Not Reported in S.W.3d, 2004 WL 2804853 (Tex.App.-Dallas)
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MEMORANDUM OPINION

Court of Appeals of Texas,
Dallas.
Shahid (Bobby) AZIZ, Appellant
v.
Kenneth L. McDONOUGH, Appellee.

No. 05-03-01159-CV.
Dec. 1, 2004.

On Appeal from the County Court at Law No. 5, Dallas County, Mark Geenberg, Judge, Texas, Trial Court Cause No. CC-00-13676-E.
Brian Robert Arnold, Ward, O'Brien, Staev, Fisk, Arnold & Garcia, LLC, Dallas, for appellant.

Vanessa Mahoney Biggens, G. Patrick Collins & Associates, Roy L. Stacy, Calhoun & Stacy, P.C., David G. Allen, Stacy & Condor, Hollie M. Eisenhauer, Dallas, for appellee.

Before Justices MOSELEY, FRANCIS, and MAZZANT.

MEMORANDUM OPINION
Opinion by Justice MAZZANT.

***1** In this personal injury case, Shahid Aziz appeals the trial court's judgment on damages. The case was tried before a jury, and the jury found Kenneth L. McDonough negligent and attributed one hundred percent of the cause of the collision to McDonough. However, the jury did not award Aziz any monetary damages. In one issue on appeal, Aziz contends the court erred by not overruling the jury's answer as to damages, arguing the answers were against the great weight and preponderance of the evidence. We affirm the trial court's judgment.

McDonough's car struck the rear of Aziz's car while traveling on Interstate 30 during morning rush-hour traffic. Aziz obtained information from McDonough, and they both left the scene. Later that day, Aziz left work and went home. The next day he contacted an attorney, and within two days of that he saw a chiropractor, Dr. Viernow. Aziz continued to see Dr. Viernow for over three months. Some time later, Aziz filed this suit against McDonough, requesting damages for past and future physical pain and mental anguish; past and future reasonably necessary medical care; past and future physical impairment; and loss of past wages.[FN1] The jury, although finding McDonough negligent, awarded Aziz no damages. Aziz filed a motion requesting the court to disregard the jury's answers and a motion for new trial; the court denied both motions.

FN1. Only seven separate questions on damages were submitted to the jury. In his brief to this Court, Aziz, however, lists twelve separate questions. Two of the extra questions are because Aziz separated physical pain and mental anguish into two separate questions; they were submitted together in the court's charge. The other three extra questions, however-“disfigurement” and future loss of earning capacity-were not submitted to the jury. We do not address these issues on appeal.

In his sole issue, Aziz argues his evidence was undisputed, and therefore, the jury's answers were against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust. The evidence about what *caused* Aziz's injuries, however-including the severity of the collision itself and whether the collision or previous injuries caused the present injury, was not undisputed.[FN2]

FN2. In his brief, Aziz repeatedly points out that his evidence was admitted “without objection.” He seems to contend that because McDonough did not object to the evidence, it established facts as a matter of law. He also appears to contend that not objecting to the evidence indicated the evidence was undisputed. During oral argument, he referred to the evidence as having been “stipulated,”

> possibly insinuating that McDonough's failure to object translated into a stipulation. Those contentions are incorrect. Not objecting to evidence introduced at trial is not the same as stipulating to facts or causation. Further, not objecting to evidence being admitted at trial does not make that evidence undisputed.

We review a jury's failure to award damages under the same type of standard as we review the factual sufficiency of a jury's finding in favor of an issue. *See* *Pilkington v. Kornell*, 822 S.W.2d 223, 225-26 (Tex.App.-Dallas 1991, writ denied). In considering whether a jury's negative finding is against the great weight and preponderance of the evidence, we review the entire record, considering all the evidence-that which is favorable and that which is contrary to the verdict. *Monroe v. Grider*, 884 S.W.2d 811, 820 (Tex.App.-Dallas 1994, writ denied). We reverse and remand for a new trial only if the verdict is so against the great weight and preponderance of the evidence that it is manifestly unjust. *Id.* In a typical negligence action, the plaintiff must establish not only a causal nexus between the defendant's negligent act and the occurrence, but also between the occurrence and the injuries of which the plaintiff complains. *See* *Morgan v. Compugraphic Corp.*, 675 S.W.2d 729, 731 (Tex.1984). When the evidence raises the issue of whether the injuries or damages were actually caused by the negligence, we may uphold a jury's refusal to award damages after finding liability. *See, e.g.*, *Sanchez v. King*, 932 S.W.2d 177, 182 (Tex.App.-El Paso 1996, no writ); *Hipp v. J.D. Lowrie Well Serv., Inc.*, 800 S.W.2d 668, 671 (Tex.App.-Corpus Christi 1990, writ denied). The jury must resolve inconsistencies in the testimony and evidence, deciding whom and what to believe and disbelieve. *See* *Pilkington*, 822 S.W.2d at 230; *S. W. Tex. Coors, Inc. v. Morales*, 948 S.W.2d 948, 950 (Tex.App.-San Antonio 1997, no writ). The jury is free to accept or reject any witness's testimony, including an expert witness, because opinion testimony does not establish any material fact, such as causation and future medical expenses, as a matter of law. *See* *Pilkington*, 822 S.W.2d at 230.

The Collision

***2** When testifying about the speed the cars were traveling when they collided, Aziz testified he had been traveling 30 or 35 miles per hour then came to a complete stop before being hit. However, he later said, “I slowed down almost to a complete stop.” He stated that in his rear-view mirror, he saw McDonough approaching him “maybe fractions of a second” before he hit Aziz. Aziz said McDonough was going “so fast” he could see nothing “but a blur.” Aziz also admitted he may have said McDonough was traveling 30 or 40 miles per hour. Dr. Viernow testified that he estimated, based on statements from Aziz, that McDonough was traveling 60 miles per hour at the time of the collision. Contrary to the above, McDonough testified he “bumped” the car in front of him and estimated he was traveling five miles per hour prior to the collision. McDonough testified he was not hurt “at all.” Aziz testified the collision damaged his bumper and caused his rear-view mirror to fall off. According to Aziz, the cost to repair his car was “somewhere around $200.” He later said that was the *estimate* for repair; he never had his car repaired. The jury saw photographs of Aziz's car, and he pointed out the damage to his car. However, he also testified the bumper had not been replaced after a collision in 1997; the bumper had been “repaired” then. And the bumper was not repaired after he was hit from behind in 1994. Dr. Viernow's medical records reflected that Aziz's car was “severely damaged”; Dr. Viernow testified that documentation was based on what Aziz told him.

Aziz's Injury

Aziz testified he saw Dr. Viernow because of the pain he felt in his neck and back after this collision. However, he also admitted to having previously received treatment for his neck and back due to other car collisions. He said those prior injuries were resolved before the present collision.

Dr. Viernow testified that in his medical opinion, the injuries were caused by the present collision. His medical records indicated Aziz had reported no “similar or same condition” and that Aziz denied any previous symptoms. Dr. Viernow stated he questioned patients about their medical history-if they had “ever ... been injured in a car accident”-because previous injuries would affect how he would analyze the current injury. If the patient reported no previous pain, that would indicate to Dr. Viernow that the current symptoms are all due to the current collision. Aziz reported no previous pain or injury to Dr. Viernow.

McDonough offered and admitted three exhibits showing Aziz's medical history. Exhibit 15 consists of medical records from 1994 when Aziz sought treatment for neck and back pain after an automobile collision. Exhibit 13 is the hospital record that shows Aziz sought medical treatment for neck pain after an automobile collision in 1997. Exhibit 14 consists of medical records from a chiropractic clinic. The records show that Aziz sought treatment in July 1998 for back and neck pain. That report states that Aziz was 36 years old but had first had trouble with his back when he was 35; he reported having had back pain since September 26, 1997. Aziz stated on the report he had trouble with his back "numerous times" during the "past year." The records also show Aziz received treatment through September 1998 and at that time, he still complained of back pain.

Discussion

***3** The jury was free to disbelieve Aziz's account of the collision and believe McDonough's. *See Pilkington*, 822 S.W.2d at 230. The jury was likewise free to determine, based on McDonough's version of events, that the collision was not severe. Although Dr. Viernow testified as an expert that he believed the collision caused the injuries, he stated that he based his determinations of a patient's injury on a patient's medical history. Aziz reported no prior injuries to Dr. Viernow. However, the medical records showed Aziz had prior injuries to both his neck and back. The jury was free to deduce that Dr. Viernow's conclusion that the collision caused Aziz's injuries was based on incomplete information, weighing against the strength of that conclusion.

Based on the above, the jury could have concluded the present collision did not cause Aziz's past or future pain, mental anguish, need for medical care, physical impairment, and loss of wages in question. *See Pilkington*, 822 S.W.2d at 230. Accordingly, we conclude the jury's answers were not against the great weight and preponderance of the evidence. *See Sanchez*, 932 S.W.2d at 182; *Hipp*, 800 S.W.2d at 671. We resolve appellant's sole issue against him.

We affirm the trial court's judgment.

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