FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 1D18-4029

MYRA ROZAR,

Appellant,

v.

R. J. REYNOLDS TOBACCO COMPANY,

Appellee.

On appeal from the Circuit Court for Duval County.
Robert M. Dees, Judge.

March 23, 2020

OSTERHAUS, J.

Myra Rozar appeals an *Engle*-progeny judgment seeking a new trial on grounds that the trial court erroneously allowed irrelevant and prejudicial personal health history evidence at her trial. In the alternative, she seeks a new trial because the jury awarded inadequate damages. We affirm in part and reverse in part.

I.

Rozar filed an action for damages in 2008 against R.J. Reynolds Tobacco Company as a member of the class defined by *Engle v. Liggett Grp., Inc.*, 945 So. 2d 1246 (Fla. 2006). Rozar had smoked cigarettes since the 1950s and was diagnosed with chronic

obstructive pulmonary disease (COPD) in 1994. As her case advanced toward trial, Rozar moved unsuccessfully to keep Reynolds from mentioning a prior lawsuit she had filed against a breast implant manufacturer whose product had caused Rozar to have health problems. At trial, the jury heard evidence about Rozar's medical history and various surgeries that went beyond just her smoking-related COPD. Ultimately, the jury awarded Rozar $375,000 in compensatory damages; $25,000 for past medical expenses; $300,000 for future medical expenses; $0 for past pain and suffering; and $50,000 for future pain and suffering. Because the parties stipulated to $216,121 in past medical expenses, the trial court conformed the verdict to the parties' stipulation. Rozar also sought additur or a new trial on the other damage awards. But the trial court denied her motions and Rozar appealed.

II.

A.

On appeal, Rozar argues first that the trial court erred by allowing Appellee to present irrelevant medical evidence that unlawfully prejudiced the jury. "As a general rule, '[a] trial judge's ruling on the admissibility of evidence will not be disturbed absent an abuse of discretion.' 'However, a court's discretion is limited by the evidence code and applicable case law. A court's erroneous interpretation of these authorities is subject to *de novo* review.'" *Pantoja v. State*, 59 So. 3d 1092, 1095 (Fla. 2011) (citations omitted). A trial court's evidentiary decisions "should not be overturned if the record supports a finding [that] the evidence is relevant and not more prejudicial than probative." *Kopsho v. State*, 84 So. 3d 204, 217 (Fla. 2012). "Relevancy has been defined as a tendency to establish a fact in controversy . . . ." *Id.* (quoting *Zabner v. Howard Johnson's Inc.*, 227 So. 2d 543, 545 (Fla. 4th DCA 1969)); *see also* § 90.401, Fla. Stat. (defining relevant evidence); *Taylor v. Culver*, 178 So. 3d 550, 551 (Fla. 1st DCA 2015) (noting that "all relevant evidence is admissible, except as provided by law").

Rozar specifically disputes the trial court's decision to allow references at trial to her breast implant lawsuit from the 1990s and evidence of her other non-COPD-related health problems and

procedures. Since 1994, Rozar has had an extensive history of both COPD and non-COPD-related health problems that have caused her significant difficulties. Rozar wrote a note to her doctor in 1997, for example, stating that she had "missed over 1400 hours of sick leave, annual leave and leave without pay, for my lupus since 1994." Another doctor believed her reference to lupus to actually be rheumatoid arthritis. Another doctor testified that rheumatoid arthritis caused pain and limited Rozar's mobility, and that her hypercoagulable state and arthritis complicated the prospects of a second COPD-related lung reduction surgery. Also, evidence indicated that the implants and silicone in plaintiff's system may have caused chills, nervousness, mental confusion, dizziness, hives, allergies, and joint issues.

When a plaintiff's overall health is affected by prior and contemporaneous medical injuries and conditions unrelated to the lawsuit, courts may permit a defendant to cross-examine the plaintiff about them with the goal of correctly linking the litigated injury with its corresponding harms. *See, e.g.*, *Jackson v. Albright*, 120 So. 3d 37, 39-40 (Fla. 4th DCA 2013) (allowing cross-examination when the plaintiff's physical condition may be affected by prior injuries, which were the subject of prior lawsuits); *Ortlieb v. Butts*, 849 So. 2d 1165, 1167-68 (Fla. 4th DCA 2003) (recognizing that the jury might attribute the plaintiff's medical problems to other conditions and not to the accident); *Zabner*, 227 So. 2d at 545 ("[A] plaintiff may properly be cross examined as to his previous injuries . . . similar to that constituting the basis of the present action for the purpose of showing that his present physical condition is not the result of the injury presently sued for . . . ."). In this case, Rozar sued based only on the harms she suffered from smoking and her COPD. Given Rozar's history of medical problems overlapping with her COPD, we cannot conclude that the trial court abused its discretion by allowing the jury to broadly consider the extent to which her multi-million-dollar damages claims were partly attributable to other, non-COPD medical problems. This evidence doesn't appear more prejudicial than probative. Nor did it appear to mislead the jury or result in a miscarriage of justice.

We acknowledge Rozar's concern that the trial court permitted Appellee to raise her previous implant-related lawsuit

at trial. The *Zabner* case, on which Rozar relies, disapproved of a defendant's use of evidence of a prior lawsuit to show a plaintiff's propensity for litigiousness. *See* 227 So. 2d at 546. The defendant in *Zabner* put on evidence of the plaintiff's fifteen prior lawsuits. And Rozar believes that her jury was similarly prejudiced by Appellee's references to her previous lawsuit. But we don't see the same problem here as in *Zabner*. The references made to the lawsuit at trial were brief and do not show a general propensity for litigiousness. Rozar was asked on cross-examination about the old lawsuit which helped to uncover her COPD in 1994. Her COPD diagnosis and implant lawsuit were intertwined in that, during a medical evaluation related to the lawsuit, a doctor had Rozar complete a pulmonary function test. This test revealed her COPD. Due to this relationship, and because the jury had the difficult job of having to distinguish between various health harms to properly determine damages, the trial court didn't abuse its discretion by allowing the lawsuit evidence. *See Zenchak v. Kaeufer*, 612 So. 2d 725, 727 (Fla. 4th DCA 1993) (concluding that because a question at trial "concerned only one prior lawsuit, and was relevant, . . . [it] did not impermissibly raise the issue of litigiousness"); *Jackson*, 120 So. 3d at 40 (allowing inquiries about a prior settlement where the issue was relevant for purposes other than impeachment for litigiousness).

B.

Rozar also seeks a new trial with respect to inadequate damages awards. We review her challenge to the trial court's denial of motions for additur or new trial under an abuse of discretion standard. *Allstate Ins. Co. v. Manasse*, 707 So. 2d 1110, 1111 (Fla. 1998); *Philip Morris USA Inc. v. Danielson*, 224 So. 3d 291, 293 (Fla. 1st DCA 2017).

When a defendant is found liable and a jury awards money damages, the trial court will review the damages if so requested and determine if the awards are excessive or inadequate. § 768.74, Fla. Stat. "A trial court may grant a new trial if the verdict is excessive or inadequate, against the manifest weight of the evidence, or both." *Danielson*, 224 So. 3d at 294. In determining whether a damages award is inadequate, Florida law directs courts to consider:

> (a) Whether the amount awarded is indicative of prejudice, passion, or corruption on the part of the trier of fact;
>
> (b) Whether it appears that the trier of fact ignored the evidence in reaching a verdict or misconceived the merits of the case relating to the amounts of damages recoverable;
>
> (c) Whether the trier of fact took improper elements of damages into account or arrived at the amount of damages by speculation and conjecture;
>
> (d) Whether the amount awarded bears a reasonable relation to the amount of damages proved and the injury suffered; and
>
> (e) Whether the amount awarded is supported by the evidence and is such that it could be adduced in a logical manner by reasonable persons.

§ 768.74(5), Fla. Stat. The trial court "does not sit as a seventh juror," but will reverse if the undisputed evidence supports a damages award that wasn't made. *See Dyes v. Spick*, 606 So. 2d 700, 702-03 (Fla. 1st DCA 1992).

1.

The jury awarded Rozar nothing for past pain and suffering. She argues that this zero-dollar result was inadequate as a matter of law. It is generally difficult to find fault with a jury's decision on pain and suffering damages because "there is no objective standard by which to measure them." *Odom v. R.J. Reynolds Tobacco Co.*, 254 So. 3d 268, 276 (Fla. 2018) (quoting *Angrand v. Key*, 657 So. 2d 1146, 1149 (Fla. 1995)). "Damages for pain and suffering are difficult to calculate, have no set standard of measurement, and for this reason are uniquely reserved to a jury for their decision." *Pogue v. Garib*, 254 So. 3d 503, 507 (Fla. 4th DCA 2018) (quoting *Ortega v. Belony*, 185 So. 3d 538, 539-40 (Fla. 3d DCA 2015)).

That said, the evidence must support a jury's zero-dollar award for it to stand. And where "the evidence is undisputed or

substantially undisputed that a plaintiff has experienced and will experience pain and suffering as a result of an accident, a zero award for pain and suffering is inadequate as a matter of law." *Ellender v. Bricker,* 967 So. 2d 1088, 1093 (Fla. 2d DCA 2007) (*quoting Dolphin Cruise Line, Inc. v. Stassinopoulos*, 731 So. 2d 708, 710 (Fla. 3d DCA 1999)). In *Ellender*, for example, the Second District considered a situation where doctors testified that the plaintiff suffered back, neck, shoulder, and headache pain from his accident-related injuries. *Id.* at 1092 Although the plaintiff had suffered a prior lower back injury that could have contributed to his pain, he didn't have a preexisting neck issue. *Id.* The jury found that the plaintiff had suffered injuries requiring post-accident treatment and pain management and yet awarded no past noneconomic damages. *Id.* at 1093. Under those circumstances, then-Judge Canady wrote that the zero-dollar noneconomic verdict had to be reversed: "the jury's failure to award even nominal past noneconomic damages was not supported by the weight of the evidence and must be reversed." *Id.* (quoting *Allstate Ins. Co. v. Campbell*, 842 So. 2d 1031, 1034-35 (Fla. 2d DCA 2003)); s*ee also Ramey v. Winn Dixie Montgomery, Inc.*, 710 So. 2d 191, 193 (Fla. 1st DCA 1998) (finding a zero-damages award to be unreasonable in view of the evidence).

The circumstances here are similar to *Ellender*. There is no dispute here that Rozar has smoking-caused COPD. The medical evidence at trial backed Rozar's own testimony of struggles caused by substantial and permanent damage to her lungs. One doctor described the damage as "a huge hole" in her lung "about the size of a football." Another doctor testified that her "right upper lobe is virtually destroyed" and "basically looks like Swiss cheese." As to her left upper lung: "[t]here's no lung up here at all, just gigantic holes." As a result, Rozar suffers severe shortness of breath. A doctor likened her COPD to breathing through straws. At first, Rozar's condition limited her breathing as though she was "breathing through one of those straws that you drink a smoothie." Over time, she is "now down to one of the tiny straws that you get in a drink, and that means if she tries to do anything, she starts to butt right up against the most she can breathe." The testimony of Rozar's doctor confirmed that by the time of her lung reduction surgery, Rozar couldn't walk around the room without being severely short of breath. The medical testimony backed Rozar's

description of needing oxygen and being unable to complete routine household tasks such as sweeping, vacuuming, and basic gardening. The trial court noted that the extensive evidence of her difficult COPD symptoms and treatment was substantially uncontroverted. And the jury's award of economic damages and future noneconomic damages demonstrates its basic acceptance of the evidence about her condition. *Ellender*, 967 So. 2d at 1093 (highlighting the incongruity of a jury awarding past medical costs, but nothing for past noneconomic damages). Under § 768.74(5)'s criteria and the uncontroverted evidence, the zero verdict for past pain and suffering is inadequate. *See Dyes*, 606 So. 2d at 703 (concluding that the zero-damages award for past noneconomic damages violated elements (b), (d), and (e) of § 768.74(5)). We thus reverse and remand the order denying the motion for additur or new trial as to the past pain and suffering award.

2.

Finally, Rozar challenges the damages awarded for future pain and suffering and future medical expenses as inadequate. The jury awarded Rozar $50,000 for future pain and suffering and $300,000 for future medical expenses. These are not insignificant sums. We give "great latitude" to the determinations of juries to decide future damages "[d]ue to the somewhat speculative nature of what may occur in the future." *Id.* at 704. And, here, we do not find a similar record basis for reversing the awards as inadequate in view of the disputed evidence. We affirm the future damages awards. *See id.* (reversing as to past noneconomic damages but affirming on future damages); *Campbell*, 842 So. 2d at 1035 (reversing and remanding for a new trial on past noneconomic damages only).

III.

Accordingly, we affirm the trial court's decisions regarding the admission of non-COPD-related medical evidence and the future damages awards. We reverse and remand, however, the order denying additur or new trial on the zero-damages award for past noneconomic damages and remand that single issue for proceedings consistent with this opinion.

LEWIS and B.L. THOMAS, JJ., concur.

Not final until disposition of any timely and authorized motion under Fla. R. App. P. 9.330 or 9.331.

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