STATE OF MICHIGAN

COURT OF APPEALS

DORIAN CARTER, Plaintiff-Appellee,	UNPUBLISHED March 18, 2014
v LIBERTY MUTUAL GROUP, Defendant-Appellant.	No. 308359 Wayne Circuit Court LC No. 09-008357-NF

DORIAN CARTER, Plaintiff-Appellee,	
v LIBERTY MUTUAL GROUP, Defendant-Appellant.	No. 308884 Wayne Circuit Court LC No. 09-008357-NF

Before: JANSEN, P.J., and K. F. KELLY and SERVITTO, JJ.

PER CURIAM.

In this no-fault action, defendant appeals as of right the jury trial verdict in favor of plaintiff (Docket No. 308359) and the trial court's award of attorney fees to plaintiff (Docket No. 308884). Because the trial court committed reversible error in failing to give the jury a requested special instruction on fraudulent claims, and this error resulted in unfair prejudice to defendant to the extent that failure to vacate the verdict would be inconsistent with substantial justice, we vacate the jury verdict and remand for a new trial (Docket No. 308359). We thus also vacate the award of attorney fees to plaintiff (Docket No. 308884).

On June 30, 2008, plaintiff was driving on the freeway when his vehicle was suddenly rear-ended by another vehicle, which caused his vehicle to spin out of control and crash. There is no dispute that plaintiff was not at fault in the accident. Plaintiff initiated the instant action on his assertion that he sustained injuries in the accident and that defendant, his no-fault insurance provider, refused to pay the personal protection insurance benefits to which he was entitled.

The matter proceeded to trial and, relevant to the instant matter, defendant requested that the trial court provide the jury with a fraud instruction concerning plaintiff's claim for benefits. Defendant also requested that a question concerning fraud be placed on the jury verdict form. The trial court denied both requests. The jury ultimately returned a verdict in favor of plaintiff. Plaintiff thereafter moved for an award of attorney fees in his favor, which the trial court granted. This appeal followed.

Defendant first claims that the trial court committed reversible error when it failed to provide the jury with a requested fraud instruction and failed to place a fraud question on the jury verdict form. We agree.

We review de novo claims of instructional error based on a legal issue. *Jackson v Nelson*, 252 Mich App 643, 647; 654 NW2d 604 (2002). A trial court's decision that a standard instruction was applicable to the facts of the case and was supported by the evidence, however, is entitled to deference; accordingly, the decision is reviewed for an abuse of discretion. *Alfieri v Bertorelli*, 295 Mich App 189, 196; 813 NW2d 772 (2012); *Keywell & Rosenfeld v Bithell*, 254 Mich App 300, 339; 657 NW2d 759 (2002). An abuse of discretion occurs when the result is outside the range of principled outcomes. *Nelson v Dubose*, 291 Mich App 496, 500; 806 NW2d 333 (2011). The trial court's denial of a requested special jury instruction is reviewed de novo. *Hardrick v Auto Club Ins Ass'n*, 294 Mich App 651, 679; 819 NW2d 28 (2011).

The jury instructions "should include all the elements of the plaintiff's claims and should not omit material issues, defenses, or theories if the evidence supports them." *Case v Consumers Power Co*, 463 Mich 1, 6; 615 NW2d 17 (2000). "[W]e examine the jury instructions as a whole to determine whether there is error requiring reversal . . . . Even if somewhat imperfect, instructions do not create error requiring reversal if, on balance, the theories of the parties and the applicable law are adequately and fairly presented to the jury." *Id*. When the standard jury instructions do not adequately address a topic, the trial court is obligated to give additional instructions when requested by a party, if the supplemental instructions properly inform the jury of the applicable law and are supported by the evidence. *Bouverette v Westinghouse Electric Corp*, 245 Mich App 391, 401-402; 628 NW2d 86 (2001). Supplemental instructions, when given, must be concise, understandable, conversational, unslanted, and nonargumentative. *Id*.

Defendant submitted several instructions for the trial court's consideration regarding fraud. First, defendant requested that the trial court provide a slightly amended version of M Civ JI 128.01. The traditional M Civ JI 128.01 reads as follows:

> Plaintiff claims that defendant defrauded [him / her / it]. To establish fraud, plaintiff has the burden of proving each of the following elements by clear and convincing evidence:
>
> a. Defendant made a representation of [a material fact / material facts].
>
> b. The representation was false when it was made.
>
> c. Defendant knew the representation was false when [he / she / it] made it, or defendant made it recklessly, that is, without knowing whether it was true.

> d. Defendant made the representation with the intent that plaintiff rely on it.
>
> e. Plaintiff relied on the representation.
>
> f. Plaintiff was damaged as a result of [his / her / its] reliance.
>
> Your verdict will be for the plaintiff (on the claim of fraud) if you decide that plaintiff has proved each of these elements by clear and convincing evidence.
>
> Your verdict will be for the defendant (on the claim of fraud) if you decide that plaintiff has failed to prove any one of these elements by clear and convincing evidence.

Defendant's proposed version of the instruction read:

> Defendant claims that the Plaintiff has committed fraud. To establish fraud, Defendant has the burden of proving each of the following:

Defendant then listed the elements set forth in the standard M Civ JI 128.01 changing the word "plaintiff" to the word "defendant."

The above instruction, proposed by defendant, is the standard jury instruction for the *tort* of fraud. Notably, in the "notes on use" section following M Civ JI 128.01, it states, "[t]his instruction is intended to be used in a tort action for damages for fraud. It is not designed for use in other types of cases." This is not a tort action in which damages are sought for fraud. Rather, defendant was seeking to void any liability to plaintiff under the language of its insurance policy due to plaintiff's alleged fraud. Thus, the requested instruction was inapplicable to the facts of this case and the trial court did not abuse its discretion in declining to give defendant's requested modified M Civ JI 128.01.

Defendant additionally argues that the trial court erred in refusing to provide one of its special jury instructions. The first proposed special jury instruction reads:

> The defendant in this matter may be allowed 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. If you find that Dorian Carter submitted a claim that was so excessive or fraudulent as to lack a reasonable foundation, you may find that Liberty Mutual Group is entitled to an award.

Defendant based this proposed jury instruction on MCL 500.3148(2), which allows for the recovery of attorney fees by an insurer in its defense of a claim if the claim was in some respect fraudulent or excessive. MCL 500.3148(2) however, provides, in relevant part, that "an insurer may be allowed by a court an award of a reasonable sum against a claimant as an attorney's fee . . . ." Thus, not only is the award of such attorney fees discretionary, it is allowed *by a court*—not a jury. In requesting that the trial court submit the proposed special instruction to the jury, defendant was essentially asking for the reading of a modified version of MCL 500.3148(2) and asking that the jury resolve the issue as to whether it was entitled to attorney

fees. Because whether attorney fees may be awarded under the statute is for the court, not the jury, to resolve, defendant was not entitled to the special proposed jury instruction. The trial court thus did not err in declining to give this instruction.

Defendant also submitted an alternative proposed special jury instruction:

> If you find that Plaintiff submitted a claim that is in some respect so excessive as to have no reasonable foundation, you may find that Plaintiff submitted a fraudulent claim to Defendant.

Defendant asserts that it was entitled to this instruction as the evidence supported its fraud defense and such an instruction would place the factual issue before the jury. We agree.

In its initial responsive pleadings, defendant plead as affirmative defenses that "plaintiff's claims are, in whole or in part, fraudulent or so excessive that it has no reasonable foundation which entitles Defendant to an award representing an attorney fee for the cost of defending this action pursuant to MCL 500.3148(2)" and "[i]nsured or those acting in concert with Insured have misrepresented material facts in connection with the procurement of the policy or Insured's claim under the policy, thereby voiding the policy *ab initio* and any applicable coverage under it." The policy at issue contains the following provision:

> FRAUD
>
> We do not provide coverage for any "insured" who has made fraudulent statements or engaged in fraudulent conduct in connection with any accident or loss for which coverage is sought under this policy.

Thus, defendant pled fraud and misrepresentation as affirmative defenses and if it were found that plaintiff engaged in fraudulent conduct or made fraudulent statements in connection with the loss for which he sought coverage; defendant's policy explicitly stated that coverage would not be provided. At trial, evidence of fraud and or misrepresentation on plaintiff's part was presented that warranted a fraud instruction and/or a fraud question on the verdict form.

The vast majority of plaintiff's claims consisted of claims for replacement services and attendant care services. Karl Intemann, senior special investigator for defendant, testified that defendant initially placed payment of benefits to plaintiff on hold pending an investigation due to the involvement of a certain doctor in plaintiff's treatment. Intemann additionally testified, and plaintiff confirmed, that immediately after his accident plaintiff obtained the services of a "case manager" to handle his insurance matters. Intemann testified that it was unusual to see a case manager in a fairly simple claim such as plaintiff's. He testified that case managers are typically involved only in cases where catastrophic injuries are involved and that case managers are typically registered nurses or medical professionals who bill the no-fault insurer. The case manager used by plaintiff was a disbarred attorney who, according to Intemann, sent documents out under other attorney's letterhead and would alternately use the title of paralegal or case manager. He did not bill defendant.

Evidence was also presented at trial that defendant received forms listing replacement services and attendant care services that were allegedly performed for plaintiff. In several

instances, said forms were sent to the adjuster for dates post-dating the date on which the forms were received—the adjuster was thus receiving statements for services that had supposedly been rendered when the dates listed for the services had not even yet occurred. One of the forms bore a notary that was post-dated as well, and one of defendant's disability slips was also post-dated. And, according to Intemann, the only doctor that had provided any disability slips for plaintiff, even though he had been treating with several doctors, was the doctor that defendant had been investigating for years.

With respect to the specific replacement and attendant care claims, plaintiff testified that immediately after the accident, he was unable to work or drive and required help getting out of bed, showering, dressing, and with all aspects of daily life. Plaintiff testified that a close family friend, Nelson Shaw, who was in his late 60's or early 70's, came to plaintiff's home every day after the accident from between 7:30 and 9:00 a.m. and stayed until 3:00 to 5:00 p.m. Plaintiff testified that Shaw performed services for him every day from June 30, 2008, until sometime in May 2011 for approximately 8 to 9 hours per day. He then testified that he was out of town on at least three week long trips during that time during which Shaw did not accompany him or provide services. Documentary evidence was admitted establishing that plaintiff submitted forms to defendant indicating that replacement and attendant care services were performed by Shaw every day from June 30, 2008, through May 2011, including those time periods when plaintiff was out of town and Shaw could not have performed such services.

Shaw testified that he had previously testified to having spent approximately three hours per day with plaintiff. He testified at trial that the amount of time varied depending on what needed to be done that day and that he sometimes spent more than six hours in one day with plaintiff.

Evidence was also presented that video surveillance was performed on plaintiff to determine if the claimed services were actually being performed. On one date that services were allegedly performed, just four months after the accident, Shaw did not appear at plaintiff's house. Despite the video evidence, an affidavit attesting to the fact that Shaw was there on that date was submitted to defendant. Video evidence was also shown of plaintiff driving himself to school, of putting a backpack on his back and walking to classes, of driving for over an hour, and of him driving Shaw around. These last activities took place in March of 2011 when plaintiff was still disabled and claimed a need for attendant care and replacement services due to his inability to attend to his own daily needs.

Affidavits signed by Shaw in support of the services provided by him were submitted into evidence at trial as well. The affidavits were identical for every day for the time period submitted as they related to replacement services performed. For every day of the week, the affidavits stated the following services provided by Shaw, "Clean bedroom, clean bathroom, clean kitchen, take out trash, do laundry" with a listed time of 2.5 hours every day for these tasks. At trial, Shaw testified that he did plaintiff's laundry since the accident, but did not do laundry every single day. He also testified that he took out plaintiff's trash *if* it needed to be removed from his sleeping area. Shaw testified that he made plaintiff's bed every day and cleaned the kitchen of the home every day because he was using the kitchen to cook for plaintiff. Shaw did not, however, claim that plaintiff was unable to do all of these by himself from the time of the accident until July of 2011. According to Shaw, plaintiff was slowly getting better and

wanted to do things for himself so Shaw would let plaintiff do whatever he was able. When asked why Shaw continued to sign affidavits saying he was doing the things for plaintiff every day when plaintiff was actually doing some of the things for himself, Shaw testified it was because the forms were presented to him every three or four months and he would forget. Shaw also testified that plaintiff's case manager prepared documents for him to sign about the services he provided to plaintiff and that he really did not read the documents before signing them.

Shaw's affidavits concerning provided attendant care were also identical for every single day for the time period submitted. They represented that Shaw provided services for plaintiff seven days a week for six hours per day, from 8:00 a.m. to 2:00 p.m. to wit: present and assure the taking of medications; watch and observe Dorian Carter; provide liquids and other forms of nourishment he may need; assist in morning and afternoon exercises; prepare breakfast, lunch and dinner; assist in and out of bathtub; assist in and out of bed; assist in putting on clothes. The affidavits were not consistent with Shaw's testimony concerning how many hours per day he was with plaintiff, or his testimony that he did not perform all of these tasks every day. The affidavits were also not necessarily consistent with plaintiff's testimony that he was capable of taking his own medications and did not require assistance with every task every day.

While Shaw and plaintiff indicated that any inconsistencies in the forms or affidavits were the fault of plaintiff's case manager, and that they did not read any documents or know anything about what was being submitted, the fact is, plaintiff hired the case manager to act as his agent for purposes of dealing with defendant. Despite defendant's requests to both the case manager and plaintiff to address issues directly with plaintiff, plaintiff continued to submit all documentation and communication exclusively through the case manager. In agency law, "the principal and his agent share a legal identity; it is a fundamental rule that the principal is bound, and liable for, the acts of his agent done with the actual or apparent authority of the principal." *People v Konrad*, 449 Mich 263, 280–281; 536 NW2d 517 (1995); see also *Persinger v Holst*, 248 Mich App 499, 505; 639 NW2d 594 (2001) (the principal is liable for an agent's lawful actions performed under the auspices of the principal's authority). The case manager mailed affidavits for replacement services that *plaintiff* indicated were performed for him. He submitted the affidavits and other documents to defendant *at plaintiff's request*, in the role of plaintiff's agent, thus rendering plaintiff liable for the case manger's actions. And, plaintiff is the person now seeking payment based upon the affidavits and for the claimed attendant and replacement services—not Shaw or the case manager. Moreover, the policy language does not require that the insured *intentionally* made fraudulent statements or engaged in fraudulent conduct in order for the defendant to not provide coverage.

In any event, plaintiff and Shaw's conflicting testimony and the video surveillance provide more than sufficient evidence to raise a question of fact about whether plaintiff submitted a claim that is in some respect so excessive as to have no reasonable foundation and thus engaged in fraudulent conduct or made fraudulent statements in connection with the loss for which he sought coverage such that a jury could find that plaintiff submitted a fraudulent claim to defendant. The trial court abused its discretion in finding that the instruction was not applicable to the facts of this case and erred in failing to give an instruction on fraud or misrepresentation where the evidence supported such an instruction.

However, instructional error warrants reversal only if it "resulted in such unfair prejudice to the complaining party that the failure to vacate the jury verdict would be 'inconsistent with substantial justice.'" *Ward v Consolidated Rail Corp*, 472 Mich 77, 84; 693 NW2d 366 (2005), quoting *Johnson v Corbet*, 423 Mich 304, 327; 377 NW2d 713 (1985) and MCR 2.613(A).

Here, had fraud been found by the jury, the language in the insurance policy may have precluded defendant from having to pay anything to plaintiff. Thus, failure to vacate the verdict would be inconsistent with substantial justice. In reaching this conclusion, we would note that although plaintiff requested $21,900 in replacement services and $64,395 in attendant care expenses, the jury awarded only $1,000 in replacement services and nothing in attendant care expenses.[1] Thus, the jury's minimal award on replacement services and nothing in attendant care services despite the submission of affidavits that such services were performed suggests that this jury found the claims for the same fraudulent or, at the very least, excessive, lending further support to our conclusion that the jury verdict should be vacated and a new trial should be ordered consistent with substantial justice.

Additionally, as argued by defendant, the issue of whether plaintiff submitted fraudulent claims to plaintiff should have been presented to the jury on the verdict form. Defendant requested that the verdict form contain the question "Did plaintiff submit a fraudulent claim for benefits?" Again, because defendant presented fraud as an affirmative defense and the evidence at trial supported the defense, a question of fact concerning whether plaintiff submitted fraudulent claims for benefits to defendant was created and this issue should have been submitted to the jury.

Because the jury verdict is being vacated and a new trial ordered, the award of attorney fees in Docket No. 308884 is also vacated.

Given our determination that a new trial is warranted, we need not address defendant's claims concerning alleged errors that occurred during trial. However, several pre-trial issues nevertheless require review. Of these, the first is defendant's contention that the trial court abused its discretion in denying his motion to strike plaintiff's expert, Dr. Lerner, from testifying. We disagree.

MCR 2.401(I)(1) provides that the parties shall file and serve witness lists, including the name of expert witnesses and the expert's field of expertise, no later than the time directed by the trial court. MCR 2.401(I)(2) provides, "The court may order that any witness not listed in accordance with this rule will be prohibited from testifying at trial except upon good cause shown."

[1] Plaintiff asserts that the jury's award of $18,687.06 in allowable expenses includes $7,000 in attendant care expenses. The verdict form does not break down the allowable expenses. The judgment entered on the verdict, however, specifies that the $18,687.06 was for "unpaid medical, chiropractic and prescription expenses."

Defendant moved for partial summary disposition after discovery had closed, contending that Dr. Policherla was the only doctor that had disabled plaintiff in any way or prescribed him attendant care or household services. Defendant also contended that Dr. Policherla "will neither testify at trial nor will he provide an affidavit as to the reasonableness and necessity of the treatment he provided or as to the disability of Plaintiff." Defendant thus argued that no physician would opine that plaintiff was disabled as a result of the accident or that any attendant care, wage loss, or household services were reasonable or necessary and plaintiff thus could not prevail on those issues. Apparently, defendant was engaged in an ongoing investigation into Dr. Policherla in other matters and was poised to or already had entered into an agreement with Dr. Policherla concerning his involvement with defendant's insureds or in cases concerning defendant's insureds. At a settlement conference discussing this matter, plaintiff brought up the issue of adding an expert witness to his case, considering Dr. Policherla's potential unwillingness or inability to testify in the case. At the conclusion of the settlement conference, the parties signed a stipulated order as to form only, that allowed plaintiff to add one more expert to its witness list and provided that he would further provide dates for the deposition of said expert, Laran Lerner, to occur by February 28, 2011.

The fact that defendant reached an agreement with Dr. Policherla in a separate case wherein Dr. Policherla agreed that he would not have anything further to do with defendant or its insureds was not brought to plaintiff's attention until after discovery had closed. By then, plaintiff had been treating with Dr. Policherla for over two years. It is true that Karl Intemann, investigator for defendant, testified that he told plaintiff that defendant would not consider the billings of Dr. Policherla and that he did not believe that Dr. Policherla would stand behind the disability slips he issued to plaintiff. There is nothing to indicate, however, that plaintiff would have known that this was because defendant had an agreement with Dr. Policherla or that Intemann's statements were anything more than posturing on defendant's part.

An agreement between defendant and plaintiff's primary expert witness presents good cause for adding an expert witness to plaintiff's witness list. MCR 2.401(I)(2). There is no indication that plaintiff was responsible in any way for the delay in adding this expert, as it was prompted only by defendant's late revelation. Additionally, defendant was given an opportunity to depose Dr. Lerner several months prior to trial and has not established that it suffered any prejudice as a result of the late addition.

The trial court further did not abuse its discretion in denying defendant's motion to exclude testimony that plaintiff was hit by an intoxicated driver. MRE 402 provides:

> All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, the Constitution of the State of Michigan, these rules, or other rules adopted by the Supreme Court. Evidence which is not relevant is not admissible.

"'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401. Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the

issue, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. MRE 403.

Defendant sought to exclude testimony by a police officer who witnessed the accident that the person who hit plaintiff was intoxicated at the time of the accident. While this piece of information is arguably only marginally relevant, it serves to explain the totality of the circumstances surrounding plaintiff's accident. This fact explained how plaintiff could be rear-ended on a freeway, when he was traveling at an average rate of speed in relatively light traffic on an average evening with non-slippery road conditions. And, defendant has not established that the danger of unfair prejudice of a passing reference to the information would substantially outweigh the probative value of the totality of the evidence. The trial court thus did not abuse its discretion in allowing the challenged evidence to be admitted.

Finally, the trial court did not abuse its discretion in denying defendant's third motion to dismiss. Defendant requested dismissal as a discovery sanction. MCR 2.313(B)(2) provides that a trial court may impose a "just" sanction for a party's refusal to comply with a discovery order or failing to answer interrogatories pursuant to MCR 2.313(D)(1)(b). The sanctions include dismissal. MCR 2.313(B)(2)(c); MCR 2.504(B)(1). Because dismissal is a harsh sanction that should be taken cautiously, a trial court must carefully evaluate all available options on the record before imposing this sanction. *Hanks v SLB Management, Inc*, 188 Mich App 656, 658; 471 NW2d 621 (1991). "Severe sanctions are generally appropriate only when a party flagrantly and wantonly refuses to facilitate discovery, not when the failure to comply with a discovery request is accidental or involuntary." *Bass v Combs*, 238 Mich App 16, 26; 604 NW2d 727 (1999), overruled on other grounds by *Dimmitt & Owens Fin, Inc v Deloitte & Touche (ISC), LLC*, 481 Mich 618; 752 NW2d 37 (2008). Factors the trial court should consider before imposing dismissal as a sanction include: "(1) whether the violation was wilful or accidental; (2) the party's history of refusing to comply with discovery requests; (3) the prejudice to the opposing party; (4) whether there exists a history of deliberate delay; (5) the degree of compliance with other provisions of the court's order; (6) attempts to cure the defect; and (7) whether a lesser sanction would better serve the interests of justice." *Richardson v Ryder Truck Rental, Inc*, 213 Mich App 447, 451; 540 NW2d 696 (1995).

Here, the trial court did not impose any sanction against plaintiff for anything, at any time during the proceedings. The record reflects that defendant filed its first motion to dismiss within five months of the case being initiated when plaintiff did not timely respond to defendant's first interrogatories and request for production of documents. The trial court ordered plaintiff to provide responses within seven days and it appears that plaintiff complied with the order. Defendant's second motion to dismiss was cancelled before a hearing on the same could be held. Defendant's third motion to dismiss was premised primarily upon plaintiff's failure to file a timely or court rule compliant trial brief, although the motion does mention that plaintiff also failed to comply with other trial court orders.

Applying the factors set forth in *Richardson*, 213 Mich App at 451, to the instant matter, we first note that there is nothing to indicate that the violations were willful. The only discovery violation defendant even claims was willful was the "difficulty" it had in scheduling plaintiff's deposition. Yet that was not the basis for any of defendant's motions for dismissal. Second, given that the case proceeded for two and half years before concluding in a trial and involved the

exchange of somewhat extensive medical records, and the taking of several medical depositions, plaintiff's twice being late in responding to interrogatories and filing a late trial brief is not necessarily a significant history of refusing to comply with discovery requests. And, that defendant sought dismissal the very first time plaintiff did not timely submit answers indicates that defendant was less than patient and quick to seek the intervention of the court as well as dismissal rather than a lesser sanction. Third, defendant has failed to articulate any prejudice it suffered due to the lateness of plaintiff's responses. Fourth, defendant has failed to establish that plaintiff's delay was deliberate. Fifth, plaintiff appears to have complied with the trial court's other orders. Sixth, plaintiff appears to have corrected the defects. Finally, the trial court found no need to impose any sanction, let alone the harsh sanction of dismissal. We see no abuse of discretion in the trial court's finding.

We vacate the jury verdict in Docket No. 308359 and remand for a new trial. We also vacate the award of attorney fees in Docket No. 308884. We do not retain jurisdiction.

/s/ Kathleen Jansen
/s/ Kirsten Frank Kelly
/s/ Deborah A. Servitto