



Fourth Court of Appeals San Antonio, Texas

DISSENTING OPINION

No. 04-18-00444-CV

David **VILLARREAL**,
Appellant

v.

Jonabelle Josiane **TIMMS**,
Appellee

From the 37th Judicial District Court, Bexar County, Texas
Trial Court No. 2016CI18748
Honorable Michael E. Mery, Judge Presiding

Opinion by: Beth Watkins, Justice
Dissenting Opinion by: Sandee Bryan Marion, Chief Justice

Sitting: Sandee Bryan Marion, Chief Justice
Luz Elena D. Chapa, Justice
Beth Watkins, Justice

Delivered and Filed: May 8, 2019

“The trier of fact is given wide discretion to award damages anywhere within the range of evidence presented at trial.” *Pope v. Gaffney*, No. 04-03-00456-CV, 2004 WL 1732325, at *2 (Tex. App.—San Antonio Aug. 4, 2004, no pet.). In exercising this discretion, “[t]he jury is the sole judge of the credibility of the witnesses and the weight to be given to their testimony.” *Id.* Because I believe the jury’s award of \$35,650 for past medical expenses was within the range of the evidence as the jury could have weighed it, I respectfully dissent.

BACKGROUND

Three separate elements are required to be proven to support a recovery for past medical expenses: “(1) the amount of the charges for the medical expenses; (2) the reasonableness of the charges; and (3) the necessity of the charges.” *Singleton v. Bowman*, 557 S.W.3d 711, 716 (Tex. App.—Texarkana 2018, pet. denied) (internal quotation omitted). Because the jury is required to consider both the “reasonableness” and the “necessity” of the charges, I first summarize the evidence presented at trial as to both of these elements.

On June 9, 2015, Jonabelle Josiane Timms rear ended Villarreal’s vehicle during rush hour, stop-and-go traffic on a highway. Timms was driving a Volkswagen Jetta while Villarreal was driving a Ford F-150 truck. Timms estimated she was traveling about 10-15 mph at the time of impact, while Villarreal estimated Timms was traveling about 30 mph. Photographs showing the damage to the vehicles were introduced into evidence.

The extent of Villarreal’s injuries caused by the accident was disputed at trial. Timms testified Villarreal stated he was fine at the scene of the accident, and the police report indicated Villarreal did not sustain any injuries. Timms testified Villarreal was walking around at the accident scene, and Villarreal testified he drove from the accident scene to a restaurant where he ate dinner with a friend. At trial, Villarreal testified he told Timms and the police officer he was a little stiff at the accident scene but was not hurt.

On June 10, 2015, the day after the accident, Villarreal testified he woke with a “total stiff neck” and was hardly able to get out of bed. Villarreal sought medical treatment and was examined by Dr. Elizabeth Clark, who he had not previously seen for medical treatment. The history section of Dr. Clark’s progress note reported Villarreal was non-ambulatory after the accident, and the onset of his pain and stiffness was acute. Villarreal testified he did not tell Dr. Clark he was non-

ambulatory. Dr. Clark referred Villarreal to physical therapy and instructed him to take 600 mg of ibuprofen for pain and to follow up as needed. No other medication was prescribed, and the evidence at trial established 600 mg was the equivalent of three over-the-counter ibuprofen. The progress note did not show that any restrictions were placed on Villarreal's activities; however, Villarreal testified he was placed on light duty by her.

On June 11, 2015, Villarreal was examined by a chiropractor, Dr. Neil Boecking. The history section of the progress note reported Villarreal felt a pop in his neck as soon as the impact occurred, and he felt pain shoot from his neck to his shoulder. Dr. Boecking's plan of care was twelve visits for physical therapy and chiropractic care. No medication was prescribed, and no restrictions were placed on Villarreal's activities; however, Villarreal again testified he was placed on light duty.

On July 14, 2015, Villarreal was examined by Dr. Manish Patel, an orthopedic surgeon, who reviewed an MRI performed on July 7, 2015. Dr. Patel referred Villarreal for injections in his neck and recommended a referral for a spine surgery evaluation if the injections did not relieve the pain. No medication was prescribed, and no restrictions were placed on Villarreal's activities; however, Villarreal testified he was placed on light duty by Dr. Patel.

On July 20, 2015, Villarreal was examined by Dr. Ed Cerdas who performed a series of three injections. The history section of Dr. Cerdas's report stated Villarreal was hit from behind by a larger truck that lifted his car from behind; however, Villarreal testified he did not report that information to Dr. Cerdas. Villarreal agreed Dr. Cerdas did not restrict his activities.

During the course of the injections by Dr. Cerdas, Villarreal had his last visit with Dr. Boecking on August 6, 2015. Dr. Boecking noted future surgical intervention may be required due to the nature of Villarreal's injury; however, he also noted Villarreal had completed all

conservative care measures and was released from care. Dr. Boecking did not place any restrictions on Villarreal's activities.

On August 11, 2015, Villarreal underwent a nerve conduction test by Dr. Christine Vidouria. Dr. Vidouria reported Villarreal's numbness in his fingers was due to carpal tunnel syndrome, and Villarreal did not have any cervical or lumbar radiculopathy. Villarreal's medical records do not show any physician reviewed the results of the test with Villarreal. Villarreal initially testified he never discussed the results of the test with anyone, but later stated he had reviewed the results with a doctor.

On September 11, 2015, Villarreal had his last visit with Dr. Cerdas at which Villarreal reported "his neck is significantly better, occasionally he has a sharp, burning pain on the left side of his neck that lasts for very short periods of time, but overall better." Villarreal denied "numbness or tingling in the upper extremities." Dr. Cerdas's report concluded:

This gentleman I believe has responded reasonably well to the care and the injections. He still takes occasional ibuprofen; however, he is quite concerned with his condition, especially in the future and wishes to follow back up from a surgical standpoint. I will accommodate him and make those referrals at this time, but overall I feel he has made significant progress.

No restrictions were placed on Villarreal's activities by Dr. Cerdas. Villarreal testified Dr. Cerdas told him if he did not feel better he would need surgery.

On December 10, 2015, Villarreal underwent surgery for a single level neck fusion performed by Dr. Adam Bruggeman. Dr. Bruggeman's report from Villarreal's six-week post-surgical follow-up stated:

[Villarreal] feels that his neck pain and popping has largely resolved. He does still have some radiating pain in the muscle of his trapezius on the left and right side, but mostly on the left side. He denies any new symptoms. He is anxious to get back to work. Again, he feels the pain is much better.

On March 16, 2016, Villarreal had a three-month follow-up with Dr. Bruggeman. Villarreal reported “his neck is doing fine but has been experiencing a lot [of] spasms . . . which resolve with ibuprofen and baclofen.” Baclofen is a muscle relaxant that was first prescribed for Villarreal’s muscle spasms by Dr. Christine Contreras on February 9, 2016. Dr. Bruggeman noted Villarreal’s cervical range of motion had considerably increased, and they discussed continuation of muscle relaxants and physical therapy as needed.

No additional medical records were introduced into evidence from the March 16, 2016 follow-up to the date trial commenced on April 2, 2018. Villarreal testified he continued to experience pain and took his muscle relaxer and five ibuprofen a day. Villarreal stated he hurts when he does strenuous work, and because he is not able to perform the heavier jobs as an appliance repairman, he is unable to work the same amount of overtime as before the accident. Two of Villarreal’s co-workers also testified Villarreal was not able to perform the same amount of work since the accident. An exhibit Villarreal identified as listing the amounts he paid in medical bills was introduced into evidence. The total amount listed on the exhibit was \$131,821.46.

Villarreal read portions of Dr. Patel’s deposition at trial relating to his course of care. In the deposition, Dr. Patel testified when he examined Villarreal on July 14, 2015, Villarreal had good range of motion but pain with extension and rotation. Dr. Patel also testified Villarreal had numbness, tingling, and pain which is called radiculopathy. Dr. Patel stated the MRI showed arthritis at various levels of Villarreal’s spine and an acute injury to one area of his neck which included disc herniation and a non-displaced compression fracture. Dr. Patel testified all of the medical treatment Villarreal received was necessary as a result of the accident. With regard to whether all of the medical charges were reasonable, Dr. Patel stated, “I’m not involved in the

charges at all for that practice.” Dr. Patel agreed he did not place any restrictions on Villarreal’s activities when he examined him.

Timms called Dr. Joel Jenne, an orthopedic spine surgeon,¹ to testify. Based on his review of Villarreal’s medical records, Dr. Jenne testified he would not have recommended surgery for Villarreal; however, Dr. Jenne testified the medical records suggest Villarreal improved after surgery. With regard to the \$131,821.46 in medical bills, Dr. Jenne testified the amounts were not reasonable and customary collected amounts for the treatment Villarreal received because they were too high. Dr. Jenne specifically testified: (1) the charges for the injections were \$10,200 too high; (2) the charges for the MRIs were \$3,250 too high; (3) the charge for the surgical hospital was \$53,000 too high; and (4) the charge for the surgeon’s fee was \$20,000 too high.

ANALYSIS

“To recover for past medical expenses, a plaintiff must prove the actual amount of the expenses incurred and that those expenses were reasonable and necessary.” *Galvan v. Garcia*, 502 S.W.3d 382, 386 (Tex. App.—San Antonio 2016, no pet.). As previously noted, three separate elements are required to be proven to support a recovery for past medical expenses: “(1) the amount of the charges for the medical expenses; (2) the reasonableness of the charges; and (3) the necessity of the charges.” *Singleton*, 557 S.W.3d at 716.

As the majority notes, the amount of the charges was proven by Villarreal’s medical bills which showed the amount charged was \$131,821.46. The majority then focuses on the “reasonableness of the charges” and Dr. Jenne’s criticisms of specific amounts charged for Villarreal’s treatment. The jury, however, could read Dr. Jenne’s testimony as a broader challenge to the total amount charged because Dr. Jenne generally testified that the total amount charged for

¹ During his testimony, Dr. Jenne referred to Dr. Patel as a hand surgeon.

Villarreal's treatment was in excess of the reasonable and customary collected amount for that treatment. The jury also had to weigh Dr. Patel's refusal to opine on the reasonableness of the charges, including the charges for his own services. Finally, the jury had to weigh the evidence relating to "the necessity of the charges," including the medical records and Dr. Cerdas's report regarding Villarreal's condition following the injections.

We "may not set aside a finding of damages merely because the jury's reasoning in arriving at the amount is unclear." *Pope*, 2004 WL 1732325, at *2. Although the manner in which the jury weighed the evidence in reaching its award of \$35,650 for past medical expenses is unclear, the evidence clearly shows the "necessity" of the medical services was disputed at trial, and the jury could have found Villarreal incurred any number of expenses that were not necessary. Therefore, the jury could have given no weight to charges the majority weighs in reaching its "basement" for the award.

The amount of damages the jury awards based on the evidence is uniquely within the jury's discretion, and the jury's award of \$35,650.00 for past medical expenses is within the range of evidence. *See id.* at *2-4. Accordingly, I disagree that the jury's damage award for past medical expenses is against the great weight and preponderance of the evidence. Because the majority holds to the contrary, I respectfully dissent.

Sandee Bryan Marion, Chief Justice