# STATE OF MICHIGAN

# COURT OF APPEALS

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WILLIE L. JONES, JR.,

Plaintiff-Appellant,

v

BRADLEY L. FOUT, AVIS RENT-A-CAR and PACIFIC SCIENTIFIC,

Defendants-Appellees.

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UNPUBLISHED
October 28, 1997

No. 198097
Saginaw Circuit Court
LC No. 93-56555-NI

Before: Young, P.J., and Markman and Smolenski, JJ.

PER CURIAM.

Plaintiff appeals by right an order denying his motion for new trial or for judgment notwithstanding the verdict (JNOV). This matter arises out of a July 21, 1992, automobile accident in which plaintiff was rear-ended by defendant. The jury returned a verdict of no cause of action. It found that while plaintiff sustained injury or damage, defendant's negligence was not the proximate cause of the injuries.

This Court reviews a trial court's ruling on a motion for new trial for an abuse of discretion. *Phillips v Mazda Motor Mfg Corp*, 204 Mich App 401, 410-411; 516 NW2d 502 (1994). Where a new trial is sought on the basis that the verdict is against the great weight of the evidence, MCR 2.611(A)(1)(e), the trial court's function is to determine whether the "overwhelming weight of the evidence favors the losing party." *Scott v Illinois Tool Works, Inc*, 217 Mich App 35, 41; 550 NW2d 809 (1996). An appellate court reviews a trial court's denial of a motion for JNOV by examining the testimony and all legitimate inferences that may be drawn therefrom in the light most favorable to the nonmoving party; if reasonable minds could differ, the motion is properly denied. *Matras v Amoco Oil Co*, 424 Mich 675, 681-682; 385 NW2d 586 (1986).

Plaintiff first contends that the proximate cause finding was against the great weight of the evidence. He claims that his testimony about the accident was undisputed and that the medical experts testified that his injuries were, at a minimum, compatible with the accident. However, plaintiff's psychiatrist testified that he saw plaintiff a few weeks after the accident and that plaintiff did not mention

it and that, when plaintiff ultimately mentioned an accident in December 1992, plaintiff said it had occurred in September (rather than July, when the accident at issue occurred.) Further, plaintiff himself admitted that he did not seek treatment for his injuries until November 1992, at which time he informed the doctor that he had been in an accident in September. We also note that the medical experts relied on plaintiff's own account of the accident in testifying. On the basis of the evidence, the jury could have reasonably believed that some event other than the accident at issue caused plaintiff's injuries. Accordingly, the trial court properly denied plaintiff's motion for new trial or JNOV on this basis.

Plaintiff next contends that one juror slept through part of the trial. MCR 2.611(A)(b) states in pertinent part:

> A new trial may be granted to all or some of the parties . . . whenever their substantial rights are materially affected . . . [by] misconduct of the jury."

However, the present case does not require us to determine whether a juror's sleeping through part of a trial constitutes jury misconduct that requires a new trial.

Here, seven jurors were seated at the beginning of the trial. After the jury had been instructed and were ready to deliberate, plaintiff's counsel claimed for the first time that one juror had slept through "the vast majority" of the trial. Defendant's counsel countered that the juror was "awake long enough" and disputed that he "slept through the whole case."[1] The court stated that if both counsel agreed that a particular juror be excused, it would do so, otherwise it would excuse a juror at random. Defendant's counsel suggested that all seven jurors deliberate and that a majority of six of the seven be sufficient for a verdict. Plaintiff's counsel agreed to this by stating, "That's fine." The seven jurors unanimously found that plaintiff sustained injury or damage but that defendant's negligence was not a proximate cause of the injury or damage.

"It is well settled that error requiring reversal must be that of the trial court and not that to which the appellant contributed by plan or negligence." *Fellows v Superior Products Co*, 201 Mich App 155, 165; 506 NW2d 534 (1993). "A party is not allowed to assign as error on appeal something which his or her own counsel deemed proper at trial, since to do so would permit the party to harbor error as an appellate parachute." *Dresselhouse v Chrysler Corp*, 177 Mich App 470, 477; 442 NW2d 705 (1989). Here, plaintiff's counsel consented to the procedure suggested by defendant's counsel under which the juror who allegedly slept through part of the trial deliberated with the jury. Accordingly, any error in failing to excuse the juror in question would not require reversal. Further, the fact that the other six jurors found that defendant's negligence was not a proximate cause of plaintiff's injuries indicates that plaintiff was not prejudiced by the fact that the juror in question was not excused. We also note that plaintiff's counsel failed to properly preserve this issue by objecting at a time when the court could have best remedied the situation, e.g., by instructing the juror to be attentive. For these reasons, we find that the trial court did not abuse its discretion in denying plaintiff's motion for new trial on this basis.

Affirmed.

/s/ Robert P. Young, Jr.
/s/ Stephen J. Markman
/s/ Michael R. Smolenski

[1] Defendant's counsel does not set forth the legal standard by which we determine whether a sleeping juror has been "awake long enough" during trial not to be considered a sleeping juror. Nor does counsel specifically describe those parts of the trial that a juror may sleep through and yet remain "awake long enough". Perhaps, however, that is for the best.