In The

Court of Appeals

Ninth District of Texas at Beaumont

NO. 09-10-00539-CV

CITY OF PORT ARTHUR, Appellant

V.

MARGARET BROWN, Appellee

On Appeal from the 136th District Court
Jefferson County, Texas
Trial Cause No. D-182,314

MEMORANDUM OPINION

The City of Port Arthur (the City) appeals from a jury's decision rejecting the City's claim that its employee, Clint Tanner, was injured when a truck in which he was a passenger was rear-ended by a pickup driven by Margaret Brown. *See* Tex. Lab. Code Ann. § 417.001 (West 2006) (allowing a self-insured worker's compensation provider that paid worker's compensation benefits to sue the person who caused an injury to the self-insured's employee). In four issues, the City advances two arguments in its appeal from the jury's verdict. In issues one and three, the City argues that the evidence

conclusively establishes that Brown injured Tanner. Issues one through four argue that the jury's verdict is contrary to the greater weight and preponderance of the evidence. We affirm the trial court's judgment.

Background

In July 2007, Brown approached an intersection and stopped behind the City's truck carrying Tanner; when the City's truck began moving forward, Brown took her foot off her brake, and her pickup moved forward, bumping into the City's truck. Photographs of the involved trucks show only slight damage to their bumpers. James Bickham, another City employee and passenger in the City's pickup, testified that he was not injured in the accident.

According to Tanner, he felt "a medium jolt[]" from the impact. After the accident, Tanner told the investigating officer that he was not injured. Although Tanner did not feel he had been injured on the day the accident occurred, he testified that about a week or two later he began feeling a pain in his back that radiated down his left leg. Three weeks after the accident, Tanner sought medical treatment in the emergency room for neck and back pain. The next day Tanner saw Dr. Lance Craig, who treated Tanner for a period of approximately five months after Tanner first saw him; Dr. Craig diagnosed Tanner as having suffered a lumbar disk herniation. Ultimately, Dr. Craig referred Tanner to a spinal surgeon in Houston, and in March 2008, Tanner had surgery

to repair a herniated disk in his lower back. Dr. Craig testified that in his opinion, based on Tanner's history, Tanner's herniated disk was caused by the accident.

In the sole issue submitted to the jury, the jury answered "No" to a question about whether the rear-end collision caused the injury for which the City paid Tanner worker's compensation benefits. Based on the jury's verdict, the trial court signed a take-nothing judgment.

Analysis

As Tanner's subrogee, the City stands in the shoes of the injured employee. *See Bashara v. Baptist Mem'l Hosp. Sys.*, 685 S.W.2d 307, 311 (Tex. 1985). As the party seeking an affirmative recovery, the City bore the burden of proof at trial. *See Franks v. Sematech, Inc.*, 936 S.W.2d 959, 960 (Tex. 1997) (per curiam) ("There is but one cause of action for an employee's injuries, and it belongs to the employee."). Because it lost an issue on which it had the burden of proving at trial, the City "must demonstrate on appeal that the evidence establishes, as a matter of law, all vital facts in support of the issue[]" if it is to prevail on its legal sufficiency arguments. *Dow Chem. Co. v. Francis*, 46 S.W.3d 237, 241 (Tex. 2001).

With respect to reviewing a legal sufficiency issue that concerns the inferences to be drawn from evidence admitted at a trial, "we credit evidence that supports the verdict if reasonable jurors could, and disregard contrary evidence unless reasonable jurors could not." *Kroger Tex. Ltd. P'ship v. Suberu*, 216 S.W.3d 788, 793 (Tex. 2006) (citing *City of*

Keller v. Wilson, 168 S.W.3d 802, 827 (Tex. 2005)). According to the City, Dr. Craig's opinion that the accident caused Tanner's herniated disk is conclusive and binding because Brown did not present any expert testimony or evidence contradicting it. The City also argues the jury should not have been asked to decide the case because the evidence allowed the jury to reach only one conclusion—that the accident caused Tanner's herniated disk. An appellate court conducting a legal sufficiency review cannot "'disregard undisputed evidence that allows of only one logical inference.'" *City of Keller*, 168 S.W.3d at 814 (quoting *St. Joseph Hosp. v. Wolff*, 94 S.W.3d 513, 519-20 (Tex. 2002)). "By definition, such evidence can be viewed in only one light, and reasonable jurors can reach only one conclusion from it." *Id.* However, evidence is conclusive only if reasonable people could not differ in their conclusions. *Id.* at 816.

The City also challenges the jury's verdict on factual sufficiency grounds. As the party that bore the burden of proof at trial, the City must demonstrate that the jury's finding is "against the great weight and preponderance of the evidence[.]" *Id*. at 826. A jury finding will be set aside "only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust." *Cain v. Bain*, 709 S.W.2d 175, 176 (Tex. 1986). Furthermore, in reviewing the factual sufficiency of the evidence, we may not substitute our own judgment for that of the jury, even if we would reach a different conclusion on the evidence. *Mar. Overseas Corp. v. Ellis*, 971 S.W.2d 402, 407 (Tex. 1998).

With respect to credibility determinations, "[j]urors are the sole judges of the credibility of the witnesses and the weight to give their testimony." *City of Keller*, 168 S.W.3d at 819 (footnote omitted). Juries are free to believe one witness and disbelieve another, and to resolve inconsistencies in the testimony. *McGalliard v. Kuhlmann*, 722 S.W.2d 694, 697 (Tex. 1986). "Even uncontroverted expert testimony does not bind jurors unless the subject matter is one for experts alone." *City of Keller*, 168 S.W.3d at 820. Nevertheless, jurors "cannot ignore undisputed testimony that is clear, positive, direct, otherwise credible, free from contradictions and inconsistencies, and could have been readily controverted." *Id.*

Because the jury answered "No" to the issue submitted to it, the jury decided the City failed to meet its burden of proving by a preponderance of the evidence that Brown caused Tanner's injury. While the City produced expert testimony relating Tanner's lumbar disk injury, the City's expert, Dr. Craig, clearly indicated that his opinion was based on the history Tanner provided to him. Dr. Craig stated that Tanner's symptoms were consistent with the "injury-causing event[.]" However, Dr. Craig also explained that after Tanner's initial visit in August 2007, he diagnosed Tanner as having suffered a lumbar strain; Dr. Craig did not initially diagnose Tanner as having suffered a herniated disk.

In September 2007, an MRI obtained on Tanner's lumbar spine showed that Tanner had a bulging disk at L5-S1, and that he had degenerative disk disease. An MRI

report done in September 2007 notes that there was no disk bulging or degeneration in disks other than the bulge and degeneration noted at the L5-S1 level. Dr. Craig also explained that in the course of treating patients with degenerative disk disease, it was not uncommon to find that these patients also had disk bulges or herniations. With respect to degenerative disk disease, Dr. Craig testified that, without testing or a history of complaints, there is no way to tell how long the patient had suffered from the condition, that degenerative disk disease is something that took years to develop, and that continuing to work made everything get worse. The evidence showed that Tanner worked between the date of the rear-end collision and the date he had surgery, and there were no tests introduced at trial showing the condition of Tanner's lumbar spine before Brown collided with him.

After being referred to a spinal surgeon, Tanner had back surgery in March 2008 to correct a herniated disk at L4-5. The spinal surgeon interpreted Tanner's September 2007 MRI as showing a herniated disk at L4-5. In relying on the spinal surgeon's interpretation of Tanner's MRI, Dr. Craig stated that he disagreed with the radiologist's interpretation that the MRI showed a herniated disk at L5-S1; instead, Dr. Craig opined that Tanner's herniated disk was at L4-5, where the surgeon performed surgery. The jury also heard that Dr. Craig has no specialized training in reading MRI films. Additionally, the jury did not have the benefit of any testimony from the spinal surgeon or from the radiologist who interpreted Tanner's September 2007 MRI.

In this case, Dr. Craig conceded that his opinion was dependent on the accuracy of Tanner's history. Our court has previously stated that "the presence or absence of pain, based on the *subjective* complaints of an individual, is not a subject for experts or skilled witnesses alone." *Waltrip v. Bilbon Corp.*, 38 S.W.3d 873, 882 (Tex. App.—Beaumont 2001, pet. denied). In this case, the jury could have been influenced by Dr. Craig's testimony that a herniated disk can have a number of different causes other than trauma, by Dr. Craig's reliance on Tanner's history, by the radiology report that showed no defect at L4-5, or by the absence of an objective medical test to establish the condition of Tanner's lumbar spine before the date the collision with Brown occurred. We conclude the jury was free to disregard the testimony of Dr. Craig and the testimony of Tanner tracing Tanner's back pain to the rear-end collision involving Brown. On this record, and in light of the disputed evidence relating to the severity of the impact of the trucks in the collision, we conclude that Dr. Craig's opinion tracing Tanner's herniated disk to the rear-end collision with Brown was not conclusive on the issue of causation. We overrule the City's argument that it established causation as a matter of law.

Additionally, after considering and weighing all of the evidence, we further conclude that the jury's verdict is not so contrary to the overwhelming weight and preponderance of the evidence that the jury's verdict is clearly wrong and unjust. While we might not have reached the same conclusion had we been sitting as jurors, we are not free on this record to disregard the jury's rejection of the City's theory that the accident

with Brown injured Tanner's back. Therefore, we also overrule the City's request for new trial.

We hold that the evidence admitted before the jury presented fact issues, the trial judge did not err in submitting the case to the jury, nor did the trial judge err in denying the City's motion for judgment notwithstanding the verdict. Having overruled issues one through four, we affirm the trial court's judgment.

AFFIRMED.

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HOLLIS HORTON
Justice

Submitted on August 15, 2011
Opinion Delivered September 29, 2011
Before Gaultney, Kreger, and Horton, JJ.