STATE OF MICHIGAN

COURT OF APPEALS

ALI SOUEIDAN,

Plaintiff-Appellant,[1]

and

MOUSSA SOUEIDAN, by Next Friend ALI SOUEIDAN,

Plaintiff,

and

AFFILIATED DIAGNOSTICS OF OAKLAND and HASSAN HAMMOUD, M.D., PC, doing business as ADVANCED ORTHOPEDIC CENTER,

Intervening Plaintiffs,

v

FARM BUREAU GENERAL INSURANCE COMPANY OF MICHIGAN,

Defendant-Appellee.

UNPUBLISHED
July 24, 2018

No. 338388
Wayne Circuit Court
LC No. 16-003386-NF

Before: CAMERON, P.J., and JANSEN and O'CONNELL, JJ.

PER CURIAM.

[1] Defendant's motion for summary disposition was filed against Ali Soueidan only, and Moussa Soueidan was dismissed by stipulation in the lower court, and is not a party on appeal. Therefore, Ali Soueidan will be referred to individually as "plaintiff" herein.

Plaintiff, Ali Soueidan, appeals an order granting defendant, Farm Bureau General Insurance Company of Michigan's, motion for summary disposition in this no-fault action.[2] The trial court granted summary disposition under MCR 2.116(C)(10) concluding that plaintiff made fraudulent claims for personal injury protection (PIP) benefits, thereby voiding his coverage. On appeal, plaintiff argues that the trial court erred in granting summary disposition because there are genuine issues of material fact whether plaintiff's claims for PIP benefits were fraudulent. We disagree and therefore affirm.

I. FACTUAL BACKGROUND

This case arises out of a motor vehicle accident that occurred in Dearborn, Michigan. Plaintiff was stopped at a red light when another driver rear-ended plaintiff's vehicle. Plaintiff is an owner and manager of a car wash and oil change shop. After the accident, plaintiff's doctor gave him a disability certificate and, at that time, plaintiff stopped working or performing housework. Plaintiff's wife, Zahra Soueidan, did all of the household chores and helped plaintiff bathe and get dressed. Plaintiff began collecting PIP benefits, and at some point, defendant hired an investigator to conduct surveillance. During the investigation, an investigator observed plaintiff partaking in activities that were contrary to his claims for PIP benefits, including shoveling snow and working. Defendant discontinued coverage, and plaintiff filed suit. The trial court granted defendant's motion for summary disposition, concluding plaintiff committed fraud in contravention to the insurance policy's fraud provision. Plaintiff argues on appeal that the trial court erred in granting defendant's motion for summary disposition because defendant failed to demonstrate that the discrepancies between plaintiff's testimony regarding his injuries and the surveillance of plaintiff established fraud beyond a question of fact. We disagree.

II. STANDARD OF REVIEW

This Court reviews a motion for summary disposition de novo. *Gorman v American Honda Motor Co, Inc*, 302 Mich App 113, 115; 839 NW2d 223 (2013). This Court reviews only the evidence that was presented at the time the trial court made its decision on the motion. *Id*. at 120. A motion for summary disposition under MCR 2.116(C)(10) challenges the factual sufficiency of a plaintiff's claim. *Gorman*, 302 Mich App at 115. The trial court considers the evidence in the light most favorable to the nonmoving party. *Id*. Summary disposition is proper under MCR 2.116(C)(10) if "there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *Gorman*, 302 Mich App at 116 (quotation marks and citation omitted). There is a genuine issue of material fact "when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *Id*. (quotation marks and citation omitted).

[2] The claims of the intervening plaintiffs and plaintiff's son, Moussa Soueidan, were dismissed by stipulation of the parties in the lower court and are not at issue on appeal.

III. ANALYSIS

Our analysis begins with the terms of the policy at issue. Plaintiff's insurance policy contained the following fraud exclusion:

> The entire policy will be void if, whether before or after a loss, you, any family member, or any insured under this policy has:
> 1. intentionally concealed or misrepresented any material fact or circumstance,
> 2. engaged in fraudulent conduct, or
> 3. made false statements,
> relating to this insurance or to a loss to which this insurance applies.

"The rules of contract interpretation apply to the interpretation of insurance contracts." *McGrath v Allstate Ins Co*, 290 Mich App 434, 439; 802 NW2d 619 (2010). The insurance policy shall be read as a whole, giving effect to each word, clause, and phrase. *Id*. If the language is clear, the specific language must be enforced by the court; however, any ambiguity that exists is construed against the insurance company. *Id*. Undefined terms are given their plain and ordinary meanings. *Id*.

The insurance company has the burden to prove that an exclusionary clause in a policy applies. *Shelton v Auto-Owners Ins Co*, 318 Mich App 648, 657; 899 NW2d 744 (2017). Reliance on an exclusionary clause is an affirmative defense. *Id*. To obtain summary disposition, the insurer must demonstrate that there is no question of material fact regarding any element of the affirmative defense. *Id*. To establish a claim of fraud pursuant to an insurance contract, the following requirements must be met:

> To void a policy because the insured has wilfully misrepresented a material fact, an insurer must show that (1) the misrepresentation was material, (2) that it was false, (3) that the insured knew that it was false at the time it was made or that it was made recklessly, without any knowledge of its truth, and (4) that the insured made the material misrepresentation with the intention that the insurer would act upon it. A statement is material if it is reasonably relevant to the insurer's investigation of a claim. [*Mina v Gen Star Indemnity Co*, 218 Mich App 678, 686; 555 NW2d 1 (1996), rev'd in part on other grounds by 455 Mich 866 (1997) (citation omitted).]

The parties dispute the application of *Bahri v IDS Prop Cas Ins Co*, 308 Mich App 420; 864 NW2d 609 (2014), to the facts at hand. In *Bahri*, the plaintiff was in a car accident, and sought PIP and uninsured motorist benefits from the defendant insurer. *Bahri*, 308 Mich App at 421-422. The trial court granted the insurer's motion for summary disposition because the plaintiff's policy precluded benefits based on her fraudulent misrepresentations. *Id*. at 422. The intervening plaintiffs, two physicians, intervened to recover PIP benefits for the medical services that they provided to the plaintiff and appealed the order granting the insurer summary disposition. *Id*.

On appeal in *Bahri*, this Court agreed that the policy's fraud exclusion applied to the plaintiff's claim. *Id*. at 425. In requesting replacement services, the plaintiff relied upon a

statement indicating that she received 19 days of services before the date of the car accident. *Id*. The document, on its face, made a false claim. *Id*. In addition, the insurer provided surveillance of the plaintiff performing activities inconsistent with the limitations that she claimed. *Id*. The "[p]laintiff was observed bending, lifting, carrying objects, running errands, and driving – on the dates when she specifically claimed she needed help with such tasks." *Id*. One day, the plaintiff claimed that she required assistance doing household chores, but she was seen lifting, carrying, and dumping a bucket of liquid in her yard. *Id*. On another day, she sought replacement services for grocery shopping, but she was observed running errands for eight hours. *Id*. The plaintiff specifically claimed needing someone to drive her, but she was seen driving her own car. *Id*. at 425-426. This Court found that this evidence belied the plaintiff's claims for replacement services, and there was no genuine issue of material fact regarding the plaintiff's fraud. *Id*. at 426. This Court affirmed summary disposition in the insurer's favor. *Id*. at 428.

Plaintiff argues that *Bahri* differs from the facts at hand because the plaintiff in *Bahri* made "blatantly false submissions," and because this Court has recently declined to follow *Bahri* where the facts used to support fraud are not as clear as in *Bahri*. However, plaintiff relies on mostly unpublished case law, which is not binding under the rule of stare decisis, MCR 7.215(C)(1), where this Court did not follow *Bahri*.

Plaintiff also relies on *Shelton*, where this Court distinguished *Bahri*, concluding there were questions of fact as to whether the plaintiff made material misrepresentations with the intent to defraud the insurer. *Shelton*, 318 Mich App at 656. In *Shelton*, the insurer sought summary disposition based on a fraud exclusion in the policy because the plaintiff made fraudulent statements regarding her need for replacement services. *Id*. at 650. The trial court granted the insurer summary disposition as to the plaintiff's claim for replacement services, but it denied summary disposition relating to medical services, and the insurer appealed. *Id*. at 650-651. The insurer relied on photographs and an investigator's report to argue that the plaintiff committed fraud, but this Court disagreed. *Id*. at 658. The photographs were too blurry to determine whether they were of the plaintiff, and the insurer's arguments were inconsistent with the investigation reports. *Id*. The insurer argued that the plaintiff fraudulently claimed assistance for doing laundry, but the plaintiff was observed wringing out a shirt on her front lawn. *Id*. at 659. This Court compared the facts to *Bahri* and stated:

> While such repeated activities [in *Bahri*] are sufficient to establish the elements of fraud beyond a question of fact, a single episode of wringing out a shirt does not, nor do isolated examples of an injured person participating in simple physical actions such as bending, modest lifting, or other basic physical movements that the person asserts are painful or difficult. These types of inconsistencies in a claimant's statements are not sufficient to establish any of the elements of fraud beyond a question of fact. [*Id*. at 660.[3]]

[3] Our Court in *Shelton* declared that the inconsistency in the plaintiff's statement involving the wringing out of a shirt was "not sufficient to establish any of the elements of fraud beyond a question of fact." *Shelton*, 318 Mich App at 660. However, this Court went a step further and

We agree with the trial court that the fraud exception applied in this case. Plaintiff and Zahra made multiple fraudulent statements to substantiate plaintiff's claims for replacement services, and the surveillance reports and videos submitted by defendant depicted plaintiff engaging in activities inconsistent with his claimed limitations. Pursuant to the fraud exclusion, false statements or misrepresentations made by Zahra preclude recovery by plaintiff because she was a family member and insured under the same policy.

Plaintiff testified that he did not work since the day of the accident, which was July 23, 2013. He tried to go to work that day, but the oil gun jumped out of his hand. He officially stopped working at the end of July 2013, when the doctor restricted him from working because plaintiff could not lift anything heavy or make sudden movements, and he had to carry heavy oil or lift a heavy spray gun at the car wash and oil shop. Zahra also testified that plaintiff was not employed or working at the time of her deposition because he had stopped working after his doctor restricted him.

Surveillance conducted every day from September 18, 2013, to September 23, 2013, did not depict plaintiff going to the car wash that he owned and managed. However, he did go to his car wash or the car wash owned by his brother, where plaintiff was also employed, on November 14, 2013, November 16, 2013, December 6, 2013, December 14, 2013, and December 22, 2013. There is video footage of plaintiff driving to the car washes on all of these dates, except November 14, 2013. At his car wash, he retrieved and read the mail. He did paperwork. On one occasion, he locked the business door at the end of the day. On December 22, 2013, plaintiff was observed standing near vehicles in the oil shop with their hoods up, "tinker[ing] with the hood latch." In the surveillance footage, plaintiff was near a car looking under the popped hood for several minutes.

On appeal, plaintiff argues that the surveillance does not demonstrate that plaintiff actually worked on any cars, just that he would stop by his business for short periods of time to get the mail and check in. Plaintiff argues that this does not amount to fraud. We disagree. This evidence directly contradicts plaintiff's assertion that he could no longer work after the accident. Although not observed directly servicing any cars, he went to his place of employment every day that surveillance was conducted in November and December of 2013. Moreover, on November 14, 2013, he was directly observed working the cash register at a gas station owned by his brother, and he actually rang up the investigator. Video footage taken by the investigator inside the gas station depicted plaintiff working at the cash register and walking around the store.

Plaintiff also testified that his doctors restricted him from doing housework. Plaintiff said that, before the accident, he took the garbage out, picked his children up from school, vacuumed, made the bed, did laundry, and cooked. He claimed that he could not do any housework after the

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stated that other "simple physical actions such as bending, modest lifting, or other basic physical movements" also do not establish fraud beyond a question of fact. *Id*. We consider this proclamation nothing more than dicta, as it was not essential to the decision and therefore not binding. See *Black's Law Dictionary* (10th ed). There very well may be instances when a simple physical activity establishes the elements of fraud beyond a question of fact.

accident, and Zahra did everything that he could not do. Zahra said that plaintiff could no longer cook or clean. Zahra also testified that they hired someone to do their yard work and shovel snow, but she could not provide the contact information or proof of payment because she paid cash for the service. Zahra testified that plaintiff had not done any lawn mowing since the accident, and that there was "no way" that plaintiff could shovel snow "[i]n his condition."

However, plaintiff was observed "pushing snow" on his porch and driveway on December 14, 2013, after he returned home from the car wash. Plaintiff argues that this does not constitute a material misrepresentation because the snow had been shoveled two times previously that day, and plaintiff did not engage in any heavy snow shoveling. We disagree. At 7:00 a.m., the investigation report indicates that approximately 2 inches of snow fell overnight, and there were no fresh tire tracks in the snow. That morning, two children shoveled plaintiff's driveway and sidewalk, and were paid by Zahra. Zahra shoveled in the afternoon. When plaintiff returned home, he was observed from 6:00 p.m. to 6:04 p.m. doing the following:

> [Plaintiff] arrives at his residence, parking in the driveway. He exits the vehicle and steps to the porch, where he retrieves a snow shovel. Using his right hand only, he removes snow from the porch by pushing it. He clears the porch steps, then pushes the shovel down the driveway, removing snow from the driver's side of the van, walking all the way to the street. [Plaintiff] clears a path down the sidewalk by again pushing the snow forward. Once at the base of the driveway, [plaintiff] lifts the shovel and tosses the snow, then continues to push snow from the base of the driveway. He shows no sign of any pain or discomfort.

We reviewed the surveillance video footage of plaintiff shoveling snow. Plaintiff pushed the shovel with his right hand the distance from his porch to the street, where he used both hands to push more snow, and then lifted the shovel and threw snow to the side. Although plaintiff was only observed shoveling for a short amount of time, this evidence directly contradicts plaintiff's assertion that he could not perform housework, particularly using his right arm.

Plaintiff testified that Zahra washed his back while bathing and helped him get dressed by putting on his shirt and pulling his belt buckle. He could not pull his belt on with his right arm. Zahra said that she helped plaintiff bathe, get dressed, take his medicine, and she did all of the ironing and laundry. However, on October 28, 2013, plaintiff was observed working on a lawn mower in his garage, "vigorously pulling on the ignition string with his right hand so that his arm extended behind him and above shoulder height." Plaintiff was observed cleaning his garage on November 12, 2013, in which he walked around, bent over, swept the floor, used his arms, and carried two small patio tables. On November 14, 2013, plaintiff dropped off, and later picked up, one of his sons from a learning and sports center. The surveillance footage depicted plaintiff walking and driving on this date.

Plaintiff testified that he drove to his medical appointments unless he was on medication; on those days, Zahra would drive him. Zahra said that plaintiff was afraid to drive, his back would hurt, and he did not drive for long trips, but he did start to drive a few months before Zahra's deposition. She said that plaintiff being able to drive decreased the errands that she had to run for plaintiff. Plaintiff argues on appeal that he never asserted that he was restricted from driving. However, the surveillance evidence indicated that plaintiff was driving much sooner

after the accident on July 23, 2013, than plaintiff and Zahra indicated during their depositions. Zahra testified that plaintiff started to drive a few months before her deposition on May 26, 2015, and he was starting to drive "little by little." However, plaintiff was observed driving on October 28, 2013, November 8, 2013, November 14, 2013, November 16, 2013, December 6, 2013, December 14, 2013, and December 22, 2013, more than 18 months prior to Zahra's deposition in May 2015.

Lastly, at plaintiff's deposition on October 14, 2014, he testified that he had not left the state of Michigan since the accident and neither had Zahra. At Zahra's deposition on May 26, 2015, she stated that the whole family, including plaintiff, went to Florida for vacation in August 2014 for eight or nine days. She claimed that she did all of the attendant care duties during the trip and all of the driving. In the household services statement submitted for the month of August 2014, household services were claimed every day of the month, for services such as cooking, dishwashing, vacuuming, dusting, doing the laundry, and taking out the garbage. It is unlikely that Zahra performed such services while the family was on vacation at the theme parks in Orlando, Florida. Zahra testified that they stayed in a Sheraton Hotel, and Moussa Soueidan, plaintiff's son, ordered room service one day when he did not go to the theme park, but otherwise, the family went out to eat. Additionally, Zahra testified that she and plaintiff went to an all-inclusive resort in Cancun, Mexico for approximately seven or eight nights in May 2015. Plaintiff also claimed household or replacement services for this time period. It is even more unlikely that Zahra performed household work while the couple vacationed at an all-inclusive resort.

All of this evidence belies plaintiff's assertion that he needed replacement services, and it directly contradicts the representations made in the household services statements. Plaintiff said that he could not work, but he frequented his place of employment after the date that plaintiff claimed that he stopped working. Plaintiff said that he needed help getting dressed and putting on his belt buckle, but he was observed fixing a lawn mower and shoveling snow. Zahra claimed that plaintiff only began to drive a few months before her deposition on May 26, 2015, but he was observed driving as early as October 2013. Additionally, plaintiff made claims for replacement services while he was on vacation in Florida and in Mexico. "[S]uch repeated activities are sufficient to establish the elements of fraud beyond a question of fact." *Shelton*, 318 Mich App at 660. "Reasonable minds could not differ in light of this clear evidence that plaintiff made fraudulent representations for purposes of recovering PIP benefits." *Bahri*, 308 Mich App at 426. Therefore, there is no genuine issue of material fact regarding plaintiff's fraud, and plaintiff is precluded from claiming PIP benefits. *Id.* The trial court properly granted defendant's motion for summary disposition.

Affirmed.

/s/ Thomas C. Cameron
/s/ Kathleen Jansen
/s/ Peter D. O'Connell