STATE OF MICHIGAN

COURT OF APPEALS

CHARLES PELLERITO,

Plaintiff-Appellee,

v Nos. 92413; 93707

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Defendant-Appellant.

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BEFORE: MacKenzie, P.J., M.M. Doctoroff and P.J. Clulo,* JJ.

PER CURIAM

In these consolidated appeals, defendant no-fault automobile insurer appeals as of right from a jury verdict awarding plaintiff wage-loss benefits and damages for emotional distress. Defendant also appeals as of right from an order awarding plaintiff prejudgment interest, costs, and attorney fees. We affirm in part, reverse in part, and remand to the trial court.

Trial testimony showed that on June 9, 1978, plaintiff, a jitney repairman at Chrysler Corporation, was involved in an automobile accident and injured his back. That same day, plaintiff went to work but had to leave after approximately an hour and a half due to pain in the back, neck and shoulder.

That day, plaintiff reported the accident to defendant. He was sent a form to fill out, whereupon he began receiving $1,373 per month in wage-loss benefits.

For the next one and a half years, plaintiff experienced severe pain in his lower back and left leg. He had to drag his leg when he walked, and it would "give out" if he put too much weight on it. Plaintiff received several treatments, including a corset, pain medication, heat therapy and diathermy. He also saw a chiropractor.

Plaintiff testified that in February, 1979, defendant's adjuster, Brenda Rucks, told plaintiff of her intent to stop his

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*Circuit judge, sitting on the Court of Appeals by assignment.

fraud and attempt to recover the $6,000 overpayment. Plaintiff then filed a workers' compensation claim.

In November, 1980, plaintiff filed a complaint in the instant case. Defendant denied liability, and counterclaimed for a return of benefits or setoff. On March 9, 1981, Chrysler voluntarily paid workers' compensation benefits of $185 per week to plaintiff retroactive to June 22, 1979. These benefits continued until May 31, 1982.

In September or October, 1983, plaintiff redeemed his workers' compensation claim for $12,000.

In April, 1984, the trial court granted defendant's motion for summary disposition on the ground that plaintiff had filed a petition for workers' compensation disability benefits wherein he asserted a work-related injury.

On appeal, this Court reversed and remanded for trial, holding that the mere filing of a workers' compensation claim cannot conclusively determine whether plaintiff's first or second injury gave rise to the work loss. (Unpublished opinion of the Court of Appeals, No. 77857, rel'd 2/12/85.) This Court further stated:

> "Since the facts do not clearly establish which injury caused the work loss, summary judgment was improper. If the first injury were the sole cause of the work loss, the insurance company would be liable for the full amount of the personal protection insurance payments. In that case, plaintiff was not entitled to any worker's compensation benefits. Plaintiff would be responsible for returning the worker's compensation benefits, but defendant would owe plaintiff and would not be able to claim a setoff. At the other extreme, the work loss could be due solely to a work-related injury. In that case, defendant would not be responsible for any payments due after the date of the second injury. MacDonald, supra. [419 Mich 146; 350 NW2d 233 (1984)."

At trial, defendant moved for a directed verdict, which was denied. The jury, through use of a special verdict form, found that plaintiff's inability to continue to work after June 22, 1979, was due to the injury sustained in the accident of June 9, 1978 and not due to an injury or injuries which may have occurred on the job between May 15, 1979 and June 22, 1979.

Defendant subsequently moved for a JNOV or new trial, which was denied.

wage loss benefits because he had been receiving them too long. She advised him to try to return to work. Plaintiff testified that Rucks stated that if he made an honest attempt to work but was unable to do so, he could receive rehabilitation training.

That spring, defendant delayed paying plaintiff's benefits until it received reports of the doctors to which it referred him. During approximately the same time, plaintiff was also given physicals through Chrysler, which refused to take him back. Plaintiff stated that the interruptions in benefits were "driving [him] nuts".

Plaintiff returned to work on May 16, 1979. He stated that he was in pain while at work, and could only work 13 days during the next month.

On June 22, 1979, plaintiff was at work and while placing a lever under an engine and applying pressure, he again injured his back. He did not return to work after this injury.

Plaintiff contacted Rucks in July, 1979. She sent him to more doctors. Defendant continued to pay wage-loss benefits for June, July and August of 1979.

In September, 1979, Rucks told plaintiff that she believed that his inability to work was caused by the June 22, 1979 injury he sustained at Chrysler and that defendant was no longer responsible for wage-loss benefits. Nonetheless, defendant paid plaintiff wage-loss benefits for September and October.

In November, 1979, when plaintiff picked up his next check, Rucks advised him to file a claim under workmen's compensation because he had previously returned to work. Defendant stopped paying plaintiff on December 12, 1979.

In January or February, 1980, plaintiff spoke with the supervisor of defendant's claims department, Mr. Van Houten. Van Houten told plaintiff that defendant had overpaid him from June to December, 1979. Plaintiff testified that Van Houten indicated that if plaintiff were to see an attorney, defendant would claim

I

Defendant first claims that the trial court erred by failing to direct a verdict in its favor on plaintiff's claim for wage loss benefits because plaintiff's acceptance and redemption of workers' compensation benefits precluded the existence of a factual issue. It contends that because plaintiff accepted these benefits, he is conclusively presumed to have been solely disabled from an injury in the course of employment and not entitled to no-fault wage-loss benefits.

Plaintiff argues that the trial court properly denied defendant's motion for a directed verdict because a factual issue existed regarding the cause of his disability.

The standard of review applicable to a denial of a motion for a directed verdict is that review by this Court is limited to whether the party opposing the motion offered evidence upon which reasonable minds could differ. Heyler v Dixon, 160 Mich App 130, 143; 408 NW2d 121 (1987), lv den 428 Mich 919 (1987). The test is whether, viewing the facts in a light most favorable to the non-moving party, reasonable persons could reach a different conclusion and, if so, the case is properly one for the jury. The non-moving party must be given the benefit of every reasonable inference that can be drawn from the evidence. Id.

In support of defendant's position that plaintiff's acceptance of workers' compensation benefits precluded the determination that a factual issue existed, it relies on three cases: Jordan v C A Roberts Co, 381 Mich 91; 158 NW2d 901 (1968); MacDonald v State Farm Ins Co, 419 Mich 146; 350 NW2d 233 (1986); and Gregory v Transamerica Ins Co, 425 Mich 625; 391 NW2d 312 (1986). These cases, however, are distinguishable from the present case.

In Jordan, supra, the plaintiff's decedent was fatally injured while working. Plaintiff, as his widow, received workers' compensation benefits and redeemed her claim because it was determined that the decedent was defendant's employee.

Plaintiff then, in her capacity as administratrix of the decedent's estate, filed a wrongful death action, alleging that the decedent was an independent contractor at the time of the fatal injuries and that the exclusive remedy provision of the workers' compensation act did not apply. The court found that because the workers' compensation appeal board had determined that the decedent was an employee rather than an independent contractor, the tort action was barred by the exclusive remedy provision of the act.

In MacDonald, supra, the plaintiff, a self-employed carpenter, was disabled while driving his car. Approximately, two weeks later, he suffered an unrelated heart attack. It was stipulated that either the car accident or the heart attack, acting independent of the other, would give plaintiff a work-loss disability. The Supreme Court, stating that the work-loss benefits in MCL 500.3107(b); MSA 24.13107(b) compensate the insured for income he would have received but for the accident, held that plaintiff would have worked until his heart attack but that after the heart attack would have earned no wages even if the accident had not occurred. Therefore, the plaintiff was only eligible to receive benefits for the two-week period between the accident and the heart attack.

In Gregory, supra, the plaintiff was injured in a car accident while at work. He received workers' compensation benefits for a time, as well as no-fault benefits which were in excess of the workers' compensation benefits for a wage loss. Approximately one year after the workers' compensation benefits were discontinued, the plaintiff redeemed his workers' compensation claim for $12,500, five hundred of which was allocated to wage loss. Plaintiff then demanded full personal protection benefits from the no-fault insurer for lost wages, minus the $500 allocated to wage loss in the redemption agreement, retroactive to when the workers' compensation payments were stopped. The Supreme Court held that a workers' compensation redemption agreement operates as a bar to further

claims by the plaintiff against any insurer for primary wage-loss benefits, although the no-fault insurer remains liable for all claims in excess of the benefits.

Unlike the decedent in Jordan or the plaintiff in Gregory, plaintiff in the present case was not injured in the course of a sole incident. He was involved in two separate events approximately one year apart. There is no question that defendant paid plaintiff benefits for his 1978 injury. As to the 1979 injury, defendant continued to pay benefits for approximately six months after the occurrence. Plaintiff also received workmen's compensation benefits for the 1979 occurrence. It was possible to find that the 1978 injury was the cause of plaintiff's disability.

Unlike the situation in MacDonald, the parties in the present case have not stipulated that either the 1978 car accident, or the 1979 work occurrence, acting independent of the other, would give plaintiff a work-loss disability. Plaintiff's disability involved a question of causation.

After reviewing the evidence in a light most favorable to plaintiff, we find that he presented evidence upon which reasonable minds could differ, Heyler, supra. Accordingly, the trial court's denial of defendant's motion for a directed verdict does not constitute error requiring reversal.

Defendant further contends that the trial court erred by failing to give three requested non-standard jury instructions.

Jury instructions must be reviewed as a whole and not in selected excerpts to determine if error has occurred. Esparaza v Horn Machinery Co, 160 Mich App 630, 638; 408 NW2d 404 (1987), lv den 428 Mich 917 (1987). In Houston v Grand Trunk WR Co, 159 Mich App 602, 608-609; 407 NW2d 52 (1987), this Court reviewed defendant's claim that the trial court erred by failing to give a requested nonstandard jury instruction, stating:

> "[W]hen a party requests an instruction that is not covered by the Standard Jury Instructions, the trial court may, at its discretion, give additional, concise, understandable,

conversational and nonargumentative instructions, provided they are applicable and accurately state the law. Young v E W Bliss Co, 130 Mich App 363; 343 NW2d 553 (1983); MCR 2.516(D). The determination of whether a requested jury instruction is applicable and accurately states the law is within the discretion of the trial court. Moody v Pulte Homes, Inc, 423 Mich 150; 378 NW2d 319 (1985). A supplemental instruction need not be given if the instruction would add nothing to an otherwise balanced and fair jury charge nor enhance the ability of the jurors to decide the case intelligently, fairly and impartially. Johnson v Corbet, 423 Mich 304, 327; 377 NW2d 713 (1985)."

Our review of the record indicates that the proposed instructions would not have added to the fair charge nor enhanced the jurors' ability to decide the case, Corbet, supra. Additionally, the proposed instruction relative to defendant's entitlement to setoff confuses the law regarding setoffs. A no-fault insurer is not automatically entitled to setoff. The Supreme Court has stated that state or federal benefits provided or required to be provided must be deducted from no-fault benefits under MCL 500.3109; MSA 24.13109, if they (1) serve the same purpose as no-fault benefits and (2) are provided or required to be provided as a result of the same accident. See Jarosz v DAIIE, 418 Mich 565, 577-580; 345 NW2d 563 (1984).[1] We find no error requiring reversal in the trial court's refusal to give defendant's nonstandard instructions.

Defendant next claims that the verdict for plaintiff for wage-loss benefits was against the great weight of the evidence. The question whether the verdict is against the great weight of the evidence generally involves issues of credibility. In reviewing the issue on appeal, this Court looks to whether there was an abuse of discretion in denying the motion for new trial rather than resolving credibility issues anew. See Carpenter v Cleveland, 32 Mich App 213; 188 NW2d 248 (1971). After reviewing the record, we find no abuse of the trial court's discretion.

II

Defendant next asserts that the trial court erred by failing to decide, as a matter of law on defendant's motion for directed verdict, that plaintiff failed to plead and prove a cause of action for intentional infliction of emotional distress.

It asserts that damages for mental distress are unavailable for a breach of contract action. See Kewin v Massachusetts Mutual Life Ins Co, 409 Mich 401; 295 NW2d 50 (1980). However, plaintiff claims such damages under a tort theory.

In Roberts v Auto-Owners Ins Co, 422 Mich 594, 597; 374 NW2d 905 (1985), the Supreme Court found that the plaintiffs had failed to make a minimum showing of proof to withstand the defendant's motion for a directed verdict.[2] The Supreme Court noted that courts which recognize this tort, including this Court,[3] have generally embraced the restatement definition of the tort:

"'§46. Outrageous Conduct Causing Severe Emotional Distress

"'(1) One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it for such bodily harm. [Restatement Torts, 2d, § 46, p 71.]'

"Four elements are identified in this definition: (1) 'extreme and outrageous' conduct, (2) intent or recklessness, (3) causation, and (4) 'severe emotional distress.' See, e.g., Ross v Burns, 612 F2d 271, 273 (CA 6, 1980)." Id., p 602.

The Court then quoted the Restatement Comment, summarizing the prevailing view of what constitutes "extreme and outrageous" conduct:

"'The cases thus far decided have found liability only where the defendant's conduct has been extreme and outrageous. It has not been enough that the defendant has acted with an intent which is tortious or even criminal, or that he has intended to inflict emotional distress, or even that his conduct has been characterized by 'malice', or a degree of aggravation which would entitle the plaintiff to punitive damages for another tort. Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. Generally, the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, 'Outrageous!'

"'The liability clearly does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities. The rough edges of our society are still in need of a good deal of filing down, and in the meantime plaintiffs must necessarily be expected and required to be hardened to a certain amount of rough language, and to occasional acts that are definitely inconsiderate and unkind. There is no occasion for the law to intervene in every case where some one's [sic] feelings are hurt. There must still be freedom to express an unflattering opinion, and some safety valve must be left through which irascible tempers may blow off relatively harmless steam. [Restatement Torts, 2d, § 46, comment d, p 72-73.]'" Id., pp 602-603.

The Court then went on to note that some conduct which would otherwise be extreme and outrageous might be privileged under the circumstances:

> "The actor is never liable, for example, where he has done no more than to insist upon his legal rights in a permissible way, even though he is well aware that such insistence is certain to cause emotional distress. [Restatement Torts, 2d, § 46, comment g, p 76.]" Id.

In a contractual setting such as the present case, a tort action must rest on a breach of duty distinct from the contract. Id., pp 603-604; Hart v Ludwig, 347 Mich 559; 79 NW2d 895 (1956). Neither the mere failure to pay a contractual obligation, nor request for a verification of claims absent harassment or similarly egregious conduct, nor dilatory handling of a party's claim, constitutes "outrageous" conduct for purposes of the tort of intentional infliction of emotional distress. Id., pp 605-608.

In this case, defendant's conduct did not meet the Restatement definition for outrageous conduct. Defendant merely insisted on its rights under the insurance contract. In February, 1979, Rucks formed the opinion that plaintiff might be able to return to work. Defendant delayed plaintiff's wage-loss benefits in February, March, April and May, 1979, until a doctor's report confirmed that plaintiff was still unable to work. In doing so, State Farm merely insisted on its legal rights by requiring medical confirmation of plaintiff's disability before paying benefits.

After the June 22, 1979 incident at Chrysler, defendant had a right to request a determination of whether plaintiff's disability was caused by the automobile accident or a work injury. Since plaintiff did receive workers' compensation benefits based upon the work incident, defendant had some basis for its position. While defendant may not have been reasonable, in light of the medical evidence in insisting that the work injury alone and not the automobile accident caused plaintiff's disability, this amounted to a breach of its contract to provide benefits and not an independent tort.

Finally, while Van Houten's threat to sue plaintiff for overpayment of wage-loss benefits if plaintiff pursued a claim against defendant for further benefits must have been alarming to plaintiff, State Farm could properly make that claim. A review of the evidence does not establish that State Farm's handling of plaintiff's claim amounted to outrageous conduct or harassment as defined by the Restatement and Michigan law. In essence, plaintiff claimed that State Farm caused him mental distress by breaching its contract to provide benefits. State Farm's conduct does not establish a breach of duty apart from a breach of its duty under the contract to provide benefits. See Hart, supra.

The trial court erred in failing to direct a verdict on this claim and abused its discretion in denying defendant's motion for new trial. Accordingly, we vacate the jury award to plaintiff for damages for intentional infliction of emotional distress.

Our disposition of this matter renders it unnecessary to address defendant's other claims of error regarding this issue. See Parsonson v Construction Equipment Co, 18 Mich App 87, 90; 170 NW2d 479 (1969), aff'd 386 Mich 61; 191 NW2d 465 (1971).

III

Defendant next claims that the trial court erred by admitting a letter written by plaintiff's physician into evidence. Defendant contends that the letter was cumulative of Dr. Anderson's testimony and constituted hearsay. Plaintiff argues that the letter was properly admitted to show that defendant had notice of Dr. Anderson's opinion that the auto accident caused plaintiff's disability.

The trial court has broad discretion in determining whether to exclude relevant evidence as cumulative. See Wayne County Sheriff v Wayne County Board of Comm'rs, 148 Mich App 702; 385 NW2d 267 (1986).

At trial, the deposition of Dr. Anderson was read into evidence. During the deposition, Anderson had been questioned

regarding the letter, but was not cross-examined on it. At trial, the letter itself was received into evidence.

The letter was not admitted in order to prove the truth of the matters within it. It was instead admitted to show defendant's knowledge of Anderson's opinion contained in it. Contrary to defendant's assertion, it was neither cumulative evidence nor violative of MRE 801 and 802.

Nor was its submission violative of MRE 803. It was never admitted following refreshment of Anderson's recollection. It was submitted during the examination of a witness in order to prove defendant's knowledge of its contents. Evidence which is competent for one purpose may not be excluded because it is incompetent for another purpose. See Sykes v Village of Portland, 193 Mich 86, 97; 159 NW 325 (1916). We find no abuse of the trial court's discretion in admitting the letter into evidence.

IV

Defendant's final claim is that the trial court erred by taxing 12% interest on the judgment for wage-loss benefits and also by taxing actual attorney fees pursuant to the no-fault act.

MCL 500.3142; MSA 24.13142 provides:

"(1) Personal protection insurance benefits are payable as loss accrues.

"(2) Personal protection insurance benefits are overdue if not paid within 30 days after an insurer receives reasonable proof of the fact and of the amount of loss sustained. If reasonable proof is not supplied as to the entire claim, the amount supported by reasonable proof is overdue if not paid within 30 days after the proof is received by the insurer. Any part of the remainder of the claim that is later supported by reasonable proof is overdue if not paid within 30 days after the proof is received by the insurer. For the purpose of calculating the extent to which benefits are overdue, payment shall be treated as made on the date a draft or other valid instrument was placed in the United States mail in a properly addressed, postpaid envelope, or, if not so posted, on the date of delivery.

"(3) An overdue payment bears simple interest at the rate of 12% per annum." (Emphasis supplied.)

The general rule for application of section 3142 holds that the interest provision is triggered when personal protection benefits become overdue, 30 days after the insurer receives reasonable proof of the claim. Joiner v Michigan Mutual Ins Co,

161 Mich App 285, 292; 409 NW2d 808 (1987). There is no qualification for the good faith with which the insurer denies liability. Id. If there is a failure to pay benefits and it is later determined that benefits are due, penalty interest must be assessed. Bach v State Farm Ins, 137 Mich App 128, 132; 357 NW2d 325 (1984).

In the present case, defendant argues that it lacked reasonable proof of loss from plaintiff or alternatively, that if plaintiff's expert's testimony constituted reasonable proof of loss, interest should only be taxed as of 30 days after the testimony was taken.

This Court reviews the trial court's findings relative to when reasonable proof of loss was received under the "clearly erroneous" standard. See English v Home Ins Co, 112 Mich App 468, 476; 316 NW2d 463 (1982). Although neither party raises the issue, we find that the trial court failed to make findings relative to when "reasonable proof" of loss was presented. Instead, the trial court, citing section 3142, awarded interest under that provision to begin from an incorrect point in time--the date of filing the complaint--just as it did when awarding plaintiff interest pursuant to MCL 600.6013; MSA 27A.6013. For this reason, we remand this matter to the trial court for a determination of when defendant received reasonable proof of loss so that the determination of when the payment became overdue can be correctly calculated.

Defendant also claims that the trial court erred by awarding plaintiff attorney fees because this case involved issues of statutory construction, case law, and medical causation. MCL 500.3148; MSA 24.13148 provides in relevant part:

> "(1) An attorney is entitled to a reasonable fee for advising and representing a claimant in an action for personal or property protection insurance benefits which are overdue. The attorney's fee shall be a charge against the insurer in addition to the benefits recovered, if the court finds that the insurer unreasonably refused to pay the claim or unreasonably delayed in making proper payment."

A trial court's finding of unreasonable refusal or delay by an insurance company to pay no-fault benefits will be

disturbed on appeal only if the finding is clearly erroneous. Kalin v DAIIE, 112 Mich App 497, 509; 316 NW2d 467 (1982). Attorney fees will not be awarded where the delay is the product of a legitimate question of statutory construction, constitutional law, or even bona fide factual uncertainty. English, supra.

Because the facts and circumstances of this case do not abide the possibility that the trial court's decision to award attorney fees was clearly erroneous, we find no error requiring reversal.

Affirmed in part, reversed in part, and remanded for a determination as to when defendant had "reasonable proof" of loss in order that interest may be recalculated pursuant to MCL 500.3142; MSA 24.13142.

Costs to plaintiff pursuant to MCR 7.216 are denied.

s/Barbara B. MacKenzie
s/Martin M. Doctoroff
s/Paul J. Clulo

FOOTNOTES

[1] We note that this setoff provision clearly does not apply to the present case, where plaintiff claimed and received benefits for two separate accidents.

[2] The Supreme Court did not officially adopt this tort as part of Michigan law. See Roberts, supra, p 601, n. 6; p 611.

[3] See, e.g., Wendt v Auto-Owners Ins Co, 156 Mich App 19; 401 NW2d 375 (1986); Crossley v All State Ins Co, 155 Mich App 749; 389 NW2d 173 (1986); Butler v DAIIE, 121 Mich App 727; 329 NW2d 781 (1982).