

ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
WENDELL L. GRIFFEN, JUDGE

DIVISION III

CA08-20

June 18, 2008

CONNIE COMBS-SMITH
APPELLANT

AN APPEAL FROM PULASKI
COUNTY CIRCUIT COURT
[CV2005-13368]

V.

HON. JAMES MOODY, JR., JUDGE

CHLMANSE HOPKINS and DART
CONTAINER CORPORATION OF
MISSISSIPPI, LLC, d/b/a DART
CONTAINER CORPORATION
APPELLEES

AFFIRMED

Connie Combs-Smith asserts that the trial court abused its discretion in not ordering a new trial because the jury failed to consider all of the elements of damage in her personal-injury case. Specifically, she argues that the award is not supported by the evidence because the jury awarded damages for only a portion of her medical expenses. She also argues that the jury's award is internally inconsistent because the jury awarded damages for medical expenses and pain and suffering but omitted damages for the nature, extent, and duration of her injuries. Appellant's sufficiency argument does not provide a basis for reversal; it is merely a complaint that the jury did not believe her proof. Further, appellant waived the argument that the verdict was inconsistent because she failed to challenge the verdict before the jury was discharged. Accordingly, we affirm the trial court's order.

I. Facts

Appellant was injured in an automobile accident that occurred on August 9, 2004, when appellee Chlmanse Hopkins ran a red light and struck appellant's vehicle. At the time,

Hopkins was employed by appellee Dart Container Corporation, and was acting within the scope of his employment. Appellant sued appellees for negligence. Appellees conceded that Hopkins was at fault for running the red light, so only the issue of damages was tried to the jury.

On the day of the accident, appellant was taken to the emergency room. The emergency room records stated that appellant had mild back pain and right knee pain but no loss of consciousness, and no neck, chest, or abdominal pain. However, in appellant's deposition, she contradicted the record, stating that she never told the doctor that she had mild back pain or no loss of consciousness, and that she never denied having neck, chest, or abdominal pain. In fact, appellant insisted that she never spoke to the emergency room doctor.

X-rays of her back and knee showed no objective finding of an injury but did reveal degenerative changes in each. A comparison of appellant's back x-ray from 2002 showed a straightening of the lumbar lordosis with no evidence for fracture or dislocation. Appellant initially denied that she had experienced back pain prior to the August 9, 2004 accident or had x-rays taken of her back prior to that incident. But when confronted with the 2002 record, she admitted that she had complained of back pain in 2002. Nonetheless, she said that she did not remember having x-rays taken of her back at that time.

In any event, appellant was directed to see her personal physician, Dr. Rose Bullock. She first saw Dr. Bullock on August 11, 2004, and complained of body aches, lower back pain, and neck pain. On August 23, she complained of headaches, and pain in her neck, back, shoulder, and feet. Dr. Bullock noted swelling in both feet. Dr. Bullock prescribed aquatic therapy, which appellant refused because she said something in the water made her sick. Dr. Bullock then ordered hot packs and a TENS unit for pain. Appellant was also given a prescription for pain medication on each visit with Dr. Bullock.

Dr. Bullock ordered physical therapy for three-to-four weeks. Beginning August 11, appellant received physical therapy every one-to-three days, until August 26, 2004. Dr. Bullock's next report after September 3 stated, "Pt. DNKA for further scheduled visits. DC PT [illegible] to noncompliance." The next therapy session was billed for October 19, 2004.

In her deposition, appellant admitted that she did not comply with the prescribed therapy. For example, she did not apply moist heat as recommended. Although she testified that she replaced the pads for her TENS unit as recommended, in her deposition, she stated that she did not. She also said that when she refused aquatic therapy, she resumed the "other therapy," which she explained was "quiet time" that was advised by Dr. Bullock. Even though there is no bill reflecting payment for any physical therapy services received between August 26, 2004, and October 19, 2004, appellant insisted that she continued with therapy in that interim.

The next medical record from Dr. Bullock after September 3 is also dated October 19, 2004. Appellant's chief complaints upon her return were left knee pain, shoulder pain, and back pain. She reported left arm pain on November 3, 2004, and was instructed to apply moist heat to her arm. Appellant first specifically complained of left elbow pain on November 11, 2004. On November 22, she complained of pain in her lower back and left foot.

Dr. Bullock noted on November 22, 2004, that appellant was "still" receiving therapy for her left elbow. She ordered an MRI of appellant's left elbow and foot. The MRIs were taken on December 16, 2004, and were reviewed by Dr. Thomas Rooney, an orthopedic surgeon to whom Dr. Bullock had referred appellant. He concluded that the MRI of appellant's left elbow showed that appellant had a "loose body" in the posterior joint space but showed no evidence of an acute injury to the other structures of the elbow, including the ligaments. Due to appellant's obesity (she weighed approximately 306 pounds), Dr. Rooney recommended giving appellant more time to heal, rather than performing surgery. He opined

that her arm “is much too big to consider arthroscopy of the elbow.” He speculated that an “open” surgery might be considered after six more months.

By way of deposition testimony, Dr. Bullock explained that the “loose body” in appellant’s elbow could have been caused by an injury or by arthritis. Nonetheless, she saw no signs of arthritis, and opined that it was “more likely than not” that appellant’s left elbow pain was caused by the accident, even though appellant did not specifically complain of elbow pain until November. Dr. Bullock explained that appellant’s elbow pain could have become more pronounced as she began to use her elbow more frequently. However, the doctor admitted that suggestion was speculative.

The MRI of appellant’s left foot revealed “a sprain of the mid-foot/forefoot with a Lisfranc ligament sprain, and edema at the bases of the third and fourth metatarsals.” Dr. Rooney reported that the foot abnormalities “could represent a chronic stress reaction or a microfracture (bone bruise).” Dr. Rooney concluded that there was nothing else to be done medically to help appellant’s foot, except to allow more time to heal.

Dr. Bullock concluded that appellant’s left foot sprain was “more likely than not” caused by the accident. Yet, the doctor admitted that “anything” could have happened between August and November, when appellant first specifically complained of elbow pain and left foot pain. As to appellant’s knee pain, Dr. Bullock stated that it is normal for a person with appellant’s “body mass index” to have a degenerative change in the knees.

On February 7, 2005, Dr. Bullock concluded that appellant had suffered permanent impairment to her left elbow and left foot. She ultimately referred appellant to Dr. Annika Whitfield, a podiatrist. Appellant saw Dr. Whitfield on April 11 and 18, 2005. Dr. Whitfield diagnosed appellant with tendonitis and swelling in her left ankle. Appellant was advised to follow-up as needed. On June 15, 2005, Dr. Bullock released appellant with a 5% impairment rating to the body as a whole.

Appellant admitted that she was involved in two additional automobile accidents after the August 9, 2004 accident, one of which may have been in October 2004 (the same month that she returned to Dr. Bullock after a six-week hiatus). The parties stipulated that the other accident occurred on May 17, 2005.

Appellant further testified that, before the August 2004 accident, she did not have any problems with her elbow. She said before the accident, she played softball and kickball, and roller-skated with her children. She said that, since the accident, she cannot tie her shoes or participate in activities with her children or grandchildren. Yet, appellant testified that she watched her grandchildren, who were one- and two-years old, and that she watched another child.

Appellant submitted a list of medical expenses from August 9, 2004, through April 18, 2006, and a list of prescription expenses from October 7, 2004, through June 6, 2005, cumulatively totaling \$16,416.59. The jury was instructed to consider the following elements of damage sustained by appellant that it found was proximately caused by appellees' negligence: the nature, extent, and duration of any injury; the reasonable expense of any necessary medical care, treatment, and services rendered; and any pain and suffering and mental anguish experienced in the past and reasonably certain to be experienced in the future.

The matter was submitted to the jury on special interrogatories. The jury unanimously awarded appellant \$4000 in medical expenses and \$4000 for pain and suffering and mental anguish, but awarded no damages for the nature, extent, and duration of appellant's injury. After the judgment was announced, appellant did not challenge the verdict in any manner. In fact, when the trial judge asked whether there were any motions that needed to be dealt with at that point, appellant's counsel replied, "No, your honor."

Appellant subsequently filed a motion for a new trial pursuant to Arkansas Rule of Civil Procedure 59(a)(5) and (6), which permit a trial court to order a new trial where there

has been an error in the assessment of the recovery and where the decision is clearly contrary to the preponderance of the evidence. She argued that the jury's award of \$8000 was in error, as it was clearly against the preponderance of the evidence. However, appellant did not argue, as she does now, that the verdict was internally inconsistent.

II. Discussion

We first address appellant's argument that the jury's verdict is not supported by substantial evidence because the jury failed to award damages for all of her medical expenses. 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. *See Depew v. Jackson*, 330 Ark. 733, 957 S.W.2d 177 (1997). In reviewing the circuit court's denial of a motion for new trial based on a claim that the damage award was inadequate, an important consideration is whether a fair-minded jury could have reasonably fixed the award at the challenged amount. *Id.* When a motion for new trial is made on the ground that the verdict was clearly contrary to the preponderance of the evidence, we affirm the denial of the motion if the jury's verdict is supported by substantial evidence. *Id.* We affirm the trial court's order in the instant case under either standard.

The reasonableness and necessity of medical expenses are questions of fact to be decided by the fact-finder, but those damages will only be allowed if the plaintiff provides a sufficient evidentiary foundation. *See Young v. Barbera*, 366 Ark. 120, 233 S.W.3d 651 (2006). A party seeking to recover medical expenses in a personal-injury case has the burden of proving both the reasonableness and necessity of those expenses. *Id.* A "necessary" expense is one that is causally related to the tortfeasor's negligence. *Id.* The mere fact that a plaintiff has incurred medical expenses and the defendant has admitted liability does not automatically translate into a damage award equivalent to those expenses. *See, e.g., Depew v. Jackson, supra* (affirming the denial of a motion for a new trial where the plaintiff submitted \$15,000 in

medical bills but was awarded only \$1600, where the jury could have found that some of the plaintiff's bills were due to her preexisting condition rather than the tortfeasor's negligence).

Although appellant asserts that "this is not a case in which it can be argued that the jury simply disbelieved her evidence," the jury could have determined that appellant did not credibly testify regarding the nature, extent, and duration of her injuries. *See Millsaps v. Rinehart*, 276 Ark. 147, 634 S.W.2d 98 (1982) (stating that the testimony concerning the duration and extent of the victim's injuries and pain and suffering was a credibility issue for the jury to determine). As such, the jury could have determined that not all of appellant's medical expenses were causally related to her August 9, 2004 accident.

Appellant cursorily argues that she submitted evidence of over \$16,000 in medical bills "related to this injury." Given that the jury awarded only one-fourth of the medical expenses requested, it apparently believed that some of appellant's complaints and medical treatment did *not* result from her accident. The fatal flaw in appellant's argument is that she neither points this court to the causal connection between the August 2004 accident and *all* of her medical expenses, nor explains how the jury erred in apparently finding that she failed to prove that causal connection.

The jury could have believed that appellant's minor injuries did not require medical treatment for the entire twenty-month period between August 9, 2004, through April 18, 2006. She had preexisting degenerative conditions in her back and knees but no sign of an acute injury to either following the accident. She sustained a sprain to her left foot, and Dr. Rooney opined on January 31, 2005, that nothing else could be done to treat it. The cause of the loose body in her elbow was never determined – no signs of arthritis or acute injury were found – and surgery was never definitely recommended. Moreover, appellant contradicted her own medical records and admitted that she did not follow her prescribed course of therapy. In fact, she did not receive physical therapy from August 26 until October

19, and did not receive other medical treatment from September 3 until October 19.

Notably, appellant did not specifically complain of left elbow pain or left ankle pain until after she returned to the doctor in November, and the jury could have believed that some of her medical treatment at that point and thereafter was necessitated by an October 2004 car accident. *The jury was not even required to believe that appellant did not know in what year the October accident occurred*; it could have believed that appellant knew the accident occurred in October 2004, and that she refused to admit that fact because some of her medical treatment was due to that accident. Additionally, appellant was undisputedly involved in another car wreck in May 2005. While she was ultimately released with a 5% impairment rating to the body as a whole, that rating was assigned *after* the May 2005 injury.

Nor was the jury required to believe appellant's contradictory testimony regarding her physical limitations. Appellant testified that she babysat for her two grandchildren, who were then one- and two-years old. Appellant also said that she watched another child. Yet, she insisted that she had trouble tying her shoes.

On these facts, the jury was not required to believe that appellant's pain arose or continued as she described to her various treating physicians. The issue is not whether the evidence would have supported a *larger* award, but whether substantial evidence supported the award that was given or whether a fair-minded jury could have reasonably fixed the award at the challenged amount. *See Depew, supra; Millsaps, supra*. Because either standard is met, the trial court did not abuse its discretion in denying appellant's motion for a new trial based on the amount of the verdict.

Finally, we hold that appellant waived her argument that the jury's verdict is "internally inconsistent" because the jury awarded damages for medical expenses, pain and suffering, and mental anguish but omitted damages for the nature, extent, and duration of her injury. Appellant waived any objection based on the inconsistency or irregularity of the

verdict because she did not challenge the verdict before the jury was discharged.¹

The long-standing rule in Arkansas is that the time to object to an irregularity or inconsistency in a jury verdict is prior to the discharge of the jury. *See Spears v. Mills*, 347 Ark. 932, 69 S.W.3d 407(2002); *Grubbs v. Hindes*, 101 Ark. App. 45, ___ S.W.3d ___ (Mar. 5, 2008). Appellant did not object to any irregularity in the jury's verdict before the jury was discharged; nor did she present to the trial court the argument that she presents here regarding the inconsistency of the jury's verdict based on the jury's failure to award damages for the nature, extent, and duration of her injury. Accordingly, her argument is not preserved for appellate review. *See Spears, supra; Hindes, supra.*²

Affirmed.

ROBBINS and VAUGHT, JJ., agree.

¹Appellant did not reply to appellees' waiver argument.

²We observe that a jury may choose *not* to award damages for the nature, extent, and duration of the victim's injury even though it awards damages for medical expenses or other damages. *See, e.g., Millsaps, supra* (affirming the denial of a motion for a new trial in a negligence case arising from an automobile accident where the jury was instructed to consider the nature, extent, and duration of the victim's injuries, but limited damages to medical expenses and property damage).