STATE OF MICHIGAN

COURT OF APPEALS

LAKESHIA JACKSON, Individually, and as Next friend for MARTEZ COLLUM, a Minor,

Plaintiff-Appellant,

v

CNA INSURANCE COMPANY,

Defendant-Appellee,

and

JOHN DOE,

Defendant.

UNPUBLISHED
May 31, 2002

No. 227093
Wayne Circuit Court
LC No. 98-816109-NI

LAKESHIA JACKSON,

Plaintiff-Appellant,

v

CONTINENTAL INSURANCE COMPANY,

Defendant-Appellee.

No. 227531
Wayne Circuit Court
LC No. 98-811681-NF

LAKESHIA JACKSON, as Next Friend for MARTEZ CULLOM, a Minor,

Plaintiff-Appellant,

v

CONTINENTAL INSURANCE COMPANY, d/b/a CNA INSURANCE COMPANY,

No. 227532
Wayne Circuit Court
LC No. 98-838841-NF

Defendant-Appellee.

Before: Jansen, P.J., and Zahra and Meter, JJ.

PER CURIAM.

These consolidated appeals involve a motor vehicle accident that occurred on December 9, 1997, in which plaintiff Lakeshia Jackson and her son, Martez Cullom, allegedly were injured. Defendant CNA Insurance Company (hereinafter "defendant") was the insurer of the vehicle that plaintiff was driving at the time of the accident. In Docket No. 227093, plaintiff filed suit against defendant for uninsured motorist benefits. In Docket Nos. 227531 and 227532, plaintiff commenced separate actions for first-party no-fault benefits on behalf of herself and her son. Following a jury trial in the uninsured motorist case, the jury determined that the negligence of the uninsured motorist was not a proximate cause of any injuries to plaintiff or her son. Accordingly, the trial court entered a verdict of no cause of action in favor of defendant. The court subsequently granted defendant's motion for summary disposition in the two first-party cases, concluding that, in light of the jury verdict in the uninsured motorist case, res judicata barred the actions. Plaintiff appeals as of right in all three cases, and we affirm.

Plaintiff first argues that the trial court erred by allowing defendant to introduce evidence of a subsequent accident involving plaintiff and her son in 1999. We review a trial court's decision to admit evidence for an abuse of discretion. *Cole v Eckstein*, 202 Mich App 111, 113; 507 NW2d 792 (1993).

Plaintiff argues that evidence about the 1999 accident was inadmissible because it was both irrelevant and unduly prejudicial. We disagree. "Evidence is relevant if it tends to make the existence of a fact at issue more probable or less probable than it would be without the evidence." *McDonald v Stroh Brewery Co*, 191 Mich App 601, 605; 478 NW2d 669 (1991); see also MRE 401. "Under MRE 403, relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." *Haberkorn v Chrysler Corp*, 210 Mich App 354, 361-362; 533 NW2d 373 (1995).

The record reveals that plaintiff was not limiting her claim for damages to those allegedly sustained only before the August 1999 accident. Therefore, we cannot say that the trial court abused its discretion by concluding that evidence of the 1999 accident was relevant to establishing the extent of plaintiff's and her son's injuries and future damages and whether those injuries were caused by the accident in 1997. Furthermore, we are not persuaded that the probative value of the evidence was substantially outweighed by the danger of unfair prejudice, given the jurors' need to ascertain which, in any, of plaintiff's and her son's alleged damages were attributable to the 1997 accident. No abuse of discretion occurred.

Next, plaintiff argues that the trial court erred by admitting the deposition testimony of Irvin Jones, plaintiff's former boss, without a proper showing that he was unavailable for trial. See MRE 804. Even assuming, arguendo, that the deposition should not have been admitted, we discern no grounds for reversal. Indeed, a error in the admission of evidence does not require

reversal unless a substantial right of a party was affected. MRE 103(a); *Temple v Kelel Distributing Co*, 183 Mich App 326, 329-330; 454 NW2d 610 (1990). Here, plaintiff does not develop an argument regarding how the evidence prejudiced her. See *Henson v Veterans Cab Co*, 384 Mich 486, 494; 185 NW2d 383 (1971) (an appellant alleging evidentiary error bears the burden of showing prejudice), and *Kubisz v Cadillac Gage Textron, Inc*, 236 Mich App 629, 631 n 1; 601 NW2d 160 (1999) (a party may not merely announce a position and leave it to this Court to develop the supporting argument). Moreover, we cannot say that the erroneous admission of Jones' deposition testimony affected plaintiff's substantial rights because much of Jones' testimony was cumulative. Reversal is unwarranted.

In a related issue, plaintiff argues that the trial court erred in ruling on the admissibility of portions of Jones' deposition testimony. We disagree. Indeed, Jones' testimony concerning plaintiff's employment records and drug test results was admissible under the business records exception to the hearsay rule, MRE 803(6). Jones was also properly permitted to offer his opinion, as plaintiff's former supervisor, on whether plaintiff was physically able to perform her job after the accident in 1997. Under MRE 701, laypersons are permitted to offer opinion testimony if that testimony is "(a) rationally based on the perceptions of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue." Here, Jones' opinion was based on his opportunity to observe plaintiff while at work and his opinion was also helpful in deciding if plaintiff was able to do the requirements of her job. Accordingly, the trial court did not abuse its discretion in admitting this testimony.

Next, plaintiff argues that the trial court erroneously instructed the jury that it could infer from her failure to produce evidence regarding the 1999 accident and a previous automobile accident in 1994 that the evidence was adverse to plaintiff. See SJI2d 6.01. However, other than setting forth the text of SJI2d 6.01, plaintiff cites no authority in support of her argument. Accordingly, she has waived the argument for purposes of appeal. See *Check Reporting Services, Inc v Michigan National Bank-Lansing*, 191 Mich App 614, 628; 478 NW2d 893 (1991).

At any rate, we discern no basis for reversal. SJI2d 6.01 provides that if a party fails to produce evidence within his or her control and provides no reasonable excuse for this failure, the jury may infer that the evidence in question would have been adverse to that party. *Ellsworth v Hotel Corp of America*, 236 Mich App 185, 193; 600 NW2d 129 (1999). In *Ellsworth*, this Court held that an instruction based on SJI2d 6.01 should be given only if

> (1) the evidence was under the control of the party who failed to produce it and could have been produced by that party, (2) no reasonable excuse for the failure to produce the evidence has been given, and (3) the evidence would have been material, not merely cumulative, and not equally available to the opposite party. See Note on Use of SJI2d 6.01. [*Id.*]

Here, the trial court instructed the jury that plaintiff failed to produce evidence related to her 1994 and 1999 automobile accidents, including information about her treating doctors, hospitals, and other records related to those accidents. This information was clearly within plaintiff's control and could have been produced by plaintiff. Moreover, plaintiff did not provide a reasonable excuse for not producing this evidence. She claimed that she did not

produce it either because she did not think it was relevant or because she was not requesting any compensation for those accidents. However, the extent of the injuries sustained in both accidents was relevant to determining the extent of the injuries, if any, sustained in the 1997 accident. Additionally, the evidence in question was material and not merely cumulative. The physical condition of plaintiff and her son was highly relevant to the request for damages in this action and also relevant to the question of proximate cause. Finally, the evidence was not cumulative of any other evidence presented, nor was it equally available to defendant. Thus, even if plaintiff had not waived this issue, we would hold that the trial court did not err by instructing the jury in accordance with SJI2d 6.01.

Next, plaintiff argues that the jury's verdict was against the great weight of the evidence. Because plaintiff failed to raise this issue in a motion for a new trial in the trial court, this issue is waived, and we decline to address it. *DeGroot v Barber*, 198 Mich App 48, 54; 497 NW2d 530 (1993).

Finally, plaintiff argues that the trial court erred by granting defendant summary disposition in the two first-party cases on the basis of the jury's verdict in the uninsured motorist case. The central issue in the uninsured motorist case was whether injuries to plaintiff and her son were caused by the August 1997 accident. The jury concluded that they were not.

This Court reviews de novo a trial court's decision with regard to a motion for summary disposition. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). Defendant moved for summary disposition under MCR 2.116(C)(10). A motion under MCR 2.116(C)(10) tests the factual support for a claim. Summary disposition should be granted if, except as to the amount of damages, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Babula v Robertson*, 212 Mich App 45, 48; 536 NW2d 834 (1995).

Although the trial court relied on the doctrine of res judicata in granting defendant's motions for summary disposition, defendant argues on appeal that the trial court's decision may be affirmed on the basis of collateral estoppel. Collateral estoppel precludes relitigation of an issue in a subsequent, different case between the same parties if the prior action resulted in a valid final judgment and the issue was actually and necessarily determined in the prior action. *Horn v Dep't of Corrections*, 216 Mich App 58, 62; 548 NW2d 660 (1996). The issue in the second case must be the same as that in the first proceeding. *Id.*

> To be necessarily determined in the first action, the issue must have been essential to the resulting judgment; a finding upon which the judgment did not depend cannot support collateral estoppel. [*Bd of Co Road Comm'rs for the Co of Eaton v Schultz*, 205 Mich App 371, 377; 521 NW2d 847 (1994).]

Furthermore, "the same parties must have had a full opportunity to litigate the issue in the prior proceeding, and there must be mutuality of estoppel." *Nummer v Dep't of Treasury*, 448 Mich 534, 542; 533 NW2d 250 (1995). Collateral estoppel will only apply if the basis of the former judgment can be "clearly, definitely, and unequivocally ascertained." *Ditmore v Michalik*, 244 Mich App 569, 578; 625 NW2d 462 (2001).

Personal protection benefits are paid without regard to fault. *Bronson Methodist Hosp v Forshee*, 198 Mich App 617, 629; 499 NW2d 423 (1993). An insurer is generally liable for personal protection insurance benefits under the no-fault act where there is accidental bodily injury arising out of the ownership, operation, maintenance, or use of a motor vehicle as a motor vehicle. *Belcher v Aetna Casualty & Surety Co*, 409 Mich 231, 242; 293 NW2d 594 (1980). Benefits payable under the no-fault act for personal injury protection include medical expenses, work-loss benefits, and replacement services. *Specht v Citizens Ins Co of America*, 234 Mich App 292, 295; 593 NW2d 670 (1999).

Plaintiff 's argument focuses solely on the fact that different damages were sought in the three cases. However, in order to recover in either of the cases, plaintiff was required to prove that she and her son were injured as a result of a motor vehicle collision. In the uninsured motorist case, the jury determined that the alleged injuries to plaintiff and her son were not proximately caused by the 1997 accident. Accordingly, under collateral estoppel, the jury's verdict in that case foreclosed plaintiff from establishing a necessary issue in the first-party cases. Although the trial court relied on res judicata as the basis for its decision, we affirm the decision because the court reached the correct result. See *Griffey v Prestige Stamping, Inc*, 189 Mich App 665, 669; 473 NW2d 790 (1991).

Affirmed.

/s/ Kathleen Jansen
/s/ Brian K. Zahra
/s/ Patrick M. Meter