NUMBER 13-18-00362-CV

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI – EDINBURG

COLUMBIA VALLEY HEALTHCARE SYSTEM L.P. D/B/A VALLEY REGIONAL MEDICAL CENTER, **Appellant,**

v.

ALEXIS ANDRADE, A MINOR, BY AND THROUGH HIS MOTHER, ANA RAMIREZ, AS NEXT FRIEND AND ANA RAMIREZ, INDIVIDUALLY, **Appellees.**

On appeal from the 445th District Court of Cameron County, Texas.

MEMORANDUM OPINION

Before Justices Benavides, Longoria, and Perkes
Memorandum Opinion by Justice Longoria

Appellees Ana Ramirez and Alex Andrade, a minor, by and through his mother Ramirez, brought a negligence action against appellant Columbia Valley Healthcare

System, LP, DBA Valley Regional Medical Center (VRMC) arising from the birth of Andrade. After a jury trial, a verdict was returned in favor of appellees.

By nine issues, VRMC argues that: (1) there is legally and factually insufficient evidence to support a finding of causation; (2) the trial court erred by failing to charge the jury on Andrade's life expectancy; (3) the trial court erred by failing to charge the jury on future healthcare expenses for Andrade before and after he turns eighteen; (4) the lump sum and the five-year periodic payments awarded in the final judgment are not supported by the evidence; (5) the final judgment disregards the jury's findings on Andrade's future medical expenses; (6) the periodic payments statute is ambiguous; (7) VRMC is entitled to a remittitur of $7,248,000 based on appellees' request that periodic payments of $604,000 a year for five years would compensate for future damages; (8) the trial court erred in excluding expert testimony; and (9) alternatively, the trial court's judgment should be modified. We affirm.

I. BACKGROUND

On Friday, October 24, 2014, Ana was hospitalized at VRMC prior to giving premature birth to her son, Andrade. During her hospitalization, Andrade's heart rate decelerated multiple times. As a result, Dagoberto Martinez, an obstetrician, ordered the nurses to continuously monitor Andrade's heart rate. Throughout the remainder of the weekend, Andrade's heart rate remained normal. However, shortly after midnight on Sunday, Andrade's heart rate dropped below the baseline heart rate for approximately two minutes. At approximately 12:20 a.m., Andrade's heart rate dropped again for approximately seven minutes. At 12:38 a.m., Andrade's heart rate dropped to a level that one of the nurses admitted was "dangerous." After this drop, Andrade's heart rate did not

return to normal; instead, at 12:48 a.m., Andrade's heart rate dropped even further. At 12:50 a.m., the nurses could not detect a heartbeat, but they did not call Martinez until 12:56 a.m. Martinez arrived at the hospital at 1:14 a.m. and shortly thereafter ordered a c-section to be performed.

When Andrade was delivered at 1:33 a.m., Martinez observed that the umbilical cord was tightly wrapped around his neck, resulting in oxygen and blood loss to his brain. After being med-flighted to Corpus Christi and a month-long stay in critical care, Andrade was diagnosed with cerebral palsy, a permanent and severe brain injury. He requires 24-hour care.

A little over a year prior to trial, VRMC submitted its Request for Court Ordered Periodic Payments. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 74.503(a) (stating that "[a]t the request of a defendant physician or health care provider or claimant, the court shall order that medical, health care, or custodial services awarded in a health care liability claim be paid in whole or in part in periodic payments rather than by a lump-sum payment").

Appellees argued at trial that the nurses breached their duty of care to call the doctor the first time the heart rate decelerated, nearly an hour before ultimately calling the doctor. They argued the nurses were negligent because they did not call the doctor until they could no longer find the heart rate.

The jury found in favor of Andrade and his mother, finding VRMC negligent, and awarded damages. The jury awarded Andrade $62,000 in past healthcare expenses, $9,060,000 in future healthcare expenses from the time of trial until Andrade reaches the age of eighteen years, and $1,208,000 in future healthcare expenses after age eighteen.

Appellees filed proposed judgments, each stating that five "periodic payments in the amount of $604,000.00 will compensate [Andrade] for his future damages." Appellees requested that the balance of the jury verdict—$7,310,000—be paid to them in a one-time, lump sum payment. The trial court rendered final judgment as proposed by appellees and ordered that all payments be placed in a special needs trust for Andrade.

VRMC filed its Request for Findings of Fact and Conclusions of Law, asking the trial court to make substantive findings of fact and conclusions of law in support of its periodic payment award. *See id.* § 74.503(c). The trial court formally denied the request by order. VRMC's objections and a motion to reconsider were likewise denied by formal order. VRMC subsequently filed its: Motion for New Trial, or in the Alternative, Request for Remittitur; Motion for Judgment Notwithstanding the Verdict; and Motion to Reform the Judgment. The trial court denied each of the motions. This appeal followed.

II. CAUSATION

In its first issue, VRMC argues that there is legally and factually insufficient evidence to support a finding of causation.

A. Standard of Review & Applicable Law

> Evidence is legally insufficient to support a jury finding when (1) the record discloses a complete absence of evidence of a vital fact; (2) the court is barred by rules of law or of evidence from giving weight to the only evidence offered to prove a vital fact; (3) the evidence offered to prove a vital fact is no more than a mere scintilla; or (4) the evidence establishes conclusively the opposite of a vital fact.

Bustamante v. Ponte, 529 S.W.3d 447, 455–56 (Tex. 2017); *see City of Keller v. Wilson,* 168 S.W.3d 802, 810 (Tex. 2005). More than a scintilla of evidence exists when the evidence supporting the finding, as a whole, "rises to a level that would enable reasonable and fair-minded people to differ in their conclusions." *Merrell Dow Pharms. v.*

Havner, 953 S.W.2d 706, 711 (Tex. 1997); *Transp. Ins. v. Moriel,* 879 S.W.2d 10, 25 (Tex. 1994).

If the evidence is so weak as to do no more than create a mere surmise or suspicion of its existence, its legal effect is that it is no evidence. *See Haynes & Boone v. Bowser Bouldin, Ltd.,* 896 S.W.2d 179, 182 (Tex. 1995), abrogated by *Ford Motor Co. v. Ledesma*, 242 S.W.3d 32 (Tex. 2007). Conversely, evidence conclusively establishes a vital fact when the evidence is such that reasonable people could not disagree in their conclusions. *See City of Keller,* 168 S.W.3d at 814–17. In conducting a legal sufficiency review, we must consider the evidence in the light most favorable to the trial court's findings and indulge every reasonable inference that would support them. *See Bustamante*, 529 S.W.3d at 456; *City of Keller,* 168 S.W.3d at 822.

> To satisfy a legal sufficiency review, plaintiffs in medical-malpractice cases 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 defendants, meaning simply that it is "more likely than not' that the ultimate harm or condition resulted from such negligence.

Bustamante, 529 S.W.3d at 456 (quoting *Jelinek v. Casas*, 328 S.W.3d 526, 532–33 (Tex. 2010)). Additionally, "when the evidence demonstrates other *plausible* causes of the injury or condition that could be negated, the plaintiff must offer evidence excluding those causes with reasonable certainty." *Bustamante*, 529 S.W.3d at 456. Ultimately, we will uphold a trial court's ruling if it is correct under any legal theory. *See Columbia Med. Ctr. Subsidiary, L.P. v. Meier*, 198 S.W.3d 408, 411 (Tex. App.—Dallas 2006, pet. denied).

Under a factual sufficiency review, we consider and weigh all of the evidence and set aside the judgment below only if it is so against the great weight and preponderance of the evidence so as to be wrong and unjust. *See City of Keller,* 168 S.W.3d at 826.

B. Discussion

VRMC first argues that appellees' experts failed to rule out a combination of plausible events and conditions that could have contributed to Andrade's injuries. In particular, it points to the following facts: (1) Ramirez was a "high-risk candidate" because of her age and high blood sugar; (2) Ramirez had an untreated urinary tract infection during her pregnancy; (3) Ramirez missed several of her routine checkups during pregnancy; (4) Ramirez had a premature rupture of membranes, which is what led to her being hospitalized in the first place; (5) pathological studies performed after the birth indicated that Ramirez had a large placental abruption, meaning the placenta tore away from the uterine wall; (6) the umbilical cord itself was twisted and inflamed, possibly indicating that less oxygen was flowing to Andrade; and (7) Ramirez showed signs of chronic infection and the amniotic fluid itself was infected. However, the evidence shows that none of these conditions were raised as a plausible cause of the injury. And even if the evidence did raise other plausible causes of the injury, the experts negated them as possible causes.

Robert Zimmerman, M.D., a pediatric neuroradiologist, testified that the pattern of injury shown on Andrade's neuroimaging studies could not be anything other than acute asphyxia. Stephen Glass, M.D., a pediatric neurologist, testified that Andrade suffered acute asphyxia that was caused by the nuchal cord wrapping tightly around his head. Zimmerman and Glass ruled out genetic conditions and infection as possible causes of the injury. Zimmerman also excluded abnormalities with the placenta as a possible cause. VRMC's expert, Michael Ross, M.D., agreed that Andrade was asphyxiated by the umbilical cord. Ross also agreed in excluding other factors as possible causes of

Andrade's asphyxia, including problems with the placenta, infection, and genetic conditions. To the extent that the evidence raised other plausible causes of the injury, appellees offered evidence that excluded them as possible sources of the injury with reasonable certainty. *See Bustamante*, 529 S.W.3d at 456.

VRMC also argues that the evidence does not prove that the nurses' failure to notify Martinez earlier was a substantial factor in Andrade's injuries. More specifically, VRMC argues that the evidence failed to establish that the outcome would have been any different if Martinez had intervened sooner. However, Martinez claimed he was unable to "make the decision that [he] needed to make to save [Andrade]" because of the nurses' failure to call him earlier. According to Martinez, if he had been called earlier, he would have been able to perform a c-section earlier, before Andrade suffered from significant oxygen deprivation. Similarly, appellees' maternal fetal medicine expert, James Balducci, M.D., testified that the nurses should have called Martinez as soon as Andrade's heart rate began deaccelerating at 12:23 a.m. instead of waiting until 12:56 a.m. Balducci further opined:

> [a]nd that has been my major criticism and my major opinion in this case[;] the doctor was basically shut out, didn't have a chance. If the doctor was called the first time or the second time or the third time, he had his chance to come in and save the baby.

Ross likewise testified that if Andrade had been delivered by 1:21 a.m., he would not have suffered any long-term injuries. Therefore, we conclude that there was legally and factually sufficient evidence of causation. *See id.* at 455. We overrule VRMC's first issue.

III. THE PERIODIC PAYMENT STATUTE

Issues two through seven all deal with the application and interpretation of the periodic payment statute. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 74.503.[1]

A. Jury Charge Error

In its second and third issues, VRMC argues that the trial court erred by failing to charge the jury on Andrade's life expectancy and on future healthcare expenses for Andrade before and after he turns eighteen, respectively.

1. Standard of Review & Applicable Law

Generally, the trial court has considerable discretion in determining the proper jury instructions, and we will only reverse if the trial court abused its discretion. *See Columbia Rio Grande Healthcare, L.P. v. Hawley*, 284 S.W.3d 851, 856 (Tex. 2009); *Fluor Daniel, Inc. v. Boyd*, 941 S.W.2d 292, 295 (Tex. App.—Corpus Christi–Edinburg 1996, writ

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[1] The periodic payment statute states in its entirety:

> (a) At the request of a defendant physician or health care provider or claimant, the court shall order that medical, health care, or custodial services awarded in a health care liability claim be paid in whole or in part in periodic payments rather than by a lump-sum payment.
>
> (b) At the request of a defendant physician or health care provider or claimant, the court may order that future damages other than medical, health care, or custodial services awarded in a health care liability claim be paid in whole or in part in periodic payments rather than by a lump sum payment.
>
> (c) The court shall make a specific finding of the dollar amount of periodic payments that will compensate the claimant for the future damages.
>
> (d) The court shall specify in its judgment ordering the payment of future damages by periodic payments the:
>
> (1) recipient of the payments;
>
> (2) dollar amount of the payments;
>
> (3) interval between payments; and
>
> (4) number of payments or the period of time over which payments must be made.

TEX. CIV. PRAC. & REM. CODE ANN. § 74.503.

denied). The trial court abuses its discretion if it acts arbitrarily or fails to follow guiding rules and principles. *See Hawley*, 284 S.W.3d at 856; *Fluor Daniel*, 941 S.W.2d at 295.

"The chief guiding principle the trial court should refer to when submitting instructions and definitions is Rule 277." *Fluor Daniel*, 941 S.W.2d at 295; *see* TEX. R. CIV. P. 277. According to Rule 277, the trial court should give "such instructions and definitions as shall be proper to enable the jury to render a verdict." TEX. R. CIV. P. 277. An instruction is proper if it "(1) assists the jury, (2) accurately states the law, and (3) finds support in the pleadings and evidence." *Hawley*, 284 S.W.3d at 856; *see Ohrt v. Union Gas Corp.*, 398 S.W.3d 315, 338 (Tex. App.—Corpus Christi–Edinburg 2012, pet. denied).

However, "an appellate court will not reverse a judge for a charge error unless that error was harmful because it probably caused the rendition of an improper judgment or probably prevented the petitioner from properly presenting the case to the appellate courts." *Thota v. Young*, 366 S.W.3d 678, 687 (Tex. 2012) (internal quotations omitted) *see* TEX. R. APP. P. 44.1. Charge error is considered harmful "if it relates to a contested, critical issue." *Thota*, 366 S.W.3d at 687 (quoting *Hawley,* 284 S.W.3d at 856).

2. Discussion

a. Life Expectancy

In its second issue, VRMC asserts that because Andrade's life expectancy was a controlling issue of fact, the trial court erred by failing to charge the jury on his life expectancy. More specifically, even though life expectancy is not mentioned in the periodic payment statute, VRMC argues that § 74.503(d)(4) necessitates a jury finding on life expectancy. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 74.503(d)(4). Appellees argue

that the periodic payment statute does not require the jury to make a specific finding on life expectancy. We agree with appellees.

Under § 74.503(d), a trial court is required to specify in its judgment the: (1) recipient of the payments; (2) dollar amount of the payments; (3) interval between payments; and (4) number of payments or the period of time over which payments must be made. *Id.* § 74.503(d). According to VRMC, the trial court cannot make these statutorily required findings without a jury finding on life expectancy. However, life expectancy is not mentioned anywhere in the statute, and VRMC has failed to identify any other statute that requires a jury finding on life expectancy. Additionally, VRMC has not cited, and we cannot find, a single case that has required a specific jury finding on life expectancy. While not dealing specifically with the periodic payment statute, the Fort Worth Court of Appeals has previously concluded that plaintiffs in a medical malpractice suit are not required to prove life expectancy to a reasonable medical probability because life expectancy is uncertain. *See Columbia Med. Ctr. of Las Colinas v. Bush ex rel. Bush*, 122 S.W.3d 835, 863 (Tex. App.—Fort Worth 2003, pet. denied) (holding that it would be impossible for plaintiffs to prove life expectancy to a reasonable medical probability because "life expectancy, by its very nature, is uncertain"); *Pipgras v. Hart*, 832 S.W.2d 360, 365 (Tex. App.—Fort Worth 1992, writ denied) ("Life expectancy, medical advances, and the future cost of products, services and money are not matters of certainty, thus appellate courts are particularly reluctant to disturb a jury's award of these damages.").

Considering the trial court's broad discretion in determining the proper jury instructions, we conclude that VRMC has failed to demonstrate how the trial court abused this discretion. *Hawley*, 284 S.W.3d at 856. We overrule VRMC's second issue.

b. Annual Future Healthcare Expenses

In its third issue, VRMC asserts that the charge was erroneous because it did not instruct the jury to make a finding as to Andrade's future healthcare expenses for each year, both before and after he turns eighteen. Similar to its arguments above, VRMC argues that Andrade's annual future healthcare costs were a controlling issue of fact that should have been resolved by the jury. However, we note that the periodic payment statute is silent on the issue. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 74.503. Also, VRMC fails to cite, and we cannot find, any cases that have concluded that a specific jury finding on annual future healthcare costs is mandatory. The jury awarded Andrade $9,060,000 in future healthcare expenses from the time of trial until Andrade reaches the age of eighteen years, and $1,208,000 in future healthcare expenses after age eighteen. VRMC has failed to demonstrate that the trial court erred by requiring the jury to further break down those findings into year-by-year awards for future healthcare expenses. We overrule VRMC's third issue.

B. The Lump Sum & Periodic Payment

In its fourth issue, VRMC argues that the lump sum payment and the five-year periodic payments were not supported by the evidence. Additionally, VRMC claims that the trial court erred by failing to file findings of fact and conclusions of law regarding the lump sum and periodic payments. In its fifth issue, VRMC argues that the trial court's division between the lump sum and periodic payments disregarded the jury's findings.

1. Standard of Review & Applicable Law

We review a trial court's order for periodic payments for an abuse of discretion. *Regent Care Ctr. of San Antonio, L.P. v. Detrick*, ___ S.W.3d ___, ___, 2020 WL 2311943, at *5 (Tex. May 8, 2020).

> The court may order that an award of future medical expenses be paid periodically either in whole or in part, but the "dollar amount" of the "periodic payments" it orders must be the amount that evidence shows will "compensate the claimant for the future damages." In other words, any division between lump-sum payments and periodic payments of damages that will be "incurred after the date of judgment" must be founded in the record. The party requesting an order for periodic payments has the burden to identify for the trial court evidence regarding each of the findings required by section 74.503, and the findings must be supported by sufficient evidence. The trial record may not contain all of the evidence necessary to make the required findings, and the trial court has discretion to receive additional evidence for that purpose. Such evidence may not be used to contradict the jury's findings on any issues submitted to it, however. Subchapter K gives the trial court no discretion to craft its own award of damages inconsistent with the jury's verdict.

Id. at *5 (internal citations omitted); *see* TEX. CIV. PRAC. & REM. CODE ANN. § 74.503.

2. Discussion

The jury awarded a total of $10,330,000 to Andrade: $62,000 in past healthcare expenses, $9,060,000 in future healthcare expenses before Andrade turns eighteen, and $1,208,000 in future healthcare expenses after age eighteen. In its final verdict, the trial court found that five "periodic payments in the amount of $604,000.00 will compensate [Andrade] for his future damages." The judgment then stated that VRMC must pay appellees one lump sum payment of $7,310,000 in cash; this amount represented "the balance of the total amount of the Final Judgment . . . after deduction for periodic payments."

The Texas Supreme Court's recent decision in *Regent* is especially instructive concerning the trial court's division between the lump sum and periodic payments. *See Regent*, ___ S.W.3d ___, ___, 2020 WL 2311943, at *5. In *Regent*, the plaintiff was ultimately awarded $3,399,371. *See id.* The defendant Regent requested that the entire award of future medical care be paid in periodic payments, but the trial court only ordered that $256,358 be paid in periodic payments over a twenty-four-month timeframe. *See id.* On appeal, Regent argued that the trial court abused its discretion in awarding that number in periodic payments because it was unsupported by the evidence. *See id.* The court of appeals concluded that the trial court had not abused its discretion in determining the amount to be paid in periodic payments. *See id.*

The *Regent* Court concluded that the trial court erred by ordering $256,358 to be paid periodically because nothing in the record supported awarding only that specific portion of the damages as periodic payments. *See id.* However, the Court stated that Regent Care is not entitled to reversal unless this error harmed Regent, "that is, unless the trial court had discretion to order that a larger amount of [the plaintiff's] damages be paid periodically." *Id.* Continuing its analysis, the Court noted that Regent Care had presented no evidence supporting its request that the entire award be paid periodically. *See id.* The *Regent* Court also noted that the jury had specifically found that $3 million is what would compensate the plaintiff "if paid *now* in cash." *Id.* (emphasis added). It would have been an abuse of discretion if the trial court had ordered the $3 million to be awarded periodically, either in whole or in part, because doing so would "effectively 'double discount' the award." *See id.* This is because paying $3 million, which the jury had

determined would compensate the plaintiff if paid *now*, in periodic payments would undercompensate the plaintiff for the expenses "he would incur in the future." *See id.*

The present case is distinguishable from *Regent*. In the present case, appellees submitted evidence that they would incur $655,000 in annual healthcare costs caring for Andrade. VRMC asserted that the annual costs would only amount to $604,000. Additionally, appellees submitted evidence to suggest that Andrade might have a life expectancy of twenty-nine years, whereas VRMC argued that Andrade only had a life expectancy of five years. Thus, unlike *Regent*, the amount that the trial court ordered to be paid periodically in this case—$604,000 a year for five years—is based on sufficient evidence in the record.

Furthermore, VRMC has failed to demonstrate that the trial court had discretion to order a higher amount of the damages be paid periodically. Simply requesting periodic payments does not entitle a party to have the entire award paid out in periodic payments. *See id.*; *see also* TEX. CIV. PRAC. & REM. CODE ANN. § 74.503. It is true that when a defendant invokes the periodic payment statute, the defendant is entitled to have at least a portion of the "medical, health care, or custodial services" damages allocated as periodic payments. TEX. CIV. PRAC. & REM. CODE ANN. § 74.503(a) (providing that the trial court "shall" order that the award for such damages be made in periodic payments, either "in whole or in part"). However, subsection (b) states only that the trial court "may order" that future damages (other than for medical care, health care, or custodial services) be paid in periodic payments, in whole or in part. *Id.* § 74.503(b). Additionally, there is no language in the statute that mandates the entire award be paid in periodic payments per the defendant's request. *See id.* To the contrary, both subsection (a) and (b) clearly allow

damages to "be paid in whole *or in part* in periodic payments." *Id.* § 74.503(a), (b) (emphasis added). Thus, even though VRMC requested court-ordered periodic payments over one year prior to trial, this alone does not entitle VRMC to have the entire jury award paid as periodic payments. *See id.*; *Regent*, ___ S.W.3d at ___. And there is no other evidence to support ordering the entire award to be paid periodically.

VRMC also argues that the trial court erred by refusing to file findings of fact and conclusions of law. However, VRMC acknowledges that findings of fact and conclusions of law are generally only required when requested by a party in "any case tried in the district or county court *without a jury*." TEX. R. CIV. P. 296 (emphasis added). This case was tried before a jury. Additionally, in *Regent*, the Court held that the division between the lump sum and periodic payments needed to be based on evidence in the record. *See Regent*, ___ S.W.3d ___, ___, 2020 WL 2311943, at *5. *Regent* did not hold that a trial court's ordering of periodic payments must be supported by findings of fact and conclusions of law. We conclude that VRMC has failed to demonstrate that the trial court erred by failing to file findings of fact and conclusions of law.

We overrule VRMC's fourth issue.

In its fifth issue, VRMC argues that the trial court's judgment disregards the jury's findings. According to VRMC, the judgment ignores the jury's findings on future damages. It is true that the trial court has no discretion to craft an award of damages inconsistent with the jury's verdict. *See Regent*, ___ S.W.3d at ___; *see also* TEX. R. CIV. P. 301. However, the $604,000 figure that the trial court ordered to be paid periodically is based directly on the figure used by the jury in its calculation of damages. The jury awarded $9,060,000 for Andrade's healthcare expenses from age three to eighteen, which is

exactly $604,000 a year for fifteen years. The jury additionally awarded Andrade $1,208,000 for future medical expenses after the age of eighteen, which is exactly $604,000 a year for two years. The trial court's judgment is not inconsistent with the jury's award. *See id.*

We overrule VRMC's fifth issue.

C. Remittitur

In its seventh issue, which we address out of order, VRMC argues that it is entitled to a remittitur of $7,248,000 because the appellees suggested that the periodic payments of $604,000 a year for five years would fully compensate them for future damages.

At a hearing on appellees' proposed judgment, appellees stated:

> So what we're asking the Court to do, under 503C, is the Court shall make a specific finding. We're asking the Court to find that the amount necessary in periodic payments to compensate the claimant is $604,000 a year . . . [and] we're requesting that these be made each year for five years.

Thus, VRMC argues that any award beyond $3,020,000 is overcompensation as a matter of law. However, appellees did not assert that this amount would fully compensate them for all past, present, and future expenses; they were merely asserting that $604,000 a year is how much would be appropriate to award specifically as periodic payments. In other words, appellees were merely suggesting that this serve as the amount awarded as periodic payments. Appellees did not express an explicit desire to forego the remainder of its award under the jury verdict. The periodic payments statutes allow the award to be paid, in whole or in part, as periodic payments. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 74.503. Thus, the appellees were still entitled to recover the remainder of the award that was not granted as periodic payments as a lump sum. *See id.* Ultimately, VRMC has

failed to demonstrate why we should contradict the jury's verdict and reduce the award by $7,248,000.

We overrule VRMC's seventh issue.

D. Ambiguous Statutes

By its sixth issue, and in the alternative to the above, VRMC argues that the periodic payment statute is ambiguous and that its internally-conflicting provisions should be resolved in favor of "(1) jury questions on life expectancy and future medical by year, and (2) evidence to support the periodic payment award and lump sum award, if any."

"Whether statutory language is ambiguous is a matter of law for courts to decide, and language is ambiguous only if the words yield more than one reasonable interpretation." *Sw. Royalties, Inc. v. Hegar*, 500 S.W.3d 400, 405 (Tex. 2016). VRMC claims that subsections (a) and (c) of § 74.503 conflict with one another. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 74.503 (a), (c). Subsection (a) states: "[a]t the request of a defendant physician or health care provider or claimant, the court shall order that medical, health care, or custodial services awarded in a health care liability claim be paid in whole or in part in periodic payments rather than by a lump-sum payment." *Id.* § 74.503 (a). Subsection (c) states: "[t]he court shall make a specific finding of the dollar amount of periodic payments that will compensate the claimant for the future damages." VRMC argues that there is a conflict between subsection (a), which gives trial court's discretion to divide the award between the lump and periodic payments, and subsection (c), which according to VRMC, "gives the trial court no such discretion." However, we see no conflict between these subsections. Subsection (a) gives the trial court the ability to award a portion of the award as periodic payments. *Id.* Subsection (c) then mandates that, if the

trial court does award periodic payments, it must specify a specific dollar amount that will "compensate the claimant for the future damages." *Id.* § 74.503(c).

VRMC additionally argues that § 74.503(a) is inconsistent with § 74.506, which requires that "[p]eriodic payments . . . terminate on the death of the recipient." *Id.* § 74.506(b). However, we fail to see a conflict. VRMC assumes that the entire damages award must be subject to termination at death per § 74.506(b), but VRMC offers no support for this interpretation. There is no statute that mandates that the entire damages award must be subject to termination upon death of the recipient. Rather, § 74.503(a) allows trial courts to divide damage awards into lump sum payments and periodic payments, while § 74.506 simply mandates that any periodic payments that were ordered must terminate upon death of the recipient. *See id.* §§ 74.503(a), 74.506(b).

We overrule VRMC's sixth issue.

IV. Exclusion of Expert Testimony

By its eighth issue, VRMC argues that the trial court erred by excluding the expert testimony of Susan Combs.

A. Standard of Review & Applicable Law

We review a trial court's exclusion of evidence under the abuse of discretion standard. *See Caffe Ribs, Inc. v. State*, 487 S.W.3d 137, 142 (Tex. 2016). Rule 702 of the Texas Rules of Evidence contains three requirements for the admission of expert testimony: (1) the witness must be qualified; (2) the proposed testimony must be scientific knowledge; and (3) the testimony must assist the trier of fact to understand the evidence or to determine a fact issue. *See* TEX. R. EVID. 702; *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 589 (1993); *E.I. du Pont de Nemours & Co., Inc. v. Robinson*, 923 S.W.2d

549, 556 (Tex. 1995). To constitute scientific knowledge, the proposed testimony must be relevant and reliable. *See Robinson*, 923 S.W.2d at 556. "The requirement that the proposed testimony be relevant incorporates traditional relevancy analysis under Rules 401 and 402." *Id.*; *see* TEX. R. EVID. 401, 402. To be relevant, the proposed testimony must be "sufficiently tied to the facts of the case that it will aid the jury in resolving a factual dispute." *Robinson*, 923 S.W.2d at 556.

Under the collateral source rule, a wrongdoer is barred from "offsetting his liability by insurance benefits independently procured by the injured party." *Sky View at Las Palmas, LLC v. Mendez*, 555 S.W.3d 101, 114 (Tex. 2018).

> The collateral source rule is both a rule of evidence and damages. Generally, it precludes a tortfeasor from obtaining the benefit of, or even mentioning, payments to the injured party from sources other than the tortfeasor. In other words, the defendant is not entitled to present evidence of, or obtain an offset for, funds received by the plaintiff from a collateral source.

McMillan v. Hearne, 584 S.W.3d 505, 520 (Tex. App.—Texarkana 2019, no pet.) (quoting *Taylor v. Am. Fabritech, Inc.*, 132 S.W.3d 613, 626 (Tex. App.—Houston [14th Dist.] 2004, pet. denied)).

To obtain reversal of a judgment based on error in the admission or exclusion of evidence, an appellant must show that the trial court's ruling was in error and that the error probably caused the rendition of an improper judgment. *See* TEX. R. APP. P. 44.1(a)(1).

B. Discussion

Below at the trial court, appellees agreed that Combs was qualified to testify as an expert concerning the Affordable Care Act (ACA). However, appellees asserted that her testimony was not relevant to the issue of future medical expenses, and the trial court

granted appellee's motion to exclude her testimony based on the collateral source rule. On appeal, VRMC asserts that Combs's testimony "would have aided the factfinder in determining the right plan for Andrade and the reasonable cost of actual future medical expenses." Thus, according to VRMC, Combs's testimony was relevant and admissible. We agree with appellees.

In her offer of proof, Combs testified that Andrade would be able to obtain health insurance coverage under the ACA, which would reduce the cost of future medical expenses. The effect of her testimony was to offset the liability of VRMC by insurance benefits that Andrade would be able to procure under the ACA. *See Sky View*, 555 S.W.3d at 114. This falls within the purview of the collateral source rule. *See id.*; *McMillan*, 584 S.W.3d at 520; *Taylor*, 132 S.W.3d at 626. VRMC cannot introduce evidence to project what Andrade's future medical costs would be with the benefit of insurance coverage under the ACA. *See Sky View*, 555 S.W.3d at 114. The trial court did not err in excluding Combs's testimony. *See Caffe Ribs*, 487 S.W.3d at 142.

However, even if the trial court erred in excluding Combs's testimony, VRMC failed to demonstrate that it was harmed by such error. *See* TEX. R. APP. P. 44.1(a)(1). As we discussed above, the jury's award of damages was based on the evidence submitted by VRMC's expert that Andrade's future medical costs would be $604,000 per year. Thus, it is hard to conclude that the exclusion of Combs's testimony probably caused the rendition of an improper judgment when the damages awarded by the jury were based on the numbers promulgated by VRMC's own expert. *See Gunn v. McCoy*, 554 S.W.3d 645, 671 (Tex. 2018) (concluding that the exclusion of expert testimony concerning future medical

expenses was not harmful error because it did not probably cause the rendition of an improper judgment).

We overrule VRMC's eighth issue.

V. MODIFICATION OF THE JUDGMENT

In its ninth and final issue, VRMC argues, alternatively to the above, that the trial court's judgment should be modified in several ways. Below, VRMC filed a motion to reform the judgment that was denied by the trial court.

A. Special Trust

First, VRMC asserts that the special trust does not belong in the judgment because: (1) § 74.503 makes no mention of special trusts and the special trust is not a party to the suit; (2) the special trust allows funds to be used to maintain good health, safety, and well-being, but the jury did not award any damages for good health, safety, or well-being; and (3) the special trust mandates that any residuary trust estate revert to Andrade's father and mother at death, thus making his father a contingent beneficiary to the jury's award of $10,330,000 even though the father was not a named party in the suit. Thus, VRMC requests that we modify the judgment to remove any reference to a special trust.

Even though special trusts are not mentioned in § 74.503, a trial court has broad discretion in determining the method of funding periodic payments. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 74.505. Furthermore, compensation for Andrade's future well-being and safety is a perfectly acceptable use of the trust funds. VRMC offers no support to indicate that this would be an improper use of the money. And VRMC's third complaint seems to simply be a complaint that the trust will be disbursed to Andrade's heirs-in-law

in accordance with Texas law. *See* TEX. EST. CODE ANN. § 101.001. VRMC offers no support as to why this is improper.

B. Deposit of Periodic Payments into a Bank Account

VRMC next requests that we delete the requirement that VRMC deposit the entire sum of the periodic payment in an interest-bearing escrow bank account. According to VRMC, this requirement does not comply with § 74.501(3), which states that "'[p]eriodic payments' means the payment of money or its equivalent *to the recipient* of future damages at defined intervals." TEX. CIV. PRAC. & REM. CODE ANN. § 74.501(3) (emphasis added). However, we again note that the trial court has considerable discretion in determining how to fund the payments. *See id.* § 74.505. VRMC offered one method of funding the payments, and the trial court simply chose a different method. The funds are still being paid to Andrade, the recipient. VRMC has failed to demonstrate that the trial court's decision to require the periodic payments be deposited in a bank account was an abuse of discretion. *See Regent*, ___ S.W.3d at ___.

C. Notification of Death Provisions

VRMC next argues that the judgment should be reformed to state

> Plaintiffs are required to notify the Vice President of Quality and Patient Safety at [VRMC] within thirty days of [Andrade's] death and, if death occurs within thirty days of a periodic payment, Plaintiffs are required to notify the Vice President of Quality and Patient Safety at [VRMC] prior to any scheduled payment.

Otherwise, according to VRMC, appellees could send notification of death within thirty days of death but after a periodic payment has already been made to the irrevocable trust. VRMC's concern is that it will make a periodic payment after Andrade has died. However, the obligation to make periodic payments terminates upon the death of the recipient, not

upon the date of notification. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 74.506. And the final judgment already states that when Andrade passes away, VRMC is "entitled to withdraw the remaining funds in escrow."

VRMC also suggests that notifying its counsel of Andrade's death is insufficient; instead, VRMC argues that we should modify the judgment to require appellees to notify its Vice President of Quality and Patient Safety of Andrade's death via certified mail. However, VRMC is silent as to why this would be necessary or helpful. As such, we will not modify the language of the judgment in this regard.

D. Attorney's Fees

VRMC also asks us to eliminate the portion of the judgment declaring the present value of the periodic payments "for purposes of computing attorney's fees." However, the trial court is required to specify a present-day value of periodic payments for purposes of computing attorney's fees. *See id.* § 74.507.

VRMC additionally asks us to delete the portion of the judgment that states that "Defendant pay the balance of the total amount of the Final Judgment after deduction for the periodic payments of $3,020,000 in cash to the Plaintiffs and Plaintiffs' attorneys within thirty days of the date of entry of this Final Judgment." VRMC argues that this language suggests it is an obligor for attorney's fees, when in reality "any obligation for such fees is due under private contract between [appellees] and [their] attorneys." VRMC also complains that appellees' attorneys are not a party to the suit. However, the final judgment makes it clear that VRMC must make the necessary payments to appellees so that they, in turn, can pay their attorneys. VRMC offers no authority to support the proposition that this language is improper.

E. Post-Judgment Interest

Finally, VRMC argues that the trial court improperly calculated post-judgment interest. The final judgment states:

> [T]he total judgment amount of $10,330,000.00, plus the prejudgment interest of $5,078.90, will bear post judgment interest at the annual rate of FIVE AND 00/100 PERCENT (5.00%) from the date the Final Judgment is entered by this Court until the final judgment is fully paid.

VRMC argues this language, particularly the phrase "fully paid," requires it to continue paying post-judgment interest on the full sum of damages until the entire judgment is paid. In other words, VRMC asserts it will have to pay post-judgment interest on the entire $10,335,078.90 award until the final periodic payment is delivered to appellees. VRMC asks us to modify the judgment so that its post-judgment obligations cease once the $3,020,000 is deposited. Appellees agree with VRMC that "[a]ll obligations for post-judgment interest cease the day [VRMC] pays the balance of the Judgment and deposits the sum of $3,020,000 in escrow." Thus, appellees argue there is no need to modify the judgment because there is no confusion. We agree with appellees.

We overrule VRMC's ninth issue.

VI. CONCLUSION

We affirm the judgment of the trial court.

NORA L. LONGORIA
Justice

Delivered and filed the
30th day of July, 2020.