Affirmed and Opinion Filed January 8, 2018.

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-16-00639-CV

STACI BOWSER, Appellant
V.
CRAIG RANCH EMERGENCY HOSPITAL L.L.C., Appellee

On Appeal from the 401st Judicial District Court
Collin County, Texas
Trial Court Cause No. 401-00158-2012

MEMORANDUM OPINION

Before Justices Lang, Brown, and Whitehill
Opinion by Justice Lang

Staci Bowser appeals the trial court's judgment ordering that Bowser take nothing on her medical negligence claim under Chapter 74 of the Texas Civil Practice and Remedies Code against Craig Ranch Emergency Hospital L.L.C. d/b/a Emerus 24 Hour Emergency Room. In her sole issue on appeal, Bowser argues the trial court erred when it denied her objection to the jury charge. We conclude that, even if the trial court erred, Bowser has not shown that she was harmed by the alleged error. The trial court's final judgment is affirmed.

I. PROCEDURAL CONTEXT

In her fourth amended petition, Bowser alleged a claim for medical negligence against Craig Ranch. Generally, she claimed that a nurse gave her an injection in the wrong location for the deltoid muscle, resulting in a nerve injury that caused her to develop complex regional pain syndrome (CRPS). Bowser alleged that Craig Ranch breached its duty of care in six different

ways. Craig Ranch answered generally denying the claim and asserting several affirmative defenses.

The case was tried to a jury. After Bowser rested her case, Craig Ranch moved for a directed verdict on four of Bowser's allegations of medical negligence on the basis that there was no evidence of negligence or causation. The trial court granted the motion for directed verdict and the case proceeded on the two remaining allegations, i.e., Craig Ranch breached its duty of care to Bowser by (1) failing to use the correct location for injection into the deltoid muscle, and (2) failing to inject a safer muscle than the deltoid, that is, a muscle that posed a lower risk of injuring a nerve. Bowser submitted a proposed jury charge, which included five proposed instructions that added to the standard pattern jury charge instruction by defining what must be foreseeable under Texas law. She contended that this was necessary because the ultimate resulting diagnosis was different from the original injury. Also, during the charge conference, Bowser objected to the proximate cause instruction in the proposed jury charge, arguing:

> [T]he general pattern jury charge definition of foreseeability is not sufficient in this case because Texas law is such that only an injury or an inciting event must be foreseeable. And then the consequences that naturally proceed thereafter are also included, and without inclusion, something to that effect, [] it's confusing to the jury and misleading.

Then, Bowser specifically requested that the trial court use her second proposed instruction. The trial court overruled the objection and instructed the jury with the standard pattern jury instruction on proximate cause.

The trial court's jury charge defined "negligence" and "proximate cause" as follows:

> "Negligence," when used with respect to the conduct of Craig Ranch [], means failure to use ordinary care, that is failing to do what which an [sic] registered nurse of ordinary prudence would have done under the same or similar circumstances or doing that which an [sic] registered nurse of ordinary prudence would not have done under the same or similar circumstances.
>
> . . . .

> "Proximate cause," when used with respect to the conduct of Craig Ranch [], means a cause that was a substantial factor in bringing about an injury, and which case such injury would not have occurred. In order to be a proximate cause, the act or omission complained of must be such that an [sic] registered nurse exercising ordinary care would have foreseen that the injury, or some similar injury, might reasonably result therefrom. There may be more than one proximate cause of an injury.

The broad-form liability question submitted to the jury closely tracked the language suggested by the Texas Pattern Jury Charge in this type of case: "Did the negligence, if any, of Craig Ranch [] proximately cause the injury in question?"[1] *See* State Bar of Tex., Tex. Pattern Jury Charges: Negligence of Physician, Hosp., or Other Health Care Provider, PJC 51.3 (2016). The jury answered "No." The trial court signed a final judgment incorporating the directed verdict and the jury's verdict, and ordering that Bowser take nothing by her suit.

II. JURY CHARGE

In her sole issue on appeal, Bowser argues the trial court erred when it denied her objections to the jury charge. Assuming, but without deciding, that it was error for the trial court to deny Bowser's objection to the charge and incorporate her requested jury instruction on proximate cause, we consider whether that alleged error constituted harmful error. *See Thota v. Young*, 366 S.W.3d 678, 686 (Tex. 2012) (assuming error and deciding issue based on harmful error analysis). In her brief on appeal, Bowser claims that the *Casteel* presumed harm analysis applies and further argues the error was harmful under a traditional harm analysis. *See Crown Life Ins. v. Casteel*, 22 S.W.3d 378 (Tex. 2000).

[1] Although the Texas Pattern Jury Charges are not "law," they are heavily relied upon by bench and bar, and are based on what the State Bar Committee perceives the present law to be. *See Shelby Distributions, Inc. v. Reta*, 441 S.W.3d 715, 719–20 (Tex. App.—El Paso 2014, no pet.); *THI of Tex. at Lubbock I, LLC v. Perea*, 329 S.W.3d 548, 569 (Tex. App.—Amarillo 2010, pet. denied).

A. Applicable Law

Erroneous rulings require reversal only if a review of the record reveals the error was harmful. *See Sw. Energy Prod. Co. v. Berry-Helfand*, 491 S.W.3d 699, 728 (Tex. 2016). Texas Rule of Appellate Procedure 44.1(a) provides that:

> No judgment may be reversed on appeal on the ground that the trial court made an error of law unless the court of appeals concludes that the error complained of:
>
> (1) probably caused the rendition of an improper judgment; or
>
> (2) probably prevented the appellant from properly presenting the case to the court of appeals.

TEX. R. APP. P. 44.1(a)(1)–(2); *see also G & H Towing Co. v. Magee*, 347 S.W.3d 293, 297 (Tex. 2011) (per curiam) (applying harmless error rule to trial court error in granting summary judgment). The harmless error rule applies to all errors. *See Magee*, 347 S.W.3d at 297 (citing *Lorusso v. Members Mut. Ins.*, 603 S.W.2d 818, 819–20 (Tex. 1980)). It is the complaining party's burden to show harm on appeal. *See Ford Motor Co. v. Castillo*, 279 S.W.3d 656, 667 (Tex. 2009) (apply harm analysis to claim trial court abused its discretion in discovery ruling and noting it is complaining party's burden to show harm).

An incorrect jury instruction requires reversal only if it "was reasonably calculated to and probably did cause the rendition of an improper judgment." *See Bed, Bath & Beyond, Inc. v. Urista*, 211 S.W.3d 753, 757 (Tex. 2006). To determine whether the instruction probably caused an improper judgment, an appellate court examines the entire record. *See Urista*, 211 S.W.3d at 757. Charge error is generally considered harmful error if it relates to a contested, critical issue. *See Thota*, 366 S.W.3d at 687. However, generally, error in the submission of an issue is harmless when the findings of the jury in answer to other issues are sufficient to support the judgment. *See Texas & New Orleans RR. Co. v. McGinnis*, 109 S.W.2d 160, 163 (Tex. 1937); *Imagine Auto. Grp. v. Boardwalk Motor Cars, Ltd.*, 430 S.W.3d 620, 648 (Tex. App.—Dallas 2014, pet. denied); *see also Shupe v. Lingafelter*, 192 S.W.3d 577, 579 (Tex. 2006) (discussing

error in omission of issue). An exception to this rule exists when the charge error confuses the jury as to all of the issues or theories that are sufficient to support the judgment. *See Imagine Auto.*, 430 S.W.3d at 648.

In some cases, such as preserved *Casteel* error, harm may be presumed. *See Sw. Energy*, 491 S.W.3d at 728 (citing *Casteel*, 22 S.W.3d at 388–89). When a single broad-form liability question erroneously commingles valid and invalid theories and the appellant's objection is timely and specific, the error is harmful when it cannot be determined whether the improperly submitted theories formed the sole basis for the jury's finding. *See Thota*, 366 S.W.3d at 688; *Casteel*, 22 S.W.3d at 389. The *Casteel* presumed harm analysis also applies to a broad-form question that commingles valid and invalid elements of damages for which there is no evidence as well as a single broad-form proportionate responsibility question that includes a factually unsupported claim. *See Thota*, 366 S.W.3d at 688; *Romero v. KPH Consolidation, Inc.*, 166 S.W.3d 212, 226–27 (Tex. 2005); *Harris Cty. v. Smith*, 96 S.W.3d 230, 233–34 (Tex. 2002). However, when a broad-form question submits a single liability theory, e.g., negligence, to the jury, *Casteel*'s multiple-liability-theory analysis does not apply. *See Thota*, 366 S.W.3d at 688; *Urista*, 211 S.W.3d at 756–57.

B. Application of the Law to the Facts

First, we address whether *Casteel*'s presumed harm analysis should be applied to the contested jury charge as Bowser asserts in her reply brief. She contends that harm must be presumed because the single question presented to the jury combined the negligence issue and the proximate cause issue, so it is impossible to assess how the jury was affected by the erroneous proximate cause instruction.

To prevail on a healthcare liability or medical negligence claim, the plaintiff must prove: (1) the existence of a duty by the healthcare provider to act according to the applicable standard

of care; (2) a breach of the applicable standard of care; (3) an injury; and (4) a causal connection between the breach of care and the injury. *See Bowser v. Craig Ranch Hosp., LLC*, No. 05-14-00501-CV, 2015 WL 3946371, at *3 (Tex. App.—Dallas Jun. 29, 2015, no pet.); *Mitchell v. Baylor Med. Ctr.*, 109 S.W.3d 838, 841 (Tex. App.—Dallas 2003, no pet.); *see also* TEX. CIV. PRAC. & REM. CODE ANN. § 74.001(a)(13) (West 2017) (defining a healthcare liability claim); *Rio Grande Valley Vein Clinic, P.S. v. Guerrero*, 431 S.W.3d 64, 65 (Tex. 2014) (listing three elements). The Texas Supreme Court has specifically limited its holding in *Casteel* and its progeny to the submission of broad-form questions incorporating multiple theories of liability or multiple damage elements. *See Urista*, 211 S.W.3d at 757. When, as here, the broad form question submitted a single liability theory, i.e., a medical negligence claim, to the jury, *Casteel*'s multiple-liability-theory analysis does not apply. *See Urista*, 211 S.W.3d at 757. Because we conclude that *Casteel* does not control this case, we need not undertake the reversible error analysis applied in presumed harm cases, which requires a determination of whether the error "probably prevented [Bowser] from properly presenting the case to the court of appeals." *See* TEX. R. APP. P. 44.1(a)(2); *Urista*, 211 S.W.3d at 757.

We will apply the traditional harm analysis. *See* TEX. R. APP. P. 44.1(a)(a); *Urista*, 211 S.W.3d at 757. Under the traditional harm analysis, we review the entire record to see if the contested charge issue probably caused the rendition of an improper judgment. In her brief on appeal, Bowser argues the alleged error probably caused the rendition of an improper judgment because "it cannot be disputed that the existence and causation of CRPS was a contested, critical issue in the case" and charge error that relates to a contested critical issue is generally considered harmful. Craig Ranch responds that Bowser cannot show harmful error because the jury question included both the issues of negligence and proximate cause, and Bowser has not challenged on appeal the jury's refusal to find negligence.

A review of the record reveals at least two reasons why we cannot conclude the proximate cause instruction resulted in harm. First, as Craig Ranch argues, it is reasonable to conclude that Bowser failed to carry her burden of proof on the element of negligence. *See Imagine Auto.*, 430 S.W.3d at 648. Bowser does not assign error to the submission of the negligence instruction or the fact that the jury could have decided the case against her on the basis that there was no negligence. Further, negligence and proximate cause were defined separately, and the operative jury question asked the jury in one sentence whether they found Craig Ranch's conduct to be negligent and the proximate cause of the injury. Second, in her brief on appeal, Bowser concedes that while she contends she offered evidence at trial supporting a finding of negligence and proximate cause, Craig Ranch offered contrary evidence. The jury, as fact finder, is the sole judge of the credibility of the witnesses and the weight to be given to the evidence. *See Ashmore v. JMS Construction, Inc.*, No. 05-15-00537-CV, 2016 WL 7217256, at *9 (Tex. App.—Dallas Dec. 13, 2016, no pet.) (discussing sufficiency of the evidence). Accordingly, we conclude the jury could have chosen to weigh the evidence such that it found no negligence.

Assuming, without deciding, the trial court erred, we conclude that Bowser has not shown that she was harmed by that error. Issue one is decided against Bowser.

III. CONCLUSION

Even if the trial court erred, Bowser has not shown that she was harmed by the alleged error.

The trial court's final judgment is affirmed.

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/Douglas S. Lang/
DOUGLAS S. LANG
JUSTICE

Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

STACI BOWSER, Appellant

No. 05-16-00639-CV V.

CRAIG RANCH EMERGENCY HOSPITAL L.L.C., Appellee

On Appeal from the 401st Judicial District Court, Collin County, Texas
Trial Court Cause No. 401-00158-2012.
Opinion delivered by Justice Lang. Justices Brown and Whitehill participating.

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

It is **ORDERED** that appellee CRAIG RANCH EMERGENCY HOSPITAL L.L.C. recover its costs of this appeal from appellant STACI BOWSER.

Judgment entered this 8th day of January, 2018.