



1-1-2006

## 2003 Texas House Bill 4: Unanimous Exemplary Damage Awards and Texas Civil Jury Instructions.

Patricia F. Miller

Follow this and additional works at: <https://commons.stmarytx.edu/thestmaryslawjournal>



Part of the [Environmental Law Commons](#), [Health Law and Policy Commons](#), [Immigration Law Commons](#), [Jurisprudence Commons](#), [Law and Society Commons](#), [Legal Ethics and Professional Responsibility Commons](#), [Military, War, and Peace Commons](#), [Oil, Gas, and Mineral Law Commons](#), and the [State and Local Government Law Commons](#)

---

### Recommended Citation

Patricia F. Miller, *2003 Texas House Bill 4: Unanimous Exemplary Damage Awards and Texas Civil Jury Instructions.*, 37 ST. MARY'S L.J. (2006).

Available at: <https://commons.stmarytx.edu/thestmaryslawjournal/vol37/iss2/5>

This Article is brought to you for free and open access by the St. Mary's Law Journals at Digital Commons at St. Mary's University. It has been accepted for inclusion in St. Mary's Law Journal by an authorized editor of Digital Commons at St. Mary's University. For more information, please contact [egoode@stmarytx.edu](mailto:egoode@stmarytx.edu), [sfowler@stmarytx.edu](mailto:sfowler@stmarytx.edu).

## 2003 TEXAS HOUSE BILL 4: UNANIMOUS EXEMPLARY DAMAGE AWARDS AND TEXAS CIVIL JURY INSTRUCTIONS

PATRICIA F. MILLER

I. Introduction.....	515
II. Background .....	523
A. House Bill 4’s Legislative Environment .....	523
B. Exemplary Damages in Texas Courts.....	528
C. Texas Supreme Court Trends in Punitive Damage Award Cases .....	533
D. Procedural Safeguards and Jury Discretion .....	537
III. Civil Jury Instructions .....	541
A. Drafting Objectives and Fundamentals .....	541
B. Standard of Review .....	542
C. Use of Pattern Jury Charges in Texas .....	543
D. Jury Instructions and Exemplary Damage Awards .....	546
IV. Texas Rules of Civil Procedure .....	549
A. Texas Rule of Civil Procedure 277 .....	549
B. Texas Rule of Civil Procedure 292 .....	551
V. Applying House Bill 4 to Civil Jury Instructions.....	552
A. Judicial Interpretation of Statutory Language .....	552
B. Legislative Intent and House Bill 4.....	556
C. Texas Pattern Jury Charge Revisions After House Bill 4 .....	562
VI. The Texas Supreme Court’s 2005 Order: Unanimous Jury Finding for Actual Damages? .....	565
VII. Conclusion .....	566
A. After House Bill 4 .....	566
B. Future Tort Reform Aimed at Exemplary Damages? ..	567

### I. INTRODUCTION

“Liability to compensate is only part of the tort grab bag: the awards are equally open to creative interpretation.”<sup>1</sup> Reducing a jury’s “creative interpretation” of tort damages in a given lawsuit is one of the primary reasons for legislative changes to the common law governing tort dam-

---

1. J.T.H. JOHNSON, OUR LIABILITY PREDICAMENT 25 (1997).

ages.<sup>2</sup> Statutory tort reform is a state legislature's method of modifying state tort law when the legislature perceives a need for reform.<sup>3</sup> Historically, one reason for a state legislature to enact tort reform legislation was based on the need for predictability in damage awards.<sup>4</sup>

Lawmakers and other supporters of tort reform generally describe enacted tort reform legislation as having a positive effect on consumers.<sup>5</sup>

2. See *TORT LAW AND THE PUBLIC INTEREST: COMPETITION, INNOVATION, AND CONSUMER WELFARE* 27 (Peter H. Schuck ed., 1991) (reviewing the "politicization" of the common law based on state tort reform legislation). Liability "crises" involving damage awards and skyrocketing liability insurance premiums resulting from such creative interpretation are the impetus for state politicians to enact tort reform. *Id.* at 27-29; see also KENNETH S. ABRAHAM, *THE FORMS AND FUNCTIONS OF TORT LAW* 238-49 (2d ed. 2002) (discussing the tort liability "crises" in the United States in the mid-1970s and mid-1980s).

3. See KENNETH S. ABRAHAM, *THE FORMS AND FUNCTIONS OF TORT LAW* 238-49 (2d ed. 2002) (providing a history of statutory tort reform and reasons for legislation governing tort damages).

4. See *id.* at 239 (discussing two views of tort reform legislation: (1) Defendants need a way to predict the potential jury award for damages; or (2) Defendants need a way to decrease jury awards against them).

5. See *Historic Tort Reform Bill Passes*, *ADVOC.* (Texans for Lawsuit Reform, Houston, Tex.), June 2003, at 1 (claiming that "HB 4 will benefit generations of Texans in innumerable and immeasurable ways, including: restoring respect for the law, improving the efficiency of our courts, producing cost savings to consumers for the goods and services they purchase, alleviating our current health care crisis, and encouraging economic development and job growth"); FreedomWorks – Citizens for a Sound Economy & Empower America, *Texas House Civil Practices Chairman Joe Nixon's Omnibus Tort Reform Bill Is Good for Texas, Good for Texas Citizens* (Feb. 14, 2003), [http://www.freedomworks.org/newsroom/press\\_template.php?press\\_id=585](http://www.freedomworks.org/newsroom/press_template.php?press_id=585) (highlighting H.B. 4's effects on consumers in the areas of class-action litigation reforms, offer of settlement requirements and responsibilities, changes to joint and several liability and venue, and reforms in product liability litigation) (on file with the *St. Mary's Law Journal*). The Texas Citizens for a Sound Economy describes its purpose of supporting tort reforms as "common-sense approaches to solving public policy problems." *Id.*; see also Christopher Guadagnino, *The Story Behind Tort Reform Success in Texas*, *PHYSICIAN'S NEWS DIG.*, Sept. 2003, <http://www.physiciansnews.com/spotlight/903.html> (documenting an interview with Charles W. Bailey, Jr., M.D., president of the Texas Medical Association, in which Dr. Bailey said "Texas physicians couldn't be more pleased with the outcome" of the 2003 legislative actions relating to medical malpractice liability reforms) (on file with the *St. Mary's Law Journal*); Ken Ortolon, *Protecting Tort Reform: The Battle for Medical Liability Reform Moves to the Ballot Box*, *TEX. MED.*, Sept. 9, 2004, <http://www.texmed.org/Templates.aspx?id=778> (describing the passage of H.B. 4 as "half the battle" for Texas physicians to receive "meaningful tort relief") (on file with the *St. Mary's Law Journal*); Press Release, Senator Robert "Bob" Deuell, Tex. State Senate Dist. 2, Capital Update, Senate Approves Lawsuit Reform Legislation (May 16, 2003), <http://www.deuell.senate.state.tx.us/pr03/c051603a.htm> (announcing the passage of H.B. 4 by the Texas Senate and Senator Deuell's opinion that he was "confident this legislation will have positive benefits for those that I represent, as well as all the people of Texas") (on file with the *St. Mary's Law Journal*); Press Release, Tex. Senate News, Tort Reform Legislation Passed by Senate (May 16, 2003), <http://www.senate.state.tx.us/75r/senate/Archives/Arch03/p051603a.htm> (announc-

But tort reform can also create new hurdles for plaintiffs seeking damage awards in civil litigation. The Texas Legislature's 2003 House Bill 4 (H.B. 4)<sup>6</sup> amendment to the Texas Civil Practice and Remedies Code (Code)<sup>7</sup> represents the most recent example of major tort reform in Texas. Heralded by supporters as a "comprehensive civil justice reform bill"<sup>8</sup> and a

---

ing the approval of H.B. 4 by the Texas Senate with the purpose of ending lawsuit abuse) (on file with the *St. Mary's Law Journal*); Press Release, Tex. House of Representatives, House Bill 4 Praised As Most Significant Economic Dev. Measure of 2003 (Mar. 28, 2003), <http://www.house.state.tx.us/news/release.php?id=272> (announcing the approval of H.B. 4 by the Texas House of Representatives as "the most significant economic development measure of the 2003 session") (on file with the *St. Mary's Law Journal*); Texas Conservative Coalition, Internet Home Page, <http://www.txcc.org> (last visited Oct. 4, 2004) (describing the TCC's support of H.B. 4 as a comprehensive tort reform bill) (on file with the *St. Mary's Law Journal*). *Contra* Jake Bernstein, *Plaintiff Lament*, TEX. OBSERVER, Apr. 25, 2003, at 7, available at 2003 WLNR 13179164, <http://www.texasobserver.org> (lamenting the inaction of the Texas Trial Lawyers Association in response to H.B. 4 and describing the legislation as the "Trial Lawyers Extinction Act"); Jessica Chapman & Dave Mann, *Payoff Is a Bitch*, TEX. OBSERVER, Apr. 25, 2003, at 8, available at 2003 WLNR 13179266, <http://www.texasobserver.org> (criticizing H.B. 4 and the Texans for Lawsuit Reform organization); Dave Mann, *Will the Senate Save Us?*, TEX. OBSERVER, Apr. 25, 2003, at 9, available at 2003 WLNR 13179305, <http://www.texasobserver.org> (labeling H.B. 4 "as a foul-smelling piece of legislative refuse no one wanted to touch"); Kim Franklin-Marth, *Medical Malpractice Cap Would Threaten Patients' Safety*, The Texas Patient Safety Foundation, Legislative Action, [http://www.texaspatientsafetyfoundation.org/legislative\\_action\\_HB4.html](http://www.texaspatientsafetyfoundation.org/legislative_action_HB4.html) (last visited Oct. 4, 2004) (contending that H.B. 4 caps on noneconomic damages will threaten all Texas patients by eliminating the deterrent effect of unlimited damage awards on negligent medical practices and threatening the ability of an injured patient to obtain a competent attorney) (on file with the *St. Mary's Law Journal*); Michael L. Slack, *Tort Reform in Texas, Thinking Outside the Bench*, 46th Annual Convention – Louisiana Trial Lawyer's Association, at 1 (Sept. 18-20, 2003) (describing the 78th Texas Legislature regular session as both "one of the most contentious and rancorous sessions in memory," and a Republican response to the party's "tort-reform activist patrons") (on file with the *St. Mary's Law Journal*). *See generally* John T. Montford & Will G. Barber, *1987 Texas Tort Reform: The Quest for a Fairer and More Predictable Texas Civil Justice System*, 25 HOUS. L. REV. 245, 355-56 (1988) (describing the 1987 tort reform as "the Texas Legislature[']s response] to the problem of frivolous suits in Texas" and as "deterrents . . . to discourage the burdening of the civil justice system with baseless, frivolous suits and motions").

6. Tex. H.B. 4, 78th Leg., R.S. (2003).

7. TEX. CIV. PRAC. & REM. CODE ANN. (Vernon 1997 & Supp. 2005). *See generally* Steven R. Collins, *Where Did the Civil Practice and Remedies Code Come From?*, 50 TEX. B.J. 134, 135 (1987) (providing the historical background of the Texas Civil Practice and Remedies Code, designed to be part of a continuous program of revising Texas statutes).

8. *See* HOUSE COMM. ON CIVIL PRACTICES, BILL ANALYSIS, TEX. H.B. 4, 78th Leg., R.S. 91-93 (2003), reprinted in CAPITOL RESEARCH SERV., THE LEGISLATIVE HISTORY OF TEX. H.B. 4, 78TH LEG., R.S. (2003): ARTICLE 13, DAMAGES, at 13-14 (2003), available at <http://www.capitol.state.tx.us> (describing the purpose of H.B. 4 as intending to address and correct problems in the Texas court system causing a healthcare crisis, and identifying the root causes of problems in the current litigation environment as: "non-meritorious lawsuits, a general increase in jury awards, a disproportionate increase in awards for

“comprehensive tort reform bill,”<sup>9</sup> H.B. 4 has been alternatively criticized as the product of Republican efforts to reduce damage awards and severely restrict certain causes of action based solely on economics.<sup>10</sup> What remains to be seen is whether H.B. 4 will meet promised expectations of increasing consumers’ access to healthcare<sup>11</sup> without unfairly reducing plaintiffs’ rights to pursue tort recovery for legitimate damages,<sup>12</sup> while

---

noneconomic damages, unreasonable pressure to settle defensible claims and other procedural aspects of our current court system that are patently unbalanced”).

9. See *id.* (describing the alleged benefits to be derived from the passage of H.B. 4, including restoring balance to the court system, and reducing litigation costs).

10. See John Council, *Tort Reform King: Joe Nixon Makes No Apologies for H.B. 4*, TEX. LAW., Dec. 22, 2003, at 18, available at 12/22/2003 TEXLAW 18 (Westlaw) (reporting on State Representative Joe Nixon’s response to criticism of H.B. 4, and describing plaintiff attorney complaints that causes of action where economic damages are low, but noneconomic damages are typically high, will not be economically feasible to pursue).

11. See *Good News and Bad News on Tort Reform*, FRONTLINE, May 2004, at 1-2, available at <http://www.torchnet.org/fl14-06.htm#art3> (reproducing a commentary written by Representative Joe Nixon, in which he reports on the successes of H.B. 4 and Proposition 12, resulting in increased access to healthcare). But see Stephanie Mencimer, “*Tort Reform*,” *Lone Star Style*, S. EXPOSURE, Oct. 14, 2004, at 5-6 (denying that Texas needed tort reform to increase citizens’ access to medical care).

12. See William Hoffman, *New Tort Reform Law Already Creating a Rush to File Lawsuits*, DALLAS BUS. J., June 23, 2003, [http://www.bizjournals.com/accounts/sign\\_in?uri=/dallas/stories/2003/06/23/story2.html](http://www.bizjournals.com/accounts/sign_in?uri=/dallas/stories/2003/06/23/story2.html) (reporting on attorney speculation that H.B. 4 and the noneconomic damage cap of \$250,000 per defendant will not affect “mainstream players,” may actually increase litigation, and will force plaintiff attorneys to be more creative, while giving defense lawyers more work) (on file with the *St. Mary’s Law Journal*). But see Dan Lambe, Guest Column, *Proposition 12 Is No Cure for Health Care Ills*, AMARILLO GLOBE-NEWS, May 22, 2004, [http://www.amarillo.com/stories/052204/opi\\_guest.shtml](http://www.amarillo.com/stories/052204/opi_guest.shtml) (reporting the story of a cancer patient who alleged medical malpractice for failure to detect cancer, closing his opportunity for treatment, and tort reform robbing him of the choice to file a lawsuit against the medical provider) (on file with the *St. Mary’s Law Journal*); Local Opinion, *Texas Injustice*, LUFKIN DAILY NEWS, July 7, 2004, <http://www.texaswatch.org/media/ldn070704.htm> (decrying the negative effect of tort reform on plaintiffs who, as a result of H.B. 4, are unable to retain a lawyer because attorneys working on a contingency basis must balance the costs of pursuing litigation against the decreased potential for jury awards, and are more likely to decline a complicated case without assurance of more than a break-even recovery) (on file with the *St. Mary’s Law Journal*); Stephanie Mencimer, “*Tort Reform*,” *Lone Star Style*, S. EXPOSURE, Oct. 14, 2004, at 4-5 (criticizing President George W. Bush and the Republican party for tort reform resulting in legitimate injury claims without the possibility of reaching the courthouse); Claire Osborn, *Many Lawyers Avoiding Malpractice Cases*, AUSTIN AM.-STATESMAN, June 14, 2004, <http://www.texaswatch.org/media/aas061404.htm> (comparing opinions of attorneys on the efficacy of 2003 tort reform, and addressing the negative effect of H.B. 4’s cap for pain and suffering based on the ability of lawyers to take medical malpractice cases) (on file with the *St. Mary’s Law Journal*); Mary Alice Robbins, *Fallout from the Tort Reform Revolution*, TEX. LAW., June 16, 2003, at 15, available at 6/16/2003 TEXLAW 15 (Westlaw) (documenting interviews with attorneys, including a former defense lawyer who believes the statutory cap on damages discriminates against children, and

simultaneously reducing medical providers' malpractice insurance premiums.<sup>13</sup> What is clear is H.B. 4 will adversely affect Texas plaintiffs seeking exemplary (punitive) damages<sup>14</sup> from a jury.

---

the poor and elderly who will have small economic damages); Press Release, Homeowners Against Deficient Dwellings, Homebuyer Consumer Group Claims Tort Reform Is the Problem, Not the Answer (Apr. 2, 2003), <http://www.prweb.com/releases/2003/4/prweb61961.htm> (advising that tort reforms in the homebuilding industry have limited homeowners' access to the court system while not delivering on touted benefits of reducing construction defects, lowering home prices and insurance premiums) (on file with the *St. Mary's Law Journal*).

13. See 2003 *Legislative Compendium: Professional Liability Reform*, Texas Medical Association, Internet Practice Management Menu Page, <http://www.texmed.org/Template.aspx?id=2675> (last visited Oct. 27, 2004) (lauding H.B. 4 and H.J.R. 3 (Proposition 12) as "the lynchpin of effective premium relief") (on file with the *St. Mary's Law Journal*). *Contra* Debate on Tex. H.B. 4 on the Floor of the House of Representatives, 78th Leg., R.S. 14 (Mar. 19, 2003) (statement of Rep. Miguel ("Mike") Wise) (transcript available from the Office of the House Committee Coordinator), reprinted in CAPITOL RESEARCH SERV., THE LEGISLATIVE HISTORY OF TEX. H.B. 4, 78TH LEG., R.S. (2003): ARTICLE 13, DAMAGES, at 22 (2003) (finding nothing in H.B. 4 that gives Texas House members the opportunity to lower medical malpractice insurance premiums for physicians and noting that the bill "actually hurts doctors in that it tends to limit class actions which directly contradicts the Texas Medical Association's pioneering efforts to challenge commercial managed care plans at the courthouse"); John M. Cummings, *Are Lawyers the Real Villains?*, FORT WORTH STAR-TELEGRAM, June 25, 2004, at B11, available at <http://www.texaswatch.org/media/fwst062504.htm> (reporting a dramatic reduction in malpractice lawsuits since the passage of H.B. 4, and criticizing tort reform as benefiting insurance carriers and companies, not malpractice plaintiffs and physicians who continue to see insurance rate increases); Janet Elliott, *Tort Reform Yet to Give Much Benefit to Doctors*, HOUS. CHRON., Aug. 24, 2004, at B3, available at <http://www.texaswatch.org/media/hc082404.htm> (announcing the results of a study that Texas hospitals have already recognized savings on insurance premiums, while Texas doctors have yet to see relief from rising malpractice insurance premiums). The writer reports that only one of five major malpractice insurers has actually agreed to lower rates after passage of H.B. 4. *Id.*; Jim Vertuno, *House Members Upset More Doctors Not Getting Relief*, LAREDO MORNING TIMES, Apr. 23, 2004, <http://www.texaswatch.org/media/lmt042304.htm> (quoting Representative Joe Nixon, proponent of H.B. 4, complaining about a lack of malpractice premium rate decreases for doctors, that "[s]ome of us put ourselves way out on the line for our doctors" and sternly reminding malpractice insurers that tort reform was passed to benefit doctors, not increase insurer profits) (on file with the *St. Mary's Law Journal*); *Good News and Bad News on Tort Reform*, FRONTLINE, May 2004, at 1-2, available at <http://www.torchnet.org/fl14-06.htm#art3> (reproducing a commentary written by Representative Joe Nixon, in which he reports on the successes of H.B. 4 and Proposition 12). Reportedly, the state's largest insurance carrier reduced its malpractice insurance rates on Jan. 1, 2004; yet three months later, Mr. Nixon complained about the failure of malpractice insurance carriers to reduce rates. *Id.*

14. Compare TEX. CIV. PRAC. & REM. CODE ANN. § 41.001(5) (Vernon Supp. 2005) (defining exemplary damages as: "any damages awarded as a penalty or by way of punishment but not for compensatory purposes. Exemplary damages are neither economic nor noneconomic damages. 'Exemplary damages' includes punitive damages."), and TEX. CIV.

The 2003 H.B. 4 amendment to the Texas Civil Practice and Remedies Code<sup>15</sup> added a new requirement to the Chapter 41 damages section (Chapter 41). Prior to the 2003 H.B. 4 amendment to the damages section of the Code, a unanimous jury finding of liability for, and the amount of, exemplary damages was not required.<sup>16</sup> However, with the passage of H.B. 4, in order for a plaintiff to receive an award for exemplary damages, the jury must be unanimous in both its *liability findings* for exemplary damages and in the *amount* of the exemplary damage award.<sup>17</sup> Anything less than a unanimous jury means a Texas plaintiff seeking exemplary damages will never receive them. Consequently, the unanimity requirements make it more difficult for a plaintiff to receive a punitive damage award from a Texas jury.<sup>18</sup> In addition to facing a cap on noneconomic damages for certain causes of action, a Texas plaintiff must now convince every member of the jury of both the liability findings for exemplary damages and the amount of any exemplary damage award.

Along with the unanimity requirements, H.B. 4's amendment also requires the jury receive a jury instruction when exemplary damages are involved. One reaction to the new jury instruction was that the unanimity requirements were ambiguous<sup>19</sup> because the required jury instruction

PRAC. & REM. CODE ANN. § 41.003(a)(1)-(3) (Vernon Supp. 2005) (stating that recovery for exemplary damages must result from fraud, malice, or gross negligence), *with* BLACK'S LAW DICTIONARY 396 (7th ed. 1999) (referring the reader seeking the definition of exemplary damages to the definition of punitive damages, which reads: "[d]amages awarded in addition to actual damages when the defendant acted with recklessness, malice, or deceit"), *and* THE AMERICAN HERITAGE COLLEGE DICTIONARY 1109 (3d ed. 1993) (defining punitive damages as "[d]amages awarded by a court against a defendant as a deterrent or punishment to redress an egregious wrong perpetrated by the defendant").

15. TEX. CIV. PRAC. & REM. CODE ANN. ch. 41 (Vernon Supp. 2005).

16. *Compare* TEX. CIV. PRAC. & REM. CODE ANN. § 41.003 (Vernon 1997) (listing the previous Code's standards for recovery of exemplary damages, the claimant's burden of proof, and statutory reliance on establishment of a cause of action authorizing exemplary damages), *with* TEX. CIV. PRAC. & REM. CODE ANN. § 41.003 (Vernon Supp. 2005) (listing the additional standards added by H.B. 4 whereby exemplary damages may only be awarded if the jury's liability finding for, and the amount of, exemplary damages is unanimous, and adding a required jury instruction for unanimity in order to award exemplary damages).

17. TEX. CIV. PRAC. & REM. CODE ANN. § 41.003(d) (Vernon Supp. 2005).

18. *See* Paul Koning, *Tort Reform and Legal Malpractice*, TEX. LAW., Aug. 18, 2003, at 21, *available at* 8/18/2003 TEXLAW 21 (Westlaw) (explaining that the H.B. 4 requirement, that juries agree unanimously both on whether to award exemplary damages and on the amount of the award, will make exemplary damage awards even less common in professional liability cases).

19. *See* Claudia Wilson Frost & J. Brett Busby, *Charging the Jury in the Wake of HB4*, 67 TEX. B.J. 276, 278 (2004), *available at* <http://www.texasbar.com> (discussing the ambiguity caused by the H.B. 4 amendment requirement that an exemplary damage award must be unanimous); *see also* John Blaise Gsanger & Jeffrey S. Levinger, *What in the World*

only partially reflected H.B. 4's changes to the Code. In all cases of exemplary damages, both H.B. 4's amendment and the current Code require a jury instruction informing the jury that the *amount* of an award for exemplary damages must be unanimous,<sup>20</sup> but the amendment does not require a jury instruction that exemplary damages may be awarded only if the jury's *liability findings* were also unanimous.<sup>21</sup> A plain reading of the Code prescribes that a unanimous jury award for exemplary damages would be set aside if the liability finding(s) for the exemplary damage award were not also unanimous.

Lawyers and judges struggled to understand the Texas Legislature's intent in adding the unanimity requirements to the Code that are accompanied with only a partial jury instruction.<sup>22</sup> Why not include a required jury instruction that the jury should first be instructed that its liability findings for exemplary damages must be unanimous? H.B. 4's changes to the damages chapter of the Texas Civil Practice and Remedies Code<sup>23</sup> meant that Texas courts would have to determine the legislature's intent as to what a jury should be told about its liability findings for exemplary damages.<sup>24</sup> After H.B. 4 became effective, questions arose as to how Texas courts would interpret the Code when instructing a jury. For example, would courts include a jury instruction that informs the jury that its liability findings for exemplary damages must also be unanimous, although the Code does not require it? Moreover, can justification for the jury instruction be found in the Code itself, or in the existing Texas Rules of Civil Procedure?

---

*Does the Charge Look Like After House Bill 4?*, in REAL DAMAGES AFTER HB4, ch. 8, at 2 ¶ II.A. (State Bar of Tex. ed., 2004) (explaining that one problem created is "that unanimity is required in determining the *amount* of exemplary damages" but "it is not clear . . . whether the jury also should be instructed that unanimity is required in determining *liability* for exemplary damages"). In addition, H.B. 4 created problems with the existing (2004) Texas Rules of Civil Procedure 277 and 226a by requiring unanimity in the jury's findings of liability for exemplary damages and the amount of any exemplary damage award. *Id.*

20. TEX. CIV. PRAC. & REM. CODE ANN. § 41.003(e) (Vernon Supp. 2005).

21. *Id.*

22. See Claudia Wilson Frost & J. Brett Busby, *Charging the Jury in the Wake of HB 4*, 67 TEX. B.J. 276, 278 (2004), available at <http://www.texasbar.com> (addressing the predicament created by H.B. 4).

23. Compare TEX. CIV. PRAC. & REM. CODE ANN. § 41 (Vernon 1997) (containing the Code verbiage prior to the changes made by H.B. 4), with TEX. CIV. PRAC. & REM. CODE ANN. § 41 (Vernon Supp. 2005) (amending the 1997 Texas Civil Practice and Remedies Code, Chapter 41, Damages in 2003).

24. See Claudia Wilson Frost & J. Brett Busby, *Charging the Jury in the Wake of HB 4*, 67 TEX. B.J. 276, 278 (2004), available at <http://www.texasbar.com> (recognizing that the courts will have to decide whether unanimity is required for both liability for and the amount of exemplary damages).



Ostensibly, the Texas Legislature intended to reduce jury awards for punitive damages by requiring unanimity in the liability findings and the amount of an exemplary damage award.<sup>25</sup> However, the reason(s) for not including a required jury instruction for the unanimity requirement in the jury's liability findings for exemplary damages remains vague. Why would the Texas Legislature effectively hide the ball from a jury, potentially waste the jurors' time, and set a plaintiff up for failure? By creating ambiguity in the jury instruction, the legislature may have intended all along to hide the Code's unanimity requirements to further reduce the punitive damage awards in Texas.<sup>26</sup>

Ultimately, the Texas Supreme Court picked up the ball, and answered the question on how the Texas courts would interpret the ambiguity, by adding the missing jury instruction to the Texas Rules of Civil Procedure. On January 27, 2005, the Texas Supreme Court issued a final order amending Texas Rules of Civil Procedure 226a<sup>27</sup> and 292<sup>28</sup> with the intent "to conform to requirements in H.B. 4 . . . for unanimous jury findings on liability and the amount of exemplary damages before exemplary damages can be awarded."<sup>29</sup> However, the court's order may not accurately reflect the Texas Legislature's intent because it exceeds the changes effected by H.B. 4's language. Notably, the Texas Supreme Court's order does not follow the court's history of strictly construing statutes, but it

---

25. See Press Release, Tex. House of Representatives, Freshmen Republicans Back Tort Reform Effort (Mar. 20, 2003), <http://www.house.state.tx.us/news/release.php?id=227> (announcing unanimous support among the twenty-six Republican freshmen for H.B. 4, and their intent to pass legislation to reduce (cap) "difficult to measure noneconomic damages") (on file with the *St. Mary's Law Journal*). *Contra* Press Release, Tex. House of Representatives, Tex. Legislators, Concerned Tex. Families Blast HB 4 (Mar. 18, 2003), <http://www.house.state.tx.us/news/release.php?id=186> (announcing a decision by four State Representatives to align themselves with Texas families injured by product defects and medical malpractice, and criticizing H.B. 4 as the "wrong remedy for [a] malpractice crisis") (on file with the *St. Mary's Law Journal*).

26. See Jeffrey Rasansky, Guest Columnist, *Medical Malpractice Caps a Bad Operation for Texans*, FORT WORTH BUS. PRESS, Apr. 2003, <http://www.legalpr.com/4-2003-Rasansky-ftwbizpress-commentary.html> (criticizing the Texas Legislature for interfering with the traditional province of the jury to award pain and suffering damages based on all of the evidence presented at trial) (on file with the *St. Mary's Law Journal*); *The Unusual Suspects*, TEX. OBSERVER, Apr. 25, 2003, at 8, available at <http://www.texasobserver.org> (announcing passage of H.B. 4 and the change in damages that "would strip fundamental power away from juries, a foundation of our democracy and the Texas Constitution").

27. TEX. R. CIV. P. 226a.

28. *Id.* 292.

29. Texas Supreme Court Advisory: Supreme Court Issues Rules Orders, Thurs., Jan. 27, 2005, [http://www.supreme.courts.state.tx.us/rules/rules\\_advisory\\_012705.htm](http://www.supreme.courts.state.tx.us/rules/rules_advisory_012705.htm) (on file with the *St. Mary's Law Journal*).

does create an additional hurdle for plaintiffs seeking exemplary damage awards in Texas courts.

This Comment explores the legislature's reasons for requiring unanimous jury verdicts for exemplary damage awards in the 2003 H.B. 4 amendment to Chapter 41 of the Texas Civil Practice and Remedies Code. Additionally, this Comment discusses the Texas Supreme Court's response, the addition of a partial jury instruction to Chapter 41, to the ambiguity created by H.B. 4's amendment. A brief history of exemplary damage awards explains the environment in which the Texas Legislature operated when it passed H.B. 4. Part II examines the legislative environment surrounding the passage of H.B. 4, highlights in the history of exemplary damage awards in Texas, trends in the Texas Supreme Court affecting punitive damage awards and the power of Texas juries, and the controversy over exemplary damages. Part III reviews objectives and fundamentals involved in drafting jury instructions, the use of pattern jury charges, and Texas cases involving jury instructions and punitive damage awards. Part IV addresses the impact of H.B. 4's changes to exemplary damages in Texas Rules of Civil Procedure 277 and 292. Part V reviews the Texas Supreme Court's historical approach to statutory interpretation, the apparent intent of the Texas Legislature in enacting the H.B. 4 unanimity requirements, and changes to the Texas Pattern Jury Charges. Part VI explains the Texas Supreme Court's 2005 revisions to Texas Rules of Civil Procedure 226a and 292, and discusses an inconsistency between the court's order and H.B. 4's actual language. Finally, Part VII briefly speculates about future tort reform aimed at exemplary damages.

## II. BACKGROUND

### A. *House Bill 4's Legislative Environment*

On June 11, 2003, Texas Governor Rick Perry signed H.B. 4 into law.<sup>30</sup> The need for reforms in the state's civil justice system resulted from a purported healthcare crisis caused by medical malpractice litigation,<sup>31</sup>

---

30. See Press Release, House Bill 4 Signed by Governor: Promises Reform and Relief (June 17, 2003), <http://www.house.state.tx.us/news/release.php?id=470> (announcing the signing of H.B. 4 by Governor Perry and explaining the purpose of the legislation as a way to improve the Texas civil justice system) (on file with the *St. Mary's Law Journal*); see also News Release, Tex. Health Res., Governor Signs Bill at HMFWS (June 11, 2003), <http://www.texashealth.org/main.asp?level=3&id=&name=Home/THRInfo/NewsRoom/THRheadlines&article=1C41C26524EB4ABFB15CFDAD4E3087E2> (reporting the governor's signing of H.B. 4, which ironically occurred at the Harris Methodist Fort Worth Hospital) (on file with the *St. Mary's Law Journal*).

31. See Joseph S. Cohen, *2003 Texas Legislative Session Gives Prescription for Health Care Reform*, Hous. Bus. J., July 11, 2003, <http://www.houston.bizjournals.com/houston/>

and the resulting prohibitive increases in malpractice insurance premiums for healthcare providers.<sup>32</sup> The bill was originally filed in the Texas House of Representatives on February 17, 2003, and received in the Texas Senate on March 31, 2003.<sup>33</sup> Throughout the legislative process, public hearings were held, and testimony and debate were received by the Texas House and Senate Committees.<sup>34</sup> The legislative process surrounding H.B. 4 has been described as a “bloody floor fight” and a “terrific melodrama.”<sup>35</sup> The House Committee summarized the purpose of H.B. 4 as providing “various corrective measures that will help bring more balance

stories/2003/07/14/focus2.html (describing H.B. 4's purposes and its effects on recovery for damages when applying the new law) (on file with the *St. Mary's Law Journal*).

32. See Hon. Joe Nixon, *Best Policy for Texans, Vote YES to Proposition 12*, News & Events, Proposition 12: Point-Counterpoint, TEX. YOUNG LAW. ASS'N, Sept. 1, 2003, at 2-3, available at [http://www.tyla.org/newsitem\\_detail.cfm?NewsItemID=114](http://www.tyla.org/newsitem_detail.cfm?NewsItemID=114) (claiming a medical malpractice crisis in Texas, based in part on: “85% of claims against doctors fail, but can cost anywhere from \$10,000 to \$40,000 per defendant to defend” and “in 1989, the average noneconomic award was \$318,666,” but ten years later “the average noneconomic award in medical malpractice cases was \$1,379,203”). Representative Nixon also argued that the adverse effects on the availability of medical liability insurance are reflected by “the number of medical liability companies in Texas [dropping] from 17 to 4 just since 2000.” *Id.*; see also Jonathan Nelson, *Storm and Stress, Power, Intrigue and High Drama in the Texas Legislature*, TEX. FAM. PHYSICIAN (2003), <http://www.tafp.org/News/2003/pt1tort.htm> (describing the Texas Academy of Family Physicians' support of H.B. 4 as the organization's “top priority,” in order to reduce the number of medical malpractice lawsuits and medical malpractice insurance premiums) (on file with the *St. Mary's Law Journal*). The rising cost of medical malpractice insurance and the number of medical malpractice lawsuits reportedly forced medical providers to limit their services or close their practices. *Id.* But see Debate on Tex. H.B. 4 on the Floor of the House of Representatives, 78th Leg., R.S. 14 (Mar. 19, 2003) (statement of Rep. Miguel (“Mike”) Wise) (transcript available from the Office of the House Committee Coordinator), reprinted in CAPITOL RESEARCH SERV., THE LEGISLATIVE HISTORY OF TEX. H.B. 4, 78TH LEG., R.S. (2003): ARTICLE 13, DAMAGES, at 22, ex. 9 (2003) (describing H.B. 4's purported benefits to Texas physicians as creating a “Trojan horse situation” that really benefits a special interest group of business organizations under the guise of a medical liability crisis). See generally Christopher Vaeth, Annotation, *Allowance of Punitive Damages in Medical Malpractice Action*, 35 A.L.R.5TH 145 (2004) (analyzing cases where punitive damages were awarded against a healthcare provider and questioning whether the conduct warranted a punitive damage award).

33. See H.J. OF TEX., 78th Leg., R.S. (2003) (bill actions), <http://www.capitol.state.tx.us> (listing by ascending or descending date, the actions taken on H.B. 4 by the Texas House and Senate, and providing the journal page number for each action).

34. *Id.*; see *infra* notes 190, 200-07 and accompanying text (describing the Texas House and Senate Committees' actions).

35. See Michael King, *Fiddling While Texas Burns*, AUSTIN CHRON., Mar. 28, 2003, [http://www.austinchronicle.com/issues/dispatch/2003-03-28/pols\\_capitol.html](http://www.austinchronicle.com/issues/dispatch/2003-03-28/pols_capitol.html) (describing the tort reform process in the Texas House as “increasingly angry exchanges” that polarized the membership during “the long and bitter debate”) (on file with the *St. Mary's Law Journal*); 2003 Legislative Compendium: Professional Liability Reform, Texas Medical Association, Internet Practice Management Menu Page, <http://www.texmed.org/Tem->

to the Texas civil justice system, reduce the costs of litigation, and help restore litigation to its proper role in our society.”<sup>36</sup> Media reports focused on the statutory damages cap in H.B. 4, but attentive observers recognized the limiting effect of tort reform on civil juries’ discretion to award damages.<sup>37</sup>

At times during the legislative process related to H.B. 4, legislators debated the basic meaning and purpose of exemplary damage awards. For example, during the House floor debate, Representative Joaquin Castro made an unsuccessful attempt to exempt individuals under age eighteen from the Code’s exemplary damage award limitations.<sup>38</sup> In response, Representative Joe Nixon cautioned members not to make any changes to the “application of punitive damages in H.B. 4,”<sup>39</sup> and described Representative Castro’s amendment as “a major step backwards in terms of

---

plate.aspx?id=2675 (last visited Oct. 27, 2004) (labeling the process of enacting H.B. 4 as “tumultuous, sometimes rancorous”) (on file with the *St. Mary’s Law Journal*).

36. See HOUSE COMM. ON CIVIL PRACTICES, BILL ANALYSIS, TEX. H.B. 4, 78TH LEG., R.S. 91-93 (2003), reprinted in CAPITOL RESEARCH SERV., THE LEGISLATIVE HISTORY OF TEX. H.B. 4, 78TH LEG., R.S. (2003): ARTICLE 13, DAMAGES, at 13-14 (2003), available at <http://www.capitol.state.tx.us> (providing background and the purpose behind H.B. 4).

37. See Michael King, *Fiddling While Texas Burns*, AUSTIN CHRON., Mar. 28, 2003, [http://www.austinchronicle.com/issues/dispatch/2003-03-28/pols\\_capitol.html](http://www.austinchronicle.com/issues/dispatch/2003-03-28/pols_capitol.html) (opining that the 2003 tort reform served to “[s]lam the courthouse door even more tightly against ordinary workers, consumers, and juries”) (on file with the *St. Mary’s Law Journal*); Joseph F. Brophy, *Save Texas Courts, Vote NO to Proposition 12*, News & Events, Proposition 12: Point-Counterpoint, TEX. YOUNG LAW. ASS’N, Sept. 1, 2003, [http://www.tyla.org/newsitem\\_detail.cfm?NewsItemID=114](http://www.tyla.org/newsitem_detail.cfm?NewsItemID=114) (presenting arguments opposing Proposition 12 and arguing that the medical malpractice situation did not warrant “[a] radical change to the [Texas] Constitution that would cripple trial by jury, and let politicians decide damages, instead of judges and juries,” and “[r]ecognizing that most Texans would oppose any bill that would handcuff our jury system”). But see Hon. Joe Nixon, *Best Policy for Texans, Vote YES to Proposition 12*, News & Events, Proposition 12: Point-Counterpoint, TEX. YOUNG LAWS.’ ASS’N, Sept. 1, 2003, [http://www.tyla.org/newsitem\\_detail.cfm?NewsItemID=114](http://www.tyla.org/newsitem_detail.cfm?NewsItemID=114) (pointing out that the medical malpractice damage cap applies only to noneconomic damages and not to any other portion of an economic damages award, and that “access to the courts cannot be equated with unlimited damages for pain and suffering”).

38. Debate on Tex. H.B. 4 on the Floor of the House of Representatives, 78th Leg., R.S. 14 (Mar. 27, 2003) (statement of Rep. Joaquin Castro) (transcript available from the Office of the House Committee Coordinator), reprinted in CAPITOL RESEARCH SERV., THE LEGISLATIVE HISTORY OF TEX. H.B. 4, 78TH LEG., R.S. (2003): ARTICLE 13, DAMAGES, at 25, ex. 10 (2003).

39. Debate on Tex. H.B. 4 on the Floor of the House of Representatives, 78th Leg., R.S. 14 (Mar. 27, 2003) (statement of Rep. Joe Nixon) (transcript available from the Office of the House Committee Coordinator), reprinted in CAPITOL RESEARCH SERV., THE LEGISLATIVE HISTORY OF TEX. H.B. 4, 78TH LEG., R.S. (2003): ARTICLE 13, DAMAGES, at 25, ex. 10 (2003).

curbing excessive damages.”<sup>40</sup> Representatives Castro and Nixon bantered the meaning and purpose of exemplary damages in the following circular, hairsplitting exchange:

CASTRO: Mr. Nixon, do you agree in theory and in practice also that exemplary damages are used by courts to correct bad behavior?

NIXON: Not necessarily, no.

CASTRO: Well, how – how – what is there [sic] function? What would you describe is there [sic] function?

NIXON: As I said, it's really a form of punishment. It's not correcting bad behavior, but it's a form of punishment – where the malfeasance has been so great as to justify an award of super-damages in – in an appropriate case.<sup>41</sup>

Seeking clarification, Representative Castro subsequently continued the discussion:

CASTRO: Now, I asked you earlier whether punitive damages or exemplary damages are used to correct bad behavior and you made the comment that they're not necessarily used to correct bad behavior, but in fact used to punish. Well, isn't it so that you only punish those who have committed bad behavior? Don't you spank your child when they've done something wrong?

NIXON: I understand what you are getting at. That's – that's why they're called punitive damages.

CASTRO: Well, then maybe, please explain the distinction between punitive damages and exemplary damages.

NIXON: Well they're both trying to make an example out of an individual or be – or be punitive. There's – the terms are interchangeable.

CASTRO: So then the function is to correct bad behavior, to punish those who have committed a wrong act?

NIXON: It's to punish. Once a behavior has been – has been committed, the actual damages are really designed to correct the bad be-

40. Debate on Tex. H.B. 4 on the Floor of the House of Representatives, 78th Leg., R.S. 14 (Mar. 27, 2003) (statement of Rep. Joe Nixon) (transcript available from the Office of the House Committee Coordinator), *reprinted in* CAPITOL RESEARCH SERV., THE LEGISLATIVE HISTORY OF TEX. H.B. 4, 78TH LEG., R.S. (2003): ARTICLE 13, DAMAGES, at 26, ex. 10 (2003).

41. Debate on Tex. H.B. 4 on the Floor of the House of Representatives, 78th Leg., R.S. 14 (Mar. 27, 2003) (statements of Rep. Joaquin Castro and Rep. Joe Nixon) (transcript available from the Office of the House Committee Coordinator), *reprinted in* CAPITOL RESEARCH SERV., THE LEGISLATIVE HISTORY OF TEX. H.B. 4, 78TH LEG., R.S. (2003): ARTICLE 13, DAMAGES, at 27, ex. 10 (2003).

havior, to make the person whole, to put them back into the place they were prior to their actions.<sup>42</sup>

Despite the confusion over correcting bad behavior, the Code's definition of exemplary damages follows Representative Nixon's definition that punitive damages are for the purpose of punishment.<sup>43</sup> But regardless of how one defines exemplary damages, those damages were primarily blamed for increasing the cost of personal injury settlements in Texas during the debates regarding H.B. 4.<sup>44</sup> The Texas Legislature received testimony during hearings on H.B. 4 that "in Texas, punitive damages were significantly more common than they were elsewhere in the country."<sup>45</sup> In addition, testimony regarding nursing home litigation included complaints that Texas juries were too unpredictable for insurance carriers to

42. Debate on Tex. H.B. 4 on the Floor of the House of Representatives, 78th Leg., R.S. 14 (Mar. 27, 2003) (statements of Rep. Joaquin Castro and Rep. Joe Nixon) (transcript available from the Office of the House Committee Coordinator), *reprinted in* CAPITOL RESEARCH SERV., THE LEGISLATIVE HISTORY OF TEX. H.B. 4, 78TH LEG., R.S. (2003): ARTICLE 13, DAMAGES, at 27-28, ex. 10 (2003).

43. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 41.001(5) (Vernon Supp. 2004-2005) (defining exemplary damages as "any damages awarded as a *penalty* or by way of *punishment*" (emphasis added)); *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 432 (2001) (discussing the purpose of punitive damages as operating similar to private fines and an assessment of the jury's expression of moral condemnation). *See generally* DAN B. DOBBS, 1 DOBBS LAW OF REMEDIES § 311(3) (2d ed. 1993) (explaining the deterrence rationale for awarding punitive damages).

44. *See Texas House Bill 4: Hearings on H.B. 4 Before the Senate Comm. on State Affairs*, 78th Leg., R.S. 4-13 (May 5, 2003) (statement of Theresa Bourdon, on behalf of Texas Health Care Association) (transcript available from Senate Staff Services Office), *reprinted in* CAPITOL RESEARCH SERV., THE LEGISLATIVE HISTORY OF TEX. H.B. 4, 78TH LEG., R.S. (2003): ARTICLE 13, DAMAGES, at 40-42, ex. 13 (2003) (providing recommendations, as a professional actuary and managing director for Aon Risk Consultants, about the frequency and severity of punitive damage awards in Texas's nursing home litigation).

45. *Texas House Bill 4: Hearings on H.B. 4 Before the Senate Comm. on State Affairs*, 78th Leg., R.S. 4-13 (May 5, 2003) (statement of Theresa Bourdon, on behalf of Texas Health Care Association) (transcript available from Senate Staff Services Office), *reprinted in* CAPITOL RESEARCH SERV., THE LEGISLATIVE HISTORY OF TEX. H.B. 4, 78TH LEG., R.S. (2003): ARTICLE 13, DAMAGES, at 40-44 (2003). Ms. Bourdon testified that according to a Harvard study, punitive damages in Texas formed "part of the compensation package in 30 percent of paid claims . . . [c]ompare[d] to only 17 percent countrywide." *Id.* at 5. According to Ms. Bourdon, Texas faced a litigation crisis involving claims against nursing homes by the elderly, which caused the insurance crisis. *Id.* at 4. The chief complaint involved section 41.008 of the Texas Civil Practice and Remedies Code, which Ms. Bourdon described as a "punitive damage loophole" for the elderly. *Id.* at 5. The exemption for the elderly remained in section 41.008 of the Code after the passage of H.B. 4, except if section 74.001 applied to the offending conduct in a healthcare situation. TEX. CIV. PRAC. & REM. CODE ANN. §§ 41.008(7), 74.001 (Vernon 1997 & Supp. 2005).

continue to operate in the state,<sup>46</sup> jury awards were out of control,<sup>47</sup> and the “fear of that huge punitive damage” award caused insurers to leave the state.<sup>48</sup>

In response to the apparent urgency, Texas legislators involved in the drafting and passage of H.B. 4 operated within a political environment created by the purported healthcare crisis for which punitive damage awards, and not insurance carriers' profits, were to blame. Apparently, despite the existing procedural safeguards and the prevailing judicial approach to the evaluation of a jury's punitive damage award, Texas courts could not sufficiently control inappropriate jury awards for punitive damages. As a result, the Texas Legislature would attempt to do so through the tort reform components included in H.B. 4.

### B. *Exemplary Damages in Texas Courts*

A cursory review of the historical highlights of Texas punitive damage awards provides a general understanding of the judicial approach, prior to the passage of H.B. 4, to the evaluation of a jury's punitive damage award on appellate review. After the Texas Legislature adopted the common law in 1849,<sup>49</sup> punitive damages could be recovered for punishment of limited types of aggravated conduct, including fraud and malice.<sup>50</sup>

46. *Texas House Bill 4: Hearings on H.B. 4 Before the Senate Comm. on State Affairs*, 78th Leg., R.S. 4-13 (May 5, 2003) (statement of Theresa Bourdon, on behalf of Texas Health Care Association) (transcript available from Senate Staff Services Office), reprinted in CAPITOL RESEARCH SERV., THE LEGISLATIVE HISTORY OF TEX. H.B. 4, 78TH LEG., R.S. (2003): ARTICLE 13, DAMAGES, at 42, ex. 13 (2003); *Texas House Bill 4: Hearings on H.B. 4 Before the Senate Comm. on State Affairs*, 78th Leg., R.S. 13-15 (May 5, 2003) (statement of George Linial, on behalf of Texas Association of Homes and Services for the Aging) (transcript available from Senate Staff Services Office), reprinted in CAPITOL RESEARCH SERV., THE LEGISLATIVE HISTORY OF TEX. H.B. 4, 78TH LEG., R.S. (2003): ARTICLE 13, DAMAGES, at 42-44, ex. 13 (2003).

47. *Texas House Bill 4: Hearings on H.B. 4 Before the Senate Comm. on State Affairs*, 78th Leg., R.S. 13-15 (May 5, 2003) (statement of George Linial, on behalf of Texas Association of Homes and Services for the Aging) (transcript available from Senate Staff Services Office), reprinted in CAPITOL RESEARCH SERV., THE LEGISLATIVE HISTORY OF TEX. H.B. 4, 78TH LEG., R.S. (2003): ARTICLE 13, DAMAGES, at 42-44, ex. 13 (2003). Mr. Linial told Chairman Ratliff that “in 2001, three of the top ten jury verdicts in Texas were long-term care cases and the total verdict amounts on these three were 444 million dollars” (subsequently reduced by the judges to 55 million dollars). *Id.* at 14.

48. *Id.*

49. See Sylvia M. Demarest, *The History of Punitive Damages in Texas*, 28 S. TEX. L. REV. 535, 538 n.19 (1987) (noting the adoption of the common law in Texas, as codified in TEX. REV. CIV. STAT. ANN. art. 1 (Vernon 1969)).

50. See *id.* at 538 (summarizing the blending of the common law with decisions of the Texas Supreme Court between 1849 and 1851 to allow for punitive damages to punish a tortfeasor, while also recognizing the deterrent effect of such awards).

Subsequently, the Texas Legislature and the Texas courts expanded the causes of action for potential recovery of punitive damages to include wrongful death<sup>51</sup> based on gross negligence,<sup>52</sup> and bad faith based on an insurer's violation of the duty of good faith and fair dealing.<sup>53</sup>

During the late nineteenth century and early twentieth century, the Texas Supreme Court's definitions of gross negligence "placed a substantial burden upon a plaintiff seeking punitive damages"<sup>54</sup> where, "[b]ecause of [the] demanding standard, no appellate court in Texas ever upheld a punitive damages award."<sup>55</sup> A trend of reversing punitive damage awards continued until 1981<sup>56</sup> when the Texas Supreme Court adopted a new, no evidence standard of review that gave "the jury greater discretion to award punitive damages"<sup>57</sup> and usually resulted in upholding jury verdicts for punitive damages.

51. *See id.* at 540 (explaining the recognition of a cause of action for wrongful death in Texas as a result of legislation passed in 1860).

52. *See id.* at 539 (discussing the development of a cause of action for wrongful death and introducing the concept of gross negligence, which "became the most common and, perhaps, the most controversial basis for awarding punitive damages").

53. *See id.* at 565-71 (chronicling the development of a tort cause of action for bad faith in Texas, and discussing the cases based on an insurer's violation of article 21.21 of the Texas Insurance Code and sections 17.46 and 17.50 of the Texas Deceptive Trade Practices Act); *see also* *Transp. Ins. Co. v. Moriel*, 879 S.W.2d 10, 17-18 (Tex. 1994) (discussing the threshold of a bad faith tort cause of action); *Viles v. Sec. Nat'l Ins. Co.*, 788 S.W.2d 566, 567 (Tex. 1990) (providing the court's reasoning as to the elements of a bad faith cause of action under an insurance contract).

54. *See* Sylvia M. Demarest, *The History of Punitive Damages in Texas*, 28 S. TEX. L. REV. 535, 543-44 (1987) (reviewing a line of Texas Supreme Court decisions in which plaintiffs periodically sought punitive damages for gross negligence, but the plaintiffs' efforts to prevail were made increasingly difficult as a result of the court's changing definition for what constituted gross negligence).

55. *See id.* at 546 (explaining how the Texas Supreme Court ignored the standard of review for a jury verdict by adhering to the court's strict definition of gross negligence).

56. *See id.* at 546-51 (citing *Burk Royalty Co. v. Walls*, 616 S.W.2d 911 (Tex. 1981); *Putnam v. Mo. Valley, Inc.*, 616 S.W.2d 930 (Tex. 1981)) (citing the two Texas Supreme Court cases in which the no evidence standard would now be used to examine the sufficiency of the evidence in determining "whether some evidence supports the jury's finding").

57. *See id.* at 550-51 (summarizing the standard of review adopted by the court as examining the sufficiency of the evidence under a no evidence standard, and in the case of gross negligence, quoting *Burk Royalty Co.*, 616 S.W.2d at 922, that "the reviewing court must look to all of the surrounding facts, circumstances, and conditions"); *see also* *Burk Royalty Co.*, 616 S.W.2d at 915 (noting that the "traditional standard [of review] to be applied by an appellate court in testing a 'no evidence' point is for the court to consider only the evidence, when viewed in its most favorable light, that tends to support the jury's finding . . . and to disregard all evidence leading to a contrary conclusion"). The no evidence standard of review issue is "whether there is some evidence to support the jury's finding." *Id.*; *Boatright v. Tex. Am. Title Co.*, 790 S.W.2d 722, 729 (Tex. App.—El Paso



A major change in the Texas Supreme Court's rulings on punitive damage awards occurred in 1994. In *Transportation Insurance Co. v. Moriel*,<sup>58</sup> the Texas Supreme Court reversed and remanded a bad faith dispute where the jury awarded the plaintiff both compensatory and punitive damages.<sup>59</sup> The court discussed the "exceptional nature of punitive damages,"<sup>60</sup> replacing the no evidence standard of review in favor of a new standard of whether the evidence is legally sufficient to support a punitive damage award.<sup>61</sup> The court declined to require a Texas trial court to "articulate its reasons for refusing to disturb a punitive damage award,"<sup>62</sup> but adopted the requirement "of bifurcated trials in punitive damage cases" upon timely motion, in order to "protect against awards that are grossly excessive."<sup>63</sup>

---

1990, writ dismissed) (finding sufficient evidence to support a liability finding and punitive damage award). The court in *Boatright* also found that the punitive damage award was justified to punish the defendant and grant the plaintiff damages that could not be categorized as actual damages. *Id.*

58. 879 S.W.2d 10 (Tex. 1994).

59. *Transp. Ins. Co. v. Moriel*, 879 S.W.2d 10, 33 (Tex. 1994).

60. *Id.* at 16-17.

61. *See id.* at 19 (rejecting the definition of gross negligence previously used by the court and adopting a new three-step test to allow the court to determine the legal sufficiency of the evidence to support a jury's punitive damage award for gross negligence). The court's first step in the test was to "examine our traditional definition of gross negligence and identify its basic elements." *Id.* The second step was "to determine how these elements should be applied in the context" of the cause of action involved in the dispute. *Id.* The final step was to "determine meaningfully whether legally sufficient evidence supports the verdict." *Id.*; *see also* *Saenz v. Fid. Ins. Underwriters*, 925 S.W.2d 607, 613 (Tex. 1996) (holding that the plaintiff was "not entitled to damages for medical care" and finding no evidence of any wrongful conduct by the defendant, regardless of the jury's finding of damages and wrongful conduct); Phil Hardberger, *Juries Under Siege*, 30 ST. MARY'S L.J. 1, 4-5 (1998) (asserting, after the Texas Supreme Court's decisions overturning jury verdicts in *Moriel* and *Saenz*, that "[j]uries' assessments were wiped out by increasingly harsher standards for mental anguish and punitive damages"). In *Saenz*, the Texas Supreme Court reversed a jury's verdict for punitive damages, finding no evidence of actual damages for mental anguish. *Id.* at 5 n.13; *accord* *Merrell Dow Pharms., Inc. v. Havner*, 953 S.W.2d 706, 720, 730 (Tex. 1997) (finding evidence legally insufficient to support a judgment after a bifurcated jury trial in which the jury awarded \$30 million in punitive damages).

62. *See Moriel*, 879 S.W.2d at 32-33 (explaining the court's reluctance to burden an already overtaxed and overworked system of trial courts by requiring courts to "articulate their reasons for upholding punitive awards, or even to take affirmative steps to consider post trial objections to a punitive damage award"). *See generally* *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 464-65 (1993) (refusing to find as a constitutional violation a trial judge's failure to articulate the reasons for upholding a punitive damages award).

63. *See Moriel*, 879 S.W.2d at 30 (justifying the court's decision to require bifurcated trials in punitive damage cases as protecting against punitive damage awards the court believes to be grossly excessive).

In addition, the court decided that appellate courts are required to justify their “factual sufficiency review of . . . punitive damage[ ] award[s]” by explaining “why that evidence either supports or does not support the punitive damage[ ] award.”<sup>64</sup> The court acknowledged that Texas juries

---

64. *Id.* at 31; see TEX. CIV. PRAC. & REM. CODE ANN. § 41.013 (Vernon 1997 & Supp. 2005) (providing that “an appellate court that reviews the evidence with respect to a finding by a trier of fact concerning liability for exemplary damages or with respect to the amount of exemplary damages awarded shall state, in a written opinion, the court’s reasons for upholding or disturbing the finding or award”); *Wilhelm v. Flores*, 133 S.W.3d 726, 732-33 (Tex. App.—Corpus Christi 2003, pet. filed) (providing the standard of review on a legal and factual sufficiency challenge). Initially, a court applies a no evidence standard of review when a challenge is made to a finding of fact by an argument that the jury’s finding is not supported by legally sufficient evidence. *Id.* at 732. The legal sufficiency challenge can only be sustained when: (1) there is a complete lack of evidence of a vital fact; (2) the record discloses no more than a mere scintilla of evidence to prove a vital fact; (3) the court is bound by rules of law or evidence from giving weight to the only evidence offered to prove a vital fact; or (4) the evidence establishes conclusively the opposite of the vital fact. *Id.* The reviewing court must view “the evidence in a light that tends to support the finding of the disputed fact” and disregard evidence and inferences contrary to the finding. *Id.* The no evidence-scintilla rule means that “[w]hen the evidence offered to prove a vital fact is so weak as to do no more than create a mere surmise or suspicion of its existence, the evidence is not more than a scintilla and, in legal effect, is no evidence.” *Id.* The no evidence-scintilla rule test is: “if reasonable minds cannot differ from the conclusion, then the evidence offered to support the existence of a vital fact lacks probative force, and it will be held to be the legal equivalent of no evidence.” *Id.* The Texas Supreme Court’s decisions in 2002 that clarified the standard of review for challenges based on legal and factual sufficiency were summarized in detail in the opinion in *Columbia Medical Center of Las Colinas v. Bush*, 122 S.W.3d 835, 843 (Tex. App.—Fort Worth 2003, pet. denied). Legal and factual sufficiency reviews must consider “whether the evidence is such that a fact finder could reasonably form a firm belief or conviction about the truth of the matter required to be established by clear and convincing evidence.” *Columbia Med. Ctr. of Las Colinas*, 122 S.W.3d at 843; see also *Cathey v. Meyer*, 115 S.W.3d 644, 666 (Tex. App.—Waco 2003) (finding the evidence was legally sufficient to support one aspect of the jury’s actual damage award after “[c]onstruing the evidence in the light most favorable to the jury’s finding, considering only the evidence and inferences which support the finding, and indulging every reasonable inference in favor of the finding”), *aff’d in part, rev’d in part on other grounds*, 167 S.W.3d 327 (Tex. 2005); *Sanchez v. Brownsville Sports Ctr.*, 51 S.W.3d 643, 653-54 (Tex. App.—Corpus Christi 2001, pet. granted, judgment vacated w.r.m.) (applying the no evidence-scintilla rule in a review of the legal sufficiency of the evidence while remembering that it is the jury’s role “to judge the credibility of the evidence, to assign the weight to be given to testimony, and to resolve inconsistencies within or conflicts among the witnesses’ testimony”); *C & D Robotics, Inc. v. Mann*, 47 S.W.3d 194, 201-02 (Tex. App.—Texarkana 2001, no pet.) (finding insufficient evidence to support the jury’s finding of malice necessary to support the exemplary damage award in a retaliatory discharge case, but finding sufficient evidence to support the compensatory and nonpecuniary damage awards); *Lesikar v. Rappeport*, 33 S.W.3d 282, 296 (Tex. App.—Texarkana 2000, pet. denied) (acknowledging the power of the jury and limiting the court’s role by stating that “we may not act as a thirteenth juror in assessing the evidence and the credibility of the witnesses,” but also finding the \$2 million punitive damage award excessive); *Reliable Consul-*

received adequate instructions on punitive damage factors,<sup>65</sup> limiting the jury's discretion,<sup>66</sup> but still felt the need for additional procedural safeguards which effectively substitute the court's opinion for the jury's verdict. One of the court's procedural safeguards requires bifurcation, upon proper motion, in all punitive damage cases.<sup>67</sup>

The requirement of a bifurcated trial for all punitive damage cases relies on the belief that bifurcation prevents both juror prejudice on liability findings against wealthy defendants and excessive awards for punitive damages. In *Moriel*, the court explained its adopted bifurcation process to separate the jury's determination of the amount of a punitive damage award from the question of liability for actual and punitive damages:

[T]he jury first hears evidence relevant to liability for actual damages, the amount of actual damages, and liability for punitive damages . . . , and then returns findings on these issues. If the jury answers the punitive damage liability question in the plaintiff's favor, the same jury is then presented evidence relevant only to the amount of punitive damages, and determines the proper amount of punitive damages, considering the totality of the evidence presented at both phases of the trial.<sup>68</sup>

---

tants, Inc. v. Jaquez, 25 S.W.3d 336, 341-43 (Tex. App.—Austin 2000, pet. denied) (concluding that the evidence was both legally and factually sufficient to support the jury's liability finding).

65. *Moriel*, 879 S.W.2d at 29 n.26.

66. See *id.* at 27 (introducing the new procedural standards for all future punitive damage cases to ensure the jury's punitive damage award is appropriate based on the defendant's conduct even though the applicable jury instruction may already limit the jury's discretion). See generally Tom Alan Cunningham & Paula K. Hutchinson, *Bifurcated Trials: Creative Uses of the Moriel Decision*, 46 BAYLOR L. REV. 807 (1994) (discussing the procedural safeguards in *Moriel* and the types of cases where bifurcation is necessary).

67. See TEX. CIV. PRAC. & REM. CODE ANN. § 41.009 (Vernon Supp. 2005) (requiring the court to provide a bifurcated trial upon motion by a defendant); TEX. R. CIV. P. 174(b) (codifying the court's decision requiring separate trials on separate issues to avoid prejudice or further inconvenience of the parties); see also 2 ROY W. McDONALD & ELAINE A. GRAFTON CARLSON, TEXAS CIVIL PRACTICE § 8:43 (2d. ed. 2003) (explaining the bifurcation procedure contained within the Texas Rules of Civil Procedure); C.R. McCorkle, Annotation, *Separate Trial of Issues of Liability and Damages in Tort*, 85 A.L.R.2D 9, 12-14 (2004) (citing cases wherein the question of the defendant's liability was tried first and separately from the question of recoverable damages under certain circumstances, or by power under a statute or court rule).

68. See *Moriel*, 879 S.W.2d at 30 (explaining different approaches to the bifurcation process for punitive damage cases). The court noted that "other states require bifurcation of the entire punitive damage claim, including liability and amount." *Id.* The court based its decision on bifurcation of only the amount of a punitive damage award on the policies of reducing risk of prejudice "while minimizing the confusion and inefficiency that can result from a bifurcated trial." *Id.*

The court's decision to order a bifurcated trial<sup>69</sup> is relevant to the ambiguity created by the changes made to the damages chapter of the Texas Civil Practice and Remedies Code. As a result of H.B. 4, when a jury is not unanimous in its liability findings for exemplary damages, it will never hear the issue of an award for exemplary damages.<sup>70</sup> In the first phase of a bifurcated trial, the Texas Civil Practice and Remedies Code does not allow the plaintiff to introduce evidence that is relevant only to the amount of the exemplary damages,<sup>71</sup> including information about the defendant's net worth.<sup>72</sup> The result of totally isolating the plaintiff from any award for exemplary damages may be exactly what the Texas Legislature intended.

An instruction informing the jurors that their liability findings must be unanimous in order for the plaintiff to receive any award for exemplary damages educates jurors and protects the plaintiff's interests in a bifurcated proceeding. However, protecting a plaintiff's interest is apparently not what the court intended in *Moriel* (or the Texas Legislature in passing H.B. 4). After *Moriel*, in *Greater Houston Transportation Co. v. Zrubeck*,<sup>73</sup> the Thirteenth Court of Appeals recognized that bifurcation "unfairly increases the plaintiff's burden of persuasion."<sup>74</sup> In addition to bifurcation, the unanimity requirements in H.B. 4 further distance a plaintiff from a punitive damage award.

### C. Texas Supreme Court Trends in Punitive Damage Award Cases

In addition to bifurcation of the proceedings, many of the Texas Supreme Court's decisions in the last twenty years, where the court substituted its opinion for that of the jury, reduced a jury's ability to award punitive damages. The court's decisions in the areas of redefining common law<sup>75</sup> and statutory duties,<sup>76</sup> interpreting contracts,<sup>77</sup> refining stan-

69. TEX. R. CIV. P. 174(b).

70. Robert J. Witte & James G. Ruiz, *House Bill 4, Article 13 Damages*, 7 J. TEX. CONSUMER L. 33, 35 (2003).

71. TEX. CIV. PRAC. & REM. CODE ANN. § 41.011(b) (Vernon 1997 & Supp. 2005).

72. *Id.* § 41.011(a)(6).

73. 850 S.W.2d 579 (Tex. App.—Corpus Christi 1993, writ denied).

74. See *Greater Houston Transp. Co. v. Zrubeck*, 850 S.W.2d 579, 588 (Tex. App.—Corpus Christi 1993, writ denied) (explaining that the existing Texas Rules of Civil Procedure 292 requirement that a verdict may be rendered in any cause by the occurrence, as to each and all answers made, of the same ten members of an original jury of twelve would increase a plaintiff's burden, and holding "that a second trial to the same jury conducted pursuant to TEX. R. CIV. P. 174(b) is a separate trial; thus, concurrence of the same ten jurors . . . is not required").

75. Phil Hardberger, *Juries Under Siege*, 30 ST. MARY'S L.J. 1, 14-18 (1998) (analyzing the Phillips/Hecht court's decisions that "attacked jury verdicts . . . by narrowing . . . com-

dards of review,<sup>78</sup> and overturning awards for punitive damages<sup>79</sup> have negatively affected Texas plaintiffs seeking punitive damages. Continuing an apparent trend, the Texas Supreme Court recently reversed the Eighth Court of Appeals's upholding of a jury's award of exemplary damages in *Tiller v. McLure*.<sup>80</sup> The Texas Supreme Court, based on its review of the evidence compared with the elements of the plaintiff's cause of action, found no evidence to support the jury's finding of an award.<sup>81</sup>

Another mode of attack on a jury's award of punitive damages is to question whether the amount of the award violates a defendant's constitutional rights.<sup>82</sup> In *Pacific Mutual Life Insurance Co. v.*

mon-law duty" and "chang[ing] the question to be given to a jury" which "virtually eliminated the cause of action for breaching this duty").

76. See *id.* at 34 (describing several cases where the "Phillips/Hecht [c]ourt . . . narrowed extra-contractual duties owed by insurers . . . by eliminating statutory remedies in the third-party context and, because of the sweeping nature of its holdings, perhaps attempting to do so in the first-party context").

77. See *id.* at 18 (reviewing the Texas Supreme Court's holdings in which it "limited the jury's role . . . by construing language as a matter of law" which allows "the [c]ourt to interpret [insurance] policy language narrowly, without the involvement of a jury"). The court finds the insurance policy language to be ambiguous and then determines policy coverage issues as a matter of law, paving the way for a defendant's motion for summary judgment. *Id.* at 21.

78. See *id.* at 39 (criticizing the Texas Supreme Court's "attempts at clarifying the standards of review for bad faith claims" as a reflection of the court's "distrust of juries"); see also W. Wendell Hall, *Standard of Review in Texas*, 34 ST. MARY'S L.J. 1, 7 (2002) (updating the standard of review Texas appellate courts primarily use in pretrial, trial, and post-trial proceedings).

79. See Phil Hardberger, *Juries Under Siege*, 30 ST. MARY'S L.J. 1, 47, 49-50 (1998) (opining that the Texas Supreme Court "expressed a deep reluctance to let juries award damages for particularly culpable behavior" and "showed a distinct reluctance to let the jury speak for the community," which "shows the [c]ourt's deep mistrust for the ability of juries to determine what is reasonable or unreasonable and how much in damages is necessary to compensate and punish").

80. 121 S.W.3d 709 (Tex. 2003).

81. See *Tiller v. McLure*, 121 S.W.3d 709, 710-11 (Tex. 2003) (concluding that as a matter of law, the jury's finding of extreme and outrageous conduct to support the plaintiff's cause of action for intentional infliction of emotional distress was not supported by the evidence). *But see* *Golden Eagle Archery, Inc. v. Jackson*, 116 S.W.3d 757, 761 (Tex. 2003) (reviewing whether a court of appeals applied the correct standard of review for factual sufficiency and noting the principle that "a court must not merely substitute its judgment for that of the jury . . . [T]he jury is the sole judge of the credibility of witnesses and the weight to be given to their testimony.").

82. See Jane Massey Draper, Annotation, *Excessiveness or Inadequacy of Punitive Damages in Cases Not Involving Personal Injury or Death*, 14 A.L.R.5TH 242 (2004) (analyzing cases where the amount of the punitive damage award was challenged on the grounds of excessiveness or inadequacy). Ms. Draper also notes the constitutional challenges to punitive damages under the Eighth and Fourteenth Amendments. *Id.* § 2 n.8-9. See generally *Tompkins v. Cyr*, 995 F. Supp. 664, 682 (N.D. Tex. 1998) (noting the crucial

*Haslip*,<sup>83</sup> the United States Supreme Court held that jury instructions that educate jurors about the nature and purpose of punitive damages satisfy due process concerns.<sup>84</sup> The constitutionality of punitive damage awards by Texas juries have been reviewed using tests created by the courts to determine if the awards are excessive.<sup>85</sup> These constitutionally

---

distinction between the Constitution's protection of outrageous speech, but not outrageous conduct); Randy R. Koenders, Annotation, *Propriety of Limiting to Issue of Damages Alone New Trial Granted on Ground of Inadequacy of Damages—Modern Cases*, 5 A.L.R.5TH 875 (2004) (reviewing the facts that courts use to determine whether to order a new trial on damages alone for cases where the adequacy of a damage award is challenged).

83. 499 U.S. 1 (1991).

84. *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 15-19 (1991). The United States Supreme Court affirmed the jury's discretion to award punitive damages based on the prevailing common law method of determining the amount of a punitive damage award based on the "gravity of the wrong and the need to deter similar wrongful conduct." *Id.* at 15; see also RONALD W. EADES, *JURY INSTRUCTIONS ON DAMAGES IN TORT ACTIONS* 100 (4th ed., LEXIS 1998) (providing a pattern jury instruction with the objective of informing a jury of the purpose of punitive damages). In Texas, the Civil Practice and Remedies Code requires that before a jury makes an exemplary damage award, it must consider "the definition and purposes of exemplary damages" as defined in section 41.001 of the Code. TEX. CIV. PRAC. & REM. CODE ANN. § 41.010(a) (Vernon Supp. 2005).

85. See *Fibreboard Corp. v. Pool*, 813 S.W.2d 658, 686-87 (Tex. App.—Texarkana 1991, writ denied) (reviewing constitutional tests used by the Texas Supreme Court in 1980 and 1981, and the United States Supreme Court in 1989 and 1991). In 1980, the Texas Supreme Court held that a punitive damage award was unconstitutionally excessive "[w]hen it becomes so manifestly violative of the constitutional prohibition against excessive fines as to shock the sense of mankind." *Id.* at 686 (citing *Pennington v. Singleton*, 606 S.W.2d 682, 690 (Tex. 1980)). In 1981, the Texas Supreme Court used a five-factor test to determine the constitutionality of a jury's punitive damage award. *Id.* The factors mandate that "the trial court must consider: (1) the nature of the wrong, (2) the character of the conduct involved, (3) the degree of culpability of the wrongdoer, (4) the situation and sensibilities of the parties, and (5) the extent to which the defendant's conduct offends the public's sense of justice and propriety." *Id.* (citing *Alamo Nat'l Bank v. Kraus*, 616 S.W.2d 908, 910 (Tex. 1981)). The Fourteenth Court of Appeals (Houston) considered: "(1) the frequency of the wrongful conduct; (2) the size of an award needed to deter similar wrongs in the future; and (3) the financial ability of the defendant." *Seminole Pipeline Co. v. Broad Leaf Partners, Inc.*, 979 S.W.2d 730, 752 (Tex. App.—Houston [14th Dist.] 1998, no pet.); see also *Glasscock v. Armstrong Cork Co.*, 946 F.2d 1085, 1095 (5th Cir. 1991) (applying Texas law and the *Kraus* test to uphold a punitive damage award with a 20:1 ratio between compensatory and punitive damages by finding the award was "reasonably proportioned to actual damages"). The court explained that the "proportionality requirement is simply a tool to help Texas courts determine when an exemplary damage award is the product of the jury's passion rather than its reason." *Id.* (citing *Wright v. Gifford-Hill & Co.*, 725 S.W.2d 712, 714 (Tex. 1987)). Additionally, the court recognized the difficulty a jury faces when attempting to objectively award punitive damages. *Id.* at 1095-96 (citing *State Farm Mut. Auto. Ins. Co. v. Zubiate*, 808 S.W.2d 590, 607 (Tex. Civ. App. 1991, writ denied)).

based tests are now part of the Texas Civil Practice and Remedies Code.<sup>86</sup>

Since the United States Supreme Court's 1996 decision in *BMW of North America v. Gore*<sup>87</sup> regarding the constitutionality of a punitive damage award, federal and state courts appear more likely to intrude on the function of a jury in awarding punitive damages.<sup>88</sup> The Supreme Court recently reversed and remanded a jury's \$145 million punitive damage award in *State Farm Mutual Automobile Insurance Co. v. Campbell*.<sup>89</sup> Following *Gore*, the court on remand in *Campbell* reduced the jury's award after substituting its opinion for that of the jury's on the reprehensibility of the defendant's actions.<sup>90</sup> Correspondingly, the Texas

86. TEX. CIV. PRAC. & REM. CODE ANN. § 41.011 (Vernon 1997 & Supp. 2005).

87. 517 U.S. 559 (1996).

88. See *BMW of N. Am. v. Gore*, 517 U.S. 559, 583-86 (1996) (holding that a jury's punitive damage award with a 500:1 ratio between actual damages and punitive damages, already reduced by the Alabama Supreme Court, was unconstitutionally excessive, and creating three guideposts for a court to use to evaluate whether a jury's punitive damage award is unconstitutionally excessive). The court's three guideposts were to review: (1) the degree of reprehensibility of the defendant's conduct; (2) the ratio between the harm suffered and the award; and (3) the difference between the remedy and those imposed in other civil cases. *Id.* at 574-75; see also Michelle J. Carey, Case Note, *BMW of North America v. Gore: A Misplaced Guide for Punitive Damage Awards*, 18 N. ILL. U. L. REV. 219, 237-38 (1997) (concluding that the Supreme Court's decision in *BMW of North America* resulted in "dismal implications" for the future of punitive damage awards). See generally *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 431 (2001) (concluding that the constitutional issue created under the Due Process Clause for a punitive damage award alleged to be grossly excessive punishment warrants de novo review by the Court).

89. 538 U.S. 408, 429 (2003), *remanded to* 98 P.3d 409 (Utah 2004), *cert. denied*, 125 S. Ct. 114 (2004). The Court remanded the case to the Utah Supreme Court based on its application of *BMW of North America* and a finding that the punitive award "was neither reasonable nor proportionate to the wrong committed." *Id.*

90. See *Campbell v. State Farm Mut. Auto. Ins. Co.*, 98 P.3d 409, 418-19 (Utah 2004), *cert. denied*, 125 S. Ct. 114 (2004) (holding on remand from the Supreme Court that a 145:1 ratio between compensatory and punitive damages was unconstitutional, but a 9:1 ratio was constitutional and complied with the Court's guideposts in *BMW of North America v. Gore*). The Utah Supreme Court noted that the Supreme Court's recognition of the authority of state law to determine the factors that a jury may use to determine the amount of a punitive damage award, and reasserted the court's authority to determine a punitive damage award. *Id.* at 411-12; see also Joseph Sanders, *Punitive Damages in Consumer Actions*, 8 J. TEX. CONSUMER L. 22, 25 (2004) (concluding, "the most important aspect of the *Campbell* opinion is not the ratio discussion, but the evidentiary ruling that punitive damages should be based on the particular case at hand"); Marc A. Johnston, Recent Case, *The Supreme Court's New Take on Punitive Damages in State Farm Mutual Automobile Insurance Co. v. Campbell: Criticism and Strategies for Plaintiffs' Lawyers Navigating the New Rules*, 39 TORT TRIAL & INS. PRAC. L.J. 1093, 1094 (2004) (criticizing the Court's standard of review for failure to "give adequate deference to the trial court's or the jury's determinations of demeanor and witness credibility, which may be crucial to the assess-

Supreme Court reviews a jury's damage award to require a new trial when the "amount of damages awarded is so against the great weight and preponderance of the evidence as to be manifestly unjust, shock the conscience, or clearly demonstrate bias."<sup>91</sup> Texas courts continue to apply procedural safeguards to ensure that jury awards for punitive damages are properly calculated against defendants. Even so, the appropriate inquiry asks whether jurors should have that much power to apply their discretion when awarding punitive damages and whether courts could exercise too much control over juries.

#### D. *Procedural Safeguards and Jury Discretion*

The combination of the prevailing judicial approach to the review of punitive damage awards, controversy over punitive damage awards, and increased political pressure on the Texas Legislature led to the passage of H.B. 4. Apparently the existing procedural safeguards to control a jury's discretion were not working, and in 2003 something else had to be done.

Numerous studies reflect conflicting claims of whether punitive damage awards are out of control—requiring or disputing justifications for

---

ment of punitive damages"). The *BMW of North America* guideposts applied in *Campbell* present "substantial roadblocks" and "significant constraints as to the type and relevance of the evidence that is admissible, and lack the ability to request damages for a defendant's out-of-state acts," further limiting a plaintiff's ability to obtain a punitive damage award. *Id.* at 1117; Lorraine Woellert & Mike France, *Tort Reform Has Friends in High Places*, BUS. WK. ONLINE, Apr. 21, 2003, [http://www.businessweek.com/cgi-bin/register/archiveSearch.cgi?h=03\\_16/b3829074.htm](http://www.businessweek.com/cgi-bin/register/archiveSearch.cgi?h=03_16/b3829074.htm) (describing the Supreme Court's action reducing punitive damages in *Campbell* as "the biggest tort reform victory in years" and a defining moment in the history of punitive damage awards) (on file with the *St. Mary's Law Journal*). *But see* Gary S. Becker, *How to Put the Right Cap on Punitive Damages*, BUS. WK. ONLINE, Sept. 15, 2003, [http://www.businessweek.com/cgi-bin/register/archiveSearch.cgi?h=03\\_37/63849036\\_m2007.htm](http://www.businessweek.com/cgi-bin/register/archiveSearch.cgi?h=03_37/63849036_m2007.htm) (commenting on Justice Scalia's dissent in *Campbell*, where he argued "that the determination of punitive damages should continue to be left to individual judges and juries") (on file with the *St. Mary's Law Journal*). *See generally* *Scribner v. Waffle House, Inc.*, 14 F. Supp. 2d 873, 937-46 (N.D. Tex. 1998) (reviewing several Fifth Circuit cases following the Supreme Court's decisions in *BMW of North America v. Gore*, *TXO Production Corp. v. Alliance Resources Corp.*, and *Pacific Mutual Life Insurance Co. v. Haslip*), *vacated*, 62 F. Supp. 2d 1186 (N.D. Tex. 1999); *In re Lile*, 161 B.R. 788, 792-93 (Bankr. S.D. Tex. 1993) (applying the *Haslip* decision to find that the bankruptcy court properly considered the amount of a punitive damage award against the IRS), *aff'd in part*, 43 F.3d 668 (5th Cir. 1994).

91. *Golden Eagle Archery, Inc. v. Jackson*, 116 S.W.3d 757, 773 (Tex. 2003). *See generally* David L. Perry & Patricia A. Shackelford, *Arguing Personal Injury Damages: New Developments and Historically Permitted Arguments*, Tex. Trial Lawyers Ass'n Mid-Year Bd. Meeting & Seminar 3-4 (June 11-12, 2004) (reviewing *BMW of North America v. Gore*, *State Farm v. Campbell*, and other cases on the issue of the constitutionality of exemplary damage awards) (on file with the *St. Mary's Law Journal*).



tort reform.<sup>92</sup> Both sides of the argument recognize the power of juries to award punitive damages and the necessity of providing juries with proper instructions on the issue of exemplary damages.<sup>93</sup> The term “punitive damages” commonly invokes emotional responses and brings to mind headlines announcing astronomical jury awards,<sup>94</sup> punishment for abhorrent behavior by large companies with deep pockets,<sup>95</sup> excessive lit-

---

92. See, e.g., Stephen Daniels & Joanne Martin, *Myth and Reality in Punitive Damages*, 75 MINN. L. REV. 1, 33 (1990) (concluding that “[c]ontrary to the rhetoric of the reformers, punitive damages were not routinely awarded during the early 1980’s [sic]”); Victor E. Schwartz et al., *Judges, Juries, and Punitive Damages: An Empirical Study – or a Tempest in a Teapot?*, LITIG. NEWSL. (The Federalist Soc’y), 2003, <http://www.fed-soc.org/Publications/practicegroupnewsletters/PG%20Links/juries.htm> (last visited Sept. 25, 2004) (criticizing the accuracy of an empirical study of state court trials for not focusing on the causes of action and jurisdictions where excessive awards for punitive damages are more probable) (on file with the *St. Mary’s Law Journal*); *Punitive Damage Awards in Financial Injury Jury Verdicts*, 1997 RAND Inst. for Civil Justice, <http://www.rand.org/publications/RB/RB9028> (last visited Sept. 25, 2004) (presenting the results of an empirical study of state court trials involving financial injury verdicts, which were found to be more likely than personal injury verdicts to include punitive damages) (on file with the *St. Mary’s Law Journal*).

93. See Alan Calnan, *Ending the Punitive Damage Debate*, 45 DEPAUL L. REV. 101, 104 (1995) (questioning whether punitive damages are even justified by examining the history, rationale, and weaknesses of punitive damage awards); Thomas M. Melsheimer & Steven H. Stodghill, *Due Process and Punitive Damages: Providing Meaningful Guidance to the Jury*, 47 SMU L. REV. 329, 333 (1994) (arguing that the problem with punitive damage awards lies in the inadequacy of jury instructions to guide the jury in using its discretion); William Tucker, *A Big Fat Jury Verdict*, WKLY. STANDARD, June 14, 2004, at 16, available at 2004 WLNR 15245795 (criticizing a jury’s punitive damage award and citing studies that indicate jurors are not capable of determining a punitive damage award) (on file with the *St. Mary’s Law Journal*). Mr. Tucker refers to research finding three factors to explain a jury’s decision to award punitive damages. *Id.* The first factor is that “juries will give larger awards to plaintiffs who are viewed as ‘local.’” *Id.* The second factor is that “juries will give higher awards when the defendants are viewed as having a lot of money.” *Id.* The third factor is that “juries will give higher awards when the plaintiff attorney asks for higher amounts.” *Id.*

94. See Stephanie Mencimer, *False Alarm*, WASH. MONTHLY, Oct. 2004, at 18, 18-19, available at 2004 WL 15811174 (arguing that the insurance industry, tobacco companies, and others control advertising and the media by overstating the frequency and the amount of punitive damage awards to advocate for tort reform that “would end the civil jury’s role in many lawsuits”). Ms. Mencimer describes the perpetuation of “anti-lawsuit propaganda” as an assault on the civil jury system that “gravely jeopardized Americans’ unique democratic right to participate on civil juries” and is targeted at potential jurors. *Id.* at 19.

95. See STEPHEN DANIELS & JOANNE MARTIN, CIVIL JURIES AND THE POLITICS OF REFORM 202-04 (1995) (defending punitive damage awards for the purpose of effectively deterring heinous conduct while asserting that the proponents of tort reform represent the very entities that can only be punished through punitive damage awards). The authors label the materials gathered by proponents of tort reform as “press kits,” which are used to spread horror stories and data that inaccurately “characterize the punitive damages system as one so seriously flawed,” and distorts the frequency and amount of punitive damage

igation,<sup>96</sup> and justice for underdogs or an undeserved windfall for plaintiffs.<sup>97</sup> Jurors are blamed for awarding inexplicable punitive damage awards and creating unacceptable risk, uncertainty, and fear for defendants. Obviously, jurors bring their emotions to the jury room during deliberations. But a jury's power to calculate a punitive damage award based on emotions must be tempered with some guarantee of predictability and stability. Consequently, jury instructions should "provide . . . a meaningful, sensible framework for . . . decisionmaking" in order to stabilize jurors' emotions and guide their discretion.<sup>98</sup>

In addition to jury instructions and bifurcation, courts administer other procedural safeguards to monitor a jury's discretion to award punitive damages to a plaintiff. For example, courts decide whether prospective jurors can be questioned during voir dire about their attitude toward tort reform and punitive damages,<sup>99</sup> including their exposure to media and

awards. *Id.* at 205; see also Sylvia M. Demarest & David E. Jones, *Exemplary Damages As an Instrument of Social Policy: Is Tort Reform in the Public Interest?*, 18 ST. MARY'S L.J. 797, 805-21 (1987) (discussing the importance of punitive damages as part of social policy to deter wrongful conduct and presenting ways to increase the effectiveness of punitive damage awards); Michael L. Rustad, *How the Common Good Is Served by the Remedy of Punitive Damages*, 64 TENN. L. REV. 793, 795-809 (1997) (criticizing tort reform and arguing that punitive damage awards in product liability cases are in the public's interest).

96. See HOUSE RESEARCH ORG., BILL ANALYSIS, Tex. H.B. 4, 78th Leg., R.S. 43 (2003), reprinted in CAPITOL RESEARCH SERV., THE LEGISLATIVE HISTORY OF TEX. H.B. 4, 78TH LEG., R.S. (2003): ARTICLE 13, DAMAGES, at 16, ex. 19 (2003) (summarizing the arguments of H.B. 4 supporters relating to exemplary damages).

97. See Michelle J. Carey, Case Note, *BMW of North America v. Gore: A Misplaced Guide for Punitive Damage Awards*, 18 N. ILL. U. L. REV. 219, 219-20 (1997) (listing arguments against punitive damage awards). The author provides four areas of attack against awards for punitive damages: (1) optimal deterrence is not achieved; (2) over-deterrence actually results; (3) excessive litigation is encouraged; and (4) compensatory damages fully compensate plaintiffs. *Id.*; see also Stephen Daniels & Joanne Martin, *Myth and Reality in Punitive Damages*, 75 MINN. L. REV. 1, 14 (1990) (listing four propositions made by supporters of tort reform: "punitive damages are routinely awarded, punitive damages are routinely awarded in large amounts, the frequency and size of these awards are rapidly increasing;" and the trend is "national in scope"). The authors also describe the behavior by a defendant warranting punitive damages as "malicious, willful, wanton, oppressive, or outrageous." *Id.* at 7; Posting of Dr. Juris, *What Is Tort Reform – and Why Is It Bad for the Public?*, Oct. 30, 2003, [http://www.corpreform.typepad.com/corpreform/2003/10/what\\_is\\_tort\\_re.html](http://www.corpreform.typepad.com/corpreform/2003/10/what_is_tort_re.html) (recounting one of the most famous punitive damage awards in America involving Ms. Stella Liebeck, who received a large punitive damage jury award for personal injuries sustained when she accidentally spilled a hot cup of McDonald's coffee in her lap) (on file with the *St. Mary's Law Journal*).

98. Thomas M. Melsheimer & Steven H. Stodghill, *Due Process and Punitive Damages: Providing Meaningful Guidance to the Jury*, 47 SMU L. REV. 329, 333 (1994).

99. See generally Richard L. Ruth, Annotation, *Propriety of Inquiry on Voir Dire As to Juror's Attitude Toward, or Acquaintance with Literature Dealing with, Amount of Damage Awards*, 63 A.L.R.5TH 285 (2004) (comparing cases in which a party could question

tort reform advertising campaigns.<sup>100</sup> Further, the Texas Civil Practice and Remedies Code provides that the jury must first make an award to the plaintiff for actual damages before it can award exemplary damages.<sup>101</sup> But while the Texas Supreme Court recognized the importance of accurate jury instructions explaining the Code's unanimity requirements as an additional procedural safeguard to control a jury's discretion, the court's January 27, 2005 "missing" jury instruction may have gone too far.

---

prospective jurors about their attitudes toward large damage awards and tort reform, with cases wherein courts have prohibited such an inquiry).

100. See *Babcock v. Nw. Mem'l Hosp.*, 767 S.W.2d 705, 707-09 (Tex. 1989) (finding an abuse of discretion by the trial court). The Texas Supreme Court held that a trial court committed reversible error when it refused to allow a party to question prospective jurors during voir dire about insurance industry advertisements concerning the unavailability and cost of insurance allegedly caused by jury verdicts. *Id.* The court discussed appellate court decisions that held parties have a right to question potential jurors during voir dire about possible prejudice caused by tort reform advertising. *Id.*; see also *Nat'l County Mut. Fire Ins. Co. v. Howard*, 749 S.W.2d 618, 621 (Tex. App.—Fort Worth 1988, writ denied) (finding that the large amount of publicity surrounding 1987 Texas tort reform resulted in questionable advertisements relevant to the issue of prejudice, regardless of whether the defendants were insured).

101. TEX. CIV. PRAC. & REM. CODE ANN. § 41.004(a) (Vernon Supp. 2005); see *Riley v. Champion Int'l Corp.*, 973 F. Supp. 634, 641-42 (E.D. Tex. 1997) (applying Texas law that recovery of actual damages is a prerequisite to receipt of exemplary damages); *Twin City Fire Ins. Co. v. Davis*, 904 S.W.2d 663, 665 (Tex. 1995) (stressing that actual damages resulting from a tort must be proven before punitive damages can be awarded); *Fed. Express Corp. v. Dutschmann*, 846 S.W.2d 282, 284 (Tex. 1993) (holding that there cannot be a punitive damage award in the absence of an independent tort and actual damages); *Nabours v. Longview Sav. & Loan Ass'n*, 700 S.W.2d 901, 903 (Tex. 1985) (following precedent that "[e]ven in cases where actual damages are *not recoverable*, it is still necessary to allege, prove and secure jury findings on the existence and amount of actual damage sufficient to support an award of punitive damage"); *Doubleday & Co. v. Rogers*, 674 S.W.2d 751, 754 (Tex. 1984) (recognizing that Texas cases unanimously hold that "recovery of actual damages is a prerequisite to receipt of exemplary damages"); *Cathey v. Meyer*, 115 S.W.3d 644, 666-67 (Tex. App.—Waco 2003) (determining that a plaintiff cannot receive exemplary damages where there is no evidence of actual damages arising out of alleged fraud related to development projects), *aff'd in part, rev'd in part on other grounds*, 167 S.W.3d 327 (Tex. 2005); cf. *Alcatel USA, Inc. v. Cisco Sys.*, 239 F. Supp. 2d 660, 674 (E.D. Tex. 2002) (denying a plaintiff statutory damages that were contingent on actual damages in the absence of a recovery for actual damages). See generally Richard C. Tinney, Annotation, *Sufficiency of Showing of Actual Damages to Support Award of Punitive Damages – Modern Cases*, 40 A.L.R.4TH 11 (1985 & Supp. Aug. 2005) (reviewing cases where courts addressed whether a sufficient showing for actual damages supported an award for punitive damages).

### III. CIVIL JURY INSTRUCTIONS

#### A. *Drafting Objectives and Fundamentals*

A trial judge is responsible for providing jury instructions, including instructions about what verdict the law requires if the jury makes certain factual findings.<sup>102</sup> Properly drafted jury instructions or pattern jury charges must reflect the current law<sup>103</sup> and articulate the instruction in a way to prevent juror confusion and reversal on the ground of erroneous instructions. Trial courts must ensure that jury charges are “logical, simple, fair, legally correct, and complete.”<sup>104</sup> General criticisms of pattern jury charges often lament that they prevent independent thought and adaptation based on the individual case circumstances.<sup>105</sup> Other criticisms include the failure of a jury charge to inform a jury that a punitive damage award must be proportional to actual damages to be preserved on appeal.<sup>106</sup>

102. See LINDA R. MONK, *THE WORDS WE LIVE BY: YOUR ANNOTATED GUIDE TO THE CONSTITUTION* 183 (Judy Pray ed., 2003) (explaining the Seventh Amendment’s protection of a trial by jury in federal civil cases and the judge’s role in determining the law that is applicable to the facts determined by the jury, and combining the law and facts in the jury instruction).

103. See Sylvia Walbolt & Cristina Alonso, *Jury Instructions: A Road Map for Trial Counsel*, GPSOLO, Sept. 2004, at 32 (explaining the process of drafting jury instructions or modifying pattern instructions). The authors explain the goals of jury instructions and warn against making mistakes by overlooking revisions to applicable law in favor of using a pattern jury instruction. *Id.*; see also 34 T. RAY GUY & NANCY SAINT-PAUL, *TEXAS PRACTICE SERIES: THE JURY CHARGE IN TEXAS CIVIL LITIGATION* § 1.6 (3d ed. 2003 & Supp. 2005) (advising that it is not an abuse of discretion when a jury charge follows the language of a statute and subsequently asks for an answer on the jury’s liability decision).

104. See *Styers v. Schindler Elevator Corp.*, 115 S.W.3d 321, 325 (Tex. App.—Texarkana 2003, pet. denied) (citing *Hyundai Motor Co. v. Rodriguez*, 995 S.W.2d 661, 664 (Tex. 1999)) (considering the definitions provided by the trial court in the jury charge). A trial court has more discretion in submitting definitions than in its jury charge. *Id.*

105. See ROBERT G. NIELAND, *PATTERN JURY INSTRUCTIONS: A CRITICAL LOOK AT A MODERN MOVEMENT TO IMPROVE THE JURY SYSTEM* 39-49 (1980) (evaluating the criticisms of pattern jury instructions, including that they are too abstract, discourage flexibility, and are argumentative). The author also evaluates the benefits of pattern jury instructions, discussing how they can be effective if properly written because “[t]hey tend to promote impartiality, accuracy, and uniformity.” *Id.* at 53; see also 34 T. RAY GUY & NANCY SAINT-PAUL, *TEXAS PRACTICE SERIES: THE JURY CHARGE IN TEXAS CIVIL LITIGATION* § 1.1 (3d ed. 2003 & Supp. 2005) (noting that the jury charge should “submit fact issues for the jury’s decision logically, simply, clearly, fairly, correctly, and completely”); Don Musser, *Instructing the Jury—Pattern Instructions*, 6 AM. JUR. TRIALS § 923 at 9 (2003), (recommending that pattern jury instructions be written affirmatively and be “conversational, understandable, unslanted, and accurate”).

106. See Robert E. Goodfriend, *Preserving Error in Punitive Damage Cases*, 53 TEX. B.J. 1282, 1288 (1990) (criticizing the unfairness of the Texas courts’ practice of concealing from the jury the appellate standards that will be applied to determine the constitutionality

### B. *Standard of Review*

Civil jury instructions should accurately reflect H.B. 4's amendments to the Texas Civil Practice and Remedies Code. The judgment of a court based on an error in the jury charge is reversible unless the error was harmless.<sup>107</sup> The appellate standard of review of a jury charge determines whether the trial court's charge was an abuse of discretion.<sup>108</sup> While a trial court does have broad discretion to determine the instructions in submitting issues to the jury, a jury instruction "must (1) assist the jury, (2) accurately state the law, and (3) find support in the pleadings and the evidence."<sup>109</sup> No error occurs when the jury charge does not confuse the jury and resolves the controlling issues contained in the pleadings.<sup>110</sup> A jury charge that follows civil statutory language and then asks a statutory-controlling question is not an abuse of discretion.<sup>111</sup>

---

of a jury's exemplary damage award). The author suggests jury instructions advising the jury of the factors that appellate courts use to review an exemplary damage award to ensure that the jury is guided to comply with the due process and equal protection clauses of both the Texas and United States Constitutions. *Id.* at 1292.

107. *See* *Reinhart v. Young*, 906 S.W.2d 471, 473 (Tex. 1995) (applying Texas Rule of Appellate Procedure 81(b)(1), which provides that "[e]rror in the jury charge is reversible only if, in the light of the entire record, it was reasonably calculated to and probably did cause the rendition of an improper judgment"); *see also* *Quantum Chem. Corp. v. Toenies*, 47 S.W.3d 473, 480 (Tex. 2001) (following the Texas Rules of Appellate Procedure and requiring the entire record to be examined to determine whether the instruction probably caused an improper judgment); *Freudiger v. Keller*, 104 S.W.3d 294, 295-96 (Tex. App.—Texarkana 2003, pet. denied) (examining a jury instruction based on whether the error resulted in an improper judgment); 34 T. RAY GUY & NANCY SAINT-PAUL, TEXAS PRACTICE SERIES: THE JURY CHARGE IN TEXAS CIVIL LITIGATION § 1.34 (3d ed. 2003 & Supp. 2005) (reviewing the appellate standards for review of Texas civil jury charges).

108. *Tex. Dep't of Human Servs. v. E.B.*, 802 S.W.2d 647, 649 (Tex. 1990); *In re J.T.G.*, 121 S.W.3d 117, 128 (Tex. App.—Fort Worth 2003, no pet.).

109. *In re J.T.G.*, 121 S.W.3d at 129; *see also* *Fogus v. Moreno*, No. 04-03-00679-CV, 2004 WL 1562068, at \*2 (Tex. App.—San Antonio July 14, 2004, no pet.) (mem. op.) (discussing a litigant's right to have the trial court submit disputed fact issues and controlling issues to a jury).

110. *Friday v. Spears*, 975 S.W.2d 699, 700 (Tex. App.—Texarkana 1998, no pet.).

111. *See In re J.T.G.*, 121 S.W.3d 117, 129 (Tex. App.—Fort Worth 2003, no pet.) (holding that a jury charge that followed the statutory language controlling parental termination rights properly assisted the jury and was not an abuse of discretion); 34 T. RAY GUY & NANCY SAINT-PAUL, TEXAS PRACTICE SERIES: THE JURY CHARGE IN TEXAS CIVIL LITIGATION § 1.6 (2003 & Supp. 2005) (maintaining the necessity of a jury charge based on liability under a civil statute to track the statutory language); *see also* *State Farm Lloyds v. Nicolau*, 951 S.W.2d 444, 450-51 (Tex. 1997) (finding no basis for the jury's finding of malice in a breach of contract and bad faith lawsuit by applying the plain language of the applicable code, and noting that the jury instruction correctly tracked the statutory language); *Spencer v. Eagle Star Ins. Co. of Am.*, 876 S.W.2d 154, 157 (Tex. 1994) (determining whether a jury question was defective by recognizing that a jury charge should track the language of a statutory provision as closely as possible).

Usually the submission of the damage issues to the jury remains independent from, and conditional upon, findings on the liability issues.<sup>112</sup> To preserve an error in the charge for appeal, the complaining party must make a proper and timely objection.<sup>113</sup> Obviously, the standard of review for error requires an accurate jury charge and courts must follow the Texas Rules of Civil Procedure in instructing a jury. Yet, the missing jury instruction in H.B. 4's amendment to the Texas Civil Practice and Remedies Code concealed the actual unanimity requirements, and did not accurately and completely state the applicable law. But did the Texas Supreme Court's 2005 order accurately and completely state H.B. 4's amendments?

### C. *Use of Pattern Jury Charges in Texas*

The Texas Rules of Civil Procedure require a court to give both admonitory instructions to the jury<sup>114</sup> and instructions with definitions to assist the jury in reaching a verdict.<sup>115</sup> Rule 277 specifically forbids the court from commenting directly on the weight of the evidence,<sup>116</sup> or “ad-

112. See *Baker v. Turken*, 630 S.W.2d 454, 455 (Tex. App.—Fort Worth 1982, writ ref'd n.r.e.) (reviewing Rule 277 and opining that despite changes made to the rule, a plaintiff is still entitled to an independent submission of special issues on damages); see also *Castle Tex. Prod. Ltd. P'ship v. Long Trusts*, 134 S.W.3d 267, 277 (Tex. App.—Tyler 2003, pet. denied) (holding that no basis existed for the exemplary damage award based on the predicate theories of recovery).

113. *Fethkenher v. Kroger Co.*, 139 S.W.3d 24, 31 (Tex. App.—Fort Worth 2004, no pet.). “The test for preservation of a jury charge complaint is whether the party made the trial court aware of the complaint, timely and plainly, and obtained a ruling.” *Id.*; see *Phippen v. Deere & Co.*, 965 S.W.2d 713, 719 (Tex. App.—Texarkana 1998, no pet.) (concluding that failure to raise an objection to a verdict for exemplary damages before the jury was discharged constituted waiver of the objection to the issue).

114. TEX. R. CIV. P. 226a.

115. See *id.* 277 (requiring the court in all jury cases to submit broad-form questions to the jury along with instructions and definitions to enable the jury to reach a verdict); see also 71 TEX. JUR. 3D *Trial & Alternative Dispute Resolution* § 311 (2004) (discussing the court's considerable discretion to provide definitions and instructions to the jury and listing terms that require a definition). The court's discretion extends to adding definitions to the pattern jury charge. *Id.*

116. See *Garcia v. Sky Climber, Inc.*, 470 S.W.2d 261, 265 (Tex. App.—Houston [1st Dist.] 1971, writ ref'd n.r.e.) (holding that the judge's comment on the weight of evidence was impermissible, and that by adding a definition to the charge the jury could have interpreted the court's opinion on the answers to the special issues); see also 4 ROY W. McDONALD & ELAINE A. GRAFTON CARLSON, TEXAS CIVIL PRACTICE § 22:12 (2d ed. 2001) (explaining Rule 277's prohibition on commenting on the weight of the evidence in the charge); cf. Gary D. Spivey, Annotation, *Verdict-Urging Instructions in Civil Case Commenting on Weight of Majority View or Authorizing Compromise*, 41 A.L.R.3D 845, 848-51 (2004) (considering the coercive effect of verdict-urging instructions that comment on the weight of the majority view or authorize the jurors to compromise).

vis[ing] the jury of the effect of [its] answers,"<sup>117</sup> unless the comment or advice is only incidental as part of an instruction or definition. Broad-form<sup>118</sup> submission of questions to a jury is required whenever feasible under Rule 277.<sup>119</sup> Moreover, the rule allows the court to "predicate the damage question or questions upon affirmative findings of liability."<sup>120</sup>

117. TEX. R. CIV. P. 277; see 4 ROY W. McDONALD & ELAINE A. GRAFTON CARLSON, TEXAS CIVIL PRACTICE § 22:33 (2d ed. 2001) (summarizing damage questions to a jury and applying Rule 277); 34 T. RAY GUY, TEXAS PRACTICE SERIES: THE JURY CHARGE IN TEXAS CIVIL LITIGATION § 3.8 (3d ed. 2003) (summarizing Rule 277 of the Texas Rule of Civil Procedure, which prohibits comments about the weight of the evidence or the effect of the jury's answers in the court's charge to the jury); see also H.E. Butt Grocery Co. v. Bilotto, 985 S.W.2d 22, 25 (Tex. 1998) (Gonzalez, J., concurring) (explaining that the court's holding is based on Rule 277 permitting conditional damages jury instructions). Justice Gonzalez wrote that the court's holding clearly did not overrule existing case law prohibiting the court from directly informing a jury of the legal effect of its answers. *Id.*

118. See Burk Royalty Co. v. Walls, 616 S.W.2d 911, 924-25 (Tex. 1981) (overruling cases requiring a separate and distinct submission of issues and discussing the court's other cases where broad submissions were approved); Mobil Chem. Co. v. Bell, 517 S.W.2d 245, 255 (Tex. 1974) (holding that, under Rule 277, "the submission of a broad issue inquiring generally whether the defendant was negligent is not error and is not subject to the objection that the single issue inquires about several elements or issues"); see also Harris County v. Smith, 96 S.W.3d 230, 231-32 (Tex. 2002) (finding harmful error in a broad-form jury question that included an element of damages where there was no evidence that the plaintiff sustained any damages related to the element); Torrington Co. v. Stutzman, 46 S.W.3d 829, 838 (Tex. 2000) (finding a broad-form question erroneous for failure to include all essential elements necessary to find negligence); Crown Life Ins. Co. v. Casteel, 22 S.W.3d 378, 389 (Tex. 2000) (holding that it was harmful error to include an improper liability theory in a single broad-form question); Urista v. Bed, Bath, & Beyond, Inc., 132 S.W.3d 517, 523 (Tex. App.—Houston [1st Dist.] 2004, pet. granted) (holding that it was reversible error to commingle a valid negligence theory with an invalid theory in a single broad-form jury instruction); Ridgecrest Ret. & Healthcare v. Urban, 135 S.W.3d 757, 763 (Tex. App.—Houston [1st Dist.] 2004, pet. denied) (finding harmful error in a jury instruction based on an invalid theory of liability combined with a valid theory, where the court could not determine whether the jury's verdict was based on the invalid theory); KPH Consolidation, Inc. v. Romero, 102 S.W.3d 135, 161-62 (Tex. App.—Houston [14th Dist.] 2003) (Seymore, J., concurring) (criticizing the trial court for using a broad-form charge when it was aware of the potential for error in submitting a single liability apportionment question with two liability questions), *aff'd*, 166 S.W.3d 212 (Tex. 2005). Justice Seymore reminded lawyers and judges that Rule 277 is not absolute and encourages trial judges to use their discretion in charging the jury in order to reduce appeals and avoid retrials. *Id.* See generally 34 T. RAY GUY, TEXAS PRACTICE SERIES: THE JURY CHARGE IN TEXAS CIVIL LITIGATION § 1.3 (3d ed. 2003) (explaining the historical development of Texas civil jury charges, beginning with general charges, special issues, and then broad-form questions).

119. TEX. R. CIV. P. 277.

120. *Id.*; see also 4 ROY W. McDONALD & ELAINE A. GRAFTON CARLSON, TEXAS CIVIL PRACTICE § 23:19(b) n.11 (2d ed. 2001) (citing H.E. Butt Grocery Co. v. Bilotto, 985 S.W.2d 22, 25 (Tex. 1998)) (recognizing the court upheld a jury instruction that based the damage question on a percentage finding for negligence). In addition, courts must decide

The State Bar of Texas Committee on Pattern Jury Charges<sup>121</sup> developed, and continues to update and publish, a set of pattern jury charges.<sup>122</sup> Although not mandatory, judges and attorneys use the Texas Pattern Jury Charges (TPJC) when preparing jury instructions in accordance with broad-form submission practice.<sup>123</sup> The 2003 edition of the TPJC cited the changes rendered by H.B. 4 and delineated actions filed on or after September 1, 2003, with admonitory instructions in cases with

---

whether a jury's determination must include liability for punitive damages before a plaintiff may introduce evidence of the defendant's wealth. *See generally* James McLoughlin, Annotation, *Necessity of Determination or Showing of Liability for Punitive Damages Before Discovery or Reception of Evidence of Defendant's Wealth*, 32 A.L.R.4TH 432 (2004) (analyzing cases where courts have determined whether a finding of liability for punitive damages is required, or not required, before the defendant's wealth can be considered).

121. *See* STATE BAR OF TEX. & TEX. YOUNG LAWERS ASS'N, 2004-2005 VOLUNTEER AND STAFF GUIDE, STATE BAR COMMITTEES, at 23, 29 (2004) (listing the members of the four State Bar of Texas Pattern Jury Charge Committees responsible for revising the four volumes of the published TPJC). In addition, the State Bar of Texas Guide includes the date each committee was created, the budget code number, the purpose of the committee, and the officers of each committee. *Id.*

122. COMM. ON PATTERN JURY CHARGES, STATE BAR OF TEX., TEXAS PATTERN JURY CHARGES—BUSINESS, CONSUMER, INSURANCE & EMPLOYMENT (2005); COMM. ON PATTERN JURY CHARGES, STATE BAR OF TEX., TEXAS PATTERN JURY CHARGES—FAMILY (2005); COMM. ON PATTERN JURY CHARGES, STATE BAR OF TEX., TEXAS PATTERN JURY CHARGES—GENERAL NEGLIGENCE & INTENTIONAL PERSONAL TORTS (2005); COMM. ON PATTERN JURY CHARGES, STATE BAR OF TEX., TEXAS PATTERN JURY CHARGES—MALPRACTICE, PREMISES & PRODUCTS (2005).

123. *See* H.E. Butt Grocery Co. v. Bilotto, 928 S.W.2d 197, 199-200 (Tex. App.—San Antonio 1996) (describing the Texas Pattern Jury Charge as “a widely accepted source throughout the legal community,” which is based on the interpretation of the current statutory and case law by the State Bar PJC Committees), *aff'd*, 985 S.W.2d 22 (Tex. 1998); *see also* Green Tree Fin. Corp. v. Garcia, 988 S.W.2d 776, 780 (Tex. App.—San Antonio 1999, no pet.) (deciding the issue of whether the TPJC accuracy included predicate requirements for determining exemplary damages against the defendant and finding that the PJC was not defective). The *Green Tree* court cited *Bilotto's* comments regarding the bench and bar's acceptance of the Texas Pattern Jury Charges and cited other cases where the Texas Supreme Court did not find the TPJC defective. *Id.*; *Murphy v. Waldrip*, 692 S.W.2d 584, 592 (Tex. App.—Fort Worth 1985, writ ref'd n.r.e.) (commenting that the Pattern Jury Form Book is not intended to be the only source for the appropriate jury instruction language); 4 ROY W. McDONALD & ELAINE A. GRAFTON CARLSON, TEXAS CIVIL PRACTICE § 22:16 (2d ed. 2001) (explaining the Texas Pattern Jury Charges and the Texas Supreme Court's position on use of the TPJC); 71 TEX. JUR. 3D *Trial & Alternative Dispute Resolution* § 277 (2004) (explaining reliance by the bench and bar on the TPJC and the Texas Supreme Court's actions relating to the TPJC); *cf.* John D. Perovich, Annotation, *Construction of Statutes or Rules Making Mandatory the Use of Pattern or Uniform Approved Jury Instructions*, 49 A.L.R.3D 128 (2004) (reviewing civil cases in states where pattern jury instructions are mandatory based on state statutes or court rules).



exemplary damage claims, both bifurcated and non-bifurcated.<sup>124</sup> In September of 2005, the TPJC volumes were updated to reflect the Texas Supreme Court's January 27, 2005 order.<sup>125</sup>

#### D. *Jury Instructions and Exemplary Damage Awards*

Trial courts have broad discretion in submitting jury instructions and are not required to use pattern jury instructions<sup>126</sup> as long as the charge is legally correct.<sup>127</sup> A trial court abuses its discretion when it fails to instruct a jury on predicate findings required for punitive damages.<sup>128</sup> A trial court may disregard an affirmative answer to a finding on liability when the jury question on liability is immaterial, or unsupported by the evidence, and grant a judgment notwithstanding an adverse verdict, but a defendant is only entitled to a new trial if the question and instruction are defective.<sup>129</sup> Rule 278 of the Texas Rules of Civil Procedure provides that failure to submit a jury instruction will not be grounds for reversal unless the party complaining of the judgment requested in writing a "substantially correct" jury instruction.<sup>130</sup> Any alleged error(s) in a jury instruction is reversible only if, based on the totality of the circumstances,

124. COMM. ON PATTERN JURY CHARGES, STATE BAR OF TEX., TEXAS PATTERN JURY CHARGES—BUSINESS, CONSUMER, INSURANCE & EMPLOYMENT 12, 14 (2003).

125. COMM. ON PATTERN JURY CHARGES, STATE BAR OF TEX., TEXAS PATTERN JURY CHARGES—BUSINESS, CONSUMER, INSURANCE & EMPLOYMENT (2005); COMM. ON PATTERN JURY CHARGES, STATE BAR OF TEX., TEXAS PATTERN JURY CHARGES—FAMILY (2005); COMM. ON PATTERN JURY CHARGES, STATE BAR OF TEX., TEXAS PATTERN JURY CHARGES—GENERAL NEGLIGENCE & INTENTIONAL PERSONAL TORTS (2005); COMM. ON PATTERN JURY CHARGES, STATE BAR OF TEX., TEXAS PATTERN JURY CHARGES—MALPRACTICE, PREMISES & PRODUCTS (2005).

126. *Styers v. Schindler Elevator Corp.*, 115 S.W.3d 321, 325 (Tex. App.—Texarkana 2003, pet. denied).

127. *Star Enter. v. Marze*, 61 S.W.3d 449, 458 (Tex. App.—San Antonio 2001, pet. denied).

128. *Green Tree Fin. Corp. v. Garcia*, 988 S.W.2d 776, 785-86 (Tex. App.—San Antonio 1999, no pet.); *see also McElroy v. Fitts*, 876 S.W.2d 190, 196-99 (Tex. App.—El Paso 1994, writ dism'd by agr.) (finding the court's charge on exemplary damages inadequate and reversing the jury's punitive damage award).

129. *Spencer v. Eagle Star Ins. Co.*, 876 S.W.2d 154, 155 (Tex. 1994).

130. TEX. R. CIV. P. 278; *see also Union Pac. R.R. v. Williams*, 85 S.W.3d 162, 166 (Tex. 2002) (holding that failure to give a jury instruction resulted in reversible error and the defendant properly preserved error by submitting a written proposed jury instruction that was substantially correct). *Contra William V. Dorsaneo, III, Revision and Recodification of the Texas Rules of Civil Procedure Concerning the Jury Charge*, 41 S. TEX. L. REV. 675, 676 (2000) (recommending revisions in the jury charge rules in the Texas Rules of Civil Procedure). The author's complaints center around problems involving development of jury questions, instructions, and definitions, and the preservation of complaints about the charge that were created by the adoption of the broad-form practice. *Id.* at 679. *See generally* 4 ROY W. McDONALD & ELAINE A. GRAFTON CARLSON, TEXAS CIVIL PRAC.

the instruction “amounted to such a denial of the rights of the complaining party as was reasonably calculated and probably did cause the rendition of an improper judgment.”<sup>131</sup>

A plaintiff must prove “by clear and convincing evidence” that its exemplary damage claim is based on harm resulting from fraud,<sup>132</sup> malice,<sup>133</sup> or gross negligence.<sup>134</sup> A plaintiff is also required to prove by clear and convincing evidence all of the elements of exemplary damages contained within the Civil Practice and Remedies Code standards for recovery.<sup>135</sup> By definition, clear and convincing evidence for the purposes of awarding exemplary damages is “that measure or degree of proof that will produce in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established.”<sup>136</sup>

TICE § 22:33 (2d ed. 2001 & Supp. 2004) (providing an overview on the form of the jury charge for damage questions).

131. *Island Recreational Dev. Corp. v. Republic of Tex. Sav. Ass’n*, 710 S.W.2d 551, 555 (Tex. 1986).

132. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 41.001(6) (Vernon Supp. 2005) (defining ‘Fraud’ as “fraud other than constructive fraud”); *id.* § 41.003(a)(1) (Vernon Supp. 2005) (requiring the claimant to prove fraud in order to recover exemplary damages).

133. *See id.* § 41.003(a)(2) (requiring the claimant to prove malice in order to recover exemplary damages); TEX. CIV. PRAC. & REM. CODE ANN. § 41.001(7) (Vernon Supp. 2005) (defining ‘Malice’ as “a specific intent by the defendant to cause substantial injury or harm to the claimant”); *see also* *Gorges Foodservice, Inc. v. Huerta*, 964 S.W.2d 656, 674-75 (Tex. App.—Corpus Christi 1997, pet. withdrawn) (holding that the plaintiff’s evidence was legally and factually sufficient to prove the defendant acted with malice to sustain the jury’s exemplary damage award).

134. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 41.003(a)(3) (Vernon Supp. 2005) (requiring the claimant to prove gross negligence in order to recover exemplary damages).

‘Gross negligence’ means an act or omission: (A) which when viewed objectively from the standpoint of the actor at the time of its occurrence involves an extreme degree of risk, considering the probability and magnitude of the potential harm to others; and (B) of which the actor has actual, subjective awareness of the risk involved, but nevertheless proceeds with conscious indifference to the rights, safety, or welfare of others.

*Id.* § 41.001(11).

135. *Id.* § 41.003(b); *see also* *Dunbar Med. Sys., Inc. v. Gammex Inc.*, 216 F.3d 441, 455 (5th Cir. 2000) (finding no clear error in a jury’s award of punitive damages applying sections 41.003(a) and (b) of the Texas Civil Practice and Remedies Code to the plaintiff’s evidence). The Fifth Circuit reversed the district court’s award of prejudgment interest on the punitive damage award in accordance with Texas law. *Id.* (relying on section 41.007 of the Texas Civil Practice and Remedies Code, which prohibits prejudgment interest on an award of exemplary damages); *Peshak v. Greer*, 13 S.W.3d 421, 426-27 (Tex. App.—Corpus Christi 2000, no pet.) (reversing a punitive damage award in a defamation case based on a jury instruction that did not follow the exemplary damage requirements defined in section 41.003 of the Texas Civil Practice and Remedies Code).

136. *Gore v. Scotland Golf, Inc.*, 136 S.W.3d 26, 34 (Tex. App.—San Antonio 2003, pet. denied).

The amount of a punitive damage award supposedly lies within the jury's discretion,<sup>137</sup> subject to factual sufficiency review. Likewise, the standard of review for a complaint alleging an excessive damage award is factual sufficiency of the evidence.<sup>138</sup> An appellate court should not set aside a punitive damage award unless the record clearly shows that the jury acted with passion, prejudice, or another improper motive.<sup>139</sup> Although the amount of an exemplary damage award by itself is not conclusive, an appellate court may also find the award excessive if it "shocks the conscience of the court."<sup>140</sup> The reviewing court may also find that a jury's exemplary damage award is "presumptively reasonable" based on statutory limitations for exemplary damages,<sup>141</sup> but the jury may not be

137. TEX. CIV. PRAC. & REM. CODE ANN. § 41.010(b) (Vernon Supp. 2005); *K-Mart Corp. Store No. 7441 v. Trotti*, 677 S.W.2d 632, 640 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.).

138. *Wilhelm v. Flores*, 133 S.W.3d 726, 736 (Tex. App.—Corpus Christi 2003, pet. filed).

139. *See, e.g., Styers v. Schindler Elevator Corp.*, 115 S.W.3d 321, 324 (Tex. App.—Texarkana 2003, pet. denied) (revisiting the court's position that a trial court must "disqualify a juror only if it finds that the juror's state of mind leads to the natural inference that the juror will not act impartially"); *Dayton Hudson Corp. v. Altus*, 715 S.W.2d 670, 674 (Tex. App.—Houston [1st Dist.] 1986, writ ref'd n.r.e.) (acknowledging the appellate court's inability to substitute its judgment for the amount of the jury's award unless there is evidence that the award is the result of passion, prejudice, another improper motive, or the amount of the award is such that it shocks the conscience of the court); *Tidelands Auto. Club v. Walters*, 699 S.W.2d 939, 945 (Tex. App.—Beaumont 1985, writ ref'd n.r.e.) (recognizing in a case where exemplary damages were awarded for intentional infliction of emotional distress that "[t]here is no certain standard to measure damages of this nature as they cannot be proven with certainty and accuracy. . . . [T]he question of damages, if not excessive, is properly left for the jury to determine."); *Chasewood Constr. Co. v. Rico*, 696 S.W.2d 439, 448 (Tex. App.—San Antonio 1985, writ ref'd n.r.e.) (affirming the awards for actual and punitive damages after finding nothing on the record to indicate the jury acted under passion, prejudice, or any other improper motive); *Murphy v. Waldrip*, 692 S.W.2d 584, 588 (Tex. App.—Fort Worth 1985, writ ref'd n.r.e.) (finding no evidence that the actual and punitive damages resulted because "jurors were so controlled by passion, prejudice or bias as to render them unwilling to consider the merits of the case").

140. *See Ford Motor Co. v. Durrill*, 714 S.W.2d 329, 346-47 (Tex. App.—Corpus Christi 1986) (reforming a jury's award after it was remitted by the trial court on the basis that the amount shocked the conscience of the court), *writ granted, judgm't vacated w.r.m.*, 754 S.W.2d 646 (Tex. 1988).

141. *Foley v. Parlier*, 68 S.W.3d 870, 881 (Tex. App.—Fort Worth 2002, no pet.) (holding that the jury's exemplary damage award was not excessive because it was reasonably proportioned to the actual damages and within the exemplary damage limitations of Texas Civil Practice and Remedies Code sections 41.007 and 41.008). The reviewing court recognized its obligation to determine "on a case-by-case basis" whether defendants who deserve punishment receive the appropriate level of an exemplary damage award imposed against them. *Id. See generally* TEX. CIV. PRAC. & REM. CODE ANN. § 41.008 (Vernon Supp. 2005) (limiting, in section (b), exemplary damage awards to the greater of: (1) two times the economic damages and the jury's noneconomic damage award, but not more

informed about a statutory limitation on exemplary damages.<sup>142</sup> In addition to H.B. 4's partial jury instruction on the unanimity requirement for the amount of exemplary damages, and now the Texas Supreme Court's jury instruction on the unanimity requirement for liability findings for exemplary damages, the Texas Civil Practice and Remedies Code requires that the jury be instructed as to the definitions relating to damages and the evidence relating to the amount of economic damages and exemplary damages.<sup>143</sup>

#### IV. TEXAS RULES OF CIVIL PROCEDURE

##### A. *Texas Rule of Civil Procedure 277*

One could argue that the Texas Rules of Civil Procedure allowed a jury instruction informing the jury of H.B. 4's unanimity requirement for liability findings for exemplary damages without the Texas Supreme Court having to amend the rules. Specifically, Rule 277 of the Texas Rules of Civil Procedure permits the court to "predicate the damage question or questions upon affirmative findings of liability";<sup>144</sup> yet the same rule forbids the court from advising the jury of the effect of its answers.<sup>145</sup>

---

than \$750,000; or (2) \$200,000). The section for limitation on the amount of recovery does not apply to certain causes of action listed in section 41.008(c). *Id.*

142. TEX. CIV. PRAC. & REM. CODE ANN. § 41.008(e) (Vernon Supp. 2005). The Code prohibits informing the jury of the statutory limitation on exemplary damages "by any means, including voir dire, introduction into evidence, argument, or instruction." *Id.* In addition, section 41.008(a) requires that the jury determine the amount of economic damages separately from any other compensatory damage amounts. *Id.* § 41.008(a).

143. *Id.* § 41.012 (Vernon 1997 & Supp. 2005).

144. TEX. R. CIV. P. 277; *Grieger v. Vega*, 153 Tex. 498, 271 S.W.2d 85, 87 (1954) (reaffirming the Texas Supreme Court's position "that it is error to submit a special issue conditionally when the effect of such submission is to inform the jury as to the judgment which will be rendered as a result of the verdict"). In *Grieger*, the court recognized that where jurors were informed of the effect of their answers, "but where the effect is so obvious that any juror with ordinary intelligence would know its effect, neither the letter nor the spirit of the rule is violated by a charge which assumes such knowledge." *Id.* at 502; *see also* James G. Denton, *Informing a Jury of the Legal Effect of Its Answers*, 2 ST. MARY'S L.J. 1, 1-9 (1970) (explaining the development of the rule in Texas that forbids a court to inform a jury of the legal result of its answers to any issue(s) in a special issues practice system).

145. TEX. R. CIV. P. 277; *see also* *Steakley Bros. Chevrolet, Inc. v. Westbrook*, 558 S.W.2d 544, 547 (Tex. Civ. App.—Waco 1977, writ ref'd n.r.e.) (affirming an award for exemplary damages where the jury instructions failed to tell the jury that exemplary damages could only be awarded if the defendant's conduct was willful and malicious); *Magic Chef, Inc. v. Sibley*, 546 S.W.2d 851, 857 (Tex. Civ. App.—San Antonio 1977, writ ref'd n.r.e.) (holding that it was harmless error to tell the jury that it was necessary to find a defective product before the plaintiff could recover damages); *Cont'l Oil Co. v. Barnes*, 97 S.W.2d 494, 497 (Tex. Civ. App.—Fort Worth 1936, writ ref'd) (discussing Texas law creat-

Courts presume that a jury will follow the instructions providing the elements of a cause of action or defense.<sup>146</sup> Rule 277 allows the court's charge to "incidentally constitute[ ] a comment on the weight of the evidence," and if only part of an instruction, to "advise[ ] the jury of the effect of their answers."<sup>147</sup>

In *H.E. Butt Grocery Co. v. Bilotto*,<sup>148</sup> the Texas Supreme Court affirmed the court of appeals in holding a jury instruction that based a damage question on a finding of liability did not violate Rule 277.<sup>149</sup> The court recognized that "[t]he trial court is given wide latitude to determine the propriety of explanatory instructions and definitions."<sup>150</sup> An instruction that does "not directly inform the jury of the legal effect of its answers, but merely directs the jury to answer the damages question only if certain conditions are satisfied" and "merely incidentally informs the jury of the legal effect of its answers"<sup>151</sup> does not violate the Texas Rules of Civil Procedure. The Texas Supreme Court's order revising the Rules of

ing special issues where no general charge or instruction can be given to the jury that would let the jurors know the effect of their answers on the judgment). *See generally* D. A. Cox, Annotation, *Reversible Effect of Informing Jury of the Effect That Their Answers to Special Interrogatories or Special Issues May Have upon Ultimate Liability or Judgment*, 90 A.L.R.2d 1040 (2004) (considering cases where the "reversible effect of a trial judge's informing the jury as to the effect of their answers to special issues or interrogatories upon the ultimate rights or liabilities of the parties and the final judgment in the litigation"). The author specifically discusses Texas cases involving the issue of a judge's comments or instruction on special issues. *Id.* at 1041.

146. *See Sanchez v. Excelo Bldg. Maint.*, 780 S.W.2d 851, 854 (Tex. App.—San Antonio 1989, no writ) (dismissing the plaintiff's assumption by commenting that "if juries answering broad-form questions pay no heed to the instructions" then the court would "perhaps . . . need to re-think the whole idea of broad-form submission").

147. TEX. R. CIV. P. 277.

148. 985 S.W.2d 22 (Tex. 1998).

149. *H.E. Butt Grocery Co. v. Bilotto*, 985 S.W.2d 22, 25 (Tex. 1998).

150. *See id.* at 23 (citing *Mobil Chem. Co. v. Bell*, 517 S.W.2d 245, 256 (Tex. 1974)) (confirming that the trial court has the discretion to determine jury instructions and the definitions were found not to involve error). In *Mobil*, the court applied Rule 277 to a res ipsa jury instruction, and commented that instructions depend on the facts and circumstances of each case and recognizing that the trial court's considerable discretion to determine necessary and proper instructions. *Mobil*, 517 S.W.2d at 256.

151. *Bilotto*, 985 S.W.2d at 24; *see Sanchez*, 780 S.W.2d at 855 (holding that "properly worded conditional submissions do not impermissibly comment on the weight of the evidence"). The San Antonio Court of Appeals also noted "that [R]ule 277 explicitly allows the court to predicate the damage questions on affirmative findings of liability; the rule also states that instructions and definitions that make incidental comments are not objectionable." *Id.*; *see also H.E. Butt Grocery Co. v. Paez*, 742 S.W.2d 824, 825 (Tex. App.—Corpus Christi 1987, writ denied) (affirming the judgment of the trial court and finding no error when the court instructed the jury during deliberations in response to the jury's question asking if they could award damages in the absence of negligence). *But see Robert J. Witte & James G. Ruiz, House Bill 4, Article 13 Damages*, 7 J. TEX. CONSUMER L. 33, 35

Civil Procedure to require the instruction for unanimity in the jury's liability findings can be justified based on the argument that the "certain condition" requirement of *Bilotto* is the unanimity requirement of H.B. 4; the unanimity instructions would merely help to explain when the jury should answer the damages question. However, the Texas Supreme Court did not extend H.B. 4's unanimity requirement to Rule 277, but instead chose to both add the missing jury instruction to Rule 226a and revise Rule 292.

### B. *Texas Rule of Civil Procedure 292*

Prior to H.B. 4's amendment requiring unanimous jury findings of liability and for the amount of exemplary damages, a plaintiff could secure an exemplary damage award based on the verdict of only ten jurors,<sup>152</sup> and the same ten jurors did not have to concur on all the issues in both trials.<sup>153</sup> Specifically, Texas Rule of Civil Procedure 292 controlled a verdict by a portion of an original jury and provided that "[a] verdict may be rendered in any cause by the concurrence, as to each and all answers made, of the same ten members of an original jury of twelve or of the same five members of an original jury of six."<sup>154</sup>

After the passage of H.B. 4, the same twelve (or six) jurors must first be unanimous in their liability findings for exemplary damages, and then also unanimous in the amount of their punitive damage award. The Texas Supreme Court revised Texas Rule of Civil Procedure 292 to reflect the unanimity requirement for a liability finding and an award of exemplary damages.<sup>155</sup> Rule 292 now tracks the verbiage of H.B. 4 that a verdict awarding exemplary damages may be rendered only if the jury unani-

---

(2003) (arguing that an instruction informing the jury that its liability findings must be unanimous would advise jurors of the effect of their answers).

152. TEX. R. CIV. P. 292 (2004, amended 2005).

153. See *Greater Houston Transp. Co. v. Zrubeck*, 850 S.W.2d 579, 587 (Tex. App.—Corpus Christi 1993, writ denied) (holding that the same ten jurors who found liability in the first part of a bifurcated trial need not be the same ten jurors who award exemplary damages in the second part of the trial). *But see Hyman Farm Serv., Inc. v. Earth Oil & Gas Co.*, 920 S.W.2d 452, 457 (Tex. App.—Amarillo 1996, no writ) (interpreting Texas Rule of Civil Procedure 292 as requiring the same ten members of the jury to be in concurrence even in a bifurcated trial). See generally Christian Ellis, *Trial Bifurcation: Applicability of Texas Rule of Civil Procedure 292*, 49 BAYLOR L. REV. 1057, 1060-64 (1997) (discussing the conflict between *Greater Houston* and *Hyman Farm*).

154. TEX. R. CIV. P. 292 (2004, amended 2005). In addition, Rule 292 further requires that if three jurors die or are disabled, leaving only nine of the original jury of twelve, the remaining nine jurors may continue deliberations and then render a verdict. *Id.* However, the jurors remaining from the original twelve, or six, must all concur and sign the verdict. *Id.*

155. TEX. R. CIV. P. 292.

mously found liability for exemplary damages and the amount of exemplary damages.<sup>156</sup>

Proponents of unanimous jury verdicts argue that research supports the belief that unanimous jury verdicts are less erratic than mere majority jury verdicts.<sup>157</sup> In addition, when verdicts are not required to be unanimous, “jurors who disagree with the majority can be marginalized and told their votes don’t count, cutting deliberations short and thus eliminating some of the diversity and representativeness expected of juries.”<sup>158</sup> Although a larger jury may guarantee stability and due process, a plaintiff’s burden of persuasion at trial clearly increases as the number of jurors in a required unanimous jury increases.

## V. APPLYING HOUSE BILL 4 TO CIVIL JURY INSTRUCTIONS

### A. *Judicial Interpretation of Statutory Language*

After H.B. 4 became law, the most pressing question was how Texas courts would interpret Chapter 41 in developing jury instructions. Defense attorneys were expected to argue that the absence of the jury instruction regarding unanimous liability findings “was intentional and designed to ensure that no instruction be given to the jury advising . . . [it] of the effects of [its] answer.”<sup>159</sup> Conversely, plaintiff attorneys were expected to argue the absence of the jury instruction was merely an unfortunate oversight,<sup>160</sup> requiring an additional instruction to resolve the ambiguity and follow the language in Chapter 41.

156. *Id.* 292(b).

157. See Terry Carter, *Breaking Barriers*, A.B.A. J., Dec. 2004, at 62, 63 (discussing the ABA’s project to reform the jury system and the committee’s efforts to reinstitute the unanimous jury and twelve-person jury standards). In addition to a twelve-person, unanimous jury standard, the project committee proposed allowing jurors to take notes, and in civil trials, ask questions. *Id.* at 62. The committee is also concerned with jury privacy and the judge’s role in balancing secrecy and juror anonymity with the openness necessary to maintain confidence in the jury system. *Id.* at 63. See generally LINDA R. MONK, *THE WORDS WE LIVE BY: YOUR ANNOTATED GUIDE TO THE CONSTITUTION* 182 (Judy Pray ed., 2003) (presenting arguments for and against abolishing jury trials in civil cases). The argument supporting abolishment of jury trials advocates that “juries are not the most efficient and competent dispensers of justice” and “juries in some complicated trials . . . produce such erratic verdicts that they violate due process of law.” *Id.* The argument against abolishing jury trials centers on the belief that trial by jury in criminal and civil cases “is essential to democratic self-government” by allowing citizens to “directly participate in decision making.” *Id.*

158. Terry Carter, *Breaking Barriers*, A.B.A. J., Dec. 2004, at 62, 63.

159. Robert J. Witte & James G. Ruiz, *House Bill 4, Article 13 Damages*, 7 J. TEX. CONSUMER L. 33, 35 (2003).

160. *Id.*

The reviewing court applies a logical process to determine how to interpret a statute. Initially, a court must determine whether a statute is ambiguous; and if it is clear and unambiguous, whether a plain reading of the statute produces an “absurd result.”<sup>161</sup> The test for whether a statute is ambiguous is whether the court finds the plain language “is susceptible of two or more reasonable interpretations.”<sup>162</sup> When a statute’s plain language can logically support two reasonable, contradictory interpretations, the statute is ambiguous.<sup>163</sup>

In *Fleming Foods of Texas, Inc. v. Rylander*,<sup>164</sup> the Texas Supreme Court held that a clear and unambiguous recodification of the Tax Code did not require interpretation according to the prior law and legislative history.<sup>165</sup> The court referred to the Code Construction Act,<sup>166</sup> wherein courts *may* use prior law, the legislative history, and circumstances of the current law to determine whether a statute is ambiguous.<sup>167</sup> However, a

161. See J. Scott Morris, *The Texas Supreme Court and Strict Construction*, 63 TEX. B.J. 1042, 1048 (2000) (stating the Texas Supreme Court’s primary rule in statutory construction that a statute that is clear and unambiguous must be given a plain reading, unless its plain reading causes an absurd result). The author reviews six 1999 Texas Supreme Court cases involving statutory construction and concludes the court follows the strict construction rule. *Id.* at 1043. Examples of cases applying the rarely used “absurd results exception” reasoning are provided by the author in a footnote. *Id.* at 1048 n.79.

162. See *Segal v. Emmes Capital, L.L.C.*, 155 S.W.3d 267, 286 (Tex. App.—Houston [1st Dist.] 2004, pet. dism’d) (citing *In re Mo. Pac. R.R.*, 998 S.W.2d 212, 217 (Tex. 1999)) (applying the Texas Supreme Court’s logic based on the plain language of the statute to the parties’ interpretations of the Property Code). The court found the disputed section of the Property Code to contain ambiguity which supported both parties’ interpretation. *Id.* at 286-87. The court also reviewed the factors in section 311.023 of the Code Construction Act that a court may consider when deciding if a statute is ambiguous. *Id.* at 287. The *Segal* court could not resolve the ambiguity in the Property Code by using the factors. *Id.* Then, the court used the Doctrine of Legislative Acceptance to decide the issue of ambiguity. *Id.* at 294. The court held that “[w]hen the [l]egislature re-enacts without material change an ambiguous statute that has been given a long-standing judicial interpretation, we presume that the [l]egislature intended the statute to have the meaning ascribed by the courts.” *Id.*

163. *Id.* at 286; J. Scott Morris, *The Texas Supreme Court and Strict Construction*, 63 TEX. B.J. 1042, 1045 (2000).

164. 6 S.W.3d 278 (Tex. 1999).

165. *Fleming Foods of Tex., Inc. v. Rylander*, 6 S.W.3d 278, 286 (Tex. 1999). The court found that the Doctrine of Legislative Acceptance, applied by the court of appeals, did not apply because the former code article was substantially changed in its verbiage and the statute was unambiguous. *Id.* at 282.

166. TEX. GOV’T CODE ANN. § 311 (Vernon 2005); see also Steven R. Collins, *Where Did the Civil Practice and Remedies Code Come from?*, 50 TEX. B.J. 134, 136 (1987) (describing the legislature’s response to the common law rule requiring a court to first find ambiguity before using rules of construction to determine the meaning of a revised statute).

167. *Fleming Foods*, 6 S.W.3d at 283.



court may not use extrinsic sources “to alter or disregard the express terms of a code provision when its meaning is clear from the code when considered in its entirety, unless there is an error such as a typographical one.”<sup>168</sup> The Texas Supreme Court will not add words to clarify a statute unless it is necessary to reflect clear and unmistakable legislative intent and only in “truly extraordinary circumstances.”<sup>169</sup>

Recently, the Texas Supreme Court revisited the issue of statutory construction. In *Helena Chemical Co. v. Wilkins*,<sup>170</sup> the court held a statute’s provisions, and the legislative intent behind them, must be interpreted according to the plain language of the statute, and from within the entire context of the statute.<sup>171</sup> The court will consider the factors listed in the Code Construction Act to determine the legislature’s intent and whether the statute is facially ambiguous.<sup>172</sup>

The Code Construction Act includes definitions of the words “may” and “shall.”<sup>173</sup> Sections 41.003(d) and (e) of the Texas Civil Practice and Remedies Code, Standards for Recovery of Exemplary Damages, include these two words in establishing the substance of the Code.<sup>174</sup> Pointedly, the jury has discretion to award exemplary damages, but only if its liabil-

168. *Id.* at 284.

169. *Fitzgerald v. Advanced Spine Fixation Sys. Inc.*, 996 S.W.2d 864, 867 (Tex. 1999); *see also* *Stringer v. Cendant Mortgage Corp.*, 23 S.W.3d 353, 355 (Tex. 2000) (interpreting the Texas Constitution based on the literal text, giving effect to the plain language and intent of the framers and adopters); *Surgitek, Bristol-Myers Corp. v. Abel*, 997 S.W.2d 598, 602 (Tex. 1999) (resolving the issue of the burden of proof under section 15.003(a) of the Texas Civil Practice and Remedies Code, the court took notice of the location of the section within the venue chapter of the Code and considered the legislature’s intent based on the plain meaning of the section); *Phillips v. Beaver*, 995 S.W.2d 655, 658 (Tex. 1999) (asserting the court’s objective “to determine and give effect to the [l]egislature’s intent” while looking at the plain language of the statute and the consequences of each construction); *Atascosa County v. Atascosa County Appraisal Dist.*, 990 S.W.2d 255, 258 (Tex. 1999) (rejecting statutory interpretations that would defeat the legislation’s purpose). The process of statutory interpretation also includes considering “the consequences that would follow from each construction [of the act in question].” *Id.* (quoting *Sharp v. House of Lloyd, Inc.*, 815 S.W.2d 245, 249 (Tex. 1991)).

170. 47 S.W.3d 486, 493 (Tex. 2001).

171. *See Helena Chem. Co. v. Wilkins*, 47 S.W.3d 486, 493 (Tex. 2001) (explaining the proper process for statutory construction).

172. *Id.* The Code Construction Act’s factors that the court considered included “the object sought to be obtained; the circumstances of the statute’s enactment; the legislative history; the common law or former statutory provisions, including laws on the same or similar subjects; the consequences of a particular construction; administrative construction of the statute; and the title, preamble, and emergency provision.” *Id.* *See generally* TEX. GOV’T CODE ANN. § 311.023 (Vernon 2005) (listing seven matters a court may consider in construing a statute in addition to “other matters”).

173. TEX. GOV’T CODE ANN. § 311.016 (Vernon 2005).

174. TEX. CIV. PRAC. & REM. CODE ANN. § 41.003 (Vernon Supp. 2005).

ity finding(s) and the amount of the award is unanimous.<sup>175</sup> The Code does not grant the court discretion in charging the jury, but imposes a duty on the court to give the required jury instruction informing the jurors that in order for them to find exemplary damages, the jury must be unanimous as to the amount of the award.<sup>176</sup>

Ostensibly, if the Texas Supreme Court and other Texas courts determined after H.B. 4 that Chapter 41 of the Texas Civil Practice and Remedies Code was clear and unambiguous, they would not have construed the statute outside of its literal, plain meaning unless they found an obvious error or the language produced an “absurd result.”<sup>177</sup> Alternatively, if Texas courts found after H.B. 4 that Chapter 41 was ambiguous, they may have used rules of construction, legislative history, prior versions, and other extrinsic sources to help interpret the statute.<sup>178</sup> Regardless of concerns that H.B. 4 caused ambiguity in the Code,<sup>179</sup> based on prior decisions when the Texas Supreme Court strictly construed statutes, it appeared doubtful that the court would treat the omission of a jury instruction for a unanimous liability finding for exemplary damages as an ambiguity in the Code.<sup>180</sup> Yet surprisingly, this is exactly what the Texas Supreme Court did in its 2005 order.<sup>181</sup>

The absence of a required jury instruction informing jurors of the unanimity requirement for their liability findings could also be considered unambiguous because the Texas Legislature could have, but did not, provide the same verbiage. Courts may determine the legislature’s intent

175. *Id.*

176. *Id.*

177. *Fleming Foods of Tex., Inc. v. Rylander*, 6 S.W.3d 278, 284 (Tex. 1999).

178. *Fitzgerald v. Advanced Spine Fixation Sys., Inc.*, 996 S.W.2d 864, 865-66 (Tex. 1999). In *Fitzgerald*, section 82.002(a) of the Texas Civil Practice and Remedies Code was at issue. *Id.* at 865. The court found no extraordinary circumstances to warrant the addition of words to the statute to reflect clear legislative intent. *Id.* at 867. The court refused to alter a condition of the code that was inconsistent with the apparent purpose of the text, which was found to be part of a scheme to protect manufacturers and sellers of products. *Id.* at 868-69.

179. See Claudia Wilson Frost & J. Brett Busby, *Charging the Jury in the Wake of HB4*, 67 TEX. B.J. 276, 278 (2004), available at <http://www.texasbar.com> (opining that the H.B. 4 amendment requirement, that an exemplary damage award must be unanimous, created ambiguity in the Code).

180. See J. Scott Morris, *The Texas Supreme Court and Strict Construction*, 63 TEX. B.J. 1042, 1048 (2000) (reviewing previous decisions in which the court strictly construed the statutes at issue).

181. Texas Supreme Court Advisory: Supreme Court Issues Rules Orders, Thurs., Jan. 27, 2005, [http://www.supreme.courts.state.tx.us/rules/rules\\_advisory\\_012705.htm](http://www.supreme.courts.state.tx.us/rules/rules_advisory_012705.htm) (on file with the *St. Mary's Law Journal*).

from the actual language contained in a statute,<sup>182</sup> or from the absence of language in a statute.<sup>183</sup> In *Albertson's, Inc. v. Sinclair*,<sup>184</sup> the Texas Supreme Court refused to extend a consequence for noncompliance with a statute from one section to another because the statute did not specifically provide a consequence in the applicable section of the statute.<sup>185</sup> The court noted that the legislature could have, but did not provide for a consequence for noncompliance.<sup>186</sup> The absence of the required jury instruction in H.B. 4 creates an inference that the Texas Legislature deliberately chose not to include an instruction for a jury's liability findings for exemplary damages.<sup>187</sup> Based on the Texas Supreme Court's strict constructionist holding in *Albertson's, Inc.*, Texas courts would seem to construe strictly the language of Chapter 41 and not add a required jury instruction for liability findings.<sup>188</sup> Regardless of the Texas Supreme Court's prior decisions where it strictly construed statutes and declined to broaden statutes beyond the original verbiage, the court's January 27, 2005 order found ambiguity in H.B. 4. But does the court's order follow the Texas Legislature's intent, and does it create another hurdle—in addition to those specifically created by H.B. 4—for plaintiffs seeking exemplary damages?

#### B. *Legislative Intent and House Bill 4*

The unanimity requirements for exemplary damage awards created by H.B. 4 establish part of the Texas Legislature's tort reform plan to reduce

182. See *Quantum Chem. Corp. v. Toennies*, 47 S.W.3d 473, 479-80 (Tex. 2001) (following the basic rule of statutory construction by enforcing the plain meaning of an unambiguous statute). In determining congressional intent, the court considered limitations that Congress could have easily provided had it intended to do so. *Id.*

183. See *Osterberg v. Peca*, 12 S.W.3d 31, 38 (Tex. 2000) (recognizing that the legislature's intent can be found in the absence of a statutory requirement). The court will not add language to a statute where the legislature clearly knew how to add a requirement if one was intended. *Id.*

184. 984 S.W.2d 958 (Tex. 1999).

185. See *Albertson's, Inc. v. Sinclair*, 984 S.W.2d 958, 962 (Tex. 1999) (holding that the legislature could have but did not similarly provide a code provision, which indicated its intention not to do so); see also *Bally Total Fitness Corp. v. Jackson*, 53 S.W.3d 352, 358 (Tex. 2001) (refusing to broaden section 51.014(a)(3) of the Texas Civil Practice and Remedies Code on the basis that the legislature could have added language but did not).

186. *Albertson's, Inc.*, 984 S.W.2d at 962.

187. *Id.*; see Robert J. Witte & James G. Ruiz, *House Bill 4, Article 13 Damages*, 7 J. TEX. CONSUMER L. 33, 34 (2003) (recognizing both the issue created by H.B. 4 of "[w]hether the legislature's silence on this issue was an oversight or intentional," and the debate over the absence of a jury instruction on the unanimity requirement for the jury's liability findings for exemplary damages).

188. *Albertson's, Inc.*, 984 S.W.2d at 962.

the number of punitive damage awards made by juries.<sup>189</sup> The Texas Legislature's intent in requiring unanimous exemplary damage awards can be understood from reviewing the history of H.B. 4 as it made its way through the Texas House of Representatives and the Texas Senate. What is less clear is the legislature's reason(s) for including an ambiguous mandatory jury instruction.

Representative Joe Nixon originally filed H.B. 4 as two separate bills:<sup>190</sup> House Bill 3 related to medical malpractice liability,<sup>191</sup> and H.B. 4 related to tort liability.<sup>192</sup> Curiously, the introduced version of H.B. 4 did not include any changes to the damages section of the Civil Practice and Remedies Code.<sup>193</sup> H.B. 4, combined with House Bill 3, was sent to the House Civil Practices Committee, chaired by Representative Nixon. The House Civil Practices Committee analyzed the background and purpose of H.B. 4:

Texas faces a general environment of excessive litigation. This has resulted in a crisis in access to healthcare as medical providers leave the state or leave the profession altogether. It has also resulted in higher costs to patients and consumers, caused companies to locate outside of Texas, disproportionately burdened Texas courts, and even forced some companies into bankruptcy.

[H.B. 4] is a comprehensive civil justice reform bill intended to address and correct problems that currently impair the fairness and

189. See Thomas M. Melsheimer & Steven H. Stodghill, *Due Process and Punitive Damages: Providing Meaningful Guidance to the Jury*, 47 SMU L. REV. 329, 348-49 (1994) (opining that legislative solutions to the issue of punitive damages, other than bifurcation, have "devalue[d] the role of the jury as the purveyor of justice in our society, a role guaranteed by the Seventh Amendment").

190. See generally Texas Legislature Online, 78(R) Bill Actions for HB 4, <http://www.capitol.state.tx.us/cgi-bin/db2www/tlo/billhist/actions.d2w/report?LEG=78&SESS=R&CHAMBER=H&BILLTYPE=B&BILLSUFFIX=00004>, reprinted in CAPITOL RESEARCH SERV., THE LEGISLATIVE HISTORY OF TEX. H.B. 4, 78TH LEG., R.S. (2003): ARTICLE 13, DAMAGES, ex. 1 (2003) (listing in chronological or reverse chronological order the actions on H.B. 4 by description, comment, date and journal page) (on file with the *St. Mary's Law Journal*).

191. See CAPITOL RESEARCH SERV., THE LEGISLATIVE HISTORY OF TEX. H.B. 4, 78TH LEG., R.S. (2003): ARTICLE 13, DAMAGES, at 2, 4 (2003) (describing House Bill 3 as a medical malpractice reform bill, specifically limiting recovery for punitive damages). Mr. Nixon filed H.J.R. 3, a constitutional amendment authorizing the Texas Legislature to set noneconomic damage caps, at the same time as he filed House Bill 3. *Id.* at 4.

192. *Id.* at 1.

193. See *id.* (listing the original ten articles included in H.B. 4, as introduced in the Texas House of Representatives). The original articles pertained to class actions, settlements, venue, proportionate responsibility and designation of responsible parties, products liability, interest, appeal bonds, evidence relating to seat belts, liability for civil suits of a foreign corporation, and the effective date of the legislation. *Id.*

efficiency of our court system. [H.B. 4] addresses many of the root causes of the current situation: non-meritorious lawsuits, a general increase in jury awards, a disproportionate increase in awards for noneconomic damages, unreasonable pressure to settle defensible claims and other procedural aspects of our current court system that are patently unbalanced. Key components to the solutions contained within [H.B. 4] include a cap on noneconomic damages for medical liability claims, provisions for payment of future damages as accrued, limitations on plaintiff attorney contingency fee contracts, cost-shifting of litigation costs in some cases, and class action reforms.

In summary, [H.B. 4] provides for various corrective measures that will help bring more balance to the Texas civil justice system, reduce the costs of litigation, and help restore litigation to it [sic] proper role in our society.<sup>194</sup>

After merger of the two bills, H.B. 4 included Article 13, which altered the damages chapter of the Civil Practice and Remedies Code.<sup>195</sup> Article 13 proposed changes to the Code's damages chapter limiting exemplary damages to: (1) an amount equal to the greater of two times the economic damages plus the noneconomic damages determined by the jury, not to exceed \$750,000; or (2) \$200,000.<sup>196</sup> The proposed changes described the noneconomic damage award as "an amount equal to any noneconomic damages *found by the jury*, not to exceed \$750,000" rather than "an amount equal to any noneconomic damages *to be awarded in the judgment*, not to exceed \$750,000."<sup>197</sup> The intent of the change was to allow the trial judge, and not the jury, to determine the amount of noneconomic damages that are subject to the exemplary damage cap; in effect, this allows the judge to determine the exemplary damage award.<sup>198</sup>

194. HOUSE COMM. ON CIVIL PRACTICES, BILL ANALYSIS, Tex. H.B. 4, 78th Leg., R.S. 91-93 (2003), reprinted in CAPITOL RESEARCH SERV., THE LEGISLATIVE HISTORY OF TEX. H.B. 4, 78TH LEG., R.S. (2003): ARTICLE 13, DAMAGES, at 13-14 (2003).

195. CAPITOL RESEARCH SERV., THE LEGISLATIVE HISTORY OF TEX. H.B. 4, 78TH LEG., R.S. (2003): ARTICLE 13, DAMAGES, at 12 (2003).

196. HOUSE COMM. ON CIVIL PRACTICES, COMM. SUBSTITUTE, Tex. H.B. 4, 78th Leg., R.S. 91 (2003), reprinted in CAPITOL RESEARCH SERV., THE LEGISLATIVE HISTORY OF TEX. H.B. 4, 78TH LEG., R.S. (2003): ARTICLE 13, DAMAGES, at 12, ex. 2 (2003).

197. *Id.* (emphasis added).

198. See HOUSE RESEARCH ORG., BILL ANALYSIS, Tex. H.B. 4, 78th Leg., R.S. 35 (2003), reprinted in CAPITOL RESEARCH SERV., THE LEGISLATIVE HISTORY OF TEX. H.B. 4, 78TH LEG., R.S. (2003): ARTICLE 13, DAMAGES, at 15, ex. 19 (2003) (quoting the House Research Organization's report explaining the changes H.B. 4 would have on determining the cap on punitive damages). "A court would have to determine the cap on [the] basis of the amount of damages awarded in the judgment, rather than the amount found by the jury; that is, the judge could adjust the jury award before determining the amount of exemplary damages." *Id.*

The House Research Organization considered the arguments of both supporters<sup>199</sup> and opponents<sup>200</sup> of H.B. 4 as it related to exemplary damages. Supporters argued that by allowing the trial judge to determine the exemplary damage award, the legislature is helping to safeguard the entire legal system “[b]ecause juries often do not understand the complexities of corporate finance, [and as a result] they find it difficult to ascertain the proper amount of damages to assess against a corporate wrongdoer.”<sup>201</sup> In addition, opponents argued both that limiting exemplary damages would “undermine a jury’s ability to send the proper message to the wrongdoer,” and that because “[j]urors decide murder cases and other cases, . . . they can be trusted to determine how much to assess against a wrongdoer in exemplary damages.”<sup>202</sup> The opponents pointed out that the current law has an existing safeguard because a judge already has the ability to reduce a jury’s exemplary damage award.<sup>203</sup>

Subsequently, H.B. 4 was referred to the Senate and the State Affairs Committee,<sup>204</sup> chaired by Senator Bill Ratliff. Public hearings included testimony about the proposed changes to the verbiage of the exemplary damage limitation section of the Civil Practice and Remedies Code.<sup>205</sup> Supporters of the proposed change believed that the Code should require that the noneconomic damages amount should be based on the amount a plaintiff may actually recover rather than on the amount of the jury’s finding for the noneconomic damages.<sup>206</sup> Opponents of the proposed

199. HOUSE RESEARCH ORG., BILL ANALYSIS, Tex. H.B. 4, 78th Leg., R.S. 43 (2003), reprinted in CAPITOL RESEARCH SERV., THE LEGISLATIVE HISTORY OF TEX. H.B. 4, 78TH LEG., R.S. (2003): ARTICLE 13, DAMAGES, at 16, ex. 19 (2003) (summarizing the arguments of H.B. 4 supporters relating to exemplary damages).

200. HOUSE RESEARCH ORG., BILL ANALYSIS, Tex. H.B. 4, 78th Leg., R.S. 50 (2003), reprinted in CAPITOL RESEARCH SERV., THE LEGISLATIVE HISTORY OF TEX. H.B. 4, 78TH LEG., R.S. (2003): ARTICLE 13, DAMAGES, at 16, ex. 19 (2003) (summarizing the arguments of H.B. 4 opponents relating to exemplary damages).

201. HOUSE RESEARCH ORG., BILL ANALYSIS, Tex. H.B. 4, 78th Leg., R.S. 43 (2003), reprinted in CAPITOL RESEARCH SERV., THE LEGISLATIVE HISTORY OF TEX. H.B. 4, 78TH LEG., R.S. (2003): ARTICLE 13, DAMAGES, at 16, ex. 19 (2003).

202. HOUSE RESEARCH ORG., BILL ANALYSIS, Tex. H.B. 4, 78th Leg., R.S. 50 (2003), reprinted in CAPITOL RESEARCH SERV., THE LEGISLATIVE HISTORY OF TEX. H.B. 4, 78TH LEG., R.S. (2003): ARTICLE 13, DAMAGES, at 16, ex. 19 (2003) (summarizing the arguments of H.B. 4 opponents relating to exemplary damages).

203. *Id.*

204. CAPITOL RESEARCH SERV., THE LEGISLATIVE HISTORY OF TEX. H.B. 4, 78TH LEG., R.S. (2003): ARTICLE 13, DAMAGES, at 32 (2003).

205. *Id.* at 34-39.

206. *Texas House Bill 4: Hearings on H.B. 4 Before the Senate Comm. on State Affairs*, 78th Leg., R.S. 21-22 (Apr. 22, 2003) (statement of Brent Cooper, on behalf of Texas Alliance for Patient Access) (transcript available from Senate Staff Services Office), reprinted in CAPITOL RESEARCH SERV., THE LEGISLATIVE HISTORY OF TEX. H.B. 4, 78TH LEG., R.S. (2003): ARTICLE 13, DAMAGES, at 34-35, ex. 11 (2003) (testifying in support of Article 13’s

changes questioned the very existence of Article 13, pointing out that it was not included in the House's original version of the bill and that they could find no public testimony "in which people . . . explained the exact reason behind Article 13."<sup>207</sup> Some opponents suspected the proposed changes were an attempt to preempt the Texas Supreme Court's interpretation of section 41.008 of the Texas Civil Practice and Remedies Code, as it pertains to application of the choice between the possible exemplary damage limitation amounts.<sup>208</sup> The proposed change to Article 13 would

---

proposed changes to section 41.008 of the Texas Civil Practice and Remedies Code). Mr. Cooper testified that he believed the proposed changes would more accurately reflect the original intent of the Texas Legislature that "where there's only one person who's been injured even if you have five or six people making claims, there would only be one cap awarded against a single defendant." *Id.* The example used by Mr. Cooper involved a wrongful death case where a spouse and four or five children attempted to apply the exemplary damage cap to each individual. *Id.* Mr. Cooper complained that some courts apply the existing Code where "if you had six people who are making a claim, one defendant could be liable to a cap for each of those claimants." *Id.* In addition, Mr. Cooper testified that reductions, such as those for settlement credits and contributory negligence, ultimately reduce the amount of the jury's award and should not be included in calculating the exemplary damage cap. *Id.*

207. *Texas House Bill 4: Hearings on H.B. 4 Before the Senate Comm. on State Affairs*, 78th Leg., R.S. 22-26 (Apr. 22, 2003) (statement of Mike Slack, on behalf of the Texas Trial Lawyers Association) (transcript available from Senate Staff Services Office), reprinted in CAPITOL RESEARCH SERV., THE LEGISLATIVE HISTORY OF TEX. H.B. 4, 78TH LEG., R.S. (2003): ARTICLE 13, DAMAGES, at 35-39, ex. 11 (2003) (testifying in opposition to Article 13's proposed changes to section 41.008 of the Texas Civil Practice and Remedies Code).

208. *Texas House Bill 4: Hearings on H.B. 4 Before the Senate Comm. on State Affairs*, 78th Leg., R.S. 23-26 (Apr. 22, 2003) (statement of Mike Slack, on behalf of the Texas Trial Lawyers Association) (transcript available from Senate Staff Services Office), reprinted in CAPITOL RESEARCH SERV., THE LEGISLATIVE HISTORY OF TEX. H.B. 4, 78TH LEG., R.S. (2003): ARTICLE 13, DAMAGES, at 36, ex. 11 (2003) (questioning the motives of supporters of Article 13's "very curious alteration of the language referring to the judgment"). According to Mr. Slack, the suspicions surrounded fears about how the Texas Supreme Court would decide the case of *Hall v. Diamond Shamrock Refining Co.*, 82 S.W.3d 5 (Tex. App.—San Antonio 2001), *rev'd on other grounds*, 168 S.W.3d 164 (Tex. 2005). *Id.* In *Hall*, the spouse of a Diamond Shamrock employee filed a survivor lawsuit for punitive damages for gross negligence after her husband died in a refinery explosion. *Hall*, 82 S.W.3d at 10. The trial court excluded the plaintiff's evidence of economic and noneconomic damages, which greatly exceeded \$200,000, on the basis of relevancy because actual and compensatory damages are not recoverable under the Workers' Compensation Act. *Id.* at 23-24. As a result, the plaintiff's recovery was limited under section 41.008 to \$200,000, rather than the alternative of the noneconomic damages found by the jury, not to exceed \$750,000. *Id.* The San Antonio Court of Appeals reversed the trial court, finding "the evidence of compensatory damages is relevant because the jury needs this evidence to calculate the punitive damages using the formula" in section 41.008(b)(1). *Id.* at 24. The court held that section 41.008(a) of the Texas Civil Practice and Remedies Code requires the jury to determine economic damages separately from compensatory damages, and the formula in section 41.008(b) required the jury to receive evidence of all of the damages.

decrease the amount of exemplary damages awarded against a defendant under section 41.008 of the Texas Civil Practice and Remedies Code by reducing the amount of both economic and noneconomic damages to be used in the formula.<sup>209</sup>

The requirements of a unanimous jury finding and unanimous award for exemplary damages appeared in the State Affairs Committee's first proposed substitute for H.B. 4.<sup>210</sup> The Senate Committee Substitute for H.B. 4 totally eliminated the House's proposed changes to the Code section where the exemplary damage limitation pertaining to noneconomic damages is calculated, but included the unanimity requirement for liability findings for exemplary damages and the amount of an award, including the one mandatory jury instruction.<sup>211</sup>

---

*Id.* The Texas Supreme Court reversed the San Antonio Court of Appeals, concluding "that there is no clear and convincing evidence of gross negligence" to warrant punitive damages. *Diamond Shamrock Ref. Co. v. Hall*, 168 S.W.3d 164, 169 (Tex. 2005). Referring to the pending issue presented in *Hall*, Mr. Slack said he was "relatively confident that that's what [is] in the crosshairs of Article 13. And, after reviewing the opinion and discussing it with my colleagues, that, it appears the fingerprints are all over it." *Texas House Bill 4: Hearings on H.B. 4 Before the Senate Comm. on State Affairs*, 78th Leg., R.S. 25 (Apr. 22, 2003) (statement of Mike Slack, on behalf of the Texas Trial Lawyers Association) (transcript available from Senate Staff Services Office), reprinted in *CAPITOL RESEARCH SERV., THE LEGISLATIVE HISTORY OF TEX. H.B. 4, 78TH LEG., R.S. (2003): ARTICLE 13, DAMAGES*, at 38, ex. 11 (2003). Contrary to Mr. Slack's assertion, the court's decision did not interpret section 41.008.

209. *Texas House Bill 4: Hearings on H.B. 4 Before the Senate Comm. on State Affairs*, 78th Leg., R.S. 25 (Apr. 22, 2003) (statement of Mike Slack, on behalf of the Texas Trial Lawyers Association) (transcript available from Senate Staff Services Office), reprinted in *CAPITOL RESEARCH SERV., THE LEGISLATIVE HISTORY OF TEX. H.B. 4, 78TH LEG., R.S. (2003): ARTICLE 13, DAMAGES*, at 38, ex. 11 (2003).

210. See *Texas House Bill 4: Hearings on H.B. 4 Before the Senate Comm. on State Affairs*, 78th Leg., R.S. 5 (Apr. 30, 2003) (transcript available from Senate Staff Services Office), reprinted in *CAPITOL RESEARCH SERV., THE LEGISLATIVE HISTORY OF TEX. H.B. 4, 78TH LEG., R.S. (2003): ARTICLE 13, DAMAGES*, at 39, ex. 12, 17 (2003) (summarizing Chairman Ratliff's brief review of the proposed committee substitute on April 30, 2003). In the second committee substitute for H.B. 4, presented on May 13, 2003, Chairman Ratliff explained that Article 13 "clarifies that exemplary damages may be awarded only if the jury was unanimous in regard to finding the liability for and the amount of exemplary damages." *Texas House Bill 4: Hearings on H.B. 4 Before the Senate Comm. on State Affairs*, 78th Leg., R.S. 6 (May 13, 2003) (transcript available from Senate Staff Services Office), reprinted in *CAPITOL RESEARCH SERV., THE LEGISLATIVE HISTORY OF TEX. H.B. 4, 78TH LEG., R.S. (2003): ARTICLE 13, DAMAGES*, at 48, ex. 16 (2003).

211. *Tex. H.B. 4, Senate Comm. Substitute for H.B. No. 4, 78th Leg., R.S. 39 (2003)*, reprinted in *CAPITOL RESEARCH SERV., THE LEGISLATIVE HISTORY OF TEX. H.B. 4, 78TH LEG., R.S. (2003): ARTICLE 13, DAMAGES*, at 51, ex. 3 (2003); *SENATE RESEARCH CTR., BILL ANALYSIS, Tex. H.B. 4, 78th Leg., R.S. (2003)*, reprinted in *CAPITOL RESEARCH SERV., THE LEGISLATIVE HISTORY OF TEX. H.B. 4, 78TH LEG., R.S. (2003): ARTICLE 13, DAMAGES*, at 54-56 (2003). Senator Ratliff explained to the Senate during the second and third readings that a punitive damage "award has to be unanimous on the part of the jury.



The House refused to agree with the Senate amendments to H.B. 4, specifically the changes to punitive damages,<sup>212</sup> and a committee was appointed to resolve the outstanding issues.<sup>213</sup> Thereafter, the Conference Committee quietly retained the Senate's version of Article 13.<sup>214</sup> The House adopted the Conference Committee Report, recording the legislative intent and including the statement: "That was really our goal, to make sure we calm down the insurance liability damage awards so now there is predictability of a particular standard."<sup>215</sup> The Senate also adopted the Conference Committee Report,<sup>216</sup> and H.B. 4 was ready for Governor Perry's review. Hence, exemplary damage awards are now contingent on unanimous jury findings of liability for exemplary damages and on the amount of any exemplary damage award.

### C. *Texas Pattern Jury Charge Revisions After House Bill 4*

The issues created by H.B. 4's requirement of a jury instruction only when the jury is unanimous in its findings of liability for exemplary damages<sup>217</sup> meant revisions were needed<sup>218</sup> in the Texas Pattern Jury Charges

Instead often [sic] jurors, it would require all [twelve]." Debate on Tex. H.B. 4 on the Floor of the Senate, 78th Leg., R.S. 3 (May 16, 2003) (transcript available from Senate Staff Services Office), *reprinted in* CAPITOL RESEARCH SERV., THE LEGISLATIVE HISTORY OF TEX. H.B. 4, 78TH LEG., R.S. (2003): ARTICLE 13, DAMAGES, at 56, ex. 17 (2003).

212. H.J. OF TEX., 78th Leg., R.S. 3361 (2003), *reprinted in* CAPITOL RESEARCH SERV., THE LEGISLATIVE HISTORY OF TEX. H.B. 4, 78TH LEG., R.S. (2003): ARTICLE 13, DAMAGES, at 58-59 (2003) (highlighting the response of the House members to the Senate's amendments to H.B. 4, which resulted in a request for a conference committee to resolve the issues separating the House and Senate). Specifically, Representative Nixon mentioned the Senate's requirement of a unanimous verdict for punitive damage awards in light of the House's efforts not to change any statute provision pertaining to punitive damages. *Id.*

213. *Id.*

214. *Tex. H.B. 4, Conference Comm. Report*, 78th Leg., R.S. (May 31, 2003), *reprinted in* CAPITOL RESEARCH SERV., THE LEGISLATIVE HISTORY OF TEX. H.B. 4, 78TH LEG., R.S. (2003): ARTICLE 13, DAMAGES, at 59-65, ex. 5 (2003). The Conference Committee Report includes a side-by-side comparison of the difference between the Senate's substituted version of H.B. 4, the House's version, and the Conference Committee's version. *Id.*

215. H.J. OF TEX., 78th Leg., R.S. 6038-41 (2003).

216. Debate on Tex. H.B. 4 on the Floor of the Senate, 78th Leg., R.S. 6038-41 (June 1, 2003) (transcript available from the Senate Staff Services Office), *reprinted in* CAPITOL RESEARCH SERV., THE LEGISLATIVE HISTORY OF TEX. H.B. 4, 78TH LEG., R.S. (2003): ARTICLE 13, DAMAGES, at 69 (2003); *see* S.J. OF TEX., 78th Leg., R.S. 5003-08 (2003), *reprinted in* CAPITOL RESEARCH SERV., THE LEGISLATIVE HISTORY OF TEX. H.B. 4, 78TH LEG., R.S. (2003): ARTICLE 13, DAMAGES, at 69 (2003) (providing the legislative intent remarks from the June 1, 2003 debate).

217. TEX. CIV. PRAC. & REM. CODE ANN. § 41.003(d), (e) (Vernon Supp. 2005).

218. *See* Claudia Wilson Frost & J. Brett Busby, *Charging the Jury in the Wake of HB4*, 67 TEX. B.J. 276, 278 (2004), available at <http://www.texasbar.com> (addressing neces-

(TPJC) and the Texas Rules of Civil Procedure.<sup>219</sup> In 2004, the Texas Bar Pattern Jury Charge Oversight Committee worked on revisions to the TPJC instructions for exemplary damages based on changes necessitated by H.B. 4.<sup>220</sup> Before the Texas Supreme Court acted in 2005, judges and lawyers attempted to comply with an arguably ambiguously written amendment.<sup>221</sup>

The 2002 editions of the TPJC provide instructions conditioning damages on liability<sup>222</sup> and instructions tailored to certain causes of action.<sup>223</sup> In addition, the pattern jury charges provide specific jury instructions for exemplary damages when the predicate question for liability is answered affirmatively.<sup>224</sup> The pattern jury charges also include informative com-

---

sary revisions to both the TPJC and the Texas Rules of Civil Procedure, as a result of H.B. 4).

219. See TEX. R. CIV. P. 226a (2004, amended 2005) (listing the approved admonitory instructions to a jury and the oral and written instructions that may be used to modify the admonitory instructions). The approved written modifications include informing the jury that a verdict is rendered “upon the vote of ten or more jurors.” *Id.*

220. See *Committee Reports, Pattern Jury Charges (PJC) – Business, Consumer, Insurance, and Employment*, 67 TEX. B.J. 556, 566 (2004), available at [http://www.texasbar.com/Template.cfm?section=texas\\_bar\\_journal1&Template=/ContentManagement/ContentDisplay.cfm&ContentID=8667](http://www.texasbar.com/Template.cfm?section=texas_bar_journal1&Template=/ContentManagement/ContentDisplay.cfm&ContentID=8667) (describing the activities of the State Bar of Texas PJC – Business, Consumer, Insurance, and Employment Oversight Committee in revising the TPJC to respond to changes to the Texas Civil Practice and Remedies Code).

221. See Claudia Wilson Frost & J. Brett Busby, *Charging the Jury in the Wake of HB4*, 67 TEX. B.J. 276, 278 (2004), available at <http://www.texasbar.com> (addressing the struggle that lawyers and judges will face in interpreting H.B. 4’s unanimity requirements until revisions are made to the Civil Practice and Remedies Code and Texas Rules of Civil Procedure). See generally David L. Perry & Patricia A. Shackelford, *Arguing Personal Injury Damages: New Developments and Historically Permitted Arguments*, Tex. Trial Lawyers Ass’n Mid-Year Bd. Meeting & Seminar 2-3 (June 11-12, 2004) available at [www.perryhaas.com/Zph\\_documents/ArguingPersonalInjuryDamage.pdf](http://www.perryhaas.com/Zph_documents/ArguingPersonalInjuryDamage.pdf) (discussing punitive damages after H.B. 4, and the fact that Chapter 41 now requires a unanimous jury verdict for the amount of an exemplary damage award, as well as an instruction that the jury’s answer to the amount of an exemplary damage award must be unanimous) (on file with the *St. Mary’s Law Journal*).

222. See COMM. ON PATTERN JURY CHARGES, STATE BAR OF TEX., TEXAS PATTERN JURY CHARGES—BUSINESS, CONSUMER, INSURANCE & EMPLOYMENT 203 (2002) (providing PJC 110.1 Predicate – Instruction Conditioning Damages Question on Liability: “If your answer to Question [*insert number of appropriate liability question*] is ‘Yes,’ then answer the following question. Otherwise, do not answer the following question.”).

223. See, e.g., *id.* at 241 (providing a question and instruction on exemplary damages for actions involving interference with contract); *id.* at 252 (suggesting a predicate question and instruction on exemplary damages for causes of action for workers’ compensation benefits); *id.* at 256 (recommending a predicate question and instruction for an action involving unlawful employment practices where the plaintiff is seeking punitive damages).

224. See, e.g., *id.* at 265 (providing an instruction for exemplary damages predicated on an affirmative answer to a preceding instruction finding liability justifying an exemplary damage award); COMM. ON PATTERN JURY CHARGES, STATE BAR OF TEX., TEXAS PAT-

ments following the instructions where submission is conditioned upon a finding, or an instruction is subject to a statutory limitation.<sup>225</sup> For example, one comment informs the reader that a predicate instruction is not required if the court has granted a motion to bifurcate on the issue of punitive damages because a separate charge should be used in the second part of the trial.<sup>226</sup> However, unless the jury was informed that its liability finding must be unanimous in the first part of the trial, the exemplary damage issue would not be given to the jury in the second phase of the trial.

Prior to the Texas Supreme Court's 2005 order, several other alternatives to the ambiguity created by H.B. 4 in the jury instructions were considered while drafting this Comment. One alternative, as previously suggested, is that courts could interpret Texas Rule of Civil Procedure 277 as allowing the court to instruct the jury that its liability findings for exemplary damages must be unanimous. Rule 277 already allows a court to predicate the damage question upon affirmative findings of liability.<sup>227</sup> Although the *Bilotto* court did not define the word "explanatory" in its holding, H.B. 4's unanimity requirement could be found to be explanatory and not more than incidental information. Although defense counsel may argue that the explanatory instruction does advise the jury of the effect of its answers, the proposed instruction does no more than the jury instruction already included in H.B. 4. The TPJC could be revised to include this explanatory information in the jury instruction in all cases where the plaintiff seeks exemplary damages. Also, Rule 277 of the Texas Rules of Civil Procedure could be amended to provide that the court may predicate the damage question or questions upon *unanimous*, affirmative findings of liability. Another alternative models changes to the TPJC verbiage after the Fifth Circuit's Pattern Jury Instructions general instructions for a charge and informs the jury that its answers and its

---

TERN JURY CHARGES—MALPRACTICE, PREMISES & PRODUCTS 197 (2002) (including a specific instruction for personal injury damages and exemplary damages); COMM. ON PATTERN JURY CHARGES, STATE BAR OF TEX., TEXAS PATTERN JURY CHARGES—GENERAL NEGLIGENCE & INTENTIONAL PERSONAL TORTS 107 (2002) (recommending the jury instruction for the question for exemplary damages for personal injury actions).

225. See COMM. ON PATTERN JURY CHARGES, STATE BAR OF TEX., TEXAS PATTERN JURY CHARGES—BUSINESS, CONSUMER, INSURANCE & EMPLOYMENT 203 (2002) (providing informative comments on when to use PJC 110.1).

226. COMM. ON PATTERN JURY CHARGES, STATE BAR OF TEX., TEXAS PATTERN JURY CHARGES—MALPRACTICE, PREMISES & PRODUCTS 198 (2002).

227. See *H.E. Butt Grocery Co. v. Bilotto*, 985 S.W.2d 22, 23 (Tex. 1998) (providing the history of Texas Rule of Civil Procedure 277 and the specific 1987 amendment adding the language of predication of a damage question upon an affirmative finding of liability).

verdict must be unanimous.<sup>228</sup> Ultimately, rather than revise Rule 277 or follow the Fifth Circuit's Pattern Jury Instructions, the Texas Supreme Court chose to revise Rules 226a and 292 of the Texas Rules of Civil Procedure.

#### VI. THE TEXAS SUPREME COURT'S 2005 ORDER: UNANIMOUS JURY FINDING FOR ACTUAL DAMAGES?

The Texas Supreme Court's 2005 order revised the Texas Rules of Civil Procedure 226a and 292 in an attempt to resolve the ambiguity created by H.B. 4. However, the court's changes apply to *actual* damages as well as exemplary damages. Under the Texas Civil Practice and Remedies Code, a plaintiff is entitled to exemplary damages only if damages other than nominal damages are awarded.<sup>229</sup> After H.B. 4, a plaintiff is entitled to exemplary damages only if the jury was unanimous in finding both liability for exemplary damages and the amount of exemplary damages. H.B. 4's partial, required jury instruction informed the jury that in order for it to find exemplary damages, it must unanimously answer the question on the amount of exemplary damages. H.B. 4 did not require that the jury be told it must unanimously find liability on at least one claim for *actual* damages.

The Texas Supreme Court changed Rule 226a to read that a court *must* give the instruction prescribed by the court's January 27, 2005 order.<sup>230</sup> The Texas Supreme Court interpreted H.B. 4 to include a jury instruction that informs the jury not only that its findings on liability for exemplary damages and on the amount of exemplary damages must be unanimous, but it must also unanimously *find liability* "on at least one claim for actual

---

228. FIFTH CIRCUIT PATTERN JURY INSTRUCTIONS (CIVIL CASES) 29 (Comm. on Pattern Jury Instructions Dist. Judges Ass'n ed., 2004) (containing pattern jury instructions for use in federal question cases). The general jury instruction also advises the jury of the procedure for the foreperson to follow after it has reached a unanimous verdict. *Id.* at 32. The damages chapter of the pattern instructions informs juries that they must first determine liability and the court's instruction on damages is only for guidance if the jury continues to deliberate on the damages issue. *Id.* at 183. The punitive damages subsection of the pattern instructions could be used in the TPJC, with modifications to comply with H.B. 4's required jury instruction. *Id.* at 198-99. See generally *Fragumar Corp. v. Dunlap*, 925 F.2d 836, 839 (5th Cir. 1991) (remanding for a new trial to determine damages after the judge improperly allowed the jury to enter a majority verdict after properly giving the unanimity instruction contained in the *Pattern Jury Instructions, Civil Cases*, 1983 edition, section 8A).

229. TEX. CIV. PRAC. & REM. CODE ANN. § 41.004(a) (Vernon Supp. 2005).

230. TEX. R. CIV. P. 226a (changing the rule from reading, "The court *shall* give such admonitory instructions to the jury panel and to the jury as may be prescribed by the [Texas] Supreme Court in an order or orders entered for that purpose" to "[t]he court *must* give instructions to the jury panel and the jury as prescribed by order of the [Texas] Supreme Court under this rule" (emphasis added)).

damages that will support an award of exemplary damages.”<sup>231</sup> Part of the court’s jury charge correctly reads: “The jury need not be unanimous in finding the *amount* of actual damages.”<sup>232</sup> However, the court’s order and jury charge is not what H.B. 4 requires. H.B. 4 did not require a unanimous finding of “at least one claim for *actual* damages” to support an award for exemplary damages.<sup>233</sup> Although the Texas Civil Practice and Remedies Code requires actual damages before awarding exemplary damages, the finding of actual damages is not required to be unanimous. Notably, the court’s revision to Rule 292 does not specify that a verdict may only be rendered for exemplary damages if the jury unanimously found liability for actual damages, yet this verbiage was added to Rule 226a. Consequently, a plaintiff should not be required to secure a unanimous jury finding for at least one claim for actual damages, and the former versions of Rules 226a and 292 of the Texas Rule of Civil Procedure should apply in the court’s charge to the jury on the issue of actual damages. Not only does the Texas Supreme Court’s 2005 order not follow the court’s strict constructionist history, it also creates new language that expands H.B. 4 in a way not considered by the legislature. The court’s order effectively creates a new unanimity requirement for a jury’s liability findings for actual damages—yet another hurdle for Texas plaintiffs seeking exemplary damages.

## VII. CONCLUSION

### A. *After House Bill 4*

The Texas Supreme Court interpreted H.B. 4 to require that the jury charge include instructions to the jury that its liability findings for exemplary damages must also be unanimous in order for exemplary damages to be awarded to a plaintiff. However, the court exceeded the statutory-controlling language in requiring an instruction that the jury must also be unanimous in its finding for actual damages, the first hurdle a plaintiff confronts on the path to an exemplary damage award. In practice, the unanimity requirements certainly “place a greater emphasis on the jury

---

231. *Id.* According to Rule 226a’s Approved Instructions, the court is required to instruct the jury as follows: “If exemplary damages are sought against a defendant, the jury must unanimously find, with respect to that defendant, (i) liability on at least one claim for actual damages that will support an award of exemplary damages, and . . . .” *Id.* See generally Jennifer Bruch Hogan & Richard P. Hogan, Jr., *Charging the Jury in Changing Times*, 46 S. TEX. L. REV. 973, 998-1000 (2005) (reviewing the Texas Supreme Court’s January 27, 2005 order regarding Rule 226a).

232. TEX. R. CIV. P. 226a (emphasis added).

233. *Id.* (emphasis added).

selection phase of a future trial given that defense counsel will only need one juror to defeat an award of exemplary damages.”<sup>234</sup>

### B. *Future Tort Reform Aimed at Exemplary Damages?*

Only time will tell how Texas plaintiffs will fare based on the changes brought by H.B. 4 in civil cases involving exemplary damages. In the meantime, the battles and frustrations over the need for tort reform will certainly continue in future legislative sessions.<sup>235</sup> Even legislators involved in the passage of H.B. 4 expressed frustration and uncertainty about the need for additional tort reform and sought assurances that the legislature would not attempt to further control Texas juries. For example, during the June 1, 2003 floor debate, Senator Mario Gallegos pointed out that the Senate has “been passing tort reform since the malpractice bill was passed in 1977,” and said “throughout this entire session we have been solving an insurance problem by taking away rights from our constituents.”<sup>236</sup> Senator Gallegos then asked Senator Ratliff if he would “consider this to be the end” of tort reform, to which Senator Ratliff replied: “Senator, I certainly can’t answer that.”<sup>237</sup> After H.B. 4 is long forgotten, Texas plaintiffs can probably expect additional legislative controls over a jury’s ability to award exemplary damages through changes to jury instructions or in other ways that will appear in future attempts at tort reform. Perhaps future legislative records will include more detail so citizens can better understand the legislature’s true reasons for passing tort reform that results in additional limitations on a jury’s discretion to award exemplary damages.

---

234. Robert J. Witte & James G. Ruiz, *House Bill 4, Article 13 Damages*, 7 J. TEX. CONSUMER L. 33, 34 (2003).

235. See John Williams, *Alliances Put Heat on Tort Reformers*, HOUS. CHRON., Jan. 26, 2004, at A11, available at <http://www.texasgop.org/newsroom/newsDisplay.php?id=2697> (reporting on allegations that trial lawyers were financing and supporting opponents of Democratic legislators campaigning for reelection in order to punish them for supporting Proposition 12 and H.B. 4).

236. See S.J. OF TEX., 78th Leg., R.S. 5007 (2003) (presenting questioning by Senator Gallegos and the answers provided by Senator Ratliff, after unanimous consent in the Senate to Senator Gallegos’s motion “to establish legislative intent regarding H.B. 4”).

237. *Id.* at 5008.

