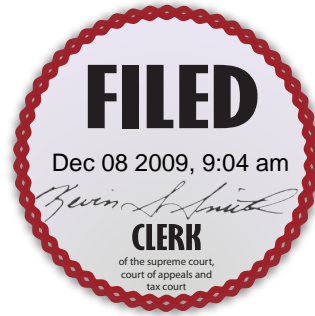


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**IN THE
COURT OF APPEALS OF INDIANA**

RADMILA LAZAREVIC,)

Appellant-Plaintiff,)

vs.)

No. 45A03-0904-CV-161

DAVID L. PERKINS, JR.,)

Appellee-Defendant.)

APPEAL FROM THE LAKE SUPERIOR COURT
The Honorable Jeffery J. Dywan, Judge
Cause No. 45D11-0703-CT-40

December 8, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issue

Radmila Lazarevic appeals a judgment, upon a jury verdict, awarding her \$15,000 in damages following an auto accident. Lazarevic raises a single issue for our review, which we restate as whether the trial court committed reversible error in instructing the jury that, if the evidence warranted, it could award no damages or nominal damages for pain, suffering, and impairment. Concluding the instruction should not have been given but the error was harmless, we affirm.

Facts and Procedural History

The facts are largely undisputed. On March 17, 2005, Lazarevic stopped her vehicle for a red light at the intersection of U.S. 30 and Taft Street in Merrillville, Indiana. Perkins's vehicle rear-ended Lazarevic's vehicle. After a Merrillville police officer arrived on the scene and prepared an accident report, Lazarevic and Perkins both drove away. Lazarevic complained of pain to her head at the accident scene, but did not seek medical treatment the day of the accident.

The following day, Lazarevic saw her family physician and complained of headaches and pain and stiffness in her neck, back, and arms. The physician prescribed pain medication and advised her to take ten days off work. One week later, Lazarevic returned to her family physician with an additional complaint of shoulder pain. The physician prescribed physical therapy, which Lazarevic received for one month and which helped her lower back pain but not the other pain symptoms. Two months after the physical therapy, Lazarevic saw a chiropractor, who provided the same treatment as the physical therapist. After three to four

months of chiropractic therapy, Lazarevic went to see a spine specialist. The spine specialist sent her to see a pain management physician, Dr. Mohammad Uddin, whom she first saw in January 2006. Dr. Uddin prescribed medication and physical therapy, and after those treatments were unsuccessful, a series of four epidural steroid injections. Lazarevic's medical bills ultimately totaled \$103,409.38.

On March 6, 2007, Lazarevic filed a complaint for damages against Perkins. The case was tried to a jury on March 16 and 17, 2009. At trial, Perkins's liability "was only slightly contested," but "damages were hotly contested." Appellant's Brief at 6. The trial court granted Lazarevic's motion for judgment on the evidence regarding her liability, ruling as a matter of law that Lazarevic was not at fault for the accident.

Perkins and Lazarevic disputed the nature and extent of Lazarevic's injuries caused by the accident. Lazarevic called Dr. Uddin, who opined the accident caused Lazarevic to suffer cervical facet joint syndrome and aggravated her cervical degenerative disc disease and cervical radiculitis. Dr. Uddin described these conditions as chronic and opined Lazarevic would need additional future treatment. Perkins called Dr. Russell Glantz, whom he had hired to examine Lazarevic and who had reviewed her medical history and records. Dr. Glantz opined that as a result of the accident, Lazarevic suffered a soft tissue injury to her neck, lower back, and forearm muscles, which would normally heal within three months with physical therapy, and after three months Lazarevic's medical symptoms were no longer related to the accident. Dr. Glantz further opined Lazarevic did not suffer from any cervical

facet joint syndrome or cervical degenerative disc disease, and her symptoms of cervical radiculitis were not close enough in time to the accident to be related.

Based on Dr. Glantz's testimony, Perkins's position was Lazarevic's medical bills resulting from the accident were limited to the three-month period following the accident and totaled just over \$2,000. Perkins's closing argument to the jury recommended a damages award "in the fifteen to thirty thousand dollar range." Transcript at 372.

The trial court's final jury instructions stated:

If you find . . . that the plaintiff has suffered damages then you must then decide the total amount of money that would fairly and reasonably compensate Plaintiff . . . for each element of damages. In deciding these damages, you are to consider the following:

1. The nature and extent of the injuries and the effect of the injuries on the ability to function as a normal person.
2. Whether the injuries are temporary or permanent.
3. The physical pain and mental suffering experienced to the present and to be experienced in the future due to the injuries.
4. The reasonable expense of necessary medical care, treatment and services and the reasonable expense of future medical care, treatment and services.
5. The aggravation of a previous condition or disease.
6. The value of lost time.

. . . Your decision must be based on the evidence relating to damages and not on guess or speculation.

* * *

A person is entitled to the full function of her body, and any loss of function or disability is in itself compensable because of the effect upon the quality and enjoyment of life which would not have been impaired but for the injury.

* * *

Within the guidelines of these instructions, the amount to be awarded as damages rests within your sound discretion. You are instructed that it is not necessary for the Plaintiff . . . to have to introduce evidence as to the monetary value of any pain, suffering, mental anguish or disability suffered. . . .

It is only necessary that . . . Lazarevic has proven to you by a preponderance of the evidence, the nature and extent of any such injury, pain,

suffering, mental anguish or disability, and it [sic] your duty as jurors to fix the monetary value of such pain, suffering, anguish or disability.

Appellant's App. at 83-84, 86. The trial court also gave, over Lazarevic's objection, a jury instruction stating:

Damages for pain and suffering are a jury question that may not be reduced to fixed rules and mathematical precision. In negligence cases claiming personal injury, the jury is not required to award substantial damages for pain and suffering and impairment; an award of no damages or only nominal damages for these items may be appropriate if the evidence so warrants.

Id. at 87.

The jury found Perkins at fault for the accident and awarded Lazarevic \$15,000 in damages, and the trial court entered judgment accordingly. Lazarevic now appeals.

Discussion and Decision

I. Standard of Review

In reviewing a trial court's decision to give or refuse a jury instruction, this court "considers whether the instruction (1) correctly states the law, (2) is supported by the evidence in the record, and (3) is covered in substance by other instructions." Willis v. Westerfield, 839 N.E.2d 1179, 1189 (Ind. 2006). The trial court has discretion in instructing the jury and will be reversed on the latter two issues only for an abuse of discretion. Id. However, we review de novo whether an instruction correctly states the law. Francoise v. Jones, 907 N.E.2d 139, 151 (Ind. Ct. App. 2009), trans. denied. Any error in instructing the jury is subject to a harmless-error analysis: reversal and a new trial are warranted only if, at a minimum, the erroneous instruction "could have formed the basis for the jury's verdict."

Simmons v. Erie Ins. Exchange, Inc., 891 N.E.2d 1059, 1071 (Ind. Ct. App. 2008) (quotation and alteration omitted).¹

II. Jury Instruction on Damages

A. Propriety of the Instruction

Lazarevic argues the trial court erred in granting the instruction stating, “In negligence cases claiming personal injury, the jury is not required to award substantial damages for pain and suffering and impairment; an award of no damages or only nominal damages for these items may be appropriate if the evidence so warrants.” Appellant’s App. at 87. Perkins concedes the evidence did not warrant an award of no or nominal damages for Lazarevic’s pain, suffering, and impairment. See Appellee’s Brief at 2 (stating jury’s \$15,000 award was “eminently appropriate,” even though in Perkins’s view Lazarevic’s medical bills resulting from the accident were little more than \$2,000). We address whether the instruction was proper, considering the factors set forth in Willis, 839 N.E.2d at 1189.

As to the first factor, whether the instruction correctly states the law, we note the instruction tracks language from this court’s opinion in Dee v. Becker, 636 N.E.2d 176, 178 (Ind. Ct. App. 2004) (“In personal injury cases, the trier of fact is not required to award substantial damages for lost income, permanent impairment, or pain and suffering; an award of no damages or only nominal damages for these items may be appropriate if the evidence so warrants.”). In Dee we addressed the plaintiff’s claim the jury’s damages award was

¹ In Simmons, this court noted our supreme court has used two different standards to evaluate harmless error. The supreme court has stated “one seeking a new trial on the basis of an improper jury instruction must show ‘a reasonable probability that substantial rights of the complaining party have been adversely affected.’” Simmons, 891 N.E.2d at 1071 (quoting Elma Buchta Trucking, Inc. v. Stanley, 744 N.E.2d 939, 944 (Ind. 2001)). However, the supreme court has also held “[a]n erroneous instruction merits reversal if it could have formed the basis for the jury’s

inadequate, that is, so small as to clearly indicate the jury was motivated by prejudice or passion or that it considered an improper element. Id. Thus, the quoted language, which explained a reason for rejecting this claim, did not purport to be a generally applicable statement of law regarding what the jury should consider to reach a proper verdict. As a result, it was not appropriate language to include in a jury instruction. See Higgins v. State, 783 N.E.2d 1180, 1184-85 (Ind. Ct. App. 2003) (observing that “language in an appellate opinion stating the rationale for a decision is not necessarily proper for use as a jury instruction”), trans. denied. Further, as Lazarevic points out, the instruction was at best an incomplete statement of the law because substantial damages may also be appropriate if the evidence warrants.

As to the second factor, whether the instruction was supported by evidence in the record, we note that although the extent of Lazarevic’s damages was vigorously contested, there was no evidence Lazarevic suffered no or only nominal pain, suffering, and impairment as a result of the auto accident. Lazarevic’s uncontroverted testimony was she experienced pain in her back, shoulders, neck, and arms in the weeks and months following the accident and medication and physical therapy were largely ineffective in alleviating her pain. The physician testifying for Perkins conceded the auto accident caused at least a soft tissue injury that would normally take three months to heal. Therefore, we cannot say evidence in the record supports an instruction stating the jury could award Lazarevic no or nominal damages for pain, suffering, and impairment.

verdict.” Id. (quoting Fleetwood Enters., Inc. v. Progressive N. Ins. Co., 749 N.E.2d 492, 495 (Ind. 2001)).

Because the instruction that the jury could award no damages or nominal damages for pain, suffering, and impairment was at best an incomplete statement of the law and was not supported by evidence in the record, the trial court abused its discretion in granting the instruction. We next consider whether the error was harmless.

B. Harmless Error

In determining whether the instruction was harmless error, we consider it in reference to the other instructions, as jury instructions “must be viewed as a whole and construed in harmony with each other and it is not necessary for any one instruction to contain all the law applicable to the case.” Northrop Corp. v. General Motors Corp., 807 N.E.2d 70, 94 (Ind. Ct. App. 2004) (quotation omitted), trans. denied. Here, the trial court instructed the jury:

If you find . . . that the plaintiff has suffered damages then you must then decide the total amount of money that would fairly and reasonably compensate Plaintiff . . . for each element of damages. In deciding these damages, you are to consider the following:

1. The nature and extent of the injuries and the effect of the injuries on the ability to function as a normal person.
2. Whether the injuries are temporary or permanent.
3. The physical pain and mental suffering experienced to the present and to be experienced in the future due to the injuries.
4. The reasonable expense of necessary medical care, treatment and services and the reasonable expense of future medical care, treatment and services.
5. The aggravation of a previous condition or disease.
6. The value of lost time.

Appellant’s App. at 83. Further, the jury was instructed that:

Within the guidelines of these instructions, the amount to be awarded as damages rests within your sound discretion. . . .

It is only necessary that . . . Lazarevic has proven to you by a preponderance of the evidence, the nature and extent of any such injury, pain,

suffering, mental anguish or disability, and it [sic] your duty as jurors to fix the monetary value of such pain, suffering, anguish or disability.

Id. at 86. Thus, the other instructions that were given informed the jury: 1) that, assuming liability, it must award fair and reasonable compensation, 2) for all items of actual damage, including physical pain, mental suffering, impairment, and reasonable medical expenses, and 3) the jury has discretion to determine the amount of damages. On appeal, we presume the jury followed the law contained in the trial court's instructions and applied that law to the evidence. Dee, 636 N.E.2d at 180.

In light of these other instructions, the issue becomes whether the jury was confused or misled by the erroneous instruction stating it could award nominal or no damages for pain, suffering, and impairment "if the evidence so warrants." Appellant's App. at 87. We do not think that is the case. The other instructions clearly implied substantial damages may be appropriate based on the evidence, and this court presumes the jury applied these instructions. Further, the jury's award of \$15,000, though considerably less than Lazarevic argued for, is not nominal and was supported by Perkins's evidence. Therefore, Lazarevic has not shown the jury's verdict may have been predicated on the erroneous instruction so as to require reversal and a new trial.

Lazarevic contends she was prejudiced by the instruction because, as in Collins v. Rambo, 831 N.E.2d 241, 250 (Ind. Ct. App. 2005), it was a mandatory instruction. We disagree. A mandatory instruction charges the jury that if it finds a certain set of facts exists, it must render a verdict for a particular party. Skaggs v. Davis, 424 N.E.2d 137, 141 (Ind. Ct. App. 1981). Mandatory instructions are generally disfavored, and this court has cautioned

they not be used. Northrop Corp., 807 N.E.2d at 103. Here, the erroneous instruction was not a mandatory instruction because it neither set forth a factual scenario nor used mandatory language. Rather, the instruction was a general, if incomplete, statement of law and used permissive language, stating nominal or no damages “may be appropriate if the evidence so warrants.” Appellant’s App. at 87 (emphasis added). Especially in light of the other instructions stating the jury’s discretion to fix damages, the jury was not commanded to award no or nominal damages for pain and suffering. Therefore, in light of all the instructions given and the jury’s verdict, the trial court’s error was harmless.

Conclusion

The trial court erred in instructing the jury on the issue of damages, but its error was harmless. Therefore, we affirm the trial court’s judgment.

Affirmed.

DARDEN, J., and MATHIAS, J., concur.