STATE OF MICHIGAN

COURT OF APPEALS

JOHN P. KELMENDI,

Plaintiff-Appellant,

v

CITIZENS INSURANCE COMPANY OF AMERICA,

Defendant-Appellee,

and

RAMADEVI NAVARASLA,

Defendant.

UNPUBLISHED
February 8, 2007

No. 264019
Oakland Circuit Court
LC No. 2001-032771-NI

Before: Jansen, P.J., and Sawyer and Bandstra, JJ.

PER CURIAM.

Plaintiff appeals as of right the jury verdict of no cause of action on his claim for damages arising from injuries, and exacerbation of preexisting injuries, sustained in an automobile accident. We affirm.

On June 24, 1998, plaintiff was involved in an automobile accident. On June 22, 2001, plaintiff filed the instant action to recover first-party benefits under the Michigan no-fault act, MCL 500.3101 *et seq*, for allowable expenses, medical expenses, lost wages, and replacement services incurred after June 22, 2000,[1] from defendant, Citizens Insurance Company.

Plaintiff asserts on appeal that the trial court committed error requiring reversal by failing to properly instruct the jury on how to consider evidence that the 1998 accident aggravated his pre-existing injuries arising from two slip-and-fall incidents in 1981 and 1983 and a motor vehicle accident in 1994. We disagree. This Court reviews de novo claims of instructional error.

[1] Pursuant to the one-year-back rule set forth in MCL 500.3145(1), plaintiff was precluded from recovering benefits for expenses incurred before June 20, 2000.

Cox v Flint Bd of Hosp Mgrs, 467 Mich 1, 8; 651 NW2d 356 (2002). Jury instructions are reviewed in their entirety to determine whether they accurately and fairly presented the applicable law and the parties' theories. Jury instructions should include all the elements of the plaintiff's claims and should not omit material issues, defenses, or theories if the evidence supports them. *Hill v Hoig*, 258 Mich App 538, 540; 672 NW2d 531 (2003); *Meyer v City of Center Line*, 242 Mich App 560, 566; 619 NW2d 182 (2000).

To preserve a jury instruction issue for review, a party must object on the record before the jury retires to deliberate. MCR 2.516(C).[2] When properly preserved, this Court reviews assertions of instructional error de novo. *Cox*, *supra*. However, appellate review of an unpreserved instructional error is limited to instances in which the failure to review would result in manifest injustice. *Meyer*, *supra*; *Phinney v Perlmutter*, 222 Mich App 513, 537; 564 NW2d 532 (1997). Manifest injustice occurs when a defect in an instruction is so great as to constitute plain error requiring a new trial or when it pertains to a basic and controlling issue in the case. *Shinholster v Annapolis Hospital*, 255 Mich App 339, 351; 660 NW2d 361 (2003), aff'd in part, rev'd in part on other grounds 471 Mich 540 (2004); *Phinney*, *supra*.

In this case, evidence was presented that plaintiff had pre-existing injuries and medical conditions, and that he suffered an injury in the June 24, 1998, accident. An instruction, such as M Civ JI 50.11,[3] may have been useful to instruct the jury on how to evaluate plaintiff's claim alleging aggravation of his pre-existing injuries. However, plaintiff did not request an instruction on this issue, did not object to the trial court's failure to give the instruction, and, further, affirmatively acquiesced to the instructions as given. Therefore, plaintiff effectively

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[2] MCR 2.516(C) provides:

> A party may assign as error the giving of or the failure to give an instruction only if the party objects on the record before the jury retires to consider the verdict (or, in the case of instructions given after deliberations have begun, before the jury resumes deliberations), stating specifically the matter to which the party objects and the grounds for the objection. Opportunity must be given to make the objection out of the hearing of the jury.

[3] M Civ J I 50.11 instructs in pertinent part:

> If an injury suffered by plaintiff is a combined product of both a preexisting [disease/injury/state of heath] and the effects of defendant's negligent conduct, it is your duty to determine and award damages caused by defendant's conduct alone. You must separate the damages caused by defendant's conduct from the condition which was preexisting if it is possible to do so.
>
> However, if after careful consideration, you are unable to separate the damages caused by defendant's conduct from those which were preexisting, then the entire amount of plaintiff's damages must be assessed against the defendant.

waived this issue. *Chastain v General Motors Corp (On Remand)*, 254 Mich App 576, 591; 657 NW2d 804 (2002); *Phinney, supra* at 537-538.

Moreover, plaintiff has not shown any manifest injustice in the verdict rendered. The instructions as given accurately and fairly presented the applicable law. They instructed the jury as to the types of damages available to plaintiff under the no-fault act, as well as the elements plaintiff was required to establish in order to recover such damages, including that the damages sought must have resulted from injuries arising from the 1998 accident. Based on those instructions, the jury affirmatively found that plaintiff did not suffer recoverable damages as a result of injuries arising from the 1998 accident. Thus, there was no need for the jury to apportion plaintiff's damages between the injuries suffered in the 1998 accident and plaintiff's pre-existing injuries and medical conditions. Accordingly, the court's alleged failure to give an instruction on the proper handling of plaintiff's pre-existing injuries was, at worst, harmless error.

Plaintiff next contends that the trial court erred in admitting a videotape of plaintiff because its probative value was substantially outweighed by a danger of unfair prejudice. We disagree. This Court reviews the admission or exclusion of evidence is reviewed for an abuse of discretion. *Chmielewski v Xermac Inc*, 457 Mich 593, 614; 580 NW2d 817 (1998). "Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401. "All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, the Constitution of Michigan, these rules, or other rules adopted by the Supreme Court." MRE 402. However, a trial court has discretion to exclude relevant evidence if its probative value is substantially outweighed by the danger of unfair prejudice. MRE 403; *Lewis v LeGrow*, 258 Mich App 175, 199; 670 NW2d 675 (2003). Unfair prejudice does not mean merely damaging to a party's case. Rather, evidence is unfairly prejudicial only if there is a danger that marginally probative evidence will be given undue or preemptive weight by the jury. *Id.*; *Franzel v Kerr Mfg Co*, 234 Mich App 600, 618; 600 NW2d 66 (1999).

Before trial, the court denied plaintiff's motion in limine to exclude a video surveillance tape of plaintiff made shortly after the 1998 accident for litigation of plaintiff's claims for third-party benefits arising from a prior motor vehicle accident, in 1994. The tape shows plaintiff walking around his home on July 15, 1998, and changing a tire on his car on September 8, 1998. It tends to refute plaintiff's trial testimony that he was in excruciating pain following the 1998 accident, which limited his activities and his ability to care for himself and his dependents. Thus, the video was relevant to the jury's determination of whether plaintiff was disabled by the 1998 accident and whether he incurred recoverable expenses and required replacement services for his daily living as a result of injuries sustained in that accident. Further, while the videotape is damaging to plaintiff's assertion that he suffered the claimed damages as a result of the 1998 accident, there is no indication that the jury gave it undue or preemptive weight. Accordingly, the trial court did not abuse its discretion in admitting the videotape into evidence.

Finally, plaintiff claims that the jury verdict was inconsistent because it found that plaintiff suffered accidental bodily injury in the 1998 accident but that plaintiff was not eligible for any personal injury protection benefits for expenses incurred after June 22, 2000. We disagree. This Court reviews de novo claims of inconsistent jury verdicts. *Lagalo v Allied Corp*,

457 Mich 278, 282-285; 577 NW2d 462 (1998); *Payton v Detroit*, 211 Mich App 375, 397; 536 NW2d 233 (1995). A jury's verdict is not inconsistent if there is an interpretation of the evidence that can explain the findings. *Lagalo, supra* at 282. Every attempt must be made to harmonize a jury's verdicts. Only if the verdicts are so logically and legally inconsistent that they cannot be reconciled will they be set aside. *Id.*, citing *Granger v Fruehauf Corp*, 429 Mich 1, 7, 9; 412 NW2d 199 (1987).

The jury unanimously concluded that (1) plaintiff timely provided written notice to defendant within one year of the accident; (2) plaintiff suffered a bodily injury in the 1998 accident; (3) plaintiff did not incur any allowable expense after June 22, 2000, as a result of injuries suffered in the 1998 accident; (3) plaintiff was not unable to return to work after June 22, 2000, as a result of injuries suffered in the 1998 accident; (4) plaintiff did not incur any household replacement services after June 22, 2000, as a result of injuries suffered in the 1998 accident; and (5) payment for any expenses that plaintiff was entitled to after June 22, 2000, were not overdue.

Contrary to plaintiff's assertion, the jury's finding that plaintiff suffered an accidental bodily injury in 1998 is not logically inconsistent with the jury's finding that plaintiff was not entitled to any personal injury protection benefits after June 22, 2000, as a result of injuries suffered in the 1998 accident. Based on the evidence presented at trial, including the videotape of plaintiff's activities shortly after the accident and extensive testimony regarding plaintiff's pre-existing injuries and medical conditions, the jury could reasonably conclude that the injuries plaintiff suffered during the 1998 accident were minor and/or did not cause the damages, if any, that plaintiff experienced after June 22, 2000.

We affirm.

/s/ Kathleen Jansen
/s/ David H. Sawyer
/s/ Richard A. Bandstra