STATE OF MICHIGAN

COURT OF APPEALS

RUSSELL LOIOLA, a legally incapacitated person, by JEFFREY FRIED, Personal Representative,

Plaintiff-Appellee,

v

CITIZENS INSURANCE COMPANY OF AMERICA,

Defendant,

and

CITIZENS INSURANCE COMPANY OF THE MIDWEST,

Defendant-Appellant.

UNPUBLISHED
December 2, 2021

No. 348670
Washtenaw Circuit Court
LC No. 16-001044-NF

ON REMAND

Before: BECKERING, P.J., and O'BRIEN and SWARTZLE, JJ.

PER CURIAM.

In this no-fault insurance dispute, Jeffrey Fried, acting as a personal representative, filed suit against defendant, Citizens Insurance Company of the Midwest, on behalf of Russell Loiola, seeking benefits under the no-fault insurance act, MCL 500.3101 *et seq*. A jury returned a verdict in Loiola's favor, awarding him $353,438.79 plus interest, and the trial court later awarded Loiola penalty attorney fees under MCL 500.3148. Citizens appealed to this Court, raising several claims of error, including the assertion that the trial court erred by denying special jury instructions on fraudulent insurance acts. Finding error in the trial court's refusal to instruct on fraud, as well as several other errors related to allowable expenses, jury instructions on vocational rehabilitation,

and the award of attorney fees, the majority opinion of this Court vacated the judgment in Loiola's favor, vacated the award of attorney fees and costs, and remanded for a new trial.[1]

Loiola sought leave to appeal in the Michigan Supreme Court. In lieu of granting leave to appeal, the Court vacated the portion of this Court's opinion that dealt with the trial court's refusal to instruct the jury on fraudulent insurance acts, and remanded "for reconsideration in light of *Glasker-Davis v Auvenshine*, 333 Mich App 222[; 964 NW2d 809] (2020)." *Fried v Citizens Ins Co of America*, ___ Mich ___; 964 NW2d 371 (2021). In all other respects the Court denied leave to appeal. *Id*.

On remand, in light of *Glasker-Davis*'s holding that fraud raised as an affirmative defense must be pleaded with particularity, Citizens was required to plead fraud with particularity as an affirmative defense. Although Citizens generally raised the issue of fraud in its affirmative defenses, it failed to identify the circumstances constituting fraud with specificity as required for pleading fraud under MCR 2.112(B)(1). Despite this failure, a new trial is nevertheless warranted in light of the errors identified in the Court's previous opinion, which the Supreme Court's remand order left untouched. Accordingly, the case is remanded for a new trial for the reasons previously articulated by this Court with clarification that Citizens failed to plead fraud with particularity, and with instructions for the trial court to allow Citizens to move to amend its affirmative defenses.

I. FACTS AND PROCEDURAL HISTORY

In *Loiola*, unpub op at 2-3, this Court summarized the basic facts of this case as follows:

> Loiola was injured in a hit-and-run motor vehicle accident in January 2010. It is undisputed that he suffered a traumatic brain injury, though the degree of the injury and the level of care medically necessary for his injury were matters of debate among experts during trial. Loiola's claim was assigned to Citizens under the Michigan Assigned Claims Plan (MACP).
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> Following the accident, between 2010 and 2013, Loiola lived with his mother, and it appears that Citizens paid benefits during this time. However, in 2013, Citizens began investigating Loiola's continued claims for benefits and requested an independent medical examination (IME). In the meantime, Loiola's living situation changed. He moved from his mother's home to a facility called Special Tree. In 2014, he moved from Special Tree to another facility called Progressions, where Loiola lived more independently. Finally, and most relevant to this case, in November 2015, he moved to a "semi-independent living" facility called NeuroRestorative. He was still living in this facility during trial. Significant to the issues in this case, the charges while at NeuroRestorative consisted of two categories: (1) per diem charges, relating to things like food and room and board, and (2) additional charges for professional services Loiola received. For a time

[1] *Loiola v Citizens Ins Co of America*, unpublished per curiam opinion of the Court of Appeals, issued August 6, 2020 (Docket No. 348670). Judge Beckering concurred in result only. *Id*. (BECKERING, J., concurring).

while Loiola was at NeuroRestorative, Citizens paid for specific therapies, but Citizens never paid the per diem charges, and it later stopped paying for any of NeuroRestorative's services.

In November 2016, Fried, who had been appointed Loiola's guardian in October 2014, filed this suit against Citizens on Loiola's behalf, seeking payment of benefits under the no-fault insurance act. The charges at issue relate to those incurred from November 2015 onward. In particular, Loiola sought a total of $383,255.21 in benefits, which included (1) NeuroRestorative's bills, (2) charges for a "case manager," (3) charges by Fried for acting as Loiola's guardian, and (4) the outstanding balance on a partially unpaid bill for a neuropsychological examination.

[In the trial court,] Citizens disputed its liability for these charges on several grounds. First, relying on its IMEs and other evidence, Citizens asserted that long-term, semi-independent living at NeuroRestorative was not reasonable and necessary for someone with Loiola's level of injury, particularly years after the accident. Second, also related to the extent of Loiola's injuries and his need for services related to the accident, Citizens asserted that many of Loiola's ongoing complaints—including anxiety, depression, and cognitive difficulties—existed, to some degree, before the accident and that Loiola was exaggerating his post-accident symptoms as evinced by his repeated failures on validity testing during neuropsychological examinations. Third, regardless of the level of Loiola's injuries, Citizens asserted that there were certain charges by NeuroRestorative that were not compensable under the no-fault insurance act as a matter of law, including a food stipend and wages paid to Loiola. Finally, Citizens maintained that Loiola was disqualified from receiving personal protection insurance (PIP) benefits under MCL 500.3173a(2) because he made, or caused to be made, false statements in support of a claim for benefits under the MACP.

In the trial court, Citizens moved for summary disposition under MCR 2.116(C)(10), and later filed a motion for judgment notwithstanding the verdict (JNOV) or a new trial, regarding those charges that Citizens contended were not compensable as a matter of law. The trial court denied both motions. Citizens also requested special jury instructions on (1) allowable expenses and (2) fraudulent insurance acts under MCL 500.3173a(2). The trial court denied the instructions.

Following trial, the jury returned a verdict in Loiola's favor, awarding $353,438.79 of the $383,255.21 sought. After trial, the trial court also awarded Loiola penalty attorney fees [in the amount of $241,342.50] under [MCL 500.3148].

Following trial, Citizens appealed to this Court as of right, challenging the judgment as well as the award of penalty attorney fees. Citizens argued that particular charges sought by Loiola were not allowable expenses as a matter of law. In addition, Citizens asserted that the trial court erred by denying special jury instructions on allowable expenses, and most pertinent to this remand, fraudulent insurance acts under MCL 500.3173a. Finally, Citizens challenged the award

of penalty attorney fees under MCL 500.3148, contending that its denial of benefits was not unreasonable given legitimate questions of fact and law.

As set forth in detail in this Court's previous opinion, the majority rejected several of Citizens' arguments, but also found several errors that ultimately warranted a new trial, and the Court vacated the award of penalty attorney fees. As relevant to this remand, in regard to the jury instruction involving fraud, this Court explained:

> In sum, the trial court abused its discretion by denying an instruction on fraud given evidence that Loiola submitted false information in support of his claims by misrepresenting his mental health, substance abuse, and academic record when speaking with doctors. This evidence was material to establishing Loiola's "baseline" for purposes of investigating his injuries and his need for treatment. By failing to give this instruction despite evidence of fraudulent insurance acts, the trial court denied Citizens a defense to Loiola's claims for benefits. On this record, particularly when coupled with the other errors in this case, it would be inconsistent with substantial justice to allow the jury verdict to stand. [*Loiola*, unpub op at 20.]

Although this Court primarily focused on the substantive applicability of a fraud instruction on the facts of this case, in a footnote, this Court also considered whether Citizens properly pleaded fraud in answer to Loiola's complaint. This Court reasoned:

> On appeal, Loiola argues that Citizens failed to plead fraud in their [answer], and that even if they pleaded that defense, they failed to plead it with particularity. Loiola raised these arguments below, but the trial court declined to address them.
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> First addressing whether Citizens pleaded fraud in their answer, they clearly did. Citizens' answer stated, "Under MCL 500.3173a(2) and the Michigan Assigned Claims Plan, Plaintiffs [sic] is ineligible for any benefits through the Michigan Assigned Claims Plan if Plaintiff has made or caused to be made false statements during the course of their claim for Plaintiff's benefits regarding the alleged accident," and, "Should it be determined that Plaintiff's claim is supported by fraudulent information, the entire claim is ineligible for benefits."
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> Turning to Loiola's claim that Citizens' failed to plead fraud with particularity, he relies on MCR 2.112(B)(1), which states, "In allegations of fraud or mistake, the circumstances constituting fraud or mistake must be stated with particularity." Yet Loiola has failed to cite any precedent indicating that the pleading requirement set forth by MCR 2.112(B)(1) is applicable to affirmative defenses in the first instance. Generally, that rule "applies only to the original *pleadings* opening a case," *Williams v Williams*, 214 Mich App 391, 395; 542 NW2d 892 (1995) (emphasis added), and affirmative defenses do not qualify as "pleadings" under our court rules, MCR 2.110(A); *McCracken v City of Detroit*, 291 Mich App 522, 527; 806 NW2d 337 (2011). [*Id*. at 17-18 n 9.]

Following this Court's decision, Loiola sought leave to appeal in the Michigan Supreme Court. On September 29, 2021, the Supreme Court entered its remand order, which provides:

> On order of the Court, the application for leave to appeal the August 6, 2020 judgment of the Court of Appeals is considered and, pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we VACATE Part III.B.2 of the judgment of the Court of Appeals and we REMAND this case to that court for reconsideration in light of *Glasker-Davis v Auvenshine*, 333 Mich App 222 (2020). In all other respects, leave to appeal is DENIED, because we are not persuaded that the remaining questions presented should be reviewed by this Court. [*Fried*, ___ Mich at ___; 964 NW2d at 371.]

The case is now back before this Court on remand for reconsideration as directed in the Supreme Court's order.

II. ANALYSIS

Pursuant to this Court's recent decision in *Glasker-Davis*, Citizens was required to plead fraud as an affirmative defense with particularity, and we conclude that it failed to do so. We further conclude, however, that the errors identified in the undisturbed portions of this Court's previous decision nevertheless warrant a new trial. We therefore remand for a new trial, and the trial court should allow Citizens the opportunity to move to amend its affirmative defenses on remand.

This Court reviews "de novo the sufficiency of any assertions of affirmative defenses." *Glasker-Davis*, 333 Mich App at 229.

As explained earlier in this opinion, Citizens contends that Loiola engaged in fraudulent insurance acts that preclude him from receiving PIP benefits under the MACP in light of MCL 500.3173a(2), which, at the time relevant to Loiola's case,[2] stated:

> A person who presents or causes to be presented an oral or written statement, including computer-generated information, as part of or in support of a claim to the Michigan automobile insurance placement facility for payment or another benefit knowing that the statement contains false information concerning a fact or thing material to the claim commits a fraudulent insurance act under [MCL 500.4503] that is subject to the penalties imposed under [MCL 500.4511]. A claim

[2] MCL 500.3173a was amended by 2019 PA 21, effective June 11, 2019. However, because the current case commenced before the effective date of that amendment, this case is controlled by the former provisions of the no-fault act. See *Loiola*, unpub op at 1 n 2, citing *George v Allstate Ins Co*, 329 Mich App 448, 451 n 3; 942 NW2d 628 (2019). After the 2019 amendments to the no-fault act, the provision regarding fraudulent claims under the MACP—which has been amended—can now be found at MCL 500.3173a(4).

> that contains or is supported by a fraudulent insurance act as described in this subsection is ineligible for payment or benefits under the assigned claims plan.

Pursuant to this provision, a fraudulent insurance act when making a claim under the MACP serves as a defense to payment of PIP benefits. This provision applies equally to false statements made to the Michigan automobile insurance placement facility (MAIPF) and to false statements made to a defendant-insurer that has been assigned the claim under the MACP. See *Candler v Farm Bureau Mut Ins Co of Mich*, 321 Mich App 772, 781; 910 NW2d 666 (2017).

In light of the Michigan Supreme Court's remand order, we must reconsider this Court's previous decision with respect to whether Citizens was required to plead fraud as an affirmative defense with particularity and, if so, whether Citizens satisfied this standard.

In *Glasker-Davis*, 333 Mich App at 224, the plaintiff sought "household assistance or replacement-care services" under her no-fault insurance policy with Meemic Insurance Company. The services in question had been performed by the plaintiff's daughter, and in seeking these benefits, the plaintiff submitted documents indicating that her daughter performed household chores "almost every day" from July 1, 2016 to September 30, 2017. *Id.* However, the plaintiff's deposition testimony indicated that, during much of the relevant time period, her daughter provided assistance only two or three times a week. *Id.* at 225. The plaintiff's no-fault insurance policy with Meemic included a fraud provision, stating that the entire policy "is void if any insured person has intentionally concealed or misrepresented any material fact or circumstance relating to . . . any claim made under it." *Id.* When the plaintiff filed suit seeking no-fault benefits, Meemic's answer included 46 paragraphs relating to affirmative defenses, including the assertion that: "The Plaintiff has given false and/or conflicting information to Defendant, thus, are [sic] fraudulent in nature." *Id.* at 224. Meemic eventually moved for summary disposition on the basis that the plaintiff misrepresented material facts, and in response, the plaintiff asserted that Meemic failed to properly raise fraud as an affirmative defense because it failed to plead it with particularity. *Id.* at 225-226. The trial court granted summary disposition in favor of Meemic. *Id.* at 226-227. The plaintiff appealed to this Court. *Id.* at 227.

On appeal, this Court explained that "affirmative defenses are highly analogous to pleadings" and "serve essentially the same functional purpose." *Id.* at 230. This Court observed that the court rules allow a party to "move to amend its affirmative defenses at any time, and leave should be granted freely unless doing so would prejudice the other party." *Id.* As a result, "a defending party is not required to inundate a plaintiff with a laundry list of every conceivable affirmative defense from the outset, irrespective of whether there is reason to believe any of the defenses might ultimately be supportable." *Id.* at 231. Rather, "a defending party may, and should, amend its affirmative defenses on an ongoing basis as supported by the actual evidence discovered in a matter." *Id.* Moreover, the Court agreed with the plaintiff's contention that "a tome of disconnected boilerplate affirmative defenses, many of questionable relevance, does not provide the opposing party with any meaningful way to respond." *Id.* at 232. Accordingly, this Court concluded that a "defense premised on an alleged violation of an antifraud provision in an insurance policy constitutes an affirmative fraud defense," and that such a defense must be pleaded with particularity. *Id.* See MCR 2.112(B)(1). Ultimately, the Court held that Meemic "did not adequately raise the affirmative defense of fraud[,]" and the "trial court erred by granting summary disposition in Meemic's favor." *Glasker-Davis*, 333 Mich App at 233.

In this case, with its first responsive pleading, Citizens filed a document titled "Affirmative Defenses & Reservation of Affirmative Defenses." Relevant to fraud, Citizens alleged:

> 14. Under MCL 500.3173a(2) and the Michigan Assigned Claims Plan, Plaintiffs is [sic] ineligible for any benefits through the Michigan Assigned Claims Plan if Plaintiff has made or caused to be made false statements during the course of their claim for Plaintiff's benefits regarding the alleged accident.
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> 15. Should it be determined that Plaintiff's claim is supported by fraudulent information, the entire claim is ineligible for benefits.

Citizens also generally "reserve[d] the right to add to or amend" its affirmative defenses.

Although Citizens raised the issue of fraud under MCL 500.3173a(2) as a possible affirmative defense, it did so without any specificity with regard to Loiola's purportedly false statements or the circumstances constituting fraud. See MCR 2.112(B)(1). That is, Citizens provided no information about what statements Loiola made, when the statements were made, or how the statements were incorrect or false. See *Glasker-Davis*, 333 Mich App at 232-233. Given the failure to set forth facts and circumstances constituting fraud as an affirmative defense, Citizens' general references to fraud and MCL 500.3173a(2) were insufficient to plead fraud as an affirmative defense with particularity. See *id*. at 233. See also MCR 2.112(B)(1).[3]

Given that this case is being remanded to the trial court for a new trial in light of the other errors identified in this Court's previous opinion,[4] we address whether Citizens should be afforded an opportunity to move the trial court to amend its affirmative defenses to plead fraud with particularity in light of new precedent, i.e., *Glasker-Davis*, which was decided well after the trial in this case. We conclude that Citizens should be given the opportunity to move to amend its affirmative defenses on remand.

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[3] We recognize that *Glasker-Davis* did not involve, and did not address, fraud under MCL 500.3173a in the context of claims under the MACP, and thus it may not necessarily apply in the context of a claim involving the MACP. See *Shelton v Auto-Owners Ins Co*, 318 Mich App 648, 652; 899 NW2d 744 (2017) (determining that law governing application of a fraud exclusion in an insurance policy did not apply to statutory claim for no-fault benefits). The parties never raised this issue, however, and this Court's previous decision characterized Citizens' fraud defense as an affirmative defense. See *Loiola*, unpub op at 17-18 n 9.

[4] At this juncture, the Supreme Court has only vacated the portion of this Court's opinion that dealt with the trial court's refusal to instruct the jury on fraudulent insurance acts. *Fried*, ___ Mich at ___; 964 NW2d at 371. In all other respects, the Supreme Court denied leave to appeal, *id*., thereby leaving intact this Court's previous conclusions that a new trial was warranted on the basis of errors relating to allowable expenses and jury instructions regarding vocational rehabilitation. See *Loiola*, unpub op at 13, 16. See also *Reeves v Cincinnati, Inc. (After Remand)*, 208 Mich App 556, 559; 528 NW2d 787 (1995) (noting that portions of a decision "unaffected by a higher court" constitute the law of the case).

The failure to initially raise a proper affirmative defense does not forever bar it from being raised. *Fraser Twp v Haney (On Remand)*, 331 Mich App 96, 99; 951 NW2d 97 (2020). As noted in *Glasker-Davis*, 333 Mich App at 230, "[a] party may move to amend its affirmative defenses at any time, and leave should be granted freely unless doing so would prejudice the other party."

Although Citizens failed to plead fraud with particularity, Citizens nevertheless raised the applicability of MCL 500.3173a(2) in its affirmative defenses, giving Loiola notice that fraud was an issue. Further, at hearings before trial, the issue was discussed in more detail, including Citizens' specific assertions that Loiola engaged in fraud by, among other things, mispresenting his history to doctors during examinations and by claiming to have worked more hours than reported on forms submitted to Citizens. Cf. *VHS of Mich, Inc. v State Farm Mut Auto Ins Co*, ___ Mich App ___, ___; ___ NW2d ___ (2021) (No. 352881); slip op at 9 (concluding that the defendant should be allowed to amend its answer to the complaint when, although the defendant did not plead fraud as an affirmative defense with specificity, the defendant provided the plaintiff "with reasonable notice that it would be pursuing a fraud defense"). Indeed, evidence supporting Citizens' fraud claim was already presented to the jury during the trial. See MCR 2.118(C) (allowing for amendment of pleadings to conform to the evidence). These circumstances do not suggest that amendment would prevent Loiola from receiving a fair trial on remand. See *VHS of Mich, Inc.*, ___ Mich App at ___; slip op at 9.

Moreover, leave to amend should be freely given when justice so requires, MCR 2.118(A)(2), and to the extent Citizens failed to properly plead fraud with particularity or to move to amend its affirmative defenses, it should be noted that *Glasker-Davis* was decided after the proceedings in this case. Prior to *Glasker-Davis*, as noted in this Court's previous opinion, it was questionable whether fraud as an affirmative defense needed to be pleaded with particularity.[5] There is nothing to suggest that there was bad faith or dilatory motive by Citizens that would support denial of a motion to amend. See generally *Weymers v Khera*, 454 Mich 639, 658; 563 NW2d 647 (1997).

In summary, pursuant to this Court's recent decision in *Glasker-Davis*, Citizens was required to plead fraud as an affirmative defense with particularity. Citizens' first responsive pleading included general references to fraud, but it was devoid of the particularity required to plead fraud under MCR 2.112(B)(1). Nevertheless, given that affirmative defenses may be amended at any time and this case is being remanded for a new trial, on remand, the trial court should allow Citizens an opportunity to move to amend its affirmative defenses, and Loiola be given an opportunity to respond. See *WA Foote Mem Hosp v Mich Assigned Claims Plan*, 321 Mich App 159, 196; 909 NW2d 38 (2017) (remanding with direction that the plaintiff be allowed to move to amend its complaint "so that the trial court may address the attendant issues in the first instance"), aff'd in part, vacated in part on other grounds 504 Mich 985 (2019).

[5] Indeed, in this case, the trial court declined to decide the fraud question on the basis of pleading requirements but instead concluded, on the merits, that a fraud instruction was not warranted. In this context, Citizens had no reason to move to amend its affirmative defenses to add more specificity to its fraud allegations.

The matter is remanded to the trial court for further proceedings consistent with this opinion and this Court's original opinion. We do not retain jurisdiction.

/s/ Jane M. Beckering
/s/ Colleen A. O'Brien
/s/ Brock A. Swartzle