

**Affirmed and Memorandum Opinion filed February 11, 2016.**



**In The**

**Fourteenth Court of Appeals**

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**NO. 14-14-00411-CV**

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**PAMELA WALKER, Appellant**

**V.**

**SUZANNE SCOPEL AND JUSTIN SCOPEL, Appellees**

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**On Appeal from the 268th District Court  
Fort Bend County, Texas  
Trial Court Cause No. 12-DCV-200283**

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**M E M O R A N D U M    O P I N I O N**

Appellant Pamela Walker appeals from a take nothing judgment entered in favor of appellee Justin Scopel following the trial of an automobile accident case involving a rear-end collision.<sup>1</sup> In two issues, Walker argues that: (1) the trial court erred in admitting photographs of her vehicle taken by Scopel after the accident

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<sup>1</sup> Because Walker non-suited her claims against Suzanne Scopel at trial, Suzanne is not a party to the appeal.

and (2) the jury was not permitted to award zero damages based on the evidence presented at trial. We affirm.

## **BACKGROUND**

The accident at issue occurred when Scopel rear-ended Walker while driving to work on January 5, 2012. According to Scopel, he was stopped behind Walker's vehicle when he let his foot off the brake and hit her from behind. Scopel estimated that he was traveling between 3 and 7 miles per hour at the time of the collision. Walker called 9-1-1 and left the scene via ambulance. Walker claims that as a result of the accident, she experiences neck and back pain. At trial, Walker asked the jury to award her damages for past and future physical pain, mental anguish, and physical impairment.

Although Scopel conceded that he caused the accident, he disputed Walker's damages. Scopel's theory of the case was that Walker's injuries were the result of a preexisting condition. He presented photographs depicting the minor damage to Walker's vehicle and described the accident as a "bump." After hearing testimony from Scopel, Walker's treating physicians, Walker, and her husband, the jury awarded Walker zero damages. Walker appeals.

## **ISSUES AND ANALYSIS**

### **I. Jury's Award of Zero Damages**

In her second issue, Walker argues that the jury was not at liberty to award zero damages for her past and future physical pain, mental anguish, and physical impairment because she presented "ample evidence" that she suffered "some amount of damages" as a result of the collision with Scopel. We disagree.

#### **A. Standard of Review**

A jury's finding on damages cannot be set aside unless such findings are so

against the overwhelming weight and preponderance of the evidence as to be clearly wrong and manifestly unjust. *Thompson v. Mercantile Thrift Stores, Inc.*, 650 S.W.2d 120, 122 (Tex. App.—Houston [14th Dist.] 1983, no writ). When there are substantially undisputed objective symptoms of injury, a jury cannot ignore the undisputed facts and arbitrarily deny any recovery. *Szmalec v. Madro*, 650 S.W.2d 514, 517 (Tex. App.—Houston [14th Dist.] 1983, writ ref'd n.r.e.). However, when a party alleges injuries which are primarily of a subjective nature, and there is no directly observable or objective evidence that an injury has occurred, a fact issue is created which must be determined solely by the jury. *Id.* It is exclusively within the province of the jury to determine the credibility of the witnesses and the weight to be given their testimony. *Id.*

### **B. Testimony at Trial**

At trial, the jury heard testimony about Walker's injuries from Walker's chiropractor, Dr. Roberto Solis; Walker's physical therapist, Renee Blalock; Walker's husband; and Walker herself. Dr. Solis testified that he first met Walker in August 2012, about eight months after the accident at issue. He stated that he treated Walker 36 times between August and February 2013, but her symptoms only changed mildly during that time. Dr. Solis stated that at her first appointment, Walker complained of severe radiating neck pain and low back pain. Dr. Solis testified that he conducted several objective, orthopedic tests that were positive for inflamed joints, neck pain, and low back pain. Solis stated that Walker's MRI indicated a three millimeter bone spur and a one millimeter disk bulge. Dr. Solis described additional findings but noted that these were the result of degeneration or were preexisting conditions. He testified that in his opinion, the disk bulge was not consistent with degeneration or a preexisting condition and that such injuries were "usually due to some kind of trauma."

However, Solis testified that he was aware that Walker was involved in a car accident in 2011. When asked if he could say whether the bulges resulted from the 2012 wreck with Scopel, Solis stated that “it is very difficult to age the tearing of a disk” and that Walker indicated to him that she had pain following both accidents. According to Solis, if a person has a torn disk, “every single accident [they] have will cause increased trauma to those particular areas. It basically is like pouring more fuel on the fire.”

Dr. Solis then reviewed Walker’s intake forms and acknowledged that she reported “constant pain in neck, shoulder.” He also testified that where the form asked if the patient had experienced this concern before, Walker wrote: “car accident, June 2011.” Dr. Solis also acknowledged that he never referred Walker to an orthopedic specialist or a neurologist. Finally, on cross-examination, Dr. Solis stated that he could not say whether the conditions he observed in Walker’s MRI resulted from the 2011 or 2012 wreck.

The jury then heard testimony from Walker’s physical therapist, Renee Blalock. Blalock stated that she first saw Walker on January 18, 2012, after Walker’s physician referred her with a diagnosis of a lumbar strain. Blalock testified that Walker came in for therapy about twice a week until her last visit on February 29, 2012. During her initial assessment, Blalock noted the following: deficits in Walker’s flexibility, balance, and lower spine; weakness in her lower extremity, core, and spinal muscles; and pain, tenderness and a limited range of motion in her lower back.

Blalock testified that initially, Walker’s therapy was “a little rough” but she ultimately saw improvement in Walker’s lower back. She stated that Walker continued to have pain in her traps in her left shoulder and experienced a muscle spasm during one visit. Blalock testified that she did not think Walker was faking

her symptoms because she is trained to look for signs of malingering but did not observe any in Walker's case. Blalock described Walker's overall condition as "fair" and testified that Walker was doing better by her final visit with no increase in pain.

Walker's husband, Sergeant Gregory Walker, also testified about her condition. He stated that before the accident with Scopel, Walker was very active and enjoyed exercising, biking, and playing volleyball with their daughter. Gregory testified that he has to help his wife around the house more, and they can no longer go on trips because she cannot sit in the car for long periods of time. He noted that his wife's relationships with their children have become "tough" because she can no longer attend their extracurricular events. Gregory testified that his wife uses a TENS unit to help relieve tightness in her muscles, and wears a neck cushion to help with her discomfort. He stated that she has also had some injections. Finally, Gregory noted that his wife's condition has somewhat improved since the accident.

Walker testified last. She described the accident with Scopel, stating that the impact was so hard that her neck snapped, her back popped, and she could not feel her legs. She testified that she got out of her vehicle, called 9-1-1, and left the scene in an ambulance. Walker stated that at the emergency room, she had a CAT scan that revealed a "bad sprain and spasm." Later, Walker visited her primary doctor, who referred her to Blalock after she complained of neck and back pain.

Walker then testified about her prior injuries. She stated that in 2008 she had some problems with her rotator cuff and arm, so she visited a specialist and received one injection. Walker testified that in 2009 she experienced some tingling in her body and legs after the death of a relative, and her doctor referred her to a neurologist. She estimated that she saw the neurologist twice and stated that the doctor attributed the tingling to nerves. Walker also stated that she was involved in

a hit-and-run accident in June 2011. She testified that she was “swiped” by another vehicle and her car was totaled. Walker stated that her left arm was “jerked” in the collision and she had a large bruise on her hand. She initially testified that she did not have any neck or back problems after the June 2011 accident. Walker stated that she saw a doctor on the day of the accident, but she did not receive physical therapy or visit a chiropractor or a neurologist.

Regarding the accident at issue, Walker stated that she stopped physical therapy because her primary doctor wanted her to see a spine specialist. She visited the specialist, who examined Walker and recommended that she see a chiropractor or an acupuncturist. Walker testified that her acupuncturist and Dr. Solis, the chiropractor, were in the same group. She stated that each time she saw the acupuncturist, she also saw Dr. Solis. Walker testified that she stopped seeing Dr. Solis in February 2013 because her primary doctor recommended that she see a new pain specialist. According to Walker, the pain specialist gave her some injections so that she could tolerate a car ride to her son’s basketball game. Walker stated that she received eight injections every six months. She testified that the injections gave her relief for about a month, but then the pain and spasms returned. Walker stated that she was unaware of any degenerative changes in her back until she had the MRI in March 2013. She testified that prior to this accident, she had not experienced this type of pain.

On cross-examination, Walker admitted that she was transported to the hospital via ambulance at her request. According to Walker, the emergency room doctors did not inform her that the issues she had at the C4 and C5 level were due to degeneration. She stated that she was diagnosed with a sprain and a spasm and was at the hospital for approximately three hours. She acknowledged that she had been taking muscle relaxers at the time of the collision but stated that they were

prescribed for TMJ. Regarding the June 2011 accident, Walker again testified that she did not have any neck or back problems as a result. However, Scopel presented an email Walker wrote to her primary doctor dated June 30, 2011, which stated:

Good morning,

I was in a hit/run car accident last week and in need of a physical therapist. Would you please schedule me with one? I injured my left hand however; my neck and back are beginning to hurt. Thanks!

Walker would not admit that this email was inconsistent with her statements that she only injured her hand in the June 2011 accident. When asked whether she also requested physical therapy after the accident with Scopel, Walker stated, “No. I did not.” Scopel again confronted Walker with contradictory evidence—her physician’s notes stating “[s]he would like to do therapy.” When pressed, Walker testified that she only said she wanted therapy after her doctor recommended it.

Scopel also asked Walker about medical records from April 2012, after Walker had completed therapy with Blalock. At that time, Walker wrote that her neck and lower back pain were improving, but her left shoulder pain was getting worse. The records reported that her chief complaint at that time was back pain, but also noted pain in her left arm that had persisted for 4-5 years. Scopel then pointed out several other times in these records where Walker indicated that her pain had been ongoing for several years. Walker acknowledged that both her chiropractor and physical therapist testified that they spent a lot of time focusing on her left shoulder and left arm, and she admitted that she had had this problem for years. Although Walker testified that her doctors recommended she see an orthopedic specialist, she acknowledged that there was no indication of this in her records.

Finally, Walker testified about her abilities since the accident at issue. She stated that she went on a trip to Las Vegas in May 2012. Walker also testified that

she has not been treated by an orthopedic specialist or a neurologist, nor has she had any surgery as a result of the accident. She stated that she drives herself to work each day, works 40 or more hours each week, and does the grocery shopping. Walker testified that her attendance at football and basketball games is “limited,” and she does some cooking for her family. She concluded by stating that she has good days and bad days, but before the wreck with Scopel, she never had the intense pain she currently experiences.

Walker argues that based on the above testimony, the evidence is undisputed that she suffered some damage as a result of the collision with Scopel; thus, she claims that the jury was not at liberty to award her zero damages. She further contends that “whether or not [she] had experienced pain at some point in her life prior to the collision does not absolve Scopel of responsibility for the damages he caused” because, even if she had a preexisting condition, Scopel would still be responsible for her damages “to the degree that his negligence aggravated the condition.” She claims that Dr. Solis’s statement that “every single accident you will have will cause increased trauma to those particular areas” (referring to her torn disks) is proof that Scopel aggravated her injuries and that she was entitled to some damages.

### **C. Analysis**

Walker is correct in her assertion that a defendant “takes the plaintiff as he finds her” and is thus responsible for damages resulting from the aggravation of a preexisting condition. *See Coates v. Whittington*, 758 S.W.2d 749, 752 (Tex. 1988). However, based on the evidence presented at trial, we cannot say that the jury’s decision to award Walker zero damages is against the “great weight and preponderance of the evidence.” *See Enright v. Goodman Distrib., Inc.*, 330 S.W.3d 392, 398 (Tex. App.—Houston [14th Dist.] 2010, no pet.) (citing *Dow*



*Chem. Co. v. Francis*, 46 S.W.3d 237, 242 (Tex. 2001)). While Walker presented some evidence that her injuries resulted from the accident at issue or were at least aggravated by it, all of this evidence was in the form of testimony from Walker or her treating physicians. As the sole judge of the credibility of witnesses and the weight to be given their testimony, the jury was free to disregard Walker's testimony that her pain became worse after the accident. See *Golden Eagle Archery, Inc. v. Jackson*, 116 S.W.3d 757, 761 (Tex. 2003). The jury was also at liberty to discredit the testimony of Dr. Solis and Blalock, all of which was based primarily on the subjective reports of pain received from Walker herself. See *Henry v. Mitchell*, No. 14-08-00106-CV, 2010 WL 2361574, at \*2–3 (Tex. App.—Houston [14th Dist.] June 15, 2010, no pet.) (mem. op.) (holding jury was free to disbelieve doctor's testimony, which was based entirely upon appellants' subjective reports of pain); *Walker v. Ricks*, 101 S.W.3d 740, 748 (Tex. App.—Corpus Christi 2003, no pet.) (holding jury may disbelieve a witness, including a physician, even if testimony is not contradicted); *Waltrip v. Bilbon Corp.*, 38 S.W.3d 873, 882 (Tex. App.—Beaumont 2001, pet. denied) (holding jury was free to disregard testimony of expert and lay witnesses regarding appellant's physical pain and mental anguish). Also, the jury could have given more weight to the evidence that tended to show that Walker's injuries did not result from the accident at issue—particularly Walker's email indicating that she suffered practically the same injuries immediately following the hit-and-run accident in 2011.

Furthermore, the majority of Walker's injuries were subjective complaints of pain. This court has repeatedly upheld jury verdicts of zero damages when the plaintiff's alleged injuries were based primarily on subjective testimony. See, e.g., *Szmalec*, 650 S.W.2d at 517; *Henry*, 2010 WL 2361574 at \*3; *Cox v. Centerpoint Energy, Inc.*, No. 14-05-01130-CV, 2007 WL 1437519, at \*6–7 (Tex. App.—

Houston [14th Dist.] May 17, 2007, no pet.) (mem. op.). Again, while there was some subjective testimony concerning Walker's alleged injuries, there was also testimony from which the jury could have concluded that these injuries were not caused by the accident with Scopel. Not only did Dr. Solis testify that he could not determine which wreck caused her disk bulges, but he also admitted that he had treated patients with the same back injuries as Walker who had never been in an accident. Although Dr. Solis did note that a subsequent accident would aggravate a person's pain, he did not specifically state that Walker's condition had in fact been aggravated. There was also documentary evidence from which the jury could have reasonably concluded that Walker's alleged injuries were attributable to an earlier accident.

We hold that the jury's award of zero damages to Walker for past or future physical pain, mental anguish, and physical impairment was not so against the overwhelming weight and preponderance of the evidence as to be manifestly unjust. We overrule Walker's second issue.

## **II. Admissibility of the Post-Accident Photographs**

Walker also argues that the trial court erred in admitting three photographs depicting the damage to her vehicle.<sup>2</sup> Walker filed a motion to exclude the photographs, but the judge denied her motion in a pretrial hearing. Walker did not renew her objection at trial. On appeal, Walker contends that "the photographs were of extremely limited probative value to the amount of physical pain, mental anguish, and physical impairment suffered by Walker." She also claims that any

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<sup>2</sup> The photos in question were marked as Defendant's Exhibit 1. The first image shows the back end of Walker's Hummer, particularly her tire cover and license plate. A small area of the tire cover appears to have been scratched or scuffed; white marks on the red paint are visible. The second two photos show the damage to the tire cover more closely.

probative value was substantially outweighed by the danger of unfair prejudice, confusing the issues, and misleading the jury.

In response, Scopel argues that the photographs are relevant to the issue of Walker's damages resulting from the accident. Scopel further contends that even if the photos were improperly admitted, Walker has waived her objection because she did not object to testimony that "graphically describe[d] the same conditions depicted in the photographs."<sup>3</sup> We first address Scopel's waiver argument.

### **A. Waiver**

Scopel claims that Walker waived her objection to the accident photos by not objecting to his testimony regarding the details of the accident and by testifying herself about the force and impact of the accident. In support of his argument, Scopel cites *Trailways Inc. v. Clark*, 794 S.W.2d 479, 488 (Tex. App.—Corpus Christi 1990, writ denied). In *Clark*, appellants objected to the admission of post-death photographs of the decedents' bodies on the grounds of relevance and prejudice. *Id.* However, appellants did not object to testimony from the decedents' daughters that "graphically described certain elements of the condition of the bodies before and after the pictures were introduced." *Id.* The court held that "[e]ven though an objection to evidence is properly made, prior or subsequent presentation of essentially the same evidence waives error." *Id.*

We have reviewed the trial transcript and conclude that neither Scopel nor Walker's testimony presented "essentially the same evidence." The photographs

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<sup>3</sup> Scopel also claims that Walker waived her objection to the photos by failing to renew her objection when they were presented during Scopel's cross-examination. However, Rule 103(b) of the Texas Rules of Evidence states that "[w]hen the court hears a party's objections outside the presence of the jury and rules that evidence is admissible, a party need not renew an objection to preserve a claim of error for appeal." Tex. R. Evid. 103(b). Thus, Scopel's contention is without merit.

depict damage to the tire cover of Walker's Hummer, but contrary to Scopel's argument, neither party specifically testified about the damage to Walker's vehicle. When questioned by Walker on direct, Scopel testified about how fast he was going, where the accident occurred, and what happened afterward, but he did not describe any property damage. Furthermore, when his attorney admitted the photos during his cross-examination, Scopel only stated that he took the photos at issue and answered in the affirmative when asked whether they showed the damage to the tire cover. He did not describe what was depicted in the photos.

Walker did not testify about the damage to her vehicle, either. Her testimony only addressed the force of the impact, her alleged injuries, and her subsequent medical care. Finally, although Walker's husband noted that the tire cover on his wife's vehicle had to be replaced, he did not explain how it was damaged. Because no other evidence was presented describing Walker's vehicle damage, we find this case distinguishable from *Clark* and hold that Walker has not waived her objection to the photographs. We next address whether the photographs were properly admitted.

## **B. Standard of Review**

The decision to admit or exclude evidence lies within the sound discretion of the trial court. *Bay Area Healthcare Grp., Ltd. v. McShane*, 239 S.W.3d 231, 234 (Tex. 2007). A trial court exceeds its discretion if it acts in an arbitrary or unreasonable manner or without reference to guiding rules or principles. *Caffe Ribs, Inc. v. State*, 328 S.W.3d 919, 927 (Tex. App.—Houston [14th Dist.] 2010, no pet.) (citing *Bowie Mem'l Hosp. v. Wright*, 79 S.W.3d 48, 52 (Tex. 2002)). When reviewing matters committed to the trial court's discretion, a reviewing court may not substitute its own judgment for that of the trial court. *Id.* Thus, the question is not whether this Court would have admitted the evidence. Rather, an

appellate court will uphold the trial court's evidentiary ruling if there is any legitimate basis for the ruling, even if that ground was not raised in the trial court. *Hooper v. Chittaluru*, 222 S.W.3d 103, 107 (Tex. App.—Houston [14th Dist.] 2006, pet. denied) (op. on reh'g). Therefore, we examine all bases for the trial court's decision that are suggested by the record or urged by the parties. *Id.*

A party seeking to reverse a judgment based on evidentiary error must prove that the error probably resulted in the rendition of an improper judgment, which usually requires the complaining party to show that the judgment turns on the particular evidence excluded or admitted. *Prestige Ford Co. v. Gilmore*, 56 S.W.3d 73, 78 (Tex. App.—Houston [14th Dist.] 2001, pet. denied). To determine whether excluded evidence probably resulted in the rendition of an improper judgment, an appellate court reviews the entire record. *Caffe Ribs, Inc.*, 328 S.W.3d at 927 (citing *Interstate Northborough P'ship v. State*, 66 S.W.3d 213, 220 (Tex. 2001)).

### **C. Rule 403 and Harmless Error**

Walker contends that any probative value the photographs might have had was substantially outweighed by the danger of unfair prejudice, confusing the issues, and misleading the jury. *See* Tex. R. Evid. 403. She argues that the photographs were introduced to invite the jury to speculate that “because the damage to [her] vehicle was relatively minor, the collision must have been low-impact” and “because the collision was purportedly low-impact, Walker must be faking her injuries.” Walker claims that the jury's award of zero damages shows it was “clearly” confused and misled by the photographs.

However, even if the trial court erroneously admitted the photographs, Walker has not shown that their admission probably resulted in the rendition of an improper judgment or that the case turned on these exhibits. *See City of Brownsville v. Alvarado*, 897 S.W.2d 750, 753–54 (Tex. 1995). Although she

claims the admission of the photographs “is the only way to explain [the jury’s] decision to award [her] no damages whatsoever,” we disagree. As described above, Scopel presented ample evidence suggesting that Walker’s injuries may have been the result of a prior hit-and-run accident or normal aging, and the jury was free to believe Scopel’s version of events over Walker’s testimony. *See Knoll v. Neblett*, 966 S.W.2d 622, 630 (Tex. App.—Houston [14th Dist.] 1998, pet. denied) (holding that jury, as the sole judge of the credibility of witnesses and weight to be given their testimony, was entitled to discount testimony of any witness). First, although Walker’s expert testified that disk bulges like hers were “usually due to some kind of trauma,” he could not identify which accident caused Walker’s injuries. Furthermore, Walker’s medical records showed that she had been complaining of the same pain and injuries for several years. Finally, Walker herself wrote an email stating that she suffered from neck and back pain shortly after the first hit-and-run accident. On these facts, we conclude that the admission of the photographs probably did not result in an improper judgment. We overrule Walker’s first issue.

#### CONCLUSION

The judgment of the trial court is affirmed.

/s/ Ken Wise  
Justice

Panel consists of Justices Jamison, McCally, and Wise.