mart Corp. v. Rhyne*, 932 S.W.2d 140, 144, 147 (Tex. App. – Texarkana 1996, no writ); *Greater Houston Transp. Co. v. Zrubeck*, 850 S.W.2d 579, 589 (Tex. App. – Corpus Christi 1993, writ denied). After *Harris County*, however, an appellant who has made a proper objection will need only show that there is no evidence of one element in a general, multi-element

damages award to demonstrate harmful error and successfully attack the award.

B. Actual Damages in Fraud Cases

1. Direct Damages

There exists some continuing debate in Texas regarding the proper measure of direct damages in a fraud case. Traditionally, direct damages are measured by either the out-of-pocket or the benefit-of-the-bargain standard. *See, e.g., Arthur Andersen & Co. v. Perry Equip. Corp.*, 945 S.W.2d 812, 816 (Tex. 1997). Similarly, with respect to fraud cases, the Texas Supreme Court has noted on at least two recent occasions that “Texas recognizes two measure of direct damages for common-law fraud: the out-of-pocket measure and the benefit of the bargain measure.” *Formosa Plastics Corp. USA v. Presidio Eng’rs and Contractors, Inc.*, 960 S.W.2d 41, 49 (Tex. 1998); *see also Latham v. Castillo*, 972 S.W.2d 66, 70 (Tex. 1998) (same).

However, *Formosa Plastics* and *Latham* are notable in at least two respects. First, both opinions’ pronouncement of Texas law are arguably dicta; in neither case was the Supreme Court actually considering the particular question of what constitutes the proper measure of damages in a fraud case. Second, in making this statement regarding fraud damages, the Supreme Court in both of these opinions disregarded a long line of earlier Texas cases expressly rejecting the benefit of the bargain as a recoverable measure of damages in fraud cases. Indeed, in *Sobel v. Jenkins*, 477 S.W.2d 863 (Tex. 1972), *Morriss-Buick v. Pondrom*, 113 S.W.2d 889 (1938), and *George v. Hesse*, 93 S.W. 107 (1906), the Supreme Court repeatedly adopted the out-of-pocket calculation – to the express exclusion of the benefit-of-the-bargain measure – as the proper measure of damages in a fraud case. And while the Court in *Formosa Plastics* acknowledged both *George* and *Hesse*, even citing them for the proper enunciation of the out-of-pocket measure, the Court never overruled these older cases in declaring that the benefit-of-the-bargain is in fact a recoverable measure of damage in fraud cases. At least one commentator has noted this precedential tension and discussed the possibility of raising this issue on appeal. *See Jennifer Bruch Hogan, Appealing Actual and Punitive Damages: A Selected Review*, State Bar of Texas Advanced Civil Appellate Practice Course, September 20-21, 2001.

2. Indirect Damages

In 1983, in one of the early Texas cases to acknowledge the possibility of recovering consequential damages in a fraud case, the Court in *Trehholm v. Ratcliff* stated that “[s]pecial damages may be recovered for losses on improvements to property purchased as a result of misrepresentation.” 646

S.W.2d 927, 933 (Tex. 1983). In 1997, the Court first adopted the Restatement approach to consequential damages in fraud cases, which expressly approves the recovery of damages for lost profits in a fraud case if the fraud is committed in a business transaction. *Arthur Andersen*, 945 S.W.2d 812, 817 (Tex. 1997) (citing RESTATEMENT (SECOND) OF TORTS § 549 (1977)). The Court confirmed this approach in *Formosa Plastics*, when it stated that “[w]hen properly pleaded and proved, consequential damages that are foreseeable and directly traceable to the fraud and result from it might be recoverable.” 960 S.W.2d at 49 n.1 (emphasis added). Several Texas courts have thus permitted recovery of consequential damages in fraud cases; the key, however, lies in the language of *Formosa Plastics* that the damages be “properly pleaded and proved.” See, e.g., *Shell Oil Prods. Co. v. Main Street Ventures, L.L.C.*, 90 S.W.3d 375, 384-85 (Tex. App. – Dallas 2002, pet. dism’d by agr.); *Rivas v. Cantu*, 37 S.W.3d 101, 108 (Tex. App. – Corpus Christi 2000, pet. denied); *Lesikar v. Rappoport*, 33 S.W.3d 282, 305 (Tex. App. – Texarkana 2000, pet. denied).

C. Recovery of Lost Profits

In 1994, the Texas Supreme Court in *Texas Instruments, Inc. v. Teletron Energy Management, Inc.* refocused its analysis of jury awards of lost profits. 877 S.W.2d 276 (Tex. 1994). There, the Court reaffirmed the long-standing rule that lost profits must be “the natural and probable consequences of the act or omission complained of, and their amount [must] shown with sufficient certainty” *Id.* at 279 (quoting *Southwest Battery Corp. v. Owen*, 115 S.W.2d 1097, 1098 (Tex. 1938)). Although the Court acknowledged that “[t]he requirement of ‘reasonable certainty’ in the proof of lost profits is intended to be flexible enough to accommodate the myriad circumstances in which claims for lost profits arise,” the Court emphasized that courts must engage in a stringent, “fact-intensive” inquiry with “clear parameters” into the proof of lost profits. *Id.* at 279-80. The Court then stated what has become the “reasonable certainty” standard of analysis for lost profits:

Profits which are largely speculative, as from an activity dependent on uncertain or changing market conditions, or on chancy business opportunities, or on promotion of untested products or entry into unknown or unviable markets, or on the success of a new and unproven enterprise, cannot be recovered. Factors like these and others which make a business venture risky in prospect preclude recovery of lost profits in retrospect.

Id. at 280. Applying this fact-intensive test in *Teletron*, the Court rejected the jury’s award of lost profits for an innovative, yet unfinished and unproven programmable thermostat. *Id.* at 280-81.

Courts considering lost profits awards since 1994 have applied the *Teletron* analysis with varying detail and scrutiny. A number of courts have followed *Teletron*’s lead and utilized a detailed, critical analysis of the facts and expert testimony supporting lost profits awards. See, e.g., *Szczepanik v. First Southern Trust Co.*, 883 S.W.2d 648, 649-50 (Tex. 1994); *Edmunds v. Sanders*, 2 S.W.3d 697, 705-06 (Tex. App. – El Paso 1999, pet. denied); *Ishin Speed Sport, Inc. v. Rutherford*, 933 S.W.2d 343, 350-51 (Tex. App. – Fort Worth 1996, no writ); *Information Communications Corp. v. Unisys Corp.*, 181 F.3d 629, 633-34 (5th Cir. 1999); *Hiller v. Manufacturers Prod. Research Group*, 59 F.3d 1514, 1520-23 (5th Cir. 1995). This close scrutiny usually – but not always – results in reversal of lost profits awards. In *Rutherford*, for example, the court closely scrutinized both the qualifications of the lost profits expert and substance of his testimony before concluding, based on the totality of the evidence, that the jury’s lost profits award was supportable. 933 S.W.2d at 350-51.

Other courts, however, have utilized decidedly less critical analysis to consider lost profits awards, almost appearing to rubber-stamp the awards if there was some evidence to support them. See, e.g., *The Coca-Cola Co. v. Harmar Bottling Co.*, 2003 WL 21665169 (Tex. App. – Texarkana July 17, 2003, no pet. h.); *Aboud v. Schlichtemeier*, 6 S.W.3d 742, 747-48 (Tex. App. – Corpus Christi 1999, pet. denied); *America’s Favorite Chicken Co. v. Samaras*, 929 S.W.2d 617, 628-29 (Tex. App. – San Antonio 1996, writ denied); *DSC Communications Corp. v. Next Level Communications*, 107 F.3d 322, 329-30 (5th Cir. 1997).

This divergence in approach has led to a somewhat unsettling result: the prospect of successfully preserving or attacking a lost profits award, while governed by the standards enunciated in *Teletron*, will frequently be determined by no more than the effort a particular court chooses to expend in the parsing the sometimes complicated damages proof and campaigning it to the fact-intensive *Teletron* factors.

D. Reviewing Both Existence and Amount of Non-Economic Damages

Until 1996, Texas courts of appeal took an extremely relaxed approach to reviewing jury awards of non-economic damages. Indeed, in considering challenges to mental anguish awards, courts routinely demurred to any meaningful analysis, often simply observing that “translating mental anguish into dollars

is necessarily an arbitrary process. The jury is given no guidelines, for there are no objective standards of measurement.” *State Farm Mut. Auto Ins. Co. v. Zubiarte*, 808 S.W.2d 590, 601 (Tex. App. – El Paso 1991, writ denied); *see also Brown v. Robinson*, 747 S.W.2d 24, 26 (Tex. App. – El Paso 1988, no writ).

In 1996, however, the Texas Supreme Court in *Saenz v. Fidelity & Guaranty Insurance Underwriters*, 925 S.W.2d 607 (Tex. 1996), emphatically rejected this *laissez faire* approach. In *Saenz*, the Court acknowledged that a jury necessarily has some latitude in assessing intangible damages, but also made it clear that this latitude would not wholly insulate the jury’s verdict from appellate review. The Court stated:

While the impossibility of any exact evaluation of mental anguish damages requires that juries be given a measure of discretion in finding damages, that discretion is limited. Juries cannot simply pick a number and put it in the blank. They must find an amount that, in the standard language of the jury charge, “would fairly and reasonably compensate” for the loss.

Id. at 614 (quoting *Parkway Co. v. Woodruff*, 901 S.W.2d 434, 444 (Tex. 1995)).

Saenz was thus an important step in limiting the range and scope of a jury’s discretion in awarding intangible damages. Often overlooked in *Saenz*, however, was the Court’s focus on requiring meaningful appellate review of not only the *existence* of intangible damages, but also of the *amount* awarded by the jury. As the Court stated:

not only must there be evidence of the existence of compensable mental anguish, there must also be 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 614.

Inexplicably, later decisions from some Texas courts of appeal have signaled a return to the *laissez faire* approach to reviewing intangible damages that was rejected in *Saenz*. As one post-*Saenz* court of appeals wrote in summarily affirming a large damage award:

The mental process by which a jury determines the amount of damages is

ordinarily not cognizable by an appellate court. Where the law does not provide a precise legal measure of damages the amount to be awarded is generally within the discretion of the jury. In assessing personal injury damages, the trier of fact has great discretion in fixing the amount of the damage award.

Ponce v. Sandoval, 68 S.W.3d 799, 806 (Tex. App. – Amarillo 2001, no pet.); *see also Krishnan v. Ramirez*, 42 S.W.3d 205, 218 (Tex. App. – Corpus Christi 2001, pet. denied) (“Because personal injury damages are unliquidated and are not capable of certain measurement, the jury has broad discretion in assessing the amount of damages in a personal injury case. We defer to the jury’s discretion in determining awards for such damages.”).

The Supreme Court, however, recently reaffirmed its requirement that there be a meaningful appellate review of the evidence supporting both the existence *and amount* of intangible damages awarded by a jury. In *Bentley v. Bunton*, 94 S.W.3d 561, 576 (Tex. 2002), the Court was asked to review a jury’s award of \$7 million in past mental anguish damages to a state district judge who had been defamed by a local TV talk show host. Relying on the principles articulated in *Saenz*, the plurality re-emphasized that a jury’s award of non-economic damages would not be insulated from appellate review simply by a bare showing that there was legally sufficient evidence of the existence of the intangible damages. Rather, appellate courts must continue the inquiry to “determine whether there is any evidence at all of the amount of damages determined by the jury.” *Id.* at 606. Thus, while the plurality in *Bentley* specifically noted that there was “no doubt” that legally sufficient evidence existed to support the mental anguish award – indeed, the judge had “testified that the ordeal had cost him time, deprived him of sleep, caused him embarrassment in the community in which he had spent almost all of his life, disrupted his family, and distressed his children at school” – the plurality nevertheless held that

all of this is *no evidence that [the judge] suffered mental anguish in the amount of \$7 million*, more than forty times the amount awarded to him for damage to his reputation. The amount is not merely excessive and unreasonable; it is far beyond any figure the evidence can support.

Id. at 607 (emphasis added). On remand, the court of appeals was instructed to reconsider and possibly remit the jury’s award of mental anguish damages. *Id.*

Justice Baker's dissent attacked the plurality for "improperly conduct[ing] a factual sufficiency review of mental anguish damages" -- a review that is beyond the Supreme Court's jurisdiction. *Id.* at 618 (Baker, J., dissenting). In particular, Justice Baker was troubled that the plurality specifically found the evidence to be legally sufficient that the judge suffered mental anguish, yet still proceeded to consider the excessiveness of the damage award when the court of appeals already had concluded that the evidence was factually sufficient to support the \$7 million award. *Id.* at 621-22 (Baker, J., dissenting). Justice Baker further questioned whether it was appropriate to remand the case, when the proper disposition upon finding that there was no evidence of the amount of the award was to reverse and *render*. *Id.* (Baker, J., dissenting).

E. A Comparative Approach to Reviewing the Factual Sufficiency of Non-Economic Damages

As was discussed in Bentley, once a court has determined that there is legally sufficient evidence to support a jury's damage award, the focus then turns to whether there is factually sufficient evidence to support that award, examining all of the evidence in the record to determine whether the amount awarded is (1) supported by evidence so weak or (2) is so against the great weight and preponderance of the evidence so as to be manifestly unjust. *Pope v. Moore*, 711 S.W.2d 622, 624 (Tex. 1986). This factual sufficiency review has led to an emerging debate regarding the appellate courts' use of a relatively controversial tool in evaluating a jury's damage award: comparing awards in comparable cases in determining whether there is *factually sufficient* evidence to support an amount awarded by the jury.

A number of courts have declined to compare damage awards from comparable cases when considering whether an award is excessive. As one court has held, "[i]n determining whether an award of damages by a jury is excessive, we believe each case must stand on its own facts and that the same loss occurring to different individuals obviously differ in effect as to the amount of damages" *Claunch v. Bennett*, 395 S.W.2d 719, 725 (Tex. Civ. App. – Amarillo 1965, no writ); *see also Caterpillar Tractor Co. v. Boyett*, 674 S.W.2d 782, 790 (Tex. App. – Corpus Christi 1984, no writ) ("There is no certain standard by which personal injury damages can be measured, and each case must stand on its own facts and circumstances, and a comparison with other cases on amounts of verdicts are of little or no help."); *Moore's, Inc. v. Garcia*, 604 S.W.2d 261, 266 (Tex. Civ. App. – Corpus Christi 1980, writ ref'd n.r.e.) ("the practice of comparing awards of other cases is unsatisfactory because of the continued erosion of the value of the dollar.").

These decisions rejecting a comparative approach to considering the excessiveness of a jury's damage award are arguably of little precedential value. Most all of them long predate *Saenz*, which specifically disapproved of the cases suggesting that courts should defer entirely to juries' awards of intangible damages. Instead, a number of more recent decisions have begun to employ the comparative approach in their factual sufficiency analysis. For example, in *Lee Lewis Construction, Inc. v. Harrison*, 64 S.W.3d 1, 15-16 (Tex. App. – Amarillo 1999), *aff'd*, 70 S.W.3d 778 (Tex. 2001), the court remitted a \$500,000 mental anguish award to \$100,000 after comparing it to "the verdicts rendered in other cases."

Indeed, as long as a traditional factual sufficiency analysis is also employed, the broader, more insightful comparative approach arguably can aid courts in their task of "conduct[ing] a meaningful evidentiary review" of the amount of a jury's damage awards. Although each case necessarily must be judged on its own facts,

courts have traditionally . . . looked to approved awards in similar cases [because] the comparison of an award with others which have secured the approval of juries and courts tends to reinforce a determination of whether a particular award is reasonable compensation . . . or is to some extent the product of an understandable but improper attempt to award compensation not justified by the evidence or permitted by law.

Landreth v. Reed, 570 S.W.2d 486, 492 (Tex. Civ. App. –Texarkana 1978, no writ); *see also Port Terminal R.R. Ass'n v. Noland*, 288 S.W.2d 276, 282-83 (Tex. Civ. App. – Galveston 1956, writ ref'd n.r.e.) ("[t]he only objective approach to the problem [of evaluating whether a jury award is excessive] is that of comparing the award made with those which have been approved by other courts in comparable litigation."). As other commentators have noted, "[j]uries have no way to compare an award in a given case with other awards in similar cases, but judges do. Without some kind of review, the system will produce radically inconsistent awards for the same kinds of injuries and will be destined to take on more of the aspects of a lottery than it already has." William Powers, Jr. and Jack Ratliff, *Another Look at "No Evidence" and "Insufficient Evidence,"* 69 TEX. L. REV. 515, 564 (1991).

Because the Texas Supreme Court has yet to address this issue, practitioners faced with challenging the factual sufficiency of a sizable non-economic damage award should consider comparing it to damage awards from other cases involving similar facts.

F. The Fifth Circuit's Approach to Reviewing Non-Economic Damages

The U.S. Court of Appeals for the Fifth Circuit has taken this comparative analysis a step further. For many years, the Fifth Circuit often employed a comparative analysis of other, similar cases in connection with its review of damage. *See, e.g., Osburn v. Anchor Laboratories, Inc.*, 825 F.2d 908, 920 (5th Cir. 1987) (explaining that comparable cases provide “rough guidance” to damage review); *Gautreaux v. Insurance Co. of N. Am.*, 811 F.2d 908, 914 (5th Cir. 1987); *In re Air Crash Disaster Near New Orleans II*, 795 F.2d 1230, 1236-37 (5th Cir. 1986); *In re Air Crash Disaster Near New Orleans I*, 767 F.2d 1151, 1156-57 (5th Cir. 1985). Judge Thomas Gee synthesized the analysis perhaps most directly and concisely:

We have stated that comparing damage awards in similar cases is helpful in determining whether a particular award is excessive. On the other hand, we have also observed that we cannot determine excessiveness solely by comparing damage awards and that each case depends on its own facts. Each of our statements is accurate: damage awards in analogous cases provide an objective frame of reference, but they do not control our assessment of individual circumstances. Therefore, when we review a damage award, our first task is to examine damage awards in analogous cases, setting an objective frame of reference for our inquiry. Within this framework, we examine the facts that are unique to each case, asking whether the award is entirely disproportionate to the injury sustained.

Wheat v. United States, 860 F.2d 1256, 1259-60 (5th Cir. 1988) (internal citations omitted).

In *Douglass v. Delta Air Lines*, 897 F.2d 1336 (5th Cir. 1990), however, the Fifth Circuit took this comparative analysis a significant step further. In that case, the Court recognized that in connection with its excessiveness review, the court “compare[s] damages in factually similar cases, and arising within the controlling jurisdiction, in order to construct an objective framework for comparison.” *Id.* at 1339 (citing *Wheat*, 860 F.2d at 1259-60). And while the court stated that these “similar cases provide a helpful framework for general comparison, but do not supply any legal standard,” the *Douglass* court proceeded to create a strict mathematical cap from this analysis. *Douglass*, 897 F.2d at 1334 (citing *Wheat*, 860 F.2d at 1259-60). Under the *Douglass* version of the

“maximum recovery rule,” the court stated that it would automatically reduce any damage award that “exceeds 133% of the highest previous recovery in the state.” *Douglass*, 897 F.2d at 1334 & n.14 (citing *Gutierrez v. Exxon Corp.*, 764 F.2d 399, 403 (5th Cir. 1985) and *Haley v. Pan Am. World Airways, Inc.*, 746 F.2d 311 (5th Cir. 1984)).

The strict “maximum recovery rule” was applied by various Fifth Circuit panels in different ways. Some panels continued to view the comparison to prior cases as “rough guidance” rather than a strict rule. *Marcel v. Placid Oil Co.*, 11 F.3d 563, 568-69 (5th Cir. 1994) (specifically stating that comparisons are appropriate in excessiveness analysis); *see also Randall v. Chevron U.S.A., Inc.*, 13 F.3d 888, 902 (5th Cir. 1994); *Seidman v. American Airlines, Inc.*, 923 F.2d 1134, 1141 (5th Cir. 1991). Other panels have completely eschewed the comparative analysis, considering damage awards strictly on their own facts. *Eiland v. Westinghouse Elec. Corp.*, 58 F.3d 176, 183 (5th Cir. 1995); *Wellborn v. Sears, Roebuck & Co.*, 970 F.2d 1420, 1427-29 (5th Cir. 1992).

More recently, however, the Fifth Circuit has utilized the strict *Douglass*-maximum recovery cap to reduce non-economic damage awards with little additional focus on the facts of the case. *See, e.g., Thomas v. Texas Dep't of Criminal Justice*, 297 F.3d 361, 370-72 (5th Cir. 2002) (reducing damage award in half, adding a 50% multiplier); *Salinas v. O'Neill*, 286 F.3d 827 (5th Cir. 2002) (explaining reasoning behind cap); *Lebron v. United States*, 279 F.3d 321, 328 (5th Cir. 2002) (reducing damages to an amount equal to highest comparable judgment); *Giles v. General Elec. Co.*, 245 F.3d 474, 489 (5th Cir. 2001) (reducing damages award to match award in similar case).

This strict cap has not been without its critics, both in the Fifth Circuit and in Texas state courts. In *Thomas v. Texas Department of Criminal Justice*, Justice Dennis's concurring opinion offered a relatively harsh criticism of the hard “maximum recovery” cap:

This practice is highly suspect and contrary to controlling law in this circuit. Although judgments in comparable cases may provide some frame of reference when reviewing awards for excessiveness, they do not control our assessment of an individual case. The proper focus of our inquiry is whether, based on the facts in the record, the award is entirely disproportionate to the injury sustained, not whether the award is greater or smaller than awards granted by previous juries.

297 F.3d at 373 (Dennis, J., concurring). And in *Atchison, Topeka, & Santa Fe Ry. Co. v. Cruz*, the El Paso court of appeals specifically rejected a request to adopt in Texas an analysis similar to the maximum recovery rule, explaining:

the maximum recovery rule is a damages “cap.” Such limits are best imposed by legislative bodies, not courts. If the Texas Legislature wishes to enact a law that determines the appropriate amount for juries to award for intangible damages, it may certainly do so, but this Court will not act in such a manner.

9 S.W.3d 173, 182-83 (Tex. App. – El Paso 1999), pet. granted, judgment vacated pursuant to settlement, 44 TEX. SUP. CT. J. 196 (2000).

II. CHALLENGES TO PUNITIVE DAMAGE AWARDS

A. Limits on the Scope of Admissible Evidence – *State Farm v. Campbell*

In *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), the Supreme Court concluded for the first time that substantive due process under the Fourteenth Amendment to the United States Constitution can, in certain circumstances, operate to limit a punitive damages award. In *Gore*, the Court considered a \$2 million punitive damage award that was 500 times greater than the actual damages award, and established a three-pronged analysis for determining whether a punitive damages award is constitutionally excessive:

1. the degree of **reprehensibility** of the defendant’s misconduct;
2. the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages awarded (the so-called **ratio** factor); and
3. the difference between the punitive damages awarded by the jury and other **comparable civil or criminal penalties** that could be imposed for similar misconduct.

Id. at 574-85. Applying this analysis, the Court concluded by a 5-4 vote that the \$2 million punitive damages award was “grossly excessive.” *Id.* at 585-86.

This past term, the Court revisited the *Gore* analysis with far more specificity and precision than *Gore* itself. In *State Farm Auto. Ins. Co. v. Campbell*, 538 U.S. ___, 123 S.Ct. 1513 (2003), the Court engaged in an in-depth analysis of the three *Gore* factors in considering the scope of admissible evidence that may be used to prove a defendant’s other wrongs or acts for purposes of a jury’s consideration of

punitive damages. This is of particular importance in Texas, where courts routinely have allowed evidence of a defendant’s other wrongs or acts as part of a punitive damages analysis, *see, e.g., Castro v. Sebesta*, 808 S.W.2d 189, 191 (Tex. App. – Houston [14th Dist.] 1991, no writ), and it is not uncommon for creative practitioners to seek to introduce evidence of a defendant’s general policies, practices, or goals in an effort to elevate the jury’s ire against the defendant.

Campbell was a suit for bad faith and fraud brought by an insured that arose out of State Farm’s refusal first to settle a serious automobile liability claim within policy limits, and later to pay the resulting excess judgment until some time after the Utah Supreme Court had affirmed the jury’s award against the insured. 123 S.Ct. at 1517-18. In the subsequent bad faith case against State Farm, the plaintiffs were allowed to introduce evidence that State Farm’s decision to first make the insured go to trial and then later delay payment of the excess judgment was the result of a broader national scheme to meet corporate fiscal goals by capping payouts on claims companywide. *Id.* at 1518-19. The plaintiffs’ evidence included extensive expert testimony regarding fraudulent practices by State Farm in its nationwide operations. Notably, most of the evidence pertaining to State Farm’s business practices bore no relation to the type of third-party automobile insurance claim underlying the insured’s complaint against State Farm. *Id.* at 1519. Plaintiffs’ counsel, however, convinced the trial court that “there was no limitation on the scope of evidence that could be considered” regarding punitive damages, and as the Court thus observed, “[t]his case . . . was used as a platform to expose, and punish, the perceived deficiencies of State Farm’s operations throughout the country.” *Id.* at 1522. The Utah Supreme Court affirmed an award of \$1 million in compensatory damages and **\$145 million** in punitive damages.

The U.S. Supreme Court considered this award under each of the *Gore* factors. First, in connection with its reprehensibility analysis under the first *Gore* factor, the *Campbell* Court re-emphasized that the elements relevant to this factor are whether (1) the harm caused was physical rather than economic; (2) the conduct evinced an indifference to or reckless disregard of the health or safety of others; (3) the victim was financially vulnerable; (4) the conduct involved repeated actions or was an isolated incident; and (5) the harm was intentional or accidental. *Id.* at 1521.

In considering the evidence that had been presented to the jury in *Campbell*, however, the Court substantially narrowed the scope of evidence that may be considered by the jury in awarding punitive damages. The Court first noted that notions of

federalism and comity dictate that “[a] State cannot punish a defendant for conduct that may have been lawful where it occurred . . . [nor] does a State have a legitimate concern in imposing punitive damages to punish a defendant for unlawful acts committed outside of the State’s jurisdiction.” *Id.* at 1522 (citations omitted). Lawful out-of-state conduct may be probative “when it demonstrates the deliberateness and culpability of the defendant’s action in the State where it is tortious, but that conduct *must have a nexus to the specific harm suffered* by the plaintiff.” *Id.* (emphasis added). Significantly, the Court stated that if this evidence is admitted at all, the jury must be specifically instructed that it may not use evidence of out-of-state conduct to punish a defendant for acts that were lawful in the jurisdiction where they occurred. *Id.* at 1522-23.

The Court further emphasized that a “defendant’s dissimilar acts, independent from the acts upon which liability was premised, may not serve as the basis for punitive damages.” *Id.* at 1523. A defendant should be punished only “for the conduct that harmed the plaintiff, not for being an unsavory individual or business,” and due process does not permit courts in the consideration of a punitive damage award to “adjudicate the merits of other parties’ hypothetical claims against a defendant under the guise of the [*Gore*] reprehensibility analysis.” *Id.* And while the Court did not specify precisely what constituted “similar conduct” for purposes of admissibility, its comment that the “conduct in question replicate the prior transgressions” reveals that the Court will likely demand a rather close similarity. *Id.*

Under the second *Gore* factor, the Court reiterated its reluctance to draw “a bright line ratio which a punitive damages award cannot exceed.” *Id.* at 1524. Nonetheless, the Court proceeded to state that “in practice, few awards exceeding a single digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process.” *Id.* (citing *Gore*, 517 U.S. 582; *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 458 (1993)). Under this general rule, the Court employed something of a sliding scale analysis, explaining that “ratios greater than those we have previously upheld may comport with due process where a particularly egregious act has resulted in only a small amount of economic damages,” while an exceptionally large compensatory damages award may permit only a lower ratio. *Campbell*, 123 S.Ct. at 1524. Of further significance was the Court’s holding that actual damage awards for emotional distress – such as those for “humiliation or indignation aroused by the defendant’s act” – often already contain a punitive component that should be considered in evaluating the excessiveness of a punitive damage award. *Id.*

Finally, under the third *Gore* factor (“the disparity between the punitive damages award and the civil penalties authorized or imposed in comparable cases”) the Court likely further limited the scope of evidence that is properly considered in awarding punitive damages. Although the Court previously had permitted consideration of criminal penalties that could also be imposed for a defendant’s conduct, the *Campbell* Court counseled that

great care must be taken to avoid use of civil process to assess criminal penalties that can be imposed only after the heightened protections of a criminal trial have been observed, including, of course, its higher standards of proof. Punitive damages are not a substitute for the criminal process, and the remote possibility of a criminal sanction does not automatically sustain a punitive damages award.

Id. at 1526.

Campbell clearly signals a stricter approach to the review of evidence supporting punitive damage awards. Indeed, in the wake of the *Campbell* decision, the Court has vacated a number of punitive damage awards and remanded the cases for reconsideration in light of the Court’s new analysis. *See, e.g., Nat’l Union Fire Ins. Co. v. Textron Financial Corp.*, 123 S.Ct. 1783 (2003) (\$1.7 million punitives); *DeKalb Genetics Corp. v. Bayer Cropscience, S.A.*, 123 S.Ct. 1828 (2003) (\$50 million punitives); *San Paolo U.S. Holding Co., Inc. v. Simon*, 123 S.Ct. 1828 (2003) (\$2.5 million punitives).

Practically, *Campbell* will affect in a number of ways the manner in which both trial and appellate practitioners present and appeal punitive damages. First, counsel for defendants may utilize the breadth of the Court’s holding with respect to the proper consideration of corporate defendants’ wealth. In its analysis of the second *Gore* factor, the *Campbell* Court emphasized that a defendant’s wealth cannot serve the purpose of simply prejudicing a jury against a wealthy defendant and will not “justify an otherwise unconstitutional punitive damages award.” *Campbell*, 123 S.Ct. at 1525. Thus, if a party’s other evidence of punitive damages is scant in a particular case, this language may serve as the foundation for an argument that excludes evidence of a defendant’s wealth altogether.

In addition, zealous and creative plaintiffs’ counsel will almost certainly continue to look for and attempt to offer evidence of allegedly harmful companywide policies and “similar conduct.” To the extent this information is as relevant and discoverable

as it was before *Campbell*, its ultimate admissibility will now depend on how narrowly particular courts define “similar conduct” in various cases. Counsel for defendants should – as early as possible in litigation – look to establish and maintain as narrow a definition as possible. If a court does permit consideration of similar conduct, defense counsel may be able to argue that the defendant already has been subject to punitive damages and thus should not have to pay punitive damages for the same conduct more than once. *Cf. Owens-Corning Fiberglas Corp. v. Malone*, 972 S.W.2d 35, 37 (Tex. 1998) (past settlements that included amounts for punitive damages and other paid punitive damages awards were relevant when offered in mitigation of punitive damages). And if evidence of out-of-state or other conduct is admitted, practitioners must be sure to follow *Campbell*’s directive and request limiting instructions specifically curtailing the jury’s consideration of that conduct.

B. Remittitur or Entry of Judgment of Excessive Punitive Damage Awards

Another unresolved issue arising out of the *Gore* – *Campbell* line of cases is whether a constitutionally excessive punitive damage award should be remitted (thereby giving the plaintiff the option of a new trial), or whether the appellate court should simply render judgment for what it deems to be a constitutionally permissible amount. *Campbell* sheds some light on this question, for while the Supreme Court did not actually render judgment in an amount it deemed appropriate (it specifically stated that “[t]he proper calculation of punitive damages under the principles we have discussed should be resolved, in the first instance, by the Utah courts”), the Court did remand the case to the Utah Supreme Court, with a strong suggestion that a one-to-one ratio of punitive to actual damages should be the constitutional maximum in that case. 123 S.Ct. at 1526.

Some federal courts of appeal have taken the route of remittitur. In *F.D.I.C. v. Hamilton*, 122 F.3d 854 (10th Cir. 1997), the district court rendered judgment in favor of the plaintiffs for \$44,000 in actual damages and \$1,200,000 in punitive damages. On appeal, the Tenth Circuit concluded that a punitive damage award with a ratio of 27:1 was constitutionally excessive and gave the option of a remittitur of the punitive damage award to \$264,000 (or six times the amount of actual damages suffered by the plaintiffs). *Id.* at 861-62. Notably, at least one Texas court has taken this approach. See *Lesikar v. Rappeport*, 33 S.W.3d 282, 314 (Tex. App. – Texarkana 2000, pet. denied) (suggesting remittitur of \$1.4 million of constitutionally excessive \$2 million punitive damage award).

The Eleventh Circuit took a slightly different approach in *Johansen v. Combustion Engineering, Inc.*, 170 F.3d 1320 (11th Cir. 1999), holding that when a punitive damages award is reduced because it is constitutionally excessive, the court may simply render judgment in the reduced amount without offering the plaintiff the option of a new trial. In that case, the jury awarded 15 property owners compensatory damages totaling \$47,000 (or just over \$3,300 to each plaintiff) and punitive damages of \$45 million (or \$3 million each), which the district court remitted to \$15 million (and the plaintiffs accepted). After the case was remanded by the United State Supreme Court in light of *Gore*, the district court determined that the Constitution would permit punitive damages of no more than 100 times each property owner’s compensatory damages award, and thus rendered judgment in the aggregate amount of \$4.35 million without giving the property owners an opportunity for a new trial.

In upholding the district court’s rendition of judgment without seeking the plaintiff’s consent or offering them the option of a new trial, the Eleventh Circuit noted that the plaintiff’s consent is “irrelevant if the Constitution requires the reduction.” *Id.* at 1331. And because a court has a “mandatory duty to correct an unconstitutionally excessive verdict so that it conforms to the requirements of the due process clause,” the court concluded that a district court may render judgment for that amount as a matter of law.

From a practical standpoint, the *Johansen* approach appears to make the most sense. Once a punitive damages award is deemed constitutionally excessive in a particular case, something akin to a punitive damages “ceiling” is set in that case. If a plaintiff then accepts a new trial in lieu of remittitur, and the punitive damage award is less than the amount that was suggested by the remittitur, the plaintiff is worse off. On the other hand, if a new trial results in a punitive damage award that is equal to or greater than the original award, then it will likely be deemed unconstitutional on its face and will have to be reduced. Indeed, the only situation in which a plaintiff should even consider rejecting a suggested remittitur is if the jury did not award the plaintiff an adequate amount of compensatory damages in the first case, and a larger compensatory damages award on retrial may in turn support a larger punitive damages award. But under the “sliding scale” language from *Campbell* discussed above, even this result may not necessarily justify a larger punitive damage award. As a result, under these scenarios, a plaintiff achieves little or no benefit from electing a new trial.

C. Assessing Punitive Damages Against a Corporation

A corporation may not be held liable for punitive damages based simply on the existence of an ordinary agent relationship with the wrongdoer. *See Hammerly Oaks, Inc. v. Edwards*, 958 S.W.2d 387, 390-91 (Tex. 1997). Thus, punitive damages cannot rest solely on the theory of respondeat superior:

[P]unitive damages are warranted only when the act is that of the corporation rather than the act of its “ordinary servants or agents.” Thus, a corporation’s liability for punitive damages is placed on very different grounds than respondeat superior.

Id. at 391 (quoting *Fort Worth Elevators Co. v. Russell*, 70 S.W.2d 397, 402 (Tex. 1934)).

Rather than adopt respondeat superior as a basis for imposing punitive damages, Texas follows RESTATEMENT OF TORTS § 909, which is a modified version of what has been called “exceptional liability.” *Hammerly Oaks*, 958 S.W.2d at 390-91. That section provides:

Punitive damages can properly be awarded against a master or other principal because of an act by an agent if, but only if,

- (a) the principal authorized the doing and the manner of the act; or
- (b) the agent was unfit and the principal was reckless in employing him; or
- (c) the agent was employed in a managerial capacity and was acting in the scope of employment; or
- (d) the employer or a manager of the employer ratified or approved the act.

Id. at 391. To recover punitive damages against a corporation for the acts of an agent, the plaintiff must “plead, prove and obtain findings” with respect to the requisite elements. *Hyman Farm Serv., Inc. v. Earth Oil & Gas Co.*, 920 S.W.2d 452, 458 (Tex. App. – Amarillo 1996, no writ).

To determine whether an employee functions in a “managerial capacity,” the Texas Supreme Court has employed the construct of “vice principal.” *Hammerly Oaks*, 958 S.W.2d at 391. A vice principal encompasses four classes of employees: (1) corporate officers; (2) those who have the authority to employ, direct, and discharge other employees; (3) those engaged in the performance of a non-delegable or

absolute duties of the employer; and (4) those to whom the employer has confided the management of the whole or a department or division of its business. *Id.*; *see also Corporate Wings, Inc. v. King*, 767 S.W.2d 485, 488 (Tex. App.—Dallas 1989, no writ).

At least two different situations may arise if a court fails to submit a jury issue regarding the Restatement § 909 factors for imposing punitive damages against a corporation. For example, in *Ramos v. Frito-Lay, Inc.*, 784 S.W.2d 667 (Tex. 1990), the Court considered a situation in which neither side had requested an issue as to managerial capacity, neither side had objected to its omission from the charge, and the trial court had rendered judgment against Frito-Lay for actual and exemplary damages arising from an assault committed by one of Frito-Lay’s district sales manager. On review from the appellate court’s reversal of the exemplary damage award, the plaintiff argued that Frito-Lay had waived its right to complain about the punitive damage award because it had failed to make a specific objection in the trial court to the absence of a question about the employee’s managerial capacity. *Id.* at 668. Frito-Lay, on the other hand, argued that it was the plaintiff’s burden to obtain affirmative jury findings on all elements necessary for an award of exemplary damages and that it had no obligation to object to the plaintiff’s failure to submit issues as to the employee’s managerial capacity. *Id.*

In reversing the appellate court, the Texas Supreme Court recognized that it was the plaintiff’s burden to obtain affirmative answers as to the necessary elements of his cause of action and that a defendant does not have a duty to object when “an entire theory [is] omitted from the charge.” *Id.* Nevertheless, when “issues are omitted which constitute only a part of a complete and independent ground and other issues necessarily referable to that ground are submitted and answered, the omitted elements are deemed found in support of the judgment if no objection is made and they are supported by some evidence.” *Id.*; *see* TEX. R. CIV. P. 279. Here, the issue of whether the employee was employed in a managerial capacity and acting in the scope of his employment constituted an element of the plaintiff’s cause of action; it did not encompass an independent ground of recovery. *Ramos*, 784 S.W.2d at 668. Consequently, an objection by Frito-Lay to the omission of the element of managerial capacity was “necessary to prevent a deemed finding against it.” *Id.* Because Frito-Lay did not object and because there was evidence that the employee committed the assault while in his capacity as a manager, the Court concluded that punitive damages were properly awarded against the employer. *See also Missouri Pac. R.R. Co. v. Lemon*, 861 S.W.2d 501, 520-21 (Tex. App. – Houston [14th Dist.] 1993, writ *dism’d* by *agr.*) (for

purposes of awarding exemplary damages against railroad in wrongful death action arising from train-automobile collision, it was not necessary for the trial court to submit exceptional liability or vice-principal issues because those facts were established as a matter of law); *Mercy Hosp. of Laredo v. Rios*, 776 S.W.2d 626, 635 (Tex. App. – San Antonio 1989, writ denied) (defendant-hospital waived its argument that there was no jury finding that the charge nurses were vice principals for the hospital when it failed to object in accordance with TEX. R. CIV. P. 274).

In contrast to *Ramos*, the court in *Green Tree Financial Corp. v. Garcia*, 988 S.W.2d 776 (Tex. App. – San Antonio 1999, no pet.), considered the situation where a corporate defendant requested a jury issue as to its predicate liability for exemplary damages, but the trial court refused to include it in the charge. Because the appellate court could contemplate scenarios under which the jury properly could have imposed liability but not assessed punitive damages against the corporate defendant, as well as scenarios in which the jury properly might have assessed both liability and punitive damages against the corporate defendant, the court held that the trial court's error in overruling the defendant's objection to the charge required the judgment to be reversed and the case remanded for a new trial. *Id.* at 783-84.

There are other unresolved and interesting issues regarding corporate liability for punitive damages. For example, can one corporation be a vice principal of another corporation? At least one court has suggested that the answer is "yes." See *Pedernales Elec. Coop., Inc. v. Schulz*, 583 S.W.2d 882, 885 (Tex. Civ. App. – Waco 1979, writ ref'd n.r.e.) (power company that owned electric lines was liable for exemplary damages based on the conduct of a governmental entity that it had engaged to engineer, manage, and maintain the electric lines in question). It is an open question whether *Schulz* will support imposing punitive damages against a parent corporation for the malicious or fraudulent conduct of a subsidiary corporation to which it has delegated a department or division of its business.

In the medical malpractice context, at least two courts have held (pre-*Hammerly Oaks*) that charge nurses are vice principals of hospitals and that their conduct may subject a hospital to punitive damages. In *Mercy Hospital of Laredo v. Rios*, 776 S.W.2d 626, 635 (Tex. App. – San Antonio 1989, writ denied), for example, the court recognized that "it is clear that a hospital is responsible for the action of a registered nurse in charge" and that a head nurse may be a vice principal for purposes of awarding punitive damages against a hospital. Likewise, in *Texarkana Memorial Hospital, Inc. v. Firth*, 746 S.W.2d 494, 498 (Tex. App. – Texarkana 1988, no writ), the court observed

that the jury "certainly could have found" that the nurses in charge of the open psychiatric unit were vice principals who could bind the hospital, regardless of their job title designation.

Other issues arise in attempting to impose punitive damages against a defendant because of the criminal act of another. Section 41.005(a) of the Texas Civil Practice and Remedies Code specifically provides that "[i]n an action arising from harm resulting from an assault, theft, or other criminal act, a court may not award exemplary damages against a defendant because of the criminal act of another." TEX. CIV. PRAC. & REM. CODE § 41.005(a). There are four exceptions to this general rule.

First, the exemption does not apply if the criminal act was committed by an employee of the defendant. *Id.* § 41.005(b)(1). In such circumstances, an employer may be liable for punitive damages if one of the four predicates for exceptional liability as set forth in RESTATEMENT § 909 is established. *Id.* § 41.005(c). *Second*, the exemption does not apply if the defendant is criminally responsible as a party to the criminal act under the provisions of Chapter 7 of the Texas Penal Code. *Id.* § 41.005(b)(2). *Third*, the exemption does not apply if the criminal act occurred at a location where, at the time of the criminal act, the defendant was maintaining a "common nuisance" under the provisions of Chapter 125 of the Texas Civil Practice and Remedies Code and had not made reasonable attempts to abate the nuisance. *Id.* § 41.005(b)(3); see also *id.* § 125.001 *et al.* (identifying common nuisances, including places of prostitution or gambling). And *fourth*, the exemption does not apply if the criminal act resulted from the defendant's intentional or knowing violation of a statutory duty under Chapter 92, Subchapter D, of the Texas Property Code, and the criminal act occurred after the statutory deadline for compliance with that duty. *Id.* § 41.005(b)(4).

Healthcare Centers of Texas, Inc. v. Rigby, 97 S.W.3d 610 (Tex. App. – Houston [14th Dist.] 2002, pet. filed), appears to be one of the only cases to interpret section 41.005. In *Rigby*, a female nursing home resident, who was sexually assaulted by a male resident of the nursing home, brought a negligence action against the nursing home. The jury awarded the plaintiff \$5 million in actual damages and \$50 in punitive damages, and the trial court remitted those amounts to \$1 million and \$10 million, respectively. *Id.* at 614.

On appeal, the nursing home argued that section 41.005 barred an award of exemplary damages because the plaintiff's damages were caused by the criminal act of a third party. *Id.* at 617. The court agreed, and in so doing, noted that section 41.005(a) "bans punitive damages for the criminal conduct of another" and it

was “undisputed that the direct cause of [plaintiff’s] harm was the criminal conduct of another.” *Id.* at 618. Thus, even though the jury concluded that the harm to the plaintiff resulted from the “malice” of the nursing home, by and through its “vice principal,” the plaintiff nevertheless was barred from recovering exemplary damages under section 41.005 despite such findings because the plaintiff judicially admitted in her petition that her harm was caused the criminal conduct of another resident. *Id.* at 619-20. As the court concluded, the affirmative finding of malice against the nursing home did *not* supercede the effect of the plaintiff’s judicial admission that her harm was caused when she was assaulted by another resident. *Id.* at 620.

Further, although the plaintiff requested and the trial court submitted a question asking the jury to determine whether the nursing home’s actions constituted the criminal act of injury to an elderly or disabled person under TEX. PEN. CODE § 22.04 – to which the jury answered “yes” – the court noted that the issue was not submitted with the correct definitions and instructions for corporate criminal responsibility. *Id.* at 620. Nevertheless, the court’s interpretation of section 41.005 rendered this defect moot because it concluded that “the legislature did not provide an exception to exemption from punitive damages when a defendant commits a criminal act but is not responsible as a party.” *Id.* at 620. The court therefore held that section 41.005 barred the plaintiff’s recovery of punitive damages notwithstanding the jury’s affirmative answers to the questions on malice, vice principal, and concurrent criminal act. *Id.*

In a concurring opinion, Justice Fowler noted that although one of the jury questions asked the jury to assess damages based on the nursing home’s criminal act, that act “has no significance by itself.” *Id.* at 629 (Fowler, J., concurring). Rather, under her view, the nursing home’s act could be viewed “only in the context of what it failed to prevent” – *i.e.*, a resident’s rape of a fellow nursing home resident. *Id.* Consequently, Justice Fowler concluded that “the two acts are so intertwined that one cannot be considered without the other,” and in such a case, “the jury’s award had to be based, at least in part, on the criminal act of another,” which is precisely what the section 41.005(a) punitive damage bar covers. *Id.*

D. Review of Punitive Damage Awards After *Moriel*

Moriel did not change the legal or factual sufficiency standards for reviewing punitive damage awards. *See Transportation Ins. Co. v. Moriel*, 879 S.W.2d 10 (Tex. 1994). But to ensure that the Texas system complies with procedural due process, *Moriel* did increase the court of appeals’ obligations in the review process.

When an award of punitive damages is challenged on factual insufficiency grounds, the court of appeals, whether affirming, reversing, or remitting, must detail all of the evidence and explain why it either does or does not support the award in light of the *Kraus* factors: (1) the nature of the wrong; (2) the character of conduct involved; (3) the degree of culpability of the wrongdoer; (4) the situation and sensibilities of the parties; and (5) the extent to which the conduct offends a public sense of justice and propriety. *See Ellis County State Bank v. Keever*, 915 S.W.2d 478, 479 (Tex. 1995); *Alamo Nat’l Bank v. Kraus*, 616 S.W.2d 908, 910 (Tex. 1981).

Post-*Moriel*, are courts of appeals really conducting this rigorous review of punitive damage awards? The level of scrutiny seems to vary from one court of appeals to another, and sometimes appears to turn mainly on the amount awarded.

At the extreme end of the spectrum – representing a rigorous review – is *Mobil Oil Corp. v. Ellender*, 934 S.W.2d 439 (Tex. App. Beaumont – 1996), *aff’d in part and rev’d in part*, 968 S.W.2d 917 (Tex. 1998). There, the court reviewed a jury award of \$6 million in punitive damages, which was reduced under the cap by approximately \$2.5 million. Although the Beaumont Court of Appeals was critical of *Moriel*, it nevertheless engaged in a “detailed analysis of the evidence, microscopically viewed through application of the *Kraus* factors.” *Id.* at 445. Indeed, the court reviewed the same evidence at least three times -- *first*, to determine whether that evidence supported the jury’s affirmative finding of gross negligence; *second*, to determine whether the award of exemplary damages was reasonable in light of the *Kraus* factors; and *third*, to explain “why” such evidence either supported or did not support the punitive damage award. *See id.* at 456-57; *see also id.* at 445-63. On review, the Texas Supreme Court concluded that, despite the appellate court’s “occasional misleading language,” its factual sufficiency review had complied with the *Kraus*, *Moriel*, and *Keever* requirements by painstakingly detailing *all* relevant evidence in its exhaustive review of the jury’s gross negligence finding. *Ellender*, 968 S.W.2d at 925-26.

The Dallas Court of Appeals likewise engaged in an extensive review of each of the *Kraus* factors in *Ellis County State Bank v. Keever*, 936 S.W.2d 683 (Tex. App.--Dallas 1996, no writ). Indeed, although the court noted that the *Kraus* factors are “not well defined in Texas law,” “often overlap,” and “do not always apply to every award of punitive damages,” it nevertheless reviewed the evidence separately with respect to each of those factors. *Id.* at 686-90; *see also Baribeau v. Gustafson*, ___ S.W.3d ___, 2003 WL 1090587, at *6-7 (Tex. App. – San Antonio Mar. 12, 2003, no pet. h.).

On the other end of the spectrum, some courts largely rely upon their discussion of the evidence showing gross negligence to hold that the evidence is also sufficient under the *Kraus* factors. See, e.g., *Convalescent Servs., Inc. v. Schultz*, 921 S.W.2d 731, 740 (Tex. App. – Houston [14th Dist.] 1996, writ denied); *I-Gotcha, Inc. v. McInnis*, 903 S.W.2d 829, 841-45 (Tex. App. – Fort Worth 1995, writ denied).

E. Effect on Punitive Damage Awards When Actual Damages Are Remitted

In *Southwestern Investment Co. v. Neeley*, 452 S.W.2d 705, 708 (Tex. 1970), the Texas Supreme Court held that when a substantial portion of actual damages is remitted, the court is obligated to “give consideration to the ratio between exemplary and actual damages as established by the jury in passing on the further question of excessiveness of exemplary damages.” This ratio, however, is not controlling and represents only one factor to consider. *Id.*

Subsequently, in *Tatum v. Preston Carter Co.*, 702 S.W.2d 186 (Tex. 1986), the Court addressed a case where the court of appeals had reduced actual damages by 75.66%, and then had remitted the punitive damages by the very same percentage. In reversing the judgment and remanding the case to the appellate court, the Court held:

The reasonable proportion rule does not, standing alone, serve to fix a particular ratio. Its function is served by consideration of the [*Kraus*] factors in determining what proportion is reasonable. . . . [P]roportional reduction of exemplary damages, in the exact ratio (75.66%) as the proportional reduction in actual damages, was error.

Id. at 188.

On remand, the Dallas Court of Appeals expressed confusion about the Texas Supreme Court’s opinion, noting that the Supreme Court had neither questioned nor overruled *Southwestern Investment*. See *Preston Carter Co. v. Tatum*, 708 S.W.2d 23, 24 (Tex. App.–Dallas 1986, writ ref’d n.r.e.). Although the Texas Supreme Court cited the *Kraus* factors, which generally deal with the reasonableness of a punitive damages award, “the [*Kraus*] opinion reaffirms the rule that exemplary damages must be reasonably proportional to actual damages and cites *Southwestern Investment* as authority for this rule.” *Id.* After concluding that it still had to consider the proportionate reduction rule as one factor, the court of appeals discussed the *Kraus* factors, and then reduced the punitive damages by 75%. *Id.* at 25.

Based on the court of appeals’ interpretation, one can argue that *Tatum* precludes an automatic reduction

of the amount of punitive damages by the precise percentage that actual damages are reduced, but still retains the proportionate reduction rule as a dominant factor to consider.

The remaining case law is likewise inconclusive. In *Fort Worth Cab & Baggage Co. v. Salinas*, 735 S.W.2d 303, 306 (Tex. App. – Fort Worth 1987, no writ), for example, the court rejected the argument that exemplary damages should be reduced in proportion to a remittitur of actual damages, holding instead that the *Kraus* factors formed the only test.

In contrast, another court of appeals recognized the applicability of the proportionate reduction rule, but interpreted the rule in a way that makes it very difficult to obtain a proportionate reduction of punitive damages. See *Haynes & Boone v. Bowser Bouldin, Ltd.*, 864 S.W.2d 662, 675 (Tex. App. – San Antonio 1993), *rev’d*, 896 S.W.2d 179 (Tex. 1995). After rendering a take-nothing judgment with respect to a substantial portion of actual damages, the San Antonio Court of Appeals recognized that it was under an obligation to consider the ratio between exemplary and actual damages found by the jury. *Id.* The court nonetheless affirmed the punitive damages award, holding that there was no indication the jury intended a one-to-one ratio of punitives and actual damages, and that the overall ratio was reasonable under the *Kraus* factors even after the reduction of actual damages. *Id.* By requiring evidence that the jury intended a particular ratio, the court in effect adopted a presumption against the proportionate reduction of punitives damages, because it will be difficult to affirmatively show that the jury attached significance to a particular ratio.

On review, the Texas Supreme Court reversed on the ground that the elimination of almost all the actual damages required reconsideration of the amount of punitive damages. The Court, however, provided little clarification of the appropriateness of the court of appeals’ approach:

Because nearly all of the actual damages have been reversed on appeal, we remand to the court of appeals for reconsideration of the punitive damage award in light of this opinion and [*Kraus*]. Consequently, we do not reach the issue of whether the court of appeals performed a proper factual sufficiency review regarding the award of punitive damages.

Haynes & Boone, 896 S.W.2d 179, 193 (Tex. 1995).

The upshot of these decisions is that the original ratio of actual to punitive damages is a strong factor, but not dispositive, in determining the amount of punitives following a remittitur of actuals. The

original ratio might be dispositive, however, if it is obvious that the jury intended to award a particular ratio of actual to punitive damages.

F. Standard of Review for Fraud/Malice Predicate

As noted previously, a plaintiff seeking exemplary damages must establish “by clear and convincing evidence” that the harm at issue resulted from fraud, malice, or willful act or omission or gross neglect in a wrongful death action. TEX. CIV. PRAC. & REM. CODE § 41.003(a). For purposes of exemplary damages, clear and convincing evidence is defined as that “measure or degree of proof that will produce in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established.” *Id.* The effect of this higher burden of proof in the trial court on the appellate standard of review is somewhat unclear.

In *Foley v. Parlier*, 68 S.W.3d 870, 880 (Tex. App. – Fort Worth 2002, no pet.), the court observed that “[t]his higher burden of proof in the trial court does not alter the standard of review for factual sufficiency; it merely changes the weight of the evidence to support a finding or verdict.” Thus, an appellate court’s review of factual sufficiency of the evidence under a clear and convincing standard requires the court to “determine whether the evidence is sufficient to make the existence of the facts highly probable, not merely whether the evidence supporting the finding is sufficient to make the existence of the fact more probable than not, as required by the preponderance standard.” *Id.* In other words, the court must consider “whether the evidence is sufficient to produce in the mind of the fact finder a firm belief or conviction as to the truth of the allegation sought to be established.” *Id.*

The Texas Supreme Court recently addressed this issue in the context of parental termination, which also requires clear and convincing evidence. Specifically, in *In re C.H.*, 89 S.W.3d 17, 18-19, 25 (Tex. 2002), the Court considered the appropriate factual sufficiency standard of review when the clear and convincing evidence burden of proof is applied at trial, and concluded that “the burden of proof at trial necessarily affects appellate review of the evidence.” The Court thus held that the factual sufficiency standard for reviewing termination findings is “whether the evidence is such that a factfinder could reasonably form a firm belief or conviction that grounds exist for termination [of parental rights].” *Id.* at 18-19; *see also id.* at 25. In so holding, the Court expressly “reject[ed] standards that retain the traditional factual sufficiency standard while attempting to accommodate the clear-and-convincing burden of proof”:

Under traditional factual sufficiency standards, a court determines if a finding is so against the great weight and preponderance of the evidence that it is manifestly unjust, shocks the conscience, or clearly demonstrates bias. But that standard is inadequate when evidence is more than a preponderance (more likely than not) standard but is not clear and convincing. As a matter of logic, a finding that must be based on clear and convincing evidence cannot be viewed the same as one that may be sustained on a mere preponderance.

Id. at 25. In addition, “the reviewing court must detail the evidence relevant to the issue of parental termination and clearly state why the evidence is insufficient to support a termination by clear and convincing evidence.” *Id.* at 19.

In *In re J.F.C.*, 96 S.W.3d 256 (Tex. 2002), the Texas Supreme Court revisited this issue with respect to the legal sufficiency standard of review in the parental termination context. Applying the same logic employed in *In re C.H.*, the Court concluded that the traditional legal sufficiency standard, which upholds a finding supported by “[a]nything more than a scintilla of evidence,” is inadequate when clear and convincing evidence is required. *Id.* at 264-65. Thus, the Court held that, in cases requiring clear and convincing proof, evidence is legally insufficient if “a court determines that no reasonable factfinder could form a firm belief or conviction that the matter that must be proven is true.” *Id.* at 266.

Although not yet specifically addressed by the Texas Supreme Court, the Court’s holdings in *In re C.H.* and *In re J.F.C.* may have significant implications for the appellate standard for reviewing judgments awarding exemplary damages. Indeed, the Dallas Court of Appeals very recently applied the *J.F.C.* analysis in connection with its consideration of a malice finding supporting punitive damages in a malicious prosecution case. *See Kroger Texas Limited P’ship v. Suberu*, __ S.W.3d __, 2003 WL 21962310, *8 (Tex. App. – Dallas, August 18, 2003, no pet. h.).

Also unresolved by the Texas Supreme Court is the application of the U.S. Supreme Court’s opinion in *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001). In *Leatherman Tool*, the Court held that an appellate court should review *de novo* the constitutionality of a punitive damage award under *BMW*, instead of applying an abuse of discretion standard. *Id.* at 431, 441. Whether a *de novo* standard of review also applies to proceedings in a Texas state court is unclear in light of the U.S. Supreme Court’s opinion in *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415 (1996), which applied an abuse of discretion standard to measure the alleged

excessiveness of a jury's actual damages award in an action based on state law.

G. Judicial Redistribution of Punitive Damage Awards

The Ohio Supreme Court recently ordered \$20 million of a \$30 million punitive damage award be used to establish a charitable trust, rather than go to the plaintiff. In *Dardinger v. Anthem Blue Cross & Blue Shield*, 781 N.E.2d 121 (Ohio 2002), the executor of a patient's estate brought an action against the patient's health insurer and parent corporation to recover for breach of contract and the bad faith denial of a claim for chemotherapy to treat brain tumors. In suggesting a remittitur of the jury's punitive damage award from \$49 million to \$30 million, the court held that a \$20 million portion of the punitive damage award "should go to a place that will achieve a societal good, a good that can rationally offset the harm done by the defendants in this case." *Id.* at 146. The court therefore ordered that the money go to a state hospital to establish a cancer research fund to be named after the decedent "[d]ue to the societal stake in the punitive damages award." *Id.*

In so holding, the court noted that "[t]here is a philosophical void between the reasons we award punitive damages and how the damages are distributed" -- *i.e.*, "[t]he community makes the statement, while the plaintiff reaps the monetary award." *Id.* at 145. Indeed, the court noted that numerous states have formalized through legislation a mechanical means to divide a punitive damages award between the plaintiff and the state. *Id.* And because the "purpose of punitive damages is not to compensate a plaintiff but to punish the guilty, deter future misconduct, and to demonstrate society's disapproval," the court noted that "it is the societal element that is most important" in awarding punitive damages. *Id.*

Dardinger has profound implications. Absent legislative action, what authority does a court have to order redistribution of a punitive damage award? Does the court or the plaintiff get to select the beneficiary of the award? Does the *Dardinger* approach make a court more likely to affirm punitive damage awards? Does the plaintiff's attorney forfeit any contingent fee interest in the portion of the punitive damage award that is redistributed to charity? And is the jury told that a court may redistribute some of its punitive damages award to charity?

III. HB 4 AND THE NEW TEXAS DAMAGES CAPS

House Bill 4, passed by the Texas Legislature on June 2, 2003 and signed into law by Governor Perry on June 11, 2003, represents the most significant revisions to the various Texas damages caps since the 1997

revisions to the punitive damage caps and the 1977 enactment of the medical malpractice caps. The following discussion breaks down and explains the six parts of HB 4 that may have the most significant and immediate impact.

A. New Damages Caps in Medical Malpractice Litigation

Under the current medical malpractice caps that apply to wrongful death and survival claims, in an action on a health care liability claim where final judgment is rendered against a physician or health care provider, the statutory limit of the physician or health care provider's civil liability for non-economic damages is \$500,000. TEX. REV. CIV. STAT. ANN. art. 4590i, § 11.02(a). Because the original caps were passed in 1977, this statutory figure is tied to a consumer price index multiplier to bring the cap to the present value of money. As of August 2003, the cap is approximately \$1,450,000.

HB 4 (in conjunction with the constitutional amendment in H.J.R. 3) enacts a number of new statutory sections that will further affect the ability of a plaintiff to recover non-economic damages in all medical malpractice actions. New TEX. CIV. PRAC. & REM. CODE § 74.301(a) will provide that in *any* action on a health care liability claim where final judgment is rendered against a physician or health care provider (not a health care institution), the limit of civil liability for non-economic damages of the physician or health care provider (inclusive of all persons or entities for which vicarious liability theories may apply) shall not be more than \$250,000 for each claimant. This cap applies regardless of the number of defendant physicians or health care providers against whom the claim is asserted or the number of separate causes of action on which the claim is based.

With respect to health care institutions, new TEX. CIV. PRAC. & REM. CODE § 74.301(b) will provide that in an action on a health care liability claim where final judgment is rendered against a single health care institution, the same \$250,000 cap on non-economic damages applies. In actions involving more than one health care institution, new TEX. CIV. PRAC. & REM. CODE § 74.301(c) will provide that the same \$250,000 cap on non-economic damages will apply per health care institution, up to a total cap of \$500,000 for all health care institutions.

HB 4 further specifies what "economic" and "non-economic" damages will mean. Under the new statute, economic damages will be defined as "compensatory damages intended to compensate a claimant for actual economic or pecuniary loss"; "noneconomic damages will be defined as "damages awarded for the purpose of compensating a claimant for physical pain and suffering, mental or emotional

pain or anguish, loss of consortium, disfigurement, physical impairment, loss of companionship and society, inconvenience, loss of enjoyment or life, injury to reputation, and all other nonpecuniary losses of any kind other than exemplary damages.”¹

B. Future Damages in Medical Malpractice Litigation

HB 4 also enacts a number of somewhat radical new provisions that will affect the way medical malpractice defendants can opt to deal with future damage awards. New TEX. CIV. PRAC. & REM. CODE §§ 74.501-74.507 will provide that upon the request of any defendant:

- a court *shall* order that damages for future medical or custodial care be paid in whole or in part in periodic payments rather than by lump sum payment; and
- with respect to all other future damages, a court *may* order that they be paid in whole or in part in periodic payments.

If the court orders either of these options, the court is required to specify in the final judgment (1) the recipient of the payments, (2) the dollar amount of the payments, (3) the interval between payments, and (4) the number of payments and the period of time over which the payments must be made. If the defendant is not adequately insured, as a condition of authorizing future payments, the court *must* require a defendant to provide evidence of financial responsibility in an amount adequate to assure full payment of damages awarded by the judgment.

Notably, under the new statute these periodic payments (other than loss of future earnings) will terminate on the death of the recipient. Similarly, awards of attorney’s fees based on periodic payments of future damages must be calibrated to the life expectancy of the plaintiff, then reduced to present value.

C. Proportionate Responsibility

HB 4 also modifies the way that proportionate responsibility will be determined. Under the revisions to TEX. CIV. PRAC. & REM. CODE § 33.013, a defendant may be jointly and severally liable only for the specific cause(s) of action for which his liability is determined by the finder of fact to be greater than 50%. The immediate effect of this change will likely be to

require a separate proportionate responsibility question for each cause of action for which there may be more than one responsible party. In addition, the new language in the statute will allow the jury to consider the conduct of any responsible person – not merely actual or responsible “parties,” or settling defendants – when allocating fault; thus, the jury will be able to consider and allocate fault to individuals such as criminals or individuals not subject to the court’s jurisdiction.

D. Punitive Damages Generally

HB 4 makes the following three changes to the Texas Civil Practice and Remedies Code that will affect the award of punitive damages in general cases:

- 1) **Unanimity** – Under new TEX. CIV. PRAC. & REM. CODE § 41.003(d), exemplary damages “may be awarded only if the jury was unanimous in regard to finding liability for and the amount of exemplary damages.” New TEX. CIV. PRAC. & REM. CODE § 41.003(e) requires that the jury be instructed about the need for unanimity.
- 2) **Nominal damages** – HB 4 removes from TEX. CIV. PRAC. & REM. CODE § 41.004(b) the section providing that a claimant can recover exemplary damages based upon an award of nominal damages if the defendant’s conduct is shown by clear and convincing evidence to have resulted from malice.
- 3) **“Nursing Home exception”** – HB 4 also removes the Penal Code “cap busting” provision from TEX. CIV. PRAC. & REM. CODE § 41.008(c)(7), which previously provided that the caps would not apply in a case that involved a knowing or intentional violation by a health care provider of the Penal Code section relating to injury to a child, elderly individual, or disabled individual. Section 41.008(c)(7) is unchanged as to defendants who are not health care providers.

E. Supersedeas Bonds

HB 4 provides a number of new, significant protections for judgment debtors. First, the bill repeals TEX. CIV. PRAC. & REM. CODE §§ 52.002-.004 and adds new section 52.006(a), which provides that when dealing with a money judgment, the amount of security required to effectively supersede the judgment must equal the sum of compensatory damages awarded in the judgment only, plus interest for the estimated duration of the appeal, plus costs. As a result, a judgment debtor will no longer need to post a

¹ These definitions of economic and noneconomic damages are actually located in the exemplary damages section of the Civil Practice and Remedies Code; new TEX. CIV. PRAC. & REM. CODE § 74.001 provides that those phrases in the new medical malpractice liability sections discussed above shall have the same meaning.

supersedeas bond covering exemplary damages. The new sections do not address awards of attorney's fees or prejudgment interest; a legitimate argument can be made, however, that the exclusion of these elements from this otherwise comprehensive statutory revision means that the legislature did not intend to require that they be superseded.

HB 4 also caps the maximum amount of a supersedeas bond that a judgment debtor will ever be required to post. Under new section 52.006(b), "[n]otwithstanding any other law or rule of court, when a judgment is for money, the amount of security must not exceed the lesser of (1) 50 % of the judgment debtor's net worth or (2) \$25 million." The statute does not provide any guidance regarding the undefined term "net worth." Moreover, issues regarding the breadth of discovery into net worth or the computation of a defendant's net worth are not addressed in the statute.

Finally, under new section 52.006(c), if a judgment debtor is able to show that he is "likely to suffer substantial economic harm if required to post security" in the amount required by statute, the trial court is *required* to lower the amount of security to an amount that will not cause the debtor substantial economic harm.

F. Pre and Post-Judgment Interest

Under current law, the post-judgment interest rate floor and ceiling are 10 and 20 percent. *See* TEX. FIN. CODE § 304.003(c). HB 4 cuts the post-judgment interest rate by tying it to the prime rate as published by the Federal Reserve Bank of New York, with a floor of 5 percent and a ceiling of 15 percent. This change will also affect the pre-judgment interest rate, because under TEX. FIN. CODE § 304.103, "[t]he prejudgment interest rate is equal to the post-judgment interest rate applicable at the time of judgment."