

STATE OF MICHIGAN
COURT OF APPEALS

LAWRENCE F. JOHNSON,

Plaintiff-Appellee,

v

TRANSAMERICA INSURANCE CORPORATION OF
AMERICA, a Michigan Corporation,

Defendant-Appellant.

UNPUBLISHED
March 13, 1995

No. 158040
LC No. 91-114850 CK

Before: Fitzgerald, P.J., and Michael J. Kelly and E. R. Post,* JJ.

PER CURIAM.

Defendant appeals as of right a circuit court judgment in the amount of \$43,881.25, entered in favor of plaintiff following a jury trial. We affirm.

On May 10, 1989, plaintiff's car was struck two times in the rear by a semi-trailer truck, causing plaintiff to lose control of his car and roll over several times. Plaintiff suffered multiple serious injuries.

Plaintiff was insured with defendant insurance company. He claimed no fault benefits for loss of wages, medical and hospital expenses, and other applicable benefits. Plaintiff's treating physician, Dr. Abramson, found plaintiff to be disabled because the bending and twisting necessitated by his job as a crane operator would have exacerbated his injuries. Dr. Abramson referred plaintiff to several specialists, including Dr. Choon Rim, a neurologist.

In November 1990, Dr. Nathan Gross examined plaintiff at defendant's request. Dr. Gross determined that plaintiff had only a mild disc bulge and that plaintiff was otherwise neurologically intact. Dr. Gross recommended certain physical therapy exercises that he opined would have enabled plaintiff to return to work. Plaintiff did not follow the recommendations. On January 1, 1991, defendant stopped paying plaintiff's lost wages and medical benefits. Defendant requested that plaintiff undergo an examination under oath, but plaintiff did not do so.

Plaintiff subsequently filed this lawsuit in June 1991, seeking no fault benefits plus interest and attorney fees. The jury returned a verdict for plaintiff in the amount of \$29,184.98, to which the final judgment added costs, attorney fees and interest.

Defendant first argues that the trial court abused its discretion in excluding most of Dr. Rim's testimony regarding plaintiff's neurological condition. We disagree. Plaintiff consulted Dr. Rim concerning his impotency. Dr. Rim examined plaintiff without regard to plaintiff's ability to work. Moreover, Dr. Rim's examination occurred in July 1989, long before defendant stopped paying plaintiff's benefits.

Defendant next argues that the trial court erred in denying its motion for a directed verdict where plaintiff failed to appear for an examination under oath, as required in plaintiff's insurance policy.

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

We find no error. First, the motion for directed verdict was premature. The trial court had not yet heard testimony regarding plaintiff's refusal to undergo the examination. The trial court was obliged to examine only the evidence presented up to the time of the motion. Teodorescu v Bushnell, Gage, Reizen & Byington (On Remand), 201 Mich App 260, 264; 506 NW2d 275 (1993). Second, plaintiff's deposition substantially fulfilled the examination requirement of the insurance policy. See Gordon v St Paul Fire & Casualty Ins Co, 197 Mich 226, 230; 163 NW 956 (1917); Gibson v Group Ins Co of Michigan, 142 Mich App 271, 274-275; 369 NW2d 484 (1985). Third, it was not clear that the examination requirement, which appeared in Part IV of the policy concerning uninsured motorist coverage, applied to plaintiff's claim, which fell under Part II.

Finally, defendant argues that the trial court erred in denying its motion for mistrial in light of plaintiff's closing argument. Plaintiff's attorney stated during closing argument that "[t]here isn't a source of income that [plaintiff] is getting." While we agree that this comment technically violated the trial court's ruling on plaintiff's prior motion in limine to exclude any reference to plaintiff's alternate sources of income, we consider the error harmless. It consisted of one sentence and was neither pointed nor repetitive. The jury had heard plaintiff's testimony. The subsequent verdict was not excessive in any way. In addition, defendant failed to raise an contemporaneous objection to the comment. Under these circumstances, the trial court did not err in denying defendant's motion for a mistrial. Hollingshead v Gunderman, 256 Mich 299, 304; 239 NW 280 (1931); Barnes v B & V Construction, Inc, 137 Mich App 595, 600-601; 357 NW2d 894 (1984); Taubitz v Grand T W Railroad, 133 Mich App 122, 129; 348 NW2d 712 (1984).

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Michael J. Kelly
/s/ Edward R. Post