



Fourth Court of Appeals
San Antonio, Texas

MEMORANDUM OPINION

No. 04-16-00028-CV

Jaime Ruben **AGUIRRE**, Jr.,¹
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

AFFIRMED

The sole issue presented in this appeal is whether the evidence is legally and factually sufficient to support a jury's award of \$40,000.00 to Jose Hector Soto for future medical expenses arising from injuries he sustained in an automobile accident. Jaime Ruben Aguirre, Jr. contends the evidence is insufficient to establish: (1) a reasonable probability Soto will need medical treatment in the future; (2) a reasonable probability that future medical expenses will be incurred;

¹ The trial court's judgment refers to appellant as Jaime Ruben Aguirre. The original petition, other trial court filings and orders, and the appellate briefs refer to appellant as Jaime Ruben Aguirre, Jr.

(3) \$40,000.00 is a reasonable amount for future medical expenses; and (4) the accident caused the condition that requires future medical treatment. We affirm the trial court's judgment.

BACKGROUND

On March 27, 2011, a pickup truck driven by Aguirre and a car driven by Soto collided in an intersection after Aguirre ran a stop sign. Soto's air bags deployed, and both vehicles were towed from the scene. On February 28, 2013, Soto filed the underlying lawsuit against Aguirre, and the case went to trial before a jury on September 21, 2015, with Aguirre stipulating to liability.

During the investigating officer's testimony, several pictures of the damaged vehicles were introduced into evidence. Although Soto declined medical treatment at the scene, he testified he was experiencing pain in his lower back, neck, and shoulders the following day and sought medical treatment. Soto testified he had never previously been in a car accident and did not have pain prior to the accident.

Soto initially was treated by Gateway Chiropractic. Soto testified he rated his pain as an eight to a ten. Soto's first treatment date at Gateway was March 28, 2011, and his last treatment date was April 22, 2011. The treating chiropractor completed a physician's report on April 25, 2011, stating no further treatment was needed and Soto had made a complete recovery. On his April 22, 2011 exam report, the treating chiropractor marked that Soto had zero pain with cervical range of motion and a pain level of one with lumbar range of motion. The report also showed that Soto reported ongoing pain, and Soto testified at trial that his pain level was still at an eight when he finished his treatment at Gateway.

Because he was still experiencing pain, Soto testified he next sought medical treatment from Dr. Sergio Espinoza with Laredo Spine Medical Center on May 2, 2011. The medical records state Soto's chief complaint was pain in his cervical and lumbar spine. On May 6, 2011, Dr. Espinoza ordered an MRI of Soto's cervical and lumbar spine. The MRI of Soto's cervical spine

showed a “small central disc herniation” at the C5-C6 level “measuring approximately 1-1.5 mm in size, causing [a] mild narrowing of [the] spinal canal.” In addition, the MRI of Soto’s lumbar spine showed: (1) at L3-L4, a “mild diffuse disc herniation by approximately 1.5 mm, causing mild narrowing of [the] spinal canal with flattening of the ventral aspect of [the] thecal sac” and mild narrowing of the bilateral neural foramina; (2) at L4-L5, a “diffuse disc herniation by approximately 2.5 mm, causing mild narrowing of [the] spinal canal with indentation on the ventral aspect of the thecal sac” and mild narrowing of the bilateral neural foramina; and (3) at L5-S1, a “mild diffuse disc herniation by approximately 1.5 mm, causing mild narrowing of spinal canal and bilateral neural foramina.” Soto’s last day of treatment with Dr. Espinoza was May 25, 2011, and Soto testified his pain was at a four when he finished treatment. On October 18, 2011, Dr. Espinoza prepared a report summarizing Soto’s current status as follows:

He could experience an exacerbation due to the nature of the injury. Remissions and exacerbations are quite prevalent on an alternating basis following injuries of this nature. It could be expected, within a degree of medical probability, that the patient would then require follow-up diagnostics and further rehabilitative care for the remissions and exacerbations.

If that were to happen he would likely need an orthopedic consultation. The estimated cost of this further evaluation/treatment is approximately \$3000. In addition he would likely required [sic] further chiropractic/physical medicine treatment totaling approximately \$8000.

Soto testified he was still having pain in June 2011, so Dr. Espinoza referred him to Dr. Judson Somerville, an anesthesiologist. Dr. Somerville’s report stated Soto reported experiencing “[p]oor sleep since [the] accident.” The report also stated although Soto reported he was not then experiencing pain, “he does have some pain [which] interferes with his sleep.” With regard to the lumbar spine, the report noted the MRI results and stated, “Educated on techniques to maintain pain control and prevent future relapses which are now sure to occur after the damage substained [sic].” Ultimately, Dr. Somerville recommended injections to relieve Soto’s lower back pain;

however, Soto elected not to undergo the injections because their possible complications included paralysis.

By July 2011, Soto testified he was still experiencing pain that was interfering with his sleep, so Dr. Espinoza referred him to Dr. Jose Dones, a neurosurgeon. Dr. Dones's report stated that Soto complained of neck pain and lower back pain. The recommendation in Dr. Dones's report stated, "Patient will benefit from dorsal rizotomy [a surgical procedure] total cost around \$18000 for both levels."

Although Soto did not seek any additional medical treatment prior to trial, he testified his back is not healed. Soto described the problem with his back as follows:

How I've said, when I'm working, if I stay still, like suddenly I just get a numb feeling on my lower back. When I go to sleep, since I have to get my six hours of sleep because of the hours that I work, I — for a certain amount of time when I'm on my back, I just get a cramp feeling and I have to turn to a prone position.

So, I sleep on my stomach in order for that to go away. Basically, what I'm saying is that after the accident it wasn't the same anymore with my back. That's what I'm trying to say.

Although Soto testified he was not in pain as he was testifying, he takes Tylenol for the pain he does experience every now and then.

Dr. Espinoza also testified at the trial. Based on the tests he performed on Soto's initial visit, Dr. Espinoza stated Soto was not malingering or exaggerating his symptoms. Dr. Espinoza also stated it was not typical or normal for a twenty-one-year-old man to have the type of disc lesion Soto has. Because Soto has a lesion at such a young age, Dr. Espinoza testified a likelihood existed that he would experience a progression of the disc herniation because discs dehydrate as a person ages. Dr. Espinoza had not treated Soto since May 25, 2011, and testified he was unaware if Soto had experienced the remissions and exacerbations he referenced in his October 2011 report. With regard to future medical treatment, Dr. Espinoza testified as follows:

Q. Okay. And opposing counsel is talking about future medicals?

A. Uh-huh.

Q. She briefly touched upon that. If the jury — well, 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?

A. I think that would be reasonable.

Q. 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?

A. 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 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.

Dr. Espinoza then testified the average cost for a checkup with a chiropractor would be \$450, and Soto had a life expectancy of forty years. Therefore, if Soto went to two checkups each year for forty years, the reasonable cost would be \$36,000. Dr. Espinoza stated the two checkups per year was reasonable not just for Soto but for anyone who typically sees a chiropractor even without a disc herniation. Although Dr. Espinoza agreed “a chance” existed that Soto would be pain-free and not have to seek additional treatment, Dr. Espinoza also testified it was not “a chance” Soto should take, and further testified as follows:

Q. 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?

A. I haven't seen him in four years. Correct.²

² In his brief, Aguirre argues this testimony establishes that Dr. Espinoza could not opine that Soto would need future treatment based on a reasonable medical probability. Based on the entirety of Dr. Espinoza's testimony, however, it was within the jury's province to determine the weight Dr. Espinoza's response should be given. *See City of Keller v. Wilson*, 168 S.W.3d 802, 819 (Tex. 2005) (noting jurors are sole judge of weight to give a witness's testimony). In view of his earlier testimony, the jury could have determined Dr. Espinoza's response simply confirmed he had not seen Soto in four years.

Dr. Richard Anguiano, the radiologist who interpreted Soto's MRI, testified Soto's disc herniations were especially abnormal given Soto's age. Dr. Anguiano explained when a disc has a herniation, it starts to slowly leak fluid over time leading to the disc becoming dry. Dr. Anguiano further explained the fluid in the disc remains white on an MRI image when initially herniated; however, as the fluid leaks and the disc dries, the disc turns dark. Because Soto's MRI showed the discs were currently white, Dr. Anguiano stated the injury happened within a few weeks or months before the MRI was taken, testifying as follows:

Q. And can you conclude within a reasonable medical probability on the findings?

A. Based on my findings, this is abnormal for somebody of this age. The fact that they are white indicates that it's more recent. The fact that I have a documented injury, this is probably exactly that, you had an accident before that. Other than that, I would go in and say this was due to the accident.

Q. The accident of March 2011?

A. Six weeks before. Correct.

In response to whether he would recommend that Soto get another MRI as soon as possible, Dr. Anguiano responded:

A. If this were me, I would have already had another MRI or two, just to see where things are at and see how much damage is occurring. Obviously, if he's symptomatic, we'd need to follow to see the changes because at some point, whether he's having pain now or not, I expect he's going to have some pain or discomfort that's going to be developed or become worse with time.

Q. Would you agree that he needs an MRI?

A. Yes. I would agree.

Based on the cost of Soto's prior MRIs and their interpretation, Dr. Anguiano testified an MRI of both the lumbar spine and cervical spine with interpretations would cost approximately \$4,400.

With regard to whether Soto will have pain in the future, Dr. Anguiano testified as follows:

Q. Thank you, Doctor. And we'd talked a little bit about Mr. Soto not hav[ing] any pain right now. If he has no pain right now, there's no way to know whether he will have any pain in the future based upon reasonable medical probability because he hasn't been looked at in four years; is that correct?

A. I would — I actually would disagree with that. As we talked about the disc, if the disc is injured, I expect his disc to start drying out. We don't know

what his disc looks like. I would expect if we had an MRI we can see the before and after. I could see which one is white and which one is black. You would go, oh, that disc turned black.

Once the disc is injured, it doesn't fix itself. I believe only 10 percent of herniations ever go to surgery if even that. Whether or not the disc is causing pain from the herniation that disc is dry now, it's acting as a disc of somebody my age or older. So, therefore, a 20 something-year-old person should be as active as a 20-year-old person would, and not have a problem of a 50-year-old man. Unfortunately, they're probably going to have a problem. It's fantastic that he doesn't have pain now. Would I expect him to have problems early? Yes.

Aguirre introduced two affidavits from Dr. Ruby Khan, a chiropractor. One affidavit is based on her review of the medical records and billing records from Gateway Chiropractic, and the other affidavit is based on her review of the medical records and billing records from Dr. Espinoza. Dr. Khan opined that Soto required only four weeks of chiropractic treatment. Both of Dr. Khan's affidavits state, "For a patient such as this, with no objective documentation of injury beyond a self-limiting soft tissue injury, recovery is to be expected within four (4) weeks." Dr. Espinoza was critical of Dr. Khan's opinion because Dr. Kahn never examined Soto. Dr. Espinoza also noted both of Dr. Khan's affidavits contained the same or substantially identical language, and Dr. Khan did not reference the MRI in the affidavit criticizing his services.

After hearing the evidence, a jury awarded Soto: (1) \$5,000.00 for past physical pain and mental anguish; (2) \$1,000.00 in future physical pain and mental anguish; (3) \$14,119.02 in past medical expenses; and (4) \$40,000.00 in future medical expenses. As previously noted, Aguirre is only appealing the jury's award of future medical expenses, asserting the evidence is legally and factually insufficient to support that award.

STANDARD OF REVIEW

When reviewing a legal sufficiency challenge, "[w]e review the evidence in the light most favorable to the verdict, crediting favorable evidence if reasonable jurors could, and disregarding contrary evidence unless reasonable jurors could not." *Cruz v. Andrews Restoration, Inc.*, 364

S.W.3d 817, 819 (Tex. 2012). We sustain a legal sufficiency challenge where the record shows: (1) a complete absence of evidence of a vital fact; (2) the court is barred by rules of law or evidence from giving weight to the only evidence offered to prove a vital fact; (3) the evidence offered to prove a vital fact is no more than a mere scintilla; or (4) the evidence establishes conclusively the opposite of the vital fact. *Danet v. Bhan*, 436 S.W.3d 793, 797 (Tex. 2014) (per curiam); *see also King Ranch, Inc. v. Chapman*, 118 S.W.3d 742, 751 (Tex. 2003) (“More than a scintilla of evidence exists when the evidence ‘rises to a level that would enable reasonable and fair-minded people to differ in their conclusions.’”) (quoting *Merrell Dow Pharms., Inc. v. Havner*, 953 S.W.2d 706, 711 (Tex. 1997)). A reviewing court can only set aside a verdict for factual insufficiency when, after considering and weighing all of the evidence, the evidence is so weak or the finding is so against the great weight and preponderance of the evidence that the verdict is clearly wrong and unjust. *Dow Chem. Co. v. Francis*, 46 S.W.3d 237, 242 (Tex. 2001) (per curiam). When undertaking a sufficiency analysis, we do not pass upon the credibility of witnesses or substitute our judgment for that of the trier of fact, even if there is conflicting evidence upon which a different finding could be supported. *City of Keller v. Wilson*, 168 S.W.3d 802, 819-21 (Tex. 2005).

WHETHER ACCIDENT CAUSED CONDITION REQUIRING FUTURE MEDICAL TREATMENT

In the fourth subissue in Aguirre’s brief, he contends the evidence is legally and factually insufficient to establish “that the accident caused the condition that requires any future treatment.” Aguirre contends Dr. Anguiano’s opinion stating the herniations occurred within a few weeks or months before the MRI coupled with Soto’s testimony indicating he had no pain before the accident is insufficient because: (1) Dr. Anguiano lacked a factual basis to determine causation because he had not examined Soto and had no knowledge of the accident facts; and (2) Dr. Anguiano failed to exclude the possibility the herniations pre-dated the accident. We disagree with Aguirre’s review of the evidence.

First, the evidence establishes Dr. Anguiano had a factual basis for his opinion. Dr. Anguiano's report contains a clinical history summary which states, "21 year old status post motor vehicle accident; with low back pain, spasms and decreased range of motion." In addition, Dr. Anguiano's trial testimony established he knew the date of the car accident and the time that lapsed between the accident and the MRI.

Next, Dr. Anguiano provided a medical basis for concluding the accident was the cause of Soto's injuries. First, Dr. Anguiano stated Soto's herniations were abnormal for someone of his age. Second, the fact the MRI image showed the discs were currently white medically established the injury was more recent, specifically within six or seven weeks of the MRI. The accident occurred on March 27, 2011, and the MRI was taken May 6, 2011.

Based on the foregoing, we hold the evidence is legally and factually sufficient to support the jury's finding that the accident was the cause of Soto's disc herniations.

FUTURE MEDICAL EXPENSES

In the first three subissues in Aguirre's brief, he contends the evidence is legally and factually insufficient to support the award of future medical expenses because the evidence did not establish: (1) a reasonable probability Soto will need medical treatment in the future;³ (2) a reasonable probability that future medical expenses will be incurred; or (3) \$40,000.00 is a reasonable amount for future medical expenses.

³ In this subissue, Aguirre also contends the evidence is insufficient to establish that Soto's condition will benefit from medical treatment in the future. As explained below, however, to recover future medical expenses, a plaintiff is only required to show a reasonable probability that medical expenses resulting from the injury will be incurred in the future and the reasonable costs of such care. *Bituminous Cas. Corp. v. Cleveland*, 223 S.W.3d 485, 490 (Tex. App.—Amarillo 2006, no pet.); *Rosenboom Mach. & Tool, Inc. v. Machala*, 995 S.W.2d 817, 828 (Tex. App.—Houston [1st Dist.] 1999, pet. denied). Even if Soto was required to establish his condition would benefit from medical treatment in the future, Dr. Espinoza testified Soto would benefit from checkups with a chiropractor twice a year given his condition, Dr. Anguiano testified Soto should have "another MRI or two" to see how his disc herniations were progressing, and the jury could infer a benefit to Soto based on his pain being alleviated through past medical care. *See Saeco Elec. & Util., Ltd. v. Gonzales*, 392 S.W.3d 803, 808 (Tex. App.—San Antonio 2012, pet. granted, judgment vacated w.r.m.) (noting jury may consider medical care rendered to plaintiff before trial and plaintiff's condition at trial to award future medical expenses).

“In Texas, the ‘reasonable probability’ rule is followed for damages for future medical expenses.” *Saeco Elec. & Util., Ltd. v. Gonzales*, 392 S.W.3d 803, 808 (Tex. App.—San Antonio 2012, pet. granted, judgment vacated w.r.m.). To recover future medical expenses, a plaintiff is required to show a reasonable probability that medical expenses resulting from the injury will be incurred in the future and the reasonable costs of such care. *Bituminous Cas. Corp. v. Cleveland*, 223 S.W.3d 485, 490 (Tex. App.—Amarillo 2006, no pet.); *Rosenboom Mach. & Tool, Inc. v. Machala*, 995 S.W.2d 817, 828 (Tex. App.—Houston [1st Dist.] 1999, pet. denied). “No precise evidence is required,” and “[t]estimony of a ‘reasonable medical probability’ by a medical expert is not a requisite to recovery [of] future medical expenses.” *Bill Miller Bar-B-Q Enters., Ltd. v. Gonzales*, No. 04-04-00747-CV, 2005 WL 2176079, at *2 (Tex. App.—San Antonio Aug. 24, 2005, pet. denied) (mem. op.); *Saeco Elec. & Util., Ltd.*, 392 S.W.3d at 808 (noting expert medical testimony not required to recover future medical expenses). “Instead, a jury can make an award for future medical expenses based on the nature of the plaintiff’s injuries, medical care rendered to a plaintiff before trial, and the condition of the plaintiff at the time of trial.” *Saeco Elec. & Util., Ltd.*, 392 S.W.3d at 808. “Furthermore, a jury’s award of future medical expenses lies mostly within the jury’s discretion.” *Id.* “Because issues such as life expectancy, medical advances, and the future costs of products and services are, by their very nature, uncertain, appellate courts are particularly reluctant to disturb a jury’s award of these damages.” *Id.* (internal quotes omitted).

Soto testified that he continues to experience pain. After working his twelve to thirteen hour shift as a registered nurse in a neonatal intensive care unit, Soto will sometimes experience a numb feeling in his back. Soto also sometimes experiences cramps while he is sleeping. Although Soto was not in pain while testifying at trial, he stated his back is not healed.

Dr. Espinoza testified Soto’s MRI showed a herniated disc in his cervical spine and multiple herniated discs in his lumbar spine. Because Soto was only twenty-six at the time of trial,

the herniation will likely progress as Soto ages, and the herniated discs will affect Soto his entire life. Dr. Espinoza explained pain levels from a herniated disc fluctuate depending on activity levels and stressed the importance of having the herniations checked one or two times a year to ensure their condition remains stabilized and to adjust or update exercises as needed to ensure stability is maintained. Dr. Espinoza testified Soto has a forty year life expectancy, and the average cost of a bi-annual check would be \$450. Accordingly, Dr. Espinoza concluded the cost of reasonable treatment to ensure Soto's condition remains stabilized would be \$36,000 considering his life expectancy ($\$450 \times \text{two checks each year} \times 40 \text{ years}$). The jury also had the billing records for the chiropractic services previously provided by Gateway Chiropractic and Dr. Espinoza. The charges for those services totaled \$3,140 for Soto's fourteen treatments at Gateway, and \$5,530 for Soto's thirteen treatments by Dr. Espinoza.

Dr. Angiano testified the MRI revealed Soto's herniated discs were caused by an injury Soto sustained within a few weeks or months before the MRI. Dr. Angiano also testified a herniated disc is unable to fix itself and starts to leak fluid over time causing the disc to dry out. As the disc dries out, the disc will cause more problems. Dr. Angiano testified repeat MRIs to follow the progress of the herniation was reasonable. Even if Soto was not currently experiencing pain, Dr. Angiano testified he will experience pain in the future as the disc dries out. Dr. Angiano stated the cost of an MRI for both the lumbar and cervical spine and a radiologist's interpretation of those MRIs would be approximately \$4,400.

Finally, Dr. Somerville's report stated pain and future relapses "are now sure to occur" based on the injury Soto sustained. And, Dr. Dones estimated if Soto pursued surgery, the cost would be approximately \$18,000.

Based on the foregoing, the jury could have found a reasonable probability that Soto would require routine follow-up and additional treatment in the future given the nature of Soto's injury.

Although Soto was not in pain at the time of trial and had not sought treatment in four years, both Dr. Espinoza and Dr. Angiano testified Soto would need treatment in the future as the fluid leaked from the herniated discs causing them to dry, and Dr. Somerville opined Soto was “now sure” to experience pain and relapses in the future. In addition, the jury could have found \$40,000 would be the reasonable cost of Soto’s future care given: (1) the actual cost of Soto’s past chiropractic services; (2) Dr. Espinoza’s estimation of the cost of future chiropractic services; (3) Dr. Aguiano’s estimation of the cost of each follow-up MRI; and (4) Dr. Dones’s estimation of the cost of surgery. Therefore, having reviewed all of the evidence, we hold the evidence is legally and factually sufficient to support’s the jury’s award of \$40,000.00 in future medical expenses.

CONCLUSION

The trial court’s judgment is affirmed.

Luz Elena D. Chapa, Justice