

**Rita ZAVALA, Individually and Doing Business As Rita's Fiesta Cafe, Appellant v.
Diana ESTRADA, ¹ Appellee**

1 The judgment was not rendered in favor of Estrada's husband, Luciano Estrada,
and he has not appealed.

No. 04-97-00097-CV

COURT OF APPEALS OF TEXAS, FOURTH DISTRICT, SAN ANTONIO

1998 Tex. App. LEXIS 1137

**February 25, 1998, Delivered
February 25, 1998, Filed**

NOTICE: [*1] PURSUANT TO THE TEXAS RULES OF APPELLATE
PROCEDURE, UNPUBLISHED OPINIONS SHALL NOT BE CITED AS AUTHORITY
BY COUNSEL OR BY A COURT.

PRIOR HISTORY: From the 37th Judicial District Court, Bexar County, Texas. Trial Court No. 94-CI-14992. Honorable Carolyn Spears-Petersen, Judge Presiding.

DISPOSITION: AFFIRMED.

CASE SUMMARY:

PROCEDURAL POSTURE: Appellant cafe owner challenged a judgment of the 37th Judicial District Court, Bexar County (Texas), which found in favor of appellee customer in her personal injury suit against appellant.

OVERVIEW: Appellee customer sued appellant café owner for injuries appellee sustained in a slip-and-fall accident on appellant's property. Subsequent to a verdict in favor of appellee, appellant argued that the trial court erred in admitting evidence of the liability insurance appellant possessed. Reviewing the record, the court held that, while the trial court erred in admitting evidence concerning appellant's liability insurance, the court did not err in admitting evidence of appellant's health insurance, as appellant had waived argument against its admission by failing to object in a timely manner. The court then acknowledged that the curative instruction regarding the erroneous admission of the evidence of appellant's liability insurance was vague. However, reviewing the record, the court held that testimony from a physician concerning appellee's injuries, along with other evidence, was sufficient to uphold the jury's award of future medical expenses. Thus, the court held that the trial court's error in admitting evidence of appellant's liability insurance was harmless, as it did not cause the jury to render an excessive award.

OUTCOME: The court affirmed the judgment in favor of appellee customer in her personal injury suit against appellant cafe owner because evidence supported the award of future medical expenses to appellee.

LexisNexis(R) Headnotes

*Civil Procedure > Appeals > Standards of Review > Abuse of Discretion
Evidence > Procedural Considerations > Rulings on Evidence*

[HN1] The admission or exclusion of evidence is within the trial court's discretion. To show the trial court abused its discretion, an appellant must demonstrate the court excluded the evidence arbitrarily and without reference to guiding rules or principles.

Evidence > Relevance > Liability Insurance

[HN2] Generally, the admissibility of insurance evidence is governed by Tex. R. Civ. Evid. 411, which provides that evidence that a person was or was not insured against liability is not admissible upon the issue of whether he acted negligently or otherwise wrongfully. This rule does not require the exclusion of evidence of insurance against liability when offered for another issue, such as proof of agency, ownership, or control, if disputed, or bias or prejudice of a witness.

Civil Procedure > Judgments > General Overview

Civil Procedure > Appeals > Standards of Review > Reversible Errors

Evidence > Procedural Considerations > Rulings on Evidence

[HN3] Even if a trial court erred in admitting evidence, an appellate court may not reverse the judgment unless the error was calculated to cause and probably did cause rendition of an improper judgment. *Tex. R. App. P. 44.1*. To determine whether the mention of insurance caused an improper judgment, an appellate court examines the strength of the curative instruction, the extent insurance was discussed, and the evidence supporting the jury's findings. The mention of insurance is not per se reversible error.

Civil Procedure > Appeals > Standards of Review

[HN4] In reviewing factual sufficiency of a verdict, an appellate court examines all the evidence to determine whether the jury's finding is manifestly unjust.

Civil Procedure > Appeals > Standards of Review

Torts > Damages > Compensatory Damages > Medical Expenses

[HN5] While a jury in a tort suit has great discretion to determine future medical expenses, there must be a reasonable probability medical expenses will be incurred in the future. The jury may consider the nature of the injuries, the medical care rendered before trial, and the injured party's condition before trial. Expert testimony is not required.

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FOR APPELLEE: Roberto Guerra, Pascual Madrigal, Elias R. Lorenzana, GUERRA, MADRIGAL & LORENZANA, L.L.P., San Antonio, TX.

JUDGES: Opinion by: Paul W. Green, Justice. Sitting: Catherine Stone, Justice, Paul W. Green, Justice, Karen Angelini, Justice.

OPINION BY: PAUL W. GREEN

OPINION

Rita Zavala appeals a judgment rendered in favor of Diana Estrada, who was injured in a slip and fall. In three points of error, Zavala argues the trial court erred in admitting evidence of insurance. Finding no reversible error, we affirm.

Background

Zavala owns "Rita's Fiesta Cafe," where Estrada slipped on a puddle of soup. The jury found Zavala 75 percent negligent and Estrada 25 percent negligent. The jury awarded Estrada \$ 7,000 for past medical expenses and \$ 30,000 for future medical expenses, both of which were later remitted. The trial court rendered judgment in favor of Estrada for \$ 35,999.75.

Discussion

In her first point of error, Zavala contends the trial court erred in admitting Linda Salas' reference to [*2] insurance. Zavala's second point of error opposes another reference to insurance made by Estrada. In her final point of error, Zavala alleges these references were harmful as demonstrated by the lack of evidence supporting the jury's finding of future medical expenses.

1. Standard and Scope of Review

[HN1] The admission or exclusion of evidence is within the trial court's discretion. *Tracy v. Annie's Attic, Inc.*, 840 S.W.2d 527, 531 (Tex. App.--Tyler 1992, writ denied). To show the trial court abused its discretion, an appellant must demonstrate the court excluded the evidence arbitrarily and without reference to guiding rules or principles. *See Downer v. Aquamarine Operators, Inc.*, 701 S.W.2d 238, 241-42 (Tex. 1985). [HN2] Generally, the admissibility of insurance evidence is governed by Rule 411 of the Rules of Civil Evidence, which provides:

Evidence that a person was or was not insured against liability is not admissible upon the issue of whether he acted negligently or otherwise wrongfully. This rule does not require the exclusion of evidence of insurance against liability when offered for another issue, such as proof of agency, ownership, or control, if disputed, or [*3] bias or prejudice of a witness.

TEX. R. CIV. EVID. 411; *see also Bleeker v. Villarreal*, 941 S.W.2d 163, 174 (Tex. App.--Corpus Christi 1996, writ dismissed).

[HN3] Even if the trial court erred in admitting evidence, we may not reverse the judgment unless the error was calculated to cause and probably did cause rendition of an improper judgment. *TEX. R. APP. P. 44.1*; *see McCraw v. Maris*, 828 S.W.2d 756, 757 (Tex. 1992). To determine whether the mention of insurance caused an improper judgment, we examine the strength of the curative instruction, *Brockett v. Tice*, 445 S.W.2d 20, 23 (Tex. Civ. App.--Houston [1st Dist.] 1969, writ refused n.r.e.); the extent insurance was discussed, *Tucker v. Lightfoot*, 653 S.W.2d 587, 590 (Tex. App.--San Antonio 1983, no writ); and the evidence supporting the jury's findings, *Beall v. Ditmore*, 867 S.W.2d 791, 795-96 (Tex. App.--El Paso 1993, writ denied). *See also United Cab Co. v. Mason*, 775 S.W.2d 783, 786-87 (Tex. App.--Houston [1st Dist.] 1989, writ denied) (collecting cases where mention of insurance was harmful). The mention of insurance is not per se reversible error.² *Tucker*, 653 S.W.2d at 590.

2 We disagree with Zavala's suggestion that violations of Rule 411 involve a different measure of harm. *See Standard Fire Ins. Co. v. Reese*, 584 S.W.2d 835, 840 (Tex. 1979) (not an insurance case); *Pride Transport Co., Inc. v. Hughes*, 591 S.W.2d 631, 634 (Tex. Civ. App.--Eastland 1980, writ refused n.r.e.) (an insurance case citing *Reese*).

[*4] 2. Waiver and Error

Zavala's first two points of error concern error. In rebuttal, Estrada argues that error, if any, was waived by Zavala's failure to timely request curative instructions and by her failure to object to the sufficiency of the instructions that were given. In discussing waiver, we also decide whether the trial court erred in admitting the evidence.

The first reference to insurance occurred during Estrada's direct examination of her sister, Linda Salas:

[Estrada] called [Zavala] a day after [the accident] because [Estrada] started having -- you know, her back started hurting, and then she called Rita [Zavala]. And then Rita was giving her the runaround. . . . [Zavala] told [Estrada] to go ahead and call her if [Estrada] needed a doctor, and the doctor would take care of her. But when [Estrada] called, and she needed the medical help -- [Estrada] doesn't have insurance -- she gave her the runaround. First, [Zavala] gave [Estrada] the number of an insurance agent to call.

(Emphasis added).

Zavala's counsel asked to approach the bench, and the court recessed the jury. Counsel then moved for a mistrial on the basis [*5] of Rule 411, and Estrada's attorney asked that the remark be stricken and the jury admonished. The court denied the motion for mistrial; and, when the jury returned from its recess, the court instructed the jury "to disregard the last answer that the witness gave And in disregarding that answer, you're not to consider it for any reason in your deliberations." The court did not identify the contents of the "last answer."

The second reference to insurance occurred during Estrada's direct testimony:

Q. Now, do you have *medical health insurance* at Pena Brothers as part of your compensation?

A. No, I don't.

Q. Did you back then or now have any kind of *medical health insurance* incident to your husband's employment?

(Emphasis added).

Zavala's counsel asked to approach the bench, the court recessed the jury, and counsel moved for a mistrial on the basis of Rule 411. In response, Estrada's counsel explained that he asked about health insurance because he anticipated the defense would "make quite a bit of her failure to get follow-up care." The trial court said, "I'm going to deny the motion for mistrial. I will instruct the jury to disregard the last two questions." [*6] The jury returned approximately twenty minutes later, and direct examination resumed. Six questions later, Estrada's lawyer asked her about the first doctor she saw, and Zavala's counsel said, "Your Honor, I believe it was at that part where objections were raised, and you were going to make an instruction to the jury." The court did so by saying: "Before you left, there were two questions asked by the plaintiffs' attorney, and I would ask you to disregard those and not consider them for any reason in your deliberations." The questions were not otherwise identified.

Salas' testimony refers to both Estrada's health insurance and Zavala's liability insurance. Zavala's counsel preserved his complaint about Zavala's liability insurance by obtaining an adverse ruling on his motion for mistrial. *See Beall*, 867 S.W.2d at 795. Additionally, counsel was not required to complain about the sufficiency of the curative instruction. Finally, the comment should have been excluded under Rule 411 as a comment on Zavala's liability. Thus, we sustain that portion of Zavala's first point of error regarding Salas's reference to liability insurance.

As for Salas' testimony regarding Estrada's health [*7] insurance, Zavala's first complaint was preserved, but it was later waived by the admission of the same evidence during Estrada's testimony. Estrada was twice asked about her health insurance before Zavala's counsel objected. Even if counsel's objection was timely, the admission of health insurance evidence was not error under Rule 411 because it did not comment on Zavala's liability. *See Thornhill v. Ronnie's I-45 Truck Stop, Inc.*, 944 S.W.2d 780, 794 (Tex. App.--Beaumont 1997, writ abated pending settlement); *Loom Craft Carpet Mills, Inc. v. Gorrell*, 823 S.W.2d 431, 432 (Tex. App.--Texarkana 1992, no writ). Thus, we overrule Zavala's second point of error and that portion of her first point of error regarding Salas' health insurance testimony.

3. Harm and Sufficiency of the Evidence

Zavala raises harm in her third point of error. Specifically, she asserts error was not cured by the trial court's instructions because they were vague, confusing, and insufficient. Furthermore, she argues, "the only reasonable explanation for the award of \$ 30,000 in future medical expenses is ... the testimony about insurance" because the evidence is otherwise factually insufficient [*8] to support the award. We agree the instructions to disregard were vague and confusing, but we disagree the evidence was insufficient to support the award for future medical expenses.

[HN4] In reviewing factual sufficiency, we examine all the evidence to determine whether the jury's finding is manifestly unjust. *Keller Indus., Inc. v. Reeves*, 656 S.W.2d 221, 227 (Tex. App.--Austin 1983, writ ref'd n.r.e.). [HN5] While the jury has great discretion to determine future medical expenses, there must be a reasonable probability medical expenses will be incurred in the future. *K Mart Corp. v. Rhyne*, 932 S.W.2d 140, 144 (Tex. App.--Texarkana 1996, no writ). The jury may consider the nature of the injuries, the medical care rendered before trial, and the injured party's condition before trial. *Hughett v. Dwyre*, 624 S.W.2d 401, 405 (Tex. App.--Amarillo 1981, writ ref'd n.r.e.). Expert testimony is not required. *Southwest Texas Coors, Inc. v. Morales*, 948 S.W.2d 948, 952 (Tex. App.--San Antonio 1997, no writ); *Rhyne*, 932 S.W.2d at 144.

Doctor Durairaj testified Estrada suffered from a herniated cervical disc that was permanent and irreversible. He explained her medical expenses [*9] totaled \$ 3,898, and he recommended she have a myelogram, which would cost \$ 1,800. Estrada possibly required surgery, but the doctor could not make a firm decision without the myelogram. He estimated the costs of future surgery to be \$ 22,850. Doctor Durairaj also said Estrada's injury was aggravated by a later accident. Estrada testified she did not continue her medical treatment or have the myelogram because she could not afford it. She also indicated she took nonprescription painkillers twice daily because she still suffered severe pain. During closing argument, Estrada's attorney asked for \$ 30,000 in future medical expenses. The jury awarded \$ 30,000, which the trial court reduced to \$ 22,850.

The evidence is factually sufficient to support the jury's award of future medical expenses. *See McElroy v. Fitts*, 876 S.W.2d 190, 198 (Tex. App.--El Paso 1994, writ dism'd by agr.) (holding uncertainty about future surgery did not

defeat factual sufficiency); *Strahan v. Davis*, 872 S.W.2d 828, 832-33 (Tex. App.--Waco 1994, writ denied) (holding possibility of future surgery did not defeat factual sufficiency). Thus, we cannot say that one reference to Zavala's liability insurance [*10] caused the jury's award to be excessive, even if the instruction to disregard was confusing. Given the entire record, we hold that the mention of insurance did not cause rendition of an improper judgment. Accordingly, we overrule Zavala's third point of error.

Conclusion

Although we find error in the admission of insurance testimony, we also find the error harmless. We therefore affirm the trial court's judgment.

PAUL W. GREEN,

JUSTICE