STATE OF MICHIGAN

COURT OF APPEALS

RANDALL DILLARD,

Plaintiff-Appellee,

v

FARM BUREAU INSURANCE COMPANY,

Defendant-Appellant.

UNPUBLISHED
March 11, 2010

No. 288134
Calhoun Circuit Court
LC No. 07-000015-CK

Before: Fitzgerald, P.J., and Cavanagh and Davis, JJ.

PER CURIAM.

Defendant, Farm Bureau Insurance Company, appeals as of right the judgment entered on a jury verdict in favor of plaintiff in this action for breach of contract. We reverse and remand for a new trial.

This action arises from Farm Bureau's denial of plaintiff's claim under a homeowners' insurance policy for damages resulting from vandalism and theft. The officer who responded to the scene found no signs of forced entry and windows broken from the inside out. He found that the crime scene appeared to have been staged. After an investigation by Farm Bureau's Special Investigations Unit, Farm Bureau denied plaintiff's claim for homeowners insurance benefits on the basis of its conclusion that plaintiff had a guilty connection to the incident and materially misrepresented the facts and circumstances of his loss.[1] Plaintiff brought this suit to enforce the contract.

In the face of Farm Bureau's concerns about plaintiff's veracity regarding his connection with the vandalism and theft, plaintiff submitted to a polygraph examination. The polygraph examiner concluded that plaintiff was being truthful when he answered "no" to each of the following test questions:

1. Did you plan with anyone to have your home broke into while you were gone?

[1] MCL 500.2833(1)(c) allows insurers to void policies, at their discretion, for misrepresentation, fraud, or concealment and requires only that a policy notify the insured of the condition.

2. Did you knowingly file a false insurance claim about the break in of your home?

3. Did you go out of town to give yourself a false alibi with regards to the break-in of your home?

4. Do you know for sure who caused the damage to the inside of your home?

Plaintiff moved in limine to admit the polygraph evidence. Farm Bureau objected and, following a hearing on the motion, the trial court ruled "the results of the plaintiff's polygraph test shall be relevant if and only if the defendant seeks to introduce evidence or argument regarding the plaintiff's guilty connection to the cause of the vandalism." The trial court further ruled that defendant could cross-examine plaintiff regarding only the results of the polygraph examination, but that defendant could not present any witnesses to testify regarding the reliability of polygraph examinations or the manner in which the examination was conducted. The court stated in part:

> You know, in a criminal case we don't let polygraphs in, and I know they are questionable in terms of their reliability and so on. In a civil case such as this where one of the principle affirmative defenses is the plaintiff is culpable for the damage, I think in fairness the plaintiff is allowed to put in evidence that he passed a polygraph, and defense is entitled to argue they are not reliable, looks at the facts, look beyond what somebody may have done on a particular day. For all we know the machine may have been faulty. I don't know how the argument would go in that regard, but I want a level playing field.

This Court is bound by Michigan Supreme Court precedent, *People v Barbara*, 400 Mich 352, 364; 255 NW2d 171 (1977), which established a per se exclusionary rule regarding polygraph evidence at trial. See also *People v Jones*, 468 Mich 345, 355; 662 NW2d 376 (2003) ("The bright-line rule that evidence relating to a polygraph examination is inadmissible is well established"). The *Barbara* Court reasoned that the polygraph technique had not received the degree of acceptance or standardization among scientists to allow its admissibility. See *People v Ray*, 431 Mich 260, 265; 430 NW2d 626 (1988). Polygraph test evidence is inadmissible during both criminal and civil trials. *Barbara*, 400 Mich at 364; *People v Davis*, 343 Mich 348, 370; 72 NW2d 269 (1955); *Michigan State Employees Assoc v Michigan Civil Service Comm*, 126 Mich App 797, 805; 338 NW2d 220 (1983).

The federal courts have abandoned the *Davis-Frye* test for scientific evidence, used by the *Barbara* Court to support its polygraph exclusionary rule, and have adopted in FRE 702 the less rigid admissibility standard of *Daubert v Merrell Dow Pharmaceuticals, Inc*, 509 US 579; 113 S Ct 2786; 125 L Ed 2d 469 (1993). However, in *United States v Scheffer*, 523 US 303; 118 S Ct 1261, 1265-1267; 140 L Ed 2d 413 (1998), the United States Supreme Court held that a per se rule against admission of polygraph evidence in court marital proceedings did not violate the defendant's constitutional right to present a defense. The *Scheffer* Court reaffirmed that "there is simply no consensus that polygraph evidence is reliable." *Id.* The Sixth Circuit Court of Appeals also continues to hold that the results of polygraph examinations are inherently unreliable. See *United States v Thomas*, 167 F3d 299 (CA 6, 1999); *King v Trippett*, 192 F3d 517 (CA 6, 1999).

Accordingly, until the United States Supreme Court or the Michigan Supreme Court rule differently, this Court is bound to follow *Barbara* and its per se exclusionary rule.[2] The "exclusion at trial of polygraph results rests upon the judicial estimate that the trier of fact will give disproportionate weight to the results and consider the evidence of conclusive proof of guilt or innocence." *People v Ray*, 431 Mich 260, 265; 430 Mich 626 (1988). Indeed, a jury is apt to attribute too much weight to a polygraph examination's results and, thus, abdicate its own role as assessor of credibility. Accordingly, we conclude that the trial court erred by granting plaintiff's motion to admit testimony regarding the results of the polygraph examination. The admission of plaintiff's testimony that he passed a polygraph examination, while erroneous, is not per se grounds for reversal. See *People v McGhee*, 268 Mich App 600, 633; 709 NW2d 595 (2005). However, it is of particular concern where, as here, plaintiff's credibility was the primary issue. Based on our careful review of the record, we find it more probable than not that a different outcome would have occurred in the absence of the erroneous admission of the polygraph evidence. We therefore conclude that its admission was not harmless, so the error requires reversal. *People v Lukity*, 460 Mich 484, 495; 596 NW2d 607 (1999). Because a new trial is warranted, we need not address the remaining arguments presented by Farm Bureau as to the present trial.

Reversed and remanded for a new trial. Jurisdiction is not retained.

/s/ E. Thomas Fitzgerald
/s/ Mark J. Cavanagh
/s/ Alton T. Davis

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[2]Indeed, although there are a few reported decisions involving the admissibility of polygraph evidence in a civil suit, almost all courts that have considered the question have held that the results of a polygraph test or the refusal to take a polygraph test are not admissible in evidence. See *Butler v Balal, Inc*, unpublished opinion per curiam of the Court of Appeals, issued November 21, 2006 (Docket No. 266113); *Alexander v State Farm Mut Auto Ins Co*, unpublished opinion per curiam of the Court of Appeals, issued July 7, 2000 (Docket No. 219926); See also *Senders v CNA Ins Co's*, 212 NJ Super 518, 520; 515 A2d 820 (1986).