

VIRGINIA:

*In the Supreme Court of Virginia held at the Supreme Court Building in the
City of Richmond on* Friday *the* 12th *day of* December, 2014.

Stephanie A. Herring, Appellant,

against Record No. 140417
Circuit Court No. CL12-122

Samuel L. Johnson, Appellee.

Upon an appeal from a
judgment rendered by the Circuit
Court of Fluvanna County.

Upon consideration of the record, briefs, and argument of counsel, the Court is of opinion that there is error in the judgment of the circuit court.

The appellant, Stephanie A. Herring, filed an action against the appellee, Samuel L. Johnson, seeking damages for personal injuries sustained as a result of an automobile accident in which the vehicle operated by Johnson collided with the rear of the vehicle Herring was driving. Johnson conceded liability but contested the extent of Herring's injuries caused by the accident. At a jury trial limited to the issue of damages, the jury awarded Herring damages in the amount of \$5,649.00.

On appeal, Herring asserts that the circuit court erred by refusing to set aside the jury verdict because it is inadequate as a matter of law. Although Herring claimed medical expenses of approximately \$18,000, she contends that Johnson agreed that she

incurred special damages in the amount of \$5,649.55.¹ According to Herring, that amount was a fixed, constituent part of the verdict, making the verdict inadequate as a matter of law because the jury failed to compensate Herring for any non-monetary damages.

Generally, a court "should not disturb a jury verdict establishing damages which has been fairly rendered and is based on competent evidence." Poulston v. Rock, 251 Va. 254, 258, 467 S.E.2d 479, 481 (1996); accord Norfolk Beverage Co. v. Cho, 259 Va. 348, 353, 525 S.E.2d 287, 290 (2000). A jury verdict, nevertheless, "is not beyond the control of the courts." Id. Indeed, courts have a "duty to correct a verdict that plainly appears to be unfair or would result in a miscarriage of justice." Id.

"[A] jury award in a personal injury action which compensates a plaintiff for the exact amount of the plaintiff's medical expenses and other special damages is inadequate as a matter of law." Bowers v. Sprouse, 254 Va. 428, 431, 492 S.E.2d 637, 639 (1997). This "bright line rule" only applies "to those factual situations in which the jury verdict is identical to the full amount of the special damages." Walker v. Mason, 257 Va. 65, 68, 510 S.E.2d 734, 735 (1999). The rule "does not extend to an award which deviates from the amount of all the special damages claimed, even if the amount of the verdict corresponds to an identifiable portion of the special damages." Id.

In the present case, the jury verdict was less than the full amount of the special damages claimed by Herring even though the

¹ The record reflects and the parties do not dispute that a demonstrative exhibit shown by Johnson to the jury but not admitted into evidence contained that number.

amount awarded, according to Herring, represented a fixed, identifiable portion of her special damages. Thus, "the bright line rule of Bowers cannot be applied." Id. Instead, the verdict must be reviewed "under traditional principles relating to the adequacy of jury verdicts" such as those enunciated in Bradner v. Mitchell, 234 Va. 483, 362 S.E.2d 718 (1987). Walker, 257 Va. at 72, 510 S.E.2d at 737.

Under those principles, when evidence is "uncontroverted and so complete that no rational fact-finder could disregard it[,] it must be considered as a fixed constituent part of the verdict." Bradner, 234 Va. at 487, 362 S.E.2d at 720. "When the remainder of the award consists of an amount which appears to the court insufficient to compensate the plaintiff for such non-monetary elements of damages as pain, suffering, deformity, loss of working capacity, and the like, where such are proven, the verdict should be set aside as inadequate." Id. See also DeWald v. King, 233 Va. 140, 146, 354 S.E.2d 60, 63 (1987) (holding that a verdict in the approximate amount of special damages was inadequate as a matter of law because the jury disregarded certain elements of damages); Rome v. Kelly Springfield Tire Co., 217 Va. 943, 948, 234 S.E.2d 277, 281 (1977) (holding that a verdict in the exact amount of special damages was inadequate as a matter of law because it failed to compensate the plaintiff for any item of non-monetary damages).

At trial, Johnson's medical expert witness, Dr. William C. Andrews, Jr., conceded that the medical treatment Herring received on the day of the accident along with the treatment provided by her primary care physician and Herring's physical therapy through January 14, 2011 - a period of slightly more than three months - was

medically necessary and appropriate for the injuries she sustained in the accident. This testimony was uncontroverted.

The jury award approximated the medical expenses that Johnson did not dispute, i.e., those incurred by Herring from the date of the accident through January 14, 2011.² Those medical expenses were thus "a fixed constituent part of the verdict." Bradner, 234 Va. at 490, 362 S.E.2d at 722. The circuit court's jury instruction for determining damages set forth four elements of damages that the jury should have considered in fixing its award.³ Despite evidence demonstrating Herring's physical pain and inconvenience suffered during the same time frame, the jury verdict represents only one of those four elements: Herring's past medical expenses for a specific period of time. In other words, the jury disregarded the

² During deliberations, the jury submitted the following two questions: (1) "What is the exact amount from Dr. Andrews for the medical bills three months from the accident?" and (2) "Can we award any amount above the amount, i.e., \$5,700?" The circuit court instructed the jury to be guided by their recollection of the evidence and the jury instructions they had received.

³ The four elements of damages listed in the jury instructions were:

- (1) any bodily injuries [Herring] sustained and their effect on her health according to their degree and probable duration;
- (2) any physical pain and mental anguish she suffered in the past, and any that she may be reasonably expected to suffer in the future;
- (3) any inconvenience caused in the past, and any that probably will be caused in the future; and
- (4) any medical expenses incurred in the past, and any that may be reasonably expected to occur in the future.

instruction on damages by failing to consider "non-monetary elements of damages," id. at 487, 362 S.E.2d at 720, and in doing so, failed to compensate Herring for any item of non-monetary damages. See Rome, 217 Va. at 948, 234 S.E.2d at 281. Thus, the verdict was inadequate as a matter of law. Id.

For these reasons, the judgment is reversed, and this case is remanded to the Circuit Court of Fluvanna County for a new trial on the issue of damages.

This order shall be certified to the said circuit court.

JUSTICE McCLANAHAN, with whom Justice Powell joins, dissenting.

I would affirm the judgment of the circuit court. Based on the evidence in the record, I do not agree that the amount of \$5,649, which was substantially less than the special damages claimed by Herring, was "uncontroverted and so complete that no rational fact-finder could disregard it" such that "it must be considered as a fixed, constituent part of the verdict." Bradner v. Mitchell, 234 Va. 483, 487, 362 S.E.2d 718, 721 (1987). In my view, the majority's holding is irreconcilable with this Court's precedent in which we have refused to speculate regarding the components of the jury's verdict when it awards less than the full amount of special damages claimed in a case where the extent of injuries is contested.

In support of her claim for medical expenses, Herring introduced into evidence a "Statement of Damages" with accompanying medical bills. The bills were for medical services rendered in connection with her emergency room visit, treatment by her primary

care physician, treatment by additional providers, diagnostic testing, and physical therapy. The bills also included costs incurred for prescription drugs. The "Statement of Damages" contained a summary of medical expenses itemized by provider and presented a total of \$18,151.14.⁴

Johnson's expert, Dr. William C. Andrews, Jr., testified that Herring sustained a strain or sprain of her neck and back, and that the normal period of recovery is 12 weeks. He also testified regarding an anomaly in Herring's neck shown on the MRI as well as degenerative changes in her neck and back which could be causing her pain. Dr. Andrews did not acknowledge a specific amount of the claimed damages as being reasonably related to the accident. Rather, he stated that the emergency room visit on the date of the accident, Herring's primary care doctor visits, and physical therapy through January 14, 2011 (the day she was released from physical therapy) were appropriate treatment for this type of injury. Dr. Andrews was not cross-examined by Herring's counsel as to any of the other expenses contained in the "Statement of Damages."

Johnson made no concession of liability as to a specific amount of special damages. During opening argument, Johnson's counsel told the jury that his expert, Dr. Andrews, would testify that Herring sustained a neck or back strain and that a three-month

⁴ The "Statement of Damages" attached to the medical bills did not contain a calculation for expenses through any specific date, but was itemized only by provider. Thus, from this exhibit, the jury could only determine a figure that represented medical expenses incurred through a specific date by reviewing the bills and performing its own calculations.

treatment period from the date of the accident was appropriate.⁵ Johnson's counsel further stated that while Herring claims medical bills of approximately \$18,000, Johnson believed that three months of treatment would be "approximately \$5,500." In closing argument, in addition to contesting the nature and extent of Herring's claimed injuries and pain, and summarizing the evidence regarding Herring's pre-existing conditions that may be causing her pain, Johnson's counsel argued that "Dr. Andrews is correct that for \$5,000, approximately \$5,600 is the appropriate level of treatment because of this accident." Thus, to the extent the majority relies upon opening and closing arguments by Johnson's counsel as constituting a "concession," counsel mentioned three separate figures: \$5,000, \$5,500, and \$5,600.

It is clear that neither this evidence nor argument of defense counsel established an amount of \$5,649 as "uncontroverted" and "fixed." Even if the Court treats Dr. Andrews' testimony regarding the appropriate treatment as constituting "uncontroverted" proof of a portion of Herring's special damages, Dr. Andrews did not specify any amount as representing such portion. Dr. Andrews only referenced Herring's emergency room visit, primary care physician visits, and physical therapy and did not include expenses for diagnostic testing, other physicians, or prescriptions. Furthermore, because the "Statement of Damages" introduced into evidence and provided to the jury was itemized by provider, there is no amount shown for expenses incurred through a particular time period. In fact, in attempting to calculate expenses incurred

⁵ Since the accident occurred on September 29, 2010, a three-month treatment period would end on December 29, 2010.

through a specific date, one will reach differing results depending on whether the three-month period referenced in the jury question or the time period through January 14, 2011, is used, and whether only the specific providers mentioned by Dr. Andrews in his testimony or all expenses claimed for one of these time periods are included. Therefore, the evidence was reasonably "susceptible to different findings." Walker v. Mason, 257 Va. 65, 69, 510 S.E.2d 734, 735 (1999).

The only possible support for the majority's conclusion that the jury award represented an uncontroverted and fixed portion of past medical expenses is that a chart displayed to the jury during Johnson's closing argument purportedly contained a figure of \$5,649.55 as representing treatment through January 14, 2011. On principle, this Court should not overturn a jury verdict based on a demonstrative exhibit that was not introduced into evidence, is not in the record, and is not available for review by this Court.⁶ Furthermore, even if the amount of \$5,649 is the equivalent of some portion of Herring's damages, this Court has heretofore refused to speculate regarding the intentions of the jury when it awards an amount less than the total specials claimed "even if the amount of the verdict corresponds to an identifiable portion of the special damages." Walker, 257 Va. at 68-71, 510 S.E.2d at 735-37 (emphasis added) (reinstating jury verdict that was equivalent to lost wages

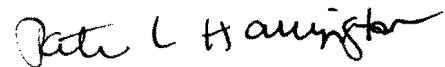
⁶ Notably, the jury asked for "the exact amount from Dr. Andrews," not for an amount shown on the chart. Additionally, the jury asked for the amount for "three months from the accident," not through January 14, 2011.

claim where plaintiff's evidence of special damages included medical expenses and lost wages).

On this record, therefore, we can only guess at the intentions of the jury when it awarded less than the total special damages claimed. Certainly, "[w]hile one may speculate as to the components of the damage amount awarded on this conflicting evidence, such speculation is not sufficient to warrant the conclusion, as a matter of law, that the jury did not consider all the elements of damage in reaching the amount of its verdict." Id. at 71, 510 S.E.2d at 737.

A Copy,

Teste:

A handwritten signature in cursive script that reads "Peter L. Hamilton".

Clerk