STATE OF MICHIGAN

COURT OF APPEALS

JOHN R. FUREIGH,

Plaintiff-Appellant/
Cross-Appellee,

v

AETNA CASUALTY & SURETY COMPANY,

Defendant-Appellee/
Cross-Appellant.

UNPUBLISHED
March 2, 1995

No. 136526
LC No. 89-105222-CZ

Before: Jansen, P.J., and White and M.J. Talbot,* JJ.

PER CURIAM.

Plaintiff appeals as of right and defendant cross-appeals from a judgment in the net amount of $25,121 for plaintiff for personal protection insurance benefits under a no-fault policy. We affirm the judgment, vacate the order regarding costs, and remand on the attorney fees issue.

This case stems from a motor vehicle accident on June 22, 1974. Plaintiff was driving his motorcycle to work in Flint when he was struck by a pickup truck. Plaintiff suffered severe injuries, including a broken pelvis, fractures of the right fibula and tibula, fractures of L-4 and L-5 in his back, and internal injuries. Plaintiff had an uncoordinated policy with defendant. Plaintiff's medical coverage was provided by defendant and Medicare. Therefore, plaintiff was entitled to have defendant pay his medical bills under the insurance policy even if Medicare also paid all or part of the bills. Defendant paid no-fault benefits until 1988. In 1988, defendant required that plaintiff submit to a medical examination and it hired an investigator to determine if plaintiff was disabled as he claimed.

On August 15, 1988, plaintiff was examined by Dr. Shane VerVoort. On October 26, 1988, plaintiff was examined by Dr. Luis Zumarraga. As a result of these medical examinations, defendant informed plaintiff in a letter, dated November 3, 1988, that it would no longer pay plaintiff for medical expenses from February 17, 1988 onward. Plaintiff filed suit against defendant in the Genesee Circuit Court on July 24, 1989, for no-fault personal protection insurance benefits, damages under the Michigan Consumer Protection Act (MCPA), and a claim of intentional infliction of emotional distress.

The trial court granted defendant's motion for summary disposition pursuant to MCR 2.116(C)(8) with respect to the claim under the MCPA and the claim for intentional infliction of emotional distress. The no-fault PIP claim was tried before a jury in August of 1990. The jury found that plaintiff incurred allowable expenses of $25,876 as a result of the accident. The trial court denied plaintiff's subsequent motion for judgment notwithstanding the verdict or new trial, and judgment was entered on December 19, 1990. In that judgment, the trial court subtracted $4,255 as a setoff for defendant in order to reimburse defendant for an overpayment on a prior claim. The trial court then added penalty interest of $1,200, statutory interest of $1,800, and attorney fees of $500 for plaintiff. This appeal was filed on January 8, 1991. In April of 1991, the trial court denied plaintiff's motion to tax mediation fees and expert witness fees, but allowed other costs totalling $2,997.27.

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

Plaintiff raises a total of seven issues on appeal. We will address those issues in a different order than presented in plaintiff's brief. Defendant also raises separate issues in its cross-appeal.

I

Plaintiff argues that the trial court erred in granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(8) with regard to Counts II and III (the claim under the MCPA and the claim for intentional infliction of emotional distress). We review the trial court's grant of summary disposition pursuant to MCR 2.116(C)(8) de novo. Garvelink v The Detroit News, 206 Mich App 604, 607; 522 NW2d 883 (1994). MCR 2.116(C)(8) permits summary disposition when the opposing party has failed to state a claim upon which relief can be granted. A motion pursuant to MCR 2.116(C)(8) determines only whether the opposing party's pleadings allege a prima facie case. Radtke v Everett, 442 Mich 368, 373; 501 NW2d 155 (1993). A court may grant a motion pursuant to MCR 2.116(C)(8) only where the claim is so clearly unenforceable as a matter of law that no factual development could possibly justify recovery. Wade v Dep't of Corrections, 439 Mich 158, 163; 483 NW2d 26 (1992).

We note that plaintiff has failed to provide this Court with a copy of the transcript of the motion hearing in violation of MCR 7.210(B)(1)(a). Our review is therefore limited to reviewing the pleadings and determining legal issues. Admiral Ins Co v Columbia Casualty Ins Co, 194 Mich App 300, 305; 486 NW2d 351 (1992).

With regard to the intentional infliction of emotional distress claim, plaintiff alleged the tortious conduct as defendant engaging in a pattern of conduct in delaying payment, making erratic payments, refusing to pay, and following and spying on him. Plaintiff also alleged that because of defendant's intentional refusal to pay, his wife left him and this caused him severe emotional distress. Even if accepted as true, we do not find these allegations to rise to a level of extreme and outrageous conduct necessary to sustain a claim for intentional infliction of emotional distress. Roberts v Auto-Owners Ins Co, 422 Mich 594, 602; 374 NW2d 905 (1985); Runions v Auto-Owners Ins Co, 197 Mich App 105, 109-110; 495 NW2d 166 (1992).

With regard to plaintiff's claim that he should have been allowed to amend the complaint, plaintiff has not set forth any additional evidence to support a claim for intentional infliction of emotional distress. Further, without a copy of the transcript of the hearing, it is impossible to determine what evidence and arguments were presented to the trial court. Thus, effective appellate review of this issue is precluded.

With regard to plaintiff's claim under the MCPA, we find that plaintiff did not state a claim as a matter of law. The MCPA does not apply to this dispute between the insured and the insurer. Kekel v Allstate Ins Co, 144 Mich App 379; 375 NW2d 455 (1985). The conduct complained of by plaintiff in his complaint is covered by MCL 500.2043; MSA 24.12043, and, therefore, as a matter of law plaintiff has not stated a claim under the MCPA. MCL 445.904(1)(a), (2)(a); MSA 19.418(4)(1)(a), (2)(a).

Accordingly, the trial court did not err in granting defendant's motion for summary disposition with respect to the claim under the MCPA and the claim for intentional infliction of emotional distress.

II

Plaintiff also asserts several evidentiary errors at trial. The decision whether to admit or exclude evidence is within the trial court's discretion and will not be disturbed on appeal absent an abuse of discretion. Cleary v The Turning Point, 203 Mich App 208, 210; 512 NW2d 9 (1994). An abuse of discretion is found only if an unprejudiced person, considering the facts on which the trial court acted, would say there was no justification or excuse for the ruling. Id.

First, plaintiff claims that the trial court improperly excluded certain deposition testimony regarding the hospital's peer review process. Dr. Gill was a psychiatrist who treated plaintiff for depression in Florida at Humana Hospital. Dr. Gill had plaintiff hospitalized for his depressive disorder. The jury awarded plaintiff $7,685 for Dr. Gill's medical bills, but plaintiff was not awarded any benefits for the hospitalizations.

At trial, part of Dr. Gill's deposition testimony was excluded from being read into the record regarding his explanation of the function of the peer review board. Plaintiff argues that the jury may have awarded hospitalization benefits had it heard Dr. Gill's testimony concerning the peer review board's approval of the hospitalizations. The trial court did not allow the testimony finding that there was an inadequate foundation made for Dr. Gill to define peer review.

Although the record is not entirely clear, it appears that the trial court was concerned that there was not an adequate foundation made for Dr. Gill, who was not on the peer review board, to define the function of the board. We cannot say that the trial court abused its discretion in this regard because no evidence was introduced sufficient to support a finding that Dr. Gill had any personal knowledge of how the peer review board worked. MRE 602. Thus, without such a foundation, the trial court properly excluded the testimony.

In any event, we find any error to be harmless regarding the above evidentiary rulings because Dr. Gill's testimony regarding the peer review board was admitted to the extent that the jury heard his testimony that there is certain criteria for a hospitalization and if the criteria is not fulfilled, then the hospitalization is denied. Further, the parties stipulated to the testimony of Elaine Smith, a hospital employee, who would have testified that if the Medicare peer review organization determined that hospitalization was unnecessary, then Medicare would not pay its portion of the bill and none of plaintiff's hospitalizations would have been denied by the peer review organization. Because the jury heard this evidence, any error by the trial court in excluding Dr. Gill's testimony regarding the peer review board was harmless.

The trial court also excluded Dr. Gill's testimony concerning the criteria used by psychiatrists for admitting patients to a hospital. Dr. Gill's testimony was in response to defense counsel's questions during the deposition and defendant sought to have the testimony excluded at trial. The trial court permitted defendant to strike this testimony at trial. We find no abuse of discretion because the court found that the testimony should be excluded in the interest of fairness where the question was asked by defense counsel and defense counsel sought to have the evidence excluded. MRE 106. Further, there was testimony by Dr. Gill regarding his reasons for hospitalizing plaintiff. Under these circumstances, we find no abuse of discretion.

III

Plaintiff also claims that the trial court erred in denying his motion in limine to prohibit defendant from mentioning Medicare payments on some bills involved. We find no abuse of discretion in this ruling.

The trial court's reasons for the ruling is somewhat unclear from the record, however, we believe that the trial court properly denied the motion in limine because the collateral source rule did not bar the evidence. The collateral source rule bars evidence of other insurance coverage when introduced for the purpose of mitigating damages. Nasser v Auto Club Ins Ass'n, 435 Mich 33, 58; 457 NW2d 637 (1990). However, there is an exception where the evidence is sought to prove malingering or motivation on the plaintiff's part not to resume employment or to extend the disability. Id. The evidence should be admitted only if it appears to the trial court from other evidence that there is a real possibility that the

plaintiff was motivated by receipt of collateral source benefits to remain inactive as long as he did. Id., p 59. Further, even if the evidence is being offered for a competent purpose, the trial court must determine whether the evidence should be excluded as being more prejudicial than probative. Id., pp 59-60.

It was defendant's contention at trial that plaintiff feigned the extent of his disability so that he could obtain hospitalization and recoup financial gain by having Medicare pay the hospital while having defendant pay directly to him. Here, the evidence of the receipt of Medicare benefits was proper because it was admitted to prove malingering or to show that the extent of the disability was being feigned. Further, there was evidence to support that there was a real possibility that plaintiff was motivated by receipt of the collateral source benefits from the video showing plaintiff's mobility and the testimony of the doctors who examined plaintiff for defendant. Id., p 59. Accordingly, the trial court did not abuse its discretion in admitting the evidence of the Medicare benefits.

Plaintiff next claims that the trial court improperly admitted the videotape testimony of Dr. Barry Rubin, defendant's psychiatric expert, concerning plaintiff's juvenile history. Plaintiff's claim that the evidence was only to prejudice the jury against him is not supported by the record because the remarks made concerning plaintiff's juvenile history were brief and the doctor testified that a complete and accurate history was needed for him to diagnose any disorder. The underlying facts essential to an opinion made by an expert may be admitted into evidence. MRE 703. Accordingly, the trial court did not abuse its discretion in admitting this evidence.

Plaintiff next claims that the trial court improperly admitted evidence relating to plaintiff's claimed setoff. The trial court allowed defendant to admit an exhibit showing an alleged series of overpayments by defendant totalling $6,760.72. As noted by defendant, this exhibit was admitted to impeach plaintiff's claim that he had never requested defendant to pay more than what the hospital charged Medicare. Therefore, the evidence was relevant and properly admitted. MRE 401, 402, 607.

Plaintiff next claims that the trial court improperly excluded his proposed exhibit 10, an attorney compilation of the home care benefits of $26,210 sought by plaintiff. The trial court found the document to be inadmissible, but allowed plaintiff to put it on a blackboard and address it in his closing argument. The attorney compilation sheet was not relevant to any issue in trial, therefore, the trial court did not abuse its discretion in not admitting the proposed exhibit. MRE 401, 402.

Plaintiff next contends that the trial court improperly allowed defendant to submit exhibit A, a compilation of direct reimbursements made to plaintiff by defendant totalling $139,820.18. Plaintiff did not argue at trial that the exhibit lacked probative value as he now does on appeal. Therefore, the issue is not preserved for appellate review. MRE 103(a)(1).

Plaintiff next argues that the trial court improperly allowed defendant to submit exhibits L and M which are hospital charges. Plaintiff did not object to the introduction of these exhibits at trial. The issue is, therefore, not preserved for appellate review. MRE 103(a)(1).

Plaintiff also argues that the trial court improperly admitted defendant's exhibit N, the reports of rehabilitation specialist Ethel Forrest. Forrest sent the monthly reports to defendant's claims representative. The videotape deposition of Forrest was also shown to the jury. Plaintiff now claims that the effect of admitting Forrest's reports highlighted the documents over her own testimony. Plaintiff's claim is wholly without legal or record support. Plaintiff has failed to show any basis for relief or that the trial court abused its discretion. MRE 103(a), MCR 2.613(A).

IV

Plaintiff also contends that evidence of the surveillance videotapes taken by defendant should not have been admitted because they were not timely furnished to plaintiff in violation of the discovery rules. We find that the trial court did not abuse its discretion based on the record before us.

The discovery cut-off date in this case was April 16, 1990. Plaintiff filed a request for production of documents, including all videotapes taken of plaintiff, on May 16, 1990. Defendant did not respond to the request. In a motion in limine dated August 7, 1990, plaintiff moved to exclude all videotapes because defendant failed to provide the videotapes until August 3 and 8, 1990, lack of authenticity, and defendant's use of a composite of the videotapes. The trial court first addressed the motion on August 9, and originally ruled to exclude the videotapes because they were not shown during discovery. However, the trial court later reversed its ruling and allowed the videotapes because plaintiff never filed a motion to compel discovery. Ultimately, the only videotape actually admitted at trial was the composite videotape which showed excerpts of plaintiff's activities on three or four days.

The trial court did not abuse its discretion in denying the motion in limine because plaintiff never moved to compel discovery pursuant to MCR 2.313(A)(2). See MCR 2.310(B)(3). Plaintiff is not entitled to a sanction (here, the exclusion of the videotape as evidence) where he never moved to compel discovery. The surveillance videotape was properly admitted at trial.

Plaintiff next contends that the trial court abused its discretion when it denied his motion for a copy of defendant's claim file relating to him. We find that this issue is not preserved for appellate review. First, plaintiff has not provided this Court with a copy of the transcript of the motion in violation of MCR 7.210(B)(1)(a), thus rendering our review of this issue nearly impossible because we cannot determine the trial court's reason to limit the in camera inspection of the file to certain documents. Further, plaintiff's argument is cursory and conclusory, without citation to any authority. A party may not leave it to an appellate court to search for authority to sustain or reject its position. Speaker-Hines & Thomas, Inc v Dep't of Treasury, 207 Mich App 84, 90-91; 523 NW2d 826 (1994). Accordingly, we find that this issue is not properly preserved for appellate review.

V

Plaintiff next argues that the jury verdict was inconsistent, there was an omission from the special verdict form, and the verdict was against the great weight of the evidence.

Plaintiff's claim that a miscellaneous expense category was omitted from the special verdict form is waived because plaintiff did not object to the omission before the jury retired to deliberate. MCR 2.514(C).

Plaintiff also claims that the jury's verdict was inconsistent because the jury awarded him all of Dr. Gill's medical bills, but did not award him benefits for the mental health hospitalizations. Every attempt must be made to harmonize a jury's verdict. Only where the verdict is so logically and legally inconsistent that it cannot be reconciled will it be set aside. Granger v Fruehauf Corp, 429 Mich 1, 9; 412 NW2d 199 (1987). The proper remedy to correct a defective verdict is to either reinstruct the jury or to order a new trial. Beasley v Washington, 169 Mich App 650, 658; 427 NW2d 177 (1988). Reinstructing the jury was not a possibility in this case because this was not requested at the time of the jury verdict.

The jury's verdict is not inconsistent. The jury awarded plaintiff $7,685 for Dr. Gill's medical bills, but it did not award plaintiff any benefits for his mental health hospitalizations. It is apparent from the verdict form that the jury did not intend to award plaintiff any benefits for inpatient, hospital care,

but did award plaintiff benefits for individual doctor's bills which were not inpatient care. This is entirely consistent with the jury's decision to award plaintiff no benefits for the mental health bills for the hospitalizations at Humana Hospital. The jury's verdict is, therefore, not inconsistent with regard to the awards for Dr. Gill's bills and no award for the mental health hospitalizations.

Plaintiff also claims that there was uncontroverted evidence that he needed home care after his orthopedic surgery in March 1990 by his wife in the amount of $13,44[illegible]. The jury awarded no benefits for the home care expenses. Contrary to plaintiff's claim, the evidence was not uncontroverted in this regard and the record does not support his claim. Dr. Dlabal performed back surgery in March 1990 and plaintiff was put in a body cast. Plaintiff could walk enough to use the bathroom and do toileting-type care. Although Dr. Dlabal did prescribe attendant care, Dr. Dlabal also testified regarding plaintiff's ability to walk and there was other evidence at trial concerning plaintiff possibly feigning the extent of his disability. Therefore, there was sufficient evidence to submit the question of whether home care services were reasonably necessary to the jury. Nasser, supra, pp 49-50.

Accordingly, the trial court did not abuse its discretion in denying plaintiff's motion for new trial because the jury's verdict was not inconsistent. Constantineau v DCI Food Equipment, Inc, 195 Mich App 511, 514; 491 NW2d 262 (1992).

Plaintiff next claims that the trial court erred in denying his motion for new trial because the jury's verdict is against the great weight of the evidence. The trial court's grant or denial of a motion for new trial on the ground that the verdict is against the great weight of the evidence is reviewed for an abuse of discretion. People v Herbert, 444 Mich 466, 477; 511 NW2d 654 (1993). In determining whether the verdict is against the great weight of the evidence, a court must review the whole body of proofs and may evaluate the credibility of witnesses. Id., pp 475-476. This exercise of judicial power is to be undertaken with great caution because of the special role accorded jurors. Id., p 477.

We find no abuse of discretion in the trial court's denial of plaintiff's motion for new trial. There was conflicting evidence presented concerning plaintiff's disability and needs. There was clearly a great deal of conflicting evidence from the expert witnesses. Further, the trial court was aware of the credibility issues raised at trial. Under these circumstances, and on review of the whole proofs, we cannot say that the verdict is against the great weight of the evidence.

Finally, plaintiff claims that the trial court abused its discretion in denying his motion for new trial for the numerous grounds raised in his motion. We have reviewed the motion and find that the reasons raised for a new trial have been previously addressed and rejected in this opinion. The trial court did not abuse its discretion in denying plaintiff's motion for new trial.

VI

We now turn to the setoff issue raised by defendant in its cross-appeal. Defendant contends that the trial court should have awarded a setoff against the jury verdict for the full amount of alleged overpayments made by defendant to Humana Hospital. Defendant sought a setoff of $6,760, but the trial court awarded a setoff of $4,255. We affirm the trial court's actual setoff.

In this case, plaintiff has an uncoordinated policy with defendant. Thus, plaintiff was entitled to have defendant pay his medical bills directly to him under his no-fault policy even if Medicare also paid all or part of the medical bills directly to the hospital. However, Humana Hospital would adjust its medical bills to the amount that Medicare actually paid, with the exception of the amounts that were billed to plaintiff. Defendant alleges that overpayments occurred when it made its payments directly to plaintiff without knowing the hospital's adjusted bills. Defendant claimed that the alleged overpayments

occurred between 1984 and 1988 and totalled $6,760.72. The trial court, however, ruled that it would set off $4,255 because that was the only amount where the evidence was clear that defendant had overpaid on one hospital bill. That hospital bill was for an admission in March 1988. The trial court disallowed the other claimed setoffs because it was not satisfied that defendant submitted adequate proof on them.

Defendant is not entitled to any further setoff. In reviewing defendant's trial exhibit I, any previous overpayments occurred before February 17, 1988, the date that defendant stated it would no longer pay insurance benefits. Therefore, defendant's claim on overpayments occurring before February 17, 1988, was not properly before the trial court because it was outside of the pleadings. Additionally, defendant never filed a counterclaim for any alleged overpayments. MCL 600.111; MSA 27A.111; MCR 2.203. Under these circumstances, defendant cannot set off any alleged overpayments made regarding hospitalizations that were not at issue during trial.

Accordingly, we find no error with regard to the trial court's decision to set off only the amount of overpayment made during the March 1988 hospitalization. That setoff was proper because it appears from the record that the trial court effectively allowed defendant to amend its pleadings to assert a setoff for the March 1988 hospital bill. MCR 2.118(C)(2); Winiemko v Valenti, 203 Mich App 411, 414; 513 NW2d 181 (1994).

VII

Finally, we address the parties' issues regarding attorney fees and costs.

Plaintiff claims that the trial court erred in refusing to award reasonable attorney fees and costs and that the fee of $500 awarded by the court was inadequate. Defendant argues that it, and not plaintiff, should have been awarded attorney fees. We remand for further findings.

Generally, attorney fees are not recoverable in litigation, either as costs or as an item of damages, unless expressly allowed by statute or court rule. Bonner v Chicago Title Ins Co, 194 Mich App 462, 468; 487 NW2d 807 (1992). Here, attorney fees are permitted to be recovered pursuant to MCL 500.3148; MSA 24.13148. In determining the reasonableness of an attorney's fee, the trial court should consider (1) the professional standing and experience of the attorney, (2) the skill, time, and labor involved, (3) the amount in question and results achieved, (4) the difficulty of the case, (5) the expenses incurred, and (6) the nature and length of the professional relationship between the attorney and client. Wood v DAIIE, 413 Mich 573, 588; 321 NW2d 653 (1982); Bloemsma v Auto Club Ins Ass'n (After Remand), 190 Mich App 686, 689; 476 NW2d 487 (1991). The trial court is not limited to these factors and need not detail its findings with regard to each specific factor. Wood, supra, p 588. An award of attorney fees will be upheld on appeal unless the trial court's determination regarding reasonableness was an abuse of discretion. Id.

The trial court's reasons for awarding $500 in attorney fees to plaintiff are insufficient for us to engage in any meaningful review. On remand, the trial court should first determine whether defendant unreasonably refused to pay the claim or unreasonably delayed in making the proper payment. MCL 500.3148(1); MSA 24.13148(1). If so, then the court should determine the reasonableness of the attorney fee and should make findings pursuant to the factors set forth in Wood or any other factors it finds to be applicable.

Additionally, the court should also determine if defendant is entitled to attorney fees. The court must determine whether plaintiff's claim was in some respect fraudulent or so excessive as to have no reasonable foundation. MCL 500.3148(2); MSA 24.13148(2). If so, the court should again consider the factors set forth in Wood, or any other applicable factors, to determine the reasonableness of the fee.

Therefore, we remand to the trial court for further findings on the issue of whether attorney fees are authorized to either, or both, of the parties under MCL 500.3148; MSA 24.13148. The trial court should make specific factual and legal findings as stated above.

With regard to plaintiff's claim that the trial court erred in refusing to award costs for the expert witness fees for Dr. Gill and Dr. Dlabal and defendant's claim that the trial court erred in awarding xeroxing costs to plaintiff, we find that the trial court was without jurisdiction to make these rulings. The claim of appeal was filed on January 8, 1991, and the claim of cross-appeal was filed on January 25, 1991. The issue of costs was decided at a hearing on April 8, 1991, and the resultant order was dated April 24, 1991. After a claim of appeal is filed, a trial court may not set aside or amend the judgment or order appealed from except by order of this Court, by stipulation of the parties, or as otherwise provided by law. MCR 7.208(A). A trial court is prohibited from granting a party attorney fees or costs after the claim of appeal is filed, unless the order or judgment expressed an intention to grant such costs. Admiral Ins Co, supra, p 314. A trial court may determine the amount of costs to be taxed after a claim of appeal is filed only if the judgment provides for costs. MCR 7.208(C)(1).

Here, the order of judgment only provided for attorney fees, but did not provide for costs. Therefore, the trial court was without jurisdiction to award any costs following the filing of the claim of appeal and cross-appeal. MCR 7.208(A). Consequently, we vacate the April 24, 1991, order regarding the expert witness fees and xeroxing costs. However, the costs issue may be raised and addressed on remand.

VIII

Accordingly, we affirm the jury's verdict in plaintiff's favor. We vacate the order of April 24, 1991, concerning costs. We remand to the trial court for further findings regarding the issue of attorney fees. We do not retain jurisdiction.

/s/ Kathleen Jansen
/s/ Michael J. Talbot

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WHITE, J. (concurring).

Because I agree that any error in the trial court's striking portions of Dr. Gill's deposition testimony was harmless, I concur in the majority's affirmance on this issue. I join the majority opinion in all other respects.

/s/ Helene N. White

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