

IN THE SUPREME COURT OF TEXAS

No. 04-0550

FIFTH CLUB, INC. AND DAVID A. WEST,
PETITIONERS,

v.

ROBERTO RAMIREZ, RESPONDENT

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE THIRD DISTRICT OF TEXAS

Argued October 18, 2005

JUSTICE WILLETT, joined by JUSTICE HECHT, JUSTICE WAINWRIGHT, and JUSTICE JOHNSON, dissenting in part.

I join fully in the reasoning and conclusions set forth in Parts I–III of the majority opinion, but disagree with Part IV’s discussion regarding future mental anguish damages. Because I believe the evidence was legally insufficient to support the jury’s award of damages for Ramirez’s future mental anguish, I respectfully dissent from this part of the Court’s ruling.

In conducting a legal sufficiency review of mental anguish damages, we have held that such damages are recoverable if the plaintiff provides (1) direct evidence of the nature, duration, or severity of his anguish establishing a substantial disruption in his daily routine, or (2) other evidence of a high degree of mental pain and distress that is more than mere worry, anxiety, vexation,

embarrassment, or anger. *Saenz v. Fid. & Guar. Ins. Underwriters*, 925 S.W.2d 607, 614 (Tex. 1996); *Parkway Co. v. Woodruff*, 901 S.W.2d 434, 444 (Tex. 1995). Application of this standard to the evidence presented does not always submit to a simple analysis. As the majority recognizes, we noted in *Parkway* that “some types of disturbing or shocking injuries have been found sufficient to support an inference that the injury was accompanied by mental anguish.” 901 S.W.2d at 445. In addition, damages for future mental anguish are recoverable only if the plaintiff demonstrates a “reasonable probability” that past mental anguish will continue in the future. *Fisher v. Coastal Transp. Co.*, 230 S.W.2d 522, 524–25 (Tex. 1950).

Ramirez offered proof that he suffered a serious physical assault. West does not challenge the legal sufficiency of proof of *past* mental anguish. I agree with West, however, that the proof was legally insufficient to support an award of *future* mental anguish damages. The altercation in issue occurred on September 17, 2000, and the trial occurred more than two years later, in Fall 2002.

Focusing on the evidence of Ramirez’s future mental anguish, Ramirez, when asked how the incident has affected him, testified:

I am the kind of person that I don’t talk to people about what’s going on with me, not even to my wife. All these, I have kept inside, and I have been having a lot of communication problems with my family. *I don’t know if this is going to affect me in the future.* This is what has happened, and I have a lot of anger inside of me for what happened, for what they did to me.

Ramirez also testified that “I have everything inside of me,” that he did not want to talk to his wife about the incident, that he was generally less communicative, and that he had taken an anger management course.

Ramirez’s wife testified that Ramirez is less communicative with his daughter, and that

It's very hard for him to talk to people. And even us, when we—whenever we talk or something like this comes up or anything—this issue comes up, he doesn't want to talk about it. He feels very bad that—what happened to him. I could see him—I'm with him all the time, and I could see that he can't sleep well. He's always tossing and turning. I know he has nightmares. He doesn't tell me but I can see it.

She also testified that Ramirez became depressed and manifested various symptoms of this depression right after the incident, including crying and being “spaced out,” and that “he's still like that now,” but “probably not as much as he was” She testified that “even now . . . I try not to push him because I can only imagine what he feels.”

With regard to future mental anguish, this evidence does not in my view demonstrate a substantial disruption in Ramirez's daily routine or show that Ramirez's ability to work, attend to his personal needs, or engage in other aspects of daily living will be substantially impaired.

Nor does this evidence constitute proof of a high degree of future mental pain and distress amounting to more than mere worry, anxiety, vexation, embarrassment, or anger. Ramirez's testimony that he continued to carry a lot of anger, and that he does not want to talk about the incident, and his wife's testimony that he has nightmares, tosses and turns at night, and has become less communicative, do not amount to a high degree of future mental pain and distress.

By comparison, in *Saenz* a plaintiff testified that the defendant's conduct had caused her to worry a lot about future medical bills and to worry that she would lose her house. 925 S.W.2d at 614. While accepting that these concerns were real and understandable, we held that they did not rise to the level of compensable past or future mental anguish. *Id.* In *Parkway*, which involved a house being flooded multiple times due to faulty drainage, we did not question the sincerity of a husband's testimony that he was “very disturbed” by the defendant's conduct, or his wife's testimony

that the husband “would come home and he would become very quiet” and that the defendant’s conduct had caused friction in the marriage and “changed our life style.” 901 S.W.2d at 445. We held, however, that this evidence did not rise to a level of compensable mental anguish damages. *Id.*

Granted, those cases, unlike the present case, did not involve personal injury claims. But our decision in *Fisher v. Coastal Transport Co.* did, and in that case we applied the long-established “reasonable probability” test and said future mental anguish damages are recoverable only if the plaintiff shows that future ill effects are reasonably probable, not merely possible. 230 S.W.2d at 524–25. *Cf. Lubbock County v. Strube*, 953 S.W.2d 847, 856–57 (Tex. App.—Austin 1997, pet. denied) (a wrongful termination case holding that plaintiff was entitled to past but not future mental anguish damages, where plaintiff suffered from depression and withdrew “into a shell” but failed to demonstrate that her past mental anguish would continue in the future).

I in no way contest Ramirez’s genuineness, and concede that definitions of “mental anguish” are inherently nebulous and imprecise, requiring reviewing juries and courts to weigh shades and degrees of plaintiffs’ emotional reactions. But Ramirez himself admits he does not know how—or, more fundamentally, *if*—the altercation will affect him in the future. *Fisher*, 230 S.W.2d at 524 (noting that fairness and justice dictate that jurors “are limited to the bounds of reasonable probability and cannot wander at will in the realms of mere possibility”).

All in all, the descriptive evidence in the pending case is not qualitatively or quantitatively different from the evidence in *Saenz* and *Parkway*, and as Ramirez’s own testimony suggests, does not establish a probable substantial disruption in Ramirez’s daily routine or show emotions beyond

the realm of worry, anxiety, vexation, embarrassment, or anger needed to support an award of future mental anguish damages.

Don R. Willett
Justice

Opinion delivered: June 30, 2006