STATE OF MICHIGAN

COURT OF APPEALS

MAMADOU ALPHA DIALLO,

Plaintiff-Appellant,

v

AMERICAN COUNTRY INSURANCE COMPANY,

Defendant-Appellee.

UNPUBLISHED
May 14, 2020

No. 349049
Macomb Circuit Court
LC No. 2017-004559-NF

Before: K. F. KELLY, P.J., and BORRELLO and BOONSTRA, JJ.

PER CURIAM.

Plaintiff appeals by right the trial court's order granting summary disposition in favor of defendant. We reverse and remand for further proceedings.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

Plaintiff was injured when his vehicle struck a light pole. Defendant insured the vehicle. Plaintiff applied for personal protection insurance (PIP) benefits, including reimbursement for lost wages as an Uber driver. In the application, in a section labeled "Avg. Weekly Wage/Salary," plaintiff entered $1,465. This amount accurately approximated plaintiff's "gross receipts" as reported on Schedule C of his federal income tax returns; however, because plaintiff had also claimed substantial business expenses, those tax returns also reflected a substantially lower adjusted gross income.

Defendant paid plaintiff PIP benefits, including lost wages, for approximately nine months. When defendant ceased paying those benefits, plaintiff sued for reinstatement of benefits. Defendant moved for summary disposition under MCR 2.116(C)(8) and MCR 2.116(C)(10), arguing that plaintiff had fraudulently represented his wage loss, voiding the policy. The trial court agreed and granted summary disposition in favor of defendant under MCR 2.116(C)(10), stating in relevant part:

> Defendant [sic] signed an Application for Benefits dated February 3, 2017 in which he claimed an average weekly wage/salary of $1,465 from Alaye Limo.

> Defendant's [sic] signed answers to interrogatories on March 2, 2018 that claimed a rate of pay of $1,400-1,600 per week as an Uber driver. He testified on June 21, 2018 to earning, on average, $1,500 per week as an Uber driver.
>
> Uber issued a Form 1099-K to defendant [sic] indicating "Gross amount of payment card/third party network transactions" of $66,177.23 for 2016. Defendant [sic] indicated gross income of $70,327 and business expenses of $66,250 on his 2016 Schedule C, resulting in a net income of $4,077. Therefore, defendant [sic] would have an average income of $78.19 per week in 2016.
>
> Consequently, defendant's [sic] work loss claim is demonstrably false. The misrepresentations are material as the misrepresentations relate to attempts to seek payment of PIP benefits from defendant. The misrepresentations are clearly made with an intent that defendant would rely on them and issue work loss payments, which defendant did issue. Taking into consideration the monetary ramifications of the misrepresentations, reasonable minds could only conclude the misrepresentations were made to defraud defendant.

This appeal followed.

II. STANDARD OF REVIEW

We review de novo a trial court's order granting summary disposition under MCR 2.116(C)(10). *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). "We review a motion brought under MCR 2.116(C)(10) by considering the pleadings, admissions, and other evidence submitted by the parties in the light most favorable to the nonmoving party." *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008). "Summary disposition is appropriate . . . if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *West*, 469 Mich at 183. "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *Id.*

To the extent this Court must interpret and apply the provisions of the no-fault act, we review de novo issues of statutory interpretation. *Tree City Props LLC v Perkey*, 327 Mich App 244, 247; 933 NW2d 704 (2019). "The overall goal of statutory interpretation is to give effect to the intent of the Legislature." *Hmeidan v State Farm Mut Auto Ins Co*, 326 Mich App 467, 478; 928 NW2d 258 (2018). "If the statutory language is clear and unambiguous, judicial construction is neither required nor permitted, and courts must apply the statute as written." *Tevis v Amex Assurance Co*, 283 Mich App 76, 81; 770 NW2d 16 (2009).

III. ANALYSIS

Plaintiff argues that the trial court erred by concluding as a matter of law that plaintiff's reported wage loss should have been based on his adjusted gross income and that plaintiff therefore engaged in fraudulently misrepresentations in applying for PIP benefits. We agree.

The Michigan no-fault act provides that a provider of PIP benefits "is liable 'to pay benefits for accidental bodily injury arising out of the ownership, operation, maintenance or use of a motor vehicle as a motor vehicle . . . .' " *McPherson v McPherson*, 493 Mich 294, 296-297; 831 NW2d 219 (2013), quoting MCL 500.3105(1). "Loss of income from work" is a benefit under the no-fault act. MCL 500.3107(1)(b); *Copus v MEEMIC Ins Co*, 291 Mich App 593, 594; 805 NW2d 623 (2011).

"Work loss" is statutorily defined as " 'loss of income from work an injured person would have performed during the first 3 years after the date of the accident if he or she had not been injured . . . .' " *Hannay v Dep't of Transp*, 497 Mich 45, 80; 860 NW2d 67 (2014), quoting MCL 500.3107(1)(b). "[T]he term 'loss of income from work,' and in particular the term 'income,' is not defined in the statute." *Brown v Home-Owners Ins Co*, 298 Mich App 678, 686; 828 NW2d 400 (2012). "The purpose of the [work-loss] provision is to ensure that work-loss benefits are available to compensate injured persons for the income they would have received but for the accident." *Id*. at 685. "[T]he claimant bears the burden of proof of actual loss of earnings." *Sullivan v North River Ins Co*, 238 Mich App 433, 437; 606 NW2d 383 (1999).

The elements of fraud in connection with an insurance policy are as follows:

> To establish actionable fraud, [defendant] bears the burden of proving that (1) [plaintiff] made a material misrepresentation; (2) it was false; (3) when [he] made it, [he] knew it was false, or else made it recklessly, without any knowledge of its truth, and as a positive assertion; (4) [he] made it with the intention that it should be acted on by [defendant]; (5) [defendant] acted in reliance on it; and (6) [defendant] thereby suffered injury. [*Titan Ins Co v Hyten*, 491 Mich 547, 571-572; 817 NW2d 562 (2012).]

In cases involving a party's intent to commit fraud, summary disposition is rarely appropriate. See *Pemberton v Dharmani*, 207 Mich App 522, 529 n1; 525 NW2d 497 (1994). Intent to defraud consists of "more than mistake of fact or honest misstatements on the part of the insured" and "cannot be established from the mere fact that the loss was less than was claimed in the preliminary proofs furnished to the insurer." *Mina v Gen Star Indemnity Co*, 218 Mich App 678, 686; 555 NW2d 1 (1996), rev'd in part on other grounds 455 Mich 866 (1997).

As a threshold matter, we note that defendant, both in the trial court and on appeal, asserts that plaintiff misrepresented his wage loss on three separate occasions: once when he filled out his application for benefits and twice when responding to questions posed to him during discovery. Further, trial court referenced the answers plaintiff gave during discovery when discussing plaintiff's alleged misrepresentations to defendant. To the extent the trial court relied on the answers given by plaintiff during discovery in making its ruling, it erred by doing so. Plaintiff did not make these statements until *after* defendant had ceased making wage-loss payments to plaintiff; therefore, defendant could not have relied on those statements to its injury. See *Hyten*, 491 Mich at 571-572.

With regard to plaintiff's report of his weekly wages in his application for benefits, we conclude that the trial court erred by determining, as a matter of law, that plaintiff misrepresented, or intended to misrepresent, his wages. On the application form provided by defendant, defendant

asked for plaintiff's "Avg. Weekly Wage/Salary." There is no dispute that, in response, plaintiff provided his gross weekly wages.[1] The terms "wage" and "salary," however, are not defined in the application for benefits. When terms are undefined, "consulting a dictionary is appropriate." *Vushaj v Farm Bureau Gen Ins Co of Mich*, 284 Mich App 513, 515; 773 NW2d 758 (2009) (quotation marks and citation omitted). Merriam-Webster's Collegiate Dictionary defines "salary" as "fixed compensation paid regularly for services." *Merriam-Webster's Collegiate Dictionary* (11th ed). It defines "wage" as "a payment . . . of money for labor or services . . . ." *Id*. Both of these terms refer to a *gross* amount received by virtue of payment. These terms stand in contrast to terms that may imply a *net* benefit, such as "income," which is defined as "a gain or recurrent benefit usually measured in money . . . ." *Id*. Although MCL 500.3107(1)(b) defines "work loss" as "income," that statute controls the amount of wage-loss benefits to which a claimant is entitled;[2] it does not resolve the question of whether plaintiff made a fraudulent misrepresentation when filling out defendant's application. Simply put, defendant asked plaintiff to disclose the amount of his weekly wages, and he did so. Whether this amount should have been reduced by plaintiff's claimed business expenses is a question that is wholly distinct from whether plaintiff made a fraudulent misrepresentation when submitting the application. A jury could find that plaintiff believed, in completing the application, that he was being truthful (or, for that matter, that he was correct) when he based his weekly wage loss on his gross income, regardless of whether it ultimately would be the proper basis for computing the amount of benefits to which he was entitled. See *Mina*, 218 Mich App at 686. Moreover, to the extent there is ambiguity in the terms of the application, any such ambiguity should be construed against defendant. *Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 62; 664 NW2d 776 (2003) ("[I]t is . . . well established that ambiguous language should be construed against the drafter, i.e., the insurer.").

The trial court cited *Bahri v IDS Prop Cas Ins Co*, 308 Mich App 420; 864 NW2d 609 (2014), in determining that plaintiff defrauded defendant; but *Bahri* is easily distinguishable from this case. In *Bahri*, this Court concluded that the trial court had not erred by granting summary disposition on the basis of fraud when the plaintiff had "sought recoupment for services that were performed over the 19 days preceding the accident." *Bahri*, 308 Mich App at 425. The defendant also presented video evidence that depicted the plaintiff "performing activities inconsistent with her claimed limitations." *Id*. As a result of such "clear evidence," this Court concluded that the trial court did not err when it determined that the plaintiff committed fraud when seeking PIP benefits. *Id*. at 426. No such clear evidence exists in this case, and a reasonable juror could have concluded that plaintiff honestly believed that he was providing the correct information on

[1] Defendant does not contest the accuracy of the lost wages figure supplied by plaintiff (as derived from his "gross receipts"). Rather, defendant's position is that the figure should have been derived from plaintiff's adjusted gross income.

[2] We do not mean to imply that plaintiff would only be entitled to recover lost wage income net of business expenses. Rather, in determining lost wages, the factfinder properly may assess, for example, whether or to what extent plaintiff incurred business expenses even while incurring associated lost wages, and whether plaintiff should recover gross lost wages or lost wages net of all or a portion of his business expenses. See *Adams v Auto Club Ins Ass'n*, 154 Mich App 186, 193-194; 397 NW2d 262 (1986).

defendant's application form. See *Mina*, 218 Mich App at 686; see also *Hyten*, 491 Mich at 571-572.

Additionally, the trial court concluded that the difference between plaintiff's weekly wages as stated on his application and his adjusted gross income on his tax returns made plaintiff's claim "demonstrably false" and clearly showed that plaintiff had made misrepresentations to defraud defendant. We disagree that this was clear-cut evidence of fraud or fraudulent intent. "Reasonable business expenses" may indeed, at least in certain circumstances, properly be deducted from gross salary or wages in order to determine lost income. See *Brown*, 298 Mich App at 687, citing *Adams v Auto Club Ins Ass'n*, 154 Mich App 186, 193-194; 397 NW2d 262 (1986). However, in *Adams*, we noted that "[t]he decision concerning whether certain business-related expenses should be deductible business expenses for purposes of determining work-loss benefits is primarily a factual question," and noted further that an insurer possessed the right to seek reimbursement for overpaid benefits. *Adams*, 154 Mich App at 194. Apart from the reasons stated earlier, there was at a minimum a genuine issue of material fact regarding whether some or all of plaintiff's claimed expenses should be charged against his gross receipts. *Id*. We disagree with the trial court that the disparity in plaintiff's gross receipts and adjusted gross income demonstrated fraud or an intent to defraud. See *Hyten*, 491 Mich at 571-572.

We therefore conclude that genuine issues of material fact exist regarding whether plaintiff defrauded or intended to defraud defendant when he submitted the application for wage-loss benefits, and that the trial court therefore erred by granting summary disposition in favor of defendant under MCR 2.116(C)(10). *Nahshal v Freemont Ins Co*, 324 Mich App 696, 719; 922 NW2d 662 (2018) ("When there is a question of fact on at least one of the elements, and the insured is not otherwise entitled to summary disposition, the matter is one for the jury.").

Accordingly, we reverse the trial court's order granting summary disposition in favor of defendant and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Kirsten Frank Kelly
/s/ Stephen L. Borrello
/s/ Mark T. Boonstra