

ARAWC Connect 2023 Occupational Injury Conference

CASE LAW UPDATE STEVEN J. BLANCO, ESQ.



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Recent Cases and New Law

- Proof required for non-economic damages
 - Mental anguish
 - Loss of companionship
 - Pain and suffering
- Arguments used to convince a jury to award these damages
- Course and Scope Issues
- Arbitration Procedures

**Gregory v. Chohan, __ S.W.3d __, No. 21-0017, 2023
WL 4035886 (Tex. June 16, 2023)**



**SCOTX standard for non-economic
damages**

Facts

Gregory v. Chohan

- This case arose from a fatal multi-vehicle accident occurring on an unlit, icy stretch of highway near Amarillo, Texas.
- An 18-wheeler jackknifed across the highway, leading to a pileup of vehicles and other 18-wheelers, and the death of four people, including Bhunpinder Deol (Deol).
- Deol's family brought a wrongful death suit against the driver of the jackknifed 18-wheeler and the trucking company that employed her.
- A Dallas County jury awarded a total of \$38.8 million to the surviving family members (multiple parties).

Facts

- The surviving wife, children, and parents of decedent, Bhupinder Deol, were awarded over \$15 million for their **noneconomic damages**.
- To award these damages, the jury heard evidence supporting the existence of mental anguish and loss of companionship, but no evidence was presented to support the amount of these non-economic damages.

Facts/Arguments

- The attorney urged the jury to give them “two cents” for every mile New Prime trucks drove in 2013, the year of the accident.
- The calculation of two cents for each of the 650 million miles driven by New Prime trucks in 2013 equals \$39 million.
- Also argued and made references to a \$71 million military fighter jet and a \$186 million painting to justify the amount of damages sought.
- The Deol award of \$16.8 million with over \$15 million awarded for mental anguish and loss of consortium was appealed.

Affirmed on Appeal

- Other plaintiffs settled, the Deol award was reviewed on appeal on a no-evidence issue.
- The en banc Court of Appeals for the Fifth District of Texas affirmed the jury's award, and the defendants subsequently petitioned the Texas Supreme Court for review.
- The Texas Supreme Court granted review and issued an opinion addressing the damages and evidence issues.

SCOTX Answers

Part One

When deciding the matter, the Texas Supreme Court first declined to create a separate rule or to distinguish its precedent when analyzing non-economic damages in wrongful death actions as opposed to non-death injury or defamation cases. In doing so, the court explained that “no matter the source of the mental anguish or loss of companionship suffered, our precedent is clear that ‘there must be . . . evidence to justify the amount awarded’ in compensatory damages, just as there must be evidence to support any other relief afforded by our judicial system.”

SCOTX Answers

Part Two

- The court condemned the use of unsubstantiated anchoring tactics deployed by the plaintiff's counsel at trial.
- The plaintiff's counsel suggested damages amounts to the jury by referencing objects with no rational connection to the facts of the case (e.g., the cost of a fighter jet, expensive painting, or a percentage of a company's revenue).
- The court explained that these unsubstantiated anchoring tactics were attempts to help a jury place a monetary value on human lives but emphasized that awards for mental anguish and loss of companionship are not meant to place a value on human life. Rather, they are meant to compensate the plaintiff for their injury.
- The court further explained that the trial court should have stopped the plaintiff's counsel's use of unsubstantiated anchors sua sponte, pursuant to Tex. R. Civ. P. 269(g).

SCOTX Answers

- The court also rejected outright the suggestion that economic damages must be considered as a reference for non-economic damages in wrongful death cases.
- The court explained that the severity of mental anguish and loss of companionship suffered by surviving family members does not correlate with one's economic status.
- The court pointed to the nature, duration, and severity of the anguish suffered as relevant to the amount awarded.
- The requirement is that the amount of damages must have a rational basis grounded in the evidence.

Take-Away

1. Can help avoid “nuclear verdicts.”
2. Confirms that awards for non-economic damages are not punitive and are not meant to be used to place a value on human life. Instead, they are meant to compensate a plaintiff for their injury.
3. Furthermore, to recover these damages, a plaintiff must demonstrate (1) evidence of the existence of compensable mental anguish, and (2) a rational basis grounded in the evidence to justify the amount awarded.
4. Example: evidence of financial consequences relating to the severe emotional disruption in a plaintiff’s life, or evidence showing how the money could enable a plaintiff to better cope with the grief or restore their emotional health.
5. No more “fill in the blank” or anchoring arguments.

In re Rudolph Auto., LLC, No. 21-0135, 2023 WL 4035804 (Tex. June 16, 2023),

“Course and Scope of Employment”

- Use of workers’ compensation law and precedent in evaluating “course and scope” in NonSub cases.
- The Texas Supreme Court has long directed Texas courts to interpret the phrase “course and scope of employment” more broadly in workers-compensation cases than in non-workers’-compensation cases.
- In workers’-compensation cases, the worker has given up the right to sue, so coverage should be interpreted broadly.
- In nonsubscriber and vicarious-liability (third-party) cases, on the other hand, employees and third parties have intact their ability to sue and hence still have available remedies, so there is no need to interpret “course and scope” so broadly.

Facts

In re

Rudolph Auto., LLC

- In Rudolph, a car dealership manager and his team of employees stayed after hours to drink beer and talk.
- The employees clocked out at 8 p.m., consumed some beers, and then one employee, Irma Villegas, walked toward her car but changed course and walked over to a different area of the dealership.
- At the same time, employee Christian Ruiz got into his truck and headed for the exit. In doing so, however, he accidentally struck Villegas, causing her to suffer catastrophic injuries that ultimately resulted in her death after seven years in a nursing home.
- An El Paso jury awarded Villegas' family over \$4 million in damages – but considering that award to be insufficient, Villegas's family filed a motion for new trial, which the trial court granted. **The defendant appealed.**

Facts

- The jury determined Ruiz (driver) and Villegas were NOT in course and scope of employment.
- The trial court cited four reasons for overturning the verdict, only one of which is directly relevant to non-subscription.
- With regard to that grounds, the trial court concluded that the Texas Supreme Court's decision in *Painter v. Amerimex Drilling*, which was issued the same day as the jury verdict "was important law" that affected the trial Court's rulings and the parties' positions.
- It concluded, "[b]ased on the *Painter* opinion... it appears to this [trial] Court that it needs to reconsider whether [the driver and pedestrian] were injured in the course of employment as a matter of law."

Summary

- In the *Painter* decision, the Texas Supreme Court discussed the interplay between workers'-compensation law and other law governing "course and scope" in non-workers'-compensation cases.
- Historically the two concepts have been kept separate. Even so, the Court adopted the workers'-compensation-derived "coming and going" rule in third-party/vicarious-liability cases.
- That rule provides that an employee **is not** in the course and scope of employment when merely coming to or going home from work.

Summary

- It then went further and adopted one of the workers'-compensation-derived exceptions to that rule called the "special mission" exception.
- Provides that coming to or going home from work is not within the employee's course and scope of employment unless the employee is on a special mission (i.e., running an errand for) the employer.
- Further, in *Painter*, the Court generally redefined how "course and scope of employment" is determined:
- The course-and-scope inquiry ... involves an objective analysis, hinging on whether the employee was performing the tasks generally assigned to him in furtherance of the employer's business. That is, the employee must be acting with the employer's authority and for the employer's benefit.

Rudolph Analysis

- Several nonsubscribers filed an amicus brief in the Rudolph Supreme Court appeal because the appellate court in *Rudolph* read the *Painter* decision to not just adopt the “special mission” exception, but ALL workers’-compensation-related exceptions to the coming-and-going rule, including the “access doctrine.”
- Under the workers’-compensation “access doctrine,” if an employee is still on the employer’s premises after clocking out, then he is still acting in the course and scope of his employment.
- The amici argued that the “access doctrine” should not be adopted in non-workers’-compensation cases, because doing so would unduly enlarge an employer’s liability both to its employees and to third parties injured by its employees, even though the employee is no longer acting for the employer’s benefit after being clocked out.

Rudolph Analysis

- *Painter* and *Rudolph* address whether an employee was acting within the course and scope of employment, but here, the jury found for plaintiffs on that point involving a far different fact pattern and upon very pro-plaintiff instructions.
- The jury found that Flores [the manager] was acting within the scope of his employment and that Ruiz [the driver] and Villegas [the pedestrian] were not.
- The Court's decision in *Painter* turned on the rejection of a "task-by-task" test in determining when the course-and-scope standard is met. *Painter* had no material bearing on any question pertinent to the *Rudolph* case, such as the application of the access doctrine with the course-and-scope question.

Take-Away

- This statement is helpful to nonsubscribers because by saying *Painter* is irrelevant to the access-doctrine issue—and by saying the *Painter* decision would not have changed the jury’s findings that Ruiz and Villegas **were not in the course and scope**, it effectively overruled that part of the Rudolph Court of Appeals decision that held the *Painter* decision called for a **wholesale adoption of all workers’-compensation-related doctrines when interpreting the course-and-scope issue**.
- As a result, at least for now, it appears that if an employee is “off the clock,” when injured, the **employee is not acting within the course and scope of employment**, even if the injury occurs while the employee is still on the employer’s property.
- In other words, the “access doctrine” is still limited to workers’-compensation cases and cannot currently be used to transform an off-the-clock injury into an “on-the-job” injury.

ARBITRATION UPDATE



Delgado v. Dish Network

- Employee discrimination claim.
- Deals with procedure for selection of arbitrator.
- Employer filed motion to compel arbitration (2016). The motion was initially denied. After long appellate process, the trial court was directed to compel arbitration (end of 2022).
- The issue contested was the appointment of the arbitrator to hear the case.

Background

- The Employee agrees that this Agreement is governed by the Federal Arbitration Act, 9 U.S.C. §§ 1 et. seq., and is fully enforceable.... The arbitration shall be governed by and construed in accordance with the substantive law of the State in which the Employee performs services for EchoStar as of the date of the demand for arbitration **A Single arbitrator engaged in the practice of law from the American Arbitration Association (“AAA”) shall conduct the arbitration under the then current procedures of the AAA's National Rules for the Resolution of Employment Disputes ...**

Background

- Parties did not agree on selection of arbitrator.
- The Trial Court suggested several and each was rejected by the parties.
- The Trial Court then appointed an arbitrator (previously rejected) and the defendant pursued mandamus relief.
- The only issue was the selection of the arbitrator under the parties' agreement.
- No specific authority on this point– at the time.

Decision and Lesson

- It would have been easy enough for the parties to agree that AAA should handle the selection process for the arbitrator. They could have said something like, “If the parties fail to agree on an arbitrator, then the AAA will appoint the arbitrator under their then current rules.”
- But the agreement here does not contain the more global adoption of the AAA rules to govern the “administration” of the arbitration, or that the arbitration “proceedings” will be governed by the AAA, or that the “dispute” will be resolved under the AAA rules.
- Instead, it provides that arbitrator “shall conduct the arbitration under the then current procedures of the AAA's National Rules for the Resolution of Employment Disputes.” The sequencing used in the clause presupposes that the arbitrator has already been selected by the time the AAA rules are followed.
- Make sure the arbitration clause you use has specific points to address the entire process for arbitration.

Jury Verdicts in Texas

JUROR 12
PLEASANT
COOPERATIVE

JUROR 3
BOSSY?
NO SMILE

JUROR 8
BLUE SWEATER
HR BACKGROUND

JUROR 5
FORMER CPA
TECHNICAL



JUROR 11
ON JURY
HES (SI

JUROR 17
KNOWS OF DEF
SAYS CAN BE
FAIR

JUROR 2
SAID "SIR"
FOLLOWER??

JUROR 9
SEEMS GREAT
VERY SMART

2022

Three Highest Workplace Injury Verdicts (*cringe*)

Texas

- Workplace Safety/Workplace Negligence/Electrocution
- \$15,600,000.11

Texas

- Workplace Safety/Gross Negligence/Electrocution
- \$16,000,000.

**New
Mexico**

- Workplace Negligence/Negligent Training/Fall
- \$7,861,500.00.