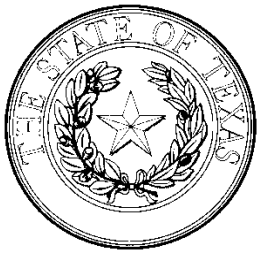
Opinion issued February 16, 2012.



In The

Court of Appeals

For The

First District of Texas

NO. 01-10-00811-CV

JAMES G. BOWMAN, Appellant

V.

MITULKUMAR PATEL, Appellee

On Appeal from the 127nd District Court
Harris County, Texas
Trial Court Case No. 08CV21953

MEMORANDUM OPINION

In a negligence action, a jury found appellant, James G. Bowman, to have caused a two car accident with appellee, Mitulkumar Patel. The jury awarded Patel

$3,000 for past physical pain, $6,032 for past medical care, and $5,000 for past mental anguish. In four issues, Bowman challenges the trial court's judgment, contending that (1) there was legally and factually insufficient evidence to support an award for past mental anguish; (2) the trial court wrongfully excluded evidence of Patel's work record; (3) opposing counsel presented an improper jury argument regarding attorney's fees; and (4) if no single error warrants a new trial, the cumulative effect of these errors does. We reverse and render in part and reverse and remand in part.

BACKGROUND

Patel filed suit in Harris County, Texas alleging that Bowman was negligent and that his acts were the proximate cause of a car accident between the two drivers. At trial, Patel testified about the accident and Bowman's involvement in the rear-end collision. Bowman also testified, conceding that he caused the accident. After the accident, Patel was taken to Montgomery County Medical Center by EMS, where he was treated for neck and back pain, and then released later the same day. Patel was given a prescription and also received treatments from a chiropractor for his neck and back pain. However, Patel never followed up with a specialist or any other medical doctor, and never underwent surgery for his injuries.

After closing arguments, the jury returned a verdict in favor of Patel. Bowman then filed a motion for a new trial concerning, among other things, the award for mental anguish, the exclusion of evidence of Patel's work history, and Patel's closing argument referencing attorney's fees. The motion was denied, and this appeal followed.

SUFFICIENCY OF THE EVIDENCE

In his first issue, Bowman contends the evidence presented at trial was legally and/or factually insufficient to show past mental anguish. Bowman argues Patel offered nothing during his testimony to show mental anguish, and that the record contains no evidence of past mental pain or distress.

Standard of Review

An award of compensatory damages for mental anguish will survive a legal sufficiency challenge if the record contains direct evidence of the nature, duration, and severity of the plaintiff's mental anguish, thus establishing a substantial disruption in the plaintiff's routine. *Parkway Co. v. Woodruff,* 901 S.W.2d 434, 444 (Tex. 1995). If claimants fail to present direct evidence of the nature, duration, and severity of their anguish, the appellate court conducts a traditional no-evidence review. *Id.* In this review, the court determines whether the record contains any evidence of a high degree of mental pain and distress that is more than mere worry, anxiety, vexation, embarrassment, or anger. *Id.* We note, however, that the absence

of evidence of the nature, duration, and severity of mental anguish, particularly when it can be readily supplied or procured by the plaintiff, justifies close judicial scrutiny of other evidence offered on this element of damages. *Id.* A plaintiff may recover for mental anguish after providing evidence of "a mental sensation of pain resulting from such painful emotions as grief, severe disappointment, indignation, wounded pride, shame, despair or public humiliation or a combination of any of these." *Wal–Mart Stores, Inc. v. Odem,* 929 S.W.2d 513, 528 (Tex. App.—San Antonio 1996, writ denied). However, evidence that a plaintiff "was unable to sleep, was depressed, and suffered from anxiety . . . does not rise to the level of compensable mental anguish as defined by Texas law." *Lefton v. Griffith,* 136 S.W.3d 271, 279 (Tex. App.—San Antonio 2004, no pet.) (citation and quotations omitted); *see also Saenz v. Fid. & Guar. Ins. Underwriters,* 925 S.W.2d 607, 614 (Tex. 1996) (explaining that, though plaintiff's concerns were both "real" and "understandable," they were not compensable under Texas law).

Evidence of Mental Anguish

Bowman contends Patel offered no evidence to support his claim for mental anguish. He claims Patel presented only evidence of physical suffering, but not of mental or emotional distress. However, Patel insists his continuous headaches and lack of concentration, which affected his work, are proof of his mental anguish.

Here, Patel presented evidence only to his physical pain, and the record is absent of any direct evidence to the nature, duration, and severity of his mental anguish. Patel testified to continuous headaches, in addition to his back and neck pains. He complained the headaches affected his concentration, and that he could not work. All of his physical ailments, with the exception of occasional headaches, had resolved by the time of trial. Patel provided no testimony regarding the emotional effects of his injury. He never saw a psychiatrist or psychologist.

Because the jury provided separate awards for physical pain and mental anguish, evidence of Patel's physical pain is not relevant to an award for mental anguish. *See Rice Food Mkts., Inc. v. Williams*, 47 S.W.3d 734, 739 (Tex. App.—Houston [1st Dist.] 2001, pet. denied). Patel merely provided a conclusory statement that he claimed mental anguish, which is not sufficient to recover damages. *See Gunn Infiniti, Inc. v. O'Byrne*, 996 S.W.2d 854, 861 (Tex. 1999); *Jackson v. Gutierrez*, 77 S.W.3d at 898, 903 (Tex. App.—Houston [14th Dist. 2002, no pet.). This type of evidence does not display the high degree of mental pain or distress required to recover damages for mental anguish. *See Tex. Mut. Ins. Co. v. Ruttinger*, 265 S.W.3d 651, 672 (Tex. App.—Houston [1st Dist.] 2008), *rev'd on other grounds*, ___S.W.3d.___ (Tex. 2011).

While the record was silent on the nature, duration and severity of Patel's mental anguish, it did contain evidence showing a lack of mental suffering. Patel's

medical records, provided in both Bowman's and Patel's exhibits, show he displayed "normal behavior," "no obvious distress," and "no evidence of depression, excessive anxiety, or agitation."

Because the record does not contain any evidence showing a high degree of mental pain that is "more than mere worry, anxiety, vexation, embarrassment, or anger" to support an award of mental anguish damages, we sustain Bowman's first issue. *See Parkway Co.*, 901 S.W.2d at 444.

EXCLUSION OF EMPLOYMENT EVIDENCE

In Bowman's second point of error, he argues the trial court improperly excluded an Affidavit of No Record[1] from "Palace Hotel." Bowman claimed this evidence was needed to contradict Patel's testimony and that it directly relates to Patel's credibility as the sole witness for his claims. The trial court, however, excluded the evidence of Patel's work history because Patel had dropped his claim for lost wages.

[1] In response to a discovery request from Bowman regarding Patel's employment, the Palace Hotel provided an affidavit, which stated in part:

> "Patel is a friend and had some family issues so I was helping him and his wife provide accommodation and if he help me to work motel desk clerk duty for which I paid $1800.00 in cash from Feb 06 to Sept 06."

Preservation of Error

Patel argues Bowman failed to preserve his complaint concerning excluded employment record. Because this issue goes towards preservation of error, we address it first.

An error may not be predicated upon a ruling which excludes evidence unless a substantial right of the party is affected, and the substance of the evidence was made known to the trial court by offer of proof, or it was apparent. TEX. R. EVID. 103(a)(2). An offer of proof may be in the form of concise statement by counsel or in question-and-answer form. *See Chance v. Chance*, 911 S.W.2d 40, 51–52 (Tex. App.—Beaumont 1995, writ denied). It is not required that the offer of proof show what specific facts the examination would reveal, but the appellant must clearly inform the trial court of the subject matter about which it wants to examine the witness. *Fletcher v. Minn. Mining & Mfg. Co.*, 57 S.W.3d 602, 610-11 (Tex. App.—Houston [1st Dist.] 2001, pet. denied).

Here, Bowman offered proof to the court through a concise statement concerning the employment records around the time of the accident. Bowman was not requested, nor required to provide proof through a question-and-answer form. *See* TEX. R. EVID. 103(b). Bowman provided a summary of the substance of the affidavit excluded, and furthermore submitted the exhibit to be reviewed by this Court. Bowman successfully described the subject matter desired from the

witness—his employment history—and thus error was preserved. *See Fletcher*, 57 S.W.3d at 610–11.

Harm

Patel, however, argues that error, if any, in excluding the evidence was harmless. We agree. To obtain reversal of a judgment based upon error of the trial court in the exclusion of evidence, the following must be shown: "(1) that the trial court did in fact commit error; and (2) that the error was reasonably calculated to cause and probably did cause rendition of an improper judgment." *Gee v. Liberty Mut. Fire Ins. Co.*, 765 S.W.2d 394, 396 (Tex. 1989). It is not necessary for the complaining party to show "but for" the exclusion of evidence a different judgment would have resulted, instead it is only required that the exclusion probably resulted in an improper judgment. *McCraw v. Maris*, 828 S.W.2d 756, 758 (Tex. 1992). An error in the exclusion of evidence requires reversal if it is both controlling on a material issue and not cumulative. *Mentis v. Barnard*, 870 S.W.2d 14, 16 (Tex. 1994). Thus, we review the entire record to determine whether the evidence excluded was controlling to the judgment. *Gee*, 765 S.W.2d at 396.

Here, the affidavit of no record, if relevant, went to the issue of mental anguish. *See Parkway Co.*, 901 S.W.2d at 444 (stating that to show mental anguish a plaintiff must show, among other things, "a substantial disruption in [his] daily routine"). The lack of employment would go to the issue of whether Patel's daily

routine was disrupted by the accident. However, this Court has held that no mental anguish was proved as a matter of law. Thus, Patel's damages for mental anguish are not a material issue in this case. Thus, error, if any, in not allowing Bowman to impeach Patel with the affidavit regarding his employment, is harmless. *See Gulf Liquids New River Project, LLC v. Gulsby Eng'g, Inc.*, No. 01-08-00311-CV, 2011 WL 662672, *20 (Tex. App.—Houston [1st Dist.] Feb. 7, 2011, no pet. h.) (holding erroneous exclusion of evidence harmless when appellate court affirmed disregarding jury findings to which excluded evidence would have been relevant.).

Therefore, we overrule Bowman's second issue.

ATTORNEY'S FEES

In his third issue, Bowman argues that Patel improperly referenced attorney's fees during his closing argument. Bowman claims this argument was incurable and warrants a new trial.

During closing arguments, Patel's counsel argued regarding the appropriate amount of damages he felt would be appropriate. In doing so, counsel stated, "And believe it or not, the lawyer is actually going to get something, ladies and gentlemen." This argument violated a motion in limine, which restricted any reference to attorney's fees. After counsel made the argument, the trial court interjected, an off-the record bench conference was held, and counsel never returned to the issue of attorney's fees. Bowman never objected to the argument.

In general, a complaint concerning an improper jury argument is preserved through a timely objection and a ruling by the trial court. TEX. R. APP. P. 33.1(a). However, a complaint of an incurable argument may be asserted and preserved in a motion for a new trial, even without a complaint and ruling during trial. *Phillips v. Bramlett*, 288 S.W.3d 876, 883 (Tex. 2009). These instances are rare, and to prevail a party must show that the argument "by its nature, degree, and extent constituted such an error that an instruction from the court or retraction of the argument could not remove its effects." *Living Ctrs. of Tex., Inc. v. Penalver*, 256 S.W.3d 678, 680-81 (Tex. 2008). The complaining party must show the argument was so extreme that a "juror of ordinary intelligence could have been persuaded by that argument to agree to a verdict contrary to that which he would have agreed but for such argument." *Austin v. Weems*, 337 S.W.3d 415, 428 (Tex. App.—Houston [1st Dist.] 2011, no pet.) (quoting *Phillips*, 288 S.W.3d at 883).

Bowman failed to timely object and seek a ruling from the trial court, and thus did not properly preserve the complaint. In addition, the jury argument concerning attorney's fees by its "nature, degree, and extent" was not incurable by a retraction of the statement or instructions from the court. *See Penalver*, 256 S.W.3d at 680-81. The jury charge instructed the jurors to disregard the issue of attorney's fees. Thus, we concluded that the statement was not so extreme as to cause "a juror of ordinary intelligence" to be persuaded to find a verdict contrary to

what he or she would have reached before the argument. *See Austin*, 337 S.W.3d at 428.

Therefore, we overrule Bowman's third point of error.

CUMULATIVE ERROR

In his fourth issue, Bowman argues that he is entitled to a new trial because of the cumulative effect of the numerous errors by the trial court. It is true that "[a] reviewing court may reverse a lower-court judgment under the cumulative-error doctrine when the record shows a number of instances of error, "'no one instance being sufficient to call for reversal, yet all the instances taken together may do so.'" *Univ. of Tex. at Austin v. Hinton*, 822 S.W.2d 197, 205 (Tex. App.—Austin 1991, no writ) (quoting *Sproles Motor Freight Lines, Inc. v. Long*, 168 S.W.2d 642, 645 (Tex. 1943)). However, to show cumulative error, an appellant must shows that, based on the record as a whole, but for the alleged errors, the jury would have rendered a verdict favorable to it. *See Town E. Ford Sales, Inc. v. Gray*, 730 S.W.2d 796, 810 (Tex. App.—Dallas 1987, no writ).

In this case, we have found one instance of reversible error relating to Patel's mental anguish claim, upon which we reverse and render a take nothing judgment. Bowman does not show how the record as a whole show that the remaining alleged errors would have caused the jury to render a verdict in his favor.

We overrule point of error four.

CONCLUSION

We reverse the judgment awarding damages for past mental anguish and render judgment that Patel take nothing on that claim. We affirm the remaining portions of the judgment.

Sherry Radack
Chief Justice

Panel consists of Chief Justice Radack and Justices Higley and Brown.