In The

Court of Appeals

Ninth District of Texas at Beaumont

NO. 09-10-00209-CV

DELTA SEABOARD WELL SERVICE, INC. AND JIMMY NEWCOMB,
Appellants

V.

KAREN DUKE AND AS NEXT FRIEND OF GEORGE DUKE,
Appellee

On Appeal from the 163rd District Court
Orange County, Texas
Trial Cause No. B-070182-C

MEMORANDUM OPINION

Appellee Karen Duke and as next friend of George Duke, sued appellant Delta Seaboard Well Service, Inc. ("Delta") and its employee, appellant Jimmy Newcomb, for personal injuries allegedly sustained when an eighteen-wheeler driven by Newcomb was struck by an unknown driver, jackknifed, and collided with the vehicle occupied by Duke and her minor son. The jury found that the negligence of Newcomb, Delta, and the unidentified second truck driver proximately caused the accident and assigned 30% responsibility to Newcomb, 60% to Delta, and 10% to the "John Doe" truck driver. The jury awarded damages to Karen Duke and George Duke, and the trial court signed a

judgment in accordance with the jury's verdict. The trial court denied appellants' motion for JNOV, as well as their motion for new trial. Delta and Newcomb then filed this appeal, in which they raise five issues for our consideration. We reverse the trial court's judgment as to Delta and render judgment that appellees take nothing from Delta, and we reverse the trial court's judgment as to Newcomb and remand the case for a new trial.

ISSUE TWO

In issue two, Delta asserts that there is no evidence that its alleged negligence in failing to properly train Newcomb proximately caused the accident.[1] Because this issue is dispositive with respect to Delta, we address it first.

Prior to working for Delta, Newcomb had worked for B.J. Services, where he received on-the-job training as an eighteen-wheeler driver. Newcomb's training with B.J. Services involved watching videos for three or four weeks, and he learned such things as inspecting and maintaining a truck, properly changing lanes, and being aware of traffic. Newcomb operated an eighteen-wheeler at B.J. Services by himself for approximately two to three months.

Newcomb testified that he had obtained a commercial driver's license five years earlier, and he already had his commercial driver's license when he went to work at Delta. According to Newcomb, to obtain a commercial driver's license, "you have to

[1] Appellants do not raise an issue challenging the jury's finding that Newcomb was negligent. In addition, although Duke's petition alleged that Delta negligently entrusted the eighteen-wheeler to Newcomb, at trial and on appeal, Duke instead focused on her general allegations of negligence, including her theory that Delta's negligent failure to train Newcomb proximately caused the accident. Duke did not allege that Delta was vicariously liable for Newcomb's negligence.

drive with [] D.P.S. officers. You have to take tests. You have to do training. You have to be on top of it." Newcomb recalled that before he applied for and received his commercial driver's license, he trained with B.J. Services for about six months. Newcomb's training entailed being behind the wheel of a truck, as well as attending classroom sessions with a live instructor and watching videotapes. According to Newcomb, when he went to work for Delta, he had no history of traffic tickets or citations, and he did not receive a ticket when the accident with Duke occurred.

When the accident occurred in July of 2006, Newcomb was employed with Delta as a truck driver. Newcomb had previously worked for B.J. Services for approximately one year. Newcomb recalled that when he arrived at B.J. Services, he trained with experienced people, and would "go out with the safety man, train with him." Newcomb testified that when he went to work for Delta, Delta's safety manual did not include information about jackknifing. Newcomb testified that during the hiring process, Delta interviewed Newcomb, another driver rode with Newcomb on several occasions, and Newcomb "would follow [the other driver] to locations." Delta did not require Newcomb to take a defensive driving course. Newcomb testified that he recalled that Delta did not train him specifically about jackknifing, but B.J. Services did train him about jackknifing. Newcomb then qualified his testimony by stating, "it's all traffic safety. I mean[,] it's all the same thing." Newcomb explained, "They never actually physically took me out and trained me," but he stated that he believed he saw a manual or a video concerning jackknifing.

When the accident occurred, Newcomb was driving on Interstate 10, and he saw people ahead of him beginning to stop, so he downshifted. Newcomb also observed Duke in the other lane. Newcomb testified that as he was coming down the bridge, another eighteen-wheeler pulled in front of him and "just barely may have clipped" the left corner bumper of Newcomb's truck. Newcomb testified that he slammed on his brakes because he was "shutting it down[,]" and the other eighteen-wheeler continued driving. Newcomb stated that he only had "an instant" to decide how to react, and his only choice was to apply his brakes. Newcomb's truck jackknifed and struck Duke's vehicle, which was in the right lane, and pushed it against the guard rail.

According to Newcomb, slamming on the brakes can cause a truck to jackknife, but doing so will not always cause a truck to jackknife. Newcomb opined that slamming on the brakes was his only option because the other eighteen-wheeler was in the left lane. Newcomb testified, "That split second decision that I made, if I would have hit the back of that 18-wheeler, not knowing what was in it, could have killed me and everybody else around me." Newcomb testified that he was being attentive, and that the accident "was a split second emergency." Newcomb explained that he made a split second decision to make sure that the accident would not kill him or anyone around him. Newcomb testified that he never uses his cell phone when driving an eighteen-wheeler, and he was not using his cell phone when the accident occurred.

Delta's operations manager, Mitchell Derrick, testified that he was responsible for safety and transportation at Delta when the accident occurred. Derrick explained that Delta's manual does not specifically address eighteen-wheeler safety or cell phone usage,

but he believed that Newcomb received either written or verbal information. Derrick testified that Delta made all of its drivers aware that they should not use cell phone while driving. Delta did not administer a written examination to Newcomb before hiring him. According to Derrick, Delta did "daily safety meetings in the shop and on . . . rigs every day in the morning." Derrick testified that when Delta hired Newcomb, one of Delta's drivers who had fifteen years of experience drove with Newcomb during the first week of Newcomb's employment. Derrick testified that he believed Newcomb's recollection to the contrary was mistaken.

Derrick explained that "[t]he Department of Transportation does not require . . . that you send a driver out and do a road check or any of that. When they come to you with a CDL driver's license, they're trained already, and I checked [Newcomb's] background . . . ." According to Derrick, Delta does not hire drivers who do not have a commercial driver's license. Derrick testified,

> I follow all the . . . Department of Transportation[] vehicle regulations. When a driver comes in, we check his background, do a criminal background check. We have to do a driving record check for the last five years for a CDL driver. I have to send him to get drug tested and make sure he has a physical card, and if he doesn't, or if his is expired, then I have to send him for a physical exam. We talk to his previous employers about his driving and go over all his information, basically just double-check everything. If everything comes back clear, then we hire him and put him with another driver to check him out to make sure he is driving properly.

Derrick testified that he was responsible for insuring that Delta followed these procedures when Newcomb was hired, and that Delta did follow the proper procedures. Delta found no record of criminal behavior by Newcomb, confirmed that Newcomb's commercial driver's license was current, and checked Newcomb's driving record, and Newcomb

passed his drug test and physical examination. Derrick characterized Newcomb as a good employee. With respect to the accident with Duke, Derrick testified, "From what I could tell, [Newcomb] did what he had to do in the situation, and there was no fault found by the D.P.S. . . . ."

Crash reconstruction expert Robin Wright testified that "Newcomb applied the brakes of his vehicle with such force, the brakes locked, and he applied a steering input to his right, causing his tractor to enter a clockwise jack-knife." In addition, Wright testified that Newcomb "failed to change lanes safely as required, striking the Duke vehicle, forcing it into the concrete guardrail." Wright opined that by failing to safely change lanes, Newcomb violated the transportation code. Wright also testified that Newcomb turned his vehicle from a straight course when it was unsafe to do so. Wright characterized Newcomb's failure to change lanes safely and turning his vehicle as faulty evasive actions. According to Wright, the accident was caused by "over-aggressive braking and [Newcomb's] steering input to the right causing the truck to jack-knife and collide with Ms. Duke's vehicle."

Wright opined that any unsafe lane change by the unknown driver did not excuse Newcomb's faulty evasive actions. Wright testified that Newcomb was negligent, and that Newcomb's negligence was a proximate cause of the accident. Wright acknowledged that Newcomb's testimony did not indicate that Newcomb had steered to the right, but Wright explained that Newcomb must have done so based upon the fact that the truck "jack-knifed in a clockwise direction." Wright also explained that Newcomb

had a fraction of a second to react, and he testified that Newcomb's reaction "is instinctive, I would think."

In reviewing the legal sufficiency of the evidence, we review the evidence in the light most favorable to the jury's verdict, crediting evidence favorable to that party if reasonable jurors could, and disregarding contrary evidence unless reasonable jurors could not. *City of Keller v. Wilson*, 168 S.W.3d 802, 827 (Tex. 2005). When a party challenges the legal sufficiency of the evidence supporting an adverse finding on which the opposing party had the burden of proof, the challenging party will prevail if the record shows (1) there is no evidence supporting a vital fact, (2) the evidence offered to prove a vital fact is no more than a mere scintilla, (3) the evidence conclusively establishes the opposite of a vital fact, or (4) the court is barred by law or the rules of evidence from considering the only evidence offered to prove the vital fact. *Id*. at 810. More than a scintilla of evidence exists when the evidence supporting the finding, as a whole, would enable reasonable and fair-minded people to differ in their conclusions. *Merrell Dow Pharms., Inc. v. Havner*, 953 S.W.2d 706, 711 (Tex. 1997). If the evidence is so weak that it does no more than create a mere surmise or suspicion of its existence, it is no evidence. *Haynes & Boone v. Bowser Bouldin, Ltd.*, 896 S.W.2d 179, 182 (Tex. 1995). Evidence conclusively establishes a vital fact when the evidence is such that reasonable people could not disagree in their conclusions. *City of Keller*, 168 S.W.3d at 814-17. In reviewing the factual sufficiency of the evidence, we weigh all of the evidence "and will set aside the verdict only if it is so against the great weight and

preponderance of the evidence that it is clearly wrong and unjust." *Id.* at 826; *see also Cain v. Bain*, 709 S.W.2d 175, 176 (Tex. 1986).

To prove a negligence cause of action, the plaintiff must show that the defendant had a legal duty, that the defendant breached its legal duty, and that the breach proximately caused the plaintiff's injury. *W. Invs., Inc. v. Urena*, 162 S.W.3d 547, 550 (Tex. 2005). The elements of proximate cause are cause-in-fact and foreseeability. *Id*. at 551. The test for cause-in-fact is whether the alleged negligent act or omission was a substantial factor in causing the injury without which the harm would not have occurred. *Id*. (citing *Marathon Corp. v. Pitzner*, 106 S.W.3d 724, 727 (Tex. 2003)). Cause-in-fact must be established by probative evidence rather than mere conjecture, guess, or speculation. *Id*.; *Doe v. Boys Clubs of Greater Dallas, Inc.*, 907 S.W.2d 472, 477 (Tex. 1995). '"The evidence must . . . show that such negligence was the proximate, and not the remote, cause of the resulting injuries . . . [and] justify the conclusion that such injury was the natural and probable result thereof."' *Doe*, 907 S.W.2d at 477 (quoting *Carey v. Pure Distrib. Corp.*, 133 Tex. 31, 124 S.W.2d 847, 849 (1939)).

Newcomb testified that he had received on-the-job training from Delta and his previous employer, as well as training associated with obtaining his commercial driver's license, and that he possessed a commercial driver's license and a clean driving record when the accident occurred. Newcomb also testified that he had received training concerning jackknifing. In addition, Derrick testified that before hiring Newcomb, Delta checked Newcomb's background and driving record, had Newcomb drug tested and physically examined, spoke to Newcomb's previous employer about his driving, and

verified that Newcomb possessed a commercial driver's license. Duke's crash reconstruction expert, Wright, testified that Newcomb was negligent by making an unsafe lane change, applying the brakes too aggressively, and steering the truck to the right. However, Wright also explained that Newcomb had only a fraction of a second to react, and Wright characterized Newcomb's reaction as instinctive.

Viewing the evidence in the light most favorable to the verdict, we conclude that the evidence is legally insufficient to prove that Delta's alleged failure to train Newcomb was a cause-in-fact of the collision. *See City of Keller*, 168 S.W.3d at 827; *Urena*, 162 S.W.3d at 550-51. In addition, there is legally insufficient evidence to establish that, had Delta provided additional training to Newcomb, the accident would not have occurred. *See Urena*, 162 S.W.3d at 551; *Doe*, 907 S.W.2d at 477. Although Wright opined that Newcomb was negligent, he also characterized Newcomb's reaction as instinctive and noted that Newcomb had a fraction of a second to react to the situation. Viewing all of the evidence in the light most favorable to the verdict, the evidence is legally insufficient to prove that any act or omission by Delta was a substantial factor in bringing about Duke's injuries. *See Urena*, 162 S.W.3d at 551; *see also City of Keller*, 168 S.W.3d at 827. Accordingly, we sustain issue two, reverse the trial court's judgment as to Delta, and render judgment that Duke take nothing from Delta. We need not address further issues raised by Delta, as they would not result in greater relief. *See* Tex. R. App. P. 47.1.

ISSUE THREE

Newcomb asserts in issue three that the evidence was legally and factually insufficient to support the award of future medical expenses and future physical impairment to Karen Duke.[2] The jury awarded Karen Duke $65,052 for future medical care expenses and $25,052 for future physical impairment. Based upon the jury's finding that Newcomb's proportionate responsibility was 30%, the trial court signed a judgment in favor of Karen Duke against Newcomb for future medical expenses in the amount of $19,515.60 and future physical impairment in the amount of $7,515.60.

Duke testified that after the accident, she was taken by ambulance to the hospital, where she received pain medication, had X-rays, and was instructed to follow up with her doctor. Duke visited her regular doctor, but when Duke continued to experience back problems, she was referred to neurosurgeon Dr. Charles Clark. Duke testified that Dr. Clark informed her that she had bulging discs and would require surgery, and Dr. Clark ultimately performed surgery on Duke.

Duke testified that she still experienced burning in her back and pain in her hips, so she returned to Dr. Clark. Duke testified that Dr. Clark prescribed an anti-inflammatory medication and "said that this time [there were] a few problems, but he was just going to watch me. He said I would probably need surgery later on, but he was not going to recommend it now, because where he did the surgery before looked fine." Duke testified that her back still bothers her "quite a bit[,]" and she experiences burning and stiffness, as well as pain and burning in her hips. Duke returned to work in January of

[2] Duke testified that her son was not physically injured in the accident.

2007. According to Duke, when Dr. Clark released her to return to work in January of 2007, he instructed her to call him as needed, and Duke did not consult Dr. Clark again until July of 2009. When asked whether she was scheduled for further surgery, Duke testified, "No, sir, [Dr. Clark's] just watching me."

Dr. Clark testified by video deposition. According to Dr. Clark, an MRI scan after the accident revealed that Duke had stenosis in her mid-lumbar area, two areas of disc protrusion, and nerve impingement. On September 12, 2006, Dr. Clark performed a decompressed laminectomy and foraminotomies on Duke. Dr. Clark saw Duke again on September 22, 2006, and he testified, "I thought she was doing well. She was having the normal recovery problems, a little bit of muscle spasms, a little bit of cramping. We put her in . . . physical therapy." Dr. Clark testified that when he examined Duke in January of 2007, "She greatly improved. She had no spasms. Her problems were very minimal. I thought . . . she could go back to work January the 15th." Dr. Clark explained that he twice examined Duke in January 2007, and he prescribed an anti-inflammatory analgesic. Dr. Clark testified he again examined Duke in June of 2007, and he "thought she was doing really well[,]" so he continued her anti-inflammatory medication, and he did not see her again until June of 2009.

Dr. Clark explained that when Duke returned to see him in June of 2009, she reported that she had taken a trip and was experiencing "a little back pain." Dr. Clark x-rayed Duke's back, and he discovered post-surgical changes, so he ordered an MRI scan of Duke's lumbar area. Dr. Clark explained that the results of that MRI

> were mixed honestly. The area of surgery looked really good. The decompression was very successful. The postsurgical areas looked really good. Above the surgery, there was starting to be a few changes[.] . . . [S]he had some mild narrowing in that area. Much as she'd had in the area below. She also had some areas in her nerve root bundles inside her spine that looked a little suspicious for sticking together or clumping together, but I didn't think it was that bad; she didn't think it was that bad; and we elected to just kind of watch this area and see. It may be as more time evolve[s] that she may have to have this area done also, but for now I think it's tolerable and livable.

Dr. Clark testified that he planned to treat Duke conservatively, and that he intended to continue monitoring her condition. Dr. Clark opined that Duke's injury was permanent, and that she would experience some residual problems for the rest of her life. When asked about Duke's prognosis, Dr. Clark explained,

> I hate it when people use the term guarded; but I would have to say, you know, I . . . think guarded means you're really not sure, it could go either way. And she may continue to be functional and be okay the way she is now, or she may have to have some surgery. I – at this point I just can't say.

When asked again what treatment Duke might need in the future, Dr. Clark testified that

> if she has an occasional acute flare-up, we may want to do some physical therapy. She may need episodes of medication from time to time, and then, of course, the ultimate would be more surgery and neither she nor I at this time . . . want that, but that is within the realm of possibility.

Dr. Clark explained that he is currently unable to say within reasonable medical probability that Duke will require further surgery. Dr. Clark anticipated that Duke might require three to four office visits per year, and that physical therapy is "in the realm of probability."

As previously discussed in our analysis of issue two, in reviewing the legal sufficiency of the evidence, we review the evidence in the light most favorable to the

jury's verdict, crediting evidence favorable to that party if reasonable jurors could, and disregarding contrary evidence unless reasonable jurors could not. *City of Keller*, 168 S.W.3d at 827. To recover for future medical expenses, a plaintiff must show that there is a reasonable probability that expenses resulting from the injury will be necessary in the future. *Pilgrim's Pride Corp. v. Cernat*, 205 S.W.3d 110, 121 (Tex. App.—Texarkana 2006, pet. denied). Making such a showing requires a plaintiff to show (1) a reasonable probability that she will incur future medical expenses and (2) the reasonably probable amount of the future medical expenses. *Bituminous Cas. Corp. v. Cleveland*, 223 S.W.3d 485, 490 (Tex. App.—Amarillo 2006, no pet.). The jury can determine the amount of future medical expenses based upon (1) the injuries suffered, (2) the medical care rendered before trial, (3) the plaintiff's progress toward recovery under the treatment received, and (4) the plaintiff's condition at the time of trial. *Volkswagen of AM., Inc. v. Ramirez*, 79 S.W.3d 113, 127 (Tex. App.—Corpus Christi 2002), *rev'd on other grounds*, 159 S.W.3d 897 (Tex. 2004); *Rosenboom Mach. & Tool, Inc. v. Machala*, 995 S.W.2d 817, 828 (Tex. App.—Houston [1st Dist.] 1999, pet. denied).

Duke introduced into evidence her medical billing records, as well as a summary that indicated that the total amount of her medical care was $55,040.66, which included items such as transport by ambulance, charges from various hospitals, cardiology services, MRI and imaging centers, anesthesia, radiology, and physical therapy. The total cost of Duke's physical therapy sessions was $1,390. Evidence was not admitted regarding the cost of the medications that Dr. Clark prescribed for Duke. The billing

records from Dr. Clark's office indicate that Duke's office visits generally ranged from $70 to $110 each, and her post-operative follow-up visits were $230 each.

As previously discussed, the jury awarded Duke future medical expenses in the amount of $65,052, and based upon the jury's finding that Newcomb's proportionate responsibility was 30%, the trial court signed a judgment that awarded Duke $19,515.60 from Newcomb for future medical expenses. Dr. Clark testified that it is "in the realm of probability" that Duke will require additional physical therapy. No evidence was introduced concerning the cost of Duke's medications. Dr. Clark estimated that Duke would require three or four visits per year as he continued to monitor and conservatively treat her. Although Dr. Clark testified that it is possible Duke would require another surgery, the evidence does not establish a reasonable probability that she will need additional surgery.

For all of these reasons, viewing the evidence in the light most favorable to the verdict, we conclude that the evidence is legally sufficient to support an award for future medical expenses. *See City of Keller*, 168 S.W.3d at 827; *Bituminous Cas. Corp.*, 223 S.W.3d at 490. However, viewing the evidence supporting the finding, as well as the evidence that is contrary to the finding, we conclude that the evidence is factually insufficient to support the award of future medical expenses in the amount of $65,052 (of which Newcomb's 30% proportionate responsibility was $19,515.60). We sustain issue three in part. Because addressing the remainder of issue three, as well as issues four and five, would not result in greater relief, we need not do so. *See* Tex. R. App. P. 47.1. An appellate court "may not order a separate trial solely on unliquidated damages if liability

is contested." Tex. R. App. P. 44.1(b). At trial, Newcomb contended that he was confronted with a sudden emergency, and that the accident was unavoidable. Therefore, the appropriate remedy is to remand for a new trial as to Newcomb. *See Minn. Mining & Mfg. Co. v. Nishika Ltd.*, 953 S.W.2d 733, 740 (Tex. 1997) ("A remand for a new trial solely on the damages issue is not appropriate in this case. [Petitioner] has contested its liability . . . throughout this litigation. The damages . . . are unliquidated. Remand of both liability and damages is mandatory under these circumstances."); *see also* Tex. R. App. P. 44.1(b). Accordingly, we reverse the trial court's judgment as to Delta and render judgment that Duke take nothing from Delta, and we reverse the trial court's judgment and remand the cause for a new trial as to Newcomb.

REVERSED AND RENDERED IN PART; REVERSED AND REMANDED IN PART.

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STEVE McKEITHEN
Chief Justice

Submitted on June 9, 2011
Opinion Delivered August 31, 2011

Before McKeithen, C.J., Kreger and Horton, JJ.