Affirmed on Condition of Remittitur and Opinion filed August 24, 2000.

In The

Fourteenth Court of Appeals

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NO. 14-98-01273-CV

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SOFAMOR, S.N.C., Appellant

V.

ETTIE BERNICE REED, Appellee

On Appeal from the 125th District Court
Harris County, Texas
Trial Court Cause No. 95-056534

O P I N I O N

Sofamor , S.N.C., appellant, appeals from a judgment awarding Ettie Bernice Reed, appellee, $431,350.00 in damages in her products liability suit against Sofamor. The judgment of the trial court is affirmed on condition of remittitur.

Sofamor manufactured and sold to appellee's surgeon a medical device known as the CD spinal fixation system, which was stainless steel rods and screws for surgical implantation in and along the spine. Appellee's surgeon implanted the CD system in appellee to stabilize her spine following lumbar spinal fusion surgery. Two of the screws loosened and one eventually broke. The Sofamor CD system was classified by the FDA as a Class III medical device,

requiring pre-market approval upon a showing that the device was "safe and effective" for its intended use.

The jury found that Sofamor had misrepresented to the medical profession that the CD system was safe and effective, and that appellee's surgeon had relied on such misrepresentation in implanting the device in appellee. The jury further found that such misrepresentations were a producing cause of appellee's injuries. Appellant Sofamor presents six issues on appeal, attacking the legal and factual sufficiency of the evidence for the jury's finding that there was a misrepresentation by Sofamor that was a producing cause of injury to appellee; attacking the legal and factual sufficiency of the evidence as to causation, including the testimony of appellee's expert, Dr. Richard Levy; alleging that the affirmative defense of limitations was established as a matter of law,and attacking the legal and factual sufficiency of the evidence to support the jury's award of past medical expenses.

Under its first issue, appellant alleges that there is no evidence, or only insufficient evidence, that it made any misrepresentations to appellee's surgeon regarding the regulatory status of the device, such that there is no evidence to support the jury's finding of a misrepresentation under question #2. This complaint, however, is predicated upon the jury having been limited to "regulatory status" as the subject matter of any misrepresentation. Jury question #2 stated:

> Was there a misrepresentation by Sofamor, S.N.C., that was a producing cause of [the] occurrence in question? There was a misrepresentation if:
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> 1. Sofamor, S.N.C., represented to the medical profession that CD System was safe and effective for pedicle fixation; and
> 2. The CD System failed to be safe and effective for pedicle fixation; and
> 3. The representation about the CD System involved a material fact concerning the character or quality of the device in question; and
> 4. [appellee's surgeon] relied on the representation made by Sofamor, S.N.C. in purchasing and implanting the CD System.

> A "material fact" is a fact that is important to a physician by which the physician may justifiably be expected to be influenced in making the decision to purchase and implant the product.
>
> Answer "yes" or "no"
>
> Answer: Yes

Jury question #2 did not require the jury to find or limit "regulatory status" as the source or subject matter for any misrepresentation, and it cannot be said that the jury's answer found that appellant misrepresented the regulatory status of the CD System. Rather, the question required the misrepresentation to involve safety and effectiveness of the device for pedicle fixation. We disagree with appellant's contention that appellee tried her case solely on the issue of illegal marketing and regulatory non-compliance, and overrule the first issue.

By its second issue, appellant contends, in the alternative, that appellee's injuries were caused by loosening of the screws, not breakage, such that the claimed representation regarding screw breakage was not a cause of appellee's injuries. This position assumes that appellant made only representations that the screw would not break for a certain period of time, and that screw breakage was found by the jury to be a cause of appellee's injuries. Again this limitation on the evidence and in the jury's findings is not borne out by the record. Appellee's surgeon testified that appellant said the screw would not "fail" within three years (not merely not beak within three years), that two screws became loose shortly after surgery, and that one screw broke within the three-year period. Appellee's expert witness testified that the loosening of the screw was a fusion failure, which was a failure of the device which caused pain and injury to appellee; this is sufficient to support the jury's answer to question #2. Appellant's second issue is overruled.

By its third issue, appellant contends that the testimony of appellee's expert witness, Dr. Levy, is insufficient to support the finding of causation. Specifically, appellant argues that inasmuch as Dr. Levy failed to rule out other possible conditions causing appellee's pain, his opinion that the loose screws caused her pain is untenable. We disagree with appellant's interpretation of the record. Dr. Levy affirmatively stated that while appellee may have had

other painful conditions, the loose screws definitely were a source of pain for her. Under the jury issues as submitted, this is sufficient to support the causation finding and we overruled the third issue.

Appellant's fourth issue alleges that Dr. Levy's opinions and testimony are unreliable as he is a neurosurgeon, not an orthopedic surgeon, and unable to testify as to matters within the realm of orthopedics. A review of the record, however, clearly shows that there is a significant overlap between the medical disciplines of neurosurgery and orthopedic surgery, and appellant has not presented us with a record showing that Dr. Levy's testimony or opinions were strictly within the realm of orthopedics and not neurosurgery. That he has not personally performed the subject surgical procedure or used the medical device made the basis of this lawsuit is immaterial as to admissibility of Dr. Levy's testimony in this case. We find Dr. Levy's testimony and opinions to be admissible under Rule 702, TEX. R. EVID. Appellant's arguments are either not supported by the record, or go to the weight, not the admissibility, of the testimony. We find no abuse of discretion by the trial court in admitting Dr. Levy's testimony. *See United Blood Services v. Longoria*, 983 S.W.2d 29, 30 (Tex. 1997). Appellant's fourth issue is overruled.

Under its fifth issue, Sofamor disputes the jury's finding in favor of appellee under the discovery rule as to the limitations defense. The jury found that appellee did not discover, nor should she have discovered in the exercise of reasonable care and diligence, the facts establishing a claim for her injuries prior to November 15, 1993. Appellant's position is that appellee, as a matter of law, knew or should have known of her claim and injuries prior to such date, such that the discovery rule is inapplicable. The record shows that appellant did not know that the device had failed to properly fuse within the time frame alleged by appellant. Appellant argues that her continued pain should have put her on notice that there was a problem; however, as appellant correctly noted earlier, appellee had pain from several sources and nothing in the record shows that she knew or should have known that any particular type or duration of pain was due to a product failure. The evidence is sufficient to uphold the discovery rule application

and the jury's finding. *See Childs v. Haussecker*, 974 S.W.2d 31 (Tex. 1998). Appellant's fifth issue is overruled.

Lastly, appellant urges under its sixth issue that the evidence is insufficient to support the jury's award of past medical expenses in an amount of $67,000.00. By separate filing, appellee has agreed to a remittitur of $1,708.69 plus accrued judgment interest, and at oral argument of this case, verbally agreed to any remittitur this Court may find necessary, in lieu of ordering a new trial. We have reviewed all of the medical expenses evidence and medical records to ascertain whether any of the expenses were for pre-implantation surgeries, as alleged by appellant, and find there is an unexplained discrepancy between the $33,010.02 which appellee concedes as past medical expenses, and the $67,000.00 awarded by the jury. The jury's award to appellant of $67,000.00 for past medical expenses must be reduced to $33,010.02, the sum supported by the evidence.

A remittitur in the amount of $33,989.98 is suggested as to the judgment in favor of appellee Ettie Bernice Reed. If within ten (10) days of the date of this judgment, appellee Ettie Bernice Reed files with this Court a remittitur, as suggested, the judgment as to appellee will be reformed and affirmed, otherwise, the judgment will be reversed and remanded.

The judgment of the trial court is affirmed on condition of remittitur.

/s/ Bill Cannon
Justice

Judgment rendered and Opinion filed August 24, 2000.

Panel consists of Justices Sears, Cannon and Lee.*

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* Senior Justices Ross A. Sears, Bill Cannon, and Norman Lee sitting by assignment.