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NON-ECONOMIC DAMAGES, POST-*GREGORY*

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I. INTRODUCTION

Before the Texas Legislature passed House Bill 4 ("HB 4") in 2003, the distinction between economic and non-economic damages was important primarily because of the limitations in Chapter 41 of the Civil Practice and Remedies Code on the recovery of exemplary damages as a factor of economic damages. *See* former Tex. Civ. Prac. & Rem. Code §§ 41.008(a) & 41.008(b). Although Article 4590i, the statute containing the bulk of the statutory medical liability provisions, imposed a cap on *total* damages (held to violate the Texas Constitution in some circumstances), it imposed no caps nor other limitations on non-economic damages.

HB 4 created a variety of new medical liability caps. Some of the new caps apply to non-economics damages, while other caps apply to total (economic plus non-economic) damages. Post-HB 4, the distinction between economic and non-economic damages retains its importance in the context of Chapter 41's continuing limitations on punitive damages. *See* Tex. Civ. Prac. & Rem. Code Ch. 41. The distinction, however, has a greatly-enhanced significance because of all of the new medical liability caps on non-economic damages.

Furthermore, HB 4 diminished the amounts of recoverable economic losses in some circumstances with other new provisions mandating that: 1) evidence to prove certain losses must be presented in the form of net losses after reduction for income tax payments or unpaid tax liability pursuant to any federal income tax law, and 2) recovery of medical or health care expenses incurred is limited to "the amount actually paid or incurred by or on behalf of the claimant." *See* Tex. Civ. Prac. & Rem. Code §§ 18.091 & 41.0105.

For the past thirty years, the Texas Supreme Court has steadily chipped away at the discretion given to jurors to award non-economic damages. In June of 2023, the Court's on-going effort culminated in the Court's issuance of *Gregory v. Chohan*, an opinion that raised as many questions as it provided answers. We will need further opinions from the Texas Supreme Court to have a clear understanding of where plaintiffs and defendants stand in the wake of *Gregory*. In any event, *Gregory* will make the plaintiff's task of obtaining non-economic damages at trial and keeping those damages on appeal more difficult.

II. WHEN A PLAINTIFF DELIBERATELY CHOOSES TO TRY A CASE SOLELY ON NON-ECONOMIC DAMAGES

In the past 10 years or so, there has been a growing trend within the plaintiffs' bar to try certain personal injury cases without introducing evidence of economic damages. What types of personal injury cases? Particularly those with small medical bills and other economic damages. Why? The theory is that a small amount of economic damages gives the jury a low anchor for its verdict, and that plaintiffs in these cases can actually do better at the courthouse without introducing evidence of economic damages.

Jury consultant David Ball summarizes the concern as follows in his book, *David Ball on Damages 3*:

Jurors tend toward noneconomic verdicts that are some proportion, fraction, multiple, or equivalent of the economics damages figure. So if medical bills and lost wages are $125,000, jurors are likely to argue that the plaintiff should get half that amount, or double (once in awhile), or that the amount exactly, or "just a little more" or "not as much as." This is because they seize on anything tangible as an anchor to help them "calculate" the intangible – even when there is no relationship between the two. This makes your economic damages figure extraordinarily important – and sometimes, extraordinarily dangerous. In a case with $125,000 in economic damages, jurors are likely to add no more than a few hundred thousand inn non-economic damages. With identical noneconomic harms, $2,000,000 in economic losses is almost sure to result in a far greater non-economic verdict than just a few hundred thousand.

Ball, *David Ball on Damages 3* 55-56 (2011).

In addition to cases with a concern about the small amount of medical bills in relation to the harm suffered, trying cases without evidence of medical bills and/or no loss of earning capacity claim may be appropriate for other cases. These include cases with problems proving lost wages or earnings (missing or unfiled tax returns or no steady work history) or questionably high medical bills for services that arguably were not necessary.

Likewise, studies consistently show that verdicts with high medical bills and high lost income numbers consistently receive higher non-economic damages awards than cases with lower economic damages, all things being equal. *See* Kritzer, Liu & Vidmar, "An Exploration of 'Non-Economic' Damages in Civil Jury Awards," 55 Wm. & Mary L. Rev. 971 (2014); Rand Corporation, "Compensation of Injuries: Civil Jury Verdicts in Cook County (1984).

Plaintiffs who decide to try a case without evidence of economic damages need to decide when to show their hand. For example, if the plaintiff files medical bills affidavits before later non-suiting a claim for medical bills, this could strengthen the defendant's argument that the bills are nevertheless admissible at trial.

In cases in which plaintiffs non-suit claims for medical bills, defendants may argue that, although the medical bills are not admissible to support the plaintiff's claims for medical bills, they may still be admissible on the issue of the plaintiff's claims for pain and suffering and other non-economic damages.

Plaintiffs may argue that defendants must first establish the proper predicate through one or more experts to establish the link between the amount of medical bills and the plaintiff's damages.

Plaintiffs may also argue that the collateral source rule prevents evidence of the medical bills if the plaintiff is not seeking to recover medical expenses. The "collateral source rule" in Texas actually is two distinct, but related common law rules – a rule of evidence, and a rule of damages. As a rule of evidence, it prevents the defendant in a personal injury case from introducing evidence that any part of the plaintiff's damages was paid by a collateral source. As a rule of damages, it prevents any offset of the plaintiff's recovery by the amount of damages paid by a collateral source.

In *Haygood v. Escobedo*, 356 S.W.3d 390 (Tex. 2011), the Texas Supreme Court made a number of statements that will be helpful to plaintiffs who seek to exclude evidence of medical bills in cases where the plaintiff seeks no recovery of medical bills. Among others, these statements include:

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