



## **Case Summary**

Lisa and Nicole Tanasijevic appeal the jury's verdict in favor of Alicia Bookwood.

We affirm.

### **Issues**

Lisa and Nicole raise three issues, which we restate as:

- I. whether the trial court abused its discretion by admitting photographs of the property damage resulting from a collision between Bookwood and Lisa's vehicles;
- II. whether the trial court erred by giving the jury a verdict form that allowed the jury to find for Bookwood and against Lisa and Nicole; and
- III. whether the damages award was inadequate.

### **Facts**

On September 22, 2008, Lisa and her daughter, Nicole, were stopped in traffic at a red light when Lisa's vehicle was struck from behind by Bookwood's vehicle. Neither Lisa nor Nicole needed medical attention at the scene. Lisa saw scratches on her bumper but said that her husband could buff out the scratches. They did not report the collision to the police or exchange names, addresses, or insurance information. Lisa and Nicole proceeded to a nearby store and did some shopping. Lisa called her husband, who told her that she was required to report the collision to the police. While driving to another store, Lisa saw Bookwood's vehicle in a parking lot and wrote down her license plate number. Later that evening, Lisa reported the collision to the police.

Two days after the collision, Lisa claimed to be experiencing neck and back pain, and Nicole claimed to be experiencing neck and shoulder pain. In the phonebook, Lisa found Team Physicians, which advertised medical care to treat “auto injuries,” neck pain, and back pain. Defendant’s Ex. D & E. Lisa and Nicole received treatment from Dr. Aleksandr Goldvenkht at Team Physicians from September 2008 through December 2008. Dr. Goldvenkht diagnosed Lisa with a whiplash injury, “which is sprain/strain injury to the cervical, thoracic, and lumbar spine” caused by the collision. Tr. p. 208. Dr. Goldvenkht diagnosed Nicole with a “whiplash, sprain/strain injury to her neck and mid-back region with no neurological deficits” as a result of the collision. Id. at 228. The treatment for both Lisa and Nicole included physical therapy, TENS units, chiropractic adjustments, and home exercises. Nicole missed twenty-six days of school after the collision.

Lisa and Nicole filed a complaint against Bookwood in October 2008. Both Lisa and Nicole went back to Dr. Goldvenkht in June 2009, complaining of continuing neck and back pain. Both Lisa and Nicole were prescribed an additional round of physical therapy. Bookwood took Lisa and Nicole’s depositions on July 10, 2009.

Before the trial, Lisa and Nicole filed a motion in limine to prevent the admission of photographs of Lisa’s vehicle into evidence, which the trial court denied. At the jury trial, Bookwood admitted to causing the collision. The main issues of contention during the trial were whether and to what extent Lisa and Nicole were injured as a result of the collision. Lisa and Nicole stipulated to the admissibility of Bookwood’s exhibits, and Bookwood stipulated to the admissibility of Lisa and Nicole’s exhibits. Plaintiffs’

Exhibits 1 through 4 were photographs of Lisa's vehicle. Defendant's Exhibit A was also a photograph of Lisa's vehicle. In their testimony, both Lisa and Nicole complained that they still have occasional pain. Dr. Goldvenkht believed that Lisa had reached maximum medical improvement and that she had a permanent injury. He recommended that she continue doing home physical therapy exercises. He did not believe that Nicole had a permanent injury as a result of the collision.

Dr. Terry Lichtor, a neurosurgeon, testified as an expert for Bookwood. Dr. Lichtor reviewed photographs of Lisa's car, Lisa and Nicole's medical records, and other documents. Dr. Lichtor opined that, based on his review of the records, Nicole had some soft tissue injuries as a result of the collision, which should have resolved within a few weeks or three to four months, at most. Dr. Lichtor also testified that, based on the records, Lisa had some "neck symptoms," which largely resolved with conservative treatment. *Id.* at 386. In Dr. Lichtor's opinion, "[t]here would be no permanency to the minor soft tissue injury sustained by [Lisa or Nicole] secondary to the accident that occurred during September of 200[8]." *Id.* at 390. Dr. Lichtor also noted that Lisa and Nicole's complaints were subjective, and he could not measure or determine whether the complaints were real.

Over Lisa and Nicole's objection, one of the proposed verdict forms allowed the jury to find for Bookwood and against Lisa and Nicole. During closing arguments, Bookwood argued that Lisa and Nicole were not credible regarding their injuries and that their alleged injuries could not be corroborated with objective medical tests.

Bookwood's counsel encouraged the jury to find for Bookwood if it did not believe Lisa and Nicole. The jury found for Bookwood and against Lisa and Nicole.

Lisa and Nicole filed a motion to correct error pursuant to Indiana Trial Rule 59. Lisa and Nicole argued that the trial court had erred by giving the jury a verdict form that allowed the jury to find for Bookwood and against Lisa and Nicole. They also argued that the "damages awarded by the jury were inadequate as a matter of law." App. p. 124. Additionally, they argued that the trial court erred by allowing Bookwood to admit photographs of the damage to Lisa's vehicle as a result of the collision. After a hearing, the trial court denied Lisa and Nicole's motion to correct error. Lisa and Nicole now appeal.

## **Analysis**

### ***I. Admission of Photographs***

Lisa and Nicole argue that the trial court erred by denying their motion in limine regarding the photographs of Lisa's vehicle. We first note that, "[o]nly trial objections, not motions in limine, are effective to preserve claims of error for appellate review." Raess v. Doescher, 883 N.E.2d 790, 796 (Ind. 2008). "Failure to object at trial to the admission of the evidence results in waiver of the error, notwithstanding a prior motion in limine." Id. at 796-97. Lisa and Nicole did not object to Bookwood's admission of the photograph, and they waived any error.

Waiver notwithstanding, we also note that Lisa and Nicole themselves admitted photographs of Lisa's vehicle into evidence. Lisa and Nicole claim that the trial court's ruling on their motion in limine forced them to admit the photographs, "or at their peril,

wait for the defense to admit the photos with the inference to be drawn that the plaintiffs did not want the jury to see the photos.” Appellant’s Br. p. 16 n.5. We addressed a similar argument in Santonelli v. State, 743 N.E.2d 1281, 1286 (Ind. Ct. App. 2001), trans. denied, and held:

Counsel can object to evidence which she deems inadmissible and still respond to it, rebut it or otherwise attempt to explain it without waiving the client’s right to an appeal. Or, counsel can make a tactical decision to use the evidence deemed objectionable offensively in a way which goes beyond rebutting the objectionable evidence, thereby rendering the admission of such evidence harmless. Counsel cannot do both.

Here, having had their motion in limine denied, Lisa and Nicole could have objected to Bookwood’s admission of the photograph. However, having decided to admit the photographs themselves, they invited any error. Witte v. Mundy ex rel. Mundy, 820 N.E.2d 128, 133 (Ind. 2005) (noting that, under the invited error doctrine, a party may not take advantage of an error that she commits, invites, or which is the natural consequence of her own neglect or misconduct).

## ***II. Verdict Form***

The next issue is whether the trial court erred by giving the jury a verdict form that allowed the jury to find for Bookwood and against Lisa and Nicole. In reviewing a trial court’s decision to give or refuse a tendered instruction, we consider whether the instruction: (1) correctly states the law, (2) is supported by the evidence in the record, and (3) is covered in substance by other instructions. Wal-Mart Stores, Inc. v. Wright, 774 N.E.2d 891, 893 (Ind. 2002). Lisa and Nicole seem to argue that the proposed verdict

form was not supported by the evidence in the record. The trial court has discretion in instructing the jury, and we will reverse on the last two issues only when the instructions amount to an abuse of discretion. Id. “Jury instructions are to be considered as a whole and in reference to each other.” Clay City Consol. Sch. Corp. v. Timberman, 918 N.E.2d 292, 300 (Ind. 2009).

Over Lisa and Nicole’s objection, the trial court gave the jury a possible verdict form, which provided: “We, the Jury, find for the Defendant, ALICIA BOOKWOOD, and against the Plaintiffs, LISA A. TANASIJEVIC, and NICOLE TANASIJEVIC.” App. p. 8. Lisa and Nicole argue that the trial court erred by giving the verdict form to the jury because Bookwood had admitted liability and the only issue to be determined was the amount of damages to be awarded. However, the elements of a negligence cause of action consist of: (1) a duty owed to the plaintiff, (2) a breach of that duty by defendant (3) which proximately causes (4) plaintiff’s damages. Peak v. Campbell, 578 N.E.2d 360, 361 (Ind. 1991). Bookwood admitted that she was at fault in the collision, i.e., that she owed a duty to Lisa and Nicole and breached that duty. The jury was left to determine whether Bookwood’s breach proximately caused damages to Lisa and Nicole and, if so, the amount of Lisa and Nicole’s damages. The trial court also instructed the jury: “[Bookwood] has admitted that she was responsible for the collision between the vehicle which she was driving and the one operated by [Lisa and Nicole]. The only issue for your determination is the nature and extent of the plaintiffs’ injuries and damages, if

any, proximately caused by the defendant.”<sup>1</sup> Tr. p. 462 (emphasis added). The jury could have, and apparently did, decide that Bookwood’s breach did not proximately cause Lisa and Nicole’s alleged damages.

Lisa and Nicole argue that even Bookwood’s expert testified that they were injured in the collision. Lisa and Nicole misconstrue Dr. Lichtor’s testimony. He testified that, based on his review of the records, Lisa and Nicole had sustained soft tissue injuries. However, he also noted that Lisa and Nicole’s complaints were subjective, and he could not measure or determine whether the complaints were real. The jury was still free to determine Lisa and Nicole’s credibility and whether they were actually injured.

Lisa and Nicole’s reliance on Deible v. Poole, 691 N.E.2d 1313 (Ind. Ct. App. 1998), opinion adopted on transfer, Deible v. Poole, 702 N.E.2d 1076 (Ind. 1998), for the proposition that the verdict form was erroneous, is misplaced. In Deible, the defendant admitted that he was at fault in the collision and that the plaintiff had sustained some injury. The defendant disputed the extent of the plaintiff’s injuries. The jury returned a verdict that stated: “We, the Jury assess the percentages of fault as follows: Plaintiff, Kathleen Deible, 100 percent; Defendant, Steven Poole, zero percent, and we, therefore, find for the Defendant, Steven Poole, and against the Plaintiff Kathleen Deible.” Deible, 691 N.E.2d at 1314. We concluded that, “[a]fter [the defendant] admitted liability for the accident and also admitted that [the plaintiff] was entitled to some damages, the jury was required to determine what portion of the claimed damages were attributable to [the defendant’s] actions and what portion were attributable to [the plaintiff’s] action.” Id. at

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<sup>1</sup> Lisa and Nicole did not object to this instruction.

1316. However, we determined that “[t]he jury appears to have misunderstood this task and instead appears to have relieved [the defendant] of any liability based upon his mitigation defense.” Id. We concluded that prejudicial error had occurred and remanded for a new trial on damages.

Deible is distinguishable from the situation here. There, the defendant admitted that he was at fault in the collision and that the plaintiff had sustained some injury. Here, Bookwood admitted that she was at fault in the collision but not that Lisa and Nicole were injured in the collision. Whether Lisa and Nicole were injured as a result of the collision remained a question for the jury. The jury found for Bookwood, indicating that Lisa and Nicole failed to meet their burden of proof as to proximate cause of their alleged damages. Unlike in Deible, we find no indication that the jury misunderstood its task. We conclude that the giving of the proposed verdict form was supported by the evidence in the record, and the trial court did not err by giving the verdict form to the jury.

### ***III. Inadequate Damages***

Lisa and Nicole argue that the damages were inadequate and sought relief under Indiana Trial Rule 59(J)(5). A trial court has broad discretion to correct error under Indiana Trial Rule 59. Hockema v. J.S., 832 N.E.2d 537, 541 (Ind. Ct. App. 2005), trans. denied. We review a trial court’s decision to grant a motion to correct error for an abuse of discretion, and we reverse only when the trial court’s decision was against the logic and effect of the facts and circumstances before it, together with the inferences that can be drawn therefrom. Id. Additionally, a trial court’s abuse of discretion may result when

its decision is without reason or is based upon impermissible considerations. Id. Trial courts must afford juries great latitude in making damage award determinations. Id.

Indiana Trial Rule 59(J)(5) provides:

The court, if it determines that prejudicial or harmful error has been committed, shall take such action as will cure the error, including without limitation the following with respect to all or some of the parties and all or some of the errors:

\* \* \* \* \*

(5) In the case of excessive or inadequate damages, enter final judgment on the evidence for the amount of the proper damages, grant a new trial, or grant a new trial subject to additur or remittitur[.]

A verdict must be upheld if the award determination falls within the bounds of the evidence. Hockema, 832 N.E.2d at 541. Additionally, a trial court may only reverse a jury's award determination "when it is apparent from a review of the evidence that the amount of damages awarded by the jury is so small or so great as to clearly indicate that the jury was motivated by prejudice, passion, partiality, corruption or that it considered an improper element." Id.

A motion under Rule 59(J)(5) for inadequate damages is inapplicable here. The cases cited by Lisa and Nicole involve verdicts for a plaintiff where the damages awarded were inadequate. See Neher v. Hobbs, 760 N.E.2d 602 (Ind. 2002) (holding that, although a jury entered a verdict for the plaintiff, the jury's award of no damages was inadequate); Childress v. Buckler, 779 N.E.2d 546 (Ind. Ct. App. 2002) (holding that, although a jury entered a verdict for the plaintiff, the jury's award of \$1639 in damages was substantially inadequate); Russell v. Neumann-Steadman, 759 N.E.2d 234 (Ind. Ct.

App. 2001) (holding that, where the jury entered a verdict for the plaintiff, the jury's award of no damages was inadequate).

Here, the jury entered a verdict for the defendant, Bookwood. Given Bookwood's admission of fault for the collision and closing arguments, it is apparent that the jury found Lisa and Nicole's alleged injuries were not proximately caused by Bookwood, and there is evidence to support that determination. It is clear that we cannot find the damages were inadequate where a verdict was entered for the defendant.<sup>2</sup>

### **Conclusion**

Lisa and Nicole waived any argument regarding the admission of the photographs of Lisa's vehicle. The trial court did not err by giving the jury the proposed verdict form, and Lisa and Nicole's argument regarding the inadequacy of the damages fails. Consequently, we affirm the judgment in favor of Bookwood.

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<sup>2</sup> It is apparent that Lisa and Nicole's real complaint is the verdict in favor of Bookwood. To address the verdict for Bookwood, Lisa and Nicole could have filed a motion to correct error pursuant to Indiana Trial Rule 59(J)(7), which provides:

The court, if it determines that prejudicial or harmful error has been committed, shall take such action as will cure the error, including without limitation the following with respect to all or some of the parties and all or some of the errors:

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(7) In reviewing the evidence, the court shall grant a new trial if it determines that the verdict of a non-advisory jury is against the weight of the evidence; and shall enter judgment, subject to the provisions herein, if the court determines that the verdict of a non-advisory jury is clearly erroneous as contrary to or not supported by the evidence, or if the court determines that the findings and judgment upon issues tried without a jury or with an advisory jury are against the weight of the evidence.

However, they did not file a motion under Rule 59(J)(7).

Affirmed.

BAKER, J., and VAIDIK, J., concur.