STATE OF MICHIGAN

COURT OF APPEALS

ROBERT QUINN,

Plaintiff-Appellee,

v

HASTINGS MUTUAL INSURANCE COMPANY,

Defendant-Appellant.

UNPUBLISHED
February 12, 2002

No. 227096
Chippewa Circuit Court
LC No. 97-003206-NF

Before: Griffin, P.J., and Markey and Meter, JJ.

PER CURIAM.

Defendant appeals by right from a judgment for plaintiff entered after a jury trial. We affirm.

Plaintiff incurred injuries in an automobile accident on October 21, 1990. Defendant is the no-fault insurer responsible for paying allowable expenses related to the injuries plaintiff sustained in the accident. The crux of this appeal involves defendant's failure to continue paying plaintiff's medical bills for a cervical and arm condition that defendant contends is not related to the 1990 accident.

Defendant first argues that plaintiff presented no competent evidence connecting the cervical and arm condition to the accident and that therefore the trial court should have granted defendant's motion for a judgment notwithstanding the verdict (JNOV), directed verdict, or new trial. We review de novo a trial court's decision to deny a motion for JNOV. *Morinelli v Provident Life & Accident Ins Co*, 242 Mich App 255, 260; 617 NW2d 777 (2000). We "view the testimony and all legitimate inferences that may be drawn therefrom in a light most favorable to the nonmoving party." *Id.* "If reasonable jurors could have honestly reached different conclusions, the jury verdict must stand." *Id.* at 260-261. Similarly,

> [a] trial court's ruling with respect to a motion for a directed verdict is reviewed de novo on appeal. *Thomas v McGinnis*, 239 Mich App 636, 643; 609 NW2d 222 (2000). In reviewing the trial court's ruling, this Court views the evidence presented up to the time of the motion in the light most favorable to the nonmoving party, grants that party every reasonable inference, and resolves any

> conflict in the evidence in that party's favor to decide whether a question of fact existed. *Id*. at 643-644. A directed verdict is appropriate only when no factual questions exist on which reasonable minds could differ. *Id*. at 644. Neither the trial court nor this Court may substitute its judgment for that of the jury. *Hunt v Freeman*, 217 Mich App 92, 99, 550 NW2d 817 (1996). [*Wickens v Oakwood Healthcare System*, 242 Mich App 385, 388-389; 619 NW2d 7 (2000), reversed and vacated in part on other grounds 465 Mich 53 (2001).]

Finally, we review for an abuse of discretion a trial court's denial of a motion for a new trial based on the great weight of the evidence. *People v McCray*, 245 Mich App 631, 637; 630 NW2d 633 (2001). "The test is whether the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand." *Id*.

Under Michigan's no-fault automobile insurance act, an insurer is liable for all reasonable charges incurred for reasonably necessary products, services, and accommodations related to the care, recovery, or rehabilitation of an insured who was injured in an automobile accident. MCL 500.3107(a); *Nasser v Auto Club Ins Ass'n*, 435 Mich 33, 49; 457 NW2d 637 (1990). The insured has the burden of proving that the incurred medical expenses were reasonably necessary to recover from injuries caused by the automobile accident. *Nasser*, *supra* at 50. To show causation here, plaintiff must prove by a preponderance of the evidence that his cervical and arm condition arose out of the injuries he sustained in the 1990 accident. *Kochoian v Allstate Ins Co*, 168 Mich App 1, 6-7; 423 NW2d 913 (1988).

Defendant suggests that the opinions of two Mayo Clinic neurosurgeons should have removed the question of causation from the province of the jury because the doctors could not definitively include or exclude the 1990 accident as the cause of plaintiff's cervical complaints. We disagree.

If the only testimony presented at trial fails to support a plaintiff's theory of causation, a directed verdict is appropriate. *Dengler v State Farm Mutual Ins Co*, 135 Mich App 645, 648-649; 354 NW2d 294 (1984). Here, however, the physician who had treated plaintiff for nearly nine years, Dr. John Cilluffo, testified that there was a causal relationship between the accident and plaintiff's cervical and arm condition. He based his opinion on his long-term relationship with plaintiff and the fact that plaintiff had not experienced cervical and arm pain before the accident. The two Mayo Clinic neurosurgeons' opinions did not directly contradict plaintiff's physician; the neurosurgeons were simply unable to include or exclude the 1990 accident as the cause of plaintiff's condition, as was defendant's own independent medical examiner. Moreover, plaintiff testified that he had not experienced the problems at issue before the accident. Accordingly, the testimony presented at trial created a question of fact about which reasonable minds could differ, and the testimony did not "preponderate[] so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand." *McCray, supra* at 637; *Morinelli, supra* at 260; *Wickens, supra* at 388-389.

Defendant contends that Cilluffo's testimony was incompetent because it was essentially contradicted by the notes of another doctor, J.W. Rae, to whom plaintiff had been referred by Cilluffo. According to defendant, Rae's notes indicate that plaintiff experienced arm distress before the 1990 accident. Thus, defendant argues, there was no competent evidence supporting

a cause-and-effect relationship in this case. We do not find defendant's argument persuasive. First, to the extent that Rae's notes contradict the testimony of plaintiff and Cilluffo, an evidentiary contradiction existed, and it was *the province of the jury* to resolve it. Indeed, plaintiff's indication that he had experienced no cervical or arm pain before the accident was not so inherently implausible that a reasonable juror could not believe it. See *People v Lemmon*, 456 Mich 625, 642-644; 610 NW2d 234 (1998). We further note that injuries sustained in an automobile accident that complicate a plaintiff's preexisting medical condition do not automatically preclude an insured from no-fault coverage. See *Mollitor v Associated Truck Lines*, 140 Mich App 431, 438; 364 NW2d 344 (1985). Under the evidence presented at trial, the jury reasonably could have concluded that the severity of an earlier condition worsened after the accident. No error occurred.

Defendant next contends that the trial court erred in awarding plaintiff attorney fees because a legitimate factual uncertainty existed with regard to causation.

MCL 500.3148(1) permits the trial court to award attorney fees to an insured if the court finds that the insurer unreasonably refused to pay an insured's claim or unreasonably delayed payment of an insured's claim. *Attard v Citizens Ins Co of America*, 237 Mich App 311, 317; 602 NW2d 633 (1999).

Determining whether to award attorney fees under the no-fault act depends not on whether an insurer ultimately is found liable for a certain expense, but rather on whether the insurer's initial refusal to pay the expense was unreasonable. *McCarthy v Auto Club Ins Ass'n*, 208 Mich App 97, 105; 527 NW2d 524 (1994); *Shanafelt v Allstate Ins Co*, 217 Mich App 625, 635; 552 NW2d 671 (1996). An insurer's delay in making payment under the no-fault act is not unreasonable if the delay is based on a legitimate question of statutory construction, constitutional law, or factual uncertainty. *Attard*, *supra* at 317. This Court should not reverse a trial court's finding of unreasonable refusal or delay unless it is clearly erroneous. *McKelvie v Auto Club Ins Ass'n*, 203 Mich App 331, 335; 512 NW2d 74 (1994).

In ruling on the reasonableness of an insurer's delay or refusal to pay an insured's claim, a trial court may consider the insurer's inconsistent actions with regard to that claim. *McKelvie*, *supra* at 337. Even if evidence presented at trial tended to support the insurer's claim that there existed a legitimate factual uncertainty to justify its refusal, an insurer's refusal of payment may be unreasonably based actions already taken by the insurer. *Id*.

In light of *McKelvie, supra* at 337, defendant's inconsistencies in handling plaintiff's claim in the instant appeal justified the trial court's ruling. Defendant obtained the opinion of an independent medical examiner that supported defendant's argument that a factual uncertainty existed with regard to causation, but six months later, defendant authorized the first of plaintiff's cervical surgeries. One month after that, defendant authorized plaintiff's second cervical surgery. Six months later, defendant gave plaintiff $2,050 to cover the expenses of his trip to Mayo Clinic, but then delayed payment of the Mayo Clinic bill for more than one year after receiving it and refused to pay for subsequent therapies. The trial court here, like the court in *McKelvie*, declined to find defendant's refusal to pay reasonable in light of its previous payments for the same condition. We discern no clear error with respect to this ruling.

Affirmed.

/s/ Richard Allen Griffin
/s/ Jane E. Markey
/s/ Patrick M. Meter