Fourth Court of Appeals
San Antonio, Texas

DISSENTING OPINION

No. 04-16-00028-CV

Jaime Ruben **AGUIRRE** Jr.,
Appellant

v.

Jose Hector **SOTO**,
Appellee

From the 111th Judicial District Court, Webb County, Texas
Trial Court No. 2013-CVT-000380-D2
Honorable Monica Z. Notzon, Judge Presiding

Opinion by: Luz Elena D. Chapa, Justice
Dissenting Opinion by: Patricia O. Alvarez, Justice

Sitting: Patricia O. Alvarez, Justice
Luz Elena D. Chapa, Justice
Jason Pulliam, Justice

Delivered and Filed: October 12, 2016

Although I agree the evidence is legally and factually sufficient to support the jury's finding that the accident caused the condition requiring Soto's medical treatment, I do not believe the evidence is legally or factually sufficient to support the jury's award of $40,000.00 in future medical expenses. Accordingly, I respectfully dissent.

Texas follows the "reasonable probability rule" for future damages for personal injuries. *Rosenboom Mach. & Tool, Inc. v. Machala*, 995 S.W.2d 817, 828 (Tex. App.—Houston [1st Dist.] 1999, pet. denied). Thus, to recover future medical expenses, a plaintiff must show that there is a

reasonable probability that the plaintiff will require future medical care as a result of the injury and the reasonable costs of such future care. *Id.*

Dr. Richard Anguiano testified that Soto's disc herniations were the result of the injuries sustained within a couple of months of the MRI and that the herniations would likely cause early degenerative changes in the future. Dr. Anguiano testified that Soto would likely require two future MRIs at a total cost of $4,414.00. I agree that Dr. Anguiano's testimony is legally and factually sufficient evidence to support a finding within a reasonable probability that Soto will incur approximately $4,000.00 in future MRI expenses. Additionally, Dr. Dones's report provides some evidence that possible future surgical expenses in the amount of $18,000.00 are likewise substantiated. *See Bituminous Cas. Corp. v. Cleveland*, 223 S.W.3d 485, 490 (Tex. App.—Amarillo, no pet.) (citing *Lenz v. Lenz*, 79 S.W.3d 10, 19 (Tex. 2002)) (noting that for a legal sufficiency challenge, "[i]f there is more than a scintilla of evidence to support the verdict, we uphold the judgment").

The majority looks to Dr. Sergio Espinoza's expert opinions to substantiate the remaining damage award. In his October 2011 report, Dr. Espinoza opined that, based on reasonable medical probability, Soto would likely require further chiropractic physical medical treatment totaling approximately $8,000.00. At trial, Dr. Espinoza increased this amount to $36,000.00. Unlike Dr. Anguiano's testimony, Dr. Espinoza's testimony does not support future medical expenses under the reasonable probability rule. *See Rosenboom Mach. & Tool*, 995 S.W.2d at 828. Dr. Espinoza testified as follows:

> Soto's Attorney: . . . [W]ell, let me ask you this: Do you think Mr. Soto would benefit from yearly adjustments or yearly visits to the chiropractor? Given his condition with the herniated discs, would he benefit from that?
>
> Espinoza: I think that would be reasonable.
>
> . . . .

> Soto's Attorney: Okay. And so how many times, Doctor, would you recommend that he see a chiropractor if he were able to afford to go see a chiropractor?
>
> Espinoza: Typically someone who has a disc herniation, their pain levels may fluctuate, depending on activity levels or just a change in occupation. If you are more of a physical labor[er] or even sitting can cause disc pressure. It could be anywhere from one to two times a year just to get a checkup, to make sure that his condition is still stabilized, maybe even update his exercises to make sure that he's doing them and make sure that he stays stable in the future.

Based on this statement, Soto's trial counsel proceeded to calculate two visits per year, at $450.00 per visit, for forty years, for a total of $36,000.00.

> Soto's Attorney: I'll represent to you that I did the math, and it comes out to $36,000. In your opinion, is that reasonable treatment for Mr. Soto for the remainder of his life as far as just chiropractic treatment is concerned?
>
> Espinoza: Yes. I would say for him and for anyone else that typically sees a chiropractor without a disc herniation, they go once or twice a year just to get checked up.

During cross-examination, Dr. Espinoza conceded that his opinion was based on information that was four years old and that he could not state, at that point in time, with a reasonable medical probability, what future medical expenses Soto would incur.

> Aguirre's Attorney: And you understand, sir, that chance is not the legal basis for which a jury awards money in this case? Chance and fear of what the future may hold is not the proper legal determination.
>
> It is based on reasonable medical probability, and you have nothing to look at right now to say that in reasonable medical probability this man is going to need X, Y, and Z in the future because you haven't seen him in four years?
>
> Espinoza: I haven't seen him in four years. Correct.

Based on Dr. Espinoza's testimony, the only testimony that supports a reasonable probability that Soto would incur future medical expenses resulting from the accident in question

is Dr. Espinoza's October 2011 report in which he opined that Soto would likely require further chiropractic physical medical treatment totaling approximately $8,000.00. His testimony at trial simply muses that Soto—***or anyone else without a disc herniation that typically sees a chiropractor***—should see a chiropractor twice a year. Dr. Espinoza's statement does not show how Aguirre's injury created a reasonable probability that he will require chiropractic treatment, twice a year, for forty years. To the contrary, Dr. Espinoza's testimony simply provides his opinion that ***everyone*** should see a chiropractor for adjustments and treatment twice a year. Although a jury is authorized to consider (1) the nature of Soto's injuries, (2) the medical care Soto received before trial, and (3) Soto's condition at trial, the decision must be based on reason. *See Bituminous Cas. Corp.*, 223 S.W.3d at 490; *cf. Saeco Elec. & Util., Ltd., v. Gonzales*, 392 S.W.3d 803, 808 (Tex. App.—San Antonio 2012, pet. granted, judgm't vacated w.r.m.). Dr. Espinoza's statement is neither legally nor factually sufficient evidence to support a reasonable probability that Soto will incur $900 per year of chiropractic expenses for forty years *as a result of the accident*.

In *Gulf States Utilities Co. v. Low*, 79 S.W.3d 561, 567 (Tex. 2002), the Texas Supreme Court explained, "In determining damages, the jury has discretion to award damages within the range of evidence presented at trial." While I agree with the majority that the medical expenses previously incurred by Soto were related to the accident, even reviewing the evidence in the light most favorable to the verdict, *see Bituminous Cas. Corp.*, 223 S.W.3d at 490, I cannot conclude the evidence is either legally or factually sufficient to support the finding that there is a reasonable probability that Aguirre will incur $40,000.00 in future medical expenses resulting from the injury, *see SeaRiver Maritime, Inc. v. Pike*, No. 13-05-0033-CV, 2006 WL 1553264, at *6 (Tex. App.—Corpus Christi June 6, 2006, pet. denied) (mem. op.) (citing *Ortiz v. Jones*, 917 S.W.2d 770, 772 (Tex. 1996) (finding award excessive based on evidence presented at trial). Because the damage award exceeds the range of legally and factually sufficient evidence presented at trial, I would

reverse the jury's award on future medical expenses and remand this cause to the trial court for further proceedings.

Patricia O. Alvarez, Justice