STATE OF MICHIGAN

COURT OF APPEALS

MICHELLE COLLIER, Plaintiff-Appellant,	UNPUBLISHED March 25, 2014
v	No. 310633 Wayne Circuit Court
LIBERTY MUTUAL INSURANCE COMPANY, Defendant-Appellee.	LC No. 10-002769-NF

Before: BECKERING, P.J., and STEPHENS and RIORDAN, JJ.

PER CURIAM.

In this action to determine the cause of plaintiff Michelle Collier's injuries, plaintiff appeals as of right the May 18, 2012 order denying her motion for a new trial after a jury entered a no cause of action verdict in favor of defendant Liberty Mutual Insurance Company. Because we find no errors warranting relief, we affirm.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

The instant action is the fourth round of litigation between the parties. This case arises out of a March 19, 2001 automobile accident in which plaintiff, who was uninsured, was injured while riding as a passenger in a motor vehicle insured by defendant. Plaintiff eventually became paralyzed; the cause of her paralysis is the subject of this action. Defendant initially paid no-fault personal protection insurance (PIP) benefits to plaintiff, and, after three rounds of litigation, each of which was resolved without a final judgment on the issue of causation, paid PIP benefits as recently as October of 2009. However, upon receipt of a medical examination in 2009 that stated that plaintiff's paralysis was not caused by the March 19, 2001 automobile accident, defendant ceased paying benefits. This cessation of benefits prompted the filing of plaintiff's complaint in the case at bar.

In her complaint, plaintiff alleged that the March 19, 2001 automobile accident aggravated a preexisting Chiari malformation, which is a developmental anomaly at the base of the brain that results in the downward displacement of some of the brain's structures into the spinal canal. Plaintiff underwent surgery for this condition with Dr. Phillip Friedman on February 26, 2004, nearly three years after the automobile accident. Subsequently, in September of 2004, plaintiff was diagnosed with transverse myelitis, which is a neurological disorder caused by inflammation across the spinal cord. In the case at bar, plaintiff's transverse myelitis caused permanent paralysis in her lower extremities. Plaintiff alleged that she developed

transverse myelitis following her February 26, 2004 surgery. She argued that because the March 19, 2001 automobile accident aggravated the Chiari malformation, thereby necessitating the surgery, and that because the surgery caused her transverse myelitis, which caused her paralysis, her paralysis was caused by the March 19, 2001 automobile accident. Plaintiff sought PIP benefits in the form of attendant care.

Following discovery, the trial court granted partial summary disposition to plaintiff, finding that her request for attendant care was reasonably necessary for her care and recovery. The trial court ruled that the causation of plaintiff's injuries presented a genuine issue of material fact, and the parties proceeded to trial in February of 2012. At trial, plaintiff and defendant presented *de bene esse* deposition testimony from expert witnesses who testified concerning the cause of plaintiff's paralysis. Dr. Friedman, the neurosurgeon who performed surgery on plaintiff's Chiari malformation in February of 2004, opined that the March 19, 2001 automobile accident aggravated plaintiff's preexisting Chiari malformation, thereby necessitating surgery. Noting that the surgery occurred nearly three years after the automobile accident, Dr. Friedman testified that some symptoms of an aggravated Chiari malformation, such as headaches and neck pain, would present immediately after the event that caused the aggravation. He also testified that the symptoms could fluctuate over time or be delayed, and that symptoms of an aggravated Chiari malformation "sometimes just don't make sense." After reviewing plaintiff's medical records, Dr. Friedman noted that plaintiff's symptoms were not continuous between the time of the accident and her surgery in 2004.

Concerning her transverse myelitis, plaintiff presented the testimony of Dr. Tessy Jenkins, a neurologist who diagnosed plaintiff's transverse myelitis in September of 2004. Dr. Jenkins testified that the cause of transverse myelitis was "truly [ ] a gray area" in the medical community, but in the case at bar, she believed that plaintiff's February 26, 2004 surgery caused her transverse myelitis. She believed that the stress to plaintiff's immune system as a result of the surgery ultimately caused her transverse myelitis. Dr. Jenkins admitted during her testimony that this opinion had changed within the last year.

Plaintiff also presented the *de bene esse* deposition testimony of Dr. Kevin Lee, a neurosurgeon, who opined, within a reasonable degree of medical certainty, that plaintiff's Chiari malformation was aggravated by the March 19, 2001 accident, thereby necessitating the surgery performed by Dr. Friedman on February 26, 2004. Further, Dr. Lee testified that plaintiff's transverse myelitis developed because of the February 26, 2004 surgery. During trial, plaintiff attempted to introduce into evidence medical journals obtained by Dr. Lee that suggested a link between surgery and the development of transverse myelitis. Upon objection by defendant's trial counsel, the trial court precluded admission of the medical journals as exhibits, and struck Dr. Lee's *de bene esse* deposition testimony concerning the journals.

Defendant presented its own experts with regard to causation. Dr. Gary Trock, a neurologist, opined that plaintiff's February 26, 2004 surgery did not cause her transverse myelitis. Dr. Trock explained that in his experience, the most common cause of transverse myelitis was an infection of some kind. He believed, based on his review of the medical records in this case, that plaintiff had a mild virus that was undetected, and that this virus caused her transverse myelitis. Dr. Trock also opined that plaintiff's Chiari malformation was not aggravated by the March 19, 2001 automobile accident. In reaching this conclusion, he noted

that Dr. Friedman's February 26, 2004 surgery notes did not indicate trauma to plaintiff's cerebellar tonsils, and that if the automobile accident had aggravated the Chiari malformation to the extent alleged, she would have suffered trauma to her cerebellar tonsils.

Defendant also presented testimony from Dr. Karol Zakalik, a neurosurgeon who reviewed plaintiff's medical records at defendant's request. Dr. Zakalik echoed Dr. Trock's opinion that the March 19, 2001 automobile accident did not aggravate plaintiff's Chiari malformation. Dr. Zakalik opined that it takes significant trauma to aggravate a Chiari malformation, and that, based on plaintiff's medical records, plaintiff did not suffer such trauma in the March 19, 2001 automobile accident. With regard to plaintiff's transverse myelitis, Dr. Zakalik opined that the condition was not caused by the February 26, 2004 surgery. He testified that in his experience, he had never seen transverse myelitis caused by complications resulting from surgery.

At the close of proofs, the jury was asked to answer the question: "Did Plaintiff's claimed injuries arise out of the March 19, 2001 motor vehicle accident?" The jury answered this question in the negative, finding that plaintiff's injuries were not caused by the March 19, 2001 accident. On March 22, 2012, the trial court entered an order stating, "that Plaintiff's injuries, as alleged in the Complaints, do not arise out of the March 19, 2001 car accident and, therefore, a verdict of no cause of action is entered in favor of Liberty Mutual Insurance Company." Thereafter, on May 18, 2012, the trial court denied plaintiff's motion for a new trial, or, in the alternative, judgment notwithstanding the verdict (JNOV). It is from this order that plaintiff now appeals as of right.

II. ADMISSION OF REPORTS PREPARED BY DEFENSE EXPERTS

At trial, the trial court, over plaintiff's objection, admitted four reports authored by Dr. Zakalik and one report authored by Dr. Trock. The reports recounted plaintiff's medical history and included opinions from the doctors that the March 19, 2001 automobile accident did not cause plaintiff's transverse myelitis or paralysis. "A trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion." *Edry v Adelman*, 486 Mich 634, 639; 786 NW2d 567 (2010). "An abuse of discretion occurs when the trial court chooses an outcome falling outside the range of principled outcomes." *Id.*

We find the trial court abused its discretion by admitting the reports into evidence because the reports contained inadmissible hearsay. "'Hearsay' is a statement, other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." MRE 801(c). Hearsay is inadmissible, unless an exception or exclusion applies. MRE 802. Here, the reports contained hearsay because they contained out-of-court statements made by the doctors, and because they were admitted as substantive evidence for the truth of the matter asserted therein. See MRE 801(c). Thus, in order to be admissible, they had to meet a hearsay exception or exclusion. MRE 802.

Defendant cites MRE 803(6), the business records exception, as an applicable hearsay exception. In pertinent part, MRE 803(6) provides a hearsay exception for:

> A memorandum, report, record, or data compilation, in any form, of acts, transactions, occurrences, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by certification that complies with a rule promulgated by the supreme court or a statute permitting certification, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness.

As stated in the rule, the record must be kept and made in the regular course of business activity. *Merrow v Bofferding*, 458 Mich 617, 627; 581 NW2d 696 (1998); *Price v Long Realty, Inc*, 199 Mich App 461, 468; 502 NW2d 337 (1993).

The reports do not satisfy the requirements of MRE 803(6). There is no evidence that the reports were kept or made in the regular course of business activity. Moreover, each report expressly states that it was prepared for defendant, or that it was prepared for one of the four lawsuits between plaintiff and defendant. As such, the reports were not business records kept and prepared in the regular course of business activity. *Augustine v Allstate Ins Co*, 292 Mich App 408, 431; 807 NW2d 77 (2011); *Price*, 199 Mich App at 468. Additionally, defendant does not allege that the reports satisfy any other hearsay exception or exclusion, and we find none that apply. Consequently, the reports were inadmissible, and the trial court abused its discretion by admitting them. *Price*, 199 Mich App at 468.

Nevertheless, despite the erroneous admission of this evidence, plaintiff is not entitled to reversal. Initially, plaintiff abandons this issue because she makes no effort to argue that the admission of the reports affected the outcome at trial. *Ypsilanti Charter Twp v Kircher*, 281 Mich App 251, 287; 761 NW2d 761 (2008). Moreover, any such argument by plaintiff would lack merit in this instance because the contents of the doctors' reports were cumulative to testimony offered by the doctors. Indeed, the reports contained plaintiff's medical history and opinions by Dr. Trock and Dr. Zakalik that the automobile accident neither aggravated plaintiff's Chiari malformation nor caused her transverse myelitis. Both doctors provided this same information through admissible evidence during their respective direct examinations. As such, the trial court's admission of the reports was cumulative to properly admitted evidence, and the trial court's erroneous evidentiary ruling was harmless. *Price*, 199 Mich App at 468. Consequently, plaintiff is not entitled to relief. *Craig v Oakwood Hosp*, 471 Mich 67, 76; 684 NW2d 296 (2004), quoting MCR 2.613(A) and MRE 103(a) ("any error in the admission or exclusion of evidence will not warrant appellate relief 'unless refusal to take this action appears . . . inconsistent with substantial justice,' or affects 'a substantial right of the [opposing] party.'").

III. EXCLUSION OF MEDICAL JOURNALS

Next, plaintiff argues that the trial court abused its discretion when it excluded from evidence articles contained in medical journals indicating that transverse myelitis could be caused by surgery. Plaintiff sought to introduce these articles at trial, and sought to admit

testimony from Dr. Lee's *de bene esse* deposition about the contents of the articles. The trial court excluded the evidence pursuant to MRE 707. We review the trial court's decision to exclude the evidence for an abuse of discretion. *Edry*, 486 Mich at 639.

MRE 707 provides that:

> To the extent called to the attention of an expert witness upon cross-examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice, are admissible for impeachment purposes only. If admitted, the statements may be read into evidence but may not be received as exhibits.

The plain language of MRE 707 prohibits a party from using learned treatises on direct examination for the purpose of bolstering its own expert witness. *Lockridge v Oakwood Hosp*, 285 Mich App 678, 691; 777 NW2d 511 (2009); *Hilgendorf v St. John Hosp & Med Center Corp*, 245 Mich App 670, 702; 630 NW2d 356 (2001). Here, plaintiff sought to introduce the articles during Dr. Lee's direct examination to bolster Dr. Lee's testimony that surgery could cause transverse myelitis. This is expressly prohibited by MRE 707.[1] *Lockridge*, 285 Mich App at 691; *Hilgendorf*, 245 Mich App at 702. As such, the trial court did not abuse its discretion when it excluded the articles. See *Edry*, 486 Mich at 639.

On appeal, plaintiff argues that the articles were admissible pursuant to MRE 702 and 703, and that she was not required to comply with MRE 707. She also argues that the trial court abused its discretion by striking testimony about the articles from Dr. Lee's *de bene esse* deposition. Plaintiff did not raise these claims before the trial court; thus, we need not consider them. *Nuculovic v Hill*, 287 Mich App 58, 63; 783 NW2d 124 (2010). Moreover, we find these claims to be without merit.

First, in passing, plaintiff argues that the articles and Dr. Lee's testimony concerning the contents of the articles were admissible pursuant to MRE 703. MRE 703 provides that:

> The facts or data in the particular case upon which an expert bases an opinion or inference shall be in evidence. This rule does not restrict the discretion of the court to receive expert opinion testimony subject to the condition that the factual bases of the opinion be admitted in evidence hereafter.

"This rule permits an expert's opinion only if that opinion is based exclusively on evidence that has been introduced into evidence in some way other than through the expert's hearsay

[1] A party is free to solicit from his or her own expert the fact that a particular learned treatise is considered a reliable authority in anticipation of later impeaching an opposing party's expert under MRE 707, *Wolak v Walczak*, 125 Mich App 271, 275; 335 NW2d 908 (1983), but such treatise may not be used as substantive evidence in a case, *Hilgendorf*, 245 Mich App at 702-707.

testimony." *People v Fackelman*, 489 Mich 515, 534; 802 NW2d 552 (2011) (quotation omitted). "It necessarily follows that an expert witness may not base his or her testimony on facts that are not in evidence." *People v Unger*, 278 Mich App 210, 248; 749 NW2d 272 (2008). However, "MRE 703 does not preclude an expert from basing an opinion on the expert's personal knowledge." *Morales v State Farm Mut Auto Ins Co*, 279 Mich App 720, 735; 761 NW2d 454 (2008).

In the case at bar, any proffered testimony by Dr. Lee concerning the articles was not based on facts or data that were in evidence. Indeed, the articles had been stricken.[2] Consequently, Dr. Lee was not permitted to testify about the above-mentioned journal articles. MRE 703; *Morales*, 279 Mich App at 735. Further, despite plaintiff's assertions, nothing in the plain language of MRE 703 permits the introduction of the articles themselves when the articles were inadmissible pursuant to MRE 707.

Next, plaintiff argues that the articles and Dr. Lee's testimony concerning the articles were admissible pursuant to MRE 702. This argument also lacks merit. MRE 702 establishes parameters for expert testimony, and provides:

> If the court determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Here, there is no issue concerning MRE 702 because neither party challenged whether the stricken testimony and articles were the product of reliable principles and methods, that the testimony was based on sufficient facts and data, or that Dr. Lee applied the principles and methods reliably to the facts of this case. Rather, as discussed above, regardless of whether the proposed testimony or articles met the requirements of MRE 702, the testimony and articles were inadmissible pursuant to MRE 703 and 707. *Lockridge*, 285 Mich App at 691; *Morales*, 279 Mich App at 735; *Hilgendorf*, 245 Mich App at 702.

IV. MOTION FOR NEW TRIAL AND JNOV

Next, plaintiff argues that the trial court erred by denying her motion for a new trial and her alternative motion for JNOV. "We review de novo the trial court's ruling on a motion for JNOV." *Morales v State Farm Mut Auto Ins Co*, 279 Mich App 720, 733; 761 NW2d 454 (2008). "The trial court should grant a JNOV motion only when the evidence and all legitimate inferences viewed in a light most favorable to the nonmoving party fail to establish a claim as a matter of law." *Id.* "When the evidence presented could lead reasonable jurors to disagree, the

[2] The articles constitute hearsay and are not considered evidentiary "facts or data" for purposes of MRE 703.

trial court may not substitute its judgment for that of the jury." *Foreman v Foreman*, 266 Mich App 132, 136; 701 NW2d 167 (2005).

Plaintiff also claims that she was entitled to a new trial pursuant to MCR 2.611(A)(1)(e) because the jury's verdict was against the great weight of the evidence. "A trial court's decision to grant or deny a motion for a new trial under MCR 2.611 is reviewed for an abuse of discretion." *Gilbert v DaimlerChrysler Corp*, 470 Mich 749, 761; 685 NW2d 391 (2004). "Determining whether a verdict is against the great weight of the evidence requires review of the whole body of proofs." *Dawe v Bar-Levav & Assoc (On Remand)*, 289 Mich App 380, 401; 808 NW2d 240 (2010).

> When a party challenges a jury's verdict as against the great weight of the evidence, this Court 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 our judgment regarding the credibility of the witnesses. The Michigan Supreme Court has repeatedly held that the jury's verdict must be upheld, even if it is arguably inconsistent, [i]f there is an interpretation of the evidence that provides a logical explanation for the findings of the jury. [*Allard v State Farm Ins Co*, 271 Mich App 394, 406-407; 722 NW2d 268 (2006) (quotations and citations omitted; alteration in original).]

In the case at bar, plaintiff's cause of action was for PIP benefits for injuries allegedly incurred in the March 19, 2001 automobile accident. "MCL 500.3105(1) establishes that a personal protection insurance provider is liable under the no-fault act 'to pay benefits for accidental bodily injury arising out of the ownership, operation, maintenance or use of a motor vehicle as a motor vehicle, subject to the provisions of this chapter.'" *Douglas v Allstate Ins Co*, 492 Mich 241, 257; 821 NW2d 472 (2012), quoting MCL 500.3105(1). MCL 500.3105(1) requires that a plaintiff establish two threshold causation requirements in order to be entitled to PIP benefits. *Id.*

> First, an insurer is liable only if benefits are "*for* accidental bodily injury . . . ." "[F]or" implies a causal connection. "[A]ccidental bodily injury" therefore triggers an insurer's liability and defines the scope of that liability. Accordingly, a no-fault insurer is liable to pay benefits only to the extent that the claimed benefits are causally connected to the accidental bodily injury arising out of an automobile accident.
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> Second, an insurer is liable to pay benefits for accidental bodily injury only if those injuries "aris[e] out of" or are caused by "the ownership, operation, maintenance or use of a motor vehicle . . . ." It is not *any* bodily injury that triggers an insurer's liability under the no-fault act. Rather, it is only those injuries that are caused by the insured's use of a motor vehicle." [*Id.*, quoting *Griffith v State Farm Mut Auto Ins Co*, 472 Mich 521, 531; 697 NW2d 895 (2005) (alterations in original).]

In light of the evidence presented at trial, the trial court did not abuse its discretion when it denied plaintiff's motion for a new trial because there was competent evidence to support the

jury's verdict. Regarding the cause of plaintiff's paralysis, defendant presented testimony from expert witnesses who refuted plaintiff's claims that: (1) the automobile accident aggravated the Chiari malformation, thereby creating the need for plaintiff's February 26, 2004 surgery; and (2) the February 26, 2004 surgery caused plaintiff's transverse myelitis. Additionally, with regard to whether the automobile accident aggravated plaintiff's Chiari malformation, defendant noted that plaintiff's medical records after the automobile accident were inconsistent with an aggravated Chiari malformation. Further, defendant presented evidence that plaintiff displayed symptoms of an aggravated Chiari malformation, such as headaches and dizziness, before the March 19, 2001 automobile accident. If plaintiff experienced symptoms of an aggravated Chiari malformation before the March 19, 2001 automobile accident, a reasonable jury could have found that the automobile accident did not aggravate the Chiari malformation. Consequently, on this record, there was competent evidence to support the jury's verdict that the March 19, 2001 automobile accident did not cause plaintiff's paralysis. See *Dawe (On Remand)*, 289 Mich App at 402. As such, the trial court did not abuse its discretion when it declined to grant plaintiff a new trial. *Gilbert*, 470 Mich at 761.[3] See also *Allard*, 271 Mich App at 406-407 ("If there is any competent evidence to support the jury's verdict, we must defer our judgment regarding the credibility of the witnesses.").

Lastly, plaintiff argues that the jury's verdict was against the great weight of the evidence because Toni Macigewski, a claims adjuster who, at times handled plaintiff's case for defendant, made a judicial admission during her testimony that plaintiff's paralysis was caused by the March 19, 2001 automobile accident. A judicial admission is a formal concession by a party or its counsel that removes a particular fact from issue. *Radtke v Miller, Canfield, Paddock & Stone*, 453 Mich 413, 421; 551 NW2d 698 (1996). A judicial admission must be made for the purpose of relieving the opposing party of its obligation to prove a certain issue. See *id.* See also *Ortega v Lenderink*, 382 Mich 218, 222-223; 169 NW2d 470 (1969). We reject this claim because plaintiff failed to cite a portion of Macigewski's trial testimony in support of this claim. *McIntosh v McIntosh*, 282 Mich App 471, 485; 768 NW2d 325 (2009) ("This Court will not search the record for factual support for a party's claim.").

Moreover, nothing in Macigewski's testimony rose to the level of a formal judicial admission that relieved plaintiff of her burden to prove that her paralysis was caused by the March 19, 2001 automobile accident. Macigewski merely testified that defendant paid PIP benefits to plaintiff until approximately October of 2009 because defendant believed, based on opinions from medical experts, that plaintiff's current condition was caused by the March 19, 2001 automobile accident. This does not rise to the level of an express statement by Macigewski that defendant wished to conclusively admit that plaintiff's injuries were caused by the March 19, 2001 automobile accident. See *Radtke*, 453 Mich at 421; *Ortega*, 382 Mich at 222-223. At most, this was an evidentiary admission that, at one time, defendant believed plaintiff's injuries

[3] Although plaintiff does not develop her alternative claim that the trial court erred when it denied her motion for JNOV, because the evidence, when viewed in a light most favorable to defendant, establishes the defense of causation, the trial court's denial of this alternative motion was not erroneous. See *Morales*, 279 Mich App at 733.

were caused by the March 19, 2001 automobile accident. An evidentiary admission is distinct from a judicial admission in that it is not a formal decision to relieve a party from its obligation to prove a certain issue. *Radtke*, 453 Mich at 421. Indeed, an evidentiary admission does not conclusively establish a matter for trial. *Id.* Rather, an evidentiary admission, which simply consists of a party's prior statement, is always subject to contradiction or explanation. *Id.* Here, Macigewski explained that defendant's previous decision to pay no-fault benefits to plaintiff was based on then-existing medical evidence, and that the decision to discontinue benefits came after it received new medical opinions. Macigewski's explanation concerning defendant's prior evidentiary admission that at one time it believed plaintiff's injuries were caused by the accident, combined with the expert testimony noted above, demonstrates that the jury's verdict was not against the great weight of the evidence. *Dawe (On Remand)*, 289 Mich App at 402; *Allard*, 271 Mich App at 406-407.

Affirmed.

/s/ Jane M. Beckering
/s/ Cynthia Diane Stephens
/s/ Michael J. Riordan