STATE OF MICHIGAN

COURT OF APPEALS

GAYLORD F. HUGGETT,

Plaintiff-Appellant,
Cross-Appellee,

v

ALLSTATE INSURANCE COMPANY,

Defendant-Appellee,
Cross-Appellant.

UNPUBLISHED
January 10, 1997

No. 185529
LC No. 92-000469-NF

Before: Fitzgerald, P.J., and O'Connell and T. L. Ludington,* JJ.

PER CURIAM.

Plaintiff Gaylord Huggett sued defendant Allstate Insurance Company for first-party no fault benefits. Defendant did not dispute plaintiff's injuries, claiming only that they did not arise out of the accident. Following a no-cause verdict, the trial court denied plaintiff's motion for judgment notwithstanding the verdict (JNOV) or for new trial and denied defendant's motion for costs pursuant to MCR 2.405. Both plaintiff and defendant now appeal as of right. We affirm.

Plaintiff's medical history includes a back surgery in 1968. He conceded that since then he has taken pain medication for his back and that his back has bothered him intermittently. From 1975 to 1990 plaintiff's work required a lot of lifting and pulling. In March 1989 Dr. Fabi performed surgery on plaintiff's back to address a herniated disc at the L4-5 level. Plaintiff could not attribute the herniation to any specific event but explained that his back had just become progressively worse. Plaintiff returned to work in June 1989 without restrictions, and he resumed his recreational activities. However, he continued to take medication for his back.

On September 19, 1989, plaintiff was traveling in his van when another vehicle broadsided him. Following the accident plaintiff was able to get out of his vehicle and spoke with the investigating police officer. The officer considered the severity of impact to be a "1" on a scale of zero to seven, with seven

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* Circuit judge, sitting on the Court of Appeals by assignment.

denoting the greatest damage. No ambulance or paramedics responded, and plaintiff sought his own treatment. Both vehicles involved were drivable, and plaintiff drove away from the scene.

After the accident plaintiff presented to a hospital emergency room. Plaintiff testified that he complained of neck, shoulder, and low back pain as well as pain "I believe probably in the leg area." However, the medical records do not mention any pain complaint with respect to plaintiff's legs.

Thereafter plaintiff saw Dr. Fabi, who continued plaintiff on his previous back pain medication. While Dr. Fabi eventually restricted plaintiff from work due to plaintiff's low back and leg pain, this did not occur until more than a year after the accident, and the restriction lasted less than one month.

Defendant sent plaintiff to Dr. Alger and to Dr. Fefferman. On March 21, 1990, defendant ceased its payment of personal protection insurance benefits on the basis of Dr. Fefferman's finding that plaintiff did not complain of leg pain until twenty months after the accident. Also bearing on that decision was Dr. Alger's report in which he opined that plaintiff had returned to his pre-accident condition and was in no need of further medical treatment.

Plaintiff conceded that on June 25, 1991, he was working on his hands and knees in a flower bed when he experienced an unusual episode of pain in his right leg and low back so severe that he could not get up without his wife's help. Plaintiff obtained emergency room treatment, and shortly thereafter Dr. Kornblum performed surgery to address the reherniation of the disc at the L4-5 level.

At trial plaintiff claimed that he was injured in the accident, necessitating the July 1991 surgery to address the reherniated disc at the L4-5 level. Defendant did not dispute plaintiff's injury, claiming only that it was not related to the accident but instead was an extension of plaintiff's ongoing, pre-existing back ailment.

The jury found for defendant, concluding that plaintiff's injury did not arise out of the accident. Plaintiff raises four issues on appeal which all relate to the trial court's "arising out of" instruction. Defendant cross-appeals the trial court's denial of costs to defendant under MCR 2.405.

I

Plaintiff argues that the trial court erred by refusing to instruct the jury that it is sufficient if plaintiff establishes that the accident was *a* cause of his injury and that the court's refusal imposed a higher burden of proof on plaintiff by allowing the jury to infer that the accident had to be the *sole* cause of his injury. We disagree.

When standard jury instructions do not adequately cover an area, the trial court is required to give additional instructions when requested provided they properly inform the jury of the applicable law and are supported by the evidence. *Koester v Novi*, 213 Mich App 653, 664; 540 NW2d 765 (1995). The determination whether supplemental instructions are applicable and accurate is within the trial court's discretion. *Id.*

"Under personal protection insurance an insurer 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); MSA 24.13105.

As to the meaning of "arising out of," the trial court gave the following instruction:

> When I say the term, arising out of, I mean that the accident and the injury must be connected in a manner that is something more than merely incidental or fortuitous. Phrasing it a bit differently, arising out of is not something so remote or attenuate as to preclude a finding that it arose out of the use of a motor vehicle.
>
> The question to be answered is whether the injury originated from, had its origin in, grew out of, or flowed from the use of the vehicle.
>
> You are instructed that the defendant takes the plaintiff as it finds him. If you find that the plaintiff was unusually susceptible to injury, that fact will not relieve the defendant from responsibility for payment of benefits due to the plaintiff arising out of the accident of September 19, 1989.

The court reasoned that this additional instruction was necessary because there was no standard instruction defining "arising out of" and "because the focus of this entire trial is whether these injuries arose out of an automobile use."

The thrust of plaintiff's argument is that the jury was not informed that liability could rest on a finding that the accident was *a* cause of plaintiff's injury without the need to find that it was the only cause. Plaintiff relies on *Kirby v Larson*, 400 Mich 585, 605; 256 NW2d 400 (1977), a third-party no-fault case in which the Michigan Supreme Court emphasized that the correct instruction in a negligence case is that the defendant's negligence must be *a* proximate cause, not *the* proximate cause.

The problem with applying *Kirby* to the present case is that *Kirby* was a third-party no-fault case and the present case is a first-party no-fault case. This difference is critical because the concept of causation in a third-party case is governed by SJI2d 36.05 and 36.06 which specifically relate the concept of proximate causation to a third-party case. See also SJI2d 36.01A. By contrast, a first-party case is governed by SJI2d 35.02, which predicates liability on a finding that the plaintiff's injuries "arose out of" the ownership, operation, maintenance, or use of a motor vehicle. The comments to SJI2d 35.02 expressly provide that "[p]roximate cause is *not* required" (emphasis in original).

These two causation standards are different. Proximate cause means "first, that the negligent conduct must have been a cause of plaintiff's injury, and, second, that the plaintiff's injury must have been a natural and probable result of the negligent conduct." SJI2d 15.01. "Arising out of" means that there must be a causal connection between the injury and the accident "which connection must be more than incidental, fortuitous or but for." SJI2d 35.02, Comment. Stated differently, the connection "is not so remote or attenuated as to preclude a finding that it arose out of the use of a motor vehicle." *Kochoian v Allstate Ins Co*, 168 Mich App 1, 9; 423 NW2d 913 (1988). "The question to be

answered is whether the injury 'originated from,' 'had its origin in,' 'grew out of,' or 'flowed from' the use of the vehicle." *Shinabarger v Citizens Ins Co*, 90 Mich App 307, 314; 282 NW2d 301 (1979).

It should be noted that the above-referenced language is identical to that which the trial court read to the jury. Accordingly, there was no error of inclusion, and plaintiff points to none. Instead, he argues that the court erred by omission; namely, in plaintiff's view, the court should have further instructed the jury that if the motor vehicle was one of the causes, a sufficient causal connection exists even though there were other independent causes. *Id*. at 313.

We disagree, finding that the trial court correctly refused to give this instruction. "The determination whether an instruction is accurate and applicable in view of all the factors in a particular case is in the sound discretion of the trial court." *Williams v Coleman*, 194 Mich App 606, 623; 488 NW2d 464 (1992). Therefore, it is permissible for the court to refuse to give an otherwise accurate instruction based on the facts of the particular case before it. *Sells v Monroe County*, 158 Mich App 637, 649; 405 NW2d 387 (1987). The instruction plaintiff requested is based on *Shinabarger*, *supra*, which was a concurrent cause case. The present case, by contrast, is not a concurrent cause case. Thus, given the particular facts of this case and the factual difference between it and *Shinabarger*, the court's refusal to give plaintiff's requested instruction was permissible. A court's obligation to give a supplemental instruction -- even though it accurately states the law -- is obviated where the evidence in the particular case before it does not support its inclusion. *Koester*, *supra* at 664. In fact, to instruct on a matter which is not supported by the evidence is error. *Id.*

The danger in giving the instruction which plaintiff requested is that the jury could improperly base liability on a finding that the accident was *a* cause of plaintiff's injury, i.e., contributed to it, without the requisite finding that the causal connection between the two was more than fortuitous, incidental, or but for. Plaintiff's counsel certainly, and incorrectly, argued but-for causation to the jury throughout the trial. In voir dire plaintiff's counsel stated,

> If I were to take this paper clip, for example, and if I were to bend it back and forth a number of times, 10 or 15 times, eventually the paper clip would break, Right?
>
> PROSPECTIVE JURORS: Right.
>
> PLAINTIFF'S COUNSEL: And, each bend, each bend in the paper clip is then a cause.

In closing plaintiff's counsel stated,

> I'm sure you recall the example that I showed to you during jury selection in this matter, the paper clip example. We talked about metal fatigue. And, I indicated that, as we all know, and we've all done this, if you bend this paper clip enough times it's gonna break. Each bend is a cause. The breakage of the paper clip originates in that first bend, in the second bend. The breakage of the paper clip flows from the repeated bending of this paper clip.

> Well, I suggest, ladies and gentlemen, that's a very apt analogy for this case. That's what happened to Mr. Huggett.

The suggestion of this argument is that if it takes one hundred bends of the paper clip to make it break, then each bend is a cause. That, of course, is true. Without bend number seventeen, or fifty-nine, or eighty-three, the clip would not break. But for each of those one hundred bends, the clip would remain intact. However, the causal connection necessary to support a finding of liability must be more than but-for. We find that the potential danger of plaintiff's requested instruction, especially in light of plaintiff's misleading argument to the jury, is an independent ground for rejecting it separate from the trial court's motivation that it was not supported by the facts of the case as compared to those in *Shinabarger*.

Plaintiff's argument that the instruction given allowed the jury to erroneously infer that the accident had to be the sole cause of injury is not persuasive. The court specifically instructed the jurors that, in considering the evidence, they were to apply their own general knowledge and common experience in the affairs of life. The court, in giving the parties' theories of the case, impliedly confirmed the basic commonsense notion that a result can have more than one cause when the court stated, "Plaintiff . . . contends . . . that the accident caused or at least aggravated, or was *one of the causes* of his disc herniation" (emphasis added). Plaintiff's counsel reminded the jury in his opening argument that there could be more than one cause of plaintiff's injury, stating,

> The question that you are being asked to decide here, is: Did Mr. Huggett's disc herniation arise out of the automobile accident? In other words, was the automobile accident the cause, or *one of the causes* of his disc herniation? [Emphasis added.]

Plaintiff's argument is also defeated by the jurors' own voir dire confession that they understood a result can have more than one cause.

> PLAINTIFF'S COUNSEL: Do all of you understand that an -- an -- that an event might have more than one cause to begin with?
>
> PROSPECTIVE JURORS: Right.

In sum, we hold that the instruction given was accurate, and the court properly refused to give the instruction plaintiff requested because, though a correct statement of the law, that instruction was not supported by the particular facts of this case. Independent from the court's reasoning, the requested instructions were improper as having a strong likelihood of misleading the jury.

II

Plaintiff next argues that defendant deprived plaintiff of a fair trial by a misstatement of the law in closing argument. We disagree.

Matters pertaining to the regulation and conduct of trials, including the arguments made by counsel, are within the trial court's broad discretion and will not be disturbed absent an abuse of that discretion. *Warden v Fenton Lanes, Inc,* 197 Mich App 618, 625; 495 NW2d 849 (1992). An attorney's comments will not merit reversal "unless they indicate a deliberate course of conduct aimed at preventing a fair and impartial trial" or "were such as to deflect the jury's attention from the issues involved and had a controlling influence upon the verdict." *Wilson v General Motors Corp,* 183 Mich App 21, 26; 454 NW2d 405 (1990).

Defendant admits that during its closing argument it misstated the law regarding the meaning of the "arising out of" instruction. However, plaintiff timely objected and the trial court stated, "Members of the jury, I'm about to instruct you on the law, whether that's gonna be this morning or this afternoon, and, you will take my instructions as the law you're to follow."

In *Rentfrow v Grand Trunk W R Co*, 9 Mich App 655; 158 NW2d 69 (1968), this Court found that the plaintiff's counsel misstated the law with respect to contributory negligence in his argument to the jury. *Id.* at 659. Nevertheless, this Court upheld the result on the basis that the trial court, in response to an objection, had instructed the jurors that they were to decide the case on the law as the court gave it to them and not on any statements of counsel as to what they claimed it to be. *Id.*

Likewise here, immediately after plaintiff's objection to defendant's misstatement of law, the trial court gave a curative instruction to the jurors that the law they were to follow would be given to them by the court. Thus, "[t]he potential prejudice arising out of the improper argument of counsel was cured by this instruction." *Id.*

In sum, we hold that plaintiff was not denied a fair trial on the basis of defense counsel's misstatement of the law in closing argument.

III

Plaintiff next argues that the court abused its discretion in denying plaintiff's motion for JNOV where the jurors would have found liability had the court read to them plaintiff's proposed instruction on the phrase "arising out of" and that instruction was proper. We disagree.

A trial court's decision granting or denying a motion for JNOV will be upheld absent a clear abuse of discretion. *Michigan Microtech, Inc v Federated Publications, Inc,* 187 Mich App 178, 186-187; 466 NW2d 717 (1991).

Plaintiff bases his argument on the trial court's finding,

> After the verdict was received, the court and counsel conducted a so-called exit interview with the jury. Jurors were specifically asked what their verdict would have been had plaintiff's requested instruction been given. The jurors indicated that they would have found liability.

Once a jury is polled and discharged, its verdict may be challenged only regarding matters of form, such as clerical errors, or extraneous errors, such as undue influence from outside forces, and such challenges may be based only on statements given under oath, such as oral testimony or by affidavit. *Hoffman v Monroe Pub Schools,* 96 Mich App 256, 261; 292 NW2d 542 (1980). Here, plaintiff's argument fails because the challenge is to the substantive verdict itself and is premised on unsworn statements.

Aside from the bar against substantive challenges and the bar against challenges being based on unsworn statements, plaintiff's argument rests on the view that the court's "arising out of" instruction was erroneous and that the court erred in refusing to give plaintiff's proposed instruction. Because the basis for plaintiff's argument is fallacious, Issue I, *supra*, this argument likewise fails.

IV

Plaintiff next argues that the trial court erred in denying his motion for a new trial because the verdict is against the great weight of the evidence. A trial court's decision on a motion for a new trial will not be disturbed absent an abuse of discretion. *Bordeaux v Celotex Corp,* 203 Mich App 158, 170; 511 NW2d 899(1993).

Determining whether a verdict is against the great weight of the evidence requires review of all the evidence, *People v Herbert*, 444 Mich 466, 475; 511 NW2d 654 (1993), with the test being whether the verdict is against the overwhelming weight of the evidence. *Heshelman v Lombardi*, 183 Mich App 72, 76; 454 NW2d 603 (1990). While it is within the trial court's discretion to grant a new trial, *Herbert, supra* at 477, the jury's verdict should not be set aside where there is competent evidence to support it; the trial court cannot substitute its judgment for that of the jury. *King v Taylor Chrysler-Plymouth, Inc,* 184 Mich App 204, 210; 457 NW2d 42 (1990).

A trial court's determination that a verdict is not against the great weight of the evidence is given substantial deference. *Arrington v Detroit Osteopathic Hospital* (*On Rem*), 196 Mich App 544, 560; 493 NW2d 492 (1992). Such deference is in recognition of the trial court's opportunity to hear witnesses' testimony firsthand and, thus, its unique position to assess credibility. *Kochoian v Allstate Ins Co*, 168 Mich App 1, 11; 423 NW2d 913 (1988).

Plaintiff's argument that the verdict is against the great weight of the evidence is not supported by the record. The expert testimony weighed against a finding of liability. Dr. Alger opined that the accident was not the cause of plaintiff's reherniation, and he noted that this conclusion was supported by plaintiff's continuation of work after the accident. Dr. Kornblum opined that the flower bed incident in June 1991 was "the most significant event" precipitating the severe pain plaintiff experienced precedent

to surgery in July 1991 and that the accident was not significant because plaintiff experienced no change in his complaints or behavior around the time of the accident.

Dr. Fabi's testimony was the most supportive of the experts in terms of liability; however, its weakness was in its failure to relate to the "arising out of" standard. He testified, "It is reasonable to assume that there was a relationship between the accident and his [plaintiff's] subsequent complaints." However, Fabi did not elaborate on what the nature of this relationship was. He did not testify that this relationship was a causal one that was more than fortuitous, incidental, or but for. Fabi testified, "[I]t should be relatively clear that the accident was a precipitating factor [of the reherniation]." However, he did not testify as to what he meant by "precipitating factor." On cross-examination, Fabi admitted that there were no diagnostic tests that showed that the accident caused the reherniation. He further conceded that plaintiff was performing at work until the flower bed incident and that immediately after the accident plaintiff reported no symptoms consistent with disc herniation.

In terms of lay witnesses, while the testimony of plaintiff and his family was generally supportive of liability, some testimony was not. For example, when asked to explain the onset of the herniated disc that necessitated the March 1989 surgery, plaintiff testified "It just happened; it just got progressively worse." This testimony, that plaintiff had previously suffered a disc herniation absent any specific accident or trauma, supports the conclusion that the reherniation also perhaps "just happened" and that it did not arise out of the accident.

In sum, we conclude that, considering the entire record, the verdict was not against the great weight of the evidence, and, thus, the trial court did not abuse its discretion in denying plaintiff's motion for new trial.

V

On cross-appeal defendant argues that the trial court erred when it denied defendant's motion for costs made under the offer of judgment rule, MCR 2.405. We disagree..

A trial court's decision whether to award attorney fees pursuant to MCR 2.405 will not be disturbed absent an abuse of discretion. *Nostrant v Chez Ami, Inc*, 207 Mich App 334, 337; 525 NW2d 470 (1994).

Following mediation, plaintiff and defendant exchanged offers of judgment which neither accepted. No one disputes that the no-cause verdict was less favorable to plaintiff than the average offer. Thus, the trial court may have, but was not obligated to, assess costs against plaintiff and to award them to defendant. MCR 2.405(D)(3).

An award of attorney fees is discretionary under the court rule and may be denied "in the interest of justice." MCR 2.405(D)(3). The rule itself provides no guidance with respect to the meaning of "the interest of justice." *Sanders v Monical Machinery*, 163 Mich App 689, 692; 415 NW2d 276 (1987). However, this Court recently provided some guidance in defining the parameters of the interest of justice exception in *Luidens v 63rd District Court*, ___ Mich App ___ (Docket No.

165935, rel'd 9/7/96). In *Luidens*, the Court discussed those factors that would justify a denial of costs in the interest of justice and noted that "a case involving a legal issue of first impression or a case involving an issue of public interest that should be litigated are examples of unusual circumstances in which it might be in the interest of justice not to award [costs including] attorney fees under MCR 2.405." *Id.*, slip op p 6. Here, the trial court declined to assess costs against plaintiff based primarily on the fact that the "primary issue" was whether plaintiff's injuries arose out of the use of a motor vehicle, which issue required the court to "fashion an instruction" on the definition of "arising out of" where "there is no particularly helpful guidance from case authority directly on point" given the "unique facts" of this case. The trial court went on to opine that "there are cases which must go to trial to litigate uncertainties which may exist in the law. This was such a case." The trial court's well-reasoned opinion was in accord with *Luidens*, and we find no abuse of discretion in the trial court's decision to deny an award of attorney fees.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Peter D. O'Connell
/s/ Thomas L. Ludington