



Schouest
Bamdas
Soshea
BenMaier
& Eastham

CARRA MILLER
cmiller@sbsb-eastham.com

June 18, 2023

**Supreme Court of Texas:
Noneconomic Damages Must be Supported by Evidence and Not Unsubstantiated Anchors**

In a plurality opinion¹ rendered on June 16, 2023, the Supreme Court of Texas addressed the issue of how a noneconomic damages award must be supported. *Gregory v. Chohan*, __ S.W.3d ___, No. 21-0017, 2023 WL 4035886 (Tex. June 16, 2023). Joined by the minority opinions, the court held that: 1) noneconomic damages must be supported by evidence of the nature, duration, and severity of the type of damages claimed; and 2) unsubstantiated anchors, such as comparing mental anguish to the cost of a fighter jet, a work of art, or a comparison of cents to the number of miles driven by a defendant’s vehicles, are improper jury arguments. Based on the unsubstantiated anchor arguments used at trial, the court reversed and remanded the case.² Although the case is a wrongful-death case examining primarily mental-anguish damages, the court broadly rendered its opinion to all types of cases involving any type of noneconomic damages.

This case arose from a multi-vehicle pileup on an icy highway near Amarillo. The wreck involved two passenger vehicles and seven eighteen-wheelers. Four people died as a result of the accident, and many others were injured. All the claims settled prior to the appeal except for those related to the survivors of a driver of one of the eighteen-wheelers found not to have caused the accident. At the trial level, the jury awarded approximately \$16.8 million to the driver’s family.

¹ Justice Blacklock wrote the plurality opinion, in which Chief Justice Hecht and Justice Busby joined in full, and Justice Bland joined except as to Parts II.C.2 and II.D, which would impose a “rational basis,” “rational reason,” or “rational connection” standard for an award of noneconomic damages. Justice Devine filed a concurring opinion, in which Justice Boyd joined. Justice Bland filed an opinion concurring in part. Justice Lehrmann, Justice Huddle, and Justice Young did not take part in the decision.

² Although this case was reversed and remanded for a new trial, the court noted that it ordered a new trial due to an ancillary issue regarding the designation of a responsible third party. The court stated that, in cases with improper arguments such as this case, it normally reverses and remands to the intermediate appellate court in remittitur.



Schouest
Bamdass
Soshea
BenMaier
& Eastham

CARRA MILLER
cmiller@sbsb-eastham.com

Noneconomic damages for past and future mental anguish and loss of companionship accounted for more than \$15 million of the total damages award.³

The defendants appealed. The intermediate court of appeals, sitting *en banc*, affirmed the trial court's judgment on all issues. On appeal to the Supreme Court of Texas, the defendants argued: 1) the court of appeals reviewed the amount of the noneconomic damages award under an overly deferential standard of review, and 2) the amount of the award was not supported by the evidence.

At the outset of the plurality opinion, the court discussed the history and policy behind noneconomic damages, noting that "appellate courts have a duty to ensure that the damages award for a noneconomic injury are the result of a rational effort, grounded in the evidence to *compensate* the plaintiff for the injury," and that "[j]uries cannot simply pick a number and put it in the blank." (emphasis in original). Before turning to the case at hand, the court stated: "The unavoidable truth is that money cannot genuinely compensate for emotional trauma, whether or not tort law claims otherwise." It then "grapple[d] with the difficulties that inevitably arise when courts attempt to evaluate the size of these compensatory awards."

The court first reviewed its precedent regarding what evidence is required to uphold an award of noneconomic damages. It held that there must be "some evidence to justify the amount awarded;" specifically, "legally sufficient 'evidence of the nature, duration, and severity' of [noneconomic damages] to support both the *existence* and the *amount* of the compensable loss." (emphasis in original). Prior to this decision, it was unclear whether this evidentiary standard applied to noneconomic damages outside of the personal injury and defamation contexts. This opinion clearly extends it to all cases where noneconomic damages are cognizable.

The court next addressed the issue of unsubstantiated anchoring. It defined unsubstantiated anchoring as "a tactic whereby attorneys suggest damages amounts by reference to objects or values with no rational connection to the facts of the case." In the trial court, the plaintiffs' attorneys suggested noneconomic damages amounts by comparing the noneconomic damages to a \$71 million Boeing F-18 fighter jet, a \$186 million painting by Mark Rothko, and a request for an award of "[t]wo cents worth for each [decedent]; six cents a mile for the six hundred and fifty [million] miles . . . [that the defendant's trucks] traveled in the year that they took these people's lives." The court held that unsubstantiated anchors like these have nothing to do with the emotional injuries suffered by the driver and cannot rationally connect the extent of the injuries to the amount awarded. It reasoned that Texas Rule of Civil Procedure 269(e) speaks clearly to this issue in

³ The jury also awarded noneconomic damages for the driver's conscious pain and suffering, but apparently in a less significant amount.



CARRA MILLER
cmiller@sbsb-eastham.com

stating: “Counsel shall be required to confine the argument strictly to the evidence and to the arguments of opposing counsel.”

Notably, the concurring opinion by Justice Devine (in which Justice Boyd joined) agrees with the above-stated holdings of the plurality opinion—including the portion regarding unsubstantiated anchoring—but criticizes the plurality opinion for being unable to articulate what evidence may be sufficient to show the amount of damages that could be properly awarded. In reconciling the two opinions, an argument exists that plaintiffs’ attorneys may not be permitted to request a specific amount of noneconomic damages from the jury in closing arguments at trial.

This case may impact maritime cases filed in Texas state courts if it is found to be procedural in nature rather than creating substantive law. The last maritime appellate decision rendered regarding the proper amount of damages was *Exxon Shipping Co. v. Baker*, in which the Supreme Court of the United States imposed a 1:1 damages cap ratio on punitive to actual damages. 554 U.S. 471 (2008). Whether that decision was procedural (and could apply to maritime cases in state courts) or substantive (applying only to cases in federal courts) has not yet been tested in appellate courts. Unlike the *Baker* case, the instant case does not impose a damages cap—instead, it sets an evidentiary standard. This renders it more likely to be found as procedural; thus, it may apply to noneconomic damages awards in maritime cases filed in Texas state courts.

The *Gregory* plurality and minority opinions may be found here: <https://www.txcourts.gov/supreme/orders-opinions/2023/june/june-16-2023/>.