Affirmed and Memorandum Opinion filed June 15, 2010.

In The

Fourteenth Court of Appeals

NO. 14-08-00106-CV

HOLLY HENRY AND JAMES HENRY, Appellants

V.

BARTHOLOMEW MITCHELL, Appellee

On Appeal from the County Civil Court at Law No. 1
Harris County, Texas
Trial Court Cause No. 880409

MEMORANDUM OPINION

Appellants, Holly Henry and James Henry, were involved in an automobile collision with appellee, Bartholomew Mitchell. Following a jury trial, the trial court entered a final judgment that awarded Holly Henry $300.00 in damages plus prejudgment interest and court costs, and awarded James Henry zero damages. Appellants both appeal from that judgment. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Late on the evening of Saturday, January 8, 2005, appellants were stopped in their vehicle at a red light when appellee struck their vehicle from behind. Following the

collision, Mr. Henry, who works as a Harris County Deputy Sheriff, testified his initial reaction to the collision was that appellants' vehicle was being ambushed and that he quickly exited the vehicle in a tactical fashion "to draw the fire away from [his] wife." After realizing the accident was not an ambush, Mr. Henry approached appellee to ascertain whether he was injured. Neither appellant experienced any cuts, bruises, or fractures as a result of this collision. Appellants refused to be transported to the hospital by ambulance. Instead, they were driven to the emergency room by a family member.

After arriving at the emergency room, appellants were examined by Dr. Evan Tow. Dr. Tow performed tests to rule out the existence of fractures. In his notes, Dr. Tow noted appellants did not have any fractures and that they were complaining of mild pain. Because there were no fractures, Dr. Tow did not order any further testing, such as x-rays, on appellants. Dr. Tow diagnosed appellants with neck sprains/strains and prescribed a muscle relaxant and ibuprofen and advised them to see their primary care doctor the following Monday. Dr. Tow testified his diagnoses were based entirely on appellants' subjective reports of pain. Dr. Tow had no further contact with appellants once they left the emergency room on the morning of January 9, 2005. Neither appellant made the recommended follow up visit with their primary care physician. In fact, after leaving the emergency room, neither appellant sought any further medical treatment related to the January 8, 2005 accident.

The evidence reveals that Mr. Henry continues to work as a Harris County Deputy Sheriff, participates in weight lifting, jogging, kick boxing, and traditional karate matches. Finally, Mr. Henry testified that, at the time of the trial, he could still do everything he could do before the January 8, 2005 collision, only slower.

Mrs. Henry testified that, prior to the January 8, 2005 accident, she had always suffered from sinus headaches but not muscle headaches. She testified that since the accident, she has suffered from muscle headaches that are so severe she cannot stand loud

noises and she must lie down. However, Mrs. Henry also testified that, soon after the January 8, 2005 accident, she became an EMT working on an ambulance. While working in her ambulance, Mrs. Henry testified she was involved in another motor vehicle accident that made her neck pain worse. Finally, during appellee's cross-examination of Mrs. Henry, the following interrogatory was read into evidence: "Are you presently suffering from any symptoms or any physical or emotional problems as a result of the accident made the basis of this suit? If so, please state fully the nature of each symptom, problem, or complaint, and the length of time you have had each symptom, problem, or complaint." Mrs. Henry's answer: "Not that I notice."

The case was submitted to the jury and it found appellee's negligence proximately caused the January 8, 2005 collision. The jury then awarded Mrs. Henry $300.00 for past physical pain and suffering and nothing for future pain and suffering. The jury did not award Mr. Henry any damages for past or future pain and suffering.[1] The trial court rendered a final judgment based on the jury's verdict. This appeal followed.

DISCUSSION

In their brief, appellants list three issues on appeal. However, since all three issues make the same argument: that the $300.00 awarded to Mrs. Henry and the award of zero damages to Mr. Henry are against the great weight and preponderance of the evidence, we will construe them as a single issue.[2]

[1] Past and future pain and suffering were the only categories of damages submitted to the jury.

[2] To the extent appellants' issues on appeal could be construed as making the argument that there was a conflict in the jury's answers, we conclude appellants waived this issue as they did not object to the allegedly conflicting jury answers before the jury was discharged. *Coastal Chem, Inc. v. Brown*, 35 S.W.3d 90, 100 (Tex. App.—Houston [14th Dist.] 2000, pet. denied).

I. The standard of review.

When reviewing a challenge to the factual sufficiency of a jury's damages findings, we consider and weigh all of the evidence, both in support of and against the findings, to decide whether the verdict should be set aside. *Doctor v. Pardue*, 186 S.W.3d 4, 17 (Tex. App.—Houston [1st Dist.] 2006, pet. denied) (citing *Pool v. Ford Motor Co.*, 715 S.W.2d 629, 635 (Tex. 1986), disapproved of on other grounds by *Crown Life Ins. Co. v. Casteel*, 22 S.W.3d 378 (Tex. 2000)). We uphold the jury's verdict unless it is so against the great weight and preponderance of the evidence as to be manifestly unjust or shocking to the conscience. *Id.* We may not substitute our judgment for that of the jury, even if the evidence would clearly support a different result. *Nip v. Checkpoint Sys., Inc.*, 154 S.W.3d 767, 769 (Tex. App.—Houston [14th Dist.] 2004, no pet.).

The jury is the sole judge of the credibility of the witnesses and the weight to be given their testimony. *Golden Eagle Archery, Inc. v. Jackson*, 116 S.W.3d 757, 761 (Tex. 2003). As factfinder, the jury is free to disbelieve expert witnesses. *See Walker v. Ricks*, 101 S.W.3d 740, 748 (Tex. App.—Corpus Christi 2003, no pet.); *Waltrip v. Bilbon Corp.*, 38 S.W.3d 873, 882 (Tex. App.—Beaumont 2001, pet. denied). Although it may not disregard objective symptoms of an injury, a jury may ignore a complaining party's subjective evidence. *Gonzalez v. Wal-Mart Stores, Inc.*, 143 S.W.3d 118, 123 (Tex. App.—San Antonio 2004, no pet.).

The process of awarding damages for amorphous injuries such as mental anguish is inherently difficult because the alleged injury is a subjective, unliquidated, nonpecuniary loss. *Dollison v. Hayes*, 79 S.W.3d 246, 249 (Tex. App.—Texarkana 2002, no pet.). Because there are no objective guidelines to assess the monetary equivalent to such injuries, the jury is given a great deal of discretion in awarding an amount of damages it deems appropriate. *See Texarkana Mem'l Hosp., Inc. v. Murdock*, 946 S.W.2d 836, 841 (Tex. 1997). In some instances, the injuries suffered are so substantial and the symptoms

so objective that an award of damages for pain and suffering is clearly supported and the failure to award such damages while simultaneously awarding medical expenses would be clearly erroneous. *See Horton v. Denny's Inc.*, 128 S.W.3d 256, 260 (Tex. App.—Tyler 2003, pet. denied). However, when the fact of injury and resulting damages chiefly depends on subjective evidence, appellate courts are reluctant to hold the non-findings of damages as against the great weight and preponderance of the evidence. *Id.*

II. The jury's damages findings are not against the great weight and preponderance of the evidence.

Appellants challenge the jury's award of minimal physical pain and suffering damages to Mrs. Henry and none to Mr. Henry. Here, the jury could have taken into account the fact that neither appellant followed up with their primary care doctor the Monday following the accident or sought any additional medical treatment related to the accident. The jury could also have taken into account Mrs. Henry's interrogatory response that, at the time of trial, she was not experiencing any symptoms, problems, or complaints related to the January 2005 collision. In addition, the jury could have decided to disregard Mr. Henry's testimony regarding his alleged pain and suffering based on his continued participation in activities such as weight lifting, jogging, kick boxing, and karate. Finally, despite their arguments to the contrary, appellants' alleged injuries and the resulting pain and suffering were subjective. Dr. Tow's testimony confirmed the subjective nature of their alleged injuries when he testified that his diagnoses were based entirely on appellants' subjective reports of pain. Therefore, we conclude the evidence is factually sufficient to sustain the jury's findings regarding appellants' pain and suffering damages. *See Cox v. Centerpoint Energy, Inc.*, No. 14-05-01130-CV, 2007 WL 1437519, at *6–7 (Tex. App.—Houston [14th Dist.] May 17, 2007, no pet.) (mem. op.) (affirming zero damage award for future pain and mental anguish because jury was free to disbelieve

the plaintiff's subjective claims and doctor's testimony based entirely on plaintiff's reports). Accordingly, we overrule appellants' issues on appeal.

CONCLUSION

Having overruled appellants' issues on appeal, we affirm the trial court's judgment.

/s/ John S. Anderson
Justice

Panel consists of Chief Justice Hedges and Justices Anderson and Mirabal.[3]

[3] Senior Justice Margaret G. Mirabal sitting by assignment.