Affirmed as Modified; Majority and Concurring Opinions filed August 16, 2001.

In The

Fourteenth Court of Appeals

NO. 14-99-00503-CV

WAL-MART STORES, INC. AND CLYDE CANTER, Appellants

V.

CANDACE M. HOKE AND JIMMIE HOKE, Appellees

On Appeal from the 155th District Court
Waller County, Texas
Trial Court Cause No. 96-05-13-802

M A J O R I T Y O P I N I O N

Appellants, Wal-Mart Stores, Inc. and Clyde Canter (Canter), collectively "Wal-Mart,"appeal a judgment in a personal injury suit in favor of appellees, Candace Hoke (Candace) and Jimmie Hoke (Jimmie) The jury awarded Candace $250,000 in damages against Wal-Mart and Canter, jointly and severally. The trial court reduced the damages to $200,000 based on Candace's contributory negligence. The trial court added pre-judgment interest to that amount commencing on the date of the incident. In three points of error, Wal-Mart asserts: (1) the evidence is legally and factually insufficient to support the damages for past pain and mental anguish: (2) the jury award is grossly excessive: (3)

the trial court erred in admitting into evidence a "Day in the Life" video and a video depicting the administration of spinal injections; and (4) the trial court incorrectly calculated prejudgment interest. We modify the trial court's judgment and affirm the judgment as modified.

FACTUAL BACKGROUND

Candace Hoke visited a Wal-Mart store. While walking through the paper goods aisle, Hoke was struck in the head and shoulder by a Charmin box that weighed between 20 and 25 pounds. A store employee pushed the box from a shelving unit in the store and the box fell approximately twelve feet. No caution or warning signs were displayed in the aisle. Hoke was knocked to the floor, dazed, and did not respond to questions. She was transported by ambulance to the emergency room, where she was diagnosed with cervical muscle strain/spasms and a right shoulder contusion. Hoke was an accomplished equestrian and, although she was injured in the Wal-Mart accident, she continued to compete in equestrian competitions after her injury and up until trial. Candace sued Wal-Mart for negligence. A jury found 20% represented Candace's percentage of responsibility for her injuries, but awarded her $250,000 for past pain and mental anguish. The jury failed to award Candace any damages for the other damage elements contained in the jury charge. The trial court reduced Candace's damages award to $200,000 to account for her percentage of responsibility.

DISCUSSION AND HOLDINGS

I.

Sufficiency of the Evidence

In its first point of error, Wal-Mart contends the jury's award of damages for Candace's past physical pain and past mental anguish was not supported by legally or factually sufficient evidence. In addition, Wal-Mart complains the damage award was excessive. When both legal and factual sufficiency points are raised, we are required to

rule on the "no evidence" point first. *Glover v. Texas Gen. Indem. Co.*, 619 S.w.2d 400, 401 (Tex. 1981). Here, in part I A, we will address only the legal sufficiency challenge because an excessive damage award claim is reviewed under the same standard as that applied to any factual insufficiency claim. *Haryanto v. Saeed*, 860 S.W.2d 913, 921 (Tex. App.—Houston [14th Dist.] 1993, writ denied).

A. Standards of Review

In determining whether there is no evidence of probative force to support a jury's finding, all the record evidence must be considered in the light most favorable to the party in whose favor the verdict has been rendered, and every reasonable inference deducible from the evidence is to be indulged in that party's favor. *Merrill Dow. Pharm. v. Havner*, 953 S.W.2d 706, 711 (Tex. 1997). A no evidence point will be sustained when (a) there is a complete absence of a vital fact; (b) the court is barred by rules of law or of evidence from giving weight to the only evidence offered to prove a vital fact; (c) the evidence offered to prove a vital fact is no more than a mere scintilla; or (d) the evidence conclusively establishes the opposite of the vital fact. *Id.* More than a scintilla of evidence exists when the evidence supporting the finding, as a whole, rises to a level that would enable reasonable and fair-minded people to differ in their conclusions. *Id.* Less than a scintilla of evidence exists when the evidence is so weak as to do no more than create a mere surmise or suspicion of a fact. *Kindred v. Con/Chem. Inc.*, 650 S.W.2d 61, 63 (Tex. 1983). Stated differently, any evidence of probative force requires the reviewing court to uphold the jury's verdict. *ACS Investors, Inc. v. McLaughlin*, 943 S.W.2d 426, 430 (Tex. 1997).

We review the factual sufficiency of the evidence by weighing and considering the evidence both in support of, and contrary to, the challenged findings. *Plas-Tex, Inc. v. U.S. Steel Corp.*, 772 S.W.2d 442, 445 (Tex. 1989). We will set aside the judgment only if the evidence that supports the jury finding is so weak as to be clearly wrong and manifestly

unjust. *Cain v. Bain*, 709 S.W.2d 175, 176 (Tex. 1986). Factual sufficiency points of error concede conflicting evidence, yet maintain that the evidence against the jury's is so great as to make the finding erroneous. *Raw Hide Oil & Gas Inc. v. Maxus Exploration Co.*, 766 S.W.2d 264, 275 (Tex. App.—Amarillo 1988, writ denied). The court of appeals is not a fact finder. *Maritime Overseas Corp. v. Ellis*, 971 S.W.2d 402, 407 (Tex. 1998). Accordingly, the court of appeals may not pass upon witness credibility or substitute its judgment for that of the jury, even if the evidence would clearly support a different result. *Pool v. Ford Motor Co.*, 715 S.W.2d 629, 634 (Tex. 1986).

B. Jury Findings Challenged on Sufficiency Grounds

The gravamen of Wal-Mart's first point of error is this: Wal-Mart concedes Candace suffered some injury on October 26, 1993, but there is no legally or factually sufficient evidence causally relating any of Candace's claimed injuries, other than her initial soft tissue injuries, to any negligence by Wal-Mart. Instead, Wal-Mart suggested at trial and on appeal the evidence was insufficient to establish Candace's pain resulted solely from Wal-Mart's negligence, or her pain was a cumulative result of other events, such as her falls from horses after the incident. Wal-Mart's issue contains two parts. The inquiry necessary to answer Wal-Mart's issue involves first, an examination of the evidence supporting the jury's determination Wal-Mart caused 80% of Candace's injuries, and second, an examination of the evidence supporting the damage award of $200,000 for Wal-Mart's percentage of responsibility for Candace's past physical pain and mental anguish under the legal and factual standards of review.

C. The Evidence

The evidence in this case relating to Candace's physical pain, and the source of that pain, following the incident at Wal-Mart is extensive. Dr. Jeffrey Jackson is a board certified medical neurologist. He treated Candace, and diagnosed her as having multiple anatomical injuries that resulted from a blow to the head. She suffered a concussion to her

cervical spinal cord. He determined she has ongoing multiple musculoskeletal and axial spine problems. He testified the blow to Candace's head caused her head to arch back, bumping the spinal cord. Since the injury she has had problems with strength in her legs, swelling in her legs, and she has very jumpy reflexes in her legs, which is a symptom of spinal cord dysfunction. She has pain and sensory loss in the right leg. Dr. Jackson testified Candace is still suffering from most of the problems she had when he first saw her.

Significantly, Dr. Jackson testified on direct examination that in his professional medical opinion, Candace was not faking her injuries. Further, he testified it was his opinion that Candace's injuries have been "very painful" since she incurred them. He testified he had never seen her when she was not in pain, and that she is always in pain. These conclusions regarding her pain are corroborated by objective signs on exams. Dr. Jackson also testified to his belief that Candace suffered a brain injury that has resulted in some memory deficit. Dr. Jackson also actively encouraged Candace to ride her horses as much as she can for the psychological benefits. He testified her chronic pain produced depression. The pain is produced by a number of objective injuries and factors. He summarized her injuries as disabling as far as her occupation is concerned.

On cross-examination, Dr. Jackson was informed that Candace had suffered three falls from horses after the incident at Wal-Mart, but before visiting him. Dr. Jackson testified he could not rule out the possibility that a fall from a horse could cause the problems she is having, but he also stated his belief that the principal injury at Wal-Mart, a spinal cord injury, is certainly the most serious injury. During cross-examination, Wal-Mart counsel read Dr. Jackson an entry in another doctor's records regarding Candace. The record stated that Candace had "lost all prior progress and decreased in strength--fell off horse." Dr. Jackson disagreed with the suggested interpretation that a fall from a horse exacerbated her complaints and caused her to lose all her progress at that time. Instead, Dr. Jackson interpreted the entry to convey that she was doing well, "then backslided" in

her progress in the strength in her legs was decreasing, which caused her to fall off the horse. During his cross-examination, Dr. Jackson defined somatization as an exaggeration of a pre-existing symptoms brought on by psychological stressors, typically due to depression and in Candace's case, due to pending litigation. A related condition is secondary gain, which includes a desire for attention or money. Dr. Jackson admitted that secondary gain was at work in Candace.

On redirect, Dr. Jackson clarified issues raised during cross-examination. First, he testified that Candace is not trying to "milk the legal" system for big bucks, and he believes she is genuinely injured. Second, he also testified to his belief, in connection with the issue of secondary gain, that she is trying to win enough to take care of herself. She always shows up for appointments, and she does what she is asked to do, leading Dr. Jackson to believe she is neither exaggerating nor trying to get a gigantic monetary reward.

Dr. Louis Fabre is an M.D. and a psychiatrist. He treated Candace and her husband Jimmie. Dr. Fabre's diagnosis of Candace was that she had a traumatic brain injury and major depression. His report also concluded that she had spinal cord injury and occupational problems. He testified she needed future psychiatric therapy. Dr. Fabre did not believe Candace was faking any of her medical or psychiatric illnesses. In his opinion, all of Candace's injuries were caused by a blow to the head sustained on October 26, 1993, and thus, he did not believe she was suffering from somaticism or that she was a malingerer. On cross-examination, he stated his belief that there were no secondary gain issues at work here.

Dr. Fabre also testified that he had diagnosed Jimmie as having major depression. He stated it is a serious and sometimes life threatening illness, and it often ends in suicide, hospitalization, or years of treatment. His opinion was that Jimmie's depression is primarily caused by the problems related to his wife's injuries. He reached this conclusion

because Candace's injury basically prevented Jimmie from earning a living in the horse show business. He was overwhelmed with her pain and with her inability to function the way she had previously.

Dr. Norma Cook is neuropsychologist with a Ph.D, a specialist in the relationship between the brain and behavior. She examined Candace on two occasions, the first in February 1995, and the last in September 1998, just before trial. Dr. Cook testified Candace has defective ability to perform manual manipulations, fluctuations in ability, and below average verbal fluency. She has impaired ability to use her hands, including a slowed ability to perform sequential maneuvers with both hands. She is depressed, and the loss of her equestrian skills is a focal point of that depression. Dr. Cook also explained how Candace's neuropsychological injuries are a factor in her health:

> Historically, [Candace] was an honor student in high school, used to having a brain that works better than most people, I would say. Her intelligence is now merely average and her memory is not dependable, due to fluctuations in her attention and slowing with the ability with which she can manipulate information. These make her less efficient, unable to function in every day life.

Dr. Cook describes Candace as mentally impaired and disabled. She also described her as having a chronic pain syndrome. She also testified she did not believe Candace was suffering from a somatization disorder at the time of trial. She testified the conversion and somatization disorders are very similar terms. Initially, she suspected Candace exhibited conversion disorder because she exhibited a very positive outlook concerning her ability to overcome her problems and get well. Dr. Cook questioned how she could be so happy when she was in such terrible pain all of the time. Eventually her depression progressed and her optimistic outlook diminished. After performing some personality testing, Dr. Cook determined conversion no longer was present in Candace.

Dr. John Trowbridge, an M.D., testified as an expert in orthopedic medicine. He is

Candace's treating physician. He treated her with the objective of rebuilding the support tissues that hold the bone structures in place. He testified she has a very specific injury, very dramatic and very extensive injuries. He described her as having injuries in the mid and lower part of her neck. Her ligaments are torn in the lower section of her neck and in the upper and mid section of her mid back. He testified Candace is in continuous pain. The injections Dr. Trowbridge administers to Candace in her back only moderate her pain, but do not give her total relief from it. He told the jury her injuries were obvious to anyone in his speciality. When Dr. Trowbridge was asked during cross-examination "so the jury is clear on this, you are absolutely convinced that Mrs. Hoke is in pain and suffering from some condition in her spine that is hurting her?" He responded, "[a]bsolutely." Dr. Trowbridge found the injury was consistent with a fairly devastating injury, not an accumulation of injuries occurring before or after that injury while she was riding or an accumulation of all of those. He testified her injuries are unlikely to be an accumulation based on the records presented by Candace's other physicians because they had seen her since the injury and before she had seen him. During the cross-examination of Dr. Trowbridge, he was asked this question: "you would agree with me that that is the difficult question this jury has to answer is are her injuries associated with the fall at Wal-Mart or could they be caused by those intervening accidents." The witness answered as follows:

> I don't know that that is a difficult question. If she had not sought care with the kinds of injuries that I had seen before, then I would look for some episode where she had done som specific injury, and she didn't do it just to her neck. She did it down her sping and to a shoulder and potentially to a knee, though I am not sure about that. But that is hard to tell because sh has been a rider for these years. *So my thinking on this is that she claims a fairly devastating injury, which is consistent with how she showed up injured, not cumulatively over time."*

(emphasis added).

Dr. John Stirling Meyer, M.D., testified through correspondence dated April 2, 1998, that was introduced as an exhibit and read by Dr. Trowbridge, that he had concluded there is no question Candace suffered head, neck, and spine injuries around October 26, 1993.

The letter also stated that Dr. Meyer was, after reading a letter from Dr. Trowbridge, of the opinion that Dr. Trowbridge's letter provided a true and accurate summary of her current medical condition and he was in substantive agreement with his statements. Finally, Dr. Meyer did not see any sign Candace was pursuing treatment with him for secondary gain, or any sign of somaticism during his treatment of her or conversion reaction.

Candace testified she had been kicked in the head by one of her horses approximately ten years before the incident at Wal-Mart. The kick did not knock her down and she did not seek medical attention for the injury. She also testified that during the period from the time of the kick until the date of the incident at Wal-Mart, she did not suffer any of the symptoms that she is now complaining about. Those symptoms all began occurring after the injury at Wal-Mart. She testified she is still in pain. She also has memory lapses and an inability to remember the names of people she has known a long time. She acknowledged that she resumed riding within eighteen days after the incident at Wal-Mart and continues trying to regain her earlier level of equestrian skills because she refuses to believe her condition is hopeless. Her riding during events at horse shows is only for short periods of time. She kept her doctors totally informed of everything she did involving her horses and events. But after several falls, she knew she didn't have the strength to ride any more, so she decided to find other doctors who could improve her condition. Candace testified she had seizures periodically as a result of the incident. On redirect she testified that the pain is always there, it never goes away, but that it has decreased over time. As to the severity of the pain, she testified that during the first year after the incident, the pain was severe. When the pain is not in that category, she describes anything less than that as mild pain. She also testified the injections by Dr. Trowbridge had given her some relief from the pain. Finally, she testified that the average time she rides on a horse after the incident is approximately ten minutes.

Dr. David Bailey is a chiropractor. He testified he has published articles on the nature of cervical spine and lumbar spine injuries, diagnosis of cervical instability, and

treatment of lumbar disk diseases. He has been treating Candace for a period of five years. During the time he had seen Candace, he testified her condition had improved, but when he examined her a month before trial, it appeared she had lost some of her progress compared to prior visits. Dr. Bailey first saw Candace six days after the incident. He testified it is not unusual for an injury like the one Candace sustained to last for a period of five years. He adverted to a number of studies that show five years or more after an injury to the neck, people are still going to the doctor, whether there is any litigation or not. What Dr. Bailey found after obtaining the x-ray of Candace's neck was that the bones in the middle part of her neck slipped too much when she moved her head forward and backward. In his opinion, based on reasonable chiropractic probability, that slippage is proof of an injury to the cervical spine and to the ligaments of the cervical spine. Dr. Bailey also testified that her injuries were consistent to a blow to the head. He further testified that trauma to the head is transmitted directly to the cervical spine and it affects the rest of the spinal column because they are all tied together. In his opinion, the injury was a new injury, not an old one. When asked whether the type of injury Candace suffered was painful, Dr. Bailey replied that it is painful, usually a low level constant pain that can escalate if physical activity is too strenuous. Dr. Bailey initially advised Candace to avoid riding her horses for one month, and later gradually allowed her to increase her riding and related activities. He testified he did not see anything from his tests on and observations of Candace that suggested an injury other than the injury from the incident in October 1993. Dr. Bailey testified Candace is disabled to some extent. In his opinion, the pain she is suffering is consistent with the type of injuries she suffered from the Wal-Mart incident. He also testified that chiropractors routinely consider, in evaluating a patient, the issue of magnification or exaggeration of symptoms to determine how much of the complaint is real, and how much of it is not. This was done in Candace's case. His professional conclusion was that she was not malingering or exaggerating her symptoms.

A witness named Pam Buck testified about a rodeo event in California during which

Candace fell off a horse during a barrel race. The event was during 1994 or 1995. Candace fell off the rear of the horse and landed in the soft sand in a sitting position. Ms. Buck testified Candace got up quickly and did not appear to be hurt.

Dr. Sheff Olinger, M.D., testified for Wal-Mart. He is a physician in the specialty practice of neurology. He is retired from active practice, and he never actually treated or examined Candace. He was retained for a fee by Wal-Mart to render an opinion based on the medical records only. He reviewed the records of, among others, Dr. Nancy Leslie, Ph.D., Jeffrey Kozak of the Fondren Orthopedic Group, Dr. Jeffrey Jackson, M.D., Methodist Hospital of Houston, and Dr. John Trowbridge. He also saw the videotape referred to as The Day in The Life of Candace. Dr. Olinger has reviewed records for Wal-Mart in other cases and given opinions favorable to Wal-Mart in those cases. Dr. Olinger testified Candace experienced a minor injury to the head and muscles of the neck and spine on October 26, 1993. He defined minor as an injury from which one recovers spontaneously and without particular treatment. He stated his belief that Candace ought to be able to recover from the "strain" she suffered within two months. Candace's medical records contained references to her falls from horses in July 1994 and January 1995. Dr. Olinger testified that a doctor examining Candace in January 1995 after the second fall would not be able, assuming her complaints represented an actual abnormality, to assign a certain percentage to one injury as opposed to another injury. He agreed that when Candace fell from a horse eighteen days after her injury it could have aggravated her existing injury or caused a new injury. He testified the medical records he examined did not contain any credible evidence that any physical injury underlies these complaints. Other medical records involving Candace powerfully suggested to Dr. Olinger that many of her symptoms are imagined. He opined that Candace's MRI, CAT scan, and x-ray do not reveal any evidence of an injury related to the incident in 1993. Because he found the injury at Wal-Mart could not have produced these symptoms, he concluded there was an emotional or psychological basis for her symptoms. He described Dr. Trowbridge as

having no credence in the medical community and outside the mainstream of medicine. Dr. Olinger disagreed with the medical opinions of other doctors regarding Candace; specifically disagreeing with the opinions of Dr. Stirling Meyer, Dr. Jackson, Dr. Bailey, and Dr. Fabre. He further testified that secondary gain plays some role—a contributing or important aspect—in the picture of Candace's symptoms. Dr. Olinger could not agree with Dr. Jackson's opinion Candace was not faking her injuries, not malingering, and had no conversion reaction and no somatization.

We will now apply the standards of review to the four sub-issues contained in Wal-Mart's first issue.

1. Proximate Cause of Candace's Injuries

Proximate cause cannot be established by mere conjecture or guess, but rather must be proved by evidence of probative force. *Farley v. M M Cattle Co.*, 529 S.W.2d 751, 755 (Tex. 1975). Here, the jury heard evidence that Candace had fallen from her horse several times after the injury. They also heard testimony from the doctors that they could not rule out the falls as a source of some of Candace's complaints about pain, but those physicians believed it was unlikely. Whether a particular act of negligence is a cause in fact of an injury is a question for the jury's determination. *Id.* Here, however, the jury charge contained the definition of "proximate cause," and it informed the jury that "[t]here may be more than one proximate cause of an event." Question one of the jury charge asked whether the negligence of the persons listed in the question caused the injury in question, and the persons listed were Wal-Mart and Candace. In response, the jury answered "yes" as to both parties.

The second question in the charge asked the jury "What percentage of the negligence that caused the injury do you find to be attributable to each of those found by you, in your answer to Question 1, to have been negligent?" The jury found Wal-Mart's negligence caused 80% of Candace's injuries, and that Candace caused 20% of her

injuries.

During the charge conference, counsel for Wal-Mart complained about question two based on the assertion that Wal-Mart had established as a matter of law that Candace was contributorily negligent.[1] During closing argument, however, counsel for Wal-Mart suggested, in addition to repeating the contributory negligence argument, that Candace's equestrian activities after the initial incident exacerbated the initial injury. Specifically, Wal-Mart's counsel stated "[i]t's not Wal-Mart's fault she chose to go ride on the horse. It's not Wal-Mart's fault she fell off. I don't know whether she hurt herself any more significantly or not." These arguments all go to the extent to which Candace bore comparative responsibility for her injuries. The jury was allowed to take, and did take, Candace's comparative responsibility into consideration when it assigned her 20% responsibility for her injuries. The jury heard evidence that all of Candace's symptoms emanated from the Wal-Mart incident. Conversely, the jury also heard evidence that Candace only suffered soft tissue damage from her contact with the box of Charmin, and recovery from that type of injury usually takes less than two months. Moreover, medical opinions were offered that Candace's original injury may have been aggravated by her subsequent falls from her horses, or that these falls could have created a new injury.

As set forth above, a no evidence point will be sustained when the evidence offered to prove a vital fact is no more than a mere scintilla. *Merrill Dow*, 953 S.W.2d at 711. However, more than a scintilla exists when the evidence supporting the finding rises to a level that would enable reasonable and fair minded people to differ in their conclusions. *Id*.

Here, the evidence outlined above would allow reasonable and fair minded people to differ on the question of whether Candace's injuries described during trial were causally

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[1] Contributory negligence is now referred to as comparative responsibility. *Gen. Motors Corp. v. Sanchez*, 997 S.W.2d 584, 593 (Tex. 1999).

related to the Wal-Mart incident or to her falls from horses before and after the incident. Thus, the evidence to support the jury's finding Wal-Mart bore comparative responsibility for 80% of Candace's injuries is supported by legally sufficient evidence.

Moreover, the evidence supporting Wal-Mart's level of comparative responsibility is not so weak as to be clearly wrong and manifestly unjust.

2. Damages Awarded For Past Physical Pain

In personal injury cases, the jury has discretion over the amount of damages. *City of Houston v. Howard*, 786 S.W.2d 391, 395 (Tex. App.—Houston [14th Dist.] 1990, writ denied). Pain and suffering are necessarily speculative and are particularly within the province of the jury. *Lee v. Huntsville Livestock Serv*., 934 S.W.2d 158, 160 (Tex. App.—Houston [14th Dist.] 1996, no writ). There are no objective guidelines by which we may measure the money equivalent of pain and mental anguish, and the jury is allowed a great deal of discretion in fixing this amount. *Id*. The appropriate amount of recovery for pain and anguish is left to the discretion of the jury. *Id*. at 161. Here, we must determine first whether or not the evidence supporting Candace's allegations of pain constitutes more or less than a scintilla, and second, if it does, whether that evidence is so weak as to be clearly wrong and manifestly unjust. Candace testified that the pain from the incident at Wal-Mart is always there, it never goes away, but that it has decreased over time. She also testified that during the first year after the incident, the pain was severe. Dr. Jackson gave his professional medical opinion that Candace was not faking her injuries and that her injuries had been very painful since inception. He further testified she has pain and sensory loss in her right leg. Dr. Cook described Candace as having chronic pain syndrome. Dr. Bailey testified Candace's injury is painful to her, usually a low level constant pain that can escalate if physical activity is too strenuous. However, Dr. Olinger testified, after reviewing Candace's medical records, no solid evidence that any physical injury underlay Candace's complaints, and no objective tests revealed anything other than

minor injuries as a direct result of the Wal-Mart incident. Dr. Medley testified he believed Candace was telling the truth about her perception of pain.

The evidence presented in this case permitted the jury to evaluate the witnesses for the purpose of answering the question of the dollars required to compensate Candace for her past physical pain. Indeed, Wal-Mart concedes in its brief that Candace suffered some injury on October 26, 1993, thus leaving only the question of the extent of the injury. We have held the evidence in this case to be legally sufficient to support the jury's finding Wal-Mart was responsible for 80% of Candace's injuries, but Wal-Mart now challenges the evidentiary support for the dollar amount for this 80% awarded by the jury. Here, the past physical pain and mental anguish issues were submitted together in a broad from question requiring a single dollar amount for both elements. When a damages issue is submitted in broad form, an appellate court cannot ascertain with certainty what amount of the damages award is attributable to each element. *Haryanto v. Saeed*, 860 S.W.2d 913, 921 (Tex. App.—Houston [14th Dist.] 1993, writ denied). And, when the elements of actual damages considered by the jury include the more amorphous, discretionary damages such as mental anguish, pain and suffering, any amount awarded above the more definite damages such as past medical expenses will be shunted to the jury. *Id.* at 922. Therefore, under the current practice, a meaningful review on appeal of damages questions in broad form is extremely difficult. *Id*.

Applying the appropriate standard of review to the jury's damage award for past physical pain, we cannot say there was no probative evidence to support the jury's damage award for past physical pain contained within the single dollar amount for the broad form question. Accordingly, we hold the evidence legally sufficient to support the jury's conclusion that an unspecified portion of the total amount of $200,000 is an appropriate level of compensation for 80% of Candace's past physical pain. We also hold the evidence supporting that finding is not so weak as to be clearly wrong and manifestly unjust.

3. Damages Awarded For Past Mental Anguish

Texas has authorized recovery of mental anguish damages in virtually all personal injury actions, even where the defendant's conduct was merely negligent. *City of Tyler v. Likes*, 962 S.W.2d 489, 495 (Tex. 1997). Where serious bodily injury is inflicted, some degree of physical and mental suffering is the necessary result. *Id*. The term "mental anguish" implies a relatively high degree of mental pain and distress. *Brookshire Bros., Inc*. v. *Wagnon*, 979 S.W.2d 343, 353 (Tex. App.—Tyler 1998, pet. denied). It means more than disappointment, anger, resentment, or embarrassment, although it may include all of those. *Parkway Co. v. Woodruff*, 901 S.W.2d 434, 444 (Tex. 1995). The *Parkway* court held it is clear that an award of mental anguish damages will survive a legal sufficiency challenge when the plaintiff has introduced direct evidence of the nature, duration, and severity of their mental anguish, thus establishing a substantial disruption in their plaintiff's daily routine. *Id.* Such evidence, whether in the form of the claimant's own testimony, that of third parties, or that of experts, is more likely to provide the fact finder with adequate details to assess mental anguish claims. *Id*.

Candace testified she suffered seizures as a result of the incident at Wal-Mart. She testified it was humiliating to her when she is out in public and can't stop a seizure. She stated she had no self-esteem when such an event was over. She testified she competed in fewer horse shows following the incident. Her doctors had told her she too sick to compete in horse shows after the incident. She also testified about her inability to care for her fourteen-year-old son after the incident. She testified she was unable to drive her son to the events he needed to attend. Her son wanted to stay with Candace and Jim, but Candace testifed he left to live with his father because of her critical illness and because he couldn't stand to see his mother in such pain.

Jimmie testified Candace's injury had a deleterious effect on his sexual relationship

with his wife. He testified as follows:

Q. Okay. And the jury needs to know has this had any type of effect on your sexual relationship with your wife?

A. Well, yes sir. I don't like to use the word– -I love my wife.

Q. Pardon me?

A. I love my wife. I miss that loving part. I don't particularly like that word, but that is the way I phrase it.

Q. That is a better way to phrase it.

A. I miss the intimate–that part, you know. I don't feel like she is my –she is the woman I married. Her personality has changed. She had to be one of the kindest people that I've ever known, and she is very irritable and....

Q. You are talking about after October at Wal-mart when she was injured?

A. After '93. You know, I know she hurts, brings on–you know, when you hurt like that you are very irritable. She is very short [with people]. Like I said, she is one of the kindest people I've known. Her personality is just not the same. We don't do anything anymore. We used to go dancing a lot, at least two to three times a week.

Q. Are you able to do that now?

A. No sir, she can't.

Q. Do you go dancing at least once?

A. No, sir. No, that's–that stopped [in] '93. I haven't sat in a movie theater in I don't know when. She can't sit there through a movie, ...

Jimmie also testified Candace wears a device called a neuro-stimulator that sends a small electrical impulse to the muscles in her back to prevent spasms. He testified that his relationship with Candace had ceased to be that of a husband and wife, and he has become more like a caretaker. He has to be, in his words, her shadow all the time because he never knows when she will go into a seizure, or when she is going to forget to complete a task. He also testified he, Candace and the children regularly attended church on Sunday before the October 1993 incident, but because she is unable to travel and to sit for long periods of time, they no longer attend church. He testified he and Candace both miss going to church on Sunday. He also testified Candace spends a great deal of her time in bed. Specifically, he testified she is out of bed approximately two-and-a-half to three hours a

day. She spends long periods of time in her bed to rest and get away from the pain. Jimmie has to bathe Candace and comb her hair. He testified it embarrasses her for him to bathe her. He has seen his wife lying in bed crying on many occasions. He has stopped asking why any more because he knows from experience that she is either crying from pain or because she cannot do anything. He and Candace are also receiving psychiatric counseling from Dr. Fabre, who had prescribed Zoloft for his depression. He also testified Candace drops things she is holding when she has a seizure and goes numb.

James David Lawrence is a professional horse trainer and has known Candace for a long time. He judges horse show events and observed Candace both before and after the October 1993 incident at Wal-Mart. In his opinion, on a scale of 0 to 10, with ten being the best, he rated her riding skills a 10 before 1993. After 1993, his opinion of her riding skills was "mediocre at best," and on the zero to ten scale, his opinion was that she was a two or a three. He also testified he had seen her compete hundreds of time before 1993, and only a dozen time since then. Before the injury, she was a world class competitor, but after the incident, Mr. Lawrence replied only "no" when asked whether she was still a world class competitor. He also testified that her ability to make money from breeding her stallion, on whom she was national champion before the incident, had declined since then because her inability to continue riding him terminated his status as the number one stallion in the nation, and thus, reduced the requests for breeding and the associated fees.

It is difficult to determine the portion of the obvious disruption in Candace's daily routine that is due to her pain and lack of muscle control, from the portion that is due to mental anguish. As noted above, these two damage elements were submitted to the jury in one broad form question. This is a personal injury action and Texas has authorized recovery of mental anguish damages in virtually all personal injury actions. *Krishnan v. Sepulveda*, 916 S.W.2d 478, 481 (Tex. 1995). Candace has, based on the evidence, suffered an injury that has, among other things, prevented her from riding her horses as often as she would like and participating in the number of competitions she would like.

Horses are the major focus in her life and the testimony reflects her injury has drastically reduced her ability to maintain that degree of focus. Her self-esteem is low and she no longer desires sexual intimacy with her husband. Her husband testified her personality had changed since the incident, and Wal-Mart has not advanced any arguments suggesting her personality change is due to anything else than her mental anguish over her changed circumstances since the incident at Wal-Mart. Dr. Fabre testified Candace has major depression stemming from the incident. Here, the record is infused with testimony from the claimant, her husband, and experts as to the nature, duration and severity of Candace's mental anguish. Under *Parkway*, it is this type of evidence that provides the fact finder with adequate details to assess mental anguish claims. 901 S.W.2d at 353. Moreover, mental anguish may be implied from illness or injuries accompanied by physical pain that is proximately caused by the defendant. *Kingham Messenger & Delivery Serv. Inc., v. Daniels*, 435 S.W.2d 270, 273 (Tex. Civ. App.—Houston [14th Dist.] 1968, no writ). And certainly, the loss of enjoyment of life, which encompasses the loss of the injured party's former lifestyle, may be considered when determining mental anguish damages. *Brookshire Bros*., 979 S.W.2d at 353. Considering the evidence in the light most favorable to Candace, and indulging every reasonable inference deducible from the evidence in her favor, as we must, we hold the evidence is legally sufficient to support the jury's award for past mental anguish contained in its answer to the broad form question addressing past physical pain and mental anguish. Further, we cannot say the evidence supporting that finding by the jury is so weak as to be clearly wrong and manifestly unjust.

4. Is the Damage Award Excessive?

The final sub-issue raised by Wal-Mart in its first issue is its challenge to the award of damages as excessive. Wal-Mart supports its challenge by analyzing various cases in

which the jury awarded amounts for pain and anguish, and comparing that amount to the medical expenses incurred in each case. This analysis has no bearing on the question of whether a particular jury award is excessive. The standard of review for an excessive damages complaint is factual sufficiency of the evidence. *Maritime Overseas Corp*., 971 S.W.2d at 406.

We have already held that the evidence supporting the dual elements of past physical pain and mental anguish is both legally and factually sufficient. If both components of the jury's award are supported by factually sufficient evidence, it necessarily follows that the entire damage award is supported by factually sufficient evidence. Accordingly, we overrule all four issues contained in Wal-Mart's first issue.

II.
Video Evidence

Wal-Mart contends the trial court abused its discretion by admitting into evidence two videotapes. The first video tape is a "Day in the Life" film and the second is of Hoke's doctor administering spinal injections displaying her ongoing treatment. The trial court viewed the videotapes before admitting them into evidence. The admission or exclusion of evidence rests within the sound discretion of the trial court. *City of Brownsville v. Alvarado*, 897 S.W.2d 750, 753 (Tex. 1995). To obtain reversal of a judgment based on error of the trial court in admission or exclusion of evidence, the following must be shown: (1) the trial court did in fact commit error, and (2) that the error was reasonably calculated to cause and probably did cause rendition of an improper judgment. *Gee v. Liberty Mut. Fire Ins. Co.*, 765 S.W.2d 394, 396 (Tex. 1989).

a. Day in the life video—Exhibit 82

The first videotape Wal-Mart challenges is a "Day in the Life" film. Such films purport to show how an injury has affected the daily routine of its victim. Typical "Day in the Life" films show the victim in a variety of everyday situations, including getting

around the home, eating meals, and interacting with family members. These films are prepared solely to be used as evidence in litigation concerning the injury. Such evidence is often desired because "films illustrate, better than words, the impact the injury had on the plaintiff's life." *Grimes v. Employers Mut. Liab. Ins. Co.*, 73 F.R.D. 607, 610 (D. Alaska 1977). Wal-Mart argues that Hoke's "Day in the Life" videotape was unduly prejudicial within the meaning of Texas Rule of Evidence 403 and thus, inadmissible.

Exhibit 82 is basically a monologue by Candace describing her life before and after the incident, with footage of the events she is describing interspersed at the appropriate points. The video shows how well she performed in horse shows, including her jumping skills, before the incident It also shows how nearly everything in her life has changed since the incident; most importantly, that Jimmie has to help her do virtually everything. She moves cautiously and slowly and takes large doses of pain pills. She says in the video that most of her day is spent in bed. It also shows her receiving injections in the lumbar region of her spine.

Wal-Mart introduced two exhibits that give a different perspective of Candace. Exhibit 93A was described by Wal-Mart's counsel as a composite riding history, which contains excerpts reflecting her condition before and after the incident. This video depicts Candace riding one of her horses in various events extending from 1991 to 1996. In two of the 1996 events, Candace is shown wearing a neck brace. In a 1993 event, shortly after the incident, the video shows Candace holding her neck at the conclusion of the sequence of jumps for her event. Exhibit 93B is a surveillance video of Candace walking in a parking lot and getting in and out of her truck near some gasoline pumps during 1995. The obvious purpose of these tapes was to provide the jury with evidence Candace's injuries were not very serious.

Exhibits 93A and 93B were shown to the jury before Exhibit 82, a day in the life video. Now Wal-Mart contends the trial court erred in admitting Exhibit 82. It is well

settled that a party on appeal should not be heard to complain of the admission of improper evidence offered by the other side, when he himself introduced the same evidence or evidence of a similar character. *McInnes v. Yamaha Motor Corp*., 673 S.W.2d 185, 188 (Tex. 1984). This Court has also applied the rule. *Parkway Hosp., Inc. v. Lee*, 946 S.W.2d 580, 587 (Tex. App.—Houston [14th Dist.] 1997, writ denied) (finding no error where hospital complained on appeal that video showing plaintiff's injuries was unduly prejudicial because hospital had no prior notice, but then later introduced same video into evidence). Applying the rule here, we conclude the trial court did not abuse its discretion in admitting Exhibit 82.

b. Medical treatment video—Exhibit 84

Wal-Mart next argues the trial court abused its discretion in admitting into evidence a videotape that shows Dr. Trowbridge performing spinal injections on Candace The trial court allowed the film to be viewed, but without sound. The film shows the spinal injection procedure, which is an invasive procedure and shows blood and Candace's difficulty in tolerating the pain. Wal-Mart argues the film's probative value was substantially outweighed by the danger of unfair prejudice and inflaming the sympathy of the jury, that the video is hearsay because defense counsel was not present when it was made, and it constitutes cumulative evidence in light of the fact that Candace and Dr. Trowbridge testified about the specifics of the spinal injection procedure and the pain involved.

We agree that Wal-Mart offered those objections initially to Exhibit 84, but after discussing the matter with the court and obtaining the court's agreement to certain conditions, including running the tape without sound, *requested* that the tape be shown. The colloquy is as follows:

> **Wal-Mart's Counsel**: [I]n light of your overruling of my objection ans showing the videotape, I would like to request that the court only allow the videotape to be shown, that the sound be turned down completely, just so they can view the procedures. There was no necessity for the screaming

> to be on there or anything like that. Nor is there any necessity for the doctor to talk during the tape. The plaintiff's attorney can follow up with questioning after the fact and that may lessen the impact. *I am probably killing myself on appeal here, but in the interest of the trial, I would request that and that the tape be shown, period, and that is it and then the doctor questioned about it.*
>
> **Court**: I will agree to that request. No volume.

Here, Wal-Mart explicitly withdrew its earlier objections to Exhibit 84 and explicitly requested the trial court to show the video under conditions accepted by the trial court. In this context, Wal-Mart lead the trial court into error, and now seeks to complain about it on appeal. Such conduct will not preserve error for appeal. *Union City Body Co. v. Ramirez*, 911 S.W.2d 196, 202 (Tex. App.—San Antonio 1998, no writ). Here, Wal-Mart not only failed to voice an objection to Exhibit 84, but affirmatively encouraged the trial court to show the video to the jury, under conditions specified by Wal-Mart and agreed to by the court. We hold Wal-Mart has not preserved anything for review regarding the trial court's admission of Exhibit 84. Accordingly, the trial court did not abuse its discretion in admitting Exhibit 84. Wal-Mart's second point of error is overruled.

III
Prejudgment Interest

In its final issue, Wal-Mart contends the trial court incorrectly calculated the prejudgment interest from the date of the injury, October 26, 1993, when Candace made an accident report. Wal-Mart argues that Texas law mandates that prejudgment interest does not begin to accrue until six months after the defendant receives a written notice of claim. Hoke, however, argues Wal-Mart received notice of her claim the day of the accident based on the following: Hoke was given a note that named Wal-Mart's claim specialist; she was given a claim number; and a Wal-Mart employee completed her accident report.

According to the statute, prejudgment interest accrues beginning on the 180th day after the date the defendant receives written notice of a claim or on the date suit is filed, whichever occurs first. TEX. FIN. CODE ANN. § 304.104 (Vernon 1998). The prejudgement interest statute does not set forth requirements for what constitutes adequate written notice of a claim. *Robinson v. Brice,* 894 S.W.2d 525, 528 (Tex. App.—Austin 1995, writ denied). The statute, however, plainly requires not merely written notice of an accident and resulting injuries, but also written notice of a claim. *Id.* The statute does not define the term "claim." The word "claim" ordinarily means a demand for compensation or an assertion of a right to be paid. *Id*. The statute does not require the claimant to demand an exact amount or list every element of damage claimed. *Id*. at 529. We will examine the documents Wal-Mart and Candace reference in support of their respective arguments under this standard.

Wal-Mart argues it did not receive written notice of a claim for compensation from Candace until February 22, 1994, the date it received letter from Candace dated, February 12, 1994. Candace contends, however, Wal-Mart had notice of her claim on October 26, 1993. On October 26, 1993, a note was given to Candace that provided the name of Wal-Mart's claim specialist, Walt Ney, his telephone number, and a ten digit alpha-numeric number that may be a claim number for Candace's incident. The bottom of the note bears the handwritten notation, "Given to us at pharmacy by WM employee after filling prescription 10/26/93." On October 29, Ney sent Candace an authorization for medical records and reports. Finally, on February 22, 1994, Ney received a handwritten letter from Candace requesting payment for medical expenses, lost wages, and other monetary losses as a result of the incident. The letter states, in part:

> "Enclosed are copies of payments made concerning this case. ... Please remit payment of $467.69 in full. ... Due to my injury at [Wal-Mart]...horses and I have been virtually idle since 10/26/93. In the immediate future, I will be forced to send six horses to other trainers.... The cost per horse will be $400.00 to $500.00 per month for training. ... The

> expenditures for the paying of another trainer to do my routine activities will be invoiced to Wal-Mart through your office."

Candace's letter was sufficient to notify Wal-Mart that she was claiming compensation for her injuries and afforded it the opportunity to settle the claim without incurring liability for prejudgment interest. Therefore, Candace is entitled to prejudgment interest calculated beginning on the 180th day after February 22, 1994, the date Wal-Mart received Candace's letter dated February 12, and ending on the day preceding the date judgment was rendered. *See* TEX. FIN. CODE ANN. § 304.104.

We sustain Wal-Mart's third appellate issue. The judgment will be modified to reflect the correct commencement date for prejudgment interest of February 22, 1994, and as modified, the judgment is affirmed.

/s/ John S. Anderson
Justice

Judgment rendered and Opinion filed August 16, 2001.

Panel consists of Justices Anderson, Hudson, and Edelman. (Hudson, J. Concurring)

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