AFFIRMED and Opinion Filed October 19, 2020

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-19-01174-CV

MICHAEL W. GRIGGS, Appellant
V.
VICTOR L. COHEN, Appellee

On Appeal from the 101st Judicial District Court
Dallas County, Texas
Trial Court Cause No. DC-17-09945-E

MEMORANDUM OPINION

Before Justices Whitehill, Pedersen, III, and Reichek
Opinion by Justice Whitehill

This is a negligence case arising from a two-vehicle traffic accident. After a jury trial, plaintiff–appellee Victor L. Cohen recovered damages including $10,600 for future medical expenses. On appeal, defendant–appellant Michael W. Griggs raises two issues attacking the legal and factual sufficiency of the evidence supporting the future medical expenses finding. We overrule both issues and affirm.

I. BACKGROUND

A. Facts

Cohen was the only witness at trial. He testified to the following facts:

In February 2017, Cohen and Griggs were involved in a traffic accident. Cohen was driving a Nissan Altima, and Griggs was driving a dually pick-up truck. They were traveling the same direction on Jim Miller Road with Cohen in the far right lane and Griggs in the lane to Cohen's left. Griggs was in the process of passing Cohen when he changed lanes and collided with Cohen. When that happened, Cohen's head hit his driver's side window, and his knee hit the door. The two drivers pulled over and exchanged information. They didn't call the police or summon an ambulance, and Cohen drove his car home.

Cohen "wasn't hurt any" at the time of the accident, but he began to have pain about a week later. He tried over the counter medications, but his condition didn't improve. About three or four weeks after the accident, he went to a chiropractor for pain in his knee and neck. He saw the chiropractor six times, and he was pain-free at the time of his last visit. He also saw a doctor one time and had an x-ray.

B. Procedural History

Cohen sued Griggs for negligence. In June 2019, the case was tried before a jury. The jury found that Griggs's negligence proximately caused the accident. It found that Cohen's damages included $2,775 for past medical expenses and $10,600 for future medical expenses.

The trial judge rendered judgment on the verdict.

Griggs filed a motion for judgment notwithstanding the verdict that challenged the sufficiency of the evidence to support the future medical expenses

finding and sought either rendition of a new judgment disregarding that finding or a new trial.

The trial judge denied Griggs's motion, and Griggs timely appealed.

II. STANDARD OF REVIEW

We review the denial of a motion for judgment notwithstanding the verdict under a legal sufficiency standard. *Brown v. Zimmerman*, 160 S.W.3d 695, 702 (Tex. App.—Dallas 2005, no pet.); *see also Excel Corp. v. McDonald*, 223 S.W.3d 506, 508 (Tex. App.—Amarillo 2006, pet. denied) (denial of motion to disregard jury finding is reviewed under legal sufficiency standard).

When an appellant attacks the legal sufficiency of the evidence to support an adverse finding on an issue on which it did not have the burden of proof, it must show that no evidence supports the finding. *Guillory v. Dietrich*, 598 S.W.3d 284, 293 (Tex. App.—Dallas 2020, pet. denied). When evidence is so weak that it does no more than create a surmise or suspicion of the matter to be proved, the evidence is no more than a scintilla and, in legal effect, is no evidence. *Id*.

Evidence is legally sufficient if it would enable reasonable and fair-minded people to reach the verdict under review. *City of Keller v. Wilson*, 168 S.W.3d 802, 827 (Tex. 2005). In conducting our review, we view the evidence in the light most favorable to the verdict and indulge every reasonable inference supporting it. *Id*. at 822. We must credit evidence favorable to the verdict if a reasonable person could,

and we must disregard contrary evidence unless a reasonable person could not. *Id*. at 827.

When we review the denial of a new trial motion based on a factual sufficiency complaint, we apply the same factual sufficiency standard that the trial court applied. *In re Campbell*, 577 S.W.3d 293, 300 (Tex. App.—Houston [14th Dist.] 2019, orig. proceeding).

When an appellant challenges the factual sufficiency of the evidence to support an adverse finding on an issue on which it did not have the burden of proof, it must demonstrate that there is insufficient evidence to support the adverse finding. *Hoss v. Alardin*, 338 S.W.3d 635, 651 (Tex. App.—Dallas 2011, no pet.). In reviewing the challenge, we consider all the evidence in the record and set the verdict aside only if the evidence supporting the jury finding is so weak or the finding is so against the overwhelming weight of the evidence that the finding is clearly wrong and unjust. *Id*. The jury is the sole judge of witness credibility and the weight to be given their testimony. *Golden Eagle Archery, Inc. v. Jackson*, 116 S.W.3d 757, 761 (Tex. 2003).

III. ANALYSIS

A. Is the evidence *legally* insufficient to support the fact of future medical expenses?

No. Cohen presented enough evidence to permit a reasonable jury to conclude that he will probably incur future medical expenses if his accident related injuries cause him future pain and there is documentary evidence that he will probably have

that pain in the future. Griggs does not challenge the sufficiency of the evidence to support the amount of such future medical expenses if they are incurred.

To recover future medical expenses, a plaintiff must show a reasonable probability that those expenses will be incurred. *Sanmina-SCI Corp. v. Ogburn*, 153 S.W.3d 639, 642 (Tex. App.—Dallas 2004, pet. denied). This includes evidence proving that, in all reasonable probability, future medical care will be required and the reasonable cost of such care. *Id*. No particular evidence is required to support a future medical expenses award, which is always speculative to some degree. *N.F. v. A.S.*, No. 05-16-00254-CV, 2017 WL 3276452, at *4 (Tex. App.—Dallas Aug. 2, 2017, pet. denied) (mem. op.). The jury may base an award on the nature of the plaintiff's injuries, the medical treatment the plaintiff has received in the past, and the plaintiff's condition at trial. *Id*.

Griggs argues that Cohen adduced no evidence showing a reasonable probability that he would receive future medical treatment for his accident related injuries. In particular, he argues that Cohen denied having any plans to seek additional medical treatment, and he quotes Cohen's testimony as follows:

> Q. And you don't have plans to get any future medical treatment for your injuries. True?
>
> A. No.
>
> . . . .
>
> Q. And do you ever plan on taking the chiropractor up on the future medical expenses?

A. No, not really, unless I start hurting all over again.

Griggs argues that this testimony shows, at most, a possibility that Cohen might receive future medical treatment.

The first question is worded such that Cohen's "No" answer creates a confusing double negative. It could mean that he disagrees with the premise that he does not plan to get future medical treatments. Or, it could mean that he agrees with that premise, i.e., he doesn't plan to get more medical treatment. His second answer, however, indicates that he plans to get future medical treatment for his injuries if those injuries cause him future pain.

And Cohen's chiropractor's discharge report was admitted into evidence. That report recites that "Mr. Cohen will most likely continue to experience pain and decreased range of motion that could have to be addressed in the future."

Additionally, Cohen testified that he still occasionally experienced pain from the accident. Specifically, he testified that his pain returned after his last chiropractic treatment, that he had neck pain that "comes and goes," and that he has left knee pain at times. He attributed his pain to the accident because it was different from his arthritis pain.

From this collective evidence, the jury could reasonably infer that Cohen would probably suffer more pain in the future and therefore seek additional medical treatment, even though he also testified that he had no current plans to do so.

The foregoing evidence distinguishes this case from Griggs's authorities. *See Aim-Ex Indus., Inc. v. Slover*, No. 07-09-0184-CV, 2010 WL 2136599, at *3 (Tex. App.—Amarillo May 19, 2010, pet. denied) (mem. op.); *Rosenboom Mach. & Tool, Inc. v. Machala*, 995 S.W.2d 817, 828 (Tex. App.—Houston [1st Dist.] 1999, writ denied); *Fibreboard Corp. v. Pool*, 813 S.W.2d 658, 681–82 (Tex. App.—Texarkana 1991, writ denied).

We hold that a reasonable jury could conclude from the totality of the evidence that there was a reasonable probability that Cohen would seek future medical treatment for his injuries. Accordingly, the trial judge correctly denied Griggs's motion for judgment notwithstanding the verdict as to the future medical expenses award. We overrule Griggs's first issue.

B. Is the evidence *factually* insufficient to support the future medical expenses finding?

No. Although some evidence weighs against the jury's finding, the finding is not clearly wrong and unjust under the evidence as a whole.[1] *See Hoss*, 338 S.W.3d at 651.

Griggs argues that Cohen's testimony that he had no current plans to seek medical treatment suffices to make the jury's future medical expenses finding clearly wrong. He also argues that the evidence supporting the finding, such as the chiropractor's discharge report, is "incredibly weak."

[1] Cohen argues that Griggs did not preserve this issue in the trial court. We assume without deciding that error was preserved.

Although Cohen's supporting evidence is not overwhelming, that is not the standard we apply in this factual sufficiency review. Rather, it is Griggs's appellate factual sufficiency burden in this case to show that the evidence was overwhelming that Cohen would not suffer *any* future medical expenses. Griggs identifies no evidence to that effect.

For the reasons stated previously, the jury could have believed Cohen's testimony that he would seek more medical treatment if his pain returned. Accordingly, we overrule Griggs's second issue.

IV. DISPOSITION

Having rejected both of Griggs's issues, we affirm the trial court's judgment.

/Bill Whitehill/
BILL WHITEHILL
JUSTICE

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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

MICHAEL W. GRIGGS, Appellant	On Appeal from the 101st Judicial District Court, Dallas County, Texas
No. 05-19-01174-CV V.	Trial Court Cause No. DC-17-09945-E.
VICTOR L. COHEN, Appellee	Opinion delivered by Justice Whitehill. Justices Pedersen, III and Reichek participating.

In accordance with this Court's opinion of this date, the judgment of the trial court is **AFFIRMED**.

It is **ORDERED** that appellee Victor L. Cohen recover his costs of this appeal from appellant Michael W. Griggs.

Judgment entered October 19, 2020