UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0903

September Term, 2015

JOSHUA LAWRENCE

v.

BRIAN CHRISTOPHER HENRY

Krauser, C.J.,
Graeff,
Kenney, James A., III
(Retired, Specially Assigned),

JJ.

Opinion by Graeff, J.

Filed: May 4, 2016

This appeal arises from a lawsuit filed by Joshua Lawrence, appellant, in the Circuit Court for Prince George's County, against Brian Henry, appellee, alleging that Mr. Henry was liable for injuries that Mr. Lawrence sustained in a motor vehicle collision caused by Mr. Henry's negligent driving. Mr. Henry admitted liability, and trial proceeded only on the issue of damages. The jury awarded Mr. Lawrence $48,740 in damages.

On appeal, Mr. Lawrence presents two questions for our review, which we have rephrased slightly, as follows:

(1) Did the trial court abuse its discretion in denying Mr. Lawrence's requested pattern jury instructions on susceptibility to injury and aggravation of a previous condition?

(2) Did the trial court abuse its discretion when it precluded plaintiff's counsel from stating to the jury in closing argument that Mr. Lawrence's injuries were permanent?

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

FACTUAL AND PROCEDURAL BACKGROUND

On May 12, 2012, Mr. Lawrence was driving on a side street near the intersection of Russett Green E and Laurel Fort Meade Road in Laurel, Maryland. Mr. Henry failed to yield, and his vehicle collided with Mr. Lawrence's vehicle. Mr. Lawrence testified that, at the time of the accident, he experienced "all types of pain" in his neck, back, and shoulder, pain which he had not experienced prior to the accident.

Following the accident, Mr. Lawrence visited a chiropractor, due to shoulder and back pain. Mr. Lawrence received physical therapy from his chiropractor, but the pain continued. The chiropractor referred Mr. Lawrence to Dr. Joel Fechter, an orthopedic surgeon.

Dr. Fechter ordered an MRI of Mr. Lawrence's shoulder. He determined that Mr. Lawrence suffered from tendinosis (inflammation) of the rotator cuff, with a possible "posterior labral tear."[1] Dr. Fechter treated Mr. Lawrence's injuries with injections and physical therapy.

Mr. Lawrence continued to experience pain, so Dr. Fechter ordered a MRI arthrogram, a MRI supplemented with injected dye to improve the quality of the scan. The MRI arthrogram indicated that Mr. Lawrence had a partial tear of the rotator cuff. Because medication and other treatments were not working, Mr. Lawrence elected to have surgery on his shoulder.

On April 8, 2013, Dr. Fechter operated on Mr. Lawrence's shoulder. He found "a small partial thickness rotator cuff tear which [he] cleaned up." Dr. Fechter also "cleaned out some inflamed tissue, trimmed off the bone," and "cleaned up" a "posterior labral tear." After the operation, Mr. Lawrence's condition improved significantly. His shoulder pain, however, returned the following year. Dr. Fechter stated that future treatment options included an additional MRI, more physical therapy, and another surgery. Mr. Lawrence testified that he planned on undergoing another surgery because he "ha[s] to . . . for it to get better."

[1] Dr. Joel Fechter explained that the labrum is "a soft tissue structure that allows the ligaments to attach to the glenoid which is sort of the saucer that the ball of the humeral head articulates on."

On October 16, 2013, Mr. Lawrence filed a complaint against Mr. Henry, alleging one count of negligence.[2] On April 15, 2015, the case went to trial, proceeding only on the issue of damages.

Dr. Fechter testified that, to a reasonable degree of medical certainty, Mr. Lawrence's complaints, as well as the treatment he received from Dr. Fechter, were causally related to the May 12, 2012, accident. Although "degenerative changes" are a "pretty common way to get rotator cuff tears," Dr. Fechter stated that "it would be very unusual to have that as a result of a degenerative process in a 26 year old healthy guy."

The defense called orthopedic surgeon Dr. Clifford Hinkes as its expert medical witness. Dr. Hinkes testified, to a reasonable degree of medical certainty, that Mr. Lawrence suffered a strain and sprain in his shoulder in the May 2012 accident, but he had since recovered, and the inflammation and partial tear in his rotator cuff were not causally related to the accident. Dr. Hinkes explained that the rotator cuff muscle is "commonly inflamed and irritated in active young people," and Mr. Lawrence's shoulder "was partially torn in the area that is subject to wear and tear from activity."[3] He stated that Mr. Lawrence's surgery was not causally related to the accident, and any future treatment of his shoulder likewise would be unrelated to the accident.

[2] Diane Henry was also named in the complaint, but Mr. Lawrence subsequently dismissed all claims against her.

[3] Joshua Lawrence testified that, prior to the accident, he exercised "almost every day." His exercise routine included weight lifting (bench press and curls), pull-ups, and cardio. Appellant also played football in high school. He stated that he would do approximately 40 push-ups every day during practice.

On April 16, 2015, the jury returned its verdict on damages. The jury awarded Mr. Lawrence $40,240 in past medical expenses, $0 in future medical expenses, and $8,500 in non-economic damages, for a total of $48,740.

On May 6, 2015, Mr. Lawrence filed a Motion for New Trial. On June 10, 2015, the circuit court denied Mr. Lawrence's motion, without explanation.

DISCUSSION

I.

Jury Instructions

Mr. Lawrence contends that the circuit court abused its discretion in denying his request for two jury instructions: (1) "Susceptibility to Injury"; and (2) "Aggravation of Previous Condition." He asserts that these instructions were a correct statement of the law, and "the jury's low award of non-economic damages is a clear indication that [appellant] was prejudiced by the [c]ourt's failure to give the requested instruction."

Mr. Henry argues that Mr. Lawrence's claims regarding the jury instructions are not preserved for this Court's review. In any event, Mr. Henry argues that the circuit court did not abuse its discretion in declining to instruct the jury on susceptibility to injury and aggravation of previous condition.

A.

Proceedings Below

On April 14, 2015, Mr. Lawrence provided the circuit court with a list of requested jury instructions. These instructions included Maryland Pattern Civil Jury Instruction ("MPJI-Cv") 10:3, Susceptibility to Injury, which 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.

He also included MPJI-Cv 10:4, Aggravation of Previous Condition, which provides: "A person who had a particular condition before the accident may be awarded damages for the aggravation or worsening of that condition."

On the morning of April 16, 2015, shortly before the court instructed the jury, the following colloquy occurred:

> THE COURT: . . . . So before we bring the jury out, I want to give you the instructions and a copy of them. I did not include aggravation. I thought about it last night. I don't know if you have anything else you want to offer or say about it, but I really don't think it should be given, so I'll listen to you if you have anything else to say on the matter.
>
> [PLAINTIFF'S COUNSEL]: Your Honor, I don't have anything else to say, but I will, just for the record, just continue my objection to it not being included.
>
> After the court instructed the jury, the following occurred at the bench:
>
> THE COURT: Okay. All right. [Counsel?]

> [PLAINTIFF'S COUNSEL]: Your Honor, my objections that I made yesterday, are you not giving the instruction on aggravation of a preexisting condition?[4]
>
> [DEFENDANT'S COUNSEL]: I (indiscernible), Your Honor.
>
> THE COURT: Okay. All right, then, you may go forward with closings . . . .

B.

Preservation

Mr. Henry argues that Mr. Lawrence's argument regarding the trial court's decision not to instruct the jury on susceptibility to injury and aggravation of previous condition are not preserved for this Court's review. He contends that Mr. Lawrence did not object on-the-record to the failure to give the susceptibility to injury instruction, and although counsel did object to the aggravation instruction, he failed to disclose any grounds for this objection.

Pursuant to Maryland Rule 2-520(e): "No party may assign as error the giving or the failure to give an instruction unless the party objects on the record promptly after the court instructs the jury, stating distinctly the matter to which the party objects and the grounds of the objection." This rule requires parties to precisely state their objections to jury instructions "for the plain reason that the trial court has no opportunity to correct or amplify the instructions for the benefit of the jury if the judge is not informed of the exact nature and grounds of the objection.'" *B-Line Med., LLC v. Interactive Digital Sols., Inc.*,

[4] Mr. Lawrence states on appeal that counsel was referencing a prior objection that was made off-the-record.

209 Md. App. 22, 57 (2012) (quoting *Fearnow v. Chesapeake & Potomac Tel. Co.*, 342 Md. 363, 38 (1996)).

Mr. Lawrence does not dispute that the record contains no articulated reason why the court should give the requested instructions. He asserts, however, that there previously had been "a lengthy exchange" with the trial judge regarding both of these instructions, but "unbeknownst to Counsel, this exchange was not preserved." He contends that the circuit court "clearly referenced" his objections when the trial judge stated: "I did not include aggravation. I thought about it last night. I don't know if you have anything *else* you want to offer or say about it." He asserts that, had he "known that the transcript of the prior day's exchange would not be made then he certainly would have re-articulated the entire exchange."

Unfortunately for Mr. Lawrence, the record before us does not show the requisite objection.[5] Under these circumstances, this issue is not preserved for this Court's review.

C.

Merits

In any event, even if the contention was preserved for review, we would find it to be without merit. In *Jarrett v. State*, 220 Md. App. 571, 583-84 (2014), we set forth the applicable standard of review for jury instruction issues:

[5] We note that counsel could have attempted to reconstruct the proceedings that occurred off-the-record and submitted, if possible, an affidavit by all trial counsel agreeing to what occurred during that off-the-record proceeding. There is no suggestion that such an attempt was made.

> Maryland Rule 4-325(c) provides that "[t]he court may, and at the request of any party shall, instruct the jury as to the applicable law[.]" We review "a trial court's refusal or giving of a jury instruction under the abuse of discretion standard." *Stabb v. State*, 423 Md. 454, 465 (2011). The Court of Appeals has explained:
>
> > We consider the following factors when deciding whether a trial court abused its discretion in deciding whether to grant or deny a request for a particular jury instruction: (1) whether the requested instruction was a correct statement of the law; (2) whether it was applicable under the facts of the case; and (3) whether it was fairly covered in the instructions actually given.
>
> *Id.* (citing *Gunning v. State*, 347 Md. 332, 351 (1997)). "The burden is on the complaining party to show both prejudice and error." *Tharp v. State*, 129 Md. App. 319, 329 (1999), *aff'd*, 362 Md. 77 (2000).

Mr. Lawrence argues, and Mr. Henry does not dispute, that the jury instructions Mr. Lawrence requested are correct statements of law, and the substance of the requested instructions was not fairly covered by the instructions actually given. The dispute here is whether the instructions were applicable to the case in light of the facts presented at trial.

Mr. Lawrence also argues that the instructions were applicable to the facts of the case because "[n]umerous times throughout his testimony, Dr. Hinkes stated that [Mr. Lawrence's] injury was not caused by the accident, but rather was related to long term use." He asserts that, although it was not his "position that the [accident] aggravated a preexisting condition, the jury certainly could have come to that conclusion based on the evidence presented." "In fact," he argues, Mr. Henry's "entire case was predicated on the theory that [Mr. Lawrence's] condition, and the need for his surgery, was not caused by the accident, but rather was a preexisting condition." Thus, he asserts, jury instructions

advising the jury that he could be awarded damages for the aggravation of a pre-existing condition, even if he was more susceptible to injuries, were applicable to the facts.

Mr. Henry argues that the requested instructions were inapplicable because neither "party presented any evidence to support a finding that some previous condition was aggravated by accident, or made [Mr.] Lawrence more susceptible than the average person to the injuries complained of by him." He asserts that Mr. Lawrence's "case was based on the theory that the accident caused a rotator cuff tear injury to his right shoulder," and Mr. Lawrence "did not contend, or introduce any evidence to suggest, that he had any pre-existing condition which was aggravated or worsened by the accident, or which made his rotator cuff more susceptible to injury." And the defense theory was that the car accident "may have caused [Mr.] Lawrence a shoulder sprain or strain from which he had recovered," and the condition for which he had been treated by Dr. Fechter was not an injury related to the accident, but rather, "a pre-existing condition caused by repetitive wear and tear activity."

We agree with Mr. Henry. No party contended, and no expert testified, that Mr. Lawrence was particularly susceptible to injury in his shoulder or that a pre-existing injury was aggravated by the accident. Under these circumstances, the circuit court properly exercised its discretion in concluding that there was insufficient evidence to instruct the jury on those issues.

II.

Closing Argument

Mr. Lawrence next argues that the circuit court abused its discretion in denying his counsel "the opportunity to argue in his closing that [his] injuries were permanent and would require future medical treatment." He contends that, because three years had passed since the accident and he still had significant pain, and the expert testified that additional surgery may be required, the evidence was sufficient for the jury to infer permanency of his injuries.

Mr. Henry argues that Mr. Lawrence failed to preserve this argument for this Court's review. In any event, he contends that the circuit court did not abuse its discretion in precluding counsel from arguing that Mr. Lawrence's "claimed right shoulder injury would cause him 'pain and suffering for the rest of his life.'"

1.

Proceedings Below

On April 16, 2015, shortly before closing argument, defense counsel made an oral motion to preclude plaintiff's counsel from arguing to the jury that Mr. Lawrence's injuries were permanent. He stated that there "was no testimony regarding permanency. The only thing about [the] future was future surgery and physical therapy. There was no permanency opinion even rendered. So I don't think he can [argue] that." The court stated that, if plaintiff's counsel was intending to make that argument, he needed to have put into evidence a Life Table to assist the jury in calculating damages. Plaintiff's counsel asked:

"So the court is saying that I can't make an argument for future pain and suffering even though both doctors agree that there is going to be future treatment, including the surgery?" Defense counsel clarified that they were not objecting to the discussion of future surgery, but rather, the argument that Mr. Lawrence will have "pain and suffering for the rest of his life." The court then asked plaintiff's counsel to produce a transcript of trial testimony where a witness had said that Mr. Lawrence would experience pain and suffering for the rest of his life. Plaintiff's counsel produced the transcript of testimony from Dr. Hinkes, the defense's medical expert, in which the doctor stated that Mr. Lawrence's symptoms "come and go," "the operation is done on inflammation, so you can't really guarantee that is all going to go away," and he is "apt to have inflammation and irritation come and go still." The court asked plaintiff's counsel if *his* expert medical witness ever addressed the issue of permanency, to which plaintiff's counsel conceded that he had not. The court stated: "[I]f you're arguing permanency, you have to have sufficient evidence to prove it, and you have the burden, and I don't see where you do from . . . what [the defense's] doctor said."

After further discussion, the court found that plaintiff's counsel did not produce sufficient evidence to argue permanency to the jury, and even if it did, he failed to present any evidence on damages calculation.

2.

Preservation

As noted, *supra*, Mr. Lawrence argues on appeal that the jury could infer permanency due to the fact that three years had passed, he was still experiencing pain, and he required additional treatment. Mr. Henry contends that this argument was "never argued to the trial court. Instead, [Mr.] Lawrence's contention below was that the testimony of the defense expert, Dr. Hinkes, that [Mr.] Lawrence would have 'future problems' and continued 'inflammation problems' was sufficient to support an inference of permanency." He argues that the trial court "specifically recognized" that Dr. Hinkes' testimony was "the basis of [Mr.] Lawrence's contention," and it rejected that argument. He contends that "a trial court cannot be found to have abused its discretion by not accepting an argument that was never presented to it by the complaining party." We agree.

Ordinarily, an appellate court will not decide an issue "unless it plainly appears by the record to have been raised in or decided by the trial court." Md. Rule 8-131(a). *Accord Sutton v. FedFirst Fin. Corp.*, 226 Md. App. 46, 80 n.18 (2015), *cert. denied*, 446 Md. 293 (2016) (declining to address an argument that was not made below).

Here, Mr. Lawrence did not argue below, as he does on appeal, that the amount of time that passed between the accident and the trial permitted him to argue permanency to the jury. Accordingly, this issue is not preserved for our review.

In any event, even if the argument was preserved for our review, it is devoid of merit. As the parties acknowledge, this Court has stated that there are four ways a plaintiff can establish that an injury is permanent:

> "The first is when the testimony of a medical expert that the injury is permanent is sufficient. The second is where the injury by its very nature establishes permanency (loss of limb; wrongful death). The third is where the injury, while not by its nature clearly permanent, leads to an inference of permanency due to the passage of times between the act which caused the injury and the time of trial. The fourth is where there has been a lapse of time between the injury and trial and there is some expert testimony tending to establish permanency."

Byrum v. Maryott, 26 Md. App. 130, 134, *cert. denied*, 275 Md. 753 (1975) (citations omitted). As Mr. Henry points out, however, there is also the fundamental principle that, "'before it can be said that the effect of an injury is permanent, it must appear that it is caused by some condition caused by the injury which *is not likely to change*.'" *Id.* at 133 (quoting *Mangione v. Snead*, 173 Md. 33, 51 (1937)) (emphasis added).

Here, Mr. Lawrence's evidence indicated that the condition of his shoulder was likely to change, in that he was scheduled to have another surgery. Because there was no evidence regarding the likely result of this treatment, there was insufficient evidence for the jury to infer permanency of Mr. Lawrence's injuries. The circuit court did not abuse its discretion in precluding closing argument in this regard.

JUDGMENT OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.