

17CA0305 Dosien v Dorsey 03-22-2018

COLORADO COURT OF APPEALS

DATE FILED

March 22, 2018

CASE NUMBER: 2017CA305

Court of Appeals No. 17CA0305
City and County of Denver District Court No. 15CV33511
Honorable Shelley I. Gilman, Judge

Ludmila "Mila" Dosien,

Plaintiff-Appellee,

v.

Ronald Dorsey, D.D.S.,

Defendant-Appellant.

JUDGMENT AFFIRMED

Division V

Opinion by JUDGE DUNN

Román and Welling, JJ., concur

NOT PUBLISHED PURSUANT TO C.A.R. 35(e)

Announced March 22, 2018

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¶ 1 Ronald Dorsey, D.D.S., appeals the judgment awarding Ludmila “Mila” Dosien \$1,636,911 in future economic damages. We affirm.

I. Background

¶ 2 Dr. Dorsey replaced a crown on one of Ms. Dosien’s teeth. As a result of Dr. Dorsey’s negligent placement of the post supporting the crown, Ms. Dosien developed a heart infection. To treat the infection, doctors prescribed Ms. Dosien gentamicin, an antibiotic with the potential for severe side effects, including damage to the inner ear and vestibular system.¹

¶ 3 Several weeks after Ms. Dosien began taking gentamicin, she experienced dizziness and trouble walking. Based on these symptoms, her primary care physician, Dr. Morris Askenazi, diagnosed her with vertigo. Ms. Dosien later was referred to Dr. Carol Foster, a neurotology specialist² who examined Ms. Dosien and determined that the gentamicin permanently damaged her inner ear, causing the vertigo. As a result of the vertigo, Ms. Dosien

¹ At trial, an expert explained the vestibular system as the “three main parts of the body that give you the ability to stand and walk.”

² A neurotologist “specialize[s] in dizziness . . . and balance . . . that comes from the ear or the brain.”

suffered falls and other injuries. She was left unable to walk without a cane, and her ability to independently perform day-to-day activities changed “pretty dramatic[ally].”

¶ 4 Ms. Dosien filed this malpractice action against Dr. Dorsey. The jury found in favor of Ms. Dosien and awarded her, as relevant here, \$1,636,911 in future economic damages.

II. Future Medical Expenses

¶ 5 Dr. Dorsey does not challenge the jury’s liability finding or its award of non-economic damages. But he contends that the jury’s future economic damages award should be vacated because, in his view, Ms. Dosien presented insufficient evidence to show that those damages would be “necessarily incurred.” We disagree.

¶ 6 Ms. Dosien contends that this issue is not preserved for appeal because Dr. Dorsey did not move for a directed verdict. We, however, are not aware of authority requiring a party to seek a directed verdict to later challenge whether a damage award is sufficiently supported. In any event, we need not wade into the preservation issue because it does not affect the outcome here. We therefore will review de novo whether sufficient evidence supports the damages award. *Blood v. Qwest Servs. Corp.*, 224 P.3d 301,

314 (Colo. App. 2009), *aff'd*, 252 P.3d 1071 (Colo. 2011); *accord Northstar Project Mgmt., Inc. v. DLR Grp., Inc.*, 2013 CO 12, ¶ 14. In doing so, we view the evidence in the light most favorable to the verdict. *Northstar Project Mgmt.*, ¶ 14.

¶ 7 To warrant an award of future medical expenses, a plaintiff must present substantial evidence establishing a reasonable probability that the expenses will necessarily be incurred. *Wallbank v. Rothenberg*, 74 P.3d 413, 419 (Colo. App. 2003) (*Wallbank I*); *cf. Kendall v. Hargrave*, 142 Colo. 120, 123, 349 P.2d 993, 994 (1960) (requiring a showing that medical expenses be a “necessary and reasonable value of the services rendered”). Substantial evidence supports a verdict if it is probative, credible, and competent enough to “warrant a reasonable belief in the existence of facts supporting a particular finding, without regard to the existence of contradicting testimony or contradictory inferences.” *Palmer v. Diaz*, 214 P.3d 546, 552 (Colo. App. 2009).

¶ 8 Having reviewed the record, we conclude that substantial competent evidence supports the jury’s future economic damages award. First, Dr. Askenazi testified as an expert in primary care medicine. He explained that he had treated Ms. Dosien for about

twelve years and that the vertigo created “a pretty dramatic change.” He stated that before the vertigo Ms. Dosien “manage[d] to live a productive life and to be independent,” but that the vertigo affected her ability to even drive. And because of her difficulty in maintaining her balance, he testified that she would often “trip[] over something or [lose] her balance and fall[].” So she consistently began using a cane after the vertigo. Years after her diagnosis, Dr. Askenazi did not “believe she [was] having any improvement.”

¶ 9 Next, without objection, Dr. Foster was qualified to testify as a neurotology expert. She explained the effects of inner ear damage. Specifically, she testified that “people who don’t have an inner ear balance system are much, much more likely to have damaging falls.” She also explained that patients with vertigo “can’t drive themselves, so they can’t do routine things” on their own. And after running tests on Ms. Dosien, she determined that “[t]here was just a little hint of function” in her inner ears and that “her eye movements . . . [had] very poor responses.” Dr. Foster testified that “by six months after the original injury, any improvement that’s going to occur will have occurred, and anything that’s left after that is permanent.” She explained that the goal of the recommended

medical expenses was to prevent or mitigate Ms. Dosien's falls and without the recommended care, the risk of sustaining serious injuries would continue. She confirmed that her recommended future medical care expenses were "reasonable and medically necessary."

¶ 10 Shayna Fowler, a rehabilitation counselor, then testified as an expert in life care planning. She described a life care plan as a document developed for people "involved in some type of catastrophic injury" or who have "some type of medical condition" that "outlines their future medical care and rehabilitative care and the cost of those needs for the rest of [their] life." Ms. Fowler testified that she reviewed Ms. Dosien's medical records, spoke with her doctors, and interviewed Ms. Dosien to develop a life care plan to address her permanent vertigo. Ms. Fowler then explained her proposed life care plan to the jury and reviewed the recommended services along with the expected duration, frequency, and cost of those services.

¶ 11 In particular, Ms. Fowler testified about several specific recommendations that she and the doctors made to mitigate Ms. Dosien's injury risk and maintain her quality of life, including

- a physiatrist to help direct her rehab program, monitor her treatment plan, and help build her strength and function;
- an occupational therapy home visit to ensure that her home was furnished with “equipment or supplies that would help her to be more independent and functional”;
- physical therapy to “help her find some modalities that she could do on her own”;
- a cane for a period of time, which would then be upgraded to a four-wheeled walker, and eventually a wheelchair or power scooter;
- a rolling utility cart in order to carry excess items because her cane only allows her to carry items with one hand;
- a personal care assistant to cook for her, run errands with her, and help with household chores;
- a method of reliable transportation to make three to seven trips a week for appointments and other errands;
- a housecleaner once per week to deep clean her home;

- a defined number of sessions with a personal trainer to “help with that core strength, keep her balance,” and to help with the weight she had gained due to inactivity;
- home modifications, including a walk-in bathtub and a stackable washer and dryer; and
- an iPad and audiobooks because Ms. Dosien felt isolated, “[could not] do anything,” and “[it was] like Ground Hog day every day for her, sitting there.”

¶ 12 Ms. Fowler explained why each item on the life care plan was necessary. And Drs. Askenazi and Foster unequivocally confirmed during their respective testimony that their care recommendations were reasonable and medically necessary.

¶ 13 Ms. Dosien also shared her vertigo story with the jury. She explained that before the vertigo, she had “been independent for a very long time” and “did everything” around the house. But since the diagnosis, she had difficulty performing simple tasks and had fallen several times. She testified that she fell into the counter, across her coffee table, and getting out of her bed and bathtub. The jury saw several photographs showing “gash[es],” burns, cuts, and bruises that Ms. Dosien sustained resulting from various falls.

Throughout her testimony, Ms. Dosien confirmed that she had difficulty performing daily tasks.

¶ 14 In all, the jury heard evidence that Ms. Dosien’s vertigo was permanent. And it learned what type of medical care was reasonable and necessary to mitigate future harm and ensure Ms. Dosien’s safety. It heard from three experts who opined to the future care required, and it received a detailed explanation of the life care plan recommendations. Thus, substantial evidence sufficiently supported the jury’s award of future economic damages. Under these circumstances, we will not disturb the jury’s award. *Cf. Margenau v. Bowlin*, 12 P.3d 1214, 1218 (Colo. App. 2000) (declining to disturb jury’s damages award where the award could be reasonably supported by the record despite physician’s ostensibly equivocal opinion about the causation of plaintiff’s injuries and the frequency of plaintiff’s future treatment).

¶ 15 Still, relying on *Wallbank I*, Dr. Dorsey contends that the evidence showed only that the future medical expenses were a “possibility rather than necessity.” But *Wallbank I* doesn’t help him. There, the division concluded that there was no evidence that future medical expenses would be incurred. 74 P.3d at 419. For

the same reason, *Reynolds v. Reichwein*, 510 P.2d 895, 896 (Colo. App. 1973) (not published pursuant to C.A.R. 35(f)), is not helpful. The evidence presented in that case likewise established that future medical treatment was only a possibility.

¶ 16 That is not the case here. As already outlined, substantial competent evidence showed the vertigo was permanent and without the recommended care, Ms. Dosien would continue to face significant risk of injury. That Ms. Dosien would continue to fall and injure herself without the recommended care was not, as Dr. Dorsey suggests, a “possibility.” Rather a jury could reasonably conclude from the evidence presented that Ms. Dosien will permanently require help, that the recommended care was reasonable and necessary, and that she faced a near certain risk of falls and serious injuries without it. *See Pfantz v. Kmart Corp.*, 85 P.3d 564, 570-71 (Colo. App. 2003) (noting that evidence of plaintiff’s history of medical treatment for the injury and testimony about the extent of injury, ongoing therapy, and lingering symptoms supported the verdict despite expert’s “speculation” of required future surgery); *cf. CeBuzz, Inc. v. Sniderman*, 171 Colo. 246, 255, 466 P.2d 457, 461 (1970) (concluding that plaintiff’s testimony

about her continuous pain and documented doctor and hospital visits was sufficient for the jury to consider future damages).

¶ 17 We thus conclude that sufficient evidence supported the jury's award of future medical expenses.

III. Statutory Damages Cap

¶ 18 Dr. Dorsey alternatively contends that the trial court abused its discretion in finding good cause to exceed the cap on total damages under the Health Care Availability Act (HCAA), §§ 13-64-101 to -503, C.R.S. 2017. We disagree.

¶ 19 The HCAA generally limits damage awards for medical malpractice to \$1,000,000. § 13-64-302(1)(b), C.R.S. 2017; *Wallbank v. Rothenberg*, 140 P.3d 177, 180 (Colo. App. 2006) (*Wallbank II*). As relevant here, the HCAA provides an exception to the damages cap when the trial court, upon good cause shown, “determines that the present value of . . . future economic damages would exceed such limitation and that the application of such limitation would be unfair.” § 13-64-302(1)(b). It is the plaintiff's burden to establish good cause (a “legally sufficient reason”) and unfairness (“marked by injustice, partiality, or deception”). *Wallbank II*, 140 P.3d at 180 (citations omitted).

¶ 20 “In making findings as to ‘good cause’ and ‘unfairness’ (which essentially are different ways of saying the same thing), trial courts must consider the ‘totality of circumstances.’” *Vitetta v. Corrigan*, 240 P.3d 322, 329 (Colo. App. 2009). But because the statute does not include a list of factors for the court to consider, the court “may exercise its discretion to consider factors it deems relevant.” *Wallbank II*, 140 P.3d at 180-81.

¶ 21 A court’s determinations of good cause and unfairness are factual questions that we review for an abuse of discretion. *Id.* at 179; accord *Pressey v. Children’s Hosp. Colo.*, 2017 COA 28, ¶ 43. A court abuses its discretion if its decision is manifestly arbitrary, unfair, or unreasonable, or when it misapplies the law. *Gateway Logistics, Inc. v. Smay*, 2013 CO 25, ¶ 13.

¶ 22 After the verdict, Ms. Dosien moved for entry of judgment and argued that it was appropriate to exceed the statutory damages cap because she presented unrebutted evidence of “severe, permanent, bilateral vestibular damage” and was “no longer able to perform activities of daily living . . . in a safe manner.” She explained that she would continue to “suffer a future similar to the past three years” if she did not receive the full amount the jury awarded.

¶ 23 Dr. Dorsey argued — as he does now — that the evidence of future medical costs was “extremely speculative” and “based on the unfounded opinions” of Dr. Askenazi and Dr. Foster. He also argued that the statutory cap would be adequate to cover Ms. Dosien’s future care needs. And he contended that entering judgment above the cap based solely on the jury’s verdict would circumvent “the legislative goal of reducing the cost of health care.”

¶ 24 Rejecting those arguments, the trial court found that Ms. Dosien “has established good cause to exceed the statutory limitation and that application of the limitation would be unfair.” In so finding, the trial court considered and credited the testimony of Dr. Askenazi that Ms. Dosien had exhibited changes since the vertigo began and that he had “not seen any improvement in her condition in the last few years.” The court also credited his testimony that Ms. Dosien’s quality of life would improve by “mitigating dangers caused by the vertigo.” And the court considered and credited the expert opinions of Dr. Foster that established the permanency of the vertigo and Ms. Fowler’s conclusions about the care needed to mitigate the dangers Ms.

Dosien faced.³ Because the trial court considered relevant factors and because the record supports the trial court’s ruling, we can’t conclude that the court abused its discretion in finding good cause to exceed the cap. *See Wallbank II*, 140 P.3d at 180-81 (A trial court “may exercise its discretion to consider factors it deems relevant when determining whether a movant qualifies for the . . . exception to the cap.”).

¶ 25 To Dr. Dorsey’s assertion that the experts’ testimony was “highly speculative” and “unfounded,” we have two observations. First, Dr. Dorsey did not challenge the relevance or reliability of the experts’ opinions under CRE 702. *See* CRE 702; *Estate of Ford v. Eicher*, 250 P.3d 262, 266 (Colo. 2011) (the standard for admissibility of expert testimony is relevance and reliability). And the experts’ opinions were all based upon their significant knowledge, experience, training, and education. To the extent their opinions were not couched in terms of absolute certainty, a degree of uncertainty does not make them speculative or unfounded. *See*

³ The court also adopted “the reasons set forth in” Ms. Dosien’s reply brief, which included arguments about legislative intent and the extent to which other damages would not adequately compensate her.

People v. Ramirez, 155 P.3d 371, 378 (Colo. 2007) (noting that expert “[t]estimony is not speculative simply because . . . [it] is in the form of an opinion or stated with less than certainty”). Second, to the extent Dr. Dorsey is challenging the experts’ credibility, it was for the trial court to consider the evidence, weigh the testimony, and assess credibility. See *Kim v. Grover C. Coors Tr.*, 179 P.3d 86, 97 (Colo. App. 2007) (“[T]he trier of fact may reject unpersuasive expert testimony”). That it reached a different conclusion than Dr. Dorsey does not establish an abuse of discretion.⁴

¶ 26 In short, the trial court did not abuse its discretion in finding good cause to exceed the HCAA damages cap.

IV. Conclusion

¶ 27 We affirm the judgment.

JUDGE ROMÁN and JUDGE WELLING concur.

⁴ Though it doesn’t affect the outcome, we observe that the record belies Dr. Dorsey’s argument that the testimony did not separate Ms. Dosien’s future care for vertigo from the necessary care for her other medical issues. Indeed, all three witnesses testified that their recommendations related only to the vertigo diagnosis. And the jury was instructed to limit its award of future damages to injuries caused by Dr. Dorsey’s negligence. We presume the jury followed that instruction. See *Alhilo v. Kliem*, 2016 COA 142, ¶ 39.

