

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

Nos. 1901 & 1902

September Term, 2014

MICHAEL W. HARRIS

v.

RED HILL LAWN
SERVICE, INC., ET AL.

Eyler, Deborah S.,
Wright,
Nazarian

JJ.

CONSOLIDATED CASES

Opinion by Wright, J.

Filed: November 24, 2015

*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.

Appellant, Michael Harris, brings this appeal from the Circuit Court for Carroll County's judgment that ruled on his workers' compensation claim stemming from injuries sustained when the company vehicle he was driving was struck from behind. Harris sustained injuries to his head, neck, and back, and he had surgery on his back. After developing additional health issues, the Workers' Compensation Commission ("the Commission") held a hearing on May 18, 2011, for authorization for treatment, payment of medical bills, and payment of additional temporary total disability benefits.

On June 8, 2011, the Commission issued an order authorizing medical treatment, payment of medical bills, and temporary total disability benefits. The appellees, Red Hill Lawn Service, Inc., ("Red Hill"), filed an appeal to the circuit court. While on appeal, issues were filed by Harris for authorization for additional treatment and payment of previously authorized treatment. Red Hill filed issues of whether Harris had reached maximum medical improvement. Following a hearing on December 22, 2011, the Commission authorized the additional requested treatment by an order dated January 9, 2012, also finding that Harris had not reached maximum medical improvement.

Red Hill filed a Motion for Rehearing on the payment of the medical bill which was denied by the Commission. On January 19, 2012, Red Hill filed an appeal of the Commission's order to the circuit court. The appeals were consolidated for trial, and the trial was stayed pending the outcome of a related third-party action by a joint motion. On September 2, 2014, a jury trial was held on the appeals in the circuit court.

At the close of Red Hill's case, Harris moved for judgment based on legal insufficiency of the evidence presented, which was denied. Harris moved for judgment again, which was also denied. The jury returned a verdict in favor of Red Hill on September 11, 2014. Harris filed a motion for judgment notwithstanding the verdict ("JNOV") which was denied on October 10, 2014. Harris then filed this appeal presenting the following questions for consideration:

1. Did the trial court err in allowing the Appellees to question the Appellant about the timing of the diagnosis of his condition in conjunction with the related incomplete third-party claim results?
2. Did the trial court err in refusing to allow the Appellant to elicit testimony of the relationship of the verdict in the first trial of the third-party claim to the Appellee's termination of temporary total disability benefits and medical care and treatment?
3. Did the trial court err in refusing to give Claimant's Proposed Jury Instructions 1, 2, and 3, explaining the statutory relationship of the third-party claim to the workers' compensation claim?
4. Did the trial court err in denying Appellant's Motion for Judgment Notwithstanding the Verdict (and Motions for Judgment at the close of Appellee's case and at the close of all the evidence) on the grounds that expert testimony was not presented that was legally sufficient to overturn the decision of the Workers' Compensation Commission?

For the reasons discussed below, we answer no to all four questions and, therefore, affirm the decision of the circuit court.

Facts

On August 28, 2007, Harris was driving a Red Hill company vehicle during the course of his employment and was struck from behind by a third-party driver. As a result of the accident, Harris suffered several injuries to his neck, chest, and back. He filed a

workers' compensation case against Red Hill and a separate civil suit against the responsible third-party driver who struck him.

Harris received treatment, including back surgery, for his injuries, paid for by Red Hill. He was initially seen by two doctors that had previously seen and treated Harris for pre-existing back and neurological complaints: Dr. Henderson immediately after the accident; and his chiropractor, Mr. Tarquini, for his back and neck through September 27, 2007. Harris was seen by Dr. Myles Brager, an orthopedic surgeon, for his back through October and November of 2007. Harris had back surgery on October 10, 2007, and subsequently Harris, though noting "one hundred percent improvement," reported some residual burning pain in his thigh that Dr. Brager noted as consistent with the injury and resultant surgery.

Harris had a series of syncopal¹ events in October 2007, but he only sought medical treatment for one of the events. After these events, Harris returned to Dr. Brager and complained that he was experiencing numbness and stiffness in his neck which Dr. Brager indicated were not related to the back surgery. On November 25, 2007, Harris had a third syncope event for which he was hospitalized for five days. Testing and evaluation at the hospital did not reveal the cause of these events. After the last event, Harris's condition and symptoms changed dramatically. His wife testified that after his last event, he became weaker with increased body pain, burning sensations, and numbness.

¹ "Syncope," or "fainting," is a temporary loss of consciousness. <https://www.nlm.nih.gov/medlineplus/fainting.html> (last visited Nov. 12, 2015).

From January 2008 until the trial, Harris was seen by several doctors. On January 7, 2008, Harris saw Dr. William Keys and “raised the inquiry” to Dr. Keys about Reflex Sympathetic Dystrophy/Complex Regional Pain Syndrome (“RSD/CRPS”).² Harris inquired about the RSD/CRPS diagnosis because it was recommended by “another legal group” advising him at the time.³ In his report after seeing Harris, Dr. Keys indicated that he did not believe Harris to be suffering from RSD/CRPS. Harris was then referred to Dr. Bruce Sicilia, a pain management specialist, who treated Harris as an in-patient and an out-patient, and then sought treatment from Dr. Charlene Hafer-Macko. Dr. Hafer-Macko indicated that she listed RSD/CRPS as a possible diagnosis for Harris.

In November 2010, Harris was seen by Dr. Anthony Kirkpatrick of the RSD/CRPS Treatment Center and Research Institute in Tampa, Florida, where he was diagnosed with whole-body RSD/CRPS. Dr. Robert Knoble also diagnosed him with RSD/CRPS in December 2010. Harris was offered a ketamine treatment, which is a drug

² Complex Regional Pain Syndrome, CRPS, formerly known as RSD Reflex Sympathetic Dystrophy, is here referred to as RSD/CRPS. It is a chronic pain condition believed to be caused by damage to the peripheral and central nervous systems.

Dr. Jay Brokaw testified that there are four elements to the diagnosis: 1) An injury; 2) The pain from the injury is out of proportion with what is expected from the injury; 3) Evidence of problems with blood flow, sweating, or autonomic system; and 4) Exclusion criteria – there is no other explanation for the disease outside of the other three criteria.

³ In his brief, Harris suggests that Dr. Fink, his pain management specialist, discussed RSD/CRPS with him. His wife, however, testified that “another legal group” suggested the inquiry.

that is supposed to “reboot” the brain to relieve pain. Red Hill refused to pay for this treatment.

On May 18, 2011, a hearing was held before the Commission, which found that Harris had RSD/CRPS, and that the diagnosis was related to Harris’s accident of August 28, 2007. The Commission ordered Red Hill to pay the November 2010 medical treatment from Dr. Kirpatrick and authorized another visit to the doctor for a second round of ketamine treatment. After a second hearing on December 22, 2011, the Commission passed an order requiring payment of the second ketamine treatment and authorizing a third round of ketamine treatments with Dr. Kirpatrick. Red Hill appealed both decisions to the circuit court and both cases were consolidated for trial.

On September 2, 2014, an eight-day trial commenced in the circuit court. All of Harris’s medical records were submitted as joint exhibits, with the exception of an October 5, 2011 medical report from Dr. Hafer-Macko. Red Hill called three expert witnesses to testify: Dr. Brager; Dr. Ronald Cohen, a neurosurgeon; and Dr. Jay Brokaw, a pain management physiatrist. Harris offered three of his treating physicians as witnesses on his behalf: Dr. Kirkpatrick, Dr. Sicilia, and Dr. Hafer-Macko. All three testified that they diagnosed Harris as having whole body RSD/CRPS at the time of trial. The jury was presented with a single issue: “Do you find that [Red Hill] has proved by a preponderance of the evidence that [Harris’s condition], alleged to be [RSD/CRPS] was not causally related to the work-related accident of August 28, 2007?” It subsequently returned a verdict in favor of Red Hill.

Additional facts will be discussed below as they become relevant.

Discussion

I. The admission of evidence regarding Harris's timeline in seeking his RSD/CRPS diagnosis was appropriate.

Harris argues that the circuit court abused its discretion by permitting Red Hill to question Harris about the timing of his RSD/CRPS diagnosis in relation to the third-party trial result. The line of questioning and the testimony evidence it produced is a question of evidence admissibility, which is “left to the sound discretion of the trial court” and “will not be disturbed on appeal” absent abuse of discretion. *Titan Custom Cabinet, Inc. v. Advance Contracting*, 178 Md. App. 209, 218 (2008) (citation omitted). The circuit court abuses its discretion if “no reasonable person would take the view [it] adapted,” or when its ruling “does not logically follow from the findings upon which it supposedly rests or has no reasonable relationship to its announced objectives.” *Abrishamian v. Barbely*, 188 Md. App. 334, 342 (2009) (citation omitted).

Md. Rule 5-403 guides the circuit court in matters of admitting relevant evidence. It states that otherwise relevant evidence “may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury” Md. Rule 5-403. Whether the probative value of evidence is substantially outweighed by the danger of unfair prejudice “is left to the sound discretion of the trial judge and will be reversed only upon a clear showing of abuse of discretion.” *Malik v. State*, 152 Md. App. 305, 324 (2003) (citation omitted). The more probative the evidence, the less likely that the court will find the evidence to be unfairly prejudicial. *Burris v. State*, 435 Md. 370, 392 (2013). The probative value of evidence is the

tendency of the evidence to establish the proposition that it is offered to prove. *Smith v. State*, 218 Md. App. 689, 704 (2014) (quoting *Williams v. State*, 342 Md. 724, 737 (1996)).

Harris argues that the circuit court admitted unfairly prejudicial evidence that “mis[ed] the jury” when it permitted Red Hill to pursue a line of questioning that indicated Harris sought a diagnosis for RSD/CRPS after the third-party proceedings resulted in a mistrial. While Red Hill asserts that this evidence shows motive,⁴ Harris contends that the information showed nothing “other than a chronological sequence.” Harris asserts that the admission of such evidence solely for chronological purposes is “substantially injurious to the Appellant” and the prejudicial effect of the questions is outweighed by its probative value.

In this instance, the risk of misleading the jury was not outweighed by the probative value of the evidence. In *CSX Transp., Inc. v. Pitts*, we explained:

Evidence is never excluded merely because it is prejudicial or portrays a party in a negative fashion. There must be an additional showing that the prejudice rises to the level of “unfair” by evoking such a strong emotional response--sympathy, hatred, or contempt to name a few--in the trier of fact that logic and reasoning cannot overcome the prejudice.

203 Md. App. 343, 382 n.15 (2012) (citing *Moore v. State*, 84 Md. App. 165, 172 (1990) (internal quotation marks omitted)).

⁴ Red Hill avers that it has a right to inquire why Harris sought RSD/CRPS evaluations from multiple new doctors after the first third-party proceedings ended in a mistrial.

Red Hill's questions went to Harris's motive for seeking the RSD/CRPS diagnosis. Because the issue before the circuit court was whether a causal link existed between the RSD/CRPS diagnosis and the accident, and ultimately whether Red Hill must cover the cost of the treatment, the question of whether Harris had motive to seek an additional diagnosis was particularly probative. Evidence of when Harris sought treatment for RSD/CRPS after the third-party proceeding resulted in a mistrial had "the tendency" "to establish the proposition" that the accident did not necessarily result in Harris's RSD/CRPS. *Smith*, 218 Md. App. at 704 (citation omitted).

Harris asserts that the inference that the jury drew from the evidence is that he sought a diagnosis of RSD/CRPS because he somehow lost the third-party claim.⁵ Even if this was the ultimate result, it does not rise to the level of "unfair" because evidence is not excluded merely because it is prejudicial. *CSX Transp., Inc.*, 203 Md. App. at 382, n.15; *see also Moore*, 84 Md. App. at 172 ("If prejudice were the test, no evidence would ever be admitted. Parties . . . have a right to introduce prejudicial evidence."). To rise to an "unfair" level, the evidence must "produce[] such an emotional response [in the trier of fact] that logic cannot overcome prejudice or sympathy needlessly injected into the case." *Id.* (citation omitted).

Harris fails to show exactly how evidence of his seeking additional RSD/CRPS evaluations from multiple doctors would lead the jury to draw conclusions that not only

⁵ The 2010 jury trial between Harris and the third-party was declared a mistrial. A second jury trial, which took place after the treatment for the RSD/CRPS, led to a substantial jury verdict, but was reversed by this Court.

had “no relationship to the objective sought to be proven,” but also produced in the jury a strong emotional response that rose to an “unfair” prejudice against Harris. With nothing but this bald allegation, we cannot say that the circuit court abused its discretion by permitting Red Hill to question Harris on the timing of his RSD/CRPS evaluations.

II. Red Hill’s expert testimony met the legal standard to allow the jury to consider the case.

During the trial, Harris moved for judgment twice, at the close of Red Hill’s case and at the close of all of the evidence, on the basis that there was insufficient evidence for the jury to hear the case. Both motions were denied. After the judgment, Harris filed for JNOV or, in the alternative, a Motion for New Trial on the same basis of legal insufficiency of the evidence. Now appealing the denial of those motions, Harris asserts that Red Hill’s expert medical testimony did not meet the legal sufficiency standard to allow the jury to consider the case.

The denial of a motion for judgment or a motion for JNOV are reviewed under the same standard. *Orwick v. Moldawer*, 150 Md. App. 528, 531-32 (2003) (citations omitted). This Court considers “whether on the evidence presented a reasonable fact-finder could find the elements of the cause of action by a preponderance of the evidence.” *Univ. of Maryland Med. Sys. Corp. v. Gholston*, 203 Md. App. 321, 329 (2012) (citation omitted). This Court will construe all inferences “in the light most favorable to the party against whom the motion is made. Consequently, if there is any evidence, no matter how slight, that is legally sufficient to generate a jury question, the case must be submitted to the jury for its consideration.” *Orwick*, 150 Md. App. at 531. The amount of evidence is

“legally sufficient if it showed directly or supported a rational inference of the facts to be proved” that would fairly convince the jury. *Williams v. State*, 5 Md. App. 450, 466 (1968).

Harris supports his claim that Red Hill’s medical testimony did not meet the legal sufficiency standard to permit the jury to hear the case by pointing out that “no less than six medical experts appeared at the trial, and not one of them agreed on the diagnosis of [Harris’s] condition.” Harris argues that Red Hill’s experts “used incorrect facts as a basis for their opinions,” and that overall, their conclusion that Harris did not have RSD/CRPS were wrong.

At trial, Red Hill called three expert witnesses that offered extensive testimony, all of whom were accepted as experts by the circuit court without objection by Harris. First, Red Hill called Dr. Brager, who was the first doctor to perform surgery on Harris. Dr. Brager testified that he found the neurological issues Harris was experiencing to be unrelated to the back surgery that he performed on Harris after the accident. He also expressed that he did not find anything abnormal in Harris’s recovery. Dr. Brager further testified that Harris did not come back or contact him after December 28, 2007.

Second, Red Hill called Dr. Cohen, a board-certified neurosurgeon who has seen and treated many patients with RSD/CRPS. Dr. Cohen examined Harris in 2010 and 2014 and determined that Harris had cervical myelopathy.⁶ Dr. Cohen testified that,

⁶ Cervical myelopathy is a “syndrome that results from a disorder in the spinal cord that disrupts or interrupts the normal transmission of the neural signals.” Cervical myelopathy may affect the arms and hands, legs, and bowel and bladder function, causing symptoms such as numbness and weakness of hands or arms, leg stiffness, and loss of

based on his medical opinion, the syncope events were not caused by the automobile accident, pointing out that “there [was] no indication that there is any ongoing medical cause or mechanism by which anything that happened in the accident . . . could cause syncope a couple of months later.” Dr. Cohen explained that the syncopal event and the spread of the condition throughout Harris’s full body was not consistent with RSD/CRPS, which “usually spreads in a sequential fashion,” taking time spreading from limb to limb. Dr. Cohen also noted during his testimony that Dr. Sicilia and Dr. Hafer-Macko, who initially agreed with Dr. Cohen on the cervical myelopathy diagnosis, changed their opinions after Harris was seen and treated by Dr. Kirkpatrick for RSD/CRPS.

Third, Red Hill presented Dr. Brokaw, who is board-certified in pain management and physical medicine and also knowledgeable about RSD/CRPS. Dr. Brokaw testified that Harris’s neurological issues and symptoms were inconsistent with the RSD/CRPS diagnosis. Dr. Brokaw explained that “whatever it is [Harris] has, it is not RSD,” because the timing of his symptoms did not reflect the typical progress of RSD/CRPS. He noted that Harris’s symptoms “started over his whole body all the time,” whereas RSD/CRPS spreads more slowly through different parts of the body. Further, while syncope does sometimes occur with patients with RSD/CRPS, Dr. Brokaw testified that “[s]yncope is a late effect of RSD,” usually occurring “in the second or third stage, months or years later,” not in the beginning of the syndrome. Explaining that RSD/CRPS

balance. <http://www.columbianeurosurgery.org/conditions/cervical-myelopathy/> (last accessed Nov. 13, 2015). Dr. Cohen testified that he had treated “thousands of patients with cervical myelopathy.”

is a “blood-flow issue mainly,” Dr. Brokow asserted that it was “not something that would be caused by a car accident.”

The testimony presented by Red Hill’s experts was legally sufficient to be sent to the jury; it “supported a rational inference” that Harris was not suffering from RSD/CRPS, or that his neurological disorder was not causally connected to the motor vehicle accident. *Williams*, 5 Md. App. at 446. The jury was appropriately charged with the task of weighing the different expert witnesses’ testimony, and it could determine to whom to accord more weight. *See Braxton v. State*, 123 Md. App. 599, 651 (1998) (discussing that it is “the jury’s function to judge the credibility of the witnesses and weigh their testimony” and thereby “resolve contested facts”). In this case, both Harris and Red Hill called to the stand medical experts who testified as to what they believed to be Harris’s condition. The record in this case consists of thousands of pages of medical reports. Harris wants nothing more than for us to review the evidence and find in his favor. Because sufficient evidence was presented to send the matter to the jury, the judge appropriately denied Harris’ motions for judgment and JNOV.

III. The circuit court properly denied Harris’s proposed jury instructions.

Harris claims that the circuit court abused its discretion when it rejected his three proposed jury instructions. When reviewing challenges to jury instructions, this Court will not disturb them “so long as the law is fairly covered by the jury instructions.” *Farley v. Allstate Ins. Co.*, 355 Md. 34, 46 (1999) (citing *Jacobson v. Julian*, 246 Md. 549, 561 (1967)). The reviewing court must consider whether “the requested instruction was a correct exposition of the law,” whether “that law was applicable in light of the

evidence before the jury,” and whether the substance of the requested instruction was “fairly covered by the instruction actually given.” *Wegad v. Howard Street Jewelers Inc.*, 326 Md. 409, 414 (1992) (citation omitted). The burden rests on the complaining party to show both prejudice and error. *Harris v. Harris*, 310 Md. 310, 319 (1987).

Taken as a whole, Harris’s proposed instructions⁷ suggest that if the claimant recovers under the workers’ compensation claim as well as the third-party claim, then the workers’ compensation insurer is entitled to repayment of the money paid out to the claimant in the workers’ compensation claim. Red Hill objected to the instructions on the

⁷ Harris’s proposed jury instructions were as follows:

Requested Jury Instruction 1

When a person other than the Employer is liable for the injury of the Claimant, and workers’ compensation benefits are also payable, the Claimant may

- a) File a claim for Workers’ compensation; or
- b) [B]ring an action against the other person for damages

Requested Jury Instruction 2

If the Claimant, Mr. Harris, recovers damages, he must:

1. First, deduct the costs and expenses for the action from the damages;
2. [N]ext, reimburse to the Employer and Insurer for the compensation already paid and any amounts paid for medical treatment; and
3. [K]eep the balance of the recover.

Requested Jury Instruction 3

If the amount of recovery received by the Claimant in the claim against the person legally responsible for the damages is less than the amount that the Claimant would otherwise be entitled to receive in workers’ compensation benefits, the Claimant may reopen the workers’ compensation claim and recover the difference between the net amount of recovery in the legal action and the full amount of workers’ compensation payable.

basis that they had no relevance to the issue presented to the jury. Red Hill avers that the instructions' only purpose would be to advise the jury of the monetary results of the third-party case, which, it maintains, would require a full explanation of the third-party case that is not relevant to the decision. The circuit court noted that it would not allow the instruction to be given because "they could sway the jury from its given duty to decide whether or not the RSD/CRPS was related to the accident, it could be a sympathy factor."

Harris's proposed instructions required a discussion, to a degree, of the third-party proceeding. The circuit court and the parties had already determined that the third-party proceeding was not pertinent to the present workers' compensation proceeding. While some discussion of the third-party proceeding necessarily arose during the eight-day trial, it was not enough to warrant jury instructions on the matter. A circuit court commits no error where the proposed instructions are "irrelevant" to the issue before the jury. *Boone v. American Mfrs. Mut. Ins. Co.*, 150 Md. App. 201, 229 (2003) (discussing *Farley v. Allstate Ins. Co.*, 355 Md. 34 (1999)). In this case, the matter before the jury was whether a causal link existed between Harris's accident and his alleged RSD/CRPS. The proposed jury instructions, however, deal with the process of bringing a workers' compensation claim and third-party claim simultaneously and with the distribution of funds after a third-party case. The law raised by the proposed instructions was outside the issue presented before the jury, and the circuit court properly exercised its discretion. *See Rite Aid Corp. v. Levy-Gray*, 162 Md. App. 673, 713 (2005) (holding that a party may be entitled to its proposed instructions only when the legal assertions of the

instructions have been generated by the evidence); *see also Smith Co. v. Smick*, 119 Md. 279, 281 (1913) (reasoning that “the defendant had the undoubted right to have the jury confined to the issue as made by the pleadings”) (citations omitted).

By delving further into the third-party discussion, the proposed jury instructions would have presented more information than was needed and would, therefore, have confused the jury, distracting it from the matter being decided. Although there is the risk, as Harris asserts, that the jury could determine that Harris was being compensated twice without the instruction, that was not the issue before the jury. Clarifying instructions, therefore, were unnecessary and “irrelevant.” *Boone*, 150 Md. App. at 229. Because the “court need not grant a requested instruction if the matter is fairly covered by instructions actually given,” the circuit court appropriately denied Harris’s requested instructions. Md. Rule 2-520(c).

IV. We will not reach the issue of whether the circuit court’s exclusion of Harris’s evidence regarding the third-party claim was appropriate.

Harris further opines that while Red Hill was permitted “to question the diagnosis of RSD/CRPS in relation to the 2010 third-party result,” the circuit court did not permit Harris to present testimony about the suspension of his workers’ compensation benefits following the mistrial of the third-party proceeding. Harris claims that the court abused its discretion by refusing to allow him to present this information because it was “substantially injurious to [his] case.”

Harris offers no argument in support of his conclusory assertion that the circuit court abused its discretion because Harris’s case was damaged. An appellate court is not

required to address an argument on appeal when the appellant has failed to adequately brief his argument. *Honeycutt v. Honeycutt*, 150 Md. App. 604, 618 (2003) (citing Md. Rule 8-504(a), requiring that a brief contain an “[a]rgument in support of the party’s position”); *see also Klauenberg v. State*, 355 Md. 528, 552 (1999) (stating that an appellate court need not consider “arguments not presented in a brief or not presented with particularity”). Because Harris does not support his statement that the court abused its discretion with argument, this Court need not address this issue. *See Beck v. Mangels*, 100 Md. App. 144, 149 (1994) (refusing to address appellants’ questions where appellants failed to offer substantial argument).

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