UT LAW CLE | THE UNIVERSITY OF TEXAS SCHOOL OF LAW

PRESENTED AT

2022 CONFERENCE ON STATE AND FEDERAL APPEALS

JUNE 16-17, 2022
AUSTIN, TEXAS

How Much Is Too Much?: Review Of Excessiveness Of Damages

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The United States Supreme Court holds that due process restricts the amount of punitive damages that can be awarded to a prevailing plaintiff. *See BMW of N.A., Inc. v. Gore*, 517 U.S. 559 (1996); *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003). Since *Gore* and *Campbell*, appellate courts must scrutinize the magnitude of punitive damages when they are challenged for violating the defendant's right to due process.

In Texas, some advocates have similarly argued for more scrutiny and new standards for reviewing noneconomic damages like pain and suffering, mental anguish, loss of enjoyment of life, and loss of companionship and society. *E.g.*, *United Rentals N.A., Inc. v. Evans*, 608 S.W.3d 449 (Tex. App.—Dallas 2020, pet. filed); *Gregory v. Chohan*, 615 S.W.3d 277 (Tex. App.—Dallas 2020, pet. filed) (en banc). In *Gregory*, dissenting opinions, a petition for review before the Texas Supreme Court, and amicus briefs supporting the petitioners have all called on the Court to impose parallel limitations on awards of noneconomic damages.

This article describes the current state of the law guiding appellate courts in their review of noneconomic awards. Along the way, we will see what standards apply to Fifth Circuit review of awards rendered by federal district courts in Texas. The article will then shift to the arguments for and against changing how courts review noneconomic damages. Finally, the article will survey possible changes, noting which are more and less disruptive to the status quo for plaintiffs and defendants.

I. Current Law

A. Texas

In Texas, courts review jury findings for either factual sufficiency or legal sufficiency. *See generally Windrum v. Kareh*, 581 S.W.3d 761, 781 (Tex. 2019). When an appellant claims that a jury overestimated damages, the appellate courts treat the issue as a factual sufficiency challenge. *Pope v. Moore*, 711 S.W.2d 622, 624 (Tex. 1986); *see also Larson v. Cactus Util. Co.*, 730 S.W.2d 640, 641 (Tex. 1987) (making standard for remittitur factual sufficiency).

Factual sufficiency challenges can be entertained only by the intermediate courts of appeals. *Golden Eagle Archery, Inc. v. Jackson*, 116 S.W.3d 757, 761 (Tex. 2003). This is because an appellate court reviewing a jury finding for factual sufficiency does not simply ask whether there was any evidence to support the jury's verdict or if a reasonable jury could have reached the verdict that the actual jury did; rather, the appellate court must weigh the evidence, and if the jury's verdict was against the great weight and preponderance of the evidence, then the court can reverse and remand for a new trial or suggest remittitur of the award. *See In re King's Estate*, 244 S.W.2d 660, 661 (Tex. 1951). Because there is an element of factfinding in reversing a jury's verdict for factual sufficiency, the Texas Supreme Court lacks jurisdiction to entertain factual sufficiency challenges to a jury verdict. *See* TEX. CONST. art. V, § 6(a) (making decisions of intermediate appellate courts "conclusive on all questions of fact brought before them on appeal or error"). For these reasons, only the courts of appeals can suggest remittitur of excessive verdicts. *Aquaplex, Inc. v. Rancho La Valencia, Inc.*, 297 S.W.3d 768, 777 (Tex. 2009).

While the Texas Supreme Court can (along with the intermediate courts) knock out a type of damages altogether on a legal sufficiency, or "no-evidence," challenge, such a challenge is the wrong vehicle for remitting an excessive jury verdict. *See, e.g.*, *Parkway Co. v. Woodruff*, 901 S.W.2d 434, 444 (Tex. 1995); *Pope*, 711 S.W.2d at 624. For example, before a plaintiff can recover damages for mental anguish, she must show that she experienced "a high degree of mental pain and distress that is more than mere worry, anxiety, vexation, embarrassment, or anger." *Anderson v. Durant*, 550 S.W.3d 605, 618–19 (Tex. 2018). Whether or not a plaintiff's evidence of mental anguish rises to this threshold is an appropriate question for legal sufficiency review. *Parkway*, 991 S.W.2d at 444.

Unlike factual sufficiency review, the appellate court does not weigh the evidence on both sides of a disputed fact issue when ruling on legal sufficiency. *See City of Keller v. Wilson*, 168 S.W.3d 802, 810–11 (Tex. 2005); Robert W. Calvert, *"No Evidence" & "Insufficient Evidence" Points of Error*, 38 TEX. L. REV. 361 (1960). Rather, a Texas appellate court entertaining a legal sufficiency challenge is functioning like a federal court reviewing a motion for

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First appeared as part of the conference materials for the
32nd Annual Conference on State and Federal Appeals session
"How Much is Too Much?: Review of the Excessiveness of Damages"