COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

20-P-59

HARRY CHURCHILL & another[1]

vs.

PMG PHYSICIAN ASSOCIATES, P.C., & another.[2]

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

This case arises from the plaintiffs' claims that defendant Thomas Browning, a physician, committed malpractice by failing to perform a digital rectal exam (DRE) on plaintiff Harry Churchill (Harry),[3] and to discuss with him a prostate-specific antigen (PSA) test, at an appointment in 2010, either of which could have led to the detection of Harry's prostate cancer then, nearly two years before its actual discovery. After a five-day trial, the jury returned a special verdict finding that (1) Browning did perform the DRE; (2) he did not discuss the PSA test; (3) the failure to discuss the PSA test caused harm to

[1] Monica Churchill.

[2] Thomas Browning.

[3] Because the two plaintiffs have the same surname, we refer to them individually, when necessary, by their respective first names.

Harry; and (4) the plaintiffs had proved zero dollars in damages.[4,5] The plaintiffs appeal the amended judgment,[6] and also claim error in the denial of various posttrial motions. We affirm.

1. Motion for additur or, in the alternative, a new trial on damages. The plaintiffs' argument in support of additur is straightforward: that the plaintiffs' damages were so incontrovertibly proven that the jury's award of zero dollars cannot stand.[7] "An additur is appropriate where the judge concludes that the verdict is sound except for the amount of damages and that the amount of damages is unreasonable." Service Publs., Inc. v. Goverman, 396 Mass. 567, 580 (1986).

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[4] Before the jury were charged, the parties agreed that the relevant standard of care required Browning to administer the DRE and to discuss the PSA test.

[5] The jury also found no liability for the defendants on Monica's concomitant loss of consortium claim.

[6] On July 9, 2019, judgment entered for Harry on his malpractice claim, awarding him "Zero Dollars ($0.00) and his costs of action." On September 18, 2019, upon motion by the defendants, the judge amended the judgment to instead reflect judgment entering for the defendants on that claim.

[7] The plaintiffs also claim error in the denial of their motion for judgment notwithstanding the verdict (JNOV motion) regarding Monica's loss of consortium claim, but there was no error in denying that motion where the plaintiffs failed to make the prerequisite motion for a directed verdict. See Mass. R. Civ. P. 50 (b), as amended, 428 Mass. 1402 (1998); Bonofiglio v. Commercial Union Ins. Co., 411 Mass. 31, 34 (1991). Moreover, even if we were to reach the merits of the JNOV motion, we see no error in its denial; the jury were not required to credit the testimony on which Monica's loss of consortium claim relied. See Lydon v. Boston Elevated Ry. Co., 309 Mass. 205, 206-207 (1941).

"[M]otions for a new trial on the theory that the damages were inadequate . . . 'ought not to be granted unless on a survey of the whole case it appears to the judicial conscience and judgment that otherwise a miscarriage of justice will result.'" Walsh v. Chestnut Hill Bank & Trust Co., 414 Mass. 283, 292 (1993), quoting Bartley v. Phillips, 317 Mass. 35, 41 (1944). "[T]he allowance of a motion for a new trial based upon an inadequate or excessive award of damages, and the direction of an addition or remittitur, rests in the sound discretion of the judge." Baudanza v. Comcast of Mass. I, Inc., 454 Mass. 622, 630 (2009), quoting Blake v. Commissioner of Correction, 403 Mass. 764, 771 (1989). We review for any abuse of that discretion. See id.

We note at the outset that the plaintiffs are not entitled to pursue a theory of damages on appeal that was not fairly presented to the jury. See Poly v. Moylan, 423 Mass. 141, 149 (1996) ("An appeal is not the proper time to advance new theories of recovery"). In their opening, the plaintiffs' counsel explained to the jury that "the harm or damages that have to be proved are self-evident . . . Mr. Churchill is going to die prematurely from his prostate cancer." In their closing, counsel identified the harm to Harry as "[go]ing from a curable

to an incurable state."[8] On appeal, the plaintiffs repeat those assertions, but also raise a new theory: that Harry is entitled to damages resulting from the burden of his alleged need to undergo more extensive treatment due to the delayed diagnosis. In particular, they argue that the treatment he chose in 2012 (a prostatectomy) would have obviated the need for the radiation and hormone treatment he has since undergone, had it instead been performed in 2010.

Even assuming that each theory of damages -- premature death and additional treatment burdens -- is properly before us, we see no abuse of discretion in the judge's denial of the plaintiffs' motion. The defendants presented extensive expert testimony that, because of the inherently aggressive nature of Harry's particular cancer, he suffered no difference in prognosis or treatment from the delayed diagnosis. The defendants' causation expert opined that, rather than suffering a diminished life expectancy, Harry's prognosis was unchanged by the delay -- that his outcome was dependent on how the cancer responded to treatment, not when it was discovered.[9] The expert

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[8] The plaintiffs' counsel further explained in closing that he "do[es] not tell juries what they should do when it comes to damages."

[9] The defendants' expert opined that Harry had responded "beautifully" to the treatment. Medical records in evidence show that Harry's PSA levels were "undetectable" as of July 2017 and continued to be undetectable at least through May 2019, approximately one month before trial. Furthermore, the

further opined that the delay in diagnosis did not render Harry's cancer incurable, because it had never been curable, only treatable. Moreover, and relevant to the plaintiffs' newly-developed theory of damages on appeal, the expert opined that Harry would have required the same treatment of hormone and radiation therapy had he been diagnosed in 2010.[10] In sum, the defendants provided ample testimony to support the theory that they articulated in their opening statement: "The biology of the cancer was going to determine the prognosis, the outcome, and the treatment."

Though the plaintiffs presented evidence to the contrary, the jury were free to credit the defendants' experts over the plaintiffs'. See Green, petitioner, 475 Mass. 624, 631 (2016). In doing so, they were likewise free to reasonably conclude that Harry, though harmed in some sense by the delay in diagnosis,

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defendants' expert testified that two large studies showed that PSA testing led to no statistically significant decrease in mortality from prostate cancer, a conclusion plaintiffs' expert essentially agreed with.

[10] Other testimony supported the expert's conclusion that "even if [Harry's cancer] was diagnosed in 2010, he would have received the same treatment." He testified that Harry's cancer had a "Gleason score" of nine, and that the score -- a measure of the aggressiveness of prostate cancer made via biopsy -- would not have changed based on the time of diagnosis, because it was fixed from the cancer's inception. Harry's treatment options, according to the expert, were thus similarly fixed. Furthermore, the expert testified that surgery alone cannot eliminate a Gleason score nine cancer, and that such cancers are treated with hormone and radiation therapy even if surgery is performed, and even if the cancer is confined to the prostate.

suffered no compensable damages attributable to the defendants' negligence.[11] Based on this record, the judge was well within his discretion to find the verdict supported by the evidence, and thus deny the plaintiffs' motion for additur or, in the alternative, a new trial on damages.[12] See Walsh, 414 Mass. at 292; Service Publs., Inc., 396 Mass. at 580.

2. Inconsistent verdict. We similarly find no error in the judge's denial of the plaintiffs' request that he find the verdict inconsistent and instruct the jury to deliberate further. "In determining whether there is an inconsistency in the jury's answers, the answers are to be viewed in the light of the attendant circumstances, including the pleadings, issues submitted, and the judge's instructions. . . . If the jury's answers can be harmonized, they must be resolved so as to harmonize them." Solimene v. B. Grauel & Co., 399 Mass. 790, 800 (1987). The plaintiffs have not cited and we are not aware of any binding authority holding that a special verdict finding

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[11] Other reasonable alternatives could also explain the verdict. For example, based on the evidence presented, the jury could have found that they could not determine an amount of damages without impermissibly speculating. We need not explore the universe of explanations so long as we are satisfied that a reasonable one exists.

[12] As the jury found no liability for the defendants on Monica's loss of consortium claim, the plaintiffs' request for additur or a new trial on damages as to that claim was dependent upon the granting of their JNOV motion, which, as explained supra, was properly denied.

liability but zero dollars in damages is inconsistent as a matter of law.[13] For the reasons already expressed, our review of the record reveals no inconsistency in the jury's answers and thus no error in the judge's decision. See Palriwala v. Palriwala Corp., 64 Mass. App. Ct. 663, 670-675 (2005).

Conclusion. For all the foregoing reasons, the amended judgment is affirmed, and there was no error in the denial of the plaintiffs' posttrial motions.

So ordered.

By the Court (Green, C.J., Kinder & Englander, JJ.[14]),

Joseph F. Stanton

Clerk

Entered: February 17, 2021.

[13] The defendants have cited a variety of cases that, although also not binding, demonstrate instances in which zero damage awards have been upheld. See, e.g., Ruiz-Rodriguez v. Colberg-Comas, 882 F.2d 15, 17-18 (1st Cir. 1989) (zero damages for surviving child's mental suffering); Poulin Corp. v. Chrysler Corp., 861 F.2d 5, 7 (1st Cir. 1988) (zero damages for breach of covenant of good faith and fair dealing and negligent misrepresentation); Gallagher v. Marguglio, 429 Pa. Super. 451, 456-457 (1993) (zero damages from delayed cancer diagnosis).

[14] The panelists are listed in order of seniority.