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Trial Matters

(Can you prove damages?)

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TEXAS SUPREME COURT UPDATE ON CIVIL DAMAGES

INTRODUCTION

Every year the Texas Supreme Court, through its staff attorneys and law clerks, summarize cases the Court grants or decides. This Texas Supreme Court Update is described by the Court as a live document, updated monthly. The Court organizes the cases by topic, and includes a table of contents. So, for this Texas Supreme Court Update on Civil Damages, I selected the three most relevant case decisions on civil damages but also included a recap of two cases that are likely to or already pending review by the high Court. To read the Supreme Court of Texas Update for November 2024 through December 2025, go to supreme-court-of-texas-update-paper.pdf

A. SUPREME COURT OF TEXAS DECISIONS

1. When can the court award damages caused by a delay in specific performance?

a. *White Knight Development, LLC v. Simmons,* 718 S.W.3d 203 (2025)

The issue in this case is whether a seller awarded specific performance for breach of contract may also be compensated for expenses incurred due to the buyer's delay in performance. White Knight Development purchased land from Dick and Julie Simmons. The buyer and sellers agreed to amend the sales contract to include a buy-back provision, in the event the residents of the subdivision voted to extend restrictions which would interfere with the buyer's plan to develop the property. Id. at 206. The buy-back provision required the seller to re-purchase the land, minus any unpaid balance owed by the buyer, within 45 days of the requested. Five months after the purchase, in October 2016, the buyer invoked the buy-back provision when property owners voted to extend the restrictions, giving the sellers until late December 2017, for the same $400,000 price. Id. at 207. The Simmonses refused, and White Knight sued. After a bench trial, the trial court found that the Simmonses breached the contract, and it awarded White Knight specific performance of the buy-back provision as well as a monetary award for various expenses White Knight incurred. The sellers failed to re-purchase the property and litigation ensued. The buyer sued for specific performance of the buy-back provision as well as for damages incurred, including but not limited to bank fees, taxes, interest, and other costs. The sellers counterclaimed seeking a declaration that a condition precedent had not occurred, i.e. extension of the property restrictions, and therefore the restrictions were invalid.

After a bench trial at which the buyer put on evidence of the multiple loans and collateral it had to put up to avoid foreclosure, the ultimate defaults on the multiple loans, and use of the company credit card to pay property taxes and loan interest, the Court found the seller breach the contract and were precluded from arguing the invalidity of the restriction extension. The court awarded specific performance under the buy-back provision and also awarded the buyer $308,136.14 in additional damages/consequential damages. Id. at 207. The court issued findings of fact and conclusions of law in which it itemized the monetary award:

- $103,667.73 for expenses "related to" the Simmons property, including property taxes, forbearance and refinancing fees, and interest payments for the MidSouth loan and the two other loans it acquired to avoid defaulting on the MidSouth loan;
- $45,619.83 for property taxes owed in 2020 ($4,862.23 for the Simmons property and the rest for other properties);
- $8,211.57 in penalties related to past due property taxes for 2020 ($875.20 for the Simmons property and the rest for other properties);
- $59,318.00 in "operating loan interest" for White Knight "to continue business";
- $74,802.00 in "loan interest related to another property that had to be refinanced to avoid foreclosure of" the Simmons property; and
- $16,518.00 in "credit card interest" for White Knight to "continue business."

On appeal, the court modified the judgment to remove the monetary award, but otherwise affirmed the judgment. Id. at 208. Although it concluded that courts may award equitable compensation along with specific performance in narrow circumstances, it held that such an award was impermissible because the trial court did not expressly state that its monetary award was equitable. The Supreme Court reversed in part, holding that in limited circumstances a plaintiff may both obtain specific performance and recover equitable compensation for the breaching party's delay in performing to restore the plaintiff to the position it would have occupied had the contract been timely performed. The Court explained that recoverable expenses must be reasonable, foreseeable, directly traceable to the delay in performance. And, in cases in which the buyer breached, the damages must have been incurred in connection with the seller's care and custody of the property during the delay. The Court concluded that the court of appeals erred by deleting the entire monetary award without analyzing whether some expenses were recoverable, and so it remanded the case to for further consideration of the issue.

The Texas Supreme Court further said:

> "The court of appeals modified the judgment to delete the $308,136.14 monetary award but otherwise affirmed. 703 S.W.3d 136, 150 (Tex. App.—Waco 2023). The court acknowledged a principle we embrace today: that monetary compensation may be awarded alongside an award of specific performance "in narrow circumstances—when it is deemed necessary to place the parties in the same position as if the contract had been performed." *Id.* at 149 (quoting *Davis v. Luby*, No. 04-09-00662-CV, 2010 WL 3160000, at *4 (Tex. App.—San Antonio Aug. 11, 2010, no pet.)). But the court of appeals then went in search of an express statement by the trial court that the monetary award was equitable in nature. Finding none, it concluded that White Knight was not permitted to "receive relief in the form of specific performance of the contract and then also receive damages for its breach." *Id.*; *see also id.* (finding noteworthy the absence of any "indication in the findings or judgment that the amounts the trial court awarded to White Knight were to adjust the equities so that the parties were put in the position in which they would have been had the transaction been closed as contemplated")." Id.

Thus, specific performance is an equitable remedy for a breach of contract, and an alternative to legal damages. Id. at 209. Citing to *Pathfinder Oil & Gas, Inc. v. Great W. Drilling, Ltd.*, 574 S.W.3d 882, 887 (Tex. 2019); *see also Hays St. Bridge Restoration Grp. v. City of San Antonio*, 570 S.W.3d 697, 707 (Tex. 2019) ("Damages and specific performance are alternatives to one another."). Specific performance is not a separate cause of action but rather a substitute for monetary damages when such damages would be inadequate. Citing to *Ifiesimama v. Haile*, 522 S.W.3d 675, 685 (Tex. App.—Houston [1st Dist.] 2017, pet. denied); *Scott v. Sebree*, 986 S.W.2d 364, 368 (Tex. App.—Austin 1999, pet. denied); *see also Sharyland Water Supply Corp. v. City of Alton*, 354 S.W.3d 407, 423 (Tex. 2011) (concluding that specific performance was foreclosed because "an adequate remedy at law exists").

However, the Court acknowledged there are damages that can be awarded as a result of defendant's late performance, or reimbursement of expenses incident to specific performance. Id. Courts of appeals has held that, though narrow, payment of expenses incurred by plaintiffs as a result of a defendant's late performance were available to equalize any losses caused by the delay. Id. at 210. This award, though, was not a contract damage, but equitable-where specific performance alone does not restore the nonbreaching party to the position it held before the breach. Id. Because the award is available in narrow circumstances and is intended to remedy the gap between the breach and the specific performance, the court also re-stated the monetary award does not violate the one satisfaction rule. Id. Instead, any award would address only "those expenses that are directly traceable to the delay, foreseeable, commercially reasonable, and incurred in connection with its care and custody of the Simmons property. Id. at 211.

The court goes on to provide guidance for what damages can be considered, including whether the expenses would have been incurred regardless of breach, like property taxes. Instead, the court looks to the type or category of expense, whether the parties would have foreseen those expenses at the time of the contract, including expenses needed to care for, dispose of or that are fair, proper or moderate "in the context of an exchange of goods and services." Id. at 212. The Supreme Court concluded that the trial court had not abused its discretion in awarding equitable monetary damages, despite the label it gave for the amounts, provided the award was necessary to place the buyer in the same position as if the contract had been performed. The high court reversed the appellate court and remanded the case back to the trial court for a review of the award under the principles set out in the Supreme Court's opinion.

2. How to prove lost profits.

a. *American Midstream (Alabama Intrastate), LLC v. Rainbow,* 714 S.W.3d 572 (Tex. 2025)

In this case American Midstream (lessor) and Rainbow (lessee) entered into contract regarding the transport of gas through two pipelines. Id at 574. When Rainbow believed lessor changed the terms of the agreement, it sued for breach of contract and alleged more than $6 million dollars in lost profits. Id. In a bench trial, the court found for Rainbow, and in its amended findings of facts and conclusions of law, it found that lessor breached the contract and that lessee had in fact suffered more than $6 million dollars in damages. Id. at 578. The Court of Appeals, though divided, affirmed and opined that Rainbow's damage model accounted "with reasonable certainty" for the difference between what it bargained for and what it received. Id.

The Supreme Court disagreed with the Court of Appeals and sided with the appellate dissent, finding that contract did not limit the type of imbalance of the gas flow that would excuse it from performing and thus the courts could not either. Id. at 579. For purposes of this paper, the relevant court analysis relates to calculation of lost profits. Id. at 583.

Courts may award lost profits only if the plaintiff proves the facts and amounts of damages with *reasonable certainty*. Citing to *Horizon Health Corp. v. Acadia Healthcare Co.*, 520 S.W.3d 860 (Tex. 2017). Where, as here, the claimant relies on speculative, untested, unproven and "chancy" business opportunities, lost profits are not recoverable. Id. at 583-584. The lessee argued it was entitled to $6 million dollars because it intended to but was prevented from

making daily trades it had never before engaged in, in a market it had never used. The Supreme Court restated its opinion from a 1994 case where it held that "[t]he mere hope for success of an untried enterprise, even when that hope is realistic, is not enough for recovery of lost profits." *Tex. Instruments, Inc. v. Teletron Energy Mgmt*., Inc., 877 S.W.2d 276, 279 (Tex. 1994).

Closing with a humorous reference, the Court restated the words of its 2015 opinion in *Phillips v. Cartlon Energy Grp., LLC*, 475 S.W.3d 265, 280 (Tex. 2015):

> " 'But lost profits cannot be awarded based on a speculative strategy, as the trial court did here. 'In the memorable words of Don Meredith, the reputed origin of this aphorism, 'If ifs and buts were candy and nuts, we'd all have a Merry Christmas.' " *Phillips*, 475 S.W.3d at 280 n.40.

3. Sufficiency of evidence on medical damages award (with discussion on what constitutes incurable jury argument)

a. *In re Space Expl. Techs. Corp.,* 716 S.W.3d 576 (Tex. 2025)

This case stems from a crash that occurred in Cameron County, Texas. The Supreme Court not only decided the sufficiency of evidence for the trial court's grant of Plaintiff's Motion for New Trial, but also what evidence supported the trial court's order that the damage award was "manifestly low." Space Exploration Technologies Corporation (Space X) employee Lauran Krueger was driving to a project site from her hotel (as she was a Florida-based engineer), when she rear-ended a vehicle that then pushed into a Toyota Tundra occupied by Plaintiff-driver, and three passengers (who were employees of a subcontractor to the same Space X site to which Krueger was also headed. A coworker of Plaintiffs came upon the same and called their employer, who then called his attorney ("the original attorney"). The original attorney alleged told the employer to have Plaintiffs go see a doctor and to also have the Toyota Tundra towed to a collision center for a repair estimate. None of the Plaintiffs complained of pain at the scene, telling their co-worker only that they were shaken and sore but okay. The medical doctor Plaintiffs saw the day of the accident released them after examining them and taking x-rays which showed degeneration and osteoarthritic changes. The x-ray interpretation also noted "no significant acute abnormalities." Plaintiffs were given some work related lifting restrictions, but were otherwise cleared to return to work. Instead, though, their employer "arranged for their transportation to his attorney's office", where the men retained counsel and were sent by counsel to the chiropractor-all in the same day. It was also alleged that the original attorney decided which medical and chiropractic doctors the Plaintiffs were sent to and that the men followed their attorney's plan.

Plaintiff driver and two of the three passengers filed suit against Kreuger and Space X. At trial Plaintiffs sought more than one million dollars for their injuries, suing the driver and her employer. They alleged Space X was vicariously liable for Keurger's negligence. They sought damages for physical impairment, physical pain and suffering, mental anguish, and medical expenses (later mostly all were nonsuited). It was undisputed that the impact to Plaintiff's vehicle was 7.5 miles per hour. It is notable that Plaintiffs' trial lawyer (new attorney) was not the original attorney, who had passed away. Plaintiffs' new attorney asked the trial court to exclude evidence that the original attorney picked the treating doctors and to also exclude any testimony from the non-party passenger (who testified he was surprised to hear his coworkers had filed suit for this accident). The trial court agreed to exclude testimony from the non-party passenger regarding any therapy plans discussed with the original attorney, but allowed his testimony that the lawyer picked the doctors.

At trial, Plaintiffs argued Space X was liable because Kreuger was on a "special mission" while traveling from the hotel to the work site[1]. Plaintiffs sought $3.75 million dollars in damages. Their new attorney argued the degeneration diagnosed from the x-rays did not preclude their recovery, but rather made it so that Plaintiffs " 'were easier to hurt because of this degeneration, their bodies just didn't bounce back as quickly' and 'that's why they're in pain, because of the crash.'" Defendants elicisit testimony that Plaintiffs work and the physical demands of their work were the cause of the "decades" or wear and tear evidence on the diagnostic studies.

At closing, Plaintiffs' counsel argued:

1. Space X wanted a free pass;
2. Space X was trying to make Plaintiffs out to be liars;

[1] To establish a claim for vicarious liability, a plaintiff must show that a worker " 'was acting in the course and scope of his employment' at the time of the negligent conduct. *Id.* at 131. Under the 'coming-and-going rule,' an employee does not act within the course and scope of his employment when traveling to and from work". *Cameron Int'l Corp. v. Martinez*, 662 S.W.3d 373, 376 (Tex. 2022), citing to *Painter v. Amerimex Drilling I*, *Ltd*., 561 S.W.3d 125 (Tex. 2018).

3. Space X thought "[it could] get away with not paying";

To counter, Defense counsel argued:

1. This was a lawyer driven plan;
2. Plaintiffs' claims were a "shakedown";
3. Plaintiff's vehicle was towed to make this "fender-bender" accident look more serious than it was*; Plaintiff objected to the closing statement at this point.*
4. That the Plaintiffs' treating doctors were "assigned" by the lawyer and had created medical evidence "with the long process of therapy";
5. That there was no "special mission";
6. That Plaintiffs wanted the jury to award damages simply because Space X had "resources";
7. That $8,000 per Plaintiff was appropriate.

As noted above, Plaintiffs counsel did object to defense counsel's closing at that point, asserting that it was an improper attack; without ruling, the trial court simply said "[m]ove on" and defense counsel proceeded with his closing statement. At rebuttal, Plaintiffs' counsel argued back that the original attorney was a "good man" and not someone "launching shakedowns and plots". After resting and during jury deliberations, Plaintiffs counsel re-urged, on the record, that he objected to the improper attack but did not intend to seek a mistrial. Rather, he reserved his right to seek a new trial "if it [didn't] go well."

The jury found "(1) Krueger's negligence proximately caused the accident, (2) she was not acting in the course and scope of her employment with SpaceX, and (3) she was liable to the three plaintiffs for $73,500, $40,000, and $10,000, respectively." The trial court granted Plaintiffs' motion for new trial based on defendant's "incurable" closing arguments more than likely caused the rendition of the verdict. The Thirteenth Court of Appeals denied the petition for mandamus, opining that neither party timely complained of the alleged order defect to the trial court, and the intermediary court would therefore have to speculate about which arguments the trial court found objectionable. The Texas Supreme Court, upon review of the petition for mandamus noted that the trial court amended its order, setting out 13 pages of reasons why the motion for new trial was supported by evidence. Instead of sending the matter back to the Court of Appeals for consideration, the high court considered it, given is concurrent jurisdiction and judicial efficiency.

Despite the amended order setting out more specifically that "defense counsel's closing contained 'inflammatory, highly prejudicial, and incurable jury arguments" that created the unsubstantiated impression that the plaintiffs and their counsel conspired to manufacture their damages with the physicians' help", the Court stated incurable argument is rare.

> "Incurable argument is rare. *See, e.g., Alonzo*, 689 S.W.3d at 913; *Rudolph Auto.*, 674 S.W.3d at 310; *Living Ctrs.*, 256 S.W.3d at 681. Examples include '[r]epeatedly telling jurors that they would align themselves with Nazis if they ruled for the defense,' 'remarks of racial prejudice, unsupported and extreme attacks on opposing parties and witnesses, or accusing opposing parties of witness manipulation or evidence tampering.' *Rudolph Auto.*, 674 S.W.3d at 311-12. Such arguments 'strike[ ] at the very core of the judicial process,' *Phillips v. Bramlett*, 288 S.W.3d 876, 883 (Tex. 2009), and 'damage the judicial system itself by impairing the confidence which our citizens have in the system,' *Living Ctrs.*, 256 S.W.3d at 681." Id at 582.

Defense counsel's arguments that this was a lawyer-driven case, that the doctors were "assigned by the lawyer" or made to look more serious were statements adduced in trial, through testimony. The Court therefore considered them "fair game" as there had been no objection at the time the testimony was offered. Further, the Court said defense counsel had made impassioned and "loaded rhetoric" that was curable with an instruction. It also distinguished defense counsel's hyperbole and potentially inflammatory language from those statements its has found to be "exceptional instances" of incurable argument. Citing to *Standard Fire Insurance Co. v. Reese*, 584 S.W.2d, 835, 840-841 (Tex. 1979).

Here, Plaintiffs' counsel did not secure a ruling to his objection, did not seek a curative instruction, bolstered the original attorney's reputation on rebuttal closing and "lie[d] in wait", hedging his bet on the jury's findings. Counsel's failure to secure a ruling on his objection and failure to move for a mistrial on to later move for a mistrial was "too

little, too late. Overturning a jury verdict—a consequential act of constitutional import—cannot rest on so thin a reed as what transpired here."[2]

Most importantly, for the scope of this paper, the Court addressed the trial court's amended order that the basis warranting a new trial was the "manifestly low damages" awarded by the jury. The order was devoid of the basis for a finding the award was "manifestly low", stating only that $123,500 was. The Supreme Court set out that it could order the trial court to render judgment on the jury verdict or compel the trial court to redraft the order to elaborate on the how and why the jury's award was manifestly low. Here, the appellate record did not include the 2,400 pages of medical records admitted at trial. Without those exhibits, the Court could not determine whether the trial court has a valid basis to determine the jury award was manifestly too low. Therefore, the Court ordered the trial court to redraft its order to elaborate on the reasoning, which might also permit the trial court to confirm that truly proper and sufficiently weighted evidence exists to support the order granting the new trial. However, this order was regarding Kreuger, not Space X. The Supreme Court rendered judgment in favor of Space X, finding there was no evidence of a special mission.

B. CASES TO WATCH!

1. Appellate decisions on sufficiency of personal injury awards

a. *JMI Contractors, LLC v. Medellin*

In this case out of the Fourth Court of Appeal in San Antonio, the appellate court considered whether a jury's finding of nearly $5 million dollars in personal injury damages was supported by the factual and legal evidence. Further, this case also presented an argument of incurable jury argument, only this time by Plaintiff's counsel[3]. Here, a subcontractor's worker (Jose Manuel Medellin) fell from a rooftop while installing a roofing membrane on a restoration project in multi-family housing roofs damaged by hail. Medellin sued the general contractor JMI Contractors, LLC (JMI) for negligence, premises liability, and gross negligence. Plaintiff contended JMI failed to adequately warn him of the dangers, and because JMI had exercised control over how the work was performed as well as the use of fall protection safety measures, Medellin could not take safety measures to protect himself, i.e. or invoking the necessary use exception.

By way of background, the subcontractor Metal Roof & TPO Specialist, LLC (Metal Roof) had not yet been awarded the contract with JMI, and on the day of the incident. Rather, JMI and Metal Roof were attempting a new roofing technique as a "job sample", before JMI could decide whether to award the contract. At trial, there was evidence that JMI's safety advisor, project manager, and roofing supervisor (JMI's employees) were responsible for ensuring all workers used fall protection while performing work for JMI. A JMI roofing supervisor testified it was his job to hire independent contractors for roofing contracts, and to ensure the independent contractors followed JMI's safety rules. The day of the accident, JMI's employees visited the site and knew a warning line was not in place on the roof. Evidence further established Medellin was not wearing a harness while on the roof, even though they were. JMI's employees did not install a warning line because the sample was to be installed on a patch in the middle of the building's roof. A heat gun would be used to install the roofing material on the sample patch that had already been marked and the material set on top of the roof. Medellin did not know the scope of the work he would do that day, bringing only his toolbelt, but he testified the only times he used a harness was on a pitched roof three stories or higher, implying he would not have used one on this roof anyway. However, he also testified he had never worked on a flat roof before and had not installed the type of material being installed that day. Metal Roof had called him that morning to work as a helper. JMI knew Medellin was not wearing a harness and knew a warning line was not in place on the roof. Nevertheless, JMI told Plaintiff what he needed to do and how and believed Medellin would be safe because he was working in the middle of the building's roof[4]. They did not ask him to wear a harness.

The jury returned a $4,637,375.72 verdict for Plaintiff, including economic and non-economic damages. It awarded past and future pain and suffering, past and future physical impairment, past and future medical expenses, loss of future earnings, past and future mental anguish and exemplary damages. In its findings, the jury determined JMI was liable for negligent activity, premise liability, breach of duty and gross negligence. JMI appealed all those findings.

The appellate court found evidence 1) JMI controlled the safety and manner of Medellin's work, 2) provided more than a mere presence at the job site, and 3) was responsible for ensuring workers followed JMI's safety requirements. Accordingly, the Fourth Court opined evidence established that JMI should have anticipated Medellin, a helper who

[2] The Supreme Court was clear to say it does not condone inflammatory or prejudicial rhetoric, reminding practitioners that they are officers of the court and proper and ethical conduct requires limitation on prejudicial and inadmissible matters being argued. Further, it reminded trial courts they need not wait for an objection to correct a violation of these rules.

[3] Defendant also appealed the trial court's exclusion of evidence that Plaintiff had ingested drugs and alcohol on the day of his accident.

[4] There was also evidence JMI had a watchman designated to serve as fall protection.

was performing a job sample, was unable to take the safety measures required to avoid the risk of falling off a flat roof. They held the necessary-use exception applies to these facts, and JMI owed him a duty to warn of the dangers associated with the roofing project. The appellate court also determined the evidence was sufficient to support a gross negligence finding because "[w]hen viewing this evidence objectively from [JMI's employee's] standpoint and in the light most favorable to the jury's finding, the jury could have formed a firm belief or conviction installing the sample patch without using a warning line or ensuring the workers wore harnesses created an extreme risk of harm." And evidence that JMI's safety consultant had to correct JMI's project manager and roofing consultant in the past, for not complying safety guidelines on projects, was sufficient evidence on which the jury could find JMI acted with gross negligence. For purposes of this paper and topic, we will focus below on the Fourth Court's analysis of the sufficiency of damages awarded.

> "If there is more than a scintilla of evidence to support the jury's finding, then the evidence is legally sufficient to support the jury's finding. *See id.* at 518. Whether the evidence is factually sufficient to support the jury's finding of damages, we consider all the evidence in the record, both for and against the jury's finding. *See id.* Evidence is factually insufficient if the jury's finding 'is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust.' *Id.* As the trier of fact, the jury 'determines the credibility of the witnesses and the weight to be given their testimony, decides whether to believe or is believe all or any part of the testimony, and resolves any inconsistencies in the testimony.' *Id.* Accordingly, when there is conflicting evidence, we defer to the jury as the trier of fact. *See id." Citing to Tagle v. Galvan, 155 S.W.3d 510, 517 (Tex. App.-San Antonio 2004, no pet.)*

The jury awarded damages for loss of future earning capacity in the amount of $288,000. Here, the court notes that "Lost earning capacity is an assessment of what the plaintiff's capacity to earn a livelihood actually was and the extent to which that capacity was impaired by the injury." Non-exclusive factors such as *stamina, efficiency, ability to work with pain, the weakness and degenerative changes* which naturally result from an injury and from long-suffered pain, and *life expectancy* are legitimate considerations in determining whether a person has experienced an impairment in future earning capacity. To that end, the jury heard testimony indicating Medellin was 29 years old at the time of the incident, was a skilled roofer and his capacity to work had been impaired. Medellin testified he could not work full weeks or complete the same tasks. Doctor testified about pain deficits and limitations. JMI's contention Medellin returned to roofing work after the accident is irrelevant because he could not work everyday and sometimes could not work at all because of his injuries. Medellin also testified he earned between $160 and $200 per day as a skilled roofer or up to $1200 a work week. The court found evidence was legally and factually sufficient to support the jury's award for lost future earning capacity.

As to past and future medical damages, the jury awarded $119,579.34 as to past medicals. As to this element of damages, the court held that Plaintiff introduced 18.001 affidavits to support the reasonableness and necessity of the expenses and any alleged trial court error in excluding the defense's controverting expert was inadequately briefed and failed to establish how trial court erred. As to future medical expenses, Texas follows the "reasonable probability" rule where Plaintiff must how a reasonable probability the expenses will be incurred in the future. And though the referred method is through medical testimony, the Court also stated there is "no precise evidence…required", Thus, the jury was free to consider the nature of Plaintiff's injuries, the medical care rendered, and Plaintiff's condition at time of trial. "Because issues such as life expectancy, medical advances, and the future costs of products and services are, by their very nature, uncertain, appellate courts are particularly reluctant to disturb a jury's award of these damages." Citing to *Antonov v. Walters*, 168 S.W.3d 901, 908 (Tex. App.—Fort Worth 2005, pet. denied).

The jury also awarded $500,000 for past and $800,000 for past and future pain and suffering. Overarching in the court sufficiency analysis the tenet that "Texas courts, including this court, have recognized '[t]he process of awarding damages for amorphous, discretionary injuries such as pain and suffering is inherently difficult because the alleged injury is a subjective, unliquidated, nonpecuniary loss' ". So, juries are given wide latitude, and an award will not be disturbed if sufficient probative evidence exists to support it. Here, Plaintiff's testifying medical doctor told the jury about all the fractures, surgeries to his leg and elbow (with screws and plates), complications, intense pain, and limitations Plaintiff had and was enduring. Fact witnesses also testified about Plaintiff's "desperation", anger, how he would "cry", and how Plaintiff said this accident was the "most painful thing", and how he "wanted to die." Notably, the court said the jury was also allowed to infer pain from the nature of the injury. It held there was sufficient evidence to support the jury's award.

Regarding past and future mental anguish, the jury awarded $800,000 for past and $500,000 for future mental anguish. Here the court considered that "[e]vidence of past pain and mental anguish may be proven through a plaintiff's testimony or other evidence, including circumstantial evidence." Plaintiff's wife testified about the significant changes

in Plaintiff's life, the disruption and his inability to do daily tasks (bathing, eating, restroom, could not play with his child). The court determined this evidence was sufficient to support the nature, duration, severity of mental anguish.

Finally, as to past and future physical impairment, which the court opined includes loss of enjoyment of life, the jury awarded $100,000 for past and $100,000 for future impairment. As support this element, Plaintiff put on evidence that he was unable to engage in daily activities such as sitting, standing, walking, or playing with his daughter for extended periods of time. There was testimony Plaintiff was not happy, because he loved to work and did not like sitting around and doing nothing. Importantly, the court did set out that past and future physical impairment require a showing of physical impairment by way of damages and injuries that are distinct from, or extend beyond, pain and suffering, mental anguish, lost wages or diminished capacity. So in addition to the testimony from fact witnesses, the jury also heard from the medical treater and from medical records that detailed Medellin's inability to have full use of his body, that Plaintiff would have less strength in his injured leg, less range of motion, less grip in his arm, and difficulty lifting for the remainder of his life due to the accident. The court, therefore, determined the evidence was legally and factually sufficient to establish Medellin's loss of enjoyment of life.

JMI argued the jury's award for exemplary damages was legally and factually insufficient as Plaintiff had failed to produce evidence of JMI's net worth. JMI argued the jury awarded $1,000,000 in punitive damages because Plaintiff's counsel told them to "just write a big number." The appellate court found that though evidence of net worth is relevant, there is no statute or case law defining a defendant's net worth as a necessary element for recovery of exemplary damages. In support of this opinion, the court cited to Durban v. Guajardo, 79 S.W.3d 198, 210-11 (Tex.App.-Dallas 2002, no pet.), which held that ("Nothing in chapter 41 of the Texas Civil Practice and Remedies Code, *Moriel*, or other Texas case law indicates that evidence of the defendant's net worth is a necessary element for the plaintiff to recover any exemplary damages."). Further, the Fourth Court determined there was sufficient evidence to support a gross negligence finding and upheld the exemplary damage award. In conclusion, the appellate court upheld the trial court's rulings[5].

The Texas Supreme Court has granted review of the sufficiency of the negligent activity and premise liability finding, the damages award, the exemplary damages award, the incurable closing argument[6] allegation and the alleged improperly excluded evidence of alcohol and drug use rulings.

b. *Footy Rooty Development, Inc., et al. v. Jane Doe (MD)* 2025 WL 3764017 (Tex. Civ.-Corpus Christi-Edinburg Dec. 2025[7]).

This case comes out of the County Court at Law #4 of Nueces County, Texas. The Thirteenth Court of Appeals, with an opinion from Justice L. Aron Pena issued his opinion on December 30, 2025. This case, though not on review to the Texas Supreme Court, was included because of its discussion of the post-Chohan[8] discussion on the evidence to support the award of mental anguish, as opposed to the evidence required to establish the right to recover.

Footy Rooty Development, Inc., FR Standards, LLC, FR Saratoga CC, LLC, and Xu Liu (Defendants) appealed a default judgment in a case involving the alleged sexual assault of a customer, "Jane Doe (M.D.)" (Doe). Defendants complained there was insufficient evidence to support the trial court's award of $3,000,000 as well as of attorney's fees. The Thirteenth Court of appeals affirmed in part and reversed and remanded in part.

By way of background, Doe was a massage customer who claims she was sexually assaulted by an unlicensed employee. Doe sued under theories of negligence, negligence per se, gross negligence, and deceptive trade practices violations, negligent hiring, supervising, and training and premises liability. Doe also alleged respondeat superior, agency, piercing the corporate veil, aiding and abetting, and conspiracy. After serving Defendants by substituted service, Doe secured a default judgement against them when they failed to appear, but severing out the defendants who had not yet been served with citation from the lawsuit. The trial court awarded "Actual Damages" of $3,000,000, consisting of past damages in the amount of $500,000 and future damages in the amount of $2,500,000. The trial court also awarded Doe prejudgment and post-judgment interest, costs of court, attorney's fees of $20,000, and conditional appellate attorney's fees. The trial court's default judgment awarded "Actual Damages" but did not specify the category

[5] Chief Justice Rebeca Martinez dissented, arguing the trial court and appellate court's decision that Plaintiff's drug and alcohol use the morning of the incident should be excluded was error and resulted in the appellate court's flawed decision as to the remaining appellate points.

[6] Plaintiff's counsel referred to Plaintiff as a noncitizen worker, an undocumented worker, and asked the jury to award a large sum of money to send a message to the roofing industry and to ultimately protected other undocumented workers. JMI did not object to the statements nor request a curative instruction. The appellate court found the statements were not an appeal to the jury's national prejudice nor a call to unite based on ethnic solidarity.

[7] End of year Chohan-referenced decision on December 30, 2025. Only Westlaw citation currently available.

[8] *Gregory v. Chohan, 680 S.W.*3d 546 (Tex. 2023) at 563–564

or categories of damages awarded. The appellate court note that the default judgment did not include damages for gross negligence, even though gross negligence was admitted by virtue of default. Importantly, Appellants did not object to the global nature of the damage award and did not request findings of fact or conclusions of law. Therefore, the Court said it was not possible to determine what portion of the damages were allocated to each ground of recovery and therefore the inquiry turned to whether there was sufficient evidence to support any award.

As to past and future medical care and expenses, the intermediary court determined the damage award could not include any sums for past or future medical care and expenses because Doe did not produce any evidence regarding those special damages. There was no evidence of medical expenses nor expert testimony (or evidence) establishing that in all reasonable probability future medical care would be required, nor was there evidence of the reasonable cost of future care.

Regarding lost wages or loss of earning capacity, the court found there was no evidence to establish what the lost wages were, nor of earning capacity or wages to "any degree of certainty," thereby precluding recovery of those damages. And in keeping with the post-*Chohan* decision on the sufficiency of damages sustained for mental anguish, appellants asserted that Doe's affidavit did not establish "'a high degree of mental pain and distress that is greater than mere worry, anxiety, vexation, embarrassment, or anger.'" The court restated that "[t]o recover damages for mental anguish, a plaintiff must produce 'direct evidence of the nature, duration, and severity of [her] mental anguish' which establishes 'a substantial disruption in [her] daily routine.'" This evidence includes evidence of the mental sensation of pain resulting from grief, severe disappointment, indignation, wounded pride, shame, despair, and public humiliation. Thus, in order to recover damages for future mental anguish,

Doe was required to establish the reasonable probability that compensable mental anguish will persist, as well as produce some evidence to support or justify the amount awarded. Citing to *Gregory v. Chohan, 680 S.W.*3d 546 (Tex. 2023) at 563–564. Specific examples of evidence can include plaintiff's own testimony as it did here. Doe's affidavit sufficiently established that Doe was sexually assaulted, that:

> "she 'could no longer live by [herself],' she 'had to give up [her] place in Victoria, Texas,' and she moved back home. Doe testified that she was 'terrified to be alone,' and she 'felt ashamed, dirty[,] and scared to be around people.' Doe underwent weekly counseling because of the incident 'for over a year,' and stopped when the facility 'no longer had funds.' Doe further stated that she had 'wanted to go back [to counseling] but it is difficult for [her] to speak with another man about [her] emotions because of [her] fears.' Doe explained that she 'couldn't go back to work' for a period of approximately two years after the accident, and that she 'survived as [her] mother helped [her] financially [be]cause [she] mentally and emotionally could not support [herself] during this time as [she] was basically in treatment.' Doe further testified that the nature of her employment changed because of the assault. Doe 'used to be a field clerk and work outside with both men and women and at times in the office,' which was a job she enjoyed, whereas now, she works as a 'fire watch,' and is 'pretty much ... alone' and 'isolated.'"

Based on the court's view that the incident was a disturbing and shocking injury, and that Doe testified about the nature, duration, and severity of her mental anguish, and her testimony established that her anguish caused substantial disruptions in her daily life, the court held there was sufficient evidence to support an inference that she sustained mental anguish. However, the appellate court opined that Doe's affidavit was factually insufficient to support the trial court's award of $3,000,000, even though she had established the existence of a compensable claim. And though the court said that the jury has latitude in determining an award, it must award an amount based on evidence from which a reasonable person could estimate fair compensation, and not an award based on irrelevant considerations such as passion or prejudice, nor based on impermissible appeals to other irrelevant considerations. So, where the trial court awarded Doe $500,000 in past damages and $2,500,000 in future damages, the record lacked evidence to justify the amount awarded. "In short, the only evidence before the trial court was Doe's affidavit, and Doe's affidavit does not address the amount of her damages or suggest or provide an amount that would fairly and reasonably compensate her for her injuries". Citing to Gregory, 670 S.W.3d at 557; Saenz, 925 S.W.3d at 614. The intermediary court determined "the trial court awarded $3,000,000 based on counsel's argument alone, and the record fail[ed] to include any rationale for this number."

As to the trial court's award of attorney's fees, appellants asserted that the trial court abused its discretion by awarding attorney's fees without legally and factually sufficient evidence. Specifically, appellants contend that the trial court erred by awarding $20,000 in attorney's fees because Doe's counsel's affidavit stated that he worked 42 hours at an hourly rate was $300 per hour, for a total of $12,000. The trial court's award of $20,000 was therefore unsupported by the evidence, even if additional work was probably done, as the record was devoid of evidence to establish or support it.

And for contingent appellate fees, the Court held there be evidence or "opinion testimony about the services it reasonably believes will be necessary to defend the appeal and a reasonable hourly rate for those services." Here, Doe's counsel provided testimony regarding his hourly rate and the amount of time required to handle appeals to the intermediate court of appeals, including an initial brief, any reply briefs, and a motion for rehearing. Counsel also provided evidence of the reasonable and necessary fee to handle an appeal to the Supreme Court would be $30,000.00. Importantly, the appellate court said, the trial court was "also free to consider the entire record and the common knowledge of the lawyers and judges in evaluating [Plaintiff's] request for a specific amount of fees." Thus, the evidence was sufficient to support this award. The Court affirmed the default judgment in part and reversed and remand in part

Notably, the Court recognized that the intermediate appellate courts are inconsistent in their approach to recovery of contingent appellate fees regarding the sufficiency of the description of the services to be rendered on appeal and listed them as follows:

> *"Faith P. & Charles L. Bybee Found. v. Knutzen*, 681 S.W.3d 818, 840–41 (Tex. App.—Austin 2023, no pet.) (stating that affidavit testimony was legally insufficient because it provided no evidence of the tasks necessary to defend an appeal);
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> *Jones-Hospod v. Hospod*, 676 S.W.3d 709, 725–26 (Tex. App.—El Paso 2023, no pet.) (finding that an attorney's testimony regarding appellate rates and that an appeal "would be in excess of $20,000" was legally insufficient);
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> *Hizar v. Heflin*, 672 S.W.3d 774, 803 (Tex. App.—Dallas 2023, pet. denied) (concluding that testimony was legally insufficient to support an award of contingent appellate fees where counsel did not identify the services reasonably believed necessary to defend the appeal or an hourly rate for those services);
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> *Lakeway Psychiatry & Behav. Health, PLLC v. Brite*, 656 S.W.3d 621, 640 (Tex. App.—El Paso 2022, no pet.) (holding that testimony setting forth an hourly rate and the amounts requested for each stage of appeal was sufficient);
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> *Gibbons & Bravos Surveying L.L.C. v. Gibbons*, No. 04-24-00249-CV, 2025 WL 2326062, at *7 (Tex. App.—San Antonio Aug. 13, 2025, no pet.) (mem. op.) ("Because Mr. Zlotucha presented competent expert opinion testimony of his hourly rate and the total cost he believes will be required at each stage of an appeal, we hold the evidence presented to the trial court was sufficient to support the award of conditional appellate attorney's fees."); *Johnson v. Bearfoot Cos.*, No. 02-23-00366-CV, 2024 WL 2202033, at *10 (Tex. App.—Fort Worth May 16, 2024, no pet.) (mem. op.) (holding that an affidavit setting forth an hourly rate and an opinion regarding the total anticipated costs at each stage of appeal to be sufficient);
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> *Trujillo v. Shafaii Invs., Ltd.*, No. 01-22-00819-CV, 2024 WL 2001612, at *12 (Tex. App.—Houston [1st Dist.] May 7, 2024, pet. denied) (mem. op. on r'hg) ("Although some attorney's fee affidavits identify particular services involved in an appeal, all appeals involve researching, preparing, and drafting a brief, so remanding this case for a more specific description of particular services would provide little if any benefit.")."