

O

Z E R O

O

U

O

Zero

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 that the evidence 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

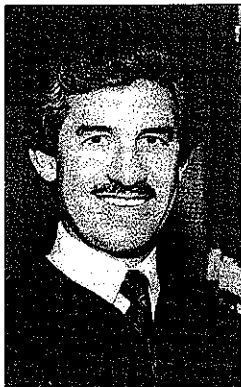
When a jury has returned a verdict that awards \$0 for an element of damages, the plaintiff generally has two alternatives.³ The plaintiff may, if he or she believes that the *amount* of damages sought was conclusively proved, move the court to disregard the jury's answer.⁴ More typically, however, the 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

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).



Justice Raul A. Gonzalez received a B.A. from The University of Texas in 1963; a J.D. from the University of Houston in 1966; and an LL.M. from the University of Virginia in 1986. He has served as a district judge, court of appeals judge, and since October 1984, as a justice of the Texas Supreme Court.



Rob Gilbreath, an associate with the firm of Vial, Hamilton, Koch & Knox in Dallas, is a former briefing attorney for Justice Gonzalez. He is a 1989 cum laude graduate of Baylor Law School, where he served as lead articles editor of the *Baylor Law Review*.

NO OBJECTIONS.

For Unanimous Approval, Meet On Padre Island.

Convene in meeting rooms for 25 to 500 with AV packages and a skilled Convention Staff. Enjoy recess at poolside and theme parties. Then, settle into our 500-ft. pool with swim-up bars. It's Texas' largest. Also appealing are tennis, nearby golf, beach volleyball, horseback riding, cruises and beach parties. Finally, adjourn to a 1, 2 or 3 bedroom suite with built-in stereo, cable TV, kitchen, washer & dryer, Jacuzzi tub and wetbar. We rest our case.

PORT ROYAL

Ocean Resort Condominiums
Port Aransas, Mustang Island, Texas

For Group Information & Availability
Please Call Sandi McNorton
(USA) 800 847 5659 (TX) 800 242 1034

GO WITH THE PRO.

Let Kauffman manage your
low to moderate-income housing
compliance services.

When it comes to audit services, you can't afford to turn the job over to just anyone. You need a firm of professionals with specific experience in Low- to Moderate-Income Housing. A firm who can not only perform audit services with precision and accuracy, but also coordinate corrections, train staff, and bring the property into compliance. Just as important, you need a firm who can do all this at a reasonable cost — and that firm is Kauffman Associates. Monitoring 35,000 housing units representing \$1.5 billion in assets, Kauffman has earned a national reputation through its commitment to expert document analysis; accurate, file-by-file examination; comprehensive reporting; and uncompromising follow-through on every job. Working with investors, housing agencies, and law firms across the country, Kauffman has proven time and again that it pays to go with the pro.



8505 Freeport Parkway
Suite 240
Irving, Texas 75063
(214) 621-0080

Affiliate Member: National Council of State Housing Agencies;
Association of Local Housing Finance Agencies