ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
SARAH J. HEFFLEY, JUDGE

DIVISION I

CA 06-1461

ROBBI BLACK
APPELLANT

V.

BRITTANY A. VANN
APPELLEE

October 10, 2007

APPEAL FROM THE MONTGOMERY COUNTY CIRCUIT COURT
[NO. CIV-2004-30]

HONORABLE JERRY WAYNE LOONEY, JUDGE

AFFIRMED

In this personal-injury lawsuit, appellant Robbi Black appeals from a judgment awarding her $744 in damages and an order denying her motion for a new trial. For reversal, she raises two issues that deal with jury instructions, and she also argues that the jury's damage award is inadequate and that its verdict is contrary to the evidence. We find no merit in the arguments raised and affirm.

On September 11, 2002, appellant was a passenger in a pickup truck driven by appellee Brittany Vann. Vann lost control of her truck and had an off-set, head-on collision with a vehicle in the opposing lane of traffic. The impact of the collision was strong, as it knocked the other vehicle backwards some sixty-eight feet. Both vehicles overturned. Appellant was taken by ambulance to the emergency room with complaints of pain to her left shoulder, left knee, and her

nose. She was treated and released that evening, but was advised to follow up with her regular physician, Dr. Mike Verser. Appellant saw Dr. Verser on September 13, 2002, and complained of back pain, left knee pain, and swelling to her forehead.

More than two years after the accident, on January 27, 2005, appellant returned to Dr. Verser complaining of pain in her left knee, which she related to the 2002 car accident. Dr. Verser recommended an MRI, which was performed on February 7, 2005. The result of the MRI was "normal."

On February 22, 2005, appellant had an appointment with Dr. Eric Carson, a chiropractor. Appellant presented with complaints of pain in her lower back, left hip, and left knee, which she attributed to the 2002 accident. At the request of Dr. Carson, a radiographic study was done of appellant's lumbar spine by Dr. Kenneth Ratajczak. Dr. Ratajczak reported that the lumbar motion study indicated translational motion segment change at L2, L3, and L4. His impression was lumbar hypolordosis, and he assigned a permanent impairment rating of twenty percent based on the AMA Guides, 5th edition.

By this lawsuit, appellant claimed that her left knee and lower back were injured in the accident, and she sought damages for medical expenses, pain and suffering, loss of income and earning capacity, mental anguish, and permanent impairment. Appellee accepted liability, and the case went to trial on the issues of whether appellant's claimed injuries were the result of the accident, and the amount of damages. The jury returned a verdict of $744, and judgment was entered accordingly. Appellant subsequently filed a motion for a new trial. The trial court denied that motion by written order, and this appeal followed.

Appellant first argues that the trial court erred by giving AMI 2214 regarding mitigation

of damages. The instruction given by the trial court tracked the model instruction and advised the jury that an injured person must use ordinary care to determine whether medical treatment is needed and to obtain medical treatment, and that any damages resulting from a failure to use such care cannot be recovered. The model instruction also includes a provision that an injured person must use ordinary care to follow the instructions of her physician, but this part of the instruction was not given to the jury.

Appellant contends that the trial court erred by giving the instruction because there was no evidence that her damages were increased by the failure to seek medical treatment. Appellant bases this argument on the decision in *Check v. Meredith,* 243 Ark. 498, 420 S.W.2d 866 (1967), in which the supreme court held that the trial court properly refused to give that portion of the instruction about following the recommendations of a physician, because there was no proof that the failure to follow the physician's recommendations resulted in an enhancement of the plaintiffs' damages. Appellant argues that Dr. Carson testified that it would have been impossible for her to have avoided permanent impairment from the accident, and she asserts that there was no contradictory proof that her failure to seek medical treatment for her back caused any permanent injury.

A party is entitled to a jury instruction when it is a correct statement of the law, and there is some basis in the evidence to support giving the instruction. *McMickle v. Griffin,* 369 Ark. 318, ___ S.W.3d ___ (2007). We will not reverse a trial court's decision to give an instruction unless the court abused its discretion. *Cinnamon Valley Resort v. EMAC Enterprises, Inc.,* 89 Ark. App. 236, 202 S.W.3d 1 (2005). We find no abuse of discretion here. Appellant testified that she began experiencing pain in her back two weeks after the accident. She said that the pain had become

progressively worse and was exacerbated with activity. According to appellant, she used to ride her horse everyday and had planned on being a horse trainer, but she had not been able to ride her horse since the accident. She said she also had trouble standing for long periods of time when she worked at a restaurant, that she had problems bending to pick up trash at another job, and that she had not been able to stock shelves during her brief employment at the Dollar Store. Long car rides bothered her as well. Yet, despite these alleged difficulties, appellant did not seek treatment for her back until over two years after the accident.

Dr. Carson testified that appellant sustained damage to the anterior longitudinal ligament and that her vertebra at L2, L3, and L4 were out of alignment and "floppy." He opined that ligament damage never heals one-hundred percent. Dr. Carson said that the misalignment of the vertebra caused pinching of the nerves and pressure to be placed on her spinal cord, resulting in pain. He explained that an artery runs alongside the nerve, and that when the nerve is pinched, it cuts off the supply of blood and nutrients to the disc. Over time, the disc will begin to dehydrate and allow the joints to become bone to bone. This shriveling of the discs caused chronic pain. Dr. Carson testified that treatment called corrective spinal manipulation brings more circulation and causes the joint to start lubricating itself. Because appellant's discs were starting to dry out, she was treated with this procedure. He believed that her condition had improved considerably with treatment.

Dr. Carson further testified that appellant's injuries were permanent and progressive but that there is deterioration of the spine when it is not taken care of. He said that appellant's condition had digressed and her injuries had worsened over the two years since the accident, and that ideally it would have been better to start treatment after the accident. He also said that it

would have been reasonable for a person exercising ordinary concern for her body to seek medical attention after becoming symptomatic with the type of injuries sustained by appellant. Dr. Carson testified that her condition would be aggravated with activity, such as horse riding and even household chores.

On this evidence, we cannot conclude that giving this instruction was error. While there was evidence that appellant's condition was permanent and progressive, there was also testimony that appellant's condition had worsened with the lack of treatment. Therefore, we affirm on this point.

The next question for us to decide is whether the trial court erred by failing to give AMI 2215, the instruction on collateral sources. Appellant's proffered instruction would have told the jury that it was not to reduce the amount of damages by any "medical payment benefits" received by or on behalf of appellant. As stated before, a party is entitled to a jury instruction when it is a correct statement of the law, and there is some basis in the evidence to support it. *McMickle v. Griffin, supra*. We will not reverse a trial court's refusal to give a proffered instruction unless the court abused its discretion. *Schmidt v. Stearman,* 98 Ark. App. 167, ___ S.W.3d ___ (2007).

The "Note on Use" to AMI 2215 states that the instruction should be given when the jury may assume or infer the existence of collateral sources given the facts of the case. Appellant argues that the instruction should have been given because there was testimony that appellant sat in her truck and that she drove. Appellant contends that, because the jury knew that she drove a vehicle, it would naturally assume that she had insurance covering her medical expenses. We are not persuaded that payment from a collateral source can be fairly drawn from vague references to operating a vehicle. Without more, the inference appellant suggests is too remote and indiscreet,

and thus does not provide a sufficient factual predicate for giving this instruction. The trial court did not abuse its discretion by refusing this instruction.

As her final point, appellant contends that the trial court erred in denying her motion for a new trial. The jury's verdict was based on interrogatories. It awarded appellant $744 for medical expenses incurred in the past. However, the jury awarded zero damages for permanent injury, future medical expenses, pain and suffering, mental anguish, lost wages and future earnings. Appellant moved for a new trial, arguing that the jury's verdict was contrary to the evidence and that there had been an error in the assessment of the amount of the recovery because the jury failed to take into account all the elements of her claimed damages.

Rule 59(a)(5) of the Arkansas Rules of Civil Procedure provides that a new trial may be granted on the ground of error in the assessment of the amount of the recovery, whether too large or too small. When the primary issue is the alleged inadequacy of the damage award, we will affirm the denial of a motion for a new trial absent a clear and manifest abuse of discretion. *Fritz v. Baptist Memorial Health Care Corp.,* 92 Ark. App. 181, 211 S.W.3d 593 (2005). An important consideration is whether a fair-minded jury could have reasonably fixed the award at the challenged amount. *Depew v. Jackson,* 330 Ark. 733, 957 S.W.2d 177 (1997). When a motion for a new trial is made on the ground that the verdict is clearly contrary to the preponderance of the evidence, we will likewise affirm the denial of the motion if the jury's verdict is supported by substantial evidence. *Barringer v. Hall,* 89 Ark. App. 293, 202 S.W.3d 568 (2005).

Citing *Young v. Barbera,* 366 Ark. 120, ___ S.W.3d ___ (2006); *Carr v. Woods,* 294 Ark. 13, 740 S.W.2d 145 (1987); *Garnett v. Crow,* 70 Ark. App. 97, 14 S.W.3d 531 (2000); and *Tirado v. O'Hara,* 70 Ark. App. 152, 15 S.W.3d 715 (2000), appellant contends that she should have been

granted a new trial because the jury failed to take into account all of the elements of the total injury proven. The decisions in *Carr, Garnett,* and *Tirado* provide little guidance because they each involved the review of a trial court's grant of a motion for a new trial, whereas here the trial court denied appellant's motion for a new trial. *See Depew v. Jackson, supra* (cases reviewing the grant of a new trial offer little guidance when reviewing the denial of a motion for a new trial). *Young* is also of little help because the trial court, sitting as the trier of fact, committed error by requiring expert testimony to prove that the treatment Young received was reasonable and necessary.

As we view the evidence here, Dr. Carson testified that appellant's injuries were permanent and debilitating. He also expressed the opinion that appellant's injuries were caused by the accident, believing that the injury to her back could only have been caused by major trauma. He also stated that given the interconnectivity of nerves, appellant's knee pain was caused by the injury to her back.

By contrast, the jury heard testimony that appellant did not seek medical attention for her injuries for over two years, although she had been to the doctor on any number of occasions. In January 2005, appellant saw Dr. Verser for knee pain, but the result of the MRI was unremarkable. During this visit, she made no mention of having any problem with her back. Yet, she presented to Dr. Carson a month later with complaints about her back. In her deposition, appellant did not make any claim that her back had been injured in the accident, as she only spoke of a knee problem. Appellant also admitted that she had both knee and back problems prior to the accident. Although appellant stated that she could no longer ride her horse, there was testimony that appellant rode her horse in a Christmas parade following the accident, and she also participated in a rodeo. Even though she testified that she was not a serious competitor in the rodeo and had just

wanted to be "out there," it was revealed that she had been the runner-up in the competition. Appellant also testified that she had ridden a calf. Appellant's employment application at the Dollar Store showed that appellant claimed no physical limitations.

The admission of fault by a defendant does not automatically entitle the plaintiff to recover damages. *James v. Bill C. Harris Construction Co., Inc.,* 297 Ark. 435, 763 S.W.2d 640 (1989). The jury is the sole judge of the credibility of the witnesses and of the weight and value of the evidence, and it may believe or disbelieve the testimony of one or all of the plaintiff's witnesses, even though the evidence is uncontradicted and unimpeached. *Potlatch Corp. v. Missouri Pacific Railroad Co.,* 321 Ark. 214, 902 S.W.2d 217 (1995).

The jury in this case awarded appellant past medical expenses in the amount of $744, which roughly approximates the charges associated with her trip to the emergency room following the accident. Based on the evidence, we believe the jury could reasonably conclude that appellant was not as injured as she claimed, or that the accident was not the proximate cause of her injuries, or both. We can find no abuse of discretion, nor can we say that the jury's verdict is not supported by substantial evidence. Therefore, we affirm the denial of appellant's motion for a new trial.

Affirmed.

GLOVER and VAUGHT, JJ., agree.