Zero

APPELLATE REVIEW OF A JURY'S FINDING OF "ZERO DAMAGES"

By Justice Raul A. Gonzalez
and Rob Gilbreath

SUPPOSE A JURY IN A PERSONAL INJURY CASE RETURNS A verdict finding the defendant liable but awards the plaintiff $0 for an element of damages. Suppose also that on appeal the court determines thattheevidence establishes that the plaintiff's damages were, though existent, inconsequential for that element. Should the case be remanded for a new trial *solely* because the jury failed to award compensation for that element? When should a case involving a jury finding of zero damages be reversed and remanded?

The so called "zero damages rule" dictates, in its most basic application, that, in cases involving unliquidated damages, the jury *must* award something for every element of damage "proved," or else the case will be remanded for a new trial.[1] Recent supreme court decisions have rendered the rule of questionable validity, and its continued use threatens to hinder proper appellate review of jury findings. The premise underlying the rule — that a plaintiff should be compensated for all damages that he or she has adequately proved — is, of course, sound. It is the substitution of this rule for the principles of evidentiary review that is problematic. The appropriate challenge for a plaintiff to raise to a jury's answer that no damages were sustained is that the jury finding is against the great weight and preponderance of the evidence,[2] and it is critical that appellate courts adhere to settled rules of evidentiary review in testing such a challenge.

The purpose of this article is threefold: 1) to question the continuing viability of the zero damages rule; 2) to encourage practitioners to challenge jury awards of zero damages as against the great weight and preponderance of the evidence rather than as violative of the zero damages rule; and 3) to advocate that appellate courts not use the zero damages rule as a substitute for well-settled standards of evidentiary review.

Preserving Error

When a jury has returned a verdict that awards $0 for an element of damages, the plaintiff generally has two alternatives.[3] The plaintiff may, if he or she believes that the *amount* of damages sought was conclusively proved, move the court to disregard the jury's answer.[4] More typically, however, the plaintiff will assert that the element of damages was extensively, (rather than conclusively) proved which enables the plaintiff to move the court to grant a new trial on grounds that the jury's answer is against the great weight and preponderance of the evidence.[5] In either scenario, if the plaintiff's motion is overruled by the trial court, the complaint is preserved for appellate review.[6]

Standards of Appellate Review

Upon appeal, a court of appeals is empowered to "unfind" facts that a jury has improperly found, provided error has been properly preserved.[7] In reviewing a claim by the plaintiff that the jury's finding of zero damages is against the great weight and preponderance of the evidence, the court's analysis should adhere to the standard of review originally set forth in *In Re King's Estate*.[8] There the court held that in reviewing the sufficiency of the evidence, a court of

appeals should consider and weigh all of the evidence in the case and set aside the verdict and remand for a new trial only if it concludes that the verdict is so against the great weight and preponderance of the evidence as to be manifestly unjust.[9] A different analysis is used, however, when evaluating the occasional claim that the amount of damages was *conclusively* proved by the evidence. The appellate court should first consider only that evidence which supports the jury finding; all evidence or reasonable inferences to the contrary should be rejected. If the court determines that there is no evidence to support the jury's finding, it should then examine the entire record to see if the plaintiff's damages were proved as a matter of law.[10] Rendition of judgment is the proper remedy if the plaintiff proved the amount of damages sought as a matter of law.[11]

These are the appropriate standards by which challenges to a finding of zero damages should be scrutinized, and a court of appeals should not set aside a jury finding of zero damages without undertaking such review.[12] If the appellant has couched his or her point of error in language to the effect that the finding violates the rule against zero damages, the court should, by examining the arguments in support of that point, determine whether the plaintiff is actually asserting that the amount of damages was proved as a matter of law or whether the plaintiff is asserting that the jury's finding is against the great weight and preponderance of the evidence.[13] The remainder of this article will focus on the potential for conflict between the zero damages rule and the correct standard of review for a challenge that the jury finding is against the weight and preponderance of the evidence.

The Zero Damages Rule Conflicts with *Pool v. Ford Motor Co.*

In *Pool v. Ford Motor Co.*,[14] the supreme court held that:

> [C]ourts of appeals, when reversing on insufficiency grounds, should, in their opinions, detail the evidence relevant to the issue in consideration and clearly state why the jury's finding is factually insufficient or is so against the great weight and preponderance as to be manifestly unjust; why it shocks the conscience; or clearly demonstrates bias. Further, those courts, in their opinions, should state in what regard the contrary evidence greatly outweighs the evidence in support of the verdict.[15]

This requirement was established so that the supreme court can determine if the court of appeals has examined the evidence in accordance with the standard of review set forth in *In Re King's Estate*.[16] The zero damages rule was created before *Pool* and is inconsistent with that decision because it circumvents the requirement that, in order to reach the conclusion that the jury's finding is against the great weight and preponderance of the evidence, the court must expressly determine that the finding is manifestly unjust, shocks the conscience, or clearly demonstrates bias.[17]

In other words, a reviewing court is required, under a strict interpretation of the zero damages rule, to reverse and remand even in cases where the difference between the jury's finding of $0 and the damages actually proved is so de minimus that it clearly does not constitute manifest injustice.[18] The zero damages rule, as a result of its simplistic formulation, allows a reviewing court to conclude simply that there is some evidence of the element of damages the jury refused to award compensation for and then remand on the ground that it was unjust for the jury to award zero dollars. To require a new trial under *Pool,* however, the reviewing court must conclude, after weighing all of the evidence, including the evidence in support of the $0 finding,[19] that the element of damages was so abundantly established that the discrepancy between the evidence and the finding of zero dollars is manifestly unjust.[20] The evidence must do more than establish a threshold level of proof that the plaintiff experienced an element of damages; it must establish that element of damages so thoroughly that it would be manifestly unjust to tolerate the award of $0.[21] The zero damages rule should be discarded because it interferes with the jury's role as the finder of fact.[22]

Objective and Subjective Symptoms of Injury

The rule against zero damages has become intertwined with the following guideline articulated in a concurring opinion by Justice Keith in *Dupree v. Blackmon:*[23] If the plaintiff has *objective* symptoms of injury, for example a cut or laceration of the body, the plaintiff's evidence cannot be disregarded by the jury; if the plaintiff's complaints are *subjective* in nature and thus incapable of direct proof, for example, headaches, then the jury may award zero damages.[24] Although this formulation is a useful rule of thumb for determining whether a jury verdict is so against the great weight and preponderance of the evidence as to be manifestly unjust,[25] if rigidly applied, it too threatens to frustrate application of *Pool.* For a $0 damages finding that has been challenged as against the great weight and preponderance of the evidence, the proper analysis for a court of appeals, whether the plaintiff's complaint is objective or subjective, is to weigh all of the evidence, detailing it in the opinion, and to determine whether the jury's finding is so contrary to the evidence as to be manifestly unjust.[26]

Pool is the Controlling Precedent

Pool is the applicable supreme court standard for appellate review of a jury finding of zero damages. Although its roots are somewhat indefinite,[27] the zero damages rule did not originate with the supreme court; all opinions citing the rule as authority were written by lower appellate courts.[28] One supreme court case, *Lowery v. Berry,*[29] has been cited in connection with the rule.[30] In *Lowery,* the court, discussing the severe injuries, stated that the jury's finding of no damages was "not only unsupported by any evidence, but [was] contrary to all of the evidence."[31] The court then held, citing former Rule 328 of the Texas Rules of Civil Procedure, that the undisputed facts disclosed that the plaintiff suffered severe injuries and that the court of appeals properly disregarded the jury's answer. Texas Rule of Civil Procedure 328 (repealed effective Jan. 1, 1988) provided that the trial court could grant a new trial if the damages were manifestly too small or too large.[32] A close reading of *Lowery,* however, reveals that the court did not base its holding on the premise that a jury must award something for every element of damages resulting from an injury regardless of the quantum of proof. Instead, the court held that the plaintiff in that case had proved substantial damages as a matter of law, which made the jury's finding of $0 damages indefensible.

Conclusion

The incompatibility of the zero damages rule with supreme court standards of evidentiary review, combined with the supreme court's consistent enforcement[33] of those guidelines as set forth in *Pool,* signals its demise. It is no longer useful to speak in terms of an absolute prohibition

against a jury finding of zero damages. The better practice for both attorneys and appellate courts is to utilize the conventional rules of evidentiary review. A plaintiff faced with a jury finding of zero damages should challenge the finding as against the great weight and preponderance of the evidence, and courts of appeals should weigh all of the evidence to determine whether the finding is so against the weight and preponderance of the evidence as to be manifestly unjust, shocking to the conscience, or clearly the product of bias.[34] Continued use of the zero damages rule may otherwise undermine well-established rules of evidentiary review by shifting the analysis away from the proper inquiry: whether the jury finding is so contrary to the damages evidence as to be manifestly unjust.[35] When the damages evidence contained in the record is minimal, the jury's $0 finding cannot be manifestly unjust,[36] and judicial resources should not be needlessly expended on a new trial.

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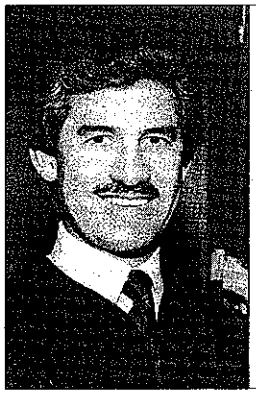
1. *Robinson v. Minick*, 755 S.W.2d 890, 892 (Tex. App.—Houston [1st Dist.] 1988, writ denied); Roth, *Inadequate Damages As Basis For New Trial*, 44 Tex. B.J. 369, 372 (1981)[hereinafter Roth]; Branton & Lovett, Texas Damages, C-48 (1989). The zero damages rule is typically employed in cases where the jury has found that the plaintiff is entitled to compensation for medical expenses for his or her injuries but awards $0 for pain and suffering and mental anguish. *See, e.g., Hammond v. Estate of Rimmer*, 643 S.W.2d 222 (Tex. App.—Eastland 1982, writ ref'd n.r.e.); *Taylor v. Head*, 414 S.W.2d 542 (Tex. Civ. App.—Texarkana 1967, writ ref'd n.r.e.); *Bolen v. Timmons*, 407 S.W.2d 947 (Tex. Civ. App.—Amarillo 1966, no writ); *see generally* Annotation, *Validity of Verdict Awarding Plaintiff in Personal Injury Action Amount of Medical Expenses but Failing to Award Damages for Pain and Suffering*, 20 A.L.R.2d 276 (1951).
2. A claim that the damages were manifestly too small under Texas Rule of Civil Procedure 320 is essentially a contention that the finding is contrary to the great weight and preponderance of the evidence. 4 R. McDonald, Texas Civil Practice § 18.15 (rev. 1984). A plaintiff may also, depending on the element of damage, wish to assert that his damages were conclusively proved.
3. An appellant waives the right, however, to complain that the jury's answers do not comport with the evidence if he or she moves for judgment on the verdict and that motion is granted and judgment rendered. *Litton Industrial Products, Inc. v. Gammage*, 668 S.W.2d 319 (Tex. 1984).
4. Few types of personal injury damages are capable of being proved as a matter of law. *See Martin v. Warren & Miller Co.*, 639 S.W.2d 706, 707 (Tex. App.—Tyler 1982, no writ)("no evidence" challenge to jury's finding of $0 damages for pain and mental anguish inappropriate because court cannot supply the amount of appellant's damages if point of error sustained).
5. *See* 4 R. McDonald, Texas Civil Practice § 18.14 (rev. 1984); *see generally* Hall, *Standards of Appellate Review in Civil Appeals*, 21 ST. MARY'S L.J. 865 (1990) [hereinafter Hall].
6. *See generally* McManus, *Preservation of Evidence Points of Error*, 39 TEX. B.J. 1080 (1976); *see also* Calvert, *"No Evidence" and "Insufficient Evidence" Points of Error*, 38 Tex. L. Rev. 359, 362-65 (1960)[hereinafter Calvert]; Tex. R. Civ. P. 324 (motion for new trial prerequisite to appellate complaint that jury finding is against the overwhelming weight of the evidence).
7. Tex. Const. art. 5, § 6; *In Re King's Estate*, 244 S.W.2d 660, 662 (Tex. 1951); *Pool v. Ford Motor Co.*, 715 S.W.2d 629, 634-35 (Tex. 1986).
8. 244 S.W.2d 660 (Tex. 1951).
9. *Id.* at 661.
10. *Sterner v. Marathon Oil Co.*, 767 S.W.2d 686, 690 (Tex. 1989); *Holley v. Watts*, 629 S.W.2d 694, 696 (Tex. 1982).
11. Calvert, *supra* note 7, at 368-69.
12. *Cf. Pope v. Moore*, 711 S.W.2d 622, 623-24 (Tex. 1986)(the proper standard for remittitur purposes is factual sufficiency); *accord Larson v. Cactus Utility Co.*, 730 S.W.2d 640, 641 (Tex. 1987).
13. *Holley*, 629 S.W.2d at 696 (points of error should be liberally construed by looking not only to the wording of the point but also to the argument thereunder); *see, e.g., Landacre v. Armstrong Building Maintenance Co.*, 725 S.W.2d 323, 325 (Tex. App.—Corpus Christi 1986, writ ref'd n.r.e.).
14. 715 S.W.2d 629 (Tex. 1986).
15. *Id.* at 635.
16. *Id.*
17. *Pool* makes it clear that the zero damages rule is no longer viable. A jury can find zero damages so long as: 1) the amount sought for that element of damages was not established as a matter of law; and 2) the finding is not so against the great weight and preponderance of the evidence that it is manifestly unjust.
18. *See Dupree v. Blackmon*, 481 S.W.2d 216, 219 (Tex. Civ. App.—Beaumont 1972, writ ref'd n.r.e.); *Martin v. Warren & Miller Co.*, 639 S.W.2d 706, 709 (Tex. App.—Tyler 1982, no writ); *Sansom v. Pizza Hut of East Texas, Inc.*, 617 S.W.2d 288, 293 (Tex. Civ. App.—Tyler 1981, no writ); *Bolen v. Timmons*, 407 S.W.2d 947, 949 (Tex. Civ. App.—Amarillo 1966, no writ); *Bazzano v. Ware*, 530 S.W.2d 650, 652 (Tex. Civ. App.—Beaumont 1975, writ ref'd n.r.e.); *see also McKinzie v. Fleming*, 588 F.2d 165, 167 (5th Cir. 1979).
19. *See Watson v. Prewitt*, 159 Tex. 305, 320 S.W.2d 815 (1959).
20. "[C]ourts of appeals may not reverse simply because they conclude that the evidence preponderates toward an affirmative answer. The courts of appeals may only reverse where the great weight of the evidence supports an affirmative answer." Hall, *supra* note 5, at 910.
21. *Cf. Armstead v. Harvey*, 390 S.W.2d 871 (Tex.App.—Texarkana 1965, no writ) (refusing to reverse and remand because jury could have concluded from the evidence that the plaintiff's injuries were, though existent, inconsequential).
22. The supreme court had an opportunity to discard the zero damages rule when it granted writ in *Robinson v. Minick*, 755 S.W.2d 890 (Tex.App.—Houston [1st Dist.] 1988, writ denied). *See* 33 Tex. Sup. Ct. J. 131 (Dec. 20, 1989). Thereafter, the court denied the writ noting that it had been improvidently granted. 33 Tex. Sup. Ct. J. 216 (Feb. 17, 1990). The official demise of this rule will have to await another day.
23. 481 S.W.2d 216 (Tex.Civ.App.—Beaumont 1972, writ ref'd n.r.e.).
24. *Id.* This rule was apparently first enunciated by Justice Keith in his concurring opinion in *Dupree v. Blackmon*, 481 S.W.2d at 221. *See also Bazzano v. Ware*, 530 S.W.2d 650, 652 (Tex. Civ. App.—Beaumont 1975, writ ref'd n.r.e.); *Rodriguez v. Kvasnicka*, 710 S.W.2d 724 (Tex. App.—Corpus Christi 1986, writ ref'd n.r.e.); *Tatum v. Huddleston*, 711 S.W.2d 367 (Tex. App.—Texarkana 1986, no writ); *Jackson v. Taylor*, 912 F.2d 795, 797 (5th Cir. 1990).
25. Roth, *supra* note 1, at 372.
26. *See INA of Texas v. Briscoe*, 780 S.W.2d 786 (Tex. 1989); *Lofton v. Texas Brine Corp.*, 720 S.W.2d 804, 805 (Tex. 1986) .
27. Some early cases contain language that may have been taken out of context to support the creation of a rigid zero damages rule that does not allow for de minimus errors. For example, in *Clark v. Spurdis*, 258 S.W. 881 (Tex. Civ. App.—Beaumont 1924, writ dism'd), the court stated that "[i]t is a fundamental and cardinal principle of law that the injured party, when entitled to recover, shall have adequate compensation for the injuries suffered." The court based its holding, however, on the fact that the jury's finding was so against the weight of the evidence that it was "manifestly wrong" *Id.* at 883-84. *See also Boultinghouse v. Thompson*, 291 S.W. 573 (Tex.Civ.App.—San Antonio 1927, writ dism'd); *Coppedge v. Kreuz*, 2 S.W.2d 362 (Tex. Civ. App.—Austin 1928, no writ); *Evers v. Langerhans*, 122 S.W.2d 208 (Tex. Civ. App.—San Antonio 1938, no writ).
28. *See, e.g, Edmondson v. Keller*, 401 S.W.2d 718, 720 (Tex. Civ. App.—Austin 1966, no writ); *Taylor v. Head*, 414 S.W.2d 542, 544 (Tex. Civ. App.—Texarkana 1967, writ ref'd n.r.e.); *Gallegos v. Clegg*, 417 S.W.2d 347, 357 (Tex. Civ. App.—Corpus Christi 1967, writ ref'd n.r.e.); *Franco v. Graham*, 470 S.W.2d 429, 440 (Tex. Civ. App.—Corpus Christi 1971), *aff'd on other grounds*, 488 S.W.2d 390 (Tex. 1972); *Martin v. Warren & Miller Co.*, 639 S.W.2d 706, 709 (Tex. App.—Tyler 1982, no writ); *Alarcon v. Circe*, 704 S.W.2d 521 (Tex. App.—Corpus Christi 1986, no writ); *Turner v. Lone Star Industries. Inc.*, 733 S.W.2d 242, 246 (Tex. App.—Houston [1st Dist.] 1987, writ ref'd n.r.e.); *Robinson v. Minnick*, 755 S.W.2d 890, 894 (Tex. App.—Houston [1st Dist.] 1988, writ denied); *Russell v. Hankerson*, 771 S.W.2d 650, 652 (Tex. App.—Corpus Christi 1989, writ denied).
29. 269 S.W.2d 795 (Tex. 1954).
30. *See, e.g., Dupree*, 481 S.W.2d at 219; *Bolen*, 407 S.W.2d at 949; Roth,

supra note 1, at 371.

31. *Lowery*, 269 S.W.2d at 797.
32. Tex. R. Civ. P. 328 (Vernon 1977). Texas Rule of Civil Procedure 320 now provides for the granting of a new trial when the damages are manifestly too small or too large. A claim that damages are manifestly too small is essentially a contention that the finding is against the great weight and preponderance of the evidence. *See supra* note 2.
33. *See, e.g., Briscoe*, 780 S.W.2d at 786; *Sosa v. City of Balch Springs*, 772 S.W.2d 71, 72 (Tex. 1989); *Herbert v. Herbert*, 754 S.W.2d 141, 144 (Tex. 1988); *Larson*, 730 S.W.2d at 641; *Lofton*, 720 S.W.2d at 805; *Pope*, 711 S.W.2d at 634.
34. In *Hammond v. Estate of Rimmer*, 643 S.W.2d 222 (Tex.App. Eastland 1982, writ ref'd n.r.e.), both the plaintiff and the court of appeals properly addressed the jury's finding of zero damages. The plaintiff asserted in his point of error that the trial court erred in failing to grant a new trial because the jury's answer was so against the great weight and preponderance of the evidence as to be manifestly unjust, and the court of appeals reviewed the evidence (using Justice Keith's rule as a guideline) under the standard in *In Re King's Estate*. The court held: "It seems clear to us that the answer of 'none' as the amount of damages . . . is so against the great weight and preponderance of the evidence as to be manifestly unjust. *In Re King's Estate*, 150 Tex. 662, 244 S.W.2d 660 (1951)." *Hammond*, 643 S.W.2d at 224; *see also Landacre*, 725 S.W.2d at 322-23.
35. In apparent recognition of the conflict between the zero damages rule and *Pool*, some courts have taken to both citing the rule and applying the standard of review set forth in *Pool*. *See, e.g., Kennedy v. Missouri Pacific R.R. Co.*, 778 S.W.2d 552, 557-58 (Tex.App. Beaumont 1989, writ denied); *Crowe v. Gulf Packing Co.*, 716 S.W.2d 623, 625 (Tex.App. Corpus Christi 1986, no writ). *Pool* is the only standard that should be used.
36. "It is generally the rule, at least in actions involving no fixed measure of damages, that a new trial will be granted only where the inadequacy of the damages is clear or is so gross as to shock the conscience of the court, or to make it clearly apparent that an injustice has been done; the inadequacy must be so great as to indicate passion, prejudice, mistake, misconception of the law or evidence, or other improper motive on the part of the jury." 66 C.J.S. *New Trial* § 77 (1950); *see generally* W. Garwood, *The Question of Insufficient Evidence on Appeal*, 30 Tex. L. Rev. 803, 811-12 (1952) (discussing how courts decide what constitutes manifest injustice).



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