STATE OF MICHIGAN

COURT OF APPEALS

JOSEPH A. KLOBERDANZ III,

Plaintiff-Appellant,

v

UNITED STATES FIDELITY AND GUARANTY INSURANCE COMPANY,

Defendant-Appellee.

UNPUBLISHED
July 18, 1997

No. 192637
Saginaw Circuit Court
LC No. 92-052334

Before: Gribbs, P.J., and Sawyer and Young, JJ.

PER CURIAM.

In this first-party no-fault insurance case, plaintiff appeals as of right from a judgment in his favor, which was based on a jury verdict awarding plaintiff $4,778.60 for a portion of medical expenses he had incurred.[1] We affirm.

Plaintiff first argues that prejudice resulted when the trial court called defendant's medical experts "independent" in front of the jury because it created an impression that these witnesses had greater reliability or trustworthiness. Plaintiff also argues that the trial court abused its discretion in failing to give plaintiff's requested jury instruction to cure the prejudice created by this comment. We disagree. We acknowledge that defendant's medical examinations were not "independent" because they were performed by doctors selected and paid for by defendant and that the trial court incorrectly indicated in front of the jury that "the statute [MCL 500.3151; MSA 24.13151], reads independent medical examinations," when the statute in fact reads "medical examinations." However, the trial court cured any prejudicial effect that this discussion may have had by explaining to the jury that that the examinations in question were done by doctors who were selected and paid for by defendant. In this sense, the trial court's actions were consistent with its earlier decision that it was "going to let [defendant] call [the medical examinations] whatever [defendant] want[ed] to call them," but that it also would not restrict plaintiff's counsel "from telling the jury . . . who [the doctors who performed the examination were] and who hired them" because such information was "part of fully exploring the facts." There is no indication that plaintiff was denied a fair and impartial trial. *American Casualty v Costello,* 174 Mich App 1, 11; 435 NW2d 760 (1989).

The trial court also properly declined to give a special jury instruction regarding the term "independent." In addition to telling the jury that the medical examinations were performed by doctors who were selected and paid for by defendant, the trial court gave SJI2d 4.01:

> You are the judges of the facts in this case, and you must determine which witnesses to believe and what weight to give to their testimony. In doing so, you may consider each witness's ability and opportunity to observe, his or her memory, manner while testifying, any interest, bias, or prejudice, and the reasonableness of the testimony considered in light of all of the other evidence.

These instructions adequately covered any prejudice that may have occurred in referring to the examinations as "independent" because the first clarified the misstatement and the second specifically addressed the jury's role in weighing the credibility of witnesses. There was no abuse of discretion. *Mills v White Castle System, Inc,* 199 Mich App 588, 592; 502 NW2d 331 (1992).

Next, plaintiff argues that the decisions in *Hanks v SLB Management, Inc,* 188 Mich App 656; 471 NW2d 621 (1991), and *Houston v Southwest Detroit Hospital,* 166 Mich App 623; 420 NW2d 835 (1987), support his contention that the trial court erred by failing to evaluate on the record all of the available options under MCL 500.3153; MSA 24.13153, before it dismissed part of plaintiff's claims for failure to comply with a pretrial order. Plaintiff argues that the trial court abused its discretion in dismissing part of his action because there was no showing of the unavailability of other sanctions nor any showing of willfulness on plaintiff's part. *Hanks, supra,* at 658. In both *Hanks* and *Houston,* this Court reversed the trial court for dismissing the respective plaintiff's *entire* action when the trial court had failed to consider all the available options on the record. Here, however, the trial court made it clear that it was aware of all the possible sanctions available under MCL 500.3153; MSA 24.13153, by citing those options in its opinion. Furthermore, unlike the courts in *Hanks,* and *Houston,* where the trial court dismissed the respective plaintiff's *entire* actions, the facts of this case show that the trial court carefully tailored its sanctions so as to only penalize plaintiff for his failure to appear for defendants' scheduled medical examinations.

Plaintiff brought this action against defendant to recover medical expenses that were arguably unrelated to the injuries he received from an accident. In accordance with the trial court's pre-trial order, defendant attempted to schedule its own medical examinations of plaintiff before plaintiff incurred any further medical bills. In fact, defendant even offered to pay for plaintiff's air fare to return to Michigan from Colorado for the examinations. Despite defendant's repeated requests, plaintiff failed to appear for six separately scheduled examinations due to his own personal calendar conflicts or other reasons. In the mean time, plaintiff was incurring further medical expenses for physical therapy and other treatment. By the time plaintiff actually submitted to defendant's requests and was examined by defendant's doctors, he had already incurred significant additional medical expenses. With this history in mind, the trial court found that "plaintiff's failure to attend several scheduled appointments tantamount to a refusal to submit to a physical examination" and chose only to dismiss that part of plaintiff's claims that were incurred from "the date defendant offered to pay for plaintiff's air fare until the date plaintiff actually submitted to the examination." Because this sanction was carefully crafted so as to only

address plaintiff's failure to submit to defendant's requests for a medical examination, we find no abuse of discretion.

Moreover, contrary to plaintiff's claim, the trial court did make a finding that plaintiff willfully failed to appear for defendant's scheduled medical examinations. *Houston, supra,* at 628. Letters submitted by defendant in this case indicate that plaintiff consciously and intentionally decided not to attend the medical examinations scheduled by defendant. For example, in a letter dated June 30, 1992 plaintiff wrote "The exams scheduled for July will not be attended. I suggest that if you want IMEs before September, that arrangements be made for me to attend one in Denver, Colorado." Moreover, plaintiff offered no explanation for how his failure to show up for the medical examinations could be construed as accidental or involuntary. Based on this evidence, the trial court specifically found plaintiff's conduct to be willful when it held that plaintiff's failure to attend several scheduled appointments was tantamount to a refusal to submit to a physical examination.

Affirmed.

/s/ Roman S. Gribbs
/s/ David H. Sawyer
/s/ Robert P. Young, Jr.

[1] Plaintiff was awarded an additional $1,731.72 in interest for a total judgment of $6,510.32.