Opinion issued September 29, 2011.

In The

Court of Appeals

For The

First District of Texas

NO. 01-10-00650-CV

IRMA FAJARDO, Appellant

V.

TIBURCIO FUENTES D/B/A ERASMO JIMENEZ TRUCKING, Appellee

On Appeal from the 189th District Court
Harris County, Texas
Trial Court Case No. 2008-00791

MEMORANDUM OPINION

Appellant, Irma Fajardo, appeals from a judgment rendered upon a jury verdict against appellee, Tiburcio Fuentes, awarding appellant $16,400 in actual damages for injuries incurred in an automobile accident. Fajardo challenges the factual sufficiency of the evidence supporting the awarded damages. We affirm.

BACKGROUND

On March 23, 2007, Fajardo was a passenger in a vehicle that collided with a dump truck driven by Fuentes. In November 2009, a jury found Fuentes to have been negligent and awarded Fajardo $16,400 in damages: $14,000 for past medical expenses and $2,400 for past loss of earning capacity. The jury did not award money for any other category of damages on which it was charged, i.e., future medical expenses or loss of earning capacity; past or future physical impairment, physical pain and mental anguish, or disfigurement.

After denying Fajardo's motion requesting a new trial because the awarded damages were too low in light of the evidence, the trial court rendered judgment on the jury's verdict.

Fajardo appealed.

SUFFICIENCY OF THE EVIDENCE

In two issues, Fajardo argues on appeal that the evidence is factually insufficient to support the jury's award of (1) zero damages for past disfigurement, and (2) only $14,000 for past medical expenses.

A. Standard of Review

When a party attacks the factual sufficiency of an adverse finding on an issue on which it has the burden of proof, it must demonstrate on appeal that the adverse finding is against the great weight and preponderance of the evidence.

Dow Chem. Co. v. Francis, 46 S.W.3d 237, 242 (Tex. 2001); *Urista v. Bed, Bath, & Beyond, Inc.*, 245 S.W.3d 591, 601 (Tex. App.—Houston [1st Dist.] 2007, no pet.). A reviewing court must consider and weigh all of the evidence and can set aside a verdict only if the evidence is so weak or the finding is so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. *Dow Chem Co.*, 46 S.W.3d at 242.

Jury findings must be accorded great deference. *Herbert v. Herbert*, 754 S.W.2d 141, 143 (Tex. 1988). The fact finder is the sole judge of witnesses' credibility and the weight given their testimony, and the fact finder may choose to believe one witness over another. *Golden Eagle Archery, Inc. v. Jackson*, 116 S.W.3d 757, 761 (Tex. 2003). Because it is the fact finder's province to resolve conflicting evidence, we assume that the fact finder resolved all evidentiary conflicts in accordance with its decision if a reasonable minds could have done so. *City of Keller v. Wilson*, 168 S.W.3d 802, 819 (Tex. 2005). An appellate court may not impose its own opinion to the contrary of the fact finder's implicit credibility determinations. *Id.*

B. Disfigurement

In her first issue, Fajardo argues that the evidence was factually insufficient to support an award of zero damages for past disfigurement. Specifically, she

contends that undisputed evidence of bruising mandates some award of damages for past disfigurement.

1. Applicable Law

"Disfigurement has been defined as that which impairs or injures the beauty, symmetry, or appearance of a person or thing; that which renders unsightly, misshapen or imperfect, or deforms in some manner." *Goldman v. Torres*, 341 S.W.2d 154, 160 (Tex. 1960); *Doctor v. Pardue*, 186 S.W.3d 4, 18 (Tex. App.—Houston [1st Dist.] 2006, pet. denied). "[W]hether to award damages and how much is uniquely within the factfinder's discretion." *Golden Eagle Archery, Inc.*, 116 S.W.3d at 772. "The amount[] of damages awarded for . . . disfigurement [is] necessarily speculative and each case must be judged on its own facts." *Figueroa v. Davis*, 318 S.W.3d 53, 62 (Tex. App.—Houston [1st Dist.] 2010, no pet.) (quoting *Pentes Design, Inc. v. Perez*, 840 S.W.2d 75, 80 (Tex. App.—Corpus Christi 1992, writ denied)).

2. Application

Fajardo sustained abdominal bruising and swelling from contact with her seat belt during the accident. This bruising was referenced in the hospital records from her visit immediately after the accident, and the jury was shown pictures of the bruising taken a few days after the accident. According to Fajardo, the "jury is not free to disregard objective evidence, such as the obvious bruising that resulted

from the collision." Because she established damages as a matter of law, she asserts, the jury was not at liberty to award zero damages, and the judgment is thus so against the great weight and preponderance of the evidence as to be manifestly unjust. *See Lowery v. Berry*, 269 S.W.2d 795, 796–97 (Tex. 1954) (new trial required when undisputed evidence showed serious injury to child—including multiple skull fractures and severely torn skin and tissue—but jury awarded no damages).

In response, Fuentes argues that this kind of bruising "is not evidence supporting, much less requiring, an award of disfigurement damages." Pointing out that an "essential element of [a] claim for disfigurement is embarrassment," she contends that Fajardo's bruising falls far short of the type of injury that would require an award of past disfigurement damages. Fuentes acknowledges that bruising might be relevant to whether Fajardo sustained past pain and suffering, but notes that Fajardo has not appealed the jury's failure to award pain and suffering damages.

We agree with Fuentes and hold that the jury's award of zero dollars in disfigurement damages for her abdominal bruises is not against the great weight and preponderance of the evidence. The three cases Fajardo cites in support of her argument that disfigurement damages are mandatory are distinguishable. She first cites our opinion in *Doctor v. Pardue*, a case in which the plaintiff was rendered a

quadriplegic in an airplane crash. 186 S.W.3d at 4. While recognizing the considerable discretion afforded to juries, *id.* at 17, we concluded that the evidence of the plaintiff's substantial injuries was so overwhelming that the jury's failure to award various non-economic damages—including past disfigurement—was against the great weight and preponderance of the evidence. *Id.* at 20–21. Fajardo's bruising is clearly not analogous to the plaintiff's injuries in *Pardue*.

The other two cases Fajardo cites do not hold that past disfigurement damages must be awarded when evidence of injury is presented; rather, in both cases the courts upheld a jury's award of past disfigurement damages as supported by sufficient evidence. *See Transit Mgmt. Co. of Laredo v. Sanchez*, 886 S.W.2d 823, 826 (Tex. App.—San Antonio 1994, no writ) (affirming jury's award of past disfigurement damages when a hydraulic hose burst and hydraulic fluid burned and discolored the plaintiff's face); *Hopkins Cnty. Hosp. Dist. v. Allen*, 760 S.W.2d 341, 344–45 (Tex. App.—Texarkana 1988, no writ) (affirming jury's award of future disfigurement damages when a surgical procedure necessitated by the defendant's negligence left a long scar along the plaintiff's abdomen).

Whether bruising such as Fajardo's requires compensation for past disfigurement falls within the province of the jury in accordance with its discretion. *See Figueroa*, 318 S.W.3d at 62*; Golden Eagle Archery, Inc.*, 116 S.W.3d at 772.

The jury's decision to award zero damages for past disfigurement was not against the great weight and preponderance of the evidence. We overrule Fajardo's first issue.

C. Past Medical Expenses

In her second issue, Fajardo contends that the evidence is factually insufficient to support an award of only $14,000 for past medical expenses.

1. Applicable law

To recover medical expenses, a claimant must prove that the charges incurred were reasonable and necessary. *Nat'l Union Fire Ins. Co. v. Wyar*, 821 S.W.2d 291, 297 (Tex. App.—Houston [1st Dist.] 1991, no writ). A jury may conclude, even when an objective injury is shown, that the injury is attributable to factors other than a defendant's negligence. *See McDonald v. Dankworth*, 212 S.W.3d 336, 348 (Tex. App.—Austin 2006, no pet.). Thus, "proof of a causal nexus between the event sued upon and the damages claimed is required." *Jackson v. Gutierrez*, 77 S.W.3d 898, 902 (Tex. App.—Houston [14th Dist.] 2002, no pet.); *see also Morgan v. Compugraphic Corp.*, 675 S.W.2d 729, 732 (Tex. 1984) ("Proving that the event sued upon caused the plaintiff's alleged injuries is part and parcel of proving the amount of damages to which the plaintiff is entitled.").

The jury generally has discretion to award damages within the range of evidence presented at trial. *Gulf States Utils., Co. v. Low*, 79 S.W.3d 561, 566

(Tex. 2002). We will not disregard the jury's damages finding merely because "the jury's reasoning in arriving at its figures may be unclear." *First State Bank v. Keilman*, 851 S.W.2d 914, 930 (Tex. App.—Austin 1993, writ denied). "A jury may not, however, arbitrarily assess an amount neither authorized nor supported by the evidence presented at trial." *Id*. "In other words, a jury may not 'pull figures out of a hat'; a rational basis for calculation must exist." *Id.* (quoting *Neiman-Marcus Group, Inc. v. Dworkin*, 919 F.2d 368, 372 (5th Cir. 1990)). "A jury's finding [on damages] may be disregarded if the amount 'was not the result of conscientious conviction in the minds of the jury and the court.'" *Id.* at 930–31 (quoting *Mills v. Jackson*, 711 S.W.2d 427, 431 (Tex. App.—Fort Worth 1986, no writ)).

2. Application

Fajardo requested that she be awarded $52,420.52, in past medical expenses, which is the total of her doctor's visits, diagnostic tests, and therapy from fifteen different providers. Arguing that Fajardo was inappropriately overtreated for her alleged soft tissue injuries, Fuentes asked the jury to award in past medical expenses only $5,200, which represents (1) Fajardo's emergency room bill following the accident, (2) visits with her first doctor for the first year after the accident, and (3) about half of her physical therapy bills. The jury awarded $14,000 in past medical expenses.

At trial, Fuentes presented evidence that Fajardo was involved in another collision in October 2006, just six months before the March 2007 collision. Medical records from two doctors indicated that Fajardo may have suffered neck and back injuries in the earlier October 2006 accident.

Testimony and medical records were introduced at trial from three physicians who disagreed among themselves about the extent of Fajardo's back injuries. Each also proffered different opinions about the cause of any injuries and the appropriate treatment. For example, after the accident, Fajardo's first treating physician noted that her sensory and motor exams were normal at each of eleven visits and—after reviewing MRI and EMG studies indicating that the foramen in the vertebral space where nerves exit the spine had gotten smaller to the point of creating pressure on the nerve—did not recommend surgery on Fajardo's back or neck. Her next doctor, based on his own sensory and motor exams and reviews of the same MRI and EMG studies, opined that Fajardo had a tear in the annulus of one lumbar disc and some tearing and bulging of an adjacent lumbar disc, for which he recommended surgery.

Defendant's expert neurosurgeon also examined Fajardo and reviewed her medical records. He concluded there is "no objective evidence to support any of her subjective complaints because there was no significant abnormality in the studies done on her body that would have caused her complaints and her lack of

response to treatments." He disagreed, from his interpretation of her records, that she had a tear in her disc and opined that she did not need surgery. Although he identified a bulge in a lumbar disc, he concluded it was not caused by the accident.

The jury heard medical evidence that ranged from testimony at one end of the spectrum that Fajardo needed 50-60 chiropractic visits, several procedures including epidural steroid injections, a discogram and back surgery, to testimony on opposite end of the spectrum that that most of Fajardo's chiropractic visits were unnecessary, that she did not meet the medical criteria for the procedures that were performed on her, and that she did not need surgery.

There was further conflicting evidence as to the reasonableness of the medical charges introduced. Fajardo's medical expert testified that all $52,420.52 she requested in past medical expenses were reasonable and necessary. Fuentes's medical expert testified that Fajardo was charged more than what was reasonable for some medical services, and that other charges were for wholly unnecessary medical services.

The $14,000 in past medical damages awarded falls within the range of evidence presented at trial and that evidence provided a rational basis by which the jury could have reached its past damages award. *See, e.g.*, *Houge v. Kroger Store No. 107*, 875 S.W.2d 477, 481–82 (Tex. App.—Houston [1st Dist.] 1994, writ denied) (jury's award of $10,884.70 in past medical damages when actual medical

expenses exceeded $38,000.00 was supported by factually sufficient evidence because a reasonable jury could believe that plaintiff's injuries were not fully attributable to accident in defendant's store); *see also Enright v. Goodman Distribution, Inc.*, 330 S.W.3d 392, 403 (Tex. App.—Houston [14th Dist.] 2010, no pet.) (jury's award of $15,199.00 in past medical expenses when actual medical expenses were $106,927.52 was supported by factually sufficient evidence in light of physician's testimony that accident was not cause of plaintiff's entire injury and that much of his treatments and surgery were medically unnecessary) ; *Wagner v. Taylor*, 867 S.W.2d 404, 405 (Tex. App.—Texarkana 1993, no pet.) (jury's award of $1,000 in past medical expenses when actual medical expenses were $2,968.53 was supported by factually sufficient evidence because jury was entitled to assess evidence and witness credibility in determining what amount of medical expense was necessary and fairly attributable to accident).

The jury's award $14,000 in damages for past medical expenses was not against the great weight and preponderance of the evidence. We overrule Fajardo's second issue.

CONCLUSION

We affirm the trial court's judgment.

Sherry Radack
Chief Justice

Panel consists of Chief Justice Radack and Justices Bland and Huddle.