Fourth Court of Appeals
San Antonio, Texas

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

REVERSED AND REMANDED

This appeal arises out of a jury verdict rendered in favor of David Villarreal in an automobile accident case. Villarreal contends the jury's findings as to certain measures of damages are against the great weight and preponderance of the evidence. We reverse the trial court's judgment and remand for a new trial.

BACKGROUND

Jonabelle Josiane Timms rear ended Villarreal's vehicle. Villarreal suffered a broken bone and a herniated disc in his neck, sought medical treatment, and was examined by Dr. Elizabeth

Clark. Thereafter, Villarreal sought treatment from Dr. Neil Boecking, a chiropractor, and Dr. Manish Patel, an orthopedic surgeon. Dr. Patel referred Villarreal to Dr. Ed Cerday for injections in his neck and recommended a referral for a spine surgery evaluation if the injections did not relieve the pain. Dr. Cerday provided three epidural injections to Villarreal. During the course of the injections by Dr. Cerday, Villarreal had his last visit with Dr. Boecking. Dr. Boecking noted future surgical intervention might be required due to the nature of Villarreal's injury. Ultimately, Villarreal underwent surgery for a single-level neck fusion, which was performed by Dr. Adam Bruggeman.

Villarreal filed a negligence action against Timms. With regard to damages, Villarreal sought, among other things, recovery for his past medical expenses. In support of this claim, Villarreal introduced and the trial court admitted into evidence an exhibit showing medical bills of $131,821.46. In addition, Dr. Patel testified the accident necessitated all of the medical treatment Villarreal received. As to whether all of the charges were reasonable, Dr. Patel advised he was not involved with regard to any charges other than his own.

In response, Timms presented the testimony of Dr. Joel Jenne, an orthopedic spine surgeon. Although Dr. Jenne testified he would not have recommended surgery, he admitted the medical records suggest Villarreal improved after the surgery. With regard to the $131,821.46 in medical bills, Dr. Jenne testified the amounts were not the reasonable and customary collected amounts for the treatment Villarreal received because: (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.

At the conclusion of the evidence, the jury found Timms's negligence proximately caused the accident. In response to what sum of money would fairly and reasonably compensate Villarreal for his injuries that resulted from the accident, the jury responded:

a. Physical pain and mental anguish sustained in the past.
ANSWER: $40,000.00

b. Physical pain and mental anguish that, in reasonable probability, David Villarreal will sustain in the future.
ANSWER: $0.00

c. Physical impairment sustained in the past.
ANSWER: $10,000.00

d. Physical impairment that, in reasonable probability, David Villarreal will sustain in the future.
ANSWER: $0.00

e. Medical care expenses incurred in the past.
ANSWER: $35,650.00

f. Loss of earning capacity sustained in the past.
ANSWER: $14,000.00

g. Loss of earning capacity that, that, in reasonable probability, David Villarreal will sustain in the future.
ANSWER: $0.00

The trial court signed a judgment on the jury's verdict and subsequently denied Villarreal's motion for new trial. Villarreal appeals.

ANALYSIS

On appeal, Villarreal contends the evidence is factually insufficient to support the jury's findings of zero damages with regard to his future physical pain and mental anguish as well as his future physical impairment. Likewise, he contends the evidence is factually insufficient to support the jury's award of $35,650 for past medical expenses, arguing the jury should have awarded at least $45,371.46. Because our decision with regard to the award of past medical expenses is dispositive under Rule 44.1(b) of the Texas Rules of Appellate Procedure, we need not review the sufficiency of the future damage awards. *See* TEX. R. APP. P. 44.1(b).

Standard of Review

"When a party attacks the factual sufficiency of an adverse finding on an issue on which [he] has the burden of proof, [he] must demonstrate on appeal that the adverse finding is against the great weight and preponderance of the evidence." *Dow Chem. Co. v. Francis*, 46 S.W.3d 237, 242 (Tex. 2001); *see Perez v. Arredondo*, 452 S.W.3d 847, 860 (Tex. App.—San Antonio 2014, no pet.). "The court of appeals must consider and weigh all of the evidence, and can set aside a verdict only if the evidence is so weak or if the finding is so against the great weight and preponderance of the evidence that it is clearly wrong and unjust." *Dow Chem. Co.*, 46 S.W.3d 242; *see United Parcel Serv., Inc. v. Rankin*, 468 S.W.3d 609, 615 (Tex. App.—San Antonio 2015, pet. denied). "[I]n conducting a factual sufficiency review, a court must not merely substitute its judgment for that of the jury" because "the jury is the sole judge of the credibility of witnesses and the weight to be given to their testimony." *Golden Eagle Archery, Inc. v. Jackson*, 116 S.W.3d 757, 761 (Tex. 2003); *Rankin*, 468 S.W.3d at 615.

Application

The jury awarded Villareal past medical expenses of $35,650. Villarreal contends the jury should have awarded at least $45,371.46 even if it subtracted the specific amounts Dr. Jenne testified were higher than the reasonable and usual charges. Based on our review of all of the evidence, we agree the jury's award is so against the great weight and preponderance of the evidence as to be manifestly unjust. *See Dow Chem. Co.*, 46 S.W.3d at 242.

A plaintiff may prove medical expenses were reasonable and necessary by: (1) presenting expert testimony, or (2) by submitting affidavits that comply with Texas Civil Practice and Remedies Code section 18.001. *See, e.g., Gunn v. McCoy*, 554 S.W.3d 645, 672 (Tex. 2018). Consistent with section 18.001, the jury received copies of Villarreal's medical bills showing the cost of his medical and surgical treatment was $131,821.46. Thus, this is the highest amount the

jury could have awarded for Villarreal's past medical treatment—it represents the "ceiling" on that award. *See, e.g., Reliance Steel & Aluminum Co. v. Sevcik*, 267 S.W.3d 867, 871–72 (Tex. 2008) (approving appellate court's reversal of jury award of $40,000 in past medical expenses where evidence showed only $33,985.23 in past medical expenses).

Based on the expert testimony of Dr. Jenne, Timms asked the jury to award less than $131,821.46. Dr. Jenne testified the reasonable cost for:

- epidural injections are $400 each—not $12,450 for three injections, as the bills showed—which, along with the other uncontested charges, would yield reasonable and necessary medical bills from Injury Medical Group of $11,700;

- MRIs are $500 to $600 each—not $4,450 for two as described by Villarreal's medical bills—which would yield minimum reasonable and necessary medical bills from injury Diagnostic Services of $1,000;

- the hospital's fee is $18,000—not $71,340.89—which would yield reasonable and necessary medical bills from Foundation Surgical Hospital of San Antonio of $18,000;

- the surgeon's fee is $4,400 to $5,100—not $26,533.22—which would yield minimum reasonable and necessary medical bills from Adam J. Bruggeman, M.D. of the Texas Spine Care Center of $4,400.

Dr. Jenne did not criticize any other amounts or take issue with the remaining medical bills of $6,180 from Pro-Care Medical Group or $367.35 for medications. These amounts total $41,647.35. Thus, this is the lowest amount the jury could have awarded for Villarreal's past medical treatment—it represents the "basement" on that award. *See, e.g., Golden Eagle Archery*, 116 S.W.3d at 775 (noting award of no damages for pain and suffering should be reversed on appeal if there is objective, undisputed evidence of significant injury jury did not compensate for in some other category of damages); *see also Horton v. Denny's Inc.*, 128 S.W.3d 256, 262 (Tex. App.—Tyler 2003, pet. denied) (finding award of $1,000 in past damages against great weight and preponderance of evidence where undisputed evidence showed medical bills of $4,717.25 directly

related to plaintiff's objective injury); *Downing v. Uniroyal, Inc.*, 451 S.W.2d 279, 283 (Tex. Civ. App.—Dallas 1970, no writ) (holding, in case involving objective evidence of injury, award of $12 for past medical expenses "manifestly too small" when evidence showed expenses of $600).

The dissenting opinion relies on a statement by Dr. Jenne that the cost of Villarreal's past medical treatment was "high" and appears to construe Dr. Jenne's single statement as a criticism of the total amount charged. However, when considered in context, we hold Dr. Jenne's statement is merely a limitation on his opinion about which particular past medical expenses were high.

When asked if $131,821.46 was a reasonable and customary amount for the treatment Villarreal received, Dr. Jenne stated, "They're high, sir." He then immediately described the particulars of how "they're high:"

- about "10,200 bucks over charge" for the epidural injections;
- 3,250 "bucks too high" for the MRIs;
- "essentially 53,000 less than" the $71,340 for the hospital's fee; and
- "20 grand too high" for the surgeon's fee.

This testimony explained the particular past medical expenses Dr. Jenne found "high." Dr. Jenne's testimony does not suggest that even if the specific line items he described were reduced, Villarreal's past medical expenses were still generally too high. Timms's attorney agreed, asking the jury to "take all of the numbers that were too high and subtract them from the $131,000, you end up with $45,371.46 … this is the usual and customary collections."[1]

The standard of review requires this court to examine the entire record to determine if some evidence supports the jury's finding. Because $41,647.35 is the lowest amount supported by the

[1] The discrepancy between $45,371.46 and $41,647.35 appears to result from the fact that Dr. Jenne provided a range of customary charges.

record, this court must set the "basement" at that amount. The fact that the jury awarded a lower amount than even Timms requested indicates that the jury answered this question not based on "only the evidence introduced [at trial] under oath," as the court's charge instructed, but based on something else. *See, e.g., Jackson*, 116 S.W.3d at 771 (recognizing appellate court must presume jury followed instructions unless record demonstrates otherwise); *see also Gulf States Utils. Co. v. Low*, 79 S.W.3d 561, 566 (Tex. 2002) (noting jury generally has discretion to award damages within range of evidence presented at trial). Because the lone "high, sir" statement, when considered in context, did not lower the "basement" amount the jury could award, we conclude the jury's past medical damage award is against the great weight and preponderance of the evidence. *See Dow Chem. Co.*, 46 S.W.3d at 242.

An appellate court may not reverse and remand for a new trial on damages alone when, as here, liability was contested in the trial court. *See* TEX. R. APP. P. 44.1(b) (prohibiting appellate court from ordering separate trial solely on unliquidated damages if liability is contested). We are therefore required to remand the entire case for a new trial. *See Estrada v. Dillon*, 44 S.W.3d 558, 562 (Tex. 2001) (per curiam). For that reason, we need not address Villarreal's remaining arguments. *See* TEX. R. APP. P. 47.1.

CONCLUSION

Because the evidence is factually insufficient to support the jury's award of $35,650 in past medical expenses, we sustain that portion of Villarreal's appellate issue. We therefore reverse the trial court's judgment and remand the matter for a new trial on liability and damages. *See* TEX. R. APP. P. 44.1(b); *Estrada*, 44 S.W.3d at 562.

Beth Watkins, Justice