Circuit Court for Charles County
Case No. 08-C-16-003179

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 562

September Term, 2018

SHELBY LYNN HURST

v.

STEVEN MUDD

Nazarian,
Wells,
Adkins, Sally D.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Adkins, J.

Filed: November 14, 2019

A rainy day and a slippery road drives this appeal to us, which involves injuries stemming from a car crash on Route 925 in Waldorf, Maryland. Appellant Shelby Lynn Hurst—attempting to turn into her driveway—crossed in front of Appellee Steven Mudd, coming from the opposite direction, which resulted in a head-on collision. Mudd brought suit for personal injuries, and a Charles County jury returned a verdict of $1,109,303.50.

Hurst appeals, and presents the following questions:

1. Did the trial court abuse its discretion and err by failing to find that the non-economic damages verdict was excessive and not supported by the evidence?

2. Did the trial court abuse its discretion and err by permitting Appellee to conduct cross-examination beyond the scope of direct examination, resulting in the infusion of extraneous and prejudicial matters before the jury and denying Appellant a fair trial?

3. Did the trial court abuse its discretion and err by permitting Appellee's expert Dr. Michael Fedorczyk to testify as to causation of an annular tear when the opinion was not set forth in Dr. Fedorczyk's expert designation or in Dr. Fedorczyk's reports?

For the reasons discussed below, we affirm the judgment of the Circuit Court.

BACKGROUND

Mudd has worked for the Charles County Department of Public Works for 31 years. He works as an "equipment operator three" and his tasks include operating backhoes, Bobcats, and other heavy equipment. Some of Mudd's duties include repairing county road shoulders, re-paving potholes, putting up and taking down road signs, and snow removal. To do this, Mudd loads and unloads asphalt, chains, and other tools from his

truck. In his spare time, he enjoys doing yard work, including mowing his lawn and mulching. Before the collision, he was able to do his jobs and hobbies without any back pain.

On May 21, 2015, Mudd was driving home from work on Route 925. Hurst was approaching in her vehicle from the opposite direction, and tried to take a left, into her driveway. She cut in front of Mudd, and misjudged his speed, resulting in a head-on collision. Mudd was wearing a seatbelt at the time of the crash, and his airbags deployed, rendering him unconscious for a brief period. Upon waking up, Mudd exited his vehicle and stared at the crash scene until emergency personnel showed up and placed him in an ambulance.

The day after the accident, Mudd went to Dr. Fedorczyk, a chiropractor in Waldorf. Fedorczyk testified that when he came in, Mudd was in a lot of pain, and not moving well. Orthopedic and neurological testing revealed a "decreased range of motion in his neck and his low back." Tests further indicated that Mudd suffered a disk injury in his back. Fedorczyk referred Mudd for a cervical MRI, which show some bulging of a disk in his spine. Fedorczyk prescribed a series of chiropractic rehab, and referred Mudd out for an orthopedic consultation.

The consultation led Mudd to the office of Dr. Michael Franchetti, an orthopedic surgeon in Laurel. Fifteen days after the collision Mudd saw Franchetti's associate, Dr. Duany, who reported Mudd had "pain in his back and shooting down both legs as well as neck pain." Mudd told Duany his pain was a ten out of ten. Franchetti testified that prior

to the collision Mudd was asymptomatic, meaning he had no neck or back problems. Mudd was prescribed an anti-inflammatory and muscle relaxant.

Four weeks later, on July 1, 2015, Mudd was again examined by Franchetti's office. Duany noted Mudd was getting mild relief from chiropractic therapy, but the neck and back pain persisted, as well as radiating symptoms down Mudd's left leg to his calf. Due to Mudd's continued spasms and sciatic complaints, Duany ordered an MRI scan of Mudd's lumbar spine (the "7/4/15 scan"). The scan revealed an annular tear of the L4-5 disc in Mudd's spinal column. Franchetti characterized the tear as a "pain generator," the kind which "most often doesn't heal." He explained that it often does not heal due to limited blood supply in the area of the tear. Due to the lack of healing potential, surgery is not done to repair the tear, so Mudd will have to spend the rest of his life coping with the pain of it. Mudd wanted to get back to work, so Duany cleared him for "light duties with no excessive standing or heavy lifting . . . ."

Mudd returned to work on "light duty" in June, before eventually returning to his full duties towards the end of July, 2015. In November, while working full duty and picking a piece of equipment up off his truck, Mudd felt pain in his back. On November 10, five days after injuring his back at work, Mudd had another lower back MRI scan. Franchetti explained that this scan showed no substantial change in Mudd's back in comparison to 7/4/15 scan taken four months earlier.

Dr. Richard Brouillette testified as an expert in "interventional pain management." Brouillette examined Mudd almost two years after the collision, in May of 2017. Mudd

reported that his lumbar spine pain level was still at a nine out of ten. Brouillette offered him Gabapentin, an anti-neuropathic non-narcotic pain reliver that typically treats nerve related pain. Mudd declined the medication, as he was concerned about his return to work, and worried the potential side effects might inhibit his ability to perform.

Mudd's experts all opined that he suffered an annular tear between the L4 and L5 vertebrae of his spine due to the car crash with Hurst. They all opined that this injury was permanent, painful, and would continue to cause substantial pain. Despite that pain, Mudd has continued to decline pain relief medication that may prevent him from working. He has returned to full duty as an "equipment operator three" for the Charles County Department of Public Works.

Hurst admitted liability during trial. During Mudd's closing argument, he requested the jury award $27,435 for past medical bills, which they did. For past lost wages he requested $8,349; the jury awarded $13,340. To cover future pain and suffering, Mudd made a *per diem* argument, contending that one hour of his current wage, for every day for the rest of his life, would be adequate (Mudd is 51 years old). The jury heard his current wage was $28.90 per hour, which would be "10,548 dollars a year and if you times that by 29 years, its $305,906.50." Having suggested this number, he reminded the jury, "maybe I'm underselling this injury . . . [m]aybe it's worth more than that, maybe you think it's worth less than that; that's the power of the jury. You guys can do whatever you want." The jury awarded him $1,109,294.50 for pain and suffering.

DISCUSSION

On February 2, 2018, judgment was entered in favor of Mudd for $840,784, after the trial court reduced the non-economic damages to $800,000 pursuant to Maryland Code (1974, 2002 Repl. Vol.), § 11-108 of the Courts and Judicial Proceedings Article. One day prior, Hurst filed a Motion For New Trial, which was denied. The motion claimed a new trial was warranted for substantively the same reasons Hurst now claims reversal is warranted: evidence was erroneously admitted resulting in impermissible prejudice; and the jury disregarded the evidence with a 'grossly excessive' award.

Hurst argues the trial court erred in denying a new trial because "[t]he verdict in this case shocks the conscience and is excessive; it is contrary to the evidence, is arbitrary, capricious, and punitive." She seeks a reversal of the trial court's denial of the motion for new trial.

Abuse of Discretion

We begin with the standard of review for an appellate court reviewing a trial court's ruling on a motion for new trial, as that is the remedy Hurst seeks for each of the questions she brings before us. As the Court of Appeals said in *Cooley v. State*, 385 Md. 165, 175, (2005) (cleaned up):

> The question whether to grant a new trial is within the discretion of the trial court. Ordinarily, a trial court's order denying a motion for a new trial will be reviewed on appeal if it is claimed that the trial court abused its discretion. We have expressed that this discretion afforded a trial judge is broad but it is not boundless.

In *Buck v. Cam's Broadloom Rugs, Inc.*, 328 Md. 51 (1992), the underlying case—similar to here—asked "the trial judge to draw upon his own view of the weight of the evidence . . . in determining whether justice would be served by granting a new trial." *Id.* at 59. The Court of Appeals explained why in these situations the trial judge's discretion is broad:

> Because the exercise of discretion under these circumstances depends so heavily upon the unique opportunity the trial judge has to closely observe the entire trial, complete with nuances, inflections, and impressions never to be gained from a cold record, it is a discretion that will rarely, if ever, be disturbed on appeal.

Id.

Having defined the trial judge's discretion here as broad but not boundless, we should also identify what an abuse of discretion would look like. Although the contours of discretion shift, depending on the circumstances, we find Judge Wilner's illustration of the term edifying. To be an abuse of discretion, "the decision under consideration has to be well removed from any center mark imagined by the reviewing court and beyond the fringe of what the court deems minimally acceptable." *North v. North*, 102 Md. App. 1, 13-14 (1994).

Non-Economic Damages Verdict

Hurst contends that the testimony and evidence presented at trial rebuts Mudd's claim that his injury is substantial and permanent. She claims the non-economic damages verdict shocks the conscience and is excessive, and thus a new trial must be granted. She

asserts that this case is similar to *Conklin v. Schillinger*, 255 Md. 50 (1968), and *Yiallouros v. Tolson*, 203 Md. App. 562 (2012); and that they should guide our decision.

Conklin was a tort case based on a car accident. After a verdict in favor of the plaintiffs, the trial court judge ordered a new trial on the grounds that the verdict was excessive. *Id.* at 68. The Court of Appeals affirmed the trial court's authority to do so. *Id.* Hurst's reliance on *Conklin* is misplaced, because *Conklin* applies the same deferential standard of review as we do and declines to overturn the trial court's decision. The critical difference is that unlike this case, in *Conklin*, the trial court granted a new trial.

Similarly, *Yiallouros* is not helpful to Hurst. *Yiallouros* also alleged negligence after a motor vehicle accident. A jury found for the plaintiff and awarded economic and non-economic damages totaling over eight-hundred-thousand dollars. The defendant, Tolson, moved for remittitur or new trial, which the trial judge granted. *Id*. at 564. At the conclusion of the second trial, the jury found for Yiallouros, but also found that he was contributorily negligent, and so awarded no damages. *Id*. Yiallouros appealed, and we held that the trial judge erred in granting a new trial. *Id.* at 565.

The trial court in *Yiallouros* explained its reasoning for granting a new trial, finding it had erroneously admitted expert testimony; and that the non-economic damages were grossly excessive. *Id*. at 575, 580. We will discuss expert testimony below, but here we highlight that in *Yiallouros* we found no reason to reverse the trial judge's finding on the non-economic damages award, and noted "[t]he presiding judge drew from his many years of experience as a lawyer and a jurist, as well as his immediate observations of the relevant

evidence, to conclude that the non-economic damages awarded were grossly excessive." *Id.* at 580.

Like *Conklin*, *Yiallouros* dealt with a trial judge granting a new trial, which is not the case here. Here we are dealing with a denial. "When a trial judge denies a motion for a new trial and/or remittitur based on the excessiveness of compensatory damages, we consider his or her exercise of discretion based on whether the verdict is grossly excessive, or shocks the conscience of the court, or is inordinate or outrageously excessive, or even simply excessive." *Exxon Mobil Corp. v. Ford*, 433 Md. 426, 477 (2013) (cleaned up).

A more persuasive case is *Hebron Volunteer Fire Dep't., Inc. v. Whitelock*, 166 Md. App. 619 (2006). There, a patron at a carnival sued the sponsor of the carnival, the Hebron Volunteer Fire Department, after being injured while getting off a Ferris wheel. At trial the plaintiff, Whitelock, stated he suffered permanent injuries from the incident, was unable to do some of his favorite activities anymore, and experienced wrist pain daily at a level "between six and seven" on a scale of one to ten. *Id.* at 624. At closing arguments, plaintiff's attorney made a *per diem* argument, similar to Mudd's. Counsel gave a range between $170,000 and $340,000, based on daily pain and suffering, to compensate for the next 17 years of plaintiff's life. The jury returned a verdict of $525,000 in non-economic damages.

The trial court, drawing on its view of the weight of the evidence, granted a motion for remittitur or new trial, giving plaintiff the choice of either accepting a remittitur of $225,000 or having a new trial. Plaintiff accepted the remittitur, and both parties appealed.

This Court was convinced that the trial court neither abused its discretion in granting remittitur, nor abused it by choosing $225,000 as the remittitur amount.

To summarize, in *Hebron*, a trial court found, based on the weight of the evidence, that a non-economic damages award that exceeded the range in plaintiff's *per diem* request was excessive. This Court held the trial court was within its discretion to establish (via remittitur) what amount it did not consider excessive. The *per diem* damages argument is not unfamiliar to this Court. *See, e.g., Market Tavern, Inc. v. Bowen*, 92 Md. App. 622 (1992) (jury awarded $150,000 in compensatory damages based on a *per diem* argument regarding the plaintiff's broken jaw). We have a similar situation here, where we are asked to review a trial court's finding on non-economic damages that exceeded the *per diem* request of the plaintiff.

The record reflects that the trial court carefully evaluated the character of the testimony and of the trial when considering the justness of the verdict. The court found, "[i]t comes down to . . . whether or not the verdict shocks the conscience of the Court. It did not. I sat through the trial. I watched this gentleman testify. . . . And I thought to myself this gentleman is very convincing, very credible." The court went on to discuss the size of the verdict, "I thought the whole time it was a case that could be worth more than what [Mudd's counsel] asked for and maybe she did too. I don't know." Finally, when reflecting on the jury and the justness of their verdict, the court opined, "I think this jury did what they were charged to do. No one made any suggestion that they were inappropriate, disregarded the law and certainly didn't disregard the evidence or the facts."

The trial court has the unique opportunity we do not enjoy at the appellate level, "to closely observe the entire trial, complete with nuances, inflections, and impressions." *Buck*, 328 Md. at 57. The court's comments in the present case make clear it did that. The findings expressed by the trial court are exactly why Maryland jurisprudence is bereft of cases where an appellate court reverses a trial court's ruling on a motion for new trial—appellate judges do not sit through trial, cannot observe the nuances and inflections of live testimony, and almost certainly would not—from a cold record—have a better feel for the case than the trial judge. We hold the trial court was well within the limits of discretion in finding a non-economic damages award that exceeded the plaintiff's *per diem* request was not excessive.

Cross-Examination

Hurst argues that the trial court abused its discretion when it permitted Mudd's counsel to cross-examine her on certain pictures not in evidence and not mentioned on direct examination. She contends the questions were simply to elicit "punitive passion and prejudice" against her, and as such, the trial court erred in denying the motion for new trial.

The argument surrounds the following exchange:

> [PLAINTIFF COUNSEL]: Q. And, in fact, because it happened right in front of your house, family members were able to take pictures of where the cars were, what the cars looked like, correct?
>
> DEFENSE COUNSEL: Objection.
>
> [BY HURST]: A. I don't recall.

THE COURT: She can answer.

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Q. Your family took photos of the vehicles and what it looked like, but those photos are now missing,
correct?
A. I guess so.

Q. You're aware of that, correct?

A. Okay.

Q. I'm not trying to put words in your mouth, you're aware of that, correct?

A. Okay.

Q. Is that a yes you're aware of that, you know that?

A. I guess so.

Q. Okay.

A. I don't remember.

Questioning then moved onto other topics, without bringing up the photos again.

Maryland Rule 5-611(b) governs the scope of cross-examination. It states:

> (1) Except as provided in subsection (b)(2), cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. Except for the cross-examination of an accused who testifies on a preliminary matter, the court may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination.

> (2) An accused who testifies on a non-preliminary matter may be cross-examined on any matter relevant to any issue in the action.

The Court of Appeals discussed the Rule in *Simmons v. State*, 392 Md. 279, 296 (2006), stating that "managing the scope of cross-examination is a matter that falls within the sound discretion of the trial court." In *Mines v. State*, 208 Md. App. 280, 295 (2012), We explained that "we will not disturb such a ruling absent a showing of prejudicial abuse of discretion."

Mudd asserts the line of questioning was for potential impeachment purposes, which would fall under Rule 5-611(b)(1) regarding the credibility of the witness. During direct examination Hurst admitted liability for the collision, and discussed how it occurred. She explained how her wheels spun as she was trying to take the turn into her driveway. On cross-examination, when asked about the severity of the impact, she stated she could not remember. Mudd argues that if there were photos of Hurst's vehicle, they may have depicted a destroyed car, which would call into question Hurst's claim that she could not recall the severity of the impact.

Cross-examination is within the sound discretion of the trial court. The supposed missing pictures were not brought up again during cross-examination, in closing arguments, nor anywhere else in trial. There has been no showing that the question improperly prejudiced Hurst in the eyes of the jury, and therefore we hold there was no abuse of discretion in denying a new trial on this ground.

Expert Testimony

Prior to trial, in a motion *in limine*, Hurst moved to preclude Fedorczyk's causation testimony claiming that his opinion was not set forth in discovery. The trial court denied the motion. This issue was also raised in Hurst's denied motion for new trial. Hurst now asserts both denials were abuses of discretion, and thus a new trial must be granted. She claims "neither Appellee's expert disclosure, nor Dr. Fedorczyk's final report summarizing his findings, set forth that he would be testifying as to the cause of the annular tear disk injury."

Six months before trial Mudd submitted a "Plaintiff's Experts List" that identified people to be called as expert witnesses on his behalf at the trial. That list includes Fedorczyk, as an "expert in the field of Chiropractic Medicine." It states "[h]e will also testify regarding Plaintiff's diagnosis, prognosis, causation of injury, permanency . . . ." Fedorczyk's Final Report—submitted into evidence—describes his evaluation of Mudd's injuries, and treatment of said injuries. It states, "[b]ased on the patient's history and current research I believe to a reasonable degree of medical certainty that Steven Mudd suffered the injuries described in this report solely as a result of the motor vehicle accident, which occurred on 5/21/15." At trial, Fedorczyk testified, "Mudd suffered from this accident the headaches, the neck injury, the upper and lower back injuries, the radiating pains all from the motor vehicle accident that he had on the 21st."

Maryland Rule 2-402(g)(1) governs discovery involving experts expected to be called at trial. It states, in relevant part:

> (A) Generally. A party by interrogatories may require any other party to identify each person, other than a party, whom the other party expects to call as an expert witness at trial; to state the subject matter on which the expert is expected to testify; to state the substance of the findings and the opinions to which the expert is expected to testify and a summary of the grounds for each opinion; and to produce any written report made by the expert concerning those findings and opinions. A party also may take the deposition of the expert.

"One of the fundamental and principal objectives of discovery is to require the disclosure of facts by a party litigant to all of his adversaries." *Logan v. LSP Marketing Corp.*, 196 Md. App. 684, 698 (2010) (cleaned up). There We went on to say, "once a trial court resolves a discovery dispute, our review of that resolution is quite narrow . . . . [W]e may not reverse unless we find an abuse of discretion." *Id.* at 699 (cleaned up).

Plaintiff's Expert List, and Fedorczyk's Final Report were a clear disclosure of the facts Fedorczyk testified to at trial. We will not disturb the trial court's resolution of this discovery matter.

CONCLUSION

For these reasons, we affirm the judgment of the Circuit Court for Charles County.

JUDGMENT OF THE CIRCUIT COURT FOR CHARLES COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.