STATE OF MICHIGAN

COURT OF APPEALS

MICHAEL D. JOHNSON, as Next Friend for BRADLEY JOHNSON, a Minor, Plaintiff/Counter-Defendant-Appellant/Cross-Appellee,	UNPUBLISHED June 15, 2006
v	No. 258731 Wayne Circuit Court
FARMERS INSURANCE EXCHANGE, Defendant/Counter-Plaintiff-Appellee/Cross-Appellant.	LC No. 03-339848-NI

Before: Whitbeck, C.J., and Zahra and Donofrio, JJ.

PER CURIAM.

This case involves plaintiff's claim against defendant for no-fault personal injury protection benefits and defendant's counterclaim for payments made for rehabilitation services. Following a jury trial, plaintiff was awarded $52,256.98. However, the trial court agreed that defendant was entitled to a setoff for the amount it paid for rehabilitation services, $108,551.30. Plaintiff appeals as of right, challenging the trial court's order granting a setoff and the trial court's order denying his motion for attorney fees. Defendant cross appeals the trial court's order denying its separate motion for attorney fees. We affirm.

I Facts

Plaintiff's minor son, Bradley Johnson, was injured in a car accident on October 6, 2002. Defendant was plaintiff's no-fault insurer and did not dispute that Bradley was injured in the accident. Subsequently, plaintiff submitted a claim to defendant for inpatient rehabilitation services at Communicare, which defendant denied because it did not believe the treatment was related to Bradley's accident injuries. Defendant had also refused to pay other expenses. Plaintiff subsequently filed this action for the recovery of personal injury protection benefits under the no-fault act, MCL 500.3101 *et seq*. Plaintiff also sought an injunction to prevent defendant from further denying benefits, and in particular an order requiring defendant to pay for the Communicare expenses. The trial court granted plaintiff's preliminary injunction request and

expedited the trial. Defendant's motion to set aside the preliminary injunction was denied. Defendant thereafter filed a counterclaim for recoupment of the Communicare expenses, alleging that the treatment at Communicare was not "reasonable and necessary" for Bradley's care, recovery, or rehabilitation from injuries sustained in the accident. Following a trial,[1] the jury determined that plaintiff was entitled to payment for case management and attorney services, but denied plaintiff's claim for replacement services, attendant care services, and the Communicare expenses. The trial court set off plaintiff's judgment against defendant's counterclaim for recoupment of the Communicare costs it had paid.

II Directed Verdict

Plaintiff first argues that the trial court erred in denying his motion for a directed verdict. Plaintiff asserts that there was no issue of fact for the jury because his medical experts established that the Communicare expenses were necessary and reasonable, and defendant failed to rebut this medical testimony.

We review de novo a trial court's decision on a motion for a directed verdict. *Kallabat v State Farm Mut Automobile Ins Co*, 256 Mich App 146, 150; 662 NW2d 97 (2003). This Court views "the evidence and all legitimate inferences arising from the evidence in the light most favorable to the nonmoving party to determine whether the evidence fails to establish a claim as a matter of law." *Id*. When the evidence could lead reasonable jurors to disagree, a directed verdict is not appropriate. *Tobin v Providence Hosp*, 244 Mich App 626, 652; 624 NW2d 548 (2001).

MCL 500.3701(1)(a) provides that personal injury protection benefits are payable for "[a]llowable expenses consisting of all reasonable charges incurred for reasonably necessary products, services and accommodations for an injured person's care, recovery, or rehabilitation." "To be reimbursed for an 'allowable expense' under MCL 500.3701(1)(a), a plaintiff bears the burden of proving that (1) the charge for the service was reasonable, (2) the expense was reasonably necessary, and (3) the expense was incurred." *Kallabat, supra* at 151. Generally, whether expenses are reasonable and reasonably necessary is a question of fact for the jury. *Id*. (citations omitted).

Plaintiff asserts that the testimony of defendant's adjuster was insufficient to rebut his experts' medical testimony because the adjuster has no medical experience or training. Relying on *SPECT Imaging, Inc v Allstate Ins Co*, 246 Mich App 568; 633 NW2d 461 (2001), defendant argues that it was not required to present expert medical testimony in order to rebut plaintiff's claim that the Communicare expenses were reasonable and necessary. In *SPECT Imaging*, the Court recognized that "insurance companies are not required to accept health-care providers' unilateral decisions about what constitutes reasonable medical expenses, because to do so would undermine the Legislature's purpose in enacting [MCL 500.]3107." *Id*. at 577, citing *McGill v Automobile Ass'n of Michigan*, 207 Mich App 402, 408; 526 NW2d 12 (1994). This Court in

[1] Because the initial circuit court judge retired before trial, a different circuit court judge presided over the trial and the remainder of proceedings.

McGill stated, "[I]t is clear that the Legislature did not intend for no-fault insurers to pay all claims submitted without reviewing the claims for lack of coverage, excessiveness, or fraud." *Id.* (citation omitted).

We disagree with plaintiff that *SPECT Imaging* is not applicable to this case because the parties in that case presented competing expert medical testimony, whereas defendant here presented no expert medical testimony. This distinction is immaterial to the question whether there must be competing medical testimony. *SPECT Imaging* and *McGill* indicate that the adjuster's lack of medical experience does not render her unqualified to make a claim determination based on the records available. The weight to be given the adjuster's testimony and that of plaintiff's experts was a question for the jury. *Clery v Sherwood*, 151 Mich App 55, 64; 390 NW2d 682 (1986).

The critical question is whether there was sufficient evidence presented to create a question of fact regarding the reasonableness and necessity of the Communicare expense. We agree with the trial court the evidence regarding Bradley's pre-accident behavior, his apparent recovery from the head injury, his improved grades and behavior with constant monitoring, and his subsequent return to poor behavior, were all factors that the jury could weigh in making its determination whether Bradley's post-accident bad behavior was related to his head injury suffered in the accident. Moreover, apart from the conclusions of defendant's adjuster, all the records on which she based her decision were admitted into evidence and were available for the jury to consider. Viewed in a light most favorable to defendant, the non-medical evidence could be construed as indicative of no causal connection between Bradley's head injury and his post-accident behavior in the summer of 2003. Although plaintiff presented expert medical testimony to the contrary, the trial court did not err in finding that a question of fact existed for the jury. Thus, the trial court properly denied plaintiff's motion for a directed verdict.

III Motion for a New Trial

This Court reviews for an abuse of discretion a trial court's decision to grant or deny a party's motion for a new trial. *Kelly v Builders Square, Inc*, 465 Mich 29, 34; 632 NW2d 912 (2001). This Court also reviews for an abuse of discretion a trial court's decision to admit or exclude evidence. *Elezovic v Ford Motor Co*, 472 Mich 408, 419; 697 NW2d 851 (2005). An abuse of discretion is found only if an unprejudiced person, considering the facts on which the trial court acted, would say that there was no justification or excuse for the ruling made, *Shuler v Michigan Physicians Mut Liability Co*, 260 Mich App 492, 509; 679 NW2d 106 (2004), or the result is so palpably and grossly violative of fact and logic that it evidences a perversity of will, a defiance of judgment, or the exercise of passion or bias, *Barrett v Kirtland Community College*, 245 Mich App 306, 325; 628 NW2d 63 (2001).

A new trial may be ordered when the trial court committed an error of law. MCR 2.611(A)(1)(g). Plaintiff argues that he is entitled to a new trial because the trial court's ruling excluding mention of defendant's counterclaim at trial denied him his due process right to a jury trial. We disagree. The only issue of fact in defendant's counterclaim was whether the Communicare expenses were reasonable and necessary. This same issue was raised in plaintiff's complaint. In order to prevail on his claim for the Communicare expenses, plaintiff had to prove that the expenses were reasonable and necessary. We fail to see how plaintiff was deprived of a jury trial. The issue was fully litigated before the jury and the trial court did not limit plaintiff's

opportunity to present a "defense." Notably, plaintiff does not state what evidence or defenses he was denied the right to present. The trial court did not err in denying plaintiff's motion for a new trial on this basis.

Plaintiff also argues that the trial court committed legal error when it did not set defendant's counterclaim for trial, yet found that plaintiff was liable on it based on the jury's verdict. Because plaintiff did not present this precise argument below, it is unpreserved. Unpreserved issues are reviewed by this Court for plain error affecting a party's substantial rights. *Kern v Blethen-Coluni*, 240 Mich App 333, 336; 612 NW2d 838 (2000).

MCR 2.505(B) states, "For convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, the court may order a separate trial of one or more claims, cross-claims, counter-claims, third-party claims, or issues." The issue of the Communicare expenses, the only issue of fact in defendant's counterclaim, was also an issue in plaintiff's complaint. Thus, we fail to see how separate trials would have been more convenient or efficient. Further, we perceive of no prejudice to plaintiff by not separating the claims and plaintiff does not explain what he would have done differently had the counterclaim been tried separately. Therefore, we find no plain error.

Plaintiff next argues that the trial court erred in excluding mention of the preliminary injunction at trial under MRE 403. The trial court found that it would be more prejudicial than probative to mention the injunction. It was concerned that the jury would consider the issuance of the injunction as proof of the reasonableness and necessity of the Communicare expenses. While, as plaintiff asserts, the trial court could have issued a cautionary instruction, there was also a very real possibility that the jury would use the information for an improper purpose. Unfair prejudice exists when there is a tendency that the evidence will be given undue or preemptive weight by the jury. *Lewis v LeGrow*, 258 Mich App 175, 199; 670 NW2d 675 (2003).

Additionally, plaintiff does not explain on appeal what probative value mentioning the preliminary injunction had. Below, plaintiff cited the need to establish why defendant did not pay certain bills, which pertained to interest owed, and to establish that defendant was unreasonable in its payment delay, which pertained to possible attorney fees. But the trial court correctly noted that it was not necessary to determine why a bill was not paid to determine whether interest was owed, see MCL 500.3142, and the question whether defendant unreasonably delayed or refused to pay a benefit, for the purpose of determining attorney fees, is a question for the trial court, not the jury, see MCL 500.3148(1). For these reasons, the trial court did not abuse its discretion by precluding reference to the preliminary injunction.

Plaintiff also asserts that he is entitled to a new trial because the trial court erred in setting off his award against the counterclaim. Plaintiff argues that setoff was not appropriate because he was not to receive any monies; instead it was for the benefit providers. We conclude that plaintiff waived this issue because at the hearing on his motion for a preliminary injunction, he admitted that defendant would have the right of setoff against him if it prevailed at trial. A party cannot take a position before the trial court and then argue on appeal that the resultant action was error. *Czymbor's Timber, Inc v Saginaw*, 269 Mich App 551, 556; 711 NW2d 442 (2006). Further, setoff is an equitable remedy that is an appropriate method of satisfying a judgment. See MCL 600.6008; *Minority Earth Movers, Inc v Walter Toebe Constr Co*, 251 Mich App 87,

96; 649 NW2d 397 (2002). In addition, plaintiff has not indicated any legal basis under MCR 2.611(A)(1) that would entitle him to a new trial. Thus, we find no error requiring a new trial.

IV Plaintiff's Motion for Attorney Fees

Plaintiff argues that the trial court erred in denying his motion for attorney fees under MCL 500.3148(1) because defendant unreasonably delayed payment of certain bills. This Court reviews for clear error a trial court's decision not to award attorney fees under MCL 500.3148(1). *Amerisure Ins Co v Auto-Owners Ins Co*, 262 Mich App 10, 24; 684 NW2d 391 (2004). "Clear error exists if the reviewing court is left with a definite and firm conviction that a mistake occurred." *Id.*

MCL 500.3148(1) provides:

> 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.

We conclude that the trial court did not commit clear error in finding that defendant's delay in paying benefits was reasonable. The trial court found that defendant's delay was reasonable because of "very unusual" circumstances in which the previous trial court had issued a preliminary injunction requiring defendant pay for Communicare expenses. As mentioned, plaintiff's counsel, at a motion for a preliminary injunction, represented to the trial court that:

> *Plaintiff Counsel.* they see—they have a way to come back to get their money back:
>
> *Trial Court.* From Who?
>
> *Plaintiff Counsel.* Well from the client and they can subtract it from the benefits they are paying. Because there are other benefits outstanding right now they owe my client, and they have confirmed in writing 10 thousand dollars for attendant care benefits they haven't paid. There's probably 40 or 50 thousand dollars worth of benefits they haven't paid that is part of this litigation.
>
> So, they are going to have a right at the trial if this doesn't resolve to offset a good portion of this . . .

The trial court ordered, without a hearing, that defendant pay Communicare expenses it disputed based in part on plaintiff counsel's representation that defendant could set-off these benefits from currently-owed benefits. There is no indication that defendant would have delayed payment of currently-owed benefits had plaintiff not sought such extraordinary relief. Indeed,

defendant stipulated that it owed these benefits. Under these circumstances, we cannot conclude that the trial court clearly erred in finding that defendant reasonably delayed payment.[2]

V Defendant's Motion for Attorney Fees

On cross appeal, defendant argues that the trial court abused its discretion by denying its request for attorney fees under MCL 500.3148(2).[3] Defendant maintains that plaintiff's claim was in some respects "so excessive as to have no reasonable foundation." This Court reviews for an abuse of discretion a trial court's decision to award or deny attorney fees. But its findings regarding the fraudulent, excessive, or unreasonable nature of a claim under MCL 500.3148(2) are reviewed for clear error. *Beach v State Farm Mut Automobile Ins Co*, 216 Mich App 612, 627; 550 NW2d 580 (1996).

The trial court denied defendant's motion because it found that defendant was not the prevailing party, never reaching the question whether plaintiff's claims were in some respect excessive. On appeal, defendant does not address whether it was a prevailing party as defined by MCR 2.625. However, it cited MCR 2.625(B)(1) in its motion before the trial court. That subrule provides that if there are several judgments entered under MCR 2.116 (summary disposition) or MCR 2.505(A) (consolidated actions) and a party prevails in one, the party is considered a prevailing party as to that judgment. But because the trial court only entered one judgment, this subrule is inapplicable. Although defendant prevailed on its counterclaim, it was also found liable for some of the benefits plaintiff raised in his complaint. Therefore, defendant

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[2] Moreover, because plaintiff did not delineate in his motion, supporting brief, or at the hearing the specific costs that defendant allegedly unreasonably delayed in paying, this Court need not consider this claim as plaintiff abandoned review of this issue with respect to any benefits that were not stipulated to at trial as due and owing at that time, which defendant conceded had not been paid, and were subsequently listed in the judgment. The party seeking reversal on appeal has the burden of providing the reviewing court with a record that establishes the factual basis underlying his argument and the failure to so do may result in the issue being deemed abandoned on appeal. See *Admiral Ins Co v Columbia Cas Ins Co*, 194 Mich App 300, 305; 486 NW2d 351 (1992); *Band v Livonia Assoc*, 176 Mich App 95, 103-104; 439 NW2d 285 (1989).

[3] MCL 500.3148(2) provides, in part:

> An insurer may be allowed by a court an award of a reasonable sum against a claimant as an attorney's fee for the insurer's attorney in defense against a claim that was in some respect fraudulent or so excessive as to have no reasonable foundation.

Because the award is to defendant, a party to this action, the prevailing party requirement of MCR 2.625 is applicable.

did not prevail in full and could not recover attorney fees. *Mitchell v Dahlberg*, 215 Mich App 718, 729; 547 NW2d 74 (1996). The trial court did not err in denying defendant's motion for attorney fees.

Affirmed.

/s/ William C. Whitbeck
/s/ Brian K. Zahra
/s/ Pat M. Donofrio