

# EXCESSIVE DAMAGE REVIEW IN THE FIFTH CIRCUIT: THE CONFLICT AND QUAGMIRE CONTINUE

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I. INTRODUCTION.....	453
II. THE PRACTICAL ISSUE IN SHARP AND CLEAR FOCUS.....	454
III. A BRIEF REVIEW OF THE HISTORY.....	454
IV. THE PUSHBACK.....	456
V. THE FACTIONS.....	458
VI. THE RECENT CASES.....	459
VII. THE FUTURE.....	461

## I. INTRODUCTION

Since the publication of the original article in 2003, the Fifth Circuit’s internal conflict over the method of resolving excessive damage challenges has continued unabated.<sup>1</sup> The focal point of the conflict is the “case comparison methodology,” according to which the damages challenged as excessive are compared to damage findings in prior cases within the

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1. This Article is an update of Lawrence James Madigan, *Excessive Damage Review in the Fifth Circuit: A Quagmire of Inconsistency*, 34 TEX. TECH L. REV. 429 (2003). The original article traced the development of the circuit’s methodology in reviewing excessive damage challenges and identified serious errors in that methodology, principally a “case comparison methodology.” *Id.* at 437. In essence, with the “case comparison” the court determines the merits of “excessive damage” challenges by comparing the damage findings in the case at bar to the non-economic damage findings in prior, yet unrelated, cases within the relevant jurisdiction. *Id.* at 441. Indeed, with resort to a “case comparison paradigm” to determine if a non-economic damage finding is excessive, the terms “controlling precedent” and “stare decisis” no longer refer to principles of law but have been expanded to now include fact-findings on damages in totally unrelated and disparate cases. *Id.* at 434-35; see *Douglass v. Delta Air Lines, Inc.*, 897 F.2d 1336, 1339 (5th Cir. 1990). The results produced by this rubric can be mind numbing, especially in a profession and jurisprudence grounded in principle. Consider the situation in which at least six jurors, all of whom have personal knowledge of the parties, witnesses, and the evidence, have made a determination of the reasonable monetary amount necessary to compensate a plaintiff for a specific element of non-economic damage, and have been joined in that determination by the trial judge and one appellate judge; yet all are overruled by two other appellate judges who have determined *merely from reading a transcript* that the damage finding is excessive. This is precisely what occurred in *Vogler v. Blackmore*, 352 F.3d 150 (5th Cir. 2003). The principle of deference for personal knowledge is gone. This situation is then compounded by the appellate panel’s comparing the case at bar to a plaintiff’s damages that occurred eighteen years prior to the case at bar and reducing the damages to the level of the older case. This was done in *Lebron v. United States*, 279 F.3d 321 (5th Cir. 2002). For more detail on *Lebron*, 279 F.3d at 327-29, see *infra* note 48.

relevant jurisdiction to determine excessiveness.<sup>2</sup> By dint of their decisions, concurrences, or dissents, most of the circuit's judges have aligned themselves on one or the other side of this issue.<sup>3</sup> As explicated in the original article, the results have been a disaster of Fifth Circuit jurisprudence in the area of excessiveness review—a quagmire of conflicting principles and decisions.<sup>4</sup> And although recent decisions do not portend a resolution of the conflict—something that can be achieved only by the en banc court—they do signal changes in this area of appellate jurisprudence.<sup>5</sup>

## II. THE PRACTICAL ISSUE IN SHARP AND CLEAR FOCUS

The focal issue in this internal circuit conflict may be reduced to the following: Are challenges that nonpecuniary damage findings are excessive to be decided by determining the sufficiency of evidentiary support in the record or by comparing the challenged damages to damage findings in prior, supposedly similar but unrelated cases?<sup>6</sup>

## III. A BRIEF REVIEW OF THE HISTORY

The circuit gave birth to the judge-made “maximum recovery rule” in 1970.<sup>7</sup> The rule, as adopted, provided that an excessiveness issue is determined by whether the amount of the award reflects the maximum the fact-finder could have awarded under the evidence in the case.<sup>8</sup> If the award exceeds the maximum amount that could have been awarded under the evidence, then the amount must be reduced accordingly.<sup>9</sup> This formulation of the rule was applied for eleven years until the court addressed a defendant's suggestion that the challenged damage finding

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2. See Madigan, *supra* note 1, at 434-35. “Relevant jurisdiction,” for cases involving the substantive law of a state within the Fifth Circuit's geographical jurisdiction, are cases from that particular state and, for cases involving federal substantive law, are cases decided by the Fifth Circuit. See *Douglass*, 897 F.2d at 1339. Still unresolved is the conflict in Fifth Circuit decisions that allow comparison of the damage findings in the case at bar with district court cases as opposed to cases decided only on appeal. Compare *id.* (allowing comparison to district court cases), with *Lebron*, 279 F.3d at 326 (limiting comparison to cases decided on appeal). It is noteworthy that these conflicting decisions were each authored by two of the main proponents of case comparison methodology. Needless to say, even the proponents of case comparison cannot agree on its parameters!

3. See discussion *supra* note 2.

4. See Madigan, *supra* note 1, at 437-38.

5. See *id.* at 438-42.

6. See *Thomas v. Tex. Dep't of Criminal Justice*, 297 F.3d 361, 373 (5th Cir. 2002) (Dennis, J., concurring).

7. *Gorsalitz v. Olin Mathieson Chem. Corp.*, 429 F.2d 1033, 1047 (5th Cir. 1970), *modified*, 456 F.2d 180 (5th Cir. 1972).

8. *Id.*

9. *Caldarera v. E. Airlines, Inc.*, 705 F.2d 778, 783 (5th Cir. 1983).

exceeded that in comparable cases.<sup>10</sup> And although several panels had rejected early attempts to utilize damage findings in prior cases as a “case comparison” adjunct to the maximum-recovery-rule evidentiary analysis,<sup>11</sup> a “case comparison paradigm” was engrafted into the application of the rule in 1983 in *Caldarera v. Eastern Airlines, Inc.*<sup>12</sup> In the nineteen years between the *Caldarera* decision in 1983 and *Salinas v. O’Neill* in 2002, the proponents of case comparison morphed it from a noncontrolling guideline, into “not always controlling,” into the essence of the maximum-recovery-rule excessiveness analysis.<sup>13</sup> By 2002, for its proponents, case comparison became the *sine qua non* of maximum recovery rule methodology, and the question of evidentiary support for the challenged damage findings was no longer of consequence in the excessiveness evaluation.<sup>14</sup>

With this evolution, the proponents of case comparison changed the defined purpose of the maximum-recovery rule from an effort to determine the maximum amount the fact-finder could have awarded *based on the evidence in the case* to an effort “to bring rough consistency into comparable damages awards.”<sup>15</sup> At a fundamental level, this was an effort to set objective limits on non-economic damages that are inherently subjective in nature—how and to what extent did this injury and its sequelae affect this particular individual? And in achieving a complete distortion of the maximum-recovery rule’s original purpose and methodology, the proponents of case comparison methodology did not discriminate between jury damage findings and trial court damage findings;

10. *Miley v. Oppenheimer & Co.*, 637 F.2d 318, 331-32 (5th Cir. Unit A Feb. 1981), *abrogated by* *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213 (1985).

11. *See Johnson v. Offshore Express, Inc.*, 845 F.2d 1347, 1356 (5th Cir. 1988); *Hernandez v. M/V Rajaan*, 841 F.2d 582, 587 (5th Cir. 1988); *Winbourne v. E. Airlines, Inc.*, 758 F.2d 1016, 1018 (5th Cir. 1984) (per curiam); *Sosa v. M/V Lago Izabal*, 736 F.2d 1028, 1035 (5th Cir. 1984); *Allen v. Seacoast Prods., Inc.*, 623 F.2d 355, 365 (5th Cir. 1980), *overruled by Gautreaux v. Scurlock Marine, Inc.*, 107 F.3d 331 (5th Cir. 1997); *Wiley v. Stensaker Schiffahrtsges.*, 557 F.2d 1168, 1172 (5th Cir. 1977).

12. *Caldarera*, 705 F.2d at 785.

13. *See Salinas v. O’Neill*, 286 F.3d 827, 830 (5th Cir. 2002) (“A mainstay of the excessiveness determination is comparison to awards for similar injuries.”). *Compare Lebron v. United States*, 279 F.3d 321, 326 (5th Cir. 2002) (“[P]rior damages awards are not always controlling . . .”), and *Douglass v. Delta Air Lines, Inc.*, 897 F.2d 1336, 1339 (5th Cir. 2002) (declaring that “[a] departure from precedent is merited if unique facts are present that are not reflected within the controlling caselaw”), with *Wheat v. United States*, 860 F.2d 1256, 1260 (5th Cir. 1988) (stating that case comparison “might serve as a point of reference,” but it “is not controlling”), and *Giancontieri v. Pan Am. World Airways, Inc. (In re Air Crash Disaster Near New Orleans, La. on July 9, 1982)*, 767 F.2d 1151, 1156 (5th Cir. 1985) (explaining that case comparison provides “rough guidance”).

14. *Salinas*, 286 F.3d at 831. “In practice, our evaluation of what a jury could have awarded is tied to awards in cases with similar injuries.” *Id.* “This judge-made rule *essentially provides* that we will decline to reduce damages where the amount awarded is not disproportionate to at least *one factually similar* case from the relevant jurisdiction.” *Lebron*, 279 F.3d at 326 (first emphasis added) (quoting *Douglass*, 897 F.2d at 1344). “Despite the well-established and limited role for case comparisons in this circuit, the majority opinion moves comparability to the forefront of our excessiveness inquiry.” *Thomas v. Tex. Dep’t of Criminal Justice*, 297 F.3d 361, 375 (5th Cir. 2002) (Dennis, J., concurring).

15. *Lebron*, 279 F.3d at 328; *see Caldarera*, 705 F.2d at 784.

as deference to jury findings—due to Seventh Amendment constraints—and deference to the trial court, which “ha[d] seen the parties and heard the evidence” (as opposed to appellate judges who only read papers) went the way of the rule’s original intent and methodology.<sup>16</sup> And this well-established deference falls solely on the basis of a “perception” of an appellate court that the finding is excessive.<sup>17</sup>

#### IV. THE PUSHBACK

To be sure, there were opponents to these developments. Indeed, a case comparison methodology for excessiveness review had been rejected even before the maximum-recovery rule had been adopted in the circuit.<sup>18</sup> One would think that the circuit’s frequently cited “precedent rule,” according to which “the holding of the first panel to address an issue is the law of this [c]ircuit, thereby binding all subsequent panels unless and until the first panel’s holding is overruled by the [c]ourt sitting en banc or by the Supreme Court,” would have prevented, or at least inhibited, the adoption of case comparison in the excessiveness calculus.<sup>19</sup> But within the quagmire of inconsistency that is Fifth Circuit excessive damage review, this precedent rule, along with many other established principles,<sup>20</sup> presented no obstacle to the proponents of case comparison; it was simply disregarded.<sup>21</sup>

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16. *Caldarera*, 705 F.2d at 783-84.

17. *Lebron*, 279 F.3d at 325.

18. *See Fruit Indus., Inc. v. Petty*, 268 F.2d 391, 395 (5th Cir. 1959). The court does not determine excessiveness by comparing verdicts rendered in different causes; “each case must be determined on its own facts.” *Id.*

19. *Smith v. GTE Corp.*, 236 F.3d 1292, 1300 n.8 (11th Cir. 2001) (citing *Cargill v. Turpin*, 120 F.3d 1366, 1386 (11th Cir. 1997); *see United States v. Ocean Bulk Ships, Inc.*, 248 F.3d 331, 340 n.2 (5th Cir. 2001); *Barrientes v. Johnson*, 221 F.3d 741, 780 n.30 (5th Cir. 2000); *FDIC v. Abraham*, 137 F.3d 264, 269 (5th Cir. 1998); *Broussard v. S. Pac. Transp. Co.*, 665 F.2d 1387, 1387 (5th Cir. 1982) (en banc); *United States v. Kirk*, 528 F.2d 1057, 1063 (5th Cir. 1976).

20. First and foremost is the circuit precedent rule. *See supra* note 19 and accompanying text. Second, “each case must be determined on its own facts.” *See Sosa v. M/V Lago Izabal*, 736 F.2d 1028, 1035 (5th Cir. 1984). Third, a jury verdict is reversed for excessiveness except “on the strongest of showings.” *See Caldarera*, 705 F.2d at 784 (internal quotation marks omitted). Fourth, a determination of excessiveness “is justified only when the award exceeds that bounds of reason under the facts of the case.” *Thomas v. Tex. Dep’t of Criminal Justice*, 297 F.3d 361, 374 (5th Cir. 2002). Fifth, comparisons serve only as a point of reference and are in no way controlling. *Wakefield v. United States*, 765 F.2d 55, 59-60 (5th Cir. 1985). Sixth, “a cold record cannot capture the atmosphere, the expressions, the attitudes that are the marrow of a jury trial.” *In re Clay*, 35 F.3d 190, 194 (5th Cir. 1994). Seventh, “[o]ur review is not only hindsight, but is based on a written record with no ability to assess the impact . . . on the jury.” *Caldarera*, 705 F.2d at 782.

21. *See Thomas*, 297 F.3d at 373 (Dennis, J., concurring).

Indeed, between 1977 and 1988, the case comparison proponents ignored at least six unequivocal decisions rejecting that methodology for resolving excessive damage challenges.<sup>22</sup>

Additionally, from 1985 to 2003, the pushback against case comparisons was embodied in dissents in four cases and a concurrence in a fifth.<sup>23</sup> One of the dissents and the concurrence are particularly noteworthy due to the candor and clarity with which they dissect the unprincipled approach to excessive damage review that is case comparison.

Early on in the morphing of the maximum-recovery rule into a case comparison paradigm, Judge Tate's dissent in *Giancontieri v. Pan American World Airways, Inc.* highlighted the myriad of flaws in case comparison and ended with an admonition that likely reveals the fundamental force behind a case comparison methodology in the circuit:

Appellate courts have a tendency to aggrandize unto themselves the powers to right wrongs (as they see them), an institutional tendency to centralize justice-notions in themselves, which (regrettably) lends itself to bureaucratized rules of review—a tendency that flouts the fundamental principle that “the trial on the merits should be ‘the main event’ . . . rather than ‘a tryout on the road . . . .’” I fear that, unwittingly, my esteemed brethren have by their decision contributed to this tendency to convert trial fact-issues into appellate law-principles so as thereby to be susceptible to bureaucratizing appellate supervision and control.<sup>24</sup>

Unfortunately, as evidenced by the continued inexorable evolution of case comparison analysis after this cogent and stinging dissent, this verbal hit fell on deaf ears.

Of equal stature in the mileposts of criticism of case comparison analysis is the concurrence of Judge Dennis in *Thomas v. Texas Department of Criminal Justice*.<sup>25</sup> Once again, one of the intellectual leaders of the court took to task the case comparison paradigm, highlighting the fact that it had been rejected previously by numerous circuit cases.<sup>26</sup> But this cogent

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22. See *Johnson v. Offshore Express, Inc.*, 845 F.2d 1347, 1356 (5th Cir. 1988); *Hernandez v. M/V Rajaan*, 841 F.2d 582, 587 (5th Cir. 1988); *Winbourne v. E. Airlines, Inc.*, 758 F.2d 1016, 1018 (5th Cir. 1984) (per curiam); *Sosa*, 736 F.2d at 1035; *Allen v. Seacoast Prods., Inc.*, 623 F.2d 355, 365 (5th Cir. 1980), *overruled by* *Gautreaux v. Scurlock Marine, Inc.*, 107 F.3d 331 (5th Cir. 1997); *Wiley v. Stensaker Schiffahrtsges.*, 557 F.2d 1168, 1172 (5th Cir. 1977).

23. See *Vogler v. Blackmore*, 352 F.3d 150, 161 (5th Cir. 2003) (Reavley, J., dissenting); *Thomas*, 297 F.3d at 373 (Dennis, J., concurring); *Randall v. Chevron U.S.A., Inc.*, 13 F.3d 888, 911 (5th Cir. 1994) (Parker, J., dissenting), *overruled by* *Bienvenu v. Texaco, Inc.*, 164 F.3d 901 (5th Cir. 1999); *Wheat v. United States*, 860 F.2d 1256, 1263-66 (5th Cir. 1988) (Williams, J., concurring in part and dissenting in part); *Giancontieri v. Pan Am. World Airways, Inc.* (*In re Air Crash Disaster Near New Orleans, La. on July 9, 1982*), 767 F.2d 1151, 1160 (5th Cir. 1985) (Tate, J., dissenting in part).

24. *Giancontieri*, 767 F.2d at 1170 (citation omitted).

25. See *Thomas*, 297 F.3d at 374.

26. See *Johnson*, 845 F.2d at 1356; *Hernandez*, 841 F.2d at 587; *Winbourne*, 758 F.2d at 1018; *Sosa*, 736 F.2d at 1035; *Allen*, 623 F.2d at 365; *Wiley*, 557 F.2d at 1172.

reminder of circuit precedent was also ignored, as the following year no less than three subsequent decisions continued to utilize the methodology.<sup>27</sup>

Based on the reasoning and the indisputable supporting authority cited in both Judge Tate's dissent and Judge Dennis's concurrence, the unavoidable inference is that there is something more than jurisprudence in play here, perhaps ideology.<sup>28</sup> This same inference results when one considers the total lack of jurisprudential reasoning provided to support a case comparison methodology and the number of established legal principles that are ignored by the proponents of case comparisons in their quest to establish it as the law of the circuit.<sup>29</sup>

## V. THE FACTIONS

As of this writing, of the fifteen current, active judges on the court,<sup>30</sup> five have yet to serve on a panel confronted with the issue of excessiveness review.<sup>31</sup> Of the remaining ten judges, the decisions that they have authored, or in which they have participated, provide a case-based alignment on this issue of excessive damage review methodology.<sup>32</sup> The leaders are readily identified, either by their insistence on application of a case comparison paradigm or by their forceful rejection of same. The leader of the proponents of case comparison is former Chief Judge Jones,<sup>33</sup> followed closely by Judge Smith.<sup>34</sup> In joining without dissent in panel opinions applying the case comparison methodology, this pro-comparison side includes Judges Jolly, Davis, and Clement.<sup>35</sup> The leader of the opposition to case comparison review is Judge Dennis<sup>36</sup>—and arguably, by

27. See *Pineda v. United Parcel Serv., Inc.*, 353 F.3d 414 (5th Cir. 2003), *rev'd*, 360 F.3d 483 (5th Cir. 2004); *Moore v. M/V Angela*, 353 F.3d 376, 384-85 (5th Cir. 2003); *Vogler*, 352 F.3d at 156-58 (majority opinion).

28. See *Thomas*, 297 F.3d at 373-78; *Giancontieri*, 767 F.2d at 1160-70.

29. See *supra* note 20.

30. Although there are seventeen positions on the Fifth Circuit court, as of September 2012 there are two vacancies.

31. They are Judges Elrod, Southwick, Haynes, Graves, Jr., and Higginson.

32. The positions of the seven senior status judges will not be addressed because of the reduced occasion to participate further in the internal conflict on this subject.

33. See *Lebron v. United States*, 279 F.3d 321, 325-30 (5th Cir. 2002) (authoring the opinion); *Vogler v. Blackmore*, 352 F.3d 150, 156-59 (5th Cir. 2003) (joining in decision); *Zeno v. Great Atl. & Pac. Tea Co.*, 803 F.2d 178, 181-82 (5th Cir. 1986) (Jones, J., dissenting) (dissenting on refusal of majority to reduce jury damage findings based on a case comparison to allegedly similar injury cases).

34. See *Salinas v. O'Neill*, 286 F.3d 827, 830-33 (5th Cir. 2002); *Giles v. Gen. Elec. Co.*, 245 F.3d 474, 488-95 (5th Cir. 2001); *Deffenbaugh-Williams v. Wal-Mart Stores, Inc.*, 156 F.3d 581, 598 (5th Cir. 1998), *reh'g en banc, opinion vacated sub nom. Williams v. Wal-Mart Stores, Inc.*, 169 F.3d 215 (5th Cir.), *and opinion reinstated on reh'g*, 182 F.3d 333 (5th Cir. 1999); *Douglass v. Delta Air Lines, Inc.*, 897 F.2d 1336, 1344-46 (5th Cir. 1990).

35. See *Vogler*, 352 F.3d at 156-59; *Lebron*, 279 F.3d at 325-30; *Denton v. Morgan*, 136 F.3d 1038, 1046-47 (5th Cir. 1998).

36. See *Thomas v. Tex. Dep't of Criminal Justice*, 297 F.3d 361, 373 (5th Cir. 2002) (Dennis, J., concurring).

joining in panel opinions in which case comparison has not been implicated, Judges King, Stewart, Prado, and Owen.<sup>37</sup>

## VI. THE RECENT CASES

In the ten Fifth Circuit cases addressing excessive damage challenges and the maximum-recovery rule that have been decided since 2002, five panels have used case comparisons to reduce damages,<sup>38</sup> and without regard to case comparisons, five have left the damage findings undisturbed.<sup>39</sup> This alone is not remarkable given the division of active judges on the issue. But there are two noteworthy aspects of these cases. First, the four most recent cases have refused to employ a case comparison methodology: two because “unique facts [were] present that are not reflected within the controlling case law,”<sup>40</sup> the third because “there is no factually similar case in the relevant jurisdiction,”<sup>41</sup> and a fourth because without employing case comparison, the damage finding was found not to be excessive.<sup>42</sup> In eschewing case comparison analysis, two of these four cases utilized the phrase “the maximum recovery rule is not implicated.”<sup>43</sup> This novel and rather unique language raises some very interesting questions. It is easy to find factual distinctions between cases that render them dissimilar. That is part of the problem with a case comparison method. So is this phrase a euphemism for “we reject a case comparison method”? Or perhaps the phrase “the maximum recovery rule is not implicated” is utilized because the circuit precedent rule, which, when not ignored, proscribes one panel from overruling a panel in a prior case?<sup>44</sup> Second, Judge Smith, a strong proponent for case comparison excessive damage review in the past, was a panel member in two of these four cases and, in joining in the per curiam decisions in these two cases, voiced no opposition to the refusal to implicate case comparisons.<sup>45</sup> Does this signal a shift in Judge Smith’s view on case comparison analysis?

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37. See *Learmonth v. Sears, Roebuck & Co.*, 631 F.3d 724, 739 (5th Cir. 2011); *Foradori v. Harris*, 523 F.3d 477, 505 (5th Cir. 2008).

38. See *Pineda v. United Parcel Serv., Inc.*, 353 F.3d 414 (5th Cir. 2003), *rev'd*, 360 F.3d 483 (5th Cir. 2004); *Moore v. M/V Angela*, 353 F.3d 376, 393 (5th Cir. 2003); *Vogler*, 352 F.3d at 161; *Thomas*, 297 F.3d at 373 (majority opinion); *Salinas*, 286 F.3d at 832-33.

39. See *Ledet v. Smith Marine Towing Corp.*, 455 F. App’x 417, 422-23 (5th Cir. 2011); *Learmonth*, 631 F.3d at 740; *Tureaud v. Grambling State Univ.*, 294 F. App’x 909, 916 (5th Cir. 2008); *Foradori*, 523 F.3d at 519; *Castellano v. Fragozo*, 311 F.3d 689, 712 (5th Cir.), *rev’d en banc*, 352 F.3d 939 (5th Cir. 2003).

40. *Ledet*, 455 F. App’x at 422; see *Learmonth*, 631 F.3d at 739.

41. *Foradori*, 523 F.3d at 505.

42. See *Tureaud*, 294 F. App’x at 916.

43. *Learmonth*, 631 F.3d at 739; *Foradori*, 523 F.3d at 506.

44. See *United States v. Ocean Bulk Ships, Inc.*, 248 F.3d 331, 344 n.2 (5th Cir. 2001).

45. See *Ledet*, 455 F. App’x at 418; *Tureaud*, 294 F. App’x at 910.

Finally, as this conflict continues unabated until en banc resolution, the most recent case on the issue, *Ledet v. Smith Marine Towing Corp.*, does contain an improvement in the case comparison method, if improvement is indeed possible.<sup>46</sup> That feature involves converting the damage amount in the prior case to case-at-bar, present-day dollars.<sup>47</sup> This conversion factor would seem to be an obvious and common sense requirement, especially when attempting to compare damages in the case at bar with a case tried eighteen years prior.<sup>48</sup> But in the inventory of cases addressing case

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46. *Ledet*, 455 F. App'x at 423.

47. *See id.*

48. *See Lebron v. United States*, 279 F.3d 321, 327-29 (5th Cir. 2002). Because of the extreme results wrought by the *Lebron* court's utilization of case comparisons, a brief summary of the case and the court's actions is warranted. *Lebron* was a Federal Tort Claim Act case (nonjury) involving obstetrical negligence, which resulted in the *Lebron* infant suffering diffuse bihemispheric brain damage with neurological sequelae of permanent spastic quadriplegia, seizure disorder, and mental impairment. *Id.* at 324. It was tried to a Ronald-Reagan-nominated-and-confirmed district judge with twenty years experience on the federal bench at the time of trial, who then presided over the Western District of Texas. *Id.* This highly regarded jurist had an excellent reputation for objectivity and fairness and was certainly not a rogue, liberal judge. Further, this judge, in making his damage findings, attempted to apply the maximum recovery rule, as it had become a case comparison paradigm, and had reviewed damage findings in allegedly similar Texas cases that had not been appealed. *Id.* at 326. And with that background, the *Lebron* court began to work its mischief:

1. In making his damage findings, the district judge had utilized damage findings in district court cases in accordance with Fifth Circuit precedent. *See id.* But the *Lebron* court declined to compare the damages awarded the *Lebrons* with damage awards in cases that had not been appealed and, in doing so, violated the circuit's precedent rule. *Id.* The court in *Douglass v. Delta Air Lines, Inc.* had held that "[a]wards imposed by district courts do not, as Delta suggests, serve as precedent only upon review." *Douglass v. Delta Air Lines, Inc.*, 897 F.2d 1336, 1344 (5th Cir. 1990).

2. In addition to ignoring circuit precedent, the *Lebron* court showed no deference to this trial judge and his damage findings when it reduced the brain-damaged child's noneconomic damages from \$9 million to \$1.25 million, an 86% reduction, to the level of damages in the case of *Roberts v. Williamson*, 52 S.W.3d 343 (Tex. App.—Texarkana 2001), *aff'd in part and rev'd in part*, 111 S.W.3d 113 (Tex. 2003), a case with an injury and neurological sequelae not remotely similar to *Lebron*. *See Lebron*, 279 F.3d at 328. *Roberts* was a case in which the *Williamson* child had suffered right hemisphere damage (as opposed to the *Lebron* child's bihemispheric diffuse brain damage). *See Roberts*, 52 S.W.3d at 347. Because of the drastic difference in the type and extent of brain damage suffered, the *Williamson* child in *Roberts* had a much more benign neurological outcome than that of the *Lebron* child. *Id.* For example, the *Williamson* child suffered from partial left side physical impairment from hemiplegia and was not totally paralyzed, as was the *Lebron* child whose brain damage had resulted in spastic quadriplegia. *See Lebron*, 279 F.3d at 328; *Roberts*, 52 S.W.3d at 350. The *Williamson* child did not suffer a seizure disorder as the *Lebron* child did. *See Lebron*, 279 F.3d at 331. The *Williamson* child was not cortically blind as was the *Lebron* child. *See id.* at 330. These major differences, which preclude any notion of "similarity," and which are apparent from the *Roberts* reported opinion and the *Lebron* appellate record, were dismissed by the *Lebron* panel by stating that the brain injuries sustained by both children were "analogous." *See Lebron*, 279 F.3d at 328; *Roberts*, 52 S.W.3d at 347. Clearly, they were not! Not even close. Note the *Lebron* court did not use the term "similar"! *See Lebron*, 279 F.3d at 324-33. The brain damage and neurological sequelae in the respective cases were neither analogous nor remotely similar.

3. In reducing the *Lebron* child's nonpecuniary damages, the *Lebron* court refused to apply a 33% or 50% "multiplier" (i.e., percentage enhancement), a function that had become standard in the Fifth Circuit decisions that had reduced damages on an excessiveness complaint. *See id.* at 333; *Salinas v. O'Neill*, 286 F.3d 827, 831 n.6 (5th Cir. 2002).



comparison, *Ledet* appears to be the only case to include this conversion feature in its analysis.<sup>49</sup> This does little to remediate the quagmire, but it definitely removes one of the most inequitable features of case comparison analysis.

## VII. THE FUTURE

Without en banc court intervention, there will be no remediation of the quagmire that is excessive damage review in the Fifth Circuit. The multiple conflicting cases by Fifth Circuit panels discussed herein certainly qualify this issue for en banc determination.<sup>50</sup> Until that intervention, the newer judges that have yet to confront the excessiveness issue will be compelled to align with one of the two sides in this conflict when assigned to a panel presented with the review methodology issue. Hopefully the next party that suffers a case comparison reduction in his nonpecuniary damages will pursue a petition for en banc rehearing seeking reinstatement of his damages and en banc remediation of the quagmire.

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4. The *Lebron* court reduced the Lebron parents' noneconomic damages from \$3,000,000 to \$2,000,000 based on the damages awarded to the mother of a brain-damaged child in a birth injury case that was tried eighteen years prior to *Lebron*—a case in which the author was privileged to be both trial counsel and appellate counsel for the Bonds family. *Lebron*, 279 F.3d at 327; see *Ingraham v. United States*, 808 F.2d 1075, 1077 (5th Cir. 1987). And in reducing the Lebron parents' damages on the basis of comparing their damages to an eighteen-year-old case, there was no effort by the *Lebron* court to convert the damages in the eighteen-year-old case to present-day *Lebron* dollars for a more realistic comparison. If the *Lebron* court had converted Mrs. Bonds's 1982 trial, nonpecuniary damages of \$750,000 to *Lebron*, 2000-trial, present-day dollars, a conversion that was done in *Ledet v. Smith Marine Towing Corp.*, 455 F. App'x 417 (5th Cir. 2011), using the Bureau of Labor Statistics CPI Inflation Calculator, the resulting amount would have been \$1,335,000 for each parent, an amount that would have warranted a reduction of at most \$330,000 rather than the *Lebron* court's \$1,000,000 reduction. In light of these actions, it is not hyperbole to state that in the gradations of injustice wrought by the case comparison paradigm, *Lebron* stands ignominiously as the Mount Everest.

49. See *Ledet*, 455 F. App'x at 423.

50. See FED. R. APP. P. 35(a)(1) (stating that "en banc consideration is necessary to secure or maintain uniformity of the court's decisions").

