STATE OF MICHIGAN

COURT OF APPEALS

MYKHAYLO VOVNA and VIKTOR PROSHKOV, Plaintiffs-Appellees,	UNPUBLISHED September 28, 2010
V STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Defendant-Appellant.	No. 291625 Wayne Circuit Court LC No. 07-725977-NF

Before: FITZGERALD, P.J., and MARKEY and BECKERING, JJ.

PER CURIAM.

In this action to recover first-party no-fault benefits following an automobile accident, defendant appeals by right the trial court's order, following a bench trial, awarding plaintiff Mykhaylo Vovna judgment for $2,111.65, and awarding plaintiff Viktor Proshkov judgment for $1,991. We affirm as modified.

Plaintiffs allege that they were injured in an automobile accident while occupying a vehicle defendant insured. Defendant denied liability on the ground that the vehicle that it insured was not the vehicle actually involved in the accident. At trial, both plaintiffs testified that they were injured while occupying the vehicle that defendant insured, and photographs of the damaged vehicle were introduced at trial. Although there were inconsistencies in some of the testimony, and the testimony conflicted with information in the vehicle's title history, the trial court found that "there is sufficient evidence on the record that indicates that an accident occurred involving the vehicle in question" and that "apparent inconsistencies in some of the testimony have not established that the accident was manufactured."

I. STANDARD OF REVIEW

A trial court's findings of fact in a bench trial are reviewed for clear error. MCR 2.613(C); *Carrier Creek Drain Drainage Dist v Land One, LLC*, 269 Mich App 324, 329; 712 NW2d 168 (2005). A finding of fact is clearly erroneous when the reviewing court is left with a definite and firm conviction that a mistake has been made. *Id*. at 329-330.

II. WHETHER THE COVERED VEHICLE WAS INVOLVED IN THE ACCIDENT

Defendant first argues that the trial court clearly erred in finding that its covered vehicle was the vehicle that was actually involved in plaintiffs' automobile accident. We disagree.

As the trial court observed, the evidence raised suspicions concerning whether the vehicle plaintiffs were occupying at the time of the accident was the same vehicle that was insured by defendant. In particular, Dawn Wahlstrom, an employee of defendant's fraud investigation unit, testified that the various "red flags" included (1) that the vehicle's title history did not show that Vovna's family had purchased the vehicle, (2) the claim involved a loss on a newly acquired policy, (3) different locations were reported as the accident scene, (4) the locations of the accident were not consistent with facts provided to defendant, and (5) the damage to the vehicle was not consistent with the witness accounts of the accident.

The insured vehicle was allegedly owned by plaintiff Vovna's father, Ihnatiy Vovna, but no bill of sale was produced for the vehicle, and no transfer of title to any Vovna family member appeared in the vehicle's title history. The vehicle's title history indicated that title to the vehicle was transferred to M&R Auto Sales & Service on September 14, 2006. An insurance binder was issued for the vehicle on September 15, 2006. The accident occurred on October 22, 2006. The title history indicated the next title transfer for the vehicle was November 12, 2006, and showed an increase in the odometer reading of only nine miles since the date of the previous title transfer. Vovna testified that the vehicle was purchased by his father through a dealer at an automobile auction in September 2006, and that they relied on the dealer to complete the necessary paperwork to transfer the title. Thereafter, Vovna's father regularly drove the vehicle to work, but Vovna also drove it.

Conflicting testimony was also presented concerning the location of the accident. Testimony was presented that it occurred at Gallagher Street and either Conant Street or Caniff Street in Hamtramck, where both plaintiffs lived. Descriptions of how the accident occurred also varied.

The trial court considered defendant's argument that conflicts in the testimony and the contradictions in the vehicle's title history raised questions concerning whether the vehicle insured by defendant was the same vehicle actually involved in the accident, but ultimately was not persuaded by the argument. Despite the discrepancies in the title history, the testimony did not foreclose the possibility that, as plaintiff Vovna claimed, the Vovnas purchased the vehicle through a dealer, who purchased it at an auction, that the Vovnas relied on the dealer to complete the paperwork for the transfer of title, and that the discrepancies in the vehicle title information could be attributable to errors by sources other than plaintiffs or the Vovnas. The conflicting accounts concerning where the accident occurred all placed the accident in the same general vicinity, and the trial court reasonably could have found that the plaintiffs were not sure or simply mistaken about the exact location. Moreover, both plaintiffs were from Ukraine. Plaintiff Vovna primarily spoke Russian and was not fluent in English, and the driver of the other vehicle spoke only Bengali. The trial court attributed some of the apparent contradictions in the case to the language barriers involved.

Ultimately, the case depended in large part on the credibility of plaintiffs, who testified that they were occupying the vehicle defendant insured at the time of the accident. "Due regard

shall be given to the trial court's superior opportunity and ability to judge the credibility of witnesses." *Sparling Plastic Indus, Inc v Sparling*, 229 Mich App 704, 716; 583 NW2d 232 (1998). Further, plaintiffs submitted photographs of the damaged vehicle after the accident. Although defendant argued that the photographs did not depict sufficient identifying details to allow it to confirm that the vehicle depicted was the same vehicle that it insured, the trial court found that defendant's investigation efforts to learn the identity of the vehicle involved in the accident were also inadequate. In particular, Wahlstrom admitted that she did not make any telephone calls to the facility where the vehicle was supposedly towed, and she did not know who may have called about the car. She admittedly did not use any of defendant's staff to try to locate the car.

While we agree with the trial court that there were inconsistencies in some of the testimony, and that conflicting evidence in the vehicle's title history raised questions concerning the identity of the vehicle involved in the accident, we are not left with a definite and firm conviction that the trial court erred in finding plaintiffs were occupying a vehicle involved in an accident that defendant insured. We reject defendant's argument that the trial court improperly considered the police report, which was hearsay. The trial court expressly indicated that it would not consider the police report in deciding this case, and there is no indication in the court's written opinion that it did.

In sum, defendant has failed to show that the trial court clearly erred in finding that the vehicle defendant insured was in an accident while plaintiffs occupied it.

III. PLAINTIFFS' ENTITLEMENT TO BENEFITS UNDER MCL 500.3107(1)

Defendant next argues that the trial court erred in awarding plaintiffs benefits for medical expenses, work loss, and mileage reimbursement under MCL 500.3107(1). The burden was on plaintiffs to prove their right to no-fault benefits. *Anton v State Farm Mut Auto Ins Co*, 238 Mich App 673, 684; 607 NW2d 123 (1999).

To recover for medical expenses, plaintiffs were required to show that (1) any charge was reasonable, (2) the expense was reasonably necessary, and (3) the expense was incurred. *Nasser v Auto Club Ins Ass'n*, 435 Mich 33, 50; 457 NW2d 637 (1990). Only plaintiff Vovna was awarded reimbursement for medical expenses. The trial court awarded him $764 for hospital expenses, and $29 for an x-ray expense. This award is supported by Vovna's testimony that he went to the hospital and was treated there on the day after the accident for dizziness and back pain associated with the automobile accident and that he was billed $764.05 for the hospital and doctor expense and another $29 for the x-ray expense. Vovna's testimony supports the trial court findings that these expenses were reasonable, necessary, and actually incurred. We disagree with defendant's argument that the $29 charge for an x-ray of Vovna's elbow was not shown to be related to the automobile accident. Vovna testified that his treatment at the hospital was related to the injuries he received in the automobile accident. Defendant inaccurately asserts that Vovna only complained of injuries to his back, neck, and head. Vovna testified that he injured his right hand in the accident, which emergency medical technicians treated at the scene, and that he received further treatment for his hand at the hospital. Defendant has not shown that a $29 charge for an x-ray is unreasonable, that an x-ray was not reasonably necessary, or that the expense was not actually incurred.

With respect to lost wages, the trial court agreed that plaintiffs' wage-loss claims were not fully supported and appeared to be overstated; however, the court awarded both plaintiffs a partial amount for their claims.

To recover for lost wages, plaintiffs were required to show that, but for the accident, they would have been employed and, as a consequence, lost income from work plaintiffs "would have performed during the first 3 years after the date of the accident if he or she had not been injured." MCL 500.31071(b); *Sullivan v North River Ins Co*, 238 Mich App 433, 437; 606 NW2d 383 (1999). Plaintiffs presented evidence that both were employed at the time of the accident. Vovna testified that, before the accident, he was employed with a roofing company for which he earned $10 an hour, but he did not work after the accident because of his injuries. Although Vovna did not provide supporting documentation for the amount of his hourly pay, the trial court was entitled to rely on Vovna's testimony, and we defer to the trial court's decision to accept that testimony as credible. Proshkov testified that he was employed as a painter before the accident and continued working in that job after the accident except for days he received treatment for his accident-related injuries at the Pain and Injury Rehabilitation Clinic. Vovna also received treatment at the Pain and Injury Rehabilitation Clinic. Rachel Stadick, a licensed chiropractor and certified massage therapist, treated both plaintiffs at the clinic and provided supporting documentation for the dates of their treatments.

The trial court found that both plaintiffs were not disabled from working because of their injuries, but that they were unable to work on the days they received treatment at the Pain and Injury Rehabilitation Clinic. Accordingly, the court awarded them wage-loss benefits only for the days of their documented treatment at the clinic. We disagree with defendant's argument that the trial court's award is inconsistent with Stadick's testimony that plaintiffs could have continued to work while recovering from their injuries. The trial court consistently found that both plaintiffs were capable of continuing to work, but recognized that they could not receive treatment and work at the same time. Thus, they were entitled to wage-loss benefits for the dates they were unable to work because of their treatment. We find no clear error in the trial court's determination that both plaintiffs were entitled to limited wage-loss benefits.

We also disagree with defendant's argument that the trial court erred by using a rate of $96 a day to calculate Proshkov's lost wages. Proshkov testified that before the accident he earned about $600 to $720 a week, or about $100 to $120 a day. On cross-examination, he admitted that his income from 2005 to 2006 had dropped by $5,000 to $6,000 a year. He also admitted that for about 12 to 15 weeks before the accident, his income was less than $480 a week. The trial court calculated Proshkov's lost wages using a daily rate of $96, which is based on a weekly income of $480 for five days of work a week. Because the evidence indicated that Proshkov had earned up to $120 a day before the accident and had earned less than $96 a day for only a limited period before the accident, the trial court's decision to calculate daily wage-loss benefits using the rate of $96 a day is not clearly erroneous.

Defendant lastly argues that the trial court erred in calculating the amount of Vovna's mileage reimbursement. We agree. In its findings, the trial court stated that Vovna and Proshkov were both entitled to $195.80 for mileage reimbursement. In its order of judgment, however, the trial court awarded Proshkov $195.80 and awarded Vovna $213.60 for mileage reimbursement. The parties do not dispute the trial court's use of a rate of $.445 a mile to calculate mileage reimbursement. The evidence indicated that Vovna made 26 trips to the Pain

and Injury Rehabilitation Clinic. Vovna testified that each trip to and from the clinic was 16 miles. Thus, Vovna was entitled to be reimbursed for 416 miles (26 x 16 = 416), and his total mileage reimbursement should have been $185.12 (416 x $.445 = $185.12). Accordingly, we affirm the trial court's award of mileage reimbursement for Vovna, but modify the amount of the award to $185.12, consistent with the evidence at trial.

In their brief on appeal, plaintiffs also ask this Court to increase the trial court's award of damages and to strike Dawn Wahlstrom's testimony. They also assert that they are entitled to attorney fees and interest under the no-fault act. "[A]n appeal is limited to the issues raised by the appellant, unless the appellee cross-appeals as provided in MCR 7.207." *Rohl v Leone*, 258 Mich App 72, 77 n 2; 669 NW2d 579, 581 (2003). Because plaintiff did not raise these issues in a cross appeal, they are not properly before this Court and we decline to consider them.

We affirm as modified. As the prevailing parties, plaintiffs may tax costs pursuant to MCR 7.219.

/s/ E. Thomas Fitzgerald
/s/ Jane E. Markey
/s/ Jane M. Beckering