NUMBER 13-16-00126-CV

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI - EDINBURG

O'CONNELL O'CONNELL AND JAMES DOUGLAS O'CONNELL, **Appellants,**

v.

VAMSI K. GULLAPALLI, M.D. AND COASTAL BEND RETINA, P.A., **Appellees.**

On appeal from the County Court at Law No. 1 of Nueces County, Texas.

MEMORANDUM OPINION

Before Chief Justice Valdez and Justices Rodriguez and Benavides
Memorandum Opinion by Justice Benavides

By two issues, appellants O'Connell and James O'Connell (collectively O'Connell) challenge the jury verdict in their medical malpractice suit against appellee Dr. Vamsi Gullapalli and Coastal Bend Retina, P.A. (Coastal Bend). O'Connell argues that: (1) the evidence was insufficient to support the verdict; and (2) a third-party doctor defendant

should not have been included in the jury charge because there was no evidence to support its submission. We affirm.

I. BACKGROUND

A. Coastal Bend Procedure

O'Connell was referred to Coastal Bend, the clinic where Dr. Gullapalli worked, to repair a macular hole in her right eye in December 2011. Her primary care eye doctor, Dr. John Sohocki, diagnosed O'Connell with glaucoma in the days prior to sending O'Connell to Coastal Bend, and Dr. Sohocki placed her on the treatment drop Travatan to control the pressures in her eyes.

Dr. Gullapalli first examined O'Connell on December 12, 2011, determined there was a macular hole in her right eye that would need surgical repair, and scheduled surgery two days later. Dr. Gullapalli performed a pars plana vitrectomy to repair the macular hole and sealed the hole in O'Connell's right eye with non-expansile gas, as is the "common practice." O'Connell had a routine follow-up examination with Dr. Gullapalli the following day, showing her eye pressure to be 14, which was within the normal range according to Drs. Gullapalli and his expert, Dr. Timothy Cleland. O'Connell's next follow-up examination was scheduled for about a week later, but she called Coastal Bend twice complaining of vision issues before her next visit. During her first phone call on December 17, 2011, O'Connell spoke to Dr. Gullapalli and complained of blurry vision, excessive tearing, and congestion. Dr. Gullapalli believed all of those conditions were normal side effects following the type of surgery performed, but asked O'Connell to come into the clinic so he could evaluate her. O'Connell stated she was unable to come in because she lived two hours away, her husband was sick, and he could

not drive. O'Connell called back to the clinic on December 19th and spoke to a technician at Coastal Bend. The technician relayed the substance of the phone call to Dr. Gullapalli and asked O'Connell to come in, but told her excessive tearing was normal following her procedure. O'Connell did not visit Coastal Bend prior to her scheduled follow-up visit. At her schedule follow-up on December 22, Dr. Gullapalli determined that O'Connell had lost all vision in her right eye, other than light perception. Her right eye had suffered what Dr. Gullapalli referred to as a "snuff out" of her vision.

Dr. Gullapalli sent O'Connell to additional specialists following the snuff-out to try to preserve or recover her lost vision. Tests were run, but O'Connell's vision loss was not able to be recovered.

B. Trial on the Merits

O'Connell sued Dr. Gullapalli for malpractice, alleging he breached the standard of care required by retinal surgeons. O'Connell's allegations centered on Dr. Gullapalli's instructions to discontinue the use of her Travatan glaucoma drops following the pars plana vitrectomy to repair the macular hole in her right eye.

During trial, O'Connell testified that her vision had been poor since childhood, and she had been seeing Dr. Sohocki since the 1990s. Dr. Sohocki's notes from 1997 indicate that he had suspicions regarding glaucoma at that time, but O'Connell admitted that she went a lengthy period without visiting any eye doctor because she experienced no problems with her eyes or vision. Dr. Sohocki's records indicated that O'Connell did not come see him again until 2009, but even when she would attend an appointment, O'Connell would not always allow Dr. Sohocki to dilate her eyes because she needed to drive home. It was not until December 2011 that O'Connell complained that her visual

acuity was fuzzy, and Dr. Sohocki began treating O'Connell with glaucoma drops. Shortly after, O'Connell had the surgery performed by Dr. Gullapalli, and he took her off her glaucoma drops temporarily following the surgery. Dr. Gullapalli placed O'Connell back on Travatan after she lost her vision, but her vision was not restored.

O'Connell stated that she began seeing Dr. William Sponsel, a glaucoma specialist, and Dr. Jeremiah Brown, a retina specialist, the year following Dr. Gullapalli's surgery. Dr. Brown repeated the macular hole surgery on her right eye because Dr. Gullapalli's surgery did not fix the hole. Dr. Brown then performed a pars plana vitrectomy on the left eye after that eye also developed a macular hole. Following the left eye surgery, Dr. Brown placed Travatan drops in O'Connell's eye. The day following the surgery, O'Connell's eye pressure was at 2, which was dangerously low according to Drs. Gullapalli and O'Connell's experts, Dr. Jaqueline Wong and Dr. Brown. Dr. Brown had O'Connell discontinue using the Travatan drops, and the week following surgery, O'Connell's eye pressure was at 30.

Dr. Brown testified by video deposition. He stated that increased intraocular pressure and pressure spikes within the eye are a recognized risk of any eye surgery, and that glaucoma can add to that risk. Dr. Brown agreed that the records showed that Dr. Gullapalli performed a visual field test on O'Connell prior to surgery to determine how much of her vision field she had lost. Dr. Brown stated Dr. Sponsel determined that O'Connell had advanced glaucoma, but Dr. Brown still believed that the pressure build-up caused O'Connell's loss of vision. When testifying about the standard of care required from retinal surgeons, Dr. Brown stated doctors should do what is reasonable and appropriate to try to control the pressure spikes. He also believed it is important to

use medication to control pressure in the eye but did not state that he believed that not using medication would be a violation of the standard of care. On cross-examination, Dr. Brown admitted that O'Connell's cup-to-disk ratio (which is used to determine the condition of the optic nerve) showed severe damage to her optic nerve and stated that the nerve fibers left were barely attached. Dr. Brown agreed that a snuff-out could have been caused by any type of eye surgery and changes in eye pressure would not be the only complication that could affect the optic nerve. Dr. Brown explained that he had performed macular hole surgeries where the procedure was not successful through no fault of his, similar to Dr. Gullapalli's surgery. Dr. Brown further testified that O'Connell had visual field loss before her referral to Dr. Gullapalli and that he also agreed with Dr. Gullapalli's expert, Dr. Timothy Cleland, that Dr. Gullapalli performed the surgery within the standard of care expected of retinal surgeons.

O'Connell next called Dr. Wong, a retinal specialist, to testify. Dr. Wong stated that she was retained as an expert witness by O'Connell's attorneys. She opined that Dr. Gullapalli breached the standard of care in four areas: (1) he did not look at O'Connell's prior medical records; (2) he did not notice significant optic atrophy prior to surgery; (3) he did not have O'Connell resume her Travatan drops following surgery; and (4) he failed to realize he had put O'Connell in a precarious, high risk situation for pressure spikes. Dr. Wong concluded that the only factor that caused O'Connell's loss of sight was the increased intraocular pressure that she was not properly protected from because of the discontinuation of Travatan drops. Dr. Wong does not believe that O'Connell's glaucoma would have snuffed out her vision alone. She reasoned that Dr. Gullapalli is responsible for the vision loss because he should have done more to protect O'Connell's

remaining vision, and Dr. Wong does not believe Dr. Sohocki's lack of treatment is to blame. On cross-examination, Dr. Wong agreed that an earlier diagnosis of glaucoma could have possibly prevented O'Connell's visual field loss through medication. However, Dr. Wong blamed Dr. Sohocki for O'Connell's lack of dilation during their visits, even though O'Connell refused to have her eyes dilated. At trial, Dr. Wong criticized Dr. Brown's monitoring of O'Connell's intraocular pressures following surgery, although during her pre-trial deposition, Dr. Wong had no criticism of Dr. Brown or his techniques. Essentially, Dr. Wong concluded that Dr. Gullapalli was to blame for O'Connell's vision loss because he did not protect her remaining vision by using pressure-controlling eye drops.

Dr. Gullapalli testified on his own behalf. He stated that he understands the standard of care required for ordinary retinal surgeons. Dr. Gullapalli explained that although he is not specially trained in glaucoma, he had knowledge of the condition and how to treat it. Dr. Gullapalli stated that upon O'Connell's first visit to Coastal Bend, she informed his staff that she had been having vision problems for three months. He assumed Dr. Sohocki was evaluating her optic nerve and treating her for glaucoma based on the medications she was prescribed. Dr. Gullapalli explained that a macular hole repair does not require visual field tests to perform the surgery, and it was not routine to do visual field tests prior to that type of surgery. He did agree that he did not have a clear picture of O'Connell's optic nerve damage because glaucoma management was under Dr. Sohocki's care; however, Dr. Gullapalli stated he had a treatment plan in place to keep the intraocular pressures low during and following surgery. Dr. Gullapalli explained that O'Connell had chronic glaucoma, where the pressure stayed elevated and

ate away at the optic nerve for years, which also explained why O'Connell never experienced pain. Dr. Gullapalli did not place pressure-reducing drops in O'Connell's eyes because he felt his treatment plan was sufficient. According to Dr. Gullapalli, Travatan has a risk of inflammation associated with it, and he stated that very few surgeons place pressure control drops in a patient's eye following this type of surgery. Dr. Gullapalli explained that he spoke to O'Connell via telephone following surgery and even though her symptoms did not seem problematic, he asked her to come in for an evaluation, which she did not do. He stated that even normal pressure could have caused her vision to be snuffed out and that he could not know the pressure in her eyes on the days he did not see her. However, although Dr. Gullapalli stated he examined O'Connell's optic nerve and was aware of its basic state, he also testified he did not know the condition of her optic nerve, that the standard of care requires him to know the condition, and he fell below the standard of care in not knowing that information.

On direct examination, Dr. Gullapalli testified that based on the damage to O'Connell's optic nerve he saw following the surgery, her vision would have snuffed out eventually on its own. He agreed he treated her conditions–the macular hole and the underlying glaucoma–according to his training and as a prudent, reasonable retinal surgeon across the country would have. In response to Dr. Wong's critique that he did not request O'Connell's prior record, Dr. Gullapalli stated that none of O'Connell's doctors had requested his records either. He also stated that in his evaluation of O'Connell, he had examined the optic nerve, so he was aware of its basic condition. Dr. Gullapalli believed the surgery went well with no complications, and he was pleased with O'Connell's eye pressure the day following surgery. Dr. Gullapalli also stated that even

if he had had additional information about O'Connell's optic nerve, it would not have changed the approach he took with the surgery and post-operation treatment. He believes the only difference between the surgery he performed and the surgery Dr. Brown performed was the use of the pressure drops, which caused a significant drop in pressure on O'Connell's left eye. Although O'Connell stated Dr. Gullapalli did not explain things thoroughly to her, Dr. Gullapalli testified that he went through the risks, benefits, alternatives, and additional options of the surgery, and O'Connell wanted to proceed forward with the surgery. He also testified that he believed that in using ordinary care, a doctor would not be able to foresee a rise in pressure following a vitrectomy as long as precautions were taken. Regarding O'Connell's phone calls to Coastal Bend, Dr. Gullapalli explained the side effects of which she complained were normal and expected, that O'Connell did not come in to see him even though he asked her to do so, and she did not complain of pain even though she told Dr. Brown later she was experiencing pain at the time she called Coastal Bend. Dr. Gullapalli did agree that when he first knew O'Connell had lost her useful vision, he thought a rise in pressure could have caused the snuff out, but based on a subsequent MRI and additional testing, he knew her optic nerve was shriveled and O'Connell's vision loss was inevitable. Dr. Gullapalli believed O'Connell's left eye did not experience the same snuff out following surgery because it was in a better condition than the right eye. Dr. Gullapalli felt that based on Dr. Wong's criticism, all of O'Connell's doctors would have fallen below the standard of care, yet O'Connell is only stating that Dr. Gullapalli fell below the standard.

Dr. Cleland testified as an expert witness for the defense. Dr. Cleland believed the surgery and post-operative procedures were within the standard of care of retinal

surgeons. Dr. Cleland agreed that Travatan is pro-inflammatory and he would have also stopped O'Connell's use of the drops after her post-operative pressure was 14. Dr. Cleland states an earlier diagnosis of glaucoma could have slowed down the deterioration of the eyes and avoided the damage. Dr. Cleland did not believe that Dr. Gullapalli was the proximate cause of harm or damage to O'Connell's vision or that his care or treatment were the reason she lost her vision. Dr. Cleland stated that he feels the way Dr. Gullapalli performed the procedure and aftercare was according to the standard procedures used in the retinal medical community.

During the jury charge conference, Dr. Gullapalli asked that Dr. Sohocki be added as a third-party defendant for O'Connell's negligence claim. O'Connell objected to the inclusion of Dr. Sohocki, and the trial court overruled her objection. The jury found for Dr. Gullapalli and stated that neither Dr. Gullapalli nor Dr. Sohocki was negligent. O'Connell filed a motion for new trial, which was denied. This appeal followed.

II. EVIDENCE WAS SUFFICIENT

By her first issue, O'Connell argues the evidence was legally and factually insufficient to support the jury verdict because Dr. Gullapalli and his expert offered conclusory opinions and Dr. Gullapalli made judicial admissions during his testimony.

A. Standard of Review

In reviewing the legal sufficiency of the evidence, we view the evidence in the light favorable to the verdict, crediting favorable evidence if reasonable jurors could, and disregarding contrary evidence unless reasonable jurors could not. *Playboy Enters., Inc. v. Editorial Caballero, S.A. de C.V.*, 202 S.W.3d 250, 263 (Tex. App.—Corpus Christi 2006, pet. denied) (citing *City of Keller v. Wilson*, 168 S.W.3d 802, 807 (Tex. 2005)). In

conducting a legal sufficiency review, we will sustain a legal sufficiency point if the record reveals the following: (a) the complete absence of a vital fact; (b) the court is barred by rules of law or of evidence from giving weight to the only evidence offered to prove a vital fact; (c) the evidence offered to prove a vital fact is no more than a mere scintilla; or (d) the evidence establishes conclusively the opposite of the vital fact. *City of Keller*, 168 S.W.3d at 810. The fact finder is the sole judge of the credibility of the witnesses and the weight to give their testimony. *Id.* at 819.

When a party attacks the factual sufficiency of an adverse finding on an issue on which it has the burden of proof, it must demonstrate on appeal that the adverse finding is against the great weight and preponderance of the evidence. *See Dow Chem. Co. v. Francis*, 46 S.W.3d 237, 241 (Tex. 2001). In a factual sufficiency review, we consider and weigh all the evidence. *See Cain v. Bain*, 709 S.W.2d 175, 176 (Tex. 1986). We review the evidence keeping in mind that it is the jury's role, not ours, to judge the credibility of the evidence, to assign the weight to be given to testimony, and to resolve inconsistencies within or conflicts among the witnesses' testimony. *Brandt v. Surber*, 194 S.W.3d 108, 115 (Tex. App.—Corpus Christi 2006, pet. ref'd); s*ee Kareh v. Windrum*, No. 01-14-00179-CV, ___ S.W.3d ___, ___, 2017 WL 1018598, at *9 (Tex. App.—Houston [1st Dist.] 2017, no pet. h.) (op. on reh'g). We may not substitute our judgment for that of the jury. *See Kareh*, 2017 WL 18598 at *9. "Because it is the jury's province to resolve conflicting evidence, we must assume that jurors resolved all conflicts in accordance with their verdict." *Figueroa v. Davis*, 318 S.W.3d 53, 60 (Tex. App.—Houston [1st Dist.] 2010, no pet.).

B. Applicable Law

1. Sufficiency

To meet the legal sufficiency standard in medical malpractice cases "plaintiffs are required to adduce evidence of a 'reasonable medical probability' or 'reasonable probability' that their injuries were caused by the negligence of one or more of the defendants, meaning simply that it is 'more likely than not' that the ultimate harm or condition resulted from such negligence.'" *Jelinek v. Casas*, 328 S.W.3d 526, 532–33 (Tex. 2010) (quoting *Kramer v. Lewisville Mem'l Hosp.*, 858 S.W.2d 397, 399–400 (Tex. 1993)). The "elements of a health care liability claim sounding in negligence are (1) a legal duty, (2) a breach of duty, and (3) damages proximately caused by the breach." *Kareh*, 2017 WL 1018598 at *9. The plaintiff bears the burden to prove that the negligence caused an injury: "[A]t trial, the plaintiff must establish two causal nexuses in order to be entitled to recovery: (a) a causal nexus between the defendant's conduct and the event sued upon; and (b) a causal nexus between the event sued upon and the plaintiff's injuries." *Jelinek*, 328 S.W.3d at 532. "The ultimate standard of proof on causation is whether, by a preponderance of the evidence, the negligent act or omission is shown to be a substantial factor in bringing about the harm and without which the harm would not have occurred." *Brandt*, 194 S.W.3d at 115.

"The standard of care for a health care provider is what an ordinarily prudent health care provider would do under the same or similar circumstances." *Kareh*, 2017 WL 1018598 at *9. "In a medical malpractice claim, the plaintiff ordinarily must produce expert testimony to establish the applicable standard of care and causation if those matters are not within the experience of a layperson." *Id*.

2. Experts

Texas Rule of Evidence 702 provides that "a witness qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue." TEX. R. EVID. 702. "'It is the basis of the witness's opinion, and not the witness's qualification or his bare opinions alone, that can settle an issue as a matter of law: a claim will not stand or fall on the mere *ipse dixit* of a credentialed witness.'" *Coastal Transp. Co. v. Crown Cent. Petroleum Corp.*, 136 S.W.3d 227, 232 (Tex. 2004) (quoting *Burrow v. Arce*, 997 S.W.2d 229, 235 (Tex. 1999)).

"Qualified experts may offer opinion testimony if that testimony is both relevant and based on a reliable foundation." *Gharda USA, Inc. v. Control Solutions, Inc.*, 464 S.W.3d 338, 348 (Tex. 2015). "Expert opinion testimony is relevant when it is 'sufficiently tied to the facts of the case [so] that it will aid the jury in resolving a factual dispute.'" *Id*. (citing *E.I. du Pont de Nemours & Co. v. Robinson*, 923 S.W.2d 549, 556 (Tex. 1995)).

3. Judicial Admissions

A judicial admission is a formal waiver of proof, usually found in the pleadings or stipulations of the parties, that dispenses with the production of evidence on an issue and bars the admitting party from disputing it. *DowElanco v. Benitez*, 4 S.W.3d 866, 871 (Tex. App.—Corpus Christi 1999, no pet.); *see Perez v. Perez*, No. 13-11-00169-CV, 2013 WL 398932, at *2 (Tex. App.—Corpus Christi 2013, no pet. h.) (mem. op.). "As long as the statement stands unretracted, it must be taken as true by the court and jury; it is binding on the declarant, and the declarant cannot introduce evidence to contradict

it." *Sherman v. Merit Office Portfolio, Ltd.*, 106 S.W.3d 135, 140 (Tex. App.—Dallas 2003, pet. denied). "It is the nature of an admission that by intention it be an act of waiver, and not merely a statement of assertion or concession, made for some independent purpose." *Id*. (citing *U.S. Fid. & Guar. Co. v. Carr*, 242 S.W.2d 224, 228 (Tex. Civ. App.—San Antonio 1951, writ ref'd)).

The Texas Supreme Court has held that a party's testimonial declarations that are contrary to his position may be quasi-admissions and, generally, treated merely as some evidence. *Mendoza v. Fid. & Guar. Ins. Underwriters, Inc.*, 606 S.W.2d 692, 692 (Tex. 1980). The weight to be given quasi-admissions is to be decided by the trier of fact. *Id*. A quasi-admission will be treated as a judicial admission if it appears that the following conditions are satisfied:

> (1) the statement was made during a judicial proceeding; (2) it was contrary to an essential fact embraced in his theory of defense; (3) it was deliberate, clear, and unequivocal, thereby eliminating the hypothesis of mere mistake or slip of the tongue; (4) giving conclusive effect to the declaration would be consistent with public policy, and (5) the statement was not destructive to the opposing party's theory of recovery.

Medina v. Hart, 240 S.W.3d 16, 23 (Tex. App.—Corpus Christi 2007, pet. denied). A judicial admission relieves the opposing party's burden of proof on an issue. *Id*. In fact, a judicial admission bars the party admitting the fact from later disputing its existence. *Id*.

However, to rely on a judicial admission, a party must timely object to the submission of a jury question on the issue that is the subject of the judicial admission; in other words, a party must object to asking the jury to decide a question that has already been judicially admitted and instead must rely on the judicial admission. *See Houston*

First. Am. Sav. v. Musick, 650 S.W.2d 764, 769 (Tex. 1983); *see also Perez*, 2013 WL 398932 at *3. Further, a party that seeks to rely on a judicial admission must protect the record by objection to the introduction of controverting evidence on the ground that there has been a judicial admission. *See Marshall v. Vise*, 767 S.W.2d 699, 700 (Tex. 1989).

C. Discussion

1. Defense Testimony

O'Connell argues that the opinions of Dr. Gullapalli and Dr. Cleland were no more than conclusory assertions and did not amount to legally or factually sufficient evidence to support the jury's verdict.

The evidence Dr. Cleland relied on to form his expert opinion and testified about came from O'Connell's medical records, the facts concerning her care under Dr. Gullapalli, and his training and experience in the field of retinal surgery. Besides his testimony alone, Dr. Cleland's expert report was admitted into evidence and was used to explain his conclusions to the jury. Dr. Cleland opined that O'Connell's surgery was done with the appropriate standard of care in place by Dr. Gullapalli. Dr. Cleland also agreed that Dr. Gullapalli and Dr. Brown's follow-up procedures with O'Connell were done within the standard of care and agreed as to how those time frames are normally administered. He agreed that O'Connell's pressures were in a good range following Dr. Gullapalli's surgery and he would have also removed the Travatan because it is a pro-inflammatory medication. Dr. Cleland testified about the standard procedures used in the retinal fields regarding the use of gas to close a macular hole, as Dr. Gullpalli attempted to do during surgery. Dr. Cleland also agreed with other retinal experts who saw O'Connell following the surgery, that her vision loss was most likely due to end-stage

glaucoma and a snuff-out of the optic nerve, not a pressure increase following surgery. Additionally, even O'Connell's expert, Dr. Brown, agreed that O'Connell's vision loss could be related to end-stage glaucoma, similar to testimony provided by Drs. Gullapalli and Cleland.

"Opinion testimony that is conclusory or speculative is not relevant evidence, because it does not tend to make the existence of a material fact 'more or less probable.'" *Wal-Mart Stores, Inc. v. Merrell*, 313 S.W.3d 837, 839 (Tex. 2010) (quoting TEX. R. EVID. 401). The testimony provided by Dr. Cleland and Dr. Gullapalli was not conclusory opinion testimony because the opinions offered did make a material fact less probable. Their testimony provided the jury with an alternative explanation for O'Connell's vision loss, which was her end-stage glaucoma and inevitable snuffing out of her vision due to the disease. The jury, as the ultimate trier of the facts, rejected O'Connell's theory of Dr. Gullapalli's negligence based on the evidence presented and found no negligence on the part of either doctor presented in the jury charge. *See City of Keller*, 168 S.W.3d at 819; *see also Brandt*, 194 S.W.3d at 115. "Because it is the jury's province to resolve conflicting evidence, we must assume that jurors resolved all conflicts in accordance with their verdict." *Figueroa*, 318 S.W.3d at 60. We find the evidence was factually and legally sufficient to support the jury verdict. *See id*.; *see also Dow Chem. Co.,* 46 S.W.3d at 241. The expert witnesses who testified presented valid opinion testimony that was not conclusory and that was supported by evidence. *See Gharda USA, Inc.*, 464 S.W.3d at 348.

2. Judicial Admissions

O'Connell also asserts that Dr. Gullapalli judicially admitted to his negligence in

eighteen different instances throughout the trial record. Although Dr. Gullapalli did agree with statements made by O'Connell multiple different times throughout his testimony, we do not find that the statements constituted essential facts that were contrary to Dr. Gullapalli's defense. *See Medina*, 240 S.W.3d at 23. Three of the admissions that O'Connell relies upon could have been relevant to determining the matter of negligence. In her brief, O'Connell cited:

> 14. [Dr. Gullapalli] admitted that in January 2012, he wrote that the most likely cause of the snuff out of O'Connell O'Connell's vision in her right eye were pressure increases too great for O'Connell O'Connell because of her particular type and severity of glaucoma.
>
> 15. [Dr. Gullapalli] admitted that he did not know O'Connell O'Connell's particular type or severity of glaucoma prior to surgery.
>
> . . . .
>
> 18. [Dr. Gullapalli] admitted the standard of care required him to know the condition of O'Connell O'Connell's optic nerve in order to properly manage it; he, however, had no idea what the condition of her right optic nerve was; and he, therefore, fell below the standard of care.

O'Connell also cited Dr. Gullapalli's testimony on cross-examination:

> Q. (By Defense) You had no idea what the state of her optic nerve was, right?
>
> A. (Dr. Gullapalli). No.
>
> Q. And the standard of care requires you to know it so you can make decisions based upon the state of her optic nerve, right?
>
> A. Un-huh, yes.
>
> Q. And you fell below the standard of care because you didn't know what the state of her optic nerve was, correct?
>
> A. Yes.

During direct examination with his defense counsel, Dr. Gullapalli clarified the statements he made to O'Connell's counsel.

> Gullapalli: Well, first of all, for macular hole surgery, it doesn't matter what the state [of the optic nerve] is. If you don't do the surgery, the macular hole is going to stay there, probably get larger, and go through some permanent changes that would end up not restoring the vision.
>
> Number two, as per the surgery for the macular hole is concerned, we always try to do the same way, basically try do it in safe–safe way so that the pressure doesn't go up during the surgery, and we also take precautions to make sure the pressure doesn't go after; and that's–and so, it–it didn't matter whether I had the notes or not.
> . . . .
>
> Defense: –did–did she tell you that she had had any discussion with Dr. Sohocki about change in her visual fields over the period of years that he had been treating her?
>
> Gullapalli: No, she did not.
>
> Defense: If she had come to you with–with these two visual fields, would it have altered your approach to the macular hole?
>
> Gullapalli: No.
>
> Defense: Why is that?
>
> Gullapalli: Because as I said, we always do the surgery in a safe way so that the pressure doesn't go up. We take precautions to make sure the pressure doesn't go up. And so–and that's pretty much standard way of doing it. It's not like you have to make sudden changes to your surgery techniques to make that–prevent that. So there is nothing that you would do differently. You could put drops at the end of the case as a precaution, but it can also make the pressure go down, so you don't–so it's kind of a fine balance that you–

Dr. Gullapalli continued to testify on direct examination[1] that he followed the standard of care used by retinal surgeons across the country and that it was not necessary to further evaluate O'Connell's optic nerve for the type of surgery he was performing to repair the macular hole. Drs. Cleland and Brown made similar statements regarding what procedures were necessary to repair a macular hole. Based upon this record, we do not find Dr. Gullapalli's statements to be a judicial admission.

3. Summary

Having concluded the evidence was sufficient and Dr. Gullapalli's statements did not amount to judicial admissions, we overrule O'Connell's first issue.

III. THIRD PARTY NEGLIGENCE INSTRUCTION WAS NOT ERRONEOUS

By her second issue, O'Connell alleges the trial court committed error by submitting Dr. Sohocki as a responsible third party for the jury to consider in the charge because no evidence supported the submission.

A. Standard of Review and Applicable Law

"To include anything in the jury charge, whether by question, instruction or definition, it must be raised by the written pleadings and the evidence." *Wal-Mart Stores, Inc. v. Redding*, 56 S.W.3d 141, 149 (Tex. App.—Houston [14th Dist.] 2001, pet. ref'd). "In reviewing a point complaining that there was no evidence to support the submission of a question to the jury, we look only at the evidence which tends to support the judgment in order to determine if the trial court abused its discretion in submitting the issue." *Union*

[1] Dr. Gullapalli was called as a witness during O'Connell's case in chief; therefore, O'Connell's counsel started with questions on cross-examination and Dr. Gullapalli's counsel questioned him following O'Connell's questions on direct examination.

Pacific Res. Co. v. Cooper, 109 S.W.3d 557, 560 (Tex. App.—Tyler 2003, pet. ref'd). "We will consider circumstantial evidence and indulge all inferences in favor of the submission." *Id*. "A trial court may decline to submit a relevant issue, only if there is no evidence to support it." *Id*. "When the evidence offered to prove a vital fact is so weak as to do no more than create a mere surmise or suspicion of its existence, the evidence is no more than a scintilla and is, in legal effect, no evidence." *Id*.

B. Discussion

The trial court submitted the following question to the jury as part of the jury charge:

> Did the negligence, if any, of those named below proximately cause the injury in question?
>
> Answer "Yes" or "No" for each of the following:
>
> 1. Dr. Vamsi K. Gullapalli
>
> 2. Dr. John Sohocki
>
> Plaintiffs have the burden of proof on this question as to Dr. Vamsi K. Gullapalli.
>
> Defendant has the burden of proof on this question as to Dr. John Sohocki.

The jury answered "No" to both questions.

Although O'Connell argues there was no evidence presented to support the submission of the jury question regarding Dr. Sohocki's proximate cause to her injury, the record shows otherwise. Throughout the trial, there was extensive testimony regarding Dr. Sohocki's treatment of O'Connell. Dr. Sohocki was O'Connell's long term eye doctor. Dr. Sohocki had suspicions that O'Connell had glaucoma back in the 1990's, yet did not follow up on diagnosis even after her extended absence from his clinic. Although

O'Connell's experts do not blame Dr. Sohocki for her loss of vision in the right eye, the burden was on Dr. Gullapalli to present evidence that Dr. Sohocki's negligence was contributory.

Dr. Gullapalli and his expert testified that O'Connell had severe glaucoma when she first saw Dr. Gullapalli. Dr. Gullapalli assumed that Dr. Sohocki was treating O'Connell for the glaucoma and had evidence to support that assumption based on the medication she was prescribed. Dr. Gullapalli made decisions for his treatment of O'Connell based on Dr. Sohocki's referral and course of treatment for O'Connell's glaucoma. Dr. Cleland stated that he believed that an earlier diagnosis of glaucoma could have slowed down and possibly prevented the damage from glaucoma that O'Connell experienced. Based on the testimony presented, there was more than a scintilla of evidence regarding Dr. Sohocki's percentage of negligence, and the question was proper to submit to the jury. *See Union Pacific*, 109 S.W.3d at 560. Accordingly, the trial court did not abuse its discretion. We overrule O'Connell's second issue.

IV. CONCLUSION

We affirm the judgment of the trial court.

GINA M. BENAVIDES,
Justice

Delivered and filed the
29th day of June, 2017.