Affirmed and Opinion filed March 16, 2000.

In The

Fourteenth Court of Appeals

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NO. 14-97-00835-CV

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JENNI B. THOMAS, Appellant

V.

ROBERT PARKER AND PAMELLA PARKER, DAVID P. WILLIAMS & ASSOCIATES, INC., MEMORIAL CITY PHYSICAL THERAPY & SPORTS REHABILITATION CENTER, DAVID WENDEBORN AND ROBERT SUMPTER, Appellees

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On Appeal from the 270th District Court
Harris County, Texas
Trial Court Cause No. 95-12678

O P I N I O N

Jenni B. Thomas (Thomas) sued appellees Robert Parker and Pamella Parker for damages arising out of personal injuries she sustained when she slipped and fell at their house in July 1993. She was referred to the other appellees (Williams) for therapy, and in November 1993, she fell off a stool during therapy and injured her left arm. She subsequently sued Williams for damages arising out of personal injuries when she fell off the stool at their clinic. The trial court consolidated the two suits, and a jury found against Thomas in both claims. The trial court entered a take-nothing judgment against her based on the

jury verdict. In three points of error, Thomas contends: (1) the trial court erred by admitting evidence of her prior injury claims; (2) the trial court erred by consolidating the two lawsuits; and (3) the jury's verdict in the Williams case was against the "great weight and sufficiency" of the evidence. We affirm.

Thomas worked for the Parkers as a housekeeper for about eight years. On July 6, 1993, at about 4:30 p.m., she walked down the outside steps from the back door, and stepped on a rug that covered two bricks. She twisted her right ankle and suffered a broken bone in her third toe. Dr. Robert Parker (appellee) stated he put the rug down, but the bricks were not there at that time. Thomas stated she was not watching where she was going when she went down the stairs. Thomas initially was treated by Dr. Parker, who is a podiatrist specializing in injuries and diseases of the foot. She eventually went to Dr. John Bishop who referred her to Williams for physical therapy.

On November 1, 1993, Thomas went to Williams for therapy, and was escorted to the treatment area by appellee Robert Sumpter, a physical therapist aide. Sumpter told Thomas to begin her towel exercises, and asked if she needed assistance. Thomas told Sumpter that she did not need any assistance, and Sumpter left the room. Thomas knew how to do the towel exercises and had done them many times at home. To perform the exercise, Thomas would sit in a chair and slide a towel on a smooth surface with her injured foot.

Elizabeth Hammer was a patient waiting for therapy, and observed Thomas walk on her crutches and select a rolling stool next to the middle table in the treatment room. There was a lower rolling stool in the room, a stationary chair, and the higher rolling stool selected by Thomas. Ms. Hammer observed Thomas put her crutches on the table and sit on the edge of the higher rolling stool. As she did so, the stool pushed out from behind her, and Thomas fell to the ground injuring her left elbow. Ms. Hammer testified that Thomas "bears the full responsibility for the fact that she fell" without objection from appellant's counsel.

Three days after the accident, Dr. Craig Crouch, an orthopedic surgeon examined Thomas' left elbow, and concluded that it was bruised. Upon further complaints by Thomas of pain in the elbow, Dr. Crouch completed an MRI which showed only a muscle irritation and no fractures. Upon further complaints of pain by Thomas, Dr. Crouch concluded she suffered a lateral epicondylitis to the left elbow

(inflammation in the elbow). Thomas continued complaining of pain, and Dr. Crouch referred her to Dr. Bennett who eventually operated on her elbow. Dr. Crouch explained that Thomas suffered from reflex sympathetic dystrophy (RSD), which is continuous pain because the normal cycle of healing is not working properly.

Dr. Crouch referred Thomas to Dr. Redko, a specialist in pain management and RSD. Dr. Redko implanted a spinal stimulator for pain in her right foot and left elbow; he testified that Thomas would need some treatment for this pain for the rest of her life.

In September 1996, Dr. Richard Larrey was retained by Williams to examine Thomas. Dr. Larrey found that Thomas' x-rays of her left elbow were normal, and that she had sustained only a bruise to her elbow. As a result of his examination, Dr. Larrey stated that Thomas does not have RSD. Dr. Larrey opined that Thomas had "a psychological disturbance that probably propagated the prolonged and ineffective medical care which she had received." He criticized Thomas' pain management treatments primarily because they were given in response to Thomas' subjective complaints of pain, rather than objective evidence of an injury. He opined that such "highly expensive, dangerous and ineffective treatment, giving large doses of narcotic pain medicine over a long period of time, the monster you create is worse than the problem you started with from a medical standpoint, because of the problems of addiction, secondary gain behavior, psychological disturbances, and all the rest."

Dr. Larrey stated that secondary gain is a "conscious and/or . . . unconscious influence of a patient's mental state and/or psychological awareness being on their physical condition and how those . . . affect their response of their body to treatment." He stated that it was unlikely that Thomas' perception "and/or reality of her pain" would improve until the litigation was solved. Dr. Larrey concluded: "I think that once it [the litigation] is solved, it most likely would solve, resolve fairly promptly."

In point of error one, Thomas contends the trial court erred by admitting evidence of her prior claims. Thomas cites *Hartford Accident and Indemnity Company v. McCardell,* 369 S.W.2d 331 (Tex.1963) and *H.P. Brinkley v. Liberty Mutual Ins. Co.,* 331 S.W.2d 423 (Tex.Civ.App.–Texarkana 1959, no writ) as authority for the proposition that evidence of prior claims is not admissible. Appellees contend that Thomas has waived this complaint because she failed to object

when appellees first mentioned her prior claims during their opening statement to the jury. During the trial, Thomas' counsel raised her prior injuries on direct examination for the first time, and appellees cross-examined Thomas concerning two of these prior injuries without objection. By failing to object, appellees contend Thomas has waived this issue on appeal. Appellees further contend that by introducing these injuries for the first time on direct examination by her counsel, appellant has waived her complaint on appeal that appellees subsequently introduced the same evidence, citing *McInnes v. Yamaha Motor Corp. U.S.A.*, 673 S.W.2d 185, 188 (Tex.1984) as authority.

On direct examination by her trial counsel, appellant stated: (1) she injured her neck and left shoulder in 1982 in a car accident; (2) she injured her face, jaw, and left arm in 1983 in a slip and fall in a mall; (3) she injured her right arm and right knee in 1988 in a slip and fall accident in a Safeway store; and (4) she injured her right big toe and right arm in 1990 in a slip and fall accident in a Randall's store. After appellant testified to these injuries, appellees cross-examined Thomas concerning the 1988 and 1990 injuries only. Appellant stated she injured her right elbow in the 1988 accident in Safeway, which was diagnosed as epicondylitis. Thomas stated that surgery for the elbow was scheduled, canceled, and rescheduled. She subsequently settled her claim with Safeway, then never sought any further medical treatment for her right elbow, and never developed RSD in her right arm.

After injuring the same right arm in 1990 in Randall's, Thomas also scheduled surgery to her right arm several times but subsequently canceled. Thomas stated she did not develop RSD in the right arm in this case, and had no further problems after settling her claim against Randall's.

Thomas made no objection to the opening statement by appellees to the jury concerning these prior claims, nor to appellees' cross-examination of Thomas about two of these prior injuries, nor to the introduction of any prior-claims evidence by appellees on the grounds claimed in this appeal. Appellant never asked for a ruling by the trial court on the grounds claimed in this appeal. Appellant obtained a ruling on a motion in limine that appellees could not produce evidence of "unrelated" claims and settlements. However, the trial court allowed appellees the right to produce evidence of prior injuries.

The trial court's ruling on a motion in limine does not preserve error. If the evidence is offered at trial, the party who wants to exclude it must object when it is offered. *Hartford Accident & Indem. Co.*

v. McCardell, 369 S.W.2d at 335; *Collins v. Collins*, 904 S.W.2d 792, 798, (Tex.App.-Houston[1st Dist] 1995), *writ denied*, 923 S.W.2d 569 (Tex.1996); *Hartnett v. Hampton Ins., Inc.,* 870 S.W..2d 162, 165(Tex.App.–San Antonio 1993, writ denied). For these reasons, appellant has waived her complaint on appeal.

Furthermore, by first introducing evidence of these prior claims on direct examination, Thomas has waived her complaint on appeal that appellees thereafter introduced the same evidence or evidence of a similar character. *McInnes*, 673 S.W.2d at 188. Because appellant has failed to preserve error, we overrule her point of error one.

In point two, appellant contends the trial court erred by consolidating two lawsuits that did not have common issues of law or fact and which arose out of separate transactions and/or occurrences. Appellant contends the trial court abused its discretion in consolidating these two cases and she has been prejudiced thereby.

Appellant did not object to the Parkers' motion to consolidate, nor did they file any response to the motion, nor did she raise this contention in her motion for new trial. Appellant raises this contention for the first time in this appeal. The complaining party must show that it exercised reasonable diligence to avoid or prevent the harm by opposing the order for consolidation. *Lone Star Ford, Inc. v. McCormick*, 838 S.W.2d 734, 738 (Tex.App.-Houston[1st Dist.] 1992, writ denied). Appellant has waived this complaint by failing to object at trial to the consolidation. *Id*.

Although appellant contends in her brief that she objected to the consolidation, she does not cite to the record where this objection is located. Therefore, appellant has waived this sub-point that she objected to the consolidation because she fails to make an accurate reference to the record to support her complaint on appeal. *Casteel-Diebolt v. Diebolt*, 912 S.W.2d 302, 305 (Tex.App.-Houston[14th Dist] 1995, no writ); *Tacon Mechanical Contractors v. Grant Sheet*, 889 S.W.2d 666, 671 (Tex.App.--Houston [14th Dist.] 1994, writ denied). Appellant's point of error two is overruled.

In point of error three, appellant contends that the evidence is factually insufficient to support the jury's apportionment of 40% responsibility to Williams and 60% responsibility to her in their answers to question 5.

To prevail on her factual sufficiency challenges, appellant must show that the adverse findings are against the great weight and preponderance of the evidence. *See Cain v. Bain*, 709 S.W.2d 175, 176 (Tex.1986) (per curiam). In conducting this review, we examine the entire record, considering both the evidence in favor of, and contrary to, the challenged finding. *Id*. We must uphold the jury's finding unless it is so against the great weight and preponderance of the evidence as to be manifestly unjust or erroneous. *Pool v. Ford Motor Co.*, 715 S.W.2d 629, 635 (Tex.1986). *See also Knoll v. Neblett*, 966 S.W.2d 622, 629-632(Tex.App.-Houston[14th Dist.] 1998, pet. denied).

Evidence supporting the jury's verdict is recited above in connection with the discussion of the factual background. An uninterested eyewitness, Ms. Hammer, was a patient awaiting physical therapy, and observed appellant choose a high rolling stool to sit on instead of a lower stationary chair, or a lower rolling stool. Ms. Hammer observed appellant sit on the edge of the stool which caused the stool to slip backwards from under her. Ms. Hammer testified that Thomas bore the full responsibility of her fall. Thomas testified that she bore some responsibility for her fall, and nothing prevented her from seeing the rolling stool had wheels on it. Thomas stated she performed the towel exercises at home sitting on her toilet, which was stationary. Thomas' liability expert, Bina Lorfing, a physical therapist that treated Thomas at another clinic, testified on cross-examination by Williams that Williams would not necessarily be negligent by not helping Thomas into a chair. Lorfing stated that physical therapists encourage independence by patients. Lorfing further opined that it would not be negligent to allow a patient to move about independently if that patient had previously demonstrated she was able to move on her own.

The contrary evidence consists primarily of Lorfing's testimony on direct examination by Thomas' attorney. Lorfing stated she based her testimony on Thomas' report to her about how the accident happened. Lorfing stated it would be inappropriate for the therapist: (1) to leave Thomas unattended in the therapy room; (2) to leave Thomas without helping her down from the therapy table; (3) to put a towel on the floor by a chair with rolling wheels and leave the room; and (4) to instruct Thomas to get down on

her own from the table and to use the rolling chair for her exercises without any assistance. She further opined that Williams was negligent in providing Thomas with a rolling stool

In her brief, appellant repeats her allegations of "uncontroverted evidence" stated in her motion for new trial in support of her claim of factual insufficiency. She does not support these factual summaries and conclusions with any reference to the record. The record in this case consists of eight volumes of testimony and eight volumes of exhibits.

The Texas Rules of Appellate Procedure require that an appellate brief "must state concisely . . . the facts pertinent to the issues or points presented. The statement must be supported by record references." TEX. R. APP. P. 38.1(f). An appellate court is not required to search a record without guidance from an appellant to determine whether assertions regarding the facts of the case are valid. *Nawas v. R & S Vending*, 920 S.W.2d 734, 737(Tex.App.-Houston[1st Dist.] 1996, no writ); *Anheuser-Busch Companies, Inc. v. Summit Coffee Co.*, 858 S.W.2d 928 (Tex.App.--Dallas 1993, writ denied). Appellant has inadequately briefed this point and we will not search the record to find support for her factual summaries and conclusions.

Having reviewed the entire record, we find the evidence contrary to the jury's verdict is not so overwhelming as to render their verdict unjust. The jury, as the sole judge of the credibility of the witnesses and the weight to be given to their testimony, was entitled to discount the testimony of any witness. *Skrepnek v. Shearson Lehman Bros., Inc.*, 889 S.W.2d 578, 579 (Tex.App.--Houston [14th Dist.] 1994, no writ). Appellant acknowledged that she had two prior injuries to her right elbow which resulted in settlements and no further complaints about her injury. The injuries claimed in the two prior accidents to her right elbow were similar to the injury she claimed to her left elbow in this accident-- epicondylitis. Appellant admitted she was partially responsible for the accident. Her expert witness initially said leaving Thomas unattended with a rolling stool in the therapy room was inappropriate; on cross-examination, and after further facts were presented by appellees, she indicated these circumstances are not necessarily improper.

When the evidence is in conflict and there is substantial evidence to support a jury's answer either way, the conclusion reached by the jury is not manifestly unjust. *See Benoit v. Wilson*, 150 Tex. 273,

239 S.W.2d 792, 797 (1951); *Knoll*, 966 S.W.2d at 629-632; *Middleton v. Palmer*, 601 S.W.2d 759, 766 (Tex.Civ.App.--Dallas 1980, writ ref'd n.r.e.). Because the evidence is conflicting and the jury was permitted to evaluate the credibility of the witnesses and the weight to place on their testimony, we should not disturb the verdict. This court is not a fact finder, so we may not pass upon the credibility of the witnesses or substitute our judgment for that of the trier of fact, even if the evidence would support a different result. *Clancy v. Zale Corp*., 705 S.W.2d 820, 826 (Tex.App.--Dallas 1986, writ ref'd n.r.e.). We conclude the evidence is factually sufficient to support the jury's answer to question five on proportionate responsibility, and we overrule appellant's point of error three.

We affirm the judgment of the trial court.

/s/ Bill Cannon
Justice

Judgment rendered and Opinion filed March 16, 2000.

Panel consists of Justices Sears, Cannon, and Hutson-Dunn.*

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

* Senior Justices Ross A. Sears, Bill Cannon, and D. Camille Hutson-Dunn sitting by assignment.