

For the Defense

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NEWSLETTER: July 2023



"DO NOT WITHHOLD GOOD FROM THOSE TO WHOM IT IS DUE,
WHEN IT IS IN YOUR POWER TO ACT." PROVERBS 3:27



by *Joanna Lippman Salinas*

Last month, our country celebrated Independence Day, which is generally associated with some combination of family, friends, BBQ, beer and fireworks. However, one could argue that the 4th is not *really* the effective date of the legal document at the heart of this holiday: the Declaration of Independence. July 2, 1776 was when the Continental Congress voted in favor of the resolution for independence. An initial working draft of the Declaration was adopted on July 4th, but the final document and the first signatures weren't inked until August. It then took another six months to get it fully executed!

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*SUMMER
FUN!*

The firm hosted a fun team outing to celebrate our awesome 2023 summer clerks as their time here comes to a close. We wish them the best and thank you all for your hard work!

Perhaps things really haven't changed that much when it comes to reaching an agreement and getting it finalized. At Fletcher Farley, we pride ourselves on diligently pursuing cases to conclusion, and we thank you for entrusting us to accomplish the same. So, as we are knee-deep in the sweltering days of August, feel free to continue the celebration of Independence Day throughout this month. What could possibly be wrong with another month of family, friends, BBQ, beer and fireworks? We wish each of you a great end to this extra hot summer.



HEY BATTA BATTA...
SWING!



Defending Our Clients from Bugs (and sometimes landlords?!) that *BITE?*



Joe Harrison and *Iris Harris* obtained summary judgment for a client in Bexar County District Court.

The plaintiff in this case alleged a "swarm of biting insects" emerged from an air vent at defendant's apartment complex and bit him. Iris prepared a no-evidence summary judgment motion arguing that even if the incident occurred as alleged, the tenant had no

evidence that the landlord had any prior knowledge of the insects in the air vents, and therefore no way to remedy the condition prior to plaintiff's incident.

At the hearing, the plaintiff's counsel argued that their client had provided the defendant notice by reporting the bugs to property management. Joe countered that all evidence of plaintiff reporting the event to defendant occurred *after* the incident and therefore was irrelevant to the question of notice at the time of incident. This logical argument convinced the judge to grant the defendant's motion for *summary judgment*.

Great job, to Joe & Iris (and all the support team at FFSS that assisted you) in this WIN!

Noneconomic Damages in Texas Courts:

Excluding Improper Anchoring Arguments



by Cole P. Wilson

Juries are given wide discretion when assigning dollar values to emotional injury, however amounts awarded must still be supported by sufficient evidence. Often, plaintiff's counsel will attempt to support a request for a noneconomic damages award through "unsubstantiated anchoring," a tactic whereby attorneys suggest damages amounts by reference to objects or values with no rational connection to the facts of the case. Often criticized by the defense bar for the lack of scrutiny they can sometimes receive, large noneconomic damages awards for mental anguish and loss of companionship will face a closer review on appeal after the Texas Supreme Court's recent opinion in *Gregory and New Prime, Inc. v. Jaswinder Chohan, et al.*, decided June 16. While none of the Supreme Court's three opinions in *Gregory* received the five votes needed to form a majority and establish new a standard for reviewing noneconomic damages awards, the Court's

three opinions provide helpful guidance to litigants as they prepare cases involving noneconomic damages of any kind for trial.

The case arises from a fatal, multi-vehicle accident that took place in the middle of the night on November 23, 2013, near Amarillo, when an eighteen-wheeler driven by Sarah Gregory jackknifed in the middle of an unlit road. The resulting pileup caused four deaths, and among those killed was Bupinder Deol, the driver of one of several trucks involved in the collision. Deol's wife and family brought a wrongful death action against Gregory and her employer, New Prime, Inc. The estates and families of other decedents also intervened in the litigation.

Before a Dallas County jury, plaintiffs asked for, and were ultimately granted, a large noneconomic damages award after counsel anchored the jury to huge, unsubstantiated sums with no rational connection to the case—a \$71 million Boeing F-18 fighter and a Rothko painting valued at \$186 million. Plaintiffs' counsel also urged jurors to give defendants their "two cents worth" for every one of the 650 million miles that New Prime's trucks drove during the year of the accident. The jury awarded approximately \$39 million to the plaintiffs, including \$1.8 million in economic damages and another \$15 million in noneconomic damages for past and future mental anguish and loss of companionship to Deol's family.

After trial, defendants settled with the other plaintiffs, and appealed the noneconomic damages award granted to Deol's family. On appeal, defendants challenged the size of the noneconomic damages award and the trial court's exclusion of a responsible third-party from the jury charge. An en banc Court of Appeals affirmed, and defendants petitioned the Supreme Court for review. Three Justices did not participate in the Supreme Court's decision, but the six participating Justices unanimously reversed the decision of the Court of Appeals and remanded the case for a new trial. The Court did not form the majority needed to establish a new standard for

evaluating the sufficiency of evidence to support a noneconomic damages award, but all participating Justices agreed that plaintiffs' counsel had made improper arguments anchoring the jury to irrelevant and unsupported considerations when valuing noneconomic damages.

To affirm a noneconomic damages award on appeal, there must be evidence of the nature, duration, and severity of mental anguish to support both the (1) existence and (2) amount of compensable loss. Each of six Justices who participated in the decision appeared to agree that plaintiffs had presented sufficient evidence demonstrating the existence of compensable mental anguish and loss of companionship. However, no evidence was presented to the jury justifying the award by connecting the mental anguish suffered to any specific amount of compensation. Rather than connect the evidence to a specific amount of damages that might compensate plaintiffs, counsel's arguments referencing the price of fighter jets, the value of artwork, and the number of miles driven by New Prime's trucks "did just the opposite by encouraging the jury to base an ostensibly compensatory award on improper considerations that have no connection to the rational compensation of [plaintiffs]."

Concurring in the judgement, Justice Devine, joined by Justice Boyd, agreed that plaintiffs cannot rely on unsubstantiated anchoring when asking juries to compensate them for past and future mental anguish. But rather than suggest a new standard, Justice Devine expressed that it should be left to the Legislature instead of the courts to construct a policy-based approach to noneconomic losses that balances the tension between providing just compensation and concerns about the arbitrariness of awards for mental anguish, pain, and suffering.

Also concurring in the judgment, Justice Bland noted the common ground that she shared with her colleagues in agreeing that plaintiffs' improper anchoring arguments sufficed to warrant reversal of the jury's award, but

left the work of creating a new standard for reviewing noneconomic damages awards to a future case that did not present a record with the same improper anchoring arguments that she believed required reversal in this case.

Although the Court failed to form a majority, its three opinions provide valuable guidance to litigants about how to properly discuss the measurement of noneconomic damages at trial. First, all six Justices signaled that a plaintiff may not rely on improper anchoring arguments or ask a jury to “pick a number” to support an award for noneconomic damages. Defense counsel should be prepared to file the appropriate pretrial motions prohibiting such arguments from being made to the jury. As the plurality explained, unsubstantial anchors “like those employed here have nothing to do with the emotional injuries suffered by the plaintiff and cannot rationally connect the extent of the injuries to the amount awarded.” Second, the defense should also prepare thorough cross-examinations about the severity, duration, and nature of mental anguish—three details that plaintiffs must show to support a request for noneconomic damages.

Ultimately, *Gregory* will not be the Court’s final word on how plaintiffs might show a rational connection between their mental anguish and the amount they are seeking from a jury in compensation, and defendants should be prepared to confront novel arguments from plaintiffs as their counsel search for different tools to translate pain and suffering to dollars and cents.

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QUESTIONS?

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