NUMBER 13-18-00458-CV

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI - EDINBURG

JERRY GARCIA AND SUSANNA GARCIA, **Appellants,**

v.

ROTH CONSTRUCTION, INC. AND GUINEA ROTH CONSTRUCTION, **Appellees.**

On appeal from the 24th District Court of Victoria County, Texas.

MEMORANDUM OPINION

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

Appellants Jerry and Susanna Garcia challenge the trial court's grant of summary judgment in favor of appellees Roth Construction, Inc.[1] and Guinea Roth Construction

[1] Roth Construction, Inc. is a company located in Victoria with which JBS, Jerry's employer had

(GRC). The Garcias raise two issues: (1) the trial court abused its discretion in sustaining GRC's objections to their summary judgment evidence, and (2) the trial court erred by granting GRC's no-evidence motion for summary judgment. We affirm in part and we reverse and remand in part.[2]

I. BACKGROUND

Based upon the summary judgment evidence, Jerry worked for JBS Construction in 2013 and was offered an opportunity to work in Africa on a project for GRC as an employee of JBS and subcontractor to GRC. On February 13, 2013, Jerry was directed to the Victoria Health Department for vaccinations of Hepatitis A, and B, MMR,[3] TdaP,[4] Typhoid, and Yellow Fever. He also received a prescription for Malarone.[5] Jerry was instructed to begin taking Malarone on March 17, 2013 and continue taking one pill a day until completed, 101 tablets total. Jerry testified he complied with these instructions.

On March 19, 2013, Jerry and a co-worker traveled by air to Equatorial Guinea and arrived the following day. He believed that he would be in Africa ninety days; however,

previously contracted. Steven Roth owns Roth and a majority interest in GRC. Roth Construction was dismissed from the litigation in February 2017.

[2] All pending motions will be dismissed as moot.

[3] According to the Centers for Disease Control (CDC), MMR is a vaccine to prevent measles, mumps, and rubella. *See Measles, Mumps, and Rubella (MMR) Vaccination: What Everyone Should Know*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/vaccines/vpd/mmr/public/index.html (last visited June 29, 2020).

[4] According to the CDC, TdaP is a vaccine to prevent tetanus, diphtheria, and pertussis. CTRS. FOR DISEASE CONTROL & PREVENTION, TDAP (TETANUS, DIPHTHERIA, PERTUSSIS) VACCINE: WHAT YOU NEED TO KNOW (2020), https://www.cdc.gov/vaccines/hcp/vis/vis-statements/tdap.pd).

[5] Malarone is one of several medications that can be prescribed to persons traveling to malaria endemic countries to prevent malaria, according to the CDC. *See* https://wwwnc.cdc.gov/travel/yellowbook/2020/travel-related-infectious-diseases/malaria#5217 (last visited June 29, 2020).

when he looked at his return ticket while traveling, he learned that he would be there longer, approximately five months.

On June 25, 2013, while still in Africa, Jerry completed his course of Malarone. Jerry testified that before he ran out, he notified Randy Rucker, the GRC person in charge of the project, that he would run out of Malarone before he was scheduled to go home. Rucker gave Jerry another medication that came in a yellow box. Jerry could not read the instructions because they were in French. Rucker told him that the drug would do the same thing as Malarone but to take four tablets a day. There were twenty-four tablets in each box. Rucker provided him with two boxes. Jerry finished the second box on July 7, 2013. Although he requested more medication, Rucker did not provide more. Jerry left Africa to come home on July 15, 2013, earlier than he was scheduled.

Jerry testified that while taking Malarone, he was not sick and does not recall ever being unable to work. When he was given the yellow box medication, he "had a mild headache, mild dizziness and a little blurriness of [] vision." He had a "slight fever" in the 99s, never 100 or higher. He was still able to work and perform his job duties throughout the time he was taking the yellow box medication. After he stopped taking the yellow box medication, he felt better, and those symptoms went away. On July 11, he began to have a very bad headache; his vision was so bad he could barely read; he was shaking; had chills; and had a temperature of 103. Although he tried to work, Jerry was physically unable to do his job. He could not read plans or the tape measure. His severe symptoms continued after he left Africa. Jerry got home from Africa on July 16, 2013.

On July 17, 2013, Susanna contacted the Victoria City–County Health Department and advised them that Jerry had run out of Malarone while he was in Africa and described his symptoms. Bain G. Cate, M.D., at the Heath Department prescribed an eight-day course of Malarone. After Jerry started taking Malarone, his symptoms cleared up over the next few days, except for his vision problems. On July 24, 2013, he finished the Malarone. His vision did not improve and he sought medical treatment.

On July 26, 2013, Jerry saw Dr. Dang, an optometrist in Victoria. Dr. Dang referred Jerry for an MRI to rule out multiple sclerosis with a plan to recheck him on July 30, 2013. She diagnosed "optic neuritis OS [left eye], first episode, H/A/P OU [both eyes]." On July 30, 2013, she examined Jerry again and assessed "bilateral swollen disc OS> OD R/O papilledema"[6] and referred him to the emergency room.

On July 30, 2013, Jerry went to the emergency room at Citizens Medical Center for testing to rule out papilledema where blood chemistry was performed with mostly normal results.[7] A CT of the head without contrast was performed to rule out papilledema. The report stated: "No significant abnormality on unenhanced cranial CT." Jerry was discharged from the ER with a clinical impression of papilledema. He was then referred to South Texas Eye Center. Jerry instead saw Caia D. Homerstad, OD[8] the next day. He

[6] "Papilledema is swelling of the optic disk due to increased intracranial pressure. Optic disk swelling resulting from causes that do not involve increased intracranial pressure (e.g., malignant hypertension, thrombosis of the central retinal vein) is not considered papilledema." *See* JAMES GARRITY, *Papilledema*, MERCK MANUAL PROF'L VERSION https://www. merckmanuals.com/professional/eye-disorders/optic-nerve-disorders/papilledema. (Last viewed June 29, 2020).

[7] His white blood cell count was slightly above normal at 13.28 with a reference range of 4.80–10.80, his chloride level was 108 with a reference range of 98–107, and his neutrophils were 8.65 with a reference range of 2.48–.1.

[8] Dr. Homerstad, like Dr. Dang, is a Doctor of Optometry.

gave her a history of being in Africa and loss of vision. Dr. Homerstad dilated his eyes and noted mild disc edema and disc pallor in both eyes. Her impression was papilledema. She referred Jerry to Cybele Woon, M.D., a neuro-ophthalmologist in Houston. On August 20, 2013, Dr. Homerstad saw Jerry again, diagnosed optic neuropathy, ordered lab work, and started him on Bactrim and prednisone.[9] Dr. Homerstad has continued to treat Jerry.

Dr. Woon saw Jerry on August 1, 2013. She is board-certified in ophthalmology. Her office notes state he was in Africa for four months but ran out of Malarone on June 22, 2013, took Malarone again seven days on his return, was given a local anti-malarial drug and had night sweats that continued until July 1. His vision began to get cloudy three weeks before leaving. He had no skin rash. His BP was normal. Dr. Woon's impression was "bilateral edema, possible infectious disease, labs for nutrition, CBC, MRI/LP negative." On August 9, 2013, Jerry underwent another brain MRI in Houston. The results were: "1. No intracranial abnormalities noted. No intracranial demyelinating lesions are noted. 2. Diffusion imaging is normal. No cerebral ischemia noted. 3. Following contrast administration there is no abnormal enhancement in the brain, skull base or meninges." Additional laboratory testing was performed in Houston on September 19, 2013, including cerebral spinal fluid. The testing included: an angiotensin converting enzyme test to rule out sarcoidosis, a test for syphilis, testing for Lyme disease, and other non-standard tests that were all negative. On September 25, 2013, Dr. Woon ordered a Malaria antibody screen. The ELISA IgG test had a .24 result.[10]

[9] The Bactrim and prednisone were prescribed to treat any potential underlying bacterial infection according to Dr. Woon's records.

[10] According to the laboratory, the reference range for a positive test for malaria is > than 1. However, the test looks for antibodies for malaria.

On October 10, 2013, Dr. Woon wrote a letter to the worker's compensation carrier for JBS Construction stating that she had ruled out bacterial infections, malignancy, and multiple sclerosis, and informing them that Jerry has positive IgG antibodies to malaria which indicates past malaria infection consistent with his reported history. She wrote,

> There have been documented cases of optic neuritis associated with malaria, with several cases reported in the early 2000s and the most recent case in September 2013 in the Journal of Neuro-ophthalmology. These were people who developed optic neuritis in spite of adequate therapy for active malaria.

Dr. Woon referred Jerry to Todd Price, M.D., an infectious disease specialist in Houston, to determine whether Jerry was suffering from something currently active and whether Jerry had malaria. Dr. Price ran more laboratory tests and reported back to Dr. Woon by letter and telephone. His written report states in part:

> Evaluation has been extensive, including malaria antibody measure of 0.24, which is within normal range. In addition, CSF was evaluated and there is no evidence of syphilis on CSF or from blood testing. He also had no evidence of meningitis. Bartonella henselae antibodies were performed, which were negative. Other negatives include that for RPR, HLA-827 and toxoplasmosis among others . . . . PAST MEDICAL HISTORY: 1) Possible malaria. 2) Fever, chills and sweats within a few weeks after stopping Malarone while living in Africa.
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> . . .
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> ASSESSMENT: 1) Malaria. 2) Optic neuritis. PLAN: 1) Repeat malaria smear. 2) Repeat malaria antibody. 3) CBC to assess white count, hemoglobin and platelet count. 4) Chemistry panel to monitor kidney function, liver function and glucose control. 5) Quantitative immunoglobulins, lgG, lgA, lgM and lgG subclasses. It may be that he had malaria. The testing today will not prove or disprove whether he had malaria in Equatorial Guinea. It will prove if he has current malaria and need for

> additional treatment. It is likely though he had malaria in Africa, this was the likely cause of optic neuritis, the neuritis component appears to be resolved, but the visual field disturbance is compromised and this may not improve. I discussed this in detail with the patient, the patient's wife and Dr. Woon.

Jerry's vision did not improve after the end of 2013; however, he continued to be treated and followed by Dr. Homerstad and Dr. Woon. He has not worked since 2013 and cannot drive due to his visual field impairments.

In February 2014, Jerry filed suit against GRC and Roth Construction on the grounds of negligence and gross negligence seeking damages for personal injuries. In 2015, in his Fourth Amended Petition, Susanna was added as a party and damages she sought damages for her loss of society and services and mental anguish.

In 2017, GRC filed motions to strike the testimony of the Garcias's expert witnesses Drs. Price, Mathew Waxman, and Woon. The Garcias filed responses, but the trial court did not rule on the motions before trial. Trial began on August 15, 2017. The trial court determined it would hear the motions to strike or limit testimony at hearings outside the presence of the jury, before the witness testified. Dr. Woon testified first. At the conclusion of her voir dire, the trial court limited her testimony and disallowed any testimony that malaria was the cause of Jerry's optic neuritis, nor could she testify regarding a scientific article she located after her deposition was taken earlier in August 2017.[11]

Dr. Waxman was called to testify. Due to time constraints, the trial court agreed that his qualifications and other preliminary matters could be covered before the jury, but

[11] Harald Noedl et al., *Sensitivity and Specificity of Antigen Detection ELISA for Malarial Diagnosis*, 75 AMN. JOURNAL OF TROPICAL MED. & HYGIENE 1205, 1208 (2006).

Dr. Waxman was not to express his opinion on Jerry's malaria diagnosis or be asked about it before GRC had an opportunity to conduct its voir dire outside the jury's presence. Dr. Waxman was before the jury when he answered an open-ended question by expressing his opinion that Jerry had malaria which caused his vision problems. His statement violated the trial court's ruling and the trial court declared a mistrial at GRC's request.

Days after the trial ended, GRC filed a no-evidence motion for summary judgment. *See* TEX. R. CIV. P. 166a(i). The Garcias requested a postponement of GRC's submission date and requested an oral hearing on the motion. GRC responded. The trial court granted the continuance but denied the request for oral hearing. The Garcias's response to GRC's motion complained that it was insufficiently specific.[12] After the Garcias filed their response, GRC filed extensive objections to the Garcias's summary judgment evidence. The Garcias responded. The trial court sustained GRC's objections and granted GRC's no-evidence motion for summary judgment. This appeal followed.[13]

[12] Specifically, the Garcias's response complained that "[r]eading GRC's motion at its most liberal, it only says that there is no competent evidence on causation and damages. At one point, the motion calls for 'competent expert testimony' while, at another, only 'competent evidence.' There is a reference to medical causation which makes the allegation generically to damages."

[13] The Garcias' Second Amended Notice of Appeal states that they also appeal the interlocutory grant of Roth Construction Inc.'s hybrid motion for summary judgment. Roth Construction's motion asserted, "Summary Judgment should be granted . . . because it was not involved in the project in question, it had no contractual or other legal relationship with the Plaintiffs or . . . (JBS Builders, Inc.), and therefore owed no legal duties for which it could be liable to the Plaintiffs." The Garcias noted in their own brief, "Appellants have not raised an issue in this appeal related to the trial court's grant of summary judgment in favor of Roth Construction." To comply with Rule 38.1, the appealing party "must provide such a discussion of the facts and the authorities relied upon to maintain the point at issue." *Lowry v. Tarbox*, 537 S.W.3d 599, 619 (Tex. App.—San Antonio 2017, pet. denied). "When appellants fail to discuss the evidence supporting their claim or apply the law to the facts, they present nothing for review." *Id.*; *see Bolling v. Farmers Branch Indep. Sch. Dist*., 315 S.W.3d 893, 895-96 (Tex. App.—Dallas 2010, no pet.). The Garcias have waived any issue regarding Roth Construction, Inc. by failing to raise an issue in their brief. *See* Tex. R. App. P. 38.1(f).

II. EVIDENCE

By their first issue and four sub issues, the Garcias argue that the trial court abused its discretion by sustaining GRC's objections to their summary judgment evidence.

A. Summary Judgment Objections

GRC objected to most of the evidence the Garcias offered in response to GRC's motion. The objections fell into the following categories:

> 1. Evidence was not properly disclosed in discovery as to Drs. Woon and Waxman;
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> 2. Evidence from treating physicians that Dr. Woon relied upon cannot be readily controverted because they cannot be cross-examined, and their diagnoses are unreliable;
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> 3. Drs. Woon and Waxman's opinions are unreliable and inadmissible because they are conclusory and there is too great an analytical gap between the data they rely upon and their conclusions;
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> 4. The Garcias's affidavits are not based on personal knowledge and contain hearsay;
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> 5. The Garcias's response failed to identify specific excerpts of the depositions of Randy Rucker, James Roth, and Beatrice Ramirez;
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> 6. The deposition of Steve Roth, the GRC Contract with Roth Construction, and the GRC contract with Equatorial Guinea are irrelevant;
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> 7. Dr. Lee's deposition does not support the Garcias's position;
>
> 8. Rule 702 to the Medical records of Drs. Woon, Price, Ortiz, Dang, Homerstad, Citizen's Medical Center, Victoria County Health Department, LabCorp, Quest Diagnostics, ELISA (IgG) result, Dr. Price office note, Dr. Woon's office notes, Dr. Homerstad's office note, Dr. Ortiz office note.

The trial court sustained GRC's twenty-seven objections.

B. Standard of Review for Admission or Exclusion of Evidence

We review a trial court's decision to exclude evidence for an abuse of discretion. *Starwood Mgmt., LLC v. Swaim*, 530 S.W.3d 673, 678 (Tex. 2017) (per curiam) ("We review the rendition of summary judgments de novo. But we review a trial court's decision to exclude evidence for an abuse of discretion."); *Gammill v. Jack Williams Chevrolet, Inc*., 972 S.W.2d 713, 718 (Tex. 1998). The test for exclusion of expert testimony is the same. *See Gammill*, 972 S.W.2d at 718. The test for abuse of discretion is whether the trial court acted without reference to any guiding rules or principles. *U–Haul Intern., Inc. v. Waldrip*, 380 S.W.3d 118, 132 (Tex. 2012); *Kingsley Properties, LP v. San Jacinto Title Servs. of Corpus Christi, LLC*, 501 S.W.3d 344, 353 (Tex. App.—Corpus Christi–Edinburg 2016, no pet.).

A party complaining on appeal about the admission or exclusion of evidence must show that the error (a) probably caused the rendition of an improper judgment; or (b) probably prevented the petitioner from properly presenting the case to the appellate courts. TEX. R. APP. P. 44.1(a). "We review the entire record to assess the importance of the excluded evidence, and exclusion is likely harmful if the evidence is crucial to a key issue." *Diamond Offshore Services Ltd. v. Williams*, 542 S.W.3d 539, 551 (Tex. 2018)

C. Relevance Objections

By issue one and sub issue 1(c), the Garcias challenge the trial court's ruling excluding two contracts, exhibits 30 and 31. GRC objected to the deposition of Steve Roth (exhibit 8) and the two contracts as irrelevant. TEX. R. EVID. 402. Relevant evidence is evidence of a fact that has any tendency to make a fact of consequence to the litigation

more or less probable. *Id.* R. 401. Evidence is sufficiently relevant if it provides "a small nudge" toward proving or disproving a fact of consequence. *Gonzalez v. State*, 544 S.W.3d 363, 370 (Tex. Crim. App. 2018). If there is some logical connection either directly or by inference between the evidence and a fact to be proved, the evidence is relevant. *PPC Transp. v. Metcalf*, 254 S.W.3d 636, 642 (Tex. App.—Tyler 2008, no pet.).

The contract between JBS and GRC (exhibit 30) assigns responsibility to GRC to provide vaccinations, medication, housing, and travel for JBS employees.[14] The contract between Equatorial Guinea and GRC (exhibit 31), which is written in Spanish, is to build a presidential library. These facts do not prove or disprove whether Jerry contracted malaria. They are part of the background facts to the circumstances under which he may have contracted malaria.

The trial court did not abuse its discretion by excluding the Spanish language contract between Guinea and GRC, exhibit 31. However, the decision regarding the GRC and JBS contract is a much closer call because it assigns responsibility for many of the circumstances that relate to malarial exposure to GRC. Because this summary judgment motion concerns itself solely with medical causation, the scale tips in favor of the trial court's ruling and no harm resulted from that ruling.

We overrule the Garcias's sub issue one(c) in part.

[14] The Garcias do not challenge the trial court's exclusion of the deposition of Steven Roth. Steven Roth is one of the owners of GRC and a signatory to the contract with Equatorial Guinea to build the project there. His deposition discusses the contract with Equatorial Guinea and with JBS Construction. Roth identified Rucker as the person with day-to-day responsibility for the project and identified Rucker as the designated safety person for GRC on the jobsite. Roth further discussed his awareness of the malaria problem in West Africa and Equatorial Guinea.

D. Objections to Jerry and Susanna's Affidavits

The trial court sustained the objections to most paragraphs of Jerry and Susanna Garcias' affidavits. By issue one and sub issue (d), the Garcias challenge that ruling as an abuse of discretion.

To constitute competent summary judgment evidence, affidavits must be made on personal knowledge, set forth facts as would be admissible in evidence and show affirmatively that the affiant is competent to testify to matters stated therein. TEX. R. CIV. P. 166a(f); *Larson v. Family Violence & Sexual Assault Prevention Ctr. of S. Tex.*, 64 S.W.3d 506, 511 (Tex. App.—Corpus Christi–Edinburg 2001, pet. denied); *H.S.M. Acquisitions, Inc. v. West*, 917 S.W.2d 872, 881 (Tex. App.—Corpus Christi–Edinburg 1996, writ denied).

GRC objected to much of Jerry and Susanna's affidavits on grounds of hearsay and lack of personal knowledge. The challenged statements from Jerry's affidavit are reproduced and underlined in the chart below:

Jerry Garcia Affidavit	Objection	Response
2. I worked for JBS Builders back in 2013. JBS Builders had a contract to perform work in Africa for Guinea-Roth Construccion (also referred to as "Roth"). I, along with a co-worker, were sent to Equatorial Guinea to work on a Roth job building the Presidential Library in that country.	Objection: conclusory and not probative.	Response: portions of the contract were read to Jerry by James Sanchez.

4. I followed all directions and instructions prior to leaving for Africa. This included obtaining anti-malarial medication and vaccination shots. Roth Construction was to provide and pay for all medications and vaccinations for my work in Africa.	Objection: no personal knowledge.	Response: portions of the contract were read to Jerry by James Sanchez.
5. I was instructed to go to the health department for my pre-trip medications and vaccinations. The doctor there prescribed Malarone to protect me against malaria. I obtained a prescription before I left for Africa and it was filled on February 14, 2013. The prescription was for 101 tablets. Roth had approved that number.	Objection: no personal knowledge and GRC is not a medical provider.	Response: offered to show basis of Jerry's actions in reporting to the Health Department, obtaining vaccinations and the Malarone prescription.
6. I was told to take 1 pill of Malarone each day. I was to begin two days before my flight. I was to continue taking 1 pill each day, every day while I was in Africa. I was to take the remaining tablets once I left Africa to return home.	Objection: hearsay.	Response: offered to show the basis for Jerry's actions.
7. I was not worried about the amount of malaria medication. Before leaving, it was my clear understanding that I would work in Africa for only 90 days. Roth had approved and paid for the exact number I needed for that time but no more.	Objection: no personal knowledge.	Response: offered to show the basis for Jerry's actions.
10. By the time my co-worker, J.R. Perez, and I arrived in Equatorial Guinea, there was some concern or confusion as to how long we were to stay there. We talked to Roth's safety supervisor, Randy Rucker, about the length of	Objection to what Mr. Rucker said in paragraphs 10-17.	Response: not hearsay, admission by a party opponent. TEX. R. EVID. 801(e)(2)(D), as to all Rucker's statements within Jerry's affidavit, paragraphs 10-17.

stay and how much Malarone we had been given. Mr. Rucker told us not to worry about it and that Roth would take care of it. Randy Rucker told us that, if we ever ran out of medication, Roth would supply us with medication.		
11. While working in Africa, I stayed on Roth Construction's jobsite in a camp. Roth Construction provided me with a small room in a trailer. The air conditioner did not work. Mosquitos would enter the trailer and my room all the time. Roth did not provide or make available any protective netting of any kind for my bed. Immediately behind my trailer, there was a ditch that Roth had dug. It was full of water and attracted lots of mosquitoes. Roth never did anything about that. Roth never sprayed the jobsite or camp area for mosquitos. Whether at the camp or working at the job site, I was constantly exposed to mosquitos.		
12. As my malaria medication ran low, I continued to report my concerns about not having enough medication to Randy Rucker. Mr. Rucker told me not to worry every time I asked.		
13. I took my last dose of Malarone on June 25, 2013. That same day, Mr. Rucker handed me a yellow box that he told me would do the same thing as Malarone. The writing on the box was in French. I do not speak or understand French. The tablets looked different. When I told	Objection: lack of personal knowledge, best evidence rule.	Response: Jerry has personal knowledge that he does not read the language on the label of the medication and that he believed he recognized the language to be French.

this to Mr. Rucker this medication looks different and cannot be right, he told me that it was just like Malarone only you took it differently.		
14. The yellow box had 24 pills in it. Mr. Rucker instructed me to take four pills a day. I trusted Randy Rucker and took the medication as he advised.		
15. The first box lasted for 6 days. Mr. Rucker provided me with another yellow box as the first box was running low. That medication was the same as the one Mr. Rucker had provided when my Malarone ran out. I continued to take the medication as Mr. Rucker told me—4 pills per day.		
16. As the second box of medication running low, I asked Mr. Rucker for more medication. He said that would get me more. He never did.		
17. I finished the second yellow box on July 7, 2013. I continued to ask Mr. Rucker about not having any malaria medicine. He told that I was going home in a few more days and I would be okay without it.		
21. When I was given the yellow box, I became sick. I had a mild headache, mild dizziness and a little blurriness of my vision. That was probably due to my headache. I had a slight fever. I had a thermometer that my wife had packed and my temperature was in the 99s. It was never 100 or higher.	Objection: Jerry is not a medical doctor and is not qualified to attribute the cause of his symptoms.	Response: Statements based on personal knowledge of the sequence of events.

I was still able to work every day and perform all of my job duties. I felt like this while I was taking the yellow box medicine. Once I stopped that medicine, I began to feel better and these symptoms went away.		
26. A couple of months after I stared seeing Dr. Woon, we found out that the yellow box medicine was a drug called Coartem. Coartem does not protect against malaria. It is only used to treat malaria. We told Dr. Woon about this. In response Dr. Woon had me tested again at Citizens Hospital and then referred me to a Dr. Price.	Objection: Jerry is not qualified to opine about the uses of Coartem.	Response: Jerry and his wife looked up the medication to see what he had been given and learned it did not prevent malaria. Offered to explain his subsequent actions. Jerry and his wife looked up the medication to understand what he had been given.
28. My eye problems are in both eyes. Dr. Woon has diagnosed it as optic neuritis. I understand that to mean the nerves to my eyes were somehow damage[d] by the malaria.	Objection: Jerry is not qualified as medical expert.	Response: A witness is not required to be a medical expert to testify about his own physical or mental health. *Berry Prop. Mgmt., Inc. v. Bliskey*, 850 S.W.2d 644, 664 (Tex. App.—Corpus Christi–Edinburg 1993, writ dism'd).
29. Both Dr. Woon and Dr. Price have told me that my eye problems are due to malaria. They have both told me that I got malaria in Africa while working for Roth.	Objection: hearsay.	
31. This disease has caused me to lose my vision and has placed a big burden on my family. I cannot see very well at all. I can no longer drive a vehicle. I can no longer read. I can no longer work. I can no longer take care of my wife and family. I cannot do the things in life that I use to enjoy.	Objection: not qualified as medical expert.	Response: Personal knowledge that disease has cause loss of vision.

The trial court sustained GRC's objections to Jerry's affidavit. Much of that information is either background, to show the information that formed the basis of Jerry's actions, or statements of a party opponent. *See* TEX. R. EVID. 801(e)(2)(C), (D) (statement of party opponent is not hearsay); *Krishnan v. Law Offices of Preston Henrichson, P.C.*, 83 S.W.3d 295, 300 (Tex. App.—Corpus Christi–Edinburg 2002, pet. denied) (holding affidavit stating basis for action was proper summary judgment evidence over hearsay objection). Jerry understood that Rucker was the safety man on the GRC job site and in charge of the project in Africa. In addition, the contract between JBS and GRC provided that "General Contractor [GRC] will provide Subcontractor's workforce with the required travel shots and medications for Equatorial Guinea, airfares to and from Equatorial Guinea and inland transportation. General Contractor will provide housing lodging and meals."

Jerry described his interactions with Rucker regarding his lack of anti-malarial medication. Rucker's statements to him are not hearsay according to Rule 801. Instead, they are statements of a party opponent pursuant to Rule 801(e)(2)(C) or (D). *See* TEX. R. EVID. 801(e)(2)(C), (D); *Tryco Enters., Inc. v. Robinson*, 390 S.W.3d 497, 506 (Tex. App.—Houston [1st Dist.] 2012, pet. dism'd); *Worley v. Butler*, 809 S.W.2d 242, 245 (Tex. App.—Corpus Christi–Edinburg 1990, no writ). To show that a statement is an admission by a party-opponent under Rule 801(e)(2)(D), the existence of the agency or employment relationship must be established, but there is no requirement that the agency relationship be established with independent corroborating evidence. *Tryco Enterprises, Inc.*; 390 S.W.3d at 506. GRC objected in part that "The record does not reflect that Mr. Rucker is

competent to testify as to any of the issues contested by this Motion (whether Mr. Garcia had malaria and whether it caused his eye injury. Nor are the referenced statements any evidence tending to prove same)." However, Rucker's statements are relevant and admissible.

GRC's objection that Jerry did not have personal knowledge that the "yellow-box" language was French and its "best evidence" rule objection are both misplaced. *See* Tex. R. Evid. 1002,1004(c); *White v. Bath*, 825 S.W.2d 227, 231 (Tex. App.—Houston [14th Dist.] 1992, writ denied).[15] Jerry's point was that he could not read the label, although he recognized the language to be French. *See White,* 825 S.W.2d at 231. As a result, Jerry had to rely on Rucker, GRC's agent, for instructions on how to take the medication.

Although Jerry is not qualified to determine whether his symptoms were caused by his ingestion of Coartem, he has personal knowledge of the chronology of his symptoms, that both his eyes are affected, that his activities are limited by his visual problems, and his ability to earn a living is also affected. *See Berry Property Mgmt., Inc.*, 850 S.W.2d at 664.

An affidavit that includes information received to show the basis of subsequent action is also proper because the information received is not offered for its truth. *See* TEX.

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[15] The court held:

> When the document and its contents are only collaterally related to the issues in the case, the best evidence rule does not apply. Here, the deposition and its contents were only collaterally related to the controlling issue of whether White had violated the discovery rules. The aim was not to prove the contents of the deposition, but rather to determine whether any discovery abuses had occurred. Therefore, the best evidence rule was not applicable.

White v. Bath, 825 S.W.2d 227, 231 (Tex. App.—Houston [14th Dist.] 1992, writ denied).

R. EVID. 801(d)(2); *City of Austin v. Hous. Lighting & Power Co.*, 844 S.W.2d 773, 791 (Tex. App.—Dallas 1992, writ denied) (holding that newspaper articles were properly admitted to show state of knowledge and notice). The rules of evidence and case law do not support the trial court's wholesale exclusion of the challenged paragraphs of Jerry's affidavit.

Susanna's affidavit was shorter but drew similar objections that the trial court sustained.[16] Much of Susanna's affidavit is not based on her personal knowledge. But Jerry's statements to her when made at the time he was experiencing symptoms are exceptions to the hearsay rule. *See* TEX. R. EVID. 803(3); *Pittsburgh Corning Corp. v. Walters*, 1 S.W.3d 759, 771–72 (Tex. App.—Corpus Christi–Edinburg 1999, pet. denied).[17] In addition, the information she received from JBS and Guinea Roth with the name of the medication provided to Jerry was information that caused her to act. Susanna then transmitted that information to Jerry's doctor. *See* TEX. R. EVID. 801(d)(2); *City of Austin*, 844 S.W.2d at 791. Those statements from Susanna's affidavit should not have been excluded on hearsay grounds.

[16] Susanna's affidavit included information Jerry told her about the length of their stay, the medication he took, how he felt while he was there, her observations of Jerry's health when he returned from Africa, her actions regarding his appointments and prescriptions, the chronology of doctor's appointments that Susanna drove Jerry to, information she received from the employer with the name of the yellow box medication, and Jerry's limitations. GRC lodged objections on grounds of no personal knowledge and hearsay.

[17] "[A] statement is not excluded as hearsay if the statement is of 'the declarant's then existing state of mind, emotion, sensation, or physical condition. . . .'" TEX. R. EVID. 803(3). *Pittsburgh Corning Corp. v. Walters*, 1 S.W.3d 759, 771–72 (Tex. App.—Corpus Christi–Edinburg 1999, pet. denied). Statements admitted under the rule are "usually spontaneous remarks about pain or some other sensation, made by the declarant while the sensation, not readily observable by a third party, is being experienced." *Ochs v. Martinez,* 789 S.W.2d 949, 959 (Tex. App.—San Antonio 1990, writ denied).

The trial court's error in excluding this evidence was harmful because the treating doctors relied on evidence from Jerry and Susanna regarding when Jerry took Malarone, when he took Coartem, when he experienced symptoms, and when he traveled to determine whether he could have contracted malaria.

We sustain the Garcias's sub issue one(d) in part and overrule it in part.

E. Objections to Medical Records

The Garcias provided medical records from multiple facilities and physicians with accompanying business record affidavits for the medical records of Dr. Woon, Dr. Price, Dr. Ortiz, Dr. Dang, Victoria Eye Center, Citizens Medical Center, Victoria Health Department, Lab Corp., Quest Diagnostics, and Lab Corp. GRC objected to these exhibits 10 through 18, 23, and 29 on the following basis:

> Neither Dr. Woon nor Dr. Waxman may rely upon other non-qualified doctors' purported diagnoses in order to form or bolster their own diagnosis. No doctor in this case has been qualified as an expert in malaria or malaria causing vision problems, especially not Drs. Homerstad, Dang, Ortiz, or Price, who are all different medical specialties than Dr. Woon. Drs. Homerstad's, Dang's, and Ortiz's, and Price's records are conclusory and do not demonstrate that they are qualified or sufficiently reliable to render opinions on the diagnosis of Plaintiff's alleged malaria or it's alleged role in causing his eye injury.

The trial court sustained the objection which we understand to be an objection of limitation, not of entire exclusion. *See* TEX. R. CIV. P. 166a(c); TEX. R. EVID. 803(6); *see also Hilburn v. Joyce Steel Erection, Inc.*, No. 13-95-00274-CV, 1997 WL 33760897, at *4 (Tex. App.—Corpus Christi–Edinburg May 22, 1997, no writ) (mem. op.) (holding business records accompanied by proper affidavit are admissible in summary judgment proceedings).

In addition, GRC objected on the grounds that evidence from treating physicians that Dr. Woon relied upon cannot be readily controverted because they cannot be cross-examined, and their diagnoses are unreliable. Rule 803(6) contemplates that medical records, including diagnoses, are admissible without more than a business records affidavit. TEX. R. EVID. 803(6). Thus, they are not excludable on the ground of no sponsoring witness. If a party wishes to cross-examine the physician, the party wishing to do so must take the physician's deposition pursuant to the rules of procedure.

Exhibit 10 is Dr. Woon's medical records which will be addressed separately along with the challenge to the admissibility of her opinions. Exhibits 25–28 are various letters authored by Dr. Woon in 2013 and 2014 relating to Jerry's medical care; Exhibits 25 and 26 are part of her medical records.

Exhibit 11 is Dr. Price's medical records and Exhibit 24 is a November 18, 2003 office note from Dr. Price that appears within his medical records. Dr. Price is an infectious disease specialist who examined Jerry and consulted with Dr. Woon at her request. He reviewed Jerry's records and laboratory work and concluded based upon his history and negative findings for everything except the ELISA IgG test of .24 that Jerry possibly had malaria in the past. Because his records are accompanied by the appropriate business records affidavit, they, including his diagnoses, are admissible for purposes of the summary judgment proceeding. *See* TEX. R. EVID. 803(6).

Exhibits 12 and 29 are the reports of Fernando Ortiz, M.D. dated April 17, 2014, who performed a disability evaluation on Jerry and who interpreted the ELISA test and recommended follow up testing to determine his "present status about Malaria infection

acquired in Africa . . . .” Texas Rule of Evidence 803(6) plainly authorizes the admission of the medical records without any witness at all including diagnoses which are identified in the rule itself. *See* TEX. R. EVID. 803(6) (authorizing admission of medical opinions and diagnoses as business records upon affidavit from custodian of records or other qualified witness); *see also Brown v. State*, No. 03-10-00515-CR, 2013 WL 857252, at *3 (Tex. App.—Austin Mar. 7, 2013, no pet.) (mem. op.). Thus, Dr. Ortiz’s records were admissible for purposes of the summary judgment, including his diagnosis based upon the ELISA test. *See* TEX. R. EVID. 803(6).

Dr. Dang’s records, exhibit 13 do not include a diagnosis of malaria. Dr. Homerstad’s records, exhibit 14, reflect that Dr. Woon diagnosed “ischemic optic neuropathy due to malaria” based on the ELISA antigen testing and her records include correspondence with Dr. Woon and Citizens Medical Center test results. Dr. Homerstad did not diagnose malaria and her records should not have been excluded on that basis. *See id.*

The records from the various facilities, exhibits 15-18, and 23, report the results of various testing performed on Jerry at the request of his physicians. None of those exhibits include a diagnosis of malaria. GRC’s objection did not apply.

As we understand the limiting objection by GRC, it did not apply to exhibits 12, 14-18, and 23[18] which do not include a diagnosis of malaria by any of those providers and the trial court abused its discretion by sustaining the objection if that meant it excluded

[18] Exhibits 17 and 23 are from Lab Corp and include the ELISSA IgG test results. Exhibit 17 is accompanied by a business records affidavit and exhibit 23 is accompanied by both a billing and business records affidavit. GRC objected in part that the test was inadmissible because it was not properly authenticated. Its objection was misplaced.

the records from consideration. Such exclusion was also harmful because Dr. Woon relied on the results of those examinations and other testing which did not diagnose malaria to perform her differential diagnosis. *See Transcon. Ins. Co. v. Crump*, 330 S.W.3d 211, 215–16 (Tex. 2010). As to exhibits 11, 17, and 23, they are proper business records and their diagnoses are admissible through the business records predicate. The trial court abused its discretion by excluding those exhibits. *See* TEX. R. EVID. 803(6). Excluding exhibits 17 and 23 is also harmful because the test result was used by Dr. Woon as part of the analysis to reach her differential diagnosis and disagreement by knowledgeable professionals regarding the meaning of the test result does not make the test or result unreliable. *See Transcon. Ins. Co.*, 330 S.W.3d 211, 215–16. The exclusion of Dr. Price's records was also harmful because they too were part of Dr. Woon's process of ruling out possible causes of Jerry's optic neuritis.

F. Objections to Expert Witnesses

By the Garcias's first issue and sub issues (a) and (b), they challenge the trial court's exclusion of Drs. Woon and Waxman's allegedly new opinions, reliance on undisclosed data, and the trial court's determination that they were not competent to opine on causation.

GRC's objections to Drs. Woon and Waxman's affidavits include: (1) failure to disclose new opinions and new materials on which they rely; (2) their opinions do not have sufficient foundation, are speculative and conclusory, and (3) their opinions are impaired by analytical gaps. GRC further objected to Dr. Lee, its retained witness' deposition on the grounds that it does not support the Garcias's position. However, on

appeal the Garcias do not contest the trial court's exclusion of Dr. Lee's testimony.

1. Discovery Supplementation

In general, parties have an obligation to supplement their discovery responses before trial. *See* TEX. R. CIV. P. 193.6. "If an expert witness is retained by, employed by, or otherwise under the control of a party, that party must also amend or supplement any deposition testimony or written report by the expert, but only with regard to the expert's mental impressions or opinions and the basis for them." *Id.* R. 195.6. If a party learns that its written discovery responses regarding a testifying expert were or have become incomplete or incorrect, the party must supplement the response, unless the additional or corrective information has been made known to the other parties. *Id.* R.193.5, 195.6. A party must also supplement incomplete or incorrect deposition testimony by a retained expert, but only regarding the expert's mental impressions or opinions and the basis for them. *Id.*

Dr. Woon is a non-retained treating physician. Dr. Waxman is a retained expert. That distinction is important when addressing GRC's objections regarding alleged failure to properly supplement discovery.

a. Dr. Woon

GRC objects to the Garcias's failure to supplement as to Dr. Woon based upon an article that Dr. Woon discussed at trial, eight months before the trial court ruled on GRC's motion for summary judgment.

When an expert changes her opinion about a material issue after being deposed, the party must supplement discovery. *See Kingsley Properties, LP v. San Jacinto Title*

Services of Corpus Christi, LLC, 501 S.W.3d 344, 353 (Tex. App.—Corpus Christi–Edinburg 2016, no pet.); *Beinar v. Deegan* , 432 S.W.3d 398, 404–05 (Tex. App.—Dallas 2014, no pet.) (disallowing new report with material change in expert's opinion produced seven days before summary judgment). But, "[t]he discovery rules do not prevent experts from refining calculations and perfecting reports through the time of trial." *Id.* (quoting *Exxon Corp. v. W. Tex. Gathering Co*., 868 S.W.2d 299, 304 (Tex.1993)); *Koko Motel, Inc. v. Mayo*, 91 S.W.3d 41, 49 (Tex. App.—Amarillo 2002, pet. denied). The duty to supplement "require[s] that opposing parties have sufficient information about an expert's opinion to prepare a rebuttal with their own experts and cross-examination, and that they be promptly and fully advised when further developments have rendered past information incorrect or misleading." *Exxon Corp.*, 868 S.W.2d at 304.

The Garcias designated Dr. Woon, along with all of Jerry's medical providers:

> Plaintiffs health care providers are expected to testify as to the nature, extent, duration and cause of Plaintiff's injuries and damages. It is also expected that these witnesses will testify as to the reasonableness and necessity of Plaintiff's past and future medical/health care needs. Plaintiff may call any persons who have executed an Affidavit or given a deposition on written questions for the purpose of "proving up" medical bills and/or records. None of the above-listed expert witnesses have been retained or employed by Plaintiff nor are they subject to Plaintiffs control. Such being the case, Plaintiffs have (or will) provide Defendant with all records and bills in his possession from his health care providers.

Dr. Woon's deposition was taken on August 4, 2017, before trial began approximately ten days later. At trial on voir dire, Dr. Woon was asked about additional research she had done between her deposition and trial on the meaning of the reference range for the ELISA antigen test administered to Jerry.[19] In addition, Dr. Woon testified

[19] The article Dr. Woon mentioned was Sensitivity and Specificity of Antigen Detection ELISA for

on cross-examination that as part of her differential diagnoses she had not ruled out the following diseases that are common in equatorial Guinea and that can cause optical neuritis: dengue, herpes, West Nile virus, or Chikungunya. Dr. Woon's summary judgment affidavit addresses those diseases and rules them out based upon the known signs and symptoms of each disease, and Jerry's existing laboratory work and clinical history but GRC objects that these are new opinions not previously disclosed.

Dr. Woon's affidavit states in relevant part:

> I then considered any other potential causes. The defense's expert and attorneys have suggested the following:
>
> 1. HIV/AIDS: Over the course of the 4 years I treated him, Mr. Garcia had no signs or symptoms of this disease. He also received no treatment for this disease. The CDC has established that a person with untreated HIV/AIDS has a life expectancy of no more than 3 years. . . . Mr. Garcia has exceeded that life expectancy by well over a year. This effectively and in medical certainty rules out this disease.
>
> 2. Yellow Fever: Before leaving for Africa, Mr. Garcia received the vaccination for this disease. The World Health Organization classifies it as "an extremely effective vaccine". . . .Mr. Garcia also had no symptoms or laboratory results indicative of this disease. In all reasonable medical certainty, I was able to rule out Yellow Fever.[20]
>
> 3. Herpes Zoster: This is what is commonly referred to as the shingles. This disease causes a severe blistering rash that covers a large portion of the body. Mr. Garcia had no such rash at any point in time before or during my treatment of him. I was able, in reasonable medical certainty, to rule out this disease.
>
> 4. Zika: This disease does not cause optic neuritis unless it is passed along congenitally. This did not occur in Mr. Garcia's case. Non-congenital ocular diseases or problems do not include optic neuritis; rather, they include conjunctivitis and uveitis. This is borne out not only by my own education,

Malarial Diagnosis published in the American Journal of Tropical Medicine and Hygiene.

[20] The yellow fever vaccine is more than ninety-nine percent effective in preventing malaria when given thirty days or more before exposure based upon WHO documents attached to Dr. Woon's affidavit.

training and experience but also by the peer-reviewed, reliable and authoritative literature. Mr. Garcia had none of these; therefore, I was also able, in reasonable medical certainty, to exclude this disease.

5. Chikungunya: The hallmark feature of this disease is severe joint pain. Mr. Garcia had no history or record of this. This led me to, in reasonable medical certainty, rule out this disease.

6. West Nile: This disease causes very specific ocular findings, most notably chorioretinal lesions, usually a creamy yellow in color. Neither my examinations nor the examinations by either Dr. Dang or Dr. Homerstad found any such conditions. The lack of such findings excludes, with reasonable medical certainty, West Nile as a potential cause.

7. Dengue Fever: The CDC provides the medical profession with the characteristic symptoms of this disease, the most characteristic being bleeding manifestations. This includes bleeding from the nose or gums as well as vomiting of blood. Mr. Garcia had none of these symptoms. He also did not have a low white blood count which is diagnostic for this disease. If anything, he had a slightly elevated white blood count on July 30th. I was able to rule out this disease, in reasonable medical certainty, as a cause of Mr. Garcia's optic neuritis.

8. Flu shot: A flu shot has also been suggested as a possible cause of Mr. Garcia's optic neuritis: however, Mr. Garcia has never had a flu shot. This allows me to absolutely rule out a flu shot as a cause of Mr. Garcia's optic neuritis.

During her deposition, Dr. Woon testified that herpes does not ordinarily cause optic neuritis unless the patient is "very sick" and he had no herpetic lesions or rashes. Jerry's laboratory work did not indicate an overall depressed immune system that you would see with AIDS or HIV. Dr. Woon further testified that Chickungunya ordinarily presents with joint pain which Jerry did not have. West Nile ordinarily causes diarrhea and vomiting that Jerry did not have. Zika in adults usually presents with inflammation in the conjunctiva and iritis, which Jerry did not have, and at the time she was not aware of optic neuritis associated with Zika. Although Dr. Woon has now explicitly ruled out these

diseases, she has done so based upon CDC and WHO materials as well as Jerry's preexisting laboratory testing and clinical examination. Dr. Woon's diagnosis is unchanged; she diagnosed Jerry with optic neuritis caused by malaria contracted when he was in Africa. The change in Dr. Woon's affidavit is similar to the refinement of opinions by the experts in *Exxon Corp.,* 868 S.W.2d at 804; *Norfolk Southern Railway, Company v. Bailey*, 92 S.W.3d 577, 581 (Tex. App.—Austin 2002, no pet.) (holding trial court did not abuse its discretion in allowing expert to testify regarding changed opinion when the updated radiology report on which he relied was received by all parties almost two months before trial); and *Koko Motel, Inc.*, 91 S.W.3d at 51 (holding expert was entitled to perform additional calculations using methodology and data already appearing of record).

The purpose of the supplementation rule is to prevent unfair surprise and to allow opposing experts to fully prepare. *Exxon Corp.*, 868 S.W.2d at 804. The refinement of Dr. Woon's opinion was only an expansion of information that she revealed during her deposition. *See id.; Koko Motel, Inc.*, 91 S.W.3d at 51. Dr. Woon's affidavit should not have been excluded for failure to supplement. *See Exxon Corp.*, 868 S.W.2d at 804.

b. Dr. Waxman

Dr. Matthew Waxman is the Garcias's retained expert on tropical diseases. His affidavit described the materials he reviewed related to the case and then generally referenced scientific publications. Dr. Waxman does not specifically mention any articles in his affidavit or his designation.[21] GRC's objection states: "Plaintiffs did not supplement

[21] "[T]he oncologist's affidavit does not itself disclose the specific scientific literature the oncologist consulted, and does not identify what the literature states, the implicit assertion is that the scientific literature reviewed supports his opinion." *Pink v. Goodyear Tire & Rubber Co*., 324 S.W.3d 290, 297 (Tex. App.—Beaumont 2010, pet. dism'd). The trial court made no ruling requiring disclosure of the scientific literature

their expert designation to reflect any new opinions or new underlying data or literature, and, to the extent that Dr. Waxman relies upon new opinions, data or literature, Defendant objects, asks that such evidence be struck." GRC additionally complains:

> His affidavit, by contrast, relies upon six additional depositions, including Jerry Garcia, Steve Roth, Beatrice Ramirez, James Sanchez, Cybele Woon, and Andrew Lee. In addition, his affidavit states that he has relied upon unidentified "publications and other reliable writings," but none were timely disclosed. For this reason, his "affidavit" should be struck in its entirety. Alternatively, all portions of his "affidavit" that refer to these additional, undisclosed materials should be struck. Moreover, his lack of specificity and his failure to identify the parts of these materials upon which he relied makes his affidavit conclusory and lacking of proper foundation. This is yet another reason that it should be struck.

However, GRC does not identify any new opinions expressed by Dr. Waxman in its objections. In addition to his previous report and designation, GRC was aware of the substance of much of Dr. Waxman's testimony from trial. GRC does not identify any change of opinion. The only new materials GRC identifies are depositions taken in this case from that time to the present, that GRC was aware of when they were taken. GRC chose not to take Dr. Waxman's deposition before trial.

In comparison to his earlier report, Dr. Waxman ruled out the diseases suggested at trial by GRC as possible causes based upon data already available in Jerry's medical records and by applying his medical knowledge to the facts within his area of expertise, tropical disease. Such a refinement of his opinions based upon facts already of record is proper and Dr. Waxman's affidavit should not have been excluded for failure to supplement discovery. *See Exxon Corp.,* 868 S.W.2d at 804; *Bailey*, 92 S.W.3d at 581

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or benzene exposure evidence on which the treating oncologist relied and did not strike any of Pink's evidence. *Id.*

Koko Motel, Inc., 91 S.W.3d at 51.

2. Expert Opinions

a. Standard of Review

The two experts challenged are Dr. Woon, a board-certified neuro-ophthalmologist and Dr. Waxman who is board certified in both internal and emergency medicine. Expert witness testimony is admissible if the witness is qualified as an expert, the opinion is relevant to the issues in the case, and the opinion is based on a reliable foundation. *See* TEX. R. EVID. 702; *Exxon Pipeline Co. v. Zwahr*, 88 S.W.3d 623, 629 (Tex. 2002); *Aguillera v. John G. & Marie Stella Kenedy Mem'l Found.*, 162 S.W.3d 689, 693 (Tex. App.—Corpus Christi–Edinburg 2005, pet. denied).

In determining whether expert testimony is reliable, a court should consider the factors in *E.I. du Pont de Nemours & Co. v. Robinson*, 923 S.W.2d 549, 557 (Tex.1995), as well as the expert's experience, knowledge, and training. *See Gammill v. Jack Williams Chevrolet, Inc*., 972 S.W.2d 713, 726–27 (Tex. 1998) (deeming expert testimony based on the latter considerations unreliable when "there is simply too great an analytical gap between the data and the opinion proffered").

> [I]n very few cases will the evidence be such that the trial court's reliability determination can properly be based only on the experience of a qualified expert to the exclusion of factors such as those set out in *Robinson*, or, on the other hand, properly be based only on factors such as those set out in *Robinson* to the exclusion of considerations based on a qualified expert's experience.

Transcon. Ins. Co., 330 S.W.3d at 215–16 (citing *Whirlpool Corp. v. Camacho*, 298 S.W.3d 631, 638 (Tex. 2009); *see also Mack Trucks*, 206 S.W.3d at 579 ("[T]he criteria for assessing reliability must vary depending on the nature of the evidence."). In

Transcon., Ins., the court considered

> the reliability of a treating physician's opinion based on a particular diagnostic methodology—differential diagnosis. This is a routine diagnostic method used in internal medicine whereby a treating physician formulates a hypothesis as to likely causes of a patient's presented symptoms and eliminates unlikely causes by a deductive process of elimination.
>
> . . .
>
> Several of the *Robinson* factors apply to differential diagnosis as a method or technique, as well as its application and the conclusions reached in a particular case. "Differential diagnosis is 'the basic method of internal medicine' and enjoys widespread acceptance in the medical community. Generally speaking, when properly conducted the technique has important non-judicial uses, is generally accepted as valid by the medical community, and has been subjected to use, peer review, and testing."

330 S.W.3d at 217 (internal citations omitted).

Although in some cases, "a physician's differential diagnosis may be too dependent upon the physician's subjective guesswork or produce too great a rate of error—for example, when there are several consistent, possible causes for a particular set of symptoms," if evidence presents "other plausible causes of the injury or condition that could be negated, the [proponent of the testimony] must offer evidence excluding those causes with reasonable certainty." *Id.* at 218. In addition, the observations of the expert must be sufficiently tied to his or her opinion such that there is not an analytical gap between the facts, the science, and the opinion. *See id.* (citing *Gammill*, 972 S.W.2d at 727).

"An expert's testimony is conclusory if the witness simply states a conclusion without an explanation or factual substantiation". *Bustamante v. Ponte*, 529 S.W.3d 447, 462 (Tex. 2017) (citing *Nat. Gas Pipeline Co. v. Justiss*, 397 S.W.3d 150, 156–57 (Tex. 2012)). If no basis for the opinion is offered, or the basis offered provides no support, the

opinion is merely a conclusory statement and cannot be considered probative evidence, regardless of whether there is no objection. *Id.* (citing *City of San Antonio v. Pollock*, 284 S.W.3d 809, 816–18 (Tex. 2009)). If "the expert merely gives an unexplained conclusion or asks the jury to 'take my word for it' because of his or her status as an expert" the opinion is conclusory and cannot be considered. *Arkoma Basin Exploration Co. v. FMF Assoc. 1990–A, Ltd*., 249 S.W.3d 380, 389 (Tex. 2008).

1. Dr. Woon

In addition to her board certification in ophthalmology, Dr. Woon has been recertified twice and is also a fellow of the American Academy of Ophthalmology. Dr. Woon's medical practice specializes in neuro-ophthalmology which she has practiced for more than twenty-five years. Dr. Woon describes her field as:

> Neuro-ophthalmology is a medical sub-specialty that merges the specialty medical fields of neurology and ophthalmology, often dealing with complex systemic diseases that have manifestations on the visual system. Systemic diseases generally include those affecting the body as a whole and, by definition, would include tropical diseases (such as malaria) that manifest themselves visually. Those diseases include afferent visual system disorders (e.g. optic neuritis, optic neuropathy, papilledema, brain tumors or strokes) and efferent visual system disorders (e.g. anisocoria diplopia, ophthalmoplegia, ptosis, nystagmus, blepharospasm, and seizures of the eye or eye muscles, and hemifacial spasm). This requires me to know or be aware of both the neuro-ophthalmological effects and the underlying systematic causes of those effects. Throughout my education and training, I have learned what those causes are, how to recognize them and, as necessary, diagnose or treat them.

According to Dr. Woon, since the beginning of her medical education, she "became familiar with, and knowledgeable about the various tropical diseases including malaria." Her familiarity has increased over the course of her education, training, medical practice and experience and she is "familiar with the clinical symptoms and other signs of malaria

and the various methods available to diagnose that disease." She is also familiar with the "neuro-ophthalmological effects that malaria can cause." Determining the cause of a neuro-ophthalmologic condition such as optic neuritis requires Dr. Woon "to use [her] knowledge, ability and expertise to diagnose that underlying cause." Dr. Woon testified, "It also requires me to use my knowledge, ability and expertise to identify other possible causes and rule those out. That is a basic function of my specialty and expertise as a neuro-ophthalmologist."

Dr. Woon described the tools she used to diagnose her patients: (1) the patient's medical history; (2) prior health care medical records; (3) my examination, treatment and testing performed or ordered by me and my office; (4) any outside testing or laboratory results; (5) consultation with, or referrals to, other medical doctors and health care providers; and (6) my research and review of any relevant medical literature including medical texts, publications and literature. She testified that she used these tools to diagnose and treat Jerry.

Dr. Woon considered Jerry's history of his time in Africa including the dates he took Malarone, the medication he took that he later learned was Coartem from a local Guinea pharmacy, his symptoms while in Africa, and his course of Malarone after he returned home. Dr. Woon had the benefit of his exams by the local eye doctors from Victoria, the lab reports from Citizens Memorial Hospital and other laboratories, and her consultation with Dr. Price. Dr. Woon consulted the World Health Organization (WHO) publications on malaria and other materials for information on malarial incidence in Equatorial Guinea and its incubation period of seven to fifteen days. She knew that Jerry had received shots

to prevent yellow fever, Hepatitis A and Hepatitis B before leaving for Africa and that he had not traveled outside the United States before that trip.

According to the literature Dr. Woon consulted, Malarone is over 99% effective in preventing malaria when taken as directed, one tablet every day starting one to two days before travel, daily while in Africa until he ran out, and continuing for several days after returning from travel to a country with endemic malaria.[22] Jerry was without malaria prophylaxis from June 25 until after he returned home and resumed Malarone on July 17. He developed a high fever and chills on July 11, 2013[23] which continued until a few days after he resumed Malarone treatment.

In November 2013, Dr. Woon referred Jerry to Dr. Todd Price, a tropical disease specialist for further testing and for consultation. His report stated he observed evidence of possible past malaria, but he concluded that any testing performed would not indicate whether Jerry had past malaria but only whether he still had malaria or some other disease process. Drs. Price and Woon conferred by phone after Jerry's testing. A medical expert like Dr. Woon, may rely on facts or data of a type reasonably relied on by experts in that field. *See* TEX. R. EVID. 703; *Methodist Hosp. v. Addison*, 574 S.W.3d 490, 502 (Tex. App.—Houston [14th Dist.] 2018, no pet.).

[22] Malarone is also effective to treat malaria. It has no other uses according to the FDA publication attached to Dr. Woon's affidavit.

[23] According to the WHO fact sheet on Malaria attached to Dr. Woon's affidavit, "Malaria is an acute febrile illness. In a non-immune individual, symptoms appear seven days or more (usually 10–15 days) after the infective mosquito bite. The first symptoms—fever, headache, chills and vomiting—may be mild and difficult to recognize as malaria."

Dr. Woon theorized that Jerry's response to the ELISA IgG test meant that at one time Jerry had malaria but no longer had active malaria, otherwise he would have had no malaria antigens in his blood and the test result would be zero. Active malaria infection would be a result higher than one. A blood smear, the "gold standard" test only detects active malaria. After her deposition, Dr. Woon continued to do research and found a peer-reviewed scientific article in which a blood bank decided that the presence of malaria antigen of .01 in an ELISA IgG test required them to discard the blood. That article was the one excluded at trial, eight months before the summary judgment motion was submitted. As a result of Jerry's anomalous ELISA IgG test result, his other laboratory tests that ruled out many more common causes of optic neuritis, Jerry's travel and exposure history, Dr. Woon concluded that in reasonable medical probability Jerry had had malaria, recovered from it by taking Malarone when he got home, but malaria caused his optic neuritis. She did not perform additional testing to rule out West Nile, Zika, Chickungunya, Dengue, or herpes because Jerry's clinical presentation did not warrant testing. Of those diseases, only herpes is treatable, and Jerry did not have any of the herpes lesions characteristic of the disease.

Dr. Woon considered the Federal Drug Administration (FDA) materials on Coartem. Coartem is used to treat malaria but is not used or effective as a prophylactic. The dosage for treatment is: "A 3-day treatment schedule with a total of 6 doses is recommended for adult patients with a bodyweight of 35 kg and above: Four tablets as a single initial dose, 4 tablets again after 8 hours and then 4 tablets twice daily (morning and evening) for the following two days (total course of 24 tablets)." The dosage Jerry

was given was not within a therapeutic range according to the FDA materials attached to Dr. Woon's affidavit.

2. Dr. Waxman

Dr. Waxman reviewed Jerry's medical records, his deposition, other depositions, and test results. Dr. Waxman is board certified in emergency and internal medicine and holds a diploma in tropical medicine. The diploma provides specialized training in tropical infections and tropical infectious diseases. He practices travel medicine and practices medicine internationally including in areas like western Africa. In his travel medicine practice, he prescribes malaria prophylaxis, including Malarone and has treated patients who have acquired tropical infectious diseases. When Dr. Waxman works abroad, the large majority of his work falls within the subspecialty of tropical medicine including diagnosing, testing, and treating malaria and other tropical diseases. He has written and been published in peer-reviewed medical journals on tropical medicine, hygiene, and infectious diseases, including malaria, and has lectured on the same topics at the American Society of Tropical Medicine, among others. He is presently working with the CDC on a research project for publication on malaria. Dr. Waxman is also familiar with Coartem which does not prevent malaria.

As a result of his experience and training, and based upon the materials he reviewed, Dr. Waxman concluded, based upon reasonable medical certainty, that Jerry contracted malaria while in Equatorial Guinea, that he was protected from malaria while taking Malarone, but was not when he completed his course of the drug on June 25, that Coartem did not protect Jerry from malaria, the Malarone provided to Jerry upon his return

treated Jerry's malaria, and Jerry's optic neuritis was caused by malaria. Dr. Waxman further testified that he is familiar with the other tropical diseases suggested as possible causes for Jerry's optic neuritis and finds no support for them as a cause for Jerry's optic neuritis in his clinical presentation or testing: Dengue fever, West Nile, Chickungunya, or yellow fever.

Jerry had not previously been out of the United State before his trip to Africa. As such he would not have been exposed to malaria and would not have developed antibodies to protect him against malaria. The ELISA IgG test administered to Jerry to test for malaria antibodies should have read zero if Jerry had no exposure to malaria because he would have no antibodies. The .24 reading suggests a dormant or past, but not active, phase of malaria. Dr. Waxman is familiar with such tests, how they are performed and what the results mean. None of Jerry's other laboratory or other tests were positive. Dr, Waxman concluded that within reasonable medical probability, Jerry contracted malaria during the period after June 25, 2013, when he completed his course of Malarone and July 11, 2013, when he developed a high fever and shaking chills that was treated by the Malarone he received after he returned home on July 17, 2013.

c. Conclusion

Differential diagnosis is a well-recognized basis for doctors to determine the most likely cause of a patient's illness and treat that illness. Sometimes a diagnosis can be confirmed with certainty; sometimes not. In courtrooms, differential diagnosis is also recognized as a legitimate basis for expert medical opinion. *See Transcon., Ins.*, 330 S.W.3d at 217; *Scott's Marina at lake Grapevine Ltd. v. Brown*, 365 S.W.3d 146, 157

(Tex. App.—Amarillo 2013, pet. denied). "Yet a medical causation expert need not 'disprov[e] or discredit[ ] every possible cause other than the one espoused by him.'" *Transcon., Ins.*, 330 S.W.3d at 218 (quoting *Viterbo v. Dow Chem. Co*., 826 F.2d 420, 424 (5th Cir. 1987)). "We reject the contention that our holding in *Wal-Mart Stores, Inc. v. Merrell*, 313 S.W.3d 837 (Tex. 2010) (per curiam), requires experts to exclude all other potential causes when opining on causation." *Bustamante*, 529 S.W.3d at 468; *see Merrell Dow Pharm., Inc.*, 953 S.W.2d at 720.

Here, by the time Jerry saw any medical providers regarding his eye damage, it was not possible to confirm active malaria (if present) due to the course of Malarone he completed on his return from Equatorial Guinea. If the cause was something else, he showed no signs in the multiple blood tests, CT scan, MRI, spinal tap and additional blood work conducted on him over the next three months which ruled out bacterial infections, multiple sclerosis, and other more common causes of optic neuritis. The only testing that gave any hint of a diagnosis was his ELISA IgG antigen test. Dr. Woon consulted her books, including her Walsh & Hoyt's Clinical Neuro-Ophthalmology (6th Ed. 2005), which included a section on the causal relationship between optic neuritis and malaria. Other tropical diseases and herpes did not fit clinically, nor did AIDS/HIV based upon Jerry's lab work.

Similarly, Dr. Waxman's experience with tropical diseases and his records review supported Dr. Woon's conclusions regarding the interpretation of the ELISA IgG test. Both relied on the incubation period for malaria which is variable but can be three to fourteen days or more. Jerry's last day on Malarone was June 25 and his first day with a

temperature over 103 was July 11, 2013. He took Malarone again from July 17, 2013 through July 24, 2013. By the time Dr. Woon saw Jerry on August 1, Jerry had been fever free at least a week. The ELISA IgG test was performed on October 3, 2013.

There is some dispute in the record regarding the dates on which Jerry took Coartem and his last day of taking Malarone based upon variations in his medical history as written down by the various medical personnel who saw Jerry. There is disagreement between Dr. Lee, GRC's expert neuro-opthalmologist, and Dr. Woon regarding the interpretation of the ELISA IgG test result, although they both agree that Jerry has optic neuritis likely caused by an infection and that his optic neuritis is permanent. They also agree that the testing that was done was appropriate, and although some additional testing could have been done, it would not have helped treat Jerry. An expert's factual assumptions do not have to be uncontested or established as a matter of law. *Sw. Energy Prod. Co. v. Berry-Helfand*, 491 S.W.3d 699, 717 (Tex. 2016). If the evidence conflicts, it is the province of the jury to determine which evidence to credit. *See id.*

Here, both of the Garcias's experts are qualified to express opinions, Dr. Woon on the cause of Jerry's optic neuritis even when the cause is a tropical infectious disease, and Dr. Waxman on the diagnosis of an infectious tropical disease. Both are qualified to express their medical opinions regarding the interpretation of the ELISA IgG test and its support for their diagnoses. They have each explained how and why they have ruled out the most probable other causes of Jerry's optical neuritis both by testing and by considering his clinical presentation compared to the clinical signs and symptoms of other possible diseases. An expert is not required to rule out every other possible cause, only

other probable causes which has been done. *See Bustamante*, 529 S.W.3d at 468. As a result, Drs. Woon and Waxman's affidavits should not have been excluded. Dr. Woon's medical records should also not have been excluded. The trial court's exclusion of Dr. Price's records, exhibit 11, was a closer call but ultimately was an abuse of discretion. The exclusion of the infectious disease doctor's records and Dr. Woon's testimony regarding their consultation was harmful because it was part of the process of determining the possible cause of Jerry's optical neuritis. Dr. Price was someone with a broader knowledge of infectious diseases whose insights could suggest a path that Dr. Woon had not considered as part of her differential diagnosis and treatment. Instead, Dr. Price supported her previous testing explorations and confirmed that there no way to positively determine whether someone had past malaria if they no longer had it.

Because Dr. Woon and Dr. Waxman are the Garcias's experts on causation, their exclusion was harmful as was the exclusion of Dr. Woon's business records. We sustain the Garcias's first issue, sub-issues (a) in part, (b) in part, (c), and (d).

III. NO-EVIDENCE SUMMARY JUDGMENT

By their second issue, the Garcias argue that the trial court erred in granting GRC's no-evidence motion for summary judgment. GRC moved for no-evidence summary judgment on the grounds that the Garcias "have no legally competent evidence of medical causation—i.e., they have no evidence that Jerry Garcia had malaria, and they have no evidence that malaria caused his alleged eye injury."

A. Standard of Review

We review no-evidence summary judgments under the same legal sufficiency standard as directed verdicts. *See Merriman v. XTO Energy, Inc*., 407 S.W.3d 244, 248 (Tex. 2013); *King Ranch, Inc. v. Chapman*, 118 S.W.3d 742, 750 (Tex. 2003). Under that standard, evidence is considered in the light most favorable to the nonmovant, crediting evidence a reasonable jury could credit and disregarding contrary evidence and inferences unless a reasonable jury could not. *Goodyear Tire & Rubber Co. v. Mayes*, 236 S.W.3d 754, 756 (Tex. 2007) (per curiam); *City of Keller v. Wilson*, 168 S.W.3d 802, 823 (Tex. 2005). The nonmovant has the burden to produce summary judgment evidence raising a genuine issue of material fact as to each challenged element of its cause of action. TEX. R. CIV. P. 166a(i); *Johnson v. Brewer & Pritchard, P.C.*, 73 S.W.3d 193, 206 (Tex. 2002). A no evidence challenge will be sustained when

> (a) there is a complete absence of evidence 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 conclusively establishes the opposite of the vital fact.

King Ranch, 118 S.W.3d at 751 (quoting *Merrell Dow Pharms*, 953 S.W.2d at 711). Summary judgment is improper if the non-movant produces evidence to raise a genuine issue of material fact. TEX. R. CIV. P. 166a(i).

The non-movant is required to produce a scintilla of probative evidence to raise a genuine issue of material fact on the challenged elements. *Forbes, Inc. v. Granada Biosciences, Inc*., 124 S.W.3d 167, 172 (Tex. 2003); *see also Alvarez v. Salazar-Davis*, No.13-18-00366-CV, 2019 WL 5445215, at *2 (Tex. App.—Corpus Christi–Edinburg Oct.

24, 2019, no pet) (mem. op.). "Less than a scintilla of evidence exists when the evidence is 'so weak as to do no more than create a mere surmise or suspicion of a fact.'" *Ortega v. City Nat'l Bank*, 97 S.W.3d 765, 771–72 (Tex. App.—Corpus Christi–Edinburg 2003, no pet.) (quoting *Kindred v. Con/Chem, Inc.*, 650 S.W.2d 61, 63 (Tex. 1983)). In determining whether the non-movant has produced more than a scintilla of evidence, we review the evidence in the light most favorable to the non-movant, crediting such evidence if reasonable jurors could, and disregarding contrary evidence unless reasonable jurors could not. *See City of Keller*, 168 S.W.3d at 827; *see also St. Clair v. Alexander*, No. 13-08-00218-CV, 2009 WL 3135812, at *6 (Tex. App.—Corpus Christi–Edinburg Sept. 30, 2009, pet. denied) (mem. op.).

B. Discussion

GRC moved for summary judgment on the ground that the Garcias had no competent evidence that Jerry's loss of vision was caused by malaria. GRC relied on its objections to the Garcias's expert witnesses to prevail on the motion. Having sustained the Garcias's challenge to the trial court's exclusion of Dr. Woon and Dr. Waxman's opinions that Jerry contracted malaria and that it caused his optic neuritis, the trial court erred in granting GRC's no-evidence motion. There is more than a scintilla of evidence supporting causation.[24]

We sustain the Garcias's second issue.

[24] GRC argues in its brief that the Garcias did not address foreseeability as part of the proximate cause element of their cause of action. We note the Garcias's objection to the vagueness of GRC's motion and its explicit focus on medical causation. We will not address an issue not addressed by the parties and the trial court.

III. CONCLUSION

The trial court judgment is affirmed in part as to Roth Construction, Inc., and is reversed as to GRC and remanded for further proceedings consistent with this Memorandum Opinion.

GINA M. BENAVIDES,
Justice

Delivered and filed the
23rd day of July, 2020.