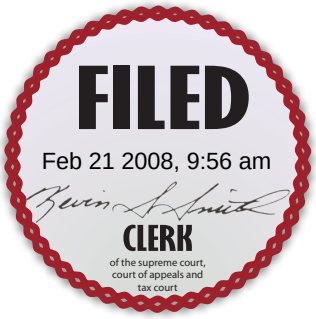

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IN THE
COURT OF APPEALS OF INDIANA

KENNETH McCLANAHAN,	)	
	)	
Appellant-Plaintiff,	)	
	)	
vs.	)	No. 22A01-0703-CV-141
	)	
TAMMY MASON,	)	
	)	
Appellee-Defendant.	)	

APPEAL FROM THE FLOYD CIRCUIT COURT
The Honorable J. Terrance Cody, Judge
Cause No. 22C01-0406-CT-366

February 21, 2008

MEMORANDUM DECISION – NOT FOR PUBLICATION

MATHIAS, Judge

Kenneth McClanahan ("McClanahan") sued Tammy Mason ("Mason") in Floyd Circuit Court for damages he allegedly sustained in an automobile accident involving Mason. The jury returned a verdict in favor of Mason and McClanahan appeals. He raises three issues, which we consolidate and restate as:

I. Whether the trial court abused its discretion when it admitted evidence of prior and subsequent automobile accidents involving McClanahan; and,

II. Whether the jury's verdict was against the weight of the evidence.

Concluding that the admission of evidence of the prior and subsequent automobile accidents was harmless error, and that the jury's verdict was not against the weight of the evidence, we affirm.

Facts and Procedural History

On January 3, 2003, McClanahan was stopped at an intersection attempting to turn left when he was struck from behind with a vehicle driven by Mason. The police officer at the scene did not initially draft an accident report because she did not believe any damage sustained met the $750 in damages required in order to draft a report. McClanahan returned home after the accident, but later went to the emergency room because his chest and shoulders were hurting and he was sore. McClanahan also told emergency room personnel that his knee was sore, and he was told to return if the pain persisted. However, records from the emergency room did not indicate that McClanahan complained of knee pain.

The next morning at approximately 4:00 a.m., McClanahan felt severe pain in his knee as he rolled over in bed. He returned to the emergency room and was referred to Dr. William Grossman ("Dr. Grossman"). Dr. Grossman treated McClanahan for a torn

medial meniscus, which he believed was caused by the accident. McClanahan attended physical therapy, but his knee did not improve. Therefore, Dr. Grossman performed corrective surgery on McClanahan's knee.

On June 9, 2004, McClanahan filed a complaint against Mason alleging that she operated her vehicle in a negligent manner causing the collision, and as a result, McClanahan "sustained serious bodily injuries causing him to incur medical expenses, and said medical expenses will continue to be incurred in the future. . . . [H]e has been caused to suffer great mental and physical pain and discomfort which will continue into the future." Appellant's App. pp. 7-8. A jury trial commenced on November 29, 2006, and the jury rendered a verdict in favor of Mason and against McClanahan. McClanahan then filed a motion to correct error and argued that the jury's verdict was against the weight of the evidence. His motion was denied and McClanahan now appeals. Additional facts will be provided as necessary.

I. Admission of Prior and Subsequent Automobile Accidents

During trial, evidence was admitted concerning automobile accidents McClanahan was involved in both prior to and subsequent to the accident at issue in this case. McClanahan argues that this evidence was admitted "for the sole purpose of portraying Mr. McClanahan as litigious." Br. of Appellant at 4.

The admission or exclusion of evidence is a determination entrusted to the discretion of the trial court. Lachenman v. Stice, 838 N.E.2d 451, 464 (Ind. Ct. App. 2005), trans. denied. Further, the trial court's evidentiary rulings are afforded great deference on appeal and are overturned only upon a showing of an abuse of discretion.

Bova v. Gary, 843 N.E.2d 952, 955 (Ind. Ct. App. 2006). We will not overturn a trial court's decision to admit or exclude evidence "absent a showing of a manifest abuse resulting in the denial of a fair trial." Id.; see also Walker v. Cuppett, 808 N.E.2d 85, 92 (Ind. Ct. App. 2004) ("Even if a trial court errs in a ruling on the admissibility of evidence, this court will only reverse if the error is inconsistent with substantial justice.").

Moreover, it is within the trial court's discretion to determine the scope of cross-examination, and only an abuse of that discretion warrants reversal. Walker, 808 N.E.2d at 92. "'Cross-examination is permissible as to the subject matter covered on direct examination, including any matter which tends to elucidate, modify, explain, contradict or rebut testimony given during direct examination by the witness.'" Id. (citation omitted).

During cross-examination, McClanahan was questioned regarding injuries he sustained in two accidents prior to the accident at issue in this case. McClanahan was also asked whether he pursued claims "to recover money for neck and back injuries resulting from those prior accidents." Tr. p. 124. McClanahan responded that he did pursue claims, testified as to the injuries sustained due to those accidents, and stated that he recovered $7500 as a result of the 2001 accident. Tr. pp. 123-35.

With regard to the subsequent accident, during direct examination, McClanahan testified that he was involved in a subsequent accident in April of 2003. Tr. p. 75. He gave the jury a description of that one car accident and the minor injuries he sustained. Tr. pp. 76-77. On cross-examination, the following exchange occurred:

> COUNSEL: And would you also agree, well let me ask you, why didn't you follow up with treatment in that?

> McCLANAHAN: I did, I mean they took me to the emergency room and I stayed for six hours.
> COUNSEL: And why didn't you, did you pursue a claim in that[?]
> McCLANAHAN: No. No sir I did not pursue a claim because, there was circumstances.
> COUNSEL: Ok. And is that also the reason you didn't get treated, continue to get treated after that?

Tr. pp. 137-38.

McClanahan's counsel objected to that question. Mason's counsel responded, "I think as to why and when he pursues treatment is certainly a relevant question for this jury and the history is if he's got a claim to make he pursues treatment." Id. at 138. The trial court granted McClanahan's motion to strike and admonished the jury, stating "Ladies and Gentlemen ignore the comments that [Mason's Counsel] made about Mr. McClanahan and treatment at this April 2003 accident[.] [I]t is irrelevant to the case that is in front of us." Id. at 139.

The trial court did not abuse its discretion when it admitted testimony concerning prior injuries suffered by McClanahan. "[A] tortfeasor takes the injured person as [she] finds [him], and the tortfeasor is not relieved from liability merely because an injured party's pre-existing physical condition makes him or her more susceptible to injury." Bolin v. Wingert, 764 N.E.2d 201, 207 (Ind. 2002). Nevertheless, a defendant is liable only for the extent to which his or her conduct resulted in an aggravation of the pre-existing condition, and not for the condition as it was. Alexander v. Scheid, 726 N.E.2d 272, 284 (Ind. 2000).

The standard of admissibility for a defendant's introduction of evidence of a plaintiff's medical problems unrelated to his negligence is the existence of a possibility,

not a probability, that a plaintiff's claimed damages resulted from a condition or event unrelated to the defendant's negligence. Rondinelli v Bowden, 155 Ind. App. 582, 586, 293 N.E.2d 812, 814-15 (1973) "'[C]ross-examination and other evidence is admissible to lay a basis for impeachment or show that the injury complained of is due to some other cause where the present injury and the prior injury or condition are similar, or where a causal relationship between them can be shown.'" Walker, 808 N.E.2d at 96 (quoting Rondinelli, 155 Ind. App. at 586, 293 N.E.2d at 814-15); see also id. ("A defendant may successfully challenge a plaintiff's claims as to the nature, extent, and source of her injuries through cross-examination and argument [and] is not limited to doing so only through the presentation of a case-in-chief.").

In this case, McClanahan's initial complaints after the accident and reason for his initial visit to the emergency room were neck and back soreness. Moreover, McClanahan requested damages for his pain and suffering. Therefore, the trial court properly allowed Mason to cross-examine McClanahan about neck and back injuries he suffered in prior automobile accidents. With regard to the admission of evidence of injuries suffered in the subsequent automobile accident, McClanahan has waived that claim because he testified to those injuries on direct examination. See In re Guardianship of Knepper, 856 N.E.2d 150, 156 (Ind. Ct. App. 2006), trans. denied ("This court has determined that a party may not take advantage of an error that he commits, invites, or which is the natural consequence of his own neglect or misconduct.").

However, we cannot reach the same conclusion with regard to the evidence admitted of the claims McClanahan filed as a result of those accidents. That evidence

was not relevant to the issues presented at trial, i.e. was Mason negligent and if so, did her negligence cause injury to McClanahan. Mason's counsel essentially conceded that he sought to admit such evidence to establish that McClanahan is litigious in an attempt to attack his credibility. Tr. p. 116. Accordingly, we conclude that the trial court abused its discretion when it admitted this evidence. Costanzi v. Ryan, 175 Ind.App. 257, 271, 370 N.E.2d 1333, 1341 (1978) (quoting McCormick's Handbook of the Law of Evidence § 196 (2d ed. E. Cleary 1972)) ("[W]hen it is sought to be shown merely that the plaintiff is a chronic litigant, or a chronic personal injury litigant, the courts consider that the slight probative value is overborne by the danger of prejudice, and they exclude the evidence.").

Nevertheless, we cannot conclude that admission of this evidence resulted in denial of a fair trial. McClanahan was briefly questioned regarding the claims he filed as a result of his prior accidents. Moreover, his testimony established that he was not at fault in the prior accidents, and that he filed claims because he was injured. We cannot conclude that a reasonable jury would determine that McClanahan's testimony lacked credibility because he was involved in two prior accidents through no fault of his own, which resulted in injuries and vehicular damages, and therefore, he filed claims.

Finally, Mason's counsel's statement in front of the jury, which is quoted above, is troubling. But the jury was admonished not to consider counsel's statement, and McClanahan has not shown that the admonishment failed to cure the error. James v. State, 613 N.E.2d 15, 22 (Ind. 1993) (A timely and accurate admonishment is presumed to cure any error in the admission of evidence.).

II. Jury's Verdict

McClanahan also argues that the jury's verdict was against the weight of the evidence.[1] When we review the sufficiency of evidence in a civil case, we will decide whether there is substantial evidence of probative value supporting the judgment. Jamrosz v. Resource Benefits, Inc., 839 N.E.2d 746, 758 (Ind. Ct. App. 2005), trans. denied. We neither weigh the evidence nor judge the credibility of witnesses, but consider only the evidence most favorable to the judgment along with all reasonable inferences to be drawn therefrom. Davidson v. Bailey, 826 N.E.2d 80, 87 (Ind. Ct. App. 2005). "The verdict will be affirmed unless we conclude that it is against the great weight of the evidence." Id.

To recover on a theory of negligence, McClanahan was required to establish: (1) a duty owed by the defendant to the plaintiff, arising from the relationship between the defendant and the plaintiff; (2) breach of this duty by the defendant; and (3) an injury to the plaintiff proximately caused by the breach. See Lincke v. Long Beach Country Club, 702 N.E.2d 738, 740 (Ind. Ct. App. 1998), trans. denied. Here, there is ample evidence from which a jury could reasonably conclude that Mason's breach of duty did not proximately cause McClanahan's injuries.

Mason testified that she was stopped behind McClanahan's vehicle, and when McClanahan began to proceed into the intersection, she removed her foot from the brake

[1] As Mason notes in her brief, the jury entered a verdict in her favor, yet McClanahan has relied on the standard for inadequate jury verdicts in addressing this issue. While we acknowledge that McClanahan has incorrectly cited cases involving inadequate jury verdicts, he is essentially arguing that the jury's verdict was against the weight of the evidence. Therefore, we reject Mason's argument that McClanahan has waived this issue. Moreover, we note that contrary to Mason's assertion, McClanahan did not forfeit his arguments concerning the admissibility of evidence of his prior and subsequent automobile accidents by failing to include these arguments in his motion to correct error. See Ind. Trial Rule 59(A) (2008).

and "eased forward." Tr. p. 196. Mason stated that when she made contact with McClanahan's vehicle, she had not yet put her foot on the accelerator. Id. Mason described the contract between the vehicles as a "tap." Id. Moreover, there was no visible damage to either vehicle. At the scene of the accident, McClanahan did not indicate that he was injured and he told Mason that he was fine. Id. at 201.

Although Dr. Grossman opined that "the motor-vehicle accident is the most likely culprit to explain the tear in [McClanahan's] medial meniscus" in his right knee, he also agreed that a medial meniscus tear can result "from wear and tear from day-to-day activities." Appellant's App. pp. 303, 305. He also testified that horizontal tears, like the tear suffered by McClanahan, "are usually associated with wear and tear" and "many people in their 60s have asymptomatic meniscal tears." Id. at 306, 308. Dr. Grossman also indicated that McClanahan's injury did not "look like" an injury caused by striking his knee on the vehicle's dashboard.[2] Id. at 308. Finally, McClanahan told Dr. Grossman that he experienced a significant impact in the accident and Dr. Grossman relied on this statement in forming his opinion that the accident caused the knee injury. Id. at 305.

From this evidence, it was reasonable for the jury to determine that the impact between the vehicles was significantly minor and such impact did not cause McClanahan's knee injury. Accordingly, we cannot conclude that the jury's verdict is against the great weight of the evidence.

[2] McClanahan testified that he struck his knee on the vehicle's steering column. Tr. p. 57.

Conclusion

The trial court committed harmless error when it admitted evidence of claims McClanahan pursued after being involved in other automobile accidents, and the jury's verdict is supported by sufficient evidence.

Affirmed.

NAJAM, J., and BRADFORD, J., concur.