

Affirmed and Opinion Filed June 1, 2018



**In The
Court of Appeals
Fifth District of Texas at Dallas**

No. 05-17-00116-CV

**EUGENE GAYTAN, Appellant
V.
DALLAS AREA RAPID TRANSIT, Appellee**

**On Appeal from the County Court at Law No. 2
Dallas County, Texas
Trial Court Cause No. CC-14-00838-B**

MEMORANDUM OPINION

Before Justices Francis, Brown, and Stoddart
Opinion by Justice Francis

Eugene Gaytan appeals a take-nothing judgment rendered by the trial court in his personal injury suit. Bringing two issues, Gaytan contends the trial court erred in disregarding the jury's award of future medical expenses and denying his motion for new trial. We affirm the trial court's judgment.

In February 2012, Gaytan was a passenger on a Dallas Area Rapid Transit bus that was involved in a low-impact collision with a car. Gaytan stated the bus swerved, causing him to be thrown forward to the edge of his seat, and he caught himself several inches from the floor. He was wearing a lap belt and shoulder harness at the time of the accident.

Of the twelve passengers on the bus, Gaytan was the only one who claimed to be injured. He was taken by ambulance to Medical City Hospital on a backboard with a neck brace. At the

hospital, he complained of mild pain in his left flank and lower back. Gaytan told hospital personnel he was “jerked to the side slightly” during the accident, but did not suffer a blow to the head and did not have a headache. A physical exam showed Gaytan had full, painless range-of-motion of his neck, normal range-of-motion of his back, and no visible injuries. Gaytan exhibited some soft tissue tenderness in his lower back, but X-rays revealed no compression fractures or acute diseases of the spine. Gaytan was diagnosed with a lumbar strain and given prescriptions for pain medication and muscle relaxers. He was told to return to the hospital if his condition worsened or changed unexpectedly and to follow up with Dr. Steven Lau in four days even if he felt better. The record doesn’t indicate Gaytan ever met with Dr. Lau.

One month later, Gaytan went to the emergency room at Methodist Hospital. He told them he had been in a “minor motor vehicle collision” a month earlier and was experiencing neck pain. Gaytan was given a CT scan which showed no acute fractures, but a 4 mm protruding disc herniation at C3-4 and congenital fusion at C2-3.

Gaytan was diagnosed with strained muscles and ligaments in his neck. The discharge instructions stated such injuries were common after car accidents, but the pain usually began within several hours after the accident and improved greatly with proper treatment in one-to-two weeks. Gaytan again received prescriptions for pain medication and muscle relaxers. The discharge contains a referral to Dr. Richard Meyrat, a neurosurgeon, with instructions to call him within two days. The record doesn’t show Gaytan ever contacted Dr. Meyrat.

Gaytan filed this suit two years later against DART, the driver of the car involved in the collision, and the owner the car. He sought damages for “serious injuries to his neck and back” or, in the alternative, an aggravation of a pre-existing condition. He alleged claims for negligence, negligent entrustment, respondeat superior, and common carrier liability.

A jury trial was conducted on October 17, 2016. Gaytan requested only a partial reporter's record on appeal and the trial transcript contains only Gaytan's testimony and his exhibits. Gaytan testified at length about the pain he suffered and impairments to his daily life since the collision. He stated he wore a neck brace for two to three hours every morning and massaged his neck for ten to fifteen minutes every day. He conceded he had not received any medical treatment for his injuries since his visit to Methodist Hospital in March 2012 and his medical records from Medical City and Methodist were submitted into evidence. Gaytan also testified he had been in two more accidents while riding on DART buses in 2014 and he claimed to have injured his neck as a result of each of those accidents as well.

The jury found the DART driver and the driver of the car each 50% negligent in causing the accident at issue. The jury declined to award Gaytan any damages for past or future physical pain, mental anguish, or physical impairment. They did award him \$7,000.69 in past medical expenses, representing the total amount owed for the treatment provided by the ambulance, Medical City, and Methodist in 2012. They also awarded him \$45,000 in future medical expenses.

DART filed a motion to disregard the jury's finding on future medical expenses and for judgment on the remainder of the verdict. DART argued the evidence showed Gaytan had not received any medical treatment in over four and a half years for the injuries he allegedly sustained in the 2012 accident, and he offered no evidence to suggest future medical care was reasonably probable or the reasonable cost of any future care. DART contended Gaytan's testimony regarding his subjective belief about the need for future medical care was insufficient to support the award. In addition, DART argued Gaytan offered no evidence to separate future treatment for injuries he allegedly sustained in 2012 and treatment for any injuries he claims to have sustained in the two later bus accidents. Gaytan responded that awards of future medical expenses were within the

jury's sound discretion and his testimony regarding his current condition along with evidence of past medical treatment was sufficient to support the award.

The trial court granted DART's motion to disregard the jury finding and, after applying a previous settlement between Gaytan and the driver of the car to the amount awarded for past medical expenses, rendered judgment that Gaytan take-nothing by his claims against DART. Gaytan filed a motion for new trial and for modification of the judgment arguing that more than a scintilla of evidence supported the jury's finding of future medical expenses and the jury's failure to award damages for physical pain, mental anguish, and physical impairment was against the great weight and preponderance of the evidence. The trial court denied the motion and this appeal followed.

As stated above, the record filed by Gaytan in this appeal includes only a partial reporter's record containing Gaytan's testimony and exhibits. The partial record indicates other exhibits were admitted but not included in the record and the parties stated during oral argument before this Court that other witnesses testified at trial. Under the rules of appellate procedure, if an appellant requests a partial reporter's record, he must include in the request a statement of the points or issues to be presented on appeal and the appeal is limited to those points and issues. TEX. R. APP. P. 34.6(c)(1). This allows the other parties an opportunity to request additional portions of the record they believe are relevant to the issues presented. *See Garcia v. Sasson*, 516 S.W.3d 585, 590 (Tex. App.—Houston [1st Dist.] 2017, no pet.). The statement of issues must be filed in time for the other parties to designate any additional, relevant portions of the record and to prepare their appellate briefs. *Id.* In the absence of a statement of issues, we must presume that any missing portions of the record are relevant and support the trial court's judgment. *Id.*

Here, Gaytan’s request for the reporter’s record did not include a statement of issues to be presented on appeal.¹ No other statement of issues appears in the record and Gaytan’s notice of appeal lists only the judgment and orders from which he is appealing. Because there is no indication in the record that Gaytan timely provided the other parties with a statement of issues he intended to present on appeal, we must presume the portions of the reporter’s record he did not request are relevant and support the trial court’s judgment. *Id.* at 591; *see also Cavazos v. Pay and Save, Inc.*, 357 S.W.3d 86, 88 (Tex. App.—Amarillo 2011, no pet.).

In his first issue, Gaytan contends the trial court erred in granting DART’s motion to disregard the jury’s award of future medical expenses because he presented more than a scintilla of evidence to support the finding. We review a trial court’s grant of a judgment notwithstanding the verdict under a no-evidence standard, examining whether any evidence supports the jury’s finding. *See Gharda USA, Inc. v. Control Sols., Inc.*, 464 S.W.3d 338, 347 (Tex. 2015). We are limited to reviewing only the evidence tending to support the jury’s verdict and must disregard all evidence to the contrary. *Id.* If more than a scintilla of evidence supports the verdict, it must be upheld. *Id.* More than a scintilla of evidence exists when the evidence supporting the finding would enable reasonable and fair minded people to differ in their conclusions. *Id.*

To recover for future medical expenses under Texas law, a plaintiff must provide evidence showing a reasonable probability the medical expenses will be incurred and the probable cost of such expenses. *See Rosenboom Mach. & Tool, Inc. v. Machala*, 995 S.W.2d 817, 828 (Tex. App.—Houston [1st Dist.] 1999, pet. denied). Although the preferred practice for establishing future medical expenses is through expert medical testimony, such testimony is not required. *See Whole Foods Mkt. Sw, L.P. v. Tijerina*, 979 S.W.2d 768, 781 (Tex. App.—Houston [14th Dist.]

¹ Although Gaytan’s request for the reporter’s record was not included in the record on appeal, we may sua sponte take judicial notice of matters of public record. TEX. R. EVID. 201; *Langdale v. Villamil*, 813 S.W.2d 187, 189–90 (Tex. App.—Houston [14th Dist.] 1991, no writ).

1998, pet. denied). Relevant evidence includes the reasonable cost of past medical treatment, the nature of the injury, the progress toward recovery under the treatment received, and the plaintiff's condition at the time of trial. *See Machala*, 995 S.W.2d at 828. The jury has broad discretion to determine the amount to award. *See Tijerina*, 979 S.W.2d at 781. But this standard of review is not so nebulous that it allows us to uphold a jury award when no evidence supports it. *Id.*

In this case, the record contains no evidence of what medical care, if any, Gaytan was reasonably likely to receive in the future or the reasonable cost of such care. Gaytan had not received any medical treatment for his injuries for over four and a half years at the time of trial. He provided no evidence of any expenses incurred in relation to his injuries other than the two emergency room visits in 2012. He was referred to a neurosurgeon after his second emergency room visit, but there is nothing in the record to suggest surgery was recommended or that he was even a candidate for surgery. In fact, Gaytan testified he was unwilling to have surgery because he was afraid of a bad result and didn't think it would help.

Gaytan argues the jury's award of \$45,000 in future medical expenses could be supported by multiplying an annual cost of \$7,000 for two emergency room visits for six and one half years. There was no evidence, however, to show a reasonable probability Gaytan would visit the emergency room in the future, let alone twice yearly, in connection with the injuries he sustained in 2012. The only emergency room visits he made after 2012 were as a result of other accidents. Without any evidence to support the necessity or cost of future medical care, the jury's award was entirely speculative and cannot be upheld. *See id.* at 782; *Machala*, 995 S.W.2d at 828; *Caskey v. Bradley*, 773 S.W.2d 735, 740 (Tex. App.—Fort Worth 1989, no writ). We conclude the trial court properly granted judgment notwithstanding the verdict on Gaytan's request for future medical expenses.

In his second issue, Gaytan contends the trial court erred in denying his motion for new trial because the jury's failure to award damages for physical pain, mental anguish, and physical impairment was against the great weight and preponderance of the evidence. Gaytan argues the uncontroverted evidence showed he suffered an objective injury – a disc herniation – and, therefore, the jury was required to award damages. *See Rumzek v. Lucchesi*, 543 S.W.3d 327, 332–33 (Tex. App.—El Paso 2017, pet. filed).

Although Gaytan contends the evidence he presented of an objective injury was uncontroverted, he filed only a partial record without fulfilling the requirements of rule 34.6 of the rules of appellate procedure. *See* TEX. R. APP. P. 34.6. Accordingly, we must presume the missing portions of the record contradict Gaytan's evidence and support the judgment. *See Garcia*, 516 S.W.3d at 590.

Furthermore, the medical evidence in the appellate record does not tie Gaytan's disc herniation to either the accident at issue or the pain he was allegedly suffering. The CT scan revealing the herniation was not done until a month after the accident and neither the scan report nor the hospital records as a whole connect the herniation to the collision. Even after the herniation was discovered, the doctors at Methodist diagnosed Gaytan's pain as being caused by strained muscles and ligaments, not the herniated disc. Neck and back muscle strains are subjective rather than objective injuries. *See Rumzek*, 543 S.W.3d at 334–35.

A jury's evaluation of the severity of a collision and the extent of the plaintiff's resulting injuries must necessarily be based in large part on the appearance and demeanor of the witnesses at trial and the credibility of their testimony. *See Mills v. Jackson*, 711 S.W.2d 427, 434 (Tex. App.—Fort Worth 1986, no writ). The jury determines credibility and may disbelieve any witness even if he is neither impeached nor contradicted. *Id.* The record here shows Gaytan characterized the bus accident as minor and he was strapped into his seat when it occurred. He was the only

passenger to claim an injury and he did not complain of neck pain at that time. Although Gaytan gave extensive testimony at trial that he suffered from neck pain after the 2012 accident which significantly impacted his daily life, he had not sought medical treatment for over four and a half years and stated he was involved in two later bus accidents that also caused injury to his neck. The jury was free to disbelieve any or all of Gaytan's testimony and their refusal to award damages for physical pain, mental anguish, and physical impairment is not against the great weight and preponderance of the evidence. We conclude the trial court did not err in denying Gaytan's motion for new trial.

We affirm the trial court's judgment.

/Molly Francis/
MOLLY FRANCIS
JUSTICE

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**Court of Appeals
Fifth District of Texas at Dallas**

JUDGMENT

EUGENE GAYTAN, Appellant

No. 05-17-00116-CV V.

DALLAS AREA RAPID TRANSIT,
Appellee

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Opinion delivered by Justice Francis.

Justices Brown and Stoddart participating.

In accordance with this Court's opinion of this date, the judgment of the trial court is **AFFIRMED**.

It is **ORDERED** that appellee DALLAS AREA RAPID TRANSIT recover its costs of this appeal from appellant EUGENE GAYTAN.

Judgment entered June 1, 2018.