COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH

NO. 02-17-00005-CV

JULIE A. LAQUEY — APPELLANT

V.

LANDON MICHAEL COX — APPELLEE

FROM COUNTY COURT AT LAW NO. 2 OF TARRANT COUNTY
TRIAL COURT NO. 2013-004809-2

MEMORANDUM OPINION[1]

Appellant Julie A. LaQuey filed a personal-injury suit against Appellee Landon Michael Cox seeking damages arising from an August 22, 2012 automobile accident. Following a trial, the jury found that Cox's negligence proximately caused the occurrence in question. In response to the damages question, the jury awarded $15,000 for past medical expenses, $10,000 for future

[1]*See* Tex. R. App. P. 47.4.

medical expenses, $6,000 for past physical pain and suffering, and $0 for future physical pain and suffering. The trial court entered judgment for Julie on the jury's verdict in the amount of $31,000, plus $3,205.44 in prejudgment interest and $4,884.90 in taxable court costs. In a single issue, Julie appeals the judgment in her favor, asserting that the trial court erred by not granting her motion for new trial because the jury's award of zero damages to her for future physical pain and suffering was against the great weight and preponderance of the evidence. We will affirm.

The gist of Julie's argument is that the future-medical-expenses evidence established that all future medical expenses would be incurred "solely" to treat Julie's future pain and suffering and that, therefore, in light of the jury's award of $10,000 to Julie for future medical expenses, its award of zero for future pain and suffering was against the great weight and preponderance of the evidence.[2]

In reviewing a factual sufficiency challenge to an adverse finding on which the party had the burden of proof, the appellate court considers and weighs all of the evidence, both in support of and against the findings, to determine whether "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). The appellate court will reverse and remand for a new trial only if the verdict is so

[2]Julie argues that "the jury's answer of zero for future pain and suffering is manifestly unjust and against the great weight of the evidence is clearly seen in the jury's awarding future medical, which was solely for the purpose of treating future pain and suffering."

against the great weight and preponderance of the evidence that it is manifestly unjust or shocking to the conscience. *Golden Eagle Archery, Inc. v. Jackson*, 116 S.W.3d 757, 761 (Tex. 2003). The jury is the sole judge of the credibility of the witnesses and the weight of their testimony. *Id.* The jury may believe one witness and disbelieve another and resolve inconsistencies in any testimony. *Id.*; *see also Figueroa v. Davis*, 318 S.W.3d 53, 60 (Tex. App.—Houston [1st Dist.] 2010, no pet.) (citing *City of Keller v. Wilson*, 168 S.W.3d 802, 819–20 (Tex. 2005)). We may not substitute our judgment for that of the jury, even if the evidence would support a different result. *Mar. Overseas Corp. v. Ellis*, 971 S.W.2d 402, 407 (Tex.), *cert. denied*, 525 U.S. 1017 (1998).

No fixed rule exists for measuring damages for physical pain, mental anguish, or physical impairment; each case must be measured by its own facts, and considerable discretion and latitude must be given to the jury's award. *SunBridge Healthcare Corp. v. Penny*, 160 S.W.3d 230, 247 (Tex. App.—Texarkana 2005, no pet.). The process of awarding damages for amorphous, discretionary injuries such as pain and suffering in a personal injury case is inherently difficult because the alleged injury is a subjective, unliquidated, non-pecuniary loss. *Moore v. State Farm Mut. Auto. Ins. Co.*, No. 01-09-00657-CV, 2010 WL 2220878, at *3 (Tex. App.—Houston [1st Dist.] June 3, 2010, no pet.) (mem. op.); *Dollison v. Hayes*, 79 S.W.3d 246, 249 (Tex. App.—Texarkana 2002, no pet.). It is particularly within the province of the jury to set the amount of damages for pain and suffering. *See Lanier v. E. Found. Inc.*, 401 S.W.3d 445,

455 (Tex. App.—Dallas 2013, no pet.); *Hicks v. Ricardo*, 834 S.W.2d 587, 591 (Tex. App.—Houston [1st Dist.] 1992, no writ); *see also Moore*, 2010 WL 2220878, at *3.

In some cases, the injuries have objective manifestations that plainly support some award for past pain and suffering. *Moore*, 2010 WL 2220878, at *4 (citing *Dollison*, 79 S.W.3d at 249–50); *Hammett v. Zimmerman*, 804 S.W.2d 663, 664 (Tex. App.—Fort Worth 1991, no writ); *Cornelison v. Aggregate Haulers, Inc*., 777 S.W.2d 542, 548 (Tex. App.—Fort Worth 1989, writ denied). In cases with these sorts of objective physical injury manifestations, a jury's failure to award damages for past pain and suffering, while simultaneously awarding medical expenses, is error. *Moore*, 2010 WL 2220878, at *4 (citing *Dollison*, 79 S.W.3d at 250 n.1). For example, objectively verifiable injuries like bone fractures, nerve damage, burns, lacerations, torn muscles, and concussions have been held to support an award of pain and suffering. *Id.* But in other cases, where the objective indicia of injury are less obvious or entirely absent, a jury may disregard purely subjective complaints that are necessarily speculative and incapable of direct proof. *Id.* (citing *Srite v. Owens–Ill., Inc.*, 870 S.W.2d 556, 559 (Tex. App.—Houston [1st Dist.] 1993), *rev'd on other grounds sub nom. Owens–Ill., Inc. v. Burt*, 897 S.W.2d 765, 769 (Tex. 1995); *Blizzard v. Nationwide Mut. Fire Ins. Co.*, 756 S.W.2d 801, 805 (Tex. App.—Dallas 1988, no writ) (jury finding of no damages for pain and suffering not improper when indicia of injury and damages almost entirely subjective)).

Julie testified that the accident caused her to experience back pain that she did not have before the accident.[3] The evidence concerning Julie's injury (low back pain) and whether it would continue in the future falls into the latter category—an injury where the objective criteria are less obvious. Sherri Murrell, a physical therapist who was treating Julie for mild fascial pain in her hip and lumbar pain, testified that there were times when Julie was better and times when she was not. Murrell testified that there were no restrictions on Julie's activities but said that Julie may experience periods of pain. Julie's family practice doctor indicated that Julie's pain from the accident had improved and that he could not say whether or not she would recover fully; he said it was likely she would experience discomfort for a long period of time. Shannon Brown, a chiropractor, treated Julie for radiculopathy from the lumbar spine—radiating pain from the lower back. Brown testified that Julie would need "maintenance" treatment about once a month for the rest of her life to maintain the level of improvement she had attained during her active care regarding her pain level. Medical records from Dr. Brent T. Alford, who treated Julie at the Fort Worth Brain and Spine Center, recite that he saw her for a follow-up appointment on

[3]Julie's healthcare providers did not articulate a specific physically-based injury attributable to the accident that caused Julie's low back pain; Dr. Alford's records indicate that Julie could be experiencing SI joint pain versus left lower lumbar facet mediated pain and that it was possible she had an injured disc causing some vague radicular type pain.

December 11, 2013, approximately sixteen months after the accident. Dr. Alford's report of the visit states that Julie

> is doing better after chiropractic and physical therapy. Her neck and back do not seem to be bothering her much at this point. She has increased her activities and seems to be tolerating it well.
>
> . . . .
>
> She [Julie] does not feel any further treatment is needed at this time. She may continue to perform activities as tolerated. We will plan on seeing her back in the office on an as[-]needed basis at this point.

On July 15, 2014, Julie was in another automobile accident; she was rear-ended. She injured her neck, resulting in a "whiplash" type of injury, and received medical treatment. Julie testified that her neck had healed and that she was not seeking to recover those medical expenses in this suit. On August 22, 2016, trial commenced on Julie's personal injury suit against Appellee Cox.

The presence or absence of pain is an inherently subjective question for which the plaintiff bears the burden of production and persuasion. *Thompson v. Stolar*, 458 S.W.3d 46, 61 (Tex. App.—El Paso 2014, no pet.). Viewing all of the evidence relating to Julie's future pain and suffering from her injuries, Julie's injuries did not objectively manifest in a verifiable, physical manner such that the jury's failure to award *future* pain and suffering damages constituted error in light of its award of future medical expenses to Julie. *See, e.g.*, *Cox v. Centerpoint Energy, Inc.*, No. 14-05-01130-CV, 2007 WL 1437519, at *7 (Tex. App.—Houston [14th Dist.] May 17, 2007, no pet.) (mem. op.) (holding evidence factually sufficient to sustain jury's finding of zero damages for future pain despite

jury's award of future medical expenses). The jury was entitled to believe or to disbelieve Julie's complaints of ongoing periods of pain. *See, e.g*., *Hammett*, 804 S.W.2d at 666 (quoting *Dupree v. Blackmon*, 481 S.W.2d 216, 221 (Tex. Civ. App.—Beaumont 1972, writ ref'd n.r.e.)). Julie argues that the evidence is factually insufficient to support the jury's failure to award future pain and suffering damages because no healthcare provider testified that she would not continue to suffer future pain. But—because Julie's complaints of back pain are subjective in nature, incapable of direct proof, and do not stem from evidence of an objective physical injury—the jury was free to exercise its discretion as the sole judge of the weight and credibility of the evidence to award zero future pain and suffering damages. *See Thompson*, 458 S.W.3d at 62. Based on the evidence presented—including that Julie was rear-ended in a subsequent automobile accident—and deferring to the jury's weight and credibility determinations, the jury's failure to award *future* pain and suffering damages to Julie is not so against the great weight and preponderance of the evidence that it is manifestly unjust or shocking to the conscience. *See Dow Chem. Co.*, 46 S.W.3d at 242.

We overrule Julie's sole issue, and we affirm the trial court's judgment.

PER CURIAM

PANEL: WALKER, MEIER, and GABRIEL, JJ.

DELIVERED: October 5, 2017