KeyCite Yellow Flag - Negative Treatment
Review Granted September 2, 2022

615 S.W.3d 277
Court of Appeals of Texas, Dallas.

Sarah GREGORY and New Prime, Inc., Appellants
v.
Jaswinder CHOHAN, Individually and as Next Friend and Natural Mother of G.K.D., H.S.D., and A.D., Minors, and as Representative of the Estate of Bhupinder Singh Deol, Darshan Singh Deol, Jagtar Kaur Deol, Guillermo Vasquez, William Vasquez, Individually and as Administrator of the Estate of Alma B. ("Belinda") Vasquez, Alma J. Perales, Individually and as Administrator of the Estate of Hector Perales and as Next Friend of Minor N.P., Appellees

No. 05-18-00167-CV
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Opinion Filed November 30, 2020

Synopsis

Background: Widow of trucker, individually and on behalf of their children and trucker's estate, and trucker's parents brought wrongful death action against driver of jackknifed truck that blocked interstate, allegedly causing multi-vehicle accident at which trucker was killed while outside his truck, and against driver's employer, alleging vicarious liability, as well as claims for negligent entrustment, supervision, and training. After granting widow's and parents' motion to strike driver and employer's designations of responsible third parties, and following jury trial, the County Court at Law No. 5, Dallas County, Mark Greenberg, J., entered judgment against driver and employer, awarding jury verdict totaling almost $17 million to widow, children, estate, and parents. Driver and employer appealed.

Holdings: The Court of Appeals, en banc, Reichek, J., held that:

[1] evidence was legally and factually sufficient to support finding that driver was negligent;

[2] sudden-emergency doctrine did not apply as defense;

[3] evidence supported finding that driver's negligence was a proximate cause of trucker's death;

[4] jury instruction on unavoidable accident was not required;

[5] employer was jointly and severally liable with driver for damages awarded;

[6] comparison of amounts of noneconomic damages awarded to amounts awarded in similar circumstances was insufficient to show that damages were excessive; and

[7] evidence supported noneconomic damages award of $7,437,500.00 to widow.

Affirmed.

Whitehill, J., filed opinion concurring in part and dissenting in part in which Richter, J., sitting by assignment, joined.

Schenck, J., filed opinion concurring in part and dissenting in part in which, Browning, J., and Richter, J., sitting by assignment, joined.

Procedural Posture(s): On Appeal; Judgment; Motion to Strike.

West Headnotes (82)

[1] Appeal and Error Review for factual or legal sufficiency; "no evidence" review

A challenge to legal sufficiency of the evidence requires an appellate court to view the evidence in the light most favorable to the verdict, and indulge every reasonable inference that would support it.

[2] Appeal and Error Legal sufficiency or "no evidence" in general

Evidence is legally sufficient to support a verdict on appeal if more than a scintilla of evidence exists.

1 Case that cites this headnote

[3] **Appeal and Error** Scintilla of evidence

More than a scintilla of evidence exists, such as would be sufficient to support a verdict on appeal, if the evidence furnishes some reasonable basis for differing conclusions by reasonable minds about a vital fact's existence.

1 Case that cites this headnote

[4] **Automobiles** Nature and condition of highway

Evidence was legally and factually sufficient to support jury's finding that driver of jackknifed truck was negligent, in wrongful death action brought by family and estate of trucker killed at site of accident involving multiple vehicles that attempted to avoid collision with truck on interstate; driver had set truck's cruise control at 58 miles per hour under forecasted freezing and icy conditions, driver applied a hard stop in freezing drizzle and sleet as she approached a patch of ice, and driver subsequently abandoned jackknifed truck, which she knew was blocking most of the lanes on dark, icy highway, without activating emergency flashers or setting out triangles or flares.

[5] **Negligence** Ordinary care

"Negligence" means a failure to use ordinary care, which is failing to behave as a person of ordinary prudence would have under the same or similar circumstances.

[6] **Automobiles** Vehicles at Rest or Unattended

Automobiles Lights, signals, and warnings

If a parked or disabled vehicle obstructs the road, the operator of the vehicle must act with reasonable promptness to warn other motorists of the vehicle's presence and to remove the vehicle from the road.

[7] **Automobiles** Lights, signals, and warnings

Failure of other involved tractor-trailer drivers to activate warning systems did not establish that driver of jackknifed truck satisfied standard of care in wrongful death action brought against driver and her employer by family and estate of trucker killed at scene of accident involving multiple vehicles that attempted to avoid collision with jackknifed truck, which was blocking interstate without warning lights; standard of care is determined objectively, other drivers' vehicles cleared the roadway and were not stopped in a way that created a hazard to oncoming traffic, and evidence did not show that other drivers had the same amount of time to activate a warning system before fatalities occurred.

[8] **Automobiles** Acts in emergencies

Automobiles Speed and lack of control

Any sudden emergency when driver's truck jackknifed on icy interstate, leading to multi-vehicle accident, was proximately caused by driver's negligence such that sudden-emergency doctrine did not apply as defense in wrongful death action brought by family and estate of trucker killed at multi-vehicle accident scene, against driver of jackknifed truck and her employer; driver failed to recheck weather conditions, drove with cruise control activated at an unsafe speed, applied a hard stop as her truck hit ice, and failed to warn oncoming traffic of the hazard she created.

1 Case that cites this headnote

[9] **Negligence** Self-created emergencies

The "sudden-emergency doctrine," applies as a defense to negligence only if the sudden emergency was not proximately caused by any negligence of the defendant and, after the emergency arises, the defendant acts as a person of ordinary prudence would have acted under the same or similar circumstances.

1 Case that cites this headnote

[10] **Negligence** Necessity of causation

Negligence Foreseeability

In the context of negligence, proximate cause has two sub-elements, cause-in-fact and foreseeability.

[11] **Negligence** "But-for" causation; act without which event would not have occurred

Negligence Substantial factor

Negligence is a "cause-in-fact" of an injury if (1) the injury would not have occurred without the negligence and (2) the negligence is a substantial factor in causing the injury.

[12] **Negligence** Foreseeability

Foreseeability, as an element of proximate cause in the negligence context, requires that the negligent actor, as a person of ordinary intelligence, anticipate, or should have anticipated, the danger their negligence created for others.

[13] **Negligence** Proximity in time or place

To proximately cause an injury, an actor need not be the last cause, nor commit the act immediately preceding the injury.

2 Cases that cite this headnote

[14] **Negligence** Possibility of multiple causes

In the context of negligence, there can be more than one proximate cause of an accident.

2 Cases that cite this headnote

[15] **Negligence** Effect of other causes on liability

When a new cause or agency concurs with the continuing and co-operating original negligence in working an injury, the original negligence remains a proximate cause of the injury, and the fact that the new concurring cause or agency may not have been reasonably foreseeable does not relieve the wrongdoer of liability.

[16] **Negligence** In general; foreseeability of other cause

It is no defense that a third person's negligent act intervened to cause the injury to the plaintiff if the new act cooperates with the still-persisting original negligence of the defendant to bring about the injury.

[17] **Automobiles** Speed and lack of control

Automobiles Vehicles at rest or unattended

Evidence supported jury's finding that driver's negligence in jackknifing truck and abandoning it on dark, icy interstate without warning to oncoming traffic continued and remained active to create a danger such that it was a proximate cause of trucker's death at multi-vehicle accident scene, in wrongful death action brought by trucker's family and estate, even though jackknifed truck had come to a rest; driver's negligence led to collision of unwarned tractor-trailer into van that was pushed into trucker.

[18] **Negligence** Effect of others' fault; comparative negligence

The jury is given wide latitude in performing its duty to serve as factfinder in allocating

responsibility for an accident. Tex. Civ. Prac. & Rem. Code Ann. § 33.003.

[19] **Appeal and Error** Negligence in general

Even if the evidence could support a different percentage allocation of responsibility, an appellate court may not substitute its judgment for that of the jury so long as there was evidence before the jury that can rationally support its conclusions.

[20] **Automobiles** Comparative negligence and apportionment of fault

Evidence Causation

Apportionment of 15% responsibility for death of trucker to company operating tractor-trailer that struck van, causing van to roll over trucker at scene of multi-vehicle accident, was not against the great weight and preponderance of the evidence, in wrongful death action brought by trucker's family and estate, even though no injuries occurred before tractor-trailer arrived at scene; driver of tractor-trailer did not see jackknifed truck blocking interstate until he was nearly upon it, as none of its warning systems were activated, and accident reconstructionist testified that none of the collisions would have occurred, including tractor-trailer's collision with van, if jackknifed truck had not been blocking interstate.

[21] **Negligence** Whose acts or fault may be considered; non-parties

A tort defendant may designate a person as a "responsible third party"; the designation's purpose is to have facts relating to that third party submitted to the trier of fact as a possible cause of, or contributing factor to, the claimant's alleged injury, which may reduce the percentage of responsibility attributed to the defendant, thus ultimately reducing its liability to the claimant. Tex. Civ. Prac. & Rem. Code Ann. §§ 33.003, 33.004(a).

1 Case that cites this headnote

[22] **Negligence** Standard or degree of proof, in general

A party has produced sufficient evidence to support submission of a question to the jury regarding the conduct of a person, in the context of determining percentage of responsibility for harm caused, when it provides more than a scintilla of evidence of potential responsibility for the claimed injury. Tex. Civ. Prac. & Rem. Code Ann. §§ 33.003(b), 33.004(l).

4 Cases that cite this headnote

[23] **Negligence** Standard or degree of proof, in general

More than a scintilla of evidence of a party's potential responsibility for a claimed injury is provided, such that a question regarding the party's conduct may be submitted to a jury, when the evidence rises to a level that would enable reasonable and fair-minded people to differ in their conclusions concerning a party's responsibility for an injury. Tex. Civ. Prac. & Rem. Code Ann. §§ 33.003(b), 33.004(l).

2 Cases that cite this headnote

[24] **Negligence** Standard or degree of proof, in general

A party produces less than a scintilla of evidence of another party's potential responsibility for a claimed injury when the evidence is so weak as to do no more than create a mere surmise or suspicion of a fact, precluding submission to the jury of a question regarding the other party's conduct.

2 Cases that cite this headnote

[25] **Appeal and Error** Negligence in general

A trial court's ruling on a motion to strike the designation of a responsible third party presents a legal question and is reviewed de novo. Tex. Civ. Prac. & Rem. Code Ann. § 33.004(l).

1 Case that cites this headnote

[26] **Appeal and Error** Statement of evidence

Parties Striking out Parties

When presenting evidence to a court to defeat a motion to strike a designation of a responsible third party, a party must specifically identify the supporting proof on file that it seeks to have considered by the trial court; neither the Court of Appeals nor the trial court is required to wade through a voluminous record to marshal a party's proof. Tex. Civ. Prac. & Rem. Code Ann. § 33.004(l).

1 Case that cites this headnote

[27] **Automobiles** Comparative negligence and apportionment of fault

Evidence was insufficient to show that any act or omission by trucking company was a substantial factor in causing death of trucker who was killed at multi-vehicle accident scene by van set in motion by tractor-trailer that collided with it in avoiding car that collided with company's overturned tractor-trailer, and thus there was no error in granting motion to strike company's designation, by driver of truck that jackknifed and blocked interstate and her employer, as a responsible third party in wrongful death action brought by trucker's family and estate; but for jackknifed truck blocking highway without a hazard warning signal, van would have had ample space and time to stop and leave highway, rather than colliding with jackknifed truck and stopping in hazardous position. Tex. Civ. Prac. & Rem. Code Ann. § 33.004(l).

[28] **Automobiles** Comparative negligence and apportionment of fault

Argument that trucker's exit from his cab and later death at multi-vehicle accident scene occurred as result of his vehicle's collision with trucking company's tractor-trailer as both sought to avoid jackknifed truck blocking interstate was insufficient to show that any act or omission by company was a substantial factor in causing trucker's death, and thus there was no error in granting motion to strike company's designation, by driver of truck that jackknifed and blocked interstate and her employer, as a responsible third party in wrongful death action brought by trucker's family and estate; testimony indicated that trucker left cab to check on occupants of other vehicles, and such speculative argument did nothing more than create a mere surmise or suspicion. Tex. Civ. Prac. & Rem. Code Ann. § 33.004(l).

[29] **Appeal and Error** Instructions

Trial Authority to instruct jury in general

A trial court has considerable discretion to determine proper jury instructions, and an appellate court reviews a trial court's decision to submit or refuse a particular instruction for an abuse of discretion.

[30] **Negligence** Proximate cause

Unavoidable accident is an inferential rebuttal defense to negligence.

[31] **Negligence** Proximate Cause

The purpose of the unavoidable-accident instruction is to advise the jurors that they do not have to place blame on a party to a negligence suit if the evidence shows that conditions beyond the party's control caused the accident.

[32] **Negligence** Unavoidable or Inevitable Accident

An "unavoidable accident" is an event not proximately caused by the negligence of any party to it, and is a defense to negligence.

[33] **Negligence** Proximate Cause

An instruction on unavoidable accident is most often used to inquire about the causal effect of some physical condition or circumstance such as fog, snow, sleet, wet or slick pavement, or obstruction of view, or to resolve a case involving a very young child who is legally incapable of negligence.

[34] **Negligence** Unavoidable or Inevitable Accident

Negligence Proximate Cause

In the negligence context, the doctrine of sudden emergency is subsumed by the broader doctrine of unavoidable accident; a trial court is only required to submit an unavoidable accident instruction to the jury if the evidence shows the existence of an unavoidable accident that was not a sudden emergency.

[35] **Negligence** Proximate Cause

An unavoidable-accident jury instruction is proper only when there is evidence that an event was not proximately caused by the negligence of any party to the event.

[36] **Automobiles** Proximate cause of injury

Jury instruction on unavoidable accident was not required at trial in wrongful death action brought by family and estate of trucker killed at multi-vehicle accident site, against driver of abandoned jackknifed truck that allegedly caused such accident on dark, icy interstate, and her employer, even though truck jackknifed as result of black ice; evidence established that driver was negligent before she encountered ice, by traveling at excessive speed under the conditions, having cruise control activated, failing to recheck weather, and hard braking on ice, and unavoidable accident instruction was unlikely to impact jury's consideration of driver's failure to activate emergency flashers or set out flares, another basis for negligence.

More cases on this issue

[37] **Automobiles** Scope of employment

Whether or not driver was negligently trained, supervised, or entrusted with a truck, employer of driver of jackknifed truck that blocked interstate at time of multi-vehicle accident was jointly and severally liable with driver for damages awarded in wrongful death action brought by family and estate of trucker killed at accident scene, where it was undisputed that driver was employer's employee acting within the scope of her employment at the time of the accident, as confirmed in employer's requested jury instructions.

More cases on this issue

[38] **Labor and Employment** Furtherance of Employer's Business

Labor and Employment Authority

Under common law, an employer is generally liable for the tort of its employee when the tortious act falls within the scope of the employee's general authority in furtherance of the employer's business and for the accomplishment of the object for which the employee was hired.

[39] **Death** Suffering of deceased

Under state law, a party in wrongful death action may recover damages only for pain that is consciously suffered and experienced by the deceased.

[40] **Damages** Physical suffering and inconvenience in general

In the context of damages, the presence or absence of physical pain is an inherently subjective question.

[41] **Death** Damages

In the context of damages, a court may infer pain and suffering from proof that the deceased had severe injuries; in addition, pain and suffering may be established by circumstantial evidence.

[42] **Death** Damages

Evidence supported finding that trucker experienced conscious pain and suffering in connection with his death at multi-vehicle accident scene, in wrongful death action brought by trucker's family and estate against driver of jackknifed truck abandoned on dark, icy interstate without hazard warning, and driver's employer; trucker died of massive blunt force trauma injuries to his head and chest when rolled over by a van, and a witness described seeing trucker in agonizing pain, convulsing and vocalizing while lying in the road.

[43] **Death** Excessive Damages

Noneconomic damages of $15,065,000 were not excessive as disproportionate to economic damages of $1,354,200 awarded in wrongful death case brought against driver of jackknifed truck by family and estate of 45-year-old trucker killed at site of accident involving multiple vehicles attempting to avoid collision with jackknifed truck on interstate; mental anguish and loss of companionship had little to do with pecuniary loss, and there was no proportionality requirement in wrongful death cases, in which emotional impact of loss of a beloved person was the most significant harm experienced by surviving relatives.

[44] **Damages** Loss of earnings, services, or consortium

Damages Mental suffering and emotional distress

Mental anguish and loss of companionship damages are unliquidated and incapable of precise mathematical calculation.

[45] **Damages** Amount Awarded

Under some circumstances, it may be proper to award similarly situated individuals like amounts of damages.

[46] **Death** Measure and Amount Awarded

Jury exercised requisite level of care in amounts of noneconomic damages awarded to each member of trucker's family in wrongful death action brought by family and estate against driver of jackknifed truck that was abandoned on interstate, resulting in multi-vehicle accident scene at which 45-year-old trucker was killed; although jury awarded the same amounts for past mental anguish and loss of companionship to all three surviving spouses from accident, as well as the same amounts to trucker's three children for past and future loss of companionship, trucker's wife received more than another survivor for future mental anguish and loss of companionship, for loss of younger spouse, and trucker's youngest child was awarded much less for past and future mental anguish than her older brothers.

1 Case that cites this headnote
More cases on this issue

[47] **Death** Loss of society

A claim for loss of companionship and society asks what positive benefits have been taken away from the beneficiaries by reason of a wrongful death.

[48] **Appeal and Error** Particular Cases and Items

An appellate court accords respect to a jury's award of non-economic damages when the record demonstrates careful consideration of what amounts to assess.

1 Case that cites this headnote

[49] **Appeal and Error** Particular Cases and Items

A jury awarding damages demonstrates the careful consideration respected by an appellate court when it awards different claimants different amounts for different categories of non-economic damages.

1 Case that cites this headnote

[50] **Damages** Questions for Jury

Each award of non-economic damages is a unique exercise of a jury's discretion.

1 Case that cites this headnote

[51] **Death** Excessive Damages

Comparison of amounts of noneconomic damages awarded in wrongful death action to amounts awarded in allegedly similar circumstances was insufficient to show that such damages were excessive, in action brought by trucker's family and estate against driver of jackknifed truck blocking interstate at time of multi-vehicle accident, despite driver's assertion that amounts exceeded average awarded in several other cases involving the death of a spouse, father, and adult child; driver failed to identify and apply factors in the cited cases to explain how amounts awarded in the case at hand were excessive based on the facts presented.

[52] **Death** Excessive Damages

Wrongful death cases other than a case at issue are informative as to whether a particular damages award is excessive only insofar as those cases identify relevant factors that can indicate a particular damage award is excessive in light of the evidence presented; for example, an award of mental anguish damages may be considered excessive if there is little evidence to show the nature, duration, or severity of the anguish.

[53] **Trial** Comments on Evidence or Witnesses

Trial Necessity

Trial Instruction or Admonition to Jury

Counsel's statement in closing argument in wrongful death trial, suggesting that the jury award $39 million, did not invalidate jury's award of damages totaling $38,801,775.00, in action brought against driver of jackknifed truck by family and estate of trucker who was killed at scene of accident involving multiple vehicles seeking to avoid truck, despite driver's assertion that jury began with $39 million figure and worked backwards; in context, statement put into perspective the range of damages that counsel suggested and followed remarks accurately setting out standards and factors applicable to noneconomic damages, driver's counsel did not object to statement or comment on it during closing argument, and jury was correctly instructed on the law to consider in noneconomic damages.

More cases on this issue

[54] **Appeal and Error** Excessive Award; Remittitur

In determining whether damages are excessive, an appellate court employs a factual sufficiency analysis.

[55] **Appeal and Error** Review for Correctness or Error

In the context of a damages award, an appellate court can set aside a verdict only if it is so contrary to the overwhelming weight of the evidence that the verdict is clearly wrong and unjust.

[56] **Death** Loss of society

Death Mental suffering or emotional distress of plaintiff or beneficiary

In the context of damages for wrongful death, the nebulous issues of mental anguish and loss of companionship and society are inherently somewhat imprecise.

[57] **Death** Measure and Amount Awarded

Because wrongful-death damages awarded for mental anguish and loss of companionship are unliquidated and incapable of precise mathematical calculation, once the existence of non-economic loss is established, the jury is given significant discretion in fixing the amount of the award.

[58] **Appeal and Error** Particular Cases and Items

An appellate court takes into account a jury's significant discretion in fixing the amount of a damages award for non-economic losses when it conducts a meaningful review of the quantum of any such award.

[59] **Damages** Mode of estimating damages in general

Damages Mode of estimating damages in general

Damages Mode of estimating damages in general

Juries must find an amount of damages that fairly and reasonably compensates for the plaintiffs' loss.

[60] **Death** Loss of society

Death Mental suffering or emotional distress of plaintiff or beneficiary

In wrongful death cases, mental anguish damages and loss of companionship and society damages both compensate for non-economic losses.

[61] **Death** Mental suffering or emotional distress of plaintiff or beneficiary

A damages award for mental anguish in a wrongful death case is concerned not with the benefits the claimants have lost, but with the direct emotional suffering experienced as a result of the death.

[62] **Damages** Nature of Injury or Threat in General

Compensation for mental anguish can be awarded only for such anguish that causes substantial disruption in daily routine or a high degree of mental pain and distress.

[63] **Death** Damages

In wrongful death cases, proof of mental anguish, for purposes of a damages award, does not require evidence of physical symptoms such as sleeplessness, weight loss, nervousness, personality changes, and the like.

[64] **Death** Damages

In the context of damages, proof of a familial relationship alone constitutes some evidence of the mental anguish a surviving family member experiences when another member dies.

[65] **Death** Loss of society

In the context of damages, while mental anguish focuses on the negative impact a wrongful death has on the beneficiaries, a claim for loss of companionship and society asks what positive benefits have been taken away from the beneficiaries by reason of the wrongful death.

[66] **Death** Loss of society

Damages for loss of companionship and society are intended to compensate the beneficiary for the positive benefits flowing from the love, comfort, companionship, and society that the beneficiary would have received had the decedent lived.

[67] **Death** Loss of society

Death Mental suffering or emotional distress of plaintiff or beneficiary

In awarding damages for mental anguish and loss of companionship in a wrongful death case, the jury may consider (1) the relationship between husband and wife or a parent and child, (2) the living arrangements of the parties, (3) any absence of the deceased from the beneficiary for extended periods, (4) the harmony of family relations, and (5) common interests and activities.

[68] **Appeal and Error** Instructions understood or followed

An appellate court must presume that a jury followed instructions unless the record shows otherwise.

[69] **Death** Measure and Amount Awarded

Evidence supported total non-economic damages award of $7,437,500 to widow of 45 year-old trucker killed at scene of multi-vehicle accident, including $350,000 for past companionship, $2,625,000 for future companionship, $525,000 for past mental anguish, and $3,937,500 for future mental anguish, in widow's wrongful death action against driver of jackknifed truck that blocked interstate, and driver's employer; widow had a long and loving relationship with trucker, on whom she depended both financially and emotionally, widow suffered tremendous grief and depression which had not waned, and she was left to wonder for over a day about his whereabouts before learning of his death, news of which devastated her such that she had no memory of the funeral or how her children learned of the death.

1 Case that cites this headnote

[70] **Death** Measure and Amount Awarded

Evidence supported damages award to each of two minor sons of 45 year-old trucker killed at scene of multi-vehicle accident in the amount of $160,000 for past companionship, $160,000 for past mental anguish, $925,000 for future mental anguish, and $1,200,000 for future companionship, in wrongful death action brought on their behalf against driver of jackknifed truck that blocked interstate, and against driver's employer; older son became reclusive, lost loving role model with whom he used to play video games, ride bikes, and play basketball, and younger son became depressed, less active, gained weight, and lost educational and travel opportunities due to family's reduced income.

1 Case that cites this headnote

[71] **Death** Measure and Amount Awarded

Evidence supported damages award of $97,500 for past and future mental anguish to daughter of 45-year-old trucker killed at scene of multi-vehicle accident when daughter was seven months old, even though evidence of her mental anguish was not as fully developed as that of her older brothers' anguish, in wrongful death action brought on her behalf against driver of jackknifed truck that blocked interstate; award

was less than the $1,085,000 awarded to each of her two brothers, mother testified that trucker was extremely protective of daughter, implying that they had bonded and he provided a sense of security that was no longer present after he died, daughter became aware of and troubled by father's absence, and daughter was affected by the family's emotional turmoil and financial situation.

[72] **Death** Measure and Amount Awarded

Evidence supported damages award of $1,360,000 for past and future loss of companionship and support to daughter of 45-year-old trucker killed at scene of multi-vehicle accident, in wrongful death action brought on her behalf against driver of jackknifed truck that caused such accident by blocking interstate, and driver's employer, even though daughter was seven months old when trucker died; trucker had been a loving father, provided financial and emotional support to his family, and promoted the education of his children.

[73] **Death** Measure and Amount Awarded

Evidence supported damages award of $640,000 for mental anguish and loss of companionship to mother of 45-year-old trucker killed at scene of multi-vehicle accident, in wrongful death action brought by trucker's family and estate against driver of jackknifed truck that caused accident by blocking interstate, and against driver's employer; mother lived with trucker's family, mother and trucker had close relationship, enjoying cooking and gardening together, and mother continued to cry multiple times a day more than four years after trucker's death.

[74] **Death** Measure and Amount Awarded

Evidence supported damages award of $640,000 for mental anguish and loss of companionship to father of 45-year-old trucker killed at scene of multi-vehicle accident, in wrongful death action brought by trucker's family and estate against driver of jackknifed truck that caused accident by blocking interstate, and driver's employer; father lived with trucker's family in the same household, which had to move cross-country for trucker's widow to find work, father initially felt obligated to keep news of death from trucker's widow, father arranged for transport of trucker's body home and traveled internationally to spread trucker's ashes, and father witnessed pain experienced by household including his wife, trucker's mother, who continued to cry daily four years after his death.

[75] **Damages** Questions for Jury

It is uniquely the province of the jury to quantify matters of non-economic damages.

[76] **Appeal and Error** Jury as factfinder below in general

As long as there is sufficient probative evidence to support the jury's verdict, an appellate court will not substitute its judgment for that of the jury.

[77] **Appeal and Error** Mistake, passion, or prejudice; shocking conscience or sense of justice

In the absence of a showing that passion, prejudice, or other improper motive influenced the jury, the amount of a damages award assessed by it will not be set aside as excessive.

[78] **Damages** Excessive damages in general

A large damages award, in and of itself, does not show that a jury was influenced by passion, prejudice, sympathy, or other circumstances not in evidence.

[79] **Appeal and Error** Mistake, passion, or prejudice; shocking conscience or sense of justice

For an appellate court to reverse a damages award, it must be flagrantly outrageous, extravagant, and so excessive that it shocks the judicial conscience.

[80] **Appeal and Error** Cumulative Error

The "doctrine of cumulative error," provides that a reviewing court may reverse a lower-court judgment when the record shows a number of instances of error, no one instance being sufficient to call for a reversal, yet all the instances taken together may do so.

1 Case that cites this headnote
More cases on this issue

[81] **Appeal and Error** Cumulative Error

To support reversal based on cumulative error, a complaining party must show that based on the record as a whole, but for the alleged errors, the jury would have rendered a verdict favorable to it.

2 Cases that cite this headnote
More cases on this issue

[82] **Appeal and Error** Cumulative Error

When there are no errors to be considered as a combined whole for purposes of evaluating harm, an appellate court rejects cumulative error arguments.

2 Cases that cite this headnote
More cases on this issue

***287 On Appeal from the County Court at Law No. 5, Dallas County, Texas, Trial Court Cause No. CC-15-02925-E, Honorable Mark Greenberg, Judge**

Attorneys and Law Firms

Wanda Fowler, Lisa Wright, Thomas C. Wright, Wright Close & Barger, LLP, Houston, Alex Bell, Douglas D. Fletcher, Fernando P. Arias, Steven A. Springer, Fletcher, Farley, Shipman & Salinas, LLP, Dallas, for Appellants.

Micky N. Das, Tyler & Das, Houston, Jeffrey S. Levinger, Levinger PC, Dallas, Robert Timothy Tate, Tate Rehmet Law Office, PC, Sherman, for Appellees Jaswinder Chohan, et al.

Michael H. Bassett, Sadie Horner, The Bassett Firm, Dallas, J. J. Burns, Dollar Burns & Becker, L.C., Kansas City MO, Jeffrey S. Levinger, Levinger PC, Dallas, for Appellees Alma J. Perales, et al.

Before the Court En Banc [1]

EN BANC OPINION

Opinion by Justice Reichek

Sarah Gregory and New Prime, Inc. appeal a judgment awarding damages to the Estate of Bhupinder Singh Deol and his wife, children, and parents in connection with Deol's death following a multi-vehicle collision on Interstate 40 in Texas. [2] In twelve issues, [3] Gregory and New Prime challenge the sufficiency of the evidence to support various jury findings and assert instances of error in the jury charge and in the striking of designated responsible third parties. For the reasons set out below, we overrule the twelve issues presented and we affirm the trial court's judgment.

BACKGROUND [4]

This appeal involves a multi-vehicle accident that occurred in the early morning hours of November 23, 2013, on an unlit portion of Interstate 40, after Gregory jackknifed a tractor-trailer she was driving for New Prime. Four people died, and others were injured, as a result of the accident.

The tractor-trailers and the vehicles involved in the accident were traveling east on Interstate 40 near the New Mexico–Texas state line. That portion of Interstate 40 is a four-lane

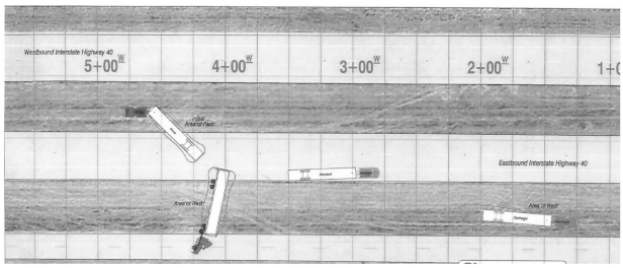
highway, two lanes in each direction, with right and left shoulders, and grassy medians between the east- and west-bound lanes and between the shoulders and service roads.

***288** As Gregory drove the New Prime tractor-trailer east on Interstate 40, she saw the brake lights of two passenger vehicles one-half mile to one mile ahead. She applied the brakes in a firm fashion and the truck slid on a patch of ice. Gregory lost control, and the tractor-trailer jackknifed across the roadway. When it finally came to rest, the cab was partially on the left shoulder with the trailer at an angle, blocking all of the left lane and half of the right lane of traffic. Gregory abandoned the truck without activating its emergency flashers or setting out any reflective triangles or flares despite instructions to do so contained in an "Accident Checklist" in the cab. She returned to the truck when she realized her co-driver, 22-year-old Aaron Ellison, was in the cab's sleeping berth.[5] Gregory roused Ellison, and together they walked through the center median toward the westbound traffic to get to a safe area.

Soon afterwards, six tractor-trailers and two passenger vehicles crashed into or around the New Prime truck, the first being a Maryland Trucking Company tractor-trailer driven by Deol. Deol managed to maneuver his truck around the New Prime truck, but was clipped on the right rear side by a Danfreight Systems' tractor-trailer. Deol stopped his tractor-trailer on the right shoulder and the Danfreight System's tractor-trailer stopped in the grassy area between the right shoulder and the service road.

An ATG Transportation tractor-trailer then arrived. Its driver steered hard to the right to avoid the New Prime truck, overturning in the process so that the cab was on the grassy area beyond the right shoulder and the back of the trailer protruded onto the right shoulder. At that point, the accident scene appeared as follows with the New Prime tractor-trailer jackknifed, the ATG Transportation tractor-trailer on its side, the Maryland tractor-trailer on the right shoulder, and the Danfreight tractor-trailer ahead on the right grassy median.[6]

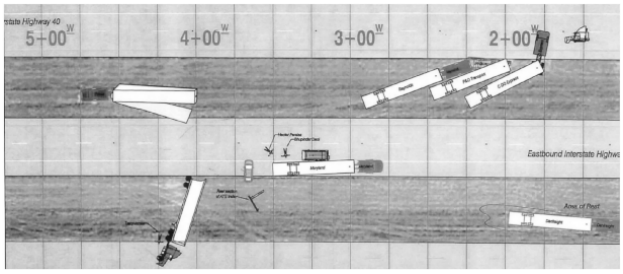
***289**



Moments later, Guillermo Vasquez, his wife Belinda, their adult son William, their adult daughter Alma Perales, Alma's husband Hector Perales, and one of the Perales' sons approached the accident scene in their Chevy van. They were traveling at approximately 30 miles per hour. As Vasquez approached the accident site, he took his foot off the pedal and steered left. The van slid and hit the New Prime truck at ***290** approximately 10 miles per hour. No one was injured in that collision. Shortly thereafter, a silver Prius going more than 70 miles per hour came upon the scene. It collided with the rear of the ATG trailer and remained on the right shoulder. Three of the Prius passengers had time to get out of the car and were attempting to extract the fourth. While they were doing so, a P&O Transportation tractor-trailer, driven by Orland Ferrer, arrived on the scene. Ferrer saw the Prius and steered left in an effort to avoid it. At that point, he saw the unlit New Prime trailer jackknifed across the road, but he could not brake quickly enough on the icy road to avoid striking the Vasquezes' van that was stopped in front of it.

After colliding with the Vasquezes' van, the P&O truck itself was then struck by two other tractor-trailers, one belonging to D.O.D. Reynolds and the other to CDO Express Diversified. All three of the tractor-trailers ended up in the center median. The final accident scene appeared as follows with the New Prime truck on the left shoulder and center median, the Prius and Vasquez van near the Maryland truck, and the Reynolds, P&O, and CDO Express trucks on the center median.

***291**



When state troopers arrived at the scene, they discovered multiple people had been killed or seriously injured, including Deol who was lying on the roadway. Accident reconstruction experts concluded that when the P&O truck struck the Vasquez van, it caused the van to roll and run over Deol, killing him.

Deol's wife, Jaswinder Chohan, individually and on behalf of her and Deol's three children, together with Deol's estate and Deol's parents, who lived with Deol's family, sued Gregory, New Prime, and others for negligence. In addition to claiming New Prime was vicariously liable for Gregory's negligence, the Deol family asserted direct claims of negligence against New ***292** Prime for negligent entrustment, supervision, and training. The Deol family settled their claims against all of the defendants other than Gregory and New Prime.

Before trial, Gregory and New Prime designated P&O Transport, ATG Transportation, Danfreight Systems, and their respective drivers as responsible third parties. The Deol family moved to strike these designations, and the trial court granted the motion. The court stated it would reconsider its ruling before submitting the case to the jury.

At trial, Gregory and New Prime requested that the trial court instruct the jury on the concepts of sudden emergency, unavoidable accident, and new and independent cause. The trial court granted Gregory and New Prime's request as to the sudden emergency instruction, but denied their request as to the unavoidable-accident and new-and-independent cause instructions. Ultimately, the trial court asked the jury to decide whether the negligence of Gregory, New Prime, the P&O driver, and Deol proximately caused Deol's death. The trial court did not ask the jury to consider any negligence on the part of ATG Transportation or Danfreight Systems. The jury answered affirmatively as to causation with respect to Gregory, New Prime, and the P&O driver, and negatively as to Deol himself. The jury apportioned responsibility for Deol's death as follows: fifty-five percent to Gregory, thirty percent to New Prime, and fifteen percent to the P&O driver.

The jury awarded almost $17 million in economic and non-economic damages to the estate and family of Deol, including $500,000 for Deol's pain and mental anguish. The trial court entered a final judgment stating, in part, the following:

> At trial it was undisputed that Defendant Sarah Gregory was an employee of Defendant New Prime, Inc. d/b/a Prime, Inc., operating within the course and scope of her employment at the time of the accident. Therefore, Defendant New Prime, Inc. d/b/a Prime, Inc. is vicariously liable for the negligence of Defendant Sarah Gregory and her percentage of responsibility is attributed to Defendant New Prime, Inc. d/b/a Prime, Inc.

The judgment awarded the Deol family "actual damages in the sum of sixteen million four hundred forty-seven thousand two hundred seventy-two dollars and thirty-one cents ($16,447,272.31), reflecting settlement credits of four hundred seventy-eight thousand eight hundred thirty dollars and no cents ($478,830.00), from Defendants Sarah Gregory and New Prime, Inc. d/b/a Prime, Inc., which are jointly and severally liable for the entire amount of such sum." Gregory and New Prime then brought this appeal.

DISCUSSION

I. Sufficiency of the Evidence – Negligence

[1] **[2]** **[3]** In their first issue, Gregory and New Prime assert the evidence is legally and factually insufficient to prove Gregory was negligent. Gregory and New Prime's legal sufficiency challenge requires us to view the evidence "in the light most favorable to the verdict, and indulge every reasonable inference that would support it." *City of Keller v. Wilson*, 168 S.W.3d 802, 822 (Tex. 2005). The evidence is legally sufficient if "more than a scintilla of evidence exists." *Browning–Ferris, Inc. v. Reyna*, 865 S.W.2d 925, 928 (Tex. 1993). More than a scintilla of evidence exists if the evidence furnishes some reasonable basis for differing conclusions by reasonable minds about a vital fact's existence. *Litton Loan Servicing, L.P. v. Manning*, 366 S.W.3d 837, 840 (Tex. App.—Dallas 2012, pet. denied). The final test for legal sufficiency must always be whether the ***293** evidence at trial would

enable reasonable and fair-minded people to reach the verdict under review. *Del Lago Partners, Inc. v. Smith*, 307 S.W.3d 762, 770 (Tex. 2010). In reviewing Gregory and New Prime's factual-sufficiency challenge, we "consider and weigh all the evidence, and we should set aside the verdict only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust." *Cain v. Bain*, 709 S.W.2d 175, 176 (Tex. 1986).

[4] **[5]** Negligence means a failure to use ordinary care, which is failing to behave as a person of ordinary prudence would have under the same or similar circumstances. *Union Pac. R.R. Co. v. Nami*, 498 S.W.3d 890, 896 (Tex. 2016). We conclude the testimony presented at trial from Gregory, Ellison, New Prime's safety supervisor, the P&O driver, a meteorologist, a motor carrier expert, an accident reconstructionist, and others is legally and factually sufficient to establish Gregory was negligent in multiple ways.

The evidence showed this fatal trip began with Gregory and her 22-year-old teammate, Ellison, driving to California to drop off cargo and pick up a load of beer to deliver to North Carolina. Gregory relieved Ellison as driver in Santa Rosa, New Mexico. She had to backtrack several hours in the opposite direction to a casino in Sky City, New Mexico, because Ellison had left his wallet there. Gregory then encountered snow on the way back to Santa Rosa. She experienced problems with the windshield-wiper fluid, causing difficulty seeing out the windshield because of freezing ice. She stopped in Moriarty, New Mexico, to have the problem fixed and then proceeded to travel east toward Amarillo, Texas.

Gregory checked the weather while in Moriarty but did not make any effort to obtain updates thereafter. The National Weather Service issued a winter weather advisory covering the relevant time and area, warning of snow, sleet, or freezing rain that could create slippery roads. The temperature was 23 degrees, and there was light freezing drizzle and sleet. The freezing and icy conditions extended west all the way to the state line. [7] Despite the weather conditions and running behind schedule, Gregory approached the accident site with the truck's cruise control set at 58 miles per hour. Experts testified cruise control should not be used when there is precipitation or indications of ice. Gregory acknowledged, and others confirmed, that, if it was precipitating, her speed was in violation of the applicable standard of care, that is to say, not a speed at which a person of ordinary prudence would travel.

Gregory testified she lost control of the New Prime truck when she applied a "hard stop" and hit a patch of ice. The jury heard from a safety expert who testified a prudent driver would not apply maximum braking pressure under the conditions Gregory faced. [8] One of the other truck drivers involved in the accident testified ***294** that, when attempting to stop or slow down, drivers should stab the brake, then let up, stab again, then let up again, because holding the brakes down locks everything up causing the driver to lose control of the vehicle. Significantly, Gregory admitted that, in losing control of the rig, she failed to meet the standard of care required in operating a tractor-trailer. Accordingly, in addition to establishing Gregory failed to recognize adverse weather conditions and drove at an unsafe speed, the evidence supported a finding that Gregory was negligent in braking in a manner that caused the trailer to jackknife upon encountering ice on the roadway.

[6] The evidence regarding negligence addressed not only Gregory's actions resulting in her truck blocking the roadway, but also her actions after her truck became disabled that were material to creating the resulting pile up. If a parked or disabled vehicle obstructs the road, the operator of the vehicle must act with reasonable promptness to warn other motorists of the vehicle's presence and to remove the vehicle from the road. *Lofton v. Norman*, 508 S.W.2d 915, 919 (Tex. App.—Corpus Christi–Edinburg 1974, writ ref'd n.r.e.); *McClellan v. Lee*, 426 S.W.2d 635, 638 (Tex. App.—Houston [1st Dist.] 1968, no writ). Gregory did neither. She failed to activate the truck's emergency warning flashers, failed to set out reflective triangles or flares, and abandoned her truck in its jackknifed condition on the dark, icy highway blocking most of the eastbound lanes even though she knew that oncoming motorists would have to "fend for themselves, with respect to the hazard [she] created." Gregory acknowledged that by abandoning the truck she violated the standard of care that New Prime wanted her to follow.

[7] Gregory and New Prime contend evidence that the other tractor-trailer drivers who were involved in the accident did not activate any warning systems shows she did not violate the standard of care. Many of the other tractor-trailers, however,

managed to clear the roadway and were stopped in a way that did not create a hazard to oncoming traffic. More importantly, the standard of care is determined objectively by what a person of ordinary prudence would have done under the same or similar circumstances. *See 20801, Inc. v. Parker*, 249 S.W.3d 392, 398 (Tex. 2008). Accordingly, the conduct of the other drivers does not conclusively establish that Gregory did not violate the objective standard of care. Finally, while the evidence showed Gregory had time to exit her truck, walk away, return to retrieve Ellison, and then again walk to safety, the record does not show that the drivers whose vehicles came upon the scene later and were forced to stop in a manner that blocked the road had the same amount of time to activate a warning system before the fatal events occurred.

[8] **[9]** Gregory attempts to rely on the defense of sudden emergency. The sudden-emergency doctrine applies only if the sudden emergency was not proximately caused by any negligence of the defendant and, after the emergency arises, the defendant acts as a person of ordinary prudence would have acted under the same or similar circumstances. *Dillard v. Tex. Elec. Coop.*, 157 S.W.3d 429, 432 n.4 (Tex. 2005). As noted above, the evidence established Gregory's actions before and after her tractor-trailer encountered ice on the roadway were negligent because she failed to recheck the weather, drove with the cruise control activated at an unsafe speed, applied a hard stop as her truck hit the ice, and then failed to warn oncoming traffic of the hazard she created when a reasonably prudent person would have done so. Accordingly, the jury had more than sufficient ***295** evidence to reject Gregory and New Prime's sudden-emergency defense.

Considering and weighing all of the evidence in the record pertinent to the finding of negligence, we determine that there is more than a scintilla of competent evidence to support the jury's finding, and the finding is not contrary to the overwhelming weight of all the evidence as to be clearly wrong and unjust. Accordingly, we conclude the evidence is legally and factually sufficient to support the jury's finding Gregory was negligent.

II. Sufficiency of the Evidence – Proximate Cause

[10] **[11]** **[12]** In their fourth issue, Gregory and New Prime also contend the evidence is legally and factually insufficient to support the jury's finding that Gregory's conduct proximately caused Deol's death. Proximate cause has two sub-elements, cause-in-fact and foreseeability. *W. Invs., Inc. v. Urena*, 162 S.W.3d 547, 551 (Tex. 2005). Negligence is a cause-in-fact of an injury if (1) the injury would not have occurred without the negligence and (2) the negligence is a substantial factor in causing the injury. *Miller v. Lone Star HMA, L.P.*, No. 05-17-00954-CV, 2018 WL 3991191, at *2 (Tex. App.—Dallas Aug. 21, 2018, pet. denied) (mem. op.). Foreseeability requires that the negligent actor, as a person of ordinary intelligence, anticipate, or should have anticipated, the danger their negligence created for others. *See Nixon v. Mr. Prop. Mgmt. Co.*, 690 S.W.2d 546, 549–50 (Tex. 1985).

[13] **[14]** **[15]** **[16]** To proximately cause an injury, an actor need not be the last cause, nor commit the act immediately preceding the injury. *J. Wigglesworth Co. v. Peeples*, 985 S.W.2d 659, 663 (Tex. App.—Fort Worth 1999, pet. denied) (citing *Tex. Power & Light Co. v. Stone*, 84 S.W.2d 738, 740 (Tex. App.—Eastland 1935, writ ref'd)). Moreover, there can be more than one proximate cause of an accident. *Travis v. City of Mesquite*, 830 S.W.2d 94, 98 (Tex. 1992). When the new cause or agency concurs with the continuing and co-operating original negligence in working the injury, the original negligence remains a proximate cause of the injury, and the fact that the new concurring cause or agency may not have been reasonably foreseeable should not relieve the wrongdoer of liability. *Bell v. Campbell*, 434 S.W.2d 117, 122 (Tex. 1968). Thus, it is no defense that a third person's negligent act intervened to cause the injury to the plaintiff if the new act cooperates with the still-persisting original negligence of the defendant to bring about the injury. *See Rodriguez v. Moerbe*, 963 S.W.2d 808, 819 (Tex. App.—San Antonio 1998, pet. denied).

Gregory and New Prime claim Gregory's negligence was not a cause-in-fact of the collision that killed Deol because the initial accident had come to a rest and intervening conduct became the proximate cause of Deol's death. Gregory and New Prime also argue that Gregory merely created a condition in which the accident occurred and thus Gregory's actions were not a proximate cause under controlling Texas law.

In support of their contention that the accident had run its course at the time Deol was struck and killed by the Vasquez van, Gregory and New Prime rely on *Bell v. Campbell.* In *Bell*, a vehicle pulling a trailer on a highway rear-ended

another vehicle. *Bell*, 434 S.W.2d at 119. During the accident, the trailer broke off and came to rest on the highway. *Id.* Passers-by then stopped to help move the trailer to the side of the road. *Id.* As they were doing so, they were struck by another automobile, the driver of which had ignored or failed to see a person flashing a warning signal. *Id.* The estates of two of ***296** the passers-by sued the owner of the trailer for negligence. On appeal, the Texas Supreme Court agreed with the determination by the jury that the negligence of the owner of the trailer did not constitute legal causation. The court stated "[t]he active and immediate cause of the second collision ... was an entirely independent agency.... All forces involved in or generated by the first collision had come to rest, and no one was in any real or apparent danger therefrom." *Id.* at 120. The court further held that the defendant's negligence "did not actively contribute in any way to the injuries.... It simply created a condition which attracted [plaintiffs] to the scene ..." *Id.* at 122.

We observe that while the facts in *Bell* and this case are similar in part, there are critical differences. The record before us establishes Gregory's negligence did not merely create a condition which "attracted" Deol to the scene. Rather, Gregory's negligence caused Deol to take evasive action and then have his truck struck by another tractor-trailer. He was in the zone of danger created by Gregory and that persisted unabated thereafter because of her failure to signal any warning. Thus, unlike the warning provided in *Bell* before the second driver hit the good Samaritans, here there was no warning before the P&O driver approached the scene colliding with the Vasquez van and pushing it into Deol, causing his death. The jury in this case could readily conclude that the potential danger created by Gregory's negligence in jackknifing the trailer and in failing to warn oncoming traffic, continued and remained active. Her actions and failure to act continued to create a danger to which those already involved in the accident and those that encountered the scene were exposed. Thus, Gregory's negligence "actively contributed" to Deol's peril in the critical time frame.

Gregory and New Prime also rely on *Union Pump v. Allbritton*, 898 S.W.2d 773 (Tex. 1995). That case involved a fire at a Texaco facility, which had been caused by a machine manufactured by Union Pump. *Id.* at 774. Allbritton, a Texaco employee, assisted in extinguishing the fire. When leaving the scene, Allbritton walked over a pipe rack which was wet with water or foam. *Id.* She slipped on the rack and injured herself. *Id.* Allbritton stated the route she took over the pipes was the shorter route but not the safer route. *Id.* Allbritton admitted she chose the less-safe route because she had a "bad habit" of doing so. *Id.* Relying on the above-quoted language in *Bell*, the court held that the negligence of Union Pump was too remote to constitute proximate cause of Allbritton's injury. *Id.* at 776.

Again, the facts of *Union Pump* are materially different from those presented here in that the plaintiff in *Union Pump* was not injured by the danger created by the defendant's negligence because that danger had ceased to exist. In contrast, Gregory's negligence in jackknifing the trailer and in failing to warn oncoming traffic created an active danger that continued to exist and contributed to Deol's death. We further note there are several cases factually similar to this case from this Court and other courts of appeals that likewise distinguish *Bell, Union Pump*, or both. *See, e.g., In re Molina*, 575 S.W.3d 76, 82 (Tex. App.—Dallas 2019, orig. proceeding) (driver's conduct in darting across roadway did not merely furnish condition that made accident possible, it forced another driver to slow down, which in turn caused collision); *Westfreight Sys., Inc. v. Heuston*, No. 04-14-00124-CV, 2015 WL 3772397, at *4 (Tex. App.—San Antonio June 17, 2015, pet. denied) (mem. op.) (driver's initial negligence in backing 18-wheeler across darkened highway continued to pose danger even after he began ***297** moving truck forward); *Homeland Express, L.L.C. v. Seale*, 420 S.W.3d 145, 150–51 (Tex. App.—El Paso 2012, no pet.) (driver's negligence in parking 18-wheeler on part of lane of travel and failing to set out warning devices was proximate cause of collision that occurred thereafter; dangerous situation caused by parking 18-wheeler never abated and forces generated by driver's conduct had not come to rest at time of collision); *Longoria v. Graham*, 44 S.W.3d 671, 676 & n.6 (Tex. App.—Houston [14th Dist.] 2001, no pet.) (rejecting argument that plaintiff should have stayed in car instead of exhibiting good Samaritan conduct); *Peeples*, 985 S.W.2d at 664 (holding that by negligently causing his truck to become disabled on interstate highway and block traffic, defendant was legal cause of subsequent collision; evidence "clearly" established that defendant's negligence and effects thereof, *i.e.*, traffic backup, had not come to rest); *J.D. Abrams, Inc. v. McIver*, 966 S.W.2d 87, 94 (Tex. App.—Houston [1st Dist.] 1998, pet. denied) (defendant highway contractor negligently restricted lanes of traffic, creating slowdowns or stoppages, and causing rear-end collisions; held that effects of its negligence, though

negligence apparently had been committed hours earlier, had not ended and caused accident in much more direct sequence than in *Bell* and *Union Pump*); *Almaraz v. Burke*, 827 S.W.2d 80, 82 (Tex. App.—Fort Worth 1992, writ denied) (defendant negligently lost control of vehicle, leaving it sideways and disabled in overpass; distinguishing *Bell*, court held defendant was a proximate cause of second collision, which occurred ten minutes after first, because defendant could reasonably foresee his wrecked vehicle causing subsequent collision before preventative action could be taken).

We believe the cited cases from our Court and sister courts of appeals are materially on point and are faithful to the guiding principles of law provided by the supreme court that the negligence must be a substantial factor in bringing about the plaintiff's harm. "The word 'substantial' is used to denote the fact that the defendant's conduct has such an effect in producing the harm as to lead reasonable [people] to regard it as a cause, using that word in the popular sense, in which there always lurks the idea of responsibility...." *Lear Siegler, Inc. v. Perez*, 819 S.W.2d 470, 472 (Tex. 1991) (quoting RESTATEMENT (SECOND) OF TORTS § 431 cmt. 1 (1965)).

[17] We conclude, based on the evidence presented at trial, the jury could have reasonably concluded that Gregory's initial negligence in jackknifing the trailer and abandoning the vehicle on a dark, icy highway without warning to oncoming traffic, continued to pose a danger to all motorists who approached the scene thereafter and until the injuries at issue here occurred. All forces involved in or generated by Gregory's actions had not come to a rest, and others were still in real danger therefrom.

III. Apportionment of Liability

In their second issue, Gregory and New Prime urge that the apportionment of only fifteen percent responsibility to the P&O driver is against the great weight and preponderance of the evidence. They contend that the finding ignores the fact that no one was hurt until the P&O truck arrived on the scene.

[18] **[19]** The jury is given wide latitude in performing its duty to serve as factfinder in allocating responsibility for an accident pursuant to section 33.003 of the Texas Civil Practice and Remedies Code. *Rosell v. Cent. W. Motor Stages, Inc.*, 89 S.W.3d 643, 659 (Tex. App.—Dallas 2002, pet. denied). Even if the evidence could support a different percentage allocation ***298** of responsibility, an appellate court may not substitute its judgment for that of the jury so long as there was evidence before the jury that can rationally support its conclusions. *Samco Props., Inc. v. Cheatham*, 977 S.W.2d 469, 478 (Tex. App.—Houston [14th Dist.] 1998, pet. denied).

[20] The jury in this case heard evidence over the course of a three-week trial that Gregory lost control of the tractor-trailer she was driving after hard-braking on ice which resulted in the truck jackknifing. Gregory then abandoned the truck on the highway, leaving it blocking most of both lanes of travel on a dark evening without activating or setting out any warning system or device. By the time the P&O truck arrived on the scene, the ATG Transportation truck and the truck driven by Deol were on the right-side shoulder and grassy area because of the hazard created by Gregory's abandoned vehicle. Because Gregory failed to activate any warning system, the P&O driver did not see the New Prime trailer until he was nearly upon it. The accident reconstructionist testified none of the collisions, including the P&O truck's collision with the Vasquez van, would have occurred if Gregory's trailer had not been blocking the roadway. Based upon this evidence, we cannot find reversible error in the jury's allocation of only fifteen percent of the responsibility to P&O.

IV. Responsible Third Parties

[21] In their third issue, Gregory and New Prime contend the trial court erred in striking their designation of ATG Transportation and Danfreight Systems as potentially responsible third parties. Texas law allows a tort defendant to designate a person as a "responsible third party." TEX. CIV. PRAC. & REM. CODE § 33.004(a). The designation's purpose is to have facts relating to that third party submitted to the trier of fact as a possible cause of, or contributing factor to, the claimant's alleged injury. *See id.* § 33.003. This may reduce the percentage of responsibility attributed to the defendant, thus ultimately reducing its liability to the claimant. *Id.* § 33.013.

Once a responsible third party has been designated, and after an adequate time for discovery has passed, a party may move to strike the designation "on the ground that there is no evidence that the designated person is responsible for any portion of the claimant's alleged injury or damage." *Id.* § *33.004(l)*; *In re Yamaha Golf-Car Co.*, No. 05-19-00292-CV,

2019 WL 1512578, at *1 (Tex. App.—Dallas Apr. 8, 2019, orig. proceeding) (mem. op.). When confronted with a motion to strike, a defendant must produce sufficient evidence to raise a genuine issue of fact regarding the designated person's responsibility for the claimant's injury. *In re Yamaha*, 2019 WL 1512578, at *1. A trial court may not submit a question to the jury regarding the conduct of any person without sufficient evidence to support the submission. *Id.* § 33.003(b).

[22] **[23]** **[24]** A party has produced sufficient evidence to support submission of a question to the jury when it provides more than a scintilla of evidence of potential responsibility for the claimed injury. *Elbaor v. Smith*, 845 S.W.2d 240, 243 (Tex. 1992) (citing *Roy v. Howard-Glendale Funeral Home*, 820 S.W.2d 844, 846 (Tex. App.—Houston [1st Dist.] 1991, writ denied)). This occurs when the evidence "rises to a level that would enable reasonable and fair-minded people to differ in their conclusions" concerning a party's responsibility for an injury. *King Ranch, Inc. v. Chapman*, 118 S.W.3d 742, 751 (Tex. 2003) (quoting *Merrell Dow Pharms., Inc. v. Havner*, 953 S.W.2d 706, 711 (Tex. 1997)). A party has produced less than a scintilla of evidence "when the evidence is 'so weak ***299** as to do no more than create a mere surmise or suspicion' of a fact." *Id.* (quoting *Kindred v. Con/Chem, Inc.*, 650 S.W.2d 61, 63 (Tex. 1983)).

[25] The trial court's ruling on a motion to strike presents a legal question. *Ham v. Equity Residential Prop. Mgmt. Servs., Corp.*, 315 S.W.3d 627, 631 (Tex. App.—Dallas 2010, pet. denied). Thus, our review is de novo. *Molina*, 575 S.W.3d at 80.

[26] The Deol family moved to strike Gregory and New Prime's designation of ATG Transportation and Danfreight Systems, arguing there was no evidence these parties proximately caused the death of Deol. When presenting evidence to a court to defeat a motion to strike a designation of a responsible third party, a party must specifically identify the supporting proof on file that it seeks to have considered by the trial court. *In re Transit Mix Concrete & Materials Co.*, No. 12-13-00364-CV, 2014 WL 1922724, at *5 (Tex. App.—Tyler May 14, 2014, orig. proceeding) (mem. op.). Neither this Court nor the trial court is required to wade through a voluminous record to marshal a party's proof. *Id.*

First, Gregory and New Prime argue that, because the evidence established Guillermo Vasquez and the P&O truck moved to the left to avoid colliding with the ATG Transportation truck that had come to rest on the right grassy median, they fulfilled their obligation to raise a genuine fact issue as to the cause of Deol's death. We disagree.

[27] The evidence established the Vasquez van was traveling at a low rate of speed when it approached the accident site. Because Gregory did not activate a warning signal, Guillermo Vasquez had no notice of the presence of that truck until he came upon it in the dark. The evidence showed that, but for Gregory's vehicle blocking the road with no hazard warning signal, Vasquez would have had ample space and time to stop his vehicle and get off the road, notwithstanding the location of the ATG Transportation truck. Because it was due to Gregory's actions that the Vasquez van was placed in the position it was before being pushed over Deol, the evidence is insufficient to establish that any act or omission by ATG Transportation was a substantial factor in causing Deol's death. Consequently, the trial court did not err in striking Gregory and New Prime's designation of ATG Transportation as a responsible third party.

[28] As to Danfreight Systems, Gregory and New Prime contend that because (1) the police report indicated the Danfreight truck took evasive action and struck the Maryland truck after the Maryland truck, driven by Deol, began to slow down, (2) Gregory and New Prime's accident reconstructionist opined that the left side of the Danfreight trailer collided with the right rear corner of the Maryland trailer, and (3) the evidence established Deol exited his truck, there is some evidence Deol "might" not have exited his truck and been run over by the Vasquez van, if his truck had not been hit by the Danfreight truck. This claimed evidence is so weak as to do no more than create a mere surmise or suspicion. In fact, the evidence showed Deol exited his truck to check on other people who were involved in collisions caused by Gregory's conduct, not because his vehicle was struck. [9] Accordingly, Gregory and New Prime did not produce sufficient evidence to support a finding that an act or omission of Danfreight Systems caused Deol's death. Consequently, the trial ***300** court did not err in striking Gregory and New Prime's designation of Danfreight Systems as a responsible third party.

V. Jury Instruction

[29] In their fifth issue, Gregory and New Prime urge that, although the trial court instructed the jury on sudden emergency,[10] it improperly refused to instruct the jury on the doctrine of unavoidable accident. A trial court has considerable discretion to determine proper jury instructions, and we review a trial court's decision to submit or refuse a particular instruction for an abuse of discretion. *Thota v. Young*, 366 S.W.3d 678, 687 (Tex. 2012).

[30] **[31]** **[32]** **[33]** **[34]** Unavoidable accident is an inferential rebuttal defense. *Dillard*, 157 S.W.3d at 432. The purpose of the unavoidable-accident instruction is to advise the jurors that "they do not have to place blame on a party to the suit if the evidence shows that conditions beyond the party's control caused the accident." *Id.* (citing *Reinhart v. Young*, 906 S.W.2d 471, 472 (Tex. 1995)). An unavoidable accident is "an event not proximately caused by the negligence of any party to it." *Reinhart*, 906 S.W.2d at 472. An instruction on unavoidable accident is "most often used to inquire about the causal effect of some physical condition or circumstance such as fog, snow, sleet, wet or slick pavement, or obstruction of view, or to resolve a case involving a very young child who is legally incapable of negligence." *Id.* The doctrine of sudden emergency is subsumed by the broader doctrine of unavoidable accident. *Id.* at 474. Thus, the trial court would have been required to submit an unavoidable accident instruction only if the evidence showed the existence of an unavoidable accident that was not a sudden emergency. *See Columbia Rio Grande Healthcare, L.P. v. Hawley*, 284 S.W.3d 851, 855 (Tex. 2009).

During deliberations, the jury sent a note asking "Does a degre[e of] negligence or external factor not represented as a cause that contributed in question 2 get taken into account in determining losses?" Gregory and New Prime argue this note suggests the jury wanted to factor black ice into its deliberations. Question 2 concerned the apportionment of responsibility of those found negligent in causing the deaths of Belinda Vasquez and Hector Perales and the injuries to the Vasquez and Perales parties. The jury's inquiry was not tied to a negligence and proximate cause question.

[35] Gregory and New Prime acknowledge that their primary line of defense was their contention that black ice caused Gregory and others to lose control of their vehicles. On appeal, Gregory and New Prime claim the sudden-emergency instruction extended only to Gregory's failure to take action once she was stopped and facing traffic and did not cover their assertion that Gregory jackknifed the trailer because of black ice. But Gregory and New Prime's contention fails to recognize that an unavoidable-accident instruction is proper only when there is evidence that the event was not proximately caused by the negligence of any party to the event. ***301** *Hill v. Winn Dixie Tex., Inc.*, 849 S.W.2d 802, 803 (Tex. 1992). It is not error to refuse or fail to give an unavoidable-accident instruction where the evidence shows the accident was in fact avoidable in the exercise of due care. *See* W. W. Allen, Annotation, *Instructions on unavoidable accident, or the like, in motor vehicle cases*, 65 A.L.R.2d 12 (1959).

[36] We conclude that the evidence in this case does not raise the issue of unavoidable accident. While Gregory may have encountered ice on the roadway, the evidence established she was negligent before she encountered the ice. More particularly, the evidence established she failed to safely operate her vehicle based on conditions that existed at the time of the accident, she was traveling at a speed that was excessive under the circumstances,[11] she had the cruise control activated when it was not appropriate to do so, and she hard-braked on the ice when she should not have done so. The safety expert testified commercial drivers are expected to understand the concept of black ice and to check the weather and avoid excessive speed and reliance on cruise control because of the risks it poses.

Had Gregory checked the weather, maintained a proper speed, not activated the cruise control, and not hard-braked, she could have avoided losing control of her vehicle. Because Gregory did not take adequate precautions, she was precluded from relying on "unavoidable accident" as a defense. *See Hyatt Cheek Builders-Eng's Co. v. Bd. of Regents of Univ. of Tex. Sys.*, 607 S.W.2d 258, 266–67 (Tex. App.—Texarkana 1980, writ dism'd) (trial court did not err in refusing to submit instruction on unavoidable accident because reasonably prudent contractor should have foreseen soil movement that led to pipe break); *Otis Elevator Co. v. Shows*, 822 S.W.2d 59, 63 (Tex. App.—Houston [1st Dist.] 1991, writ denied) ("An 'unavoidable accident' is one that ordinary care and diligence could not have prevented, or one which could not have been foreseen or prevented by the exercise of reasonable precautions."). Consequently, the evidence presented did not

compel the trial court to submit the question of whether a non-human factor proximately caused the accident. In all events, an unavoidable-accident instruction would not have impacted or exonerated Gregory's failure to activate the emergency flashers or set out warning devices after she allowed the trailer to jackknife, another basis upon which the jury was entitled to find negligence. Accordingly, we conclude the trial court did not abuse its discretion in refusing to instruct the jury on unavoidable accident.

VI. New Prime's Liability

The sixth, seventh, eighth, and ninth issues, concern the jury's findings on the Deol family's claims against New Prime for alleged negligent entrustment, supervision, and training. More particularly, New Prime contends there is no evidence of negligent entrustment and the trial court abused its discretion in instructing the jury it could find New Prime liable if it found it negligently supervised Gregory or negligently trained Gregory. In addition, New Prime argues the trial court erred in submitting the negligent entrustment and the defective negligent supervision and negligent training claims without giving a separate blank for each in the liability and apportionment questions, thereby making it impossible to know on what claim the jury found New Prime liable, thereby violating ***302** *Crown Life Insurance Co. v. Casteel*, 22 S.W.3d 378 (Tex. 2000).

[37] **[38]** In addition to asserting New Prime was negligent in entrusting a commercial vehicle to Gregory and in its supervision and training of her, the Deol family claimed New Prime was vicariously liable for Gregory's actions. Under common law, an employer is generally liable for the tort of its employee "when the tortious act falls within the scope of the employee's general authority in furtherance of the employer's business and for the accomplishment of the object for which the employee was hired." *Goodyear Tire & Rubber Co. v. Mayes*, 236 S.W.3d 754, 757 (Tex. 2007) (internal quotation omitted). As stated in the trial court's judgment, it was undisputed at trial that Gregory was an employee of New Prime acting within the scope of her employment when the collisions occurred. Indeed, in their proposed jury charge, Gregory and New Prime stated:

> Since NEW PRIME has admitted that its driver was in the course and scope of her employment at the time of the alleged accident and is thus vicariously liable for her negligence, if any, Plaintiffs' claims against NEW PRIME for respondeat superior and their direct negligence claims for negligent training, supervision, entrustment, and other alleged acts or omissions on the part of NEW PRIME have been rendered moot. [12]

Consequently, New Prime is jointly and severally liable with Gregory for the damages awarded to the Deol family. *See Pierre v. Swearingen*, 331 S.W.3d 150, 154–55 (Tex. App.—Dallas 2011, no pet.) (employer's vicarious liability derivative of and commensurate with that of employee).

The trial court rendered judgment against New Prime as jointly and severally liable with Gregory for the entire amount of the judgment based on the company's vicarious liability for Gregory's actions, not on the jury's finding concerning the company's direct negligence for entrusting a commercial vehicle to Gregory and in supervising and training her. Because we have already concluded Gregory was properly found liable for negligence, and New Prime's liability is commensurate with Gregory's, it is unnecessary for us to address the alternative bases upon which the jury found New Prime liable.

VII. Pain and Mental Anguish

In their tenth issue, Gregory and New Prime claim no evidence supports a conclusion that Deol experienced conscious pain and suffering in connection with his death. The standard of review for legal sufficiency challenges is set forth earlier in our discussion of Gregory and New Prime's first issue. We need not address Gregory and New Prime's assertion that the Deol family's expert on pain and suffering's testimony was not reliable because other evidence, including eyewitness Ondre Reynolds's testimony, supports the jury's

decision to compensate Deol's estate for his pain and mental anguish.

[39] **[40]** **[41]** In Texas, a party may recover damages only for pain that is consciously suffered and experienced by the deceased. *SunBridge Healthcare Corp. v. Penny*, 160 S.W.3d 230, 248 (Tex. App.—Texarkana 2005, no pet.). The presence or absence of physical pain is an inherently subjective ***303** question. *Id.* We may infer pain and suffering from proof that the deceased had severe injuries. *Id.* In addition, pain and suffering may be established by circumstantial evidence. *Id.*

[42] The evidence established Deol died of massive blunt force trauma injuries. His head and chest were flattened when the Vasquez van ran over him. Reynolds, the driver of another tractor-trailer, testified that he saw Deol lying in the road. He described Deol as being in "agonizing pain" and "convulsing." Reynolds stated, "He was, like, shaking and stuff. Like in pain. He was in pain.... He was just rolling around in pain." Reynolds also stated he saw Deol moving and heard him say "Oh," indicating consciousness. Reynolds's testimony, together with the evidence concerning the traumatic injuries Deol sustained, is more than a scintilla of competent evidence to support the jury's finding Deol experienced conscious pain and suffering. We overrule Gregory and New Prime's tenth issue.

VIII. Non-Economic Damages

In their twelfth issue, Gregory and New Prime challenge the non-economic damages awarded to the Deol family as a result of his death. The jury awarded Deol's six family members, including his wife, his three children, and his parents, non-economic damages totaling $15,065,000. This figure excludes the $500,000 awarded to the estate for Deol's pain and mental anguish. Broken down by damage category and family member, the jury awarded the following.

	Wife	Son	Son	Daughter	Mother	Father
Loss of past companionship	$350,000	$160,000	$160,000	$160,000	$160,000	$160,000
Loss of future companionship	$2,625,000	$1,200,000	$1,200,000	$1,200,000	$160,000	$160,000
Past mental anguish	$525,000	$160,000	$160,000	$5,000	$160,000	$160,000
Future mental anguish	$3,937,500	$925,000	$925,000	$92,500	$160,000	$160,000
Total	$7,437,500	$2,445,000	$2,445,000	$1,457,500	$640,000	$640,000

***304** Gregory and New Prime concede the Deol family suffered grief and loss as a result of Deol's death. But they contend the jury awards of non-economic damages suffer four problems. First, Gregory and New Prime claim the awards are excessive because they are disproportionate to the economic damages awarded to these individuals. Second, they contend the damages awarded were not individualized because some of the awards for certain categories of damages were consistent for every member of the Deol family. Third, they argue that the damages awarded were excessive compared to damages awarded or upheld in other wrongful death cases. Finally, they argue that there is not legally or factually sufficient evidence to support these awards and the awards were the result of improper closing argument. We address each of these arguments in turn.

A. Economic vs. non-economic damages

With respect to Gregory and New Prime's claim that the awards are excessive because they are disproportionate to the economic damages awarded, [13] they cite no controlling authority to support a proportionality requirement in wrongful death cases, and we have found none. Rather, they rely heavily on *Bentley v. Bunton*, 94 S.W.3d 561 (Tex. 2002) to support their argument. But *Bentley* is a defamation case brought by a

public official, which necessitated a careful review of the non-economic damage award to ensure it did not have a chilling effect on First Amendment-protected speech. As the court noted, "[d]amage awards left largely to a jury's discretion threaten too great an inhibition of speech protected by the First Amendment." *Id.* at 605. With this in mind, the court considered the plaintiff's $7 million mental anguish award and the $150,000 reputation damage award, and concluded that there was "no evidence" that the plaintiff suffered mental anguish in the amount of $7 million, "more than 40 times the amount awarded him for damage to his reputation." *Id.* at 607.

In addition to *Bentley*, appellants also rely on three other cases: *Exxon Shipping v. Baker*, 554 U.S. 471, 128 S.Ct. 2605, 171 L.Ed.2d 570 (2008); *Bishop Abbey Homes v. Hale*, No. 05-14-01137-CV, 2015 WL 9167799 (Tex. App. – Dallas Dec. 16, 2015, pet. denied) (mem. op.); and *Gordon v. Redelsperger*, No. 02-17-00461-CV, 2019 WL 619186 (Tex. App. – Fort Worth Feb. 14, 2019, no pet.) (mem. op.). But, like *Bentley*, these are not wrongful death cases. *Baker* addressed questions of maritime law related to the Exxon Valdez oil spill. *Baker*, 554 U.S. at 475–76, 128 S.Ct. 2605. *Hale* involved faulty construction of the plaintiffs' "dream home," and this Court determined the ratio between pecuniary and non-pecuniary damages did not support the mental anguish damages awarded to the two plaintiffs. *Hale*, 2015 WL 9167799, at *19. And *Redelsperger* involved a confrontation in a parking lot in which the plaintiff suffered a gash above his eye. The court in *Redelsperger* affirmed the jury's award for past and future physical pain and mental anguish, but it suggested a remittitur of damages awarded for past and future physical impairment based on a lack of evidence of losses resulting from any physical impairment. *Redelsperger*, 2019 WL 619186, at *14–15.

[43] **[44]** Death is different. In wrongful death cases, the emotional impact of the loss of a beloved person is *the most significant damage* suffered by surviving relatives. ***305** *Moore v. Lillebo*, 722 S.W.2d 683, 685 (Tex. 1986). One can experience crushing mental anguish and loss of companionship from the death of a family member even without experiencing significant pecuniary loss. One has little, if anything, to do with the other. As shown in our review of the evidence below, the focus is on the relationship between the decedent and the survivor. Given that mental anguish and loss of companionship are heavily dependent on the relationship between the deceased and the beneficiary, we reject Gregory and New Prime's proportionality argument. [14]

B. Individualization of Awards

[45] Next, Gregory and New Prime contend the damages awarded were not individualized because some of the awards for certain categories of damages awarded were consistent for every member of the Deol family. But, under some circumstances, it may be proper to award similarly situated individuals like amounts. *See, e.g., JBS Carriers, Inc. v. Washington*, 513 S.W.3d 703, 718 (Tex. App.—San Antonio 2017) (rejecting defendants' criticism that jury awarded all three adult children "the same amount" for mental anguish and loss of companionship from their mother's death), *rev'd on other grounds*, 564 S.W.3d 830 (Tex. 2018).

[46] Moreover, the record belies appellants' contention that the jury simply picked numbers and put them in the blanks. Guillermo Vasquez, Alma Perales, and Deol's wife, Jaswinder, were the three surviving spouses in this lawsuit. While the jury awarded the three spouses the same amounts in past mental anguish ($525,000) and past loss of companionship ($350,000), they awarded Guillermo significantly less in future mental anguish and loss of companionship compared with Alma and Jaswinder, apparently accounting for Guillermo's poor health and advanced age. This difference in treatment reflects a careful and sensitive analysis on the part of the jury. As for Alma and Jaswinder, the jury could have determined that both women were entitled to similar figures – both had been without their husbands for the same amount of time, both of their husbands were killed in the same manner, both learned of their husbands' deaths in tragic ways, both were left as widows with children to raise and without the primary source of their household's income, and both women testified compellingly about the closeness of their relationships with their respective husbands.

[47] Deol left behind three young children, A.D., H.D., and G.D. At the time of trial, A.D. and H.D. were 12 and 14 years old, respectively, and G.D. was 4 years old. ***306** All three children were awarded the same amounts in past and future loss of companionship. A claim for loss of companionship and society asks "what positive benefits have been taken away

from the beneficiaries by reason of the wrongful death?" *Lillebo*, 722 S.W.2d at 688. It is entirely reasonable for the jury to conclude the positive benefits lost would be similar for three young children of the same father, who had been without him, and would be without him in the future, the same amount of time. The evidence at trial established that Deol was a doting father who was heavily invested in all three of his children's lives, and the jury could have determined that they were deprived of the same benefits because of his death and this deprivation would continue their entire lives.

In comparison, the jury did not award the children the same past and future mental anguish awards. G.D., who was an infant when Deol was killed, was awarded significantly less than her brothers. While her brothers were each awarded $160,000 in past mental anguish, the jury awarded G.D. only $5,000. And, although her brothers were awarded $925,000 in future mental anguish, G.D.'s award was one-tenth of this amount, $92,500. The jury clearly considered the differing circumstances of the Deol children and factored them into the awards.

Deol's father, Darshan, and his mother, Jagtar, were each awarded $160,000 across all categories of non-economic damages. The fact that the amounts are equal does not mean they were random or a product of the jury failing to properly deliberate on the amounts each party was entitled to recover. Instead, the equal amounts may easily reflect the similarities of the parents' situations including their ages (71 and 75 at the time of trial) and that they both lived with Deol and his family at the time of his death.

[48] **[49]** We accord respect to a jury's award of non-economic damages when the record demonstrates careful consideration of what amounts to assess. A jury demonstrates this level of care where, as here, it awards different claimants different amounts for different categories of non-economic damages. *Serv. Corp. Int'l v. Aragon*, 268 S.W.3d 112, 121–22 (Tex. App. – Eastland 2008, pet. denied). Overall, we find that the jury exercised the requisite level of care in determining the non-economic damage amounts awarded to each member of the Deol family and we reject Appellants' argument that the jury simply picked numbers at random and filled them in the blanks.

C. Comparison with other wrongful death cases

[50] Gregory and New Prime also argue that comparing the awards made in this case with awards in similar cases confirms that these awards are excessive. Appellants reference several cases involving "similar circumstances: the death of a spouse, father, and adult child," and argue generally that the awards at issue are higher than the average awarded in those cases. But each award of non-economic damages is a unique exercise of the jury's discretion. *Primoris Energy Servs. Corp. v. Myers*, 569 S.W.3d 745, 760 (Tex. App.—Houston [1st Dist.] 2018, no pet.) (" 'Because the measure of damages in a personal injury case is not subject to precise mathematical calculation, each case must be measured by its own facts, and considerable latitude and discretion are vested in the jury' ... Therefore, comparison with other cases or amounts of verdicts is 'generally of little or no help.' ") (quoting *U-Haul Int'l., Inc. v. Waldrip*, 322 S.W.3d 821, 855-56 (Tex. App.—Dallas 2010)), ***307** *rev'd in part*, 380 S.W.3d 118 (Tex. 2012); *see also Emerson Elec. Co. v. Johnson*, 601 S.W.3d 813, 845 (Tex. App.—Fort Worth 2018, pet. granted) (mem. op.) (each case must be measured by its own facts, and because appropriateness of award turns on specific facts of case, "referencing the amounts awarded in other cases is of limited help to a court reviewing the sufficiency of the evidence to support an award."); *George Grubbs Enters., Inc. v. Bien*, 881 S.W.2d 843, 858 (Tex. App.—Fort Worth 1994) (comparisons with other cases or verdicts of little help because same loss will result in different damages to different individuals), *rev'd on other grounds*, 900 S.W.2d 337 (Tex. 1995); *Harris v. Balderas*, 949 S.W.2d 42, 44 (Tex. App.—San Antonio 1997, no writ) (explaining there is no certain standard by which personal injury damages can be measured; each case must stand on own facts and circumstances, and comparison with other cases on amounts of verdicts is of little or no help).

[51] **[52]** Other wrongful death cases are informative only insofar as those cases identify relevant factors that can indicate a particular damage award is excessive in light of the evidence presented. *Critical Path Res., Inc. v. Cuevas*, 561 S.W.3d 523, 568 (Tex. App.—Houston [14th Dist.] 2018, pet. granted, judgm't vacated w.r.m.). For example, an award of mental anguish damages may be considered excessive if there is little evidence to show the nature, duration, or

severity of the anguish. *See id.* Because each award must be measured against its own supporting facts, however, a simplistic comparison of the amounts awarded in this case to the amounts awarded in other cases is of no analytical or persuasive value. *See id.* To successfully mount a challenge to the amount of the award, appellants were required to apply the factors identified in the cases they cite and explain how they show that the awards in this case are excessive based on the facts presented. *Id.* Appellants made no attempt to do this. The mere fact that the cases they cite are wrongful death cases involving damage awards to family members does not, by itself, explain why the awards in those cases dictate a lesser amount is appropriate here.

D. Legal and Factual Sufficiency

Appellants claim that, rather than awarding damages based on specific evidence presented, the jury appears to have started with the $39 million figure counsel for the Vasquez/Perales family suggested in closing argument and worked backwards. In his argument, counsel stated: "But if you don't like any of the [earlier] analysis with respect to damages, then think about it this way ... [J]ust give them your two cents' worth ... six cents a mile for the six hundred and fifty ... million miles they traveled in the year that they took these people's lives.... Just give them your two cents' worth. That's $39 million." The jury awards to both the Vasquez/Perales and Deol families totaled $38,801,775. We first address appellants' argument that the non-economic damage awards in this case were the result of improper closing argument and then review the awards under the applicable standard of review.

1. Counsel's statement

The above statement, made by counsel for the Vasquez/Perales family, came in without objection and without comment by counsel for Gregory and New Prime during their closing argument. This statement was one of many arguments counsel made concerning damages during closing argument, including, but not limited to, the following:

> ***308** The instruction is to compensate in this case. And that is your juror's call to action. The action required is to equalize the money with the harms and the losses. The word "compensate" in trial means to balance. And the requirement to compensate means that the weight of the harm must be balanced by the weight of the compensation. *And the law in every courthouse in America says nothing goes on the scale but the losses and harms caused by negligence, no outside reason.* Your most important job is to make sure everyone follows that law.
>
> ... This is important because if your verdict is for less than the full and fair amount that equalizes the harms, *if your verdict is some symbolic amount or some token amount or anything less than the full measure of losses and harms, if you take any outside reason into account even a little, then the law has not been fulfilled.*
>
> And what are the harms and losses in this case? You've heard the evidence. You've met the family and heard about what used to be, a wife and a mother gone, a husband and a father gone, incredible pain, physical and emotional suffering, the loss of a limb, the drastic changes to all of their lives.
>
> And when I think of Guillermo and his injuries and when I think of Guillermo and losing his wife and his son-in-law, and when I think of William and Alma losing their mother, and when I think of Alma losing her husband, and Noah and Elijah losing their father and their grandmother and an entire generation, two generations of family wiped out and a family destroyed and losses that will go on for (unintelligible), in some cases a combined 50 years, *I can't imagine that you wouldn't consider the total for those losses somewhere between 30- and 40 million.* But that is my suggestion. It is my obligation to give you that. It is your decision and your decision alone. You might think more; you might think less. That would be your call, but that's my suggestion of awarding to these folks.

(Emphasis added).

[53] Clearly then, although counsel for the Vasquez/Perales family made the complained-of statement which culminated in a suggestion that the jury award $39 million, that statement must be considered in the context of counsel's preceding remarks that accurately set out the standards and factors applicable to non-economic damages. Counsel's comment regarding "six cents a mile" put into perspective the $30 million to $40 million amount he suggested the plaintiffs were entitled to receive based on the facts presented. In addition, counsel for appellees addressed the appropriate

factors relevant to non-economic damages during both voir dire and opening statements. Finally, the jury charge correctly instructed the jury on the law to consider in awarding non-economic damages, and unless the record demonstrates otherwise, we presume the jury followed these instructions. *Golden Eagle Archery, Inc. v. Jackson*, 116 S.W.3d 757, 771 (Tex. 2003). Appellants point to nothing in the record nor any authority that would provide a rational basis for us to conclude that the complained-of statement led the jury to make its decisions on an improper basis or affected the jury's award of non-economic damages in this case.

2. Sufficiency of the Evidence

[54] **[55]** **[56]** **[57]** **[58]** **[59]** In determining whether damages are excessive,[15] we employ a factual ***309** sufficiency analysis. *Pope v. Moore*, 711 S.W.2d 622, 624 (Tex. 1986) (per curiam); *Balbuena v. Balbuena ex rel. Balbuena*, No. 05-02-00459-CV, 2002 WL 31646678, at *3 (Tex. App.—Dallas Nov. 25, 2002, no pet.) (not designated for publication). We can set aside a verdict only if it is so contrary to the overwhelming weight of the evidence that the verdict is clearly wrong and unjust. *Ortiz v. Jones*, 917 S.W.2d 770, 772 (Tex. 1996). The nebulous issues of mental anguish and loss of companionship and society are "inherently somewhat imprecise." *Uzoka*, 290 S.W.3d at 454. Because these damages are unliquidated and incapable of precise mathematical calculation, once the existence of non-economic loss is established, the jury is given significant discretion in fixing the amount of the award. *Id.* We take that into account when we conduct a meaningful review of the quantum of any such award. *Saenz v. Fid. & Guar. Ins. Underwriters*, 925 S.W.2d 607, 614 (Tex. 1996). Juries must find an amount that would fairly and reasonably compensate for the plaintiffs' loss.

Damages at Issue

[60] **[61]** **[62]** **[63]** **[64]** In wrongful death cases, mental anguish damages and loss of companionship and society damages both compensate for non-economic losses. *Lillebo*, 722 S.W.2d at 687. Mental anguish is concerned not with the benefits the claimants have lost, but with the direct emotional suffering experienced as a result of the death. *Id.* at 688. Compensation for mental anguish can be awarded only for such anguish that causes "substantial disruption in daily routine" or "a high degree of mental pain and distress." *Parkway Co. v. Woodruff*, 901 S.W.2d 434, 444 (Tex. 1995). However, in wrongful death cases, proof of mental anguish does not require evidence of physical symptoms such as sleeplessness, weight loss, nervousness, personality changes, and the like. *Lillebo*, 722 S.W.2d at 686–87. Proof of the familial relationship alone "constitutes some evidence" of the mental anguish a surviving family member experiences when another member dies. *Id.* at 686.

[65] **[66]** **[67]** While mental anguish focuses on the negative impact the wrongful death had on the beneficiaries, a claim for loss of companionship and society asks "what positive benefits have been taken away from the beneficiaries by reason of the wrongful death?" *Id.* at 688. Damages for loss of companionship and society are intended to compensate the beneficiary for the positive benefits flowing from the love, comfort, companionship, and society that the beneficiary would have received had the decedent lived. *Id.* at 687–88. In awarding damages for mental anguish and loss of companionship in a wrongful death case, the jury may consider (1) the relationship between husband and wife or a parent and child; (2) the living arrangements of the parties; (3) any absence of the deceased from the beneficiary for extended periods; (4) the harmony of family relations; and (5) common interests and activities. *Id.* at 688. The jury charge in this case properly instructed the jury on these factors.

Trial Testimony Relevant to the Awards

The evidence presented at trial established Deol was 45 years old at the time of his death and his life expectancy was 78.4 years. Accordingly, had Deol survived the accident, he was expected to live another 33 years. Deol's wife, Jaswinder, testified regarding the effect of Deol's death on her and her family members and about the ***310** positive influences Deol had on them.[16] *See Woodruff*, 901 S.W.2d at 444 (mental anguish evidence can come from testimony of third parties).

Counsel's questioning of Jaswinder spans over fifty pages of the reporter's record. Jaswinder testified that she and Deol first met in India when she was 16 or 17 years old. Deol courted her for a year before she would speak to him and they began dating. Eventually, Jaswinder's family moved to Canada and Deol's family moved to the United States. Jaswinder's parents wanted an arranged marriage for her with

someone else, but she and Deol loved each other and fought for their relationship. She stated that, throughout her and Deol's struggle for acceptance with her family, she knew they were meant to be.

Jaswinder and Deol had three children together, and she described their family as very close. They enjoyed many activities and traveling together. Jaswinder worked part-time, and Deol was the primary financial provider for their extended family that included Deol's parents, who lived with them. Deol "did everything" for the family. He loved cooking and working in the garden, and he would help out around the house. Jaswinder and Deol were "very, very close." He was "everything" to her and was her "best friend." Even when he was on the road working, Jaswinder would call and consult with him about "every single thing." Even now, when she's stressed, she finds herself talking to Deol. Deol had been excited to experience their children's milestones, and she misses Deol every time her children do something memorable, like when G.D. crawled for the first time. She stated she "misses everything" about her husband.

The night of the accident Jaswinder tried calling Deol a "hundred times." She was concerned because he always answered her calls on the first ring. The following evening, Jaswinder arrived home from work to find the house full of relatives. The police had earlier informed Deol's father that Deol had been killed, but the family did not want to tell Jaswinder because they were afraid she would become hysterical in front of the children. When Jaswinder learned the police had come by, she became worried. She began calling hospitals in Texas looking for Deol. Eventually she found a business card with the phone number for the local police, and she called and left a message. Shortly thereafter, someone returned her call and told her that Deol had been killed. She described that moment as "the saddest moment of her life." She has no memory of what happened next, and she doesn't remember how her children learned their father was dead. At the funeral she "was out of [her] mind." She stated she could not recall the funeral or how she got there.

Consistent with tradition, Jaswinder and the family traveled to India to spread Deol's ashes in a river. Although it is also tradition to pass out the deceased's clothing to the poor, Jaswinder could not bring herself to part with Deol's belongings, and she bought new clothes for the poor instead. Jaswinder stated she saved all of Deol's belongings, including his electric razor that still has his hair in it.

Since Deol supported the family, they could not afford to keep their house after his death. Jaswinder was forced to relocate the family from Maryland to California so that she could work for Deol's brother. She ***311** stated they can no longer pay for the things they used to enjoy.

Jaswinder began taking anti-depressant medication, which she was still taking at the time of trial. She described Deol as "the love of her life," and she misses him "every single moment." She said the home environment is "very sad" and Deol's death "destroyed" her family. They no longer celebrate birthdays and she sometimes misses parent-teacher conferences because they are too difficult without Deol.

When the children learned of Deol's passing, H.D., the oldest, sat with Jaswinder and held her. A.D. went to his room and would not talk to anyone. H.D. and A.D. were very attached to Deol, whom Jaswinder described as a loving father. Before Deol's death, H.D. was happy. Now he is in pain and very quiet. He does not talk much and stays to himself. Jaswinder stated he no longer has a role model. H.D. was given two tickets to his middle school graduation. He brought one ticket home telling Jaswinder "we do not need two." He then went to his room and cried. Deol and H.D. used to play video games, ride bikes, and play basketball. Deol used to put H.D. and A.D. to bed, and he would stay with them until they fell asleep.

Since Deol's death, A.D. has gained a lot of weight. He was more active before Deol's death because he and Deol often did things together. Now A.D. just sits with Jaswinder and reads. He seems depressed most days and frequently talks about his dad. A.D. was in a gifted program in Maryland, but after they moved to California, advanced classes were no longer an option because of the expenses involved. Jaswinder stated they also do not travel anymore because she does not like to drive on the highway and they do not have enough money. Both boys continue to cry out for their father.

G.D. was seven months old when Deol died. Deol loved G.D. deeply, and when she was born he would not allow other family members to hold her. Jaswinder testified that G.D. notices other children have fathers and she asks frequently about hers. G.D. sees pictures of Deol in the house and asks

when he's coming home, and whether they are going to go pick him up from the airport. Jaswinder stated she can't bring herself to face G.D. when she asks about her dad and, when G.D. notices that her questions make Jaswinder sad, she will stop asking. According to Jaswinder, G.D. recognizes the family is struggling financially and when she sees things in the store that she wants, she will say it is too expensive, even when Jaswinder is willing to buy it for her.

At the time of Deol's death, Deol's mother, Jagtar, was 71 years old and his father, Darshan, was 75. Deol and Jagtar were very close. They used to cook and garden together. Since Deol's death, she cries multiple times every day. Darshan learned of his son's death from the police officer who visited the house. He arranged to have his son's body transported back to Maryland for the funeral, and he traveled with Jaswinder to India to spread his son's ashes. While Darshan does not cry in front of Jaswinder, she explained that since Deol's death, the entire family's living environment is sad and everything has changed.

Jury Instructions

The jury instructions defined loss of companionship and society to mean "the loss of the positive benefits flowing from the love, comfort, companionship, and society that [each Deol family member], in reasonable probability, would have received from Bhupinder Singh Deol had he lived." The instructions also defined mental anguish as "the emotional pain, torment, and suffering experienced by [each ***312** Deol family member] because of the death of Bhupinder Singh Deol." The trial court further instructed the jury that it could consider the relationship between Deol and each Deol family member, their living arrangements, any extended absences from one another, the harmony of their family relations, and their common interests and activities. *See Lillebo*, 722 S.W.2d at 688 (describing these elements for jury's consideration in wrongful death cases). The trial court also instructed the jury not to include damages for one element in the others.

[68] Under *Golden Eagle Archery*, we must presume that the jury followed these instructions and did not award damages for one element more than once unless the record shows otherwise. 116 S.W.3d at 771. Thus, in determining the damages, the jury charge permitted the jury to make its own determination of how to categorize and compensate the Deol family based on the evidence presented about the damages caused to the family because of Deol's death. *Id.* at 770.

Jaswinder

The jury awarded Jaswinder $350,000 in loss of past companionship, $2,625,000 in loss of future companionship, $525,000 in past mental anguish, and $3,937,500 in future mental anguish, for a total of $7,437,500 in non-economic damages. Appellants do not specify which of these awards they believe to be excessive, nor do they specify in what respect the evidence is lacking to support these different awards. Appellants did not subject Jaswinder to cross-examination, nor did they address any of the plaintiffs' damages in their closing argument. Appellants' motion for judgment notwithstanding the verdict simply alleged there was "no evidence" to support each category of damages for each plaintiff.

The evidence presented established Jaswinder had a long and loving relationship with Deol, and she was dependent on him both financially and emotionally. From the evidence presented, the jury could have found Jaswinder and Deol had an extremely harmonious relationship and shared the love of their family and the nurturing and education of their children. In addition, the evidence supports a finding that Jaswinder has suffered tremendous grief and depression since Deol's death, and that her grief had not waned over the years. Gregory and New Prime concede that the way Jaswinder learned of her husband's demise was tragic. Her testimony established she was left to wonder for over a day where he was and what had happened to him and that she was devastated when she learned of Deol's death.

[69] The evidence showed Deol's death significantly and permanently changed Jaswinder's life. She no longer has Deol to provide emotional and financial support. The jury could have reasonably concluded Jaswinder and Deol had a very special, symbiotic relationship, the loss of which is likely to leave long-lasting emotional devastation. *See, e.g., Transco Leasing Corp. v. United States*, 896 F.2d 1435, 1453 (5th Cir.), *amended on other grounds on rehearing*, 905 F.2d 61 (5th Cir. 1990). Accordingly, we conclude the evidence supporting Jaswinder's mental anguish and loss of companionship damages more than satisfies the *Lillebo* factors for reviewing awards for excessiveness. Jaswinder's testimony was thorough, detailed, non-conclusory, and

compelling, and the jury's awards were not so contrary to the overwhelming weight of the evidence that the verdicts were clearly wrong and unjust.

***313** Deol's Children [17]

[70] A.D. was 8 years old and H.D. was 10 years old when Deol died. According to the trial record, Deol was very close to both his sons. Both boys have demonstrated significant and continuing grief over Deol's death. The boys no longer enjoy their father's guidance and companionship, and they cannot afford to do the things they used to do. From the evidence presented, the jury could have reasonably concluded Deol's death had a profound and lasting impact on H.D. and A.D. Again, the evidence developed at trial supports the *Lillebo* factors, and the jury's awards to H.D. and A.D. of $160,000 for loss of past companionship, $160,000 for past mental anguish, $925,000 for future mental anguish, and $1,200,000 for loss of future companionship were not so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust.

[71] With respect to G.D., while she was situated differently than her brothers because she was an infant at the time of Deol's death, there was evidence that she has experienced mental anguish and loss of companionship due to the loss of her father. Jaswinder testified Deol was extremely protective of G.D. from the time she was born. The jury could infer from this that G.D. bonded with Deol and he provided a sense of security that was no longer present after he died. Along with the evidence that G.D. was aware of, and troubled by, the absence of her father, the jury was free to consider the emotional turmoil and other disruption that Deol's death caused in the home. While the evidence concerning G.D.'s mental anguish was not as fully developed as it was for her brothers, the jury's award of only $97,500 in past and future mental anguish accounted for this.

[72] As to loss of companionship and society, the record established Deol was a loving father and provided financial and emotional support to his family and promoted the education of his children. While G.D. was young at the time of Deol's death, the jury could have reasonably concluded her loss of the companionship and society of Deol was no less than that of her brothers. Accordingly, we conclude the jury's award of $1,360,000 to G.D. for past and future loss of companionship and support is not clearly wrong or manifestly unjust.

Deol's Parents

[73] The evidence established Deol's parents lived with Deol and his family. Four years after Deol's death, his mother still cries every day. Given the manner in which Deol died, the closeness between Deol and Jagtar, and the severe emotional distress she exhibited, we conclude a reasonable jury could conclude she suffered significant mental anguish and a loss of companionship as a result of Deol's death.

[74] While we acknowledge there was less testimony specific to Deol's father, the jury was free to consider the general testimony about how the whole family was living together in one house and that the household as a whole was "destroyed" by Deol's death. In addition, the jury heard how Darshan was the first to learn of his son's death from the police officer who visited the house and how he felt he had to keep this information from Jaswinder. It ***314** was Darshan who arranged to have his son's body transported back to Maryland, and he made the long trip with Jaswinder to India for the solemn purpose of spreading Deol's ashes. Because Deol was the family's primary caretaker, the entire family was forced to move cross-country so that Jaswinder could find full-time work. Finally, Darshan has had to watch his wife cry multiple times a day, every day, since their son was killed. The fact that Deol's father may not have expressed his grief in the same manner as the other members of his family, did not preclude the jury from finding he has suffered, and will continue to suffer, equally.

[75] **[76]** **[77]** **[78]** **[79]** It is uniquely the province of the jury to quantify matters of non-economic damages. *See United Rentals N. Am., Inc. v. Evans*, 608 S.W.3d 449, 469 (Tex. App.—Dallas 2020, pet. filed). "As long as there is sufficient probative evidence to support the jury's verdict, this Court will not substitute its judgment for that of the jury." *Id.* In the absence of a showing that passion, prejudice, or other improper motive influenced the jury, the amount assessed by it will not be set aside as excessive. *Id.* A large award, in and of itself, does not show that the jury was influenced by passion, prejudice, sympathy, or other circumstances not in evidence. *Id.* For us to reverse an award, it must be flagrantly outrageous, extravagant, and so excessive that it shocks the judicial conscience. None of the awards at issue here meet

this criteria. We conclude the evidence supports the amounts awarded to each member of the Deol family.

IX. Cumulative Error

[80] **[81]** In their final issue, Gregory and New Prime contend the cumulative effects of the matters they assert as the trial court's errors in this case requires reversal and remand for a new trial. Texas courts recognize the doctrine of cumulative error, wherein a reviewing court may reverse a lower-court judgment when the record shows a number of instances of error, "no one instance being sufficient to call for a reversal, yet all the instances taken together may do so." *Sproles Motor Freight Lines, Inc. v. Long*, 140 Tex. 494, 168 S.W.2d 642, 645 (1943). To support reversal based on cumulative error, a complaining party must show that "based on the record as a whole, but for the alleged errors, the jury would have rendered a verdict favorable to it." *Owens-Corning Fiberglas Corp. v. Malone*, 916 S.W.2d 551, 570 (Tex. App.—Houston [1st Dist.] 1996), *aff'd*, 972 S.W.2d 35 (Tex. 1998).

[82] Here, Gregory and New Prime contend that the combination of the trial court's striking responsible third parties, failing to submit a charge instruction on unavoidable accident, and submitting improper broad form jury questions on negligent entrustment, negligent training, and negligent supervision, probably caused the rendition of an improper verdict. As discussed above, we have concluded there is no error in regard to Gregory and New Prime's complaints. When there are no errors to be considered as a combined whole for purposes of evaluating harm, we reject cumulative error arguments. *In re BCH Dev., LLC*, 525 S.W.3d 920, 930 (Tex. App.—Dallas 2017, orig. proceeding) (citing *Caro v. Sharp*, No. 03-03-00108-CV, 2003 WL 21354602, at *8 (Tex. App.—Austin June 12, 2003, pet. denied) (mem. op.)).

CONCLUSION

We overrule Gregory and New Prime's first through tenth and twelfth through thirteenth issues. We affirm the trial court's judgment.

Whitehill, J., concurring in part and dissenting in part, joined by Richter, J.

Schenck, J., concurring in part and dissenting in part, joined by Browning, J. and Richter, J.

*315 OPINION CONCURRING IN PART AND DISSENTING IN PART TO THE COURT'S OPINION

Concurring and Dissenting Opinion by Justice Schenck

I join Parts I through VII and IX of the majority opinion that I drafted as the panel opinion prior to the Court deciding to consider this case en banc. However, I respectfully dissent from Part VIII of the majority opinion in which the majority resolves Gregory and New Prime's challenge of the non-economic damages awarded to the Deol family members because, in doing so, the majority misapplies, or wholly fails to apply, the factual sufficiency standard of review. More particularly, the majority fails to conduct a "meaningful evidentiary review" of the mental anguish and loss of companionship damage awards as required by Texas Supreme Court precedent. *See Saenz v. Fidelity & Guar. Ins. Underwriters*, 925 S.W.2d 607, 614 (Tex. 1996).

I.

To summarize, I differ from the majority in the standards that govern the amount of mental anguish awards in a case such as this where (1) there has been no effort to present evidence augmented by proper legal argument or admissible opinion testimony that would direct the factfinder to a "fair and reasonable" number and (2) there has been obviously improper argument urging the jury to disregard the compensatory purpose of its award in order to "send a message" with its number. As I indicated in what is now the majority opinion, while it is a close question, I do not believe that this improper argument mandates reversal on its own account. Instead, I believe we are obliged to look for other evidentiary support for the award and to affirm the award if, using the proper burden of proof and standards of review, we can do so. That obligation requires us to examine both legal and factual sufficiency and, I believe, permits us to employ objective measures, including looking to awards in

like cases *both* to support [1] the award and to assess potential excessiveness.

In my view, the majority misses the mark by affirming the awards simply because the jury heard Jaswinder Chohan's testimony concerning the family members' relationships with Deol and that they are understandably deeply saddened by his death. I agree that this evidence is sufficient to establish the fact of the emotional injury and the entitlement to pursue *some* amount of damages; it is not, however, also *a priori* assumption that the evidence is factually sufficient to support the award of any amount that would not "shock the judicial conscience," whatever that might mean. Conflating evidence of the existence of an injury with its quantification ignores that two distinct and critical questions are involved in the trial court, as the Texas Supreme Court has repeatedly stressed. *See, e.g., id.* Likewise, deferring to *any* number so derived so long as it does not "shock the conscience" is not the "meaningful" evidentiary review the supreme court has insisted upon in these cases. It is, instead, a retrenchment to the rejected doctrine that such awards are inherently ***316** arbitrary, leaving both the claim and the resulting award needlessly open to attacks, such as the due process claim Gregory and New Prime raise here. Instead, I believe that we can, and should, strive to apply more objective and manageable standards at both the trial and appellate levels that the supreme court has recognized and applied over the past decades.

Insofar as *legal* sufficiency is concerned, I believe that the Texas Supreme Court's decision in *Moore v. Lillebo* supports the argument that evidence of a *close* familial bond is sufficient in its own right to support the existence of some compensable injury, if not its amount. 722 S.W.2d 683, 685 (Tex. 1986). [2] As a result, barring any further evidence of the amount, we would be obliged to avoid a reversal and rendition and should, instead, move on to consider *factual* sufficiency, which Gregory and New Prime also challenge.

But, as to factual sufficiency, the evidence at trial must be tied in some non-arbitrary fashion to the jury's award, and our review of it must be "meaningful." *Saenz*, 925 S.W.2d at 614. This is not only a plain directive by *Saenz* and other controlling cases, I believe it is essential to the continued recognition of the claim as against modern due process standards or a re-evaluation of the common law that initially refused to recognize it for the reasons I articulate herein. Arguments to the effect the jury "heard the evidence" and received a written charge warning against passion is a truism in this and every other case. If countenanced as enough in its own right this would amount to allowing the jury to "pick a number and put it in the blank," something it is not permitted to do. *Id.* Accepting the number so yielded by that process, with the declaration that our "conscience" is not "shocked," affords no review. Worse, the complete lack of articulable, objective standards makes it impossible for parties to mediate their claims in advance of trial or direct their arguments in a court and further subjects the claim to broader attack.

II.

I believe historical overview of mental anguish damages and loss of companionship damages in wrongful death cases is helpful in understanding the current state of the law in this area. Historically, courts distrusted claims of mental anguish or mental suffering. *Parkway Co. v. Woodruff*, 901 S.W.2d 434, 442 (Tex. 1995). In fact, at first, the common law, in Texas and elsewhere, refused to acknowledge mental or emotional harm as a compensable loss at all. *Lynch v. Knight*, 11 Eng. Rep. 854, 863 (1861). It did so because mental anguish is inherently subjective and claims of mental anguish do not readily lend themselves to judicial management to avoid arbitrary deprivations of the answering defendant's rights. *See, e.g., Parkway*, 901 S.W.2d at 442.

Nevertheless, over time, in keeping with growing empirical and scientific proof, courts came to recognize mental anguish as not only a real phenomenon but as a legally cognizable damage in its own right, crafting exceptions to the categorical ban on recovery along the way. *Id.* Acknowledging that the existence of mental anguish ***317** is less readily verifiable than other, physical injuries, mental anguish damages were initially limited to cases in which there was a physical injury. *See Hill v. Kimball*, 76 Tex. 210, 13 S.W. 59, 59 (1890). Then, compensation for mental anguish unaccompanied by a physical impact injury was allowed provided the mental anguish had "a physical manifestation." *See id.*; *see also Gulf, C. & S.F. Ry. Co. v. Hayter*, 93 Tex. 239, 54 S.W. 944, 945 (1900). The physical impact rule was eased further with the Texas Supreme Court adopting the "zone of danger" theory of bystander recovery from *Dillon v. Legg*. [3]

Eventually, the requirement of an actual physical injury or near injury was abandoned at common law in this narrow, statutory setting to allow wrongful death claimants to recover mental anguish damages without any physical injury or proximity to the events, though initially only on behalf of a parent for the loss of a minor child. *See Freeman v. City of Pasadena*, 744 S.W.2d 923, 923–24 (Tex. 1988); *Sanchez v. Schindler*, 651 S.W.2d 249, 253 (Tex. 1983). [4]

I fear that we may forget too easily how close and controversial these latter decisions were. *E.g., Sanchez*, 651 S.W.2d at 253 (Pope, C.J., dissenting joined by McGee and Barrow, JJ.). And, likewise, how important the subsequent supreme court decisions concerning the need for objective standards and meaningful review are to sustaining a claim for a loss virtually every human will sustain during his or her life. To this day, other jurisdictions as progressive and enlightened as our own have engaged in the same experiential exercise of refining common law rules and have found the risk of "unmanageable" and totally "unpredictable liability" to outweigh the benefit of recognizing the claim at all in a variety of settings. *See, e.g., Guia v. Arakaki*, 105 Hawai'i 484, 99 P.3d 1068 (2004).

In the decades before *Sanchez*, our own supreme court declined to recognize any claim of emotional distress absent physical impact, no matter how real the injury was, and left the matter to the legislature, expressing the concern that it would "open a wide and dangerous field in which it is difficult, if not impossible, to consistently apply the rule." *Harned v. E-Z Fin. Co.*, 151 Tex. 641, 254 S.W.2d 81, 86 (1953). *Sanchez* set us on a different and difficult path. Yet, *Saenz* insists that it does not impose an impossible task. I believe that we can, and must, enforce some standards that do not reopen the claim to the charge that it is inconsistently applied and unpredictable if the experiment is to survive.

III.

A. Proof of the Existence of Mental Anguish Is Distinct From Proof Quantifying Its Extent

In 1995, the Texas Supreme Court set forth the specific type of evidence a claimant must present to establish the *existence* of compensable mental anguish. *Parkway*, 901 S.W.2d at 444. More particularly, the supreme court stated mental anguish damages could not be awarded unless there was (1) direct evidence of the nature, duration, or severity of the plaintiff's anguish, thus establishing a substantial disruption in the plaintiff's daily routine or (2) other evidence showing that the plaintiff suffered from a high degree of mental pain ***318** and distress that is more than mere worry, anxiety, vexation, embarrassment, or anger. *Id.* Evidence of the *existence* of a compensable injury is not simultaneously evidence of its *quantum.* Were it otherwise, the notion of nominal damages would not exist. *MBM Fin. Corp. v. Woodlands Operating Co., L.P.*, 292 S.W.3d 660, 665 (Tex. 2009). Because such nominal damage awards obviously fail to compensate for an established injury, we rightly resist resort to them. *Id.* at 666. We generally ask, instead, whether the party with the burden of proving the amount has brought "forward the best evidence of the damage of which the situation admits." *Id.* (quoting *Gulf Coast Inv. Corp. v. Rothman*, 506 S.W.2d 856, 858 (Tex. 1974)). We are willing to affix the label of "actual damages" to damages that are *actually* shown by that best evidence if it "affords a reasonable basis for estimating [the] loss." *Gulf Coast Inv.*, 506 S.W.2d at 858. "Application of the rule" has never meant "that a guess or surmise on the part of the jury would suffice." *Id.* Earlier efforts to suggest that emotional awards are inherently arbitrary and somehow exempt from this requirement have already been rejected. *Saenz*, 925 S.W.2d at 614 ("[W]e disagree with the court of appeals that translating mental anguish into dollars is a necessarily arbitrary process."). Rather, to support an award of mental anguish damages, "[t]here must be both [1] evidence of the *existence* of compensable mental anguish and [2] *evidence to justify the amount awarded.*" *Hancock v. Variyam*, 400 S.W.3d 59, 68 (Tex. 2013) (emphasis and enumeration added).

Here, Gregory and New Prime concede that the members of the Deol family suffered mental anguish as a result of Deol's death. On appeal, they challenge the legal and factual sufficiency of the evidence to justify the amounts awarded. [5] They contend that the closing argument adopted by Deol's counsel urged jurors to punish, rather than compensate, for the injury. I note that the resulting award is quite close to the "amount" so urged. Putting that problem aside for the moment, the evidence before the jury, as I will detail below, showed a close familial relation of a type sufficient, in my

view, to support entitlement to some award and to overcome a legal sufficiency bar and the resulting rendition of an adverse judgment. Thus, I would overrule Gregory and New Prime's legal sufficiency challenge of the mental anguish damages awarded to the Deol family members and proceed to a factual sufficiency review.

While the jury heard about a close familial relation, the jury did not hear any evidence of, among other things, the likely duration of the Deol family members' mental anguish or the need for therapy or other treatment or its costs. It did not have evidence or guidance, in the form of expert opinion or otherwise, concerning whether, among other things, their emotional distress had resulted or might result in a material diminution in quality of life or functioning, a propensity for alcohol or drug abuse, a disruption of relationships, or their ability to seek or hold employment. *See, e.g., Atchison, Topeka & Santa Fe Ry. v. Cruz*, 9 S.W.3d 173, 184–85 (Tex. App.—El Paso 1999, pet. granted, judgm't vacated, remanded by agr.) (appellees' economist gave the jury guidelines in how damages for intangible elements could be calculated). The jury's attempt to affix a number in this case was not only misinformed ***319** by improper argument, it was little more than guesswork that would be applicable to any case involving the loss of a close family member. I accept that some real loss occurs in every such case and readily accept that some damages can be presumed to follow. But, if *any* number could be upheld as *factually* sufficient on this showing, we would move back to the position explicitly rejected in *Saenz*, making the process "necessarily arbitrary" and compelling us to accept virtually any damage figure in any wrongful death case.

B. Common Law Standards

I note that in the 30-plus years since the Texas Supreme Court first recognized mental anguish damages in wrongful death cases, and in the years since the supreme court handed down *Saenz*, with notable exceptions, the high court has given the intermediate appellate courts little guidance to govern its mandate that courts of appeals, as the sole appellate courts addressing factual sufficiency of non-economic damages, conduct a "meaningful review" of them. [6]

While the majority appears to adhere to prior panel precedent dismissing a comparison of the award in one case to any other like cases as "generally of little or no help," *see U-Haul Int'l, Inc. v. Waldrip*, 322 S.W.3d 821, 855–56 (Tex. App.—Dallas 2010), *aff'd in part, rev'd in part on other grounds*, 380 S.W.3d 118 (Tex. 2012), I disagree. *See Bill Hendrix Auto Parts v. Blackburn*, 433 S.W.2d 237 (Tex. App.—Houston [14th Dist.] 1968, no writ). [7] The supreme court has recently confirmed that this comparison to like cases is entirely proper. *See Anderson v. Durant*, 550 S.W.3d 605, 620 (Tex. 2018). Indeed, at this stage, it appears to be the only expressly approved vehicle we have for lending some measure of objectivity and predictability to mental anguish awards in wrongful death cases. The only other like metric available in other contexts—the ratio between economic and non-economic damages—is ill-suited to this claim because it is brought by the surviving family members, not the decedent whose primary economic loss is captured in a separate claim.

Before I briefly discuss the other strategies developed for judicial management of these awards, I will note that the United State Supreme Court began its foray into the proper due-process-compelled review standards for punitive damages by comparison to the broad discretion juries had in affixing a proper number to compensate for emotional distress. *Pac. Mut. Life Ins. v. Haslip*, 499 U.S. 1, 20, 111 S.Ct. 1032, 113 L.Ed.2d 1 (1991). Critical to the court's original determination that Alabama procedures created "a definite and meaningful constraint" on the amounts juries awarded. *Id.* at 20–23, 111 S.Ct. 1032. Thereafter, it would appear that the United States Supreme Court's confidence that state court appellate review actually provided that meaningful constraint against arbitrary awards slipped. The Supreme Court, as a matter of federal due process, introduced much firmer constraints deemed necessary to assure that any award is "based upon an 'application of law, rather than a decisionmaker's caprice.' " *E.g.,* ***320** *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 418, 123 S.Ct. 1513, 155 L.Ed.2d 585 (2003) (recounting march toward mandatory 3-prong "guideposts," mandatory *de novo* appellate review) (internal citation omitted).

Other common law jurisdictions have developed other techniques aimed at avoiding arbitrarily excessive awards. As noted, some have simply opted to adhere to our own, pre-1985 common law, banning non-economic damage awards in wrongful death cases. *See, e.g., In re Air Crash at Belle Harbor, N. Y. on Nov. 12, 2001*, 450 F. Supp. 2d 432

(S.D.N.Y. 2006) (applying New York law). As modern understanding seems to confirm only that mental anguish in these settings is real, if challenging to quantify, I would find other options to support their recognition to be preferable. Congress,[8] state legislatures,[9] and courts[10] have adopted various limits or caps on non-economic damages to lend some predictability and, in some cases, in response to run-away jury verdicts with the limits typically expressed in the hundreds of thousands of dollars. These provisions sometimes operate not so much as absolute caps but as a limited authorization for presumed damages, much like our own *Moore* decision permits presumption of *some* quantum of harm. Claimants are still required to show harm, and the awards are scrutinized as such, up to the presumed limit. Claimants are also permitted to prove entitlement to additional amounts that would be supported by proof peculiar to the case, such as aggravating conduct by the defendant. In this way, the rule acknowledges the uncertain nature of the injury while obliging the claimant to adduce more meaningful proof as the claim exceeds the upper limits. *Cf. Addington v. Tex.*, 441 U.S. 418, 99 S.Ct. 1804, 60 L.Ed.2d 323 (1979) (discussing proof standards compelled by due process in relation to extent and nature of the interest involved).

While the Texas Legislature has not adopted any limit or cap on non-economic damages, the Texas Supreme Court is not bound by the prior legislative inaction in an area like tort law, which has traditionally been developed primarily through the judicial process. *Sanchez*, 651 S.W.2d at 252 (citing Green, *Protection of the Family Under Tort Law*, 10 HASTINGS L.J. 237, 245 (1959)). Mental anguish and loss of companionship damages are judicially created remedies, and it is within the supreme court's authority to adapt or refine the common law it created should it conclude that *Saenz* and its progeny have not lent the necessary degree of rigor to these awards since 1996. It is said that the genius ***321** of the common law is that it evolves slowly in the light of reason and experience. *DeSantis v. Wackenhut Corp.*, 793 S.W.2d 670, 690 (Tex. 1990) (Mauzy, J., concurring); O.W. Holmes, Jr., THE COMMON LAW 273 (1881) ("The life of the law has not been logic; it has been experience.").[11]

In my review of approximately one hundred and fifty cases in which the Texas Supreme Court considered mental anguish damages, in only two of those cases did the court uphold the damages awarded as supported by legally sufficient evidence. Those awards were of $5,000 and $150,000, respectively in *Bennett v. Grant*, 525 S.W.3d 642 (Tex. 2017), and *Bunton v. Bentley*, 153 S.W.3d 50 (Tex. 2004). While I do not believe that the court's approval of a $150,000 mental anguish award as against *legal* sufficiency challenges would answer the question as a whole, it comes close to like limits in other jurisdictions and should give pause to an intermediate appellate court charged with conducting "meaningful review" of an award in a case, like this, where the jury was operating with little in the way of guidance.

As an intermediate appellate court, our charge is limited to the guidance we have, which at this stage includes only the limited direct evidence and argument offered at trial and comparison to like awards. With that in my mind, I will turn to that task.

C. Factual Sufficiency Under *Saenz* and *Anderson*

When reviewing an assertion that the evidence is factually insufficient to support a finding, we set aside the finding only if, after considering and weighing all of the evidence in the record pertinent to that finding, we determine that the credible evidence supporting the finding is so weak or so contrary to the overwhelming weight of all the evidence that the answer should be set aside and a new trial ordered. *Pool v. Ford Motor Co.*, 715 S.W.2d 629, 635 (Tex. 1986). Whether damages are excessive and whether a remittitur is appropriate is a factual determination that is final in the court of appeals. *Mar. Overseas Corp. v. Ellis*, 971 S.W.2d 402, 407 (Tex. 1998); *see also* TEX. CONST. art. V, § 6; TEX. GOV'T CODE ANN. § 22.225(a).

The nebulous issues of mental anguish and loss of companionship are "inherently somewhat imprecise." *Thomas v. Uzoka*, 290 S.W.3d 437, 454 (Tex. App.—Houston [14th Dist.] 2009, pet. denied). Because these damages are unliquidated and incapable of precise mathematical calculation, once the existence of non-economic loss is established, the jury is given significant discretion in fixing the amount of the award. *Id.* Yet, at the same time, a factual sufficiency review ensures that the evidence supports the jury's award; and, although difficult, the law *requires* appellate courts to conduct a "meaningful" factual sufficiency review of a jury's nonpecuniary damages award in a wrongful death case. *Hawkins v. Walker*, 238 S.W.3d 517, 531 (Tex.

App.—Beaumont 2007, no pet.) (citing *Saenz*, 925 S.W.2d at 614). [12] Thus, while a jury has latitude in assessing intangible ***322** damages in wrongful death cases, its damage awards do not escape the scrutiny of appellate review. *See Saenz*, 925 S.W.2d at 614. Merely establishing the existence of compensable mental anguish is not enough. *Id.* There must be evidence that the *amount* found is a fair and reasonable compensation, just as there must be evidence to support any other jury finding. *Id.* Juries are not permitted "to pick a number and put it in the blank." *Id.*

1. The Awards in This Case

In this case, the jury awarded the Deol family non-economic damages totaling $15,065,000. [13] This figure excludes the $500,000 the jury awarded Deol's estate for his pain and mental anguish, the amount of which Gregory and New Prime do not complain. Broken down by damage category and family member, the jury awarded the following.

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	Wife	Each Son	Daughter	Mother	Father
Loss of past companionship	$350,000	$160,000	$160,000	$160,000	$160,000
Loss of future companionship	$2,625,000	$1,200,000	$1,200,000	$160,000	$160,000
Past mental anguish	$525,000	$160,000	$5,000	$160,000	$160,000
Future mental anguish	$3,937,500	$925,000	$92,500	$160,000	$160,000
Total	$7,437,500	$2,445,000	$1,457,500	$640,000	$640,000

As noted *supra*, at trial, neither the Deol family nor the Vasquez/Perales family attempted to quantify the amount of non-economic damages. Instead, during closing arguments, Mr. Dollar, counsel for the Vasquez/Perales family, the family that settled their dispute with Gregory and New Prime during the pendency of this appeal, stated: "But if you don't like any of the [earlier] analysis with respect to damages, then think about it this way ... [J]ust give them your two cents worth ... six cents a mile for the six hundred and fifty ... million miles they traveled in the year that they took these people's lives.... Just given them your two cents worth. That's $39 million." During his closing arguments, counsel for the Deol family stated, "I'm not going to recant what Mr. Dollar said, but all of it is all reflected by me as well." The jury awards to the Vasquez/Perales and Deol family members totaled just over $38.8 million.

Clearly, an award on the basis urged at trial would not be a fair and reasonable compensation, as it is not addressed to compensation at all. Instead, it would be punitive and could not survive a meaningful appellate review.

The record before us, in and of itself, does not guide a fact-finder in calculating non-economic damages and does not provide a basis upon which this Court can conduct a meaningful review to determine the amounts awarded are fair and reasonable compensations to the Deol family members. As I noted above, *supra* at p. 317, respect for the jury's decision supported as it is by legally sufficient evidence ***324** that the Deol family suffered non-economic injuries, that only the factual sufficiency of the amount of those damages remain at issue, together with interests of judicial economy to avoid remand and new trial, compel me to suggest resort to an outside source for guidance to uphold the awards.

The Deol family and Gregory and New Prime have provided us with samples of verdicts in other cases. Some of those cases involved the death of more than one family member, [14] some involved a parent's claim for the loss of a minor or teenage child, [15] and in some the non-economic damages were not challenged. [16] I believe the search for comparative awards should be limited to wrongful death cases involving

a deceased married adult leaving behind minor children. Relatively few cases fall within this criteria, however.

2. The Evidence Presented in This Case

The evidence established that Deol was 45 years old at the time of his death and his life expectancy was 78.4 years. So had Deol survived the accident, he was expected to live another 33 years. At trial, Deol's wife, Jaswinder Chohan, was the only witness who testified regarding the effect of Deol's death on her and Deol's family members and about the positive influences Deol had on them. [17] *See Parkway*, 901 S.W.2d at 444 (mental anguish evidence need not come from plaintiffs themselves, but may be provided in the form of third parties' testimony).

Through her testimony, Chohan established she met Deol when she was 17 or 18 years old and Deol was 26 or 27. They both lived in India at the time. Thereafter, Deol's family moved to the United States, and Chohan's family moved to Canada. Chohan and Deol maintained contact and eventually married in 2002.

Three children were born to the marriage of Chohan and Deol, two sons, A.D. and H.D., and one daughter, G.D. The daughter is the youngest of the three. At the time of trial, A.D. and H.D. were 12 and 14 years old, respectively, and G.D. was 4 years old.

Deol became a truck driver and eventually started his own company, Maryland Trucking. Deol was the primary financial provider for the family, and prior to his death, Chohan worked part-time at a toy store and helped Deol with his trucking business.

***325** Deol and Chohan were very close and talked constantly even when he was on the road. Chohan "told Deol everything" and, even though he is deceased, she "still talks to him when she is stressed." Chohan described Deol as the love of her life.

Deol loved to cook, work in the garden, and spend time with his family and delighted in seeing and hearing about his children's accomplishments. Deol also liked to travel, and he often took the family on trips to different places. Deol wanted his children to be well educated and ensured that they took extra classes to get ahead. He did not want them to be truck drivers.

On the night of the accident, Chohan tried calling Deol several times. She was concerned when Deol did not answer because he always answered her calls on the first ring. The next day, she continued to call him but got no answer. It was not until late afternoon that she learned, through Deol's aunt, that Deol had been in an accident. She was not provided with any detail at that time. Frantic to find her husband, Chohan called around to hospitals in Texas to see if Deol had been admitted. She could not find him. Eventually, the police advised Chohan that Deol did not survive the accident. Chohan described that moment as the saddest in her life.

When the children learned of Deol's passing, H.D. sat with Chohan and held her. A.D. went to his room and would not talk to anyone. One of Chohan's sisters took care of G.D., as she was only seven months old at the time. Deol's sons were very attached to Deol, and he was a loving father.

Deol's father made arrangements to bring Deol's body back to Gaithersburg, Maryland, where they were living, for a ceremony and cremation. The children attended the ceremony, during which the boys cried.

Thereafter, Chohan, the children and Deol's parents, who lived with Deol and his family, had to leave their home in Maryland because Chohan could not make the monthly mortgage payments. They moved to Bakersfield, California, to live with Deol's brother, and Chohan began working for him as she now had to financially provide for the family.

Chohan became depressed after Deol's death and began taking prescription medication. At the time of trial, she was still on the medication and she still had all of Deol's personal belongings, including his shoes and electric razor, containing fragments of his beard. Chohan explained she missed Deol every single moment. When the children do new things, it makes her sad that he is not there to share the moment. She has no one to talk to now. Going to things like parent-teacher conferences also makes her sad. While Chohan described her sadness and depressed state through the time of trial, she did not speak to the likely duration of her mental anguish or indicate she was in need of counseling presently or in the future.

As to Deol's eldest son, H.D., the jury did not hear any evidence of the likely duration of his mental anguish or the need for therapy or other treatment. Rather, Chohan relayed that H.D. used to be happy, now he is very quiet, and "stays to himself." She recounted that H.D. was given two tickets to his middle school graduation. He brought one ticket home telling Chohan "we do not need two." He then went to his room and cried. Deol and H.D. used to play video games, ride bikes, and play basketball together. Deol used to put H.D. and A.D. to bed, and he would stay with them until they fell asleep.

As to Deol's son A.D., the jury likewise did not hear any evidence of the likely duration of A.D.'s mental anguish or the ***326** need for therapy or other treatment. Rather, Chohan described A.D. as being similar to Deol. She stated that, since Deol's death, A.D. has gained a lot of weight because he is less active than he used to be. Before Deol's death, Deol and A.D. often did things together, now A.D. just sits with Chohan and reads. Chohan claimed A.D. seems depressed most days and indicated he often talks about his father and thinks about what they would have done had Deol still been alive. A.D. was in a gifted program in his school in Maryland. After the move to California, that was no longer an option, as Chohan could not afford to pay for extra classes.

H.D. and A.D. commented about what they remember about their dad and what they miss. They remember playing with him and going to different places. Now there is no adult male to play with them, and they do not travel because Chohan does not like to drive on the highway and they do not have the financial resources to pay for travel. Both boys continue to cry out for their father.

G.D. was only seven months old when Deol died. At the time of trial, she was four years old. The jury did not hear any evidence of G.D.'s mental anguish. Rather, Chohan explained that G.D. asks a lot of questions about her dad. Every day she asks when he is going to come home, and she now tells people she does not have a dad. She is trying to "figure out why she is different" from other children and does not have a dad.

At the time of trial, Deol's mother and father were 75 and 80 years old, respectively. They learned of Deol's death when police officers arrived at their home in Gaithersburg, Maryland. Deol and his mother were very close. They used to cook and garden together. Since Deol's death, Deol's mother is always crying, and she has aged significantly. While Deol's father does not cry in front of Chohan, she explained that since Deol's death, the entire family's living environment is sad. Everything has changed. The jury did not hear any evidence concerning the likely duration of the mental anguish or the need for therapy or other treatment of any of the family members.

a. Non-economic Damages Awarded to Surviving Spouses

In *Badall v. Durgapersad*, the court of appeals affirmed awards of $105,000 for loss of companionship and $41,240 for mental anguish to the wife of a 56 year old man shot and killed in a tire shop he owned. 454 S.W.3d 626, 639–40 (Tex. App.—Houston [1st Dist.] 2014, pet. denied). In that case, Durapersad testified that her husband's death left her without her soul mate, her everything. She missed him every day. *Id.* at 632. She acknowledged she and her husband had some arguments and disagreements. *Id.* She claimed to have suffered a heart attack as a result of her husband's death, to no longer sleep well, and to have been in and out of doctors' offices and the hospital since her husband's death. *Id.* Durapersad indicated that for most of the six years preceding her husband's death, she worked in Louisiana and came to Texas on the weekends to be with her husband. *Id.* She had retired a few months before her husband's death to spend more time with him. *Id.*

In *Thomas v. Uzoka*, the court of appeals affirmed awards of $100,000 for past mental anguish, $50,000 for future mental anguish, $100,000 for past loss of companionship and $450,000 for future loss of companionship to the wife of a taxi-cab driver who had been killed in a head-on collision. 290 S.W.3d 437, 456 (Tex. App.—Houston [1st Dist.] 2009, pet. denied). The evidence established that during the first ***327** few years of their marriage, Uzoka and her husband lived in different cities because they were enrolled in different universities. *Id.* They saw each other on the weekends. *Id.* At trial, Uzoka testified she and her husband planned to get a nice apartment together when they graduated from college and to have a formal wedding, as they had married at the courthouse without a significant ceremony. *Id.* They also planned to have at least two, and possibly as many as four, children. *Id.*

In *Phillips v. Bramlett*, the court of appeals concluded that awards of $1,000,000 to Bramlett for mental anguish and

$1,265,000 for loss of companionship in connection with the death of his wife following a mis-performed hysterectomy were supported by factually sufficient evidence. 258 S.W.3d 158, 174–176 (Tex. App.—Amarillo 2007, no pet.), *rev'd on other grounds*, 288 S.W.3d 876 (Tex. 2009). [18] The evidence presented in that case established Bramlett and his wife enjoyed a harmonious relationship in which each was a full partner in the marriage. Their work schedules left little time for outside interests, and Bramlett and his wife spent their time raising a family and furthering their collective goals. *Id.* at 174. Bramlett testified that since his wife's death, his life had become empty. *Id.* In addition, there was evidence of the nature, duration, and severity of Bramlett's mental anguish. Although it had been three years since Bramlett's wife's death, he still felt the same, and he thinks he hears his wife in the house. *Id.*

In *Columbia Medical Center of Las Colinas v. Hogue*, this Court affirmed awards of $750,000 for past loss of consortium, $1,250,000 for past mental anguish, $1,750,000 for future loss of consortium, and $600,000 for future mental anguish to the wife of a man who died while seeking medical assistance for pulmonary and cardiac issues. 132 S.W.3d 671, 684 (Tex. App.—Dallas 2004), *aff'd in part, rev'd in part on other grounds*, 271 S.W.3d 238 (Tex. 2008). In affirming these awards, this Court considered testimony that the decedent and his wife were married for 26 years, and when he died, "half of [her] died"; decedent spent considerable time with his wife and two sons visiting his sons often at college and talking with one of his sons over the phone several times a week; his sons were everything to him, they had a great bond and were best friends; decedent coached his sons in sports; overall, the relationship of decedent with his family was strong and good. *Id.* at 684, 686.

The substantial range of non-economic awards to surviving spouses from a total of $146,240 in *Badall v. Durgapersad* to $4,350,000 in *Columbia Medical Center of Las Colinas v. Hogue* to $7,437,500 in this case highlights the problem with the current adherence to the proof standards dictated by *Saenz* at the trial court level and the apparent lack of objectively predictable appellate review guidelines. Nevertheless, these cases would appear to demonstrate that the jury's awards of non-economic damages to Chohan in this case are excessive.

b. Non-economic Damages Awarded to Children of the Deceased

In *Wackenhut Corrections Corp. v. De la Rosa*, the court of appeals affirmed awards of $2,000,000 for future mental anguish and $2,000,000 for future loss of consortium to the daughters of De la Rosa who was brutally murdered by two inmates ***328** while incarcerated at a Wackenhut Corrections' facility. 305 S.W.3d 594, 608, 636–40 (Tex. App.—Corpus Christi–Edinburg 2009, no pet.). De la Rosa was an honorably discharged former National Guardsman, who was serving a six-month sentence in connection with the possession of less than 1/4 gram of cocaine. *Id.* at 600. A few days before his expected release, De la Rosa was beaten to death by two other inmates using a lock tied to a sock, while Wackenhut's officers stood by and watched, and Wackenhut's wardens smirked and laughed. *Id.* In that case, several witnesses testified as to the effect of De la Rosa's death on his three daughters, including the daughters themselves. De la Rosa's widow testified De la Rosa was very excited to have children and about his loving and nurturing relationships with his daughters. *Id.* at 638. She testified about their reactions to De la Rosa's death and indicated that they cry and are very sad. *Id.* De la Rosa's sister also testified about the effect of De la Rosa's death on his daughters. The oldest daughter tattooed her father's name on herself because she did not want to let him go. *Id.* The oldest daughter was eighteen years old at the time of trial. She testified about how much she loved her father and how sad she was that he was not at her graduation and that she would miss him at important times in her life such as when she gets married and has a child. *Id.* at 639. De la Rosa's other daughters testified about how much they loved and missed their father. While De la Rosa and his wife had been separated for some time, his wife testified she was sure De la Rosa would be involved in their lives upon release from prison and she and De la Rosa intended to discuss reconciliation upon his release. *Id.*

In *Phillips v. Bramlett*, the Amarillo court of appeals concluded that awards of $1,000,000 to each of Vicki Bramlett's sons for mental anguish and $2,250,000 for loss of companionship were supported by factually sufficient evidence. 258 S.W.3d at 175–176. The evidence presented in that case established that as a result of Vicki's death, her sons moved to Oregon to be near Vicki's twin sister. *Id.* at

176. Although the move had helped, things were not the same. *Id.* The sons testified that they think about their mother almost every day. *Id.* The court noted that the evidence "was demonstrative of the significant role that Vicki played in the lives of the boys." *Id.* at 174. She was their personal mentor in all things. *Id.* The court further noted that the relationship Vicki's sons had with Vicki was strong, they lived with Vicki at the time of her death, there were no extended absences by anyone from the home, and they shared interests, most significantly, the lives of each other. *Id.* at 175.

In *Fibreboard Corp. v. Pool*, the court of appeals affirmed a total award of $25,000 for loss of companionship to the seven minor children of a man who died from asbestos exposure.[19] 813 S.W.2d 658, 684 (Tex. App.—Texarkana 1991, writ denied). One of the deceased's sons testified his father "pushed the children hard" because he wanted them to excel, that he was a good role model, that he was supportive of the children, and that he was always available to help them with their problems. *Id.* The deceased's wife testified that her children's father was a good family man and was good with the children. *Id.* The court of appeals concluded, "[e]vidence of a father who is a good role model and who is always around to help his children, with no evidence to the contrary, is sufficient to support the award of damages." *Id.*

***329** The range in these damages from $6,700 to $4,000,000 once again appears to demonstrate the lack of consistent or predictable standards of review in this area. The breadth of the range on highly similar fact patterns presents a challenge in identifying anything beyond the range itself. There is obviously a potential for inadequate damages at the low end and excessiveness at the other. Operating on the assumption that each, and thus all, of these appellate courts adhered to the dictate of "meaningful" review, we would be left to choose between the minimum and maximum approved awards or an average, assuming these cases are sufficient in number to permit the comparison to support the judgment.

c. Non-economic Damages Awarded to Parents of the Deceased

In *Wackenhut Corrections Corp. v. De la Rosa*, the Corpus Christi Court of Appeals affirmed awards of $2,500,000 for past mental anguish, $2,500,000 for future mental anguish, $2,500,000 for past loss of consortium, and $2,500,000 for future loss of consortium to De la Rosa's mother. 305 S.W.3d at 642. The evidence at trial established De la Rosa's mother was very close to her son and enjoyed a strong relationship with him—so much so that he named his first-born child after her. *Id.* at 640. The family spent weekends together and family holidays, and De la Rosa's mother was particularly proud of her son, a former National Guardsman. *Id.* She suffered severe emotional distress due to the brutal murder of her child in the custody of, and at the hands of, those who were charged with his protection. *Id.* The testimony showed that the wardens smirked and laughed while De la Rosa was beaten to death and De la Rosa was beaten so badly that his mother did not recognize him when he was being identified at the funeral home. *Id.* at 641. The testimony further showed that De la Rosa's mother clung to her son's picture and cried every night, wishing that her own death would come sooner so that she could join her son. *Id.*

In *Page v. Fulton*, the Beaumont Court of Appeals affirmed an award of $150,000 for pecuniary loss, loss of companionship and mental anguish to the parents of the deceased who was murdered by her husband.[20] 30 S.W.3d 61, 72–73 (Tex. App.—Beaumont 2000, no pet.). The court noted there was little evidence in the record as to the effect of the daughter's death on her father other than his dogged determination to pursue his former son-in-law. *Id.* at 72. Because a single question was submitted to the jury for both parents, the court noted that the award could be upheld if there was evidence supporting the award for either parent. *Id.* at 72–73. The evidence established the family was close and enjoyed frequent contact and that eight years after her death, her mother could barely think about it. *Id.* at 73. Not only was their daughter murdered, her parents had to slowly come to the realization that a loved and trusted member of the family was responsible for her death. *Id.*

In *Pittsburgh Corning Corp v. Walters*, the Corpus Christi Court of Appeals affirmed awards of $145,375.54 to each of the parents of the deceased who died from mesothelioma.[21] 1 S.W.3d 759, 781 (Tex. App.—Corpus Christi–Edinburg 1999, pet. denied). The evidence established the deceased was the only son of the Walters and they relied on him to provide substantial support due to their age and health. *Id.* His death left his parents with no other family. *Id.*

***330** Again, the vast range of awards from $225,000 (after adjusting for inflation) to $10,000,000 seems to demonstrate the chronic nature of the review problem that *Saenz* and its progeny set out to resolve. The evidence concerning the effect of Deol's death upon his parents is most akin to that presented in *Walters*; thus I conclude the awards of $640,000 to Deol's parents are potentially excessive, though to what extent is difficult to discern from the relatively few cases available and their wide range.

D. Remittitur or Remand

Because I am issuing a dissenting opinion, I ultimately need not determine whether there are enough awards in cases with similar data points to suggest remittiturs here or whether a remand for a retrial would be the appropriate remedy. In all events, I find the record bereft of any evidentiary basis for the jury's decision to award approximately $15 million in damages to the Deol family and cannot join the majority in affirming the judgment without either reformation by some meaningful attempt at remittitur or a remand for a new trial.

CONCURRING AND DISSENTING OPINION

Concurring and Dissenting Opinion by Justice Whitehill

I join the majority opinion save its Part VIII, from which I dissent.

Justice Schenck's dissent highlights important jurisprudential issues regarding the review standards for mental anguish damages in wrongful death cases. His dissent is excellent as far as it goes and standing alone should compel supreme court review of those issues in this case. I write separately because Justice Schenck's dissent does not go far enough.

I. *Moore v. Lillebo*

Justice Schenck's dissent stops short because it assumes that *Moore v. Lillebo*, 722 S.W.2d 683 (Tex. 1986) mandates submitting a mental anguish *damages* question for every qualifying family member in every wrongful death case regardless of the evidence—or lack thereof—concerning the nature and extent of that family member's actual resulting mental anguish. Stated differently, he accepts the idea that *Lillebo* holds that a proper family tie is itself legally some evidence of both the fact of mental anguish injury and the resulting damage amount such that mental anguish damages for the suing family member are presumed and the only question is how much.

Indeed, loose language in *Lillebo* implies that result:

> Proof of [the parents'] family relationship constitutes some evidence they suffered mental anguish from the wrongful death of their son. The evidence mandates submission of a damage issue on mental anguish.

Id. at 686. But *Lillebo* does not hold that a required family relationship alone is legally sufficient evidence of the amount of resulting mental anguish damages. *Lillebo* is not stare decisis precedent for that idea because that issue was not before the supreme court in that case. Thus, any implication to that effect is obiter dicta.

More specifically, *Lillebo* was a no evidence review case concerning the fact of mental anguish injury—not the quantum of related damages. The trial court there declined to submit a mental anguish damage question because there was no evidence that the claimants suffered any physical manifestations of their mental anguish. The supreme court reversed, holding that physical manifestation proof was ***331** no longer required to recover mental anguish damages in wrongful death cases:

> We hold, in a wrongful death cause of action, it is no longer necessary to prove that mental anguish is physically manifested. A physical manifestation of mental anguish is evidence of the extent or nature of the mental anguish suffered, *but it is no longer the only proof of mental anguish.*

Id. (emphasis added). Thus, the factual sufficiency of the evidence supporting an amount of resulting mental anguish damages was not at issue in that case.

Furthermore, other parts of *Lillebo* illuminate that the presumed factum of mental anguish injury is rebuttable and that evidence of more than just a qualifying family relationship is required to prove a recoverable damage quantum amount. For example, the preceding highlighted *Lillebo* quote recognizes that there are other forms of mental anguish evidence beyond physical manifestation of that injury. To that end, *Lillebo* recognizes that not all family relationships are loving and caring—indeed some such relationships may be hateful or openly hostile. *See id.*

Additionally, *Lillebo* quotes extensively from the Eighth Circuit's exposition of Arkansas law to the effect that mental anguish recoveries are to be based on the emotional impact suggested by the circumstances surrounding the claimant's loss. *Id.* (quoting *Connell v. Steel Haulers, Inc.*, 455 F.2d 688, 691 (8th Cir. 1972)).

Thus, *Lillebo* acknowledges that losing a loved one may well inflict on different family members varying degrees of mental anguish in a range from great pain to none, depending on their interpersonal histories and the circumstances of the loss. That being so, it follows that the presumption of mental anguish injury from the wrongful death of an immediate family member is rebuttable and that some legally sufficient evidence beyond a mere family relationship is necessary to support an awarded mental anguish damage amount. *See Nat. Gas Pipeline Co. of Am. v. Justiss*, 397 S.W.3d 150, 161 (Tex. 2012) (conclusory evidence is legally no evidence).

Finally, *Lillebo* also holds that mental anguish, on one hand, and loss of society and companionship, on the other, are separate damage categories that compensate separate types of injuries. 722 S.W.2d at 687–88. Accordingly, loss of society and companionship damages evidence must be different from mental anguish damages evidence so that evidence of the former is no evidence of the latter.

But Justice Schenck's opinion is correct in that, like punitive damages, mental anguish damages awards must be subject to articulable, objective review standards lest they become impermissible arbitrary and due process deficient punishments.

II. Application

In this specific case, claimants' sole jury argument for a mental anguish damages amount based on six cents per mile driven has no mooring to any individualized mental anguish suffering or related quantum facts in evidence for any particular plaintiff. As such, it is a naked plea for an emotional, punitive response with no evidentiary support.

Additionally, the jury's total damages findings show that claimants' jury argument harmed appellants. Claimants argued that the jury should award total damages of six cents per mile driven in the accident year, which came out to $39 million. That calculation was unmoored to facts concerning the claimants' actual injuries and arbitrary on its face. Yet, the jury awarded damages totaling $38,801,775, including almost $36 million in *noneconomic* damages.

***332** Moreover, the jury awarded identical sums to several claimants—including claimants from different families. For example, the jury awarded $160,000 for past mental anguish to each of the Vazquezes' three children, Hector Perales's son Elijah, two of Deol's children, and Deol's parents. It also awarded the three surviving spouses the same $525,000 for past mental anguish damages. These findings suggest that the jury did not make the required individualized determinations rooted in the evidence.

Furthermore, within the Deol family, the jury awarded different family members the same amounts for several noneconomic damages categories. This further indicates that the jury's fact findings are not rooted in the evidence specific to each claimant. [1] First, there is legally no evidence supporting G.D.'s mental anguish damages awards of $5,000 for past mental anguish and $92,500 for future mental anguish. G.D. was seven months old when Deol died and about four and a half years old at trial. Chohan's sister took care of her when they learned of Deol's death. There is no evidence that four year old G.D. suffered any past mental anguish at all through trial. Likewise, although G.D. may suffer future loss of companionship injuries and damages for not having her father, on this record it is pure speculation as

to how much future mental anguish she will experience from his death.

Second, the evidence concerning the mental anguish impact of Deol's death on his father is similarly empty, consisting of evidence that the father is sad. That conclusory evidence is legally no evidence. And even if it were legally some evidence, it would not pass factual sufficiency muster under existing standards.

III. Conclusion

I write these things not to denigrate the loss most people feel from the wrongful death of an immediate family member. Surely that pain can be real and should be compensated when there is evidence measured against an articulable objective standard supporting it. Accordingly, I urge the supreme court to consider this case and provide guidance in this murky area of the law.

All Citations

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Footnotes

1 The Court En Banc consists of the 13 current justices as well as the Honorable Martin Richter, Justice, Court of Appeals, Fifth District of Texas as Dallas, Retired, who sat by assignment on the original panel.

2 One of the vehicles involved in the collision was a van driven by Guillermo Vasquez. He and several family members, identified herein as the Vasquez/Perales family, were also parties to this suit and the judgment included various damage awards to them. During the pendency of this appeal, Gregory and New Prime settled the Vasquez/Perales family's claims and the Vasquez/Perales family released their judgment. Accordingly, this opinion will address Gregory and New Prime's complaints as they relate to the Deol family only.

3 Initially, Gregory and New Prime asserted thirteen issues. One of those issues, issue eleven, concerned the Vasquez/Perales family only. Because Gregory and New Prime have settled the Vasquez/Perales family's claims, we do not consider that issue. TEX. R. APP. P. 47.1.

4 Justice Schenck was the original author of this opinion. The background facts and portions of the analysis in this en banc opinion were adapted from his original opinion.

5 New Prime hired Gregory approximately three months prior to the accident at issue in this case. After some training, she obtained a **commercial driver's license**. She spent several more weeks driving tractor-trailers under the oversight of certified instructors. At the time of the accident, Gregory was classified as a B1 driver, meaning she had to be paired with a certified instructor or an experienced driver. There was evidence adduced at trial that Ellison was only marginally more experienced than Gregory.

6 The accident scene depictions in this opinion are extracted from exhibits admitted at trial.

7 Three years after the accident, some of the witnesses did not recall inclement weather at the time of the accident. The jury was free to weigh their testimony against that of the meteorologist and the fact that the evidence showed Gregory encountered ice at the time of the accident. *Leibovitz v. Sequoia Real Estate Holdings, L.P.*, 465 S.W.3d 331, 351 (Tex. App.—Dallas 2015, no pet.) (factfinder is sole judge of credibility and weight to be given testimony).

8 The expert explained that because there is a tractor and a separate trailer, coupled with a fifth wheel, there is a brake lag, which means there is roughly a half-second delay between when the driver of the tractor applies the brakes and when the brakes are actually applied throughout the entire vehicle.

9 Gregory and New Prime did not object to testimony from witnesses stating they had been told Deol exited his vehicle to check on others.

10 The trial court instructed the jury on sudden emergency as follows:

> If a person is confronted by an "emergency" arising suddenly and unexpectedly, which was not proximately caused by any negligence on his or her part and which, to a reasonable person, requires immediate action without time for deliberation, his or her conduct in such an emergency is not negligence or failure to use ordinary care if, after such emergency arises, he or she acts as a person of ordinary prudence would have acted under the same or similar circumstances.

11 The safety expert testified that truck drivers are to reduce their speed when adverse conditions exist. The speed should be reduced one-third below the posted speed limit in rainy conditions, one-half the posted speed limit in snowy conditions, and to a crawl in icy conditions.

12 Because New Prime stipulated that Gregory was acting within the course and scope of her employment, a vicarious liability question was not necessary. *Cf.* *Diamond Offshore Mgmt. v. Guidry*, 171 S.W.3d 840, 844 (Tex. 2005) (holding where evidence did not conclusively show employee was acting within scope of employment, instruction or question submitting issue to jury is prerequisite to imposition of vicarious liability).

13 The jury awarded Deol's wife $925,200, his older son, H.D., $139,800, his younger son, A.D., $141,000, his daughter, G.D., $145,800, and his parents $1,200 each in pecuniary damages.

14 We acknowledge that our sister court invoked a proportionality requirement in *Lane v. Martinez*, 494 S.W.3d 339 (Tex. App. – Eastland 2015, no pet.), a wrongful death case. The *Lane* court, however, based its excessiveness determination on its conclusion that the jury simply picked numbers and put them in the blanks. *Id.* at 350. Although it did refer to proportionality between pecuniary and non-pecuniary damages as a "benchmark," it considered proportionality alongside several other factors that supported its ultimate conclusion that the non-pecuniary damages at issue in that case were improper because they were not the result of an individualized analysis. *Id.* at 351. We also note that *Lane* is not binding on this Court, and to the extent it suggests that courts of appeal should consider the ratio between economic and non-economic damage in determining excessiveness of non-economic damages in wrongful death cases, we disagree; such practice is contrary to decades of jurisprudence observing that mental anguish and loss of companionship damages are unliquidated and incapable of precise mathematical calculation. *Thomas v. Uzoka*, 290 S.W.3d 437, 454 (Tex. App.—Houston [14th Dist.] 2009, pet. denied) (collecting cases).

15 Appellants concede that members of the Deol family experienced some mental anguish and loss of companionship such that these questions were correctly submitted to the jury. Appellants challenge only the amounts of the awards contending they were excessive.

16 Jaswinder testified the children were at home in Bakersfield, California with their grandparents. She explained she did not bring the children to court because she did not want them to hear about the accident. She stated it was hard for her to be there.

17 It is unclear which non-economic damage awards appellants challenge, but in their opening brief appellants complain that there was no evidence revealing "true mental anguish" for Deol's children. In their supplemental briefing, appellants complain that the lost companionship awards for Deol's children were identical and the jury gave the same amount for their mental anguish damages.

1 While cases have typically looked at like awards for proof of excessiveness, if we are to conclude that proof of a close familial relation is enough to presume some mental injury to avoid a legal insufficiency challenge, like cases might also be relevant to determine whether the jury was within its lawful discretion in choosing a particular amount.

2 I concede that *Moore* is neither recent nor as clear as one might like in this respect, as Justice Whitehill observes. As discussed below, if I read *Moore* correctly, I believe a better alternative may be to accept it as not only embracing proof of *some* amount of damage, but an amount up to a presumed floor in keeping with more broadly acknowledged understanding of the presumed injury. What I do not accept as consistent with *Saenz* and its progeny or the due process clause is that proof of *any* injury translates into adequate proof of *any* amount.

3 *Dillon v. Legg*, 68 Cal.2d 728, 69 Cal.Rptr. 72, 441 P.2d 912, 920 (1968).

4 At the same time the Texas Supreme Court abolished the ban on mental anguish damages in wrongful death cases, it also acknowledged loss of companionship damages in wrongful death cases. *See* *Sanchez*, 651 S.W.2d at 253.

5 More particularly, in their supplemental briefing to the Court, Gregory and New Prime clarified that they are claiming the evidence is legally and factually insufficient to support any award for future mental anguish and is factually insufficient to support the awards for past mental anguish and past and future loss of companionship.

6 Claims for non-economic damages suffer the same infirmities as claims of partisan gerrymandering, which the United States Supreme Court has refrained from addressing because the Constitution contains no legal standards for resolving such claims and are thus not subject to judicial management. *See* *Rucho v. Common Cause*, —— U.S. ——, 139 S. Ct. 2484, 2499, 204 L.Ed.2d 931 (2019).

7 *See also* *Emerson Elec. v. Johnson*, 601 S.W.3d 813, 845 (Tex. App.—Fort Worth 2018, pet. granted).

8 Title VII claimants, for example, are limited in their recovery of emotional distress, regardless of the extent of their injury, depending on the size of the employer, with maximum recovery being limited to $300,000. 42 U.S.C. § 1981a(b)(3).

9 Many states have imposed hard limits on the recovery of noneconomic damages ranging from $250,000 to $1,000,000. *See* ALASKA STAT. ANN. § 09-17.010(b) ($400,000 wrongful death); CAL. CIV. CODE. ANN. § 3333.2 ($250,000 medical malpractice); COLO. REV. STAT. § 13-21-102.5 (wrongful death $250,000 with inflation adjustment); IDAHO CODE ANN. § 6-1603(4)(1) ($250,000 wrongful death); MASS. GEN. LAWS ch. 231 § 60H ($500,000 medical malpractice); MD. CODE ANN., CTS. & JUD. PROC. § 11-108(b)(2) ($500,000 wrongful death); MISS. CODE ANN. § 11-1-60(2)(6) ($1,000,000 wrongful death); ORE. REV. STAT. § 31.710(1) ($500,000 wrongful death); TENN. CODE ANN. § 29-39-102 ($750,000 wrongful death).

10 For example, the Supreme Court of Canada, which adheres to the same common law our constitution embraces, adopted a non-economic damages cap with adjustment for inflation–presently just under $400,000. *Andres v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229; *Thornton v. District No.* 57, [1978] 2

S.C.R. 267; *Arnold v. Teno*, [1978] 2 S.C.R. 287. The rule permits additional damages on proof of aggravating damages. *McIntyre v. Grigg*, [2006] 83 O.R. 3d 161 (Can. Ont. C.A.).

11 A limit or cap might be structured to allow the reviewing court, in resolving a factual sufficiency challenge, to defer to the jury's award provided it falls within the evidence and the capped amount. If the award exceeds the cap, the intermediate appellate court would consider whether extraordinary circumstances support a higher award.

12 I note that while our sister court of appeals considered the *Saenz* dictate of a "meaningful review" to apply to the review of loss of companionship damages, the Texas Supreme Court has not yet expressly stated as much. Nevertheless, in *Bennett v. Grant*, the court signaled application of the meaningful review to non-economic damages generally. 525 S.W.3d 642, 648 (Tex. 2017). For purposes of this dissent, given the nature of both mental anguish and loss of companionship damages, I find it appropriate to apply the same standard of review.

13 Damages for loss of companionship and society are intended to compensate the beneficiary for the positive benefits flowing from the love, comfort, companionship, and society that the beneficiary would have received had the decedent lived. *Moore v. Lillebo*, 722 S.W.2d 683, 687–88 (Tex. 1986). Mental anguish is concerned not with the benefits the claimants have lost, but with the direct emotional suffering experienced as a result of the death. *Id.* at 688. In awarding damages for mental anguish and loss of society and companionship in a wrongful death case, the trier of fact may consider (1) the relationship between husband and wife, or a parent and child; (2) the living arrangements of the parties; (3) any absence of the deceased from the beneficiary for extended periods; (4) the harmony of family relations; and (5) common interests and activities. *Id.*

14 *See Atchison, Topeka & Santa Fe Ry. Co. v. Cruz*, 9 S.W.3d 173, 182–86 (Tex. App.—El Paso 1999, pet. granted, judgm't vacated, remanded by agr.) (death of both parents); *Pittsburgh Corning Corp. v. Walters*, 1 S.W.3d 759, 781 (Tex. App.—Corpus Christi–Edinburg 1999, pet. denied) (death of spouse and adult son); *C & H Nationwide, Inc. v. Thompson*, 810 S.W.2d 259, 265 (Tex. App.—Houston [1st Dist.] 1991) (death of spouse and father), *rev'd on other grounds*, 903 S.W.2d 315 (Tex. 1994).

15 *See Wellborn v. Sears, Roebuck & Co.*, 970 F.2d 1420, 1427 (5th Cir. 1992) (death of teenage son); *Russell v. Ramirez*, 949 S.W.2d 480, 486–87 (Tex. App.—Houston [1st Dist.] 1997, no pet.) (same); *Guzman v. Guajardo*, 761 S.W.2d 506, 510–11 (Tex. App.—Corpus Christi–Edinburg 1988, writ denied) (death of minor son); *Gulf States Util. Co. v. Reed*, 659 S.W.2d 849, 855 (Tex. App.—Houston [14th Dist.] 1983, writ ref'd n.r.e.) (death of teenage son).

16 *See Serv-Air, Inc. v. Profitt*, 18 S.W.3d 652, 662 (Tex. App.—San Antonio 1999, pet. dism'd by agr.); *C & H Nationwide, Inc. v. Thompson*, 810 S.W.2d 259, 265 (Tex. App.—Houston [1st Dist.] 1991), *rev'd on other grounds*, 903 S.W.2d 315 (Tex. 1994).

17 Chohan testified the children were at home in Bakersfield, California, with their grandparents. She explained she did not bring the children to court because she did not want them to hear about the accident. She stated it was hard for her to be there.

18 The Texas Supreme Court concluded the damage caps in the Medical Liability Act and Insurance Improvement Act applied.

19 Adjusting for inflation, the award would be $47,000, so approximately $6,700 per child.

20 Adjusting for inflation, the award would be approximately $225,000.

21 Adjusting for inflation, the awards would be approximately $225,000 to each parent.

1

	Wife	Each Son	G.D.	Mother	Father
Loss of past companionship	$350,000	$160,000	$160,000	$160,000	$160,000
Loss of future companionship	$2,625,000	$1,200,000	$1,200,000	$160,000	$160,000
Past mental anguish	$525,000	$160,000	$5,000	$160,000	$160,000
Future mental anguish	$3,937,500	$925,000	$92,500	$160,000	$160,000
Total	$7,437,500	$2,445,000	$1,457,500	$640,000	$640,000

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