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# LOOKING FORWARD TO 2019

“Texas-Sized” Verdicts in 2018—  
Outliers or Paradigmatic Shift?

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“Everything’s bigger in Texas.” To many, this phrase is not merely a colloquialism, but rather a defining characteristic of the Lone Star State. Yet, for much of the state’s recent history, this “Texas-sized” perception generally was not reflected in civil jury verdicts in tort lawsuits. That is, until 2018, when juries from across the state’s rural and urban counties delivered one record-breaking verdict after another—including at least three nine-figure tort verdicts.

Whether the massive awards themselves will stand—as there will be appeals and settlements—this article seeks to highlight what may be traits and trends in these high-verdict cases resulting in the juries’ staggering awards. After recounting seven of the largest jury awards from 2018, the article will briefly discuss recurring themes by plaintiffs’ counsel and how Texas’s changing political landscape will likely impact the value of future verdicts and settlement negotiations.

## I. A LOOK BACK ON 2018’S NOTABLE VERDICTS

The following seven cases represent seven of the highest jury verdicts from 2018. This year, four cases were believed to set the record for highest verdict and included three awards that surpassed \$100 million. Interestingly, four of the top seven cases came out of rural and historically conservative East Texas—including two from Upshur County, Texas. The other three cases came out of Texas’s two most populous and urban counties: Harris and Dallas Counties.

### A. *McPherson v. Jefferson Trucking*:<sup>1</sup> Jury Awards Parents of 21 Year-Old Decedent \$260 Million after Son Slams into Side of Tractor-Trailer Blocking Highway

On November 9, 2018, an Upshur County jury awarded \$260 million to the family of 21 year-old Riley McPherson (“Riley”), after the jury determined Jefferson Trucking (“Jefferson”), its owner Timothy Jefferson (“Timothy”), and its driver Eric Jefferson (“Eric”) were vastly responsible for the fatal collision that killed Riley on U.S. Highway 271 near Gilmer, Texas.

#### 1. Facts

At approximately 5:35 a.m. on the morning of February 13, 2016, Defendant driver, Eric, an employee of Jefferson, attempted to back his tractor-trailer into a private residence off of U.S. Highway 271. While doing so, Eric positioned the tractor-trailer across the two northbound and two southbound lanes that comprised the four lane highway.

While the truck was blocking the lanes, Riley drove his 2008 Chevrolet Express van into the side of the tractor-trailer. Riley purportedly could not see the tractor-trailer because it was dark, and there were no skid marks on the road. Moreover, ladders found inside Riley’s van were found about 150 feet from the crash scene. Riley died from the collision. Eric was charged with criminally negligent homicide.

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<sup>1</sup> Cause No. 16-00247, in the 115th Judicial District Court, Upshur County, Texas.

## 2. Lawsuit and Trial

Riley's parents, Karen Pearson and Eddie McPherson, filed suit against Eric, Jefferson, and Timothy, seeking wrongful death damages for their negligence. According to Plaintiffs, Eric was already in the private driveway but attempted to reposition the tractor-trailer by suddenly pulling back out into the highway. Riley did not have enough time to stop before slamming into the side of the truck. Plaintiffs also presented evidence that, at the time of the accident, Eric had just returned home from Ohio, arguing that Eric drove 17 hours straight, much longer than the daily maximum hours allowed under state and federal law.

Plaintiffs claimed that Jefferson and Timothy were vicariously liable and independently liable for the negligent hiring of Eric, known to be reckless driver.

## 3. Jury Verdict

The jury found the defendants negligent, apportioning 65% liability on Eric; 20% liability on Jefferson; and 10% liability on Timothy. The jury also allotted 5% responsibility to Riley. The jury awarded *a record-breaking \$260 million in damages* to Riley's parents, which was assessed as follows:

### **Eddie McPherson**

- |  |                      |
|--|----------------------|
| • Past and future loss of companionship: | \$60 million         |
| • Past and future mental anguish:        | \$80 million         |
| <b>TOTAL:</b>                            | <b>\$140 million</b> |

### **Karen Pearson**

- |  |                      |
|--|----------------------|
| • Past and future loss of companionship: | \$60 million         |
| • Past and future mental anguish:        | \$60 million         |
| <b>TOTAL:</b>                            | <b>\$120 million</b> |

<b>TOTAL:</b>	<b>\$260 million</b>
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### **B. *Reavis v. Toyota*:<sup>2</sup> Dallas County Jury Awards Family over \$242 Million from Toyota for Defective Seat Backs in a Rear-End Collision**

On August 17, 2018, a unanimous Dallas County jury awarded Benjamin and Kristi Reavis (the Reavises") \$242,100,000.00<sup>3</sup> in damages after finding Toyota vastly responsible for traumatic brain injuries sustained by the Reavises' children, Owen, 3, and Emily, 5, in a rear-end collision in Dallas, Texas.

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<sup>2</sup> Cause No. DC-16-15296, in the 134th Judicial District Court of Dallas County, Texas.

<sup>3</sup> The entire award totaled \$243,236,248.71. Before trial, the parties stipulated to \$1,133,248 in past medical expenses.

## 1. Facts

On September 25, 2016, Benjamin was driving his 2002 Lexus ES 300 sedan on Dallas's North Central Expressway, just north of downtown Dallas, Texas. Kristi rode in the front passenger seat while Owen and Emily were seated in forward-facing children's car seats in the back seat.

Benjamin encountered traffic, forcing him to stop, when the Lexus was rear-ended by a 2009 Honda Pilot driven by Michael Steven Mummaw ("Mummaw") and owned by Mark Howell ("Howell"). Benjamin and Kristi were left without serious injury, but in what the Reavises claimed was "an otherwise uneventful collision," the Lexus's front seats malfunctioned and collapsed backward, striking the Reavis children in the head, resulting in both Emily and Owen sustaining skull fractures and traumatic and permanent brain injuries.

## 2. Lawsuit and Trial

The Reavises filed suit in November 2016, against Mummaw and Toyota<sup>4</sup> for personal injuries sustained in the collision.<sup>5</sup> They claimed Mummaw was negligent because he failed to keep a proper lookout, failed control his speed, followed too closely, and failed to brake or turn in time to avoid the collision. At trial, the Reavises recommended the jury only assess 5% liability on Mummaw. The crux of the Reavises' case was directed at Toyota, claiming that the Lexus's front seats, front seat backs and occupant restraint systems were defectively designed and marketed and were in an unreasonably dangerous condition. The Reavises, through their seat back and seat belt design expert, Gary Whitman, claimed that the front seats were designed defectively because they failed to prevent the front passengers from "ramping" up and over the seat back and striking the rear seat passengers in a rear-end collision. The Reavises pointed to testing from the early 1990s to argue that Toyota knew the front seat backs could ramp too far rearward in a rear-end collision, but chose to "bury its head in the sand." The Reavises' biomechanical expert testified that the children's injuries resulted, not from the collision itself, but from striking their parents' seat backs.<sup>6</sup>

Toyota denied the front seat system was defective, arguing that, not only did the front seat system meet or exceed the Federal Motor Vehicle Safety Standards, but that it performed its own testing to ensure the vehicle was reasonably safe. The accident, according to Toyota, was more severe than 95% of rear-end tow-away collisions. Toyota then argued Whitman's opinions were conclusory and his safer alternative designs did not relate back to the date the Lexus was manufactured in 2002. Toyota also argued that there was no evidence that the safer alternative designs would have prevented the injuries sustained by Owen and Emily. Rather, Toyota claimed Mummaw was solely responsible for the accident and the injuries. Toyota also argued

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<sup>4</sup> Plaintiffs technically sued Toyota Motor Sales, USA, Inc. and Toyota Motor Corporation. They also originally sued Toyota Motor North America, Inc., but nonsuited this entity prior to trial.

<sup>5</sup> Plaintiffs also sued Mark Howell, the owner of the vehicle driven by Mummaw, but nonsuited him before trial.

<sup>6</sup> The expert also testified that the car seats were properly installed and used.

that the children's child restraint systems were not properly installed or used at the time of the accident.

Emily and Owen both underwent surgery for their traumatic brain injuries and, as a result, spent several weeks in ICU and several more weeks in inpatient rehabilitation. The parties stipulated that the reasonable and necessary medical expenses were \$575,680.69 for Emily and \$560,568.02 for Owen. The Reavises claimed Emily's and Owen's traumatic brain injuries were permanent and would worsen with age, necessitating treatment for the rest of their lives. The Reavises presented life care plans totaling \$35,500,000 for Owen and \$42,200,000 for Emily, after being adjusted for inflation. Moreover, they presented expert testimony that Emily's and Owen's lost earning capacity totaled approximately \$2.1 million and \$2.7 million, respectively. The Reavises also sought non-economic awards for past and future pain and suffering, past and future physical impairment, and past and future disfigurement for the children. Benjamin and Kristi each made bystander claims for past and future mental anguish. Additionally, the Reavises sought punitive damages from both Toyota and Mummaw for gross negligence.

Toyota did not present a competing life care plan. Rather, it argued it was too early to determine the children's prognoses, whether they would be gainfully employed, and whether they would need full-time care in a facility. Toyota also disputed the present-value amounts presented by the Reavises' economist.

### 3. Jury Verdict

After a three-week trial, the jury deliberated for over eight hours before rendering its unanimous verdict in favor of the Reavises. The jury found that a design defect and defect in warnings in the Lexus was a producing cause of Owen's and Emily's.<sup>7</sup> The jury also found that Mummaw was negligent, while Benjamin and Kristi were not. Overall, the jury assigned 90% of the responsibility to Toyota Motor Corporation, 5% to Toyota Motor Sales, U.S.A, and 5% to Mummaw.<sup>8</sup>

The jury then awarded damages as follows:

#### Emily Reavis

- Past physical pain and mental anguish: \$1,000,000.00
- Future physical pain and mental anguish: \$2,500,000.00
- Future loss of earning capacity: \$2,800,000.00
- Past disfigurement: \$250,000.00
- Future disfigurement: \$750,000.00
- Past physical impairment: \$500,000.00

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<sup>7</sup> The jury found that Toyota Motor Sales, U.S.A was liable as a nonmanufacturing seller under the Texas Civil Practices & Remedies Code.

<sup>8</sup> Toyota Motor Corporation, being found 90% responsible, is jointly and severally liable for the entire amount of the award.

- Future physical impairment: \$18,750,000.00
- Past medical expenses (stipulated): \$575,680.69
- Future medical expenses until age 18: \$804,000.00
- Future medical expenses after age 18: \$20,696,000.00
- TOTAL: \$48,625,680.69**

**Owen Reavis**

- Past physical pain and mental anguish: \$1,000,000.00
- Future physical pain and mental anguish: \$2,500,000.00
- Future loss of earning capacity: \$2,800,000.00
- Past disfigurement: \$250,000.00
- Future disfigurement: \$0.00
- Past physical impairment: \$500,000.00
- Future physical impairment: \$18,000,000.00
- Past medical expenses (stipulated): \$560,568.02
- Future medical expenses until age 18: \$931,000.00
- Future medical expenses after age 18: \$18,069,000.00
- TOTAL: \$44,610,568.02**

**Benjamin Reavis**

- Past Mental Anguish: \$1,000,000.00
- Future Mental Anguish: \$2,000,000.00
- TOTAL: \$3,000,000.00**

**Kristi Reavis**

- Past Mental Anguish: \$1,000,000.00
- Future Mental Anguish: \$2,000,000.00
- TOTAL: \$3,000,000.00**

**Exemplary Damages**

- Toyota Motor Corporation: \$129,600,000.00
- Toyota Motor Sales, U.S.A., Inc.: \$14,400,000.00
- TOTAL: \$144,000,000.00<sup>9</sup>**

**TOTAL: \$243,236,248.71**

**C. *Patterson v. FTS International Manufacturing*:<sup>10</sup> Man Awarded \$101 Million in Actual and Punitive Damages after Being Rear-Ended by Driver with Marijuana and Methamphetamines in His System**

<sup>9</sup> The trial court later reduced the punitive damage award to stay within Texas’s statutory punitive damage cap.

<sup>10</sup> Cause No. 356-15, in the 115th Judicial District Court of Upshur County, Texas

On July 19, 2018, an Upshur County jury awarded \$101 million in actual and punitive damages against FTS International (“FTSI”) and its driver, Bill Acker (“Acker”), after determining the defendants were negligent and grossly negligent in a rear-end accident resulting in injuries Joshua Patterson (“Joshua”).

## **1. Facts**

At approximately 1:00 p.m. on September 15, 2013, Joshua was driving his 2010 Ford F-150 southbound on U.S. Highway 259 when he was rear-ended by a truck carrying frac sand being driven by Acker, an employee of FTSI. Joshua survived the collision, even telling the investigating officer that he was not injured. However, soon after the wreck, Joshua purportedly began complaining of neck and back injuries, which eventually forced him to stop working.

Following the accident, Acker underwent a drug test that revealed Acker had marijuana and methamphetamines in his system at the time of the accident. Additionally, Acker was on probation with FTSI for his poor driving performance and had three moving violations within a two-and-a-half year period.

## **2. Lawsuit and Trial**

Joshua filed suit against Acker and FTSI seeking damages for negligence and gross negligence. Joshua claimed that Acker failed to control his speed and focused on Acker’s drug use and prior driving record to not only illustrate Acker’s negligence, but also to establish FTSI’s liability.

Joshua argued that FTSI hired Acker, against its own policies. FTSI’s policies prohibit employees from driving for the company when their driving record demonstrates a pattern of “risky behavior”—defined as a record consisting of three moving violations within a 36-month period. Acker’s record disqualified him for employment as a driver, yet FTSI hired him. Joshua also produced evidence that Acker lied on his application, was on probation with FTSI, and was previously suspended by FTSI twice. In his deposition, Acker also testified that he had used marijuana and methamphetamines about three times per week.

During trial, an FTSI representative testified that the company used a third-party vendor to conduct background checks, but admitted that, had the company spent \$20 to obtain Acker’s driving history from the Texas Department of Transportation, Acker would not have been hired. Additionally, Acker testified that FTSI had never trained him, but, nevertheless, told him to sign and date the certificates as if he had. This occurred the week before trial. Finally, Joshua produced evidence that the Federal Motor Carrier Safety Administration downgraded FTSI’s carrier status to “conditional” after it discovered critical violations of the Controlled Substances and Alcohol Use and Testing regulation.

Joshua claimed he sustained severe neck and back injuries in the accident, eventually necessitating surgery, including a back fusion. Because of the surgery, Joshua, a crane operator, claimed that he could no longer work.

### 3. Jury Verdict

A unanimous jury found Acker 70% liable and FTSI 30% liable for the collision, awarding Patterson actual damages of approximately \$26 million, of which non-economic damages totaled about \$25 million. The trial court bifurcated the question of gross negligence, which resulted in a punitive damages finding of \$75 million against FTSI and \$50,000 against Acker. FTSI was responsible for all damages excluding Acker's \$50,000 punitive damages.

#### D. ***Blake v. Werner Enterprises***:<sup>11</sup> **Werner Enterprises Liable for \$89 Million Verdict after Vehicle Carrying Plaintiffs Loses Control, Crosses into Oncoming Traffic, and Is Struck by Werner Truck**

On May 21, 2018, a Harris County jury handed down a 10-2 verdict against Werner Enterprises ("Werner"), awarding \$89,687,994 against it, after finding it responsible for a collision involving one of its drivers that killed a seven year-old boy and paralyzed a twelve year-old girl.

#### 1. Facts

On December 30, 2014, Jennifer Blake ("Blake") and her children, Brianna Blake ("Briana") (12), Nathan Blake ("Nathan") (14), and Zackery Blake ("Zackery") (7) were passengers in a 2003 Ford F-350 pickup truck driven by Zaragosa "Trey" Salinas ("Salinas"). They were travelling eastbound on Interstate 20, just outside Odessa, Texas, when Salinas lost control of the pickup truck, crossed over the grass median, and into the oncoming westbound lanes, where it was struck by a Werner tractor-trailer driven by Werner employee, Shiraz Ali ("Ali"). Zackery was killed, Brianna was rendered quadriplegic, and Blake and Nathan were seriously injured.

Ali, who was a student driver for Werner at the time of the accident, was driving in the left lane at approximately 50-60 miles per hour. The speed limit was 75 miles per hour. Ali's trainer was asleep in the rear berth. The parties disputed the weather and road conditions immediately before the collision. Blake claimed freezing rain created "black ice" road conditions, while Werner and Ali disputed this.

#### 2. Lawsuit and Trial

Blake, individually and on behalf of Brianna, Nathan, and the Estate of Zackery, filed suit against Ali and Werner claiming their negligence and gross negligence caused their personal injuries. Although Salinas's pickup lost control and entered into Ali's lane, Salinas was not named as a defendant.

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<sup>11</sup> Cause No. 2015-36666, in the 127th Judicial District Court of Harris County, Texas

Blake alleged that Ali failed to keep a proper lookout, failed to control his speed, and was driving too fast for the allegedly icy conditions. Icy conditions were forecast, and winter weather warnings were in effect for that area. Blake argued that in those conditions, Ali should not have been driving 50-60 miles per hour but, instead, should have slowed down and drove in the right lane or pulled off the road. Blake contended that had Ali not been driving at that speed in the left lane, the collision would have been far less severe or not occurred at all.

Additionally, Blake alleged that Werner was independently responsible for the accident because it negligently trained and supervised Ali. Blake focused on Ali's lack of training and experience driving commercial vehicles, especially in icy road conditions. Ali was a trainee driver, who was only hired earlier that month. And, while he had a supervisor with him, the supervisor was asleep at the time of the accident. Blake also argued that Werner's safety policies were extremely poor, as Ali should have been notified of the weather conditions, either through a temperature gauge or radio, and told to stop driving.

Werner and Ali vigorously denied any liability for the accident. Its corporate representatives testified that Werner did nothing wrong and planned to make no changes to its safety policies. Werner and Ali designated Salinas as a responsible third party, arguing Salinas was negligent and wholly responsible for the accident. Werner and Ali pointed out that Salinas failed to control his speed and lost control, causing the pickup truck to come into Ali's lane. Ali, who was driving well below the posted speed limit, was unable to avoid the accident.

Zackery sustained a subdural hematoma, right pneumothorax, and liver and spleen lacerations. He survived three days before dying from his injuries.

Brianna was rendered a quadriplegic, including permanent brain injuries that necessitated multiple brain surgeries, an intraventricular hemorrhage, left pulmonary contusion, and left malleolar fracture. During one day of trial, Brianna was wheeled in front of the jury on a ventilator. She is unable to walk, talk, and is incontinent. Blake claims Brianna requires 24-hour care for the rest of her life. Blake presented a life care plan for Brianna totaling more than \$43 million.

Nathan sustained a collapsed lung, fractures to his left scapula and clavicle, and severe brain injuries. Blake sustained neck and back sprains and strains, a left orbital wall fracture, and various head injuries. Blake also claimed past and future mental anguish related to Zackery's death and past and future mental anguish as a bystander to Brianna's and Nathan's injuries.

### **3. Jury Verdict**

Following a six week trial, the jury deliberated nearly three days before rendering a 10-2 verdict for Blake. The jury found Werner 70% liable, Ali 14% liable, and Salinas 16% liable. While the jury found negligence, it did not find gross negligence.

The jury awarded a total of \$89,687,994, to Blake, for which Werner was jointly and severally liable.

**Jennifer Blake**

• Past physical pain and mental anguish:	\$2,310,000.00
• Future physical pain and mental anguish:	\$4,620,000.00
• Past physical impairment:	\$2,310,000.00
• Future physical impairment:	\$2,310,000.00
• Past mental anguish, loss of companionship:	\$1,650,000.00
• Future mental anguish, loss of companionship:	\$1,650,000.00
• Past bystander mental anguish:	\$825,000.00
• Future bystander mental anguish:	\$825,000.00
<b>TOTAL:</b>	<b>\$16,500,000.00</b>

**Nathan Blake**

• Past physical pain and mental anguish:	\$1,000,000.00
• Future physical pain and mental anguish:	\$1,000,000.00
• Past physical impairment:	\$1,000,000.00
• Future physical impairment:	\$1,000,000.00
• Past disfigurement:	\$500,000.00
• Future disfigurement:	\$500,000.00
<b>TOTAL:</b>	<b>\$5,000,000.00</b>

**Brianna Blake**

• Past physical pain and mental anguish:	\$3,750,000.00
• Future physical pain and mental anguish:	\$7,500,000.00
• Past physical impairment:	\$3,750,000.00
• Future physical impairment:	\$7,500,000.00
• Past disfigurement:	\$1,250,000.00
• Future disfigurement:	\$1,250,000.00
• Future medical expenses:	\$43,187,994.00
<b>TOTAL:</b>	<b>\$68,187,994.00</b>

**TOTAL:** **\$89,687,994.00<sup>12</sup>**

**E. *Pierce v. East Texas Medical Center:*<sup>13</sup> Man Awarded over \$43 Million after Hospital Allows Suspended Doctor to Provide Substandard Care, Resulting in Prolonged Medically Induced Coma**

<sup>12</sup> The total award was reduced to \$89,190,494.00, after a \$497,500.00 settlement credit was applied.

<sup>13</sup> Cause No. 16-0853-C, in the 241st Judicial District Court, Smith County, Texas.

On January 30, 2018, a Smith County jury awarded Billy Pierce (“Pierce”) (61) \$43,327,246.00 after finding Dr. Gary Boyd (“Boyd”), a suspended gastroenterologist, provided substandard care, causing Pierce to sustain permanent personal injuries and necessitating a liver transplant. At the time of treatment, Boyd was on probation, yet East Texas Medical Center (ETMC) allowed Boyd to treat Pierce.

## **1. Facts**

On April 21, 2014, Pierce was admitted to ETMC in Tyler, Texas, complaining of stomach pain and vomiting. Boyd was Pierce’s gastroenterologist and, after reviewing a CT scan, diagnosed Pierce with stones in the bile duct, acute pancreatitis, and cholangitis. However, Boyd incorrectly determined that the stones could not be removed because of an anatomical abnormality, which made it impossible to surgically remove the stones.

Over the course of the next few weeks, Pierce was left in a medically induced coma without receiving any treatment. Pierce developed sepsis and multi-organ failure. Eventually, on May 26, 2014, a second opinion was sought by another gastroenterologist, who found that Boyd was incorrect. Pierce underwent surgery to remove the stones, but, due to the length of time that passed, Pierce sustained permanent damage to his organs. Pierce was forced to undergo a liver transplant.

During Pierce’s treatment, Boyd was on probation with the Texas Medical Board for a prior incident where he misdiagnosed a patient and performed unnecessary medical procedures. Boyd’s privileges at ETMC had been automatically suspended since 2013, pursuant to ETMC’s bylaws.

## **2. Lawsuit and Trial**

Pierce filed suit against Boyd, two other gastroenterologists that covered for Boyd when he was unavailable, Gastroenterology Associates (Boyd’s employer), and ETMC. All of the gastroenterology defendants, including Boyd, settled prior to trial. Pierce proceeded to trial against ETMC only.

Pierce argued that ETMC was grossly negligent for allowing Boyd to practice at the hospital without privileges. Additionally, Pierce presented evidence that ETMC’s CEO rejected a demand from the staff in 2013 to take action against Boyd. After Boyd’s reprimand in 2013, ETMC’s medical executive committee demanded the CEO take action numerous times throughout the fall of 2013. Three of ETMC’s own doctors testified on Pierce’s behalf, claiming that ETMC knew Boyd was a problem, but failed to take any action. Pierce’s hospital administration expert testified that the hospital violated its bylaws and Joint Commission standards by allowing Pierce to practice without privileges.

Due to ETMC's gross negligence, Pierce claimed he did not receive proper and timely treatment. Had he received proper care, Pierce's stones would have been immediately removed and he would have gotten back to his normal life after a short hospital stay.

ETMC argued Pierce was already in poor condition, which deteriorated rapidly, through no one's fault, including Boyd's. ETMC took the position that its doctors saved Pierce's life.

According to Pierce's life care planner, Pierce is required to be under the care of liver specialists for the rest of his life, and take anti-rejection medication that will have debilitating side effects. Additionally, Pierce earned \$900,000 per year, before he was forced to stop working due to this incident.

### 3. Jury Verdict

Following a five-day trial, the jury rendered a verdict finding ETMC and Boyd were negligent in providing substandard care to Pierce. The jury assessed 90% liability on ETMC and 10% on Boyd, who were the only two parties on the jury charge. ETMC was also found grossly negligent. The jury awarded Pierce a total of \$43,327,245.74, including \$25 million of punitive damages assessed against ETMC. The rest of the award was assessed as follows:

#### **Billy Pierce**

• Past medical expenses:	\$1,327,245.74
• Future medical expenses:	\$3,500,000.00
• Past physical impairment:	\$1,000,000.00
• Future physical impairment:	\$1,000,000.00
• Past mental anguish:	\$1,000,000.00
• Future mental anguish:	\$1,000,000.00
• Past physical pain:	\$1,000,000.00
• Future physical pain:	\$1,000,000.00
• Past lost earning capacity:	\$1,500,000.00
• Future lost earning capacity:	\$6,000,000.00
<b>TOTAL:</b>	<b>\$18,327,245.74</b>

**TOTAL WITH PUNITIVE DAMAGES: \$43,327,245.74**

ETMC ultimately paid \$9 million, representing the ceiling of the parties' high/low settlement agreement.

#### **F. *Estate of Kari Rene Hunt Dunn v. OM Lodging*:<sup>14</sup> Hotel Partly Responsible for \$41 Million Verdict after Jury Found Hotel Negligent in Handling Woman's Murder**

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<sup>14</sup> Cause No. 15-0819, in the 71st Judicial District Court, Harrison County, Texas.

On June 21, 2018, a Harrison County jury awarded an East Texas family \$41,550,000 for the stabbing death of Kari Rene Hunt Dunn by her estranged husband, Brad Dunn, in a Marshall, Texas, hotel room.

## **1. Facts**

On December 1, 2013, Kari Rene Hunt Dunn (“Kari”) (31) met her estranged husband, Brad Dunn (“Brad”), at the Baymont Inn & Suites hotel in Marshall, Texas. The couple had separated a few months prior. Brad rented a hotel room so he could spend the weekend with their three children: Brianna (9), Kylie (4) and Zane (2). Kari dropped the kids off at Brad’s room, when Brad asked Kari to come into his room. While in the hotel room, Brad and Kari went into the bathroom so they could talk privately. There, Brad stabbed Kari twenty-one times.

During the stabbing, Kari reportedly shouted for the children to call 911. Brianna tried to call 911, but was unable to get through because she did not know to press “9” before calling an outside line. While Brianna attempted to call 911, Kylie and Zane left the room to find help. They ran into two on-duty housekeepers, who did not speak English.

Roughly twelve minutes after the stabbing, Brad walked out of the bathroom, locking it behind him, took Kylie, and left. After more than fifteen minutes passed from when Kari began screaming, a guest in a nearby room called 911. First responders arrived on the scene ten minutes later, finding Kari dead. Brad was later convicted of the murder and sentenced 99 years in prison.

Notably, this incident prompted Congress to implement federal legislation in February 2018 (named “Kari’s Law”) requiring businesses to offer direct-dial 911 access.

## **2. Lawsuit and Trial**

Kari’s family filed suit against Brad and the hotel owner, OM Lodging LLC. The family acknowledged that Brad was mostly responsible for the incident, but claimed that the hotel’s actions and inactions prevented paramedics from arriving sooner and saving Kari’s life. The family alleged that the hotel’s employees essentially ignored the children, failed to monitor surveillance video, and should have called 911 when they saw the unattended children gesturing for help. The family also retained a hotel expert, who testified that the hotel’s policies and procedures were inadequate to deal with medical emergencies, and the employees were improperly trained and supervised. The family further argued that, even though Kari was stabbed twenty-one times, she was conscious for 10-15 minutes after the attack began, with their trauma surgeon expert opining Kari would have survived if she received timely treatment. The expert testified that Kari was still alive when Brad left the bathroom.

The hotel argued that Brad was solely responsible for the incident and that, given the circumstances, its employees acted reasonably. The hotel claimed that, after being approached

by the children, the housekeepers entered the room twice, but did not realize a medical emergency was occurring. Dunn was pro se and did not attend trial, as he was in prison.

The hotel presented a competing medical expert, an emergency medicine specialist, who testified that Kari would not have survived, even if timely treated because she likely was dead by the time Brad left the bathroom.

The family asked the jury to award damages for Kari's physical pain, mental anguish, and disfigurement. Additionally, each of Kari's four surviving family members, including her three children and her father, sought wrongful death damages.

### 3. Jury Verdict

The jury found that the hotel was liable for negligence, including negligent training, hiring, and supervision, apportioning 20% fault to the hotel. The jury also found that Brad was 80% liable. The jury awarded the plaintiffs \$41,550,000, of which the hotel was liable for \$8,310,000.<sup>15</sup> The award was assessed as follows:

#### **The Estate of Kari Rene Hunt Dunn**

- Physical pain and mental anguish: \$1,000,000.00
- TOTAL: \$1,000,000.00**

#### **Brianna A. Dunn**

- Past loss of companionship and society: \$1,000,000.00
- Future loss of companionship and society: \$2,000,000.00
- Past loss of pecuniary contribution: \$100,000.00
- Future loss of pecuniary contribution: \$500,000.00
- Past mental anguish: \$3,000,000.00
- Future mental anguish: \$5,000,000.00
- TOTAL: \$11,600,000.00**

#### **Kylie J. Dunn**

- Past loss of companionship and society: \$1,000,000.00
- Future loss of companionship and society: \$2,000,000.00
- Past loss of pecuniary contribution: \$100,000.00
- Future loss of pecuniary contribution: \$500,000.00
- Past mental anguish: \$3,000,000.00
- Future mental anguish: \$5,000,000.00
- TOTAL: \$11,600,000.00**

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<sup>15</sup> Plaintiffs and OM Lodging subsequently settled for \$2.4 million at mediation.

**Zane A. Dunn**

- Past loss of companionship and society: \$1,000,000.00
- Future loss of companionship and society: \$2,000,000.00
- Past loss of pecuniary contribution: \$100,000.00
- Future loss of pecuniary contribution: \$500,000.00
- Past mental anguish: \$3,000,000.00
- Future mental anguish: \$5,000,000.00
- TOTAL: \$11,600,000.00**

**Henry “Hank” Hunt**

- Past loss of companionship and society: \$500,000.00
- Future loss of companionship and society: \$1,000,000.00
- Past loss of pecuniary contribution: \$50,000.00
- Future loss of pecuniary contribution: \$200,000.00
- Past mental anguish: \$1,000,000.00
- Future mental anguish: \$2,000,000.00
- TOTAL: \$4,750,000.00**

**TOTAL: \$40,550,000.00**

**G. *Figgs v. Georgia Pacific*<sup>16</sup>: Mill Supervisor Awarded \$33 Million for Personal Injuries Arising from Explosion Caused by Defective Dust-Collection System**

On April 11, 2018, a Harris County jury awarded Ralph A. Figgs (“Figgs”) \$33,129,390.95 in damages for personal injuries sustained after a dust-collection system exploded in a plywood mill in Corrigan, Texas.

**1. Facts**

On April 26, 2014, a sander caught fire at a Georgia Pacific, LLC, plywood mill in Corrigan, Texas. The fire traveled down the ductwork of the sander’s dust-collection system, where combustible sawdust generated from the sander is collected and transported through 400 feet of ductwork to a 25 foot tall, outdoor structure used to hold the dust, known as the baghouse. The dust-collection system was designed and installed by Aircon, Inc. The system also had a spark-detection and spark-extinguishment system, an abort gate, and a control center, which were all designed by GreCon.

As the fire traveled through the ductwork, it triggered GreCon’s spark-detection and extinguishment system. Even though the system worked correctly, it failed to extinguish the fire. The fire eventually traveled into the baghouse, causing an explosion. Two employees were

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<sup>16</sup> Cause No. 2016-26100, in the 129th Judicial District Court, Harris County, Texas.

killed in the explosion and several more employees, including Figgs, were injured. At the time of the incident, Figgs (62) was a supervisor at the plywood mill. He sustained severe burns.

## 2. Lawsuit and Trial

Figgs brought suit against twenty-five entities, including Aircon, GreCon, and Georgia Pacific. By the time of trial, the only entities remaining were Aircon and GreCon (collectively “Defendants”).<sup>17</sup>

Figgs sued Aircon for negligence, gross negligence, marketing defect, and design defect. Against GreCon, he asserted negligence, negligent undertaking, marketing defect and design defect—under the theory of substantial participation. The crux of Figgs’s argument was that the dust-collection system was marketed as being capable of preventing, isolating, and eliminating fires before the fires reached the baghouse. In this incident, this system failed to do so. Figgs further claimed that the system failed to meet industry standards, and Defendants failed to warn Georgia Pacific of the hazards associated with the system. While Figgs conceded that the GreCon components did not fail, he argued the components were located too close to the baghouse and should have been moved.

Defendants argued that the explosion was a result of Georgia Pacific’s failure to adequately train its employees regarding the hazards and emergency procedures associated with the system. Moreover, they claimed that Georgia Pacific failed to maintain the system, including cleaning the ducts. GreCon also pointed out that the system was in place for nearly ten years without incident or malfunction. Rather, the sander itself was deemed a fire-hazard by the manufacturer, and Georgia Pacific failed to take any action to remediate the hazard, or correct several issues with the sander. Additionally, GreCon presented evidence that the fan in the dust-collection system was turned off, thus preventing the fire from being drawn into the water curtains, as designed.

Figgs sustained severe second and third degree burns to his head, arms, back, and hands, necessitating several surgeries and skin grafts. He was also claimed brain damage, PTSD, and depression, resulting from the incident. Figgs sought \$187,210.95 for past medical expenses; \$4,830,000.00 in future medical expenses; \$290,116.00 for past earning capacity; and \$322,064 for future earning capacity.

Defendants focused on Figgs’ claim of a brain injury, noting that Figgs did not lose consciousness after the explosion and was reported to have a Glasgow coma scale score of 15 (out of 15) on the night of the incident.

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<sup>17</sup> Georgia Pacific reached a confidential settlement agreement with Figgs prior to trial. However, it remained on the jury charge.

### 3. Jury Verdict

The jury found that the dust-collection system suffered from design and marketing defects that were a producing cause of Figgs' injuries. It further found that Georgia Pacific and GreCon were negligent. The jury apportioned 51% of the responsibility to Aircon; 26% to GreCon; and 23% to Georgia Pacific. The jury did not find that Aircon was grossly negligent. Figgs was awarded \$33,129,390.95<sup>18</sup>, which was assessed as follows:

#### **Ralph A. Figgs**

• Past physical pain:	\$6,000,000.00
• Future physical pain:	\$3,000,000.00
• Past mental anguish:	\$3,000,000.00
• Future mental anguish:	\$5,000,000.00
• Past medical expenses:	\$187,210.95
• Future medical expenses:	\$4,830,000.00
• Past disfigurement:	\$2,000,000.00
• Future disfigurement:	\$1,500,000.00
• Past physical impairment:	\$2,000,000.00
• Future physical impairment:	\$5,000,000.00
• Past lost earning capacity:	\$291,116.00
• Future lost earning capacity:	\$322,064.00
<b>TOTAL:</b>	<b>\$33,129,390.95</b>

## II. COMMON TRENDS AND THEMES

To some extent, these cases can be explained as “perfect storm” outliers, plagued with especially aggravating facts, bad actors, and severe injuries. Many were trucking cases with inexperienced drivers. It has been well-reported that the United States is undergoing a fairly large truck driver shortage, as it has become a less-desirable job.<sup>19</sup> Desperate to fill the empty positions, some trucking companies have relaxed hiring standards, hiring drivers with little experience or less-than-desirable backgrounds.

However, simply calling these cases “outliers” appears to be misguided. While the cases encompass a wide range of facts and severity of injuries, several trends and themes are present in all of them, built around the plaintiffs' presentation of the case, supporting an argument for a broader paradigmatic shift in Texas.

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<sup>18</sup> GreCon (26% liable) was ordered to pay \$8,613,641.65. Aircon (51% liable) was jointly and severally liable for the remainder of the award. After settlement credits were deducted, Aircon was ordered to pay \$24,206,890.95.

<sup>19</sup> See e.g. Heather Long, “America has a massive truck driver shortage. Here’s why few want an \$80,000 job,” WASH. POST (May 28, 2018), available at [https://www.washingtonpost.com/news/wonk/wp/2018/05/28/america-has-a-massive-truck-driver-shortage-heres-why-few-want-an-80000-job/?noredirect=on&utm\\_term=.76a7dfccc8a7](https://www.washingtonpost.com/news/wonk/wp/2018/05/28/america-has-a-massive-truck-driver-shortage-heres-why-few-want-an-80000-job/?noredirect=on&utm_term=.76a7dfccc8a7).

## **A. The Corporate Defendant: Focus on the Deep Pockets**

In general, plaintiffs' counsel in the above-referenced cases focus on convincing the jury to place all, or at least most, liability on the corporate defendant. These defendants typically have "deep pockets." Additionally, in Texas, a defendant is jointly and severally liable for the entire award, if it is found more than 50% liable—all the more reason to focus on corporate liability. Six of the seven juries in the above cases apportioned more than 50% liability on the corporate defendant.

## **B. The Reptile Theory**

To expand the scope of a corporate defendant's "bad acts," plaintiffs' counsel employ the "reptile theory." Developed in 2009, the reptile theory has become a near-pervasive trial technique utilized by plaintiffs, to appeal to a juror's "reptilian brain" or survival mode.

As the cases above illustrate, plaintiffs' counsel seek to prove that the corporate defendant is not merely liable for causing injury to the plaintiff, but instead offer evidence that the corporate defendant's acts or omissions transcend the circumstances of the case. A corporate defendant's conduct is presented as prevalent and posing danger to the entire community. The effects are two-fold. First, by expanding the scope of the corporate acts and omissions to encompass society as a whole, the jurors become more engaged, but also begin to identify with the victim. Second, the jurors are more likely to become enraged and, in turn, more likely to be motivated to send a message to the corporate defendant.

A corollary of the reptile theory is to highlight a company's or its employee's violation of government regulations, industry standards, and its own policies. It furthers the overall trial theme of expanding the scope of trial beyond the case-specific facts to the global actions of the company. Generally, plaintiffs' counsel set the stage by introducing the regulation, standard, or policy, furthering the reptilian appeal—the importance of the rule to the community, at large.

In a lawsuit for negligence, a jury must determine whether a defendant acted "reasonably." Use of the reasonable person standard, while veiled as objective, is necessarily subjective, as it relies on the juror's own perception of reasonableness. When the reasonableness of a company's acts or omissions is assessed, the standard becomes more muddled and complex to the lay juror. By presenting evidence that a company violated a government regulation, industry standard, or its own policies, the standard necessarily becomes black and white to the lay juror. Assigning culpability to a "rule breaker" is easier than assigning culpability to a company that acted unreasonably.

Assuming the company actually did violate a regulation or policy, the company is forced to either find an excuse for breaking the rules, or admit it broke the rules and minimize the impact its rule breaking. Either situation forces the company into a "damage control" posture, playing directly into plaintiffs' counsel's hands. Plaintiffs' counsel then argues that this is proof that the

company shows no remorse or regard for the rules, and, as such, suggests the jury send a message to the company and punish it.

### **C. Damages and the Jury Charge: The Outlet for an Angry Jury**

Motivating an angry jury to “send a message” is most of the battle. This past year revealed that once a jury is enraged against a corporate defendant, it will give plaintiffs everything asked for and more. Plaintiffs’ counsel took advantage of this by presenting massive economic damage models and crafting jury charges to maximize awards.

In non-wrongful death cases, plaintiffs presented massive multi-million dollar life care plans to prove-up claims for future medical expenses. Generally, life-care plans represent the worst-case scenario for a plaintiff and are adjusted for inflation. Life care plans are often supported by a team of different experts, including a life-care planner, an economist, and a treating physician. This was evident in the *Werner* and *Toyota* cases. In *Werner*, more than half of the \$89 million verdict was allocated to Brianna Blake’s future medical expenses, supported by Plaintiffs’ \$43 million life care plan. In *Toyota*, plaintiffs presented a life-care plan for both of the Reavis children, built on the assumption that, as adults, the children would need to live in a facility. Facility care comprised the largest portion of the life-care plans, totaling \$42 million and \$35.5 million respectively.

Defending against a life care plan has proved difficult for the defense. Often, defense attorneys refrain from retaining their own expert to prepare a competing life care plan in fear of setting a damage floor. This leaves a defendant with only an attack on the reasonableness and necessity of the life care plan. This strategy, not surprisingly, can come with its own set of side effects. For example, attacking the life care plan of a particularly sympathetic plaintiff, without presenting a competing life care plan, may paint the defendant as heartless to the jury.

In 2018, plaintiffs’ counsel also used the jury charge to their advantage to secure massive non-economic damage awards. Unlike economic damages, typically presented through documents and experts, non-economic damages are largely left to the discretion of the jury. Accordingly, plaintiffs’ counsel sought to maximize the angry juries’ ability to exercise that discretion.

Moreover, a jury charge could have as many as eight non-economic “blanks” per injured plaintiff for the jury to complete. Of course, the more blanks on the verdict form, the more money a jury will award.

### **D. Responsible for the “Injury,” not the “Occurrence”**

In the motor-vehicle accident cases above, a subtle change in wording on the jury charge may have also led to a greater percentage of liability assigned to defendants. Generally, the proportional responsibility question on the jury charged is framed in terms of the parties that caused or contributed to the *occurrence*. Plaintiffs’ counsel, however, have sought to change

*occurrence to injury* in the charge. This subtle change reframes the question, taking the focus off of who caused the occurrence (*i.e.*, the accident) to who caused a plaintiff's injury.

*Werner*, a case with serious liability issues, illustrates the potential impact of this change in wording. In that case, it is possible the driver of the pickup truck, Salinas, might have received a larger apportionment of liability if the jury considered the cause of the "occurrence." Salinas, after all, lost control of the pickup truck and swerved over into the Werner driver's lane. But the question was framed in terms of who caused the "injury." This change right into plaintiffs' counsel's playbook: had Werner not allowed its driver to be on the road in those conditions, the injuries would not have been as severe. Therefore, in the jury's mind, while Werner may not have caused the "occurrence," it was primarily responsible for the "injuries."

### **E. The Changing Art of Trial Presentation**

In the past, the skill of oration was paramount in effective trial presentation because most people engaged in the world by speaking and listening. But, the internet and smart phones have caused a significant shift in our society from oral to visual communication.

The courtroom was one of the last holdouts of the digital age, causing jurors to detach from the trial. Plaintiffs' counsel took the lead to update their trial presentations accordingly.

Most Americans, particularly Millennial and Generation Z individuals, now communicate visually—typically through a screen. Whether texting, scrolling, or SnapChatting, Americans today are more receptive to communication and information presented visually. Accordingly, jurors today want to be *shown* and not *told*. Plaintiffs' counsel have been happy to oblige. Technology provides animated re-creations of incidents, usually motor vehicle accidents. Depositions are videotaped and played back to the jury at trial, rather than reading from the transcript. Plaintiffs' counsel now create Hollywood-quality "day in the life" videos to show a jury how injuries affect their clients' day-to-day lives. While not necessarily a new technique, one of the more compelling moments of the *Werner* trial involved presenting Brianna Blake to the jury. Rendered a quadriplegic, the little girl was wheeled in front of the jury on a ventilator.

Additionally, jurors today have a significantly shorter attention span. Most Americans walk around with a super-computer in their pocket, with which they are able to indefinitely entertain themselves at the touch of a button. Exacerbating the situation, jurors are taken away from their phones and forced to sit all day at trial, where most of what they are watching is, in their mind, boring, or worse, not important. From trial's start, it is an uphill battle to capture their quickly-fleeting attention span.

Plaintiffs' counsel have adapted by focusing their presentation of the case on telling a compelling, emotionally-charged story. Their arguments tend to be "big picture," striving, as much as possible, to stay away from the details of the alleged tort. Instead, the case-in-chief often focuses on one "antagonist," most often, the corporate defendant. While other defendants may be present or at least present in the charge, Plaintiffs' counsel found success

this past year focusing on proving the liability of the corporate antagonist, rather any individual liability. The short, focused, concise, and emotionally-driven driven story proved persuasive in 2018.

While some of these techniques can be utilized by defendants, the defense bar has, for the most part, been slow to catch up. Plaintiffs' counsel necessarily have built-in advantages, such as telling their story first, often dictating the terms by which the case is argued. Defendants' counsel, often focused on poking holes in Plaintiffs' case, can become scattered, losing jurors along the way. Finally, perhaps the biggest built-in disadvantage for Defendants' counsel is that they are typically forced to counter emotional appeals to a jury with appeals to reason. If not careful, a jury can quickly perceive defense counsel as cold-hearted.

#### **F. Gross Negligence: Bifurcate or Not to Bifurcate**

Finally, these cases may show a trend regarding the treatment of the gross negligence question. Plaintiffs' counsel seem less inclined to proceed with gross negligence at trial during the liability phase. Punitive damage awards are often considered tenuous, not holding up on appeal.<sup>20</sup> Punitive damages are also subject to a statutory cap.<sup>21</sup>

In Texas, a trial may be bifurcated to try the issue of punitive damages in a separate proceeding from the liability and actual damages portion of trial. Dropping a gross negligence claim during or shortly before trial appears to have become a strategic decision more Plaintiffs' counsel take, especially when implementing the reptile theory. The reptile theory is designed to motivate a jury to punish, once reflected in a punitive damages award. If a defendant demands bifurcation of the trial, the jury cannot render a punitive damage award at the liability stage. The reptile theory, however, allows the jury to "punish" the defendant through awarding substantially higher non-economic damages award. An example of this strategy played out in *Jefferson Trucking*, where the jury awarded \$260 million in wrongful death damages alone. That said, in some instances, should Plaintiffs' counsel continue to seek punitive damages despite bifurcation, a jury may continue to punish a corporate defendant, such as occurred in the *FTSI* and *Toyota* verdicts.

### **III. NOTE ON IMPACT OF CHANGING POLITICAL LANDSCAPE IN TEXAS ON VERDICTS**

So, what does the future hold? Texas trial judges and appellate justices (including those on the Texas Supreme Court) are elected to their seats. Historically, which political parties would hold judicial seats in a given a jurisdiction was easily predicted. That has changed dramatically in the last two national election cycles as a result of altered statewide demographics amongst the eligible voting pool. In the State's more populous counties, the trial bench and appellate courts have seen the election of more jurists who in private practice represented plaintiffs as opposed

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<sup>20</sup> Though this trend may be changing. *See infra* § III.

<sup>21</sup> Exemplary damages are capped at two times the amount of economic damages plus up to \$750,000 of the non-economic damages awarded by a jury. TEX. CIV. PRAC. & REM. CODE § 41.008(b).

to corporate defendants or insurance companies. It can be fairly surmised that one's prejudicial career can have an effect on how decisions are made from the bench in discovery, at trial, and on appeal.

For these reasons, the changes in the bench will necessarily impact strategic decisions made by plaintiffs, defendants, and their counsel, before, during, and after trial. If Plaintiffs' counsel is more confident that large verdicts will be affirmed on appeal, they may be less hesitant to seek extremely large non-economic and punitive damage awards and less incentivized to settle post-trial. Settlement values may increase and even more cases may settle prior to trial.

#### **IV. CONCLUSION**

In 2018, the excessive verdicts could be attributed to a "perfect storm" of bad facts, bad actors, and bad injuries. But these issues have existed in cases for years. There must be recognition and concern by Defense counsel that the Texas-sized verdicts of 2018 may not be outliers, but represent a broader shift. Currently, Plaintiffs' counsel are proving to be more capable in telling jurors a compelling story. Moving forward into 2019 without thought and recognition of Plaintiffs' counsel tactics, juries could continue to award more excessive verdicts. Defendants' counsel must be more cautious in relying on the prospect of appeal, must adapt to the new strategies of the plaintiffs' bar, and become innovative in defending against them before and during trial. While everything is generally bigger in Texas, verdicts hopefully will not be in 2019 and beyond.