Rel: June 19, 2020

SUPREME COURT OF ALABAMA

OCTOBER TERM, 2019-2020

1170589

Nancy Hicks

v.

Allstate Insurance Company

1170632

Allstate Insurance Company

v.

Nancy Hicks

Appeals from Madison Circuit Court
(CV-15-901699)

STEWART, Justice.

This matter is before the Court on consolidated appeals from the Madison Circuit Court ("the trial court") stemming from an action filed by Nancy Hicks for injuries sustained in an automobile accident. Hicks appeals following the trial court's denial of her motion for a new trial. Allstate Insurance Company ("Allstate") cross-appeals, challenging the trial court's denial of its motion for a partial judgment as a matter of law on the issue of causation of Hicks's injuries. For the reasons stated below, we reverse the trial court's order denying Hicks's motion for a new trial, and we remand the cause to the trial court for a new trial. We affirm the trial court's order denying Allstate's motion for a partial judgment as a matter of law.

Facts and Procedural History

On October 9, 2014, Hicks was the passenger in an automobile being driven by Yesy Gonzalez ("Yesy") when William Davis rear-ended their vehicle, causing injuries to Hicks's head, back, and neck. Yesy also sustained injuries as a result of the accident.

Hicks, Yesy, and Alfonso Gonzalez ("Alfonso"), Yesy's husband (hereinafter collectively referred to as "the plaintiffs") filed a complaint in the trial court on September 16, 2015, asserting various claims against Davis's estate[1] and against Allstate, the Gonzalezes' underinsured-motorist ("UIM") insurance carrier. Hicks and Yesy asserted claims of negligence against Davis's estate, and Alfonso asserted a loss-of-consortium claim against Davis's estate. The plaintiffs also sought UIM benefits from Allstate. Hicks also amended the complaint to assert a claim for UIM benefits against State Farm Mutual Automobile Insurance Company ("State Farm"), her UIM insurance carrier.

Initially, both Allstate and State Farm opted out of the litigation, see Lowe v. Nationwide Insurance Co., 521 So. 2d 1309 (Ala. 1988), and the plaintiffs proceeded against Davis's estate. The plaintiffs subsequently agreed to a stipulation of dismissal of all claims they asserted against Davis's estate. As a result of the dismissal of the claims against Davis's estate, the matter proceeded to trial on February 12, 2018,

[1]Davis died after the accident but before the plaintiffs filed the complaint.

solely on the plaintiffs' claims against Allstate for UIM benefits. State Farm continued to opt out.

The evidence at trial presented the following relevant facts pertaining to Hicks's claim. As a result of the collision, Hicks's body was thrown forward and then backward, and her head hit the passenger-side window of the car. Hicks sought initial treatment at the Huntsville Hospital emergency room for pain in her back, neck, and head. On October 13, 2014, Hicks visited Dr. Ramakrishna Vennam, her primary-care physician, who diagnosed Hicks with a whiplash injury, post-traumatic headaches, and lower back pain. One month after the wreck, Hicks was diagnosed by Dr. Lynn Boyer, a neurologist, with a concussion. On October 28, 2014, Hicks went to the emergency room at Huntsville Hospital complaining of pain in her head, neck, and back, and she was diagnosed by the emergency-room physician with a cervical strain in her neck. On January 23, 2015, Dr. Vennam saw Hicks, who was complaining of a sharp pain in the left side of her head from headaches and chronic back pain. Dr. Vennam referred Hicks to Dr. Rhett Murray, a neurosurgeon. Dr. Murray had previously treated Hicks for lower back pain in 2009, which treatment included

surgery to correct a herniated or ruptured disk, relieving a compressed nerve.

Dr. Murray diagnosed Hicks with spondylolisthesis, grade one, and indicated there was a 25 percent slip between the L-4 and L-5 vertebrae in Hicks's back. Dr. Murray also diagnosed Hicks with mild spondylosis, which is arthritic spurs in the neck. Dr. Murray stated that the slip of the bone that he found between the L-4 and L-5 vertebrae in March 2016 was not present in scans of Hicks's back after the 2009 operation. Dr. Murray also diagnosed Hicks with a slipped disk between the bones of her L-5 and S-1 vertebrae and with stenosis, a narrowing of the spinal canal, which was causing nerve compression in her back.

On October 17, 2016, Dr. Murray performed a two-level spinal-fusion surgery on Hicks. Under direct examination by Hicks's attorney during a video deposition that was played to the jury, Dr. Murray testified as follows concerning the surgery:

> "An incision is made on the low back in the middle of the affected areas. And the muscles are pulled back exposing the spine. The roof of the spine bones, which is called the 'lamina,' are removed in order to expose the nerves. The spurs form on these joints. They are removed so that the nerves are

> further decompressed. If there's any scar tissue, it is removed from around the nerves. That's called a 'neurolysis,' Screws are placed into the spine bones through what we call the 'pedicles' which are die arms that connect the back of the spine to the front of the spine. So six screws were placed in her L-4, L-5j and S-1, at each level. The discs which are the spacers between the bones are removed. This doesn't show -- well, actually it does show. This is the spacer that [we] put back into the disc once we remove it. It's packed with her bone that we harvest from the removal of the roof of the spine. So two of these were placed. And then rods are passed through the screws and locked down with top screws as well as a cross link in order to hold everything together. Bone is also laid down to the sides here in hopes of getting this to become solid with bone overtime."

Dr. Murray testified that the screws and the rods would likely remain in Hicks's body permanently. Dr. Murray testified:

> "[T]hose bones no longer bend. That's what a fusion is designed to do. So it adds stresses to the joints above. And she has a probable 10 to 15 percent chance of developing adjacent level significant disease."

Hicks testified that she had external scarring at the site of the surgery. Dr. Murray testified as follows regarding Hicks's impairment:

> "[Hick's attorney:] Doctor, is there an impairment rating associated with this type of procedure?
>
> "[Dr. Murray]: There is. I usually send them out to our physiatrist to perform the impairment rating

> using the [American Medical Association] Guidelines. I am certain she would have one."

Hicks attempted to introduce a mortality table into evidence to aid the jury in determining damages. Hicks argued that the testimony of Dr. Murray, specifically that Hicks would have permanent hardware in her spine and permanent scarring from the fusion surgery and that Hicks had not yet recovered from the neck injuries she complained of, was sufficient evidence to allow for the submission of a mortality table. The trial court acknowledged that "the whole transcript of [Dr. Murray's] deposition [was] admitted for purposes of this argument" but ultimately did not allow Hicks to admit the mortality table into evidence, finding that Hicks had not presented sufficient evidence that her injuries were permanent. The trial court also prohibited Hicks from discussing permanent disability in her closing argument. In addition, during the charging conference, the trial court, over Hicks's objection, rejected jury instructions on permanent injury and mortality tables.

At the close of the plaintiffs' evidence, Allstate filed a motion for a partial judgment as a matter of law as to Hicks's claim against it, arguing that Hicks had failed to

prove that her spinal-fusion surgery was necessitated by the injuries she suffered in the October 2014 automobile accident. The trial court denied Allstate's motion. Allstate did not file a postjudgment motion to renew its motion for a partial judgment as a matter of law.

On February 15, 2018, the jury returned a verdict for Hicks in the amount of $135,000 and for Yesy in the amount of $200,000.[2] The trial court reduced the judgment against Allstate and in favor of Hicks to $35,000 because Davis's insurance company was responsible under its policy with Davis for the first $100,000 in damages.

On February 28, 2018, Hicks filed a motion for a new trial pursuant to Rule 59(a), Ala. R. Civ. P. Hicks argued that the trial court erroneously determined that Hicks's injuries were not permanent, that the trial court should have allowed Hicks to offer a mortality table into evidence, and that the trial court improperly refused to instruct the jury on permanent injuries and mortality tables. The trial court denied the motion on the same day. On March 23, 2018, Hicks

[2]Alfonso's loss-of-consortium claim had been dismissed.

filed a notice of appeal. Allstate timely filed a cross-appeal on April 5, 2018.

Analysis

I. Allstate's Cross-Appeal (No. 1170632)

Because the issues raised by Allstate in its cross-appeal could be dispositive of Hicks's appeal, we address the cross-appeal first. Allstate argues that the trial court's denial of its motion for a partial judgment as a matter of law on the issue of causation underlying Hicks's claim is reversible error because, it asserts, Hicks did not present sufficient evidence showing that her spinal-fusion surgery was necessitated by the October 2014 automobile accident.

We must first determine whether Allstate has preserved this argument for appellate review.

> "Rule 50(b), Ala. R. Civ. P., provides a specific procedure for challenging the sufficiency of the evidence:
>
> "'....'
>
> "... In accordance with this procedure is the well-settled rule 'that a motion for a [preverdict judgment as a matter of law] must be made at the close of all the evidence and that a timely post-trial motion for judgment [as a matter of law] must be subsequently made before an appellate court may consider on appeal the insufficiency-of-evidence

> issue directed to the jury's verdict.' Bains v. Jameson, 507 So. 2d 504, 505 (Ala. 1987); see also Great Atlantic & Pacific Tea Co. v. Sealy, 374 So. 2d 877 (Ala. 1979); Black v. Black, 469 So. 2d 1288 (Ala. 1985); Housing Auth. of the City of Prichard v. Malloy, 341 So. 2d 708 (Ala. 1977)."

Sears, Roebuck & Co. v. Harris, 630 So. 2d 1018, 1024-25 (Ala. 1993). In Clark v. Black, 630 So. 2d 1012, 1016 (1994), this Court stated that "the unsuccessful movant's failure to present the trial court with an opportunity to revisit the sufficiency of the evidence issue in [a postverdict motion for a judgment as matter of law] precludes appellate reversal of the denial of the [preverdict motion for a judgment as matter of law]." See also Cook's Pest Control, Inc. v. Rebar, 28 So. 3d 716, 723 (Ala. 2009).

Allstate made its motion for a partial judgment as a matter of law at the close of the plaintiffs' evidence and before the jury entered its verdict. Allstate, however, did not make a postjudgment motion for a partial judgment as a matter of law on the issue of causation. Therefore, Allstate did not preserve its causation argument for appellate review. Accordingly, we do not address the merits of Allstate's argument, and we affirm the trial court's judgment insofar as

it denied Allstate's motion for a partial judgment as a matter of law.

II. Hicks's Appeal (No. 1170589)

Hicks argues that the trial court erred in refusing to allow the jury to determine whether Hicks had suffered permanent injury in computing damages. In particular, Hicks asserts that she presented evidence demonstrating a permanent injury and that, as a result, the trial court erred by denying the admission into evidence of the mortality table and by refusing to instruct the jury using Hicks's proposed instructions on the law pertaining to permanent injury and on the use of mortality tables.

> "The decision to grant or deny a motion for new trial rests within the sound discretion of the trial court, and the exercise of that discretion will not be disturbed on appeal unless some legal right was abused and the record plainly and palpably shows that the trial court was in error."

Green Tree Acceptance, Inc. v. Standridge, 565 So. 2d 38, 45 (1990) (citing Hill v. Cherry, 379 So. 2d 590 (1980)).

We first address Hicks's argument that the trial court erred by excluding the mortality table from evidence because, she argues, the trial court incorrectly determined that Hicks had not presented sufficient evidence or testimony from her

treating physicians to indicate that her injuries were permanent. "'"It has been held that where there is nothing from which a layman can form any well-grounded opinion as to the permanency of the injury or where the injury is purely subjective, expert evidence must be introduced. 25A C.J.S. Damages § 162(9), at 110 (1966)."'" Skerlick v. Gainey, 42 So. 3d 1288, 1290 (Ala. Civ. App. 2010) (quoting Flowers Hosp., Inc. v. Arnold, 638 So. 2d 851, 852 (Ala. 1994), quoting in turn Jones v. Fortner, 507 So. 2d 908, 910 (Ala. 1987)). Further, "[t]his court has held that where there is evidence from which there is a reasonable inference that a plaintiff's injuries are permanent, the mortality tables are admissible." Louisville & Nashville R.R. v. Steel, 257 Ala. 474, 481, 59 So. 2d 664, 669 (1952) (citing Southern Ry. v. Cunningham, 152 Ala. 147, 44 So. 658 (1907)).

At trial, Hicks offered deposition testimony from Dr. Vennam and Dr. Murray showing the extent of the injuries she suffered as a consequence of the automobile accident. Dr. Murray testified in detail regarding the spinal-fusion surgery he performed on Hicks following the accident. Although Dr. Murray did not specifically mention the words "permanent

injury," he testified that the hardware inserted during the surgery -- screws, rods, and "spacers" between Hicks's vertebrae -- is likely to remain permanently in Hicks's body. He testified that, as a result of the surgery, the spinal bones that were involved in the operation no longer bend, which adds stress to the joints above those bones. When asked about the effect that the surgery he performed on Hicks in 2009 could have on the development of her spondylolisthesis, Dr. Murray responded: "[W]hen you operate on anyone, even the smallest operation, you do not strengthen the spine. In fact, you take a little bit of strength away from the spine." He testified that Hicks had a "10 to 15 percent chance of developing adjacent level significant disease." Finally, Dr. Murray testified that he was certain that there would be an impairment rating associated with the surgery he performed on Hicks. Hicks further testified that she had surgical scars on her body as a result of the 2016 surgery. See Ozment v. Wilkerson, 646 So. 2d 4, 6 (Ala. 1994)("[T]he jury could reasonably have concluded that the [plaintiff's] scar constituted a permanent injury. Therefore, the court did not err in admitting the mortality tables.").

Allstate did not offer any evidence at trial to refute the testimony of Dr. Murray or to challenge his testimony as to the extent of Hicks's injuries. Allstate simply argued that Hicks had failed to present sufficient evidence that her injuries were permanent and that they were caused by the October 2014 automobile accident to allow for the submission into evidence of a mortality table.

Dr. Murray's medical testimony about the permanent hardware remaining in Hicks's body, Hick's permanently hindered mobility as a result of the spinal-fusion surgery, and the inherent damage that generally occurs as a result of any surgical procedure on the spine, combined with Hicks's testimony about the permanent external scarring resulting from the surgery, provided evidence from which a jury could reasonably infer that Hicks suffered permanent injuries. Accordingly, the trial court exceeded its discretion in refusing to admit into evidence the mortality table offered by Hicks as an aid for the jury in determining damages.

> "In reviewing a ruling on the admissibility of evidence, ... the standard is whether the trial court exceeded its discretion in excluding the evidence. In Bowers v. Wal-Mart Stores, Inc., 827 So. 2d 63, 71 (Ala. 2001), this Court stated: 'When evidentiary rulings of the trial court are reviewed

> on appeal, "rulings on the admissibility of evidence are within the sound discretion of the trial judge and will not be disturbed on appeal absent an abuse of that discretion."'"

Swanstrom v. Teledyne Cont'l Motors, Inc., 43 So. 3d 564, 574 (Ala. 2009) (quoting Bama's Best Party Sales, Inc. v. Tupperware, U.S., Inc., 723 So. 2d 29, 32 (Ala. 1998)).

The only issue for the jury to determine in this case was the amount of damages to which Hicks was entitled, and the mortality table can be used by the jury as an aid in determining permanent damages.[3] By refusing to allow the jury to consider the mortality table, the trial court hindered the jury's ability to determine the appropriate amount of damages to which Hicks was entitled in a trial in which the only issue was the amount of damages. Because the trial court erroneously determined that the mortality table could not be admitted into evidence, the trial court's denial of Hicks's motion for a new trial is due to be reversed. Because of our holding on this issue, we pretermit discussion of Hicks's other argument in

[3]See Alabama Farm Bureau Mut. Cas. Ins. Co. v. Smelley, 295 Ala. 346, 349, 329 So. 2d 544, 546 (1976) ("If the [mortality] tables are admitted, they may be used by the jury to determine the plaintiff's impaired or diminished earning capacity." (citing Alabama Great Southern Ry. v. Gambrell, 262 Ala. 290, 78 So. 2d 619 (1955))).

support of her request for a new trial, namely that the trial court erred by not giving the requested jury instructions on permanent injuries and on the use of mortality tables.

Conclusion

For the foregoing reasons, the trial court's order denying Hicks's motion for a new trial is reversed, and the cause is remanded to the trial court for a new trial. Because Allstate did not properly preserve for appellate review its motion for a partial judgment as a matter of law of the issue of causation underlying Hicks's claim, the trial court's denial of that motion is affirmed.

1170589 -- REVERSED AND REMANDED WITH INSTRUCTIONS.

Parker, C.J., and Wise, J., concur.

Bolin and Sellers, JJ., concur in the result.

1170632 -- AFFIRMED.

Parker, C.J., and Bolin and Wise, JJ., concur.

Sellers, J., concurs in the result.