UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2420

September Term, 2013

PATRICIA MAREK

v.

OLGA CARBALLO, ET AL.

Kehoe,
Berger,
Nazarian,

JJ.

Opinion by Berger, J.

Filed: December 30, 2014

This appeal arises out of a jury verdict in the Circuit Court for Montgomery County finding Olga Carballo ("Carballo") and State Farm Mutual Automobile Insurance Company ("State Farm") liable to Patricia Marek ("Marek") in the amount of $10,000. Carballo's liability can be traced to an automobile collision in which Carballo and Marek were involved. At trial, Carballo conceded her liability, and the only issue in dispute was the amount of damages sustained by Marek.

On appeal, Marek presents two issues[1] for our review, which we have rephrased as follows:

> 1. Whether the circuit court erred in admitting testimony that Marek underwent a neuropsychological evaluation for the purpose of obtaining disability benefits through the Social Security Administration.
>
> 2. Whether the circuit court erred in declining to give a jury instruction on susceptibility.

For the reasons that follow, we affirm the judgment of the Circuit Court for Montgomery County.

---

[1] The issues, as presented by Marek, are:

> 1. Did the trial court err and/or abuse its discretion in permitting Appellees to disclose to the jury that an independent mental and neurological exam was performed on Marek, for Social Security benefits purposes?
>
> 2. Did the trial court err and/or abuse its discretion refusing [sic] to give a jury instruction that as a result of her pre-existing medical condition Marek was more susceptible to injury?

FACTUAL AND PROCEDURAL BACKGROUND

On April 15, 2011, during the evening rush hour, Marek was driving home from work when her vehicle was struck from behind by a vehicle driven by Carballo. At the time of the collision, Marek's vehicle was slowing to stop at an intersection with a red light. Carballo, who was driving behind Marek, was unable to stop her vehicle before it collided with the rear of Marek's vehicle. Marek and Carballo vigorously dispute the events immediately following the collision, but these facts are not material to our analysis of the issues presented on appeal.

On July 5, 2012, Marek filed a complaint against Carballo in the Circuit Court for Montgomery County, alleging that Marek had suffered various injuries in the April 15, 2011 collision as a result of Carballo's negligence. On December 6, 2012, the court granted State Farm's consent motion to intervene in the litigation as Marek's uninsured and under-insured motorist policy carrier. The trial was presented to a jury over six days in November 2013.

At trial, Marek presented the testimony of Dr. Suzanne Southworth ("Dr. Southworth"), a clinical psychologist and neuropsychologist who treated Marek for the injuries she sustained in the April 15, 2011 collision. Dr. Southworth testified that, in the course of her treatment of Marek, she had examined a neuropsychological evaluation of Marek performed by a Dr. Kelly Zinna ("Dr. Zinna"). Dr. Zinna was employed by the Social Security Administration and performed a neuropsychological evaluation of Marek for the

purpose of determining the disability benefits, if any, to which Marek would be entitled.[2] Marek also presented the testimony of Dr. Richard Barth ("Dr. Barth"), who evaluated and treated injuries Marek sustained to her shoulder, allegedly as a result of the April 15, 2011 collision.

On November 19, 2013, the jury awarded Marek $10,000 in damages for past medical expenses against Carballo and State Farm. The jury elected not to award any damages to Marek for past loss of earnings, future surgery, future loss of earnings, or non-economic damages. This timely appeal followed.

DISCUSSION

I. Collateral Source Evidence

A. Standard of Review

When an appeal contests a trial court's decision to admit or exclude evidence, we engage in the following two-step review process:

> "'First, we consider whether the evidence is legally relevant, a conclusion of law which we review *de novo*.'" *Brethren Mut. Ins. Co. v. Suchoza*, 212 Md. App. 43, 52, 66 A.3d 1073 (2013) (quoting *Wash. Metro. Area Transit Auth. v. Washington*, 210 Md. App. 439, 451, 63 A.3d 609 (2013)). To qualify as relevant, evidence must tend "to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Md. Rule 5-401. Evidence that is relevant is admissible, but the trial court does have not [sic] discretion to admit evidence that is not relevant. Md. Rule 5-402; *State v.*

[2] We note, however, that Dr. Zinna did not testify at Marek's trial.

> *Simms*, 420 Md. 705, 724, 25 A.3d 144 (2011). After determining whether the evidence in question is relevant, we look to whether the court "'abused its discretion by admitting relevant evidence which should have been excluded'" as unfairly prejudicial. *Brethren Mut. Ins. Co.*, 212 Md. App. at 52, 66 A.3d 1073 (quoting *Wash. Metro. Area Transit Auth.*, 210 Md. App. at 451, 63 A.3d 609).

Smith v. State, 218 Md. App. 689, 704 (2014).

The collateral source rule covers one class of evidence that should be excluded by trial courts as unfairly prejudicial. The collateral source rule "precludes the admission of evidence of benefits received by the plaintiff, other than compensation for the injury from the defendant itself, when such evidence could be misused by the jury to reduce an award because of its belief that the plaintiff was not in as dire financial straits as might otherwise have seemed to be the case." *Norfolk S. Ry. Corp. v. Henry Tiller*, 179 Md. App. 318, 343 (2008). "[E]vidence of collateral payments is admissible if there is evidence in the case of malingering or exaggeration of injury but evidence as to collateral payments is inadmissible in the absence of evidence of malingering or exaggeration or where the real purpose of the evidence offered as to collateral sources is the mitigation of liability for damages of the defendant." *Kelch v. Mass Transit Admin.*, 42 Md. App. 291, 296 (1979) *aff'd*, 287 Md. 223 (1980) (internal citations omitted).

B. No Collateral Source Evidence Was Admitted At Trial

Marek contends that the trial court improperly admitted testimony from Dr. Southworth that constituted collateral source evidence, which Marek considered to be

unfairly prejudicial. During cross-examination of Dr. Southworth, the following colloquy ensued:

> [DEFENSE COUNSEL]: No problem, your honor. Okay, so you are aware that Dr. Zinna performed a neuropsychological evaluation on Ms. Marek in between the first and second test, correct?
>
> [DR. SOUTHWORTH]: Correct.
>
> [DEFENSE COUNSEL]: Okay. And I believe you've testified that in your words, she did substantially lower on Dr. Zinna's examination, correct?
>
> [DR. SOUTHWORTH]: Correct.
>
> [DEFENSE COUNSEL]: Do you know why Dr. Zinna was giving her evaluation? Do you know for what purpose?
>
> [DR. SOUTHWORTH]: I believe she was evaluating her for disability.
>
> [DEFENSE COUNSEL]: Okay. And on the disability evaluation neuropsychological testing, she did substantially lower than she did on your first and second test, correct?
>
> [DR. SOUTHWORTH]: Correct.
>
> * * *
>
> [DEFENSE COUNSEL]: All right. Did you review the raw data from Dr. Zinna's testing to make any further conclusions along those lines?
>
> * * *
>
> [DR. SOUTHWORTH]: Because it was a disability evaluation, I was under the impression that it would not be made available.

In reviewing the trial court's admission of Dr. Southworth's testimony, we first assess whether the testimony was relevant. Critically, counsel for Marek raised the issue of Dr. Zinna's evaluation during direct examination of Dr. Southworth, asking Dr. Southworth to opine on the results of Dr. Zinna's evaluation. During direct examination of Dr. Southworth, the following colloquy ensued:

> [PLAINTIFF'S COUNSEL]: Sure. The question was what is your opinion to a reasonable degree of psychological certainty as to what Dr. Zinna's testing suggested as relating to [Marek's] cognition?
>
> [DR. SOUTHWORTH]: The test results were invalid and did not give any useful information.
>
> [PLAINTIFF'S COUNSEL]: Okay. And --
>
> THE COURT: And why was that?
>
> [DR. SOUTHWORTH]: Because they were so far below what we knew she was capable of previously, that they just didn't make any sense at all.

Dr. Southworth's testimony during direct examination essentially classified the results of Dr. Zinna's evaluation as being completely anomalous. As Carballo never disputed her liability for Marek's injuries, the only issue at trial was the extent of Marek's injuries and the amount of damages to which she was entitled. The wide variation in Marek's performance on evaluations administered by different doctors was an important fact for the jury to consider in assessing the actual extent of Marek's injuries that were attributable to the April 15, 2011 collision.

By illustrating that Marek was evaluated by Dr. Southworth for treatment purposes and Dr. Zinna for disability purposes, Carballo and State Farm suggested a possible explanation for the large discrepancies in Marek's performance on different neuropsychological evaluations. Carballo and State Farm argued that Marek intentionally performed worse on her disability evaluation, to secure lucrative benefits, but represented her injuries more accurately to Dr. Southworth, so that Marek would receive treatment tailored to her actual injuries. Dr. Southworth's testimony regarding the purpose of Dr. Zinna's evaluation, therefore, was relevant in explaining Marek's varying performance on multiple neuropsychological evaluations. This in turn was very relevant in determining the true extent of Marek's injuries for which Carballo was liable.

Having determined that Dr. Southworth's testimony was relevant, we now turn our attention to whether Dr. Southworth's testimony was so unfairly prejudicial that the trial court abused its discretion in admitting it. We hold that Dr. Southworth's responses on cross-examination do not constitute unfairly prejudicial collateral source evidence. As recited, *supra*, collateral source evidence is "*evidence of benefits received by the plaintiff*, other than compensation for the injury from the defendant itself." *Norfolk*, *supra*, 179 Md. App. at 343 (emphasis added). Dr. Southworth never testified that Marek received any benefits from collateral sources, including disability benefits from the Social Security Administration. Indeed, Dr. Southworth did not even mention Dr. Zinna's association with the Social Security

Administration.[3] Dr. Southworth's testimony merely established that Marek was evaluated to determine if she was disabled, but fell far short of establishing that Marek was eligible for, much less received, any benefits. We are not persuaded that the jury's knowledge that Marek was merely evaluated for disability resulted in a prejudicial reduction of the damages ultimately awarded to Marek.

In *Titan Custom Cabinet, Inc. v. Advance Construction, Inc.*, we held that similar evidence did not constitute unfairly prejudicial collateral source evidence. In *Titan*, the plaintiff was cross-examined regarding his lack of success in pursuing insurance proceeds for his damages. *Titan Custom Cabinet, Inc. v. Advance Contracting, Inc.*, 178 Md. App. 209, 227 (2008). "The court . . . allowed the line of questioning to suggest that [the plaintiffs] changed their theory for recovery, three years after the flood, only after they were

---

[3] We note that before the cross-examination of Dr. Southworth began, counsel for State Farm notified the court and counsel for Marek that he intended to question Dr. Southworth about Dr. Zinna's evaluation. Counsel for Marek objected to this line of questioning and, following a short colloquy with the court, stated:

> [PLAINTIFF'S COUNSEL]: And I don't have a problem with [defense counsel] asking isn't it true Dr. Zinna wasn't hired by us. Isn't it true Dr. Zinna was, you know, an independent person if they want to say that, but to bring up the word Social Security would completely prejudice the plaintiff. So I have no objection to ascertaining clearly this is not --

Nevertheless, Marek has failed to identify any portion of Dr. Southworth's testimony in which Dr. Southworth identified Dr. Zinna's connection to the Social Security Administration or even mentioned the words "Social Security." Dr. Southworth merely testified that Dr. Zinna conducted her evaluation of Marek "for disability."

unsuccessful in pursuing their claims against" their insurers. *Id.* We held that such cross-examination testimony was not unfairly prejudicial collateral source evidence because "[t]he purpose of the cross-examination was to impeach [the plaintiff's] credibility by pointing out his prior inconsistent statement and not to suggest that appellants were 'partially paid.'" *Id.* at 228. Our holding in *Titan* was supported by the fact that "[n]owhere in the record d[id] [defense] counsel imply that [plaintiffs] had already received compensation for their damages and, thus, should not be compensated again." *Id.* at 227.

Similarly, in the instant case, Carballo and State Farm did not question Dr. Southworth about the purpose of Dr. Zinna's evaluation to suggest that Marek had already received sufficient compensation for her injuries. Rather, the reason for their line of questioning was to impeach the credibility of Marek whom Carballo and State Farm believed to be exaggerating the severity of her injuries. Accordingly, we hold that Dr. Southworth's cross-examination testimony in the instant case did not constitute collateral source evidence and its admission by the trial court was not an abuse of discretion.

Assuming, *arguendo*, that Dr. Southworth's testimony concerning the purpose of Dr. Zinna's testing constituted collateral source evidence, the admission of Dr. Southworth's testimony did not prejudice Marek. We hold that the curative collateral source instruction given to the jury ameliorated any prejudicial effect that could possibly be attributed to Dr.

Southworth's testimony. At Marek's request, the trial court gave the following collateral source rule instruction[4] to the jury:

> Damages collateral source rule. In arriving at the amount of damages to be awarded for past and future medical expenses and past loss of earnings you may not reduce the amount of your award because you believe or infer that the plaintiff has received or will receive reimbursement for or payment of proven medical expenses or lost earnings from persons or entities other than the defendant such as, for example, sick leave paid by the plaintiff's employer or medical expenses paid for by plaintiff's health insurer or Social Security Disability.

We have previously held that "[t]he jury is presumed to follow curative instructions." *Cantine v. State*, 160 Md. App. 391, 409 (2004). Moreover, no evidence was introduced at trial suggesting that "plaintiff has received or will receive . . . payment . . . from . . . plaintiff's health insurer or Social Security Disability." Counsel for Marek requested the pattern collateral source rule instruction, but added language that encompassed payment or reimbursement as a result of Social Security disability. As such, this instruction was

---

[4] The instruction given at trial differs slightly from the Maryland Civil Pattern Jury Instruction for the collateral source rule, which is reproduced below:

> In arriving at the amount of damages to be awarded for past and future medical expenses and past loss of earnings, you may not reduce the amount of your award because you believe or infer that plaintiff has received or will receive reimbursement for or payment of proven medical expenses or lost earnings from persons or entities other than the defendant, such as, for example, sick leave paid by the plaintiff's employer or medical expenses paid by plaintiff's health insurer.

Maryland Civil Pattern Jury Instructions ("MPJI-Cv") § 10:8 (4th ed. 2009).

sufficient to cure any prejudicial effect that could possibly be attributed to the testimony elicited during cross-examination of Dr. Southworth.

II. Aggravation vs. Susceptibility Jury Instruction

A. Standard of Review

> We review a trial judge's decision whether to give a jury instruction under the abuse of discretion standard. *Conyers v. State*, 354 Md. 132, 177, 729 A.2d 910, 934 (1999). Moreover, we will overturn a jury verdict and grant a new trial based on such an error only if it rises to the level of prejudicial error.
>
> In determining whether there was error, "[i]t is well settled that when [an] objection is raised to a court's instruction, attention should not be focused on a particular portion lifted out of context, but rather its adequacy is determined by viewing it as a whole." *Collins v. State*, 318 Md. 269, 283, 568 A.2d 1, 8 (1990) (citation and quotation marks omitted). Error will be found if the given instruction is not supported by evidence in the case. *Rustin v. Smith*, 104 Md.App. 676, 680, 657 A.2d 412, 414 (1995).The proven error must then be prejudicial, not harmless.

CSX Transp., Inc. v. Pitts, 430 Md. 431, 458 (2013).

B. Susceptibility Jury Instruction Was Not Applicable

Marek contends that the trial court abused its discretion when it declined to give a jury instruction that degenerative changes in Marek's shoulder made her more susceptible to the shoulder injury she allegedly suffered during the April 15, 2011 collision. The court did, however, give the jury an instruction regarding aggravation of a previous injury. In declining to give the susceptibility jury instruction, the trial court found:

> THE COURT: I don't see where the facts of this case -- somebody's got to make the call. I just don't see where in the

> facts of this case a susceptibility injury. [sic] If there was a testimony [sic] about it by Dr. Barth, there was no more than a sentence worth of -- or two worth of -- or question or two with respect to susceptibility, because if it had been anything substantial I would have noted it. And I know I noted the parts about aggravation, so I'm going to give the instruction on aggravation. I think that's certainly sufficient under the facts of this case.

The trial court, therefore, declined to give the jury an instruction on susceptibility to injury because it found that the instruction was not supported by the evidence in the case. Instead, it concluded that the facts of the case appropriately supported an aggravation jury instruction.

The Maryland Civil Pattern Jury Instruction for susceptibility to injury provides:

> The effect that an injury might have upon a particular person depends upon the susceptibility to injury of the plaintiff. In other words, the fact that the injury would have been less serious if inflicted upon another person should not affect the amount of damages to which the plaintiff may be entitled.

Maryland Civil Pattern Jury Instructions ("MPJI-Cv") § 10:3 (4th ed. 2009). In contrast, the pattern jury instruction for aggravation of an injury provides:

> A person who had a particular condition before the accident may be awarded damages for the aggravation or worsening of that condition.

Maryland Civil Pattern Jury Instructions ("MPJI-Cv") § 10:4 (4th ed. 2009). Furthermore, we have previously held that:

> The susceptibility to injury instruction is applicable only to cases in which the injury suffered as a result of the purported negligence of a defendant is greater than it would have been if the plaintiff had been stronger or healthier. For example, if a hemophiliac is cut by flying glass in an automobile collision and

> his blood does not clot properly, causing serious injury, it is no excuse for the defendant to say that a person with normal blood would not have suffered as greatly.

Wrobleski v. de Lara, 121 Md. App. 181, 195 (1998) *aff'd*, 353 Md. 509 (1999).

In the instant case, Marek failed to present any evidence or advance any argument suggesting that the shoulder injuries she suffered as a result of the collision were any greater than the shoulder injuries anyone else would have sustained had they been in Marek's position. Therefore, Marek has failed to identify any evidence in her case that supported the giving of a susceptibility jury instruction. Rather, Marek baldly asserts that testimony from Dr. Barth established that Marek had experienced degenerative changes in her shoulder prior to the accident. On appeal, Marek contends that it is this very testimony that supports giving the susceptibility jury instruction in this case. Nevertheless, in her brief, Marek fails to quote or identify any relevant portion of Dr. Barth's testimony in support of her contention that a jury instruction regarding her susceptibility was generated by the evidence in this case. Therefore, we cannot conclude that the trial court abused its discretion in finding that the susceptibility instruction was not generated by the evidence admitted at trial. Dr. Barth's testimony, as described by the parties to this appeal, simply established that Marek had a preexisting shoulder condition, which was aggravated or worsened by the collision for which Carballo was responsible.

For the reasons stated above, we hold that the trial court did not abuse its discretion when it permitted counsel for State Farm to cross-examine Dr. Southworth regarding the

purpose of Dr. Zinna's evaluation of Marek. Further, we hold that the trial court did not abuse its discretion in refusing Marek's request to give a susceptibility to injury instruction to the jury.

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