

**RECENT TEXAS CASES INVOLVING
ACTUAL/COMPENSATORY DAMAGES**

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“PRACTICING BEFORE THE TEXAS SUPREME COURT”

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“THINKING 'BOUT THE GOVERNMENT: RECENT TEXAS SUPREME COURT CASES INVOLVING
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U.T. CONFERENCE ON STATE AND FEDERAL APPEALS (JUNE 2003)

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SEMINAR PRESENTATIONS/PAPERS (CONTINUED)

- "ORAL ARGUMENT: THE FIRST TWO MINUTES,"
U.T. CONFERENCE ON STATE AND FEDERAL APPEALS (JUNE 2002)
- "ETHICS FOR EMPLOYMENT LAWYERS (INTERACTIVE ETHICS)"
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- "THE FUTURE OF EMPLOYMENT LAW,"
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- "HAVE RECENT CASES DISABLED THE ADA OR MERELY MADE US REGARD IT AS DISABLED?"
EMPLOYMENT LAW COURSE/SOUTH TEXAS COLLEGE OF LAW (JULY 2000).
- "EINE TOTALE WIDERLEGUNG VON STEPHEN HAWKINGS THEORIEN VON ZEIT UND RAUM," 38
DEUTSCHE ZEITSCHRIFT FÜR ASTROPHYSIK 247 (DEZEMBER 1999).
- "INTERLOCUTORY APPEALS AND WRITS OF MANDAMUS,"
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STATE BAR CONFERENCE ON DAMAGES (APRIL-MAY 1997).
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TABLE OF CONTENTS

I. MENTAL ANGUISH DAMAGES 1
A. Mental Anguish Award Upheld 1
B. Mental Anguish Award Reversed..... 4
C. An Exception For Most Rules 6

II. PHYSICAL PAIN AND SUFFERING..... 7

III. PAST AND FUTURE MEDICAL EXPENSES 8
A. Future Medical Expenses Award Upheld Against Challenge That Award Was Too High. 8
B. Future Medical Expenses Award Upheld Against Challenge That Award Was Too Low..... 9
C. Future Medical Expenses Reversed (Upholding Challenge That Award Was Too High). 10

IV. PHYSICAL IMPAIRMENT..... 10
A. Jury Finding of Physical Impairment Damages Upheld 10
B. Jury Finding of Physical Impairment Damages Not Upheld 10

V. GOLDEN EAGLE ARCHERY AND ITS AFTERMATH REGARDING STANDARD OF REVIEW WHERE DAMAGES OVERLAPPING SEVERAL CATEGORIES ARE CHALLENGED. 11

RECENT TEXAS CASES INVOLVING ACTUAL/COMPENSATORY DAMAGES

I. MENTAL ANGUISH DAMAGES

To support an award of mental anguish, a party must present either direct evidence of the nature, duration, and severity of her mental anguish, thereby establishing a substantial interruption in her daily routine, or circumstantial evidence of a high degree of mental pain and distress that is greater in degree than mere worry, anxiety, vexation, embarrassment, or anger. *Parkway Co. v. Woodruff*, 901 S.W.2d 434, 444, 38 Tex. Sup. Ct. J. 828 (Tex. 1995); *Minnesota Life Ins. Co. v. Vasquez*, 133 S.W.3d 320, 324 (Tex. App.--Corpus Christi 2004, pet. filed). The process of awarding damages for amorphous, discretionary injuries such as mental anguish is inherently difficult because the alleged injury is a subjective, unliquidated, nonpecuniary loss. *Dawson v. Briggs*, 107 S.W.3d 739, 750 (Tex. App.--Fort Worth 2003). Mental anguish can be established through testimony from the injured party explaining how she felt and how her life was disrupted. *Minnesota Life Ins. Co. v. Vasquez*, 133 S.W.3d at 324.

The Supreme Court recently restated that compensation for mental anguish requires evidence of "substantial" disruption in daily routine or "a high degree of mental pain and distress." See *Bentley v. Bunton*, 94 S.W.3d 561, 606, 45 Tex. Sup. Ct. J. 1172 (Tex. 2002) (quoting *Saenz v. Fidelity & Guar. Ins. Underwriters*, 925 S.W.2d 607, 614, 39 Tex. Sup. Ct. J. 743 (Tex. 1996) and *Parkway*, 901 S.W.2d at 444); *Household Credit Services, Inc. v. Driscoll*, 989 S.W.2d 72, 91 (Tex. App.--El Paso 1998, pet. denied). In *Bunton*, the Court found the evidence met the required standard: the plaintiff was deprived of sleep; the experience caused him embarrassment in the community, disrupted his family life, and distressed his children at school; friends testified he had been depressed, his honor and integrity had been impugned, and his family had suffered. *Bunton*, 94 S.W.3d at 606-07.

Likewise in *Latham v. Castillo*, the Court found there was some evidence of a high degree of mental pain and distress. 972 S.W.2d at 70. The Castillos testified the defendant's conduct "made [Ernest] throw up," made him "sick, nervous, mad[,]" "hurt [him] a lot[,]" broke [Audona's] heart, and left her "devastated" and feeling "physically ill." *Id.*

In contrast, the Court in *Gunn Infiniti* found plaintiff's testimony—that he experienced severe disappointment, constant mental sensation of pain, a lot of anguish and grief, embarrassment, and ridicule -- did not rise to the level required to sustain a verdict for mental anguish damages. *Gunn Infiniti, Inc. v.*

O'Byrne, 996 S.W.2d 854, 860-61 (Tex. 1999). Further, there was no evidence of any disruption in plaintiff's daily routine. Absent what *Parkway* calls "adequate details to assess mental anguish claims[,]" the evidence is legally insufficient to support an award of mental anguish. *Parkway*, 901 S.W.2d at 444. Thus, conclusory testimony of emotion is insufficient to establish compensable mental anguish. See *Gunn Infiniti, Inc. v. O'Byrne*, 996 S.W.2d at 861 (conclusory testimony); *Latham v. Castillo*, 972 S.W.2d 66, 70, 41 Tex. Sup. Ct. J. 994 (Tex. 1998) ("mere emotions").

A. Mental Anguish Award Upheld

Grey Wolf Drilling Co., L.P. v. Perez, 2004 Tex. App. LEXIS 2011 (Tex. App.--San Antonio 2004, pet. denied): Court Upholds Mental Anguish Award in Employment Discrimination Case

Facts: Employee Perez sustained a work injury and filed a worker's compensation claim. After returning to work, the employee was transferred to a different oil rig and maintained that he was constantly harassed by his supervisors and new co-workers. Subsequently, the employee was terminated for poor work performance. Perez then sued employer Grey Wolf claiming employment discrimination, slander, negligence/gross negligence, breach of contract, fraud, and intentional infliction of emotional distress. The trial court found in favor of Perez on his discrimination claim and awarded \$ 114,974.50 as front pay, mental anguish and actual damages. Grey Wolf appealed, among other issues, the legal and factual sufficiency of the evidence to support the trial court's award of damages for mental anguish.

Holding: The Court upheld the trial court's mental anguish award. The court found that the nature, duration, and severity of Perez's mental anguish constituted a substantial disruption of his daily routine that went beyond mere disappointment, anger, worry, anxiety, resentment, or embarrassment. In particular, the court noted that Perez testified that he suffered from humiliation and despair, severe headaches and vomiting, and that these physical manifestations resulted weight loss and insomnia. His wife also testified that he was under tremendous stress. Both testified that the termination had a detrimental effect on their children, finances, and marriage. During this time, his wife filed for divorce. The Court found this evidence legally and factually sufficient to support the award of damages for mental anguish. See *Saenz v. Fidelity & Guar. Ins. Underwriters*, 925 S.W.2d 607, 614, 39 Tex. Sup. Ct. J. 743 (Tex. 1996); *Texas Animal Health Comm'n*, 27 S.W.3d at 63.

Minn. Life Ins. Co. v. Vasquez, 133 S.W.3d 320 (Tex. App.--Corpus Christi 2004, pet. filed): Court

Upholds Mental Anguish Award for Delayed Payment of Accidental Death Insurance Policy, Even Though Award Was 1.5 Times the Amount of Policy

Facts: Appellee, Elia Vasquez, successfully sued appellant, Minnesota Life Insurance Company, for knowing violations of the Texas Insurance Code. Appellee alleged that Minnesota Life unreasonably delayed payment on the proceeds of an accidental death policy that insured the life of her deceased husband. The jury award included \$ 60,000 for mental anguish damages, one and one-half times the amount Vasquez was entitled to under the underlying insurance policy. Among the six issues raised by Minnesota Life on appeal were the legal and factual insufficiency of the evidence to support a finding of mental anguish and the legal and factual insufficiency of the evidence to support the amount of mental anguish damages found.

Holding: The appellate court held that the evidence was legally and factually sufficient to support the mental anguish award. The Court first noted that mental anguish damages could be awarded for the aggravation of a medical condition:

If a party's pre-existing medical condition deteriorates or is compounded because of the torts of another party, the worry and pain associated with the aggravated condition can be considered mental anguish. *Powell v. Underbrink*, 499 S.W.2d 206, 210-11 (Tex. App.-San Antonio 1973, no writ); see *Southwest Tex. Coors v. Morales*, 948 S.W.2d 948, 952-53 (Tex. App.-San Antonio 1997, no pet.). [*Minn Life Ins.*, 133 S.W.3d at 324].

Vasquez testified that she could not sleep due to the stress caused by Minnesota Life's delay in the payment of the accidental death claim. She claimed she was worried about the mortgage on her home and felt that her "whole world" had caved in. This concern about the loss of her home led her to look for work, even though her doctor had told her not to work for at least another year due to her various health problems. During the waiting period, Vasquez, a diabetic, experienced an increased blood-sugar level that her doctor attributed to stress. This change in blood-sugar levels led to a change in her medical regimen, from taking pills to having daily insulin shots.

The Court held that this evidence supported a mental anguish award, and that the \$ 60,000 award, although one and one-half times the amount Vasquez was entitled to under the underlying insurance policy, appeared neither arbitrary nor unrelated to the source of this anguish. Thus, the Court upheld the award.

Carpenter v. Holmes Builders, Inc., 2004 Tex. App. LEXIS 1649 (Tex. App.--Dallas 2004, pet. denied): Court Upholds Mental Anguish Award for Home Owners in Negligent Construction Case

Facts: Plaintiffs, home owners, filed suit in the Dallas County District Court (Texas) against defendant home builder for negligent construction of their home's foundation. Plaintiffs entered into a written contract in June 1994 with defendant, The Holmes Builders, Inc. to build a home for them, for a total purchase price of \$ 641,000. Plaintiffs moved into the home in 1995. Plaintiffs filed suit in May 1999, alleging that the foundation of their home was inadequately designed and constructed. Plaintiffs asserted several theories of liability, including negligence, breach of warranty, violations of the Texas Deceptive Trade Practices - Consumer Protection Act (DTPA), and fraud. The jury made liability findings supporting the allegations for negligence, DTPA, and breach of warranty claims. The trial court awarded damages of \$ 1,876,600, including \$ 150,000 in mental anguish damages for each plaintiff. Among defendant's points of error was a claim that the evidence was legally and factually insufficient to support the mental anguish award.

Holding: The Eleventh District Court of Appeals upheld the award of mental anguish damages, finding that there was a substantial disruption of plaintiff's daily routines over an extended period of time. The Court noted:

Appellant Carpenter testified that the problems with his "dream home" had weighed heavily on his mind. He testified that it was very painful for him to see the problems with the home on a daily basis. He stated that he suffered a great deal of anxiety, embarrassment, and feelings of helplessness living in a home that could not be sold and that continued to get worse. He also attributed a recurring eye infection to the stress caused by the problems with the home. Appellant Carpenter testified that he had endured many sleepless nights in the 3 ½ years preceding the trial. Appellant Perez testified that she had cried every day since receiving Manesh's report in 1998. She stated that the ordeal had put appellants' lives "on hold" for 3 ½ years. She additionally testified that the matter caused a great deal of stress on a daily basis. Appellant Perez testified that she had also lost sleep and experienced severe worry and anxiety. [*Carpenter*, 2004 Tex. App. LEXIS 1649, 18-19].

The Court held that this evidence was legally sufficient to support the damages and not against the great weight

and preponderance of the evidence. Finally, the Court stated that amounts awarded were reasonable in light of the frequency and duration of Plaintiffs' mental suffering and that the mental anguish damages were not unreasonable when compared to the other damages awarded by the jury.

Ross v. Ross, 2004 Tex. App. LEXIS 3395 (Tex. App.--Austin 2004, no pet.): Court Upholds Mental Anguish Award in Divorce Proceeding Case

Facts: Plaintiff Shanney Ross sought damages for intentional infliction of emotional distress against Carl Ross in a divorce proceeding. Shanney and a friend testified that Carl physically abused Shanney, chased her and her children in his vehicle on multiple occasions, threatened to break her neck, repeatedly left vulgar voicemail messages, and would look up her dress to ensure she was wearing a slip in public. The trial court awarded Shanney \$ 150,000 for her intentional infliction of emotional distress claim. Carl contended that the award was excessive.

Holding: The Court upheld the award for intentional infliction of mental illness as fair and reasonable. The Court first noted that most of Shanney's evidence on damages related to mental anguish.

Shanney testified that she suffered bodily injury as a result of Carl's physical abuse, though she offered no specifics about the injuries. As for Shanney's mental pain and distress, [Shanney's counselor] testified that Shanney suffered from major depression and post traumatic stress disorder. He described her as extremely stressed, very depressed, and in a state of shock. He also testified about her symptoms of discouragement, hopelessness, feelings of despair, and grief. At the time of trial, Shanney was still seeing her counselor and suffering from her symptoms of depression and post-traumatic stress disorder. [Ross, 2004 Tex. App. LEXIS 3395, *33].

Based on this testimony, the Court held that the court as fact finder did more than "simply pick a number and put it in the blank," as required by the Texas Supreme Court. See *Bentley v. Bunton*, 94 S.W.3d 561, 606, 45 Tex. Sup. Ct. J. 1172 (Tex. 2002); *Saenz v. Fidelity & Guar. Ins. Underwriters*, 925 S.W.2d 607, 614, 39 Tex. Sup. Ct. J. 743 (Tex. 1996). Therefore, the Court affirmed the award.

Columbia Med. Ctr. of Las Colinas, Inc. v. Hogue, 132 S.W.3d 671 (Tex. App.--Dallas 2004): Court

Upholds Award for Past and Future Loss of Companionship, Society and Mental Anguish

Facts: Robert Hogue, Jr. waited almost four hours for a specialist and an echocardiogram was not performed immediately as requested at defendant hospital. When a cardiologist arrived, he determined Robert needed immediate open heart surgery. Robert was transferred to another hospital for the surgery, but died shortly after arrival. A jury found the hospital grossly negligent and awarded damages, including an award for past and future loss of companionship, society and mental anguish (unfortunately, the opinion does not include the amount of this award). Defendant hospital challenged the award.

Holding: The Court upheld the award for past and future loss of companionship, society and mental anguish. The Court first noted the basis of damages for the loss of companionship and society:

Damages for loss of companionship and society compensate for a loss of positive benefits that flowed to the family for the decedent's having been part of the family. [Moore v. Lillebo, 722 S.W.2d 683, 687-88, 29 Tex. Sup. Ct. J. 513 (Tex. 1987).] Companionship and society are defined as the positive benefits flowing from the love, comfort, companionship and society the familial survivors would, in reasonable probability, experience if the decedent lived. *Id.* at 688. [Hogue, 132 S.W.3d at 683].

The Court then explained the basis for mental anguish damages:

Mental anguish represents an emotional response to the wrongful death itself. [Moore] at 687. It is defined as the emotional pain, torment, and suffering the familial survivors would, in reasonable probability, experience from the death of a family member. *Id.* at 688. [Hogue, 132 S.W.3d at 683].

While the Court acknowledged two different bases for these types of damages, it noted that when awarding damages for loss of companionship and society and for mental anguish, a jury may consider the same factors:

- (1) the relationship between husband and wife, or a parent and child; (2) the living arrangements of the parties; (3) any absence of [*684] the deceased from the beneficiary for extended periods; (4) the harmony of family relations; and (5) common interests and activities. [See Moore at 688] [Hogue, 132 S.W.3d at 683-84].

The Court found sufficient evidence supporting the jury's award for loss of companionship and society and mental anguish in this case. In support of its holding, the Court noted that decedent and his wife were married for twenty-six years, that decedent spent a lot of time with his wife and two sons, that he was "best friends" with his sons, and that his overall relationship with his family was strong and good.

***Bunton v. Bentley*, 153 S.W.3d 50 (Tex. 2004): Texas Supreme Court Upholds Mental Anguish Award, But Holds that a Court of Appeals Should Reevaluate Exemplary Damages When Compensatory Damages are Reduced**

Facts: This was the second time that the Texas Supreme Court considered this defamation case. Earlier, the Court considered a trial court's awards of \$ 7 million for past mental anguish. The Court remanded the case back to the Court of appeals "to reconsider the excessiveness of the jury's award of mental anguish damages." *Bentley v. Bunton*, 94 S.W.3d 561, 607 (Tex. 2002). The court of appeals then suggested a remittitur that would reduce the mental anguish damages to \$ 150,000. The court of appeals did not adjust the exemplary damages because the defendant did not complain of the award of exemplary damages on appeal. In the second trip to the Texas Supreme Court, Bunton challenged the awards of both compensatory damages and exemplary damages.

Holding: The Supreme Court upheld the \$ 150,000 mental anguish award, noting that the incident deprived the plaintiff of sleep, cost him time, caused him embarrassment in the community, disrupted his family, and distressed his children at school. In addition, friends testified that he had been depressed, his honor and integrity had been impugned, his family had suffered, and he would never be the same.

However, the court reversed the portion of the judgment dealing with exemplary damages and remanded the case to the court of appeals to consider whether the exemplary damage award was grossly disproportionate to the harm to the plaintiff and general damages recovered.

Because the exemplary damages must bear a reasonable relation to the defendant's conduct and to the actual harm suffered, a claim that the exemplary damages are grossly disproportionate may therefore arise any time the compensatory damages are significantly adjusted. Ideally, the court of appeals should automatically reevaluate exemplary damages whenever compensatory damages are reduced. *See Preston Carter Co.*, 702 S.W.2d at 187-88. [*Bunton*, 153 S.W.3d at 54].

Note: The appellate court subsequently upheld the \$ 1 million exemplary damage award as reasonable and within the United States Supreme Court's accepted ratio between harm and exemplary damages. *Bunton v. Bentley*, 2005 Tex. App. LEXIS 2216 (Tex. App.--Tyler 2005, pet. filed).

B. Mental Anguish Award Reversed

***TMC Foods L.L.C. v. Mason*, 2004 Tex. App. LEXIS 3941 (Tex. App.--Beaumont 2004, no pet.): Plaintiff's Testimony Was Too Conclusory To Provide Adequate Details to Assess Mental Anguish Damages**

Facts: Mason sued his employer, alleging her employment was terminated in retaliation for filing and pursuing a workers' compensation claim. The trial court award Mason damages including \$ 1,500 for mental anguish. Employer appealed, challenging the award for mental anguish on sufficiency grounds.

Holding: Ruling on the issue of mental anguish damages, the Court held Mason's conclusory testimony that she was devastated, "really upset," and humiliated as a result of her termination did not provide adequate details to assess her mental anguish.

As in *Gunn Infiniti* and *Parkway*, conclusory testimony of her emotions does not provide 'adequate details to assess mental anguish.' *See Gunn Infiniti, Inc.*, 996 S.W.2d at 860; *Parkway*, 901 S.W.2d at 445. She presented no testimony of a 'substantial disruption in her daily routine' caused by her emotional injury; she offered no specifics from which the jury could assess her injury and damages. Without this evidence, the jury was left to speculate on the nature, duration, and severity of the mental injury. *See id.* The evidence is legally insufficient to support an award of mental anguish damages. [*TMC Foods*, 2004 Tex. App. LEXIS 3941, *13].

***Jabri v. Alsayed*, 145 S.W.3d 660 (Tex. App.--Houston [14th Dist.], 2004, no pet.): Court Overturns Mental Anguish Award in DTPA Case, Holding Defendant's Actions Were Not a Producing Cause of Plaintiff's Mental Anguish**

Facts: Alsayed, the lessee of a convenience store, sued a corporation and the owner of the store for alleged fraud and violations of the Deceptive Trade Practices Act (DTPA), Tex. Bus. & Com. Code Ann. ch. 17. The corporation operated the owner's convenience stores. The corporation leased one of the stores to Alsayed. The owner represented to Alsayed that the store was an ongoing business with a

good customer base. Alsayed did not realize the profits promised by the owner, in part because the store was in an unsavory location and was experiencing thefts and other crimes. The jury found that appellants had knowingly engaged in an unconscionable action or course of action that was a producing cause of damages to the lessee. The jury also found that the lessee suffered mental anguish. Among the awarded damages was \$ 5,000 in mental anguish damages. Among the appellants seven points of error was a claim that the evidence was insufficient to support mental anguish damages.

Holding: The Court overturned the mental anguish award. The Court first noted that “[u]nder the DTPA, mental anguish damages are recoverable when there is proof of deceptive or unconscionable actions or courses of action committed knowingly. *Norwest Mortgage, Inc. v. Salinas*, 999 S.W.2d 846, 862 (Tex. App.-Corpus Christi 1999, pet. denied).” [*Jabri*, 145 S.W.3d at 669]. The Court acknowledged that the appellants knowingly violated the DTPA. However, the Court held that there was insufficient proof that defendant’s knowing unconscionable action was a producing cause of plaintiff’s mental anguish:

Alsayed failed to present any evidence... that his fear was caused by appellants’ knowing unconscionable acts. *See Saenz v. Fidelity & Guar. Ins. Underwriters*, 925 S.W.2d 607, 614, 39 Tex. Sup. Ct. J. 743 (Tex. 1996). Alsayed’s fear stemmed from the high crime in the area, not from appellants’ misrepresentations regarding the profitability of the business. Further, Alsayed did not testify that any of appellants’ actions caused or contributed to the existing conditions at Broadway Fast Stop. Additionally, Alsayed did not testify that any of the conditions at the store caused him a high degree of mental pain and distress that was more than mere worry, anxiety, vexation, embarrassment, or anger. *See id.* There was no testimony that the conditions at Broadway Fast Stop caused Alsayed physical injury, illness, loss of sleep, or a substantial disruption in his daily routine. [*Jabri*, 145 S.W.3d at 669].

***Petco Animal Supplies, Inc. v. Schuster*, 144 S.W.3d 554 (Tex. App.--Austin 2004, no pet.): Mental Anguish Damages and Related Counseling Costs and Damages for “Intrinsic Value” for Loss of Companionship” Not Available for the Loss of Animal**

Facts: Plaintiff’s dog, Licorice, ran away from a Petco employee and was found four days later, run over by traffic. A default judgment was entered against Petco for breach of contract, gross negligence, and conversion. The district court awarded Schuster the following damages: \$ 500.00 as the replacement value of Licorice; \$ 892.00 as reimbursement costs of putting Licorice through training school; \$ 52.40 as reimbursement for microchip implantation (do not laugh, the poor woman lost her dog); \$ 857.68 as lost wages for Schuster when she was searching for Licorice; \$ 160.00 as counseling costs; \$10,000 as compensation to Schuster for mental anguish and emotional distress; \$ 10,000 as compensation for “intrinsic value” loss of companionship; \$ 10,000 as exemplary damages; and \$ 6,750 as attorney’s fees (with more allowed for any appeals taken). Among the issues raised by Petco on appeal was the claim that Texas law does not support any award for mental anguish and related counseling, “intrinsic value” loss of companionship, or lost wages for the loss of a dog.

Holding: The Court held there could be no damages awarded for mental anguish, or related counseling, or “intrinsic value” loss of companionship, or lost wages for the loss of a dog. The Court first noted that Texas courts have continually classified dogs as property for damages purposes. *Zeid v. Pearce*, 953 S.W.2d 368 (Tex. App.--El Paso 1997, no writ); *Bueckner v. Hamel*, 886 S.W.2d 368, 370 (Tex. App.--Houston [1st Dist.] 1994, writ denied); *Heiligmann v. Rose*, 81 Tex. 222, 16 S.W. 931 (Tex. 1891); *see also Arrington v. Arrington*, 613 S.W.2d 565, 569 (Tex. Civ. App.--Fort Worth 1981, no writ).

Addressing the issue of mental anguish damages, the Court distinguished Schuster’s claim from *City of Garland v. White*, 368 S.W.2d 12, 14-17 (Tex Civ. App.--Eastland 1963, writ ref’d n.r.e.), in which a plaintiff was awarded mental anguish damages in a case involving the intentional shooting of a dog. Following *Seminole Pipeline Co. v. Broad Leaf Partners, Inc.*, 979 S.W.2d 730, 753-757 (Tex. App.--Houston [14th Dist.] 1998, no pet.), stated “that grossly negligent property damage can support a claim for mental anguish only where there is evidence of some ill-will, animus, or desire to harm the plaintiff personally.” [*Petco*, 144 S.W.3d at 562 (emphasis added)]. The Court found no such evidence in this case and reversed the mental anguish award. The Court expanded its ruling that Schuster could not recover mental anguish damages to hold that she could not recover counseling expenses.

The court also found insufficient evidence to support an award for “intrinsic value” loss of companionship. The Court defined intrinsic value as an inherent personal or sentimental; it is a value not established by market forces. *Star Houston, Inc. v. Kundak*, 843 S.W.2d 294, 298 (Tex. App.--Houston

[14th Dist.] 1992, no writ). While the Court acknowledged some compelling arguments to award intrinsic value damages in animal cases, it held the Texas Supreme Court's ruling in *Heiligmann* excluded such a recovery. *Heiligmann* permitted recovery of a dog's "special or pecuniary value" ascertained solely "by reference to the usefulness and services of the dog." *Heiligmann*, 16 S.W. at 932 (emphasis added). *Heiligmann* precluded an intrinsic value award in this case, as Schuster relied solely on sentimental considerations. Further, the Court held that even if intrinsic damages could be awarded in a dog case, Schuster could still not recover those damages in this case. Under *International Great Northern R. Co. v. Casey*, 46 S.W.2d 669, 670 (Tex. Comm. App. 1932, holding approved), intrinsic value damages are recoverable only if property is shown to have neither market value nor replacement value. Schuster offered no proof regarding where her dog had market value, and she claimed her dog's replacement value was \$ 500. Therefore, the Court reversed trial court's "intrinsic value" loss of companionship award.

***Royal Maccabees Life Ins. Co. v. James*, 146 S.W.3d 340 (Tex. App.--Dallas 2004, no pet.): Court Reverses and Remands Mental Anguish Award Where Jury Charge Commingled Valid and Invalid Liability Grounds; and Mental Anguish Damages are Not Recoverable for Contract-Based Claims.**

Facts: The widow of an insured and the City of Mesquite, the insured's employer, sued an insurer over an insurance policy issued by defendant Royal Maccabees for Mesquite employees. Royal Maccabees paid \$ 50,000 in benefits before the trial. The lawsuit and trial arose out of Royal Maccabees denial of an additional \$ 50,000 in benefits for which Donnie James had paid premiums for four years and ten months prior to his death. At trial, the jury found that Royal Maccabees breached the insurance contract, violated the Deceptive Trade Practices-Consumer Protection Act, violated the Insurance Code, breached its duty of good faith and fair dealing, and committed fraud. The trial court entered judgment in the amount of \$ 665,450.25, which amount included insurance benefits, mental anguish damages, damages for violation of Texas Insurance Code article 21.55, punitive damages, attorney's fees, and interest. Royal Maccabees filed a motion for rehearing. Among Royal Maccabees's sixteen points of error was a complaint about the award for mental anguish damages.

Holding: The court affirmed three points of error, including the assertion that the jury question on mental anguish damages contained error. The Court concluded that there was more than a scintilla of evidence to support the award of mental anguish damages. However, the Court noted that mental

anguish damages are not recoverable for breach of contract. The jury charge at trial allowed the jury to assess mental anguish damages if the jury answered "yes" to any one of a number of questions. One of these questions asked whether Royal Maccabees had breached the contract. The Court concluded that this portion of the jury charge contained error. The court explained:

In *Crown Life Ins. Co. v. Casteel*, 22 S.W.3d 378, 388, 43 Tex. Sup. Ct. J. 348 (Tex. 2000), the supreme court held that it was error to submit a single broad-form liability question that commingles valid and invalid liability grounds. The supreme court extended *Casteel* to cover a single broad-form damages question that contains both proper and improper elements of damages. *Harris County v. Smith*, 96 S.W.3d 230, 233-34, 46 Tex. Sup. Ct. J. 263 (Tex. 2002). Assuming a timely objection, such error is harmful for two reasons. First, it prevents the reviewing court from determining whether the jury's damages were based on an improper element. *Casteel*, 22 S.W.3d at 388. Second, it prevents the appellant from isolating the error and presenting his case on appeal. *Id.* [*Royal Maccabees*, 146 S.W.3d at 351].

In this case, the jury charge "was harmful because it is not possible for this Court to determine that the jury did not improperly consider the breach of contract in deciding to award mental anguish damages and it prevented Royal Maccabees from isolating the error and presenting its case on appeal. *See Harris*, 96 S.W.3d at 234; *Casteel*, 22 S.W.3d at 388." [*Royal Maccabees*, 146 S.W.3d at 351]. Therefore, the Court reversed and remanded the award of mental anguish damages.

C. An Exception For Most Rules

As we all know: In our line of work, however, there is an exception to almost every rule. A recent case also demonstrates that sometimes emotional distress damages are available in suits that involve a breach of contract.

***Noah v. Univ. of Tex. Med. Branch at Galveston*, 2004 Tex. App. LEXIS 7239 (Tex. App.-- 2004)- Court Discusses the Possibility of Mental Anguish Damages in "Special Relationships" Contract Cases**

Facts: Family members sought recovery of damages for their mental anguish and emotional distress that resulted from the commingling of the ashes and alleged mishandling of the remains of their

deceased relatives. Plaintiffs claimed UTMB violated its promises to only use the bodies for the advancement of medical science and education and to treat the bodies with the dignity and consideration that is due to every human being.

Holding: The First District Court of Appeals noted that mental anguish damages may be compensable in a narrow set of contracts cases.

[T]he Texas Supreme Court has noted that mental anguish damages may be compensable when they are a foreseeable result of the breach of a duty arising out of certain "special relationships," including "a very limited number of contracts dealing with intensely emotional noncommercial subjects such as preparing a corpse for burial." [*City of Tyler v. Likes*, 962 S.W.2d 489, 496, 41 Tex. Sup. Ct. J. 174 (Tex. 1997)]; see *Pat H. Foley & Co. v. Wyatt*, 442 S.W.2d 904, 906 (Tex. Civ. App.--Houston [14th Dist.] 1969, writ ref'd n.r.e.). Special relationship cases generally have three common elements: (1) a contractual relationship between the parties, (2) a particular susceptibility to emotional distress on the part of the plaintiff, and (3) the defendant's knowledge of the plaintiff's particular susceptibility to the emotional distress, based on the circumstances. *Lions Eye Bank v. Perry*, 56 S.W.3d 872, 877 (Tex. App.--Houston [14th Dist.] 2001, pet. denied); see also *Johnson v. Standard Fruit & Vegetable Co.*, 984 S.W.2d 633, 638 (Tex. App.--Houston [1st Dist.] 1997), rev'd on other grounds, 985 S.W.2d 62, 42 Tex. Sup. Ct. J. 274 (Tex. 1998). [Noah, 2004 Tex. App. LEXIS 7239, *10-11].

However, the Court did not reach the issue of whether the contract in question created such a "special relationship" because the plaintiffs had not established the existence of a waiver of the university's immunity from suit for their contract actions.

II. PHYSICAL PAIN AND SUFFERING

There remain, of course, no precise guidelines to assess the monetary equivalent of pain and suffering resulting from a physical injury, so a jury has wide latitude in determining the amount of the award. *Texarkana Mem'l Hosp., Inc. v. Murdock*, 946 S.W.2d 836, 841, 40 Tex. Sup. Ct. J. 513 (Tex. 1997); see also *Southwest Texas Coors, Inc. v. Morales*, 948 S.W.2d 948, 951 (Tex. App.--San Antonio 1997, no pet.); *Dawson v. Briggs*, 107 S.W.3d 739, 750-51 (Tex. App.--Fort Worth 2003, no pet.). The process of awarding damages for injuries such as pain and

suffering is inherently difficult because the alleged injury is a subjective, unliquidated, nonpecuniary loss. *Dawson*, 107 S.W.3d at 750; *Tagle v. Galvan*, 155 S.W.3d 510, 518 (Tex. App.--San Antonio 2004, no pet.). Even where there is no direct evidence of pain, the factfinder may infer pain from the nature of the injury. See *Prescott v. Kroger Co.*, 877 S.W.2d 373, 376 (Tex. App.--Houston [1st Dist.] 1994, writ denied). The law assumes that physical pain results from a serious injury. *City of Tyler v. Likes*, 962 S.W.2d 489, 495, 41 Tex. Sup. Ct. J. 174 (Tex. 1997). Some courts analyze physical pain and suffering and mental anguish together. The following are cases where awards for physical pain and suffering were upheld.

***Gibbins v. Berlin*, 2005 Tex. App. LEXIS 2495 (Tex. App.--Fort Worth 2005, no pet.): Court Upholds Awards for Past and Future Physical Pain and Mental Anguish in a Case Involving a "Fight" with Restaurant Owner.**

Facts: Plaintiffs Berlin and Merz, jukebox vendors, brought an assault action against Gibbons, a restaurant owner, to recover for injuries sustained in an altercation that ensued when plaintiffs visited the restaurant to inspect a jukebox. The "fight" consisted of two punches. Each plaintiff received one punch and one broken jaw. Berlin's facial injuries necessitated the insertion of a metal plate, and his mouth was wired shut for several weeks. He also received a fractured collarbone, damage to his shoulder, and lacerations to his face when he hit the floor. He testified that he had continued to have pain in his collarbone and shoulder, numbness in his jaw, and had suffered disfigurement to his face. Merz also had a metal plate inserted in his jaw, his mouth was wired shut, and he was required to have oral surgery. Merz testified that he continued to have pain and sensitivity in his jaw, and his face was disfigured. The jury awarded each plaintiff \$ 100,000 for past physical pain and mental anguish and \$ 250,000 and \$ 100,000 respectively to Berlin and Merz for future physical pain and mental anguish. Gibbons appealed.

Holding: The Court upheld the awards for past physical pain and mental anguish and future physical pain and mental anguish. The plaintiffs presented no expert testimony or documentary evidence such as medical records relevant to these damages. Nevertheless, the Court held that the testimony of the plaintiffs about their injuries provided legally and factually sufficient evidence to uphold the damage award.

***Goldberg v. Dicks*, 2004 Tex. App. LEXIS 1258 (Tex. App.--Tyler 2004, pet. filed): Court Upheld Award**

for Future Mental Anguish and Physical Pain in a Motorist's Personal Injury Action.

Facts: Plaintiff Dicks, a pickup truck passenger, was ejected from a truck as it swerved to avoid an 18-wheeler. Dicks suffered multiple injuries, including an injury to his shoulder, skin burns over fifteen percent of his total body surface, a broken left foot, and complete tears of the medial meniscus and anterior cruciate ligament in his knee. The jury awarded damages, including \$ 200,000.00 for future physical pain and mental anguish. Defendants appealed this award.

Holding: The Court upheld the award for future mental anguish and physical pain. The Court analyzed these two types of future damages together. Two doctors testified there was a reasonable probability that Dicks's condition would worsen over time. They stated that Dicks was at risk to develop arthritis and that he would probably require a total knee replacement surgery. The Court held that this evidence constituted more than the scintilla of evidence necessary to support the jury's award of future mental anguish and physical pain.

III. PAST AND FUTURE MEDICAL EXPENSES

Texas follows the "reasonable probability" rule for future damage for personal injuries. *See City of San Antonio v. Vela*, 762 S.W.2d 314, 320 (Tex. App.--San Antonio 1988, writ denied); *see also Columbia Med. Ctr. of Las Colinas v. Bush*, 122 S.W.3d 835, 862-63 (Tex. App.--Fort Worth 2003, pet. denied). This includes evidence proving that, in all reasonable probability, future medical care will be required and the reasonable cost of such care. *See DaimlerChrysler Corp. v. Hillhouse*, 2004 Tex. App. LEXIS 4921, No. 04-02-00548-CV, 2004 WL 1195687 (Tex. App.-San Antonio Jun. 2, 2004, no pet. h.). As a result, an award of future medical expenses is a matter primarily for the trier of fact to determine, and no precise evidence is required. *Vela*, 762 S.W.2d at 320; *see also Bush*, 122 S.W.3d at 863. The trier of fact may base its award on the nature of the injuries, the medical care rendered before trial, and the condition of the injured party at the time of trial. *Vela*, 762 S.W.2d at 320. In order to "sustain a finding on future medical expenses, the plaintiff is not required to establish the future medical consequences of his injury by expert medical testimony grounded on 'reasonable medical probability.'" *Id.* Because issues such as life expectancy, medical advances, and the future costs of products and services are, by their very nature, uncertain, appellate courts are particularly reluctant to disturb a jury's award of these damages. *See Pipgras v. Hart*, 832 S.W.2d 360, 365 (Tex. App.-Fort Worth 1992, writ denied).

A. Future Medical Expenses Award Upheld Against Challenge That Award Was Too High.

***DaimlerChrysler Corp. v. Hillhouse*, 161 S.W.3d 541 (Tex. App.--San Antonio 2004, pet. filed)- Jury May Award Future Medical Expenses Damages Without Expert Medical Testimony.**

Facts: Plaintiffs sued DaimlerChrysler for the personal injuries that Ashlee Hillhouse, a minor, suffered when an airbag deployed following an automobile accident. The jury found in favor of plaintiffs on both design defects and marketing defects claims and found DaimlerChrysler negligent. The jury returned a \$ 3.5 million verdict in favor of the plaintiffs, including \$ 500,000 in future medical expenses. The trial court denied DaimlerChrysler's motion for judgment notwithstanding the verdict, but reduced the award of future medical expenses from \$ 500,000 to \$ 400,000. On appeal, DaimlerChrysler challenged the sufficiency of the evidence on both claims and the amount of damages awarded for Ashlee's future medical expenses.

Holding: The Court upheld the marketing defect claim, then turned to the issue of future medical expenses. The Court first noted that expert testimony is not required to establish such a claim.

Although the preferred practice for establishing future medical costs is through expert medical testimony, there is no requirement that the claimant establish such costs through expert testimony. *Tijerina*, 979 S.W.2d at 781. Because no precise evidence is required, the jury may award such damages based upon the nature of the injury, the medical care rendered prior to trial, and the condition of the injured party at the time of trial. *Vela*, 762 S.W.2d at 321. [*DaimlerChrysler*, 161 S.W.3d at 556].

Examining the facts of this case, the Court noted Ashlee's past medical expenses amounted to \$ 46,000. Ashlee's surgeon testified that she would need to remain in physical therapy for at least another five to six years. Her surgeon also testified may want additional future surgeries that would transfer nerve tissue from her legs to her arms in the hope that she might regain more function in her hand. Thus, the Court found sufficient evidence to uphold the \$ 400,000 award based on the nature of Ashlee's injury, her condition at trial, the need for future physical therapy, and the possibility of future surgeries.

***Sanmina-SCI Corp. v. Ogburn*, 153 S.W.3d 639 (Tex. App.--Dallas 2004, pet. filed)- Court Upholds**

Future Medical Expenses in Warehouse Accident Case

Facts: Leonard was employed as a truck driver. Part of his job responsibilities included making deliveries to a warehouse operated by the Sanmina-SCI Corporation and Sanmina Corporation. While making a delivery, the claimant attempted to lift one of the warehouse doors, and as he was doing so, a heavy roller fell off the door, striking him on the shoulder. The claimant argued that as a result of the incident, he suffered serious and possibly permanent injuries. Ogburn brought a premises liability action against Sanmina-SCI Corporation and Sanmina Corporation. Sanmina appealed from the jury's verdict in favor of Ogburn contending, among other things, there was no evidence or insufficient evidence to support the jury's award of \$ 45,000 in future medical expenses. Ogburn argued the evidence of his need for future surgery and medications was sufficient to support the jury's award of future medical expenses.

Holding: The Dallas Court of Appeals upheld the trial court's judgment. The Court noted that experts on both sides discussed Ogburn's need for more treatment including a surgical procedure known as a glenohumeral fusion. Ogburn's treating physician stated that Ogburn had elected not to have the surgery by the time of the trial, but claimed that if Ogburn's condition did not improve significantly, he would need to have the surgery. Thus, both doctors stated that there was a reasonable probability that Ogburn would eventually need the surgery and estimated the cost of the surgery to be approximately \$ 25,000. In addition, Ogburn testified that he would need approximately \$ 300 per month for the rest of his life to cover the cost of medication. At the time of the trial, he was fifty-six years old. On the basis of this evidence, the Court upheld the jury award of \$ 45,000 for future medical expenses.

B. Future Medical Expenses Award Upheld Against Challenge That Award Was Too Low.

***Fitz v. San Antonio Hospitality Invs., Inc.*, 2004 Tex. App. LEXIS 3507 (Tex. App.-- San Antonio 2004, no pet.): Evidence of Alcohol Consumption May be Relevant to Calculation of Mental Anguish Damages; Court holds Future Medical Expenses Award is Not Too Low**

Facts: Bryon Fitz sued San Antonio Hospitality Investments, Inc., a hotel franchisee, after he was injured by a tractor-trailer turning into a hotel owned and operated by the company. The trial court entered a take-nothing judgment in favor of San Antonio Hospitality Investments. Among the five issues Fitz raised on appeal were claims that the trial court erred

in admitting evidence of his alcohol consumption in the months before his accident and that the jury's award of only \$ 1.2 million for future medical expenses was against the great weight and preponderance of the evidence. According to Fitz, his drinking was irrelevant and prejudicial to his case because it was undisputed that he was not intoxicated at the time of the accident. Fitz also argued that the \$ 1.2 million award for future medical expenses was too low in light of expert testimony stating that Fitz would require attendant care services for his daily care in excess of \$ 1.1 million over his lifetime. Fitz claims he should have been awarded an additional \$ 1.1 million to compensate him for the future cost of attendant care services.

Holding: The San Antonio Court of Appeals overruled all of Fitz's appellate issues and affirmed the judgment of the trial court.

Alcohol and Mental Anguish Damages: The Court first held that the trial court did not err admitting evidence concerning Fitz's alcohol consumption. The court found that the evidence was relevant:

[E]vidence of Fitz's alcohol consumption bears directly upon the degree of pain and anguish suffered by Fitz as a result of the accident. According to Fitz's expert on pain management, Dr. James Rogers, a person's use of alcohol would be important to pain management because of its exacerbating effect and bearing on treatment methodology... [and] could have given [Rogers] "an idea of other problems that may be exacerbating [his] pain." [Fitz, 2004 Tex. App. LEXIS 3507, *13-14].

Thus, even though alcohol did not play a causative role in the accident, it was relevant to the calculation of mental anguish damages.

Future Medical Expenses: The Court also overruled Fitz's assertion that the award for future medical expenses was too low in light of the testimony of Fitz's expert about the need for attendant care. The Court noted that a jury is the sole judge of the credibility of the witnesses and the weight given to their testimony. As a result, a jury may choose to be guided by expert testimony on future medical damages, but is not bound by it. The court suggested that the jury may have been influenced by internal inconsistencies in Fitz's expert's testimony about the need for attendant care. In particular, on cross-examination, the expert testified that Fitz had been able to take care of himself without any assistance. The Court suggested that the jury could have properly attached significance to this inconsistency in reaching its verdict. Therefore, the Court held that the jury's award for medical costs was not so against the great

weight and preponderance of the evidence as to be manifestly unjust.

C. Future Medical Expenses Reversed (Upholding Challenge That Award Was Too High).

See Mendoza v. Sandoval, 2005 Tex. App. LEXIS 3189 (Tex. App.--Corpus Christi 2005, no pet., below (p.20))

IV. PHYSICAL IMPAIRMENT

The effect of any physical impairment must be substantial and extend beyond any pain, suffering, mental anguish, lost wages, or diminished earning capacity. *Golden Eagle Archery, Inc. v. Jackson*, 116 S.W.3d at 772; *Patlyek v. Brittain*, 149 S.W.3d 781, 2004 Tex. App. LEXIS 6290, 2004 WL 1573032, *3 (Tex. App.--Austin, July 15, 2004, pet. filed). To recover damages for physical impairment, the plaintiff must show: (1) he incurred injuries that are distinct from, or extend beyond, injuries compensable as pain and suffering, loss of earning capacity, or other damage elements; and (2) these distinct injuries have had a "substantial" effect. *Patlyek v. Brittain*, 2004 Tex. App. LEXIS 6290, 2004 WL 1573032, *3.

"Physical impairment" encompasses the loss of the injured party's former lifestyle" and "can encompass both economic and non-economic losses, and can include hedonic damages, or 'loss of enjoyment of life.'" *Patlyek v. Brittain*, 149 S.W.3d 781, 2004 WL 1573032, at *3 (Tex. App.--Austin, 2004, pet. denied) (citing *Golden Eagle Archery, Inc. v. Jackson*, 116 S.W.3d 757, 772, 46 Tex. Sup. Ct. J. 1133 (Tex. 2003)). The focus should be on whether the injuries have impeded [the] plaintiff's ability to engage in specific non-work related activities, such as sports, hobbies, or recreational activities. *See Patlyek*, 149 S.W.3d 781, [WL] at *4:

By focusing on actual impediments to the plaintiffs' activities, a reviewing court can distinguish losses comprising physical impairment from the pain, suffering, inconvenience, or distress compensable in and of themselves through pain and suffering or mental anguish damages. By focusing on activities unrelated to work, a reviewing court can distinguish losses comprising physical impairment from those comprising lost wages or earning capacity."

A. Jury Finding of Physical Impairment Damages Upheld

Patlyek v. Brittain, 149 S.W.3d 781, 2004 WL 1573032 (Tex. App.--Austin, 2004, pet. denied): Court Overturns a Trial Court's Order to

Disregard a Jury's Physical Impairment Award in a Motor Vehicle Accident Case

Facts: A Hays County jury returned a verdict in favor of plaintiff Patlyek for \$ 15,683.25 for personal injuries sustained in a car accident, including \$ 6000 for past physical impairment. The trial court granted a motion to disregard the physical impairment finding, concluding there was no evidence to support it. Patlyek appealed this ruling.

Holding: The Court held that plaintiff's inability to turn his head to the left constituted evidence of compensable physical impairment, meeting the requirements that the impairment be substantial and distinct from other damages. There was evidence that plaintiff was unable to turn his head to the left completely or quickly until several months after he had otherwise fully recovered. While perhaps not a "dramatic" limitation, the Court viewed this as a substantial limitation, as being unable to rotate one's head completely would have a negative impact on day-to-day activities, such as driving a car, responding to one's name when called, or any recreational activity involving movement of one's head. Moreover, this limitation was independent of the pain and weakness the plaintiff experienced. Therefore, the found legally and factually sufficient evidence to reverse the judgment of the county court disregarding the jury's verdict awarding past physical impairment damages.

B. Jury Finding of Physical Impairment Damages Not Upheld

Wald-Tinkle Packaging & Distrib. v. Pinok, 2004 Tex. App. LEXIS 11721 (Tex. App.--Houston [1st Dist.] 2004, no pet.): Court Strikes Physical Impairment Award as Duplicative of Other Damage Awards.

Facts: Plaintiff sued employer for negligence after receiving a third-degree burn to his arm at work. The jury awarded \$ 73,949.63, including amounts for lost past wages and past and future pain and suffering, mental anguish, disfigurement, and physical impairment. The trial court struck the \$ 8,000 for past and future physical impairment. The plaintiff appealed the trial court's decision to disregard the physical impairment award.

Holding: The Court of Appeals affirmed the trial court's decision to strike the physical impairment award. The Court noted that there was some evidence of past and future impairment:

With respect to past physical impairment, Pinok testified that he had difficulty conducting his normal activities while the wound on his forearm was still open and that

he had not been able to use his arm in any capacity because the skin on his arm was very thin. With respect to future physical impairment, Pinok testified that he continued to experience impairment in his arm because, when he applied force, his forearm would itch and begin to hurt. Pinok also testified, however, that he had "pretty much recovered" and that he was able to do all the things in his daily life and work that he had done prior to his injury. [*Wald-Tinkle*, 2004 Tex. App. LEXIS 11721, *39].

However, the Court held that Pinok failed to present evidence of any substantial damages that were distinct from other damages:

Pinok did not testify about limitations to his ability to engage in specific, non-work-related activities. See *Patlyek*, 149 S.W.3d 781, 2004 WL 1573032, at *4. Neither did his testimony reveal injuries that were distinct from, or that extended beyond, injuries compensable as pain and suffering, loss of earning capacity, or other damage elements. See *id.*; see also *Golden Eagle Archery*, 116 S.W.3d at 772. The jury not only compensated Pinok for his past medical expenses, but awarded him \$ 25,000 in damages for his past and future physical pain and mental anguish and \$ 27,000 in damages for his past and future disfigurement. We hold that Pinok presented no evidence showing an impairment separate and distinct from his pain and suffering, disfigurement, and lost wages--injuries for which he was awarded damages. [*Wald-Tinkle*, 2004 Tex. App. LEXIS 11721, *39-40].

V. GOLDEN EAGLE ARCHERY AND ITS AFTERMATH REGARDING STANDARD OF REVIEW WHERE DAMAGES OVERLAPPING SEVERAL CATEGORIES ARE CHALLENGED.

In *Golden Eagle Archery, Inc. v. Jackson*, 116 S.W.3d 757, 46 Tex. Sup. Ct. J. 1133 (Tex. 2003), the Texas Supreme Court provided a new standard of review for cases in which damages overlapping several categories are challenged. First, a court of appeals should consider the evidence unique to the damage element under review. *Id.* at 773. If the evidence is factually insufficient to support the award of damages in that category, a court should then consider if the evidence supporting an award in that category would also support an award in other categories, and if so, if there is factually sufficient evidence to uphold the total award. *Id.* This approach "takes into account all the

evidence regarding damages in categories that overlap, but does not credit that evidence more than once in evaluating the amount awarded by the jury." *Id.* In addition, the supreme court held that a court of appeals should detail the evidence supporting a jury's finding on damages and explain how the contrary evidence greatly outweighed the evidence supporting the jury's verdict. *Id.* at 775 (citing *Pool v. Ford Motor Co.*, 715 S.W.2d 629, 635, 29 Tex. Sup. Ct. J. 301 (Tex. 1986)).

***Jackson v. Golden Eagle Archery, Inc.*, 143 S.W.3d 477 (Tex. App.--Beaumont 2004, no pet. h.): Court Applies Texas Supreme Court's Standard of Review and Upholds Jury Damages Award**

Facts: Plaintiff Jackson was demonstrating the use of a compound bow when the bow broke and struck him in the eye, causing broken bones and other injuries. The jury found Jackson's to include \$ 2,500 for physical pain and mental anguish, \$ 2,500 for loss of vision, \$ 0 for physical impairment other than loss of vision, and \$ 1,500 for disfigurement. In an earlier decision, this Beaumont Court of Appeals reversed the judgment, holding the jury's failure to award damages for physical impairment other than the loss of vision was so against the great weight and preponderance of evidence as to be manifestly unjust. See *Jackson v. Golden Eagle Archery, Inc.*, 29 S.W.3d 925 (Tex. App.--Beaumont 2000). However, on appeal, the Supreme Court of Texas found that the court of appeals had failed to apply the proper standard of review set forth in *Pool v. Ford Motor Co.*, 715 S.W.2d 629, 635, 29 Tex. Sup. Ct. J. 301 (Tex. 1986), and set out a new standard for factual sufficiency review when evidence applies to more than one damage category. See *Golden Eagle Archery, Inc. v. Jackson*, 116 S.W.3d 757, 46 Tex. Sup. Ct. J. 1133 (Tex. 2003) (discussed above). The Texas Supreme Court remanded this case back to the Beaumont Court.

Holding: Applying the test articulated by the Supreme Court (*Golden Eagle Archery, Inc. v. Jackson*, 116 S.W.3d 757, 772, (Tex. 2003)), the Court of Appeals did not find that the trial court's failure to award larger damages in the categories of physical pain and mental anguish, physical impairment of loss of vision, physical impairment other than loss of vision, and disfigurement was against the great weight and preponderance of the evidence. Applying the Supreme Court's test, the Court first examined whether the evidence unique to each damage category was sufficient. The Court assigned all the evidence relating to non-economic damages into one or more of the four challenged categories. The Court followed the Supreme Court's instructions to place evidence relating to the loss of enjoyment of life into the categories for physical impairment. *Id.* at 772. The Court also noted that in this case, there was no evidence unique to the

category of physical impairment other than the loss of vision. After categorizing the evidence, and without providing much analysis, the Court stated, “[c]onsidering the evidence unique to each category, we are unable to conclude the jury’s failure to award larger damages for any of the four categories is against the great weight and preponderance of the evidence.” *Jackson*, 143 S.W.3d at 486. Because the Court ruled the evidence was factually sufficient to uphold the awards in each category, the Court did not advance to the second step in the Supreme Court’s standard of review.

***Mendoza v. Sandoval*, 2005 Tex. App. LEXIS 3189 (Tex. App.--Corpus Christi 2005, no pet.):**

Facts: In a civil action, trial court entered a no-answer default judgment in favor of plaintiffs, granting award for past and future medical expenses and mental anguish. Defendant appealed these awards.

Holding: The award of damages was reversed and remanded.

Past and Future Medical Expenses: The Court held that the plaintiffs did not provide an expert to establish the reasonableness and necessity of the past medical expenses nor did they supply an affidavit that complied with TEX. CIV. PRAC. & REM. CODE § 18.001 that would dispense with the necessity of providing an expert to establish the reasonableness and necessity of past medical expenses. Therefore, the plaintiffs failed to provide sufficient evidence to uphold the past medical expense award. Extending this analysis, the Court held that there was also insufficient evidence to uphold the award for future medical expenses.

Mental Anguish Award: Finally, the Court held there was insufficient evidence to uphold an award for past or present mental anguish. The only evidence presented the plaintiffs addressing the issue of mental anguish were “yes” responses to counsel’s questions: *i.e.*, “did plaintiff suffer mental anguish in the past” and “will plaintiff continue to suffer mental anguish in the future?” The Court noted “[t]hese responses did not sufficiently establish that there was a substantial disruption in appellees’ daily routines, nor did they show the nature, duration or severity of appellees’ anguish.” [*Mendoza*, 2005 Tex. App. LEXIS 3189, *10].

***SunBridge Healthcare Corp. v. Penny*, 160 S.W.3d 230 (Tex. App.--Texarkana 2005, no pet.): Court Upholds Award for Physical Pain and Mental Anguish, But Reduces Awards for Disfigurement and Physical Impairment in Wrongful Death Case**

Facts: Pauline Penny was a resident of a nursing home in Linden, Texas, operated by SunBridge

Healthcare Corp. Between November 2000 and February 12, 2001, she fell fourteen times at the nursing home. On March 27, 2001, she and another resident were taken to a physician by a staff member of the nursing home. Upon arriving at the physician’s office, both residents were placed in wheelchairs. Mrs. Penny was left unattended in her wheelchair when the staff member went back to assist the other resident. Mrs. Penny’s wheelchair began rolling down the sidewalk at a rapid speed. A witness saw that Mrs. Penny had a “real scared expression on her face.” When the wheelchair veered off the sidewalk, Mrs. Penny was thrown onto the concrete parking lot and suffered serious injuries. Four days later, she died from those injuries. Bruce Penny, the independent administrator of Mrs. Penny’s estate, sued appellants claiming vicarious liability, negligence, gross negligence, violation of resident’s rights, and injury to the elderly. The jury returned a verdict in favor of Penny awarding \$ 1,000,000 in pain and suffering and mental anguish, \$ 496,934 for disfigurement, \$ 496,934 for physical impairment, and \$ 6,132 in funeral and burial expenses. Among the issues raised on appeal was the legal and factual sufficiency of the evidence to support the jury’s awards.

Holding: The Court upheld the award for physical pain and mental anguish, but reduced the awards for disfigurement and physical impairment in light of the short duration of those damages.

Award for Physical Pain and Mental Anguish: The Court upheld the \$ 1,000,000 award for “conscious pain and emotional pain, torment, and suffering experienced before death as a result of the occurrence in question.” Before analyzing the award for physical pain and mental anguish, the Court discussed the difficulty of assessing physical and mental damages together:

Damages for physical and mental injuries are separate and distinct. *Southwest Tex. Coors, Inc. v. Morales*, 948 S.W.2d 948, 954 (Tex. App.--San Antonio 1997, no writ) (Green, J., concurring). Here, however, the jury charge included a question that concerned both “conscious physical pain and emotional pain, torment, and suffering” When a damage issue is submitted in broad form, ascertaining the amount the jury awarded for each element of damages is difficult, if not impossible. *See Wal-Mart Stores, Inc. v. Garcia*, 30 S.W.3d 19, 24 (Tex. App.--San Antonio 2000, no pet.); *Brookshire Bros. v. Lewis*, 997 S.W.2d 908, 921-22 (Tex. App.--Beaumont 1999, pet. denied). Therefore, an appellant who seeks to challenge a multi-element damage award on appeal must address each element and show the evidence

is insufficient to support the entire award. See *Garcia*, 30 S.W.3d at 24; *Lewis*, 997 S.W.2d at 922. If an appellant fails to address an element of damages, the appellant waives the sufficiency challenge. See *Garcia*, 30 S.W.3d at 24; *Lewis*, 997 S.W.2d at 922. [SunBridge, 160 S.W.3d at 248].

In this case, the Court upheld the award for physical pain and mental anguish, comparing the award to awards in similar cases involving a relatively short duration of pain and mental anguish.

Award for Disfigurement. The Court provided a definition for disfigurement:

Disfigurement has been defined as "that which impairs or injures the beauty, symmetry, or appearance of a person or thing; that which renders unsightly, misshapen or imperfect, or deforms in some manner." *Goldman v. Torres*, 161 Tex. 437, 341 S.W.2d 154, 160, 4 Tex. Sup. Ct. J. 163 (1960). Expert testimony is not a prerequisite to the award of damages for disfigurement. *Sanchez*, 886 S.W.2d at 826. [SunBridge Healthcare Corp. v. Penny, 160 S.W.3d at 252].

Noting there were photographs showing significant swelling, distortion, and discoloration of Mrs. Penny's faces and hands and testimony that Mrs. Penny had bitten through her tongue, the court found that there was sufficient to uphold an award for disfigurement as a result of the March 27, 2001 fall. However, the Court reduced the amount of based on the short duration of the disfigurement:

[T]he damages for disfigurement must be measured from the date of the injury until the time the disfigurement is expected to end. See *Armellini Express Lines of Fla., Inc. v. Ansley*, 605 S.W.2d 297, 311 (Tex. Civ. App.--Corpus Christi 1980, writ ref'd n.r.e.); *Tex. Farm Prods. Co. v. Leva*, 535 S.W.2d 953 (Tex. Civ. App.--Tyler 1976, no writ) (jury questions determine the past and future disfigurement damages separately). Here, the duration of the disfigurement damages was only four days. We cannot find that the evidence is factually sufficient to support an award of damages of \$ 496,934.00, and we suggest a remittitur for the disfigurement damages of \$ 396,934.00. [SunBridge Healthcare Corp. v. Penny, 160 S.W.3d at 252-253].

Award for Physical Impairment. The court noted that before the March 27 fall, Mrs. Penny participated in some daily activities, including getting up and around, socializing with friends in the nursing home, and playing bingo and forty-two. From the time she was placed in her room after the accident until her death, she was unable to speak or move about at all. The Court found this evidence sufficient for a physical impairment award. However, as before, the court noted the limited duration of Mrs. Penny's impairment and suggested a remittitur of \$ 346,934.

***Ramirez v. Fifth Club, Inc.*, 144 S.W.3d 574 (Tex. App.--Austin 2004, pet. granted June 10, 2005): In a Case Arising Out of a Patron's Altercation with Night Club Security Guards, Court Upholds Awards for Physical Pain and Mental Anguish Sustained in the Past, Mental Anguish in the Future, and Physical Impairment Sustained in the Past.**

Facts: Plaintiff Ramirez sustained a fractured skull in an altercation with the security guards at a night club. The trial court awarded him \$ 80,000 for physical pain and mental anguish sustained in the past, \$ 20,000 for mental anguish that he will reasonably sustain in the future, and \$ 7,000 for physical impairment sustained in the past. The defendants appealed these awards.

Holding: The Court of Appeals upheld the damage awards.

Past Physical Pain and Mental Anguish: The Court found sufficient evidence to support the award for past physical pain and mental anguish, nothing Ramirez's fractured skull, swollen face, frequent headaches, inability to sleep and his request that his daughter not be allowed to see him in his condition at the hospital.

Future Physical Pain and Mental Anguish: The Court upheld the award for future physical pain and mental anguish that Ramirez would reasonably sustain in the future, noting there was evidence that at the time of the trial, over a year after the altercation, Ramirez continued to have difficulties talking to people, was "always tossing and turning," and was having nightmares. His wife testified that he was eating less, pushing her away, and suffering from depression.

Physical Impairment. Finally, the Court found that Ramirez suffered from an impairment extending beyond any impediment to his earning capacity and beyond any physical pain and mental anguish that produced a separate and distinct loss sufficient to support the physical impairment award. In support of the award, the Court noted that Ramirez spent a week recovering from his injuries, had difficulty eating and communicating, and avoided his daughter so she would not see his injuries. In addition, his wife stated that

before the incident he would exercise and eat frequently, but after the altercation he would not eat and would spend time in his room alone.

***Tagle v. Galvan*, 155 S.W.3d 510 (Tex. App.--San Antonio 2004, no pet.): Court Upholds Broad-Form Damage Award in Motor Vehicle Accident Case**

Facts: Plaintiff Galvan sued for damages sustained in a motor vehicle accident with an 18-wheel truck. The trial court awarded \$ 2 million in a broad-form damages award, for past and future physical pain and suffering, past and future mental anguish, past and future loss of physical capacity, past and future medical expenses, and past and future loss of wage earning capacity.

Holding: Before addressing the legal and factual sufficiency of the evidence in support of the damages, the Court addressed the form of damage submission. The Court noted that under *Harris Co. v. Smith*, 96 S.W.3d 230 (Tex. 2002), defendants could insist on separate findings for each element of damages. However, the defendants here waived the right to separate findings by failing to specifically draw the trial court's attention to a challenge of the sufficiency of the evidence supporting any particular element of the damages claimed. Therefore, the defendants could only challenge the sufficiency of the damages as a whole.

The Court then held that the evidence was legally and factually sufficient to support the broad-form award. Tagle reported severe pain when he bent down that prevented him from sleeping and depression. His doctors testified that they prescribed pain and antidepressant medications. Finally, his orthopedic surgeon testified that he would continue to have decreased mobility, that the back surgery he performed was reasonable and necessary, and that Tagle was probably not employable. The Court held that this evidence was legally and factually sufficient to uphold the damage award as a whole.

***Gonzalez v. Wal-Mart Stores, Inc.*, 143 S.W.3d 118 (Tex. App.--San Antonio 2004, no pet.): Court Upholds a Zero-Damage Award in Personal Injury Case**

Facts: Plaintiff Servando Gonzalez and his wife sued Wal-Mart after Servando was injured when several boxes fell from a moving pallet jack onto his neck and back. The trial court awarded \$10,000 for past physical pain and suffering, but no damages for future pain and suffering, past and future mental anguish, past and future physical impairment, past and future medical care, past and future disfigurement, past and future loss of earning capacity, and loss of

consortium by his wife. Plaintiffs appealed, challenging the zero damage award.

Holding: The Court held that the zero damage award for future pain and suffering, past and future mental anguish, past and future physical impairment, past and future medical care, past and future disfigurement, past and future loss of earning capacity, and loss of consortium was not an abuse of discretion, as there was conflicting evidence in the case. A medical expert testified that the incident would not have caused Gonzalez's injuries, that he had prior injuries to his neck and back area, and that he had abnormalities in his back that were not related to trauma. Thus, the court ruled there was legally and factually sufficient evidence to sustain the jury's zero damage award.