STATE OF MICHIGAN

COURT OF APPEALS

STEVEN DANIEL, a/k/a STEPHEN DANIEL, Plaintiff-Appellant, and WILLIAM BEAUMONT HOSPITAL, Intervening Plaintiff, v AUTO CLUB INSURANCE COMPANY, Defendant-Appellee.	UNPUBLISHED November 21, 2013 No. 310947 Wayne Circuit Court LC No. 10-006122-NF

Before: SAWYER, P.J., and O'CONNELL and K. F. KELLY, JJ.

PER CURIAM.

Plaintiff appeals as of right a judgment of no cause of action against plaintiff after a jury returned a verdict in favor of defendant in an action for no-fault insurance benefits. Specifically, plaintiff argues that the trial court improperly denied plaintiff's motions for directed verdict and judgment notwithstanding the verdict (JNOV). Plaintiff also argues that defendant is estopped from denying coverage. We affirm.

Plaintiff needed car insurance to drive his car on February 9, 2010, but his insurance had lapsed the previous year, and he was unable to make a payment to reinstate his policy. Plaintiff called his friend and asked him to call defendant and make a payment on plaintiff's behalf. His friend agreed and made the call and payment on February 9. That same day, plaintiff was driving on I-94 in Detroit when he was involved in a car accident at 11:00 a.m. Defendant denied plaintiff's claim after deciding that coverage did not begin until 11:02 a.m.

The main dispute is over the time of payment because the time of payment sets the time the policy went into effect. Plaintiff's friend testified that defendant received payment at 10:46 a.m., and plaintiff produced a bank receipt confirming payment at 10:46 a.m. However, defendant presented a receipt that showed it processed payment at 11:02 a.m. Defendant also presented evidence that plaintiff's policy could not have taken effect before 10:55 a.m. because defendant's receipts are time and date stamped in chronological order, and the receipt

sequentially numbered before plaintiff's receipt was stamped at 10:55 a.m. Further, two other employees of defendant testified they denied the claim because the accident occurred before coverage began.

Plaintiff's argument that he was entitled to a directed verdict or JNOV because defendant received payment before the accident is properly preserved because plaintiff raised these arguments in the trial court. *Gen Motors Corp v Dep't of Treasury*, 290 Mich App 355, 386; 803 NW2d 698 (2010).

We review both a trial court's decision on a motion for directed verdict and on a motion for JNOV de novo. *Diamond v Witherspoon*, 265 Mich App 673, 681; 696 NW2d 770 (2005). In reviewing a decision on a motion for directed verdict, this Court "reviews all the evidence presented up to the time of the directed verdict motion, considers that evidence in the light most favorable to the nonmoving party, and determines whether a question of fact existed." *Id.* at 681-682. "A directed verdict is appropriate only when no factual question exists on which reasonable jurors could differ." *Id.* In reviewing a motion for JNOV, this Court also views evidence in "the light most favorable to the nonmoving party," and "[i]f reasonable jurors could honestly have reached different conclusions, the jury verdict must stand." *Id.*

The motion for directed verdict was properly denied because, when plaintiff moved for a directed verdict after the last defense witness was examined, a question of fact existed over the time of coverage. Based on the the record, reasonable jurors could differ on whether they believed plaintiff's coverage started at 10:46 a.m. or at 11:02 a.m. Therefore, the trial court properly denied plaintiff's motion for directed verdict. *Diamond*, 265 Mich App at 681-682.

Similarly, regarding plaintiff's motion for JNOV, there was sufficient evidence for reasonable jurors to honestly conclude that plaintiff's insurance coverage began at either 10:46 a.m. or 11:02 a.m. Therefore, the trial court properly denied plaintiff's motion for JNOV. *Id.*

Plaintiff also argues that defendant is estopped from denying payment. This argument is unpreserved. *Gen Motors Corp*, 290 Mich App at 386. Our failure to consider the issue will not result in manifest injustice because plaintiff's claim is without merit. Nevertheless, plaintiff's argument stems from the doctrine of waiver, which states that the payment of past due premiums extends a policy purchased before loss beyond the lapse date when the payment was accepted by the insurer in a manner that induces the insured to believe he is still covered. *Pastucha v Roth*, 290 Mich 1, 9-10; 287 NW 355 (1939); *Glass v Harvest Life Ins Co*, 168 Mich App 667, 670; 425 NW2d 107 (1988). In explaining the doctrine, one Court noted, "[a]n insurer which unconditionally accepts a premium with knowledge of a loss may be found to have waived its right to assert the policy lapse." *Glass*, 168 Mich App at 670. The Court also explained, "the premium must be promptly returned upon learning that death preceded payment." *Id.* at 671

In this case, the doctrine of waiver is inapplicable. First, plaintiff did not make a payment for a premium that was past due that extended his policy beyond the lapse date. *Roth*, 290 Mich at 9-10. On February 9, defendant received payment for a new policy. Therefore, there is no past policy that defendant sought payment for that would bind defendant. *Id.* Second, payment was not accepted in a manner that induced plaintiff to believe his previous policy was still in effect. *Id.* Defendant's salesperson wrote "a new policy" following the lapse in

September and was required to hit a "get rate" button before finalizing payment. Plaintiff's policy had been previously cancelled due to non-payment, and the salesperson called plaintiff each time such events took place to explain that his policy was cancelled. Therefore, defendant accepted plaintiff's payment in a manner that made it clear that plaintiff was purchasing a new policy. Third, defendant did not accept plaintiff's payment with knowledge of a loss. *Glass*, 168 Mich App at 670-671. Plaintiff filed his report of loss on February 15, and review of the claim began on February 19. Finally, plaintiff's claim that defendant never rescinded the policy or refunded the premium is irrelevant because the doctrine of waiver is not applicable. Plaintiff's estoppel claim is entirely without merit.

Accordingly, the trial court did not err in denying plaintiff's motions for directed verdict and JNOV.

Affirmed.

/s/ David H. Sawyer
/s/ Peter D. O'Connell
/s/ Kirsten Frank Kelly