IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 93-8621

PILAR ORNELAS,

Plaintiff-Appellant-
Cross Appellee,

v.

ALLSUP'S CONVENIENCE STORES,
INC.,

Defendant-Appellee-
Cross-Appellant.

Appeals from the United States District Court
for the Western District of Texas
(P-93-CV-11)

(October 31, 1994)

Before KING and BENAVIDES, Circuit Judges, and LAKE[*], District Judge.

PER CURIAM:[**]

The plaintiff, Pilar Ornelas ("Ornelas"), was employed by the defendant, Allsup's Convenience Stores, Inc. ("Allsup's"), when she slipped and fell in mop water during the course and

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[*]District Judge of the Southern District of Texas sitting by designation.

[**]Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

scope of her employment. Ornelas sued Allsup's, alleging negligence and breach of contract. The jury found for Ornelas on both counts, but the trial court granted in part Allsup's motion for judgment as a matter law, pursuant to FED. R. CIV. P. 50. Both parties appeal. We affirm in part, and reverse and remand in part.

I. FACTS AND PROCEDURAL HISTORY

Ornelas is a Texas resident and Allsup's is a New Mexico corporation. Ornelas interviewed for a position as clerk at an Allsup's convenience store in Pecos, Texas, in March 1992. She claims that she was told by the supervisor and another Allsup's employee that Allsup's would pay any medical bills if she became hurt on the job. She also claims that she accepted the job based upon this representation. Ornelas signed a form stating, "I understand that the company will not make any payments in connection with an injury that is not clearly sustained on the job and reported at the time it occurs."

Ornelas performed a wide variety of tasks for Allsup's, including cooking, cashiering, and cleaning. She claims that she complained to her supervisor that it was difficult to handle all the jobs by herself and that she needed additional equipment. Although Ornelas's supervisor, Margarita Rodriguez ("Rodriguez"), agreed with Ornelas's complaints, time pressures and the inability to maintain an adequate staff kept her from doing anything about Ornelas's requests. According to Ornelas,

Rodriguez was fired by Allsup's because she required Ornelas and other employees to work overtime.

While working the evening shift on Saturday, October 10, 1992, Ornelas was doing her chores to prepare for the usual rush of customers at about 10 p.m. She noticed candy stuck to the floor near the entrance of the store and attempted to mop it up. Unsuccessful, she switched to a knife or blade of some sort in order to scrape up the candy. When a customer approached, Ornelas started to rise but slipped in the water and fell on her buttocks. The customer helped Ornelas to her feet. About two hours later, Ornelas's supervisor arrived, and Ornelas was taken to the hospital by another customer.

Allsup's apparently paid some medical bills but refused to pay for others, including recommended physical therapy. Ornelas did not work from the time of her injury until trial in July 1993, and she remains in almost constant pain. She has had no source of income since the accident. According to Allsup's, it stopped paying Ornelas's medical expenses when she did not return to Dr. Garza, who was apparently the orthopedic surgeon who recommended a bone scan to confirm the injury before sending Ornelas to physical therapy.

Ornelas sued Allsup's for negligence and breach of contract.[1] A jury found in Ornelas's favor on both claims,

[1] Allsup is not a subscriber to the Texas workers' compensation system. This fact preserves Ornelas's negligence action against Allsup and precludes Allsup from raising the defenses of assumption of the risk, contributory negligence, and the fellow servant rule. TEX. LAB. CODE ANN. § 406.033(a) (Vernon

awarding $9500 for past pain, suffering, and lost wages, and $12,500 for future pain, suffering, and lost earning capacity. The jury also awarded damages for medical expenses: $1358.06 for past expenses (less amounts paid by Allsup's) and $2500 for future expenses. Finally, the jury found that Allsup's breached its employment contract with Ornelas.

The district court then granted in part and denied in part Allsup's motion for judgment as a matter of law under FED. R. CIV. P. 50. The court held that Ornelas had submitted no evidence of proximate causation, thus losing on her negligence claim. The court also found that although the jury finding of breach of contract could stand, Ornelas's failure to submit a jury question on contractual damages meant that no damages could be awarded. Both parties have appealed.[2] Ornelas argues on appeal that the jury's finding of negligence was supported by sufficient evidence and, alternatively, that the jury's findings of past and future medical expenses are the proper measure of damages for the contract action.

II. STANDARD OF REVIEW

We review the district court's ruling on a request for judgment as a matter of law de novo. Conkling v. Turner, 18 F.3d 1285, 1300 (5th Cir. 1994); Omnitech Int'l, Inc. v. Clorox Co., 11 F.3d 1316, 1322-23 (5th Cir. 1994), petition for cert. filed,

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Pamph. 1994).

[2] The trial court assessed costs to Allsup's pursuant to FED. R. CIV. P. 68 and Allsup's appealed on this basis. However, Allsup's abandoned this claim at oral argument.

62 U.S.L.W. 3844 (U.S. May 25, 1994) (No. 93-1927). A judgment as a matter of law should not be granted unless the facts and inferences point so strongly and overwhelmingly in favor of one side that reasonable persons could not disagree on the verdict. Omnitech, 11 F.3d at 1323.

III. DISCUSSION

A. NEGLIGENCE

The district court held that Allsup's was entitled to judgment as a matter of law on Ornelas's negligence claims because reasonable jurors "could not have found any alleged negligence on the part of Defendant was a proximate cause of any alleged injury Plaintiff sustained." The Texas Supreme Court recently reviewed the doctrine of proximate cause in Travis v. City of Mesquite, 830 S.W.2d 94 (Tex. 1992). In Texas, the two elements of proximate cause are cause in fact and foreseeability. Id. at 98. Cause in fact means that "the act or omission was a substantial factor in bringing about the injury, and without it harm would not have occurred." Id. Foreseeability means that "the actor, as a person of ordinary intelligence, should have anticipated the dangers that his negligent act created for others." Id. Foreseeability does not require someone to "anticipate the precise manner in which injury will occur" as long as that person created the dangerous situation through negligence. Id.

Ornelas contends that Allsup's was negligent in failing to maintain a safe workplace--specifically Allsup's failed to

provide "safety mats" for Ornelas to use while mopping and Allsup's chronically understaffed the store. From these alleged acts of negligence, Ornelas claims Allsup's proximately caused her injuries:

> Had Ornelas been on a safety mat while she was trying to scrape the candy off the floor, she would not have slipped and injured herself. Also, had the store been adequately staffed, Ornelas would not have been rushing to clean the floor and would not have been trying to quickly get up from the floor when the customer . . . approached the store.

However, Ornelas did not present sufficient evidence to support this story. With respect to the safety mats, Ornelas presented the following evidence:

> Q [by Ornelas's counsel]: Are there any type of safety mats or anything for you to place down on a wet floor for you to walk on?
>
> A [Ornelas]: No.

This exchange is the sum total of the evidence Ornelas offered about safety mats. This is not enough evidence to allow reasonable persons to conclude that "without it [the lack of safety mats] the harm [the fall] would not have occurred." Mesquite, 830 S.W.2d at 98. What is a safety mat? How does a safety mat work? When would it be used? Ornelas provided no evidence from which the jury could even infer the answer to any of these questions. Ornelas did not show that anyone ever uses a safety mat to prevent falls when mopping. Ornelas never even presented evidence that she would have used a mat if she had one and that if she had used a mat it would have prevented her fall. In other words, evidence that Ornelas did not have a mat is not

enough alone to allow a jury to reasonably infer that if she had a mat and used it she would not have fallen.

Additionally, Ornelas did not present sufficient evidence that failure to adequately staff the store proximately caused her fall. Ornelas testified that she told her supervisor that she generally had to "run back and forth" to comply with all of her duties, but Ornelas did not present any evidence that on the occasion when she fell that she was "quickly get[ting] up from the floor" to tend to a customer. Ornelas simply fell while getting up off the floor. There is no evidence that if Allsup's had hired other employees Ornelas would not have fallen. The record shows that some other Allsup's stores have two employees per shift, but there is no evidence as to how their duties are divided or how the two employees work together. If Allsup's had required another employee during Ornelas's shift, the other employee could have been cleaning the restrooms or the parking lot when Ornelas fell. We simply do not know. What we do know is that Ornelas eventually would have had to get up from the floor, and Ornelas presented no evidence that having another employee working the register would have prevented her fall.

We conclude that the facts and inferences from the evidence presented point so strongly and overwhelmingly in favor of Allsup's that reasonable persons could not find that Allsup's proximately caused Ornelas's injuries. See Omnitech, 11 F.3d at 1323. Thus, we affirm this portion of the trial court's judgment.

B. Breach of Contract

Ornelas sued Allsup's for breach of contract, based on Allsup's promise to Ornelas that it would pay her medical expenses if she became injured on the job. The jury found that a contract to pay medical expenses existed and that Allsup's breached that contract.[3] The district court entered judgment for Ornelas on her contract claim, but it awarded no damages because "the Jury's verdict was silent as to the amount of contractual damages" she sustained. Ornelas argues the district court erred by failing to accept the jury findings of medical expense damages as findings of contractual damages.

Ornelas focuses our attention on the precise questions submitted to the jury. Question 3 read as follows:

> What sum of money, if any, if paid now in cash, would fairly and reasonably compensate plaintiff Pilar Ornelas for the medical expenses she incurred as a result of injuries that resulted from the occurrence in question?

Question 4 read as follows:

> Did defendant Allsup's Convenience Stores, Inc. breach its contract of employment, if any, with plaintiff Pilar Ornelas by failing to provide her with medical expenses?

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[3] Allsup's claims that there is "no evidence to support the jury's finding that Allsup's breached its contract with Ornelas." We disagree. Ornelas testified that Allsup's promised to pay her medical bills if injured on the job. Allsup's even agrees that Ornelas signed a form which said "I understand that the company will not make any payments in connection with an injury that is not clearly sustained on the job and reported at the time it occurs." Ornelas testified that she sustained her injury on the job while working and reported it the same night. The jury's finding that Allsup's breached this contract is plausible in light of the record, and therefore we cannot disturb this finding. Rangel v. Morales, 8 F.3d 242, 245 (5th Cir. 1993).

Ornelas argues that no special issue using the term "contractual damages" was required because the damages found in answer to Question 3 precisely correspond to the amount of contractual damages she would have been entitled to under Question 4. We agree with Ornelas.

The jury found that Allsup's breached its contract with Ornelas "by failing to provide her with medical expenses." The measure of damages for breach of this contract would be at least the amount of medical expenses Allsup's failed to provide. The jury made a specific finding[4] of $1358.06 (less bills already paid by Allsup's) for past medical expenses and $2500 for future medical expenses.[5] These findings were sufficient to support a

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[4] Allsup's, relying on Christopherson v. Allied-Signal Corp., 939 F.2d 1106 (5th Cir. 1991), cert. denied, 112 S. Ct. 1280 (1992), contends that the jury's findings of medical damages must be discarded because Ornelas did not establish by expert testimony that the fall caused her injuries. Ornelas responds that expert medical testimony is not essential to proof of causation of damages, relying on cases such as Daylin, Inc. v. Juarez, 766 S.W.2d 347 (Tex. App.SQEl Paso 1989, writ denied), overruled on other grounds by Avila v. Avila, 843 S.W.2d 280 (Tex. App.SQEl Paso 1992, no writ).

We find Daylin persuasive. The back-injured plaintiff in Daylin simply testified about the circumstances of his injury and his subsequent symptoms of pain and discomfort, apparently without any medical testimony. Id. at 351. Yet the court affirmed a $250,000 default judgment, observing that "[t]he lay proof of the sequence of events, his objective symptoms of pain and discomfort fortified by evidence of timely treatment, produced a logical, traceable connection between the accident and the result." Id.; accord Morgan v. Compugraphic Corp., 675 S.W.2d 729, 733 (Tex. 1984). Ornelas produced evidence of the sequence of events leading to her injury, her objective symptoms of pain and discomfort, and her medical treatment. Under the Daylin standard, this created a logical chain of causation from which the jury could infer that the fall caused her injuries.

[5] Allsup's argues that "[t]here was no testimony or other

judgment for Ornelas awarding her the medical expenses as contract damages. See Olney Sav. & Loan Ass'n v. Trinity Banc Sav. Ass'n, 885 F.2d 266, 270 (5th Cir. 1989) (finding no error in failure to submit a question on ratification because jury answer's to ratification question would have been identical to its answer to the question submitted for waiver); Gladden v. Roach, 864 F.2d 1196, 1201 (5th Cir.) (stating that failure to submit a separate question on damages for false imprisonment claim not error because damages from false imprisonment would be identical to damages found in the question submitted for the constitutional violation damages), cert. denied, 491 U.S. 907 (1989). We conclude that the district court erred in refusing to award Ornelas contract damages based on the jury's findings of past and future medical expenses.

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evidence admitted as to future damages . . . of medical expenses," and therefore the jury's finding of $2500 for future medical expenses should be disregarded. The test for future medical expenses is as follows:

> Texas follows the "reasonable probability" rule for future damage for personal injuries. Adhering to the "reasonable probability" rule, the Texas courts have also consistently held that the award of future medical expenses is a matter primarily for the jury to determine. No precise evidence is required. The jury may make its award based upon the nature of the injuries, the medical care rendered before trial, and the condition of the injured party at the time of trial.

City of San Antonio v. Vela, 762 S.W.2d 314, 320-21 (Tex. App.SQSan Antonio 1988, writ denied) (citations omitted). Ornelas submitted evidence concerning the nature and condition of her injury as well as the medical treatment she received. Under the "reasonable probability" rule, this evidence is sufficient to allow the jury to estimate future medical expenses.

IV. CONCLUSION

For the foregoing reasons, we AFFIRM the trial court's judgment as to negligence and REVERSE the trial court's judgment as to the contract action. Further, we REMAND this case for entry of judgment of $3858.06 "less bills already paid by Allsup's," plus pre- and post-judgment interest and reasonable attorney's fees.[6]

[6] Ornelas asked for attorney's fees in her pleadings. She is entitled to them under TEX. CIV. PRAC. & REM. CODE ANN. §38.001(8) (Vernon 1986) (authorizing recovery of reasonably attorney's fees if the claim is for an oral or written contract).