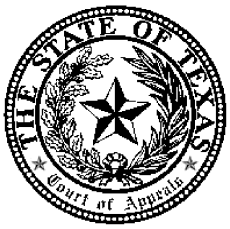
Affirmed and Opinion filed October 4, 2001.



In The

Fourteenth Court of Appeals

NO. 14-00-01448-CV

SHERIDA K. WILSON, Appellant

V.

GARY PHILLIPS, Appellee

On Appeal from the 164th District Court
Harris County, Texas
Trial Court Cause No. 00-22172

O P I N I O N

Appellant Sherida K. Wilson, plaintiff below, appeals from a no-answer default judgment awarding her breach-of-contract damages and attorney's fees, but denying her request for compensatory tort damages and punitive damages. Gary Phillips, defendant below, has not responded. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

After having sexual relations with Phillips, appellant was diagnosed with genital herpes. Phillips admitted he knew he was infected, but later told appellant, "I never wanted

anything in my life like I wanted you and nothing was going to stand in my way." Phillips agreed to pay for appellant's medication, but the payments did not begin for six months, were sporadic, and stopped in September 1999.

Appellant sued Phillips for intentional injury, fraud, and breach of contract. Alleging she sustained "medical expenses, pain & suffering, worry, mental anguish and disruption of relations with others," appellant sought both compensatory and punitive damages for her tort claims. Phillips did not answer, and appellant moved for, and was granted, default judgment.

At the damages hearing, appellant testified the condition flares up about three times a year and, during those times, she cannot "wear jeans or pants of any kind. . . It's painful to sit. It's painful to urinate." Appellant also testified that two men she had dated since becoming infected left as soon as she told them about her condition. When asked what she thought would be an appropriate amount for compensatory damages, appellant responded, "I can't [state] an amount of money."

The trial court found Phillips "knew of his affliction but did not reveal to the plaintiff anything about his affliction. [Phillips] knew that it is a highly contagious disease, knew that it causes its victims extreme pain and knew that it is incurable. [Phillips] fraudulently concealed his affliction from the plaintiff and seduced her." The trial court deleted the portion of the proposed judgment stating, "The pain & suffering, mental anguish and worry proximately resulting from her affliction and the interference with her normal sexual relations have caused the plaintiff to sustain damages in the amount of $250,000.00." The trial court also deleted the entire proposed paragraph stating Phillips' deliberate and knowing concealment of his condition constituted outrageous conduct warranting punitive damages.

The trial court rendered judgment awarding appellant $90,992.00 for breach-of-contract damages.[1] The trial court did not award compensatory or punitive damages.

[1] The trial court also heard testimony on, and awarded, attorney's fees of $5,000 for services rendered through trial.

DISCUSSION

In issue one, appellant argues the trial court reversibly erred by not awarding any compensatory tort damages when it found the defendant had fraudulently, knowingly, and intentionally inflicted a serious and painful injury.[2] We apply the same standard of review to a trial court's findings that we apply in reviewing a jury's findings. *Anderson v. City of Seven Points*, 806 S.W.2d 791, 794 (Tex. 1991). We will reverse the trial court's implicit finding appellant suffered no extra-contractual damages only if the finding is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. *See Peter v. Ogden Ground Servs., Inc*., 915 S.W.2d 648, 649 (Tex. App.—Houston [14th Dist.] 1996, no writ) (citing *Cain v. Bain*, 709 S.W.2d 175, 176 (Tex. 1986)).

In *Lehmann v. Weighat*, this court explained:

> "The[] cases perhaps indicate that appellate courts are more reluctant to hold jury findings of no damage for pain and suffering contrary to the great weight and preponderance of the evidence when the indicia of injury and damages are more *subjective* than *objective.* The more evidence of outward signs of pain, the less findings of damages depend upon the claimant's own feelings and complaints, the more likely appellate courts are to overturn jury findings of no damages for pain and suffering."

917 S.W.2d 379, 385 (Tex. App.—Houston [14th Dist.] 1996, writ denied) (quoting *Blizzard v. Nationwide Mut. Fire Ins. Co.*, 756 S.W.2d 801, 805 (Tex. App.—Dallas 1988, no writ)) (emphasis added by *Lehman*).

Appellate courts in the following cases sustained a jury's findings of no damages at least in part because the appellate court concluded the plaintiff's evidence of the damages

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[2] Appellant contends, although the actual measure of damages is within the fact-finder's discretion, the fact-finder has no discretion over whether an award may be made when the plaintiff has proved the defendant caused the plaintiff to sustain an injury. In essence, appellant invokes the "zero damages rule." In *Srite v. Owens-Illinois Inc.*, the First Court of Appeals held the zero damages rule conflicts with the standard of review articulated by the Texas Supreme Court in the case of *Pool v. Ford Motor Co.*, 715 S.W.2d 629, 635 (Tex. 1986). *Srite*, 870 S.W.2d 556, 558 (Tex. App.—Houston [1st Dist.] 1993), *reversed in part on other grounds*, 897 S.W.2d 765 (Tex. 1995).

was subjective: *Hyler v. Boytor*, 823 S.W.2d 425, 426-27 (Tex. App.—Houston [1st Dist.] 1992, no writ) (upholding jury's finding of no damages for past and future physical pain and mental anguish when plaintiff testified she had pain in both arms, a tingling sensation, problems with concentration, diarrhea, vomiting, and hair loss, but only objective injury was slight bulging "at C3-4" per cat scan); *Blizzard v. Nationwide Mut. Fire Ins. Co.*, 756 S.W.2d 801, 805 (Tex. App.—Dallas 1988, no writ) (upholding jury's failure to find plaintiff should be compensated for past or future physical pain and mental anguish, or physical impairment when plaintiff obtained only occasional medical attention, no hospitalization or surgery, and almost no medication); *McGuffin v. Terrell*, 732 S.W.2d 425, 427-28 (Tex. App.—Fort Worth 1987, no writ) (upholding jury finding of zero dollar damages for past pain and suffering when there were no findings of objective symptoms until approximately three weeks after accident and when substantially all evidence concerning plaintiff's pain and suffering and extent of alleged injuries came from plaintiff or doctor to whom she related alleged pain and suffering). In contrast, when a plaintiff's testimony about the painfulness of her injury was supported by the testimony of physicians, an appellate court overturned the jury's finding of zero damages. *See Russell v. Hankerson*, 771 S.W.2d 650, 651, 653, (Tex. App.—Corpus Christi 1989, writ denied).

In the present case, appellant testified about her pain and suffering. In addition, the record on appeal contains appellant's medical chart indicating positive test results for herpes simplex and a notation of a prescription for medication for "pain, itching & burning." The record, however, does not show the trial court admitted the chart into evidence. We find only the following colloquy regarding appellant's exhibits:

> [Appellant's counsel:] Ms. Wilson is here to offer testimony to assist the Court in reaching a determination in this case. And in addition to that, Your Honor, I have a number [of] exhibits that I have prepared that I would like to offer into the record.
>
> And if I might, for convenience purposes, these are designated Exhibits A through M.
>
> If I might offer them for admission at this time.

THE COURT: Certainly.

[Plaintiff's counsel]: Thank you, Judge.

Although the record is devoid of any indication appellant moved the exhibits into evidence or that the trial court admitted them, we recognize that a number of courts have held that evidence the trial court and parties treat as if it had been admitted is, for all practical purposes, admitted. *See Texas Dept. of Pub. Safety v. Latimer*, 939 S.W.2d 240, 243 (Tex. App.—Austin 1997, no writ) (citing cases).

In the present case, however, we need not decide whether the medical chart was admitted because, even if the trial court admitted and considered the chart, the trial court's implicit finding of no compensatory damages is not against the great weight and preponderance of the evidence so as to be manifestly unjust. Appellant referred only once to the medical chart, and the chart provides only minimal objective evidence (the notation of the purpose of the prescription) to support appellant's subjective testimony regarding pain and suffering.[3] When we weigh the subjective complaints against the limited objective information in appellant's chart, it is apparent the indicia of injury are more subjective than objective. *See Hyler*, 823 S.W.2d at 428. Thus, the finding of no damages should not be overturned.[4]

We overrule appellant's issue one.

In issue two, appellant argues the trial court reversibly erred by not awarding punitive damages. When a plaintiff does not recover actual tort damages, she cannot recover punitive

[3] The date on the chart does not correspond to the date appellant remembered being diagnosed with herpes.

[4] Examples of objectively verifiable evidence to support an award of damages for subjective complaints include: bone fractures, nerve damage, severe burns, lacerations, tendinitis, torn muscles requiring surgery, reverse curvature of the spine, concussion, and lumbar sprains. *See Hammett v. Zimmerman*, 804 S.W.2d 663, 666 (Tex. App.—Fort Worth 1991, no writ).

damages. *See Houston Mercantile Exch. Corp. v. Dailey Petroleum Corp.*, 930 S.W.2d 242, 249 (Tex. App.—Houston [14th Dist.] 1996, no writ) (stating rule).

We overrule appellant's issue two.

We affirm the trial court's judgment.

/s/ John S. Anderson
Justice

Judgment rendered and Opinion filed October 4, 2001.

Panel consists of Justices Anderson, Hudson, and Frost.

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