# STATE OF MICHIGAN

# COURT OF APPEALS

VALERIE RISSI,

Plaintiff-Appellant,

v

WILLIAM CURTIS and AUTO-OWNERS/HOME-OWNERS INSURANCE COMPANY,

Defendant-Appellees.

UNPUBLISHED
July 21, 2015

No. 321691
Muskegon Circuit Court
LC No. 11-48124-NI

Before: SERVITTO , P.J., and BECKERING and BOONSTRA, JJ.

PER CURIAM.

In this third-party no-fault case, plaintiff appeals by right the judgment of the trial court, following a jury trial, awarding plaintiff $70,192.80 in damages. The judgment reduced the jury award of $116,988 by 40% in light of the jury's finding, via special verdict form, that plaintiff's comparative negligence amounted to 40% of the cause of the accident. Following the jury verdict and entry of judgment, plaintiff moved for a new trial. The trial court denied the motion. This appeal followed. We affirm.

## I. PERTINENT FACTS AND PROCEDURAL HISTORY

This case arises from a single-vehicle accident that occurred on January 8, 2011 in Muskegon. Defendant William Curtis was driving the vehicle; plaintiff was his passenger. Plaintiff testified that she had no memory of the day of the accident. Curtis testified that he and plaintiff had frequented at least two different bars in the Muskegon area that evening, where they drank alcohol together. Curtis only recollected having had 3 drinks, but stated that he must have had more. Curtis testified that, after their drinking, plaintiff asked him for a ride to her daughter's house. Curtis had no recollection of what caused the accident. Curtis's vehicle left US-31 and collided with a tree. Plaintiff sustained a traumatic brain injury. Medical records admitted at trial indicated that Curtis had a blood alcohol level of .196 mg/dl when tested at the hospital following the accident; plaintiff had a blood alcohol level of .146 mg/dl at that time.

Plaintiff brought suit for third-party no-fault benefits against Curtis for his role in the accident. Plaintiff also asserted claims for underinsured motorist benefits against her own no-fault insurer, Defendant Auto-Owners/Home-Owners Insurance Company ("Auto-Owners"). Prior to trial, plaintiff made a motion in limine to exclude the testimony of Auto-Owners's expert

witness in toxicology, Dr. Daniel McCoy, as well as to exclude evidence of Curtis's and plaintiff's tested blood-alcohol levels. Plaintiff argued that McCoy's deposition testimony indicated that he lacked a foundation for his opinions concerning Curtis's and plaintiff's intoxication at the time plaintiff accepted a ride from Curtis. The trial court denied plaintiff's motion.

At trial, plaintiff stipulated to the trial court's qualification of McCoy as an expert in toxicology. McCoy testified regarding the effects of alcohol intoxication in general. Specifically, McCoy testified to the effects of alcohol consumption on a person's judgment and decision-making. McCoy also testified regarding visible signs of intoxication, and stated that a person generally exhibits visible signs of intoxication when his or her blood alcohol level is between .05 mg/dl and .10 mg/dl, and that those signs become more obvious as blood alcohol level rises above .10 mg/dl, although visible signs of intoxication can differ from person to person depending on such factors as alcohol tolerance.

McCoy opined that, given their tested blood-alcohol levels, Curtis and plaintiff both would have had impaired judgment and that Curtis would have been exhibiting visible signs of intoxication. On cross-examination, McCoy admitted that he did not have information regarding Curtis's alcohol consumption on the night in question, including when Curtis took his last drink, and that his opinion was based only on his tested blood-alcohol level. McCoy also admitted to not knowing Curtis's height, weight, or drinking habits, other than that he was told that Curtis was not a heavy drinker. McCoy indicated that he would need this information if he were trying to calculate a blood alcohol level at a certain point in time. McCoy agreed with plaintiff's counsel that a man of Curtis's size who took only three drinks over "a couple hours" would have a low blood alcohol level, and that it would be an "OK decision" for someone to ride in a car with that person if they showed no signs of being drunk. However, McCoy also stated that it was not possible for a man of Curtis's size to become drunk on three standard drinks, and that it would take more than nine normal drinks over two hours to reach that level. McCoy also stated that a person's blood-alcohol level can either rise or fall between the time they take their last drink and the time a blood-alcohol test is administered. However, he opined, based on the time periods involved, that the lowest blood alcohol level Curtis could have possessed when he left the bar was .12 mg/dl, and that the lowest level plaintiff could have possessed was .09 mg/dl.

Plaintiff presented testimony from numerous witnesses concerning her inability to resume her former job as a broadcast captioner, her prior income level, her cognitive and memory problems, and her inability to engage in activities she had previously enjoyed due to her brain injury.

Defendants' raised an affirmative defense based on plaintiff's intoxication pursuant to MCL 600.2955a, which states in relevant part:

> It is an absolute defense in an action for the death of an individual or for injury to a person or property that the individual upon whose death or injury the action is based had an impaired ability to function due to the influence of intoxicating liquor or a controlled substance, and as a result of that impaired ability, the individual was 50% or more the cause of the accident or event that resulted in the death or injury. If the individual described in this subsection was less than 50%

> the cause of the accident or event, an award of damages shall be reduced by that percentage.

The jury thus was instructed that it could find that plaintiff was negligent and that her negligence was a proximate cause of her injuries, and that if the jury concluded that plaintiff's negligence was a proximate cause of her accident, the percentage of negligence attributable to plaintiff would be used to reduce her award.

The jury completed a special verdict form. Relevant to this appeal, the jury answered "yes" to the questions "Was Valerie Rissi [plaintiff] negligent?" and "Was Valerie Rissi's negligence a proximate cause of her own injuries?" and, in Question 6, attributed 40% of the negligence causing her injuries to plaintiff. The jury also answered "yes" to the questions of whether Curtis and plaintiff, respectively, were the cause of the accident due to intoxication, and, in Question 9, attributed 25% of the cause of the accident to plaintiff's intoxication.

Regarding plaintiff's damages, the jury awarded plaintiff $116,988.00 for past economic loss, zero dollars for future economic loss, and zero dollars for past or present non-economic loss. The special verdict form included the following statement:

> **Please note, the Judge will reduce the total amount of plaintiff's damages for economic loss by the percentage of negligence attributed to Valerie Rissi, if any, entered in Question No. 6 above.

Following the verdict, the trial court stated:

> Let the record reflect that we had an in chambers consultation with the parties at which time I revealed the percentages that were in the verdict and we agreed that the percentages reflected in question number six would be the percentages that the Court would apply in arriving at the verdict in this matter. So it appears that judgement [sic] should enter for, it looks like $7,192.80 [sic] to me.
>
> This appeal followed.[1]

## II. TOXICOLOGIST TESTIMONY

Plaintiff argues on appeal that the trial court erred in allowing McCoy's testimony. We review the trial court's admission of expert testimony for an abuse of discretion. *Woodard v Custer*, 476 Mich 545, 557; 719 NW2d 842 (2006). An abuse of discretion exists if the decision results in an outcome outside the range of principled outcomes. *Id*.

[1] The jury also returned no cause of action on plaintiff's claim against Auto-Owners for violations of the uniform trade practices act, MCL 500.2001 *et seq*., and plaintiff does not appeal that portion of the verdict. Plaintiff voluntarily dismissed her claim against Auto-Owners for violation of the Michigan consumer protection act, MCL 445.901 *et seq*., at the close of her proofs; that claim is also not a part of this appeal.

Expert testimony is admissible if the witness is a qualified expert, there are facts in evidence that are subject to examination and analysis by a competent expert, and the knowledge is in a particular area that belongs more to an expert than to the common man. See MRE 702; *Surman v Surman*, 277 Mich App 287, 308; 745 NW2d 802 (2007). The trial court must determine whether the proffered expert testimony will aid the jury in making the ultimate decision in the case. *Zeeland Farm Services, Inc v JBL Enterprises, Inc*, 219 Mich App 190, 196-197; 555 NW2d 733 (1996). The facts upon which an expert bases his opinion must be in evidence. MRE 703; *Badiee v Brighton Area Sch*, 265 Mich App 343, 370; 695 NW2d 521 (2005).

Here, plaintiff does not challenge (and indeed stipulated at trial to) McCoy's qualification as an expert in toxicology. Instead, plaintiff argues that McCoy lacked an evidentiary foundation of the intoxication of plaintiff or Curtis, and thus should not have been permitted to opine concerning their intoxication at the time plaintiff asked Curtis for a ride home. However, plaintiff's and Curtis's blood-alcohol tests following the accident were admitted into evidence. The record shows that McCoy based his opinion on that evidence and his experience as a toxicologist. Plaintiff was permitted to explore the assumptions McCoy made in reaching his conclusions and elicited testimony that McCoy lacked direct evidence of plaintiff's or Curtis's alcohol consumption or visible intoxication on the night in question. Although plaintiff claims that McCoy "admitted the lack of foundation during the course of his deposition testimony," our review of that testimony shows that McCoy testified substantially similarly to how he did at trial. McCoy agreed at his deposition that he could not state with certainty that Curtis appeared intoxicated at the time plaintiff asked him for a ride, or that plaintiff was "legally intoxicated" when she made her decision to accept that ride. McCoy did not opine differently at trial; rather, given certain assumptions such as weight and gender, he gave his expert opinion as to the lowest blood-alcohol level Curtis and plaintiff could have had when they left the bar. Plaintiff's challenges to that testimony go to its weight, not its admissibility. *Lenawee County v Wagley*, 301 Mich App 134, 166; 836 NW2d 193 (2013). Because McCoy's opinion was based on facts in evidence and his qualifications as an expert, we find no abuse of discretion in the trial court's admission of this evidence. *Woodard*, 476 Mich at 557.

## II. INCONSISTENT JURY VERDICT

Plaintiff argues that the jury erred in finding, pursuant to MCL 600.2955a, that plaintiff's intoxication was a proximate cause of the accident. We disagree. We will uphold a jury verdict if there is an interpretation that provides a logical explanation for its findings. See *Bean v Directions Unlimited, Inc*, 462 Mich 23, 31; 609 NW2d 567 (2000).[2]

Plaintiff's argument is premised in part on what she deems the improper admission of the testimony of McCoy. As discussed above, we find no error in the admission of McCoy's testimony. Plaintiff further argues that the jury was confused about the application of MCL 600.2955a. Plaintiff supports this argument by reference to *Piccalo v Nix (On Remand)*,

[2] Plaintiff does not challenge the trial court's instruction to the jury regarding MCL 600.2955a, but only challenges the resulting verdict.

252 Mich App 675; 653 NW2d 447 (2002), and *Mallison v Scribner*, 269 Mich App 1; 709 NW2d 227 (2005), rev'd 475 Mich 878 (2006). These cases do not aid plaintiff.

*Piccalo* involved a jury verdict finding no cause of action for the plaintiff, a passenger with a drunk driver, after the jury found the plaintiff's intoxication was more than 50 percent of the cause of the accident. *Piccalo*, 246 Mich App at 681. Plaintiff points out that, in addition to choosing to ride with a drunk driver, the plaintiff in *Piccalo* chose to drink while underage and chose to ride in an open area of the vehicle that contained no seats or restraints and contained loose tires and tools. All of this is true. *Id*. at 680. However, the jury in *Piccalo* also found the plaintiff's intoxication resulted in higher degree of culpability than the jury in the instant case did regarding plaintiff's intoxication. There is no conflict between the instant case and *Piccalo* that would render the jury's verdict in this case logically inconsistent.

*Mallison* also does not support plaintiff's position. In *Mallison*, this Court granted summary disposition to the defendants, citing *Piccalo*, on the grounds that plaintiff voluntarily chose to ride with a drunk driver, and voluntarily chose to participate in off-road driving, and that therefore there was no genuine question of material fact that plaintiff's intoxication was 50 percent or more of the cause of the accident. *Mallison*, 269 Mich App at 5. Our Supreme Court reversed this Court and remanded to the trial court for further proceedings, stating that

> The Court of Appeals and the Gogebic Circuit Court erred in finding, *as a matter of law*, that as a result of plaintiff's impaired ability to function due to the influence of intoxicating liquor, she was 50% or more the cause of the accident that resulted in her injuries and that she is barred from recovery under MCL 600.2955a(1). [*Mallison*, 475 Mich 878; 715 NW2d 72 (2006) (emphasis added).]

Again, as in *Piccalo*, the plaintiff in *Mallison* made additional poor decisions beyond merely accepting a ride from an intoxicated driver. But the *Mallison* Court did not state that a *jury* was prohibited from finding the plaintiff to be more than 50 percent the cause of her accident, only that, under the facts of that case, the trial court and this Court erred in making that determination *as a matter of law*. At best *Mallison* stands for the principle that it the province of the jury to determine the application of MCL 600.2955a to the facts of the case, which is precisely what occurred here. Nothing in *Mallison* supports the conclusion that the jury's verdict in the instant case was inconsistent.

Plaintiff additionally argues that the jury's confusion is evident in the special verdict form, where the jury found plaintiff's intoxication to be 25% responsible for her accident, but found plaintiff's negligence to be 40% responsible for her accident. The jury verdict form, with which plaintiff's counsel specifically indicated his agreement during closing argument, and the record indicate that plaintiff agreed that her award would be reduced by the amount stated in the answer to Question 6, i.e., 40%. A party may not take an appeal from an error to which the aggrieved party contributed by plan or negligence. *Smith v Musgrove*, 372 Mich 329, 331; 125 NW2d 869 (1964). Further, questions 6 and 9 are not identical, and a difference in their answers is not logically inconsistent. Question 6 asks the jury to assess plaintiff's level of comparative negligence *in general*, while question 9 asks the jury to assess the percentage of plaintiff's negligence *attributable to her intoxication*. Michigan is a comparative negligence state, *Placek v*

*Sterling Heights*, 405 Mich 638; 275 NW2d 511 (1979), and the jury was required to assess plaintiff's comparative fault under those principles. Additionally, the specific facts of this case required the jury to make a determination pursuant to MCL 600.2955a. The fact that one amount is subsumed within the other is not logically inconsistent. The jury may have concluded, for example, that a portion of plaintiff's negligence in accepting a ride from the intoxicated Curtis arose not from her own intoxication, but simply from her own lack of ordinary care. In any event, this Court need not speculate; we will affirm a verdict that is not logically inconsistent. *Bean v Directions Unlimited, Inc*, 462 Mich at 31.

Plaintiff also asserts that the jury verdict was also inconsistent in its award of past, but not future, economic damages. There is no logical inconsistency in such an award. It was within the province of the jury to determine, based on the evidence before it concerning the degree of severity of plaintiff's injury and her level of post-accident recuperation and capabilities, whether plaintiff's past compensable economic damages would continue into the future. "No legal principle requires the jury to award one item of damages merely because it has awarded another item." *Kelly v Builders Square, Inc*, 465 Mich 29, 39-40; 632 NW2d 912 (2001).

Because we find that the trial court did not err in admitting McCoy's testimony, and the jury verdict was not inconsistent, we also reject defendant's argument that the trial court erred in denying her motion for a new trial on the grounds that the verdict was against the great weight of the evidence. We further reject plaintiff's unsupported contention that the jury was prejudiced or ignored the trial court's instructions on damages, and that the resulting award was grossly inadequate. A new trial based on inadequate damages is only warranted if the verdict shocks the judicial conscience, *Hill v Henderson*, 107 Mich App 551, 553; 309 NW2d 663 (1981), or was induced by improper means, passion, or prejudice, *Kelly*, 465 Mich at 35. The instant case presents none of these issues, and the trial court accordingly did not err in declining to grant plaintiff a new trial. See MCR 2.611(A)(1); *Allard v State Farm Ins Co*, 271 Mich App 394, 406-407; 722 NW2d 268 (2006).

Affirmed.

/s/ Deborah A. Servitto
/s/ Jane M. Beckering
/s/ Mark T. Boonstra