In The

Court of Appeals

Ninth District of Texas at Beaumont

NO. 09-14-00323-CV

JOHN R. RIZZUTI III, Appellant

V.

DILLAN SMITH, Appellee

On Appeal from the 410th District Court
Montgomery County, Texas
Trial Cause No. 13-02-01311 CV

MEMORANDUM OPINION

In this appeal from a judgment rendered against the defendant in a personal injury case, we are asked to resolve two issues: (1) whether legally sufficient evidence was introduced at trial to support the jury's award of the plaintiff's past medical expenses; and, (2) whether legally sufficient evidence was introduced at trial to support the jury's award on the plaintiff's claim seeking to be reimbursed for the loss of a college tuition payment that the plaintiff made before the plaintiff's injury occurred. We conclude that the evidence is legally sufficient to

support the jury's award of past medical expenses, but that the evidence is legally insufficient to support the award for lost tuition. The trial court's judgment is affirmed in part, and it is reversed and remanded in part for further proceedings that are consistent with the Court's opinion.

Background

In the early morning hours of February 19, 2011, John R. Rizzuti III backed the SUV he was driving into Dillan Smith, who was located behind the SUV. The accident occurred in a parking lot near several bars where the group occupying the SUV and the group Smith was with had been drinking. According to Jonathan Gutierrez, one of the individuals in Smith's group, he saw Rizzuti back over Smith, put the SUV in a forward gear and run over Smith again, and then reverse gears and run over Smith again.

Smith suffered a number of injuries from being run over, but the most significant of his injuries concerned his left knee, which was dislocated. Smith was taken by ambulance from the parking lot to the emergency room of a hospital located in College Station. Ultimately, Smith was transferred to a hospital in Houston, and he underwent several surgeries for his injuries. According to Smith, he underwent approximately twelve surgical procedures for the injuries that he suffered from being run over by the SUV.

When Smith's injuries occurred, he was attending a junior college and living in College Station. According to Smith, his injuries prevented him from completing the 2011 spring semester at his college. During the trial, Smith testified that he lost approximately $1,500 to $2,000 in tuition because he could not complete his coursework after his injuries occurred.

At the conclusion of the trial, the jury found both Rizzuti and Smith negligent, and placed 82% of the fault for the accident on Rizzuti and 18% of the fault on Smith. The jury also found that Rizzuti had been grossly negligent. The jury awarded Smith $6,000 for past pain and mental anguish, $3,000 for future pain and mental anguish, $1,500 for loss of past tuition, and $112,753.60 for the medical expenses that he incurred in the past. The jury found that Smith failed to prove he would incur future medical expenses related to the accident, and also failed to award any damages based on Smith's claims for past or future physical impairment. Although the jury found that Rizzuti was grossly negligent, it also failed to award any exemplary damages.

Based on the jury's findings, the trial court, in the final judgment, awarded Smith $102,957.95. In his appeal, Rizzuti's complaints concern the sufficiency of the evidence to support the jury's awards on the issues of Smith's past medical expenses and lost tuition.

Standard of Review

Rizzuti's two issues both raise legal sufficiency complaints. Evidence is legally sufficient if it "would enable reasonable and fair-minded people to reach the verdict under review." *City of Keller v. Wilson*, 168 S.W.3d 802, 827 (Tex. 2005). In evaluating whether the evidence in a case is legally sufficient to support a verdict, "we credit evidence that supports the verdict if reasonable jurors could, and disregard contrary evidence unless reasonable jurors could not." *Kroger Tex. Ltd. P'ship v. Suberu*, 216 S.W.3d 788, 793 (Tex. 2006) (citing *City of Keller*, 168 S.W.3d at 827); *Am. Interstate Ins. Co. v. Hinson*, 172 S.W.3d 108, 114 (Tex. App.—Beaumont 2005, pet. denied). A defendant is entitled to prevail on a legal sufficiency challenge if the record of the trial shows either: (1) a complete absence of evidence of a vital fact; (2) some rule of law or the rules of evidence bar the court from giving weight to the only evidence offered to prove a vital fact; (3) the evidence admitted to the factfinder to prove a vital fact amounts to no more than a mere scintilla to support the verdict; or (4) the evidence conclusively establishes the opposite of the fact the factfinder found based on the evidence admitted at trial. *City of Keller*, 168 S.W.3d at 810 (quoting Robert W. Calvert, *"No Evidence" & "Insufficient Evidence" Points of Error*, 38 Tex. L. Rev. 361, 362-63 (1960)).

Past Medical

Rizzuti contends the evidence is legally insufficient to show that the medical expenses Smith incurred were reasonable in amount or that they were necessarily related to the injuries Smith suffered when run over by the SUV. According to Rizzuti, the evidence that supports the damage award on past medical expenses amounts to legally insufficient evidence because Smith failed to call any experts or to present a section 18.001 affidavit proving up Smith's medical expenses, an affidavit that is sufficient to support an award of past medical expenses under the Texas Civil Practice and Remedies Code. *See* Tex. Civ. Prac. & Rem. Code Ann. § 18.001 (West 2015) (providing that an affidavit concerning the cost and necessity of services is sufficient evidence to support a jury's finding that the amount charged was reasonable).

To resolve the arguments Rizzuti presents in his first issue, we consider Rizzuti's claim that the trial court did not admit any affidavits to prove up Smith's bills under Sections 18.001 and 18.002 of the Texas Civil Practice and Remedies Code. Tex. Civ. Prac. & Rem. Code Ann. § 18.001-.002 (West 2015). In Smith's case, the record before us shows that the trial court admitted exhibits that included Smith's medical records, billing records,[1] and an exhibit that summarized Smith's

[1] The trial court admitted a large number of medical and billing records into evidence before the trial started. After the parties rested, from the comments made

medical expenses by date of service, provider, and amount. These exhibits were admitted without objection. Although Smith asserts that no billing records affidavits were admitted at trial, the record of the proceedings in the trial court is not consistent with the argument Rizzuti makes in his appeal.

In considering Rizzuti's legal sufficiency challenge, we review the evidence supporting the jury's award in the light that most favors the verdict, crediting

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in chambers, we surmise that the attorneys possibly had some side agreement with the trial court about what exhibits the jury was to consider when it retired. However, the agreement, if one existed, was not reduced to writing, and the substance of whatever understanding the attorneys had with the trial court does not appear in the record that is before us in the appeal. Instead, the record shows that the medical records at issue were all admitted before the start of the trial, and that just before the jury retired, the trial court told the jury that it would be given "all the exhibits as soon as they're ready[.]" The trial court did not indicate that "all the exhibits" did not include all of the exhibits that the record shows were admitted before the jury heard any testimony.

After the court reporter filed the reporter's record for the appeal, we noted that the exhibit volume the reporter filed failed to include the billing records. When we advised the parties that the billing records were missing from the exhibit volume, a dispute arose regarding the authenticity of the missing exhibits; as a result, we abated the appeal, and the trial court conducted a hearing to address the missing exhibits. *See* Tex. R. App. P. 34.6(e)(2). Following that hearing, the trial court ordered the missing medical billing exhibits to be included in a supplemental reporters record, and it found that the copies of the documents presented to it in that hearing "accurately duplicate[d] with reasonable certainty the original Exhibits." Following the hearing, the reporter filed a supplemental reporter's record, which includes a number of billing records affidavits. As the billing records affidavits were admitted into evidence, and the hearing before the trial court regarding the missing exhibits does not show the jury never saw them, we are required to presume that the exhibits were before the jury in evaluating Rizzuti's legal sufficiency claim.

evidence favorable to the plaintiff if reasonable jurors could do so, and disregarding contrary evidence unless reasonable jurors could not. *See City of Keller*, 168 S.W.3d at 827. In personal injury cases, section 18.001 of the Texas Civil Practice and Remedies Code allows the plaintiff to establish the reasonableness and necessity of medical expenses through the affidavit of either the person who provided the service or the person in charge of the records showing the service that was provided. *See* Tex. Civ. Prac. & Rem. Code Ann. § 18.001(c). The affidavit of such person "is sufficient evidence to support a finding of fact by judge or jury that the amount charged was reasonable or that the service was necessary." Tex. Civ. Prac. & Rem. Code Ann. § 18.001(b). The billing records affidavits admitted in Smith's trial offer more than a scintilla of evidence to support the jury's award of Smith's past medical expenses. *See City of Keller*, 168 S.W.3d at 810.

Additionally, Smith offered, and the trial court admitted, a summary of Smith's billing records into evidence during the trial. The summary was admitted without objection. Upon proper foundation, summaries of documents may be admitted as substantive evidence. *See* Tex. R. Evid. 1006; *Ramin' Corp. v. Wills*, No. 09-14-00168-CV, 2015 Tex. App. LEXIS 10612, *44 (Tex. App.—Beaumont Oct. 15, 2015, no pet.); Jeff Brown & Reece Rondon, *Texas Rules of Evidence Handbook* 1028 (2015) (explaining that evidence admitted under Rule 1006 of the

Rules of Evidence is admitted as substantive evidence unlike a demonstrative summary that is not independently admissible). In Smith's case, the summary was admitted as substantive evidence to support Smith's damage claim. Under Rule of Evidence 1006, a summary of voluminous billing records, otherwise admissible under the rules, offers substantive evidence to support a factfinder's verdict. *See Montes v. Filley*, 359 S.W.3d 260, 266 (Tex. App.—El Paso 2011, no pet.) (relying, in part, on a summary of medical expenses admitted under Rule 1006 to support the trial court's finding that the expenses were reasonable and necessary).

In Smith's case, the record shows that the trial court admitted fifteen billing records affidavits into evidence, and all of the affidavits are signed by the person in charge of the medical provider's records. The fifteen affidavits state that the charges made by the respective facility where the affiant was the custodian were reasonable and necessary for Smith's proper care and treatment. Rizzuti did not file controverting affidavits, and he did not object to the admission of the exhibits or the summary on the basis that Smith had failed to comply with any of the requirements of Sections 18.001 and 18.002. *See* Tex. Civ. Prac. & Rem. Code Ann. § 18.001-.002.

While the billing records affidavits and the summary of his expenses regarding the amounts Smith paid for his treatment did not conclusively prove that charges of those facilities were reasonable or that the services were necessary, the

evidence was sufficient to enable reasonable and fair minded jurors to return an award on Smith's claim for his past medical expenses. *See City of Keller*, 168 S.W.3d at 827. Because legally sufficient evidence is in the record that supports an award on the issue of Smith's past medical expenses, we overrule Rizzuti's first issue.

Loss of Tuition

In issue two, Rizzuti contends that the evidence before the jury was legally insufficient to support the jury's award to Smith of $1,500 in lost tuition.[2] Rizzuti contends there was no evidence that the tuition expense was reasonable in amount.

The evidence in the record concerning Smith's loss of $1,500 in tuition contains evidence that suggests he lost the benefit of his tuition payment because he was required to medically withdraw from school. Smith testified he lost between $1,500 and $2,000 in tuition. However, there was no testimony admitted during the trial that addressed the reasonable charge for a semester in the college where Smith was enrolled, or evidence addressing the charges for college tuition

[2] In his brief, Rizzuti has not argued that loss of tuition is not a recoverable element of damages in a personal injury case. We have found no Texas cases discussing whether such a consequential loss is a foreseeable loss in personal injury cases. However, because Rizzuti has not argued that the loss was not a recoverable element of damages in personal injury cases, we have assumed that such a loss is recoverable in the opinion. However, we express no opinion about whether lost tuition is a proper element of damages in personal injury cases generally, and this case should not be cited for the proposition that it is generally a recoverable element of damages.

generally. Tuition costs are not matters of common observation or general knowledge, so the need to prove that the amount Smith paid was reasonable cannot depend on the fact that some of the jurors might have had personal experience with paying tuition. *See Dallas Ry. & Terminal Co. v. Gossett*, 294 S.W.2d 377, 382-83 (Tex. 1956). Given the lack of controlling authority to guide whether evidence of reasonableness is required to support a jury's award of lost tuition, we apply the general rule, which required that Smith prove that the amount he paid for the services was reasonable. *Id.* at 383. Because there is no testimony showing the amount Smith paid for the tuition that he lost was reasonable, we hold the evidence is legally insufficient to support the jury's award on his claim for lost tuition. We render judgment that Smith recover nothing on his claim seeking to be reimbursed for his lost tuition.

Cross-Point

In his brief, Smith included an issue asserting that no evidence supports the jury's finding that he was negligent. *See* Tex. R. App. P. 38.2(b). However, the record shows that Smith did not file a notice of appeal, so he failed to perfect his right to raise a cross-point of error. *See* Tex. R. App. P. 25.1(c) (requiring that "[a] party who seeks to alter the trial court's judgment or other appealable order must file a notice of appeal"). Additionally, Smith has not argued that any grounds exist to justify or excuse his failure to comply with the requirement that he file a notice

of appeal. *Id*. Because Smith did not appeal from the trial court's judgment, and because through his cross-point he seeks a more favorable judgment than the one the trial court rendered, we hold that Smith waived his right to raise any cross-points in his appeal. *See Lubbock Cty., Tex. v. Trammel's Lubbock Bail Bonds*, 80 S.W.3d 580, 584 (Tex. 2002). We overrule Smith's cross-point because the cross-point was not properly preserved for our review.

Conclusion

We hold that legally sufficient evidence supports the jury's award of past medical expenses, and that the evidence is legally insufficient to support the jury's award for Smith's loss of tuition. We affirm the jury's findings on the issues of the parties' negligence and their proportionate fault. Because the net damage award must be recalculated, as do the awards for interest, we remand the case to the trial court to recalculate the net awards in a manner consistent with the Court's opinion and with Rule 301 of the Texas Rules of Civil Procedure. Tex. R. Civ. P. 301; *see also* Tex. R. App. P. 43.2(d).

AFFIRMED IN PART, REVERSED AND REMANDED IN PART.

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HOLLIS HORTON
Justice

Submitted on March 10, 2015
Opinion Delivered March 10, 2016
Before Kreger, Horton, and Johnson, JJ.