COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

18-P-1132

ALLAN M. LEAVITT

vs.

CYNTHIA A. PHILLIPS & others.[1]

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

This case arises out of an automobile accident between Cynthia A. Phillips, a Massachusetts resident, and Melissa Aebersold, a Vermont resident. The plaintiff, Allan M. Leavitt, was a passenger in Aebersold's automobile and was also a Vermont resident at the time of the accident. Leavitt brought a complaint alleging negligence against Phillips and asserting ten other claims against Aebersold, her insurance company, his own insurance company, and Phillips's insurance company. In Phillips's answer, she asserted a cross claim against Aebersold for negligence. All of Leavitt's claims, except his negligence claim against Phillips, were either dismissed on summary judgment or stayed pending a determination as to Phillips's

[1] Melissa Aebersold, The Commerce Insurance Company, GEICO Indemnity Company, and United Services Automobile Association.

negligence, and the case thus proceeded to trial solely on Phillips's and Aebersold's negligence. The jury concluded that Phillips was negligent but that her negligence did not cause Leavitt's injuries, with judgment thus entering for Phillips.[2] Leavitt's subsequent motion for a new trial on causation and damages was denied. On appeal, Leavitt raises numerous arguments with respect to the proceedings below. We affirm.

Discussion. 1. Personal injury protection. Leavitt's primary argument on appeal relates to most of the claims that he asserted against Aebersold; Aebersold's insurance company, GEICO Indemnity Company (GEICO);[3] and Leavitt's own insurance company, United Services Automobile Association (USAA). These claims turned on whether Aebersold was required, under Massachusetts

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[2] At the close of Leavitt's case, Phillips and Aebersold moved for directed verdicts based on Leavitt's failure to prove an injury sufficient to satisfy the threshold requirements of G. L. c. 231, § 6D. The trial judge deferred decisions on these motions but ultimately, after the jury verdict, allowed both motions. After the jury verdict, the remaining claims that were stayed pending a determination as to Phillips's negligence were also dismissed.

[3] Leavitt's complaint named "GEICO Insurance Company" as a defendant. However, "GEICO Indemnity Company" is the real party in interest. In an attempt to fix this error, Leavitt and GEICO agreed by joint stipulation to amend the complaint such that all references to "GEICO Insurance Company" would instead be to "GEICO Indemnity Insurance Company." GEICO ultimately realized that this name, too, contained the erroneous inclusion of the word "insurance," and that error was fixed pursuant to a motion by GEICO. Leavitt argues that GEICO knowingly entered into a false stipulation to disguise the real party in interest, which he believes is still unknown. This argument is without foundation.

law, to purchase certain minimum motor vehicle insurance coverages, and in particular whether she had to carry personal injury protection (PIP).[4] Leavitt argues that Aebersold was required to carry PIP, even as a nonresident of the Commonwealth, because she spent more than thirty days in the Commonwealth in 1998.[5] In making this argument, Leavitt relies on G. L. c. 90, § 3.

General Laws c. 90, § 3, sets forth the requirements for nonresidents operating motor vehicles in the Commonwealth. The statute exempts most nonresidents from having to comply with the Commonwealth's motor vehicle insurance requirements,[6] with a

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[4] As against Aebersold, Leavitt asserted a claim for failure to carry PIP. As against GEICO and USAA, Leavitt asserted (1) claims for breach of contract arising from the denials of his PIP claims, (2) claims for unfair or deceptive acts and practices under Massachusetts law, and claims for bad faith conduct under Vermont law, arising from the denials of his PIP claims, and (3) claims seeking declaratory judgments that GEICO and USAA were required to pay his PIP claims. All of the above claims were dismissed on summary judgment, with declarations being entered that GEICO and USAA were not obligated to provide PIP coverage, and are addressed in this section. Leavitt also asserted underinsured motorist claims against GEICO and USAA. The underinsured motorist claims did not turn on the PIP issue and are addressed in note 10, infra.

[5] He further argues that if Aebersold was required to carry PIP, her policy with GEICO and his policy with USAA provided PIP due to both policies' out-of-State coverage clauses. Because we conclude that Aebersold was not required to carry PIP, we need not address this claim.

[6] This exemption applies only if a nonresident has complied with the "laws relative to motor vehicles and trailers, and the registration and operation thereof, of the state or country [in which the motor vehicle or trailer is registered]." G. L. c. 90, § 3.

notable exception at issue here. That exception is the following: "no motor vehicle or trailer shall be [operated pursuant to this exemption] on more than thirty days in the aggregate in any one year or, in the case where the owner thereof acquires a regular place of abode or business or employment within the commonwealth, beyond a period of thirty days after the acquisition thereof." G. L. c. 90, § 3.

Leavitt's argument goes to the first of the two temporal limitations in G. L. c. 90, § 3. He interprets this language to mean that once a motor vehicle has been operated in Commonwealth for more than thirty days in the aggregate in any one year, the owner of that motor vehicle must comply with the Commonwealth's motor vehicle insurance requirements in perpetuity. He contends that Aebersold, who spent more than thirty days in the Commonwealth in 1998, still had to carry PIP at the time of the accident, two decades later. We disagree, as this interpretation of the statute would produce absurd results. See Bellalta v. Zoning Bd. of Appeals of Brookline, 481 Mass. 372, 378 (2019) (statutory interpretation must avoid absurd results). We thus construe this language in G. L. c. 90, § 3, as requiring nonresidents to purchase the requisite motor vehicle insurance only during the year in which they have driven a motor vehicle in the Commonwealth for more than thirty days in the aggregate. See Commonwealth v. Chown, 459 Mass. 756, 766 (2011), quoting

G. L. c. 90, § 3 ("in the absence of the requisite liability insurance, a nonresident may not operate a motor vehicle in Massachusetts for 'more than thirty days in the aggregate in any one year'"). Once a year has passed, the thirty-day clock restarts.[7]

[7] Leavitt raises a variety of other arguments regarding the fact that his PIP-related claims against GEICO and USAA were all dismissed on summary judgment. First, he argues that the judge violated his rights of due process and equal protection by refusing to consider his requests for declaratory relief before granting summary judgment. This assertion lacks merit. Requests for declaratory relief are frequently resolved at the summary judgment stage, and the judge properly declared Leavitt's rights when granting summary judgment. See Rawston v. Commissioner of Pub. Welfare, 412 Mass. 778, 785 (1992) (with respect to resolving petition for declaratory relief at summary judgment stage, declaration of rights instead of dismissal should be entered). Second, Leavitt asserts that the judge erred in dismissing on summary judgment his breach of contract claims where there were material facts in dispute and where the judge made clearly erroneous findings of fact. He has not, however, pointed to any such facts or findings, and the argument is thus waived. See Mass. R. A. P. 16 (a) (9) (A), as appearing in 481 Mass. 1630 (2019). Third, Leavitt argues that the judge erred in denying his requests for attorney's fees. Contrary to his assertions, Hanover Ins. Co. v. Golden, 436 Mass. 584, 584 (2002), does not support his argument; it involved an insured who brought a successful action for declaratory relief. Fourth, Leavitt argues that the GEICO and USAA insurance policies that were part of the summary judgment record were not "true and accurate" copies. This argument lacks foundation.

Leavitt also raises an argument with respect to how his PIP-related claim against Aebersold was dismissed. After the judge granted GEICO's motion for summary judgment, Aebersold prepared a motion for judgment on the pleadings based on the same legal arguments (i.e., that she did not have to carry personal injury protection because she had not been in the Commonwealth for more than thirty days in the aggregate in the year of the accident). Before Aebersold received Leavitt's opposition, a different judge held a hearing during which

2. Phillips's negligence. At trial, Leavitt made clear that, as against Phillips, he was seeking damages only for pain and suffering. He thus had the burden of proving that his injuries satisfied at least one of several statutory threshold requirements. See G. L. c. 231, § 6D (limiting recovery of damages for pain and suffering in motor vehicle tort actions to certain circumstances, including when plaintiff's medical expenses exceed $2,000). Leavitt raises two sets of arguments with respect to his proof of these threshold requirements: (1) arguments regarding evidence of his medical expenses and (2) arguments as to the weight of the evidence.[8]

We first turn to Leavitt's arguments regarding evidence of his medical expenses. Leavitt contends that the judge erred in denying his requests to obtain discovery from GEICO and USAA

Aebersold's motion for judgment on the pleadings was raised. Noting that the legal arguments had already been addressed in the ruling on GEICO's motion for summary judgment, the judge dismissed Leavitt's claim against Aebersold. We are not persuaded that this evidences ex parte communications.

[8] We note that Leavitt also alleged a claim for unfair or deceptive acts and practices against Phillips's insurance company, The Commerce Insurance Company (Commerce), related to Commerce's response to Leavitt's demand for settlement. This claim was stayed pending a determination as to Phillips's negligence and then dismissed. To the extent this claim was properly dismissed due to the fact that Phillips is not liable, the claim is addressed herein. Even assuming, however, that some portion of Leavitt's claim survived despite the fact that Phillips is not liable, Leavitt has not raised any arguments with respect to Commerce and any such arguments are waived. See Mass. R. A. P. 16 (a) (9) (A).

regarding any medical bills that they paid on his behalf. Leavitt has not explained, however, how any such payments are relevant to his negligence claim against Phillips. Leavitt further contends that the judge erred in prohibiting him from introducing Medicare summaries to prove the truth of the matter asserted therein, that he received medical care in excess of the $2,000 statutory threshold. See G. L. c. 231, § 6D. This is hearsay, and Leavitt has not articulated a single hearsay exception that applies.[9]

We next turn to Leavitt's arguments as to the weight of the evidence. As stated in note 2, supra, Phillips moved for a directed verdict based on Leavitt's failure to prove an injury sufficient to satisfy the threshold requirements of G. L. c. 231, § 6D. The trial judge initially deferred a decision on this motion but allowed it after the jury concluded that Phillips's negligence did not cause Leavitt's injuries. Leavitt argues that the judge erred in allowing Phillips's motion for a

[9] While G. L. c. 233, § 79G, sets forth procedures for the admission of itemized medical bills to avoid this common hearsay problem, Leavitt has not argued that the Medicare summaries are itemized bills. Even assuming that they are, Leavitt did not follow the procedures set forth in that statute. We further note that Leavitt's arguments with respect to GEICO and USAA may have been intended to address whether they were obligated to help him obtain itemized medical bills that complied with the procedures of G. L. c. 233, § 79G. The policy language that Leavitt cites in support of any such argument imposes no such obligation on either GEICO or USAA.

directed verdict and in denying Leavitt's subsequent motion for a new trial. Both arguments ask us to address the weight of the evidence. See O'Brien v. Pearson, 449 Mass. 377, 383-384 (2007) (setting forth standards of review for motion for directed verdict and motion for new trial). Both arguments fail because there was ample evidence that the automobile accident did not cause Leavitt's injuries. While Leavitt points to the testimony of his treating physician that the automobile accident caused radiculopathy, resulting in pain and numbness in Leavitt's arms and part of his hands, credibility of an expert is for the jury to decide. See Leibovich v. Antonellis, 410 Mass. 568, 573 (1991) ("The jury is entitled to discount, or disbelieve, the expert's testimony"). The jury had reason not to credit Leavitt's treating physician where there was evidence that (1) the accident was a minor one involving a low speed, soft impact, (2) Leavitt did not experience pain in his hands and arms until well after the accident, contrary to his own testimony, (3) neurological tests did not support a finding of radiculopathy, and (4) Leavitt suffered from a degenerative disease that could have caused the pain in his hands and arms.[10]

[10] The jury verdict also mooted Leavitt's underinsured motorist claims against GEICO and USAA. The only argument Leavitt raises as to either claim is that the judge erred in staying discovery pending a determination as to Phillips's negligence. This argument appears to go to Leavitt's ability to obtain discovery

3. Allegations of judicial misconduct. Lastly, Leavitt raises several allegations of judicial misconduct, including that the Superior Court (1) failed to address Leavitt's accusations of ex parte communications, (2) manipulated the docket, and (3) failed to disclose the name of a newly-inducted Superior Court judge who observed one of the hearings in this matter. Leavitt's accusations of ex parte communications and manipulations of the docket are without foundation, and the name of the newly-inducted Superior Court judge was in fact disclosed. All of these arguments are thus without merit.[11]

Judgment affirmed.

By the Court (Vuono, Maldonado & Neyman, JJ.[12]),

Joseph F. Stanton

Clerk

Entered: August 27, 2019.

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regarding the medical bills that GEICO and USAA paid on his behalf, which we have already considered and rejected.

[11] We have carefully considered all of the arguments raised in Leavitt's brief. To the extent any additional arguments have not been addressed specifically herein, we have found them to be without merit. See Commonwealth v. Domanski, 332 Mass. 66, 78 (1954).

[12] The panelists are listed in order of seniority.