Affirmed and Memorandum Opinion filed August 9, 2011.

In The

Fourteenth Court of Appeals

NO. 14-09-00825-CV

GLENN BELFORD, Appellant

V.

MICHAEL T. WALSH, Appellee

On Appeal from the 125th District Court
Harris County, Texas
Trial Court Cause No. 2007-03487

MEMORANDUM OPINION

Glenn Belford appeals from a judgment in which the trial court awarded him certain categories of damages in his personal-injury suit against appellee, Michael T. Walsh. In two issues, Belford contends the evidence is factually insufficient to support the jury's findings that he did not sustain several additional categories of damages. We affirm.

I. FACTUAL AND PROCEDURAL HISTORY

On October 13, 2005, Belford and Walsh were in an auto accident when Walsh struck Belford's vehicle from behind, propelling it into the vehicle ahead. Belford got out of his car and helped to separate the vehicles. He had no visible injuries. Paramedics arrived at the scene, immobilized Belford's neck, and transported him to an emergency

room where he was evaluated and released. However, he subsequently had extensive medical treatment, including two spinal surgeries.

Belford sued Walsh for injuries sustained in the auto accident. The jury found that both parties were negligent and assigned 7% liability to Belford and 93% to Walsh. Belford was awarded compensation for past physical pain and mental anguish, past loss of earning capacity, past physical impairment, and past and future medical expenses, but the jury found that Belford was entitled to no compensation for past disfigurement or for future physical impairment, future disfigurement, or future physical pain and mental anguish. On June 9, 2009, the trial court signed a final judgment awarding Belford $137,600.98 in damages (consistent with the verdict except for past medical expenses which were reduced by stipulation of the parties), plus pre-and post-judgment interest and costs of court. Belford filed a motion for new trial in which he challenged the factual sufficiency of the evidence, which the court denied.

II. ISSUES PRESENTED

In his first appellate issue, Belford challenges the factual sufficiency of the evidence supporting the jury's finding of zero damages for past disfigurement, future disfigurement, future physical impairment, and future physical pain and mental anguish. In his second issue, Belford argues the trial court abused its discretion by denying his motion for new trial. This complaint is encompassed within the first issue because the basis for Belford's motion for new trial was his factual-insufficiency contention.

III. STANDARD OF REVIEW

Disfigurement, physical impairment, and physical pain and mental anguish are overlapping categories of damages. *Golden Eagle Archery, Inc. v. Jackson*, 116 S.W.3d 757, 770 (Tex. 2003). When the appellant challenges the jury's failure to find greater damages in more than one overlapping category, we first determine if the evidence unique to each category is factually sufficient. *Id.* at 775. If it is not, we consider all the

overlapping evidence, together with the evidence unique to each category, to determine if the total amount awarded in the overlapping categories is factually sufficient. *Id.* We will reverse for factual insufficiency only if we conclude, after examining the evidence in a neutral light, that the verdict is so against the great weight and preponderance of the evidence as to be manifestly unjust, shock the conscience, or clearly demonstrate bias. *Id.* at 761.

IV. THE JURY CHARGE

We begin by examining the jury charge to identify the evidence that will be pertinent to our analysis. *See id.* at 762. The trial court instructed the jury as follows:

> What sum of money, if paid now in cash, would fairly and reasonably compensate Glenn Belford for his injuries, if any, that resulted from the occurrence in question?
>
> Do not include any amount for any condition existing before the occurrence in question, except to the extent, if any, that such other condition was aggravated by any injuries that resulted from the occurrence in question.
>
> Consider the elements of damages listed below and none other. Consider each element separately. Do not include damages for one element in any other element. Do not include interest on any amount of damages you find.
>
> Do not reduce the amounts, if any, in your answers because of the negligence, if any, of Glenn Belford.
>
> Answer separately, in dollars and cents, for damages, if any.
>
> a. Physical pain and mental anguish sustained in the past.
>
> Answer: $20,000
>
> b. Physical pain and mental anguish that, in reasonable probability, Glenn Belford will sustain in the future.
>
> Answer: $ -0-
>
> c. Loss of earning capacity sustained in the past.
>
> Answer: $38,000
>
> d. Disfigurement sustained in the past.
>
> Answer: $ -0-

e. Disfigurement that, in reasonable probability, Glenn Belford will sustain in the future.

Answer: $ -0-

f. Physical impairment sustained in the past.

Answer: $15,000

g. Physical impairment that, in reasonable probability, Glenn Belford will sustain in the future.

Answer: $ -0-

h. Reasonable expenses of necessary medical care in the past.

[This was followed by a list of 17 of Belford's health-care providers. Each provider's name corresponded to a blank for the jury's answer, and the jury made a separate finding for each. The jury found that all of the expenses for the care Belford received from eight providers was reasonable and necessary. Only half of the expenses from six providers were found to be compensable, and the jury found that none of the expenses for the care from two providers was reasonable and necessary.][1]

i. Reasonable expenses of necessary medical care that, in reasonable probability, Glenn Belford will incur in the future.

Answer: $45,000[2]

The jury charge contains no definition of the terms used in the damage categories "physical pain and mental anguish," "disfigurement," and "physical impairment." We therefore summarize the evidence in the record concerning the disfigurement, physical impairment, physical pain, and mental anguish Belford experienced, both before and after the accident.

V. The Evidence

A. Pre-Accident Medical Evidence

[1] This accounts for 16 of the 17 providers. The jury found that Belford was entitled to an award for the remaining health-care provider's services, but we have found no evidence in the record as to the amount charged by that entity, and therefore cannot say whether that amount was equal to the amount charged.

[2] Capitalization and punctuation standardized.

When the accident occurred in 2005, Belford was 47 years old, and according to medical records, he began having back pain when he was 20 years old. In the intervening years, he was treated by a chiropractor two or three times annually, and he occasionally sought treatment from other physicians.[3] In 1994, when he was 36 years old, Belford was diagnosed with arthritis. An MRI[4] taken at that time showed protruding disks at L4-L5 and L5-S1. His medical records also indicate that Belford had "postural changes and pelvic distortion."

In 1997, Belford sought treatment for pain in his neck and radiculopathy[5] causing pain in his left shoulder and numbness in his left arm. His treating physician opined that the disks between his fourth through seventh cervical vertebrae were compressed, and he diagnosed Belford with "cervical pain syndrome." In another episode that year, Belford reported to his physician that he had neck pain for the preceding three weeks.

In 1998, Belford was diagnosed with degenerative disk disease, arthritis, and chronic bursitis. In one visit to his doctor that year, he reported that he had pain in his lower back for the preceding three weeks that "would not go away." An MRI performed in 1998 also revealed "mild scoliosis and exaggerated lordosis." *Scoliosis* is a "lateral curvature of the spine," and *lordosis* is an "abnormally exaggerated forward curvature of the spine." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2035, 1337 (Philip Babcock Gove ed., 3d ed. 1993).

In 1999 and 2000, Belford had chiropractic adjustments to his neck as well as his back, but he continued to have episodes of lower back pain that lasted for weeks and were not helped by chiropractic adjustment. An MRI in 1999 showed that the L5-S1 space had

[3] Because one of the clinics where he was treated had closed, and because he could not remember the name of one of his previous chiropractors, Belford was not able to produce all of the medical records related to the care he received for his back or neck pain prior to the accident.

[4] The jury heard from Dr. Stephen Esses that this stands for "magnetic resonance imaging."

[5] As Dr. Esses explained at trial, "radiculopathy means involvement of the nerve that goes from the spine down the extremity."

continued to narrow and Belford was developing bone spurs on his vertebrae. His back pain continued to be located primarily at L5-S1. Around this time, Belford had surgery on his left shoulder to repair a torn rotator cuff. In 2001, he also saw a physician for pain in the right side of his neck.

Belford and his physician first discussed spinal surgery in 2002. His doctor directed him to have another MRI on his lumbar spine, but Belford did not do so. When he saw his primary-care physician again for pain at L5-S1 in 2003, the physician referred him to another doctor "for disk disease." An MRI performed that year was essentially unchanged from his 1999 MRI.

B. Post-Accident Medical Evidence

The day of the accident, paramedics transported Belford from the scene to West Houston Medical Center, where he complained of pain in his lower back and left arm. The next day, Belford saw his primary-care physician for pain in his left arm and tenderness over his sternum. The doctor noted a bruise on Belford's left arm and diagnosed "musculoskeletal strain."

Although he was happy with his regular chiropractor, Belford began seeing a different chiropractor, Dr. Gabriela Smart, at his lawyer's recommendation. When he saw her four days after the accident, he reported pain in his upper, middle, and lower back, his neck, and his tailbone, as well as numbness and tingling in his left arm and both legs. He additionally stated that he had difficulties with his activities of daily living. He did not report his history of neck or back pain. An MRI performed three weeks after the accident revealed degenerative disk disease, herniated disks[6] at C3-C4, C5-C6, C6-C7, L4-L5, and L5-S1, but "no evidence of any direct spinal cord or nerve root compression."

[6] Dr. Esses explained that a herniation is "disk material that [is] outside its usual confines."

In December 2005, Belford was referred to orthopaedic surgeon Zoran Cupic. According to Dr. Cupic, Belford stated that "he did have problems with his low back when he was 20 years old. This has gotten better and he has had a regular job since then. He has never had another injury or any other problem with his low back." Dr. Cupic diagnosed Belford with degenerative disk disease at C3-C4, C5-C6, C6-C7, and "the lumbosacral spine, primarily at L5-S1." He additionally diagnosed severe back and neck strain. Neurologist Charles Popenoy also saw Belford that month. Dr. Popenoy found spinal stenosis from C3 to C7 from herniated disks and bone spurs, as well as large herniated disks at L4-L5 and L5-S1. In January 2006, Belford consulted with orthopaedic surgeon Kenneth J.H. Lee, and his diagnosis was essentially the same as the one Belford received from Dr. Popenoy.

In October 2006, Dr. Stephen Esses removed the herniated disk at L5-S1. The surgery resolved Belford's back and leg symptoms, and Dr. Esses noted that the wound healed completely. He attributed Belford's pain to the accident because Belford told the doctor that his pain became worse after the collision. Dr. Esses further reasoned that because the vast majority of patients with degenerative disk disease do not require surgery, and Belford did require surgery, the accident was the probable cause. On the other hand, Dr. Esses agreed that the disk herniation could have occurred before the auto accident, and testified that a herniated disk usually is not caused by a single event. The doctor also agreed that when Belford began seeing him three-and-a-half months after the accident, Belford did not inform him of two prior injuries to his back. In the first incident, which occurred in 1993 or early 1994, Belford was assaulted from behind and knocked unconscious, which caused him to fall on his face. That incident caused puffiness in his face, lumbar strain, cervical strain, pain in his shoulder, pain in the back of his head, and left a half-inch scar over one eye. The second incident occurred at work when Belford was climbing out of an aerial platform. Dr. Esses characterized Belford's prior back and neck problems as "significant."

In the months after the lumbar diskectomy, Belford's back pain resolved but he began to complain of increasing pain in his neck and radiating down his arms, particularly his right arm. A cervical MRI showed that the herniated disk at C3-C4 now caused the bones to be out of alignment and to compress the spinal cord. On November 28, 2007, Dr. Esses operated on Belford's neck to remove the herniated disk, realign the two vertebrae, and attach a plate to hold them stable. The surgery also was intended to correct Belford's radiculopathy. In concluding that the accident necessitated the surgery, Dr. Esses relied on Belford's representations that the symptoms from his left arm increased after the collision. He agreed, however, that the disk herniations probably were not the result of the accident, but instead occurred over a long period of time. He also explained that the malalignment, or retrolisthesis, was caused by the disk herniations, and not by the accident. In addition, he noted that he removed a bone spur at this level, but explained that the accident did not cause the bone spurs, which instead form over a long period of time.

By January 2008, Belford informed Dr. Esses that the surgery to his neck had resolved the symptoms in his arm. On January 24, 2008, Belford told Dr. Esses that he was about eighty percent better. Six days later, he saw his primary-care physician, who noted the surgery to Belford's neck with the words "initial success." As to Belford's lumbar symptoms, however, Belford now reported that he was in chronic pain and could not sit or walk for long. His primary-care physician referred him to neurologist Hazem Machkhas and prescribed Neurontin.[7] Dr. Machkhas did not testify, but his records were admitted into evidence. Dr. Machkhas wrote that Belford complained of "what appears to be muscle pain in the low back as well as the neck." He noted some lumbar muscle spasms but "no weakness or sensory loss," and he recommended that Belford perform lumbar and cervical exercises and "start minimizing his Vicodin intake."[8]

[7] At trial, Dr. Esses testified that the more expensive drug Lyrica, which is prescribed to decrease nerve irritability and treat neuropathy, is similar to Neurontin.

[8] Dr. Esses stated that Vicodin is a narcotic pain reliever.

Belford saw his primary-care physician in March 2008 for complaints of neck pain, and reported that he was feeling better while taking Neurontin. A cervical MRI performed around this time showed that the cervical fusion was healed, although bone spurs remained on other vertebrae below the fusion. Belford was again referred to a neurologist, and on April 15, 2008, Dr. Machkhas noted that Belford's back was improved, but he continued to complain of severe neck pain, which Dr. Machkhas described as "most likely musculoskeletal." Dr. Machkhas increased Belford's dosage of Neurontin and recommended exercise. A week later, Belford called Dr. Machkhas's office and demanded to be seen within the next two days because "he has to be seen before his lawyer files the suit on his behalf." As Dr. Machkhas noted, "I told him I would be happy to refer him to [an]other neurologist who might assist him in litigation. He became belligerent, became verbally abusive, and proceeded to hang up." Dr. Machkhas played no further role in Belford's treatment.

Dr. Esses examined Belford on March 6 and March 24, 2008, and noted that Belford had no further arm symptoms, but still had neck pain. He referred Belford to a neurologist in March 2008, and although there are records of Dr. Machkhas's examination of Belford on April 15, 2008, Dr. Esses testified that Belford still had not seen a neurologist by the time he saw Dr. Esses again in early May 2008. At that time, Belford still had no further problems with his arms, but he did have a popping sensation in his neck and some pain. Dr. Esses referred Belford to neurologist Mohammad Athari, who began treating Belford in May 2008.

When Dr. Esses was deposed in July 2008, he agreed that Belford's arm pain, tingling, numbness, and weakness had been resolved, and Belford's only remaining symptom was neck pain. He testified that pain is subjective, and Belford would continue to experience neck pain from the accident "indefinitely" because "[t]he longer that you experience pain, continuously, the more likely that that pain is going to continue." He stated that Belford probably would need to take three of the drugs Dr. Athari

prescribed—Soma, a muscle relaxant; Talwin, a narcotic pain reliever; and Lyrica, a drug to decrease nerve irritability—for the rest of his life. Dr. Esses agreed that narcotic pain relievers generally are prescribed to be taken "as needed," but stated,

> Most patients who have chronic pain don't wait until they have pain to take the medication. So, I have patients that wake up in the morning, they don't have pain when they wake up, but they take a Vicodin or they take a Vicoprofen because they will [sic] if they do not, they'll have pain at noontime or pain at 2:00 o'clock in the afternoon.

Dr. Esses opined that, "[w]ith the understanding that impairment is an arbitrary assignment," Belford would have a "25 percent whole person impairment based upon the fact he had a cervical radiculopathy, which awards him a 15 percent impairment, and a lumbar radiculopathy, which will award him a 10 percent impairment."

C. The Belfords' Testimony Concerning Pain, Mental Anguish, and Impairment

Belford offered conflicting testimony about his back and neck pain. In a pretrial deposition, Belford agreed that prior to the accident, he had back pain "just about every day," with "some days worse than others." At trial, he was asked about this testimony, and he stated, "I guess it was the wrong answer . . . ." He agreed that he had as many problems with his neck before the accident as after the accident, but he also testified that he "really didn't have that many problems" with his neck before the collision. When asked if his neck pain after the accident was different from his pain before the accident, he stated, "It was somewhat like the past" but it "wouldn't go away." He stated that he did not recall any problems with his arm before the accident, but he now has numbness and burning in his right arm, fingers, and hand. He testified that without the medication Dr. Athari prescribed, the pain would be unbearable.

Belford did agree, however, that he had to give up some activities before the accident due to problems with his back. He explained that even before 2005, he sometimes would move the wrong way and his back would "go out" to the extent that he could not walk. Although he played basketball for exercise every week for many years,

he gave it up in 2001 because it caused problems with his back. He also testified that before the accident, "I was mowing the yard and my back went out on me one time, and I don't mow it no more."

When asked to identify activities he can no longer perform as a result of the accident, he stated that he can no longer clean the pool and cannot play with his children as he would like because he cannot feel his hands at times. As a result, he drops things. Because he was afraid that he would drop his 20-pound infant son, he put the child in day care while his wife works instead of caring for the baby himself.

Belford still exercises, however, and testified that it "helps a lot." At the time of trial, he had a regular exercise routine using a rowing machine and various weight machines for a total of an hour to an hour-and-a-half each day. Depending on the type of weight machine used, he could lift 50 to 110 pounds. He goes to the same nightclub every Friday night and dances "sometimes, but not often." At a pretrial deposition, he stated that he dances fast, but at trial he denied this.

Belford's wife Kenecia's testimony was similar. She testified that she had known her husband since 1997, although they were divorced for part of that time. She stated that before the accident, Belford went to the chiropractor two or three times a year for back pain and never had neck pain. According to Kenecia, Belford was more cautious in handling their youngest child than he had been in handling their other children before the accident. She stated that he even stood differently, and turned his head by moving his whole body. She related that their daughter told Belford she would teach her brother to play basketball, but Belford said he would do that. Kenecia stated that "he kind of got bothered by that" because "it just reminded him that, you know, maybe he will, maybe he won't. He may not be able to." She also testified that one of her husband's medications made him groggy so that he slept during the day, and another medication made him restless at night, but without them, he suffered unbearable pain.

VI. ANALYSIS

Having summarized the relevant evidence, we now consider its factual sufficiency to support the jury's zero-damage findings in the challenged categories. To the extent possible, we first consider the evidence unique to each category, and then consider the evidence that overlaps these damage categories. In doing so, we remain mindful that "[m]atters of past and future pain and suffering, disfigurement and physical impairment are necessarily speculative, and *it is particularly within the province of the jury to resolve these matters and determine the amounts attributable thereto.*" *Nowsco Servs. Div. of Big Three Indus., Inc. v. Lassman*, 686 S.W.2d 197, 200 (Tex. App.—Houston [14th Dist.] 1984, writ ref'd n.r.e.) (citing *Rosenblum v. Bloom*, 492 S.W.2d 321, 325 (Tex. Civ. App.—Waco 1973, writ ref'd. n.r.e.)). The trier of fact is the sole judge of the credibility of the witnesses and the weight to be given to their testimony. *Teel v. Shifflett*, 309 S.W.3d 597, 603 (Tex. App.—Houston [14th Dist.] pet. denied). We may not substitute our own judgment for that of the jury, even if the evidence would clearly support a different result. *Maritime Overseas Corp. v. Ellis*, 971 S.W.2d 402, 407 (Tex. 1998). Consequently, the amount of evidence necessary to affirm a judgment is far less than that necessary to reverse a judgment. *GTE Mobilnet of S. Tex. v. Pascoue*t, 61 S.W.3d 599, 616 (Tex. App.—Houston [14th Dist.] 2001, pet. denied).

A. 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, 447, 341 S.W.2d 154, 160 (1960) (citing *Superior Mining Co. v. Indus. Comm'n*, 309 Ill. 339, 340, 141 N.E. 165 (1923)). Although "disfigurement" was not defined in the jury charge, we

have previously noted that the word's common meaning is the same. *See Kroger Co. v. Brown*, 267 S.W.3d 320, 323 (Tex. App.—Houston [14th Dist.] 2008, no pet.).

In challenging the jury's zero-damage findings for future as well as past disfigurement, Belford makes the same argument. He asserts that "the opening of [his] back and neck to perform the surgery left scarring and imperfections where formerly there was none." He then argues that the appellate courts have upheld disfigurement damages based on evidence of scarring. *See, e.g.*, *Hopkins County Hosp. Dist.*, 344 S.W.2d 341, 344 (Tex. App.—Texarkana 1988, no writ) (upholding finding of $50,000 for future disfigurement where plaintiff was left with a long vertical scar on her abdomen and produced evidence that she was embarrassed by it and that "some people who see her scar have said and will say 'yuck' because it looks bad"); *Nw. Mall, Inc. v. Lubri-lon Int'l, Inc.*, 681 S.W.2d 797, 804 (Tex. App.—Houston [14th Dist.] 1984, writ ref'd n.r.e.) (upholding finding of $25,000 for past disfigurement and $30,000 for future disfigurement where plaintiff required six surgeries with progressively bigger scars, and plaintiff considered herself deformed and would only wear clothes that covered the scars); *Pedernales Elec. Coop., Inc. v. Schulz*, 583 S.W.2d 882, 886 (Tex. Civ. App.—Waco 1979, writ ref'd n.r.e.) (upholding $4,000 disfigurement award that was supported by "actual showing of the scar to the jury," photographs in the record, and medical testimony that the scar would "remain about the same permanently"). Here, however, there was evidence that surgical incisions were made, but there is no evidence in the record that Belford has been or will be left with perceptible scars or imperfections. None were mentioned by the witnesses, and none are described in the medical records.

Belford's position seems to be that surgery necessarily leaves scars, and scars are necessarily disfiguring, so that conclusive proof of surgery is conclusive proof of disfigurement. We disagree. As we have previously observed, the jury has "considerable discretion" in determining whether a person has been disfigured, and

determining the appropriate compensation. *See Tri-State Motor Transit Co. v. Nicar*, 765 S.W.2d 786, 494 (Tex. App.—Houston [14th Dist.] 1989, no writ). In reviewing such findings, we must consider each case on its own facts. *Id.* During his testimony, Belford did not show any surgical scars to the jury nor did he testify that he felt disfigured or deformed. There is no evidence in the record depicting or describing any surgical scars, and no witness testified on the subject.

On this record, we conclude that the jury's finding of zero damages for past and future disfigurement is not against the great weight of the evidence.

B. Future Physical Impairment

"'Physical impairment' encompasses loss of the injured party's former lifestyle, the effect of which must be substantial and extend beyond any pain, suffering, mental anguish, lost wages, or diminished earning capacity." *Kroger Co.*, 267 S.W.3d at 324. "Indeed, if other elements such as pain, suffering, mental anguish, and disfigurement are submitted, there is little left for which to compensate under the category of physical impairment other than loss of enjoyment of life. *Golden Eagle Archery*, 116 S.W.3d at 772.

Belford argues that the jury's finding of zero damages for future physical impairment is against the great weight of the evidence because Dr. Esses (1) testified that Belford is "not going to be engaged in doing heavy lifting, bending, or twisting"; (2) "would not recommend" that Belford resume playing basketball; and (3) opined that he has a 25% permanent impairment based on his cervical and lumbar radiculopathy. As to his first contention, the jury may not have credited Dr. Esses's testimony that Belford was unable to bend, twist, or perform heavy lifting. This testimony arguably was contradicted by Belford's testimony that he works out at a gym for sixty to ninety minutes every day using a rowing machine and lifting weights of 50 to 110 pounds using a dozen different kinds of machines "that work every part of your body." *See Peter v. Ogden Ground Servs.*

Inc., 915 S.W.2d 648, 650 (Tex. App.—Houston [14th Dist.] 1996, no pet.) (upholding award of zero damages for future physical impairment where plaintiff's injuries would require him to avoid lifting weights over 45 pounds or repetitively bending and stooping).

The jury also may have concluded that, after two surgeries, Belford's physical restrictions were no longer any greater than they were before the accident. For example, Belford may be unable to play basketball in the future, but he did not play basketball before the accident, either; his preexisting back problems caused him to give it up four years before the accident. The evidence as to whether Belford "fast dances" is conflicting, but there is no evidence that his dancing habits before and after the accident are different. The jury also may have concluded that any future physical impairment is the result of a preexisting condition.

Finally, the jury was not required to credit Dr. Esses's testimony that Belford has a 25% impairment as a result of the accident. Not only did Dr. Esses state that the figure was arbitrary, he explained that he arrived at that percentage by adding the impairment ratings for cervical and lumbar radiculopathy. Dr. Esses further testified that lumbar surgery resolved Belford's problems with his legs, and he noted in January, March, and July of 2008 that the cervical surgery resolved the symptoms in Belford's arms. The jury therefore could conclude that there was no continuing radiculopathy as a result of the accident. Although Belford continues to complain of numbness in his right hand, Dr. Esses repeatedly remarked that the symptoms in Belford's arms were resolved, and we are required to accept the jury's resolution of any conflict in the evidence. *See Golden Eagle Archery*, 116 S.W.3d at 761. The jury may have resolved this conflict by crediting Dr. Esses' testimony rather than Belford's testimony. It also is possible that the jury credited Belford's complaints of numbness, but concluded that he did not carry the burden to establish that these symptoms were the result of the accident.

The availability of such alternatives illustrates why "[t]he determination that the appellant has not and will not suffer physical impairment apart from that already compensated for is uniquely within the jury's province." *See Landacre v. Armstrong Bldg. Maint. Co.*, 725 S.W.2d 323, 325 (Tex. App.—Corpus Christi 1986, writ ref'd n.r.e.). On this record we cannot conclude that the jury's finding of zero damages for future physical impairment as a result of the accident is against the great weight of the evidence.

C. Future Physical Pain and Mental Anguish

Pain is a state of discomfort, distress, or hurt. *See* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1621. Mental anguish is a high degree of mental pain and distress that is more than mere worry, anxiety, vexation, embarrassment, or anger. *See Parkway Co. v. Woodruff*, 901 S.W.2d 434, 444 (Tex. 1995). To recover damages for future mental anguish, the plaintiff must establish that there is a reasonable probability that he will suffer compensable mental anguish in the future. *See Adams v. YMCA of San Antonio*, 265 S.W.3d 915, 917 (Tex. 2008) (per curiam).

Belford contends that his future medical expenses are for pain medication, and thus, the jury's finding of zero damages for future physical pain and mental anguish conflicts with its finding that he is entitled to $45,000 for future medical expenses. This argument, however, has been waived. A complaint that the jury's answers conflict must be raised before the trial court discharges the jury. *Cressman Tubular Prods. Corp. v. Kurt Wiseman Oil & Gas, Ltd.*, 322 S.W.3d 453, 462 (Tex. App.—Houston [14th Dist.] 2010, pet. filed); TEX. R. CIV. P. 295. Because Belford did not do so, we need not attempt to reconcile the purportedly inconsistent findings. *See id.* (citing *Springs Window Fashions Div., Inc. v. Blind Maker, Inc.*, 184 S.W.3d 840, 867 (Tex. App.—Austin 2006, pet. granted, judgm't vacated w.r.m.)).

Belford additionally argues that "[o]nce it has been proven by objective evidence that the injury will continue to affect the Appellant, the jury may not give a take nothing verdict for future pain, suffering, and mental anguish." *See Hicks v. Ricardo*, 834 S.W.2d 587, 592 (Tex. App.—Houston [1st Dist.] 1992, no writ). The Texas Supreme Court similarly noted in dicta that the jury's prerogative to resolve conflicts in evidence "does not mean . . . that a verdict awarding no damages for pain and suffering should be upheld on appeal if there is objective, undisputed evidence of a significant injury and the jury could not have compensated the injured party in some other category of damages." *Golden Eagle Archery*, 116 S.W.3d at 774–75. In the quoted statements, causation is assumed. These arguments do not apply here, because the evidence that the accident caused Belford's pain is primarily subjective, whereas there is objective as well as subjective evidence that Belford's spinal injuries, which are the alleged source of his pain, occurred before the accident.

The subjective evidence that Belford's pain was due to preexisting conditions include his 27-year history of low-back pain and prior reports of neck pain and radiculopathy. Objectively, multiple lumbar MRIs taken before the accident show significant spinal problems including scoliosis, lordosis, arthritis, degenerative disk disease, dessicated disks, protruding disks, narrowing of the space between vertebrae, and bone spurs. Although there are no pre-accident cervical MRIs in the record, an MRI taken three weeks after the accident shows bone spurs on the cervical vertebrae and multiple herniated disks. Dr. Esses testified that it is not known when Belford's disk herniations occurred, but herniation usually is not caused by a single event, and in all probability, these occurred over a long period of time. He similarly testified that bone spurs occur over an extended time period, and he did not attribute them to the accident. Based on this evidence, the jury could conclude that Belford's injuries were attributable to his preexisting conditions.

The conflicting evidence for an award of damages for future physical pain and mental anguish is based on Belford's subjective testimony or the statements of his wife and doctors—which, in turn, are based on Belford's subjective reports of pain. The jury was free to disbelieve all or any part of Belford's reports of the nature and severity of his pain, and to similarly reject the testimony of other witnesses founded on those subjective complaints. *See Cox. v. Centerpoint Energy, Inc.*, No. 14-05-01130-CV, 2007 WL 1437519, at *6 (Tex. App.—Houston [14th Dist.] May 17, 2007, no pet.) (mem. op.).

Finally, Dr. Esses testified that many patients who have conditions that can cause chronic pain take their medication on a schedule to prevent pain, rather than taking it as needed to relieve pain. Based on this testimony, the jury may have concluded that Belford's medication would prevent pain from arising.

On this record, we cannot say that the jury's finding of zero damages for future physical pain and mental anguish is against the great weight of the evidence. Because the evidence is factually sufficient to support the challenged findings, the trial court did not err in denying Belford's motion for new trial. We therefore overrule both of the issues presented in this appeal.

VII. CONCLUSION

For the foregoing reasons, we affirm the trial court's judgment.

/s/ Tracy Christopher
Justice

Panel consists of Justices Seymore, Boyce, and Christopher (Seymore, J., concurs without opinion).