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Presswood v. Goehring
Tex.App.-Houston [1 Dist.],2005.
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MEMORANDUM OPINION
Court of Appeals of Texas,Houston (1st Dist.).
Clayton Edward **PRESSWOOD**, Appellant
v.
Julia W. **GOEHRING**, Appellee.
No. 01-04-00134-CV.

June 9, 2005.

On Appeal from the 127th District Court, Harris County, Texas, Trial Court Cause No.2001-38325.

Jack McKinley and Brian M. Chandler, for Clayton Edward **Presswood**.
Scott Rothenberg and Keith M. Fletcher, for Julia W. **Goehring**.

Panel consists of Justices NUCHIA, JENNINGS, and ALCALA.

MEMORANDUM OPINION

SAM NUCHIA, Justice.

***1** Clayton Edward **Presswood**, appellant and defendant below, appeals a judgment awarding $64,384.97, which includes a $5,000 award for future medical expenses, to Julia W. **Goehring**, appellee, for damages resulting from an automobile accident. Appellant admitted fault, and the case was tried to a jury on damages only. In two issues, appellant challenges (1) the trial court's limitation of his cross-examination of **Goehring** regarding her pre-existing back and neck problems, and (2) the trial court's jury charge submitting future medical damages as an element of recovery. We modify the judgment and affirm.

BACKGROUND

On Tuesday, February 15, 2000, appellant rear-ended Goehring while her vehicle was stopped for a red light. At trial, appellant testified that the collision was his fault. Goehring testified that, although she initially told appellant that she was " alright," she later exhibited symptoms of injury such as stiffness and pain in her neck and back and that she saw a physician the day after the accident. On the following Sunday, according to Goehring's testimony, her "whole nervous system shut down" when she suffered uncontrollable leg tremors and blurred vision, was unable to walk or speak, and had a blackout. She testified that her husband took her to the emergency room and that she remained in the hospital for five days.

The medical records of **Goehring's** post-accident treatment were admitted into evidence and indicate that, when admitted to the hospital, **Goehring** indicated that she was a "generally healthy female with no medication" and did not mention any prior injuries or medical treatment. Upon her discharge from the hospital, **Goehring** was ordered not to climb stairs, not to lift anything heavier than one pound, not to drive, and to participate in outpatient physical therapy to improve her walking. **Goehring** testified that she had to use a walker immediately after leaving the hospital and that the physical therapy lasted several months. She also stated that, for three weeks following her discharge, she had to rely on friends and neighbors to prepare meals for her and her children and to take her children upstairs to put them to bed. Goehring stated that she was still suffering pain at the time of trial and could not pick up her five-year-old daughter.

Dr. Sheila Jacobson, a neurologist, testified by deposition that she was the physician who admitted Goehring to the hospital and treated her during her recovery. She stated that she initially ordered diagnostic tests, including magnetic resonance imaging ("MRI") scans, and consulted with Dr.

Mahmood Moradi, a neurosurgeon, on the results. Jacobson testified that Moradi concluded that the MRI on Goehring's spine revealed that she had bulging discs constituting "multi-level degenerative changes." Jacobson stated that she and Moradi agreed that the bulging discs were pre-existing conditions that were not caused by the collision. But Jacobson also testified that she and Moradi also agreed that Goehring had sustained a "whiplash" injury in the collision with appellant that was " superimposed on this [bulging disk] pre-existing condition."

*2 Appellant's counsel asked Dr. Jacobson about injuries Goehring suffered in a prior automobile accident in 1994, including whether or not that prior accident could be the cause of her present symptoms. Jacobson testified that, according to the records of the physician who treated Goehring after her 1994 accident, whether Goehring would have permanent impairment as a result of the 1994 accident was "undetermined." Jacobson also stated that the 1994 "whiplash" injury was "indirectly" related to the injuries Goehring was treated for as a result of the accident caused by appellant. Jacobson explained, "I think [the accident with appellant] did re-stress her neck and reactivate whiplash and, you know, cause her to have some of the pain and some of the range of motion problems that she had when she came into the hospital" after the accident caused by appellant. When asked by appellant's counsel if the 1994 neck trauma "made it worse when she was involved in this accident in 2000," Jacobson said that the accident in 2000 "re-activated symptoms." During the reading of Dr. Jacobson's deposition testimony, appellant offered medical records into evidence from two visits Goehring made to the Kelsey-Seybold clinic approximately a month before being rear-ended by appellant. Appellant argued that these records established that Goehring was already suffering, before the accident, from the same problems she claimed were caused by the accident with appellant. Goehring's counsel objected to the introduction of the Kelsey-Seybold records because there was "no medical testimony" to assist the jury in reading the Kelsey-Seybold records and appellant was asking the jury "to rely upon that lawyer over there [appellant's counsel] to interpret these medical records for them." The trial court sustained the objection and excluded the Kelsey-Seybold records, but made it clear that the issue could be re-addressed if medical testimony was made available to assist the jury in interpreting the records.

During his cross-examination of Goehring, appellant's counsel elicited testimony that she continued to have, at the time of trial, "soft tissue" problems from her 1994 accident. However, when appellant's counsel asked, "[W]hen was the last time, before the accident [with appellant, that] you had some of these soft tissue ..." the trial court interrupted the cross-examination, ordered the jury removed, and asked appellant's counsel if there were "any other areas that you have to inquire on examination of this witness, Counsel, other than one that asked this witness to give an answer as to information or cross that the Court had previously excluded?" Appellant's counsel responded, "I don't know." The trial court then declared the witness passed, asked appellant's counsel if he had any more witnesses, and receiving the response that appellant had no more witnesses, recalled the jury.

DISCUSSION

In his first issue, appellant contends that the trial court erred by "refusing to allow **Presswood** to cross-examine **Goehring** about her prior back and neck problems." Appellant also complains in this issue of the trial court's exclusion of **Goehring's** Kelsey-Seybold medical records from evidence.

A. Restriction on cross-examination

*3 A review of the portion of the record cited by appellant as the basis for his complaint reveals that he has mischaracterized what the trial court did at that point in the trial. At that point, which was prior to the beginning of appellant's cross-examination of Goehring, there is a rambling discussion by the trial court about what kind of medical testimony might be admissible in a trial such as this one. However, our review of this discussion and the dialogue between appellant's counsel and the court leads us to conclude that at most, if the trial court excluded

anything at that time it excluded only evidence directly related to Goehring's visit to the Kelsey-Seybold clinic on January 7, 2000.[FN1] Contrary to appellant's assertions, at this point in the trial no specific evidence was offered or excluded and no other restrictions were placed on cross-examination. We note that appellant made no objection to the trial court's actions at this time, therefore no error, if any there was, is preserved. [FN2] Tex.R.App. P. 33.1(a); *see also Fortune Production Co. v. Conoco, Inc.,* 52 S.W .3d 671, 681 (Tex.2000) ("Conoco did not assert this argument in the trial court, and, therefore, it has not been preserved for appeal.").

FN1. Even that evidence was not excluded by the trial court, but a certain predicate seemed to be specified.

FN2. Although appellant complains that he was not allowed to cross-examine Goehring about her "prior back and neck injuries," the record reveals that the trial court did permit such cross-examination. However, after Goehring admitted that she still had some problems from pre-existing injuries, the trial court halted the cross-examination and removed the jury when she apparently believed appellant's counsel's next question related to the Kelsey-Seybold medical records that had previously been excluded. The trial court gave appellant the opportunity to ask Goehring other questions and appellant did not object to the trial court's actions at that time. It was not until after Goehring was passed as a witness and appellant's counsel was making an "offer of proof" for questions that he had not asked Goehring, that appellant's counsel explained to the trial court that his question was not intended to be related to the excluded evidence. When appellant's counsel read the questions he said he would have asked Goehring, the trial court questioned why appellant needed to make a bill of exceptions or offer of proof because "I would have allowed those questions." The trial court allowed appellant to present his offer of proof; however, appellant did not request that the jury be allowed to hear the evidence.

B. Exclusion of Kelsey-Seybold records

Before his cross-examination of Goehring, during the testimony by deposition of Jacobson, appellant offered the Kelsey-Seybold records into evidence. Appellant argued to the trial court that the Kelsey-Seybold records supported his contention that, a mere month before the accident, Goehring suffered from the same symptoms she complained of after the accident caused by appellant. Goehring objected to the admission of the records on the basis that they were not "supported by medical testimony. " The trial court sustained the objection.

A trial court acts within its discretion in requiring expert guidance in interpreting medical records. *See, e.g., H.E. Butt Grocery Co. v. Resendez,* 989 S.W.2d 768, 774 (Tex.App.-Corpus Christi 1997) (excluding "bare medical records without any interpretation or evidence" that would relate prior knee surgeries to current medical condition), *rev'd on other grounds,* 988 S.W.2d 218 (Tex.1999); *Kalteyer v. Sneed,* 837 S.W.2d 848, 854 (Tex.App.-Austin 1992, no writ) (noting that case " illustrate[d] the hazard of trying to make a lay evaluation of medical records rather than having expert testimony" to establish whether standard of care was violated). Here, the excluded records consist of two single-page, pre-printed forms with handwritten notations using abbreviations, symbols, and medical terminology that would be unfamiliar to laypersons. In addition, the medical implications of the information contained in the records clearly could not be determined by a layperson. We hold that, under these circumstances, the trial court did not abuse its discretion in excluding the Kelsey-Seybold medical records.

We overrule appellant's first issue.

C. Future Medical Damages

***4** In his second issue, appellant contends that the

trial court erred in submitting future medical damages as an element of recovery and then entering judgment on the jury's award. Specifically, appellant complains that the submission and entry of judgment on the award was error because there was no evidence that future expenses were probable as opposed to possible. We construe appellant's issue to be a challenge to the legal sufficiency of the evidence to support the charge to the jury on future medical damages.

1. Standard of Review

An award of future medical expenses lies within the discretion of the jury. *Rosenboom Mach. & Tool, Inc. v. Machala,* 995 S.W.2d 817, 828 (Tex.App.-Houston [1st Dist.] 1999, pet. denied). In considering the legal sufficiency of the evidence to support an award of future medical expenses, we must examine the entire record for any probative evidence and disregard all evidence to the contrary. *Id.; see also Garza v. Alviar,* 395 S.W.2d 821, 823 (Tex.1965). Texas follows the "reasonable probability rule" for future damages for personal injuries. *Machala,* 995 S.W.2d at 828. To sustain an award of future medical expenses at all the plaintiff must present evidence establishing, in all reasonable probability, that future medical care will be required and the reasonable cost of that care. *Id.* Once the plaintiff has established the reasonable probability of future medical expenses and care, a jury can determine the reasonable amount of the expenses and care based on the injuries suffered, the medical care rendered before trial, the progress toward recovery under the treatment received, and the condition of the injured party at the time of trial. *Id.*

2. Charge's limitation of future medical award

When asked by the trial court if he had any objections to the jury charge, appellant's counsel replied, "I don't think there is any evidence of reasonable expenses of necessary medical care in the future." **Goehring's** counsel asserted in response that Jacobson had testified by deposition regarding possible future medical care, including that **Goehring** might need to maintain a "TENS unit " for future use.[FN3] The trial court stated that it would allow **Goehring's** argument for an award of future medical expenses as to the evidence of the cost of maintaining the TENS unit, and excluded any argument as to future surgeries. The trial court noted that appellant's objection was "overruled," but that Goehring's argument "was limited" by the trial court. Thus, Goehring could recover only the expenses for her maintenance of the TENS unit and other non-surgical medical care if her future need for it could be established in all reasonable probability.

FN3. When asked to describe what a " TENS unit" was, Jacobson provided the jury with the following description:
It's a device that sends little electrical shocks, little ... through some wires that are connected to whatever location the patient puts the wires, they put the little electrodes on, and it will send pulse ... electrical impulses. It helps with pain in some patients through whatever means, and it's used pretty often after people have had physical therapy and in her case, it seemed to help.

3. Evidence of reasonable probability

There was no testimony establishing that, in all reasonable probability, Goehring would require the use of the TENS unit or other medical care in the future. Absent this testimony, the evidence was legally insufficient to support the jury's award for future medical care and expenses. *See Machala,* 995 S.W.2d at 828.

***5** Goehring did testify that, as of the date of trial, she was still was using the TENS unit to alleviate her pain, but also testified that she was no longer receiving physical therapy and did not think she needed a doctor's care to treat her pain. Additionally, Jacobson testified that Goehring's use of the TENS at the time of trial, two years after the accident, didn't surprise her. But Jacobson also testified that Goehring only "potentially" might need future medical treatment and that she wouldn't recommend Goehring throw away the TENS unit

because she "could perhaps" continue to use it. This testimony does not meet the standard of "all reasonable probability." *See id.* (reversing future medical award because evidence, including plaintiff's testimony she had ongoing pain from fractured vertebrae, did not establish reasonable probability of future medical care); *see also Pilgrim's Pride Corp. v. Smoak,* 134 S.W.3d 880, 905-06 (Tex.App.-Texarkana 2004, pet. denied) (reversing future medical award as too speculative and noting that reasonable probability required showing needed future medical care was "more probable than not").

We sustain appellant's second issue.

CONCLUSION

We modify the judgment of the trial court to reduce the amount awarded to Goehring by $5,000, that being the portion of the award attributed to damages for future medical expenses, and, as modified, affirm the trial court's judgment.

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