Circuit Court for Anne Arundel County
Case No. C-02-CV-18-000656

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1908

September Term, 2019

BRITTANY L. TOWNSEND

v.

JEANETTE S. DERRY

Graeff,
Berger,
Eyler, Deborah S.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Graeff, J.

Filed: December 10, 2020

This appeal arises from an automobile accident that occurred on February 4, 2017. Brittany Townsend, appellant, filed a complaint for personal injury against Jeanette Derry, appellee, in the Circuit Court for Anne Arundel County. Following a two-day jury trial, the jury found that Ms. Derry was negligent, but Ms. Townsend's injuries were not "caused or aggravated by" the accident. Ms. Townsend timely filed a Motion for New Trial, which the circuit court denied.

On appeal, appellant presents the following question for this Court's review:

> Did the trial court err in overruling appellant's objections, failing to give a curative instruction, and denying appellant's Motion for New Trial in response to improper and prejudicial statements made by counsel for appellee in opening statements?

For the reasons set forth below, we answer that question in the negative, and therefore, we shall affirm the judgment of the circuit court.

FACTUAL AND PROCEDURAL BACKGROUND

On February 4, 2017, at 7:30 a.m., Ms. Townsend was travelling west on West Street in Annapolis, Maryland. Ms. Townsend turned left at the intersection with Riva Road, pursuant to a green left-turn arrow. At that time, Ms. Derry was traveling east on West Street, approaching that intersection. After stopping for a red light, Ms. Derry proceeded through the intersection and collided with Ms. Townsend's vehicle.

Ms. Townsend explained that, before she got all the way through the intersection, the rear passenger side of her car "was struck." The impact of the collision caused Ms. Townsend to move from side to side.

After the collision, she did not immediately stop, but she proceeded a short distance down Riva Road to the rear entrance of a Wholefoods store in the back of the Annapolis Towne Center. She testified that she did not want to get out of her car or pull over at the scene because she did not want to obstruct traffic in the intersection or create another accident.

After Ms. Townsend stopped, she contacted 9-1-1 and advised that she had just been in an accident. Ms. Derry followed Ms. Townsend. She approached Ms. Townsend's car and began "banging on" the driver's side window. Ms. Derry ultimately came back with an officer from the Anne Arundel County Police Department, and the officer facilitated an exchange of information.

Ms. Townsend testified that she felt some discomfort immediately after the collision, so she went home instead of going to work. More than three weeks later, she went to Express Care with complaints of pain in her shoulder and neck. A note on the medical report stated that her lawyer told her to go. She was prescribed a muscle relaxer, but she refused it.

Two weeks later, Ms. Townsend sought treatment from Alina Messick, a physician's assistant who had been treating Ms. Townsend for neck pain for several years. Ms. Townsend had experienced neck and back pain her "entire adult life." She had been in two prior accidents in 2015 where she sustained injuries to her neck and her back, but she stated that the accident exacerbated her condition. At the time of the accident, Ms.

Townsend was taking a compound ointment with an anti-inflammatory, a muscle relaxer, and Vicodin, as needed, for pain.

Ms. Messick ordered an MRI, which indicated that Ms. Townsend had a SLAP tear, an injury to the labrum of the shoulder, "the ring of cartilage that surrounds the socket of the shoulder joint." George S. Athwal, MD & Matthew D. Budge, MD, FAAOS, *SLAP Tears*, OrthoInfo (October 2019) https://orthoinfo.aaos.org/en/diseases--conditions/slap-tears/, available at https://perma.cc/7X4R-5FL4 (last visited December 10, 2020) Ms. Messick referred Ms. Townsend to Dr. Bear at Chesapeake Orthopaedics for follow-up treatment.

Ms. Townsend was first seen by Dr. House at Chesapeake Orthopaedics. Dr. House recommended a "conservative treatment option." He administered a cortisone shot to help with inflammation and prescribed physical therapy.

Physical therapy caused Ms. Townsend greater discomfort, so she met with Dr. Bear to discuss additional treatment options. At this time, they discussed surgery.

Surgery on Ms. Townsend's shoulder took place several weeks later. After surgery, her arm was in a sling for approximately four and one-half weeks. Two weeks following the surgery, Ms. Townsend began twelve weeks of physical therapy. Although the physical therapy helped her condition, she still experienced occasional flare-ups.

Ms. Townsend's medical expert, Dr. Bands, testified regarding Ms. Townsend's injuries. Dr. Bands reviewed Ms. Townsend's medical records dating back to 2016, and he testified that, in his opinion, to a reasonable degree of medical and scientific certainty,

Ms. Townsend's shoulder injury was causally related to the February 4, 2017 collision. Dr. Bands had reviewed an MRI from September 4, 2008. The radiologist interpreting that MRI stated that it showed irritation to the rotator-cuff and changes in the "labral rim around the socket," but the radiologist could not determine whether the labral rim was torn.

Dr. Bands explained that, visualizing the labral rim as a clock, the potential tear in the 2008 MRI was in the "five o'clock position." When Dr. Bands performed an independent medical examination on Ms. Townsend prior to trial, he found a tear in her labral rim, a SLAP injury, at the "12 o'clock to two o'clock position." He stated that there were several ways in which the labral rim can become injured, such as "repetitive overhead activities" and "acute trauma." Car accidents commonly lead to labral injuries. Dr. Bands testified that Ms. Townsend likely would need some future surgery. He anticipated that the surgery would cost $100,000, although he admitted that this was an estimate. After presenting testimony from Dr. Bands and Ms. Townsend, Ms. Townsend rested her case.

Ms. Derry introduced a video of the *de bene esse* deposition of her medical expert, Dr. J. Richard Wells. Dr. Wells testified that he had reviewed all of Ms. Townsend's relevant medical records, as well as conducted his own independent medical examination. He testified that, upon examination, Ms. Townsend's range of motion was less than normal. All of Ms. Townsend's rotator cuff muscles, however, were normal.

Dr. Wells opined that Ms. Townsend "did not sustain any structural injury to her shoulder as a result of" the accident, and therefore, the surgery to her shoulder was not related to her accident. He based this conclusion on the MRI findings, but more

importantly, the onset of pain. He explained: "If you have an acute traumatic tear of the labrum . . . [it's] excruciatingly painful. . . . She would not have been able to drive home, which she did," and "[s]he would not have waited twenty-four days to seek medical attention, only at the request of her attorney."

Dr. Wells opined that, based on the description of the accident, and the specific way in which a SLAP injury occurs, the accident would not have caused an acute tear of the labrum. He stated that, giving Ms. Townsend "the benefit of the doubt, and I'm saying considerable doubt," she "could have had a mild soft tissue strain of the muscles around the shoulder, but she did not have an acute tear or an aggravation of a tear, making it worse, of the labrum in her shoulder." Dr. Wells noted Ms. Townsend's prior problems with neck and back injuries, stating that, three days before the accident, she was "complaining of 10/10 pain. Which is the worst pain ever." Dr. Wells opined that the accident did not cause additional back pain, and it did not tear or structurally aggravate a prior labral tear. On cross examination, he restated that there was no medical evidence to relate the labral tear of the shoulder to the accident.

Following Dr. Wells' testimony, Ms. Derry testified that she had stopped for the red light at the intersection of West Street and Riva Road. Ms. Derry looked at the scenery and then observed a Jeep to her left proceed through the intersection. She saw that her light was green, and she proceeded through the intersection. She testified that she collided with Ms. Townsend's car seconds after she entered the intersection.

At the conclusion of the evidence, the court instructed the jury. The court advised that "opening statements and arguments of the lawyers are not evidence," and the jury was "the sole judges of whether testimony should be believed." The trial court further instructed the jury that they were not required to "believe any witness, even though the testimony is uncontradicted," and they were "not required to accept any expert's opinion."

On Friday, October 25, 2019, at 4:15 p.m., after closing arguments, the jury began deliberations. At 5:25 p.m., the court excused the jury for the weekend.

On Monday, October 28, 2019, the jury resumed their deliberations at approximately 9:10 a.m. At 9:19 a.m., the jury asked to see the depositions, specifically the video of Dr. Wells. The court, after discussing the note with counsel, advised the jury to rely on their memory of the evidence. At 10:10 a.m., the jury reached a verdict. It found Ms. Derry negligent in the accident, but it found that the injuries to Ms. Townsend were not caused or aggravated by the accident.

On November 6, 2019, counsel for Ms. Townsend filed a Motion for New Trial and Request for Hearing, alleging that statements made by counsel for Ms. Derry in his opening statement were "prejudicial and improper," and those statements violated the "golden rule." Counsel for Ms. Townsend argued that the jury's decision, after finding Ms. Derry negligent, to decline to award "clear and uncontroverted damages" to Ms. Townsend "warrant[ed] granting [Ms. Townsend] a new trial on damages." Counsel for Ms. Derry opposed the motion, asserting that none of the statements made during opening statement

were improper, prejudicial, or violative of the "golden rule." The circuit court denied the motion, and this appeal followed.

DISCUSSION

During opening statements, counsel for Ms. Derry made a number of comments to which counsel for Ms. Townsend objected. At the conclusion of opening statements, counsel approached for a bench conference. Ms. Townsend's counsel explained that he was objecting "because it's a lot of argument," and he was concerned that the comments crossed the line of what is acceptable during opening statements. Counsel for Ms. Derry replied that he could "say pretty much anything I want." The court advised that "the jury will certainly be told that opening statements and closing arguments are not evidence." Counsel for Ms. Townsend did not ask for any further action from the court at the time.

On appeal, Ms. Townsend's claim focuses solely on statements made by counsel for Ms. Derry in opening statement. She contends that counsel made several improper and prejudicial statements, and the circuit court, in response, erred in overruling her objections, failing to give curative instructions, and denying her subsequent motion for a new trial. She asserts that the court's errors warrant a new trial regarding damages.

Ms. Derry contends that the court properly denied the motion for a new trial. She argues that her counsel's comments were proper because they "were statements of fact, not arguments." She asserts that, even if the statements were improper, they did not have a prejudicial effect on the jury, and the trial judge took sufficient curative measures to remedy any possible prejudice.

Before addressing the specific comments, we note that "the primary purpose of an opening statement is to apprise, with reasonable succinctness, the trier of fact of the questions involved in the case it is about to hear, and what the parties expect to prove, so as to prepare the trier of fact for the evidence to be adduced." *Lai v. Sagle*, 373 Md. 306, 318 (2003). In addressing the parties' assertions here, we will assess whether the comments were improper, and if so, whether the court took sufficient curative actions to remedy any potential prejudice. As the Court of Appeals explained in *Goldberg v. Boone*, 396 Md. 94, 115 (2006) (quoting *DeMay v. Carper*, 247 Md. 535, 540 (1967)):

> [I]mproper or prejudicial statements, remarks or arguments of counsel generally are cured by reproof by the trial judge; to his discretion customarily is left the choice of methods to protect the fair and unprejudiced workings of the judicial proceedings . . . and only in the exceptional case, the blatant case, will his choice of cure and his decision as to its effect be reversed on appeal.

With that background in mind, we will address each statement at issue in this case.

I.

Leaving the Scene

The first remark to which Ms. Townsend's counsel objected was as follows:

> [MS. DERRY'S COUNSEL:] One of the most important things about this accident is what happened immediately after the accident, immediately after. I'm guessing, and I think I'm right, we've all been through driver's ed. When you have an accident you're supposed to stop and exchange information. Unfortunately, one of the drivers in this accident did not stop and left the scene. That would be the Plaintiff. **If the Plaintiff is so sure that she was not at fault for this accident, why not remain at the scene?** Well, you can argue, well, it's West Street, it's busy, I didn't want to block traffic.
>
> Well, wait a second. It's Saturday morning in February at 7:30. I think you'll hear there wasn't a whole lot of traffic around. Okay. She didn't want to stop right there. I don't know if you all are familiar with Riva Road, how

> it goes out behind Annapolis Town Center. I happen to be, because I live right there. So when you go out Riva Road, when you cross—there's a concrete median. When you get beyond that, there are driveways on the right where you can pull in and stop. There's a cemetery on the left that has a driveway where you can pull in and stop. And after that, there is another driveway. A huge driveway. Which is the back entrance into the Town Center and Whole Foods. That's where she pulled in.
>
> But I guess it's one of his clues in the mystery. She didn't stop at the top, she continued going all the way down. So she's not visible from the road anymore. Well, **if you're so sure that this accident is not your fault, why do you leave the scene—**
>
> [MS. TOWNSEND'S COUNSEL:] Objection.
>
> THE COURT: Overruled.
>
> [MS. DERRY'S COUNSEL:] **Why do you leave the scene** and take your vehicle to where no one can see it? I want you to think about that question and think about what the answer is.

(Emphasis added.)

Ms. Townsend contends that counsel's remark that "driver's ed" teaches drivers to stop after an accident so that they can exchange information, coupled with the assertion that Ms. Townsend "fled the scene," was essentially an argument that Ms. Townsend had "engaged in criminal activity by leaving the scene." Ms. Derry argues that the statements pertaining to driver's education and Ms. Townsend leaving the scene were "simply facts," and counsel did not use the words "crime" or "criminal." Additionally, the jury found in Ms. Townsend's favor on the issue of negligence.

Here, as Ms. Derry notes, the evidence did show that Ms. Townsend left the scene after the accident, and she explained why she did so during her testimony. We perceive nothing improper in this comment.

Moreover, in a civil case, an appellant is entitled to reversal of a judgment only if he or she shows error *and* prejudice. *In re J.J.*, 231 Md. 304, 337 (2016) ("To warrant reversal in a civil case, an appellant must show both error and prejudice."), *aff'd* 456 Md. 428 (2017). *Accord Barksdale v. Wilkowsky*, 419 Md. 649, 657–58 (2011). Here, given the jury's verdict in favor of Ms. Townsend on the issue of negligence, there was no prejudice to Ms. Townsend. Indeed, at oral argument, counsel for Ms. Townsend conceded, commendably, that there was no prejudice as a result of this comment.

II.

Medical Care

The next comments to which Ms. Townsend objects were based on a medical record stating that, when Ms. Townsend first went to a medical provider after the accident, she stated: "My lawyer made me come today." The comments relating to that medical record were as follows:

> [MS. DERRY'S COUNSEL:] Quote, and this is in quotes, "My lawyer made me come today." Now, maybe that's the new normal in America where you go to your lawyer before you get healthcare. **I hope that's not what we're coming to.**
>
> [MS. TOWNSEND'S COUNSEL:] Objection.
>
> [MS. DERRY'S COUNSEL:] If you're injured –
>
> THE COURT: I'll sustain the comment.
>
> [MS. DERRY'S COUNSEL:] If you're injured, or you claim to be injured, **I think medical providers are the people you should see**. But nonetheless—
>
> [MS. TOWNSEND'S COUNSEL:] Objection.

THE COURT: Overruled.

(Emphasis added.)

In her brief, Ms. Townsend argued that these comments were improper because they "mocked [her] for seeking legal counsel." At oral argument, counsel argued that these comments violated the "golden rule."

"A 'golden rule' argument is one in which an arguing attorney asks the jury to place themselves in the shoes of the victim." *Lawson v. State*, 389 Md. 570, 593 n.11 (2005). It is improper because it appeals to the jurors' "prejudices and asks them to abandon their neutral fact finding role." *Id.* at 594.

The comments here did not amount to an improper golden rule argument. They did not ask the jury to put themselves "in the shoes of the victim," but rather, they were opinions of counsel.

Moreover, the comments, combined with the court's response, were not unduly prejudicial. With respect to the following comment: "Now, maybe that's the new normal in America where you go to your lawyer before you get healthcare. I hope that's not what we're coming to[,]" the court sustained Ms. Townsend's objection. Because Ms. Townsend received the relief she requested, there was no error by the court in this regard.

Ms. Townsend further argues that counsel's statement, that if a person is injured "I think medical providers are the people you should see," was improper. That was not a "statement of fact," and counsel for Ms. Derry agreed at oral argument that it was an

improper comment. Counsel argued, however, and we agree, that this statement was not so prejudicial that reversal of the judgment is required.

III.

Medical Experts

The next two comments that Ms. Townsend contends were improper related to the expert witnesses. With respect to Dr. Bands, Ms. Townsend's medical expert, counsel stated:

> [MS. DERRY'S COUNSEL:] But Dr. Bands goes on a little bit farther than that. He says, and he'll testify, I'm sure, today or tomorrow, on the stand. That she's going to need a future surgery. He doesn't say what kind of surgery, but he said she needed a future surgery. Now remember, she's had absolutely no treatment whatsoever since July of 2017. But Dr. Bands and his crystal ball said; oh, there's another surgery down the road. And all of this other treatment which she's magically going to need, which she hasn't had. And then, as Dr. Wells says, the absurdity of it all is, that's another $100,000 or so. No treatment since July 2017, but now we need another $100,000 for treatment that I think she's going to [have]. **I'm dying to hear how he's going to justify that**.
>
> [MS. TOWNSEND'S COUNSEL:] Objection.
>
> [MS. DERRY'S COUNSEL:] But there's another part—
>
> THE COURT: Overruled.

(Emphasis added.)

Counsel then discussed Dr. Wells, Ms. Derry's medical expert. In response to comments by Ms. Townsend's counsel in opening statement that Dr. Wells earned approximately $200,000 to $300,000 a year testifying for defendants involved in an accident, counsel stated:

> [MS. DERRY'S COUNSEL:] But to make an issue about what Dr. Wells' compensation is is more like, well, red herring. It has nothing to do with the evaluation of this woman's injury. No matter how much a doctor is compensated either by the plaintiff or by the defendant, they take an oath too. **And they're not going to come in here, and when I say "come in here,"** (inaudible), **and lie**.
>
> [MS. TOWNSEND'S COUNSEL:] Objection.
>
> [MS. DERRY'S COUNSEL:] They don't do that.
>
> THE COURT: Overruled.
>
> * * *
>
> [MS. DERRY'S COUNSEL:] They call it the way they see it.

(Emphasis added.)

Ms. Townsend argues that counsel's comments regarding Dr. Bands' "crystal ball" and how counsel was "dying to hear" how Dr. Bands was going to justify his opinion that Ms. Townsend needed surgery costing $100,000 were improper because they "impermissibly challenged a witness's credibility prior to their testimony." She further contends that counsel impermissibly vouched for Dr. Wells' credibility by stating that Dr. Wells would not lie during his testimony.

Ms. Derry contends that "the comments made concerning both expert witnesses were totally appropriate." She asserts that counsel's comments merely "introduced each expert witness and informed the jury what was going to be discussed and argued throughout trial."

We begin with counsel's remarks concerning Dr. Bands. We are not persuaded that counsel's statements were improper. Dr. Bands did testify that Ms. Townsend would

require $100,000 for future surgery, and counsel's statement was merely highlighting the need for an explanation regarding that testimony.

With respect to the argument that counsel improperly vouched for Dr. Wells' credibility by stating that Dr. Wells would not lie, we agree that this comment was improper. In a criminal case, we have explained that it is improper for a prosecutor to vouch for the credibility of a witness by expressing his or her personal opinion of the witness' veracity. *Sivells v. State*, 196 Md. App. 254, 280 (2010), *cert. granted*, 418 Md. 397, *cert. dismissed as improvidently granted*, 421 Md. 659 (2011).

We conclude that a similar rule applies in civil cases, and an attorney should not vouch for the credibility of a witness. *See* Md. Rule 19-303.4(e), Fairness to Opposing Party and Attorney (An attorney shall not state his or her personal opinion as to the credibility of a witness.).

We thus turn to consider the prejudicial effect of this comment. Here, in denying the motion for a new trial, the circuit court determined that the comments were not so prejudicial as to require a new trial. We conclude that the court's decision in this regard was not an abuse of discretion. *See Kleban v. Eghrari-Sabet*, 174 Md. App. 60, 82 (2007) (A circuit court's determination to deny a motion for a new trial is reviewed for an abuse of discretion.).

As explained, at the conclusion of opening statements, counsel approached the bench explaining that he was objecting "because it's a lot of argument," and he was concerned that it crossed the line of what was acceptable. The court advised that the jury

would be told that opening statements were not evidence, and the court did give such an instruction to the jury at the close of the evidence. The court did not abuse its discretion in determining that this curative measure was sufficient to cure any impropriety in opening statement, particularly when counsel did not request any further relief. *See Lai v. Sagle*, 373 Md. 306, 318 (2003) (footnote omitted) ("[I]f remarks made by an attorney in an opening statement include 'facts' that plainly are inadmissible and highly prejudicial to another party, a mistrial ordinarily would be one of the principal remedies considered, upon motion by the adversely affected party.").

Ms. Townsend argues, however, that the jury's verdict, finding Ms. Derry negligent but awarding no damages, shows that she was prejudiced by counsel's remarks. We disagree.

It is the trial court's job, not ours, to determine whether the verdict is against the weight of the evidence because this analysis "requires assessment of credibility and assignment of weight to evidence." *Buck v. Cam's Broadloom Rugs, Inc.*, 328 Md. 51, 60 (1992). As this Court has explained, a jury's failure to award damages, even though there was evidence that the plaintiff experienced pain, "does not necessarily warrant a new trial" because a jury can reject testimony supporting the claim for damages. *Abrishamian v. Barbely*, 188 Md. App. 334, 348 (2009) (quoting *Brooks v. Bienkowsi*, 150 Md. App. 87, 128 (2003)), *cert. denied*, 412 Md. 255 (2010).

Here, Dr. Wells testified that Ms. Townsend "did not sustain any structural injury to her shoulder as a result of" the accident. He testified that Ms. Townsend's medical

records showed a history of back and neck problems and the accident did not cause additional back pain, noting that three days before the accident, she was "complaining of 10/10 pain and the worst ever." This evidence was sufficient to support the jury's verdict deciding to award no damages. Accordingly, under the circumstances of this case, we cannot conclude that the circuit court abused its discretion in denying Ms. Townsend's motion for a new trial.

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