

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.

715 S.W.2d at 635. Courts of appeals may not reverse on the mere conclusion that the evidence preponderates toward an affirmative answer but may reverse only after a detailing of evidence under *Pool* indicates that the great weight of that evidence supports an affirmative answer. *Herbert v. Herbert*, 754 S.W.2d 141, 144 (Tex. 1988).

Some courts of appeals, though, have applied a different rule when a jury finds liability but fails to award damages. Although the so-called "zero damages" rule has various iterations, it generally provides that, once a jury has found an injury and some resulting damage, the failure to compensate for intangible damage elements such as pain and suffering is necessarily against the great weight and preponderance of the evidence. See W. Wendall Hall, *Standards of Review in Texas*, 29 St. Mary's L.J. 351, 465-66 (1998); Raul A. Gonzalez & Rob Gilbreath, *Appellate Review of a Jury's Finding of "Zero Damages,"* 54 Tex. B.J. 418 (1991). When strictly applying the "zero damages" rule, a reviewing court does not consider and weigh all of the evidence in the case (both that which tends to support the jury's finding and that which does not), state in what regard the contrary evidence greatly outweighs the evidence that supports the verdict, or explain why the jury's finding shocks the conscience or clearly demonstrates bias, as *Pool* requires. Because the "zero damages" rule is inconsistent with the *Pool* review standard, we should take this opportunity to expressly disavow it.

In this case, although the court of appeals recited the *Pool* standard, it actually conducted an evidentiary review that more closely resembles the "zero damages" rule. From the existence of the injury itself, which necessitated hospitalization and surgery, the court of appeals concluded that Jackson suffered compensable physical impairment other than loss of vision and that the jury's finding to the contrary was so against the great weight and preponderance of the evidence as to be manifestly unjust. There are several

problems with the court of appeals' approach. First, the court began its analysis by examining the record for evidence *against* the jury's finding, citing Jackson's facial fractures, hospitalization and frequent headaches as some evidence of impairment other than loss of vision. It then failed to recite all of the evidence that *supports* the jury's finding. Jackson himself testified that he recovered well from his eye injury, and that he received an excellent result from his surgery. There was evidence that Jackson's headaches had lessened over time. At Jackson's request, his doctor released him to return to work approximately two months after the injury, and he continued to work five days a week as he had before. Jackson was able to perform tasks around the home after his injury, and he continued to go hunting, although not as frequently. The court of appeals recounted some of this evidence, but failed to articulate in what regard the contrary evidence so greatly outweighed the evidence supporting the jury's verdict as to shock the conscience or be manifestly unjust. *See Pool*, 715 S.W.2d at 635.

More importantly, though, in order to recover, Jackson had to demonstrate that his physical impairment other than loss of vision produced a distinct loss that was substantial and should be compensated. *See Estrada v. Dillon*, 44 S.W.3d 558, 562 (Tex. 2001) (citing *Landacre v. Armstrong Bldg. Maint. Co.*, 725 S.W.2d 323, 325 (Tex. App. — Corpus Christi 1986, writ ref'd n.r.e.) (applying rule that to recover for physical impairment a plaintiff must prove that the effect of the physical impairment extends beyond any impediment to earning capacity or pain and suffering to the extent that it produces a substantial separate and distinct loss); *Platt v. Fregia*, 597 S.W.2d 495, 495-96 (Tex.Civ.App. — Beaumont 1980, writ ref'd n.r.e.) (concluding that the jury was not required to award physical impairment damages where plaintiff suffered severe knee injury, but surgery produced good results, plaintiff was soon able to resume almost everything he could do before the injury, and he had a 30% functional loss). The charge in this case allowed the jury to award separate damages for medical care, physical pain and mental anguish, physical impairment of loss of vision, physical impairment other than loss of vision, disfigurement, and loss of earnings in the past. The jury was instructed to consider each damage element separately and

not to include damages for one element in any other. We must presume that the jury followed the court's instruction. *See In re J.F.C.*, 96 S.W.3d 256, 298 (Tex. 2002). Accordingly, to reverse based on the jury's finding of zero damages for Jackson's alleged physical impairment other than loss of vision, the court of appeals was required to detail the evidence that would show Jackson suffered a distinct physical impairment loss that did not overlap the other damage elements the jury found. Further, that evidence must demonstrate a distinct loss so substantial and compelling that, when weighed against the contrary evidence, the jury's failure to compensate it is manifestly unjust, shocks the conscience, or clearly demonstrates bias. The court of appeals summarily concluded that Jackson's facial fractures, hospitalization, and headaches "are demonstrative of impairment beyond pain and suffering, loss of earning capacity, and loss of vision," but it does not explain how they resulted in any impairment beyond the damages elements for which Jackson was compensated or why the jury's contrary finding was manifestly unjust. I would reverse and remand the case to the court of appeals with instructions to conduct a proper factual sufficiency review under the standard we articulated in *Pool*.

Rather than applying the relatively straightforward *Pool* standard, the Court wanders through the origins of physical impairment as a distinct damage element (something neither party felt compelled to discuss), ruminates on whether impairment damages should be awarded for other than permanent injuries (again, neither party raised the issue), and contemplates which damage element best encompasses the concept of hedonic damages (nary a word from the parties). Because the Court's writing consists primarily of dicta, and the factual sufficiency review standard it "adopt[s]

today" is confusing at best and completely unnecessary, I concur in the judgment only.

Harriet O'Neill
Justice

OPINION DELIVERED: September 11, 2003.