Circuit Court for Prince George's County
Case No. CAL17-35481

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND**

No. 0036

September Term, 2020

TERENCE WILLIAMS

v.

DIMENSIONS HEALTH CORPORATION

Berger,
Beachley,
Zic,

JJ.

Opinion by Zic, J.

Filed: August 28, 2023

* This is an unreported opinion. This opinion may not be cited as precedent within the rule of stare decisis. It may be cited for its persuasive value only if the citation conforms to Md. Rule 1-104(a)(2)(B).

** At the November 8, 2022 general election, the voters of Maryland ratified a constitutional amendment changing the name of the Court of Special Appeals of Maryland to the Appellate Court of Maryland. The name change took effect on December 14, 2022.

Appellant/cross-appellee Terence Williams brought suit against Dr. Montague Blundon and appellee/cross-appellant Dimensions Health Corporation, Inc., d/b/a Prince George's Hospital Center ("Hospital") in the Circuit Court for Prince George's County, alleging that Dr. Blundon was negligent in treating Mr. Williams' right leg, which had been injured in a motor vehicle accident. Mr. Williams sued Dr. Blundon for medical negligence and the Hospital under a theory of apparent agency.

The Hospital moved for summary judgment at the close of Mr. Williams' case, arguing Mr. Williams did not establish sufficient evidence of apparent agency, and the court reserved ruling on the motion. At the conclusion of all evidence, the Hospital renewed its motion for summary judgment on apparent agency, and both the Hospital and Dr. Blundon moved for summary judgment based on insufficient evidence of economic damages. The circuit court again reserved ruling on both motions. The jury found in favor of Mr. Williams, and that Dr. Blundon was an agent of the Hospital. Dr. Blundon and the Hospital both filed motions for judgment notwithstanding the verdict on the issue of economic damages, and the Hospital also filed a motion for judgment notwithstanding the verdict on the issue of apparent agency. The court denied the motions on economic damages and granted the Hospital's motion based on apparent agency.

Mr. Williams appealed the court's grant of the motion for judgment notwithstanding the verdict on apparent agency, and the Hospital filed a cross-appeal on the denial of the motion on the issue of economic damages. We affirmed the circuit court's decision to grant the motion on apparent agency and declined to consider the

Hospital's cross-appeal. The Supreme Court[1] granted certiorari and reversed, holding that Dr. Blundon was an apparent agent of the Hospital. This case now returns to us to consider the Hospital's cross-appeal regarding economic damages.

QUESTIONS PRESENTED

On cross-appeal, the Hospital presents one question for our review, which we have rephrased as follows:[2]

> Did the circuit court err in concluding that there was sufficient evidence to support the jury's economic damages award?

For the reasons that follow, we answer the question in the negative and affirm the circuit court's decision to deny the motion for judgment notwithstanding the verdict, upholding the jury's damages award of $6,285,549.

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[1] At the November 8, 2022 general election, the voters of Maryland ratified a constitutional amendment changing the name of the Court of Appeals of Maryland to the Supreme Court of Maryland. The name change took effect on December 14, 2022.

[2] The Hospital presented the following question in its conditional cross-appeal:

> In medical-negligence actions, recoverable damages must be caused by the defendants' tortious conduct—not the plaintiff's preexisting conditions. Here, the plaintiff crashed his car, breaking both legs and one arm, and his surgeon negligently failed to save his permanently damaged right leg from amputation. Did the trial court err by upholding a $6 million damages award that compensates him for both the accident injuries and the amputated right leg?

Mr. Williams reframed the question as follows:

> Was the trial court legally correct in denying judgment notwithstanding the verdict as to damages where the evidence established additional damages to the plaintiff as a result of losing two legs, as opposed to one?

BACKGROUND

Early in the morning of May 3, 2014, Mr. Williams was involved in a single-car accident[3] when he lost control of his vehicle while driving on the Capital Beltway and crashed. Mr. Williams hit the guardrail and flipped several times, resulting in severe injuries to his left arm and both of his legs. Emergency personnel arrived shortly after and took Mr. Williams to the Hospital, where he was treated by multiple physicians, including Dr. Blundon, an undisputed independent contractor. There, Dr. Blundon performed a fasciotomy on Mr. Williams' right leg, resulting in an above-the-knee amputation of the leg. Due to the severity of the injuries to Mr. Williams' left leg, the left leg was also amputated. It is undisputed that Dr. Blundon and the Hospital are not responsible for the above-the-knee amputation of Mr. Williams' left leg and the severe and permanent damage to his left arm.

On November 14, 2017, Mr. Williams filed this medical malpractice case against Dr. Blundon, alleging that Dr. Blundon negligently performed a fasciotomy to address compartment syndrome in Mr. Williams' right leg, which ultimately resulted in its amputation. Further, Mr. Williams asserted liability on the part of the Hospital based on apparent agency. The matter proceeded to trial on October 7, 2019.

[3] Mr. Williams testified that he was "clipped" by another vehicle; however, neither Mr. Williams nor the bystander who witnessed the accident told the paramedics that another individual had caused Mr. Williams to lose control of the vehicle.

Expert Testimony

At trial, Mr. Williams, Dr. Blundon, and the Hospital offered extensive expert witness testimony regarding the cause of Mr. Williams' right leg injuries and the care he would need as a result. While objections were made to certain statements by each of the experts, no objection was made to the admission or testimony of any of the expert witnesses.

Mr. Williams called the following expert witnesses to testify regarding the extent of his injuries: John Michael, Michael Sirkin, Michael April, Cathryn Winslow, and Thomas Borzilleri. He first presented an expert in prosthetics and orthotics, John Michael, to testify as to the prostheses Mr. Williams would need due to the amputation of his right leg. Mr. Michael opined that Mr. Williams required three separate sets of prostheses: the power knee prostheses, shortened prostheses, and water aerobic prostheses. For the power knee, Mr. Michael testified that each prosthesis had an initial cost of $94,174, requires yearly maintenance of $9,400, and needs periodic socket replacement at $22,738 each. Next, he testified that the shortened prostheses cost $27,336 each, require yearly maintenance of $2,700, and the same socket replacement of $22,738. Finally, the water aerobic prostheses each cost $27,660, require $2,766 of yearly maintenance, and the same $22,738 socket replacement. Each prosthesis had a projected lifespan of four to six years. For comparison, Mr. Michael then testified as to the prostheses he would have recommended if Mr. Williams had retained his right leg. Assuming Mr. Williams would have "sufficient strength to use his surviving knee to

stand up and down," instead of the power knees, Mr. Michael would recommend a sophisticated walking prosthesis that would cost $209,227, require yearly maintenance of $20,923, and a socket replacement of $16,923.[4] Mr. Michael would also recommend a fitness prothesis so that Mr. Williams could exercise more regularly, which would cost $33,166, require annual maintenance of $3,317, and a socket replacement of $16,923. Finally, Mr. Michael testified he would again recommend a water aerobic prothesis, which costs $29,075, requires maintenance of $2,907 each year, and the same socket replacement of $16,923. Each prosthesis again has a projected lifespan of four to six years. Mr. Michael provided this information to the life care planner, Cathryn Winslow, so that she could use the assessment to determine what care Mr. Williams would need and the overall cost when creating his life care plan.[5] On cross-examination, Mr. Michael acknowledged that Mr. Williams has chronic full-body pain and noted that without proper pain management, he would have a difficult time utilizing any of the prostheses consistently.

Dr. Michael Sirkin, an expert in orthopedic surgery and trauma surgery, testified that if Mr. Williams' compartment syndrome had been treated timely, Mr. Williams

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[4] Mr. Michael testified that he discussed the prostheses socket replacement cost with Mr. Williams' current prosthetist and used this cost of $16,923 in this calculation. It is unclear exactly why there is a discrepancy between the socket replacement cost used in the calculation for one leg versus the $22,738 used for two legs.

[5] The life care plan developed by Ms. Winslow was not admitted into evidence and is therefore not included in the record, thus we are unable to verify the final prostheses amount awarded to Mr. Williams and the breakdown regarding what the award was for. We assume that the testimony regarding the life care plan and numbers included is an accurate description of the document itself.

would have a right leg that he could "probably walk on," although he would have trouble with recreational activities like sports and would likely have occasional pain. On cross-examination, however, he conceded that even with proper treatment, Mr. Williams "[a]bsolutely 100 percent was not going to have a normal right leg."

Dr. Michael April, a physical medicine and rehabilitation expert, testified that he assessed Mr. Williams' current and future needs and compared them to what he determined Mr. Williams' needs would be if his right leg had been saved. Dr. April shared his determination of Mr. Williams' needs with Ms. Winslow and assisted in the formulation of the life care plan for Mr. Williams. Dr. April also opined that Mr. Williams' life expectancy was 23 additional years when adjusted for smoking. Although Dr. April testified that he had "adjust[ed] his recommendations for assistance in the event [Mr. Williams] had one extremity amputated with a limited function left upper extremity, prosthetic leg on the left side and chronic pain medication," he agreed that even if he had kept his right leg, Mr. Williams "would still need care because of his chronic pain, his [] non-functional left upper extremity, and his above-the-knee amputation on the left."

Another expert witness, Cathryn Winslow, testified that she created a life care plan for Mr. Williams. A life care plan explains what support an individual will need as a result of a catastrophic injury or illness, examines the short- and long-term goals of the individual, and emphasizes maximum wellness and independence. Ms. Winslow prepared a life care plan for Mr. Williams, which required her to meet with Mr. Williams, read his medical records, and read reports from Dr. April and Mr. Michael. The life care

plan included the expenses for Mr. Williams' needs that she attributed to the loss of his right leg. To determine this number, Ms. Winslow calculated the total cost of care that Mr. Williams would need if he had retained his right leg and subtracted this amount from the total cost of care that he now requires. In doing this, Ms. Winslow testified that if he still had his right leg, Mr. Williams would only require a total of 12 hours of attendant care each week, however, due to the loss of his right leg, Mr. Williams now needs 24/7 attendant care. Based on an hourly rate of $22 an hour for a home health aide, the difference between 12 hours per week and 24/7 care amounted to about $178,992 per year for life. Ms. Winslow also allocated $54,000 for a wheelchair van to be driven by a caretaker, claiming that Mr. Williams would not require a wheelchair van if he had not lost his right leg because he would otherwise be able to drive. Finally, Ms. Winslow testified that she relied on Mr. Michael's recommendations regarding prostheses to allocate funds in the life care plan for prostheses. Ms. Winslow testified as to her calculations for the prostheses as follows:

> So one is for everyday use. One is for swimming. And one is for aerobic exercise, the fitness prosthetic leg for aerobic exercise. Essentially he gave me pricing for one leg, meaning he's got the right leg, it's there, it's working, so we're just replacing the left leg. He gave me the pricing for that prosthetic. It's [a] very expensive prosthetic. It cost[s] $209,227 for one prosthetic. Plus maintenance, plus socket replacement for that prosthetic.
>
> The cost of two legs that Mr. Williams can use now, he also gave me. And again he broke it down the same way, the cost of two legs was less than the cost of the one very, very expensive leg had his right leg been saved. So the prosthetic leg for one leg cost[s] [$]209,227 and the prosthetic leg for two, given his current capabilities is [$]188,349. So the

> difference was a minus $2,876.[6] It cost[s] less for him to have two prostheses than one. And then there is the annual prosthetic maintenance and the socket replacement. And did he explain sockets? So you all know sockets. So the socket replacements are replaced more often than [the] prosthetic. Gave me the length of time that typically a prosthetic leg will last, a socket will last, and how much it cost every year to maintain that leg. You have to go in and fix straps, et cetera. There are just different things that break down on them because they're used so much. So the prosthetic maintenance he said typically is 10 percent of the cost of the appliance, of the prosthetic. So the maintenance cost for one leg was $2,923,[7] but the cost of maintenance for two legs was $18,834. So again it cost[s] less for two legs and that's for one to maintain them on this main prosthetic. And then the socket replacement, the cost of one socket replacement for the expensive leg was $16,923. The cost of the socket replacement for the two was $45,477. And the difference there was $28,553. So, that's the main prosthetic leg. And he's got two more. And remember with each one of them there is going to be maintenance, socket, and the actual prosthetic. So the fitness prosthetic leg. If one leg had been saved, the fitness leg would have cost $33,166, two legs $54,672. And the difference is $21,506.
>
> The prosthetic maintenance, the cost of one was $3,317, 10 percent, and the cost of two for maintenance is $5,468. And the difference between those two is $2,151. Socket replacement cost -- if one leg had been saved, would have been $16,923 every two years for the socket to be replaced and [$]45,477 every two years for [replacing] two sockets, and this is on the fitness leg.
>
> Now, we got one more leg to go and that's the aqua leg, called a water prosthetic leg on my report. Again for one leg had, $29,075. For two legs $55,332. Maintenance, $5,534 for the cost of two. And $2,907 had he only had one

[6] This appears to be a mathematical error, as the difference between $209,227 and $188,349 is $20,878. This error does not affect our analysis.

[7] Mr. Michael testified that the maintenance cost for the sophisticated walking prosthesis is $20,923. This error also does not affect our analysis.

> amputated. And socket replacements every two years for two legs $45,477. For [one] leg that is $16,923. The difference [is] $28,553.

On cross-examination, Ms. Winslow conceded that she may have included duplicative prostheses, items Mr. Williams does not need, or items that were not recommended.[8] Additionally, Ms. Winslow testified that her estimates had been made assuming that if Mr. Williams' right leg had not been amputated, it would be functional, and she conceded that "if the right leg would not have been functional, then all of [her] estimates for all of the items would also not be accurate." Mr. Williams then moved to admit Ms. Winslow's life care plan as an exhibit. The Hospital objected "to the numbers for the reasons that [it] already stated," referring to the Hospital's cross-examination of Ms. Winslow's testimony where counsel questioned her methodology and the massive increase in necessary attendant care she credited to the loss of the right leg. The life care plan was not admitted as an exhibit.

Mr. Williams then called an expert in economics and economic analysis of life care plans, Dr. Thomas Borzilleri. Dr. Borzilleri testified that his role was to determine the amount of money that Mr. Williams needs now to implement Ms. Winslow's life care plan over his lifetime. To this end, Dr. Borzilleri testified that the present value of the life care plan Ms. Winslow prepared was between $6,399,732 and $6,542,191 based on a

[8] Mr. Williams asked the jury to award him $1,266,196 in damages for the leg prostheses. Because the life care plan was not admitted as evidence and therefore is not included in the record, it is unclear precisely which prostheses were included in the plan and what their costs were to amount to the requested $1,266,196.

life expectancy of 23 years. Dr. Borzilleri did not testify as to the present value of each element of the damages requested by Mr. Williams, only the sum of all economic damages.

The defense provided several experts in similar fields: Richard Grant, Terrence Sheehan, David Fenton, and Trudy Koslow. Dr. Richard Grant, a trauma orthopedic surgery expert, testified that had Mr. Williams' right leg been saved, it would not be very functional as it would have suffered nerve damage and would likely be in constant pain. Dr. Terrence Sheehan, an expert in physical medicine and rehabilitation testified that life would be about the same for Mr. Williams even with his right leg because of his chronic pain.

David Fenton, an expert in prosthetics, also testified for the defense. Mr. Fenton discussed the medical evaluation he conducted of Mr. Williams and stated that Mr. Williams' chronic pain keeps him in bed four to five times a week, he is unable to bear much weight on his left arm, and has been unsuccessful with all of the prostheses he has tried so far. For these reasons, particularly Mr. Williams' chronic pain, Mr. Fenton opined that he is not currently a prosthetic candidate and would make little progress as a prosthetic user.

Trudy Koslow, the life care planning expert for the defense, testified as to the care Mr. Williams now needs as compared to what he would have needed if he had not lost his right leg. Ms. Koslow testified that even if Mr. Williams had retained his right leg, he would still have a nearly non-functional left arm, chronic back and body pain, phantom

pain in his left leg, and would still require the same amount of caregiver services and pain management as he now needs. Ms. Koslow created her own life care plan[9] and refuted the testimony of Ms. Winslow by offering her own expert opinion as to the care Mr. Williams would need; however, she did not testify regarding any monetary estimates for the care, prostheses, and equipment that Mr. Williams would have had and now requires. The defense did not present an economics expert.

Mr. Williams' Testimony

Mr. Williams also testified at trial. He testified that he suffers from daily unbearable pain in both lower extremities, his left arm, and his back. He has a limited range of motion in his left arm and ranks the daily pain in his left elbow and shoulder as an eight out of ten, even while taking Oxycontin. Mr. Williams testified that his back pain is a six out of ten daily, sometimes increasing to an eight out of ten. Additionally, his phantom pain in both legs is constant and continuously at an eight or nine out of ten each day. When Mr. Williams began attempting to use the prostheses designed for him, he reported ten out of ten pain and was unwilling to wear the prostheses due to the severe nerve pain he encountered. At the time of the trial, Mr. Williams had not tried the prostheses or contacted his prosthetics specialist in almost one year. Mr. Williams testified that he spends approximately 90 percent of his time in bed due to his chronic full-body pain. He further testified that because of the damage to his left arm, he is

[9] Ms. Koslow testified that she also created a life care plan for Mr. Williams' needs. Ms. Koslow's plan was also not admitted as an exhibit, and we are therefore unable to verify how it differed from the life care plan developed by Ms. Winslow.

unable to groom himself, shower, dress, and cook. Finally, Mr. Williams conceded that even if he had retained his right leg, he did not think he would be able to drive because sometimes his body suddenly "shuts down," and he could risk getting stuck on the side of the road.

Oral Motions for Summary Judgment

At the conclusion of all of the evidence, the Hospital moved for summary judgment on the issue of apparent agency and adopted Dr. Blundon's argument on the issue of economic damages. Responding to Dr. Blundon's assertion that Mr. Williams' experts valued more than just the amputation of the right leg, Mr. Williams argued:

> We did what we were required to do under Maryland law and particularly under *Mayer [v.] North Arundel Hospital*, that was to apportion damages. And the simple way to explain it is this: We had to start with what Mr. Williams' needs are now completely to have some sort of baseline.
>
> Then we took the position that, as this case -- what this case is about, he would have had a right leg of some functionality which would have still required some needs but not as much as what he needs now.
>
> For example -- and Ms. Winslow, I think, made it plain with probably the simplest example we can get. She says, now he needs 24/7 care, but if he didn't have -- if he had one leg, he wouldn't need 24/7 care. He would need a lot less, but my life care plan only calls for the difference between the two.
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> * * *
>
> That's -- and for example, Ms. Winslow made it -- made it a point to say, for example, there is nothing in the life care plan dealing with pain management, medications, or anything like that because she says, I can't parse that out.

> And under North Arundel -- or *Mayer [v.] North Arundel*, that case says that it -- when you're talking about two causes of injury or damages to a plaintiff, it is the plaintiff's burden to first -- we could come in and say to you, Judge, it is impossible for us to apportion these damages. And if you agree with us as a matter of law, they can be held responsible for everything.
>
> And *Mayer [v.] North Arundel* also says that if the damages can be apportioned or divisible, then it's [our] burden to do so and to present that evidence to the jury. That's what we did here.
>
> There's nothing in the life care plan that is related to what Mr. Williams needs now that he would have otherwise needed had he had one leg saved.

The Hospital responded to Mr. Williams, arguing:

> Your Honor, I think I need to officially move for judgment on that basis as well that -- so I adopt [Dr. Blundon's] argument. But in -- in response to Mr. Wells' comments regarding Ms. Winslow's life care plan, I would respectfully disagree with the testimony.
>
> The testimony clearly was from Ms. Winslow that he needed 24-hour care because of all of his problems, and she specifically said he would still need care grooming himself, shaving himself, putting clothes on, putting pants on, cooking, and -- and that was not included in her one-and-point-seven hours per week of care that she was giving him for the right-lower extremity.
>
> I would argue that the damages are able to be apportioned, and it is what is related to the right leg, which is 1.7 hours per day for a total of 12 hours per week for purposes of the attendant care. We can argue about the prosthetic care. I think that's a little different.
>
> But in terms of the attendant care, the 24 hours of attendant care is -- and I think both -- both Dr. April and Ms. Winslow agreed, that's related to his chronic pain and his all over function, not just the fact that he's a bilateral amputee;

> and, therein, I believe lies the difference of opinion between the parties.

The court reserved ruling on the motions and put the question to the jury.

Jury Instructions, Closing Arguments, and the Verdict

The following day, the circuit court provided the jury with the following instructions:

> I will remind you that neither the opening statements nor closing statements of a lawyer is evidence. So if your memory of the testimony or evidence is different than anything I might say -- I try to say nothing -- or the lawyers might say, rely on your own collective memory.
>
> Now, during the deliberations, you cannot communicate with anyone. You're aware of that. Don't use any cell phones or electronic media. Get all of your information that you will need either from me or from the exhibits.
>
> * * *
>
> Now we will go over expert testimony. An expert is a witness who has special training, background, or experience in a given field. You should give expert testimony the weight and value you believe it should have. You are not required to accept any expert's opinion, but you should consider an expert's testimony together with all of the other evidence.
>
> Now, anybody who testifies, including a party, is a witness, and you alone are the sole judges of whether and what witness testimony should be believed. In making this decision, you may apply your own common sense and everyday experiences.

The court went on to instruct the jury to evaluate the witnesses' credibility and explained and defined the "preponderance of the evidence" standard. The court continued:

> Now, shortly in this case, you will weigh the evidence, and to weigh anything you have to have a standard. And the

standard in a civil case is a preponderance of the evidence. The plaintiff asserts -- or a party who asserts a claim or a defense has the burden of proving it by a preponderance of the evidence.

In order to prove something by a preponderance of the evidence, a party must prove that it is more likely so than not so. In other words, a preponderance of the evidence means such evidence opposed to it, has more convincing force and produce[s] in your minds a belief that it is more likely true than not true.

In determining whether a party has met the burden of proof, you should consider the quality of all of the evidence regardless of who called the witness or introduced the exhibit and regardless of the number of witnesses or exhibits which one party or the other may have produced. If you believe the evidence is evenly balanced on an issue, then your finding on that issue must be against the party who has the burden of proving it.

* * *

Let’s talk about negligence. Negligence is doing something that a person using reasonable care would not do or not doing something that a person using reasonable care would do.

Reasonable care means that caution, attention, or skill that a reasonable person would use under the same or similar circumstances. When referring to a health care provider, however, you have to find a breach of the standard of care in order for that to be negligent.

A health care provider is negligent if the health care provider does not use that degree of care and skill which a reasonably competent health care provider engaged in a similar practice and acting in similar circumstances would use.

The health care provider treating a patient is under a legal duty to do so within the standard of care throughout the period of treatment. That does not change because some aspects of the treatment rendered to the patient may have

> been successful or indeed may have been heroic. Still treatment must be all rendered in accordance with the standard of care.
>
> Now, for the plaintiff to recover damages, the defendant's negligence must be a cause of the plaintiff's injuries.
>
> * * *
>
> In the event you find for the Plaintiff on the issues of liability in accordance with the verdict sheet and the instructions in the verdict sheet, you must then go on to consider the question of damages.
>
> It will be your duty to determine what, if any, award will fairly compensate the Plaintiff for his losses. The burden is on the Plaintiff to prove by a preponderance of the evidence each item of damage claimed to be caused by the Defendants. In considering the items of damage, keep in mind your award must adequately and fairly compensate the Plaintiff, but an award should not be based on guesswork.

The court continued, instructing the jury on the difference between economic and non-economic damages, and life expectancy. None of the parties objected to any of the instructions given.

The parties then went on to make their closing arguments. Mr. Williams' counsel appeared to utilize a slide show presentation; however, it is not included in the record. Mr. Williams' counsel presented to the jury how it should complete the jury verdict sheet, requesting, for the first time, $210,857 for durable medical equipment, $5,059,692 for attendant care, $16,500 for case management, and $1,255,142 for prosthetic leg costs. Mr. Williams further requested the jury "apply justice" when awarding non-economic damages. Dr. Blundon's counsel then made the following argument:

> Remember Ms. Winslow? Well, you know, yeah, he needs this, but I can't parse that out because everything is so interconnected.
>
> Of course it is. It's all interconnected. And then she admitted to you that because I can't parse it out, you know, perhaps my plan is not accurate.
>
> Well, the numbers that they have put up are on this inaccurate plan, because what they should have done is exactly what Ms. Koslow did, and said, I got to take him as he is. What does he need for the right leg only? That wasn't put in front of you. You don't have those numbers. You have numbers for Mr. Williams with his left leg amputated, his left arm not working, and all the pain that he described to you. That's just an incorrect valuation on this case.
>
> * * *
>
> So you need to ask yourself: What did the life care planner say in this case that was required for the right leg only? They said nothing, because they agreed that the left arm is causing major problems with this gentleman to the point where he needs attendant help. That big five-million-dollar number, he needs that notwithstanding whether he has the right leg or not. Because you heard the testimony: I can't bathe. I can't do this. I can't do that.
>
> I am not demeaning Mr. Williams for who he is. I am telling you what their own expert said. The left leg is going to require a van and all this other stuff. That wasn't put -- saying that the right leg has caused the need for this. They are telling you overall what he needs. They did not segregate it out for you.

During deliberations, the jury provided the court with a note that read: "Need life expectancy plans from both parties." It was assumed that the jury meant it wanted to see the life care plans. The court responded instructing that the jurors must rely on their own recollection, as "[n]either plan has been admitted in evidence." The jury found Dr. Blundon had committed medical malpractice and that his negligence was a cause of Mr.

Williams' damages. The jury also found Dr. Blundon was an agent of the Hospital, awarding Mr. Williams $6,285,549 in damages, with $210,857 for durable medical equipment, $165,000 for case management, $5,059,692 for attendant care, $550,000 for prostheses, and $300,000 for non-economic damages.

Motions for Judgment Notwithstanding the Verdict

Both Dr. Blundon and the Hospital filed motions for judgment notwithstanding the verdict on the issue of economic damages. In its motion, the Hospital stated that Mr. Williams' "experts' testimony and the factual evidence demonstrated that the claimed attendant care, case management, and cost for a wheelchair van are based on Mr. Williams' pre-existing injuries and not the amputation of the injured right leg." The Hospital continued:

> When there is evidence of permanent injury prior to a negligent act, the question becomes one of apportionment of damages between an innocent act and a negligent act and the permanent injury that existed prior to the negligent act is equivalent to a pre-existing injury. *Mayer v. North Arundel Hosp. Ass'n, Inc.*, 145 Md. App. 235, 250 (2002). The Plaintiff bears the burden of showing an aggravation and in that circumstance, a defendant is only liable for the aggravation. *Id*. (additional citations omitted).
>
> In this case, the plaintiff's experts' testimony about economic damages for future "attendant care" completely failed to apportion this claim for his pre-existing conditions. . . . The factual evidence clearly demonstrated that Mr. Williams' function is severely impaired by his chronic pain, his amputated left leg, and the lack of function in his left arm. The evidence established that these pre-existing injuries prevent Mr. Williams from performing his activities of daily living and on most days from even getting out of bed. There was no expert opinion that the amputation of the badly injured right leg caused these pre-existing conditions,

> including his chronic pain syndrome. There was no expert opinion evidence that his chronic total body pain syndrome and need for high dose opiate medications would have been alleviated in any way had the injured right leg been salvaged.
>
> . . .
>
> In fact, the Plaintiff's experts expressly acknowledged that the claimed damages for attendant care encompassed care for his significant pre-existing medical conditions and limitations.

In response, Mr. Williams stated that the Hospital was "wrong on both counts" in its arguments that Mr. Williams' experts "did not 'take Mr. Williams as he would have been prior to the alleged negligence'" and that "Plaintiff was required to apportion the attendant care damages." Mr. Williams further asserted that "given that Plaintiff's evidence was that the harms he suffered were indivisible, it was the Defendants' burden to show that Plaintiff's damages could be apportioned." Mr. Williams contended that the "argument that Plaintiff's experts failed to 'take Mr. Williams as he would have been prior to the alleged negligence . . .' completely ignores the testimony of Plaintiff's experts on this point and takes the testimony out of context. That is exactly what the Plaintiff's experts did." Mr. Williams then addressed apportionment:

> Defendants' complaint with respect to attendant care needs put forth as damages by the Plaintiff for the loss of his right leg is bottomed on the fact that Mr. Williams' care needs include care needs arising from "chronic pain," amputated left leg and limited function of his left arm and hand. They claim these injuries are "pre-existing injuries" and not related to the amputated right leg.[] They claim, for the first time, in the face of uncontradicted testimony that the harm arising from these additional injuries could not be "parsed out," without any evidentiary support, that these harms from these injuries are divisible and that "[i]n this case,

> the Plaintiff's experts' testimony about economic damages for future 'attendant care' completely failed to apportion this claim for his pre-existing conditions." ("These injuries were divisible . . . But the Plaintiff did not present evidence dividing the valuation of damages to Plaintiff's right leg from those suffered from the other injuries in the accident."). Their argument is not Maryland law.
>
> As Defendants repeatedly point out, Plaintiff's evidence and expert testimony was the harm arising from these additional injuries could not be "parsed out." Defendants seem to accept that the testimony of Plaintiff's experts that Terence Williams' chronic pain, etc. injuries, namely, his pain condition, was [sic] could not be "parsed out." Thus, Plaintiff's evidence was that these harms were not divisible.
>
> Plaintiff's evidence was that these harms arising from these injuries could not be "parsed out" between the accident as a cause and Dr. Blundon's negligence as a cause. In other words, Plaintiff's evidence was that this aspect of injury was indivisible. Plaintiff's burden - which he met - was to show that the harm caused was at least a contributing proximate result of Dr. Blundon's negligence. That being the case, since Dr. Blundon's negligence was a substantial factor in causing Mr. Williams' injury, he is legally responsible for the entirety of plaintiff's damages. *Carter v. Wallace & Gale Asbestos Settlement Trust*, 439 Md. 333, 354-355. 96 A. 3d 147, 59-160 (2014). To the extent that Defendants argue that the harm was at least theoretically divisible; **"[t]he burden then shift[ed] to the defendant[s] to either deny all liability *or to prove that the harm caused can be divided and the damages therefore be apportioned*."** *Carter v. Wallace & Gale Asbestos Settlement Trust*, 439 Md. 333, 354-355. 96 A. 3d 147, 59-160 (2014) (emphasis added). These Defendants chose to deny all liability and now must live with the result of their choice.

Mr. Williams then went on to discuss *Carter v. Wallace & Gale Asbestos Settlement Trust*, 439 Md. 333 (2014), noting that the Court rejected apportionment in that instance, as death is not a divisible injury. Further, the Court stated, "where an injury

is reasonably – or theoretically – divisible, the burden of proof would shift to the defendant to prove that apportionment of damages is appropriate." 439 Md. at 355. Mr. Williams contended that if the defendants wanted to argue for apportionment, it was their burden to prove that the harm from Mr. Williams' chronic body pain, left leg amputation, and limited left arm function was "reasonably – or theoretically – divisible" from that of the right leg. Mr. Williams claims that rather than meeting the burden placed on defendants by *Carter*, they instead "concede, as their motions demonstrate, that the harm was not reasonably divisible," by referencing Ms. Winslow's insistence that the harm could not be "parsed out." Mr. Williams continued:

> Pursuant to *Carter*, supra, assuming the harm caused was theoretically divisible, Terence Williams' burden was to make a prima facie showing that the harm caused was at least a contributing proximate result of Dr. Blundon's negligence. He met that burden. Consequently, *Carter*, supra, directs that burden then shifted to the Defendants to (1) either deny all liability or (2) to prove that the harm caused can be divided and the damages therefore be apportioned. The Defendant did not request a Frye-Reed hearing on apportionment for the Court to decide [the] issue of divisibility. Under *Carter*, supra, even if this Court accepts Defendants' argument that there was evidence that the harm was reasonably divisible, the issue of apportionment was a question of fact for the jury. *Carter*, 439 Md. at 354-55, 96 A.3d at 159-160. Here, the Defendants relied on cross examination to raise the question of apportionment before the jury. Defendants do not point the Court to any evidence tending to show, for example, that Plaintiffs chronic pain was related solely to the physical injuries caused by the accident itself rather than Dr. Blundon's negligence. Rather than attempt to prove that the harms caused can be divided and the damages therefore apportioned, the Defendants chose to deny all liability. The jury rejected their denial. See, *Mayer v. North Arundel Hospital*, 145 Md. Ap. 235, 254, 802 A. 2d 483, 494 ("A

> defendant is free to put on evidence that the harm is divisible and how it should be divided.")
>
> . . .
>
> "Because no reasonable basis for dividing the injury between the plaintiff and the defendant exists, the more appropriate rule applicable to the award of damages in this case would be what is colloquially known as the eggshell plaintiff rule." 439 Md. at 357, 96 A. 2d. at 161, fn. 11. That rule requires the Defendants to accept the frailties with which the Plaintiff was afflicted, namely, body pain, an amputated left leg and a limited function left arm. *Peterson v. Goodyear Tire & Rubber Co.*, 254 Md. 137, 254 A.2d 198 (1969).

In its reply, the Hospital addressed Mr. Williams' claim that the damages are not apportionable. The Hospital claimed that Mr. Williams "essentially concedes that the claim for economic damages and award for future medical services for 'attendant care' includes the cost of future medical care for Mr. William[s'] total injuries from the car accident and not the loss of the severely injured right leg." Further, it noted that Mr. Williams simultaneously argues that the nature of the injuries keeps them from being divisible, while also arguing that the injuries are distinct, and that Ms. Winslow did separate the damage from the extensive prior injuries. The Hospital continued:

> The Maryland law on a Plaintiff's ability to collect damages for a negligent injury in the context of a pre-existing injury is set forth in *Mayer v North Arundel Hosp. Ass'n, Inc.*, 145 Md. App. 235, 246 (2002). When there is evidence of permanent injury prior to a negligent act, the question becomes one of apportionment of damages between an innocent act and a negligent act and the permanent injury that existed prior to the negligent act is equivalent to a pre-existing injury. *Id*. at 250. . . . The Plaintiff alleges the right leg was treated negligently causing the permanently injured right leg to be amputated. Thus, the Plaintiff alleged an aggravation of a pre-existing condition. Contrary to the

Opposition, "the Plaintiff bears the burden of showing an aggravation and in that circumstance, a defendant is only liable for the aggravation." *Id*. (additional citations omitted).

The Plaintiff failed to put on a *prima facie* case that the alleged negligence caused the claimed economic damages. . . . Under the guidance of *Mayer v North Arundel*, a Plaintiff bears the burden to prove an aggravation of a pre-existing condition and damages are to be apportioned when (1) there are distinct harms, or (2) there is a reasonable basis for determining the contribution of each cause to a single harm. *Id*. at 249. The Court explained that "distinct harms" specifically include injury to "different parts of the body." *Id*. at 250. The alleged negligence in this case is limited to only the loss of the severely injured right leg while the pre-existing injuries involve injuries to multiple other parts of the body in addition to the severely injured right leg. The Plaintiff's argument confounds itself because the Plaintiff formally claims to seek only damages for the loss of the badly injured right leg, yet the facts reveal that the Plaintiff is claiming damages for the injury the Plaintiff sustained in the car accident and not the amputation of the injured leg.

The injury in this case was not a single harm or inherently or obviously indivisible and thus incapable of being apportioned as the Opposition suggests. *Id*. at 250-251 (holding that a worsening brain injury was not inherently indivisible or incapable of being apportioned). The alleged injury in this case is clearly able to be separated from the extensive pre-existing injuries that the Plaintiff had sustained at the time of the purported negligence. Mr. Williams suffered tremendous permanent injury to multiple body parts, including severe injury to the right leg in the car accident and these injuries are deemed to be divisible and pre-existing injuries under Maryland law. The alleged failure to salvage the severely injured right leg is a separate injury that is able to be apportioned – the Plaintiff simply put forward a claim for medical services and products related to his pre-existing injuries. The Plaintiff failed to put forward a *prima facie* case of economic damages for a single harm or economic damages caused by an aggravation of the pre-existing condition. The Plaintiff now claims that it did separate the claimed injury and that it is impossible to separate the claimed injury from

> the pre-existing injury such that the Plaintiff is able to recover economic damages for future medical services that are related to his pre-existing and distinct injuries caused in the car accident.

The Hospital then addressed Mr. Williams' reliance on *Carter*, arguing that "substantial factor" analysis is not relevant here and explaining that *Carter* "involved a negligent act that was determined to be a 'substantial factor' in bringing about a single harm that was not divisible." Because "substantial factor" causation "addresses the situation where multiple independent acts produce a single injury that would have occurred as a result of each cause alone," though, the Hospital explained that the concept does not apply in this case:

> There was no evidence that the loss of the severely injured right leg alone would have caused the same injury and/or damages as the car accident and no reasonable juror could have found as much. Likewise, the Plaintiff did not put forward a *prima facie* case showing that Dr. Blundon's negligent act was a proximate cause of the single harm that is the basis for the economic damages claim. Contrary to the Opposition, the "substantial factor" causation is simply not relevant in this case and does not provide a basis for the economic damages for the future "attendant care" and products claimed by the Plaintiff.

A hearing on the motions for judgment notwithstanding the verdict was held on January 29, 2020. At the hearing, Mr. Williams' counsel highlighted Dr. April's testimony, in which he claimed that he looked at Mr. Williams' needs and based his recommendation on if one leg had been saved. Dr. April testified at trial that he "agree[d] with Ms. Winslow that if [Mr. Williams] had one leg amputated with his

limited function, he had a prosthesis even with chronic pain complex, he [still] needs attendant care, but less than what he needs currently now." Counsel continued:

> That was the case. He made it worse, and that is what our testimony was. That is what our experts testified to. The difference between what his needs would have been had Dr. Blundon not caused him to lose that leg and what he needed as a result of that.

Finally, Mr. Williams' counsel argued: "This is a jurisdiction that says we have meager evidence to give the jury. The jury decides. That is what they did."

Counsel for the Hospital then stated that she "would disagree with [Mr. Williams'] Counsel that this is an indivisible injury. I think what is clear from Ms. Winslow's testimony is that there are things that Mr. Williams required regardless of whether or not this leg was amputated or not, and she outlines all of that." Counsel continued:

> He required attendant care. He required all of those things. So they are divisible. What is the additive effect, if you will, of adding this other leg amputation? So there is a global needs that he – his global needs, which included a great deal of attendant care.
>
> It is the Plaintiff's burden to apportion out specifically what this is because it is divisible, as the Plaintiff's expert clearly did when they divided out one leg from a bilateral amputation.

After the hearing, the court denied the motion for judgment notwithstanding the verdict on economic damages. The court did, however, correct the case management award, reducing it to $16,500 due to a clerical error.

Appeals

Mr. Williams appealed the court's grant of the motion for judgment notwithstanding the verdict on apparent agency, and the Hospital filed a cross-appeal on the denial of the motion for judgment notwithstanding the verdict on the issue of economic damages. We affirmed the circuit court decision and declined to consider the Hospital's cross-appeal. *Williams v. Dimensions Health Corp.*, No. 0036, Sept. Term 2020, 2021 WL 3052830 (Md. Ct. Spec. App. July 20, 2021). The Supreme Court granted certiorari and reversed, holding that Dr. Blundon was an apparent agent of the Hospital, and remanded to this Court to rule on the cross-appeal regarding damages. *Williams v. Dimensions Health Corp.*, 480 Md. 24 (2022).

THE PARTIES' CONTENTIONS

I. THE HOSPITAL'S OPENING BRIEF

On cross-appeal, the Hospital argues that (1) "Mr. Williams'[] injuries are not indivisible, and his damages must be apportioned between those caused by his accident and those caused by Dr. Blundon's negligence," and (2) "Most of the expenses awarded by the jury lacked adequate evidentiary support."

In support of its first argument, the Hospital cites to the principles in Maryland law that death is the "paradigmatic indivisible injury," and "an injury to two different parts of the body" is a "paradigmatic example of 'two distinct harms'"—a divisible injury. The Hospital maintains that it cannot be held liable for injuries to the left side of Mr. Williams' body because such injuries are "distinct harms," "unrelated to Dr.

Blundon's negligent treatment" on Mr. Williams' right leg. The Hospital then argues that "a plaintiff has the burden of showing an aggravation of a preexisting condition and a defendant is liable only for the aggravation"—here, the preexisting condition being injuries caused by the car accident, and the aggravation being Dr. Blundon's negligence. The Hospital contends that the defendant does not bear the burden of proving "divisibility of the harm" or limiting "the defendant's own liability."

In support of its second argument, the Hospital asserts that "[n]egligent health care providers are liable only for the damages that they have negligently caused." The Hospital contends that the future-care plan upon which Mr. Williams' expert witnesses relied "included expenses that were not directly related to the loss of his injured right leg and, instead, arose from his significant pre-existing injuries and limitations." Specifically, the Hospital argues that the "enormous compensation for round-the-clock attendant care" was "improper" because "[n]o expert testified that Mr. Williams'[] chronic total body pain syndrome and need for high-dose opiate medications would have been reduced if the injured right leg [had] been salvaged." The Hospital maintains that testimony offered by Mr. Williams' experts "made clear that the claimed damages for attendant care encompassed care for his significant pre-existing medical conditions and limitations," and that Mr. Williams and his experts "failed to show what needs were caused by the right-leg amputation." Finally, the Hospital asserts that the jury's award of $500,000 for prostheses and $54,000 for a wheelchair van—"that Mr. Williams could not operate regardless of how his right leg was treated"—were "unfounded" and not

supported by "sufficient proof" because the expert witnesses "[s]imply utter[ed] that Mr. Williams may need these devices."

For these reasons, the Hospital asks this Court to "vacate the portion of the award that compensates Mr. Williams for the injuries from the car accident and award only those damages that the evidence showed were caused by Dr. Blundon's negligence."

II. MR. WILLIAMS' ANSWERING BRIEF

In response, Mr. Williams argues that (1) his "damages are apportioned between those caused by his accident and those caused by Dr. Blundon's negligence," (2) "[t]here was adequate evidentiary support for the Life Care Plan expenses awarded by the jury," and (3) "[t]he Hospital failed to meet its burden to prove apportionment of damages was appropriate."

In support of his first argument, Mr. Williams maintains that the damages awarded by the jury were apportioned appropriately because his expert witnesses testified that amputation of his right leg necessitated "additional protheses," "additional attendant care," "additional case management services," and "other items made necessary by Dr. Blundon's negligence." Mr. Williams then reviews portions of the expert testimony. He notes that Dr. April testified that Mr. Williams' attendant-care needs were increased by Dr. Blundon's negligence, and Ms. Winslow testified that, as she developed the life care plan, she compared the difference in Mr. Williams' needs with and without Dr. Blundon's negligence.

In support of his second argument, Mr. Williams addresses "each of the items" that the Hospital "contends lack adequate evidentiary support" to sustain the jury's award. With respect to the award for attendant care, he contends that the "life care plan included the increase in attendant care caused by Dr. Blundon's negligence – nothing more." Mr. Williams asserts that the Hospital disagreed with the evidence on this item but "offered no alternative to the jury," the Hospital did not challenge the life care planning expert's methodology, and the expert testimony was admitted.

As for the award for prostheses, Mr. Williams notes that the $550,000 jury award was less than half of the $1,266,196 that he had claimed and maintains that, although his expert admitted that "some of the [prostheses] in the life care plan were not needed or duplicative," the "jury apparently weighed the evidence and [this claim] . . . and reduced that item of damage" accordingly.

Next, regarding the wheelchair van, Mr. Williams asserts that the Hospital "overlooks or misreads the expert testimony" supporting this need. He explains that an attendant, "not Mr. Williams, would drive the wheelchair van" and that, if Mr. Williams' right leg were salvaged, the "wheelchair van would not be necessary." He also explains that he testified as to his current inability to drive, not whether he would have been able to drive if his right leg were salvaged.[10]

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[10] In support of this proposition, Mr. Williams quotes the following testimony:

> [COUNSEL FOR HOSPITAL]: And you are not able or don't think you'd be able to drive even with a right leg, because your body just shuts down at times and you don't even know when it's going to happen, and you can't drive

In support of his third argument,[11] Mr. Williams asserts that "apportionment of damages is not a genuine issue here," but that "the Hospital complains that '. . . Mr. Williams' left-side injuries are 'distinct harms – unrelated to Dr. Blundon's negligent treatment . . .' and claim they must be apportioned." He then asserts that the Hospital's "primary complaint is that Mr. Williams' attendant care needs include care needs arising from the injuries sustained as a result of the car accident and not Dr. Blundon's negligence." After having argued above that the damages were properly apportioned, Mr. Williams argues the following:

> Without any evidentiary support, and in the face of **uncontradicted** testimony that the harm arising from these other injuries could not be "parsed out," the Hospital nonetheless asserts that these harms from these injuries are divisible. As will be seen below, the Hospital's "divisibility" argument, made after conceding below that damages were apportioned, is legally incorrect, and the relief sought is inconsistent with Maryland law.
>
> [Mr.] Williams' evidence and expert testimony was that these harms arising from his car crash – the chronic pain, amputated left leg and limited use of his left arm and hand –

> because you don't want to be somewhere and your body shuts down and you'll be stuck on the side of the road.
>
> [MR. WILLIAMS]: Correct.

[11] In his third argument, Mr. Williams wavers between the analysis for divisible injuries and indivisible injuries, such that he appears to contend that all his injuries—from the car accident and Dr. Blundon's negligence alike—were indivisible and the Hospital bore the burden of proving otherwise. In his first argument, though, as summarized above, he argues that the damages were appropriately apportioned. We note that apportionment only occurs when injuries are divisible, and, therefore, these two arguments are seemingly contradictory. *Carter v. Wallace & Gale Asbestos Settlement Trust*, 439 Md. 333, 359 (2014) ("Only if the harm is reasonably divisible is the issue of apportionment a question of fact for the jury . . . .").

> could not be "parsed out" between the accident and Dr. Blundon's negligence.

Mr. Williams also reasons that if his injuries were indivisible, "the Hospital would be liable for all of Mr. Williams' damages," and the "eggshell plaintiff" rule would apply.

Mr. Williams then explains that he met his burden of proving that "the harm caused by Dr. Blundon was at least a contributing proximate result[12] of Dr. Blundon's negligence," and, therefore, the "burden shifted to the Hospital to either deny all liability or to prove that the harm caused can be divided and the damages therefore apportioned." He goes on to cite *Carter* as "instructive"—turning the conversation back to divisibility after arguing that his injuries were indivisible—explaining that "where an injury is reasonably . . . divisible, the burden of proof would shift to the defendant to prove that apportionment of damages is appropriate" and to prove that the "need for attendant care was reasonabl[y] . . . divisible."

He then argues, returning to the analysis for a presumptively indivisible injury, that he "made a prima facie showing that Dr. Blundon's negligence was at least a contributing proximate cause of his need for attendant care," and, therefore, "the burden was on the Hospital to (1) either deny all liability or (2) to prove that the harm can be

[12] Mr. Williams borrows causation language from *Carter*, where the Court held that, "if an injury is indivisible, any tortfeasors joined in the litigation whose conduct was a substantial factor in causing the plaintiff's injury would be legally responsible for the entirety of the plaintiff's damages." 439 Md. at 354. *See id.* at 355 (citing *Azure v. City of Billings*, 596 P.2d 460, 471 ("Where the harm caused is theoretically divisible, plaintiff's burden is to make a prima facie showing that the harm caused was at least a *contributing proximate result* of the defendant's act or omission.") (emphasis added)).

divided and the damages therefore apportioned." In Mr. Williams' view, the Hospital elected to deny all liability, and the jury "rejected its denial." Mr. Williams maintains that the Hospital did not attempt to prove divisibility of harm but rather "took the position that Mr. Williams' attendant care needs were related solely to the car accident."[13]

Also relying on *Carter*, Mr. Williams explains that even if "an unidentified non-party driver also contributed to his injury . . . [Mr. Williams] was allowed to sue [Dr. Blundon and the Hospital] for the full amount of his damages for his indivisible injury."

Turning back to the issue of apportionment of damages for a divisible injury, he further asserts that the "problem for the Hospital is that it relied on cross examination to raise the question of apportionment before the jury," but "[t]hat effort failed." Mr. Williams faults the Hospital because it "did not ask the trial court . . . to decide whether, as a matter of law" the attendant-care needs were divisible and did not ask the trial court to give the jury an instruction "on the issue of 'aggravation of pre-existing condition.'"

Mr. Williams concludes by arguing that the Hospital's request for this Court to vacate the portion of the jury award that compensates Mr. Williams for injuries caused by the car accident, not Dr. Blundon's negligence, is unsupported by Maryland law. In so arguing, Mr. Williams analogizes the requested relief to that which the Supreme Court of Maryland rejected in *Carter*. In *Carter*, the Court rejected the defendant's "proposal to

[13] Mr. Williams then states that the Hospital "does not point this Court to any evidence tending to show . . . that Mr. Williams' chronic pain was related **solely** to the physical injuries caused by the accident itself rather than Dr. Blundon's negligence" and that "no expert testified that Mr. Williams' 'chronic body pain' was caused **solely** by the injuries caused by the car crash."

apportion damages between the plaintiff's conduct contributing to his death and the defendant's conduct" because such apportionment would "hold the plaintiff accountable under comparative negligence principles," to which Maryland law does not ascribe.

For these reasons, Mr. Williams asks this Court to affirm the circuit court's denial of judgment notwithstanding the verdict with respect to the damages award.

III. THE HOSPITAL'S REPLY BRIEF

In response to Mr. Williams' reply, the Hospital argues that (1) "[n]o competent evidence supports the $5 million attendant-care award for apportioned harm," and (2) "Dr. Blundon cannot be liable for the distinct, preexisting injuries to Mr. Williams'[] left side under the theory that they are indivisible from his right-leg amputation."

The Hospital first distills Mr. Williams' argument as follows: "Mr. Williams'[] damages theory is that, if his experts testified that they apportioned damages and the jury agreed, the Court has no choice but to accept that his experts did it properly—regardless of the evidence." The Hospital maintains that "[t]here is no evidence or reasonable basis to infer that Mr. Williams'[] attendant-care needs for medication management, grooming, and monitoring him while he sleeps would somehow dwindle from 24 hours per day to less than two hours per day if Dr. Blundon had salvaged his badly broken right leg." Accordingly, the "attendant-care award plainly and impermissibly compensates Mr. Williams for his car-accident injuries, unrelated to his right-leg amputation." The Hospital argues that the evidence "disproves" the expert testimony, and "merely articulating the expert opinion does not create a factual basis for the damages."

In support of its second argument, the Hospital begins by stating the following:

> After insisting (in Parts A and B of his argument) that his experts properly apportioned damages to exclude the damages unrelated to Dr. Blundon's negligent failure to save his right leg, Mr. Williams reverses course in Part C, contending that the "harms arising from his car crash . . . could not be 'parsed out' between the accident and Dr. Blundon's negligence." He incorrectly argues that Dr. Blundon could appropriately be liable for all of Mr. Williams'[] needs, while misidentifying the [Supreme Court of Maryland's] 2014 *Carter* opinion as "instructive" here. It is not.
>
> Mr. Williams errs further by arguing that [Dr. Blundon and the Hospital] carried the burden of denying or disproving liability for car-accident injuries to the left side of Mr. Williams'[] body. Completing the series of legal errors, Mr. Williams also misidentifies himself as an "eggshell plaintiff." These self-contradicting arguments completely misconstrue Maryland law on damages for divisible harm and successive injuries.

The Hospital then explains that the injuries caused by the car accident and Dr. Blundon's negligence are "plainly distinct" and "successive." The Hospital quotes *Mayer*, asserting that "if a tortfeasor causes injury, and a physician negligently treats the injury, the plaintiff generally has the burden of proving the additional harm caused by the physician's negligence." The Hospital then states that *Carter* "is simply not relevant here" because it involved "a truly indivisible injury" and "concurrent, instead of successive, tortfeasors."

Next, the Hospital rebuts Mr. Williams' argument that he could "recover here under a lower burden of proof as an 'eggshell plaintiff,'" explaining that that doctrine applies where an "unexpectedly fragile" plaintiff incurs "damages that are much more

severe than anticipated." The Hospital asserts that Mr. Williams' injuries were "obvious and severe," and he was not "an apparently healthy plaintiff with some latent health condition." The Hospital further argues that even if the eggshell plaintiff doctrine applied, the defendant "is liable only for the extent to which the defendant's conduct has resulted in an aggravation of the pre-existing condition, and not for the condition as it was." The Hospital then reiterates its request for "this Court to vacate the portion of the award that compensates Mr. Williams for his car-accident injuries."

As explained further below, we affirm the denial of judgment notwithstanding the verdict on the issue of damages, concluding that Mr. Williams presented sufficient evidence for a reasonable jury to determine that the care, prostheses, and wheelchair van were to compensate Mr. Williams for the loss of his right leg and that these damages amounted to $6,285,549.

DISCUSSION

I. STANDARD OF REVIEW

A circuit court's ruling on a motion for judgment notwithstanding the verdict is reviewed for legal correctness. *Bell v. Chance*, 460 Md. 28, 52 (2018). When conducting this review, we ask "whether on the evidence presented a reasonable fact-finder could find the elements of the cause of action by a preponderance of the evidence." *Univ. of Md. Med. Sys. Corp. v. Gholston*, 203 Md. App. 321, 329 (2012). We "assume[] the truth of all credible evidence on the issue and any inferences therefrom in the light

most favorable to . . . the nonmoving parties." *Lowery v. Smithsburg Emergency Med. Serv.*, 173 Md. App. 662, 683 (2007).

We uphold a circuit court's denial of a motion for judgment notwithstanding the verdict "[i]f there is any evidence, no matter how slight, legally sufficient to generate a jury question." *James v. Gen. Motors Corp.*, 74 Md. App. 479, 484 (1988) (emphasis added). "Thus, if the nonmoving party offers competent evidence that rises above speculation, hypothesis, and conjecture, the JNOV should be denied." *Barnes v. Greater Baltimore Med. Ctr., Inc.*, 210 Md. App. 457, 480 (2013) (citations omitted). Conversely, "[i]f there is no rational ground under the law governing the case for upholding the jury's verdict, [JNOV] must be granted." *Stracke v. Estate of Butler*, 465 Md. 407, 420 (2019) (quoting *Bell*, 460 Md. at 52).

II. DIVISIBILITY

For context, we will briefly discuss the issue of divisibility. We decide, however, that due to the procedural posture of this case, we need not determine if Mr. Williams proved whether the harm incurred from the amputation of his severely damaged right leg was divisible from the other injuries that he sustained in the car accident.

A. The Legal Context: Restatement (Second) of Torts, *Mayer*, and *Carter*

We find three sources of law to be helpful in our analysis of divisibility: the Restatement (Second) of Torts, *Carter v. Wallace & Gale Asbestos Settlement Trust*, 439 Md. 333 (2014), and *Mayer v. North Arundel Hosp. Ass'n, Inc.*, 145 Md. App. 235,

(2002). As noted above, both parties rely on *Carter* and *Mayer* in their briefs, thus we will discuss both cases further for clarity.

Restatement (Second) of Torts

We note that Maryland follows the Restatement (Second) of Torts, which requires damages for harm be apportioned when there are distinct harms or the contribution of each cause to a single harm can reasonably be determined. Restatement (Second) of Torts § 433A(1). Section 433A applies "whenever two or more causes have combined to bring about harm to the plaintiff, and each has been a substantial factor in producing the harm." Restatement § 433A cmt. a. This may include multiple parties, an innocent act combined with a tortfeasor's negligent act, or further harm caused to a pre-existing condition not caused by the tortfeasor. Restatement § 433A cmt. a and e. Some injuries, such as harms to different parts of the body, are clearly distinct and capable of being apportioned. Restatement § 433A cmt. b. There are other instances where harm may be distinguished when successive injuries occur, such as when an original act results in an injury, which is followed by negligent treatment by a physician. Restatement § 433A cmt. c. In such an instance, the physician, who played no part in causing the original injury, is "liable only for the additional harm caused by his own negligence in treatment." *Id.* Even if the harms are not distinct, they may nevertheless still be divisible upon a rational basis and able to be apportioned accordingly. Restatement § 433A cmt. d. When this is the case and does not result in injustice to the parties, the court may require this apportionment to be made. *Id.* Conversely, by their very nature, some harms are

incapable of apportionment. Restatement § 433A(2). If damages cannot be apportioned, the harm is "indivisible," and a wrongdoer is liable for the entire extent of the harm. Restatement § 433A(2) cmt. i.

The court is to determine whether the harm to the plaintiff is capable of apportionment among multiple causes as a matter of law. Restatement § 434(1). If the court determines that the harm is apportionable, the actual apportionment of the harm becomes an issue for the trier of fact, unless the court determines that no jury could reasonably differ. Restatement § 434(2). The plaintiff typically has the burden to prove that the tortious conduct of the defendant is the cause of the plaintiff's harm. Restatement § 433B(1). The Restatement contemplates occasions with two or more tortfeasors. In such instances, the burden shifts to the defendants to each prove that he has not caused the harm. *Id.*

Both *Carter* and *Mayer* guide our understanding of divisibility and the burden on each party at trial.

Carter

Carter explains divisibility and the burden of proof on each party. *Carter* involved a decedent who worked in a steel plant containing asbestos for over 30 years and smoked "half a pack to a full pack of cigarettes every day for 65 years." 439 Md. at 339. The decedent was diagnosed with lung cancer and died shortly after. *Id.* At trial, the asbestos company's settlement trust requested that the circuit court allow

apportionment of the damages, as both the tobacco smoking and exposure to asbestos contributed to the decedent's death. *Id*. at 341.

The settlement trust requested that its expert witness be permitted to testify as to the apportionment of damages between the asbestos exposure and tobacco use, and that the jury be instructed on apportionment of damages. *Id*. at 341-42. The settlement trust would have instructed the jury that if it found that the decedent suffered from asbestos-related lung disease and had a history of tobacco exposure, and both asbestos and tobacco exposure were substantial factors in the development of the lung disease, the jury was to apportion damages between the causes. *Id*. at 342. This apportionment was to be "based on the percentage [the jury] believe[s] each factor contributed to [the decedent's] lung disease." *Id*. The court excluded the expert's testimony regarding apportionment and declined to give the jury instruction. *Id*. at 341-42. The jury returned a verdict in favor of the decedent, and the settlement trust appealed. *Id*. at 346-47.

The Appellate Court reversed, holding that refusing to instruct the jury on apportionment and excluding the settlement trust's expert testimony was in error. The Supreme Court then reversed the Appellate Court. In its analysis, the Court held that "apportionment of damages is appropriate only where the injury in question is reasonably divisible among multiple causes." *Carter*, 439 Md. at 351. The Court noted the difference between a divisible and indivisible injury, saying "[t]he distinction is one between injuries which are reasonably capable of being separated and injuries which are

not." *Id*. (quoting W. Page Keeton et al., *Prosser and Keeton on Torts* § 52, at 345-46 (5th ed. 1984)). In discussing indivisibility, the Court stated:

> To be sure, if an injury is indivisible, any tortfeasors joined in the litigation whose conduct was a substantial factor in causing the plaintiff's injury would be legally responsible for the entirety of the plaintiff's damages. Only if the harm is reasonably divisible is the issue of apportionment a question of fact for the jury or a basis for a *Frye-Reed* hearing.[14] In that instance, where an injury is reasonably – or theoretically – divisible, the burden of proof would shift to the defendant to prove that apportionment of damages is appropriate. *See Azure* [*v. City of Billings*, 182 Mont. 234,596 P.2d 460 (Mont 1979)], 596 P.2d at 471 ("[W]here the harm caused is theoretically divisible, plaintiff's burden is to make a prima facie showing that the harm caused was at least a contributing proximate result of the defendant's act or omission. The burden then shifts to the defendant to either deny all liability or to prove that the harm caused can be divided and the damages therefore be apportioned.").

Id. at 354-55 (internal footnote omitted).

The Court noted that certain injuries, such as death, are generally considered to be indivisible, as there is no reasonable or practical way to allocate the contribution of multiple causes. *Id*. at 355 (citing *Mayer v. North Arundel Hosp. Ass'n, Inc.*, 145 Md. App. 235 (2002); Restatement (Second) of Torts § 433A cmt. I; and W. Page Keeton et al., *Prosser and Keeton on Torts* § 52, at 345-46 (5th ed. 1984)). If a reasonable jury

[14] Maryland previously used the "general acceptance" standard for admission of expert testimony set forth in *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), adopted in *Reed v. State*, 283 Md. 374 (1978). The Supreme Court of Maryland has discontinued use of the *Frye-Reed* standard, and in *Rochkind v. Stevenson*, 471 Md. 1 (2020), adopted the *Daubert* standard which "provide[s] a list of flexible factors to help courts determine the reliability of expert testimony." *Rochkind*, 471 Md. at 5 (discussing *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993)).

could not differ, the court may determine as a matter of law whether the injury is divisible. *Id*. at 359-60. Crediting the circuit court's careful consideration of whether the decedent's death was capable of apportionment, the Court held that it was not an abuse of discretion to disallow expert testimony and jury instructions on apportionment when the circuit court determined that the harm to the decedent was indivisible as a matter of law. *Id*. at 361. When the court has made a finding that an injury is indivisible, there is therefore no need to task the jury with apportioning damages.

Mayer

In *Carter*, the Court referenced *Mayer* in its discussion of divisibility. *Mayer* concerned a young child who suffered severe brain damage after the physician and hospital allegedly negligently failed to diagnose or treat the child for seizures. 145 Md. App. at 240. The harm to the child was split between the actions of the physician prior to 9:00 pm, and after 9:00 pm, with the jury being instructed that they may only consider acts that occurred prior to 9:00 pm. *Id*. at 241. The plaintiff did not object to this instruction. *Id*. It is well settled that the burden is on the plaintiff to prove negligence, the existence of an injury, and causation in fact and proximate cause. *Id*. at 245-46. It follows that the plaintiff must produce enough evidence to show the injury is indivisible or shift the burden to the defendant to show that the injury was divisible. *Id*. at 246.

This Court noted that "damages for harm are to be apportioned among two or more causes where (1) there are distinct harms, or (2) there is a reasonable basis for determining the contribution of each cause to a single harm." *Id*. a 249. Multiple causes

include, among other things, aggravation of a preexisting injury. *Id*. at 250. The Court continued that a "permanent injury that existed prior to the negligent act is equivalent to a 'preexisting' injury, and the subsequent act—its aggravation." *Id.* While Restatement 2d of Torts § 433B considers two or more tortfeasors, in *Mayer*, we held that in the instance where there is a harm with multiple causes and only one defendant, the burden of proof remains on the plaintiff to show divisibility of harm. *Id*. at 252, 254. When "there are two or more causes of harm, one defendant, and indivisibility is not apparent, the plaintiff has the burden of producing evidence to show that the harm is not divisible or, if it is, some evidence to show that a harm was produced by each cause and the nature of the harm." *Id.* at 254. *Mayer* only addresses the burden of production to get the issue of divisibility to a jury, however, and did not address "the question of whether the burden of persuasion would shift if the issues were before a jury," although the court noted "we do not believe that the burden of persuasion would or should shift." *Id*. at 253.

Mayer reminds us that only if no reasonable jury could differ may the court determine as a matter of law whether an injury is divisible:

> The question of whether a harm is capable of apportionment between two or more causes is for the court if it can be decided as a matter of law. If not, both the question[s of] whether a harm is capable of apportionment, and if so, actual apportionment, are questions for the factfinder.

Mayer, 145 Md. App. at 253-54. It therefore follows that for divisibility to be an issue, the circuit court must make some finding as to the ability of the harm to be apportioned, and if the court does not determine that the injuries are indivisible, the jury must be

instructed that it is their role to determine divisibility and the harm apportionable to any defendants.

B. Mr. Williams' Case

Although we find *Mayer* and *Carter* useful for understanding divisibility, we need not apply them to determine whether Mr. Williams' injuries are divisible or indivisible as a matter of law. As *Carter* teaches us, the time to have raised the issue of divisibility was with regard to the admissibility of expert testimony to be determined at a *Daubert-Rochkind* hearing and/or with regard to jury instructions. That did not happen here. During trial, neither the Hospital, Dr. Blundon, nor Mr. Williams asked the court to determine as a matter of law whether Mr. Williams' injuries were divisible or indivisible.

The Hospital does not contend that the circuit court erred in making any determination—or in failing to make any determination—about the divisibility of the harm to Mr. Williams as a matter of law. The Hospital also does not contend that there was any error with the admissibility of expert testimony, the jury instructions given, or that certain jury instructions were requested but not given, on divisibility. The Hospital's question on cross-appeal is ultimately whether the circuit court erred in denying the motion for judgment notwithstanding the verdict on the issue of economic damages, contending that Mr. Williams presented insufficient expert testimony to uphold the jury's verdict.

We need only determine whether sufficient evidence was presented by Mr. Williams to support the jury's award. As explained below, we conclude that there was sufficient evidence to support the award.

III. SUFFICIENCY OF THE EVIDENCE

The Hospital contends that there was insufficient evidence to support the ultimate economic damages awarded to Mr. Williams by the jury. The Hospital argues that certain expenses awarded were not directly related to the loss of Mr. Williams' right leg and instead were due to his severe preexisting injuries. The Hospital particularly finds issue with the award for attendant care, prostheses, and a wheelchair van.

Mr. Williams offered extensive testimony from several experts in the field of prosthetics and orthotics, orthopedic and trauma surgery, physical medicine and rehabilitation, and life care planning. Each individual was admitted as an expert in her or his respective field without objection. The experts testified as to the needs that Mr. Williams now has due to the amputation of his right leg, including prostheses, attendant care, case management services, and other necessary items. Through this expert testimony, Mr. Williams offered conflicting accounts regarding whether the experts were accounting for both the car accident injuries and the right leg amputation, or just considering the loss of the right leg. At times, Mr. Williams argues that only the amputation of the right leg is being reflected, and that the testimony from Ms. Winslow proves this because she allegedly only accounted for the loss of the right leg when calculating the attendant care. Mr. Williams, however, also reiterates numerous times

that Ms. Winslow could not "parse out" the pain management, indicating that they are unable to differentiate between the amputated right leg and the rest of his injuries. At no point during any of the testimony by expert witnesses does Mr. Williams, Dr. Blundon, or the Hospital mention divisibility.

A. Attendant Care

At trial, Mr. Williams' expert witness on life care planning, Cathryn Winslow, testified regarding the attendant care Mr. Williams would need. Ms. Winslow testified that as a result of the loss of his right leg, Mr. Williams now needs attendant care 24 hours per day, as opposed to the 12 hours per week that he would have needed had he retained his right leg. This was to assist Mr. Williams with maintenance tasks like grooming, household work, and shopping for groceries. The Hospital questioned Ms. Winslow on cross-examination about her methodology for determining how much attendant care Mr. Williams would need. It also presented its own expert witness, Trudy Koslow, to disagree, testifying that Mr. Williams required the 24/7 attendant care because of his chronic pain from his left arm and left leg, as well as his right leg amputation, thus the amputation of his right leg did not lead to any increase in attendant care. Ms. Koslow did not, however, testify as to the actual economic damages she believed Mr. Williams was owed, only that Ms. Winslow's determinations were incorrect.[15] The Hospital did

[15] It is possible that an actual monetary breakdown was included in Ms. Koslow's life care plan, however, as the plan was not admitted as an exhibit, we may only rely on the transcripts provided which do not show a competing proposed economic damages award.

not object to the admission of Ms. Winslow's testimony as to the attendant-care costs or qualifications as an expert witness. Instead, the Hospital presented a contrary opinion, and the question of which expert witness's testimony should be given more value was left to the jury.

As noted, a motion for judgment notwithstanding the verdict requires only that the nonmoving party provides evidence at trial that "rises above speculation, hypothesis, and conjecture." *Barnes v. Greater Baltimore Med. Ctr., Inc.*, 210 Md. App. 457, 480 (2013). Mr. Williams' expert provided a detailed breakdown of the amount of increased care he would need as a result of the loss of his right leg. The values Ms. Winslow calculated were based on the hourly rate of $22 an hour for a home health aide, and the difference between 12 hours of care per week and 24 hours of care daily amounted to an allocation of $178,992 per year for life. Based on her life care plan, Mr. Williams submitted to the jury that attendant care would cost $5,069,692. Ms. Winslow's testimony was not merely speculative, and the jury was well within its role to determine that this award accurately represented the additional attendant-care needs that Mr. Williams faces because of the loss of his right leg due to Dr. Blundon's negligence.

B. Prostheses

Mr. Williams claimed $1,266,196 and was awarded $550,000 to cover the cost of prostheses for his right leg. Mr. Michael, a prosthetics and orthotics expert, testified as to the various prostheses Mr. Williams should have now, and those he would have recommended had Mr. Williams not lost his right leg. Ms. Winslow also testified that

she included prostheses in her life care plan. She did admit, however, that some protheses might have been included by mistake as they were not needed or duplicative. While the plan called for $1,266,196 to be awarded to Mr. Williams, the jury, seemingly arbitrarily, decided to only award $550,000. Mr. Williams contends that this is because the jury "weighed the evidence and the claim of unnecessary or duplicative prosthetic items against what was claimed and reduced that item of damage to less than half of what Mr. Williams sought." As the life care plan was not included in the record, we are unable to verify exactly which prostheses were duplicative, and why the jury determined that the appropriate amount to award was $550,000. A jury's decision need only be supported by competent evidence. *Barnes*, 210 Md. App. at 480. Enough evidence was presented to the jury to persuade it that Mr. Williams needed certain prosthetic devices due to the loss of his right leg. It was the jury's role to determine, based on the evidence presented through testimony and the life care plans, which additional prostheses Mr. Williams required and how much they would cost. While the record does not reflect how the jury determined that $550,000 was the appropriate amount to award Mr. Williams, we cannot say that there is "no rational ground under the law" to uphold this award. *Stracke*, 465 Md. at 420.

C. Wheelchair Van

Finally, the Hospital contends that the jury should not have awarded Mr. Williams $54,000 for a wheelchair van—the cost of which is included in the award of $210,857 for durable medical equipment—because Mr. Williams is unable to drive due to the effects

of his pain medication. As Mr. Williams points out, however, the wheelchair van is to be driven by an attendant, not by Mr. Williams himself. Mr. Williams cites both the testimony of Ms. Winslow and Dr. Sirkin for the proposition that had Mr. Williams been able to keep his right leg, it would be functional, and he would be able to drive. This statement overlooks the fact that Mr. Williams testified that his own current inability to drive is due to the pain medication he takes and the fact that sometimes "[his] body just shuts down." It is unclear the extent to which Mr. Williams would still have these issues had he retained his right leg; however, it was not unreasonable for the jury to find that Mr. Williams would still be able to drive and would not require the wheelchair van if he still had his right leg.

It was the role of the jury to hear the evidence proffered by Mr. Williams, Dr. Blundon, and the Hospital, and conclude whether Dr. Blundon was negligent in treating Mr. Williams, and if so, what economic and non-economic damages would adequately compensate him for this negligence. When Dr. Blundon and the Hospital moved for judgment notwithstanding the verdict, the circuit court denied the motions and upheld the jury verdict. As noted, when reviewing the denial of a motion for judgment notwithstanding the verdict, we assume the truth of the evidence in favor of the nonmoving party and will only grant the motion for judgment notwithstanding the verdict "[i]f there is no rational ground under the law governing the case for upholding the jury's verdict." *Lowery v. Smithsburg Emergency Med. Serv.*, 173 Md. App. 662, 683 (2007); *Stracke v. Estate of Butler*, 465 Md. 407, 420 (2019). Here, assuming the truth of all

evidence in the light most favorable to Mr. Williams, it is clear that Mr. Williams offered expert testimony and evidence that rises beyond mere speculation. The jury members were instructed that they may "give expert testimony the weight and value [they] believe it should have," and that they "are not required to accept any expert's opinion, but [they] should consider an expert's opinion together with all of the other evidence." Here, the jury credited the testimony of Mr. Williams' experts over the Hospital's contentions otherwise that the damages to which they testified reflected Mr. Williams' needs due to the harm caused by Dr. Blundon's negligence. It was not unreasonable for the jury to decide in this way, and we cannot conclude that there was "no rational ground" for the jury's verdict. *Stracke*, 465 Md. at 420.

Disagreement between the opinions of expert witnesses does not render evidence presented by the witnesses insufficient. Because the jury's verdict and award of damages rested on "competent evidence that rises above speculation, hypothesis, and conjecture," *Barnes v. Greater Baltimore Med. Ctr., Inc.*, 210 Md. App. 457, 480 (2013), it was appropriate for the circuit court to deny the Hospital's motion for judgment notwithstanding the verdict on the issue of economic damages.

For the foregoing reasons, we find the circuit court did not err in denying the Hospital's motion for judgment notwithstanding the verdict on damages. We therefore affirm the circuit court's judgment upholding the $6,285,549 damages award to Mr. Williams.

JUDGMENT OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY AFFIRMED; COSTS TO BE PAID BY APPELLEE.