Circuit Court for Anne Arundel County
Case No. C-02-CV-17-002824

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1193

September Term, 2019

HEATHER GARDNER

v.

ROBERT KAYSER

Graeff,
Kehoe,
Zic,

JJ.

Opinion by Graeff, J.

Filed: January 19, 2021

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

This appeal arises from an automobile accident that occurred on December 14, 2014. Heather Gardner, appellant, filed a complaint for negligence against Robert Kayser, appellee, in the Circuit Court for Anne Arundel County. Prior to trial, Mr. Kayser admitted liability, and trial proceeded on the issue of damages. Following a two-day trial, the jury returned a verdict of $0. Ms. Gardner filed a Motion to Revise the Judgment, or, in the alternative, a Motion for a New Trial, which the circuit court denied.

On appeal, Ms. Gardner presents two questions for this Court's review,[1] which we have combined and rephrased, as follows:

> Did the circuit court err in failing to revise the judgment through additur or grant a new trial where the jury's verdict of $0 was irreconcilably inconsistent with the evidence?

For the reasons set forth below, we shall affirm the judgment of the circuit court.

FACTUAL AND PROCEDURAL BACKGROUND

On December 14, 2014, at approximately 6:30 p.m., Ms. Gardner was stopped at an intersection. Mr. Kayser was approaching the intersection in his vehicle, and after taking his eyes off the road, he collided into the rear of Ms. Gardner's motor vehicle. Mr. Kayser apologized to Ms. Gardner immediately following the collision.

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[1] Ms. Gardner's two questions presented were as follows:

1. Did the lower court err by failing to revise the judgment in this case through additur by increasing the amount of the verdict for Ms. Gardner where the jury's verdict of $0 was irreconcilably inconsistent with the uncontroverted evidence?

2. Did the lower court err by failing to grant a new trial in this case where the jury's verdict of $0 was irreconcilably inconsistent with the uncontroverted evidence?

Ms. Gardner testified that she "was feeling fine" immediately after the collision, but as she was driving home, "her head started to hurt." The next morning, her headache had gone away, but her body "was kind of starting to stiffen up a little bit."

Ms. Gardner went to see Dr. Franchetti, an orthopedic surgeon, on December 15, 2014. Dr. Franchetti previously had treated Ms. Gardner for a neck condition. Dr. Franchetti testified that Ms. Gardner's injuries were consistent with whiplash, specifically an "extension flexion type injury to the spine." He ordered x-rays of Ms. Gardner's cervical spine, which revealed that she had lost the normal curvature of her neck, which was consistent with cervical muscular spasms. After examining Ms. Gardner and reviewing the x-rays, Dr. Franchetti determined that she "was suffering from acute cervical strain and an acute lumbosacral strain due to the December 14, [2014] motor vehicle accident."

Ms. Gardner saw Dr. Franchetti again on December 30, 2014, and she presented with continued neck pain, as well as pain in her lower back. Dr. Franchetti continued her course of treatment, which consisted of physical therapy, over-the-counter pain relief medication, and prescription pain relief medication. Dr. Franchetti authorized Ms. Gardner to return to work on January 5, 2015, and he instructed her to return for a follow-up evaluation in four weeks.

On January 27, 2015, Ms. Gardner returned to Dr. Franchetti's office, but she was placed under the care of Dr. Duwaney, another orthopedic surgeon, due to Dr. Franchetti's unavailability. Ms. Gardner was feeling better, and Dr. Duwaney recommended that Ms.

Gardner continue with physical therapy. Dr. Duwaney determined that Ms. Gardner also had an injury to her right sacroiliac joint, and she prescribed therapy for that injury. Dr. Duwaney instructed Ms. Gardner to return for follow-up care in six weeks.

Ms. Gardner saw Dr. Duwaney again on March 10, 2015. Ms. Gardner had improved by 50% with respect to her lower back, and her neck also had improved. Dr. Duwaney diagnosed Ms. Gardner with "persistent lumbar strain with improved sacroiliitis."

Dr. Duwaney referred Ms. Gardner to Dr. Kaufman, a practitioner at the Baltimore Neurosurgery and Spine Center, for "consideration of a sacroiliac joint injection on the right side." Dr. Kaufman performed the injection procedure at the Windsor Mills Surgery Center on April 14, 2015.

On April 21, 2015, Ms. Gardner again saw Dr. Duwaney. Dr. Duwaney's records showed that, with respect to her lower back, she had full range of motion with flexion. No abnormalities were documented.[2]

On July 10, 2015, Ms. Gardner returned to Dr. Franchetti's office. Although her neck pain had resolved, she reported "flare-ups" to her lower back. Dr. Franchetti noticed some tenderness on the sacroiliac joint, but the examination otherwise was normal. Ms. Gardner was advised to return to physical therapy for two weeks.

[2] No medical records were introduced at trial. Dr. Franchetti testified at his video deposition regarding Dr. Duwaney's records.

On December 18, 2015, Ms. Gardner returned to Dr. Franchetti's office complaining of neck pain. On January 12, 2016, Dr. Franchetti administered trigger point injections to Ms. Gardner's neck and cervical spine. At the time he administered the injections, Dr. Franchetti did not consider Ms. Gardner's neck pain to be causally related to the December 14, 2014, accident.

On March 1, 2016, Dr. Franchetti saw Ms. Gardner. He "diagnosed her with improved sprains and strains of her neck and low back cervical lumbar" and advised her that further treatment was not likely to improve her condition.

On June 19, 2018, at counsel's request, Ms. Gardner returned to Dr. Franchetti. Ms. Gardner asserted that her neck pain had resolved, but she still was experiencing pain in her lower back. Dr. Franchetti's examination of Ms. Gardner revealed that her neck was normal, but there was tenderness and spasming in her back. Dr. Franchetti determined that Ms. Gardner's lower back injury was permanent, and it was causally related to the December 14, 2014, accident, although he did not quantify the degree to which she was permanently injured.

During his deposition, Dr. Franchetti testified that Ms. Gardner's neck pain was causally related to the accident. In support, he stated: "The only trauma [Ms. Gardner] sustained was the motor vehicle accident[,] and there was no intervening trauma in the interim." He acknowledged, however, that Ms. Gardner had problems with her neck prior to the December 14, 2014, accident. Ms. Gardner did not introduce any of her medical bills. Instead, she relied purely on testimony to establish her damages.

Lilly and Delbert Gardner, Ms. Gardner's parents, testified regarding the impact that lower back pain bore on Ms. Gardner's daily life. Lilly Gardner described her daughter as "[p]retty much the same" following the accident, but she noted that Ms. Gardner frequently had to get up to stretch when sitting for prolonged periods of time, and she wore heating patches on her back. Lilly Gardner testified that her daughter had "a lot of pain," but did not "complain about it."

Delbert Gardner testified that Ms. Gardner was reluctant to help her parents with the luggage while on vacation. She also used a special cushion when sitting at his dining room table.

Mr. Kayser did not call any witnesses on his behalf. He rested at the conclusion of Ms. Gardner's case.

Ms. Gardner remained outside of the courtroom for the duration of the trial, except when she testified. Her counsel told the jury that she did so because the case was emotional for her. Mr. Kayser did not attend the trial at all. His counsel advised the jury that Mr. Kayser's presence was not necessary because he admitted liability for the collision.

At the conclusion of the evidence, before the case was submitted to the jury on the issue of damages, the court instructed the jury. It gave, among others, the following instructions: Maryland Civil Pattern Jury Instruction ("MPJI-Cv") 1:3 (5th ed., 2018 Supp.), advising the jury that they "need not believe any witness even though the testimony is uncontradicted"; MPJI-Cv 1:4, advising the jury that they were "not required to accept any expert's opinion"; and MPJI-Cv 10:1, advising the jury that it was their "duty to

determine what, if any, award" was warranted, but any award "should not be based on guesswork."

During closing argument, counsel for Ms. Gardner stated that the value of the case was $125,000. Counsel for Mr. Kayser responded to the suggestion of a $125,000 award by stating that the court had advised not to give an award based on "guesswork." He noted that "[th]ere was no injury at the scene." Ms. Gardner's testimony of back pain every day was contradicted by testimony of her doctors, and there was no objective test showing anatomical change. He stated that the evidence showed an accident, and "I am sure, and you should consider, that there was some temporary exacerbation of [Ms. Gardner's] neck and back problems for some period of time following the accident." He contended that "the only credible evidence in this case shows that the last of the problems, and that is the last of the lower back problems, had cleared up by April 21 of 2015[,] four or so months after this accident happened."

After approximately 30 minutes of deliberations, the jury returned a verdict on the sole issue before it, the amount of damages, if any, for injuries found to result from the accident. The jury awarded Ms. Gardner the amount of "$0."

Ms. Gardner filed a timely motion to revise the judgment of the circuit court, or, in the alternative, for a new trial. In that motion, Ms. Gardner asserted that the zero-dollar verdict was "irreconcilably inconsistent with the uncontroverted evidence." She requested that the court "revise the judgment and increase the verdict . . . through additur to an amount

that the [c]ourt in its discretion feels is just." Alternatively, Ms. Gardner asked the court to grant a new trial. The circuit court denied Ms. Gardner's motion.

This appeal followed.

DISCUSSION

Ms. Gardner contends that the jury's award of $0 in non-economic damages is "inequitable, insufficient and in direct contravention with the evidence presented at trial." Specifically, she asserts that a verdict of no damages shocks the conscience when there is no dispute that the plaintiff was injured in an accident. Accordingly, she argues that, given the unconscionable verdict here, the circuit court abused its discretion by failing to grant her motion to revise through additur or grant her a new trial.

"Additur" is defined as a "court's order, issued usu. with the defendant's consent, that increases the jury's award of damages to avoid a new trial on grounds of inadequate damages." ADDITUR, Black's Law Dictionary (11th ed. 2019). Ms. Gardner notes that a court can order a remittitur and reduce an excessive verdict. *See Cunningham v. Baltimore County*, 246 Md. App. 630, 703–04 (2020) (discussing court's ability, in its discretion, to reduce a damages award on the ground that it was excessive), *cert. denied*, No. 270, September Term, 2020, 2020 WL 7417957 (Nov. 20, 2020). She asserts that, in the same way that the court has the discretion to modify an excessive verdict, it should be able to order additur and increase an inadequate verdict.

That argument may have validity. As Ms. Gardner candidly concedes, however, Maryland has never explicitly adopted the use of additur. *See Millison v. Clark*, 32 Md.

App. 140, 143 (Although accepted in other courts as an alternative to a new trial, additur "appears not to have been recognized in Maryland."), *cert. denied*, 279 Md. 728 (1976). *Accord Free State Bank & Tr. Co. v. Ellis*, 45 Md. App. 159, 166 ("Maryland has not joined those jurisdictions that permit additur."), *cert. denied*, 288 Md. 734 (1980). *See also Goldman, Skeen & Wadler, P.A. v. Cooper, Beckman & Tuerk, L.L.P.*, 122 Md. App. 29, 56 (1998) ("[A]dditur has never been viable in [Maryland].").

It is in the context of that case law that we must address the issue that is raised here, i.e., whether the circuit court abused its discretion in declining to grant the motion for additur, or in the alternative, a new trial. Ms. Gardner acknowledges that the standard of review here is an abuse of discretion. *See Cunningham*, 246 Md. App. at 700 ("The decision whether to grant a motion for a new trial is a matter within the discretion of the trial court."); *Owens-Illinois, Inc. v. Hunter*, 162 Md. App. 385, 415 ("We will not disturb a trial judge's remittitur decision except in cases of an abuse of discretion."), *cert. denied*, 388 Md. 674 (2005). An abuse of discretion will be found only when "no reasonable person would take the view adopted by the [circuit] court, or when the court acts without reference to any guiding rules or principles." *Bord v. Baltimore County*, 220 Md. App. 529, 566 (2014) (quoting *In re Adoption/Guardianship No. 3598*, 347 Md. 295, 312 (1997)). "[W]here a trial court's ruling is reasonable, even if we believe it might have gone the other way, we will not disturb it on appeal." *Fontaine v. State*, 134 Md. App. 275, 288, *cert. denied*, 362 Md. 188 (2000).

Here, we cannot conclude that the circuit court abused its discretion in denying Ms. Gardner's motion for additur or a new trial. This Court previously stated that it was not aware of "any case that has been reversed for an inadequate verdict." *Abrishamian v. Barbely*, 188 Md. App. 334, 347 (2009), *cert. denied*, 412 Md. 255 (2010). Ms. Gardner was not able to cite any case that had done so since the time of that decision.

The appellate court is reluctant to second guess the court's decision in declining to revise a verdict as against the weight of the evidence because the jury and the trial judge are the ones who heard and saw the witnesses as they testified. As this Court has explained, even in a case where there is evidence that the plaintiff experienced pain, a jury's failure to award damages does not require a new trial because a jury can reject testimony supporting a claim for damages. *Abrishamian*, 188 Md. App. at 348. When a jury decides not to award damages, and there is a motion based on the ground that the verdict is against the weight of the evidence, the resolution of that issue is best left to the trial court, which is also present at the trial and able to assess the credibility of the witnesses. *See Buck v. Cam's Broadloom Rugs, Inc.*, 328 Md. 51, 60 (1992).

Here, Ms. Gardner stated that she had no pain at the time of the accident. As counsel noted, no medical records were produced showing any anatomical injury. The jury, who heard the evidence, was free to disbelieve the evidence of damages presented. And under the circumstances, including that the remedy of additur has not been expressly adopted by Maryland, and the evidence in this case, we cannot conclude that the trial court abused its

discretion in declining to interfere with the verdict by denying the motion for additur or a new trial.

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