S T A T E O F M I C H I G A N

C O U R T O F A P P E A L S

DONICA DAVIS, Plaintiff-Appellant,	UNPUBLISHED October 18, 2011
v	No. 299927 Ingham Circuit Court
AUTO-OWNERS INSURANCE COMPANY, Defendant-Appellee.	LC No. 08-000570-NS

Before: M. J. KELLY, P.J., and FITZGERALD and WHITBECK, JJ.

PER CURIAM.

In this suit involving first-party no-fault insurance benefits, plaintiff Donica Davis appeals by right the trial court's decision to deny her motion for a new trial. On appeal, Davis argues that the jury's verdict in favor of her insurer, defendant Auto-Owners Insurance Company, was against the great weight of the evidence. She also argues that she did not receive a fair trial because there was evidence that two jurors fell asleep during a portion of her trial. Given these errors, she maintains, the trial court should have granted her motion for a new trial. We conclude that there were no errors warranting a new trial. For that reason, we affirm.

I. BASIC FACTS AND PROCEDURAL HISTORY

Davis testified that, in November 2005, she sat in her car waiting for a space to open at a gas station. While she was waiting, the driver of a nearby truck backed up and hit her car.

Sally Huss testified that she was stopped at a gas station in her pickup truck when she noticed that the car in front of her needed room in order to get out. She backed her truck up and, after moving less than 1 foot, she hit Davis' car. Huss said that she did not exceed 1 or 2 miles per hour while backing up. Huss' passenger, Sara Burnett, testified that Huss hit Davis' car after moving somewhere between 6 and twelve inches. She said she heard a "little bitty thud" at the time of impact. Photos showed that Davis' car had a small dent on the right rear fender. Burnett stated that, after Huss hit Davis' car, Davis "jumped out" and began to yell and scream while flailing her arms.

Davis testified that she did not at first realize that she had been hurt in the accident. But within a half-hour of the accident, her back began to lock up. She thereafter sought treatment for her injury. Davis had an extensive history of back problems from prior accidents. She testified that she had had two falls that resulted in injuries. After one fall, she required surgery on her

ankles and she injured her lower back in the second fall. She had surgery to fuse vertebra in her lower back as a result of the second fall and she admitted that she did not fully recover from that fall. She also testified that she had been in two car accidents before the one in November 2005—one of which resulted in injuries to her neck and back.

For approximately 1 year after the November 2005 accident, Auto-Owners paid for Davis' treatment. However, in December 2006, Auto-Owners suspended the payment of benefits to Davis. Auto-Owners suspended the payments after a physician hired by Auto-Owners performed a medical examination on Davis and concluded that Davis' back problems were not related to the November 2005 accident.

In September 2007, Davis sued Auto-Owners for the recovery of unpaid personal protection insurance benefits, which are commonly referred to as PIP benefits. Her suit proceeded to trial in June 2010.

At trial, Auto-Owners' theory of the case was that Davis did not suffer an injury or the aggravation of a preexisting injury as a result of the November 2005 accident. The jury answered the first question on the verdict form, "Did the plaintiff sustain an accidental bodily injury?" with "No." Accordingly, the trial court entered a judgment in favor of Auto-Owners on June 21, 2010.

Davis moved for a new trial in July 2010. In her motion, she argued that the jury's verdict was against the great weight of the evidence because even Auto-Owners' witnesses did not dispute that Davis suffered an injury. She also argued that there was evidence that two jurors might have fallen asleep during the playing of a video deposition. She felt that she was entitled to a new trial as a result of these errors.

The trial court denied Davis motion for a new trial in August 2010. This appeal followed.

II. MOTION FOR A NEW TRIAL

A. STANDARDS OF REVIEW

On appeal, Davis argues that the trial court erred when it denied her motion for a new trial on two bases: that the verdict was against the great weight of the evidence and as a result of juror misconduct. This Court reviews a trial court's decision on a motion for a new trial for an abuse of discretion. See *Bean v Directions Unlimited, Inc*, 462 Mich 24, 34-35; 609 NW2d 567 (2000). A trial court abuses its discretion when it selects an outcome that is not within the range of principled outcomes. *McManamon v Redford Charter Twp*, 273 Mich App 131, 138; 730 NW2d 757 (2006).

B. GREAT WEIGHT OF THE EVIDENCE

A court may grant a new trial when the verdict is against the great weight of the evidence, MCR 2.611(A)(1)(e), but should do so only when the verdict is "manifestly against the clear weight of the evidence." *Ellsworth v Hotel Corp of America*, 236 Mich App 185, 194; 600 NW2d 129 (1999) (quotation marks and citation omitted). The trial court cannot substitute its

judgment for that of the factfinder, and the jury's verdict should not be set aside if there is competent evidence to support it. *Id.* When a party challenges a jury's verdict as being against the great weight of the evidence, we must give substantial deference to the judgment of the trier of fact. If there is any competent evidence to support the jury's verdict, we must defer to the jury's assessment of the witnesses' credibility. *Allard v State Farm Ins Co*, 271 Mich App 394, 406-407; 722 NW2d 268 (2006). Even if it is inconsistent, the jury's verdict must be upheld if there is any interpretation of the evidence that could logically explain it. *Id.* at 407.

An insurer who issues a policy under Michigan's no-fault act is "liable to pay benefits for accidental bodily injury arising out of the ownership, operation, maintenance or use of a motor vehicle as a motor vehicle." MCL 500.3105(1). The question whether there was an accidental bodily injury is a question of fact to be resolved by the jury. See *Allard*, 271 Mich App at 406-408; *McKim v Home Ins Co (On Remand)*, 163 Mich App 828, 830; 415 NW2d 315 (1987). Here, although question one on the verdict form did not specifically refer to the November 2005 accident, the jury clearly found that Davis did not suffer an accidental injury as a result of that accident. Hence, the question is whether that finding was manifestly against the clear weight of the evidence. *Ellsworth*, 236 Mich App at 194.

Davis admits on appeal that there was some circumstantial evidence that supports the jury's finding; notably, the evidence that Davis had extensive preexisting injuries and that the "X-rays and [MRIs] showed no change in pathology following the November 2005 accident." However, she still contends that the jury's verdict was against the great weight of the evidence because, in addition to the testimony of her treating physicians, Auto-Owners' own claims representative and the physician it hired to perform a medical examination on Davis testified that Davis sustained an injury in the accident.

Initially, we note that the circumstantial evidence identified by Davis was alone sufficient to sustain the verdict. Documentary evidence and testimony established that Davis had extensive back problems before the accident at issue and the documents plainly recorded the extent of the preexisting pathology. Further, given the low severity of the impact and the testimony and documentary evidence that tended to show that Davis' pathology had not changed after the accident, a reasonable jury could find that Davis did not suffer an accidental bodily injury in the accident. And, Auto-Owners' trial lawyer argued in closing that the jury could make such a finding on this evidence alone. Because the jury's verdict was logical in light of this evidence and the parties' theories, we cannot conclude that the trial court erred when it determined that Davis was not entitled to a new trial on this basis. See *Bean*, 462 Mich at 31-32 (examining whether the verdict was against the great weight of the evidence in light of the principle that a jury verdict should be upheld—even if arguably inconsistent—if it can be reconciled in light of how the parties' legal theories were actually argued and applied at trial); see also *Allard*, 271 Mich App at 407 (noting that a jury's verdict must be upheld if there is a logical explanation for the jury's findings).

Even if we were to conclude that this circumstantial evidence were insufficient—on its own—to uphold the jury's verdict, we do not agree with Davis' contention that Auto-Owners' witnesses agreed that Davis had actually suffered an injury in the accident.

At trial, Joel Bawks testified that he was a claims representative with Auto-Owners and that he took over Davis' case from another representative. He stated that Auto-Owners had been paying PIP benefits to Davis after the November 2005 accident; he explained that Auto-Owners had paid the benefits because Auto-Owners had "reasonable proof that indicated that [Davis] had been injured in the accident." But he also stated that he suspended the payments to Davis after Auto-Owners had a physician perform a medical examination on Davis in which he concluded that Davis' back problems were not related to the November 2005 accident. Thus, Bawks' testimony did not establish that Bawks—assuming that he was even qualified to offer such an opinion[1]—agreed that Davis had actually suffered an injury in the accident. Rather, his explanation served merely to show that Auto-Owners had no reason to doubt Davis' or her physicians' statements regarding causation prior to the medical examination.

We also cannot agree that Dr. Stanley Sczecienski conceded that Davis suffered an injury during the November 2005 accident. Dr. Sczecienski testified by video deposition that he was an osteopathic physician and surgeon and that he conducted a medical examination of Davis in order to determine whether her back problems were caused by the November 2005 accident. At one point during the deposition, Davis' lawyer began to question Dr. Sczecienski about whether he thought Davis was "exaggerating, overreporting or being theatrical" in reporting her pain. Dr. Sczecienski agreed that he saw no evidence of that with Davis. After this, Davis' lawyer asked the doctor whether it was true that he was not stating that Davis "didn't aggravate her pain as a result of this accident," to which he replied that he was "not saying that, that's correct." After a cursory reading of this testimony, one might be tempted to state that Dr. Sczecienski admitted that Davis suffered an injury as a result of the accident. However, that is not what he actually stated; he stated that it was not his position that Davis did not aggravate her *pain*. That is, to the extent that he made any concession, he conceded that Davis reported an aggravation in her pain after the accident. Despite this apparent concession, he nevertheless testified that there was no evidence that Davis suffered an *injury* in the accident. He stated that his examination showed no sign that she had a new injury or an aggravation of a preexisting injury:

> In my opinion she was at what I would determine to be preaccident status. This is not to say that she's had a perfect back because even before this accident she had had surgical intervention done to her back. But in the context, I could find no objective evidence that showed me that there was any ongoing pathology. And, in fact, the examination was completely normal.

Although the statement that she was at "preaccident status" could imply that she suffered an injury and then healed sufficiently to be at the same status that she had before the accident, it could also be understood that he was stating that the records reveal that her status at the time of the examination was the same that she had before. And, when his testimony is taken as a whole, it is plain that he concluded that she had not suffered an injury during the accident at issue; he explained that there was "nothing that I could relate to that accident. I mean, she had some

[1] On cross-examination Bawks testified that he was not a doctor and was not qualified to state what treatments might be best for Davis.

chronic degenerative situation, she had a previous surgery, but it certainly is not related to this date." He also found it noteworthy that Davis' medical records did not support the conclusion that she suffered a new injury: "[I]f you're going to have a problem such as this related to trauma, it's going to occur at the time of the trauma; it's not something that builds up steam over the course of time. And even if that were to happen, it's not supported by the MRIs."

Considering Dr. Sczecienski's testimony as a whole, one cannot state that he conceded that Davis suffered an injury as a result of the November 2005 accident. And, because his testimony can be logically construed to support the jury's verdict, the trial court correctly deferred to the jury's resolution of the issue. *Allard*, 271 Mich App at 406-407.

The trial court properly determined that the evidence was not against the great weight of the evidence.

C. JUROR MISCONDUCT

Davis also contends that the trial court should have granted her motion for a new trial because of jury misconduct; specifically, because there was evidence that two jurors fell asleep during the trial. A trial court may grant a new trial for juror misconduct. See MCR 2.611(A)(1)(b). But the misconduct must be such that it "materially affected" the "substantial rights" of the complaining party. MCR 2.611(A)(1). To meet this test, the moving party must establish that juror misconduct occurred and that the misconduct either actually prejudiced his or her trial or materially affected his or her substantial rights. *Bynum v ESAB Group, Inc*, 467 Mich 280, 286-287; 651 NW2d 383 (2002).

On the first day of trial, Davis' lawyer had the court play the video deposition of one of her physicians. The court began the video at 1:50 p.m., but stopped the video at 2:35 p.m. for a break. The court resumed the video at 2:54 p.m. and finished it at 3:22 p.m. There was no explanation for the break on the record and Davis' lawyer did not object or otherwise raise an issue with regard to whether any of the jurors fell asleep at that time.

After the verdict in favor of Auto-Owners, Davis moved for a new trial, in part, because she believed there was evidence that two jurors fell asleep at the trial. Davis submitted an affidavit from her lawyer wherein he averred that he saw two jurors who appeared to have their eyes closed during the video.

At the hearing on her motion for a new trial, Davis' lawyer conceded that he did not know whether the jurors were actually asleep: "it appeared a couple of the jury panel members were sleeping or at least sitting with their eyes closed for a lengthy period of time during the video presentations." He even stated that it was not his position that this evidence was a "basis to award a new trial." Instead, he stated that it was his position that this was further evidence that the jury's verdict was not made on the basis of the evidence presented at trial.

After hearing the parties' arguments at the hearing on Davis' motion, the trial court stated that it did notice that two jurors appeared to be "dozing off" during the video. It was for that reason that it called a break. The court further said that the problem apparently only occurred the one time and that there was no evidence that the jurors had actually missed any testimony. The trial court also stated that, had Davis' lawyer objected at that time, it would have ordered the

video to be played again. Given these facts, the trial court determined that Davis's lawyer had not demonstrated misconduct sufficient to warrant a new trial.

On this record, we agree with Auto-Owners that Davis failed to properly preserve this claim of error, notwithstanding that she raised the issue by motion after trial. As the trial court correctly noted, Davis' lawyer did not object to the trial court's handling of this matter at trial. Had Davis' lawyer objected, the trial court could have quickly investigated whether the jurors had actually fallen asleep and, if they had, could have ascertained whether and to what extent they might have missed testimony. The trial court could also have easily rectified the error by ordering the video to be replayed. As such, Davis' lawyer's decision not to object deprived the trial court of the opportunity to correct the error. Accordingly, we decline to exercise our discretion to review this claim of error. See *Walters v Nadell*, 481 Mich 377, 387; 751 NW2d 431 (2008). We also believe that Davis' lawyer's concession that the jurors' conduct would not, by itself, warrant a new trial amounted to a waiver of this claim of error. See *Lewis v LeGrow*, 258 Mich app 175, 210; 670 NW2d 675 (2003) (observing that an appellant may not raise a claim of error on appeal to which he or she contributed by design or negligence).

In any event, even if we were to review this claim of error, we would conclude that Davis has not demonstrated prejudice or that her substantial rights were affected by misconduct. As the trial court recognized, there was no evidence that the jurors at issue actually missed any testimony. In the absence of such evidence, the trial court could not grant Davis' request for a new trial on that basis. See *Bynum*, 467 Mich at 287 (noting that there was no finding that the juror actually committed misconduct and, absent such a finding, the plaintiff could not establish prejudice or that her substantial rights were materially affected).

The trial court properly denied Davis' motion for a new trial.

Affirmed.

/s/ Michael J. Kelly
/s/ E. Thomas Fitzgerald
/s/ William C. Whitbeck