MICROFILM DIVIDER

OMB/RECORDS MANAGEMENT DIVISION
SFN 2053 (2/85) 5M

ROLL NUMBER

DESCRIPTION

2370

The micrographic images on this film are accurate reproductions of records delivered to Modern Information Systems for microfilming and were filmed in the regular course of business. The photographic process meets standards of the American National Standards Institute (ANSI) for archival microfilm. NOTICE: If the filmed image above is less legible than this Notice, it is due to the quality of the document being filmed.

Operator's Signature — Date: 10/22/03

2003 SENATE TRANSPORTATION

SB 2370

2003 SENATE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. SB 2370

Senate Transportation Committee

☐ Conference Committee

Hearing Date 2-13-03

Tape Number	Side A	Side B	Meter #
1		X	2900-end
2	X		0-3645
2		X	3100-3500
Committee Clerk Signature	Mary K Monson		

Minutes:

The hearing on SB 2370 relating to definitions for no-fault insurance was opened by **Chairman Senator Thomas Trenbeath.**

Rob Hovland: (Chairman, ND Domestic Insurers' Association) See attached testimony in support of SB 2370.

Senator Nething asked if there was any charted evidence that chiropractic rates rose as soon as the treatments were covered by no-fault.

Rob Hovland replied that years ago when chiropractic treatment was first determined to be considered an acceptable medical treatment the cost went up. His company has not charted rates since treatments were covered by no-fault.

(Meter 4610) Discussion on limiting chiropractic visits to three. Some concern was voiced as to whether visits should be limited.

Pat Ward: (Attorney, Zuger Kirmis & Smith, Bismarck) See attached testimony in support of SB 2370.

Kent Olson: (Executive Director, ND PIA) (Tape 1 Side B Meter 6040 through Tape 2 Side A Meter 180) No fault insurance is too good and that leads to abuses. Cited examples of abuse. Feels that if we can't fix the abuses then repeal the law.

Senator Nething: Reported that the committee has passed out a bill to call for a study of the no fault law.

Kent Olson replied that the no fault law should be studied but throwing it out wouldn't be good for the consumer. It is good coverage.

Brian Bowker (Marketing Manager, Dakota Fire and Insurance Company) Affirmed Dakota Fire support of SB 2370. (Tape 2 Side A Meter 340) In the company's experience, chiropractic treatment is the method of treatment that most easily lends itself to abuse. The proposed definition change to "economic loss" would be welcome to Dakota Fire and would serve to introduce an element of fairness and objectivity. The proposed definition changes to the term "occupying" would be valued in eliminating claim scenarios that stretch the imagination and test the boundaries of logic and reason.

Cal Rolfson: (Bismarck Attorney) See attached testimony in opposition to SB 2370 Subsections 7 and 9 of Section 1. If fraud is the issue, there are currently ample statutes in the state of North Dakota to deal with fraud. Would support a study of the no-fault laws.

Michael Jacklitch (Chiropractor, Wahpeton) See attached testimony in opposition of SB 2370.

Dr. Mark Pewe: (Chiropractor, Rolla and Bottineau) (Tape 2 Side A Meter 2230) Testified in opposition to SB 2370. The three visit limit has no clinical basis. Individuals backing this

legislative initiative are failing to look at the basis of care, medical necessity. It needs to be understood that in cases causing traumatic insult to the body, such as in automobile accidents, each case is uniquely different. Limiting to three visits and then waiting for a referral prescription can cause undue harm to the patient's progress, particularly in the early stages of healing. Medical physicians most likely don't have formal training in chiropractic care so how can they make decisions as to whether chiropractic care is appropriate.

Dan Ulmer: (Blue Cross) (Tape 2 Side A Meter 2700) Testified in opposition of SB 2370. This bill creates a significant cost shift to Blue Cross. Asked if there was really an auto insurance crisis occurring. Need to talk about the ripple effects if the no-fault law is repealed. The changes are significant.

Paula Grossinger (Executive Director of the ND Trial Lawyers Association) (Tape 2 Side A Meter 2980) Addressed the subjective nature of pain. Pain is what the patient says it is. The medical profession is too willing to treat pain by prescribing a pill instead of looking at various effective treatments such as chiropractors.

Jeff Welkum (ND Trial Lawyers) See attached testimony in opposition of SB 2370.

The hearing on SB 2370 was closed.

Senator Nething moved a **Do Not Pass**. Seconded by **Senator Taylor**. Roll call vote 6-0-0. **Passed**. Floor carrier is **Senator Taylor**.

Date: 2-13-03
Roll Call Vote #:

2003 SENATE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. SB 2370

Senate **TRANSPORTATION** Committee

☐ Check here for Conference Committee

Legislative Council Amendment Number

Action Taken Do not pass

Motion Made By Sen. Nething Seconded By Senator Taylor

Senators	Yes	No	Senators	Yes	No
Senator Thomas Trenbeath, Chair	✓		Senator Dennis Bercier	✓	
Senator Duaine Espegard, V. Chair	✓		Senator Ryan Taylor	✓	
Senator Duane Mutch	✓				
Senator Dave Nething	✓				

Total (Yes) 6 No 0

Absent 0

Floor Assignment Senator Taylor

If the vote is on an amendment, briefly indicate intent:

REPORT OF STANDING COMMITTEE (410)
February 13, 2003 4:17 p.m.

Module No: SR-28-2654
Carrier: Taylor
Insert LC: . Title: .

REPORT OF STANDING COMMITTEE

SB 2370: Transportation Committee (Sen. Trenbeath, Chairman) recommends DO NOT PASS (6 YEAS, 0 NAYS, 0 ABSENT AND NOT VOTING). SB 2370 was placed on the Eleventh order on the calendar.

(2) DESK, (3) COMM

SR-28-2654

2003 TESTIMONY

SB 2370

TESTIMONY ON SENATE BILL 2370

My name is Rob Hovland. I am currently the Chairman of the North Dakota Domestic Insurers' Association, and here to support Senate Bill 2370.

The proposed changes to Sections 12 and 13 of N.D.C.C. 26.1-41-01 address problems in no-fault insurance that unreasonably drive up the cost of auto insurance. Claims involving vehicle maintenance, "entering or alighting from the vehicle," and injuries in which the vehicle just happens to the object where an injury occurs are good examples of the problems these changes are intended to fix. Essentially, the proposed changes would provide no-fault coverage for the typical auto accident, but would discontinue coverage for non-accident related claims.

The proposed changes to Sections 7 and 9 are intended to partially address the problems caused by chiropractic and massage therapy, with respect to no-fault insurance. When the North Dakota legislature mandated no-fault insurance in 1975, there were two primary goals – help people injured in auto accidents get back on their feet, and give consumers a more cost efficient system of having injury related expenses paid. This would be accomplished by having no-fault insurance pay for medical bills until an injured person reached their "maximum medical improvement," and also pay lost wages during the recovery period.

Chiropractic care and massage therapy were not considered when the no-fault laws were designed, because in 1975, neither were accepted as legitimate

medical treatment. As a result, a number of problems have arisen concerning chiropractic care and massage therapy, with respect to no-fault insurance. For example, no one anticipated that no-fault insurers would be paying significantly more for treatments than private payers or health insurers. Likewise, another issue that wasn't considered was chiropractic and massage therapy rates rising as soon as treatments were required to be covered by no-fault insurance. Problems with pre-existing injuries, and the incentive of chiropractors and claimants to attribute them to auto accidents was also never considered. Furthermore, the unanticipated claims handling costs associated with no-fault insurance and chiropractic care and massage therapy have produced a cost inefficient system that has defeated the purpose of no-fault insurance. Simply put, chiropractic treatment and massage therapy coverage under no-fault insurance is a bad buy for consumers.

The proposed changes to the chiropractic care and massage therapy are an attempt to put some cost control measures on an inefficient system that is costing North Dakota consumers dearly.

We would urge a Do Pass on Senate Bill.

Testimony of Patrick Ward In Support of SB 2370

My name is Patrick Ward. I am an attorney with the law firm of Zuger Kirmis & Smith of Bismarck. I represent the North Dakota Domestic Insurance Companies. I am here to testify in support of SB 2370.

SB 2370 makes two simple changes in the no fault definitions. The first of these, is a limitation on the number of chiropractic visits on a no fault claim without a medical prescription. The second definition changes and tightens up the definition of occupying a vehicle to more narrowly provide coverage only if the accident occurs while actually seated in the vehicle. Both of these definitions in their existing form have caused substantial problems by being overboard.

In the last several years since the no fault statute was enacted, my law firm and others like it in the state, have obtained many defense verdicts in lawsuits based on a jury finding of "no serious injury" related to the motor vehicle accident. As a result of those verdicts, the liability carrier for the defendant driver is not required to pay any damages to the claimant. Unfortunately, those verdicts come years after the no fault insurer for the claimant has paid thousands of dollars in medical bills. Frequently these claims involve very minor fender benders with little or no damage to the vehicle and a claimant who has a long prior history of orthopedic problems with the neck and back, numerous prior chiropractic or massage visits, and sometimes accompanying depression or attention seeking behavior. In

many of these cases, the no fault carrier has already paid its entire limits of $30,000. More frequently, the amount paid out for chiropractic and other diagnostic tests is in the range of $5,000 to $20,000. In about 2 or 3% of cases, according to a recent DOI study, an IME was done and benefits terminated. Even after the successful verdict for the defense that the injuries claimed to be caused by the motor vehicle accident were definitely not, the no fault insurer has no way to recoup the thousands of dollars it has paid out.

In some cases, there are glaring examples of fraud. In one recent case tried about two years ago by one of my partners in Minot, a chiropractor now residing in Minnesota admitted under oath that he had changed the medical records to show the date of first treatment as being after a motor vehicle accident when it was actually several days before the motor vehicle accident. In that case, the no fault insurer paid out $4,500 for chiropractic treatments that were not related to the motor vehicle accident. The records were changed so that bills could be submitted to an insurer at a much higher rate than would be paid by the claimant without insurance coverage.

Another interesting example is the case of Platz v. Austin Mutual Insurance decided by the North Dakota Supreme Court on July 11, 2002. A copy of that decision is attached to this testimony. In that case, both Mrs. Platz and her daughter, Rebecca Johnson, claimed to be injured in an accident when a Barnes County mower tractor made a sudden left turn in front of their pickup near

Sanborn, North Dakota. Platz had insurance coverage with Austin Mutual which provided the standard no fault coverage of $30,000 per person.

In a period of about 10 months, Austin Mutual paid Platz $11,600 and Johnson $6,700 for medical expenses. This included 134 chiropractic trips in 10 months. Austin Mutual also paid Platz $5,000 and Johnson $409 for lost wages during the same period. Finally, on June 30, 1998, Austin Mutual send a letter to Platz and Johnson terminating their benefits based on an independent medical examination by an orthopedic specialist.

Platz and Johnson sued Austin Mutual claiming breach of contract and bad faith. The court concluded after trial that neither Platz nor Johnson were entitled to any benefits under the no fault policy after the termination date of the independent medical examination. The court stated that the intent of no fault insurance was to encourage quick informal payments to insure claimants were compensated for their injuries. Platz also expected Austin Mutual to pay for a large multi person hot tub, special mattress, a conversion seat, and a treadmill. She did not disclose to her treating physicians her extensive medical history involving pain and treatment to the same areas of her body she claimed were injured in the motor vehicle accident. Although Austin Mutual prevailed in the lawsuit, it had to pay its attorneys' fees to defend the claim. In addition, it had no way to recover the over $11,000 it paid for chiropractic and other treatments for Platz or the $6,700 it paid for chiropractic and other treatments to Johnson.

The current North Dakota no fault system has many flaws. A minority of states which still have no fault insurance are reviewing whether the system should continue to exist. Many states are doing away with it altogether. Several states have limitations on chiropractic treatments under no fault either by limiting the total number of treatments or a specific dollar amount for the visits. A few states require medical expenses under no fault to follow the same schedule as Blue Cross Blue Shield or Medicare schedules of fees.

We urge you to redefine the definition of medical expenses in the no fault statute to put a reasonable limit on the number of chiropractic visits available.

Likewise, the definition of occupying under the statute is currently over broad. In a 1979 decision, Weber v. State Farm Mutual, a man that was hunting was removing a loaded shotgun from the vehicle when the gun went off. Under the broad definition of occupying our Supreme Court found that that injury was covered under no fault. There have been more recent examples with cases where persons have sustained injuries while loading or unloading a vehicle that should more properly have been charged to their medical insurer but unfortunately were charged to the no fault carrier where there is no fee schedule, co-payments, or deductibles.

The vast majority of automobile insurers in North Dakota are mutual companies which are in essence owned by their policyholders. If those companies are able

to keep down costs, it translates into more reasonable insurance premiums. Given all of the other factors currently affecting automobile insurance premiums in North Dakota, these repairs to the no fault statue are reasonable and necessary. Lets make sure that only reasonable and necessary medical expenses are charged to the no fault insurer from the beginning of the process before it is too late to recoup the costs being paid out by policyholders of these mutual companies to cover these non-accident related injuries.

We urge a unanimous Do Pass on SB 2370.

2370

Supreme Court of North Dakota.
Janice A. **PIATZ** and Rebecca B. Johnson, Plaintiffs and Appellants,
v.
AUSTIN MUTUAL INSURANCE COMPANY, a corporation, Defendant and Appellee.
No. 20010082.
July 11, 2002.

Insureds brought action against automobile insurer for breach of contract and bad faith by terminating no-fault benefits. The East Central Judicial District Court, Cass County, Lawrence A. Leclerc, J., bifurcated the trial and dismissed the claims. Insureds appealed. The Supreme Court, Neumann, J., held that: (1) insurer did not waive its defense that continued medical care was unnecessary by making prior no-fault payments; (2) evidence of orthopedic specialist's independent medical examinations for and payments by automobile insurer could be excluded based on inadequate foundation; (3) orthopedic specialist was qualified to testify as an expert for automobile insurer; and (4) evidence supported trial court's conclusions that a larger hot tub, a special mattress, a conversion seat, and a treadmill were not reasonable and necessary medical or rehabilitation expenses.
Affirmed.
Mary Muehlen Maring, J., concurred in the result.

West Headnotes

[1] KeyCite Notes

30 Appeal and Error
30XVI Review
30XVI(H) Discretion of Lower Court
30k949 k. Allowance of Remedy and Matters of Procedure in General. Most Cited Cases

A trial court's ruling on bifurcation of trials will not be overturned on appeal unless the complaining party demonstrates the court abused its discretion. Rules Civ.Proc., Rule 42(b).

[2] KeyCite Notes

30 Appeal and Error
30XVI Review
30XVI(H) Discretion of Lower Court
30k944 Power to Review
30k946 k. Abuse of Discretion. Most Cited Cases

A trial court abuses its discretion when it acts in an arbitrary, unreasonable, or unconscionable manner or when its decision is not the product of a rational mental process leading to a reasoned determination.

30 Appeal and Error
30XVI Review
30XVI(I) Questions of Fact, Verdicts, and Findings
30XVI(I)3 Findings of Court
30k1012 Against Weight of Evidence
30k1012.1 In General
30k1012.1(1) k. In General. Most Cited Cases

The Supreme Court does not second-guess the trial court on its credibility determinations in a bench trial, does not reweigh evidence or reassess credibility, does not reexamine findings of fact made upon conflicting testimony, but gives due regard to the trial court's opportunity to assess the credibility of the witnesses.

[23] KeyCite Notes

30 Appeal and Error
30XVI Review
30XVI(I) Questions of Fact, Verdicts, and Findings
30XVI(I)3 Findings of Court
30k1011 On Conflicting Evidence
30k1011.1 In General
30k1011.1(7) k. Clear, Plain, or Manifest Error. Most Cited Cases

The trial court's choice between two permissible views of the evidence is not clearly erroneous.

*684 Leland F. Hagen (argued) of Lee Hagen Law Office, Ltd., Fargo, for plaintiffs and appellants.

R.B. McLarnan and Timothy J. McLarnan (argued) of McLarnan, Hannaher & Skatvold, P.L.L.P., Moorhead, for defendant and appellee.

NEUMANN, Justice.

[¶ 1] Janice Piatz and Rebecca Johnson appeal from the trial court's judgment dismissing their claims against Austin Mutual Insurance Company for breach of contract and bad faith. We affirm.

I

[¶ 2] On July 2, 1997, Janice Piatz and her daughter, Rebecca Johnson, were both injured in an accident when a Barnes County mower tractor made a sudden left turn in front of their pickup on a highway near Sanborn, North Dakota. Both Piatz and Johnson sustained injuries from the collision. Piatz and Johnson had insurance coverage issued by Austin Mutual Insurance Company. The policy provided standard no-fault coverage in the amount of $30,000 per person.

[¶ 3] Piatz and Johnson submitted claims for no-fault benefits with Austin Mutual. Between July 2, 1997, and May 26, 1998, Austin Mutual paid Piatz $11,629.95 and Johnson $6,749.72 for medical expenses. Austin Mutual also paid Piatz $5,055.23 and Johnson $409.75 for their wages lost during the same period. On June 30, 1998, Austin Mutual sent a letter to Piatz and Johnson terminating their benefits. This letter was based on the opinion of Dr. Robert Fielden, who, after conducting an individual medical examination, determined Piatz did not require any treatment beyond six to eight weeks following the accident, and Johnson did not require any further treatment beyond four to six weeks following the accident.

[¶ 4] Piatz and Johnson sued Austin Mutual claiming breach of contract and bad faith. On the morning of the trial, the trial court informed the parties it was bifurcating the claim for breach of

contract from the claim for bad faith. Plaintiffs then waived the jury on the breach of contract claim, and that claim was tried to the court on December 11 through 13, 2000. On February 5, 2001, the trial court issued its findings of fact, conclusions of law, and order for judgment, concluding neither Piatz nor Johnson were entitled to benefits for expenses incurred after May 26, 1998. A judgment of dismissal of their claims was entered March 19, 2001. Piatz and Johnson appeal.

II

[¶ 5] Piatz and Johnson argue the trial court abused its discretion when, on its **685* own motion, it bifurcated trial of the breach of contract and bad faith claims. Piatz and Johnson claim the trial court's order did not further the convenience of the parties because all the exhibits and testimony would have to be submitted anew in the second trial. They contend the decision did not advance fairness, justice, or judicial economy, and it caused considerable inconvenience and expense.

[1] [2] [3] [¶ 6] A trial court's ruling on bifurcation of trials under N.D.R.Civ.P. 42(b) will not be overturned on appeal unless the complaining party demonstrates the court abused its discretion. *See Praus v. Mack*, 2001 ND 80, ¶ 8, 626 N.W.2d 239 (affirming a denial of a motion to sever trial of an indemnity claim from trial of a negligence action). A trial court abuses its discretion when it acts in an arbitrary, unreasonable, or unconscionable manner, or when its decision is not the product of a rational mental process leading to a reasoned determination. *Id.* at ¶ 6. An abuse of discretion by the trial court is never assumed, the party seeking relief has the burden to affirmatively establish it. *Gepner v. Fujicolor Processing, Inc.*, 2001 ND 207, ¶ 13, 637 N.W.2d 681.

[4] [5] [6] [¶ 7] A touchstone for an effective appeal on any proper issue is that the matter was appropriately raised in the trial court so the trial court could effectively rule on it. *State v. Freed*, 1999 ND 185, ¶ 13, 599 N.W.2d 858. To take advantage of irregularities during trial, a party must object at the time they occur, so that the trial court may take appropriate action if possible to remedy any prejudice that may have resulted. *Anderson v. Otis Elevator Co.*, 453 N.W.2d 798, 801 (N.D.1990). A party's failure to object to an irregularity at trial acts as a waiver. *Sabot v. Fargo Women's Health Org.*, 500 N.W.2d 889, 894 (N.D.1993).

[7] [¶ 8] We have not had the opportunity prior to this case to address a *sua sponte* order of bifurcation. Because N.D.R.Civ.P. 42(b) is virtually identical to the similar federal rule from which it was derived, this Court will look to relevant federal caselaw construing the federal rule for guidance in construing our own rule. *Kiker v. Walters*, 482 N.W.2d 626, 628, n. 2 (N.D.1992). In *Johnson v. Helmerich & Payne, Inc.*, 892 F.2d 422 (5th Cir.1990), the appellants argued the trial court erred in bifurcating the trial issues on the morning of the trial. The court stated that appellants' failure to object precludes appellate review unless the issue presents a pure question of law and to ignore it would result in a miscarriage of justice. *Id.* at 424. The court declined to review the propriety of the trial court's decision to bifurcate the trial absent an objection on the record because the separation of issues is an obvious use of Rule 42(b). *Id.* (citing 9 C. Wright & A. Miller, *Federal Practice and Procedure*, § 2390 (1971)).

[8] [¶ 9] In the present action, Piatz and Johnson admit in their brief they failed to object to the trial court's decision to bifurcate the issues of breach of contract and bad faith. Piatz and Johnson argue their failure to object does not amount to a waiver. They claim that under N.D.R.Civ.P. 46, an objection was unnecessary because they were not given an opportunity to object.

[9] [¶ 10] The relevant portion of N.D.R.Civ.P. 46 provides, "if a party has no opportunity to object to a ruling or order at the time it is made, the absence of an objection does not thereafter prejudice the party." The transcript provided by Piatz and Johnson does not include the trial court's ruling on bifurcation. Without a transcript of the trial court's ruling, we are unable to determine that

the trial court did not allow Piatz and Johnson an **686* opportunity to raise a proper objection. Unless the record affirmatively shows the occurrence of the matters which the appellant relies upon for relief, the appellant may not urge those matters on appeal. *City of Grand Forks v. Dohman*, 552 N.W.2d 66, 68 (N.D.1996) (citing *State v. Raywalt*, 436 N.W.2d 234, 239 (N.D.1989)). We have stated that when the record on appeal does not allow for a meaningful and intelligent review of the alleged error, we will decline to review the issue. *Bell v. Bell*, 540 N.W.2d 602, 604 (N.D.1995). Having failed to object to the trial court's decision, and having failed to present this Court with a proper record for review, we conclude Piatz and Johnson have not met their burden of proving the trial court abused its discretion in bifurcating the trial.

III

[10] [¶ 11] Piatz and Johnson claim Austin Mutual's initial payments for medical expenses were made when it had access to both Piatz and Johnson's medical records. Therefore, they argue Austin Mutual waived its defense that continued claims for benefits were not reasonable or necessary because Austin Mutual had made prior payments. We disagree.

[11] [¶ 12] Piatz and Johnson's argument is contrary to the public policy behind North Dakota's no-fault statute, N.D.C.C. ch. 26.1-41. No-fault insurance was designed to encourage quick, informal payments to assure injured plaintiffs are compensated for their injuries. *See* John Alan Appleman & Jean Appleman, *Insurance Law and Practice* § 5162, at 441 (2002); *see also Aponte-Correa v. Allstate Ins. Co.*, 162 N.J. 318, 744 A.2d 175, 178 (2000). "One of the primary purposes of the no-fault insurance law is to avoid protracted litigation over issues of fault or causation." *Weber v. State Farm Mut. Auto. Ins. Co.*, 284 N.W.2d 299, 301 (N.D.1979). The intent was to secure rapid payment of claims by eliminating the fault controversy and wasteful litigation, similar to the objectives of workers' compensation statutes. Appleman, *supra*, § 5162, at 441.

[¶ 13] Similar arguments have been raised in the workers' compensation arena. *See e.g. Childs v. Copper Valley Electric Ass'n*, 860 P.2d 1184, 1190 (Alaska 1993); *Townsend v. Argonaut Ins. Co.*, 60 Or.App. 32, 652 P.2d 828, 830 (1982). In *Townsend*, the plaintiff injured his back at work and started receiving medical benefits. 652 P.2d at 829. Five years after the initial injury, the plaintiff was diagnosed with ankylosing spondylitis, a form of arthritis of the spine. *Id.* Argonaut Insurance agreed to continue paying medical expenses and benefits until the dispute over the cause of injury was resolved. *Id.* at 830. The plaintiff argued on appeal that Argonaut waived its right to deny compensability of his back disease because it continued paying medical benefits after the disease was diagnosed. *Id.* The court rejected the plaintiff's argument, holding the plaintiff's position would subvert the purpose of the workers' compensation system by encouraging the insurance company to withhold benefits. *Id.* at 831.

[¶ 14] In *Childs*, the plaintiff argued that because the employer had paid initial medical bills, the employer was estopped from denying any further liability. 860 P.2d at 1190. The court found the trial judge was correct in rejecting this argument on public policy grounds. *Id.* The trial judge concluded that to hold otherwise "would encourage every employer to dispute an employee's claim to the fullest extent possible, since any payment of benefits might be seen as a concession of liability." *Id.*

**687* [¶ 15] We find the rationale in these cases supports our rejection of the plaintiffs' argument in the present case. Austin Mutual paid no-fault benefits for claims submitted by Piatz and Johnson. After a period of time, questions were raised about reasonableness and necessity of continued treatment. Austin Mutual conducted an independent medical examination and determined no further benefits were necessary. To hold that Austin Mutual waived its defense regarding the necessity of continued medical care by initially paying no-fault benefits would encourage insurance carriers to examine and litigate every claim before any benefits were paid. This is contrary to the rationale and public policy of the no-fault statutes.

IV

[¶ 16] Piatz and Johnson argue the trial court erred in excluding evidence of Dr. Fielden's prior independent medical examinations. Piatz and Johnson offered Dr. Fielden's answers to interrogatories from a prior case to indicate he performed an average of approximately 1,200 individual medical examinations and earned over $500,000 per year. The trial court refused to take judicial notice of this document, ruling there had not been sufficient foundation established.

[12] [13] [¶ 17] A trial court's decision to exclude evidence because of inadequate foundation lies within the sound discretion of the trial court and will not be disturbed on appeal unless there was an abuse of discretion that affected substantial rights of the parties. *Swiontek v. Ryder Truck Rental, Inc.*, 432 N.W.2d 893, 896 (N.D.1988). We review a trial court's exclusion of evidence on foundational grounds as follows:

Whether or not an exhibit should have been excluded on the basis that it lacked adequate foundation is primarily within the sound discretion of the trial court, the exercise of which will not be disturbed on appeal in the absence of a showing that it affected the substantial rights of the parties.

Id. (citing *Ned Nastrom Motors, Inc. v. Nastrom-Peterson-Neubauer Co.*, 338 N.W.2d 64, 66 (N.D.1983)).

[14] [¶ 18] Piatz and Johnson attempted to introduce evidence concerning Dr. Fielden's prior individual medical examinations through Austin Mutual's previous attorney who handled their claim. The trial court excluded the document and refused to take judicial notice because Piatz and Johnson had not established a connection between Dr. Fielden's answers to interrogatories and the testifying witness. We do not find this to be an abuse of discretion.

[¶ 19] Further, any harm caused to Piatz and Johnson was nullified by the inclusion of the evidence in Dr. Fielden's deposition. Dr. Fielden did not testify at trial, but his deposition was received by the trial court. At his deposition, Piatz and Johnson were able to cross-examine him with the information they tried to introduce at trial. The trial court was made aware of the number of individual medical examinations performed by Dr. Fielden and the amount of income he received.

V

[15] [¶ 20] Piatz and Johnson argue Dr. Fielden was not qualified to express an opinion about whether chiropractic treatment was necessary. They claim Dr. Fielden acknowledged he had no training in the field of chiropractic treatment, yet the trial court gave full weight to his opinions.

[16] [17] [¶ 21] Whether a witness is qualified as an expert is within the sound discretion of the trial court, and will not be **688* reversed on appeal unless that discretion is abused. *Myer v. Rygg*, 2001 ND 123, ¶ 8, 630 N.W.2d 62. A trial court abuses its discretion when it acts in an arbitrary, unreasonable, or unconscionable manner, or when its decision is not the product of a rational mental process. *Botnen v. Lukens*, 1998 ND 224, ¶ 12, 587 N.W.2d 141. We are reluctant on appeal to interfere with the broad discretion given to the trial courts to determine the qualifications and usefulness of expert witnesses. *Myer*, 630 N.W.2d 62, 2001 ND 123, at ¶ 8.

[¶ 22] Dr. Fielden was asked to explain the conclusions he reached concerning the physical condition of Piatz and Johnson. Johnson and Piatz objected because Dr. Fielden was not a chiropractor and should not be allowed to comment about the necessity of any chiropractic treatment. We have explained that a witness need not be licensed in a given field to be an expert, so long as the witness possesses the requisite knowledge, skill, experience, training, or education in that field. *See Oberlander v. Oberlander*, 460 N.W.2d 400, 402 (N.D.1990); *see also Myer*, 630 N.W.2d 62, 2001 ND 123, at ¶ 14; *Kluck v. Kluck*, 1997 ND 41, ¶ 9, 561 N.W.2d 263; *State v. Carlson*, 1997 ND 7, ¶ 26, 559 N.W.2d 802; *Anderson v. A.P.I. Co.*, 1997 ND 6, ¶ 9, 559 N.W.2d 204. The record reflects that Dr. Fielden graduated from medical school in 1957 and went on to receive specialized training in orthopedic surgery, taught orthopedic surgery at the University of Toronto and the University of

Minnesota, and continued to perform orthopedic surgeries until 1994. Dr. Fielden testified as to his opinion regarding the condition of Piatz and Johnson based on his individual evaluation and his years of experience as an orthopedic specialist. We conclude the trial court did not abuse its discretion in allowing Dr. Fielden to testify concerning the medical conditions of Piatz and Johnson.

VI

[18] [¶ 23] Piatz and Johnson argue the trial court's findings of fact are clearly erroneous. They challenge the following findings of fact: the small hot tub provided by Austin Mutual was sufficient to comply with Austin Mutual's contractual obligation; a special mattress was not a reasonable or necessary medical rehabilitation expense for Johnson; a conversion seat was not a reasonable or necessary medical rehabilitation expense for Johnson; a treadmill was not a reasonable or necessary medical rehabilitation expense for Johnson; Piatz failed to disclose to her treating physicians her extensive medical history involving pain and treatment to the same areas of her body she claims were injured in the accident on July 2, 1997; no reliable medical opinions were submitted on behalf of Piatz connecting her claim for damages to the accident; and prior to May 26, 1998, Piatz and Johnson had recovered from any and all injuries she sustained in the accident of July 2, 1997.

[19] [20] [21] [22] [23] [¶ 24] We review the trial court's findings of fact under the clearly erroneous standard set forth in N.D.R.Civ.P. 52(a). *Auction Effertz, Ltd. v. Schecher*, 2000 ND 109, ¶ 10, 611 N.W.2d 173. A trial court's findings of fact on appeal are presumed to be correct, and the complaining party bears the burden of demonstrating a finding is clearly erroneous. *State ex rel. Heitkamp v. Family Life Servs.*, 2000 ND 166, ¶ 19, 616 N.W.2d 826. A trial court's findings of fact are not clearly erroneous under if they have support in the evidence, and we are not left with a definite and firm conviction a mistake has been made. *Id.* In *Estate of Howser*, 2002 ND 33, ¶ 10, 639 N.W.2d 485 (quoting *Moen v. Thomas*, 2001 ND 95, ¶ 19-20, 627 N.W.2d 146), we explained:

***689** In a bench trial, the trial court is "the determiner of credibility issues and we do not second-guess the trial court on its credibility determinations." We do not reweigh evidence or reassess credibility, nor do we reexamine findings of fact made upon conflicting testimony. We give due regard to the trial court's opportunity to assess the credibility of the witnesses, and the court's choice between two permissible views of the evidence is not clearly erroneous.

[¶ 25] In its findings of fact, the trial court gave significant weight to Dr. Fielden's conclusion that Piatz and Johnson had fully recovered from any injuries sustained in the accident on July 2, 1997. The trial court found no reliable medical opinions were submitted on behalf of Piatz because Piatz had failed to disclose to her doctors her prior medical history regarding pain and treatment to the areas injured in the accident on July 2, 1997. The trial court also noted Johnson had engaged in full and rigorous exercise and physical activity since the accident, including participating in track by throwing the discus and shot-put, lifting weights, running, doing gymnastics, playing basketball, and snowmobiling. These facts, combined with Dr. Fielden's conclusions, support the trial court's findings that a larger hot tub, a special mattress, a conversion seat, and a treadmill were not reasonable and necessary medical or rehabilitation expenses. After reviewing the evidence in this case, we are not left with a definite and firm conviction that a mistake has been made. We conclude the trial court's findings of fact are not clearly erroneous.

VII

[¶ 26] The judgment of dismissal is affirmed.

[¶ 27] GERALD W. VANDE WALLE, C.J., DALE V. SANDSTROM, and CAROL RONNING KAPSNER, JJ., concur.

MARY MUEHLEN MARING, J.: I concur in the result.
N.D.,2002.

TESTIMONY

BY
CALVIN N. ROLFSON
IN OPPOSITION TO
SENATE BILL 2370

My name is Cal Rolfson. I am attorney in Bismarck. Thank you for the privilege of appearing before you today.

I represent the North Dakota Chiropractic Association. I appear here in opposition to Subsections 7 and 9 of Section 1 of Senate Bill 2370. Let me explain why.

Chiropractic care is recognized and accepted by the public policy of North Dakota and the medical community at large for the valuable resources they provide to injured citizens suffering from musculoskeletal and neuromuscular conditions, especially those involving the spine. Many clinics, medical facilities and hospitals across the state of North Dakota have Doctors of Chiropractic on their staffs because of public demand for their services. This is particularly true in rural clinics and hospitals in North Dakota.

Let me give you the top ten reasons why Subection 7 and 9 of Section 1 of this Bill should be killed.

1. The three-visit chiropractor (and massage) limit found on lines 8-10 and 18-20 on page 1 of the Bill is utterly arbitrary and based upon no scientific or other research as far as I can tell. It is essentially insulting to patients and car accident victims who seek chiropractic (and massage) care for their injuries.

2. The proposed language that I referenced found in Subsection 7 and 9 of Section 1 of the Bill, implies first that chiropractic care is appropriate, but without any references to a particular class of injury, or patient class, or otherwise, the language globally says that after three visits the patient must interrupt her care by a chiropractor and make a separate appointment with a medical doctor before continuing with recovery. I know of no public policy in North Dakota that claims to be competent to distinguish between the type of provider care one individual must receive as a result of injuries in a car accident, as opposed to another would receive.

3. Many medical doctors know less about spinal and musculoskeletal injuries than chiropractors. However, the Bill doesn't explain why <u>any</u> physician who may have little specific knowledge of the spine, (whether an internist, general practitioner, endocrinologist, or ob/gyn

physician) must "prescribe" further chiropractic care to have the injured insured continue with the care he may have initiated with his chiropractic physician.

4. The Bill uses the term "prescription" rather than "referral" to describe the orders for 4+ chiropractic treatments. I'm not sure a "prescription" is the proper term.

5. The Bill does not distinguish between injured elderly, injured teenagers, injured men or women, or physically impaired drivers. Each may have their own unique rehabilitation needs. The Bill simply lumps all injuries and all drivers and all physicians and all chiropractors into one pot and pays no attention to unique medical necessity. That should be exclusively for healthcare providers to determine, not the government. It makes just as much sense to limit medical doctors to three visits without a referral from a chiropractor.

7. In order to drive lawfully, automobile drivers pay a premium for an insurance policy that contains PIP/No-fault coverage as required by the public policy of North Dakota. The insurance contract does not provide such three-visit limitation for chiropractors. It would certainly surprise most of us if insurance companies in North Dakota would

reduce their premiums if this Bill becomes law.

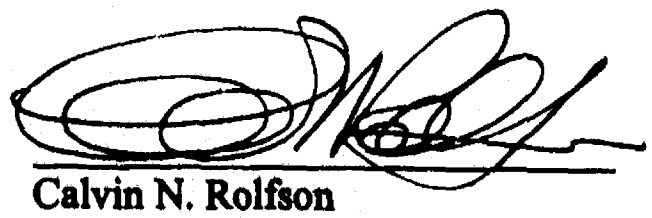
8. What is the rationale for permitting unlimited religious healing methods, unlimited dental care, unlimited x-rays or unlimited nursing care, but arbitrarily limiting chiropractic care to three visits?

9. The objectionable portions of this Bill actually favor chiropractors that practice in medical clinics and hospitals in rural areas where that collaborative relationship is common. It discriminates against those in private practice.

10. If injured patients are not able to see chiropractors for more than three visits without an M.D. referral, the injured patient will be required to seek more expensive M.D. care. It is a well established maximum that the longer a person with a back injury can stay out of surgery, the better.

Following my testimony you will hear from several doctors of chiropractic who will explain from their own personal experience why this portion of Senate Bill 2370 is not only insulting to them, but risks increase medical cost for the injured person and their insurer.

Thank you for the privilege of appearing before this Committee.



Calvin N. Rolfson
Legislative Counsel
North Dakota Chiropractic Association
(Lobbyist No. 144)

PROPOSED AMENDMENTS TO SENATE BILL NO. 2370

Page 1, line 1, remove "7, 9,"

Page 1, remove lines 6 through 20.

Renumber accordingly

Chiropractic care is a mainstream form of therapeutic care for musculoskeletal and neuromuscular conditions that is widely recognized by the insurance industry, the federal government with its Medicare and related programs, and state programs including the North Dakota Workers Compensation Bureau. Chiropractic care is recognized and accepted by the medical community at large as an appropriate treatment for musculoskeletal and neuromuscular conditions, especially those involving the spine. This is evidenced by the fact that many medical facilities and hospitals across the state of North Dakota have direct chiropractic access with chiropractors on staff. This bill somewhat puzzles me, as it appears that the Chiropractic profession and Chiropractic treatment is being targeted for restrictive parameters, when other forms of care, including care that is provided in accordance with recognized religious healing methods, are not addressed in this bill.

The restrictive limit as proposed in the current bill, seems at best arbitrary and appears to be a prejudicial limit as to the type of doctor who can render care or services for legitimate physical injuries. There is no clinical basis for choosing such a number, and to think that with every physical injury, a pre-determined level of care is considered appropriate, flies in the face of reality. Care must be based on medical necessity, both with the type of intervention and the length of care required. The medical necessity of care is based on many individual factors, each unique and contributory to the entire clinical picture of each individual patient. These factors may include, but are not limited to the severity of the

Michael Jacklitch

Chiropractic care is a mainstream form of therapeutic care for musculoskeletal and neuromuscular conditions that is widely recognized by the insurance industry, the federal government with its Medicare and related programs, and state programs including the North Dakota Workers Compensation Bureau. Chiropractic care is recognized and accepted by the medical community at large as an appropriate treatment for musculoskeletal and neuromuscular conditions, especially those involving the spine. This is evidenced by the fact that many medical facilities and hospitals across the state of North Dakota have direct chiropractic access with chiropractors on staff. This bill somewhat puzzles me, as it appears that the Chiropractic profession and Chiropractic treatment is being targeted for restrictive parameters, when other forms of care, including care that is provided in accordance with recognized religious healing methods, are not addressed in this bill.

The restrictive limit as proposed in the current bill, seems at best arbitrary and appears to be a prejudicial limit as to the type of doctor who can render care or services for legitimate physical injuries. There is no clinical basis for choosing such a number, and to think that with every physical injury, a pre-determined level of care is considered appropriate, flies in the face of reality. Care must be based on medical necessity, both with the type of intervention and the length of care required. The medical necessity of care is based on many individual factors, each unique and contributory to the entire clinical picture of each individual patient. These factors may include, but are not limited to the severity of the

accident, age of the patient, past physical history, and complicating conditions.

With injuries of the type seen as the result of a motor vehicle accident, it is essential to receive care as soon as possible following the accident to affect the best chance at physiological healing. To require a referral to the appropriate specialist, that being a specialist in orthopedics or neurology, one would significantly delay appropriate treatment for the individual. Referrals between chiropractors and medical specialists are commonplace, but are the result of the necessity of a second opinion based on response to treatment or lack thereof. With the restrictive number of 3 visits, there would be no rationale to warrant a referral, as clinical progression in most cases, would be impossible to ascertain within that timeframe. Referrals and clinical judgments for additional therapeutic intervention are based on clinical response to treatment and progression of each case on an individual basis. Appropriate referrals are made to the specialist who is best trained for the type of injury involved in cases such as these involving the musculoskeletal or the neuromuscular system. The referral to an orthopedic specialist or a neurologist would be the appropriate referral. It is common when referring to such a specialist to have to wait four to six weeks before the patient can be seen and evaluated. This would penalize the patient by not allowing him or her to receive necessary care during the critical period of time following the accident, with the possibility of occurrence of complications and impairment.

By imposing such a minimal visit cap, the patients right to choose the type of provider and the type of care is severely limited. This provision in this bill will require the patient to "jump through more hoops" to be able to access and receive care to which he or she is entitled. As with every profession, there are small numbers of providers who attempt to "push the envelope" regarding amount of care provided for the given injury. These providers are few in number, however are very visible to the insurance industry who see these same providers or clinics time and time again, for treating at what would seem to be excessive levels when compared to the rest of their peers. The requirements of referral to another physician for continued chiropractic care is not a viable answer if one is attempting to control the excessive cost by those providers who may treat excessively. As many in the insurance industry no doubt are aware, these providers often times already have in place referring physicians who will allow ongoing continued care, with the benefit of cross referrals and the end result of escalating overall costs to the insurance industry. This bill would only serve to penalize both the patient and the chiropractor who treats in an ethical and appropriate manner. There are viable solutions to this problem, foremost being a review of services based on medical necessity, not on arbitrary numbers. I would encourage the individual insurance carriers to work with the chiropractic profession in North Dakota to help curb excessive treatment and to allow necessary treatment based on the standards for medical necessity.

The economic consequences of forcing patients for referral, after minimal therapeutic chiropractic intervention, only to have care resumed after physiologically damaging delay, would have the exact opposite effect as to what this bill is purporting to control. The most important aspect to remember is that the individual patient has the right to choose caring, competent, and cost effective interventions, such as chiropractic care to promote physiological healing and restoration of active function, both in the work place and everyday life. Care must be based on medical necessity and fairness, and passage of this bill would take neither in consideration.

THANK YOU

Testimony of Jeffrey S. Weikum on Senate Bill No. 2370
February 13, 2003
Senate Transportation Committee

The North Dakota Trial Lawyers oppose the proposed amendments to Subsections 7 & 9 on the grounds that this legislation is violative of North Dakota's Constitution in as much as the legislation restricts citizens' access to the medical providers and care of their choice. Further the intent of this legislation is not rationally related to a legitimate goal and there are adequate measures already in place to address these same concerns through substantially less repugnant means.

The North Dakota Trial Lawyers further oppose the proposed amendments to Subsections 12 & 13 on the grounds that this legislation destroys many of the intended purpose of the current no-fault legislation.

North Dakota no-fault laws are designed to provide access to medical care and ease the immediate financial burden of individuals injured in connection with motor vehicles use and operation. North Dakota has recognized that the motor vehicles are dangerous, people will be injured on a regular basis and there is a good reason to ensure that they have access to medical care and some immediate offset for the financial loss associated with these injuries.

The proposed legislation would remove that protection for the individuals least able to afford to replace the loss from their own resources. Specifically, farm families, children and the elderly.

Passage of this Bill would preclude no-fault protection in such extremely common cases such as:

- Farmers and farm families injured in the use of pickups & farm vehicles
- Anyone injured when riding in the box or tailgate of a pickup or other similar vehicle
- Children/young people who are often injured in the entering or exiting of a vehicle while it is still moving
- Children seated on their parent's laps
- A vehicle passenger lying down in a seat because of illness
- A parent moving about in the passenger compartment of a vehicle attending to the needs of a child

Farm families, children and the elderly are often not covered by health insurance and are the common injured parties in many no-fault situations and will by the most affected by these legislation changes.

Who is Senate Bill 2370 intending to protect? Certainly not the citizens of North Dakota.

As an additional aside, passage of this legislation will increase litigation.

I would respectfully request that the committee assign a **"Do Not Pass"** recommendation to Senate Bill 2370.