Affirmed and Opinion filed February 17, 2000.

In The

Fourteenth Court of Appeals

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NO. 14-98-00842-CV

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WILLIAM MOORE, Appellant

V.

GODFREY SULLIVAN, Appellee

On Appeal from the 129th District Court
Harris County, Texas
Trial Court Cause No. 96-35015

O P I N I O N

A jury found William Moore, a Re/Max real estate agent, negligent for his part in an automobile accident, and judgment was entered awarding Godfrey Sullivan $147,524.77. Moore argues in two issues: the trial court erred in admitting evidence that ReMax required him to carry liability insurance and there is no evidence to support the jury's damages award. We affirm.

Admission of Re/Max's Insurance Requirement

In his first issue, Moore argues the trial court erred by admitting evidence that Re/Max required him to carry automobile liability insurance. We disagree. While insurance cannot be offered to prove that a person acted negligently, evidence of insurance is admissible "when offered for another issue, such as proof of agency, ownership or control." TEX. R. EVID. 411; *see St. Joseph Hosp. v. Wolff*, 999 S.W.2d 579, 595 (Tex. App.–Austin 1999, pet. filed); *Jacobini v. Hall*, 719 S.W.2d 396, 401 (Tex. App.–Fort Worth 1986, writ ref'd n.r.e.).

Sullivan sued both Moore and Re/Max, alleging Re/Max was Moore's employer, and either there was a joint enterprise between Moore and Re/Max, or Re/Max had an agency relationship with Moore. During trial, Sullivan introduced evidence that Re/Max required its agents to carry automobile liability insurance and to name Re/Max as an additional insured. Moore concedes this evidence of insurance was offered to prove the existence of an agency relationship between Re/Max and him. Thus, although the trial court granted Re/Max a directed verdict, releasing it from liability for the accident, we cannot say the district court abused his discretion in admitting evidence of insurance. *See Malone v. Foster*, 977 S.W.2d 562, 564 (Tex. 1998).

Accordingly, we overrule Moore's first issue.

Evidentiary Sufficiency of Damage Award

Moore next argues that the jury's award of damages was not supported by the evidence. Included in this issue regarding the excessiveness of the damage award, Sullivan argues the following: (1) there is no evidence that Moore's surgery was caused by the accident; (2) the jury awarded more for past medical expenses than the total amount of bills submitted by Moore; (3) there was no evidence to support an award of future medical expenses; and (4) there was no evidence to support the award of future loss of earning capacity.

Initially, we note Moore's issue is multifarious because he raises all of these grounds of error in one issue. *See Bell v. Texas Dep't of Criminal Justice-Institutional Div.*, 962 S.W.2d 156, 157 n. 1 (Tex. App.–Houston [14th Dist.] 1998, pet. denied). Previously, if a point of error was multifarious, a court could refuse to review it or it may consider the point of error if it could determine, with reasonable certainty, the error about which the complaint was made. *See Shull v. United Parcel Service*, 4

S.W.3d 46, 51 (Tex. App.–San Antonio 1999, pet. denied). The new Appellate Rules provide for a situation where a point of error or issue may include numerous grounds of error. *See* TEX. R. APP. P. 38.1(e). Appellate Rule 38.1(e) provides: "[t]he brief must state concisely all issues or points presented for review. The statement of an issue or point will be treated as covering every subsidiary question that is fairly included." TEX. R. APP. P. 38.1(e). This rule reveals "the intention of the Supreme Court to have all appeals judged on the merits of controversies rather than hypertechnical waiver issues" and "represents a major change in one of the most picayune areas of appellate law under the old rules." John Hill Cayce, Jr., Anne Gardner and Felicia Harris Kyle, *Civil Appeals in Texas: Practicing Under the New Rules of Appellate Procedure*, 49 BAYLOR L. REV. 867, 946-47 (1997); *see*, 6 MCDONALD & CARLSON, TEXAS CIVIL PRACTICE 2d § 38:5 (West 1998). Accordingly, because Sullivan's grounds of error are fairly included in his issue complaining of the excessiveness of the damage award, we will examine each of his grounds.

The standard for reviewing whether a damage award is excessive is factual sufficiency of the evidence. *See Maritime Overseas Corp. v. Ellis*, 971 S.W.2d 402, 406-7 (Tex. 1998) *cert. denied*, 119 S. Ct. 541 (1998); *Rose v. Doctors Hosp.*, 801 S.W.2d 841, 847-48 (Tex. 1990). Using this standard of review, we will "examine all the evidence in the record to determine whether sufficient evidence supports the damage award." *Pope v. Moore*, 711 S.W.2d 622, 624 (Tex. 1986). We may set aside the damages award as excessive only if the award is so contrary to the overwhelming weight of the evidence as to be clearly wrong or unjust. *See Ortiz v. Jones*, 917 S.W.2d 770, 772 (Tex. 1996). Although we examine all of the evidence presented at trial, we may not pass upon the witnesses' credibility or substitute our judgment for that of the jury, even if the evidence would clearly support a different result. *See Ellis*, 971 S.W.2d at 407; *Pool v. Ford Motor Co.*, 715 S.W.2d 629, 634 (Tex. 1986). This is because the jury is the *exclusive* judge of the facts and the credibility of the witnesses. *See Benoit v. Wilson*, 239 S.W.2d 792, 796-97 (Tex. 1951); *Wyler Indus. Works, Inc. v. Garcia*, 999 S.W.2d 494, 499 (Tex. App.–El Paso 1999, no pet. h.).

Expert Testimony

Moore argues the evidence is legally insufficient to support the jury's conclusion that the car accident proximately caused Sullivan's back surgery.[1] He also argued Sullivan's expert was not qualified to testify regarding the proximate cause of Sullivan's back injury.

To raise an appellate issue that an expert's testimony provides no evidence to support the verdict, a party must first object to the expert "before trial or [at least] when the evidence is offered." *Ellis*, 971 S.W.2d at 409. Because Moore did not object to the expert's testimony, he waived any appellate complaint regarding the expert's qualifications or the sufficiency of his testimony. *See id*. Thus, the expert's testimony Sullivan's injury was proximately caused by the accident and the resulting requirements of his treatment, is probative evidence, i.e., legally sufficient, to support the jury's verdict. *See id*.; ; *see also Texas Commerce Bank, N.A. v. New*, 3 S.W.3d 515, 516-17 (Tex. 1999) (unobjected to hearsay constitutes probative evidence to support a judgment).

Past Medical Expenses

Moore also complains the jury's award of $21,400 for past medical expenses is not supported by the evidence because the evidence would only support an $18,179.40 award. However, in his motion for remittitur to the trial court, Moore stated $19,974.77 of the award was supported by the evidence. Sullivan agreed to Moore's suggested remittitur of $1,425.23.

Appellate Rule 33.1(a) requires an objection be made to the trial court, which is either implicitly or overtly overruled, before bringing a complaint on appeal. *See* TEX. R. APP. P. 33.1(a). Additionally, an objection on appeal that is not the same as that urged at trial presents nothing for review. *See Holland v. Hayden*, 901 S.W.2d 763, 765 (Tex. App.–Houston [14th Dist.] 1995, writ denied). When Sullivan agreed to Moore's remittitur in the trial court, and Moore did not file an additional request for remittitur, he had no objection regarding the sufficiency of the evidence to support the damage award. Thus, the trial court was never informed of the error Moore brings on appeal. Accordingly, error was not preserved on this issue.

Future Medical Expenses

[1] We will review the legal sufficiency of the evidence using the usual standard of review. *See Uniroyal Goodrich Tire Co., v. Martinez*, 977 S.W.2d 328, 334 (Tex. 1998).

Next, Moore argues there is no evidence to support the $12,000 jury award for future medical expenses. We disagree. An award of future medical expenses is primarily a matter for the jury to decide, and precise evidence is not required to support the award. *See Strahan v. Davis*, 872 S.W.2d 828, 833 (Tex. App.–Waco 1994, writ denied); *Hughett v. Dwyre*, 624 S.W.2d 401, 405 (Tex. App.–Amarillo 1981, writ ref'd n.r.e.). The award may be based on the nature of the injuries, the medical care rendered in the past, and the condition of the injured party at the time of trial. *See id.*; *Pipgras v. Hart*, 832 S.W.2d 360, 366 (Tex. App.–Fort Worth 1992, writ denied). If there is any probative evidence that supports the jury's finding of future medical expenses, the award must be upheld. *See Strahan*, 872 S.W.2d at 833.

Sullivan's back injury resulted in constant pain, which was only slightly relieved by surgery. His doctor testified that although he under went extensive testing, surgery, and rehabilitation for his injury, his condition would result in a lifetime of pain. *See id.* (testimony of a "reasonable medical probability" by a medical expert is not a prerequisite to a recovery for future medical expenses.). At trial, Sullivan testifed he cannot recall a moment without pain since the car accident. He also testified that he must use a cane and continues to have back problems. He must take medications for his back pain.

Accordingly, we find the evidence is sufficient to support the $12,000 award for future medical expenses. *See id.*

Lost Earnings

Moore next complains the $55,000 jury award for future loss of earning capacity was not supported by the evidence. We disagree. "In a personal injury suit the amount which the plaintiff might have earned in the future is always uncertain, and must be left largely to the sound judgment and discretion of the jury." *McIver v. Gloria*, 140 Tex. 566, 169 S.W.2d 710, 711 (1943); *see King v. Skelly*, 452 S.W.2d 691, 693 (Tex. 1970); *Tri-State Motor Transit Co. v. Nicar*, 765 S.W.2d 486, 492 (Tex. App.–Houston [14th Dist.] 1989, no writ). Additionally, Sullivan "is not required to prove the exact amount [of future loss of earning capacity], but only the facts from which the jury, in the exercise of sound judgment and discretion, can determine the proper amount." *Id.* Although the jury is given such discretionary power, it should not be left to mere conjecture where facts appear to be available upon which the jury could base an intelligent answer. *See Bonney v. San Antonio Transit Co.*, 160 Tex. 11, 325 S.W.2d 117, 121

(1959). The injured party is required to introduce sufficient evidence to enable the jury to reasonably measure earning capacity prior to the injury. *See City of Houston v. Howard*, 786 S.W.2d 391, 396 (Tex. App.–Houston [14th Dist.] 1990, writ denied). Plus, recovery for loss of future earning capacity does not require a showing of actual lost earnings, life expectancy, or even that the injured party was currently employed at the time of the accident. *See McIver*, 140 Tex. 566, 169 S.W.2d at 711; *Wal-Mart Stores, Inc. v. Cordova*, 856 S.W.2d 768, 770 (Tex. App.–El Paso 1993, writ denied); *Nicar*, 765 S.W.2d at 492.

The evidence is sufficient to support the jury's verdict. Sullivan worked part-time for $35 an hour as a credit manager for Ideal Services Company. The Vice-President of Ideal testified that Sullivan would have been promoted if he had continued working for them after the accident.

The jury properly determined the value of Sullivan's lost earning capacity "from their common knowledge[,] sense of justice,"and the evidence. *See McIver*, 140 Tex. 566, 169 S.W.2d at 711; *King*, 452 S.W.2d at 693. Thus, the evidence is sufficient to support the award of future loss of earnings.

Accordingly, we find the evidence is factually sufficient to support the complained of portions of the jury's damage award.

Having overruled all of Moore's issues, we affirm the trial court's judgment.

Norman Lee
Justice

Judgment rendered and Opinion filed February 17, 2000.

Panel consists of Justices Draughn, Lee, and Hutson-Dunn.[**]

Do Not Publish — TEX. R. APP. P. 47.3(b).

[**] Senior Justices Joe L. Draughn, Norman Lee, and Camille Hutson-Dunn sitting by assignment.