STATE OF MICHIGAN

COURT OF APPEALS

HARLEY REED,

Plaintiff-Appellant,

v

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Defendant-Appellee.

UNPUBLISHED
January 26, 2023

No. 359083
Wayne Circuit Court
LC No. 20-004025-NI

Before: YATES, P.J., and JANSEN and SERVITTO, JJ.

PER CURIAM.

Plaintiff, Harley Reed, was involved in a motor-vehicle collision when his Chevy Blazer was hit from behind by Kristy DiPasquale's vehicle. Reed filed suit alleging negligence, and he demanded both first-party and third-party no-fault benefits. The case was initially complicated by the involvement of other parties such as DiPasquale and a medical-services provider, but the action ultimately was reduced to two-party litigation between Reed and his insurer, defendant State Farm Mutual Automobile Insurance Company (State Farm), over first-party no-fault benefits. The trial court ruled that Reed had made a fraudulent demand for first-party no-fault benefits because he had not suffered injuries at the level of severity he claimed, so the trial court awarded summary disposition to State Farm under MCR 2.116(C)(10). We conclude that there remains a genuine issue of material fact that forecloses an award of summary disposition, so we reverse the summary disposition award and remand the case for further proceedings.

I. FACTUAL BACKGROUND

On May 16, 2019, plaintiff was rear-ended while waiting for pedestrians to cross the street before he made a right-hand turn. At the time of the accident, plaintiff had automobile insurance through a State Farm policy. The collision resulted in damage to the rear of plaintiff's vehicle and injuries to plaintiff. After the accident, plaintiff required physical therapy, pain injections, and the care of an orthopedic specialist. Plaintiff's injuries included aggravation of the neck pain, a left-shoulder injury, and headaches he had been suffering since an automobile accident in August 2018.

Plaintiff also incurred a new injury to his lumbar area that caused sciatic leg pain and numbness in his left leg. In spite of all that, plaintiff returned to work soon after the accident.

In the wake of the collision, State Farm investigated plaintiff's insurance claim. As part of that investigation, plaintiff submitted to an examination under oath (EUO) on December 9, 2019. Plaintiff testified that his injuries from the collision on May 16, 2019, were aggravated by his work as a painting and drywall contractor that involved heavy lifting, standing or walking for extended periods, and overhead work. He described his symptoms and pain as "everyday" and debilitating at times, causing him to lose sleep and to reduce his work schedule, although he continued to work through pain on a part-time basis out of economic necessity. Unbeknownst to plaintiff, State Farm had enlisted a private investigator prior to the EUO to conduct surveillance of plaintiff. The private investigator documented plaintiff helping to move a refrigerator, carrying five-gallon buckets and equipment, and bending at the waist. When plaintiff was confronted with the private investigator's evidence, plaintiff stated that he was experiencing pain while carrying the buckets and equipment, and that he was not carrying the refrigerator, but simply placing his hands on top of the refrigerator to help in guiding it up the stairs and through a doorway for another person who was lifting it from the bottom with the assistance of a dolly.

After plaintiff's EUO, State Farm denied his claim for no-fault insurance benefits. Plaintiff responded by filing a complaint against State Farm seeking no-fault benefits for medical expenses and lost income. On several occasions, State Farm moved the trial court for summary disposition based on plaintiff's allegedly fraudulent representations about the nature and extent of his injuries resulting from the collision. The parties battled over that issue on factual and legal grounds. The trial court at first denied summary disposition to State Farm, but ultimately awarded relief under MCR 2.116(C)(10) after two days of oral argument, concluding that no reasonable juror could find that plaintiff had not committed fraud in his testimony about his work limitations.

II. LEGAL ANALYSIS

Plaintiff challenges the trial court's decision to award summary disposition to State Farm under MCR 2.116(C)(10). A motion under MCR 2.116(C)(10) "tests the *factual sufficiency* of a claim." *El-Khalil v Oakwood Healthcare, Inc*, 504 Mich 152, 160; 934 NW2d 665 (2019). When addressing such a motion, a court "must consider all evidence submitted by the parties in the light most favorable to the party opposing the motion." *Id.* "A motion under MCR 2.116(C)(10) may only be granted when there is no genuine issue of material fact." *Id.* " 'A genuine issue of material fact exists when the record leaves open an issue upon which reasonable minds might differ.' " *Id.* State Farm persuaded the trial court that plaintiff made fraudulent misrepresentations in his effort to obtain no-fault insurance benefits and that those misrepresentations allowed State Farm to deny plaintiff's demand for no-fault benefits. The first portion of State Farm's argument rests upon the factual assertion that plaintiff made material misrepresentations in seeking no-fault benefits, while the second portion of State Farm's argument rests upon the legal consequences that flow from such material misrepresentations in pursuit of no-fault benefits. We shall take up each portion of State Farm's argument in turn.

A. DID PLAINTIFF MAKE MATERIAL MISREPRESENTATIONS?

Plaintiff testified at his EUO on December 9, 2019, that he dealt with pain so severe that it required him to sit down to tie his shoes and resulted in a loss of sleep. He testified his pain was aggravated by heavy lifting, working with arms raised overhead, and standing for extended periods of time. Plaintiff described experiencing leg numbness that had, on one occasion, caused his leg to give out. Because his work as a contractor always aggravated his symptoms to some extent, he reduced his work schedule from full-time to part-time. When asked specifically for a quantitative assessment of his lifting restrictions, plaintiff responded:

> Honestly, it's hard to say because, to be perfectly honest with you, I'm in everyday pain. You know, it's not like, you know, the pain starts once I pick something up. The pain is there regardless if I pick something up or not. . . . The shot that they gave me was helping a little bit, but that's wore off.

Plaintiff never denied lifting his painting supplies. He simply maintained that those activities were difficult for him to perform and caused him pain, but he continued to do them because of economic necessity.

An automobile insurer "can reject fraudulent claims without rescinding" a no-fault policy. *Meemic Ins Co v Fortson*, 506 Mich 287, 304 n 10; 954 NW2d 115 (2020). But in order "to deny coverage because the insured has willfully mispresented 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." *Fashho v Liberty Mut Ins Co*, 333 Mich App 612, 618; 963 NW2d 695 (2020) (quotation marks omitted). Plaintiff's statements at the EUO about his injuries and the resulting limitations were material because they were "reasonably relevant to the insurer's investigation of [plaintiff's] claim."[1] *Id.* In addition, plaintiff made the statements at the EUO "with the intention that the insurer would act upon" them. *Id.* But plaintiff insists that genuine issues of material fact remain with respect to the falsity of his statements at the EUO and his knowledge about whether the statements were untruthful. We agree.

To prove plaintiff made false statements about the severity of his pain, defendant presented photographs of plaintiff carrying or lifting buckets and helping to move a refrigerator weeks before his EUO. But plaintiff never denied that he engaged in those types of activities. Rather, he asserted

[1] The EUO took place on December 9, 2019, months before plaintiff filed suit on March 16, 2020. EUO "provisions, which require the insured to answer questions about the accident and damages claimed, existed in many types of insurance policies long before the advent of no-fault automobile insurance." *Cruz v State Farm Mut Auto Ins Co*, 466 Mich 588, 597; 648 NW2d 591 (2002). The purpose of an EUO is "to enable insurers to gather facts so as to discover and eliminate fraudulent insurance claims." *Id.* "An insurance policy provision requiring compliance with an EUO 'before an insured has the right to bring an action against [an insurer]' is generally a valid and enforceable condition." *Gueye v State Farm Mut Auto Ins Co*, ___ Mich App ___, ___; ___ NW2d ___ (2022) (Docket No. 358992); slip op at 4.

that he used other means to move heavy objects whenever he could, and he explained that, despite his pain, he undertook those activities purely out of economic necessity. And to explain the picture of a refrigerator being moved, plaintiff offered his sworn statement that he merely put his hands on the refrigerator to guide it, not to lift it. The trial court dismissed plaintiff's explanations for the activities depicted in the photographs that State Farm obtained, observing that no juror would believe plaintiff's explanations. But under Michigan law, a trial court "may not resolve factual disputes or determine credibility in ruling on a summary disposition motion." *Burkhardt v Bailey*, 260 Mich App 636, 647; 680 NW2d 453 (2004). Plaintiff has never asserted that he completely abstained from any activities. He simply stated that his injuries made some of those activities more difficult, so he tried to avoid them. Consequently, whether plaintiff's statements about the severity of his injuries were fraudulent cannot be resolved by the photographs documenting plaintiff's work activities. Instead, there remains a question of fact that can only be determined by an assessment of plaintiff's credibility. Because an assessment of credibility can play no role in the resolution of State Farm's motion for summary disposition under MCR 2.116(C)(10), we must reverse the trial court's award of summary disposition and leave the issue of plaintiff's credibility for resolution at trial. See *El-Khalil*, 504 Mich at 160.

B. DO MATERIAL MISREPRESENTATIONS JUSTIFY DENYING A CLAIM?

The legal question posed by defendant's request for summary disposition pursuant to MCR 2.116(C)(10) is becoming increasingly difficult to answer under Michigan law. Historically, this Court has held that an insured's false statement in making a claim for insurance benefits justifies the denial of the claim if the false statement is "material," i.e., reasonably relevant to the insurer's investigation of the claim. *Bahri v IDS Prop Cas Ins Co*, 308 Mich App 420, 424-425; 864 NW2d 609 (2014). But recently, we carved out an exception to that rule for false statements made by an insured party during the course of litigation over insurance benefits, as opposed to statements made before litigation. *Haydaw v Farm Bureau Ins Co*, 332 Mich App 719, 723; 957 NW2d 858 (2020). And more recently, we held that an insured's false statements to an insurer made after procuring a no-fault insurance policy could not be used to void the policy. *Williams v Farm Bureau Mut Ins Co of Mich*, 335 Mich App 574, 581; 967 NW2d 869 (2021). But neither of those recent opinions deals with the circumstances in this case, where State Farm merely denied a claim—as opposed to voiding a no-fault policy—based upon false statements made after the insurance policy was issued but before litigation commenced. Instead, this case fits comfortably within our holding in *Fashho*, 333 Mich App 612, which stands for the proposition that an insured's false statements made after procurement of an insurance policy can justify denying a claim, as opposed to voiding the policy.[2]

[2] The policy State Farm issued to plaintiff provides that "[t]here is no coverage under this policy if you or any other person insured under this policy has made false statements with the intent to conceal or misrepresent any material fact or circumstance in connection with any claim under this policy." Insurers "can avail themselves of both statutory defenses and common-law defenses that the no-fault act has not displaced." *Fortson*, 506 Mich at 302. State Farm's policy language is consonant with the observation that "[i]t would make little sense to say that an insurer can invoke common-law defenses when sued but cannot place those defenses in its contract." *Id.*

Id. at 618-622; see also *Shelton v Auto-Owners Ins Co*, 318 Mich App 648, 655; 899 NW2d 744 (2017) ("if an insurer concludes that a claim is fraudulent, it may deny the claim").

One significant difference between plaintiff's case and *Fassho* prevents us from relying on *Fassho* to affirm the trial court's summary disposition award to State Farm. In *Fassho*, we noted that "[t]he evidence defendant presented established that plaintiff's representation about his need for wage-loss benefits because he could not perform all of his job functions after the accident was untrue." *Fassho*, 333 Mich App at 621. Accordingly, there was no genuine issue of material fact about whether the insured had made a material misrepresentation to the insurer. The only question involved the legal consequences that flow from that material misrepresentation. Here, conversely, there remains a genuine issue of fact as to whether plaintiff made a material misrepresentation to State Farm at the EUO. The existence of that genuine issue of material fact not only distinguishes this case from *Fassho*, but also requires us to reverse the trial court's award of summary disposition to State Farm and remand the case to the trial court.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Christopher P. Yates
/s/ Kathleen Jansen
/s/ Deborah A. Servitto